محكمة قطر الدولية
ومركز تسوية المنازعات
QATAR INTERNATIONAL COURT
AND DISPUTE RESOLUTION CENTRE

In the name of His Highness Sheikh Tamim bin Hamad Al Thani,
Emir of the State of Qatar

Neutral Citation: [2021] QIC (A) 6

(On appeal from [2020] QIC (F) 14)

IN THE QATAR INTERNATIONAL COURT

APPELLATE DIVISION

CASE No. CTAD0001/2020

20 June 2021

PROTECH SOLUTIONS LLC

Respondent

v

QATAR ISLAMIC BANK QPSC

Appellant

JUDGMENT

Before:

Lord Thomas of Cwmgiedd, President

Justice Chelva Rajah SC

Justice Hassan Al Sayed

ORDER

1. Permission to appeal granted, but appeal dismissed with the costs of the appeal to be paid by the Appellant to the Respondent, to be assessed by the Registrar if not agreed.

JUDGMENT

1. The Appellant (QIB) is a leading Islamic bank and the second largest bank in Qatar. As part of its retail banking business, it provides an Automatic Teller Machines (ATM) network in Qatar. That network utilises ATMs manufactured by NCR supported by a Switch software system.

2. QIB decided to replace some of the ATMs. In 2017 it entered into negotiations with the Respondent (Protech), a technology company. It is the sole supplier of Diebold-Nixdorf (DN) ATMs in Qatar; it had supplied these ATMs to other banks but not to QIB.

3. QIB and Protech, after lengthy negotiations and after Protech had provided QIB with a DN ATM for test purposes, entered into an agreement in 2019 for the supply of 44 DN ATMs and associated services (including a 7-year maintenance period) for the ATMs. The price set out in the contract for the supply of the ATMs was US$ 768,040. There was a dispute as to the terms of the agreement which was one of the issues resolved in the judgment of the First Instance Circuit. It determined (in accepting QIB's submission), that the agreement was contained in a Professional Services Agreement signed on 21/24 November 2019 (the agreement). There is no appeal on that issue.

4. The ATMs were delivered to Doha in May 2019. Protech then started to install the machines and integrate them into QIB's existing Switch system. As the First Instance Circuit found, major problems occurred during the process of integrating the DN ATMs into QIB's Switch system which, though a world class system, had been configured for NCR machines. QIB contended that the DN ATMs failed the various tests and installation phases set out in Schedule 1 to the agreement, including the system integration test, the Vynamic view test and the user acceptance test; during the Pilot test it was said the ATMs crashed and all the machines installed at different branches during the pre-rollout and rollout phases crashed in the middle of transactions.

5. On 23 December 2019, QIB sent a "Service Agreement Termination" notice (the Termination Notice) which stated as its subject "Notice of Termination of service agreement for the implementation of DN ATMs and Vynamic Solution". QIB terminated the agreement by this notice.

6. In January 2020 Protech commenced proceedings seeking payment of the purchase price of $768,040 for the DN ATMs and damages in excess of $2m. QIB counterclaimed for damages of QAR 2.537m.

7. The trial of the proceedings took place before the First Instance Circuit (Justices Arthur Hamilton, Fritz Brand and Ali Malek QC) during which evidence was given by witnesses. On 20 October 2020 the First Instance Circuit handed down its judgment. It held (in addition to determining that the agreement between the parties was set out in the Professional Services Agreement of 21/24 November 2019) that:

    a. QIB was not entitled to terminate the agreement on 23 December 2019; its termination was wrongful.

    b. Protech was entitled to be indemnified under Art 707 of the Civil Code for all expenses incurred, all work completed and any profit that would have been made. The purchase price of the ATMs was the best measure of this indemnity. This sum should therefore be paid by QIB to Protech.

    c. No damages were due to Protech in respect of the lost maintenance period or a proposed monitoring contract.

    d. QIB's counterclaim failed as the wasted expenses incurred by it in relation to the ATMs were the result of QIB's wrongful termination of the agreement

    e. Protech should be awarded interest at the rate of 5% from the date at which the sum of $768,040 should have been paid.

8. The Appellant sought permission to appeal. In a judgment dated 27 January 2021, [2021] QIC (A) 1, we refused permission to appeal on 3 of the issues raised, but adjourned the application by QIB to appeal against the dismissal of its counterclaim for damages and the award of interest in favour of Protech to a rolled up hearing at which we would consider both the grant of permission and, if granted, the merits of the appeal.

9. During the course of the hearing of the appeal it became apparent that neither party had put before us all the relevant legal materials in respect of interest. We allowed each to file a further written submission.

Issue 1: QIB's right to counterclaim for damages

10. We will consider QIB's right to counterclaim for damages by first examining the obligations owed by Protech to QIB.

The obligations under the agreement

11. There were four provisions which set out the essence of the relevant obligations under the agreement:

    a. Protech, as the Service Provider, was obliged by clause 2.1 to

    > "provide the Services to the Customer, and such other services consistent with the Services, at such places as the Customer may reasonably require of the Service Provider from time to time."

    and under 2.2 to

    > "devote to its obligations under this agreement its time, attention and skill as may be necessary for the proper performance of those obligations."

    b. Under Clause 4.2, Protech represented, warranted and undertook to QIB that:

    > "(d) the Services will be provided in a timely and professional manner and in accordance with the timetable agreed upon with the Customer in

the change management plan or as otherwise agreed with the Customer and will conform to the standards generally observed in the industry for similar services;

(e) it will acquaint itself with and comply with any working practices, rules or procedures applicable to others (whether independent contractors or employees) at any location where the Service Provider is performing the Services."

c. Services were defined to mean the "services and deliverable to be provided by [Protech] under this agreement including, without limitation, those identified in Schedule 1." The term "Deliverables" was defined as the deliverables to be supplied by Protech "as part of the Services in each case by the date specified in Annex 1".

d. Schedule 1 was entitled "Services and Deliverables" and provided that Protech was to provide to QIB the "following Services and Deliverables". It set out what was described as the scope of the work under six headings: (1) a system integration test, (2) a Vynamic View (which included installation, configuration and customisation), (3) a User acceptance test , (4) a Pilot, (5) a pre-rollout and (6) a Rollout. The Rollout specified; "1: Delivery of the ATM. 2. Installation and configuration of the ATM; 3 Conduct test transactions prior to Commissioning; 4. Commissioning."

e. Annex 1 set out the number of ATMs to be supplied according to their functionality and installation type and the software licences. It did not set out any dates.

12. As the First Instance Circuit correctly held (as we set out in our judgment of 27 January 2021), the agreement, which was expressly governed by Qatari law, was not simply an agreement for the sale of the DN ATMs but also an agreement for services, including the integration of the DN ATMs into QIB's Switch system. Protech was, in our view, under a duty under the agreement to use skill and observe professional standards to discharge the obligations. This was the clear common intention of the parties set out in the agreement. It was also the clear common intention of the parties that the right of QIB to terminate the agreement, if there was a failure to perform the obligations, was

that set out in clause 11 of the agreement. As that common intention is clear from the agreement, it is therefore not necessary to refer to or rely on, in relation to the obligations of the parties, other provisions of the Civil Code, particularly the articles referrable to the performance of specific types of contract including Articles 423, 445, 464, 451, 684 and 687 (to which we were referred by QIB).

The counterclaim as advanced before the First Instance Circuit

13. Before the First Instance Circuit, QIB claimed it was entitled to terminate the agreement summarily and without notice under clause 11 which provided:

> "11.1 The Customer shall be entitled to terminate this agreement at any time on giving the Service Provider not less than 30 days' prior written notice of termination. If the Customer does terminate in accordance with this Clause, it shall pay the Service Provider all undisputed Fees that have accrued but not yet been paid.
>
> 11.2 Each party shall have the right, without prejudice to its other rights or remedies, to terminate this agreement immediately by written notice to the other if the other party:
>
> > (a) is in material breach of any of its obligations under this agreement and either that breach is incapable of remedy or the other party shall have failed to remedy that breach within 30 days after receiving written notice requiring it to remedy that breach; or
> >
> > (b) is unable to pay its debts or becomes insolvent or an order is made or a resolution passed for the administration, winding-up or dissolution of the other party (otherwise than for the purposes of a solvent amalgamation or reconstruction) or an administrative or other receiver, manager, liquidator, administrator, trustee or similar officer is appointed over all or any substantial part of the assets of the other party or the other party enters into or proposes any composition or arrangement with its creditors generally or anything analogous to the foregoing occurs in any applicable jurisdiction.
>
> 11.3 Any termination of this agreement shall not affect any accrued rights or liabilities of either party, nor shall it affect the coming into force or the continuance in force of any provision of this agreement which is expressly or by implication intended to come into force or continue in force on or after termination."

14. QIB claimed it was entitled to terminate the agreement on two bases:

    a. Its primary case was based on a breach of the obligations under clauses 2.4 and 2.6 of the agreement. At paragraphs 24 - 26 of its judgment, the First Instance Circuit held that these clauses only applied to the deliverables, the DN ATMs, and that QIB had failed to show there was any breach in relation to the DN ATMs. Schedule 1 was, as we have set out, the relevant provision in respect of services, including the integration of the DN ATMs into QIB's system; the obligations of Protech in respect of the integration of the ATMs into QIB's Switch system was not "a deliverable". Clauses 2.3 and 2.6 did not therefore apply to any breach in respect of integration into QIB's Switch system. We refused permission to appeal on this issue as the First Instance Circuit was plainly not in error in its decision, as set out in paragraph 10 of our judgment of 27 January 2021.

    b. QIB's alternative case was that there had been breach of the provisions of clauses 4.2 (d) and (e) in respect of the integration into the Switch system. The First Instance Circuit held at paragraphs 27-28 that, assuming there had been a breach by Protech, QIB was not entitled to rely on the immediate right to terminate under clause 11.2. That clause required either proof that the breach was not remediable or that Protech be given 30 days to remedy the breach. QIB had not given Protech 30 days to remedy and could not prove the breach was irremediable. As set out in paragraph 11 of our judgment of 27 January 2021 we refused permission to appeal as the First Instance Circuit was plainly not in error in its decision that QIB was not entitled to terminate under Clause 11 without giving 30 days' notice

QIB's contention that it was entitled to damages

15. At the oral argument QIB contended that it was entitled to damages on a number of grounds:

    a. As the agreement was an agreement for goods and services, Protech was required to provide ATMs that worked when integrated into the Switch system.

b. Under the provisions of the Civil Code, QIB was entitled to judge whether Protech had complied with its obligations.

c. The decision of the First Instance Circuit that it had failed to give 30 days' notice to remedy was not a bar.

16. Protech denied it was under the obligation to integrate the ATMs into QIB's Switch system, but argued that the court did not have to determine the issue. QIB had not afforded it the opportunity to remedy; there was no evidence to show that, if it had been given 30 days' notice, it would not have remedied the alleged breaches. QIB sought to meet this contention by submitting that the breach was incapable of remedy and therefore Protech could not rely on any failure to give it 30 days' notice.

Our conclusion on the right to claim damages

17. As we have already set out, the agreement plainly required Protech to exercise its skill and professional duties to integrate the DN ATMs into QIB's Switch system. It is also clear, on the evidence before the First Instance Circuit, that the DN ATMs had not been successfully integrated. As the obligation to integrate was that of Protech and, as it was accepted that QIB had a world class Switch system, it could be inferred, in the absence of evidence to the contrary, that Protech was responsible for the failure and was in breach of the agreement.

18. However, Protech was, in our judgement, entitled to 30 days' notice to remedy the breach, unless the breach was incapable of remedy. The First Instance Circuit observed that the breach alleged by QIB appeared to be of a nature that, given time, could be rectified; but whether it could have been was another matter, as 30 days' notice was not given. We agree with that observation. Although there was ample evidence about the problems, and these were eloquently reiterated on behalf of QIB in the course of the argument presented on the appeal, nothing was adduced to show the failure to integrate the Switch system was incapable of remedy or could not have been remedied in the 30-day period. The question therefore arises as to whether it was for QIB to prove the breach was incapable of remedy either at all or within the 30-day period, in

circumstances where QIB has sought to invoke termination without allowing an opportunity to remedy.

19. Commercial contracts commonly contain clauses requiring (1) notice to be given to a party alleged to be in breach and (2) the opportunity to remedy (or, cure - a term often used) the breach before termination can be invoked by the other party. They perform an essential commercial purpose in giving the party in breach a final opportunity to remedy. What happens during that final opportunity usually makes it clear, as the First Instance Circuit observed, whether the breach was remediable within the specified timescale. It thus provides a clear resolution of the issue. It is also common for such clauses to contain a provision similar to that in clause 11 which dispenses with the requirement of notice and the opportunity to remedy in cases where the breach is incapable of remedy. Given the importance of allowing the opportunity of remedy and the need for a clear resolution of whether the alleged breach was either remedied or not remedied within the specified timescale, we consider that if a party serves a notice of termination on the basis that a breach is incapable of remedy or cannot be remedied within the 30-day period, then it is for that party to prove that fact.

20. However, QIB adduced no evidence to show the breach was incapable of remedy or could not be remedied within the 30-day period. As no such evidence was adduced, QIB cannot show that the problems with integrating the ATMs into its Switch system could not have been remedied within the 30-day period; as they deprived Protech of the opportunity to remedy, they therefore cannot, given the absence of evidence, establish a breach of the agreement on which to found their counterclaim.

Evidence from experts

21. Although QIB had not sought the appointment of an expert before the Court of First Instance, it applied to us for the appointment of an expert as a means of addressing the issue on whether the failures in breach of contract could be remedied.

22. In the Qatar International Court provision is made for expert evidence in Articles 10.2.3, 27.1.3 to 27.1.5, 27.2, 27.4, 27.5 and 27.6 of the QFC Civil and Commercial

Court Regulations and Procedural Rules. In common with most other Commercial Courts worldwide, it is the trial court, the First Instance Circuit of the Qatar International Court, which hears all the evidence in each case. If parties wish to adduce expert evidence, they must do so before that Court in accordance with the Articles to which we have referred. In most cases where expert evidence is required, the court will ordinarily hear expert evidence called by the parties, having given appropriate directions. It is always permissible to seek the appointment of a joint expert or under Article 27.2 the Court can appoint an expert to assist the court, but such applications must be made to the First Instance Circuit.

23. The Appellate Division will not ordinarily permit expert evidence to be adduced before it, whether it is expert evidence to be called by a party, or a joint expert or a court appointed expert. The Appellate Division may in unusual circumstances entertain an application for expert evidence, if there are good and exceptional reasons why such evidence was not adduced before the First Instance Circuit, but such circumstances will be rare.

24. In the present case there are no circumstances which would justify the appointment of an expert by this court for the appeal. The nature of the dispute was clear. As it was evident that there was an issue as to whether the DN ATMs could be integrated by Protech into QIB's Switch system, then the expert evidence necessary to resolve that issue should have been adduced by the parties before the First Instance Circuit. There was no reason why this was not done.

Overall conclusion on issue 1

25. For these reasons, although we consider that we should grant permission in the light of the arguments advanced on the interpretation of the agreement and the use of experts, the appeal must be dismissed on this issue.

Issue 2: The award of interest to the Claimant/Respondent

26. As its second ground of appeal QIB contended that the First Instance Circuit was wrong in awarding interest.

27. As the First Instance Circuit explained at paragraph 38 of its judgment, it awarded interest as compensation for the loss suffered by Protech by the delay in payment of the amount which had become due on the termination of the agreement on 23 December 2019. The award of compensation was made through the exercise of the Court's powers under Article 10.4.9 of the QFC Civil and Commercial Court Regulations and Procedural Rules to make an Order for the payment of interest. It awarded interest at the rate used in a number of other cases, namely 5% from the date payment became due until the date of judgment and at the rate of 5% thereafter until payment. In determining interest was payable and in setting the rate of interest due before judgment, the First Instance Circuit followed a consistent line of First Instance Circuit decisions including the clear analysis set out in *Qatar Financial Centre Regulatory Authority v Horizon Crescent Wealth LLC* [2020] QIC (F) 12.

28. QIB's appeal was advanced on the basis that there should have been no award of interest; in the circumstances the award of interest was an order for payment for failure to pay debts on time and hence usuary. Calling it compensation did not change the fact it was usuary; particular reliance was placed on decision No 133 (7/14) of the International Islamic Fiqh Academy and resolution 267 (21/2018).

29. We cannot accept this contention. In general the obligation to pay interest on a sum not paid when due is governed by the proper law of the contract. In most disputes before this court, the position with regard to pre-judgment interest will be governed either by Article 104 of the QFC Contract Regulations 2005 as the applicable law or by the application of Article 18 of the QFC Law and paragraphs 8 and 9 of Schedule 6 to that law and Article 11 of the QFC Civil and Commercial Court Regulations and Procedural Rules. Article 104 reflects the general principle of law that interest is payable to compensate the person to whom the money is owed for being kept out of the money due; it provides:

> "(1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.
>
> (2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing in the State.
>
> (3) The aggrieved party is entitled to additional damages if the non-payment caused him a greater harm.
>
> (4) Unless otherwise agreed, interest on damages for breach of non-monetary obligations accrues as from the time the damages are awarded."

30. The law of Qatar is set out in decision 184 of 2010 where the Court of Cassation recognised that there were two types of interest – compensatory interest and delay interest. Delay interest was actually compensation due to the creditor for the delay by the debtor in breach of his obligations to pay the amount due on the due date, whether or not the contract provided for the payment of interest. Similar principles were applied in decision 40 of 2013, decision 208 of 2014 and decision 254 of 2014. In decision 208 of 2014 the Court said:

> "compensating the lender for the harm due to late payment of debts is the debtor's duty, taking into account the civil responsibility provisions and the usual bank practice which is considered general knowledge and does not require proof thereof".

31. In the present case, as QIB did not pay the amount due when it should have paid it, its failure caused loss to Protech for which compensation was awarded in the form of interest. In our judgement, compensation in the form of interest was plainly payable.

32. The rate of 5% has been applied in a number of decisions of the First Instance Circuit as the rate at which interest should be awarded on sums that should have been paid before judgment. In our view there was no error on the part of the First Instance Circuit in this case in applying that rate to compensate Protech. The position on interest on sums due under an Order following a judgment and which are not paid in accordance

with the terms of the Order is set out in *Qatar Financial Centre Regulatory Authority v Horizon Crescent Wealth Management* [2021] QIC (A) 5.

33. For these reasons, although we have granted permission to appeal to make clear the position in relation to the award of interest on sums which should have been paid before judgment in proceedings before the Qatar International Court, we dismiss the appeal.

By the Court,

Lord Thomas of Cwmgiedd
President

Representation:

The Appellant was represented by Mr. Khalid Alhababi and Dr Hassan Okour, Alhababi Law Firm, Doha, Qatar.

The Respondent was represented by Mr Paul Fisher, 4 New Square, London, UK.