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ECLI:EN:RBDHA: 2021:533

Court	The Hague District Court
Judgment Date	27-01-2021
Publication date	27-01-2021
Case number	C-09-602393-KG ZA 20-1081
Practice areas	Civil law
Particulars	Summary proceedings
Content indication	Summary bailiff proceedings under Article 3a of the Court Bailiffs Act Third-party attachments against Albania. Immunity from execution. It cannot be established that the attached assets are not used or intended to be used for public purposes, with the exception of Albania's claims for indemnity under the agreement with the attached third party.
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Judgment

The Hague District Court

Commercial Team - provisional relief judge

case- / roll number: C/09/602393 / KG ZA 20/1081

Summary judgment of 27 January 2021

in the case brought by [A], assistant bailiff at the firm of [the bailiff] [place 1] (hereinafter: the bailiff), under Article 438(4) of the Civil Procedure Code between

1 **Hydro S.R.L. of Rome (Italy),**

2. **Costruzioni S.R.L.** of Rome (Italy),

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3. **[claimant 3]** at [place 2] ([country 1]),
4. **[claimant 4]** at [place 2] ([country 1]),
5. **[claimant 5]** at [place 3] ([country 2]),
6. **[claimant 6]** at [place 2] ([country 1]),

represented by advocates J. W. de Groot and K. P. W. van der Sanden of Amsterdam, against:

the State of the Netherlands (the Ministry of Justice and Security) in The Hague, advocates W. Wisman and A. F. Veldhuis of The Hague.

The parties are hereinafter respectively referred to as 'Hydro *et al*' and 'the State'.

1 Procedural background

1.1. The procedural history appears in:

- the bailiff's minutes of 11 November 2020 with (ultimately) 10 exhibits;
- the Hydro *et al* statement of claim with (ultimately) 26 exhibits;
- the State's defence with 1 exhibit;
- the skeleton arguments submitted by Hydro *et al* and the State at the hearing.

1.2. The parties have been summoned to appear at the hearing by bailiff's summons. The Republic of Albania (hereinafter: Albania) has also been summoned, but made no appearance.

1.3. Judgment is issued this day at the hearing.

2 Factual background

Based on the documents and the discussion at the hearing, the court proceeds on the basis of the following facts:

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2.1. In an arbitral award of 24 April 2019 (hereinafter: the arbitral award) delivered by the International Centre for Settlement of Investment Disputes (ICSID) at the World Bank in Washington in a dispute between Hydro *et al* and Albania, Albania was ordered (insofar as relevant) to pay Hydro *et al* an amount in excess of EUR 108 million. Albania has not proceeded to payment to date.

2.2. On 12 August 2019, this court's provisional relief judge granted Hydro *et al* leave to enforce the arbitral award upon request. The enforcement order was served on Albania by summons of 26 August 2019, ordering Albania to pay the outstanding amount within two days from the service.

2.3. By bailiff summons of 26 August 2019, Hydro *et al* imposed third-party attachments on Albania for the above claim with interest and costs. The attached third parties are Shell Upstream Albania B.V. having its registered office in The Hague (hereinafter: SUA), Shell Albania Block 4 B.V. having its registered office in The Hague (hereinafter: SAB4) (both companies together are hereafter jointly referred to as "Shell"), and San Leon Durresi B.V., having its registered office in Leiden (hereinafter: SLD). These third-party attachments were served on Albania by summons of 3 September 2019. On 27 August 2019, the bailiff made the communication within the meaning of Article 3a (1) of the Bailiff Act to the Minister of Justice and Security (hereinafter: the Minister).

2.4. By bailiff summons of 13 August 2020, Hydro *et al* again imposed third-party attachments on Albania for the above claim with interest and costs on assets held by SLD. That third-party attachment was served on Albania by summons of 18 August 2020. On 17 August 2020, the bailiff made the communication within the meaning of Article 3a (1) of the Bailiff Act to the Minister.

2.5. The third-party declarations issued by Shell to Hydro *et al* show the following. SUA and SAB4 both concluded an agreement with Albania, represented by the National Agency of Natural Resources ('AKBN'), an agency under the Ministry of Infrastructure and Energy. In short, the agreements between Shell and AKBN provide for a form of cooperation whereby, within a given area, Shell acquires the right to discover, develop and eventually produce and sell "Petroleum" (previously also referred to as "Hydrocarbon", hereinafter referred to as "oil") in cooperation with AKBN. Under the agreements, AKBN is entitled to a part of the oil (either in kind or in cash). In addition, AKBN is entitled to a share of Shell's profits. Further, under the agreements, Shell is to pay AKBN production bonuses, a training bonus payment of USD 300,000, AKBN's damages and indemnities and claims of a public law nature.

2.6. The third-party declaration issued by SLD to Hydro *et al* shows that SLD and Albania are parties to a profit-sharing contract which includes agreements on how profits related to commercial oil exploitation in a given area of Albania are to be shared between the parties.

2.7. On 1 and 12 October 2020, the Minister notified the bailiff that the above attachments should be lifted because they are contrary to the State's obligations under international law.

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3 The dispute

3.1. In summary, Hydro *et al* claim (to the greatest extent possible in a provisionally enforceable judgment) the following:

primarily: to annul the obligations imposed on the bailiff under the Minister's notices, if necessary, with respect to specific assets of Albania, subject to further conditions and/or by issuing an order to the State;

in the alternative: to refer the case to merits proceedings and to suspend the effects of the Minister's notices pending the resolution of the dispute by the merits court,

with a costs order against the State.

3.2. The arguments put forward by Hydro *et al* in support of these claims (in summary) are as follows. The attachments imposed are not contrary to the State's international law obligations, and the Minister's notices are therefore unfounded. Albania does not enjoy immunity from execution because the attachments are intended for purely commercial non-public use. This is evident, among other things, from the legal relationship between Shell and SLD of the one part, and Albania of the other. Albania's claims are commercial claims used to a finance the commercial activities of AKBN. Albania has waived immunity in this respect and expressly acknowledged that its claims under the contract are purely commercial. SLD has not disclosed its agreement with Albania to Hydro *et al*, but Hydro at al are in possession of an earlier agreement between the same parties that, presumably, contain the same arrangements as the current agreement between them. That agreement provides for similar grounds for AKBN's claims as the Shell agreements.

All claims against Shell and SLD under the agreements are held by AKBN and the proceeds of AKBN are not transferred to Albania's 'treasury'. In addition, this case is similar to another Hydro *et al* case concerning a different attached third party (Statkraft Markets B.V.), where the Minister unreservedly concluded that Albania did not enjoy immunity from execution. Foreign judges have also settled the immunity debate in favour of Hydro *et al*. Furthermore, it is significant that the individual assets covered by the attachments also have a non-public purpose, with the exception of tax liabilities.

Albania's State budget takes account of an obligation towards Hydro *et al* by allocating a part of the treasury, namely a sum in the amount of the claim of Hydro *et al*, to Hydro's claim against Albania. Accordingly, having regard to Article 19(b) of the UN Convention, this amount of receipts from the claims does not enjoy any immunity even if it was intended for the treasury.

3.3. The State has put forward a defence which shall, to the extent necessary, be discussed further below.

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4 Assessment of the dispute

4.1. These are summary bailiff proceedings within the meaning of Article 3a of the Court Bailiffs Act (GDW). Pursuant to Article 3a (1) of the GDW, the bailiff informed the Minister of third-party attachments of assets held by Shell and SLD on behalf of Albania. Subsequently, in accordance with Article 3a (2) of the GDW, the Minister notified the bailiff that the act in question was contrary to the State's obligations under international law. In such a case, paragraph 6 of the said Article obliges the bailiff to lift the attachments and to remedy their consequences. Article 3a (7) of the GDW empowers the provisional relief judge to annul the effects of the notice. Since Hydro *et al* wish to maintain the attachments in full, and have not granted the bailiff permission to lift the attachments, the bailiff has initiated these proceedings on the basis of Article 438(4) of the Civil Procedure Code and Article 3a (7) of the GDW.

4.2. The first question is whether the failure on the part of the Republic of Albania (hereinafter: Albania) to make an appearance stands in the way of this matter proceeding to a substantive assessment. In the provisional relief judge's opinion, the answer is "no". It follows from the text of Article 3a of the GDW that the State has its own position whenever an attachment is, or is about to be, imposed against a foreign State. In such a case, the State has the duty to prevent the attachment in question violating its international law obligations. The foreign State's intervention is not required in this respect; the issue concerns the State's own responsibility to comply with its obligations under international law. If a situation arises in which, as in the present case, the attachment of the foreign State's assets has already been imposed, the State may serve notice to the attached party(ies) lifting the attachments and thereby eliminating their effects.

4.3. The above combination of rules implies that Albania is not a party to these proceedings. This is not changed by the fact that Albania has been summoned as a party with an interest in its outcome. Whether Albania has been correctly summoned therefore need not be decided (see also ECLI:EN:GHAMS: 2015:2314).

4.4. According to the Minister, the attachments imposed are contrary to the State's obligations under international law because the attached assets are covered by immunity from execution. It must be decided whether the Minister's notice was justified. In deciding this issue, the fundamental premiss is that international law is based on the sovereignty of States. For this reason, property belonging to foreign States is not, in principle, subject to attachment and execution. Exceptions to this presumption are provided in Article 19 of the United Nations Convention on Jurisdictional Immunities of States and Their Properties [*sic*] of 2 December 2004 (hereinafter: the UN Convention). Although the UN Convention has not yet entered into force for the Netherlands, it follows from judgments of the Supreme Court of 28 June 2013 (ECLI:NL:HR: 2013:45) and 30 September 2016 (ECLI:EN:HR: 2016:2236) that the content of the UN Convention (partially) reflects existing international customary law and Article 19 specifically can be regarded as a codification of customary international law.

4.5. Hydro *et al* invoke the exceptions to the principle of immunity from execution referred to in Article 19(a), (b) and (c) of the UN Convention. These grounds will be discussed in turn below.

4.6. In its introductory words and paragraph (a), Article 19 of the UN Convention provides that immunity from execution does not apply if the foreign State has consented to the measures and thus waived its immunity from execution. Since Hydro *et al* are not in possession of the current agreement between AKBN and SLD, it is not possible to establish the precise arrangements between those parties. Therefore, Hydro *et al*'s reliance on Article 19(a) of the UN Convention cannot succeed in so far as it relates to the attachments imposed on assets held by SLD. To the extent that Hydro *et al* argue that Albania has waived immunity from execution in the agreements with Shell, such an arrangement would not benefit them in any event, since it would only apply between the parties to the contract.

4.7. In its introductory words and paragraph (b), Article 19 of the UN Convention provides that immunity from execution does not apply if the foreign State has allocated or earmarked property for the satisfaction of the attaching party's claim. In invoking this provision, Hydro *et al* refer to an English translation of a page from a "Med-year [*sic*] report on the implementation of the 2020 budget, assessment of the macroeconomical [*sic*], fiscal and budget situation for 5 months of 2020 for the 12 months of 2020" originating from the State budget of Albania published on the Internet and mentioning Albania's payment obligation vis-a-vis Hydro *et al* based on the arbitral award. The provisional relief judge agrees with the State that this does not meet the exception in Article 19, introductory words and (b), of the UN Convention. The text under the heading "V.4 Other Quota Liabilities" and the subheading "V.4.2 "Decisions of the International Court of Arbitration" reads: "They relate to final decisions for the resolution of conflicts in bilateral or multilateral disputes, against the Albanian state. (…) in cases when the respondent party is the 'Albanian state' or 'Albanian government', these decisions are liquidated through the budget of MFE and/or the Reserve Fund of the state budget, if the need arises. (…)". The mere mention of the arbitral award in this way in the State budget, where it is referred to as a 'conditional' obligation in the case between Hydro *et al* and Albania, cannot be regarded as a specific intention to satisfy the claim. It cannot be inferred from the page submitted that Albania has allocated or earmarked property for the satisfaction of Hydro *et al*'s claim.

4.8. In its introductory words and paragraph (c), Article 19 of the UN Convention provides (to the extent relevant) that a foreign State is not entitled to immunity from execution if 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. In support of their reliance on this exception from immunity from execution, Hydro *et al* refer to the contractual provisions in the agreements between AKBN and the attached third parties and to the position of the contracting party AKBN in Albania. As already mentioned above, Hydro *et al* are not in possession of the current agreement between SLD and AKBN. They assume that the provisions of that agreement are almost identical to those in the agreements between AKBN and Shell, but that premiss cannot be accepted in these proceedings. The fact that SLD and AKBN have previously made similar agreements and the nature of the agreement is unchanged is insufficient for that purpose. Consequently, the claims shall be

rejected to the extent that they concern the continuation of the attachment of assets held by SLD.

4.9. The assessment of Hydro *et al*'s reliance on Article 19, introductory words and (c), of the UN Convention in so far as it relates to the attachment of assets held by Shell must be carried out applying the following test, as set out in the so-called Samruk case (HR 18 December 2020, ECLI:NL:HR:2020:2103). Foreign States are not obliged to provide information indicating that their property is intended to be used in a manner that precludes attachment and execution. The burden is always on the creditor to provide the information that is necessary to establish that the foreign assets are in use or intended for use (essentially) for other than public purposes. The presumption of immunity from execution is rebutted only if it is established that the assets in question are used or intended to be used for other than public purposes. It is for the party who invokes an exception to immunity from execution to provide the information based on which that can be established. The reference time for the assessment whether this is the case is the date of the attachment.

4.10. Hydro *et al* have argued that AKBN is a commercial vehicle and that AKBN's claims are commercial claims based on commercial agreements; however, this does not provide a basis from which the purpose of the funds can be inferred. A commercial *origin and nature* of the claim does not yet mean that the claim also has a non-public *purpose*. Nor does that conclusion follow from the fact that the agreement with Shell provides for payments in US dollars. Such funds can still be used for public purposes after exchange. Hydro *et al* also argued that it can be inferred from the fact that Albania has waived immunity and acknowledged that its contractual claims are purely commercial that Albania's claims against Shell are non-public. That argument must likewise be rejected since these contractual agreements between the parties cannot lead to any conclusion as to the intended use of the assets. Such agreements are not an obstacle to the assets being intended for public use. Furthermore, if Albania indeed itself considered the revenues to be intended for commercial use as Hydro *et al* assume, it would not have had to waive immunity from execution in the first place. No such conclusion can thus be drawn on that basis.

4.11. Hydro *et al* further allege that the Minister had, in an identical case, established that the claims were non-public and that foreign judges had resolved the immunity debate in their favour. Be that as it may, this case must nonetheless be examined on its own merits. It is the State's own responsibility, in each case, to comply with international law obligations and such responsibility is not limited either by possible errors in the past or by foreign court judgments.

4.12. Hydro *et al* further argue that AKBN used the revenues from the Shell agreements solely to finance its commercial activities and that it did not make payments into the Albanian Treasury. In support of that position, Hydro *et al* refer to a Deloitte report from February 2018, prepared for Albania's Ministry of Infrastructure and Energy covering the year 2016. While the report does note that AKBN is not, as such, included in the public budget, it immediately adds the following exception: *"except when AKBN implements specific projects foreseen in the State Budget".* In addition, Deloitte reports that AKBN's

annual accounts have not been published. As a result, there is a lack of full insight into AKBN's cash flows, and it cannot be concluded based on the report that AKBN's revenues from the Shell agreements do not benefit Albania's Treasury. On the contrary, the report contains a table which shows that AKBN is indeed a source of government revenue from the *'extractive sector'*. The table shows that AKBN's bonuses from that sector go to the State treasury. There is a dash next to other cash flows, but that is not a basis to assume that other cash flows do not go to public purposes. Indeed, the explanatory note to the table states that the table does not reflect all the cash flows because not all the information is known. Moreover, the report shows that there were, at that time, no agreements on the transfer of the proceeds from of oil sales. On page 45 of the report there is a diagram showing that, at the time of the report, it was not yet known whether and what share of AKBN in oil profits would accrue to the Albanian State because oil production had not yet started. It cannot be assumed that such arrangements are still absent or cannot be made in the future. There is no information on that. Hydro *et al* also argued with reference to an EITI (Extractive Industries Transparancy [*sic*] Initiative) report of 11 August 2017 that there is, at present, no evidence that AKBN's receipts from the claims have a specific sovereign purpose. However, Hydro *et al* thereby overlook that immunity from execution is the starting point and that, in order to admit an exception, it must be established that the goods are not used or intended to be used for public purposes. The information contained in the ETI-report thus likewise does not establish that AKBN's revenues cannot and will not have a specific sovereign purpose in the future. After all, immunity from execution is not limited to assets the *immediate* purpose of which is a public one. Furthermore, the documents relied on by Hydro *et al* date to a period well before the reference date for determining the intended use of the assets, such that it cannot be ruled out that other agreements between Shell and AKBN existed at that reference date.

4.13. In view of the foregoing, there are no grounds to lift the obligations imposed on the bailiff by the Minister's notices as regards the attachments in their entirety. It remains to be assessed whether, as Hydro *et al* argue, the various individual assets attached in possession of Shell each have a non-public purpose.

4.14. Hydro *et al*'s arguments to the effect that AKBN's claims to the oil have a commercial purpose are similar to the arguments already rejected above. The fact that these revenues have been generated in a purely commercial setting does not mean that the proceeds will also be spent purely commercially.

4.15. It is not disputed that the "training bonus" claims are used to purchase literature, data, software, hardware and technical equipment for AKBN or the provision of specific services as requested by AKBN, as compensation for AKBN's administrative costs in connection with the implementation of the Agreement and for other costs, and for the training of AKBN staff; however, that does not lead to the conclusion that such claims may be attached. It has not been established that the staff of AKBN, an agency of an Albanian Ministry, are engaged in purely commercial activities. The fact that the bonus only benefits those employees who do not perform a public mission is an assumption that cannot be deduced from the documents. It may not be clear to Hydro *et al* what public purpose the Minister sees in the commercial bonus structure of the training bonus

and other production bonuses, but it is not the Minister's task to explain this. Hydro *et al* have failed to provide evidence demonstrating that these bonuses lack a public purpose.

4.16. Nor is it established that AKBN's possible claims against Shell in respect of damages or penalties are used solely for their contractual or factual purpose, such as, for example, the replacement of damaged goods. The fact that such fees are contractually payable for a certain purpose does not mean that they are actually used for that purpose. In the view of the provisional relief judge, the situation is different with respect to AKBN's indemnity claims under the Shell agreements. Those involve indemnifying AKBN for "all claims by third parties for personal injury or property damage resulting from the conduct of Petroleum Operations". Such claims will therefore, by their nature, be used to satisfy private claims of third parties as a result of AKBN's commercial activities under the agreements with Shell, and will therefore never flow into the State treasury. Albania enjoys no immunity from execution, in respect of those claims, such that Hydro *et al*'s primary claim shall be allowed insofar as it relates to this claim.

4.17. For the remainder, the primary claim will be rejected. Based on the foregoing, the provisional relief judge also sees no reason to grant the subsidiary claim for a reference of the case to merits proceedings. These proceedings have not demonstrated any need for further enquiry. The conclusion of the matter is that the Minister's notice - except in so far as it relates to AKBN's indemnity claims vis-a-vis Shell discussed above - is justified, and that the attachment of the remaining assets held by Shell and SLD must be lifted. This outcome is consistent with the nature of the proceedings under Civil Procedure Code, Article 438 (4), the subject of which is the provision of an immediate remedy (if any).

4.18. Having failed in most of its claims, Hydro *et al* shall bear the costs of these proceedings. There is no ground for an order of post-judgment costs, since the costs award simultaneously provides an enforcement title for such post-judgment costs (see HR 19 March 2010, ECLI:EN:HR:2010:BL1116, NJ 2011/237).

5 The decision

The provisional relief judge

5.1. annuls the obligations imposed on the bailiff under the Minister's notices in so far as they relate to the indemnity claims by Albania under the agreements with Shell and SLD and lifts the remainder of the attachments of Albania's assets held by Shell and SLD;

5.2. orders Hydro *et al* to pay the State the costs of the proceedings payable to the State within 14 days of the delivery of the judgment, so far assessed on the part of the State at €1.636.--, of which €980.-- in legal fees and €656.-- in court fees;

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5.3. declares that, in default of timely payment, statutory interest shall accrue on the costs of the proceedings;

5.4. declares this judgment provisionally enforceable;

5.5. rejects the claimant's other or different claims.

This judgment was issued by mr. T.F. Hesselink and publicly pronounced on 27 January 2021.

hvd