



IN THE COURT OF FIRST INSTANCE
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

30 March 2023

CASE No: AIFC-C/CFI/2022/0003

BULDIRSHIN-2012 LLP

Claimant

v

STATE INSTITUTION "ASTANA EDUCATION DEPARTMENT"

Defendant

JUDGMENT

Justice of the AIFC Court:
The Rt. Hon. Sir Jack Beatson FBA

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Appendix: *Summary of the Positions of the Experts on Kazakh Law on the Issues before the Court*

JUDGMENT

A. Introduction

1. This is a claim under a public-private partnership contract to construct and operate a kindergarten for 360 pupils in the City of Astana, hereafter “the kindergarten”, on a plot of land, hereafter “the plot” “*near the intersection of streets with project names No. 29 and No 36*”: PPP Contract, clause 2. It is brought by Buldirshin-2012 LLP, hereafter “the Private Partner” or “the Claimant” against the City of Astana’s Education Department,¹ hereafter “the Public Partner” or “the Defendant”.
2. The contract (hereafter “the PPP Contract”) was entered into on 29 May 2017 and pursuant to clause 155 came into force on 1 June 2017 when it was registered with the Astana Department of Finance. The parties later modified it by two supplementary agreements which reflected the need for the additional cost of the design and construction of a transformer substation connected to the plot and the prolongation of the construction period as described below. Supplementary Agreement No. 1 is dated 11 December 2020 and Supplementary Agreement No. 2 is dated 2 September 2021.
3. The construction of the kindergarten took 30 months rather than the 18 months specified in the project implementation schedule in Appendix 2 of the PPP Contract. In December 2020 paragraph 7 of Supplementary Agreement No. 1 retrospectively replaced that Appendix and provided that construction was to be between 1 August 2017 and 1 October 2020.
4. The kindergarten was completed in September 2020 and opened on 28 September 2020. On 7 October 2020 the Public Partner signed a “Facility Commissioning Certificate” accepting it into operation and state registration of that occurred on 20 October 2020. The act of acceptance of the transformer substation was signed by the Private Partner on 8 October 2020 but state registration was only completed on 2 July 2021 because of an error when registration was first attempted.
5. The nature of the parties’ dispute and their positions are set out in detail later in this judgment. At this stage it suffices to state that the root of the dispute is that the plot the Public Partner provided for the planned kindergarten did not have engineering infrastructure in the form of a transformer substation and an electricity power cable line connected to it.

¹ The name of the city has changed twice since the date of the contract. On 20 March 2019 the city of Astana was renamed Nur-Sultan but on 16 September 2022 the name Astana was restored. In this judgment, it will be referred to as Astana or “the City” although when the claim was filed and the pleadings were settled it was called Nur-Sultan, and the defendant is named as “*State Institution ‘Nur-Sultan Education Department’*” in the pleadings and in many of the documents relied on by the parties.

6. This was because the Public Partner had envisaged that the kindergarten would obtain its power from a transformer substation that was to be built on a neighbouring site on which another kindergarten was to be built. That substation, designed and costed in 2015, was to be constructed by another private partner but was not built because the plan to build the other kindergarten did not proceed. Although it was put out to tender twice, no investor had bid for it.
7. The consequences of the lack of electricity infrastructure were discussed at meetings of the PPP Competition Commission and the Commission for Direct Negotiations on the implementation of the PPP project on 11 October 2019, and a meeting of the PPP Commission on 10 February 2020. Those meetings decided that the construction period for the kindergarten should be extended, and the Private Partner would construct and commission a transformer substation and be reimbursed for its investment costs by the Public Partner.
8. The questions for decision in the present case include when the Public Partner provided the plot of land and whether it was responsible for the consequences of the absence of the electricity infrastructure. Those consequences included delay, increased expenses, and loss of profit. In particular, are only the investment costs specified in the contract recoverable or is the Private Partner entitled to its actual investment costs and losses of profits. The questions also include whether the Private Partner was in breach of its obligation to provide reports *inter alia* on the status of construction and, if it was, the consequences of any breaches.
9. The Public Partner also alleges that the Private Partner did not fulfil its obligation under clause 94(4) of the contract to admit “*at least 100% of the capacity of the kindergarten within the framework of the state educational order for pre-school education/training*”. But, at a CMC on 18 October 2022, just over a month before the date of the hearing, I accepted an application by the Private Partner that the issue of placement and proportion under the state order should not be heard together with its claim. I summarise the basis of the Private Partner’s application and set out my reasons for accepting it at [56] - [61] below.²

B Applicable Law and Jurisdiction

- 10 Clauses 129-130 of the PPP Contract provide that the contract is governed by the law of the Republic of Kazakhstan.
- 11 As modified by clause 4 of Supplementary Agreement No 1, clause 134 of the PPP Contract, which deals with Dispute Resolution, confers jurisdiction on this, the Astana International Financial Centre Court, hereafter “the AIFC Court”, to resolve disputes related to the contract.

² References in square brackets are to paragraphs of this judgment.

- 12 It is common ground that the PPP Contract, in this case for the construction and operation of the kindergarten as a PPP facility, falls within a category of civil-law investment long-term public-private agreements that are concluded and performed in particular in accordance with the Law on Public-Private Partnership No 379-V LRK dated 31 October 2015, (hereafter “the Law on Public-Private Partnership”), the Civil Code of the Republic of Kazakhstan (hereafter “the Civil Code”), and the Entrepreneurial Code of the Republic of Kazakhstan (hereafter “the Entrepreneurial Code”): see section 1 of the Joint Report of Dr Nesterova and Mr Privalov, the experts on Kazakhstan Law. That reflects Article 2(1) of the Law on Public-Private Partnership which provides that:

“The legislation of the Republic of Kazakhstan in the field of public private partnership is based on the constitution of the Republic of Kazakhstan and consists of the Civil Code of the Republic of Kazakhstan, this law and other regulatory acts of the Republic of Kazakhstan”.

C Procedural History

- 13 The Private Partner filed its claim on 11 February 2022. The Public Partner’s response to the claim is undated but was received by the Registry of the AIFC Court on 28 March 2022. The Court held a Case Management Conference on 7 April 2022 and, on 8 April 2022, issued Directions Order No. 1 which *inter alia* fixed the trial for 2 and 3 August 2022, with the possibility of sitting on 4 August if necessary. Pursuant to that, the parties filed the documents and legislation³ on which they relied in English and Russian, and served various statements by the witnesses of fact as referred to more fully below. Written opening submissions were filed by the Public Partner on 14 July 2022 and by the Private Partner on 26 July 2022. The Private Partner also filed Dr Nesterova’s report on Kazakhstan law dated 22 June 2022 with supporting material annexed to it.
- 14 There were, however, delays in filing documents. More significantly, the Public Partner did not file an independent expert’s report as required by Directions Order No. 1, and its Opening Submissions, entitled “*Written Introductory Statement outlining our Position and with a brief supporting argument*”, consisted of four paragraphs on a single page. By 22 July 2022 it was clear that the case would not be ready for trial by the hearing on 2 and 3 August 2022, and those dates were vacated by the Court.
- 15 On 28 July 2022 the Public Partner informed the court that it did not have the financial resources to pay for an independent expert's report. Although the trial dates had

³ In this judgment I use the Ministry of Justice of the Republic of Kazakhstan’s English translations of the Constitution, the Civil Code, and the laws on Public-Private Partnership and on Architectural, Town Planning and Construction Activity available on its website. No issues concerning those translations were raised by the parties.

already been vacated, on 4 August it applied to postpone the trial, stating that it needed time to submit a candidate to be an independent expert. On 15 August and 7 October 2022, the Registrar gave further Instructions about the expert witnesses and required the parties to provide the court with the availability of their witnesses of fact and expert witnesses.

- 16 I have referred to the CMC on 18 October 2022. After it, on 21 October 2022, Directions Order No. 2 was issued. That order granted the Public Party permission to use the report of its expert Mr. Gennady Privalov dated 17 October 2022 at the trial and call him to give evidence, and to file an additional Opening Submission to supplement its earlier one-page “*Written Introductory Statement*”. A new trial date was fixed for 22 and 23 November 2022 with the possibility of the hearing continuing on 24 November. The Order gave further directions concerning the witnesses of fact and the service of witness statements and expert evidence as to Kazakhstan law in accordance with Part 19 of the Rules of the AIFC Court. It also directed the parties to provide a list of the factual and legal issues in the case, identifying issues on which there is agreement and those on which there is no agreement. It also recorded that the Court would deal with any disputes as to the meaning of a document which had been translated into English in accordance with Article 31(4) of the AIFC Court Regulations 2017 and rule 2.4 of the AIFC Court Rules 2018.
- 17 The trial took place on 22 and 23 November 2022 in the AIFC Court’s Court Room in Astana. The third day was not required. The claimant was represented by Ms. Gulnur Nurkeyeva, a partner in the Grata International Law Firm and the defendant by Mr. Nariman Elamanov, the Deputy Head of the Education Department of the City of Astana, but not a lawyer. During the hearing, the Tribunal heard evidence from the witnesses and experts referred to below as well as oral opening and closing submissions by the representatives of the parties. Following the hearing both parties filed written closing submissions on 30 November 2022.

D The Background

- 18 I have referred to the *Law on Public-Private Partnership* which regulates public-private partnerships between state bodies and private entities in Kazakhstan. Article 3 of that law sets out the objects and principles which apply to such partnerships. The objects include “*attracting investments to the state economy by pooling the resources of a public partner and a private partner for the development of infrastructure and life support systems*” and “*increasing the level of availability and quality of ... services, taking into account the interests and needs of the population ...*”: Articles 3.1(2) and (3). The principles include “*identification of a private partner on a competitive basis*” except where authorised by that law: Article 3.2(2). They also include “*the principle of balance – mutually beneficial distribution of responsibilities, guarantees, risks, and revenues between the Public Partner and the Private Partner in the implementation of the public-private project*”: Article 3.2(3).

- 19 There are a number of mechanisms for implementing public-private partnerships. The PPP Contract in the present case provided for a BTO (Build, Transfer, Operate) mechanism. Under that, the public partner provides the plot upon which (in this case) the kindergarten is to be constructed on a temporary gratuitous use and turnkey basis, the facility is transferred to the state upon completion of construction, and is then operated by the private partner during the term of the contract: see clauses 23 and 86 of the PPP Contract and see further *Concept of the PPP Project “Construction and Operation of kindergartens in Astana*, §2.1.1 and 3.3 (hereafter “*Concept*”).
- 20 In 2016 the Akimat of Astana decided to use a contractual Public-Private Partnership to address a shortage of over 80,000 places in institutions for preschool education and training for children in Astana because of the lack of buildings for kindergartens in public ownership and growth in the birth rate: see *Concept*, §§2.1.1, 3.4.1 and *Conclusions*. What was envisaged was the construction of five kindergartens by a private partner or partners with a total capacity of 1,440 places of which 480 places would be in the State Order: see *Concept*, Table 55 and §3 of the Standard Tender Documentation of the project.
- 21 The *Concept* stated (see §2.1.4) that it was planned to implement a contractual PPP because of “*the need to attract a private partner for 100% investment in the construction of PPP facilities*”. It also stated (see §3.5.5) that “*compensation of investment costs will ensure repayment of debt obligations of the private partner, as a result of which the return on investment is achieved, there are no cash gaps, and the financial attractiveness of the project increases.*” The *Concept’s* conclusions stated that “*in order to ensure the attractiveness of the PPP project for the private partner, according to the institutional scheme, it is assumed that the public order will be placed in PPP facilities for at least 33% of the project capacity, the remaining part can be organised by the Private Partner on a private basis*”. The conclusions also stated that “*From the point of view of technical support, the project is fully implementable. Land plots for placement of kindergartens are defined, there are developed working projects for construction*”.
- 22 The project was put out to tender. Each of the five kindergartens was a separate lot and bidders were able to bid for the entire project or for one or more of the lots. Lot 4 was to build the kindergarten which has given rise to the dispute in this case. Paragraph 14 of the standard tender documentation for the project required a tenderer who wished to bid to submit documents to confirm compliance with the qualification requirements in paragraph 15 by 28 November 2016. Paragraphs 21, 29 and 34 required applications in sealed envelopes to be made by 13:00 hours Astana time on 20 December 2016, with the envelopes being opened later that day and a decision to be made within 10 days of the opening of the envelopes. The qualification requirements included a requirement in paragraph 15(5) to provide a letter of guarantee that the potential private partner was solvent. Where the potential private partner intended to take out a loan to implement the project, paragraph 15(14) required it to confirm the readiness of financial organisations to provide financing to it if it was recognised as the winner of the competition.

- 23 Paragraph 27 of the tender documentation set out the criteria for determining the best tender applications, and the points-based system for evaluating the criteria. The criteria included the amount of the amount of state obligations under the project, the term of payment of state obligations, the construction period, the tenderer's experience of implemented similar projects, and (see paragraph 27(12)) the percentage of places offered by a potential private partner for children under a state order. A table in paragraph 28 sets out the way the criteria are evaluated in. Item 11.1 of the table states that the *"State order under the project is 33% (in the context of each kindergarten)"* and *"P% - 1.5 points assigned (subtracted) for each 1% increase (decrease) in the basic share of placement of children under the state order for project"*.
- 24 Buldirshin-2012 submitted its bid for Lot 4 on 20 December 2016. It was the only bidder for that Lot: see Protocol No 6 to Meetings of the Competition Commission to Determine a Private Partner dated 20 April 2017, and the evidence of Ms Bikeeva. A letter dated 20 December 2020 from the Chairman of the Council for the Protection of the Rights of Entrepreneurs to the Mayor of Nur-Sultan stated that *"this PPP facility is the only pre-school facility in Nur-Sultan built within the framework of PPP"*.

E The Terms of the PPP Contract

- 25 The PPP Contract is in 33 Parts and has 184 clauses and 6 Appendices. Its provisions on the applicable law and the jurisdiction of this Court have been summarised at [10] – [12].
- 26 Part 3 of the contract deals with the procedure for granting a land plot to the Private Partner. Clause 7 provides that the Public Partner *"undertakes, within 60 (sixty) calendar days from the date of entry into force of the Contract, to take all necessary measures in accordance with the law to provide the Private Partner with a land plot for the construction and operation of a PPP facility"*. Clause 8 provides that the description of the land plot required for the kindergarten is specified in Appendix 3 and that *"the engineering infrastructure must be connected to the provided land plot to the connection point"*. Clauses 4 and 23 provide that the Private Partner is to construct and operate the kindergarten for the specified implementation period of 20 years and 10 months after which it is subject to transfer to the state for ownership and use. That period was modified by clause 2 of Supplementary Agreement No 1 made on 11 December 2020 to 22 years and 6 months.
- 27 Clause 4 and Appendix 2 of the contract originally specified an implementation schedule of 2 months to *"financial closure"* and an 18-month period for construction from the date of financial closure. Clause 1(13) defines *"financial closure"* as *"the date on which the Private Partner provides a written notification to the Public Partner that it has received the right to access the use of financial resources, including those provided by financial institutions (investors) under the contract with the Private"*

Partner on financing necessary for the construction ...". The contract also originally specified 2 months for commissioning of the kindergarten, and 19 years for its operation and use by the Private Partner: see clauses 158 and 159 and Appendix 2. The construction period was later modified by clause 6 of Supplementary Agreement No 1 to a period of 38 months from the date of financial closure. Clause 7 of Supplementary Agreement No 1, made on 11 December 2020, and amended Appendix 2, provided that financial closure was to be the period between 29 May and 29 July 2017, that is, it remained within 2 months of the date of the contract.

- 28 I turn to provisions concerning the financing of the project and the sources of cost recovery and income generation. As to financing, clause 18 of the contract provides that the sources, size and terms of the financing for the PPP project are specified in Appendix 4. Appendix 4 states that 10% of the cost of the facility is to come from the Private Partner's own funds and 90% of the cost from funds borrowed by the Private Partner.
- 29 Part 11 of the contract specifies the sources of cost recovery and revenue generation for the Private Partner. Clause 71 provides that these are "*implementation of services during the operation of*" the kindergarten and "*compensation of [its] investment costs in accordance with the budget legislation of the Republic of Kazakhstan*".
- 30 Clause 72 provides that "*compensation for investment costs to the Private Partner*" (hereafter "CIC")⁴ "*is determined in accordance with the legislation*". Clause 73 provides that the CIC by the Public Partner to the Private Partner "*under this contract amounts to 1,688,648,570 KZT*". By Supplementary Agreement No 2 the figure in clause 73 was amended in the light of the Public Partner's agreement to compensate the Private Partner for the work on the transformer substation and power cable line. As amended, clause 73 provided that the total CIC by the Public Partner to the Private Partner under the contract is 2,035,174,570 KZT, of which 1,688,648,570 KZT is the CIC for the kindergarten building and 346,526,000 KZT is the CIC for the construction of the transformer substation.
- 31 Clause 74 provides that the CIC includes expenses for the construction of the PPP facility and expenses for managing the company during its construction. Clauses 75-76 provide that the payments are made after the facility is commissioned by the periodic payments specified in Appendix 6 to the contract "*subject to adjustments provided for in this Contract*".
- 32 Clause 80 provides that "*if the Private Partner violates its terms [it] pays the Public Partner penalties or the Public Partner reduces the payment of the CIC by the amount of penalties in each individual case of such violation...*"

⁴ This is the abbreviation/acronym used in the contract and which I use in this judgment, but a number of others, including CIP, CIM, CMP, and CIE are used in the English translations of the documents.

- 33 The other terms of the contract that are material to the dispute are set out or summarised in this and the following paragraphs. Clauses 12 to 16 deal with failure to grant or delay in granting the Private Partner the right to use the land plot through no fault of the Private Partner which results in the Private Partner not being able to start construction. Their effect is that for delays not exceeding 180 days the Private Partner is entitled to extend the period for the construction of the kindergarten by the period of the delay and for longer delays to receive compensation in accordance with clause 145.1 and/or a penalty.
- 34 Part 6 of the contract deals with the construction of the PPP facility. Four clauses were relied on in the submissions. Clause 27 provides that construction is carried out with funds raised by the Private Partner and risks arising during the construction *“are assigned to the Private Partner”*. Clause 36 provides that *“If the Private Partner discovers circumstances beyond the control of the Parties that make it impossible to construct and commission the PPP facility within the time limits stipulated by the C, and (or) operate the PPP facility, the Private Partner undertakes to immediately notify the Public Partner of these circumstances in order to coordinate further actions of the parties to fulfil this Contract”*. Clause 37 gives the Public Partner *“the right to assign the Private Partner to perform additional work that is not specified in the contract ... but is required due to unforeseen circumstances”*. Clause 40 gives the Private Partner *“the right to extend the construction period ... with compensation for costs, due to any of the following reasons: delay, suspension or obstacle caused by the actions of the Public partner, including, but not limited to, failure to submit land plots within the terms of the Contract”*.
- 35 Part 7 of the contract deals with the operation of the PPP facility. By clause 44, the facility is transferred to the Private Partner for operation for a period of 19 years. Clause 49 provides:
- “... the Private Partner is obliged to provide pre school education and training services under the following conditions: (1) accept children in the amount of at least 100% of the capacity of the kindergarten within the framework of the state educational order for preschool education and training, the amount of per capita funding per pupil. The amount of per capita funding and parental fees per pupil for preschool education and training of children is approved annually by the resolution of the Akimat of Astana. ...”*
- 36 Part 13 of the contract concerns ownership of the PPP facility and its transfer. Clause 86 provides that the *“created and Commission PPP facility shall be subject to transfer to municipal ownership”*. It also states that *acceptance of PPP facility into municipal ownership, and subsequent transfer into operation to the Public Partner shall be carried out in accordance with the requirements of current legislation.”*
- 37 Part 14 of the contract concerns the rights and obligations of the Public Partner and Part 15 those of the Private Partner. By clause 92(2) the Public Partner must *“ensure*

that the Private Partner is provided with a land plot for the construction and operation of a PPP facility, in accordance with the legislation and this contract". By clause 92(6) the Public Partner must "ensure timely payment of CIC to the Private Partner in accordance with the terms of the contract and legislation". Clause 92(7) provides that the Public Partner must "ensure that the Private Partner receives a state educational order for pre-school education and training, the amount of per capita funding per pupil in the amount of at least 100% of the capacity of the kindergarten".

- 38 By clause 93(5) the Private Partner has the right to receive CIC in accordance with the terms of the contract and the legislation and, by clause 93(7), to claim damages. Clause 94(4) is the corollary of clause 92(7). It provides that the Private Partner must *"accept children in the amount of at least 100% of the capacity of the kindergarten within the framework of the state educational order for preschool education and training, the amount of per capita funding per pupil"*. Supplementary Agreement No 2 added a new clause 94(17) which provides that the Private Partner must *"transfer the transformer substation to community communal ownership by signing the statement of transfer and acceptance and other necessary documents"*.
- 39 Part 17 of the contract deals with PPP monitoring. Clause 100 requires the Private Partner to provide *"the Public Partner with a quarterly report on the performance of the Private Partner's obligations under the contract within 10 (ten) calendar days from the end of the reporting period. The report must contain the documents specified in Appendix 5 to the contract"*.
- 40 Appendix 5 lists 21 categories of document required for submitting a report during either the construction phase or the operation phase of the contract or both. I list nine of the ten categories referred to by Mr Privalov (Report, page 12). Many, including the project implementation and construction schedule (by month) (10), loan agreements (14), bond prospectuses and information about bond holders (15), insurance contracts (12) and guarantee agreements (13) must be submitted *"once and as it changes"*. Others, including financial statements (4), the risk matrix for the project (7), and information about state support measures (8) must be submitted *"on a quarterly basis"* and, in the case of construction reports (16) and a photo report on the results of construction (18), on that basis during the construction period.
- 41 Clause 102 of the contract obliges the Parties *"to provide each other with timely information necessary for the performance of their obligations under the contract, and immediately notify each other of the occurrence of significant events that may affect the proper performance of the obligations provided for in the contract"*.
- 42 Part 18 of the contract deals with risk allocation, risk assessment and measures for their control. Clause 104 is a table setting out the parties' agreed allocation of 24 risks under the contract. Those allocated to the Private Partner include the risk of increase of construction costs (1), untimely financial closure (8), deviation from the working documentation (17), increasing the construction period (18), and the cost of raw materials (19). Those allocated to the Public Partner include the risk of untimely supply

of engineering communications (11), changes of plans proposed by local authorities or other government bodies (12), and untimely access to the site (13).

- 43 Clause 105 deals with what are called “disruption events”. They include, (1) the failure of the Public Partner to fulfil its own obligations under the contract, (2) violation of the payment term for CIC exceeding 30 days, (8) violation of deadlines and increase in costs by 5% or more during the construction which occur not due to the fault of the Private Partner. Clause 107 provides that the parties have the right to restore the financial balance in accordance with the financial and economic model if there is a violation of the balance as a result of either a favourable event or a disruption event. Clause 109 provides a procedure for the parties to do so by making changes to the CIC and other payments and for early termination or extension of the contract.
- 44 Part 19 of the contract deals with the liability of the parties. Clause 110 provides that they are liable under the contract and the Law on Public-Private Partnership for any non-performance or improper performance of obligations under the contract. Clause 114 provides that *“Payment of compensation, penalties (fines), damages of the Parties arising as a result of default or improper performance by the other Party of its obligations under the contract is made in accordance with the Contract”*. Clause 115 provides that *“The Public Partner will be liable for losses, expenditures and expenses (including legal costs and payments) caused to the Private Partner... if such losses, expenditures and expenses arose solely through the fault of the Public Partner and such guilt is proved in court”*. Clause 116 provides that *“Any Party has the right not to start performing its obligations under the Contract or to suspend their performance with immediate notification to the other Party, if the other Party’s violation of its obligations under the Contract hinders the performance of the obligations stipulated in the Contract”*.

F The Claim and the Defence

- 45 I gave a general summary of what lies at the root of the dispute at [5]. The Private Partner’s case is set out in its claim form dated 11 February 2022, an undated supplement to the Statement of Claim received by the Registry of the AIFC Court on 13 July 2022, and its written and oral opening and closing submissions. The Public Partner’s case is set out in an undated response to the claim received by the Registry of the AIFC Court on 28 March 2022, and in its written and oral opening and closing submissions. The Court also had before it a list of the factual and legal issues in the case and the parties’ respective position prepared pursuant to §9 of Directions Order No 2 dated 21 October 2022. The positions of the parties can be summarised as follows.

(i) The claim

- 46 The Private Partner claims that the land plot provided by the Public Partner for the construction of the kindergarten did not have the engineering infrastructure (in

particular, a transformer substation and a power cable line) connected to it at the connection points as required by clause 8 of the contract. The consequence was, it submitted, that, by clause 104(11) of the PPP Contract, the risk of “*untimely supply of engineering communications*” was allocated to the Public Sector. The design and estimation documentation provided for the kindergarten to be constructed in 2017-2018 and the estimated costs were based on estimated prices for those years.

47 It submitted that the failure to provide a transformer substation and a power cable line connected to the land plot led to a significant delay in the investment and construction stages and the commissioning of the kindergarten. It was, it maintained, a breach of contract which resulted in an increase in the CIC, the investment costs incurred by it for the project, loss of profits and other losses arising as a result of default or improper performance by the Public Partner of its obligations under the contract. Its case is that the Public Partner is liable to pay the investment costs specified in the contract and the difference between those and the actual investment costs and loss of profits caused to it. It originally also claimed for real damage and actual CIC in respect of the transformer substation and cable line. In its opening submissions, however, it sought to withdraw those claims while reserving the right to bring fresh proceedings for them. Its reasons for seeking to withdraw that part of the claim were that the CIC for the transformer substation and the actual damage caused had not been subjected to forensic examinations, and documents, including the certificate of acceptance and contracts with individuals and banks for the provision of credit, had not been filed. I deal with its application at [179] – [182].

48 The Private Partner seeks the following relief:

- (a) Payment of the CIC specified in the Payment Schedule in Appendix 6 to the PPP Contract as amended by Supplementary Agreement No 1 which was due in 2018 and 2019 but not paid. This element of the claim is for 281,441,428 KZT for 2018 and 281,441,428 KZT 2019, a total of 562,882,856 KZT. The Public Partner does not dispute the debt in respect of those amounts or that it remains unpaid. But for the reason summarised at [55], it has asked the Court to require the Private Partner to enter into an agreement postponing payment to the period 2024-2025.
- (b) Payment of the difference between the CIC specified in the PPP Contract as amended and the Private Party’s actual investment costs in respect of the kindergarten. The Private Partner claims this difference constitutes “real damage” to which it is entitled because, under clauses 104(11) and 105 of the PPP Contract, the delayed delivery of the electrical infrastructure was a disrupting event the risk of which was borne by the Public Partner. The Private Partner was accordingly entitled to compensation for its actual investment costs. It submitted its actual expenses for the kindergarten totalled 2,515,634,896 KZT; an additional 480,460,326 KZT as at 17 November 2020. Originally an additional 167,876,737 KZT was claimed in respect of the transformer substation as at 17 November 2021, but, as I have stated, the Private Partner wishes to withdraw that part of the claim while reserving the right to bring fresh proceedings for it.

- (c) a penalty under Articles 295 and 353 of the Civil Code and Clauses 110 and 114 of the PPP Contract because the Public Partner failed and/or delayed in fulfilling its monetary obligations under the contract. It thus unlawfully used the unpaid principal debt of 562,882,856 KZT (see (a) above) from 18 November 2020, the date of state registration of the Act of Commissioning of the kindergarten until 3 August 2022. The sum claimed under this head is 100,478,446.23 KZT.
- (d) loss of profits of 611,428,598 KZT between 2018 and 2020 under Articles 9, 350 and 351(1) of the Civil Code for losses not covered by the penalty.
- (e) The claimant's legal costs of 50,000,000 KZT.

The total sum claimed is thus 1.805,250,226 KZT.

(ii) The Response to the Claim

- 49 The Public Partner's pleaded case is contained in its initial response and defence to the claim, received by the Registry of the AFC Court on 28 March 2022. That case has a number of limbs, one of which, "the state order issue", involved a counterclaim, which, at the 18 October 2022 CMC, for the reasons in [56] – [61], I ruled should not be heard together with the Private Partner's claim. The Public Partner's response was supplemented by two short opening submissions and its closing submissions, and the way it put its case evolved to some extent. The summary of its case in the following paragraphs reflects that evolution and includes points made in its opening and closing submissions.
- 50 The first limb of the Public Partner's pleaded case is that the plot of land had been provided in a timely manner by 1 August 2017 in accordance with Appendix 3 to the PPP Contract: Response, §7. It claimed that the Private Partner did not immediately notify it that the effect of the absence of electricity infrastructure made it impossible to construct and commission the PPP facility as required by clause 36 of the contract: see Response, §9. It initially maintained (see Response, §10) that the first letter about the transformer substation was received in August 2020 long after December 2018, when the original 18-month period specified for putting the PPP facility into operation expired.
- 51 The second limb of its defence is that the Private Partner failed to provide it with any of the quarterly reports and documents required by clause 100 and Appendix 5 of the contract. It submitted that this breach of contract has two consequences.
- 52 The first is that the Private Partner had no right under clause 116 of the contract not to perform its obligations, to suspend performance, or to maintain that the fault of the Public Partner caused it significant financial losses and increased CIC: Response, §§32 and 35. This meant, it maintained, that under clause 27 of the PPP Contract the

Private Partner bore the risks that arose during the construction period: Response, §15. Those risks included the need to extend that period, the time it took to transfer the obligation to provide the transformer substation to the Private Partner, and Private Partner's additional expenses (CIC) and lost profits: §§15 and 17-18 of the Response. The Private Partner was not therefore entitled to recover its actual CIC, only the CIC accepted by the Public Partner and specified in the contract as amended by Supplementary Agreements No. 1 and No. 2.

- 53 The second consequence is that the Private Partner's breach of contract in not providing the reports required by clause 100 and Appendix 5 of the contract gave rise to a claim by the Public Partner for damages under Article 295 of the Civil Code and clause 80 of the contract: Response, §§35-39.
- 54 The Public Partner's response also relied on the fact that the kindergarten and transformer substation were not transferred to communal ownership after being commissioned as required by clause 86 of the PPP Contract. The reason (discussed at [149] ff.) was the parties' disagreement as to what figure for CIC the relevant documentation for the transfer to communal ownership should contain: Response, §§53-55. The Public Partner maintained it was the amount specified in the PPP Contract as varied by the two Supplementary Agreements. The Private Partner maintained that it was the actual investment costs incurred by it ("actual CIC"). In relation to the transformer substation, §56 of the Response, the final paragraph of this limb of the Public Partner's defence, states that it "*assume[s] that the Private Partner intentionally delays the process of transferring the transformer substation to the communal property of the city, indicating the amount in the acceptance certificate that does not comply with the decision of the maslikhat and the additional agreement*" (emphasis in the original).
- 55 The Public Partner also relied on two provisions in the *Law on Public-Private Partnership*. The first is the limitation in Article 46(1-1) on the changes permitted in a public-private agreement: Response, §46. Article 46(1-1) provides that the conditions of a public-private partnership agreement specified in Article 46(1) "*can be changed by agreement of the parties only under the condition of positive budgetary efficiency (in monetary terms) of such changes*" and subject to "*the preservation (increase) of the economic and social efficiency of the public-private partnership project*". The second, relied on to justify the postponement of the CIC for 2018 and 2019 to 2024 and 2025, is Article 9(4). Article 9(4) requires payment of CIC "*to be carried out after the commissioning of the public private partnership facility in equal shares over a period of at least five years*". The Public Partner submitted that meant that "*payments must be made no earlier than five years, the requirement of earlier ones will be illegal*": Closing, §13, page 10.

G Ruling on the placement in the State Order point

- 56 Paragraphs 57-59 of the Public Partner’s response deal with its allegation that the Private Partner has not fulfilled its obligations under the PPP Contract to admit “*at least 100% of the capacity of the kindergarten within the framework of the state educational order for pre-school education/training*”. Relying on clause 94(1) of the PPP Contract,⁵ the Public Partner submitted that the Private Partner has admitted children outside the state educational order’s framework.
- 57 The supplement to the Private Partner’s statement of claim received by the Court Registry on 13 July 2022 contained two responses to the question of the proportion of children to be placed under the state order. The first was a defence of mistake and that the Agreement contained contradictory terms because the calculations in the financial and economic model of the project (hereafter the “FEM”), which was annexed to, and an integral part of the contract were made on the basis of 33% placement in the state order. The second was that the significant delay in the start of the operation of the kindergarten caused by the lack of utilities and the adverse economic consequences and increased costs caused by the introduction of quarantine measures to prevent the spread of COVID-19 meant that the model with a state order of that percentage “*objectively cannot reach the rate of profitability specified in the FEM of the Agreement*”.
- 58 In its Opening submissions, however, the Private Party submitted that the issue of placement and proportion of children under the state order should not be considered in these proceedings. In §19 of those submissions, it submitted that the payments of CIC pursuant to clause 75 of the PPP Contract are not related to the percentage of public and private orders so that there is no causal relationship between payment of CIC and the numbers of children in the state order. Accordingly, see Opening §22, it maintained that the percentage of pupils admitted under the state order is a separate issue and not related to the substance of the Private Partner’s claim for the CIC. It submitted that this therefore does not affect the issue of paying the CIC and is a matter which is properly for a counterclaim under Rule 13.2 of the Rules of the AIFC Court. The Private Partner submitted that as the Public Partner did not file a counterclaim in time or apply to the court to file one out of time this matter should not be considered by the Court together with the Private Partner’s claim.
- 59 In part, this submission relied on one aspect of the Overriding Objective set out in Part 1 of the AIFC Court Rules 2018. Rule 1.6(3) requires the court to ensure “*that the case is dealt with expeditiously and effectively, using no more resources than are necessary*”. The Private Partner argued that it is not compatible with the requirement to deal with a case expeditiously using no more resources than are necessary for this court to deal with an issue not related to the substance of the Private Partner’s claim for the CIC where a counterclaim has not been properly brought. It therefore

⁵ §58 refers to clauses 23, 86 and 94(4) of the PPP Contract, but only clause 94(4) refers to 100%, although clause 92(7) also does so.

submitted that the Public Partner's claim concerning the percentage of pupils admitted under the state order should be left to an independent claim by the Public Partner, which it accepted the Public Partner had the right to file.

60 The Private Party also claimed that in negotiations on 15 September 2020, the parties resolved that *"after the commissioning of the PPP facility, ... the state order in the kindergarten will be placed at least 33[%] of the design capacity, the rest part the Private Partner organises on a private basis"*. The resolution was signed by the [then] head of the City's Department of Education, Mr. Sh. Kadyrova. This, it was argued, is consistent with an earlier letter dated 25 August 2020 from D Shoganbay, then the Deputy Head of the City's Education Department to the City's Chamber of Entrepreneurs. In that letter, Mr Shoganbay stated that according to the Concept of the PPP Project on the construction and operation of kindergartens in the city of Astana in 2016, approved in 2016, *"the state order in the kindergarten will fill at least 33% of the design capacity, the rest of the capacity the private partner organizes on a private basis"*. The Private Partner maintains, on the basis of this, that the parties *"had a clear understanding ... that the state educational order would be placed in the amount of 33%"*.

61 At the CMC on 18 October 2022, I heard submissions by the parties on this question and ruled that it should not be heard together with the Private Partner's claim. I accept the submission that the percentage of pupils admitted under the state order is not related to the substance of the Private Partner's claim for the CIC, does not affect the issue of paying the CIC and is properly a matter for a counterclaim under Rule 13.2 of the Rules of the AIFC Court. This Court would not want to take an overly strict approach to questions such as the absence of a counterclaim or an application to file a properly particularised counterclaim. But, apart from any insufficiency of pleading, in this case the issue of what proportion of pupils were to be under the state order raises disputed factual issues which are insufficiently supported by evidence. This is illustrated by the letter signed by Mr Shoganbay on 25 August 2020 and the resolution signed by Mr. Kadyrova on 15 September 2020. Those factual issues in turn give rise to legal issues about whether the PPP Contract contained contradictory terms or whether the Public Partner is not able to rely on it for some other reason, such as an operative mistake. Those issues were not addressed in the documentation before me on 18 October 2022 or in the Public Partner's submissions. The procedural and evidential deficiencies in the way the Public Body raised the question of placement in the state order were unfortunate. My ruling did not preclude the Public Partner filing a claim against the Private Partner regarding the placement of children under a state order. It has not yet done so but must do so if it wishes to pursue this matter.

H The Witnesses of Fact

62 On behalf of the Claimant Private Partner, the following individuals provided witness statements and were cross-examined at the hearing, giving their evidence through a Russian interpreter:

- (1) **Mr Zhanbolat Meldeshov** is a director of the Private Partner and Chairman of its Supervisory Board. He and Mr Almas Satylganov were project managers on the project for the construction of the kindergarten. Mr Meldeshov's evidence dealt with the tender, the effect of the failure to provide the necessary engineering infrastructure, and the efforts by the company with the Education Department and the Mayor of the City to get the public partner to provide the required transformer substation.
- (2) **Mr Almas Satylganov**, the other project manager, gave evidence dealing with the consequences of the site not being connected to a power supply with sufficient capacity. It covered delay and increase in construction costs, negotiations with the Education Department and the Akimat about the need to resolve the lack of a power supply, an approach to the Astana Regional Electric Grid company ("Astana REC JSC") and putting the facility into operation. His responsibilities included planning organisation and control of the process, relationships with contractors, suppliers, state partners, and other organisations involved in the construction. They included utility services and government bodies. He drafted the letters and notifications that were signed by Mr Meldeshev and sent to the Department of Education and to utility providers including the regional power generating company.
- (3) **Mr Vasily Semenovich Kovalenko** is the head of production and the technical department of the "Nurbolat" Production Co-operative. "Nurbolat" was employed by the Private Partner as the general contractor for the construction of the kindergarten by a contract dated 25 September 2017. Mr Kovalenko's evidence covered the lack of an electrical power connection, how much power was required, attempts to develop options for connecting to other transformer substations, rental of generators and the impact of the electricity power issues on the timetable and the cost of construction.
- (4) **Mr Kuralgani Rakhimovich Amanzhholov** provided construction supervision on behalf of "Platan" LLP/JSC the firm employed by the Private Partner to provide technical supervision of the project. He visited the site frequently. His evidence concerned the consequences of what he said was a failure by the Public Partner to provide an electricity connection on timing and the costs incurred, and the attempts of the Private Partner to solve the problem. His evidence also dealt with issues concerning the registration of the land plot for the transformer substation and the acceptance of the substation.
- (5) **Mr Toleubay Askarov** is an executive director of Astanagorproekt-Sh LLP which provided Author's supervision from October 2019. By then construction had started, and Mr Askarov worked on the project, and finalised and approved the project documentation. His evidence concerned compliance with technical specifications and the requirements of construction legislation, the consequences of not bringing the engineering infrastructure to the connection points, and efforts

to resolve the issue of electrification of the kindergarten, including the construction of the transformer substation.

- (6) **Ms Akerke Mirambekovna Zhusupova** is the Chief Expert of the Laboratory of Special Studies at the Institute of Forensic Examinations in Astana. The Institute is a branch of the State Centre for Forensic Examinations of the Ministry of Justice of the Republic of Kazakhstan. Ms Zhusupova wrote a report, expert opinion No 89p, dated 22 April 2021 on the correctness of figures in two Certificates. The first Certificate dated 20 October 2020 concerned the book value of the kindergarten. The second Certificate dated 17 November 2020 concerned the Private Partner's investment costs.

63 On behalf of the Defendant Public Partner, the following individuals provided witness statements and were cross-examined at the hearing, giving their evidence through a Russian interpreter:

- (1) **Ms. Ekaterina Smyshlyaeva** is Head of the Legal Department of the Astana Regional Electric Grid company ("Astana REC JSC"). Her evidence concerned the process for connecting to electricity networks and applications by the Private Partner in March and July 2018 and May 2019 for connecting electricity for the construction of the kindergarten and Astana REC JSC's response to them.
- (2) **Ms Gulzhan Dzhaksylykovna Aitzhanova** was at the material time Deputy Head of the City's Education Department and responsible for all PPP projects including this one. Her evidence concerned the transfer of the land to the Private Partner, the commencement and progress of construction, the decision in October 2019 to build a separate transformer substation, and whether the Private Partner provided documents for financial closure and complied with its reporting obligations under the contract.
- (3) **Ms Lyazzat Kasymbekova** is Head of the City's Department of Economics and Budget Planning. Her evidence dealt with the part played by her department in the planning, implementation and assessment of PPP projects, and the information, documents and reports on the project her department requested and received from the Department of Education. It covered the Project Concept for the construction and operation of kindergartens in Astana, whether there was a contractual deadline for providing the engineering infrastructure, the responsibility for failing to meet the time limits specified in the contract, and the impact of the fact that the criteria for selecting the best tender for a project included the percentage of places under the state order offered by a potential Private Partner.
- (4) **Ms Aliya Bikeeva:** Ms Bikeeva was formerly the Director of the Public-Private Partnership Department of "Astana Invest" which gave consultancy support to Astana City's Education Department for the kindergarten project. Her evidence concerned the *Concept* for the kindergarten project and the requirement that an

applicant making a tender offer to provide at least 33% of the kindergarten's places to for children taking places under the state order. She also stated that one of the criteria for selection of the best competitive application was the percentage of places offered to accommodate children under the state order, and the formula for calculating that percentage.

- (5) **Mr Diyarov Olzhas** is the Chief Specialist of Asset Management and Public Procurement of the City. His evidence concerned the process and documentation required for transferring Public-Private objects to is state or public ownership and, in this case, the process for transferring the kindergarten and transformer substation to the communal property of the City.

I The Expert Evidence

64 The parties also adduced expert evidence on Kazakhstan law:

(1) For the Private Partner, **Dr Elena Nesterova**. Dr Nesterova is candidate of legal sciences, an Associate Professor at the Adilet Higher School of Law at the Caspian University in Almaty, a partner in the law firm United Consultants LLP and Chief Researcher at the Institute of Legislation and Legal Information of the Ministry of Justice of the Republic of Kazakhstan. She has provided expert opinions on Kazakhstan law in international arbitrations and proceedings in foreign courts. She has also provided opinions on the interpretation and application of civil law for the Constitutional Council of the Republic of Kazakhstan and business entities. Her signed report is dated 22 June 2022 and has supporting material annexed to it.

(2) For the Public Partner, **Mr Gennady Privalov**. Mr Privalov is an advocate and a member of the Bar Association of the City of Astana. He has had a licence to practice law since 1999. Before then he was a lawyer-adviser to Agrosnab JSC, a legal consultant to the Akmola department of transport inspection, an assistant to the Akmola Transport prosecutor, Deputy Aviation Transport Prosecutor of the City of Astana, and a chief specialist of the Department for Control and Protection of Entrepreneurship. Mr Privalov's a signed report is dated 17 October 2022. Responding to a question by me at the end of his oral evidence, he said that he is a civil law expert but that in his professional life he had also dealt with administrative law and criminal law.

65 Dr Nesterova and Mr Privalov were asked to give expert opinions on the interpretation of the obligations of both parties under the PPP Contract under Kazakhstan law and whether the parties had complied with those obligations. After their Reports were exchanged, they met and prepared a Joint Memorandum (hereafter "JM") dated 4 November 2022 which identifies and summarises the matters on which they agreed and those on which they were unable to agree. Their views are summarised in the Appendix to this judgment. At the hearing they gave

oral evidence and were cross-examined. Dr Nesterova's evidence was given via video-link.

J Discussion and Conclusions on the Disputed Issues

(i) When was the plot provided?

- 66 The period of 60 days specified by clause 7 of the PPP Contract from the date the contract came into force on 1 June 2017 for the provision of the plot expired on 1 August 2017. The issue is whether the plot of land was provided when the Public Partner permitted the Private Partner to enter and start construction or when it granted the Private Partner the right to lease the plot. The latter point is linked to the question, considered at [79] ff, whether the obligation to provide the plot only arose when financial closure occurred. Although in the evidence and submissions, time was spent on when the plot was provided to the Private Partner, it will be seen that the more important question is whether the Public Partner was in breach of its obligation to provide engineering infrastructure, in particular electrical power infrastructure. That question is considered at [91] ff.
- 67 The following facts relevant to the provision of the plot are not in dispute. On 4th July 2017 the Public Partner was granted the right to lease the plot in the area of the intersection of streets with project names No. 29 and No. 36 by Decree No 197-1352 of the Akimat of the City of Astana.
- 68 On 12th July 2017 the City of Astana's Department of Land Relations and Control and Protection of Land in Astana concluded an agreement with the Astana City Education Department "*for temporary gratuitous land use (lease) for a period of 10 months*" of the plot for the purpose of landscaping.
- 69 On 2 March 2018 the Public Partner notified the Office of State Architectural and Construction Control State Institution of the city of Astana of the commencement of the implementation of construction activities for the kindergarten to be built on the plot and received a coupon for the receipt of the notification, with the registration number of HKMZH -41. There is no reference to the Private Partner on the coupon which was signed by the Public Partner.
- 70 On 18th April 2018 the City Commission on granting rights to land plots in Astana city granted the Private Partner the right to lease the plot: see Minutes No. 11 signed by A. Amrin, the Commission's Chairman, and the Deputy Akim of Astana.
- 71 The Public Partner's case is that the Private Partner was provided with the plot by the agreement on temporary gratuitous use dated 12 July 2017: Public Partner's Closing, §3, page 4. Its alternative submission, considered at [79] ff., is that it was not obliged to take all necessary measures to provide the plot until financial closure had

occurred: Public Partner's Opening §6 and Closing §2 page 3, and the evidence of Ms Aitzhanova, who at the time was responsible for all the City of Astana's PPP projects.

- 72 The Public Partner's primary submission relied on the evidence of Ms Aitzhanova and Ms Kasymbekova who relied on the agreement on temporary gratuitous use dated 12 July 2017. In cross-examination, when shown that document, Ms Aitzhanova accepted that document showed the land was in fact provided by the City to the Public Partner. Ms Kasymbekova accepted in cross-examination that she had relied on a report received from the Public Partner which referred to the document dated 12 July 2017. Ms Aitzhanova also stated that without the decision taken on 18 April 2018 and recorded in Minutes No. 11, the Private Partner could not start construction and that decision could not have been taken earlier because documents showing financial closure had not been provided, a matter I consider at [79] ff.
- 73 It was also submitted by the Public Partner that the requirements of clause 7 were satisfied from the time the Public Partner urged the Private Partner to start construction or from the time that construction started in March 2018.
- 74 The significance of March is that it was then that the Public Partner notified the Office of State Architectural and Construction Control State Institution of the City of Astana of the commencement of construction activities and was sent a "coupon" acknowledging receipt of the notification. The relevance of the Office of State Architectural and Construction Control is that Article 68(2) and (12) of the Law on Architectural, Town-Planning and Construction Activity in the Republic of Kazakhstan dated 16 July 2001 No. 242 respectively provide that in the case of a customer intending to build an object who has the "appropriate land right" "no additional decision from local executive bodies of districts (cities) is required" and that "prior to the commencement of construction ... the customer is obliged to notify bodies carrying out state architectural and construction control of the beginning of performance of construction ...".⁶ In this case, the coupon was signed by the Public Partner and not the Private Partner because at that time the Private Partner did not have rights to the land plot.
- 75 I have concluded that what clause 7 of the contract requires is the grant of a right rather than a mere permission to enter and work on the land. It is true that clause 7 states only that the obligation of the Public Partner is "to take all necessary measures in accordance with the law to provide the private partner with a land plot for the construction and operation of a PPP facility". It does not expressly refer to the Private Partner having the legal right to use the land plot. Nevertheless clauses 9 and 10 and 12 suggest that what the contract contemplates is a legal right.

⁶ The basic definitions used in the law are set out in Article 1. Article 1(56.3) defines "customer" as "an individual or legal entity operating in accordance with the legislation of the Republic of Kazakhstan on architectural town planning and construction activities. Depending on the purpose of an activity, a customer may be a customer investor of a project programme, customer owner, developer or their authorised persons".

- 76 Clause 9 provides that the land is to be provided on terms of temporary gratuitous use. Clause 10, which precludes the Private Partner from transferring its rights to the plot to other persons, assumes that it has rights and not a mere permission. Clause 12 provides that where the Private Partner *“is not granted the right to use the land plot within the terms specified in the contract through no fault of the Private Partner, and for this reason ... cannot start construction ... [it] Is entitled to extend the term of the construction of the PPP facility.”*
- 77 Accordingly, the plot was transferred to and thus provided to the Private Partner on 18 April 2018. Unless the Public Partner’s argument that its obligation to take all necessary measures to provide the plot only arose after financial closure which had not occurred is correct, which I consider at [79] ff, this was ten months after the contract came into force rather than the 60-day period specified in clause 7 for the Public Partner to *“take all necessary measures”* to provide the Private Partner with the plot.
- 78 I conclude by observing that in cross-examination Ms Aitzhanova stated that without being provided with the right to lease the land the Private Partner could not start construction. This may reflect the strict legal position but, in this case, it did not reflect the factual reality because it was common ground that construction started in March 2018: see for example JM, section 4.

(ii) The relevance of financial closure to the obligation to provide the plot and the start of construction:

- 79 As stated at [27], clause 4 and Appendix 2 of the contract as amended provided that financial closure was to be within two months of the date of the contract, that is before 29 July 2017. One of the Public Partner’s arguments was that the obligation to provide the plot only arose after financial closure, which in this case was delayed because the Private Partner did not provide written notification that it had the right to access the financing necessary for the construction of the kindergarten, as was required by clause 1(13) of the contract.
- 80 The first question is therefore is whether the obligation to take all necessary measures in accordance with the law to provide the plot did only arise after financial closure. In my judgment, it clearly did not. Article 392 of the Civil Code provides:

“When interpreting provisions of an agreement, the court shall take into account the literal meaning of the words and expressions contained in it. The literal meaning of a provision in of an agreement, where unclear, shall be established by way of comparing that with other conditions and the sense of the agreement as a whole.”

- 81 Clause 7 of the contract specifies that all necessary measures to provide the plot must be taken within a period of 60 days from the date on which the contract comes into force. Clause 7 does not refer to financial closure and the reference to a period from the date on which the contract comes into force reflects an express choice to use that rather than financial closure as the period by when the necessary measures to provide the plot must be taken. Clause 155 provides that the contract comes into force from the moment of its public registration with the relevant registration authority which in this case was 1 June 2017. The literal meaning of clause 7 is that the obligation to take the necessary measures to provide the plot arose on 1 June 2017 and the period for compliance ended on 1 August 2017.
- 82 There is no ambiguity in clause 7, but had there been, it is clear from Article 392 of the Civil Code that, as the experts agreed, the meaning of particular words is determined by comparison with other conditions in the contract and its meaning as a whole. In this case, Clause 7 is to be contrasted with clause 157 where the construction period is defined as a period from the date of financial closure. It thus appears from clause 157 that where the parties wished to define an obligation by reference to financial closure, they did so expressly.
- 83 In any event, although the documents before the court do not include a written notification by the Private Partner that it had the financing necessary for the project there is no evidence that it did not. Indeed, the evidence points the other way.
- 84 When submitting its tender on 20 December 2016, the Private Partner provided notarised documents confirming its compliance with the qualification requirements. These included the availability of money amounting to 10% of the cost of the project in its accounts and a letter from the JSC Bank of Astana, Astana branch. It was confirmed by Ms Aitzhanova that the Private Partner met the qualification requirements for the tender. She, however, described the bank's letter as only confirming readiness to provide financing if the tender succeeded: it was, she stated, a letter of intent rather than actual money. Although this is strictly true, fulfilling the qualification requirements indicated that the Private Partner was likely to have the necessary financial means to start construction should its tender succeed.
- 85 On 24 November 2017 the Private Partner transferred 16,873,651 KZT to the "Nutbolat" Production Co-operative as a prepayment for building materials. Moreover, a document disclosed only at the start of the hearing showed that on 30 November 2017 the Private Partner and "Nurbolat" entered into a non-revolving Credit Line in the amount of 360,000,000 KZT with SB Sberbank JSC, for which it provided security in the form of a number of non-residential buildings, a cash deposit of 120,000,000 KZT and a number of guarantees. In his oral evidence, Mr Meldeshov stated that the Private Partner disclosed this loan to the Public Partner. He also stated that *"regarding the financial closure, the State Partner has never ... raised any issues, because from the very beginning, all the funding was confirmed, we confirmed that we [were] prepared to start construction with our own financing, ... there were no financial issues whatsoever"*. I do not accept the Private Partner's explanation for

the very late disclosure of this document, that it had only just received it and the bank's permission to disclose it, but there was no challenge to the authenticity of the document.

- 86 While, as Ms Aitzhanova stated, it was not the responsibility of the Public Partner to request the Private Partner to provide a report on financial closure, I note that there is also no evidence that, prior to these proceedings and at any stage during the construction period, the Public Partner made any complaint that the Private Partner had not notified it of financial closure. The Public Partner was entitled to *“unhindered access to ... documentation related to the implementation of activities under the PPP project”* and to *“require information ... about the construction ...”*: clauses 91(2) and (6) of the contract. It did not avail itself of these rights. Moreover, clause 101 provides that if, while monitoring the Private Partner's compliance with the contract, the Public Partner detected violations *“that may significantly affect the Private Partner's compliance with the terms of the contract”*, it should request in writing that the violations be eliminated within 30 days, or a period agreed by the parties. That was not done either in respect of financial closure or the reports and documents required by clause 100. What happened was that the construction proceeded, and the kindergarten and transformer substation were accepted into operation by the Public Partner in its Commissioning Certificates dated 7 and 8 October 2020, after which over 909,000,000 KZT was paid to the Private Partner: see Private Partner's Opening, §§ 3.3 -3.4.
- 87 As to the loan by Sberbank, the Public Partner submitted in its closing that the loan did not show that the Private Partner had raised the financing required for the project and thus achieved financial closure. This was because the loan was for only about 25% of the investment costs (CIC) of 1,688,648,570 KZT stated in clause 73 of the contract and not for 90% of the costs as specified in Appendix 4. It stated that *“this eloquently indicates that at the time of the conclusion of the contract, as well as at the beginning of construction, evidence for raising 1,688,648,570 KZT was not provided to either the defendant or the court”*: Closing §2 page 3.
- 88 Since financial closure refers to a written notification by the Private Partner, on the evidence before me it is not possible to say exactly when it occurred. In view of my conclusion on the meaning of clause 7, it is not necessary to decide when it occurred because it is not necessary to decide whether the obligation to provide the plot only arose after financial closure. What would the position have been had it been necessary to decide the question?
- 89 The evidence before me is not entirely clear, but I consider that, had it been necessary to decide the question, there is sufficient evidence to have enabled me to make one of three inferences. The first is to infer from the evidence and findings summarised above that financial closure did occur before the plot was provided. The second is that, if financial closure had not occurred before then, the reason was that the Private Partner did not have rights to the plot until April 2018. The Public Partner, which had those rights before then, notified the Office of State Architectural and

Construction Control about the commencement of construction on 2 March 2018, when it is common ground that construction started. The third possibility is based on the conduct of the Public Partner in encouraging the Private Partner to commence construction, and then notifying the Office of State Architectural and Construction Control but not raising the question of financial closure until after the commencement of these proceedings. I consider that conduct would preclude the Public Partner from relying on this point, in a similar way to the way, in a common law system, the principle of estoppel precludes a person from relying on its strict rights.

- 90 Accordingly, I reject the Public Partner’s submission that the delay in the start of construction was caused by a failure of financial closure for which the Private Party was responsible.

(iii) Engineering infrastructure: what was done to connect the plot to the connection point of the electricity network, and whose responsibility was it to do so?

- 91 By clause 8 of the contract, the engineering infrastructure, including electricity, “***must be connected to the land plot to the connection points***” (emphasis added). This requirement is clear and express. At the time the plot was provided to the Private Partner, there was no electricity connection between it and the electricity connection points because the Public Partner’s original plan for the connection point to be provided from a transformer substation which was to be built on a nearby site proposed for another kindergarten did not proceed.
- 92 The Private Partner’s pleaded case is that it took all measures to resolve the electricity supply issue as soon as possible and that it repeatedly sent notification letters and appeals to the Public Partner which did nothing to resolve it. The documents initially filed in support of this part of its pleaded case date only from 21 August 2020, but the material before me includes earlier documents which were subsequently added to the case file as well as the evidence of a number of the witnesses.
- 93 The Public Partner’s position, supported by Mr Privalov’s opinion, is that it was not in breach of the contract. This it submitted is because the Private Partner was aware that it would be necessary for electricity to be connected to a temporary connection point during construction but did not raise the issue at the beginning of construction. The Public Partner originally claimed that the Private Partner did not formally complain until August 2020 but by the time of the hearing it maintained that the first letters of complaint were those to it from the Private Partner dated 8 and 19 June 2018: see for example § 2 of page 4 of Mr Privalov’s opinion.⁷

⁷ The Private Partner’s Opening Submissions err in stating §§12 and 14 that it notified the Public Partner of the problem in obtaining an electricity supply seven days after signing the PPP Contract. The Contract is dated 29 May 2017 and the letter relied on is dated 8 June 2018.

- 94 The Public Partner also relied on the fact that the Private Partner took independent steps to obtain a connection point for the tie-in and did not use those made available by the electricity company, Astana REC JSC, at the airport site or by “Expo Town Success”, a housing construction co-operative which owned the “Vienna Quarter” connection point. The diesel generators were leased from two entrepreneurs between January and December 2019 after the technical specifications to the airport connection point had been provided in March 2018 but not taken up and the Public Partner is not liable to reimburse the Private Partner for them: Closing, § 6.
- 95 The third limb of this part of the Public Partner’s argument was that the dispute concerning the connection to the electricity infrastructure was resolved by later decisions and the two Supplementary Agreements made in December 2020 and September 2021. Those agreements modified the PPP Contract by providing for the Private Partner to construct a transformer substation and allocated funds at the CIC specified in the agreements. The Public Partner submitted that the Private Partner is not entitled to recover the 492,157,728 KZT it claims as additional expenses because of the increase in its estimated costs: Closing, §8.
- 96 Evidence about the position on electricity infrastructure was given on behalf of the Private Partner by Messrs Meldeshov, Kovalenko, Amanzholov, Satylganov, and Askarov. Evidence on behalf of the Public Partner was given by Ms Smyshlyaeva, Head of Legal Services at Astana REC, and Ms Aitzhanova, at the material time Deputy Head of the City’s Education Department and responsible for all its PPP projects.
- 97 I first set out my findings of fact. It is, as I have stated, common ground that construction started in March 2018. It is clear from the documentation and the evidence of Ms Smyshlyaeva, that, on 27 March 2018, the Private Partner applied to Astana REC for an electrical connection for the construction of the kindergarten. On 30 March 2018 Astana REC offered the Private Partner a connection point at the airport substation. Ms Smyshlyaeva stated that where construction was going on it was Astana REC’s practice to enable the construction activity by giving the applicant the closest and most cost-effective connection point. She said that, at the time, that was the airport substation. She also stated that the Private Partner did not follow this up and did not use the specifications. It was not said by her or by the other witnesses whether, and if so how, the Public Partner was involved in this application.
- 98 The Private Partner gave several reasons for not using the technical specifications issued on 30 March 2018. The first was that the airport was too far from the site. Ms Smyshlyaeva accepted in cross-examination that the airport substation was far away from the kindergarten. But she stated that the Private Partner did not have to connect to the airport substation itself. There was, she stated, a transmission line from the substation and a pylon close to the plot which the Private Partner was supposed to use as its connection point. The second reason was that the technical specifications issued by Astana REC’s chief engineer required the construction of electric transmission lines and an integrated transformer substation.

- 99 A third possible reason appears from two letters from the Private Partner to the Public Partner dated 8 and 19 June 2018. Those letters refer to the substantial payments demanded by the owners of the transformer substations for which Astana REC had issued technical conditions and the fact that lack of a temporary power supplies made it difficult to perform construction work or to meet the construction period specified in the contract.
- 100 There is a sharp conflict in the evidence concerning the position between March and June 2018. The Public Partner's case was that the Private Partner did not raise the issue at the beginning of construction. Ms Aitzhanova stated that no letters or notifications had been provided by the Private Partner since the beginning of the contract. Although this may primarily have been a reference to the documents required by Appendix 5 to the contract, those included construction reports, which would encompass reports about the effect of the absence of a connection to the electricity grid.
- 101 As to the witnesses for the Private Partner, in cross-examination Mr Meldeshov stated that the Public Partner told the Private Partner that it was for it to find a tie-in to the electrical grid, effectively saying *"just go ahead and look for any tie-in, that's on you"*. He also stated that they brought the difficulties in getting the electricity power needed for construction to the Public Partner from Day 1. Responding to a question by me, he said that he personally talked to Ms Aitzhanova. Mr Satylganov stated that he had repeatedly raised the issue of the urgent need to resolve the acute issue of electrification at different levels, including directly with the heads and deputies of the Public Partner, the Akims and their deputies but that they *"received no effective assistance during the construction period"*: Statement, §§ 12-13. Mr Meldeshov and Mr Satylganov's evidence that they had raised the electricity issue with the Public Partner was not challenged by Mr Elamanov.
- 102 Mr Kovalenko's evidence was that they went to the power supply company with this issue *"but there were constant delays ... first of all, probably because of the inactivity of the Public Partner"*. He and Mr Amanzholov, who was responsible for technical supervision, also said that because no electricity connection was provided by the Public Partner they did not connect to permanent grids and had to rent diesel generators.
- 103 At some stage, it is not clear from the evidence exactly when, the Private Partner sought to connect to substations located in the "Vienna Quarter". The substantially unchallenged evidence of Mr Amanzholov and Mr Kovalenko was that the Vienna Quarter had insufficient spare capacity of the 150-200 KW needed and that Buldirshin's attempts to obtain a connection there were at first refused *"citing the lack of free capacity"*. Mr Kovalenko also stated that *"the Private Partner provided electricity under a temporary connection scheme from the neighbouring construction site of the residential complex Vienna Quarter with a capacity not exceeding 15 to 20 kW, but the provided capacities were only enough for the needs of the administrative*

office” and not for the construction work: see statement, §13. His evidence was that the lack of sufficient electrical power led to significant delay to the construction. Mr Meldeshov stated that they notified the Public Partner of the refusal by the construction company which owned the Vienna Quarter’s connection point to give permission to connect because it did not have surplus capacity. He also stated that the connection to the Vienna Quarter’s connection point which was insufficient for construction purposes was obtained without any assistance from the Public Partner.

- 104 What the documents show is that on 13 July 2018 the Private Partner applied to Astana REC to enable it to resolve the problem of power supply by transferring the technical specifications previously issued for the substation that had been planned to be constructed at the intersection of Ryskulov and No 36 streets which had not proceeded. But in a letter dated 17 July 2018, S Menkin, First Deputy Chairman of Astana REC’s Management Board for Production replied returning the application. He stated this was because *“a request for the issuance, extension and modification of technical specifications is submitted by the customer (stated institution and Department of Education of Astana city) for the design and construction of the facility. Considering the above, due to the absence of the customer’s application, we are forced to return your application ...”*. Ms Smyshlyaeva stated that the problem was that the Private Partner had not provided documents confirming its entitlement to request the connection and that the owner of the connection point had agreed to the application. She also pointed to the statement in the last paragraph of the letter which stated that the technical conditions would be changed *“upon repeated application... with a full package of documents and if the owner of the networks agrees ...”*.
- 105 At times the evidence of Messrs Meldeshov, Kovalenko, Amanzholov, Satylganov and Askarov on this question and the inactivity of the Public Partner was general and did not refer to specific documents. There is, however, support for it in the two letters dated 8 and 19 June 2018 to which I have referred. In those letters the Private Partner set out the problem caused because of the non-construction of the transformer substation that was to have been constructed on the nearby site. In the first it referred to the difficulties it faced in getting a temporary power supply and asked the Public Partner *“to coordinate the issue of issuing a consolidated plan of external engineering networks for the facility”*. In the second, it asked the City *“to consider transferring the Design and Estimate Documentation for the Transformer Substation in full, as an addendum to the existing contract, so that this transformer substation will be included in Lot No. 5 on a legal basis as an annex to contract No. 1 dated May 29, 2017”*. It was thus in June 2018 that it first proposed what between 2 and 3 years later became Supplementary Agreements No 1 and No 2.
- 106 It is telling that on the question of electricity infrastructure and what information the Private Partner had given to the Public Partner neither Ms Aitzhanova’s brief statement nor her oral evidence refer to these letters. Her statement said only that: *“Regarding power supply, the facility was connected to the power supply network to the neighbouring Vienna Quarter residential complex under construction at the*

request of the Akimat, but it was only in 2019 that the question arose that for further normal functioning, taking into account the existing capacities of the residential complex's power supply network, it was necessary to build a separate TS that was not included in the project..."

- 107 There is, moreover, not a single document before the court evidencing a request by the Public Partner or the Akimat to provide a connection to electrical infrastructure either in the Vienna Quarter or elsewhere. This is also telling in view of the requirement in clause 8 of the contract that the plot must be connected to the engineering infrastructure's connection points and the statement in the Public Partner's Additional Opening Submissions, dated 8 November 2022, that *"it is impossible to get a connection point bypassing the State Partner"*.
- 108 Ms Aitzhanova appeared to be unaware of any of the problems with electricity supply in 2018 and erred in stating that the question of electricity and the need to build a transformer substation only arose in 2019. In her oral evidence she also stated that she was unaware of how many kilowatts the Vienna Quarter was able to provide for this construction. She stated that none of the reports Appendix 5 of the PPP Contract required the Private Partner to submit had been received. She had never requested them or complained about the Private Partner not providing those documents because it was not the Public Partner's responsibility to remind the Private Partner of its obligations.
- 109 As to what happened in 2019, on 28 May 2019 the Private Partner submitted a further application for temporary specifications for an electrical connection for the construction of the kindergarten. Ms Smyshlyaeva stated that on 6 June 2019 the Private Partner was provided with specifications for the Vienna Quarter residential complex's connection point but again it did not fulfil the conditions.
- 110 The steps the Private Partner had requested in the letters of June 2018 were the subject of an appeal by it to the Competition Commission. On 11 October 2019 a meeting of the Competition Commission and the Commission for Direct Negotiations on the implementation of the PPP project decided and recorded in a protocol that an additional agreement should be concluded with the Private Partner. It was decided that the terms for the commissioning of the kindergarten should be extended and the payment schedule for the payment of CIC should be postponed. It was also decided that the Private Partner should be instructed to construct and commission a transformer substation and electric grid line and to prepare documents containing the cost of the additional work.
- 111 On 5 November 2019 the Private Partner re-applied for new technical specifications and informed Astana REC that it was cancelling the previous specifications. The letter stated that this was because Expo Town Success, which owned the Vienna Quarter's connection point, had *"requested significant amounts of compensation through their networks"* for which Buldirshin 2012 would not be compensated by the State upon completion of the construction.

- 112 The Private Partner was provided with a land plot for the transformer substation by Akimat Resolution 510-1524 dated 14 November 2019. During December 2019, updated design and estimate documentation for the substation was prepared. Work on it started in January 2020 and was completed in September 2020: see Mr Askarov’s statement, §§ 11-14. The construction was undertaken by the Private Partner on the basis of the protocol decision at the meeting of 11 October 2019 but without the additional agreement specified in the decision at that meeting.
- 113 While construction was underway, there were further negotiations about the Private Partner’s estimate of the design and construction costs of the transformer substation and about additional costs it claimed to have incurred because the Public Partner had not provided a plot connected to the electricity supply networks. I deal with the claim for the additional costs at [161] – [169]. The Private Partner provided its estimates of the additional cost of the work for constructing the transformer substation for a meeting of the PPP Commission on 10 February 2020. At that meeting the Commission decided to submit those figures for budgetary approval. These decisions were eventually reflected in Supplementary Agreement No 1 made in December 2020 which *inter alia* provided for extending the period for the commissioning of the kindergarten and for additional work for the construction of a transformer substation. They were also reflected in the amendment to clause 73 of the PPP Contract made by Supplementary Agreement No. 2 in September 2021.
- 114 In summary, I have concluded that that the Private Partner gave the Public Partner written notice of the power supply problems in June 2018. On the basis of the evidence of Messrs Meldeshov, Kovalenko, Amanzholov and Askarov, I consider that before then they also communicated more informally with the Public Partner about the problems. I accept the evidence that they were told to look for a tie-in themselves and as to the inactivity of the Public Partner. There is no evidence that the Public Partner took any steps to provide an electricity connection point for the Private Partner or assisted it in its efforts to do so. Despite its obligations under clause 8 of the contract, it appears to have left it to the Private Partner to sort out the problem. The Private Partner’s efforts did not succeed. One of the owners of the two transformer substations for which specifications were issued initially had no excess capacity. Both of them required substantial compensation from the Private Partner which it considered it would not be able to recover from the Public Partner.

(iii) Conclusions on breach:

- 115 The Public Partner’s response to the claim maintained that the provision of the plot without the infrastructure connections did not entitle the Private Partner to a penalty or compensation. It submitted that “*clause 16 of the [contract] states only about untimely provision of the land plot without reservation of engineering networks*” but “*the land plot was provided... on time according to [Appendix] 3 to the [contract]*”: Response, §33. I can deal with this submission briefly. Although the

response only refers to clause 16, clauses 12-15 also make provisions about delay or failure to provide the plot. The Public Partner's submission overlooks the fact that clause 8 of the contract states that "the engineering infrastructure must be connected to the provided land plot". It is also inconsistent with other provisions of the contract and provisions of the Civil Code to which I turn.

116 On the issues of contract and construction law which arise on this question, the legislative starting point is the *Civil Code* and the material provisions on contracts of work and labour in Chapter 32 of that Code. The provisions relevant to this issue are in the third part ("paragraph 3") of Chapter 32, "*Features of Construction Contract*". In the context of this PPP Contract the references in the three provisions set out below to "the contractor" are to the Private Partner, and the references to "the customer" are to the Public Partner.

117 Article 651(1), headed "*Construction Contract*", provides:

*"Under the construction contract the contractor agrees in the original terms according to the customer to build a specific object or perform other construction work, and **the customer agrees to provide the contractor with the necessary conditions for the performance of work**, accept the result and pay for it at the agreed price".* (emphasis added)

118 Article 658, headed "*Providing the Land Section for Construction*", provides:

*"**The customer shall be obliged to provide land for the construction in such area and state as indicated in the contract.** In the absence of such instructions in the contract, the area and the state of the land should ensure the timely start of work, their normal maintenance and completion on time."* (emphasis added)

119 Article 659, headed "*Additional Duties Of the Customer in the Contract for Construction Work*" provide:

*"**The customer is obliged in the cases and in the manner prescribed by the contract for construction work**, to transfer to the contractor for the use needed buildings and facilities, **to ensure the transportation of goods to the contractor, the temporary power supply networks**, water and steam lines, and provide other services. Payment shall be made on the terms stipulated in the contract."* (emphasis added)

120 The obligations imposed on the "customer", in this case the Public Partner, by Articles 651, 658 and 659 of the Civil Code are thus respectively to "*provide the contractor*", in this case the Private Partner, "*with the necessary conditions for the*

performance of work” (Article 651), with *“a land plot in such ... state as indicated in the contract”* (Article 658), and to *“ensure the temporary power supply networks”* (Article 659).

- 121 The two provisions of the contract in this case which are relevant to this issue are clauses 8 and 104. Clause 8 expressly and clearly requires the engineering infrastructure to the connection points to be connected to the land plot provided. Clause 104 sets out the distribution of risks agreed on by the Parties. Clauses 104(11) and (12) assign the risk of *“untimely supply of engineering communications”* and *“changes to plans proposed by local authorities or other government bodies”* to the *“Public Sector”*.
- 122 I have summarised the Public Partner’s submissions on this issue at [78] and [93] – [95]. In this and the following paragraphs I consider them more fully and give my reasons for rejecting them. The first limb of the Public Partner’s submission was that there was no breach of contract. The Private Partner was aware of the need for electricity to be connected to a temporary connection point but did not raise the point at the start of construction. I reject this submission. The Public Partner was either aware of the lack of an electricity connection point or should have been. The language of clause 8 is unqualified in requiring the Public Partner to provide the plot with the connection and the contract does not require the Private Partner to notify the Public Partner or raise the point at the start of construction.
- 123 Clause 36, upon which the Public Partner primarily relied, does not in fact support its case. Clause 36 makes provision for *“circumstances beyond the control of the Parties that make it impossible to construct and commission the PPP facility within the [stipulated] time limit”*. But the contract assigned the obligation to supply the necessary infrastructure, including electricity infrastructure, to the Public Partner. It also assigned the risk of untimely supply of such infrastructure on the Public Sector, that is the Public Partner. The Public Partner’s original plan was that the plot’s electricity connection point would be the transformer substation on the site on which another kindergarten would be built under another PPP project. It thus knew or should have known that the other project did not proceed because there were no bidders, and that circumstance left the plot with which these proceedings are concerned without the necessary electricity infrastructure.
- 124 In his report, Mr Privalov relied on the obligation of the parties *“immediately”* to notify each other of the occurrence of significant events that may affect the proper performance of the obligations under the contract in clause 102. I have concluded that clause 102 does not assist the Public Partner in the circumstances of this case.
- 125 First, I have found that the Private Partner informally brought the problems caused by the lack of an electricity connection point to the attention of the Public Partner before the two letters dated 8 and 19 June 2018.

- 126 Secondly, the first of the June 2018 letters was written within the 10-day period from the end of the first reporting period after the beginning of construction on 2 March 2018. Even if it did not strictly satisfy the requirement in clause 100 and Appendix 5 No 16 in respect of construction reports, it and the subsequent letter put the Public Partner on notice of this problem at an early stage.
- 127 Thirdly, even if the Private Partner should have done more, the obligation under clause 102 does not negate the breach of clause 8 and the information was known to, or should have been known to, the Public Partner. The application of clause 102 to the present circumstances does not sit comfortably with clauses 104(11) and (12) which allocate the risks of untimely supply of engineering communications and changes to plans proposed by local authorities or other government bodies to the Public Sector. The supply of engineering infrastructure to the plot of land provided upon which the kindergarten was to be constructed was completely dependent on the Public Partner and, as Dr Nesterova stated in the summary of her views in the Joint Memorandum, is included in the zone of its obligations.
- 128 The second limb of the Public Partner’s case on this issue is that the Private Partner took independent steps to obtain an electricity connection point and did not make use of the connection points for which Astana REC had provided technical specifications. I do not consider that an innocent party who takes steps in an attempt to mitigate the loss caused by a breach of contract by the other party is precluded from relying on the breach of contract, particularly where those steps are reasonable ones designed to reduce the losses caused by the breach.
- 129 Moreover, the contractual obligation that *“the engineering infrastructure must be connected to the provided land plot to the connection point”* did not envisage that the Private Party would pay for the connection, whereas the owners of the connection points for which Astana REC provided technical specifications required substantial payments from it. Under the PPP Contract, the Private Partner would not have been able to claim reimbursement of any payments to the owners of the connection points. In those circumstances, I do not consider that its conduct in not proceeding with the technical specifications offered preclude it from relying on the Public Partner’s breach of contract.
- 130 The third limb of the Public Partner’s case on this issue is that the dispute about the lack of a connection to the electricity connection point was settled by the Supplementary Agreements which modified the PPP Contract by providing for the construction of the transformer substation and by allocating the funds specified in those agreements. It is misconceived. Paragraph 5 of Supplementary Agreement No 2 expressly provides that paragraphs 1 and 2, in which the amounts of CIC are set out, *“do not limit the rights of a private partner to compensation for losses payments and increases [in] the compensation of investment costs associated with the increased in the cost of the project, other costs and lost profits in accordance with the norms of the current legislation of the Republic of Kazakhstan and the agreement”*.

- 131 I also reject the submission summarised at [55] that the changes did not meet the requirements of Article 46(1-1) of the Law on Public-Private Partnerships. What occurred here were not simple “changes” in the terms of a PPP agreement by the parties. The changes that were made in the Supplementary Agreements reflected the October 2019 recommendations and decisions of the PPP Competition Commission, a body responsible for regulation of PPP Contracts. The Agreements sought to address the consequences of the Public Partner’s failure to provide the necessary infrastructure connection, i.e. the consequences of what I have found to be a breach of contract by the Public Partner. They did so by adjustments recommended by the PPP Competition Commission and, after further negotiation, agreed by both parties because performance of the contract within the original timescale was impossible.
- 132 The Public Partner’s submission also appears to seek to apply Article 46(1-1) to the operation of the remedies for breach of contract provided for in a PPP Contract or by the Civil Code. Both the PPP Contract and the Civil Code make provision for remedies for breach. The contract was awarded after a tendering process, although in this case this Private Partner was the only bidder. It was not suggested by the Public Partner that when the contract made it did not satisfy the principles of balance, mutually beneficial distribution of responsibilities, risks, and revenues between the Public Partner and the Private Partner in Article 3.2(3) of the Law. The PPP Contract with the provision for those remedies was entered into after the approval of the relevant authorities. I have concluded that in these circumstances it cannot be said that Article 46(1-1) applies to and precludes the operation of the remedies for breach of contract provided for in a PPP Contract or by the Civil Code.
- 133 I also reject the submission in relation to the unpaid CIC for 2018 and 2019 based on Article 9(4) of the Law on Public-Private Partnerships. Article 9(4) requires that reimbursement of the CIC “*shall be made after the launch of the public private partnership facility in equal instalments over a period of at least five years in line with the public private partnership*”. The schedule in Appendix 6 to the PPP Contract provides for payments over a 6-year period from 2018, at a time when the contract provided that the construction period was to end in December 2018 so that payments were scheduled to start after the launch of the facility.
- 134 Supplementary Agreement No 1 extended the construction period to 1 October 2020 but only changed the amounts of CIC for 2020 and 2021.⁸ It left the figures for the other years unchanged. It did not change the start date for CIC reimbursement, and provides that “*the remaining clauses of the Agreement not affected by this Supplementary Agreement remain unchanged and the Parties confirm their obligations under them*”. There is a similar saving for unaffected provisions of the

⁸ Clause 8 changed the figure for 2020 from 281,441,428 KZT to 281,441,000 KZT and for 2021 from 281,441,856 KZT.

PPP Contract in Supplementary Agreement No 2, which increased the CIC for 2021 to reflect the construction of the transformer substation.⁹

- 135 Although the court has power under Article 401(2) of the Civil Code to amend a contract at the request of one of the parties to the contract, it does so only where there is “*a material violation of the agreement by the other party*” or where stipulated by other legislative acts or an agreement. In this case, I have found that the Public Partner is in breach of the PPP Contract. There is no agreement in the Supplementary Agreements or elsewhere to postpone the dates for the reimbursement of the CIC to 2024 and 2025. The Public Partner has not pointed to any other legislation authorising the court to amend the PPP Contract in these circumstances. To amend it by postponing the dates on which payments of CIC are to be made at the request of a contract breaker whose breach precluded the innocent party from performing by the contractual specified date is very unattractive. It would be to impose the consequences of the breach on the innocent party who has suffered loss and would relieve the contract breaker of at least some of the consequences of its own breach.
- 136 Against the background of the provisions of the Civil Code set out at [117] to [119], and the terms of clauses 8 and 104(11) and (12) I have concluded that the Public Partner was obliged to provide the engineering infrastructure to the connection points and bears the risk of the change of plans caused by the fact that the original plan for the construction of the transformer substation on a neighbouring site by another Private Partner constructing another kindergarten did not come to fruition. I have also concluded that the Public Partner was in breach of its obligation. I consider whether the breach amounted to a guilty failure by the Public Partner to fulfil its obligation at [161] ff. I also consider whether, if it did, the consequence is that under the legislation of the Republic of Kazakhstan and the terms of the PPP Contract the Public Partner is liable to reimburse the Private Partner for the additional costs incurred by it which were caused by the breach.

(iv) Reports and documents required by clause 100 and Appendix 5:

- 137 The Public Partner submitted that the Private Partner provided no reports on the fulfilment of obligations under the contract and the status of construction: Closing, §11 page 10. Two of its witnesses stated that they had not seen any of the reports and documents required by clause 100: see Ms Aitzhanova, §§ 4-5 and Ms Kasymbekova, §§ 28-29. Ms Kasymbekova was the head of the City’s Department of Economics and Budget Planning and said she only saw the documents passed to her department by the Education Department. I referred at [108] to Ms Aitzhanova’s statement that she had not requested the documents or complained about the Private Partner not providing them because that was the responsibility of the Private

⁹ Clause 2 changed the schedule in Appendix 6 for 2021 to 627,967,856 KZT (adding the 346,526,000 KZT in respect of the transformer substation) and added the same amount to the total increasing it from 1,688,648,570 KZT to 2,035,174,570 KZT.

Partner. In cross-examination, it was put to her that she was claiming that the Private Partner prepared monthly construction reports which were later provided for forensic examination, but that it had never provided them to the Public Partner. She replied that the Public Partner had not received any documents from the Private Partner, including these progress reports and asked to which specialist they were submitted.

- 138 The Private Partner did not file direct documentary evidence showing that such reports had been submitted to the Public Partner. It relied on Acts of Completed Works signed by the Private Partner and the contractor for the months between May 2018 and October 2020¹⁰ which it had submitted to the State Centre for Forensic Examinations of the Ministry of Justice of the Republic of Kazakhstan on 2 April 2021 for the determination *inter alia* the actual CIC incurred by the Private Partner. The Acts of Completed Works are referred to in the Centre's expert opinion No 63p dated 6 May 2021. There was no suggestion that the Acts of Completed Works referred to in opinion No. 63p are not genuine, and it appears that, after the kindergarten was commissioned, they did lead to a number of payments to the Private Partner.
- 139 Given the existence of the Acts of Completed Works prepared for the specified months, in many cases more than one Act for a given month, it is difficult to understand why the Private Partner would not have provided them to the Public Partner. But Ms Nurkeyeva did not suggest that it would be appropriate for the court to infer from the provision to the State Centre for Forensic Examinations in 2021 of the Acts between 2018 to 2020 that they had been provided to the Public Partner on a quarterly basis between 2018 and 2020. She was correct not to do so. The Private Partner did not provide evidence, such as a receipt or the name of the official to whom the reports were provided. Nor did it explain the absence of documentary evidence.
- 140 It is, however, not necessary to infer that the reports were in fact provided because I have concluded that their provision is not a requirement for the Private Partner to be reimbursed for the contractually specified CIC and additional costs associated with the Public Partner's failure to provide the electricity connection point. I agree with Dr Nesterova (JM, section 5) that *"the procedure and fulfilment by the [Private Partner] of its obligations to provide quarterly reports did not affect its rights to claim compensation for additional costs associated with the [Public] Partner's failure to fulfil the obligation to bring engineering infrastructure to the land provided for construction"*.
- 141 As to the position if, as the Public Partner maintained, no reports were provided, the Public Partner did not suggest that it has suffered loss within the meaning of Article 9(4) of the Civil Code from failure to provide the reports. It relied on Article 295 which is chapter 18 of the Code which is concerned with securing the execution of obligations and not chapter 20 which deals with liability for violation of an obligation.

¹⁰ In the case of many months there were several Acts of completed Works.

It claimed a penalty under Article 295 and clause 80 of the contract, submitting that the penalty should be “a percentage of non-performed or improperly performed obligation, in this case, the [CIC]”: Response, §§ 37-39.

- 142 Article 293 is in paragraph 2 of chapter 18, entitled “Forfeit”. The definition of “forfeit” is in Article 292 which provides:

*“Damages (fine, penalty) shall be recognized as a monetary amount defined by legislation or agreement, which must be paid by a debtor to the creditor in the case of failure to execute, or improper execution of an obligation, in particular, in the case of a delay in execution. **Upon the claim to pay the damages, the creditor shall not be obliged to prove losses caused to him.**”* (emphasis added)

- 143 Article 295(1) provides:

“A creditor shall have the right to claim the payment of damages as determined by legislation (legal damages), irrespective of whether the obligation for its payment is stipulated in the agreement of the parties.”

- 144 Article 296 provides the amount of a forfeit is to be a fixed monetary amount; a percentage of the amount in default, or the amount of the improperly executed obligation. But the obligation under clause 100 is to provide reports rather than to pay money and neither clause 100 nor the remainder of the PPP Contract specify a defined lump sum or a process for determining the amount of penalty in the way envisaged by clause 80 and is done by clauses 16 and 81 of the contract. Article 295(1) of the Civil Code shows that the fact that the contract does not provide for the payment of a forfeit does not preclude the award of one by the court. But it does mean that the task of determining what monetary sum would be appropriate and not an excessive penalty is not straightforward, particularly where, as in this case, the Public Partner claiming the penalty has not suggested a figure or principles which could be used to determine a figure.

- 145 Article 297, which gives the court the power to reduce the amount of “the penalty (fine, fee)” “if it is excessively large compared to the losses of the creditor”, where the debtor requests it, is not applicable because there has been no request. But the discussion of Article 297 in this court by Justice Sir Rupert Jackson in Case No: AIFC-C/CFI/2022/0020 *Freedom Finance JSC v Egor Romanyuk* (1 February 2023) at [5.12] – [5.16] and [6.10] – [6.13] is of some assistance. In that case the contract provided for a defined lump sum, but what was said about how to approach the determination of what penalty to award is useful even where the contract does not do so. Mr. Sergei Vataev, who attended the trial in that case as *amicus curiae* and assisted the Court in the capacity of an independent advocate, stated that Kazakhstan courts exercise their discretion as to whether a penalty is excessively large “based on common sense and rational considerations”. He concluded that “the courts often exercise a

‘sympathetic’ attitude and reduce the penalty, especially if its size is not commensurate to the actual damages” suffered by the person claiming it.

146 In this case the Public Partner has not alleged that the failure to provide the reports caused it loss. It did not request in writing as envisaged by clause 101 of the contract (referred to at [86]) that the Private Partner’s breaches of clause 100 be eliminated within 30 days or a period agreed by the parties. The fact that the procedure in clause 101 was not used suggests that the Public Partner did not consider the failure to provide the Reports, in the words of that provision *“may significantly affect the Private Partner’s compliance with the terms of the contract”*. Moreover, in the light of Ms Aitzhanova’s evidence, it appears that, at no stage during the construction period or before the commencement of these proceedings did the Public Partner complain to the Private Partner about its failure to provide the reports. After the construction was completed, the Public Partner signed a Commissioning Certificate accepting the facility into operation. No complaint has been made about the quality of the work.

147 I also take into account the fact that, as was common ground, the PPP Contract was one to be performed in particular in accordance with the Law on Public-Private Partnership. Article 1(6) of that law provides that such a partnership is a form of co-operation between the partners. Article 3(1)(1) provides that one of the main objectives of such a partnership is the creation of conditions for effective interaction between the partners and Article 3(2) that its principles include the principles *“of consistency – a step by step construction of the relationship ...”* and *“of balance - mutually beneficial distribution of responsibilities”* between the partners. In my judgment, the failure to follow the procedure in clause 101 or to complain about the reports to the Private Partner but then to claim a penalty is not consistent with the principle of good faith in Article 8(2) of the Civil Code. that, when exercising their rights *“citizens and legal entities must act in good faith, reasonably and fairly”*.

148 I have borne in mind the need for the penalty or forfeit to be of an amount, in Mr. Vataev’s words *“commensurate to the actual damages”*, that in this case the failure to provide the reports caused no loss, and the other factors I set out above. I have concluded that in this case the appropriate penalty is 2,500,000 KZT.

(vi) Transfer of the PPP facility to communal ownership

149 Clause 86 of the contract provides that *“the created and commissioned PPP facility shall be subject to transfer to municipal ownership”* but although the facility has been commissioned, to date the transfer has not occurred. It appears that the documentation and procedure for transfer has not been completed because of a dispute as to the amounts of CIC due and what amount should be entered in the Transfer and Acceptance Certificate. The Public Partner maintains that it should be the CIC specified in the contract as amended. The Private Partner maintains that, as a result of the Public Partner’s breach of contract in relation to the electricity

infrastructure, it should be the actual CIC it incurred. Agreements made in March and August 2021 that the Transfer and Acceptance Certificate should contain both sums, probably with the aim of not prejudicing their legal positions, have not resolved the matter.

- 150 The history of what occurred is summarised below, partly from letters before the court and partly from the agreed minutes of negotiations between the parties on 19 August 2021. Before doing so, I summarise the procedure for such transfers. It is contained in an Order of the Minister of National Economy of the Republic of Kazakhstan dated 25 November 2015, *“On Approval of the Rules for the Admission of Public Private Partnership Objects (Facilities) into State Ownership Rule No. 713.*
- 151 Rule 713 requires the Private Partner to apply for the acceptance of a facility into communal ownership within 30 working days of it being commissioned: §9. In the present case the kindergarten and transformer substation were commissioned on 7 and 8 October 2020. State registration of the commissioning of the kindergarten occurred on 20 October 2020. State registration of the transformer substation was only completed on 2 July 2021 because of an error when registration was first attempted. §12 of Rule No. 713 requires the Public Partner to make a decision on the application within 10 days.
- 152 I turn to the history. In a letter dated 6 November 2020, within the 30-day period specified in §9 of Rule No. 713, the Private Partner requested the Akim of Astana to accept the facility into communal ownership. The letter stated that copies of the contract, the Facility Commissioning Certificates and the confirmation of state registration by the judicial authorities were annexed. It also stated that a document confirming the book value of the facility and a report on its technical condition would be provided.
- 153 The minutes of the negotiations on 19 August 2021 record that the Transfer and Acceptance Certificate was prepared in November 2020 and the Private Partner subsequently stated that it had sent it to the Public Partner but without a covering letter that month on or about 18 November. On 15 December 2020 the Private Partner sent the Public Partner two copies of the Transfer and Acceptance Certificate which it had signed in a letter, ref. no. 1-21/403. The letter stated that with the sending of the Transfer and Acceptance Certificate it had fulfilled its obligations and asked the Public Partner to pay the CIC. The summary of the position of the Public Partner in the minutes of the negotiations on 19 August 2021 records that the Transfer and Acceptance Certificate provided in December 2020 indicated only 2,180,806,298 KZT, the sum claimed by the Private Partner as its actual CIC, and not the 1,688,648,570 KZT specified in the contract for the kindergarten building.
- 154 On 3 February 2021, the Akimat of Astana resolved to accept the kindergarten into the communal ownership of the City and to require the Department of Assets and Public Procurement to ensure the transfer of the property to the Department of Education, the Public Partner. The was more than 2 months after the expiry of the

30-day deadline specified in §12 of Rule No. 713. The Private Partner submitted that resolution showed that the Akim considered that it had completed its part of the transfer process and had fulfilled its obligation to transfer the kindergarten to communal ownership.

- 155 What the minutes of the negotiations on 19 August 2021 record in the summary by the Public Partner of its position is also material. The Public Partner's position was that at a meeting in March 2021 the parties had agreed to indicate two amounts of CIC in the Transfer and Acceptance Certificate, the 1,688,648,570 KZT specified in the contract as amended and the 2,180,806,298 KZT claimed by the Private Partner as its actual CIC.
- 156 It appears that in a letter dated 14 May 2021 (not before the court), the Public Partner stated that the Private Partner had not yet signed the Act of Acceptance and Transfer. The Private Partner's response in a letter dated 3 June 2021 (ref. no 1-21/49) was that that was not true. It stated that it had sent the Act of Acceptance and Transfer *"at least five times"*, listing November 2020, the letter dated 15 December, and letters dated 15 January 2021 (ref. no. 1-21/03), 19 February 2021 (ref. no. 1-21/6), and 5 May 2021 (ref. no. 1-21/38). The letter dated 3 June stated that *"once again, we send you the act of acceptance and transfer signed by us with the actual book value for further registration by the authorised body of the ownership and transfer of the PPP object to us for possession and use in accordance with the times of the PPP Contract."*
- 157 The summary of the Public Partner's position at the negotiations on 19 August 2021 states that the Private Partner had not yet signed the Transfer and Acceptance Certificate and as at that date had only sent certificates indicating the CIC claimed by the Private Partner. The summary of the Private Partner's position at the August negotiations stated the basis upon which it claimed to be entitled to its actual CIC; that is the destabilising events caused by the Public Partner.
- 158 At the negotiations on 19 August 2021, two decisions were made about the Transfer and Acceptance Certificate. The first, in effect reiterating what the Public Partner accepted had been agreed in March, was that each party should prescribe the amount of CIC it considered was due. The Private Partner should prescribe the 2,180,806,298 KZT it claimed as its actual CIC. The Public Partner should prescribe the 1,688,648,570 KZT specified in the contract as amended. The second decision was that in the Certificate the Private Partner should indicate the date of 18 November 2020 and the Public Partner should indicate the date of the meeting; 19 August 2021.
- 159 I accept Ms Nurkeyeva's submission that the facts I have set out show that the Private Partner attempted to transfer the kindergarten and transformer substation to communal ownership from November 2020. It did so in a way consistent with its claim to be entitled to its actual CIC as a result of the breaches of contract by the Public Partner. Although the Public Partner accepted that in March 2021 it had

agreed that the Transfer and Acceptance Certificate should indicate two amounts of CIC, reflecting the parties' positions, and although it had received signed copies of the Certificate signed by the Private Partner it continued not to sign the Certificate. It has maintained its position despite the agreements in March and August 2021 that the Transfer and Acceptance Certificate should reflect both parties' positions on CIC.

160 I also accept Ms Nurkeyeva's submission that, since the dispute about the amount of CIC that is payable is before me, my decision on that will resolve the somewhat formal question of the terms upon which the Certificate should be signed. I deal with the amount of CIC to which Private Partner is entitled at [171] – [182] below.

(vii) The extent of the Public Partner's liability for its failure to fulfil its obligation to connect the plot to the connection point of the electricity network:

a) Compensation for losses caused by the violation and 'guilt' within clause 115 and the Civil Code:

161 Clauses 110, 114 and 115 of the PPP Contract¹¹ and Articles 350, 359 and 366 of the Civil Code provide that the Public Partner is liable for losses caused to the Private Partner by its failure to fulfil its obligation to provide that the land plot has the engineering infrastructure to the connection points connected to it if, in the words used in Clause 115, the losses "*arose solely through the fault of the Public Partner and such guilt is proved in court*".

162 Article 350 of the Civil Code provides that "*a debtor who violated an obligation shall be obliged to compensate the creditor for any losses caused by the violation*". with losses and damages as defined by Article 9(4). It provides:

"the concept of damages means the losses, which are in curd all must be encouraged by the person whose right is violated, the loss or damage of his property (real damage) and also lost profit which this person would have received under the normal conditions of the turnover, should his right have not been violated (lost profits)".

163 Article 359(1) provides:

*"A debtor shall be responsible for failure to execute and (or) improper execution of an obligation if guilt exists, unless it is otherwise stipulated in legislation or agreement. **A debtor shall be recognized as innocent, if he proves that he adopted all the remedies under his control for a proper execution of the obligation.**"* (emphasis added)

¹¹ The clauses are set out or summarised at [44].

Article 366(2) of the Civil Code makes similar provision for delay in performing an obligation unless the party which has delayed *“proves that the delay took place due to circumstances for which neither he himself nor those persons who, by virtue of legislation or the creditor’s instructions, were entrusted with the acceptance of performance, are not responsible”*.

- 164 Articles 359 and 366 impose the burden on the person in breach of the obligation to show that *“guilt”* does not exist by proving that he or she has taken all steps in his or her power to perform the obligation although that is subject to contrary provision in an agreement. Article 359(1) provides that its provisions apply *“unless it is otherwise stipulated in legislation or agreement”*. Article 359(2) provides that *“legislation or the agreement may provide for other grounds for liability or release therefrom”*.
- 165 Mr Privalov’s view (see JM, section 8(i)) is that the PPP Contract in this case provides for a different burden of proof because by clause 115 of the PPP Contract guilt can be determined *“only by the court, if there is evidence of guilt”*. There is some force in this although clause 115 does not expressly address the burden of proof or expressly disapply the default provision in Article 359. In view of my findings at [105] – [114] it is not necessary to determine whether the language of clause 115 suffices to disapply the default rule in Article 359 and require that the innocent party, here the Private Partner, prove the guilt of the person who has not fulfilled his or her obligation.
- 166 This is because, on the evidence I have accepted and the findings I have made, the Private Partner has shown that the Public Partner did not take all steps in its power to perform its obligation and thus established *“guilt”* within Article 359 of the Civil Code. The Public Partner knew or should have known that the transformer substation envisaged as the connection point for this kindergarten had not been built. On the basis of the evidence of Messrs Meldeshov, Amanzholov, Satylganov and Kovalenko, I have found that, rather than doing anything to provide a connection point, the Public Partner effectively left it to the Private Partner to do so. It was essentially inactive. It did not respond positively when the Private Partner informed it of the problems. It did not assist the Private Partner in the performance of its work under the contract as it was obliged to by Article 629(1) of the Civil Code. It did not accept responsibility until after the Private Partner’s appeal to the PPP Competition Commission succeeded in October 2019, some 18 months after construction had started.
- 167 The customer’s obligation under Article 629(1) of the Civil Code to assist the contractor in the performance of work to the extent and in the manner prescribed by the contract is also relevant to the question of the extent of the liability of the customer, here the Public Partner. The second part of Article 629(1) provides that, *“in the event of the non-performance of this obligation, “the contractor has the right to demand compensation for damages including the extra costs, caused by the downtime or deferral of execution of work or increase in the price of work”*.

168 For these reasons, I have found that the “guilt” of the Public Partner has been established. Accordingly, Article 9(4) of the Civil Code entitles the Private Partner to “*the entire restitution of the damages inflicted on him (her)*”.

b) Restoring the financial balance after a “disruption event”:

169 Clause 107 of the contract provides that the parties “*have the right to restore the financial balance in accordance with the financial and economic model, if there is violation of the balance as a result of ... a disruption event*”. By clauses 105(1) and (8) “*disruption event*” includes “*failure of the public partner to fulfil [its] own obligations under the contract*” and “*violation of deadlines and increase in costs by 5 (five) % or more during the construction of the PPP facility, which occurred not due to the fault of the Private Partner*”.

170 The procedure specified in clause 109 for reviewing the CIC and other payments was not operated but the Private Partner relied on the right in clause 107 to restore the initial financial balance and on the calculations in the financial and economic model in Appendix 7 to the contract. Supported by §§ 37-41 of Dr Nesterova’s Report, it submitted that clause 107 showed that the intention of the agreement was to compensate it fully for the investments made, and that, after the occurrence of a disruption event, they entitled it to recover the actual CIC rather than the amounts specified in the contract itself. I accept this submission.

c) Recovery of the actual investment costs:

171 The Public Partner’s case that the Private Partner is only entitled to the CIC specified in the contract and not to the actual CIC assumes either that it was not in breach of contract or, if it was, that its “guilt” was not established. Alternatively, it overlooks the provisions of the Civil Code discussed above, in particular Articles 350 and 9(4), and clauses 107 and 115 of the contract. The Private Partner’s claim as to the amount of its actual investment costs were examined by the Institute of Forensic Examinations, a branch of the State Centre for Forensic Examinations of the Ministry of Justice of the Republic of Kazakhstan. Ms Zhusupova, a specialist and the Institute’s Chief Expert, conducted the examination and prepared a report, expert opinion No 89p, dated 22 April 2021. The examination and report were based on the documents submitted by Buldirshin-2012.

172 Ms Zhusupova examined whether: (a) the work on the kindergarten specified in the design and estimate documentation and completion certificates and its cost corresponded to the completion certificates; (b) the actual work on the kindergarten and its cost corresponded to the completion certificates, (c) the volume and cost of any actual works not taken into account in the calculations for excluded and added works, and (d) the specified prices in the design and estimate

documentation corresponded to the period of actual work in 2018 to 2020. In each case the Institute was to determine the extent of any discrepancy.

- 173 On the book value, the Report stated that the costs incurred during the construction of the facility were:

| Construction of: | Cost (tenge) |
|-------------------------|-----------------------|
| Kindergarten | 2,175,895,543 |
| TP and cable line | 338,314,530 |
| Total book value | 2,514,210,073* |

*This is the value of the book value of the facility indicated in the Certificate dated 20 October 2020.

- 174 On the correctness of the CIC stated in the contract for the kindergarten (1,688,648,570 KZT) and in Supplementary Agreement No. 1 for the transformer substation and cable line (346, 526,000 KZT), the Report stated that the actual investment costs were:

| Construction of: | CMP | Adm. Expenses | Financing costs | Total thous. Tenge |
|-------------------------|---------------------|----------------------|------------------------|---------------------------|
| Kindergarten | 1,869,724,69 | 22,900,89 | 284,694,8 | 2,177,320.37 |
| TP and cable line | 338,314,53 | 0 | 0 | 338,314.53 |
| Total | 2,208,039,22 | 22,900,89 | 284,694,8 | 2,515,634,9* |

*This is the value of the Private Partner's investment costs for the project indicated in the Certificate dated 17 November 2020.

- 175 In her oral evidence Ms Zhusupova stated that the truthfulness of the documents was the responsibility of the applicant, here Buldirshin-2012. It had submitted the primary accounting documents which she had described in the opinion. They were all compliant with accounting standards and were properly signed and stamped. The documents sufficed for a full forensic examination, and she had taken them all into account. While Ms Zhusupova was giving evidence, Mr Elamanov stated that in the Republic of Kazakhstan the value of construction facilities is defined by the conclusions or opinions of state experts and not private institutions and suggested that the views of the PPP authorities as to project costs prevailed over those of specialists such as Ms Zhusupova. However, in cross-examination he did not directly challenge the truthfulness of the documents or the figures themselves.
- 176 Mr Elamanov's submissions appeared to reflect a lack of understanding about the role of the Institute of Forensic Examinations and Ms Zhusupova in seeking to treat them as though they were private entities. The Institute is a public body, a branch of the State Centre for Forensic Examinations, which operates under the auspices of the Ministry of Justice. The examination was carried out by its Chief Expert. There was no suggestion that the examination was not carried out in accordance with the

Law *On Forensic Science Activity* dated 10 February 2017. The principles of forensic science activity under Article 5 of that Law include the independence of the forensic expert, his or her being comprehensive and objective, and complying with his or her professional ethical requirements.

- 177 Mr Elamanov's submissions, moreover, did not take account of the fact that the CIC figures in the contract were based on a construction period of 18 months starting in August 2017, not one lasting 30 months starting in March 2018 where the initial stages had to be performed in sub-optimal way using diesel generators. It was the additional work resulting from the Public Partner's failure to perform its obligations in relation to the electricity infrastructure and its delay in recognising that it was necessary to construct a transformer substation that meant that the actual CIC was greater than the CIC specified in the contract. There is in fact no inconsistency between the figures of actual investment costs submitted by the Public Partner for a project that took 30 months and the figures projected when contemplating a future project that would take 18 months.
- 178 For these reasons, leaving aside the issue of real damage and the actual investment costs in respect of the transformer substation and cable line discussed in the following paragraphs, I have concluded that the Private Partner has established that the figures confirmed by the forensic examination as the actual CIC are correct. Subject one caveat, I have concluded that the Public Partner is obliged to reimburse the Private Partner the difference between the total of 2,515,634,896 KZT actual CIC costs certified in expert opinion No 89p and the CIC provided for in the PPP Contract and the Supplementary Agreements. The caveat arises because the certified total of 2,515,634,896 KZT includes CMP of 338,314,530 in respect of the transformer substation and cable line but, as I have stated, the Public Partner has applied to withdraw its claims for real damage and actual CIC in respect of the transformer substation and cable line while reserving the right to bring fresh proceedings for them.
- 179 The Public Partner first sought to withdraw these claims in its Opening Submissions filed on 26 July 2022. Its reasons for seeking to do so were that the CIC for the transformer substation and the actual damage caused had not been subjected to forensic examinations, and documents, including the certificate of acceptance and contracts with individuals and banks for the provision of credit, had not been filed. The Public Partner did not comment or make submissions about this application either before or at the trial.
- 180 The information before the court leaves several questions unanswered. The first is that, as seen from the figures set out in [173] – [174], expert opinion No 89p does contain figures for the book value and the CMP of the transformer substation and cable line. The table set out in [174] gives a total of 2,515,634,896 KZT for actual investment costs which includes 338,314,530 KZT in respect of the transformer substation and cable line, which I understand reflects only the actual construction costs, and is the same figure as the book value in the table set out in [173]. But,

unless any fresh proceedings are only for administrative expenses and financing costs, it is possible that a fresh claim for the actual CIC in respect of the transformer substation and cable line might risk double recovery.

181 Secondly, expert opinion No. 89p was issued on 22 April 2021, over a year before the Private Partner's Opening Submissions. The Private Partner has not stated how long before filing its Opening Submissions it discovered that it had not submitted all the documents concerning the actual CIC for the transformer substation and cable line for forensic examination. It has also not given the reason for its failure to do so, which may well have been administrative error. Thirdly, the Private Partner has not said that it was not possible for a forensic examination of the documents concerning the transformer substation and cable line to have been undertaken between the date it discovered the problem (at its latest 26 July 2022) and the trial in November.

182 The unanswered questions left by these omissions do not sit comfortably with the overriding objective in Rule 1.6 of the AIFC Court Rules and may be relevant to the issue of costs should this matter come before the court again. Notwithstanding them, I have concluded that the Private Partner's application to withdraw these claims should be granted and it should be able to bring fresh proceedings for them provided that the following conditions are met:

- (a) A properly particularised claim supported by an expert opinion based on a forensic examination and the relative relevant documents is filed within two months of the handing down of this judgment.
- (b) The claim should not duplicate the figures for actual investment costs for the transformer substation and cable line that are included in the calculation in expert opinion 89p and should provide an explanation of why there is no duplication.
- (c) The Private Partner should inform the court when it discovered that it had failed to submit all the documents needed for determining the actual CIC for the transformer substation and cable line and why it did not apply for a forensic examination between the date of that discovery and the trial.

d) *Penalty for improper use of other peoples' money:*

183 The Private Partner is also entitled to what Article 353 of the Civil Code describes as "*a penalty*" for "*improper use of other peoples' money as a result of failure to fulfil a monetary obligation or delay in their payment, or their unreasonable receipt or savings at the expense of another person*". The "*penalty*" is interest calculated on the base rate of the National Bank of the Republic of Kazakhstan from the date on which the monetary obligation became due until either the date the claim was filed, the date of the decision or the date of the actual payment "*at the choice of*

the creditor”: see Article 353(1). In this case the Private Partner has chosen to claim the penalty from 18 November 2020, the date of state registration of the Act of Commissioning of the kindergarten until 3 August 2022, about six months after 15 February 2022 when the claim was filed and about seven months before the date of this decision. It would have been entitled to claim the penalty until the date of this decision but has thus not chosen to do so. It is entitled to recover the 100,478,446 KZT claimed under Article 353.

e) Loss of Profit:

- 184 By Article 9(4) of the Civil Code (set out at [162]), the compensation for losses caused by the violation of an obligation under Article 350 include lost profits. Accordingly, as I have found that the Public Partner was at fault and “guilty” of breaches of clause 115 of the contract (see [161]) it is liable for such of the Private Partner’s loss of profits that were caused by those breaches.
- 185 The Private Partner submitted that the loss of profit is to be calculated on the basis of the estimates of net profit in the FEM of the kindergarten.¹² Those were 177,867,000 KZT for 2018, 198,652,000 KZT for 2019, and 234,909,000 KZT for 2020. It therefore claimed a total of 611,428,598 KZT as lost profit for the period from 2018 to 2020.
- 186 The Private Partner supported its submission by comparing the FEM’s estimate with the figures for actual net profit for 2021 and the first half of 2022. Those figures are in Statements of Comprehensive Income for that period which exclude income that is not related to the kindergarten and CIC payable under the contract. They are respectively 158,600,000 KZT for 2021, that is 11% less than the FEM’s estimate, and 107,153,000 KZT for the first half of 2022, that is 4% more than the FEM’s estimate.¹³ On the basis of the differences in the figures for actual net profit in that 18 month period from the FEM’s estimate and the fact that in 2021 the actual profit was 11% less than the FEM’s estimate, while the actual figures are relevant, the material before me does not enable me to conclude that the figures for the second half of 2022 would make up for the 11% deficit in 2021. Accordingly, in my judgment, giving some weight to the figures for actual net profit, the compensation for losses of profit should be 10% less than the FEM’s estimate. I therefore award the Private partner 584,853,298 KZT in respect of losses of profit between 2018 and 2020.

¹² C’s Opening §§48-50; C’s Closing §§ 96 and 99(5); § 9 of the Table in the list of factual and legal issues submitted pursuant to §9 of Directions Order No 2.

¹³ C’s Opening §§51-53; C’s Closing §§ 96 and 99(5). The figures estimated for 2018 - 2020 are taken from the section on net profitability in the FEM’s “Forecast Report on income and Expenses (Income Statement)”. The figures which are stated to be actual net profit for 2021 and the first half of 2022 are taken from Buldirshin-2012 LLP’s Statements of Comprehensive Income for those periods.

f) The Private Partner's legal costs:

- 187 On 7 June 2021 the Private Partner contracted with S. Spector LLP for the provision of legal services in these proceedings at a fixed price of 50,000,000 KZT. It claims this sum from the Public Partner.
- 188 This court has power to make orders that one party pay the costs of another: AIFC Court Regulations 2017, reg. 27(4)(j) and AIFC Court Rules 2018, Part 26. Part 26.4 of the AIFC Court Rules provides that the court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are paid. Part 26.5 provides that if the Court decides to make an order as to costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. As to the basis of assessment, Part 26.11 provides that the court will allow costs which were *“reasonably and necessarily incurred and ... proportionate to the matters in issue”*.
- 189 The Public Partner's Closing, §7 of the Prayer on page 16, resists this. It, however, gives no reason why the general rule should not apply and has not argued that the costs claimed by the Private Partner were not reasonably and necessarily incurred and proportionate to the matters in issue.
- 190 In deciding whether the general rule should apply and, if so, whether the costs claimed by the Private Partner are reasonable and proportionate to the matters in issue, I have considered the number of issues which had to be addressed and decided, and their complexity. Section J of the judgment shows that there were many disputed issues of fact and law. This was a complex construction dispute, with additional complexity because the contract was a long-term public-private investment agreement which had to be concluded and performed in accordance with the Law on Public-Private Partnership. The total sum claimed is 1,805,250,226 KZT, which is in the region of US\$4 million. I have concluded that a fixed price of 50,000,000 KZT for legal services in a claim of this size and complexity is reasonable and proportionate to the matters in issue and that the Private Partner is entitled to recover that sum.

K Conclusions and Disposition

- 191 My conclusions on the main issues and the reasons for them set out in section J of this judgment mean that the Private Partner has substantially succeeded in its claims. Before summarising those conclusions and the orders of the court in the remainder of this section, I refer to my two interlocutory rulings.
- 192 The first is my ruling at the CMC on 18 October 2022 that the issue of placement and proportion under the state order raised in the Public Partner's Response to the claim should not be heard together with the claim. I summarised the basis of the Private Partner's application and my reasons for accepting it at [56] - [61]. That

ruling did not preclude the Public Partner filing a claim against the Private Partner regarding the placement of children under a state order. It has not yet done so but must do so if it wishes to pursue this matter.

193 The second matter is the Private Partner's application to withdraw its claims for real damage and actual CIC in respect of the transformer substation and cable line while reserving the right to bring fresh proceedings for them. I accepted this application in the judgment at [182]. But I did so on the condition that a properly particularised claim supported by an expert opinion based on a forensic examination and the relative relevant documents is filed within two months of the handing down of this judgment. There are two other conditions also set out at [182].

194 My conclusions and the orders of the court are:

- (1) The Public Partner was in breach of its obligations to provide the plot within the period specified in the contract and to provide a plot connected to the connection point of the electricity network: see [66], [77], [91], [114] and [136].
- (2) The dates for the reimbursement of the CIC for 2018 and for 2019 are not to be postponed to 2024 and 2025: see [135]. Accordingly, the Private Partner is entitled to recover 281,441,428 KZT for 2018 and the same sum for 2019, a total of 562,882,860 KZT which the Court orders the Public Partner to pay. The Public Partner remains liable to pay the sum payable as CIC in 2023 under the payment schedule in the PPP Contract.
- (3) The Private Partner is entitled to a payment of 100,478,446 KZT under Article 353 of the Civil Code for the unlawful use of the 562,882,860 KZT due as CIC in 2018 and 2019 and the Court so orders: see [183].
- (4) The Private Partner is entitled to recover compensation for the difference between the CIC provided for in the contract, 2,035,174,570 KZT, and its actual investment costs: see [168] – [170]. In the light of expert opinion 89p I have found (at [178]) that its actual CIC amounted to a total of 2,515,634,896 KZT as of 17 November 2020, which total included CMP of 338,314,530 in respect of the transformer substation and cable line. The Private Partner is therefore entitled to the difference of 480,460,326 KZT as compensation which the Court orders the Public Partner to pay.
- (5) The Private Partner is entitled to recover from the Public Partner its losses of profit between 2018 and 2020. For the reasons given at [184] – [185] the loss of profit has been assessed as 584,853,298 KZT, which the Court orders the Public Partner to pay.
- (6) For the reasons given at [188] - [189] the Private Partner is entitled to recover from the Public Partner its legal costs of 50,000,000 KZT which is a reasonable

and proportionate sum for a claim of this size and complexity, and which the Court orders the Public Partner to pay.

(7) Against the evidential position summarised at [138] - [139], I concluded at [144] - [148] that the Public Partner is entitled to recover from the Private Partner a forfeit or penalty of 2,500,000 KZT under Article 295 of the Civil Code for failure between 2018 and 2020 to submit the reports required by clause 100 and Appendix 5 of the contract to the Public Partner. It was not appropriate to infer that it had done so from the Acts of Completed Works signed by the Private Partner and the contractor for the months between May 2018 and October 2020 which it submitted for forensic examination on 2 April 2021. The Court orders that the sum of 2,500,000 KZT be deducted from the total sum which the Court has ordered the Public Partner to pay.

195 The sums payable under the various heads of liability are set out in the Table below:

| Head of Recovery | Amount (KZT) |
|---|----------------------|
| Debt for CIC due in 2018 | 281,441,428 |
| Debt for CIC due in 2019 | 281,441,428 |
| Penalty under Civil Code, Article 353 for the unlawful use of the debts for CIC due for the period from 18 November 2020 to 3 August 2022 | 100,478,446 |
| Compensation for the difference between the CIC actually incurred and the CIC provided for in the PPP Contract and the Supplementary Agreements | 480,460,326 |
| Loss of profit for the period from 2018 to 2020 | 584,853,298 |
| The Private Partner's legal costs | 50,000,000 |
| The forfeit the Private Partner is Ordered to pay under Article 295 of the Civil Code | minus 2,500,000 |
| TOTAL SUM THE PUBLIC PARTNER IS ORDERED TO PAY AFTER DEDUCTING THE 2,500,000 KZT FORFEIT UNDER ARTICLE 295 | 1,776,174,926 |

196 The Court orders the Public Partner to pay the Private Partner the sum of **1,776,174,926 KZT** within 28 days of the handing down of this judgment.

By Order of the Court,



The Rt. Hon. Sir Jack Beatson FBA,
Justice, AIFC Court





Representation:

The Claimant, Buldirshin-2012 LLP, was represented by Ms. Gulnur Nurkeyeva, a Partner of Grata LLP Law Firm.

The Defendant, The State Institution “Astana Education Department”, was represented by Mr. Elamanov Nariman, Deputy Head of the Education Department.

APPENDIX TO THE JUDGMENT**SUMMARY OF THE POSITION OF THE EXPERTS ON KAZAKH LAW ON THE ISSUES****BEFORE THE COURT**

- 1 Both Dr Nesterova and Mr Privalov commented on the content and general application of the relevant Kazakhstan legislation to the legal issues under the PPP contract and the application of such law to the facts of this case. They prepared reports and a Joint Memorandum (hereafter “JM”) which identifies and summarises the matters on which they agreed and those on which they were unable to agree. The extent of the differences between them is evident from the summary of their positions on the issues before the court in these proceedings in the paragraphs that follow.¹⁴ Accordingly, the summary does not include their opinions on the issue of placement and proportion of children under the state order and whether, in relation to that, the court’s power under Article 401(2) of the Civil Code to order that the terms of the PPP contract on the state order issue be amended which are summarised in JM sections 18 and 19.

Legal Nature of the PPP contract, JM, section 1

- 2 It was agreed by the experts that the PPP contract in this case falls within the category of civil law investment long term Public Private Partnership agreements subject to Law No. 379 V LRK dated 31 October 2015 and the Civil and Entrepreneurial Codes of Kazakhstan: see JM, section 1.

Rules for Interpreting a Contract under Kazakh law, JM section 17

- 3 JM section 17 states that it was also agreed by Dr Nesterova and Mr Privalov that the rules for interpreting a Treaty or contract under Kazakh law are:

“ ... priority in interpretation he's given to the literal content of the words and expressions contained in the [contract].¹⁵

In cases of ambiguity of the direct meaning of the literal content of words and expressions, it is established by comparison with other conditions and the meaning of the contract as a whole.

Only when a literal interpretation is not possible does the court resort to ascertaining the actual common will of the parties, taking into

¹⁴ References to Dr Nesterova’s Report are to paragraph numbers. Mr Privalov’s Report was unpaginated and contains no paragraph numbers. References to it are to the sequential page number and the page in Bundle No. 4 of the documents before the court (B4/ xx, xx).

¹⁵ The English translation of JM, section 17 uses the words “Treaty”, “contract” and “Agreement”. “Treaty” appears to be used to refer to a “contract”, and in this extract the word “[contract]” in square brackets is used instead of Treaty”.

account the purpose of the [contract]. To do this the court takes into account all the accompanying circumstances, including negotiations and correspondence preceding the contract, the practise established in the mutual relations of the parties, business customs, and the subsequent behaviour of the parties.

The interpretation of the Agreement is carried out by the court in the event that this is done in fulfilment of the requirements stated by the parties.”

An obligation to provide a plot of land with engineering infrastructure connected to it, whether there was breach and the presence or absence of claims for the provision of a plot of land: JM, sections 2, 3 and 7.

- 4 The experts agreed that under clauses 7 and 8 of the contract the Public Partner was obliged to provide the Private Partner with a plot of land for the construction with the necessary engineering infrastructure. They did not, however, agree which party bore the risk of untimely provision of that engineering infrastructure or whether the Public Partner was in breach of its obligation to provide a plot of land with engineering infrastructure connected to it.
- 5 Dr Nesterova stated that the Public Partner was obliged to provide a plot with the infrastructure necessary for the construction work and subsequent operation of the kindergarten: Report, §18, JM, section 2. That was expressly provided for by the contract and imperative norms in Articles 651, 658 and 659 of the Kazakhstan Civil Code: Report, §§ 17 and 21-24; JM, section 2. As the Public Partner did not provide a plot with the necessary infrastructure it was in breach of that obligation, and, provided it did not prove that it had taken all measures in its power to fulfil its obligation to do so, would be liable under clause 115 of the contract: Report, §§25 and 33 and Article 359(1) of the Kazakhstan Civil Code and JM, section 3. She also stated that the risk of untimely provision of the engineering utilities was expressly assigned to the Public Partner by clause 104 (11) of the contract: Report, §§ 19 and 22, JM, section 2. The presence or absence of claims for the provision of a plot of land as well as the form and content of such claims do not affect the Private Partner’s right to demand compensation for all additional costs associated with the failure of the public Partner to fulfil the obligation to provide a plot of land with the electricity infrastructure connected to it: JM, Section 7(iv). I summarise Dr Nesterov’s view as to the consequences of a failure by the Public Partner to fulfil its contractual obligations below.
- 6 As to Mr Privalov’s view, JM section 2 records him as considering that “*the infrastructure includes many components*”, that “*in view of the specifics of construction, the point of connection of electricity has changed*”, and that “*it is provided exclusively by Astana REC JSC*”. The Joint Memorandum also states that the issue of connection was first raised by the Private Partner in June 2018 and, in relation to the start of construction in March 2018, records Mr Privalov’s view that the delay

was due to the fault of the Private Partner: JM, section 4, Mr Privalov's point (ii). Mr Privalov's view is that the Public Partner was not in breach of an obligation to provide a plot with the necessary infrastructure for two reasons. The first was that the plot was handed over to the Private Partner on time under the agreement and the Private Partner accepted the plot without any comments and made no claims concerning the provision of the land for about 10 months until June 2018: Report, pages 4 and 10 (B4 pp 89 and 95); Mr Privalov's point (ii) in JM section 3 and section 7. The second was that the Private Partner did not notify the Public Partner about the infrastructure including the electricity connection as it was required to by clauses 36 and 102 of the contract: Report, pages 3 and 9 (B4 pp 88 and 94) and Mr Privalov's points in JM section 3. There was thus no evidence of the guilt of the Public Partner before the court.

The start of construction: JM, section 4

- 7 The experts agree that there was a delay in starting construction and that it in fact started in March 2018: JM, section 4. Dr Nesterova stated that the reasons for the delay are a matter of fact and not one of law. Mr Privalov, however, stated that while they are "*more a matter of fact*" they are also "*a legal issue*". Dr Nesterova also stated that, whatever the reason for the delay in starting construction, the delay did not deprive the Private Partner of the right to compensation for additional costs associated with the failure of the Public Partner to bring the engineering infrastructure to the plot which was provided.

The provision of quarterly reports: JM, section 5

- 8 The experts did not agree. Dr Nesterova considered that the provision of quarterly reports by the Private Partner is a matter of fact, not a matter of law: JM, section 5(i). She also considered that the fulfilment by the Private Partner of its obligations to provide quarterly reports did not affect its rights to claim compensation for all additional costs associated with the Public Partner's failure to fulfil the obligation to bring engineering infrastructure to the land provided for construction of the kindergarten: Report, §66, JM, section 5(ii). Mr Privalov considered that the absence of any of these reports in the documentation filed by the Private Partner demonstrates the absence of factual confirmation of its arguments: Report, page 3-5, 9-10, 11, 12 **4/88-92, 95, 97**, JM, section 5

The obligation in clause 36 to notify the Public Partner: JM, section 6

- 9 The experts did not agree. Dr Nesterova considered that clause 36 of the contract does not apply the situation which arose because of the lack of engineering infrastructure: Report, §63, JM, section 6 (i)-(iii), (v). It imposes an obligation on the Private Partner to notify the Public Partner if it "*discovers circumstances beyond the control of the Parties that make it impossible to construct and commission the PPP facility within the time limit stipulated by the Contract*". Dr Nesterova stated that clause 36 is clear and subject to literal interpretation. The supply of engineering infrastructure to the plot of

land provided upon which the kindergarten was to be constructed was completely dependent on the Public Partner and included in the zone of its obligations, risks and responsibilities: Report, §65, JM, section 6(iii). She inferred from an undated letter from the Public Partner to the Private Partner after Buldirshin-2012's appeal regarding the PPP contract that the Public Partner knew about the lack of power grid infrastructure on the plot: Report, §25 and Appendix 9, JM, section 6 (iv). She considered that the official notification (or non-notification) of the lack of power grid infrastructure on the plot is *“legally indifferent and does not affect the Private Partner to compensate[ion] for its losses caused by the failure of the Public Partner to fulfil the obligation to supply engineering infrastructure”*: Report, §66. Dr Nesterova also considered that the issue of procedure, methods and content of communications between the parties after the contract was made is a matter of fact and not a legal issue: Report, §64, JM, section 6(vi).

- 10 Mr Privalov stated that, in addition to clause 36 concerning circumstances beyond the control of the parties, clause 102 of the contract required the Parties to provide each other with timely information necessary for the performance of their obligations under the contract and immediately to notify each other of the occurrence of significant events that may affect the proper performance of those obligations: Report, page 3 (B4/88) and JM, section 6. He concluded that: *“As can be seen from the documents provided by the Private Partner, the obligations under the contract were not fulfilled”*: Report, page 3 (B4/88).

Guilt as a condition of the responsibility of the Public Partner: JM, section 8

- 11 The Experts agree that in accordance with clause 115 of the contract, the Public Partner is liable for damages, losses and expenses caused to the Private Partner, if they arose solely through the fault of the Public Partner and such guilt is proven in court. They do not agree as to the burden of proof and its allocation.
- 12 Dr Nesterova considers that Article 359 of the Civil Code establishes a presumption of guilt on the part of a person who breaches an obligation, and civil law imposes the burden on that person (in this case the Public Partner) of proving that he has taken all measures in his power for the proper performance of the obligation (in this case the obligation to bring engineering infrastructure to the plot of land: report, §§ 29-33. She did not express an opinion as to whether the Public Partner was able properly to fulfil its obligation to provide the necessary electrical grid infrastructure since that was a question of fact, not law: Report, §34. But she considered that the undated letter referred to at [10] above *“testifies to the guilt of the Public Partner of its failure to fulfil its obligation”*: § 35. In that letter, see her Report §25 and Appendix 9, Mr Shoganbay, then Deputy Head of the Department of Education, stated that, according to its plans, the designated transformer substation wants to be erected in the future under another not yet concluded Public Private Partnership agreement for a similar kindergarten which in the event was not concluded.

- 13 Mr Privalov stated that the guilt of a person under Article 359 can only be determined in accordance with the PPP contract where there is evidence of guilt. Here, the provision of the land plot without comment by the Private Partner about the infrastructure at the time of transfer meant that there was no such evidence. The letter relied on by Dr Nesterova was not such evidence. It was about the construction of a transformer substation, a permanent connection, which was carried out with the consent of the Private Partner and paid for at prices provided by the Private Partner itself: JM, section 8, Mr Privalov's point (iii).

Restoration of Financial Balance in the event of a destabilizing event: JM, section 9

- 14 The experts did not agree. Dr Nesterova considered that Public Partner was under an obligation to restore the initial economic balance of interests of the Parties in the event of the Public Partner's failure to fulfil its obligations under the PPP Contract: Report, §§ 40-41. That balance, she stated, was reflected in Appendix 7 to the PPP Contract, the financial and economic model ("FEM") of the kindergarten: Report, §40.
- 15 Dr Nesterova stated that if, "*due to the violation by the [Public] Partner of its obligations*", the amount of the Private Partner's costs turned out to be "*higher than planned*", then "*all such unforeseen costs, within the meaning of [clauses] 105(1), 107(2) and 109 of the [PPP contract] are subject to compensation by the [Public] Partner in order to restore the initial balance of economic interests*": Report, §41 By clause 105(1), what the PPP contract calls "*disruption events*", but Dr Nesterova calls "*destablizing conditions*" include the failure of the Public Partner to fulfil its obligations under the contract, and "clause 107(2) ... provides for the restoration of the financial balance in accordance with the [FEM], if there is imbalance as the result of a destabilizing event": JM, section 9, Dr Nesterova's (ii) and (iii).

- 16 Mr Privalov's view on this, as summarised in JM, section 9 is:

- (i) "*All investments invested by the [Public] Partner are compensated in full in accordance with the agreement and schedule for the payment of the bare minimum wage.*"
- (ii) "*Moreover, the operation of the constructed kindergarten by 100% without the provision of services under the State order in violation of the agreement indicates that the Private Partner compensates all financial investments in excess of the amounts received from the state, even proving the guilt of the state partner in court.*"

The only reference in his Report to placement under the state order is at page 11 (B4/96) which states that "*the unilateral use of the constructed facility – a kindergarten for 360 places, is contrary to the Agreement*" and refers to clause 49 of the PPP contract.

The terms and conditions of the Supplementary Agreements No 1 and No 2 for the reimbursement of the Private Partner's costs, JM section 10

- 17 The experts agree that Supplementary Agreements No. 1 and No. 2 amended the PPP Contract in terms of making payments for the capital investment, transferring the transformer substation, and increasing the construction period. They do not agree on whether the fact of entering into Supplementary Agreements limited the Private Partner's right to compensation for other expenses in excess of those stipulated by these Supplementary Agreements.
- 18 Dr Nesterova's view is that clause 5 of Supplementary Agreement No 2 means that, by increasing the size of the KIZ by the cost of constructing a transformer substation, the parties understood that there are other costs of the Private Partner associated with an increase in the cost of the project, and agreed but all such losses (costs and lost profits) associated with an increase in the cost of the project will be compensated to the Private Partner.
- 19 Mr Privalov's view on this, as summarised in JM, section 10, is that the conclusion of Supplementary Agreement No. 2 on granting the Private Partner the right to compensation for costs, expenses and lost profits associated with an increase in the cost of the project, provided that the guilt of the Public Partner in these circumstances is proved in accordance with clause 115 of the PPP contract. As to the transformer substation, he stated that it was designed, built and paid (fully compensated for the cost) with the full consent of the Parties, and at prices provided by the Private Partner. The references in his Report to the effect of the Supplementary Agreements are on pages 10 and 11 (B4/95-96). On page 10 it is stated that after the Private Partner addressed the Public Partner about the lack of infrastructure, extensive *"correspondence was provided to resolve the issue, which resulted in the conclusion of Additional Agreement No. 1... where the issue of the construction of a transformer substation and payment of its cost was mutually resolved"* On page 11 it is stated that the actions of the Parties as shown in the correspondence and the Supplementary Agreements is that *"when a solution to the problem was required, when there was talk about increasing the construction time, or the construction of a transformer substation, the issues were resolved, the deadlines were revised, funds for the construction of the substation (at prices provided by the Private Partner) were allocated"*. This, Mr Privalov stated *"is stipulated both by the [PPP contract], as well as by the norms of the Civil Legislation, and by business practices"*.

Kazakhstan Civil Code Articles 366 and 629(1): JM sections 11-12

- 20 Dr Nesterova and Mr Privalov disagreed about the effect of Articles 366 and 629(1) of the Kazakhstan Civil Code, respectively on Creditor's Delay and the obligation of the customer to assist the contractor in the performance of work to the extent and in the manner prescribed by the contract. Dr Nesterova, Report §§ 44 - 46 and JM section 11, states that in accordance with Article 366; (i) *"it is mandatory for the for a creditor to compensate the debtor for all losses that are in causal connexion with the delay made by the creditor"*; (ii) *The types of delay of the creditor include non-performance*

by the creditor of actions before which the debtor could not fulfil his own obligation; and (iii) “the only circumstance that releases the creditor from liability for delay is the fact proven by the creditor that the delay is caused by circumstances for which he is not responsible”. The second part of Article 629(1) provides that, in the event of the non-performance by the customer of the obligation to assist the contractor, *“the contractor has the right to demand compensation for damages including the extra costs, caused by the downtime or deferral of execution of work or increase in the price of work”.* Dr Nesterova stated that *“therefore, the Respondent’s delay in fulfilling its obligation to equip the land plot with the necessary infrastructure services serves as the basis for liability to the claimant in the form of compensation for losses caused by the corresponding delay in the construction of the kindergarten and putting it into operation”*: Report, §46, JM section 12.

- 21 Mr Privalov’s view is that Article 366 applies only if there is guilt, evidenced in court as provided by clause 115 of the contract. He stated that in the absence of a single document, whether a financial or other report in accordance with Appendix No 5 of the contract, *“it is impossible to objectively assess the guilt of the state of the Public Partner only from the controversial veil of not providing one part of the infrastructure”*: JM, section 11 and see the references in the Report to the absence of documentation, e.g. at pp 7, 9 (**B4/ 92 and 94**). The JM also records in section 12 that Mr Privalov believes that the land plot was provided in a timely manner with the infrastructure at the time of transfer without comments, that the delay in the start of construction, was through no fault of the Public Partner, and that the Public Partner took responsible measures to resolve issues relating to the implementation of the contract.

Article 655 of the Civil Code: Reviewing the Price of a Construction Contract: JM, section 13

- 22 The experts did not agree. Dr Nesterova dealt with this in §§45-53 of her Report. On the basis of Articles 629(1) and 655 of the Civil Code, she stated that the provision in the contract of a fixed cost for the costs of building a kindergarten does not deprive the Private Partner of the right to additional compensation for unforeseen costs: Report §51. She also stated that the Private Partner has the right to demand compensation for its additional costs caused by an increase in the deadlines for the execution of work, downtime of its personnel, an increase in the cost of maintaining facilities and personnel as well as any other costs caused by the Public Partners delay in fulfilling its obligation to ensure the construction of engineering infrastructure and the consequent deviation from the initial parameters of the project: Report, §51.
- 23 Mr Privalov’s summary in JM, section 13 states that he considers that the contract defines certain types of work and costs with which the Private Partner agreed by signing it. Moreover, in the case of the construction of the transformer substation, the Private Partner itself ordered the design and estimate documentation and built the substation as shown quickly and without delay at the prices it had provided. Everything has been paid for and reimbursed. This summary appears to reflect passages from pages 10 and 11 of his Report (**B4/ 95-96**) to which I refer when

summarising his views on Articles 366 and 629(1) of the Civil Code in § 22 of this Appendix.

Legal Protection of Investors in Kazakhstan: Entrepreneurial Code, Article 276, JM, section 14

- 24 The experts did not agree. Dr Nesterova dealt with this in the section of her report on reviewing the Price of a Construction Contract, which I have summarised at [23] above. She relied on the right of an investor under Article 276(1) and (2) of the Entrepreneurial Code to compensation for harm caused by acts of State bodies that do not comply with Kazakh law and illegal actions (inaction) of officials of those bodies. Her overall conclusion in § 53 is that the Kazakh investment legislation guarantees the investor full compensation for all his losses caused as a result of improper fulfilment by state bodies of their obligations to investors.
- 25 Mr Privalov's summary in JM, section 14 makes two points. The first, (i) is that *"all investment costs are compensated in accordance with the agreement and are paid on time"*. The second, (ii), is that *"in violation of contractual obligations, the Private Partner, after the construction of the kindergarten, 100% exploits it in his own commercial interests. At the same time, the state, compensating the costs of building a kindergarten, is not able to provide places within the framework of the state order."*
- 26 Mr Privalov's Report does not refer to Article 276 of the Entrepreneurial Code. At page 11 (B4/96), it is stated that

"non-compliance by the Private Partner with the requirements of the [Public] Partner to provide places under the state order, first of all, contradicts the essence of the legislation on Public Private Partnership. In this case, operating a 100% kindergarten for 360 places, Buldirshin-2012 LLP - a Private Partner, damages both the state and children entitled to receive this service from the state."

Compensable Damages, JM, section 15

- 27 The experts did not agree. Dr Nesterova's summary in this section of the JM states:
- (i) *"the issue of the composition and [amount] of damages to be recovered is a matter of evidence and falls within the prerogative of the court";*
 - (ii) *"Under Kazakh law (Article 9(4) of the Civil Code), losses are understood to be expenses that are incurred or must be incurred by a person in order to compensate for property damaged caused by a violation of an obligation, loss or damage to a person's property (actual damage), as well as lost income, which the person would have received under normal conditions of turnover if his counterparty had not violated his obligation (lost profit);*

- (iii) *“The general rule relating to damages is that damages incurred must be recovered”;*
- (iv) *“Based on the general principle that a party making material claims must substantiate the grounds and amount of its claims, Kazakh judicial practice is based on the fact that certain proven losses are subject to recovery, the amount of which is calculated by the claimant”;*
- (v) *“In accordance with [Article 350(4) of the Civil Code], when determining the amount of lost profits, the measures taken by the creditor to obtain it and the preparations made for this purpose are taken into account”;*
- (vi) *“the causal relationship between the debtors breach of his obligations and the creditors losses, proven by the recoverer, is a necessary basis for recovering damages”.*

Sub-paragraph (ii) summarises § 4 of Dr Nesterova’s Report; (iii), (iv) and (v) summarise §55, and (vi) summarises §56.

28 Mr Privalov’s summary in JM, section15 states:

- (i) *“Losses incurred as part of the evidence under this agreement may arise only during the analysis and provision all financial and other statements as part of the execution of Appendix No 5 to the agreement. In this case, how much money was received and from which investor, when and at what interest, how much own funds were used, how much was paid”;*
- (ii) *“the starting point in this case is clause 157 of the agreement. The construction period of the PPP facility is determined by the parties within 38 ... months from the date of the Financial Closing by the Private Partner”;*
- (iii) *Clause 1(13) of the PPP contract defines Financial Closure as “the date on which the Private Partner provides a written notification to the Public Partner that he has received the right to access the use of funds, including those provided by financial institutions investors under agreements with the Private Partner on financing necessary for the construction of the PPP facility. There is no information”.*

As to (i), Appendix 5 of the contract is referred to at pages 4, 9 and 12 of Mr Privalov’s Report (B4/89, 94 and 97). As to (ii), his Report does not refer to clause 157 of the contract but pages 10-11 (B4/95-96) state that the construction period was extended by Supplementary Agreement No 2. As to (iii), the Report contains references to the term “financial closure” at pp. 9 and 12 (B4/94 and 97) and to the absence of documents at pages 7, 9-10 and 12 (B4/92, 94-95 and 97).

Penalty for misuse of other people’s money: JM, section 16

29 The issue concerns Article 353 of the Civil Code, the heading to which on the English translation of the Civil Code on the Republic of Kazakhstan Ministry of Justice’s website is “Liability for unlawful use of somebody’s funds” and which uses the term “damages”.

30 The experts did not agree. Dr Nesterova's summary of §§57- 59 of her Report in this section of the JM states:

- (i) *"Illegal use of other people's money entails the obligation of the offender to pay, at the request of the victim, a legal penalty in the manner prescribed by Article 353 of the Civil Code ..."*
- (ii) *"To file a claim for the recovery of a penalty under Article 353 of the Civil Code ... does not require an agreement between the debtor and the creditor on the penalty, since it is legal";*
- (iii) *Article 353 provides that "the legal penalty is subject to collection from the moment of the first day of misuse of other peoples funds and until the day the money is actually paid to the creditor".*

31 Mr Privalov's summary in JM, section 16 states that he believes that:

- (i) *Unlawful use of other people's money is possible only in case of violation of the agreement by any party. Violations of the Public-Private Agreement ... from no government partner provided".*
- (ii) *Illegal use of funds by the Public Partner is not allowed. All financial issues are resolved in accordance with the Agreement.*

32 There is no reference to Article 353 in Mr Privalov's Report, but at page 11 (B4/96) it is stated that the issues were resolved by the Supplementary Agreements when the deadlines were extended and funds for the construction of the transformer substation were allocated.

Obligations of the Private Partner to Transfer the PPP facility to communal ownership; JM, section 20

33 The experts did not agree. Dr Nesterova's summary of §§78-80 of her Report in this section of the JM states:

- (i) *"Article 284(2) of the Civil Code ... expressly provides for the right of a person to suspend the performance of obligations if the counterparty improperly performs counter obligations."*
- (ii) *"This rule covers any counter obligations of a bona fide a counterparty faced with improper performance of an obligation by its counterparty."*
- (iii) *In accordance with this rule, the Claimant has the right to suspend the fulfilment of its obligation to transfer the PPP object to communal ownership until the Respondent fulfils the counter obligation to properly compensate the claimant for investment costs."*

34 Mr Privalov's summary in JM, section 20 states:

- (i) *“As can be seen from the materials provided, the Claimant grossly violates the agreement, both in terms of the provision of the state educational order, and in terms of transferring objects to communal ownership.”*
- (ii) *“All the Claimant’s claims for compensation for investment costs, damage caused by the untimely commissioning of the facility, which are caused by the fault of the Respondent, are disputable and not supported by sufficient evidence.”*

As to (i) pages 3-4 and 7-8 of Mr Privalov’s Report (**B4/88-89 and 92-93**) refer to documents provided which he states show that the Private Partner did not fulfil its obligations under the contract. As to (ii), pages 4, 7, and 9-12 (**B4/89, 92 and 94-97**) refer to the absence of documents and the insufficiency of the evidence filed. There is no reference to Article 284 in his Report.