IN THE COURT OF APPEAL

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

27 June 2022

CASE No: AIFC-C/CA/2022/0011

Ministry of Healthcare of the Republic of Kazakhstan

Appellant

v

Success K Limited Liability Partnership

Respondent

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

ORDER

1. **An extension of time for filing the application for permission to appeal is granted.**

2. **The application for permission to appeal is refused.**

JUDGMENT

1. By a judgment dated 24 January 2022 in Case No. AIFC-C/CFI/2021/0008 the Court of First Instance of the Astana International Financial Centre ("the AIFC") decided two applications relating to a Final Award dated 4 October 2021 made in Arbitration No. 2/2021 in the International Arbitration Centre of the AIFC. By that Award the arbitral tribunal awarded the claimant in the arbitration, Success K LLP ("Success"), substantial sums claimed against the Ministry of Healthcare of the Republic of Kazakhstan ("the Ministry") by way of debt and contractual penalty under a Contract made between the parties for the provision of consultancy services by Success to the Ministry. The two applications before the Court, described as being in substance mirror images of each other, were (1) an application by Success seeking recognition and enforcement of the Award, and (2) an application by the Ministry seeking to have the Award cancelled or set aside and refusal of its recognition and enforcement on the ground that the arbitration agreement was invalid under the law of the Republic of Kazakhstan. For reasons given in the judgment, the Court ordered that Success's application be granted and that the Ministry's application be dismissed.

2. The Ministry now applies to the Court of Appeal of the AIFC for (a) an extension of time for filing an application for permission to appeal from that decision; (b) permission to appeal; and (c) further relief consequent upon the grant of such permission and upon success in any resulting appeal.

Extension of time

3. By Rule 29.8(2) of the AIFC Court Rules, an appellant's application for permission to appeal from a decision of a lower Court may be made to the appeal Court in an appellant's notice. By Rule 29.10(2), in a case where no direction as to time has been made by the lower Court, the appellant must file the appellant's notice within 21 days after the date of the decision of the lower Court. Rule 29.12 provides that where the time for appeal has expired, the appellant must file the appellant's notice and includ e in it (1) an application for an extension of time, and (2) a statement of the reason for the delay and the steps taken prior to the application being made. Further provisions relating to an appellant's notice are contained in Rules 29.23 to 29.27. No separate form of appellant's notice has been prescribed for use in the Court. The standard claim/application form must be used for the purpose.

4. The time for filing an appellant's notice in respect of the decision dated 24 January 2022 expired on 14 February 2022.

5. Under cover of a letter dated 15 February 2022, one day after the expiry of the time limit, the Ministry sent a "Statement for permission to appeal" against the decision of 24 January 2022. The Statement contained grounds of appeal materially identical to those eventually included in a duly completed claim/application form issued on 18 May 2022 (see below). But it had numerous deficiencies, in addition to its lateness: (i) it gave no reason for the failure to comply with the time limit (nor has any

reason been offered subsequently); (ii) it was not in the proper form; (iii) it was only in the Russian language, with no English translation as is required by Rule 2.3 and is made clear on the face of the proper form; and (iv) it was sent not to the AIFC Court Registry but to the AIFC Authority, which forwarded it promptly to the Registry. On the same day, 15 February, the Registry contacted the Ministry to inform it that it must communicate directly with the Registry on case matters, to confirm relevant contact details and to request it to send the letter to the Registry via email in the English language. The letter was received by the Registry via email in the English language on 18 February. On 21 February the Registry sent a claim/application form to the Ministry and asked the Ministry to complete the form and file it properly with the Registry. According to information provided by the Registry, there were then various communications between the Ministry (which had personnel changes) and the Registry until the application form was formally sent to the Registry on 11 May before being stamped and registered by the Registry on 18 May. According to the Ministry, the completed application form was sent via email at the beginning of March but correspondence and negotiations were subsequently conducted to bring the text into line and translate it. Nothing turns on any slight difference between those accounts.

6. That is a regrettable history of delay, stemming from an initial failure to comply with the relevant Rules. The AIFC Court Rules underpin the administration of justice by the Court and a failure to comply with them will not readily be condoned. I bear in mind, however, that the Court's procedures, including the appeals procedures in particular, are still relatively unfamiliar to many litigants and that the Ministry's delay in producing a completed application in the proper form may be attributable in part to such unfamiliarity. Moreover, an important consideration is that the substance of the Ministry's grounds was advanced at an early stage in the initial Statement – just a day (in the Russian version) or four days (in the English translation) after the expiry of the time limit. A further consideration is that the delay does not appear to have caused any prejudice to Success: none is alleged in Success's written objection to the grant of an extension of time, and this Court's understanding is that the monies due to Success under the Final Award have been paid in full by the Ministry.

7. Taking everything into account and in the exercise of judicial discretion, I have come to the conclusion that the Ministry should be granted the required extension of time. It follows that the Ministry's substantive application for permission to appeal falls to be considered by the Court, and I therefore turn to assess that application.

The application for permission to appeal

8. Rule 29.6 of the AIFC Court Rules provides that permission to appeal may be given where the appeal Court considers that (1) the appeal would have a real prospect of success or (2) there is some other compelling reason why the appeal should be heard. By Rule 29.7 success on an appeal depends on establishing that the decision of the lower Court was (1) wrong or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court.

9. The Ministry's application for permission to appeal advances five substantive grounds, which may be summarised as follows:

(1) alleged failure by the arbitral tribunal and the Court of First Instance to take into account and give a legal assessment of the consequences, under the applicable law (namely the law of the Republic of Kazakhstan) of the impossibility of performance of contractual obligations and of circumstances of force majeure;

(2) an argument that, having regard to the impossibility of fulfilment of obligations under the
Contract, the Ministry sent a lawful notice of termination on 14 August 2020 and that the Contract therefore expired on that date;

(3) alleged failure of the Court of First Instance to take into account that the Ministry acknowledged performance of the contractual obligations but considered that they were not performed qualitatively, and a contention that the Court was not qualified to assess the quality of services rendered;

(4) an argument that the acts of services rendered under the Contract were signed by persons not authorised to do so and could not be evidence of proper performance of the contractual obligations; and

(5) arguments that Success performed the Contract in violation of its terms; that the expiration of the term of the Contract entailed the termination of the obligations of the parties; that the Ministry, on the basis of reports provided by Success, had determined that there was no basis for payment for services rendered prior to the date of termination; and that the obligations of the Ministry to sign acts of completed works were terminated.

10. Those grounds face fundamental difficulties.

11. First, they do not address the issues that were before the Court of First Instance and were the subject of the decision that the Ministry seeks to appeal. As already indicated, the Ministry's case before that Court was that the arbitration agreement was invalid because it was concluded in violation of the law of the Republic of Kazakhstan without obtaining the consent of the state body responsible for state property. That case was rejected for the detailed reasons given in the Court's judgment, addressing both the primary way in which the case had been put by the Ministry and an alternative or additional submission understood to be advanced in the application to the Court. The grounds set out in the application for permission to appeal do not touch on those reasons. They raise matters that were not raised before the Court, either by the Ministry's own application seeking to have the Final Award cancelled or set aside or by Success's application for recognition and enforcement of the Award. They provide no basis for doubting the correctness of the Court's decision on the issues before it.

12. Secondly, the matters raised in the grounds would not have provided a proper basis of challenge to the Final Award even if they had been raised before the Court of First Instance. They relate to the substantive merits of the Ministry's case before the arbitral tribunal. As such, they fall outside the limited grounds on which the Award could be challenged in court.

13. Regulation 44 of the AIFC Arbitration Regulations (as adopted by resolution of the AIFC Management Council dated 5 December 2017) provides:

> "**Application for setting aside as exclusive recourse against arbitral award**
>
> (1) Recourse to a court against an arbitral award made in the seat of the AIFC may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
>
> (2) Such application may only be made to the AIFC Court. An arbitral award may be set aside by the AIFC Court only if:
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> (a) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement was under some incapacity; or the said 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 AIFC;
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or the tribunal proceedings or was otherwise unable to present his case;
>
> (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 …
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties …
>
> (b) the AIFC Court finds that:
>
> (i) the subject matter of the dispute is not capable of settlement by arbitration under AIFC law; or
>
> (ii) the award is in conflict with the public policy of the Republic of Kazakhstan.
>
> (3) …."

14. Regulation 47 contains parallel provisions as to the grounds for refusing recognition or enforcement of an arbitral award.

15. The applications decided by the Court of First Instance concerned the validity of the arbitration agreement, an issue falling within Regulation 44(2)(a)(i) and the parallel provision of Regulation 47(1)(a)(i). By contrast, the grounds of the application for permission to appeal do not relate to the

validity of the arbitration agreement or to any of the other bases on which an arbitral award may be set aside or its recognition and enforcement may be refused.

16. For all those reasons an appeal against the decision of the Court of First Instance would have no real prospect of success. Nor is there any other compelling reason why an appeal should be heard.

17. The application for permission to appeal must therefore be refused. In those circumstances the further relief sought in the application does not arise for consideration.

Representation:

The Appellant was represented by Mr. Zhasulan Abulkhairov

The Respondent was represented by Mr. Yerbolat Khassanov, SNK Responsa.