محكمة قطر الدولية
ومركز تسوية المنازعات
QATAR INTERNATIONAL COURT
AND DISPUTE RESOLUTION CENTRE

In the name of His Highness Sheikh Tamim bin Hamad Al Thani,

Emir of the State of Qatar

Neutral Citation: [2021] QIC (A) 8 (on appeal from [2021] QIC (F) 22)

IN THE QATAR INTERNATIONAL COURT

APPELLATE DIVISION

30 December 2021

CASE No. CTAD0007/2021 (on appeal from CTFIC0006/2021)

BETWEEN:

BUSINESS BOX CONSULTANCY LLC

Claimant/ Respondent in the appeal

v

ABDULLA AL DARWISH FAKHRO

Defendant/Applicant in the appeal

JUDGMENT ON PERMISSION TO APPEAL

Before:

Lord Thomas of Cwmgiedd, President

Justice Hassan Al Sayed

Justice Ali Malek QC

ORDER ON PERMISSION TO APPEAL

1. Permission to appeal against the judgment of the First Instance Circuit is refused.

JUDGMENT

The factual background

1. The applicant, (Mr Abdulla) a resident of Qatar, entered into a contract in December 2019 with the Respondent (Business Box) a company established at the QFC and licensed to provide professional services, including the preparation of feasibility studies.

2. Under the contract, Business Box agreed to provide a feasibility study for Mr Abdulla which Mr Abdulla would use to obtain the financing from the Qatar Development Bank (QDB) for a proposed copper plant to be built in Qatar which would produce copper pipes, tubes, wires and other products from copper cathodes that could be smelted from scrap and ore primarily using robots.

3. The fee of QAR 70,000 was to be paid in three instalments – QAR 35,000 on acceptance of the quotation, QAR 15,000 on submission of a draft feasibility report and QAR 20,000 on submission of the final report.

4. After payment of the first instalment, Business Box prepared a first draft of the feasibility study which it submitted on 7 May 2020. It concluded:

> Based on market analysis, technical assessments and the financial projections, the project is deemed to be financially feasible.

5. When the draft was submitted to the QDB, it raised a number of questions; some were based on its experience in relation to another of its customers which also dealt in copper.

6. On 16 August 2020 Business Box submitted its final feasibility study which concluded:

> Based on market analysis, technical assessment and the financial projections, the project is deemed not feasible due to the following reasons…

7. After considering the study, the QDB refused to provide financing.

8. Mr Abdulla then declined to pay the final instalment of the fees on the basis that the feasibility study was not fit for purpose; he contended that it should have concluded that the business proposal was feasible or should have done more research to prove its feasibility. It was also contended that Business Box should have appreciated the project was not viable earlier.

The course of the proceedings

9. Mr Abdulla began proceedings to recover the sums paid in the Civil Courts of Qatar, despite the clause in the contract conferring exclusive jurisdiction on this court. The proceedings were stayed by the Civil Courts of Qatar.

10. Business Box commenced proceedings before this court seeking (1) the outstanding instalment, (2) the expenses incurred by it in the proceedings in the Civil Court and a further sum to compensate Business Box for the time its managing partner, Mr Chaar, had spent in the conduct of the proceedings.

11. Mr Abdulla counterclaimed for the repayment of QAR 50,000 and damages for the failure to prepare a feasibility study which was fit for purpose.

The trial

12. The proceedings were tried before the First Instance Circuit (Justice Bruce Robertson, Justice Rashid Al Anezi and Justice Fritz Brand); Mr Abdulla represented himself and Mr Chaar represented Business Box. Both gave evidence.

13. Mr Chaar's evidence was that the further work done by Business Box after the draft feasibility study and in response to the questions raised by the QDB established that:

    a. there was an acute shortage of scrap copper which would be the main source of raw material for the project; there were significant fluctuations in the price of copper;
    b. that an entity contemplated as one of the customers of the proposed factory was in fact a major competitor for the scarce commodity of scrap copper;
    c. that this customer/competitor was financed by the QDB and was operating at half its capacity because of its inability to obtain the source material which was vital for the success of Mr Abdulla's proposed project;
    d. that there was a ban on the export of copper products from the State of Qatar.

14. Mr Chaar also gave evidence that he had done a number of feasibility studies for the QDB. There was nothing wrong with the feasibility study. The QDB had not rejected the financing of the project because the study failed to meet the bank's requirements. It rejected the project because the project was not feasible in the light of the factors set out in the report which Mr Chaar summarised in his evidence.

15. Mr Abdulla's evidence was that some independent experts had considered the feasibility study and found it wanting. However, no details were given. No expert evidence was called by Mr Abdulla. In his closing submission, Mr Abdulla asked that an expert be appointed. As appears from the court record of the submissions and the discussion with one of the members of the trial court, this was the first time such a request had been made. Mr Abdulla had not even asked for an expert in the proceedings in the Civil Courts of Qatar. His request was refused.

16. In a judgment dated 12 August 2021, the First Instance Circuit accepted the evidence given by Mr Chaar in relation to the conclusion in the final feasibility study. The court then considered whether the feasibility study was fit for purpose and set out its reasons for deciding it was. It ordered Mr Abdulla to pay Business Box the outstanding amount due of QAR 20,000 together with a sum of QAR 4,000 as compensation for late

payment and costs; its other claims were dismissed. Mr Abdulla's counterclaims were also dismissed.

The application for permission to appeal

17. Mr Abdulla then sought permission to appeal to this court on two grounds:

    a. The First Instance Court should have appointed an expert;
    b. The court failed to examine the defence.

    As both parties had represented themselves at the trial and were proposing to do so on appeal, we ordered a short oral hearing at which Mr Abdulla and Mr Chaar made submissions to us.

18. It was clear from the judgment that the defence of Mr Abdulla was carefully considered by the First Instance Circuit. There is therefore no merit at all in the second ground of appeal. It is not necessary for us to consider it further. The first ground of appeal raises a more general issue.

The need for expert evidence

19. In *Protech Solutions LLC v Qatar Islamic Bank* [2021] QIC (A) 6 one of the matters before this court was an application by the appellant for the appointment of an expert by this court in circumstances where no application whatsoever for an expert had been made to the First Instance Circuit. In summarising the procedure to be followed in the Qatar International Court for the appointment of an expert, the court said at paragraphs 22- 24:

> 22. In the Qatar International Court provision is made for expert evidence in Articles 10.2.3, 27.1.3 to 27.1.5, 27.2, 27.4, 27.5 and 27.6 of the QFC Civil and Commercial Court Regulations and Procedural Rules. In common with most other Commercial Courts worldwide, it is the trial court, the First Instance Circuit of the Qatar International Court, which hears all the evidence in each case. If parties wish to adduce expert evidence, they must

> do so before that Court in accordance with the Articles to which we have referred. In most cases where expert evidence is required, the court will ordinarily hear expert evidence called by the parties, having given appropriate directions. It is always permissible to seek the appointment of a joint expert or under Article 27.2 the Court can appoint an expert to assist the court, but such applications must be made to the First Instance Circuit.
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> 23. Although [the appellant] had not sought the appointment of an expert before the Court of First Instance, it applied to us for the appointment of an expert as a means of addressing the issue on whether the failures in breach of contract could be remedied.
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> 24. The Appellate Division will not ordinarily permit expert evidence to be adduced before it, whether it is expert evidence to be called by a party, or a joint expert or a court appointed expert. The Appellate Division may in unusual circumstances entertain an application for expert evidence, if there are good and exceptional reasons why such evidence was not adduced before the First Instance Circuit, but such circumstances will be rare.

20. In the present appeal, as we have set out, the application for expert evidence was made to the First Instance Circuit during the closing submissions after the evidence had been given. It was refused. Mr Abdulla contended before us that the court was wrong in its refusal. Expert evidence was essential for the just determination of the dispute; the court should not have refused the request. No prejudice would have arisen as the court could have adjourned its decision until after the receipt of the expert's evidence.

21. We cannot accept that submission for three principal reasons. These give rise to important points of practice which it is important for those bringing or defending proceedings in this court to have at the forefront of their mind:

    (1) As this court set out in *Protech,* the Rules of the court are clear. If a party considers the case requires expert evidence, then this issue must be raised before the First Instance Circuit before the trial and directions sought. In the application to adduce expert evidence it will be necessary to identify the field in which the evidence is

required and where practicable the name of the expert. There was no good reason why such an application was not made in these proceedings.

(2) The court will not ordinarily allow expert evidence to be adduced at trial unless the application is made in good time before the trial so that it can be heard and considered as part of the trial. It will only be in the rarest circumstances that the court will consider an application for expert evidence during the course of the trial. There were no circumstances in these proceedings which would justify the court granting such an application; it would have delayed the resolution of the dispute and added significantly to the costs.

(3) However, even if an application is made for expert evidence at an appropriate time before the trial, it does not follow that the court will grant the application. The court will consider whether expert evidence is not only necessary (in the sense that a decision cannot be made without it) but proportionate for the just resolution of the case. In deciding whether to give permission the court will have in mind the Overriding Objective in Article 4 of the QFC Civil and Commercial Court Regulations and Procedural Rules. In these proceedings expert evidence was not necessary, let alone proportionate.

22. It may be helpful to amplify the third reason. It is clear that in commercial disputes worldwide, whether before a commercial court or before arbitrators, expert evidence is sometimes adduced when it is not necessary. Not only does expert evidence add considerably to the cost of resolving a dispute but it can also result in making the case more complicated than it in fact is.

23. It is important to recall that expert evidence is only necessary where the judge is required to make a decision on a matter where the judge could not properly do so without the assistance of a person possessing specialist knowledge or expertise; the point is most commonly made by reference to the well-known observations made in *R v Bonython* (1984) 38 SASR 45 by the Supreme Court of South Australia when it said that a court had to consider:

whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area.

24. The court will therefore invariably consider whether the proposed evidence is necessary. But that is not the end of the inquiry. It will also consider the issue of reasonableness and proportionality in the context of the dispute as a whole. There may be cases where the cost and time that would be taken in preparing and hearing expert evidence will lead to the conclusion that it was not proportionate and reasonable or where the issue on which expert evidence is necessary can be refined in such a way that the scope of the evidence is kept within reasonable bounds or a joint expert appointed.

25. This approach is, we think, also in line with the approach of courts that have a civilian law tradition. Such courts no longer treat it as axiomatic that what might appear, at first sight, to be a factual enquiry which requires expert evidence, actually requires expert evidence. It is for the trial judge to determine if the case can in fact be resolved without expert evidence. This question has been considered by the Qatari Court of Cassation in many cases, for instance, in decision 29 of 2007, decision 125 of 2008, decision 68 of 2009, decision 163 of 2011 and decision 93 of 2012. In Decision 29 of 2007, dated 19 June 2007, the Court of Cassation for instance stated that the court is not obliged to grant a request for an expert if it can decide the case on the papers already submitted to the court. In Decision 125 of 2008, dated 24 February 2008, the Court of Cassation stated that the appointment of an expert in the case is a matter for decision by the trial court within the exercise of its powers; it is for it alone to determine whether adoption of the procedure for an expert is necessary or unnecessary. The Court of Appeal had found there was sufficient evidence before the court to enable the court to adjudicate the dispute without the need for an expert.

26. In the present case, expert evidence was not necessary. The issue as to whether the report was fit for purpose was a matter that could be determined by the First Instance Circuit without expert evidence. The feasibility study was a document that was addressed to a bank and written in terms that could readily be understood. The task of the court was to consider whether the information that would be required by the bank

was incorporated within the feasibility study, whether it was clearly set out and whether the report drew reasonable conclusions from the material set out in it. We have carefully considered the study. It contains a detailed analysis of the matters relevant to the commercial and financial viability of the proposed plant and draws reasonable conclusions from the analysis. We can see no basis on which it could possibly be argued that the First Instance Circuit was unable to determine whether it was fit for purpose without the assistance of expert evidence.

27. We therefore refuse permission to appeal.

By the Court,

[signed]

Lord Thomas of Cwmgiedd

President

A signed copy of this judgment is held with the Registry

Representation:

The Applicant represented himself.

The Respondent was represented by its Managing Director, Mr. Chaar.