IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(I) 30

Originating Application No 8 of 2023

Between

Transpac Investments Limited

… *Claimant*

And

TIH Limited

… *Defendant*

JUDGMENT

[Civil Procedure — Costs — Principles]
[Civil Procedure — Interest — Pre-judgment interest]

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Transpac Investments Ltd
v
TIH Ltd

[2024] SGHC(I) 30

Singapore International Commercial Court — Originating Application No 8 of 2023
Sir Henry Bernard Eder IJ
27 September 2024

18 October 2024 Judgment reserved.

Sir Henry Bernard Eder IJ:

Introduction

1 This judgment follows on from my earlier judgment in SIC/OA 8/2023 ("OA 8" or the "Suit") dated 20 August 2024, published as *Transpac Investments Ltd v TIH Ltd* [2024] SGHC(I) 23 (the "Judgment"), whereby the court granted judgment in favour of the claimant, TIL, against the defendant, TIH. I shall use the same abbreviations as those used in the Judgment. The two outstanding issues concern: (a) TIL's claim for costs and disbursements; and (b) TIL's claim for interest. I deal with each in turn.

Costs

2 The applicable principles are not in dispute. A distinction has to be drawn between costs incurred before the transfer of the Suit to the Singapore

International Commercial Court ("SICC") ("pre-transfer costs") and costs incurred after the transfer of the Suit to the SICC ("post-transfer costs"). Here, it is common ground that Appendix G of the Supreme Court Practice Directions 2021 ("Appendix G") continues to be a guide for the assessment of pre-transfer costs: *Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter* [2023] 4 SLR 77 at [27], citing with approval *CBX and another v CBZ and others* [2022] 1 SLR 88 at [28]. With regard to post-transfer costs, a successful party is entitled to costs and the quantum of the costs award will generally reflect the costs incurred by the party entitled to costs, subject to principles of proportionality and reasonableness: see O 22 r 3(1) ("r 3(1)") of the Singapore International Commercial Court Rules 2021 ("SICC Rules 2021") and *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 ("*Senda*") at [51]–[79].

3 TIL now claims the following costs:

(a) pre-transfer costs amounting to $50,000;

(b) post-transfer costs amounting to $1m;

(c) cost for abortive work carried out in respect of SIC/SUM 37/2024 ("SUM 37") in the sum of $15,000; and

(d) disbursements of $162,976.64 (inclusive of TIL's expert Professor Huang's expert fees of $44,059.20).

4 In support of these claims, TIL provided information concerning the hourly rates charged by the lawyers involved, *viz*:

(a) Mr Foo Maw Shen ("FMS") (32 years' call) with an hourly rate of $950;

(b) Mr Chu Hua Yi ("CHY") (17 years' call) with an hourly rate of $850;

(c) Mr Leonard Lee ("LL") (4 years' call) with an hourly rate of $550 (involved until end-December 2023); and

(d) Mr Foo Jyh Howe ("FJH") (4 years' call) with an hourly rate of $600 (from end-December 2023 to date); and

(e) Mr Goh Jia Jie ("GJJ") (5 years' call) with an hourly rate of $600 (who was only asked to help in carrying out research for the speaking note).

5 In addition, TIL provided a breakdown of the total time spent in conducting the Suit, *viz*,

(a) Pre-transfer, from April 2022 to 30 June 2023 (the date on which the Suit was transferred to the SICC), the total is $117,597.50 for a total of 151 hours of work, broken down as follows:

(i) FMS: 51 hours, totalling $48,450;

(ii) CHY: 46.3 hours, totalling $37,715; and

(iii) LL: 53.7 hours, totalling $31,432.50.

(b) Post-transfer, from 1 July 2023 to 5 June 2024 (the completion of the trial), the total is $1,006,450 for a total of 1,243.75 hours of work, broken down as follows:

(i) FMS: 364.50 hours, totalling $346,275;

(ii) CHY: 530.50 hours, totalling $450,925; and

(iii) LL / FJH / GJJ: 348.75 hours, totalling $209,250.

Pre-Transfer Costs – $50,000

6 In support of its claim under this head, TIL submitted in summary as follows:

(a) The Case Management Plan dated 21 July 2023 ("CMP") jointly submitted by parties showed that pre-transfer costs incurred by both parties at the point of transfer to the SICC were substantial, *viz*, for TIL, $120,000 (excluding disbursements); and, for TIH, $200,000 (excluding tax and disbursements). Both TIL's and TIH's estimate of the overall costs if the matter proceeded to trial on its merits was $750,000 (excluding disbursements).

(b) Based on Appendix G, Part III(A)(ii), the guide for party-and-party costs for matters that are settled before trial at the pleadings stage in the General Division of the High Court are (i) for commercial matters: $5,000 to $14,000; and (ii) for equity and trusts matters: $5,000 to $18,000.

(c) Given that the Suit dealt with both commercial matters and multiple and complicated issues relating to equity and trusts, both tariffs should apply *cumulatively*. Hence, the range should be between $10,000 and $32,000.

(d) In cases where the pre-transfer work done involves a higher level of complexity, it is open to the court to adopt a higher costs range within Appendix G: see *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2024] 5 SLR 1 ("*BCBC Singapore*") at

[53]–[54] where the SICC applied the higher Appendix G costs range to reflect the level of complexity involved.

(e) In addition, it is open to the court to apply an uplift on the appropriate Appendix G costs. In *BCBC Singapore*, the SICC at [58] allowed an uplift of $2,000 to the successful defendants' pre-transfer costs for pleadings-related work, bearing in mind that "during the pre-transfer period, two sets of amendments had been made to the statement of claim, defence & counterclaim and the reply to defence & counterclaim".

(f) The court should here allow an approximate 1.5 times uplift having regard, in particular, to the complexity of the issues.

(g) In light of all the above, TIL ought to be awarded pre-transfer costs in the sum of $50,000, *ie*, $32,000 (the highest tariff in the costs range for pleadings under the commercial and equity and trusts category) plus an approximate 1.5 times uplift.

7 TIH submitted that no pre-transfer costs should be awarded. Alternatively, the amount awarded should be no more than $5,000 solely for the preparation of the statement of claim and particulars.

8 In support of that submission, TIH submitted in summary that: (a) the pre-transfer period was only nine months long; (b) the pleadings were at an early stage; (c) the documents in the case (at least at that stage) were not voluminous by any stretch; (d) the issues in the case were far less complex than in *BCBC Singapore*; (e) there is no basis for adding together the tariffs in Appendix G; (f) the figures given by the parties in the Agreed Trial Checklist filed on 1 April 2024 (the "Agreed Trial Checklist") are not determinative or binding on costs;

(g) TIL's costs include excessive/disproportionate time costs; and (h) the amount claimed includes costs incurred in respect of TIL's summary judgment application (HC/SUM 4240/2022) which should, in any event, be disallowed, because TIL agreed to pay costs to TIH in the sum of $8,000 plus disbursements of $1,995.40 in respect of their withdrawal of the application.

9 As to these submissions, I see no basis for mechanistically adding together the tariffs in Appendix G. At most, it seems to me that the starting point should be the top end of the range for equity and trusts matters, *ie*, $18,000. I say "starting point" because I readily accept that it is open to the court to apply an "uplift" in appropriate circumstances. However, whilst I recognise that the figures given by the parties in the Agreed Trial Checklist appear to show that substantial costs were apparently incurred by both parties pre-transfer, the fact is that the case was still at a relatively early stage when the case was transferred to the SICC. Further, bearing in mind TIH's submissions as summarised above, I do not consider that the uplift suggested by TIL is justifiable when considered, for example, in the context of the $2,000 uplift allowed in *BCBC Singapore*. Indeed, I see no reason why the uplift in the present case should be higher.

10 For these brief reasons, I would allow $20,000 (all-in) in respect of pre-transfer costs.

Post-Transfer Costs - $1m plus $15,000 in respect of SUM 37

11 As stated above, the regime for awarding post-transfer costs is very different, *viz*, a successful party is entitled to costs and the quantum of the costs award will generally reflect the costs incurred by the party entitled to costs, subject to principles of proportionality and reasonableness.

12 There is no doubt that TIL is properly to be regarded as the overall successful party. However, it remains to consider the extent to which the costs claimed by TIL are proportionate and reasonable and what if any discounts ought to be applied having regard to the considerations referred to in r 3(1) and *Senda*.

13 Here, TIL submitted that the costs claimed were proportionate and reasonable. In support of that submission, TIL relied on a number of matters which I summarise as follows:

(a) The court rejected all of TIH's defences that spanned a broad range of factual and legal issues, including those relating to contractual interpretation of clause 4 of the Bond Deed read with clause 2.7 of the BOA, whether 99% of the Parallel Funds Contingent Claims had indeed been distributed or released pursuant to clause 2.7.3 of the BOA, interpretation of the trust deeds of the Parallel Funds, alleged breaches of fiduciary duties and alleged conflict of interest and duty on the part of the trustee of the Parallel Funds and TIL, wide-ranging arguments in the context of equitable defences such as estoppel and the doctrine of "unclean hands" raised against TIL and limitation periods.

(b) What started as a straightforward claim that an Account Closure Event had occurred under the BOA was substantially and unduly complicated by TIH raising numerous serious allegations ranging from fraud, dishonesty, suggestions of possible contraventions of Chinese tax laws to breaches of equitable duties (not just on the part of TIL but also on the part of the trustee of the Parallel Funds, when the trustee was not even a party to the Bond Deed and BOA). All these defences eventually failed; but TIL have had to deal with them in the Suit, leading to

substantial costs having to be incurred (ironically, to recover its own money).

(c) Even after the Judgment was released, TIH filed a stay application pending appeal *via* SUM 37 (in circumstances where it did not file any appeal) to prevent the Bond Amount from being released, only to withdraw it on the very day that parties were supposed to exchange submissions.

14 In broad terms, I readily accept that the litigation raised complex and substantial issues of both law and fact (the latter requiring consideration of relevant events over an extended period) as is plain from the terms of my Judgment. In light of that fact and that the amount in dispute was in excess of US$10m, it cannot be said that the costs incurred were disproportionate. However, it remains to consider whether the costs claimed were reasonable.

15 As stated above, TIL claims post-transfer costs of $1m (excluding disbursements and goods and services tax) which, it submitted, had been sensibly and reasonably incurred for the following reasons:

(a) Complex factual and legal issues had to be dealt with and traversed. These required substantial arguments at length – see [94] of the Judgment for a summary of issues dealt with in the Judgment.

(b) Substantial witness statements (supported by exhibits) were filed by both sides.

(c) Additionally, expert evidence on Chinese tax law was required to be adduced to deal with the very complex issues of tax regulations in China and on whether there was any risk of the Chinese tax authorities

being able to recover the Contingent Claims. As the Chinese regulations and authorities were mostly not in the English language, they had to be translated.

(d) Accordingly, much skill, knowledge and responsibility was required, and much time and labour (1242.25 hours in total, post-transfer) had been expended by TIL's counsel, which consisted of FMS (32 years' experience), CHY (17 years' experience) and one senior associate (4–5 years' experience).

(e) Very serious and wide-ranging allegations had been raised by TIH (which have all been rejected by this court) that TIL had no choice but to deal with in the witness statements, at trial and in the speaking note.

(f) The value of TIL's claim is high, *ie,* the US$10m Bond Amount plus any interest thereon as *per* clause 4 of the Bond Deed.

(g) The release of the Bond Amount was of utmost importance to TIL, given that TIL had been seeking the release of the Bond Amount since December 2015, but was constantly met with resistance from TIH. It was Dr Leong's evidence that TIL has suffered great opportunity loss by virtue of TIH's refusal to co-operate in the release of the Bond Amount. This eventually resulted in TIL commencing OA 8 against TIH, which only concluded after eight days of trial.

(h) It is also to be noted that the person involved and with knowledge of the transaction on TIL's side, *ie*, Dr Leong, is already over 80 years old. Many of the other persons were no longer with TIL. It was thus imperative for TIL and Dr Leong (on a personal level), to seek the return

of the Bond Amount, before persons with such knowledge are no longer available.

(i) Further, by TIH's own estimate at para 11 of the Agreed Trial Checklist, it would have incurred an estimated $950,000 from the commencement of OA 8 until the end of trial, which is similar to the total costs of $1,050,000 (excluding disbursements) claimed by TIL. It is appropriate for the court to order costs claimed by the successful party if the unsuccessful party's estimate of costs is similar or identical: *Reliance Infrastructure Ltd v Shanghai Electric Group Co Ltd* [2024] SGHC(I) 8 at [14], referring to *Qilin World Capital Ltd v CPIT Investments Ltd and another appeal* [2019] 1 SLR 1 at [32]. In this regard, it is not unusual for TIL's costs (as the claimant) to be somewhat higher than TIH's costs (as the defendant), given that the claimant has the general carriage of the proceedings: *Pertamina International Marketing & Distribution Pte Ltd v P-H-O-E-N-I-X Petroleum Philippines, Inc (also known as Phoenix Petroleum Philippines, Inc) and another matter* [2024] SGHC(I) 26 at [10(g)].

16 Whilst TIH acknowledged that TIL was entitled to an award of costs in TIL's favour, it was TIH's case that: (a) TIL's post-transfer costs should be reduced substantially and capped at $500,000 (or 50% of the amount claimed by TIL); and (b) TIL's disbursements should be similarly discounted by 50% for lack of particularity.

17 As for the sum claimed of $1m, TIH submitted that this was excessive and unreasonable for various reasons as set out in TIH's written submissions. I deal with specific objections raised by TIH below but before doing so I bear well in mind the following general points:

(a) In support of its submissions, TIH drew my attention to the Guide to the Assessment of Costs in the Singapore International Commercial Court and the reference there made to a number of other costs awards previously made in this court which, it was said by TIH, had similar features to the present case. I recognise the force of that submission although ultimately each case must turn on its facts.

(b) According to TIH, this case did not involve any particular difficulty or novelty. I do not accept that submission. In my view, TIH raised a plethora of difficult points of law (both Singapore law and Chinese law) and fact which were far from straightforward.

(c) TIH relied on the fact that no Senior Counsel, King's Counsel or other foreign lawyers were involved. Both sets of solicitors operated with "lean teams"; TIH only had three lawyers on the team at any one point in time, and TIL's team comprised between three and five lawyers. In such circumstances, it seems to me that there must have been at least duplication of work on both sides and that this must be taken into account.

(d) TIH submitted that there was no particular urgency in the case. In part, that is true, but the fact is that I can well understand why, after so much delay, TIL was keen to obtain a decision as soon as possible.

(e) TIH drew my attention to the fact that there had been a mediation in 2023. However, that failed to achieve a settlement. In my view, nothing turns on this point.

(f) Both TIL's and TIH's estimate at the CMP of the overall costs if the matter proceeded to trial on the merits was $750,000 (excluding

disbursements); and although such estimates are, of course, not determinative or binding on costs, they are nevertheless a potentially relevant factor to be taken into account.

(g) Although TIL was the overall successful party, it is important to note that, as submitted by TIH, I rejected TIL's case under clauses 2.7.2 and 2.7.5 of the BOA. Although the former limb of TIL's claim did not take up much time, the latter involved a significant amount of time and therefore costs. On this basis, TIH submitted that this should be reflected in a significant reduction in costs including the disallowance of the entirety of the expert's fees that, on the basis of the Judgment, went solely to TIL's case based on clause 2.7.5. I see much force in that submission. However, there are two main counter-arguments to that submission. First, if TIH had not sought to challenge TIL's case on the basis of clause 2.7.3, the whole trial would have been unnecessary. Second, although TIH defeated TIL's claim based on clause 2.7.5, TIL succeeded on a substantial sub-issue in relation to Chinese law. In the circumstances, it seems to me that these factors need to be taken into account and reflected in the award of costs.

18 Bearing everything I have said in mind, having considered the various breakdowns provided by TIL and doing the best I can on the information provided, it is my view that the following sums claimed are excessive and unreasonable, *viz*,

(a) $19,285 claimed by TIL for drafting further and better particulars. This seems to me a relatively straightforward exercise. I would only allow $12,000.

(b) The sum claimed for various amendments to the statement of claim (totalling $35,650). TIL had previously agreed to pay TIH costs occasioned by these amendments, and TIL had apparently paid these costs in April 2024. Claim disallowed in full.

(c) $87,240 (representing over 117 hours of billed time) for preparing the first list of documents. This seems to be an excessive amount of time to have spent on this exercise. I would only allow 50% of this claim, being $43,620.

(d) $230,090 and $36,575 for preparing TIL's factual and expert witness statements as well as its opening statement. Again, this seems an excessive amount of time to have spent on this exercise. I would in total allow $150,000.

(e) $416,445 for "[p]reparation and getting up for, and attendance at trial". This represents approximately 475 hours which, on any view, seems difficult to justify. Further, I suspect that a large amount of this time was spent in relation to TIL's case based on clause 2.7.5 as to which I bear in mind my comments in [17(g)] above. For these reasons, I would, at most, allow $275,000 in respect of this item of claim, representing approximately 66% of the sum claimed.

(f) $19,960 for "[w]ork done in respect of Security for Costs furnished on 13 May 2024, pursuant to SIC/SUM 14/2024". As noted at [41] of my judgment for TIH's application for further security for costs in SIC/SUM 14/2024 ("SUM 14"), which was published as *Transpac Investments Ltd v TIH Ltd* [2024] SGHC(I) 12, TIL must pay TIH's costs of this application. I thus disallow TIL's claim for $19,960 as work done in SUM 14.

19 For these reasons, I would reduce the sum claimed by approximately $364,625 and therefore allow the sum of $635,375 under this head. To this sum, I would allow the further sum claimed by TIL of $15,000 in respect of TIH's application for a stay of enforcement (SUM 37) which was withdrawn by TIH at a late stage – making a total (with some small rounding) of $650,500.

Disbursements - $162,976.64

20 Under this head, TIL claims disbursements of $162,976.64 (inclusive of Prof Huang's expert fees of $44,059.20). TIH submitted that only 50% of this figure should be allowed.

21 In this context, TIH drew attention to the observations of the Court of Appeal in *Senda* at [100(c)] to the effect that the party claiming costs for expert fees should provide a breakdown of number of hours claimed and some explanation of what work those hours were incurred for. Further, TIH submitted that, instead, TIL's table of disbursements only stated Prof Huang's hourly rate of RMB1,500 and the total hours spent, which is insufficient for the court to determine whether such costs are reasonable. I do not accept that submission. The work done by Prof Huang appears from the face of his reports which were, in my view, thorough and careful. Given that work, it seems to me that his fees are perhaps somewhat modest. I would allow those expert fees in full.

22 I note that TIH also raises some further objections to some of the entries claimed by TIL under this head on the basis that, according to TIH, the entries are "entirely opaque". Although I see some force in that submission, I do not find this very surprising since TIH's objections concern three relatively small sums totalling approximately $16,000. In the circumstances, I would reduce the total amount claimed by approximately $8,000.

23 With some rounding, I would therefore allow disbursements in the sum of $155,000.

Conclusion on Costs

24 For all these reasons, I would assess the post-transfer costs payable by TIH to TIL in the total sum of $650,500 + $155,000, *ie*, $805,500 including disbursements, excluding goods and service tax. From that sum, I would deduct the sum of $35,000 (all-in) to be paid by TIL to TIH, which is my decision after considering and netting off sums due (if any) in respect of various interlocutory matters, namely SIC/SUM 47/2023, SIC/SUM 48/2023, SIC/SUM 16/2024 and SUM 14.

25 The result is that it is my conclusion that TIH must pay to TIL the net sum of $790,500 (taking into account pre-transfer costs, post-transfer costs and disbursements, but excluding goods and service tax (where applicable)), such sum to be paid within 14 days of the date of this Judgment together with simple interest at 5.33% *per annum* from that date until payment; and I so order.

Pre-Judgment interest from 29 December 2015 until the date of Judgment or until the date on which TIH withdrew SUM 37

26 In support of this claim, TIL submitted that, as a matter of principle, claimants who have been kept out of pocket without basis should be able to recover interest on money that was found to have been owed to them from the date of their entitlement until the date it was paid. Nevertheless, TIL accepted that the court retained the discretion whether to award interest at all, what the interest rate should be, what proportion of the sum should bear interest and the period for which interest should be awarded: *Grains and Industrial Products*

Trading Pte Ltd v Bank of India and another [2016] 3 SLR 1308 ("*Grains*") at [138].

27 On the facts of this case, TIL submitted that it had indeed been wrongfully kept out of its money from the date when the Account Closure Event occurred on 29 December 2015 up to 6 September 2024 (when TIH withdrew SUM 37). While the Bond Amount remained at all times money that belonged to TIL, TIL said that it did not have free use of it. In fact, TIL said that it did not even have a right to dictate how the Bond Amount would be invested without TIH's approval because (according to TIL) TIH wanted to keep the Bond Amount as a security against potential liabilities (which it was not entitled to do after 29 December 2015, since an Account Closure Event had occurred). The result was that TIL had been kept out of its own money while TIH has had the benefit of the Bond Amount for the purposes of securing its own liabilities, and thus TIL should be compensated by way of pre-judgment interest.

28 In further support of its claim under this head, TIL relied on the evidence of TIH's intention to use the Bond Amount to secure its own liabilities and to prevent TIL's free usage of the Bond Amount, *viz*,

(a) para 82 of Mr Chan's witness statement: "…[a]s this was not in line with the parties' agreement and would have put monies in the Bond Account at a risk of dissipation, TIH did not agree with the investment proposal …"; and

(b) para 145 of Mr Wang's first witness statement: "…TIH refused to give approval because that would have encumbered the Bond Account and may have undermined or reduced the value of the Bond Amount if

> the charges and security were enforced. Nothing was said about the release of the Bond Account …".

29 Further, TIL submitted that as a result of TIH's prevention of TIL's usage of the Bond Amount, the Bond Account was only valued at US$11,560,349.90 as at 31 March 2024 and, as at 31 August 2024, the valuation of the Bond Account was only US$11,963,746.34. Thus, TIL calculated that the annualised return of the Bond Amount of US$10m was only approximately 1.63% *per annum* which was significantly less than the interest that might otherwise have been earned by TIL during this period and that TIL should therefore be entitled to interest.

30 Thus, TIL submitted that given that TIL never agreed to keep the Bond Amount in the Bond Account after 29 December 2015, and that it had always asked for ways in which better usage and returns could be made of the Bond Amount (which have always been rejected by TIH), TIL ought to be compensated for being kept out of its own money from 29 December 2015, *ie*, the date on which an Account Closure Event occurred, by an award of interest at the default interest rate of 5.33% *per annum*, as there is no reason to depart from the default interest rate.

31 As I understand, TIH did not dispute that the court has power to award interest in these circumstances. However, TIH submitted that the court should not do so for four main reasons which I address below albeit in a slightly different order.

32 First, TIH submitted that even if it can be said that TIL was kept out of its money, this was not done "wrongfully". In support of that submission, TIH submitted that the purpose of the Bond Account was to cover potential

contingent claims that may arise from Chinese tax liabilities; that as the court found that the ten-year Chinese tax limitation period only expired at the date of the Judgment, the maintenance of the Bond Account until that date accorded with the parties' commercial intention to have a ready pool of funds to meet any Contingent Claims; that in fact the court found that TIH was not in material breach of the BOA by maintaining the provisions in its financial statements up to the expiry of Chinese tax limitation period and that it did not act in bad faith in doing so. Thus, TIH submitted that TIH's insistence on the maintenance of the Bond Account (even after 29 December 2015) was similarly done in good faith; and that on this basis, it cannot be said TIL was "wrongfully" kept out of its money until the Judgment was issued. In my view, this argument may have some force in the context of TIH's case pursuant to clause 2.7.5. However, it seems to me irrelevant in the face of my conclusion that there was an Account Closure Event pursuant to clause 2.7.3 on 29 December 2015. Accordingly, I reject this argument.

33 Second, TIH submitted that TIL was not kept out of its money under the BOA, since it was contractually entitled to (pursuant to clause 2.4 of the BOA), and did in fact, invest the Bond Amount in funds managed or recommended by Bank Pictet. According to TIH, the increase in the Bond Amount represented an increase of approximately 20% over ten years. Although that is significantly below the default rate of interest, it seems to me that absent any evidence as to specifically what TIL might otherwise have done with this fund, there is much force in this part of TIH's case under this head.

34 Third, TIH submitted that it certainly did not have use of the Bond Amount: the Bond Amount was at all times TIL's, and TIL was entitled to all income from investments made in the Bond Account. In the circumstances, the

primary bases for an award of pre-judgment interest are not satisfied in this case. Again, I see much force in this submission.

35 Fourth, TIH submitted that if pre-judgment interest was awarded, this would be tantamount to double recovery. In particular, TIH submitted that TIL had through its own investments generated returns of almost 20% on the Bond Amount and TIL is now seeking additional interest of 5.33% *per annum*. The primary argument TIL advanced was that its "annualised return" of 1.63% (which, in any event, TIH disputes) fell below the default interest rate of 5.33% *per annum*. This is, of course, a strong argument for not awarding the full default rate but it seems to me that the point might be met by awarding a reduced rate of interest – say 2.5%. However, TIH submitted that TIL's argument is not meritorious. In particular, TIH submitted that pre-judgment interest is not awarded for the purposes of improving the successful claimant's returns from its own investments of its own funds; that, put another way – a claimant is not entitled to retrospectively choose the higher of two returns – the actual return made by it on its own investments or 5.33%; that pre-judgment interest does not amount to a guarantee of minimum investment returns; and that there is no evidence of what products were made available to TIL by Bank Pictet or the returns that would have been earned if TIL had chosen products other than those it chose to invest in, and similarly there is no evidence on what investments (or returns) TIL would have made if the funds were not kept in the Bond Account. Again, I see much force in this submission.

36 Although I have rejected the first of TIH's arguments as referred to above, the other arguments advanced by TIH seem to me to carry much force. Further, I bear in mind that TIL delayed commencing the present proceedings for many years. Although it is well-established that interest should not be awarded where there is unjustifiable delay in bringing proceedings (see, for

example, *Grains* at [139]), TIL submitted that it should not be penalised for such delay in particular because it had always sought to resolve the matter with TIH amicably; that TIL also cherished its relationship with Bank Pictet and did not want to jeopardise that relationship; and that it was confident that KPMG would soon issue the tax opinion.

37 I bear all these matters well in mind. However, in my view, the balance of the arguments tilt strongly against an award of interest in the particular circumstances of the present case; and, in the exercise of my discretion, I decline to award any interest.

Sir Henry Bernard Eder
International Judge

Foo Maw Shen, Chu Hua Yi and Foo Jyh Howe (FC Legal Asia LLC) for the claimant;
Nair Suresh Sukumaran, Noel Chua Yi How, Alex Chia Yao Wei and Joshua Goh Zemin (PK Wong & Nair LLC) for the defendant.