

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

22 February 2021

CASE No: AIFC-C/CFI/2020/0010

MODTECH GROUP TEKNOLOJI SISTEMLERI LTD

Claimant

V

MOSSTON ENGINEERING LTD

First Defendant

and

KAZTECHNOLOGY JSC

Second Defendant

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

ORDER

1. **It is declared that the claims by the Claimant against the First Defendant and the Second Defendant fall outside the jurisdiction of the AIFC Court.**
2. **The claims are dismissed accordingly for lack of jurisdiction.**

JUDGMENT

Introduction

1. By a claim form filed at the AIFC Court in November 2020 the Claimant, Modtech Group Teknoloji Sistemleri Ltd (“Modtech”) claims (1) the sum of US\$ 5,100,000 (five million one hundred thousand US dollars) from the First Defendant, Mosston Engineering Ltd (“Mosston”), and (2) the sum of US\$ 1,600,000 (one million six hundred thousand US dollars) from the Second Defendant, Kaztechnology JSC (“Kaztechnology”).
2. This is my judgment on the preliminary issue, ordered in circumstances described below, of whether the claims fall within the jurisdiction of the Court.
3. The events that give rise to the claims involve four companies, as follows:
 - (1) Modtech is a Private Company registered in the Astana International Financial Centre (“the AIFC”).
 - (2) Mosston is a company incorporated in the Seychelles in June 2005 and redomiciled into the Marshall Islands in July 2016.
 - (3) Kaztechnology is a Joint Stock Company incorporated under the law of the Republic of Kazakhstan.
 - (4) A fourth company with an important role, though not itself a party to these proceedings, is Fameway Investments Ltd (“Fameway”), a Cypriot state enterprise.
4. The claims relate to payments made under two contracts for the sale of goods. The sums paid are said to have been repayable by reason of the sellers’ non-performance or incomplete performance of their supply obligations under the contracts. The contracts in question are:
 - (1) Contract No. 7/15 dated 2 April 2015 between Kaztechnology as seller and Mosston as buyer (“Contract 7/15”), together with an amendment agreement of the same date between Kaztechnology, Mosston and Fameway; and
 - (2) Contract No. 15/45 dated 29 May 2015 between Mosston as seller and Fameway as buyer (“Contract 15/45”).
5. As explained below, payments under both contracts were made to the seller by Fameway and any right to recover those payments lay originally with Fameway rather than with Modtech (which was

not a party to the contracts or the payments). As against Mosston, however, Modtech relies on an agreement dated 27 August 2020 and made between Modtech and Fameway (“the Assignment Agreement”) by which there was assigned to Modtech what was said to be an outstanding debt in the sum of US\$ 5,100,000 owed by Mosston to Fameway. The basis on which Modtech claims to be entitled to recover the sum of US\$ 1,600,000 from Kaztechnology is less clear.

Procedural history

6. Modtech’s claim form set out the claims against Mosston and Kaztechnology and referred to a number of supporting documents which helped to clarify the nature of the claims.
7. In response, Mosston filed an acknowledgement of service and two documents but did not file a defence or make an application under Part 8 of the AIFC Court Rules disputing jurisdiction.
8. Kaztechnology filed a brief defence, taking issue with the claim on grounds of jurisdiction and substance.
9. Modtech did not file a reply.
10. I then issued draft case management directions, directing the parties to consider the draft and to agree or make submissions on the directions proposed with a view to progressing the case to trial. The draft included a paragraph identifying provisionally the main issues of jurisdiction and substance in the case. In response, Modtech made submissions on the issues both of jurisdiction and of substance and filed further documents in support but did not otherwise address the draft directions. Mosston set out its position that the Court has no jurisdiction to hear the dispute and requested an order to that effect under Rule 8.8 of the AIFC Court Rules (without making any formal application under Part 8) but did not otherwise address the draft directions. Kaztechnology repeated its submission on jurisdiction and added briefly to its submissions on the substance of the claim but did not otherwise address the draft directions.
11. In the light of the parties’ responses I ordered that the question whether the Court has jurisdiction in relation to the claims against Mosston and Kaztechnology be determined as a preliminary issue, to be heard by video link on 16 February 2021. I indicated that if the Court were found to have jurisdiction in relation to either or both of the claims, I would issue further directions for the trial of the claim or claims.
12. The hearing took place as scheduled on 16 February 2021, when I received commendably succinct oral submissions from Mr Temir Ibrayev on behalf of Modtech, from Mr Ruslan Kubrakov on behalf of Mosston, and from Ms Aizhan Kalambayeva on behalf of Kaztechnology.

The factual history

13. By Contract 7/15, dated 2 April 2015, Kaztechnology agreed to sell to Mosston various products specified in Annex No.1 to the contract (namely items of ammunition). The total contract price was US\$ 14,839,122.16. Payment terms included:

“4.1 Contract payment is made in US dollars as follows:

- 4.1.1. Buyer is obliged to make an advance payment in amount of 1,600,000 (one million six hundred thousand US dollars) within 10 (ten) days since Contract signing

4.1.2 Buyer is obliged to pay remaining amount (except advanced payment) before batch shipment after obtaining a transport license and acceptance at Seller warehouse.”

In a section of the contract headed “Legislation and Arbitrage” it was provided that “all debates originating in terms of Contract, Parties must settle by negotiation” (clause 11.1); that “In case when Parties cannot come to an agreement, all debates and disputes must be regulated in accordance with the Rules of Conciliation and Arbitration of the International Court of Arbitration” (clause 11.2); and that “Arbitration decision is final and binding for the Parties” (clause 11.3). The place of conclusion of the contract was stated to be Dubai, UAE. The contract was stated to be drawn up in the Russian language: a certified translation into English has been provided to the Court.

14. An “Amendment agreement to the Contract No. 7/15”, also dated 2 April 2015 (“the amendment agreement”) was entered into between Kaztechnology as seller, Mosston as buyer and Fameway as “payer”. It recorded that the parties were all aware of the terms of Contract 7/15 and that they agreed to add the following point 4.1.3 to those terms:

“4.1.3. The Buyer has the right to fulfil the obligation for making the advance payment and/or other payments, mentioned by this Contract both personally and through the Company-Payer Fameway Investments Ltd. on terms indicated in this Contract, with immediate and obligatory written notification of the Buyer.

Factual fulfilment by the Company Fameway Investments Ltd. of the obligations for making the advance payment and/or further payments is recognized by corresponding fulfilment of Buyer’s obligations by himself regarding the payment of debts.

Seller and Buyer came to the agreement that any payment from the Company Fameway Investments Ltd. to the Seller are being estimated (understood) as the fulfilment of money liabilities by the Buyer within the frames of this Contract towards the Seller and voluntary and conscientious transfer of debt in amount of paid amount by the Buyer to the Company Fameway Investments Ltd.

Payer shall make the advance payment in amount of 1,600,000 US dollars to the account of Seller. In case of making an advance payment and other payments by this Contract by the company Fameway Investments Ltd., all expenses relating to the payment of purchase costs, including all amounts of banking commissions, are being paid by the Company Fameway Investments Ltd.”

15. The case pleaded in the claim form is that the claimant, i.e. Modtech itself, made the advance payment of US\$ 1,600,000 due to Kaztechnology under clause 4.1.1 of Contract 7/15. The claim form states that although Mosston was the party obliged to make the payment, Mosston did not have the resources to make it, so Modtech proceeded to make the payment on behalf of Mosston. It states further that the contract was not completed as the goods were destroyed in a warehouse fire, which is the basis of the claim to recovery of the advance payment. Despite the way in which the case is pleaded, however, it is clear that Modtech’s actual case is that the advance payment of US\$ 1,600,000 to Kaztechnology was made by Fameway in accordance with clause 4.1.3 of Contract 7/15 as inserted by the amendment agreement, and that the right to recover that sum for failure to supply the goods lay originally with Fameway but now lies with Modtech. At the hearing, Mr Ibrayev confirmed this to be Modtech’s case; and the supporting documents supplied to the Court by Modtech include a wire transfer statement evidencing the transfer of US\$ 1,600,000 by Fameway to Kaztechnology on 10 April 2015.

16. Modtech's claim to be entitled to recovery of the US\$ 1,600,000 is disputed by Kaztechnology. There may well be factual issues: for example, on the limited material I have seen it seems to me possible that the goods covered by the advance payment of US\$ 1,600,000 were in fact delivered to Mosston and that any non-delivery related only to some later consignments. But there are also substantial legal issues. The basis on which Modtech seeks effectively to stand in the shoes of Fameway for the purposes of recovery against Kaztechnology is not clear to me: Modtech does not rely directly on the Assignment Agreement since that relates only to an outstanding debt said to have been owed by Mosston to Fameway. Further questions that appear to me to arise are whether, having regard in particular to clause 4.1.3 of the amended Contract 7/15, the advance payment, although made in fact by Fameway, is to be treated as having been made by or on behalf of Mosston and, if so, whether any right to recover the payment from Kaztechnology lay with Mosston rather than with Fameway, whilst Fameway had a separate right to be reimbursed by Mosston in respect of its expenditure on the advance payment. I mention these points in order to indicate the potential scope of the dispute between Modtech and Kaztechnology.
17. The second relevant sale contract is Contract 15/45, dated 29 May 2015, by which Mosston agreed to sell to Fameway various products listed in Appendix No.1 to the contract (again items of ammunition, but overlapping only to a small extent with those specified in Contract 7/15). The total contract price was US\$ 17,930,000. Payment terms were:
- “4.1.1. The Buyer shall make the advance payment in the amount of twenty (20) percent of the whole amount of the Contract, that comprises 3,586,000 (three million five hundred and eighty six thousand) US dollars only within 3 (three) calendar days following the day the contract is signed.
 - 4.1.2. After, the Buyer shall make the payment in amount of 3,586,000 (three million five hundred and eighty six thousand) US dollars, that comprises (20) percent of the whole amount of the Contract by June 15th 2015.
 - 4.1.3. The rest 60% of the whole amount of the Contract that comprises 10,758,000 (ten millions seven hundred and fifty eight thousand) US dollars, the Buyer shall transfer to the account of the Seller after the provision of export license.”

The contract stated further that Dubai, United Arab Emirates, was regarded as the place of conclusion of the contract and that the contract was signed in two side-by-side versions, in the Russian and English languages: both versions were to have the same meaning but in the event of a discrepancy the English version was to prevail. There was no arbitration clause or other provision as to how any disputes were to be resolved.

18. The case pleaded in the claim form is that the claimant, i.e. Modtech, was party to the contract with Mosston and made payments under the contract which it is entitled to recover from Mosston. It is, however, clear and was confirmed by Mr Ibrayev at the hearing that Modtech's actual case depends not on any original involvement by it in the transaction but on the subsequent assignment to it of a debt owed by Mosston to Fameway. In substance it is contended that (i) Fameway was party to Contract 15/45 and made payments under it; (ii) Mosston did not fulfil its obligation to supply the goods, with the consequence that Fameway was entitled to recover the payments made; (iii) the amount owed by Mosston to Fameway as at 27 August 2020 was US\$ 5,100,000; and (iv) that debt was assigned by Fameway to Modtech by the Assignment Agreement.

19. Although Mosston has not served a Defence, it was confirmed by Mr Kubrakov at the hearing that Mosston disputes the alleged debt of US\$ 5,100,000 to Fameway. How that sum was calculated for the purposes of the Assignment Agreement is unclear: the agreement annexes a “Reconciliation Report” which does not produce a clear-cut answer. The matter does not need to be resolved for the purposes of the preliminary issue of jurisdiction, but some consideration of it is important for an understanding of the scope of the dispute between the parties. For that reason I refer below to relevant material before the Court, before setting out the terms of the Assignment Agreement.
20. That Fameway made payments to Mosston amounting in total to US\$ 9,887,000 is evidenced by wire transfer statements filed with Modtech’s claim form which show payments on the following dates: on 2 June 2015, the sum of US\$ 3,586,000 (the amount of the advance payment due under clause 4.1.1 of Contract 15/45); on 5 June 2015, the further sum of US\$ 3,586,000 (the amount of the payment due under clause 4.1.2); and the further sums of US\$ 1,000,000 on 21 August 2015 and of US\$ 1,715,000 on 24 September 2015.
21. One of the documents filed by Mosston is an “Agreement for Set-off of Amounts” made between Mosston, Fameway and Aheloy OPM OOD, a Bulgarian company with no direct involvement in these proceedings (“the Set-off Agreement”). The document is in English and is dated 26 May 2016. It provides as follows:

“Aheloy OPM OOD has paid advances for delivery of Defense related products to Alguns EOOD / Fameway Investments Ltd in the total amount of USD 6,019,010.00.

The above mentioned amount will be deducted from the payments made from Fameway Investments Ltd to Mosston Engineering LTD and will be transferred to contract No AH/ME/12/2015 and contract No AH/ME/13/2015.

With this agreement all the Alguns EOOD / Fameway Investments Ltd delivery obligations, which received advance payments, to Aheloy OPM OOD are closed.

With this agreement all the Mosston Engineering LTD obligations to return the advance payments to Fameway Investments in amount of USD 6,019,000 are drop out.

Aheloy OPM OOD has the obligation to pay to Mosston Engineering LTD up to the full amounts of the above mentioned two contracts and according the full statement of business relations between the both companies.”

22. Just two weeks later, on 8 June 2016, Mr Davit Galstyan as Director of Mosston wrote the following note, seemingly to Mr Robert Odobasic, the Manager of Fameway:

“Robert,

Transferred amount from your side comprises to:

- 1) 11,487,000 US dollars plus 200,000 USD, that in total amount comprises to 11,687,000 USD
- 2) Cession with Aheloy OPM comprises to 6,019,010 USD

3) The amount of the contract for S-8 KOM rockets comprises to 4,655,200 USD

4) also 500,000 USD is the amount for delay of presenting EUC from your side.

The debt at this moment is 512.790 USD.

This is the situation for this moment.

For which 2 mln you are talking about I do not know.

The rest 512,790 USD will be set-off after presenting of IIC for S-8 KOM and DVC from Saudi Arabia.”

That note appears on a copy of the last page of Contract 15/45 but the note is dated long after the conclusion of that contract and refers to matters evidently going well beyond the scope of the contract. The document itself was filed by Modtech with the Assignment Agreement and appears to be the Reconciliation Report referred to in point 1.1 of that agreement (see below).

23. That brings me to the terms of the Assignment Agreement itself. The agreement is stated to have been drafted in Russian: the Court has been provided with a translation into English. The agreement is headed “Contract No. 01-270820 on claim assignment”, “Nur-Sultan city”, and is dated 27 August 2020 and made between Modtech as assignee and Fameway as assignor. It reads as follows:

- “1.1. Taking into account that according to the Reconciliation Report of 15/45 29.05.2015 as an Annex No.1 to the Contract ... Mosston Engineering Ltd, hereinafter referred to as the Debtor, has outstanding debt to Assignor in the amount of 5,100,000 USD (five million one hundred thousand); Assignor transfer to Assignee the money claim 5,100,000 USD (five million one hundred thousand) to the Debtor and Assignee is obliged to accept the Assignment within 3 (three) days after this Contract signing.
- 1.2. Assignor Assignment to the Debtor in the amount of 5,100,000 USD (five million one hundred thousand) is transferred to Assignee at the moment of the Contract signed by authorised representatives of Parties.
- 1.3. Assignor Assignment to the Debtor mentioned in point 1.1 of the Contract is transferred to Assignee under the conditions existing on the date of Contract signing within amount mentioned in point 1.1.
- 1.4. Herewith Parties declare and warranty that all actions taking by them within this Contract satisfy the requirements of Kazakhstan Republic existing legislation and legislation of Astana International Financial Center.
- 1.5. Assignor declares that the claim transferred under this Contract is valid and not assigned to the third party before and is responsible for invalidity of transferred obligation.
- 1.6. Obligations taken by Parties under this Contract can be considered as fulfilled since their recording in accounting registers.
- 1.7. This Contract comes into force since signing by all Parties and stays in force till its execution.
- 1.8. For all other issues not included in this Contract the Parties are guided by Kazakhstan Republic existing legislation and legislation of Astana International Financial Center.”

24. If the “Reconciliation Report of 15/45 29.05.2015” referred to in point 1.1 of the Assignment Agreement is indeed the note dated 8 June 2016 described above, apparently written by Mr Galstyan of Mosston to Mr Odobasic of Fameway, it is not obvious how the figure of US\$ 5,100,000 by way of outstanding debt is derived from it; nor is that figure otherwise explained.

Jurisdiction

25. The jurisdiction of the AIFC Court is laid down in Article 13 of the Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre (Constitutional Statute No. 438-V ZRK of 7 December 2015, as subsequently amended):

“4. The AIFC Court has exclusive jurisdiction in relation to the hearing and adjudication of the following disputes ...:

- 1) disputes between AIFC Participants, AIFC Participants and AIFC Bodies and an AIFC Participant or AIFC Body and its expat Employees;
- 2) disputes relating to activities conducted in the AIFC and governed by the Acting Law of the AIFC;
- 3) disputes transferred to the AIFC Court by agreement of the parties.

...

10. The AIFC Court has exclusive jurisdiction to interpret AIFC Acts.”

26. Article 1(5) of the same Constitutional Statute defines “AIFC Participants” as “legal entities registered under the Acting Law of the AIFC and legal entities recognised by the AIFC”. By Article 4.1, the “Acting Law of the AIFC” consists of the Constitutional Statute itself, AIFC Acts which are not inconsistent with the Constitutional Statute, and “the Acting Law of the Republic of Kazakhstan, which applies in part to matters not governed by this Constitutional Statute and AIFC Acts”.

27. The relevant provisions of Article 13 of the AIFC Constitutional Statute are reflected in Article 26(1) of the AIFC Court Regulations (Resolution of the AIFC Management Council dated 5 December 2017):

“The Court has exclusive jurisdiction, as provided by Article 13 of the AIFC Constitutional Statute, in relation to:

- (a) any disputes arising between the AIFC’s Participants, Bodies and/or their foreign employees;
- (b) any disputes relating to operations carried out in the AIFC and regulated by the law of the AIFC;
- (c) any disputes transferred to the Court by agreement of the parties; and
- (d) the interpretation of AIFC Acts.”

28. Article 26(2) of the Regulations provides that the reference to “disputes” between the parties mentioned applies to civil and commercial disputes arising from transactions, contracts, arrangements or incidences. By Article 26(3), the reference to “transferred to the Court by agreement of the parties” applies to all parties, including parties not registered in the AIFC, such that all parties may “opt in” to the jurisdiction of the Court by agreeing to give the Court jurisdiction pre- or post-dispute.

29. For convenience I will refer below only to Article 26(1) of the AIFC Court Regulations, on the basis that despite slight differences in wording between it and Article 13 of the AIFC Constitutional Statute the substance of the two sets of provisions must be the same and they must be given the same effect.
30. Modtech does not rely on Article 26(1)(a) or (d) for the purposes of jurisdiction in this case. It is accepted that the disputes that arise are not between the AIFC's Participants (Modtech alone is an AIFC Participant for this purpose) or otherwise within (a), and that the disputes do not involve the interpretation of AIFC Acts within (d). The focus of attention is on Article 26(1)(b) and (c).
31. As regards Article 26(1)(b), Modtech's contention is that by clauses 1.4 and 1.8 of the Assignment Agreement the parties to that agreement have agreed that the law of the AIFC is to regulate relations under the agreement. As set out above, clause 1.4 contains a declaration and warranty by the parties that "all actions tak[en] by them within this Contract satisfy the requirements of Kazakhstan Republic existing legislation and legislation of Astana International Financial Center"; and clause 1.8 states that for issues not included in the agreement the parties "are guided by Kazakhstan Republic existing legislation and legislation of Astana International Financial Center". Mr Ibrayev submitted that the Assignment Agreement was entered into with a deliberate choice of AIFC law in order to bring the matter within the jurisdiction of the AIFC Court. He referred to the positive benefits of that jurisdiction and also to the absence of any clear basis of jurisdiction in the relations that existed between Mosston and Fameway. He said that the Assignment Agreement made reference to the law of the Republic of Kazakhstan as well as to the law of the AIFC because of certain gaps in AIFC law, in particular as regards currency transactions which are governed by the law of the Republic of Kazakhstan.
32. Those submissions face several difficulties. First, they apply only to the claim against Mosston, since the Assignment Agreement relates specifically to an outstanding debt said to be owed by Mosston to Fameway and says nothing about any rights of Fameway as against Kaztechnology.
33. Secondly, it is far from clear that the Assignment Agreement is "regulated by the law of the AIFC" within Article 26(1)(b). The clauses relied on go no further than to recite compatibility with the legislation of the AIFC as well as the existing legislation of the Republic of Kazakhstan. They do not spell out that the agreement is governed by the former rather than the latter. I think it more likely that the general law of the Republic of Kazakhstan would be held to govern the agreement, though it is unnecessary for me to reach any decision on that point.
34. Thirdly, to fall within Article 26(1)(b) a dispute must relate to "operations carried out in the AIFC *and* regulated by the law of the AIFC" (emphasis added). Both limbs of the provision must be satisfied: the dispute must relate to operations carried out in the AIFC and those operations must be regulated by the law of the AIFC. There is little to show that the making of the Assignment Agreement constituted or formed part of operations carried out in the AIFC. I doubt whether its references to the law of the AIFC and the fact that one of the parties (but not the other) was an AIFC Participant are sufficient for that purpose.
35. Fourthly, and more importantly, the disputes between Modtech and the two defendants are centred not on the Assignment Agreement but on the payments made under Contract 7/15 and Contract 15/45 and the consequences of non-performance or incomplete performance of those contracts for recovery of the payments made. Those contracts, however, have no pleaded connection with the AIFC, plainly had nothing to do with operations carried out in the AIFC, and equally plainly were not

regulated by the law of the AIFC. They predated the commencement of operations within the AIFC; and whatever law governs them, it is not the law of the AIFC. In my judgment, that is a decisive reason for rejecting jurisdiction on the basis of Article 26(1)(b).

36. To put the matter in another way, if there had been no Assignment Agreement and the claims against Mosston and Kaztechnology had been brought by Fameway, there would have been no arguable basis for finding jurisdiction under Article 26(1)(b); and the assignment to Modtech of Fameway's rights against Mosston cannot create a fundamentally different position in respect of jurisdiction.
37. As regards the effect of the Assignment Agreement, I should also mention that Mr Ibrayev relied on Article 341 of the Civil Code of the Republic of Kazakhstan which states, in the context of assignment of rights:

“Unless it is otherwise stipulated in legislation or the agreement, the right of the initial creditor shall be transferred to the new creditor in the same volume and on the same terms which existed at the moment of the conveyance of the right. In particular, the rights shall be conveyed to the new creditor, which secure the execution of the obligation, and also any other rights which are related to the right to claim, including the right to remuneration (interest) not received.”

In my judgment, however, that provision takes matters no further and gives Modtech no assistance on the issue of jurisdiction. The provision makes clear that the effect of an assignment is to transfer to the assignee (the new creditor) the rights enjoyed by the assignor (the initial creditor). But that simply brings one back to the point that the Assignment Agreement places Modtech in no better a position than the initial creditor, Fameway.

38. Turning to Article 26(1)(c) of the AIFC Court Regulations, I am satisfied that there is no basis for a finding that the disputes in this case have been “transferred to the Court by agreement of the parties”. There is no agreement in any of the relevant contracts for resolution of disputes by the Court. On the contrary, Contract 7/15 contains express arbitration provisions; Contract 15/45 contains no provision for dispute resolution; and the Assignment Agreement, if relevant at all on this point, is likewise silent on the question of dispute resolution. Nor is there any subsequent opt-in by the parties to the jurisdiction of the Court.
39. Modtech contends that Kaztechnology's agreement to transfer of the dispute to the Court is to be found in a letter No. 619 dated 28 October 2020 from Kaztechnology to Modtech. The letter was sent in reply to two pre-claim letters from Modtech, both of them bearing the reference “No. 8 as of 12.10.2020”. Modtech's letters referred to a decision dated 4 March 2020 of an Arbitration Panel appointed by Kazakhstan International Arbitrage LLP to determine a dispute between Mosston and Kaztechnology in respect of Contract 7/15. The Arbitration Panel had ordered Kaztechnology to repay to Mosston payments in the total sum of US\$ 2,386,922.84 made by Mosston under the contract. Mosston had subsequently obtained a writ of execution to enforce the order. Modtech's pre-claim letters asserted that the amount of that debt had been transferred to Modtech under the Assignment Agreement, and requested Kaztechnology to suspend payment pursuant to the arbitration decision and writ of execution and to pay the sum instead to Modtech. Kaztechnology's reply was as follows:

“Currently, the Company has filed a private complaint against the court decision as of October 6, 2020 on the issue of a writ of execution with the intention of further appeal against the decision of the Kazakhstan International Arbitration Court as of March 4, 2020

We would like to note that all payments made by ‘MOSSTON ENGINEERING’ LTD, were made under the contract No. 7/15 as of April 2, 2015.

At the same time, we would like to inform you that regarding the collection of the amount of debt from ‘MOSSTON ENGINEERING’ LTD, you have the right to apply to the appropriate authorities, including the ‘Astana’ International Financial Center.”

40. In the last paragraph of that letter, Kaztechnology did no more than refer to Modtech’s existing right to apply to the appropriate authorities, including the AIFC. It did not agree to submit to the jurisdiction of those authorities or purport to give them any jurisdiction that they would not otherwise have. It was referring moreover to collection of a debt from Mosston, not to any claim against Kaztechnology, and what was said could not have any effect on the position of Mosston since Mosston was not a party to the correspondence. Thus, the letter did not involve any agreement either by Kaztechnology or by Mosston for transfer of Modtech’s disputes with them to the AIFC Court.
41. I should mention for completeness that, according to Kaztechnology’s submissions in response to the draft case management directions, the decision of the Arbitration Panel was annulled by Almaty City Court on 12 January 2021, though Mosston has the right to appeal the ruling within 6 months of that date. As things stand, therefore, the decision of the Arbitration Panel has no separate relevance to the present proceedings.
42. Finally, since Mr Ibrayev sought to rely on the cumulative effect of his various arguments as establishing the jurisdiction of the AIFC Court to hear the claims, I should make clear my view that putting the arguments together does not cure their individual weaknesses or otherwise affect my analysis or conclusion.

Conclusion

43. For the reasons given above, I conclude that the Court does not have jurisdiction in respect of Modtech’s claims against either Mosston or Kaztechnology. The appropriate way to give effect to my conclusion is to make a declaration to that effect and to dismiss the claims for lack of jurisdiction.
44. Any application for permission to appeal under Part 29 of the AIFC Court Rules against this Court’s Order, and any application for costs under Part 26, must be made in writing and will be decided on the papers.

By the Court,

Stephen Richards





Representation:

The Claimant was represented by Mr. Temir Ibrayev (ABROY Boutique Law Firm).

The First Defendant was represented by Mr. Ruslan Kubrakov (Law Firm Sunkar LLP).

The Second Defendant was represented by Ms Aizhan Kalambayeva (in-house lawyer, Kaztechnology JSC).