## In the name of the King

# role decision

**AMSTERDAM DISTRICT COURT**

section for private law

Case number / roll number: C/13/651217 / HA ZA 18-723

**Roll call decision of 28 April 2021**

in the case of

**1. ANATOLIA STATI,**
residing in Chisinau (Moldova),
**2. GABRIEL STATI ,**
residing in Chisinau (Moldova),
3. the company under foreign law
**ASCOM GROUP S.A. ,**
established in Chisinau (Moldova),
4. **TERRA RAF TRANS TRAIDING LTD. is** a company incorporated under foreign law with its registered office in Gibraltar,
plaintiffs in the main proceedings, defendants in the main proceedings, lawyer K.J. Krzeminski of Rotterdam,

against

the company under foreign law
**SAMRUK-KAZYNA JSC,**
established in Astana (Kazakhstan),
defendant in the main proceedings, plaintiff in the counterclaim, advocaat J. van den Brande, Rotterdam,

and

the **republic of kazakhstan,**
Astana (Kazakhstan) ,
E.W. Peijster, lawyer, Amsterdam.

The parties will hereinafter be referred to as Stati c.s. , Samruk and Kazakhstan.

## 1. The procedure

1.1. The further course of the procedure is evident from:
the judgment in incidental proceedings of 18 March 2020 and the (procedural) documents referred to therein, Kazakhstan's reply, with supporting documents , the interlocutory judgment of 23 September 2020, setting a hearing for 17 March 2021 and referring the case to the roll of 4 November 2020 for the reply in reconviction.

1.2. . In the interlocutory judgment of 23 September 2020, it was considered that amendments to the claim and further submissions must be in the possession of the court and the other party/parties at least ten days before the oral proceedings.

1.3. After an extension of twelve weeks granted to them by the District Court at their request, Stati et al. submitted a counter response on 27 January 2021, together with an additional document containing the grounds for the claim and an amendment to the claim in the context of the case, with the production of s. Subsequently, the case was placed on the roll of 10 February 2021 for the reply act on the part of Samruk and Kazakhstan .

1.4. In response to letters subsequently received from the lawyers, the court, by letter of 12 February 2021 from the Registrar, submitted to the parties a draft agenda for the oral hearing on 17 March 2021 .

1.5. After the parties had responded to the draft agenda, the court adopted the final agenda for the oral hearing on 17 March 2021. The parties were informed thereof by letter of 22 February 2021 from the Registrar.

1.6. The oral hearing took place on 17 March 2021. An official record of the proceedings has been drawn up.

1.7. The roll call has been set for today.

## 2. Developments after the judgment in incidents of 18 March 2020

Following the incidental judgment of 18 March 2020, the following developments have taken place .

*Request for recognition and authorisation to enforce the arbitral awards in the Netherlands*

2.1. By order of 14 July 2020, ECLI:NL:GHAMS :2020:2032, the Amsterdam Court of Appeal granted the request of Stati et al. for recognition and leave to implement the arbitral awards in the Netherlands, to the extent directed against Kazakhstan, and (definitely) rejected the request, to the extent directed against Samruk.

2.2. On 14 September 2020, Kazakhstan lodged an appeal to the Supreme Court of Cassation against the interlocutory decision of 6 November 2018, ECLI:NL:GHAMS:2018:4155, of the Amsterdam Court of Appeal. This appeal is exclusively directed against the opinion of the Court of Appeal that it has jurisdiction to hear the application on the basis of (the transitional law to) article 1075 paragraph 2 of the Dutch Code of Civil Procedure (Rv).

*Prejudgment attachment of goods located in the Netherlands*

2.3. By judgment of 18 December 2020, ECLI:NL:HR:2020:2 10 3, the Supreme Court set aside the judgment of 7 May 2019, ECLI:NL:GHAMS:2019:1566, of the Amsterdam Court of Appeal and referred the dispute to the Court of Appeal for further consideration and decision.
Court of Appeal of The Hague. To this end, in so far as relevant here, he considered:

3.1.1 Part 2 of the plea in case No 1 9/0314 2 and part 3 of the plea in case No 19 /03144 are directed, first of all, against the judgment of the Court of Appeal in paragraph 3.7 that Samruk invoked immunity from execution only in the event that Samruk was identified with Kazakhstan. The parties complained that the Court of Appeal had failed to appreciate that ground 14 of Samruk and the explanation thereof cannot reasonably be interpreted in any other way than that the reliance on immunity from execution was made in case the Court of Appeal subscribes to the opinion of the judge in preliminary relief proceedings that Stati et al. can seek recourse against the assets of Samruk for their claims against Kazakhstan.
3.1.2 This complaint is well-founded. What Samruk has stated in ground 14 and the explanation thereof in its statement of appeal does not allow any other explanation than that Samruk has invoked immunity from execution in case the Court of Appeal agrees with the opinion of the judge in preliminary relief proceedings that Stati et al. can seek recourse against Samruk's assets for their claims against Kazakhstan, regardless of whether they can do so on the basis of identification between Kazakhstan and Samruk or on the basis of misuse of powers by Samruk to invoke its legal independence. The judgment of the court is therefore incomprehensible.
l In section 3.7 the Court of Appeal ruled that, even if it is assumed that Samruk is allowed to rely on the immunity of the State of Kazakhstan, such a reliance should then (also) be considered to have been made on behalf of Kazakhstan. The Court of Appeal, however, rejected the reliance on immunity from execution in section 3.7 on the grounds that (i) for rejection of the reliance on immunity from execution it is sufficient that Stati et al. make it plausible that the immediate destination of the seized goods (Samruk's shares in KMGK) is other than a public destination, and (ii) that Stati et al. have made this sufficiently plausible.
3.2.2 The parties mentioned above in 3.1.1 also contest these judgments as incorrect or insufficiently substantiated. Against judgement (i), the parties argue that the validity of an appeal to immunity from execution depends on whether the seized goods, in whole or in part, are intended for purposes other than public purposes and that this does not exclusively concern the immediate destination of the seized goods.
With regard to claim (ii), the components rely on the contentions of Samruk and Kazakhstan that Samruk is a State-owned legal entity, a so-called 'Sovereign Wealth Fund', whose purpose is to increase the national wealth of Kazakhstan, that the proceeds of its investments are therefore destined for that purpose, and that this also applies to the proceeds which it has from the shares in KMGK, which is a state-owned company engaged in the development, management and exploitation of oil fields located in Kazakhstan's territorial waters in the Caspian Sea. According to the components, it follows from these statements that the shares have a public purpose.
3.2.3 It is in line with the purpose of the immunity from execution - which is to respect the sovereignty of foreign states - to take as a starting point that the property of foreign states is not subject to attachment or execution unless and to the extent that it has been determined that it is destined for a purpose that is not incompatible with that purpose. This is in line with Article 19(c) of the UN Convention, which on this point can be regarded as a rule of customary international law. It is also in line with this scope of immunity from execution that foreign states are not obliged to provide information to the effect that their property is destined for a purpose which precludes attachment and execution.
In accordance with the foregoing, the burden of proof and of establishing that the foreign State's goods are liable to attachment and to enforcement rests on the creditor who attaches or wishes to attach them and that (...) it must always be established that the goods in question are liable to attachment. The creditor will therefore always have to provide information that will make it possible to establish that the goods are being used or are intended by the foreign State for, in short, purposes other than public use.
3.2.4 The requirement applied by the Court of Appeal that it is decisive whether the immediate destination of the seized goods is other than a public destination, does not correspond to the rules set out above in 3.2.3 and therefore shows an incorrect interpretation of the law. Those rules amount to a presumption of immunity from execution under international law for the assets of a foreign State, which only applies if it is established that the assets in question are being used or intended by the foreign State for purposes other than public use, and that it is for the party invoking an exception to immunity from execution to provide information by which that can be established. It follows from those rules that immunity from execution is not limited to goods whose immediate use is public.
3.2.5 Furthermore, the opinion of the Court of Appeal that the destination of the shares in KMGK held by Samruk is other than a public destination, is incorrect in law or insufficiently substantiated. In the light of the circumstances brought forward by Samruk and Kazakhstan in the assertions referred to above in 3.2.2 - which assertions are partly established (...) and partly were not rejected by the Court of Appeal and whose correctness in cassation must therefore be the starting point - it is not clear, without further substantiation, why it can be assumed as an established fact that the shares in KMGK held by Samruk have a public function.

have a purpose other than a public purpose. The fact that the proceeds from the shares in KMGK are intended to increase the national wealth of Kazakhstan indicates in principle that they have a public purpose.
3.2.6 Therefore, the complaints of the divisions set out above in 3.2.2 are also successful.
3.2.7 For the further assessment of the reliance on immunity from execution, it will also have to be considered, after the referral, whether the seized goods (Sam ruuk's shares in KMGK) should be regarded as property' of the State of Kazakhstan within the meaning of Article 19(c) of the UN Convention, which on this point constitutes a rule of customary international law.

2.4.Sam ruk has brought the case before the Court of Appeal of The Hague on 12 March 2021 by 23 March 2021.

## 3. The rating

In the main and in the counterclaim

3.1. The agenda for the oral hearing on 17 March 2021 was:
- the jurisdiction of the Dutch courts in this matter, also in the light of the judgment of the Supreme Court of 18 December 2020 referred to in 2.3 above;
- the objection to the counterclaim and the procedural consequences of both a positive and a negative decision on that objection;
- the objection to the amendment of the claim and grounds of the claim in the main proceedings and the procedural consequences of both a positive and a negative decision on that objection;
- the continuation of the proceedings, also in the light of the proceedings currently pending before the Court of Appeal of The Hague (see above under 2.4).

3.2. . During the oral hearing, the court added as an agenda item the condition under which Stati et al. had submitted their claims. On that occasion, the lawyers of Stati et al. stated that, as far as they were concerned, that condition had been met.

3.3. In the incidental ruling of 18 March 2020 (hereafter: the judgment), it was considered in the section on Jurisdiction (under the heading Seizure of foreigners) that, first of all, the legal status of the prejudgment attachment levied by Stati et al. on Samruk's shares in the capital of KMGK should be examined. In paragraph 5.9, it was considered that, apart from the seizure prevented or lifted against security, in the absence of a legally existing (continuing) precautionary seizure, no jurisdiction can be derived from Article 767 of the Dutch Code of Civil Procedure. In this respect, it was put first that the steps taken by Samruk in preliminary relief proceedings had not yet led to the lifting of the attachment levied by Stati et al. on its shares in the capital of KMGK (legal considerations 5.10). It was also premised on the fact that the assessment of the counterclaims brought by Samruk (which also sought the lifting of the attachment levied by Stati et al. on its shares in the capital of KMGK) was not (yet) at issue at the time.
In legal paragraph 5.13 of the judgment, it was considered that within the framework of the aforementioned investigation into the legal status of the precautionary attachment imposed by Stati et al. on the shares in the capital of KMGK, consideration should also be given to Samruk's and Kazakhstan's reliance on immunity from execution. It was considered that if this appeal were to succeed, it would mean the end of the attachment (with all the consequences this would have for the jurisdiction of the Dutch court). In legal consideration 5.15 it was ruled that

Samruk and Kazakhstan have not sufficiently disputed Stati et al's assertion that Samruk's shares in the capital of KMGK are susceptible to attachment because these shares and the proceeds from them are immediately used by Samruk and its shareholder Kazakhstan or are intended for purposes other than public purposes. It was concluded in paragraph 5.16 that the attachment by Stati et al. of Samruk's shares in the capital of KMGK was legally valid (vo01i).

3.4. In the judgment, it was ruled in the section on Postponement that there is no reason to postpone the proceedings. For this purpose, it was considered, first of all, that Samruk has not made it sufficiently plausible that the Supreme Court will reach a different opinion than the Court of Appeal of Amsterdam in its judgment of 7 May 2019. To this end, it was also considered that the interim order of 6 May 2018 of the Amsterdam Court of Appeal leaves no room for doubt as to the outcome of the proceedings for the recognition and leave to execute in the Netherlands the Arbitral Award and the Supplementary Arbitral Award, insofar as these proceedings concern Samruk.

3.5. In its decision of 14 July 2020, the Amsterdam Court of Appeal did indeed (definitively) reject Stati et al's request for recognition and leave to implement the arbitral awards in Nede rland, insofar as directed against Samruk. Stati et al. have drawn the conclusions referred to above under 3.2.

3.6. The second and third items on the agenda for the oral hearing on 17 March 2021 are related to a certain extent. During the oral hearing, Samruk stated that her objection was prompted by the fear that she would not be able to properly inform the court about these subjects at the hearing, without further written explanations. She added that her objection was cast in a different light by the fact that these subjects were not dealt with substantively at the hearing on 17 March 2021. It requested a 12-week period in which to respond in writing to the amended claim in g. Kazakhstan made the same request.
The District Court considered that, in so far as relevant here, article 130 paragraph 1 of the Code of Civil Procedure stipulates that, as long as the court has not yet rendered a final judgment, the plaintiff is authorised to change or increase his claim or the grounds thereof in writing, by statement of claim or deed in the roll, and that the defendant is authorised to object to this, on the ground that the change or increase is in violation of the requirements of due process. Also in view of the (further) position of Samruk and Kazakhstan as articulated above, the District Court allows the change of claim and the grounds thereof as laid down in the deed of 27 January 2021 by Stati et al. Samruk and Kazakhstan will be given the opportunity to respond to this by deed. The District Court deems a period of six weeks sufficient for this purpose, because before the oral hearing of 17 March 2021 Samruk and Kazakhstan were already given the opportunity to respond to the amendment of claim and its grounds (see above under 1.3).

3.7. Subsequently, the hearing of the case shall be adjourned, pending the judgment of the Court of Appeal of The Hague in the proceedings referred to under 2.4 above. The reasons for this are as follows. Both in the proceedings before the Court of Appeals of The Hague and in the present proceedings, the central issue is the legal status of the precautionary seizure by Stati et al. of the shares in the capital of KMGK, partly in the light of Samruk's and Kazakhstan's reliance on immunity from execution (which, in turn, must now be enforced).

be considered in the light of the judgment of the Hoge Raad of 18 December 2020). In the present proceedings, the jurisdiction of the Dutch court is added. In both proceedings, the legal (continued) existence of the attachment must be decided. As stated in
In the session of 17 March 2021, contradictory decisions can lead to procedural complications. The immunity from execution was not (further) discussed at that time.
After Samruk and Kazakhstàn have taken the act referred to under 3.6, the case will be moved to the parking roll of 6 October 2021, pending the ruling of the Court of Appeal of The Hague. The case will be brought forward as soon as the parties have informed the court that the Court of Appeal of The Hague has ruled. The case will then be placed on the case list at a time to be determined, so that the judgment can be put in the case and the parties can - at the same time - express their views by deed (exclusively) on the judgment and the consequences they attach to it in the present dispute. An oral procedure will then be scheduled.

3.8. Any further decision is reserved.

## 4. The decision

The court:

<u>in convention:</u>

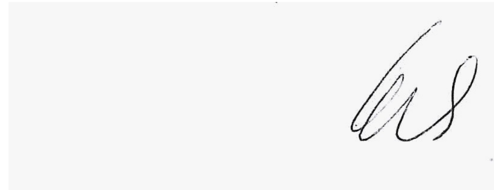
- Refers the case to the roll of 9 June 2021 for the purpose of taking the steps referred to in paragraph 3.6 on the part of Samruk and Kazakhstan;

<u>in the main proceedings and in the counterclaim:</u>

- orders that the case be referred to the parking roll of 6 October 2021, pending the judgment of the Court of Appeal of The Hague;

- shall reserve any further decision.

This decision was rendered by mr. N.C.H. Blankevoort, mr. R.H.C. van Harmelen and mr. M. C. H. Broesterhuizen and pronounced in public on 28 April 2021.



In the absence of Mr Blankevoort, this roll call decision was signed by Mr Broesterhuizen.