UNOFFICIAL TRANSLATION

To

Svea Court of Appeal, Division 5

SUBMISSION

Appellant:
The Republic of Kazakhstan
Ministry of Finance
11 Zhenis Avenue
010000, Nur-Sultan, Kazakhstan

Counsel:
Advokaterna Alexander Foerster and Ludwig Metz and
jur.kand. Julia Fermbäck and *jur.kand.* Matilda Magnusson
Mannheimer Swartling Advokatbyrå AB
P.O Box 1711, 111 87 Stockholm
Telephone: 08-595 060 00
Email: alexander.foerster@msa.se, ludwig.metz@msa.se,
julia.fermback@msa.se, matilda.magnusson@msa.se

Opposing parties and applicants:
Anatolie Stati
20 Dragomirna Street
Chisinau, MD-2008, Moldova

Gabriel Stati
1A Ghioceilor Street
Chisinau, MD-2008, Moldova

Terra Raf Trans Traiding Ltd.
Don House, Suite 31
30–38 Main Street, Gibraltar

Ascom Group S.A.
75 A. Mateevici Street
Chisinau, MD-2008, Moldova

Counsel:
Advokaterna Bo G.H. Nilsson, Therese Isaksson and Ginta Ahrel and
jur.kand. Kristians Goldsteins
Westerberg & Partners Advokatbyrå AB
P.O Box 3101, 103 62 Stockholm
Telephone: 08-578 403 00
Email: bo.nilsson@westerberg.com, therese.isaksson@westerberg.com,
ginta.ahrel@westerberg.com,
kristians.goldsteins@westerberg.com

Appealed decisions:
Nacka District Court's decisions on 5 July 2019 in cases no. Ä 6686-17, Ä 1222-18, Ä 1223-18, Ä 1857-18, Ä 1859-18, Ä 1977-18, Ä 2543-18, Ä 2544-18, Ä 4353-18, Ä 4354-18, Ä 6339-18 and Ä 6620-18.

Table of contents

Acting as counsel for the Republic of Kazakhstan (”**Kazakhstan**”), we submit the following supplementary appeal.

A. Introduction and outline

1. Nacka District Court decided on 5 July 2019 to reject Kazakhstan’s and the National Bank of the Republic of Kazakhstan’s (the ”**National Bank**”) appeals regarding the Swedish Enforcement Authority’s (the “**SEA**”) decisions

   (i) on 1 November 2017, no. 12174654207 and 12174652920;

   (ii) on 14 November 2017, no. 12174759568;

   (iii) on 19 February 2018, no. 1218367322;

   (iv) on 12 April 2018, no. 12181150496, 12181151544 and 12181151692;

   (v) on 12 June 2018, no. 12183170427;

   (vi) on 18 June 2018, no. 12183207427; and

   (vii) on 20 September 2018, no. 12184059371.

2. The appealed decisions concern seizure of assets claimed to belong to Kazakhstan. The enforcement measures were taken upon applications by Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd. The enforcement orders are the arbitral award in SCC case V(116/2010), Svea Court of Appeal’s judgment on 9 December 2016 in case no. T 2675-17 and Stockholm District Court’s decision on 24 January 2018 in case no. T 10498-17 under which Kazakhstan has been ordered to pay a total of over SEK 4 billion to the applicants.

3. The assets that the SEA seized had a total value of approximately SEK 725 million. The assets can be divided into three categories: securities, claims for dividends and claims for cash. The enforcement measures taken in the cases are described in the following.

4. Firstly, the cases concern enforcement decisions against the Bank of New York Mellon’s (”**BNY Mellon**”) security deposit *Safe Custody Account No*. 01-100261060 in Skandinaviska Enskilda Banken AB (publ) (”**SEB**”). The

securities that were registered in the deposit were nominee registered at Euroclear and attached under the SEA's decision of 6 September 2017. The value was then approximately SEK 786 million. After the securities were sequestered the SEA has made four seizure decisions.

5. The first decision was made on 14 November 2017 and concerned seizure of the securities that were previously sequestered. Their estimated value was then approximately SEK 780 million.[1] On 19 February 2018 the SEA made a second decision concerning seizure of the same securities.[2] On 12 April 2018 the SEA made another decision concerning seizure of the same securities.[3] On 12 June 2018 a fourth seizure decision was made. The decision concerned securities that had not been seized previously and their estimated value was approximately SEK 2,8 million.[4]

6. Thereafter, the SEA instructed SEB to sell the securities. The securities were sold for over SEK 720 million and the earnings from the sale are now held by the SEA.

7. Secondly, the cases concern two decisions to seize claims for dividends from the securities. The SEA made the first decision on 1 November 2017. The estimated total value of the seized claims was SEK 1,7 million.[5] On 12 April 2018 the SEA made another decision concerning seizure of the same claims that was seized on 1 November 2017.[6]

8. Thirdly, the cases concern four decisions concerning seizure of claims on funds in BNY Mellon's cash account with SEB.

9. On 1 November 2017 the SEA also decided to seize what is described in the decision as repayment of tax (*återbetalning av skatt*) but concerns a claim on BNY Mellon's cash account. A total of SEK 2,245,741 was seized.[7] On 12 April 2018 the SEA made another decision concerning seizure of the same

---

[1] The SEA's decision no. 12174759568 on 14 November 2017.
[2] The SEA's decision no.. 1218367322 on 19 February 2018.
[3] The SEA's decision no. 12181150496 on 12 April 2018.
[4] The SEA's decision no. 12183170427 on 12 June 2018.
[5] The SEA's decision no. 12174654207 on 1 November 2017.
[6] The SEA's decision no. 12181151544 on 12 April 2018.
[7] The SEA's decision no. 12174652920 on 1 November 2018.

property.[8] The third decision was made on 18 June 2018 and concerned BNY Mellon's claim on funds in SEB to an amount of SEK 2 billion.[9] The fourth and final decision was made on 20 September 2018. The decision concerned a claim against SEB with an estimated value of SEK 20,619, according to the SEA.[10]

10. In total, the SEA has made ten decisions concerning seizure of property. Four of them concern rights to securities in BNY Mellon's deposit with SEB, two of them concern claims on dividends and four of them concern funds in BNY Mellon's cash account with SEB. The total value of the property is approximately SEK 725 million. The claims on dividends and the funds on the cash account are directly pertaining to the securities in BNY Mellon's security deposit. What is stated in the following applies to the property as a whole, unless states otherwise.

11. All decisions have been appealed by Kazakhstan. In its appeals to Nacka District Court Kazakhstan stated that the enforcement measures must be lifted because it is not evident that the property belongs to Kazakhstan within the meaning of the Enforcement Code, that the property is covered by state immunity and that the securities are not located in Sweden. On incorrect ground, the District Court came to the opposite conclusion.

12. The appeal is outlined as follows. Chapter B and C includes Kazakhstan's requests for relief and grounds. Chapter D presents the background to the cases and the involved parties. The grounds for the appeal are elaborated in chapter E, which presents the conditions for when nominee registered securities may be seized, in chapter F, which explains that the property does not belong to Kazakhstan, and in chapter G, which explains that the securities are not located in Sweden. In these parts, Kazakhstan refers to what the National Bank has stated in chapter III of its appeal of 11 October 2019. In chapter H is explained that the seized property enjoys immunity from enforcement measures. In chapter I, Kazakhstan presents why the Court of Appeal should grant leave to appeal and in Chapter J the continuing

[8] The SEA's decision no. 12181151692 on 12 April 2018.
[9] The SEA's decision no. 12183207427 on 18 June 2018,
[10] The SEA's decision no. 12184059371 on 20 September 2018.

handling of the case. Chapter K includes Kazakhstan's preliminary statement of evidence.

B. Requests for relief

13. Kazakhstan requests that the Court of Appeal grant leave for appeal and, overruling the District Court's decision, lifts the SEA's decisions on seizure in decision no. 174654207 and no. 12174652920 on 1 November 2017, no. 12174759568 on 14 November 2017, no. 1218367322 on 19 February 2018, no.12181150496, 12181151544 and 12181151692 on 12 April 2018, no. 12183170427 on 12 June 2018, no. 12183207427 on 18 June 2018 and no. 12184059371 on 20 September 2018.

14. Kazakhstan requests that the Court of Appeal order the applicants to jointly compensate Kazakhstan for its legal costs in the District Court with USD 1,446,116 and SEK 30,807 excluding VAT.

15. Kazakhstan requests compensation for its legal costs in the Court of Appeal with an amount that will be specified later.

C. Grounds

16. The seized property does not belong to the debtor Kazakhstan within the meaning of Chapter 4, Section 17 of the Swedish Enforcement Code. The provision means that movable property may only be seized if it is evident that the debtor owns the property. The applicants have not proven that the property belongs to Kazakhstan. The property may thus not be seized or subject to any other enforcement measures for Kazakhstan's debts.

17. Even if the Court of Appeal would find that the property belongs to Kazakhstan, the seized rights to the securities are not in Sweden. This means that the rights to the securities are covered by immunity under the principle expressed in Article 19 of the United Nations Convention on Jurisdictional Immunities of States and Their Property (the "**UN Convention**") and that the SEA and the Swedish courts in any event lack authority to decide on enforcement measures against them. For this reason also, the securities may not be subject to enforcement measures for Kazakhstan's debt.

18. Even if the property would have belonged to Kazakhstan within the meaning of the Enforcement Code and would have been located in Sweden, the property is covered by immunity from enforcement measures under the principle expressed in Article 21(1)(c) in the UN Convention. The National Bank possesses, controls and manages the property. The property therefore belong to the National Bank (”*property of the central bank*”) under Article 21(1)(c) of the UN Convention and may thus not be subject to enforcement measures.

19. Even if the property would have belonged to Kazakhstan within the meaning of the Enforcement Code, been located in Sweden and not have enjoyed immunity as “*property of*” the National Bank within the meaning of the UN Convention, the property is in any event covered by immunity under the principle expressed in Article 19 of the UN Convention. None of the exceptions to the main rule of immunity expressed in Article 19 of the UN Convention are applicable. Kazakhstan has neither consented to measures of constraint nor allocated or earmarked the property for the claim that the cases concern. The property is in use and intended for use (i) to ensure the social and economic development of Kazakhstan, (ii) to reduce the state’s economic vulnerability to external factors and (iii) within the framework of Kazakhstan’s monetary policy. These purposes constitutes government non-commercial purposes. The Property is thus immune under the principle expressed in article 19 in the UN Convention and may thus not be subject to enforcement measures.

20. Finally, under Chapter 3, Section 21, Para. 2 of the Enforcement Code, enforcement of the arbitral award cannot take place because the arbitral award is contrary to Swedish public policy. The SEA’s decisions no. 12181150496, 12181151544, 12181151683, 12183170427, 12183207427 and 12184059371, which were based on the arbitral award, must therefore be lifted.

D. Background

D.1 Parties

D.1.1 Kazakhstan

21. Kazakhstan is a republic in Central Asia with a population of approximately 18 million people. With an area of over 2,7 million square kilometres, Kazakhstan is

the ninth largest country in the world. After being a part of the Soviet Union since 1920 Kazakhstan declared independency in December 1991. The separation from the Soviet Union initially meant big economic challenges for the country. However, substantial resources in the form of natural gas and oil have led to strong growth and been crucial to the stabilization of Kazakhstan's economy.

D.1.2 The National Bank

22. The National Bank is the central bank of Kazakhstan. The headquarters of the National Bank is in the city Almaty in Kazakhstan. The National Bank's main objective is to ensure the price stability in Kazakhstan. The National Bank manages the National Fund within its mission as the central bank of Kazakhstan. The National Bank is an independent legal entity.[11]

D.1.3 The applicants

23. The applicants are Anatolie Stati, Gabriel Stati, Terra Raf Trans Traiding Ltd and Ascom Group S.A. Anatolie Stati and his son Gabriel Stati are Romanian and Moldovan citizens and have their residence in Moldova. Together they own Terra Raf Trans Traiding Ltd, a company with its registered office in Gibraltar. Ascom Group S.A. has its registered office in Moldova and is owned solely by Anatolie Stati.

24. Anatolie Stati has been considered to be the richest person in Moldova. Together with his son Gabriel Stati he controls a large number of companies with registered offices in many jurisdictions, including jurisdictions where company information is scarcely accessible, as for example the British Virgin Islands. This makes the Stati conglomerate hard to survey.

D.2 The arbitration, the award and the claim against it

25. The appealed cases primarily derive from an award in an arbitration between the applicants on the one side and Kazakhstan on the other side. The arbitration was

[11] The fact that the National Bank is an independent legal entity has been confirmed in the decision of Svea Court of Appeal on 23 February 2018 in case no. ÖÄ 11256-17. Svea Court of Appeal stated that the National Bank is a legal entity that can acquire rights and assume obligations within civil law. The Court of Appeal also stated that the fact that the National Bank in some cases can act as a representative for Kazakhstan did not change the assessment.

seated in Sweden and concerned an alleged investment in Kazakhstan made by the applicants. The tribunal rendered an award on 19 December 2013, corrected on 17 January 2014, in which the applicants were granted damages in the amount of approximately USD 500 million.

26. After the award was rendered, Kazakhstan became aware of circumstances showing that the applicants had misled the tribunal in the arbitration by referring to false evidence and untrue statements. For this reason, Kazakhstan challenged the award in Svea Court of Appeal (case no. T 2675-14). Kazakhstan asserted, within the scope of the Court of Appeal proceedings, that the applicants' misleading had been decisive for, *inter alia*, the tribunal's assessment on the quantum of the damage. However, the Court of Appeal found no reason to invalidate the award under Section 33 of the Swedish Arbitration Act.

D.3 Enforcement outside of Sweden

27. Parallel with the enforcement proceedings in Sweden the applicants have also commenced enforcement proceedings in England, Belgium, the Netherlands, the U.S., Italy, France and Luxembourg. Kazakhstan has opposed enforcement in every jurisdiction on the ground that the award was obtained by misleading the tribunal. Kazakhstan has asserted that enforcement of the award is contrary to the public policy of the enforcement country. Kazakhstan has also opposed enforcement measures targeted at assets deriving from the National Fund with reference to the assets not belonging to Kazakhstan and in any event being protected by state immunity.

28. The enforcement proceedings in England were first stayed pending the outcome of the challenge before the Svea Court of Appeal. After the judgment of the Court of Appeal was rendered, the proceedings were resumed. On 6 June 2017, the High Court of Justice of England and Wales rendered a preliminary decision in which the Court held that Kazakhstan had shown, at a *prima facie* assessment, the award resulted from a fraud ("*there is a sufficient prima facie case that the Award was obtained by fraud*").[12]

[12] The High Court of Justice's judgment of 6 June 2017 in the case between Stati et al. and Kazakhstan, 11 May 2018, the district court's case file no. 23 and 67.

29. Therefore the court allowed a complete material trial of the question whether the applicants obtained the award by fraud and planned a two week long hearing in October 2018. In order to avoid a final judgment by an English court confirming that the award results from fraud, the applicants applied in March 2018 for discontinuance of its claim in England. On 11 May 2018, the English court decided to set aside the applicants' notice of discontinuance.[13] The court therewith stated the following regarding the real reason for the applicants application notice of discontinuance.

> "The real reason for the notice of discontinuance is that the Statis do not wish to take the risk that the trial may lead to findings against them and in favour of the State."[14]

30. The applicants appealed the decision to the English Court of Appeal, which in August 2018 allowed the applicants to discontinue its claim. The discontinuance means that it is definite, with binding effect, that the award is not enforceable in England. In Belgium, the Netherlands, the U.S., Italy, France and Luxembourg there is no final decision yet.

31. As to assets originating from the National Fund, the Supreme Court of the Netherlands has decided that such assets cannot not be sequestered as they are covered by state immunity under international law.[15]

D.4 Property originating from the National Fund

32. Kazakhstan created *The National Fund of the Republic of Kazakhstan* (the "**National Fund**") in 2000. The purpose was to preserve incomes from the oil industry in order to stabilise the national economy by reducing the effects of fluctuating oil and gas prices and to save for future generations.

---

[13] The High Court of Justice's judgment of 11 May 2018 in the case between Stati et al. and Kazakhstan, 11 May 2018, the district court's case file no. 68.

[14] The High Court of Justice's judgment of 11 May 2018 in the case between Stati et al. and Kazakhstan, 11 May 2018, the district court's case file no. 68, item 25.

[15] The Supreme Court of the Netherlands' decision of 14 October 2016 in the case between Stati el al. and the Netherlands, the district court's case file no. 25 and 70.

33. The National Fund was established as a Kazakh *trust*, of which Kazakhstan is the *trustor* and the National Bank is the *trustee*. Within the National Fund, Kazakhstan transfers oil incomes to the National Bank for management.

34. The National Bank's responsibility for the National Fund is governed by Kazakh law and an agreement between Kazakhstan and the National Bank (the "**National Fund Agreement**").[16]

35. Kazakh law and the National Fund Agreement provides that the National Bank's role as *trustee* includes a responsibility for the National Bank to invest the assets originating from the National Fund in financial instruments. Under the National Fund Agreement, the National Bank can either hold the assets by itself or transfer the assets to third parties, which then manages the assets by direction of the National Bank.

36. As set out in the National Fund Agreement, the National Bank has transferred part of the assets of the National Fund to the third party BNY Mellon. BNY is to act as a global custodian, or global intermediary (i.e. original intermediary, see paragraph 49 below on the meaning of the term). This is governed by Global Custody Agreement ("**GCA**").

37. GCA was first entered into by the National Bank, BNY Mellon and Boston Safe Deposit and Trust Company. Boston Safe Deposit and Trust Company's rights and obligations under the agreement were transferred to BNY Mellon on 6 April 2016. Since then, BNY Mellon is the sole opposite party in relation to the National Bank.

38. GCA sets out that "[t]*he ownership of Securities in the Account shall be clearly recorded on Boston Safe's* [(BNY Mellon's)] *books as belonging to the Client* [(the National Bank)]".[17] The agreement thus provides that the ownership of the claims on securities acquired by BNY Mellon be registered as belonging to the National Bank,

[16] The National Fund Agreement and Supplementary Agreement, the district court's case file no. 35 and 79 respectively 36 and 80.

[17] Global Custody Agreement, 24 December 2001, the district court's case file no. 134, Article 5.

i.e. on the National Bank's account in BNY Mellon's register. BNY Mellon keeps register of the National Bank's assets in London.[18]

39. BNY Mellon manages and invests the assets upon instructions from the National Bank and asset managers engaged by the National Bank. It has, *inter alia*, been decided that assets originating from the National Fund be invested in shares in Swedish CSD-registered companies.

40. In order to execute its own and its customers' acquisitions of securities in Swedish CSD-registered companies, BNY Mellon has engaged SEB as an intermediary, a sub-custodian. SEB is approved nominee by Euroclear. This means that SEB is entitled to register securities on behalf of its clients on nominee accounts in Euroclear's register.[19]

41. In order for SEB to register securities on behalf of BNY Mellon, BNY Mellon transfers funds from its own and its customers' accounts in England to a joint omnibus account with SEB in Sweden under an agreement between BNY Mellon and SEB. The agreement governs all investments that BNY Mellon carries out for itself and on behalf of its clients. For this purpose, SEB has registered over 6,000 security deposits in Sweden in BNY Mellon's name under the agreement with BNY Mellon.[20]

42. For purposes of the acquisitions, BNY Mellon has transferred money from the National Bank's accounts with BNY Mellon in London to BNY Mellon's omnibus account with SEB. SEB has subsequently executed the acquisitions by using the funds on the omnibus account to nominee register shares in Swedish CSD-registered companies. Following the acquisitions, the rights pertaining to the shares have been registered on SEB:s nominee account with Euroclear, on BNY Mellon's security deposit with SEB and on the National Bank's account with BNY Mellon in England.

---

[18] Letter from BNY Mellon to Frank Advokatbyrå of 13 October 2017, the district court's case file no. 38 and 78.

[19] Cf. Chapter 3, Section 2 § of the Swedish Central Securities Depositories and Financial Instrument (Accounts) Act (*lagen om värdepapperscentraler och kontoföring av finansiella instrument)*. The details were also confirmed by Catharina Buresten in her witness testimony at the hearing in Nacka District Court.

[20] The details were confirmed by Catharina Buresten in her witness testimony at the hearing in Nacka District Court.

E. Prerequisites for seizing CSD-registered securities

E.1 Introduction

43. As described in Chapter A, the SEA has seized claims for (i) rights registered on a security deposit, (ii) dividends and (iii) a cash account with SEB.[21] The seized claims were registered on accounts held by BNY Mellon on behalf of client. The securities registered on BNY Mellon's security deposit with SEB were nominee registered with Euroclear. This means that the holding of the securities was registered with Euroclear by SEB in its own name on behalf its customer.

44. Thus, there is no register in Sweden that points out Kazakhstan as the owner of neither the SEB accounts nor the securities registered with Euroclear.[22] Nevertheless, the SEA and Nacka District Court have both concluded that the property in the accounts belongs to Kazakhstan in the meaning of the Swedish Enforcement Code.

45. Below the following is described: (i) the prerequisites for seizing CSD-registered securities held in a chain of intermediaries, and (ii) the applicable law when seizing such securities.

E.2 Dematerialised securities can only be seized from the account provider who has registered the debtor's rights

46. Shares in Swedish CSD-registered companies are registered in CSD register with the Swedish CSD Euroclear. The CSD register consists of accounts in which holdings of rights to the securities are registered.

47. There are two kinds of accounts: owner accounts and nominee accounts. Owner accounts can be opened either by individuals or legal entities. Their holdings are registered in their own name for their own account. Nominee accounts can only be

[21] The SEA's decisions set out that claims on the omnibus account were subject to seizure. However, none on the seized claims pertains to the omnibus account.

[22] In the cases, it has been asserted that the account description of the security deposit points out Kazakhstan as the owner of the accounts with SEB. As described in paragraph 79, the account description in not a registration of Kazakhstan's right to the account with SEB and has not entailed that Kazakhstan has been granted any rights against SEB. See also chapter I.1 in the National Bank's submission on 11 October 2019.

opened by nominees approved by Euroclear (e.g. SEB). Their holdings are registered in their own name on behalf of someone.

48. Euroclear's register provides the owner of shares only if the ownership right is registered on an owner account. The owner of nominee registered securities is not provided by Euroclear's register. [23] CSD's must however provide a summary of shareholders with more than 500 nominee registered shares in a CSD-registered company.[24] Such information is provided by the nominee and kept in a public nominee list.[25]

49. If the intermediary is aware that its client is not the ultimate owner, there is no obligation to report who the ultimate owner is.[26] The intermediary may in that case report that the securities are held on behalf of another intermediary. It is not unusual that chains of intermediaries who register rights to securities are formed in that way. On the contrary, securities are more frequently acquired by foreign investors engaging a custodian in another country (original custodian) who in turn engages local intermediaries (sub-custodians) in other countries.[27]

50. In these cases the foreign investor's ownership right is not stated in the public nominee list. The sub-custodian who registered the holding of securities with Euroclear is usually not even aware of who the ultimate owner is, but is merely aware that its client (the original custodian) is not the owner.[28] Instead, the ultimate owner's right to the securities is registered in the register that the global custodian keeps in another country under the laws applicable there. This has in the legal

---

[23] Cf. Chapter 4, Section 16 and Chapter 3, Sections 8-10 of the Swedish Central Securities Depositories and Financial Instrument (Accounts) Act (*lagen om värdepapperscentraler och kontoföring av finansiella instrument)* samt witness statement by Mats Gunnarsson on 22 January 2018, the district court's case file no. 47 and 102, p. 2.

[24] Chapter 3, Section 13 of the Swedish Central Securities Depositories and Financial Instrument (Accounts) Act (*lagen om värdepapperscentraler och kontoföring av finansiella instrument)*.

[25] Witness statement by Mats Gunnarsson on 22 January 2018, the district court's case file no. 47 and 102, p. 5.

[26] Wallin-Norman, K., *Kontorätt: rätt till kontoförda värdepapper,* Jure Förlag, 2009, p. 163.

[27] Wallin-Norman, K., *Kontorätt: rätt till kontoförda värdepapper*, Jure Förlag, 2009, p. 164

[28] Wallin-Norman, K., *Kontorätt: rätt till kontoförda värdepapper*, Jure Förlag, 2009, p. 164.

literature been referred to as a ”*foreign ownership*”, which is governed by foreign law as further elaborated on in Chapter E.3.[29]

51. The holding system for securities described above has in an international contexts been called indirect holding system. In such a system, the ultimate owner’s rights to the securities are not provided by any other intermediary but the original custodian of the securities. Instead, the system can be described as consisting of links between the investor, the original custodian, sub-custodians and the CSD, where each link has an account provider and an account holder.[30]

52. In the first link, the investor is account holder and the original custodian the account provider. In the next link, the original custodian is the account holder and the sub-custodian the account provider. The rights and obligations of each account holder and account provider are only visible in the register of the account provider who is the counterparty to the account holder (the relevant account provider).

53. Correspondingly, seizures can only be executed against the account provider who has registered the rights of the debtor, and not with any account provider in another link of the chain. This means that a deposit with a sub-custodian only can be seized for the debt of the sub-custodian’s client.

54. The international community has made efforts to prohibit seizure against anyone else than the account provider having registered the account holder’s right (prohibition of upper-tier attachment).[31] Such prohibition was included in UNIDROIT Convention of Substantive Rules regarding Intermediated Securities of 2009 and for a while the EU Commission has been working to ensure that the member states’ national law prohibits such seizure.

55. The prohibition is justified, *inter alia*, by one obtaining a security for a claim in the form of a pledge to securities must be able to rely on the pledge. If seizure would be allowed against another account holder then the one who has registered the debtor’s security rights, the value of creditors’ pledge risk to erode. Prohibition against

---

[29] Wallin-Norman, K., *Kontorätt: rätt till kontoförda värdepapper*, Jure Förlag, 2009, p. 164.

[30] Cf. Wallin-Norman, K., *Kontorätt: rätt till kontoförda värdepapper*, Jure Förlag, 2009, p. 301.

[31] See e.g. the European Commission’s Consultation document of the services of the directorate-general internal market and services, DG Markt G2 MET/OT/acg D(2010) 768690, p. 21 and UNIDROIT Convention on Substantive Rules for Intermediated Securities, Article 22.

seizure against others than the debtor's account provider thereby aims to establish legal certainty, efficiency and ensure that investors can freely exercise rights to securities.[32]

56. However, in holding systems such as the Swedish, a prohibition against seizure of securities against another than the debtor's account provider is considered already following by law.[33] Seizing an investor's assets with someone else then the relevant account holder may in such systems only take place if the investor would have had such rights directly against that account provider.[34] Where there are links of investors, original custodians and sub-custodians, seizure can only be taken against the original custodian for the investor's debts.

E.3 Applicable law

57. The international private law's principle outset is that the property law aspects should be assessed under the law of the country where the property was located when the right in question arise (the *lex rei sitae* principle).[35] This principle is considered applicable to both immovable and movable property and is thus applicable also to securities and claims.

58. Under the *lex rei sitae* principle, property law aspects of transactions of physical securities are determined by the law in the country where the security was physically located when the transaction was carried out. When it comes to dematerialised securities held through registrations in a chain of account providers in different countries, multiple jurisdictions may be affected by the same transactions. The *lex rei sitae* principle is then insufficient, why the principle has evolved through specific choice of law provisions for financial instruments.[36]

---

[32] See the European Commission's Consultation document of the services of the directorate-general internal market and services, DG Markt G2 MET/OT/acg D(2010) 768690, p. 22.

[33] Cf. Chapter 6 Section 1 § of the Swedish Central Securities Depositories and Financial Instrument (Accounts) Act.(*lagen om värdepapperscentraler och kontoföring av finansiella instrument*) and the European Commission's Consultation document of the services of the directorate-general internal market and services, DG Markt G2 MET/OT/acg D(2010) 768690, p. 21.

[34] Cf. Europeiska kommissionens EU Clearing and Settlement, Legal Certainty Group, Questionnaire, Horizontal answers, MARKT/G2/MNCT D(2005), p. 318-329.

[35] Government bill no. 1999/2000:18, p. 41.

[36] Wallin-Norman, K., *Kontorätt: rätt till kontoförda värdepapper*, Jure Förlag, 2009, p. 298.

59. The EU has adopted conflict of law rules on property law aspects of dispositions of financial instruments in Article 9.2 in the European Parliament and Council Directive 98/26/EC on settlement finality in payment and securities settlement systems (the "**Settlement Finality Directive**"), Article 24 of Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of credit institutions (the "**Winding Up Directive**") and Article 9 of Directive 2002/47/EC on financial collateral arrangements (the "**Financial Collateral Directive**").

60. The method applied for conflict of laws in the mentioned directives is expressed in different ways but ought to have the same meaning: the applicable law is the law in the country where the account holder's rights to the securities are registered.[37]

61. Article 9.2 of the Finality Directive has been implemented in Swedish law through Chapter 5, Section 3 of the Swedish Act on Trade with Financial Instruments. The rule in Chapter 5, Section 3 of the Act on Trade with Financial Instruments implies that the legal consequences in relation to others then the parties of a transfer, pledge or other disposition of financial instruments, when the acquirer's right to the instrument has been registered by law, shall be determined be the law in the country where the register is kept.

62. The *travaux préparatoires* clarify that the rule is applicable not only to registrations explicitly required by law, but also registrations carried out under generally accepted legal principles.[38] The legislator stated the following on the meaning of the rule.

> ”Enligt paragrafen skall, när förvärvarens rätt till de finansiella instrumenten har registrerats enligt lag, lagen i det land där registret förs tillämpas beträffande rättsverkningarna i förhållande till andra än parterna. Med förvärvaren avses således den som förvärvat den rätt som förfogandet avser, t.ex. äganderätt, panträtt eller annan särskild rätt. Registreringen skall avse rätten till de finansiella instrumenten.”[39]

63. The conflict of law rule set out in Chapter 5, Section 3 of Act on Trade with Financial Instruments entails that the property law aspects of an acquirer's disposition shall be determined by the law in the country where the rights to the

---

[37] Cf. COM (2018) 89 final and Wallin-Norman, K., *Kontorätt: rätt till kontoförda värdepapper*, Jure Förlag, 2009, p. 300.

[38] Government bill no. 1999/2000:18 p. 111.

[39] Government bill no. 1999/2000:18 p. 110.

disposition are registered. The rule is not limited registers with constitutive character but also register with evidentiary value.[40]

64. However, when rights to securities are registered by a chain of intermediaries, multiple registers in several different countries may fulfil the prerequisites of the mentioned conflict of law rule. The conflict of law rule should then be interpreted on basis of the fact that it and the mentioned directives originate from the Place of the Relevant Intermediary Approach (the "**PRIMA principle**"). Under the PRIMA principle, property law aspects of an investor's rights to dematerialised securities, which are held by an intermediary in its own name but on behalf of the investor, be determined under the law of the intermediary of the investor's account, where the investor's right to securities have been registered.[41] The PRIMA principle has been advocated in legal literature, *inter alia,* for simplifying choices of law and establishing legal certainty for both investors as well as intermediaries and pledge holders.[42]

65. When securities are acquired through a chain of intermediaries as described in section 49-52, the choice of law rule in Chapter 5, Section 3 of Act on Trade with Financial Instruments should be applied as follows. The investor's rights to the securities are determined under the law in the country where the original custodian keeps its register. The original custodian's rights to the securities are determined by the law in the country where the sub custodian keeps its register. The sub-custodian's rights to securities on nominee accounts are determined by the law in the country where the nominee register is kept.

66. In these cases the SEA have seized claims on securities and thereto pertaining funds registered on accounts with SEB for Kazakhstan's debt. SEB:s registers provides that the accounts belong to BNY Mellon. In turn, BNY Mellon has registered the security deposit holding on the National Bank's account in BNY Mellon's register.

67. Under the conflict of law rule in Chapter 5, Section 3 of Act on Trade with Financial Instruments, Swedish law should thus be applied to BNY Mellon's disposal of the

---

[40] Cf. Government bill no. 2004/05:30, p. 92.

[41] Explanatory report on the Hague Convention of the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, 2 ed., p. 19.

[42] Afrell, L. och Bogdan, M., JT 2001/02, p. 517 and Millqvist, G., JT 2002/03, p. 855.

accounts with SEB and English law on the National Bank's disposal of the accounts with BNY Mellon. Kazakhstan does not have a security account or any securities, why Chapter 5, Section 3 of Act on Trade with Financial Instruments is not applicable. Any claim against the National Bank belonging to Kazakhstan should thus under international private law principles be determined under Kazakh law.[43]

68. As described in chapter E.2, seizure can only be taken against the account provider that has registered the debtor's rights to the securities, why multiple countries' legislation should as a main rule not have to be applied in parallel to determine if the seized assets belong to the debtor. However, in these cases the SEA have nevertheless seized assets on BNY Mellon's account with SEB for Kazakhstan's debt.

69. If the Court of Appeal finds that accounts belonging to a third party can be seized on basis of rights granted the debtor under another register, which they cannot, should the law in the country where that register is kept be applied to the property law aspects of the registration in that register. That entails the following. The issue of whether the National Bank's right to the account with BNY Mellon provides for seizure on BNY Mellon's account with SEB for Kazakhstan's debt is determined by English law. The issue of whether Kazakhstan's claim against the National Bank provides for seizure at BNY Mellon's accounts with SEB for Kazakhstan's debt is determined by Kazakh law.

70. If the Court of Appeal finds it possible to seize rights at another account provider than the one having registered the debtor's rights to the securities must thus Swedish, English and Kazakh law be applied to the rights in the respective link of account provider and account holder. Such approach to rights between account holders and account providers implies both application issues and lacking foreseeability and have, *inter alia*, against that background been criticised in the legal literature.[44]

---

[43] Cf. Bogdan. M, *Svensk internationell privat- och processrätt*, 8 ed., Norstedts Juridik 2014, p. 277.

[44] See, *inter alia*, Wallin-Norman, K., *Kontorätt: rätt till kontoförda värdepapper*, Jure Förlag, 2009, p. 301, Afrell, L. and Bogdan, M., JT 2001/02, p. 517 and Hanqvist D., JT 2003/04 no 2, p. 456.

E.4 Summary

71. The Swedish holding system for dematerialised financial instruments allow for securities to be nominee registered without the underlying investor's right being registered on either the nominee account nor the security deposit with the nominee. When securities are invested through chains of custodians, the investor's right to the securities is normally only registered with the custodian that the investor has a contractual relationship with. As a result, seizure of securities for the investor's debt can only be taken against the custodian who has registered the investor's rights, and not against any custodian at a later stage.

72. In the present cases, that entails that the Court of Appeal must determine if Kazakhstan is account holder in relation to SEB or otherwise could claim such rights against SEB. If the answer to that question is no, the attachment decisions must be lifted.

73. If the Court of Appeal would deem it possible to attach a custodian's rights for an investor's debt – which it is not – the law in the country where the investor's rights are registered be applies on the property law aspects of the registration in that register.

F. The property does not belong to Kazakhstan

F.1 Introduction

74. In this chapter, Kazakhstan refers to chapter III in the National Bank's submission of 11 October 2019 and joins in what the National Bank has stated there. What it stated in this chapter is intended to reflect the National Bank's submission in the mentioned chapter. No difference in fact is intended.

75. The appealed cases concern seizure of assets registered on BNY Mellon's account with SEB. The assets consists of rights to securities and cash. The cash pertain to the securities and the same facts and legal reasoning are therefore asserted as to all the seized property.

76. Under Chapter 4, Section 17 of the Enforcement Code, movable property may be seized if it has been established that the property belongs to the debtor. That it must be established that Kazakhstan owns the seized property is a high evidentiary

requirement that can be equated with that it in a convincing manner must be established that Kazakhstan owns the property.[45]

F.2 Kazakhstan does not hold any rights to the SEB accounts

77. For seizure on the SEB accounts to be allowed for Kazakhstan's debt must in accordance with what is described in section E.2 Kazakhstan be deemed account holder or otherwise have such rights against SEB (cf. para. 56 with reference to footnote 32).

78. It is undisputed that the accounts with SEB which have been seized are registered on and belongs to BNY Mellon.[46] In turn, BNY Mellon manages the accounts on their customer's behalf.[47] SEB har no insight as to who BNY Mellon's underlying customer is.[48] In the witness testimony at the hearing in Nacka District Court, Catharina Buresten, head of risk management, investor services at SEB, stated that SEB only take instructions from BNY Mellon concerning BNY Mellon's accounts.

79. In her testimony, Catharina Buresten also stated that the account description that BNY Mellon asked SEB to add to the security deposit in SEB:s register, which refers to the Ministry of Finance of Kazakhstan and which has been reported to Euroclear's public nominee register as described in para. 49, has not resulted in Kazakhstan acquiring any rights in relation to BNY Mellon's security deposit or otherwise against SEB.[49]

80. The evidence which the SEA and Nacka District Court assert have proven that BNY Mellon's accounts with SEB belong to Kazakhstan does not prove that Kazakhstan

---

[45] See Gregow, T., *Beviskrav i fråga om anspråk på äganderätt i rättegång och i utsökningsmål*, i Höglund, O. m.fl. (red), Festskrift till Lars Welamson, 1988, p. 213.

[46] See also SEB Statement of Securities, the districts court's case file no. 39.

[47] E-mail from SEB to the SEA of 29 August 2017, the districts court's case file no. 48 and 104.

[48] E-mail from SEB to the SEA of 25 August 2017, the districts court's case file no. 103, e-mail from SEB to the SEA of 29 August 2017, the districts court's case file no. 48 and 104 and e-mail from SEB to Frank Advokatbyrå of 29 September 2017, the districts court's case file no. 49 and SEB's statement of 10 April 2018 to NBK's counsel, the districts court's case file no. 180.

[49] The reference to Kazakhstan is made in SEB Statement of Securities, the districts court's case file no. 39 and e.g. in the excerpt of the public nominee register regarding the shareholders in Svenska Handelsbanken (publ), the districts court's case file no. 40.

is account holder in relation to SEB or otherwise could have claimed any rights against SEB. The attached assets does therefore not belong to Kazakhstan.

81. Even if the Court of Appeal would consider that a right to the securities and funds registered on BNY Mellon's accounts with SEB derives from Kazakhstan, Kazakhstan does not have an ownership right as the identity of the funds have been lost by mixture with BNY Mellon's own funds on the omnibus account.[50]

82. BNY Mellon's security deposit and cash account with SEB can therefore not be considered belonging to Kazakhstan under Chapter 4, Section 17 of the Enforcement Code.

F.3 Kazakhstan does not have any rights to the securities registered abroad

83. As described above, seizure of assets is not allowed against any other account provider than the one that the debtor can claim its rights against. Even if the Court of Appeal would deem it possible, there is no support for Kazakhstan being able to claim any rights against neither SEB, BNY Mellon nor the National Bank as to the Swedish CSD-shares registered on BNY Mellon security deposit with SEB.

84. As also described in chapter F.2, the rights to the accounts with SEB belong to BNY Mellon and not Kazakhstan.

85. In turn, BNY Mellon has registered the rights pertaining to the shares in Swedish CSD-registered companies on accounts with BNY Mellon. BNY Mellon has its registration business in England. England law should thus be applied on the issue of whether the accounts with BNY Mellon belong to Kazakhstan.[51]

86. As described in section D.4, BNY Mellon has entered into GCA with the National Bank. Under GCA, BNY Mellon shall open accounts at BNY Mellon and carry out the investment decisions by the National Bank and asset managers appointed by the National Bank.

---

[50] Cf. NJA 2009 p. 500.

[51] See section 67–69.

87. BNY Mellon has in turn entered into agreement with SEB as sub-custodian to carry out the acquisitions of rights to shares in Swedish CSD-registered companies for its own and its customers' behalf.[52]

88. The security deposit with SEB which was seized is held by BNY Mellon under GCA.[53] Under GCA, BNY Mellon is to register the rights to securities that BNY Mellons acquires as belonging to the National Bank. This is expressed in GCA as follows.

> "The ownership of Securities in the Account shall be clearly recorded on Boston Safe's [(BNY Mellon's)] books as belonging to the Client [(the National Bank)], and, to the extent Securities are physically held in the Securities Account, such Securities shall also be physically segregated from the general assets of Boston Safe [BNY Mellon]."[54] (Our emphasis.)

89. In letter of 13 October 2017 to Frank Advokatbyrå, BNY Mellon confirms that the bank has registered the National Bank as owner of the rights to the shares in the Swedish CSD-registered companies acquired by SEB.[55] That the rights to the shares in Swedish CSD-registered companies acquired under GCA are registered on accounts belonging to the National Bank is also evident from the account statements from BNY Mellon and the witness statement of Aliya Moldabekova, director of monetary operations department at the National Bank.[56]

90. In the letter to Frank Advokatbyrå, BNY Mellon also confirms that BNY Mellon (i) only accept instructions under GCA from the National Bank, (ii) does not have any contractual relationship with Kazakhstan as regards the security deposit with SEB, and (iii) does not accept any instructions from Kazakhstan as regards the security deposit with SEB.[57]

---

[52] Letter from BNY Mellon to Frank Advokatbyrå of 13 October 2017, the districts court's case file no. 38 and 78.

[53] Letter from BNY Mellon to Frank Advokatbyrå of 13 October 2017, the districts court's case file no. 38 and 78.

[54] Global Custody Agreement, 24 December 2001, the districts court's case file no. 134, Article 5(b).

[55] Letter from BNY Mellon to Frank Advokatbyrå of 13 October 2017, the districts court's case file no. 38 and 78.

[56] Account statements from BNY Mellon, the districts court's case file no. 65 and 88 and witness statement from Aliya Moldabekova on 22 May 2018, the districts court's case file no. 57 and 77.

[57] Letter from BNY Mellon to Frank Advokatbyrå of 13 October 2017, the districts court's case file no. 38 and 78. Cf. Global Custody Agreement, 24 December 2001, the districts court's case file no. 134, Article 4(a).

91. Kazakhstan is thus not the account holder concerning the accounts with BNY Mellon where the rights to the securities acquired under GCA are registered. Neither can Kazakhstan claim any rights against BNY Mellon. These rights belong solely to the National Bank.[58]

92. On basis of the above can neither the account with BNY Mellon where the ownership right to securities acquired by SEB is registered be deemed belonging to Kazakhstan under Chapter 4, Section 17 of the Enforcement Code. All rights to the securities that BNY Mellon have instructed SEB to acquire under GCA instead belong to the National Bank.

93. That conclusion reached also the English High Court in the AIG case between AIG Capital Partners, Inc and CJSC Tema Real Estate Company on one side and Kazakhstan, the National Bank ABN AMRO Mellon Global Securities Services B.V. (now BNY Mellon) and ABN AMRO Bank N.V. Ltd on the other side. One of the issues in that case was whether assets registered on the National Bank's account with BNY Mellon under GCA could be seized for Kazakhstan's debt. High Court held that Kazakhstan under GCA and English law could not be deemed having any claim against BNY Mellon that could be seized for Kazakhstan's debt.[59]

94. On basis of the above, it is established that the rights to the securities registered on the National Bank's account with BNY Mellon cannot be seized for Kazakhstan's debt.

95. Neither does Kazakhstan have any ownership right as to the securities registered with, or other claim against, the National Bank which allows for seizure on BNY Mellon's accounts with SEB. The same goes for the funds transferred by Kazakhstan to the National Bank for trust management within the National Fund. Article 1.1 of the National Fund Agreement sets out that funds transferred to the National Bank as part of the National Fund are held in trust. Of that trust, the

---

[58] Global Custody Agreement, 24 December 2001, the districts court's case file no. 134, Article 5(b), letter from BNY Mellon to Frank Advokatbyrå of 13 October 2017, the districts court's case file no. 38 and 78 and witness statement of Aliya Moldabekova on 22 May 2018, the districts court's case file no. 57 and 77.

[59] The High Court of Justice judgment of 20 October 2005 in the case between AIG Capital Partners et al and Kazakhstan and The National Bank, the districts court's case file no. 24 and 69.

National Bank is trustee and Kazakhstan trustor. As described in section 67, this relationship is governed by Kazakh law.

96. Under Article 885 of Kazakhstan's civil code, assets transferred to a trust are "*held, and accounted for, by the trustee in his own name, and are no longer within the control of the trustor or his creditors*".[60] The person creating and transferring assets to a trust, i.e. the trustor, thus loses the control over the assets and these cannot be claimed by the trustor's creditors. This is also set out in the commentary to Kazakhstan's civil code as follows.

> "As a general rule, the foreclosure on the debts of the founder of the property transferred by him (her) in trust, shall not be permitted. Exceptions concern bankruptcy/insolvency of the founder which is a legal entity (except for a public enterprise and an institution) and an individual entrepreneur. In case of bankruptcy/insolvency of such founders the trust management is terminated and the property shall be included to the bankruptcy assets."[61] (Our emphasis.)

97. All funds transferred from Kazakhstan to the National Bank to be part of the trust that forms the National Fund are thus separated from Kazakhstan's own assets and cannot be seized for Kazakhstan's debts under Kazakh law.[62] Kazakhstan only has a contingent claim against the National Bank for money in the local currency *tenge*. Kazakhstan has no ownership rights to the funds and rights registered with the National Bank or on accounts with external custodians belonging to the National Bank. Under Kazakh law can thus neither the National Bank's accounts with BNY Mellon nor BNY Mellons accounts with SEB be seized for Kazakhstan's debt.

F.4 Summary

98. The SEA have seized claims on funds and assets registered on a security deposit and cash accounts with SEB. SEB's register sets out that the accounts belongs to BNY Mellon. In turn, BNY Mellon holds the rights on behalf of its customer the National Bank and has registered the National Bank's right on accounts with

---

[60] Expert opinion from the professors Suleimenov and Mukasheva on 28 February 2018, the districts court's case file no. 30 and 82, items 19–20.

[61] Expert opinion from the professors Suleimenov and Mukasheva on 28 February 2018, the districts court's case file no. 30 and 82, item 21. It should be noted that the commentary to Kazakhstan's civil code was, among others, drafted by professor Maidan Suleimenov (executive editor of the commentary).

[62] Expert opinion from the professors Suleimenov and Mukasheva on 28 February 2018, the districts court's case file no. 30 and 82, item 22.

BNY Mellon belonging to the National Bank. Kazakhstan does not have any ownership rights as to the accounts with neither SEB nor BNY Mellon. GCA sets out that the rights to the accounts with BNY Mellon belongs to the National Bank. BNY Mellon has reported that it is the National Bank and not Kazakhstan that is the owner of the rights that BNY Mellon has registered in its register as to securities in Swedish CSD-registered companies.

99. As a main rule, securities can only be seized at the account provider which has registered the debtor's rights to the securities. Hence, seizure cannot be made against a custodian which the debtor cannot claim any rights against. The accounts with SEB can thus not be seized for Kazakhstan's debt. Neither does Kazakhstan have any rights to the accounts with SEB under foreign law.

100. The seized assets can therefore not be deemed belonging to Kazakhstan under Chapter 4, Section 17 of the Enforcement Code. The seizure decisions must therefore be lifted.

G. The seized rights to the securities are not located in Sweden

101. The SEA's executive authority is limited to such assets that are located in Sweden. The SEA is thus not authorised to take enforcement measures against property not located in Sweden. Such property is also protected by state immunity under Article 19(c) of the UN Convention, as enforcement against state property can only be taken against property located within the territory of the forum state.[63]

102. The issue of where the seized rights to securities should be deemed located should be determined on basis of the general conflict of laws principle on dematerialised securities expressed in Chapter 5, Section 3 of the Act on Trade with Financial Instruments, the Settlement Finality Directive, the Winding Up Directive, Financial Collateral Directive and PRIMA and described in chapter E.3. Under that principle, securities are located in the country where the account holder's rights are registered.

103. As described in chapter F.2, there is no information about the underlying investor of the rights to the securities at the security deposit with SEB registered in any registers

[63] See further in chapter H.

in Sweden. Information about the underlying investor is registered only in BNY Mellon's register in London, which points out the National Bank as the owner of the account where the rights to the securities are registered. In literature this has been described as a "foreign ownership right" (*utländsk äganderätt*) which is determined by foreign law.[64] On basis of the investor's, i.e. the National Bank's, rights being registered in London, the securities acquired under GCA must be deemed located abroad.

104. If the securities are considered to belong to Kazakhstan, the seized rights were thus located abroad at the time of the seizure. The SEA was thus not authorised to take enforcement measures against the securities and the securities are under all circumstances protected by state immunity under Article 19(c) of the UN Convention. The seizure decisions should therefore be lifted as to the securities.

H. The property enjoys immunity from enforcement measures

H.1 Introduction

105. If the Court of Appeal consider that the seized property belong to Kazakhstan under Chapter 4, Section 17 of the Enforcement Code and is located in Sweden, the property is, as described in the following chapters, nevertheless under all circumstances protected by state immunity as it has been acquired within the National Fund.

H.1.1 The principles expressed in Articles 19 and 21 of the Convention should be applied

106. The principle of sovereignty is the most fundamental principle of international law and means that all states are equal. As a result of the principle of sovereignty, states cannot exercise jurisdiction over each other. This is expressed by the principle of state immunity. State immunity may refer to either jurisdiction or enforcement. In these cases, immunity from enforcement is relevant.

107. The main principle under customary international law is that all state actions and all state property enjoy immunity (absolute immunity).[65] As states have more frequently

[64] Wallin-Norman, K., *Kontorätt: rätt till kontoförda värdepapper*, Jure Förlag, 2009, p. 164.

[65] Expert opinion from professor Pål Wrange of 20 April 2018, the districts court's case file no 95, p. 5.

become involved in commercial activities has the absolute immunity developed towards a more limited immunity in some regards (restrictive immunity). Restrictive immunity means that governmental sovereign acts enjoy absolute immunity whereas states' civil acts are not immune.

108. The development towards restrictive immunity has mainly taken place as to jurisdiction. State practice is not as clear concerning immunity from enforcement.[66] A majority of states insists on absolute immunity when it comes to enforcement measures.[67]

109. The lack of uniform state practice on restrictive immunity from enforcement measures was confirmed by the Swedish Supreme Court in NJA 2011 p. 475. The Supreme Court stated the following.

> ”Immunity against execution of state property is a consequence of the view that states are equal. It has been regarded a greater intrusion in a state's sovereignty to carry out measures of constraint against a state's property than to grant court jurisdiction against that state. Mutual state practice has previously been cautious not to grant a foreign state immunity against enforcement measures. A corresponding development of state practice as to immunity against jurisdiction appears not to have taken place as to immunity against enforcement. Also, there is no mutual state practice as to limitations on the immunity against enforcement.”[68] (Our emphasis.)

110. The Supreme Court thus held that the more restrictive view on state immunity from jurisdiction that has developed internationally is not applicable on immunity from enforcement.

111. With the objective of codifying international customary law on state immunity, the General Assembly of the UN adopted the UN Convention on 4 December 2004. The UN Convention has until now been ratified by 28 states and comes into force 30 days after having been ratified by 30 states.

112. The UN Convention codified the principle recognised by many states that state property as a main rule enjoy immunity and only in exceptional cases can be subject

---

[66] Expert opinion from professor Said Mahmoudi of 20 April 2018, the districts court's case file no. 50 and 94, item 5 and NJA 2011 p. 475, item 9.

[67] Expert opinion from professor Said Mahmoudi of 20 April 2018, the districts court's case file no. 50 and 94, item 6.

[68] NJA 2011 p. 475, para. 9.

to enforcement measures.[69] By allowing exceptions from immunity, the UN Convention must be considered to be an expression of the restrictive immunity advocated by states in the Western world. Therefore, current customary law does not allow for more extensive limitations on immunity than what is stated in the UN Convention.[70]

113. Sweden has ratified the UN Convention and incorporated in through the Swedish Act (2009:1515) on immunity for states and their property. The act comes into effect when the UN Convention does. Both the Swedish legislator and the Supreme Court have confirmed that the UN Convention, in now relevant parts, constitutes present customary law.[71] Hence, the UN Convention is a natural starting point for Swedish courts and authorities when determining issues on state immunity.[72]

114. In NJA 2011 p. 574 the Supreme Court stated the following as to how the UN Convention should be applied in Swedish law.

> ”The 2004 Convention can be said to express the by now by many states acknowledge principle that enforcement is allowed at least in some state property, namely in property that is used for other than governmental non-commercial purposes (see Article 19(c)). However, there seems to be differing views – both in point of fact and over time – on what should be considered a possession for governmental non-commercial purposes. […] Impediment because of state immunity against enforcement in property owned by a foreign state should however exist if the purpose with the possession of the property is of such qualified kind, such as when the property is used for the state’s sovereign acts or therewith similar tasks of official nature or when the property is of such specific kind set out in Article 21 of the 2004 UN Convention.” (Our emphasis.)

115. The Supreme Court thus confirmed that the principles expressed in Articles 19 and 21 of the UN Convention should be applied by a Swedish court in issues of enforcement in a foreign state’s property. Articles 19 and 21 must therefore be

---

[69] Expert opinion from professor Said Mahmoudi of 20 April 2018, the districts court's case file no. 50 and 94, item 18.

[70] Expert opinion from professor Pål Wrange of 20 April 2018, the districts court's case file no. 95, p. 7.

[71] Government bill no. 2008/09:204 p. 87 and NJA 2011 p. 475 p. 12.

[72] Cf. expert opinion from professor Said Mahmoudi of 20 April 2018, the districts court's case file no. 50 and 94, item 32.

considered to reflect existing Swedish law.[73] The Court of Appeal must therefore apply the principles expressed in Articles 19 and 21.

H.1.2 The meaning of Articles 19 and 21 of the UN Convention

116. The main rule on immunity and the scope of exceptions from the main rule are expressed in Article 19 of the UN Convention, which sets out the following.

> ”**Article 19**
> **State immunity from post-judgment measures of constraint**
>
> No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State, may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
>
> (a) the State has expressly consented to the taking of such measures […];
>
> (b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or
>
> (c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against the property that has a connection with the entity against which the proceeding was directed.”

117. The main rule is thus that enforcement measures may not be taken against a foreign state’s assets in Sweden. For enforcement measures to be allowed must one the exceptions in Article 19(a)–(c) be at hand.

118. Kazakhstan has not consented to enforcement measures and has neither allocated or earmarked the property for the claim that the issues concern. The provisions in Article 19(a)–(b) are therefore not applicable.

119. Article 19(c) provides that post-judgment measures of constraint can be taken if it has been established that (i) the property is specifically in use or intended for use by the state for other than government non-commercial purposes, and that (ii) the property is in the territory of the state of the forum, whereby the measures (iii) may only be taken against property that has a connection with the entity against which the proceeding was directed.

---

[73] Expert opinion from professor Said Mahmoudi of 20 April 2018, the districts court's case file no. 50 and 94, item 32.

120. Even if the prerequisites of Article 19(c) are met, international customary law provide that certain categories of state property are particularly important to protect. Such assets can under no circumstance be subject to enforcement measures. This principle is set out in Article 21.

> "**Article 21**
> **Specific categories of property**
>
> 1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under Article 19, subparagraph (c):
>
> (a) property, […], which is used or intended for use in the performance of the functions of the diplomatic mission of the State […];
>
> (b) property of a military character or used or intended for use in the performance of military functions;
>
> (c) property of the central bank or other monetary authority of the authority of the state;
>
> (d) property forming part of the cultural heritage of the State […];
>
> (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.
>
> 2. Paragraph 1 is without prejudice to Article 18 and Article 19, subparagraphs (a) and (b)."

121. Property belonging to any of the categories in item (a)–(e) can thus not be considered in use or intended for use for other than government non-commercial purposes under Article 19. In the Swedish Government bill no. 2008/09:204, the Swedish legislator described the significance of Article 21 as follows.

> "In Article 21.2 is set out various kinds of state property that should not be considered property specifically in use or intended for use by the state for other than governmental non-commercial purposes under Article 19(c). property enumerated in Article 21 can thus no be subject to enforcement measure under the provision in Article 19(c)."[74]

122. The said means that even if certain property is subject to the exception from the main rule on immunity under Article 19(c), the property cannot be subject to

[74] Government bill no. 2008/09:204 p. 82.

enforcement if it is of the specific kind set out in Article 21. Under Article 21(1)(c), property of the central bank is considered to be such property.

123. In section H.2 is explained that the seized property enjoys immunity from enforcement measures as property of the central bank under Article 21(1)(c) and in section H.3 is explained that the property enjoys immunity because the purpose with the possession of it is of such qualified kind that it must considered in use of intended for use for government non-commercial purposes under Article 19(c).

H.1.3 Burden of proof

124. The wording of Article 19(c) of the UN Convention provides that enforcement measures in a foreign state's property may only be taken if "*it has been established that*" the property is used or intended for use for a purpose that makes it not enjoy immunity.[75] The expression "*it has been established that*" signals that there is a presumption of immunity and that the burden of proof lies with the party arguing that immunity does not apply.

125. This is also how Svea Court of Appeal interpreted the provision in NJA 2011 p. 475. The Court of Appeal held that "*the provision provides that the burden of proof lies with the part arguing that the property is used for commercial purposes*". The Supreme Court did not mention the burden of proof but said that the respect for state immunity and the respect for that foreign states' cannot be forced to issue details they do not want to issue, can lead to the usual rules on proof not being fully upheld.

126. In his expert opinion, professor Said Mahmoudi states the following on the burden of proof in these cases.

> "In the present case the burden of proof lies with the Investors [i.e. the applicants]. That is a consequence of the principle 'presumption of immunity'. It is always the party seeking enforcement that has to prove that the assets in question are used for other than sovereign, non-commercial purposes and that immunity therefore not applies. It is only is that has been made that the National Bank/Kazakhstan must show why immunity applies anyway under Articles 19(c), 21(c) and customary law." [76] (Our emphasis)

[75] Cf. the Swedish translation of the UN Convention where the term has been translated to "*det ska ha fastställts att*".

[76] Professor Said Mahmoudi's expert opinion of 20 April 2018, the districts court's case file no. 50 and 94, p. 56.

127. Mahmoudi's conclusion is thus that it lies with the applicants to show that the property does not enjoy immunity. Mahmoudi's interpretation is supported by the literature. Lady Hazel Fox CMG, QC and professor Philippa Webb write the following.

> "By reason of the general immunity of property of a foreign State from measures of constraint, the burden of proof that the property is in use or intended use for a commercial purpose rests with the claimant."[77]

128. Professors Roger O'Keefe and Christian J. Tams hold the same opinion:

> "The practical consequence of this structure for the conduct of proceedings under the Convention is that, once a legal or natural person satisfies the court that it qualifies as a foreign 'State' within the meaning of Article 2(1)(b) of the Convention, it is presumed to enjoy immunity from the court's jurisdiction unless the claimant can make out one of the specified exceptions to immunity. In other words, it follows from Article 5, as formulated, that the burden of proof lies on the claimant to prove that the State is not immune from the proceedings. It is not up to the State to establish that it is entitled to immunity."[78] (Our emphasis.)

129. Hence, both Fox & Webb and O'Keefe & Tams hold that since the main rule is that foreign states' property enjoy immunity, it lies with the party seeking enforcement to prove that the property is not covered by state immunity under any of the exceptions in the UN Convention.

130. The said means that the burden of proof lies on the applicants to prove that the property is not immune against enforcement measures under Articles 19 and 21(1)(c) of the UN Convention.

H.2 The property enjoys immunity as "*property of the central bank*" under Article 21(1)(c) of the UN Convention

H.2.1 The principle set out in Article 21(1)(c) of the UN Convention must be applied

131. Under Article 2(1)(b)(iii) of the UN Convention, the provisions of the UN Convention are applicable to state agencies or instrumentalities to the extent that

---

[77] Fox, H. & Webb, P., *The Law of State Immunity*, 3 ed., Oxford University Press, 2015, Exhibit K-53, p. 511.

[78] O'Keefe, R. & Tams, C., *The United Nations Convention on Jurisdictional Immunities of States and Their property, A Commentary*, 1 u., Oxford University Press, 2013, Exhibit K-54, p. 103.

they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the state.

132. In accordance with what has been described in section D.1.2 and footnote 11, the National Bank is an independent legal person. The Kazakh state has by law and agreement instructed the National Bank to manage the National Fund, which aims to stabilise the economy in Kazakhstan. Article 8 of Kazakhstan's Law on the National Bank sets out that the National Bank's management of the National Fund, as well as the implementation of the monetary policy, the supervision of the financial market and the issuing of notes and coins, are part of the functions that the National Bank shall carry out.[79]

133. The National Bank's management of the National Fund is therefore an act in the exercise of sovereign authority of the state under Article 2(1)(b)(iii) of the UN Convention.

134. As set out above have the contracting states to the UN Convention held that specific categories of state assets must be given an even stronger protection by, in accordance with current customary law, declaring them absolute immune from enforcement measure.[80] Property of the central bank is such property that under all circumstances is not subject to the exception from immunity set out in Article 19(c). Property of the central bank is thus always considered to enjoy immunity, regardless of what is the purpose of the use or intended use of the property.[81]

135. The UN Convention has not yet come into effect and is therefore not directly applicable. However, to a large extent the UN Convention is a codification of current customary law.[82] That Article 21(1)(c) of the UN Convention reflects current

[79] Kazakhstan's Law on the National Bank (English translation), the districts court's case file no. 28, Article 8(31).

[80] Expert opinion from professor Said Mahmoudi on 20 April 2018, the districts court's case file no. 50 and 94, item 19.

[81] Expert opinion from professor Pål Wrange on 20 April 2018, the districts court's case file no. 95, p. 10.

[82] See NJA 2009 p. 905, NJA 2011 p. 475, para. 12 and government bill no. 2008/09:204, p. 52.

customary law has been confirmed by both the Supreme Court and the legislator.[83] It has also been confirmed by Mahmoudi and professor Pål Wrange. [84]

136. In summary, it is established that Article 21(1)(c) of the UN Convention reflects current customary law and should be applied as current Swedish law.

137. Decisive for whether the property enjoy the absolute immunity set out in Article 21(1)(c) is whether (i) the National Bank is such a central bank intended in the provision, and (ii) the property belongs to the National Bank under the UN Convention. If the property is deemed ”*property of the central bank*”, it is immune regardless of what purpose it is used or intended for.

H.2.2 The National Bank is such a central bank intended in Article 21(1)(c) of the UN Convention

138. There is no definition of a ”central bank” in the UN Convention. Fox and Webb does however described a central bank as follows.

> ”Fundamentally, a central bank is set up by a State with the duty of being the guardian and regulator of the monetary system and currency of that state both internally and internationally.
>
> […]
>
> Proof of the status of a central bank would seem to be made by evidence of its constitution and functions.”[85]

139. Decisive for whether an entity is a central bank is thus how it is constituted and what functions it has. According to Wrange, central banks’ important function to the state is also the reason for why their assets are immune to enforcement.[86] The main

---

[83] NJA 2011 p. 475, para. 14 and government bill no. 2008/09:204, p. 87, which emphasises that Article 18-21 of the UN Convention codifies customary law.

[84] Expert opinion from professor Said Mahmoudi on 20 April 2018, the districts court's case file no. 50 and 94, section VI. See also expert opinion from professor Pål Wrange den 20 April 2018, the districts court's case file no. 95, p. 7, which explains that customary law does not allow any further limitations in the immunity than set out in the UN Convention.

[85] Fox, H. & Webb, P., *The Law of State Immunity*, 3 ed., Oxford University Press, 2015, Exhibit K-53, p. 373.

[86] Expert opinion from professor Pål Wrange on 10 October 2018, the districts court's case file no. 202, p. 8. Wrange refers to a summary by Bank for International Settlements, a collaboration agency for central banks around the world, which makes it clear that central banks’ function and independence varies greatly, Issues in the Governance of Central Banks: A report from the Central Bank Governance Group, Basel, 2009, the districts court's case file no. 204, p. v.

functions of a central bank includes carrying out the state's monetary policy and possession of the national reserves.[87]

140. Kazakhstan has appointed the National Bank to its central bank.[88] The National Bank's activities and functions are subject to Kazakh legislation. Article 1 of Kazakhstan's Law on the National Bank provides that the National Bank shall represent Kazakh interests in relation to other central banks and foreign banks.

141. The National Bank's primary task is to achieve price stability in Kazakhstan.[89] To achieve this, Kazakhstan has assigned the National Bank to carry out the state's monetary policy, ensure that the payment system is working, regulate the currency and supervise the financial system.[90]

142. The monetary policy is, *inter alia*, carried out by the National Bank determining the official interest rate and performing currency exchange transaction with the Kazakh currency *tenge*.[91] The National Bank is also assigned to manage the National Bank, a government pensions fund and the currency reserves. The National Bank's management of the National Fund is regulated in law by Kazakhstan's Budget Code and Civil Code. The Budget Code sets out that "*Trust Management of the National Fund of the Republic of Kazakhstan is carried out by the National Bank of the Republic of Kazakhstan on the basis of the trust management agreement*".[92]

---

[87] Fox, H. & Webb, P., *The Law of State Immunity*, 3 ed., Oxford University Press, 2015, Exhibit K-53, p. 374.

[88] Kazakhstan's Law on the National Bank (English translation), the districts court's case file no.28, Article 1.

[89] Kazakhstan's Law on the National Bank (English translation), the districts court's case file no.28, Article 7 and 8.

[90] Kazakhstan's Law on the National Bank (English translation), the districts court's case file no. 28, Article 2.

[91] Kazakhstan's Law on the National Bank (English translation), the districts court's case file no. 28, Article 29, para 2 and 39.

[92] Kazakhstan's Budget Code (English translation), the districts court's case file no. 33 and 74, Article 21.

143. Even a high-level comparison with the Swedish Riksbank show that the National Bank has such function that central banks typically have.[93] Also the Riksbank is responsible for managing the gold- and currency reserves.[94]

144. In summary, it is established that the National Bank is appointed the central bank of Kazakhstan and has such functions that central banks typically have. The National Bank is therefore such a central bank as intended in Article 21(1)(c) of the UN Convention.

H.2.3 The property is ”*property of*” the National Bank

H.2.3.1 *The meaning of the term “property of the central bank”*

145. Article 21(1)(c) of the UN Convention apply to all property that is “*property of*” a central bank. There is no definition of the expression ”*property of*” in the UN Convention.

146. The expression ”*property of*” is used also in Article 19(c), which concerns ”*property of a state*”. O’Keefe and Tams have summarised the significance of “*property of a state*” as follows.

> ”The preposition ’of’ could, as a matter of ordinary meaning, be taken to mean ‘belonging to’ – that is, to denote ownership alone. But it could equally be taken to comprehend possession or control. Recourse to the *travaux préparatoires* to resolve this ambiguity indicates plainly that the second reading is the correct one. The words ‘property of a State’, having been proposed as shorthand for the formulation ‘its property or property in its possession or control’ adopted on first reading, are to be construed as referring to any property that a State owns or that it possesses or controls.”[95] (Vår understrykning.)

147. The expression ”*property of a state*” is thus considered to include all property that a state owns, possesses or controls.

148. When the provision was adopted, the contracting states agreed that a state’s property should be protected by the UN Convention ”*in the case of a State* […] *owning,*

---

[93] The Swedish Act on the Swedish Riksbank, Chapter 1, Section 1.

[94] The Swedish Act on the Swedish Riksbank, Chapter 7, Section 2 and the Riksbank’s statement regarding the Gold and Currency Reserve, the districts court's case file no. 189 and 198.

[95] O’Keefe, R. & Tams, C., *The United Nations Convention on Jurisdictional Immunities of States and Their property. A Commentary*, 1 ed., Oxford University Press, 2013, Exhibit K-54, p. 315 f. Cf. p. 299 f.

possessing or controlling that property".[96] The expression "*property of a state*" does thus not only include ownership but also possession or control.

149. The expression "*property of the central bank*" in Article 21(1)(c) should be interpreted in the same way as Article 19(c). This is confirmed by Mahmoudi with reference to the UN Convention's annex *Understanding with respect to certain provisions of the Convention*.[97] He writes the following.

> "This clarification means that also property that is possessed, disposed, managed or controlled by the central bank should *a priori* be considered 'property' and subject to the specific protection awarded by Article 21 (c)."

150. Mahmoudi also writes "[t]*hat 'property' includes more than what a central bank actually owns was not a controversial issue during the negotiations in the ILC, in the Sixth Committee of the General Assembly or its Ad Hoc Committee* [sic]".[98] This conclusion is supported by Wrange. He writes the following.

> "From the *travaux préparatoires* of the Convention it is clear that 'property of' includes also 'possession or control'; the expression 'its property or property in its possession or control' in an earlier draft was replaced by the more vigorous 'property of'. For me it is beyond all doubt that the property in question in its entirety is covered by this expression. NBK disposes freely over property".[99]

151. That the expression "*property of the central bank*" under customary law includes all property that a central bank has any form of right or interest in is confirmed by the English High Court in the AIG case.

> "'property' has a wide meaning. It will include all real and personal property and will embrace any right or interest, legal or equitable, or contractual, in assets that are held by or on behalf of a State or any 'emanation of the State' or a central bank or other monetary authority that comes within sections 13 and 14 of the SIA.
>
> The words '*property of a State's central bank or other monetary authority*' mean any asset in which the central bank has some kind of property interest as described above, which asset is allocated to or held in the name of the central

---

[96] Yearbook of ILC, 1986, vol. 1, the districts court's case file no. 97, p. 171, para. 84.

[97] Expert opinion from professor Said Mahmoudi on 20 April 2018, the districts court's case file no. 50 and 94, para. 35.

[98] Expert opinion from professor Said Mahmoudi on 20 April 2018, the districts court's case file no. 50 and 94, para. 36.

[99] Expert opinion from professor Pål Wrange on 20 April 2018, the districts court's case file no. 95, p. 8.

> bank, irrespective of the capacity in which the central bank holds the asset or the purpose for which the asset is held."[100]

152. In summary, the term "*property of the central bank*" includes all property that a central bank owns, possesses or manages. The property can thus enjoy immunity even if the National Bank would not be considered its owner. It is sufficient if the National Bank is considered to possess or control the property for it to be considered "*property of*" the National Bank under the UN Convention.

H.2.3.2 *The seized property is "property of the central bank"*

153. It is undisputed in the case that the National Bank manages the assets in the National Fund.[101] For that reason alone there can be no doubt that the seized property is "*property of*" the National Bank under the UN Convention and therefore enjoy immunity under the principle in Article 21(1)(c). Also the following circumstances show that the National Bank controls the assets in the National Fund.

154. As described in chapter D.4, the National Bank is *trustee* of the National Fund. Under Article 883(1) of Kazakhstan's Civil Code, a *trustee* acts in its own name and holds all rights to the property when the property is held in trust. A *trustee* also has a "*right of claim*" to the property when it is held in trust.[102] Under Kazakhstan's Civil Code, the National Bank controls, as *trustee*, the property held, used and possessed by the National Bank on behalf of Kazakhstan.[103] These rights entails that the National Bank has control over the National Fund.

155. In addition to the National Bank controlling the National Fund as described above, the National Bank also controls the specific assets of the National Fund that has been seized. This is elaborated on in the following.

---

[100] The High Court of Justice's judgment on 20 October 2005 in the case between AIG Capital Partners et al and Kazakhstan and The National Bank, the districts court's case file no. 24 and 69, para. 95(2)(b) and (c).

[101] Nacka District Court's decision of 5 July 2019 in case no. Ä 2543-18 et al, p. 4.

[102] Expert opinion from professors Suleimenov and Mukasheva den 28 February 2018, the districts court's case file no. 30 and 82, section V.

[103] Kazakhstan's Civil Code (English translation), the districts court's case file no. 32 and 81, Article 883(1).

156. If the property is considered belonging to Kazakhstan under Chapter 4, Section 17 of the Enforcement Code it is undisputed in the case that the property derives from the National Fund and has been acquired within the structure described in chapter D.4. As described in that chapter the National Bank has transferred some of the assets in the National Fund to the third party BNY Mellon under the GCA. Article 5 of the GCA sets out that "[t]*he ownership of Securities in the Account shall be clearly recorded on* [BNY Mellon]*'s books as belonging to* [the National Bank]".[104] The Agreement thus provide that the ownership of the specific assets that BNY Mellon holds shall be recorded on the account of the National Bank in BNY Mellon's register.

157. That the National Bank controls the property that BNY Mellon possesses is also evident from the letter from BNY Mellon to Frank Advokatbyrå of 13 October 2017. It sets out, *inter alia*, that BNY Mellon "*holds certain shares and other assets in custody for NBK*", "*acts upon instructions from its client NBK*" but does not accept "*any instructions from the Republic of Kazakhstan*" or has "*any contractual relationship with the Republic of Kazakhstan*", and that "*NBK is the owner of the shares and other assets in BNYM's books*".[105]

158. Accordingly, as it is the National Bank that is the registered owner of the assets, BNY Mellon does not take any instructions from Kazakhstan concerning the property. It is also confirmed by the witness statement of Aliya Moldabekova and was confirmed by Aliya Moldabekova in her witness testimony in Nacka District Court on 10 April 2019.[106]

159. The funds at BNY Mellon are invested in accordance with the decisions by the National Bank and the asset managers engaged by the National Bank. The asset managers act on behalf of and in accordance with the instructions of the National Bank, and these instructions are executed finally by the BNY Mellon. The National Bank's right to decide over the property must be deemed to be such control which entails that the property is "*property of*" the National Bank.

---

[104] Global Custody Agreement, 24 December 2001, the districts court's case file no. 134, Article 5.

[105] Letter from BNY Mellon to Frank Advokatbyrå of 13 October 2017, the districts court's case file no. 38 and 78.

[106] Aliya Moldabekova's witness statement of 22 May 2018, the districts court's case file no. 57 and 77.

160. In summary, the National Bank controls the National Fund as *trustee* as this relationship, under Kazakh law, implies the possession of all rights to the property held in trust. Also, the National Bank controls the assets registered at BNY Mellon, by the National Bank being considered the owner of the assets under GCA and BNY Mellon's register. It is also the National Bank that controls how and when the funds in the National Fund are invested. These circumstances entail that the property is within the National Bank's control so that it is "*property of the central bank*" under the principle set out in Article 21(1)(c) of the UN Convention.

161. The fact that Kazakhstan has a right to receive means from the National Fund for specific purposes and under a certain predetermined procedure does not change that.[107]

162. Transfers from the National Fund to Kazakhstan are strictly regulated and can only be carried out for certain specific purposes. Funds can only be transferred in the local currency *tenge*, which means that Kazakhstan can never receive any specific assets, for example securities. The fact that Kazakhstan has some limited ways of using the means of the National Fund does change the fact that the National Bank controls the assets in the National Fund as set out above.

163. Both Mahmoudi and Wrange hold the view that the property is immune under Article 21(1)(c).[108] Wrange states the following.

> "From the *travaux préparatoires* of the Convention it is clear that 'property of' includes also 'possession or control'; the expression 'its property or property in its possession or control' in an earlier draft was replaced by the more vigorous 'property of'. For me it is beyond all doubt that the property in question in its entirety is covered by this expression. NBK disposes freely over property."[109]

164. This conclusion is supported by state practice through the mentioned AIG case, which is an important case in state practice concerning state immunity for central

---

[107] As set out in Presidential Decree no 385, 8 December 2016, the districts court's case file no. 146, item 5.1, there is a commission supervising the use of the assets in the National Fund which includes review of efficient and lawful use.

[108] Expert opinion from professor Said Mahmoudi on 20 April 2018, the districts court's case file no. 50 and 94, section VII.

[109] Expert opinion from professor Pål Wrange on 20 April 2018, the districts court's case file no. 95, p. 8 and 10.

bank assets.[110] The AIG case was settled by the English High Court under the English State Immunity Act, which includes a provision on immunity for central bank assets that has the same structure and terms as Article 21(1)(c) does. The factual circumstances were also strikingly similar those in these cases; also in the AIG case was the property in question assets acquired by the custodian that now is BNY Mellon on behalf of the National Bank within the National Fund. The English Court found that the property in question enjoyed immunity as property of a central bank and the enforcement measures could therefore not be taken. The AIG case is a frequently cited example of state practice and is thus part of the material that forms the basis of customary law.[111]

165. In all it is clear that the property is controlled by the National Bank and is ”*property of a central bank*” under Article 21(1)(c) of the UN Convention. The property is therefore immune from enforcement measures under current customary law .

H.3 The property is held for government non-commercial purposes

H.3.1 Introduction

166. As stated above in chapter H.1, enforcement measures may only be taken against the property if it has been established that one of the exceptions in Article 19 in the UN Convention are applicable. The only exception that could be applicable to these cases is Article 19(c), under which enforcement measures may be taken if it has been established that (i) the property is specifically in use or intended for use by the state for other than government non-commercial purposes, and (ii) is in the territory of the state of the forum.

167. The issue of where the rights to the property are located is discussed in chapter G. In the following, it is explained that Kazakhstan does not use or intends to use the property for other than government non-commercial purposes.

[110] The High Court of Justice’s judgment on 20 October 2005 in the case between AIG Capital Partners et. al. and Kazakhstan and The National Bank, the districts court's case file no. 24 and 69.

[111] Expert opinion from professor Pål Wrange of 10 October 2018, the districts court's case file no. 202, p. 8.

H.3.2 Decisive for Article19(c) of the UN Convention is for what purpose the property is held

168. Decisive for the question of whether certain property is used, or intended to be used, for government non-commercial purposes is the purpose of the use or possession of the property, and not the nature of property in question. This has been described by O'Keefe and Tams as "[t]*he 'commercial use' criterion goes to the purpose, rather than the nature, of the property's use*".[112]

169. That the purpose of the possession of the property is decisive for whether Article 19(c) of the UN Convention applies is also confirmed by Mahmoudi. He writes in his expert opinion that "[a]*n almost uniform state practise shows that the 'purpose' of the other state's property is the most determinant factor when deciding if enforcement measures may be taken*".[113]

170. This interpretation of Article 19(c) is also consistent with how the provision was applied by the Supreme Court in NJA 2011 p. 475. In paragraph 14, the Supreme Court stated that an impediment against enforcement because of immunity is considered to be at hand if "*the purpose of the use or possession is of a specific nature*."

171. In summary, it is the purpose of the property rather than the nature that determines whether the seized property is protected by state immunity under the principle expressed in Article 19(c) in the UN Convention. The purpose for which the seized property is used is explained in the following.

H.3.3 The property forms part of the National Fund and aims to add stability and savings

H.3.3.1 *The purpose of the National Fund*

172. The property stems from the National Fund, which was created in 2000 through Presidential Decree no. 402. The purpose of its creation was to achieve financial stability and reducing the effects of fluctuating oil and gas prices and other external

---

[112] See O'Keefe, R. & Tams, C., *The United Nations Convention on Jurisdictional Immunities of States and Their property. A Commentary*, 1 ed., Oxford University Press, 2013, Exhibit K-54, p. 323.

[113] Expert opinion from Professor Said Mahmoudi of 20 April 2018, the districts court's case file no. 50 and 94, section 43.

factors on Kazakhstan's state finances. Presidential Decree no. 402 provides that the National Fund was created "[i]*n order to ensure stable social and economic development of the country, accumulation of financial resources for future generations,* [and] *reduce the dependence of the economy on the impact of unfavourable external factors*".[114]

173. The purpose of the National Fund has also been codified in Kazakhstan's Budget Code, which sets forth the following.

> "National Fund of the Republic of Kazakhstan is intended to ensure the social and economic development of the state through the accumulation of financial assets and other assets, excluding intangible assets, reduction of economic dependence on the oil sector and the impact of adverse external factors."[115]

174. The National Fund's purpose is thus to ensure the social and economic development and to reduce the state economy's dependence on the oil sector and the impact of adverse external factors.

175. It is not uncommon that states who's public finances are directly depending on market prices of natural resources establishes funds like the National Fund. On the contrary, sovereign wealth funds are often fundamental to the economy in states with great natural resources. One example is the Norwegian oil fund *Statens pensjonsfond utland* (*Oljefondet*), which was set up by the Norwegian state with the objective to support the funding of pensions and ensure a long-term use of the state's oil incomes.[116] Since Kazakhstan is a country which welfare heavily depends on the oil and gas prices, the National Fund is fundamental for Kazakhstan's development and financial stability.

176. To accomplish the overall purpose of the National Fund – i.e. to ensure the social and economic development and to reduce financial dependence on the oil sector – the fund has both a savings function and a stabilisation function. This is expressed in Presidential Decree no. 385 as follows.

> "The National Fund's goal is to preserve financial resources by accumulating savings for future generations and reducing the national budget's dependence

[114] Presidential Decree no. 402, the districts court's case file no. 34 and 73.

[115] Kazakhstan's Budget Code (English translation), the districts court's case file no. 33 and 74, Article 21(2).

[116] Norway's Lov om Statens pensjonsfond, Para. 1.

> on global commodity markets. Therefore, the National Fund has both saving and stabilisation responsibilities." (Our emphasis.)

177. The savings function accomplishes the purpose of the National Fund in the long term by saving for future generations, whereas the stabilisation function accomplishes the purpose on short term by reducing the state budget's dependency on international oil prices.

178. In order to ensure that the savings function of the National Fund is accomplished, a minimum balance has been established.[117] The stabilisation function is accomplished by annual guaranteed transfers to the state budget and by targeted transfers to fund crisis management programmes to stimulate economic growth during periods of economic decline or growth deceleration to provide funding for non-profit social projects and strategic infrastructure projects.[118] National Fund assets cannot be used for any other purposes.[119]

179. In summary, the National Fund aims to ensure the social and economic development in Kazakhstan and to reduce the state economy's dependency on the oil sector and the effects of fluctuating oil prices. This purpose needs to be accomplished both in short term and in long term, which is why the National Fund has a savings function and a stabilisation function.

H.3.3.2 *The National Bank's management of the property is consistent with the purposes of the National Fund*

180. The assets transferred to the National Fund by Kazakhstan are held in *trust* by the National Bank. The National Bank's management of the assets in the National Fund is governed by the National Fund Agreement and law by, *inter alia,* Presidential Decree no. 385, Kazakhstan's Budget Code, Law on the National Bank and the Resolution of the Board of the National Bank no. 65.

181. In accordance with GCA and in consistence with the National Fund Agreement, the National Bank has transferred part of the assets in the National Fund to BNY Mellon

---

[117] Presidential Decree no. 385, 8 December 2016, the districts court's case file no. 146, Article 4, para 3.
[118] Presidential Decree no. 385, 8 December 2016, the districts court's case file no. 146, Article 4, para 4.
[119] Presidential Decree no. 385, 8 December 2016, the districts court's case file no. 146, Article 4, para 5.

for external management.[120] In turn, BNY Mellon invests the National Fund assets upon instructions from the National Bank and asset managers appointed by the National Bank by, *inter alia*, acquiring securities. The assets acquired by BNY Mellon under GCA and thus derive from the National Fund.[121]

182. The property was acquired within the investment operations conducted by the National Bank as *trustee* of the National Fund. The main objectives with the investment operations have been established by law through Presidential Decree no. 385 and are as follows.

> ”The main goals for investment operations during the management of National Fund assets are preserving the assets, maintaining adequate liquidity and ensuring long term returns with an appropriate level of risk. Ensuring long term returns on National Fund assets will involve short term fluctuations.”[122]

183. The National Bank’s main objectives with the management of the National Fund are thus to (i) preserve the National Fund, (ii) maintain adequate liquidity and (iii) ensure long term returns with an appropriate risk level.

184. Kazakhstan’s Budget Code establishes that the assets in the National Fund are invested in financial instruments for the following purposes.

> “2. The National Fund of the Republic of Kazakhstan is located in the approved financial instruments, except for intangible assets, in order to ensure:
>
> 1) a preservation of the National Fund of the Republic of Kazakhstan;
>
> 2) maintaining of a sufficient level of liquidity of the National Fund of the Republic of Kazakhstan;
>
> 3) a high level of profitability of the National Fund of the Republic of Kazakhstan in the long term with a moderate level of risk;
>
> 4) reception of the investment income in the long term.”[123]

---

[120] Aliya Moldabekova’s witness statement of 22 May 2018, the districts court's case file no. 57 and 77 and the National Fund Agreement, the districts court's case file no. 35 and 79, Article 2(2.1.2).

[121] Nacka District Court’s decision of 5 July 2019 in case no. Ä 2543-18 m.fl., p. 4-5.

[122] Presidential Decree no. 385, 8 December 2016, the districts court's case file no. 146, Article 5(3) para 2.

[123] Kazakhstan’s Budget Code (English translation), the districts court's case file no. 33 and 74, Article 23(2).

185. In accordance with the main goals set out in Presidential Decree no. 385, the assets in the National Fund are thus invested in financial instruments for the purpose of preserving the National Fund, maintaining adequate liquidity, ensuring a high level of profitability in the long term with a moderate level of risk and receiving investment income in the long term.

186. Presidential Decree no. 385 further set out that the National Fund has a stabilisation and a savings portfolio in order to achieve its goals and functions.[124] The aim of the stabilisation portfolio is to maintain an adequate level of liquidity whereas the goal with the savings portfolio is to accumulate and preserve funds to ensure long-term returns with an appropriate level of risk.[125]

187. In order to ensure the efficient management of the National Fund and its compliance with Kazakh law, the investment strategy of the National Bank has been established in regulation by Resolution of the Board of the National Bank no 65.

188. Article 2(17) of Resolution of the Board of the National Bank no 65 sets out that all transfers to and from the savings portfolio are made through the stabilisation portfolio.[126] If the stabilisation portfolio does not total to a certain amount by the end of the month, assets from the savings portfolio are to be transferred to the stabilisation portfolio.[127] Correspondingly, any excess in the stabilisation portfolio is to be transferred to the saving portfolio.[128] The National Bank is thus transferring assets between the portfolios in order to accomplish the purpose of the National Fund.

189. In summary, the National Bank's management of the assets in the National Fund is governed by Kazakh law and aims to accomplish the purposes of the National Fund as established in Kazakh law and regulations. All holdings and possessions of assets

---

[124] Presidential Decree no. 385, Exhibit 8 December 2016, the districts court's case file no. 146, Article 5(3), para 5.

[125] Presidential Decree no. 385, 8 December 2016, the districts court's case file no. 146, Article 5(3), para 5 and 6.

[126] Resolution of the Board of the National Bank no 65 , the districts court's case file no. 147, Article 2(17).

[127] Resolution of the Board of the National Bank no 65, the districts court's case file no. 147, Article 3(29).

[128] Presidential Decree no. 385, , 8 December 2016, the districts court's case file no. 146, Article 5(3), para 6.

part of the National Fund are conducted in order to achieve the purposes of the National Fund, i.e. to create stability and to ensure the economic development for future generations. The property has thus been acquired to accomplish the purposes of the National Fund.

H.3.3.3 *Transfers from the National Fund can only be made in order to accomplish the purposes of the National Fund*

190. As *trustor* of the National Fund, Kazakhstan is under Kazakh law entitled to receive funds from the National Fund through annual guaranteed transfers and targeted transfers.[129]

191. The annual guaranteed transfers are made to Kazakhstan's state budget and totals to an amount set out in Kazakh law.[130] Targeted transfers may only be carried out upon decision by the president in decree and to fund (i) crisis management programmes during periods of economic decline or growth deceleration (ii) non-profit social projects and strategic infrastructure projects if no alternative funding sources are available.[131]

192. For Kazakhstan to receive funds from the National Fund, the funds must be (i) transferred in the local currency *tenge*, (ii) used in accordance with the purposes of the National Fund, (iii) approved by the parliament in Kazakhstan and (iv) incorporated in the state budget.[132]

193. Article 23(4) in Kazakhstan's Budget Code sets out that the National Fund "*may not be used for crediting individuals and legal entities, and as ensuring the performance of obligations*.". The assets of the National Fund may thus not be used for payments to individuals or legal entities or to ensure the performance of obligations.[133]

---

[129] Presidential Decree no. 385, 8 December 2016, the districts court's case file no. 146, Article 5(1) and Kazakhstan's Budget Code (English translation), the districts court's case file no. 33 and 74, Article 23(1).

[130] Presidential Decree no. 385, 8 December 2016, the districts court's case file no. 146, Article 5(1).

[131] Presidential Decree no. 385, 8 December 2016, the districts court's case file no. 146, Article 5(1).

[132] Aliya Moldabekova's witness statement of 22 May 2018, the districts court's case file no. 57 and 77, para 8.

[133] Kazakhstan's Budget Code (English translation), the districts court's case file no. 33 and 74, Article 23(4).

194. In summary, transfers of funds from the National Fund to Kazakhstan as *trustor* may only be made for specific purposes and in accordance with a procedure established by law. Kazakhstan may in turn only use the assets for purposes consistent with the purposes of the National Fund.

H.3.3.4 *Summary*

195. Kazakhstan's economy is directly depending on income from oil sales. In order to reduce the effects of fluctuating oil prices on Kazakhstan's state economy, and to ensure the social and economic development for future generations, Kazakhstan has created the National Fund. In the National Fund income from the oil sales are held and invested. The National Bank manages the National Fund in a *trust* and does so in order to accomplish the purposes of the National Fund. The National Bank invests the assets in the National Fund in accordance with the purposes of the National Fund and what have otherwise been established by law. Transfers from the National Fund may only be made in accordance with a procedure set out in law and for purposes consistent with the purposes of the National Fund. If the property seized by the SEA is considered to belong to Kazakhstan, it derives from the National Fund and was acquired by the National Bank as has been explained above.

H.3.4 The purpose of the possession of the property is governmental non-commercial

196. As described above, property of a foreign state is immune against enforcement measures if it is used or intended to be used for government non-commercial purposes. As to the interpretation of the phrase government non-commercial purposes, the Supreme Court have stated that a bar due to immunity is considered to be at hand if "*the purpose of the use or possession is of a specific nature such as when the property is in use for the state's exercise of sovereign activities or other similar tasks of an official nature*".[134]

197. The Supreme Court thus confirms that it is the purpose of the property rather than the nature of the property that determines whether the property is protected by state immunity under Article 19(c). However, the ruling of the Supreme Court does not provide whether the purpose of holding assets in a national fund is considered

[134] NJA 2011 p. 475, para. 14.

government non-commercial, even if Article 21(1)(c) is not applicable. Sweden does not have any precedent on this matter. Neither was the matter discussed in the Swedish Government bill 2008/09:204.

198. In the Norwegian committee investigation *Organisering av Norges Bank och Statens pensjonsfond utland*, the Norwegian Ministry of Foreign Affairs explained their view on what constitutes government non-commercial purposes as follows.

> ”In the cases where a state organ for instance trades with shares, obligations etc. based on an ordinary commercial approach, this normally will constitute commercial transactions for which the organ does not have immunity. If it concerns the special management of public funds for the purpose of securing the state’s present and future finances, this strongly suggests that the activity constitutes the exercise of sovereign activity which has immunity.”[135] (Our emphasis.)

199. The Norwegian committee thus concluded that if the purpose of the management of public assets is to ensure the state’s current and future economy, the property should be immune.

200. The purposes for which the National Fund has been created, and the assets have been invested and used in accordance with, are sovereign since they aim to ensure the state’s economic stability and long term social and economic development.

201. The purposes are sovereign regardless of whether the immediate purpose of the property is considered to be to ensure the National Fund’s stability function or savings function. As described in section H.3.3.2, the holdings in both the stabilisation portfolio and the savings portfolio aims to ensure the general purpose of the National Fund, which is sovereign.

202. This is not effected by the fact that the assets in the National Fund have been invested in order to increase in value. On the contrary, the increase in value is a necessity for the National Fund to ensure long term stability. For the same reason, the Riksbank invests the assets in the Swedish gold and currency reserve in foreign currencies.[136]

---

[135] Utenriksdepartementet’s investigation NOU 2017:13, the districts court's case file no. 100, p. 570.

[136] The Riksbank’s investment policy for the gold and currency reserve, the districts court's case file no. 99, p. 1.

203. The fact that the property is of such type that it can increase in value is not determinant for whether the property is used or intended to be used for government non-commercial purposes under Article 19(c) of the UN Convention. This is confirmed by Wrange, who writes the following in his expert opinion.

> ”In this context it is important to emphasise what has already been explained above, that it is not relevant for immunity from enforcement measures what is done with the asset (e.g. if it is traded with), but the purpose of the property. If [the National Bank] or the person acting for [the National Bank] does so on a market or not is thus irrelevant, since the purpose of the property is sovereign, i.e. to stabilise and save.”[137]

204. Also Mahmoudi considers property stemming from the National Fund to be held for qualified purposes. In his expert opinion, he writes as follows.

> “The purpose of the National Fund, as described above, is *inter alia* ‘to ensure a stable social and economic development of the country […] [to accumulate] financial resources for future generations, [and to] reduce the dependence of the economy on the impact of unfavourable external factors…’ In my opinion, this purpose is qualified and can in no way be considered commercial. This means that the requirement for a non-commercial purpose of the property in order for it to be immune against enforcement measures in accordance with Article 19(c) is met.”[138] (Our emphasis.)

205. Thus, Mahmoudi’s conclusion is that the seized property is immune and therefore protected from enforcement measures under Article 19 of the UN Convention. Wrange reaches the same conclusion. He writes the following in his expert opinion.

> ”On my part, there is no doubt that the property is protected by state immunity, regardless of if you apply the specific rule in Article 21 or the general rule in Article 19.”[139]

206. In summary, it is clear that the purpose of the possession of the property is qualified regardless of whether Kazakhstan or the National Bank are considered to be in possession of the property and that enforcement measures may not be taken as the property is immune under the principle expressed in Article 19 of the UN Convention.

---

[137] Expert opinion from professor Pål Wrange on 20 April 2018, the districts court's case file no. 95, p. 10.

[138] Expert opinion from professor Said Mahmoudi of 20 April 2018, the districts court's case file no. 50 and 94, p. 48.

[139] Expert opinion from professor Pål Wrange of 20 April 2018, the districts court's case file no. 95, p. 11.

I. Leave to appeal must be granted

I.1 Introduction

207. Leave to appeal must be granted under Section 39, paragraph 2 of the Swedish Court Proceedings Act (*lagen (1996:242) om domstolsärenden*) because (i) there is reason for an amendment of the District Court's conclusion, (ii) the accuracy of the District Court's conclusion cannot be evaluated if leave to appeal is not granted and (iii) it is of importance for the guidance of the application of the law that the Court of Appeal considers the appeal.

I.2 The District Court's reasoning is incomplete and vague

208. The cases concern enforcement measures against property of great value allegedly belonging to a foreign state. It involves complex issues on, *inter alia*, property law, applicable law, application of foreign law and international law. The parties have submitted extensive briefs, evidence, legal material and expert opinions. The hearing in the District Court lasted for four days and four witnesses were examined.

209. The evidence invoked by the parties concerns, *inter alia*, who owns the property and for what purpose it is held. The SEA did not have access to that information when it made the appealed seizure decisions.

210. It is not clear from the District Court's decision if the invoked evidence was even taken into account. In fact, the decision does not mention any evidence at all (except for the GCA which was invoked by all parties in the cases).

211. The District Court's reasons are consistently incomplete and vague as to the legal arguments and the assessments of the issues of fact. Two examples are described below.

212. In the District Court, it was in dispute by the parties how the phrase "*property of the central bank*" in Article 21(1)(c) should be interpreted. Kazakhstan and the National Bank held that it is sufficient that the National Bank manages the property for it to be considered "*property of*", whereas the applicants held that the wording only refers to ownership. It is not clear from the District Court's reasoning how the phrase was interpreted by the District Court. On this issue, the District Court referred to a

number of circumstances without further explaining how they are relevant to the assessment.

213. Kazakhstan also pleaded that the property is immune against enforcement measures because it is held for government non-commercial purposes under Article 19(c) of the UN Convention. The District Court's reasons on this ground are practically non-existent. It cannot be understood from the reasons if the District Court tried that issue at all. The reference made by the District Court that"[n]*one of the circumstances referred to by the appellants are grounds for immunity against enforcement measures"* is inadequate.

214. In summary, there is reason to grant review permit because the District Court's reasons are short, incomplete and vague as to the evaluation of evidence, the legal arguments and the assessment of the issues in fact. Leave to appeal must be granted under such circumstances.[140]

I.3 The District Court's decision is incorrect

215. In order to reach its conclusion, the District Court would have had to conclude that (i) the securities are located in Sweden, (ii) it has been established that Kazakhstan is the owner of the property, (iii) the property is not immune under the principle expressed in Article 21(1)(c) of the UN Convention and (iv) the property is not immune under the principle expressed in Article19 of the UN Convention.

216. As to the accuracy of the District Court's assessment of the issues in (i) and (ii), reference is made to what has been explained in chapter E–G. The District Court's conclusions are also incorrect as to the issues in (iii) and (iv). In addition to what has been explained in section H.2 and H.3 there is reason for an amendment of the District Court's conclusions for the following reasons.

217. In its assessment of the issue in (iii) the District Court refers to six circumstances supporting that the property is "*property of*" the National Bank under Article 21(1)(c) of the UN Convention. All of the circumstances referred to by the District Court are attributable to Kazakhstan's right to the property. The District Court does not explain why Kazakhstan's rights to the property are relevant. None of

[140] See NJA 2009 p. 590.

them excludes that the National Bank has rights to, control over or possession of the property.

218. The fact that these circumstances were attached importance indicates that the District Court believed the rights of Kazakhstan to *per se* exclude that the property is ”*property of*” the National Bank under Article 21(1)(c). That is an incorrect application of customary law.

219. Even if the property would be considered belonging to Kazakhstan, it does not exclude that the property at the same time is ”*property of*” the National Bank. On the contrary, Article 21(1)(c) only applies to such central bank property that at the same time is ”*property of the state*”. This is follows from the introduction to Article 21(1) which sets out the following.

> ”1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under Article 19, subparagraph (c): […]” (Our emphasis.)

220. Article 21(1)(c) is thus only applicable to such central bank property that also is ”*property of the state*”. Property can thus be owned, possessed, or controlled by the state and at the same time be ”*property of the central bank*” under Article 21(1)(c). Decisive for whether property is ”*property of the central bank*” is what rights the central bank has to the property.

221. That Article 21(1)(c) is to be interpreted this way is natural considering central banks’ relations to the state and the structure of the UN Convention. Even though many central banks are separate legal entities, they are subject to some kind of sovereign governance. In order for the UN Convention to be applicable on central banks at all, Article 2(1)(b)(iii) requires that the central banks must be empowered to act or actually be acting with sovereign authority of the state. The UN Convention is thus not intended to be applicable to central bank property with no connection to the state.

222. This means that the District Court’s reasoning that Kazakhstan’s rights to the property excludes that the property is ”*property of a central bank*” under Article 21(1)(c) is incorrect.

223. There is also reason to doubt the accuracy of the District Court's decision on the issue of whether the property is immune under Article19(c) of the UN Convention, merely because the District Court without explanation rejected the appeals on this ground even though two of Sweden's leading experts on international law are of the opinion that the SEA's decisions violate applicable customary law. The District Court does not even mention the expert opinions invoked by the parties or the relevant quoted literature.

224. When deciding whether leave for appeal should be granted based on the probability that the decision be amended, the bar should be set low.[141] Therefore, there are strong reasons for granting leave to appeal in this case.

I.4 It is of importance for the guidance of the application of the law that the court of appeal considers the appeal

225. Finally, the cases concern a number of legal issues never tried before by Swedish courts, e.g. where dematerialised securities are located, who owns dematerialised securities held by a chain of custodians in the meaning of the Swedish Enforcement Code and if state immunity applies to property that forms part of a national fund managed by a central bank. It is therefore of great importance for the application of law that Kazakhstan's appeal is considered by the Court of Appeal.

J. The continuing handling of the case

226. Kazakhstan will develop the circumstances supporting that the arbitral award is contrary to public policy after the Court of Appeal has decided on leave to appeal.

227. Kazakhstan requests that the Court of Appeal hold a hearing as it can be presumed to be of advantage for the investigation and further a quick decision of the cases.

K. Preliminary statement of evidence

228. See attached statement of evidence.

---

[141] Cf. Heuman, L., *Kravet på prövningstillstånd för att hovrätten skall bedöma ett tvistemål*, JT 2007/08, p. 599.

Stockholm on 11 October 2019

/signature

Alexander Foerster

/signature

Julia Fermbäck

/signature

Ludwig Metz

/signature

Matilda Magnusson

Exhibit	Document
K-53	Fox, H. & Webb, P., *The Law of State Immunity*, 3 ed., Oxford University Press, 2015
K-54	O'Keefe, R. & Tams, C., *The United Nations Convention on Jurisdictional Immunities of States and Their Property. A Commentary*, 1 ed., Oxford University Press, 2013