IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

5 December 2024

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

JSC "NATIONAL COMPANY QAZAVTOJOL"

Claimant

v

KAZAKHSTAN BRANCH OF JSC WITH LIMITED LIABILITY "SINOHYDRO CORPORATION LIMITED"

Defendant

JUDGMENT AND ORDER

Justice of the Court:
Justice Tom Montagu-Smith KC

ORDER

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

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

AND UPON the Court finding that it is open to the Claimant to challenge the Decisions and reclaim the payment.

AND UPON the Court considering the parties' statements of case and the evidence and submissions submitted in support.

AND UPON hearing counsel for the parties.

IT IS ORDERED THAT:

1. The Defendant shall take pay the Claimant the sum of KZT 2,350,696,276.46 by 18:00 Astana time on Friday, 4 April 2025.

2. The parties have permission to apply for orders consequential to this Judgment by 18:00 Astana time on Friday, 24 January 2024.

JUDGMENT

A. Introduction

1. This claim concerns a construction contract ("the Contract") under which the Defendant agreed to provide construction works in respect of an 81km stretch of the Kurty-Burylbaital road.

2. In the course of the works, the Defendant raised a number of claims. This claim concerns 5 claims which were not capable of agreement. The Defendant submitted those claims to the engineer. They were then the subject of decision by a disputes board, supplemented by the determination of the engineer ("the Decisions").

3. The Claimant ultimately paid KZT 2,827,207,679.50 pursuant to the Decisions. By these proceedings, the Claimant challenges the Decisions and seeks recovery of the sums paid.

B. Factual background

4. The parties entered into the Contract on 11 July 2017. The Contract was on FIDIC Red Book terms. The agreed contract price was KZT 20,806,464,141, the equivalent of approximately US$40m at today's rates, and approximately US$62.4m at the rates prevailing at the time of contracting.

5. Work was due to commence on or about 1 December 2017. Time for completion of the works was originally agreed to be 990 days. The progress of the works was delayed by a number of factors, including the COVID-19 crisis.

6. During the course of the Contract, the Claimant submitted to the engineer the 5 claims which are the subject of this dispute.

7. The first claim concerned the excavation of gravel pits and quarries required for the construction works. The Defendant discovered that excavations were generally prohibited near certain sections of the road and was obliged to seek permits, resulting in delay.

8. The second claim was for compensation resulting from the Claimant's delay in providing the advance payment to the Defendant.

9. The third claim was for the consequences of an increase in the mineral extraction tax which the Defendant said had been increased during the course of the Contract.

10. The fourth claim was for costs associated with the excavation of rocks which the Defendant said had been discovered under the surface at various locations and which could not have been foreseen.

11. The fifth and largest claim was for costs said to have resulted from delays and disruption caused by COVID-19.

12. The claims were advanced at various times and in various ways, although the precise chronology remains unclear. I set out in more detail below an issue which arose in relation to the timing of reports said to have been submitted by the Defendant in support of the claims.

13. On or about 10 March 2022, the claims were referred to a dispute avoidance and adjudication board comprised of an engineer, Mr Damir Alimov. Mr Alimov produced his decision on 24 March 2022. In it, he determined some of the claims in favour of the Defendant and referred some elements of them to the engineer.

14. On claim 1, the board noted that the parties had agreed Supplementary Agreement No. 1. I have not been shown a copy of that agreement. According to the board, clause 3 provided that the Defendant would provide supporting documents on costs to the engineer. The engineer, the board said, had concluded that the Defendant had not complied with this provision. The board made no positive finding on claim 1.

15. On claim 2, the board awarded KZT 84,866,836.72. No interest calculation was set out. The board appears to have relied on interest calculations prepared by the engineer and set out in a letter, which I have not seen.

16. On claims 3 and 4, the board relied on comments from the engineer. The board's comments focused solely on the quantum of the claims, not on the Claimant's liability for them. For claim 3, the board said that the Defendant needed to submit soil compaction test results, presumably to calculate the volume of soil concerned. As the volume for 2022 could not be verified until after the work was complete, the Defendant was directed to resubmit the claim after excavation was finished. For claim 4, the Defendant was directed to provide certain information, including a laboratory report on the soil. For each claim, the board said that payment would be made by the Claimant after the various test were complete and, in the case of claim 4, after "agreeing on prices and other procedures under the terms of the Contract".

17. As to claim 5, the board noted that the engineer had sought additional information and explanations as to why the delays were due to the COVID-19 crisis and not other factors. The board concluded that the Defendant's COVID-19 precautions had been "excessive", noting certain actions which "cannot be considered as the impact of coronavirus infection". The board noted that there had been a number of letters issued by the engineer before the crisis associated with slow pace of work by the Defendant.

18. The board ultimately decided to grant an extension of time. However, this appears to have been on pragmatic grounds. The board concluded that termination would cause more delay than granting an extension and that, in those circumstances, an extension of time would benefit all parties and should be granted. As to the financial claim, the board said "Payment will be made after consideration and approval by the Engineer."

19. The engineer issued his decision on 1 August 2022. In it, he awarded the Defendant a total of KZT 2,887,207,679.50 as follows:

    1) Claim 1 (gravel pits): KZT 580,586,318.37;

2)	Claim 2 (late payment):	KZT 84,866,836.72;
3)	Claim 3 (extraction tax):	KZT 160,702,040.50;
4)	Claim 4 (rock excavation):	KZT 28,679,981.20;
5)	Claim 5 (COVID-19):	KZT 1,695,701,662.02;
	Subtotal:	KZT 2,550,536,838.31;
	VAT	KZT 306,064,420.60;
	Total	**KZT 2,887,207,679.50**

20. The table above records the engineer's summary of his decision. As can be seen, it includes a number of mathematical errors. The subtotal contains a very minor error (it should be 2,550,536,838.81). However, the total should be KZT 2,856,601,259.41. The total is therefore KZT 30,606,420.09 more than the total of the preceding numbers in the table.

21. I have not been told how the VAT was calculated. However, the engineer appears to have applied a 12% rate to the amount of the 5 claims. Neither party has taken any issue with that aspect of the award.

22. In December 2022, the parties entered into Supplementary Agreement No. 3 to the Contract. By its terms, the parties agreed relevantly that the Defendant would:

> "temporarily make a payment in the amount of 2,827,132,994.2 KZT to a special escrow account and extend the Contract term for 380 days… but the [Claimant] will apply to the court on the issue [sic.] disagreement with the decision of the DAB on the amount of compensation and the Contract extension period:
>
> - At the same time, if the decision is made in the direction of the [Claimant], the [Defendant] undertakes to reimburse the amount of compensation in full within 84 days after the official court decision is made."

23. I do not know the reason for the difference between the amount recorded in the engineer's determination and the amount recorded in Supplementary Agreement No. 3.

24. The parties further agreed to submit their dispute to the jurisdiction of this Court.

25. The Claimant paid some, but not all of the amount due. This prompted the Defendant to bring proceedings for the balance. On 17 May 2023, the former Chief Justice Lord Mance ordered the Claimant to pay the balance and it is common ground that it did so. The Chief Justice noted, at paragraph 9 of his Judgment, that:

> "That would of course leave the Defendant free under Supplementary Agreement No. 3 to bring any challenge or claim which it wishes in any way it can."

26. On 14 November 2023, the Claimant issued these proceedings. In them, the Claimant challenges the Decisions and seeks recovery of the money it has paid.

27. The Defendant initially argued that it was not open to the Claimant to challenge the Decisions, but was bound by them, for various reasons. Following a hearing on 16 September 2024, I gave judgment on 19 September 2024, in which I rejected those arguments and found that the Claimant was entitled challenge the findings. Amongst other matters, I noted that the parties had expressly agreed that the Claimant had that right.

C. <u>The evidence at trial</u>

28. In preparation for trial, I sought the parties' views and, if possible, agreement, on directions. I received no substantive assistance from the parties. I asked the parties again for their assistance in this at the hearing on 16 September 2024. The Claimant's counsel stated that the Claimant did not have access to the appendices to 5 claim reports on which the Defendant relied in these proceedings.

29. The engineer's decision was said to take into consideration the dispute board's decision and "the Contractor's submission of a revised summarized claim for Claims 1 to 5, and additional information and revisions submitted to the Engineer".

30. I was provided with copies of 5 documents entitled Claim Report No.1 to No.5. Each of the documents was dated prior to the engineer's decision. Claim Report No. 2 was dated 19 March 2019. The remaining reports were dated 28 March 2022 (No. 3 and No. 4) and 31 March 2022 (No. 1 and No. 5). These documents were produced by the Defendant as attachments to the Defence in these proceedings. They were relied on as the reports on the basis of which the engineer made his decision. On close inspection of the reports, however, it is difficult to see how that could be the case. I address this further below.

31. Each of the claim reports referred to appendices. By their descriptions, the appendices appeared to include documents intended to substantiate the claims made. The Claimant has said that it has never received those appendices. The Defendant said it had. I have received no evidence either way. At the hearing on 16 September 2024, it appeared to me highly likely that the appendices would contain documents and information relevant to the assessment of the claims. On behalf of the Defendant, Ms Li confirmed that the Defendant was able to produce the documents. In light of that, on 19 September 2024, I ordered the Defendant to produce the appendices. I also directed the parties to liaise again about directions and provide the court with their proposals, including on witness evidence and expert evidence, if any.

32. The Defendant did not produce the appendices. In light of that, in further submissions, the Claimant indicated that it would invite the Court to draw adverse inferences. In its own submissions, the Defendant asserted that it no longer had access to the appendices. In the Order of 31 October 2024, I made certain case management directions. In my reasons, I made the following observations:

> "The Defendant has made a number of assertions about why it should not have to produce the documents and why it says it cannot do so. If the Defendant wishes to establish those assertions, it will need to support them with written evidence in the form of a witness statement and documents. Simple assertion will not be sufficient at trial. I will assess at trial, in the light of the

evidence produced, whether and if so what adverse inferences should be drawn. At this stage, the parties should not assume that I will decide that issue one way or the other."

33. Neither party invited me to give permission for expert evidence, so I did not do so. In relation to the evidence required for trial, I made the point again that "mere assertion will not be sufficient."

34. I appreciate that, for some, the procedure in the AIFC Court will be unfamiliar. It may be that in other fora, it is sufficient for representatives simply to assert facts. That is not the position in the AIFC Court and I consider that this was made absolutely clear to the parties to these proceedings before trial. The parties are substantial commercial enterprises. The quantum involved is significant.

35. At trial, neither party filed a witness statement or called any witnesses. I was invited to decide the claim on the evidence. As a result, the evidence before me was extremely limited. I was provided with the Contract documents and the Decisions. Save for the claim reports and some limited correspondence, I was provided with very little documentary evidence.

36. There was, in many respects, a good deal of agreement as to the underlying facts, so I was not faced with deciding the issues in a complete vacuum. In addition, as will be seen, many of the Claimant's criticisms of the Decisions turned on the terms of the Contract. Despite this, there were significant areas where facts were asserted by the Defendant and not admitted by the Claimant, in respect of which there was no evidence whatsoever. In particular, with some limited exceptions, the Claimant was generally not willing to accept the factual conclusions of the engineer as to the costs incurred by the Defendant and the reasons for them. In addition, as I have said, the Claimant's position was that the Decisions were difficult to evaluate even on their own terms, because the documents supporting the claims (presumed to be found in the appendices to the reports) had not been produced.

37. As a result of these issues, I asked the parties to address me at the outset of the trial on two issues:

    1) The burden of proof and the evidential value of the Decisions, if any; and
    2) The consequences of the Defendant's failure to produce the appendices to the reports.

38. As to the first issue, the Claimant's position was that it was for the Defendant to prove the facts justifying the claims. In practice, however, the Claimant's position was somewhat more pragmatic. For example, in respect of Claim No. 5 (COVID-19), the Claimant was prepared to accept that the costs claimed had actually been incurred. However, the Claimant disputed that the full period claimed was due to the Pandemic and so contended that the sum should be reduced accordingly. The effect of the Claimant's position however was that, in principle, the Decisions had no evidential value at all.

39. The Defendant took the opposite position. This was, the Defendant said, the Claimant's claim. As a result, it was for the Claimant to establish the facts. The Defendant said that the disputes board and the engineer had considered the claim reports and their appendices and that, as a result, the decisions were properly made and could be relied upon. The Defendant repeatedly retreated to the assertion that the Claimant was not entitled to challenge the decisions of the board and the engineer, for one reason or another. However, that issue had, as I have said, been determined in my earlier Judgment.

40. As to the second issue, Ms Li on behalf of the Defendant, said that the Defendant no longer had access to the appendices. She told me that construction had completed in "*early summer 2024*" and that the "*specialists, heads of units, surveyors and estimators*" had gone back to China. The Defendant, I was told, had only some of the paperwork. It has all, she said, been sent to the Claimant contemporaneously. I was not given any explanation of what had in fact been done to try to find the documents. I was told that some further attempts could be made to try to get them and that it might be possible to get a witness statement. No evidence was produced in support of Ms Li's assertions.

41. The Claimant did not accept this explanation. Nor was it accepted that the documents had been provided to the Defendant at the time. The Claimant's position was that I should draw the inference that the appendices to the claim reports in accordance with AIFC Court Rule 17.38, which states:

> "If a party fails without satisfactory explanation to produce any document requested in a Request to Produce to which he has not objected in due time or fails to produce any document ordered to be produced by the Court, the Court may infer that such document would be adverse to the interests of that party."

42. As I said to Ms Li at the time, I find the explanation provided for the Defendant's failure to produce the appendices very surprising indeed. It is hard to understand how the Defendant could have organized itself in a way which means that it no longer has access to its own documents. It is even more surprising that it is able to find the reports, but not the appendices to those reports.

43. In any event, no evidence was produced to explain the Defendant's failure, contrary to my express instruction in my Order of 19 September 2024.

44. Ms Li also submitted the Defendant "*did not need to produce*" the reports. I found this submission very surprising. The Defendant needed to produce the reports because the Court had ordered the Defendant to do so. That Order has never been challenged.

45. In the course of the hearing, further issues arose in respect of the reports. It now appears to me that the claim reports produced by the Defendant could not in fact have been documents on which the disputes board or engineer relied in reaching their decisions. This became clear on inspection of the engineer's decisions on claims 1, 3 and 5.

46. In respect of claim 1, the engineer said that "*the Contractor submitted a claim for KZT 985,350,546.39 on 1 April 2022*". This claim, he said, was then reduced by the Defendant to a total of KZT 645,613,620.37. The claim was comprised of 17 individual cost items. The engineer produced a table showing, in respect of each item, the sum claimed and the amount awarded. In respect of 3 items, the sum claimed was reduced, with the balance ordered as claimed. The engineer then explained, in respect of each of those 3 items, that he found them to be either "*not clearly substantiated and supported by consistent documentations*" or "*not clearly shown to be associated with this claimed delayed activity*". He therefore reduced the amount claimed by the sums associated with those items and awarded the balance, KZT 580,586,318.37.

47. Claim report No. 1, however, is inconsistent with this. It is dated 31 March 2022, so purports to come before the 1 April 2022 claim referred to by the engineer. Despite that, it states at paragraph 4.3: "*The total cost of the claim is 580 586 318.37 tenge.*" The report therefore claims precisely the amount which the engineer ultimately awarded, after assessment and reduction of the Defendant's final claim submission.

48. In respect of claim 3, the disputes board referred to a claim report dated 14 March 2022, in which the claim asserted was for KZT 151,613,538.85. The engineer's decision awarded KZT 160,702,040.50. The document submitted by the Defendant in these proceedings and named Claim Report No. 3 is dated 28 March 2022. The sum claimed is KZT 160,702,040.50. That sum matches the sum awarded by the engineer, not the sum reported by the disputes board as claimed in March 2022.

49. In respect of claim 5, the engineer recorded that the Defendant initially claimed KZT 4,144,455,206.87. After consultations, he says, and after the dispute board decision, a revised claim was submitted on 27 July 2022 in the total amount of KZT 2,678,553,484.88. Once again, the engineer set out the itemized claim in a table. In respect of 3 of the 15 listed items, he awarded nothing on the basis that they were "*not clearly substantiated and supported by consistent documentations.*" After deduction of those items, the total amount awarded was KZT 1,695,701,662.02.

50. Claim Report No. 5 is dated 31 March 2022. However, just as with Claim No. 1, the sum claimed matched the sum awarded by the engineer, not the sum which the engineer recorded as being claimed. Not only that, the table on the final page of the report appeared to match the engineer's table in his report. It included two columns. The first matched (with one minor exception in row 8) the table of items reported by the engineer as having been claimed by the Defendant. The second column matched the amount determined by the engineer as being due.

51. It does not therefore appear possible that the documents entitled Claim Report No. 1, Claim Report No. 3 and Claim Report No. 5 could have been documents submitted to the disputes board or the engineer in support of Claims 1, 3 and 5. The total sums asserted in those Reports matched precisely the sums awarded by the engineer. The sums in respect of claims 1 and 5 were, according to the engineer, reduced sums, less than the amounts claimed. Nor is there any obvious reason why a claim report submitted by the Defendant recorded precisely the items of the claim which had been rejected by the engineer.

52. When Ms Li, who appeared for the Defendant, was asked about this at the hearing, she was unable to provide any explanation. This is one of the problems with producing evidence unsupported by any witness. Where discrepancies emerge, there may be no-one present who can explain them and the Court is left with documents which are, in one way or another, unreliable.

53. I am troubled by the fact that documents were produced by the Defendant in these proceedings as the claim reports on the basis of which the Decisions were made when, it appears, they are not. This raises a number of questions, none of which are the subject of any evidence. Quite apart from the question of how these documents were in fact produced and how they came to be presented to the Court in this way, I have not been provided with the actual claim documents relied on by the Claimant before the engineer.

54. I do not accept the Defendant's submission that the Decisions are binding. I have already given my reasons for that. That does not necessarily mean that they have no weight whatsoever. However, their weight is limited. The Decisions demonstrate, to some extent and in some respects, that the engineer and the disputes board considered the claims to be made out. However, the very purpose of these proceedings is to test those conclusions.

55. There are barely any reasons for the apparent conclusions that the Claimant is liable for the claims:

    1) As regards Claim 1 (gravel pits), the board reached no conclusion. The engineer gave no reasons for finding liability. On one reading, he may have relied on Supplementary Agreement No. 1. I have not been provided with a copy but, from the board's description, it does not appear to admit liability and the Defendant has not suggested that it did.

    2) As regards Claim 2 (late advance payment), the facts were ultimately not in dispute, so the issue does not arise.

    3) As to Claim 3 (mineral extraction tax) and 4 (rock excavation), the board did not appear to address the reasons for the Claimant's liability and the engineer gave no substantive reasons at all.

    4) As to Claim 5 (COVID-19), the board appeared skeptical of the Defendant's claim. The engineer identified certain items which were not substantiated, but otherwise provided no reasoning.

56. In those circumstances, I do not think the conclusions of the dispute board or the engineer provide much if any assistance to the Defendant on liability. Where those issues turn on points of law, the Decision could provide no such assistance.

57. As to the quantum of each claim, the engineer relied on the submissions and documents provided to it by the Defendant. In light of the problems with the reports submitted by the Defendant, its failure to produce the appendices to those reports as ordered, and its failure otherwise to produce any other documents or other evidence substantiating quantum, I do not consider the Decisions provide much assistance at all. The engineer appears to have accepted the Defendant's assertions in most respects and it is impossible to assess the accuracy of those conclusions without inspecting the underlying documents.

58. In the light of those conclusions, I turn now to consider each of the claims in turn.

D. Claim No. 1 – gravel pits

59. The completion of the works required the creation of gravel pits or quarries. These were not intended to be permanent features of the final construction works. Rather, they were required to facilitate the roadworks and were refilled and covered over before the works were completed.

60. On or around 5 October 2017, the Defendant was informed that mining was forbidden along certain parts of the road which ran through a nature reserve. On 3 March 2018, the engineer instructed the Defendant to prepare a "project", which I understand to be a detailed report and application intended to justify the proposed excavations. The Defendant appointed a consultant on 7 March 2018 and the consultant submitted a report on 28 May 2018. On 9 August 2018, permission was granted to use certain plots for excavation. The parties ultimately agreed an extension of time for the works in respect of this episode. However, the parties disagreed about whether the Claimant should be responsible for the Defendant's prolongation and other costs.

61. The disputes board made no clear decision on this issue. However, the engineer awarded a total of KZT 580,586,318.37 effectively as prolongation costs arising from delays associated with these issues.

62. The Claimant's counsel confirmed that the Claimant accepted the chronology set out above. However, the Claimant's position was that the claim should have failed for two reasons:

1) The cost was at the contractor's risk.

2) The claim was made out of time.

D.1 Contractor's risk

63. In Claim Report No. 1, this claim was justified on the basis of clause 8.5 of the General Conditions of Contract. That provision was also referred to in the disputes board decision, albeit no clear decision was made about this justification. The engineer's decision did not refer to any contractual provision at all.

64. In oral submissions, the parties also referred to clause 1.13 of the General Conditions. I address that provision first.

D.1.1 Clause 1.13

65. Clause 1.13 provides as follows:

> "The Contractor shall, in performing the Contract, comply with applicable Laws. Unless otherwise stated in the Particular Conditions:
>
> (a) the Employer shall have obtained (or shall obtain) the planning, zoning, building permit or similar permission for the Permanent Works, and any other permissions described in the Specification as having been (or to be) obtained by the Employer; and the Employer shall indemnify and hold the Contractor harmless against and from the consequences of any failure to do so; and
>
> (b) the Contractor shall give all notices, pay all taxes, duties and fees, and obtain all permits, licences and approvals, as required by the Laws in relation to the execution and completion of the Works and the remedying of any defects; and the Contractor shall

indemnify and hold the Employer harmless against and from the consequences of any failure to do so…"

66. The Contract provided the following definitions:

    1) Clause 1.1.5.4:

       "Permanent Works" means the permanent works to be executed by the Contractor under the Contract.

    2) Clause 1.1.5.7:
       "Temporary Works" means all temporary works of every kind (other than Contractor's Equipment) required on Site for the execution and completion of the Permanent Works and the remedying of any defects.

67. The Claimant's position was that these provisions therefore distinguished between the Permanent Works and everything else. The Employer was responsible for obtaining planning, zoning, buildings permits or other permissions required for Permanent Works. The Contractor was responsible for obtaining permits for the works themselves.

68. The gravel pits were not, according to the Claimant, Permanent Works. They were temporary Works and so came within clause 1.13(b), such that the Defendant was responsible for obtaining the necessary permits.

69. The Defendant considered that the terms were unclear. However, the Defendant's position was that the gravel pits were necessary to produce the material required for carrying out the Permanent Works. As such, they were part of the Permanent Works. Clause 1.13(a), the Defendant said, was about the responsibility for getting permits, which fell on the employer. Clause 1.13(b), by contrast, was about paying for them. The Defendant asserted that the Claimant had not participated in obtaining any permits.

70. In my view, the Claimant is clearly correct. The obligation to obtain the relevant permits fell on the Defendant.

71. Under clause 1.13(a), the employer was responsible for obtaining the permits required to leave the works in their final state. Where a building is erected, planning permissions, zoning permits and building control permits are all likely to be necessary. Where, as here, the works are carried out to reinstate or repair pre-existing structures, there are unlikely to be any permits required which fall within this provision. Under clause 1.13(b), the contractor is responsible for obtaining any permits required to carry out the works.

72. Contrary to the Defendant's submission, the provision is not simply about payment – it refers in terms to the Contractor being obliged to "obtain all permits, licences and approvals, as required by the Laws in relation to the execution and completion of the Works."

73. Clause 1.13 therefore provides no justification for this claim.

D.1.2 Clause 8.5

74. Clause 8.5 of the Contract stated as follows:

> "Delays Caused by Authorities
>
> If the following conditions apply, namely:
>
> (a) the Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities in the Country,
> (b) these authorities delay or disrupt the Contractor's work, and
> (c) the delay or disruption was Unforeseeable,
>
> then this delay or disruption will be considered as a cause of delay under sub-paragraph (b) of Sub-Clause 8.4 [*Extension of Time for Completion*]."

75. The term "Unforeseeable" is defined in clause 1.1.6.8 as "not reasonably foreseeable by an experienced contractor by the Base Date." "Base Date" is defined in clause 1.1.3.1 as "the date 28 days prior to the latest date for submission of the Tender."

76. The Defendant's position was that it was a Chinese company which could not have known that there were special permitting requirements in place. The process for obtaining permissions took, the Defendant said, 1.5 years to complete. It involved, I was told, numerous challenges to government decisions in the Courts.

77. No evidence was included in the bundle to substantiate these assertions. They also appear to be inconsistent with the chronology provided by the disputes board. According to that, the Defendant did not appoint a consultant until 7 March 2018, more than 3 months after works were due to commence and 5 months after the Defendant was informed about the restrictions. The consultant produced a report on 28 May 2018 and permission was granted on 9 August 2018. According to the disputes board, then, the authorities took about 2.5 months to grant the permit. I have seen nothing to suggest that that was an unforeseeable period of time.

78. Nor can I conclude that the Defendant diligently followed the procedures, given its apparent delay in appointing a consultant after the issue arose. Furthermore, had the issue been identified before the works began, they could have been programmed into the schedule.

79. In these circumstances, it is impossible to conclude that the test set out in clause 8.5 is satisfied. Insofar as the 2.5 months taken by the authorities to provide the permit constitutes a delay, within the meaning of clause 8.5(b), I do not consider it was unforeseeable at the Base Date, given the land was designated as a nature reserve in 2001.

80. I therefore conclude that claim 1 should fail.

D.2 Claim out of time

81. Had I concluded that claim 1 was otherwise made out, I would have found that it failed because it was made too late.

82. Clause 20.1 provides:

> "If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.
>
> If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim."

83. As the Claimant pointed out, according to the Defendant's Claim Report No. 1:

1) At paragraph 2.4: The Defendant was aware of the permitting issue by 5 October 2017 at the latest; but
2) At paragraph 2.7: The Defendant sent the engineer a notice of claim in respect of this issue on 30 November 2017.

84. The Defendant therefore waited 56 days to notify a claim.

85. The Defendant's counsel accepted that time started on 5 October 2017. However, she suggested that there may have been another letter to the employer which could have amounted to a claim and which would have been copied to the engineer.

86. I reject this explanation. Any claim would have had to be made in a letter directed to the engineer. A letter to the employer which was copied to the engineer could not have served that purpose. In any event, no such letter has been produced and I was directed to no evidence that such a letter was sent. I regard the suggestion that it might as speculation.

87. In the circumstances, the Defendant's claim was made to the engineer out of time. It has not been suggested that I have the power to extend time or that I should do so. As a result, the consequences in clause 20.1 apply and this claim fails.

D.3 Quantum

88. In light of my decision that claim 1 should be rejected, it is not necessary for me to address quantum. However, had I found that it should succeed, I would not have accepted the quantum asserted. That quantum is based entirely on the conclusions of the engineer and on the content of the claim reports.

For the reasons I have set out, I do not think those documents provide much if any support for the claim. No attempt was made to explain, let alone substantiate the 17 different categories of cost which were claimed under this heading.

E. Claim No. 2 – delays in paying the advance payment

89. The Claimant did not pay the advance payment on time. The dispute board awarded the Defendant the sum of KZT 84,866,836.72 as a result of the delay. Claim Report No. 2, the sum was justified by reference to the Defendant's financing costs. The Defendant said that it had obtained a loan "from the head quarter of the Company". The rate was said to be 5% above the Bank of China discount rate.

90. The Claimant accepted the facts asserted by the Defendant and that there was delay in payment. The Defendant in turn accepted that part of the delay was the result of the Defendant providing defective advance payment and performance guarantees.

91. Clause 14.8 of the General Conditions sets out the consequences of late payments:

> "If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [Payment], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay…
>
> Unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the annual rate of three percentage points above the discount rate of the central bank in the country of the currency of payment, or if not available, the interbank offered rate, and shall be paid in such currency."

92. The advance payment was due to be paid partly in USD and partly in KZT. In respect of KZT, the Particular Conditions of Contract provided:

> "For Tenge, 'discount rate' means the refinancing rate of the National Bank of the Republic of Kazakhstan as of the date of execution of cash obligation or its relevant part."

93. The claim advanced to the disputes board and engineer was for 155 days delay at 5% over the Bank of China discount rate. The correct calculation should have been for 84 days at two different rates:

    1) On sums due in USD, 3% over the Federal Reserve discount rate; and

    2) On sums due in Tenge, 3% over the National Bank of Kazakhstan refinancing rate.

94. In the circumstances, I made directions for the Claimant to prepare a revised calculation on that basis and for the Defendant to provide comments, with brief written submissions in the event of disagreement.

95. On 9 December 2024, the Claimant filed a calculation stating that the total due was KZT 40,572,617.40. This was based on 70 days delay in payment of the USD component and 83 days delay in payment of

the KZT component. The rates applied were 4.5%, rising to 4.75% on the USD amount and 12.75% falling to 12.5% on the KZT amount.

96. In response submissions on 11 December 2024, the Defendant resubmitted Claim Report No. 2, asserting that both the period of the interest and the rate were wrongly asserted by the Claimant. The Defendant submitted a calculation which asserted that (a) the part of the advance payment which was paid, was paid 73 days late (USD) and 84 days late (KZT) (b) a relatively small part of the advance payment remained unpaid for 373 days and (c) the rate should have been 12.75% throughout.

97. I take judicial notice of the facts that:

    1) The Central Bank of Kazakhstan reduced its interest rate from 9.75% to 9.5% on about 5 March 2018. As such, the Claimant appears to have applied the correct interest rate to the KZT sums of 12.75% falling to 12.5%;

    2) The primary discount rate of the Federal reserve was 2% on 16 January 2018, rising to 2.25% on 22 March 2018. Accordingly, the appropriate rates were 5% and 5.25%.

98. On the USD sums, my calculations result in a sum of USD 70,507.78 for the period between 16 January 2018 and 22 March 2018 (65 days at 5% on USD 7,918,566.36) and USD 9,111.78 from then until 30 March 2018 (8 days at 5.25%), giving a total of USD 79,619.59.

99. On the further outstanding payment, said to be USD 100,579.92, I am prepared to give the Defendant the benefit of the doubt, in light of the Claimant's acceptance of the underlying facts asserted by the Defendant. However, the correct rates must be applied. By my calculation, the total interest on this sum over the period claimed up to 24 January 2019 is USD 5,775.77. This takes into account further federal reserve discount rate changes on 14 June 2018 (to 2.5%), 27 September 2018 (to 3.25%) and 20 December 2018 (to 3.5%).

100. The total due in respect of the late payment of USD was therefore USD 85,395.33. The parties agree the contractual conversion rate of 310.66 KZT to 1 USD. This sum is therefore equivalent to KZT 26,528,911.70.

101. As to the Tenge component, I have checked the parties' calculations. My calculation leads to a sum which is less than the Claimant's. When the additional interest claimed by the Defendant for the further unpaid balance is added, the sum is still very slightly less. The difference is however de minimis. I therefore accept the Claimant's assessment of this element in the sum of KZT 17,920,284.31.

102. The total sum due in respect of claim 2 is therefore KZT 44,422,752.10.

F. Claim No. 3 – mineral extraction tax

103. Claim 3 related to an increase in the mineral extraction tax. According to paragraph 2.7 of Claim Report No. 3, the Defendant was informed of the increase on 9 December 2018 and the Defendant paid the

taxes in December 2018. Subsequent paragraphs however suggest that some payment was made much later.

104. The amount of tax paid depended on the volume of material extracted. Claim Report No. 3 contains a calculation of the additional sum paid in tax for each year above the amount expected at the time of contracting. The sums calculated for years 2018 to 2021 were based on actual volumes of material. The calculation of the final year was based on projections in the bill of quantities, rather than actual volumes.

105. The disputes board made no final decision, but noted that the Defendant should submit the results relevant to the volume calculations and documents confirming the payment of taxes. The final amount due could, the disputes board said, be determined after those conditions were met and all excavation was complete.

106. The engineer's decision awarded KZT 160,702,040.50. There is little explanation aside from the statement that the claim was discussed with the dispute board and "*found with merit*".

107. The Claimant challenged the claim on both substance and timing.

108. In the claim form, the Claimant noted that the sums identified by the disputes board and the engineer did not match. The Claimant also noted that the disputes board required documents establishing the taxes paid. In subsequent written submissions, the Claimant repeated these points and, in addition, specifically challenged the calculation for 2022 because it was an estimate, not based on actual measurements. The Claimant stated that the sum claimed should be reduced to KZT 123,287,019.93.

109. The Claimant took no issue with the proposition that an unexpected rise in tax would give rise to a claim. However, according to the Claimant, the Defendant submitted the claim to the engineer out of time.

F.1 The Defendant's entitlement in principle

110. I have been provided with no documents whatsoever to support the substance of this claim. For the reasons set out above, I am not willing merely to accept the assertions of the Defendant unless they are admitted by the Claimant or substantiated by evidence. That said, it is for the Claimant to challenge the Decisions and identify the ways in which it says they are defective.

111. In this regard, I take the Claimant's position to be that the award should be reduced to KZT 123,287,019.93. The Claimant therefore implicitly accepts that, subject to its timing object, the Defendant should have been awarded that sum.

F.2 Timing

112. The Claimant's position on timing also relied on the Defendant's Claim Report No. 3. Paragraph 2.6 of that report stated that the Defendant entered into a contract for the supply of road materials on 6

December 2018. According to the Claimant, the Defendant would have known at that date that the tax had increased.

113. I do not consider that the Claimant's conclusion follows from the facts relied on. The contract for the supply of road materials was distinct, as I understand it, from the contracts for the supply of excavation works. In any event, it is not clear that the increased tax rate was visible from the terms of the contract.

114. It may be said that these issues are matters within the Defendant's knowledge. However, I do not know whether or not those documents came into the Claimant's possession in the course of the Contract. Nor was this point clearly pleaded in the Statement of Claim. In the circumstances, I am not prepared to accept that this claim was raised late with the engineer.

115. In relation to claim 3, I therefore consider that the sum of KZT 123,287,019.93 should be awarded.

G. Claim No. 4 – rock excavation

116. Claim 4 related to the cost of rock excavation. According to the Defendant, stones were discovered under the surface which were not anticipated and which required additional works to break up and remove the stones. The Defendant notified the claim to the engineer on 11 April 2019, seeking an extension of time and additional costs under clause 4.12 and 20.1 of the General Conditions.

117. The disputes board reached no clear conclusion, but stated that "*payment will be made after conducting the required tests, agreeing on prices and other procedures under the terms of the Contract*".

118. The engineer stated that he had issued an instruction to the Defendant to submit a variation proposal. He said he had checked and accepted the quantity of works and the proposed unit rate and awarded KZT 28,679,981.20 to the Defendant.

119. The Claimant challenges this conclusion on two bases:

1) The instruction was issued by the engineer without authority and so is invalid; and

2) The Defendant has provided no evidence of the costs associated with the work.

G.1 Unauthorised instruction

120. Clause 4.12 provides for engineer's instructions. These amount to variations under clause 13. However, the circumstances in which the engineer can issue an instruction amounting to a variation is regulated by clause 3.1.

121. Clause 3.1 of the General Conditions provides, in relevant part:

> "The Engineer shall obtain the specific approval of the Employer before taking action under the following Sub-Clauses of these Conditions:

(A) Sub-Clause 4.12: agreeing or determining an extension of time and / or additional cost.
(B) Sub-Clause 13.1: instructing a Variation, except;
    (i) In an emergency situation as determined by the Engineer, or
    (ii) If such a Variation would increase the Accepted Contract Amount by less than the percentage specified in the Contract Data.

…
Notwithstanding the obligation, as set out above, to obtain approval, if, in the opinion of the Engineer, an emergency occurs affecting the safety of life or of the Works or of adjoining property, he may, without relieving the Contractor of any of his duties and responsibility under the Contract, instruct the Contractor to execute all such work or to do all such things as may, in the opinion of the Engineer, be necessary to abate or reduce the risk. The Contractor shall forthwith comply, despite the absence of approval of the Employer, with any such instruction of the Engineer. The Engineer shall determine an addition to the Contract Price, in respect of such instruction, in accordance with Clause 13 and shall notify the Contractor accordingly, with a copy to the Employer."

122. The percentage specified in the Contract Data and referred to in clause 3.1(B)(ii) was zero. As such, the engineer could only issue an instruction amounting to a variation which increased the contract sum in the event of an emergency.

123. The Defendant's position at the hearing was that the need to remove the rocks amounted to an emergency. I have seen no evidence to support that, nor to suggest that the engineer considered it an emergency.

124. In the circumstances, I do not consider that the engineer's instructions, amounting to a variation, themselves gave rise to an entitlement on behalf of the Defendant.

125. Clause 4.12 however also permits claims for costs in the absence of a variation. The clause states, relevantly:

> "If the Contractor encounters adverse physical conditions which he considers to have been Unforeseeable, the Contractor shall give notice to the Engineer as soon as practicable.
>
> This notice shall describe the physical conditions, so that they can be inspected by the Engineer, and shall set out the reasons why the Contractor considers them to be Unforeseeable. The Contractor shall continue executing the Works, using such proper and reasonable measures as are appropriate for the physical conditions, and shall comply with any instructions which the Engineer may give. If an instruction constitutes a Variation, Clause 13 [Variations and Adjustments] shall apply.
>
> If and to the extent that the Contractor encounters physical conditions which are Unforeseeable, gives such a notice, and suffers delay and/or incurs Cost due to these conditions, the Contractor shall be entitled subject to notice under Sub-Clause 20.1 [Contractor's Claims] to:

(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and
(b) payment of any such Cost, which shall be included in the Contract Price."

126. In those circumstances, in my view, the Defendant could, in principle, succeed in demonstrating that sums are recoverable for additional costs caused as a result of unforeseeable ground conditions, even in the absence of a variation.

G.2 Lack of substantiation

127. In order to succeed on a claim for costs, the Defendant would need to show:

1) That the physical conditions on the site were not reasonably foreseeable by an experienced contractor at the Base Date; and

2) That the costs claimed were the result of taking proper and reasonable measures appropriate for the physical conditions.

128. The difficulty for the Defendant in advancing this claim is that it has produced no evidence which would assist in establishing those facts. The Decisions themselves shed very little light on this and contain no analysis at all of whether the conditions were foreseeable. The disputes board decision contains nothing about the Defendant's costs. While the engineer stated that he had "*checked and accepted the quantity of the works done as well as the proposed unit rate for payment*", this provides no means by which this assessment can be checked. The engineer's assessment was based on a proposed variation. The engineer may not therefore have turned his mind to the question of whether the conditions were reasonably foreseeable. Further, the unit rate referred to by the engineer was, presumably, the Defendant's rate for providing services, which would not necessarily be the same as the cost to the Defendant of doing so.

129. Claim Report No. 4 appears to quantify the claim as, in effect, a claim for prolongation costs. However, those were said to be absorbed by extensions of time which were already granted. Paragraph 1.4 then justifies the cost as follows:

"According to the Contractor's calculations, the cost required for stone excavation was 3232.7565 tenge/m3 and the quantity of excavation was 8871.68 m3. Therefore, the Contractor's claim for the additional cost is 28,679,981.20 tenge."

130. The report appears to attach 3 appendices. However, as discussed above, these have not been produced. Nor is the actual delay which was caused explained.

131. I therefore simply do not have any material on the basis of which I could conclude that (a) the cost to the Defendant of excavating these rocks was KZT 3,232.7565/m3, nor (b) whether the entire quantity of rock asserted was actually excavated, nor whether it was all unforeseeable. The Defendant has not provided any explanation, let alone evidence, to explain how these calculations were arrived at. I do not know, for example, whether additional crew were required, whether a specialist sub-contractor was engaged, nor whether additional plant was hired.

132. In the circumstances, I am not prepared to make any award in respect of claim 4.

H. <u>Claim 5 – COVID-19</u>

133. The final claim is the most substantial and relates to delays caused by the COVID-19 crisis.

134. According to the documents, the Defendant appears to have claimed different amounts at different times for this delay.

135. The disputes board states that the Defendant's claim was for KZT 3,006,707,203.96. At that stage, the Defendant was claiming that the Pandemic had resulted in 612 days of delay. However, as a result of the extensions of time already agreed, the extension required was 381. It is not immediately clear from the disputes board decision whether the costs claimed were said to result from the 612 days period or from the 381 days period.

136. The disputes board made no positive decision that any delay had been caused by the Pandemic. The board noted that the engineer had sought further information, explanations, documents and analysis "*to prove that the above delays are not related to the Contractor's inability to manage the project and that he has taken all necessary measures to minimize delays*". The board went on to note as follows:

> "According to the Engineer, the Contractor could not prove why he claims to extend the deadline for another 381 days and complete the work by December 31, 2022 due to the coronavirus pandemic, and not to the Contractor's inability to fulfill his obligations."

137. The board noted that measures introduced by the Chief Sanitary Doctor of Kazakhstan on 22 May 2020 did not prohibit or require the shutdown of the Works. The board noted that "*it is clear that the Contractor took excessive precautions…*" and referred to 23 letters from the engineer to the Defendant about the slow pace of work on the project, with the majority coming before the Pandemic.

138. The disputes board recommended an extension of time essentially for pragmatic reasons, not because the Defendant was entitled to an extension under the Contract. In the view of the board, the works would be completed sooner if the Defendant was given an extension as the alternative was to terminate the Defendant's contract and appoint another contractor. That, the board felt, would result in more delay. Whatever the truth of that statement, the reasons given by the disputes board provide no support at all for the proposition that the Defendant was entitled to an extension of time under the Contract. The disputes board did not award any compensation to the Defendant.

139. It is not obvious that the engineer considered the question of whether the Defendant was actually entitled to compensation at all. The engineer states that the Defendant "*initially*" claimed KZT 4,144,455,206.87, which was reduced to KZT 2,678,553,484.88 on 27 July 2022. As set out above, Claim Report No. 5 claims a sum of KZT 1,695,701,662.02. However, as I have said, that document appears to have been prepared after the engineer's decision as it matches precisely the amount awarded by the engineer.

140. At trial, the Defendant's position was that I should rely on the Decisions and maintain the sum awarded. I was told by Ms Li that the Defendant had 100 staff who required mandatory compensation in the course of the Pandemic. Many, it was said, became sick and there were some fatalities. There was, however, no evidence of any of these matters before the Court, as I pointed out to Ms Li. Ms Li said that, if I was to give her further time to do so, she may be able to assemble further evidence. However, no application was made to adjourn the trial and I was given no real insight into what further evidence would be available if I did. Given the Defendant's approach to date and given its position on the appendices to the Claim Reports, it seems unlikely that more would have been forthcoming. In any event, the Defendant should have been ready for trial.

141. For its part, the Claimant's overarching position was that the Defendant had failed to substantiate the claim. It filed no evidence on the basis of which the Court could assess the claim. Even if the Court could in principle rely on the content of the Decisions, it should not do so as the Claimant did not have the supporting documents, which would appear to be included in the appendices that the Defendant had not produced.

142. The Claimant was however prepared to accept that the Pandemic has prevented works for a period of 56 days from 16 March 2020 to 11 May 2020. After that, the Claimant accepted that there would likely have been further disruption and, as a result, it could accept that there had been 93 days of delay, but no more.

143. The Claimant said that it was very difficult to know what period was covered by the Defendant's COVID-19 delay claim. Doing the best it could, the Claimant assessed that as a claim for 780 days. Assuming an even cost over that period and reducing the delay to be compensated to 93 days results in a figure of KZT 202,179,813.55. The Claimant was therefore prepared to accept that the Defendant had suffered a loss in that sum.

144. I pointed out that the Defendant's claim appears to cover 612 days and that the extension sought was reduced to 381 days, taking into account other claims for an extension. Depending on how the costs were calculated across competing causes of delay, this might result in a daily claimed cost from the Pandemic of KZT 2,770,754.35 or KZT 4,450,660.53. Applying the Claimant's 93 days concession would result in a claim of KZT 257,680,154.52 or KZT 413,911,429.31.

145. The Claimant was prepared to accept that, if I considered that the claim was intended to be spread over 612 days, it would not object to a judgment on that basis, being for KZT 257,770,754.35. However, it was not prepared to accept the increased figure if the claim was intended to be spread over 381 days instead. On one view, that might appear inconsistent. However, this reflects the fact that the Claimant was seeking to adopt a pragmatic approach in the absence of any evidence to support any of the figures in the claim, despite the Court's Order.

146. The Defendant was adamant that the whole of the cost was spread over 381 days, not 612. Further, counsel insisted that the delay was more than 93 days as, she said, there were other months outside the period of very strict lockdown when the side was not accessible.

147. I am prepared to accept that the total claim for Pandemic delays was ultimately said to be 612 days. I further accept that the extension of time sought to complete the works as a result of Pandemic delays was 381 days, reduced from 612 in light of other claimed and agreed extensions, which overlapped. I simply do not know – and the Defendant has not produced the material which would have allowed me to assess – whether the costs claimed are, in effect, costs associated with a delay of 381 days or with 612 days.

148. However, whatever the right answer to that, the difficulty for the Defendant, once again, is that it produces no evidence to support its assertions. As I have said, the Defendant has also failed to comply with the Court's Order to produce documents which would, on their face, be relevant. I am therefore not prepared simply to accept the Defendant's assertion that the costs summarized in the table in its report and in the engineer's decision were costs incurred as a result of delays caused by the Pandemic. Nor do I consider the claim gets any significant support from the Decisions themselves, for the reasons I have given.

149. In those circumstances, I am prepared to award the Defendant only what the Claimant will accept was due. That is the sum of KZT 257,680,154.52. I therefore assess claim 5 in that amount.

I. Collection and consequential order

150. I assess the value of the 5 claims as follows:

1)	Claim 1 (gravel pits):	Nil;
2)	Claim 2 (late payment):	KZT 44,422,752.10;
3)	Claim 3 (extraction tax):	KZT 123,287,019.93;
4)	Claim 4 (rock excavation):	Nil;
5)	Claim 5 (COVID-19):	KZT 257,680,154.52;
	Subtotal:	KZT 425,389,926.55;
	VAT at 12%	KZT 51,046,791.19;
	Total	**KZT 476,436,717.74**

151. To date, the Claimant has paid a total of KZT 2,827,132,994.20. The Claimant is therefore entitled to be repaid the sum of KZT 2,350,696,276.46.

152. From the Order of Justice Lord Mance, it appears the sum paid by the Claimant was paid into escrow. I asked the parties about the form of the order I should make if I considered the Claimant had overpaid. Both appeared to consider that it would be sufficient for me to order the Defendant to repay the overpayment. I will therefore make an order in those terms. However, I make clear that, if the sum currently stands in escrow, the Defendant can meet that obligation by procuring repayment from escrow to the Claimant.

153. Supplementary Agreement No. 3 provided for repayment within 84 days of Judgment. I therefore set that as the payment deadline. If the sum stands in escrow, no doubt the Defendant will be in a position to arrange its release much sooner.

154. In the course of the hearing, I asked the parties whether any other orders would be required. Both confirmed that there would not. However, I give the parties permission to apply for any other consequential orders they may seek within 14 days of this Judgment.

By Order of the Court,

Justice Tom Montagu-Smith KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Ms Ayim Kolzhanova, Chief Manager of the Department of Legal and Personnel Work of JSC “NC “QazAvtoJol”, Astana, Republic of Kazakhstan.

The Defendant was represented by Ms Irina Li, Director, Limited Liability Partnership “ASESSOR” Law Company, Almaty, Republic of Kazakhstan.