

IN THE SMALL CLAIMS COURT OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

1 March 2022

CASE No: AIFC-C/SCC/2021/014

KOSTANAI MINERALS JSC (KAZAKHSTAN)

Claimant

v

FACTORY DNEPROPETROVSKAYA VOLNA OJSC (UKRAINE)

Respondent

JUDGMENT

Justice of the Court:

Justice Charles Banner QC

ORDER

1. **The Claim is allowed.**
2. **The Defendant shall pay the Claimant 133,875 US Dollars within 7 days of this Order.**

JUDGMENT Introduction

1. This claim arises out of an agreement dated 4th January 2018, entitled Contract 04/01 (“**the Contract**”), between the parties to these proceedings, pursuant to which the Claimant undertook to supply specified chemical goods to the Defendant at a price of 573,750 US Dollars.
2. On 12th February 2018, the parties entered into an additional agreement, varying the Contract so as to provide for the supply of additional chemical goods to the Defendant. The overall price payable by the Defendant was increased to 1,644,750 US Dollars.
3. Clause 3.1 of the Contract provided that delivery of the goods could be made in whole or in parts until the full fulfilment of the terms of the Contract. Clause 5.2 required the Claimant to issue an invoice for the goods for each delivered batch. Clause 5.3 required the Defendant to make payment within 90 days from the date of shipment.
4. On the basis of the Contract, in the period from 26th February 2018 to 19th April 2019, the Claimant delivered chemical goods to the Defendant to the value of 541,875 US Dollars.
5. During 2018 and 2019 the parties agreed several further variations to Contract providing for deferred payment by the Defendant.
6. The Defendant made a partial payment to the Claimant in the sum of 100,000 US Dollars on 20th May 2019. It did not, however, make any further payments.
7. The Claimant subsequently commenced proceedings against the Defendant in the Economic Court of the Zaporozhye region of Ukraine. On 1st June 2020, that Court ordered the Defendant to pay the Claimant the sum of 308,000 US Dollars. This sum was duly paid.
8. In November 2021 a mediation between the parties took place at the AIFC International Arbitration Centre. The outcome of this mediation was an agreement between the parties dated 15th November 2021 (“**the Mediation Agreement**”), pursuant to which the Defendant agreed to pay the Claimant the remaining sum due under the Contract of 133,875 US Dollars no later than 22nd November 2021. The Mediation Agreement records that both parties were represented at the mediation and that they had read and understood the terms of the Mediation Agreement.
9. Clause 7 of the Mediation Agreement provides that any dispute in relation to the agreement shall be subject to the exclusive jurisdiction of the AIFC Court. Clause 7.1 provides that the applicable law is the substantive law of the Republic of Kazakhstan.

Procedural background

10. On 27 December 2021 the Claimant filed a Claim Form and accompanying documents at the AIFC Court, contending that the Defendant had not paid it the sum of 133,875 US Dollars, in breach of the Mediation Agreement, and asking the Court to order that the Defendant do so. No claim is made for interest.
11. The claim falls within the jurisdiction of the AIFC Small Claims Court (“**SCC**”) given that its value is below the threshold specified in Rule 28.2(1) of the AIFC Court Rules.
12. Rule 28.12 of the AIFC Court Rules provides:

“Within 14 days after he is served with a Small Claim Form, a defendant shall:

 - (1) Admit the claim by filing and serving on the claimant an admission in accordance with Part 10;
 - (2) File a Small Claim Defence to the claim setting out:
 - (a) which parts of the claim are admitted;
 - (b) which parts are denied and his reasons for denying those parts; and
 - (c) the details of any counterclaim; or
 - (3) Make an application to dispute the jurisdiction of the SCC in accordance with Part 6 and in every case shall provide an email address for service and state his residential address. Where the defendant is not an individual, he shall state the address at which he carries on business.”
13. Given the disturbances in Kazakhstan in January 2022, the Court granted the Defendant an extension of time for compliance with Rule 28.12 until 15th February 2022.
14. That date has now passed, and the Defendant has taken none of the steps to which Rule 28.12 refers. It has indicated to the Court that it does not intend to file a Defence. It has not suggested that recent events either in Kazakhstan or in Ukraine have precluded it from having a fair opportunity to consider and respond to the claim within the extended timeframe provided for by the Court.

Determination

15. The Court has proceeded to determine the claim based upon the material provided by the Claimant, and is satisfied that:
 - 1) the Defendant was obliged under the Mediation Agreement to pay the Claimant the sum of 133,875 US Dollars by 22nd November 2021;
 - 2) the Defendant has not done so and this sum remains unpaid; and
 - 3) the provisions of the Civil Code of the Republic of Kazakhstan cited by the Claimant (Articles 272, 273, 438 and/or 469) mean that this sum is due.
16. The Claim is therefore allowed. The Court orders the Defendant to pay the Claimant 133,875 US Dollars. Given the history of delayed payment and non-engagement by the Defendant in this case so far, the Court requires this sum to be paid within 7 days.

Costs

17. Rule 26.9 of the AIFC Court Rules provides:

“The SCC may not order a party to a small claim to pay a sum to another party in respect of that other party’s costs, fees and expenses, including those relating to an appeal, except:

- (1) such part of any Court fees paid by that other party as the SCC may consider appropriate;
- (2) and such further costs as the SCC may assess by the summary procedure and order to be paid by a party who has behaved unreasonably.”

18. The Claimant was not required to pay a Court fee in this case. It has not applied for its costs of legal representation in these proceedings. The Court observes, however, that the kind of persistent failure and delay in complying with legal and procedural obligations demonstrated by the Defendant in this case, in particular the unexplained failure to comply with the terms of the Mediation Agreement coupled with the equally unexplained failure to comply with Rule 28.12, may well in a future case lead to a finding of unreasonable behaviour so as to justify an award of costs under Rule 26.9(2).

By the AIFC Small Claims Court,

Charles Banner QC,
Justice, AIFC Small Claims Court

Representation:

The Claimant was represented by Yerzhanbayev Serik Saparovich, Head of the Legal Department, Kostanai Minerals JSC

The Defendant was represented by Igor Kyrychenko, SC Factory “Dnepropetrovskaya Volna”