judgment

AMSTERDAM COURT OF APPEALS

Department of Civil and Tax Law, team I

case number: 200.234.096/01 KG

Case number/role number of District Court of Amsterdam: C/13/638381 / KG ZA 17-1217

Judgment of the three-judge division for civil matters dated May 7, 2019

with regard to

1. the company under foreign law
SAMRUK-KAZYNA JSC,
registered in Astana (Kazakhstan),
the appellant,
attorney: H.F. van Druten, Amsterdam,

and

2. **REPUBLIC OF KAZAKHSTAN,**
registered in Astana (Kazakhstan), joint
party,
attorney: A.W.P. Marsman, Amsterdam,

against

1. Anatolie STATI,
living in Chisinau (Moldova),
2. Gabriel STATI,
living in Chisinau (Moldova),
3. the company under foreign law
ASCOM GROUP S.A.,
registered in Chisinau (Moldova),
4. the company under foreign law
TERRA RAF TRANS TRAIDING LTD.
registered in Gibraltar,
respondents,
Attorney at law: G.J. Meijer, Amsterdam.

The parties are hereinafter referred to as Samruk, Kazakhstan and Stati et al.

1. The course of the appellate proceedings

In a writ of summons dated 2 February 2018, Samruk lodged an appeal against a judgment by the court in preliminary relief proceedings in the District Court of Amsterdam dated 5 January 2018, rendered in this case under the above-mentioned case number/role number between Samruk as plaintiff and Stati et al. as defendants.

Samruk, Kazakhstan and Stati et al. then submitted the following documents:
- statement of appeal on behalf of Samruk, with productions;
- motion for the joinder of parties on behalf of Kazakhstan;
- defense on appeal on behalf of Stati et al., with exhibits.

Samruk, Kazakhstan and Stati et al. pleaded their case at the hearing on March 13, 2019, with Samruk represented by their aforementioned attorney and by J. van den Brande, attorney at law in Amsterdam, Kazakhstan by its aforementioned attorney, and Stati et al. by their aforementioned attorney, as well as by B.F. Assink, attorney based in Amsterdam, all with memoranda of oral pleading which they have submitted to the proceedings. Kazakhstan and Stati et al. have also been granted permission to submit further exhibits to the court.

Finally, a judgment has been requested.

Samruk has concluded, in short, that the court of appeals should, by provisionally enforceable judgment, set aside the judgment against which the appeal has been lodged and should primarily lift the attachment of the shares in the capital of KMG Kashagan B.V., or alternatively order Stati et al. – subject to the payment of a penalty – to lift the attachment against Samruk (or to have it lifted), with a decision on the costs of the proceedings, including subsequent costs and statutory interest.

Kazakhstan has petitioned for the judgment it has lodged an appeal against to be set aside, together with an order as to costs.

Stati et al. have concluded, in short, that the court of appeals should primarily uphold the judgment against which the appeal has been lodged, or alternatively in the event that the court of appeals should lift the attachment or cause it to be lifted – shall declare the judgment to be rendered provisionally unenforceable, or at least make it subject to the condition that Samruk should provide security up to the amount for which the permission to impose the attachment was granted (the order by the court in preliminary relief proceedings of the District Court of Amsterdam dated 8 September 2017), with a decision on the costs of the proceedings, including subsequent costs and statutory interest.

2. The facts

In the judgment in respect of which an appeal is lodged under 2.1 to 2.11, the court in preliminary relief proceedings has listed depending facts which it has taken as a starting point. Insofar as these facts are not in dispute between the parties, the court of appeals will also assume these facts to be accurate. In this respect, the court of appeals notes that

insofar as Samruk argues in ground 1 that the court in preliminary relief proceedings has wrongly considered something as an established fact in legal consideration 2.1, the court of appeals will reproduce this listed fact in such a way that it, as formulated, is in any case correct. Insofar as Samruk subsequently argues that certain (additional) facts are not mentioned in the enumeration, this does not affect the correctness of the facts listed by the court in preliminary relief proceedings and the court of appeals will take into account the facts that Samruk has referred to, insofar as relevant, in the considerations laid out below.

3. The assessment

3.1. This case concerns the following.

(i) According to the arbitral award mentioned under (iv), Stati et al. have invested more than a billion US dollars in (among other things) oil fields in the Republic of Kazakhstan (hereinafter: Kazakhstan). Stati et al. are of the opinion that Kazakhstan has unlawfully appropriated these investments. They have initiated arbitration proceedings against Kazakhstan on the basis of the Energy Charter.

(ii) Samruk is a Joint Stock Company (hereinafter: JSC) under Kazakhstani law. Kazakhstan is the founder and sole shareholder of Samruk, a fund referred to in the Kazakhstan Law on the National Welfare Fund. It states, among other things, that the shares in Samruk are the exclusive property of Kazakhstan and cannot be divested.

(iii) Samruk holds shares in the Dutch company KMG Kashagan B.V. (hereinafter: KMGK).

(iv) In an arbitral award dated 19 December 2013 as supplemented on 17 January 2014 (hereinafter jointly referred to as: the arbitral award) Kazakhstan was ordered, at the request of Stati et al., to pay to Stati et al. amounts of USD 497,685,101 and € 802.103,24. No appeal has been lodged against this arbitral award.

(v) In a judgment dated 9 December 2016, the competent court in Stockholm, Sweden, dismissed Kazakhstan's application for the arbitral award to be set aside.

(vi) Kazakhstan has not complied with the arbitral award.

(vii) In a petition (as appropriate), registered on August 31, 2017, Stati et al. applied to the court in preliminary relief proceedings at the District Court of Amsterdam for leave to seize the shares held by Samruk in KMGK, among other things, with the costs for that seizure to be paid by Kazakhstan and Samruk. In short, it has been argued in the application for seizure that Samruk is part of Kazakhstan. The leave was granted in an order

dated September 8, 2017, with an estimate of Stati et al.'s claims (including interest and costs) set at USD 557,656,650 and €992,520.

(viii) On September 14, 2017, Stati et al. imposed a seizure on Samruk for of all their shares in KMGK (hereinafter: the seizure).

(ix) Stati et al. have since submitted to this court a request for a review and enforcement of the arbitral award, also directed against Samruk.

(x) In a letter dated November 3, 2017, Kazakhstan requested that this court stay the proceedings referred to under (ix) until the English High Court of Justice has ruled on the English exequatur petition lodged by Stati et al., which, according to Kazakhstan, should be rejected, inter alia because the arbitral award would be the result of fraud on the part of Stati et al.

(xi) In an order dated 6 November 2018 in the proceedings referred to under (ix), this court considered, among other things, that in light of all the relevant circumstances, it would be logical, after weighing up the mutual interests, to stay the further discussion of the request for some time and also to await the judgment of the English High Court of Justice and to give Kazakhstan the opportunity to bring this judgment into the proceedings. To this the court of appeals has added, among other things, that in view of the provisionally sufficiently motivated contestation by Stati et al. of the propositions to this effect on the part of Kazakhstan, the court of appeals sees no reason to rule, under the current state of affairs and with the currently available documents, that the arbitral award was created as the result of fraud and that recognition or enforcement of the award would therefore be contrary to public order.

3.2. Samruk has in first instance requested, in short, that the attachment be lifted, with an order for Stati et al. to pay the costs of the proceedings, including the subsequent costs. In short, they have argued that Stati et al. have no claims against Samruk, but only against Kazakhstan, and that there is no reason to equate Samruk with Kazakhstan. Stati et al. have mounted a defense against Samruk's claim.

3.3. The court in preliminary relief proceedings considered the following in the judgment under appeal, in so far as it is currently relevant. The basis for the seizure by Stati et al. is the arbitral award, in which Kazakhstan is ordered to pay considerable sums of money to Stati et al. Samruk was not a party to the proceedings in this respect, and it is not disputed that Samruk is a legally independent entity. Kazakh law shall apply to the question of whether the fact that Samruk is a legally independent entity should lead to the lifting of the seizure in question. For the time being, it is sufficient to assume as a starting point, according to Kazakhstani law, that a legal entity is, in principle, not liable for claims against its shareholders and/or directors, and vice versa, on the understanding that, (also) according to Kazakh law, a claim can be made for abuse of the law. It can be deduced from a number of (more detailed) facts and circumstances that the corporate purpose of Samruk is entirely subordinate to the national interest of Kazakhstan – regardless of whether or not it coincides with that interest - as it is determined politically, that Kazakhstan is and remains its sole shareholder, and that the management of Samruk is controlled by (the politically responsible persons in) Kazakhstan. Under these circumstances, it must be assumed - given that the opposite has not been stated nor proven

- that Kazakhstan and its political leaders also exercise final control over its assets and their use, so that they can be used economically and effectively as if they belonged to Kazakhstan. For the time being, this justifies the opinion that Samruk lacks factual and economic independence in its relationship with Kazakhstan, in the sense that Samruk cannot invoke its legal independence vis-à-vis Kazakhstan in order to pursue its own policies, which may deviate from those of (the politically responsible persons in) Kazakhstan. On this basis, and in the absence of any other evidence, it must be assumed that Samruk was established by Kazakhstan with the aim (at least in part) of keeping its assets out of the control of Kazakh creditors. This implies that, at this point, it is plausible to believe that Samruk is abusing its - in principle - existing power to invoke their legal independence in their relationship with Stati et al. A balancing of interests does not lead to the claim being granted, either. Samruk has not made a sufficiently plausible argument to support the claim that they have suffered so much damage from the seizure of their shares in KMGK that, if the seizure were to be lifted, their interests would have to weigh more heavily than Stati et al.'s interest in the enforcement of the seizure. In addition, Samruk could provide security for the claims for which the seizure has been made. This leads to the conclusion that the claim or the right on which Stati et al. has based their argument has not been found to be summarily incorrect, according to the court in preliminary relief proceedings. On this basis, the court in preliminary relief proceedings refused the appeal and ordered Samruk to pay the costs of the proceedings.

3.4. The key question raised by the arguments on appeal in this dispute is not - as the court in preliminary relief proceedings (according to legal considerations 4.1 and 4.13) has considered - whether or not the seizure should be lifted because it has been demonstrated that the claim for which the seizure was made is incorrect, but the primary issue is whether the seizure should be lifted because it is unlawful in itself, since it was not levied on a property of the debtor (Kazakhstan) but on a property of a third party (Samruk), and the subsidiary issue is whether the seizure should be lifted because it constitutes an abuse of the law, weighing all (relevant) interests of the parties fully against each other. However, a number of preliminary questions need to be answered before this key question (in both parts) can be answered.

3.5. Since this case concerns foreign parties, the court of appeals would, first of all, like to note that, pursuant to Article 10:3 of the Dutch Civil Code, in the manner of litigation before the Dutch courts, Dutch law is applicable as lex fori, that it includes, among other things, provisional measures, and that the question under which conditions a measure can be requested is a matter of procedural law. This means that the question of the conditions under which the seizure can be lifted can be claimed is governed by Article 254 of the

Dutch Code of Civil Procedure and, in the case of a seizure - in particular Article 705, paragraph 2 of the Dutch Code of Civil Procedure - which means that the order to lift must be given, inter alia, if it is apparent, in brief, that the right invoked by the party imposing the seizure is flawed or that the seizure is not necessary - i.e. there is an abuse of the law - or, in the case of seizure for a pecuniary claim, if sufficient security is given for that claim. The court of appeals would like to add to this that, firstly, it is incumbent upon the party petitioning for the seizure to be lifted, with due observance of the limitations of the preliminary relief proceedings, to make it clear that the claim being argued by the party imposing the seizure is incorrect or, for example, that the seizure constitutes an abuse of the law, in which case the court in preliminary relief proceedings has to decide based on an assessment of the arguments made by both parties and been supported with appropriate evidence, which assessment cannot take place separately from the weighing of the mutual interests that is required in such a case (cf. including Supreme Court, June 14, 1996, NJ 1997/481 and Supreme Court, June 30, 2006, NJ 2007/483).

3.6. A preliminary question that then needs to be discussed is Samruk's appeal to immunity from jurisdiction. According to Samruk, the court in preliminary relief proceedings has essentially ruled that Kazakhstan has abused the law by establishing Samruk, because it created Samruk (at least in part) in order to harm its creditors, but the court in preliminary relief proceedings should not have examined the lawfulness of these actions at all, because doing so concerns a governmental act by a sovereign state within its internal systems on its own territory. This argument fails, first of all because it lacks a factual basis. After all, the court in preliminary relief proceedings did not consider that Kazakhstan had abused the law by founding Samruk, but considered that (for the time being it is plausible that) Samruk is abusing its existing authority to invoke its legal independence - the existence of which the parties agree – in its relationship to Stati et al. Furthermore, this argument fails because it cannot be inferred from the nature of this act by Samruk that it was carrying out a typical public service task, but that it was (therefore) the exercise of a commercial activity which was, moreover, in line with the purposes for which Samruk was set up, according to its own arguments (see statement of appeal under 34 and motion for the joinder of parties under, for example, 29, 31, 33 and 44). The conclusion is that ground 13 is rejected.

3.7. The final preliminary question to be answered is whether Samruk is entitled to (partly) invoke the immunity from enforcement. According to Samruk, this claim is being made only in the event that Samruk is identified with Kazakhstan. Thus argued, this argument lacks any factual basis, because the court in preliminary relief proceedings, in whose considerations this view has apparently been inferred by Samruk, did not identify Samruk and Kazakhstan jointly, but, on the contrary, (for the time being) ruled that Samruk, as a separate legal entity, is abusing its - in principle - existing power to invoke its legal independence vis-à-vis Stati et al. To this the court of appeals would like to add, somewhat superfluously, that even if it is assumed (which by no means is that the case) that (the considerations of the provisions of the court must be understood in such a way that) Samruk and Kazakhstan must be identified jointly, the court of appeals does not

agree with Samruk's argument that it may invoke immunity from enforcement. In doing so, the court of appeals has argued that the starting point in this respect should be that assets of foreign states are not subject to seizure and execution unless and insofar as it has been established that they have a purpose that is not incompatible with this, in which case it is always the creditor who has to provide information which can be used to determine that the goods are being used by the foreign state or are intended for, in short, something other than public purposes (cf. Supreme Court, September 30, 2016, NJ 2017/190). Leaving aside whether or not it is conceivable that, as in this case, Samruk, and not Kazakhstan, may invoke immunity from enforcement in this way, such an invocation would, in any case, (also) have to be considered as having been made on behalf of Kazakhstan. According to the court of appeals, it is then up to Stati et al. to make a plausible argument that, in short, not the final (ultimate), but the immediate purpose of the goods – in this case, the shares held by Samruk in KMGK - is a nonpublic purpose, if only because a different interpretation of the rules contained in the aforementioned basic principle would make it de facto impossible for individual parties imposing seizures, such as Stati et al. to assert their rights. Stati et al. have done this to a sufficient extent, also in view of what Samruk and Kazakhstan themselves already sufficiently addressed (defense on appeal under 170) Samruk's commercial purpose in their arguments (see statement of defense under 34 and motion for the joinder of parties under, for example, 29, 31, 33 and 44). This means that ground 14 also fails.

3.8. This brings the court of appeals to address the primary key question, namely whether the seizure should be lifted because it is, in itself, unlawful, since it was not imposed upon an asset of the debtor (Kazakhstan) but on an asset of a third party (Samruk). As already discussed above (under 3.6), the parties agree that Samruk is a legal entity and therefore has legal independence. Since, by virtue of the arbitral award that underlies the monetary claims made by Stati et al. and (therefore) the seizure, only Kazakhstan is a debtor of Stati et al., the seizure that has been imposed on Samruk – as court of appeals understands it, also according to the parties – in principle, in the absence of authority to do so (cf. Article 3:276, paragraph 1 of the Dutch Civil Code and Article 435 of the Dutch Code of Civil Procedure, which are provisions of procedural law), is unlawful. That means that, in principle, pursuant to Article 705, paragraph 2 of the Dutch Code of Civil Procedure, the seizure that has been imposed on Samruk must be lifted. It is therefore crucial to determine whether there are (sufficient) grounds to deviate from this basic principle. In this respect, the Court considers as follows.

3.9. The parties agree - against the relevant legal consideration (4.3) in the judgment on appeal - that the question of whether the fact that Samruk is a legally independent entity should result in the seizure being lifted is governed by Kazakhstani law. Samruk has challenged (as exhibit 9) a 'legal opinion' by S.I. Klimkin, 'Candidate of Juridical Sciences, Professor of the Caspian University' (hereinafter: Klimkin) dated November 21, 2017 concerning the legal status, rights and obligations of a JSC under Kazakhstani law on the basis of the Civil Code of the Republic of Kazakhstan (hereinafter: Kazakh Civil Code), and the following passage is included in that legal opinion:

> "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 personality and 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 [Kazakh] Civil Code, according to which founder (participant) of a legal entity or an owner of its properties shall not be liable for its obligations, and the legal entity 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."

In agreement with the court in preliminary relief proceedings, the Court of Appeal is of the opinion that, for the time being, it is sufficiently plausible that under Kazakhstani law, it is assumed that a legal entity is, in principle, not liable for claims against its shareholders and/or holders of depository receipts, and vice versa. The fact that this is a starting point to which exceptions may be made is clear from the wording that is used: the main rule applies ("as a general principle"), unless the law provides otherwise ("unless otherwise provided by this Code"). Such a restriction on the main rule can be found in Article 8 of the Kazakh Civil Code, which - also in accordance with the provisions of the law - provides, among other things, for the following:

> "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."

Samruk has argued that it cannot be deduced from this, as the court in preliminary relief proceedings has done, that in the present case an abuse of the law can be invoked under Kazakh law, more specifically it cannot be inferred that that Samruk could have abused their right to invoke their independent legal personality. Samruk states in particular that this applies to Samruk as a JSC, because a JSC can never be held liable for the obligations of its founder(s) and/or shareholder(s). Samruk cites Article 44.2 of the Kazakh Civil Code and Article 3 of the JSC Act in support of its arguments. According to Samruk, the former provision contains the general principle that a legal entity cannot be held liable for the obligations of its founder or its shareholders and/or directors, except for exceptions provided for in the laws and regulations and/or articles of association of the legal entity in question, but this general principle is repeated in Article 3 of the JSC Act without a possible exception being made, and is meant as such, with the result that, in the case of a JSC, Article 8 of the Kazakh Civil Code does not allow an exception to be made

to the general principle, apart from the fact that Article 8 of the Kazakh Civil Code cannot serve as a basis for liability. In order to substantiate their point of view, Samruk has, among other things, submitted legal opinions by Klimkin dated 21 November 2017 - supplemented on November 30, 2017 - and March 5, 2018 (see exhibits 9 and 28) and by M. K. Suleimenov, Director of the Research Institute of Private Law of the Caspian University, Academician of the National Academy of Sciences of the Republic of Kazakhstan, Doctor of Law Sciences, professor (hereinafter: Suleimenov) dated March 6, 2018 and February 22, 2019 (exhibits 29 and 42). Stati et al. disputed this interpretation of Kazakh law, stating their reasons, and in order to substantiate their arguments, they have submitted legal opinions by Peter B. Maggs, Professor of Law holding the Clifford M. & Bette A. Camey Chair in Law at the University of Illinois College of Law (hereinafter: Maggs) dated January 3, 2018 and April 12, 2018 (exhibits 26 and 34) and by Sergei Vataev, an attorney practicing law in Kazakhstan since 1992 (hereinafter: Vataev), dated June 19, 2018 and March 8, 2019 (exhibits 35 and 59). In the light of this, Samruk, who, in principle, was responsible for this, has, at this point, not made a sufficiently plausible argument that under Kazakh law, the aforementioned exception to the main rule does not apply in this case (with regard to Samruk, as JSC). Therefore, since the preliminary relief proceedings leave no room for further instruction (for example in the form of an opinion by the International Legal Institute), the court of appeals will, in the context of these proceedings, assume the possibility that under Kazakh law, abuse of the law can constitute grounds for making an exception to the main rule that a legal entity (Samruk) is not liable for claims against its shareholders and/or directors (Kazakhstan). As a result of the foregoing, grounds for appeal 3, 4, 5 and 6 are also unsuccessful. In addition, the court of appeals would like to note that in so far as Samruk has argued in ground for appeal 7 that the court in preliminary relief proceedings has wrongly interpreted a certain statement as argued by Stati et al. in this respect, the merits of this ground for appeal can remain the same, because, even if the ground for appeal is well-founded, this statement has in any case become a part of the legal battle between the parties.

3.10. With a view to answering the primary key question, it is therefore important to determine whether, as Stati et al. has argued, a circumstance has arisen in which the reliance on legal independence (by Samruk) constitutes an abuse of powers. The court in preliminary relief proceedings has answered this question in the affirmative (legal consideration 4.9) and has based its decision on the following considerations:

> "4.6. In support of its assertions on this point, Stati et al. have referred to the following facts and circumstances.
> - Kazakhstan is the founder and sole shareholder of Samruk. Kazakhstan is forbidden by law to ever dispose of its shares;
> - Samruk is controlled by the state of Kazakhstan;
> - the primary purpose of Samruk is 'to increase the national welfare of the Republic of Kazakhstan';
> - Samruk's strategy requires Kazakhstan's approval;
> - the chairman of the board of Samruk is always the prime minister of Kazakhstan;

- the members of Samruk's board are obliged to implement Kazakhstan's decisions;

- Samruk's board may not make decisions that are contrary to the decisions of Kazakhstan as the sole shareholder,

- Kazakhstan may dismiss the members of the board as it sees fit and at any time.

Samruk did not address the correctness of these facts and circumstances, or at least they did so insufficiently.

4.7. The above means that Samruk's corporate purpose is entirely subordinate to the national interest of Kazakhstan – regardless of whether or not it coincides with that interest – as it is determined politically, that Kazakhstan is and remains its sole shareholder, and that the management of Samruk is controlled by (the politically responsible persons in) Kazakhstan. Under these circumstances, it must be assumed - given that the opposite has not been stated or proven - that (political leaders in) Kazakhstan also exercise final control over its assets and their use, so that this can in fact be turned into an economically and actually as if it belonged to Kazakhstan. For the time being, this justifies the opinion that Samruk lacks factual and economic independence in its relationship with Kazakhstan, in the sense that Samruk cannot invoke its legal independence vis-à-vis Kazakhstan in order to pursue its own policies, which may deviate from those of (the politically responsible persons in) Kazakhstan. On this basis, and in the absence of any other evidence, it must be assumed that Samruk was established by Kazakhstan with the aim (at least in part) of keeping its assets out of the control of Kazakh creditors.

4.8. Furthermore, at this point, it is plausible to believe that Samruk is abusing its – in principle – existing power to invoke their legal independence in their relationship with Stati et al."

First of all, the court of appeals would like to note that in so far as Samruk is addressing legal consideration 4.8 and is arguing that Kazakhstan has good reasons not to comply with the arbitral award, this does not in any way detract from the correctness of this consideration, so ground 10 fails. In this respect, the court of appeals, notes, perhaps superfluously, that insofar as Samruk is invoking the fact that Stati et al. committed fraud in the proceedings leading to the arbitral award, it has not been definitively established in any of the proceedings that this was the case until now. Furthermore, the court of appeals notes that when Samruk (in their eighth ground for appeal) discusses the facts and circumstances mentioned in legal consideration 4.6, they give a more detailed explanation of this, but that - except insofar as it concerns the fact mentioned in their second assumption – they do not dispute its correctness. In this respect, the court of appeals notes - also in view of the statements made by Stati et al. (insofar as they have not been contradicted) - that although it is true that Kazakhstan does not manage Samruk, it established Samruk and that, as the only shareholder and through the Board of Directors and the Management Board, it has a decisive influence on Samruk's policy, such that it also exercises the final control over Samruk's assets and how they are allocated. On this basis, the court of appeals agrees with the reasoned argument of the court in preliminary relief proceedings (in legal consideration 4.7) - even if the nuances proposed by Kazakhstan, under the sixth and seventh bullet point, are taken into account (motion for joinder of parties under 91 (p. 35-36)) - and associated conclusion that Samruk lacks actual economic independence in their relationship with Kazakhstan, in the sense that Samruk cannot invoke their legal independence vis-à-vis Kazakhstan to pursue their own policies that are different from those of

(the politically responsible persons in) Kazakhstan. To this the court of appeals would like to add, contrary to what the court in preliminary relief proceedings has considered, that Samruk, whatever the (formal) purpose of the incorporation of this company is (see in particular the defense on appeal under 28-46, and under 44-46), in any event (jointly) functions as a means of keeping Kazakhstan's substantial assets of out of the control of creditors. Because it holds shares in a number of important Kazakh state shareholdings (see the defense on appeal under 42), if it can invoke its legal independence against a creditor of Kazakhstan, it cannot be recovered by that creditor, even though Kazakhstan, among other things, exercises final control over Samruk's assets and their use.

3.11. All of this culminates in the fact that, at this point, the court of appeals also considers it plausible that Samruk is abusing - within the meaning of Article 8 of the Kazakh Civil Code - the existing powers that it, in principle, has to invoke its legal independence vis-à-vis Stati et al. In this respect the court of appeals notes that Samruk has continuously argued that the court in preliminary relief proceedings has wrongly jointly identified Samruk and Kazakhstan, although under Kazakh law joint identification is not possible (see, for example, the statement of appeal under 71-73, 118 and 121), an argument that was also made by Kazakhstan (motion for the joinder of parties under 97-99). However, the court of appeals does not agree with Samruk and Kazakhstan's argument on this point, because the court in preliminary relief proceedings considered precisely the opposite in their (preliminary) ruling that Samruk, as a separate legal entity, was abuses its existing power to invoke its legal independence vis-à-vis Stati et al.

3.12. As a result of the above, ground 8, ground 9 and ground 11 fail. Given that it has been established that even though they are not a debtor of Stati et al., Samruk's assets can, in principle, be recovered by Stati et al., ground 2 and ground 12 - which in both cases are predicated on the assertion that Stati et al. do not have an enforceable title against Samruk - cannot succeed, either.

3.13. This brings the court of appeals to the answer of the subsidiary main question: namely whether the seizure should be lifted because, weighing all (relevant) interests of the parties (fully) against each other, it constitutes a misuse of power (as being vexatious or "unnecessary" in the meaning of Article 705 paragraph 2 of the Dutch Code of Civil Procedure: see among others Supreme Court, April 11, 2003, NJ 2003/440). In this case, this question coincides with the general balance of interests inherent in any preliminary relief proceedings (see statement of appeal under IV.15 and VI). When answering this question, the court of appeals first of all considers that the question of whether the imposition of a protective seizure should be regarded as vexatious and therefore unlawful must in principle be answered based on the concrete circumstances at the time of the seizure, including the amount of the claim to be recovered, the value of the assets to be seized, and the possibly disproportionate way in which the debtor's interests could be affected by the seizure of one of these assets (cf. Supreme Court, November 24, 1995, NJ

1996/161). On this point, Samruk argued in particular that the seizure of its shares in KMGK causes it a great deal of damage, because it can result in a so-called 'Event of Default' that can lead to claims of financing by third parties, and that it has therefore requested the banks to provide a waiver of the defaults, a waiver that, however, has not been provided to date. Samruk submitted a statement by Y. Zhanadil, CFO of Samruk in support of this argument. Furthermore, Samruk has argued that the judgment currently subject to appeal, which has received a considerable amount of attention in the (international) press, has potentially far-reaching consequences for Samruk's ability to attract funding. However, these statements, argued extensively by Samruk and only substantiated by a director of Samruk himself, cannot outweigh the interest they have in upholding the seizure as justified by Stati et al. (see defense on appeal under 175). In addition, Samruk has not stated that they are not in a position to provide security as defined by Article 705, paragraph 2 of the Dutch Code of Civil Procedure. This means that the seizure does not constitute a misuse of powers and that ground 15 fails.

3.14. Samruk has also argued that Stati et al. failed to inform the court in preliminary relief proceedings of the state of affairs in the proceedings before the English High Committee of Justice - in particular by failing to produce the judgment dated 6 June 2017 issued by that board - and that this constitutes a breach of Article 21 of the Dutch Code of Civil Procedure and would justify the lifting of the seizure. With regard to this point, the court of appeals is of the opinion that although Samruk claims that Stati et al. committed fraud in the proceedings leading to the arbitral award - an assertion contested by Stati et al. - neither in these proceedings nor in any other proceedings has it yet been established that Stati et al. have committed fraud. In light of these circumstances, the court of appeals upholds the judgment of the court in preliminary relief proceedings that there is no basis for the conclusion that Stati et al. incorrectly or incompletely informed the court in the application for seizure or that the information in question would have led to a different decision with regard to the permission to impose a seizure. It follows from this that ground 16 also fails.

3.15. Finally, the court of appeals considers that ground 17 lacks independent meaning, so that, in view of the court's conclusion on the preceding grounds, it also fails.

3.16. The conclusion is that the appeal fails. The judgment currently under appeal will be upheld. Samruk and Kazakhstan, as the unsuccessful parties, shall be ordered to pay the costs of the appellate proceedings.

4. The decision

The court of appeals:

upholds the judgment currently under appeal;

orders Samruk to pay the costs of the appellate proceedings and estimates those costs on the side of Stati et al. to date at € 726 for disbursements, € 3,222 in legal fees and € 157 for additional legal fees, to be increased by € 82 for additional fees and the costs of the writ of service in the event that this judgment is served, plus statutory interest thereon from fourteen days after service of this judgment until the date of payment;

orders Kazakhstan to pay the costs of the appellate proceedings and estimates those costs on the side of Stati et al. to date at € 726 for disbursements, € 3,222 in legal fees and € 157 for additional legal fees, to be increased by € 82 for additional fees and the costs of the writ of service in the event that this judgment is served, plus statutory interest thereon from fourteen days after service of this judgment until the date of payment;

declares the orders to pay the costs of the proceedings provisionally enforceable.

This judgment was handed down by D.J. van der Kwaak, G.C. Boot and F.J. Verbeek and has been pronounced in open court by the docket judge on May 7, 2019.

[signature] [signature]

J.C. W. Rang, LLM