

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

26 September 2023

CASE No: AIFC-C/CFI/2023/0002

MICHAEL WILSON & PARTNERS, LIMITED

Claimant

v

**(1) CJSC KAZSUBTON and (2) KAZPHOSPHATE LLP,
(3) KAZPHOSPHATE LIMITED**

Defendants

JUDGMENT

Chief Justice of the Court
The Rt. Hon. The Lord Mance

JUDGMENT

Introduction

1. In this case, the Claimant seeks an order from the AIFC Court enforcing:
 - a. judgments given by the English High Court against the First and Second Respondents (respectively, CJSC KAZSUBTON and Kazphosphate LLP) on, respectively, 12 May and 4 August 2004 (as restated and amended on 21 August 2013) in the principal amount of £111,401.70 together with interest; and/or
 - b. judgments given by a Netherlands Court on 22 October and 6 November 2013, recognizing and granting permission to enforce these English judgments under Article 38 of the Brussels I Regulation on the Enforcement of Judgments in Civil and Commercial Matters.
2. The two judgments relate to unpaid fees for legal services said to have been rendered to the First and Second Respondents by the Claimant, Michael Wilson and Partners, Limited, a British Virgin Island company, represented before the AIFC Court by Mr Michael Wilson himself.
3. The case was begun in the AIFC Court by a standard Claim/Application Form. Filed with the Court on 23 December 2022, this was, in accordance with Rule 4 of the Court's Rules, stamped and formally issued by the Court on 10 February 2023. In it the First and Second Respondents, both Kazakh companies, are named as "Respondents/Defendants/Judgment Debtors" and a third company, Kazphosphate Limited ("KPL"), an English company, is named as "Respondent/Third Party". The case was the subject of an oral hearing on the documents held in Astana on 17 May 2023, when the Court was addressed by representatives of the Claimant, the Second Respondent and KPL (but not the First Respondent): see further paragraphs 14 and 15 below.
4. The nature of KPL's alleged involvement was not further explained in the Claim Form; but in Outline Submissions dated 10 March 2023, the Claimant submits that:
 - a. KPL is "the sole participant in and of [the Second Respondent] as a matter of law and fact", and submits that "by Kazakh law as the sole participant and ultimate management body of [the Second Respondent], KPL is an integral part of the same"; and, further, that
 - b. KPL is a debtor owing monies to the Second Respondent within Kazakhstan, an asset against which the Claimant "is entitled to enforce as and when its application for reciprocal recognition and permission to enforce is granted".

Further, in written submissions dated 11 May 2023 submitted by the Claimant in advance of the hearing on 17 May 2023, the Claimant stated:

- c. “In addition [the Claimant] has a third-party debt order against both of the Respondents and also the Third-Party Debtor, which has been in full force and effect since 07.05.19 to date, and by which they are bound, and pursuant to which all of the debts and receivables owed by the Third-Party Debtor to [the Second Respondent] are frozen and arrested in aid of the enforcement of [the Claimant’s] judgment debts.”
5. The standard Claim Form carries a note that, when used, it “should state the law which the Claimant/Appellant maintains governs the dispute; and the provision of the law which the Claimant/Appellant maintains gives rise to the jurisdiction of the Court in respect of their application”; and, further, under the heading *Brief Details of Application*, that it should state the “Basis on which it is alleged that the Court has jurisdiction”. These are, under AIFC Court Rule 4.22, requirements for all Claim Forms.
6. What the Claim Form as completed actually said was:

“GROUND FOR REQUEST

6.MWP requests the Court to grant reciprocal recognition of the judgments and permission for their enforcement in the AIFC Court in accordance with Article 13 of the Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre No 438-V of 7 December 2015 (with amendment as of 30 December 2019, which commence on 11 January 2020)”

7. The Claim Form was put before me as Chief Justice, and the Registrar at my request wrote as follows to the Claimant by email on 15 February 2023, copied to all named Respondents:

“The ground of jurisdiction invoked in support of this application is Article 13 of the Constitutional Statute (repeated in Regulation 26(1) of the Court Regulations). Article 13 and Regulation 26(1) confer on the AIFC Court various different heads of jurisdiction, which arise on different factual hypotheses.

The application form does not identify which of these heads is said to apply or on what factual basis.

The application form therefore appears to the Court to fail to comply with the Notes for Claim attached to it, which require it to state “the provision of the law which the Claimant maintains gives rise to the jurisdiction of the Court in respect of their application” and the “Basis on which it is alleged that the Court has jurisdiction”.

The Court requires the Claimant to address these points by response which should be filed at the Court by reply to this email by **6pm Astana time on Monday 27 February 2023.**”

8. The period stated in this request was later extended to 10 March 2023. On that date the Claimant filed the Outline Submissions already referred to. In these, it submitted that its application for recognition and permission to enforce was not “a ‘claim’ *per se*”, but was a simple application, the inference being that it was unnecessary and inappropriate to require it to be brought within any particular head of Article 13 of the Constitutional Statute or of Regulation 26(1). The Court’s email direction of 15 February 2023 was on this basis said to be misconceived.

Submission to the jurisdiction

9. In the Outline Submissions, the Claimant also alleged that both the Second Respondent and KPL had filed unconditional acknowledgements of appearance and so submitted to the AIFC Court’s jurisdiction.

10. The position in the latter respect is as follows.

- a. The issue by the Court of the Claim Form on 10 February 2023 was communicated by the Court by an email of the same date saying:

“The Defendants shall file a defense to the claim by reply to this email by **6pm Astana time on Friday 10 March 2023**”.

- b. KPL filed an acknowledgement of service on 24 February 2023 and the Second Respondent filed one on 7 March 2023, in each case stating that jurisdiction would be disputed.
- c. At 3.09 p.m. on 9 March 2023 KPL filed an application for an order that the AIFC Court had no jurisdiction to try the claim against KPL, relying upon (a) the absence of any claim articulated against KPL, (b) the definition of the Court’s jurisdiction in the Constitutional Statute and Court Regulations and (c) the Claimant’s failure to state in the claim form the basis of the Court’s jurisdiction.
- d. At 4.40 p.m. on 9 March 2023 the Court extended the time for any steps by all the Respondents, including, expressly, the time for compliance with Parts 7 and 8 of the Rules, “until 14 days after the Claimant has amended its Application Form to comply with the requirements identified in the Court’s email dated 15 February 2023 or until further order”.
- e. On 10 March 2023 the Claimant filed the Outline Submissions already referred to.
- f. On 16 March 2023 the Second Respondent applied for an order that the Court does not have jurisdiction.

- g. On 23 March 2023 KPL filed an amended application, referring to the Claimant's Outline Submissions dated 10 March 2023 and expanding upon its previous application.
 - h. The First Respondent has not filed an acknowledgement of service or defence, or taken any other step in the proceedings.
11. On 30 March 2023 the Court issued Directions, which were amended on 10 April 2023, to the effect that it would, as a first step, determine the issue of jurisdiction, and that this would include
- “determining:
- a. whether a claim form within the meaning of Parts 7 and 8 of the Court's Rules is required;
 - b. whether it is necessary to invoke any head of jurisdiction specified in Article 13 of the Constitutional Statute or in AIFC Court Regulation 26(1);
 - c. whether any connections with Kazakhstan of some or all of the Defendants, of the nature alleged by the Defendants, are or may be relevant, if established to exist, to the existence of any jurisdiction on the part of the Court; this would not involve considering at this stage whether such connections actually exist;
 - d. whether the Second and/or Third Defendant has or have in any event submitted to the jurisdiction of the AIFC Court in respect of the Plaintiff's application for recognition and enforcement of the alleged judgments;
 - e. whether in the light of the answers to these questions, the Plaintiff's application for recognition and enforcement should be granted or be permitted to continue or should be struck out or dismissed.”
12. The Court added that all these questions appeared capable of being determined without going into any issues on which further evidence, beyond that already before the Court, would be necessary; however, if any party took a different view, it was at liberty to identify, within 14 days, the nature of the further evidence on which it sought to rely, and the Court would then consider to what extent such further evidence was necessary, or whether its above Directions needed in any way modifying.
13. On 24 April 2023 the Second Respondent issued applications for an order that the Claimant pay the costs of USD 6,600 allegedly incurred up to that date in relation to the proceedings and also provide security for the Second Respondent's costs, in the amount of USD 10,000 in the form of a first-class international bank's irrevocable guarantee.
14. Pursuant to the Court's Directions dated 30 March 2023, the issue of jurisdiction was on 5 May 2023 listed to come, and duly came, before the Court for submissions on Wednesday 17 May 2023 and subsequent determination. In circumstances where the hearing has already taken place and the substantive issues been fully argued, and where the costs have been, largely (if not entirely) already incurred, the Court

considers that it should determine the case on the substance, addressing costs once it has done so, rather than make any interlocutory order, whether for security or outright, regarding costs.

15. The Court was provided for the purposes of the hearing with a bundle containing the full procedural documentation, including also skeleton submissions lodged by Claimant and Second Respondent; and was addressed orally by Mr Michael Wilson for the Claimant, by Mr Bakhyt Tukulov for the Second Respondent and by Mr Mukhit Yeleuov for KPL. The First Respondent did not appear.
16. The position regarding the First Respondent, which has not appeared or taken any step in the proceedings, is clear. The Court will have, of its own motion, to consider the obvious jurisdictional issue which arises in the proceedings, and make whatever order proves appropriate in relation to that Respondent.
17. As to the Second Respondent and KPL, the Court will start by considering whether they or either of them can and should be held to have voluntarily submitted to the Court's jurisdiction. Implicit in the Claimant's submission that they had done so is the further submission that this would enable the Court to give a judgment recognizing and giving permission to enforce the English and Dutch judgments in circumstances where this would otherwise be beyond the Court's jurisdiction under the Constitutional Statute and Regulations. The Court need not examine that proposition, because it is satisfied that both the Second Respondent's and KPL's jurisdictional challenges can and should be entertained and determined by the Court.
18. So far as concerns KPL, even on the strictest application of the letter of the Rules without regard to any other matter, KPL filed its acknowledgement of service on 24 February 2023 within the 28 days allowed it under Rule 7.4(2) as an English company on which the claim form was served out of the Republic of Kazakhstan. It indicated in accordance with Rule 8.2 that it intended to dispute jurisdiction. It followed this up with its application disputing jurisdiction dated 9 March 2023, within the 14 day period prescribed by Rule 8.4(1).
19. So far as concerns the Second Respondent, its acknowledgement of service dated 24 February 2023 appears, since it is a Kazakh company, to have been outside the 14 day period prescribed by Rule 7.4(1). It followed this up with an application challenging jurisdiction on 16 March 2023, within the 14 days prescribed by Rule 8.4(1).
20. In parenthesis, it is unfortunate that the Court's own direction, when communicating the issue of the Claim Form was that the Respondents should file a defense by 10 March 2023 – no reference being made to the Rules' requirement of an earlier acknowledgement of service. While the Rules remain in their

present form, the Court will in future need to refer, or refer also, to the requirement of an acknowledgement of service. Since the Second Respondent did actually serve such an acknowledgement, it is not clear that the Court's reference to filing a defense by 10 March 2023 misled or influenced it.

21. Much more material are:

- a. the Court's email of 15 February 2023, pointing out that the Claim or Application Form failed to comply with the Notes, requiring that it state "the provision of the law which the Claimant maintains gives rise to the jurisdiction of the Court in respect of their application" and the "Basis on which it is alleged that the Court has jurisdiction" and requiring a response by, initially, 27 February 2023 and then, by extension, 10 March 2023, when the response was actually given: see paragraphs 8 and 9 above; and
- b. the Court's extension on 9 March 2023 of the time for any steps by all the Respondents, including, expressly, the time for compliance with Parts 7 and 8 of the Rules, "until 14 days after the Claimant has amended its Application Form to comply with the requirements identified in the Court's email dated 15 February 2023 or until further order".

22. The requirements of Rule 4.22 of the AIFC Court Rules are categoric:

"All Claim Forms shall state:

- (1) The law which the Claimant maintains governs the dispute; and
- (2) The provision of the law which the Claimant maintains gives rise to the jurisdiction of the Court in respect of their claim."

It follows that the Claim Form was defective and susceptible to being struck out – at least, unless it could be corrected. On its face, it invoked Article 13 of the Constitutional Statute, but it failed to identify any relevant head in Article 13: see paragraphs 6 and 7 above. By invoking Article 13, it also failed to identify, and moreover contradicted, what has since become the Claimant's primary case, namely that the case need not and does not involve any "'claim' per se" falling within Article 13, but is, rather, a simple application to enforce a foreign judgment, upon a jurisdictional basis requiring no elaboration and/or implicit in Article 40(3) of the AIFC Court Regulations. In these circumstances and also in the light of the Court's email of 15 February 2023, it would be understandable for a respondent to defer any response to the proceedings, until their jurisdictional basis was explained. However, the Second Respondent did in fact file an acknowledgement of service on 24 February 2023, before the Claimant had made any response.

23. More conclusive, therefore, is the fact that the Court, on 9 March 2023, expressly extended all Respondents' time for compliance with Parts 7 and 8. That, in the Court's view, operated as a general extension, with retrospective as well as prospective effect, even in respect of steps which the Second Respondent had already taken. Even if the Second Respondent was otherwise technically late in filing its acknowledgement of service, its time for doing so was extended retrospectively, so that its acknowledgement was in time.
24. In any event, and viewing the position at a still more general level, the Rules are not to be applied as a straightjacket, but in accordance with the overriding objective of dealing with cases justly (Rule 1.6) and, where necessary, by the court waiving "any procedural requirement if it is satisfied that it is in accordance with the overriding objective to do so" (Rule 1.8). Here, there was a Claim Form which was, at least on its face, defective in a respect which the Court itself had by its email of 15 February 2023 required to be rectified. Irrespective of the Court's extension of time on 9 March 2023, no possible detriment to the Claimant has been shown arising from any delay by any Respondent in taking any procedural step. The Court has no hesitation in concluding that, if and so far as there was, or may have been, any failure to comply with the letter of the Rules, the Court should waive that requirement, so as to enable the Second Respondent and KHL to pursue their jurisdictional challenges to the claim.

The AIFC Court's constitutional jurisdiction

25. The core issue in this case is whether it is possible in the AIFC Court to apply for and obtain recognition of and permission to enforce an English or Dutch judgment without bringing the circumstances within, or issuing a Claim Form identifying, any head of jurisdiction stated in Article 13 of the Constitutional Statute or Regulation 26(1).
26. Before getting to that core issue, the Court proposes, however, to direct a word to the unusual position of KPL. KPL is not identified in the Claim Form as a judgment debtor, but as a third-party debtor, by which the Court understands the Claimant to allege that KPL owes a debt to the First and/or Second Respondent, in respect of which the Claimant is entitled to, and has obtained, some form of third party debt order in the United Kingdom, and might be entitled to obtain such an order in Kazakhstan, if jurisdiction over all relevant entities could be properly established. In so far as the Claimant's case in this respect has been developed to any extent, it is as set out in paragraph 4a, b and c above.
27. Leaving aside for the moment the core jurisdictional issue, the Claimant has not in the Court's view made good any basis for seeking to join KPL in the present claim. This is for a number of reasons:

- a. First, the English and Dutch judgments are the only judgments in respect of which recognition and enforcement has been sought by the Claim Form, and they are not against KPL.
- b. Second, if, in some way, KPL is said to be assimilated with the Second Respondent, the time and place to allege and prove that was in England in the proceedings there, assuming that KPL could be joined as a co-defendant (e.g. as a necessary or proper party). Judgment could then, if otherwise appropriate, have been entered there against KPL (as well as, or in addition to, the Second Respondent) and would no doubt later have been recognized in the Netherlands under the Brussels 1 regime.
- c. Third, to obtain an English or (under the Brussels 1 regime a Netherlands) judgment against the Second Respondent, and then seek to join to an application for recognition and enforcement an application for judgment against another legal entity is, in contrast, self-evidently impossible. Recognition and enforcement involve just that – recognition and enforcement - in relation to a foreign judgment, not its expansion or amendment to embrace a different legal entity.
- d. Fourth, the Claim Form issued 10 February 2023 makes no claim or application to enforce the third party debt order, to which the Claimant subsequently referred in its written submissions dated 11 May 2023 (see paragraph 4c above).
- e. Fifth, even if there had been any such claim or application, documentation sent to the Court by the Claimant on 10 August 2023 shows that (i) the order dated 7 May 2019 was only an interim order freezing any debt due from KPL to the Second Respondent, (ii) that it led to a (complex) Unless Order dated 9 December 2021, under which KPL was to be debarred from defending, and the Claimant was to have “liberty to apply for and be granted a final TPDO [i.e. Third Party Debt Order]”, unless KPL met certain requirements, which however the Unless Order expressly contemplated that KPL would be likely to, and would subject to certain conditions be at liberty to, apply to vary, (iii) that further directions orders dated 9 December 2021 and 4 August 2023, also among the documentation sent to the Court on 10 August 2023, indicate that this is what in fact happened and that whether or not there should be any Final Third Party Debt Order is the subject of ongoing litigation in England and that (iv) in short, there has even to date been no Final Third Party Debt Order giving rise to an obligation on KPL’s part to pay any sum to the Claimant, which could be the subject of a claim or application for recognition and enforcement.
- f. Sixth, the consideration that, if the Claimant were able to enforce the English and/or Netherlands judgments in the AIFC Court, it might then seek, or on some ground be able to obtain third party debt order against KPL, is no basis for joining KPL to the present proceedings for recognition and enforcement.
- g. The Court would therefore have held that, whatever the merits of the core jurisdictional issue, the proceedings as against KPL are irregular and inadmissible. The Court only adds that, had the case against KPL not fallen to be dismissed on these grounds, it would have raised, and failed by reason

of, the like constitutional objection to that discussed and identified in what follows in relation to the First and Second Respondents.

28. The Court turns to the core jurisdictional issue with regard to the First and Second Respondents. Is the Claimant's application for recognition and permission to enforce the English and Dutch judgments a claim which the Claimant has brought within a head of jurisdiction set out in Article 13 of the Constitutional Statute and AIFC Court Regulation 26(1)? Is it a claim which under the Rules requires a Claim Form identifying any such head of jurisdiction? The Second Respondent and KPL submit that it is a claim requiring such a Claim Form and that the case does not fall within any existing head of the Court's jurisdiction. The Court's jurisdiction is, on their case, specifically confined.
29. The Claimant submits that it is not a claim in the sense of the Rules, but is rather a simple application, of a type which, it submits, leads in other systems speedily and without formality to recognition and enforcement in other systems. The issue of the Claim Form was, in effect, simply to start the process of recognition and enforcement. There was no need to look within the Constitutional Statute or Court Regulations for a jurisdictional basis for a simple application of this sort. The AIFC Court would, it submits, be failing in its rationale if it did not have and offer such a mechanism, and the Constitutional Statute and Regulations, read together, do, in its submission, expressly contemplate such a mechanism.
30. It is necessary at this point to set out relevant parts of the Constitutional Statute and Regulations. The Statute contains provisions as follows:

“Article 13. AIFC Court

1. The judicial settlement of disputes specified by paragraph 4 of this article is to be undertaken exclusively by the AIFC Court. The purpose of the Court is to protect the rights, freedoms and legal interests of the parties and to ensure that the Acting Law of the AIFC is implemented.
4. The AIFC Court has exclusive jurisdiction in relation to the hearing and adjudication of the following disputes, but does not have jurisdiction in criminal and administrative proceedings:
 - 1) disputes between AIFC Participants, AIFC Participants and AIFC Bodies and an AIFC Participant or AIFC Body and its expatriate 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.
5. The activities of the AIFC Court are governed by the resolution of the Council *On the Court of Astana International Financial Centre*, which is based on the principles and legislation of the law of England and Wales and the standards of leading global financial centers. The Resolution of the Council on the Court of Astana International Financial Centre determines the composition of the AIFC Court, the procedure for the appointment and removal of court officials, qualification requirements for judges and court officials, and other matters related to the functioning of the AIFC Court

6.
7. Decisions of AIFC Court of Appeal are final and not subject to appeal, and are binding on all natural and legal persons.
8. Decisions of the AIFC Court are to be enforced in the Republic of Kazakhstan in the same way, and on the same terms, as judicial acts of the courts of the Republic of Kazakhstan. To enforce a decision of the AIFC Court, a translation of the decision into the Kazakh or Russian language, in accordance with the procedure determined by AIFC Acts, is required.
9. Decisions of the courts of the Republic of Kazakhstan are to be enforced in the territory of the AIFC in accordance with legislation of the Republic of Kazakhstan.
10. The AIFC Court has exclusive jurisdiction to interpret AIFC Acts.

Article 14. International Arbitration Centre

1. The International Arbitration Centre hears disputes on the basis of an arbitration agreement between the parties.
 2. The International Arbitration Centre is established and acts in accordance with the resolution of the Council On the International Arbitration Centre.
 3. Awards of the International Arbitration Centre are to be recognized and enforced in the Republic of Kazakhstan in the same way, and on the same terms as, arbitration awards issued by arbitration institutions in the Republic of Kazakhstan. To enforce an award of the International Arbitration Centre, a translation of the award into the Kazakh or Russian language, in accordance with the procedure determined by AIFC Acts is required.
 4. Awards of arbitration courts in the Republic of Kazakhstan are to be recognized and enforced in the territory of the AIFC in accordance with legislation of the Republic of Kazakhstan.”
31. The AIFC Court Regulations reflect these provisions is wording which is not suggested to differ significantly in effect. They provide:

“PART 5: JURISDICTION OF THE COURT

26. Jurisdiction of the Court

- (1) 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.
- (2) The reference to “disputes” between the parties mentioned in this Article applies to civil or commercial disputes arising from transactions, contracts, arrangements or incidences.

- (3) The reference to “transferred to the Court by agreement of the parties” in this Article 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.
- (4) The Court does not have jurisdiction in relation to any disputes that are of a criminal or administrative nature.
- (5) The Court of First Instance has jurisdiction to hear and determine an appeal from the decision of an AIFC Body, Organization, or Participant, as provided for in the AIFC Constitutional Statute, AIFC Regulations, AIFC Court Rules, or other AIFC Rules where the appeal relates to:
 - (a) a question of law;
 - (b) an allegation of a miscarriage of justice;
 - (c) an issue of procedural fairness; or
 - (d) a matter provided for in or under AIFC law.Decisions of the Court of First Instance referred to in this Article 26(5) are final and shall not be subject to further appeal.”

32. The Regulations go on to provide:

“40. Enforcement

- (1) Judgments, orders and directions of the Court, and arbitration awards ratified by the Court, may be enforced within the AIFC in accordance with any execution order issued by the Court.
- (2) Judgments, orders and directions of the Court, and awards issued in arbitrations seated in the AIFC which have been ratified by the Court, may be enforced in the AIFC and the Republic of Kazakhstan in accordance with the AIFC Constitutional Statute.
- (3) The Court may issue rules or practice directions for the further enforcement of other judgments and arbitration awards.”

33. The AIFC Arbitration Regulations dated 5 December 2017, stated to be adopted under Article 14 of the Constitutional Statute, contain further provisions as follows:

“PART 3: RECOGNITION AND ENFORCEMENT OF AWARDS

45. Recognition and enforcement of awards

- (1) An arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognized as binding within the AIFC and, upon application in writing to the AIFC Court, shall be enforced within the AIFC subject to the provisions of this Article and of Articles 46 and 47. For the avoidance of doubt, where the Republic of Kazakhstan has entered into an applicable treaty for the mutual enforcement of judgments, orders or awards, the AIFC Court shall comply with the terms of such treaty.
- (2) The party relying on an award or applying for its enforcement shall supply the original award or duly certified copy and the original arbitration agreement referred to in Article 15 or a duly certified copy. If the award or the agreement is not made in English, the AIFC Court may request the party to supply a duly certified translation.
.....”

34. The starting point for a proper understanding of the law governing and jurisdiction of the AIFC is the Constitutional Statute. The Court and Arbitration Regulations are subsidiary law, made under the Constitutional Statute – specifically, in the case of the Court Regulations, under Article 13(5) of that Statute and, in the case of the Arbitration Regulations, under Article 14 of that Statute. It may in some contexts perhaps be legitimate to interpret the Constitutional Statute in the light of the Regulations, particularly in

so far as the Constitutional Statute was amended on two occasions (22 December 2017 and 9 January 2018) very shortly after the Regulations were enacted on 5 December 2017. There may perhaps also be a certain flexibility in Article 13(5), which is the express basis of the Court Regulations. How far this may be so in either case was not argued before me, and I express no view on it. It was not suggested that it could be relevant in the present case.

35. The jurisdiction provided by Articles 13 and 14 of the Constitutional Statute and given concrete effect by the Court and Arbitration Regulations is, on its face, a specific and carefully expressed and strictly delimited jurisdiction, albeit that it is for the most part exclusive where conferred (that is exclusive in all cases under Article 13).
36. It is noticeable in this connection that Articles 13(9) and (10) of the Constitutional Statute contain mutual provisions for the recognition and enforcement of decisions of (a) the AIFC Court in the Republic of Kazakhstan and (b) the Courts of the Republic in the AIFC. The Constitutional Statute says nothing more about recognition and enforcement of court decisions. It says nothing to confer or suggest any jurisdiction to recognize or enforce decisions of courts of jurisdictions outside Kazakhstan.
37. Article 14, relating to the International Arbitration Centre (“IAC”) is also limited in scope. It provides for (i) recognition and enforcement in the Republic of IAC awards in the same way as awards of arbitral institutions in the Republic and (ii) recognition and enforcement in the AIFC of awards made by arbitration courts [sic] in the Republic.
38. These constitutional provisions are addressed in some detail in AIFC Court and AIFC Arbitration Regulations, which were not the subject of close analysis before me. AIFC Court Regulation 40(1) only provides for enforcement “within the AIFC” of AIFC Court judgments, orders and directions as well as of arbitration awards ratified by the AIFC Court. Regulation 40(2) goes further, by providing for enforcement “in the AIFC and the Republic of Kazakhstan in accordance with the Constitutional Statute” of both AIFC judgments, orders or directions and “awards issued in arbitrations seated in the AIFC which have been ratified by the Court”. This is not the case in which to seek to explore what precisely may be comprised in this context by the concept of recognition or enforcement “within” or “in” the AIFC. But the reference to the Constitutional Statute must be to or at least include Article 13(8) of that Statute, as regards AIFC Court decisions, and article 14(3) and possibly (2) of the Statute, as regards IAC awards. The careful restriction of AIFC Court Regulation 40(2) (addressing enforcement in both the AIFC and the Republic) to awards “in arbitrations seated in the AIFC” contrasts with the wider provision in AIFC Arbitration Regulation 45(1) for recognition and enforcement “within the AIFC” of “any arbitral award, irrespective of the State or

jurisdiction in which it was made”. Again, it is unnecessary to consider what precisely may be comprised by “within the AIFC”. But the difference in treatment of IAC awards and foreign awards is clear.

39. The drafters were therefore careful in these provisions to distinguish between judgments and awards emanating within and outside Kazakhstan. AIFC Court judgments are enforceable without more in both the AIFC and the Republic, just as judgments of the ordinary Kazakh court are enforceable in Kazakhstan and the AIFC. Arbitration awards are enforceable in the AIFC *and* the Republic if the arbitration was seated in the AIFC and the award has been ratified by the AIFC Court. But in other cases arbitration awards are only enforceable “within the AIFC”. It is also very noticeable here that there are no provisions relating to the enforcement, either in the AIFC Court and still less in the Republic, of judgments from outside Kazakhstan.
40. Nothing in the Constitutional Statute or in the Court or Arbitration Regulations addresses expressly the recognition or enforcement of foreign court judgments, in the absence of any relevant treaty. There is no parallel to Arbitration Regulation 45(1) which covers foreign awards expressly, by the words “irrespective of the State or jurisdiction in which it was made”. There is however in Article 45(1) of the AIFC Arbitration Regulations the second sentence providing that:

“For the avoidance of doubt, where the Republic of Kazakhstan has entered into an applicable treaty for the mutual enforcement of judgments, orders or awards, the AIFC Court shall comply with the terms of such treaty.”

Viewed in context, this sentence may well only refer to any treaty, such as the New York Convention, relating to arbitration or the enforcement of arbitration awards, whether or not converted into court judgments in the relevant foreign jurisdiction. In other words, it is a qualification on the operation of the first sentence of Regulation 45(1). It would seem incongruous, with its wording and context, to treat it as a self-standing provision relating to enforcement of foreign judgments. Be that as it may be, there is no suggestion in the present case of any relevant treaty under which the English and Netherlands judgments are or could be sought to be enforced. It is unnecessary to consider what would be the position in the AIFC Court if there were a relevant treaty between the United Kingdom or the Netherlands and the Republic of Kazakhstan, providing for the reciprocal recognition and enforcement of judgments. If and when such a question ever arose, it would no doubt be necessary to pay close attention to the provisions regarding the Acting Law of the AIFC, set out in Article 4 of the Constitutional Statute.

41. The Claimant relies, however, on Court Regulation 40(3) as indicating that the AIFC Court has jurisdiction to recognize foreign court judgments in the absence of any treaty. That provision says (as set out in paragraph 31 above) that “The Court may issue rules or practice directions for the further enforcement of other judgments and arbitration awards.” No such rules or practice directions have been made. But the

Claimant submits that they could or should have been; that the provision at the very least indicates that the AIFC Court must have jurisdiction to recognize and enforce foreign judgments; and that the Court should give reality to this jurisdiction by shaping its procedures to do so now.

42. There may be situations where the Court can and should find a way of filling an obvious lacuna in the rules or practice directions. The Court is satisfied that the present is not such a situation. The language of Regulation 40(3) indicates a clear intention by the AIFC Management Council, acting under Article 10 of the Constitutional Statute, not to make any provision for “the further enforcement of other judgments and arbitration awards”, but to permit the Court to do so by a future rule or practice direction. Under Court Regulation 30(1), any such rule or practice direction would fall to be made by the Chief Justice, no doubt after careful consideration. No such rule or practice direction has been decided upon or made, and no basis is apparent upon which the Court could by a judgment in particular case alter or replace what must, as stated, be viewed as a clear decision by the Chief Justice not to make any such provision.
43. Still more fundamentally, the difficulty about treating Regulation 40(3) as contemplating the recognition or enforcement of foreign judgments, without more, is that no jurisdictional basis is stated or appears in the Constitutional Statute and Regulations for a provision of that scope. The provision should not be construed as having a scope which is not constitutionally authorized and would, logically, mean that it was to that extent invalid.
44. The Claimant asks rhetorically: what else can Court Regulation 40(3) mean? The first answer to this is, in the Court’s view, that there are situations in which rules or practice directions “for the further enforcement of other judgments and arbitration awards” could be necessary or appropriate. Take, for example, the provision in Article 13(9) of the Constitutional Statute for enforcement of decisions of the ordinary Kazakh Courts in the AIFC in accordance with legislation of the Republic. It might well be thought that AIFC rules and practice directions were necessary or appropriate to enable that to happen or happen smoothly.
45. Alternatively, take the situation where there was, despite the AIFC Court’s “exclusive” jurisdiction and perhaps even without objection, litigation abroad between AIFC Participants or Bodies or their employees or relating to AIFC activities, leading to a judgment which one party wished to have recognized or enforced by the AIFC Court. The claim could then fall directly within the heads of jurisdiction in Article 13. Rules and practice directions could be thought appropriate to cover that situation, even if it might be regard as remote.

46. No suggestion is made, however, that the present proceedings are justified on the basis that they fall within any of the heads of jurisdiction contained in Article 13 or 14 of the Constitutional Statute and Court Regulations 26 and 30.
47. Ultimately, therefore, the Claimant faces the problem that the jurisdiction of the AIFC Court is a special, and carefully delimited jurisdiction. The AIFC Court is not a court of general, let alone inherent, jurisdiction. The second answer to the Claimant's rhetorical question about Court Regulation 40(3) is, therefore, that, even if Regulation 40(3) were to be seen as beating the air, that cannot create a jurisdiction which does not exist, and for which there is no basis, in the Constitutional Statute and Regulations.
48. The Claimant submits that the recognition and enforcement of foreign judgments is a standard feature of any modern commercial court, and that, without such a procedure, the AIFC Court will be failing in its function and in what was expected of it. But no court or tribunal created by statute can ignore the jurisdictional limits with which it was created.
49. References to procedures which arise under Bilateral Investment Treaty arbitrations, which normally have the backing of the New York or ICSID Convention when it comes to enforcement, do not assist. Nor does it assist to refer to summary procedures for the recognition and enforcement of foreign judgments which have been created by treaty and specific legislation (such as the UK's Foreign Judgments (Reciprocal Enforcement) Act 1933) or by regulation (such as the Brussels 1 Regulation between EU member states). The Claimant's submissions in this respect over-look the fact that, at common law, a foreign judgment by an internationally competent court is treated as creating an obligation on which the judgment creditor can sue: see e.g. Dicey, Morris & Collins, *The Conflict of Laws* (16th ed) paragraphs 14-007 et seq. But, for this purpose as for any other personal action, it is still necessary to establish jurisdiction over the judgment debtor in the jurisdiction in which the obligation is sought to be enforced: see e.g. Dicey, Morris & Collins, Chapter 11, paragraphs 11R-001 et seq.
50. References to the position in other international commercial courts are equally unavailing, unless account is taken of their respective and differing powers. In relation to the general power to recognize and enforce foreign judgments which the Dubai International Financial Centre ("DIFC") Court is said to enjoy, it is, for example, relevant to consider the express provisions of the Dubai Law No 12 of 2004 on Judicial Authority (and Articles 5(A)(1)(d) and 7(4) in particular) and of Articles 19(1)(d) and 24(1)(a) of the DIFC Court Law No 10 of 2004 made thereunder.
51. The Claimant does not make good its submission that the AIFC Court was created with recognition and enforcement of the type now sought specifically in mind. The opposite seems likely to be correct, in view

of the careful delimitation by the Constitutional Statute and by the AIFC Court and AIFC Arbitration Regulations of the circumstances in which judgments and awards can be recognized and enforced.

52. The Claimant's case is that the AIFC Court can and should, almost automatically, recognize and give permission to enforce any foreign judgment by an internationally competent court, thereby rendering that judgment enforceable as an AIFC Court judgment not only within the AIFC, but also throughout the Republic of Kazakhstan, under AIFC Court Regulation 40(2). That would have the direct effect of side-stepping any provisions of ordinary Kazakh law regarding recognition and enforcement of foreign judgments. That is also the desired effect of the present proceedings. The Claimant has already attempted to enforce the English and Dutch judgments in the ordinary courts of Kazakhstan. The attempt was rejected by Ruling of the Special Inter-District Economic Court of Almaty date 17 May 2006, upheld on appeal by Resolution of the Almaty City Court's Panel for Civil Cases dated 5 July 2006. The rejection was on the ground, it appears, that there was no relevant treaty or law providing for or enabling such recognition or enforcement in Kazakhstan. Article 501 of the Civil Code of Kazakhstan provides for recognition and enforcement of foreign judgments and awards by the ordinary Courts, but only under conditions and procedures determined by law or by international treaty ratified by the Republic. While the AIFC Court does not accept that this Ruling has a *res judicata* effect in the AIFC Court, it illustrates the remarkable effect which the Claimant's case would, if accepted, have in enabling the Claimant indirectly to enforce in the Republic of Kazakhstan a judgment, for the recognition and enforcement of which the ordinary law of Kazakhstan has been held not to provide.
53. Finally, the Court should say a word about the Claimant's submission that the present case involves an application, and does not involve any claim or dispute in relation to which any specific head of jurisdiction needs to be identified in the Constitutional Statute and/or Court Regulations. It follows from what the Court has already said that this submission fails. The AIFC Court has a specifically delimited jurisdiction, which is exhaustive as regards the heads stated in Article 13. Any proceedings begun in it must be begun completing a claim/application form identifying the head of jurisdiction relied upon in the Constitutional Statute. The Articles relevant in this context are primarily Articles 13 and/or 14 (read so far as necessary and appropriate with the AIFC Court and/or AIFC Arbitration Regulations). The possibility that in some cases Article 4 might also be relevant (see e.g., paragraph 40 above) need not here be further explored. Proceedings in the AIFC Court are started, as Rule 4.1 states, "when the Court issues a Claim Form at the Request of the Claimant". The proceedings clearly also involve a dispute, which the Claimant is seeking the AIFC Court's to resolve, if only because the Respondents and KPL have not met the English and Netherlands judgments and/or do not accept that these are susceptible of recognition and enforcement by or in the AIFC Court. Finally, there may of course be applications under the AIFC Court Rules in the course of properly brought proceedings, but that is a different matter.

54. For all these reasons, the Court will declare that it has no jurisdiction to entertain the present proceedings against any of the three Respondents and will (pursuant to Rule 8.8(1)) set aside the Claim Form and dismiss the proceedings as against all three of them accordingly.
55. Subject to any contrary representation, to be made in writing within 10 days of the date of this Decision, the costs of the Second Respondent and of KPL will be ordered to be paid by the Claimant. The Second Respondent and KPL may file information as to the amount of such costs, within 10 days of the date of this Decision, to which the Claimant may respond within a further 10 days after receipt of such information. The Court will thereafter fix the costs payable.

By Order of the Court,

The Rt. Hon. The Lord Mance,
Chief Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Michael Wilson, Partner, Michael Wilson & Partners, Ltd, Almaty, Kazakhstan.

The Defendant 1 was not represented.

The Defendant 2 was represented by Mr. Bakhyt Tukulov, Partner, Tukulov & Kassilgov Litigation LLP, Almaty, Kazakhstan.

The Defendant 3 was represented by:

1. Mr. Mukhit Yeleuov, Partner, Kinstellar LLP, Almaty, Kazakhstan.
2. Ms. Dina Berkaliyeva, Managing Associate, Kinstellar LLP, Almaty, Kazakhstan.