WRIT OF SUMMONS IN THIRD PARTY OPPOSITION
aimed at the setting aside of the renewal of the garnishment order
(Articles 1033-1034, 1125, 1419 and 1459 of the Judicial Code)

In the year two thousand twenty, on ___ November 2020

AT THE REQUEST OF:

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

Hereafter referred to as the "RoK";

Claimant in the third party opposition proceedings;

Represented by its counsel Mr Arnaud NUYTS, Roel FRANSIS, Beatrice VAN TORNOUT and Estelle IRAMBONA, lawyers, with offices at 1000 Brussels, Keizerslaan 3 (T.: +32 2 551 15 68; r.fransis@liedekerke.com).

TO BE SUMMONED:

1. Mr. **STATI ANATOLIE**, entrepreneur, domiciled at MD-2008\Moldavia, 20 Dragomirna Street, Chisinau;

2. Mr. **STATI GABRIEL**, entrepreneur, domiciled at MD-2008\Moldavia, 1A Ghioceilor Street, Chisinau;

3. **ASCOM GROUP SA** ("**Ascom**"), with registered office at MD-2009\Moldavia, 75A Mateevici Street, Chisinau;

4. **TERRA RAF TRANS TRAIDING LTD** ("**Terra Raf**"), with registered office at GI-13/1 Line Wall Road, Gibraltar;

Hereinafter referred to as "**Defendants**" or "**Stati Parties**" or "**Statis**";

Defendants in the third party opposition proceedings;

Represented by their counsel Mr Stan BRIJS, Karen PARIDAEN, Arie VAN HOE and Alexander ROELS, lawyers, having office at Terhulpsesteenweg 120, 1000 Brussels, where Defendants have elected domicile in their petition dated 9 September 2020 seeking the renewal of the conservatory garnishment order dated 17 October 2017.

To appear on _____ at _____, before the attachment judge in the Dutch-speaking Court of first instance in Brussels sitting in _____;

IN ORDER TO:

For the reasons mentioned hereafter and for all other reasons to be raised in the course of the proceedings that are hereby expressly reserved;

Declare the claim admissible and well founded and consequently,

- Set aside the order for the renewal of the garnishment of the attachment judge in the Dutch-speaking Court of First Instance in Brussels, issued on 10 September 2020, with docket number 20/1300/B (hereafter the "**Renewal Order**");

- Condemn the defendants to the payment of all costs, including the costs of these proceedings comprising the procedural costs indemnity pursuant to section 1022 of the Judicial Code and estimated at 1,440 EUR;

- Order the decision to be provisionally enforceable notwithstanding any possible appeal, without the obligation to provide for a security and without the possibility of consignment.

1. SUBJECT OF THESE THIRD-PARTY OPPOSITION PROCEEDINGS

1. On 29 September 2017, the Statis requested, by way of an *ex parte* petition, permission from the attachment judge of the Dutch-speaking Court of First Instance in Brussels to levy a conservatory garnishment against the RoK on debts and assets relating to funds of the National Fund of the RoK (the "**National Fund**" or the "**NFRK**") in the hands of the Bank of New York Mellon NV/SA ("**BNYM**") who has its registered head office at 1000 Brussels, Montoyerstraat 46.

2. On 11 October 2017, the attachment judge in the Dutch-speaking Court of first instance of Brussels issued an order granting the requested permission (the **"Prior Garnishment Order**").

3. On 13 October 2017, the Statis proceeded to levy the garnishment against the RoK in the hands of BNYM on the basis of the Prior Garnishment Order. This order is currently the subject of third-party opposition proceedings pending before the Court of Appeal of Brussels sitting as attachment judge[1]. The hearing is scheduled on 13 and 20 April and 4 May 2021.

4. On 9 September 2020, the Statis requested the renewal of the Prior Garnishment Order by way of an *ex parte* petition submitted to the attachment judge in the Dutch-speaking Court of first instance of Brussels (the "**Ex Parte Petition**")[2].

5. On 10 September 2020, the renewal was granted by the attachment judge in the Dutch-speaking Court of first instance of Brussels (docket number 20/1300/B)(the "**Renewal Order**").

6. By way of the present writ of summons, the RoK files a third-party opposition against the Renewal Order. The RoK requests that the Renewal Order be set aside.

Considering that the dispute regarding the (in)validity of the Prior Garnishment Order is currently pending before the Court of Appeal of Brussels, the present writ of summons articulates only the grounds of opposition that relate specifically to the Renewal Order. For the avoidance of doubt, the RoK maintains and does not detract from any of the grounds to oppose the Prior Garnishment Order as set forth in its submissions in the proceedings before the Court of Appeal of Brussels.

7. In a nutshell, it will be demonstrated below that in their *ex parte* Petition, the Statis failed to inform the attachment judge of crucial developments in the case since the issue of the Prior Garnishment Order in October 2017, and thereby misled the attachment judge.

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[1] On 20 November 2017, the RoK filed a third party opposition against the Prior Garnishment Order before the attachment judge by way of a writ of summons. BYNM and NBK intervened in these proceedings.
On 25 May 2018, the attachment judge dismissed the RoK's third-party opposition the "**Judgment of 25 May 2018**"). In the same judgment, the attachment judge referred the question of whether the garnishment has a subject-matter (ie. the question whether the debt of the third party garnishee (BNYM) was owed to its client (the NBK), or to a third party (the RoK)) to the competent judge on the merits, namely the English judge, in accordance with article 1456(2) BJC.
On 11 July 2018 the RoK filed an appeal against the Judgment of 25 May 2018. On 12 July 2018, NBK also filed an appeal against the Judgment of 25 May 2018.

[2] Pursuant to Article 1458, of the Judicial Code ("**BCJ**") "*Except in the case of suspension provided for in Article 1493, the conservatory garnishment applies for three years from the date of the decision and, if no decision has been made, to be counted from the writ.*.
At the expiration of the three-year period, the attachment shall automatically cease to have effect, unless it is renewed".

The Statis did so in three ways:

- **First**, they have pretended that there has been no change in the facts of the case since 2017 so that there was no need for the attachment judge to make her own assessment of the conditions to levy a conservatory garnishment.

- **Second**, they have asserted that the delays in the resolution of the garnishment proceedings since 2017 has been caused by the Republic of Kazakshtan, while the truth is that the Statis' actions are the sole cause of the delays.

- **Third**, they completely misled the attachment judge on a fundamental point in this case, namely that the assets which are currently frozen by the garnishee (BNYM) are held on behalf of a foreign Central Bank (the National Bank of Kazakhstan or "**NBK**"), and that no permission to garnish a foreign Central Bank has been sought or obtained by the Statis. The fact that the assets held by by the garnishee (BNYM) are owed to and on behalf of a foreign Central Bank has now been irrevocably established in a final and binding judgment of 22 April 2020 by the English High Court which enjoys *res judicata* in the present proceedings (which the Statis inexcusably failed to mention in their *ex parte* Petition).

For these reasons, and the others outlined below and articulated at a later stage, the Renewal Order should be set aside.

2. FACTUAL AND PROCEDURAL BACKGROUND

2.1. THE EXEQUATUR PROCEEDINGS

8. The "title" invoked by the Statis in the context of these garnishment proceedings is an arbitral award rendered on 19 December 2013 in an investment arbitration against the RoK (the "**Arbitral Award**"). By this Award, the Arbitral Tribunal ordered the RoK to pay the Statis the sum of USD 497,685,101 to be increased with costs and interests, for the damage allegedly suffered by the Statis in their alleged "investment" in Kazakhstan.

The Statis have requested and obtained (so far) the exequatur of the Arbitral Award in Belgium. By judgment of 20 December 2019, the French-speaking Court of First Instance in Brussels did not uphold the RoK's third-party opposition against the exequatur (the "**Judgment of 20 December 2019**"). While the RoK asserts (inter alia) that the Arbitral Award has been produced by fraud, the Court held in that judgment that the fraud committed by the Statis, as asserted, was not the "*determining cause*"[3] of the Award.

9. The Judgment of 20 December 2019 has not finally settled the judicial debate in Belgium on the validity of the Arbitral Award for the purposes of the garnishment proceedings, for two distinct reasons:

- First, there are currently two ongoing appeals against this judgment, the first before the Court of Appeal of Brussels, and the second, before the Court of cassation. The reason why

[3] Informal translation of: "*la cause déterminante".*

two appeals have been lodged is that there is an unsettled legal controversy as to whether the exequatur proceedings are governed by the former arbitration regime of the Judicial Code (in which case the appeal must be brought before the Court of appeal) or by the new arbitration regime introduced in 2013 in the Judicial Code (in which case the appeal against exequatur must be brought directly before the Court of cassation).

- Second, by an order of 3 December 2020 issued pursuant to Article 748§2 BCJ, the Court of Appeal of Brussels ruled, in the context of the conservatory garnishment proceedings, that *"new"* and *"relevant"* evidence has come to light concerning *"the quality of the title"*, namely the validity of the Arbitral Award. This new evidence relates to the invalidation by KPMG, the former independent auditors of the Statis, of all the audit reports relating to the (alleged) investment made by the Statis in Kazakhstan. The debate about the impact of this new evidence on the "quality" of the Arbitral Award will take place before the Court of Appeal of Brussels at hearings scheduled on 13 and 20 April and 4 May 2021.

2.2. THE GARNISHMENT PROCEEDINGS

10. By the Prior Garnishment Order of 11 October 2017, the Dutch language attachment judge authorized the Statis to levy a conservatory garnishment in the hands of BNYM against RoK.

11. After the service of this order on BNYM on 13 October 2017, BNYM issued a third party declaration dated 30 October 2017. BNYM stated in this declaration that (i) it holds cash and securities at its London branch in England for its client, the National Bank of Kazakhstan ("**NBK**") (ii) in BNYM's view, there are « *uncertainties* » as to whether the RoK has claims against BNYM in respect of these assets, and (iii) as a consequence of these uncertainties it will freeze assets, for a total amount of approximately USD 22 billion at the time (the "**Third Party Declaration**").

12. By way of a writ of summons dated 20 November 2017, the RoK filed a third-party opposition against the Prior Garnishment Order before the Dutch-speaking attachment judge to request the setting aside of this order. BYNM and NBK also intervened in these proceedings.

In the context of those proceedings, the RoK (and NBK) raised various grounds to set aside the Prior Garnishment Order, including[4]:

- **sovereign immunity**: the assets placed by NBK with BNYM cannot be attached as they are assets held and managed by a foreign central bank (NBK) that are immune from execution under international and Belgian law, and

- **lack of subject-matter**: the garnishment does not have any object (or subject-matter) because BNYM does not have any debt towards the RoK but only towards NBK, which is an independent third-party with its own separate legal personality.

13. As the Statis themselves were fully aware at the time that they made the original application for garnishment (without disclosing these facts to the attachment judge at the time), there are two separate legal relationships based on two separate contracts:

[4] The RoK raised various additional grounds. For the sake of brevity, these other grounds are not addressed here, and they are articulated in the written submissions of the RoK in the appeal proceedings against the Prior Garnishment Order.

(i) the Trust Management Agreement ("**TMA**") between the RoK and the NBK, pursuant to which assets of the National Fund of the Republic of Kazakhstan (NFRK) have been transferred in trust from the RoK to the NBK; and

(ii) the Global Custody Agreement ("**GCA**") between the NBK and BNYM, pursuant to which NBK has placed certain assets of the NFRK on bank accounts held by BNYM in the name and for the benefit of NBK at BNYM's London branch.

Thus, the garnishment sought by the Statis is an illegal "fourth-party garnishment", as the debt of BNYM is towards its client NBK and not towards the RoK. Any attempt to carry out a garnishment could only be made in the hands of NBK and not in the hands of BNYM.

In the course of the contradictory debate in the opposition proceedings against the Prior Garnishment Order, the Statis came up for the first time (only in the second round of their submissions) with a contrived theory to try to justify the garnishment in the hands of BNYM. The Statis submitted that pursuant to the theories of "*simulation"*, *"piercing the corporate veil"* and/or *'abuse of rights"*, the attachment judge should ignore the existence of the above described legal relationships, and should find that the debt of BNYM is supposedly due to the RoK and, as a consequence, the garnishment has a subject-matter (these arguments of the Statis are hereinafter referred to as the "**Simulation Arguments**").

14. By judgment of 25 May 2018 (the "**Decision of 25 May 2018**"), the Dutch-speaking attachment judge declared the third party opposition against the Prior Garnishment Order admissible yet unfounded.

With respect to the ground relating to **immunity of assets held by foreign central banks**, the attachment judge rejected such ground, but only for the reason that the Statis had not sought authorization nor been authorized to carry out a garnishment of assets held and managed by NBK. The attachment judge specifically emphasized that the only permission that had been granted, related to assets held by BNYM that are due to the RoK, and not to the central bank of Kazakhstan, NBK. As will be shown below, this is crucial for the perspective of the assessment of the invalidity of the Renewal Order.

With respect to the grounds relating to the **lack of subject-matter of the garnishment**, the attachment judge ruled that (i) the subject-matter of a garnishment follows from what is stated in the garnishee declaration, and here BNYM declared that because of uncertainties it will freeze the assets, and (ii) when the declaration of the garnishee is contested, as in this case, the dispute about the existence of a debt from the garnishee to the seized-debtor "*cannot and may not be handled by the Attachment Judge, but only by the court hearing the merits of the case*", in accordance with article 1456, 2nd JC.

Consequently, the attachment judge referred the dispute about BNYM's debt to the English judge, as this judge is the competent judge on the merits with respect to the debt of BNYM (Decision of 25 May 2018, pp. 12-13, § 3.1.4).

In addition, the judge limited the amount of the garnishment to the amount of USD 530 million instead of USD 22 billion. After consultation with NBK (being BNYM's counterparty under the GCA and the only entity capable of giving instructions to BNYM in connection with the National Fund assets), BNYM confirmed on 27 June 2018 that the assets that would remain

provisionally frozen consist in the amount of USD 530 million in cash held by NBK on bank accounts with the London branch of BNYM.

15. The Judgment of 25 May 2018 has been challenged before the Brussels Court of appeal by all the parties to the proceedings. The RoK and NBK have appealed the judgment in respect, inter alia, of the ground of sovereign immunity. The Statis have appealed (through an incidental appeal) the referral to the English court of the dispute about BNYM's debt. BNYM had also initially appealed (through an incidental appeal) the judgment because the attachment judge had rejected BNYM's request to hold that it had properly executed the garnishment. BNYM has now dropped its incidental appeal because there is no dispute anymore between the Parties on this point.

The case before the Court of appeal is currently fixed for hearings on 13 and 20 April and 4 May 2021.

16. On 28 May 2018, in accordance with the Decision of 25 May 2018, the RoK and NBK initiated proceedings before the English High Court having jurisdiction on the merits to resolve the dispute over BNYM's debt (these proceedings are set out in detail below).

17. On 12 June 2018, the Statis served a bailiff's writ to convert the conservatory garnishment into an executory garnishment. The Statis wrongly asserted in this writ that the attachment judge had decided, by the Decision of 25 May 2018, that the garnishment has a subject-matter on the basis that the debt of BNYM is due to the RoK (while in truth the attachment judge had referred this issue to the English court).

On 27 June 2018, the RoK filed an opposition against this conversion of the conservatory garnishment into an executory garnishment. As the Statis had served the writ of conversion in the French language, the opposition was brought before the French-speaking attachment judge in the Court of First Instance of Brussels. Among other things, in the context of those proceedings, the RoK contests that the conservatory garnishment has been converted into an executory garnishment and that the garnishment has a subject-matter. On 12 August 2018, BNYM voluntarily intervened in these proceedings. On 16 August 2018, NBK also intervened voluntarily in these proceedings.

18. On 25 October 2018, the Statis made a request to the French-speaking attachment judge (in the executory garnishment proceedings) to seek, as interim measure, the transfer to the Belgian treasury fund of the sum of USD 530 million held by NBK on accounts with BNYM in London. All the other Parties, including BNYM, opposed this request.

By judgment of 28 June 2019, the French-speaking attachment judge dismissed the Statis' request for interim measure and ruled that the sum of USD 530 million should not be transferred to Belgium (the "**Judgment of 28 June 2019**"). In this judgment, the French-speaking attachment judge confirmed that the dispute over BNYM's debt had been rightfully referred to the English court. The attachment judge also noted that the English court had in the meantime ruled in a preliminary judgment that the English court had indeed jurisdiction to decide this matter (see further below).

The attachment judge then fixed a procedural calendar to ensure that the case would not come back in Belgium before the English court had resolved the dispute about BNYM's debt. Now

that the English court has resolved the matter (see further below), the case before the attachment judge is fixed for a hearing on 2 December 2020.

2.3. THE PROCEEDINGS ON THE MERITS IN THE UNITED KINGDOM

19. As indicated above, in accordance with the Decision of 25 May 2018, the RoK and the NBK brought proceedings before the English High Court to resolve the dispute over BNYM's debt.

20. The Statis tried to challenge the jurisdiction of the English court or at least to limit the scope of the dispute that would be resolved in England. By a judgment of 4 December 2018, the English court rejected these challenges (the "**English Jurisdiction Judgment**"). The Court held that the English courts have jurisdiction to decide on the merits of the dispute over BNYM's debt, and that the scope of this jurisdiction is not limited as asserted by the Statis.

As a consequence, the English court fixed a procedural calendar for the exchange of written submissions, witness evidence, and also expert evidence. Through these submissions and evidence, the Statis have fully developed before the English court their Simulation Arguments (in support of their case that the debt of BNYM would supposedly be due to the RoK).

21. By judgment of 22 April 2020, the English High Court resolved the dispute over BNYM's debt (the "**English Judgment on the merits**"). The court decided decisively that the debt of BNYM **is due solely to NBK** and not to the RoK.

The findings of the Court are expressed in a series of four declarations included in the final operative part of the judgment, and they are also reproduced in a formal order dated 4 May 2020. The declarations are as follows:

> "(*i) The contracting parties to the GCA are BNYM London and the NBK (and not Kazakhstan);*
>
> *(ii) the obligations owed by BNYM London under the GCA are owed solely to NBK (and not to Kazakhstan);*
>
> *(iii) BNYM London has no obligation to pay any debt due under the GCA to Kazakhstan;*
>
> *(iv) Kazakhstan does not have any claims against BNYM in relation to the cash deposits held by BNYM pursuant to the GCA"*[5] (English Judgment on the merit**s,** §§2 to 5).

22. Having resolved the merits of the dispute as set out above, the English court then went on to clarify that it "*must be for the Belgian court to determine the consequences of that decision in Belgium*"[6] (English Judgment on the merit**s**, §42). The English court therefore left it to the Belgian court to draw the **consequences** arising from the English judgment on the merits. The

[5] Informal translation of [...].
[6] Informal translation of [...].

English court however emphasised that it is expected that the English judgment will have a "*significant and possibly decisive role*"[7] on the final resolution of the proceedings in Belgium[8].

As will be explained further below, the necessary consequence of the judicial finding that BNYM's debt is owed solely to the NBK is that the garnishment has **no subject-matter**.

23. Both the Statis and also the RoK and NBK sought permission to appeal in England against this judgment on the merits. The Statis sought to appeal the finding that the debt of BNYM is only owed to the NBK and not to the RoK. The RoK and NBK sought to make a very narrow appeal only in respect of the decision of the English court not to draw itself the consequences arising from the decision that the debt of BNYM is owed solely to NBK. Indeed, the Dutch-speaking attachment judge had already decided, by the Judgment of 25 May 2018, that "*the absence of a debt owed by the garnishee to the garnished-debtor... leads only to the conclusion that the garnishment has no subject-matter*". Since the English court had concluded that BNYM's debt is exclusively owed to the NBK, the English court could have concluded itself that the attachment has no subject-matter, sparing the need for further delays in additional proceedings in Belgium.

According to the English procedural rules, permission to file an appeal must be requested initially from the first instance judge who gives the judgment. In this case, by decision of 4 May 2020, the English Judge who made the judgment (Justice Teare) decided, as is often the case in practice, to refuse to give permission to appeal against his own decision. However, when addressing the matter in its orders of 4 May 2020, the English judge still insisted that his decision on the merits "*may well inevitably lead to the conclusion [in the Belgian proceedings] that the debt should be released from the garnishment*"[9] (English Order of 4 May 2020, §4).

24. The Parties then, in accordance with English procedure, sought permission to appeal before the English Court of Appeal itself. The RoK and the NBK sought leave to appeal on the same specific and narrow point mentioned above. The Statis, for their part, sought permission to appeal supposedly only in relation to the costs of the proceedings, but in fact they also sought to incidentally appeal the judge's decision on the merits[10].

By a short order of 8 July 2020, the English Court of Appeal refused permission to appeal to both the RoK (and NBK) and to the Statis. However, the Court of Appeal did confirm that the RoK and the NBK "*were the overall successful parties*", and that the Statis are the "*unsuccessful*" parties in the proceedings in the United Kingdom[11].

25. In view of this decision of the Court of Appeal, the English Judgment on the Merits is now **final and irrevocable**. It has therefore been definitively established by the judge of the merits that BNYM's debt is owed exclusively to a third party (the NBK), and not to the garnished-debtor (the RoK).

[7] Informal translation of [...].
[8] Informal translation of [...].
[9] Informal translation of [...].
[10] The Statis argued that BNYM and the RoK would be bound by an agreement on the basis of the GCA (Statis' permission to appeal, Point 13 (C)), even though the judge had expressly ruled that the parties to the GCA were solely BNYM and NBK, and not the RoK.
[11] Ruling of 8 July 2020 on the Statis' permission to appeal. Informal translation [...].

The Belgian courts must draw the "*inevitable*" (to use the English judge's expression) consequence from the Judgment on the Merits that BNYM's debt is owed only to NBK and not to the RoK. For this reason, no renewal of the Garnishment Order should be permitted, as further elaborated below.

3. IN LAW

26. The RoK requests that Your Court declare the present third-party opposition brought by the Republic of Kazakhstan admissible (**3.1**) and well-founded (**3.2**), and consequently retract the Renewal Order.

3.1. THE THIRD-PARTY OPPOSITION IS ADMISSIBLE

27. Pursuant to articles 1419, 1033-1034, 1122 and 1125 of the Judicial Code, an opposition can be initiated by way of a writ of summons.

In the present case, the Renewal Order has been served by a writ of bailiff received by the RoK on 16 October 2020.

Thus, the present opposition proceedings are in due form and timely.

28. Article 1458, para. 2, of the Belgian Judicial Code provides that "*at the expiration of the three-year period, the attachment shall automatically cease to have effect, unless it is renewed*".

In the present case, the Prior Garnishment Order was rendered on 11 October 2017 and therefore, barring a **valid** renewal, it automatically expired on 10 October 2020.

However, as it will be demonstrated below, the renewal that has been sought and obtained by the Statis is invalid, and it should therefore be ruled that the garnishment has expired.

29. The Statis maintain in their petition that the renewal of the conservatory garnishment was not necessary due to the conversion of the conservatory garnishment into an executory garnishment (para. 3 of their *Ex Parte* Petition).

This position is incorrect.

As explained above, the validity of the conservatory garnishment is currently being challenged before the Court of Appeal, and this dispute has not yet been resolved. This challenge precludes the conversion of the conservatory garnishment into an executory garnishment until a final decision has been rendered on the merits of the challenge to the validity. Indeed, pursuant to Article 1491 (3) of the Judicial Code, *"If the garnishment is challenged before the garnishment judge at the time of service of the final decision on the merits of the dispute, the conversion of the conservatory garnishment into an executory garnishment shall only take place by service of the decision of the garnishment judge, which recognises the lawfulness of the garnishment*"[12].

[12] The legal position in this respect is further elaborated at paras. 604-614 of the RoK's written submissions of 20 July 2020 in the executory garnishment proceedings.

The fact that the Statis themselves have sought the renewal of the conservatory garnishment is a testament to the fact that they accept that the RoK's position may be the correct one, namely that the garnishment has expired without a valid renewal.

30. The renewal of the initial conservatory attachment only extends the period of validity of the initial attachment. It does not constitute a new attachment or a new title. If and when the Court of Appeal annuls the Prior Garnishment Order of 11 October 2017 and orders the release of the initial conservatory attachment, the Renewal Order will also be rendered without subject-matter or without purpose, and will automatically become moot.

Nonetheless, the Renewal Order does replace the Prior Garnishment Order (and its confirmation in the Judgment of 25 May 2018) as the title lending permission for conservatory garnishment for the future, i.e. for the next three years.

For this reason, the RoK has an interest in the meaning of article 17 and 18 BCJ to oppose the validity of the Renewal Order in the context of the present proceedings. And as will be shown below, the renewal of the garnishment is in the present case illegal and invalid, with the consequence that it should be held that there is no valid garnishment in place.

31. Moreover, the RoK takes note of the fact that the Renewal Order expressly limits the amount of the conservatory garnishment to the sum mentioned in the Statis' original petition of 29 September 2017, ie.:

- 515.822.966,35 USD in principal amount, interest and costs, plus
- an additional amount of 802.103,24 EUR for other costs.

3.2. THE THIRD-PARTY OPPOSITION IS WELL-FOUNDED

3.2.1. The legal test of renewal: "well-founded reasons"

32. Pursuant to article 1459 BCJ, a conservatory garnishment can be renewed only when there are "*well-founded reasons*" for the renewal.

The case law of the Supreme Court clarifies that when making an assessment of the existence of *"well-founded reasons"*, "*the attachment judge must verify whether the condition of **urgency** has still been met and whether, in the event of **changed circumstances**, the claim of the attachment creditor still meets the qualifications referred to in Article 1415, first paragraph, Judicial Code*" (ie. a due and payable claim) (emphasis added)[13].

In the same judgment, the Supreme Court held that "*the submission that assumes that the res judicata of the decision that at the time authorized the attachment precludes the requirements of a fixed, due and payable claim from being called into question again in the context of the renewal is based on an incorrect understanding of the law*".

[13] Cass. 18 December 2017, www.cass.be .

In other words, and this is fundamental for the purpose of these proceedings, when assessing whether or not to grant a renewal of a conservatory garnishment, the attachment judge is not bound by the *res judicata* of prior decisions that have been handed down by attachment judges in the case. The attachment judge must conduct a **new assessment himself** of whether the conditions are satisfied to levy a garnishment.

Therefore, at the time of considering the renewal, the attachment judge can and must independently investigate the requirements of the garnishment, including (i) whether the required urgency is prevalent, (ii) whether the claim is certain, fixed, due and payable, and (iii) whether the assets are susceptible to garnishment under Belgian law.

Moreover, and in any event, the attachment judge can and must consider whether there has been a change of circumstances since the original garnishment has been levied.

33. In the present case, based on the ***ex parte*** Petition from the Statis, the attachment judge formed the view, in the Renewal Order, that there are *"well-founded reasons"* to renew the garnishment in light of "*among others, the pending proceedings relating to the exequatur Judgment as a consequence of the appeal and Supreme Court petition of the garnished debtor; the conversion of the conservatory garnishment into an executory garnishment against which the garnished debtor has launched opposition proceedings*".

The attachment judge did not address, in the Renewal Order, (i) whether the required condition of urgency was satisfied, (ii) whether the claim was certain, fixed, due and payable, and (iii) whether the assets are susceptible to garnishment under Belgian law.

The attachment judge did not consider either whether there was a change of circumstances since the original garnishment order had been made.

The reason why the attachment judge did not address these conditions is that the Statis have deliberately chosen, in the *ex parte* petition, to conceal from the attachment judge crucial facts and developments in the case, and also to misrepresent very seriously the legal and factual position.

In the context of the present opposition proceedings, the RoK:

- will uncover the Statis' deceit (**3.2.2**), and
- will then explain grounds for the setting aside of the Renewal Order (**3.2.3**).

3.2.2. The Statis concealed crucial facts which would have led to the refusal of the renewal of the garnishment

34. The *ex parte* petition of the Statis contains very serious omissions and misrepresentations:

- First and most importantly, the Statis have failed to disclose judicial decisions which should have led to the refusal of the renewal of the garnishment (**3.2.2.1.**),

- Second, the Statis have advanced a series of false allegations about the facts of the case (**3.2.2.2.**), and

- Third, the Statis have provided a totally false picture of the reasons for the delays to the proceedings (**3.2.2.3.**).

3.2.2.1. Failure to disclose judicial decisions going against the renewal of the garnishment

35. The Statis have failed to disclose in their *ex parte* Petition a series of prior judicial decisions that should have prevented the renewal of the garnishment.

Sometimes, the omission consisted in failing entirely to mention the existence of relevant judgments against the Statis. In other cases, the Statis have mentioned judgments only in passing and in a misleading way, without drawing the attention of the attachment judge to crucial findings contained in such decisions that undermined entirely their application for renewal.

The list of (some of) the decisions and judicial findings that have been hidden from the attachment judge will be provided in the following paragraphs.

36. First, the Statis have failed to disclose the existence of the **Judgment of 28 June 2019 of the French-speaking attachment judge** in the executory garnishment proceedings.

Yet, this is an essential judgment to understand the true status of the garnishment proceedings. As explained, by this judgment of 28 June 2019, the French-speaking attachment judge rejected the Statis' request to transfer the sum of USD 530 Million in Belgium. To justify this rejection, the attachment judge made various essential findings about the status of the proceedings at that stage, namely almost two years after the issue of the Prior Garnishment Order and also more than one year after the Judgment of 25 May 2018.

In this judgment of 28 June 2019, the attachment judge:

- Ruled specifically that the dispute about BNYM's debt had **not** been decided in the Judgment of 25 May 2018, but had rather been referred to the English judge (§39).

- Decided that *"the identity of the creditor of the sums due by BNYM is the subject of a dispute so that the debt of BNYM cannot be characterized as certain, liquid and due"*[14] (§35).

- Decided that "*The Court can only find that 'the beneficiary of the assets' is the party who can demand payment, a question which is precisely the subject of the dispute. A garnishment can in fact only be carried out on the sums and assets owed by the garnishee to the garnished debtor, and not to a third party. However, the Stati*

[14] Informal translation of: [...].

> *consorts only have a title against Kazakhstan so that this could not be used as a basis for garnishing a third party, such as the NBK"*[15] (§36).

All of these judicial findings have a direct bearing on the issue of the renewal of the garnishment, and yet they have not been disclosed by the Statis in their *ex parte* Petition.

37. Second, and even more importantly, the Statis omitted to disclose some fundamental judicial findings made in the **English Judgment on the merits of 22 April 2020**.

The Statis have barely addressed these English proceedings, which are mentioned only in passing and without providing any context, at para. 69 of the Petition.

Again, the Statis failed to explain in their *ex parte* Petition the proper context in which the English Judgment on the merits was handed down. While the Statis asserted that the attachment judge has decided, in her Judgment of 25 May 2018, to "*dismiss the third-party opposition and arguments of RoK (...) in their entirety*" (para. 24 of the Petition), they failed to disclose that the attachment judge, very importantly, decided to refer the dispute about BNYM's debt to the judge on the merits, namely the English judge.

Even more inappropriately, the Statis failed to explain that the English court ruled that the garnishee (BNYM) owes no debt to the garnished-debtor (the RoK), and omitted to acknowledge the following four declarations made by the English judge:

> "(*i) The contracting parties to the GCA are BNYM London and the NBK (and not Kazakhstan);*
>
> (*ii) the obligations owed by BNYM London under the GCA are owed solely to NBK (and not to Kazakhstan);*
>
> *(iii) BNYM London has no obligation to pay any debt due under the GCA to Kazakhstan;*
>
> *(iv) Kazakhstan does not have any claims against BNYM in relation to the cash deposits held by BNYM pursuant to the GCA"*[16] (English Judgment on the merits, §131 and English Order of 4 May 2020, §§2 to 5).

The Statis also failed to disclose the finding made by the English judge that his decision on the merits will have a "*significant and possibly decisive role*"[17] on the garnishment proceedings in Belgium.

This omission is particularly glaring and inexcusable. As indicated above, the role of the attachment judge, when considering an application for the renewal of a garnishment, is to verify whether there is a change of circumstances which has an impact on whether the garnishment should be renewed. Yet, in the present case, the English court specifically ruled that its decision could have a "*significant and possibly decisive role*"[18] on the garnishment proceedings in Belgium. The Statis have deliberately chosen to hide this essential judicial decision from the attachment judge.

[15] Informal translation of: [...].
[16] Informal translation of [...].
[17] Informal translation of [...].
[18] Informal translation of [...].

This, by itself, should lead to the immediate lifting of the Renewal Order, as further explained below.

38. Third, the Statis have also failed entirely to disclose the **Order of 3 December 2019 of the Court of Appeal of Brussels** issued in the context of the conservatory garnishment proceedings.

By this Order, the Court of appeal found that there is "*new*" and "*relevant*" evidence which has come to light concerning "*the quality of the title*", i.e. the validity of the Awards. As noted above, this new evidence relates to the decision of KPMG to invalidate all audit reports relating to the (alleged) investments made by the Statis in Kazakhstan.

39. Fourth, the Statis also failed to disclose the **Judgment of 6 June 2017 of the English High Court** which found that "*there is a sufficient prima facie case that the Award was obtained by fraud*"[19] (English Judgment of 6 June 2017 in the exequatur proceedings, § 92)[20].

As will be shown below, this is not the first time they try to dissimulate this decision.

40. Fifth, the Statis also failed to disclose the **Judgment of 17 June 2020 of the Svea Court of Appeal** (Sweden), which ruled that the assets that the Statis are seeking to garnish, which form part of the same group of assets that are affected by the present proceedings[21], are assets of the NBK and are therefore protected by absolute immunity from execution[22].

The Svea Court of Appeal found that the assets held by NBK with BNYM are protected by immunity from enforcement because they are assets held by a foreign central bank, and that this immunity from enforcement is based on customary international law (as codified in the United Nations Convention on Jurisdictional Immunities of States and Their Property), which is equally binding on Belgium.

41. Finally, the Statis also failed to disclose the **Judgment of 23 January 2018 of the Court of Amsterdam** which decided to lift the garnishment levied in the hands of BNYM Amsterdam of the very same assets that form part of the assets that the Statis are seeking to garnish in the Renewal Order.

This is again inappropriate because the reason why the garnishment was lifted by the Amsterdam court was precisely the same reason that has now also been confirmed by the English court, namely that the debt of BNYM is due solely to NBK and not to the RoK.

[19] Informal translation of: [...].
[20] In fact, it should be stressed that the Belgian enforcement proceedings are the consequence of the Statis' "fleeing" from the English courts after this decision. Indeed, the Statis discontinued their enforcement attempts in England after this finding so as to avoid the full trial on the fraud which had been ordered by the English judge (this point is further addressed below). The Statis were allowed to do so only (i) against an undertaking never to come back to enforce the Award in the United Kingdom again and (ii) having to bear significant costs.
[21] The assets in question are assets of the National Fund which are held in Sweden by a Swedish bank, SEB, as sub-custodian of BNYM under the GCA.
[22] It should be noted, however, that this Judgment is currently the subject of an appeal before the Swedish Supreme Court.

42. The omission of the Statis to disclose all of the judicial decisions and findings listed above[23] is particularly inappropriate and inexcusable when considering that, by these decisions, the courts have held:

(i) That the debt of the garnishee (BNYM) is not due to the seized-debtor (RoK) but to a third party (NBK);

(ii) That there is new and relevant information that may affect the quality of the Arbitral Award so that the claim is by no means certain, fixed, due and payable; and

(iii) That the assets in question are protected by immunity from enforcement of the assets held and managed by foreign central banks.

The above decisions demonstrate that there has been a change of circumstances since the Prior Garnishment Order, and it was the duty of the Statis to disclose to the attachment judge this change of circumstances. The Statis have no excuse for hiding these judicial decisions from the attachment judge in their *ex parte* Petition.

3.3.1.1. False allegations about the facts of the case

43. In addition to having failed to disclose judicial decisions that undermine their request for renewal, the Statis have also made a number of false or misleading allegations regarding the facts of the case.

The false allegations are both numerous and serious. For the purpose of this summons, the following will be noted:

- In **para 4 and footnote 5** of their *ex parte* Petition, the Statis submit that "*the circumstances are unchanged*" since the Judgment of 25 May 2018 of the Dutch-speaking attachment judge.

  This statement is shockingly wrong and misleading when considering the developments identified above.

- In **para. 16**, the Statis pretend that they decided to put an end to the exequatur proceedings in England UK "*due to predominantly financial reasons*".

  This is entirely wrong. The reason why the Statis withdrew from the exequatur proceedings in England is that they wanted to avoid a full trial on the matter of fraud after the English Court had ruled that "*there is a sufficient prima facie case that the Award was obtained by fraud*"[24] (Judgment of 6 June 2017, § 92). In a subsequent judgment ordering the Statis to pay to the

[23] It should be noted that these omissions of the Statis in their *ex parte* Petition are a typical example of the well-known strategy employed by the Statis throughout the various proceedings, ie. they (i) suppress new evidence and relevant developments and prevent the courts from properly taking them into account, (ii) mislead the courts and obtain a decision based on an untruthful and incomplete record, thus tainted; (iii) collect judicial decisions in this way and create the illusion of broad judicial consent; and finally (iv) avoid scrutiny of one court by pointing to another court which allegedly performed the scrutiny.

[24] Informal translation of: [...].

RoK more than £ 2 million of legal costs for having abandoned the exequatur proceedings, the English court specifically ruled that *"the real reason for the notice of discontinuance was that the Statis did not wish to take the risk that the trial may lead to findings against them and in favour of the State"*[25], and in particular that the Statis decided *"that the risk of proceeding to trial with witness statements upon which there could be cross-examination was not a risk that was worth taking"*[26] (Judgment of 2 July 2019, §19-20).

Thus, the *"real reason"* why the Statis have fled England, as found by the English court itself, is not "financial reasons"[27]. Yet again, the Statis have not disclosed this decision nor the true reason why they have abandoned the English proceedings. They have preferred once again to mislead the attachment judge.

- In **para. 24**, the Statis allege that in the Order of 25 May 2018, the RoK's third-party opposition and all its grounds were "*dismissed in their entirety*".

  This is wrong. As noted above, the judge ruled that the matter of the (in)existence of a debt owed by the garnishee (BNYM), to the garnished-debtor (the RoK) is a matter for the judge on the merits to decide, namely the English judge.

- In **para. 65**, the Statis state that they have proof that in September 2017 "*the Kazakh parties*" (which is meant to include the RoK) tried to "*remove the assets of the NFRK from Belgium with the only intention of protecting them from garnishment by the Stati*".

  This is wrong. RoK was never in contact with BNYM regarding the assets of the NFRK, at any point of time and the exhibits that the Stati rely on by no means prove the contrary

- In **paras. 27-28, 48** and **62**, the Statis purport to provide a summary of the case advanced by the RoK about the fraud vitiating the Arbitral Award.

  This purported summary is completely wrong and misleading. It fails entirely to represent the true case of the RoK about (i) the extent and gravity of the uncovered fraud, (ii) the actions carried out by the Statis to prevent several courts from substantively reviewing the evidence about the fraud, and (iii) the fact that in the context of the conservatory garnishment proceedings, the Court of Appeal of Brussels issued an Order finding that there is "*new*" and "*relevant*" evidence which has come to light concerning "*the quality of the title*", i.e. the validity of the Arbitral Award.

  The Statis also omit to disclose to the attachment judge that:

  - Subsequent to the Award and also to the decision of the Swedish court not to annul the Award in 2016, evidence gradually emerged of the fraud committed by the Statis.

[25] Informal translation of: [...].
[26] Informal translation of: [...].
[27] In this regard it should be noted that following the withdrawal of the English enforcement proceedings, the Statis embarked into a large campaign consisting in seeking enforcement in a great number of other countries. These proceedings triggered significant costs which would have been avoided had there been a full trial on the fraud in England as had been directed by the English court.

It is only in the second part of 2019 that additional proof of the scope and ramifications of the fraud have surfaced.

- Thus, by letters of 21 August 2019, KPMG invalidated all audit reports relating to the financial statements used by the Statis during the arbitral proceedings against the RoK. In its letter to the Statis issued on that date, KPMG explains that it was misled by the Statis when preparing the financial statements, and that, consequently, no reliance can be placed on these financial statements even though they were used by the Statis in the arbitration proceedings against the RoK.

- By letters of 6 and 25 September 2019, the Statis put pressure on KPMG to reverse its decision to invalidate the audit reports.

- By letters of 20 September and 3 October 2019, KPMG refused to reverse its decision, pointing out that the Statis had not provided any response whatsoever to refute the evidence that the Statis had deceived KPMG when preparing the financial statements .

- The Statis attempted by all possible means to conceal the above KPMG correspondence, and in particular the letter of 21 August 2019 sent by KPMG to the Statis underlying that it was misled by the Statis.

- The RoK was only able to obtain this correspondence through an application for production of documents brought against KPMG before the Kazakh courts, which ordered its production and gave permission for the use of these documents in foreign proceedings by decisions of 17 and 25 October 2019.

- By letter of 6 November 2019, the RoK asked the Statis to allow this correspondence to be produced in the Belgian exequatur proceedings in light of the fact that all the deadlines for written submissions in the case had already elapsed. In response, on 10 November 2019, the Statis refused that request.

- At the hearing in the exequatur proceedings which began on 13 November 2019, the Statis once again refused to allow the production of the KPMG's Correspondence. It is only after the RoK had completed its oral pleadings that the Statis, in the middle of the hearing, made a purely tactical turnaround by lifting its objection to the production of the said correspondence. The KPMG Correspondence was therefore only admitted as an exhibit at the very end of the three hearings, just before the closure of the debates.

- While it was noted in the minutes of the hearing that the documents had been introduced in the contradictory debate, the Statis have succeeded, through their manoeuvre, to prevent the RoK from making use of the documents during its oral pleadings, as the documents were admitted as evidence only after the end of the RoK’s pleadings.

- By judgment of 20 December 2019, the French-speaking Court of First Instance of Brussels dismissed the RoK’s third party opposition to exequatur. The Court did not rule on the existence of the fraud committed by the Statis. The reason for the dismissal of the RoK’s opposition is only that, according to the judge, the Statis’ fraud was not

the "determining cause"[28] for the calculation of part of the amount of damages awarded to Statis (relating to the value of the LPG plant)[29]. The Court of First Instance did not rule on the KPMG Correspondence, which is not even mentioned once in the judgment.

- Consequently, the Court did not address either the argument that the fraud committed by the Statis evidenced by the KPMG Correspondence had an impact on the jurisdiction (or lack thereof) of the Arbitral Tribunal, on the lack of arbitrability of the dispute and on the lack of liability of the RoK (it is well established in the case law, when the investor is not in good faith (because of a fraud in relation to the investment), there is no protection from an investment treaty such as the Energy Charter Treaty).

44. None of these facts have been disclosed by the Statis. In these circumstances, the Statis' portrayal of the matter of the KPMG Correspondence in paras. 28, 48-50 of their *ex parte* Petition is highly disingenuous and misleading.

3.3.1.2. False depiction of the reasons for the delays to the exequatur and garnishment proceedings

45. The *ex parte* petition of the Statis is also highly misleading in the way that the Statis purport to explain the delays in the exequatur and garnishment proceedings.

The Statis allege in their *ex parte* petition that the RoK supposedly employs obstructive manoeuvres with the view to unduly "extend the proceedings" as long as possible and to render the proceedings overly complex[30].

This is entirely incorrect. If the proceedings have become lengthier and more complex, this is due solely and entirely to the Statis' own conduct in the proceedings, both in relation to the exequatur of the arbitral award and in relation to the garnishment proceedings.

46. Starting with the **exequatur process**, it is essential to take note of the fact that initially, the Statis had sought to obtain exequatur and to enforce the arbitral awards before the English courts. Yet, by a judgment of 6 June 2017, the English High Court ruled that "*there is a sufficient prima facie case that the Award was obtained by fraud*"[31] (Judgment 6 June 2017, § 92). The English judge then ordered a full trial on the fraud, including witness testimony and cross-examination of witnesses orally before the court.

As a consequence of this decision, the Statis abandoned the exequatur proceedings in England to avoid a full trial of their fraud. Instead of appearing at this trial, they have created procedural chaos by seeking the exequatur of the arbitral award almost simultaneously in several other countries where they hope to obtain a more superficial examination of their fraud.

[28] Informal translation of: "*la cause déterminante*".
[29] This aspect of the judgment (amongst others) is currently the subject of an appeal (both before the Court of Appeal and the Court of Cassation as described above).
[30] Ex parte Petition, paras. 2, 3, 14, 36, 62-63 and 66-68.
[31] Informal translation of: [...].

Thus, shortly after the English judgment finding that there is a *prima facie* case of fraud, the Statis have started exequatur proceedings on 24 August 2017 in Luxembourg, on 26 September 2017 in the Netherlands, on 13 November 2017 in Belgium, and on 11 December 2017 in Italy.

In these circumstances, it is difficult to understand how the Statis can seriously assert that the RoK is causing delays and disruptions. If the Statis had been confident that the arbitral award is not compromised by the fraud, the normal response and easy path for them would have been to appear at the trial of this fraud in England which was scheduled for **October 2018**. The issue of the fraud would have been resolved by now, in light of the entire evidence and the cross-examination of witnesses.

The Statis can hardly complain that the RoK is seeking legitimately, in the other exequatur proceedings including in Belgium, to go to the bottom of the evidence on the fraud. Yet, as demonstrated above, the Statis are trying in the Belgian proceedings, like they have done in the other proceedings after they fled England, to suppress the consideration of the evidence of their fraud, including the KPMG correspondence.

47. The delays and increased complexity of the **garnishment proceedings** are also solely due to the attitude of the Statis themselves.

Indeed, the very same pattern has appeared. After the Dutch-speaking attachment judge referred the dispute about BNYM's debt to the English court in the Judgment of 25 May 2018, the Statis started by challenging the jurisdiction of the English court with the view to avoid or reduce the scope of the referral to the English court. While this challenge was rightfully rejected by judgment of the English court of 4 December 2018, this incident caused by the Statis caused a delay in the proceedings of about 9 months.

Following this judgment, the Statis accepted in explicit and plain terms that the dispute to be determined by the English courts was broad and not limited to the narrow issue of who are the contracting parties to the GCA:

> *"We accept that [the English court] will deal with questions both of contract interpretation under the GCA and also the relationship between those parties, NBK, the fund and Kazakhstan (...) we're not seeking by any stretch to subvert the findings that you made in the judgment [the English Jurisdiction Judgment of 4 December 2018] on jurisdiction. We didn't appeal, that's over and done with. We certainly accept that we're before this court dealing with the issues along the lines that you formulated (...) we accept that there plainly has been a referral and we accept that it's the **broader case in the sense that it's not just limited to the GCA** (...) Your conclusion [in the English Jurisdiction Judgment] as to the referral were that [the Belgian court] didn't just refer the narrow interpretation question but that it also referred the nature of the relationship. You accepted [Kazakhstan and NBK]'s submissions that it went further than that and that it included how NBK, the fund and Kazakhstan worked."*[32] (emphasis added).

Having conceded this point, the Statis initially developed in full their case in the English proceedings, both through written submissions and through expert reports. They developed at length their Simulation Arguments in support of their case that, supposedly, the "true creditor"

[32] Transcription of the hearing on 15 February 2019 in the English proceedings, p. 13 lines 15-18, p. 14 lines 19-24, p. 18 lines 9-11, p.17 lines 11-17. Informal translation of: [...].

of the debt of BNYM would be the RoK (and not NBK) (this is recorded in para 24 of the English Judgment on the merits).

However, just before the start of the hearing in London in March 2020, the Statis have once again changed their position. They must have realised that their case about simulation was untenable, and that it was bound to be rejected by the English judge of the merits. The Statis then did the same that they had already done in the exequatur proceedings: avoid at all costs that the English court rules on their flawed case of simulation. The Statis then purposefully avoided pleading orally their case on simulation.

This led the English judge to express his surprise regarding this change of attitude of the Statis. The Judge noted that while the Statis had advanced in writing a case of simulation/"sham trust", *"no such case was advanced either on the facts or in law. I cannot say why such a case was not advanced. The fact is that no such case was advanced either in fact or in law"* (§ 32 of the English Judgment on the merits).

The English judge therefore concluded that *"in circumstances where these allegations have not been advanced in this trial the court has necessarily considered the question as to whom BNYM owes the cash sums covered by the GCA on the factual basis that there has been no fraud, sham, simulation and pretence"*[33] (§ 46 of the English Judgment on the Merits).

The English Judge then invited the Belgian courts to draw the consequences of his judgment, including in respect of the *res judicata* effect relating to the finding that there is no fraud, sham, simulation or pretence. The Judge clarified that "*whether it is open to the Statis Parties to advance such arguments or whether they are estopped from advancing such arguments on the grounds of res judicata (as that principle is understood in Belgian law)*" while recalling that "*It is the principle of res judicata which brings (desirable) finality to proceedings*"[34] (§46 of the English Judgment on the merits).

The consequence of these manoeuvres of the Statis is that, once again, the resolution of the garnishment proceedings has been delayed. It will be for the Belgian courts to see through these manoeuvres and to dismiss the Statis' attempt to revive the Simulation Arguments that they have abandoned to pursue in England.

In light of the above, it is quite extraordinary for the Statis to pretend that the RoK has caused delays and complexities in the exequatur and garnishment proceedings. If the Statis had not developed a strategy consisting in trying to switch from one jurisdiction to another each time that they get into trouble, all the disputes between the parties would already have been resolved, both in respect of the fraud and in respect of the debt of BNYM. Of course, it means that the case would have been resolved in the RoK's favour, and this is the reason why the Statis have tried to obfuscate and delay the proceedings.

3.2.3. Grounds for the setting aside of the Renewal Order

48. The grounds for the setting aside of the Renewal Order are as follows:

[33] Informal translation of: [...].
[34] Informal translation of: [...].

- The Statis' failure to disclose material facts constitute a breach of the duty of full disclosure in *ex parte* proceedings, which is in itself a sufficient reason to set aside the Renewal Order (**Ground 1**);

- The Statis' deceit of the attachment judge resulted in the Renewal Order being rendered in contradiction with the *res judicata* effect of the English Judgment on the merits (**Ground 2**);

- The Statis' deceit resulted in the Renewal Order being rendered without the ordinary law requirements for a conservatory garnishment being met (**Ground 3**).;

- The Renewal Decision must be set aside in view of the fundamentally changed circumstances that have occurred since the Prior Garnishment Order was granted (**Ground 4**).

3.3.2.1. The Statis' failure to disclose material facts is a breach of the duty of full disclosure in *ex parte* proceedings (Ground 1)

49. It is well established in procedural law that the party who brings a petition on an *ex parte* basis has the positive duty to disclose to the court all the relevant information and documents that could have an influence on the decision of the court. It is not allowed for such a party to conceal information that is relevant and material to the case[35].

E. DIRIX expresses the application principles as follows in the context of *ex parte* applications for attachment:

> *"The petition must contain all the elements that must allow the legal conditions for the attachment to be checked and that allow the debtor to present his defence (Attachment Order Antwerp 23 April 1992, RW 1992-93, 265) (...) The applicant must correctly inform the attachments judge and, for example,* ***must also mention the possible defences****. From this point of view, the applicant must also state whether a similar application has already been submitted for the same claim (see for this 'full disclosure' principle (liberal translation [...]) in the Netherlands: (...)"*[36] (emphasis added).

This obligation of full disclosure finds its basis in the duty of loyalty in the conduct of proceedings and in the right to a fair trial under Article 6 of the ECHR. These rules are breached when, for instance, a claimant purposefully omits to inform the court of the fact that he has already brought other proceedings (*ex parte* or *inter partes*) that are relevant in the matter, or when the claimant conceals important information in the case[37].

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[35] Civ. Ghent (Pres.), 29 November 1991, *TGR*, 1992, n°7, p. 13; Brussels, 14 March 2000, *JT*, 2001, p. 337, obs. L. Van Bunnen; Antwerp 2013/AR/2797, 30 April 2014, *IRDI* 2014, afl. 4, 654, noot NEEFS, K: "*The substantive criterion appears to be that the applicant's obligation to provide information extends to all the elements which are decisive for the assessment of the measure claimed. (...) According to the case-law, this includes relevant procedures previously conducted and/or pending between the parties, as well as relevant correspondence. Judgments in Belgian and foreign proceedings against third parties may also be relevant, e.g. when they have an impact on the assessment of the apparent validity of, or infringement of, the invoked right. In my opinion, it is best to also submit or mention a previous request for seizure of counterfeit goods against the same party*".

[36] E. Dirix, *Beslag*, APR , 2018 at page 280 (n°362), informal translation of: [...].; See also p. 262 (last paragraph) of the same book: "*If, in the course of the proceedings, the creditor has unilaterally concealed certain information from the judge of attachments, this gives rise to his liability (Brussels, 28 October 1996, JT 1997, 348*)".

[37] See H. Boularbah, *Requête unilatérale et inversion du contentieux*, Larcier, para. 725 to 727.

The deliberate failure to properly inform the court can also be considered as procedural fraud under Belgian law[38].

50. In the present case, the Statis have manifestly breached the obligation of full disclosure when filing their *ex parte* application for the renewal of the garnishment. As explained above, they have hidden from the attachment court the existence of various judicial decisions and findings that had a direct bearing on the issue of renewal of the garnishment, and they have also made false and misleading allegations about the facts of the case and the reasons for the delays in the proceedings.

This last point is obviously important as in the context of a request for renewal of an attachment that has already been into place for three years, the applicant has the duty not to mislead the attachment judge about the reasons why the proceedings are still ongoing at the end of this period.

51. The failure to respect the obligation of full disclosure is penalized by the immediate lifting of the *ex parte* measure[39].

3.3.2.2. The Renewal Order was rendered in contradiction to the *res judicata* of the English Judgment on the merits (Ground 2)

52. As explained above, when an application for the renewal of a garnishment is made, the attachment judge must investigate whether the conditions for a conservatory garnishment are still met at the moment of the renewal.

In his assessment, the attachment judge is not bound by the *res judicata* of the original order permitting the attachment, especially where there are changed circumstances. On the other hand, the attachment judge **is** bound by the *res judicata* effect of other decisions that have been handed down in the meantime by the **judge on the merits** between the same parties in the same capacity and in relation to the same cause (article 23 BJC).

53. In the present case, unbeknownst to the attachment judge, the judge on the merits had determined the issue of BNYM's debt and legal relationship between the parties by way of the English Judgment on the merits of 22 April 2020.

As explained above, this Judgment held that the garnishee (BNYM) owes no debt to the garnished-debtor (the RoK).

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[38] This is well established in case law. For instance, the Court of Appeal of Antwerp ruled that: "*All parties to the proceedings are expected to participate in the search for the truth in an **honest, correct and fair manner**; ... that the **aggrieved party is also under an obligation** to enlighten the judge in a serious, honest and sincere manner; that the manner in which [Ms. X] treated [this obligation] can only be characterized as personal fraud in order to obtain **greater compensation** than she was entitled to receive*", Antwerp, 19 December 1986, *Pas.*, II, 1987, pp. 57 et ss. Original text: "*Overwegende dat van alle procespartijen wordt verwacht dat ze op eerlijke, correcte en faire wijze medewerken aan het zoeken naar de waarheid; dat deze verplichting niet alleen rust op het openbaar ministerie of op de rechter, maar ook dat de benadeelde de rechter degelijk, eerlijk en oprecht voor te lichten ; dat de wijze waarop [Van C] ten deze gehandeld heeft niet anders kan worden bestempeld dan als een persoonlijk bedrog ten einde meer schadevergoeding te bekomen dan waar ze recht op had*".

[39] Attachments judge Antwerp, 23 April 1992, *R.W.* 1992-1993, p. 265; Commercial Court Brussels (president), 6 march 1995, Mediaforum, 1995-4, p. B55; See also H. Boularbah, op. cit., para 728; See also Voorz. Kh. Antwerpen 12 september 2013, *RABG* 2013, 1 399 (the sanction was *inter alia* the annulment of the authorization for the attachment). The judge indicated that it is not sufficient/appropriate to subsequently rectify and/or minimize certain facts in the context of the third-party opposition. This decision was confirmed on appeal (Antwerp 2013/AR/2797, 30 April 2014, IRDI 2014, afl. 4, 654, noot NEEFS, K).

This finding has the inevitable consequence that the renewed garnishment constitutes an illegal fourth-party garnishment on assets owed to an independent legal entity, the NBK.

54. The findings of the English Judgment on the merits of 22 April 2020 have binding *res judicata* effect on any court in subsequent proceedings, including the attachment judge in the context of a request for renewal of the garnishment.

Yet, the Statis did not see the need to duly inform the Attachment Judge of the relevant findings made in the English Judgment on the merits.

As a consequence, the attachment judge unwittingly permitted the renewal in contradiction with this *res judicata* of the English Judgment.

55. The contradiction with the English judgment is not limited to the finding that no debt is due to the RoK. The English judge also specifically decided that the debt is due solely **to NBK**, and that NBK **is the central bank of Kazakhstan**.

The English judge noted, in this respect, that NBK *"is not a minor entity or functionary but an independent central bank"* [40] *(*English Judgment on the merits, §87; see also §§ 8 and 108). And the English judge specifically ruled that, irrespective of who is the beneficiary/ owner of the National Fund, the right to the USD 530 Million is the **exclusive right of NBK as the central bank of Kazakhstan**:

> *"Whatever ownership rights the Republic has in Kazakh law to the National Fund, whether as legal owner or beneficial owner or simply as owner, they do not in English law (just as in Kazakh law) confer on the Republic a right to claim the cash, the debt owed by BNYM, from BNYM. IN the AIG case Aikens J. said much the same: 'There is no relationship of debtor and creditor between them. The fact that Kazakhstan may, ultimately, have a beneficial interest in the money represented in the cash accounts cannot, in my view, create such a relationship"*[41] (English Judgment on the merits, §108).

From the moment that it has been judicially decided, by the judge of the merits, that the debt of the garnishee is owed to a foreign central bank, this necessarily implies, as a matter of public international law (and indeed Belgian domestic law), that the assets are protected by the specific immunity of assets owned or simply **held** by foreign central banks.

This protection finds its basis in customary international law and also in article 1412*quater* JC. The latter subjects the attachment of assets owned or held by foreign central banks to a special prior permission from the attachment judge, and to very strict conditions[42]. However, this would

[40] Informal translation of: [...].
[41] Sworn translation of: [...].
[42] The Court of Cassation has recently confirmed:
"*It follows from the principle that assets held or managed by a foreign central bank are exempt from attachment that **the prior authorization of the attachments judge constitutes a substantial formality and that the defect resulting from its default cannot be covered**. The judgment, which considers that the lack of prior authorization from the attachment judge is not likely to invalidate the attachment does not legally justify its decision*"[42] (emphasis added) (Fr: "*Il résulte du principe de l'insaisissabilité des avoirs détenus ou gérés par une banque centrale étrangère que l'autorisation préalable du juge des saisies constitue une formalité substantielle et que le vice résultant de son défaut ne peut être couvert. L'arrêt, qui considère que l'absence d'autorisation préalable du juge des saisies n'est pas de nature à invalider la saisie ne justifie pas légalement sa décision.*"). (Cass. 20 December 2019, www.cass.be).

constitute a new attachment that could not be requested under the guise of a mere renewal of an existing attachment against another legal entity.

The Statis pretend in their *ex parte* petition that there would be no need for the attachment judge to investigate whether the garnished assets are protected by immunity (para. 4 of their petition). The Statis do not even mention article 1412*quater* JC in their entire Petition. Yet, in light of the findings made in the English judgment on the merits, the Statis had the obligation to raise the matter with the attachment judge, and they had the obligation to seek the permission of the attachment judge to attach assets held by a foreign central bank if they wanted to renew the garnishment.

56. The only reason advanced by the Statis to justify why the attachment judge did not need to be bothered with the rules on immunity is that, supposedly, the matter would already have been addressed in the Prior Garnishment Order of 11 October 2017 and in the Judgment of 25 May 2018, and these decisions would have *res judicata* effect on the subject.

This is, however, entirely incorrect.

As explained above, when considering an application for the renewal of a conservatory garnishment, the attachment judge must investigate whether the conditions for the garnishment are still satisfied at the time of the renewal. The original decision does not have a *res judicata* effect that precludes this investigation (as explained above). This is all the more so when there is a change of circumstances. Yet in the present case there is a manifest change of circumstances, namely the finding in the English Judgment that the sum of USD 530 Million is owed to NBK by BNYM and held by a foreign central bank.

In the present case, if not for the failure to disclose of the Statis, such an investigation regarding the immunity of assets held by foreign central banks would most certainly have taken place. And this investigation would inevitably have led to the rejection of the renewal of the garnishment on the basis of the combination of (i) the findings made in the English judgment, and (ii) the rules of immunity of assets held by foreign central banks in customary international law and in article 1412*quater* JC.

57. By consequence, the Renewal Order must be set aside.

3.3.2.3. The Renewal Order was rendered without the ordinary law requirements for a conservatory garnishment being met (Ground 3)

58. Pursuant to article 1415 BJC, the ordinary law requirements for any conservatory garnishment, and thus for any subsequent renewal, are that:

- There must be urgency; and
- The creditor must dispose of a claim which is certain, fixed, due and payable.

These requirements were not met at the time of the *ex parte* petition for the renewal of the garnishment, as is demonstrated below.

i. Lack of urgency

59. A conservatory garnishment is only possible in case of urgency. This condition also applies to the renewal of the garnishment.

The case law of the Court of Cassation defines urgency as follows:

> *"Urgency within the meaning of this provision occurs when the creditor may seriously fear that the recovery of his claim will be jeopardised because from the circumstances it appears that the debtor's solvency is threatened"*[43].

This means that it is required that the solvency of the debtor is compromised to the effect that future recovery of the claim would be at risk[44].

60. In support of their argument that there is urgency, the Statis invoke the following six elements:

A. The Prior Garnishment Order and the Judgment of 25 May 2018;
B. The RoK's refusal to comply with the Award and its decision to exercise its legal right to oppose the enforcement of the Award;
C. The fear that the RoK will move its assets to other countries;
D. The lack of financial resources of the Statis;
E. The alleged pressure put on BNYM; and
F. The Exequatur Judgment of 20 December 2019.

As will be demonstrated in the following paragraphs, none of these six elements in fact justifies the urgency.

A. The Prior Garnishment Order and the Decision of 25 May 2018 do not absolve the Statis from the requirement to prove urgency

61. The Statis' first argument in relation to urgency is that the Prior Garnishment Order and the Decision of 25 May 2018 have considered that there was urgency at the time (respectively in September 2017 and May 2018).

Yet, as already noted, when making the assessment of whether there are "well-founded reasons" for the renewal of the garnishment, the attachment judge must perform his own investigation of the urgency requirement, and he is not bound by previous decisions by the attachment judge in that regard.

Therefore, the Statis' reliance on prior decisions of the attachment judge to establish the required urgency at the moment of their petition for the renewal does not hold.

Moreover, there has been a drastic change of circumstances since September 2017 and May 2018. As explained above, in the meantime, the Statis have created a number of incidents before the judge of the merits, and they have purposefully obstructed the resolution of the dispute with

[43] Cass., 23 december 2010, C.09.0441.F, p. 5.' Informal translation of: "*Il y a célérité au sens de cette disposition lorsque le créancier peut sérieusement redouter la mise en péril du recouvrement de sa créance en raison de circonstances faisant apparaître que la solvabilité du débiteur est menacée* »).
[44] E. Dirix and K. Boerckx, *Beslag,* APR, Mechelen, Kluwer, 2010, n° 449; See Supreme Court 23 December 2010, *Arr. Cass.*, 2010, 12, 3091; Cass. 17 February 2005, *Arr. Cass.*, 2005, 2, 396.

respect to BNYM's debt. This is the sole reason why the dispute in this respect is still ongoing more than three years after the garnishment order was given. The Statis are therefore entirely responsible for the delays, and they cannot claim that there is any urgency requiring to maintain and renew the garnishment order.

B. The urgency cannot be based on the RoK's decision to exercise its legal right to oppose enforcement of the Arbitral Award

62. According to the Statis, the condition of urgency would be met because the RoK has refused to voluntarily pay the alleged debts resulting from the Award and has resisted the enforcement of the Award in foreign jurisdictions.

Yet, as it is well established in case law and legal doctrine, the urgency cannot be inferred from the mere fact that the debtor does not recognise the debt and exercises its right of defence[45]. In other words, the mere fact that there is a "delay in payment" or that the debtor does not recognize the debt, does not suffice to give rise to "urgency"[46]. Consequently, one cannot hold it against the RoK that it is exercising its legal rights in the jurisdictions where the Stati Parties levied a garnishment against it.

Moreover, once again, the sole reason why the issue of the validity of the Arbitral Award has not been finally resolved at this stage is that (i) after the English courts have ordered in June 2017 to hold a full trial of the fraud, the Statis have abandoned these proceedings to seek enforcement of the fraudulent Award in other countries including Belgium, hoping that the courts would conduct a more superficial analysis of the Award there, and (ii) the Statis have subsequently, in both the Belgian proceedings and other proceedings, resisted the consideration by the courts of the new evidence of the fraud arising from the KPMG Correspondence.

Thus, if the Statis had not objected to the introduction of the KPMG Correspondence in the Belgian exequatur proceedings, the Belgian court of first instance would have addressed this matter in its judgment of 20 December 2019. Yet, as a consequence of the manoeuvres of the Statis (described above), the matter has not been addressed at all in this judgment.

In these circumstances, the RoK cannot be accused of "frustration" or "obstruction" in the various enforcement proceedings. The RoK is exercising its fundamental rights of defence. And if there are delays and complexities in the proceedings, this is due solely to the Statis own attitude.

63. The Statis try to undermine the RoK's legitimate interest to pursue the proceedings by saying that the fraud argument of RoK "*was not granted*" in the exequatur judgment of 20 December 2019 nor by the Swedish court at the seat of the arbitration (*ex parte* Petition, § 62).

Such assertion is wrong. The Statis themselves have conceded during a hearing in the exequatur proceedings in England that the Swedish courts have not made a decision on the fraud[47].

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[45] Attachment judge Kortrijk, 25 January 1973, *Rec.gén.enr.not* 1977, n° 22, 200; E. DIRIX and K. BROECKX, *Beslag*¸ APR, Mechelen, Kluwer, 2010, nr. 450.
[46] E. Dirix, *Beslag*, APR, Mechelen, 2018, 270.
[47] Hearing Transcript in the exequatur proceedings in the UK, Day 1, February 2017, p. 99: *"So my Lord, if I can turn to estoppel, and perhaps I can start with some common ground. I accept that the Swedish decision does not decide whether the Perkwood management fee and the transfer pricing and so on and so forth was a fraud or not. I accept it did not decide that.*

The Belgian courts, as indicated, have neither ruled on the new evidence of the fraud (KPMG Correspondence) nor on its impact on the validity of the Arbitral Award (see further below).

C. The urgency cannot be inferred from the Statis' unsubstantiated allegations of alleged nefarious actions from the RoK

64. The Statis also assert that the urgency would be justified by the risk of nefarious actions from the RoK or even by a threat to RoK's solvency. They contend as follows:

> *"The Statis fear (worse still, find) that Kazakhstan will do everything to move assets to other countries (or back to Kazakhstan), to make it impossible to freeze goods that are (i) not covered by any other immunity, and (ii) are sufficient to cover the substantial claim of more than USD 500 million"* (Statis' Petition, §64).

This argument once again fails the urgency test.

First, the Statis' allegations are entirely unsubstantiated. While they bear the burden of proof of their allegation that the RoK organizes its insolvency, they do not bring any proof whatsoever. The only indication that they raise ,is that the RoK would have supposedly attempted to move assets of the NFRK in September 2017, which is said to be "proven" by correspondence that has been disclosed by BNYM in the English proceedings. Yet, when looking at that correspondence, it appears that **NBK** (not the RoK), as a result of the unlawful attachments previously carried out by the Statis abroad (in particular in Sweden, the Netherlands and Luxembourg), sought legitimately to protect the assets of the NFRK against any further unlawful garnishment from the Statis. Moreover, it appears that **NBK's** supposed "behaviour" has not been kept secret from BNYM. The latter declared, with full knowledge of the facts, that there was no financial fraud and also recognised internally that NBK adopted a cautious approach[48].

Second, in any event, these allegations do not start to establish that there would be a risk of insolvency of the State of Kazakhstan, an allegation which would of course be totally fictitious. Even if it was correct that RoK moved its assets – which is neither the case nor proven – this would not threaten RoK's solvency.

Third, this argument holds even less ground when considering that there is approximately 5.92 billion USD[49] of assets attached worldwide for the purpose of the enforcement of the Award.

I also accept that the Swedish decision was focused on Swedish public policy, which is not English public policy. I say there is not a material difference and I'll come on to that later, but I accept that as a point." Informal translation of [...].

[48] In particular BNYM declared "*There are some court orders against the assets of the Republic of Kazakhstan, and NBK (and their legal advisors) believe that a prudent approach is to move assets*".

[49] Latest information available according to the Decision of the District Court of Columbia in the United States of 13 November 2018, with docket no. 1:14-cv-01638-ABJ.

D. The urgency cannot be inferred from the Statis' alleged lack of financial resources to pursue the proceedings

65. The Statis also assert that they are in an *"unfair"* position since they "*do not dispose of unlimited financial resources*" and *"there will be a moment in time when the party who finances them pulls the plug*" (Statis' Petition, §67).

These allegations are plainly false. The enormous financial means of the Statis, accumulated through various opaque and illicit schemes, are apparent from court judgments against the Statis, and also from the results of criminal investigations conducted in various countries in relation to the illegal activities of the Statis. In addition, the Statis have now been forced to admit that they do have financial funding for the proceedings before the Belgian Courts from one of the largest publicly traded providers of litigation funding[50].

E. The urgency cannot be inferred from alleged pressure on BNYM

66. The Statis also allege that the urgency would be justified by the pressure that the RoK and NBK would have supposedly exercised on BNYM (Statis' Petition, §69). The Statis refer (i) to the letters that NBK and RoK sent to BNYM after the Judgment of 25 May 2018; and (ii) to NBK's claim for repayment and for damages filed against BNYM in the Part 7 Proceedings.

These arguments must be rejected.

It is plainly wrong to assert that the RoK (or NBK) has exercised any pressure on BNYM[51]. The correspondence that the Statis invoke do not establish any such pressure. It was normal for the RoK to respond to BNYM's letter after the Judgment of 25 May 2018 with the comment that, as it appears from the explicit terms of the Judgment of 25 May 2018, the Belgian judge did not give permission to garnish the assets held by NBK with BNYM (**stuk 1.11**).

BNYM itself does not complain about having been the subject of any pressure.

Likewise, in the opposition proceedings against the conversion of the conservatory garnishment into an executory garnishment, the attachment judge of the Brussels French-speaking court of first instance already noted, in the Judgment of 28 June 2019, that *if there has been any pressure, it should be noted that it has not had any effect on BNYM since it has maintained the freezing of the assets garnished in its hands since October 2017 and has reiterated its intention not to divest itself of these assets"*[52] (**stuk 1.27**, §41). The same judge also noted that the claim for damages cannot be considered as improper pressure on BNYM as it was instituted by NBK

[50] Reference is made to the disclosure in the UK proceedings of its funding by Griswold Investments LLC, an affiliate of one of the largest publicly traded provider of litigation finance.

[51] On the contrary, it was the Statis that do not refrain from exercising undue pressure on BNYM. For instance, by way two letters dated 18 and 19 October 2017 in the parallel attachment proceedings in the Netherlands, the Statis' counsel pressured BNYM to review its statement that it was not indebted to the RoK. After this pressure, BNYM changed the stance that it had taken 15 days earlier in a of 13 October 2017 concerning the same legal relationship and the same assets. Subsequently, also in the Belgian attachment proceedings, BNYM suddenly maintained that there were purported "*uncertainties*" regarding the existence of a debt owed by BNYM to the RoK.

[52] Informal translation of: *"en tout état de cause si des pressions ont eu lieu, il y a lieu de relever qu'elles n'ont pas eu d'effet sur BNYM puisqu'elle a maintenu le blocage des actifs saisis entre ses mains depuis le mois d'octobre 2017 et qu'elle a réitéré son intention de ne pas se dessaisir de ces avoirs".*

and not the RoK, and "*It is not therefore 'actions of the garnished debtor'*"[53], which means that the condition of urgency cannot be fulfilled with respect to the debtor on this basis (in the case that exerted pressure would be taken into account for the assessment of the condition of urgency). In any case, NBK has withdrawn its damages claim against BNYM.

Moreover, and in any event, there is no connection between the alleged pressure (in truth inexistent) put on BNYM and the fulfilment of the urgency condition (i.e. that "*the debtor's solvency is threatened*"[54]). These elements do not in any way demonstrate that there is urgency.

F. The condition of urgency has to be fulfilled even where the creditor holds an Arbitral Award

67. Finally, the Stati invoke that the condition of urgency condition would not need to be satisfied when the attachment is made on the basis of a judgment that is provisionally enforceable (in this case the Arbitral Awards). They rely in this respect on the opinion of one author published in a legal article. However, this opinion was formulated only *lege ferenda*, and it is completely isolated. This position is also irreconcilable with the legal provision that expressly requires urgency, and with the well accepted legal doctrine and case law. As noted by attachment judge Dirk Scheers, "*urgency applies to any form of precautionary attachment regardless of whether a judicial authorization is necessary or not*"[55].

To conclude, there was no urgency at the time of the filing of the application for renewal of the garnishment. For this reason also, the Renewal Order must be set aside.

ii. Lack of a certain, fixed, due and payable claim

68. As confirmed in the Order of 3 December 2019 of the Brussels Court of Appeal in the conservatory garnishment proceedings, a conservatory attachment can only be levied on *"the ground of a certain, fixed, due and payable debt"*. This requirement relates to the *"quality of the title"* relied upon by the garnishing creditor.

This requirement must also be fulfilled at the time of the filing of an application for renewal of the garnishment[56].

69. In the Order of 3 December 2019, the Brussels Court of appeal ruled that, to the extent that the RoK relies on new documents (the KPMG Correspondence) from which *"it must be inferred that the title on which the attachment is based, was obtained by fraud"*, the new documents are *"relevant as they relate to the quality of the title"*.

This means that, to the extent that the KPMG Correspondence establishes that the arbitral process is tainted by fraud, the Arbitral Award cannot be considered as a valid title that meets

[53] Informal translation of: *"il ne s'agit donc pas « d'agissements du débiteur saisi".*
[54] Cass., 23 December 2010, C.09.0441.F, p. 9: « *There is urgency within the meaning of this provision when the creditor may seriously fear that the recovery of his debt will be jeopardized because of circumstances showing that the debtor's solvency is threatened* ». (informal translation of : "*Il y a célérité au sens de cette disposition lorsque le créancier peut sérieusement redouter la mise en péril du recouvrement de sa créance en raison de circonstances faisant apparaître que la solvabilité du débiteur est menacée* ").
[55] D. Scheers, « Deel II - Bewarend beslag in vogelvlucht » in Beslag- en executierecht, Gent, Uitgeverij Larcier, 2010, p. 21-50
[56] Cass. 18 December 2017, www.cass.be.

the qualitative conditions required to levy or renew a conservatory garnishment, or at least that the topicality of that title has been compromised by the identified evidence of fraud and contradiction with Belgian public order.

70. In analysing whether the claim satisfies the conditions of article 1415 BJC in the context of a request for renewal of a garnishment, the attachment judge can and must verify whether the claim of the party seeking to carry out the garnishment has a sufficient **appearance of foundation**, in view of the documents provided in the proceedings[57]. In particular, it must be shown that the existence of the claim cannot be reasonably challenged[58].

These principles are supported by the case law of the Court of Cassation. Thus, the Court of cassation ruled that the *"certainty"* of the claim is lost when it appears that there is a dispute that is *"serious"* and has *"sufficient appearance of foundation"*.[59]

Likewise, the Court of Appeal of Antwerp confirmed that the attachment judge *"is required to examine whether the claims brought by the party seeking the attachment appear sufficiently founded, or are not open to serious challenge"* and that *"[it] can be assumed that a claim lacks the required certainty if it is subject to serious contestation before the judge ruling on the merits or depends on the result of an expert's report"*.[60]

Thus, the existence of a *"serious allegation"* affecting the certainty of the claim must lead the attachment judge to reject the request for the renewal of the garnishment[61].

When reviewing whether a claim is certain enough to justify the renewal of the conservatory garnishment, the attachment judge "*has competence of judicial control which allows him to weigh up the interests of the parties*".[62] Thus, it has been ruled by the Court of Cassation that, in the context of a third party opposition against a conservatory garnishment order, the attachment judge must strike a balance between the seriousness of the claim of the alleged creditor and the claim of the alleged debtor[63].

71. In the present case, based on the new KPMG Correspondence, and considering the terms of the Order of 4 December 2019, it must be considered that the allegation of fraud is, at the very least, a **serious allegation** that has a sufficient appearance of foundation. Indeed, the simple fact that KPMG, a well-known and respected international firm of auditors, has invalidated and withdrawn the audit reports of the Statis' companies used for the investment in Kazakhstan based on the fact that the Statis have deceived KPMG, is sufficient to establish the existence of a serious challenge to the certainty of the title.

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[57] Attachments judge Gent 22 October 2013 *RW* 2015-16, nr. 18, 705-707

[58] E. DIRIX and K. BROECKX, *Beslag*, APR, Mechelen, Kluwer, 2010, n° 455.

[59] Cass, 13 November 2009, *Pas.*, 2009/11, p. 2635-2642.

[60] (Informal translation of *"(...) hij dient na te gaan of de aanspraken van de verzoekende partij die beslag wil leggen voldoende schijn van gegrondheid hebben of niet voor ernstige betwisting vatbaar zijn. Er mag aangenomen worden dat een schuldvordering de vereiste zekerheid mist wanneer de vordering het voorwerp is van ernstige betwisting voor de bodemrechter of afhangt van de uitslag van een deskundigenonderzoek")* Antwerp, 12 March 2008, *N.j.W.*, 2009, p. 364, with note A. Vanderhaeghen. See also A. Berthe, "Saisies conservatoires et voies d'exécution : principes généraux", L. Frankignoul and al., *Actualités en droit de l'exécution forcée*, Limal, Anthemis, 2009, p. 14-15.

[61] G. De Leval, *Traité des saisies*, 1988, Faculty of Luik, p.298 ; Civ. Namur (j. sais.), 18 September 1981, *Rev. rég. dr.*, 1982, p. 53.

[62](Informal translation of: "*De beslagrechter (...) heeft een toetsingsbevoegdheid die hem toelaat de belangen van partijen af te wegen")* M. Moerman, "Deel I - Over bevoegdheid en rechtsmacht van de beslagrechter" in *Beslag- en executierecht*, Ghent, Larcier, 2010, p. 11.

[63] Cass. 6 October 1988, *Arr.Cass.* 1988-89, 150.; Attachment Judge Ghent 22 October 2013 *RW* 2015-16, nr. 18, 705-707

To avoid this conclusion, the Statis rely on the judgment of 20 December 2019 rejecting the RoK's application to set aside the exequatur of the Arbitral Award. However, as has been shown above, the Statis have prevented the first instance court, through their manoeuvres, from ruling on the impact of the KPMG Correspondence. Yet, while the Court of appeal has accepted that the KPMG Correspondence raises issues about the quality of the title, it has not yet ruled on the the issues. The challenge to the certain, fixed and due and payable character of the claim is a challenge which is currently live. It is manifestly serious (as implicitly admitted by the Court of appeal), and it presents "*sufficient appearance of foundation*".

As to the test of weighing the interests of the parties, it should have led to the rejection of the renewal of the garnishment. As explained above, the KPMG Correspondence evidences a very serious fraud committed by the Statis, and the improper channelling of monies to their benefit from their alleged "investment" in Kazakhstan. The only court that has ever considered the substance of the fraud, namely the English court, has concluded that there was (on a *prima facie* basis) a fraud, and not any court in any other country, has found otherwise.

Furthermore, the Statis have acted dishonestly in the Belgian proceedings themselves, including before Your Court, by failing to disclose material facts (see the details *supra*). Based on these elements, it is respectfully submitted that the interests of the Statis do not weigh against the new evidence which calls into question the validity of the title.

In conclusion, we respectfully invite Your Court to hold that based on the new evidence, and in particular the withdrawal of the audit reports by the Statis' own external auditors, the fraud allegations of the RoK are **serious enough** to affect the quality of the title, which should lead to the retraction of the renewal of the garnishment

72. For this reason also, the Renewal Order must be set aside.

3.3.2.4. In any event, the Renewal Order should be set aside in light of the fundamental change of circumstances (Ground 4)

73. Finally, the Renewal Order must in any event be set aside in light of the fundamentally different circumstances present at the time of the granting of the Renewal Order as compared to the time of the granting of the Prior Garnishment Order.

This assessment stands regardless of whether or not Your Court concludes (as it should), that the Statis have failed to disclose material facts in their *ex parte* Petition.

The drastic change of circumstances should induce Your Court to re-examine the case and, on the basis of this fresh analysis, to find that the Prior Garnishment Order should not be renewed.

74. The fundamental change of circumstances relates to the new developments described above, and in particular:

- The finding in the English Judgment on the merits that the debt of BNYM is not owed to the RoK, which implies that the "uncertainties" raised by BNYM in its declaration about this point have now been cleared; the consequence is that the garnishment does not have a subject-matter, and

- The finding in the English Judgment on the merits that the debt of BNYM is owed solely to NBK, which is *"not a minor entity or functionary but an independent central bank"*[64]; the consequence is that the assets are protected by the immunity from execution of assets held by foreign central banks.

Although at the time of the Prior Garnishment Order the garnishment *already* lacked a subject-matter and *already* pertained to assets protected by immunity, it is only since the English Judgment on the merits that these facts have been irrevocably established in a manner binding upon Your Court due to the *res judicata* effect of the English Judgment on the merits.

These findings of the English Judgment on the merits therefore constitute a change in circumstances.

Based on this change in circumstances, it is submitted that Your Court should conclude that there are no "well-founded reasons" to renew the garnishment.

75. Moreover, another change of circumstances relates to important recent developments in the case law of the Court of Cassation concerning sovereign immunity. Since the handing down of the Judgment of 25 May 2018, the Court of cassation has handed down three judgments which have the effect to change the legal landscape in respect of immunity. These are described succinctly below.

i. Judgment of the Court of Cassation of 20 December 2019

76. The first decision is the decision of the Court of Cassation of 20 December 2019.

In that case, the garnishing party had asserted (just as in the present case) that the corporate veil of the foreign national bank should be pierced on the basis of simulation and, in doing so, the judge should find that no prior authorization to garnish the assets of the central bank would be required.

The Court of Cassation squarely rejected this assertion and held as follows:

> "*It follows from the principle that assets held or managed by a foreign central bank are exempt from attachment that the prior authorization of the attachment judge constitutes a substantial formality and that the defect resulting from its absence cannot be waived*"[65] (emphasis added).

In other words, since the above case law of the Court of Cassation, it is irrefutable that **in all circumstances** any attempt to garnish assets "*held or managed by a foreign central bank"* (ie. regardless of the (beneficial) ownership of the assets in question) must be preceded by **prior authorisation** by the attachment judge **to garnish the assets held by such foreign bank**. The lack of such prior authorization (even in cases where there is an allegation that the foreign national bank in question should be assimilated with the garnished debtor) constitutes a

[64] Informal translation of: [...].
[65] Cass. 20 December 2019, www.cass.be . Informal translation of: "*Il résulte du principe de l'insaisissabilité des avoirs détenus ou gérés par une banque centrale étrangère que l'autorisation préalable du juge des saisies constitue une formalité substantielle et que le vice résultant de son défaut ne peut être couvert*".

fundamental violation of article 1412*quater* BCJ and results in the invalidity of the permission to garnish.

The same requirement applies to the renewal of a garnishment levied on assets of a foreign central bank.

In the present case, the Statis have sought permission to attach the assets owed to the RoK. No permission to attach the assets held by NBK, as a foreign central bank, has been requested, and such permission has not been granted. Indeed, in the Judgment of 25 May 2018, the attachment judge went out of its way to insist that she *"did not grant permission to the Statis to carry out a garnishment of the bank accounts opened in the name of the National Bank of Kazakhstan with the London branch of BNYM and held there by the National Bank of Kazakhstan"* (Judgment of 25 May 2018, p. 12, §4).

As a consequence, even in the impossible scenario that every single one of the RoK's above grounds to set aside the renewal of the garnishment would be found unconvincing (*quod certissime non*), the lack of prior authorisation to garnish asset held by NBK, as a foreign central bank, would form an insurmountable impediment to the renewal of said garnishment.

77. This new case law constitutes new circumstances which warrant a full investigation into the requirement to comply with article 1412*quater* BCJ. It should ultimately lead to the rejection of the requested renewal.

ii. Judgment of the Court of Cassation of 6 December 2019

78. The second relevant decision is the judgment of the Court of Cassation of 6 December 2019.

It was held by the Court of Cassation in that case that to assess whether an act performed by a State has a commercial or public nature, it is appropriate to consider the context and **purpose** of the act.

The same analysis can be applied to the question of the nature of the assets to which the regime of immunity from enforcement may apply.

This decision in effect endorses the RoK's position that the **purpose** given to the assets of the National Fund (*i.e.* safeguarding the natural resources of the RoK for its future generations) is vital in determining whether or not the assets serve a public purpose and should therefore be protected by immunity from enforcement (something that the Statis have consistently refused to accept in their written submissions before the various attachment judges).

In light of this case law, You Court should find that the assets are covered by immunity from enforcement and set aside the Renewal Order.

iii. Judgment of the Court of Cassation of 4 March 2019

79. The third decision is the judgment of the Court of Cassation of 4 March 2019.

In that case, the Court of Cassation confirmed that even though the 2004 UN Convention on Immunity is not yet in force, it includes rules that reflect customary international law.

This finding confirms the RoK's position that the assets in dispute are protected by the provisions of this Convention considering their nature as a reflection of customary international law.

This equally warrants the setting aside of the Renewal Order.

3.2.4. Conclusion

80. For all the above reasons, the Renewal Order must be set aside.