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Enforcement disputes: a case study

Checklist: a court may have issued an order – what should I do?

There are several important questions that need to be addressed quickly when you become aware of possible enforcement proceedings. Urgent legal advice should be obtained but, as a minimum, the following information will be required:

- Has anyone in the organisation received a copy of a Court order?
- Precisely how and when was it received?
- If a copy has not been received, has anyone otherwise had notice of the terms of an order?
- Who are the parties named on the order and what assets or activity does it potentially cover?
- If a client or customer is potentially subject to an order (directly or indirectly), can they provide a copy (and any further information)?
- What jurisdictions may be involved? This will include consideration of:
 - The domicile of the business that be affected by the order;
 - The jurisdictions in which any other branches or agents of the business may operate;
 - The location of relevant assets or activities; and
 - The location of the court that issued the order.
- Does the order contain any specific procedural requirements that must be complied with (within a short time period)?
- Are there any other procedural requirements in any of these jurisdictions that may need to be complied with?

Our first article in this series (available [here](#)) summarised the recent English judgment in the long-running dispute between the Republic of Kazakhstan, the National Bank of Kazakhstan and Moldovan investors Anatolie Stati and Gabriel Stati (and their companies Ascom Group SA and Terra Raf Trans Trading Limited, the “**Stati Parties**”).

The dispute has lasted over seven years, with enforcement proceedings taking place in multiple jurisdictions. A brief chronology of these proceedings, which remain ongoing, can be seen in the appendix. A number of practical issues arise from these proceedings that may be informative for those that are affected by cross-border court orders.

Background to dispute and context:

By way of brief reminder (for full details, please revisit our earlier [article](#)), in December 2013, the Stati Parties were awarded circa USD 500M (the “**Award**”) in an arbitration against the Republic of Kazakhstan (“**RoK**”) in a Swedish Chamber of Commerce arbitration. The Swedish Supreme Court, in a process culminating in March 2020, has since upheld the Award.

Since the Award was issued, significant efforts have been made to seek enforcement against assets alleged to belong to the RoK, including the National Fund of Kazakhstan (a sovereign wealth fund). Given the size of the Award, and the nature of the assets, this has had consequences for market participants that are not directly involved in the dispute but who are involved in the management of the assets.

In this particular case, the custodian bank was drawn into the proceedings. However, there are a wide range of circumstances in which third parties, particularly in the financial services industry, can be affected by such cases. Often, the trigger is the issuance of a Court order restraining parties from dealing with assets in some way. However, it is not

always possible to know if there has been an order, or indeed which parties may be affected. This article therefore explores the practical consequences where an order has been made, or is suspected to have been made (for example, if all dealing on an account suddenly stops without explanation).

How did enforcement start in this case?

A challenge to the Award was brought by the RoK, before the Swedish courts, shortly after the Award was issued. However, whilst that challenge was ongoing, the Stati Parties sought to enforce the Award in a number of jurisdictions between 2014 and 2020 (see our brief chronology at Appendix A).

The enforcement proceedings led to a number of satellite disputes including applications in the Netherlands and Belgium for garnishment orders (or 'third party debt' orders), and a subsequent dispute as to which assets were covered, in which jurisdictions and under which agreements. Garnishment orders were obtained against Bank of New York Mellon ("**BNYM**"), who provide banking and custody services to the National Bank of Kazakhstan ("**NBK**") which, in turn, manages assets for the RoK through the National Fund of Kazakhstan. Concurrent enforcement proceedings were pursued in England, Sweden, Italy and Luxembourg.

In addition, the RoK has run allegations of fraud in several jurisdictions, alleging that the underlying Award was obtained dishonestly. In summary, the RoK's position is that the Stati Parties inflated the value of their investment, thereby influencing the calculation of damages undertaken by the Swedish arbitration tribunal. To date, this argument has appeared as a fraud claim in Sweden, the UK and the Netherlands, and a Racketeer Influenced and Corrupt Organisations ("**RIICO**") claim in the US. Following the overturning of certain lower courts' decisions by higher courts (in both the UK and the US), the RoK's allegations of fraud have not been upheld in any jurisdiction to date. These parallel proceedings have complicated matters still further, and have resulted in greater uncertainty and delays in resolving the overall dispute.

What orders were obtained?

The enforcement proceedings were heavily contested but a number of orders were made in favour of the Stati Parties:

- 1) Garnishment orders against BNYM, attaching to assets held both inside and outside the Netherlands, with circa USD 530M of the National Fund of Kazakhstan remaining frozen (down from

USD 22.6BN) under the terms of the 2001 Global Custody Agreement ("**GCA**") executed between BNYM and NBK.

- 2) An attachment order in respect of the RoK's shareholding in the Dutch entity KMG Kashagan BG (a shareholding which is held via the Kazakh sovereign wealth fund).
- 3) An attachment order worth circa USD 100M in respect of the RoK's shareholding in 33 Swedish public companies.
- 4) Frozen funds of approximately USD 85M owed by the RoK, held by Skandinaviska Enskilda Banken in its capacity as sub-custodian under the GCA.
- 5) Recognition of the Award by the Rome Court of Appeal.
- 6) Further garnishment orders against BNYM (Luxembourg), and attachments of the RoK's shareholding in Luxembourg based Eurasian Resources Group, as well as of trade receivables due to the RoK from a number of Luxembourg companies.

To date, the Stati Parties' attachments exceed USD 6.25B, including circa USD 530M of the National Fund of Kazakhstan which remains frozen under the custody of BNYM.

The English High Court also recently held that BNYM was entitled not to act on any instructions to deal with assets held on behalf of the National Fund of Kazakhstan. In upholding BNYM's decision to respect the Belgian orders preventing the dealing with such assets, the UK High Court and the Court of Appeal reviewed a term of the GCA which provided that "*[BNYM] shall [not] be liable for and no default shall be caused by any delay or failure on the part of [BNYM] to perform any obligation which, in whole or in part, arises out of or is caused by circumstances beyond its direct and reasonable control including without limitation ... any order ... imposed by any ... judicial ... authority*".

Impact and the importance of legal advice:

There are several important lessons that can be learnt from the Stati v Kazakhstan litigation, not least how long the enforcement process can take. Whilst disputes of this nature are usually the subject of court proceedings, and therefore of particular interest to disputes lawyers, the impact of the enforcement steps taken and the decisions of the courts to date are equally relevant to day to day business operations and those advising them.

It is important to recognise that a business involved in holding assets can be seriously affected by

enforcement proceedings, whether court orders are issued domestically or internationally. Such orders are not necessarily geographically limited and separate corporate domicile may not provide a shield to compliance with orders that appear (at least arguably) to be domestic in scope. Such orders can have wider international impact, with affected parties or enforcing courts owing “loyalty” to the court that issued the original order. Moreover, given the potential cross-border impact of these orders, it is important to understand that procedural requirements can differ across jurisdictions. Failure to comply with these requirements can result in civil and criminal liability. It should also be noted that resolving any dispute as to the precise effect of court orders can take time resulting in significant potential disruption for third parties.

Reviewing contractual documentation:

Given the significant potential consequences of failing to comply with court orders (including both civil and criminal penalties in some jurisdictions), those potentially affected must consider all possible issues that may arise. For example, in the case of financial institutions, particularly relevant will be (i) account terms and conditions, (ii) custody arrangements, (iii) investment management agreements; and (iv) ongoing transactions (including the associated contractual documentation). These documents may include provisions facilitating or limiting institutions’ ability to respond effectively and appropriately upon receipt of court orders. In the Stati context, BNYM’s decision not to act on instructions to deal with the assets held on behalf of the National Fund of Kazakhstan was upheld, but only after careful analysis of the documents on which BNYM relied. The relevant term was held to be “wide and unqualified” in nature, and the clause was found

not to be “limited to domestic court orders or to foreign court orders of a particular type or status”.

Businesses should therefore consider the drafting of their existing and/or pending agreements to ensure that their ability to respond to court orders, including where the response necessitates wholesale freezing of assets, is appropriate. In appropriate circumstances, other provisions that may need to be considered include: (i) additional rights of information; (ii) permission to provide information to the court; (iii) the flexibility to suspend activity if there is a risk of breach of a court order, and (iv) discretion to perform a risk assessment upon notice of a court order, or circumstances which may suggest an order has been made.

The precise factual position in each customer relationship will differ, including as to the likelihood of such risks arising, and contractual documents will inevitably be tailored and negotiated. However, formulating a clear internal policy, and relevant wording in standard transactional documentation, is a sensible precaution.

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Appendix: a brief chronology

- Dec 2013** The Stati Parties are awarded circa USD 530M (the "**Award**") in an arbitration against the RoK in a Swedish Chamber of Commerce arbitration. (*Sweden/Arbitration*)
- March 2014** The RoK's application to annul the Award is rejected by the Svea Court of Appeal, a decision later upheld by the Swedish Supreme Court. (*Sweden/Court*)
- 23 Aug 2014** The Stati Parties apply to the Dutch courts for garnishment orders on 40 companies and 17 banks, including BNYM (the "**2014 Garnishment Orders**"). The Dutch Ministry of Justice ("**DMoJ**") block these 2014 Garnishment Orders. (*Netherlands/Court*)
- September 2014** The RoK raise fraud allegations in the US, as a defence against US enforcement, citing the Racketeer Influenced and Corrupt Organisations Act. The US courts have since, twice, refused to allow these allegations, with the US District Court for Columbia noting that "A RICO civil suit is not a vehicle to challenge non-frivolous litigation, or, in this case a valid and final foreign arbitral award". The Court held that the "suit is yet another attempt to relitigate the underlying arbitral award. Whatever fraud Kazakhstan contends occurred before and during the arbitration more than eight years ago, it had a full opportunity to raise those issues in the appeals process in Sweden, and its allegations were rejected" (*United States/Court*)
- 24 February 2014** The Stati Parties invoke the jurisdiction of the courts of England and Wales under s.101 of the Arbitration Act 1996 (*England/Court/Enforcement*)
- 28 February 2014** The Stati Parties receive permission to enforce the Award in the UK (the "**UK Enforcement Order**") (*England/Court/Enforcement*)
- 7 April 2015** The RoK apply for permission to set aside the Enforcement Order (the "**English Application**") (*England/Court/Enforcement*)
- 27 April 2015** The RoK sought permission to amend the English Application (the "**Permission Application**") to include an allegation that the Award was procured via fraud (*England/Court/Enforcement*)
- October 2016** The DMoJ's actions are upheld by the Dutch Supreme Court, and the 2014 Garnishment Orders fail (*Netherlands/Court*)
- 6 June 2017** The English High Court¹ concludes that "there is a sufficient prima facie case that the Award was obtained by fraud" and grants the Permission Application (*England/Court/Enforcement*)
- 21 August 2017** The Stati Parties obtain an attachment order worth USD 100M in respect of the RoK's shareholding in 33 public Swedish companies. The Swedish courts also award the Stati Parties their claimed legal costs (circa USD 100,000). The Swedish courts also allow the Stati Parties to freeze funds of approximately USD 85M owed by the RoK held by Skandinaviska Enskilda Banken in its capacity as sub-custodian under the GCA. Litigation regarding these attachment proceedings is expected to conclude in the autumn of 2020 (*Sweden/Court*)
- 23 August 2017** The Stati Parties make a new ex-parte application in the Dutch courts, again seeking pre-enforcement attachments of BNYM's assets, both inside and outside the Netherlands (the "**Dutch Enforcement Orders**") (*Netherlands/Court*)

¹ Stati & Ors v The Republic of Kazakhstan EWHC [2017] 1348 1348

- 8 September 2017** The Dutch courts grant the requested Dutch Enforcement Orders, stating that they would not apply to assets of BNYM at branches outside of the Netherlands (*Netherlands/Court*)
- 8 September 2017** The Stati Parties successfully apply ex-parte for an attachment order in respect of the RoK's shareholding in the Dutch entity KMG Kashagan B.V. ("**Kashagan**"), a shareholding which is held via the Kazakh sovereign wealth fund Samruk-Kazyna ("**Samruk**"). Through its stake in Kashagan (worth circa USD 5.2 billion), Kazakhstan participates in one of the largest offshore oilfields in the Caspian Sea (*Netherlands/Court*)
- 14 September 2017** The Dutch Enforcement Orders are issued pursuant to the 8 September 2017 decision, and served on BNYM (Netherlands), but do not contain the limitation contained in the Judge's decision, and extend to assets both inside and outside the Netherlands (*Netherlands/Court*)
- 29 September 2017** The Stati Parties apply ex-parte for pre-judgment attachments (the "**Belgian Enforcement Orders**") (*Belgium/Court*)
- 12 October 2017** The Dutch branch of BNYM issue a declaration stating that it has no legal relationship with the National Fund of the RoK, or the RoK (*Netherlands/Court*)
- 13 October 2017** The Belgian Enforcement Orders are granted, and BNYM is served (*Belgium/Court*)
- 30 October 2017** BNYM (Belgium) makes a declaration that it "*cannot fully exclude [the possibility] that the RoK (including the National Fund) has or will have claims on BNYM or that BNYM holds assets of or for the RoK*". (*Belgium/Court*)
- 1 November 2017** BNYM's (Netherlands) alter its previous declaration. BNYM take the view that the Dutch Enforcement Orders and Belgian Enforcement Orders effectively attach to the whole of the National Fund of Kazakhstan, held by BNYM's London branch, under a 2001 Global Custody Agreement ("**GCA**"). Accordingly BNYM elect not to deal with assets held on behalf of the National Fund of Kazakhstan, circa USD 22.6 BN in cash, bonds and equity shareholdings, comprising around 40% of the National Fund of Kazakhstan (the "**USD 22.6BN Attachment**") (*Netherlands/Court*)
- 20 November 2017** The RoK issue proceedings in Belgium to set aside the Belgian Enforcement Orders (*Belgium/Court*)
- 22 November 2017** The RoK and NBK commence Part 8 proceedings in the UK, seeking declarations that – under contractual analysis of the terms of the GCA – BNYM were not obliged or entitled to elect not to deal with the assets held on behalf of the National Fund of Kazakhstan (*England/Court/Part 8*)
- 21 December 2017** The UK High Court² dismiss the RoK's claim for declaratory relief. The High Court find that BNYM owed "*loyalty*" to the courts of Netherlands and Belgium and "*must obey*" their orders "*if it is not to face civil liability and criminal sanction*" (*England/Court/Part 8*)
- January 2018** The Amsterdam District Court lift the USD 22.6BN Attachment. The Court held that the assets held by BNYM could not offer recourse for creditors of the RoK, notwithstanding that the state might be the ultimate beneficiary. The Dutch courts found that the USD 22.6 BN Attachment effectively attached to the same assets that were the subject of the Stati Parties' failed 2014 Garnishment Orders. The Amsterdam court refuses the request from the NBK for a permanent ban preventing new attachments of BNYM's assets (*Netherlands/Court*)

² National Bank of Kazakhstan & Anor v The Bank of New York Mellon SA / NV, London Branch [2017] EWHC 3512 (Comm)

- 5 January 2018** The Samruk attachment is upheld by the Amsterdam District Court (*Netherlands/Court*)
- 26 February 2018** The Stati Parties serve a notice of discontinuance in the English enforcement proceedings (*England/Court/Enforcement*)
- 2 March 2018** The RoK apply for the English notice of discontinuance to be Set Aside (the "**Set Aside Application**") (*England/Court/Enforcement*)
- 11 May 2018** The English High Court³ hand down judgment on the Set Aside Application, confirming that the notice of discontinuance will be set aside (the "**Set Aside Order**"), and scheduling a trial for 31 October 2018 (*England/Court/Enforcement*)
- May 2018** The Belgian courts lift the USD 22.6BN Attachment, and instead limit the size of the attachment to USD 530M (the value of the Award). The RoK's argues that no "attachable obligation" exists over the USD 530M. The Belgian Courts determine that the competent courts to determine this are the courts of England and Wales (the "**Belgian Referral**") (*Belgium/Court*)
- 28 May 2018** The RoK and the NBK commence proceedings in the UK to determine the Belgian Referral (*England/Court/Belgian Referral*)
- 19 June 2018** The UK Court of Appeal⁴ confirms the Part 8 High Court decision, finding that BNYM's analysis of the terms of the GCA was correct (*England/Court/Part 8*)
- 19 July 2018** The English courts⁵ grant the RoK and the NBK permission for the Belgian Referral to be heard in the jurisdiction (*England/Court/Belgian Referral*)
- 10 August 2018** The English Court of Appeal⁶ hand down judgment in the Stati Parties' appeal of the Set Aside Order. The High Court's decision is reversed, and the Stati Parties are permitted to discontinue the English enforcement proceedings, on the condition that the original Enforcement Order be set aside, and no further enforcement proceedings take place in England and Wales. The English enforcement proceedings are dropped (*England/Court/Enforcement*)
- 4 December 2018** The Stati Parties jurisdictional challenge to the Belgian Referral is dismissed (*England/Court/Belgian Referral*)
- 1 March 2019** The Court of Appeal in Rome hand down judgment in favour of the Stati Parties. The Rome Court of Appeal rejected the RoKs arguments, and find that recognition and enforcement of the Award in Italy does not contravene Italian substantive or procedural public policy. The court also orders the RoK to reimburse the Stati Parties' legal costs, totalling EUR 120,000 (*Italy/Court*)
- 6 May 2019** The Samruk attachment is upheld by the Amsterdam Court of Appeal (*Netherlands/Court*)
- 6 May 2019** The Amsterdam Court of Appeal comments that the RoK has, to date, failed to provide its allegations of fraud, in any jurisdiction (*Netherlands/Court*)

³ Stati & Ors v The Republic of Kazakhstan [2018] EWHC 1130 (Comm)

⁴ National Bank of Kazakhstan & Anor v The Bank of New York Mellon SA / NV, London Branch [2018] EWCA Civ 1390

⁵ National Bank of Kazakhstan & Anor v The Bank of New York Mellon SA / NV, London Branch [2018] EWHC 3282 (Comm)

⁶ Stati & Ors v The Republic of Kazakhstan [2018] EWCA Civ 1896

- 17 May 2019** The UK High Court orders the Stati Parties to disclose information about the source of their funds to the RoK. It is likely that the RoK will join the litigation funders to the proceedings, enabling them to apply for a costs order, in the event that the Stati Parties cannot pay their legal costs. It is expected that, in turn, the funders will challenge the costs that the RoK is seeking to recoup (*England/Court/Enforcement*)
- 15 October 2019** The US Supreme Court declines to consider the RoK's petition for a review of the District Court decision rejecting the RoK's RICO allegations (*United States/Court*)
- 20 December 2019** The Brussels Court of First Instance hand down judgment recognising and enforcing the Award. The judgment rejected all of the RoK's objections to the Award, and awarded the Stati Parties their legal costs in the sum of EUR 36,000 (*Belgium/Court*)
- 29 December 2019** The Luxembourg Court of Appeal permit the enforcement of the Award in Luxembourg. The Stati Parties secure a further garnishment order against BNYM, and attachments of RoK's shareholding in Luxembourg-based Eurasian Resources Group, as well as of trade receivables due to the state from a number of Luxembourg companies (*Luxembourg/Court*)
- 10 February 2020** During a US hearing, a DC Circuit Judge signals the possibility of granting the RoK's request to reverse the dismissal of its RICO suit (*United States/Court*)
- 21 February 2020** A subsequent ruling by the US Court concludes that the RICO allegations are unsubstantiated and therefore could not be revived (*United States/Court*)
- 9 March 2020** The Swedish Court finds that the RoK's "unprecedented" second challenge to the Award to be "identical" to the first challenge. The Court refuses permission to appeal this ruling to Swedish Supreme Court (*Sweden/Court*)
- 22 April 2020** The UK High Court⁷ hands down its judgment, determining the Belgian Referral (*England/Court/Belgian Referral*). The dispute returns to Belgium.

⁷ (1) National Bank of Kazakhstan (2) the Republic of Kazakhstan v (1) The Bank of New York Mellon SA/NV, London Branch (2) Anatolie Stati (3) Gabriel Stati (4) Ascom Group SA (5) Terra Raf Trans Traiding Limited [2020] EWHC 916 (Comm)