IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA(I) 4

Civil Appeal No 197 of 2020

Between

(1) CBX
(2) CBY

… *Appellants*

And

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

… *Respondents*

In the matter of Originating Summons No 1 of 2020

In the matters of Section 24 of the International Arbitration Act (Cap 143A) read with Articles 34(2)(*a*) and 34(2)(*b*) of the UNCITRAL Model Law on International Commercial Arbitration and Order 69A rule 2(1)(d) of the Rules of Court (Cap 322, R5, 2014 Rev Ed)

And

In the matter of a Partial Award dated 5 June 2019 made in an ICC International Court of Arbitration Case between CBZ as Claimant and (1) CBX and (2) CBY as Respondents, as clarified in a further award dated 5 August 2019

And

In the matter of a Partial Award dated 5 June 2019 made in an ICC International Court of Arbitration Case between (1) CCA and (2) CCB as Claimants and (1) CBX and (2) CBY as Respondents, as clarified in a further award dated 5 August 2019

And

In the matter of a consolidated Final Award (Costs) dated 9 August 2019 made in two ICC International Court of Arbitration Cases between (1) CBZ (2) CCA and (3) CCB as Claimants and (1) CBX and (2) CBY as Respondents

Between

(1) CBX
(2) CBY

… *Plaintiffs*

And

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

… *Defendants*

JUDGMENT

[Civil Procedure] — [Costs - SICC] — [Principles]

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CBX and another
v
CBZ and others

[2021] SGCA(I) 4

Court of Appeal — Civil Appeal No 197 of 2020
Judith Prakash JCA, Quentin Loh JAD and Jonathan Mance IJ
5 February 2021

21 June 2021 Judgment reserved.

Judith Prakash JCA (delivering the judgment of the court):

Introduction

1 This judgment deals with the subject of the costs regime that applies when a matter filed in the High Court of Singapore (now the General Division of the High Court) is, in the course of the proceedings, transferred to the Singapore International Commercial Court ("SICC") and dealt with there until its conclusion.

Background

2 The originating action was HC/OS 1388/2019 which was filed in the High Court on 5 November 2019. It was an application by parties whom we shall refer to as "the Buyers" to set aside parts of two Partial Awards and a consolidated Costs Award (collectively, "the Awards") rendered against them in two ICC arbitrations. The Awards had been rendered in favour of parties

whom we shall refer to as "the Sellers". The Sellers were named as respondents in HC/OS 1388/2019.

3 On 14 February 2020, the High Court, on its own motion, ordered that the setting aside proceedings were to be transferred to the SICC. The orders made by the learned Deputy Registrar at the time of the transfer included the following:

> (3) The issue whether the High Court costs scale and Order 59 of the Rules of Court should continue to apply to the assessment of costs in respect of proceedings in and arising from HC/OS 1388/2019, after its transfer to the Singapore International Commercial Court, is reserved to the Singapore International Commercial Court.

We will refer to this order as the "Appendix G order". The Appendix G order was made in the presence of the parties at a pre-trial conference ("transfer PTC") held to inform them of the intention to transfer the proceedings to the SICC.

4 The proceedings were then re-designated as SIC/OS 1/2020. At the time of the transfer, parties had already filed their first round of affidavits. Thereafter, four further affidavits were filed and both parties put in written submissions before proceeding to the hearing. The proceedings were heard before the learned International Judge ("the Judge") over several hours on the morning of 15 June 2020 and his decision, *CBX and another v CBZ and others* [2020] 5 SLR 184 ("the Merits Judgment"), was delivered on 16 July 2020.

5 In the Merits Judgment, the Judge found in favour of the Sellers and gave his reasons for dismissing the Buyers' setting aside applications in respect of all three Awards. He also ordered the parties to submit agreed directions for determining the costs (incidence and quantum) of the setting aside proceedings. This was duly done and there was a subsequent hearing on costs which led to

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another judgment, *CBX and another v CBZ and others* [2021] 3 SLR 10 ("the Costs Judgment"), which was delivered on 8 October 2020. By the Costs Judgment, the Buyers were ordered to pay the Sellers costs of $150,000 all-in (*ie*, inclusive of disbursements) with interest at 5.33% per annum from the date of the Costs Judgment. The basis of the award of costs was that as the Sellers had prevailed in the setting aside applications, they should have the costs of those applications. The principles on which the amount was assessed have been questioned in this appeal.

The appeals

6 The Buyers appealed against both judgments. CA/CA 136/2020 ("CA 136") was their appeal against the Merits Judgment whilst this appeal, CA/CA 197/2020 ("CA 197"), is the appeal lodged against the Costs Judgment. The appeals were heard together by this Court. Our decision on the merits is contained in *CBX and another v CBZ and others* [2021] SGCA(I) 3 issued on 21 June 2021. For the reasons given in that judgment, we concluded that the Merits Judgment should be reversed and that the Awards should be set aside. Thus, the Buyers are the successful parties in CA 136.

7 As the basis on which the Costs Judgment was made no longer holds, that means that this appeal should also succeed and the costs order made by the Judge should be set aside accordingly. But, in this case, we do not think it sufficient to part with CA 197 on that basis. It was mounted by the Buyers on the premise that the Judge had erred in principle in his award of costs and that, therefore, even if CA 136 were to fail, there was a basis for this Court to interfere with the assessment of the Sellers' costs and substantially reduce the amount granted. Written submissions were filed in CA 197 by both parties. Having studied them and the Costs Judgment, we are of the view that we should

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deal with the substance of CA 197 and express our views on the assessment of costs in a case that is transferred from the High Court to the SICC.

The applicable costs regimes

8 Before we go on to discuss the decision of the Judge and the challenges mounted against it, a brief word about the applicable costs regimes. Costs in civil proceedings in the High Court are governed by O 59 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), while costs in proceedings in the SICC are governed by O 110 r 46 ("Rule 46") of the ROC. Further, there are "Guidelines for Party-and-Party Costs Awards in the Supreme Court of Singapore" which are intended to provide a general indication on the quantum and methodology of party-and-party costs awards in specified types of proceedings in the Supreme Court. The Costs Guidelines, also known as "Appendix G", set out a range of possible costs that may be awarded in respect of different matters that come before the courts. Of particular relevance here is that Appendix G indicates that where there is a contentious originating summons heard in the High Court, the range of costs awarded would generally fall between $12,000 and $20,000 per hearing day depending on whether there is cross-examination or not and what type of transcription service is used. Whilst judges are not bound to apply the range and can move beyond it, often there is little reason to depart substantially from it.

9 A different approach is taken in SICC cases. As can be seen, Rule 46 is much less prescriptive – no numerical ranges are specified, instead, the general rule as laid down in Rule 46(1) is:

> The successful party in any application or proceedings in the Court must pay the reasonable costs of the application or proceedings to the successful party, unless the Court orders otherwise.

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Thus, the question of amount of costs that a successful party should recover is at large and the judge is tasked to determine what is "reasonable", a determination which can be guided by many factors moving far beyond the type of proceeding, the number of hearing hours and the kind of transcription service employed (though these factors will also be relevant, of course). It would immediately be appreciated that when a case started in the High Court (and thereby subject to Appendix G in relation to costs) is transferred to the SICC, the costs implications of such transfer may be of concern to the parties to the action as the losing party may no longer be able to rely on Appendix G as of right to influence the quantum of costs awarded.

The grounds and the challenge

10 The three issues raised by the Buyers in their appeal against the Costs Judgement are as follows:

(a) Whether the Judge erred in finding that Appendix G would not (at least) be applicable to costs incurred pre-transfer of proceedings to the SICC;

(b) Whether the Judge erred in entirely disregarding the guidance of Appendix G in assessing the reasonableness of costs incurred post-transfer to the SICC; and

(c) Whether the Judge erred in finding that the sum of $150,000 (all-in) was "reasonable" in the circumstances.

The first two issues engage points of principle whilst the third relates to the exercise of the Judge's discretion. Before we consider the first two issues, we

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will set out the Judge's reasoning which led him to the conclusions that are now challenged.

11 The first point that the Judge dealt with was how Appendix G should apply to the proceedings after they were transferred to the SICC. Before him, the parties accepted that this issue was to be resolved by an interpretation of the Appendix G order. The text of the order is at [3] above. The Sellers read the Appendix G order as leaving it to the Judge 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 party. The Buyers, however, compared the Appendix G order with an equivalent court order made in *BYL and another v BYN* [2020] 4 SLR 204 ("*BYL (Costs)*"), and submitted that because the order in *BYL (Costs)* referred to "costs in respect of all proceedings" and the Appendix G order here omitted the word "all", the Deputy Registrar had only left it to the Judge to determine whether post-transfer (as opposed to pre-transfer) costs should be assessed by reference to Appendix G or Rule 46.

12 The Judge rejected the Buyers' reading of the Appendix G order. While he accepted that the absence of the word "all" in the order introduced an element of ambiguity so that the Buyers' reading of the Appendix G order was a "plausible construction", it seemed to him that the effect which the Deputy Registrar intended by the Appendix G order was precisely the same as that identified in *BYL (Costs)*. That decision said that it was for the SICC to decide whether Appendix G applied to both pre- and post-transfer costs. The Judge considered that the omission of the word "all" did not imply that the Deputy Registrar envisaged a different outcome in this case from that in *BYL (Costs)*. Given that the parties had a sharp difference on the costs implications of a transfer when they appeared before the Deputy Registrar, the latter would more

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logically and naturally have left the matter to the Judge, as the SICC judge assigned to hear the case, to determine the question. He said (at [7] of the Costs Judgment) that "seen in its factual context" the Appendix G order did not decide whether Appendix G should apply to pre- or post-transfer costs or both but left it to the Judge to "determine the appropriate scope for the application of Appendix G pre- and post-transfer". The Judge contrasted the situation before him with the transfer order in *Sheila Kazzaz and another v Standard Chartered Bank and others* [2021] 3 SLR 1 ("*Sheila Kazzaz*") where 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". In effect, the Judge was saying that in the absence of such an unambiguous direction, even pre-transfer costs were set free from the guidance in Appendix G if the SICC judge decided that they should be.

13 The second issue concerned whether Appendix G had a role to play at all in respect of post-transfer costs. The Judge's view on this was set out at [11] of the Costs Judgment. There, the Judge made the following statement of principle:

> … 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 (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.

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14 This view was expressed in response to what the Judge thought was a suggestion that a party seeking recourse against an award of costs could dictate the applicable costs regime merely by expressing a "concern" in a pre-trial conference that Appendix G should continue to apply post-transfer. The Judge was, however, at pains to emphasise at [12] of the Costs Judgment that even where Rule 46 applied, Appendix G could still "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". He considered, however, that Appendix G would be of little assistance in circumstances where it had no realistic bearing on what the parties might reasonably be expected to spend to safeguard their legal positions.

15 In [13]–[16] of the Costs Judgment, the Judge went on to "assess" the Sellers' "reasonable costs". He concluded at [16] thereof that in the circumstances $150,000 seemed reasonable, particularly since the net figure, after deduction of disbursements, would be about $127,000. He accepted in [20] of the Costs Judgment that if Appendix G applied to both pre- and post-transfer costs, $35,000 would be the maximum amount to which the Sellers should be entitled. The Judge, however, rejected any discount of the figure of $150,000 to bring it closer to $35,000 because, in his view, in the circumstances of the case, Appendix G was not a useful guide on the level of reasonable costs.

16 At this stage, we will not discuss the factors that the Judge took into account in concluding that $150,000 was a reasonable figure. We consider that the issues of principle must be resolved before the issue of quantum can be handled.

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Our decision

The legal context

17 As a precursor to the discussion that follows, it bears mention that there are two types of cases that are heard in and determined by the SICC. The first is a case that emanates from a fresh filing in the SICC Registry. Such a case is from its inception governed by O 110 of the ROC and thus subject, always and only, to the costs regime established by Rule 46. Secondly, there is the case that is filed initially in the Registry of the High Court. This category of case is subject to the ROC generally (excluding O 110) and the applicable costs regime established by O 59, and the award of costs is subject to the guidance of Appendix G. At least, O 59 applies until and unless the case is transferred to the SICC pursuant to powers vested in the Registrar.

18 From the establishment of the SICC, the transfer procedure has been applied to a fair number of cases which have an international element and which it is considered would benefit from being considered by the SICC bench. In many of these cases, counsel appearing before the Registrar at a pre-trial conference ("PTC") in relation to a proposed transfer have expressed concerns about the costs implications of the transfer. These concerns have subsequently been raised before the SICC judge on completion of proceedings when costs are under consideration. Accordingly, some jurisprudence on the issue has developed. We will discuss some of these cases.

19 The case of *CPIT Investments Ltd v Qilin World Capital Ltd and another* [2018] 4 SLR 38 ("*CPIT*") provides a good starting point. That case concerned a contractual dispute involving the sale of security provided for a loan. The plaintiff filed a suit in the High Court in early 2016 but the case was transferred

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to the SICC a few months later, on 28 June 2016. This was just after the close of pleadings. Thereafter, several interlocutory applications were made in the SICC before the case went on to trial there. Eventually, the plaintiff was partially successful and the International Judge who heard the case ("the IJ") had to consider the question of the appropriate manner of assessing costs. The IJ analysed this issue in some detail and made the following useful observations which set out a clear framework within which to consider this issue. The relevant paragraphs of the judgment are set out below:

> 23 The costs regime under O 110 r 46 of the ROC is applicable to all proceedings in the SICC. Having said that, in cases which are transferred from the High Court to the SICC under O 110 r 12, the costs regime under O 59 would have applied whilst the case was proceeding in the High Court. *Thus, in dealing with pre-transfer costs, the SICC is likely to take into account Appendix G in deciding what are reasonable costs under O 110 r 46.*
>
> 24 Of course, *it remains open for the High Court or the SICC to make express orders that Appendix G continues to be relevant post-transfer.* In this connection, the provisions of O 110 rr 12(5)(*d*) and 12(5)(*e*) are of relevance. They provide:
>
> > (5) Where a case is transferred —
> >
> > > …
> > >
> > > (*d*) the court ordering the transfer may make such consequential orders as it sees fit; and
> > >
> > > (*e*) the court to which the case is transferred may make such consequential orders as it sees fit, provided that such orders are not inconsistent with any orders made by the court ordering the transfer.
>
> 25 However, even absent an agreement by the parties or an order to that effect, although the SICC approach to costs will apply post-transfer, the SICC can, in exercising its discretion on costs, take into account all the circumstances of the case. In this regard, *there is nothing to preclude the SICC from taking account of Appendix G even in assessing reasonable costs under O 110 r 46 in a case that was filed in the High Court and transferred to the SICC, unless the parties have agreed to*

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> *disregard Appendix G altogether.* This is in the light of the wording of O 110 r 46 and para 152 of the SICC Practice Directions, which make reference to 'reasonable' costs, and the fact that costs are always in the discretion of the court. Of course, the weight to be given to Appendix G in assessing costs is highly dependent on the circumstances of each case.
>
> 26 In the present case, based on the court's records of the relevant hearings that have taken place, there was neither mention of Appendix G nor agreement or an order that the Appendix G would continue to apply. In fact, as reflected in the court's records, the matter expressly mentioned on transfer related to O 110 r 12(5)(*c*), which provides that: 'unless the court ordering the transfer otherwise directs, the parties must continue to pay the hearing fees and court fees payable in the court where the case was commenced'.
>
> 27 I am of the view that under the SICC costs regime in O 110 r 46 of the ROC, costs before the date of transfer, 28 June 2016, should, in this case, be assessed taking account of the fact that the High Court regime under O 59 would have applied before that date and, consequently, the appropriate weight ought to be given to Appendix G in assessing the reasonable costs under the SICC costs regime in O 110 r 46. As for post-transfer costs, in assessing reasonable costs, I consider that Appendix G is one of a number of factors which may be taken into consideration.
>
> [emphasis added]

20 In assessing the costs of the plaintiff in *CPIT*, the IJ considered the plaintiff's entitlement in three categories: the first was the plaintiff's costs before the date of the transfer, 28 June 2016; the second was the plaintiff's costs from 28 June to 9 November 2016 which was the date an offer to settle was made; and third, the plaintiff's costs after 9 November 2016. In respect of the first category in making his assessment, the IJ had regard to the guidelines in Appendix G. This first category representing work done before the transfer was the only category where Appendix G was specifically referred to. When dealing with the other two categories, the IJ considered what the reasonable costs of the plaintiff were without apparent reference to Appendix G. It would be noted however, that in [27] of his judgment, the IJ had stated that Appendix G would

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be one of a number of factors that would be taken into account in assessing reasonable post-transfer costs.

21 The *CPIT* decision was considered by the SICC in *BXS v BXT* [2019] 5 SLR 48 ("*BXS (Costs)*"). That was a case where the plaintiff had applied to set aside an arbitration award made in favour of the defendant and the defendant had filed a summons to strike out the plaintiff's application. There was also an application by the defendant for an extension of time. The defendant prevailed in all three applications. The defendant asked for costs for these matters in the sum of $70,000 and gave reasons why this sum was reasonable. The defendant acknowledged that if Appendix G were applicable, it would be entitled to between $19,000 and $34,000 for the three matters but submitted that the presiding IJ should depart from Appendix G. The plaintiff, in response, argued that Appendix G was relevant because it had "specifically highlighted its costs concerns at the outset when the High Court initiated the transfer of the case" to the SICC. Having heard the arguments on the applicability of Appendix G, the IJ stated at [14]:

> Given what the Plaintiff says was the parties' understanding at the time when this case was transferred to the SICC (namely, that there should be no difference in the way that costs are taxed as a result of the transfer), I should be guided by Appendix G in assessing the Defendant's reasonable costs pre- and post-transfer. In any event, [*CPIT*] itself states that, when the SICC assesses post-transfer costs, Appendix G should be treated as a relevant factor. Further, Appendix G should not be regarded as a straitjacket. Appendix G cautions in its para 2 that the Costs Guidelines therein are solely:
>
>> … intended to provide a general indication on the quantum and methodology of party-and-party costs awards in specified types of proceedings in the Supreme Court, taking into account past awards made, internal practices and general feedback.

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The IJ then went on to take Appendix G as a starting point in his assessment of the costs. He decided that in the case before him it was not appropriate to depart from Appendix G and he also emphasised, towards the end of his judgment (at [20]), that it was "not necessarily the case that the reasonable costs approach posited in *CPIT* [would] yield a different result" from that obtained by reference to Appendix G.

22 It would be noted that in [24] of the *CPIT* judgment, the court had pointed out that it remained open for the High Court or the SICC to make express orders that Appendix G would continue to be relevant post-transfer. No such order was made in *BXS (Costs)*, the plaintiff's counsel relying only on his concerns expressed at the transfer PTC. In other cases, when similar concerns were raised by one or both parties at the transfer PTC, the Deputy Registrar directed that the issue of the appropriate costs regime after transfer would be left to the IJ hearing the matter.

BYL (Costs) and our views

23 One such case was *BYL (Costs)*. There, at the time of transfer, the Deputy Registrar left open the question of how costs should be assessed thereafter. He ordered:

> (3) The following issues are reserved to the Singapore International Commercial Court:
>
> > (a) whether the High Court costs scale and Order 59 of the Rules of Court should continue to apply to the assessment of costs in respect of *all* proceedings in and arising from HC/OS 992/2019 after its transfer to the Singapore International Commercial Court;
>
> [emphasis added]

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24 When the issue of how the winning party's (the defendant in that case) costs should be assessed came up before the SICC, the plaintiff submitted that the Deputy Registrar's order meant that the court must assess pre-transfer costs in accordance with Appendix G and could only decide whether to apply Appendix G or Rule 46 to post-transfer costs. This argument was not accepted by the IJ who heard that case (and as it happens decided the present case too). He said at [4]:

> … I am unable to accept that reading of the Deputy Registrar's direction. That is because the Deputy Registrar did not simply reserve to the SICC the question of 'whether [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 Deputy Registrar instead went out of his way to insert the word 'all' before 'proceedings'. From that, it seems to me evident that the Deputy Registrar was leaving it to me to determine, at an appropriate time after the transfer of the case to the SICC, if the Appendix G regime should continue to apply to all or any part of the proceedings in or arising from the Plaintiffs' application.

25 With due respect, it appears to us that in *BYL (Costs)* the IJ misinterpreted the Deputy Registrar's order by over-emphasising the word "all" at the expense of the phases "shall continue to apply" and "after its transfer" which also appear in the direction. An order must be read as a whole: one should not glean its meaning from one word when the thrust of the sentence is to the contrary effect. It appears to us that the Deputy Registrar, in his order, was making the statement that whether Appendix G, which had applied to the proceedings up to that point, was to "continue to apply" afterwards in respect of "all proceedings in and arising … after its transfer" was up to the SICC judge who conducted the hearing. In other words, the order was not disapplying Appendix G to the steps taken in the proceedings before its transfer. It was merely saying that whether the costs of whatever happened thereafter would *still* be assessed in accordance with Appendix G or not was up to the SICC judge

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who heard the case, here the IJ. It is the location in the Deputy Registrar's order of the phrase "after its transfer to the Singapore International Commercial Court" at the end of his order that is an important key to its understanding. Had the phrase appeared after the words "should continue" then the matter would have been much more open. As it is, in its actual location, the phrase defines and confines the proceedings to which the reserved question was to apply. What was left to the IJ was whether costs for steps that were taken after transfer should be assessed by reference to Appendix G or not. The order did not, in our view, give the IJ the authority to disapply Appendix G from the earlier steps before transfer. Further, there was nothing in the order that indicated that, even if the IJ decided that Appendix G was not directly applicable to the later steps in the proceedings, the Appendix should not be taken account of to some degree in the assessment. The IJ appears to have thought that the intention of the phrase "after its transfer" was to indicate that the timing of the decision on costs was up to him. With respect, we cannot read the phrase that way. It had nothing to do with it being up to the IJ when to make a decision on costs. Rather, in our view, the phrase referred to the portion of the proceeding in respect of which the IJ would be at liberty to determine the appropriate governing costs regime and to decide to what extent, if any, Appendix G should still play a part in the assessment of reasonable costs.

26 In *BYL (Costs)*, having found that the Deputy Registrar had left it entirely to him to decide what costs regime should apply to the whole of the proceedings from inception, the IJ went on to say at [16] that "in principle, the 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". The IJ considered that this approach would be especially apt when a party had unsuccessfully sought before the SICC to set aside an arbitration award because (at [16]):

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> … 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.

27 In the present case, the Judge cited the portion of [16] of the *BYL (Costs)* judgment that we have set out above and stated that consistently with what he had said in *BYL (Costs)*, "in the normal course of events, once the case has been transferred to the SICC, parties should expect as a matter of principle, in the absence of compelling justification to the contrary, the SICC will assess the entire costs of the setting aside application (or analogous proceedings relating to an arbitral award) on the basis of Rule 46" (at [11]).

28 With due respect to the Judge, we do not agree with his views as expressed in [16] of the *BYL (Costs)* judgment or in [11] of the Costs Judgment here. In the absence of any order made by the Registrar handling the transfer PTC that Appendix G is entirely disapplied or of consent from both the parties to such disapplication, in our view Appendix G will continue to be the guide for the assessment of pre-transfer costs. Whether it plays a role in the assessment of post-transfer costs which, on the face of it, will be assessed under Rule 46, will depend on the circumstances of the case. In relation to pre-transfer costs, however, the losing party should not have to bear the burden of providing "compelling justification" why Appendix G should be referred to; rather it

should be the party who wants Appendix G to be departed from who needs to provide the justification for doing so. This discussion applies, of course, only to cases that have their inception in the High Court and to what happens while they are still there. The policy reasons behind the adoption of Appendix G for cases filed in the High Court do not cease to apply to steps taken there simply because it is later considered appropriate to transfer the case to the SICC for adjudication. It may be that the circumstances of the case once it has been adjudicated will, in the assessment of costs, support a lesser degree of dependence on Appendix G for the pre-transfer costs, as happens even in cases that remain in the High Court. It all depends on the particular facts before the court.

29 It follows from what we have said regarding the interpretation of the order made in *BYL (Costs)*, that the Appendix G order here did not bear the interpretation that the Judge gave it. Although the sentence construction of the Appendix G order differed somewhat from the order made in *BYL (Costs)*, here too the term "proceedings in and arising from" is defined by the phrase "after its transfer to the [SICC]". Rather than considering himself totally freed from the constraints of Appendix G, the Judge should have applied it to his assessment of the pre-transfer costs. The Judge stated at [12] of the Costs Judgment that: "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". We do not agree with this statement in relation to the assessment of pre-transfer costs. In relation to such costs, Appendix G would be the starting point and then a judge would need to decide whether there were factors that justified a higher assessment of the costs, but, regardless, Rule 46 would not be applicable.

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Quantum

30 We now turn to the assessment of quantum. There are two aspects here. First, in line with what we stated earlier, one part of the assessment – that of the pre-transfer costs – was done on the wrong basis, so that provides a ground for us to interfere with the assessment in principle. The other aspect is whether the assessment of the post-transfer costs was reasonable. We also point out that, as parties should be aware, appellate courts do not generally interfere with quantum assessments made at first instance. There must be a significant enough difference in the estimations of the appropriate level of costs made by the first instance court and by the appellate court, before the appellate court will interfere.

31 The Judge laid out at [15] of the Costs Judgment the factors he took into account when assessing the reasonableness of the amount that the Seller's lawyers claimed as their legal costs. These were the following:

(a) The Sellers' lawyers had not been involved in the underlying arbitrations and had to review the records and documents of the arbitrations which had taken place over three years and resulted in seven awards.

(b) The Sellers' lawyers had to keep abreast of proceedings on the on-going ALRO arbitration.

(c) Issues of Thai law were involved and expert evidence was given by both parties.

(d) The Buyers filed six affidavits in support of their setting-aside application, one of which ran to 3,135 pages. The Sellers filed two affidavits in response, totalling 1,664 pages.

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(e) If the Buyers had succeeded in their setting-aside applications, the Sellers stood to lose a principal sum of US$525m, compound interest of 15% on the same and more than €5m and nearly US$800,000 in arbitration costs.

32 The Buyers submitted that the various factors which the Judge had taken into account to justify disregarding Appendix G entirely do not in fact justify that course. We agree in so far as the pre-transfer costs were concerned. The Judge drew no distinction between the pre- and post- transfer costs and therefore did not consider how the factors he mentioned impacted the pre-transfer costs specifically and to what extent they justified departing from Appendix G.

33 We should say a few words about the actual decision in *Sheila Kazzaz* to which reference was made before us. That was another decision by the same Judge who presided below. In that case, the Judge concluded that, although Appendix G continued to be relevant under the Registrar's transfer order, its relevance was decisively outweighed by various complexities in the situation. Indeed, there were a number of facts which made *Sheila Kazzaz* an unusual case. First, and importantly, unlike the present case, there was a contractual term in *Sheila Kazzaz* that entitled the defendants there to costs on "a full indemnity basis". Secondly, the plaintiffs there had made allegations of fraud that had to be dealt with and considered and thirdly, the transactions in question there involved several jurisdictions.

34 Regarding the other factors that the Judge mentioned in [15] of the Costs Judgment, there is no doubt that there was a lot of work for the Sellers' lawyers to do as they had not represented their clients in the arbitration. As Singapore has become more prominent as an international arbitration centre, this

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dichotomy of legal counsel is often the case when matters decided by a Singapore-seated tribunal have to be litigated in the Singapore courts and local counsel are then employed. In so far as pre-transfer costs are concerned we can appreciate that lawyers who come on board for Singapore court proceedings after a complex arbitration has been completed have to tackle substantial legal documentation and this may be time consuming. We do not see it as a factor to justify disregarding Appendix G completely but rather as a factor to be taken into account when deciding whether to give an up-lift on the pre-transfer costs. This is an exercise that High Court judges regularly undertake in respect of arbitration matters before them.

35 While the Judge had emphasised that six affidavits were filed and one contained 3,135 pages, the Buyers argued that he did not appreciate that the length of the affidavits was due to parties adducing a full record of the arbitral proceedings. That was a characteristic which would be common to all setting aside proceedings and does not necessarily carry significant weight in assessing whether to disregard Appendix G for pre-transfer costs. The text of the Buyers' affidavits supporting their setting aside application ran to only 105 pages while the Sellers' affidavits in response contained only 98 pages of text.

36 We note that the Judge commented at [12] of the Costs Judgment that Appendix G would not be realistic in circumstances where a combination of factors would make it a wholly unrealistic measure of what parties might reasonably be expected to spend to safeguard their interests. Such circumstances could include the need to liaise with persons in different jurisdictions, the magnitude of the amount in dispute, the complexity of the arguments and the supporting material and the consequences to a party of losing. We accept that all these are relevant matters which impact the reasonableness of the costs

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claimed in the post-transfer period. But many of these matters are subjective and the court in assessing reasonable costs must have regard to the usual run of similar cases and not be misdirected by the amount a party with deep pockets and a great sense of entitlement is willing to spend.

37 The Buyers pointed out that Appendix G recommended costs of $12,000 per day for a contentious originating summons without cross-examination. The amount that the Sellers claimed and were granted was more than 12 times the recommended sum. The Buyers proposed $35,000 all-in as being more reasonable if Appendix G applied. This was because the proceedings were self-contained with only one interlocutory application which was resolved by consent. Secondly, the issues addressed were not particularly novel and mostly required the application of uncontroversial well-established principles of law to the facts. Thirdly, the Sellers were only required to file one round of reply affidavits and the Judge kept the hearing itself to half a day (four hours).

38 The Buyers submitted that a reasonable amount of costs even if no regard at all was paid to Appendix G would be $65,000 all in and that the figure of $150,000 (even though it included $23,000 for disbursements) was far from reasonable. First, it vastly outstripped other costs awards granted by the SICC in cases arising out of similar factual contexts. The Judge disregarded these precedents as he did not think that such a "comparative exercise" was a valid approach to assessing costs. However, the Buyers argued that it was relevant that in *BXS (Costs)* which concerned the setting aside of an arbitral award, the court had allowed costs in the sum of $40,000 (having regard to Appendix G) and in *BYL (Costs)* where the setting aside proceedings involved senior counsel on both sides in a half day hearing and with expert evidence on Indian law, the court had awarded costs in the sum of $82,500 (having regard to Rule 46 and

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including nearly $35,000 in disbursements). The Judge himself recognised that there are certain factual indicia which are common to setting aside cases heard by the SICC. Further, $150,000 is far higher than the sum which the Sellers sought as security for costs. Their initial request for an amount of $60,000 was made at a time when they had already filed their responsive affidavits so by then they would have had a good measure of their total anticipated legal costs. Subsequently, the Sellers accepted the Buyers' offer of $40,000 as security. The Judge should have paid more regard to this acceptance, according to the Buyers.

39 Our view is that the facts of this case do not justify a wholesale rejection of Appendix G for post-transfer costs. Instead it should have remained one of a number of factors which should have been kept in mind when considering the very high amounts of costs that the Sellers were asking for. We do agree with the Judge that he was entitled to assess costs in accordance with Rule 46 for the post-transfer period and that a figure of $35,000 all-in for both pre- and post-transfer costs would have been unreasonably low in the circumstances.

40 As we have stated, the Judge should have adopted a two-stage process in the assessment of costs. If he had done so, he would no doubt have asked the Sellers to break down their costs into pre- and post-transfer segments. We do not have such estimates. Instead, the Judge having adopted the Sellers' requested figure of $150,000 for the whole proceedings then proceeded as a countercheck to work backwards. He decided that on the basis of two counsel spending 40 hours each at their respective senior and junior rates, the post-transfer work would have cost $61,600. He deducted this figure and a further $23,000 for disbursements from the $150,000 and came up with $65,400 for the pre-transfer work, *ie*, the drafting and filing of the Sellers' affidavits. The Judge

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considered that none of these figures was excessive or exorbitant or disproportionate in the circumstances.

41 We have no quarrel with the award to the Sellers of the disbursements they incurred and would not interfere with this figure. Bearing in mind, however, that if the whole of the costs were assessed with an eye on Appendix G the total figure put forward by the Buyers was $35,000, in our view a sum of $25,000 would have been closer to the mark for the pre-transfer stage. In itself, that sum is considerably higher than the normal figure of $24,000 under Appendix G for an originating summons matter taking two days and where there is no cross-examination. But it does reflect the complexity of the work required in order to attack an arbitration award under the International Arbitration Act (Cap 143A, 2002 Rev Ed) and in this case three awards were involved. We use two days because counsel on both sides estimated that was how long the hearing would take and it was only because of the extensive pre-hearing preparation that the Judge himself did (in relation to reading of the papers, the submissions and authorities) that he was able to complete the hearing within four hours. Then, for the post-transfer stage, the Judge's sum of $61,600 and his basis for arriving at that sum could be adopted as a starting point for the assessment of reasonable costs, although it would always remain open to the court to consider whether there should be any reduction of that sum in the light of the substantially lower figure which would have been recoverable under Appendix G had the case remained in the High Court. Bearing in mind that this is now a theoretical exercise and we will shortly be asked to assess the Buyers' costs before the Judge, we do not wish to posit a final figure. Suffice it to say, that the likely result of the exercise would be lower by a significant enough amount than the $127,000 (excluding disbursements) which the Judge awarded the Sellers for their legal costs.

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42 We consider that precedents in the form of previous costs orders can play a useful role in the assessment process, and will in time do so in the present context, now that the proper approach has been stated. This case was not very different in its features from others of its ilk heard in the High Court over the years. No doubt every case will have its own individual facts but it will also share common features with other cases in the same category. It will be up to the judge to decide whether the matter before the court has sufficient distinguishing features to support an uplift on previous costs awards. A comparison of awards made previously is, in any case, a useful exercise for the purpose of deciding what level of costs would be reasonable.

Conclusion

43 For the reasons given above, even if the Buyers had failed in their substantive appeal, CA 136, we would have allowed the present appeal and made a downwards adjustment in respect of the amount of costs awarded to the Sellers for the proceedings below. The appeal is allowed in any event and the costs order made below is set aside.

44 As for the costs of CA 197, we award these to the Buyers. The parties shall include submissions on the amount of costs payable for this appeal in the written submissions they are making in respect of CA 136.

Judith Prakash Justice of the Court of Appeal	Quentin Loh Judge of the Appellate Division

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Jonathan Mance
International Judge

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