

[informal translation from Dutch]

# judgment

## **COURT OF AMSTERDAM**

Private law division, court in summary proceedings, civil

case reference/cause list number: C/13/639737 / KG ZA 17-1303 FB/MV

### **Judgment in summary proceedings dated 23 January 2018**

in the matter of

the legal person under foreign law

**NATIONAL BANK OF KAZAKHSTAN,**

with its registered office at Almaty (Kazakhstan),

claimant by writ of summons dated 22 December 2017,

counsel: Mr A.W.P. Marsman of Amsterdam,

and

**REPUBLIC OF KAZAKHSTAN**

with its seat in Astana (Kazakhstan), joined to the proceedings on

the side of the claimant,

counsel: Mr. M.J. Drop of Amsterdam,

and

the company under Belgian law

**THE BANK OF NEW YORK MELLON SA/NV**

with its registered office in Brussels (Belgium), intervenor,

counsel: Mr D.A.M.W.H. Strik of Amsterdam, versus

1. **ANATOLIE STATI,**

2. **GABRIEL STATI,**

both residing at Chisinau (Moldavia),

3. the legal entity under Moldavian law **ASCOM GROUP**

**S.A.,**

with its registered office in Chisinau (Moldavia),

4. the legal entity under the law of Gibraltar **TERRA RAF**

**TRANS TRADING LTD,** with its registered office in Gibraltar,

defendants,

counsel: Mr G.J. Meijer of Amsterdam.

The parties are hereinafter referred to as the NBK, the Republic of Kazakhstan, BNYM and (in the singular) Stati.

## **1. The proceedings**

1.1. At the hearing on 9 January 2018, the NBK submitted and claimed as stated in the copy of the summons appended to this judgment. Pursuant to Article 438 (5) of the Dutch Code of Civil Procedure (DCCP), the Republic of Kazakhstan was also called to appear at the hearing on 9 January 2018.

1.2. The Republic of Kazakhstan applied in a letter dated 7 January 2018 to join with the side of the NBK. A copy of that letter is appended to this judgment. The NBK and Stati did not oppose the joining. The court in summary proceedings granted the request.

BNYM has filed a motion to intervene. A copy of that motion is appended to this judgment. The NBK did not oppose intervention by BNYM. Stati did not oppose either, provided that the claims instituted (conditionally) by BNYM in the motion to intervene will be considered at a hearing, the date of which will be determined later. BNYM has consented to this. Under that condition, the court in summary proceedings awarded the application to intervene.

1.3. All parties have submitted exhibits in the proceedings. The NBK, the Republic of Kazakhstan and Stati have submitted pleading notes in the proceedings. Stati has submitted a statement of defence in the proceedings.

1.4. The following were present at the hearing:  
on the side of the NBK: A. Moldabekova with Mr Marsman and his colleague Mr M.A. Leijten;  
on the side of the Republic of Kazakhstan: S. Sultan (from the Ministry of Justice) with Mr drop and his colleague Mr N. Peters; on the side of BNYM: Ms Strik and her colleague Mr M.B. Krestin;  
on the side of Stati: E. Dzhazoyan and Mr S. Brijs (Belgian counsel for Stati) with Mr Meijer and his colleagues Mr J.M. Hummelen, Mr P.B. Fritschy, Ms P.E. Emste and Mr A. Colenbrander.  
Two English interpreters were also present.

1.5. Counsel for Stati objected to the admission of exhibits sent subsequently by NBK (in particular Exhibit 28), because they had not had sufficient opportunity to submit a defence against them. The judge in summary proceedings dismissed this objection because, as prescribed by the rules of procedure, the exhibits had been submitted in the proceedings at least 24 hours before the start of the hearing and were in response to exhibits Stati had submitted previously in the proceedings.

1.6. Stati advanced a defence, moving for refusal of the requested measures. Following further debate, the parties requested a court judgment.

1.7. In an e-mail dated 10 January 2018, Stati – as discussed at the hearing – submitted in evidence in these proceedings an attachment application sent on 1 April 2014 by Mr L.C.M. Berger (then counsel for Stati) to the court in summary proceedings of this court.

## **2. The facts**

2.1. Stati has invested sums of money to make the oil regions in the Republic of Kazakhstan profitable. Stati has subsequently asserted – essentially – that the Republic of Kazakhstan has appropriated these investments wrongly and without compensation. This prompted Stati to institute arbitration proceedings (under the Energy Charter) against the Republic of Kazakhstan before the arbitration institute of the Chamber of Commerce of Stockholm (Sweden).

An arbitral award was given on 19 December 2013. In that award, the Republic of Kazakhstan was ordered to pay compensation of USD 497,685,101 to Stati, plus interest and legal costs. In a supplementary arbitral award of 17 January 2014, the costs of arbitration were fixed at €1,069,470.98. The Republic of Kazakhstan was ordered to pay a three-quarter part of this amount, i.e. €802,103.24.

These arbitral awards are not open to appeal. In spite of repeated demands, the Republic of Kazakhstan has failed to satisfy the arbitral awards.

2.2. On 19 March 2014, the Republic of Kazakhstan applied to the court in Stockholm (Sweden) for the arbitral awards to be set aside. This claim was dismissed in a judgment dated 9 December 2016. The Republic of Kazakhstan pursued an extraordinary legal remedy before the Swedish Supreme Court. The Swedish Supreme Court dismissed this appeal on 24 October 2017.

2.3. On 1 April 2014, Stati applied to the court in summary proceedings of this court for leave to levy pre-judgment garnishment against the Republic of Kazakhstan (see paragraph 1.7 above) for a claim that was estimated at USD 520,000,000. The application was for leave to levy pre-judgment garnishment on 17 banks and 40 companies, on – essentially – all monies and monetary equivalents they held for or for the account of the Republic of Kazakhstan. One of these 17 banks is BNYM (see page 20 of the attachment application).

2.4. On 3 April 2014, the judge in summary proceedings granted Stati (provisional) leave to levy the attachment. At the same time it was ruled that the attachment may not be levied until seven days had elapsed after the bailiff had notified the Minister of – at that time still – Security and Justice (hereinafter the Minister), in application of Article 3a of the Bailiffs Act ("Bailiffs Act") of the intention to levy attachment, unless the Minister had already announced within that period that in his view, (all or part of) the attachment was not contrary to the obligations of the State of the Netherlands under international law.

2.5. On 14 April 2014, the Minister gave notice within the definition of Article 3a of the Bailiffs Act stating – essentially – that attachment is contrary to the obligations of the State of the Netherlands under international law. Immunity can be denied only where it can be established that the component parts of the assets are not designated for public purposes. According to the notice given by the Minister, it has not been demonstrated that this is the case.

2.6. Stati has claimed in summary proceedings that the Minister's notice be lifted. The judge in summary proceedings at the Court of The Hague and the Court of Appeal of The Hague dismissed Stati's claim. In its appellate judgment of 14 October 2016 (ECLI:NL:HR:2016:2371), the Supreme Court dismissed the appeal instituted by Stati to contest this.

2.7. On 28 February 2015, Stati was granted leave by the English court to enforce the arbitral award in England.

On 7 April 2015, the Republic of Kazakhstan filed an application for the leave obtained by Stati to be set aside, inter alia on the ground that the arbitral award was obtained by fraud. The English High Court gave a decision in those proceedings on 6 June 2017. It contained, inter alia, the following:

*(...), and that there is a sufficient prima facie case that the Award was obtained by fraud.*

The High Court then ruled that this would be the subject of a *trial* which would begin in October 2018.

2.8. On 30 August 2017, Stati applies to the court in summary proceedings of this court for leave to levy pre-judgment garnishment against the Republic of Kazakhstan (including the National Fund of the Republic of Kazakhstan) and the company under foreign law, Samruk-Kazyna JSC (hereinafter Samruk). The objects of attachment as they are described in the attachment application include the asset components (of the National Fund) of the Republic of Kazakhstan, which BNYM keeps in custody as global custodian. According to paragraph 52 of the attachment application, the relevant funds were transferred to 2 separate portfolios, namely the Stabilisation Fund and the Savings Fund. Paragraph 55 of the attachment application shows that a request is made to levy attachment under the branches of BNYM in Amsterdam, Brussels (Belgium), Astana (Kazakhstan) and London (United Kingdom) on the Savings Fund (see paragraph 56 of the attachment application). Stati's claim, including interest and costs, is estimated in the attachment application at USD 557,656,657.14 and €992,523.89. It was requested that the period for instituting the principal action as provided for in Article 700 (3) DCCP (namely the application for recognition and enforcement of the two arbitral awards described in paragraph 2.1) be fixed at 12 weeks.

2.9. The following was also stated in the attachment application of 30 August 2017: *Attachment of assets of a foreign state*

14. *Stati et al are aware of the fact that they are requesting leave to levy attachment against a foreign state (Kazakhstan), which enjoys immunity from enforcement in relation to assets which are designated for public purposes. However, this immunity from enforcement does not preclude the award of this application for leave to levy pre-judgment attachment. Stati et al refer to the following in that connection.*

*Previous application for leave to levy attachment (1 April 2014)*

15. *Consequent upon the Arbitral Award, Stati et al did apply to the court in summary proceedings at the Court of Amsterdam previously – namely on 1 April 2014 – for leave to levy pre-judgment garnishments or attachments.*

*(...)*

23. *However, as will be explained below, the foregoing does not preclude the award of this application for leave to levy attachment.*

*Current application for leave to levy attachment (30 August 2017)*

24. *Stati et al point out that the validity of the Arbitral Award and the Supplementary Arbitral Award has been affirmed in full in the Swedish setting aside proceedings since the earlier application for leave to levy attachment (van 1 April 2014) was submitted (...).*

25. *Furthermore, this application for leave to levy attachment relates largely to different attachment objects from those described in the earlier application for leave to levy attachment (of 1 April 2014) (...).*

26. *Finally, Stati et al have carried out specific research into establishment of the non-public use or the non-public designation of the envisaged attachment objects (...). Stati et al are furthermore of the view that this establishment in the context of the granting of leave to levy pre-judgment attachment should not be under discussion (...).*

2.10. In a decision dated 8 September 2017, the court in summary proceedings of this court granted the requested leave, on the understanding that leave was not granted in relation to the BNYM branches located outside the Netherlands, because – essentially – leave to attach, in light of the territorial effect of the pre-judgment attachment, in principle relates only to property that is located in the Netherlands or to pecuniary claims that are payable in the Netherlands. It is furthermore considered in the decision of 8 September 2017, with reference to the Supreme Court's appellate judgment of 30 September 2016 (ECLI:NL:HR:2016:2236), that it is demonstrated (prima facie) that the objects of attachment for which leave to attach is granted are not used or designated for public purposes.

2.11. On 14 September 2017, Stati levied pre-judgment attachment on BNYM. Notice was given in the writ of attachment that the “*attachment is not limited to the claims that are used or intended for use by The Republic of Kazakhstan (National Fund of the Republic of Kazakhstan) for purposes other than non-commercial public purposes.*”

2.12. In an e-mail dated 19 September 2017, the Ministry of Security and Justice notified the bailiff – essentially – that it saw no cause to issue an order as provided for in Article 3a of the Bailiffs Act, since the court summary proceedings had used the correct criteria to assess whether the assets on which attachment would be levied were used for a commercial, non-public purpose.

2.13. On 26 September 2017, Stati submitted an application to the Amsterdam Court of Appeal for the recognition and enforcement of the arbitral awards.. The oral hearing

of that application will take place on 22 June 2018.

2.14. On 11 October 2017, the Court of Brussels (Belgium) handed down a decision in which Stati was granted leave to levy attachment in Belgium. This attachment was levied on 13 October 2017.

2.15. In a letter dated 12 October 2017, (the Amsterdam Branch of) BNYM informed counsel for Stati, inter alia, as follows:  
*Please find enclosed the declaration of garnishment in relation to the pre-judgment attachment on credit balances of (i) The Republic of Kazakhstan and (ii) The Republic of Kazakhstan (National Fund of the Republic of Kazakhstan). The Dutch branch of The Bank New York Mellon SA/NV has no legal relationship with these entities, does not carry out administration for these entities and at the time of attachment had nothing to claim from these entities and would have no future claims on these entities.*  
(...)

2.16. In a letter dated 18 October 2017, counsel for Stati disputed the content of the above declaration from BNYM. The letter of 18 October 2017 included the following:  
*You have written in your letter that there is no legal relationship between the Dutch branch of BNY Mellon and the Republic of Kazakhstan (including the National Fund of the Republic of Kazakhstan). However, according to our information, BNY Mellon has concluded a Global Custody Agreement with the Republic of Kazakhstan – which is also understood to include the parts belonging to the Republic of Kazakhstan. This is inconsistent for clients alternatively BNY Mellon has not provided an adequate explanation.*  
(...)

2.17. In a letter dated 1 November 2017, BNYM informed counsel for Stati, inter alia, as follows:

*After receiving your letter dated 18 October 2017, we conducted further investigation which led to the following preliminary findings.*

*Although (a legal predecessor of) BNYM concluded a 'global custody agreement' dated 24 December 2001 (...), with the contracting party the National Bank of Kazakhstan (...), which is a state entity of the Republic of Kazakhstan, BNYM cannot entirely rule out that the Republic of Kazakhstan (including the National Fund) has or will have claims on BNYM or that BNYM holds assets of or for the Republic of Kazakhstan (including the National Fund) which are the subject of the pre-judgment garnishment, in light of its contractual relationship with the NBK and the uncertainties surrounding the legal relationship between the NBK and the Republic of Kazakhstan. On the basis of the Global Custody Agreement, BNYM holds "certain securities of the National Fund and Cash on behalf of [de NBK] as custodian and banker respectively." (...).*

*In addition, BNYM currently understands that under the law of the Republic of Kazakhstan, the NBK is not authorised to possess assets of its own which are not the property of the Republic of Kazakhstan, although the NBK does have the authority to hold, use and dispose of assets of the National Fund in accordance with an agreement between the NBK and the Republic of Kazakhstan with the government as beneficiary. BNYM is informed that this applies in spite of the fact that under the law of the Republic of Kazakhstan, the NBK has its own legal personality, is authorised to act in legal proceedings and can hold assets and liabilities that are separate from the Republic of Kazakhstan, including those belonging to parties other than the Republic of Kazakhstan.*

*BNYM refers to the statement sent yesterday to the Belgian bailiff in the context of the attachment levied their (...), in which it is explained that in the light of these uncertainties, BNYM will keep custody of the assets listed in Annex I to that letter. However, BNYM takes the view that the potential rights of the Republic of Kazakhstan relating to these assets must be established by the Creditors, the Republic of Kazakhstan and/or the NBK (in an agreement between these parties or in court proceedings). (...)*

2.18. As a consequence of the garnishment, BNYM has "frozen" a sum of approximately 27 billion American dollars (approximately 22 billion euro).

2.19. The NBK has submitted in evidence as Exhibit 13 the global custody agreement (hereinafter the GCA) which the NBK concluded on 24 December 2001 was the legal predecessor of BNYM. The NBK is referred to in the GCA as "Client". Article 5 (a) of the GCA shows that BNYM "shall hold Securities in safekeeping facilities for the account of the Client." Article 5(b) shows that "ownership of Securities in the Account shall be clearly recorded (...) as belonging to the Client". It is included in Article 26 of the GCA that the agreement is governed by English law and that the English court is competent to hear disputes arising out of the agreement.

2.20. In the summons dated 24 November 2017, Samruk summoned Stati to appear at a hearing on 5 December 2017 of the court in summary proceedings of this court. Samruk was claiming that the pre-judgment attachment levied on it be lifted. This claim was dismissed by the court in summary proceedings in a judgment dated 5 January 2018.

2.21. In a letter dated 21 December 2017, Stati made an offer to the Republic of Kazakhstan to lift the attachment levied on BNYM (Amsterdam Branch) in exchange for adequate security. A copy of this letter was sent to the NBK. Neither the Republic of Kazakhstan nor the NBK responded to this offer.

### **3. The dispute in the principal action**

3.1. The NBK is claiming a provisionally enforceable judgment:

- (a) lifting the attachment on BNYM, insofar as those attachments cover (i) assets which are part of the National Fund, (ii) bank and securities accounts in the name of the NBK, (iii) claims based on the GCA and monies and securities held pursuant to the GCA, and (iv) other assets of the NBK;
- (b) forbidding Stati, subject to a penalty payment of €5 million for each violation, to take (pre-judgment) enforcement measures in connection with the arbitral award relating to (i) assets which are part of the National Fund, (ii) bank and securities accounts in the name of the NBK, (iii) claims based on the GCA and monies and securities held pursuant to the GCA, and (iv) other assets of the NBK;
- (c) making any other provisions which the court summary proceedings deems appropriate, and
- (d) ordering Stati to pay the costs of these proceedings and subsequent costs, plus statutory interest.

3.2. In support of its claim to have the attachments lifted, the NBK asserts – in summary – the following:

- (1) Stati levied the attachment on BNYM on assets which cannot offer recourse for creditors of the Republic of Kazakhstan. The GCA, which was not concluded with the Republic of Kazakhstan, shows that the bank account and the claims arising out of them on BNYM belong to the NBK and not to the Republic of Kazakhstan. The bank accounts are also in the name of the NBK and BNYM has registered only the NBK as the owner of the monies and securities it holds on the basis of the GCA.

Furthermore, only the NBK has the right to issue payment instructions to BNYM. This interpretation of the GCA, which is governed by English law, is explicitly confirmed in the judgment of the English High Court of Justice dated 20 October 2005 in the matter of AIG Capital Partners Inc. versus the Republic of Kazakhstan (NBK Exhibit 18).

(2) The asset components of the National Fund were placed in trust management and are segregated capital which cannot form an avenue of recourse or attachment for creditors of the Republic of Kazakhstan. Since the trust structure was not created with the aim of prejudicing creditors of the Republic of Kazakhstan, there is no abuse of law.

(3) The National Fund is for public use. State-owned properties for public use do not meet the conditions for attachment and enforcement. The onus is upon the creditor (in this case Stati) to assert and prove that the asset components on which attachment has been levied are for non-public use and therefore do meet the conditions for attachment and enforcement. Stati has not demonstrated this and cannot demonstrate this. The assets of a central bank (such as the NBK) in any event enjoy the protection of immunity, which follows from the two appellate judgments of the Amsterdam Court of Appeal dated 7 April 2015 and 14 November 2017 (ECLI:NL:GHAMS:2015:1337 and ECLI:NL:GHAMS:2017:4683). The fact that these assets generate (commercially) a return does not detract in this case from the public use. The distinction introduced by Stati between the Stabilisation Fund and the Savings Fund, where it is asserted that the latter is exclusively for commercial use, is unfounded. Both 'Funds' (incidentally, this term was coined by Stati, because there is no stabilisation portfolio and no savings portfolio) are for public use. Stati also acknowledges this in relation to the stabilisation portfolio.

(4) Stati has violated the obligation to be truthful of Article 21 DCCP and the "obligation to substantiate", which in itself is an independent ground for lifting the attachment. Stati neglected to inform the court in summary proceedings about the judgment handed down by the English High Court on 6 June 2017 in parallel enforcement proceedings which was unfavourable judgment for Stati. In that judgment, the English High Court found that the arbitral award *prima facie* was obtained by fraud. In addition, Stati provided incomplete and incorrect information in the attachment application about the assets which it had attempted to attach in 2014. The NBK has reason to suspect that the 2014 application related to the same assets as those that have now been attached. Stati has also admitted in the attachment application that there is an overlap between the objects of attachment. That suspicion is reinforced by the fact that Stati (until 10 January 2018, see 1.7 of this judgment) refused to provide the NBK with a copy of the 2014 attachment application. Finally, Stati provided incorrect and incomplete information about the position and rights of the NBK and in particular about the GCA see (1) above).

In support of the claim to forbid Stati to levy attachment again in the future, the NBK asserts that this is the second attempt by Stati to levy attachment on the same assets, which do not meet the conditions for attachment and that this is causing considerable damage.

A ban that is subject to a substantial penalty payment is therefore justified, in the view of the NBK.

The NBK has an urgent interest in the award of the claims. The NBK has been unable to access its assets since the start of November 2017.

BNYM is no longer conducting new transactions and is not completing earlier transactions. Obviously, this is causing damage.

3.3. The Republic of Kazakhstan concurs with the statements by the NBK. In addition, the Republic of Kazakhstan asserts that the fraud committed by Stati, as deemed to be demonstrated *prima facie* in the English High Court's judgment of 6 June 2017, will lead the Amsterdam Court of Appeal to refuse the enforcement. The Republic of Kazakhstan not satisfy the arbitral awards before the asserted fraud has been thoroughly investigated. Following the Dutch and Belgian attachments, BNYM has frozen all assets it holds for the NBK. Consequently there is a double attachment on the same assets. Therefore, if the Republic of Kazakhstan provides security to lift the Dutch attachment, as Stati has proposed, Stati will also have to lift the foreign attachments.

3.4. To summarise, Stati has advanced the defence that the attached assets offer an avenue of recourse for the creditors of the Republic of Kazakhstan. The National Fund is "state property" of the Republic of Kazakhstan and has no independent legal personality. Two legal opinions submitted in evidence by Stati show that the National Fund as a whole is an asset of the Republic of Kazakhstan and that the NBK is not the right holder but only the manager. It is not in dispute between the parties that the monies and securities under the attachment on BNYM are part of the National Fund. The fact that the National Fund is managed by the NBK in a trust structure and on the basis of the GCA does not change this. This also follows from the two legal opinions. The Republic of Kazakhstan's purposefully placing its own assets in trust management constitutes an abuse of law because it deliberately excludes creditors. In this context, Stati invokes the anti-abuse provisions in Republic of Kazakhstan law. Stati also argues that in this case the savings portfolio does not enjoy immunity, because this asset is not for public (but for commercial) use. This use is not the ultimate use, but the immediate use and that is indisputably commercial. The aim of engaging the services of commercial asset managers is to obtain substantial profits and to reinvest those profits to achieve new profits. BNYM has only frozen the assets in the savings portfolio. Furthermore, NBK, and not Stati, bears the burden of proof (or an increased obligation to furnish facts) that these assets are for public use. The NBK has failed to meet it. Supreme Court case law on this subject is not applicable in summary proceedings to lift an attachment pursuant to Article 705 DCCP. Furthermore, the assumption of state immunity in this case would mean a disproportionate limitation of Stati's right of access to justice, as laid down in Article 6 of the ECHR.

The obligation to be truthful of Article 21 DCCP has not been violated in the attachment application of 30 August 2017. The English High Court judgment of 6 June 2017 is irrelevant because the English court has not given its views on the merits of the alleged fraud (this is, after all, a *prima facie* assessment) and because a final judgment in the English proceedings has no binding effect in the Netherlands. In paragraphs 15-23 of the attachment application there is a detailed description of the earlier attachment application from 2014, and the proceedings which followed it, up to the Supreme Court. The assertion that Stati did not provide complete and correct information about the position and rights of the NBK is based on the misconception that the assets in

question belong to the NBK and as a consequence do not meet the conditions for attachment.

Stati has a compelling interest in maintaining the attachment in full. The Republic of Kazakhstan has used every possible legal remedy to frustrate recovery by Stati. Stati's interest is consistent with the general interest in safeguarding the effectiveness of international arbitration. If the Republic of Kazakhstan provides adequate security, Stati will lift the attachments.

The claim that Stati be forbidden to levy new attachment in the future lacks specificity and would give rise to a disproportionate limitation of Stati's ability to achieve recovery.

Finally, Stati has requested that if the judgment allows the claim, it not be declared provisionally enforceable.

3.5. To the extent that they are relevant, the parties' assertions will be examined in further detail below.

#### **4. The dispute in the motion to intervene**

4.1. Essentially, BNYM is claiming the following.

1. If and insofar as the NBK claim to lift the attachments levied on BNYM is not awarded or is not awarded in full, BNYM is claiming that these attachments be lifted, to the extent that:

(i) they relate to claims, monies or monetary equivalents and/or immovable property which are not registered property of the Republic of Kazakhstan, the National Fund and/or the NBK:

a. which are not administered by BNYM under code 520 for the Amsterdam branch, or which are held and/or administered and/or will be acquired by one or more of the branches of BNYM outside the Netherlands; and/or

b. which are only payable outside the Netherlands; and

c. which are also payable outside the Netherlands;

(ii) they relate to securities, security deposits, rights of participation in security deposits or collective deposits of the Republic of Kazakhstan, the National Fund and/or the NBK:

a. that are not claims which are used to intended for use by the Republic of Kazakhstan, the National Fund and/or the NBK for purposes other than non-commercial public use; and/or

a. which are held and/or administered and/or will be acquired by one or more of the branches of BNYM outside the Netherlands and/or are administered in a securities account at a branch of BNYM outside the Netherlands; and/or

c. which are not adequately described in the writs of attachment served on BNYM; and/or

d. which BNYM holds and/or may acquire and which are administrated by/on behalf of/via the book-entry system of a central custodial institution other than the Central Depository for Book-Entry Securities as provided for in Article 1 of the Securities Book-Entry Transfer Act (Wge);

(iii) which exceed the amounts estimated by the court in summary proceedings in the leave to attach or alternatively to limit them to an amount which the introductory court deems appropriate in the proper administration of justice; and

2. ordering Stati jointly and severally to pay the costs of the attachments in the Netherlands and the costs of these proceedings, plus subsequent costs and statutory interest.

4.2. BNYM asserts in support of this – put very briefly – that the leave to attach and the attachment applications do not clearly show the scope of the leave granted and that it as a garnishee wishes to obtain an opinion on this from the court in summary proceedings. Furthermore, a sum of money has been "frozen" as a result of the attachment which is approximately 40 times the amount at which the court in summary proceedings assessed the Stati claims in the decision of 8 September 2017. The attachments are therefore disproportionate. That being the case, the application is for the lifting of attachments insofar as they exceed the estimated value of the Stati claims.

## **5. The assessment in the principal action**

5.1. The NBK did not base the claim for lifting of the attachment on the assertion of a prima facie lack of merit of Stati's right of action which should lead to lifting of the attachment (see Article 705 (2) DCCP). The main ground for lifting the attachment, according to the NBK, is that Stati was wrong to levy attachment on the NBK's rights or claims against BNYM and that these are assets which cannot offer recourse for creditors of the Republic of Kazakhstan. In this context, the NBK refers to Article 720 DCCP in conjunction with Article 475 DCCP, in which it is provided that garnishment can relate only to claims which the judgment debtor is permitted to enforce against third parties. The NBK contends that the "judgment debtor" in this connection is the Republic of Kazakhstan, not the NBK.

5.2. The contractual relationship between the NBK and BNYM is governed by the GCA concluded in 2001 (see 2.19). The GCA is governed by English law (see Article 26 of the GCA); this was not disputed by counsel for Stati at the hearing. On 20 October 2005, the (competent) English court (in the matter of *AIG Capital Partners Inc. versus the Republic of Kazakhstan*) gave its views on how the GCA should be interpreted. In that judgment, the English court determined that the Republic of Kazakhstan does not have rights against BNYM which arise out of the GCA. The following was considered in paragraph 31 of that judgment:

*The fact that the RoK (the Republic of Kazakhstan, court in summary proceedings) holds the ultimate beneficial interest in the National Fund and thereby has a beneficial interest in the Cash Accounts held by AAMGS (the legal predecessor of BNYM, court in summary proceedings) on behalf of the NBK does not, in my view, mean that there is a debt due or accruing due to the RoK in respect of these accounts. The RoK has no contractual rights against AAMGS either under the GCA or otherwise. There is no relationship of debtor and creditor between them. The fact that the RoK may, ultimately, have a beneficial interest in the money represented in the Cash Accounts cannot, in my view, create such relationship.*

5.3. The judgment cited here contains an opinion on the legal relationship between the parties involved in that judgment, which included the Republic of Kazakhstan, the NBK and BNYM. Whilst Stati was not involved as a party, it does not detract from the fact that in these summary proceedings the interpretation given by the (competent) English court of that relationship, which is governed by English law, should on the face of it be followed. The arbitral award from which Stati derives its claim, was rendered between it and the Republic of Kazakhstan. This attachment was levied on a claim which the NBK has on a third party, AAMGS BNYM. It was ruled in the considerations cited in 5.2 above that under English law, the fact that the Republic of Kazakhstan may be the ultimate beneficiary of this claim, it does not mean or imply that it is also de facto creditor of AAMGS BNYM. Consequently it would appear on the face that Stati is also unable to levy attachment on that claim for its claim on the Republic of Kazakhstan. On that basis alone, the claim to lift the attachment can be allowed.

5.4. In addition, the NBK is correct to argue that in the attachment application of 30 August 2017, Stati acted in breach of the obligation to be truthful in Article 21 DCCP. The attachment application submitted in 2014 also related, as acknowledged at the hearing, to this claim of the NBK on AAMGS BNYM. It is established that this attachment was unsuccessful (see 2.6 above). Stati should have made explicit reference hereof in this attachment application. This is consistent with the fact that the Attachment Syllabus, which should be regarded as soft law/best practice also provides in the framework of Article 21 DCCP that attachment applications submitted previously must be reported.

5.5. This attachment requested not fulfil that requirement. The wording in its paragraph 25 (“*Furthermore, this attachment application relates largely to different objects of attachment from those described in the earlier attachment application (dated 1 April 2014)*”) does not contain this explicit reference, but is more likely to be considered as concealing. Because the court in summary proceedings assesses the attachment application *ex parte*, stringent requirements must be imposed on the accuracy and completeness of the information that the applicant provides to it. Stati failed to meet those stringent requirements.

5.6. The defence from Stati in this context does not change this. The fact that the appellate judgments given by the Supreme Court in 2016 (the "autumn appellate judgment") date from after the attachment application of 2014 and that the criteria for the obligations of facts and evidence developed by the Supreme Court in the context of state immunity were not yet known in 2014, does not detract from this. The asserted fact that the current counsel for Stati did not receive the decision on the attachment application from 2014 until one day before the hearing in these proceedings (because of an argument between Stati and its former counsel), does not alter anything because that is a matter for Stati. The fact that the court in summary proceedings did not refuse the leave requested in 2014 and the attachment was (nevertheless) not levied at the time as a result of an order from the Minister pursuant to Article 3a of the Bailiffs Act, also does not imply that the above should be reconsidered. After all, that circumstance is different from the matter under consideration here, namely the quality of the provision of information that may be expected of a person who is applying for the second time for leave to levy attachment on the same object.

5.7. In these circumstances, the other grounds adduced by the NBK in support of lifting the attachment need not be discussed.

5.8. The NBK has also – essentially – claimed a ban preventing new attachments in the future. This claim cannot be allowed because it is impossible to see at the moment what future facts or circumstances might justify a potential new attachment. As a "lesser" option, it will be ruled that a copy of this judgment must be appended – subject to a (moderate) penalty payment – to any future attachment application.

5.9. Finally, Stati has requested that any judgment allowing the claim should not be declared provisionally enforceable. This is impossible because the NBK has a self-evident and compelling interest in lifting this attachment, which has after all "frozen" a sum of approximately 22 billion euro (see 2.18 above).

5.10. As the largely unsuccessful party, Stati will be ordered to pay the legal costs incurred by the NBK and subsequent costs, both with the addition of statutory interest. Stati will also be ordered to pay the legal costs incurred by the Republic of Kazakhstan as the joined party.

## **6. The assessment in the motion to intervene**

The intervention is permitted on condition that the claims are considered at a hearing, the date of which will be determined later. The claims in the motion to intervene are conditional. BNYM must give its views – given the outcome of these proceedings in the principal action – on or before 6 February 2018 on whether it wishes to continue the proceeding. The consideration of this motion will be deferred pro forma until that

date. If the answer is in the affirmative, it must indicate its unavailability dates to the clerk named below in this judgment. In that case, the other counsel must also indicate their unavailability dates.

## **7. The decision**

The court summary

proceedings

### In the principal action:

7.1. lifts the attachments levied by Stati on BNYM, insofar as those attachments cover (i) assets which are part of the National Fund, (ii) bank and securities accounts in the name of the NBK, (iii) claims based on the GCA and monies and securities held pursuant to the GCA, and (iv) other assets of the NBK;

7.2. orders Stati, subject to penalty payment of €1 million for each violation, to append a copy of this judgment to any future attachment applications submitted to a Dutch introductory court in which applies for leave to levy attachment on the basis of the arbitral awards described in paragraph 2.1 of this judgment on (i) assets which are part of the National Fund, (ii) bank and securities accounts in the name of the NBK, (iii) claims based on the GCA and monies and securities held pursuant to the GCA, and (iv) other assets of the NBK;

7.3. orders Stati to pay the costs of these proceedings incurred by the NBK, estimated to date at €97.31 in summons costs, €618 in court fees and €816 in legal fees, plus the statutory interest on these amounts with effect from the fourteenth day after service of this judgment until the date of payment in full,

7.4. order Stati to pay the costs incurred by the NBK after these proceedings, estimated at €131 in legal fees, plus, provided that service of this judgment has taken place, €68 and the costs of the record of service, and the statutory interest on these amounts with effect from the fourteenth day after service of this judgment until the date of payment in full,

7.5. orders Stati to pay the costs of these proceedings incurred by the Republic of Kazakhstan, estimated to date at €618 in court fees and €816 in legal fees,

7.6. declares this judgement to be provisionally enforceable,

7.7. rejects any and all other claims,

### In the motion to intervene:

7.8. defers consideration of the claims pro forma until six every 2018 with the purpose described in paragraph 6 of this judgment,

7.9. defers all other decisions.

This judgment was passed by F.B. Bakels, judge in summary proceedings, assisted by M. Veraart, clerk of the court, and pronounced in open court on 23 January 2018.