School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Decision Name and Date: Belokon et al. v. the Kyrgyz Republic, 2016 ONSC 4506, July 11th, 2016 – Decision by the Superior Court of Justice - Ontario

Case Report by: Marina Petri**, editor Ignacio Torterola***

Summary:

In the Judgment rendered on 11 July 2016, the Superior Court of Justice of Ontario, Canada, ruled upon the recognition and enforcement of arbitral awards against the Kyrgyz Republic. In particular, the decision deals with the issue which is common to four applications in separate proceedings: the definition of the "ownership interest" of the Kyrgyz Republic in the shares of a Canadian company, which are registered in the name of a subsidiary company, wholly owned by the Kyrgyz Republic. The existence of this "ownership interest" would imply that the shares are subject to seizure by way of execution, pursuant to the 1990 Execution Act.

The applications were dismissed on the basis of a structured interpretation of the legislative materials and the separate agreements defining the relationship between the Kyrgyz Republic and its wholly-owned subsidiary, which qualify as separate legal entities, according to Kyrgyz law. Moreover, the Applicants failed to prove that the Republic has any "ownership interest" in the shares, on the basis of either further agreements between the parties, or trust principles. The mentioned shares are thus not subject to seizure and sale under the Execution Act, since the Republic does not have any "equitable or other right, property, interest or equity of redemption" on them.

Main issues: Recognition and Enforcement of Award, Ownership Interest, Seizure, Execution, Shares in Wholly-Owned Subsidiary.

Judge: Conway J.

Applicants' Counsels: Peter Cavanagh and Chloe A. Snider (for Belokon), Robert Wisner and Stephen Brown-Okruhlik (for Entes), Steven G. Frankel (for Sistem), John Terry and Vitaly Berdichevski (for Stans).

Respondents' Counsels: Aaron Rubinoff and John Siwiec (for the Kyrgyz Republic), Matthew Latella, Christina Doria and Matt Saunders (for Kyrgyzaltyn JSC).

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Digest:

1. Relevant Facts and Procedural Dates

In 1992, the Kyrgyz Republic ("**Republic**" or "**Government**") granted the rights for the exploration and development of its largest gold mine (the "**Kumtor Project**") to a company ("**Kumtor Gold Co.**"), two thirds of which (66,7%) were held by Kyrgyzaltyn State Concern (with no separate existence), while the remaining third (33,3%) pertained to the Cameco Corporation ("**Cameco**"), a Canadian company (¶ ¶ 4, 5). In the late 1990s, the shares in Kumtor Gold were transferred from the State Concern to a Joint Stock Company ("**Kyrgyzaltyn JSC**" or "**Kyrgyzaltyn**"), which was 100% owned by the Republic (¶ 6).

In 2003, further restructuring of the Kumtor Project occurred: the shareholders transferred their shares to a Canadian company, Centerra Gold Inc. ("**Centerra**"), in exchange for which they received shares in Centerra. As a result, Kyrgyzaltyn received a 33% holding in Centerra (the "**Initial Shares**"), while Cameco obtained a 67% shareholding. In 2004, Kyrgyzaltyn reduced its shareholding to approximately 17% (¶ 9).

In the early 2000s, disputes arose between the Republic and Centerra on the management of the Kumtor Project. The Investor-State arbitration commenced by Centerra and Kumtor Gold Co. was suspended in 2008, and the Agreement on New Terms for the Kumtor Project ("**ANT**") was signed in 2009 (¶ 11) between the Republic, Kyrgyzaltyn, Cameco, Centerra and its two operating subsidiaries. It deals with the settlement of all claims in the arbitration and sets out the basis for amended agreements on the Kumtor Project (¶ 12). *Inter alia*, the ANT provided for Kyrgyzaltyn's increase in shares, from 17% to 32,7% (the "**Additional Shares**"), in exchange for an expansion to the mining concession and a more favorable tax regime for one of Centerra's subsidiaries (¶ 14). The Additional Shares were acquired by Kyrgyzaltyn through both Treasury Shares and a transfer from Cameco pursuant to the fulfilment of certain conditions set out in the ANT (¶ 15). The ratification process of the ANT included Government Resolution 254 (**"Resolution 254**"), requesting the approval of the ANT by the Kyrgyz Parliament (¶ 22), as well as a Parliamentary decree ("**Decree 1141 – IV**") instructing the Government to inform the Parliament on the implementation of the ANT (¶ 23).

The new arrangements defined in the ANT were reflected in the Restated Shareholders' Agreement ("**RSA**"), to which the Republic is not a party (¶ 18).

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2. The Analysis of the Court

The Applicants claim that the Republic owns the Centerra shares held by Kyrgyzaltyn and this ownership interest is subject to seizure pursuant to Section 18 of the Execution Act (¶ 24). The analysis put forward by the Court rejects this claim, by focusing on (1) Kyrgyz law, (2) the interpretation of the ANT, and (3) additional evidence.

Kyrgyzaltyn is a Joint Stock Company ("**JSC**"): under Kyrgyz law, JSCs have "full ownership rights to [their] assets", and once the transfer of assets to the JSC is finalized, the founders obtain shareholder rights in the company, but they no longer have any property rights on the assets transferred. Thus, by transferring its assets to Kyrgyzaltyn, the Republic relinquished any rights it had in such assets (¶ 7). Moreover, JSC assets have to be separately accounted for, and no shared liability exists between the company and the shareholders (¶ 8). Consequently, in order to support their claim that the Government *de facto* owns the Centerra shares, which are registered in Kyrgyzaltyn's name, the Applicants rely on the ANT (which needs to be interpreted according to New York law) and, that no ambiguity will be found there, based upon the language of Resolution 254 and Decree 1141 – IV (¶ 26). They acknowledge that they have the burden of proof in establishing that the Republic has an exigible interest in the Centerra shares, pursuant to the 1990 Execution Act (¶ 30).

First, the Court addresses the issue of the interpretation of the ANT (¶ ¶ 33 – 45), under New York law. It finds that the agreement is unambiguous in providing that Kyrgyzaltyn owned the Initial Shares according to Kyrgyz law on JSCs, and acquired the Additional Shares as part of an overall resolution of the dispute between Centerra and the Republic (¶ 45). More specifically, the Additional Shares were transferred to Kyrgyzaltyn as the registered and beneficial owner, and the Applicants failed to prove that the Government retains any ownership interest in those shares, with regards to either the wording of the Recitals of the ANT (¶ ¶ 40, 41, 43), that of the operative clauses of the agreement (¶ 42), or the general references to "the Kyrgyz side" made in the ANT (¶ 44).

Secondly, additional evidence (¶ ¶ 46 – 56) and trust principles (¶ ¶ 57 – 50) are taken into consideration. The former concerns the analysis of the language used in Resolution 254 (¶ 47), as well as Decree 1141 – IV (¶ 49); moreover, other Government conducts allegedly supporting the Republic's acting as the owner of the Centerra shares (¶ 53) are observed. The Court is not persuaded that this evidence, on a balance of probabilities, supports the Applicants' claims, as it is equally consistent with the Republic's acting as the sole shareholder of Kyrgyzaltyn, which remains the owner of the Centerra shares (¶ 56). Similarly, the Court rejects the Applicants' submission that Kyrgyzaltyn holds all of the Centerra shares in trust for the Republic, pursuant to the wording of Resolution 254 (¶ 59).

Finally, (¶ ¶ 61 – 64), the Court underlines that the two cases the Applicants rely on (*Tracy (Litigation guardian of) v. Iranian Ministry of Information and Security* [2014, ONSC 1696] and *1454495 Ontario Inc. v. J=Systems Inc.* [2002, ONSC CarswellOnt 458]) are distinguishable from the present case. As a matter of fact, in the mentioned case law, enough evidence existed for the Court to establish that, on a balance of probabilities, the debtor retained some sort of ownership interest in the assets in question that could therefore be subject to seizure and sale, pursuant to the "remedial nature" of the Execution Act (¶ 30). Such a causal evidence has not been proven by the Applicants in the present case (¶ 64).

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3. The Court's Decision

The Court concluded that the Republic is the sole owner of Kyrgyzaltyn, but it does not own its assets (¶ 65). The Applicants failed to prove that, on a balance of probabilities, the Republic retains any ownership interest in Kyrgyzaltyn's Centerra shares (¶ 66), which, therefore, shall not be subject to seizure and sale, pursuant to the Execution Act (¶ 67).

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