



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

12 November 2024

CASE No: AIFC-C/CFI/2023/0038

International Academy of Medicine and  
Sciences Limited Liability Partnership

Claimant

v

State Institution "Health Department of  
Almaty Region"

Defendant

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JUDGMENT

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Justice of the Court:

The Lord Faulks KC

## JUDGMENT

1. This case arises out of an agreement between the Claimant, the International Academy of Medicine and Sciences LLP and the Defendant, the State Institution “Health Department of Almaty Region”, dated 5 November 2020. The agreement was a Public-Private Partnership agreement and concerned the running of the Almaty Multidisciplinary Clinical Hospital.
2. The Claimant is the “Private Partner”; the Defendant the “Public Partner”. The agreement was expressed to be subject to PPP Law which is the Law of the Republic of Kazakhstan on Public-Private Partnership.
3. In the course of this judgment, I will refer to the parties, respectively, as the Claimant or Private Partner, and the Defendant or the State or Public Partner.
4. The claim arises out a failure by the Defendant to pay to the Claimant management fees owing under the agreement. It is not disputed that these have not been paid since July 2023.
5. The Defendant’s response to the claim is that by refusing to admit the State Partner’s representatives into the hospital the Claimant was and remains in breach of the agreement and thus the Defendant is entitled to withhold management fees.
6. The parties have exchanged skeleton arguments, called witnesses before me and made oral submissions. At the conclusion of the hearing, I invited the parties’ lawyers to send to the Court any additional submissions they wished to make within 7 days of the end of the trial. Both parties have now (after the expiry of 7 days) sent further submissions. The Claimant’s are concerned with costs, while the Defendant’s consist of a further elaboration of the oral arguments advanced at trial.
7. The Claimant has been represented by Sergei Vataev, assisted by other lawyers. The Defendant has been represented by Ms Assel Kazbekova, also assisted by other lawyers. I am grateful to them all for their help in this matter.

### The Agreement

8. My attention has been drawn to a number of provisions in the agreement. Those of particular relevance are set out below:

**Clause 107** provides for the payment of management fees.

**Clause 114** provides (among other things) that “The State Partner shall be entitled to:

1. negotiate with the Private Partner on the terms of the Contract;
2. conduct inspections of the financial and economic activities of the Private partner, but not more than once a year, including by involving an audit organisation hereunder;
9. demand termination of the Contract in case of violation of its terms by the Private Partner.”

**Clause 116** entitles the Private Partner to receive, inter alia, payment for the management of the hospital.

**Clause 135** provides that in the event of a “violation of the requirements specified therein”, the Public Partner can serve notice requesting elimination of the “violation”.

**Clause 140** entitles the Public Partner to be released of its obligations in the event of “violation”.

**Clause 143** confers jurisdiction on the AIFC Court in the event of a dispute.

Other clauses were referred to in argument.

### **The Pleadings**

9. In the Particulars of Claim, the Claimant refers to the suspension of management fees and the Defendant’s contention that the refusal to allow admission for an inspection of the hospital amounted to a violation of the agreement.
10. The Claimant pleads that the first attempt at an inspection on 26 June 2023 was eventually cancelled. The second attempt purported to be an audit with respect to the financial activities of the Private Partner. The relevant order was dated 28 July 2023. The order revealed that the Commission established in connection with the attempted inspection lacked any licenced auditor or someone with the relevant knowledge, experience and authority to conduct an audit of financial and economic activities. In those circumstances the Private Partner demanded cancellation of the order and refused to allow the Commission admission when they arrived on 31 July 2023.
11. The Claimant points out that the Defendant’s suspension of the payment of management fees took effect from 26 June 2023 when it was not in fact until the 31 July 2023 that, on their own case, there was any justification for the suspension.
12. It is the Claimant’s case that at the heart of this dispute is a failure by the State Partner fully to understand or respect the nature of the Public-Private Partnership agreement. The Claimant had in fact provided reports from independent auditors to the Defendant. The Defendant’s rights under the agreement were restricted by Clause 114 and the Commission was not intended to carry out a proper audit, in accordance with the agreement, nor was it qualified to do so.
13. The Defence refers to the nature of the agreement in relation to the hospital, also known as the “PPP object”. It sets out some of the financial implications of the agreement and refers to “an uneven distribution of funds” between the parties. The Defence emphasise that the PPP object “remains state property”.
14. In paragraph 13 of the Defence it is maintained that the Private Partner was in violation of the agreement by failing to resolve the dispute by negotiations. This was not an argument maintained at trial and, if it had been, I would not have found a breach of the agreement.
15. In paragraph 17, an explanation for some of the delay in paying management fees is provided. It is said that this was because of late distribution of funds by the Treasury.
16. More significantly, it is pleaded at paragraph 19 of the Defence, that the State Partner was entitled to “verification of the financial and economic activities of the Private Partner” and that the State has not been provided with the “necessary documents, information and access”. This is said to be a violation of contractual obligations. The State Partner’s pleaded case is that, on the Private Partner’s case, they, the State Partner must pay management fees but “do(es) not have the right to check what he pays

for”.

17. The Reply takes issue with the Defence. It refers to a significant sum of debt, which was omitted, when the agreement was signed. The Private Partner had themselves to pay this debt. However it does not form part of the claim before me, and I make no findings in relation to this alleged concealment of debt.
18. It is accepted that both the agreement and the relevant legislation provides for the possibility of an audit of the financial and economic activities of the Private Partner but reliance is placed on Clause 114 (2) in maintaining that an audit that would have been permitted was never, in fact, attempted.
19. It is argued that there are limited circumstances in which the contract can be terminated, none of which arise in this case.
20. More generally the point is made that the Public Partner has conflated its usual public (administrative) functions and its rights and obligations under the agreement. Stress is placed on the principle of non-interference by the Public Partner with the activities of the Private Partner.

### **The Skeleton Arguments**

21. The Claimant’s skeleton summarises the arguments and draws attention to Clause 114 (10) and the reference to information available “upon written request”. Attention is drawn to Article 17(2) (2) of the Public-Private Partnership law and Articles 272 and 273 of the Civil Code of Kazakhstan.
22. The Claimant maintains that the purported suspension of the payment of management fees was groundless and that there were in particular no grounds under Clause 140 for the Defendant to be released from its obligations under the agreement.
23. The Claimant updates the non-payment of management fees and sets out the basis for its claim for a “penalty”.
24. The Defendant’s skeleton outlines the witnesses that they originally intended to call and their alleged relevance.
25. There was also an application to amend the counterclaim. I refused the application on the grounds that it was far too late. Most of the oral arguments before me were an expansion of the arguments already contained in the Defence. The only substantive addition was in relation to the alleged failure by the Defendant to provide “Defect Reports”, together with a response to the arguments in relation to the claim for a penalty.

### **The Trial**

26. In opening the case, Mr Vataev summarised the claim and emphasised a number of points:
  - (a) that the Private Partner continues to run the hospital, despite the non-payment of management fees;
  - (b) that reliance on the refusal to admit for an inspection was a pretext for non -payment of management fees;
  - (c) that the attempted inspections were of a wholly different character to the right to an

audit, as provided for by the agreement;

- (d) that the State Partner seemed to have confused its role as a regulator and that of a Public Partner. If the state acts qua regulator, inspections can take place when registered with the Prosecutor's office, and where there is "good cause";
- (e) attempts at inspection were either called off, invalidated by the Prosecutor's office or, in respect of 31st July inspection, refused by the Claimant;
- (f) the State Partner was trying to punish the Private Partner by issuing "threats" that they would find faults in the hospital which they would find were material even if in fact immaterial;
- (g) in answer to questions from me, he submitted that Clause 114(4) did permit access to the premises in certain circumstances but that this sort of access was of a very different character to that which was attempted.

- 27. The first witness was Mr Najhavan Rupal, one of the founders of the Claimant. In addition to his written statement (page 1534 of the documents), Mr Rupal explained the nature of the partnership agreement and his role as an investor. In cross-examination, he acknowledged that the hospital continued to function even though management fees had not been paid and that income was received from other hospital activities.
- 28. The Claimant next called Professor Ismailov (Core Bundle page 46). He gave evidence further to a detailed written witness statement. The professor has been involved in leadership posts for 23 years. He has a PhD. and has worked for the Ministry of Health in Kazakhstan. He has been engaged in a number of health initiatives and has managed the Regional Health sector.
- 29. He described the process of being presented with, and signing, a so called "model" contract. He told me that the only Clause that the Claimant added was a reference to the AIFC Court in case of a dispute.
- 30. Serious problems came to light at the hospital. In particular a misrepresentation as to the level of debt, and problems with both water and energy supplies. As a result, a sustained response was required from the Private Partner in a short space of time in order to bring the hospital into a satisfactory condition.
- 31. The professor described "illegal and unjustified harassment by the State partner and the Akimat since 2022" and attempts to "carry out illegal inspections". He told me that the Private Partner did not oppose inspections as provided for by the agreement but did object to illegal inspections outside the scope of the agreement.
- 32. He was asked whether he or the Claimant were given notice of any violations. He said that the Claimant had received no notice of any violation or of defects, either from the Private Partner, or indeed from the State.
- 33. In cross-examination, he explained that a once yearly audit was provided for by the agreement and that the Claimant had provided such an external audit to the Defendant.
- 34. The Defendant elected to make detailed oral submissions before calling witness evidence.

35. Ms Kazbekova submitted that the inspection was partly a result of media pressure and some evidence of the unsatisfactory state of the hospital.
36. She submitted that the case “did not involve public law” but that the State Partner must be allowed access to all hospitals as this was “standard procedure.....to ensure compliance”.
37. The agreement, she said, had not been terminated but payments had been suspended because the Private Partner had not submitted any defect reports, as required. This justified withholding management fees. She also argued that there was a right to access the hospital and inspect documents which had been denied. She maintained that the Private Partner generally had not acted in good faith.
38. I asked her, on a number of occasions, to point to the relevant provision in the agreement which justified an inspection of the sort that was attempted. I never received an answer to my question.
39. She developed her argument in relation to “defects” further in post-trial submissions. It was not suggested that there were particular defects but that the obligation lay on the Private Partner to notify the State Partner of defects. This obligation would include what might be a nil return, i.e. that there were no defects to report.
40. Although Ms Kazbekova had originally intended to call witnesses who were critical of the state of the hospital, in the end she called one witness only, namely Mr Baiuzakov, whose written statement was at page 61 of the Core Bundle. He is described as the Deputy Head of the Health Department and an official representative of the State Partner.
41. His witness statement speaks of gross violations by the Private Partner. I did not find his statement easy to understand, although much of it seemed to concern the relative weakness of the State Partner’s position by virtue of the agreement as compared to the position if this had been a state run hospital. But when he gave oral evidence, the State Partner’s position became rather clearer.
42. In essence, he explained, the Public Partner was concerned about the amounts they were paying to the Private Partner and that they did not have sufficient information about how management was done. The contract was signed during Covid. They could not inspect in 2021 and after deciding to inspect in 2022, they were not permitted to do so by the Prosecutor’s office. That was the background to the attempted inspection.
43. Mr Baiuzakov told me that there was a new Head of Department who asked him why they were paying the management fees. Mr Baiuzakov added that there was no control or effective monitoring of the way the hospital was run and that by inspecting they wanted to “create a dialogue”. He denied issuing any threats.
44. He did not identify in advance any defects but said that on inspection he could have pointed out defects. He stressed that he wanted a wide inspection and that this what he regarded, in effect, to be the discharge of a duty he owed to the taxpayer.

### **Discussion**

45. The agreement is not as clear as it might be as to the rights of the State Partner to gain access to the hospital. But what is clear that whatever their rights they derived from the agreement. PPP law makes that clear. They do not have some overriding rights simply because they are the State Authority . This was a partnership agreement.

46. It seems likely that if the hospital had been state-run then the Public Partner might have had more or less unhindered access to the hospital. I do not doubt that Mr Baiuzakov genuinely thought he was acting in the interests of the state in attempting a wide ranging inspection. I daresay that if he and the Commission had inspected the hospital, they would have found some “defects” or “violations” and then attempted to negotiate, or impose, a considerably reduced management fee. But in my judgment they were not entitled by the contract to carry out this sort of inspection.
47. It was accepted by the Private Partner that access could have been obtained to the hospital but it was argued, in my view correctly, that there is a difference between access and inspection.
48. The failure by Ms Kazbekova to identify in the agreement the provision which entitled the State Partner to inspect was significant. Her difficulty was that there was never any clarity, or indeed evidence, as to the basis for the inspection despite her valiant attempts to justify it. The attempt to justify the inspection on the basis of defects or a failure by the Private Partner to notify the State Partner of any defects (or the lack of them) was not, in my view, the real reason for, or basis of, the attempted inspection.
49. I found Professor Ismailov to be an impressive witness, who seemed to me most anxious for the hospital to succeed and to be frustrated at the way in which the State Partner appeared to ignore the contract and to rely on the fact that they were a state authority to sidestep their obligations. He told me, and I accept, that the Claimant was, and remains, willing to enter into discussions (and to allow access to the hospital) about particular issues that might arise from time to time. But he correctly pointed out that Clause 114 restricts the more general rights to that of carrying out an annual audit. The Commission was not qualified to carry out such an audit and that was not their intention.
50. In my judgment the Private Partner was entitled to refuse access to the hospital and the State Partner was wrong to refuse, and continue to refuse, to pay management fees.

### **Conclusions**

51. The Defendant was and remains in breach of the agreement by failing to pay management fees from June 2023.
52. I declare that the order dated 31 July 2023 purporting to identify a violation of the agreement and to justify non-payment of management fees has no legal effect. The Defendant should pay all management fees owing as at the date of this judgment. If there is any dispute as to the amount, I will determine this on receipt of submissions from both sides. A figure should be capable of agreement.
53. The State Partner has not argued that the contract is at an end, and there were no grounds for any such argument. The contract remains in force and both parties must fulfil their obligations under the agreement.
54. As to the contractual penalty, the claim is limited to 153,000,000 KZT. The State Partner agrees the figure (although some important noughts are omitted from their calculations) but has argued that the suspension of payment of management fees was justified. I have rejected that argument and accordingly I order that the Defendant should pay the contractual penalty (or fine).
55. The Claimant also claims costs/expenses. I determine that they are entitled to their reasonable costs. The Claimant has served a list of expenses. I give the Defendant 28 days to respond. In the absence of an agreement on this issue, which I encourage, the court will decide on a figure at a hearing or on paper after receiving submissions in writing.

56. The Counterclaim is dismissed.

By the Court,

The Lord Faulks KC,  
Justice, AIFC Court

**Representation:**

The Claimant was represented by Mr. Sergei Vataev, Advocate, Legit Advocates' Bureau, Almaty, Republic of Kazakhstan.

The Defendant was represented by Ms. Assel Kazbekova, Associate Director at KPMG Tax and Advisory LLC, Almaty, Republic of Kazakhstan.