[informal translation from Dutch]

AMSTERDAM DISTRICT COURT

Private law division, Court in Summary Proceedings (Civil)

case list number / cause list number: C/13/638381 / KG ZA 17-1217 FB/MB

Judgment in summary proceedings of 5 January 2018

in the case of

SAMRUK-KAZYNA JSC., a
company under foreign law,
registered in Astana, Kazakhstan,
claimant in the summons of 24 November 2017,
Counsel: J. van den Brande and H.F. van Druten of Amsterdam,

v

1 ANATOLIE STATI,
2. GABRIEL STATI,
both residing in Chisinau, Moldavia,

3. **ASCOM GROUP S.A.,** a company under foreign law,
registered in Chisinau, Moldavia,

4. **TERRA RAF TRANS TRAIDING LTD,** a company under foreign law,
registered in Gibraltar,
defendants,
Counsel: G. J. Meijer and J.M. Flummelen of Amsterdam

1. The action

At a hearing held on 5 December 2017, the claimant, ("Samruk") put forward claims and sought orders in line with the writ of summons set out in a copy attached to this judgment. The defendants ("Stati et al.") mounted a defence in conclusion of which it requested this Court decline to grant the relief sought. Both parties inserted exhibits and a pleading note into the trial.
Following further exchanges the parties requested that judgment be issued.
Those attending the hearing were:
On Samruk's side: A. Mukhametzanov, A. Zhamiyev, G. Sehdou, J. Ruff, A. Attaïbi, M. de Jong and Van der Brande and Van Druten;

On Stati et al's side: E. Dzhazoyan, B.F. Assink, P.B. Fritschy and Meijer and Hummelen. A. Burroughs [sic], an English language interpreter, also attended for the benefit of those present who did not understand Dutch.

2. The facts

2.1. Stati et al. have invested over one billion US dollars in, amongst other things, oilfields in Kazakhstan. Stati et al. are of the view that the state of Kazakhstan (referred to variously below as the "Republic of Kazakhstan", "the state" or, in short, "Kazakhstan") has unlawfully expropriated these investments. In that connection they filed for arbitration against Kazakhstan on the basis of the Energy Charter Treaty.

2.2. Samruk is a Joint Stock Company (JSC) according to the law of the Republic of Kazakhstan. The Republic of Kazakhstan is the founder and sole shareholder of Samruk, a fund within the meaning of the 'Kazakhstan Law on the National Welfare Fund'. This states, amongst other things, that the shares in Samruk are the exclusive property of the state and are inalienable.

2.3. Samruk holds shares in KMG Kashagan B.V. ("KMGK"), a Dutch company.

2.4. In an arbitral award of 19 December 2013, that was supplemented on 17 January 2014 (collectively referred to below as the "arbitral award") Kazakhstan was, in response to a claim made by Stati et al., ordered to pay Stati et al. the amounts of USD 497,685,101 and
€ 802,103.24. No appeal may be lodged challenging this arbitral award.

2.5. In a judgment of 9 December 2016 the competent court in Stockholm, Sweden, dismissed Kazakhstan's application seeking the setting aside of the arbitral award.

2.6. Kazakhstan has not complied with the arbitral award.

2.7. On 30 August 2017 Stati et al. applied to the Court of Summary Proceedings attached to this District Court for leave to levy attachment on, amongst other things, the shares of Samruk in KMGK to the detriment of Kazakhstan and Samruk. In the attachment application it was contended, in summary, that Samruk is part of Kazakhstan. Leave was granted in a judgment of 8 September 2017, whereby the claims of Stati et al., including interest and costs, were quantified at USD 557,656,650 and € 992,520.

2.8. On 14 September 2017 Stati et al. levied attachment on all Samruk's shares in KMGK to the detriment of Samruk.

2.9. In the meanwhile and before the Amsterdam Appeal Court Stati et al. have lodged an application, in part directed against Samruk, seeking recognition and enforcement of the arbitral award.

2.10. In a letter of 3 November 2017 Kazakhstan requested that the Amsterdam Appeal Court stay the action referred to under paragraph 2.9 above until the High Court of Justice has issued a determination concerning the application for enforcement lodged in England by Stati et al., which, according to Kazakhstan, is destined to be denied, amongst other things because the arbitral award is, so it claims, the result of fraud on the part of Stati et al.

2.11. As Exhibit 9 Samruk has inserted a legal opinion prepared by S.I. Klimkin, 'Candidate of Juridical Sciences, Professor of the Caspian University', with respect to the legal status, rights and duties of a Joint-Stock Company (JSC) under Kazakhstan law on the basis of the Civil Code of the Republic of Kazakhstan (the "Kazakhstan Civil Code"). The legal opinion contains, amongst other things, the following passage:

3. The dispute

3.1. In summary Samruk is applying for the lifting of the attachment and for an order directing Stati et al. to bear the costs and subsequent costs of the action.

3.2. Samruk has based its application specifically on the proposition that Stati et al. do not have any claims against Samruk, but only against Kazakhstan and that there exist no grounds for identifying Samruk with the state.

3.3. Stati mounted a defence against this.

3.4. To the extent material, the parties' claims are examined in greater detail below.

4. Adjudication

4.1. A court will grant the lifting of a protective attachment order when, amongst other things, it is prima facie shown that the right invoked by the party levying attachment is unfounded.

4.2. The basis for the attachment levied by Stati et al. is the arbitral award according to which Kazakhstan has been ordered to pay significant sums of money to Stati et al. Samruk was not a party to the action that resulted in the arbitral award. It is not in dispute that Samruk is a legal person, that is to say, a legally independent entity.

4.3. Article 10:118 of the Dutch Civil Code (DCC) lays down that a corporation that has its seat or, in the absence thereof, its centre of activities facing the outside world at the time of its establishment, on the territory of the state according to whose law it has been established, is governed by the law of that state. Samruk has both its seat and its centre of activities in Kazakhstan, with the result that the law of that state applies to the answer to the question of whether the circumstance that it is a legally independent entity should trigger the lifting of the attachment in question. That which Stati et al. have argued otherwise (in their opinion the *lex fori* applies to the answer this question) does not suffice to adjudicate in a different sense.

4.4. On the grounds of Klimkin's legal opinion referred to in paragraph 2.11 there exist sufficient reasons supporting the interim presumption that under Kazakhstan law the basic premise is that a legal person is in principle not liable for claims against its shareholders and/or directors, and *vice versa*. According to this opinion this however is more in the nature of a general principle that prevails 'unless otherwise provided [for] by this Code', that is to say, ‘the Kazakhstan Civil Code'. In so far as is material, Article 8 of the Kazakhstan Civil Code of Kazakhstan states, as both parties concur:

4.5. Kazakhstan law therefore allows for the raising of a plea grounded on misuse of law or of a power. At the hearing, in this context Stati et al. pursued their argument that in essence Samruk was part, or an extension, of the Republic of Kazakhstan and that its reliance on its independence as a legal person with segregated assets was in this case exclusively purposed to thwart possible recovery on the part of creditors of Kazakhstan. This meant, so they contended, that Samruk was misusing its power to rely on its own legal personality.

4.6. In support of their claims on this point Stati et al. pointed to the following facts and circumstances.
- Kazakhstan is the founder and sole shareholder of Samruk. In Kazakhstan it is forbidden by law to alienate the shares at any time;
- Samruk is run by the State of Kazakhstan;
- Samruk's primary objective is ‘to increase the national welfare of the Republic of Kazakhstan’;

- Samruk's strategy requires the approval of Kazakhstan;
- the president of the board of Samruk is at all times the Kazakhstan prime minister;
- the members of the board of Samruk are obliged to implement the decisions of Kazakhstan;
- the board of Samruk may take no decisions that are at variance with 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 has not rebutted the accuracy of these facts and circumstances; or, failing that, has furnished an insufficient rebuttal thereof.

4.7. The foregoing may be summarised as follows: that the corporate objective of Samruk, if it does not coincide with, then it is subject to, the national interest of Kazakhstan, with the result that it has been determined as a matter of politics that Kazakhstan is and shall remain its sole shareholder and that the board of Samruk is controlled by Kazakhstan (or those politically responsible for Kazakhstan). Given that the contrary has neither been claimed nor has become evident, it can only be assumed that Kazakhstan (or those politically responsible for Kazakhstan) also exercise ultimate control over its assets and how these are used, with the result that in *de facto* economic terms these may be used as if they belong to Kazakhstan. These grounds warrant the interim conclusion that in its relationship towards Kazakhstan Samruk lacks *de facto* economic independence in the sense that Samruk is unable to rely on its legal independence with regard to Kazakhstan in order to carry out policy of its own that diverges from that of Kazakhstan (or from that of those politically responsible for Kazakhstan). Proceeding on this basis, and in the absence of a divergent explanation, it can only be presumed that Samruk was established by Kazakhstan with the purpose (or at least partial purpose) of keeping its assets beyond the reach of Kazakhstan's creditors.

4.8. In addition, in this trial it may be presumed that Kazakhstan is not willing to satisfy the claims of Stati et al.

4.9. In the light of the findings set out at paragraphs 4.6-4.8 above it may for the time being be presumed that Samruk is misusing (within the meaning of Article 8 of the Kazakhstan Civil Code) the power that it enjoys in principle to rely on its legal independence with regard to Stati et al.

4.10. Nor, for the same reason, can Samruk's defence hold, that Stati et al.'s applications cannot succeed because Stati et al. have been unable to submit an original arbitration agreement applicable to Samruk.

4.11. Nor can an analysis of the interests at play lead to an award of the application. Samruk has failed to make a sufficiently colourable case to the effect that it would suffer so great a loss from the attachment levied on its shares in KMGK as to cause its interests in the lifting of the attachment to weigh more heavily than those of Stati et al. in the enforcement thereof. While Samruk has claimed that the levying of attachment may trigger an Event of Default and that this may cause loans extended by third parties to become callable, it has failed to provide sufficient specification to that effect. The declaration made by Y. Zhanadil, the Managing Director of Samruk (exhibit 11 of Samruk) fails to add sufficient weight to support this. Moreover Samruk would be able to furnish security for the claims for which attachment is levied.

4.12. Nor do Samruk's propositions with regard to Article 21 of the Dutch Code of Civil Procedure furnish a ground for the lifting of the attachment. In this connection Samruk contended that Stati et al. failed to advise the Court in Summary Proceedings seized of the attachment application of the position in the action taking place before the English High Court. Yet this fails to warrant the conclusion that Stati et al. supplied the Court seized of the attachment application with either false or incomplete information, nor that this would have resulted in a different judgment in respect of the leave to levy attachment.

4.13. The foregoing leads to the conclusion that there do not exist summary indications pointing to the improper nature of the right invoked by Stati et al. The parties' other submissions need not detain this Court.

4.14. The remedy sought is thus denied and Samruk, as the party against whom judgment will be given, will be directed to bear the costs of the trial incurred on the side of Stati et al.

5. The judgment

The Court in Summary Proceedings

5.1. denies the relief sought;

5.2. orders Samruk to bear the costs of this action, that, as of today's date, are quantified on the side of Stati et al. at:
€ 618 as court registry fee
and € 816 as counsel's fee;

5.3. declares this judgment immediately enforceable.

This judgment has been rendered by F.B. Bakels, Judge in the Court of Summary Proceedings, assisted by M. Balk, Clerk, and was pronounced in open court on 5 January 2018.

type:
MB coll:
BB