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Offices open Mon.-Frid.,8.30am - 12pm

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Reference applicant : 231426 NF
Reference client : GRPARN153

Our reference : **FA49966**

*Informal translation*

# WRIT OF THIRD PARTY OPPOSITION aimed at the setting aside of the garnishment order and at the release of the garnished assets (Articles 1419, 1033-1034 and 1125 of the Judicial Code )

## 1. SUBJECT OF THE THIRD-PARTY OPPOSITION PROCEEDINGS

**1.** In this writ of summons, RoK files third-party opposition against the Garnishment Order authorising the Defendants to levy a conservatory garnishment against RoK on claims and assets relating to the Savings Fund held by the garnishee THE BANK OF NEW YORK MELLON NV, having its registered office at 1000 Brussels, Montoyerstraat 46, and registered under the company number 0806.743.159 (hereafter "**BNY Mellon**").

**2.** RoK requests that the Garnishment Order be set aside and that the release of the assets garnished under the conservatory garnishment carried out by the Defendants based on the Garnishment Order, served on 13 October 2017, be ordered. Nothing in this summons should be construed as a submission by the RoK to the jurisdiction of the Belgian courts in relation to assets that are located, held and managed outside of Belgium.

**3.** The Defendants have proceeded to the attachment measures in Belgium and in other jurisdictions only after the London High Court of Justice held on 6 June 2017 that RK presented a "*sufficient prima facie*[1] *case*[2]" that the ECT[3] Award (on the basis of which the attachment measures were carried out) was obtained by fraud on the part of the Defendants, and after the effects of the English enforcement order were stayed in England (see hereafter, 2.4.2) The authorisation for the attachment measures in Belgium was obtained based on incomplete, misleading information provided by the Defendants who, among others, have not mentioned this decision of the London High Court of Justice in their ex parte application of 29 September 2017, nor in the additional information which they provided on 9 October 2017 in response to the request of the Attachment judge.

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[1] Free translation of '*prima facie*': at first sight.
[2] Free translation of: (...).
[3] ECT is the abbreviation for "Energy Treaty Charter".

## 2. RELEVANT FACTS AND PROCEDURAL BACKGROUND

### 2.1. THE PARTIES TO THE CASE (THE DEFENDANTS)

**4.** Anatolie Stati and Gabriel Stati are entrepreneurs, holding passports of Moldova and Romania.
Ascom is a joint stock company incorporated under the laws of Moldova, with headquarters in Moldova. Anatolie Stati claims to own 100% of Ascom.
Terra Raf is a limited liability company incorporated under the laws of Gibraltar, and is located in Gibraltar. Anatolie Stati and Gabriel Stati claim to each own 50% of Terra Raf.

### 2.2. BACKGROUND OF THE CASE – THE ECT AWARD

**5.** During the period between 1999 and 2004, the Defendants acquired 100 percent of the shares in two Kazakh companies, Kazpolmunay LLP (“**KPM**”) and Tolkynneftegaz LLP (“**TNG**”). Prior to this acquisition, KPM and TNG had obtained approval from Kazakhstan to explore and develop various oil and gas fields in Kazakhstan pursuant to Subsoil Use Contracts.

**6.** KPM and TNG are ultimately controlled by the Defendants, through their ownership interests in other corporate entities. The Defendants had the power and discretion to direct the actions of KPM and TNG. KPM is wholly-owned by Ascom, which in turn is wholly-owned by Anatolie Stati. TNG is wholly-owned by Terra Raf, which in turn is owned in equal shares by Anatolie Stati and Gabriel Stati. Anatolie Stati also wholly owns Tristan Oil Ltd. (“**Tristan**”), a special purpose vehicle organized in the British Virgin Islands that was formed for the sole purpose of financing the operations of KPM and TNG. Anatolie Stati served as President and CEO of Tristan and Chairman of its board of directors. In 2006, 2007 and 2009, Anatolie Stati, through Tristan, issued notes in the nominal overall amount of USD 531.1 million in order to obtain funding for the Kazakh operations, including the construction of the Liquefied Petroleum Gas ("**LPG**") plant mentioned further below.

**7.** On 26 July 2010 the Defendants instituted proceedings before the Stockholm Chamber of Commerce[4] ("**SCC**") purportedly under the terms of the Energy Charter Treaty (“**ECT**”). The Defendants alleged to have invested substantial amounts of money in generation of a new life in the oil and gas fields in Kazakhstan, as well as, inter alia, the construction of the LPGplant. By arbitral award of 19 December 2013 (“**the Arbitral Award**”), corrected on 17 January 2014 (“**the Additional Arbitral Award**”) (together “**the ECT Award**”), RoK was ordered to pay a total of USD 497,685,101, to be increased by interest charges and costs to the defendants.

**8.** The recognition and enforcement of the ECT Award should be refused based on several grounds. Without being exhaustive, these grounds inter alia include: (i) the Arbitral Tribunal lacked substantive jurisdiction; (ii) the Arbitral Tribunal was irregularly constituted; (iii) the ECT Award was obtained by fraud on the part of the Defendants (see hereafter 2.3).

### 2.3. THE ECT AWARD WAS OBTAINED BY FRAUD

**9.** It was only after the Award had been rendered, and after the US and English exequatur actions had been commenced, that the RoK came to learn that the Defendants committed fraud and that the Award had been obtained by fraud.

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[4] Literal translation: (...).

**10.** After the ECT Award was issued, the RoK discovered that the Defendants had been involved in other arbitral proceedings relating to the same LPG Plant against another party. Those other arbitration proceedings partially overlapped in time with the arbitration proceedings against the RoK. The Defendants were represented by the same counsel in both proceedings.

**11.** When the RoK discovered this, it lodged an application before the U.S. District Court for the Southern District of New York for discovery at the law firm Clyde & Co., which represented the opposing party against the Defendants in the parallel arbitration proceedings. Though the Defendants strongly contested, the US court granted discovery by an order of 22 June 2015.

**12.** Based on the order, Clyde & Co. was forced to disclose a large number of documents. It is on the basis of these documents that the fraud was unraveled by the RoK in the summer of 2015.

**13.** The fraud is related to the LPG plant that the Defendants were to develop in Kazakhstan. The main equipment for the LPG Plant was delivered and its instalment supervised by the German company TGE Gas Engineering GmbH ("TGE") for a contract price of approx. EUR 32,000,000. The Defendants abandoned the construction in early 2009. By then it was 80% to 90% complete.

**14.** Eighteen days after the agreement with TGE had been concluded, the companies linked to the Defendants concluded an agreement with Perkwood Investment Limited ("Perkwood") (the "Perkwood Contract"). Perkwood was purported to be an independent third party company established in the UK and with which Defendants had entered into arms-length contracts. The stated purpose of the Perkwood Contract was the purchase of equipment for the LPG Plant.

**15.** As discovered later, based on the documents disclosed by Clyde & Co., **Perkwood was simply another Stati company**, which the Defendants – after denying this initially, including in submissions before the Swedish court - were forced to concede when confronted with Powers of Attorney issued by Perkwood to Mr. Stati and his son.

**16.** It is now clear that the Defendants used a number of schemes to artificially inflate the construction costs of the LPG Plant through Perkwood and the Perkwood Contract.

**17.** By way of example, the following can be mentioned:

- The Defendants purportedly purchased equipment for the LPG Plant from Perkwood at artificially inflated prices when the identical equipment had already been supplied (at a much lower cost) by TGE under the legitimate TGE Contract;

- The Defendant purportedly purchased equipment in an amount of USD 72 million from Perkwood for the LPG Plant that was not and/or could not legitimately have been required for the construction of the LPG Plant, and was never in fact delivered to the construction site of the LPG Plant, in order to fictitiously inflate the construction costs of the LPG Plant;

- The Defendants created a fictitious $43,852,108.00 “management fee” included in the total amount of the Perkwood Agreement. This fee (i) had no contractual basis, whether in the Perkwood Agreement or otherwise; and (ii) was not paid (or purportedly paid) in consideration for any services actually provided by or on behalf of Perkwood. The true purpose of any purported “management fee” paid (or purportedly paid) by TNG to Perkwood was, again, to inflate the construction costs of the LPG Plant on a fictitious basis.

**18.** The fraudulently inflated costs of constructions, in excess of USD 150 million, were also communicated by the Stati's to KPMG, their auditor, and became part of the financial statements of their companies which they submitted in the SCC Arbitration.

**19.** During the arbitration, t**he Defendants deliberately misled the Arbitral Tribunal regarding the amount of the investment in the LPG Plant, repeatedly representing (and relying on evidence to the effect) that they had invested over USD 245,000,000 in the development and construction of the LPG Plant**.

**20.** The evidence submitted included, amongst other, testimony of Mr. A. Stati himself, his chief accountant and others, as well as experts and documents, for example the financial statements containing the fraudulently inflated construction costs just described.

**21.** The Defendants further submitted into the trial an indicative bid made by the Kazakh state-owned company KazMunaiGas ("**KMG**") of USD 199,000,000 (the "**Indicative Bid**"). This sum was the average of the plant's alleged comparative value and the alleged construction costs. The figure for the construction cost used to calculate the Indicative Bid was provided by the Defendants. .

**22.** In the ECT Award, the Arbitral Tribunal considered KMG's Indicative Bid "*to be the relatively best source of information for the valuation of the LPG Plant among the various sources of information submitted by the Parties regarding the valuation for the LPG Plant*".[5] For this reason, the Arbitral Tribunal set the value of the LPG plant at USD 199,000,000, in line with KMG's Indicative Bid.

**23.** When the Arbitral Tribunal based itself on KMG's Indicative Bid for the value of the LPG plant, **a bid that had come about through the fraudulous documents submitted by the Defendants**, the ECT Award became itself vitiated by the above-mentioned fraud.

**24.** Thus, the Defendants' fraudulent scheme and false evidence affected the outcome of the SCC Arbitration, since they affected directly the Arbitral Tribunal's assessments of the questions of: (i) the Tribunal's jurisdiction; (ii) the RoK's potential liability for damages; and, (iii) the quantum of damages awarded by the Arbitral Tribunal. Had the Arbitral Tribunal known about the massive fraudulent scheme masterminded and performed for over three years by the Defendants before the SCC Arbitration, as well as the false witness statements, expert opinions procured by the Defendants and other submissions made by the Defendants, the whole focus of the SCC Arbitration would have been significantly different and it would have had a significant impact on the Arbitral Tribunal's findings on jurisdiction, liability and damages.

**25.** On 6 June 2017, the London High Court of Justice held that RoK had presented a *"sufficient prima facie*[6] *case"*[7] that the ECT Award was obtained by reason of the Defendants' fraud and that RoK did not have access before the ECT Award to the evidence of the alleged fraud.

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[5] Free translation of: (...).
[6] Free translation of '*prima facie'*: at first sight.
[7] Free translation of: (...).

## 2.4. PROCEDURAL BACKGROUND

### 2.4.1. Setting-Aside Proceedings in Sweden

**26.** On 19 March 2014, the RoK instituted proceedings before the Swedish Court of Appeal in Stockholm to set-aside the ECT Award under the Swedish Arbitration Act.

**27.** The RoK initially challenged the ECT Award on the grounds that the Arbitral Tribunal was invalidly constituted (due to SCC's improper default appointment of Professor Lebedev on behalf of the RoK), the Defendants' failure to comply with the cooling-off requirement of article 26 of the ECT and other procedural irregularities. As mentioned above, at that time, the fraud had not yet been discovered.

**28.** When the fraud came to light, the RoK commenced new proceedings in which the fraud was put forward with the (limited) knowledge of the fraud the RoK had at that time, to the best of its abilities.

**29.** On 5 October 2015, after the RoK unraveled the Defendants' fraudulent scheme, the RoK filed a motion to set aside the ECT Award because it was procured by fraud. In November 2015, the Swedisch Court decided to consolidate the RoK's challenges of the ECT Award.

**30.** With respect to the jurisdiction of the Arbitral Tribunal, RoK asserted that an action under the ECT requires a good-faith investment and that Defendants' investment was the product of their illegal conduct. With respect to liability, RoK asserted that Defendants' credibility was critical to their case and the Arbitral Tribunal's ruling in their favor. Had the Arbitral Tribunal known that Defendants were engaged in fraud, the outcome of the case would have been different. With respect to damages, RoK noted that Defendants, in claiming damages, had amongst others falsely testified that they had incurred USD 245 million in constructing the LPG Plant.

**31.** The Defendants did not offer any evidence to contradict the key elements of the fraudulent scheme. For example, they did not offer evidence as to the actual construction costs of the LPG Plant.

**32.** On 9 December 2016, the Swedish Court of Appeal handed down its decision. The Court dismissed the RoK's action despite the RoK's detailed and specific allegations regarding the fraudulent scheme.

**33.** Importantly, **the Court did not rule on the question whether Defendants engaged in a fraudulent scheme or offered false evidence and testimony in the SCC Arbitration**. The Court considered that *"the indicative bid per se is not to be regarded as false evidence"*, without addressing the question whether, as was demonstrated by cogent evidence, the false evidence had an impact on the Arbitral Award. The Court also did not address RoK's arguments that the Defendants' fraud in effect deprived the Arbitral Tribunal of jurisdiction under the ECT. The Court did not give permission to RoK to appeal the decision (this being a condition to make an appeal to the Swedish Supreme Court).

**34.** On 3 February 2017, the RoK filed a motion to quash the Swedish Court of Appeal's decision of 9 December 2016 with the Swedish Supreme Court for grave procedural errors, because the Svea Court had not ruled on all of the RoK's set-aside grounds. On 24 October 2017, the Swedish Supreme Court dismissed the RoK's motion to quash the Swedish Court of Appeal's decision, without providing any reasoning.

### 2.4.2. English Proceedings

**35.** On 24 February 2014, the Defendants filed an ex parte application to enforce the ECT Award in the High Court of Justice, Queen's Bench Division, Commercial Court, in London, England.

**36.** On 28 February 2014, the London Court issued an order granting the Defendants permission to enforce the Award, which order the Defendants served on the RoK, only nearly a year later, on 14 January 2015.

**37.** On 7 April 2015, the RoK filed an application to annul the permission to enforce the ECT Award, setting out the grounds to challenge the enforcement that were known to the RoK at the time. The effects of the enforcement order are stayed in England since then.

**38.** After the above-mentioned fraud was unravelled in the summer of 2015, on 27 August 2015, the RoK applied to amend its pleadings to add the contention that enforcement of the ECT Award **contravenes public policy by reason that it had been procured by fraud**.

**39.** The RoK submitted extensive witness evidence, documents, and legal submissions in support of its application. This included witness statements and supporting documents from international accountants, construction engineers, Kazakhstan's counsel in the arbitration and in the Swedish Proceedings.

**40.** On 6 June 2017, on the basis of the evidence submitted and submissions of both parties, the London Court **held that RoK had presented a "*sufficient prima facie case that the Award was obtained by fraud*".**[8]

**41.** At para. 65, the London Court found that on a *prima facie* basis, should the RoK's position be correct:

> "*the present case is one where [the Stati Parties] encouraged the Tribunal to rely on an indicative offer [from KMG] that [the Stati Parties] knew was misleading, because it was based on false information that they had provided*".[9]

**42.** Also and importantly, the London Court decided that the reasoning of the Swedish Court was incomplete and unconvincing. The London Court found, amongst other, the following:

> "*the Swedish Court (...) reasoned that the KMG Indicative Bid was not (itself) false evidence. That assessment holds at the time the KMG Indicative Bid was made, but I respectfully question whether it still holds when the KMG Indicative Bid is later deployed by a party who knows (but continues to conceal) that it is the product of that party's fraud*."[10]

**43.** Accordingly, the London Court ordered a full trial on the issue. Both Parties are currently engaged in the English proceedings and working towards the 8-day trial to begin in October 2018, where oral argument will be presented and witnesses and experts may be heard.

**44.** The Defendants failed to bring the English proceedings and the judgment of the London Court going back to **6 June 2017** to the attention of the Attachment judge at the time they requested the authorisation for the garnishment (**29 September 2017**). This constitutes a blatant breach of their duty to act loyally in ex-parte proceedings.[11]

[8] Free translation of: (...).
[9] Free translation of: (...).
[10] Free translation of: (...).
[11] Civ. Gent (Pres.), 29 November 1991, *TGR*, 1992, n°7, p. 13; Brussels, 14 March 2000, *JT,* 2001, p. 337, obs. L. Van Bunnen.

### 2.4.3. Other Enforcement Proceedings

**45.** It was only after the decision of the London Court of 6 June 2017, and after the effects of the enforcement order in England were stayed, that the Defendants initiated enforcement proceedings in other jurisdictions, namely Luxembourg, Sweden and the Netherlands. As in Belgium, in the other jurisdictions where enforcement is requested on the basis of the New York Convention, the Defendants failed to disclose the ongoing English proceedings and the decision of the London Court that there is a prima facie case that the ECT Award was procured by fraud.

In all jurisdictions RoK is contesting the exequatur on the basis of three main arguments. First, the Arbitral Tribunal lacked substantive jurisdiction. Second, the Arbitral Tribunal was irregularly constituted. Third, the ECT Award was the result of fraud on the part of the Defendants. This last point will now be the subject of a full trial in England.

### 2.5. THE BELGIAN GARNISHMENT PROCEEDINGS

**46.** In paragraph 19 of the *ex parte* application of 29 September 2017, the Defendants wrote that "*The Bank of New York Mellon SA/NV ("**BNY Mellon**") (...) acts as global custodian (...) for the NFRK on the basis of which Kazakhstan must have a claim against BNY Mellon in relation to the assets in the NFRK that BNY Mellon holds for the NFRK as integral part of Kazakhstan*".

**47.** The Defendants failed to inform the Attachment judge of the English proceedings and of the decision of the London Court of **6 June 2017** in their ex parte application of **29 September 2017**.

**48.** Even after the Attachment judge by letter dated 2 October 2017 explicitly requested the Defendants whether the RoK opposed the interim measures abroad (and if so, to submit the procedural documents relating thereto), the Defendants did not consider it necessary to inform the Attachment judge of the English proceedings and of the decision of the London Court of 6 June 2017 in the additional information which they submitted to the Attachment judge on 9 October 2017.Further, it should be stressed that the Defendants' presentation of the NFRK, in which this funds would consist of two separate "portfolios" of different assets (the Savings Fund on the one hand and the Stabilisation Fund on the other hand: see marginal 19 of the ex parte application of the Defendants dated 29 September 2017), does not square with the reality. This (non-existent) division was made by and for the benefit of the Defendants. The NFRK is one fund with a dual purpose, being a stabilisation purpose and a savings purpose (in order to maintain the stabilisation purpose in the future). There are no separate assets for achieving those objectives.

**49.** On the basis of this presentation of what the Defendants described to the attachment judge as being the alleged relationship between BNY Mellon and RoK, and of the alleged division in two portfolios of the assets of the NFRK, the Defendants asked permission to the attachment judge to proceed to a pre-judgment (conservatory) attachment as follows:

"(...)
*Against:*
*The Republic of Kazakhstan, including: the National Fund of the Republic of Kazakhstan (NFRK)*

*Garnishee:*
*The Bank of New York Mellon SA/NV, with registered office at 1000 Brussels, 46 Montoyerstraat, registered with the Crossroads Bank for Enterprises with number 806.743.159*

*On the following claims and assets, to the extent they pertain to (parts of) the Savings Fund as further developed in this application (Section 2.2.2):*

*(i) All claims that Kazakhstan (including the NFRK) has against BNY Mellon; and*

*(ii) All claims that Kazakhstan (including the NFRK) will directly acquire against BNY Mellon on the basis of an already existing relationship; and*

*(iii) All assets belonging to Kazakhstan (including the NFRK) held by BNY Mellon (in whatever capacity)*

*(iv) Cash and/or cash values held by BNY Mellon (in whatever capacity) for Kazakhstan (including the NFRK) and/or will acquire;*

*(v) All securities, securities deposits, participation rights in securities depos or collective depots held and/or administered by BNY Mellon to the benefit of and/or on behalf of Kazakhstan (including the NFRK)*

*As security for the claim of [Defendants] i) on the basis of the arbitral award dd. 19 December 2013 of the Arbitration Institute of the Stockholm Chamber of Commerce [free translation: (...)]*
*for a total amount of USD 515.822.966,35 per 28 September 2017 and*
*ii) on the basis of the Additional Arbitral Award dd. 17 January 2014 of the same Arbitration Institute for a total amount in principal of EUR 802.103,24.*
(...)"

**50.** In the Garnishment Order, the attachment judge, referring to the *ex parte* application of the Defendants and the grounds set out therein, decided as follows:

"*[...] authorize the applicants to proceed to a conservatory garnishment of the claims and assets that pertain to the "savings fund" in the hands of:*

- *The nv THE BANK OF NEW YORK MELLON, with registered office at 1000 Brussels, Montoyerstraat 46, registered with the CBE with number 806.743.159,*

*against:*

- *The REPUBLIC OF KAZAKHSTAN, Astana, Kazakhstan, with offices amongst others at the following addresses:*
    - *Ministry of Foreign Affairs*

      *(...)*
    - *Ministry of Finance*
      *(...)*
    - *Ministry of Justice, HOUSE OF MINISTRIES*
      *(...)*

  *Which includes the NATIONAL FUND OF THE REPUBLIC OF KAZAKHSTAN, with seat at Astana, Kazakhstan*

*for the amount of:*

*in principal, interests and costs: 515.822.966,35 USD*
*costs: 802.103,24 €*"

**51.** The Garnishment Order has been served on BNY Mellon on 13 October 2017 by bailiff Ben Van Schel in lieu of Stefan Sacré.

**52.** In an undated garnishee declaration sent to the bailiff, BNY Mellon declares that:

(i) (a legal predecessor of) BNY Mellon has entered into a global custody agreement dated 24 December 2001 with the National Bank of Kazakhstan as counterparty;

(ii) on the basis of the global custody agreement, BNY Mellon holds "*certain securities of the National Fund and Cash on behalf of [the National Bank of Kazakhstan] as custodian and banker respectively*"

(iii) BNY Mellon finds the legal relationship between the National Bank of Kazakhstan and RoK to be unclear, as well as the capacity of the National Bank of Kazakhstan to hold own assets notwithstanding it has separate legal personality;

(iv) consequently, BNY Mellon cannot entirely exclude, given the contractual relationship with the National Bank of Kazakhstan, that RoK (including the NFRK) may have or acquire claims against BNY Mellon or that BNY Mellon holds assets of or on behalf of RoK (including the NFRK);

(v) in light of these purported uncertainties, BNY Mellon will freeze cash and securities held on cash and securities accounts with the London branch of BNY Mellon (as listed in the Annex 1 of its declaration) for a total amount of approximately USD 22 billion (of which approximately USD 589 million in cash);

(vi) BNY Mellon considers that the "*potential rights of the Republic of Kazakhstan over these assets should be ascertained by the Creditors, the Republic of Kazakhstan and the NBK (either by agreement between these parties or in court proceedings)*".

## 3. THE LAW: THE REQUIREMENTS FOR THE CONSERVATORY GARNISHMENT ARE NOT MET

**53.** The legal conditions for the conservatory garnishment of the assets are not satisfied in the present case for no less than **four distinct reasons**, each of which is sufficient, on its own, to justify that the attachment order be set aside and that the assets be released.

**54.** These reasons are as follows:

- First, the Belgian courts do not have jurisdiction to authorise the garnishment of assets that are located, held and managed outside of the Belgian territory, including in particular cash and securities accounts held and managed by a branch outside of this territory (3.1);

- Second, the attachment does not meet the ordinary law requirements for the conservatory garnishment of assets (3.2);

- Third, the garnishment relates to assets of the NFRK, which are held by the National Bank of Kazakhstan, and there is no contractual relationship between the RoK and the garnishee, BNY Mellon (3.3);

- Fourth, the garnishment does not meet the specific requirements of Article *1412quater* of the Judicial Code relating to deposits of foreign central banks, nor of Article 1412*quinquies* of the Code relating to foreign sovereign assets (3.4).

### 3.1. Lack of Jurisdiction of the Belgian Courts over Assets Located, Held and Managed Outside of the Territory of Belgium

**55.** As a matter of general principles of public and private international law (territoriality principle), the attachment judge can only grant permission to attach assets or claims that are located in Belgium.

**56.** The assets frozen by BNY Mellon consist of cash and securities booked on accounts opened, held and managed in London with the London branch of the predecessor of BNY Mellon, pursuant to a global custody agreement governed by English law. It is this contract that gives rise to the obligations of BNY Mellon vis-à-vis the National Bank of Kazakhstan.

**57.** Pursuant to the English law that governs this legal relationship between NBY Mellon and the National Bank of Kazakhstan, these claims are located and payable in England, and this is the only place where BNY Mellon can validly be discharged of its obligations under this contract vis-à-vis the National Bank of Kazakhstan.

**58.** Consequently, the garnished assets are located in the UK.

**59.** The Defendants were wrong to ask permission of the attachment judge to attach the assets of the so-called ‘Savings Fund’ held by the London branch of BNY Mellon pursuant to the global custody agreement, since such assets are located in the UK (notwithstanding the fact that the assets in any case could not be garnished since they are held and managed by the National Bank of Kazakhstan, and the fact that there is no separate ‘Savings Fund’; the garnished assets are the assets of the NFRK, which are intended for non-commercial purposes).

**60.** In any event, the Garnishment Order could not have had (and does not have) the effect to authorize the Defendants to garnish such assets which are located outside of Belgium.

**61.** Moreover, in the present case, the assets that have been frozen by BNY Mellon consist in assets held and managed by a foreign central bank. Pursuant to Article 1412*quater* of the Judicial Code, such assets cannot be attached by a Belgian Court unless certain strict conditions are satisfied, including that the assets must be *“held or managed in Belgium”*. In addition, pursuant to Article 1412*quinquies*, of the Judicial Code, the assets of a foreign power cannot be attached, unless certain strict conditions are satisfied,

including that the assets be *"located in the territory of the Kingdom"* or, in the case of bank accounts, that they *"are held or managed there by that State"* (see further below, 3.4 ).

It follows from these provisions that the Belgian courts do not have jurisdiction to authorise the attachment of cash and securities accounts, held and managed, as in the present case, abroad by the foreign branch of a bank.

**62.** Conclusion: the Garnishment Order should be set aside and the release should be ordered of the garnished assets frozen by BNY Mellon, which are located outside of Belgium.

## 3.2. THE ORDINARY LAW REQUIREMENTS ARE NOT MET

### 3.2.1. Lack of urgency

**63.** A conservatory garnishment is only possible in case of urgency. It is required that the solvency of the debtor is compromised to the effect that future recovery of the claim would be at risk.[12] Thus, there is urgency only if the creditor can seriously fear that the recovery of its claim is at risk because of particular circumstances which demonstrate that the solvency of its debtor is at risk.[13] A garnishment is justified if, according to objective standards, the financial position of the debtor is at risk.[14]

**64.** In the present case, the Defendants did not contend, nor could they, that the Republic of Kazakhstan, as a recognized State internationally, is insolvent or that its solvency is at risk.

**65.** In their *ex parte* application for the Garnishment Order, the Defendants try to justify the urgency on the ground of the allegation that RoK has refused, in the past four years, to meet its "payment obligations" resulting from the ECT Award, despite the Defendants' requests thereto.

**66.** In this regard, it should be noted that as is well established in case law and legal writing, the required urgency cannot be inferred from the mere fact that the debtor does not recognise its debt and exercises its right of defence.[15]

In the present case, the ECT Award has not been paid for the good reason that it is highly defective and vitiated. The Defendants are well aware of this background and nevertheless failed to inform the Attachment Judge of the English proceedings and of the decision of the London Court. In the course of the four years since the ECT Award has been handed down, the RoK has exercised its legal rights in relation thereto. As explained above, it appears that the ECT Award was obtained by fraud, and the English Court has ordered that a full trial be held in relation to this fraud. There are other strong grounds, explained above, why the Award cannot be recognized and enforced. Hence, the mere fact that RoK has not paid the sums based cannot justify the required urgency and has nothing to do with any inability to pay.

**67.** The Defendants further assert that the limited quantity of assets present on the Belgian territory would be a sufficient criterion to justify the urgency. While this criterion has been used in certain case law

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[12] E. DIRIX and K. BROECKX, *Beslag*, APR, Mechelen, Kluwer, 2010, n° 449.
[13] Supreme Court 23 December 2010, *Arr.Cass*. 2010, n°. 12, 3091; Supreme Court 17 February 2005, *Arr.Cass*. 2005, n° 2, 396.
[14] E. DIRIX and K. BROECKX, *Beslag*, APR, Mechelen, Kluwer, 2010, n° 449.
[15] Attachment judge Kortrijk, 25 June 1973, *Rec.gén.enr.not*. 1977, n° 22,200; E. DIRIX and K. BROECKX, *Beslag*, APR, Mechelen, Kluwer, 2010, n° 450.

in specific circumstances, it cannot be applied to foreign States such as RoK. There is no doubt that RoK is a solvent State.

**68.** Lastly, the Defendant's argument that the attachment measures in other jurisdictions "most probably have alarmed" RoK is a mere unsupported and unfounded assertion that cannot, in any event, justify the alleged urgency.

**69.** Conclusion: there was and still is no urgency which would justify the garnishment measures that have been requested by the Defendants.

**70.** Consequently, the Garnishment Order should be set aside and the release of the garnished assets should be ordered.

### 3.2.2. The Defendants do not have a claim that is "certain, of a fixed amount, and due and payable", and the alleged claim violates public policy

**71.** A conservatory garnishment requires the claim to be secured to meet the following qualitative requirements:

(i) the claim must be certain, which means that its existence cannot be reasonably challenged[16],

(ii) the claim must be of a fixed amount, which means that the amount of the claim has been determined or is determinable without discussion and

(iii) the claim must be due and payable.

These requirements must be met at the time the application for the conservatory garnishment order is submitted to the attachment judge.

**72.** In their application for the Garnishment Order, the Defendants submit that they would be entitled to proceed to a conservatory garnishment based on their claim resulting from (1) the arbitral award dated 19 December 2013 of the Arbitration Institute of the Stockholm Chamber of Commerce for the total amount of USD 515,822,966.35 (per 28 September 2017) and (2) the additional arbitral award dated 17 January 2014 for the total principal amount of EUR 802,103.24.

**73.** However, this purported claim of the Defendants on which the garnishment was requested, is anything but certain, of a fixed amount, and due and payable.

**74.** As set out above, the ECT Award was obtained by fraud. The Defendants' fraudulent scheme and false evidence affected the outcome of the SCC Arbitration, since they affected the Arbitral Tribunal's assessments of the questions of: (i) the Arbitral Tribunal's jurisdiction; (ii) RoK's potential liability for damages; and, (iii) the quantum of damages awarded by the Arbitral Tribunal.

**75.** As also mentioned above, on 7 April 2015, RoK filed an application to annul the permission to enforce the ECT Award granted by the London Court. On 6 June 2017, the London Court held that RoK had presented a "*sufficient prima facie case*" that the ECT Award was obtained by reason of fraud on the

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

part of the Defendants. The parties are currently engaged in the preparations for the 8-day trial to begin in October 2018.

**76.** The Defendants, when submitting their *ex parte* application for the Garnishment Order, **deliberately failed to inform the attachment judge** of the decision of the London Court which held that there is a sufficient *prima facie* case that the ECT Award was obtained by fraud.

**77.** By doing so, the Defendants misled the attachment judge on the issue of the certain nature, of the fixed amount and of the due and payable nature of their alleged claim, in a clear attempt to circumvent, by means of a garnishment in the hands of BNY Mellon in Belgium, the inability to take direct garnishment actions against the cash and securities accounts held with the London branch of BNY Mellon in England as a consequence of the decision of the London Court, and of the stay of the effects of the enforcement order resulting thereof, .

**78.** In any event, since the Defendants' alleged claim results from an arbitral award obtained by fraud, their alleged claim is contrary to Belgian (international) public policy. Under Belgian law, an arbitral award obtained by fraud cannot be recognized and enforced in Belgium and therefore cannot be the ground of a claim that is "certain, of a fixed amount and due and payable" ((former) Article 1723, 2° and 3°, read together with Article 1704,3, a of the former arbitration rules of the BCJ, which continue to apply to the present case pursuant to Article 59,4 of the Law of 24 June 2003 modifying the Judicial Code, and Article V(1)(a) of the 1958 New York on the Recognition and Enforcement of Foreign Arbitral Awards).

**79.** The ECT Award is also defective (and cannot be subject to recognition and enforcement in Belgium, nor consequently can be the basis of a claim that is "certain, of a fixed amount and due and payable") for other reasons, including the following:

- the lack of jurisdiction of the Arbitral Tribunal, as jurisdiction under the ECT requires a good faith investment which is lacking in the present case as a consequence of the fraud ( breach of Article 1723, 3°, read together with Article 1704, 2, c and d of the former BJC and Article V(1)(a) of the New York Convention);

- the procedure of appointment of the Arbitral Tribunal was invalid as RoK has been deprived of its right to appoint one of the three arbitrators, while the Defendants have themselves appointed one arbitrator (breach of Article 1723, 3° read together with Article 1704, 2, f and g of the former BJC and Article V(1)b) and (d) of the New York Convention);

- the Defendants have failed to respect the mandatory three month cooling-off period prior to the starting of the arbitration proceedings (Article 1723, 3° read together with Article 1704, 2,c, d and g of the former BCJ and Article V(1)(c) and (d) of the New York Convention).

**80.** In these circumstances, the Defendants cannot rely on a claim that is "certain, of a fixed amount and due and payable", since their alleged claim is subject to a manifestly serious challenge. Consequently, (i) no conservatory garnishment can be authorised for such an uncertain claim and (ii) the Garnishment Order that has authorised the garnishment on the *ex parte* application of the Defendants should be set aside, both on the ground of violation of public policy.

**81.** Conclusion: the Defendants do not have a claim that is "certain, of a fixed amount and due and payable" and in any event their alleged claim based on an arbitral award obtained by fraud is contrary to Belgian (international) public policy.

**82.** Consequently, the Garnishment Order should be set aside and the release of the garnished assets should be ordered.

**83.** For the avoidance of doubt, it should be noted that at this stage, in the framework of these opposition proceedings aimed at the setting aside of the Garnishment Order and at the release of the garnished assets, there is no need for he attachment judge to make a final determination about the non-recognition and non-enforcement of the ECT Award in Belgium on the basis of the grounds for refusal of the recognition and enforcement which have been identified above. This issue will be determined in other proceedings (as indicated above, a full trial will be held in London about the fraud). It is enough to demonstrate, at this stage and for the purpose of these opposition proceedings, that the claim that is relied upon by the Defendants **is the subject of a challenge which appears, on a prima facie basis, to be serious and reasonable** (indeed, this is precisely what the London Court has found in its judgment of 6 June 2017).

### 3.3. ABSENCE OF A CONTRACTUAL RELATIONSHIP BETWEEN ROK AND BNY MELLON

**84.** The Defendants were wrong to request permission to seize the assets of the so-called '**Savings Fund'** (which thus pertains to the assets of the NFRK; there are no separate assets in a separate 'Savings Fund' portfolio, as was wrongly contended by the Defendants), of which they alleged that they would be held by BNY Mellon, pursuant to the global custody agreement of 24 December 2001. They were also wrong to present things as if RoK would have a claim against BNY Mellon in relation to those assets pursuant to the global custody agreement.

**85.** As confirmed by BNY Mellon in its garnishee declaration, the global custody agreement has been entered into between the London branch of its "legal predecessor" **and the National Bank of Kazakhstan**.

**86.** The RoK is not a party to this agreement, and the National Bank of Kazakhstan has a separate legal personality. As such, the RoK does not have a claim vis-à-vis BNY Mellon in relation to the assets of the NFRK, which are held by the National Bank of Kazakhstan with BNY Mellon. This point has been the subject of very close scrutiny and analysis by the English Commercial Court in a separate case where a creditor had, in view of the enforcement of a claim based on an arbitral award against the RoK, attempted to attach cash and securities held in London pursuant to the Global Security Agreement of 24 December 2001 with the National Bank of Kazakhstan (*AIG Capital Partners Inc and another v Republic of Kazakhstan (National Bank of Kazakhstan intervening), [2005] EWHC 2239 (Comm), [2006] 1 WLR*) (free translation: (...)) (hereafter, **"the English AIG Judgment"**). Having found that the National Bank of Kazakhstan is a distinct legal entity (para. 10), the English Court ruled that *"the fact that the RoK holds the ultimate beneficial interest in the National Fund [of Kazkhstan] and thereby has a beneficial interest in the Cash Accounts held by [the third party debtor] on behalf of the [National Bank of Kazakhstan] does not ... mean that there is a debt due or accruing due to the RoK in respect of these accounts"*[17] (para. 31).

**87.** There is no contractual relationship between RoK and BNY Mellon, and RoK is not a creditor of BNY Mellon. The contractual relationship only exists between BNY Mellon, London branch, and **the National Bank of Kazakhstan**.

**88.** This implies that the cash and securities credited on the cash and securities accounts opened in the name of and held by the National Bank of Kazakhstan with the London branch of BNY Mellon pursuant to

[17] Free translation of: (...).

the global custody agreement cannot be garnished, since **there is no creditor-debtor relationship between BNY Mellon, London branch and RoK in relation thereto**.

**89.** Conclusion: The *ex parte* application of the Defendants and the Garnishment Order addressed an obligation of restitution that does not exist between the alleged debtor (RoK) and the garnishee (BNY Mellon, London branch).

**90.** Consequently, the Garnishment Order could not have granted permission to garnish the accounts opened and held by the National Bank of Kazakhstan with BNY Mellon, London branch, and BNY Mellon should not have frozen these accounts.

The Garnishment Order should therefore be set-aside and the garnished assets should be released.

## 3.4. THE SPECIAL REQUIREMENTS OF ARTICLES 1412*QUATER* AND 1412*QUINQUIES* OF THE JUDICIAL CODE ARE NOT MET

**91.** The Defendants submitted their *ex parte* application on the basis of Article 1412***quinquies*** of the Judicial Code, and the Garnishment Order has been handed down on that basis.

**92.** The Defendants **were wrong** to invoke this legal basis for two reasons :

- First, the attachment of deposits held or managed by a foreign central bank is not governed by Article 1412*quinquies* of the Judicial Code, but by Article 1412***quater*** of the Judicial Code, whose conditions are manifestly not satisfied, explaining why the Defendants have tried to circumvent this provision (3.4.1);

- Second, in any event, even if Article 1412***quinquies*** of the Judicial Code was to be applied, the conditions of this provision are not satisfied either (3.4.2).

### 3.4.1. Defendants have circumvented Article 1412*quater* of the Judicial Code

**93.** Pursuant to Article 1412*quater* §1 of the Judicial Code, **the deposits, of whatever nature, held or managed by foreign central banks** in Belgium for their own account or on behalf of third parties cannot be seized.

**94.** The second paragraph provides that, by way of derogation of the first paragraph, the creditor who has an *"**enforceable title**"* can request the judge of attachments permission to seize said deposits, provided that he demonstrates that such deposits are ***"exclusively intended for an economic or commercial private activity"***.

**95.** As confirmed by BNY Mellon in its garnishee declaration, the garnished cash and securities accounts were opened and are held by the **National Bank of Kazakhstan** with the London branch of (the predecessor of) BNY Mellon. The National Bank of Kazakhstan is the central bank of the State (see the English AIG Judgment).

**96.** Consequently, the garnished assets qualify as "*deposits (...) held or managed by foreign central banks*", such that any attachment of these assets can only be ordered when the conditions of Article 1412*quater* of the Judicial Code are fully satisfied.

**97.** In the present case, none of the conditions of Article 1412*quater* of the Judicial Code are fulfilled:

(i) First, the garnished assets are **not *"held or managed in Belgium"***, but are held and managed in London with the London branch of the predecessor of BNY Mellon; hence, these assets are not located in Belgium and could not have been attached;

(ii) Second, these accounts are located in England and the global custody agreement is governed by English law, and as ruled by the English court, under English law these accounts of the National Bank of Kazakhstan are **immune from attachment in the UK** and cannot be garnished (see the English AIG Judgment); consequently, the Garnishment Order could not have authorised to garnish those accounts;

(iii) Third, the Defendants **did not have an enforceable title** at the time when they submitted their *ex parte* application since the ECT Award has not been declared enforceable in Belgium and, in any event, the Defendants did not have an enforceable title against the National Bank of Kazakhstan who is not a party to the ECT Award; hence, the Garnishment Order should not have authorised the garnishment of the garnished assets;

(iv) Fourth, the garnished accounts are **not exclusively intended for an economic or commercial private activity**. To the contrary, it is established that the attached assets are part of the "National Fund" of Kazakhstan. Pursuant to the Presidential Decree N° 402 of 23 August 2000 which has constituted the National Fund, the National Fund was established *"[To ensure] stable social and economic development of the country, accumulation of financial resources for future generations, [and] restructuring of the vulnerability of the economy to the influence of unfavourable external factors"*[18] (the statutory provision is quoted in paragraph 12 of the English AIG Judgment). Thus, the National Fund is used for the management of the State's economy and revenue, which is a non-commercial governmental purpose, with the consequence that the assets of the National Fund are not used or intended for use for commercial purposes. This is precisely the finding that has been made by the English Court in the abovementioned English AIG Judgment (at para. 92). In addition, the specific provision of Article 1412*quater* requires that the deposits aimed to be attached must be **exclusively** intended for an economic or commercial private activity. This is manifestly not the case in the present case.

**98.** Clearly, the Defendants have invoked Article 1412*quinquies* of the Judicial Code as the ground for their *ex parte* application in an attempt to circumvent the restrictions imposed on them by the conditions imposed in Article 1412*quater* of the Judicial Code, none of which are fulfilled.

**99.** Since none of the conditions of Article 1412*quater* of the Judicial Code are fulfilled, the Garnishment Order should be set aside and the release of the garnished assets should be ordered.

[18] Free translation of: (...).

### 3.4.2. In any event, the conditions of Article 1412*quinquies* of the Judicial Code are not fulfilled

**100.** The Defendants have invoked Article 1412*quinquies* of the Judicial Code as the ground for their *ex parte* application, and the Garnishment Order has been handed down on that ground.

**101.** Article 1412*quinquies* of the Judicial Code stipulates as follows:

> *"§1. Subject to the application of mandatory rules of supranational and international law, the assets of a foreign power, which are situated in the territory of the Kingdom, including bank accounts held or administered there by that State, notably in the exercise of the functions of diplomatic missions of the foreign power or of its consular posts, its special missions, its representations to international organizations or delegations to international organizations or international conferences, cannot be seized.*
>
> *§2. By way of derogation from paragraph 1, the creditor who has an enforceable title or authentic or private documents which, as the case may be, underlie the attachment, can request the judge of attachments, by means of an ex parte request, permission to seize the properties of foreign powers mentioned in paragraph 1, if he demonstrates that one of the following conditions is fulfilled:*
>
> *1° if the foreign power has explicitly and specifically consented that that property can be seized;*
>
> *2° if the foreign power has allocated or earmarked those properties for satisfaction of the claim which is subject of the enforceable title or authentic or private documents which, as the case may be, underlie the attachment;*
>
> *3° if it has been established that those properties are specifically in use or intended for use by the foreign power for other than non-commercial governmental purposes and if they are situated in the territory of the Kingdom, with the proviso that only those properties related to the entity referred to in the enforceable title or authentic or private documents which, as the case may be, underlie the attachment, can be seized. (...)"*[19]

**102.** None of the conditions of Article 1412*quinquies* of the Judicial Code are fulfilled:

(i) the Defendants do not have an **enforceable title or private documents** that meet the conditions for attachment. As indicated, the ECT Award was not declared enforceable in Belgium at the time the authorisation for the garnishment was requested. The Defendants are equally wrong to submit that the ECT Award would qualify as a "private document". Pursuant to Article 1445 of the Judicial Code, an arbitral award can only qualify as a private document if it is likely that the arbitral award can be declared enforceable in Belgium; in the present case, it is not at all likely that the ECT Award can be declared enforceable in Belgium since it has been obtained by fraud and thereby violates public policy; the ECT Award does not meet the conditions to be recognized and enforced in Belgium on various grounds identified above;

[19] Own emphasis added.

(ii) the garnished assets are booked on cash and securities accounts which have been opened and are held by the **<u>National Bank of Kazakhstan</u>**; they are not held or administered by RoK;

(iii) the cash and securities accounts are **<u>held and administered in London</u>**, with the London branch of the predecessor of BNY Mellon pursuant to a contract governed by English law; these accounts are not held and administered in Belgium; the Garnishment Order could not have had (and does not have) the effect to authorize the Defendants to garnish such assets which are located outside of Belgium;

(iv) these accounts are located in England and the global custody agreement is governed by English law, and as ruled by the English court, under English law these accounts of the National Bank of Kazakhstan are **<u>immune from attachment in the UK</u>** and cannot be garnished (see the English AIG Judgment); consequently, the Garnishment Order could not have authorised to garnish those accounts;

(v) the cash and securities accounts are **<u>not specifically in use or intended for use for other than non-commercial governmental purposes</u>**. The Defendants failed to demonstrate that this condition is satisfied. Indeed, as it follows from the explanation provided above, the assets of the National Fund do not meet this condition. The analysis finds further support in the fact that the legal requirement that the asset must be *"not specifically in use or intended for use by the State for other than government non-commercial purposes"* is borrowed from Articles 19 and 21 of the US Convention on Jurisdictional Immunities or States and Their Properties of 2 December 2004 (which has been signed by Belgium). Article 21 of this Convention stipulates that the following category of assets is excluded from such assets: *"property of the central bank or another monetary authority of the State"* (article 21(1)(c) of the Convention).

(vi) in any event, the garnished assets are **<u>not related to the entity (RoK) referred to in the ECT Award</u>**, since (i) they are held by the National Bank of Kazakhstan who is not a party to the ECT Award and (ii) the assets held by the National Bank of Kazakhstan are part of the National Fund of the Republic of Kazakhstan, which was not the subject matter of the ECT Award.

**103.** Consequently, the Garnishment Order should be set aside and the release of the garnished assets should be ordered.

**as such,**

in the year two thousand seventeen, on November 20

at the request of :

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

represented by its counsels ***Roel*** **FRANSIS**, ***Arnaud*** **NUYTS** and ***Hakim*** **BOULARBAH**, lawyers, with offices at 1000 Brussels, Keizerslaan 3 (T.: +32 2 551 15 68; r.fransis@liedekerke.com)

I, the undersigned, ~~Anne **VAN DEN BERGHE**~~, bailiff, with chambers at 1050 Elsene, Kroonlaan, 145 Building F 4th floor,

**have summoned:**

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

In the writ of garnishment dated 13 October 2017 served by Mr Ben Van Schel, in lieu of Mr Stefan Sacré, bailiff with offices at 1081 Koekelberg, Jettelaan 32, the defendant has elected domicile at the offices of their counsels Stan BRIJS and Charlotte DE MUYNCK, lawyers, with offices at 1000 Brussels, Terhulpsesteenweg 120.

where were and where speaking to *Bodart, Dominique, appointed*

so declared, who signs/~~does not sign~~ my original,
~~(O As the writ could not be served as stipulated under art. 35 of the Judicial Code I have served the copy by issue thereof in a closed envelope in conformity with art. 44 of the Jud.C. at ........................hours ...............min, pursuant to art. 38, par.1 Jud.C.)~~

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

In the writ of garnishment dated 13 October 2017 served by Mr Ben Van Schel, in lieu of Mr Stefan Sacré, bailiff with offices at 1081 Koekelberg, Jettelaan 32, the defendant has elected domicile at the offices of their counsels Stan BRIJS and Charlotte DE MUYNCK, lawyers, with offices at 1000 Brussels, Terhulpsesteenweg 120.

where were and where speaking to *Bodart, Dominique, appointed*

so declared, who signs/~~does not sign~~ my original,
~~(O As the writ could not be served as stipulated under art. 35 of the Judicial Code I have served the copy by issue thereof in a closed envelope in conformity with art. 44 of the Jud.C. at ........................hours ...............min, pursuant to art. 38, par.1 Jud.C.)~~

3) The company under foreign law **ASCOM GROUP SA**, with registered office at MD-2009\Moldavia, 75A Mateevici Street, Chisinau;

In the writ of garnishment dated 13 October 2017 served by Mr Ben Van Schel, in lieu of Mr Stefan Sacré, bailiff with offices at 1081 Koekelberg, Jettelaan 32, the defendant has elected domicile at the offices of their counsels Stan BRIJS and Charlotte DE MUYNCK, lawyers, with offices at 1000 Brussels, Terhulpsesteenweg 120.

where were and where speaking to *Bodart, Dominique, appointed*

so declared, who signs/~~does not sign~~ my original,
~~(O As the writ could not be served as stipulated under art. 35 of the Judicial Code I have served the copy by issue thereof in a closed envelope in conformity with art. 44 of the Jud.C. at ........................hours ..............min, pursuant to art. 38, par.1 Jud.C.)~~

4) The company under foreign law **TERRA RAF TRANS TRAIDING LTD**, with registered office at GI-13/1 Line Wall Road\GIBRALTAR;

In the writ of garnishment dated 13 October 2017 served by Mr Ben Van Schel, in lieu of Mr Stefan Sacré, bailiff with offices at 1081 Koekelberg, Jettelaan 32, the defendant has elected domicile at the offices of their counsels Stan BRIJS and Charlotte DE MUYNCK, lawyers, with offices at 1000 Brussels, Terhulpsesteenweg 120.

where were and where speaking to *Bodart, Dominique, appointed*

so declared, who signs/~~does not sign~~ my original,
~~(O As the writ could not be served as stipulated under art. 35 of the Judicial Code I have served the copy by issue thereof in a closed envelope in conformity with art. 44 of the Jud.C. at ........................hours ..............min, pursuant to art. 38, par.1 Jud.C.)~~

**To appear on Friday the first day of December two thousand seventeen at 8.45 am, before the attachment judge in the Dutch-speaking Court of first instance in Brussels, sitting in the regular court rooms, attachments court room B, room 2, at the court, expansion, Quatre-Brasstraat, 13 in Brussels;**

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 garnishment order of the attachment judge in the Dutch-speaking Court of first instance in Brussels, issued on 11 October 2017, with docket number 17/1185/B (hereafter the "**Garnishment Order**");

- Hold that the Belgian courts do not have jurisdiction to authorise the garnishment of cash and financial instruments held or managed outside of the territory of Belgium;

- Order the release of the assets that have been frozen by the garnishee (The Bank of New York Mellon NV) further to the service of the Garnishment Order on 13 October 2017;

- Order the Defendants to voluntarily release the garnished assets within 24 hours after the forthcoming decision of the attachment judge is rendered;

- Declare that, in the absence of voluntary release within the given deadline, the decision will take effect as release, and that, following the service of the decision upon the garnishee, it can no longer take into account the garnishment;

- Condemn the defendants to the payment of all costs of the garnishment and of the release of the assets, as well as the costs of these proceedings, including 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;

under all usual reserves whatsoever and without any prejudicial acknowledgement and more specifically under reserves of an increase of decrease of the amount of the claim in the course of the proceedings;

so that the summoned party would not be unaware thereof, I have left, being and speaking as mentioned above, copy of this writ, in a closed envelope, if necessary, in accordance with the law;

**Whereof record.**

Costs: 311.54 EUR

plus the postage costs, for the amount of 0.74 EUR

the bailiff

In accordance with the RD of 26 April 2017, 20.00 EUR is included in the costs of this writ in order to finance the Budgetary Fund for second-level legal aid.

Registration fees – Application of article 8bis of the Registration Fees Code – Registration fee: 50.00 €