

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

19 September 2024

CASE No: AIFC-C/CFI/2023/0044

JSC NATIONAL COMPANY QAZAVTOJOL

Claimant

v

SINOHYDRO CORPORATION LIMITED

Defendant

JUDGMENT AND ORDER

Justice of the Court:
Justice Tom Montagu-Smith KC

ORDER

UPON the Claimant's claim disputing the decisions ("the Decisions") of a disputes board and engineer pursuant to a construction contract.

AND UPON the Court ordering payment of sums found to be due pursuant to the Decisions and the Claimant making that payment.

AND UPON the Court directing a hearing of the issue of whether it is open to the Claimant to challenge the Decisions and reclaim the payment.

AND UPON hearing counsel for the parties.

IT IS ORDERED THAT:

1. The Claimant is entitled to challenge the Decisions and to claim repayment of sums paid pursuant to the Decisions.
2. The Defendant shall by 18:00 Astana time on 2 October 2024 provide to the Claimant copies of all appendices to the 5 claim reports filed with the Defence.
3. By 18:00 Astana time on 16 October 2024, the parties shall discuss between themselves and seek to agree the directions required to prepare the case for trial. Where no agreement can be reached, the parties should file their competing proposals with the Court. The parties shall in particular consider and discuss the following:
 - 1) Preparation of schedules setting out in detail the issues in dispute between the parties and their corresponding positions.
 - 2) Production of documents.
 - 3) Witness evidence.
 - 4) Expert evidence.
 - 5) The time needed for trial.
4. Any submissions on costs should be made by 18:00 Astana time on 25 September 2024.

JUDGMENT

A. Introduction

1. On 11 July 2017, the parties entered into a construction contract on FIDIC Red Book terms for the works on a stretch of road. The Claimant was the employer and the Defendant was the contractor.
2. Clause 20 of the contract provided for the resolution of disputes between the parties. By clause 20.1 of the General Conditions, any claim was to be submitted to the engineer for their decision. By clause 20.4, such decisions and any other disputes could be referred to a disputes board for review. Subject to certain contractual limitations, such decisions could then be referred to arbitration by either party.
3. Disputes arose between the parties. A disputes board was appointed on 1 March 2022. The Defendant submitted 5 claims in which it sought an extension of time of 654 days and total compensation of KZT 7,512,666,000.
4. The disputes board issued its decision on 24 March 2022. This was followed by a decision of the engineer on 1 August 2022. By these decisions, the Defendant was granted an extension of time of approximately 380 days and a total compensation of KZT 2,827,132,994.20. Slightly different periods and sums have been alleged in these proceedings. However, for present purposes, the precise calculations do not matter.
5. The Claimant was dissatisfied with the decisions. On 23 December 2022, the parties entered into Addendum No. 3, by which they agreed to vary the contract.
6. Amongst the amendments, the parties agreed to refer their disputes to the AIFC Court, rather than to arbitration.
7. Article 2 provided (in translation):

“The Parties agreed that the [Claimant] will temporarily make a payment in the amount of 2,827,132,994.20 KZT to a special escrow account and extend the Contract period for 380 days from the date of signing this supplementary agreement No. 3 by the decision of the SUS, which is mandatory in accordance with clause 20.4 of the GCC, but the Employer will apply to the court on the issue disagreement with the decision of the DAB on the amount of compensation and the Contract extension period:

 - At the same time, if the decision is made in the direction of the Employer, the Contractor undertakes to reimburse the amount of compensation in full within 84 days after the official court decision is made.
 - At the same time, if the decision is made in the direction of the Contractor, the Employer does not claim a refund of the funds paid and the application of penalties for this project to the Contractor.”
8. The Claimant made part, but not all, of the payment. As a result, the Defendant brought a claim for the balance. By an Order dated 17 May 2023, the then Chief Justice, Lord Mance, ordered the Claimant to pay the balance.
9. The Chief Justice described the effect of the addendum as follows (at paragraph 5):

“The scheme was that there would be an immediate temporary payment, what one would call a provisional payment, but that the Employer would not lose the Employer’s right to

investigate the substance of the decisions reached by the DAAB and by the Engineer but could challenge them in this Court.”

10. At paragraph 9, the Chief Justice said:

“In those circumstances, I will direct that the Court enters judgment against the Defendant for the figure of 2,203,244,303.13 KZT. That would of course leave the Defendant free under Supplementary Agreement No. 3 to bring any challenge or claim which it wishes in any way it can.”

11. The Claimant issued the present proceedings on 14 November 2023. The Defendant has filed a Defence. The Court issued directions, requiring the parties to confer and seek to agree directions for the claim to trial. No assistance was forthcoming and so the Court listed a case management conference, which took place on 17 April 2024.

12. At the case management conference, the Defendant stated that it took a preliminary objection to the claim. According to the Defendant, the Claimant was not entitled to challenge the decisions of the engineer or the disputes board, relying on 3 factors:

- 1) The decision of the Chief Justice;
- 2) The terms of the contract;
- 3) A limitation period.

13. For reasons I set out in a prior judgment, I directed the hearing of those defences as preliminary issues. The parties exchanged submissions in May. Unfortunately, the parties did not have mutual availability until 16 September 2024.

14. At the hearing, the Defendant’s counsel identified various grounds on the basis of which she claimed that the Claimant was barred from challenging the decisions. While some of the submissions were not clear to me, so far as I can understand them, the Defendant’s main arguments were the same as those raised at the case management conference. In addition, it was suggested that the Claimant had abandoned any right to challenge the decisions by continuing with the contract, making payments and permitting sums to be released from escrow.

15. It seems to me perfectly clear that the decision of the Chief Justice preserved the Claimant’s right to challenge the decisions after payment. That appears in terms in the passages I have recited above.

16. It is right that the terms of the contract imposed strict times within which a decision of the engineer and the disputes board needed to be challenged. The Defendant relied in particular on Clause 20.4 of the General Conditions, which provided that any disagreement with a decision of the dispute board needed to be raised within 28 days of the decision, failing which it would become binding. The Defendant asserts that no notice of objection was received within the time period.

17. The Claimant’s response is that, whatever the prior position, the contract was varied by Addendum No. 3. By clause 2 of that Addendum, the Defendant expressly agreed that the Claimant was entitled to apply to the Court to review the decisions.

18. The Defendant suggested that the Claimant should have made that application more quickly. However, no deadline was imposed by the Addendum. In those circumstances, the contract, as varied by Addendum No. 3 does not prohibit this claim either. To the contrary, it anticipates a claim like this one.

19. As to limitation, the Defendant's counsel asserted in argument that the claim was time barred because, under Kazakhstan law, a claim must be brought within 1 year. Counsel referred me to Article 180 of the Civil Code. On inspection, that provision deals only with when the limitation period begins to run.
20. In her response submissions, the Claimant's counsel did not dispute that the limitation period was relevant. However, she took me to Article 178 of the Kazakhstan Civil Code, which states the default position that the limitation period is 3 years. I was not shown anything to suggest that there was a different statutory limitation period for claims of this sort. The Claimant's position was would run from the date of payment, which took place in 2023. However, even if the limitation ran from the date of the disputes board decision, it would run from 23 May 2025. It is difficult to see how any earlier date could be arguable and none was suggested. In those circumstances, the claim cannot on any view be statute barred.
21. Finally, the Defendant argued that the Claimant had effectively agreed with the decisions in a number of ways. The Claimant had paid the sum directed in the decisions, had authorised the release of funds from escrow, had paid for the works and had accepted and taken over the works.
22. As the Claimant pointed out, these steps simply constituted the Claimant's performance of its obligations under the contract. The scheme of the contract is that the parties are obliged to comply with the decisions of the engineer and the disputes board even when they have been referred to arbitration (or, in this case, the Court). These sorts of arrangements are very common in construction contracts, to preserve the contractor's cash flow in the event of disputes. Compliance with those obligations cannot indicate acceptance of the disputed decisions, because the parties are obliged to comply, even while the dispute remains unresolved.
23. In the circumstances, in my judgment, the Claimant is entitled to bring this claim to challenge the decisions of the disputes board and the engineer and, if and to the extent that claim succeeds, to recover the money it has paid.
24. As set out above, I have previously asked the parties for some assistance in formulating the directions necessary to prepare this case for trial. As the claims are presently set out, it is not clear to me whether the resolution of the dispute will require input from expert witnesses, or whether the disputes are capable of resolution on the documents and by reference to the terms of the contract alone.
25. At the hearing, I asked the parties again for their assistance with directions. In response, the Claimant's counsel indicated that it is difficult for the Claimant to form a view at this stage, because it is missing certain documents which were submitted by the Defendant to substantiate its claims to the disputes board. Most significantly, the Defendant's claims were supported by 5 reports, which refer to appendices. Those appendices were not attached when produced in these proceedings and the Claimant says it has not received them. The Defendant says it has. Whatever the truth of that, the contents of those appendices appears to be important to the evaluation of these claims. They were identified by the Claimant as being critical to its understanding of the claims. The Defendant has them and can produce them. I will therefore order the Defendant to produce those documents within 14 days.
26. Thereafter, I will direct the parties (for a second time) to liaise and seek to agree directions. The Court is particularly reliant on parties to propose suitable directions. If they cannot be agreed, the parties should each file their competing proposals and the Court may convene a further case management conference if that proves necessary.

27. The parties are required to consider in particular 4 areas:
- 1) Preparation of schedules setting out in detail the issues in dispute between the parties and their corresponding positions. Preparation of schedules can assist where there are a large number of discrete issues which need to be addressed. Claimants will often prepare a schedule, leaving space for the defendant's response. The parties should consider whether this would assist and, if so, propose dates for their preparation by the Claimant and completion by the Defendant.
 - 2) Production of documents. The usual approach would be for the parties to produce the documents on which they rely and then request from the other party specific documents or narrow categories of documents which they require the other party to produce. Subject to objections, those further documents should then be produced and the Court will then resolve any disputed objections. The parties should consider the steps they consider are required and the dates by which each step should be completed.
 - 3) Witness evidence. Parties are encouraged to identify any individuals whom they intend to call to give evidence and propose dates for the exchange of statements.
 - 4) Expert evidence. The parties should consider whether any technical issues arise which require the assistance of experts. If they do, the parties may be able to agree to the appointment of a single joint expert, to assist the Court.
 - 5) Trial. The parties should consider how long they should be set aside for hearing the claim.
28. Once the parties' proposals are received, the Court will consider whether to make directions or to order another CMC.
29. I have not received any submissions on the costs of this element of the proceedings. If either party wishes to claim those costs, it should do so within 7 days.

By Order of the Court,

Justice Tom Montagu-Smith KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Ayim Kolzhanova, Chief Manager of the Department of Legal and Personnel Work of JSC "NC "QazAvtoZhol", Astana, Kazakhstan.

The First Defendant was represented by Ms. Irina Li, Director of the "Legal Company Assessor" LLP, Almaty, Kazakhstan.