

# Belgian appeal court upholds Kazakh asset freeze

Jack Ballantyne

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*National Bank of Kazakhstan (Credit: Shutterstock/Zhanna Briede)*

The Brussels Court of Appeal has upheld an attachment over US\$542 million worth of Kazakh state assets obtained by Moldovan investors seeking to enforce an Energy Charter Treaty award.

On 29 June, the Belgian court dismissed appeals by Kazakhstan and its National Bank, finding on a *prima facie* basis that the state was the true owner of the frozen funds held at the Bank of New York Mellon. It also found indications the state had engaged in “simulation” to try to put the assets beyond the reach of creditors.

A certified English translation of the Belgian decision is available [here](#).

Before the Belgian court, NautaDutilh is acting for Moldovan award creditors Anatolie and Gabriel Stati and their companies, while Kazakhstan is using Liedekerke Wolters Waelbroeck Kirkpatrick. Loyens & Loeff represents the National Bank of Kazakhstan, while BNY Mellon is using Linklaters.

The ruling came days after a Dutch court rejected a US\$118 million claim brought by the National Bank against the Statis for losses allegedly resulting from their efforts to attach assets in the Netherlands.

The Stasis obtained their award in 2013 after a tribunal chaired by **Karl-Heinz Böckstiegel** held Kazakhstan liable under the ECT for a campaign of state harassment culminating in the termination of their local oil and gas contracts. Worth almost US\$508 million when it was issued, the award is now thought to be worth US\$542 million.

Kazakhstan has opposed enforcement of the award in several jurisdictions based on allegations that the Stasis committed fraud during the arbitration by claiming, among other things, fictitious costs for the construction of a liquefied petroleum gas plant. The Stasis deny the allegations.

The English Commercial Court [found](#) in 2017 that Kazakhstan had established a “sufficient prima facie case” that the award was obtained through fraud and that the matter should be tried. However, the Stasis were later allowed to discontinue enforcement in that jurisdiction before a trial was held.

The award has been [upheld](#) by the Swedish courts at the seat of arbitration and recognised by courts in the US, Belgium, the Netherlands, Italy and Luxembourg.

The Stasis obtained attachment orders from the Dutch and Belgian courts in 2017 and served them on BNY Mellon. Since the Belgian order did not specify the amount to be frozen, BNY Mellon took the view that it was required under Belgian law to freeze the entirety of the US\$22.6 billion in assets it holds on behalf of the National Bank of Kazakhstan.

The frozen assets form part of the National Fund of Kazakhstan, a sovereign wealth fund, and are managed by the National Bank on trust for the state as beneficiary and held by BNY Mellon under a global custody agreement.

In 2018, the Brussels Court of First Instance refused to lift the attachment order entirely but [limited](#) its size to the full amount of the award. The Belgian court then sought a ruling from the English courts on the interpretation of the custody agreement, which was governed by English law.

Last year, the High Court in London [found](#) that BNY Mellon has no obligation to pay any debt due under the global custody agreement to Kazakhstan, which debt was owed solely to the central bank. It left further determinations over the release of assets to the Belgian courts. The English Court of Appeal refused the parties permission to appeal that ruling.

#### **Simulation and pretence**

In the latest decision, the Brussels appeal court found on a prima facie basis there were sufficient indications of simulation by Kazakhstan in order to conceal that it was the real holder of the funds held by BNY Mellon.

It said correspondence produced in the English courts showed that Kazakhstan and the National Bank had made clear attempts to place assets beyond the reach of the state’s award creditors and that BNY Mellon “feared

being involved in these attempts to extract assets from the creditors' right of recourse."

The court said a separate trust management agreement dated 2001 – in which Kazakhstan's Ministry of Finance purportedly placed the assets under the independent control of the National Bank – was "a mere pretence to the outside world and third parties".

The Statis were right to contest the appearances created by the state by levying an attachment against the state as the real holder of the funds, the court found.

The Belgian court further rejected arguments that the attached assets were protected by state immunity. The National Fund assets are invested for a commercial purpose and solely with a view to maximising long-term returns, it said.

On the fraud allegations, the court deferred to the dismissal of those arguments in parallel enforcement proceedings in Belgium. It also noted previous findings by the Swedish and Dutch courts that there was no decisive causal link between the alleged fraud and the quantum of damages, nor any evidence that it affected the outcome of the award.

Kazakhstan and the National Bank were ordered to pay the costs of the appeal.

The release of funds by BNY Mellon is subject to a final garnishment order that the Statis are seeking in separate proceedings before the Brussels Court of First Instance. There is also another pending proceeding in the Belgian courts regarding recognition of the award. Kazakhstan has appealed an earlier recognition decision and a further hearing is scheduled in October 2021.

#### **Statis and Kazakhstan react**

Anatolie Stati says the decision "once again confirms the award creditors' entitlement to full compensation under the award and paves the way for the collection of the frozen funds from BNY Mellon."

**Egishe Dzhazoyan**, partner at King & Spalding and global litigation counsel to the Stati parties, says the ruling is significant as it "allows recourse against attached assets, which are nominally managed by a state's central bank and are held by an independent third party."

"We are pleased that the Belgian courts never lost sight of the fact that it was Kazakhstan that has always been and remains the sole and true owner of the attached assets and accordingly the true creditor of BNY Mellon, and that the assets in question serve a purely commercial purpose."

**Almat Madaliyev**, vice-minister of justice of Kazakhstan, says: "Unfortunately, the Brussels court of appeal did not take into account a number of important issues that had been raised by the parties, including the outcome of the same

dispute between the same parties in other jurisdictions". He says the Dutch, English and Swedish courts "have ruled in our favour, dismissing all the arguments of the Statis."

He adds that Kazakhstan is determined to continue resisting the enforcement of the Statis' award, which he maintains was obtained by fraud: "Acting otherwise would be in breach of the general principle of the rule of law to which Kazakhstan is committed."

#### **State of play in other jurisdictions**

In the Netherlands, the US\$22.6 billion attachment order was [lifted](#) in 2018 after the Amsterdam District Court found that the Statis had concealed their previously unsuccessful efforts to attach the same assets.

On 23 June, the Amsterdam District Court dismissed a US\$118 million claim by the National Bank for losses it says it suffered as a result of the attachment remaining in place for seven months.

The district court affirmed that the Statis had violated their duty to be truthful to the court and had not correctly and fully informed the court when seeking to levy the attachment.

However, it held that the attachment was not unlawful, that the Stati parties had not abused their powers in bringing the proceedings and that the attachment did not result in the alleged loss. The National Bank was ordered to pay the Statis' costs.

**Albert Marsman**, partner at De Brauw and counsel to the National Bank and Kazakhstan, says: "We are pleased that the court has, again, confirmed that the Statis have been untruthful to the court, and have provided the court with false and incomplete information. This is unfortunately not the only instance where the Statis have falsely informed the Dutch courts."

In January, the Dutch Supreme Court quashed a decision that had upheld a separate [US\\$5.2 billion attachment](#) over unrelated assets held by another Kazakh sovereign wealth fund, Samruk-Kazyna. The attachment remains in place pending a referral to the Hague Court of Appeal.

In Luxembourg, the Supreme Court [overturned](#) a lower court's enforcement ruling in February on the ground that it had violated due process when it refused to admit evidence of the state's fraud allegations.

In Sweden, the Svea Court of Appeal last year lifted a US\$95 million attachment of National Fund assets in that jurisdiction on the basis of sovereign immunity. The Statis have appealed to the Swedish Supreme Court, which is due to hear the parties on 15 September. Last year, the Supreme Court [refused](#) to grant Kazakhstan a new trial to hear its renewed fraud allegations, saying the state had not presented any justifying circumstances.



The Statis say the total value of the attachments they have obtained in various jurisdictions exceeds US\$6.25 billion.

Kazakhstan has also brought litigation in the New York Supreme Court against Argentem Creek Partners, a hedge fund that has an interest in the award. The state alleges that the fund knowingly participated in the Statis' fraudulent scheme to recover fictitious costs in the arbitration. Outrider Management, a former bondholder of the Statis' company, has joined the litigation to assert its own claims against Argentem.

The case was removed to the US District Court for the Southern District of New York. In May, Argentem filed a motion to dismiss the suit and to refer the dispute to ICC arbitration under a sharing agreement between Argentem and Outrider.

*In the Belgian proceedings*

*Republic of Kazakhstan v Anatolie Stati, Gabriel Stati, Ascom Group SA, Terra Raf Trans Traiding Ltd and National Bank of the Republic of Kazakhstan and The Bank of New York Mellon NV*

Bench

- **D Degreef**

Counsel to Kazakhstan

- Kazakhstan Ministry of Justice
- Liedekerke Wolters Waelbroeck Kirkpatrick

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Partners **Stan Brijs** and **Sophie Jacmain**, of counsel **Jean-François van Drooghenbroeck** and associates **Karen Paridaen, Arie Van Hoe,\* Alexander Roels, François-Guillaume Caspar** and **Léonard Maistriaux** in Brussels

\* no longer with the firm

Counsel to National Bank of Kazakhstan

- Loyens & Loeff

**Peter Callens, Hakim Boularbah, Alice Boulvain and Alice Mallien** in Brussels

Counsel to Bank of New York Mellon

- Linklaters

**François Lefevre\***, **Stefaan Loosveld** and **Xavier Taton** in Brussels

*\*Left the firm in May 2021 to practise independently*

*In the Amsterdam District Court*

Counsel to the National Bank of Kazakhstan

- De Brauw Blackstone Westbroek

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Partners **Kasper Krzeminski**, **Freerk Vermeulen** and **Mirjam van de Hel-Koedoot** and associates **Pauline Ernste**, **Pieter Fritschy** and **Aalt Colenbrander** in Amsterdam\*

*\*The team was previously led by partner Gerard Meijer prior to his move to Linklaters in June 2019.*

*In the SCC arbitration*

Tribunal

- **Karl-Heinz Böckstiegel** (Germany)
- **David Haigh QC** (Canada) (appointed by the Stati parties)
- **Sergei Lebedev** (Russia) (appointed by the SCC on behalf of Kazakhstan)

Counsel to the Stati parties

- King & Spalding

Partners **Reggie Smith** and **Kevin Mohr** in Houston; partners **Ken Fleuriot**, **Amy Frey** and senior lawyer **Heloise Herve** in Paris; partner **Egishe Dzhazoyan** in London, and associates **Alexandra Rotar** and **Valeriya Subocheva** in Moscow

Counsel to Kazakhstan

- Norton Rose Fulbright (from early 2011)

Partner **Patricia Nacimientos\*** in Frankfurt and associates **Max Stein**, **Anastasia Maltseva\*** and **Natalia Nikiforova\*** in Frankfurt; and associates **Simon Ramsden** and **Nikhil Lakhani** in London

*\*Now at Herbert Smith Freehills*

- Winston & Strawn (from October 2012)


Partner **Joe Tirado** in London\*

\* stayed on as co-counsel when he moved from Norton Rose to Winston, has since moved to Garrigues

- Curtis Mallet-Prevost Colt & Mosle (until early 2011)

**Igor Zenkin** in Moscow (from May 2011)

**Documents**

Brussels Court of Appeal decision (certified translation)	
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Investor-state arbitration

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