

# Svea Court of Appeal rejects Kazakhstan's appeal against attachment of dematerialised securities and other assets in execution of SCC award

by *Practical Law Arbitration* with *Advokatfirman Delphi*

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In *Stati and others v The Republic of Kazakhstan and the National Bank of Kazakhstan*, Svea Court of Appeal case no ÖÅ 13682-21, the Svea Court of Appeal rejected Kazakhstan's and the National Bank of Kazakhstan's appeal against the attachment of dematerialised securities and other assets held in Swedish accounts in execution of an SCC award.

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## Speedread

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The Svea Court of Appeal has rejected Kazakhstan's and the National Bank of Kazakhstan's appeal against the attachment of dematerialised securities and other assets held in Swedish accounts in execution of an SCC award. Based on the Court of Appeal's findings, dematerialised securities are deemed to be located in Sweden if they can be identified in a Swedish securities depository. Award creditors can establish a debtor's ownership over the assets based on all relevant circumstances. Where the registered owner of dematerialised securities is a nominee acting on behalf of a third party, enforcement can be sought against the actual owner.

The court's approach to establishing ownership of dematerialised assets based on all relevant circumstances will be reassuring for international award creditors seeking enforcement in Sweden.

Kazakhstan and the National Bank of Kazakhstan have requested leave to appeal the decision of the Svea Court of Appeal to the Swedish Supreme Court. (*Stati and others v The Republic of Kazakhstan and the National Bank of Kazakhstan*, Svea Court of Appeal case no ÖÅ 13682-21 (16 January 2023).)

## Background

Pursuant to the Swedish Enforcement Code, movable property may be attached if the applicant shows that the property belongs to the debtor. The enforcement authority is only authorised to attach assets that are located in Sweden.

## Facts

In 2010, Ascom Group and others (Investors) initiated an arbitration at the SCC Arbitration Institute against the Republic of Kazakhstan under the Energy Charter Treaty (ECT). In 2013, the tribunal held that Kazakhstan had violated its obligations under the ECT and awarded the Investors damages of around USD 500 million, plus costs and interest.

Following Kazakhstan's attempts to annul the award, the Investors sought to enforce the award in various jurisdictions, including Sweden.

## Attachment of assets

In 2017 and 2018, the Swedish Enforcement Authority (*Kronofogden*) attached various assets that appeared to form part of a savings portfolio of the National Fund of Kazakhstan (Fund), a sovereign wealth fund managed by the Central Bank of Kazakhstan under a trust management agreement between the bank and Kazakhstan. The attached assets included certain liquid assets and shares in Swedish listed companies acquired and held in Swedish accounts by the Bank of New York Mellon in London (BNY Mellon) under a global custody agreement (GCA) between BNY Mellon and the National Bank of Kazakhstan (NBK). The attachment was granted on the basis that the assets belonged to the Republic of Kazakhstan. Kazakhstan and the NBK appealed the attachment orders, arguing that:

- The attached assets did not belong to Kazakhstan.
- The attached shares were not located in Sweden.
- The attached assets were protected by sovereign immunity.

## Supreme Court decision on sovereign immunity

In 2021, following appeals before the Nacka District Court and the Svea Court of Appeal regarding the attachments, the Swedish Supreme Court ruled that the attached assets lacked a clear connection to NBK's monetary policy function, and were not specifically in use or intended for use for government non-commercial purposes. Accordingly, they were not immune from execution.

The issues of whether the assets belonged to Kazakhstan and whether the shares were located in Sweden were remanded to the Court of Appeal for decision.

## Ownership and location of the assets

In the proceedings before the Court of Appeal, Kazakhstan and NBK maintained that the attached assets did not belong to Kazakhstan and that the shares should be deemed to be located outside of Sweden. Among other things, Kazakhstan and NBK argued that:

- Under the GCA, BNY Mellon acquired the assets and the NBK only had a claim on BNY Mellon for an amount corresponding to the assets' value.
- Kazakhstan did not own the assets in the Fund.
- Kazakhstan lacked the right of disposal over the assets.

In addition, the Kazakh parties argued that execution of the attachment orders would violate public policy because the award was obtained through fraud.

## Decision

The Court of Appeal rejected the appeal brought by Kazakhstan and NBK, finding that the assets were located in Sweden, and that Kazakhstan owned them.

### Where were the assets located?

The Court of Appeal noted that the Enforcement Authority had been able to:

- Locate the assets as being with the SEB bank in Sweden.
- Identify and specify the shares in a securities depository at SEB.
- Establish that the attached liquid assets related to the attached shares and were held in an SEB cash account that was, in turn, linked to a securities depository at the same bank.

In the view of the court, these facts showed that the attached assets were indeed located in Sweden. Accordingly, the Enforcement Agency was authorised to decide on the attachments.

### Was Kazakhstan the owner of the assets?

The court reasoned that the issue of ownership was an issue of obligations *inter partes* and that it was to be assessed under Swedish law, considering the Swedish location of the assets.

To answer the question of ownership, the court considered:

- Who was the registered owner of the shares.
- Who owned Fund assets.
- What role BNY Mellon had under the GCA.

In relation to these matters, the court observed that the attached shares in the SEB securities depository were nominee-registered shares issued by CSD-registered Swedish listed companies. The court also found that SEB was authorised by the Swedish CSD Euroclear to be registered as nominee of the shares and to take registration measures on its own behalf, and on behalf of others, and that BNY Mellon was registered as the nominee of the shares in SEB's register.

- **Ownership of the shares.** The court noted that Euroclear's public list of nominees included a shareholder with an address belonging to the Ministry of Finance of Kazakhstan and that the securities depository at SEB also included a reference to the Ministry of Finance for all securities in the depository. According to the court, it was therefore clear that SEB acted on behalf of BNY Mellon, whereas Kazakhstan was the shareholder.
- **Ownership of Fund assets.** It had been confirmed by the Supreme Court that the attached assets formed part of the Fund, and the only question was whether Kazakhstan owned those assets. In the view of the court, it was evident that Kazakhstan owned the assets and that NBK only managed the Fund. Among other things:
  - the purpose of the Fund was to ensure stable economic development in Kazakhstan;
  - the assets accumulated in the Fund were state revenues from oil and natural gas extraction, tax revenues and royalties;

- NBK's management of the Fund was subject to "an agreement with the Kazakh Government" and the Kazakh Government had "ultimate control over the assets in the Fund" through, among other things, statutory provisions on planned and specific purpose withdrawals from the Fund by the state;
- pursuant to a Kazakh Presidential Decree, the Fund assets were accumulated on behalf of Kazakhstan and "the assets in the Fund were not recorded as NBK's assets in NBK's annual reports".
- **BNY Mellon's role under the GCA.** The court concluded that BNY Mellon acted as a custodian of the assets in the Swedish accounts, that SEB had a corresponding assignment in relation to BNY Mellon, and, accordingly, the ownership of the assets stayed with Kazakhstan. That conclusion was reinforced by other evidence, including a power of attorney, issued to BNY Mellon by the Kazakh Minister of Finance, to exercise shareholder rights on behalf of Kazakhstan.

### Would execution of the attachment order violate public policy?

The court rejected Kazakhstan's and NBK's assertion that execution of the attachment orders would be contrary to public policy, noting that the facts relied on in support of that claim had already been examined (and rejected) in previous challenge and annulment proceedings before Swedish courts. According to the court, there was no reason to make a different assessment, notwithstanding the findings of state courts in other jurisdictions.

### Comment

Based on the Svea Court of Appeal's reasoning, nominee-registered dematerialised securities are deemed to be located in Sweden if they can be identified in a Swedish securities depository. The fact that a foreign entity is registered as a nominee for the securities is immaterial. Award creditors can establish a debtor's ownership over the assets based on all relevant circumstances. Also, if the registered owner of dematerialised securities is a nominee acting on behalf of a third party, enforcement can be sought against the actual owner. The court's approach to establishing ownership over dematerialised assets based on all relevant circumstances will be reassuring for international award creditors seeking enforcement in Sweden.

Kazakhstan and the National Bank of Kazakhstan have requested a leave to appeal the decision of the Svea Court of Appeal to the Swedish Supreme Court.

### Case

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