IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

13 October 2023

CASE No: AIFC-C/CFI/2023/0005

CASE No: AIFC-C/CFI/2023/0007

NATIONAL COMPANY "QAZAVTOJOL" JSC

Claimant

v.

"TODINI & SMS" JOINT VENTURE

Defendant

AND

"TODINI & SMS" JOINT VENTURE

Claimant

v.

NATIONAL COMPANY "QAZAVTOJOL" JSC

Defendant

JUDGMENT

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

JUDGMENT

Introduction

1. The two cases, Nos 5 and 7 of 2023, arise from the same subject-matter and are effectively mirror images of each other. Their procedural history appears from the Court's Directions dated 26 May 2023 and Order 12 July 2023. The Court thereby determined that the two cases be heard together. By its Order the Court also directed that a date be fixed for an oral hearing to decide what the Court identified as the core issue: whether a Dispute Adjudication (or "Resolution") Board ("DAB") decision dated 21 October 2022 was final. The date fixed was 26 September 2023, when the Court heard oral submissions from both parties. This is now the Court's judgment on that issue.

2. By a Contract No. EBRD/CW 02/2016 made on 30 November 2017, JSC National Company QazAvtoJol ("QAJol"), which is the Claimant in Case 5 and Defendant in Case No. 7, engaged Todini & SMS ("Todini"), which is the Claimant in Case No. 7 and the Defendant in Case No 5, as contractors to construct a highway. Todini is, evidently, a joint venture company formed on the initiative of an Italian construction company Todini Costruzioni Generali S.p.A. to contract with QAJol, a Kazakh company.

3. The Contract incorporated, inter alia, the "FIDIC" (the Fédération Internationale des Ingénieurs-Conseils) General Conditions of Contract ("GCC") supplemented by an Appendix, which make provision for circumstances in which a contractor may claim extra payment and/or time for completion. By letter dated 7 June 2022 Todini requested (under Sub-Clause 20.1 of the FIDIC Conditions) the project Engineer's determination in respect of a claim for an extension of time and extra compensation. Pursuant to this request, the Engineer issued a determination dated 1 July 2022 accepting Todini's claim to the extent of a 165 day extension and compensation of 1,033,435,835 tenge. Todini was not satisfied with this determination. Either party was, under the contract provisions, entitled to reopen any Engineer's determination by putting the matter before a Dispute Board ("DB"). Todini evidently communicated its disagreement with the Engineer's determination. The parties engaged in unsuccessful attempts to settle the whole substantive dispute between them. After these failed, the parties by an "Additional Agreement dated …. September 2022" made provision for further review of the substantive dispute by what they described as a "DAB". This Additional Agreement is variously referred to as made on 14 or 15 September 2022. It makes no difference in this case which is correct. The Additional Agreement was clearly conceived at the same time as a tripartite Dispute Settlement Agreement dated 15 September 2022, by which Mr Bilyalov Kambar Rahmetovich was appointed as the DAB. I shall for convenience refer to the Additional Agreement as the Additional Agreement of 14 September 2022, to distinguish it from the tripartite Dispute Settlement Agreement of 15 September 2022.

4. Under the original contract provisions, even a DB decision would not have been final in all circumstances. Provided that a Notice of Dissatisfaction was given within 28 days, then it too could, under Sub-Clauses 20.4 and 20.6 of the GCC, read with a contractually agreed Appendix, have been challenged by commencing an International Chamber of Commerce ("ICC") arbitration seated in Moscow. The present dispute arises, in summary, because the parties did not simply operate or reproduce the original contract provisions, in particular those of the GCC, but included in the Additional Agreement of 14 September 2022 a provision that "Any decisions of the 'DAB' will be final and binding" between the Parties.

5. Todini on 4 October 2022 set out its case on the substantive issue of extra time and payment in a detailed written submission expressed to be made to Mr Bilyalov as the DB pursuant to Sub-Clause 20.4 of the GCC. The DAB's decision, dated 21 October, though it appears only issued to the parties on 28 October 2022, was that QAJol should make an additional payment of 3,680,939,023.36 Tenge and extend Todini's time for completion by 453 days. By letter dated 18 November 2022 QAJol gave Notice of Dissatisfaction with the DAB decision on grounds summarised in the letter, invoking Sub-Clauses 20.4 and 20.6 of the GCC and proposing further efforts at amicable settlement, while indicating its intention to go to arbitration under Sub-Clause 20.6, if those efforts failed.

6. By a yet further Additional Agreement No. 2 dated 8 December 2022, the parties identified the issue which had, by that date, clearly arisen between them as to whether the DAB's decision was final and binding. They amended the contract, in terms which have led to Cases Nos. 5 and 7 being brought in the AIFC Court; and they agreed that QAJol would, pending the Court's decision on the issue of finality, make the payment and grant the extension ordered by the DAB. The terms of this Additional Agreement also provide for the position according to whether the Court's decision is in favour of QAJol or Todini. QAJol submits that the Additional Agreement of 8 December 2022 support its case that the DAB decision is not final and binding, and that its terms permit reopening before the AIFC Court of the substantive issue whether any and what extra time and payment is due.

7. The above summarises the basis on which Cases Nos 5 and 7 have been begun in the AIFC Court. In Case No 5 QAJol seeks to reopen the decision of the DAB before the AIFC Court. In Case No 7, Todini maintains that the parties, by the Additional Agreement of 14 September 2022, agreed that the DAB's decision would be final and binding, and that that is the end of the matter.

8. For completeness, the Court records two further points. First, Todini also claimed in Case No 7 an order for payment of the additional 3,680,939,023.36 Tenge into an escrow account and an extension of the time for completion by 453 days, in accordance with the further decision of the DAB. On 15 June 2023,

QAJol accepted that it had only made partial payment of the sum ordered by the DAB, due to a problem relating to Todini's rating with Bank of New York Mellon, but that an escrow account was being opened into which the balance due would be paid. By its Order dated 12 July 2023, the Court held that, subject to considering any submissions to the contrary (to be received within seven days of the date of such Order), Todini was entitled to an order for payment into escrow of the balance then unpaid (that is, 2,942,770,569.13 Tenge). No such contrary submissions having been received, the Court's Order for payment into escrow of 2,942,770,569.13 Tenge took effect, and was the Court understands complied with, accordingly. Second, Todini in an application dated 10 June 2023 sought to expand its claim in Case No 7 to include further claims for payment in US dollars and interest. By Order dated 12 July 2023, the Court expressed the view that, subject to considering any further submissions, these expanded claims fell outside the scope of the Case No 7, and were thus inadmissible. No reason having been shown for any contrary view, the expanded claims do not therefore arise or call for further consideration. The issue now for determination is simply whether the DAB decision is final and binding for all purposes or remains susceptible to be being reopened by QAJol.

The Contract

9. In order to determine the issue whether the DAB decision is final and binding, it is necessary to consider the Contract and subsequent Agreements in greater detail. The Contract makes extensive provision for circumstances in which Todini might claim an extension of time for completion and/or additional payment. The "FIDIC" GCC and Appendix provided that:

    (i) Todini was entitled in the first instance, to request the construction project's Engineer to determine and certify whether or not any such claim was good. (Sub-Clause 20.1).

    (ii) If either party disputed an Engineer's certificate or determination, it was entitled to refer such dispute to a "Dispute Board" ("DB") consisting of "one sole member" appointed (if not agreed) by the President of FIDIC (Sub-Clause 20.2, read with the Appendix).

    (iii) The DB's decision was to be

    > "binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below". (Sub-Clause 20.4).

    (iv) If either party was dissatisfied with the DB's decision it was entitled within 28 days to give a Notice of Dissatisfaction;

    > "If the DB has given its decision as to a matter in dispute to both Parties, and no Notice of Dissatisfaction has been given by either Party within 28 days after it received the DB's

decision, then the decision shall become final and binding upon both Parties" (Sub-Clause 20.4).

(v) "Where a Notice of Dissatisfaction has been given under Sub-Clause 20.4 above, both parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both parties agree otherwise, the Party giving a Notice of Dissatisfaction in accordance with Sub-Clause 20.4 above should move to commence arbitration after the fifty-sixth day from the day on which a Notice of Dissatisfaction was given, even if no attempt at an amicable settlement has been made" (Sub-Clause 20.5).

(vi) "Any dispute between the Parties arising out of or in connection with the Contract not settled amicably in accordance with Sub-Clause 20.5 above and in respect of which the DB's decision (if any) has not become final and binding shall be finally settled by arbitration. (Sub-Clause 20.6).

(vii) Sub-Clause 20.6 went on to provide for various ways in which any such arbitration could be conducted, including, in the case of a contract with foreign contractors (as this was evidently treated as being) "proceedings administered by the International Chamber of Commerce (ICC) and conducted under the ICC Rules of Arbitration". (Sub-Clause 20.6(a)). The Appendix selected the mode by a provision stating:

> "Rules of Arbitration 20.6(a) Institution is International Chamber of Commerce, Moscow, and the Arbitration Rules will be that of UNCITRAL".

The Contract as amended

10. Sub-Clause 20.2 read with the Appendix of the FIDIC GCC provided that the parties should, if possible, agree on a single suitably qualified person to act as the DB and should further reach an agreement with him for remuneration (of which each party was to pay one-half). After their unsuccessful settlement discussions, QAJol accordingly wrote to Todini on 12 September 2022 as follows:

> "Taking into account the completion of the construction period under the Contract (July 30, 2022), the Contractor's claims, due to the lack of agreement between the parties on the further implementation of the project, guided by clause 20.2 of the General Conditions of the Contract, we send for signing a draft Agreement on Dispute Adjudication Board, and also propose the candidacy of Bilyalov Kambar Rahmetovich as a Member of the Dispute Adjudication Board".

11. The letter enclosed three documents:

    a. a letter of the ALE "Kazakhstan National Association of Professional Engineers and Consultants" putting forward three potential Board members, one of whom was Mr Bilyalov;
    b. a draft tripartite agreement (in English and Russian) for Mr Bilyalov's appointment as a sole Board member, which was the progenitor of the tripartite Dispute Settlement Agreement dated 15 September 2022; and
    c. a draft Additional Agreement (in English and Russian) which became the Additional Agreement of 14 September 2022.

12. The draft Additional Agreement referred to at c) read as follows:

> "Considering that the Conditions of Contract for Construction – For Building and Engineering Works Designed by the Employer – is the FIDIC Multilateral Development Bank Harmonised Edition 2010
> The Parties shall appoint a Dispute Adjudication Board (hereinafter abbreviated as 'DAB' in accordance with Sub-Clause 20.2 of the General and Particular Conditions of the Contract).
> The DAB shall be comprised of one sole member in accordance with Sub-Clause 20.2 of the Particular Conditions of the Contract.
> Considering that the Employer and the Contractor have concluded the Contract EBRD/CW 02/2016 …. (hereinafter – the Contract) and wish to jointly appoint a Member of the Dispute Resolution Board to act as a single judge, also referred to as the Dispute Adjudication Board ….
> Considering also the letter of the ALE "Kazakhstan National Association of Professional Engineers and Consultants" dated September 6, 2022,
> The parties agree as follows:
>
> "**1. Appointment of the sole member "DAB" for the Contract**
> Guided by clause 20.2 of the General Conditions of the Contract, the Parties …. agreed to appoint Mr Bilyalov Kambar Rakhmetovich, …. as the sole participant of the DAB under the Contract.
> **2. Other provisions**
> 2.1 Any decisions of the DAB will be final and binding between the parties.
> 2.2 This Additional Agreement shall enter into full force from the date of signing of the Additional Agreement …"

13. Todini returned the draft with proposed amendments. These would, inter alia, have deletion of the word "Adjudication" and "Resolution" in the phrases "Dispute Adjudication Board" and "Dispute Resolution Board"; insertion of an additional rider; and replacement of the reference to appointing a single "judge" with a reference to appointing a single "arbitrator". The recitals would thus have read:

> "Considering that the Conditions of Contract for Construction – For Building and Engineering Works Designed by the Employer – is the FIDIC Multilateral Development Bank Harmonised Edition 2010
> The Parties shall appoint a Dispute ~~Adjudication~~ Board (hereinafter abbreviated as 'D~~A~~B' in accordance with Sub-Clause 20.2 of the General and Particular Conditions of the Contract.
> Disputes shall be decided by a 'DB' in accordance with Sub-Clause 20.4 [Obtaining Dispute Board's Decision] of the General Conditions of Contract
> Considering that the Employer and the Contractor have concluded the Contract EBRD/CW 02/2016 … (hereinafter referred to as – the Contract) and wish to jointly appoint a Member of the Dispute ~~Resolution~~ Board to act as a single arbitrator~~judge~~, also referred to as the Dispute ~~Adjudication~~ Board ….."

14. In the event, and for whatever reason, the Additional Agreement of 14 September 2022 was signed by the parties in the terms proposed by QAJol, not those of Todini's proposed redraft.

15. As to draft tripartite agreement for appointment of Mr Bilyalov, referred to at b) above, this stated

> "The Customer, the Contractor and DB have entered into this Dispute Settlement Agreement (the "Agreement") and have agreed as follows:
>
> 1. The terms and conditions of this Agreement include the 'General Terms and Conditions of the Dispute Settlement Agreement' which are attached to the General Terms and Conditions of the Contract, agreed edition by MDB, June 2010, and the following provisions. In these

provisions, which include amendments to the General Terms and Conditions of the Dispute Board Agreement, the words and phrases have the same meanings assigned to them in the General Terms and Conditions of the Dispute Board Agreement.

2. The following details of amendments to the general terms and conditions of the Agreement:
> Appendix to the Agreement 'General Terms and Conditions of the Agreement'
> Appendices to the Agreement 'Procedural Rules'"

16. The draft went on to provide for Mr Bilyalov's fees, and then:

> "4. Subject to these fees and other payments to be made by the Customer and the Contractor in accordance with Clause 6 of the 'General Terms and Conditions of the Agreement', DB agrees to act as the Dispute Board (as arbitrator) under this Agreement".

17. An amended draft, by inference put forward by Todini, proposed various amendments, shown as follows:

> "1. The Customer, the Contractor and ~~DB~~ Board Member have entered into this Dispute Settlement Agreement (the "Agreement") and have agreed as follows:
> The terms and conditions of this Agreement include the 'General Terms and Conditions of the Dispute Settlement Agreement' which are attached to the General Terms and Conditions of the 'Terms and Conditions of the Construction' Contract, of the Multinational Development Bank, Harmonised Edition June 2010, published by the International Federation of Consulting Engineers ('FIDIC') and subsequent terms and conditions, ~~agreed edition by MDB, June 2010, and the following provisions~~. In these ~~provisions~~ terms and conditions, which include amendments to the General Terms and Conditions of the Dispute ~~Board~~ Settlement Agreement, the words and phrases have the same meanings assigned to them in the General Terms and Conditions of the Dispute ~~Board~~ Settlement Agreement.
> 2. The following ~~details of~~ amendments to the ~~g~~General ~~t~~Terms and ~~c~~Conditions of the Agreement:
>
> > 2.1 The Contractor shall submit a Dispute Appeal to the Board for resolution within … 21 days from the date of signing of this Agreement;
> >
> > 2.2 The Customer shall submit its response to the Contractor's Dispute Appeal to the Board within … 28 days from the date of signing of this Agreement;
> >
> > 2.3 The Board shall render it is Decision on the dispute within … 45 calendar days from the date of signing of this Agreement
> >
> > ~~> Appendix to the Agreement 'General Terms and Conditions of the Agreement'~~
> > ~~> Appendices to the Agreement 'Procedural Rules'"~~

18. In the event, the appointment of Mr Bilyalov was agreed under and in the terms of the amended draft dated 15 September 2022, albeit only in the Russian language version.

19. Following the issue of its decision dated 21 October 2022 by the DAB in the person of Mr Bilyalov, the present issue arose whether or not that decision was the end of the matter and precluded QAJol from contending in any further forum that no or a lesser payment and extension to those found by Mr Bilyalov was appropriate.

20. In these circumstances, the parties made a yet further agreement. By the Contract Amendment No 2 dated 8 December 2022, referred to in paragraph 6 above, they recited the background consisting of Todini's claim to extra time and payment, the Engineer's determination of 1 July 2022 and the Dispute Board decision dated 21 October 2022, and continued:

> "**Preamble**
> ….
> The Employer disagrees with the Engineer's Determination and the DB Decision. In this regard, pursuant to the provisions of the Contract the Employer shall refer this matter to the Court of the Astana International Financial Centre (AIFC) in Astana in order to resolve the dispute in relation to the amount of reimbursement and an extension of Time for Completion.
> However, taking into account the protracted terms for resolving this issue and in order to continue and complete the Works the Employer will pay the reimbursement in the amount of 3,680,939,023.36 Tenge and extend the time for completion by 453 days pursuant to the DB Decision.
> The Contractor, in accordance with the Dispute Board Agreement signed on the 15 September 2022, considers the Dispute Board decision Final and Binding.
> The Employer considers the Dispute Board decision, binding, under Sub-Clause 20.4 of the GCC, but not final.
>
> **In view of the foregoing, Party decided:**
>
> 1. Amend the Contract as follows.
>
> 1.1 Amend Sub-Clause 20.6(a) (Rules of Arbitration) of the Appendix to Tender Part A, Particular Conditions, Contract Data instead of 'International Chamber of Commerce' to 'Astana International Financial Centre' (hereinafter referred to as the AIFC Court).
>
> 2. The Parties agreed that, the Employer will make a payment in the amount of 3,680,939,023.36 tenge to the special escrow account of the 'SP' 'SineMidasStroy' LLP' and extend the Time for Completion for 453 days from the date of this Amendment No 2 pursuant to Sub-Clause 2.1 of Amendment dated '…..' September, and further to the DB Decision, which is, in the Employer's opinion, binding but not final under Sub-Clause 20.4 of the GCC. However the Employer shall refer to the court this matter.
>   2.1 In this case, if the decision is in favour of the Employer, the Contractor undertakes to return fully the amount of the reimbursement within 84 days after the Court's official decision.
>   2.2 In this case, if the decision is in favour of the Contractor, the Employer shall not claim from the Contractor to refund the amounts paid and apply Delay Damages to the Contractor.
> 3. This Contract Amendment No. 2 is an integral part of the Contract and shall come into force from the date of its signature and shall be valid until the Parties fully fulfil their obligations under the Contract.
> 4. The Parties agree that the remaining conditions of the Contract not affected by this Addendum shall remain unchanged".

The Law

21. Under Appendix A to Tender / Part A of Particular Conditions – Contract Data in the Contract, Sub-Clause 1.4 provides for the Governing Law to be the Law of the Republic of Kazakhstan and the ruling language Russian.

22. The Contract falls therefore to be construed in accordance with the principles of construction applicable under the Kazakh Civil Code. These include the following in Chapter 22:

> "Article 380. Freedom of Contract
>
> 1. Citizens and legal entities shall be free in concluding agreements. …..
>
> 2. Parties may conclude agreements both as provided for and as not provided for by legislation.
>
> ….
>
> Article 382. Defining Provisions of an Agreement
>
> 1. Provisions of an agreement shall be defined at the discretion of the parties, except for the cases where the contents of a certain provision are prescribed by legislation.
>
> ……
>
> Article 392. Interpretation of an Agreement
>
> 1. When interpreting provisions of an agreement, the court shall take into account the literal meaning of the words and expressions contained in it. The literal meaning of a provision of an agreement, where unclear, shall be established by way of comparing that with other conditions and the sense of the agreement as a whole.
>
> 2. Where the rules contained in paragraph 1 of this Article do not allow to understand the contents of an agreement, the actual common will of the parties must be identified taking into account the objective of the agreement. In that respect, any relevant circumstances, including the negotiations preceding the agreement, and a letter exchange, the practice prevailing in the mutual relations of the parties, tradition of business practice, the subsequent conduct of the parties, shall be taken into account."

Analysis

23. The Court has to address the core issue of construction now before applying the principles of law stated in these Articles of the Civil Code. The primary focus under the principle in Article 392.1 of the Civil Code is on the literal meaning of any provision being interpreted, but where this is unclear then the relevant provision is be compared with and understood in the light of all the contractual conditions "and the sense of the agreement as a whole". In the case of a written agreement contained in a document signed by both parties, that points to a relatively confined exercise. Where the written agreement is to implement, supplement or vary some prior agreement, then it must, no doubt, also be admissible, at least in any case of doubt, to compare the later agreement with and read it in the context of the earlier agreement. Bearing in mind that the Additional Agreement of 14 September 2022 was negotiated and made effectively simultaneously with the tripartite Dispute Settlement Agreement dated 15 September 2022, for a common purpose, it may also be legitimate to have regard to the wording of that Agreement. But that is not critical in this case.

24. How far it may in all circumstances be appropriate to read Article 392 as containing two entirely distinct stages in any exercise of contractual construction is not a matter which I need consider in this case. In English law, it is a common-place that construction is an "iterative" process, in the course of which it may be appear that the "objective of the agreement" and surrounding circumstances such as those mentioned in Article 392.2 influence what would or might otherwise be understood as the literal meaning of the words used. Whatever may be the position in this regard under Kazakh law is immaterial to the outcome of the present case.

25. The starting point, both chronologically and logically, is the Additional Agreement of 14 September 2022. Having considered this, it will thereafter be appropriate to consider QAJol's reliance on the Contract Amendment No. 2 dated 8 December 2022 as supporting its case that it is entitled now to have the substantive merits considered by the AIFC Court.

26. In the Court's view, the literal meaning of the words and expressions contained in the Additional Agreement of 14 September 2022 is clear and is confirmed by the sense of the agreement as a whole. It is to make the DAB or DB a final decision-maker and to foreclose the right which QAJol would otherwise have had, under Sub-Clauses 20.4 and 20.6 of the FIDIC GCC, of taking to another forum (more particularly, ICC arbitration in Moscow) its dissatisfaction with the DAB's decision.

27. First and foremost, Clause 2.1 in the Additional Agreement of 14 September 2022, provides clearly and on its face unambiguously that "Any decisions of the 'DAB' will be final and binding between the Parties". Further, that wording relates closely to the provisions of Sub-Clauses 20.4 and 20.6 of the FIDIC GCC, which are at pains to make clear whether and when a Dispute Board decision is or is not "final and binding". The parties clearly had the FIDIC GCC very much in mind when drafting and agreeing the Additional Agreement of 14 September 2022 (as also the Dispute Settlement Agreement of 15 September 2022). As Todini observed without contradiction in oral submissions at the hearing, both parties are commercial concerns anyway likely to have been very familiar with the scheme of the FIDIC GCC. The parties were by their Additional Agreement of 14 September 2022 expressly addressing FIDIC conditions which provide that, in some circumstances (failure to give or lateness of a Notice of Dissatisfaction), a DB decision is "final and binding". A natural inference from their use in the Additional Agreement of the very same phrase – final and binding – in relation to "any decisions of the DAB" is that they were prescribing a regime which would differ from that otherwise applicable under the unamended CCC and would make the DAB decision binding in all circumstances.

28. Second, in the Additional Agreement dated 14 September 2022, the parties chose to use other words commonly associated with finality. In particular, they referred to "Adjudication" and to Mr Bilyalov as

"judge" in the former Agreement. (The word "arbitrator" was also used to describe Mr Bilyalov's role in the Dispute Settlement Agreement of 15 September 2022.)

29. It may be suggested, against such a construction, that still clearer language might have been used, before the parties should be understood as having effectively cut short the elaborate procedure which their original Contract unquestionably allowed, involving potentially a fresh review of the substantive merits and of the Engineer's and Mr Bilyalov's decisions before an ICC arbitration tribunal, seated in Moscow. That suggestion cannot, however, in the Court's view prevail against the considerations set out in paragraphs 27 and 28 above. In particular, the wording which the parties agreed - "Any decisions of the 'DAB' will be final and binding between the Parties" – is clear in effect.

30. I do not therefore consider it necessary to turn to the principle contained in Article 392.2 in order to arrive at the proper construction of the Additional Agreement of 14 September 2022. But, if one does look at the objective of that Agreement more widely in the light of other surrounding circumstances, this also appears consistent with an intention to achieve finality.

31. In this connection, the Court was informed that the parties had been seeking, unsuccessfully, to arrive at a consensual settlement of the substantive issues between them before they set about negotiating and agreeing the Additional Agreement of 14 September 2022 and the Dispute Settlement Agreement of 15 September 2022. That makes it at least understandable that they would, when their efforts at consensual settlement proved unsuccessful, wish to agree some other short-circuit means of finally resolving the substantive issues between them regarding the extent of any extra time and compensation due - rather than treating any DAB decision as no more potentially than another step leading to another determination in a yet further forum (ICC arbitration seated in Moscow under the original contract terms). Making the DAB decision final and binding would have achieved such an objective.

32. The documents provided by Todini in fact contain internal email messages between Todini personnel on 5 September 2022, which appear to confirm that this was Todini's objective. However, there is no suggestion that these messages reached or were known to QAJol at any material time, and so I cannot regard them as relevant background to the parties' mutual exchanges and agreement of the 14 September 2022 agreement. Indeed, there is no evidence of any background (apart from the taking place of unsuccessful settlement negotiations) to QAJol's proposal of the draft wording sent with its letter of 12 September 2022 (paragraph 10 above). It must be taken as it stands.

33. Thus far, therefore, the position is that the clear effect of the Additional Agreement of 14 September 2022 appears to be and to have been intended to be to make the decision of the DAB given on 21 October 2022 final and binding to the exclusion of any further right of challenge which would otherwise have

existed under Sub-Clauses 20.4 and 20.6 of the FIDIC GCC. In this light, therefore, the Court turns to the Contract Amendment No. 2 of 8 December 2022. In its submissions at the hearing, QAJol relied on this Amendment as showing or providing that the DAB decision was not final and could be revisited before the AIFC Court.

34. QAJol's submissions may in this respect be viewed as falling under two potential heads. First, under Article 392.2 of the Civil Code, the subsequent conduct of the parties may, at least in some contexts, also be relevant to be taken into account in the construction of an earlier agreement, here the Additional Agreement of 14 September 2022. Second, QAJol relied on the Contract Amendment No. 2 of 8 December 2022 as itself providing it with a right to challenge the DAB decision before the AIFC Court, whatever might have been the position under the earlier Additional Agreement No. 2 of 14 September 2022.

35. It is clear that the parties by clause 1.1 of the Contract Amendment No. 2 of 8 December 2022 were replacing ICC arbitration in Moscow with the AIFC Court for the purposes of Sub-Clause 20.6(a) of the FIDIC GCC. Sub-Clause 20.6 is a generally worded dispute resolution provision, covering all and any dispute not settled amicably and not the subject of any final and binding DB decision. On the face of it, clause 1.1 reads as a general amendment of Sub-Clause 20.6(a) for both current and any future purposes under this Contract. It was on any view an amendment for the purposes of the current dispute or disputes referred to in Contract Amendment No. 2 of 8 December 2022.

36. The parties went on in clause 2 to address the interim position, by providing for immediate payment into an escrow account and an immediate extension of time, pending an AIFC Court decision. Lastly, they included provisions addressing the position according to whether the Court's decision is in favour of QAJol or Todini. If it was in favour of QAJol, Todini would reimburse the amount paid into escrow. If it was in favour of Todini, QAJol was to have no claim to recover the escrow amount or to claim damages for delay.

37. The question is what dispute or disputes was or were in mind by these provisions. QAJol submits that what was being remitted to the AIFC Court was and is simply the substantive issue decided by the DAB, namely whether any and if so what extra time and payment was due to Todini under the Contract. In other words, the parties were doing no more than giving effect to the original contractual scheme applicable under Sub-Clauses 20.4 and 20.6 in circumstances where Notice of Dissatisfaction with a Dispute Board decision was given within the permitted time, but replacing ICC arbitration in Moscow with the AIFC Court as the relevant dispute resolution forum.

38. Support for QAJol's submission on this point might be said to be found in the terms of the recital, set out in paragraph 20 above, reading:

> "The Employer disagrees with the Engineer's Determination and the DB Decision. In this regard, pursuant to the provisions of the Contract the Employer shall refer this matter to the Court of the Astana International Financial Centre (AIFC) in Astana in order to resolve the dispute in relation to the amount of reimbursement and an extension of Time for Completion."

39. This recital cannot however be read in isolation. The recitals go on to conclude:

> "The Contractor, in accordance with the Dispute Board Agreement signed on the 15 September 2022, considers the Dispute Board decision Final and Binding.
> The Employer considers the Dispute Board decision, binding, under Sub-Clause 20.4 of the GCC, but not final."

40. QAJol's submission requires one to accept that, after this careful recital of the parties' radically different views about whether or not the DAB decision was final as well as binding, Todini was agreeing by the operative terms of the agreement to abandon its stance and the benefit of finality for which it had on the face of it contracted on 14 September 2022, and to submit no more than the substantive issues about extra time and compensation to the AIFC Court. That appears to the Court to be an improbable reading of the terms of the Contract Amendment No. 2 of 8 December 2022 and, if one looks further, an improbable agreement for these two parties to have reached. The recital set out in paragraph 38 above demonstrates a willingness and wish on the part of QAJol to remit the substantive issues to the AIFC Court (instead of ICC arbitration in Moscow). But it cannot, as a simple recital and in the context of the next two recitals, be read as an agreement that that course was or should be open to it. The natural reading of the recitals is that, having recited their dispute about whether the DAB decision was final, the parties were providing for its resolution; and that the first matter to be decided was therefore the core issue, whether the DAB decision was final precluding any further recourse. That interpretation is reinforced by Clause 2 of the operative part of Contract Amendment No. 2 of 8 December 2022. That, by its reference to "the DB Decision, which is, in the Employer's opinion, binding but not final under Sub-Clause 20.4 of the GCC", again expressly identifies the issue which had arisen regarding finality. The immediately following words "However, the Employer shall refer to the court this matter", read with Clause 1.1 of the Contract Amendment, involve an agreement that that issue (or "this matter") should be resolved by the AIFC Court – rather than by ICC arbitration in Moscow otherwise prescribed by the general words of unamended Sub-Clause 20.6 of the FIDIC GCC.

41. Only if the AIFC Court decided that issue in favour of QAJol would any question have arisen of a further review, before any forum, of the substantive issues what if any extra time and payment were due. In fact, the parties were agreed before the Court that, if matters reached that stage, the AIFC Court would also

be the agreed forum under the general wording of Clause 1.1 of the Contract Amendment No. 2 of 8 December 2022.

42. As it is, however, the Court considers that Todini is correct in its case on the effect of the parties' various Agreements. The Additional Agreement of 14 September 2022 made the DAB decision final and binding, and excluded any further review before an ICC arbitration tribunal in Moscow. The Contract Amendment No. 2 of 8 December 2022 remitted the dispute, which had by then arisen as to whether this was the effect of the Additional Agreement of 14 September 2022, to the AIFC Court for determination. The recital to the Contract Amendment No. 2 of 8 December 2022 set out in paragraph 38 above cannot be read in isolation, and the other recitals together with Clause 2 of the operative part of Contract Amendment No. 2 of 8 December 2022 would lack any real sense if Todini was by the same document intending to abandon its stance that the DAB decision was final. Further, no reason has been suggested why Todini should have been prepared to abandon its stance. Accordingly, there is nothing in Contract Amendment No. 2 of 8 December 2022 which could affect or change the natural meaning of the Additional Agreement of 14 September 2022; and equally nothing in it which could sensibly be read as an agreement by Todini to abandon its expressed stance, that the Additional Agreement of 14 September 2022 made the DAB decision final as well as binding, in a sense precluding further recourse in any forum.

43. During the hearing, Todini asked the Court not only to determine whether the parties had made the DAB decision of 21 October 2022 final and binding, so precluding any recourse on the substantive issues regarding extra time and payment in any other forum, but also to hold that any and all future decisions of the DAB should be final and binding in this sense. As to that, the Court is only concerned with one actual DAB decision, that of 21 October 2022. The Court did not hear submissions as to whether there are any circumstances under which the DAB constituted by Mr Bilyalov's appointment pursuant to the Additional Agreement of 14 September 2022 and the tripartite Dispute Settlement Agreement of 15 September 2022 could issue any further decision on some future issue not decided by its decision of 21 October 2022. If it could, then it may be that any such further decision would, under Clause 2.1 of the Additional Agreement of 14 September 2022, also be final as well as binding, in a sense precluding any further recourse. But, the Court does not propose to explore or decide any of such matters. The Court's decision is confined to the particular circumstances of the DAB decision of 21 October 2022 which is in issue before it.

Conclusion

44. For the reasons given, the Court concludes that the determination of the Dispute Adjudication Board consisting of Mr Bilyalov dated 21 October 2022 was and is final and binding as between the parties and

that, under clause 2.2 of the Contract Amendment dated 8 December 2022, this precludes any further challenge in any forum to the substantive merits of that Board's decision.

45. The parties are at liberty to make submissions in writing on costs (including as the amounts of any costs which should be paid by one party to the other) within 1 week after the issue of this judgment, after which the Court will issue a separate ruling on costs.

By Order of the Court,

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

Representation:

CASE No: AIFC-C/CFI/2023/0005

The Claimant was represented by Ms. Aigerim Zeinesheva, Chief Manager of the Department of Legal and Human Resources of National Company "QazAvtoJol" JSC, Astana, Kazakhstan.

The Defendant was represented by Mr. Valikhan Shaikenov, Principal, Juris Consultus, Shaikenov Law Experts (SHEL), Almaty, Kazakhstan.

CASE No: AIFC-C/CFI/2023/0007

The Claimant was represented by Mr. Valikhan Shaikenov, Principal, Juris Consultus, Shaikenov Law Experts (SHEL), Almaty, Kazakhstan.

The Defendant was represented by Ms. Aigerim Zeinesheva, Chief Manager of the Department of Legal and Human Resources of National Company "QazAvtoJol" JSC, Astana, Kazakhstan.