Tracking number of the chamber **159/B/18**
Date of the decision **25 May 2018**
Docket number **2017/4282/A**
Recorded under nr **2018/6385**

UNOFFICIAL TRANSLATION IN ENGLISH

-

DUTCH SPEAKING COURT OF FIRST INSTANCE OF BRUSSELS

Decision

- **THIRD PARTY OPPOSITION AGAINST LEAVE GRANTED FOR CONSERVATORY THIRD PARTY ATTACHMENT - ART. 1412QUINQUIES BELGIAN JUDICIAL CODE**
- **FINAL DECISION *INTER PARTES***

Attachment chamber

civil matters

The attachment judge renders the following decision in the matter:

A.R. 2017/4282/A

The **REPUBLIC OF KAZAKHSTAN**, represented by its Minister of Justice at the Ministry of Justice, with office at 010000 Astana (Kazakhstan), Left Bank, Mangilik El Street 8, House of Ministries 13,

claimant in third party opposition,

attorneys-at-law: Roel Fransis, Arnoud Nuyts, Hakim Boularbah and Nicolas Angelet, with offices at Keizerlaan 3, 1000 Brussels.

against

- **STATI Anatolie**, residing in 20 Dragomirna Street, Chisinau, MD-2008, Moldova,

- **STATI Gabriel**, residing in 1A Ghioceilor Street, Chisinau, MD-2008, Moldova,

- **ASCOM GROUP S.A.,** company under foreign law, having its registered office in 75 A. Mateevici Street, Chisinau, MD-2009 Moldova,

- **TERRA RAF TRANS TRAIDING [sic] LTD. ("Terra Raf"),** company under foreign law, having its registered office in 13/1 Line Wall Road, Gibraltar,

defendants in third party opposition,

attorneys-at-law: Stan Brijs and Charlotte De Muynck, with offices at Terhulpsesteenweg 120, 1000 Brussels, where domicile is elected,

and

- **NATIONAL BANK OF THE REPUBLIC OF KAZAKHSTAN**, domestic state entity organised under the laws of the Republic of Kazakhstan, with registered office at 21 Koktem-31, Almaty, 050040, Kazakhstan,

party in voluntary intervention,

attorneys-at-law: Peter Callens and Ahmed Tayane, having their office at Neerveldstraat 101-103, 1200 Brussels,

- **THE BANK OF NEW YORK MELLON NV**, public limited company having its registered office at 1000 Brussels, Montoyerstraat 46, registered with the Crossroads Enterprise Database under number 0806.743.159,

party in voluntary intervention,

attorneys-at-law: Françoise Lefèvre, Stefaan Loosveld and Liesbeth Truyens, with offices at 1000 Brussels, Brederodestraat 13.

Procedure

On 20 November 2017, the Republic of Kazakhstan filed its claim before the Court.

On 28 November 2017, by means of a petition filed with the Court's registry, the National Bank of the Republic of Kazakhstan voluntarily intervened.

On 30 November 2017, by means of a petition filed with the Court's registry, the Bank of New York Mellon NV voluntarily intervened.

By order of 1 December 2017, in application of article 747 Judicial Code, the calendar agreed upon by the parties for filing submissions has been confirmed and a date for the hearing was fixed for 2 February 2018.

During the public hearing of 2 February 2018, additional terms for submissions were agreed upon and the hearing was fixed for 27 April 2018.

On the following dates, submissions were filed with the Court's registry:

- on 18 December 2017, the first submissions of the defendant in third party opposition,
- on 28 December 2017, the first submissions of The Bank of New York Mellon NV,
- on 12 January 2018, the final submissions of the claimant in third party opposition,
- on 12 January 2018, the final submissions of The National Bank of the Republic of Kazakhstan,
- on 26 January 2018, the additional and final submissions of the defendant in third party opposition,
- on 21 February 2018, the additional and final submissions of The Bank of New York Mellon NV,
- on 16 March 2018, the additional and final submissions of the claimant in third party opposition,
- on 16 March 2018, the second final submissions of The National Bank of the Republic of Kazakhstan,
- on 17 April 2018, the second final submissions of the defendant in third party opposition,

On 28 November 2017, the National Bank of the Republic of Kazakhstan filed its exhibits with the Court's registry.

At the public hearing of 27 April 2018:

- Appeared:
  - for the Republic of Kazakhstan: attorneys-at-law Roel Fransis, Nicolas Angelet, Maria-Clara Van Den Bossche and Arnoud Nuyts,
  - for Stati Anatolie, Stati Gabriel, Ascom Group S.A. and Terra Raf Trans Trading Ltd.: attorneys-at-law Stan Brijs, Karen Paridaen and Arie Van Hoe,
  - for the National Bank of the Republic of Kazakhstan: attorneys-at-law Peter Callens and Ahmed Tayane,
  - for The Bank of New York Mellon: attorneys-at-law Lefebvre Françoise, Loosveld Stefaan and Liesbeth Truyens,
- the above-mentioned attorneys-at-law have been heard,
- the exhibits of all the parties have been filed,
- the closing of the debate has been ordered and the matter has been taken under advisement by the court,

Pursuant to article 748bis of the Judicial Code, the court only takes into account the last (final) submissions filed by the parties.

The provisions of the Law of 15 June 1935 with respect to the use of the languages in judicial matters have been applied.

1. SUBJECT MATTER OF THE CLAIMS AND OF THE DEFENCE

1.1 The Republic of Kazakhstan, hereinafter, **KAZAKHSTAN**, served a writ in third party opposition against the order of 11 October 2017.

Via said order, the court authorized Mr. Anatolie and Mr. Gabriel STATI and the companies incorporated under foreign law ASCOM GROUP S.A. and TERRA RAF TRANS TRAIDING LTD. to levy conservatory third party attachment "*upon debts and matters linked to the "savings fund"*" in the hands of the nv THE BANK OF NEW YORK MELLON, hereinafter **BNYM**, against KAZAKHSTAN, including the National Fund of KAZAKHSTAN, for a total amount of 515,822,966.35 USD as principal amount, interest and costs and for an additional amount of 802,103.24 EUR costs.

KAZAKHSTAN demands the revocation of that order and the lifting of the conservatory third party attachment, which was levied on 13 October 2017 in accordance with that order.

KAZHAKSTAN also requests to "*place the case into continuation for what concerns some aspects relating to the consequences of the attachment, in particular relating to the liability of the Stati and/or BNY Mellon arising out of the wrongful attachment of the assets, or in the alternative, if the case is not placed into continuation, to decide that it has no jurisdiction to rule thereon, at least to dismiss the claim of BNY Mellon (and potentially of the Stati) in this regard, as unfounded*".

1.2 BNYM, attached third party, voluntary intervened in the current third party opposition proceedings.

It requests:

- that the court should take note of "*the reasons why BNYM has frozen the assets in the cash and securities accounts at its London branch, as listed in Annex I to its declaration as a third party attachment*",
- to declare as of law that it properly executed the conservatory attachment of 13 October 2017,
- in the event the attachment would be maintained, to declare as of law that BNYM, as it has complied with the orders and decisions of the Belgian courts, is discharged towards the National Bank of Kazakhstan and KAZAKHSTAN.

1.3 The National Bank of Kazakhstan, hereinafter **NBK**, also voluntarily intervened in the current proceedings.

It requests the revocation or annulment of the order "*insofar as it applies to NBK or to any assets held by NBK with BNYM*". At the least, it requests the lifting of the attachment relating to these assets as they "*do not fall under the Order*".

It further concludes to the non-admissibility, at least its unfoundedness, of the intervening claims of BNYM.

1.4 The parties levying the attachment, hereinafter the **STATI** parties, conclude that the claims of KAZAKHSTAN and NBK are unfounded.

2. RELEVANT FACTS AND PROCEEDINGS

The parties very extensively presented in their final submissions the facts that are relevant for the dispute, and even more facts and procedural antecedents. The attachment judge refers thereto.

3. JUDGEMENT

3.1 The arguments of Kazakhstan

3.1.1. Lack of jurisdiction

1. As its first argument, KAZAKHSTAN puts forward that the Belgian attachment judge did not have jurisdiction to grant the leave for the conservatory attachment requested by the STATI parties.

KAZAKHSTAN invokes 2 arguments in this regard:

- Firstly, in principal order: the specific territoriality requirements of the articles 1412quater and 1412quinquies Judicial Code are not fulfilled
- Secondly, alternatively: the common territoriality conditions are not fulfilled.

2. The STATI parties challenge this. According to them, the Belgian attachment judge had and has indeed jurisdiction to grant the disputed leave.

3. The STATI parties have, in application of article 1412quinquies, §2 Jud. C[1], requested the leave from the Belgian attachment judge to levy conservatory attachment on the assets of KAZAKHSTAN in the hands of the Belgian company BNYM. Which assets? The claims and assets relating to the "*savings portfolio*" of the National Fund of KAZAKHSTAN that forms part of KAZAKHSTAN.

[1] Art. 1412quinquies:
§1.
Subject to the application of mandatory supranational and international provisions, the property of a foreign authority located on the territory of the Kingdom, including financial assets held or managed there by that foreign authority, in particular in the exercise of the duties of diplomatic representations of the foreign authority or its consular posts, its special missions, its representations to international organisations or delegations to bodies of international organisations or of international conferences, cannot be attached.
§2.
By way of derogation from paragraph 1, the creditor, having an enforceable title or authentic or private documents, which, as the case may be, constitute the basis of the attachment, may, by way of a petition request authorisation from the attachment judge for the attachment of the assets referred to in paragraph 1 of a foreign authority if he demonstrates that one of the following conditions is fulfilled:
1°
if the foreign authority has consented in an explicit and specific manner that these assets can be attached
2°
if the foreign authority has reserved or designated those assets for the satisfaction of the claim that is the object of the enforceable title or the authentic or private documents that, as the case may be, are at the basis of the attachment
3°
if it is established that these assets are used or are intended for use in particular by the foreign authority for other than non-commercial governmental purposes and are located on the territory of the Kingdom, with the understanding that only assets can be attached that relate to the entity designated in the enforceable title or the authentic or private documents that, as the case may be, are at the basis of the attachment.
§3
The in paragraph 1 mentioned immunity and the in paragraph 2 mentioned exceptions to that immunity are also applicable on the assets that are mentioned in those paragraphs if they are not the property of the foreign authority itself, but the property of a part of that foreign authority, even when it does not have international legal personality, of a department of that foreign authority in the sense of article 1412ter, §3 second paragraph, or of a territorial decentralized government or any other political section of the foreign authority.
The in paragraph 1 mentioned immunity and the in paragraph 2 mentioned exceptions to that immunity are also applicable on the properties mentioned in those paragraphs if they are not the property of a foreign authority, but of a supranational or international organisation of public law that uses them or intends to use them for purposes similar to non-commercial government purposes.

They obtained the requested leave on the basis of the rules mentioned in article 1412quinquies Judicial Code.

Article 1412quater Judicial Code, to which KAZAKHSTAN and its National Bank repeatedly refer and on which they base several arguments, is not applicable here. This article offers, simply summarized, the possibility to the creditor to attach assets of foreign central banks. The STATI parties did not request the attachment judge in their initial petition of 29 September 2017 for leave to levy attachment on the assets of NBK.

The only applicable legal ground for the leave that was requested and obtained can thus be found in article 1412quinquies Judicial Code, not in article 1412quater Judicial Code.

4. The question that is under discussion here is not so much whether the Belgian attachment judge has the power, but rather whether this judge has territorial jurisdiction to rule on a request to authorize conservatory attachment against a foreign state in the hands of a Belgian company.

That a judge can rule on such request is beyond any doubt. The question is whether the Belgian attachment judge has territorial jurisdiction to do so.

5. Article 1412quinquies Judicial Code holds no specific territorial rule on competence. Consequently, the common rules on territorial competence of an attachment which can be found in article 633 Jud. C. are applicable.

According to article 633, §1 Judicial Code, in case of a third party attachment it is the attachment judge of the domicile of the attached debtor who has jurisdiction, unless this domicile is abroad or unknown. In that case it is the attachment judge "of the place of enforcement of the attachment" who is competent. In case of a third party attachment, this is the place where the third party has its domicile or, if the third party is a legal entity, its registered seat.

It is not disputed that the third party has its seat in Belgium, more precisely in Brussels. Consequently, the attachment judge of Brussels has jurisdiction over the STATI parties' request.

3.1.2 Application of English law

1. Furthermore, KAZAKHSTAN puts forward that the Belgian attachment judge could not grant leave for the attachment that was requested because it would be contrary to English law.

It invokes two grounds of English law that are violated by the authorized attachment, namely:

- on the one hand: the third party has no obligations towards KAZAKHSTAN, and;
- on the other hand: the cash and security accounts held by its National Bank at the London Branch of the third party enjoy immunity against enforcement.

2. The STATI parties reply to this that the Belgian attachment judge must not apply English law, but Belgian law.

3. KAZAKHSTAN filed third party opposition against the leave to levy conservatory attachment, obtained by the STATI on 11 October 2017. According to KAZAKHSTAN, this leave could not have been granted. It demands that this leave is revoked and the attachment lifted.

The English law that should be taken into account by the attachment judge, according to KAZAKHSTAN, when it ruled on the *ex parte* request of the STATI parties and now when ruling on the third party opposition by KAZAKHSTAN and on the basis of which the judge should revoke the granted leave, concerns the substantive law that governs the contractual relation between the third party and NBK.

Immediately the attachment judge observes that it granted leave to the STATI parties to attach against KAZAKHSTAN, in accordance with their request. They did not ask to levy attachment against NBK. Such *ultra petita*- leave has not been granted.

But, even under the presumption that also English law would govern the contractual relation between the third party and the attached party, this foreign substantive law is not the law that the Belgian attachment judge should have applied during the assessment of the *ex parte* request and should apply today during the assessment of the third party opposition.

Also for the assessment of the lawfulness and validity of the third party attachment in Belgium having an international dimension, like in the case at hand against a foreign state, the Belgian attachment judge will apply its national Belgian law, as included in the case at hand in the applicable article 1412quinquies Judicial Code.

The own *lex fori* of the national judge whom is asked to authorize attachment, determines amongst other what can be attached, to what extent and under which conditions. Such application of the *lex fori* on the attachment is the simple translation of the principle of territoriality[2].

3.1.3. Non-fulfilment of the common conditions

1. As third argument KAZAKHSTAN raises that the common conditions for a conservatory attachment are not met, neither the one of urgency nor the one related to the qualities of the claim. It adds that the STATI parties have not complied with their obligation to inform the judge during the *ex parte* proceedings, and that also for this reason the attachment must be lifted.

2. The STATI parties first point out that they have requested the authorisation for conservatory attachment on the basis of article 1412quinquies Judicial Code and not on the basis of the 'usual' articles 1413 and 1447 Judicial Code.

According to them, in any event, the common conditions for a conservatory attachment were and are still fulfilled.

Finally, they deny to have "*misled*" the attachment judge during the *ex parte* proceedings.

[2] J. Erauw, "De problemen van grensoverschrijding voor executiemaatregelen in Europa" in G. De Leval en M. Storme, *Het Europees gerechtelijk recht en procesrecht*, Brugge, Die Keure, 2003, 489.

3. The STATI parties have indeed requested a specific leave to levy conservatory attachment, namely on the basis of article 1412quinquies, §2 Judicial Code. This provision sums up three possible conditions that each individually allow a creditor to ask for the leave to levy attachment on the assets of a foreign state, as an exception to the principle of immunity from enforcement provided in §1.

These conditions are added to the basic conditions that need to be fulfilled for each conservatory attachment. They are additional conditions.

The basic conditions for conservatory attachment thus needed and still need to be met. The STATI parties have also given reasons for the fulfilment of these basic conditions in their initial request.

4. The first basic condition, that is also firstly contested by KAZAKHSTAN, concerns the urgency.

In support of the urgency the STATI parties argue that KAZAKHSTAN:

- keeps on refusing to pay them despite the fact that 1) it has been ordered to pay in the first arbitral award dating back to 19 December 2013 and in the additional arbitral award of 17 January 2014, 2) its requests for suspension of enforcement and annulment of these arbitral awards have in the meantime definitively been rejected by the Swedish Supreme Court in the judgements of 20 September 2017 and 24 October 2017, 3) the repeated requests of the STATI parties, 4) its obligation to comply with international law and 5) its obligations under the Energy Charter Treaty,
- after the granting of the exequatur of the arbitral awards in Belgium by the order of 11 December 2017, even refuses to consign the causes of the contested conservatory attachment,
- frustrates and obstructs all attempts to enforce by the STATI parties, in the United States, as well as in Sweden and in the Netherlands,
- has other creditors, such as for example CARATUBE INTERNATIONAL, which in 2017 also obtained an arbitral award against KAZAKHSTAN for a claim of 39,2 million USD.

The STATI parties underscore that KAZAKHSTAN "*as a foreign debtor, is doing everything to frustrate the recovery and to shield its assets from the Stati Parties, in both Belgium and many other jurisdictions, it being understood that in Kazakhstan, the Stati Parties can evidently not count on the judiciary to enforce their claim (to the contrary, now that they are again the victim of the Government, including the judiciary system)*".

They add that the "*constant refusal by Kazakhstan to pay (on the basis of unfounded and a posteriori fabricated fraud arguments) together with the risk that no other sufficient assets in Belgium or other jurisdictions will be found"* amplify the urgency to block the attached assets in order to safeguard the later enforcement.

KAZAKHSTAN contests that urgency can be inferred from the elements invoked by the STATI. It explains that it did not comply with the arbitral awards for the reason that these awards, according to KAZAKHSTAN, are "*extremely defective and invalid*" and have been obtained by means of "*fraud*".

Its requests for suspension and annulment of the arbitral awards before the competent Swedish judges on the merits have in the meantime been rejected in the judgments of 20 September 2017 and 24 October 2017 of the Swedish Supreme Court. Its debt to the STATI parties has thus indisputably been determined.

KAZAKHSTAN invokes an English judgement of 6 June 2017 of the London High Court. This judgement was rendered in a kind of third party opposition proceedings that was introduced by KAZAKHSTAN against the authorisation for compulsory enforcement that the STATI parties had obtained in England on 28 February 2014. It is a kind of interim judgment in which the London High Court decides to examine and assess KAZAKHSTAN's fraud allegations during and after further hearings.

The Swedish Supreme Court took note of this English judgment but decided that the possible existence of fraud had no impact at all on the decisions in the arbitral awards.

The Belgian exequatur judge also took note of this English judgement. He decided that this English judgement, contrary to the said Swedish judgements, did not have an impact in Belgium and granted the exequatur for the two arbitral awards in an order of 11 December 2017. KAZAKHSTAN has introduced third party opposition proceedings against this order, but as long as it has not been made undone, it has *res judicata* and is binding upon KAZKAHSTAN as well as upon the attachment judge in the current proceedings.

All elements invoked by the STATI parties do indeed demonstrate indeed that there is urgency in such a way that the recovery is endangered.

KAZAKHSTAN wrongly argues that the STATI parties "*have waited 4 years before introducing proceedings in Belgium (and in other jurisdictions)*". The arbitral awards date from 19 December 2013 and 17 January 2014. Still in the same month in January 2014, the STATI parties commenced their enforcement proceedings, namely in the United States. KAZAKHSTAN has subsequently introduced annulment proceedings which only ended definitively with the judgement of 24 October 2017.

Despite the definitive rejection of its annulment claim, KAZAKHSTAN has failed to pay its debts to the STATI parties. These debts amount to more than 500 million USD on the basis of the first arbitral award and more than 1 million EUR on the basis of the second arbitral award.

In every country where the STATI parties wish to enforce their titles, KAZAKHSTAN introduces opposition proceedings and maintains these, even after the Swedish judgement of 24 October 2017. KAZAKHSTAN also contests the conservatory attachment measures that the STATI parties took in various countries and keeps on contesting these, even after an exequatur was granted for the arbitral awards.

KAZAKHSTAN ignores the arbitral awards and the Swedish judgement of 24 October 2017 that definitively rejected its annulment claim. It clearly does not want to pay its debts to the STATI parties and attempts as much as possible to escape from the conservatory measures by contesting the validity of the arbitral awards over and over again and by invoking immunity from enforcement.

The enforcement that the STATI parties have sought since 2014 is, taking into account all the limitations imposed on them by the immunity from enforcement, manifestly endangered.

The urgency was and still is proven.

5. Subsequently, KAZAKHSTAN argues that the STATI parties do not dispose of a certain, fixed and due claim vis-à-vis itself, and that the alleged claim would violate public policy.

6. The arbitral awards have res judicata.

The Belgian exequatur judge has in the meantime also granted the exequatur. This means that he did not find that such exequatur would be contrary to public policy[3]. Besides, he has expressly judged that not a single violation of the Belgian international public policy was proven. He has also assessed and rejected KAZAKHSTAN's fraud argument referring to the decisions of the Swedish annulment judges who decided that the possible existence of fraud did not have any impact on the decisions in the arbitral awards. He also took note of the English judgement of 6 June 2017 and set it aside as it, contrary to the Swedish judgements, does not have any impact in Belgium.

The attachment judge may not detract from this decision to grant an exequatur, which at present still exists.

The arbitral awards must therefore be considered to be "judgements" in the meaning of article 1414 Jud. C.[4] According to this provision, each judgement, even if it is not enforceable regardless of opposition or appeal, is considered as constituting leave for the purposes of levying conservatory attachment for the orders granted.

In this hypothesis it is not forbidden for the creditor to request the prior authorisation of the attachment judge but the existence of a certain claim can no longer be disputed[5].

The non-communication of the English judgement of 6 June 2017 in the initial *ex parte* petition of the STATI parties has therefore, contrary to what KAZAKHSTAN argues, not misled the attachment judge about the certain, fixed and due nature of the claim.

Also the two other missing factual elements which KAZAKHSTAN raises as shortcomings of the STATI parties under their "*duty to supply information*" are irrelevant and cannot detract from the certain, fixed and due nature of the claim of the STATI parties.

[3] See art. 1721, §1, Jud. C.
[4] E. DIRIX and K. BROECKX, *Beslag*, in A.P.R., Mechelen, Kluwer, 2010, nr. 465.
[5] E. DIRIX and K. BROECKX, *Beslag*, in A.P.R., Mechelen, Kluwer, 2010, nr. 463.

3.1.4 Lack of legal relationship with the third party

1. As its fourth argument, KAZAKHSTAN invokes that there does not exist a legal relationship between itself and the third party attached and that this third party also has no restitution obligation towards KAZAKHSTAN.

2. The STATI parties first reply that this argument is no ground for third party opposition on the basis whereof the decision authorizing the attachment can be revoked.

3. The STATI parties have requested the leave to levy conservatory attachment against KAZAKHSTAN in the hands of BNYM and have also obtained this. They did not ask to levy conservatory attachment against NBK and such an *ultra petita*- leave has not been granted either.

Contrary to what KAZAKHSTAN alleges, the attachment judge did not grant leave to the STATI parties for a "*conservatory attachment on the accounts that were opened in name of the National Bank of Kazakhstan with the London Branch of BNY Mellon and that are held there by the National Bank of Kazakhstan*".

The argument invoked by KAZAKHSTAN concerns the object and the consequences of the attachment. KAZAKHSTAN in fact alleges that the conservatory attachment could not have any object, but that the attached third party nonetheless wrongly blocked the accounts.

That the attached third party is not the debtor of the attached party is not a ground to revoke the order and to lift the authorized conservatory attachment. The absence of a debt of the attached third party vis-à-vis the attached party only leads to the finding that the third party attachment has no object.

In the present case, the attachment judge can only conclude that the authorized conservatory third party attachment does indeed have an object. The declaration of the attached third party indeed determines the object of the third party attachment. This declaration reads as follows:

> Although (a legal predecessor of) BNYM entered into a "global custody agreement", dated 24 December 2001 ("**Global Custody Agreement**") with the National Bank of Kazakhstan (the "NBK"), a "state entity" of the Republic Kazakhstan, having its seat at Kiktem-3, 21, Almaty 480090, Republic Kazakhstan, as counterparty, BNYM cannot fully exclude that the Republic Kazakhstan (including the National Fund) has or will have claims on BNYM or that BNYM holds assets of or for the Republic Kazakhstan (including the National Fund), which are the object of the conservatory attachment, in view of its contractual relationship with NBK and the uncertainties surrounding the legal relationship between NBK and the Republic Kazakhstan. Pursuant to the **Global Custody Agreement**, the Bank holds "**certain securities of the National Fund** and Cash on behalf of [the NBK] as custodian and banker respectively" (emphasis added)
>
> In addition, it is BNYM's current understanding that, under the laws of Kazakhstan, the NBK is not capable of owning any assets which are not owned by the Republic of Kazakhstan, although the NBK has the power to possess, use and dispose of assets of the National Fund, pursuant to an agreement between the NBK and the Republic of Kazakhstan with the government as beneficiary. BNYM has been informed that this is the case even though the

NBK, pursuant to Kazakh law, has separate legal personality, has legal standing in courts and can hold and possess assets and liabilities that are separate from the Republic of Kazakhstan, such as assets of other parties than the Republic of Kazakhstan.
An extensive list of assets held on the basis of the Global Custody Agreement, as from 13 October 2017, is enclosed as annex 1. These assets regard monies and securities held on the cash - and securities account with the London branch of BNYM, for a total amount of about 22 billion USD (of which about 589 million USD in cash).
In light of the uncertainties, BNYM will consider the assets summed up in Annex 1 as frozen as a result of the attachment. BNYM is however of the opinion that the possible rights of the Republic Kazakhstan on these assets should be established by the Creditors, the Republic Kazakhstan and the NBK (by means of an agreement or in legal proceedings).

The attached party can challenge this declaration of the third party before the attachment judge. But this dispute then concerns the debt of the third party and should be referred to the judge on the merits (art. 1456, second paragraph, Jud. C.)[6].

This competent judge on the merits is, as KAZAKHSTAN itself indicates, the English judge who should apply its own national substantive law.

The fourth argument of KAZAKHSTAN thus entirely fails, both in fact and in law.

3.1.5 Immunity from enforcement

1. As fifth and last argument, Kazakhstan invokes the immunity from execution, both on the basis of article 1412quater Jud. C. and on the basis of article 1412quinquies Jud.C.

2. The STATI parties repeat that only article 1412quinquies Jud.C. applies and argue that the condition listed under article §2, 3° is met as exception to the immunity from enforcement.

3. As already decided above[7], article 1412quinquies and not article 1412quater Jud.C. is applicable to the current attachment proceedings.

4. From the text of article 1412quinquies Jud. C. it appears that the principle of immunity from enforcement to the benefit of a foreign state in Belgium, is not absolute. §2 of this article indeed foresees three possible exceptions.

The STATI parties invoke the third exception, which reads as follows:

"*3° if it is established that these assets are used or are intended for use in particular by the foreign authority for other than non-commercial governmental purposes and*

[6] E. Dirix and K. Broeckx, *Beslag* in APR, Mechelen, Kluwer, 2010, nr. 789
[7] under section 3 1 1.

are located on the territory of the Kingdom, with the understanding that only assets, which relate to the entity designated in the enforceable title or the authentic or private documents that, as the case may be, constitute the basis of the attachment, can be attached."

KAZAKHSTAN contests that the conditions of this exception are met. More specifically it argues that:

1) the attached assets are completely used or intended for use for sovereign or governmental purposes,
2) the attached assets do not relate to it, and
3) the attached assets are not held or managed in Belgium.

The burden of proof that the conditions of the exception are met, is upon the creditor.

Hereafter the attachment judge examines whether or not the three contested conditions are fulfilled.

1) properties that "*are used or are intended for use in particular by the foreign authority for other than non-commercial governmental purposes*"

Rightfully the STATI parties emphasise that they have only requested, and were only granted authorisation for conservatory attachment on the claims and assets relating to the "*savings funds*" of the National Fund of KAZAKHSTAN.

It is not contested that this National Fund is part of and owned by KAZAKHSTAN.

The Presidential Decree of 23 August 2000 for the establishment of the National Fund determines its objective. This objective is on the one hand "*to create national savings (saving)*" and on the other hand "*to reduce the dependence of the national and local budgets on global prices (stabilisation)*".

The Kazakh Budget Code confirms these two objectives and functions. "*The savings function ensures*", according to this Code, "*the accumulation of financial assets and other property, excluding intangible assets, and a return on assets of the National Fund of the Republic of Kazakhstan in the long term with a moderate level of risk.*".

To realise these two objectives the funds are divided over two portfolios, a "savings portfolio" and a "stabilisation portfolio".

The NBK describes the objective of the "savings portfolio" as follows : "*to increase the profitability of the assets in the long term*".

It is not contested that the attached securities and cash, as listed by the attached third party BNYM in its declaration, are exclusively part of the savings portfolio.

On the basis of the objective of the savings portfolio, these attached securities and cash must be considered to be long term investment objects. The increase of the profitability of the assets in the long term is a commercial activity.

Consequently, the STATI parties have demonstrated that the "savings portfolio" of the National Fund of KAZAKHSTAN is in particular used "*for other than non-commercial governmental purposes*".

2) properties that "*relate to the entity designated in the enforceable title or the authentic or private documents that, as the case may be, constitute the basis of the attachment"*

KAZAKHSTAN wrongly contests that this condition is met as it is not contested that the National Fund of KAZAKHSTAN is a part and property of KAZAKHSTAN.

3) properties that "*are located on the territory of the Kingdom*"

That this condition is met, is confirmed by the declaration of the attached third party BNYM.

5. Therefore, also this last, fifth argument of KAZAKHSTAN must be rejected.

3.2. The arguments of NBK

The four arguments invoked by NBK to support its claims were also raised by KAZAKHSTAN and were answered and rejected above[8].

3.3. The claims of BNYM

The attached third party BNYM requests to declare as a matter of law that it has correctly given effect to the conservatory third party attachment and that it is discharged vis-à-vis NBK and KAZAKHSTAN.

Both claims concern the object of the attachment, namely whether or not BNYM has a debt vis-à-vis KAZAKHSTAN. KAZAKHSTAN contests the existence of this debt. This dispute can and may not be settled by the attachment judge but only by the judge on the merits. This judge on the merits is, as already decided above[9], the English judge who will apply his national substantive law.

[8] Under section 3.1.
[9] Under section 3.1.4.

3.4.Limitation of the object of the attachment

According to the declaration of the attached third party, the object of the attachment amounts to about 22 billion USD, in other words a multitude of its causes.

The STATI parties expressly confirm their agreement to a limitation of the object of the attachment to the causes thereof. They estimate these causes to amount at present, including interest, at the amount of 530 million USD.

3.5. The costs of the proceedings

In application of article 1017, first paragraph, Jud. C. the attachment judge orders KAZAKHSTAN and NBK, as requested by the STATI parties, to bear the costs of the proceedings.

For the STATI parties, this is the procedural indemnity, which is estimated at the indexed base amount for non-monetary disputes, being 1.440 EUR. The contribution of 20 EUR for the Budgetary Fund for legal second line aid is also payable by KAZAKHSTAN.

BNYM requests a ruling on costs "*as a matter of law*". Since its claims are not granted, it does not have any right to a procedural indemnity.

FOR THESE REASONS

THE ATTACHMENT JUDGE,

Deciding in first instance and on an inter partes basis;

Acknowledges the voluntary intervention of the National Bank of the republic Kazakhstan and of the Bank of New York Mellon;

Declares the claims of the republic Kazakhstan, the National Bank of the republic Kazakhstan and the Bank of New York Mellon admissible but unfounded;

Limits the object of the conservatory third party attachment of 13 October 2017 to an amount of 530 million USD;

Orders the republic of Kazakhstan and the National Bank of the republic Kazakhstan to pay the costs of the proceedings of the defendants in third party opposition (referred to as the STATI parties), estimated at the amount of 1.440 EUR (procedural indemnity);

Thus pronounced at the public hearing of the attachment chamber of the Dutch language court of first instance Brussels, on 25 May 2018.

where were present and sat as member:

Mrs. Anouk DEVENYNS, vice-president and attachment judge,

Mrs. Tania COUCK, delegated court registrar.

[*signatures*]

T. COUCK A. DEVENYNS