CITATION: Gebre LLC v. The Kyrgyz Republic et al., 2022 ONSC 4137
COURT FILE NO.: CV-22-00678369-00CL
DATE: 20220718

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
GEBRE LLC	)	*Derek J. Bell and Katelyn Ellins*, for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
THE KYRGYZ REPUBLIC, KYRGYZALTYN JSC, and CENTERRA GOLD INC.	)	
Defendants	)	**HEARD:** July 13, 2022

REASONS FOR DECISION

MCEWEN, J.

[1] Gebre LLC ("Gebre") brings this motion for partial default judgment against the Defendants, The Kyrgyz Republic ("Republic") and Kyrgyzaltyn JSC ("KJSC"). The claim against the remaining Defendant, Centerra Gold Inc. ("Centerra"), was previously discontinued.

[2] The relief sought by Gebre against the Republic and KJSC is two-fold:

(a) an order recognizing the arbitral award in *Stans Energy Corp. and Kutisay Mining LLC v. The Kyrgyz Republic*, PCA Case No. 2015-32 issued on August 20, 2019 (the "Award"); and

(b) a declaration that KJSC is the alter-ego of the Republic.[1]

[3] For the reasons that follow, I grant the relief sought by Gebre.

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[1] In the Notice of Motion and Factum of Gebre, it also sought a declaration that the Centerra shares held by KJSC (the "KZN Centerra Shares") are beneficially owned by the Republic. This relief was not pursued at the hearing of the motion.

BACKGROUND

[4] The Republic is a country in Central Asia, formerly part of the USSR. KJSC is an open-joint stock company organized under the laws of the Republic, whose sole shareholder is the State Property Management Fund of the Republic.

[5] Stans Energy Corp. ("Stans"), a publicly traded company incorporated under the laws of the Province of Ontario, owned Kutisay Mining LLC ("Kutisay"), a limited liability company incorporated in Kyrgyzstan through Stans Energy KG LLC, a limited liability registered company under the laws of the Republic.

[6] In 2015, Stans and Kutisay commenced an arbitration proceeding against the Republic in which Stans and Kutisay claimed that the Republic unlawfully expropriated their investments and failed to provide fair and equitable treatment to them contrary to the laws of the Republic on investments in the Republic (the "2003 Investment Law"). The matter proceeded to arbitration and the arbitration tribunal (the "Tribunal") issued the Award in favour of Stans and Kutisay. Thereafter, in March 2020, Stans and Kutisay entered into an agreement to assign the Award and all rights in the Award to three entities, one of which is Gebre.

[7] On March 15, 2022, Gebre commenced the within action against the Republic, KJSC and Centerra.

SERVICE OF THE STATEMENT OF CLAIM AND THE NOTING IN DEFAULT OF THE REPUBLIC AND KJSC

[8] I begin by noting that I am satisfied that the Statement of Claim was properly served on the Republic and KJSC and has come to their attention.

[9] The Statement of Claim was served on the Republic in accordance with s. 9(5) of the *State Immunity Act*, R.S.C. 1985, c. S-18, by delivering a copy of the Statement of Claim to the Deputy Minister of Foreign Affairs on March 16, 2022. On June 15, 2022, counsel for Gebre received a Certificate from the Deputy Director of the Criminal, Security and Diplomatic Law Division of Global Affairs Canada, certifying that the Statement of Claim, amongst other things, was transmitted to the Republic on April 14, 2022. The Republic has not defended the Statement of Claim or in any way responded. The Statement of Claim was also served on KJSC by couriering a copy on March 16, 2022 to KJSC to the attention of its Board of Directors. According to the legal opinion obtained by Gebre, service by courier on KJSC complies with the civil procedure code of the Republic. Further, out of an abundance of caution, Gebre provided copies of the Statement of Claim to the former counsel of KJSC.

[10] Although it is not obligated to do so, Gebre followed the good practice of providing the Republic and KJSC with copies of their Motion Record for default judgment, at considerable expense. It was served on July 7, 2022. Again, there has been no response.

[11] Based on the foregoing, I am satisfied that the Republic and KJSC were properly served and have actual notice of both the Statement of Claim and the Motion Record.

[12] The Republic was noted in default on June 20, 2022. KJSC was noted in default on June 16, 2022.[2]

THE LAW ON SUMMARY JUDGMENT

[13] Where defendants have been noted in default, as is the case here, r. 19.02(1)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, states that the defendants are deemed to have admitted the truth of the facts pleaded in the Statement of Claim.

[14] As noted recently by Justice Perell in *Barkley v. Tier 1 Capital Management Inc.*, 2022 ONSC 175, at para. 51:

> Under rule 19.02(1)(a), a defendant who has been noted in default is deemed to admit the truth of all allegations made in the statement of claim. However, a plaintiff is not entitled to judgment merely because the facts are deemed to be admitted; the pleaded facts must entitle the plaintiff to the judgment sought. Because the defendant is deemed to have admitted the allegations of fact made in the statement of claim, if the deemed admissions are sufficient to establish liability, it is not proper for the court to enter into an inquiry about liability; the judge should confine himself or herself to determining the quantum of damages.

[15] Accordingly, if the facts as pleaded are sufficient to grant summary judgment, then the inquiry ends. As has also been noted in a number of cases, although the Rules provide the consequences for noting in default, the court has the jurisdiction and the duty to be satisfied on the civil standard of proof that the plaintiff is able to prove the claim and damages. Where there are insufficient facts pleaded, the plaintiff must adduce evidence which, combined with the admitted facts, would result in a judgment being granted. If the court finds the evidence adduced at the motion to be lacking in credibility or lacking "an air of reality", the court can refuse to grant judgment or grant partial judgment regardless of the default: *Fuda v. Conn,* 2009 CanII 1140 (Ont. S.C.)), at para. 16.

[16] I accept Gebre's submissions that the deemed admission of the facts alone set out in the Statement of Claim are sufficient to grant summary judgment both with respect to the order recognizing the Award (the "Recognition Order") and the declaration that KJSC is the alter-ego of the Republic. Further, and in any event, the evidence adduced on the motion by Gebre adds an "air of reality" to support its motion.

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[2] It bears noting that Canada is not the only jurisdiction where the Republic has failed to appear. The Republic failed to respond to Gebre's recognition proceedings in the District of Columbia, U.S.A., and default judgment was obtained against the Republic.

THE RECOGNITION ORDER

[17] The test for a Recognition Order is set out in Article 36 of the Model Law. Article 35 of the Model Law states that an arbitral award "shall be recognized as binding … subject to the provisions of this article and of article 36".

[18] The general rule of interpreting the recognition and enforcement provisions of the Model Law is that "the grounds for refusal of enforcement are to be construed narrowly": *Popack v. Lipszyc*, 2018 ONCA 635, 141 O.R. (3d) 561, at para. 40.

[19] Article 36 generally provides that recognition of an arbitral award may only be refused at the request of the party against whom it is invoked if that party can prove:

> (a) incapacity of a party or legal invalidity of the agreement;
>
> (b) absence of notice or an opportunity to present the party's case (i.e. procedural unfairness);
>
> (c) absence of jurisdiction;
>
> (d) non-compliance with the arbitration agreement concerning the tribunal's composition or procedure;
>
> (e) the award is or has not yet become binding, or, if the court finds that;
>
> (f) the subject matter of the dispute is not capable of settlement by arbitration or
>
> (g) recognition would be contrary to public policy: incorporated by the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5 ("ICAA"), schedule 2 at art. 36; *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, 2017 ONCA 939, at para. 20, leave to appeal refused, 2018 CanLII 99661 (SCC).

[20] Further, the Court of Appeal in *Consolidated Contractors*, at para. 19, held that Article 5 of the Model Law prohibits court interventions except as provided in the Model Law.

[21] As noted in Gebre's factum, the following facts are set out in the Statement of Claim and are deemed to be admitted by the Republic and KJSC:

> (a) The Award is a valid, binding, and enforceable award (para. 10).
>
> (b) The Republic provided its written consent to arbitration in Article 18 of the 2003 Investment Law (paras. 11-12).
>
> (c) Under the 2003 Investment Law, in the absence of an alternative agreement between the investor and the Republic, one of the parties may ask for arbitration by

submitting the dispute to "arbitration or an international ad hoc tribunal formed in accordance with the arbitration rules of the United Nations Commission on International Trade Law" ("UNCITRAL"), which Stans and Kutisay did by serving a Notice of Arbitration on the Republic (paras. 12-13).

(d) The Tribunal consisted of the Honourable Colin L. Campbell, Q. C. (appointed by Stans and Kutisay), Mr. Stephen Jagusch, Q.C. (appointed by the Republic), and Professor Karl-Heinz Böckstiegel (President, appointed jointly by the parties) (para. 15).

(e) In the arbitration, the Republic was represented by counsel from Satarov, Askarov & Partners, King & Wood Mallesons, and the Center for Court Representation of the Government of the Kyrgyz Republic (para. 16).

(f) The Republic participated in all aspects of the arbitration, including by submitting a Request for Bifurcation, an Application for Security, a Submission on Jurisdiction, a Reply on Jurisdiction, a Statement of Defence on the Merits and Memorial on Jurisdiction, and a Rejoinder on the Merits and Reply on Jurisdiction. The Republic also submitted witness statements and expert reports in support of its pleadings (para. 16).

(g) The Tribunal considered issues of its own jurisdiction and ultimately found that it had jurisdiction (paras. 17-20).

(h) On the merits, the Tribunal unanimously found that the Republic had expropriated Stans' and Kutisay's investments in violation of Article 6(1) of the 2003 Investment Law and had also failed to treat Stans' and Kutisay's investments fairly and equitably, in breach of Article 4(4) of the 2003 Investment Law (para. 21).

(i) The Award found the Republic liable to Stans and Kutisay in the amount of US $15,027,081.89, plus pre- and post-award interest at a rate of 5%, compounded annually from October 16, 2014 until full and final satisfaction of the Award. The Tribunal ordered the Republic to pay to Stans and Kutisay two thirds of the costs of the Arbitration and two thirds of Stans' and Kutisay's legal costs (totaling US $3,137,887.17, CAD $16,472.14, and €796,303.86), plus post-award interest at a rate of 5%, compounded annually from the date of the Award until full and final payment (para. 22).

(j) The Republic has not sought to appeal the Award. Pursuant to Article 70(3) of the *English Arbitration Act of 1996*, the Republic's deadline to appeal the Award has passed (para. 23).

[22] In addition to the deemed admitted facts in the Statement of Claim, Gebre relies upon the following as lending an "air of reality" to their assertions:

- As set out in the Award, the Tribunal found that the Republic and Stans and Kutisay had agreed to resolve the dispute at issue in the arbitration under Article 18 of the 2003 Investment Law of the Republic. The Tribunal specifically stated that Article 18 contained the Republic's consent to submit to international arbitration all investment disputes with foreign investors and found that Stans and Kutisay were foreign investors within the meaning of the 2003 Investment Law.

- The Tribunal held, amongst other things, that Stans' and Kutisay's claims against the Republic constituted "investment disputes" under the 2003 Investment Law.

- The Award noted that there were no issues of capacity raised in the arbitration.

- The Republic fully participated in the arbitration and the arbitrators were selected as per the UNCITRAL Rules.

- Initially, the Tribunal conducted a hearing on jurisdiction, addressing five jurisdictional issues. This resulted in a jurisdictional award issued on January 25, 2017, in which the Tribunal found in favour of Stans and Kutisay with respect to each issue. The Republic applied to the High Court in London to set aside the jurisdictional award, which was dismissed. The Tribunal went on to determine additional jurisdictional issues raised by the Republic and held a hearing on the merits. In its Award, the Tribunal rejected the Republic's remaining jurisdictional issues and found in favour of Stans and Kutisay on the issue of the merits, awarding the amount of US $15,027,081.89 in damages plus interest and costs. The Republic did not appeal the Award.

[23] Based on the deemed admissions and the supporting evidence set out above, I am satisfied that Gebre has established that there are grounds for recognizing the Award. None of the factors in Article 36 are present. The time for any appeal has also passed and there are no limitation issues respecting the recognition of the Award.

[24] Gebre is therefore entitled to an order recognizing the Award.

KJSC IS THE ALTER-EGO OF THE REPUBLIC

[25] First, insofar as the law on declaratory relief is concerned, Gebre relies upon the decision of the Supreme Court of Canada in *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, [2019] 1 S.C.R. 99, at para. 60, where the court held that declaratory relief may be appropriate where:

> (a) the court has jurisdiction to hear the issue,
>
> (b) the dispute is real and not theoretical,
>
> (c) the party raising the issue has a genuine interest in its resolution, and
>
> (d) the responding party has an interest in opposing the declaration being sought.

[26] I agree with Gebre that in the facts of this case it is appropriate to consider the declaration sought.

[27] The four factors are present in the circumstances of this case. The court has jurisdiction to grant declaratory relief pursuant to s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 97. This is a real issue, as the nature of KJSC's identity is relevant to whether KJSC's assets can be seized by the sheriff in satisfaction of the Award. Gebre clearly has a genuine interest in the resolution of this matter, and the defendants have an interest in opposing the declaration.

[28] Second, insofar as the issue of alter-ego itself is concerned, I accept Gebre's submission that the applicable test to consider in this case was set out in *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, 141 O.R. (3d) 1, at para. 66, where the Court of Appeal held:

> With respect to cases where it is alleged that a subsidiary corporation is a mere facade that protects its parent corporation, in order to ignore the corporate separateness principle, the court must be satisfied that (i) there is complete control of the subsidiary, such that the subsidiary is the "mere puppet" of the parent corporation; and (ii) the subsidiary was incorporated for a fraudulent or improper purpose or used by the parent as a shell for improper activity.

[29] Even though the facts of the within case are different than those in *Yaiguaje*, I see no meaningful distinction between a case of a pure corporation-parent and corporation-subsidiary (as was the case in *Yaiguaje*) and the facts of this case where the "parent" is the Republic.

[30] I accept Gebre's submission that both the deemed admissions in the Statement of Claim and the additional evidence adduced on the motion satisfies the two-part test in *Yaiguaje*.

[31] With respect to the deemed admissions, as noted in Gebre's factum, the following facts are set out in the Statement of Claim and are deemed to be admitted by the Republic and KJSC:

> (a) The Republic used KJSC and its representatives as it wished to seize the Kumtor Gold Mine, without having any regard to the interests of others dealing with KJSC, including Centerra or Kumtor Gold Company CJSC ("KGC") (para. 42).
>
> (b) The Republic used KJSC as a mere instrument in pursuit of its own interest to nationalize KGC and the Kumtor Gold Mine (para. 42).
>
> (c) KJSC is the alter ego of the Republic, for reasons stated below (paras. 26, 32, 42, 47, 61, 67).
>
> (d) In December 2020, KJSC nominated Mr. Tengiz Bolturuk ("Bolturuk"), the superintendent of mining development at KJSC, as one of its representatives on the Centerra Board of Directors (para. 34).

(e) As a member of the board, Bolturuk had access to Centerra's confidential and commercially sensitive information about the Kumtor Gold Mine and Centerra and had unfettered access to the Kumtor Gold Mine (para. 35).

(f) The Republic began taking measures to nationalize KGC following the election of Sadyr Japarov as President of the Republic in January 2021. In February 2021, the Republic's Parliament formed a State Commission tasked with reviewing the effectiveness of the Kumtor Gold Mine's activities. On April 30, 2021, new legislation was introduced before Parliament that would allow the Republic to assume management authority over KGC. This law was quickly passed on May 6, 2021 and was signed into law on May 14, 2021 (the "Temporary Management Law") (para. 36).

(g) The Temporary Management Law permits the Republic's mineral resources agency to suspend KGC's rights to use subsoil resources if KGC violates Kyrgyz law. The Temporary Management Law also permits the President of the Republic to, upon such suspension, unilaterally prohibit KGC's management from making decisions relating to its operations, business management, commercial and financial activities, and to take control of KGC's assets by introducing temporary external administration with full control over all of KGC's assets (para. 37).

(h) As a result of the Republic's actions, on May 14, 2021, Centerra and KGC, among others, commenced the Centerra Arbitration (defined below) seeking injunctive relief against the Republic (para. 38).

(i) The Republic took steps to seize the Kumtor Gold Mine on May 15, 2021 and purported to implement the Temporary Management Law on May 17, 2021, despite there being no violation of Kyrgyz law. The Republic effectively seized control of the Kumtor Mine (para. 39).

(j) Bolturuk was in direct communication with the President of the Republic throughout the period of time the Republic acted to seize control of the Kumtor Gold Mine. Bolturuk acted under the direction and control of the Republic to undermine Centerra from within and seize control of the Kumtor Gold Mine (para. 40).

(k) On May 17, 2021, the day the Kumtor Gold Mine was seized by the Republic, Bolturuk resigned from his position on the Centerra board. On May 18, 2021, the Republic announced that it had appointed Bolturuk as the "external manager" of KGC (para. 41).

(l) While the Republic was acting to seize the Kumtor Gold Mine, and just days before the Republic actually seized it, KJSC took steps to defraud KGC by attempting to divert US $26 million in gold sale proceeds without authorization, presumably to fund the operation of the Kumtor Mine in the event of its expropriation (para. 43).

(m) KJSC, pursuant to an agreement called the "Restated Gold and Silver Sale Agreement," dated June 6, 2009 (CX03)" (the "GSSA"), was contractually obligated to refine doré (unrefined gold), sell the refined gold and silver to a buyer, and cause payment to Centerra (para. 44).

(n) The last shipment of doré from the Kumtor Gold Mine before the imposition of temporary management was delivered to KJSC on May 9, 2021, and payment for that shipment—approximately $26 million—was due to KGC on May 21 pursuant to s. 4.1 of the GSSA. The payment was supposed to go directly from StoneX Financial Ltd. ("StoneX"), the foreign buyer of the gold produced at the Kumtor Mine and refined by KJSC, to a bank account designated by KGC (para. 45).

(o) On May 12, 2021, KJSC forged a payment order of $26 million USD attempting to direct StoneX to deposit proceeds of the sale to a different bank account, without authorization (para. 46).

(p) The Republic used its wholly owned subsidiary, KJSC, to perpetuate fraud to fund its goal of nationalizing the Kumtor Gold Mine (para. 47).

(q) In the settlement (now the arrangement) between the Republic and Centerra, the principal consideration payable by the Republic and KJSC is the KZN Centerra Shares (Centerra shares held by KJSC). The Republic does not appear to be contributing any monetary consideration (para. 56).

[32] Insofar as the first part of the test in *Yaiguaje* is concerned (i.e. complete control), in addition to the deemed admitted facts in the Statement of Claim, Gebre relies upon the following as lending an "air of reality" to their assertions:

- Centerra and others initiated a separate arbitration against the Republic in May 2021 in relation to expropriation events detailed in that arbitration. In that arbitration, Centerra describes the Republic, through KJSC, as Centerra's largest shareholder, and states that KJSC holds shares in Centerra on behalf of the Republic. Centerra goes on to specifically plead that KJSC is the alter-ego of the Republic and that KJSC has acted, and continues to act, at the behest and instruction of the Republic with respect to KJSC's shareholding in Centerra.

- In February 2022, Justice Gilmore of the Commercial List, rendered a decision in *Centerra Gold Inc. v. Bolturuck,* 2022 ONSC 1040. Briefly, Bolturuk was appointed to the Board of Directors of Centerra as a representative of KJSC, which Justice Gilmore found to be a wholly owned corporation of the Republic. Although it is not necessary to go into detail of the facts of that case, Justice Gilmore found, among other things, that Bolturuk had been placed on the Centerra Board by KJSC to serve the national interests of the Republic.

[33] Insofar as the second portion of the test in *Yaiguaje* is concerned (i.e. that the subsidiary was incorporated for a fraudulent or improper purpose or used by the parent as a shell for improper

activity), there is an air of reality to this assertion given Justice Gilmore's further findings that Bolturuk breached his fiduciary and confidentiality duties to Centerra and that Bolturuk's actions between December 2020 and May 2021 were intended to harm Centerra. Justice Gilmore further held that Bolturuk's conduct put him in a position of conflict with Centerra and he failed to disclose communications with the President of the Republic with respect to the Republic's well-planned takeover of the Kumtor Gold Mine, which was owned by Centerra. These findings of fact by Justice Gilmore are supported by Centerra in the *Centerra Gold Inc. v. Bolturuck* pleading, which were included in the materials before me.

[34] The findings of Justice Gilmore and the evidence adduced amply demonstrate that Bolturuk, while sitting on Centerra's Board of Directors as KJSC's representative, worked for months contrary to the interests of Centerra to ensure that the Republic could nationalize the Kumtor Mine. Ultimately, Bolturuk was appointed as an external manager of KJSC and the general manager of the Kumtor Gold Mine by the Republic.

[35] Based on the foregoing, I am satisfied that KJSC was used by the Republic for an improper activity. KJSC was used by the Republic to seize the Kumtor Gold Mine and it took steps to defraud KGC by attempting to divert gold sale proceeds. Overall, I am therefore satisfied that the test in *Yaiguaje* has been met and the declaration that KJSC is the alter-ego of the Republic be granted.

THE ARRANGEMENT PROCEEDINGS

[36] I pause here to note that this motion was heard prior to the hearing that is scheduled for July 28, 2022 concerning a proposed Plan of Arrangement described in the global arrangement agreement entered into between Centerra, the Republic, KJSC et al.. I agreed to hear the motion in advance of the July 28, 2022 hearing as counsel advised, and I accepted, that the findings on this motion will not affect the ability of the court at the final order hearing to issue whatever relief it deems appropriate. The Republic and KJSC are not parties to that proceeding and, as noted, Centerra is no longer a party to this proceeding.

DISPOSITION

[37] For the reasons above, an order shall go recognizing the Award pursuant to the ICAA and the Model Law as well as a declaration that KJSC is the alter-ego of the Republic.

[38] Gebre is further entitled to its costs. It can provide me with a Bill of Costs, in writing, in this regard, along with submissions not to exceed three pages.

McEwen J.

Released: July 18, 2022

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REASONS FOR DECISION

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