Unofficial translation

Tracking number of the chamber **159/B/18**
Date of decision **25 May 2018**
Docket number **2017/4282/A**
Code number **2018/**

DUTCH-SPEAKING COURT OF FIRST INSTANCE BRUSSELS

Judgment

- *THIRD-PARTY OPPOSITION TO AUTHORISATION FOR CONSERVATORY GARNISHMENT – ART. 1412QUINQUIES BJC*
- *FINAL DECISION INTER PARTES*

Court of Attachment

civil cases

The attachment judge issues the following order in the case:

A.R. 2017/4282/A

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,

claimant in third party opposition,
lawyers: Roel FRANSIS, Arnaud NUYTS, Hakim BOULARBAH and Nicolas ANGELET, with offices at 1000 Brussels, Keizerslaan 3,

against

- **STATI Anatolie**, domiciled at 20 Dragomirna Street, Chisinau, MD-2008, Moldavia,

- **STATI Gabriel**, domiciled at 1A Ghioceilor Street, Chisinau, MD-2008, Moldavia,

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

- **TERRA RAF TRANS TRAIDING LTD. ("Terra Raf"),** company under foreign law, with registered office at 13/1 Line Wall Road, Gibraltar,

defendants in third party opposition;
lawyers: Stan BRIJS and Charlotte DE MUYNCK, with offices at 1000 Brussels, Terhulpsesteenweg 120, where Defendants have elected domicile,

and:

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

voluntarily intervening party;
Lawyers: Peter CALLENS and Ahmed TAYANE, with offices at 1200 Brussels, Neerveldstraat 101-103.

- **THE BANK OF NEW YORK MELLON**, public limited company, with registered office at 1000 Brussels, Montoyerstraat 46 and with company number 0806.743.159,

voluntarily intervening party;
Lawyers: Françoise LEFEVRE, Stefaan LOOSVELD and Liesbeth TRUYENS, with offices at 1000 Brussels, Brederodestraat 13.

Proceedings

By writ of 20 November 2017, the Republic of Kazakhstan brought its claim before the court.

By petition, submitted to the clerk's office on 28 November 2017, the National Bank of Kazakhstan intervened voluntarily.

By petition, submitted to the clerk's office on 30 November, the NV Bank of New York Mellon intervened voluntarily.

By decision of the court of 1 December 2017 in accordance with Article 747,§1 of the Belgian Judicial Code, the court confirmed the procedural calendar agreed between the parties and fixed the hearing on 2 February 2018.

At the public hearing of 2 February 2018 an additional procedural calendar for the exchange of written submissions was approved and the hearing was fixed on 27 April 2018.

On the following dates, submissions were submitted at the clerk's office:

- On 18 December 2017 a first submission for the defendant on third party opposition;
- On 28 December 2017 a fist submission for NV Bank of New York Mellon;
- On 12 January 2018 a final submission for the claimant on third party opposition;
- On 12 January 2018 a final submission for the National Bank of Kazakhstan;
- On 26 January 2018 an additional and final submission for the defendant on third party opposition;
- On 21 February 2018 a second and final submission for NV Bank of New York Mellon;
- On 16 March 2018 an additional and final submission for the claimant on third party opposition;
- On 16 March 2018 an additional and final submission for the National Bank of Kazakhstan;
- On 17 April 2018 a second additional and final submission for the defendant on third party opposition

On 28 November 2017 the exhibits of the National Bank of the Republic of Kazakhstan were submitted at the registry of the court.

At the public hearing on 27 April 2018:

- appeared before the court:
    - For the Republic of Kazakhstan: Roel Fransis, Nicolas Angelet, Maria-Clara Van den Bossche and Arnoud Nuyts,
    - For Stati Anatolie, Stati Gabriel, Ascom Group S.A. and Terra Raf Trans Trading Ltd.: Stan Brijs, Karen Paridaen and Arie Van Hoe,
    - For the National Bank of the Republic of Kazakhstan: Peter Callens and Ahmed Tayane,
    - For the NV The Bank of New York Mellon: Lefebvre Françoise Loosveld Stefaan and Liesbeth Truyens,

- The aforementioned lawyers were heard,
- The exhibits of all parties were submitted,
- The debates were closed and the case was taken into consideration.

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

The provisions of the law of 15 June 1935 on the use of languages in court proceedings were applied.

1. OBJECT OF THE CLAIMS AND OF THE DEFENCE

1.1 The Republic of Kazakhstan, hereinafter **KAZAKHSTAN**, filed a third-party opposition against the garnishment order of 11 October 2017.

Pursuant to this order, the attachment judge authorises Mr. Anatolie and Gabriel STATI and companies under foreign law ASCOM GROUP S.A. and TERRA RAF TRANS TRADING LTD. to levy a conservatory garnishment on "*claims and assets relating to the "savings fund""* held by THE BANK OF NEW YORK MELLON NV, hereafter abbreviated BNYM, against KAZAKHSTAN, including the National Fund of KAZAKHSTAN, for a total amount of USD 515,822,966.35 in principal, interests and costs and for an additional amount of EUR 802,103.24 in costs.

KAZAKHSTAN requests that the garnishment order be set aside and the release of the assets garnished on the basis of this order on 13 October 2017.

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

1.2 BNYM, the third-party garnishee, voluntarily intervened in the present third party opposition proceeding.

It asks:

- To take into account "the *reasons why BNYM has frozen the assets in the cash and securities accounts at its London branch, as listed in Annex I to its declaration as a third party garnishee*",
- To declare that it has properly executed the garnishment order of 13 October 2017,
- In the hypothesis that the garnishment is maintained, to declare that the compliance with Belgian orders and judgments, discharges it vis-à-vis the National Bank of KAZAKHSTAN and KAZAKHSTAN.

1.3 The National Bank of Kazakhstan, hereafter **NBK**, has also voluntarily intervened in the present third party opposition proceeding.

It requests that the garnishment order is retracted or quashed "*inasmuch as it applies to NBK or to any assets held by NBK with BNYM*". It request to at least lift in respect of such assets as "*such assets are not captured by the Order*".

It further holds that the interim claims of BNYM are inadmissible and at least ill-founded.

1.4 The creditors, hereinafter referred to as the **STATI parties**, hold that the claims of KAZAKHSTAN and the NBK are inadmissible.

2. FACTS AND PROCEDURAL ANTECEDENTS

In their final submissions, the parties have extensively set out the relevant facts for the present case, and have included even more facts and procedural antecedents. The attachment judge refers to these submissions.

3. JUDGMENT

3.1. THE ARGUMENTS BY KAZAKHSTAN

3.1.1. The lack of "jurisdiction"

1. Kazakhstan's first argument is that the Belgian attachment judge did not have jurisdiction to grant the garnishment order requested by the STATI parties.

Kazakhstan supplies two supporting arguments for this:

- First, in main order: the specific territorial conditions of articles 1412quater and 1412quinquies BJC are not met,
- Secondly, in subsidiary order: the common territorial conditions are not met.

2. The STATI parties dispute this. According to them, the Belgian attachment judge was, and still is, competent to grant the relevant order.

3. The STATI parties have, pursuant to article 1412quinquies, §2 BJC[1], requested authorisation from the attachment judge to garnish assets belonging to KAZAKHSTAN in the

[1] Article 1412quinquies:

hands of the Belgian company BNYM. Which assets? All claims and assets relating to the "*savings fund*" of the National Fund of KAZAKHSTAN, which is a part of KAZAKHSTAN.

On the basis of this rule, contained in article 1412quinquies BJC, they have obtained the requested authorisation.

Article 1412quater BJC, to which KAZAKHSTAN and its National Bank refer repeatedly and on which they build various arguments, is not applicable. This article, simply speaking, gives creditors the opportunity to garnish the assets of foreign central banks. With their initial petition of 29 September 2017, the STATI parties did not request authorisation of the attachment judge to garnish the assets of the NBK.

The only applicable legal basis for the requested and granted authorisation therefore has to be found in article 1412quinquies BJC, and not in article 1412quater BJC.

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§1 Subject to the application of mandatory supranational and international provisions, the property of a foreign authority located on the territory of the Kingdom, including financial assets held or managed there by that foreign authority, in particular in the exercise of the duties of diplomatic representations of the foreign authority or its consular posts, its special missions, its representations to international organisations or delegations to bodies of international organisations or of international conferences, are not subject to seizure.
§2 By way of derogation from paragraph 1, the creditor, having an enforceable title or authentic or private documents, which, as the case may be, are the basis of the attachment, may, by petition, request authorisation from the attachment judge for the attachment of the assets referred to in paragraph 1 of a foreign power if he demonstrates that one of the following conditions are fulfilled:
1° if the foreign authority consented in an explicit and specific way to the distrainability of that property;
2°if the foreign authority has reserved or indicated the property for the settlement of the claim which is the subject of the enforceable title or the authentic or private documents which, as the case may be, underlie the attachment;
3°if it is established that these assets are used or are intended for use in particular by the foreign authority for other than non-commercial governmental purposes and are located on the territory of the Kingdom, with the understanding that only assets, which relate to the entity appointed in the enforceable title or the authentic or private documents that, as the case may be, are the basis of the seizure, can be seized.
§3 The immunity referred to in paragraph 1 and the exceptions to that immunity set forth in paragraph 2 are equally applicable to the property designated in those paragraphs if they are not the property of the foreign authority itself, but of a region of the foreign authority, even when it does not possess international legal personality, of part of that foreign authority in the sense of article 1412ter, §3, second paragraph, or of a territorially decentralised administration or any other political subdivision of that foreign authority.
The immunity referred to in paragraph 1 and the exceptions to that immunity set forth in paragraph 2 are equally applicable to the property designated in those paragraphs if they are not the property of a foreign authority, but of a public supranational or international organisation which uses it or intends it for use for purposes analogous to other than non-commercial governmental purposes.

4. The question under review here is not so much whether the Belgian attachment judge has jurisdiction, but whether it is territorially competent to consider the request for authorisation for garnishment against a foreign state in the hands of a Belgian company.

That a judge may consider such request is beyond discussion. The question is whether the Belgian judge has territorial competence.

5. Article 1412quinquies BJC does not contain any specific territorial jurisdiction rules. Consequently, the common law rules regarding the competent territorial jurisdiction of an attachment judge, as set out in article 633 BJC, apply.

According to article 633, §1 BJC, the attachment judge of the domicile of the seized debtor is the competent judge in case of third-party attachment, unless this domicile is unknown or is situated abroad. In that case the attachment judge "*of the place of execution of the garnishment*" is the competent judge. In case of third-party attachment this is the place of the domicile of the third-party garnishee or, if the third-party garnishee is a legal entity, that of its registered office.

It is not contested that the third-party garnishee has its registered office in Belgium, more specifically in Brussels. Therefore the Brussels attachment judge has the territorial competence to decide on the request of the STATI parties.

3.1.2. Application of English law

1. Subsequently KAZAKHSTAN puts forward that the Belgian attachment judge could not authorise the requested attachment by reason of its conflict with English law.

It advances two grounds of English law which the authorised attachment contravenes, notably:

- on the one hand: the garnishee does not have obligations towards KAZAKHSTAN, and
- on the other hand: the cash and securities accounts held by its National Bank at the London branch of the garnishee enjoy immunity from execution.

2 The STATI parties reply that the Belgian attachment judge must apply Belgian law and not English law.

3 KAZAKHSTAN institutes third-party opposition proceedings against the order for conservatory garnishment which the STATI parties obtained on 11 October 2017. According to it, this order should not have been granted. It requests the setting aside of that order and the release of the garnished assets.

English law, which the attachment judge, at the time of the assessment of the unilateral application of the STATI parties and at present for the assessment of the third-party opposition by KAZAKHSTAN, should have taken into account according to the latter and on the basis of which it must today set aside the granted order, concerns the material law that governs the contractual relationship between the garnishee and NBK.

At once the attachment judge remarks that it granted the STATI parties, at their request, an authorisation for attachment against KAZAKHSTAN. They did not ask for attachment against the NBK. Such *ultra petita* authorisation was not granted.

Even assuming that English law also governs the contractual relationship between the garnishee and the debtor, this foreign material law is not the law that the Belgian attachment judge must apply, at the time of its assessment of the unilateral application and at present in its assessment of the third-party opposition.

Likewise, in its assessment of the regularity and legality of a garnishment in Belgium with an international dimension, such as *in casu* against a foreign State, the Belgian attachment judge will also apply Belgian national law, as enshrined *in casu* in article 1412quinquies BJC.

The own *lex fori* of the national judge with whom attachment is sought, determines amongst other things what may be attached, to what extent or under which conditions. This application of the *lex fori* on the attachment is the simple translation of the principle of territoriality[2].

3.1.3. Non-fulfilment of the common requirements

1. As third argument KAZAKHSTAN invokes that the common requirements for conservatory attachment have not been fulfilled, neither urgency, nor the qualitative requirements that a claim to be secured must meet. It adds that the STATI parties did not fulfil their obligation to provide information during the unilateral procedure and for that reason the attachment should be lifted.

2. The STATI parties indicate first that they have requested an order allowing conservatory attachment under article 1412quinquies BJC and not the 'usual' articles 1413 and 1447 BJC.

In any event the common requirements for conservatory attachment were and are, according to them, still fulfilled.

Finally, they also deny that they have "*mislead*" the attachment judge during the unilateral procedure.

3. The STATI parties indeed requested a specific authorisation for conservatory attachment, notably in application of article 1412quinquies, §2 BJC. This provision enumerates three possible requirements which each separately offer the creditor the opportunity, in contrast to the general immunity from attachment contained in §1, to seek authorisation for attachment of property belonging to a foreign State.

[2] J. ERAUW, « De problemen van grensoverschrijding voor executiemaatregelen in Europa » in G. DE LEVAL and M. STORME, *Het Europees gerechtelijk recht en procesrecht*, Brugge, Die Keure, 2003, 489.

These requirements are added onto the basic requirements that must be fulfilled for each conservatory attachment. They are additional requirements.

The basic requirements for conservatory attachment thus had to and must still be fulfilled. The STATI parties incidentally also motivated the fulfilment of these basic requirements in their original application.

4. The first basic requirement, which KAZAKHSTAN disputes, is the requirement of urgency.

The STATI parties invoke in support of the urgency that KAZAKHSTAN:

- persists in its refusal to pay them despite 1) the order to pay in the first arbitral award of 19 December 2013 and in the additional arbitral award of 17 January 2014, 2) the fact that its applications for setting aside of the execution and for annulment of these arbitral awards have in the meantime been finally rejected by the Swedish High Court in the judgments of 20 September 2017 and 24 October 2017, 3) the repeated requests from the Stati Parties, 4) its obligation to comply with international law and 5) its commitments under the Energy Charter Treaty,
- after the recognition and enforcement of the arbitral awards in Belgium by order of 11 December 2017 even refuses to consign funds sufficient to cover the cause of the conservatory garnishment,
- frustrates and obstructs all attempts at execution by the STATI parties, in the United States as well as in Sweden and in the Netherlands,
- has other creditors, such as CARATUBE INTERNATIONAL, who also obtained in 2017 an arbitral award against KAZAKHSTAN for a claim of 39.2 million USD.

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

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

KAZAKHSTAN denies that urgency can be inferred from the elements invoked by the STATI parties. It explains that the reason why it has not paid the arbitral awards is that they are according to it "*highly defective and vitiated*" and were obtained by way of "*fraud*".

Its request for the setting aside of the enforcement and annulment of the arbitral awards before the competent courts on the merits in Sweden have however in the meantime been finally rejected in the judgments of 20 September 2017 and 24 October 2017 of the Swedish High Court. Its debt to the STATI parties is therefore undeniably certain.

Kazakhstan relies on an English judgment of 6 June 2017 from the London High Court. This judgment was given in a kind of third party opposition procedure initiated by KAZAKHSTAN

against the order of enforcement which the STATI parties obtained on 28 February 2014 in England. It is a kind of interim judgment in which the London High Court decides to investigate and assess the allegations of fraud put forward by KAZAKHSTAN during and after further hearings.

The Swedish High Court took note of this English judgment but decided that the potential existence of fraud had no impact whatsoever on the decisions in the arbitral awards.

The Belgian exequatur judge also took note of this English judgment. He decided that this English judgment, in contrast to the aforementioned Swedish judgments, had no impact in Belgium and by order of 11 December 2017 issued the recognition and enforcement in Belgium of the two arbitral awards. KAZAKHSTAN has instituted third-party opposition proceedings against this order, but as long as it has not been set aside, it has *res judicata* and as such it must be taken into account by Kazakhstan and the attachment judge in the current third-party opposition proceedings.

All the elements that the STATI parties invoke demonstrate that there is urgency in the sense that the execution is at risk.

KAZAKHSTAN also alleges in error that the STATI parties "*have waited 4 years to initiate proceedings there (and in the other jurisdictions)*". The arbitral awards are dated 19 December 2013 and 17 January 2014. Already in the same month, in January 2014, the STATI parties initiated enforcement proceedings, in the United States. KAZAKHSTAN subsequently initiated a setting aside procedure that was only definitely ended with the judgment of 24 October 2017.

Despite the final rejection of its annulment application, KAZAKHSTAN still defaults on the payment of its debts towards the STATI parties. These debts amount to more than 500 million USD under the first arbitral award and more than 1 million EUR under the second arbitral award.

In each State where the STATI parties tries to execute their titles by way of enforcement, KAZAKHSTAN initiates opposition proceedings and maintains these, even after the 24 October 2017 Swedish judgement. KAZAKHSTAN also contested the conservatory measures which the STATI parties initiated in various States and continues to contest them, even after the recognition and enforcement of the arbitral awards.

KAZAKHSTAN disregards the arbitral awards and the Swedish judgment of 24 October 2017 which definitely sets aside its annulment claim. It clearly does not want to pay its debts to the STATI parties and attempts as much as possible to avoid the enforcement and also to escape the conservatory measures by contesting again and again the validity of the arbitral awards and invoking immunity from execution.

The execution which the STATI parties, taking into account the limitations which this immunity from execution imposes upon them, seek since 2014, is clearly at risk.

The urgency was and is still proven.

5. Subsequently KAZAKHSTAN alleges that the STATI parties do not hold a claim that is certain, of a fixed amount, and due and payable and that the alleged debt would violate the violation public order.

6. The arbitral awards have *res judicata*.

The Belgian exequatur judge has in the meantime declared them enforceable as well. This means that he has determined that the recognition and enforcement does not violate public order[3]. He has furthermore explicitly decided that no violation of Belgian international public order was proven. He also assessed the fraud argument made by KAZAKHSTAN and rejected it by reference to the decisions of the Swedish annulment judges who determined that the potential existence of fraud did not have any impact on the decisions in the arbitral awards. He also took into account the English judgment of 6 June 2017 and discounted it since, in contrast to the aforementioned Swedish decisions, it has no impact in Belgium.

The attachment judge cannot impinge on the enforcement decision, which is still in force up to this day.

The arbitral awards must therefore be considered "judgments" in the meaning of article 1414 BJC[4]. According to this provision every judgment, even if it not enforceable notwithstanding opposition or appeal, constitutes an authorisation for conservatory attachment for what has been decided.

Under this assumption it is not forbidden for the creditor to preliminarily request an order from the attachment judge, but the existence of a certain claim can no longer be subject to discussion[5].

The non-notification of the English judgment of 6 June 2017 with the unilateral application by the STATI parties therefore did not, contrary to what KAZAKSHTAN claims, mislead the attachment judge regards to the certain, of a fixed amount, and due and payable nature of the claim.

The two other missing factual elements which KAZAKHSTAN invokes as shortcomings by the STATI parties to their "*duty to provide information*" are not relevant and cannot impinge on the certain, of a fixed amount and due and payable nature of the claim of the STATI parties.

[3] See article 1721, §1 BJC.
[4] E. DIRIX and K. BROECKS, *Beslag*, in A.P.R., Mechelen, Kluwer, 2010, nr. 465.
[5] E. DIRIX and K. BROECKS, *Beslag*, in A.P.R., Mechelen, Kluwer, 2010, nr. 463.

3.1.4. Lack of legal relationship with the garnishee

1. As fourth argument, KAZAKHSTAN asserts that there exists no legal relationship between itself and the garnishee and that the garnishee also does not have a restitution obligation towards itself.

2. The STATI parties respond, firstly, that this argument is no ground for third-party opposition on the basis of which the order can be revoked.

3. The STATI parties have sought an order granting conservatory attachment against KAZAKHSTAN in the hands of BNYM and have obtained it. They did not ask for conservatory attachment against the NBK and such an *ultra petita* authorisation has not been granted.

Contrary to what is alleged by KAZAKHSTAN, the attachment judge did not grant an authorisation to the STATI parties for "*garnishment of the accounts that were opened in name of the National Bank of Kazakhstan at the London branch of BNY Mellon and that are held there by the National Bank of Kazakhstan*".

The argument that is raised by KAZAKHSTAN is about the subject-matter and the consequences of the attachment. KAZAKHSTAN's contention is actually that the garnishment could not have any subject-matter, and that the garnishee still wrongly froze the accounts.

The fact that the garnishee is not the debtor of the seized-debtor is not a ground for the withdrawal of the authorisation order nor for the lifting of the garnishment that has been authorised. The absence of a debt from the garnishee towards the seized-debtor only leads to the conclusion that the garnishment has no subject-matter.

In the current case the attachment judge can only consider that the garnishment that has been authorised does indeed have a subject-matter. The subject-matter of the garnishment follows in fact from the declaration of the garnishee. According to the declaration:

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

the government as beneficiary. BNYM has been informed that this is the case even though the NBK, pursuant to Kazakh law, has separate legal personality towards third parties, has legal standing in courts and can hold and possess assets and liabilities that are separate from the Republic of Kazakhstan, i.e. assets of other parties than the Republic of Kazakhstan.
A comprehensive list of assets held pursuant to the Global Custody Agreement, as of 13 October 2017, are enclosed in Annex I. The assets consist of cash and securities held on cash and securities accounts at BNYM's London branch for a total amount of roughly USD 22 billion (including USD 589 million in cash).
Given these uncertainties, BNYM has frozen the assets listed in Annex 1 pursuant to the garnishment order. However, BNYM 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).

The seized-debtor is entitled to challenge the declaration from the garnishee before the attachment judge. However this challenge relates to the debt of the third party and must be referred to the trial court in the proceedings on the merits, under article 1456, 2nd para. BJC.[6]

The competent trial court is, as stated by Kazakhstan itself, the English court who must apply its own national substantive law.

The fourth ground from Kazakhstan therefore fails entirely, both in law and in fact.

3.1.5. Immunity from execution

1. As fifth and last argument KAZAKHSTAN invokes immunity from execution, both in application of article 1412quater BJC as in application of 1412quinquies BJC.

2. The STATI parties repeat that only article 1412quinqies BJC is applicable and contend that the conditions set forth under §2, 3° as exceptions to immunity from execution are fulfilled.

3. As already decided above[7], only article 1412quinquies and not article 1412quater BJC is applicable in the current attachment case.

4. It follows from the reading of article 1412quinquies BJC that the principal immunity from execution which a foreign State enjoys in Belgium is not absolute. §2 of this article indeed provides three possible exceptions.

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

[6] E. DIRIX and K. BROECKS, *Beslag*, in A.P.R., Mechelen, Kluwer, 2010, nr. 789.
[7] Under section 3.1.1.

"*3° if it is established that these assets are used or are intended for use in particular by the foreign authority for other than non-commercial governmental purposes and are located on the territory of the Kingdom, with the understanding that only assets, which relate to the entity appointed in the enforceable title or the authentic or private documents that, as the case may be, are the basis of the seizure, can be seized*."

Kazakhstan disputes that the conditions for this exception are fulfilled. In particular it contends that:

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

The burden of proof of the fulfilment of the conditions for the exception rest on the creditor.

In the following, the attachment judge investigates whether the three contested conditions are fulfilled.

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

Rightly, the STATI parties emphasize that they only sought the authorisation for and obtained conservatory attachment on the claims and goods that relate to the "*savings fund*" of the National Fund of KAZAKHSTAN.

It is uncontested that this National Fund forms part of and is property of KAZAKHSTAN.

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

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

To realise these two purposes the funds are divided between two portfolio's, one "savings portfolio" and one "stabilisation portfolio".

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

It is not contested that the seized effects and assets, as listed by the garnishee BNYM in its declaration, belong exclusively to the savings portfolio.

On the basis of the purpose of the savings portfolio these seized effects and assets must be considered long-term investment objects. The increasing of the profitability of the capital in the long term is a commercial activity.

As a consequence, the STATI parties demonstrate that the "savings portfolio" of the National Fund of KAZAKHSTAN is used in particular "*for other than non-commercial governmental purposes*".

2) Assets which *"relate to the entity appointed in the enforceable title or the authentic or private documents that, as the case may be, are the basis of the seizure"*

KAZAKHSTAN wrongly disputes that this condition has not been met as it is not contested that the National Fund of KAZAKHSTAN is part and property of KAZAKHSTAN.

3) Assets which *"are located on the territory of the Kingdom"*

That this condition has been met is confirmed in the declaration of the garnishee BNYM.

5. This final fifth argument by KAZAKHSTAN must therefore also be rejected.

3.2. THE ARGUMENTS BY NBK

The four arguments which NBK invokes in support of its claim are also put forward by KAZAKHSTAN and answered and dismissed above[8].

3.3. THE ARGUMENTS BY BNYM

The garnishee BNYM is seeking to obtain a declaration that as matter of law it has properly executed the garnishment order and that it is discharged towards the NBK and KAZAKHSTAN.

Both requests relate to the subject-matter of the attachment, notably whether or not a debt exists from BNYM towards KAZAKHSTAN. KAZAKHSTAN disputes the existence of such debt. The attachment judge cannot and may not settle such dispute, but only the judge on the merits. The judge on the merits is, as already mentioned above[9]? the English court who must apply its own national law.

3.4. LIMITATION OF THE SUBJECT-MATTER OF THE ATTACHMENT

According to the declaration of the garnishee the subject-matter of the attachment amounts to approximatively 22 billion USD, in other words a multitude of the causes of it.

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

The STATI parties have explicitly declared their agreement to accept a limitation of the subject-matter of the attachment to its causes. They estimate these causes at present, including interests, at an amount of 530 million USD.

3.5. LEGAL COSTS

In application of article 1017, first paragraph BJC, the attachment judge orders KAZAKHSTAN and the NBK, as requested by the STATI parties, to pay the legal costs.

These consist for the STATI parties of the procedural cost indemnity, determined by the indexed basic amount for disputes not assessable in money, notably EUR 1,440. The contribution of EUR 20 for the Budgetary Fund for judicial second line assistance remains charged to KAZAKHSTAN.

BNYM requests that the costs are determined "*as justified*". Since its claims were not granted, it cannot claim procedural cost indemnity.

FOR THESE REASONS,

THE ATTACHMENT JUDGE,

Adjudicating in first instance and *inter partes*;

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

Declares the claims of the Republic of Kazakhstan, the National Bank of the Republic of Kazakhstan and The Bank of New York Mellon admissible though unfounded;

Limits the object of the garnishment of 13 October 2017 to the sum of 530 million USD;

Orders the Republic of Kazakhstan and the National Bank of the Republic of Kazakhstan to pay the legal costs of the defendant in the third-party opposition (indicated as the STATI parties), determined at the sum of 1,440 EUR (procedural cost indemnity);

Declared as such at the public hearing of the attachment chamber of the Dutch-speaking court of first instance of Brussels, on 25 May 2018, where were present and sitting:

Ms Anouk Devenyns, vice-president and attachment judge
Ms Tania Couck, deputy clerk.