



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

21 July 2023

CASE No: AIFC-C/CFI/2023/0031

CASE No: AIFC-C/CFI/2023/0032

PLS INVESTMENT CONSTRUCTION COMPANY LLP

Claimant

v

NAZARBAYEV BOLAT ABISHEVICH

Defendant

AND

PLS INVESTMENT CONSTRUCTION COMPANY LLP

Claimant

v

ALMATY HEAVY MACHINE PLANT JSC

Defendant

JUDGMENT

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

JUDGMENT

1. These two cases have been commenced in the AIFC Court by agreement of the parties, pursuant to the Court's jurisdiction under Article 13.4(3) of the Constitutional Statute of Kazakhstan No 438-V ZRK of 7 December 2015, as amended, and Regulation 26(1)(c). (2), (9) and (10) of the AIFC Court Regulations dated 5 December 2017.
2. The Claimant in both cases is PLS Investment Construction Company LLP ("PLS Investment Co"), while the Defendants are Mr Bolat Nazarbayev in Case No 31 and Almaty Heavy Machinery Company ("AHM") in Case No 32. PLS Investment Co is a separate company from PLS-TM B. K. Isatai LLP ("PLS-TM"), which also features in the matter. The Court was told that they are companies which had different founders, but are now part of the same group.
3. Under Regulations 26(1) (c and (2) the Court's jurisdiction embraces cases where parties, including parties not registered in the AIFC, 'opt in' to the jurisdiction of the Court by agreeing to give the Court jurisdiction pre-or post-dispute. But Regulations 26(9) and (10) further provide:

"(9) Any issue whether a dispute falls within the jurisdiction of the Court shall be determined by the Court whose decision shall be final.

(10) The Court shall consider the express accord of the parties to a case that the Court shall have jurisdiction and if the Court considers it desirable or appropriate, it may decline jurisdiction or may refer any proceedings to another Court within the Republic of Kazakhstan."
4. In these two cases, the question arises squarely for decision whether it is desirable or appropriate for the Court to exercise the jurisdiction otherwise conferred on it by the parties' express accord.
5. These cases have a large hinterland, going back to the era of privatization in the 1990s. On 18 February 1998, the Committee of State Property and Privatisation of the Ministry of Finance ("CSPPMF") sold 31.9% of its shares in Almaty Heavy Industry ("AHM") to Temir-Kon LLP ("Temir Kon") on various undertakings, including one to the effect that AHM's business would remain intact. By 2 April 2007 these shares had been transferred to Mr Bolat Nazarbayev, evidently giving him from 2007 a majority shareholding consisting of 86.7812% or thereabouts of AHM's shares.
6. On 18 April 2007 AHM acquired 37.6428 hectares of land at 189 Tole bi Street, Almaty from the Land Relations Department of Almaty, and on 17 May 2007 it sold 26.5802 hectares of the land so acquired to PLS Investment Co. At about the same time, it also sold a further 3.0918 hectares, indirectly it appears, to Mr Bolat Nazarbayev, who some two years later on 6 August 2009 transferred these 3.0918 hectares to PLS Investment Co.
7. On 1 April 2009 it appears that it was agreed between CSPPMF, Temir-Kon and Mr Bolat Nazarbayev that Mr Nazarbayev should step into the shoes of Temir-Kon for the purposes of compliance with what were evidently treated as continuing undertakings arising from the original share sale of 18 February 1998; and on 2 April 2009 Mr Nazarbayev sold to PLS-TM 86.7812% of the shares in AHM, which included the 31.9% of the shares which he had by 2 April 2007 acquired from Temir-Kon.

8. At various points of time, CSPPMF engaged consultants to check whether the undertakings were being fulfilled, and in 2009 its consultants, Firm Bayau, found non-fulfilment. This led to proceedings by CSPPMF seeing to set aside the sale of the 31.9% of shares in AHM by Mr Nazarbayev to PLS-TM and to return the shares to the state ownership of CSPPMF. After initial defeats, Mr Nazarbayev and PLS-TM were, with the support of AHM as third party, successful in resisting the claim by virtue of a judgment of the Supervisory Judicial Board for Civil and Administrative Cases of the Supreme Court of Kazakhstan and a subsequent judgment of District Court No 2 Auezov District dated 11 September 2012, which as it appears upheld on appeal on 30 November 2012.
9. This notwithstanding, on 31 August 2022 the General Prosecutor's Office of Kazakhstan (Almaty Office) addressed to the CSPPMF (Almaty Office) a Representation referring to a further review by Firm Bayau in 2014 and taking direct issue not only with Mr Bolat Nazarbayev's sale of the 31.9% shareholding to PLS-TM, but also with various dispositions of or dealings with AHM's property, based on alleged breaches of the undertakings as well as some other alleged features of the transactions. In particular, it challenged the validity of the sale by AHM on 17 May 2007 of 26.5082 hectares to PLS Investment Co and the sale by AHM also in May 2007 of the further 3.0918 hectares to Mr Bolat Nazarbayev.
10. Having received the Representation, CSPPMF on 16 September 2022 passed it on to AHM and to Mr Bolat Nazarbayev, with the admonition that by virtue of what the Representation said and in order to fulfil the General Prosecutor's directive, they needed "to work to return the shares of [AHM] and its property to state ownership [by] 10.10.2022"; and that "in case of failure to comply with the requirements of this notice, the Department will take action in accordance with applicable law".
11. In response to this development, the Court is informed that PLS-TM "as the current shareholder" in AHM filed a complaint with the General Prosecutor of Kazakhstan's Office against its Almaty Office's Representation. AHM submits that, in alleged violation of Article 91 of the Republic's Administrative Procedural Code, this complaint was redirected to the Almaty Office, which was itself its object and where the complaint would be considered by a direct subordinate of the Deputy Prosecutor for Almaty whose Representation was in question. On 28 November 2022 the Almaty Prosecutor's Office issued a response to the effect that, since the Representation did not implement (i.e. presumably: affect) any third party's rights or obligations, there were no legal grounds for challenging it. An appeal was lodged, about the outcome or progress of which the AIFC Court is not informed.
12. In further response to CSPPMF's communication of the General Prosecutor's Representation, the present claims were issued by PLS Investment Co on 23 December 2022. In Case No. 31, PLS Investment Co asks the AIFC Court to declare null and void the sale contract dated 6 August 2009 by which it bought 3.0918 hectares of land from Mr Bolat Nazarbayev. In Case No. 32, PLS Investment Co claims asks the AIFC Court to declare null and void the sale contract dated 17 May 2007 by which it bought 26.5082 hectares of land from AHM.
13. In both cases, the Defendants have filed Defences resisting the claims, and maintaining that no basis exists for challenging private sales in favour of bona fide purchasers. Mr Bolat Nazarbayev's Defence also highlights the rejection of the State's previous attempt to challenge the share sales, referred to in paragraph 8 above.

14. One further development should be recorded. It appears that the General Prosecutor has been before the Judicial Colloquium for Civil Cases (which may be the same as the Supervisory Judicial Board for Civil and Administrative Cases) of the Supreme Court of Kazakhstan and by decision dated 2 March 2023 obtained, on unknown grounds, the cancellation of the judgment of District Court No 2 Auezov District dated 11 September 2012 and the appellate decision dated 30 November 2012 upholding it on appeal, and their replacement by a judgment setting aside the contract dated 2 April 2009 for the sale by Mr Nazarbayev to PLS-TM of 31.9% of the shares in AHM. While this certainly underlines the desirability of some clear and definitive resolution of all issues arising from long-past transactions, whether involving shares or property, the question remains whether the AIFC Court is or can be an appropriate and effective court for this purpose as regards the property sales referred to in paragraphs 6 and 12 above.
15. When the matter came first before the AIFC Court, the Court questioned the parties about their respective stances, and, in particular, how it came about that PLS Investment Co was advocating the invalidity of property purchases which it had made, and was (in doing this) also taking a different attitude to all (including a company, PLS-TM, in the same group as it) engaged in the previous proceedings relating to the shares. The response was to the effect that PLS Investment Co did not really support the position taken by the General Prosecutor and CSPPMF, which counsel for the Claimants describes as “a superficial evaluation”; and it wanted, by bringing the present proceedings challenging the validity of the property sales, to obtain a reliable legal ruling on the position. One may however fairly question whether the best legal analysis and outcome are likely to be promoted by litigation between parties who, in reality, share a wish to achieve, and in all probability a commercial interest in achieving, the same outcome.
16. The Court also raised with the parties the apparent incongruity of proceedings in the AIFC Court seeking on their face to give effect to the admonitions of the General Prosecutor and CSPPMF, in circumstances where the persons who might be thought really interested in achieving that outcome were CSPPMF, which (as the Court was informed) had not, at that stage, been informed of the proceedings. The parties pointed out the State was not involved in the sales transactions the subject of the present proceedings. That is true, but does not alter the fact that, if the General Prosecutor’s Representation and CSPPMF’s admonition were given effect, CSPPMF would be the apparent beneficiary.
17. After hearing representations, and despite submissions from all sides that it should not do this, the Court directed that notice be given to CSPPMF of the present proceedings. Notice was given by the Registry, but without, so far as appears, any response or reaction from CSPPMF. No application was made for the Court to join CSPPMF, and it must be doubtful whether the Court would have any jurisdiction to do this, without CSPPMF’s consent.
18. The Court was informed from all sides that the parties trust the AIFC Court to adjudicate fully and fairly on the issues raised by the opposing positions which they formally advance. The Defendants also made clear that they did not wish to litigate against, effectively, the General Prosecutor in proceedings in the ordinary Kazakh courts. Nothing that this Court can do can, however, remove the exposure of all parties concerned to litigation in the Kazakh courts instigated by the General Prosecutor or commenced by CSPPMF. That is evidenced by the prior proceedings involving the shares, in which Mr Nazarbayev and AHM, as well as PLS-TM, have been involved over the years 2009 to 2012 (paragraph

8 above) and in 2023 (paragraph 14 above). PLS-TM's administrative law challenge to the Representation also evidences that some matters can only be pursued by litigation in the ordinary Kazakh courts (administrative proceedings being expressly excluded from the AIFC Court's jurisdiction by Article 13(4) of the Constitutional Statute No. 438-V ZRK of 7 December 2015 (as amended)).

19. In that light, the Court enquired of the parties what would be the effect of any judgment given, either way, by the AIFC Court, in the absence of the General Prosecutor and CSPPMF. In answer, it was accepted that an AIFC Court decision on the issues now sought to be put before it could not bind CSPPMF or preclude it from taking any steps or proceedings otherwise open to it to follow up its admonition. That must, as the Court sees it, be correct. In these circumstances, it is hard to think that any judgment by the AIFC Court would solve any real problem, or indeed be of much more than, perhaps, intellectual interest.
20. The AIFC Court exists to offer to the commercial community the administration of the law on a common law procedural basis, and it will do this in any appropriate case. But Regulation 26(10) contemplates, correctly, that there may be some, even if probably few, cases in which the Court should exercise restraint.
21. In the present cases, and in the light of the considerations which I have set out, the Court has reached the conclusion that, despite the weight to be attached to the parties' express accord, it would not be desirable or appropriate for the AIFC Court to exercise its jurisdiction by adjudicating upon the issues raised by the two present cases. They are issues which can and should be determined before the ordinary courts, either at the instance of CSPPMF which has a real interest in advancing any challenge that can be made to the property sales or at least in circumstances, which the ordinary courts could no doubt ensure, where CSPPMF would be bound by any decision which the court might reach. The AIFC Court will decline jurisdiction accordingly, pursuant to AIF Court Regulation 26(1). It is for the parties to advise themselves how to address the circumstances arising from this decision. The Court will however receive and consider any submissions, if any, which any party wishes to make within 21 days from today regarding the costs incurred in the present proceedings to date.

By Order of the Court,

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

Representation:

CASE No: AIFC-C/CFI/2022/0031

The Claimant was represented by Mr. Makish Yeskarayev, independent external lawyer, Astana, Kazakhstan.

The Defendant was represented by Mr. Vladislav Bykov, independent external lawyer, Astana, Kazakhstan.

CASE No: AIFC-C/CFI/2022/0032

The Claimant was represented by Mr. Makish Yeskarayev, independent external lawyer, Astana, Kazakhstan.

The Defendant was represented by Ms. Dinara Azhbenova, independent external lawyer, Almaty, Kazakhstan