IN THE COURT OF APPEAL

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

2 May 2023

CASE No: AIFC-C/CA/2022/0029

Ministry of Healthcare of the Republic of Kazakhstan

Appellant

v

Firm 800 Limited Liability Partnership

Respondent

JUDGMENT AND ORDER

Justice of the Court:

Justice Sir Stephen Richards

ORDER

The application for permission to appeal is refused.

JUDGMENT

Introduction

1. These proceedings arise out of an Arbitration Award ("the Award") dated 4 November 2022 made by Dr Askar Kaldybayev, the sole arbitrator appointed by the Chairman of the International Arbitration Centre ("the IAC") of the Astana International Financial Centre ("the AIFC"), in IAC Case No.12/2022. The arbitration related to a claim by Firm 800 Limited Liability Company ("Firm 800") for payment for services rendered to the Ministry of Healthcare of the Republic of Kazakhstan ("the Ministry") under a contract for conducting s social media campaign with visual support ("the Contract"). In Section G of the Award the arbitrator ordered the recovery, by Firm 800 from the Ministry, of debt in the amount of USD 27,747.14, the costs of the arbitrator's fee in the amount of USD 1,000, and legal costs in the amount of USD 1,800. Firm 800 then applied without notice to the AIFC Court of First Instance ("the CFI") for recognition and enforcement of the Award in accordance with Article 45 of the AIFC Arbitration Regulations 2017. By a Judgment and Order dated 7 December 2022 in Case No. AIFC-C/CFI/2022/0023, the Court granted the application, in these terms:

> "2. Having read the Award it appears to me that application is justified. Accordingly, I hereby order:
>
> That the Ministry of Healthcare of the Republic of Kazakhstan pay to Firm 800 Limited Liability Company:
>
> (1) debt in the amount of USD 27,747.14 (twenty-seven thousand seven hundred and forty-seven dollars and fourteen US cents);
> (2) the costs of the Arbitrator's fees in the amount of USD 1,000 (one thousand dollars);
> (3) the legal costs in the amount of USD 1,800 (one thousand eight hundred dollars).
>
> By no later than 6pm Astana time on Friday 6 January 2023, being 30 days from the date of this Judgment and Order.
>
> 3. The Defendant is given liberty to apply to have this Order set aside within 14 days of service upon it of this Order."

2. If the Ministry wished to challenge the CFI's Order, the appropriate course would have been to apply to the CFI itself, pursuant to the "liberty to apply" granted by paragraph 3 of that Order, to have the Order set aside. That fits with the procedural provisions contained in Section II (Recognition and Enforcement of Arbitral Awards) of Part 27 of the AIFC Court Rules. In particular, Rule 27.44 provides that "[w]ithin 14 days after service of an Order made without notice or within such other period as the Court may set: (1) the defendant may apply to set aside the Order; and (2) the award shall not be enforced until after: (a) the end of that period; or (b) any application made by the defendant within that period has been finally disposed of".

3. The Ministry, however, has chosen a different procedural route. By an appellant's notice issued on 23 December 2022 it has applied for permission to appeal to the AIFC Court of Appeal against the CFI's Order. That is the application now before the Court.

4. The procedural route chosen by the Ministry not only differs from the route contemplated by the CFI's own Order and the AIFC Court Rules, but has clear practical disadvantages.

5. First, by Rule 29.4 of the AIFC Court Rules, an appeal does not operate as a stay of the decision of the lower Court unless the appeal Court or the lower Court orders otherwise; nor, therefore, does an application for permission to appeal. In the absence of a stay, there has been nothing to stop enforcement of the Award in accordance with the CFI's Order.

6. Secondly, an appeal involves additional hurdles. 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; and 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. Yet there is nothing wrong in principle with the CFI entertaining a "without notice" application for recognition and enforcement of an arbitral award: such a procedure is expressly provided for by Section II of Part 27 of the AIFC Court Rules. Where an order is then made in the terms of the Order in this case, the requirements of fairness and procedural regularity are plainly met by giving the defendant an opportunity to apply to the CFI to set aside the Order before enforcement takes effect. If the defendant does not use that opportunity but seeks to put a case forward for the first time by way of appeal, then even if the Court of Appeal is willing to entertain the appeal the defendant is likely to face an uphill task to persuade the Court that the CFI fell into error on the basis of matters that were not advanced before that Court.

7. It is possible, however, that in seeking permission to appeal in this case rather than making an application to set aside pursuant to the "liberty to apply" in paragraph 3 of the CFI's Order, the Ministry misunderstood the effect of that paragraph. I have decided in the circumstances to put to one side the reservations expressed above and to look at the substance of the Ministry's application for permission to appeal as if the points now advanced had been advanced before the CFI on an application under paragraph 3 of the CFI's Order and had been considered and rejected by that Court. As will become apparent, however, I consider there to be no merit in the points advanced.

8. The grounds set out in the appellant's notice are these:

   (1) Reliance is placed on a letter of objection to the initiation of arbitration proceedings, dated 31 December 2021, to which it is said that the arbitral tribunal did not give its response or a legal assessment.
   (2) It is submitted that the applicable law under the Contract was that of the Republic of Kazakhstan, that by paragraph 3 of Article 386 of the Civil Code of the Republic of Kazakhstan, if the legislation or the contract provides for the term of the contract, the end of this period entails the termination of the parties' obligations under the contract; and that the Contract in this case had ceased to be valid at the date of filing the claim at the IAC: Firm 800 thus had no right to apply

to the IAC, and the case was subject to consideration in the Specialized Interdistrict Economic Court of Astana.

(3) It is submitted that by paragraph 1 of Article 282 of the Civil Code of the Republic of Kazakhstan, the use of foreign currency when making settlements on obligations in the territory of the Republic of Kazakhstan is allowed in cases and under conditions determined by legislative acts of the Republic of Kazakhstan or in accordance with the procedure established by them; but the arbitral tribunal did not decree the legal basis on which it decided to order recovery of amounts denominated in US dollars.

(4) It is submitted that the arbitral tribunal did not substantiate its refusal of a request to involve persons working on the Contract who could explain the essence of the Ministry's refusal to accept the services of Firm 800, and that the tribunal, not knowing about the details of the case, made an unfair arbitration decision only taking into account the position of Firm 800.

9. In addition to the Ministry's application, the Court has before it written submissions on behalf of Firm 800 in opposition to the application, pursuant to Rule 29.14 of the AIFC Court Rules. Although the Ministry's document contains a request for an oral hearing, I am satisfied that the application can be fairly determined on paper without an oral hearing (see Rules 29.16-29.17 of the AIFC Court Rules).

The relevant legal framework

10. By Article 45 of the AIFC Arbitration Regulations, an arbitral award shall be recognised as binding within the AIFC and, upon application in writing to the AIFC Court, shall be enforced within the AIFC subject to the provisions of the article and of Articles 46 and 47. Article 47(1) lays down limited grounds for refusing recognition or enforcement. The only one of possible relevance to the Ministry's present application is that "the arbitration agreement is not valid under the law to which the parties have subjected it" (Article 47(1)(a)(i)). Neither that nor any of the other grounds allows the Court to review the merits of an arbitrator's award or decision on substantive issues, whether of fact or law, made within his or her jurisdiction. The position is the same in that respect as that which applies under the provisions of Article 44 concerning an application for setting aside an arbitral award, as to which see the judgment of the AIFC Court in Case No. AIFC-C/CFI/2022/0012, *Aksaystroy-2020 LLP v. Metallinvestatyrau LLP*, in particular at paragraphs 13-17 (per Lord Mance, Chief Justice).

The letter of objection dated 31 December 2021

11. The letter dated 31 December 2021 upon which the Ministry's first ground of appeal is based was not supplied with the appellant's notice but was sent separately to the Court following a request by the Court. The letter was the Ministry's answer to Firm 800's request for arbitration. It consisted mainly of arguments that the Ministry was entitled to reject Firm 800's claim because of improper performance and failure to achieve the objectives of the Contract. To the extent that the Ministry pursued those arguments before the arbitral tribunal, they were rejected by the tribunal for reasons given in the Award; and the tribunal's decision on the substantive merits is not open to review by the Court. If and in so far as arguments about the termination of the parties' obligations on termination of the Contract were intended to relate to the validity of the arbitration agreement, the issue is considered below under the second ground of appeal. It was in any event not necessary for the arbitral tribunal to make separate reference to the letter.

Whether there was a right to apply to the IAC

12. The Ministry's second ground rests on the proposition that where, as a matter of Kazakh law, the parties' obligations under a contract have terminated on the term of the contract (or "the validity period of the agreement") coming to an end, the contractual provisions for arbitration are no longer effective. That, however, misunderstands the legal position.

13. The Contract between the parties provided in Clause 49.1 that "Any dispute between the Parties or relating to this Contract which cannot be settled amicably may be submitted by either Party to arbitration in the manner provided for in the SCC". "SCC" was defined as meaning the Special Conditions of Contract. The relevant provision of the Special Conditions of Contract read:

> "49. Disputes shall be settled by arbitration in accordance with the following provisions: Any dispute, controversy, difference or claim, whether contractual or non-contractual, arising out of or in relation to this Agreement, including its existence, validity, interpretation, performance, breach or termination, shall be referred to and finally resolved by arbitration administered by the International Arbitration Centre of the Astana International Financial centre ('IAC') in accordance with the IAC Arbitration and Mediation Rules in force on the date on which the Arbitration is filed with the Registrar of the IAC, which Rules are deemed to be incorporated into this clause.
> …
> The seat of the arbitration will be the Republic of Kazakhstan. The law governing the arbitration proceedings shall be the law of the seat."

14. The effect of a contractual provision in almost identical terms was considered by the Court in Case No. AIFC-C/CFI/2021/0008, *Ministry of Healthcare of the Republic of Kazakhstan v. Success K Limited Liability Partnership*, to which the same Ministry was a party. In that case the Court rejected an argument by the Ministry that the arbitration agreement was invalid for failure to comply with the Arbitration Act of the Republic of Kazakhstan. The detailed reasoning is not repeated here, but the essence of the matter can be seen in paragraph 26 of the Court's judgment (per Lord Mance, Chief Justice):

> "Reading Special Condition 49 as a whole, what the parties were agreeing was to resolve any disputes by IAC arbitration within the jurisdiction of the AIFC which is within the Republic of Kazakhstan and to do this subject to the arbitral law of the IAC which is found in the AIFC Arbitration Regulations and the IAC Rules. … The arbitral law is therefore for all purposes that of the AIFC and IAC …."

15. The effect of Special Condition 49 is the same in this case. The law governing the arbitration is the arbitral law of the IAC. It is distinct from the law governing the merits of the substantive dispute (in this case the law of the Republic of Kazakhstan). An arbitration agreement that is subject to the arbitral law of the IAC does not cease to exist because the substantive provisions of the contract in which it is incorporated have come to an end; nor is the IAC thereby deprived of jurisdiction to entertain a claim relating to the contract. Article 7 of the IAC Rules on Arbitration and Mediation covers the position in this way:

> "7.1 The Tribunal has the power to rule on its own jurisdiction, including on any objections with respect to the existence, validity or scope of the arbitration agreement.
>
> 7.2 An arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal that the contract is null and void shall not necessarily entail the invalidity of the arbitration agreement, and the Tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void.
>
> 7.3 Any objection that the Tribunal does not have jurisdiction shall be raised as soon as practicable and no later than in a Statement of Defence or in a Statement of Defence to a Counterclaim. …"

The rule reflects the provisions of Article 26 of the AIFC Arbitration Regulations 2017 concerning the competence of the arbitral tribunal to rule on its jurisdiction.

16. It follows that the arbitral tribunal in the present case plainly had jurisdiction to entertain Firm 800's claim. Moreover, though the point is not necessary for my decision, the Ministry's objections regarding jurisdiction were raised too late, given that it failed to raise them within the time specified by Rule 7.3 and, on the contrary, it participated actively throughout the arbitration proceedings.

Whether the arbitral tribunal was entitled to specify the amount in US dollars

17. Firm 800's invoices to the Ministry, and its claim to the IAC, were expressed in US dollars. I can find nothing in the Award to suggest that issue was taken by the Ministry at the time with the validity of that approach. Furthermore, paragraph 2 of Article 6 of the Law of the Republic of Kazakhstan dated 2 July 2018, No.167-VI "On Currency Regulation and Currency Control", to which attention has been drawn by the written submissions on behalf of Firm 800, provides that currency transactions between residents and non-residents can be carried out in national and/or foreign currency. Since Firm 800 is non-resident, being a foreign company registered under the legislation of Ukraine, there is on the face of it a valid basis under the law of the Republic of Kazakhstan for the arbitrator to have ordered recovery of amounts expressed in US dollars. It was not necessary for him to spell the matter out. In any event the issue relates to the substantive merits of the decision, which the Court cannot review, rather than going to the validity of the decision.

The refusal to allow the Ministry to call certain witnesses

18. The Ministry's fourth ground relates to the arbitrator's refusal of an application, made by the Ministry in the course of the final hearing of the arbitration, that former employees of the relevant Project Management Team be called as witnesses to provide evidence regarding the performance by Firm 800 of its duties under the Contract. The arbitrator dealt with this at paragraphs 40-56 of the Award, giving detailed reasons (including the lateness of the application) for the refusal of the application. It was plainly open to the arbitrator, having regard *inter alia* to Articles 13.4, 14.1, 14.3 and 20.2 of the IAC Rules on Arbitration and Mediation, to make the decision he did. In any event this issue

relates again to the substantive merits of the decision, which the Court cannot review, rather than going to the validity of the decision.

Conclusion

19. An appeal would have no real prospect of success, and there is no other compelling reason why an appeal should be heard. The application for permission to appeal is therefore refused.

By the Court,

Representation:

The Appellant was represented by Mr. Zhanibek Seralinov, in-house lawyer, Ministry of Healthcare, Astana, Kazakhstan.

The Respondent was represented by Mr Ravil Kassilgov, Partner at Tukulov & Kassilgov Litigation LLP, Astana, Kazakhstan.