



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

18 January 2023

CASE No: AIFC-C/CFI/2023/0001

“ALAIGYR JOINT VENTURE” LLP

Claimant

v.

“BAUPROJEKT” LLP

Defendant

JUDGMENT & ORDER

Justice of the Court:

Justice Sir Rupert Jackson



ORDER

The application before the Court is dismissed.

JUDGMENT

1. This is an application for an anti-suit injunction. The background of this application is as follows.
2. On the 21st of October 2020 a Consortium comprising Temir Zat LLP, BauProjekt LLP, and MCI Group LLP, entered into a Contract with Alaigyr Joint Venture. The contract was on the turnkey basis for procurement of "Complex works for the development of design and estimate documentation for the "Project" stages, the development of design and estimate documentation for the "Detailed documentation" stages, the supply of equipment and the construction of an enrichment plant in infrastructure facilities, tailings storage facility, and water recycling system of the mining and processing plant for the extraction and processing of polymetallic ores at the Alaigyr deposit in the Karaganda region."
3. On the 12th of October 2021 Alaigyr Joint Venture entered into a separate contract with BauProjekt LLP for engineering services on design supervision as more precisely set out in Clause 1.1 of the contract relating again to the same project concerning the Alaigyr deposit. I only have this second contract, the 12th of October 2021 Contract, in Russian. It was supplied to the court today, but a member of the Court staff has translated for me passages which appear to be relevant.
4. The contract made in October 2020 is Contract No. 117 and I shall so refer to it. The contract made in October 2021 is Contract No. 1 and I shall so refer to it. Contract No. 117 contains an arbitration clause in Clause 1.14 of the Conditions in the following terms: "Any dispute, disagreement, controversy or claim, whether contractual or non-contractual, arising out of or in connection with this Contract, including any relating to its existence, validity, interpretation, performance, breach or termination, shall be submitted to and finally resolved by arbitration proceedings conducted 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 of submission of the Request for Arbitration to the Registrar of the IAC and forming an integral part of this clause."
5. Contract No. 1, however, does not contain an arbitration clause. Instead, in Clause 11.6, Contract No. 1 provides that: "All disputes between the Parties that arise in the process of implementing the terms of the Contract are resolved through negotiation; if there is no agreement reached within 15 calendar days the disputes of the Parties are resolved through a court in the Specialized Inter-District Economic Court of Karaganda Region."
6. During 2022 Alaigyr Joint Venture became dissatisfied with the services of the Consortium under Contract No. 117 and it became dissatisfied with the services of BauProjekt under Contract No. 1. Alaigyr Joint Venture served notices of termination under both contracts. The Consortium was aggrieved by the notice of termination which it believed to be unjustified.

7. Accordingly, the Consortium resorted to arbitration as it was fully entitled to do under Clause 1.14 of Contract No. 117. Ms. Burkovskaya, who has appeared before me today, drafted the Request for Arbitration which was served on behalf of the Consortium. I understand from Mr. Korobeinikov, who appears on behalf of Alaigyr Joint Venture today, that he received the Request for Arbitration on the 17th of September 2022. I understand from the Registrar that the Request for Arbitration was registered with the International Arbitration Centre on the 18th of November 2022.
8. Essentially, the Request for Arbitration was challenging the termination of the Contract No. 117 and maintaining that Alaigyr Joint Venture had no entitlement to terminate on the grounds which they asserted.
9. Meanwhile, BauProjekt was equally dissatisfied with the termination of Contract No. 1. Contract No. 1 as previously mentioned does not contain an arbitration clause. So, BauProjekt LLP commenced proceedings in accordance with the dispute resolution procedure in Clause 11.6 of Contract No. 1. BauProjekt commenced those proceedings as it was required to do before the Specialized Inter-District Economic Court of the Karaganda province, to which I shall refer as “the Karaganda Court”.
10. In its petition to the Karaganda Court BauProjekt headed the matter “Petition for invalidation of the notice of termination of the contract by customer unilaterally through fault of the contractor and to compel the Defendant to conclude the Contract”. The petition then sets out in some detail why BauProjekt contends that the termination of Contract No. 1 was wrongful. Those arguments span pages 1-4 and the first half of page 5 of the petition.
11. Finally, in the middle of page 5 and through page 6 we find a separate claim, the Claimant asking the Court to compel Alaigyr Joint Venture to conclude a contract for BauProjekt to supervise during construction. As I say, those proceedings were duly issued in the Karaganda Court.
12. I understand that they were issued on or about the 25th of November 2022. I am told by Ms. Burkovskaya that the Registrar of the Karaganda Court held a meeting with representatives of the Parties on the 29th of November 2022 and created a WhatsApp group so that the Parties could liaise with one another. That WhatsApp group included Ms. Anna Bobkova, who is Head of the legal department of Alaigyr Joint Venture. I am told, and I have no reason to doubt, that Ms. Bobkova asked where she could find the Claim Form on the 30th of November and she was directed to it through the medium of the WhatsApp group.
13. Having studied the petition of BauProjekt in the Karaganda proceedings, Ms. Bobkova launched an application to the Karaganda Court to dismiss the claim. I have this application in Russian at pages 227-228 of the Bundle and with an English translation at pages 225-226. This application is headed “Application to dismiss the claim”.
14. The gist of the case which Ms. Bobkova presented in her application was that the whole claim in the Karaganda Court should be dismissed because Contract No. 117 contained an arbitration clause. She argued that the whole claim in the Karaganda Court was an abuse of right which was prohibited by the Civil Procedure Code and therefore the whole dispute between BauProjekt and Alaigyr Joint Venture should go to arbitration.

15. The application which Ms. Bobkova launched on the 18th of November was an application which was doomed to fail. On any view, most of the matters in the petition of BauProjekt to the Karaganda Court could only be dealt with in court proceedings pursuant to Clause 11.6 of Contract No. 1, unless both parties agreed otherwise (which was not going to happen).
16. The Karaganda Court considered the matter. It held a hearing on the 11th of January and I understand that a further hearing is planned for the 24th of January. I do not imagine that the Karaganda Court will agree to dismiss the whole claim, because on any view most of the claim must proceed before that Court.
17. On the 30th of December 2022 Alaigyr Joint Venture issued an application in this Court, the AIFC Court, to obtain an injunction. In that application Alaigyr Joint Venture asked for the following relief. I quote from paragraph 1 of the application:

"Alaigyr Joint Venture LLP (the claimant in the counterclaim in the pending IAC arbitration proceedings) ("Claimant") makes this urgent application today for the order on the interim injunction to restrain and/or prohibit one of the Respondents in the counterclaim in the pending IAC arbitration proceedings, BauProjekt LLP ("Defendant"), from continuing with proceedings in the Specialized Inter-District Economic Court of the Karaganda Region, which commenced on the 25th November 2022 ("Karaganda Proceedings"), in breach of an agreement between the Claimant and the Defendant that all disputes be referred to the International Arbitration Centre ("IAC") of the Astana International Financial Centre under Rules on Arbitration and Mediation at the IAC ("IAC Rules")."

18. On any view, this application as it stands is doomed to fail because the major part of the proceedings before the Karaganda Court can only proceed in that Court. They are not subject to an arbitration clause. To make matters worse, the Claimant, Alaigyr Joint Venture, did not serve this application on the Defendant, BauProjekt LLP. I am sure that Alaigyr Joint Venture considered the matter conscientiously, but they came to the conclusion that it should be dealt with *ex parte*. Now, there are occasions when applications to the Court must be dealt with in the absence of the Defendant party. Sometimes that is necessary, for example because there is skulduggery suspected and it is designed to avoid documents being destroyed or assets being removed from the jurisdiction. On other occasions, time simply does not allow the Defendant to be notified. But in this case, the 30th of December was some 19 days ago. There was ample time to notify the Defendant of this application and for the Defendant to prepare itself to respond to it. There matters rested until a few days ago. The case was referred to me. I gave an instruction on Friday 13 January (as soon as I heard about this case) that the Defendant should be notified immediately. I understand that an email was sent from the Registry here to the lawyers for Alaigyr Joint Venture on Friday telling them to notify the Defendant, and then again on Sunday, but it seems that these two emails were not seen and acted upon until a third email was sent to the lawyers for Alaigyr Joint Venture later on Sunday.
19. The Claimant's lawyers notified the Defendant on Sunday of this week, three days ago, and the case papers reached the Defendants or the Defendant's lawyers yesterday, Tuesday, the 17th of January. Despite the lateness of the notification of these proceedings, Ms. Burkovskaya, counsel for the Defendant to this application, namely BauProjekt LLP, has attended the hearing today and has presented her arguments. I am most grateful to Ms. Burkovskaya for making herself available to assist the Court at such short notice.


20. So, the hearing was listed for today. The hearing began at 10am. Mr. Korobeinikov of Baker McKenzie Kazakhstan B.V. appeared at the hearing today for the Claimant, Alaigyr Joint Venture, and, as I say, Ms. Burkovskaya appeared for the Defendant to this application BauProjekt LLP. Both counsel have put their arguments before me very clearly, concisely, and moderately. I thank Mr. Korobeinikov for putting his case so clearly, and I thank Ms. Burkovskaya for putting her case so clearly. Matters were delayed somewhat during the hearing this morning when documents only available in Russian had to be translated for me by a member of the Court staff. But that went smoothly and no significant delay was caused.
21. Mr. Korobeinikov in his argument was forced at an early stage to retreat from the full application contained in writing before the Court and he essentially limited himself to arguing that if we look at the petition to the Karaganda Court, we will see on the last page and a half allegations concerning price of works and so forth which overlap with issues in the arbitration. Mr. Korobeinikov took me in some detail through the latter part of the petition by BauProjekt to the Karaganda Court, and then to the Request for Arbitration drafted by Ms. Burkovskaya and filed with the International Arbitration Centre here concerning the Consortium claims against Alaigyr Joint Venture. So, both counsel have made their submissions on this. Mr. Korobeinikov submits that there is an overlap between the arbitration and the court proceedings, and that steps must be taken to prevent that. He cannot argue that the whole Court proceedings should be stopped. At most, all he can reasonably seek is that there should be some injunction limiting the scope of the court proceedings. Ms. Burkovskaya says that there should be no such injunction. There is no overlap between court proceedings and arbitration proceedings. Matters should go forward as they currently stand.
22. In support of his application Mr. Korobeinikov cited two decisions of the UK Courts. The first decision which he relies upon is the “*Angelic Grace*”, a decision of the Court of Appeal 1994 EWCA Civ J0517-10 and the second authority which he relies upon is the decision of the UK Supreme Court called *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant* 2013 UKSC 35. I bear those decisions in mind. The general principles which they set out are applicable both in Kazakhstan and England. I note in particular what the Court of Appeal said in paragraph 68 of its Judgment of the *Angelic Grace*:
- “...where an injunction is sought to restrain a Party from proceeding in a foreign court in breach of an arbitration agreement governed by English Law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced.”*
23. In the present case, I do not think the application has been made promptly or before the Karaganda proceedings were too far advanced. All that was required was a simple application, on notice to the other side, to limit the scope of the court proceedings before the Karaganda Court. Instead what has happened is that a wide-ranging application to stop the entire Karaganda proceedings was launched on the 30th of December, over a month after the beginning of court proceedings and the Defendant was not notified of that application until mid-January. That seems to me to be a very unsatisfactory situation. In the meantime, with the Karaganda Court and BauProjekt being totally unaware of the application before this Court, the proceedings in the Karaganda Court went forward. There has been a hearing on the 11th of January. At that hearing the Judge and BauProjekt did not have in mind the proceedings before this Court, although of course they did have before them the doomed

application made by Ms. Bobkova to dismiss the Karaganda proceedings. So that is the first reason why I conclude that this application should fail.

24. The second reason why I conclude that this application should fail is that I am not persuaded that there is any substantial overlap between the arbitration proceedings and the court proceedings. There may be a small area of overlap. Both the arbitrator in the arbitration, and the Judge in the Karaganda proceedings will have to tread carefully to ensure that they do not, so to speak, tread on each other's toes. But I cannot fashion an order at this stage which will prevent any overlap arising. The problem which gives rise to the application before this Court is not the fault of either of the Parties before this Court. The problem arises because we have two different contracts with two different dispute resolution procedures, that is bound to generate difficulties and problems. I am sure that Ms. Burkovskaya, acting for BauProjekt, and Mr. Korobeinikov and his team at Baker Mckenzie, acting for Alaigyr Joint Venture, will use their best endeavours to ensure that conflict between the two different processes, arbitration and litigation, are avoided altogether or failing that, are minimised.

25. But my decision on the application today is that the application must be dismissed.

By the Court,

A handwritten signature in blue ink that reads 'Rupert Jackson'.

Sir Rupert Jackson
Justice, AIFC Court



Representation:

The Claimant was represented by:

1. Mr. Alexander Korobeinikov, Partner of Baker McKenzie, Almaty, Republic of Kazakhstan;
2. Ms. Yana Daloglu, Paralegal of Baker McKenzie, Almaty, Republic of Kazakhstan.

The Defendant was represented by:

1. Ms. Feruza Burkovskaya, Director of "URKO Company" law firm, Ust-Kamenogorsk, Republic of Kazakhstan.