



## Dutch court lifts multibillion Kazakh asset freeze

24 January 2018

Sebastian Perry



Amsterdam, Unsplash/Vincent Versluis

A Dutch court has lifted an attachment order that led to the freezing of more than US\$22 billion in assets owned by a Kazakhstan sovereign fund – after finding that the arbitral creditor that won the order concealed information from the court.

In a summary judgment yesterday, the Amsterdam District Court granted a motion by the National Bank of Kazakhstan to lift an *ex parte* attachment order obtained by Moldovan investors Anatolie and Gabriel Stati and their companies.

The judgment, which has yet to be published, came a day before a court in Sweden upheld a freeze on other Kazakh assets worth US\$100 million obtained by the same creditors.

The Statis are seeking to enforce a US\$520 million Energy Charter Treaty award that they obtained in a Stockholm Chamber of Commerce arbitration against Kazakhstan in 2013 over the seizure of their oil and gas operations.

While the award has been upheld at the seat of arbitration in Sweden, the English High Court ruled [in June last year](#) that Kazakhstan had established a *prima facie* case that the award was obtained through fraud. A London trial on the fraud allegations is scheduled for October, the Statis

having been denied permission earlier this month by the English Court of Appeal to challenge the June ruling.

The Statis won leave from the Belgian and Dutch courts last September to serve protective garnishment orders on the Bank of New York Mellon. These led the US bank to freeze all the assets that it holds under a global custody agreement with the National Bank of Kazakhstan signed in 2001.

The value of those assets has been reported as US\$22.6 billion in extensive press coverage as well as court documents seen by *GAR*, though yesterday's judgment gives the figure as €22 billion (US\$27 billion).

The assets – consisting of cash, bonds and equity shareholdings – comprise around 40% of the National Fund of Kazakhstan, a fund set up to reduce the state's dependence on oil and gas revenues. The National Bank manages the fund on trust with the Kazakh government as beneficiary.

BNY Mellon contends that under Belgian and Dutch law it was required to freeze the entirety of the assets, even though their value is more than 40 times that of the Statis' award. The National Bank for its part argues that a central bank's assets are protected by sovereign immunity under international law.

In its judgment yesterday, the Amsterdam court concluded that the Statis were wrong to garnish assets that cannot offer recourse for creditors of Kazakhstan.

The court relied on a [2005 ruling](#) by the English Commercial Court rebuffing an attempt by one of Kazakhstan's ICSID award creditors, US insurer AIG Capital, to target the same assets. The English court ruled that the state did not have rights against BNY Mellon arising from the global custody agreement, which is governed by English law.

The Amsterdam court went on to rule that the Statis had acted in breach of an “obligation to be truthful” under the Dutch Code of Civil Procedure when they sought the latest attachment by failing to make explicit reference to the rejection of their previous attempt to freeze the same assets.

The Statis originally applied to the Dutch court for attachments against Kazakhstan in 2014, winning provisional leave to levy garnishments on 40 companies and 17 banks, including BNY Mellon. But the Dutch ministry of justice blocked the attachments less than two weeks later on the basis that they were contrary to the Netherlands' obligations under international law, as it had not been demonstrated that the assets were designated for non-public, commercial purposes.

Following a challenge by the Statis, the ministry's decision was upheld by the district and appeal courts of The Hague and finally by the Dutch Supreme Court in October 2016.

In their August 2017 application to the Amsterdam court, the Statis noted their earlier attachment efforts but said their current application “related largely to different attachment objects” from those in the earlier application.

The Amsterdam court yesterday characterised that submission as “concealing”. It said the 2014 application related to the same assets at BNY Mellon and had been rejected. The Statis had failed to make explicit reference to these facts in their August 2017 attachment application, and therefore had not met the requirements for accuracy and completeness of information provided by applicants seeking attachments in summary proceedings.

The Statis, represented by NautaDutilh in the latest Dutch proceedings, said that a dispute with their former Dutch counsel meant they had received a copy of their 2014 attachment application too late to submit with their new application. They also noted that the Dutch ministry of justice had not sought to block the attachment the second time around. However, the court said these factors did not excuse the Statis' omission.

The Amsterdam court refused the National Bank's request for a permanent ban preventing new attachments of the BNY Mellon assets but ruled that the Statis would face a €1 million penalty if they failed to append a copy of the latest judgment to any future attachment application.

The Statis were also ordered to pay the National Bank and Kazakhstan's legal costs for the latest proceedings.

The National Bank retained De Brauw Blackstone Westbroek in the Dutch proceedings, with Kazakhstan taking separate counsel from litigation boutique Cleber. BNY Mellon is represented by Linklaters.

Partner **Albert Marsman** of De Brauw welcomes yesterday's decision, which he says "confirms that the National Bank of Kazakhstan's funds cannot be the subject of attachment by purported creditors of the Republic. The court also made clear that it does not accept information being concealed in an attachment application, and imposed a significant fine for any future failure to be transparent."

NautaDutilh declined to comment for this article.

### **Other asset freezes still in place**

The Amsterdam court may still have to consider other motions by BNY Mellon as intervening party in the attachment proceedings. A hearing is also scheduled in the Amsterdam Court of Appeal for 22 June on the Statis' application for recognition of their SCC award in the Netherlands.

In the meantime, BNY Mellon is maintaining the freeze on the National Fund assets pending a challenge to the Belgian garnishment order that is scheduled for a hearing in Brussels on 2 February.

In a judgment [rendered in December](#) but only published this month, the English Commercial Court rejected a request by the National Bank for declaratory relief against BNY Mellon in aid of the Belgian and Dutch proceedings.

The latest Dutch decision has no bearing on the Statis' attachment of US\$5.2 billion in other assets held by Kazakh sovereign wealth fund Samruk-Kazyna. The Amsterdam court issued a ruling on 5 January [upholding that attachment](#), which was granted last September and targets the fund's indirect interest in the international consortium that runs the Kashagan oilfield in the Caspian Sea.

The Statis today also obtained a decision from the Stockholm District Court that they claim clears the way for them to begin collecting on their SCC award in Sweden. The decision, as yet unpublished, upheld an earlier ex parte attachment granted by the same court last August with respect to Kazakh shareholdings in 33 public companies, with an estimated value of US\$100 million.

According to a [press release](#) issued today by the Statis, the Stockholm court found there was a risk that, in the absence of an attachment order, Kazakhstan will dispose of the assets. They quote the

Stockholm court as saying that the state has shown it “does not intend to voluntarily pay off the debt” under the award.

The Statis say today’s decision allows the Swedish bailiff to proceed with the forced sale of the attached shares and the transfer of their sale proceeds to an escrow account. They expect the proceeds to be transferred to them after the conclusion of all legal proceedings in Sweden.

However, Kazakhstan's Swedish counsel, **Alexander Foerster** of Mannheimer Swartling, disputes the Statis’ characterisation of today’s decision and says Kazakhstan is preparing an appeal, which will mean the attachment order is not final and the bailiff will not be able to proceed with the sale of shares.

Whether the attached shares should benefit from sovereign immunity is still being considered by the Svea Court of Appeal, which is reviewing five decisions by the Nacka District Court in the Statis' favour.

Earlier this month, the Statis revealed that a foreclosure process had already begun in respect of some of the attached shares in Sweden, which had resulted in US\$3.5 million in sale proceeds being placed in escrow. A decision on whether the Statis can collect those funds is still pending with the Nacka court.

The Statis have also obtained a garnishment order against BNY Mellon in Luxembourg as well as attachments against other property in that jurisdiction, including a shareholding in Eurasian Resources Group and certain trade receivables allegedly owed to Kazakhstan by a number of Luxembourg companies.

Besides alleging fraud against the Statis in London, Kazakhstan has lodged a civil racketeering suit against them in Washington, DC, where enforcement proceedings are also pending.

#### *Before the Amsterdam District Court*

##### Counsel to the Stati parties

- NautaDutilh

Partner **Gerard Meijer**, senior associate **Jochem Hummelen** and associates **Pieter Fritschy**, **Pauline Ernste** and **Aalt Colenbrander** in Amsterdam

##### Counsel to National Bank of Kazakhstan

- De Brauw Blackstone Westbroek

Partners **Albert Marsman** and **Marnix Leijten** and senior **Abdel Zirar** in Amsterdam

##### Counsel to Kazakhstan

- Cleber

Partners **Niek Peters** and **Maarten Drop** in Amsterdam

##### Counsel to Bank of New York Mellon

- Linklaters

Partner **Daniella Strik** and senior associate **Marc Krestin** in Amsterdam

*In the English Commercial Court*

*National Bank of Kazakhstan and the Republic of Kazakhstan v The Bank of New York Mellon SA/NV, London Branch*

Bench

- **Mr Justice Popplewell**

Counsel to National Bank of Kazakhstan and the Republic of Kazakhstan

- **Ali Malek QC, David Quest QC and William Edwards** of 3 Verulam Buildings in London
- Stewarts Law

Partners **Ian Gatt QC** and **Fiona Gillett** and associate **Joe Mitchell** in London

Counsel to Bank of New York Mellon

- **Christopher Butcher QC** of 7 King's Bench Walk
- **Rupert Allen** of Fountain Court Chambers
- Linklaters

Partner **Tom Lidstrom** and managing associate **Jonathan Swil** in London

*Anatolie Stati, Gabriel Stati, Ascom Group SA, Terra Raf Trans Trading Ltd v Republic of Kazakhstan*

Bench

- **Mr Justice Knowles**

Counsel to the Stati claimants

- King & Spalding

Partners **Thomas Sprange QC, Egishe Dzhazoyan** and **Ruth Byrne**, senior associate **Benjamin Williams** and associate **Charity Kirby** in London

Counsel to Kazakhstan

- Herbert Smith Freehills

Partner **Patricia Nacimiento** and associates **Alessandro Covi, Anastasia Maltseva** and **Sascha Bauer** in Frankfurt; partner **Philip Carrington** and associate **Gillian Dobby** in London

- **Ali Malek QC, Christopher Harris** and **Paul Choon Kiat Wee** of 3 Verulam Buildings in London

*In the Belgian proceedings*Counsel to the Stati claimants

- NautaDutilh

Partner **Stan Brijs** and associate **Charlotte De Muynck** in Brussels

Counsel to Kazakhstan

- Liedekerke Wolters Waelbroeck Kirkpatrick

Partners **Hakim Boularbah**, **Arnaud Nuyts** and **Roel Fransis** in Brussels

Counsel to National Bank of Kazakhstan

- Loyens & Loeff

Partner **Peter Callens** and senior associate **Ahmed Tayane** in Brussels

Counsel to Bank of New York Mellon

- Linklaters

Partner **François Lefevre** in Brussels

*In the Luxembourg proceedings*

Counsel to the Stati claimants

- NautaDutilh

Senior associate **Antoine Laniez** and associate **Barbara Giroud**

Counsel to Kazakhstan

- Kleyr Grasso

*In the Swedish proceedings*

Counsel to the Statis

- Lindahl

Partners **Bo G H Nilsson**, **Therese Isaksson** and **Ginta Ahrel** in Stockholm

Counsel to Kazakhstan

- Mannheimer Swartling

Partner **Alexander Foerster** and associate **Ludwig Metz** in Stockholm

- MAQS Advokatbyrå

Partner **Pontus Ewerlöf** in Stockholm

- Herbert Smith Freehills

Partner **Patricia Nacimiento** and associates **Alessandro Covi**, **Niklas Fuchs** and **Sascha Bauer** in Frankfurt

#### Counsel to National Bank of Kazakhstan

- Frank Advokatbyrå

*In the DC district court proceedings*

Judge Amy Berman Jackson

#### Counsel to the Stati parties

- King & Spalding

Partner **James Berger** and counsel **Charlene Sun** in New York and partners **Kevin Mohr** and **Reggie Smith** in Texas

#### Counsel to Kazakhstan

- Norton Rose Fulbright

Partner **Matthew Kirtland** and senior associates **Kara Petteway Wheatley** and **Rebecca Bazan** in Washington, DC

*In the SCC arbitration*

#### Tribunal

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

#### Counsel to the claimants

- King & Spalding

Partners **Reggie Smith** and **Kevin Mohr** in Houston; partners **Ken Fleuriet**, **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 Nacimiento** (no longer with the firm) in Frankfurt and associates **Max Stein**, **Anastasia Maltseva** and **Natalia Nikiforova** in Frankfurt; and associates **Simon Ramsden** and **Nikhil Lakhani** in London

- 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)

---

Copyright © 2017 Law Business Research Ltd. All rights reserved. | <http://www.lbresearch.com>  
87 Lancaster Road, London, W11 1QQ, UK | Tel: +44 207 908 1188 / Fax: +44 207 229 6910  
<http://www.globcompetitionreview.com> | [editorial@globalcompetitionreview.com](mailto:editorial@globalcompetitionreview.com)