MALTA

COURT OF APPEAL
(Inferior Competence)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Sitting of the 16 of December, 2020

Appeal Number 77/2018 LM

(1) Cooperativa Archeologia, a company registered in Italy by means of number 0318590484 (codice fiscale and partita IVA)

(2) ReCoop – The Restoration and Conservation Coop Ltd, a properly constituted co-operative society, registered in Malta having as registration number K081

(3) Consorzio Toscano Cooperative CTC Soc. Coop, a company registered in Italy by means of number 03046950485 (codice fiscale and partita IVA)

collectively known as "Conservation of Malta Joint Venture"
("the Appealed Parties")

***vs*.**

Restoration Unit
("the Appellant")

The Court,

Preamble

1. This is an appeal brought before this Court by the respondent **Restoration Unit** [hereinafter "the Appellant"] from the Arbitration Tribunal decision of the 7th February, 2018, [hereinafter "the Arbitral Award"] in the arbitral proceedings having a reference number Arb. Nru. I. 4012/2014 presented in the Malta Arbitration Centre by **Cooperativa Archeologia, a company registered in Italy by means of number 0318590484 (codice fiscale and partita IVA), ReCoop – The Restoration and Conservation Coop Ltd, a properly constituted co-operative society, registered in Malta, having as registration number K 081,** and **Consorzio Toscano Cooperative CTC Soc. Coop, a company registered in Italy by means of number 03046950485 (codice fiscale and partita IVA), collectively known as "Conservation of Malta Joint Venture"**:

> *"That for the above reasons, after assessing and considering the evidence brought forward by both parties, the Arbitral Tribunal concludes that [1] Respondents are liable to pay Claimants compensation in terms of Article 35.9 of the Special Conditions forming part of the Contract of works; applicants, the amounts being liquidated of: [2] liquidates the amount due by way of compensation in the amount one hundred five thousand two hundred eleven euro and forty-two cents (€105,211.42); [3] orders Respondents to pay Claimants the liquidated sum of one hundred five thousand two hundred eleven euro and forty-two cents (€105,211.42); [4] with interest from the date of each relative invoice.*
>
> *All costs related to these proceedings, as per Taxed Bill of Costs issued by the Malta Arbitration Centre which is hereto being attached and marked document "A", are to be borne solely and exclusively by the Respondents."*

The facts of the case

2. The facts of the case concern the award of a contract to the Appealed Parties for "Restoration Works to Valletta Land Front Fortifications – VLT 10 - Restoration of St. James Cavalier", following a call for tenders made by the Department of Contracts on behalf of the Ministry for Resources and Rural Affairs in the name of the Appellant. It subsequently transpired that the total volume of work requested to be carried out by the Appealed Parties had actually decreased by 28.52% and the Appellant insisted that in accordance with Clause 35.7 of the Special Conditions, the Appealed Parties had no right to compensation in so far as the decrease did not exceed the percentages established in the special conditions of the contract – that is the decrease cannot be more than 40% of the total volume of works. The Appealed Parties disagreed on the basis of the provisions of Article 35.9 of the said Agreement. Following an unsuccessful attempt to settle the matter amicably, the Appealed Parties served the Appellant with a Notice of Commencement of Arbitration on the 5th May, 2014.

Merits

3. The Appealed Parties filed their Statement of Claim in the Malta Arbitration Centre on the 5th June, 2014, whereby they requested that they be granted:

> "*... the following relief/remedies, pursuant to any other necessary declarations:*

i) Liquidation of the payment due by Respondent to the Applicant, by way of compensation, in terms of the Article 35.9 of the Special Conditions of the Contract;

ii) Condemnation of Respondent to pay to Applicant the liquidated amount.
Applicant is furthermore claiming that Respondent is to be ordered to pay all interests, costs, including legal representation fees, relative to the present arbitration proceedings.

The foregoing is without prejudice to such further claims and additional amounts to which Applicant is or may become entitled".

4. The Appellant filed its reply on the 16th July, 2014, requesting that the claims put forward by the Appealed Parties be rejected, together with costs.

The Arbitral Award

5. The Arbitration Tribunal [hereinafter "the Tribunal"] made the following observations and conclusions relevant to this appeal:

"From the defence put forward by the Respondents to the claims made by the Claimants it is fairly clear that there is no dispute between the parties as to the facts that brought about the dispute merits of these proceedings.

The parties are in agreement that following a call for tender, the tender was awarded to the Claimants following which a contract was signed on the 11th May 2011, bearing Ref No. CT 3037/2010 and entitled **"Restoration Works to Valletta Land Front Fortifications – VLT 10 – Restoration of St James' Cavalier".**

There is no dispute that the works were executed and that following the completion of the works it transpired that a number of items, the quantities of which in effect were much less than the quantities indicated in the Contract bill of Quantities;

There is no dispute either that the need for the said modifications cannot be attributed to Claimants.

The whole issue, which is the entire basis of the dispute at hand is whether the Claimant in terms of the Contract is in effect granted the right to claim compensation for his loss as a result of the said modifications.

The two relevant articles in the Special Conditions of the Contract on which the parties are basing their arguments are article 35.7 and 35.9.

The Respondents argue that it is article 35.7 that should apply and that based on the said article the Claimants have no right to request compensation for the modifications.

Article 35.7 states the following:

> *In the event of an increase or decrease in the total volume of work required by the Contracting Authority or resulting from circumstances which are caused neither by the Contractor's negligence nor by any action on his part, the Contractor may not claim compensation unless that increase or decrease, calculated on the basis of the original prices and without varying the object of the contract, exceeds a percentage of the original contract price specified in the Special Conditions. This percentage may not be more than 20% or less than 40%. In these circumstances, on making a reasoned request submitted to the Contracting Authority, the Contractor shall be entitled to have the contractual period of performance changed.'*

The Respondents argue that the modifications are equal to a 28.52% decrease in the total volume of the original contract price and hence in terms of article 35.7 since the said decrease does not exceed 40% of the original contract price it should follow that no compensation is due.

On the other-hand the Claimants argue that article 35.7 is not applicable to the present dispute and that the relevant article is article 35.9 which states the following:

> *If the contract contains a bill of quantities or breakdown of the overall price giving an itemised list of the scale and prices of the various works, and if modifications required by the Contracting Authority or resulting from circumstances which are caused neither by the Contractor's negligence nor by an action on his part alter the scale of some of the works in such a manner that the quantity shown for any item is increased by 30% or decreased by 41% or more, the Contractor shall, on making a reasoned request to the Contracting Authority, be entitled to compensation for any damage he has suffered as a result of modifications to the original project*

> *once all the quantities in the relevant items have been executed for the purposes of the contract.'*

At a glance when one reads the two articles of the Special Conditions quoted above, it would be conceived that the two are in fact contradictory, however, when one reads the two articles more attentively and bears in mind the generality of the Special Conditions it becomes more clear that in effect the two articles are referring to two different scenarios.

On examination of the Contract[1], it is fairly clear that the format adopted by the Department of Contracts, is to have a contract which is made up of a number of separate documents all of which are considered to form an integral part of the Contract.

One of the many documents are those referred to as the Special Conditions. On reading the said conditions it is clear that a large number of these conditions are standard in nature and have been drafted in a way to cater for various different scenarios.

Article 35.9 of the Special Conditions clearly states at the outset, that it refers to a scenario where ***the contract contains a bill of quantities or breakdown of the overall price giving an itemized list of the scale and prices of the various work.***

It is the humble opinion of the arbitrator that articles 35.7 and 35.9 are in fact distinct and independent from each other, in the sense that they both regulate different scenarios.

As quoted above article 35.9 clearly states that it applies in the case that the contract contains a bill of quantities or a breakdown of the overall price, whilst article 35.7 would apply in those cases were the contractor has provided an overall price without supplying it breakdown or without providing a bill of quantities.

Article 1002 of Civil Code Chapter 16 of the Laws of Malta states:

> *'Where, by giving to the words of an agreement the meaning attached to them by usage at the time of the agreement, the terms of such agreement are clear, there shall be no room for interpretation.'*

In the case **Gloria mart Patrick Beacom vs L-Arkitett u Inginier Civili Anthony Spiteri Staines** Court of Appeal in its judgement pronounced on the 5th of October 1998, held:

[1] A copy attached to the Statement of Claim and marked as Doc A.

"Kjarament hawn non si tratta ta' każ fejn is-sens tal-kelma ma jaqbilx ma' dak li kellhom fi ħsiebhom il-partijiet kontraenti, kif jidher ċar mill-pattijiet meħudin flimkien (artikolu 1003). U meta l-kliem tal-konvenzjoni meħud fis-sens li għandu skont l-użu fiż-żmien tal-kuntratt hu ċar, ma hemmx lok għall-interpretazzjoni (artikolu 1002). Il-principju kardinali li jirregola l-istatut tal-kuntratti jibqa` dejjem dak li l-vinkolu kontrattwali għandu jiġi rispettat u li hi l-volontà tal-kontraenti, kif espressa fil-konvenzjoni, li kellha tipprevali u trid tiġi osservata. Pacta sunt servanda:

"Illi l-gurisprudenza nostrali hi kostanti filli rriteniet li mhix ammissibbli prova testimonjali kontra jew in aġġunta għall-kontenut ta' att miktub , u hi talvolta ammessa biss biex tikkjarixxi l-intenzjoni tal-partijiet meta din hi espressa b'mod ambigwu" (Vol XXIV, pt III, pg. 746):

Il-Qrati jkunu obbligati jintepretaw il-konvenzjoni "meta f'kuntratt il-partijiet ma jkunux spjegaw ruħhom ċar jew posterjorment għall-kuntratt jintervjeni avveniment li jkollu bħala konsegwenza kwistjoni li ma tkunx ġiet preveduta u li kien hemm bżonn li tiġi maqtugħa u din għandha tiġi primarjament interpretata skont l-intenzjoni tal-partijiet li jkunu ħadu parti fil-kuntratt u li tkun tidher ċar mill-kumpless tal-konvenzjonijiet" (Vol. XXXIV pt1, pg. 27)

- Omissis -

*"Infatti, kieku dan (*żjieda tal-esponenti - "dan" b'referenza għal-bidla fl-interpretazzjoni mitluba f'din il-kawża*) kellu jiġi sanzjonat kien ikun ifisser li l-Qorti ma tibqax tistabbilixxi d-drittijiet u l-obbligi tal-kontraenti skont il-volontà kontrattwali minnhom espresso fil-kuntratt. Il-vinkolu kontrattwali ma jibqax jorbot fit-termini preċiżi espressi mill-kontraenti, imma jiġi interpretat skont il-konvenjenza ta' dak li jidher li setgħet kienet l-intenzjoni tagħhom kieku setgħu jipprevedu l-konsegwenzi negattivi u futuri tal-kuntratt minnhom konkluż fuq xi wieħed mill-kontraenti. Process interpretattiv għal kollox inaċċettabbli u anti-guridiku f'kull każ....."*

The same reasoning was made also in another judgment also pronounced by the Court of Appeal on the 15th December 1995 in the case **Stanislao Cassar et vs Chevalier Antonio Cassar**:

"Il-legislatur fil-materja ta' interpretazzjoni ta' kuntratt inissel certi regoli li huma pjuttost direttivi assoluti, li ghandhom jigu segwiti skond ic-cirkostanzi, u principalment il-principju illi meta t-termini tal-kuntratt huma oskuri irid jigi kkunsidrat dak li l-partijiet kontraenti riedu. A contrario senso, meta t-termini jkunu cari, mhux lecitu ghall-Qorti li tinterpreta l-volonta` tal-kontraenti oltre dak li gie konvenut u miktub. Meta f'kuntratt il-partijiet ikunu spjegaw ruhhom car – kif

jindikaw il-kuntratti fuq citati – il-Qrati ma jkunux obbligati jinterpretaw il-konvenzjoni".

In ***Dr Raymond Pace noe vs. Salvatore Xuereb,*** on the 26th March 2010 the Court of Appeal held that:

'id-drittijiet tal-kontraenti jirriżultaw minn dak li hemm miktub fil-kuntratt u mhux minn xi ħsieb ta' parti jew oħra mill-kontraenti, u meta dak li hemm fil-kuntratt jirrizulta ċar mhux levitu li l-Qorti tapplika r-regoli ta' interpretazzjoni billi dawn huma eċċezzjoni għar-regola annunċjata fl-artikolu 1002 u cioe ta' meta l-kliem ta' konvenzjoni, meħuda fis-sens li għandu skond l-użu fiz-żmien tal-kuntratt, hu ma hemmx lok għall-interpetazzjoni.'

In ***Michael Portelli vs. Paul Bonello*** the First Hall of Civil Court in a judgement pronounced on the 30th November 2006 went one step further and stated that where the wording a contract is clear it is not permitted for one of the parties to attempt to explain what his understanding of the contract:

'anqas u anqas jista' jitħalla li xi waħda mill-kontraenti tfisser x'riedet tifhem lil hinn minn dak il-kliem ċar.'

This means that the rights and obligations of the contracting parties arise from what is enshrined in the contract and not from an interpretation given by one of the contracting parties.

On the same dictum in the judgement delivered by the Court of Appeal (Inferior) on 20 October 2003, in the case ***Gemma Fenech vs. John Bugeja*** the Court referring to Article 1002 of the Civil Code held:

'*Tajjeb li jiġi osservat ukoll qabel kull konsiderazzjoni tal-meritu illi huwa paċifiku f'materja ta' interpretazzjoni ta' kuntratti illi meta d-dicitura tal-kuntratt hija waħda ċara allura ma huwiex lecitu għall-Qorti li tittanta tinterpretah billi tindaħal x'kienet il-motivazzjoni tal-kontraenti meta kkonkludew il-ftehim. Dan jinsab rispekkjat ukoll fl-artikolu 1002 tal-Kap. 16'*

It is the arbitrator's humble opinion that as already stated above Article 35.7 and Article 35.9 are referring to completely different scenarios, and that consequently these articles are to be applied independently of each other.

Whilst Article 35.7 caters for a situation wherein the parties agreed on a total volume of works and on a global price whilst Article 35.9 on the other hand caterers for a

situation wherein the parties had agreed on a bill of quantities and a breakdown of the overall price was given.

Respondents' witness Dr Franco Agius, in fact echoed the above and gave his explanation to the applicability of both articles, held:

> *'The 35.7 is the switch, once the percentages established in 35.7 are achieved, then the contractor has a right to make compensation. Where there is a bill of quantities, it's in line with article 35.9; where there is no bill of quantities, it's in line with 35.7. Otherwise, there wouldn't be any reason why I should put two special conditions, both giving right to compensation'*

Paul Muscat, who testified in his capacity as representative of the Claimant Company, in his testimony of the 26th March 2016, confirmed that a bill of quantities was in effect drawn up and formed an integral part the contract of works in question.

For the above reasons the arbitrator is of the opinion that article 35.9 of the Contract of works is to be applied in the dispute in question and that consequently in terms of the same said article the Claimant is entitled to seek compensation for any loss suffered as a result of any modifications required by the Respondent which modifications alter the scale of some of the works in such a manner that the quantity shown for any item is increased by 30% or decreased by 41%.

The Respondents in their note of pleas, make reference to Article 35.8 of the Contract of works which entitled the Contractor in this case the Claimant to refuse to carry out any modifications which would increase the works by more than 40%, and hence argue that the Claimant in terms of the same article had the right to refuse to carry out the modifications.

> *Illi l-kuntrattur rikorrenti kienet intitolatat ukoll li jekk jara li l-modifikazzjonijiet kienu ser jeċċedu l-persentaġġi mniżżla fil-kuntratt, il-kuntrattur kien intitolat li saħansitra jirrifjuta li jagħmel dawk ix-xogħolijiet u dan ai termini tal-artiklu 35.8. Iżda ma sar l-ebda rifjut ta' dan it-tip min-naħa tar-rikorrenti, minkejja li kienu intitolati li jagħmlu dan jekk il-persentaġġ jaqbeż l-ammonti stipulat u dan ikompli juri kemm il-persentaġġ globali qatt ma ġie maqbuż u dan skont l-artikolu 35.7*

With respect the Arbitrator opines that he does not agree with the submission and consequential argument made by the Respondents. As correctly stated by the Claimants in their note of submissions, Article 35.8 of the Contract of Works does not apply to the dispute at issue. The said article can only be applicable in a scenario

where the contractor is being requested to make modifications which are bound to increase the quantum of the works and not decrease it.

Article 35.8 states that *Where the modifications, calculated in the manner described, exceeds 40%, the Contractor is entitled to refuse to carry out any work beyond that value.* The use of the word *beyond* when referring to the value of the modifications clearly shows that the right to refuse to carry out the modifications can only be exercised by the contractor in the event that these are going to increase the *quantum* and not decrease it.

Claim for Compensation

Claimants' compensation claim amounts in total to one hundred five thousand two hundred eleven euro and forty-two cents (€105,211.42) divided as to:

- €79,373.61 representing the loss suffered as a result of the implications the substantial reduction of the bill items had on the fixed costs;
- €25,837.81 representing loss of profit on bill items that suffered a substantial reduction;

It is not very clear from the Statement of Defence whether the Respondent are in effect contesting the actual *quantum* of the damages being claimed, since their defence seems to be based practically entirely on the point that in their view Article 35.9 of the Contract of Works does not apply and consequently Claimants' claim cannot be entertained.

In substantiation of their claim for compensation Claimants produced as a witness architect Joe Zammit who was appointed by the Claimants to act as Architect and Civil Engineer in connection with the works in question.

Architect Zammit furthermore drew up a detailed document substantiating the claim, which document was filed and marked as Dok JZ1. The said document in turn is divided into five separate documents marked with the letters A to E respectively.

First and foremost it must be pointed out that the document drawn up by Architect Zammit, and hence the basis of the claim put forward by the Claimants is limited solely to compensation for damages suffered as a result of reduction of certain items included in the contract which reductions were in excess of 41%. Even though in terms of article 35.9 the Claimants have the right to claim compensation in the event that the quantities of certain items are increased by 30% no claim to this effect is being made.

Both Architect Zammit and Paul Muscat in their testimony explained what considerations were made when compiling the tender bill rates, some of which were a direct consequence of the requirements of the contract, while others were required to ensure the implementation of correct working procedures necessary to comply with contract specifications and general good working practice.

Architect Zammit in his report gives a detailed list of what he defines as the main cost components that form the basis for establishing bill rates:

1. Professional/technical advisors;
2. Administrative Officers;
3. Fixed Costs;
4. Direct Labour Costs;
5. Materials;
6. Profits & Contingency.

There seems to be no dispute between the parties that the tenderers were free to establish their bill rates as they deem fit, meaning that there was nothing forbidding the Claimants from taking into consideration certain fixed costs.

As stated above in establishing the tender bill rates Claimants took into consideration their fixed costs and spread the same said costs over the various bill items.

It would appear that the Respondents are not contesting the fact that there was a reduction in certain bill items, and that in certain cases the reduction was in excess of 41%. It does not appear either that Respondents are contesting the detailed workings made by Architect Zammit in the documents he filed during the proceedings, in fact not only was Architect Zammit not cross-examined but neither was evidence produced to attempt to contradict the workings, including the details of the costs related to the overheads.

Even though it would appear that Respondents are not in effect contesting that there where a considerable amount of bill items that were reduced by more than 41%, and neither are they contesting the actual quantities of work effectively carried out, nevertheless Respondents contend that notwithstanding that applicants were not precluded from spreading costs over various bill items, the fixed costs form a high percentage of the tender sum which costs amount to €204,953.84.

Architect Mark Azzopardi, during this testimony held on the 21 April 2016, stated:

> *'As works, started on site, the amount of certain items were less than those indicated in the tenders,'*

He elaborated and held that:

> *'This is something which very often happens in restoration. We are not dealing with a new build, it is not like we know the layout of the block of flats we are going to build and how high they will be so we can quantify.'*

Furthermore, he elaborated that:

> *'So we basically have to take on indicated guesses, in some instances we know that the third of stone will be replaced for example, and in some other instances, you know, if there`s an area which is plastered for example, and we opt to remove the plaster, we never really know the state or what the stone really needs.'*

Although it is true, as stated by Respondents that the fixed costs did in effect constitute a high percentage of the tender sum, this in the abitrator's view cannot be used as a defence to avoid payment compensation.

As stated above the parties are in agreement that the tenderers were at liberty in fixing their tender bill rates, and consequently once their was nothing prohibiting the Claimants in factoring in their fix costs in the way they did, the arbitrator feels that their computation of compensation is in effect justified, and should be entertained.

(i) Loss of profits

The second part of Claimants' claim is for loss of profits suffered due to the changes in the bill of qualities.

Article 35.9 of the Special Conditions holds that "*compensation for any damage he has suffered as a result of modifications to the original project",* which wording in the humble opinion of the arbitrator clearly permits a claim for loss of profits.

The Claimants in their final submissions, claim that the calculated rate of profits was that of 12.5%, which profit varies from one item to another, and is dependent from the nature of the contract. Therefore, Claimants held that the profit lost, as a result of the reduction in certain bill items by more than 41%, amounts to €25,837.81.

Respondents in their submissions claimed that the contract had been honored, and since there were no breaches or failure to fulfill the contract on their part, the claim for the payment of damages does not subsist.

The arbitrator with respect does not agree with Respondents argument.

Article 1640 of the Civil Code states that if the employer decides to dissolve the contract of works without a valid reason for the dissolution, he is to compensate the contractor for all his expenses and work and to pay him a sum to be fixed by the court, according to circumstances, but not exceeding the profits which the contractor could have made by the contract.

According to the same said article if on the other hand the employer had a valid reason for the dissolution, then his liability is limited to such sum which shall not exceed the expenses and work of the contractor, after taking into consideration the usefulness of such expenses and work to the employer as well as any damages which he may have suffered.

Although in the case at hand the contract of works was not in effect dissolved, the arbitrator still opines that in terms of article 1640 the claim for damages made by the Claimants for loss of profits is justified unless the Respondents showed that they had a valid reason for such reduction in certain items.

The arbitrator with respect feels that the Respondents failed to show that the said reductions were in effect justified.
Architect Mark Azzopardi does in effect attempt to try and justify the reduction in certain quantities by saying that:

> *This is something which very often happens in restoration. We are not dealing with a new build, it is not like we know the layout of the block of flats we are going to build and how high they will be so we can quantify.'*

Although one cannot but agree with architect Azzopardi in the case at hand the reductions were considerable in nature, in excess of 41%. The parties in effect had recognized the fact that items originally agreed upon could have varied once the works got underway, so much so that they stated that if the reductions were less than 41% there would be no right for compensation.

The problem in the case at hand was that the reductions were very considerable and with respect that arbitrator feels that no justification for such large reductions was given.

As was held in the judgement **Wraight Ltd v P.H. & T. (Holdings) Ltd (1968)**

> "In my judgment, there are no grounds for giving to the words direct loss and/or damage caused to the Contractor by the determination´ any other meaning than that which they have, for example, in a case of breach of contract or other question of the relationship of a fault to damage in a

> legal context. Therefore it follows -- subject to any question about the meaning of the words loss of gross profit´ in the question which has been propounded by the Arbitrator - that the Claimants are, as a matter of law, entitled to recover that which they would have obtained if this contract had been fulfilled in terms of the picture visualised in advance but which they have not obtained, and cannot now obtain, under the contract, because the contract has been determined. «In my judgment, the Arbitrator arrived at the right answer in answering that question in the affirmative".

Decide

That, for the above reasons, after assessing and considering the evidence brought forward by both parties, the Arbitral Tribunal concludes that [1] Respondents are liable to pay Claimants compensation in terms of Article 35.9 of the Special Conditions forming part of the Contract of works; applicants, the amounts being liquidated of: [2] liquidates the amount due by way of compensation in the amount one hundred five thousand two hundred eleven euro and forty-two cents (€105,211.42); [3] orders Respondents to pay Claimants the liquidated sum of one hundred five thousand two hundred eleven euro and forty-two cents (€105,211.42); [4] with interest from the date of each relative invoice.

All costs related to these proceedings, as per Taxed Bill of Costs issued by the Malta Arbitration Centre which is hereto being attached and marked document "A", are to be borne solely and exclusively by the Respondents.

The Appeal

6. The Appellant felt thoroughly aggrieved by the Arbitral Award and filed an appeal application on 15th June, 2018, in accordance with the terms of article 70B of the Arbitration Act (Cap. 387 of the Laws of Malta), whereby it is asking this Court to revoke and annul that decision and to confirm the position taken by the said Appellant, with costs against the Appealed Parties. The Appellant feels aggrieved by the Arbitrator's decision because of an allegedly

gravely erroneous application of law on his part which led to what it insists are manifestly wrong conclusions.

The Reply

7. The Appealed Parties replied on the 20th August, 2018, whereby they firstly submitted that the Arbitration decided by the Arbitrator was an international commercial arbitration and therefore the Arbitration Award was unappealable. On the merits, the Appealed Parties submitted that the Arbitration Award is just and hence merits confirmation.

Considerations

8. The Court deems it prudent to primarily consider the procedural plea raised by the Appealed Parties. Unless it is found that Appellant had a right to appeal from the Arbitral Award, the Court cannot consider itself competent to entertain Appellant's appeal and for that reason it will refrain from examining the issues being raised against the Arbitral Award.

9. In their reply, the Appealed Parties submit that the Arbitration in question was an international commercial arbitration in terms of para. (a) of subarticle 1(3) of the First Schedule of Cap. 387. They explain that this must be so because the parties had their place of business in different States as indicated in the Contract Agreement, namely Malta and Italy, and hence the Arbitration

reference number was denoted with the letter 'I'. Whilst referring to Doc. A attached to their reply, the Appealed Parties contend that Appellant itself had referred the dispute between the parties to arbitration in terms of Part X – International Arbitration, subarticle 68(1) of the Arbitration Rules (Legal Notice 421/2004 as amended). When during the Arbitration proceedings the Appealed Parties referred to Article 22 of the Model Laws regulating international arbitrations and challenged the Appellant's use of the Maltese language, the said Appellant acquiesced to the use of the English language. This indicated that Appellant was well aware that the Arbitration was essentially an international commercial arbitration. The Appealed Parties argue that in terms of subarticle 69A(3) of Cap. 387, and also considering that the parties had not agreed on a right of appeal as evidenced in the agreement attached to the Statement of Claim, there was no right of appeal from the Arbitral Award and the present appeal should be declared null and void.

10. The Court notes that this preliminary plea was not contested in any manner by the Appellant, even though a specific emphasis was made upon it by the Appealed Parties' legal counsel during the parties' oral submissions before this same Court. Nonetheless it will examine whether the Appealed Parties are right to insist upon the nullity of the present appeal.

11. A reference to the agreement governing the relationship between the parties will be both appropriate and necessary, in order to establish the intention of the parties. The Contract Agreement, a copy of which is attached to the Statement of Claim as Doc. A, indicates the order of precedence of the documents attached, where the first of which following the same said Contract

Agreement, is the Special Conditions. Article 66 of the latter document provides for *"Dispute Settlement by Litigation"* as follows:

> *"Any dispute between the Parties that may arise during the performance of this contract and that has not been possible to settle otherwise between the Parties shall be submitted to the arbitration of the Malta Arbitration Centre in accordance with the Arbitration Act (Chapter 387) of the Laws of Malta.*
>
> *This law is based on "Model Law" which is the Model Law on International Commercial Arbitration adopted on June 21, 1985 by the United Nations Commission on International Trade Law reproduced in the First Schedule of the Arbitration Act."*

12. The following document in the line of precedence is the General Conditions for Works Contracts, where Article 66 which provides for *"Dispute Settlement by Litigation",* states that if the parties fail to reach an amicable settlement within 120 days of the procedure provided for in the previous paragraph, either party may seek a ruling from a national court or an arbitration ruling *"...in accordance with the Special Conditions of this contract".* This brings us back to the terms of the Special Conditions which make the provisions of Cap. 387 applicable where an attempt to settle the dispute amicably has failed.

13. There is no doubt and there does not seem to be any contestation about the submission by the Appealed Parties, that the Arbitration was an international commercial arbitration in terms of para. (a) of subarticle 1(3) of the First Schedule of Cap. 387. The Contract Agreement as well as the attached agreements and the Notice of Arbitration, all indicate the different State addresses of the respective parties and no opposition was made by Appellant

to the fact that the Notice of Commencement of Arbitration[2] was served upon it in accordance with sub-regulation 68(1) of the Arbitration Rules[3] which provides for international arbitration. Furthermore, as also noted by the Appealed Parties, the Appellant had tacitly accepted that the Arbitration was to be considered as an international arbitration when it had agreed to the use of the English Language on the basis of the provisions of Article 22 of the Model Law as incorporated under the First Schedule of Cap. 387.

14. The Court considers that the provisions of subarticle 69A(3) of Cap. 387 are sufficiently clear as to the parties' right to appeal from an arbitral award. There is no right to do so unless the parties have expressly agreed that an appeal will be allowed and this only on a point of law:

> *"(3) Recourse against an arbitral award delivered under Part V may be made to the Court of Appeal by an appeal on a point of law only if the parties to the arbitration agreement have expressly agreed that such right of appeal is available to the parties in addition to the rights of recourse as contemplated in article 34 of the Model Law. In such cases the provisions of articles 61(5), 70A, 70B and related articles shall apply."*

15. From the reference made above by the Court to the agreements governing the relationship between the parties, including the settlement of any disputes that may arise, it is also clear that no provision was made allowing the parties' the right to appeal should either or both disagree with the Arbitral Award. It also results to the Court that the Appellant has not founded its appeal on any of the circumstances outlined in article 34 of the First Schedule of Cap. 387, which thereby allows an appeal from an arbitral award. Therefore the

[2] Copy attached to Statement of Claim as well as to reply filed by the Appealed Parties.
[3] S.L. 387.01.

Court cannot but uphold the Appealed Parties plea of nullity of the present appeal.

Decide

For the above reasons, the Court declares the present appeal null and void and refrains from taking cognizance of the said appeal.

The costs related to the Arbitration proceedings shall be paid as decided in the Arbitral Award, whilst those related to these proceeedings shall also be borne in their entirety by the Appellant.

Read.

Onor. Dr Lawrence Mintoff LL.D.
Judge

Rosemarie Calleja
Deputy Registrar