



IN THE SMALL CLAIMS COURT
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

23 October 2023
Hearing dates: 2- 3 October 2023
CASE No: AIFC-C/SCC/2022/0018

“ASTANA MEDICAL UNIVERSITY” NON-PROFIT JSC

v

Claimant

“ADAM AND AHMAD MARKETING CONSULTING” COMPANY

Defendant

JUDGMENT AND ORDER

Justice of the Court:
Justice Tom Montagu-Smith KC



ORDER

- 1. The claim is dismissed.**
- 2. There shall be judgment for the Defendant on the counterclaim.**
- 3. By 18:00 Astana time on Monday 6 November 2023, the Claimant shall pay the Defendant the sums of US\$ 66,935.87 and KZT 49,914,041.**

JUDGMENT

1. This claim arises out of a contract for the provision of services to the Astana Medical University (*“the University”*).
2. The Defendant (*“the Company”*) is a company established in Jordan. It provides services to the secondary education system.
3. On 19 May 2021, the parties entered into an agreement (*“the Contract”*). Under its terms, the Company was granted the exclusive right to attract students to the University from various jurisdictions, including Egypt, Jordan, Iraq, Morocco and Palestine. The Company was obliged to take certain steps to that end, including engaging in advertising and assisting the University in gaining accreditation in the target jurisdictions. In return, the Company was entitled to retain 25% of the tuition fees for the students.
4. The University claims that the Company comprehensively failed in its duties. In addition, the University says, the Company unjustifiably retained 25% of the tuition fees of students who transferred into the University from the Kazakh Medical University of Continuing Education (*“KazMUCE”*) and failed to pay for those students to receive tuition to catch up on their courses immediately after their transfer. The University claims reimbursement of certain amounts for tuition fees. In the course of the trial, however, the University’s deputy chief accountant confirmed that nothing is now owed in respect of the students. While the University did not abandon its money claim, its primary claim is for termination of the Contract.
5. The Company’s position is that the transferring students fell within the Contract and so the Company was entitled to 25% of the fees. The University has demanded payment from the students and the Company has had to reimburse them. The Company therefore claims those sums from the University. It also claims certain sums which it overpaid for tuition in 2021 – 2022 and a payment it made under protest for catch up tuition. The Company is content for the Contract to be terminated. However, it says it should be paid what is due to date, together with its 25% of the tuition fees for the existing cohort of Jordanian students until the completion of their studies.
6. The trial of the claim took place on 2 and 3 October 2023. The University was represented by Mr Serik Kuzhamkulov. The Company was represented by Ms Ardak Khabiyeva. I am grateful to them both for their assistance.

The evidence

7. I heard from 6 witnesses in the course of the trial.
8. Two of the University’s witness statements were served extremely late. The statements were due in July 2023. While the University served one statement on 1 August 2023, the other two arrived very shortly before trial, on Friday 29 September 2023 and on the first morning of trial itself, 2 October 2023. At the start of the trial, the University applied for permission to adduce evidence from the two new witnesses.
9. The University provided no good explanation for the failure to comply with the Court’s Order, saying only that the witnesses had been on holiday at the relevant time. That does not, with respect, come close to amounting to a good reason for such extensive delay.

10. Ordinarily, I would be extremely cautious about permitting last minute evidence in this way. On behalf of the Company, however, Ms Khabiyeva indicated that she could deal with the evidence. The parties also indicated that they would be able to extend the trial into a second day. I therefore proceeded on the basis that I would allow the witnesses to give evidence and would decide later whether to take it into account, having regard to whether its admission caused unfairness to the Company or disrupted the hearing.
11. In the end, we were able to complete the evidence on 2 October 2023 and resume the hearing on 3 October for closing speeches. Ultimately, there were relatively few real disputes of fact. Some difficulties were encountered because it was not possible to show the documents to the witnesses. However, I did not consider that this caused any significant prejudice to the Company. The evidence of one of the University's new witnesses, its accountant, was helpful to the Company's case in that she confirmed that all but one of the students was up to date on tuition. In the circumstances, I have had regard to the evidence of all of the witnesses in reaching my conclusions.
12. I would not however wish that to be taken as an indication that evidence produced so late in the day will be permitted in every case. It will not. The introduction of new witnesses so soon before trial risks significant disruption and can often only fairly be accommodated if the trial is adjourned. That is an order of last resort and not one that would be likely to be justified by the sort of explanation provided by the University in this case.
13. The University relied on three witnesses:
 - a. Ms Abushakhamanova is the head of the University's Legal Support Department. She has been with the University since October 2022 and in her current role since March 2023. Her evidence was clear and she was in my view trying to assist the Court, but her evidence was of limited relevance. In particular, she was not employed by the University when the contract between the parties was agreed;
 - b. Ms Mahanova is the deputy chief accountant of the University. She gave evidence about the sums which the Company had paid for the students' education. Ms Mahanova confirmed that, of the students concerned, only one had any fees outstanding. The sums due for their tuition had, she said, been paid in full, including the sums demanded in respect of catch up tuition. In some respects, as I explain below, Ms Mahanova's evidence was contradicted by documents. I do not consider that this reflects badly on her approach to giving evidence. Given her late introduction, it was not possible to show her the documents in the course of her questioning. I found her to be an honest witness who was trying to assist;
 - c. Mr Bakhtiyor Marajapov has been employed by the University since November 2021. He was the acting director of internal administration until 5 January 2022 and supervised the legal service within the University. In some respects, I consider Mr Marajapov's evidence to be inconsistent with the contemporaneous documents, in particular on the issue of whether the transferred students fell within the terms of the Contract. In part, this may be due to the fact that he was not employed by the University at the relevant time. On those occasions, the documents were a more reliable guide. Ultimately, the only real area of factual dispute on which Mr Marajapov could give direct evidence concerned statements made in a meeting between the parties in early 2022. These were of relatively limited significance.

14. Mr Marajapov's witness statement was served on the morning of trial. In English translation, it appeared to accuse the Company of dishonesty and deceit. No allegations of dishonesty had been raised before in these proceedings. When I raised this with counsel for the University, I was told that this was simply a mistranslation. In his evidence, Mr Marajapov confirmed that he made no such accusation. I do not know how those allegations appeared in formal documents served by the University. It was however an unfortunate mistake, particularly in light of its timing. Allegations of dishonesty should not be made lightly and must be properly set out in statements of case so that the party against whom they are made has a proper opportunity to deal with them.
15. The Company relied on the evidence of 3 witnesses:
 - a. Mr Darbekov had been a lawyer working for the University at the time the Contract was entered into and he signed the Contract on its behalf. In my view, he was doing his best to assist the Court. He was not closely involved in the commercial negotiations. However, he had some insight into them as a result of his role;
 - b. Ms Badyrova was a director of the company which represents the Company's interests in Kazakhstan. She was the person who assisted the Jordanian students in their transfer and was in contact with them to deal with any problems which arose. She also gave evidence about meetings which took place with the University in early 2022 and about the steps the Company had taken to gain accreditation for the University in Jordan. She gave her evidence clearly and I found her to be an honest witness. She could not remember some of the dates of the events. However, that is unsurprising;
 - c. Mr Daoudieh was the owner of the Company. He gave evidence about a number of matters including the Company's reimbursement of sums to the transfer students. He was not cross-examined on that evidence. I found him to be an honest witness.
16. I was also provided with a number of documents. As was pointed out by counsel for the University, where evidence of witnesses conflict, the documents are likely to be the most reliable guide to the facts. The University however repeatedly pointed out that, in some respects, additional documents must exist to shed light on factual assertions made by the Company. No doubt that is true. However, the SCC is a relatively informal process and there is no requirement to produce every document which might support or be relevant to a case. The fact that other evidence might exist does not undermine the value of the evidence which has in fact been produced.
17. Ultimately, there were relatively few facts seriously in dispute.

The facts

18. According to Ms Badyrova, in 2018, the Company attracted a number of students to the medical universities of Kazakhstan, including KazMUCE.
19. In April 2021, KazMUCE was forced to close. As a result, its students were distributed to other universities. This was the subject of, it seems, intensive negotiations, including at diplomatic level.

20. On 5 May 2021, the Kazakhstan Ministry of Education and Science issued a letter to the Jordanian Embassy, setting out the procedure for the transfer of students to other universities.
21. According to Ms Badyrova, all medical universities were supposed to accept students but most did not, claiming they had insufficient space.
22. Ms Badyrova's evidence was that the Jordanian Embassy asked the University to accept the students directly, but it refused, requiring foreign students to be represented by an agent. This account is supported by a letter from the Jordanian Embassy dated 30 May 2023, which confirms that the University insisted that the Jordanian students use an intermediary. Counsel for the University challenged this evidence, saying that there would be other contemporaneous correspondence if it were true. That may or may not be the case. However, the evidence that I have seen is clear and I have no reason to doubt it – the University insisted that the students use an intermediary.
23. Ms Badyrova explained that the agreement reached under the Contract was to the advantage of the University. Under its then existing pricing, tuition was less than US\$3,000 per student per year. Under the Contract, the price per student was US\$4,200, of which the University would receive 75%, being US\$3,150. The University was therefore receiving more than its current prices, would not have to worry about collecting fees from the students and could rely on the Company to deal directly with the students.
24. On 17 May 2021, the University and KazMUCE signed an agreement for the transfer of students. Clause 2.3 of the Contract stated:

“The University guarantees to make up the missing credits free of charge...”

25. According to Mr Darbekov, the primary reason for concluding the Contract was to cover the students who were transferring from KazMUCE.
26. The terms of the Contract were negotiated between the parties in meetings in May 2021. The Contract was signed on 19 May 2021.
27. In material part, the Contract stated as follows (with typographical errors reproduced):

Clause 4.5.1(5):

“The University undertakes to... Provide educational services to foreign citizens (applicants/students) enrolled in the University in accordance with established curricula and programs;”

Clause 4.5.1(12):

“The University grants the Partner the exceptional (exclusive) right to attract foreign nationals (applicants, students) from the following countries: Arab Republic of Egypt, Hashemite Kingdom of Jordan, Republic of Iraq, Kingdom of Morocco, Palestine, The University has no right to engage other companies to carry out activities to attract students from the above-mentioned countries, as well as to accept students from the abovementioned countries.”

Clause 4.6.2 [wrongly numbered in the Contract “4.5.2”]

“The [Company] undertakes to:

- 1) Step by step on their own and at their own expense to carry out the procedure of Legalization (accreditation) of the University in all the countries listed in the Contract, according to the requirements of these countries, and its confirmation in the established time;*
- 2) On its own behalf on behalf of the University to bear all expenses, but to organize and conduct an advertising campaign on the educational programs implemented by the University at its own expense;*
- 3) Submit in a timely manner the documents necessary for the admission of applicants/students to the University in full, according to List provided by the University officially (including documents for entry visas);*
- 4) Verify and guarantee the authenticity of all documents provided by foreign nationals;]*
- 5) If necessary, issue and transfer to the representative of the University power of attorney to obtain the documents required in the framework of cooperation;*
- 6) Provide the University with written information on the number of entrants/students attracted at least two months before the beginning of the academic year;*
- 7) The Partner may act on behalf of the University only within the limits established by this Contract;*
- 8) To make appropriate arrangements for the admission of applicants/students to the University according to the list provided by the University.*
- 9) To regulate relations between the University and the Partner in the territory of the Republic of Kazakhstan, as well as relations between the University and applicants/students.*
- 10) To carry out explanatory activities to applicants/students about the rules of entry and stay in the Republic of Kazakhstan, as well as the rules of admission and study at the University;*
- 11) To carry out appropriate registration and payment of study visa for applicants/students in accordance with the legislation of the Republic of Kazakhstan in the field of migration of the population.*
- 12) Sponsorship of the University in the form of a book purchase list provided by the University on an annual basis.”*

Clause 7:

- “7.1. For the purposes of this Contract «income from joint activity» is defined as the total amount of money received by the settlement account of the Partner for the provision of educational services with the attracted foreign citizens (applicants/students).*

7.2. *The amount of revenue from joint activities to be distributed among the Parties shall be taken to be 100 %, of which:*

75% of the income you pay to the University;

25% of the income is paid to the Partner.

7.3. *The cost per student is \$4,200 (4,200) per school year.”*

Clause 10:

DURATION, PROCEDURE FOR MODIFICATION OF THE AVOIDANCE OF THE CONTRACT

10.1. *This Contract shall enter into force on the date of its signature by the authorized persons of the Parties and shall remain in force until the Parties have fulfilled all the obligations specified in this Contract , but in any case until the complete completion and completion of studies at the University attracted under this Contract students, and in terms of mutual settlements - until their full implementation by the Parties. The termination of this Contract shall not absolve the Parties from liability for breach of its terms.*

10.2. *The parties have reached a mutual decision that the obligations of the Partner under this Contract to attract applicants and students to the University shall be terminated if the University refuses to attract and enroll students from the countries specified in subparagraph 4.5.1. Of Contract. In this case, the other terms of the Contract on fulfilled obligations of the Parties shall remain in force and shall apply until the completion of studies by students engaged by the Partner under this Contract.”*

28. On 21 May 2021, the Rector of the University wrote to the Company saying:

“NJSC “Astana Medical University” announces that it is ready to accept students from Jordan studying at the Kazakh Medical University of Continuing Education for the relevant courses in accordance with the transcript (the difference between universities will close as much as possible during the year free of charge.”

29. Approximately 104 Jordanian students were ultimately transferred to the University. A list was provided to the University on 24 June 2021. The Company sent the University a different list identifying 101 students on 16 February 2022. It appears some of the students in the original list may have transferred to a different university. Nothing however turns on this.

30. On 30 June 2021, the University wrote to the Company noting that since 1 June 2021, some Jordanian students had transferred. The letter referred to an appendix which listed 104 students. The letter asked the Company to *“conclude a commercial services contract (Appendix 2) and make payment for foreign students...”*. No Appendix 2 was attached.

31. According to an Act of Reconciliation prepared in April 2022 for the tuition year 2021 – 2022, the Company paid a total of US \$ 299,970 in December 2021 for tuition fees for the transferred students.

The Act records debits of US\$ 291,034.13, leaving a balance owing by the University to the Company of US\$ 8,935.87.

32. In her oral evidence, Ms Mahanova confirmed that she was the person who prepared the Act of Reconciliation. Her evidence was that the statement only set out what had been received from the Company. In fact, it also set out what was due and confirmed an overpayment of US\$ 8,935.87. I do not consider that this reflects badly on Ms Mahanova. Given her late introduction as a witness, it was not possible to show her the documents in the course of her questioning.
33. Ms Mahanova confirmed that the statement was prepared by reference to the Contract. As far as she was concerned, the Company was paying the students' tuition fees because their tuition was being dealt with as falling within the terms of the Contract.
34. According to Ms Badyrova, she assisted the students in the transfer. She says she worked closely with university staff, ensuring that transcripts were brought across and dealing with any questions that arose. One of the university secretaries travelled to Almaty to speed up the process and they worked together to ensure all the documents were complete. Ms Badyrova says she also worked with the students to resolve all issues arising with them, including visa processing, searching for housing and other issues arising outside the University.
35. Counsel for the University suggested that there would be documents evidencing these activities. Ms Badyrova confirmed that she had such documents. They had also been referred to in her witness statement but not produced. I do not consider that the fact that these documents were not produced undermines the Company's position. Ultimately, it is accepted that the students did transfer. This must have been a significant undertaking, involving administrative transfer of transcripts, updating of visas and relocation of students. The University has not suggested that it provided the students with assistance with this. In the circumstances, I accept Ms Badyrova's evidence on this.
36. Ms Badyrova's evidence was that steps were also taken to commence the process of the University's accreditation in Jordan. According to Ms Badyrova, the Company hired a specialist referred to a "*Abilova K.S.*" who worked with the international department of the University, spending a week there in 2021. It appears clear that some progress was made. I have seen a letter from the Jordanian embassy to the University dated 14 October 2021, in which the embassy sought extensive further information from the University. On 19 January 2022, the embassy wrote again, requiring the University to make an electronic application for accreditation.
37. No specific steps were taken to seek accreditation in any of the other countries referred to in the Contract. According to Mr Daoudieh, the Gulf states have an agreement for cross-accreditation. Accreditation in Jordan would have facilitated subsequent accreditation in the other countries. Counsel for the University pointed out that there were no documents to support that position and it was only Mr Daoudieh's opinion. However, I understood Mr Daoudieh to be speaking from his experience of how other accreditation had been obtained. I have no reason to doubt his evidence. In any event, the issue was not put to the test as the University dispensed with the Company's services before accreditation was achieved in Jordan.
38. In November or December 2021, the leadership of the University changed. The relationship between the parties began to change shortly afterwards. The University began to demand payment from some of the students of the 25% of their tuition fee which had been retained by the Company. According to

the Company, the University threatened the students with expulsion if they did not pay. This led to discussions between the parties, in the course of which, the Company says, the University said that payments had been demanded from students by mistake and would be returned.

39. The Company says that it ultimately reimbursed the students for the sums they paid directly to the University. The University does not accept that. The University's deputy chief accountant Ms Mahanova did however confirm that, with one exception, all of the students were up to date on their fees. The sums due for their tuition had, she said, been paid in full, including the sums demanded in respect of catch up tuition.
40. The parties met in early 2022. It is unclear to me how many meetings took place, but there seem to have been at least two. At one of these meetings in January 2022, the parties agreed that the Company would no longer seek to attract students to the University going forwards.
41. After the meetings, the University began to deal with the student directly and demanded that they pay the full tuition of \$4,200 themselves. The University also demanded further payment from the Company of KZT 21,278,635 in respect of tuition it had provided in the summer of 2021, immediately after the students transferred. It had, it said, had to recall teachers from their holiday to provide online teaching to help students catch up on tuition they had missed at KazMUCE.
42. The Company denied that anything was due. However, it paid \$22,300 towards this demand under protest, to ensure there was no further disruption to the students. The University accepts that this sum was paid.
43. In May 2022, the University again demanded that students pay it the 25% of their tuition which had been retained by the Company. Once again, the Company says, it repaid the students for those sums.
44. The University subsequently required students to fill in questionnaires. In them, the students stated that they had no agent. According to Mr Daoudieh, the students were required to sign these in order to be able to sit their exams.
45. The students were also required to enter into direct contracts with the University. Ms Abushakhamanova confirmed they had been signed in 2023 and backdated.

The claim

46. The University seeks an order terminating the Contract under Article 401 of the Kazakhstan Civil Code on the ground that the Company has comprehensively failed to provide the services agreed.
47. In principle, the University also seeks a money judgment. It is however difficult to see how that can now be maintained.
48. In its original claim form, the University claimed the sum of KZT 21,278,635 for catch up tuition fees from the summer of 2021. The claim form also appeared to assert a loss of KZT 380,700,000 (c.\$795,158.95) said to arise from the Company's failure to attract 94 students to the University. The basis for that was never explained and it was not pursued.

49. In supplementary submissions filed on 22 June 2023, the University advanced a different claim, this time for a total of KZT 140,810,239.80. This included a claim against the Company for fees due for the students' tuition for the years 2021 – 2022 and 2022 – 2023, together with the claim for catch up tuition fees. The catch up fees had, it accepted, been partially repaid, leaving an unpaid sum in that regard of KZT 11,631,745.90. In evidence, however, Ms Mahanova confirmed that everything (or virtually everything) had now been paid in respect of the Jordanian students, including catch up tuition. For the University, Mr Kuzhamkulov said that he had no instructions to withdraw the claim. However, he did not resile in any way from Ms Mahanova's evidence.

The counterclaim

50. The Company confirmed that it had no objection to the termination of the Contract. However, it sought compensation for fees it had overpaid and paid back to students and for its future 25% fee for the future tuition of the Jordanian cohort.

51. The sums sought were:

- a. The overpaid amount for 2021 – 2022 tuition left on deposit with the University of US\$ 8,935.87;
- b. The sum of US\$22,300 paid under protest for catch up tuition;
- c. A further KZT 26,550,000 repaid to students for the 2021 – 2022 year as a result of the University requiring them to pay those sums;
- d. The Company's 25% commission for 2022 – 2023 tuition being:
 - i. KZT 18,450,000 in respect of tuition paid directly by 41 students to the University; and
 - ii. KZT 4,914,041 reimbursed to 15 students, where the Company had paid the University itself;
- e. The Company's 25% commission for 2023 – 2024 tuition for 28 students in the sum of US\$29,400; and
- f. The Company's 25% commission for 2024 – 2025 tuition for 6 students in the sum of US\$6,300.

52. Finally, the Company appears to claim reimbursement of KZT 1,865,868 for fees paid by students who have voluntarily left the University without finishing their education.

The central issues

53. In the course of the parties' submissions and evidence, the following central issues emerged:

- a. Whether the fees of the Jordanian students fell to be dealt with under the Contract, such that the Company was entitled to retain 25%;

- b. Whether the Company was liable to pay fees for catch up tuition;
 - c. What was agreed between the parties in January 2022;
 - d. In light of that, whether the Company was in breach of the Contract in any of the ways alleged so as to justify termination. The most significant related to (a) accreditation (b) attracting students to the University (c) support services for students and (d) sponsorship for course materials;
 - e. Whether any sums are due on the claim;
 - f. In light of those findings, whether any sums are due on the counterclaim, taking into account:
 - i. Payments made by the Company for regular tuition;
 - ii. Payments made by the Company under protest for catch up tuition;
 - iii. Any payments made to students by the Company, following the University's demands for payment from the students;
 - iv. Any repayments due for students who left the University without completing their studies;
 - v. Any, fees the Company is due for the future years between 2023 and 2025.
54. In addition, the University raised two points in its evidence, which were barely addressed in submission. Neither affects the outcome of this case:
- a. First, it was suggested that the Company's representatives had not presented powers of attorney in meetings with the University. This was said somehow to amount to a breach of the Contract or to invalidate claims made by the Company. This is an artificial point. There is no suggestion that the Company's representatives were ever asked to produce powers of attorney. The University dealt with them at numerous meetings. In any event, the point goes nowhere. There is no case that the University suffered any loss as a result, for example.
 - b. Second, it was pointed out that the Company is not registered for tax in Kazakhstan. This also appears irrelevant. The Company had a local entity through which it carried out its activities in Kazakhstan. I have not been shown any law, nor provided with any argument as to how or why this could affect the parties' rights under the Contract.

The tuition of the Jordanian students

55. I am entirely satisfied that the students transferred from KazMUCE to the University were intended to be the subject of the Contract. This was disputed by the University. However, in my view, there is no doubt whatsoever that that was what was intended.

56. There are a large number of factors supporting this.
57. Of perhaps most significance, the Company paid for the students' tuition. There is no suggestion that this was done pursuant to any other contract. Nor is it said this was done voluntarily. To the contrary, the University's position remains that the Company was obliged to pay for their tuition.
58. Mr Darbekov, the University's lawyer at the time, confirmed that the Contract was primarily intended to deal with the transfer of the students from KzaMUCE.
59. Ms Mahanova, the University's accountant, confirmed her understanding that the sums due from the Company were due under the Contract.
60. Minutes from the meeting of 14 January 2022 required, at point 2, the University's chief accountant to "*make reconciliation with the Company... on the attracted foreign students*". The reconciliation statement referred to the Contract and set out the sums due from the Company and paid to the University under the Contract.
61. All of this demonstrates that the parties' agreement was that the Jordanian students who transferred from KazMUCE were to be treated as students whose fees fell within the terms of the contract. It is also consistent with the evidence that the University refused to accept the students unless they had an intermediary acting for them.
62. In my view, the suggestion that the Jordanian students did not fall within the terms of the Contract is fanciful. It is also contradicted by the University's own case that sums were due from the Company in respect of tuition. There could be no possible basis to require the Company to pay tuition fees for students if it was not providing services in respect of the students in accordance with the Contract.
63. The University pointed to an agreement entered into between the University and KazMUCE. That contract, it said, governed the transfer of the students. As a result, they were not covered by the Contract. That does not follow at all. The contract with KazMUCE set out the terms of the transfer as between the two Universities. It dealt, for example, with access to documents. It is consistent with the existence of a further contract pursuant to which the students' tuition was paid and other services were provided by the Company.
64. The University relied in its submissions on the questionnaires in which students had stated that they had no agent. I get little assistance from those documents. The students were stating the position in February to April 2023, by which time the University had effectively excluded the Company from its role.
65. It was also suggested that the timing of the agreement and certain correspondence indicated that the students did not fall within the terms. It was said that the list of students was sent by the Company on 4 June 2021 but the students had been studying since 24 April 2021. In my view, this does not assist the Claimant. The transfer was clearly arranged at some speed. The timing of the letter does not affect the question of whether the contract was agreed to cover the transferring students.
66. It appears clear that, in 2021, the University was receiving a good deal. It would receive more in tuition fees than was usual at that time. The Company was then entitled to retain fees on top. In addition to

facilitating the transfer and assisting the students in their transition, the Company would take steps to obtain accreditation and would market the University in other jurisdictions. Not only that, the University would be paid on time for all students, relieving it of the administrative burden and risk of needing to seek payments from each individual student.

67. It is however very clear that the new management introduced in November and December 2021 did not see the Contract in those terms. In their view, the Company was being paid for providing little more than debt collection services. I disagree. However, for these purposes, what matters is that, having agreed the Contract, the University was obliged to allow the Company to retain 25% of the tuition fees.
68. It is regrettable that the University proceeded to demand further payments from the students. The students were in a vulnerable position and were no doubt concerned that, if they did not pay, they would not be allowed to complete their studies. The University knew full well that the students had paid the full fees to the Company and that the Company had paid what was due to the University. This was further confirmed in the Act of Reconciliation signed by both parties in April 2022.

Catch up tuition fees

69. It is equally clear that the Company was not obliged to pay any fees for catch up tuition.
70. There was no provision in the Contract which could make the Company liable for those fees. Its obligation was to pay \$3,100 per student per year. The students themselves were not obliged to pay anything. They had no direct contract with the University. Their payment obligations were to the Company. The amount to be paid for their tuition was set out in the Contract.
71. In any event, it appears to have been the agreed position that there would be no charges for catch up tuition.
72. The agreement between the University and KazMUCE signed on 17 May 2021 stated:
- “The University guarantees to make up the missing credits free of charge...”*
73. In addition, in an undated letter, the University’s then rector confirmed that the *“difference between the universities will close as much as possible during the year free of charge”*. According to the University, this was a reference to the difference in courses, whereas the additional tuition was required to catch up on teaching which should have been but was not provided at KazMUCE. There was no evidence to support that suggestion. The statement by the Rector appears to me to be made in general terms and supported by the contract with KazMUCE. In any event, it can only explain the background to the contractual arrangements which were agreed. Pursuant to those, the only tuition fees due were those set out in the Contract.
74. In the circumstances, there was no legal basis for the demand made by the University for catch up fees. The sum was paid under protest and without legal basis. As a result, the Company should be entitled to restitution of the sum paid.

The agreement in January 2022

75. The parties both accept that, at or following their meetings in early 2022, they agreed that the Company would no longer take steps to attract foreign students or to seek accreditation for the University.
76. There is some dispute as to how this came about. Mr Marajapov for the University claims that it was Ms Badyrova on the behalf of the Company who said that the Company no longer wanted to cooperate with the University. According to Mr Daoudieh and Ms Badyrova, in fact the University asked to reduce the Company's fees from 25% to 10%. This was refused, as a result of which the University said that it no longer required the Company's services.
77. I prefer the evidence of Mr Daoudieh and Ms Badyrova on this issue.
78. Mr Marajapov made clear in his evidence that he did not value the services being provided by the Company. In his view, they did little more than collect tuition fees from the students. I disagree with that assessment. However, it would explain why the University would seek to reduce the fees and then bring the relationship to an end. The Company's position is supported by a draft amendment to the Contract which refers to *"the refusal of the University to further attract and enroll applicants and students from the countries specified in the Agreement"*. Although it was never agreed, that is a contemporaneous record of the position in February 2022. Similarly, a letter from the Company dated 9 February 2022 states that *"the University refused to accept students from the company for a new intake..."*.
79. There is no similar evidence supporting the suggestion that Ms Badyrova stated that the Company would not cooperate. Nor would there be any obvious motive for the Company in doing so. The University's attitude to the Contract had changed with its management. The Company's had not. The Company's position was that Ms Badyrova would not have been authorised to make a statement of that sort. Whether or not that was true, it seems highly unlikely that she would have done so, given she was not a director of the Company itself.
80. In my view, the University's new management simply did not value the transaction that had been entered into in summer 2021 and wanted to bring it to an end.
81. Ultimately, little turns on this. Both parties accept that the parties agreed that the Company would not be required to undertake any steps going forward to attract students to the University or seek its accreditation.
82. Neither considers that this resulted in the actual termination of the Contract as a whole. The Company's position, with which I agree, is that the result was that the Company would continue to support the existing cohort of Jordanian students until they completed their studies and would continue to be required to pay for their tuition and entitled to retain 25%. This was the effect of clause 10.2 and – in my view – the thrust of what was agreed between the parties in early 2022.

Alleged breach of Contract

83. The University's position is that the Company comprehensively failed to provide the services agreed under the Contract. Given the effective termination of other services in early 2022, the focus must be on the services provided in 2021.

84. Under Article 401(2) of the Kazakhstan Civil Code:

“At the request of one of the parties, the contract may be changed or terminated by a court decision only:

1) In case of a material breach of the contract by the other party; or

2) in other cases provided for by this Code, other legislative acts or an agreement.

Violation of the contract by one of the parties is recognized as essential, which entails such damage for the other party that it is largely deprived of what it was entitled to count on when concluding the contract.”

85. In oral opening, the University alleged that the Company had failed to meet virtually every obligation under the Contract. Counsel focussed on the following alleged breaches:

- a. Failure to attract foreign students;
- b. Failure to seek or obtain accreditation;
- c. Failure to submit and prepare documents for students or assist with visas;
- d. Failure to pay for course materials.

Attracting students

86. I do not consider it realistic to expect the Company to have attracted foreign students to the University before January 2022. The Company had attracted students to KazMUCE and then assisted in their transfer. To that extent, it had fulfilled the obligation for the Jordanian cohort. Its next role was to assist accreditation, after which, it would be in a better position to attract students. By early 2022, that had not occurred. At that time, the University confirmed that it did not want the Company to attract any students.

87. In the circumstances, I do not consider that the Company was in breach of this obligation.

Accreditation

88. The Company sought the University’s accreditation in Jordan. As I have said above, this was the first step to accreditation in the other states referred to in the Contract. Substantial work was carried out to this end. The Jordanian embassy required further information and action by the University, including in early 2022. In the circumstances, by the time the University suspended the Company’s activities, there was no breach by the Company in this regard.

89. There could be no breach afterwards as the University had confirmed it did not wish to receive the services.

Documents and visas

90. As I have noted, the Company provided the Jordanian students with substantial assistance in their transfer to the University. This included assistance with documents and, I understand, with updating visas to identify their new university.

91. There is no suggestion that any of the students experienced problems with their visas or any other documents. Nor is there any suggestion that the University provided them with independent assistance in that regard. In the circumstances, it appears abundantly clear that the Company fulfilled its duties in this regard.

Course materials

92. The Company did not provide any payment for course materials. It was obliged to do so under the Contract. However, its position is that it was never provided with a list of materials or a sum which it was obliged to pay. The Company made this clear in its submissions early in these proceedings and said it stood ready to pay what was reasonably due. The University did not, however, explain what sum was due. Nor did it provide any evidence to support the allegation or explain what course materials were involved or what had been requested.

93. In the circumstances, no breach has been established. In any event, given there was no demand for payment or materials, this would not begin to justify termination.

Conclusion on termination

94. In the circumstances, I reject the University's case that the Contract should be terminated for breach by the Company. To the contrary, it seems to me that the University indicated that it had no intention of complying with its obligations under the Contract. The Company did what it could to salvage the situation, but without success. To its credit, however, the Company has done everything in its power to ensure that the students have not been prejudiced by the University's actions.

The University's money claim

95. As set out above, the University's money claim included, in principle, two elements.

96. First, it claims for sums due in respect of tuition. That claim did not survive the evidence.

97. On the evidence of the its own accountant, nothing is due from the students. In fact, rather than receiving 75% of the agreed tuition fee for the students, it has demanded and has been paid 100%.

98. Second, the University pleaded a claim for lost revenue as a result of an alleged failure to attract students. That claim was not developed. In any event, as I have found, the Company was not in breach of that obligation.

The counterclaim

99. The Company counterclaimed for various sums.

Sum on deposit

100. First, the Act of Reconciliation from April 2022 confirms that, for the year 2021 – 2022, the Company overpaid the University in the sum of US\$8,935.87. That sum appears to have been applied by the University to offset its claim for catch up fees. For the reasons explained, the University was not entitled to do so. The University is therefore liable to reimburse the Company that amount.

Catch up tuition

101. Second, the University demanded and was paid under protest US\$22,300 in respect of catch up tuition. It was not entitled to do so and must repay the sum.

Sums repaid to students for 2021 – 2022

102. Third, the Company claims to have repaid students a total of KZT 26,550,000 in respect of 59 students' tuition fees. Each student had paid the Company KZT 1,800,000, the equivalent of about \$4,200 when it was paid. The Company retained KZT 450,000 and paid the balance to the University. In late 2021, the University demanded a further KZT 450,000 from the students. As set out above, that has been paid. According to the Company, it repaid those sums to the students to ensure that they would not suffer a loss.
103. The evidence that the payments were made is provided by Mr Daoudieh. He provided a spreadsheet identifying the 59 students and recording the sum paid in respect of each. Mr Daoudieh's evidence was supported by Ms Badyrova. Counsel for the University complained that no supporting documents were produced. However, he chose not to challenge either witness on their evidence on this issue. Nor has the University approached any of the students to check whether they have been repaid by the Company. In the circumstances, I accept the Company's evidence that it repaid the sums that the students had been obliged to pay twice. That action was, in my view, admirable. It ensured that the students – who were innocently caught up in a dispute between the parties – did not suffer as a result of the University's unilateral actions.
104. In the circumstances, I find that the University is liable in restitution to repay the Company the sums repaid to the students of KZT 26,550,000.

Fees for 2022 – 2023

105. Similar considerations apply for the sums claimed in respect of the 2022 – 2023 year. The Company paid the University for 15 students. However, it was subsequently obliged to reimburse them 25% of the fee when the University demanded it from the students. The University procured payment from 41 students directly. Those payments should have been taken from the Company and it should have been entitled to retain 25%. In taking 100% of the tuition fees directly and retaining the full sum, the University was clearly in breach of the Contract. In the circumstances, the Company is entitled to recover those fees.
106. The sum claimed is KZT 18,450,000 for the fees paid directly. That is consistent with fees of KZT 450,000 for 41 students. For those reimbursed, the Company claims only KZT 4,914,041 for 15 students. It is not clear why the full KZT 450,000 was not paid for each student. However, the sum claimed is consistent with the schedule provided and less than the full 25% of their fees. In the circumstances, I

accept the Company's evidence that it repaid that sum to students as a result of the University wrongfully demanding it from students. It should be reimbursed by the University.

Repayment for students who left

107. In its written submissions, the Company included a claim for partial reimbursement of tuition fees for a small number of students who had been voluntarily expelled from the University. This was not explained at the hearing or supported by the evidence. In the circumstances, I reject that part of the claim.

Payments for future years

108. Of the Jordanian students, 28 will continue in tuition into 2023 – 2024 and 6 will continue in the year 2024 – 2025.
109. Had the University honoured the arrangement, the Company would have received 25% of the tuition fees for each student. This would have amounted to a total of US\$35,700, made up of:
- a. US\$29,400 for the year 2023 – 2024 ($\$4,200 \times 25\% \times 28$); and
 - b. US\$6,300 for the year 2024 – 2025 ($\$4,200 \times 25\% \times 6$).
110. The Company has lost that income as a result of the University's actions in bringing about the termination of the Contract. The University must compensate the Company for that lost revenue.

Collection

111. In total, the sum due from the University is therefore:
- a. US\$31,235.87 for 2021 – 2022, comprised of:
 - i. US\$8,935.87 overpayment; and
 - ii. US\$22,300 paid under protest;
 - b. KZT 49,914,041, comprised of:
 - i. KZT 26,550,000 for repayments for 2021 – 2022;
 - ii. KZT 18,450,000, being 25% of sums paid by students for 2022 – 2023; and
 - iii. KZT 4,914,041 for repayments for 2022 – 2023;
 - c. US\$35,700 for 2023 - 2025.

Conclusion and remedies

112. In the circumstances, I dismiss the claim, and grant judgment to the Company on the counterclaim in the sum of US\$ 66,935.87 and KZT 49,914,041.

By Order of the Court,



Justice Tom Montagu-Smith KC,
Justice, AIFC Court



Representation:

The Claimant was represented by Mr. Serik Kuzhamkulov, advocate, Astana Advocates' Bar Association, Astana, Republic of Kazakhstan.

The Defendant was represented by Ms. Ardak Khabiyeva, legal adviser, member of the "Adilzanger" Chamber of Legal Advisers, Astana, Republic of Kazakhstan.