CITATION: Telestat Canada and Juch-Tech, Inc. 2012 ONSC 2785
COURT FILE NO.: 11-29505
DATE: 2012/05/03

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
TELESTAT CANADA	)	Louis A. Frapporti and Philip J. Kennedy
	)	for the Applicant
	)	
	)	
Applicant	)	
	)	
- and -	)	
	)	
	)	
JUCH-TECH, INC.	)	Robert Wisner and Richard McCluskey
	)	for the Respondent
	)	
	)	
Respondent	)	
	)	
	)	
	)	**HEARD:** January 26, 2012

WHITTEN J.

REASONS FOR JUGMENT

[1] Telestat ("Telestat") is a Canadian company that operates certain communication satellites. Juch-Tech Inc. ("JTI") provides satellite based communications and internet services to customers in North America, Africa and elsewhere.

[2] On May 11, 2009 the two entities entered into an agreement (the "Agreement") whereby the latter would pay for satellite capacity to service its customer base. The Agreement was prepared by Telestat and contained standard terms and conditions.

[3] JTI alleged that the services provided through the use of the satellite were woefully inadequate for the servicing of its existing and perspective clients, and consequently did not make any payments pursuant to the Agreement. Telestat in response evoked paragraph 22 of the Agreement which provides for the termination of the Agreement.

[4] Additionally Telestat sought to have its entitlement to the relief provided for under paragraph 22, the subject of arbitration as it is provided for in paragraph 40 of the Agreement.

[5] A three person arbitral tribunal issued an interim award March 22, 2011 and a final award dated May 15, 2011. The former award, provided that JTI pay a sum to represent the damages incurred by Telestat as a consequence of the breach by JTI. The latter provided interest on the amount of damages so found, and ordered that JTI pay the attorney's fees of Telestat, and Telestat's share of the arbitrator expenses. JTI objects to the payment of the latter two expenses.

[6] Telestat now applies in this court pursuant to the *Model Law on International Commercial Arbitration* (the "Model Law") which is in force in Ontario by virtue of the *International Commercial Arbitration Act* R.S.O. 1990 c. 1.9 (the "TCCA") to recognize and enforce the arbitral award. Telestat also seeks interest on the components of the arbitral award.

THE ISSUE

[7] As observed above, the parties arbitrated the issue of a *defacto* termination and consequential penalty as referenced in paragraph 22 of the Agreement, pursuant to an all encompassing arbitration clause in the Agreement (paragraph 40). On the issue of costs the arbitration clause only speaks in terms of each party being responsible for their own expenses including attorney's fees and splitting the arbitration fees and the expenses of the arbitrator.

[8] JTI argues that the arbitration panel acted outside of or exceeded its jurisdiction and consequently its award in terms of Telestat's attorney's fees and share of the arbitration fees is not enforceable according to Model Law. Telestat responds that JTI by its actions, pleadings during the arbitration, agreed to and attorned to the jurisdiction of the arbitration panel to make such an award. Furthermore, pursuant to Article 4 of the Model Law, JTI has waived any right to object to the alleged overextension of jurisdiction.

[9] A rather secondary issue to the main issue is the applicable rate of interest to the arbitral award post May 15th, 2011 and to any amount if any the court finds is due with respect to attorney fees and arbitration costs.

BACKGROUND

[10] Given how the issues are framed, it is necessary to set out the pertinent paragraphs of the original Agreement and the conduct of the parties throughout the arbitration process. This background will then be subject to scrutiny of the applicable law.

The Agreement

[11] The Agreement consists of 4 pages that are entitled "The Agreement between …(the parties)" and a series of pages entitled "General Terms and Conditions" of the Agreement between…(the parties)". It is in the first part that the rates and term of service are set out along with a requirement for a series of six security payments payable by January 1, 2010. This part concludes with a section entitled "Entire Agreement" which basically states that the agreement along with written documents incorporated by reference herein constitute the entire agreement. Any amendment or change can only be accomplished by "an instrument in writing".

[12] It is in the General Terms and Conditions that paragraph 22 provides for "No Early Termination" and paragraph 40 provides for "Arbitration".

[13] Paragraph 22 stipulates that there is no early termination but if the customer (JTI) discontinues or cancels the services or fails to cure any breach (which in this case was the non-payment of any monies due whether it be by the service payments or the security deposits), Telestat has three options, which may be exercised in tandem with each other. The three options are a) temporarily suspend the service, b) terminate the agreement which accelerates the charges due under the contract and requires JTI to pay an "early termination charge". This charge is the aggregate of the monthly service charges at the time of the breach for 12 months or the aggregate rate of service charges for the remainder of the contract, along with any charges or fees that had ensued. This last phraseology would probably trap for the security deposits required as well. All of these payments are considered "liquidated damages" and "not as a penalty" for the default. The early termination charge is to be paid "together with all other costs and expenses of collection including reasonable attorney's fees".

[14] The third option or remedy is c) which allows Telestat to take the appropriate court action to recover damages for breach of contract together with costs and expenses in connection with enforcing the agreement including "reasonable attorney fees" (emphasis added).

[15] This latter phraseology in option b) at first blush appears to run counter to the arbitration paragraph 40. That paragraph speaks of "all disputes arising in connection with this agreement…shall be fully and finally settled under the UNCITRAL Rules (the Rules of Conciliation and Arbitration of the United Nations Commission of International Trade Law). The paragraph stipulates "each party shall bear its own expenses (including attorney's fees) and shall pay an equal share of the arbitration fees and the expenses of the arbitrators".

The Arbitration

[16] The arbitration in accordance with paragraph 40 of the Agreement was held in New York City and by virtue of the fact that the arbitration paragraph made reference to paragraph 32 of the Agreement with respect to governing law, was governed by the laws of New York State. The panel consisted of the Honourable Anthony J. Carpinello, Robert G. Allen, Esq. and James V. Masella.

[17] In its Notice of Arbitration dated December 29, 2009, Telestat claimed a contractual termination fee ("the early termination fee" referred to in paragraph 22) plus Telestat's costs and expenses of collection including reasonable attorney's fees. The attached Statement of Claim sets out the contractual breach and reiterated the claim and the relief sought.

[18] JTI in its answer with counterclaims dated June 11, 2010 denies the allegations of a breach of the Agreement and defends by pleading that that there was no meeting of the minds with respect to the service to be provided by Telestat and there was no relationship between the "early termination fee" and the damages Telestat experienced. JTI expanded upon how the service that Telestat offered was inadequate for its purposes. JTI concluded its pleading with a

request to dismiss Telestat's Statement of Claim, rescind the contract and award JTI "the cost of arbitration and its attorney's fees".

[19] Therefore from just looking at the pleadings, both parties sought costs and attorney's fees.

[20] Apparently before the hearing, namely, May 14, 2010, a report of Preliminary Hearing and Scheduling Order No. 1 was issued. This report basically set out the ground rules. It was noted that the Arbitrators would apply the Rules of Conciliation and Arbitration of the United Nations Commissions of International Trade Law ("UNCITRAL" Rules) with the applicable substantive law being that of the State of New York. All of this had been provided for in paragraph 40 of the original Agreement. It should be noted that Article 1 of the UNCITRAL Arbitration Rules states, "Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these rules subject to modification as the parties may agree". Article 40 of the Rules defines "costs". Article 42 provides for the allocation of costs to the unsuccessful party. However, paragraph 40 of the agreement provides, essentially, that each party bear their own costs which is obviously a modification of the Rules. As will be seen, both sides have divergent views as to whether or not this modification was varied.

[21] The Arbitration Hearing was conducted on October 13, 2010. Page 255 of the transcript reveals that one of the members of the panel, Mr. Masella, was struggling with the apparent inconsistency between paragraph 22 and 40 of the Agreement as to what he described as "fee shifting". He observed as did this court that both sides had requested fee reimbursement. Member Masella requested that "both sides address this issue in (their) post hearing brief".

[22] Accordingly, Telestat in its post hearing brief of November 19, 2010 repeated the phraseology of paragraph 22, namely, "together with all other costs and expenses or collection including reasonable attorney's fees". Leonard Rhodes, the attorney for Telestat went on to explain that because of JTI's alleged breach "Telestat was forced to incur "costs and expenses or collection including reasonable attorney's fees" within the meaning of paragraph 22(b) (definition of the early termination charge) to wit: costs and expenses or collection including reasonable attorney's fees, it has incurred and bringing and prosecuting its claim in this arbitration". Responding to the query of arbitrator Masella, attorney Rhodes argued that the UNCITRAL Rules allowed the parties to agree to fee shifting, notwithstanding that the rules did not so provide. The attorney sited the two paragraphs 22 and 40 as evidence that "fee shifting" was contemplated by the parties and that there was no disharmony between the paragraphs, that paragraph 22 was discreet exception to paragraph 40. In other words, attorney's fees and costs are a component of the early termination provision.

[23] Michael Sawicki attorney for JTI in his post hearing brief referring to the UNCITRAL Rules similarly argued that the panel could award costs and fees of arbitration to the prevailing party. The attorney noted that Article 1 of the Rules permitting the parties to modify the rules.

He stated "(I)n this case, both parties have submitted their respective agreements in writing" (emphasis mine) in the form of Telestat's Notice of Arbitration and Statement of Claim, and JTI's answer with counterclaim that the panel award the costs of arbitration including the attorney's fees to the prevailing party". "The attorney proceeded to note that under New York law such mutual demands for attorney's fees in an arbitration proceedings constitutes an agreement to submit the issue to arbitration, with the resulting aware being valid and enforceable"

[24] The brief of TJI continued to emphasize how the parties by their conduct represented "an unmistakably clear expression of their intention to waive the general rules that parties are responsible for their own attorney's fees".

[25] Based on the docket entries in exhibit "A" to the Affidavit of Michael Sawicki of March 29, 2011, it would appear that the panel released its interim award sometime around March 22, 2011. This "interim award" is the decision of the panel with respect to the substantive issue arbitrated: namely, whether or not Telestat was entitled to the early termination penalty contemplated by paragraph 22 of the original Agreement. The background of the dealings between the parties and their agreement were set out. Their respective positions as to what went wrong were explored. The majority of the panel mused about why Mr. Juchniewicz, the principal of JTI signed the agreement in question knowing that there were technical problems. The principal technical problem was that the customers of JTI would require larger receiver dishes from the Telestat satellite. It was noted that the principal signed as he did not want to lose what he perceived as an opportunity. What survived as an argument on behalf of JTI was that the termination provision of paragraph 22 was in fact a penalty which was disproportionate to the actual loss that Telestat would have experienced. The majority using a calculation as to what would be the daily rate of the security deposit multiplied by the number of the days between the commencement date and the contract termination date (97 days) found a loss to Telestat of $160,017.99, a far cry from the close to the $3,000,000.00 that Telestat originally sought.

[26] The majority concluded its interim award with the comment "As the parties have each agreed that they may overrule the contract's ambiguity with respect to attorney's fees, each of the parties are invited to submit proof by affidavit of the amount of attorney's fees expended in the prosecution and defence of this matter…"

[27] It was in response to this request by the majority that Telestat submitted its "Claimant's Request" for Final Award dated March 29, 2011, in which it sought its attorney's fees and fees charged to Telestat for administrative and arbitrator's fees. Telestat vigorously opposed any suggestion that JTI receive any of its fees as it had "prevailed", notwithstanding the realization of an amount for damages far less than it sought.

[28] In his affidavit sworn September 26, 2011, Mr. Wlodzimierz (Walt) Juchniewicz states that the concluding remarks of the interim award of the majority with respect to costs were a surprise as no one had agreed to amend the arbitration clause. Michael Sawicki the attorney for JTI before the arbitration panel deposes in an affidavit dated March 29th, 2011 and filed with the

Tribunal that "the Respondent and members of the panel each misinterpreted claimant's position regarding attorney's fees". The attorney sought to describe how Telestat had claimed the early termination charge which included attorney fees and costs as encompassed within the early termination charge. In other words, Telestat saw 22(b) as a discreet exception to paragraph 40. Mr. Sawicki proceeded to argue in essence that because Telestat had not succeeded in its claim for the early termination charge, it was out of the luck with respect to their attorney fees and costs.

[29] Mr. Sawicki argued that because the award was not with respect to the early termination paragraph 22, the parties were back as they were with the general arbitration paragraph 40, which did not provide for fees and expenses. Mr. Sawicki referred to Article 38 – 40 of the UNICTRAL Rules which state in principle that the costs should be borne by the unsuccessful party or could reasonable be apportioned between the parties. He went on state that because Telestat was unsuccessful in obtaining the early termination penalty (which would include attorney's fees and costs) (Telestat only received an award representing about 6% of the early termination clause) that JTI should receive its costs (i.e. attorney's fees).

[30] The Chairman of the arbitration panel, one of the majority decision makers, no doubt was somewhat perplexed about these responses in an issue which up until March 29, 2011 appeared to be a matter of consensus. He emailed each party on March 31, 2011 permitting them to file "a brief response less than 5 pages" by April 6, 2011.

[31] Telestat's response "Claimant's Response to Respondent's Application for Attorney's Fees" was dated April 6, 2011 acknowledging that while the panel had rejected Telestat's claim for the early termination charge, it had accepted JTI's arguments that the parties had modified their base agreement by virtue of their written arguments, which under New York Law would constitute an agreement to submit the question of attorney's fees to arbitration.

[32] Telestat proceeded to argue, yes it had not received an award of the early termination penalty with all the attorney fees and costs, but it had not forgone its right to ask for such costs generally as it had obtained an award against JTI, and it had not forgone its right to argue that it could still receive such costs on some other basis.

[33] In the final award of the arbitrators dated May 15, 2011, the entire panel observed that "(T)he parties had charted their own course in this regard, both at the hearing and the legal memorandum submitted subsequent thereto they have each expressly requested that the panel make an award of fees and costs including attorney's fees to the prevailing party pursuant to the UNCITRAL Arbitration Rules (see UNCITRAL Rules, Article 38). Thus attorney's fees are properly awarded in this proceeding and the panel finds that the fees sought by the claimant (Telestat) are reasonable in amount".

[34] The panel noted in regard to whether or not Telestat had "prevailed", that "a prevailing party is the party that succeeds in any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit". In other words, if the claimant succeeded some substantive relief they "prevailed".

[35] The panel proceeded to award attorney fees and disbursements in the amount of $88,117.50 and arbitral fees of $34,641.30.

INTEREST

[36] Paragraph 4 of the agreement provides "any late payments by customer to Telestat of amounts due and payable hereunder (including, but not limited to specified payments, damages and (or indemnification)) shall be charged interest at the rate of eighteen (18%) per annum, or the highest legally permissible rate of interest, whichever is lower. All interest will be compounded on a monthly basis". (underlining mine)

[37] The final award of the arbitration panel dated May 15th, 2011referred to the above paragraph and stated, "interest will be awarded from the date of the default at the contract rate". There is no dispute that pre-judgment interest is governed by the contractual rate. The question is, however, what is the prevailing post-judgment/award rate? The arbitral award is silent in this regard.

[38] The debate between the parties centers on the interaction between subsections (1) and (5) of Section 129 of the *Courts of Justice Act.* Telestat argues pursuant to paragraph 4, the 18% compounded monthly prevails under subsection (5) as a right created by the agreement, whereas JTI advances the general application of subsection (1).

APPLICABLE LAW

[39] At the outset, one notes that the "Agreement" was drafted by Telestat and could not be amended except by written agreement. The principle of "*contra proferentem*" would be applicable, in that in essence the terms of an agreement are strictly construed as against its author/draftsman.

[40] *The International Commercial Arbitration Act R.S.O. (1990) C.I.9* incorporates the UNCITRAL model law on International Commercial Arbitration into the law of Ontario. The model law is set out in the schedule to this Ontario legislation.

[41] Article 5 of the model law states, "in matters governed by this law, no court shall intervene except where so provided in this law." This article is an obvious indication of the deference to be afforded to the model law. Justice Lax in *Corporacion Transnacional de Inversiones S.A. de C.V. v. Stet International S.p.A.* (1999) O.J. No. 3573 (affirmed [2003] O.J. No. 3408) stated "(the) model law is a collaborative effort among nations to facilitate the resolution of international commercial disputes through the arbitral process." (para. 21) Her Honour's comments were based on similar remarks by the Ontario Court of Appeal in *Automatic Systems Inc v. Bracknell Corp* (1994) 113 D.L.R. (4th) at p. 456.

[42] Article 4 of the model law entitled "Waiver of Right to Object" provides that: "A party who knows that any provision of this law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds

without stating his objection to such noncompliance without undue delay or if a time limit is provided thereof within such period of time, shall be deemed to have waived his right to object." There was no time limit provided for in the original agreement. Article 32 of the UNCITRAL Rules speaks of a party failing to "object promptly…with any requirement of the arbitration agreement." Waiver as a concept independent such a deemed waiver, will be expounded upon later.

[43] An arbitral award is binding in Ontario except in certain circumstances. Pursuant to Section 34 a party can move in the Superior Court of Ontario to set aside an arbitral award. That was not done in the case of hand.

[44] Under Section 35, the successful party in an arbitration can move before the court for the enforcement of the award. The language of this section is mandatory. The court shall recognize the award as binding and enforceable. Therefore, that is the starting presumption to such an application. However, the opposing party to such a request can seek to displace that presumption by demonstrating proof that the matter comes within certain enumerated exceptions to recognition and enforcement. The applicable exception in the matter at hand is "(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions or matters submitted to arbitration may be recognized and enforced…" (similar language appears in Article 34(2)(iii))

[45] In this matter, it has already been conceded that the part of the arbitral award of damages for breach of contract, with pre-judgment interest of 18% is both recognized and enforceable. Judgment in that regard was issued January 26th, 2012.

[46] Justice Lax has stated (Ibid. paras 26-27) that the grounds for refusal of enforcement are to be construed narrowly.

[47] The only options for a judge pursuant to Section 35 and 36 are to allow, adjourn, or dismiss the application. (ref. Charron J. (as she then was) *Dalimpex Ltd. v. Janicki*; *Agros Trading Spolka Z.O.O. v Dalimpex Ltd*. (2003) O.J. No. 2994 (at para. 55).

[48] In *United Mexican States v. Cargill* (2011) O.J. No. 4320, the Ontario Court of Appeal set out an approach to the interpretation of the exception contained in (iii). That matter actually dealt with Article 34, but as mentioned above Article 34(2)(iii) employs the same language as Article 36(1)(a)(iii). The starting point is the presumption is that the arbitration panel acted within the scope of its authority. (para 33)

[49] The standard of review in questions of jurisdiction is that of "correctness". (para. 35)

[50] As for the breadth of "jurisdiction", Justice Feldman writing for the panel referred to Justice Lebel's judgment in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 59 in which he stated, "Jurisdiction is intended in the narrow sense of whether or not the tribunal had

the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter."

[51] Justice Feldman cautioned "that courts are warned to ensure that they take a narrow view of what constitutes a question of jurisdiction and to resist broadening the scope of the issue to effectively decide the merits of the case." (para. 45)

[52] In *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan* (2011) 1 A.C. 763, Lord Mance observed that "arbitration of the kind with which this appeal is concerned is consensual – the manifestation of the parties' choice to submit present or future issues between them to arbitration. Arbitrators (like many other decision-making bodies) may from time to time find themselves faced with challenges to their role or powers, and have in that event to consider the existence and extent of their authority to decide particular issues involving particular persons. But absent specific authority to do this, they cannot by their own decisions on such matters create or extend the authority conferred upon them." (para. 24)

[53] *Dallah* was referred to by Justice Feldman and no doubt influenced Her Honour to summarize her approach "(1) the role of the reviewing court is to identify a narrowly define any true question of jurisdiction…(2) did the tribunal decide an issue that was not part of the submission to arbitration and, or (3) misinterpret its authority under…(the arbitration clause)" (ibid para. 52)

[54] Justice Feldman had been a member of a previous panel in *Huras v. Primerica Financial Services Ltd*. (2000) 55 O.R. (3d), 449 (Ont. C.A.) along with Justice Borins who wrote for that panel. And perhaps, as a forerunner of his colleague's remarks, Justice Borins described the necessity to interpret the arbitration clause in a contract. "In doing so it is important to bear in mind the function of an arbitration clause in a contract, which is to embody the agreement of the contracting parties that if any dispute arises which falls within its terms, the dispute shall be settled by arbitration." As for the interpretation of such a clause, Justice Borins stated that a jurist applies ordinary principles of construction. His Honour, quoted Viscount Simon L.C. in *Heymans v. Darwins Ltd* [1942] A.C. 356 (U.K.H.L.) to the effect "an arbitration clause is a written submission agreed to by the parties to the contract, and like other written submissions to arbitrating it must be construed according to its language and in the light of the circumstances in which it is made." (at p. 366)

[55] Therefore, the analysis starts with the nature of the arbitration clause, paragraph 40, which by virtue of its inclusion in the agreement cannot be varied or amended except by instruments in writing, it is the arbitration clause which is the foundation of the submission for arbitration and in a way is the jurisdictional template for the arbitration.

Waiver

[56] In *Saskatchewan River Bungalows Ltd and Maritime Life Assurance Co.* [1994] 2 S.C.R. 490, Justice Major described the phenomena of a waiver, "waiver occurs when one party to a contract or to a proceeding takes steps which amount to forgoing reliance on some right or defect in the performance of the other party." (para. 19) Understandably, waiver requires that (1) the party waiving had full knowledge of his or her rights, or a particular defect and (2) unequivocally and consciously abandoned his or her rights, or right to complain with respect to certain defects or omission. (para. 20)

ANALYSIS:

[57] A condition precedent to the analysis is whether or not JTI has waived its right to object to the recognition and enforceability of the arbitral award with respect to attorney fees and costs as a consequence of the operation of Article 4 of the Model Rules. As was observed in the recitation of facts, with particular reference to the arbitration process, the issue of a general liability to such costs did not appear to be an issue until the release of the "Interim Award" on March 22nd, 2011, in which the arbitrator spoke of an agreement between the parties as to costs generally. Virtually, immediately, there was a response by the attorney of JTI decrying such a general application. This could not be construed as a waiver under the rules. The mistake, misunderstanding as to a general fee shifting was clearly on the table.

[58] As mentioned before, the starting point is the particular arbitration paragraph 40. Initially the paragraph speaks in encompassing language of "all disputes arising within the agreement." Therefore there is no limitation with respect to subject matter. However, as to the question of costs, "Each party shall bear its own expenses (including attorneys' fees) and shall pay an equal share of the arbitration fees and the expenses of the arbitrators."

[59] The only paragraph in the entire agreement that speaks otherwise of costs is, of course, the "No Early Termination" paragraph 22, which in option (b), describes how the "early termination charge" comes about. That "early termination charge" is payable along with all other costs and expenses of collection, including reasonable attorney's fees. Option (c) is not relevant to this analysis as it presupposes an application for breach of contract to an appropriate court.

[60] Telestat's submissions to arbitrate and statement of claim is to enforce paragraph 22(b), the early termination paragraph. In other words, what is being arbitrated is whether or not Telestat is entitled to that penalty. That particular penalty happens to include costs and expenses of collection *vis-à-vis* the penalty and attorney's fees. This is the dispute for arbitration.

[61] Not surprisingly, JTI resisted on the basis that the contract should have been rescinded as there was no meeting of minds, etc. Yes, JTI asked for its costs, as that was part of the paragraph 22(b) issue around the "early termination charge".

[62] The arbitration panel definitely had the jurisdiction pursuant to paragraph 40 to deal with the parameters of the early termination charge. However, once the panel decided in its Interim Award that the "early termination charge" was not payable and instead awarded what it thought

was appropriately liquidated damages for breach of contract (something paragraph 22(c) contemplates a court giving) the parties were outside of the scope of paragraph 22(b). Everyone up to that point had focused on costs, attorney's fees as an aspect of 22(b), but when they were outside of 22(b), could the arbitration board award costs generally? That is, when JTI cried foul, a mistake had been made, because you only get costs pursuant to section 22(b). This is not a picture of a fully informed unequivocal waiver with respect to fees generally.

[63] Had JTI waived its right to make such an objection based on its pleadings and the general conduct to that point? No, the focus on costs and pursuit of same, was within the dispute being arbitrated: namely 22(b). It is agreed that 22(b) is an exception to the each bear your own costs rule of paragraph 40; but it is so by virtue of the fact that the paragraph so uniquely includes costs compared with the rest of the agreement.

[64] There was no specific written agreement to amend paragraph 40 to provide for costs generally in a dispute outside of 22(b). I realize that JTI continued to ask for such costs itself after the Interim Award, but like Telestat, it would not have been entitled to them. The arbitrators cannot give what the arbitration clause does not permit or provides for otherwise. In a perfect world, in order to obtain costs generally, namely, for a cost award outside of 22(b), the parties should have specifically agreed to in writing. That did not happen. All their efforts were in the context of the dispute, over whether the early termination charge of 22(b) would apply or not.

[65] The parties did not agree to costs generally outside of 22(b). The arbitrators by virtue of paragraph 40, with its each party bear their own costs rule, did not have the jurisdiction to so award. The arbitrator's decision to award attorney's fees was not correct. The application by Telestat is, therefore, dismissed.

INTEREST:

[66] Given the above, the only relevant interest is that of post-judgment interest. The language of paragraph 4 of the agreement applies to damages which is what was awarded by the arbitration panel. However, the paragraph does speak of at "the highest legally permissible rate of interest whichever is lower" relative to the contract interest rate of 18%. The award was silent as to post-judgment interest, there is no evidence before the court as to what the New York law provides with respect to post-judgment interest. Accordingly, it cannot be said that, "interest is payable by a right other than under this section," ie. Rule 129(5), accordingly the post-judgment rate of interest provided for in Rule 129(1) which would be invariably lower than the contract rate applies.

[67] If the parties cannot agree as to the rate and quantum of costs, submissions as to costs not exceeding five pages above and beyond the bill of costs are to be exchanged within 30 days of receipt of this judgment, any reply to such submissions to be submitted within 15 days of the receipt of the original submissions.

Whitten J.

Released: May 03, 2012

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SUPERIOR COURT OF JUSTICE

B E T W E E N:
TELESTAT CANADA

Applicant

- and -

JUCH-TECH, INC.

Respondent

REASONS FOR JUDGMENT

Whitten J.

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