



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

22 May 2024

CASE No: AIFC-C/CFI/2024/0001

AQUA FACTORIA LLP

Claimant

v.

AOM SDF I B.V. PRIVATE LIMITED COMPANY

Defendant

---

JUDGMENT AND ORDER

---

Justice of the Court:  
Justice Tom Montagu-Smith KC

**ORDER**

**UPON** the Claimant's claim (1) for an order setting aside the Order of Justice Lord Faulks KC dated 14 November 2023; (2) for an order setting aside an arbitration award dated 18 October 2023; and (3) for an order determining the counterclaim in the arbitration;

**AND UPON** the Claimant's application for an extension of time to apply for an order setting aside the Order of Justice Lord Faulks KC dated 14 November 2023;

**AND UPON** hearing counsel for the parties;

**IT IS ORDERED THAT:**

- 1. The Claimant's application for an extension of time to apply to set aside the Order of Justice Lord Faulks KC of 14 November 2023 is extended to 15 January 2024.**
- 2. The Claimant's claim is dismissed.**
- 3. The parties shall file submissions on costs and any consequential matters by 18:00 Astana time on 29 May 2024.**

**JUDGMENT**

**A. Introduction**

1. By this claim, the Claimant seeks to set aside an arbitration award dated 18 October 2023 ("**the Award**") issued under the Rules of the International Arbitration Centre of the AIFC. The Claimant's central complaint is that the arbitrator decided the claim on the basis of a case which was not advanced or argued.
2. The underlying claim arises out of an agreement ("**the Agreement**") pursuant to which the Defendant advanced loan monies to the Claimant. The Claimant repaid the principal sum, but refused to pay any interest, prompting a claim by the Defendant. The Claimant counterclaimed in the arbitration for termination of the Agreement.
3. By the Award, the arbitrator awarded the Defendant a total of KZT 242,784,174.28, together with the arbitrator's fee of KZT 500,000. According to the Claimant, in doing so, the arbitrator relied on a finding that the parties had agreed to reduce the amount of the loan advanced. That, the Claimant says, was not the Defendant's case before the arbitrator. The arbitrator also dismissed the counterclaim.
4. The Claimant seeks to set aside the Award on the basis that it contains decisions on matters beyond the scope of the submission to arbitration, within the meaning of Article 44(2)(a)(iii) of the AIFC Arbitration Regulations. In addition, the Claimant makes certain other criticisms of the Award. The Claimant also asks this Court to determine the arbitration counterclaim in its favour and issue an order terminating the Agreement.
5. The Defendant resists the claim. The claim is, according to the Defendant, in reality an attack on the merits of the Award.

## B. Background

6. On 15 December 2020, the Claimant and the Defendant entered into the Agreement.

7. The Agreement contained the following terms:

1.1...

**“Interest”** means Loan Interest in the amount specified in Article 4 of the Agreement;

**“Repayment Schedule”** means the frequency of repayment of the next part of the Loan and Interest in accordance with Annex No. 1, which is an integral part of this Agreement;

**“Default”** means the occurrence of any of the cases listed in Article 10 of this Agreement;

...

**“Loan”** means financial (credit) resources in the form of cash provided by the Lender to the Borrower on the terms defined by this Agreement.

...

**“Loan Amount”** means money in the amount of 2,717,964,854... tenge provided to the Borrower in accordance with this Agreement.

**“Borrower’s Account”** means the Borrower’s bank account for transferring the Loan Amount to a second-tier bank, the details of which are specified in paragraph 3.2 of this Agreement.

...

2.1. The Lender shall transfer money to the Borrower for the following purposes:

- 1) Capital expenditures;
- 2) Making up current assets.

2.2. The total amount of the loan in the amount of 2,717,964,854... tenge shall be provided for the Loan maturity, and the Borrower shall undertake to repay the Loan and the Interest due on time, in the manner and on the terms provided for in this Agreement and the Repayment Schedule according to Annex No. 1 to this Agreement.

...

3.1. The Loan amount shall be provided to the Borrower within 15 (fifteen) working days from the date of fulfillment by the Borrower and the Pledgor of the conditions provided for in paragraph 3.4 of the Agreement.

3.4. The Lender’s obligation to provide a Loan shall arise only after the Borrower and the Pledgor fulfill the following conditions...

...

3.6. The period of use of the Loan shall begin from the date of receipt of the Loan Amount to the Borrower’s Account and end with the date of receipt of the entire Loan amount and Interest under this Agreement in favor of the Lender.

4.1. The Borrower shall pay the Lender the Interest according to the Repayment Schedule specified in Annex No. 1 to this Agreement. Interest shall be calculated at the rate of 8%... per annum (without capitalization).

4.2. Interest shall be accrued on the Loan amount (principal amount) actually used by the Borrower based on the number of dates of its use...

4.3. Payment by the Borrower of the Interest shall be made in tenge according to the Repayment Schedule by transfer to the Lender's Account...

...

4.5. Accrual of the Interest shall be terminated from the day following the day on which the Borrower fully fulfills their obligations to repay the Loan (including in case of early repayment of the Loan).

...

5.12. If the Borrower fails to fulfill the conditions specified in paragraph 3.4 of this Agreement within 10 (ten) calendar days from the date of conclusion of the Agreement, the Lender shall have the right to refuse further performance of this Agreement and this Agreement may be terminated unilaterally, out of court by sending a written notice to the Borrower.

...

6.1. The Borrower shall be obliged to repay the principal amount of the Loan, accrued Interest and other amounts payable in accordance with this Agreement in full and within the terms stipulated by the Repayment Schedule. The repayment schedule shall be signed by the Parties on the day the Loan is issued.

...

8.1. The Borrower shall assume obligations to the Lender:

...

8.1.11) to make an early repayment of the Loan received together with the Interest due in case of Default;

...

10.1. Borrower's Default shall be recognized as non-fulfillment or improper fulfillment by the Borrower of the following obligations under this Agreement, the Collateral Arrangement;

...

10.1.9) violation of conditions stipulated in subparagraphs 8.1.6)-8.1.8), 8.1.10) of Article 8, paragraphs 5.3., 5.8., 5.9., 6.1. of this Agreement, subparagraphs 2.2.1.-2.2.3, 2.2.6., 2.2.9., paragraphs 3.1.-3.6. of the Pledge Agreement for the real estate specified in 2.2.15., - 2.2.15, 2.2.17, paragraphs 3.1.-3.5. of the Pledge Agreement for movable property specified in subparagraph 5.1.2. of this Agreement;

...

10.2. In case of Default, the Lender shall have the right to apply the following Measures at their discretion:

10.2.1) prematurely charge the full amount of the Loan, including accrued Interest and other amounts due in accordance with the terms and conditions of this Agreement;

8. Clause 14.2 contained an arbitration agreement in favour of the International Arbitration Centre of the AIFC ("the IAC").
9. It is common ground that at least one of the conditions under Clause 2.4 of the Agreement was not satisfied by the Claimant. Despite this, on 29 December 2020, the Defendant transferred the sum of KZT 1,670,000,000 into the account designated as the Borrower's Account in clause 3.2 of the Agreement. Thereafter, on 15 January 2021, the parties both signed a version of Appendix 1 to the Agreement ("the **Appendix**") which recorded the principal amount of the Loan as up to KZT 1,670,000,000.
10. From that date forwards, the Claimant earned interest on the Loan monies at the rate of 4% per annum.
11. In the event, the Claimant was never able to fulfil the conditions of the Loan. Eventually, on 4 January 2023, the principal was repaid to the Defendant. The Claimant kept the interest which had been earned.
12. On 28 April 2023, the Defendant submitted a Request for Arbitration to the IAC. The Defendant

claimed interest on the loaned amount for the period it had been advanced in the total sum of KZT 242,784,174.28. An arbitrator was appointed and statements of case were exchanged. The Claimant counterclaimed for an order terminating the Agreement and claiming costs. A hearing took place on 28 July 2023 and further written submissions were subsequently exchanged. On 18 October 2023, the arbitrator issued the Award.

13. In the Award, the arbitrator found that, by signing the Appendix, the parties had agreed to reduce the amount of the loan which had been initially agreed. As a result, the Defendant had fulfilled its obligations under the Agreement by transferring the sum of KZT 1,670,000,000 to the Claimant on 29 December 2020. The arbitrator found that the term of the loan ran from the date the funds were sent to the Claimant's account.
14. The arbitrator referred to clause 10.2 of the Agreement, which provided, at 10.2.1 that, in the event of default, the Defendant was entitled to accelerate the Loan and accrued interest. He found that the Claimant had been in default, in that clause 3.4.10 had not been complied with, by the Claimant's own admission. That amounted to a default by operation of clause 10.1.9 of the Agreement.
15. By clause 4.2 of the Agreement, interest was calculated "*on the amount of the Loan actually used by the Borrower*". The arbitrator resolved a dispute about whether, during the initial 36 month grace period, interest accrued but was deferred or whether it did not accrue at all. He noted that the interest provided for in Appendix 1 was only consistent with the contractual interest rate if it accrued but was deferred.
16. As a result, the arbitrator awarded the Defendant KZT 242,784,174.28. The arbitrator went on to dismiss the counterclaim for termination of the Agreement.
17. On 30 October 2023, the Defendant applied to the Astana City Court for recognition and enforcement of the Award. A hearing took place on 8 November 2023 and the Court's decision was that the Defendant should approach this Court.
18. On 14 November 2023, the Defendant obtained an Order from this Court recognising and enforcing the Award and directing the Claimant to pay the sums awarded ("**the Enforcement Order**"). In the usual way, the Enforcement Order was sought and obtained without giving notice to the Claimant. The Claimant was permitted to apply to set the Order aside. The time for doing so was however abridged from the default 14 days provided for in the AIFC Court Rules to 7 days.
19. The Claimant received a copy of the Enforcement Order on 15 November 2023. On 20 November 2023, the Claimant's lawyers submitted a document to the AIFC Court asking for it to be set aside. In that document, they complained that they had not been served with the application for the Enforcement Order. That is a misunderstanding of the procedure. Common with many common law jurisdictions, the AIFC Court permits applications for the recognition and enforcement of arbitration awards to be made without notice. The Order obtained is subject to any application made by the respondent to set it aside and may not be enforced in the interim.
20. The Claimant further complained that it was not open to the Court to recognise and enforce an arbitration award during the period in which it remains open to the Respondent to apply to set aside the Award – in this jurisdiction, 3 months. That is also wrong and the point was not pressed at the hearing before me.
21. The balance of the Claimant's letter raised the issues which are raised in this claim. In particular, it was argued that (a) the arbitrator had wrongly found that the parties had agreed to reduce the loan, when the Defendant had not taken that position and (b) the arbitrator had found that certain provisions of the Agreement and the Appendix were ambiguous, such that they should have been construed against the Defendant.

22. The Defendant's document of 20 November 2023 was not in the form of an application notice. I further understand that it was not translated into English. Only some of the accompanying documents were sent to the Court and none were translated. The Claimant described the document as a "draft petition".
23. On 21 November 2023, the Claimant sent what it described as a "draft statement of claim" to this Court seeking to set aside both the Enforcement Order and the Award.
24. On 6 December 2023, the Court issued an execution order in respect of the Enforcement Order.
25. Eventually, on 15 January 2024, the Claimant submitted this claim. In it, the Claimant seeks an order:
  - a. Cancelling the Enforcement Order;
  - b. Setting aside the Award; and
  - c. Settling the Claimant's counterclaim in the arbitration by terminating the Agreement.
26. The Claimant's central complaint is that the arbitrator wrongly decided that, in signing the Appendix, the parties had agreed to reduce the loan sum. In fact, the Defendant had argued that it had advanced only part of the loan sum and intended to advance the rest, once the Claimant complied with the outstanding conditions in the Agreement. As a result, the Claimant says, the Award contained decisions on matters which were beyond the scope of the submission to arbitration. The Claimant further notes that the arbitrator found that the Appendix and the Agreement were ambiguous as to whether interest accrued in the grace period. As a result, the Claimant says, the arbitrator should have found that no interest was due. Amongst the points raised, the Claimant says that, for the loan to be "used" it needed to be applied for its intended purpose. It was not as it was held in an escrow account.
27. The Defendant resists the claim. As a threshold point, the Defendant says that the Claimant's claim comes long after the deadline imposed in the Enforcement Order, which expired on 21 November 2023. The Defendant further contends that the Claimant's case is simply an invitation to review the merits of the Award, which is not permissible.
28. At the hearing, the Claimant sought an extension of time, in the event that one was required.

**C. Extension of time**

29. It is obviously unsatisfactory that the Claimant failed properly to apply to set aside the Enforcement Order between 21 November 2023 and 15 January 2024, a period of 8 weeks. Despite that, I am willing to extend time.
30. First, I note that the time for applying to set aside the Enforcement Order was abridged from the default 14 days provided for by the Rules. That is of course well within the discretion of the Court. However, it is likely to place additional pressure on a party who is not familiar with the procedures of this Court.
31. Second, and most significantly, the Claimant set out the substance of its claim in documents which were submitted to the Court within the deadline. This is significant because it demonstrates that the Claimant was not deliberately flouting the rules and that there is limited prejudice to the Defendant as a result of the delay.
32. Third, I asked the Defendant's counsel whether he could identify any prejudice which had been

suffered by the Defendant. He was unable to do so.

33. Fourth, as the Claimant has pointed out, the statutory time limit for applying to set aside an award is 3 months. That claim was brought within time. If that claim is successful, it would be necessary to unwind the Enforcement Order one way or another.
34. None of this is an invitation to parties to miss Court deadlines. Nor is it an indication that parties can effectively ignore orders recognising and enforcing awards, if they intend to apply to set them aside. There would be likely to be costs consequences if they did so. Nor could a party who took that course complain if they were the subject of invasive execution measures while their set aside claim was being considered. In the circumstances of this case, it likely makes little practical difference. However, in case it does, I am willing to extend time.

**D. Set aside and enforcement – relevant law**

35. The Court may set aside or refuse enforcement of an arbitration award only if one of the grounds set out in the AIFC Arbitration Regulations is satisfied. Those grounds are set out in Article 44 (set aside) and Article 47 (enforcement).
36. In approaching this claim, I remind myself that Kazakhstan has acceded to the New York Convention and, in its AIFC legislation, has adopted an approach based on the UNCITRAL Model Law. In such jurisdictions, the Courts tend to show a strong “*pro-enforcement bias*”. I also remind myself that the Court is not entitled, when considering an application of this sort, to review the merits of the award. Nor should it impose unrealistic standards on arbitrators or expect them to refer to every piece of evidence or argument relied on. The burden is on the Claimant to establish that the ground relied on is made out.
37. The particular ground relied on by the Claimant is set out in Article 44(1)(2)(a)(iii) and Article 47(1)(a)(iii) in materially identical terms:

*“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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside”*

38. I would normally understand this ground to be concerned with whether the claims which are the subject of the award were submitted to the arbitrator or were within the scope of the arbitration agreement. Where a party alleges that an award was decided by reference to a “*surprise point*”, it might better be advanced under grounds (ii) (“*the party... was... unable to present his case*”) or (iv) (“*the arbitral procedure was not in accordance with the agreement of the parties*”). Whichever provision is relied on, however, it would be necessary to show that the introduction of a “*surprise point*” led to real unfairness and affected (or, at least, could well have affected) the outcome. An unheralded observation by a tribunal on a point which was entirely irrelevant to its decision could not be a ground to set aside an award.

**E. The application**

39. The Claimant argues that the case was decided on the basis of a surprise point because the arbitrator found that, by signing the Appendix, the parties were agreeing to reduce the loan amount: Award, paragraph 76. In fact, the Claimant points out, that was not the Defendant’s case.
40. In its submission of 3 August 2023, the Defendant said “*the [Defendant] transferred a portion of the loan amount... This transfer was done proportionally to the fulfilled conditions of paragraph 3.4.2...*

*The remaining part of the loan amount was supposed to be transferred by the [Defendant] after the complete replenishment of the necessary amount of the [Claimant's] own funds into its statutory capital and the fulfillment of other conditions stipulated in the Loan Agreement."*

41. According to the Claimant, then, the arbitrator has adopted a factual position which neither party contended for. This was significant, the Claimant says, for two reasons. First, interest did not run *at all* until the entire loan sum was deposited. Second, interest could only be reclaimed in the event of a default.
42. In response, the Defendant's position is that, while there is a difference in the way in which the claim was expressed and the way in which the arbitrator described his conclusions, the difference was not material. What mattered was that the parties had agreed that only the sum of KZT 1.67bn would be advanced at that time and had agreed to the terms of the Appendix.
43. According to the Defendant, interest accrued whether or not the entire loan was advanced. This was because the parties had agreed to the terms in the Appendix and, in any event, interest was expressly payable on acceleration following default. There was already a default, even before any money was advanced.
44. I agree with the Defendant.
45. For the purposes of the dispute before the arbitrator, I can see no material difference between (a) the parties agreeing that the loan sum would be reduced and (b) the parties agreeing that only part of the loan would be advanced at that time. The central issues before the arbitrator were whether interest accrued during the initial grace period and whether it was payable in the circumstances of the case.
46. What mattered for those purposes, as the Defendant says, is that the parties agreed to the terms of the Appendix.
47. At paragraph 93 of the Award, the arbitrator noted the Defendant's case that, by signing the Appendix, the parties agreed that interest on the loan amount accrued at 8% per year, including during the grace period. At paragraph 96, the arbitrator agreed with this position. He explained that, while the terms of the Appendix and the Agreement were ambiguous, that was implicit in the calculation of interest due after the grace period. Had the parties agreed that interest did not accrue, the repayments after the grace period would have been reduced, given the interest rate which was applied. That is a conclusion which was argued between the parties and was open to the arbitrator. It is not one which this court could review, even if there was any reason to doubt its logic.
48. Further, as the arbitrator pointed out at paragraph 82 of the Award, the Defendant was entitled, in the event of default, to accelerate the loan "*including the accrued Remuneration*". At paragraph 85, the arbitrator noted that the Claimant did not deny that it had failed to comply with clause 3.4.10. That, the arbitrator found, amounted to an event of default, which entitled the Defendant to recover interest. Again – there is no reason to interfere with those findings.
49. In oral submissions, the Claimant's counsel challenged these findings. She argued that clause 3.4.10 was not a precondition. It needed to be complied with after the loan was advanced. That is not what the Agreement says. However, even if correct, that could only ever amount to an error which it is not open to this court to correct.
50. The Claimant also submitted that, on a true construction of the Agreement, interest did not run until the full sum was paid. The argument was put in various ways in the claim form, by reference to the terms of the Agreement and, in particular, the formal requirements for its amendment. Again, this point is simply an assertion that the arbitrator was wrong in finding that, on his view of the



Agreement and the Appendix, interest ran from the date of payment of KZT 1.67bn.

51. Similarly, the Claimant complained that, in paragraph 95 of the Award, the arbitrator had found that the terms of the Agreement and the Appendix were not “*unambiguous*” as to whether interest accrued during the grace period. According to the Claimant, in light of that, the arbitrator should have concluded that no interest was due in the grace period. There is no merit in this. The fact that a contract is not clear does not mean it cannot be interpreted. The issue of its interpretation was squarely before the arbitrator and the parties are bound by his decision.
52. The Claimant also advanced various reasons why it said that the loan monies had not been “*used*” so as to attract interest. However, the arbitrator concluded that the monies had been used and in any event, interest was due. That decision is, with respect, totally unsurprising and was plainly open to the arbitrator on the arguments before him.
53. In the result, while I accept that there is a difference between the way in which the claim was articulated and the way in which the arbitrator expressed himself, I do not consider that it was material. I do not accept that the decision was beyond the scope of the submission to arbitration. Nor, had it been put in those terms, would I have accepted that the Claimant was unable to present its case as a result, nor that the arbitration procedure was otherwise than in accordance with the parties’ agreement.
54. I therefore reject the claim.
55. In those circumstances, the Claimant’s claim for a fresh determination of the counterclaim does not arise. However, even if I had been minded to set aside the Award, that is not a remedy I could have granted. The Court’s powers in respect of arbitrations are strictly confined by the terms of the AIFC Arbitration Regulations. In matters governed by those Regulations, the Court may not intervene, except to the extent provided for in the Regulations: Regulation 13.
56. In the light of my decision, my preliminary view is that costs would be likely to follow the event. However, I have not heard from the parties on this. I will therefore allow them a short period in which to agree an order as to costs, failing which they should file and exchange brief submissions limited to no more than 5 pages and I will decide the issue on paper. The costs submission should include costs schedules from the party (or parties) claiming to be entitled to costs.

By Order of the Court,

Justice Tom Montagu-Smith KC  
Justice, AIFC Court

**Representation:**

The Claimant was represented by Ms. Zhanar Kenbeilova, Legal representative, Astana, Kazakhstan.

The Defendant was represented by Mr. Kanat Mukanov, Lawyer, AOM SDF I B.V. Private Limited Company, Astana, Kazakhstan.