In the name of the King

judgment

AMSTERDAM DISTRICT COURT

Civil-Law Sector - Commercial Division

Case/Cause List number: C/13/638381 / KG ZA 17-1217 FB/MB

Judgment in summary proceedings dated 5 December 2018

in the matter of:

the legal entity under foreign law
SAMRUK-KAZYNA JSC.,
having its registered office in Astana, Kazakhstan,
claimant pursuant to its summons dated 24 November 2017,
attorneys: *mrs.* J. van den Brande and H.F. van Druten, Amsterdam

against

1. **ANATOLIE STATI,**
2. **GABRIEL STATI,**
both residing in Chisinau, Moldova,
3. the legal entity under foreign law,
ASCOM GROUP S.A.,
having its registered office in Chisinau, Moldova,
4. the legal entity under foreign law
TERRA RAF TRANS TRAIDING LTD.,
having its registered office in Gibraltar,
defendants,
attorneys: *mrs.* G.J. Meijer and J.M. Hummelen, Amsterdam

1. The procedure

At the hearing of 5 December 2017, claimant, hereinafter Samruk, has stated and claimed in accordance with its summons, a copy of which is attached to this judgment. Defendants, hereinafter jointly Stati et al., have put forward a defence and concluded to deny the relief sought. Both parties have submitted exhibits and pleading notes to the court.
After a debate, parties have requested the court to deliver judgment.
Present at the hearing were:
on the side of Samruk: A. Mukhametzanov, A. Zhamiyev, G. Sehdou, *mr.* J.Ruff, *mr.* A. Attaïbi, *mr.* M. de Jong and *mrs.* Van der Brande and Van Druten;
on the side of Stati et al.: E. Dzhazoyan, *mr.* B.F. Assink, *mr.* P.B. Fritschy and *mrs.* Meijer and

Hummelen. A. Burroughs, interpreter in the English language for those not having command of the Dutch language, was present as well.

2. The facts

2.1 Stati et al. have invested more than a billion American Dollars in (among other things) oil fields in Kazakhstan. Stati et al. are of the opinion that the state Kazakhstan (hereinafter: the Republic Kazakhstan, the state, or in short Kazahkstan) has appropriated these investments in an unlawful manner. In this respect they have initiated arbitration proceedings against Kazakhstan, based on the Energy Charter.

2.2 Samruk is a Joint Stock Company (JSC) under the laws of the Republic Kazakhstan. The Repulbic of Kazakhstan is the founder and sole shareholder of Samruk, a fund as referred to in the 'Kazakhstan Law on the National Welfare Fund'. This law states, among other things, that the shares in the capital of Samruk are exclusive state property and cannot be transferred.

2.3 Samruk holds shares in the company under Dutch law KMG Kashagan B.V. (KMGK).

2.4 By arbitral award dated 19 December 2013, as supplemented on 17 January 2014 (hereinafter: the arbitral award), on the application of Stati et al, Kazakhstan has been ordered to pay amounts of USD 497.685.101 and EUR 802.103,24 to Stati et al. There is no appeal against this award.

2.5 In a judgment dated 9 December 2016, the competent court in Stockholm, Sweden, has dismissed Kazakhstan's claim to reverse the arbitral award.

2.6 Kazakhstan has not complied with the arbitral award.

2.7 On 30 August 2017, Stati et al. have submitted an application to the summary proceedings judge of this district court requesting leave to, among other things, levy prejudgment attachment against Kazakhstan and Samruk on the shares that Samruk holds in KMGK. Briefly put, it has been argued in the application for attachment that Samruk is part of Kazakhstan. The leave has been granted in a decision dated 8 September 2017, whereby the size of Stati et al.'s claims has been budgeted at USD 557.656.650 and EUR 992.520 (including interest and costs).

2.8 On 14 September 2017, Stati et al. have levied prejudgment attachment against Samruk on all its shares in KMGK.

2.9 In the meantime, Stati et al. have submitted a request with the Amsterdam Court of Appeal, also addressed to Samruk, for recognition and enforcement of the arbitral award.

2.10 By letter of 3 November 2017, Kazakhstan has requested the Amsterdam Court of Appeal to stay the proceedings mentioned under 2.9 until the High Court of Justice has ruled in the exequatur procedure initiated by Stati et al. in England, which should be rejected according to Kazakhstan, among other things because the arbitral award would be the result of fraud on the side of Stati et al.

2.11 Samruk has submitted a 'legal opinion' by S.I. Klimkin, 'Candidate of Juridical Sciences, Professor of the Caspian University', as exhibit 9, in relation to the legal status, rights and obligations of a Joint-Stock Company (JSC) under the laws of Kazakhstan, on the basis of the Civil Code of the Republic of Kazakhstan (hereinafter: the Civil Code). Among other things, the legal opinion contains the following passage:
"*As a general principle, a legal entity is only liable to the full extent of its property (several proprietary liability). Since a legal entity constitutes a subject, with its separate property, which has rights and obligations, its founders, as a general principle, are not liable for its debts (equally as legal entities are not liable for debts of the founders).*
The legislation establishes separate liability of the legal entity and its founder (participant) in the article 44.2 of the Civil Code, according to which founder (participant) of a legal entity or an owner of its properties shall not be liable for obligations of its founder (participant) or the owner of its properties, unless otherwise provided by this Code, other legislative acts or constituent documents of the legal entity."

3. The dispute

3.1 Samruk seeks - briefly put - the lifting of the attachment, ordering the defendant to pay the costs of the proceedings and subsequent costs.

3.2 Particularly, Samruk has based its claim on the argument that Stati et al. have no claims against Samruk, but only against Kazakhstan, and that there are no reasons to equate Samruk with the state.

3.3 Stati et al. put forward a defence.

3.4 To the extent relevant, the parties' arguments are further dealt with in the following.

4. The assessment

4.1 The lifting of a prejudgment attachment is, among other things, granted, if the unsoundness of the claim invoked by the attaching party is summarily shown.

4.2 The basis for the attachments levied by Stati et al. is the arbitral award, in which Kazakhstan has been ordered to pay significant amounts to Stati et al. Samruk was not a party to the proceedings that led to the arbitral award. It is undisputed between parties that Samruk is a legal person, *i.e.* a separate legal entity.

4.3 Article 10:118 of the Dutch Civil Code (DCC) holds that a company that has its corporate seat or registered office, or in the absence thereof, its external center of activities at the time of incorporation, in the territory of the state under the laws of which it has been incorporated, shall be governed by the laws of that state. Samruk has both its registered seat and its external center of activities

in Kazakhstan, as a result of which the laws of that state are applicable to the question whether the fact that Samruk is a separate legal entity should lead to the lifting of the present attachment. The arguments otherwise brought forward by Stati et al. (they claim the *lex fori* applies to answering this question) are insufficient to decide otherwise.

4.4 Based on the 'legal opinion' of Klimkin referred to under 2.11, for now it is *prima facie* sufficiently plausible that, (also) under Kazakh law, the starting point is that a company shall in principle not be liable for claims on its shareholders and/or directors, and *vice versa*, applies. However, the legal opinion speaks of a '*general principle*', that applies '*unless otherwise provided by this Code*', which means '*the Civil Code*'.
Article 8 of the Civil Code of Kazakhstan provides - again according to both parties - to the extent relevant for the present case, as follows:
"*4. Citizens and legal entities must act in good faith, reasonably and fairly when exercising their rights, and comply with the requirements contained in legislation and the moral principles of the society. Entrepreneurs must also comply with the rules of business ethics. This obligation may not be excluded or restricted by any agreement. (…)*
5. Citizens and legal entities are prohibited from causing harm to any other person, abusing their rights in any other form and from using rights for any purpose other than for what they were intended."

4.5 Hence, (also) under the laws of Kazakhstan one can invoke abuse of rights or powers. In this respect, Stati et al. have argued (further) at the hearing that Samruk essentially is part of the Republic Kazakhstan, or alternatively constitutes an extension thereof, and that its reliance on its separate legal personality with a separate capital is solely aimed at frustrating possible recovery by Kazakhstan's creditors. In doing so, Samruk would abuse its powers to rely on its separate legal personality.

4.6 In support of its arguments in this respect, Stati et al. have referred to the following facts and circumstances:
- Kazakhstan is the founder and sole shareholder of Samruk. It is prohibited by law for Kazakhstan to ever transfer the shares;
- Samruk is governed by the state Kazakhstan;
- the primary goal of Samruk is 'to increase the national welfare of the Republic of Kazakhstan';
- Samruk's strategy needs approval from Kazakhstan;
- the chair of Samruk's board is at all times the prime minister of Kazakhstan;
- the members of Samruk's board are required to honour decisions made by Kazakhstan;
- Samruk's board may not adopt resolutions that contravene decisions taken by Kazakhstan as the sole shareholder;
- Kazakhstan may dismiss board members at its own discretion and at any time.
Samruk has not, or not sufficiently, contested the correctness of these facts and circumstances.

4.7 The aforementioned entails that the corporate objective of Samruk is - if not the same, than at least - completely subordinated to Kazakhstan's national interest, as this is established at the political level, that Kazakhstan is and will remain the sole shareholder, and that Samruk's board is controlled by (those politically responsible in) Kazakhstan. Under these circumstances, now that the contrary has not been stated nor proved, it has to be assumed that (those politically responsible in) Kazakhstan also

exert final control over its assets and the manner in which these are used, as a result of which these assets can de facto-economically be used as if they belong to Kazakhstan.
These grounds justify *prima facie* the conclusion that Samruk lacks de facto-economic independence in its relation to Kazakhstan, in the sense that Samruk cannot invoke its separate legal personality against Kazakhstan in order to pursue a policy of its own that deviates from the policy of (those politically responsible in) Kazakhstan. Considering the foregoing, and in the absence of another explanation, it has to be assumed that Samruk has been established by Kazakhstan (at least partially) with a view to shield Kazakhstan's assets from Kazakhstan's creditors.

4.8 In addition, in the case at hand, it is plausible that Kazakhstan is not willing to satisfy Stati et al.'s claims.

4.9 In light of the considerations listed under 4.6-4.8 it is, for now, *prima facie* plausible that Samruk abuses - in the sense of article 8 of the Civil Code of Kazakhstan - it's in principle existing power to invoke against Stati et al. its legal independence.

4.10 For the same reason, also Samruk's defence that Stati et al.'s claims cannot be awarded because Stati c.s. have not submitted an original, to Samruk applicable, arbitration agreement.

4.11 A balancing of interests does not lead to allowing the claim either. Samruk has failed to sufficiently demonstrate to suffer so much damages pursuant to the attachment of its shares in KMGK that its interests connected to lifting the attachment should outweigh the interests of Stati et al. connected to maintaining it. Admittedly, Samruk has argued that the attachment can constitute an *Event of Default* that could lead to payment demands by third parties, but this argument has insufficiently been made concrete. The statement of Y. Zhanadil, the Managing Direcotr of Samruk (Exhibit 11 submitted by Samruk) is insufficient in this respect. Furthermore, Samruk could provide security for the claims for which the attachment has been levied.

4.12 Also Samruk's argument relating to article 21 of the Dutch Code of Civil Procedure does not offer a ground for lifting of the attachment. In this respect, Samruk has argued that Stati et al. have failed to inform the judge in summary proceedings about the current situation in the procedure at the English *High Court* in the application for attachment. However, this does not justify the conclusion that Stati et al. would have provided incorrect or incomplete information to the judge in the application for attachment, nor that this would have resulted in a different judgment as to the leave to levy attachment.

4.13 The foregoing leads to the conclusion that it is not summarily evident that the claim or right invoked by Stati et al. is unfounded. Hence, there is no need to discuss the parties' other arguments.

4.14 The injunction sought is denied, and Samruk, as the party against whom judgment has been given, is ordered to pay the costs of these proceedings on the part of Stati c.s.

5. The judgment

The judge in summary proceedings:

5.1 refuses the injunction sought;

5.2 orders Samruk to pay the costs of these proceedings, on the part of Stati et al. estimated at:
- € 618 court registry fee
- € 816 counsel costs;

5.3. declares that this decision, to the extent relating to the cost order, is provisionally enforceable.

This decision was rendered by *mr.* F.B. Bakels, judge in summary proceedings, in the presence of *mr.* M. Balk, clerk of the court, and pronounced in open court on 5 January 2018.

[signatures]