IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 21

Originating Summons No 1 of 2020

Between

(1) CBX
(2) CBY

… *Plaintiffs*

And

(1) CBZ
(2) CCA
(3) CCB

… *Defendants*

JUDGMENT

[Civil Procedure] — [Costs]

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CBX and another
v
CBZ and others

[2020] SGHC(I) 21

Singapore International Commercial Court — Originating Summons No 1 of 2020
Anselmo Reyes IJ
9 September 2020

8 October 2020 Judgment reserved.

Anselmo Reyes IJ:

Introduction

1 In *CBX and another v CBZ and others* [2020] SGHC(I) 17 dated 16 July 2020, I dismissed the Plaintiffs' application to set aside two Phase II Partial Awards and the whole of a Costs Award. I now deal with the costs of the Plaintiffs' abortive application. In this determination, I will use the abbreviations defined in my previous judgment. There is no dispute that, the Defendants having prevailed, they should have the costs of the Plaintiffs' application. There is also no dispute that simple interest at 5.33% per annum should accrue on any costs awarded to the Defendants. The parties differ, however, over quantum.

2 This case was transferred from the High Court to the Singapore International Commercial Court ("**SICC**") by the Deputy Registrar on 14

February 2020. When ordering the transfer, the Deputy Registrar reserved for the SICC's determination the question of whether the costs guidelines in Appendix G of the Supreme Court Practice Directions ("**Appendix G**") "should continue to apply to the assessment of costs in respect of proceedings in and arising from [the Plaintiffs' application], after its transfer to the [SICC]". The parties' dispute over quantum is essentially a debate on whether I should assess the Defendants' pre- and post-transfer costs in accordance with Appendix G or with O 110 r 46(1) ("**Rule 46**") of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). Rule 46 is the normal rule governing costs in SICC proceedings. It provides that, except where the SICC directs otherwise, in the ordinary course of events an unsuccessful party before the SICC should bear the "reasonable costs" of the successful party. The Defendants claim S$150,000 (all-in) as their reasonable costs. The Plaintiffs reply that such amount is exorbitant and the Defendants should be entitled to no more than S$35,000 (all-in) (if pre- and post-transfer costs are assessed by reference to Appendix G) or S$45,000 (all-in) (if pre-transfer costs are assessed under Appendix G and post-transfer costs are assessed on the basis of Rule 46). The Plaintiffs additionally contend that I should discount any costs awarded to the Defendants by 20%. The Plaintiffs say that this is because, following my judgment of 16 July 2020 and contrary to the order of the High Court dated 20 January 2020 (HC/ORC 559/202) ("**ORC 559**"), the Defendants publicly disclosed confidential details relating to this case, including details of the parties in the underlying arbitrations.

Discussion

Preliminary matters

3 At the outset, two issues need to be determined.

4 First, there is the question of the 20% discount on account of the alleged breach of ORC 559. These proceedings are not the appropriate forum for dealing with any alleged infraction of ORC 559. In particular, ORC 559 permitted the parties to publish details about the relevant arbitrations where "such disclosure ... falls within an exception to the obligation of confidentiality in arbitration under Singapore law". According to the Defendants, any disclosure that they made fell squarely within an exception to the obligation of confidentiality under Singapore's arbitration law. This court has not investigated the circumstances of the relevant incident. If the Plaintiffs are of the view that there has been a breach of ORC 559 which needs to be sanctioned in some way, they should take out an appropriate summons for that purpose.

5 Second, there is a difference between the parties on the proper construction of the Deputy Registrar's order of 14 February 2020. The Defendants read the order as leaving it to me to determine the extent to which, following transfer to the SICC, Appendix G should (if at all) continue to apply to pre- and post-transfer costs incurred by the parties. The Plaintiffs, on the other hand, compare the order with the equivalent order made in *BYL and another v BYN* [2020] SGHC(I) 12 ("***BYL v BYN (Costs)***"). The order there left it for the SICC to decide whether Appendix G "should continue to apply to the assessment of costs in respect of *all* proceedings in and arising from [the Plaintiffs' setting aside application] after its transfer to the [SICC]" [emphasis added]. In *BYL v BYN (Costs)*, I observed (at [4]) that the Deputy Registrar had gone out of his way to insert the word "all" before "proceedings". I inferred from the use of "all" that the Deputy Registrar was "leaving it to me to determine ... if ... the Appendix G regime should continue to apply to all or any part of the proceedings in or arising from the Plaintiffs' application". The Plaintiffs latch onto the absence of the word "all" in the order in this case. They argue that, in consequence, the Deputy Registrar has only left it to me to

determine whether post-transfer (as opposed to pre-transfer) costs should be assessed by reference to Appendix G or Rule 46. The Plaintiffs say that, by the order here, Appendix G should be used in the assessment of pre-transfer costs. The Plaintiffs support their argument by stressing that, during a pre-trial conference on 11 February 2020 (the "**PTC**"), the Plaintiffs stated that, if the case was to be transferred, they wanted Appendix G to continue to apply.

6 I am not persuaded of the correctness of the Plaintiffs' reading of the transfer order in this case. I accept that the absence of the word "all" in the order introduces an element of ambiguity, so that the Plaintiffs' reading of the Deputy Registrar's order is a plausible construction. But, on balance, it seems to me that the effect which the Deputy Registrar intended by the order here is precisely the same as that identified in *BYL v BYN (Costs).* The inclusion of the word "all" in the transfer order in *BYL v BYN (Costs)* made the meaning of that direction clear. But it does not follow that the omission of the word "all" here (which may conceivably have been inadvertent) implies that the Deputy Registrar envisaged a different outcome. Evaluated against what happened at the pre-transfer stage of these proceedings, the Plaintiffs' conclusion strikes me as tenuous. This is because at the PTC, in response to what the Plaintiffs expressed about their wishes in respect of the applicability of Appendix G, the Defendants submitted that "with the change in procedure [due to the transfer from the High Court to the SICC], lack of strict application to costs guidelines comes with it as well". There was accordingly disagreement between the parties on the applicability of Appendix G to the assessment of all, some or none of the entire costs of these proceedings due to the transfer to the SICC.

7 There is nothing to indicate that, by his transfer order, the Deputy Registrar favoured the Plaintiffs' view as opposed to that of the Defendants. This is hardly surprising. Given the sharp difference between the parties on the

cost implications of a transfer, the Deputy Registrar would more logically and naturally have left the matter to me as the SICC judge assigned to hear the case to determine the question. In other words, seen in its factual context, the transfer order here did not decide whether Appendix G should apply to pre- or post-transfer costs or both, but left it to me to determine the appropriate scope for the application of Appendix G pre- and post-transfer. In any given case (not necessarily just a case relating to an arbitral award), where a party manages to persuade the registrar hearing a transfer application to direct that Appendix G is to apply in whole or part to the costs of the proceedings notwithstanding a transfer, the registrar will make this clear in his or her transfer order. A recent example (albeit not in respect of proceedings relating to an arbitral award) was the transfer order mentioned in *Sheila Kazzaz and another v Standard Chartered Bank and others* [2020] SGHC(I) 19 (at [9]). There the registrar unambiguously directed that "Appendix G shall continue to be relevant to the assessment of costs in respect of all proceedings in and arising from this suit after its transfer to the SICC".

8 In their respective submissions, both parties refer to what I said in *BYL v BYN (Costs)* (at [18]):

> [I]n the circumstances of this case, I doubt that Appendix G can be of real assistance even as a rough-and-ready guide on the appropriate magnitude of costs. There are two reasons for this. First, as the Defendant points out, in contrast to what was highlighted in *BXS v BXT (Costs)* at [14], there has been no understanding or concern among the parties here that there should be "no difference in the way that costs are taxed as a result of the transfer". I am thus less constrained by Appendix G in this case than I was when assessing costs in *BXS v BXT (Costs)*. ...

9 The Plaintiffs suggest that, given what they had said at the PTC about wanting Appendix G to continue to apply post-transfer, the present case was analogous to *BXS v BXT* [2019] 5 SLR 48 ("***BXS v BXT (Costs)***") where there

was an "understanding or concern among the parties ... that there should be 'no difference in the way that costs are taxed as a result of the transfer'" (see *BYL v BYN (Costs)*, [5] *supra*, at [18]). However, I am unable to agree with the Plaintiffs on this. A unilateral statement by the party applying to set aside an award that it would like Appendix G to continue to apply post-transfer can hardly constitute an "understanding or concern among the parties". Where both parties agree that Appendix G is to apply post-transfer, the SICC can give weight to such mutual understanding consistently with the principle of party autonomy in international commercial contracts. But different considerations apply when only the party seeking recourse against an award intimates its concerns as to Appendix G continuing to apply.

10 In *BYL v BYN (Costs)*, I stated (at [16]):

> In principle, [a] setting aside application having been transferred to the SICC, I ought to assess pre- and post-transfer costs in accordance with O 110 r 46. Such approach is especially apt when (as here) the SICC is exercising its jurisdiction under Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 18D(2) in relation to an unsuccessful setting-aside application. Having already gone through the time and expense of establishing its claim in arbitration proceedings pursuant to the parties' arbitration agreement, the successful party in an arbitration should in the ordinary course of events be entitled to recover its reasonable costs of subsequently defending the award. Where recoverable costs as specified by Appendix G constitute a significant discount to the successful party's reasonable costs, there could be an incentive to the unsuccessful party to delay having to pay on an award by putting up unmeritorious applications to set aside the same. The unsuccessful party would not be bearing the reasonable economic cost of its failed attempt at delay. The successful party would in effect be subsidising the unsuccessful party's attempt to avoid having to honour an award. In the absence of compelling justification, this should not be the normal position.

11 To allow a party seeking recourse against an award to dictate the applicable costs regime merely by expressing a "concern" in a pre-trial

conference that Appendix G should continue to apply post-transfer, would encourage the mischief identified in the foregoing dictum. A party mounting an unmeritorious setting aside application would be able to forestall having to bear the reasonable economic cost of a failed attempt at delay through the simple expedient of unilaterally expressing a wish at a pre-transfer hearing that Appendix G should continue to apply. That cannot be right. At a transfer hearing, the party seeking to set aside an award may certainly express its concern that Appendix G should continue to apply post-transfer. But it will need to give cogent reasons for such a state of affairs. Otherwise, the applicable costs regime (whether Appendix G, Rule 46 or some combination of both) will likely be left (as it was here) to the SICC judge hearing the application. Thereafter, consistently with what I said in *BYL v BYN (Costs)*, in the normal course of events, once a case has been transferred to the SICC, parties should expect that as a matter of principle, in the absence of compelling justification to the contrary, the SICC will assess the entire costs of a setting aside application (or analogous proceedings relating to an arbitral award) on the basis of Rule 46.

12 I should, however, reiterate what I said in *BYL v BYN (Costs)* at [17]. Even where Rule 46 applies, it does not necessarily mean that Appendix G goes out the window and the SICC will pay no heed to it when assessing costs. In many situations, Appendix G can serve as a useful reality test or starting point against which to evaluate whether costs are or are not reasonable within the terms of Rule 46. Appendix G will only be of little or no assistance where (as was the situation in *BYL v BYN (Costs)*) the circumstances of a case are such that Appendix G cannot sensibly be said to have a realistic bearing on what the parties might reasonably be expected to spend to advance or safeguard their positions. Such circumstances will typically include a combination of factors, such as the need to liaise with persons in different jurisdictions by reason of the international nature of a case, the magnitude of the amount in dispute, the

complexity of the arguments involved, the nature of the allegations being made by one party against the other, the consequences to a party of losing, *etc*.

The Defendants' reasonable costs

13 I will now assess the Defendants' reasonable costs and then compare such amount with the figure thrown up by Appendix G.

14 The Defendants quantify their actual total costs (excluding disbursements) at S$394,195.10. They agreed to a discount of 15% with their legal representatives, thereby producing a discounted figure of S$335,065.84. The Defendants' actual total costs comprise engaging:

(a) a Senior Counsel for 125 hours at S$1,100.00 per hour;

(b) a Junior Counsel for 30 hours at S$820.00 per hour;

(c) a second Junior Counsel for 34.77 hours at S$500.00 per hour until 31 December 2019 and 21.47 hours at S$540.00 per hour from 1 January 2020;

(d) a third Junior Counsel for 64.53 hours at S$400.00 per hour until 31 December 2019 and 271.32 hours at S$440.00 hours per hour from 1 January 2020;

(e) a fourth Junior Counsel for 137.42 hours at S$400.00 per hour;

(f) a fifth Junior Counsel for 4.33 hours at S$350.00 per hour; and

(g) a sixth Junior Counsel for 4 hours at S$360.00 per hour.

In addition, the Defendants incurred disbursements of US$8,715.15 plus S$11,633.23, comprising:

(a) Thai law expert fees of US$8,715.15;

(b) attestation fees of S$30.00;

(c) E-litigation fees of S$10,517.00;

(d) over-time meals and transportation costs of S$480.31;

(e) costs of overseas calls amounting to S$12.87;

(f) photocopying costs of S$560.55;

(g) transportation costs for court attendance amounting to S$28.00; and

(h) costs of telephone calls amounting to S$4.50.

I state at once that, as far as the disbursements are concerned, they seem to me reasonable and proportionate.

15 In evaluating the reasonableness or otherwise of the above costs, I bear in mind the following circumstances of this case:

(a) In contrast to the Plaintiffs' legal representatives, the Defendants' lawyers had not previously been involved in the underlying arbitrations. The Defendants' lawyers therefore had to review the record and documents of two ICC arbitrations which were conducted in multiple phases over three years and resulted in seven awards, of which the Plaintiffs were seeking to set aside two in part and one in its entirety.

(b) The Defendants' lawyers had to keep abreast of proceedings in the ongoing ALRO arbitration. This was necessary to ensure that the

Defendants' conduct of these proceedings was in line with their position in the ALRO arbitration.

(c) The Defendants had to contend with issues of Thai law, on which both parties tendered expert evidence. These Thai law issues included the treatment of compound interest under Thai law and whether the Thai court would recognise and enforce an award of compound interest in Thailand.

(d) The Plaintiffs filed six affidavits in support of their setting aside application, one of which (inclusive of exhibits) ran to 3,135 pages. The Defendants filed two affidavits in response. One was by their Thai law expert (48 pages) and the other ran to 1,616 pages.

(e) If the Plaintiffs had succeeded in their setting aside application, the Defendants stood to lose US$525m on the Remaining Amounts Orders; annual compound interest of 15% on the Remaining Amounts; €5,438,587.55 and US$798,600 in arbitration costs; and simple interest of 7.5% per annum on the foregoing costs. Further, the Plaintiffs were seeking an order from me that the Defendants pay 100% of the Plaintiffs' costs in the two ICC arbitrations. This would have meant costs of around S$3,000,000, US$2,000,000, THB2,000,000, CHF30,000 and £6,000.

16 The Plaintiffs say that it would be exorbitant for the Defendants to be compensated for the engagement of one Senior Counsel and six Junior Counsel in this case. The Plaintiffs also suggest that the involvement of Senior Counsel for 125 hours in this matter was excessive. However, the Defendants have substantially discounted the amount which they are seeking as their reasonable costs of these proceedings. The Defendants are only asking for S$150,000 (all-

in), instead of S$335,065.84 plus disbursements. In light of the circumstances identified in the previous paragraph, S$150,000 seems reasonable. By way of a reality check, if one deducts the Defendants' disbursements from S$150,000 one arrives at about S$127,000. For post-transfer preparations for the substantive hearing and counsel's appearance at such hearing, it would (I think) be reasonable to allow 40 hours for Senior Counsel at (say) S$1,100 per hour with a similar amount of time for one assisting Junior Counsel at (say) S$440 per hour. That would come to about S$61,600. Subtracting that from S$127,000 would leave only S$65,400 to cover the pre-transfer drafting and filing of the Defendants' affidavits in these proceedings. None of the latter figures appear to be excessive, exorbitant or disproportionate in the circumstances highlighted.

17 The Plaintiffs draw my attention to the Defendants' application in these proceedings for security for costs. On 24 January 2020, the Defendants' sought security from the Plaintiffs in the amount of S$60,000 for the period up to and including the substantive hearing. In their letter to the Plaintiffs, the Defendants stated:

> [I]t is also our clients' position that the sum of S$60,000 is eminently justified in the present case, especially given the work that has been done to date. Your clients have filed: (a) an approximately 3100-page affidavit … and (b) an expert opinion on Thai law … Our clients have also, on 10 January 2020, filed: (a) an approximately 1600-page response affidavit … and (b) a response expert opinion on Thai law … Moreover, your clients are also expected to further file reply affidavit(s) in response to our clients' affidavit(s).

The Plaintiffs replied on 14 February 2020 saying that the Defendants' figure of S$60,000 was "unsubstantiated". Nonetheless, "purely in the interests of saving time and costs," the Plaintiffs offered S$25,000 by way of security. On 12 March 2020 the Defendants rejected the Plaintiffs' proposed amount as "insufficient security". The Plaintiffs said that, "in the interests of saving time

and costs," they would accept S$45,000 instead. On 17 March 2020, the Plaintiffs countered with S$40,000. By a letter dated 24 March 2020, the Defendants accepted the offer of S$40,000.

18 The Plaintiffs argue that, even ignoring Appendix G, I should characterise S$150,000 as unreasonable since the amount is almost four times the amount of security that the Defendants were willing to accept as security for their costs. The Plaintiffs further observe that the Defendants agreed to S$40,000 after these proceedings had been transferred to the SICC. This (the Plaintiffs submit) implies that the Defendants regarded S$40,000 as sufficient to cover their reasonable costs assessed on the basis of Rule 46. I am unable to accept the Plaintiffs' contention. From the parties' exchanges on the issue of security, it seems to me that the Defendants initially asked for S$60,000 as the maximum amount that they believed that they might reasonably obtain as security from the Plaintiffs. At the time, the case had yet to be transferred to the SICC and even if transferred, the applicable cost regime would likely (as transpired) be left to the SICC's decision at the end of the proceedings. Eventually, in the course of negotiations straddling the date of transfer to the SICC, the parties settled on S$40,000. But this seems to have been an arbitrary (possibly even nuisance) figure put forward by the Plaintiffs which the Defendants simply accepted in the interests of expediency. I do not read the correspondence between the parties as amounting to an undertaking by the Defendants that their actual costs pre- and post-transfer would only come up to S$40,000, S$45,000 or S$60,000, as the case may be. I am consequently unable to infer much, if anything, from the parties' exchanges on security.

19 To bolster their submissions on the excessiveness of the S$150,000 sought by the Defendants, the Plaintiffs observe that the costs awarded to date by the SICC in setting-aside applications have been significantly lower. For

example, in *BXS v BXT (Costs)* ([9] *supra*), I awarded costs of S$40,000 (all-in) to the Defendant having regard to Appendix G. In *BYL v BYN (Costs)* ([5] *supra*), I awarded costs of S$82,500 to the Defendant having regard to Rule 46. I do not think that such comparative exercise is a valid approach to assessing costs. As I stated in *BYL v BYN (Costs)* (at [22]):

> [E]ach case has its unique features. It is consequently an impossible exercise to compare the costs awarded in one set of proceedings with those claimed in another with a view to establishing the reasonableness or otherwise of the latter.

In *BYL v BYN (Costs)* itself, I commented (at [13]) that I was hampered in assessing the defendant's reasonable costs by the lack of detail in its cost submissions. I did not rule out the possibility that the defendant might be entitled to more by way of recovering its reasonable costs, if it had provided more information. In contrast, the Defendants here have provided fuller and more comprehensive details of their costs. The only additional information that might have been helpful would have been a schedule providing a breakdown of the hours spent by Senior and Junior Counsel by reference to the specific pre- and post-transfer activities in which they were engaged.

20 The Plaintiffs say (and I am prepared to accept) that, applying Appendix G to pre- and post-transfer costs, S$35,000 (all-in) would be the maximum amount to which the Defendants should be entitled. Juxtaposed against the S$150,000 (all-in) that I have accepted as the Defendants' reasonable costs in these proceedings, the figure of S$35,000 pales in comparison. The question is, in light of this comparison, whether there is any compelling reason why the figure of S$150,000 should be further discounted to bring it closer in line to S$35,000. I do not think so. Given the circumstances listed in [15] above, this does not seem to be a case where Appendix G can serve as a useful guide on the level of reasonable costs. As discussed above, as a basis for a further discount,

I am unable to attach any weight to the Plaintiffs' unilateral statement at the PTC that Appendix G should apply to the costs of these proceedings pre- and post-transfer. That apart, there seems to be no good reason for the Plaintiffs to avoid having to bear the full amount of the Defendants' reasonable costs.

Conclusion

21 The Plaintiffs are to pay the Defendants' costs of S$150,000 (all-in). Simple interest at 5.33% per annum is to run on the amount of S$150,000 from the date of this judgment until payment by the Plaintiffs.

Anselmo Reyes
International Judge

Alvin Yeo SC, Lin Weiqi Wendy, Chong Wan Yee Monica, Huang Meizhen Margaret, Kara Quek Tze-Min (WongPartnership LLP) for the plaintiffs;
Francis Xavier SC, Disa Sim, David Isidore Tan Huang Loong, Kristin Ng (Rajah & Tann LLP) for the defendants.