



IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

7 October 2026

CASE No: AIFC-C/CFI/2025/0070

CLAIMANT

Claimant

v

DEFENDANT

Defendant

JUDGMENT AND ORDER

Justice of the Court:

Justice Tom Montagu-Smith KC



ORDER

1. The claim is dismissed.
2. The Defendant shall file and serve a statement of its costs by 16:00 Astana time on Wednesday, 14 October 2026.
3. The Claimant shall by 16:00 Astana time on Wednesday, 21 October 2026 file and serve its submissions on the questions of (a) whether it should be liable to pay the Defendant's costs of the claim and (b) if so, how those costs should be assessed.
4. The Claimant shall file and serve any submissions in response by 16:00 Astana time on Wednesday, 28 October 2026.

REASONS

1. By this claim, the Claimant challenges a decision of an arbitrator in which he found that he had jurisdiction over a dispute.
2. The Claimant's challenge is advanced on a variety of bases. The central arguments raised were as follows:
 - a. The arbitration agreement did not apply on its own terms because the Defendant was not a "non-resident";
 - b. The Powers of Attorney issued by the Defendant were defective.
 - c. The Respondent is not a distinct legal entity.
 - d. The arbitration agreement was waived by the Defendant bringing a claim in the Kazakhstan Courts;
 - e. The Court is bound by a finding of the Kazakhstan Court that the dispute could not be arbitrated;
 - f. The arbitration agreement was unenforceable without subsequent government consent.
 - g. The Defendant failed to comply with steps required before arbitration could be commenced;
 - h. The decision was contrary to public policy;
 - i. The Claimant has the benefit of sovereign immunity; and
 - j. There was a serious procedural irregularity in the way in which the arbitrator decided the issue of jurisdiction.
3. The Defendant takes issue with each of these points. In addition, it raises three further points. According to the Defendant:

- a. The Claimant has advanced the application under the wrong provision of AIFC Law. The Claimant relies on Article 44 of the AIFC Arbitration Regulations, when it should be invoking Article 26(3);
 - b. As a result, the time limit for making the claim was 30 days, not 3 months. The claim was therefore out of time;
 - c. The Claimant proceeded with the arbitration without reservation and thereby waived its right to object.
4. I set out below the relevant background before turning to the arguments. It seems to me that the Defendant's arguments raise threshold points and so I will address those first.

Background

5. The Claimant is an entity which is ultimately owned by and subject to the control of the Kazakhstan state.
6. The Defendant is a consortium comprising two entities: a company incorporated in Kazakhstan (outside the AIFC) and a Dutch company, operating through its Kazakhstan branch.
7. Following a public procurement exercise, the parties concluded a contract. The contract contained an arbitration agreement in the following terms:

“In the event that the Contractor is a non-resident of the Republic of Kazakhstan, any dispute, difference, controversy, or claim, whether of a contractual or non-contractual nature, arising out of or in connection with this Contract, including those regarding its existence, validity, interpretation, performance, breach, or termination, shall be referred to and finally resolved within the framework of arbitration proceedings conducted by the International Arbitration Centre of the Astana International Financial Centre (“IAC”), in accordance with the IAC Arbitration and Mediation Rules...”
8. On 29 November 2024, the Claimant gave notice that it was terminating the contract as from 30 December 2024. As a result, a dispute arose between the parties.
9. On advice, one of the Defendant members applied to the Kazakhstan Administrative Court for relief. The Administrative Court rejected the claim on 13 February 2025 on the basis that the claim did not involve a public law dispute. The Court noted, amongst other things, that another claim in respect of the contract had been commenced in another court.
10. On 27 January 2025, the same Defendant member had filed a claim against the Defendant in the Specialised Interdistrict Economic Court of the City of Almaty (“the Economic Court”). That claim, it appears, sought orders declaring as invalid the Claimant's notice of termination of the contract. Within the claim, it was asserted that the Defendant was “a legal entity registered in the Republic of Kazakhstan” and that “[a]ccordingly, the arbitration clause provided for in paragraph 13.4 of the Contract cannot be applied.” The claim asserted that the Economic Court had jurisdiction.

11. The Defendant member subsequently sought to withdraw the case, asking that the statements of case be returned. That request was granted on 9 April 2025. The Court issued a ruling that the claim be left without consideration.
12. On 21 April 2025, the Court then issued a correction. The Court stated that, rather than leaving the statement of claim without consideration, the claim should be referred to arbitration by reason of clause 13.4 of the contract.
13. The Claimant appealed against the ruling. On 3 June 2025, the Court issued a further ruling (referred to the parties as “Ruling No. 2”) in which it stated as follows:

“Meanwhile, the Panel established that the Defendant is a legal entity in which fifty or more percent of the voting shares, or participatory interests in the charter capital, directly or indirectly belong to the state, and, pursuant to paragraph 10 of Article 8 of the Law of the Republic of Kazakhstan on Arbitration, arbitration is not entitled to consider disputes between individuals and / or legal entities of the Republic of Kazakhstan, on the one hand, and state authorities, state enterprises, as well as legal entities in which fifty or more per cent of the voting shares, or participatory interests in the charter capital, directly or indirectly belong to the state, on the other hands, in the absence of consent of the authorised body of the relevant sector with respect to republican property, or of the local executive body with respect to communal property.”

14. The Court stated that “from the explanations of the Defendant’s representative, it was established that the Defendant does not have consent to enter into the arbitration agreement.”
15. The Court went on to note that “the Defendant’s arguments also merit attention, namely that the Claimant acted as a party to the contract in the form of a Consortium... while the status of the Consortium has not been determined for the purposes of giving a legal assessment to the issue of whether the dispute falls within the jurisdiction of arbitration.”
16. In the result, the Court cancelled the 9 April 2025 ruling and remitted the case to the first instance court for consideration. Subsequently, on 3 July 2025, the Economic Court issued a new ruling that the claim be left without consideration.
17. On 20 May 2025, before Ruling No. 2 was issued, the Defendant commenced arbitration proceedings by filing a request with the IAC. On 13 June 2025, the Claimant filed its response, in which it disputed jurisdiction. On 18 July 2025, the tribunal proposed that jurisdiction be determined as a preliminary issue. The parties agreed to this course on 22 July 2025 and the tribunal so ordered on 25 July 2025.
18. On 22 August 2025, the parties attended an oral hearing on the issue of jurisdiction. The tribunal then directed post-hearing briefs, which were exchanged in August 2025. The tribunal then issued its “Decision on the Issue of Competence (Jurisdiction)” on 8 September 2025. In a careful ruling, the tribunal found that it had jurisdiction, rejecting each of the Claimant’s arguments.
19. The parties then corresponded about the procedural steps in the arbitration. On 3 October 2025, the Defendant’s lawyers proposed a timetable for the proceedings. In emails dated 6 October 2025 and 8 October 2025, the Claimant’s lawyers agreed the Defendant’s proposals for the timing of further submissions. I am told that the tribunal then issued a procedural order, confirming the directions.

20. The Defendant then submitted its statement of claim in the arbitration. I understand the document was submitted on time, within 8 weeks of the procedural order. As such, it would have been submitted on or around 3 December 2025.
21. On 7 December 2025, the Claimant then filed a claim in this Court. Thereafter, on 1 January 2026, the Claimant filed a counterclaim in the arbitration. Its defence to the claim appears to have followed on or about 28 January 2026.
22. The Claimant then brought proceedings challenging the arbitrator. I dismissed that claim in my judgment dated 29 July 2026.
23. I understand that the tribunal has now gone on to hear the claim. The award is, I am told, ready, but is being held back pending determination of this claim.

The Defendant's threshold objections

24. As set out above, the Defendant raises three threshold objections to the claim:
 - a. The Claimant has invoked Article 44 of the AIFC Arbitration Regulations when it should have referred to Article 26(3);
 - b. As a result, the claim had to be brought within 30 days and is out of time;
 - c. The objection was waived by the Defendant's participation in the arbitration.
25. The Claimant's position is that the claim is properly made under Article 44, that the time limit was 3 months and that it maintained its objection to jurisdiction throughout the proceedings.
26. Article 26(2) of the AIFC Arbitration Regulations sets out when a party must raise a plea that the arbitral tribunal does not have jurisdiction. Article 26(3) then provides:

“The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, subject to any process agreed between the parties, within thirty days after having received notice of that ruling, the AIFC Court of First Instance to decide the matter, which decision shall not be subject to appeal”.
27. Article 44 provides:
 - “(1) Recourse to a court against an arbitral award made in the seat of the AIFC may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
 - (2) Such application may only be made to the AIFC Court. An arbitral award may be set aside by the AIFC Court only if: ...

- (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award, or such longer period as the parties to the arbitration have agreed in writing, or, if a request had been made under Article 43, from the date on which that request had been disposed of by the arbitral tribunal.”
28. The Claimant’s primary position was that these provisions and the time limits within them were “not mutually exclusive”. I asked whether the effect of that submission was that the 30 day time limit in Article 26(3) would never apply. The Claimant confirmed that that was not its position. However, that appears to me to be the logical consequence of the submission. If both time limits applied, there would be no logical purpose for the shorter one.
29. On examination, the Claimant’s central submission was that the tribunal’s decision on jurisdiction was not a ruling “as a preliminary question”. As such, it was not caught by Article 26(3). This was because the ruling finally determined the question of jurisdiction.
30. I reject that submission. The distinction drawn in Article 26(3) is between rulings on jurisdiction “as a preliminary question” and rulings on jurisdiction “in an award on the merits”. The word “preliminary” is therefore a reference to the stage of the proceedings at which jurisdiction is decided. It does not refer to rulings on jurisdiction which are only provisional.
31. As a result, I accept the Defendant’s argument that any challenge to the jurisdiction award needed to be brought under Article 26(3). It is not, in my judgment, fatal that the Claimant referred to the wrong statutory provision. That is an error which caused no practical prejudice and everyone understood the basis on which the challenge was brought. What does matter, however, is that the claim needed to be brought within 30 days.
32. The Claimant’s response, if it was wrong on timing, was to assert that the 30 day time limit is “procedural, not jurisdictional”. The substance of the objection, it was said, was more important than the delay. The tribunal could not, it was said “bootstrap a competence it never possessed from a claimant’s procedural delay”.
33. That submission is, in my view, equivalent to saying that the time limits do not matter at all. That is not right. Article 26(3) confers a right to apply to the Court to review a decision on jurisdiction. That right is subject to the limitation that it must be exercised within 30 days. The natural consequence is that, after expiry of the time limit, there is no such right. That time limit serves an important function. It supports the finality of the jurisdiction decision. It ensures that jurisdiction may be dealt with once and for all and quickly before the parties then go on to have their dispute resolved. That policy is further supported by the fact that this Court’s decisions on Article 26(3) applications are not subject to appeal.
34. The Defendant further argued that the Claimant had waived its right to contest jurisdiction as a result of its conduct.
35. In this regard, the Defendant relied on Article 12 of the AIFC Arbitration Regulations. Article 12 provides:



“A party who knows that any provision of these Regulations from which the parties may derogate, or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.”

36. The Defendant relied on two matters. First, the Claimant had agreed directions for the arbitration after the jurisdiction dispute was resolved. Second, the Claimant submitted a counterclaim without reserving its right to challenge jurisdiction.
37. As to the latter point, it seems to me that the submission of the counterclaim did not affect the position. By that time, the Claimant had submitted this claim in which the jurisdiction decision had been challenged. I do not consider that the counterclaim could reasonably be viewed as the Claimant deciding to abandon the challenge advanced in these proceedings.
38. However, before that challenge was submitted, the Claimant had agreed directions, had allowed the 30 day time limit to elapse without suggesting it intended to challenge the jurisdiction decision, and it had allowed the arbitration to proceed. In those circumstances, I would accept that the Claimant should be deemed to have waived its right to challenge the jurisdiction decision, pursuant to Article 12. Having agreed directions on the same day that the time to challenge the jurisdiction decision expired, the Claimant then allowed the arbitrator to issue a procedural order on the basis of that agreement and allowed the Defendant to submit its statement of claim, without objection.
39. In any event, the time to make an application under Article 26(3) expired 30 days after the jurisdiction decision, on 8 October 2025. The Claimant did not bring this claim until 7 December 2025, nearly 2 months out of time. The Claimant does not apply for an extension of the time limit. In the circumstances, I was provided with no evidence or submissions on the questions of: (a) what power, if any, I have to extend the time limit, whether retrospectively or at all; (b) how any such power should be exercised; or (c) whether it should be exercised in the circumstances of this case. In my judgment, that is the end of the matter.
40. In any event, for the reasons I set out below, had the claim been brought in time, it would have failed.

The Claimant's arguments

41. As set out above, the Claimant raised a number of arguments as to why it was said that the tribunal lacked jurisdiction.
42. As the Claimant says, the Court should approach that issue de novo. As such, it is strictly irrelevant how the tribunal reached its decision.
43. I address each of the points raised in turn.

The arbitration agreement did not apply on its own terms because the Defendant was not a “non-resident”

44. The Claimant's first argument was that the Defendant was not a “non-resident” within the meaning of the arbitration agreement.

45. As set out above, the arbitration agreement applied “In the event that the Contractor is a non-resident of the Republic of Kazakhstan”. The “Contractor” was defined in the preamble to the contract as referring to “the Consortium consisting of [X company], jointly with the Branch of [Y company]”.
46. The Claimant’s position was that the Defendant consisted of two entities. One was a company incorporated and located in Kazakhstan. As such, it was undoubtedly a resident of Kazakhstan. The other was a Kazakhstan branch of a foreign company. The Claimant relied on provisions of the Kazakhstan tax code and currency regulations to the effect that a branch of a foreign legal entity is considered a registered company in Kazakhstan. On that basis, it was suggested, both members of the Defendant were “resident” in Kazakhstan. Further, the Kazakhstan company, it was said, took the lead in practice, as it was entitled to do under the terms of the Consortium Agreement. In any event, the Defendant could not be said to be non-resident if one of its members was a resident.
47. The Defendant’s position was that the Defendant was “non-resident” within the meaning of the clause. The Defendant emphasised that the purpose of the clause was to attract international companies who might prefer arbitration to the domestic courts. That purpose would be supported on the Defendant’s case, but undermined on the Claimant’s. The Court, it was said, should not be guided by the tax code or the currency laws. It would be commercially improbable that the intention was for the arbitration agreement to apply to the foreign Defendant member, but not the domestic one. Further, as a matter of fact, the domestic member did not take the lead.
48. In my view, the Defendant is right to say that I can take little guidance from legislation. The question is one of construction. The effect of the legislation is that, for certain purposes, branches of foreign companies are treated as if they are domestic companies. However, those rules are necessary because, in general, the starting point is that a branch of a foreign company is simply part of the company. It has no legal personality of its own. As such, outside the limited context to which the legislation applies, a branch of a foreign company is not a domestic company.
49. In those circumstances, it seems to me clear that the Defendant includes one company which is a resident and one company which is not. The question – which is one of construction – is whether or not the arbitration agreement is intended to extend to some or all of the parties in those circumstances.
50. In my view, the Defendant is also correct that it would be unlikely that the parties intended that the clause might apply to claims by or against one of the Defendant members but not to claims by or against the other. Given their overlapping roles, it would be difficult to split up claims in that way, with the result that claims would overlap between courts and arbitration. It would be highly unlikely that the parties intended that result.
51. In the result, the question is whether the contract intended the arbitration agreement to apply where the contractor parties consisted of both non-resident and resident entities. In that case, is the Defendant non-resident, because the members are not both resident? Or is the Defendant not non-resident, because the members are not both non-resident.
52. In my view, the former result is most likely to be intended. That is the result which is most consistent with the commercial purpose of the clause. In order to conclude the contract, the agreement of both members of the Defendant was required. The arbitration clause was included to encourage the agreement of foreign entities. That purpose would be supported if the agreement applied where the



contractor comprised both foreign and non-foreign entities. It would be undermined if it did not. Put another way – the application of the arbitration clause never required that all parties to the contract be non-resident. In those circumstances, it is difficult to see why it should require that 2 of the 3 should be non-resident. What mattered was that all parties, including any non-resident parties, agreed to the transaction. In that context, the need to apply arbitration to disputes under the contract arose whether the contracting parties included one non-resident or multiple non-residents.

53. In those circumstances, I agree with the Defendant that the arbitration agreement applied on its own terms. For the purposes of this contract, the “Contractor” was a “non-resident”.

The Powers of Attorney

54. The Claimant complained about the powers of attorney issued by the Defendant. I confess I failed to understand the relevance of these complaints. There appeared no dispute that the parties concluded the contract. The point seemed to be that there were technical errors with the documents. On questioning, the Claimant’s position appeared to be that the issue largely went to residency. It was not obvious to me how that was the case. In any event, I do not consider this a standalone basis for disputing the tribunal’s jurisdiction.

The Respondent is not a distinct legal entity.

55. It is of course correct that the Defendant is not itself a standalone legal entity. However, that does not affect the tribunal’s jurisdiction or the validity of the award. The term “Consortium” is simply a collective noun referring to multiple entities. In that regard, it is no different in principle to using the word “Defendants”. The validity of the Contract is not affected. There is no difficulty with parties concluding a tripartite agreement. Nor is there any difficulty in 2 of those parties bringing a claim against the third in a single action. After that, the complaint is simply about the term used in the title of the proceedings to identify the parties. In my view, that is a matter of form over substance but, in any event, it does not affect the question of whether the tribunal has jurisdiction over the dispute.

The arbitration agreement was waived by the Defendant bringing a claim in the Kazakhstan Courts

56. The Defendant accepts that it brought a claim in the Kazakhstan Courts on the substance of the same dispute as is the subject of the arbitration.
57. The Claimant’s position is that the Defendant thereby lost its right to arbitrate. The Claimant relied on the principle that a party may not “blow hot and cold”. It described the Defendant’s actions as amounting to a waiver of the right to arbitrate. In other submissions, the Claimant asserted an estoppel.
58. The Defendant rejected the pleas of waiver and estoppel. It says that the dispute never reached the merits stage because it was withdrawn. No estoppel arises, it says, because there was no detriment. In any event, there is no concept of “estoppel” in Kazakhstan procedural law, albeit there is a notion of good faith. In that regard, it explains that its decision to litigate was taken in good faith on the advice of former lawyers. Further, there would need to be some form of reliance by the other party.
59. It is quite clear that the Defendant did pursue a claim in the Kazakhstan Courts. I was taken through the history at some length by counsel for the Claimant. However, when I asked how that conduct

resulted in the loss of the Defendant's right to arbitrate – what legal principles led to that conclusion – I received no clear answer.

60. The Claimant appeared to agree that the loss of a right to arbitrate would usually require agreement to vary the Contract, an accepted repudiation of the arbitration agreement, or some sort of estoppel. However, the precise mechanism relied on was never clearly articulated.
61. In English law, the adage that parties should not be entitled to “blow hot and cold” is often used as an alternative formulation of the “principle” that parties should not “reprobate and approbate”. On analysis, however, that is usually no more than another way to describe election. In law, certain event can provide a party with a choice which, once taken, cannot be undone. Thus, for example, where a party repudiates a contract, the counter-party may be entitled to elect between bringing the contract to an end and, on the other hand, affirming the contract and insisting on its performance. Once exercised, that choice cannot be undone. Thus a party cannot both affirm the contract and keep open the option of its termination. Beyond specific legal doctrines, however, there is generally no principle that a party cannot do inconsistent things at different times. A party might run a defence in one forum, for example, and lose and so take the opposite position in another forum. Principles of res judicata may confine the positions they can take in the second forum. However, that is the result of the distinct rules of res judicata.
62. In the present case, there was no obvious assertion that the contract was varied by agreement. Nor was there any particular identification of conduct coming from the Claimant which could complete a plea of variation, estoppel or acceptance of a repudiation. It seems to me that advancing a claim in court might well amount to an anticipatory breach of an arbitration agreement – it might well signal that a party does not intend to abide by the agreement's terms. However, that conduct does not terminate the agreement by itself. It confers on the other party the option to accept the breach and terminate, or to affirm the contract and insist on its performance. In the present case, the Defendant issued the relevant claim on 27 January 2025. By early April 2025, it has signalled that it wished to withdraw the claim. I have been shown no evidence that, in the intervening period, the Claimant accepted the Defendant's repudiation or relied on the Defendant's conduct in a way which would make it unconscionable to permit the Defendant to reverse course. Nor have I seen anything to suggest that the Defendant acted in bad faith in acting the way it did. It certainly changed its mind and its approach. However, that is not, in my view, enough by itself to bar the Defendant from doing so. In the circumstances of this case, I would not therefore consider that the Defendant lost the right to arbitrate by its conduct.

Arbitration agreement unenforceable without subsequent government consent

63. The Claimant's sixth argument is that that arbitration agreement is unenforceable without subsequent government consent. I take this argument out of order due to its relationship with the argument based on Ruling No. 2.
64. Article 8(10) of the Kazakhstan Arbitration Law provides:

“An arbitration tribunal is not entitled to consider disputes between natural and (or) legal persons of the Republic of Kazakhstan on the one hand and state bodies, state enterprises, as well as legal entities, whose fifty or more percent of voting shares (stakes in the authorized capital) directly or indirectly belong to the state, on the other, if there is no consent of the

authorized body of a relevant industry (in respect of public property) or local executive body (in respect of communal property).”

65. The provision then goes on to set out the procedure for obtaining such consent.
66. It is common ground that no such consent was obtained. The issue is therefore whether Article 8(10) applies to this arbitration.
67. Chief Justice Lord Mance considered a similar argument in *Success K LLP v Ministry of Healthcare of the Republic of Kazakhstan* (AIFC-C/CFI/2021/0008). In that case, the parties had agreed to IAC arbitration. The defendant argued that Article 8(10) applied such that the arbitration agreement was invalid or could not be enforced.
68. The Chief Justice rejected this argument. He found that the designation of IAC arbitration demonstrated that the law of the arbitration was intended to be AIFC law. Article 7 of the AIFC Arbitration Regulations then made clear that “The requirements of the Arbitration Law of the Republic of Kazakhstan do not apply to arbitrations conducted under these Regulations”. As such, the requirements of Article 8(10) did not apply.
69. In my judgment, the same reasoning applies in this case. In the contract, clause 13.4 designated the seat of the arbitration as “Nur-Sultan city” and stated that the applicable law governing the proceedings should be “the legislation in force at the seat of arbitration”. It might be said that this is ambiguous. However, combined with the reference to IAC arbitration, it seems to me most likely that this was intended to refer to the AIFC. If it did not, then there is no clear choice of seat and it is left to the arbitrator to decide: see IAC Arbitration and Mediation Rules, Article 15.1. It seems to me reasonably clear that the arbitrator considered the seat to be the AIFC.
70. In those circumstances, applying the reasoning in *Success K*, Article 8(10) has no application.

The finding of the Kazakhstan Court

71. The Defendant’s next argument arises from Ruling No. 2. The Claimant’s case is that Ruling No. 2 is binding on this Court and determinative of these proceedings.
72. I was provided with very little assistance at the hearing on the question of how and when this court should give effect to the findings of another court of Kazakhstan. As a result, I asked the parties to provide me with further written submissions on the issue of the impact of Ruling No. 2 on these proceedings. The parties have now done so.
73. The Defendant’s submissions arrived 10 minutes late. The following day, approximately 24 hours after the original deadline, the Defendant then filed a “supplement submission with alternative arguments”. The Claimant objects to the late filing. I am however content to admit the amended submissions. They are ultimately submissions on law. It is not said that the amended submissions refer to and answer those provided by the Claimant, so there is no unfair procedural advantage. The delay has not resulted in any consequential delay in finalising this judgment.

74. The Claimant's position is that Ruling No. 2 conclusively establishes that the dispute falls to be determined by the Kazakhstan courts, rather than by arbitration. They rely on Article 21 of the Civil Procedure Code of Kazakhstan. This provides that judicial acts are binding on all state bodies. This, the Claimant says, applies to all judicial acts, including rulings on jurisdiction, which are classified as final, non-appealable judicial acts by, inter alia, Article 34 of the CPC.
75. The Claimant invited me to apply common law principles of issue estoppel. The requirements are, it is said, that the issue be the same, the court have jurisdiction, and the parties be the same.
76. The Defendant's position is that Ruling No. 2 is a procedural decision which has no binding effect. It did not determine the validity of the arbitration agreement and established no facts with binding effect. It therefore had no preclusive effect.
77. According to the Defendant, there are 3 kinds of judicial acts under Kazakhstan law. They are decisions on the merits, disposal of appeals after review of the merits, and rulings which dispose of a procedural question. Rulings do not, the Defendant says, give rise to res judicata effects. In any event, Ruling No. 2 established no facts which are binding on the court.
78. In my view, Ruling No. 2 would not affect my conclusion on this claim. It is common ground that – whatever other elements are required – the issue which is decided must be identical for an issue estoppel to arise.
79. The Claimant asserts that the facts established by Ruling No. 2 were:
- a. The Claimant was a state owned entity falling within Article 8(10) of the Kazakhstan Arbitration Law;
 - b. No consent for arbitration was sought or obtained;
 - c. The Defendant's legal status was "uncertain, which casts doubt on its procedural capacity to participate in arbitration";
 - d. The arbitration clause is invalid, and the dispute is to be heard by the courts of Kazakhstan.
80. The first two of these propositions are not in dispute. I do not consider the third to be a finding of fact or, indeed, a finding of any kind. The Court appears to have been unable to draw any conclusions on the point. The final asserted finding is, in my view, an inaccurate summary of the Court's conclusions. The Court made no findings as to the validity of the arbitration agreement. Rather, the Court appears to have assumed that Article 8(10) of the Kazakhstan arbitration law applies to the question of whether or not the Court should refer the dispute to arbitration. The Court did not consider in terms whether the arbitrator had jurisdiction. Rather, it found that, applying Kazakhstan law, it would not refer the case to arbitration.
81. The question of whether Kazakhstan law applies at all is the central point on this claim. The effect of the Claimant's submission is that it is not open to me to reach the conclusion I have reached in the previous section of this judgment – that AIFC law should be applied and non-AIFC Kazakhstan law should not. It may very well be the case that a Kazakhstan Court applying Kazakhstan choice of law rules should apply Kazakhstan law to determine the issue of whether it should refer a case to

arbitration. However, the proper approach in the AIFC Court is different, as explained in *Success K*. It seems to me wholly improbable that the Kazakhstan Court intended to conclude that the AIFC Court should depart from previous authority and apply Kazakhstan law to IAC arbitration. In my view, it did not do so.

82. In those circumstances, in my view, even if the claim had been brought in time, I would not have found that I was bound by Ruling No. 2 to conclude that the tribunal lacked jurisdiction.

The Defendant failed to comply with steps required before arbitration could be commenced

83. In its statement of case, the Claimant asserted that the Defendant had failed to comply with mandatory pre-arbitration dispute resolution steps. The Claimant, it was said, was obliged to make good faith attempts to settle, but had in reality simply made demands. This argument was not developed in the Claimant's skeleton argument or orally.
84. The Defendant made two points in response.
85. First, its position was that, on the facts, it had complied with the requirements. I have been shown correspondence which appears to support that.
86. Second, it said that any failure to do so was an issue of admissibility, not jurisdiction. The Defendant relied on the English case of *Sierra Leone v SL Mining Limited* [2021] EWHC 286. In that case, a challenge to jurisdiction on the basis that the arbitration was premature was dismissed. It was a matter of admissibility, not jurisdiction, and so an issue for the tribunal. On this, the Judge, Sir Michael Burton, noted that "the views of the leading academic writers, after careful analysis by them, are all one way" and that "international authorities are plainly overwhelmingly in support of a case that a challenge such as the present does not go to jurisdiction". I do not extend this judgment by citing those authorities here. I simply record that I agree with those views. I also note that, in its claim form, the Claimant itself appeared to recognise that this was a challenge to admissibility. Thus the Claimant said "The Sole Arbitrator also failed to take into account that the Respondent's claim must be dismissed as inadmissible at this stage of proceedings".
87. Ultimately, the Claimant did not seriously pursue this argument.

Public policy

88. The Claimant's public policy complaint was similarly only faintly explained. The suggestion in its skeleton argument was that it would be contrary to public policy to recognise any final award in these proceedings because it would be inconsistent with Ruling No. 2. I have already found that there is no inconsistency. In any event, the issue does not arise at this stage. The only question is whether the tribunal had jurisdiction.
89. It is not clear to me whether it was being argued that Article 8(10) is somehow mandatory and a matter of public policy in itself. If that is the Claimant's position, it is wrong. The AIFC's legislation is constitutionally authorised. It permits the disapplication of Kazakhstan arbitration law. In those circumstances, it is the public policy of the State of Kazakhstan as a whole that Article 8(10) should not apply to AIFC arbitration.

State immunity

90. The Claimant asserts that it has the benefit of sovereign immunity. This argument was again not argued in the Claimant's skeleton argument. When I asked whether it had been abandoned, however, I was told that it was still maintained.
91. In part, the Claimant appeared to rely on Article 8(10) as the source of its "immunity". I have dealt with that argument above. In addition, it was said that the Claimant was immune because it was an asset of the state. The Defendant's counsel said they could not understand the submission and I have some sympathy with that position.
92. No authority was cited to me to support the Claimant's position. It seems to me highly unlikely that the Claimant would qualify for any form of state immunity. It is a commercial enterprise which is owned by the state. It is not an emanation of the state itself, such as a government Ministry. In any event, any adjudicatory immunity would be waived by entry into the arbitration agreement.

Serious procedural irregularity

93. The Claimant faintly suggested that there had been unfairness in the procedure by which the arbitrator decided the issue of jurisdiction. Once again, this argument was not pursued at the hearing.
94. I have seen nothing to support the assertion of procedural irregularity. In any event, the point is irrelevant. As the Claimant itself says, this is a de novo reconsideration of the issue of the tribunal's jurisdiction. The tribunal's own decision is of interest, but has no binding effect. It is therefore irrelevant how the tribunal reached its decision. For that reason, Article 26(3) permits challenge only on the basis of lack of jurisdiction.

Conclusion

95. I therefore dismiss the claim:
- a. It was brought out of time and no extension of time is sought; in any event
 - b. None of the grounds advanced would have succeeded.
96. The Defendant is the successful party. I would propose to deal with that issue in writing. I will therefore invite the parties' submissions on costs. If the parties consider that I should take a different course, they should make a prompt application to vary those directions.

By Order of the Court,

Justice Tom Montagu-Smith KC,
Justice, AIFC Court



Representation:

The Claimant was represented by Mr Aidar Kashkarbayev and Ms Dinara Cherniyazova, lawyers, Almaty, Kazakhstan.

The Defendant was represented by Mr Bakhyt Tukulov, Partner, and Ms Mariya Petrenko, Senior Associate, TKS Disputes LLP, Almaty, Kazakhstan.