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: [2020] QIC (F) 14

IN THE CIVIL AND COMMERCIAL COURT

OF THE QATAR FINANCIAL CENTRE

FIRST INSTANCE CIRCUIT

15 October 2020

CASE No. 1 of 2020

BETWEEN:

PROTECH SOLUTIONS LLC

Claimant

v

QATAR ISLAMIC BANK QPSC

Defendant

JUDGMENT

Before:

Justice Arthur Hamilton

Justice Fritz Brand

Justice Ali Malek QC

ORDER

(1) The Defendant is ordered to pay to the Claimant:

(a) An amount of US$ 768,040.00;

(b) Interest in the amount of US$ 31,489.64;

(c) Further interest on the amount of US$ 768,040.00 calculated at the rate of 5% per annum from 15 October 2020 to date of payment; and

(d) The reasonable costs of the proceedings, to be assessed by the Registrar if not agreed.

(2) The Defendant's counterclaims are dismissed. The Claimant is awarded its reasonable costs, to be assessed by the Registrar if not agreed.

JUDGMENT

1. The Claimant is Protech Solutions LLC ("Protech"). The Defendant is Qatar Islamic Bank QPSC ("QIB"). Protech has been established in the Qatar Financial Centre ("QFC") as a provider of technology services, including Automatic Teller Machines ("ATMs"), to banks. It is the sole supplier of Diebold-Nixdorf ("DN") ATMs in Qatar. QIB has also been established in Qatar and is listed on the Qatar Stock Exchange. It is one of the leading Islamic banks and the second largest bank in Qatar.

2. Protech's claim in these proceedings originally was an amount of US$ 3,283,632.40, which was reduced in argument to US$ 3,091,257.46, plus interest and legal costs. The

claim represents the purchase price of 44 DN ATMs and the remuneration for services to be rendered to QIB with regard to these machines. Apart from its statement of defence to the claim, QIB also filed a counterclaim for material damages in an amount of QAR 2,537,190.00 and for moral damages in an amount of QAR 500,000.00. The issues arising from the dispute will be better understood against the background that will soon follow.

3. The parties are in agreement that this Court has jurisdiction to determine their dispute. They rely on clause 18.2 of an agreement between them concluded in November 2019 and referred to as the Professional Service Agreement ("PSA"). We do not think, however, that the agreement by itself could confer jurisdiction on this Court that it would otherwise not have. But, be that as it may, Article 8.3 of the QFC Law (No. 7 of 2005 as amended) provides that this Court has jurisdiction to hear commercial disputes arising between entities established within the QFC and entities established in the State but outside the QFC, unless the parties agree otherwise. Article 9.1.4 of the QFC Court Regulations and Procedural Rules is to the same effect. Hence, we are satisfied that the Court has jurisdiction to decide the case. With regard to the applicable law, clause 19 of the PSA provides that it will be "*governed and interpreted in accordance with Qatari law*".

4. The background can be shortly stated. Apart from Protech there is only one other provider of ATMs to banks in Qatar. Although Protech has over many years supplied ATMs and associated services to a number of banks in the country, QIB was not one of its customers. Traditionally it used NCR machines instead. But during December 2017 QIB approached Protech to replace part of its NCR ATM network with DN machines.

Protracted negotiations ensued. While Protech insisted on a formal request for proposal ("RFP") containing QIB's requirements, the representatives of QIB insisted on seeking informal proposals from Protech which were then discussed and amended in an attempt to comply with QIB's orally conveyed requests. In this way at least 17 proposals were submitted by Protech between December 2017 and January 2019. During these negotiations Protech was represented by its CEO, Mr Melvyn Matthew, Mr Trojan Lorenzo and Mr Erwin Lissing while QIB was represented mainly by Mr Yousef Abu Obieh and Mr Mostafa Taha all five of whom gave evidence at the hearing before us, which was conducted virtually over two days. Although disputes of fact arose between some of these witnesses, it turned out that the determination of the issues arising do not require any credibility findings to be made. During the period of negotiations Protech also provided QIB with an ATM for testing purposes. In 2018 that machine, which was a machine for cash withdrawals only, was replaced with a fully functional machine with cheque and cash deposit facilities as well as a cash withdrawal capability.

5. The last of the proposals was submitted by Protech on 9 January 2019. According to this proposal, which was referred to as the Capex Proposal, Protech would supply QIB with 44 ATMs at a discounted price of US$ 768,040.00 and one ATM for free. The Capex Proposal also provided for maintenance of the ATMs involved for a period of 7 years which would commence after expiry of the warranty period of one year following installation. The rate offered for this maintenance service, in terms of the Capex Proposal, amounted to US$ 120,101.94 per annum for the first 5 years and US$ 240,203.88 for each of the last two years.

6. According to the evidence Mr Lorenzo, who was the Sales and Marketing Manager of Protech at the time, he then received a telephone call from Mr Hasham Daabes, a senior official of QIB on 13 January 2019. During this call, so Mr Lorenzo testified, Mr Daabes told him that QIB had accepted the Capex Proposal and that a purchase order would follow, but that this would take some weeks to process. Protech does not manufacture DN ATMs. They have to be ordered from DN in Germany. According to Mr Lorenzo, Mr Daabes therefore requested him during this telephone conversation that he should place the order in the meantime because Mr Daabes wanted installation of the ATMs to be completed by April 2019.

7. Following upon this conversation, Mr Lorenzo testified, he contacted Mr Matthew who authorised him to order the machines, despite the fact that they had no written purchase order from QIB, which Mr Lorenzo then did. This is confirmed by Mr Matthew in his testimony. In addition, Mr Lorenzo testified, he received an email from Mr Taha, one of QIB's senior officials, on 21 February 2019, confirming QIB's acceptance of the offer contained in the Capex Proposal for the ATMs. But the email did not refer to the further offer, contained in the Capex proposal, for the maintenance of these machines over 7 years after the expiry of the warranty period. The email also informed Mr Lorenzo that a purchase order would be issued by QIB within 14 days. As it happened, the purchase order was indeed issued on 28 February 2019, but was only conveyed to Protech on 9 April 2019. The purchase order again confirmed the order by QIB for the ATMs referred to in the Capex proposal but added the following conditions:

> *"This LPO is subject to the specifications and prices listed above;*
>
> *non-compliance will result in cancellation of this LPO.*

Warranty as per quotation and our agreement.

Delivery as soon as possible.

Payment will be subject to satisfactory supply of goods/completion of work/job in accordance with approved quotation, after 30 days of receipt of invoice."

8. In his evidence Mr Matthew pointed out that in terms of the Capex Proposal 20% of the purchase price for the ATMs was payable in advance with the balance of 80% payable upon delivery to QIB. But, so he testified, he attended a meeting with Mr Obieh and Mr Taha on 19 March 2019 where they insisted on a new payment schedule of 50% on delivery, 25% on installation and 25% on rollout of the machines. According to Mr Matthew he was initially unwilling to agree to this amendment but since the custom-made manufactured ATMs ordered by QIB were already on route from Germany, he was compelled to accept the amendment. At more or less the same time, so both Mr Matthew and Mr Lorenzo testified, QIB insisted that a separate agreement be entered into for the maintenance part of the contract. To comply with this request Protech submitted a draft PSA (i.e. Professional Service Agreement) to QIB on 24 March 2019.

9. The PSA provides for the 7-year maintenance of the machines by Protech at the rates offered in the Capex Proposal. It also provides for the installation of these machines in accordance with schedule 1 of the PSA. Moreover, it makes provision for the delivery of the ATM's as described and at the prices set out in the Capex Proposal as well as in QIB's purchase order. In addition, the PSA provides for a new schedule of payment for the ATMs, namely, 50% upon contract sign-off, 25% upon completion of the pilot

phase and 25% upon project closure. According to Mr Matthew the PSA also went through a number of drafts until QIB was finally satisfied with its terms. Mr Matthew felt pressurised to meet QIB's demands, because this was already in November 2019. In the event Mr Matthew signed this final version of the PSA on the 21 November 2019, which was accepted by QIB on 24 November 2019.

10. In the meantime, two things happened. First, the ATMs arrived in Doha on 20 May 2019 and were delivered to a warehouse whereupon Protech notified QIB of their whereabouts. Secondly, Protech started to implement schedule 1 of the PSA which deals with installation of the machines and the integrations of the ATMs into the system of QIB. With regard to the integration process it is common ground that the ATMs supplied by Protech had to be integrated into QIB's existing ATM switch. Likewise, it is common ground that QIB has a world class switch system. Nonetheless, major problems were encountered in the process of integrating the DN ATMs into QIB's switch system, because it had been configurated for NCR machines.

11. Schedule 1 provides for a number of stages which were contemplated to be completed step-by-step. First, the system integration test, then the Vynamic view test which had to do with the integration of the software; then the user acceptance test; followed by the pilot stage, the pre-rollout stage; and finally the rollout stage. Relying on this schedule QIB's case on the pleadings and supported by its evidence was in short that:

    a. The ATMs supplied by Protech had failed the system integration test, the Vynamic view test and the user acceptance test.

    b. In consequence Protech should not even have been allowed to proceed to the

pilot test but on the basis of assurances given by Protech that the outstanding, "open issues" would be resolved, they proceeded to the pilot phase.

c. During the pilot phase the ATMs were crashing when transactions were being executed. In this light, Protech should not have been allowed to move to the next phase. But again, because of assurances by Protech that the outstanding or open issues would be resolved, they moved to the pre-rollout stage and eventually to the rollout phase. This was in about October 2019.

d. During these final phases a number of ATMs were installed at different QIB branches. All these machines encountered problems, for instance by stopping to dispense cash in the middle of transactions and severe service interruptions in other respects. QIB received numerous complaints from its customers and these customers also started to complain in social media which was seriously detrimental to QIB's reputation. QIB reported these problems to Protech by email on a number of occasions. Protech responded by sending out service teams to the various ATMs, but the problems kept recurring.

e. In order to avoid further damage to its reputation and to provide a proper service to its customers, QIB eventually decided to remove the DN ATMs which had been installed at the time and to reinstall the old NCR machines, which had been replaced by them. Accordingly, QIB informed Protech on 12 December 2019 of its intention to terminate the contractual relationship between them and this was formally confirmed by registered letter on 23 December 2019.

12. Although the three witnesses who testified on behalf of Protech did not devote much time to the allegations regarding the poor performance of the ATMs that were delivered

to QIB, the answer that emerges from Protech's case in general seems to be broadly as follows:

a. The machines did not perform as poorly as contended for by QIB.

b. Some of the difficulties complained of resulted from the fact that QIB never provided Protech with proper specifications in the form of an RFP, which left Protech groping in the dark during the design of the machines.

c. A further cause of the problems in the performance of the machines resulted from the integration between the DN ATMs and QIB's ATM switch that was configurated for NCR ATMs.

d. Some of the difficulties complained of were still open issues that could be remedied at the time when the contractual relationship was terminated by QIB.

13. Apart from the contractual relationships described thus far, Protech relies on a further contract which it called the Managerial Service Agreement. However, in order to avoid confusion between this proposed contract, on the one hand, and the 7-year maintenance agreement which is part of the PSA, on the other, we shall refer to the former as "the monitoring agreement". In terms of the monitoring agreement, so Protech contends, it agreed to provide monitoring services for the ATMs sold. As the basis for this claim Protech relies on a draft contract which was conveyed to QIB on 25 August 2019. In terms of the draft, Protech would provide monitoring services by its personnel, working from QIB's premises 24 hours a day at a fee of US$ 21,000.00 per month for a period of 4 years. According to the evidence of Mr Lising, the assistant general manager of Protech who was called to testify on its behalf, Mr Sulthan Ibrahim, the head of technical services and IT operations at QIB, promised him by email on several

occasions during August and September 2019 that he would have the draft contract signed on behalf of QIB. Mr Lising therefore accepted that a contract had been concluded in accordance with the draft, albeit that it had not yet been signed by QIB. It appears that some technical services were provided by Protech in respect of integration issues. It is clear, however, that after these purported acceptances by Mr Ibrahim, the parties still negotiated about the terms of the monitoring agreement. So, for example, Mr Ibrahim communicated to Mr Lising in November 2019 that QIB wanted the duration of the contract to be reduced from 4 years to 12 months. In the event it is apparent that the monitoring agreement relied upon by Protech never reached the stage of final conclusion. In the event, Protech's claim in this regard seems to rest on article 99 of the Qatar Civil Code to which we will presently return.

14. Protech's total claim of US$ 3,091,257.40 is made up as follows:

    a. US$ 768,040.00 for the purchase price of the ATMs.

    b. US$ 1,080,917.40 (US$ 600,509.70 for 5 years plus US$ 480,407.70 for 2 years) for maintenance of the ATM's over a period of 7 years as per both the Capex Proposal and the PSA.

    c. The sum of US$ 1,056,000.00 for 4 years of monitoring under the monitoring agreement.

    d. The sum of US$ 186,300.00 for storage of the ATMs pending further rollout between June 2019 and August 2020.

15. QIB's counterclaim is for expenses in an amount of QAR 2,537,190.00 which allegedly became abortive after cancellation of the contractual relationship between the parties in

December 2019. Apart from an amount of QAR 763,444.00, the claim consists of costs occasioned by the employment of QIB's own staff and senior personnel for an aggregate period of 900 working days between February 2019 and December 2019 with regard to the installation and integration of the DN ATMs. The QAR 763,444.00 is claimed as expenses incurred to third parties such as NCR in the installation and integration process.

16. Although it is common ground that there was a contractual relationship between the parties, the first dispute relates to the origin of that relationship. Protech's case is that there were three contracts:

    a. a contract of purchase and sale which was concluded through an acceptance on behalf of QIB of Protech's offer contained in its Capex proposal;

    b. the PSA; and

    c. a monitoring agreement.

17. QIB's opposing contention, on the other hand is that there were two contracts: (a) a contract of purchase and sale which came into existence when QIB's purchase order was impliedly accepted by Protech through delivery of the ATMs; and (b) the PSA.

18. In support of its case Protech contends that the offer contained in the Capex proposal was accepted: (a) verbally by Mr Daabes on 9 January 2019; (b) in writing by way of an email from Mr Taha during February 2019; and (c) through QIB's purchase order of 28 February 2019. QIB denies that the offer contained in the Capex proposal was ever

accepted on its behalf. Its disavowal is based on the following grounds: (a) a denial of the telephone conversation of 9 February 2019; (b) a denial that Mr Daabes and Mr Taha were authorised to conclude a contract on behalf of QIB; (c) on the face of the Capex Proposal, the offer contained therein was only open for acceptance until 31 January 2019, which means that any purported acceptance after that date would in any event be of no force and effect; (d) since the terms of the purchase order differed from those contained in the Capex proposal, the purchase order cannot be construed as an acceptance of that offer but must be regarded as a counter offer instead which counter offer was impliedly accepted by Protech on 20 May 2019 through delivery of the ATM's; and (e) even if a contract of purchase and sale did come into existence as contended for by Protech, it was subsumed or novated by the PSA.

19. We think the answer to this dispute is that even if a contract of purchase and sale did come into existence before the conclusion of the PSA, that contract was novated and replaced by the PSA. Apart from the terms relating to a contract of maintenance, the PSA constitutes a self-standing, discrete contract of purchase and sale in that it describes both the goods and the price as well as the method of payment of that price. Moreover, some of the terms of the PSA are different from those in the prior purchase agreement contended for by Protech which renders it inconceivable that the parties intended to be bound to two contracts with different terms pertaining to the same sale. In addition, there is clause 17.11(a) of the PSA which provides under the heading "*Whole Agreement*":

"This agreement and the documents referred to in it contain the

whole agreement between the parties relating to the transaction contemplated by this agreement and supersede all previous agreements between the parties relating to those transactions."

20. With regard to both contracts of purchase and sale contended for by the parties respectively, we find the conclusion inevitable that either one would constitute a "transaction contemplated by the PSA" as envisaged by clause 17.11 which would consequently be superseded by the PSA in terms of that clause and that in consequence the former was subsumed by the latter. In this light it is unnecessary for us to decide on the merits of the other defences raised by QIB to Protech's contention that the offer contained in the Capex Proposal had been validity accepted on its behalf. Suffice it to say that these other answers also seem to well-founded.

21. The next issue arising, which is crucial to the outcome of the case, is whether QIB was entitled to cancel the PSA in accordance with the terms of that agreement, as it purported to do, by its letter of 23 December 2019. Conversely, whether QIB's purported termination of the PSA was unlawful as contended for by Protech.

22. The case for QIB that it was entitled to cancel the agreement rests on a number of provisions of the PSA. A proper understanding of this case unfortunately requires an extensive quotation of these terms. They are:

" 2. SERVICES AND DELIVERABLES

2.1 With effect from the Effective Date, the Service Provider shall provide the Services to the Customer, and such other services consistent with the Services, at such places as the Customer may reasonably require of the Service Provider from time to time.

2.2 The Service Provider shall devote to its obligations under this agreement its time, attention and skill as may be necessary for the proper performance of those obligations.

2.3 The parties acknowledge that the Service Provider, in connection with the provision of the Services, will be providing advice and recommendations to the Customer. All decisions in connection with the implementation of such advice and recommendations shall be the responsibility of and made only by, the Customer. The implementation of such advice and recommendations shall only be made with the prior written approval of the Customer.

2.4 On receipt of a Deliverable, the Customer (acting reasonably) shall verify whether that Deliverable meets its requirements. If the Deliverable does not meet the Customer's requirements based on the agreed scope of work, the Customer shall specify, in reasonable detail the reasons it considers the Deliverable does not meet its requirements, in which case the Service Provider shall promptly modify it to address those reasons. If a Deliverable does not meet the Customer's requirements following any re-submission of that Deliverable the Customer may either:

(a) again specify in reasonable detail the reasons it considers the Deliverable does not meet its requirements in which case the Service Provider shall promptly modify it to address those reasons;

or

(b) without prejudice to its other rights or remedies, terminate this Agreement immediately by written notice to the Service Provider and the Service Provider shall promptly refund to the Customer any Fees paid to the Service Provider under this agreement in respect of Deliverables that have not been accepted by the Customer at the date of the termination

2.5 The Customer shall provide its initial response regarding each Deliverable under Clause 2.4 within 5 working days of receipt of that Deliverable where reasonably practicable to do so, and shall notify the Service Provider (within 5 working days of receipt of the Deliverable) of any longer time period it requires where not

reasonably practicable to respond in full within 5 working days. If the time taken by the Customer in reviewing a Deliverable causes an unreasonable delay, the Parties shall escalate that matter to the steering committee of the Customer for resolution.

2.6 A Deliverable shall only be treated as having been accepted by the Customer if it is confirmed in writing as accepted by an authorised representative of the Customer and following such acceptance the relevant Milestone shall be deemed to have been achieved. The Customer shall not unreasonably delay the issuance of the aforementioned written acceptance of the Deliverable. If the time taken by the Customer in reviewing a Deliverable causes an unreasonable delay, the parties shall escalate that matter to the steering committee of the Customer relating to the Services for resolution.

4 REPRESENTATIONS, WARRANTIES AND UNDERTAKINGS

4.2 The Service Provider represents, warrants and undertakes to the Customer that:

...

(d) the Services will be provided in a timely and professional manner and in accordance with the timetable agreed upon with the Customer in the change management plan or as otherwise agreed with the Customer and will conform to the standards generally observed in the industry for similar services;

(e) it will acquaint itself with and comply with any working practices, rules or procedures applicable to others (whether independent contractors or employees) at any location where the Service Provider is performing the Services;

11 TERMINATION

11. 1 The Customer shall be entitled to terminate this agreement at any time on giving the Service Provider not less than 30 days' prior written notice of termination. If the Customer does terminate in accordance with this Clause, it shall pay the Service Provider all undisputed Fees that have accrued but not yet been paid.

11.2 Each party shall have the right, without prejudice to its other rights or remedies, to terminate this agreement immediately by written notice to the other if the other party:

> *(a) is in material breach of any of its obligations under this agreement and either that breach is incapable of remedy or the other party shall have failed to remedy that breach within 30 days after receiving written notice requiring it to remedy that breach; or*
>
> *(b) is unable to pay its debts or becomes insolvent or an order is made or a resolution passed for the administration, winding-up or dissolution of the other party (otherwise than for the purposes of a solvent amalgamation or reconstruction) or an administrative or other receiver, manager, liquidator, administrator, trustee or similar officer is appointed over all or any substantial part of the assets of the other party or the other party enters into or proposes any composition or arrangement with its creditors generally or anything analogous to the foregoing occurs in an applicable jurisdiction."*

23. QIB's letter of 23 December 2019 purported to terminate the contractual relationship between the parties with immediate effect. It is therefore clear that QIB never tried to rely on clause 11.1 of the PSA, which afforded it the right to cancel the contract without cause by giving 30 days' notice to that effect. Indeed, reliance on this clause is pertinently disavowed in the letter of termination which contends that QIB "*is not obligated to pay any monies to you in lieu of the [30 day] notice period, due to your failure to meet your obligations*".

24. QIB's contention that it was entitled to cancel the PSA summarily and without notice, rests firstly on clauses 2.4 and 2.6 of the PSA. We find this contention unsustainable. Both clauses 2.4 and 2.6 deal with "*Deliverables*" which term is defined in the PSA to mean "*the deliverables to be supplied by the Service Provider to the Customer as part of the Services in each case by the date specified in Anne 1*". Apart from the fact that annex 1 contains no dates, it is confined to the ATM machines themselves and does not refer to any services, and particularly not to the maintenance plan or the installation of the machines under schedule 1.

25. Schedule 1 is expressly included under the definition of "*Services*" in the definition clause and not under "*Deliverables*". Since QIB's complaint is that Protech had failed to comply with schedule 1, clauses 2.4 and 2.6 do not apply. Moreover, in contending that Protech had failed to comply with schedule 1, QIB's two witnesses made no attempt to identify the cause of such non-compliance; whether it was due to lack of skill on the part of Protech's personnel; or, because of defects in the "*Deliverables*", i.e. the ATMs themselves; or, because of difficulties in integrating the DN ATMs with QIB's switch system. In fact, because the two witnesses who testified on behalf of QIB did not profess to be ATM experts, they were not in a position to ascribe the non-compliance with schedule 1 to any defect in the "*Deliverables*". We find that QIB failed to establish any breach on the part of Protech with regard to deliverables. In short, QIB cannot rely on clauses pertaining to defects in the deliverables as defined without showing that such defects did in fact exist.

26. In addition, clause 2.4 has to be read with clause 2.5. In terms of the latter clause QIB was obliged to file any complaint about the quality of the ATMs within 5 days of delivery, which it never did. Clause 2.6 relates to delays by Protech in the provision of "*Deliverables*" by certain dates or milestones that were supposed to have been agreed upon. Since no milestones were in fact agreed upon in the PSA or any of its annexes, clause 2.6 cannot find any application. In any event, as we have pointed out, QIB's complaint is not based on delay but on Protech's failure to comply with schedule 1.

27. On QIB's version, if Protech breached clause 4 of the PSA through non-compliance

with schedule 1, on the assumption that this breach had been established, QIB could notionally rely on clause 11.2 of the PSA for terminating the contract with immediate effect. But essential requirements for reliance on this clause are (a) proof that the breach is of a nature that cannot be remedied by Protech; or (b) that Protech had failed to remedy the breach after it had been afforded 30 days to do so. Neither of these two requirements had been satisfied by QIB. As to (a) the breach of contract complained of by QIB appears to be of a nature that, given time, could be rectified. Whether they would have been rectified within 30 days, had Protech been given notice to that effect, is another question.

28. But that question does not arise because Protech had not been afforded the 30 days' notice to which it was entitled in terms of clause11.2. On the contrary, on 3 December 2019 Mr Obieh wrote an email to Mr Matthew recording a meeting they had had the previous day. According to the email, Mr Matthew acknowledged at the meeting that there were problems with the installation of the ATMs but offered to rectify these problems at no additional cost to QIB. The email then proceeded to state (at page 436 of the bundle):

> *"Based on the above, our COO has directed and communicated clearly at the meeting that all activities related to the project will be put on hold including the ATMs roll-out as QIB will be assessing the overall status of the project*" and
>
> *"As a conclusion of the meeting the COO re-stated that all activities related to project from QIB side are currently suspended. We are*

supposed to have management meeting within the coming two days in order to re-assess the overall situation and agree on the direction and next steps. Accordingly, QIB will be in a position to make a final decision on this project and inform you with the same."

29. What was conveyed to Protech in the email of 3 December 2019 was therefore in direct conflict with any indication of a decision that QIB would terminate the PSA if Protech should fail to comply with its obligations under schedule 1 within 30 days. In this light, the inevitable conclusion is that QIB's purported termination of the PSA with immediate effect on 23 December 2019 was wrongful and amounted to an anticipatory breach of the contract. This triggered the provisions of article 707 of the Qatar Civil Code which reads in relevant part:

"1. The employer may withdraw from the contract and stop the work at any time prior to its completion, provided that the contractor shall be indemnified for all expenses incurred, all work completed, and any profit he would have made had the work been completed.

2. The court may reduce the indemnity payable for the profit missed by the contractor if the circumstances make such reduction fair …"

30. In consequence, Protech was entitled upon renunciation of the contract by QIB to claim immediate payment of the purchase price of the ATM's. Although Article 707 of the

Code does not refer to a claim for the "purchase price", we believe it is reasonable to infer that the purchase price of the ATM's encompassed Protech's expenses and profits pertaining to the repudiated sale, as envisaged by Article 707.1. With reference to the provisions of Article 707.2, no reason has been suggested by QIB as to why the indemnity thus constituted should be reduced. As to the time for payment of the purchase price for the ATMs, it is true that in terms of the PSA, Protech would only be entitled to claim payment of the final 25% upon project closure, which event never occurred. But since it is QIB's wrongful conduct which rendered this occurrence impossible, the contract is regarded as having reached that stage at the date of renunciation.

31. With regard to the 7-year maintenance contract, the position is somewhat different. In terms of the PSA, the effective date of this part of the agreement was 1 year from installation of each ATM. In addition this part of the agreement provided that "*the bank retains the right to terminate this maintenance agreement without cause by giving the service provider 30 days' written notice*". Once QIB decided to terminate its contractual relationship with Protech, as it did, it was therefore entitled to cancel this part of the agreement without cause and without incurring any liability before the effective date. The fact that it did not do so renders its conduct wrongful, but its right to do so affects the quantum of its entitlement to loss of profits by virtue of article 707.2. Under this article Protech is only entitled to recover the profits it would have made if QIB had performed its legal obligations, and no more. In the event, QIB could and would probably have performed its legal obligations under the PSA by giving 30 days' notice without cause. It follows that under this rubric, Protech has no claim. Further, Protech's claim under this head is not for any profit lost but for the sums to which it

would have been entitled if it had in fact provided the maintenance services for 7 years. The provision of such services would, it may be assumed, have involved some outlay by Protech. The sums claimed would therefore in any event be excessive.

32. With regard to the claim for monitoring services it is clear to us that on Protech's own version this contract was never finally concluded. According to Mr Lissing he left Doha for the Philippines on 27 November 2019. He says that at that stage he was under the firm impression that a contract had been reached between the parties. But from his last communication with Mr Ibrahim on 27 November 2019, it is clear that they were still negotiating about whether the contract should endure for a period of 4 years or for 12 months. The inevitable conclusion is that agreement was never reached between the parties. This is underscored by the fact that Protech's claim under this heading is based on a 4-year contract which, on its own version, QIB never agreed to. In the event it is unnecessary to consider QIB's further defence that Mr Ibrahim was never authorised to enter into the monitoring agreement on its behalf. The fact that Protech rendered services to QIB on the understanding that this agreement would be concluded, might constitute a claim on the basis of unjustifiable enrichment if Qatari law allows such a concept, as to which we express no opinion. But Protech never formulated any claim on this basis and it does not arise for determination.

33. As an alternative basis for its claim under the monitoring agreement, Protech relied upon Article 99 of the Qatar Civil Code which provides:

> *"1. Where either party breaches their obligation to conclude the*

promised contract, the other party may, if not in breach, claim a judgment against the party in breach for the validity and enforceability of the promised contract.

2. *Judgment recognising the promised contract as valid and enforceable shall replace the promised contract without prejudice to the requirements of the law for registering such a contract."*

34. Read in isolation the meaning of this article is not entirely clear. The interpretation contended for by Protech is that by virtue of this article it makes no difference whether a contract had reached the stage of final conclusion or not. The parties are in any event bound to its terms as if they concluded a final contract even when it is clear that they did not. But as we see it, that interpretation cannot be sustained. The article has to be read in the context of articles 96 and 98 which provide:

"Article 96

The contract by which either or both contracting parties promise to conclude a specific contract in the future shall only be binding if all the essential terms of the contract envisaged and the time when the contract should be concluded are stated.

Article 98

Where the promise contract is binding on one party, it shall be concluded if accepted by the party favoured by the promise and the acceptance reaches the notice of the promisor within the time limit

prescribed for the promise."

35. In this context it appears to us that Article 99 is dealing with a so-called *pactum de contrahendo*, in the nature of an option. In terms of Article 96 a promised contract (e.g. the intended purchase contract) is only binding and enforceable under Article 99 as if it had been concluded if all the essential terms of that contract are stated in a binding promise contract (e.g. an option). Thus understood the monitoring contract relied upon by Protech is not enforceable. Apart from the fact that the promise contended for is not in the form of a *pactum de contrahendo* or an option, it does not contain all the essential terms of the promised contract, e.g. the duration of its operation. It follows that Protech's claim under this heading is also bound to fail.

36. With regard to Protech's claim for storage of the ATMs, the short answer is in our view that no legal basis had been made out for this claim. By allowing Protech's claim for payment of the purchase price of the ATM's, it is notionally placed in the position it would have been had these goods been delivered to QIB in accordance with the terms of the PSA. At the same time that answers the question raised on behalf of QIB in argument as to who is entitled to and responsible for the ATM's: we believe that Protech is entitled to the purchase price while QIB is- and has been- entitled to and responsible for the ATM's. It could be that in the event Protech could be said to have acted as a *negotiorum gestor* in looking after the ATMs on behalf of QIB. But, as we have said, no claim was made out on this basis- or on any other basis – for the recovery of storage costs. It follows that this claim cannot succeed.

37. QIB's counterclaim is essentially for expenses incurred by it for the purposes of installing and the integration of the ATMs which became abortive upon cancellation of the PSA. The claim is clearly predicated on the basis that the PSA had been validly terminated by QIB. This is so because there is no evidence that, had the PSA not been terminated, the ATMs would not eventually have been successfully installed. In that event the expenses incurred by QIB would not have been wasted. The cause of the loss claimed by QIB therefore lies in its wrongful termination of the PSA and not in a breach of contract by Protech. As to the claim for moral damages in an amount of QAR 500,000.00, this claim seems to rest on harm suffered by QIB to its reputation through mal-performance of the ATMs. But in our view, this amounts to a claim for consequential loss which is excluded by clause 12.4 of the PSA. In the result, QIB's counterclaim cannot succeed.

38. With regard to the claim for interest, we believe it would be fair to compensate Protech, by way of an award of interest on the purchase price of the ATMs for its loss occasioned by the delay in payment of this amount, which became due upon renunciation of the contract by QIB, on 23 December 2019. In the exercise of its power under Article 10.4.9 of its Regulations and Procedural Rules, this Court has awarded interest at the rate of 5% per annum in a number of cases in the recent past and we propose to apply that norm. Accordingly, interest is awarded in the sum of US$ 31,489.64, which is calculated on the amount of US$ 768,040,00 at the rate of 5% per annum from 23 December 2019 until 15 October 2020 together with further interest on the capital amount calculated at the rate of 5% per annum from 15 October 2020 to the date of payment.

39. As to the costs of the litigation, we find that Protech has been substantially successful in its claim, while QIB's counterclaim is bound to fail. Since we can see no reason why costs should not follow the event, a costs order is made in favour of Protech with regard to both the claim and the counterclaim.

By the Court,

Justice Fritz Brand

Representation

For the Claimant: Mr Paul Fisher, Counsel, 4 New Square, London, United Kingdom.

For the Defendant: Dr Hassan Okour, Alhababi Law Firm, Doha, Qatar.

DIGITALLY SIGNED AND VERIFIED
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