



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

12 September 2024

CASE No: AIFC-C/CFI/2024/0019

SIA RESTCOM GROUP

Claimant

v

(1) BALKHASHPOLYMETALL LLP

and

(2) POLYMETTECH LLP

Defendants

JUDGMENT AND ORDER

Justice of the Court:

Justice Sir Stephen Richards

ORDER

The claim is dismissed.

JUDGMENT

1. By a judgment dated 7 February 2024 in Case No: AIFC-C/CFI/2024/0007 the AIFC Court of First Instance (“the CFI”) allowed an application by Polymettech LLP to recognise and enforce measures set forth in an IAC Arbitration Award dated 24 January 2024 and made in an IAC arbitration between Polymettech and BalkhashPolymetall LLP (“the Award”). The CFI made an order (“the CFI Order”) in the following terms:

“that [Polymettech] is entitled:

- 1) to foreclose on immovable property, namely a land plot with cadastral No. 22:329:039:252, located at the address of Shymkent City, Yenbekshinsky district, Kapal Batyr Street, z. Ontustik Industriyaldy, building 30 (RK0201300740953802), on account of debt repayment in the amount of 239 312 640,95 (two hundred thirty-nine million three hundred twelve thousand six hundred forty point ninety-five hundredths) tenge;
 - 2) to recover from "BalkhashPolymetall" LLP in favour of "Polymettech" LLP in addition to the amount of debt the funds in the amount of 1 000 000 (one million) tenge, as well as the costs associated with arbitration proceedings in the amount of 6 007 816 (six million seven thousand eight hundred and sixteen) tenge.”
2. By a Claim Form issued on 31 May 2024 the Claimant, SIA Restcom Group, seeks an order to “cancel”, i.e. to set aside, the CFI Order and the Award, although it was not a party either to the arbitration in which the Award was made or to the court proceedings in which the CFI Order was made. BalkhashPolymetall is named as First Defendant to the claim, and Polymettech is named as Second Defendant.
 3. All three parties to the present proceedings have filed written pleadings (Claim Form and Statements of Defence) and further written submissions (including responses to the Court’s directions, SIA Restcom Group’s Objections to the Defendants’ Statements of Defence, and Polymettech’s Supplementary Arguments). Documents relied on have been annexed to the various pleadings and submissions. None of the parties has offered witness evidence to the Court. The Claimant has requested that the case be decided on the papers. Both Defendants have assented to that course. With some hesitation, I have concluded that the case can appropriately be dealt with in that way and I have therefore proceeded to a decision on the papers.

The factual history

4. BalkhashPolymetall is a subsidiary of Dala Minerals LLP. Another subsidiary of Dala Minerals that features in the case is Shymkent Smelting LLP.

5. Polymettech was first registered on 29 March 2023. On first registration the participants in it were BalkhashPolymetall and ASIAGREENTECH LLP (also a subsidiary of Dala Minerals), holding respectively 95% and 5% of the shares. On 10 August 2023, BalkhashPolymetall's shares were sold to SIRT LLP; and on 9 September 2023, ASIAGREENTECH's shares were sold to Glometech LLP. Dala Minerals LLP holds a 100% interest in SIRT but only a 10% interest in Glometech: the remaining 90% is held by Astera Industry LLP, which has no relationship with Dala Minerals or its relevant subsidiaries. In summary, however, through these various links Polymettech and BalkhashPolymetall have been affiliated companies at all material times.
6. SIA Restcom Group and certain other companies whose interests it represents (Restcom Holding Corp., Restcom Investment Limited, and Hong Kong New Age Trading Co. Limited) made a number of longterm loans to BalkhashPolymetall and Shymkent Smelting, repayable by 31 December 2022. Those loans were not repaid when the repayment period expired. Judgments were subsequently obtained as follows against BalkhashPolymetall in the Specialized Interdistrict Economic Court of Astana City, as confirmed and/or enlarged by decisions of the Judicial Chamber for Civil Cases of the Astana City Court, in the period 30 May 2023 to 19 March 2024: (1) for KZT 218,796,588 in favour of SIA Restcom Group; (2) for KZT 586,392,138 and an additional KZT 395,311,409 in favour of SIA Restcom Group and Restcom Investment Limited; and (3) for KZT 132,621,840 in favour of Restcom Holding Corp. and Hong Kong New Age Trading Co. Limited, together with an additional KZT 45,702,847 in favour of Restcom Holding Corp. and further sums of KZT 811,658 and KZT 1,395,435 by way of penalty and costs. Of those judgments, only the first had been enforced as at the date of the present claim. The remainder, amounting in total to over KZT 1 billion, had yet to be effectively enforced. In addition, there were said to be a number of contracts for which claims had not yet been filed. The total debt of BalkhashPolymetall and Shymkent Smelting to SIA Restcom Group and the companies it represents was said to be in excess of KZT 3 billion.
7. SIA Restcom Group contends that BalkhashPolymetall and related companies, including Polymettech in particular, have been acting illegally to prevent effective enforcement of those debts and evade their payment obligations.
8. Polymettech says that it has never had any contractual relations with SIA Restcom Group and has never been a debtor of that company. It claims to be a creditor of BalkhashPolymetall on a par with SIA Restcom Group and that it has acted legitimately in its relevant dealings with BalkhashPolymetall.
9. The history of dealings between the parties, including various steps taken towards enforcement of debts, is detailed and of some complexity. It does not need to be set out in full. What follows concentrates on elements of central relevance in the history leading to the Award and the CFI Order. Reference is made to matters as they appear on the face of the documents filed in this Court. Issues raised by SIA Restcom Group as to the motivation, authenticity and validity of transactions described are considered later.
10. It is convenient to start with two agreements that were entered into shortly after Polymettech was established:
 - (1) a deed of guarantee dated 4 April 2023 between Eco IL Group BV and Polymettech under which Polymettech assumed a full several and joint liability to Eco for the proper

performance by BalkhashPolymetall of each and all obligations under a specified sale contract of 6 March 2023 between Eco and BalkhashPolymetall (clause 1.1), and which provided that, in the event of Polymettech having to perform the obligations under the sale contract, all Eco's receivables from BalkhashPolymetall were to pass to Polymettech to the extent that it satisfied Eco's claims (clause 1.6); and

- (2) an agreement of the same date between Polymettech and BalkhashPolymetall confirming the signature and effect of the deed of guarantee and committing BalkhashPolymetall to reimburse Polymettech for any and all expenses incurred by it in connection with the performance of the obligations under the sale contract.

11. On 14 August 2023 Polymettech sent BalkhashPolymetall a letter of claim which referred to the terms and effect of the deed of guarantee and stated that Polymettech had performed the obligations of BalkhashPolymetall to Eco under the guarantee in a total amount equivalent to KZT 426,447,196.36. It requested payment of that sum by 21 August 2023. BalkhashPolymetall replied by letter dated 16 August 2023, acknowledging its debt to Polymettech in that sum and committing to repay the debt by 25 August 2023. In support of its entitlement to payment of that sum, Polymettech refers to the terms of the deed of guarantee and agreement of 4 April 2023 and also to Article 334.1 of the Kazakhstan Civil Code, which provides that "The guarantor who executed the obligation shall acquire all the rights of the creditor under that obligation ... in the amount in which the guarantor satisfied the claim of the creditor. The guarantor shall also have the right to claim from the debtor the payment of damages and interest ... in the amount paid to the creditor".
12. Upon BalkhashPolymetall failing to pay the sum in question by 25 August 2023, Polymettech applied to a notary for an "executive endorsement" for recovery of the debt. Such an endorsement (also referred to in the English translations of the documents before this Court as an "executive inscription") is a formal measure governed by Articles 92.1 ff. of the Kazakhstan Law on Notaries of 14 July 1997 that enables proceedings to be brought for enforcement of a debt. An executive endorsement in favour of Polymettech was made on 5 September 2023 by Notary Z.A. Myassnikova and entered into the register under number 4886 ("Executive Endorsement No.4886").
13. In proceedings brought by SIA Restcom Group against BalkhashPolymetall and Polymettech, Executive Endorsement No.4886 was subsequently found to be illegal and unenforceable, and monies recovered under it were ordered to be returned. That decision, however, postdated the Award and the CFI Order. The reasons for it and the consequences of it are examined later in this judgment. In the meantime, the factual history up to and including the Award and the CFI Order is continued by reference to events in the order in which they occurred.
14. On 26 September 2023, Executive Endorsement No.4886 was served on a bailiff who secured recovery of KZT 47,200,000 from BalkhashPolymetall through enforcement proceedings on the basis of the endorsement.
15. An apparent dispute over the procedures for enforcement in respect of the balance was then referred to mediation. This resulted in a Mediation Settlement Agreement dated 19 October 2023 between Polymettech and BalkhashPolymetall under clause 6 of which the parties acknowledged and agreed

that, so far as relevant: (1) BalkhashPolymetall owed Polymettech KZT 426,793,921.36 (namely KZT 426,447,196.36 principal and KZT 346,725 expenses) pursuant to Executive Endorsement No.4886, of which KZT 47,200,000 had been recovered; (2) Polymettech, for its part, owed KZT 142,281,280.41 to BalkhashPolymetall; (3) the parties' mutual liabilities were to be set off in compliance with Article 370 of the Kazakhstan Civil Code; (4) upon such offsetting, BalkhashPolymetall still owed Polymettech KZT 239,312,640.95, which BalkhashPolymetall committed to pay by 31 October 2023; (5) in the event of failure to pay that debt, BalkhashPolymetall would transfer to Polymettech on 1 November 2023 its title to the land plot as later described in the CFI Order quoted at paragraph 1 above ("the Land Plot"), at a market value confirmed by an independent appraiser; and (6) upon such transfer, BalkhashPolymetall's debt was to be deemed to be discharged, either fully or partially, depending on the transfer value of the transferred property. The agreement further provided, by clause 7, that all disputes and differences arising between the parties under or in connection with the agreement were to be referred to the International Arbitration Centre (the IAC) of the AIFC.

16. BalkhashPolymetall failed to pay the sum remaining due in accordance with the Mediation Settlement Agreement or to transfer the Land Plot in the event of non-payment as required by that agreement. Thereupon, by a request dated 14 November 2023, Polymettech commenced arbitration proceedings in the IAC to enforce BalkhashPolymetall's obligations under the agreement. The proceedings were contested by BalkhashPolymetall but the claim was found by the tribunal to be established in full. The tribunal made an award dated 24 January 2024 (the Award) in identical terms to those quoted in the CFI Order dated 7 February 2024 enforcing the Award (see again paragraph 1 above). The CFI Order was itself made on an application by Polymettech to the AIFC Court pursuant to Article 45 of the AIFC Arbitration Regulations.
17. The Land Plot had at one time been the property of AMIR-A LLP but ownership passed to Shymkent Smelting under a sale and purchase contract concluded on 16 March 2017. Ownership then passed from Shymkent Smelting to BalkhashPolymetall under a sale and purchase contract concluded between them on 15 June 2021. By a decision dated 20 February 2024 in proceedings brought by AMIR-A against Shymkent Smelting and BalkhashPolymetall, the Specialized Interdistrict Economic Court of Shymkent City held that the contracts of sale and purchase between AMIR-A and Shymkent Smelting and between Shymkent Smelting and BalkhashPolymetall were invalid, and obliged BalkhashPolymetall to return the Land Plot to AMIR-A. That decision was, however, reversed by a ruling dated 28 May 2024 of the Judicial Chamber for Civil Cases of the Shymkent City Court.
18. The basis of the finding of the court of first instance that the sales of the Land Plot were invalid was a finding by a Kazakhstan criminal court, upheld on appeal, that the head of AMIR-A had executed minutes of a general meeting without the consent of the LLP's participants and had forged a signature on a document approving the transaction. In reversing the decision of the court of first instance, the Judicial Chamber held that AMIR-A could be compensated by other means, e.g. by recovering the value of the Land Plot from the guilty party, and that since BalkhashPolymetall had purchased the property for its market value there were no grounds for invalidating the disputed transactions.
19. The resulting position, therefore, was that BalkhashPolymetall was the lawful owner of the Land Plot at the time of the IAC arbitration proceedings between it and Polymettech.

The invalidity of Executive Endorsement No.4886

20. On or about 12 October 2023 SIA Restcom Group brought a claim in the Specialized Interdistrict Economic Court of Shymkent City against BalkhashPolymetall and Polymettech for a ruling that Executive Endorsement No.4886 and another executive endorsement on the basis of which enforcement proceedings had been initiated were invalid and unenforceable. By a decision dated 29 January 2024 the claim was denied. The decision was, however, reversed on appeal by a ruling dated 13 May 2024 of the Judicial Chamber for Civil Cases of the Shymkent City Court. That ruling, in turn, was challenged by Polymettech in proceedings seeking cassation review before the Supreme Court of the Republic of Kazakhstan. By a decision dated 22 July 2024 a Judge of the Supreme Court refused to transfer the petition for review for consideration at a court session of the Judicial Board for Civil Cases of the Supreme Court. The ruling dated 13 May 2024 of the Judicial Chamber for Civil Cases of the Shymkent City Court was thereby upheld.
21. Although the Judge of the Supreme Court summarised and endorsed the basis on which the Judicial Chamber of the Shymkent Court had ruled in favour of SIA Restcom Group, it is preferable to refer to the fuller reasoning set out in the ruling of the Judicial Chamber itself. In disagreeing with the decision of the first instance court, the ruling stated (in the English translation provided to this Court):

“So, the court of the first instance did not take into account the fact that Balkhash Polymetall LLP has accounts payable to the plaintiff in the present case in the amount of 1 606 558 996 KZT, and all the actions of the defendants to commit the disputed writ of execution are aimed at avoiding the fulfilment of obligations to the plaintiff, by withdrawing assets to the accounts of Polymettech LLP.

....

Furthermore, the court of first instance did not take into account the plaintiff’s arguments that the sole founder of Balkhash Polymetall LLP is Dala Minerals LLP, which in turn is the parent company for Glometech LLP and Sirt LLP – companies – participants of Polymettech LLP.

....

Thus, there is objective confirmation of the fact that the debtor and the recoverer, being affiliated legal entities, applied for the writ of execution not for the purpose of actually receiving funds, but for their possible withdrawal, which is confirmed by the above-mentioned circumstances.

At the same time, the judicial board takes into account the arguments of the plaintiff with reference to the fact that such actions of the defendants are not isolated ... [Various matters in 2022 and 2023 are then referred to.]

Under such objective circumstances the judicial board comes to the conclusion that the court of first instance was incorrectly defined and clarified the range of circumstances essential to the case, which actually indicate the need to satisfy the plaintiff’s claims, due to the evidence and validity.

In reaching such conclusions, the judicial board takes into account the circumstances that the debtor and the recoverer have not presented evidence of the need to provide material assistance under previous agreements, as well as the existence of the recoverer’s accounts payable to the debtor at the time of providing material assistance.”

22. The formal ruling of the Judicial Chamber provided for the setting aside of the decision of the lower court and the making of a new decision which included the following:

“To recognise [Executive Endorsement No.4886] as illegal and unenforceable and to bring the parties to the initial position, obliging Polymettech LLP to return to BalkhashPolymetall LLP the amount of 29,431,572 (twenty-nine million four hundred thirty-one thousand five hundred seventy-two) KZT, recovered under [Executive Endorsement No.4886].

The ruling shall enter into legal force from the date of its announcement.”

The challenge to the Award and CFI Order: legal framework

23. Article 44 of the AIFC Arbitration Regulations 2017 provides:

"44. Application for setting aside as exclusive recourse against arbitral award

- (1) Recourse to a court against an arbitral award made in the seat of the AIFC may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
- (2) Such application may only be made to the AIFC Court. An arbitral award may be set aside by the AIFC Court only if:
 - (a) the party making the application furnishes proof that:
 - (i) a party to the arbitration was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication, under the law of the AIFC;
 - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case;
 - (iii) 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 ...;
 - (iv) the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties ...; or
 - (b) the AIFC Court finds that:
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under AIFC law; or
 - (ii) the award is in conflict with the public policy of the Republic of Kazakhstan.
- (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award, or such longer period

as the parties to the arbitration have agreed in writing, or, if a request had been made under Article 43 [Correction and interpretation of award; additional award], from the date on which that request had been disposed of by the arbitral tribunal.”

24. It may well be that the only persons entitled to apply to the AIFC Court pursuant to those provisions are parties to the IAC arbitration in which the award in question was made. Article 44(2)(a) refers in terms to “the party making the application”. Although the wording of Article 44(2)(b) is not limited in its terms to a finding by the Court on an application by a party to the arbitration, the time-limit provisions in Article 44(3) are again expressed in terms that contemplate only an application by such a party. The provisions on Rules 27.35 to 27.37 of the AIFC Court Rules likewise appear to contemplate that an application to set aside an award can be made only by a party to the arbitration.
25. Similarly, a judgment or order of the AIFC Court itself is open to challenge in the ordinary course only by a party to the proceedings in which the judgment or order was made. An exception is to be found in Rule 24.14 of the AIFC Court Rules which provides:

“24.14 A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied.”

Although that rule is expressed in relatively wide terms, the scope for successful reliance on it by a non-party is likely to be very limited in practice, as is suggested by the operation of the identically worded Rule 40.9 of the Civil Procedure Rules of England and Wales. The point is particularly acute in relation to a judgment or order made on an application pursuant to a provision restricting those entitled to apply (in this case, as referred to above, an apparent limitation to parties to the relevant arbitration).

26. For present purposes, however, I will assume (without deciding) that those procedural obstacles can be overcome and I will concentrate on the substantive grounds on which SIA Restcom Group seeks to have the Award and CFI Order set aside.

The issues: discussion

27. SIA Restcom Group contends that the actions of BalkhashPolymetall and Polymettech in the history of dealings described above and culminating in the obtaining of the Award and the CFI Order have pursued one single goal, namely the withdrawal of property from BalkhashPolymetall in order to prevent the enforcement of the decisions of the Kazakhstan courts of general jurisdiction. It is submitted that this Court should set aside the Award pursuant to Article 44(2)(b)(ii) of the AIFC Arbitration Regulations, on the basis of a finding that the Award is thereby in conflict with the public policy of the Republic of Kazakhstan.
28. I note that Article 42(2)(b)(ii) is the only provision of Article 44 of the AIFC Arbitration Regulations with which SIA Restcom Group engages in its submissions, and I am satisfied that it would have no case under any of the other provisions of Article 44. I can therefore concentrate on the alleged conflict with the public policy of the Republic of Kazakhstan.
29. There is a strong argument that BalkhashPolymetall and Polymettech have been acting with the aim of avoiding the enforcement of judgments against BalkhashPolymetall. A finding to that effect was a

central element in the courts' decision that Executive Endorsement No.4886 was invalid and unenforceable (paragraphs 20-21 above). The fact that Polymettech was established by BalkhashPolymetall (with a substantial share capital) at about the time when SIA Restcom Group first commenced litigation to recover the debts that BalkhashPolymetall owed to it and the other companies whose interests it represents, and against a background in which the intention to recover those debts had been clearly signalled, adds grounds for suspicion about the motivation for the dealings between these affiliated companies. I also view as doubtful an assertion by Polymettech that until recently it was not aware of the existence of SIA Restcom Group or of that company's status as a creditor of BalkhashPolymetall or of the attempt to recover certain debts from BalkhashPolymetall through judicial proceedings. I am not in a position, however, to make factual findings about such matters on the basis of the material before the Court and without much fuller factual investigation. The same applies, for example, to an assertion by BalkhashPolymetall that the various enforcement proceedings and related steps taken by SIA Restcom Group are part of an attempt by that company to take over BalkhashPolymetall's business, rather than simply an attempt to recover debts owed by it – an assertion that SIA Restcom Group seeks to rebut by referring *inter alia* to the fact that one of its applications is an application for a declaration of bankruptcy against BalkhashPolymetall.

30. In any event, I do not think that findings by this Court as to the parties' motivation in taking the various steps they did can be determinative of the issues before the Court. What really matters, in my view, is the validity of the transactions that led to the IAC arbitration and that underlie the Award, and the extent, if any, to which reliance on those transactions is to be regarded as inconsistent with decisions of the Kazakhstan courts of general jurisdiction, so as to give rise to a situation arguably engaging the public policy provision of Article 44(2)(b)(ii) of the AIFC Arbitration Regulations. The fact, if established, that the steps were taken with a view to preventing enforcement of the decisions of those courts would not be sufficient in itself, in my view, to justify a finding of conflict with the public policy of the Republic of Kazakhstan.
31. As to the validity of the relevant transactions, one needs to go back to the Eco deed of guarantee dated 4 April 2023 and the agreement of the same date between BalkhashPolymetall and Polymettech (paragraph 10 above). There has been no challenge to those agreements, let alone a finding of invalidity, in the general courts of Kazakhstan. There has been nothing to deprive the agreements of full force and effect, with the debts arising under them remaining enforceable. The agreements themselves have been put in evidence before this Court. SIA Restcom Group makes the point that the sales contract referred to in the deed of guarantee was not produced subsequently to the notary or in court or arbitration proceedings, that there are no documents confirming delivery of goods thereunder, and no evidence of the performance by Polymettech of its monetary obligations to Eco. But there is simply no basis in the evidence before this Court for finding that the agreements were anything other than genuine agreements or that the obligations said to have been performed by Polymettech were not in fact performed. Among other points raised by SIA Restcom Group are that the parties were not entitled to conclude the certificate of completion dated 14 August 2023 (paragraph 11 above) under the accounting rules of the Republic of Kazakhstan, or to include value added tax under the country's tax legislation. These and other such points would have to be resolved in the country's general courts. As it is, I see no proper ground for treating the agreements as invalid or for declining to treat the debts arising under them as debts open in principle to enforcement.

32. That brings me to Executive Endorsement No.4886. In that case there is a clear ruling by the general courts that the endorsement was invalid and unenforceable (see paragraphs 18-20 above). The effect of that ruling was not, however, to extinguish the debt that was sought to be enforced through the executive endorsement but to invalidate the endorsement as a means of enforcement of the debt. The debt itself had accrued in pursuance of the Eco deed of guarantee and agreement of the same date between BalkhashPolymetall and Polymettech, and specifically as a result of Polymettech's discharge of obligations on behalf of BalkhashPolymetall under the Eco deed of guarantee. It was a debt claimed and acknowledged in the exchanges dated 14 August 2023 and 21 August 2023 (see again paragraph 11 above). It did not arise out of the executive endorsement and it was not extinguished, retrospectively or at all, by the invalidation of the endorsement. It remained in existence.
33. At the time, long before the decision of the Judicial Chamber for Civil Cases of the Shymkent City Court ruling Executive Endorsement No.4886 to be invalid or the decision of the Supreme Court upholding that ruling, recovery of part of the debt was secured by a bailiff on the basis of the endorsement (see paragraph 14 above) but the balance was then dealt with by the Mediation Settlement Agreement dated 19 October 2023. The Mediation Settlement Agreement is another agreement to which there has been no challenge, let alone a finding of invalidity, in the general courts of Kazakhstan. Again, the agreement had full force and effect. It involved what was on its face a lawful set-off of mutual liabilities, an undertaking by BalkhashPolymetall to pay the amount still owed to Polymettech upon such offsetting, and an undertaking to transfer the Land Plot to Polymettech in the event of failure to pay that debt by the agreed date. It included a valid arbitration clause whereby all disputes and differences under or in connection with the agreement were to be referred to the IAC: the parties were fully entitled to choose the IAC as the forum for resolving any such disputes or differences. Although the agreement referred to BalkhashPolymetall's obligation to repay its debt in pursuance of Executive Endorsement No.4886, the true position, as described above, is that the debt arose out of the earlier agreements and did not depend upon the validity of the endorsement. The subsequent ruling that the endorsement was invalid and unenforceable did not negative or invalidate the Mediation Settlement Agreement or the inclusion of BalkhashPolymetall's debt within the agreement.
34. SIA Restcom Group contends further that BalkhashPolymetall violated the law, namely Article 21 of the Kazakhstan Civil Procedure Code, by signing the Mediation Settlement Agreement. It relies for that contention on an order issued on 17 October 2023 (two days before the date of the agreement) by the Specialized Interdistrict Economic Court of Astana in connection with a claim filed by it for debt recovery. The court ruled (in the English translation provided to this Court): "To seize movable and immovable property belonging to BalkhashPolymetall Limited Liability Partnership ... wherever it is located and in what it is not expressed, as well as cash in bank accounts in the amount sufficient to satisfy the claim, but not more than 760,049,612 (seven hundred sixty million forty-nine thousand six hundred and twelve) KZT", with various specified exceptions. Article 21.2 of the Civil Procedure Code, headed "Binding power of court rulings" provides that legally effective court orders and other acts "shall be binding for all state authorities, local government authorities, legal entities, officials, citizens and shall be subject to enforcement in the whole territory of the Republic of Kazakhstan"; and Article 21.3 provides that "Failure to enforce court acts as well as other disrespect towards court shall entail responsibility provided for by law". It is said that as of the date of the order there was no money or other movable property on the account of BalkhashPolymetall, and that BalkhashPolymetall had no right to issue any obligations in respect of its sole property, namely the Land Plot, or to give any

permission for its transfer, since there was an unsecured court ruling for a much larger amount than the value of the property.

35. It does not seem to me, however, that the terms of the court order of 17 October 2023 prevented BalkhashPolymetall from engaging in the exercise set out in the Mediation Settlement Agreement, namely the acknowledgement and set-off of existing liabilities, an agreement as to the time for payment of the balance, and an agreement as to what was to happen (transfer of the Land Plot) in the event of non-payment within that period. So far as I am aware, there has been no finding by the Kazakhstan courts of general jurisdiction that BalkhashPolymetall acted in breach of the order by entering into the agreement, nor even any proceedings before those courts in which such a contention is advanced. Accordingly, I do not accept that the court order of 17 October 2023 had the effect of invalidating the Mediation Settlement Agreement or that it provided a reason why the IAC's reliance on that agreement in making the Award should be held to have been in conflict with the public policy of the Republic of Kazakhstan.
36. It follows from the above that the IAC was entitled to treat the Mediation Settlement Agreement as a valid agreement and to give effect to the parties' obligations under it, both on the basis of matters as they stood at the time of the arbitration and in the light of subsequent court decisions. Moreover, the Award itself did not contradict or involve inconsistency with any decisions of the Kazakhstan courts of general jurisdiction. Even if such a contradiction or inconsistency were a proper basis for finding a conflict with the public policy of the Republic of Kazakhstan, within the meaning of Article 44(2)(b)(ii) of the AIFC Arbitration Regulations, no such conflict would arise in this case.
37. I should mention finally that the execution of the CFI Order has itself given rise to a dispute. On 12 March 2024 bailiff T.A. Makhashev, who was responsible for the execution of that order, instructed two other bailiffs to lift an "arrest" (an encumbrance) that had been placed on the Land Plot in the course of enforcement proceedings in respect of debts due to SIA Restcom Group and Restcom Investment Limited. In a decision dated 6 May 2024 the Specialized Interdistrict Administrative Court of Shymkent City held that the instruction was unlawful as being in breach of the Administrative Procedural Code of the Republic of Kazakhstan, for reasons that included failure to obtain the written consent of the claimants and to ensure a fair balance of the interests of the parties. The decision serves to illustrate the point that enforcement procedures are subject to the relevant laws of, and subject to supervision by the general courts of, the Republic of Kazakhstan. But it tells one nothing about the validity of the CFI Order, which is simply cited as one of the decisions the enforcement of which had given rise to the dispute.

Conclusion

38. For the reasons given above, I conclude that the claim by SIA Restcom Group for the setting aside of the CFI Order and the Award must be dismissed. It is not necessary in the circumstances to reach a decision on the procedural issues identified in paragraphs 23-26 above.
39. Any consequential application by BalkhashPolymetall or Polymettech for costs must be made in writing, with supporting information, within 14 days of the date of this decision, and SIA Restcom Group may respond within 14 days thereafter. The Court's decision on any such application will be made on the papers.

By the Court,

The Rt. Hon. Sir Stephen Richards Justice,
AIFC Court

Representation:

The Claimant was represented by Ms. Ainagul Zhumagulova, Attorney, a member of the Bar Association of Astana City, Republic of Kazakhstan.

The First Defendant was represented by Mr. Dmitriy Chumakov, Attorney at law, Republic of Kazakhstan.

The Second Defendant was represented by Ms. Gulmira Abenova, Attorney at law, Republic of Kazakhstan.