Which Costs Regime Applies for Which Court?
***CBX and another v CBZ and others* [2021] SGCA(I) 4**

I. Introduction

There are separate costs regimes[1] governing proceedings in the Singapore courts. At the time of the case, costs in civil proceedings in the High Court of Singapore ("**HC**") were governed by Order 59 of the Rules of Court 2014 (Cap 322, R 5, 2014 Rev Ed) ("**ROC**"), and subject to the requirements of the "Guidelines for Party-and-Party Costs Awards in the Supreme Court of Singapore" in the Supreme Court Practice Directions 2013 (also known as "**Appendix G**"). Conversely, costs in proceedings commenced in the Singapore International Commercial Court ("**SICC**") were governed by Order 110 rule 46 of the ROC ("**Rule 46**").[2]

However, what was unclear is *which* costs regime applied when a matter is transferred from the HC to the SICC. In *CBX v CBZ* [2021] SGCA(I) 4, the Court of Appeal ("**CA**") has clarified the law as to how costs should be assessed *pre* and *post* transfer, and in particular, the applicability of Appendix G to both *pre* and *post* transfer costs. Further, the CA also provided a clear approach as to the assessment of quantum (amount) of costs.

II. Material Facts

In November 2019, an application was filed in the HC by parties referred to as the "**Buyers**" to set aside parts of two partial awards and a consolidated costs award (collectively the "**Awards**") that had been rendered against them in two International Chamber of Commerce arbitrations in 2016 ("**Setting-Aside Application**"). The awards had been rendered in favour of parties referred to as the "**Sellers**".[3]

On 14 February 2020, the HC ordered that the Setting-Aside Application be transferred to the SICC. The Deputy Registrar made the following order at the time of the transfer ("**Appendix G order**"):

> (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 [the Setting-Aside Application] …, after its transfer to the Singapore International Commercial Court, is reserved to the Singapore International Commercial Court.

At the time of the transfer, the parties had already filed their first round of affidavits. Four further affidavits were filed and both parties put in written submissions before proceeding to the hearing before the SICC in June 2020.

In July 2020, the SICC judge ("**Judge**") delivered his judgment ("**Merits Judgment**"), finding in favour of the Sellers and dismissing the Setting-Aside Application. In a further judgment issued in October 2020 ("**Costs Judgment**"), the Judge awarded the Sellers the full amount they sought as their costs of the Setting-Aside Application, amounting to $150,000 all-in (i.e., inclusive of

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[1] Costs are usually awarded by the court at the conclusion of a civil trial, where the amount payable for costs will be awarded between the party who filed the claim and the party against whom the claim was made. "Costs" are the legal expenses accumulated during a lawsuit (including the lawyer's fees), while "disbursements" are out-of-pocket expenses incurred in the course of representing a case (e.g. photocopying charges and filing fees paid to the courts).

[2] Under the new Rules of Court 2021 which came into operation on 1 April 2022, the equivalent provision to Order 59 ROC is Order 21, where the assessment of costs under the new rules is similar to that under the ROC. Under the new SICC Rules 2021, which came into operation on 1 April 2022, the equivalent provision to Order 110 rule 46 ROC is Order 22 rule 2 and rule 3, where the new rules provide a non-exhaustive list of circumstances which the SICC can take into account when considering the proportionality and reasonableness of costs.

[3] These arbitrations were related to a commercial dispute over a sale and purchase agreement of shares between the Sellers and Buyers – the Sellers alleged that the Buyers were in default because of late payments, while the Buyers denied they were in default because the payment dates were postponed.

disbursements) with interest at 5.33% per annum from the date of the Costs Judgment. The basis was that as the Sellers had prevailed in the setting-aside applications, they should have the costs of those applications.

In rendering the Costs Judgment, the Judge rejected the Sellers' submission that Appendix G and Order 59 of the ROC remained relevant to the assessments of costs both *pre* and *post* transfer of the case to the SICC, and instead held that Rule 46 applied to the assessment of costs of the entire Setting-Aside Application. The Judge also rejected the Sellers' attempt to discount the $150,000 award to $35,000, holding that Appendix G did not apply in the assessment of "reasonable" costs.

In doing so, the Judge relied on the previous case of *BYL and another v BYN* [2020] 4 SLR 204 ("***BYL***"). In *BYL*, the Deputy Registrar had ordered for the assessment of costs to be reserved for the SICC's judgment. In particular, the order by the Deputy Registrar indicated that the SICC was to decide "whether the HC costs scale and O[rder] 59 of the ROC should continue to apply to the assessment of costs in respect of *all* proceedings arising from the originating action after its transfer to the SICC". The claimant in that case argued 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. However, the international judge ("***BYL* IJ**") rejected that argument, holding that the inclusion of the word "all" before "proceedings" indicated that it was for the *BYL* IJ 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 plaintiff's application. Further, the *BYL* IJ, having found that he had the liberty to decide what costs regime should apply to the whole of the proceedings from inception, also held that the *pre* and *post* transfer costs ought to be assessed in accordance with Rule 46. Applying the *BYL* IJ's holding in the Costs Judgment, the Judge held that once the case has been transferred to the SICC, in the absence of compelling justification to the contrary, the SICC will assess the entire costs of the setting aside application using Rule 46.

III. Issues on Appeal

The Buyers appealed against both the Merits Judgment and the Costs Judgment. The CA held that the Merits Judgment should be reversed and that the Awards should be set aside. As the Merits Judgment formed the basis on which the Costs Judgment was made, it followed that the appeal on the Costs Judgment should also succeed, and the costs order made by the Judge set aside.

However, this appeal was sought by the Buyers on the premise that the Judge had erred in principle in his award of costs. Therefore, even if the appeal against the Merits Judgment were to fail, the CA held there was a basis for it to interfere with the assessment of the Sellers' costs and substantially reduce the amount granted. The CA thus dealt with the substance of the appeal on the Costs Judgment, i.e. expressed its views on the assessment of costs in a case that is transferred from the HC to the SICC. The CA first explained the applicable legal background, before determining the following issues:

- Whether the Judge erred in finding that Appendix G would not be applicable to costs incurred *pre-transfer* of proceedings to the SICC, and in entirely disregarding the guidance of Appendix G in assessing the reasonableness of costs incurred *post-transfer* to the SICC; and
- Whether the Judge erred in finding that the quantum of $150,000 (all-in) was "reasonable" in the circumstances.

A. Background

<u>(i) The applicable costs regime</u>

The CA first laid out the applicable costs regimes in the different courts. Costs in civil proceedings in the HC are governed by Order 59 ROC, while costs in proceedings in the SICC are governed by Order 110 rule 46 of the ROC. Moreover, Appendix G, which is 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, sets out a range of possible costs that may be awarded in respect of different matters that come before the courts. Appendix G applies specifically to proceedings originating in the HC, but not to proceedings originating in the SICC.

Appendix G indicates that where there is a contentious originating summons heard in the HC, 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. Judges are not bound by the range, and may choose to move beyond if it they wish.

However, in SICC cases, Rule 46 does not specify numerical ranges, and instead lays down the general rule that "[t]he 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." As such, a judge in SICC proceedings has to determine what is "reasonable", which involves considering factors beyond the type of proceeding, the number of hearing hours and the type of transcription service employed.

(ii) Two types of cases heard and determined by the SICC

The CA noted the two types of cases determined by the SICC. The first originates from a fresh filing in the SICC Registry (i.e., a case commenced in the SICC). The second is a transfer case, which originates from a filing in the Registry of the HC (i.e., a case commenced in the HC). The former is governed by Order 110 of the ROC from its inception, and is therefore always and only subject to the costs regime under Rule 46. The latter is subject to the ROC generally (excluding Order 110) and the applicable costs regime established by Order 59, with the award of costs subject to the guidance of Appendix G. Order 59 applies until and unless the case is transferred to the SICC pursuant to powers vested in the Registrar.

B. Appendix G

The CA first addressed the Judge's reliance on the previous case of *BYL*. The CA disagreed with the *BYL* IJ's decision. It held that the *BYL* IJ had misinterpreted the Deputy Registrar's order by over-emphasising the word "all" at the expense of the phrases "shall continue to apply" and "after its transfer" which also appeared in the order. The CA stressed the importance of reading an order as a whole, and stated that the Deputy Registrar was instead leaving it to the *BYL* IJ to decide 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". This meant that the order was not disapplying Appendix G to the steps taken in the proceedings *before* its transfer, but was stating that the *BYL* IJ was to decide whether or not the costs of whatever happened thereafter would *still* be assessed in accordance with Appendix G.

The CA also noted that such an interpretation accorded with the phrase "after its transfer to the SICC" being located at the end of the Deputy Registrar's order, which signified that the *BYL* IJ could only decide whether costs for steps that were taken after transfer should be assessed by reference to Appendix G. The order did not give the *BYL* IJ the authority to disapply Appendix G from the earlier steps before transfer. Moreover, even if the *BYL* IJ decided that Appendix G was not directly applicable to the later steps in the proceedings, the CA decided that Appendix G should still play a part in the assessment of reasonable costs.

The CA further disagreed with the Judge's views that Rule 46 would apply to assess the entire costs of a setting aside application transferred to the SICC, holding that unless an order was made by the Registrar handling the transfer that Appendix G is entirely disapplied or where both the parties consented to such disapplication, Appendix G would continue to be the guide for the assessment of *pre*-transfer costs. As for *post*-transfer costs, which *prima facie* would be assessed under Rule 46,

depending on the circumstances of the case, Appendix G could still play a role in the assessment of such costs.

For *pre*-transfer costs, the party who wants Appendix G to be departed from needs to provide the justification for doing so. The losing party should not have to bear the burden of providing "compelling justification" why Appendix G should be referred to. The CA further observed that the policy reasons[4] behind the adoption of Appendix G for cases filed in the HC 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.

The CA also disagreed with the Judge's interpretation of the Appendix G order,(which he deemed to allow him to entirely disapply Appendix G). The term "proceedings in and arising from" was defined by the phrase "after its transfer to the [SICC]". As such, the CA held that the Judge should have applied Appendix G to his assessment of the *pre*-transfer costs instead of disregarding it entirely. The CA also disagreed with the Judge's statement in the Costs Judgement that Appendix G could "serve as a useful reality or starting point against which to evaluate whether costs are or are not reasonable within the terms of Rule 46". Instead, in the assessment of *pre*-transfer 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. Nevertheless, Rule 46 would *not* be applicable.

C. Quantum

The CA noted that there were two aspects to the assessment of quantum: whether the assessment of the *pre*-transfer costs was done on a wrong basis, and whether the *post*-transfer costs assessment was reasonable. The CA noted that the assessment of the *pre*-transfer costs had been calculated on an incorrect basis; as such, it could – in-principle – interfere with the assessment. However, it clarified that appellate courts generally do not interfere with quantum assessments, and would only do so when there is a significant enough difference in the estimations of the appropriate level of costs made by the court of the first instance, and the appellate court.

Regarding reasonableness: the CA noted that the Judge had considered five factors when assessing the reasonableness of the amounts the Sellers' lawyers claimed as their legal costs: (1) 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; (2) the Sellers' lawyers had to keep abreast of proceedings on an ongoing (separate) arbitration between the parties; (3) issues of Thai law were involved and expert evidence was given by both parties; (4) the Buyers had filed six affidavits in support of their setting-aside application (one of which ran to 3,135 pages), while the Sellers had filed two affidavits totalling 1,664 pages; and (5) 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.

The CA agreed with the Buyers' argument that these factors did not justify the Judge disregarding Appendix G entirely, insofar as the *pre*-transfer costs were concerned. The Judge had drawn no distinction between the *pre* and *post*-transfer costs and therefore did not consider how these factors affected the *pre*-transfer costs specifically, and to what extent they justified departing from Appendix G. The CA also stated the following:

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[4] As stated in Appendix G, the guidelines 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, taking into account past awards made, internal practices and general feedback." These guidelines only apply to proceedings in the Supreme Court (including the HC), and do not apply to proceedings in the SICC, which has its own directions as to costs laid out in the SICC Practice Directions 2015.

One, the CA recognised that the Sellers' lawyers had a lot of work to do as they had not represented the Sellers in the arbitration. However, such dichotomy of legal counsel was not uncommon in light of Singapore's growing prominence as an international arbitration centre. When matters decided by a Singapore-seated tribunal have to be litigated in the Singapore courts, local counsel (who may not have been involved in the arbitration) are then employed. With respect to *pre*-transfer costs, lawyers who come on board for Singapore court proceedings after the completion of a complex arbitration would have to tackle substantial legal documentation and this would likely be time consuming. While this did not justify a complete disregard of Appendix G, it was a factor to be taken in account when deciding whether to give an up-lift on the *pre*-transfer costs.

Two, the Buyers argued that the Judge did not appreciate that the length of the affidavits was due to parties producing a full record of the proceedings. However, this was a characteristic common to all setting-aside proceedings, and did not necessarily carry significant weight in assessing whether to disregard Appendix G for *pre*-transfer costs.

Three, the Judge had commented that Appendix G would not be realistic in circumstances where a combination of factors would make it an unrealistic measure of what parties might reasonably be expected to spend to safeguard their interests. Such circumstances could include: the need to liaise with person 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. While these were relevant matters affecting the reasonableness of the costs claimed in the *post*-transfer period, they were subjective in nature. A court, in assessing reasonableness 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 was willing to spend.

Four, the Buyers argued that if Appendix G applied, an all-in sum of $35,000 was more reasonable:

- The proceedings were self-contained with only one interlocutory application which was resolved by consent.
- The issues addressed were not particularly novel and mostly required the application of uncontroversial well-established principles of law to the facts.
- 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).

Conversely, the Sellers argued that where no regard was given to Appendix G, a reasonable amount of costs would be $65,000 all in (instead of the $150,000 awarded):

- $150,000 vastly outstripped other cost awards granted by the SICC in cases arising out of similar factual contexts; the Judge had disregarded these cases because he did not think that such a "comparative exercise" was a valid approach to assessing costs.
- $150,000 was far higher than the $60,000 which the Sellers had sought as security for costs; moreover, the Sellers had subsequently accepted the Buyers' offer of $40,000 as security.

Considering the above arguments, the CA agreed that the Judge was entitled to assess *post*-transfer costs in accordance with Rule 46 and that the all-in sum of $35,000 for both *pre*- and *post*- transfer costs would have been unreasonably low in the circumstances. However, the facts of the present case did not justify a wholesale rejection of Appendix G for *post*-transfer costs. Instead, Appendix G should have remained a factor in contemplation when considering the very high amounts of costs for which the Sellers were asking.

The CA then considered the Judge's assessment of costs. The CA held that the Judge should have adopted a two-stage process in the assessment of costs. If the Judge had done so, the CA noted he

would no doubt have asked the Sellers to break down their costs into *pre* and *post* transfer segments. Instead, the Judge had adopted the Sellers' requested figure of $150,000 for the whole proceedings and then proceeded as a countercheck to work backwards. Based on that figure, the Judge 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, i.e. the drafting and filing of the Sellers' affidavits. The Judge concluded that none of these figures was excessive or exorbitant or disproportionate in the circumstances.

Finally, the CA considered the Judge's award. The CA upheld the award of $23,000 in disbursements to the Sellers. However, as regards costs, the CA held that a sum of $25,000 (instead of the awarded $65,400) would have been more appropriate for the *pre*-transfer stage. Although this was higher than the normal figure of $24,000 under Appendix G for an originating summons matter taking two days and without cross-examination, the CA held that it reflected the complexity of the work required to attack an arbitration awarded under the International Arbitration Act (Cap 143A, 2002 Rev Ed) and that three awards were presently involved. The CA further noted that its use of two days in its assessment was due to the estimations by both parties' counsel as to how long the hearing would take, coupled with the fact that the actual hearing was completed within four hours only because the Judge himself had conducted extensive pre-hearing preparation.

Thus for costs in the *post*-transfer stage, the CA acknowledged that 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 the court had the discretion 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 HC.

Although the CA did not posit a final figure for the total sum of costs, it held that the only outcome from its undertaking of the two-stage process would be an amount significantly less than the $127,000 (excluding disbursements) which the Judge had awarded the Sellers for their legal costs. On a final note, the CA observed that while each case was unique on the facts, there would be common features shared among cases within the same category. Moreover, while a judge has to discretion 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 nonetheless still a useful exercise for the purpose of deciding what level of costs would be reasonable.

IV. Conclusion

The CA allowed this appeal, and set aside the costs order below. It further stated that even if the Buyers had failed in their appeal of the Merits Judgment, the CA would have allowed the appeal on the Costs Judgment, and made a downwards adjustment in the amount of costs awarded to the Sellers.

V. Lessons Learnt

The judgment clarifies the Singapore courts' position with respect to the applicable costs regimes for the various courts, as well as the approach courts should employ to the assessment of costs – especially for cases involving a transfer of proceedings. This author suggests three key takeaways:

(a) Costs in HC proceedings are governed by Order 59 ROC and subject to guidance of Appendix G. On the other hand, costs in SICC proceedings are governed by Rule 46. However, when there is a transfer of proceedings from the HC to the SICC, whether or not Appendix G continues to guide the assessment of *pre*-transfer costs depends on the order made by the Registrar handling the transfer or of consent from both parties. *Post*-transfer costs will be assessed under Rule 46, but depending on the circumstances of the case, Appendix G could still play a role in the assessments of such costs.

(b) If a party wishes for Appendix G to be disregarded in assessing *pre*-transfer costs, he or she

must provide justification for doing so. If such justification is not provided, Appendix G would continue to apply to cases which originate in the HC, even if it is later considered appropriate to transfer the case to the SICC for adjudication.

(c) With respect to the assessment of costs in a case transferred from the HC to the SICC, courts should adopt a two-stage process, first assessing the *pre*-transfer costs, before assessing the *post*-transfer courts. Courts should refrain from deriving an all-in sum of both *pre*- and *post*-transfer costs.

It is also important to note that the CA's approach in the present case has been subsequently adopted by the SICC in the case of *Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter* [2022] SGHC(I) 6. In that case, the SICC considered both *pre* and *post* transfer costs distinctly, and followed the CA's holding that Appendix G would be the starting point when it comes to *pre*-transfer costs. Moreover, Appendix G would remain relevant for the SICC's consideration in its assessment of *post*-transfer costs in transfer cases where the HC orders that Order 59 ROC applies up to the point of transfer and costs awarded after transfer shall be left to the discretion of the SICC – although the SICC noted that such a situation where Appendix G would assume relevance in SICC cases would be very exceptional. This was also applied in the subsequent case of *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2022] SGHC(I) 8, where the SICC in its assessment of *post*-transfer costs acknowledged that Appendix G would still be relevant, but held that on the facts of the case, little weight would be attached to Appendix G.

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