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

CASE No: AIFC-C/CFI/2021/0005

Date of Hearing: 18 October 2021
Further written submissions received during October and November 2021
Date of Judgment: 16 November 2021

Representation:
For the Claimant: Ms Gulnur Nurkeyeva, Mr Daniyaz Yensibayev, Ms Akzhan Sargaskayeva (Grata International Law Firm)
For the Defendant: Mr Zhandos Igembayev, Mr Zhambyl Baktiyar, Mr Dauren Mamutov (Committee for Roads of the Ministry of Industry and Infrastructure Development of the Republic of Kazakhstan)

JSC Cengiz Insaat Sanayi ve Ticaret A.S.

Claimant

v

The Committee for Roads of the Ministry of Industry and Infrastructure Development of the Republic of Kazakhstan

Defendant

JUDGMENT

Justice of the Court:
Justice Sir Rupert Jackson

JUDGMENT

This judgment is in eight parts, namely:

Part 1. INTRODUCTION

1.1. This is a claim by a building contractor for payment of sums due on an interim certificate and on the final payment certificate in respect of road building works carried out under a contract embodying the FIDIC conditions. The road in question is a major highway running from Western China though Kazakhstan to the border with the Russian Federation. The road building project was financed by the European Bank for Reconstruction and Development. The section of road the subject of this litigation is in the Aktobe region of Kazakhstan.

1.2 In this judgment I will use the following abbreviations:

'AIFC' means Astana International Financial Centre.
'Cengiz' means Cengiz Insaat Sanayi ve Ticaret A.S., a company incorporated in Turkey, the claimant.
'EBRD' means European Bank for Reconstruction and Development.
'FIDIC' means International Federation of Consulting Engineers.
'Ivrus' means Ivrus LLP, a company which was a subcontractor to Cengiz.
'Resolution 260' means Resolution 7117-18-00-2-3m/260 issued by District Court No. 2 of the Saryarkinsky District of Nur-Sultan.
'Solution 1591' means Solution 7119-19-00-2/1591 issued by the Specialised Interdistrict Economic Court of Nur-Sultan.
'The audit report' means audit report 43/17 dated 6 December 2017 prepared by the CISA.
'The Committee' means the Committee for Roads of the Ministry of Industry and Infrastructural Development of the Republic of Kazakhstan, the defendant.
'The Enforcement Law' means the Law Regarding the Enforcement Proceedings and the Status of Bailiffs.

In the course of this judgment I will refer to the claimant as either Cengiz or the claimant. I will refer to the defendant as either the Committee or the defendant.

1.3 Mr Zhambyl Baktiyar is Deputy Chairman of the Committee. Mr Dauren Mamutov is employed by the Committee as a consultant and a contract specialist. With the consent of the court, they both undertook some of the advocacy on behalf of the Committee at trial.

1.4 After these introductory remarks, I must now turn to the facts.

Part 2. THE FACTS

2.1 By a contract dated 12 July 2010 ('the road contract' or 'the contract') the Committee engaged Cengiz to carry out civil works on the construction of the road "Aktobe-Martuk-border of Russian Federation" under the South-West Corridor Road Project (Western Europe-Western China International Transit Corridor).

2.2 The road contract incorporated the following documents:

(a) the Minutes of Contract Clarifications
(b) the Letter of Acceptance
(c) the Letter of Tender
(d) the Tender Addendum Notice No. 1
(e) the Particular Conditions
(f) the General Conditions (FIDIC Conditions, first edition, 1999)
(g) the Completed Schedules
(h) the Data of Statistics Agency of the Republic of Kazakhstan
(i) the Specification
(j) the Bills of Quantities
(k) the Drawings
(l) the Performance Security
(m) the Advance Payment Security.

The contract is governed by the law of the Republic of Kazakhstan.

2.3 By Addendum 1 to the contract dated 25 May 2021, the parties agreed that all disputes in connection with the contract should be subject to the exclusive jurisdiction of the AIFC Court.

2.4 Cengiz substantially completed the works, subject to minor outstanding works and rectification of defects by 1 October 2013. On that date the Engineer issued a Taking Over Certificate, pursuant to clause 10.1 of the General Conditions.

2.5 By interim certificate 25, dated 9 April 2015, the Engineer certified that KZT 711,132,558.03 were due to Cengiz.

2.6 Cengiz completed the outstanding works and remedied the notified defects by 30 September 2015. On that date the Engineer issued a Performance Certificate pursuant to clause 11.9 of the General Conditions.

2.7 The final payment certificate, dated 19 March 2016, recorded that KZT 83,695,823 were due to Cengiz.

2.8 The Committee failed to pay the sums due under interim certificate 25 and the final payment certificate.

2.9 Allegations were made that Ivrus LLP, a subcontractor of Cengiz, had knowingly submitted false information to the statistics authorities of the Aktobe region, concerning the inflated costs of crushed stone, grade M1000 of fraction 40-70. These allegations were based upon findings made in an audit carried out during 2017. Those findings were set out in audit report 43/17 dated 6 December 2017.

2.10 At this point I should break off the narrative to deal with a red herring. There was at one stage a dispute about whether there could be any price adjustment for increases in costs. The Committee, to its credit, was determined to pay contractors for legitimate increases in costs. They took the issue to the Supreme Court and established the principle that contractors should be compensated for increased costs. See the decisions of the Kazakhstan courts on this issue dated 31 January 2018, 28 May 2018, and 13 November 2018. The November 2018 decision was a judgment of the Supreme Court of the Republic of Kazakhstan. Although a great deal of material has been put before the court concerning this particular saga, none of it is relevant to the present case.

2.11 On 8 November 2017, Mr Ignatiev, the director of Ivrus, was recognised as a suspect in a criminal case number 11700001210000 under article 177, part 4, item b of the Criminal Code of the Republic of Kazakhstan. The essence of the allegations against him was that he had misused the contractual provisions concerning costs increases. By providing inaccurate information about the costs of crushed stone, he had secured inflated payments to Ivrus; he had thereby in effect stolen money from the state. It was said that those inflated payments were routed through Cengiz, although there is no suggestion in the documents before the court that Cengiz was party to that deception.

2.12 On 18 February 2018, Judge A.I. Isaeva, the investigating judge of District Court No. 2 of the Saryarkinsky District of Nur-Sultan, issued Resolution 260. In that Resolution Judge Isaeva noted the findings in audit report 43/17. The judge had regard to articles 53-56, 161 and 163 of the Code of Criminal Procedure. She authorised the arrest of funds in the correspondent account of the Ministry of Industry and Development of the Republic of Kazakhstan, which were allocated for payment to Cengiz under the road contract.

2.13 On 8 February 2019, the criminal proceedings were terminated on the grounds that no criminal offence had been committed: see page 4 of Solution 1591. There has been some confusion about what happened subsequently. But it appears from an authoritative document produced half-way through the trial of this litigation that the criminal proceedings were subsequently revived and are currently ongoing.

2.14 On 21 April 2020, the Committee wrote to Cengiz, stating that it would suspend payment in 'final certificate 25' (apparently meaning interim certificate 25 and the final payment certificate, which was numbered 26) on the basis of Resolution 260.

2.15 In a letter to Cengiz's lawyer dated 5 April 2021, the Committee stated that payment of interim certificate 25 and the final payment certificate 'was suspended by order of the investigating judge' in Resolution 260.

2.16 Cengiz was aggrieved by the Committee's refusal to pay. Accordingly, it commenced the present proceedings.

PART 3. THE PRESENT PROCEEDINGS

3.1 By a claim form issued in the AIFC Court on 19 July 2021, Cengiz claimed against the Committee the sums due on the two unpaid certificates, together with financing charges as compensation for late payment. In reliance upon various documents listed in paragraph 2.7 of the claim form, Cengiz argued that the decision of Judge Isaeva, contained in Resolution 260, did not entitle the Committee to withhold payment.

3.2 The Committee served its defence on 3 September 2021. The Committee pleaded that by reason of the subcontractor's illegal actions, Cengiz had received an escalation of KZT 760 million to which

it was not entitled. The Committee maintained that both Resolution 260 and Solution 1591 made it unlawful for the Committee to pay the sums due on the two certificates. Accordingly, the claim should be dismissed.

3.3 Cengiz served its reply on 13 September 2021. Cengiz argued that Resolution 260 must be enforced by a bailiff in accordance with article 163 of the Code of Criminal Procedure. The Committee is not entitled to execute Resolution 260 directly. Furthermore, Resolution 260 expired after one year and so cannot now be enforced at all. Solution 1591 relates to a different contract with the serial number 002-ADB/CW-2017, whereas the contract that is the subject of this litigation has the serial number SWCRP-0-102-ERBD/CW.

3.4 The contention that Solution 1591 relates to a different contract seems to me to be well founded. Therefore, like both parties at the trial, I shall focus attention upon Solution 260.

3.5 There was a directions hearing on 23 September 2021. With the agreement of both parties, I fixed a trial date of 18 October 2021. As recorded in paragraph 5 of directions order 2 (dated 24 September), I directed that the audit report be provided to the court by 30 September. As recorded in paragraph 7, I directed:

"The parties must ascertain, agree and notify the court of the current status of the criminal proceedings concerning Mr. Ignatiev and Ivrus LLP in relation to the price of the crushed stone, which is the subject of this litigation. The parties must do this by 6pm Nur-Sultan time on Thursday 30 September 2021."

3.6 These orders did not yield the hoped-for results. There remained some uncertainty about the current status of the criminal proceedings. Neither party furnished a copy of the audit report to the court. The claimant stated that it was unable to do so, because it was not a party to the criminal proceedings. I have no reason to doubt that statement. The defendant (according to Mr Baktiyar) had the ability to obtain a copy of the audit report within ten to fifteen days by making a formal request to the Financial Monitoring Agency of the Republic of Kazakhstan, but it did not do so.

3.7 The trial of this action took place on 18 October 2021. As a result of the Covid pandemic, all previous judicial hearings at the AIFC Court had taken place remotely. The hearing on 18 October 2021 was the first in-person trial to take place in the AIFC Court. The claimant's counsel, Ms Gulnur Nurkeyeva, appeared by video link from Beijing. Her assistants, Mr Daniyaz Yensibayev and Ms Akzhan Sargaskayeva, were present in court. They both undertook some of the advocacy. The defendant's counsel, Mr Zhandos Igembayev, was present in court. He was assisted by Mr Zhambyl Baktiyar and Mr Dauren Mamutov, both employees of the Committee. With the permission of the court, Mr Baktiyar and Mr Mamutov undertook some of the advocacy on behalf of the defence.

3.8 During the short adjournment on 18 October, the defendant's team supplied to the court a short letter stating that the criminal proceedings were ongoing. It follows that those proceedings must have been reinstated at some date after their termination on 8 February 2019, but I do not know the date on which that occurred.

3.9 I asked the parties what the position was about the audit report. Mr Baktiyar accepted that the defendant had done nothing about obtaining that document, despite the court's order made at the directions hearing on 23 September. He stated that the defendant would be able to obtain it within ten or fifteen days by making a formal request to the Financial Monitoring Agency of the Republic of Kazakhstan. He asked the court to allow the defendant time to do that. He also asked the court to defer giving judgment until it had seen the report. The claimant's counsel opposed that application, maintaining that it was made too late and was unnecessary. I was reluctant to

postpone the proceedings for any substantial length of time, because (a) on one view, the claimant had already been kept out of its money for several years, (b) the defendant had created the problem, and (c) the gist of the audit report was clear from Resolution 260. Nevertheless, I gave the defendant permission to provide a copy of the audit report within fifteen days, if it was able to do so. The full text of my ruling is here.

3.10 The claimant called two witnesses at trial, namely Mr Arman Chukuev and Ms Dinara Yeskendirova. Mr Chukuev is an employee of the Ministry of Justice. He works within the Department of Justice of Nur-Sultan City. Ms Yeskendirova is an employee of the Ministry of Finance. She works within the Department of Treasury for Nur-Sultan City.

3.11 During the course of the trial, the defendant's representatives made some observations about the strength of the prosecution case in the criminal proceedings. This is not something which I can take into account. It remains to be seen whether the criminal court will conclude that Mr Ignatiev fraudulently inflated the costs of crushed stone. I note that the allegations have been made but express no view about the outcome.

3.12 On 21 October (three days after the end of the trial) the Committee for Roads wrote to the court, stating that it was unable to obtain a copy of the audit report. The Committee requested that the court should ask the Financial Monitoring Agency to provide a copy of the audit report. On 27 October the claimant responded, strongly opposing that request and arguing that the audit report was of little importance. I did not think it appropriate for the court to take the course proposed by the Committee. The next development was that on 2 November Mr Igembayev unexpectedly delivered a copy of the audit report to the court. The report was in Russian and it was not accompanied by an English translation. In those circumstances, the Registrar immediately obtained a translation – at some expense – and furnished it to me. The audit report seemed to me to be consistent with the summary of that report in Resolution 260. So there was no need for a further hearing. I directed that the parties may make any written submissions which they wished about the report on or before 12 November. Ms Nurkeyeva sent in written submissions on 11 November. Mr Igembayev made no application for an extension of time. He simply sent in the defendant's written submissions late, namely on 15 November.

3.13 Let me make it clear at this stage that the court deplores the defendant's disregard of the order (made on 23 September 2021 and confirmed in writing on 24 September) for production of the audit report. If the defendant had complied with that order at the proper time, the audit report would have been before everyone at the trial and both advocates could have dealt with it in their oral submissions. Instead, both time and costs have been wasted. On this occasion, the court has granted an indulgence to the defendant and allowed late production of the document. I bear in mind that the AIFC Court is a new court and that some people do not yet appreciate that the court's orders must be obeyed. The court will not grant a similar indulgence in future cases.

3.14 Furthermore, if a party cannot comply with a time limit and seeks more time, the proper course is to apply for an extension of time *before* the permitted period has expired. A party cannot simply grant itself an extension of time and take the relevant step late, as the defendant has done in this case.

3.15 The following have emerged as the main issues between the parties:

(i) Whether interim certificate 25 and the final payment certificate are in proper form.

(ii) Whether the Committee came under an obligation to pay the sums stated in interim certificate 25 and the final payment certificate during 2015, 2016 and 2017.

(iii) Given that the Committee did not make those payments in 2015, 2016 and 2017, whether after 11 February 2018 Resolution 260 operated as a bar to making payment on the two certificates, despite the non-involvement of the bailiffs' department.

(iv) Whether Resolution 260 could now operate as a bar to making payment or whether it has expired.

3.16 In addressing these issues, I must apply the law of the Republic of Kazakhstan. This is contained in (amongst much other material) four codes (Civil Code, Civil Procedure Code, Criminal Code, Criminal Procedure Code) and other legislation. For present purposes, the most important legislation is the Enforcement Law. I also bear in mind that the FIDIC Conditions contained in the present contract are widely used on engineering projects around the world. Although there are certain well-known differences of approach between civil and common law jurisdictions, the construction industry operates in the expectation that the FIDIC conditions will be applied in a broadly consistent manner in international construction disputes.

3.17 Having identified the issues and the governing law, I must now turn to issue (i), namely whether the two certificates were in proper form.

PART 4. ISSUE (i): WERE THE TWO CERTIFICATES IN PROPER FORM?

4.1 Mr Mamutov drew attention to the signature on certificate 25. He said that this was the signature of an employee of Kazdorproject LLP. Mr Mamutov submitted that the Engineer under the contract was Egis International and that Kazdorproject LLP were merely sub-consultants to Egis International. Therefore, Kazdorproject LLP could not exercise the powers conferred upon the Engineer under the General Conditions. The signature on the final payment certificate appears to be the same as that on interim certificate 25. So, the same issue arises on the final payment certificate.

4.2 Ms Nurkeyeva submitted that it was too late for the defendant to raise a point of that nature. If the Committee had any objection to the form of the certificates, they should have raised it at the time.

4.3 I am not sure whether Kazakh law includes any doctrine of estoppel by convention. But I do not need to investigate that interesting byway, because Part A of the Particular Conditions (incorporated into the contract, as set out in paragraph 2.2 above) is a complete answer to the defendant's case on this issue. Part A identifies the Engineer as: 'EGIS BCEOM International in association with "Kazdorproject" LLP'.

4.4 Egis International is an engineering company which operates worldwide. As I understand it Kazdorproject LLP is or was an entity set up to provide engineering services specifically for the Western Europe-Western China road project. In my view, Part A of the Particular Conditions authorised either Egis International or Kazdorproject to sign certificates in the capacity of Engineer. It would be over-formalistic and unbusinesslike to require the signatures of both entities on all such documents.

4.5 I will assume that, as Mr Mamutov says, the individual who signed the two certificates was an employee of Kazdorproject LLP. It can be seen that immediately above his signature the following words are printed: 'Egis International-Kazdorproject LLP'. I am quite satisfied that this constitutes an effective signature by the Engineer. It does not matter (if it be the case) that the individual whose handwritten signature appears was an employee of Kazdorproject, not an employee of Egis International.

4.6 Accordingly, my answer to issue (i) is yes. I must now turn to issue (ii).

PART 5. ISSUE (ii): DID THE COMMITTEE COME UNDER AN OBLIGATION TO PAY THE SUMS STATED IN THE TWO CERTIFICATES DURING 2015, 2016 AND 2017?

5.1 Clause 14.7 of the General Conditions provides:

> 'The Engineer shall pay to the Contractor:
> …
> (b) the amount certified in each Interim Payment Certificate within 56 days after the Engineer receives the Statement and supporting documents; and
> (c) the amount certified in the Final Payment Certificate within 56 days after the Employer receives this Payment Certificate.'

5.2 The Particular Conditions make a number of amendments to clause 14. In relation to clause 14.7. They provide:

> 'The Employer shall pay to the Contractor:
> …
> (b) the amount certified in each Interim Payment Certificate within 56 days after the Engineer receives the Statement and supporting documents or, at a time when the Bank's loan or credit (from which part of the payments to the Contractor is being made) is suspended, the amount shown on any statement submitted by the Contractor within 14 days after such statement is submitted, any discrepancy being rectified in the next payment to the Contractor, and
> (c) the amount certified in the Final Payment Certificate within 56 days after the Employer receives this Payment Certificate or, at a time when the Bank's loan or credit (from which part of the payments to the Contractor is being made) is suspended, the undisputed amount shown in the Final Statement within 56 days after the date of notification of the suspension in accordance with Sub-Clause 16.2 of this Contract.'

5.3 In the present case, it is not suggested that the finance provided by the EBRD for the purpose of paying interim certificate 25 or the final certificate had been suspended. Therefore, since the caveat is inapplicable, the court is dealing in effect with the original form of clause 14.7 as promulgated by FIDIC. During the course of Mr Mamutov's submissions, I asked him why the Committee had not paid interim certificate 25 in 2015 and why it had not paid the final payment certificate in 2016. He replied that the Committee 'felt a lot of doubts' about the data which the contractor had submitted.

5.4 I have some sympathy with the Committee's position. Unfortunately, however, the FIDIC Conditions do not permit the employer to withhold payment on a certificate on the basis that he harbours doubts about its accuracy. They contain formal procedures for challenging Engineer's certificates, in the event that one or other party disagrees with them. But the Committee did not operate those procedures in time or at all. The defendant could have served a notice under clause 2.5, asserting that a lesser sum was due to the contractor than that certified by the Engineer. In the absence of amicable resolution, the defendant could have used the dispute resolution machinery provided in clause 20 as it then stood. There is no evidence in the material before me that they did any of that. Clause 2.5 contains a fairly tight time limit. I appreciate that civil law jurisdictions take a more liberal approach to time bars in construction contracts than common law jurisdictions. But it is now six years after interim certificate 25 and five and a half years after the final certificate. The defendant cannot now invoke the clause 2.5 machinery to challenge the certificates. Indeed, the defendant does not seek to do so in its defence to the present claim.

5.5 In the absence of making any timeous and successful challenges to the certificates, the Committee was obliged to pay each of them within 56 days. The Committee did not do so. Therefore, the Committee's failure to pay certificate 25 in 2015 and its failure to pay the final payment certificate in 2016 were breaches of contract.

5.6 That remained the position throughout 2015 and 2016. The next question to consider is whether the position changed in 2017, when audit report 43/17 was produced. I have carefully considered that report and the parties' submissions about it. Contrary to the claimant's submissions, I am satisfied that the document sent in by Mr Igembayev on 2 November 2021 is the same as the audit report referred to in Resolution 260. The confusion about dates, upon which Ms Nurkeyeva relies, arises because there are two different ways of expressing the same date, namely 06/12/2017 and 12/06/2017. The reference number cited in Resolution 260 is 43/17. The same reference number appears on the document submitted by Mr Igembayev. That puts the identification of the document beyond doubt.

5.7 Mr Igembayev submits that the facts disclosed by the audit report would have entitled the employer to terminate the contract pursuant to clause 15.6 of the FIDIC conditions. It is quite true that if, during the currency of the contract, the Committee had acted on its suspicions (referred to in paragraph 5.3 above), the Committee could have sought to terminate the contract for fraud. The correctness of that termination could then have been tested in subsequent arbitration or litigation between the parties. But none of that happened. Therefore, Mr Igembayev's submissions in this regard remain hypothetical.

5.8 What the authors of audit report 43/17 carried out was a paper exercise. Furthermore, the documents which they examined were incomplete, as acknowledged on page 35 of their report. This report was the start of a criminal investigation, not its conclusion. It did not, indeed could not, nullify certificate 25 or the final certificate. Nor did it extinguish the contractual effect of those certificates. Indeed, the audit body recognised that those two certificates continued to impose payment obligations: see pages 18-19 of the later audit report, dated 10 August 2018.

5.9 Accordingly, my answer to issue (ii) is yes. Whether the Committee continued to be in breach of contract throughout 2018 will depend upon the answer to issue (iii). Therefore, I must now turn to that issue.

6. ISSUE (iii): AFTER 11 FEBRUARY 2018 DID RESOLUTION 260 OPERATE AS A BAR TO MAKING PAYMENT ON THE TWO CERTIFICATES?

6.1 The defendant contends that: (a) by Resolution 260 Judge Isaeva authorised the arrest of the funds allocated for paying interim certificate 25 and the final payment certificate; (b) the Committee gave effect to the judge's order by retaining those funds and not paying them to Cengiz. The Committee's staff would have been committing a criminal offence if they had paid the sums due under those two certificates.

6.2 The claimant has two answers to this contention. First, the audit report on which Resolution 260 is based has been undermined by recent judicial decisions. Secondly, the Committee was not entitled to give effect to Resolution 260, since only the bailiffs' department could do that.

6.3 As to the first point, Ms Nurkeyeva has been pressing an argument both at the case management conference on 23 September and at trial that the findings of the audit report upon which Resolution 260 is based have been undermined by the series of decisions made by the Kazakhstan courts referred to in paragraph 2.10 above. She submits with vigour that the decision of the Supreme Court of the Republic of Kazakhstan dated 13 November 2018 is binding upon this court and that really is

the end of the Committee's case.

6.4 It is not necessary for me to explore the relationship between this court and the Kazakhstan Supreme Court or to consider whether the decision dated 13 November 2018 is strictly binding upon this court. I agree with the reasoning and conclusions of the Supreme Court. The sums payable to the contractor under this contract (and no doubt under the other 48 road building contracts which were being considered by the Supreme Court) fall to be adjusted under clause 13.8 of the FIDIC Conditions.

6.5 The helpful decision of the Kazakhstan Supreme Court deals (as one might expect) with a question of general principle. It does not address (and the Supreme Court were not asked to address) the particular question whether the escalation provisions were correctly applied under contract SWCRP-0-102-ERBD/CW in relation to the cost of crushed stone. As the defendant's advocates rightly pointed out, the Supreme Court decision of 13 November 2018 does not have any bearing on the issues in the present case. I therefore reject this limb of the claimant's case.

6.6 I now come to the second limb of the claimant's case. This requires an analysis of Judge Isaeva's powers and the effect of the order which she made.

6.7 The starting point is the criminal proceedings. These could only be brought against a human being, not against a company: see article 15 of the Criminal Code. So, the 'suspect' was Mr Ignatiev, not Ivrus.

Article 163 of the Criminal Procedure Code provides:

'**Article 163. The order for sanctioning of the seizure of property**

1. The right to sanction arrest on property belongs to the investigating judge, and in the cases provided by points 2) and 3) of a part of the seventh article 107 of the present Code, - judges of regional and equated to it court.

2. The decision of the person carrying out pre-trial investigation on the initiation of the application for seizure of property shall be considered by the investigating judge alone at the place of pre-trial investigation or at the place of discovery of the property of the suspect, accused within twenty-four hours from the moment of receipt of the materials in court.

3. Excluded by the Law of the Republic of Kazakhstan dated 21.12.2017 № 118-VI

4. After considering the application for sanctioning of the seizure of property, the investigating judge shall issue the decision on sanctioning or refusal to sanction the seizure of property.'

6.8 Under article 163 Judge Isaeva was empowered to 'authorise' or 'sanction' the seizure or arrest of the funds. I have seen slightly different versions and translations of article 163, but the gist remains the same. Article 163.7 provides that the judge's decision on the seizure or arrest of property is executed by the bailiff. The terms 'seizure' and 'arrest' appeared to be used interchangeably in the documents and the oral evidence.

6.9 Judge Isaeva's order in the 'Decision' section at the end of Resolution 260 accorded with the language of article 163. The judge decided 'to authorise the arrest of funds in the correspondent account of the Ministry of Industry and Development of the Republic of Kazakhstan works allocated for a fee by AF "Cengiz Insaat" under contract No. SWCRP-0-102-EBRD/CW'.

6.10 Article 163.7 provides that the person who is to execute the seizure or arrest which the judge has authorised is the bailiff. Article 9.1.12 of the Enforcement Law provides that a court decision on the seizure of property, issued in a criminal case, is an executive document. Article 11 of the Enforcement Law provides time limits for presentation of executive documents (including 'a court

decision on the seizure of property issued in a criminal case' – article 11.1.10) for compulsory execution. Article 38 of the Enforcement Law provides what the bailiff should do upon receipt of an executive document. There is no suggestion in the provisions of the Enforcement Law which have been drawn to my attention that anyone other than a bailiff should enforce a court order authorising the arrest of funds.

6.11 Ms Yeskendirova gave evidence about how these provisions operate in practice. She said that the Treasury Department only made payments upon receipt of payment certificates from the relevant ministries. She explained that 'making payment' meant transferring monies received from those ministries to the payees.

6.12 Ms Yeskendirova said that the Treasury would arrest accounts if there was a court decision to arrest the accounts followed by a bailiff's decision to arrest the accounts. If there was a court decision without the decision of the bailiff, 'No, we cannot. We can only do it after the decision by the bailiffs.' Ms Yeskendirova went on to explain that seizures could only be imposed on certain items, not on salaries, social allocations and so forth.

6.13 Ms Yeskendirova drafted a letter dated 25 February 2021, which was approved and signed by the acting head of her department, the Department of Treasury for Nur-Sultan City. That letter stated: 'The department is not empowered to seize accounts state institutions without obtaining documents from the executive bodies of the Ministry of Justice'. The phrase 'executive bodies of the Ministry of Justice' was a reference to the bailiffs' department.

6.14 Ms Nurkeyeva submits that in the present case the Committee never did present Resolution 260 to the bailiffs' department. That submission is supported by the evidence of Mr Chukuev, an employee of the Ministry of Justice, who has examined the relevant records. The defendant did not challenge that part of Mr Chukuev's evidence. The defendant accepts that it did not present Resolution 260 to the bailiffs' department.

6.15 I note, incidentally, that the judgment attached to the Committee's defence, Solution 1591 dated 27 February 2019, provides an example of the arrest procedure working properly and effectively. It can be seen from page 2 that there was a decision of an investigating judge on 27 March 2018 authorising the arrest of funds. On 2 April 2018 the decision of the investigating judge 'was received by the relevant state body [i.e. the bailiffs' department] for execution'. This shows that the procedure can work perfectly satisfactorily, even though that did not happen in the present case.

6.16 An arrest of funds, even if carried out properly does not eliminate the debts which the fundholder was planning to pay with those monies. The debts remain. In the present case, the Committee's debts to Cengiz on the two certificates would remain, even if Resolution 260 had been presented to the bailiffs timeously. In the event, however, the Committee did not go through the necessary formalities. Resolution 260 did not operate so as to prevent the Committee paying out on the two certificates. My answer to issue (iii) is no.

PART 7. ISSUE (iv): COULD RESOLUTION 260 NOW OPERATE AS A BAR TO MAKING PAYMENT ON THE TWO CERTIFICATES?

7.1 Article 11 of the Enforcement Law sets out time limits for presenting executive documents for compulsory execution. In respect of a court decision on the seizure of property issued in a criminal case, the time limit is one year: see article 11.1.10.

7.2 More than three years have elapsed since Judge Isaeva issued Resolution 260. Therefore, it is not now possible to present that decision to the bailiffs' department for compulsory execution.

Accordingly, the answer to issue (iv) is no. Resolution 260 has expired.

PART 8. CONCLUSION

8.1 I have every sympathy with the Committee's determination to control the costs of this massive road building project to proper levels. It is entirely proper that they investigate thoroughly any allegations of wrongdoing by contractors or subcontractors. They have a duty to protect the public purse. But they must do so in accordance with the law of the Republic of Kazakhstan.

8.2 I do not know how strong the case is against Mr Ignatiev. It is not my function to decide that issue. I note that the criminal proceedings against Mr Ignatiev started, then terminated on the basis that there had been no crime and then started again. If the Committee believes that it has been defrauded, it will need to take further (and perhaps more detailed) legal advice as to how it can properly protect the public purse. But what the Committee cannot do is to continue withholding payment from Cengiz on the two outstanding certificates.

8.3 There is no dispute as to the principal sums due. The claimant is entitled to recover financing charges pursuant to clause 14.8 of the General Conditions. This provides for interest at 3% above the central bank discount rate, compounded monthly. After a delay of some six years, financing charges are bound to be substantial. The defendant has not disputed the claimant's calculation of financing charges either in its defence or in argument at trial. That may be because in a recent arbitration between the same parties the Committee's challenge to clause 14.8 failed.

8.4 The court will therefore give judgment for the claimant for 1,335,170,366 tenge, made up as follows:

Interim certificate 25:	711,132,558	tenge
Final payment certificate	83,695,823	tenge
Total principal sum	794,828,381	tenge
Financing charges	540,341,985	tenge
Total	1,335,170,366	tenge

8.5 If the claimant wishes to make an application for costs, it must make its application in writing (with a copy to the defendant) within two weeks from today. The claimant must set out brief details of costs incurred and attach supporting evidence. The defendant must send its response within two weeks thereafter. The claimant must send its reply (if any) within one week thereafter. I will then deal with that application.

ORDER: The defendant do pay to the claimant 1,335,170,366 tenge within 28 days from today.

By Order of the Court,

Rupert Jackson

Sir Rupert Jackson,
Justice, AIFC Court