IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

CASE No: AIFC-C/CFI/2022/0012

AND IN THE MATTER OF AN APPLICATION TO SET ASIDE AN AWARD DATED 18 FEBRUARY 2022 MADE IN IAC ARBITRATION No 81/2021 under the IAC Arbitration and Mediation Rules 2018

BETWEEN:

AKSAYSTROY-2020 LLP

Claimant

v

METALLINVESTATYRAU LLP

Defendant

JUDGMENT
Dated 29 July 2022

Chief Justice of the Court:

The Rt. Hon. The Lord Mance

Introduction

1. There is before the Astana International Financial Centre Court ("the AIFC Court") an application by Aksaystroy-2020 LLP ("Aksaystroy") to set aside a final award dated 18 February 2022 made in Arbitration No 81/2021 in the International Arbitration Centre ("IAC") of the AIFC by Arbitrator Indira Yeleusizova. By her Award, the arbitrator awarded the claimant in the arbitration, MetallInvest LLP ("MetallInvest"), 17,807,787 tenge as the price of metal purchased by the respondent in the arbitration, Aksaystroy, together with 3,739,635 tenge by way of interest and 580,948 tenge by way of expenses. The application is made under Article 44(2)(a)(iii) of the AIFC Arbitration Regulations 2017 on the ground, in summary, that the arbitrator exceeded her jurisdiction. The application was listed for hearing and was heard before me at an in person hearing in the AIFC Court in Nur-Sultan on 13th June 2022.

2. MetallInvest's claim to the said price was made in respect of three consignments or batches of metal allegedly delivered under a Delivery Agreement No AKTYU-288 dated 6 August 2021, amended and supplemented by an Additional Agreement dated 28 August 2021 and an Appendix containing Specification No 3 also dated 28 August 2021 (replacing two previous Specifications). All three of these contractual documents give as the Parties' legal addresses: in the case of Aksaystroy, an address in Atkobe; and, in the case of MetallInvest, an address in Atyrau. But they all also go on to specify as the address for transfer of the goods a MetallInvest warehouse at 105 Pozharsky Street, Aktobe.

3. Clause 9.1 of the Delivery Agreement provides for all disputes or disagreements arising between the Parties under the Agreement or in connection with it to be "resolved in the International Arbitration for the West Kazakhstan held at the site of the International Arbitration Centre of the Astana International Financial Center Nur-Sultan …. (hereinafter referred to as the IAC AIFC), in accordance with the Rules of Arbitration and Mediation of the IAC AIFC" by "one presiding arbitrator Indira Yeleusizova", and the Parties in clause 9.2 confirmed that "they have read and agree with the Arbitration Rules of West Kazakhstan and the IAC AIFC". On this basis MetallInvest commenced Arbitration No 81/2021 claiming the price of the three batches of metal as due, together with interest and expenses.

4. During the Arbitration, no challenge was made to the arbitrator's jurisdiction or the way in which she was exercising it. The present application is, however, made on the basis that, in the award which she issued at the conclusion of the arbitration, she, in some way, exceeded her jurisdiction. Aksaystroy's application form specifically relies in this connection on and quotes Article 44(2)(a)(iii) of the AIFC Arbitration Regulations 2017. Under Article 44(2)(a)(iii):

> "An arbitral award may be set aside by the AIFC Court only if:
> (a) The party making the application furnishes proof that:
> ……
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; ….."

It is not suggested that any other of the grounds in Article 44 on which an application may be made to set aside an IAC award has any relevance in this case.

The circumstances and Award in greater detail

5. The following matters are shown by the award and the application form and annexed documents, as well as various further documents produced by the parties after the oral hearing. It appears that Aksaystroy needed metal for construction of an apartment block in the city of Uralsk. MetallInvest's case, reflected in a letter No 228 dated 25 October 2021 to Aksaystroy, was and is that it delivered the relevant three batches of metal when they were shipped at and from its Aktobe warehouse to Aksaystroy's premises in the city of Uralsk in accordance with three goods issue slips, no 22420 dated 7 August 2021, no 28073 dated 28 August 2021 and no 28083 dated 28 August 2021. At the foot of each of the three goods issue slips, as translated, appear the words "Handed over the item Butko O.V.", followed by a note stating that the original slip caries a signature purporting to be by Mr Bikmukhambetov R.R. Mr Butko O.V. is identified as the Head of MetallInvest's

Aktobe warehouse in documents relating to the consignment of the goods produced after the hearing by MetallInvest. Mr Bikmukhambetov R.R. was treated in the arbitration as the registered recipient of a power of attorney issued by Aksaystroy, entitling him to sign accepting receipt of good on behalf of Aksaystroy. (The Ministry of Finance Register for the period ended 20 October 2021 produced with Aksaystroy's application evidences this only for the period 6 August 2021 to 18 August 2021, but nothing appears to have been made of this, presumably on the basis that his authority was or may well have been renewed and extended.) MetallInvest evidently relied in support of its claim in the arbitration on the goods issue slips, on a Reconciliation Act and Letter of Guarantee No 279 dated 27 July 2021 signed by Aksaystroy undertaking to pay the price by 12 February 2022, on electronic invoices submitted by MetallInvest dated 7 August 2021, on Specification No 3 dated 28 August 2021 signed by both Parties and on subsequent reminders to Aksaystroy about non-payment, which were not rejected by Aksaystroy. Subsequent to the oral hearing, it has also produced various further consignment documents which it says were also before the arbitrator.

6. In the above circumstances, MetallInvest initiated the present arbitration on 10 October 2021, claiming the price of the three batches. The award indicates clear that Aksaystroy sought to resist the claim before the arbitrator by reference to a number of points:

    a. The initiation of the arbitration proceedings was premature, in the light of the Letter of Guarantee undertaking to pay the price by February 2022.
    b. The consignments had been stolen by a group of persons.
    c. A criminal case had been initiated in the city of Uralsk, a "circle" of suspects had already been established, from whom initial statements had been taken, and the police were establishing the current location of the stolen goods.
    d. The authenticity of Mr Bikmukhambetov's purported signatures on behalf of Aksaystroy was in doubt.
    e. MetallInvest should be required to provide waybills covering the consignments, under paragraph 12 of the Order of the Minister for Investment and Development of the Republic of Kazakhstan dated 30 April 2015 No 546 "On Approval of the Rules for the Transportation of Goods".
    f. Aksaystroy signed the Reconciliation Act, Specification No 3 and Letter of Guarantee and acted thereafter in the belief that the goods would be or had been

delivered, and not by way of confirmation of delivery.

7. The award makes clear that the arbitrator did not consider the arbitration proceedings premature. She pointed out (in paragraph 17 of the Award) that clause 4.1 of the Delivery Agreement required Aksaystroy to pay MetallInvest 100% of the price no later than 30 days after signature by Aksaystroy or its authorized agent of the relevant Specification or invoice for the relevant consignment, if not otherwise provided by the parties in the Specification or additional agreement, and that under Specification No 3 dated 28 August 2021 the deadline for payment was set as no later than 10 September 2021.

8. As to the remaining points raised by Aksaystroy in its defence, the arbitrator was evidently satisfied on the material put before her that delivery had been effected by MetallInvest in the city of Aktobe, with shipment and acceptance of the goods taking place likewise in the city of Aktobe. The criminal proceedings had, on the other hand, been initiated in the city of Uralsk "on the basis of a report about a shortage of inventory for a large sum for the construction of multi-apartment buildings at Uralsk" (paragraph 34). In effect, any shortage or loss by abstraction had occurred subsequent to delivery to Aksaystroy at MetallInvest's Aktobe warehouse, and any criminal investigation into it was, on that basis, irrelevant. Delivery having been made, she accordingly held the price to be payable.

The issues before the AIFC Court

9. Before the AIFC Court three issues were raised:
    a. Whether the legal representatives of Aksaystroy were properly authorized to appear and to represent Aksaystroy at the hearing before me on 13th June 2022.
    b. Whether the application to set aside was issued within the three month period referred to in Article 44(3) of the AIFC Arbitration Regulations 2017.
    c. Whether the application to set aside was made good as a matter of substance.

    The first two points are new points which are, by their nature, independent of the third.

10. MetallInvest, in raising point a) before the AIFC Court, relies on Aksaystroy's failure to produce a certificate attesting to the authority of those purporting to represent it before the AIFC Court. Asked by the Court what basis there was for suggesting that such a

certificate is necessary before the AIFC Court, MetallInvest's response was that a certificate is required under the legislation of Kazakhstan, and that this is applicable under clause 12.5 of the Delivery Agreement, as recorded by the arbitrator in paragraph 24 of her Award. Clause 12.5 provides:

> "The terms, other rights, obligations and responsibilities of the Parties that are not reflected in this Agreement are regulated in accordance with the requirements of the current legislation of the Republic of Kazakhstan."

11. Clause 12.5 addresses the law governing substantive issues arising under the Delivery Agreement. Whether a certificate is required for appearance before the AIFC Court is not such a substantive issue. It is, like other procedural issues relating to any dispute, an issue subject to the law governing the dispute resolution provisions contained in Clause 9.1 and 9.2. Article 7.2 of the IAC Arbitration Rules states: "An arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract". An arbitration agreement is therefore treated as independent of, and will not infrequently be subject to a different law to that governing substantive issues arising under, the main contract. That is so here, where the Agreement provides for arbitration under the Arbitration Rules of the IAC AIFC. The intended effect is clearly that the arbitral law of the AIFC shall apply. There is under AIFC Court law no requirement for any such certificate as suggested by MetallInvest. All that is required of any lawyer appearing for a client before the AIFC Court is that she or he be (i) licensed by the AIFC Court to so appear and (ii) authorized to so appear by their client. The existence of authority is here not challenged, and would normally be presumed from the fact of appearance. It would be a serious breach of professional duty for a lawyer to appear to represent a client, without having authority to do so. It follows in the present case that point (a) raised by MetallInvest fails, and must be dismissed.

12. Point (b), again raised by MetallInvest, is that Aksaystroy's application to set aside is out of time under Article 44(3), which reads:

> "An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award, or such longer period as the parties to the arbitration have agreed in writing ……"

There is no suggestion here of any longer period than three months being agreed between the parties. MetallInvest raised point b) on the basis that the relevant start date was 23 December 2021. That is however merely the date on which Justice Tom Montagu-Smith QC in AIFC Court Case No 13 of 2021 upheld a grant by the arbitrator of interim (freezing order) relief. For the purposes of an application to set aside an award under Article 44(3), the relevant date is however "the date on which [Aksaystroy] received the award". The relevant award is here dated 18 February 2022, but it appears from the court file that it was only sent to the Parties by email by the arbitrator on 21 February 2022. Accordingly, Aksaystroy had until 21 May 2022 to apply under Article 44(3). But even if 18 February 2022 was the relevant date, Aksaystroy had until 18 May 2022. Either way, the present application dated 18 May 2022 is in time. It is in the circumstances unnecessary to consider whether there may be any basis on which the AIFC Court might be able to extend the three month period in Article 44(3). It follows from the above that point b) also fails and must be dismissed.

13. Point (c) therefore arises. Aksaystroy's application introduces this point with the statement that "The Claimant does not agree with the arbitrator's decision of 18.02.22 …. on the following grounds: …..". Similarly, in a written submission filed after the oral hearing, Aksaystroy submits that any conclusion that there had been proper delivery of the goods is "fundamentally wrong". These are unpromising starts to a submission that the arbitrator exceeded her jurisdiction. A challenge to an arbitrator's jurisdiction involves showing that the arbitrator decided some matter outside the scope of the matters submitted to her. An assertion that a party "disagrees" with the arbitrator's decision or that she reached a "wrong" conclusion goes nowhere towards showing that she exceeded her jurisdiction. A losing party in arbitration not infrequently disagrees with the award or with issues decided in it. But that says nothing about the arbitrator's jurisdiction.

14. The question under Article 44(2)(a)(iii) is not, therefore, whether a party complaining agrees or disagrees with the award or views it as "wrong". It is equally not whether the Court itself agrees or disagrees with the award or regards it as "right" or "wrong". It is one of the basic features of most commercial arbitration that arbitration awards are generally final and non-appealable (or "non-reviewable") on their factual or legal merits. This is a feature often viewed by commercial parties - at least until they lose - as an

advantage of arbitration. Parties who agree to arbitration need to be aware of this principle of finality or non-reviewability. They need to be clear before agreeing to any arbitration agreement that this is what they want – and also that this is what they will have to accept if they lose for reasons with which they do not agree. Court proceedings are different, because court procedures generally enable at least one appeal on factual or legal issues, subject to any requirement for permission to ensure some minimal prospect of success. This is what the AIFC Court, by its appeal system, allows for proceedings initiated before it (whether initiated within its exclusive jurisdiction or by agreement or under a choice of AIFC Court clause): see Part 5 of the AIFC Court Regulations and Part 29 of the Rules of the AIFC Court. If a party wishes to reserve a possibility of reviewing the rights or wrongs of a first instance decision, it may always prefer or seek to negotiate a choice of court clause as an alternative to an arbitration clause.

15. What is within an arbitrator's jurisdiction depends upon a consideration of the scope of the issue(s) submitted to arbitration. Here, the essential issue submitted was whether due delivery had been made, rendering price due under a contract for supply of metal goods. The short answer to the present application is, for reasons elaborated in greater detail below, that the arbitrator found that due delivery had been made and that the price was due; and that her decision, whether right or wrong, was in respect of issues which were submitted to her to decide, and so fell within her jurisdiction.

16. The (sole) ground for setting aside the award on which Aksaystroy relies is, as stated, excess of jurisdiction. There are in Article 44(2) and (3) of the Arbitration Regulations some other, limited grounds (modelled on those found in the New York Convention 1958) on which the Court has power to set aside an arbitration award. But all these grounds are strictly limited and none of them enables the Court to review the merits of an arbitrator's award or decision on substantive issues, whether of fact or law, made within her or his jurisdiction.

17. Aksaystroy has not by its written or oral submissions shown any grounds for considering that arbitrator Yeleusizova acted in any respect in excess of her jurisdiction. For the most part, the grounds invoked by Aksaystroy involve recitation of matters which the arbitrator addressed in her award, coupled with reasons given for disagreeing with her. As already explained, such grounds do not go to jurisdiction. They simply challenge the arbitrator's

decision on matters within her jurisdiction. To repeat, even if the Court were to conclude that the arbitrator appeared to have been wrong in the way she viewed or decided particular matters or the claim as a whole, that would be irrelevant. The question under Article 44(2) is not whether she was right or wrong, but whether her decision observed the limits on her jurisdiction. Courts as well as arbitrators do from time to time err in their reasoning and decisions in the course of exercising their jurisdiction. The only remedy for error as such is, where available, an appeal, but, as has been pointed out, arbitration does not generally offer that remedy.

18. Aksaystroy also describes the arbitrator's conclusion that delivery was made in Aktobe as a complete and unfounded contradiction, based on a failure to familiarize herself with the letter No 228 of 25th October 2021. This letter recorded that MetallInvest "had shipped metal" under the Agreement "to your facility in the city of Uralsk". Several points may be made about Aksaystroy's reference to the letter of 25th October 2021. First, where delivery was to be made depends on the contractual documentation, not on a letter written some months later. Second, and in any event, the letter is not in the Court's view inconsistent with the arbitrator's conclusion that delivery was made in Aktobe. Third, even if the Court were, in the light of the letter or the contractual documentation, to disagree with the arbitrator's decision, that would not mean that she exceeded her jurisdiction. Fourth, the Court in fact sees no reason to disagree with the arbitrator's conclusion that, under the relevant contractual provisions, the consignments were to be accepted and delivered at MetallInvest's warehouse in the city of Atyrau, not in the city of Uralsk (although that is clearly the place to which they were destined to be carried after acceptance and delivery and at which they were evidently to be used by Aksaystroy in a building construction project). Acceptance and delivery refer, in the context of the present contract between MetallInvest and Aksaystroy, to the point at which the possession of, and the risk of loss of or damage to, the goods were, under the contract, to pass from MetallInvest as supplier to Aksaystroy as buyer.

19. In this connection, the Delivery Agreement provides expressly:

> "QUANTITY AND QUALITY OF GOODS
>
> …..
>
> 2.2. Acceptance by the Buyer of the Goods in terms of quantity and quality is

carried out at the Supplier's warehouse, the address of which is specified in this Agreement.

…..

DELIVERY OF THE GOODS

5.1. The Goods are delivered from the Supplier's warehouse, within the terms agreed by the Parties in the Specifications, invoices, or invoices and invoices for the corresponding Goods. The Supplier is obliged to notify the Buyer of the readiness of the Goods for shipment no more than 3 (three) working days before the date of shipment.

….

5.3. The Goods are delivered on the terms of its pickup by the Buyer from the Supplier's warehouse, unless otherwise provided by the Parties in the Specification.

….

5.8. Together with the delivered Goods, the Supplier is obliged to transfer to the Buyer the following documents related to the shipment:

- Supplier's invoice;
- bill of lading;
- a copy of the quality certificate or other similar document, certified by the seal of the Supplier;
- certificate of work performed – in case the Supplier provides the Buyer with services for cutting, delivery of Goods to the Buyer, etc. ….

….

5.10. Acceptance of the Goods is carried out by the Buyer's representative acting on the basis of the relevant power of attorney from the Buyer. The signing by the Buyer's representative of an invoice for the corresponding Product means that the Buyer accepts this Product from the Supplier in terms of quantity and quality, and there are no claims against the Supplier regarding obvious defects of the Product.".

20. Further, as noted in paragraph 2 above, all three contractual documents, the Delivery Agreement dated 6 August 2021 and the Additional agreement No 1 and Specification No 3 specify as the address for transfer of the goods MetallInvest's warehouse at 105

Pozharsky Street, Aktobe. In addition, Specification No 3 states: "Place of acceptance of the Goods: the Supplier's warehouse at the address of Aktober, Pozharsky Street 105A".

21. Far from the arbitrator misreading the letter dated 25 October 2021, the Court considers it to reflect the contractual position, under which delivery of consignments was to be made on their collection and shipment from MetallInvest's Aktobe Goods transfer warehouse, as defined in the contractual documentation. The information given in the letter that MetallInvest "had shipped metal" under the Agreement "to your facility in the city of Uralsk" is in the Court's view entirely consistent with delivery occurring, as the Agreement provides, on shipment from the warehouse. Looking at the documents produced to the Court with the application and following the hearing, the delivery which the arbitrator found to have occurred evidently involved a Mr Butko O.V., as head of MetallInvest's Goods transfer warehouse, and Mr Bikmukhambetov R.R. accepting the goods for Aksaystroy. That was, as stated, a conclusion on a matter that was clearly and directly within the arbitrator's jurisdiction. Aksaystroy's objection to its correctness gives no basis now to challenge it before the Court.

22. Aksaystroy relies on a number of further points, all associated with the question whether delivery was actually made. It refers to the alleged theft, giving rise to the criminal case initiated in Uralsk on 2 November 2021, the establishment and initial interviewing of the circle of suspects, and the police measures to establish the location of the goods. It states that the Reconciliation Act and accounting documents were signed on trust that delivery would be or had been made. Elaborating on these points, Aksaystroy questions the very delivery of the goods and the genuineness of the signatures attesting to its acceptance of the goods at the Aktobe warehouse. It states that Mr Bikmukhambetov "has shown that on all three bills of lading [a reference to the three goods issue slips] …. his signature as a trustee [i.e. holder of a power of attorney] of Aksaystroy … was forged, i.e. this person showed that he allegedly did not receive the goods ….", that this is now being checked and established by the investigating authorities, and that visual comparison alone of the purported signatures on the goods issue slips with the power of attorney make it "really clear to the naked eye that the signature was forged". Carrying this further, the application at its end also submits that the rendering of the arbitration award while police enquiries were proceeding amounted to "direct and illegal interference in the activities of the investigating police in the framework of the initiated criminal case".

23. None of the matters set out in the previous paragraph goes to the arbitrator's jurisdiction. On the contrary, most if not all appear to have been put before her in the course of her exercise of her jurisdiction. As a matter of fact, it is far from clear when and how Mr Bikmukhambetov is suggested to have "shown" that his signature was forged. Nothing by way of statement from him to that effect has been shown to the Court or is referred to by the arbitrator. Aksaystroy's submission before the arbitrator appears to have been that an obvious difference between the power of attorney specimen and the three signatures on the goods issue slips established "doubt" about the genuineness of the latter. Further, Aksaystroy's lawyers wrote to the criminal investigators in Uralsk on 16 June 2022 noting that Mr Bikmukhambetov was "recognised as a suspect" and requesting that he be asked whether he received the goods and confirms his signature on the goods issue slips. That suggests that he had not previously been approached or asked to do this. The investigators' response on 17 June 2022 was that he had been out of Kazakhstan, but that he had said that he would be back at the end of June 2022. In fact, he was evidently back by 24 June 2022, when he made a notarial statement for MetallInvest saying that he had not given any evidence in the criminal investigation about non-delivery of the goods, but had, on the contrary, confirmed his acceptance of the goods and the corresponding invoices at MetallInvest's Aktobe warehouse.

24. The previous paragraph includes matters which were not, and could not have been, before the arbitrator, and so are mentioned only for completeness, because they appear from documents put before the Court by the parties. So far as concerns the arbitrator and her jurisdiction to make her award, all that matters is that she was asked to determine whether the price was due as a result of due delivery of the goods and that is what she did. She was aware of the "doubt" suggested regarding the signatures on the goods issue slips, but this does not appear to have been supported by any document or by more than an assertion that the signatures differed from that on the Ministry of Finance record of powers of attorney. She was not given the benefit of the expert handwriting evidence which a tribunal would normally expect to be given in such circumstances. Lay assertions about the clarity "to the naked eye" of a forgery are not often very persuasive. Aksaystroy complains before this Court that the arbitrator should have given time or further opportunity to disprove the genuineness of Mr Bikmukhambetov's signature. But no

formal request was made to the arbitrator by Aksaystroy to be given time to reinforce its case (or even it appears to await developments in the criminal proceedings). In any event, the arbitrator's decision to proceed to an award on the material before her was a decision reached in the exercise of her jurisdiction. None of the points raised in this area affects the arbitrator's jurisdiction or suggests any respect in which she exceeded it.

25. Aksaystroy's further suggestion that the arbitrator's making of her award amounted to "direct and illegal interference in the activities of the investigating police" has no force. She had before her a civil claim to the price, which depended on whether delivery had been made. An award in such a claim does not and cannot "interfere" with ongoing police or criminal activities or proceedings. The outcomes of a civil claim and a criminal investigation may of course prove to be or to point in different directions, and the arbitrator might, as a matter of discretion, have considered adjourning the arbitration proceedings to await developments in the criminal investigation. But she was not obliged to do this and did not exceed her jurisdiction by adjudicating on the civil claim which was before her. She was evidently satisfied that the claim was good - meaning that any shortage or abstraction occurred at a point after the acceptance and takeover of the goods by Aksaystroy at MetallInvest's warehouse, and that the Uralsk criminal investigation was thus concerned with alleged post-delivery loss either en route to or in Uralsk.

26. Aksaystroy also complains that it is not shown that the documentation referred to in clause 5.8 of the Delivery Agreement was issued on or against delivery. It further refers in this connection to paragraph 12 of the Rules for the Transportation of Goods by Road, approved by Order of the Minister for Investment and Development of the Republic of Kazakhstan dated 30 April 2015 No 546. According to such Rules (in a somewhat imperfect translation provided by Aksaystroy):

> "12. Transportation of goods is issued by waybills on paper or in the form of electronic digital document.
> The bill of lading is the main transportation document, according to which the consignor writes off the shipping cargo and capitalizes it by the consignee.
> 13. The consignor submits to the carrier a consignment note for the goods presented for transportation, drawn up in four copies if issued on paper.
> …..

15. Acceptance of goods for transportation from the consignor is certified by the signature of the carrier in all copies of the bill of lading in case of registration on paper.

The first copy remains with the consignor and is intended for writing off the goods presented for transportation. The second, third and fourth copies are handed over by the consignor to the carrier.

….

19. The waybill of a motor vehicle is a primary accounting document, which, together with the consignment note, determines the indicators for accounting for the operation of the vehicle.

….

Waybills of a motor vehicle and bills of lading, issued on paper, are subject to registration in the registers of the movement of waybills and waybills, and storage by the carrier together with the journals for 5 years.

20. Waybills and bills of lading are issued by the carrier on paper or in the form of an electronic digital document for one shift (flight) before the start of the shift (flight) separately for each freight vehicle ……"

27. In fact, the Court has before it from the original application signed goods issue slips dated 7 and 28 August 2021 for the three relevant batches, and MetallInvest has since the hearing also produced consignment documents, consisting of route sheets, customer coupons, consignment vouchers, transport documents, business trip instructions, certificates and travel expense documents as well as goods invoices, all of which it says were before the arbitrator. Even if there were any basis for considering that these documents did not strictly satisfy clause 5.8 of the Delivery Agreement or Kazakh Rules for the Transportation of Goods by Road (and the Court does not see any), that would be, at most, a matter for the arbitrator to consider, when exercising her jurisdiction, not a matter capable of going to her jurisdiction. The Court would only add that, if, as the arbitrator found, the goods were actually delivered by MetallInvest to Aksaystroy, it is difficult to see how or why any non-compliance with either the contractual provisions regarding delivery of bills of lading or the provisions of the ministerial Rules for the Transportation of Goods by Road could deprive MetallInvest of its right to the invoice price.

28. Although the Court has sought to some extent to analyse as well as identify the substantive points which arose in the arbitration and which are very largely sought to be raised again in and by Aksaystroy's application, the reality at the end of the day is that the arbitrator found that delivery had been affected and the price was due. There is nothing to mean or show that she exceeded her jurisdiction either in, or in the course of reaching, that conclusion. There may have been matters she might further have explored or elucidated, or further matters which might have been argued before her, but that is not to the point. The Court repeats and underlines that, where parties agree on arbitration, the Court does not have an appellate role. The grounds for intervention provided by Article 44(2) and (3) are modelled on the New York Convention and are deliberately confined. The Court's only, limited, task is, in the present case, to determine whether the arbitrator's award "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration". Here, whatever criticisms might be addressed to its substance, and many have been suggested and some of them analysed in this judgment, the position at the end of the day is that the arbitrator's award dated 18 February 2022 was concerned with and dealt with the disputed claim that due delivery had been made and that the price was accordingly due. It did not deal with any matters outside the scope of that issue.

29. The claim by Aksaystroy-2020 LLP to set aside the final award of Arbitrator Yeleusizova Indira dated 18 February 2022 therefore fails and is dismissed. Costs must follow the event, unless cause to the contrary is shown by written submissions to be lodged with the Court within ten days after the date of this judgment.

By Order of the Court,

The Rt. Hon. The Lord Mance
The Chief Justice of the AIFC Court,
29 July 2022

Representation:

The Claimant was represented by Mr. Ruslan Kenzhegaliyev, lawyer, Aksaystroy – 2020 LLP.

The Defendant was represented by Mr. Rakhat Azhgaliyev, lawyer, MetallInvestAtyrau LLP.