



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

17 May 2023

CASE No: AIFC-C/CFI/2023/0006

KAZAKHSTAN BRANCH OF JSC WITH LIMITED LIABILITY "SINOHYDRO CORPORATION LIMITED"

Claimant

v

JSC "NATIONAL COMPANY KAZAVTOZHOL"

Defendant

JUDGMENT

Chief Justice of the Court:

The Rt. Hon. The Lord Mance



ORDER

- 1. The Defendant shall pay the sum of 2,203,244,303.13 KZT into the escrow account within 14 days of this Order.**

JUDGMENT

1. In this case, the Court is concerned with a construction contract made between the Parties, with the Defendant being the “Employer” and the Claimant being the “Contractor”. It was made a considerable time ago and there was, no doubt, during the period of COVID-19 some difficulty in its performance; and a dispute arose, whether for that or other reasons.
2. In the course of that dispute, eventually, the Parties, and this is common ground, reached a Supplementary Agreement No. 3, whereby it was agreed to submit to the jurisdiction of this Court. That apparently replaced clauses which are not, apparently, now available -, in particular, original clauses 19 and 20, the latter dealing with dispute resolution. Those original clauses have been replaced, as I said, by an agreement to submit to the AIFC Court.
3. The second provision of that Agreement was that the Employer would temporarily make a payment in a large amount of 2,827,132,994.2 KZT to a special escrow account and would extend the Contract period to 380 days from the date of signing of this Supplementary Agreement No. 3.
4. The Agreement further provided that the Employer could bring before the Court the substantive issue of its disagreement with the decision of the Dispute Avoidance and Adjudication Board (hereinafter – “DAAB”) and the Engineer’s decision which had found that the Defendant should have granted an extension and that it should have made the temporary payment in the amount mentioned.
5. The scheme was that there would be an immediate temporary payment, what one would call a provisional payment, but that the Employer would not lose the Employer’s right to investigate the substance of the decisions reached by the DAAB and by the Engineer but could challenge them in this Court. And, if the Employer were successful in this challenge, Supplementary Agreement No. 3 went on to say that the Claimant undertook to reimburse the amount of compensation in full within 84 days after the official Court judgment was made.
6. This Agreement has been agreed and signed by both Parties and there is no reason why it should not be binding. The position, as it happens, is that some payments were made pursuant to the obligation to make provisional payment, but by no means the full amount. The actual amount outstanding, instead of 2,827,132,994.2 KZT, is 2,203,244,303.13 KZT. That is not, as I understand, being challenged as the figure due, and certainly no contrary evidence has been put forward.

7. Having served a claim seeking an Order from the Court for the payment of the balance of the provisional sum into the escrow account, the only reaction from the Defendant has been a very recent document dated 15 May 2023, simply reciting the facts and asking the Court to refuse the claim. It does not give any reason why a temporary payment should not be made as agreed, leaving the substantive dispute to be resolved by this Court later.
8. The formal position is that the Defendant has not acknowledged service and has not put any defence or any counterclaim. This is a situation where the Claimant is entitled to a default judgment. But for the reason that I have explained, even if the Defendant had acknowledged service and had put in as a defence the document dated 15 May 2023 to which I have referred, that still would not have provided any answer to the claim because the whole commercial purpose of Supplementary Agreement No. 3 was, as I see it, that there should be a sum in the escrow account to await the judgment of this Court at some later stage on the merits, if the Defendant wished to argue that some other sum was in fact due and that the DAAB and the Engineer were wrong in what they recommended. So, even if there had been an acknowledgment of service and defence, that would not have assisted the Defendant as I see it.
9. In those circumstances, I will direct that the Court enters judgment against the Defendant for the figure of 2,203,244,303.13 KZT. That would of course leave the Defendant free under Supplementary Agreement No. 3 to bring any challenge or claim which it wishes in any way it can.
10. I am not today concerned with the merits of any such challenge or claim. They are a quite different matter from the matter before me today, which is a simple question whether a temporary or provisional payment should be made into the escrow account. I hold that the Defendant should make such a payment in the sum mentioned and the judgment should be given accordingly and there should be liberty to apply for the Claimant for further relief if necessary.
11. The question whether there should be any order for costs in respect of the proceedings today or to date will be stood over to be decided by the Court, probably on paper, in the light of written submissions to be made by the parties. The Claimant shall make and file their submissions within two working days, and the Defendant shall respond within four working days thereafter.

By Order of the Court,

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



Representation:

The Claimant was represented by Ms. Irina Lee, Director of “Legal Company Assessor” LLP, Almaty, Kazakhstan.

The Defendant was represented by Mr. Kairatbek Nurshayev, Senior Manager of External Loans Department of JSC “National Company KazAvtoZhol”, Astana, Kazakhstan.