

**DRAFT TRANSLATION**

NACKA DISTRICT COURT

**PROTOCOL**

2017-11-29  
Proceedings in Nacka

Case no.  
Ä 5711-17, file appendix 33  
Ä 6307-17, file appendix 13

Proceedings in absentia.

**THE COURT**

Judge Mats Åhrling

**RECORDING CLERK**

Drafting clerk (Sw. *beredningsjurist*) Gustav Sandler

**APPELLANT**

The Republic of Kazakhstan  
Address at the counsels

Counsel: *Advokaten* Alexander Foerster and *jur.kand.* Ludwig Metz  
Mannheimer Swartling Advokatbyrå AB  
Box 1711  
111 87 Stockholm

**THE MATTER**

Enforcement of sequestration etc.

**DECISIONS UNDER APPEAL**

The Enforcement Authority's decisions of 6, 11 and 20 September and 5 October 2017 in case no U-24881-17/0103 and decisions of 1 November 2017, nos 12174654207 and 12174652920

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After enforcement had been requested of a sequestration decision on property belonging to the Republic of Kazakhstan in Sweden, the Enforcement Authority first decided to take *inter alia* shares, other securities and a claim regarding a refund of tax on dividends. Subsequently, the Enforcement Authority decided to execute certain property thereof.

The Republic of Kazakhstan has requested that the District Court repeal the decisions and *inter alia* stated the following. The property belongs to The National Bank of Kazakhstan (the National Bank) which is the central bank of the Republic of Kazakhstan. The property is included in the so called National Fund. Its purpose is to ensure the stability in Kazakhstan's social and economic development and reduce the state's vulnerability to *inter alia* fluctuations in commodity prices. The fund thus has a distinctively non-commercial purpose. The fund is held and managed by the National Bank. The bank is an independent legal entity in relation to the state of Kazakhstan. The state and the National Bank has entered into the so called National Fund Agreement which *inter alia* means that the bank independently manages the National Fund. Further, The National Bank and the Bank of New York Mellon (BNY) has entered into an agreement which means that BNY manages part of the assets in the National Fund. BNY has in turn assigned to SEB to hold part of the financial instruments which BNY has acquired for the fund. For this purpose, BNY has opened the account in question at SEB on behalf

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of the National Bank. Both the financial instruments and the returns of these are thus included in the National Fund. Since the fund has a distinctively non-commercial purpose, the property included therein is immune against enforcement measures according to the principles expressed in the United Nations Convention on Immunity for States and Their Property (the Convention). Even if the property would be considered to belong to the state and therefore not be considered property of a central bank, and thus not be covered by Article 21(c) of the Convention, it is covered by immunity according to other provisions in the Convention. Under all circumstances, conditions have not been met to take part of the property since the Enforcement Authority has no authority to do so when, as in the present case, the property is not located in Sweden. An order of that kind is not acceptable since it risks to violate other states' sovereignty and would result in legal uncertainty.

The Enforcement Authority has submitted comments in connection with the appeals.

After a review of the documents, the District Court renders the following

### **DECISION**

The District Court rejects the appeals.

### **REASONS**

The decisions of the Enforcement Authority which are now subject to trial have also been appealed by the National Bank. The District Court had reason to question the bank's party capacity. In that assessment, the District Court found that the National Bank is not an independent legal entity separate from the state and dismissed the appeal.

There are no reasons to make a different assessment regarding the National Bank's party capacity now. The adjudication which follows shall therefore be made on the basis that the National Bank is not an independent legal entity in relation to the state.

The mere fact that property is owned by a state does not mean that it is immune against enforcement measures. A foreign state should only be able to invoke state immunity against enforcement in property if the purpose of the possession thereof is of a qualified nature (Sw. *kvalificerat slag*), such as when the property is in use for the state's exercise of sovereignty or similar tasks of an official nature or when the property is of a specific kind specified in article 21 in the Convention, see the case NJA 2011 p. 475. The Republic of Kazakhstan has stated that the property at hand, if it is to be considered

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to belong to the state, is still immune against enforcement measures according to the provisions in the Convention.

The Republic of Kazakhstan has neither referred to any investigation which shows which assets with which the republic had entrusted BNY at the time of the enforcement or on what terms BNY had assigned SEB to manage property on behalf of the Republic of Kazakhstan. Absent extracts from accounts or similar investigation which links the now seized property to the funds with which BNY has been entrusted and which have been used to the acquisition of the financial instruments placed with SEB, it is according to the District Court not shown that any of these instruments form part of the National Fund, or has any such link to it that the possession of the property is particularly qualified. It is thus not shown that the conditions for immunity according to the Convention are met with regards to the property. The decisions should therefore not be repealed on that ground.

What the appellant has stated regarding that the property may not be seized since it is not located in Sweden does not prompt the District Court to make a different assessment regarding that issue than the one made by the Enforcement Authority.

What has otherwise been stated in support of the appeals does also not prompt the District Court to make a different assessment than the one made by the Enforcement Authority. The assessment now made by the District Court means that the appeals shall be rejected.

With this outcome, the appellant does not have right to be compensated for its legal costs.

**HOW TO APPEAL**, see attachment 2 (DV 406).

Appeal to the Svea Court of Appeal shall be submitted to the District Court no later than on 20 December 2017. A review permit is required.

As above

Gustav Sandler

Record shown/

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NACKA DISTRICT COURT

**PROTOCOL**

2017-11-29  
Proceedings in Nacka

Case no.  
Ä 5710-17, file appendix 50  
Ä 6311-17, file appendix 9  
Ä 6689-17, file appendix 24

Proceedings in absentia.

**THE COURT**

Judge Mats Åhrling

**RECORDING CLERK**

Drafting clerk (Sw. *beredningsjurist*) Gustav Sandler

**APPELLANT**

The National Bank of Kazakhstan  
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**THE MATTER**

Enforcement of sequestration etc.

**DECISIONS UNDER APPEAL**

The Enforcement Authority's decisions of 6, 11 and 20 September and 5 October 2017 in case no U-24881-17/0103, decisions of 1 November 2017, nos 12174654207 and 12174652920 and decision of 14 November 2017, no 12174759568

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After enforcement had been requested of a sequestration decision on property belonging to the Republic of Kazakhstan in Sweden, the Enforcement Authority first decided to take *inter alia* shares, other securities and a claim regarding a refund of tax on dividends. Subsequently, the Enforcement Authority decided on execution of property.

The National Bank of Kazakhstan (the National Bank), which is the central bank of the Republic of Kazakhstan, has requested that the decisions be repealed and *inter alia* stated the following. The seized property is included in the National Fund which is held by the National Bank. The National Bank is, according to Kazakh law, a legal entity separate from the state in the form of an authority. The National Bank has its own balance sheet and acts independently in relation to the state. The bank enters into legal relations with other legal entities in its own name and has therefore a right of independent legal capacity. The National Bank and the state have entered into the so called National Fund Agreement concerning the management of the National Fund. Further, the National Bank and the Bank of New York Mellon (BNY) have entered into an agreement which means that BNY manages

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part of the assets in the National Fund. The Swedish central bank (*Sveriges riksbank*) has a similar standing under Swedish law as the National Bank has under Kazakh law. The Swedish central bank is an authority under the Swedish parliament (*riksdagen*) and is a legal entity separate from the state with legal capacity and party capacity, see the case NJA 1959 p. 385.

After a review of the documents, the District Court renders the following

### DECISION

#### Reasons

In Ch. 11, section 4 of the Code of Judicial Procedure, the following is stated. Evidence that the one which is stated to be a party in a court proceeding or wants to bring an action before a court as party or as counsel for a party has capacity is not necessary, unless the court finds that evidence should be presented.

The starting point of the section is, according to the Procedural Law Committee (Sw. *Processlagberedningen*) (NJA II 1943 p. 123) that the provisions on the procedural proceeding shall be observed *ex officio*, unless it is not stipulated otherwise or is in the nature of the matter. In the parliamentary reading of the government bill, the parliamentary committee shared the law committee's view that it could not be viewed as necessary that authorisation documents be presented to the same extent as before. At the same time, the parliamentary committee found that it is important both for the court and for the party that there is no doubt regarding capacity; if it would be found after the case had been adjudicated that a party or a counsel lacked capacity, this could mean that the judgment be quashed due to grave procedural error. The court should, according to the parliamentary committee, be able to require authorisation documents when it concerned a party or a counsel whose capacity was not known to the court (see Peter Fitger et al. [20 June 2017, Zeteo], commentary on Ch. 11, section 4 of the Code of Judicial Procedure).

There is an equivalent provision in section 9 of the Court Matters Act (SFS 1996:242).

The District Court has found reasons to question the National Bank's party capacity, i.e. that the bank is an independent legal entity – in relation to the Republic of Kazakhstan – which may have rights and obligations and therefore be party in a court proceeding.

In Ch. 11, section 2, paragraph 1 of the Code of Judicial Procedure, the following is stated. A company, association, religious community, foundation or other such establishment, which may

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acquire rights and undertake obligations, can be a party to a court proceeding. The same applies to the state and a municipality or other such congregation.

Besides physical persons, there exists several forms of legal persons as legal entities. These are based on private or public law. The prerequisites under which private legal entities are acknowledged and thus may acquire rights and obligations are regulated in private law. An express provision in law is not always required for organisations of a certain kind to be acknowledged as legal persons. The same may also apply regarding other organisations, such as non-profit associations under certain circumstances. In principle, the procedural party capacity coincides with the legal capacity in private law (see Peter Fitger et. al., the commentary on Ch. 11, section 2 of the Code of Judicial Procedure).

When the issue concerns a foreign legal person, the status in the jurisdiction in which the legal person has been formed is considered to be decisive. The issue on whether the National Bank is a legal entity and which persons that may represent the bank without specific powers of attorney by taking legal actions in its name is to be assessed on the basis of Kazakh law (see Peter Fitger et. al., the commentary on Ch. 11, section 3 of the Code of Judicial Procedure, Michael Bogdan, *Svensk internationell privat- och processrätt*, 2008, pp. 167 and 168 and the cases NJA 2007 N 6 and NJA 2008 p. 660).

In the assessment on whether the National Bank may be considered an independent legal entity, the Kazakh provisions regulating the bank's legal status and operations must be analysed. Primarily, the provisions set out below are relevant to the assessment.

From Law No. 2155 of 30<sup>th</sup> March 1996 of the Republic of Kazakhstan "Concerning the National Bank of the Republic of Kazakhstan", it appears that the National Bank is a state entity which is to represent the state's interests in relation to other countries' central banks, international banks and other financial and credit institutions (article 1 and 2), that the National Bank shall be subordinate to the President of Kazakhstan (article 3), that the National Bank shall be a legal entity in the form of a state-owned institution and that the bank shall act on behalf of the state as founder of certain legal persons (article 6). Further, it is stated that the bank's capital is to be owned by the state (article 9), that, after the President's approval of the bank's annual report, the remaining part of the bank's unpaid net surplus shall be transferred to the state budget within a certain time (article 11), that the President has a great influence when the bank's representatives are assigned and dismissed and that he is also represented in the board of the bank (articles 13, 14, 16 and 18). Further, it is stated that the bank is independent within the boundaries set out by Kazakh law and the Presidential Decree and that the banks in some regards acts as an independent entity (article 21 and 22), that it, under the headline "The National Bank of Kazakhstan – An Agent of the Government of the Republic of Kazakhstan" is stated

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that the National Bank may act as a bank, a financial advisor and an agent for the state (article 23 and 26) and that it, under the headline “The National Bank of Kazakhstan – A Bank for the Government and of the Republic of Kazakhstan”, is stated that the state’s assets shall be placed in the National Bank and that the bank shall make payments and transactions on behalf of the government (article 24).

From article 17-1 of the Constitutional Law of the Republic of Kazakhstan “Concerning the President of the Republic of Kazakhstan”, it is stated that the President has the right to issue decrees concerning the National Bank. In Edict No. 1271 of 31<sup>st</sup> December 2003 of the President of the Republic of Kazakhstan “Concerning the approval of the Regulations and the structure of the National Bank of the Republic of Kazakhstan”, *inter alia* the following is stated. [*Section in English also in the Swedish version, translator’s notice*] The National Bank is a state institute, directly subordinate and accountable to the President of the Republic of Kazakhstan, ensuring the development and implementation of monetary policy, the functioning of payment systems, the appropriate level of protection of the rights and legitimate interests of consumers of financial services, Promoting stability of the financial system, performing statistical activities in the field of monetary statistics and external sector statistics, currency regulation and control, government regulation, control and supervision of financial market and financial organizations, as well as other persons within the competence regulation of functioning of the regional financial centre Almaty (1 §). The National Bank of Kazakhstan is a legal entity in the legal form of a state government agency has its own balance [*sic*], and [...] is a single centralized structure with a vertical chain of command (4 §). The National Bank of Kazakhstan shall enter into civil law relations in its own name (5 §). Funding for the National Bank of Kazakhstan is carried out from the budget (cost estimate), the National Bank of Kazakhstan [*sic*]. Type of property of the National Bank of Kazakhstan – Republican state property (12 §).

In Edict No. 1271 it is further stated that the National Bank shall act independently on behalf of the state within the framework of its assignment (32 §). It is also apparent that provisions in the decree has, on various occasions, been decided, changed and repealed by the President.

In Resolution No. 792 of the Government of the Republic of Kazakhstan dated July 26 2004 on some issues of asset management of the National Oil Fund of the Republic of Kazakhstan, the following is stated. The Bank shall determine the legal advisor in collaboration with the Government who, if necessary, will represent the interest of the Fund in foreign countries in the resolution of legal disputes arising from the asset management of the Fund (2.2.8).

From the provision described above it is thus evident that it is the government, not the bank, which is to represent the fund’s interests in legal disputes abroad arising from the management of the fund.

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From the provisions described above, it is evident that the National Bank is a state entity, subordinate to the control of the President, that the bank in certain regards acts in its own name but on behalf of the state, e.g. with regards to the management of the National Fund and that the property held by the bank is state property. These circumstances suggest that the National Bank is part of the state and not an independent legal entity.

From the investigation in the present case, it is evident that the Kazakh state has requested a refund of paid tax on dividends attributable to certain property which has been seized through decisions which have now been appealed. In the application for refund, it has been attested on the honour that the property belongs to the state. Further, BNY has in its letter to SEB on 28 July 2017 on behalf of its client instructed SEB that the refund of tax on dividends is to be made to certain accounts at BNY. That client is the Ministry of Finance. That suggests the same thing.

With regards to the claim that the legal status of National Bank is comparable to the legal status of the Swedish central bank, the District Court makes the following assessment. The bank has stated that the Swedish central bank constitutes a legal entity separate from the state with legal capacity and party capacity. The bank has, in this regard, referred to the case NJA 1959 p. 385. In that case, the Supreme Court held that the central bank constituted a legal entity separate from the crown. In the commentary on Ch. 11, section 2 of the Code of Judicial Procedure, it is stated that the Swedish central bank “ought” to be able to be considered to have its own party capacity. There is thus a certain degree of uncertainty as to whether the Swedish central bank should have such a capacity. From what the District Court has stated above, it is evident that the National Bank has a far less independent status in relation to the state than the Swedish central bank has.

In that assessment, the District Court also takes the following into account. The Republic of Kazakhstan in the year 2014 made a number of legislative changes in order to strengthen transparency and integrity in the judicial system. According to the Swedish Ministry of Foreign Affairs, a number of problems remain in practice, whereof the judicial system’s limited independence in relation to the executive power is the most serious. The Constitution stipulates an independent judiciary power, but in practice, the executive power has – if it desires so – influence over the judicial system (see the Ministry of Foreign Affairs report “Human rights, democracy and the principles of the constitutional state in Kazakhstan 2015-2016 (Sw. *“Mänskliga rättigheter, demokrati och rättsstatens principer i Kazakstan 2015-2016”*)).

Overall, the investigation strongly suggests that the National Bank is not an independent legal entity in relation to the state. The investigation to which the National Bank has referred in support of its alleged



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party capacity does not show that the bank is an independent legal entity. The National Bank has not proved its party capacity. Therefore, the appeal shall be dismissed.

**End**

The District Court dismisses the appeal.

**HOW TO APPEAL**, see attachment 1 (DV 406).

Appeal to the Svea Court of Appeal shall be submitted to the District Court no later than 20 December 2017. A review permit is required.

As above

Gustav Sandler

The record shown/