IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

1 February 2023

CASE No: AIFC-C/CFI/2022/0020

FREEDOM FINANCE JSC

Claimant

v.

EGOR ROMANYUK

Defendant

JUDGMENT

Justice of the Court:

Justice Sir Rupert Jackson

JUDGMENT

This judgment is in seven parts, namely:

Part 1. Introduction

Part 2. The facts

Part 3. The present proceedings

Part 4. Was the defendant in breach of contract?

Part 5. Kazakhstan law concerning damages and penalties

Part 6. To what remedy is the claimant entitled?

Part 7. Conclusion

PART 1. INTRODUCTION

1.1 This is a claim for USD $5 million, said to be due as liquidated damages for breach of a separation and release of claims agreement.

1.2 This case raises the question how to apply article 297 of the Civil Code in unusual circumstances.

1.3 The claimant, Freedom Finance JSC ('FFIN') is part of the Freedom Finance group of companies. Other companies in the group include Freedom Finance Belize ('FFBZ') and Freedom Holding Corporation ('FRHC'). Mr Timur Turlov is the ultimate beneficial owner of the group.

1.4 The defendant, Mr Egor Romanyuk, is experienced in asset management. He was employed as vice-president of the claimant from 4 March 2019 to 31 January 2020.

1.5 In this judgment I use the following abbreviations:

'Civil Code' means the Civil Code of the Republic of Kazakhstan.

'Civil Procedure Code' means the Civil Procedural Code of the Republic of Kazakhstan.

'SHEL' means Shaikenov Law Experts, a firm comprising Mr Arman Shaikenov and Mr Valikhan Shaikenov.

'SRCA' means the separation and release of claims agreement dated 1 February 2020.

'TKL' means Tukulov and Kassilgov Litigation, the law firm acting for the claimant.

1.6 There are two official versions of the Civil Code, one in Russian and one in Kazakh. I understand that the Russian version is more widely used, particularly in Astana and Almaty. The Kazakhstan Ministry of Justice has produced a helpful translation of the Kazakh Civil Code into English. I shall use this version, except in certain rare instances where there is an issue concerning the translation.

1.7 After these introductory remarks, I must now turn to the facts.

PART 2. THE FACTS

2.1 When Mr Romanyuk's employment with FFIN came to an end, he and FFIN entered into the SRCA. Clause 6 of the SCRA required Mr Romanyuk to refrain from publishing confidential information received during his employment. Clause 7 of the SRCA provided:

"Non-Disparagement. The Employee agrees and covenants that the Employee shall not at any time make, publish or communicate to any person or entity or in any public forum any defamatory, maliciously false, or disparaging remarks, comments, or statements concerning any member of the Employer Beneficiary Group or its businesses, practices or activities, or any of its employees, officers, or directors and their existing and prospective customers, suppliers, investors, and other associated third parties, now or in the future."

2.2 Clause 9 of the SRCA provided:

"In the event of a material breach by the Employee of any of the provisions of this Agreement, the Employee hereby acknowledges and agrees that the Employer shall be entitled to seek, in addition to other available remedies, an award for liquidated damages in an amount equal to $5,000,000 for each material breach (the "Liquidated Damages"). The parties acknowledge and agree that the employee's harm caused by a material breach would be impossible or very difficult to accurately estimate at the time of the breach and that the Liquidated Damages set forth herein is a reasonable estimate of the anticipated or actual harm that might arise from a material breach."

2.3. The consideration which FFIN agreed to pay under clause 3 of the SRCA, and duly paid, was USD $100,000. As part of the separation package agreed between the Freedom Finance Group and Mr Romanyuk (although not mentioned in the SRCA), 300,000 shares of FRHC were transferred to Mr Romanyuk. These shares were worth approximately USD 4.8 million, as explained in paragraph 9 of Mr Turlov's witness statement and confirmed by the record of FHRC's share prices in March 2020. Mr Romanyuk stated in cross-examination that the shares transfer was compensation for something that had happened and also a reward for his services, as he had helped FFIN to get a listing on Nasdaq.

2.4. For the next two years all was peaceful between the parties. Mr Romanyuk and the Freedom Finance companies went their separate ways.

2.5. Unfortunately, on 18 April 2022, in a video-address to a large number of individuals connected with Freedom Finance Mr Turlov made the following comments about Mr Romanyuk:

"With varying success. He then came to work for us, worked in our Moscow office, somehow traded, gave a lot of advice on which clients lost a lot of money, and managed to quarrel with such a prominent part of our team unfortunately, and quarreled with some of our clients. He moved to Kazakhstan and roughly the same thing happened there. We had a conflict against the background of that, he always had a dream, a very long-standing dream. He had a dream of building a career as a whistleblower, a great whistleblower and activist investor, i.e., he wanted to sue companies; he wanted to expose them; he wanted to do some big deals; to engage in corporate blackmail; to get some big payoffs from companies so that they would pay him money for doing... or not digging or something else there. In general, this was sort of his key and main job. And so, he tried to do it there, tried to buy up some company, to make corners. There was the story of Revlon, which he was initially quite active in buying

up in order to set up a corner there. This, by the way, is pure manipulation under American law. If he had succeeded, it could have been the subject of an investigation by the SEC just as creating corners, which is directly prohibited. You cannot buy up a company's stock just to jack up the price and get those who shorted it there. Unfortunately, if you read the law on manipulation, you will see it there. The problem we had was that the shares he was buying were shorted by a number of our other clients."

2.6. Mr Romanyuk learnt what Mr Turlov had been saying and was given a copy of part of the video-recording. He was understandably most displeased.

2.7. Mr Romanyuk started posting highly critical comments about Mr Turlov and the Freedom Finance companies on Instagram and Twitter. Mr Turlov maintains that those critical comments are not well-founded but that, if they enter the public domain, they could be extremely damaging to his business. I shall not therefore set those comments out in this judgment. However, anyone involved in this case, or dealing with an appeal from this judgment, will be able to read all Mr Romanyuk's posts in the court bundle.

2.8. Relations between Mr Turlov and Mr Romanyuk deteriorated badly during 2022. Each man made complaints about the other to relevant authorities. These matters are for those authorities to investigate or not, as they see fit. They are not matters for this court to inquire into. Suffice it to say that these proceedings seem to be part of a wider war being waged between Mr Turlov and Mr Romanyuk.

2.9. Mr Turlov took strong exception to Mr Romanyuk's posts on Twitter and Instagram. He considered them to be flagrant breaches of the SRCA. He therefore commenced the present proceedings.

PART 3. THE PRESENT PROCEEDINGS

3.1 By a claim form issued in the AIFC Court on 11 August 2022, FFIN contended that Mr Romanyuk had committed breaches of clauses 6 and 7 of the SRCA. Accordingly, FFIN claimed USD $5 million as liquidated damages due pursuant to clause 9 of the SRCA. FFIN applied in its claim form for the proceedings to be heard in private.

3.2 Mr Bernar Alikhan, a junior associate at TKL, had the task of serving the proceedings. On 19 September 2022 at 10.21 am he telephoned Mr Romanyuk and asked for his address. Mr Romanyuk refused to provide it. Mr Alikhan made other attempts to contact Mr Romanyuk by telephone, text message and email, but was unable to elicit any response. In those circumstances, Mr Alikhan effected service at the address for service specified in the SRCA. After service had been effected at the designated address, Mr Romanyuk failed either to acknowledge service or to serve a defence.

3.3 FFIN applied for judgment in default. I dealt with this application at a remote hearing on 10 October 2022. I gave judgment for the claimant on liability, leaving the remedy to be determined at a later hearing. In the course of the judgment I said:

"The claimant is entitled to judgment in default, but I have a concern as to whether the claimant is entitled to recover the full $5 million specified in clause 9 of the agreement. If this case were proceeding under English law, it would be necessary to decide whether that provision was an unenforceable penalty. The present contract, however, is subject to Kazakhstan law.

In a case where the penalty is excessively large compared to the losses of the creditor, Article 297 of the Kazakhstan Civil Code enables the court to reduce the amount of a penalty "considering … the interests of the debtor and the creditor that deserve attention". It is impossible to tell on the basis of the documents before the court whether it is appropriate to exercise that power in the present case. …

There must be a hearing to determine the amount of damages due. This may turn out to be $5 million or some lesser sum. As a preliminary step, there must be a directions hearing by video-link. One problem which we must consider at the directions hearing is the fact that there will probably be only one party before the court at the hearing of the assessment of damages. The issue is quite a difficult one, which requires argument on both sides. I request assistance from the claimant's counsel and from the Registrar as to whether the court can engage an amicus curiae to assist at the hearing of the assessment of damages".

3.4 Following that hearing, the Registrar approached Mr Sergei Vataev, a distinguished and experienced Kazakhstan lawyer. Mr Vataev kindly agreed to act as amicus curiae in this case, and to do so for no fee. I am extremely grateful to Mr Vataev for doing this and for the considerable assistance which he has provided to the court, both before and during the trial.

3.5 On 2nd November 2022 there was a remote case management conference, at which I gave directions leading up to the trial. Paragraph 2 of the directions order dated 2 November 2022 stated:

"Mr. Sergei Vataev will attend the trial as amicus curiae and will assist the Court in the capacity of an independent advocate. Mr. Vataev will file at the Registry in English language a short report by 6pm Astana time on Friday 6 January 2023 dealing with whether the Court can and should reduce damages below US $5 million pursuant to Article 297 of the Civil Code of the Republic of Kazakhstan or any other relevant provision. Mr. Vataev will in the same report verify independently any weight to be given to the case authorities from the national courts of the Republic of Kazakhstan relied upon in any statistical research to be filed at the Registry by the Claimant's Counsel."

3.6 On 15 December 2022 Mr Romanyuk came onto the scene. He contacted the court by email, expressing his dismay at the judgment in default and claiming to have been unaware of the proceedings. I do not accept those protestations. Having heard Mr Tukulov's skillful cross-examination of Mr Romanyuk, I am satisfied that Mr Romanyuk was well aware of these proceedings and deliberately avoided service. His non-participation before 15 December 2022 was a deliberate strategy, which he came to regret at a late stage.

3.7 On 20 December 2022 the court ordered that any application by Mr Romanyuk to set aside judgment would be dealt with at the hearing already fixed for Monday 16 January 2023. The court ordered that the full trial would follow immediately on 16 January, if the application to set aside succeeded.

3.8 On 26 December 2022 Mr Romanyuk lodged an application (headed 'Petition') to set aside the judgment in default pursuant to rules 9.18 to 9.20 of the AIFC Court Rules. On the same day Mr Romanyuk lodged a document headed 'Objection', which was in effect both his witness statement and his defence to the claim. He specifically requested that the hearing of the proceedings should take place in open court, not in private as the claimant had proposed. Mr Romanyuk made no objection to the hearing date which had been fixed (namely, 16 January 2023).

3.9 On Tuesday 10 January 2023 the defendant applied for an order that the hearing fixed for Monday 16 January should proceed by video link. Again, the defendant made no objection to the hearing date which had been fixed. In response, on 12 January 2023, the court directed that the defendant may participate by video link but his lawyers must attend in person.

3.10 At 20.47 on the evening of Friday 13 January the defendant applied to the court to adjourn the hearing which was due to take place on Monday 16 January. The principal ground of his application was that he was unable to issue powers of attorney for his legal representatives (who are based in Moscow) to act for him.

3.11 The Court rejected that application principally because:

(i) The defendant had had ample opportunity to issue a power of attorney for his Moscow lawyers.

(ii) The defendant had delayed issuing his application to postpone the hearing until an extremely late stage. He should have made this application in December, if he really needed more time.

3.12 The hearing duly took place on Monday 16 January. Mr Tukulov of TKL appeared for the claimant. Mr Kholod of Assistent Plus, a firm of Moscow lawyers, appeared for the defendant. After hearing brief argument, I made an order setting aside the judgment in default pursuant to rule 9.19 of the AIFC Court Rules. The trial then proceeded. Mr Turlov attended in person and gave evidence. Mr Romanyuk attended remotely from Dubai (where he now lives) and gave evidence.

3.13 In relation to the legal issues, Mr Bernar of TKL provided a witness statement setting out a statistical analysis of judicial decisions on article 297 of the Civil Code. SHEL (instructed by TKL) provided a report on the law of Kazakhstan concerning penalties and related issues. Mr Vataev (as amicus curiae instructed by the Court) submitted a paper addressing the issues identified in paragraph 2 of the directions order dated 2 November 2022. I have found all this legal material to be of considerable assistance.

3.14 After considering the claimant's application and the defendant's objection, I was not prepared to order that the trial take place in private. However, I appreciate that Mr Turlov does not want Mr Romanyuk's various posts (which are no longer extant) to be given any wider publicity. The correctness of those posts is strongly disputed by Mr Turlov and has not been adjudicated upon by this court. I shall therefore refrain from setting out the text of those posts, but will refer to them by reference to paragraph numbers in the claim form. Also, I have made an order banning the publication of certain documents on the court file.

3.15 Mr Romanyuk strongly disputes the accuracy of the comments which Mr Turlov made about him in the video recording referred to in Part 2 of this judgment. However, Mr Romanyuk has no concerns about those comments being quoted in this judgment. Indeed, they are the foundation of his defence to the present claim.

3.16 Having outlined the course of the proceedings, I must now address the issue of liability for breach of contract.

PART 4. WAS THE DEFENDANT IN BREACH OF CONTRACT?

4.1 The defendant contends that the SRCA was presented to him on a take it or leave it basis. If he wanted to receive the transfer of shares and the $100,000, he would need to sign the agreement. Mr Kholod submitted in his opening speech that the agreement was invalidated pursuant to article 159.9 of the Civil Code.

4.2. Article 159.9 provides:

"A transaction which is entered into under the influence of fraud, violence, or threat, and also a transaction that the person was compelled to enter into as a result of a combination of difficult circumstances and on conditions extremely unprofitable for himself (herself) which was exploited by the other party (shackling agreement), may be recognized by the court as invalid upon the action of the victim."

4.3. I do not accept that article 159.9 has any application in this case. The SRCA was a contract made between two experienced businessmen. Each had access to legal advice. The deal may have been presented on a take-it-or-leave-it basis, but that did not amount to oppression or exploitation. If Mr Romanyuk did not wish to sign, he did not need to do so. He could have pursued his claims for remuneration and for compensation in respect of any past wrongdoing (if there was any) by litigating in this court or, if he preferred, through the other Kazakhstan courts.

4.4. I now turn to the posts which are identified in the claim form. In order to ensure fairness to the defendant (whose lawyers have had limited time to prepare) I shall disregard other posts mentioned at trial but not referred to in the pleadings. Those other posts do not add materially to the claimant's case. Mr Kholod presented the defence case entirely by reference to the posts which are identified in the pleadings.

4.5. Only one post is alleged to amount to a breach of the duty of confidentiality contained in clause 6 of the SRCA. That post is pleaded in paragraph 10 of the claim form. The passage in brackets is not a breach of confidentiality. The fact that FFIN was 100% owned by Mr Turlov was a matter within the public domain. The comment about the dealings between FFIN and FFRC went beyond matters which were public knowledge. It was Mr Romanyuk's "estimate" based at least in part on what he had learnt during his employment. That employment had ended 28 months previously, so the estimate was unlikely to be accurate. This was only a modest breach of clause 6.

4.6. Was that a "material breach" within the meaning of clause 9 of the SRCA? Article 401.2 of the Civil Code provides:

"A violation of the agreement by one of the parties shall be deemed material if it entails for the other party such damage that it to a substantial degree loses something on which it had the right to count when concluding the agreement."

4.7. I understand from Mr Vataev that this is the only definition of "material breach" in the general part of the Civil Code and it is widely used by Kazakhstan lawyers. There are other definitions of "material breach" in Section 4 of the Code (starting at article 406) but that section is concerned with special categories of contract (sale, employment etc) and so is not relevant for present purposes.

4.8. Bearing in mind the extent of the information about the Freedom Finance Group which was in the public domain, I do not consider that the breach of clause 6 identified in paragraph 10 of the claim form constituted a material breach of contract. Therefore, that did not trigger clause 9 of the contract.

4.9. The claimant's primary case is based upon breach of clause 7, the non-disparagement clause. The claimant contends that the posts identified in paragraphs 10, 12, 13, 14, 15 and 16 of the claim form constituted disparagement of the Freedom Finance Group and persons connected with those companies contrary to clause 7 of the SRCA.

4.10. Mr Romanyuk accepts that he was responsible for those posts, although he points out that they automatically disappeared after 24 hours. He also contends that the court must look at the complete posts in order to appreciate the contexts, not just the limited extracts which are quoted. Those are both good points. I bear in mind the limited duration of the posts and I read them in their full contexts.

4.11. Mr Tukulov in his opening speech emphasised that "disparaging remarks" is a mild term. A remark may be disparaging, even if it is not a defamatory statement. That too is a good point and I take it into account.

4.12. Mr Kholod urges upon the court that many of the posts complained of are mere statements of Mr Romanyuk's opinion, which others may not share. They are, so to speak, fair comments which Romanyuk was entitled to express without committing any disparagement. I accept that some posts were statements of Mr Romanyuk's opinion. Nevertheless, as Mr Tukulov submitted, that does not prevent them also constituting disparagement.

4.13. Mr Kholod points out that all of the posts complained of post-date Mr Turlov's video address on 28 April 2022. This contained extremely harsh comments about Mr Romanyuk. It was widely viewed and, unlike Mr Romanyuk's posts, it was not time-limited. It was sent to all employees of FFIN.

4.14. Furthermore, says Mr Kholod, during the period when Mr Romanyuk was posting the relevant comments, Freedom Finance people were continuing to make highly damaging comments about Mr Romanyuk. Mr Romanyuk said in his oral evidence that these comments were reported to him. I accept that evidence because it is corroborated in two respects. First, Mr Turlov recalls making a video film strongly criticising Mr Romanyuk in July 2022. Secondly, under cross-examination Mr Turlov admitted that he may have told his personnel that Mr Romanyuk was running corporate blackmail and stock manipulation.

4.15. Mr Kholod submitted in his opening speech that the posts were really a means of defence against Mr Turlov, not attack. In that connection, Mr Kholod places reliance upon article 143 of the Civil Code. That provides:

"1. Through the court a citizen or a legal entity shall have the right to refutation of information which damages his (her) honor, dignity or business reputation, unless the one who spreads such information proves that the information is true.

2. Where the information that damages the honor, dignity or business reputation of a citizen or a legal entity is spread through the mass media, that information must be refuted by the same mass media without any charge imposed the aforementioned citizen or legal entity.

In the case where specified information is contained in a document issued by an organization, such a document shall be subject to replacement or annulment with the obligatory communication to the addressees of the inconsistency of the information contained in that document.

The procedure for refutation in other cases shall be established by the court.

3. A citizen or a legal entity with regard to which the mass media published information which restricts his rights or legitimate interests, shall have the right to publish their response in the same mass media free of any charge."

4.16. Mr Tukulov submits that article 143 of the Code is irrelevant in a case where there is a contract such as the contract in the present case. I agree that article 143 is not strictly relevant. First, Mr Turlov's video, though seen by numerous employees, did not constitute 'mass media'. Secondly, Mr Romanyuk's posts did not specifically address Mr Turlov's criticisms and say why those criticisms were unfounded. Instead they were counter-attacks on Mr Turlov's conduct. On the other hand article 143 enshrines a general principle, which is that persons are entitled to respond to attacks upon them. I shall bear that in mind when I come to consider the question of remedy.

4.17. I have carefully reviewed the competing arguments. I have come to the conclusion that each of the posts identified in the claim form constituted disparagement of Mr Turlov or the Freedom Finance companies or persons associated with those companies. I reach this conclusion for four reasons:

(i) Mr Tukulov is correct in his submission that 'disparage' is a fairly mild term and does not involve unduly harsh criticism.

(ii) In fact the criticisms contained in the various posts were extremely harsh, even when read in context and even bearing in mind all the caveats to which Mr Romanyuk draws attention.

(iii) The fact that the posts were short-lived does not exculpate Mr Romanyuk. They had the character of being disparaging and they were seen by numerous people during their short periods of existence in cyberspace.

(iv) The fact that Mr Romanyuk was responding to damaging criticisms of himself being voiced by Mr Turlov and his associates is no defence. There is no proviso in clause 7 along the lines "except when responding to criticisms expressed by Mr Turlov or other persons within the Freedom Finance Group". Article 143 of the Civil Code is not directly applicable. So that article does not provide a defence on liability, although it will be relevant when I come to consider remedy.

4.18. I therefore reject the various defences advanced, and hold that Mr Romanyuk acted in breach of clause 7 of the SRCA on each of the occasions pleaded in paragraphs 10, 12, 13, 14, 15 and 16 of the claim form. Having found in favour of the claimant on liability, I must now turn to the question of remedy. As a first stage in that exercise, I must review Kazakhstan law concerning damages and penalties.

PART 5. KAZAKHSTAN LAW CONCERNING DAMAGES AND PENALTIES

5.1 Chapter 20 of the Civil Code (articles 349 – 366) deals with liability for violation of an obligation. Within that chapter, article 350 states the general principle that "A debtor who violated an obligation shall be obliged to compensate the creditor for any losses caused by the violation." Breach of contract is one

form violation of an obligation. So the general rule in Kazakhstan, as in England, is that a contract breaker must compensate the other party for losses caused by the breach.

5.2 Chapter 18 of the Civil Code (articles 292 – 338-4) deals with securing execution of obligations. Paragraph 2 of chapter 18 (articles 293-298) deals with penalties.

5.3 Article 293 defines 'penalty'. The English version of article 293 reads as follows:

"Article 293. The definition of forfeit

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

5.4 That translation is not entirely correct. I therefore set out the Russian version as well:

"Статья 293. Понятие неустойки

Неустойкой (штрафом, пеней) признается определенная законодательством или договором денежная сумма, которую должник обязан уплатить кредитору в случае неисполнения или ненадлежащего исполнения обязательства, в частности в случае просрочки исполнения. По требованию об уплате неустойки кредитор не обязан доказывать причинение ему убытков"

5.5 The opening word of article 293 'Неустойкой' does not mean 'damages' as the translation suggests. It means 'penalty'. The two words in brackets after it ('штрафом' and 'пеней') make it plain that the provision is talking about all kinds of penalties, both specified sums and sums which vary according to the length of delay or the incompleteness of performance.

5.6 The primary purpose of a penalty under Kazakh law is to deter and/or punish breaches of contract. SHEL aptly describe this as a coercive function. So a penalty clause may (but need not) impose a liability greater than the likely amount of loss caused by the breach. This is different from English law, which disallows such contract provisions on policy grounds.

5.7 Article 351 of the Civil Code deals with the relationship between penalty and damages. Again, there is a translation issue. I shall therefore set out both the English and Russian versions.

5.8 The English version reads:

"Article 351. Losses and Forfeit

1. When a forfeit is established for a failure to execute, or for improper execution of an obligation, then the losses shall be compensated for the part which is not covered by the forfeit. Legislation or the agreement may stipulate the cases: where it is permitted to claim only forfeit. but not losses; where losses may be levied in full amount in addition to damages; and where at the discretion of the creditor either damages or losses may be claimed.

Legislative acts of the Republic of Kazakhstan or the contract may provide for the cases: when losses may be recovered in full amount in excess of the penalty; when at the choice of the creditor either a penalty or losses may be recovered.

Cases, in which, a penalty only may be established for failure to perform or improper performance of an obligation, shall be determined by legislative acts of the Republic of Kazakhstan.

2. In the cases where for failure to execute or improper execution of an obligation a limited liability is established, the losses which are subject to compensation in the part which is not covered by the forfeit. or in addition to it or instead of it, may be claimed up to the limits established by such limitation."

5.9 The Russian version reads:

"Статья 351. Убытки и неустойка

1. Если за неисполнение или ненадлежащее исполнение обязательства установлена неустойка, то убытки возмещаются в части, не покрытой неустойкой.

Законодательными актами Республики Казахстан или договором могут быть предусмотрены случаи: когда убытки могут быть взысканы в полной сумме сверх неустойки; когда по выбору кредитора могут быть взысканы либо неустойка, либо убытки.

Случаи, при которых за неисполнение или ненадлежащее исполнение обязательства может устанавливаться только неустойка, определяются законодательными актами Республики Казахстан.

2. В случаях, когда за неисполнение или ненадлежащее исполнение обязательства установлена ограниченная ответственность, убытки, подлежащие возмещению в части, не покрытой неустойкой, либо сверх, либо вместо нее, могут быть взысканы до пределов, установленных таким ограничением."

5.10 It can be seen from the third word of the heading and from the third word of article 351.1 that this provision is using the generic term for penalty. It is talking about all forms of penalty identified in article 293.

5.11 Mr Vataev explained during the hearing that under Kazakh law penalties have a dual function. In addition to deterring and punishing, a penalty also provides compensation for the creditor. But a penalty (unlike liquidated damages in English law) is not directly related to the likely amount of the creditor's loss. The effect of article 351 is that sometimes the creditor can recover both the penalty and compensation for losses not covered by the penalty.

5.12 I now come now to article 297. This provides:

"If the penalty (fine, fee) to be paid is excessively large as compared to the losses of the creditor, the court, at the request of the debtor, shall have the right to reduce the penalty (fine, fee), considering the degree of fulfilment of the obligation by the debtor and the interests of the debtor and creditor that deserve attention."

5.13 Mr Vataev explains in paragraph 16 of his paper that the words "at the request of the debtor" did not appear in the original version of article 297. They were added by Law of the Republic of Kazakhstan No. 49-VI dated 27 February 2017, which came into effect on 9 March 2017. The Parliament of Kazakhstan produced an explanatory note setting out the purpose of this law. In relation to the amendment of article 297, the explanatory note states:

"This suggestion is aimed at excluding the right of the court at its own discretion, that is, without a corresponding petition from the debtor, to reduce the penalty."

5.14 Mr Alikhan Bernar has carried out a statistical analysis of judicial decisions on article 297. He has produced a table of 85 relevant cases. The court generally did not make a reduction unless asked to do so. Most cases related to delay by the debtor. The court sometimes reduced the delay interest, for example where the claimant delayed filing the claim.

5.15 In his Amicus brief Mr Vataev states:

"18. The courts actively used their right of judicial discretion that was given to them by Article 297. The courts very often chose to reduce the penalty amounts, especially when the amounts of accrued penalties were comparable with the amounts of the principal claims.

19. After the amendment of 2017, the practice started to change. The courts began addressing the issue of reducing the penalty amounts only if defendants requested the reduction. In those cases, in which no request for reduction of the penalty was raised, the courts cannot rely on any legal grounds to even consider the possibility of reducing the penalty amount and therefore do not address the reduction issue.

20. From time to time the Supreme Court of Kazakhstan based on its examination of cases and controversial issues of law issues its acts, so-called "Normative Resolutions," which have the force of law and are mandatory guidelines for the courts and general public as to how certain provisions of the law should be interpreted and applied.

21. However, no Normative Resolution was ever issued in relation to Article 297, and there is no other guidance or recommendations relating to Article 297 as to, for example, what ratio of penalties and principal amounts should be viewed as "excessively large", or which interests of the parties deserve attention.

20. Therefore, the courts exercise their discretion in deciding cases based on common sense and rational considerations.

…

32. I summarize my observations of the judicial practice of applying Article 297 as follows.

33. The courts typically exercise a formal approach, strictly following the letter of law, and do not reduce the amounts of penalties without the defendants' request for reduction.

34. At the same time, if a request for the reduction of the penalty is made, the courts often exercise a "sympathetic" attitude and reduce the penalty, especially if its size is not commensurate to the actual

damages. Such attitude is characteristic in cases involving ordinary unsophisticated individuals sued by large legal entities, such as banks. Typically the penalty awarded by courts after the reduction represents some fraction of the principal amount, and rarely the court views the penalty, which is equal to or exceeds the principal amount, as appropriate.

35. However, this approach is more typical for situations with "floating" penalty amounts, where the penalty amount accrues over time and may grow to amounts equal to or exceeding the principal debt. In situations with fixed amounts of penalty, as established by the parties at the outset, the courts are less inclined to reduce the penalty."

5.16 I bear in mind those principles when addressing the issues in this case. Mr Vataev also discusses article 364 of the Civil Code, which enables the court to reduce the amount of a debtor's liability. In this case, however, neither party places reliance on article 364.

5.17 Having outlined the law on damages and penalties, I must now consider the remedy to which the claimant is entitled.

PART 6. TO WHAT REMEDY IS THE CLAIMANT ENTITLED?

6.1 In his closing speech, Mr Tukulov argued that the claimant should recover USD $5 million, the full amount specified in clause 9 of the SRCA. In response Mr Kholod submitted that, if his client is liable for breach of contract, the court should reduce the amount payable pursuant to article 297 of the Civil Code to a sum no greater than USD $100,000.

6.2 The first problem which I face is how to interpret clause 9 of the SRCA. This provides for "liquidated damages", which is a common law concept unknown to Kazakh law. See Mr Vataev's paper paragraph 48 and SHEL's report paragraphs 27 and 45. In paragraph 44 of their report SHEL comment, with good reason, that clause 9 is poorly worded and self-contradictory.

6.3 Clause 9 is clearly intended to provide for a penalty in the form of a defined lump sum. Both SHEL and Mr Vataev have reached this conclusion and I agree with them. The possible breaches of the SRCA are numerous and highly variable. Despite what clause 9 of the SRCA says, USD $5 million cannot possibly be a genuine pre-estimate of the losses likely to be caused by a breach. It is impossible to calculate a single figure which would cover all situations. The figure of $5 million is much larger than the loss likely to be caused by a breach.

6.4 The reason for including such a large figure was to deter Mr Romanyuk from speaking out. Mr Turlov explained in paragraph 8 of his witness statement that the transfer of valuable shares and the payment of $100,000 were intended to prevent Mr Romanyuk from making damaging statements about Freedom Finance. In other words, clause 9 specified a substantial penalty as a deterrent. That is perfectly legitimate under Kazakh law. Mr Romanyuk said much the same as Mr Turlov in his oral evidence. He was offered the whole deal as a package, on a take-it-or-leave-it basis. If he wanted to receive the valuable transfer of shares plus the $100,000, he would have to sign the contract which banned him from making disparaging comments. I interject to add that where a contractual term is difficult to construe (as here) it is legitimate under article 392 of the Civil Code to have regard to pre-contract negotiations and other evidence of the parties' intentions.

6.5 Mr Romanyuk was quite content at the time with the package which was offered to him. He took the shares and the cash payment. He faithfully kept to his side of the bargain. Mr Romanyuk made no public criticisms of Mr Turlov or the Freedom Finance companies.

6.6 Unfortunately, the arrangement started unravel just over two years later. Mr Turlov began to publicise bitter attacks on Mr Romanyuk's character and conduct. It is clear to me from the written and oral evidence that each man holds the other in extremely low esteem. That Mr Romanyuk should remain silent while Mr Turlov and his associates publicly blackened Mr Romanyuk's character was too much to expect.

6.7 The SRCA did not contain any provision banning Mr Turlov from making disparaging remarks about Mr Romanyuk. Nor can such a term be implied into the contract. On the other hand, both Mr Turlov and the Freedom Finance companies were under a duty to act in good faith.

6.8 Article 8 of the Civil Code is an important provision, which Mr Tukulov quotes in his written opening submissions. It provides:

> "4. Citizens and legal entities must act in good faith, reasonably and fairly when exercising their rights, and comply with the requirements contained in legislation and the moral principles of the society. Entrepreneurs must also comply with the rules of business ethics. This obligation may not be excluded or restricted by any agreement. The good faith, reasonableness and fairness of the acts of participants in civil rights relations shall be presumed.
>
> 5. Actions of citizens and legal entities aimed at causing harm to another person, abuse of the right in other forms, as well as the exercise of the right in contradiction with its purpose are not allowed.
>
> 6. No one has the right to take advantage of his/her bad faith behavior.
>
> 7. In case of non-compliance with the requirements provided for in paragraphs 3 - 6 of this article, the court may refuse to protect the right belonging to the person."

6.9 In my view, Mr Turlov was acting in bad faith by using the SRCA to muzzle Mr Romanyuk, while at the same time publicising vituperative attacks on Romanyuk and causing others to repeat such attacks.

6.10 I come now to article 297 of the Civil Code. The penalty specified in clause 9 of the contract is excessively large in comparison with any losses caused by Mr Romanyuk's breaches. I take into account (as article 297 invites me to do) the fact that Mr Romanyuk fulfilled his contractual obligations for 25 months. He would have continued to do so, if he had not been provoked. I accept that Mr Turlov and FFIN committed no breach of the SRCA. On the other hand, they acted in bad faith and they created a situation which was highly likely to cause Mr Romanyuk to act in breach of contract.

6.11 In these circumstances, the court has two different tools available. Article 8.7 of the Civil Code entitles the court to refuse to protect the claimant's rights. Alternatively, article 297 enables the court to reduce the amount of the penalty

6.12 I have come to the conclusion that I should not deprive the claimant altogether of the penalty for which clause 9 of the SRCA provides. That would be a disproportionate step for the court to take.

6.13 The appropriate course for the court to take is to exercise its powers under article 297 of the Civil Code. I bear in mind all that Mr Vataev has said about the way in which courts generally exercise their powers under article 297. In particular, he states in paragraph 20 of his paper that, in the absence of any Normative Resolution, courts exercise this discretion "based on common sense and rational considerations".

6.14 The facts of this case are most unusual. Fortunately. The provisions of Civil Code provide sufficient flexibility to enable the court to do justice between the parties. The appropriate order in all the circumstances is to reduce the penalty payable to USD $100,000, pursuant to article 297.

PART 7. CONCLUSION

7.1 I thank counsel on both sides, Mr Tukulov and Mr Kholod, for their excellent advocacy and for presenting their respective cases so clearly.

7.2 For the reasons set out above, THE COURT ORDERS THE DEFENDANT TO PAY TO THE CLAIMANT A PENALTY OF USD $100,000 WITHIN 28 DAYS FROM TODAY.

By Order of the Court,

Sir Rupert Jackson,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Bakhyt Tukulov, Tukulov & Kassilgov Litigation LLP, Almaty, Republic of Kazakhstan.

The Defendant was represented by Mr. Alexey Kholod, "Assistent Plus" International Law Firm, Moscow, Russian Federation.