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**FRENCH REPUBLIC**
**IN THE NAME OF THE FRENCH PEOPLE**

**PARIS COURT OF APPEAL**

**Division 5 – Chamber 16**
**International commercial chamber**

**DECISION DATED DECEMBER 1, 2020**
(no. /2020, 13 pages)

Registration no. on the general roll: **RG no. 19/09347 – Portalis no. 35L7-V-B7D-B7374** and by joinder: **RG no. 19/09352** – Portalis no. **35L7-V-B7D-B74AZ, RG no. 19/09554 – Portalis no. 35L7-V-B7D-B74TU and RG no. 19/09725 – Portalis no. 35L7-V-B7D-B75C4**

Decision deferred before the Court: arbitral award rendered on in Paris under the aegis of the permanent court of arbitration, by the arbitral tribunal comprised of the judge, Mr. , arbitrator-President, Professor and the Judge Mr. (cpa no. ).

**CLAIMANT**
**THE DEMOCRATIC AND POPULAR GOVERNMENT OF THE REPUBLIC OF ALGERIA**

With its registered office located at the Embassy of Algeria in France, 50 rue de LISBONNE – 75008 PARIS
Represented by its legal representatives

*Represented by Me. , attorney at the PARIS Bar, Court Registration .*

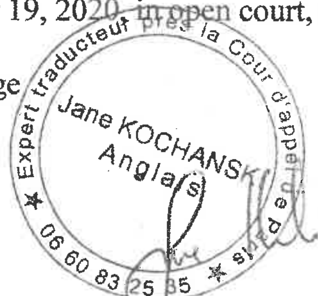
**DEFENDANT:**

**STERLING MERCHANT FINANCE LTD.**
**A company governed under American law**
With its registered office: Madison Square 1750K Street, NW, Suite 1100 – 20006 Washington DC (THE UNITED STATES)
Represented by its legal representatives

*Represented by Me attorney at the PARIS Bar*

**COMPOSITION OF THE COURT:**

The matter was heard on October 19, 2020, ~~in open~~ court, before the Court, comprised of:
Mr. François ANCEL, President
Mrs. Fabienne SCHALLER, Judge
Mrs. Laure ALDEBERT, Judge

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who deliberated and a report was presented at the hearing by Mr. François ANCEL under the conditions provided by Article 804 of the French Code of Civil Procedure.

**Court clerk**, during the proceedings: Mrs. Clémentine GLEMET

**DECISION**:

- IN ADVERSARIAL PROCEEDINGS
- upon availability of the decision to the court registry, with the parties having been previously informed under the conditions provided in the second paragraph of Article 450 of the French Code of Civil Procedure
- signed by François ANCEL, President and Clémentine GLEMET, Court clerk, who received the minutes of the decision by the signatory judge.

## 1 – THE FACTS AND PROCEDURE

1-On October 8, 2002, Sterling Merchant Finance Ltd. (hereafter "Sterling"), a company governed under American law, and carrying out an activity as a merchant bank, equity investor and as an international financial consultancy firm, entered into an agreement with the government of the Democratic and Popular Algerian Republic (hereafter the "Algerian Republic"), relating to the privatisation, in particular of three chemical companies in Algeria, the national company of fertilizer and phytosanitary spa production (hereafter "ASMIDAL"), Spa national painting company (ENAP) and the National Abrasive Glass company (hereafter "ENAVA") and several of their subsidiaries (Kimial, Fertial, Somias and Alver).

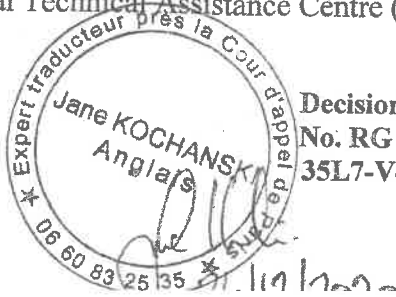
2-This agreement should be carried out in two phases. The first phase relates to the evaluation of the privatization agreement (called "elaboration of privatization scenarios", i.e., the analysis of the legal environment, technico-economic, operational and financial, financial audit, market analysis diagnostics…) and the second phase relating to the preparation, performance and finalization of the privatization operation for each of the three companies.

3-The specific condition of the agreement provided that the Algerian Republic would pay a fixed remuneration (the "Fixed Remuneration") to Sterling and a variable remuneration (the "Variable Remuneration"), with the latter being paid according to Article 6.1.2 *"for the services rendered to the client in the context of the mission defined in the Agreement. It is related to the effective realization of the sale of the capital contributions in the related companies"*.

4-The agreement provided that all the privatization services should be finalized within a period of 9 months following date of its entry into force (Article 2.3). In the event of delays due to events beyond the parties' control, it was agreed that the parties would agree to the subsequent measures required.

5-After 9 months, the privatization of said companies was unable to be made and the parties were not in approval to extend the agreement.

6-The Algerian Republic granted the privatization to other providers, i.e., to the consultancy firm KPMG and the National Technical Assistance Centre (hereafter the "CNAT").



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7-KIMIAL, ALVER, SOMIAS and FERTIAL were privatized after their interventions.

8-Sterling issued a certain number of invoices for the fixed and variable remuneration.

9-As the Algerian Republic had not made any of the requested payments, Sterling initiated an arbitral procedure before the Permanent Court of Arbitration in accordance with the CNUDCI regulation dated 1976, on the basis of Article 7.2 of the specific conditions for the agreement.

10- The Arbitral Tribunal comprised of the judge, Mr. (President), Professor (co-arbitrator) and the judge (co-arbitrator), located in Paris rendered an arbitral award on as follows:

(i) Unanimously ordered the Algerian Republic to pay Sterling for the fixed remuneration, the amount of 522,980.90 USD, increased by simple interest at the annual LIBOR rate in American dollars, plus three points, as from October 23, 2018 until the payment date,
(ii) Unanimously ordered the Algerian Republic to pay Sterling for the variable remuneration relating to the privatization of KIMIAL, the amount of 108,000 USD, increased by simple interest at the annual LIBOR rate in American dollars, plus three points, as from October 23, 2018, until the payment date,
(iii) At the majority, ordered the Algerian Republic to pay Sterling for the variable remuneration relating to the privatization of ALVER, SOMIAS and FERTIAL the amount of 2,205,091.30 USD, increased by simple interest at the annual LIBOR rate in American dollars, plus three points as from October 23, 2018, until payment date;
(iv) Unanimously decided to have the Algerian Republic assume the costs of arbitration (except for the representation costs), and, accordingly, ordered the latter to reimburse Sterling for the amounts that it had paid to cover the arbitration costs for up to the amount of 30,221.56 USD;
(v) Unanimously decided that each of the parties shall assume its own representation costs.

11- In an order dated November 26, 2018, the President of the Paris *Tribunal de grande instance* (Civil Court) declared the arbitral award enforceable and Sterling proceeded with its notification in a deed dated February 1, 2019.

12- On April 28, 2019, the 1st and 2nd of May, the Algerian Republic filed a remedy for annulment against this award, respectively registered under the RG numbers 19/09352, 19/09347, 19/09554 and 19/09725.

13-The close of the proceedings was ordered for each matter on October 6, 2020.

## II – THE PARTIES' PLEAS

**14-Pursuant to its last submissions communicated electronically on May 13, 2020 (for the files registered under the numbers RG 19/09347, 19/09352 and RG 19/09554) and on May 14, 2020 (for the file registered under the number RG 19/09725), the Algerian**



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**Republic requested of the Court, under Articles 1496 and 1520 of the French Code of Civil Procedure to do as follows:**
-Declare its annulment remedy admissible and well-founded;

-In the principal: annul the arbitral award rendered by the permanent court of Arbitration dated in all its provisions;

-In the alternative: annul the arbitral award insofar as it ordered the Algerian Republic to pay the variable remuneration in points (ii) and (iii) of the operative part of the award for the amounts of 108,000 USD and 2,205,091 USD relating to the privatization of Kimial, Fertial, Somias and Alver, increased with simple interest at the annual LIBOR rate in American dollars, plus three points;

-In the further alternative: annul the arbitral award insofar as it ordered the Algerian Republic to make the payment of the variable remuneration in point (ii) of the operative part of the award for an amount of 2,205,091.30 USD relating to the privatization of Kimial, Fertial, Somias and Alver, increased with simple interest at the annual LIBOR rate in American dollars, plus three points;

-Order Sterling to pay it the amount of 50,000 euros under Article 700 of the French Code of Civil Procedure.

**15-Pursuant to its latest submissions communicated electronically on September 29, 2020 Sterling requested of the Court, under Articles 1520 and 700 of the French Code of Civil Procedure to do as follows:**

-Judge that the arbitral tribunal has not usurped the *amiable compositeur* authority and had complied with the mission granted;
-Judge that the arbitral tribunal has not breached the adversarial principle,

Accordingly,
-Judge the Algerian Republic ill-founded in all of its claims,
-Dismiss the annulment remedy;
-Order the Algerian Republic to pay it the amount of 50,000 euros on the basis of Article 700 of the French Code of Civil Procedure and all the costs.

## III-**THE PARTIES'ARGUMENTS AND GROUNDS OF THE DECISION**

### **Concerning the joinder of the procedures:**

16-For effective organization of justice, the following matters shall be joined, registered under the numbers RG 19/09347, 19/09352, 19/09554 and 19/09725.

### **Concerning the annulment argument based on the breach by the arbitral tribunal of the adversarial principle (Article 1520 4° of the French Code of Civil Procedure)**

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17. In accordance with Article 1520, 4° of the French Code of Civil Procedure, the annulment remedy is possible if the adversarial principle has not been respected.

***Concerning the breach of the adversarial principle due to the lack of communication prior to the hearing by Sterling of a Powerpoint document presented at the hearing***

18-**The Algerian Republic** asserted that the procedure for the hearing reveals an evident breach of the adversarial principle insofar as Sterling presented a PowerPoint document that had not been communicated prior to the hearing and for which it was unaware thereof, as it did not attend the hearing and was not represented. It added that as the PowerPoint document was a visual support, the mere audio recording of the hearing may not compensate for the lack of communication of this document.

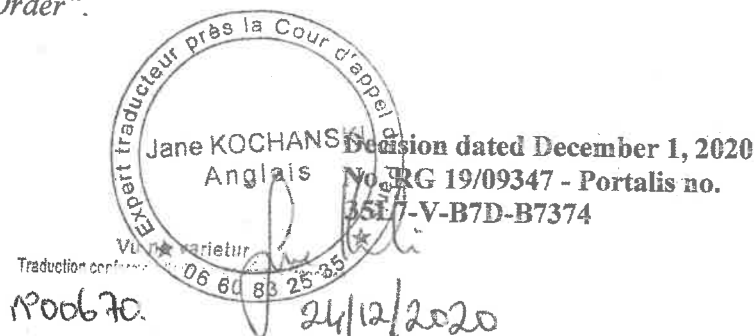
19-**In response, Sterling** asserted that the PowerPoint document was only an illustrative exhibit indicating that it would resume the arguments developed in the submissions filed during the arbitral proceedings; that it was not accompanied by any exhibit, as certified by the audio registration, and that it was authorized to produce it by virtue of the procedural order no.1 dated July 30, 2016. It added that this document had been duly transferred to the Algerian Republic after the hearing on February 1, 2017, which had the audio registration of the hearing and the authorization to present its observations until February 27, 2017, in accordance with the secretary's letter from the Permanent Court of Arbitration on February 10, 2017.

**On these grounds**,

20-The adversarial principle prevents a decision being rendered unless each party has asserted its arguments in fact and in law, to be informed of the opposing party's arguments and to discuss the latter. It also prohibits written submissions and documents from being presented before the arbitral tribunal without having also been communicated to the other party, and from grounds of fact and law being automatically raised without the parties having been convened to comment thereon.

21-In this case, the arbitration clause inserted in Article 7.2 of the specific condition of the agreement entered into between the Algerian Republic and Sterling makes reference to "*arbitration in accordance with the procedural rules of arbitration of the United Nations Commission for Commercial Law (CNUDCCI) applicable on the date of this agreement*".

22-In accordance with Article 22 of the Arbitration Regulation of the Commission of the United Nations for international commercial law applicable on the date of the disputed agreement (version dated 1976), pursuant to which "*The arbitral tribunal shall decide on the other written exhibits that the parties must or may produce, in addition to the petition and response; the tribunal shall fix the time period in which these exhibits must be communicated*", the arbitral tribunal stipulated in a procedural order no. 1 dated July 30, 2016, that whilst "*No new exhibit may be presented at the hearing, except with the Tribunal's authorization (...), illustrative exhibits may be presented by using documents previously filed, in accordance with this Order*".



23-The disputed document, which is communicated in exhibit no.10 in this procedure, which was referred to during the hearing to which the Algerian Republic did not attend, is a PowerPoint entitled "*Oral presentation of the arguments by the claimant*", which specified that "*this presentation is solely based on the information included in the petition and the rejoinder submissions submitted by the claimant*" and which includes serval slides summarizing Sterling's position.

24-A breach of the adversarial principle may not be asserted exclusively from the use of this document whereas it is not contested that the Algerian Republic had been duly convened to attend this hearing dated January 30, 2017 and that it had decided not to attend.

25-On the other hand, in accordance with its paragraph 35, the tribunal specified in its arbitral award that "*in a letter by the Permanent Arbitral Tribunal dated February 10, 2017, the tribunal had: i) transferred the audio recording of the hearing to the parties; ii) invited the parties to present any additional comment on the issues raised at the hearing (...)*" and also invited the parties "*to present any additional comments on the issues raised at the hearing at the latest on Monday 27th February 2017*".

26-It results that the Algerian Republic, which does not by any means specify the means by which the disputed illustrative document would include arguments which were not included in Sterling's submissions, which it would have been previously informed thereof, and was in any event made aware of the latter by the audio recording of the hearing which was communicated after the hearing, and to present any comments to the arbitral tribunal.

27-In view of these elements, the adversarial principle was not disregarded by the arbitral tribunal.

28-Accordingly this argument shall be dismissed.

***Concerning the breach of the adversarial principle in the context of the claim for the production of documents subsequent to the hearing***

29-**The Algerian Republic** set forth that following the hearing, the arbitral tribunal sent a list of questions in a letter dated February 10, 2017, including a claim for the communication of exhibits relating to the recruitment methods of the KPMG consultants and the CNAT and asserts that it breached the adversarial principle by applying Article 9(5) of the IBA rules, without any adversarial principle having been respected beforehand, contrary to the requirement stipulated in Article 3.5 of such rules.

30-It explained, also based on the dissenting opinion of one of the arbitrators, that following these rules, if the arbitral tribunal requested a party to provide exhibits, such party shall be entitled to refuse such request according to an adversarial procedure, and that it is only in the event of refusal that the tribunal may order such production. It added that it was only in the event whereby the tribunal "*ordered*" the production of an exhibit that Article 9(5) may apply, and not, like in this case, for a request of communication of exhibits accompanying a list of questions.



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31-It concluded that the arbitral tribunal, which made reference to the lack of production of documents, whereas such production had not been ordered and had not been subject to an adversarial discussion, to apply Article 9(5) of the IBA rules, had breached the adversarial principle.

**32-In response, Sterling** explained that the arbitral tribunal rendered a procedural order no. 3 deciding on its request for the production of documents, then, subsequent to the procedural hearing dated January 30, 2017, sent a request for the production of additional documents on February 10, 2017 to the Algerian Republic, with a list of questions. It asserted that the arbitral tribunal had ordered – and not simply requested – the Algerian Republic to produce such documents and that as the arbitral tribunal was not a party, the notion of production "*requested*" by the tribunal does not exit, with the latter "*ordering*" such production.

33-It added that the distinction made by the Algerian Republic between "*to claim*" and "*to order*" is in any event inoperative in this case as the tribunal's correspondence dated February 10, 2017 was clear concerning the injunction to produce the documents. It asserted that, if the Algerian Republic considered that the tribunal had simply requested the production of the exhibits, it should have objected thereto, which was not the case.

34-Sterling concluded by mentioning that the arbitral tribunal had duly ordered the production of such documents according to the required forms and in accordance with the rules accepted by the parties and that these rules did not by any means require the tribunal to avert the Algerian Republic to the consequences of its refusal to produce the necessary documents.

**On these grounds**,

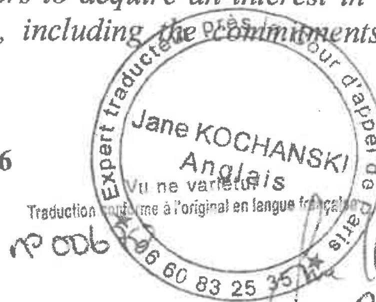
35-Firstly, it must be emphasized that the application of the IBA rules for the arbitral procedure is, in this case, not contested, with the dispute relating to the conditions of implementation of these rules, for which the Algerian Republic considers not to have been applied correctly by the arbitral tribunal, and subsequently resulting in a breach of the adversarial principle.

36-In this regard, it must be recalled that it is not part of the judge's remit deciding on the annulment to sanction an improper application of the procedural rules chosen by the parties, unless the alleged application, being erroneous, results in a breach of the adversarial principle.

37-In this case, it is well-established the Algerian Republic was requested to produce several documents during the arbitral procedure.

38-Accordingly, on the one hand, following a request by Sterling, and subject to a confidentiality commitment signed by the latter, the arbitral tribunal, after having taken into consideration the objection raised by the Algerian Republic based on the confidential nature of the documents, in accordance with a procedural order no. 3 dated February 10, 2017, ordered the latter to produce "*any excerpt of any report by the State Investment Board or by any other body of the Algerian State mentioning the amount of the financial considerations to be paid by the investors to acquire an interest in the public companies KIMIAL, FERTIAL, SOMAIS and ALVER, including the commitments that were taken for (i) a share capital*





*increase, subscription to shares, issuance premiums and any other financial commitment (investment, social restructuring costs etc.)".*

39-On the other hand, in a letter dated February 10, 2017, to which was attached the aforementioned procedural order no. 3, the arbitral tribunal also sent the Algerian Republic a "*list of questions that the tribunal would have asked if the latter had attended the hearing*" and in which it invited it "*to respond to the question raised at the hearing, in the context of its comments*".

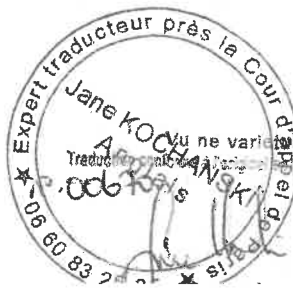
40-This document entitled "*List of questions to the defendant*" specified in its point 4 that "*on page 21 of it Submission in defence, the Defendant informed the tribunal that the subsidiaries FERTIAL, SOMIAS, KIMIAL and ALVER were privatized "with the assistance of other international consultants". The Defendant should provide the tribunal with further information, with supporting exhibits, on the recruitment methods by these international consultants, and, in particular, the copies of the agreements and the terms of reference of these consultants' mandates. The Defendant is also invited to specify, with supporting exhibits, if the investors participating in the capital of the privatized subsidiaries are those that the Claimant had suggested in its relations*".

41-If it is acknowledged that this second request for the communication of exhibits to the Algerian Republic does not specifically include the scope of the documents, the production of which was expressly ordered under the procedural order no. 3, and, accordingly, Sterling cannot allegedly consider that these two requests were the same, it is nonetheless established that the Algerian Republic could not be unaware that, in accordance with the procedural order no. 1 rendered on July 30, 2016, the arbitral tribunal had mentioned to the parties, without this issue being contested, on the one hand that the "*the tribunal may automatically order the production of documents*" and, on the other hand, that "*in addition to the provisions relating to the production of the documents above, the tribunal may use the IBA rules as supplementary guidelines, on the administration of evidence in international arbitration dated 2010 during the examination of the evidence*", and, accordingly, including the unfavourable deduction mechanism, whether in relation to the absence of production of exhibits as a result of the procedural order no. 3 and/or its request made in writing on February 10, 2017.

42-Accordingly, this mechanism was necessarily in the proceedings, without it being necessary that either party makes an express assertion thereto or that the tribunal invites either party to provide an explanation on its application.

43-In this regard, it results from paragraph no.38 of the arbitral award that the Algerian Republic was duly informed insofar as the tribunal mentioned that on February 27, 2017 (date on which the parties were due to respond), "*the Defendant filed its responses to the questions by the Tribunal dated February 10, 2017 (...) and seventeen documents communicated both in response to the tribunal's questions and in accordance with the procedural order no. 3*".

44-Furthermore, contrary to the Algerian Republic's assertion, the arbitral tribunal did not solely base its decision on the application of the unfavourable deduction to order the latter to pay a variable remuneration.



45-Upon examining the issue as to whether this was the case for the four privatized subsidiaries, on the basis of the works and services rendered by Sterling (§ 271), in paragraphs 272 to 278, the arbitral tribunal duly provided in it arbitral award the reasons and substantiation for the production of this evidence and in consideration, in particular, for the following elements:

-with regard to the privatization of KIMIAL, the tribunal acknowledged that "*the CNAT report dated November 2014, acknowledged that this file had already been subject to several rounds of negotiations with the potential purchasers*" and, that accordingly, in addition to other elements stipulated in paragraphs 273, 277, 279 and 280 to 283, "*there was a strong presumption that the Claimant's works, including its search for potential purchasers, had been used in the context of the privatization of the KIMIAL subsidiary*" (§ 274).

-with regard to the other subsidiaries (FERTIAL, SOMIAS and ALVER), the tribunal mentioned that whilst "*there was nothing to mention that the claimant had identified or entered into negotiations with the potential purchasers (...), nonetheless other factual elements suggested that the claimant's works were used for the privatization purposes of these three subsidiaries*" and the tribunal acknowledged "*in particular*" "*the following factual elements*", which it provides in detail in its paragraph 277 and which, in particular, relate to the numerous reports actually issued by Sterling to the Algerian Republic, for which the defendant "*was unable to provide any evidence or argument to contend their capacity*"; the fact that the "*defendant's new consultants - KPMG and the CNAT - specify in their correspondence and reports, that they consulted the pre-existing documents relating to FERTIAL (and KIMIAL)*"; the fact that the reports produced by KPMG and the CNAT "*testify that due to the fact that their term of office was less extensive than that of the claimant*"; that the periods applicable to the KPMG works "*seem to have been ostensibly shorter than those stipulated in the agreement with the claimant*" and that, accordingly, the total period agreed of four weeks for the works relating to the subsidiary FERTIAL for KPMG "*would not enable the later to identify a purchaser and finalize the privatization of such company without benefiting from the claimant's works*"; or the fact that "*KPMG and the CNAT have not carried out any work in relation to the privatization of the SOMIAS subsidiary*".

46-Accordingly, the arbitral tribunal inferred in its paragraph 278 that the "*elements of fact listed above, considered globally, establish the presumption that the subsidiaries FERTIAL, SOMIAS and ALVER were privatized on the basis of the services rendered by the Claimant to the Defendant*".

47-It was only after having analysed these elements that the arbitral tribunal based its decision, in addition, on the absence of response to its request for the production of complementary documents by the Algerian Republic to substantiate its position and acknowledge that whilst the Algerian Republic had provided "*information on the recruitment methods at KPMG and the CNAT, in particular, the copies of their agreements with the defendant and the terms of reference governing their services*", with these documents "*in particular, enabling it to verify the extent of the new consultants' terms of office and, accordingly, to determine if they had been requested to redo all or part of the works already accomplished by the claimant*" ~~and could~~ "*enhance or reduce the presumption according to*

*which the defendant would have used the claimant's works for the privatization of the companies in question"* (§ 279).

48- After having acknowledged that "*the defendant [had] failed to produce the documents and information requested by the tribunal, and without providing specific reasons therefor"*, the tribunal mentioned, in accordance with Article 9 (5) of the IBA rules that "*in this case, as the Defendant did not provide any satisfactory reason for the non-production of the agreements and the terms of reference for KPMG and the CNAT, the Tribunal inferred that the content of these documents would be contrary to the defendant's interests"* (§280), without failing to recall that the unfavourable conclusion rule "*shall not be mandatory but must be freely appreciated on the basis of any evidence and elements of the file submitted before the tribunal*" and considered that "*upon analysis, a set of concurring evidence, taken separately or together, substantiates the conviction that it is reasonable to conclude on a lack of diligence due by the defendant for not producing the documents required by the tribunal, undoubtedly because they were potentially detrimental"* (§282).

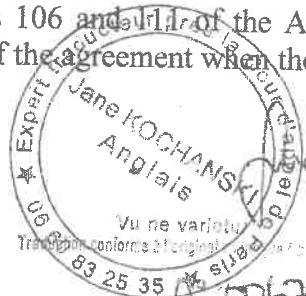
49-Accordingly, the arbitral tribunal mentioned in paragraph 283 of its award that "*Ultimately, the unfavourable conclusion for the non-production of the documents requested by the tribunal is not only related to the content of the documents that the defendant is required to provide*"; *it is also consistent with the initial presumption resulting from the evidence available, even in the absence of production of documents*" and in its paragraph 284 that "*the non-production of these documents by the defendant reinforces the presumption in favour of the use by the defendant of the claimant's works in the context of the privatization of the subsidiaries FERTIAL, SOMIAS and ALVER"*.

50-In view of all these elements, none of the elements used as the basis of the arbitral tribunal's decision were in contradiction with the adversarial proceedings, insofar as, on the hand, the parties had consented to the potential application of the unfavourable deduction rule and, on the other hand, that the tribunal had acknowledged that the refusal by the Algerian Republic to produce certain documents was not based on "*any satisfactory reason"*, and that, finally, this tribunal did not solely base its decision on this mechanism to accept Sterling's claims as it also made reference to the documents actually produced and presented in the proceedings to reach its decision.

51-Accordingly, the ground based on the breach of the adversarial principle shall be dismissed.

**Concerning the ground based on the non-respect by the arbitral tribunal of its mission for having ruled under *amiable compositeur* (Art.1520 °3 of the French Code of Civil Procedure).**

**52-The Algerian Republic** asserted that the arbitral tribunal had not respected its mission and had decided under *amiable compositeur* instead of reaching its decision on the basis of the applicable Algerian law by virtue of Article 1.2 of the specific conditions of the agreement, and in particular Articles 106 and 111 of the Algerian Civil Code, which stipulate a strict application of the terms of the agreement when they are accurately drafted.

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53-Accordingly, it contended that the arbitral tribunal had decided that Sterling was entitled to the "*Variable Remuneration*" provided in the agreement after having nonetheless acknowledged that the conditions for its granting were not met, according to paragraph 285 of the award.

54-The Algerian Republic set forth that the agreement unambiguously provided that the Variable Remuneration was a success bonus, the granting of which depended on the realization of an obligation to achieve a specific result involving the effective realization of the privatization of the companies or the procedure therefor, with the realization of phase 2 being decisive, with regard to Article 3.6 of the contractual conditions, according to which the success bonus "*shall be paid each time that the opening of capital or the privatization of each of the identified companies shall be realized and achieved*".

55-It emphasized in this regard that the Articles 6.1.1 and 6.1.2 of the specific conditions of the agreement relating to the amount and type of variable remuneration does not by any means provide therefor and that their interpretation under Articles 2.6.3 and 3.7 of these conditions provides, on the contrary, that the parties' intention was not to provide for a Variable Remuneration *pro rata* to the efforts provided by Sterling, but for the accomplishment of the privatizations. It concluded that nothing in the agreement or the law justified the payment of a Variable Remuneration according to the efforts provided.

56-It added that the tribunal based its decision on the fact that the Algerian Republic would have made reference to reports established by Sterling to finalize the subsequent privatizations whereas the ownership of these works had already been transferred by virtue of Article 3.7 of the general conditions of the agreement, which provides that the reports would become and would remain its ownership.

57-It emphasized that the arbitrator acknowledged in his partially dissenting opinion that this remuneration *pro rata* was only justified by considerations of equity and that the tribunal had acknowledged in its arbitral award that "*it emphasized equity*" and set "*a scale of equity*" (paragraph 289 of the arbitral award).

58-**In response, Sterling** asserted that the nature and content of its obligations are defined in Appendix A of the agreement, providing for two phases, without the agreement making it assume the obligation of an effective privatization of the relevant companies. It asserted that it was through the strict application of Algerian law and the agreement that the arbitral tribunal had concluded that the latter did not impose upon Sterling an obligation to achieve a specific result for the privatization of the relevant companies, but an obligation to set the procedure for the privatization of these companies, and that it did not exceed its obligations in its attempt to discover if and to what extent it had enabled the Algerian Republic to launch the privatizations, prior to ruling on the admissibility of its remuneration.

59-It added that the decision for the privatization of the companies was for the Algerian Republic and that it was due to the latter that this was not launched immediately after the realization of Sterling's services and that, in any event, the amount of the variable remuneration could not depend on the launch of the privatizations as such event was the remit of the Algerian authorities, with such condition being potestative and accordingly, void.



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60-Sterling then asserted that it had accomplished its obligations in accordance with the obligations contractually due in the context of the two phases of the works and asserted that the arbitral tribunal had justified its right to a Fixed Remuneration by the analysis of the works carried out in the context of the agreement and the contractual stipulations;

61-It added that it was with regard to Article 6.1.1 of the Specific Conditions of the Agreement and the arbitral tribunal's analysis of the financial consequences of the realization of the services, that the arbitral tribunal accepted its rights to a Variable Remuneration. It emphasized that it, in particular, retained that it was duly on the basis of its services and reports, and not solely on the basis of the works carried out by KPMG and the CNAT that the privatizations had been made.

62-It concluded that it had provided all the services due within the contractual 9 month period and specified that even although the Algerian Republic did not contest the Fixed Remuneration it had nonetheless not proceeded with payment thereof, which infers that it never intended to settle the amounts due, under any capacity whatsoever.

***On this ground,***

63-In accordance with Article 1520, 3° of the French Code of Civil Procedure, the annulment remedy is possible if the arbitral tribunal decided in non-compliance with its mission.

64-In accordance with the agreement on the terms of designation of the tribunal signed by the parties on 27th of June and 10th July 2016, in the section "*applicable law*", reference is made to Article 1.2 of the General Conditions of the Agreement, which sets forth that "*the Agreement, its meaning, interpretation and the relations between the parties shall be subject to the Applicable Law*" and Article 1.2 of the Specific Conditions of the Agreement provides that "*the applicable law is Algerian public procurement law and the laws and regulations applicable in Algeria*".

65-The seat of arbitration is located in Paris.

66-No amiable composition mission was granted to the arbitral tribunal.

67-As a basis for its decision to partially accept the claim by Sterling for the payment of a variable remuneration, the arbitral tribunal mentioned in its arbitral award that it "*first examined, whether, in principle, the consultant could, in accordance with the agreement, be entitled to a variable remuneration for the privatization transactions for which it would have carried out prior work in the context of the agreement, but which would have been finalized after the end of the agreement*" (§268) and considered that this was possible on the grounds that "*no contractual clause stipulated that, to provide entitlement for a variable remuneration, the privatizations should be finalized during the term of the agreement*" and that the "*contrary would have been inconsistent, as the finalization of the privatizations would necessarily depend on the government's decisions*" (§268). The arbitral tribunal concluded that "*it could be envisaged that the elements necessary for the privatizations be set up during the term of the agreement, but that the latter be carried out after the termination thereof. This should not deprive the consultant of his right to remuneration*" (§268).

68-It is well-established that the arbitral tribunal considered in paragraph 285 of its arbitral award that "*the services provided in the agreement were not rendered in full by [Sterling]. In particular, with regard to the subsidiaries FERTIAL, SOMIAS and ALVER (and contrary to KIMIAL), [Sterling] did not provide the services relating to the identification and negotiations with the potential purchasers (...). The issue is raised as to whether despite this uncompleted performance of the works, such as defined in the agreement, [Sterling] was nonetheless entitled to a Variable Remuneration*".

69-To respond positively to this issue, the arbitral tribunal considered that "*the response is provided in Article 6.1.2 of the Agreement, second paragraph which sets forth: "the Variable Remuneration is the part that remunerated the Consultant for the services rendered to the client in the context of the mission defined in the Agreement. It is related to the effective realization of the sale of shareholdings in the capital of the relevant companies.*" (§286).

71-The tribunal continued by specifying that "*this conception of success, synonym of result, as the outcome of the services rendered to the defendant by the claimant is confirmed by the parties' intention, such as reflected in the terms of the agreement (...)*" and, in particular, Article 6.2.1 which sets the percentages for the realization of the works by Sterling. Accordingly, the tribunal considered that "*if the services rendered by the consultant are closely related to the privatization, but that the latter never reached fruition, the consultant may not assert the variable remuneration (...). Nonetheless, if the services rendered by the consultant to the client are not specifically related to the proceeds of the sale of shareholdings in the capital, but that this sale (i.e. the privatization) was finally accomplished, the consultant shall be entitled to a variable remuneration for the services rendered (Article 6.1.2, second paragraph, first phrase)*".

72-It is on this basis of this interpretation of the clauses of the agreement that the tribunal considered that "*the relevant issue, in this case, is not so much the consultant's presence during this sale, in this case [Sterling], but rather the services [that it] rendered to the client and the degree of utility of these services to obtain such success*".

73-It results from these elements that far from deciding in equity to examine the principle of a variable remuneration due, the arbitral tribunal referred to the agreement for which it had interpreted the contractual clause to accept Sterling's right to benefit from such remuneration, without by any means modifying the economy of the agreement, by substituting the contractual obligations with new obligations, not meeting the parties' common intent.

74-In this regard, the Algerian Republic may not consider that the arbitral tribunal had acted as an *amiable compositeur* whereas such conduct may not exclusively be derived from the interpretation of the agreement, for which it considers not to be compliant to its argument, at the risk of deciding upon an improper appreciation of the terms of the agreement and, accordingly, an error of judgment by the arbitral tribunal, under the guise of the arbitrator's non-respect of his mission.

75-On the other hand, whilst on the principle of attribution of a variable remuneration the arbitral tribunal did not act as an *amiable compositeur*, it evidently assumed such mission to evaluate the amount of the remuneration due.

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76-In paragraph 289 of its arbitral award, the arbitral tribunal set forth that "*insofar as [Sterling] had only carried out a part of the works defined in the agreement, the tribunal considered that it would be unfair for the defendant to grant [Sterling] the integrality of the variable remuneration for the four companies. Accordingly, the tribunal privileged equity, as it would be inconsistent and unfair to grant the claimant all the variable remuneration for a result which had not been reached solely through its contribution*".

77-The arbitral award then mentioned that "*to define the equity scale, in this case, the tribunal made reference to the overall meaning of the agreement and the parties' intention, as compiled in the agreement per se, which enable an assessment of the proportions in which the services rendered to the defendant by the claimant, and not the efforts by the latter, managed to contribute to the intention of the result or success of the privatization of four companies*".

78-It results from these paragraphs that the tribunal intentionally and expressly based its decision on equity to evaluate the amount of the variable remuneration, for which the principle for the benefit of Sterling was previously accepted and accordingly, it had failed to comply with its mission.

79-Accordingly, the arbitral award shall be annulled insofar as it ordered the Algerian Republic to pay the variable remuneration in points (ii) and (iii) of the operative part of the award for the amounts of 108,000 USD and 2,205,091 USD relating to the privatization of Kimial, Fertial, Somias and Alver, increased with simple interest at the annual LIBOR rate in American dollars, plus three points.

**Concerning the costs and expenses**:

80-As the parties are partially unsuccessful, each party shall assume its own costs.

81-For the same reasons, equity requires that the parties' claims shall be dismissed, based on Article 700 of the French Code of Civil Procedure.

## IV-ON THESE GROUNDS

The court,

1-Ordered the joinder of the files registered under the numbers RG 19/09347, 19/09352 and RG 19/09554 and RG 19/09725;

2-Cancelled the arbitral award dated solely insofar as it ordered the Algerian Republic to pay the variable remuneration in points (ii) and (iii) in its operative part of the award for the amounts of 108,000 USD and 2,205,091 USD relating to the privatization of Kimial, Fertial, Somias and Alver, increased with simple interest at the annual LIBOR rate in American dollars, plus three points;

3-Dismissed the remedy for annulment for the additional claim;

4-Dismissed the parties' claims based on Article 700 of the French Code of Civil Procedure;

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5-Held that each party shall assume its own costs.

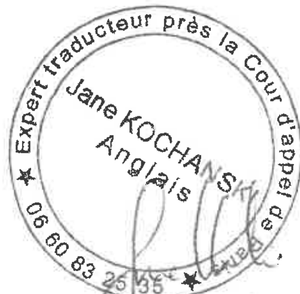
**The court clerk**
**C. GLEMET**

**The President**
**F. ANCEL**

Pour traduction certifiée conforme à l'original en langue française *visé ne variatur* sub numéro 00670 ;

Ce jour, le 24 décembre 2020.

Jane Kochanski.

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