

Brussels Court of Appeal Upholds Attachment Order against Kazakhstan



On 29 June 2021, the Brussels Court of Appeal (the **Court of Appeal**) handed down a judgment in which it upheld a protective attachment order over more than USD 500 million worth of assets, owned by Kazakhstan, and held with the Brussels subsidiary of the Bank of New York Mellon (the **BNYM**).

Background

The proceedings before the Belgian courts result from the efforts of two Moldovan investors (Anatolie and Gabriel Stati (the **Investors**)) who seek to enforce an arbitral award handed down in their favour in 2013. The arbitral tribunal (chaired by Karl-Heinz Böckstiegel) had found Kazakhstan liable for a harassment campaign against the Investors which ultimately resulted in a violation of the Energy Charter Treaty provisions on Fair and Equitable Treatment. As a result, the arbitral tribunal had ordered Kazakhstan to pay USD 508 million to the Investors as compensation for the damage suffered.

In the absence of voluntary payment from Kazakhstan, the

Investors sought a protective attachment order from the Brussels Court of First Instance in 2017 enabling them to freeze assets owned by Kazakhstan held with BNYM pending the outcome of the proceeding leading to the recognition and enforcement of their arbitral award in Belgium. The protective attachment order was obtained in *ex parte* proceedings (*i.e.*, without notice to Kazakhstan). However, upon notice of the attachment order, Kazakhstan lodged a third-party challenging the validity of the protective order. After the Brussels Court of First Instance dismissed the third-party opposition, Kazakhstan appealed that decision before the Court of Appeal.

The Court of Appeal Judgment

In its judgment of 29 June 2021, the Court of Appeal dismissed Kazakhstan's appeal, considering that the protective attachment order issued in 2017 was *prima facie* meritorious. In particular, the Court of Appeal found (i) that the Investors' claim against Kazakhstan was sufficiently certain and based on the arbitral award handed down in 2013; (ii) that the protective attachment order had been issued following Kazakhstan's refusal to comply with the arbitral award for several years and that the full recovery of the damages suffered by the Investors was thus at risk; (iii) that Kazakhstan only owned limited assets in Belgium; and (iv) that courts in the Netherlands, Sweden and Luxembourg had already ordered the freezing of Kazakhstan's assets in their respective territory.

In addition, the Court of Appeal found that the factual circumstances of the case showed that Kazakhstan had attempted to put its assets beyond the reach of the Investors. In particular, it found that Kazakhstan had attempted to conceal that it was the real owner of the assets held with BNYM by alleging that it was instead a separate entity (Kazakhstan's national bank) which was the owner of those assets. However, the Court of Appeal dismissed this argument and considered that such an allegation amounted to "*simulation*" and that

Kazakhstan had to be regarded as the real and ultimate owner of the assets held at BNYM. The 2001 trust management agreement under which assets were held by the National Bank was *“a mere pretence to the outside world and third parties”*.

Finally, the Court of Appeal rejected Kazakhstan’s argument that the attached assets were subject to State immunity. In that regard, it found that the assets were invested with the aim of maximising long-term returns and were therefore intended to be used for commercial purposes. As a result, the assets did not fall within the scope of the protection of State immunity.

Comment

It is worth noting that the present judgment of the Court of Appeal only addresses the issue of the protective attachment order aimed at freezing Kazakhstan’s assets in Belgium.

The fact that the Court of Appeal has confirmed the validity of this freezing order is without prejudice to the outcome of the pending proceedings related to the recognition and enforcement of the arbitral award issued in the Investors’ favour. Although the award had been recognised in Belgium, Kazakhstan is appealing the earlier recognition order and a further hearing is scheduled for October 2021.

It is only upon completion of those recognition and enforcement proceedings that the effective release of the assets (to the benefit of the Investors) will take place. There is therefore also pending before the Brussels Court of First Instance separate garnishment proceedings for release of the funds held by BNYM.