Court

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

CASE No: AIFC-C/CFI/2021/0008

Representation:
For Success K LLP: Mr. Erbolat Khasanov (Responsa Law Firm)
For the Ministry of Healthcare of the Republic of Kazakhstan: Ms. Bibigul Malgazhdarova (Ministry of Healthcare of the Republic of Kazakhstan)

Date of Judgment: 24 January 2022

IN THE MATTER OF AN APPLICATION FOR RECOGNITION AND ENFORCEMENT OF AN AWARD DATED 4 OCTOBER 2021 MADE IN IAC ARBITRATION No 2/2021 under the IAC Arbitration and Mediation Rules 2018
BETWEEN:

Success K Limited Liability Partnership **Claimant**

v

Ministry of Healthcare of the Republic of Kazakhstan

Defendant

AND IN THE MATTER OF AN APPLICATION TO SET ASIDE AND TO REFUSE RECOGNITION AND EXFORCEMENT OF THE SAID AWARD
BETWEEN:

Ministry of Healthcare of the Republic of Kazakhstan
Claimant

v

Success K Limited Liability Partnership

Defendant

JUDGMENT

Chief Justice of the Court:

The Rt. Hon. The Lord Mance

Introduction

1. There are before the Astana International Financial Centre Court ("the AIFC Court") two Applications relating to a Final Award dated 4 October 2021 made in Arbitration No 2/2021 in the International Arbitration Centre ("IAC") of the AIFC. By this Award, the arbitration tribunal awarded the claimant in the arbitration, Success K LLP ("Success"), 74,031,989.00 tenge as due by way of debt from the State Authority, the Ministry of Health of the Republic of Kazakhstan ("the Ministry"), together with 1,207,090.98 tenge by way of contractual penalty for delay in payment of that debt. The debt and penalty were claimed under Contract No. SHIP-3/CS-06 dated 31 July 2019 ("the Contract") made between the parties for the provision by Success to the Ministry of Consultant's (or Consultancy) Services. The Contract contains the arbitration agreement pursuant to which Arbitration No 2/2201 took place.

2. The two Applications now before the AIFC Court are an Application by Success seeking recognition and execution of the Final Award and an Application by the Ministry seeking to have the Final Award cancelled or set aside and refusal of its recognition and enforcement on the ground that the arbitration agreement was and is invalid under the law of the Republic of Kazakhstan. The two Applications are in substance mirror images of each other. This judgment addresses them together.

Procedural history

3. At a case management conference on 12 November 2021 at which representatives of the two parties were heard remotely, both parties' representatives confirmed to the Court that, since they were themselves lawyers and expert in the law of the Republic of Kazakhstan, the parties were content for all questions arising regarding the law of the Republic of Kazakhstan to be addressed by submissions made to the AIFC Court.

4. Following the case management conference, the AIFC Court issued a Directions Order dated 15 November 2021, by which, inter alia:

   a. Success's Application was stayed until resolution of the Ministry's Application for an order setting aside and refusing recognition and enforcement of the said Award or until further order.
   b. Directions were given for the sequential exchange of written submissions

(accompanied by any relevant witness statements and supporting documentation) in relation to the Ministry's Application.

c. A date for an oral hearing of the Ministry's Application was to be fixed through the Registrar.
d. Each party was given liberty to apply for any variation of the Directions Order or timetable or any further order or direction.

5. Pursuant to the Directions Order, the Ministry filed written submissions on 26 November 2021, Success filed written submissions by way of Objection on 8 December 2021 and the Ministry filed written submissions in reply on 15 December 2021. Also on 15 December 2021, both parties wrote to the Court expressing a wish to expedite the conclusion of the case to 23 December 2021, dispensing with any oral hearing.

6. The Court having considered the written submissions and the parties' wish, responded by the Registrar's email dated 23 December 2021 to the effect that:

   a. The Court believed that it should be possible to proceed to a speedy judgment without an oral hearing, with the parties' consent, but that this would not be possible until after 23 December 2021.
   b. In order to decide the issues on both parties' Applications, the Court asked both parties to inform the Court (in writing through letter within 7 days) and to produce a copy of any decision(s) of the Courts of Kazakhstan on two points, to which the Court will return below (see paragraphs 31 and 32 below).
   c. Assuming that, after seeing the responses to point 2, the Court still considered it appropriate to proceed to judgment without an oral hearing, it would propose in the judgment to deal with both the Ministry's Application to set aside and resist recognition and enforcement of the Award and Success's Application for recognition and enforcement (removing the stay of that Application for this purpose). On the information before the Court, the two Applications were mirror images of each other, so that, if the one party succeeded on one, the other party must fail on the other, and vice versa.
   d. The parties were invited to reconfirm, when responding to point 3, that they were content for the matter to proceed as set out in this way. Assuming that no point arose appearing to need further attention, the judgment should then be expected in the first half of January 2022.

7. In response to the Registrar's email, the Ministry by email on 30 December 2021 informed the Court that there was, according to the State Property and Privatization Committee, no court decision of the kind requested by the Registrar's email. It added that the only available document was a judgment of the Judicial Collegium for Civil Cases of Nur-Sultan City Court in the case *Apex Consult LLP v. The Ministry of Health* (Case No. 2a-7236-21 dated 6 October 2021), to which the Court will return below. The Ministry's

email also confirmed the Court's proposal for a possible judgment without an oral hearing.

8. Success responded to the Registrar's email by email on 10 January 2021, saying inter alia:

> "1. As a result of the search for court practice on the AIFC arbitration clause, we came to the conclusion that to date there was no court practice. …….
> 2. On the issue of the Court decision of APEX CONSULT LLP, we inform you that they had a clause not related to the court of the IAC AIFC.
> 3. We reiterate that we agree to consider the case without calling the parties."

9. Both parties were therefore agreed that the Court should proceed as indicated in the Registrar's email. This judgment will accordingly address both Applications without any further oral hearing and with the stay on Success's Application being lifted to enable this.

The AIFC Arbitration Regulations

10. The AIFC Arbitration Regulations dated 5 December 2017 ("The AIFC Arbitration Regulations") provide so far as presently material 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 with the AIFC and, upon application in writing to the AIFC, shall be enforced within the AIFC, subject to the provisions of this Article and of Articles 46 and 47.
>
> …..
>
> **47. Grounds for refusing recognition or enforcement**
>
> (1) Recognition or enforcement of an arbitral award, irrespective of the State or jurisdiction in which it was made, may be refused by the AIFC Court only
>
> (a) at the request of the party against whom it is invoked, if that party furnishes to the AIFC Court proof that:
>
> (i) ….. the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication, under the law of the State or jurisdiction where the award was made; …."

The Contract and arbitration agreement

11. The Contract for Consultant's Services is, by virtue of its General Conditions 1.1(b) and 3.1 and the Special Condition relating thereto, expressly governed by and to be construed in accordance with the law of Kazakhstan. The conditions just mentioned read as follows:

    a. *General Condition 1.1(b):*

    "'Applicable law' means the laws and any other instruments having the force of law in the Client's country or in such other country as may be specified in the **Special Conditions of Contract** ….."

    b. General Condition 3.1:

    "This Contract, its meaning and interpretation, and the relation between the Parties shall be governed by the Applicable Law."

    c. Special Condition relating to General Conditions 1.1(b) and 3.1:

    "This Contract shall be construed in accordance with the law of the Republic of Kazakhstan."

12. General Conditions 1.1(b) and 3.1 and the Special Condition relating thereto all address the applicable substantive law of the Contract. The position as regards dispute resolution is a separate matter which requires separate consideration. The applicable law governing an arbitration ("the arbitral law") may be, and not infrequently is, different from that governing substantive issues arising under the contract in which the arbitration agreement appears. That is expressly recognized in Article 7.2 of the Rules of Arbitration and Mediation at the IAC ("the IAC Rules"), set out in paragraph 34 below, as well as being a general international arbitral principle.

13. The present Contract addresses dispute resolution in Clause 49 and Special Condition 49. In a translation of the Contract put before the Court by both parties, these provisions read:

    a. Clause 49:

    "49. Dispute Resolution
    Any dispute between the Parties arising under or related to this Contract that cannot be settled amicably may be referred to by either Party to the

adjudication/arbitration in accordance with the provisions specified in the SCC."

b. Special Conditions of Contract:

"49. Disputes shall be settled by arbitration in accordance with the following provisions:
Any dispute, controversy, difference or requirement, whether contractual or non-contractual, arising from or in connection with this contract, including regarding the existence, validity, interpretation, performance, breach or termination of this contract is transferred [to be] finally resolved by arbitration administered by the [IAC] in accordance with the rules of arbitration and media [sic] and the IAC [sic] which are included in this disclaimer [sic].

1 Number of arbitrators
The number of arbitrators must be three …..

2. Place of arbitration and applicable law
The place of arbitration in the Republic of Kazakhstan. Applicable law is the law of arbitration.

3.Language of arbitration
The language of arbitration is Russian."

14. Something has evidently gone wrong in the translation of the first main paragraph. The word "media" should obviously read "mediation". But the next words "and the IAC" do not make sense in their context, and the final word "disclaimer" must be an incorrect translation. Versions of Special Condition 49 in the translations of Success's original Application and of the Final Award, which are also before the Court, assist to understand the text. The translation in the Final Award refers to disputes being resolved by

"arbitration administered by the IAC in accordance with the IAC Arbitration and Mediation Rules in force on the date on which the Request for arbitration is filed with the Registrar of the IAC, which Rules are deemed to be incorporated into this clause".

Paragraph 2 is also translated in the Final Award as follows:

"The seat of the arbitration will be the Republic of Kazakhstan. The law governing the arbitration proceedings shall be the law of the seat".

The matching statement in the Ministry's original Application to set aside is translated as follows:

> "The place of arbitration is determined as the Republic of Kazakhstan and the applicable law is the law of the arbitrage place".

Analysis of the Ministry's primary case

15. The Ministry's case is that this arbitration provision is invalid because it was concluded in violation of the law of Kazakhstan without obtaining the consent of the state body responsible for state property, namely the State Property and Privatization Committee of the Ministry of Finance of the Republic of Kazakhstan (the "CSPP"). At a late stage during the arbitration proceedings, the Ministry made to the arbitration tribunal a submission dated 21 September 2021, raising the question whether the arbitration agreement was valid and referring in this context to Article 8(10) of the Arbitration Law of the Republic of Kazakhstan. At that stage, this could only have been a question about or an objection to jurisdiction. At the present stage, its relevance is, under Article 47(1)(a)(i) of the AIFC Arbitration Regulations (see paragraph 10 above), as a potential reason for refusal of recognition and enforcement, on the ground that

    > "the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication, under the law of the State or jurisdiction where the award was made".

    The application of Article 47(1)(a)(i) depends, however, expressly on the application of the Arbitration Law of the Republic of Kazakhstan to the arbitration agreement, either as the law to which the parties subjected their arbitration agreement or (in the absence of any indication) as the law of the State or jurisdiction where the award was made.

16. Article 8(10) of the Arbitration Law of Kazakhstan, on which the Ministry relied before the arbitration tribunal, expressly precludes state bodies from engaging in arbitration without the CSPP's consent and Article 9(4) requires such consent to be recorded in the arbitration agreement. It is not suggested that any such consent was in the present case obtained by the Ministry or recorded. It also appears to be common ground that, if such consent was required in this case, the effect of failure to obtain it would, under the Civil Code of Kazakhstan, be to invalidate the arbitration agreement

contained in the Contract. The Ministry relies in this connection on the judgment of the Judicial Collegium for Civil Cases of the Court of Nur-Sultan in *Apex Consult LLP v. The Ministry* (already mentioned in paragraphs 7 and 8 above).

17. In *Apex Consult LLP v. The Ministry*, the Judicial Collegium was concerned with a consultancy contract between Apex Consult LLP and the Ministry, but there is the important difference from the present case that, according to the judgment, the agreement to arbitrate any dispute that could not be settled amicably was, in *Apex Consult LLP v The Ministry*, for such arbitration to take place

   "in the Russian Federation, unless the parties have agreed otherwise".

   A dispute having arisen which was not settled amicably, the claimant, Apex Consult LLP, requested the Ministry "to consider the possibility of amending the contract to consider controversial issues by the Specialized Interdistrict Economic Court of the city of Nur-Sultan" or, if this was not possible, "to consider the possibility of resolving the dispute in the [IAC] at the AIFC or in the Atameken Arbitration Center in the city of Nur-Sultan". There was therefore no contractual agreement to submit to IAC arbitration, merely a wish or request by Apex Consult LLP to vary the contract to provide for this or some form of arbitration other than that actually provided by the contract. The Ministry on the other hand submitted that the arbitration agreement was invalid for failure to comply with Article 8(10) of the Arbitration Law of the Republic of Kazakhstan, and that the contract had expired, the obligations under it had terminated and it was not possible to amend it.

18. The Judicial Collegium, applying the ordinary law of the Republic of Kazakhstan, accepted the submission that the arbitration agreement was invalid for failure to comply with Article 8(10) - though it went on to observe, first, that it was the Ministry's duty to comply with Article 8(10), and, second, that, in circumstances where, as a result of the Ministry's failure to comply with its duty, "the parties are deprived of the opportunity to implement the arbitration agreement, the court [of first instance] reasonably concluded that the stated claim was legitimate and should be satisfied". It appears from this last statement that the first instance court had, in the absence of a valid arbitration clause, decided the substantive claim itself in favour of

Apex Consult LLP, and that the Judicial Collegium upheld this decision. For present purposes, what matters is that the judgment in *Apex Consult LLP v The Minister* confirms the invalidity, under the ordinary civil law of the Republic of Kazakhstan, of an arbitration agreement which should, but does not, comply with Article 8(10) of the Arbitration Act of the Republic of Kazakhstan. But the judgment is and can only be only relevant if Article 8(10) of the Arbitration Act of the Republic of Kazakhstan applies to whatever arbitration agreement is under consideration (i.e. here the arbitration agreement in the Contract).

19. The arbitral tribunal on 28 September 2021 rejected the Ministry's submission that the present arbitration agreement was invalid. It rejected it on the ground that Article 8(10) did not apply to the present arbitration agreement. It referred, in support of this ground, to Regulation 7 of the AIFC Arbitration Regulations adopted by Resolution of the AIFC Management Council dated 5 December 2017 made under Article 14 of the Constitutional Statute of the Republic of Kazakhstan on the AIFC No. 438-V of 7 December 2015. Regulation 7 provides:

> "**Exemption from legislation**
> The requirements of the Arbitration Law of the Republic of Kazakhstan do not apply to arbitrations conducted under these Regulations."

20. In the light of Special Condition 49, set out in paragraphs 13-14 above, the present arbitration was an arbitration conducted under the AIFC Arbitration Regulations. Regulation 7 is, on the face of it and as the arbitral tribunal thought, the end of the matter. Regulation 7 is binding law in the AIFC. It provides, without qualification, that an arbitration conducted under the AIFC Arbitration Regulations is not subject to the requirements of the Arbitration Law of the Republic of Kazakhstan. That is a provision of the law of the AIFC to which the AIFC Court must give effect, just as the arbitration tribunal did in response to the Ministry's submission of 21 September 2021.

21. Both in its submission to the arbitration tribunal dated 21 September 2021 and in its present Application before the Court, the Ministry has, however, relied on other provisions, particularly Article 18 of the IAC Arbitration and Mediation Rules 2018 and paragraph 2 of Article 49 of the Contract, as supporting its position.

22. Article 18 provides as follows:

> "Article 18 Applicable Law
> 18.1 The Tribunal shall decide the merits of the dispute on the basis of the law in the arbitration agreement. In the absence of such agreement, the Tribunal shall apply the law that it considers most appropriate with regard to the circumstances of the case and the overriding objective.
> 18.2 Any designation by the parties of the law of a given state shall be deemed to refer to the substantive law of that state, not to its conflict of laws rules. "

23. The Ministry relies on Article 18, so the Court understands, as indicating what law applies to determine whether the arbitration agreement was valid, and on paragraph 2 of Special Condition 49 as indicating that the relevant law is the law (and in particular the Arbitration Law) of the Republic of Kazakhstan. The Court does not, however, accept that Article 18 has any relevance to the question whether the Arbitration Law of the Republic of Kazakhstan applies to the present arbitration. That is a question to be decided by the law governing the arbitration, the arbitral law. Article 18 is not addressing the arbitral law. It is addressing the law governing the merits of the substantive dispute, that is here the law governing the dispute about the unpaid debt and penalty which was referred to and decided by the IAC arbitration tribunal. Although Article 18.1 speaks of the merits of the dispute being decided "on the basis of the law in the arbitration agreement", this must mean the law governing the Contract identified by the provisions set out in paragraph 11 above. Article 18 is irrelevant to the issue regarding the arbitral law, which is before the Court.

24. Paragraph 2 of Special Condition 49 of the Contract is, in contrast, concerned with the applicable arbitral law. That is so, whichever translation set out in paragraphs 13-14 above is used. Regulation 30(1) of the AIFC Arbitration Regulations expressly provides that "The parties are free to agree on the seat of the arbitration". Paragraph 2 contains the parties' agreement on the place or seat of arbitration and on the law which is to govern the arbitral proceedings (the "arbitral law").

25. The Court understands the Ministry's case to be that paragraph 2 constitutes a choice by the parties of the law, and in particular the Arbitration Law, of the Republic of Kazakhstan as the applicable arbitral law. The Court does not accept that submission.

Paragraph 2 must be read with the first main paragraph of Special Condition 49, which provides that the parties are submitting to IAC arbitration under the IAC Rules. The IAC is part of the AIFC, which is itself both an area and a jurisdiction within the Republic of Kazakhstan. Under Article 1 of the Constitutional Statute NO 438-V ZRK of 7 December 2017, the AIFC

> "means the area within the City of [Nur-Sultan] determined by the President of the Republic of Kazakhstan as the area where the special legal regime in the financial sphere established by this Constitutional Stature applies."

Under Article 9 of the Constitutional Statute, the Court and IAC are AIFC Bodies and

> "are independent in their exercise of the powers given them by this Constitutional Statute and AIFC Acts".

Under Article 4, the law of the AIFC consists of the Constitutional Statute and AIFC Acts (of which the AIFC Arbitration Regulations are one) not inconsistent with it, while the law of the Republic of Kazakhstan only

> "applies in part to matters not governed by this Constitutional Stature and AIFC Acts".

26. Reading Special Condition 49 as a whole, what the parties were agreeing was to resolve any disputes by IAC arbitration within the jurisdiction of the AIFC which is within the Republic of Kazakhstan and to do this subject to the arbitral law of the IAC which is found in the AIFC Arbitration Regulations and the IAC Rules. It makes no real sense to suppose that, by paragraph 2, the parties intended to select a seat outside the area and jurisdiction of the AIFC or an arbitral law different from or in addition to that of the AIFC and IAC, for which they elected in the first, main part of Special Condition 49. The arbitral law is therefore for all purposes that of the AIFC and IAC. It is not in any respect the general arbitral law, or the Arbitration Law, of the Republic of Kazakhstan.

27. The AIFC Arbitration Regulations therefore apply, and Regulation 7 positively provides or confirms that the requirements of the Arbitration Law of the Republic of Kazakhstan have no application to the present IAC arbitration. It also follows that, in

the terms of Article 47(1)(a)(i) of the Arbitration Regulations, the arbitration agreement was valid under the law to which the parties submitted it, that is the law of the AIFC (and, for good measure, that it was also valid under the law of the jurisdiction, again the law of the AIFC, where the Final Award was made).

28. In conclusion, the arbitration tribunal was correct, for the reasons it gave, to dismiss the Ministry's question regarding the validity of the arbitration agreement as put in the submission dated 21 September 2021. In so far as the Ministry now submits before the Court that the arbitration agreement is invalid by virtue of Article 8(10) of the Arbitration Law of the Republic of Kazakhstan, the Court holds, for the reasons given, that Article 8(10) has no application and rejects the Ministry's submission.

The Ministry's alternative case

29. In the Ministry's Application before the AIFC Court, the Court understands the Ministry to advance an alternative or additional case to that made in its written submission of 21 September 2021. The Ministry's submissions before the Court start once again with paragraph 2 of Special Condition 49 and Article 18 of the AIFC Arbitration Rules 2018, to which the observations already made above continue to apply. But the Ministry does not in its Application focus at all on Article 8(10) of the Arbitration Law of the Republic of Kazakhstan. Instead, the Ministry submits, as the Court understands it, that the Law on State Property applies *directly* to invalidate the arbitration agreement. The way the Ministry puts this in its Application is as follows:

    a. First, the Ministry operates with "funds allocated from the budget of the Republic of Kazakhstan".
    b. Second, "the [C]ontract was concluded in a large amount of funds, …, 780,303,932 tenge …".
    c. Third, "Therefore, the Ministry of Health …. had to agree on the conclusion of conclusion of an arbitration agreement with the authorized body for state property management (CSPP) ….".

If this alternative case has any force, its logic is, self-evidently, that the whole Contract, rather than the arbitration agreement, is invalid as being contrary to the Law on State Property.

30. Success in its Objection in answer to the Ministry's case before the Court stated (in translation) that:

> "Although the Respondent refers to the Law of the Republic of Kazakhstan "On State Property", however the parties did not violate it, since there is no obligation on the state body to obtain permission to conclude agreements (contracts)."

The Ministry in its Reply dated 15 December 2021 merely reiterated its position that consent of the authorized body was mandatory under the Law on State Property.

31. In view of the alternative way in which the Ministry's case now appeared to be being advanced, the Court issued the second direction contained in the Directions Order referred to in paragraph 4 above. The two questions in relation to which the Court invited the parties to identify and produce copies of any relevant decisions of the Courts of Kazakhstan were identified as follows:

    a. Any decision of the Courts of Kazakhstan on the question whether the Law on State Property does or does not apply to, and require authorization by the appropriate state body (here the CSPP) of, an ordinary commercial contract (such as the consultancy Contract in issue in this case) made by a state body using state funds for its performance.
    b. Any decision of the Courts of Kazakhstan on the question whether, apart from and without the enactment of Article 8(10) of the Arbitration Law of the Republic of Kazakhstan, the Law on State Property does or does not have any direct application to an arbitration agreement contained in a contract made by a state body using state funds for its performance.

32. As indicated in paragraphs 7 and 8 above, the Ministry by its response dated 30 December 2021 and Success by its response dated 10 January 2022 both informed that Court that no decision had been found on either of the two questions which the Court had raised. In addition to the text set out in paragraph 8 above, Success, in paragraph 1 of its email response, simply reiterated that the Law on State Property contains "no direct rule" restricting the rights of state bodies under an arbitration clause. In none of its submissions to the Court, has the Ministry identified any provision in the Law on State Property which does stipulate that authorization is required for contracts rather than property transactions.

33. The Law on State Property is, no doubt, part of the general substantive law of the Republic of Kazakhstan, and the Court is content to proceed on the basis that, under the provisions of the Contract set out in paragraph 11 above, that law governs any substantive issues arising under the Contract. But, on examination, The Law on State Property appears to the Court to be concerned with the use, disposition and management of State Property, including funds, and not with contracts. Article 14(11) of the Law provides for an authorized body on state property to give consent to a state enterprise for alienation or other disposal of its state property (other than by way of sale of manufactured goods), and for establishment of branches and representative offices as well as for the transfer and write-off of debtor indebtedness. There is nothing in the Law to which the Court's attention has been drawn or which the Court can identify, to cover contracts generally or this particular Contract. The regulation of contracts involving the use of state funds would, if envisaged, have been expected to require specific provisions. Nothing of this sort appears to exist or has been shown. The Court would not therefore be minded to accept, on the basis of the materials and submissions before it, that the Law on State Property applies to the making of the Contract.

34. But it is not necessary to go that far or to base the Court's present decision on the Applications before it on the conclusion that the Law on State Property does not apply to contracts or to this Contract. That is not the critical question. The critical question is whether the Law on State Property applies to or has anything to do with arbitration agreements or the present arbitration agreement. Even if a contract containing provisions involving the expenditure of state funds is itself invalid, an arbitration agreement within it is a dispute resolution mechanism which does not as such contain any such provisions (although it may of course give rise to an award which does), and which, in any event, operates an independent and severable provision subject to its own arbitral law. Such an arbitration agreement is well capable of remaining valid, even if the contract containing is held invalid. Article 7 of the IAC Arbitration Rules covers this situation very clearly, stating:

> "7.2 An arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal that the contract is null and void shall not necessarily entail the invalidity of the arbitration agreement, and the Tribunal shall not cease to have jurisdiction

by reason of any allegation that the contract is non-existent or null and void".

35. Furthermore, a conclusion that the Law on State Property has no application to arbitration agreements which are included in contracts which happen to involve the expenditure of state funds is, in the Court's view, strongly supported by the enactment and existence of Article 8(10) of the Arbitration Law of the Republic of Kazakhstan itself. Article 8(10) was and is only necessary at all on the basis that either contracts generally *or at very least arbitration agreements* in contracts were and are outside the scope of the Law on State Property.

36. Finally, if arbitration agreements under the AIFC Arbitration Regulations were and are within the direct scope of the Law on State Property independently of Article 8(10) of the Arbitration Law of the Republic of Kazakhstan, that would circumvent and undermine Regulation 7 of the AIFC Arbitration Regulations, in a way which cannot have been envisaged. An obvious purpose of Regulation 7 was to clarify that there was no need to seek the consent of the state body responsible for state property, so precluding possible arguments that Article 8(10) might otherwise have required such consent. Yet the Ministry's alternative case would, if correct, mean that the Law on State Property applied directly to require the same consent, thereby rendering Regulation 7 ineffective for that purpose.

37. Even without the point made in paragraph 36, the Court considers that there is, for the reasons given in paragraphs 33 to 35, no merit in a submission that the Law on State Property has, independently of Article 8(10) of the Arbitration Law of the Republic of Kazakhstan, the direct effect of invalidating an arbitration agreement under the AIFC Regulations such as that found in the Contract. Paragraph 36 underlines that conclusion.

38. This is sufficient to determine that the Ministry's Application, which seeks cancellation or setting aside of the Final Award and refusal of its recognition and enforcement, fails; and also that no reason has been shown for refusing to recognize and enforce the Award made in Success's favour.

Supplementary observation

39. The Court would add one supplementary observation, for completeness only, on the

Ministry's alternative case. The logic of the Ministry's alternative case is, as stated in paragraph 29 above, that the Contract, rather than the arbitration agreement, is invalid. That is a case which the Ministry could and should have raised before the arbitration tribunal. For the reasons already given, it is not a case which could, in the Court's view, affect the validity of the IAC arbitration agreement in the Contract or the jurisdiction of the arbitration tribunal. The IAC arbitration agreement operates independently of the rest of the Contract, and the arbitration tribunal was the forum with jurisdiction to determine the validity of the Contract. No challenge was made before the arbitration tribunal to the validity of the Contract, and, having regard to the limited grounds on which recognition and enforcement can be refused under the AIFC Arbitration Regulations (see paragraph 10 above), none can be or is raised now.

Conclusion on the Ministry's further or alternative case

40. In summary, the Court concludes, there is nothing in the Ministry's alternative case to affect the validity of the arbitration agreement or therefore to affect the tribunal's jurisdiction or the validity of its Final Award, and the Ministry's Application also fails in so far as it is put in this way.

Order

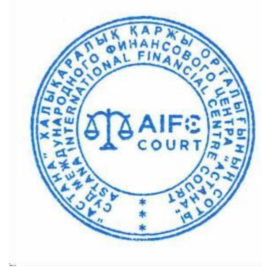
41. It follows from the above that:

    a. The Ministry of Health's Application for setting aside and refusal of recognition or execution of the Award fails and is dismissed.

    b. No other basis being suggested for refusing the recognition and execution which Success seeks, Success K LLP's Application for recognition and execution of the Award dated 4 October 2021 made against the Ministry of Health in IAC Arbitration No 2/2021 is granted.

    c. Subject to any special circumstances to which either party may wish to draw the Court's attention, within the next 7 working days, the Ministry of Health shall pay Success K LLPs' costs of its own and Success K LLP's Applications, to be assessed by the Court unless agreed.

By Order of the Court,



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