NAI 4687

ARBITRATION UNDER THE
NAI ARBITRATION RULES 2015

between

Exem Energy B.V.
(The Netherlands)

Claimant

and

Sociedade Nacional de Combustíveis de Angola, - Sonangol E.P.
(The Republic of Angola)

Respondent

FINAL AWARD

ARBITRAL TRIBUNAL

Professor A.S. Hartkamp, President
Professor F.J.M. De Ly, Co-arbitrator
Professor C.A. Schwarz, Co-arbitrator

23 July 2021

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1. THE PARTIES AND THEIR REPRESENTATIVES

1.1. The Parties are as follows.

1.2. The Claimant is:

Exem Energy B.V., an entity incorporated under the laws of The Netherlands ("**Exem**" or "**Claimant**") whose address is:
Beechavenue 54
Het Poortgebouw
1119 PW
Schiphol-Rijk
The Netherlands

1.3. The Claimant is represented in this arbitration by:

Mr. Rogier Schellaars
(schellaars@vandoorne.com)
Professor B. van Zelst
(zelstb@vandoorne.com)
Mr. B. Dijkmans van Gunst
(dijkmans@vandoorne.com)
Mr. D. van Besouw
(besouw@vandoorne.com)
Mr. B. Keizers
(keizers@vandoorne.com)
Mr. M. Doornbos
(doornbos@vandoorne.com)
Ms F.M.A. Potter
(potter@vandoorne.com)

Van Doorne N.V.
Jachthavenweg 121
1081 KM Amsterdam
The Netherlands

1.4. The Respondent is:

Sociedade Nacional de Combustíveis de Angola Sonangol - E.P., an entity incorporated under the laws of the Republic of Angola ("**Sonangol**" or "**Respondent**") whose address is:

Rua Rainha Ginga n.º 29-31
1316 Luanda
The Republic of Angola

1.5. The Respondent is represented in this arbitration by:
Yas Banifatemi
(ybanifatemi@.gbsdisputes.com)
James Herbert
(jherbert@gbsdisputes.com.com)
Anders Junker-Nilsson
(ajunkernilsson@gbsdisputes.com)
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Mr. E. Gaillard † - former counsel
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Mr. Y.M.J. Lennartz - former counsel
(yke.lennartz@nortonrosefulbright.com)
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(koen.durlinger@nortonrosefulbright.com)

GBS Disputes
22 Rue de Londres
Paris 75009
France

2. THE ARBITRAL TRIBUNAL

2.1. By letter of 29 August 2019, the Claimant appointed Prof. Filip De Ly as co-arbitrator.

2.2. By letter of 30 August 2019, the Respondent appointed Prof. C.A. Schwarz as co-arbitrator.

2.3. On 24 and 25 September 2019, Prof. Schwarz and Prof. De Ly respectively submitted their signed statements on independence, impartiality, availability and acceptance the Netherlands Arbitration Institute ("NAI") in accordance with Article 11(4) of the NAI Arbitration Rules of 1 January 2015 ("Rules").

2.4. On 17 October 2019, the administrator of the NAI confirmed their appointment as co-arbitrators.

2.5. By e-mail of 6 November 2019, the NAI informed the Parties that the co-arbitrators had appointed Prof. Hartkamp as chair of the Tribunal and forwarded them Prof. Hartkamp's disclosure and signed statement of independence, impartiality, availability and acceptance.

2.6. On 12 November 2019, Prof. Hartkamp provided further clarifications on his disclosure, following questions from the Parties.

2.7. By letter of 20 November 2019, the administrator of the NAI confirmed Prof. Hartkamp as chair of the Tribunal.

2.8. The Arbitral Tribunal's addresses are as follows:

Professor A.S. Hartkamp (Chair)
(a.hartkamp@jur.ru.nl)
The Hague

Professor F.J.M. De Ly (Co-arbitrator)
(f.dely@ziggo.nl)
Utrecht

Professor C.A. Schwarz (Co-arbitrator)
(cschwarz@ziggo.nl)
Leiden

3. APPLICABLE LEGAL FRAMEWORK

3.1. On 21 December 2006 the Parties entered into a Share Purchase Agreement ("SPA") according to which Sonangol, sole shareholder of Esperaza Holding B.V., a Dutch private limited company ("Esperaza") , sold 40% of Esperaza's shares to Exem, which agreed to buy those shares.

3.1. Clause 8.1 of the SPA provides that "[t]his Agreement is governed by and shall be construed and interpreted in accordance with the laws of the Netherlands."

3.2. Clause 8.2 of the SPA provides that "[a]ny dispute arising from this Agreement shall be finally settled in accordance with the Arbitration Rules of the Netherlands Arbitration Institute (*Nederlands Arbitrage Instituut,* or "**NAI**")." The parties have not contested the jurisdiction of the Tribunal. Pursuant to Article 62(3) of these Rules in conjunction with Articles 45(2) and 1(g) of the NAI Arbitration Rules of 1 January 2010 "[i]n an international arbitration, the arbitral tribunal shall make its award in accordance with the rules of law unless the parties agreed to authorise it to decide as amiable compositeur." As the parties have not agreed otherwise, the arbitral tribunal shall decide in accordance with the rules of law.

3.3. Clause 8.3 of the SPA provides that "[t]he arbitration procedure shall take place in Amsterdam and shall be conducted in the English language."

3.4. According to Article 3.4 of Procedural Order No. I the Parties have agreed that "(t)he Arbitral Tribunal may seek guidance from, but shall not be bound by, the IBA Rules on the Taking of Evidence in International Arbitration of 2010."

4. THE PROCEDURAL HISTORY

4.1. This procedure has commenced when Exem submitted its request for arbitration dated 17 October 2018. Although the proceedings in this case have been long and

lively, the below summary can be succinct as neither Party has objected as to the way the proceedings have been managed nor has maintained any reservation.

4.2. Sonangol's short answer dates from 21 November 2018.

4.3. On 6 January 2020 Sonangol's request (dated 3 October 2019) in another NAI proceeding between the same Parties stemming from a parallel shareholders' agreement between the Parties (NAI 4760) to consolidate those proceedings with the proceedings in this case (NAI 4687), was rejected by Mr. W.H. van Baren, appointed as "Third Person" under Article 39 NAI Rules. Pending the outcome of this procedural incident, on 28 November 2019 this Tribunal stayed the proceedings in NAI 4687.

4.4. Subsequently, Sonangol submitted an amended short answer dated 28 February 2020.

4.5. On 11 March 2020 a procedural conference was held which led to (a) the Temporary Order dated 12 March 2020 and (b) the Procedural Order No. 1 with a Procedural Timetable (appendix 1) dated 18 March 2020.

4.6 On 19 March 2019 the Temporary Order dated 12 March 2020 was amended to become a Non-Temporary Order destined to extend its effect until the final award in these proceedings. The Order indeed has been in effect and has been complied with until the end of the proceedings. Its text is as follows:

> "1. On 11 March 2020, counsel to Exem and Sonangol and the Tribunal convened for the Case Management Conference announced in my[1] emails of 26 February and 9 March.
>
> 2. The Case Management Conference was preceded by a letter of counsel to Sonangol of 28 February. In this letter Sonangol, in the first place, submits an Amended Short Answer to replace Sonangol's previous Short Answer dated 21 November 2018, alleging 'that Sonangol is entitled to refer issues arising from the SPA and Deed of Pledge to this Tribunal as of right until its Statement of Defence and has a prima facie right to amend the relief it seeks'.
>
> 3. The letter continues by requesting that the Tribunal confirm that Sonangol's Amended Short Answer has been received into the record and that it shall replace Sonangol's previous Short Answer dated 21 November 2018. This request was – after Exem's objection in its letter of 6 March – reiterated in Sonangol's letter of 9 March.
>
> 4. In the second place Sonangol's letter of 28 February informs the Tribunal of the fact that Exem on 20 February submitted a request for summary arbitral proceedings[2] requesting the following relief:

[1] The Order was issued by the Chair of the Tribunal.
[2] NAI case 4807.

‘A. to order Sonangol to, per Clause 5 SHA, undertake to distribute Esperaza's profits in the amount of EUR 80 million as most recently proposed by Esperaza's board of directors, or to freeze these dividends pending the resolution of the NAI 4687 matter;
B. to order Sonangol to refrain from enforcing its alleged right of pledge; and
C. to order Sonangol to sign and execute the Settlement Agreement – or to proceed to execution by continuing negotiations.’

5. In the letter Sonangol contends that ‘each category of relief constitutes an abusive attempt to circumvent this Tribunal’s jurisdiction and undermine Sonangol’s due process rights.’

6. The letter further states that ‘Exem has failed to explain why its request could not have been brought before this Tribunal: (i) as Exem explained in its request for summary proceedings, the SPA and SHA contain compatible arbitration clauses; and, (ii) in any event, this Tribunal would have jurisdiction to preserve the status quo pending its final decision, including by making interim orders against Sonangol (or, as is more likely, Exem)’.

7. Sonangol concludes by requesting ‘this Tribunal to order Exem, pursuant to Art. 35 of the NAI Arbitration Rules, to withdraw its request for summary arbitral proceedings and bring all requests for provisional relief relating to the matters to be determined in this arbitration, including matters arising from the SPA and/or the Deed of Pledge, before this Tribunal.’

8. The Case Management Conference was furthermore preceded by a letter of counsel to Sonangol of 11 March 2020 in which Sonangol, referring to its letter of 28 February, makes the following formal undertaking to this Tribunal:
‘(i) Pending this Tribunal’s first award, Sonangol will not take steps to cause Esperaza to release funds in the form of dividends, except on 15 days’ notice to this Tribunal; and,
(ii) Pending this Tribunal’s first award, Sonangol will not exercise any rights under the Deed of Pledge, except on 15 days’ notice to this Tribunal.’
To this, Sonangol has added that it reserves its right to vary the above undertakings on 15 days’ notice to the Tribunal.

9. Having heard the parties and after deliberation, and taking into account the letters of counsel to Exem dated 17 March 2020 and counsel to Sonangol dated 18 March 2020, the Tribunal has taken the following decisions:
I. Ad §§ 2-3. Taking into account that Exem did not oppose Sonangol’s wish ‘to refer issues arising from the SPA and Deed of Pledge to this Tribunal as of right until its Statement of Defence and has a prima facie right to amend the relief it seeks’ the Tribunal holds that Sonangol is so entitled. It is not necessary to decide whether the Short Answer dated 21 November 2018 may be replaced by the Amended Short Answer of 28 February 2020, as Sonangol is entitled to bring up the said issues in its Statement of Defence and Counterclaim and to amend its counterclaim(s) accordingly.

II. Ad §§ 4-7. Taking into account that the hearing in the Summary Arbitrary Proceedings will take place on 13 March 2020, the Tribunal by virtue of Article 35 NAI Arbitration Rules holds by way of provisional relief as follows:
A. Exem is enjoined from discussing the issues A and B mentioned in § 4 in the hearing of 13 March 2020 or in other procedural acts in NAI case 4807 pending this Tribunal's final decision in the present proceedings, because those issues are within the competence of this Tribunal (which can also decide on them by way of provisional relief) and because involving another Tribunal with the same issues may unnecessarily complicate these proceedings and may constitute an abuse of the right to institute separate arbitral proceedings;
B. This order is aimed at a sound administration of the present arbitration proceedings, may be amended if and when required or appropriate and is without prejudice to the determinations to be made in the Tribunal's final decision. No further directions at this stage are required further to address Sonangol's requests as mentioned in § 7 above.

10. The Tribunal notes that at the end of the hearing Sonangol, at the request of Exem, has reiterated its formal undertaking as mentioned in § 8."

4.7. On 21 May 2020 Exem has filed its Statement of Claim dated 20 May 2020.

4.8. On 6 August 2020 Sonangol has filed its Statement of Defence and Counterclaims dated 5 August 2020.

4.9. The document request phase – which saw document requests issued by both Parties - started on 19 August 2020 and was concluded on 20 September 2020 with the Tribunal's decisions in Procedural Order No. 2 dated 20 September. The text of this Order is as follows:

"1.1. This Procedural Order no. 2 relates to the Document Requests of 19 August 2020 made by Exem Energy B.V. and by Sociedade Nacional de Combustíveis de Angola, E.P.
1.2. The decisions of The Arbitral Tribunal are contained in two Redfern Schedules attached to this Procedural Order.[3]
1.3. The decisions must be understood against the following background.
2.1. This case is, in essence, about allegations of corruption relating to several juridical acts concluded between Claimant and Respondent. If the allegations turn out to be correct, those juridical acts may be null and void as being contrary to the *'goede zeden of openbare orde'* ('good morals or public order') as per Article 3:40 Dutch Civil Code.
2.2. Corruption is usually difficult to prove, as it more often than not resides in intentions rather than in documents.
2.3. When confronted with transactions which may be in breach of public order, arbitral tribunals have a duty – even *ex officio* - to fully investigate such violations and must require parties to put forward all relevant – direct or circumstantial – evidence available to them. According to settled Dutch case law [footnote omitted] procedural restrictions hampering this duty to investigate must be interpreted restrictively.

[3] The Redfern Schedules (including the Tribunal's decisions) count 124 pages and are not reproduced here.

2.4. For these reasons, the Arbitral Tribunal has interpreted the applicable Articles of the Dutch Code of Civil Procedure (843a and 1040), the Arbitration Rules of the *Nederlands Arbitrage Institute* (27), the IBA Rules on the Taking of Evidence in International Arbitration (3 and 9) and the Procedural Order no. 1 (6.3), allowing a Tribunal to issue an order, at the request of a party, to the other party to produce documents, in a manner sufficiently broad as to warrant that all relevant evidence will be put before the Tribunal.
2.5. In pursuing this goal the Arbitral Tribunal has taken care not to transgress the literal texts of those Articles and to treat both Parties in a fair and equal manner.
3.1. Where Sonangol's requests are granted, the tribunal's decision must be understood in the sense that i) it relates to and binds – apart from Exem itself – all persons and/or companies mentioned in section 28 of Exem's 'General Response to Respondent's requests' of 19 August 2020 (*viz*. Mr. Dokolo, Exem Holding AG, Exem's directors and Mr. da Silva); and
(ii) that Exem is under a best efforts obligation to obtain the requested documents from all (other) persons and companies mentioned on p. 17-19 of Sonangol's Application for Document Production of 2 September 2020, *viz*. Exem Africa Ltd, Exem Energia E Investimentos, Ms Isabel dos Santos and Mr. Sarju Raikundalia.
3.2. In the absence of cogent reasons given by Exem the Tribunal assumes that Exem will be able to perform its best efforts obligation.

4. The Arbitral Tribunal reminds Parties of Article 6.4. of Procedural Order No.1: 'If a party fails without satisfactory explanation to produce any document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may, on its own initiative or on the application of any Party and subject always to providing the Parties an opportunity to comment on the specific proposed adverse inference under consideration, infer that such document would be adverse to the interests of that party'.

5. This Procedural Order may be referred to as Procedural Order No. 2 and is aimed at a sound administration of the arbitral proceedings and may be amended if and when required."

4.10. On 9 December 2020 Exem filed its Statement of Reply (including rebuttal of Sonangol's Counterclaims) dated 8 December 2020.

4.11. On4 March 2021 Sonangol filed its Statement of Rejoinder and Reply on the Counterclaims dated 3 March 2021.

4.12. On 4 May 2021 Exem filed its Statement of Rejoinder on Counterclaims.

4.13. All submissions mentioned above were accompanied by exhibits. Other exhibits were submitted in the course of the proceedings with requests and other letters of the Parties up until the end of the Hearing (1 June 2021) mentioned below. Some exhibits, in particular witness statements, were accompanied by a separate set of numbered exhibits. Included in these latter exhibits were some exhibits which (also) figure in the lists of exhibits accompanying the submissions. Some of the exhibits numbered in the lists of exhibits accompanying the submissions were in fact not submitted because they were (and have remained to be) reserved.

For completeness' sake the Tribunal mentions here in summary and following the information provided by the parties in their consolidated lists of exhibits of 3 May 2021 (with the exclusion of exhibits separately numbered as accompanying other exhibits):
Exem has submitted Factual Exhibits C-1 to C-207, Legal Exhibits CL-1 to CL-68, Witness Statements CW-1 to CW-4 and Expert Opinions CE-1 and CE-2.
Sonangol has submitted Factual Exhibits R-1 to R-532, Legal Exhibits RL-1 to RL-218 and Expert Opinions RWE-1 to RWE-3.

4.14. On 5 and 7 May 2021 Sonangol has filed two objections against Exem's Statement of Rejoinder on Counterclaims, followed by a discussion between the Parties until 13 May 2021 on those and several other matters. Following a procedural conference on 12 May 2021 the Tribunal has decided in its procedural order of 14 May 2021 on all pending matters as follows:

> "1. The hearing will be held through virtual means. In the present Covid-19 situation travelling is cumbersome and the risk of virus infections may jeopardize the normal course of a physical hearing.
> 2. The Tribunal will conduct the hearing from a room in the The Hague Hearing Centre. Parties are invited to instruct the service provider(s) to install all necessary technical equipment in that room, including screens on which the transcripts of the court reporter(s) and documents presented during the hearing will be visible. (The arbitrators will bring their own laptop computers with them in order to consult, if necessary, the file of the proceedings.)
> 3. Order of opening statements: the Tribunal will first hear Exem's opening statement, followed by Sonangol's opening statement.
> 4. The parties are invited to finalize the hearing schedule, allowing time for the Tribunal to ask questions to the parties and the witnesses.
> 5. The parties are requested to finalize as soon as possible their discussions on the locations of the testimony of witnesses and on the matter of interpretation.
> 6. The parties are requested to decide as soon as possible on the issue of calling the expert witness prof. van Kampen.
> 7. The issue of post hearing briefs will be discussed and decided at the end of the hearing.
> 8. The matter of the additional documents to be submitted by Sonangol has been decided during the procedural conference. Exem will receive documents as soon as possible and at the latest on 17 May and will react on 19 May; the Tribunal will receive the documents on 17 May and will decide any controversy between the parties on 21 May.
> 9. Exem's exhibit CW-3(3) (second supplemental witness statement Mr. da Silva) is allowed onto the record.
> 10. Exem's exhibits C-185 and 186 are allowed onto the record. In reply to Sonangol's letter of 13 May the Tribunal rules that Sonangol is entitled to provide a short written submission on the (ir)relevance and (lack of) probative value of the concerned documents by Monday 17 May with a maximum limit of ten pages. Exem is allowed to file a short reaction.
> 11. The Tribunal has taken note of Sonangol's suggestion in its letter of 11 May (one but last alinea) and will consider this matter at a later stage.
> 12. The Tribunal has understood that the parties agree to allow Mr. van Andel to attend the hearing and has no objection."

4.15. Out of several other exchanges between the parties up to the beginning of the hearing (25 May 2021) mention is made here of Exem's letter of 19 May 2021 to postpone the hearing. Exem wrote the following:

> "This morning at 10:05am CET we received a message from our coordinating counsel at Grosvenor law firm, which email we append (after having only removed Mr. Diz' emailaddress from the cc-field). We append this email, further to internally consulting on the receipt of this letter and contents within Van Doorne N.V., just now. Enclosed with the letter by Grosvenor law firm (**Annex A**), is a letter by Exem's director Mr. Diz, a copy of which we also append (**Annex B**). We refer to these annexed letters.
>
> It follows from this correspondence that Mr. Diz – in light of recent developments concerning Mr. Dokolo's estate – is presently not in a position to provide Grosvenor law firm "(…) with information or instructions concerning Exem's position (…)". By extension, Grosvenor law firm takes the position that it is "(…) unable at this time to instruct [Van Doorne] to proceed with the arbitration as Mr Diz is not in a position to provide us with instructions." In light thereof, Grosvenor law firm has made it clear to us, that we must, and we cite again: "(…) seek a short adjournment of the hearing in the NAI 4867 arbitration commencing on 25 May 2021 (…)".
>
> In view of the above, we must now request your Tribunal to adjourn the hearing. It is clear from this letter that we are not entitled to appear and make representations on behalf of Exem, at the hearing scheduled for next week.
>
> We understand from Mr Diz' correspondence that, by September, it is likely that issues concerning succession and beneficial ownership of the Exem shares will have been clarified."

4.16. The Tribunal, after having taken notice of Sonangol's reaction opposing the request, has rejected the request on 20 May 2021, stating the following:

> "As the hearing is to commence in less than two business days and various organizational matters are still to be finalized, the Tribunal considers that an urgent decision is needed. The Tribunal expresses its opinion that Exem's request is belated, insufficiently substantiated and/or is unfounded and – in the exercise of its powers to conduct the arbitral proceedings according to standards of good administration of justice - has decided that Exem's request for adjournment is dismissed. After further deliberation, the Tribunal will issue all its decisions regarding pending issues for the hearing on Friday 21 May."

4.17. On 20 May 2021 Exem has informed the Tribunal that it had been re-instructed to appear at the upcoming hearing.

4.18 In this respect, the Tribunal notes that it has on several occasions rejected requests of Exem to grant an extension of the deadline for submitting a statement, e.g. on account of criminal investigations against persons related to Exem or of communicational obstacles due to Covid-19, insofar as that would inevitably lead to a postponement of the hearing. The most pressing of those requests (6 November

2020) was related to the sudden passing away of Mr. Dokolo, Chairman of the board of Exem AG and husband of Ms. Isabel dos Santos, on 29 October 2020. The Tribunal has given serious consideration to this request and has rejected it on the following grounds:

> "As the Tribunal has made clear in its letter of 28 October,[4] the Tribunal is ill-disposed toward any extension of the deadline of Exem's Statement of Reply and Defence on counterclaims which is not supported by concrete substantiation of circumstances which would justify such extension, as this may lead to indeterminate further delays. Exem's letter does not provide such substantiation nor does it propose a specific new deadline. For these reasons the request is rejected.
> However, in view of Sonangol's reaction the Tribunal is willing to grant an extension of one week (from 1 December to 8 December 2020), with the further consequences as proposed in that letter.
> Exem is invited to inform the Tribunal whether it would accept such an extension (its email of 10 November does not make this clear). If so, the Tribunal will send the parties an amended procedural timetable. If not, the Tribunal prefers to stick to the existing timetable."

4.19. On 21 May 2021 the Tribunal has issued final instructions on pending issues to the Parties, of which the following are mentioned:

> "8. Reference is made to Exem's letter of 19 May (22.14). The objections against the submission of Exhibits C-507-522 (sub 1), the Bloomberg article (sub 2) and the documents i-iii is (sub 4) are rejected.
> 9. Reference is made to Sonangol's letter of 11 May, one but last alinea (relating to formally advising witnesses of a number of points) is not taken up by the Tribunal, as the witnesses if they so desire will be accompanied by counsel for criminal law aspects of the case.
> 10. Sonangol's request in its letter of 18 May (15.29) 'that the Tribunal order Exem to produce a copy of the share register of its owner, Exem Holding AG, showing the registered holder(s) of the registered shares as well as any further documents identifying the beneficial owner of the company as of 1 May 2021' is rejected, as this fact is of no relevance to the case.
> 11. Reference is made to Sonangol's letter of 18 May (22.01).
> Sub 1 (Mr Brito Pereira's withdrawal from the arbitration): the Tribunal refers to the Procedural Order No. 1 (art. 9.7, last sentence) and grants request (i). At this moment no decision is required on the requests (ii) and (iii).
> Sub 2: see § 4 above.
> Sub 3: See § 2 above.
> Sub 4: See § 9 above.
> 12. In order to finalize its preparation of the hearing (beginning next Tuesday at 9.30am) after a turbulent week, the Tribunal does not allow any further submissions by the parties, with the exception of information relating to the organization of the hearing and urgent questions in case of unclarity of this Order."

[4] Stating among other things: "Third, as it is unclear how long the court procedures and travel restrictions will continue to exist, any extension of the deadline for the filing of Exem's Statement of Reply and Defence on counterclaims may lead to indeterminate further delays."

4.20. The seven-day hearing was held on 25-29 May, 31 May and 1 June 2021. It was hybrid in the sense that the Tribunal was present in person in the The Hague Hearing Centre, whereas the parties and their representatives and witnesses were attending by virtual means.

4.21. The hearing was attended by the following persons:

(a) On behalf of Exem:

Legal counsel: Rogier Schellaars, Amsterdam, Van Doorne N.V, Lead counsel to Exem; Bas van Zelst Amsterdam, Van Doorne N.V., Lead counsel to Exem; Diederik van Besouw, Amsterdam, Van Doorne N.V., Counsel to Exem; Bas Dijkmans van Gunst, Amsterdam, Van Doorne N.V., Counsel to Exem; Bas Keizers, Amsterdam, Van Doorne N.V., Counsel to Exem; Fabian van de Ven, Amsterdam, Van Doorne N.V., Counsel to Exem; José António Barreiros, Lisbon, JAB Avogados, Counsel to Mr Da Silva; Ana Rita Relógio, Lisbon, CSA and Partners, Counsel to Mr Raikundalia; Manuel Vaz Loureiro, Lisbon, CSA and Partners, Counsel to Mr Raikundalia.
Witnesses: Mario Filipe Moreira Leite da Silva, Lisbon; José Carvalho Neto, Porto; Sarju Raikundalia, Lisbon.
Experts: Prof. Petra van Kampen, Amsterdam, Utrecht University / FKvG Advocaten; Prof. Sofia Vale, Luanda, University Agostinho Neto.

(b) On behalf of Sonangol:

Legal counsel: Yas Banifatemi, Paris, GBS Disputes; James Herbert, Paris, GBS Disputes; Anders Junker-Nilsson, Paris, GBS Disputes; André Marini, Paris, GBS Disputes; Ashish Mitter, Paris, GBS Disputes; Lodovico Amianto, Turin, GBS Disputes; Carolina Barros, Paris, GBS Disputes; Maarten Drop, Cleber Advocaten, Amsterdam,
Experts: Prof. Alex Geert Castermans, Florence, Leiden University; Prof. Matthias Weller, Bonn, University of Bonn; Prof. Dário Moura Vicente, Lisbon, University of Lisbon; Mafalda Estácio, Lisbon, Assistant to Prof. Moura Vicente.
O*thers:* Gentil Pimenta, Luanda, Sonangol, General Counsel; Cláudia Garcia, Luanda, Sonangol, Head of Litigation. Cleber Advocaten; Camiel Boersma, Amsterdam, Cleber Advocaten; Merel Vermorken, Amsterdam, Cleber Advocaten; Robert Hein Broekhuijsen, Amsterdam, Ivy Advocaten.

4.22. The Parties have argued their case on the basis of opening statements which have been submitted to the Tribunal.
The following persons have been heard as fact witnesses on the part of Exem: Mario Filipe Moreira Leite da Silva, José Carvalho Neto and Sarju Raikundalia.
On the part of Sonangol no fact witnesses were brought forward.
The following persons have been heard as expert witnesses on the part of Exem: prof. Petra van Kampen and prof. Sofia Vale.
The following persons have been heard as expert witnesses on the part of Sonangol: prof. Alex Geert Castermans, prof. Matthias Weller and prof. Dário Moura Vicente.
The parties have held closing statements which have been submitted to the Tribunal.
The Tribunal has engaged in discussions with the Parties and their fact witnesses and expert witnesses at all stages of the hearing.

4.23. At the end of the hearing, Exem has requested to be allowed to present a short written statement in two days' time, if considered necessary, on some points raised in the closing statements of Sonangol, after which Sonangol would be allowed to react. It was agreed that this would be allowed as the last stage in these proceedings, subject to the cost submissions and reactions to those, if any. Furthermore, dates have been agreed for simultaneous cost submissions: two weeks after the hearing, followed by comments, if any, one week later. The Tribunal has informed the Parties that it intends to render the award within three months (with an allowance for some weeks on account of the summer holidays), *i.e.* in the course of September 2021. The Parties were satisfied with this prospect.
The Parties have expressed that they have had a fair opportunity to present their respective cases.

4.24. On 5 June 2021 Exem has informed the Tribunal that it shall not make an application to respond to specific issues in Sonangol's closing statement.

4.25 At the request of Sonangol the Enterprise Chamber of the Amsterdam Court of Appeal in its decision of 17 September 2020 has ordered an enquiry into Esperaza's management and course of affairs for the period from 2017; has decided to appoint a director to replace the acting director B of Esperaza with a decisive vote on the board and who is the only person authorised to independently represent the company; and has transferred in trust Exem's shares in Esperaza to a custodian to be appointed by it, so that adequate decision-making in the general meeting is guaranteed (which transfer in trust will not affect the criminal seizure of the shares which had been attached at the request of the Dutch Public Prosecutor).

4.26. In its decision of 23 June 2021 the Enterprise Chamber of the Amsterdam Court of Appeal has rejected Exem's application for immediate measures including:
1. to immediately order that Esperaza will not perform any actions in line with the Assessment or otherwise that would adversely affect the position of Exem until the Enterprise Chamber has rendered a decision on this request;
2. to release the Temporary Director from his position as temporary director of Esperaza with immediate effect;
3. and for the duration of the proceedings a. to suspend the A directors appointed by Sonangol (…) and b. to replace the Temporary Director.

4.27. In reaction to the decision of the Enterprise Chamber mentioned in the previous paragraph, on June 24, 2021, Exem filed an Application for Urgent Conservatory Measures (« Application ») which was amended on June 30, 2021. In its amended prayers for relief, Claimant sought as follows :

> *«For the reasons set out above, Exem respectfully requests your Tribunal to:*
>
> *without delay order:*
>
> *i. Sonangol not to (a) transfer shares in Esperaza and/or (b) to encumber such shares and/or (c) take any action prejudicing Exem's rights to shares in Esperaza and/or (d) take any action aimed at enabling Esperaza to divest its interest in Amorim Energia B.V., all on*

pain of an immediately payable penalty (dwangsom) of EUR 50 Million; or, in the alternative

ii. Sonangol to give 15 days' notice to the NAI 4687 Tribunal and Exem, of any intention to (a) transfer shares in Esperaza and/or (b) encumber such shares and/or (c) take any action prejudicing Exem's rights to shares in Esperaza and/or (d) take any action aimed at enabling Esperaza to divest its interest in Amorim Energia B.V., pending your Tribunal's decision on the merits, all on pain of an immediately payable penalty (dwangsom) of EUR 5 Million;

or in case of (i) and (ii) such lesser relief and/or lower or amended penalty sum as your Tribunal deems appropriate."

4.28. On July 2, 2021, Respondent filed its Response to Exem's Request for Conservatory Measures (« Response ») in which it sought as follows :

> « …, Sonangol respectfully requests the Tribunal to dismiss Exem's Application in its entirety and to order full indemnity costs against Exem at the appropriate juncture. «

4.29. Having reviewed the Application and the Response and after deliberation, the Arbitral Tribunal on July 9, 2021 dismissed the Application and did not see a reason to award costs at this stage of the proceedings. The dismissal was based on the following grounds :

a. The Arbitral Tribunal understands Claimant's requests sub (a), (b) and (c) under both (i) and (ii) to relate only to its 40% shareholding in Esperaza. The Arbitral Tribunal considers that Claimant has no sufficient actual interest in pursuing these requests as the shareholding referred to has been arrested by the Public Prosecutor and is further administered by an administrator appointed to that effect by the Enterprise Chamber which provides sufficient guarantees that such shareholding will not be transferred, encumbered or prejudiced by any action Respondent might consider pending the Arbitral Tribunal's award which might dispose of the issue as to the entity that has title to that shareholding ;

b. As to request (d) under both (i) and (ii), the Arbitral Tribunal considers that the requests lack merit as Respondent as a shareholder in Esperaza (1) cannot decide on any divesture of Esperaza's core holding of shares in Amorim Energia B.V. ; (2) cannot give binding instructions to its nominees on the Board of Directors of Esperaza as these nominees have an independent legal obligation to act in the interests of the company ; and (3) cannot give any instructions to the director appointed by the Enterprise Chamber who has an independent obligation to act in the interests of the company and its shareholders considering also the Arbitral Tribunal's pending award as to title of any alleged shareholders to the shares of Esperaza.

c. On the basis of a. and b. above, the Arbitral Tribunal does not consider that any lesser or other relief as sought by Claimant is appropriate.

4.30. The Parties made costs submissions on 9 July 2021. Each Party made comments to the other Party's submission on 16 July 2021.

4.31 On 17 July 2021 the Tribunal has closed the proceedings and indicated that it expects that the award will be issued in the course of July.

5. MAIN RELEVANT AND UNDISPUTED[5] FACTS.
A. THE EVENTS CONCERNING THE SPA OF 2006.

5.1. In 2005 the Portuguese entrepreneur Américo Amorim wished to acquire a substantial shareholding in Galp Energia SA ("Galp"), Portugal's largest and partly State owned oil and gas company.

5.2. Mr Amorim's intended investment came at a time of transition for Galp. Two of its biggest shareholders, the Italian company ENI and the Portuguese State, together holding more than 51% of Galp's stock, were in the midst of a dispute. In addition, in 2005 Galp postponed a planned Initial Public Offering ("IPO"), which eventually took place on 23 October 2006. That IPO, and by extension the investment in Galp itself, was not an assured success in light of a number of factors, which need not be reviewed here.[6]

5.3. At that time, ENI held a 33.34% stake in Galp and held out a contractual call option which, if exercised (and accepted), would grant ENI control over Galp. The call option was set to expire on 31 October 2005. The Portuguese Government contested the existence of said call option, also because it did not wish to see ENI as controlling shareholder in Galp. This opposition by the Portuguese state caused ENI to consider an exit from Galp.[7]

5.4. The Amorim Group was aware of this dynamic and identified the dispute between the Portuguese State and ENI as an investment opportunity. However, the Amorim Group was not able to provide by its own the equity amount required for the investment (in order to be able to attract further financing from banks)[8] and, moreover, did not want to take the financial risks all by itself.[9]

5.5. For this reason, in the autumn of 2005, Mr. Amorim contacted Ms Isabel dos Santos, an Angolan entrepreneur who was the daughter of the Angolan President at the time,[10] whom he knew from another business venture (the conception and development of a bank in Angola, Banco BIC) to enquire whether she (and/or her husband, Mr. Dokolo) would be interested in an investment in the energy sector.

[5] Including facts that are insufficiently disputed.
[6] Statement of Defence and Counterclaims (Sonangol), para. 28; Witness Examination Mr. Carvalho Neto, transcript day 3, p. 37/38 (confirming that there was a significant element of risk, that diminished substantially after the IPO of Galp).
[7] Statement of Claim (Exem), para. 2.2.7. The exit eventually did not materialise.
[8] According to the witness Da Silva that would have required € 420 mi (Exhibit CW-3, para. 19, 30).
[9] Witness Examination Mr. Carvalho Neto, transcript day 3, p. 48/49.
[10] See para. 8.13 *below.*

Subsequently, Ms Isabel dos Santos, apparently on behalf of Amorim[11], contacted Sonangol, Angola's largest and State owned oil and gas company, which was prepared to take part in an investment in Galp. This investment took place in several steps.[12]

5.6. The first step was the establishment in early December 2005 of the corporate holding structure through which Amorim, and eventually Sonangol, would hold their shares in Galp. On 6 December 2005, the Amorim Group[13] acquired a shelf company from a subsidiary of the Dutch bank ABN AMRO which was to be the direct Galp shareholder. That company was renamed as Amorim Energia BV ("Amorim Energia"). 55% of Amorim Energia's shares were transferred to three entities controlled by the Amorim Group. The remaining 45% were transferred to an entity called Esperaza Holdings BV ("Esperaza"). Esperaza was acquired as a shelf company from a subsidiary of ABN AMRO on 6 December 2005, by Amorim Holding II SGPS, SA, another affiliate of the Amorim family.

5.7. The second step was Sonangol's entry into the holding structure established by Amorim Group. On 30 January 2006, Amorim Holding II SGPS, SA transferred its whole shareholding in Esperaza to Sonangol. As a result of this transfer, as at 30 January 2006, Amorim Energia was indirectly owned by the Amorim Group and by Sonangol in 55% and 45% respective shareholdings.

5.8. The third step was Amorim Energia's acquisition of Galp shares. Throughout 2006, Sonangol placed a substantial amount of capital at Amorim Energia BV's disposal as a counterpart for its acquisition of Esperaza and for the purposes of helping realise Mr. Amorim's ambition to acquire a large shareholding in the Portuguese energy firm. Sonangol paid for this stake in Esperaza in three tranches:
- On 30 January 2006, Sonangol paid an Amorim affiliate EUR 81,052,300;
- On 14 August 2006, Sonangol paid an Amorim affiliate EUR 105,637,500;
- On 18 September 2006, Sonangol paid an Amorim affiliate EUR 2,310,175.

5.9. These payments contributed indirectly to Amorim Energia's acquisitions of shareholdings from several other Galp shareholders, including EDP Participações, SGPS, S.A, Portgás and REN. Additional funding for these purchases is understood to have been provided to Amorim Energia by entities belonging to the Amorim Group (the Sonangol and Amorim contributions being recognised by Amorim Energia as share premium contributions), and from a series of seven credit facilities from Portuguese and foreign financial institutions for the amount of EUR 1.28 billion.

[11] See Exhibit R-474; Statement of Rejoinder and Reply on the Counterclaim (Sonangol), para. 39; Opening Statement (Sonangol), transcript day 1, p. 148; unconvincingly rebutted in Statement of Rejoinder on Counterclaims (Exem), para. 5.11. At any rate, Ms Isabel dos Santos was not a co-investor in Galp; see para. 8.5 *below.* Her function was to act as a 'bridge' between Amorim and Sonangol (Witness Examination Mr. Carvalho Neto, transcript p. 3, p. 50 ff.).

[12] Statement of Defence and Counterclaims (Sonangol), para. 30 ff.

[13] The submissions mention both the Amorim Group and the Amorim Family. For the purposes of this award the distinction is immaterial.

5.10. As a result of these transactions, Amorim Energia's stake in Galp rose from 0% as at 6 December 2005 to 33.34% by the time of Galp's IPO on 23 October 2006.

5.11. After the Galp IPO, which turned out to be successful (see para. 5.16 and para. 8.5 below), on 21 December 2006 Sonangol and Exem together with Esperaza concluded a Share Purchase Agreement ("SPA") in which Sonangol committed to transferring 40% of Esperaza to Exem.[14] This SPA was followed by a deed of transfer of 29 December 2006.[15]

5.12. The SPA followed a Memorandum of Understanding ("MoU") developed over the course of the preceding months. The MoU, concluded between Sonangol and Exem Africa Ltd. ("Exem Africa") [16] is dated 25 January 2006 and it is according to its text made on that day.[17] Of the two draft MoU's produced by Exem, the first—MoU draft version 2—is dated 3 May 2006,[18] the second (V9) is dated – by way of a hand written note - 5 September 2006.[19] The parties agree that the MoU was concluded on or shortly after 5 September 2006, at any rate before the Galp IPO which took place on 23 October 2006.

5.13. The MoU provided that of the purchase price of € 75,075,880, 15% (i.e. € 11,261,382) shall be paid at the date of the execution of the SPA and the remaining 85%

> "shall bear non capitalized interest corresponding to the three months Euribor (without spread; p.a.) interest rate applicable in each period. Such price (principal and interest) shall be set-off through the amounts paid by Esperaza BV as ordinary or extraordinary dividends received by Exem (directly or through a company appointed by Exem) up until the moment when such dividends have been fully paid the outstanding price."

5.14. The SPA, concluded between Sonangol, Exem and Esperaza, provided the same as the MoU regarding the down payment of 15%[20] and the payment of the remaining 85% (€ 63,814,498), but added in Article 3.7 a provision to the effect that the remaining 85% should at any rate be paid by 31 December 2017. Another improvement in favour of Sonangol was that it obtained a right of pledge on all Exem's shares instead of on 85% of the shares as provided in the MoU.

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[14] Exhibits C-1.

[15] Exhibit C-2.

[16] Exem Energy B.V., the claimant in this case, was acquired by Exem Holding AG (whose UBO was Mr. Dokolo, C-162) only on 3 August 2006 (Exhibits C-42 and C-43) and first used for the conclusion of the SPA. In his memo of 13 September 2006 to Amorim, Sonangol (mr. Vicente) and Ms Isabel dos Santos, Mr. Dokolo, who had been appointed as a board member of Amorim Energia on behalf of Esperaza in April 2016, insisting on transparency in the Galp IPO with regard to "all relevant matters relating to Amorim Energia that require the agreement of its shareholders", mentions Exem Africa, but not Exem Energy (Exhibit C-45). Neither of the two was mentioned in the IPO Prospectus Exhibit R-530).

[17] Exhibit C-125. This date features at the beginning of the MoU and the first line reads "This Memorandum of Understanding (the "MoU") is made on January 25, 2006)." See further on this para. 8.10 *below.*

[18] Exhibit C-68.

[19] Exhibit C-69.

[20] This amount has been paid on 18 December 2006 by Exem Africa.

5.15. Pursuant to the MoU, the share price for which Exem bought its shares from Sonangol was the same as the price for which Sonangol had acquired the shares in Esperaza.[21]

5.16. Galp's IPO was successful. Exem's 2006 financial statements show that the value of its shares on 31 December 2006 was € 115,310,264, meaning that Exem made a gain on those shares between 29 December 2006 (the date of the deed of transfer following the SPA of 21 December 2006) and 31 December 2006 of € 42,511,742.[22]

6. MAIN RELEVANT AND UNDISPUTED FACTS.[23]
B. THE EVENTS CONCERNING THE PAYMENT AGREEMENT OF 2017.

6.1. In the years between 2006 and 2017 few dividends had been distributed by Esperaza to Sonangol and Exem, in the first place because few dividends were available due to the substantial payment obligations of Amorim Energia to the financing banks preventing dividend payments to its shareholders including Esperaza, and secondly because Sonangol had opposed such distribution as it did not want to pay Dutch dividend tax.[24] For that reason it planned a financial/tax restructuring, which however remained forthcoming.

6.2. As Exem had not paid any part of the remainder of the purchase price (as mentioned in para. 5.14 above) or of the interest before 2017 due to a lack of dividend streams from Esperaza, in that year the due date of those obligations (31 December 2017) drew near. This led to a sequence of events which will be described here briefly.[25]

6.3. In a letter of 30 June 2017, addressed to Sonangol's President of the Board of Directors, Exem – apparently having access to sufficient quantities of local Angolan currency – asked if Sonangol would be willing to accept repayment of the remainder of the debt in the local currency of kwanzas, instead of the contractually-agreed currency of Euros. At that time the President of the Board of Directors was Ms Isabel dos Santos, who had been appointed to this position in 2016 by her father, the President of Angola, who had earlier that year announced his plans to retire after the upcoming elections in 2017.[26]

6.4. Sonangol accepted this proposal in a letter of 31 August 2017,[27] which shows (i) the letterhead of the office of the President of the Board of Directors, (ii) Ms dos Santos' signature block and (iii) her initials on each page, as well as (iv) the signature of Mr. Paulino Jerónimo, who at that time was the President of the Executive section of the

[21] Opening Statement (Exem), transcript day 1, p. 48. Witness Statement Da Silva (CW-3, para. 30).
[22] Statement of Defence and Counterclaims (Sonangol), para. 47 (not disputed by Exem).
[23] Including facts that are insufficiently or incomprehensibly disputed.
[24] Statement of Reply (Exem), para. 6.19.
[25] Most coherently set out in the Statement of Defence and Counterclaims (Sonangol), para. 222 ff.
[26] Exhibit C-5.
[27] Exhibit C-6.

Board of Directors. The agreement as to payment in kwanzas has been referred to by the Parties as the Payment Agreement.

6.5. On 13 October 2017 Exem paid Sonangol AKZ[28] 11,888,704,792 in respect of the remaining debt under the SPA (which was calculated at € 72,801,461.47, *i.e.* € 63,814,498 deferred payment of the purchase price and € 8.986.963 interest).[29]

6.6. Sonangol alleges that the value of the kwanza payment was in real terms substantially less than Exem's admitted debt under the terms of the SPA.[30]

6.7. At the hearing it became clear that this payment in kwanzas did not include the interest in the amount of € 8.986.963.[31]

6.8. On 9 November 2017 Ms Isabel dos Santos, acting as Chairwoman of the Board of Directors of Sonangol,[32] confirmed receipt of the kwanza payment and declared the Deed of Pledge (on Exem's shares in Esperaza) to be terminated and Exem's obligations under the SPA to have been discharged.[33]

6.9. Ms Isabel dos Santos was fired as President of the Board of Directors of Sonangol on 15 November 2017 by the new President of Angola, João Lourenço. On the preceding day (14 November) she fired the Sonangol appointed directors of Esperaza and appointed new directors who (i) proceeded to a dividend distribution of € 78,9 million to Sonangol and € 52,6 million to Exem[34] and (ii) subsequently dissolved Esperaza.[35]

6.10. On 4 January 2018 Sonangol retransferred the kwanzas received from Exem, explaining in its letter of 28 February 2018 that it felt there was no legal or

[28] Angolan kwanza, the local currency of Angola.
[29] Exhibits C-6, C-181.
[30] See Statement of Defence and Counterclaims (Sonangol), para. 212 ff.
[31] Closing Statement (Exem), transcript day 7, p. 49 ff.; Closing Presentation (Sonangol), transcript day 7, p. According to an internal note within the financial direction at Sonangol (Exhibit C-181), the sum of the remainder of the purchase price (€ 63.814.498 = AKZ 11.888.704.792) and the interest (€ 8.986.963 = AKZ 1.674.280.194) would be € 72.801.461 or (in kwanzas) AKZ 13.562.984.986. However, Exhibits R-531 and R-532 show that out of an account held at Banco Bic a payment was made of AKZ 11.888.704.792. The same amount is mentioned in a letter from Exem to Exem Energia E Investimentos of 14 October 2017. See also Witness Examination Mr. Raikundalia, transcript day 4, p. 151. An internal memorandum from the President of the Executive Committee of Sonangol Holdings to the President of the Board of Directors of Sonangol of 19 December 217 (ExhibitC-131) shows that Sonangol considered the interest amount as pardoned (although a board decision to that effect is not on the record). The amount of AKZ 11.888.700.792 was reversed on 28 February 2018 by Sonangol to Exem Energia E Investimentos (see para. 6.10, *above*) .
[32] Statement of Defence and Counterclaims (Sonangol), para. 227; Exhibit C-8.
[33] In the light of the previous paragraph (para. 6.7) and the footnote thereto it is interesting that the letter did not mention the amount of the payment received.
[34] E.g. Statement of Claim (Exem), para. 2.6.3.
[35] Witness Examination Mr. Raikundalia, transcript day 4 p. 181 ff. The validity of these legal acts is the subject of NAI proceedings 4760 on the basis of the shareholders agreement between the Parties, which has been stayed by the NAI 4760 Arbitral Tribunal pending the award in this arbitration NAI 4687.

contractual basis to justify receiving the amount due in Euros on the basis of the SPA in kwanzas.[36]

7. STRUCTURE OF THE CLAIMS AND RELIEF SOUGHT

7.1. As mentioned above in para. 4.1 and para. 4.2 this procedure has commenced when Exem submitted its request for arbitration dated 17 October 2018, followed by Sonangol's short answer on 21 November 2018. At that stage, the proceedings were limited to the Payment Agreement (see Section 6 above). According to Exem its obligations under the SPA were discharged by the performance of that Agreement, whereas Sonangol contended that the Payment Agreement was not validly entered into by Sonangol and that, consequently, Exem had not met its payment obligations in respect of the Remainder and Interest under the SPA.

7.2. In Sonangol's Statement of Defence and Counterclaims the dispute was considerably enlarged. Following the Tribunal's decision of 19 March 2019, para. 9 (quoted in para. 4.6 above) Sonangol brought a counterclaim (with corollary claims) which professed the nullity of the SPA and the Deed of Transfer of the shares (see Section 5 above) for being contrary to public order (public policy) and good morals on account of corruption. The counterclaim of Sonangol is of a more fundamental nature and goes beyond the claim of Exem as is explained in 8.1 below.

7.3. Sonangol's request for relief reads as follows:[37]

> "<u>In respect of Exem Energy BV's claims:</u>
> Declare the entirety of Exem Energy BV's claims to be inadmissible;
> In the alternative to (i), dismiss the entirety of Exem Energy BV's claims on the merits;
>
> <u>In respect of Sonangol's counterclaims:</u>
>
> (i) Declare the SPA and the Deed of Transfer to be null and void ('*nietig*');
>
> (II) Declare that Sonangol has remained at all times the rightful owner of 100% of Esperaza or, in the alternative, that Exem never acquired title to the shares in Esperaza numbered 10,921 to 18,200 inclusive;
>
> (iii) In the alternative to (i) above, declare the Payment Agreement to be null and void ('*nietig*') and to rescind the SPA ('*ontbinden*');
>
> (iv) In connection with (iii) above, determine that its decision shall take the place of a notarial deed for the transfer by Exem Energy BV of its shares in

[36] Exhibit C-11.
[37] Statement of Rejoinder and Reply on the Counterclaim (Sonangol, para. 522.

Esperaza Holding BV to Sonangol or, alternatively, order Exem Energy BV to take all steps necessary to effect such transfer on pain of a penalty of EUR 5,000,000 for each day during which Exem Energy BV should fail to comply with the Arbitral Tribunal's decision or such other penalty as the Arbitral Tribunal may direct;

(v) As a result of (i) or (iii) above, award Sonangol no less than EUR 52,600,000 (plus interest over such amount pursuant to Article 6:119 DCC from 17 November 2017 to the date on which the Tribunal renders its award, and in any event, from the date of the award until the date the award debt is fully satisfied) in respect of dividends paid from Esperaza Holding BV to Exem Energy BV;

(vi) Order Exem Energy BV to pay to Sonangol the full costs of this arbitration, including, without limitation, the fees and expenses of the Arbitral Tribunal, the NAI's administrative charges, as well as Sonangol's legal costs, expenses and experts' fees (plus interest); and,

(vii) Grant Sonangol such further relief as the Arbitral Tribunal deems fit and proper."

7.4. Exem's claim for relief reads as follows: [38]

"Exem respectfully requests that the Arbitral Tribunal shall award the following relief to Exem by declaring or ordering, as the case may be, that:

A. Exem discharged its payment obligations under the SPA;

B. Sonangol is obliged to accept the retransfer of the Remainder and Interest in kwanzas (on the basis of the nominal amount of the payment made by Exem on 13 October 2017), subsequent to the conditions articulated in para 6.1.5, above;

C. the Deed of Pledge terminated pursuant to clause 13 of the Deed of Pledge, alternatively pursuant to article 3:82 DCC;

D. Sonangol instructs and/or requests its nominees on Esperaza's board of directors to strike the Deed of Pledge from Esperaza's shareholders register in accordance with Article 10.9 of Esperaza's articles of association, on pain of a penal sum (*dwangsom*) of EUR 100,000, payable at once, per day at which Sonangol fails to comply with the Tribunal's decisions and/or such penal sum as the Tribunal deems appropriate; and

[38] Statement of Claim (Exem), para. 8.1.1.

E. Sonangol is liable and obliged to compensate Exem for all costs of these arbitral proceedings, to the fullest extent permitted under Section Six of the NAI Rules."

7.5. In the counterclaim Exem

"respectfully submits that the Arbitral Tribunal declares the claims by Sonangol to be inadmissible, or in the alternative, dismisses Sonangol's claims in their entirety." [39]

8. ARE THE SPA AND THE DEED OF TRANSFER NULL AND VOID AS CONTRARY TO PUBLIC POLICY OR GOOD MORALS?

8.1. This question, which is the object of Sonangol's counterclaims, is of a more fundamental nature than the claim, as the decision on these, if awarded, also decides the fate of the claim. For this reason, in the following sections the counterclaim will be discussed ahead of the claim. However, as will be seen below, the discussion of the counterclaim and the discussion of the claim will to a certain extent be combined, as the facts to which the claim refers are also relevant for the decision on the counterclaim.

8.2. In the following discussion, the Tribunal will not follow the traditional order of first setting out the respective arguments of both parties separately, followed by the Tribunal's reasoning and conclusion(s). In this case that would lead to unnecessary repetition. The case lends itself to a more condensed structuring of the award, in the sense that the Tribunal will directly present its own reasoning, in which it will include the positions taken by the parties.

8.3. The Tribunal answers the question put in the heading of this section 8 in the affirmative. The reason is, to put it quite briefly, that Sonangol has succeeded in its burden of proof that the SPA transaction which is subject to Dutch law, is tainted by illegality, enabling Ms Isabel dos Santos directly or through her husband Mr. Dokolo, while using her position as daughter of the Angolan President who had a direct control over the State owned oil and gas company Sonangol, to reap an extraordinary financial gain to the detriment of Sonangol and, consequently, of the State of Angola. This conclusion will be explained in the following paragraphs.

8.4. As set out above (para. 5.5 ff.) the investment in Galp shares in the course of 2006 was effectuated by Amorim Group companies, with a contribution of nearly 190 million euros by Sonangol through Amorim Energia's 45% shareholder Esperaza,

[39] Statement of Reply (Exem), para.20.1.

which company Sonangol had acquired from Amorim. Taking into account the financial position of Galp at the time and the uncertain outcome of its IPO,[40] this investment was not without risk (see para. 5.2 *above*). Amorim did not wish to undertake this risk alone and succeeded in sharing it with Sonangol.

8.5. This risk was not shared by Exem's ultimate share- or stakeholders. Although Exem in its submissions speaks about the existence of a 'Consortium' (or 'Amorim Consortium') which it formed with the Amorim Group and Sonangol,[41] and of its 'joint venture' with Sonangol,[42] it did not – contrary to Amorim and Sonangol – join in the investment in Galp by means of indirect capital or other equity contribution. Although the SPA was already prepared before the MoU was concluded, Exem acquired its 40% share in Esperaza from Sonangol only in December 2006, after the Galp IPO had turned out to be successful. This success was partly due to an important oil find in Brazilian waters, in which Galp had a significant interest, and which became publicly known in early October 2006, *i.e.* not long before the IPO.[43]

8.6. In addition, also the transaction embedded in the SPA was set up in such a way that Exem did not incur much risk. As was mentioned in para. 5.11 ff. *above*, Exem paid only 15% of the purchase price as down payment in December 2006. The payment of the remaining 85% was deferred until the distribution of dividends or alternatively the due date of 31 December 2017 effectively providing it with vendor financing procured from Sonangol with security limited to Exem's shares in Esperaza by virtue of the deed of pledge. The interest over this amount was unusually and uncommercially low for longer term financing (as Amorim Energia would be limited in paying dividends to Esperaza given the high leverage of the Galp transaction with an equity/loan ratio of 25%).[44] As the future events were to show, eventually the remainder was not paid in euros but in kwanzas[45] and the interest was not paid at all.[46]

8.7. Exem has argued that the transaction was at arms' length and that Exem has incurred real risk. That follows in Exem's view from the facts (i) that Exem has paid the same price for the shares as Amorim and Sonangol had paid when acquiring the shares in Galp over the course of 2006,[47] and (ii) that there have been lengthy negotiations about the MoU and about the SPA, which negotiations have led to a

[40] Statement of Defence and Counterclaims (Sonangol), para. 120; Statement of Reply (Exem), para. 5.58.
[41] E.g. Statement of Claim (Exem), para. 2.2.9 and *passim.*
[42] E.g. Statement of Claim (Exem), para. 1.3.1 ff., 2.1.1 ff. and *passim.*
[43] Statement of Reply (Exem), para. 5.60.
[44] See Statement of Defence and Counterclaims (Sonangol), para. 44, 3rd bullet point. It was based on the three-month Euribor rate—that is, the average rate prime, reputable, first class European banks lend to one another—without any risk premium. It was lower than the very reasonable interest that Amorim had to pay to its financiers. See Witness Examination Mr. Carvalho Neto, transcript day 3, p. 44.
[45] See para. 6.1 *above.*
[46] See para. 6.7 with the footnote.
[47] Statement of Reply (Exem), para. 5.50; WS-3 Da Silva para. 30 and 31; Statement of Rejoinder on Counterclaims (Exem), para. 5.42. See also Statement of Rejoinder and Reply on the Counterclaim (Sonangol), para. 150, and Opening Statement (Sonangol), transcript day 1, p. 164.

marked improvement for Sonangol in the SPA as compared to the MoU, where Exem's obligation to pay the remainder of the contract price and Sonangol's right of pledge on Exem's shares in Esperaza are concerned.

8.8. The Tribunal does not agree.
Ad (i). If anything, rather the contrary is true. The share price before the Galp IPO must have reflected Galp's uncertain financial position at that time, which was considerably improved by the success of the IPO. The effect of that success was an increase of the value of the shares bought by Exem in the amount of € 42,511,742 by 31 December 2006, the date of conclusion of the SPA (see para. 5.16 above). Exem and Sonangol must have been aware of this at that time and yet neither the MoU nor the SPA were amended to reflect such increase.

8.9. Ad (ii). It is true that Exem has undertaken a more extensive obligation in the SPA than it had done in the MoU, in particular because in the SPA it accepted to pay the remainder at any rate by 31 December 2017, whereas the MoU linked the payment obligation exclusively to the distribution of dividends (see para. 5.13 and para. 5.14). Moreover, in the MoU Exem had pledged to Sonangol 85% of the shares, and in the SPA 100% of the shares.
However, in the light of the whole transaction this cannot be considered as a serious risk on Exem's side. In the system of the MoU Exem had not incurred a risk because it did not need to pay the remainder in case no dividends would be distributed. In the system of the SPA Exem would have had to pay the remainder even in the absence of dividends. However, what if Exem would be unable or unwilling to pay? It did not have sufficient equity.[48] Since there were no other securities in place, Sonangol could only have taken recourse against the shares using its right of pledge. In case the shares would not have sufficient market value or yield sufficient proceeds for Sonangol to cover its claim, the risk would be for Sonangol. If the shares would represent sufficient value or yield sufficient proceeds, Exem would have lost the shares and, in a worst case scenario, the down payment. But the down payment would in all probability be a smaller amount than the balance in case the sale proceeds would exceed the amount of the outstanding debt, which balance Sonangol would have to hand over to Exem.
In reality, Exem was hardly exposed and would in all probability even in case of breach of its payment obligations be left with a substantial gain.
In this connection it is also relevant that the Parties in Article 4.3 SPA had waived their right to rescind the SPA, meaning that in case of breach of Exem's payment obligations Sonangol would not be able to recover the property of the shares. An additional circumstance is that Exem, as well as Sonangol, knew at the date of the conclusion of the SPA (31 December 2006) that the IPO of Galp shares was highly successful and that the contracted price at that moment did not reflect the value of the Galp shares indirectly acquired by Exem through Esperaza.

[48] As admitted in the Statement of Claim (Exem), para. 2.3.4.

8.10. There has been a dispute between the parties relating to the dating of the MoU. As was mentioned in para. 5.12 above, the MoU bears the date of 25 January 2006, whereas it was negotiated in the course of the following months and signed on or shortly after 5 September 2006. It mentions some events as expected to take place in the future, whereas in reality these events had already taken place before (or took place around the same time as) the signing of the document. Sonangol has contended that the MoU was backdated by Exem and Sonangol in order to generate a false impression that Exem had borne real risk, like Sonangol, throughout the course of Amorim Energia BV's acquisition of Galp shares between January and October 2006.[49] Exem has contended that this was not the case, and that the intention of the parties was to give the MoU an effective date of 25 January 2006.[50] The Tribunal finds all this indeed strange, but does not need to enter into a closer examination of this aspect of the case. It considers the matter not of sufficient interest, as it is of the opinion (as set out in the preceding paragraphs) that Exem has incurred no normal financial risk irrespective of whether the MoU has been concluded (or has taken effect) on 25 January 2006 or in September 2006, because the MoU in the case of absence of dividends did not oblige Exem to pay the remainder of the purchase price, and perhaps even more importantly, because Exem also did not even incur such risk at the decisive moment, *i.e.* the moment when it entered the SPA in December 2006.

8.11. The uncommercial character of the deal was further confirmed – apart from the increase of the value of the shares in the following years where Exem with capital costs limited to the amount of the down payment of 15% invested and very low financial costs given the interest rate agreed[51] – by the conduct of Ms Isabel dos Santos relating to the Payment Agreement. Reference is made to para. 6.1 ff. above, in particular the payment in kwanzas (see also the following paragraph, para. 8.12), the non-payment of the interest[52] and the distribution of dividends.[53]

8.12. Relating to the payment in kwanzas, parties have expressed differing opinions on some specific points. The three most important ones are the following.
(i) Was the proposal to pay in kwanzas instead of in euros made by Exem or by Sonangol? According to the correspondence exchanged at the time the proposal was made by Exem.[54] The Tribunal is not in a position to determine whether in reality the

[49] Statement of Defence and Counterclaims (Sonangol), para. 35; Opening Statement (Sonangol), transcript day 1, p. 160 ff.
[50] However, Exem's witness Da Silva admits the backdating (transcript day 2, p. 97).
[51] On 11 December 2019 the value of the Esperaza shares was almost € 1.6 bi (of which 40% = 640 mi belonged to Exem). Dividends distributed (217 mi) exceeded the purchase price of the shares by Sonangol (almost 189 mi). See Witness Statement Da Silva (CW-3, para. 36).
[52] See para. 6.7 *above* with footnote.
[53] During the hearing, in spite of questions from the Tribunal, it remained unclear why Sonangol all of a sudden had given up its policy of resisting dividend distribution until it had restructured its financial/tax structure (see para. 6.1 above). See Witness Examination Mr. Raikundalia, transcript day 4, p. 233 ff. The explanation in the Statement of Rejoinder on Counterclaims (Exem), para. 6.35 ff. is incomprehensible to the Tribunal.
[54] See Exhibits C-5 (letter of 30 June from Exem to Sonangol) and C6 (Letter of 31 August 2017 from Sonangol to Exem). See also para. 6.3 and para. 6.4 *above.*

idea came from Sonangol's CFO, as Exem has alleged.[55] At any rate, the reason alleged by Exem (Sonangol needed kwanzas on short notice in order to acquit a number of urgent kwanza obligations[56]) is untenable. First, at the time (2017) there was a shortage in Angola of hard currency, not of kwanzas.[57] Second, in spite of the professed urgency the payment term for the kwanza payment strangely enough was extended beyond 31 December 2017, *i.e.* beyond the due date according to the SPA (which was detrimental to Sonangol).[58] Third, the kwanzas were not used for the professed purpose of acquitting urgent debts[59] and they were after some months (4 January 2018) retransferred by Sonangol to Exem Investimentos, the Angolan Exem entity that had made the transfer.[60]

(ii) Another point concerned the question who took the decision to accept the proposal relating to the payment in kwanzas and signed the letter of 31 August 2017 (see para. 6.4 above): Ms Isabel dos Santos or Mr. Paulino Jerónimo (or the latter representing the former), and whether this acceptance was authorised by the Board of Directors. The Tribunal holds that, judging from the face of the document, it is highly probable that both persons were engaged in the decision and the only other relevant fact is that that decision was in fact carried out.

(iii) Did the payment in kwanzas reflect the contractual obligations of Exem? As was mentioned in para. 6.7 above, during the hearing it became clear that the amount of kwanzas paid to Sonangol through Exem Investimentos, an Angolan company owned by Ms Isabel dos Santos on behalf of Exem, which payment was accepted by Sonangol through Ms Isabel dos Santos as a member of the Board of Sonangol (see par.8.12), did not cover the contractual interest obligations of Exem towards Sonangol and that only the principal of the debt had been paid in kwanzas.

8.13. As was already mentioned in para. 8.3 above, Ms Isabel dos Santos is the daughter of José Edoardo dos Santos, who was the Angolan President for 38 years (since 1979) until he left office on 25 September 2017.[61] It is common ground between the parties that the President of Angola has a large and direct influence on Sonangol, the most important (and State owned) company of Angola and generator of an

[55] Zie Statement of Claim (Exem) 2.4; Statement of Reply (Exem), para. 7.1 ff. referring to its witnesses Raikundalia (CW-4), para. 32 ff. and Da Silva (CW-3, para. 44); Witness Examination Mr. Raikundalia, transcript day 4, p. 130.

[56] Witness Statement Mr. Raikundalia, CW-4, para. 38 ff; Witness Examination Mr. Raikundalia, transcript day 4, p. 130.

[57] See Statement of Rejoinder and Reply on the Counterclaim (Sonangol), para. 73, where Ms Isabel dos Santos is quoted (as a witness in another case) explaining in 2018 why payment in kwanzas rather than foreign currency would be severely detrimental to an entity in Sonangol's position. As she testifies: "So, yes, we have had, now in the last two or three years (*i.e.* two or three years prior to 2018), a pretty difficult -- very, very difficult -- access to foreign exchange markets. Really very, very complex". – And Sonangol had a euro-account in Angola (Witness Examination Mr. Raikundalia, transcript day 4, p. 222).

[58] Exhibit C-6 (the letter of 31 August 2017 mentioned in para. 6.4, (co-)signed by Ms Isabel dos Santos); Witness Examination Mr. Raikundalia, transcript day 4, p. 130, 140.

[59] Exchange between the President and counsel for Exem, transcript day 1, p.110.

[60] See para. 6.7 (with footnote) *above.*

[61] His successor was João Lourenço, formerly a close collaborator of President Dos Santos.

overwhelming part of its export. *E.g.,* Sonangol's board members are appointed by the President, who also decrees the bye-laws of that company.
Ms Isabel dos Santos not only had direct access to the President of Angola, but also to Mr. Manuel Vicente, who was from 1999-2012 chairman of the Sonangol Board of Directors. Mr. Vicente was raised in the family of President Dos Santos' sister and is rumoured to be the godfather of Ms Isabel dos Santos. From 2012-2017 he was Vice-President of Angola. Mr. Vicente has been implied in a large corruption affair relating to a business project in the oil sector.[62] Both the MoU and the SPA are signed by Mr. Vicente on behalf of Sonangol.
There are no indications in the file that Exem's participation in Esperaza was known to the general public. During the Hearing it became clear that the intended transaction between Sonangol and Exem was not disclosed in Galp's IPO prospectus.[63]
On a more general note, corruption (in particular embezzlement of State property) is endemic in Angola. For as long as Transparency International has included Angola in its Corruption Perceptions reports, Angola has ranked on average in the bottom 8% of all States reviewed.[64]
According to several news media Ms Isabel dos Santos is engaged in a number of corruption affairs and has acquired a huge wealth through companies in the energy, telecom, cement, diamonds and banking sectors.[65]

8.14. As to Ms Isabel dos Santos' relation with Exem, the following can be noted. Exem Holdings's (and Exem's) director was Mr. Sindika Dokolo, who was Ms Isabel dos Santos' husband until his untimely death on 29 October 2020. The parties agree that Mr. Dokolo was Exem's UBO (ultimate beneficial owner), but differ as to the question whether also Ms Isabel dos Santos can be considered as such. However, the Arbitral Tribunal does not consider that she needs to be characterized as Exem's UBO for purposes of assessing Sonangol's illegality case. As a very close relative of the President of Angola and the – then – spouse of Mr. Dokolo, she is a politically exposed person whose actions may be scrutinized from an illegality perspective. In addition, a review of the file indicates that she – together with Mr. Dokolo was in control of Exem and related entities, that she took part in and was interested in financial dealings of Exem and that she was instrumental in the initial negotiations and present at various stages of the implementation of the Galp transaction with Amorim and Sonangol. It suffices to mention the following points.
As mentioned in para. 5.5 above, she contacted Sonangol on Mr. Amorim's behalf in connection with the Galp investment. The down payment in the SPA transaction originated from a company (a British Virgin Islands entity) owned by her, Vidatel Ltd. and was paid through Exem Africa Ltd.[66] She represented Esperaza (that is, both

[62] Statement of Rejoinder on Counterclaims (Exem), para. 7.26; Opening Statement (Sonangol), transcript day 1, p. 137.
[63] See Exhibit R-530. See also para. 5.12 with footnote 16 *above.*
[64] Statement of Rejoinder and Reply on the Counterclaim (Sonangol), para. 117.
[65] See *e.g.* the publications mentioned in footnote 71 below.
[66] Statement of Rejoinder and Reply on the Counterclaim (Sonangol), para. 13. Exem Africa was owned by Mr. Dokolo and was the same company that signed the MoU. Exem Energy BV was only acquired later in 2006 (see footnote 16).

Exem and Sonangol) in a general meeting of Amorim Energia in 2008, discussing dividend distribution.[67] She was active in all stages of the Payment Agreement, which unmistakably testifies to a conflict of interests on her side.[68] The kwanzas paid originated from, again, Vidatel Ltd.[69] and were paid through another of her companies, Exem Energia E Investimentos.[70]
Finally, Ms Isabel dos Santos herself has reported to the Portuguese Competition Authority that she has "*financial shareholdings*" in Esperaza; and she has been publicly reported as claiming ownership interests in Galp.[71]

8.15. On the basis of these facts and circumstances the Tribunal concludes that Sonangol has proven that the SPA has not only not been concluded on an arms' length basis but also that there is no economic justification for the advantages and profits that Exem through Ms Isabel dos Santos and Mr Dokolo acquired through the SPA. Neither Ms Isabel dos Santos's intermediary role in bringing together the two partners (the Amorim Group and Sonangol) in the Galp investment nor any real financial risk inherent to the acquisition of the shares in Esperaza can explain the financials gain that already and substantially materialised on the dates of the conclusion of the MoU and – more importantly – of the SPA. Prior to the December 2006 SPA Exem did not join in the Galp investment and it is common ground between the parties that Exem did not bring any equity, staff or relevant professional expertise to that investment. When Exem later joined the Galp investment at the time of the MoU and the SPA, it did so at the original share price agreed between Amorim and Sonangol without there being any reasonable business explanation for that price. It also obtained excessive financial advantages from Sonangol in terms of long term vendor finance at very low interest rates without adequate security. Taken together, the Tribunal holds that there is no other explanation for the Esperaza transaction than that it is the result of illegal actions committed by Exem and its partner at the time, Sonangol. The transaction was rendered possible by Ms Isabel dos Santos' unique position as the daughter of the Angolan President and Mr. Vicente's position – very close to the Presidential family – as President of the Board of Directors of Sonangol.

8.16. Two further considerations are to be added.
(i) First, the Esperaza transaction was aimed at obtaining a 33,34% shareholding in Galp, a major energy company in Portugal which was then state-controlled, with the

[67] Statement of Defence and Counterclaims (Sonangol), para. 54 ff.
[68] Witness Examination Mr. Raikundalia, day 4, p. 126, 133, 143; Expert Wtness Examination prof. Vale, day 6, p. 81/2; Expert Witness Examination Moura Vicente, day 6, p. 155.
[69] See Exhibit C-201.
[70] Statement of Rejoinder and Reply on the Counterclaim (Sonangol), para. 13, 329; Exhibits C-207 and R-463. The funds represented laundered funds and were dispersed in breach of a worldwide freezing order. Since October 2015, Vidatel has been subject to a worldwide freezing order handed down by the High Court of the British Virgin Islands, preventing funds from being paid out of Vidatel Ltd. by threat of criminal sanction (Exhibit RL-498). See Statement of Rejoinder and Reply on the Counterclaim (Sonangol), para. 332 (not contested by Exem).
[71] Statement of Rejoinder and Reply on the Counterclaim (Sonangol), para. 13, footnotes 16 and 17, with Exhibits; and Exhibit R-528 (Bloomberg, 23 April 2021), Exhibit R-527 (Sábado, 30 October 2020).

prospect of listing Galp through a IPO. As indicated above, Portuguese public entities sold their shareholdings in Galp to Amorim Energia with Amorim Energia becoming an anchor shareholder of Galp and preparations for a IPO being made. Sonangol's shareholding in Amorim Energia was disclosed to the market prior to the IPO. However, the IPO prospectus did not mention the MoU and the intentions of Sonangol and Exem to have Exem indirectly hold 18% of Amorim Energy's share capital and Sonangol through the SPA reduce its indirect shareholding from 45% to 27%. The Arbitral Tribunal considers that, from the perspective of market transparency and investor protection on the EU capital market, the MoU ought to have been brought to the attention of regulators and investors.
(ii) Second, the Tribunal's findings and conclusion are corroborated by the actions of Ms Isabel dos Santos as President of Sonangol at the time of the Payment Agreement: (1) with a clear conflict of interests, she was instrumental in Sonangol agreeing to payment in a weak rather than a strong currency enabling her and entities controlled by her or her husband to transfer Angolan currency assets to Sonangol rather than hard currency euro denominated assets with no obvious benefit to Sonangol; (2) she was instrumental in transferring only the principal amount of Exem's debt under the SPA to Sonangol without any interest payments while at the same time executing documents under which Sonangol discharged Exem from its payment obligations under the SPA and ended Sonangol's rights as a secured creditor under the deed of pledge.

8.17. On the basis of the Tribunal's findings and conclusions above, the question arises as to the civil law consequences of Exem's actions and conduct. In this respect, the Tribunal has considered the Parties' submissions, the expert reports filed with their submissions, the Parties' oral arguments at the hearing, the examinations of their experts at the hearing and the answers of the Parties and their experts to Tribunal questions at the hearing. Sonangol has raised a number of theories in relation thereto such as violation of public policy in Angola applicable as a supermandatory rule in Dutch based arbitrations[72] and non-compliance with transnational public policy.[73] The Tribunal considers that it does not need to address these theories given that the SPA provides for the application of Dutch law and that, under Dutch contract law, here can be no doubt that kleptocratic transactions by the ruling elite or establishment – in particular of this type and on this scale - is contrary to the "*openbare orde*" (public order/public policy). This is confirmed by the adoption by The Netherlands of international conventions regarding corruption and implementing legislation which address various forms of corruption as criminal offences. As to private remedies, these conventions are to be applied by courts and arbitral tribunals on the basis of existing statutory rules regarding public policy.[74] In

[72] Expert Statement prof. Moura Vicente (RWE-2), para. 74 ff., 125 ff.
[73] Expert Witness Statement prof. Weller (RWE-3), para. 24 ff. See for a recent survey Emmanuel Gaillard, *The emergence of transnational responses to corruption in international arbitration*, Arbitration International (2019), 35, p. 1-19 (Exhibit RL-216).
[74] See in the same sense Exhibit RWE-1 (prof. Castermans), passim; Court of Appeal The Hague 22 October 2019, ECLI:NL:GHDHA:2019:2677. This is a generally accepted principle of law in The Netherlands, sustained by

this respect, public policy is to be understood as those standards which are fundamental to the economic and social structure of Dutch society and need to be observed by everyone, also in relation to international transactions or relations which are governed by Dutch law. Article 3:40 para. 1 Dutch Civil Code ("DCC") is the most prominent expression of Dutch public policy in contract law.

8.18. Furthermore, as the case law of the Supreme Court of the Netherlands makes clear, for the operation of Article 3:40 para. 1 DCC it is not required that a legal act has been concluded or performed in violation of a specific statutory rule, in particular a rule contained in the Dutch Criminal Code.[75] Therefore, in spite of extensive discussion between the parties and at the Hearing, there is no need for the Tribunal to enter into an assessment of possible criminal law aspects of the case at hand and the Tribunal will not do so.[76] In other words, Sonangol's illegality case under Article 3:40 para. 1 DCC does not need to establish that Exem engaged in acts constituting the criminal offences of public active or passive bribery, embezzlement, forgery (regarding the alleged backdated MoU), influence paddling or abuse of power by a civil servant. It is sufficient for purposes of Article 3:40 para. 1 DCC that the allegations Sonangol raised with regard to Exem's conduct amount to violations of the foundations on which Dutch society is based. As the Tribunal has indicated, the nature and size of Exem's part of the Esperaza transaction which on any basis cannot be explained but for grand corruption by the daughter of a head of state and her husband – corroborated by violations of market integrity rules on EU capital markets at the time of the Galp IPO and of basic rules of corporate governance regarding the Payment Agreement – cannot be tolerated under Dutch private law.

8.19. According to Article 3:40 para. 1 Dutch Civil Code the consequence of non-compliance with public policy is that the legal acts discussed above in this award are

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e.g. the Civil Law Convention on Corruption of 4 November 1999 (Council of Europe) and the United Nations Convention against Corruption (2003). This includes sanctioning of corruption in private law.
Article 2 of the *Civil Law Convention on Corruption* provides that corruption means "requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof."
Article 8 provides:
"1 Each Party shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void.
2 Each Party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void, notwithstanding their right to claim for damages."
Article 8 of the *United Nations Convention against Corruption* provides: "With due regard to the rights of third parties acquired in good faith, each State arty shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action."

[75] See Asser/Sieburgh 6-III/ 330-346a. See in the same sense Exhibit RWE-1 (prof. Castermans), para. 4.19.

[76] It follows that Exem's contention (Statement of Rejoinder on Counterclaims, para. 9.19) that "the granting of Sonangol's illegality-based claims, effectively implies that your Tribunal 'imputes criminal liability' on Exem" is unfounded.

null and void.[77] This is in particular true for the MoU, the SPA and the Deed of Transfer.
It is also true for the Payment Agreement. Evidently, that Agreement would also be null and void as a consequence of the nullity of the SPA, which it was supposed to perform.
The same is true for the Deed of Pledge of 29 December 2006.[78]

8.20. For completeness' sake, the Tribunal adds that, under Dutch law, the nullity brought about by Article 3:40 para. 1 DCC is absolute. Any person can invoke that nullity and rely on it. That includes the co-contracting party, in this case Sonangol, even if that party itself has contributed to the corruption.[79] And it includes the parties' right to claim restitution of what they have rendered in performing the contract.

9. EXEM'S PROCEDURAL DEFENSE

9.1. Exem has formulated (and many times reiterated) the following procedural defense:[80] Sonangol has several times declared in its submissions that it disposed of 'clear, unambiguous evidence' to prove its corruption case. However, Sonangol has not produced that evidence. The consequence should be that the Tribunal should draw adverse inferences and/or is not allowed to accept circumstantial evidence in favour of Sonangol. In this connection Exem relies on the Articles 21[81] and 1036(2)[82] of the Dutch Code of Civil Procedure.

9.2. This defence is rejected on the following grounds.

9.3. (i) Dutch law does not know a rule as advocated by Exem. Articles 21 and 1036(2) of the Code of Civil Procedure do not contain that rule. Neither is it a rule developed in case law. Exem did not indicate where that rule can be found or where it has been argued in scholarly literature. In fact, Article 1039 of the Dutch Code of Civil Procedure points in the opposite direction: the Arbitral Tribunal "shall be free to determine the rules of evidence, the admissibility of evidence, the division of the

[77] "A juridical act that, by its content or necessary implications, violates public morality or public order, is null and void." The Tribunal does not need to resort to 'public morality ' ('good morals') as an alternate ground for illegality.

[78] Exhibit C-3.

[79] See Asser/Sieburgh 6-III(2018)/310 ff, 347ff, 643 ff.; Asser/Sieburgh 6-IV (2019)/450.

[80] *E.g.* Statement of Reply (Exem), Section 1.3 and Section 11. See also Opening Statement (Exem), transcript day 1, p. 19 ff., 38 ff. and Closing Statement (Exem), transcript day 7, p. 52 ff., 60 ff.

[81] "The parties are obliged to allege the facts relevant for the decision completely and truthfully. If this duty is not performed, the court can make the inferences it considers appropriate."

[82] "The arbitral tribunal shall treat the parties equally. The arbitral tribunal shall give the parties the opportunity mutually to set out and explain their positions and to comment on each other's position and on all documents and other information brought to the attention of the arbitral tribunal during the proceedings. The arbitral tribunal shall not base its decision, where it is unfavorable for one party, upon documents and information on which that party was not sufficiently able to comment."

burden of proof and the assessment of evidence, unless the parties have agreed otherwise."[83]

9.4. (ii) Exem has failed to indicate which evidence, available to Sonangol, has been withheld from the Tribunal or from Exem and how its position has been prejudiced by Sonangol's alleged omission. It has only alleged that Sonangol could have brought forward fact witnesses employed or having been employed by Sonangol. To this, Sonangol has rebutted that Exem could also have brought forward those witnesses, e.g. mr. Vicente. And that Exem could also have brought forward other witnesses, e.g. Ms Isabel dos Santos. And that is where this discussion has ended.

9.5. (iii) The proposed rule would not be easy to apply in practice, because there is no clear difference between direct and indirect (circumstantial) evidence. The difference depends *inter alia* on the character of the case at hand.

9.6. (iv) The Tribunal does not know whether Sonangol has withheld 'clear and unambiguous evidence'. What it knows is that the facts relied on and the contentions put forward by Sonangol are sufficiently clear and unambiguous for the Tribunal to consider Sonangol's case proven.

9.7. (v) Even where a party withholds clear and unambiguous evidence from the Tribunal, the consequence must not be a decision to the advantage of the other party. Also in this respect, the way in which the Tribunal should proceed depends on the circumstances of the case. In the present case public policy is at stake and requires a decision on the merits of the case.[84]

9.8. (vi) Sonangol's contention, referred to by Exem, that it possesses clear and unambiguous evidence does not - at any rate not in the first place - relate to the case at hand, but, more generally, to a number of instances where Ms Isabel dos Santos "has put her modus operandi [to acquire wealth] into practice." [85] In fact, Sonangol has presented such an overview in Annex I of its Statement of Defence and Counterclaims. It has also filed a number of document requests relating to those other instances. However, the Tribunal has rejected those requests as being insufficiently relevant for the case or material to its outcome.

9.9. Finally, Exem has alleged[86] that Sonangol has acted contrary to the directions of the Tribunal. In its ruling on document requests (20 September 2020, sub 10) the Tribunal has ruled that "*It is clear that Sonangol must produce all available evidence supporting its case*". Exem states that this does not easily reconcile with the 23 October 2020 e-mail, in which the Tribunal ruled that "*It is up to Sonangol to decide which evidence it must produce to convincingly argue and prove its case."* The Tribunal does not see what the difference is and in any event there was no intention to differ from the first ruling on that matter.

[83] Art. 26 para. 1 NAI Rules contains the same rule.
[84] See case note H.J. Snijders to HR 25-03-2011, ECLI:NL:HR:2011:BO9675 (Exhibit CL-39).
[85] Statement of Rejoinder and Reply on the Counterclaim (Sonangol), para. 283.
[86] Statement of Reply (Exem), para. 3.1.

10. CONCLUSION

10.1. The conclusions for the requested relief are the following.

10.2. Exem's claims: all Exem's claims mentioned in para. 7.4 and 7.5 will be dismissed as they are premised on valid and enforceable contracts while the Tribunal has held that they are null and void on account of illegality. The Tribunal does not need to enter into the question whether the claims are inadmissible.
As far as the claim mentioned in para. 7.4 E is concerned (relating to the costs of these arbitral proceedings), reference is made to Section 11 below.

10.3. Sonangol's claims:

(i) *Declare the SPA and the Deed of Transfer to be null and void ('nietig')* .

This claim will be awarded.

(ii) *Declare that Sonangol has remained at all times the rightful owner of 100% of Esperaza or, in the alternative, that Exem never acquired title to the shares in Esperaza numbered 10,921 to 18,200 inclusive.*

This claim will be awarded in its first branch.

(iii) *In the alternative to (i) above, declare the Payment Agreement to be null and void (*'nietig'*) and to rescind the SPA (*'ontbinden'*).*

This claim will be rejected for lack of interest in the light of (i);

(iv) *In connection with (iii) above, determine that its decision shall take the place of a notarial deed for the transfer by Exem Energy BV of its shares in Esperaza Holding BV to Sonangol or, alternatively, order Exem Energy BV to take all steps necessary to effect such transfer on pain of a penalty of EUR 5,000,000 for each day during which Exem Energy BV should fail to comply with the Arbitral Tribunal's decision or such other penalty as the Arbitral Tribunal may direct.*

This claim will be rejected for lack of interest in the light of (i);

(v) *As a result of (i) or (iii) above, award Sonangol no less than EUR 52,600,000 (plus interest over such amount pursuant to Article 6:119 DCC from 17 November 2017 to the date on which the Tribunal renders its award, and in any event, from the date of the award until the date the award debt is fully satisfied) in respect of dividends paid from Esperaza Holding BV to Exem Energy BV.*

This claim will be rejected. It is based on Article 6:277 DCC or, alternatively, on the doctrine of unjust enrichment (Article 6:212 DCC).[87] However, Article 6:277 is not applicable as the SPA has not been rescinded on the basis of on-performance. The SPA has been declared null and void, but that has, in itself, not the effect that Sonangol is to be considered as the creditor of the dividends that have been distributed by Esperaza. For the same reason, the Tribunal is not in a position to apply Article 6:212 DCC. Sonangol has not alleged grounds to substantiate the application of that Article. The validity or invalidity of the acts of Esperaza and the possible consequences thereof are not within the remit of this arbitration.

(vi) Order Exem Energy BV to pay to Sonangol the full costs of this arbitration, including, without limitation, the fees and expenses of the Arbitral Tribunal, the NAI's administrative charges, as well as Sonangol's legal costs, expenses and experts' fees (plus interest);

This claim will be discussed in the next section of this Award.

and,

(vii) *Grant Sonangol such further relief as the Arbitral Tribunal deems fit and proper.*

This claim will be dismissed as the Arbitral Tribunal does not consider that further relief is necessary or appropriate.

11. COSTS

11.1. The costs of the arbitration comprise the following:

	Costs	Of which is VAT
NAI administration costs	€ 55,250.00	€ 5,250.00
Tribunal fees	€ 479,709.93	€ 83,255.44
Tribunal disbursements	€ 290.06	€ 50.34
Total	€ 535.249.99	€ 88,555.78

and will be paid out of the payments with regard to the administration costs and the deposits made by Exem (€ 30,250.00 (inc. € 5,250.00 VAT)) for administration costs + € 171,250.00 for arbitrator fees and disbursements) and Sonangol (€ 25,000.00) for administration costs + € 308,750.00 for arbitrator fees and disbursements).

11.2. As Exem has been the unsuccessful party in this arbitration the costs mentioned in para. 11.1 must be borne by Exem (Article 57(2) Rules).

[87] See Statement of Defense and Counterclaims (Sonangol), para. 381 and Statement of Rejoinder and Reply on the Counterclaim (Sonangol), para 511 ff., rebutted by Exem in its Statement of Reply and Defence on counterclaims, para. 19.5 and 19.6 and Rejoinder on Counterclaims, para. 15.8 ff.

11.3. The parties have filed cost submissions on the basis that the full costs (for legal fees and expenses, expert witnesses fees and hearing expenses) must be compensated. As Sonangol has been successful in this arbitration it is entitled to reasonable compensation for these costs, if and insofar as these costs were necessary in the Tibunal's opinion (Article 56 Rules). Exem has objected to the amount of the costs claimed by Sonangol, but taking into account that the respective cost claims of Exem and Sonangol are of a comparable amount the Tribunal rejects Exem's objection and will award Sonangol's full cost claim amounting to EUR 2,613.881.38, USD 247,787.50 and GBP 27,635.00.
However, in its Cost Submission[88] Exem has alleged that it has paid the costs for the venue of the hearing in The Hague (incl. services). Sonangol has not contested this in its response to Exem's Cost Submission. Therefore, the Tribunal will deduct the amount claimed by Sonangol for the cost of the venue (EUR 17,594.42).

12. DECISION

FOR THE FOREGOING REASONS, the Tribunal decides as follows in accordance with the rules of law:

(1) All relief requested by Exem is rejected;.

(2) The Tribunal declares the SPA and the Deed of Transfer to be null and void ('nietig') ;

(3) The Tribunal declares that Sonangol has remained at all times the rightful owner of 100% of the shares in Esperaza;

(4) The Tribunal
- determines that Exem shall bear the costs of this arbitration fixed (according to Article 57(1) NAI Rules) at EUR 535,249.99;
- rules that these costs shall be paid out of the deposits of EUR 171,250.00 made by Exem and EUR 308,750.00 made by Sonangol and the administration costs of EUR 30,250.00 paid by Exem and EUR 25,000.00 paid by Sonangol;
- and orders Exem to pay to Sonangol by virtue thereof the amount of EUR 333,750.00, to be increased with statutory interest on the basis of Article 6:119 DCC as of 23 July 2021 up to the date of full payment;

(5) The Tribunal orders Exem to pay to Sonangol EUR 2,596,286.96[89], USD 247,787.50 and GBP 27,635.00 on account of Sonangol's legal and other costs, to be increased with statutory interest on the basis of Article 6:119 DCC as of 23 July 2021 up to the date of full payment; and

(6) The Tribunal rejects any and all other relief sought by the Parties.

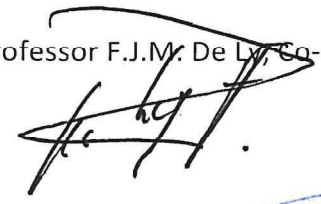
[88] See p. 4 with footnote 4.
[89] *i.e.* EUR 2.613.881,38 - EUR 17.594,42 (see para. 11.3).

NAI Arbitration 4687

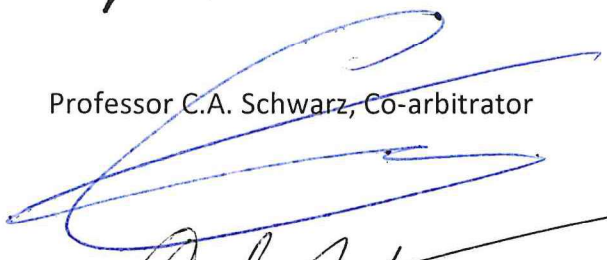
Place of the Arbitration Proceedings: Amsterdam, The Netherlands.

Date: 23 July 2021

Professor F.J.M. De Ly, Co-arbitrator



Professor C.A. Schwarz, Co-arbitrator



Professor A.S. Hartkamp, President