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

23 November 2023
CASE No: AIFC-C/CFI/2023/0033

CLAIMANT

Claimant

v

(1) DEFENDANT A
(2) DEFENDANT B
(3) DEFENDANT C
(4) DEFENDANT D

Defendants

JUDGMENT

Justice of the Court:
Justice Sir Rupert Jackson

JUDGMENT

This judgment is in five parts, namely:

Part 1. Introduction

Part 2. The facts

Part 3. The present proceedings

Part 4. The first issue: The timing of the CLAIMANT's challenge to DEFENDANT B's appointment

Part 5. The second issue: The merits of the CLAIMANT's application

PART 1. INTRODUCTION

1.1 This is an Arbitration Claim brought pursuant to Part 27 of the AIFC Court Rules in order to challenge the decision of an arbitral tribunal to dismiss an application that one member of the tribunal be removed for lack of impartiality.

1.2 In this Judgment I shall refer to the International Arbitration Centre of the Astana International Financial Centre as "the IAC". I shall refer to the Arbitration Rules of the IAC as "the IAC Rules". I shall refer to the CLAIMANT as "CLAIMANT". I shall refer to DEFENDANT D as "DEFENDANT D". CLAIMANT is the CLAIMANT in the present proceedings before the AIFC Court, but the Respondent in the underlying arbitration. DEFENDANT D is a Respondent in these proceedings before the AIFC Court, but a Claimant in the underlying arbitration.

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

PART 2. THE FACTS

2.1 On 24 November 2022, DEFENDANT D sent CLAIMANT and the IAC a request for arbitration in respect of a contractual dispute which had arisen between DEFENDANT D and CLAIMANT. The contract between the parties contained an arbitration clause requiring any such dispute to be settled by arbitration under the jurisdiction of the IAC.

2.2 On 14 February 2023, the Registry of the IAC, after discussing the case with the IAC Chairman, directed the proceedings to be conducted by a single arbitrator. After receiving that direction, Mr. Vataev, Counsel for DEFENDANT D, and Mr. Tukulov, Counsel for CLAIMANT, discussed this matter in a constructive way. They agreed that the interest of their respective clients would be best served by having a panel of three arbitrators. They both notified the IAC Registry of that decision and agreement by emails dated 16 and 21 February 2023.

2.3 On 22 February 2023, the IAC Registry very sensibly emailed both Parties accepting that decision and requesting the parties each to nominate one arbitrator promptly. CLAIMANT duly nominated DEFENDANT C. No issue arises about that nomination.

2.4 On 1 March 2023, DEFENDANT D nominated DEFENDANT B. On 8 March, Mr. Tukulov sent an email to the IAC Registry objecting to the nomination of DEFENDANT B. In paragraph 3 of his email, Mr. Tukulov wrote:

"Enmity has existed between Mr. Tukulov and [DEFENDANT B] for several years. We attach email correspondence which proves such enmity. Further email correspondence is provided for more background. We specifically draw your attention to the email of [DEFENDANT B] dated 6 December 2021 to Mr. Tukulov and many well-known practitioners in Kazakhstan within the framework of [the] Arbitration Litigation Committee of the Kazakhstan Bar Association."

Mr. Tukulov then set out that email. Mr. Tukulov maintained that DEFENDANT B was in breach of Article 9.2 of the IAC Rules by failing to disclose that matter. Mr. Tukulov copied that email to Mr. Vataev and to the Parties, but not to the two nominated arbitrators.

2.5 On 14 March 2023, DEFENDANT B responded to the concerns which Mr. Tukulov had expressed, stating that there was no real enmity between her and Mr. Tukulov.

2.6 On 28 April 2023, the Chairman of the IAC, believing that he had jurisdiction to deal with the substantive challenge, sent a letter to Mr. Vataev and Mr. Tukulov stating that CLAIMANT's challenge to DEFENDANT B was dismissed. He confirmed DEFENDANT B's appointment. Much correspondence followed between the parties, which is set out in Mr. Tukulov's helpful chronology, but which I need not set out in this Judgment.

2.7 The parties were unable to agree on an appropriate Chairman for the tribunal. This is by no means an unusual situation. I have encountered it from time to time myself in arbitrations. Therefore, the Chairman of the IAC nominated a suitable Chairman in the exercise of his powers under Article 8.4 (3) of the IAC Rules. The Chairman of the IAC selected as the presiding arbitrator and Chairman of the panel, DEFENDANT A.

2.8 On 8 June 2023, the Registry wrote to both parties stating that the following arbitrators were appointed to constitute the tribunal in this arbitration: DEFENDANT A as presiding arbitrator, DEFENDANT B appointed by the IAC on behalf of the CLAIMANT, and DEFENDANT C appointed by the IAC on behalf of the Respondent.

2.9 Unfortunately, despite the concerns which Mr. Tukulov and his clients had about the suitability of DEFENDANT B, neither CLAIMANT, nor its lawyers, exercised their rights under Article 10.3 of the IAC Rules or Regulation 20.2 of the AIFC Arbitration Regulations to send a written statement to the tribunal challenging the appointment of DEFENDANT B. The time allowed under Article 10.3 of the Rules for doing this was 14 days. The time allowed for making such a challenge under Regulation 22.2 of the Regulations was 15 days. The tribunal was appointed on 8 June 2023, so the 14-day period under the Rules expired on 22 June 2023, and the 15-day period under the Regulations expired on 23 June 2023. Instead of pursuing that particular remedy, CLAIMANT applied to the AIFC Court challenging DEFENDANT B's appointment and the Decision of the IAC Chairman.

2.10 Lord Faulks KC dealt with this matter in a written decision dated 26 June 2023. The actual decision of Lord Faulks KC appears in the second sentence of paragraph 4:

"… I am not satisfied that there are sufficient grounds to challenge the appointment. Accordingly, I reject the application."

I comment that Lord Faulks KC could not actually do otherwise, because the jurisdiction to allow such a challenge is vested in the first instance in the arbitral tribunal. The Court's role to deal with the challenge only arises if the arbitral tribunal has rejected it, and thereafter there is an application to the Court under Article 10.7 of the Rules or under Article 22.3 of the Regulations. Since there had been no prior tribunal decision and no such application under the Rules and Regulations, Lord Faulks KC could not do other than what he did, namely, to reject the application.

2.11 CLAIMANT's lawyers then applied to the Chief Justice of the AIFC Court for permission to appeal against the Decision of Lord Faulks KC. On 14 July 2023, Lord Mance, who was then the Chief Justice of the Court, made an Order, the operative part of which is in paragraph 10. That was an Order staying the request for permission to appeal.

2.12 However, understandably the Chief Justice was concerned about the situation which had arisen, and he sought the assistance of the Parties as to the appropriate way forward. Mr. Vataev sent an email on 13 July 2023 which read as follows:

> *"Dear Mr. Registrar,*
>
> *I wanted to confirm to you that I, as a counsel for [DEFENDANT D] (the Claimant in IAC Case 30/2022), am aware of the AIFC Court judgment in Case 19 of 2023 on the application of Mr. Tukulov (a counsel for [CLAIMANT], the Respondent in IAC Case 30/2022), whereby the latter tried to challenge the appointment of [DEFENDANT B] as an arbitrator in the said arbitration case. I have downloaded and reviewed the judgment from the AIFC Court website and shared it with my co-counsel and the client.*
>
> *We understand that the proper procedure for challenging an arbitrator under the IAC Arbitration and Mediation Rules (Article 10 of both Rules 2018 and 2022) is an application to the arbitral tribunal, not to the AIFC Court."*

2.13 The Chief Justice gained the impression from that email and from other materials from the Registry that the Parties were in agreement that such a challenge to the appointment of DEFENDANT B could still be made to the tribunal. The Chief Justice reflected that understanding in what I would call the obiter part of its decision. He asked to be informed if that understanding was incorrect. No one in fact reverted to the Chief Justice to say whether or not his understanding was correct. It seems to me that there was a bit of a misunderstanding, because Mr. Vataev did not intend to convey to the Registry or to the Chief Justice that any application to challenge would be in time. His email was merely stating what the correct procedure was.

2.14 By 14 July 2023, the date of the Chief Justice's Decision, the arbitration was well advanced. There had been a case management conference on 5 July 2023, and the tribunal had issued its first Procedural Order on 6 July 2023. There was also correspondence dealing with administrative aspects of the arbitration and the tribunal's appointment, as well as their fees. Mr. Tukulov very responsibly played an active part in that correspondence. But Mr. Tukulov had not abandoned his desire to challenge the appointment of DEFENDANT B.

2.15 On 18 July 2023, Mr. Tukulov wrote to the tribunal challenging the appointment of DEFENDANT B on the grounds that she was not impartial.

2.16 On 10 August 2023, the tribunal issued a unanimous Decision dismissing that challenge. The grounds for that Decision were that CLAIMANT had made the challenge too late. The Rules, as I have previously mentioned, provide a time limit of 14 days for making such a challenge. The Regulations provide a time limit of 15 days for making such a challenge. The challenge in this case was made well after the expiration of both those time limits. Thus, the tribunal, as I say, dismissed the challenge of DEFENDANT B's appointment.

2.17 CLAIMANT and Mr. Tukulov were aggrieved by the tribunal's Decision. Accordingly, they commenced the present proceedings.

PART 3. THE PRESENT PROCEEDINGS

3.1 I am told and I have no reason to doubt (although it is not apparent from the agreed bundle) that the proceedings were commenced on 17 August 2023. In a Claim Form issued in the AIFC Court on 16 October 2023, CLAIMANT set out its full case. CLAIMANT applied to the Court to set aside the tribunal's Decision dated 10 August 2023 and to remove DEFENDANT B's appointment as an arbitrator. These proceedings were brought against four Parties: the first defendant is DEFENDANT A, as the Chairman of the tribunal and presiding arbitrator; the second Defendant is DEFENDANT B; the third Defendant is DEFENDANT C; and the fourth Defendant is DEFENDANT D.

3.2 DEFENDANT A and DEFENDANT C responded to the Claim Form by adopting an entirely neutral position. DEFENDANT B responded by email dated 10 November 2023. She said that she would not participate actively in the proceedings. However, she offered some comments in paragraphs 5 and 6 of her email for the assistance of the court. Since there has been some discussion about these paragraphs, I will read them out.

> *"5. I also take comfort in my appointment in a detailed and reasoned opinion of the IAC Chairman, Mr. Krümmel, dated 28 April 2023, who was making this Decision on Appointment as an Arbitrator, and the entire package of documents and was aware of all the facts of the case.*
>
> *6. Unlike the other grounds to challenge an Arbitrator, "enmity" to a party representative is a very subjective ground, as enmity is a feeling, and only an Arbitrator herself can reliably state whether she has a feeling of enmity. I declare that I do not feel any enmity to Mr. Tukulov. There was a disagreement on my part with his position on the scope of the ethical rules for lawyers in the context of a professional discussion of the concept of "duty to the Court", which took place long ago. I genuinely believe that I am capable of making an independent and impartial decision as an Arbitrator."*

3.3 In its written Defence to the Claim, dated 13 November 2023, DEFENDANT D argued that CLAIMANT had impliedly consented to DEFENDANT B's appointment by its conduct. Secondly, DEFENDANT D said that CLAIMANT's challenge to the appointment of DEFENDANT B was out of time. Thirdly, DEFENDANT D said that the matters relied upon by CLAIMANT do not establish any lack of impartiality on the part of DEFENDANT B.

3.4 The hearing date for these proceedings was fixed for today, Wednesday, 22 November 2023. We had a slightly late start owing to yesterday's case overrunning. That is not a problem. At the hearing today, Mr. Tukulov appears as counsel for CLAIMANT and Mr. Vataev appears as counsel for DEFENDANT D. I thank both counsel for their helpful written submissions, lodged in advance of the hearing, which I have carefully considered. I also thank them and for their helpful oral submissions today.

3.5 I will now address the issues in a logical order dealing first with the timing of the CLAIMANT's challenge to DEFENDANT B's appointment.

PART 4. THE FIRST ISSUE: THE TIMING OF THE CLAIMANT'S CHALLENGE TO DEFENDANT B'S APPOINTMENT

4.1 Article 10.3 of the Rules is clear. It says:

> *"A party wishing to challenge an arbitrator shall submit a statement to the tribunal stating the reasons for the challenge within 14 days from the date the circumstances giving rise to the challenge became known to the party. The party wishing to challenge must at the same time send a copy of its written statement to all other parties. Failure to challenge an arbitrator within 14*

days of becoming aware of the relevant circumstances constitutes a waiver of the party's right to make the challenge."

4.2 One of the issues which arises in this case is what happens if a party becomes aware of grounds to challenge a member of the tribunal before the tribunal is appointed. Since the challenge must be made to the tribunal as a whole under Article 10.3 of the Rules, time cannot start to run until the tribunal as a whole has been appointed. That is because until then there is no tribunal to apply to. This interpretation of Article 10.3 of the Rules is consistent with Regulation 22(2) of the AIFC Arbitration Regulations.

4.3 Nevertheless, it is obviously good practice to give prompt notice to all parties of the challenge which will be coming when the full tribunal has been constituted. Mr. Tukulov did that on 8 March 2023, although it would have been better if he had included DEFENDANT B and DEFENDANT C in his email of that date.

4.4 Regulation 22.2 of the AIFC Regulations says:

"In the absence of such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in Article 21(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge."

4.5 Mr. Tukulov argued this morning that because of the word "or" in Regulation 22(2), it would be possible to launch a valid challenge to the appointment of the particular tribunal member within 15 days after becoming aware of the grounds for the challenge, even if the full tribunal has not been appointed. I do not accept that submission. It seems to me that the challenge, whether made under Regulation 22 of the Regulations or under Article 10 of the Rules, is a challenge which must be made to the tribunal when constituted. The word "or", which we see in Regulation 22(2), is designed to deal with the situation when a party becomes aware of a ground for challenge after the tribunal has been constituted. Suppose that on 1 July 2023 the tribunal is constituted, and on 1 August 2023 one party discovers a ground for challenging a tribunal member. That party clearly cannot do so within 14 or 15 days of the tribunal being appointed. But he can do so within 14 or 15 days of learning the grounds for challenge. So, the function of that limb of Regulation 22 is to tell us that if you become aware of grounds for the challenge after the appointment of the tribunal, you still have a couple of weeks in which to make your challenge. Regulation 22(2) of the Regulations does not say that an effective and timeous challenge can be made before the tribunal has been appointed. The very simple reason for that is that there is no one to whom the challenge can be made.

4.6 It therefore follows, contrary I am afraid to Mr. Tukulov's submissions, that the email which he sent to the Registry, copied to the parties, on 8 March 2022, was not an effective challenge under Regulation 22.2 of the Regulations or under Article 10.3 of the Rules.

4.7 I agree that the time limit can be extended in appropriate cases as a matter of discretion. But in the present case, there was no application for an extension of time. Furthermore, the present challenge was not made until 18 July 2023. It is highly unlikely that at that late date any application for an extension of time would have been granted. Mr. Tukulov made a forceful submission that justice should prevail over formality. Where it is possible for justice to prevail over formalities without prejudice to either party, I have great sympathy with that submission.

4.8 If an application is made to the tribunal to challenge a tribunal member, long after the time limits for making such an application have expired, either without an application for extension of time or after

the rejection of such an application, I do not see how the tribunal can do other than dismiss it. If thereafter there is an application to the Court under Article 10.7 of the Rules, or under Regulation 22(3) of the Regulations, the Court cannot do anything about what has gone wrong. The Court cannot conjure up a jurisdiction of the tribunal and then proceed to allow the challenge.

4.9 In the present case, the application to the tribunal was made long out of time. There was no application for extension of time, so the Court could not do other than dismiss it.

4.10 Therefore, I am bound to uphold the tribunal's decision and to dismiss this appeal. But before parting with this case, I must say something about the second issue which concerns the merits of the CLAIMANT's application.

PART 5. THE SECOND ISSUE: THE MERITS OF THE CLAIMANT'S APPLICATION

5.1 I entirely reject Mr. Vataev's suggestion that the CLAIMANT's application to remove DEFENDANT B is a delaying tactic or an attempt to disrupt the arbitration. I have no hesitation in accepting that Mr. Tukulov has a genuine concern that there may be prejudice against his client because of past disagreements between himself and DEFENDANT B. However, having read the bundle and DEFENDANT B's various declaration, emails, and statements, I accept what she says. She does not feel enmity towards Mr. Tukulov.

5.2 I am satisfied that past disagreements will not cloud her approach to this arbitration. Any experienced lawyer is well used to putting irrelevant matters out of their mind and focusing on the evidence and the issues that are relevant. There is no suggestion in the document that DEFENDANT B has ever had any enmity towards CLAIMANT. The parties to this arbitration are not the advocates, they are CLAIMANT and DEFENDANT D. The fact that DEFENDANT B may in the past have had disagreements with Mr. Tukulov cannot cause her to be in any way hostile to Mr. Tukulov's client.

5.3 Mr. Tukulov mentioned in his submissions this morning that he may have to withdraw from this case if DEFENDANT B remains on the panel. I emphatically reject that suggestion. It would be a great loss to CLAIMANT if Mr. Tukulov and his firm withdraw from this arbitration. I have had the experience of Mr. Tukulov's advocacy on more than one occasion. I have read his submissions and I can see how skillfully he conducts litigation and arbitration. It would be a great loss for CLAIMANT to forgo his services. So, I urge him to give no further consideration to withdrawing. And, insofar as I have any business to do so, I hope that CLAIMANT will not consider dismissing Mr. Tukulov because of his past disagreements with one member of the tribunal.

5.4 Mr. Tukulov, towards the end of his submissions this morning, drew my attention to four matters. First, he said, when she was nominated, DEFENDANT B did not disclose her past disagreements with Mr. Tukulov. It is clear to me that DEFENDANT B did not regard those past disagreements as being a matter which could possibly affect her impartiality, and that is why she did not disclose the matter. Maybe, it would have been wiser to disclose. Speaking for myself, as a matter of precaution, I always disclose anything that could be remotely relevant. But there is no reason to go to extremes. I do not accept that her appointment can be challenged because she did not make that disclosure.

5.5 The second point which Mr. Tukulov made is that DEFENDANT B participated in the tribunal decision to reject the challenge to her appointment. She really had no choice. The tribunal Chairman had suggested that the other two members of the tribunal should consider the challenge, and then once they had made a decision, the tribunal as a whole should issue it. Mr. Tukulov very sensibly agreed to that. Mr. Vataev felt that may be procedurally improper because of the provisions of Rule 10.1 of the IAC Rules. Having received that response from Mr. Vataev, the tribunal was not going to proceed in a way whereby either party considered the tribunal was acting unlawfully. So they proceeded to reach an unanimous decision. But if DEFENDANT B had taken no part in the decision, I have no doubt it

would have been the same. This was not a decision from which any member of the tribunal dissented. The tribunal reached what is, in my view, an entirely proper decision.

5.6 The third point, which Mr. Tukulov raises, is the email of the 6 December 2021 sent by DEFENDANT B to a number of lawyers. I can see that feelings were running high then. But there are from time to time disagreements between members of the profession. As Mr. Vataev said, this is an adversarial profession. I hope that as time passes and senior practitioners in Kazakhstan conduct more and more arbitrations under the IAC Rules, perhaps some of these personal disagreements will reduce in their intensity. But I do not see any problem arising from the December 2021 email.

5.7 Mr. Tukulov's fourth point concerns the terms of the defence which DEFENDANT B sent to the Claim in these proceedings. I have read out the two paragraphs to which Mr. Tukulov draws attention. In the first part of her email, DEFENDANT B made it quite clear that she was going to take no part in this litigation. She left the decision to the tribunal, but she added some comments for the assistance of the Court. I do not see that as being any ground to disqualify her from serving as arbitrator.

5.8 Now, none of the matters which Mr. Tukulov has urged this morning suggest to me that DEFENDANT B would not be impartial as between DEFENDANT D and CLAIMANT. Mr. Tukulov relies upon paragraph 2(c) of Part 1 of the IBA Guidelines on Conflict of Interest in International Arbitration. Paragraph 2(c) reads as follows:

> *"… doubts are justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision."*

5.9 The reasonable third-party test is one that crops up in a number of contexts, particularly when one is dealing with allegations of bias against a judge or a tribunal. It is not the most helpful legal test that I have ever encountered. Quite a lot of authority has accumulated in the United Kingdom about what the reasonable third person is like, how much knowledge he or she should have about the way things are done, how fair and reasonable he or she is, and so forth. I must confess to the somewhat heretical view that it is not a terribly helpful test, but that is the test which I must apply. I have not got to say what I think the answer is but what I think a reasonable person would say the answer is. Doing my best, I think that a reasonable third person would not think that there is a likelihood that DEFENDANT B would be other than impartial in her conduct of this arbitration.

5.10 I hope that when this judgment has been transcribed, a copy of it will be passed to all members of the tribunal so that they can see that this Court, which has a supervisory role over the conduct of the arbitration, has every confidence that all three members of the tribunal will conduct these proceedings properly.

5.11 For the reasons which I have stated, this arbitration claim is dismissed.

ORDER ON COSTS

1. Upon consideration of the statement of costs that was submitted by DEFENDANT D on 21 November 2023, I direct that KZT 5,000,000 (five million tenge) be paid by the CLAIMANT to DEFENDANT D within 28 days.

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.

DEFENDANTS 1-3 were not represented.

DEFENDANT 4 was represented by Mr. Sergey Vataev, Advocate, Legit Law Firm, Almaty, Republic of Kazakhstan.