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HKAC/A23074

IN THE MATTER OF AN ARBITRATION UNDER THE HONG KONG INTERNATIONAL CENTRE
ADMINISTERED ARBITRATION RULES (2018)

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION ORDINANCE (CAP. 609)

BETWEEN

EVOCO LTD TRADING AND BUSINESS CONSULTING

Claimant

AND

DINGSHENG ALUMINIUM INDUSTRIES (HONG KONG) TRADING CO., LIMITED

Respondent

FINAL AWARD (COSTS AND INTEREST)

MR ANDREW CHIN
Sole Arbitrator
5/F, Jardine House
1 Connaught Place, Central
Hong Kong

Place of Arbitration: Hong Kong

Date: 17th January 2024

PREAMBLE

1. The Final Award (Costs and Interest) ("**Final Award**") follows on from the Partial Award handed down by the Tribunal on 8 December 2023 ("**Partial Award**"), which dealt with the merits of the dispute.
2. Unless otherwise stated, abbreviations used in the Partial Award will be used in this Final Award.

PROCEDURAL HISTORY TO THE FINAL AWARD

3. The background of the Parties and the procedural history of this arbitration have already been recounted in the Partial Award¹. The paragraphs below will only recount the procedural history of this arbitration following the handing down of the Partial Award.
4. Following the handing down of the Partial Award, on 11 December 2023, the Tribunal provided a draft of Procedural Order No. 5 to the Parties setting out proposed directions for the disposal of the remaining issues of costs and interest for the Parties' comments.
5. The Parties provided their comments on 12 December 2023. Having considered the Parties' comments, the Tribunal handed down Procedural Order No. 5 providing for the disposal of submissions on costs and interest.
6. In particular, Procedural Order No. 5 set out the approach which the Tribunal will take into account in determining the issue of costs²:

"5. A broad-brush approach will be taken by the Tribunal in assessing claims for legal costs, disbursements and expenses.

6. Although the Tribunal may allow the full amount claimed by a Party, it will, so far as possible, ensure that the final figure is not disproportionate and/or

¹ See paragraphs 2 – 11 of the Partial Award for a description of the Parties; paragraphs 12 – 14 for the Arbitration Agreement, the governing law and the language of the arbitration; paragraphs 17 – 40 for the procedural history of this arbitration and paragraphs 41 – 60 for the background facts leading to the dispute between the Parties in this arbitration.

² The paragraphs of Procedural Order No. 5 extracted below were sent to the Parties for comments and no comments were received with respect to those paragraphs.

unreasonable having regard to the nature and circumstances of this arbitration. The Tribunal will retain this responsibility notwithstanding the absence of challenge to individual items in the make-up of the figure sought. The fact that the other Party is not disputing the amount of costs claimed can however be taken as some indication that the amount is proportionate and reasonable. The Tribunal will therefore intervene only if satisfied that the costs are so disproportionate that it is right to do so."

7. The following submissions were filed by the Parties in support of their respective positions on costs and interest through HKIAC Case Connect:

No.	Date	Description	Party
1.	20 December 2023	Submissions on Costs and Interest (2 pages with attachments)	Claimant
2.	20 December 2023	Submissions on Costs and Interest (6 pages with attachments)	Respondent
3.	3 January 2024	Reply Submissions on Costs and Interest (2 pages with no attachments)	Claimant
4.	3 January 2024	Reply Submissions on Costs and Interest (3 pages with attachments)	Respondent

8. The Tribunal proceeded to deliberate on the outstanding issues of costs and interest following receipt of the Parties' submissions and reply submissions.
9. The HKIAC sent through a letter dated 17 January 2024 setting out the final statement of account for this arbitration and fixing the final fees for the Tribunal. There was no increase in the amount of deposits requested by the HKIAC for the HKIAC's Administrative Fees nor the Tribunal's fees and expenses.

SUBMISSIONS OF THE PARTIES ON COSTS AND INTEREST

10. The Tribunal will proceed to summarise the Claimant's position on costs and interest first, followed by the Respondent's position on the same.

Claimant's Position on Costs and Interest

11. The Claimant referred to Section 74(2) of the Arbitration Ordinance (Cap. 609) and Article 34.3 of the HKIAC Rules in support of the following propositions:
- a. The Tribunal may take into account all circumstances in determining the liability for costs of the arbitration.
 - b. The Tribunal may apportion the costs of the arbitration between the Parties if it determines that such apportionment is reasonable.
12. The Claimant also states in paragraph 3 of the Claimant's Submissions on Costs that it *"...respectfully invites the Tribunal to order the costs of this Arbitration to the Respondent accordingly."*
13. The Claimant sought the following sums for costs and interest as follows:

	Description	Amount
a.	Fees of the Tribunal in accordance with Article 10 of the HKIAC Rules	Not specified
b.	Registration Fee and Administrative Fees of the HKIAC	Not specified
c.	Claimant's legal fees	10,000 Euros
d.	Disbursements and expenses	RMB 770.50
e.	Any other incidental expenses incurred by the Tribunal	Not specified
f.	Accrued interest on (a) and (b) above	HK\$9,673.08
g.	Accrued interest on (c)	HK\$1,200
h.	Further interest on (a), (b) and (c) above from 1 June 2023 to the date of the final award at 2% per month and thereafter at judgment rate until the date of payment	Not specified

	Description	Amount

14. The Claimant also enclosed two invoices for legal costs in the sum of EUR 5,000 each, a breakdown of their disbursements and expenses and a certificate signed by its counsel that the amount claimed for costs and disbursements is not greater than what has already been paid by the Claimant. The Claimant also enclosed a timesheet showing that 46.5 hours have been spent by its counsel for this arbitration.
15. In view of the ambiguity in the Claimant's stated position on costs in the Claimant's Submissions on Costs (i.e. the Claimant stating that the Tribunal should award costs of the arbitration to the Respondent whilst also setting out the costs and expenses incurred by the Claimant in this arbitration that it wishes to recover), the Tribunal sent an email dated 20 December 2023 seeking clarification as follows:

"Dear Ms Dong, Ms Kang

The Tribunal acknowledges receipt of the parties' submissions on costs.

Separately, the Tribunal notes paragraph 3 of the Claimant's submissions, which read:

"In the SKELETON SUBMISSIONS FOR THE RESPONDENT dated the 13th of November 2023, in paragraph 64, the Respondent requests that "The Respondent respectfully invites the Tribunal to dismiss the Claimant's claim and order costs to the Respondent". The Claimant hereby respectfully invites the Tribunal to order the costs of this Arbitration to the Respondent accordingly"

Can the Claimant confirm if the contents of this paragraph are accurate and there is no typographical error?"

16. No reply was received from the Claimant prior to the filing of its Reply Submissions on Costs.
17. In the Claimant's Reply Submissions on Costs, the Claimant replied to the Tribunal's request for clarification to say at paragraphs 3 and 4 that:

"3. The Claimant does not find any typographical error. The Claimant hereby reinstates its position and its agreement with the Respondent's request that "The Respondent respectfully invites the Tribunal to ... order costs to the Respondent" in paragraph 64, the SKELETON SUBMISSIONS FOR THE RESPONDENT dated the 13th of November 2023. It is not clear why the Respondent makes such a request, the Claimant chooses to agree with the Respondent regarding its willingness of bearing costs of this arbitration as requested by the Respondent.

4. Therefore, the Claimant disagree with Respondent's claim in para. 4 of Respondent's Submission on Cost that the Claimant is liable to pay the Respondent's costs of the arbitration, and respectfully invites the Tribunal to order the costs of this Arbitration to the Respondent...."

18. In view of the Claimant's statement of position at paragraphs 3 and 4 of its Reply Submissions on Costs as extracted above, the Tribunal understands the Claimant's position to be that:

- a. the Claimant is asking the Respondent to bear the Claimant's costs in this arbitration; and
- b. the Claimant has understood the Respondent to have admitted its liability to bear the Claimant's costs in this arbitration from the phrase *"The Respondent respectfully invites the Tribunal to dismiss the Claimant's claim and order costs to the Respondent."*

19. Further, the Claimant submitted that, even if the Claimant were liable to pay for the Respondent's costs of this arbitration, the Claimant disputes the amount of HK\$330,000 (up to 14 November 2023) claimed by the Respondent for its legal costs for the following reasons.

- a. Section 74 of the Arbitration Ordinance (Cap. 609) mandates that the Tribunal must only allow costs that are reasonable in the circumstances³. Factors to consider include the nature and complexity of the dispute.

³ Para 5, Claimant's Reply Submissions on Costs

- b. The amount claimed by the Respondent is too high in view of the monetary value in dispute (which was estimated as to be HK\$1,650,000) and when compared against the time spent by the Claimant's counsel (i.e 46.5 hours against 113 hours spent by the Respondent's counsel),
 - c. Moreover, this arbitration is not a complex dispute.
20. Apart from the citation of provisions from the Arbitration Ordinance and the HKIAC Rules, no legal authorities were relied upon by the Claimant in support of its submissions on costs and interest.

Respondent's Position on Costs and Interest

21. Likewise, the Respondent relies on Section 74(2) of the Arbitration Ordinance and Article 34.3 of the HKIAC Rules for similar propositions of law cited by the Claimant.
22. In addition, the Respondent relied on the English Court of Appeal case of *In Re Elgindata Ltd* (No. 2) 1 WLR 1207 for the following legal propositions⁴.
- a. The Tribunal has a discretion as to the costs of the arbitration.
 - b. The general rule is that costs should follow the event, unless there are circumstances suggesting otherwise.
 - c. The general rule is not displaced simply because the successful party has failed on its case for some issues. However, where the successful party has caused a significant increase in the length or costs of proceedings arising from these unsuccessful issues, the successful party may be deprived of the whole or part of its costs.

⁴ Paragraph 3, Respondent's Submissions on Costs

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- d. But where the successful party has improperly or unreasonably raised any issues, not only may the successful party be deprived of the whole or part of its costs, it may also be ordered to bear the whole or part of the costs of the unsuccessful party.

23. The Respondent has claimed for the following costs and expenses in this arbitration.

	Description	Amount
a.	HKIAC's Administrative Fees	HK\$16,750
b.	Deposits Paid to the HKIAC	HK\$64,525
c.	Respondent's legal fees (up to 14 November 2023) (inclusive of disbursements) ⁵	HK\$330,000
d.	Respondent's legal fees (from 15 November onwards) (inclusive of disbursements) ⁵	HK\$20,000

24. In addition to the Respondent's legal fees (see sub-paragraphs (c) and (d) in the table above), the Respondent has made a generalized claim for the Tribunal's fees, the administrative fees and any expenses payable to the HKIAC⁷.

25. In support of the amount claimed for the Respondent's legal fees, the Respondent makes the following submissions.

- a. The Respondent's counsel is a barrister qualified in Hong Kong law with over 10 years of practical experience, whose hourly rate is HK\$4,000.

⁵ Inclusive of the Respondent's expenses and disbursements such as courier and photocopying (see para 6 of the Respondent's Submissions on Costs)

⁶ Also inclusive of the Respondent's expenses and disbursements such as courier and photocopying (see para 6 of the Respondent's Submissions on Costs)

⁷ Paragraph 7, Respondent's Reply Submissions on Costs

- b. The Respondent provided a breakdown in its Submissions on Costs and Reply Submissions on Costs showing that its counsel had spent 118 hours on this arbitration. The Respondent's legal counsel had charged capped fees of each stage of work⁸. The total amount of HK\$350,000 charged is less than what the Respondent's counsel would have charged using her hourly rates.
- c. Given that there is no oral hearing and no provision for reply written submissions, the Respondent's written submissions needed to be as comprehensive as possible to deal with all issues that may arise in this case⁹.
26. Further, the Respondent has enclosed various fee notes from its legal counsel and the legal counsel's certificate¹⁰ in support of its claim for costs.
27. With respect to interest, the Respondent has only sought post-award interest at the prevailing judgment rate¹¹ pursuant to Section 80(2) of the Arbitration Ordinance, which reads:
- "(2) Interest is payable on costs awarded or ordered by an arbitral tribunal from—*
- (a) the date of the award or order on costs; or*
- (b) the date on which costs ordered are directed to be paid forthwith,*
- at the judgment rate, except when the award or order on costs otherwise provides."*
28. With respect to the Claimant's claim for costs and interest, the Respondent's position is as follows¹².

⁸ With the exception of reviewing and analyzing the Partial Award, drafting the Respondent's Submissions on Costs and Reply Submissions on Costs (see pages 2 – 3 of the Respondent's Reply Submissions on Costs)

⁹ Paragraph 9, Respondent's Submissions on Costs

¹⁰ To certify that the costs and disbursements claimed in this arbitration do not exceed the amount claimed by the Respondent.

¹¹ The current prevailing rate is 8.875% per annum.

¹² Paragraph 5, Respondent's Reply Submissions on Costs

- a. The Respondent has no comment on the quantum claimed for the Claimant's legal costs and disbursements¹³, assuming that the Claimant is entitled to recovery.
- b. In this regard, the Respondent argues that the Claimant has accepted that it is liable for the costs of the arbitration because:
 - i. the Claimant expressly said so at paragraph 3 of its Submissions on Costs; and
 - ii. the Claimant did not respond to the Tribunal's request for clarification in its email dated 20 December 2023.
- c. The Claimant is not entitled to pre-award interest because it failed to state the basis for its claim for pre-award interest.

THE TRIBUNAL'S ANALYSIS OF THE PARTIES' SUBMISSIONS ON COSTS AND INTEREST

29. The Tribunal's power to award costs is set out in Article 34 of the HKIAC Rules:

"34.1 The arbitral tribunal shall determine the costs of the arbitration in one or more orders or awards. The term "costs of the arbitration" includes only:

- (a) the fees of the arbitral tribunal, as determined in accordance with Article 10;*
- (b) the reasonable travel and other expenses incurred by the arbitral tribunal;*
- (c) the reasonable costs of expert advice and of other assistance required by the arbitral tribunal, including fees and expenses of any tribunal secretary;*
- (d) the reasonable costs for legal representation and other assistance, including fees and expenses of any witnesses and experts, if such costs were claimed during the arbitration; and*
- (e) the Registration Fee and Administrative Fees payable to HKIAC in accordance with Schedule 1, and any expenses payable to HKIAC.*

34.2 ...

¹³ Paragraph 5(a), Respondent's Reply Submissions on Costs

34.3 *The arbitral tribunal may apportion all or part of the costs of the arbitration referred to in Article 34.1 between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*"

30. Section 74 of the Arbitration Ordinance (Cap. 609) also has various provisions concerning the Tribunal's power to determine the costs of the arbitration:

".....

(6) *Subject to subsection (7), the arbitral tribunal is not obliged to follow the scales and practices adopted by the court on taxation when assessing the amount of costs (other than the fees and expenses of the tribunal) under subsection (5).*

(7) *The arbitral tribunal—*

(a) *must only allow costs that are reasonable having regard to all the circumstances; and*

(b) *unless otherwise agreed by the parties, may allow costs incurred in the preparation of the arbitral proceedings prior to the commencement of the arbitration."*

31. In view of the Tribunal's ruling in the Partial Award, where the Tribunal awarded the reliefs sought by the Respondent, the Tribunal sees no reason to depart from the general rule that costs follow the event as expressed in the English Court of Appeal case in *In Re Eigindata Ltd (No. 2)*. Even though this case deals with the issue of costs in court proceedings, the general principles on the allocation of costs expressed by Nourse L.J at page 1214 of His Lordship's judgment are consistent with the general principles of costs as applied in arbitrations seated in Hong Kong.

32. With regard to the Claimant's position that the Respondent should bear the Claimant's costs of the arbitration, it is unfortunate that the Claimant has misunderstood the phrase "*The Respondent respectfully invites the Tribunal to dismiss the Claimant's claim and order costs to the Respondent*" to mean that the Respondent has admitted to liability for the Claimant's costs, when the phrase carries the opposite meaning as typically used in Hong Kong seated arbitrations and courts. This misunderstanding could have been clarified much earlier if the Claimant had responded to the Tribunal's request for clarification sent

on 20 December 2023, instead of waiting until the filing of its Reply Submissions on Costs and Interest to do so.

33. In this regard, apart from the Claimant's misunderstanding that the Respondent was willing to pay for the Claimant's costs of the arbitration, the Claimant has not provided any reasons why costs should not follow the event. Nevertheless, the Tribunal has also considered whether there are any issues raised by the Respondent which it had found to be improperly or unreasonably raised, but has not identified any.
34. The next question concerns the quantum to be awarded to the Respondent for its costs and disbursements. In this regard, the yardstick to be applied is the reasonableness of the costs claimed as determined by various factors, which include, but are not limited to:
- a. the nature and complexity of the arbitration;
 - b. the level of experience and seniority of the Respondent's counsel; and
 - c. the amount of time spent on the arbitration.
35. With respect to the Respondent's legal costs, the Tribunal considers the sum of HK\$350,000 claimed by the Respondent to be reasonable by applying a broad brush approach for the following reasons.
- a. Although the Tribunal accepts the Claimant's submission that this is not a complicated case, but the volume of documents generated for this case is substantial. This is particularly so with respect to the number of exhibits which the Parties and Tribunal have had to peruse as annexed to the Statement of Claim¹⁴, Statement of Defence¹⁵, the witness statement of Mr Cheng Jianan Ethan¹⁶ and Mr Drazen Bulj¹⁷.

¹⁴ Around 21 exhibits

¹⁵ Around 19 exhibits

¹⁶ Around 13 exhibits

¹⁷ Around 14 exhibits

- b. The Claimant submits that the amount of time spent by the Respondent's counsel (i.e. 113 hours as of 14 November 2023) is disproportionate considering the total amount of time spent by the Claimant's counsel (i.e. 46.5 hours). However, the Tribunal does not consider this to be a weighty factor considering that the unrealistically short amount of time allegedly spent by the Claimant's counsel.
- i. For example, the Claimant's counsel only spent 1 working hour between 1 – 13 November 2023 to *"Draft arbitration brief, conf. call with client, submit to HKIAC"*. Given that the Claimant's Arbitration Brief spanned 16 pages with single spacing, it may have taken the Tribunal even longer to copy-type it.
- ii. To use another example, the Claimant's counsel only spent 1.5 hours to *"Email with client, prepare witness statement, submit to HKIAC"* between 4 September – 24 October 2023. As the Claimant submitted three witness statements spanning 19 pages in total (not even including the time taken to review the exhibits), it would likewise have taken the Tribunal even longer to copy-type those witness statements.
- c. The Claimant also argues that the amount of costs claimed by the Respondent (i.e. HK\$330,000 as of 14 November 2023) is disproportionate to the monetary value in dispute, which is estimated at HK\$1,650,000¹⁸. The Tribunal cannot give this factor any weight because the Claimant had sought an order for specific performance and had not committed to the figure of HK\$1,650,000 in any of its pleadings. The only mention of this figure is in correspondence with the HKIAC prior to the constitution of the Tribunal, which do not form part of the submissions to the Tribunal. Hence, the monetary value of the dispute is at large.

¹⁸ This figure is most likely the conversion into Hong Kong dollars from the estimate of EUR 195,000 given to the HKIAC by the Claimant through its letter dated 29 May 2023.

- d. The Tribunal also notes that the Respondent's legal costs are inclusive of its disbursements, so the actual sum incurred by way of legal costs is even lower than HK\$350,000.
 - e. Further, the Tribunal considers the hourly rate charged by the Respondent's counsel of HK\$4,000 to be reasonable in light of her seniority as a Hong Kong barrister of more than 10 years call. In this regard, the amount of legal costs incurred by the Respondent through its fixed fee arrangement with the Respondent's counsel is much lower than what the Respondent would have had to pay if the Respondent's counsel had charged on a time-cost basis.
36. For the foregoing reasons, the Tribunal will allow the Respondent to recover the sum of HK\$350,000 for its legal costs and disbursements.
37. With respect to the Respondent's claim for Administrative Fees and the deposits for the Tribunal's fees and expenses paid to the HKIAC, the Tribunal sees no reason why the Respondent cannot recover for the payments made as these payments are necessary for the Parties to go through the arbitration procedure.
38. With respect to the Respondent's claim for post-award interest, the Tribunal sees no reason why the Respondent should be denied post-award interest, given that this is the default position under Section 80(2) of the Arbitration Ordinance.
39. Hence, the Tribunal will award post-award interest at the prevailing judgment rate in Hong Kong until the date of the Claimant's payment of the Respondent's costs and disbursements.

CONCLUSION AND DISPOSITIVE SECTION

40. Having considered the Parties' submissions on costs and interests, and for the reasons set out above, the Tribunal hereby **DECIDES AND DETERMINES** in this Final Award as follows:

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- a. the Claimant do pay the total sum of HK\$431,275 with post-award interest to the Respondent as payment for the Respondent's costs of this arbitration;
 - b. the interest on the sum of HK\$431,275 to run at the prevailing judgment rate in Hong Kong until the date of payment by the Claimant.
41. The handing down of this Final Award will conclude the Tribunal's mandate in this arbitration, subject to any application by the Parties for correction, interpretation and/or an additional award under Articles 38, 39 and 40 of the HKIAC Rules.
42. It remains for the Tribunal to express its gratitude to the Parties and their respective legal representatives for their hard work and assistance, without which the smooth running of this arbitration would not have been possible.

Place of Arbitration: Hong Kong

Dated this 17th day of January 2024



ANDREW CHIN
SOLE ARBITRATOR

