# RULING

**AMSTERDAM COURT OF APPEAL**

civil and tax law division, team I
case number: 200.234.096/01 KG
case number/cause-list number Amsterdam District Court: C/l3/638381 / KG ZA 17-1217

**ruling by the three-judge section for civil-law matters on 7 May 2019**

In the matter of
1. the company incorporated under foreign law
**SAMRUK-KAZYNA JSC**,
with its registered office in Astana (Kazakhstan),
appellant,
legal counsel: H.F. van Druten, attorney practising in Amsterdam,

and

2. **REPUBLIC OF KAZACHSTAN,**
seated in Astana (Kazakhstan), joined party,
legal counsel: A.W.P. Marsman, attorney practising in Amsterdam,

versus

1. **Anatolie STATI**,
residing in Chisinau (Moldavia),
2. **GABRIEL STATI**,
residing in Chisinau (Moldavia),
3. the company incorporated under foreign law
**ASCOM GROUP S.A.**,
with its registered office in in Chisinau (Moldavia),
4. the company incorporated under foreign law
**TERRA RAF TRANS TRADING LTD.**,
with its registered office in Gibraltar,
respondents,
legal counsel: G.J. Meijer, attorney practising in Amsterdam.

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

**1. The further course of the proceedings on appeal**

By summons of 2 February 2018, Samruk appealed against a judgment of the Amsterdam District Court in preliminary relief proceedings of 5 January 2018, rendered in this case under the above-mentioned case number/cause-list number between Samruk as claimant and Stati et al. as defendants.

Samruk, Kazakhstan and Stati et al. subsequently submitted the following documents:
- statement of appeal, with exhibits, on the part of Samruk;
- statement after joinder on the part of Kazakhstan;
- defence on appeal, with exhibits, on the part of Stati et al.

Samruk, Kazakhstan and Stati et al. have argued their case at the hearing of 13 March 2019, Samruk by its aforementioned legal counsel as well as by J. van den Brande, attorney practising in Amsterdam, Kazakhstan by its aforementioned legal counsel and Stati et al. by their aforementioned legal counsel as well as by B.F. Assink, attorney practising in Amsterdam, all on the basis of written arguments that they submitted in the proceedings. Samruk, Kazakhstan and Stati et al. were also granted permission to submit further exhibits to the proceedings.

Finally, a ruling was requested.

Samruk has moved, in short, that this Court, by provisionally enforceable ruling, set aside the judgment under appeal and primarily lift the attachment on the shares in the capital of KMG Kashagan B.V., or alternatively, order Stati et al. – on pain of forfeiture of a penalty – to lift the attachment levied on Samruk, with a decision on the costs of the proceedings, including the subsequent costs and statutory interest.

Kazakhstan has moved to set aside the judgment under appeal, with a decision on the costs of the proceedings.

Stati et al. have moved, in short, that the Court of Appeal primarily uphold the judgment under appeal, or alternatively – in the event that this Court lifts the attachment – declare the judgment not provisionally enforceable, or at least make it subject to the condition that Samruk provides security up to the amount for which the leave to levy attachment (by order of the Amsterdam District Court in preliminary relief proceedings of 8 September 2017) has been granted, with a decision on the costs of the proceedings, including subsequent costs and statutory interest.

**2. The facts**

In grounds 2.1 to 2.11 of the judgment under appeal, the preliminary relief court has listed the facts that it has taken as a starting point. To the extent that these facts are not in dispute between the parties, this Court will also assume these facts to be established. In addition, this Court notes that insofar as Samruk complains with ground for appeal 1 that the preliminary relief court in ground 2.1 wrongly included something as an established fact, this Court will reproduce this listed fact in such a way that it, as formulated, is in any case correct. Insofar as Samruk subsequently notes that certain (additional) facts are not included in the list, this does not affect the correctness of the facts summarised by the preliminary relief court and this Court will take into account the facts referred to by Samruk, insofar as relevant, in the following.

**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 American 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. In connection with this, they have initiated arbitration proceedings against Kazakhstan based on the Energy Charter.

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

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

(iv) By arbitral award of 19 December 2013 as supplemented on 17 January 2014 (hereinafter jointly 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. There is no appeal possible against this ruling.

(v) In its judgment of 9 December 2016, the competent court in Stockholm, Sweden, dismissed Kazakhstan's claim to have the arbitral award set aside.

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

(vii) By (amended) application, received on 31 August 2017, Stati et al. requested the Amsterdam District Court in preliminary relief proceedings for leave to levy attachment against Kazakhstan and Samruk, on, inter alia, shares of Samruk in KMGK. The application for attachment argued, in short, that Samruk is part of Kazakhstan. The leave was granted by decision of 8 September 2017, with the claims of Stati et al. (including interest and costs) estimated at USD 557,656,650 and € 992,520.

(viii) On 14 September 2017, Stati et al. levied attachment against Samruk on all shares of Samruk in KMGK (hereinafter the 'attachment').

(ix) Stati et al. have in the meantime submitted to this Court an application for recognition and enforcement of the arbitral award, which is also directed against Samruk.

(x) By letter of 3 November 2017, Kazakhstan requested this Court to adjourn the proceedings mentioned under (ix), until the English High Court of Justice has ruled on the English application for exequatur of Stati et al., which according to Kazakhstan should be dismissed, among other things because the arbitral award would be the result of fraud on the part of Stati et al.

(xi) By order of 6 November 2018 in the proceedings referred to under (ix), this Court considered, inter alia, that, in view of all relevant circumstances, that it is logical, after weighing up the mutual interests, to adjourn the further processing of the application and to await the judgment of the English High Court of Justice and to give Kazakhstan the opportunity to submit that judgment to the proceedings. This Court added to this, among other things, that in light of the for now sufficiently substantiated contestation by Stali et al. of the statements to that effect by Kazakhstan, this Court sees insufficient reason at present, based on the currently available documents, to decide that the arbitral award was made under the influence of deception and that its recognition or enforcement would therefore be contrary to public order.

3.2 Samruk has requested in the first instance, in short, the lifting of the attachment, with Stati et al. being ordered to pay the costs of the proceedings, including any subsequent costs. Samruk has argued, in short, that Stati et al. have no claims against Samruk, but only against Kazakhstan, and that there are no grounds for equating Samruk with Kazakhstan. Stati et al. have put forward a defence against Samruk's claim.

3.3. In so far as currently relevant, the preliminary relief court considered the following in the judgment under appeal. Stati et al. base the attachment on the arbitral ruling, in which Kazakhstan was ordered to pay considerable sums of money to Stati et al. Samruk was not a party to the proceedings in this respect, while it is not disputed that Samruk is a legally independent entity. The law of Kazakhstan applies to the question whether the fact that it is a legally independent entity should lead to the lifting of the present attachment. For now it is sufficiently plausible that (also) under the law of Kazakhstan it is assumed 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) under the law of Kazakhstan a claim can be made for abuse of rights. From a number of (more detailed) facts and circumstances it can be deduced that Samruk's corporate object, if not coinciding with, is entirely subordinate to Kazakhstan's national interest, as is politically determined, Kazakhstan is and remains its sole shareholder, and Samruk's board is controlled by (the politically responsible parties in) Kazakhstan. Under these circumstances, for the present it must be assumed – now that the contrary has not been stated or proven – that (the politically responsible parties in) Kazakhstan also exercise final control over its assets and spending, with the result that this can be used factually and economically as if it belongs to Kazakhstan. On these grounds, for the present, the judgment is justified that Samruk lacks factual economic independence in its relationship to Kazakhstan, in the sense that Samruk cannot invoke its independent legal standing towards Kazakhstan to pursue its own policy that deviates from that of (the politically responsible parties in) Kazakhstan. Assuming this, and in the absence of another explanation, it must be assumed that Samruk was founded by Kazakhstan with (at least partly) the purpose of keeping its assets out of the reach of Kazakhstan's creditors. This means that for the present it is plausible that Samruk is abusing in principle its existing right to invoke its legal independence vis-à-vis Stati et al. A weighing of interests also does not lead to the granting of the request. Samruk has insufficiently demonstrated that it suffers so much damage from the attachment on its shares in KMGK that its interest in lifting the attachment would have to weigh more heavily than those of Stati et al. in enforcing it. Moreover, Samruk could provide security for the claims for which the attachment has been levied. The foregoing leads to the conclusion, according to the preliminary relief court, that it has not been proven on the balance of probabilities that the claim or right invoked by Stati et al. is unfounded. On this basis, the preliminary relief court refused the requested relief and ordered Samruk to pay the costs of the proceedings.

3.4. The key question raised by the grounds for appeal is not – as assumed by the preliminary relief court (according to grounds 4.1 and 4.13) – whether the attachment should be lifted because it has summarily been proved that the underlying claim is unfounded, but *primarily* whether the attachment should be lifted because it is

in itself unlawful, now that it was not levied on an asset of the debtor (Kazakhstan) but on an asset of a third party (Samruk), and *alternatively* whether the attachment should be lifted because, weighing all (relevant) interests of the parties (completely) against each other, it constitutes an abuse of rights. Before discussing this key question, however, a number of preliminary questions need to be answered.

3.5. Since the present case concerns foreign parties, this Court has ruled that pursuant to Article 10:3 Dutch Civil Code, Dutch law applies as lex fori in the manner of litigation before the Dutch court, that it includes provisional measures and that the question under which conditions a measure can be requested is a matter of procedural law in this respect. This means that the question under which conditions the lifting of the attachment can be applied for is governed by Article 254 DCCP and – as it concerns a prejudgment attachment – in particular Article 705(2) DCCP, which in essence means that the lifting must be granted, among other things, if it is proven on the balance of probabilities that the right invoked by the prejudgment creditor is unfounded or that the attachment is unnecessary – that is to say, if there is an abuse of rights – or, if it concerns an attachment for a pecuniary claim, sufficient security is provided for that claim. This Court adds that it may be required of the party seeking the lifting of the attachment, taking into account the limitations of the preliminary relief proceedings, to plausibly argue that the claim alleged by the judgment creditor is unfounded or for example the attachment constitutes an abuse of rights, where the preliminary relief court has to decide on the basis of an assessment of what has been put forward by both parties and has been summarily supported with evidence, which assessment cannot take place separately from the weighing of the mutual interests that is required in such a case (cf. inter alia Supreme Court 14 June 1996 NJ 1997/481 and Supreme Court 30 June 2006, NJ 2007/483).

3.6. A preliminary question that then needs to be discussed is Samruk's invocation of jurisdictional immunity. According to Samruk, the preliminary relief court essentially ruled that Kazakhstan had abused its rights by establishing Samruk, because it had founded Samruk (at least in part) to prejudice its creditors, but the preliminary relief court should not have examined the legality of these acts at all, because it concerns a government act of a sovereign state in its internal system on its own territory. First of all, this argument fails because it lacks a factual basis. After all, the preliminary relief court did not consider that Kazakhstan is guilty of an abuse of rights by establishing Samruk, but considered that (for the present it is plausible that) Samruk abused its in principle existing rights to invoke its legal independence – on the existence of which the parties agree – against Stati et al. Furthermore, this argument fails because it cannot be deduced from the nature of this act of Samruk that it exercised a typical government task in this respect, but that this (therefore) concerned the exercise of a commercial activity that was in fact in accordance with the object for which Samruk was founded according to its own assertions (see statement of appeal under 34 and statement after joinder under, for example, paras. 29, 31, 33 and 44). The conclusion is that ground for appeal 13 fails.

3.7. The final preliminary question to be answered is whether Samruk rightly (partly) invokes immunity from execution. According to Samruk, it presents this argument only in the event that Samruk is equated with Kazakhstan. Expressed in this way, this argument lacks any factual basis, because the preliminary relief court judge, in whose considerations Samruk apparently read this view, did not equate Samruk and Kazakhstan, but, on the contrary, (for the present) concluded that Samruk, as a separate legal entity, is abusing its in principle existing right to rely on its legal independence vis-à-vis Stati et al. The Court adds to this, unnecessarily, that even if (presumably) it is assumed that (the considerations of the preliminary relief court must be understood in such a way that) Samruk and Kazakhstan must be equated, this Court cannot follow Samruk in its argument that it is entitled to invoke immunity from execution. In doing so, this Court takes as its starting point that assets of foreign states are not susceptible to attachment and execution unless and insofar as it has been established that they have a use that is not incompatible with this, in which case it is always the creditor who has to provide information on the basis of which it can be determined that the assets are used by the foreign state or are intended for, in short, other than public uses (cf. Supreme Court 30 September 2016, NJ 2017/190). Leaving aside whether it is conceivable that Samruk, and not Kazakhstan, may invoke immunity from execution in this way, such an invocation will in that case at any rate (also) have to be considered as having been made on behalf of Kazakhstan. According to this Court, it is then up to Stati. et al., in short, to make it plausible that not the final (ultimate), but the immediate use of the assets – here: the shares of Samruk in KMGK – is other than a public use, already because a different interpretation of the aforementioned starting point makes it de facto impossible for individual judgment creditors such as Stati et al. to enforce their rights. Stati et al. have made this sufficiently plausible, also in view of what Samruk and Kazakhstan themselves had already argued about Samruk's commercial purpose (see statement of

appeal para. 34 and statement after joinder, for example, paras. 29, 31, 33 and 44) (defence on appeal para. 170). This means that ground for appeal 14 also fails.

3.8. This brings this Court to the answer to the primary key question, namely whether the attachment should be lifted because in itself it is unlawful now that it has not been levied in respect of assets of the debtor (Kazakhstan) but in respect of assets of a third party (Samruk). As already considered 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 claim of Stati et al. and (thus) the attachment, only Kazakhstan is a debtor of Stati. et al., the attachment that has been levied against Samruk is in principle unlawful, in the absence of the right to do so (cf. Article 3:276(1) DCC and Article 435 DCCP, both of which provisions are of a procedural nature), so that in principle, pursuant to Article 705(2) DCCP, it has to be lifted. It is therefore crucial whether there are (sufficient) grounds to deviate from this main rule. In this respect, the Court considers as follows.

3.9. The parties agree – after all, no ground of appeal is directed against the relevant ground (4.3) in the judgment – that the question whether the circumstance that Samruk is a legally independent entity should lead to the lifting of the attachment is governed by the law of Kazakhstan. Samruk has submitted (as Exhibit 9) to the proceedings a 'legal opinion' of S.I. Klimkin, 'Candidate of Juridical Sciences, Professor of the Caspian University' (hereinafter ‘Klimkin’) of 21 November 2017 regarding the legal status, rights and obligations of a JSC under the law of Kazakhstan on the basis of the Civil Code of the Republic of Kazakhstan (hereinafter ‘Civil Code’), which 'legal opinion' includes 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 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 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.”

This Court agrees with the preliminary relief court that this makes it sufficiently plausible for the present that (also) under Kazakhstan's law it is assumed that a legal entity is in principle not liable for any claims against its shareholders and/or directors, and vice versa. The fact that this is a starting point on which exceptions are possible is clear from the wording 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 Civil Code, which – also according to the parties – stipulates, among other things, 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 preliminary relief court has done, that in the present case (also) under the law of Kazakhstan an abuse of rights can be invoked, more specifically that it is possible that Samruk abuses its right to invoke its legal personality. Samruk states in particular that this applies to Samruk as a JSC, because under the law of Kazakhstan a JSC can never be held liable for obligations of its founder(s) and/or shareholder(s). Samruk invokes Article 44.2 Civil Code and Article 3 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, save 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 JSC Act without a possible exception being made, and this provision is also intended as such, with the result that no exception can be made to the general principle on the basis of Article 8 Civil Code in the case of a JSC, even apart from the fact that Article 8 Civil Code cannot serve as the basis for liability. In support of its position, Samruk submitted, among other things, legal opinions by Klimkin of 21 November 2017 – supplemented on 30 November 2017 – and 5 March 2018 (see Exhibits 9 and 28) and M.K. Suleimenov's 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') of 6 March 2018 and February 2019 (Exhibits 29 and 42). Stati et al. have disputed this interpretation of Kazakh law, giving reasons, substantiated by legal opinions by Peter B. Maggs, Professor of Law holding the Clifford M. & Bette A., among others. Carney Chair in Law at the University of Illinois College of Law (hereinafter 'Maggs') of 3 January 2018 and 12 April 2018 (Exhibits 26 and 34) and of Seigei Vataev, attorney practicing law in Kazakhstan since 1992 (hereinafter 'Vataev') of 19 June 2018 and 8 March 2019, submitted as Exhibits 35 and 59. In view of this, Samruk has for now insufficiently demonstrated that under Kazakh law the intended possible exception to the main rule (with Samruk *as JSC*) does not apply in this case. Therefore, since the preliminary relief proceedings leave no room for further instruction (for example in the form of an opinion of the International Legal Institute), this Court will, in the context of these proceedings, assume the possibility that under Kazakh law the abuse of rights may constitute a ground for making an exception to the main rule that a legal person (Samruk) is not liable for claims against its shareholders and/or directors (Kazakhstan). As a result of the above, ground for appeal 3, ground for appeal 4, ground for appeal 5 and ground for appeal 6 also fail. This Court adds that in so far as Samruk, with ground for appeal 7, complains that the preliminary relief court in this respect wrongly considered a certain assertion as put forward by Stati et al., the validity of this ground for appeal need not be discussed, because, even if the ground for appeal is well-founded, this assertion has in any case become part of the legal dispute between the parties in the appeal proceedings.

3.10. With a view to answering the primary key question, it is therefore important to determine whether there is a case here in which the reliance on legal independence (by Samruk) constitutes an abuse of rights. The preliminary relief court has answered this question in the affirmative (ground 4.9) and has based this on the following considerations:

> "4.6. In support of its assertions on this point, Stati et al. referred to the following facts and circumstances.
> - Kazakhstan is founder and sole shareholder of Samruk. Kazakhstan is prohibited by law from ever disposing of the shares;
> - Samruk is controlled 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 chairman of Samruk's board is at all times the prime minister of Kazakhstan;
> - the members of Samruk's board are obliged to implement the decisions of Kazakhstan;
> - the board of Samruk may not take decisions that conflict with decisions of Kazakhstan as sole shareholder,
> - Kazakhstan may dismiss the members of the board at its discretion and at any time.
>
> Samruk has not, or at least insufficiently contradicted the accuracy of these facts and circumstances.
>
> 4.7. In essence the foregoing means that Samruk's corporate object, if not coinciding, is entirely subordinate to Kazakhstan's national interest, as is politically determined, Kazakhstan is and remains its sole shareholder, and Samruk's board is controlled by (the politically responsible parties in) Kazakhstan. Under these circumstances, it must be assumed – now that the contrary has not been stated or proven – that (the politically responsible parties in) Kazakhstan also exercise final control over its assets and spending, so that this can be used factually and economically as if it belongs to Kazakhstan.
> For the present, this justifies the conclusion that Samruk lacks factual and economic independence in its relationship with Kazakhstan. In the sense that Samruk can invoke its legal independence vis-à-vis Kazakhstan in order to pursue its own policy, which differs from that of (the political leaders in) Kazakhstan. Assuming this, and in the absence of another explanation, it must be assumed that Samruk was founded by Kazakhstan with (at least partly) the purpose of keeping its assets out of reach of Kazakhstan's creditors.
>
> 4.8. In these proceedings it is also plausible that Kazakhstan is not prepared to pay the claims of Stati et al."

This Court observes first that in so far as Samruk is directing its appeal against ground 4.8 and argues that Kazakhstan has good reasons not to comply with the arbitral award, this does not in any way detract from the correctness of this ground so that ground for appeal 10 fails. In addition, this Court superfluously observes that insofar as Samruk invokes in this respect the fact that Stati et al. committed fraud in the proceedings leading to the arbitral award, it has so far not been definitively established in any of the proceedings that this was the case. Furthermore, this Court observes that while Samruk (with ground for appeal 8) discusses the facts and circumstances referred to in ground 4.6, it provides a more detailed explanation of these facts and circumstances in particular, but – except insofar as it concerns the fact mentioned in the second indent – does not in itself contest the correctness thereof. In this respect this Court notes – also in view of the assertions of Stati et al. (in so far as not

disputed) in this respect – that although it is true that Kazakhstan does not direct Samruk, but that it has founded Samruk and that as the sole shareholder and through the Board of Directors and the Management Board it has decisive influence on Samruk's policy, so that it also exercises the final control over Samruk's assets and the way in which they are disposed of. Also taking into account the nuances proposed by Kazakhstan in the sixth and seventh indents (statement after joinder para. 91 (pp. 35-36), this Court concurs with the opinion of the preliminary relief court (in ground 4.7) and the associated conclusion 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, different from that of (the politically responsible persons in) Kazakhstan, policy. Contrary to what the preliminary relief court has considered, this Court adds that Samruk, irrespective of the (formal) purpose of founding this company (see in this respect in particular statement after joinder paras. 28-46, in particular paras. 44-46), in any case (partly) serves as a means to keep substantial assets of Kazakhstan out of the control of creditors by holding shares in a number of important Kazakh state participations (see statement after joinder para. 42) which, if it is allowed to invoke its legal independence against a creditor of Kazakhstan, are not subject to redress by that creditor, although Kazakhstan, among other things, exercises the final control over Samruk's assets and the use thereof.

3.11. As a result, this Court also deems it plausible for the present that Samruk abuses – within the meaning of Article 8 Civil Code – its in principle existing right to invoke its legal independence vis-à-vis Stati et al. This Court notes that Samruk has continuously argued that the preliminary relief court has wrongly equated Samruk and Kazakhstan, despite this not being possible under Kazakh law (see e.g. statement of appeal paras. 71-73, 118 and 121), which argument was also pursued by Kazakhstan (statement after referral paras. 97-99). However, the Court of Appeal cannot follow Samruk and Kazakhstan in this argument, because the preliminary relief court has considered precisely the opposite by (for the present) ruling that Samruk, as a separate legal entity, abuses its in principle existing right to invoke its legal independence vis-à-vis Stati et al.

3.12. The above means that ground for appeal 8, ground for appeal 9 and ground for appeal 11 fail. Now that it has been established that (also) the assets of Samruk, although not being a debtor of Stati et al., are in principle capable of recovery by Stati et al., ground for appeal 2 and ground for appeal 12 – both of which argue that Stati et al. do not have an enforceable title against Samruk – also fail.

3.13. This brings this Court to answering the subsidiary key question, namely whether after weighing all (relevant) interests of the parties (completely) against each other the attachment should be lifted because it constitutes an abuse of rights (as being vexatious or "unnecessary" within the meaning of Article 705(2) DCCP: see, inter alia, Supreme Court 11 April 2003, NJ 2003/440). In this case, this question coincides with the general consideration of interests that is inherent in preliminary relief proceedings (see statement of appeal, IV. 15 and VI). In answering this question, this Court first notes that the question whether the levy of a prejudgement attachment should be regarded as vexatious and therefore unlawful must in principle be answered on the basis of the concrete circumstances at the time of the attachment, including the amount of the claim to be recovered, the value of the assets attached and the possibly disproportionate way in which the debtor's interests are affected by the attachment on its assets (cf. Supreme Court 24 November 1995, NJ 1996/161). In this connection, Samruk argued in particular that the attachment of its shares in KMGK causes it a great deal of damage, because it could result in a so-called Event of Default that could lead to a claim for financing by third parties, and that it has therefore asked the banks for a so-called 'waiver' of the defaults, which waiver, however, has not been provided to date. In support of this argument, Samruk submitted a statement by Y. Zhanadil, CFO of Samruk, into the proceedings. Furthermore, Samruk has argued that the judgment under appeal, which has received a lot of attention in the (international) press, has (potentially) far-reaching consequences for Samruk's ability to attract financing. However, these extensively disputed assertions of Samruk, substantiated only by a director of Samruk, cannot outweigh the substantiated interest of Stati et al. in maintaining the attachment (see defence on appeal para. 175). In addition, Samruk has not argued that it is unable to provide security within the meaning of Article 705 (2) DCCP. This means that the attachment does not constitute an abuse of rights and that ground for appeal 15 fails.

3.14. Samruk also argued that Stati et al., in their application for attachment, failed to inform the preliminary relief court of the status of the proceedings before the English High Court of Justice – in particular by failing to submit the judgment of 6 June 2017 rendered by said court – and that this constitutes a violation of Article 21 DCCP that justifies the lifting of the attachment. This Court considers in this respect that although Samruk argues that Stati et al. – who have disputed this – committed fraud in the proceedings leading to the arbitral award –

neither in those proceedings nor in any other proceedings has it been established yet that Stati et al. have committed fraud. Under these circumstances, this Court endorses the opinion of the preliminary relief court that the conclusion is not justified that Stati et al. have, in the application for attachment, incorrectly or incompletely informed the court or that the information in question would have led to a different decision with regard to the leave for attachment. It follows from this that ground for appeal 16 also fails.

3.15 Finally, this Court considered that the ground for appeal 17 lacks independent significance, so that it, considering the fate of the previous grounds for appeal, fails as well.

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

**4. Decision**

The Court of Appeal:

upholds the judgment upon appeal;

orders Samruk to pay the costs of the appeal proceedings and estimates those costs, insofar as they have been incurred to date on the part of Stati et al., at € 726 in disbursements, at € 3,222 in lawyer's fees and at € 157 in additional fee, to be increased by € 82 for after additional fee and the costs of the writ of summons in the event that this judgment is served, subject to statutory interest thereon as from fourteen days after the service of this judgment until the day of payment;

orders Kazachstan to pay the costs of the appeal proceedings and estimates those costs, insofar as they have been incurred to date on the part of Stati et al., at € 726 in disbursements, at € 3,222 in lawyer's fees and at € 157 in additional fee, to be increased by € 82 for after additional fee and the costs of the writ of summons in the event that this judgment is served, subject to statutory interest thereon as from fourteen days after the service of this judgment until the day of payment;

declares this cost award provisionally enforceable.

This ruling was rendered by the Right Honourable judges D.J. van der Kwaak, G.C. Boot and F.J. Verbeek and pronounced by the cause-list judge in an open session of the court on 7 May 2019.