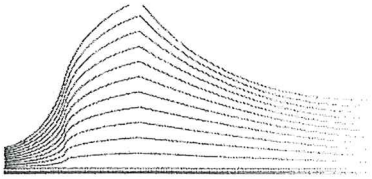

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| 2021/5536 |
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| **29 June 2021** |
| General Docket number |
| **2018/AR/1209**<br>**2018/AR/1214** |

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Final judgement

# Court of Appeal
# Brussels

# **Judgement**

17th Division,
civil matters

| Submitted on |
|---|
| Not to be registered |

COVER 01-00002221141-0001-0044-03-01-1

**IN THE CASE 2018/AR/1209:**

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

represented by Atty. Arnaud NUYTS, Atty. Roel FRANSIS, Atty. Beatrice VAN TORNOUT and Atty. Estellle IRMBON, lawyers, all with offices at boulevard de l'Empereur 3, B-1000 BRUSSELS,

against the judgement of the Brussels Dutch-language court of first instance of 25 May 2018

VERSUS:

1. **Anatolia STATI,** choosing as address for service that of his counsel Atty. Stan BRIJS at Chaussée de la Hulpe 120, B-1000 BRUSSELS,
first respondent,

2. **Gabriel STATI,** choosing as address for service that of his counsel Atty. Stan BRIJS at Chaussée de la Hulpe 120, B-1000 BRUSSELS,
second respondent,

3. **ASCOM GROUP S.A.,** choosing as address for service that of its counsel Atty. Stan BRIJS at Chaussée de la Hulpe 120, B-1000 BRUSSELS,
third respondent,

4. **TERRA RAF TRANS TRADING LTD,** choosing as address for service that of its counsel Atty. Stan BRIJS at Chaussée de la Hulpe 120, B-1000 BRUSSELS,
fourth respondent,

all represented by Atty. Stan BRIJS, Atty. Sophie JACMAIN, Atty. Karen PARIDAEN, Atty. Arie VAN HOE and Atty. Alexander ROELS, lawyers, all with offices at Chaussée de la Hulpe 120, B-1000 BRUSSELS

ALSO CONCERNING:

1. The **NATIONAL BANK OF THE REPUBLIC OF KAZAKHSTAN**, state entity organised and existing under the laws of the Republic of Kazakhstan, with registered office at 57A Mangilik Yel Avenue, Z05T8F6 Nur-Sultan (Kazakhstan)

first voluntarily intervening party,

represented by Atty. Peter CALLENS, Atty. Hakim BOULARBAH, Atty. Alice BOULVAIN and Atty. Alice MALLIEN, lawyers, all with offices at avenue de Tervueren 2, B-1040 BRUSSELS,

2. **THE BANK OF NEW YORK MELLON N.V.**, enterprise number 0806.743.159, with registered office at rue Montoyer 46, B-1000 BRUSSELS,
second voluntarily intervening party,

represented by Atty. Françoise LEFEVRE, Atty. Stefaan LOOSVELD and Atty. Xavier TATON, lawyers, all with offices at rue Brederode 13, B-1000 BRUSSELS,

**IN THE CASE 2018/AR/1214:**

**1. The NATIONAL BANK OF THE REPUBLIC OF KAZAKHSTAN**, state entity organised and existing under the laws of the Republic of Kazakhstan, with registered office at 57A Mangilik Yel Avenue, Z05T8F6 Nur-Sultan (Kazakhstan)
appellant,

represented by Atty. Peter CALLENS, Atty. Hakim BOULARBAH, Atty. Alice BOULVAIN and Atty. Alice MALLIEN, lawyers, all with offices at avenue de Tervueren 2, B-1040 BRUSSELS,

against the judgement of the Brussels Dutch-language court of first instance of 25 May 2018

VERSUS:

1. **STATI Anatolia,** choosing as address for service that of his counsel Atty. Stan BRIJS at Chaussée de la Hulpe 120, B-1000 BRUSSELS,
first respondent,

2. **STATI Gabriel,** choosing as address for service that of his counsel Atty. Stan BRIJS at Chaussée de la Hulpe 120, B-1000 BRUSSELS,
second respondent,

3. **ASCOM GROUP S.A.,** choosing as address for service that of its counsel Atty. Stan BRIJS at Chaussée de la Hulpe 120, B-1000 BRUSSELS,
third respondent,

4. **TERRA RAF TRANS TRADING LTD**, choosing as address for service
that of its counsel Atty. Stan BRIJS at Chaussée de la Hulpe 120, B-1000 BRUSSELS,
fourth respondent,

all represented by
Atty. Stan BRIJS, Atty. Sophie JACMAIN, Atty. Karen PARIDAEN, Atty. Arie VAN HOE and Atty. Alexander ROELS, lawyers, all with offices at Chaussée de la Hulpe 120, B-1000 BRUSSELS

ALSO CONCERNING:

1. The **REPUBLIC OF KAZAKHSTAN**, represented by its Minister of Justice at the Ministry of Justice with office at Left Bank, Mangilik El Street 8, House of Ministries 13, 010000 Astana, 010000 Nur-Sultan (Kazakhstan),
first voluntarily intervening party,

represented by Atty. Arnaud NUYTS, Atty. Roel FRANSIS, Atty. Beatrice VAN TORNOUT and Atty. Estellle IRMBON, lawyers, all with offices at boulevard de l'Empereur 3, B-1000 BRUSSELS,

2. **THE BANK OF NEW YORK MELLON N.V.**, enterprise number 0806.743.159, with registered office at rue Montoyer 46, B-1000 BRUSSELS,
second voluntarily intervening party,

represented by Atty. Françoise LEFEVRE, Atty. Stefaan LOOSVELD and Atty. Xavier TATON, lawyers, all with offices at rue Brederode 13, B-1000 BRUSSELS,

The referral to the court of appeal is based on:

- a petition for appeal lodged in the case known under General Docket No. 2018 AR 1209 by the Republic of Kazakhstan, hereinafter referred to as 'Kazakhstan', on 11 July 2018,

- a petition for appeal lodged in the case known under General Docket No. 2018 AR 1214 by the National Bank of the Republic of Kazakhstan, hereinafter referred to as 'NBK', on 12 July 2018,

petitions for appeal against the judgement pronounced by the Dutch-language court of first instance in Brussels, attachment division, on 25 May 2018.

No document of service was submitted for this judgement.

The court of first instance summarised the object of the dispute as follows:

**'1. OBJECT OF THE CLAIMS AND OF THE RESPONSE**

**1.1.** The Republic of KAZAKHSTAN, hereinafter referred to as **KAZAKHSTAN,** is lodging third-party opposition against the authorising decision of 11 October 2017.

With this decision, the attachment judge granted permission to Messrs. Anatolie and Gabriel STATI and the companies under foreign law ASCOM GROUP S.A. and TERRA RAF TRANS TRAIDING LTD. to impose protective attachment order *"on claims and matters relating to the "savings fund"* in the hands of THE BANK OF NEW YORK MELLON N.V., hereinafter abbreviated BNYM, against KAZAKHSTAN, including the National Fund of KAZAKHSTAN, for a total amount of USD 515,822,966.35 in principal, interest and costs, and an additional amount of € 802,103.24 in costs.

KAZAKHSTAN is claiming reversal of this decision and the lifting of the conservatory third party attachment that was levied on 13 October 2017 pursuant to this decision.

KAZAKHSTAN also asks for the "*case to be adjourned with respect to any aspects relating to the consequences of the attachment, in particular regarding the liability of the Stati and/or BNY Mellon as a result of the wrongful attachment of the assets, or subordinately, if the case is not adjourned, to declare itself incompetent to rule on the case, at least to declare the claim of BNY Mellon (and possibly that of the Stati) in this respect unfounded.*

**1.2. BNYM,** garnishee, has voluntarily intervened in these third-party opposition proceedings.

It asks:

- that it be entered into the records *"the reasons why it has frozen the assets in the cash and securities accounts with its London branch, as set out in Appendix I to its declaration as a garnishee",*
- to rule that it correctly executed the protective attachment order of 13 October 2017,
- if the attachment is maintained, to rule that it, by complying with the decisions and judgements of the Belgian courts, is discharged of liability with respect to the National Bank of KAZAKHSTAN and to KAZAKHSTAN.

**1.3.** The National Bank of KAZAKHSTAN, hereinafter abbreviated NBK, has also voluntarily intervened in these third-party opposition proceedings.

It requests the withdrawal or annulment of the authorising decision *"to the extent that it applies to NBK or to funds held by NBK with BNYM"*. At the very least, it claims the lifting of the attachment in respect of these funds because they *"are not covered by the Decision"*.

It further pleads that BNYM's interim claims are inadmissible, or at least unfounded.

**1.4.** The attaching parties, hereinafter referred to as the STATI parties, plead that the claims of KAZAKHSTAN and the NBK are unfounded.'

In the contested judgement, the attachment judge:

- entered into the records the voluntary intervention of NBK and 'The Bank of New York Mellon', hereinafter 'BNYM';
- declared the claims of Kazakhstan, the NBK and the BNYM admissible but unfounded;
- limited the object of the conservatory third party attachment dated 13 October 2017 to USD 530 million;
- ordered Kazakhstan and NBK to pay the costs of the proceedings in respect of the current first to fourth respondents, hereinafter 'the Stati', estimated at 1,440 euros.

Regarding the joinder:

The court of appeal finds that the appeals are both directed against the same judgement.

The parties have all filed written submissions via the same submissions in both cases.

With a view to the proper administration of justice, the two cases are joined.

1. **The claims of the parties in appeal** are as follows:

Kazakhstan:

'To declare the third-party opposition initiated by the Republic of Kazakhstan admissible and well-founded and, in accordance with the decision of the attachment judge at the Dutch-language Court of First Instance of Brussels of 25 May 2018 (the **"Contested Decision")**, and the decision of 11 October 2017 **("the Authorisation Order")**, except insofar as it has been decided that the dispute concerning the debt of the garnishee (i.e., the object of the Authorisation Order and

the garnishment) must be settled by the court hearing the case on the merits, namely the English court;

And then again giving judgement:

**1. Principally,** on the basis of the automatic recognition of the ruling of the judge of the English High Court of 22 April 2020, to establish that

- the debt corresponding to the amount of USD 530 million held by BNYM in accounts of its London branch in the name of NBK (the **"Blocked Assets"),** is owed exclusively to NBK and not to RK, and consequently to declare the disputed garnishment devoid of purpose **(Ground 1**); and/or
- the Blocked Assets are funds of/held by/managed by a foreign central bank and therefore benefit from enforcement immunity. As a result, to declare that the Blocked Assets are not subject to attachment so that they cannot be the object of the disputed garnishment **(Ground 2);**

**2. Subsidiarily,** to establish that

- This court of appeal does not have the required international jurisdiction to allow an attachment of goods not located in Belgium; and
- the Blocked Assets are not located in Belgium

and, consequently, to judge that this court of appeal does not have the required international jurisdiction to authorise a garnishment of the Blocked Assets **(Ground 3);**

**3. More subsidiarily,** to establish, following a new investigation on the merits, that the Authorisation Order and the disputed garnishment have no object in the absence of debt owed by BNYM towards RK **(Ground 4),**

**4. Still more subsidiarily** (should this court of appeal find that there nevertheless is a debt owed by BNYM towards RK (quod non)), to establish that

- The Blocked Assets belong to a foreign power and therefore enjoy immunity from enforcement. As a result, to declare that the Blocked Assets are cannot be attached so that they cannot be the object of the disputed garnishment **(Ground 5);**
- The legal basis invoked by the Stati does not meet the qualitative conditions to allow attachment **(Ground 6);**
- The civil law conditions for conservatory attachment are not met **(Ground 7);**
- To refer the case to the General Docket or adjourn the hearing pending the final outcome of the proceedings against the exequatur **(Ground 8);**

**5. In each case,** to declare the petition for interpretation of the Contested Decision and the incidental appeal of the Stati inadmissible, at least unfounded **(Ground 9);**

**Based on these grounds, or any one of them,**

- To reverse the Authorisation Order of the attachment judge at the Dutch-language Court of First Instance of Brussels of 11 October 2017;

- Order the lifting of the protective attachment order of 13 October 2017;

- Order the release of all claims and matters that were attached pursuant to the Authorisation Order of the attachment judge in the Dutch-language Court of First Instance of Brussels of 11 October 2017, in particular the Blocked Assets that were blocked by the garnishee (The Bank of New York Mellon NV), namely the sum of USD 530 million held in the name of the National Bank of Kazakhstan;

- Order the Stati to voluntarily lift the third-party conservatory attachment of 13 October 2017 and to release the Blocked Assets within 24 hours of the intervening judgement;

- To rule that, in the absence of a voluntary release of the attachment and release of the Blocked Assets within the prescribed period, the intervening judgement shall count as release of the attachment and release of the Blocked Assets, and that, following service of the judgement to the garnishee, it may no longer take account of the attachment;

**In any case,** to order the Stati to pay all the costs of the attachment and the costs of the release of all the assets that were attached, as well as the costs of the proceedings in first instance and in appeal, including the procedural indemnity in accordance with Article 1022 of the Belgian Judicial Code amounting to EUR 12,000 per instance.'

The NBK:

'With regard to the appeal of NBK:

• To declare the appeal of NBK admissible and well-founded;

• To amend the Contested Decision of 25 May 2018 of the attachment judge at the Dutch-language Court of First Instance in Brussels with General Docket number 2017/4282/A, except to the extent that it referred the issue of BNYM's debt to the English courts;

• Accordingly, to rule that the Authorisation Order is reversed or annulled to the extent that it applies to NBK or to funds held by BNYM under the GCA, and/or at the very least to rule that such funds are not subject to the Authorisation Order and they must therefore be released and the attachment lifted in respect of these funds;

With regard to the petition for interpretation from the Stati's

• To reject the petition for clarification from the Stati's as inadmissible, at least unfounded, having regard to the English Jurisdiction Judgement and the English Judgement of 22 April 2020, and since the referring decision

of the court of first instance is neither unclear nor ambiguous, and thus requires no interpretation;

With regard to the request for cross-appeal from the Stati's

• Dismiss the incidental appeal of the Stati's as inadmissible, at least unfounded, having regard to the English Jurisdiction Judgement and the English Judgement of 22 April 2020;

In any case,

• To order the Stati's to pay all costs, including the legal procedural indemnity, estimated at 1,440 euros for the proceedings in first instance and 1,440 euros for the appeal proceedings before this Court of Appeal.'

The BNYM:

'- to establish that BNYM may not release the assets of the National Fund until this Court of Appeal (or the attachment judge at the Brussels French-language court of first instance) makes a final decision on the validity and object of the garnishment;

- to establish that, where appropriate, BNYM must have a reasonable period of 28 days to release the blocked assets to the National Bank of Kazakhstan upon receipt of notification of a decision from this Court of Appeal (or the attachment judge at the Brussels French-language Court of First Instance) on the validity and object of the garnishment.'

The Stati:

'- to declare the Stati's claim for interpretation of the Decision *a quo* of 25 May 2018 with application of Articles 798, 799 and 1068 Belgian Judicial Code, admissible and well-founded, and to rule that the attachment judge, by considering that "*The attachee can challenge the statement of a garnishee before the attachment judge. But this dispute then concerns the debt of the third party, and must be referred to the court hearing the case on the merits (Art. 1456, second paragraph, Belgian Judicial Code) As KAZAKHSTAN itself points out, this competent court hearing the case on the merits is the English court, which must apply its national substantive law*" has not decided that in the context of a possible application of Article 1456 Belgian Judicial Code the English court must be referred to as court hearing the case on the merits and must decide on the pleas and arguments (after all, of a Belgian attachment law nature) invoked by the Stati's in their fourth argument (Title 8) of the present submissions regarding the object of the current attachment.

- subordinately, if the petition for interpretation is rejected, to declare the cross-appeal by the Stati's against the above-cited parts of the Decision *a quo* admissible and well-founded, and again giving judgement, to rule that in the present case

it is for this Court of Appeal to settle the question under Belgian law whether the current attachment has an object now that this does not belong to the English court hearing the case on the merits.

- in all cases, to rule that this Court of Appeal has jurisdiction to review and settle these disputes, and in particular the pleas and arguments set forth above in Title 8 on the object of the garnishment, and then to dismiss this third-party opposition argument of Kazakhstan in accordance with the current submissions;
dismiss the appeal lodged by Kazakhstan and NBK in its entirety, dismiss all arguments advanced by and all claims brought by Kazakhstan and NBK, and confirm the Contested Decision *a quo* of 25 May 2018, subject to the above-mentioned claim for interpretation and the cross-appeal regarding the argument of third-party appeal concerning the object of the garnishment (discussed above under Title 8 of the present submissions);

Order Kazakhstan and NBK to pay the costs of appeal, including a maximum procedural indemnity of EUR 12,000.'

**2. With regard to the claim for interpretation of the contested judgement**

The Stati claim on the basis of Articles 798, 799 and 1068 Belgian Judicial Code to rule that the court of first instance, where it considered (see p. 13, 2nd section of the contested judgement): *'The attachee can challenge the statement of (the) garnishee before the attachment judge. But this dispute then concerns the fault of the third party, and must be referred to the court hearing the case on the merits (Art. 1456, second paragraph, Belgian Judicial Code).*

*As Kazakhstan itself points out, this competent court hearing the case on the merits is the English court that must apply its national substantive law'*

has not decided that in the context of a possible application of Article 1456 Belgian Judicial Code the English court must be referred to as the court hearing the case on the merits and must decide on the pleas and arguments (after all, of a Belgian attachment law nature) invoked by the Stati's in their fourth argument (Title 8) of the present submissions regarding the object of the current attachment.

The attachment judge and the court of appeal can interpret an unclear or ambiguous court decision without extending, limiting or altering the rights enshrined in the title.

The court of first instance formulated its judgement in clear terms, where it decided that the dispute of the attachee (Kazakhstan) with regard to the statement of the garnishee

(i.e. BNYM) must be presented before the court hearing the case on the merits and that this court is the English court, which must apply its national law.

This decision is neither unclear nor ambiguous.

It needs no interpretation.

This claim is unfounded.

**3.** With regard to the Stati's claim to – if the petition for interpretation is rejected – declare their incidental appeal against *'the parts of the decision a quo cited above'* admissible and well-founded, and to rule that it is up to this court of appeal to settle the question whether the current attachment has any object under Belgian law.

The Stati's incidental appeal concerns the passage quoted verbatim under 2.

The first section *'The attachee can challenge the statement of (the) garnishee before the attachment judge. But this dispute then concerns the debt of the third party, and must be referred to the court hearing the case on the merits (Art. 1556, second paragraph, Belgian Judicial Code.)'*

is almost completely identical to the last section of Article 1456 Belgian Judicial Code to which the attachment judge refers.

It is impossible to see what interest the Stati could have in nullifying this section, which is a repetition of the legal provision that states that the garnishee can contest that it is the debtor of the attachee.

They can hardly pretend to be prejudiced by a consideration which is a mere recapitulation of an applicable rule of law.

With regard to the designation of the competent court, it is established that this designation merely indicates which court rules on the debt of the garnishee with regard to the attachee.

This designation does not mean that the court hearing the case on the merits examines the validity of the attachment.

The attachment judge did not rule on this.

The Stati read in the relevant passages what is not there.

Apparently, the Stati's incidental appeal that seeks to nullify this section in the contested judgement is based on the argument that the attachment judge decided that the appointed court hearing the case on the merits can settle the question of the validity of the attachment.

The passages to be annulled show nothing of the kind.

In view of the foregoing, this incidental appeal by the Stati cannot succeed.

**4. With regard to the authorisation decision of 11 October 2017 and the corresponding conservatory attachment levied on 13 October 2017**

PREAMBLE

Kazakhstan argues that the Stati would have failed procedurally: The ex parte petition would not meet the legal requirements because it would not contain the necessary elements to enable fulfilment of the attachment conditions to be checked and to offer the debtor the opportunity to put forward a defence.

Kazakhstan accuses the Stati of not having informed the attachment judge about the TMA and the GCA agreements and about NBK; according to them, it is crucial to know *'towards who the debt of BNYM (the garnishee) is owed and whether or not the assets enjoy immunity from enforcement'.*

Furthermore, the Stati allegedly breached their obligations in that they:

- only mentioned NBK 1 time in the ex parte petition for authorisation;
- withheld information related to the NFRK;
- said nothing about the attachment proceedings in the Netherlands, nor about the English judgement of 6 June 2017;
- make the same mistake in the renewal petition.

This position cannot be followed.

With regard to the renewal petition: That is not the issue here. The court of appeal does not rule on this.

With regard to the other alleged *'non disclosures',* the court of appeal finds that the attachment judge that rendered the authorisation decision, in the context of the adversarial third-party opposition debate against this decision, ruled as follows regarding the violation of their obligation to provide information during the ex parte proceedings alleged by Kazakhstan against the Stati:

'Contrary to what KAZAKHSTAN claims, the failure to communicate the English judgement of 6 June 2017 accompanying the original ex parte petition on the part of the STATI parties did not mislead the attachment judge as to the certain, of a fixed amount and due character of the debt claim.

Also the two other missing factual elements which KAZAKHSTAN cites as shortcomings of the STATI parties with regard to their *"duty to provide information"* are not relevant and cannot affect the certain, of a fixed amount and due character of the debt claim of the STATI parties.'

After an adversarial debate in which the NBK participated as a voluntary intervening party, the attachment judge ruled, in full knowledge of the facts, on the basis of all elements of the case as they were presented in the context of the adversarial proceedings, that there was no deception or lack of information present in the ex parte proceedings.

The court of appeal shares this view.

In the ex parte petition proceedings, the investigation of the case focuses on the basic requirements: the existence of a certain, of a fixed amount and due debt claim and the urgency.

The ex parte petition deals with both basic requirements.

Exhibits were added.

The questions of the attachment judge were answered appropriately in advance, with the answer supported by exhibits.

There is no indication that the Stati deliberately concealed relevant facts and circumstances, or that they withheld exhibits, even less that information not stated was indispensable for assessing the petition, since the attachment judge granted the petition for protective attachment order in the context of the ex parte proceedings and has not withdrawn this decision after being informed of additional exhibits and of the detailed defence of the attachee and of the position of the garnishee and the NBK.

With regard to the judgement of the Belgian Supreme Court of 20 December 2019, to which Kazakhstan refers in its last submissions (see margin number 860, p. 458):

Referring to this judgement, Kazakhstan states that in the event of attachment of assets of a central bank, the prior approval of the attachment judge is required *'even in the case of an allegation of simulation'.*

In this case, the attachment judge has granted prior permission for attachment.

The permission for attachment was granted against the Republic of Kazakhstan, not against a central bank.

The reference to this judgement of the Belgian Supreme Court is irrelevant.

The question of the specific consequences of the attachment is not addressed in the phase of authorisation based on ex parte petition.

4.1. <u>The authorisation decision and the corresponding attachment</u>

In a decision of 11 October 2017, the attachment judge in the Dutch-language court of first instance in Brussels authorised the Stati to levy conservatory attachment against Kazakhstan on the debt claims and assets relating to the *'savings fund'* held by BNYM as security for payment of the sum of USD 515,822,966.35 (principal amount) + USD 802,103.24 (costs).

The authorisation to attach was granted in application of Article 1412*quinquies* Belgian Judicial Code, the applicability of which – in particular the exception to the principle of non-attachment as stipulated in Article 1412*quinquies* §2, 3° Belgian Judicial Code – is motivated and explained in the petition attached in appendix.

The corresponding attachment is dated 13 October 2017.

The statement of the garnishee is dated 30 October 2017. In it, the BNYM further explained its decision to block all assets in the cash and securities accounts related to the National Fund in the name of the NBK at its London branch.

On 11 December 2017, the French-language court of first instance in Brussels declared enforceable the arbitral awards of the Stockholm Chamber of Commerce of 19 December 2013 and 17 January 2014.

The third-party appeal against this decision was dismissed on 20 December 2019.

On 12 June 2018, the above-mentioned decision was served together with the currently contested judgement with an order to pay the sum of USD 497,685,101 + USD 802,103 in principal + interest and costs, and with conversion of the conservatory third party attachment dated 13 October 2017 into executory garnishment.

An objection was lodged on 27 June 2018 against the aforementioned executory garnishment.

Conservatory attachment can be levied on one's own authority or on the basis of an authorising decision by the attachment judge.

In both cases, the basic conditions of urgency and the existence of a certain, of a fixed amount and due debt claim must be met.

4.2. <u>The existence of a certain, of a fixed amount and due debt claim on the part of the Stati against Kazakhstan</u>

4.2.1. The attachment was levied against the Republic of Kazakhstan with its registered office at the addresses specified in the writ of attachment, including the National Fund of the Republic of Kazakhstan with its registered office in Astana, Kazakhstan.

The attachment was neither allowed nor levied against the NBK.

The court of appeal should therefore not address the question of whether the basic conditions for a conservatory attachment against the NBK have been met.

To the extent that the parties argue in this regard, this argumentation is irrelevant.

4.2.2. The following applies concerning the existence of a certain, of a fixed amount and due debt claim on the part of the Stati against Kazakhstan.

The court of appeal is now ruling on the third-party opposition against an authorisation decision for conservatory third party attachment.

In assessing the quality of the debt claim, the court of appeal remains within its decision-making power. It is not for the court of appeal to settle the dispute on the merits or to decide definitively on the substantive law relationship between the parties to the proceedings.

The right of review of the court ruling on appeal against the decision of the attachment judge is *'marginal'.* The court of appeal judges *prima facie.* It examines whether the claims of the attaching party show a sufficient semblance of merit on which to base the protective attachment order.

The decision rendered pursuant to Article 748§2 Belgian Judicial Code granted the petition for new deadlines for the filing of submissions after establishing that Kazakhstan had provided new and relevant documents, namely Exhibits 2 and 3 dated 21 August 2019, documents relating to the quality of the title.

The court of appeal therefore did not rule on the arbitral awards, nor on the exequatur decision.

The court of appeal does not address Kazakhstan's suggestion (p. 397 of its last submissions) to wait and see what the court of appeal will decide in response to the *'complete'* investigation on the merits of the arguments for opposition to the recognition and enforcement of the arbitral decisions of 19 December 2013 and 17 January 2014, since there is no need to do so in order to be able to decide according to attachment law standards within the decision-making power of the court of appeal on the quality of the Stati's debt claim.

The court of appeal establishes that the attachment judge granted authorisation for conservatory attachment on the basis of the petition from the Stati in which the Stati set forth that they have a title for attachment:

(margin number 2.2.1 of the petition for authorisation for conservatory attachment):

'Applicants have a title pursuant to the Arbitral Award and the Supplementary Arbitral Award (Exhibits 1 and 2).

As set out under Title 1 above, Applicants have a ground against Kazakhstan for a total principal amount of USD 506,660,597.40 pursuant to the Arbitral Award (Exhibit 1) and an additional principal amount of EUR 802,103.24 pursuant to the Supplementary Arbitral Award (Exhibit 2). These amounts must be increased with interest, as set out under Title 1 above.

The validity of the Arbitral Award and the Supplementary Arbitral Award was fully affirmed in the setting-aside proceedings initiated at the request of Kazakhstan before the Svea Court of Appeal in Sweden (being the seat of the underlying arbitration proceeding), where the claim for setting aside the Arbitral Award and the Supplementary Arbitral Award was dismissed in its entirety (Exhibit 3). The Svea Court of Appeal also ruled out the possibility of "appealing to the Swedish Supreme Court against the Swedish Judgement." In yet another attempt by Kazakhstan to *frustrate* Applicants' rights, Kazakhstan disregarded the aforementioned explicit exclusion of appeal to the Swedish Supreme Court, and an appeal was lodged with the Swedish Supreme Court. Bringing *this extraordinary* appeal to the Swedish Supreme Court, like an appeal lodged before the Belgian Supreme Court in Belgium, has no suspensive effect. This dilatory attitude on the part of Kazakhstan further confirms the importance of the petition for permission to levy conservatory attachment against Kazakhstan.'

At that time, the attachment judge could not yet take into account, among others, the decisions:

- of the Swedish Supreme Court of 24 October 2017
- of the Swedish Supreme Court of 9 March 2020
- of the Swedish Supreme Court of 18 May 2020,

decisions the content of which is not subject to review here, nor is the approach chosen in these decisions nor the brevity or length of the statement of reasons,

and decisions none of which in any event resulted in annulment of the arbitral decisions.

Nevertheless, the attachment judge ruled in the authorisation decision that the Stati's claim showed a sufficient semblance of merit to allow conservatory attachment.

This assessment was correct.

It finds support not only in the aforesaid decisions, in that pursuant to these decisions of the Swedish Supreme Court, the arbitral awards must be regarded as regular binding decisions, but also

in the exequatur decision of 11 December 2017, and in the decision on third-party opposition against this decision of 20 December 2019.

With regard to Exhibits 2 and 3 (official letters dated 21 August 2019 from KPMG to Kazakhstan on the one hand and to the Stati on the other) submitted by Kazakhstan in its petition pursuant to Article 748 §2 Belgian Judicial Code, which the court of appeal considered relevant because they relate to the quality of the title and new because they date from after the last day of the deadline for filing briefings allotted to Kazakhstan:

The court of appeal now finds that these exhibits have already been submitted to the exequatur court in the context of the third-party opposition proceedings: see numbers 27.3 and 27.4 in the table contained in the

last submissions of the Stati, p. 399, for which the incorrectness of its correspondence to Kazakhstan's Exhibits 13.8 and 11.2 in the exequatur proceedings has not been established.

The exequatur court had taken note in this regard on the official report of the hearing (Exhibit 2.14 of the Stati) in the following terms (freely translated by the court of appeal):

*'Applicant (Kazakhstan) submits a file with new exhibits with a new inventory. Respondents consent to the filing. The court heard the parties concerning these new exhibits, which are thus part of the adversarial debate that took 3 hearings.*

*Applicant will not request a reopening of the debate with regard to these new exhibits.'*

It follows from this that the exhibits that the court of appeal regarded as new and relevant in its decision of 3 December 2019 in the context of the current proceedings, were known to the exequatur court when it took its decision on third-party opposition on 20 December 2019.

After taking cognisance of the exhibits relating to the *'fraud debate', the* exequatur court passed judgement.

The exequatur court ruled in this regard that Kazakhstan indicated 2 types of fraud:

- A first series of fraud cases committed by the Stati with the aim of inflating the cost of the investment for the construction of the LPG Plant;
- A second type of fraud with the aim of increasing their damage suffered by concluding the 'Laren' transaction.

With regard to the first series of fraud cases, the court finds that in the given circumstances it has not been demonstrated that the arbitral tribunal would have taken the investment costs into account to determine the correct commercial value of the LPG Plant.

The court continues (freely translated by the court of appeal): *'In this sense, the Svea Court of Appeal has also considered that 'the alleged false information in the annual reports is not directly related to the decision of the arbitral tribunal on the value of the LPG Plant.'*

and again:

*'In other words, Kazakhstan does not provide evidence of a decisive causal relationship between the fictitious inflation of the 2006 and 2007 financial statements and the amount of damage as reasonably determined by the arbitral tribunal'.*

With regard to the second part derived from the 'Laren' transaction, the court notes that Kazakhstan maintains that the Stati misled the arbitral tribunal.

The court cites in detail what the arbitral tribunal considered with regard to the 'Laren' transaction, and establishes that Kazakhstan in fact wishes to reconsider the decision on the merits of the case, which in its opinion is not up to the exequatur court to decide.

The court concludes that Kazakhstan does not show that the arbitral tribunal was deceived concerning the causes of the 'Laren' transaction, nor does it show that this allegedly fraudulent conduct affected *("affecté')* the outcome of the award.

The exequatur court concludes that it follows from what it set forth that Kazakhstan does not prove that the fraudulent cases invoked had a certain and manifest influence on the outcome of the arbitral award, or, in other words, that they were a *'determining cause'* of such.

It is not up to the court of appeal to rule in attachment cases on the content of the decision of the exequatur court, nor on the time spent on and the manner in which the debate on the fraud issue is conducted.

The decision of the exequatur court is enforceable.

The appeal lodged against this decision has no suspensive effect, nor does the appeal lodged before the Belgian Supreme Court by Kazakhstan.

In the given circumstances and without further consideration of the other arguments in this regard, the court of appeal finds that the Stati have a certain, of a fixed amount and due debt claim according to attachment law standards that can form the basis for a conservatory attachment.

Given the existence of an enforceable title, it does not belong to the court deciding at the level of appeal against a decision regarding measures of conservatory attachment, to call into question the title itself which is final and the decision of the exequatur court having res judicata.

Nor the fact that Kazakhstan now cites other exhibits than it had done before the exequatur court,

nor the nature of these exhibits and of the inferences that Kazakhstan draws from them,

are of such a nature to remove or cast doubt on the semblance of merit of the Stati's debt claim on the basis of the arbitral awards, the exequatur ruling on third-party appeal, in combination with the court decisions that rejected the claims for annulment/review, so that the attachment measures were and continued to be justified.

In this regard, the Stati refer to multiple foreign decisions included in their supporting documents that were rendered after the decision on the basis of Article 748 §2 Belgian Judicial Code of 3 December 2019, and that did not follow Kazakhstan's position on the fraud theory.

The court of appeal finds that where both the Belgian exequatur court and the foreign legal bodies have come to the conclusion after extensive investigation that the arbitral awards contain final decisions whose enforcement can be pursued and that they – with knowledge of the facts – support Kazakhstan's position with regard to the allegedly committed fraud and its influence on the arbitral awards, and on the enforceability thereof, these are elements that additionally reinforce the existence of a certain, of a fixed amount and due debt claim in favour of the Stati against Kazakhstan.

To illustrate the foregoing, reference can be made to the judgement of the Amsterdam Court of Appeal of 14 July 2020 regarding the granting of exequatur, in particular where it is stated:

"3.17 The foregoing means that with regard to the valuation of the LPG installation, no facts or circumstances have become apparent that are so serious that the arbitral awards should not have any legal effect. It has not been established that Stati c.s. deliberately misled the arbitral tribunal with regard to that valuation, nor that the alleged deception had a material influence on the establishment of the arbitral awards".

The accounting fraud allegedly committed by the Stati and Kazakhstan's assertion that the arbitral awards are based on fraudulent practices by the Stati have so far not resulted in the annulment of the arbitral awards, nor in the reform of the exequatur decision of the Belgian court.

They do not outweigh the final decisions proving the Stati's debt claim and rendering a judgement *prima facie*, they do not affect the quality of the Stati's debt claim any more than the previously submitted and new documents and Kazakhstan's argumentation based on these.

This debt claim is clearly defined. It is due and payable since the judgements have been declared enforceable in Belgium.

According to Kazakhstan, the Stati made false statements during the setting-aside proceedings and in the Belgian exequatur proceedings.

Insofar as this is the case – which has not yet been established – the influence of this on the decisions rendered in the setting-aside proceedings or in the exequatur proceedings is uncertain. In any case, it is not for the court of appeal to assess (the legal validity of) these decisions.

With regard to application of the adage *'Fraus omnia corrumpit'.* Insofar as there could be any question of fraud committed by the Stati, to date there has been no evidence whatsoever of a causal link between that fraud and the arbitral decisions on the one hand and the Belgian exequatur decision on the other.

There is therefore no reason whatsoever to decide on the basis of this adage to withdraw the authorisation decision and to lift the attachment.

4.3. <u>The urgency</u>

Conservatory third party attachment can be levied when there is urgency, i.e. when the recovery of the attaching party's debt claim is in serious danger if the conservatory attachment is not levied.

Urgency requires that the subsequent recovery action be at risk.

The burden of proof rests with the attaching party.

In their petition for imposing attachment, the Stati stated and substantiated on the basis of exhibits that they have a title: margin number 2.2.1. of the petition, subsection 4.2.2. of this judgement quoted verbatim.

With regard to urgency, the Stati put forward the following arguments:

*'Urgency.* The conservatory attachment is justified whenever the debtor's financial position is objectively endangered.

Kazakhstan has for the past four years refused to comply with its obligations under the Arbitral Award and the Supplementary Arbitral Award, despite repeated requests by Applicants to comply with its obligations under international law and under the arbitral awards.

The urgency is apparent from the fact that recovery is very difficult and uncertain. The urgency already lies in the fact that, as a foreign debtor, Kazakhstan has only limited assets on Belgian territory, while Applicants have a certain, of a fixed amount and due debt claim for more than USD 500 million, established in final arbitral awards. In addition, any assets that can be found on Belgian territory in principle cannot be attached. It is therefore crucial that Applicants can levy conservatory attachment order on assets – which are difficult to trace – that do *not* fall under this principle of non-attachability.

Finally, the attachments that have already been levied in the Netherlands, Sweden and Luxembourg (see Title 2.3) most likely alarmed the debtor and confirm the need to secure the subsequent enforcement by Applicants as soon as possible in Belgium, by means of conservatory attachment (after the Dutch court authorised the attachment in the hands of The Bank of New York Mellon for the funds held at the Dutch branch, but not for those held at the Belgian branch for reasons of jurisdiction).

It is therefore crucial, with a view to later recovery by the Applicants, that these goods are now made unavailable to Kazakhstan as an attached debtor.'

The attachment judge ruled that this basic condition was fulfilled at the time the petition was filed and the permission to attach was granted.

In the course of the third-party appeal proceedings against the authorisation decision, the 2 arbitral awards were declared enforceable in Belgium.

The court of first instance rightly ruled that it must respect the res judicata of the exequatur decision of 11 December 2017. This means that the urgency can no longer be subject to discussion.

See in this sense: Dirix, E., *Beslag* [Attachment], 2018, 271.

In the meantime, the third-party appeal against the exequatur decision was rejected in an extensively reasoned judgement of 20 December 2019.

In view of the foregoing, Kazakhstan's argument regarding the non-fulfilment of this basic condition should no longer be subject to discussion.

4.4. The object of the attachment

4.4.1. The attachment was imposed on *'all claims and matters relating to the 'Savings Fund' that it (the BNYM) has or will have, must or should owe to (...) (Kazakhstan) including the National Fund of the Republic of Kazakhstan with its registered office in Astana, Kazakhstan'.*

The fact that the garnishee does not have funds of Kazakhstan at its disposal does not mean that the attachment is invalid or must be lifted.

It only means that the attachment has no effect.

4.4.2. The attachment judge has rightly ruled that it is not for it to settle the dispute of the debt of the garnishee with regard to the attachee.

This dispute must be settled by the competent court hearing the case on the merits in application of Article 1456, 2nd paragraph Belgian Judicial Code.

The attaching party cannot assert more rights over the attachee's debt claim than the debtor itself.

If on the date of the attachment the debtor cannot assert any right to payment against the garnishee with regard to the attached goods, the attaching party cannot change this.

It must accept the attachee's debt claim – or the absence thereof – as it arises at the time of the attachment.

When a debt claim, of which a third party is the entitled party, essentially belongs to the attached debtor, this claim can be attached at the expense of the latter, who is the true owner. It is up to the attaching party to provide proof of this.

Simulation disrupts the triangular relationship of a third party attachment. Thus, in such a case, the authorisation of the attachment judge to proceed with an attachment against a debtor can lawfully be used to levy attachment in the hands of a financial institution in order to freeze funds deposited in accounts opened by a legal entity other than the attached debtor.

see: Dirix, E., *Beslag* [Attachment], 2018, margin No. 123, 103;

Georges, F., *La saisie de la monnaie scripturale* [Attachment of bank funds], 2006, 456.

In this case the English court – after an initial ruling of 4 December 2018 on jurisdiction, which was the object of a granted petition for exequatur – ruled in a final judgement of 22 April 2020, the recognition of which is not disputed in Belgium, that Kazakhstan has no claims against the garnishee *'in respect of the cash deposits held by BNYM under the GCA'.*

The English court did not rule on the possibility for Kazakhstan to assert a right to payment against the BNYM under Belgian or Kazakh law. It expressly stated that it only examined whether Kazakhstan had a claim under English law against BNYM in respect of the cash deposits held by BNYM under the GCA.

With regard to the issue of simulation, the English court found that the Stati had not raised these arguments and that it is for the Belgian court to decide whether such arguments can still be put forward.

The English court did not indicate that these arguments were unknown to it. This was not the case since they had been indicated by the Stati as part of the points of contention to be settled (Stati Exhibit 7.26.1, §24).

The English court also referred to this: Exhibit 7.26.1, §24 of the Stati:

"Reference was made to the Belgian law concepts of 'simulation' (*veinzing*) and 'pretence' (*schijnvertegenwoordiging*), and to use of a trust structure in an abusive manner (see Section 11). Considerable reference was made to Kazakh law and in particular to 'the abuse of civil rights' under Kazakh law (see Section 21). It was alleged that the TMA was a sham or mock agreement under Kazakh and/or Belgian and/or English law (Section 27)".

It noted, however, that the Stati did not put forward these arguments (orally): decision of the English court of 4 May 2020, §11, Exhibit 7.31 of the Stati, and that it made its decision as to who BNYM owes the cash within the scope of the GCA on the grounds that there was no fraud, sham, simulation or misrepresentation,

to which the English court added:

'The Stati parties, if they believe that such matters are relevant to the question whether BNYM owed a debt to the RK under English law, could have sought to prove the suggested sham, but they chose not to do so.'

The English court also clarified that in its judgement it did not decide on the object of the disputed conservatory third party attachment. In this regard, it referred to the Stati's position and to the expert report drawn up at their request by Prof. Storme, which is also filed in the context of these proceedings (Stati Exhibits 7.32 and 7.33).

In the contested judgement, the court of first instance *in general* considered that the absence of debt on the part of the garnishee with respect to the attachee *in principle* – making abstraction from the *extremely exceptional* situation of pretence, simulation, piercing the corporate veil – leads to the conclusion that the garnishment has no object. This consideration, formulated in general terms, can be accepted.

4.4.3. The assessment of the existence of simulation

The Stati argue that the court of appeal, as court hearing the case on the merits, must now rule on the question of whether the attached goods only appear to belong to the NBK and whether as a result of simulation – Kazakhstan is the true owner of these goods, so that the Stati are right to claim attachment.

The disputed conservatory attachment was levied on the basis of an authorisation decision issued by the court of first instance.

The garnishee is a Belgian company.

The attachment was authorised and levied on goods located in Belgium.

Kazakhstan argues that the court of appeal has no international jurisdiction to order the contested attachment measure.

The court of appeal rules on attachment law. The jurisdiction of the court of appeal is limited like that of the court of first instance: Its decision does not prejudice the merits of the case. It does not concern the substantive legal relationship between the parties to the proceedings.

The court of appeal assesses the validity and legality of the attachment.

Kazakhstan disputes the international jurisdiction of the court of appeal.

The dispute essentially concerns opposition to a conservatory attachment.

The attachment was authorised in Belgium by the Belgian attachment judge.

The garnishee is a Belgian company established in Belgium.

The place of attachment is Belgium.

The Belgian attachment judge could therefore allow this attachment, and the objection and subsequent appeal can be judged by the Belgian courts.

The NBK states that the court of appeal does not have exclusive jurisdiction to rule on the merits of the case *'such as issues relating to BNYM's debt (including the arguments raised by the Stati's regarding simulation, sham trust and piercing the corporate veil)' (see* p. 52 of the submissions of the NBK).

Article 1395, Paragraph 1, Belgian Judicial Code grants the attachment judge the power to take cognisance of *"all claims relating to protective attachment orders (means of enforcement (...))"* and article 1489 Belgian Judicial Code stipulates that *"only the attachment judge [is] competent to settle disputes about the validity of the protective attachment order proceedings".*

The second paragraph of Article 1489 Belgian Judicial Code stipulates: *"The decision of the attachment judge does not harm the case itself".*

In a judgement of 8 June 1989 (Belgian Supreme Court 8 June 1989, Pas. 1989, 1, p. 1078), the Belgian Supreme Court recalled, in the specific case of garnishment, the limits of the concept *"monitoring protective measures and compulsory enforcement measures",* which, on the one hand, determines the jurisdiction of the attachment judge, and, on the other hand, *"the case itself",* which falls under the jurisdiction of the court hearing the case on the merits.

The Belgian Supreme Court confirmed in clear terms that disputes about the obligations of the garnishee with regard to the attachee relate to the case itself and that the attachment judge is therefore not competent to hear them:

*"[...] it appears from the structure of this provision [Article 1542 Belgian Judicial Code and Article 1489, Paragraph 2, of the Belgian Judicial Code, that the attachment judge only acts to monitor the conservatory measures and measures of compulsory enforcement, that it must not make a decision on the case itself and that, however extensive its jurisdiction may be, it cannot, as a rule, on that basis decide on the existence of the debt claim pursuant to which the conservatory measure or means of enforcement is used, nor on a dispute by the garnishee regarding its debt to the attached debtor."*

For a conservatory third party attachment, Article 1456, Paragraph 2, Belgian Judicial Code expressly provides for a mechanism to refer disputes with regard to the statement of the garnishee and its obligations to the attachee to the court hearing the case on the merits:

*"If the garnishee disputes the debt for which the attaching party wishes to obtain payment, the matter will be brought before the competent court or, as appropriate, referred to it by the attachment judge."*

In accordance with Article 1456, Paragraph 2, Belgian Judicial Code, the court hearing the case on the merits (and not the attachment judge) is authorised to settle any dispute about the guilt of the garnishee, and therefore also to deal with the question of whether there is a legal relationship between the garnishee and the attachee. The question of the legal relationship between BNYM and Kazakhstan relates to the case itself and thus undoubtedly falls within the scope of Article 1456, Paragraph 2, Belgian Judicial Code.

Only when the object of the garnishment is confirmed by an enforceable title, a referral to the court hearing the case on the merits for a dispute about this claim is excluded. This is not the case here.

Neither the English judgement of 4 December 2018 nor the exequatur decision of 22 March 2019 nor the judgement of the English court of 22 April 2020 preclude the assertion that the Belgian attachment judge has jurisdiction to rule on the object of the disputed garnishment:

- The oldest judgement referred to above concerned the jurisdiction of the court hearing the case on the merits, whereby the argument of false pretence and related legal grounds were not examined. The English court assessed the dispute submitted to it under English law. It did not rule on the jurisdiction of the Belgian court with regard to the conservatory attachment and related incidents;
- The exequatur adds nothing substantively to the scope of that judgement;
- The judgement of 22 April 2020 expressly states that it is up to the Belgian court to determine whether arguments such as fraud, sham, simulation or misrepresentation can be put forward in the context of the attachment proceedings: §46 of this judgement.

With regard to the judgement of the attachment judge of the French-language court of first instance in Brussels of 28 June 2019: The attachment judge is of the opinion that it has jurisdiction on the merits pursuant to Article 24 §5 of the Brussels I*bis* Regulation. It refers to the Van Uden judgement and states that the legal instance with jurisdiction to take cognisance of the merits of the case on the basis of a jurisdictional rule of the Brussels I*bis* Regulation is also competent to adjudicate on provisional or conservatory measures (see margin number 29 of this judgement).

It is a fact that the attachment judge states in this judgement that the referral to the English court is not limited to the mere question of the identity of the co-contractor of a branch of the BNYM in London, but also concerns the question of negligence on the part of the BNYM *'in general'*, *'including the arguments of the Stati associates with regard to piercing the corporate veil ('la levée du voile social'), simulation and the abuse of rights, as confirmed by the decision of the High Court of Justice in London of 4 December 2018'* (judgement of 28 June 2019, p. 19, margin number 43).

It must be taken into account that the attachment judge was not aware of the judgement of 22 April 2020, nor of the judgement of the English Court of Appeal of 8 July 2020 (Exhibit 7.58.1. of the Stati) confirming that the English court only ruled on the existence of the legal claim under English law and did not determine the outcome or the

responsibility for *'the finding'* of the ongoing proceedings in Belgium. These are new elements that the court of appeal is currently taking into account.

With regard to the inapplicability of the Brussels I*bis* Regulation to arbitration awards: It does not follow from this that this Regulation does not apply to this dispute that does not concern the arbitral awards *per se* nor the exequatur, but the authorisation granted at the request of the Stati by the Belgian attachment judge in Belgium to impose protective attachment order on a Belgian company as security for a debt claim that is based on an arbitration award, but which does not concern this arbitration award itself.

In this regard, the court of appeal refers insofar as necessary to the Van Uden judgement already mentioned above (ECJ 17 November 1998, C-391/95, Van Uden, 1-7091, Nos. 33, 34 and 37) in which it was decided that conservatory measures claimed in the margins of an ongoing arbitration fall under the Brussels I*bis* Regulation.

In this case the arbitral proceedings have been completed. Thus, arbitration is obviously not the main object of the dispute, since a number of matters referred to are excluded from the scope of the Brussels I*bis* Regulation, insofar as they form the main object of the dispute.

The arbitral awards – and the exequatur with which they are vested – are today a legal fact in the Belgian legal order. On this basis, the Belgian attachment judge, in accordance with Belgian attachment law, pronounced the authorisation decision and authorised the current attachment. This authorisation decision is a civil law decision of a Belgian court. It is not a decision on arbitration, but merely a decision on whether conservatory attachment can be levied on certain assets of Kazakhstan under Belgian law. Third-party opposition was initiated by Kazakhstan – a completely new civil law procedure – in which the following attachment law discussion is key: the validity and object of this attachment, an attachment with which the Stati intend to secure their claim for damage compensation.

With regard to the *actio pauliana*: No such claim was brought by the Stati.

The Stati have imposed conservatory third party attachment in Belgium with special authorisation from the attachment judge in accordance with Article 1412*quinquies* Belgian Judicial Code, without relying on a Paulian (or analogous) claim. Nevertheless, Kazakhstan wrongly argues that the Stati invoke the *actio pauliana.*

In their 4th argument (Title 8) the Stati invoke the attachment law aspects of pretence/simulation, piercing the corporate veil, abuse of rights, etc. to demonstrate that the current attachment has an object (but not based on the *actio pauliana).* These arguments are related to enforcement and as such fall within the scope of the Brussels I*bis* Regulation.

The case law invoked in this regard by the NBK and Kazakhstan concerns other legal concepts and other factual situations and legal issues that are neither comparable nor fit within the context of the current dispute regarding conservatory attachment. There is therefore no room for analogical reasoning.

The attachment judge assesses the validity and lawfulness of conservatory and executive measures as well as the incidents that may arise as a result of such disputes.

This includes the discussion about the object of the attachment when it concerns the question whether the seized goods that, *prima facie* belonging to a third party, do not essentially belong to the property of the attachee, so that they are subject to conservatory attachment against the latter.

In the context of such a discussion, the attachment judge can assess the simulation and pretence arguments invoked.

Cf. Belgian Supreme Court 11 May 1995, Pas. 1995, 487:

'(...)

Considering that, according to Article 1395 of the Belgian Judicial Code, all claims concerning conservatory attachments and means of enforcement are brought before the attachment judge;

That pursuant to Article 1489 of the same code, only the attachment judge is competent to settle disputes about the validity of the conservatory attachment proceedings;

It follows from these provisions that the jurisdiction of the attachment judge to settle disputes relating to protective attachment orders is so extensive that any exception thereto must be expressly determined and strictly understood;

That Article 1489, second paragraph, thus limits the jurisdiction of a court by prohibiting it from ruling on the substance of the dispute before it;

That, however, since that court has to take cognisance of the interim disputes of attachment proceedings, which must be settled in order to rule on the claim brought before it, the rights relied on by the parties must be subject to a preliminary and limited examination, and consequently it must take cognisance of the main dispute in a summary manner, without, however, binding the court hearing the case on the merits;

That, therefore, although the attachment can, as a rule, only be levied against the debtor and not against third parties, this is not the case with simulation; It follows from this that, if the creditor proves, as in this case, that the actual holder of the account opened in the name of another legal person is its debtor, it can levy conservatory attachment on that account against its debtor;

That in this case it is up to the attachment judge to verify, within the limits laid down by the general rules of law whether the conditions regarding the authorisation for or maintaining of conservatory attachment have been met;

Consequently, considering that the court of appeal, by holding that the attachment judge had no jurisdiction to hear an interim dispute in the proceedings, which had been duly submitted to it, and by refusing, within the limits of its jurisdiction and without binding the court hearing the case on the merits, to settle that dispute at issue, does 'not legally justify' its decision. (...)'

Belgian Supreme Court 4 September 2020, C.20.0017.N, juridat.be:

'(...)
3. An executory garnishment can only be levied against the debtor and not against a third party, except in the case of simulation. If the creditor thus demonstrates that the debt claim belongs to the third party only as a pretence, and its debtor is the true beneficiary, then the creditor is entitled to levy attachment on it, without needing an enforceable title against the merely sham beneficiary of the debt claim.

4. The attachment judge that, pursuant to Article 1395 first paragraph of the Belgian Judicial Code, hears claims relating to the means of enforcement on the debtor's property, assesses the legality and validity of the enforcement, but is not competent to rule on other enforcement disputes. Except in cases expressly provided for by law, it cannot rule on the matter itself.

5. Pursuant to Article 1514, first paragraph, Belgian Judicial Code, the person claiming to be the owner of all or part of the attached objects can object to the sale before the attachment judge, which decides on the ownership dispute.

In accordance with Article 1613, first paragraph, of the Belgian Judicial Code, an action can be brought before the attachment judge to remove all or part of the immovable property from the attachment, against the attached party, against the attaching party, against the first registered creditor and, if the latter is prosecuting party, against the creditor whose registration immediately follows.

6. It follows from the foregoing that, in the context of an executory attachment, it is up to the attachment judge, as court hearing the case on the merits, to rule on interim disputes regarding the scope of the creditor's right of recourse that are inextricably linked to the enforcement.

Thus, in the event of an executory attachment, the attachment judge can rule as court hearing the case on the merits about the existence of a simulation regarding ownership of the attached goods.

The question is whether in this case the court of appeal is authorised to rule in an enforcement dispute on the existence of a simulation affecting the object of the attachment.

With regard to the location of the attachment: It is located in Belgium.

After all, the attachment was made on the basis of and in full accordance with the authorisation decision allowing attachment regarding the claims and matters relating to the *'Savings Fund'* in possession of the BNYM, with its registered office in Brussels, including the *'National Fund of the Republic of Kazakhstan, with its registered office in Astana, Kazakhstan'.*

With regard to the existence of simulation, it is certain that the dispute is inextricably linked to the contested conservatory attachment, since it is argued that goods were attached that – as is apparent from the (final) English judgement of 22 April 2020 – do not belong to the attachee and except in the event that simulation is demonstrated and the attached goods on that ground must be regarded as the property of the attachee, the attachment of goods that do not belong to the attached person must be lifted.

The Stati originally invoked simulation before the court hearing the case on the merits, but – as already mentioned above – they did not set forth their argument orally in this regard, although it was developed in writing.

It is for this reason that the English court assumed – *but did not judge* – that there was no fraud, sham, simulation or misrepresentation (see margin number 46 of the English judgement of 22 April 2020).

The English court rightly ruled in this regard that the Belgian court must then determine whether – taking into account the *'res judicata'* – such arguments can still be invoked in the context of the attachment proceedings.

In the course of the attachment proceedings, the parties conducted proceedings on the merits of a dispute.

The dispute about the existence of simulation could be conducted in the context of these proceedings. This is certain now that the English court has ruled to this effect in a final court decision:

'However, at trial the Stati Parties did not seek to argue that the English law question which has been referred to this court, that is whether BNYM owes the debt in question to the Republic of Kazakhstan, requires any issues such as a sham trust to be addressed. Nor did they seek to establish the factual basis for such issues. They relied upon two arguments in support of their case that BNYM owes its debt to the Republic, namely, the law of agency and the law of trusts. They could have submitted, if they had wished, that in English law questions such as a sham trust were relevant to the question whether BNYM owed a debt to the Republic or that the foreign law on such topics was required to be assessed pursuant to the English law of conflicts but they chose not to do so. No such case was advanced

either on the facts or in law. I cannot say why such a case was not advanced. The fact is that no such case was advanced either in fact or in law (...).

The second argument that the Stati Parties want to put forward in Belgium is that BNYM owes the debt to the RK on the basis of a sham trust or even fraud; see Point 21 of their summary submissions. Although the NBK and the RK (and myself) had expected these arguments to be presented in this court, they were not advanced.'

The fact that the party raising this argument in separate proceedings on the merits before a court that expressly states that it could have ruled in this regard, no longer insists on this during the course of those proceedings for whatever reason, as a result of which the court does not rule on this, does not allow us to conclude that this discussion can no longer be conducted.

The *res judicata* attached to the English judgement of 22 April 2020 does not preclude this analysis.

After all, the question of the existence of simulation was not assessed by the English court.

By failing to develop this argument orally, the Stati have not definitively renounced their right to invoke it in the context of other proceedings: here the current proceedings before the court of appeal.

With regard to the fact that simulation is invoked in the context of a conservatory attachment: This does not lead to an expansion of the jurisdiction of the attachment judge. It judges an incident that affects the conservatory attachment, but its judgement does not extend beyond that of a preliminary and limited investigation (Belgian Supreme Court 11 May 1995, RW 1995-96, 745-746).

Neither the judgement of the Belgian Supreme Court of 4 September 2020, nor the references to passages in the handbook 'Beslag' [Attachment] by E. Dirix (and K. Broeckx) (APR, 2010 and 2018), nor the judgement of the French-language attachment judge of 28 June 2019 already referred to, result in a different decision now that they are part of proceedings of executory attachment.

Contrary to what the Stati claim, the court of appeal does not see any equality of status concerning the jurisdiction of the attachment judge in the case of assessing simulation in the case of conservatory and executory attachment in the cited case law of the Belgian Supreme Court.

Neither the nature of the third-party dispute nor procedural-economic reasons allow a decision to be made to this end without a legal basis.

4.4.4. Assessment under Belgian law

Interim disputes that are based on a conservatory attachment measure that is permitted and made in Belgium are assessed by the Belgian attachment judge which judges according to Belgian law.

Cf. in this sense: Dirix, E., *Beslag* [Attachment], 2018, margin No. 103, 85-86:

"The internal jurisdiction rules also have an international effect. Since enforcement is closely linked to the exercise of state authority, the principle of territoriality applies in this regard. This means that, in principle, only the Belgian courts have jurisdiction to order enforcement measures that have effect on Belgian territory and that Belgian law applies to any enforcement that takes place in Belgium. In a European context, however, the exclusive jurisdiction of the Belgian courts must be nuanced (see also No. 265 below) [concerning the specific case of Article 35 Brussels I*bis*]. Only the Belgian courts have jurisdiction to rule on disputes arising from enforcement in Belgium (see Belgian Supreme Court 26 September 2008, RW 2009-10, 237 and JLMB 2009, 840, note L. Frankignoul. See also Art. 24, 5° Brussels I*bis* Vo and further R. Fransis, "*Het territorialiteitsbeginsel in het executierecht*" [The territoriality principle in enforcement law], RW 2009-10, 219-227). All disputes that may arise (e.g., ability to attach certain goods) are furthermore exclusively governed by Belgian law (G. Van Hecke and K. Lenaerts, "Internationaal 'privaatrecht'" [International 'private law'] in APR, 382, No. 842).

The fact that the English court ruled that according to *English (contract) law* Kazakhstan has no debt claim under the GCA with regard to BNYM, does not prevent that it can still be established under Belgian attachment law that the current attachment is effective, due to the existence of simulation and piercing the corporate veil. These Belgian attachment arguments are not affected by the findings in Part 7 of the Judgement.

3.4.5. Simulation on the part of Kazakhstan?

Simulation occurs when it is established that the act performed is based on the sham created by the parties that performed the simulated acts.

Once proof of the simulation has been provided – evidence that can be furnished by any means, including presumptions – the attaching party can ignore the simulated act and regard it as non-existent. To this end, it is not required that it demonstrates fraud on the part of the parties engaging in the simulation.

Cf. Van Aerde, C., *Doorbraak van rechtspersoonlijkheid bij beslag op zeeschepen* [Piercing the corporate veil in the seizure of seagoing vessels], IHT 2019, 234;

Van de Spye, *Veinzing en tegenbrief: van rechtsgeldige rechtsfiguur tot fraudemechanisme* [False pretence and counter letter: From valid legal concept to fraud mechanism], T. Verz. 2010, 277.

Judging *prima facie* in the context of a dispute arising from a protective attachment order with great reticence, and after a preliminary and limited investigation with a view to resolving this dispute, which concerns opposition to a conservatory attachment measure,

the court of appeal finds that the specific circumstances of the case contain sufficient indications of the existence of simulation on the basis of which it must be decided that the attachment was indeed levied on the property of the attachee.

The clear attempts by Kazakhstan and the NBK to withhold/shield assets from the right of recourse of the creditors in the context of the judgement rendered against Kazakhstan, is apparent from the internal correspondence of the BNYM: Exhibits 7.34.1 to 7.40.1 of the Stati, with it being noteworthy that the BNYM feared being involved in these attempts to extract assets from the creditors' right of recourse.

Kazakhstan's involvement in these attempts to escape attachment measures is apparent from the cross-examination of the Vice-Governor of the NBK in the context of the English proceedings 'Part 7'; See Kazakhstan Exhibit 3.40.

With regard to the NFRK (National Fund of the Republic of Kazakhstan) that was listed in the authorisation decision of 11 October 2017 and the corresponding attachment as one of the entities forming part of the attachee, the court of appeal establishes the following:

The NFRK (a fund) was established by Presidential Decree of 23 August 2000, No. 402.

This fund – and the assets associated with it – is the exclusive property of Kazakhstan.

The finding that the NFRK is wholly owned by Kazakhstan follows in the first place from Kazakh law, but was also confirmed by (Kazakh) experts.

KAZAKH LAW: Article 21 of the Kazakh Budget Code defines the NFRK as state property (Exhibit 7.2 Kazakhstan): *"1. The National Fund of the Republic of Kazakhstan represents the assets of the state, in the form of financial assets concentrated on the accounts of the Government of the Republic of Kazakhstan at the National Bank of the Republic of Kazakhstan (...)."*

See also the expert report of Kazakh experts Shaikenov and Kozik (Exhibit 4 of the BNYM, §12, §20, §22) which shows that the NFRK is owned by Kazakhstan.

The TMA (Trust Management Agreement) and the GCA (Global Custody Agreement) have not changed this.

See Article 9.1. of the GCA (Recital A), (Exhibit 1 of the BNYM): 'The client performs certain trust management services in relation to the certain assets of the Republic of Kazakhstan (the "National Fund") in accordance with the Trust Management Agreement.'

See also the provisions of the TMA, in particular Article 7.1. stating that the government is the beneficiary.

Moreover, upon termination of the TMA, the assets of the NFRK will return to Kazakhstan, as confirmed by the Vice-Governor in the context of the 'Part 7' proceedings (Stati Exhibit 7.27.1).

See in this regard the expert reports of Professor Maggs and legal scholar Didenko (Stati Exhibits 10.11 and 10.12).

See also the English decision of 22 April 2020 in the 'Part 7' proceedings: Exhibit 7.26.1, §105 and 106, and §9: *'There is consensus that the assets in the National Fund "ultimately belong" to the Republic of Kazakhstan'.*

The fact that in this case it concerns assets (securities and funds) that have been deposited in a bank account at BNYM by NBK, does not affect this.

A debt claim can also only appear to belong to a party when the debtor is the actual rightful claimant.

First of all, Kazakhstan has placed the assets "under management" with NBK, but without transferring ownership. NBK subsequently deposited these assets into an account with BNYM and is the "formal account holder" and "formal creditor". NBK may be the "formal creditor" contractually, but the funds in BNYM's account belong exclusively to Kazakhstan and are the sole property of Kazakhstan.

Simulation disrupts the triangular relationship of garnishment. In such a case, the authorisation of the attachment judge to levy attachment against a debtor can lawfully be used to levy attachment in the hands of a bank in order to freeze funds deposited in accounts opened by a legal entity other than the attached debtor.

This is clearly a case of created appearances, which the Stati rightly contest by levying attachment against the real holder of the bank accounts/funds.

Kazakhstan must be regarded the real creditor of BNYM. The TMA by which Kazakhstan has placed its assets in alleged independent trust management with NBK, and by which Kazakhstan *supposedly* would lose all of its rights and control over these assets on paper, is a mere pretence to the outside world and third parties.

In support of its judgement, the court of appeal refers to the following elements, which are proven on the basis of the exhibits (the TMA and GCA agreements, the English judgement of 22 April 2020, Exhibits 7.34.1 to 7.40.1 of the Stati.

- Kazakhstan is the founder of the NFRK; the President determines how the NFRK is used and the NFRK can be abolished in turn by presidential decree;
- The NFRK does not have a separate legal personality and always belongs to the assets of Kazakhstan;
- Kazakhstan is the exclusive owner of the NFRK's assets (NBK has no ownership rights in the NFRK);
- Kazakhstan retains control and "autocratic power" over the NFRK, NBK and TMA.;
- Kazakhstan is the (sole) beneficiary of the TMA and the GCA;
- The President – who is not a contracting party to the TMA – can terminate the TMA at any time (unilaterally), whereby NBK immediately loses all its rights arising from the TMA;
- NBK, together with Kazakhstan, tried to remove the assets of the NFRK at BNYM from Belgium and then have them purchased by NBK in its own name.
- Kazakhstan is responsible for the debts of NBK: the goods placed with BNYM through a contract (GCA) in the name of NBK as "trust manager" of Kazakhstan, in reality belong to Kazakhstan.

With regard to the absence of a *'counter letter'*: the existence of a document is not a requirement to decide on simulation. In this context, a document is an element of evidence, which – in view of the many similar indications of simulation – is not required here to prove the presence of a sham.

With regard to the English AIG judgement (Exhibit 3.22 of Kazakhstan), the court of appeal recalls that on the basis of the territoriality principle, this is assessed under Belgian law, that the Stati were not parties to the aforementioned dispute, that the arguments of the parties differ at least partly and that the court of appeal is now ruling in the context of a different dispute on the basis of the specific circumstances of the case and of the factual and procedural antecedents that are distinct from those in the AIG proceedings.

The fact that the Dutch court, in a judgement of 23 January 2018, decided to lift the garnishment on the basis of the AIG judgement is not binding on the court of appeal, nor is the English court in the context of the 'Part 8' proceedings, which Kazakhstan has not disputed: quite the contrary.

From the foregoing, and without further examining the argumentation based on piercing the corporate veil, since this examination cannot lead to a different result, it follows that Kazakhstan must be regarded as the debtor of the Stati and as the real creditor of the BNYM, whose assets are the object of the contested conservatory attachment.

4.5. With regard to enforcement immunity

4.5.1. In its second argument, Kazakhstan explains that the attached assets are owned by a central bank and that they are therefore immune from enforcement.

It was already decided above that the assets on which attachment was levied at the request of the Stati, in accordance with Article 1412*quinquies* Belgian Judicial Code, against Kazakhstan – and not NBK – on the basis of the authorisation decision of 11 October 2017, as a result of the proven simulation must be regarded here as belonging to Kazakhstan.

For this reason, the investigation of the incapacity for attachment of the attached goods, assuming that they belong to a central bank, is not useful.

The court of appeal therefore does not address this.

4.5.2. Enforcement immunity with regard to the goods of the NFRK Savings Fund on which attachment was levied against Kazakhstan?

The attachment was made on the basis of an authorisation decision granted at the request of the Stati, who based their petition on Article 1412*quinquies* Belgian Judicial Code.

Article 1412*quinquies* Belgian Judicial Code reads as follows:

*'§1.*
*Subject to the application of mandatory supranational and international provisions, the property of a foreign power located in the territory of the Kingdom, including bank assets held or managed there by that foreign power, in particular in the exercise of the duties of diplomatic missions of the foreign power or its consular officers, its special missions, its representations to international organisations or delegations to organs of international organisations or to international conferences, are not subject to attachment.*

§2
*By way of derogation from section 1, a creditor who has an enforceable order or certified or private documents in support of the attachment, as the case may be, can request authorisation in a petition to the attachment judge to attach the properties of the foreign power specified in Section 1 if it demonstrates that the following conditions are met:*

*1° The foreign power has expressly and specifically agreed to the attachment of that property;*

*2° The foreign power has reserved or designated those properties for the satisfaction of the claim that is the subject of the enforceable order or the certified or private documents which, as the case may be, form the basis of the attachment;*

*3° It has been established that those properties are in particular used or intended for use by the foreign power for purposes other than non-commercial government purposes and are located on the territory of the Kingdom, on the understanding that only properties can be attached relating to the entity against which the enforceable order or the certified or private documents supporting the attachment, as the case may be, is directed.*

§3
*The immunity referred to in Section 1 and the exceptions to that immunity referred to in Section 2 also apply to the property referred to in those paragraphs if they are not owned by a foreign power itself, but by a subregion of that foreign power, even if it does not have international legal personality, by a division of that foreign power within the meaning of Article 1412*ter*, § 3, second paragraph, or of a territorially decentralised administration or any other political division of that foreign power.*

*The immunity referred to in Section 1 and the exceptions to that immunity referred to in Section 2 also apply to the property referred to in those paragraphs if they are not owned by a foreign power, but by a public supranational or international organisation that is using or intends to use it for purposes analogous to non-commercial government purposes.'*

Kazakhstan starts from Article 19 c) of the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by the General Assembly of the United Nations on 2 December 2004, hereinafter also referred to as 'the UN Convention', and states that the conditions of the aforementioned article, which reads as follows, are not met:

*'Properties of a State shall not be subject to enforcement measures such as attachment, garnishment or executory attachment in connection with a proceeding before a court of another State, unless and to the extent that:*

*(...)*

*c) it is determined that the property is in particular used or intended for use by the State for other than non-commercial purposes and is located in the territory of the State of the forum, it being understood that enforcement measures may only be taken against property related to the entity in question.'*

It is a fact that the exception provisions of article 1412*quinquies*, §2, 3° Belgian Judicial Code and Article 19 c) of the UN Convention are similar in substance.

Given the fact that Article 19 c) of the UN Convention has not yet entered into force, and that this provision corresponds in substance to Article 1412*quinquies*, §2, 3° Belgian Judicial Code, the latter provision will be taken as the basis for the further assessment of the dispute regarding immunity in respect of the assets of the NFRK Savings Fund.

According to Kazakhstan, the Stati fail to prove the (intended) use for other than non-commercial purposes of the attached goods.

In support of its position, Kazakhstan refers, among other things, to the recent judgement of the Dutch Supreme Court of 18 December 2020 (Exhibit 12.11 of Kazakhstan).

The principle of enforcement immunity enjoyed by a foreign power in Belgium is not absolute.

The current tendency is for the principle of immunity to be interpreted less absolutely, taking into account Article 6 ECHR, which – as author Dirix rightly states – encompasses the right to enforcement and on the basis of which Belgian case law, in particular also in judgements of the Belgian Supreme Court that led to the editing of consenting comments in legal doctrine, held that the question of proportionality requires that in each case *'in light of the particular circumstances of the case'* the principle of immunity must be assessed against the fundamental right of Article 6 ECHR.

See in this sense and in this regard:

Belgian Supreme Court 21 December 2009, R.W. 690-692;

Dirix, E. *Beslag* [Attachment], 2018, 167, margin No. 207.

The intended use of the goods is key. Attachment of goods of foreign powers that are *'affected by private law'* (Dirix, E., *Beslag* [Attachment], 2018, 167, margin No. 207) are not excluded from attachment measures.

The question of the private law allocation of attached property of a foreign power is assessed on the basis of all the specific circumstances of the case.

On the basis of the exception contained in Article 1412*quinquies* §2, 3°, the principle of enforcement immunity does not apply if the following three conditions are cumulatively fulfilled:

i. The assets are used, or are intended for use, by the foreign power for purposes other than non-commercial government purposes,
ii. The assets are located on the territory of the (Belgian) Kingdom,
iii. The assets are related to the entity against which an enforceable order, or certified or private documents is addressed.

As stated above, the attached goods are located in Belgium. Indeed, the assets in cash and securities accounts relating to the NFRK that are the object of the attachment are located in a London branch of the BNYM which does not have a separate legal personality.

It must therefore be assumed that the third party attachment was levied at the registered office of the BNYM in Belgium.

Cf. Dirix, E., *Beslag* [Attachment], 2018, 421, margin No. 623.

With regard to the condition that the assets are related to the entity against which an enforceable order or certified or private documents is addressed, it is established that:

- Kazakhstan is the debtor of the Stati;
- the NFRK is owned by Kazakhstan (see above and see also the submissions of the BNYM of 15 February 2021, p. 7, margin No. 8 and p. 10-12, margin nos. 15 and 16);
- the sham situation has been demonstrated (see above),

so that this condition is also met.

With regard to the (intended) use for other than non-commercial government purposes, as stated above, the purpose or intended use of the attached goods is key.

The starting point for the assessment is the specific, actual, current use of the funds. In this context, this is the most reasonable and practicable criterion for distinguishing goods with a public, *'sovereign'* or *'other than non-commercial purpose'* so that this condition can be meaningfully understood and applied.

After all, in the long term, a State will always aim for sovereign purposes of public interest.

By understanding and applying this condition in this way, there is no question of an *'additional criterion'* being added as Kazakhstan wrongly suggests (see the last submissions of Kazakhstan, p.380), but of the specific application of the purpose criterion taking into account the context, which is completely different from other application cases as cited by Kazakhstan.

With regard to the reference to case law in the Netherlands, in particular the judgement of 7 May 2019, rescinded in a judgement of the Dutch Supreme Court of 18 December 2020: In view of the fact that the judgement of 7 May 2019 was rescinded and that the judgement of 18 December 2020 is not binding on this court of appeal, no useful contribution can be made from this in resolving this point of dispute.

The same applies to the rulings in Sweden, in particular the judgement of the Svea Court of Appeal of 17 June 2020, which moreover has been met with justified criticism: Exhibit 10.31 and note 787 in the last submissions of the Stati, freely translated as follows:

"The SVEA Court of Appeal reasoned with very little analysis that "central bank property held under a national fund" is not "fundamentally different from the regular operations of a central bank". It cited my work in support, but did not refer to my conclusion that the purposes and functions of sovereign wealth funds differ from those of central banks, and that protecting sovereign wealth funds through central bank immunity is an unresolved issue. The SVEA Court of Appeal also cited AM Capital Partners, Inc & Anr v. Kazakhstan. However, the AIG case concluded that under the UK Immunity Act, all central bank property is categorically protected, regardless of the "capacity" or the purpose "for which the property is held". In other words, the AIG court of appeal took a "comprehensive" or categorical approach to central bank asset immunity. The AIG-Court of Appeal decision did not depend on whether the assets were used for a commercial purpose or in the exercise of sovereign authority or within the scope of traditional central banking functions. To argue that any use of assets designed to maximize investment returns is sovereign and non-commercial because the sovereign's budget "increases" is much like saying that all central bank property is categorically protected because every investment strategy is designed to maximize returns. The AIG opinion grants categorical immunity to central bank assets under the UK Sovereign Immunity Act. The opinion is therefore of little help in determining how to apply a functional approach under customary international law and the UN Convention".

Moreover, it is clear from the decisions and legal contributions to which the parties reciprocally refer, sometimes approving and quoting in support of their position, and sometimes disproving, that there is no uniformity at (inter)national level with regard to the concrete interpretation given to this condition and that it is therefore up to this court of appeal to decide how this condition should be applied here, taking into account all the concrete circumstances of the case and where it is appropriate, to emphasise that the

attachment currently contested was not imposed on a central bank, so that it is not necessary to examine whether this condition has been met from that point of view.

In this case the Savings Fund of the NFRK on which the contested attachment was imposed – to be distinguished from part *'Stabilisation portfolio'* of the NFRK as evidenced by Presidential Decree No. 385 of 8 December 2016, Exhibit 10.10 of the Stati – has as goal *'increasing the long-term profitability of the assets'* (see Exhibit 10.3 of the Stati, p.2), or in other words to *'make money by investing it'*, thus a purpose other than a non-commercial one.

In other words, it is not about the Savings Fund having a *'mere connection'* (see the last submissions of Kazakhstan, p. 378) with an other-than non-commercial purpose.

In accordance with Presidential Decree No. 385, par. 5.3 (Exhibit 10.10 of the Stati), the main objective of the Savings Fund is to accumulate and maintain funds through the sale of non-renewable energy for future generations in order to guarantee long-term returns with an appropriate level of risk.

This goal is *'not of a non-commercial nature'*: The assets of the Savings Fund are invested solely with a view to maximising long-term returns.

Pure investments do not fall under the protection of state immunity.

This is a commercial purpose, which meets the condition of (intended) use for other than non-commercial purposes.

Conclusion: The appeal is unfounded on this point.

5. **With regard to the release of the blocked assets by the BNYM**

The BNYM requests a period of 28 days to release the assets blocked as a result of the attachment.

In support of its claim, it refers to the English judgements of 22 April and 4 May 2020 (its Exhibits 23 and 24).

In the judgement of 22 April 2020 (margin No. 130), the English court ruled as follows in this regard:

"In the circumstances where BNYM is willing to pay the debt to the [National Bank of Kazakhstan] and when it is free to do so, BNYM (whose conduct in this case was not criticised by the [National Bank of Kazakhstan] or the Republic of [Kazakhstan]) must be given a reasonable period of time to pay after the Belgian court has made its decision".

In the decision of 4 May 2020, the English court set the time limit for release at 28 days (margin No. 6 of this decision).

The court of appeal finds that the parties do not dispute this point.

The dispute as it is presented here concerns a conservatory attachment measure.

The opposition lodged against the conservatory attachment following the conversion of the conservatory attachment into executory attachment by writ of 12 June 2018 is still the object of proceedings to have a default judgement set aside before the attachment judge of the French-language court of first instance in Brussels.

The final decision in the context of these proceedings must be awaited before proceeding with release of the funds.

For this reason, the BNYM's request is premature.

6. **With regard to the claim for postponement of the proceedings**

Above (subsection 3.2.2. of this judgement), the court of appeal already considered that Kazakhstan's suggestion to postpone the proceedings should not be accepted.

Kazakhstan formulates this requirement most subsidiarily as *'should this Court of Appeal reject all the foregoing arguments'* (p. 459 of the last submissions of Kazakhstan).

The Stati rightly point out that this question is strange since if the last ground (Kazakhstan's ninth ground of appeal concerns the answer to the petition for interpretation by the Stati and the third-party appeal) requests that the '*current protective attachment order proceedings be placed on the General Docket*' if all the previous arguments were rejected, the question arises of what use this sending to the General Docket can still be since all Kazakhstan's arguments have been adjudicated.

Meeting Kazakhstan's requests for placing on the General Docket, to postpone proceedings or to postpone the hearings, do not contribute to the proper administration of justice as Kazakhstan wrongly claims.

This would only cause unnecessary delay since:

- the proceedings on appeal and before the Belgian Supreme Court to which Kazakhstan refers do not have suspensive effect,
- it is not appropriate for the court of appeal to anticipate the outcome of those proceedings in the context of these proceedings,
- and since the Stati have a certain, definitive and payable debt claim that they enjoy based on a valid enforceable order to which the court of appeal, for settling a dispute of conservatory attachment, should not adjudicate here, which debt claim in respect the Stati, in the given circumstances,

legitimately fear cannot be recovered if the currently contested measures would not have been taken.

This claim is unfounded.

7. **With regard to the court costs**

Having regard to the foregoing,

having regard to the fact that no claims are made by the other parties against BNYM and that this party is not demanding payment of procedural indemnity in its favour,

having regard to the fact that the Stati are not appealing the decision on court costs rendered by the court of first instance,

having regard to the exceptional scope and complexity of the matter, which by its nature cannot be valued in monetary terms, a scope and complexity that cannot be attributed to a party, but are the result of the nature and seriousness of the dispute,

the procedural indemnity on appeal to be paid to the Stati by the unsuccessful parties, Kazakhstan and NBK, is set at EUR 12,000 as claimed by this party.

**FOR THESE REASONS**

**THE COURT OF APPEAL,**

The court of appeal passes judgement in a defended action.

The proceedings took place in accordance with the Belgian Act of 15 June 1935 on the use of language in court cases.

Joins the cases known under General Docket numbers 2018 AR 1209 and 2018 AR 1214;

Dismisses the claim for interpretation of the contested decision made by the Stati as unfounded;

Declares the claims of the Stati admissible and well-founded as follows:

Establishes simulation on the part of Kazakhstan;

Establishes on the basis of a *prima facie* assessment by the court of appeal that the attached goods belong to Kazakhstan on the basis of simulation;

Declares the appeals from Kazakhstan and the NBK admissible, but unfounded;

Regarding this, dismisses the claims of Kazakhstan and the NBK;

Establishes that BNYM's petition to grant a reasonable period for the release of the funds blocked pursuant to the contested protective attachment order *hic et nunc* is premature;

Orders Kazakhstan and the NBK to pay the appeal court costs, as follows:

on the part of Kazakhstan:

- 210 euros, register duty appeal;

on the part of NBK:

- 210 euros, register duty appeal;

on the part of the Stati:

- 12,000 euros, judicial indemnity;

on the part of the BNYM:

- nil.

Thus pronounced and handed down in a public civil session of **Division 17** of the court of appeal in Brussels on **29 June 2021.**

where present and holding session were:

D. DEGREEF,
assisted by C. WILLAUMEZ,

Appeals judge,
Registrar,

C. WILLAUMEZ

D. DEGREEF

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FOR A TRUE TRANSLATION FROM DUTCH INTO ENGLISH – *NE VARIETUR*

**Evelyne Desmet**
Identification number: VTI 17296110
Sworn translator

Done in Wingene, on 08 July 2021

**Evelyne Desmet**
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VOOR EENSLUIDENDE VERTALING *NE VARIETUR* VAN HET NEDERLANDS NAAR HET ENGELS

**Evelyne Desmet**
Identificatienummer: VTI 17296110
Beëdigd vertaler

Gedaan te Wingene, op 08 juli 2021