IN THE COURT OF APPEAL
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

13 February 2026
Case №: AIFC-C/CA/2025/0041

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

Applicant/Appellant

v

JSC "NATIONAL COMPANY QAZAVTOJOL"

Respondent

JUDGMENT AND ORDER

Justice of the Court:

Justice Sir Jack Beatson FBA

JUDGMENT

A. Introduction

1. This Application, made on 24 September 2025, raises the question of the relationship of two important principles, access to justice and finality in litigation, in the context of refusal of permission to appeal (hereafter "PTA") or of an extension of time in which to do so.

2. The Applicant is the Kazakhstan Branch of JSC with limited liability Sinohydro Corporation Limited LLP, hereafter "Sinohydro", "the Applicant". It is the contractor under a project to reconstruct an 81-kilometre stretch of the Kurty-Burybaital Road, made with National Company "KazAvtoJol" JSC, hereafter "KazAvtoJol", "the Respondent", or "the Employer".

3. In §23(1) of its Application, Sinohydro requests "*the exercise of exceptional jurisdiction, necessary to prevent real injustice, to reopen the refusal of PTA/ extension"* of time in judgments in AIFC – C/CA/2025/0001 in respect of AIFC – C/CFI/2023/0044. The two judgments and orders in AIFC – C/CFI/2023/0044 were given on 19 September and 5 December 2024 by Justice Montague-Smith KC in the AIFC Court of First Instance ("the CFI"). The judgment and order of this Court in C/CA/2025/0001 refusing an extension of time and permission to appeal (hereafter "PTA") was given on 28 March 2025 by Justice Sir Stephen Richards.

4. Sinohydro claims at §4 that it does not seek to revisit the merits of the case and any error on the merits made by the CFI or by this Court. Rather, relying on a number of English authorities, in particular *Taylor v Lawrence* [2002] EWCA Civ 90 and *Ceredigion Recycling & Furniture Team v Clifford Pope & Allison Cann* [2022] EWCA Civ 22 on CPR Part 52.30, it claims that "*the narrow and 'rare' jurisdiction exists solely to maintain the integrity of the judicial process", "the integrity of the permission process",* and "*the procedural integrity of the refusal process"* which "*has been critically undermined"*: see Application, §§3, 9, 10-11 and 23. It argues that two situations in which such intervention is appropriate are (i) where the judge at the PTA stage did not grapple with a key point and (ii) where the reasoning provided is insufficient. There must also be, in the words used in a number of the cases referred to by Flaux C in *Ceredigion Recycling* at [33] – [46], a "'*powerful probability' that the decision in question would have been different if the integrity of the earlier proceedings has not been critically undermined".*

5. §23(1) of the Application does not refer to the decision and order of Justice Lord Faulks KC in AIFC-C/CA/2025/0028, given on 18 August 2025 refusing an extension of time for filing an application for permission to appeal the judgments and orders identified in paragraph 3 above. But §§11 and 14 of the Application respectively state that the applicant is "*seeking to safeguard the procedural integrity of the refusal as prescribed by the [AIFC] Court's judgments of 28 March 2025 and 18 August 2025*" and §14 refers to the refusal of PTA/extension on 18 August 2025. Accordingly, although Justice Lord Faulks's judgment is neither expressly identified nor mentioned in the request for relief, it is implicitly referred to in §§11 and 14 of the Application and I also consider it.

6. In accordance with Rules 29.16 and 29.17 of the AIFC Court Rules and in the light of Sinohydro's request in §5 of its application for "*determination on the papers with targeted clarifications*" or "*a 15-minute oral hearing*", I have determined the application to reopen the refusals of permission to appeal and for an extension of time in which to do so on the papers before me.

7. The background and details of the dispute between the parties and the contractual framework are extensively set out in Justice Montague-Smith KCs two judgments. Because it is submitted that the "*integrity of the PTA process"* has been critically undermined by the decisions refusing permission,

before turning to the grounds relied on for that submission, I summarise that background and the judgments concerning this contract. I do so because the real issue is whether the essential points raised by the grounds of appeal were addressed and the reasons why they did not satisfy the test for PTA or an extension were identified: see *Michael Wilson & Partners Ltd. v JF Emmott and others* [2024] EWCA Civ 86 at [53].

B. The contractual framework and the dispute

8. The Contract is on FIDIC 2010 Red Book terms, i.e. the FIDIC General Conditions of Contract for works designed by the Employer, one of the many standard forms developed by the Fédération Internationale des Ingénieurs-Conseils. It and two Supplemental Agreements were entered into on 11 July 2017. The Contract Data provides that the contract is to be executed in accordance with the laws of the Republic of Kazakhstan.

9. Clause 20.1 of the Contract provides for circumstances under which the contractor may claim extra payment and/or time for completion. Clauses 20.4 and 4.12 respectively provide for disputes to be referred to a Disputes Board and for the Engineer to give instructions in accordance with clause 3.1. The fifth of FIDIC's Golden Principles is that unless there is a conflict with the governing law of the contract "*all formal disputes must be referred to a [Disputes Board] for a provisional binding decision as a condition precedent to arbitration".*

10. Sub-paragraph 4 of Clause 20.4 provides that the decision of a Disputes Board "*shall be binding on both parties … unless or until it shall be revised in an amicable settlement or an arbitral award as described below".* Sub-paragraph 5 of clause 20.4 provides that if either party is dissatisfied with a decision it may, within 28 days after receiving the decision give a Notice of Dissatisfaction indicating its dissatisfaction and intention to commence arbitration and sub-paragraph 6 that, except as stated in clauses 20.7 and 20.8 neither party shall be entitled to commence arbitration of a dispute unless a Notice of Dissatisfaction has been given. The provision for arbitration under UNCITRAL Rules administered by the ICC, Moscow, originally in clause 20.6, Part A of the Special Terms of the Contract was, see below, replaced in December 2022 by dispute resolution in the AIFC Court.

11. Because progress was delayed by a number of factors, including restrictions during the COVID-19 pandemic, Sinohydro made claims for additional payments totalling KZT 7,512.666 million and an extension of 654 days for completion of the Contract which KazAvtoJol disputed. The claims were referred to a Disputes Board and the Engineer who, on 24 March 2022 ruled in favour of Sinohydro, granting it an extension of 380 days for completion of the Contract with compensation to be determined by the Engineer who on 1 August 2022 decided that the compensation for the 380 days was to be KZT 2,887,207,679.50.

12. KazAvtoJol was dissatisfied with the decisions of the Disputes Board and Engineer but rather than serving a Notice of Dissatisfaction within the 28-day period and proceeding to arbitration it entered into negotiations with Sinohydro. On 6 December 2022, the parties entered into Supplementary Agreement No 3 to the Contract.

13. Clause 1.1 of Supplementary Agreement No 3 amended clause 20.6 and the Contract Data of the Special Terms of the Contract. It provided that the dispute resolution provision in it in for UNCITRAL arbitration administered by the ICC, Moscow, was replaced by an agreement to submit to the AIFC Court.

14. Clause 2 provided that KazAvtoJol would temporarily make a payment in the sum of KZT 2,827,132,994.20 to an escrow account and contract period extended by 380 days from the date of Addendum 3 and "*apply to the court on the issue [of] disagreement with the decision"* of the Disputes Board *"on the amount of compensation and the Contract extension period".* Clause 2 also provided that "*if the decision is made in the direction of*" KazAvtoJol, Sinohydro was to reimburse the amount of compensation in full within 84 days, and *"if the decision is made in the direction of"* Sinohydro, KazAvtoJol "*does not claim a refund of the funds paid and the application of penalties for this project to"* Sinohydro.

15. Clause 3 provided that Supplementary Agreement No 3 was an integral part of the contract from the time it was signed and clause 4 that the remaining terms of the Contract remained unchanged.

16. KazAvtoJol paid part, but by no means all, of the sum due under clause 2 into an escrow account and Sinohydro brought proceedings in the AIFC Court claiming the balance remaining due. The matter came before Lord Mance CJ. In his judgment dated 17 May 2023, Lord Mance stated that KazAvtoZhol (as the English version of the Employer's name is spelled in that case) had not put in a defence or counterclaim or evidence challenging the figure claimed. Its only reaction was a document dated 15 May 2023 reciting the facts and asking the Court to refuse Sinohydro's claim: see *Sinohydro v KazAvtoZhol* AIFC-C/CFI/2023/0006 §8.

17. Lord Mance had considered the provisions of Supplementary Agreement No 3 at §§2-5. At §6 he held that there was no reason for that Agreement not to be binding and at §9 he entered judgment against KazAvtoJol for KZT 2,203,244,303.13 which he held to be the actual amount outstanding pursuant to the obligation in clause 2 to make provisional payment.[1] Importantly, Lord Mance also stated: "*That would of course leave the Defendant [KazAvtoZhol] free under Supplementary Agreement No. 3 to bring any challenge or claim which it wishes in any way it can"*. He emphasised that he was not concerned with the merits of any challenge or claim. The matter before him was the simple question of whether a temporary or provisional payment should be made into the escrow account.

The judgments and orders in AIFC – C/CFI/2023/0044, C/CA/2025/0001 and C/CA/2025/0028 that led to the present Application

(i) Application AIFC – C/CFI/2023/0044

18. On 14 November 2023, KazAvtoJol issued proceedings challenging the Disputes Board's decisions and Lord Mance's judgment of 17 May 2023. It sought the recovery of the money it had paid to Sinohydro. It appears to be common ground that in 2023 the full amount specified in the Disputes Board's decisions was paid either before Lord Mance's decision or temporarily paid into an escrow after it as ordered by him: see *KazAvtoZhol v Sinohydro* AIFC-C/CFI/2023/0044 §§2 and 25, 5 December 2024.

19. Sinohydro argued that it was not open to KazAvtoJol to challenge the Disputes Board's decisions since no Notice of Dissatisfaction had been given within the 28-day period required by clause 2.4. On 17 April 2024 Justice Montague-Smith ordered a preliminary hearing to determine that issue. The hearing took place on 16 September 2024. Sinohydro relied on the time limit in clause 20.4 of

[1] That suggests that the sum KazAvtoZhol had already paid Sinohydro was KZT 623,888,691, the difference between the sum to be paid temporarily under Supplementary Agreement No 3 and the sum Lord Mance ordered to be paid as outstanding under that Agreement.

the Contract and on the limitation periods in the Civil Code of the Republic of Kazakhstan (hereafter "the Civil Code"). It also argued that KazAvtoJol was precluded from bringing the claim because it had effectively accepted the Disputes Board's decision by paying the sum directed, authorised the release of the funds from escrow, and accepted and taken over the works.

20. Each point was considered and rejected by Justice Montague-Smith in his judgment on the preliminary issue delivered on 19 September 2024. The reason he did not apply the 28-day limit in clause 20.4 was that he held (as Lord Mance had done) that Supplementary Agreement No 3 varied the original contract and imposed no limit for bringing claims. Indeed, Justice Montague-Smith stated that since no deadline was imposed by Supplementary Agreement No 3 which was itself made more than 28 days after the Disputes Board's decision, it did not prohibit the claim and, to the contrary, clause 2 anticipates a claim such as this: see Judgment §§16-18. See also §27 of his later Judgment dated 5 December 2024. He dealt with limitation at §§19-20, stating that whether time ran from the date of the date of the Disputes Board's decision or the date of payment, the three year period in Article 178 of the Civil Code had not expired by 14 November 2023 when these proceedings were issued. As to the argument that KazAvtoJol had effectively agreed with the Disputes Board's decisions, the steps relied on by Sinohydro simply reflected the scheme of the Contract which required compliance with those decisions even where they were disputed.

21. At the hearing on 16 September 2024, KazAvtoJol stated that it did not have access to the Appendices to Sinohydro's 5 claim reports. Justice Montague-Smith KC stated the Appendices appeared to include documents intended to substantiate Sinohydro's claims, and that Sinohydro had them and could produce them. He ordered Sinohydro to do so within 14 days: see §25 of the Judgment delivered on 19 September 2025.

22. The Appendices appear not to have been produced. On 31 October 2024 Justice Montague-Smith gave case management directions for the trial of the substantive dispute. He also observed that if Sinohydro wished to rely on assertions that KazAvtoJol had received documents Sinohydro was relying on but had not produced, at the trial simple assertion would not be sufficient for the court to draw adverse inferences. He would assess in the light of the evidence produced whether, and if so, what adverse inferences would be drawn.

23. Following the trial, Justice Montague-Smith KC delivered judgment on 5 December 2024. He stated at §35 that at the trial neither party filed witness statements or called witnesses. They invited him to decide the claims on the evidence, contract documents and the decisions. Very little documentary evidence was filed save for the claim reports and limited correspondence. At §36 he stated that there was, in many respects, a good deal of agreement as to the underlying facts so that he did not have to decide the issues in a complete vacuum. Additionally, many of KazAvtoJol's criticisms of decisions turned on the terms of the Contract. But he also stated that, despite this, there were significant areas where there was no evidence whatsoever as to facts asserted by Sinohydro but were not admitted by KazAvtoJol. In particular, KazAvtoJol did not accept the Engineer's factual conclusions as to the costs incurred by Sinohydro.

24. As to the substance of the dispute, the judge stated at § 39 that at the trial Sinohydro repeatedly retreated to the assertion that KazAvtoJol was not entitled to challenge the decisions of the Board and the Engineer for one reason or another but that issue had been determined in his earlier judgment. He stated at §20 that the Engineer's table summarising his decisions included a number of mathematical errors so that the total was KZT 30,606,420.09 more than the total of the preceding numbers.

25. Justice Montague-Smith then considered Sinohydro's five claims at length at §§59- 88 (claim 1) and §§89-149 (claims 2-5). He had noted at §55 that the Disputes Board and the Engineer had given barely any reasons for their apparent conclusions that KazAvtoJol is liable for the claims. He considered (at §§68-68) that claim 1 concerning delay resulting from the need for permits concerning the gravel pits was not made out because the obligation to obtain the necessary permits fell on Sinohydro which had not adduced evidence to support its assertion that because the delays resulting from the need to obtain the permits fell within clause 8.5 of the contract it was excused from obtaining the permits. At §§81-87, he stated that, had the claim been otherwise made out, it would have been out of time. This was because notice had not been given within the 28-day period after Sinohydro became aware or should have become aware of the need for the permits as required by clause 20.1 of the Contract.

26. In the light of the problems with the claim reports submitted by Sinohydro and the absence of the Appendices to them, the judge did not consider the decisions provided much assistance on quantum. This was because the Disputes Board and/or the Engineer had relied on the submissions and documents produced by Sinohydro. See §§88-102 on claims 1 and 2, gravel pits and delays in paying the advance payment; §§ 120-121 on claim 3, mineral extraction tax; §§127-131 on claim 4, rock excavation; and §§ 147-149 on claim 5, COVID-19 pandemic delays. In those cases, the judge decided that Sinohydro was entitled to the sum which KazAvtoJol had accepted was due. The result, see §§150-151, was that the KZT 2,827,132,994.20 paid by KazAvtoJol was an overpayment and that KazAvtoJol was entitled to be repaid KZT 2,350,696,276.46.

(i) Application AIFC – C/CA/2025/0001

27. On 10 February 2025 Sinohydro applied for permission to appeal the decision delivered on 5 December 2024. This was several weeks outside AIFC Court Rule 29.10(2)'s limit requiring the application to be filed within 21 days after the date of the decision. After giving its reasons for missing the time limit, it set out the matters which it wished the appellate court to consider. Those are: in §§1 and 3 that the contract was made voluntarily and KazAvtoJol is bound by its terms and made the additional payments to Sinohydro's escrow account implementing the decision of what is said to be the Arbitration Court; in §2 that Supplementary Agreement No 4 entered into on 5 July 2024 extended the term of the contract by 284 days; in § 4 that the CFI's calculations are unreasonable in the light of the Disputes Board decision; in §5 that KazAvtoJol had missed the 28 day limit in clause 20.4 for notifying disagreement with the decision; in §6 that it had missed the one year limitation period in Article 162(2) of the Civil Code; and in §7 that the decision was not consistent with the decisions of the Engineer and Disputes Board.

28. The application was considered on the papers by Justice Sir Stephen Richards. He held that the application for permission was out of time and that the matters relied on to explain the late filing, that the power of attorney of Sinohydro's legal representative had expired on 31 August 2024 and was not authenticated until 3 January 2025 and delays resulting from the time taken to translate, were not sufficient reasons for an extension of time: §§ 6 and 12. He also held that the application did not in any event have a real prospect of success or otherwise meet the conditions for the grant of permission to appeal: § 12. Sir Stephen also stated that a document submitted to Court Registry on 20 March 2025 was not tied in with the grounds of appeal, not clearly directed to reasons the CFI gave for its decision, and, if intended to be in support of the application for PTA, was far out of time.

29. As to the merits of the grounds of appeal, Sir Stephen stated at §9 that Sinohydro's main submission was that there is a real prospect of the appeal succeeding because KazAvtoJol's claim against it was out of time. It was filed 20 months after the Disputes Board's decision on 24 March 2022 and was

thus outside the contractual 28-day time limit in clause 2.4 of the contract and the 12-month statutory limitation period in Article 162(2) of the Civil Code. Sir Stephen, however, considered that submission faced "*insurmountable difficulties".*

30. The first difficulty he identified, see §§7 and 9(i), was that the point was considered and rejected in the CFI's judgment of 19 September 2024. Sir Stephen stated that Sinohydro had not sought to appeal against that decision at the time and had not done so in the application before him. Even if the application before him could be read as raising a challenge to the decision of 19 September, it would be far out of time, and the delay would be inexcusable.

31. The second difficulty was that the judgment of 19 September 2024 also held that the 28-day period in Clause 20.4 of the Contract had been displaced by the variation made by clause 2 of Supplementary Agreement No 3. That expressly provided that KazAvtoJol was entitled to apply to the AIFC Court to review the decisions of the Disputes Board without imposing a deadline for such an application. Sir Stephen considered that finding was *"plainly correct".*

32. The third difficulty was that the judgment of 19 September 2024 held that the claim was well within the three-year default period in Article 178 of the Civil Code. At §9(iii), Justice Sir Stephen Richards considered that was plainly correct on the basis of the arguments advanced in the CFI. The application to him did raise a new argument, based on Article 162(2) of the Civil Code, that a period of one year applied but he considered that was misconceived. This he stated was because Article 162(2) is concerned with limitation periods related to the invalidity of a transaction on one of the grounds specified in Article 159(9) and (10). That he stated "*has nothing to do with the circumstances of the present case"* because the validity of the Contract is not in dispute.

33. At §10, Sir Stephen stated that the same procedural objections applied to the argument that KazAvtoJol had abandoned any right to challenge the decisions of the Disputes Board and the Engineer by continuing with the contract, making payments under it and permitting sums to be released from escrow. At §11, he stated that the application took issue with the judge's assessment in the judgment of 5 December 2024 of different and lower sums than those awarded by the Engineer for 4 of of Sinohydro's 5 claims. However, it did not attempt to engage with the reasons given by the judge for doing so and *"did not begin to show any arguable error in the Court's decision on those matters".*

(i) Application AIFC — C/CA/2025/0028

34. On 8 July 2025, Sinohydro filed application AIFC — C/CA/2025/0028 again seeking an extension of time to apply for permission to appeal the judgments and orders of the CFI in AIFC – C/CFI/2023/0044 and also seeking such permission in respect of the decision of this Court in AIFC — C/CA/2025/0001. Sinohydro's submissions in Application AIFC — C/CA/2025/0028 are in 162 paragraphs. Those in English cover 25 pages of the application form and those in Russian 24 pages.

35. The submissions in Application AIFC — C/CA/2025/0028 do not rely on the exceptional jurisdiction to reopen a decision to safeguard "*the procedural integrity of the refusal process"* that has been invoked in the application that has come before me. Application C/CA/2025/0028 appears to be a second application for permission in the ordinary way despite this Court's refusal of permission in C/CA/2025/0001. It repeats points previously put before this court, elaborating a number of them, and it adds new points. The application came before Justice Lord Faulks. As stated in §4 above, the exercise of the exceptional jurisdiction depends on the undermining of that process and requires "*a powerful probability of a different outcome had the process been properly conducted".* In the light

of those requirements, and to set the context, I give a longer than usual summary of the grounds upon which the extension of time and permission was sought in the application that came before Lord Faulks.

36. The application for an extension of time is at §§9-41 of Sinohydro's submissions. It gives Sinohydro's reasons for its delay at §§16-41. These included that it was seeking to negotiate a settlement with KazAvtoJol, had identified clear errors in the conduct of its former lawyers and hired new lawyers, and that it had acted in good faith in completing the contract. At §§35 and 37 it also stated that as the judgments challenged remain in force until set aside on the merits, extending time would not prejudice KazAvtoJol or the efficient conduct of proceedings in this Court.

37. The remaining 121 paragraphs contain the grounds for seeking permission to appeal. Many argue that the decisions of the Disputes Board remained final and binding despite clause 2 of Supplementary Agreement No 3. They submit that clause 2 did not override the specific "*mandatory and logical*" pre-litigation procedural sequence in clauses 2.4- 2.6 of the Contract and the object of the parties when contracting on FIDIC Red Book terms: see e.g. §§ 57-60, 67, 75-77, 83, 90-91,107-108, and 113.

38. Sinohydro's other submissions included complaints that (i) the limitation periods were applied in a highly selective and unfair way, depending on which party stood to benefit, for example, at §§99 and 101; (ii) its substantive claims Nos 4 and 5 had been assessed without taking account of documents before the court which substantiated their validity, see §§147 ff.; and (iii) in relation to Claim No 1, the CFI referred to and apparently relied on the Disputes Board's description of Supplementary Agreement No 1 which was not before the CFI rather than on the Agreement itself: see §130 ff.

39. The submissions criticise Justice Lord Mance's judgment dated 17 May 2023 (summarised at §§16 - 17 above) as well as those of Justices Montague-Smith and Sir Stephen Richards: see Application, §§50, 57, 91 and 160. Lord Mance's judgment is said not to be amenable to a broad interpretation because he did not consider the issue in the context of the provisions on pre-litigation procedure and the objective of the parties when entering a contract on FIDIC Red Book terms.

40. Justice Lord Faulks dealt with this second application for an extension of time and permission to appeal even more briefly than Justice Sir Stephen Richards had dealt with the first application. He identified the three decisions and orders Sinohydro wished to challenge in §1. One of these was Sir Stephen's decision, which Lord Faulks also referred to at §2. He stated that there had already been an application for permission to appeal to this court which was refused on 28 March 2025 and that the application before him was clearly outside the time limits.

41. He stated in §3 that the reasons for the delay were said to have resulted from attempts to maintain the business relationship between the parties and from the engagement of new legal representatives in the light of criticism of Sinohydro's former legal representatives. He also referred (at §4) to the submission that the application raised a "new" argument not previously before the court concerning documents. This was that certain documents should have been produced in the previous proceedings but were not and certain documents that were produced were not examined by the court. He did not consider that either constituted a valid reason within Rule 29.12 of the AIFC Court Rules for an extension of time to be granted.

42. Lord Faulks concluded that:

"*6. … It is important that there should be finality in litigation. The applicant has had the opportunity to deploy relevant arguments and to produce relevant documents in the previous proceedings. If there were any shortcomings in the presentation of the case, that is not a matter for the court."*

"7. There has been a determination on the merits of the case and a refusal of permission to appeal. It is entirely unjustifiable for the applicant now to have an extension of time for a yet further appeal. In those circumstances the application is refused."

D. The present application, AIFC-C/CA/2025/0041: Analysis and Conclusions

43. In this application, Sinohydro submitted that both of the situations identified in §4 above exist in the present case and that both concern not any error on the merits but the integrity of the PTA process which "*has been critically undermined".* It states that its skeleton arguments consistently raised what it states is the procedurally decisive threshold issue: the finality/binding nature of Disputes Board decisions under FIDIC contracts and the related contractual time architecture ("28 days/finality"), and the divergence in the CFI's approach to limitation as applied to the two parties to the dispute: see Application, §13. It submitted at §14 that when refusing PTA on 18 August 2025 this Court confined its reasoning to issues of timing, change of counsel and reproach of former counsel without addressing the procedurally decisive threshold questions.

44. It is true that the decision on 18 August 2025 did not mention either point. They and a number of other points raised in Sinohydro's submissions in its 8 July 2025 second application for an extension of time and permission to appeal were, however, dealt with by Justice Sir Stephen Richards in §9 of his short but pellucidly clear judgment in the first application for an extension of time and permission to appeal given on 28 March 2025. His judgment (summarised at §§29-33 above) dealt with all the points raised in the application dated 10 February 2025 (summarised at §27 above) and explained why the letter dated 20 March 2025 did not assist Sinohydro's application. The rules do not authorise a second application for PTA , and as stated above, the application before Justice Lord Faulks did not appear to be one based on the exceptional jurisdiction to reopen decisions. It appears that Lord Faulks was confining himself to points that had not been made in the first application. He dealt with the reasons for delay, which differed from the reasons given in the first application, and with what was said to be a new argument.

45. It would have been better for Lord Faulks to have said that Sinohydro's very extensive submissions that the decisions of the Disputes Board remained final and binding despite clause 2 of Supplementary Agreement No 3, and the submissions that the CFI applied the limitation periods inconsistently and without taking account of documents which substantiated the validity of its claims had been rejected in Sir Stephen's decision. In the light of Sinohydro's failure to produce documents it had been ordered to produce by Justice Montague-Smith and denial until recently that it had them this last point is hopeless. But the failure of Lord Faulks to have referred to this and the other points does not justify the exercise of the exceptional jurisdiction to reopen the earlier decisions. He did refer to the rejection by this Court of the earlier application for permission to appeal. In fairness to Sinohydro, I shall consider what Sinohydro identified in §§ 13 and 14 of the present application as "the procedurally decisive threshold issues". I do so in order to assess whether, in all the circumstances of this case, in particular Sir Stephen's judgment, there is a "*powerful probability"* that his decision or those of the CFI would have been different.

46. The two issues Sinohydro identified as procedurally decisive threshold issues in the application before me are the finality of Disputes Board decisions under FIDIC contracts, and the CFI's approach to limitation. I concentrate in particular on the first of those. My starting point is the Civil Code of the Republic of Kazakhstan.

47. Article 380 of the Civil Code provides for freedom of contract, and Article 382 states that "*provisions of an agreement shall be defined at the discretion of the parties, except for the cases where the contents of a certain provision are prescribed by legislation".* Sinohydro's submissions do not identify Kazakhstan legislation or even a provision in the FIDIC Contract preventing the variation of the pre-litigation procedures in that contract.

48. Article 392 of the Civil Code contains the rules governing the interpretation of contracts. Article 392(1) provides that, when interpreting an agreement, "*the court shall take into account the literal meaning of the words and expressions contained in it*" "*by way of comparing the provision in question with the other conditions and the sense of the agreement as a whole*".

49. Article 392(2) provides that where the rules in Article 392(1) "*do not allow to understand the contents of an agreement, the actual common will of the parties must be identified taking into account the objective of the agreement*" and that "*any relevant circumstances including the negotiations preceding the agreement … shall be taken into account*".

50. Sinohydro submitted (see especially §77) that the literal meaning of the words and expressions in Supplementary Agreement No 3 is clear and "*reflects that under certain circumstances expressly enumerated in the Contract (namely, failure to issue or late issuance of a Notice of Dissatisfaction), the DB decision becomes final and binding, and — moreover — in such circumstances simultaneously precludes the initiation of arbitration (or litigation)*". I reject that submission. Clause 2 expressly provides that KazAvtoJol can apply to the AIFC Court on the issue of its disagreement with the decisions on the amount of compensation and the contract extension period and if it prevailed Sinohydro was to reimburse the amount of compensation in full within 84 days: see §14 above.

51. Moreover, the negotiations that resulted in Supplementary Agreement No 3 concerned KazAvtoJol's dissatisfaction with the decisions of the Disputes Board and Engineer. Those decisions were made on 24 March and 1 August 2022, almost four months before Supplementary Agreement No 3. As Justice Montague-Smith stated, since that agreement was made more than 28 days after the Disputes Board's decision, clause 2 in fact anticipated a claim such as this: see Judgment dated 19 September 2024, §§16-18 and Judgment dated 5 December 2024, §27. If the wording of clause 2 did not suffice to preserve KazAvtoJol's ability to claim that it should be reimbursed, the clause would be denuded of its entire effect. I therefore agree with the three other judges of the AIFC Court who have decided that the effect of clause 2 of Supplementary Agreement No 3 is to vary the contract and to displace the pre-litigation procedures in the FIDIC Red Book contract.

52. I add that Sinohydo's also sought to rely on Lord Mance's decision in AIFC C— C/CFI/2023/ 0005 and 0007, *KazAvtoZhol v JSC Todini and SMS* by impliedly suggesting that it is inconsistent with *Sinohydro v KazAvtoZhol* AIFC-C/CFI/2023/0006 on which Justice Montague-Smith relied. It stated at §91 that the factual background of *Todini and SMS* is "*entirely identical to the present case"* save for the fact that an additional agreement in that case expressly stated that any decisions of the Disputes Body were final and binding between the parties. That difference, is however, fundamental. Both cases concerned additional or supplementary agreements made after the FIDIC contract. But in *Todini and SMS* the additional agreement expressly reiterated and confirmed the provision in the FIDIC Contract. In the present case the Supplementary Agreement No 3 made after the FIDIC Contract and

more than 28 days after the Disputes Body's decision expressly permitted KazAvtoJol to apply to this Court if it disagreed with that decision.

53. The submission that the CFI was unfair in its approach to limitation as applied to the two parties is also misconceived. First, Sinohydro's Claim 1 was dismissed because it was not made out. The statement that, had that claim been made out, it would have been out of time is thus not part of the CFI's decision. It is, in any event, not wrong because the statement that the 28-day period in clause 20.1 would have applied reflects the fact that clause 20.1 applies to claims by the Contractor, i.e. Sinohydro. KazAvtoJol's claim was made after Supplementary Agreement No 3 displaced the 28-day period. Sinohydro had alternatively argued that the 1-year limitation in Article 162(2) applied, an argument which was rejected for the reasons summarised at §32 above.

54. Finally, Sinohydro also submitted that the refusal to extend time operated as an implied sanction for its failure to comply with the 21-day time limit after the date of a decision laid down by Rule 29.10(2) of the AIFC Court Rules for filing an Appellant's notice. It contended that this was done without the proper assessment of "all the circumstances" that is required under stage 3 of the three stage test laid down in the English cases on relief from sanctions, notably *Denton v TH White Ltd* [2014] EWCA Civ. 906 and *Altomart Ltd v Salford Estates (No 2) Ltd* [2014] EWCA Civ. 1408. Bearing in mind that Sir Stephen grappled with the core points and all the other grounds of appeal and Lord Faulks addressed the two points which he considered had not been raised or dealt with in the previous application, I reject the submission that "all the circumstances" had not been assessed.

55. I have stated that application AIFC — C/CA/2025/0028 repeated points Sinohydro had previously put before this court, elaborating a number of them, and adding some new points. KazAvtoJol's defence submitted that Sinohydro's repeated applications violate the principle of legal certainty and constitutes an abuse of process. However, in fairness to Sinohydro and for the sake of completeness I have considered what the position would have been on the assumption that the submissions now made on the two issues identified by Sinohydro in its present application as threshold questions had been made to Sir Stephen. I have concluded that, when the entire history of the matter is taken into consideration, as I have done, it is readily apparent that Sir Stephen's original analysis was impeccable and his conclusion that the application did not have a real prospect of success or otherwise meet the conditions for the grant of PTA permission to appeal was unquestionably right.

56. As Lord Faulks stated, it is important that there should be finality in litigation. Sinohydro's application states at §§4 and 11 that it does not seek to revisit the merits of the case and is not repeating the substantive arguments of the appeal. In my judgment, despite the terms of Sir Stephen's judgment, the application that came before Lord Faulks did both.

57. Sinohydro had the opportunity to adduce documentary and other evidence in its possession and arguments first deployed in Application AIFC — C/CA/2025/0028 before the CFI's hearings but did not do so. It did not appeal against Lord Mance's decision given on 17 May 2023 or that of Justice Montague-Smith given on 19 September 2024. Its argument that the decisions of the Disputes Board in this case remained final and binding notwithstanding Supplementary Agreement No 3 was put to Sir Stephen, and considered and rejected by him. Nevertheless, over half of its submissions in Application AIFC — C/CA/2025/0028 that came before Lord Faulks claim that for various reasons clause 2 of Supplementary Agreement No 3 did not override the specific pre-litigation procedural sequence in clauses 2.4- 2.6 of the FIDIC Contract. That in my judgment borders on abuse of process.

58. This application does not meet the requirements of the exceptional jurisdiction to reopen a decision refusing permission to appeal or an extension of time, and for that reason it must be refused.

By Order of the Court,

Justice Sir Jack Beatson FBA,
Justice, AIFC Court

Representation:

The Applicant was represented by Mr. Azamat Sultanbayev, Managing Partner, Practum Legal Partners LTD, Almaty, Kazakhstan.

The Respondent was represented by Ms. Shamelova.