MALTA

QORTI TAL-APPELL
(Kompetenza Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tal-15 ta' Settembru, 2021

Appell Inferjuri Numru 24/2019 LM

Vassallo Builders Limited (C 20882)
('l-appellaa')

***vs*.**

Tigné Contracting Limited (C 28438)
('l-appellanta')

Il-Qorti,

<u>Preliminari</u>

1. Dan huwa appell magħmul mis-soċjetà intimata **Tigné Contracting Limited (C 28438)** [minn issa 'l quddiem 'is-soċjetà appellanta'] minn lodo

arbitrali mogħti fl-Arbitraġġ numru 4425/2015 tas-26 ta' Frar, 2019, [minn issa 'l quddiem 'il-lodo arbitrali'], mit-Tribunal tal-Arbitraġġ [minn issa 'l quddiem 'it-Tribunal'] fiċ-Ċentru dwar l-Arbitraġġ ta' Malta [minn issa 'l quddiem 'iċ-Ċentru'], li permezz tiegħu ddeċieda t-talbiet tas-soċjetà rikorrenti **Vassallo Builders Limited (C 20882)** [minn issa 'l quddiem 'is-soċjetà appellata'] fil-konfront tagħha kif ġej:

(a) That Vassallo Builders Ltd. shall pay to Tigné Contracting Ltd. the amount of six hundred ten thousand eight hundred eighty-nine euro (€610,889) [payable under the Award féor the Remedial Metal Works Counter-Claim].

With Interest to run from the date of this Award.

(b) That Tigné Contracting Ltd shall pay to Vassallo Builders Ltd. the amount of two hundred sixty-five thousand eighteen euro and twenty-three euro cents (€265,018.23) [payable under the Award for the Rentention Money Claim].

With interest to run from the date of this Award.

(c) That Tigné Contracting Ltd shall pay to Vassallo Builders Ltd. the amount of eighty-two thousand nine hundred sixty-four euro and thirty-two euro cents (€82,964.32) [payable under this Award for Amounts not Technically Approved Claim].

With interest to run from the date of this Award.

(d) That Tigné Contracting Ltd shall release to Vassallo Builders Ltd. the amount of three hundred thousand euro (€300,000) [under this Award for the Performance Guarantee Claim].

With Interest to run from the date of this Award.

(e) That Tigné Contracting Ltd shall pay to Vassallo Builders Ltd. the amount of ten thousand nine hundred thirty-three euro and seventy-four euro cents (€10,933.74) [payable under the Award for Preliminaries on Miscellaneous Site Instructions and Variation Orders Claim].

Interest to run from the date of this Award.

(f) That Tigné Contracting Ltd shall pay to Vassallo Builders Ltd. the amount of fifty-five thousand two hundred ninety-four euro and twenty-six euro cents (€55,294.26) [payable under the Award for the Preliminaries for Claimant's Invoices Claim].

With Interest to run from the date of this Award.

(g) That Tigné Contracting Ltd shall pay to Vassallo Builders Ltd. the amount of forty-two thousand seven hundred sixty-seven euro and thirty-eight euro cents (€42,767.38), excluding VAT, is due to the Claimant [payable under the Award for Management Fees Claim].

With Interest to run from the date of this Award.

(h) That Tigné Contracting Ltd shall pay to Vassallo Builders Ltd. the amount of one hundred forty-nine thousand fifty-three euro and thirty-one euro cents (€149,053.31) [payable under the Award for the Metal Works Price Adjustment Claim].

With Interest to run from the date of this Award.

(i) That Tigné Contracting Ltd shall pay to Vassallo Builders Ltd. the amount of eleven thousand two hundred seventy-four euro and three euro cents (€11,274.03) as set out in Annex D which forms an integral part of this Award [payable under the Award for the Finance Charges Claim].

With Interest to run from the date of this Award.

(j) The cost of the arbitration as per Taxed Bill of Costs issued by the Malta Arbitration Centre, attached hereto and marked as Annex E, shall be borne equally by the Parties.

(k) Each Party shall bear its own legal representation costs.

(l) All other claims are hereby dismissed.

(m) All determinations in this Award are exclusive of VAT. VAT is to be added, where applicable, on all amounts awarded.

(n) With regard to Interest, this is payable at the rate of eight per centum (8%) per annum."

Fatti

2. Il-fatti tal-każ odjern huma dawn li ġejjin. Il-partijiet kienu ffirmaw il-kuntratt ta' appalt *Contract Document for MC1 – Main Contractor for Block T10 Finishes and M&E Works* [minn issa 'l quddiem 'il-kuntratt ta' appalt']*,* fit-12 ta' Ġunju, 2008, imfassal fuq il-*FIDIC Red Book Contract,* li huwa intiż għal xogħlijiet ta' kostruzzjoni u ta' inġinerija. Sussegwentement inqala' xi diżgwid bejn il-partijiet dwar, fost affarijiet oħra l-kwalità tax-xogħol li kien sar mis-soċjetà appellata, u permezz ta' ftehim ffirmat fit-8 ta' April, 2015, il-partijiet iddeċidew li l-vertenzi ta' bejniethom għandhom jiġu deċiżi permezz ta' proċeduri ta' arbitraġġ.

Mertu

3. Il-partijiet intavolaw proċeduri ta' Arbitraġġ permezz ta' Avviż Konġunt tal-Arbitraġġ li huma ppreżentaw fit-2 ta' Lulju, 2015, fiċ-Ċentru, fejn fissru li s-soċjetà appellata kellha pretensjoni fis-somma ta' €1,284,485.94, bl-imgħaxijiet legali dekorribbli mid-data li fiha l-ammonti relattivi kellhom jitħallsu, u flimkien mal-ispejjeż tal-proċeduri tal-arbitraġġ, filwaqt li s-soċjetà appellanta ma kinitx qiegħda taċċetta l-pretensjoni tas-soċjetà appellata, u saħansitra kellha kontrotalba x'tagħmel fir-rigward ta' dawk l-ammonti li s-soċjetà appellata kienet qiegħda tippretendi li huma dovuti lilha mingħandha. Sussegwentement fis-27 ta' April, 2016 is-soċjetà appellata ppreżentat it-talba tagħha bil-miktub, u s-soċjetà appellanta wieġbet għall-pretensjonijiet tagħha fil-25 ta' Mejju, 2016, fejn ippreżentat ukoll kontrotalba fejn issottomettiet li s-

soċjetà appellata kienet tenuta teżegwixxi diversi xogħlijiet oħra u anki tħallas dawk l-ammonti minnha elenkati fl-istess kontrotalba jew skont kif kellhom jiġu likwidati. Is-soċjetà appellata wieġbet għall-kontrotalba fit-22 ta' Ġunju, 2016, fejn issottomettiet li t-talbiet kif miġjuba fil-kontrotalba kellhom jiġu miċħuda, u dan flimkien mal-ispejjeż.

4. Waqt is-smigħ tal-proċeduri, is-somma pretiża mis-soċjetà appellata ġiet riveduta għal €1,320,706.69 (eskluża t-taxxa fuq il-valur miżjud).

Il-Lodo Arbitrali

5. It-Tribunal wasal għal-lodo arbitrali wara li għamel is-segwenti konsiderazzjonijiet rilevanti għal dan l-appell:

> *"Part One*
>
> ***Defined Terms***
>
> *1. The following defined terms are used in this award:*
>
> - *Contract Document for MCI - Main Contractor for Block TIO Finishes and M&E Works dated 12th June 2008 ("The MCI Agreement")*
> - *Vassallo Builders Limited ("Claimant") or ("Contractor") or ("VBL")*
> - *Tigné Contracting Limited ("Respondent") or ("Employer") or ("TCL")*
> - *Claimant and Respondent ("The Parties")*
> - *The Separate Arbitration Agreement entered into on the 8th of April 2015 ("The Arbitration Agreement")*
> - *The Malta Arbitration Act Chapter 387 of the Laws of Malta ("The Arbitration Act")*
> - *The Joint Notice of Arbitration of the 30th June 2016 ("The Joint Notice")*

- *The Malta Arbitration Centre ("The Centre")*
- *Arbitration Rules in force as of 2004 ("The Rules")*
- *The Arbitration Tribunal ("Tribunal")*
- *One million three hundred and twenty thousand and seven hundred and six euros and sixty-nine euro cents (€1,320,706.69) exclusive of VAT ("The Claimed Amount"). The Claimed Amount indicated here is the claim as revised in the course of the Arbitration, differing from the original claim of one million two hundred and eighty-four thousand, four hundred eighty-five euro and ninety-four euro cents (€1,284,485.94)*
- *The Code of Organisation and Civil Procedure Chapter 12 of the Laws of Malta ("The COCP")*
- *The Civil Code Chapter 16 of the Laws of Malta ("The Civil Code")*
- *The Commercial Code Chapter 13 of the Laws of Malta ("The Commercial Code")*

Overview

2. *This arbitration concerns Vassallo Builders Limited (C20882), a limited liability company registered in Malta and having its registered office at The Three Arches, Valletta Road, Mosta ("Claimant") and Tigné Contracting Limited (C28438), a limited liability company registered in Malta and having its registered office at North Shore, Manoel Island, Gzira ("Respondent").*
   Together, ("The Parties").

3. *The dispute between the Parties arises out of an agreement entered into by the parties on the 12th June 2008, Contract Document for MCI - Main Contractor for Block TIO Finishes and M&E Works ("The MCI Agreement").*

4. *The Claimant alleges it is due the sum of one million three hundred and twenty thousand and seven hundred and six and sixty-nine euro cents (€1,320,706.69) exclusive of VAT ("the Claimed Amount") together with legal interest thereon with effect from when the relative amounts became due and arbitral costs and expenses. The Claimed Amount indicated here is the claim as revised in the course of the Arbitration, differing from the original claim of one million two hundred and eighty-four thousand, four hundred eighty-five euro and ninety four euro cents (€1,284,485.94).*

5. *The Respondent argues that the claimed amounts are not due and, on the other hand, has a counter-claim against the Claimant for an amount which will be liquidated in the counter-claim and during the proceedings.*

The Arbitration Aqreement

6. *The Parties entered into a Separate Arbitration Agreement dated 8th April 2015 ("The Arbitration Agreement").*

7. *Article 1 of the Arbitration Agreement provided that* 'The Parties hereby agree that the Dispute shall be settled by arbitration in accordance with Part IV (Domestic Arbitration) of the Malta Arbitration Act, Cap 387 of the Laws of Malta and the Arbitration Rules of the Malta Arbitration Centre as at present in force.'

8. *Article 9 of this Arbitration Agreement further provided that* 'The parties hereby agree that the Dispute shall be governed by this Arbitration Agreement and that the arbitration clause as set out in clause 20 of the [MCI] Agreement shall be superseded in so far as this Dispute is concerned'.

9. *The agreed language of the arbitration is the English language. (Article 6.1 of the Arbitration Agreement).*

10. *The Arbitration is being decided in accordance with Maltese law (Article 10.1 of the Arbitration Agreement).*

<u>The Joint Notice of Arbitration and Statement of Claim</u>

11. *The Joint Notice of Arbitration ("The Joint Notice") was submitted by the Parties on the 30th June 2016. Claimant and Respondent filed the said notice with the Malta Arbitration Centre ("The Centre") with Ref. No 4425/2015.*

12. *Pursuant to the Joint Notice, Claimant elaborated its claim in a Statement of Claim on the 27th April 2016.*

<u>Constitution of the Arbitration Tribunal</u>

13. *The Parties agreed on the appointment of three arbitrators, in accordance with the Arbitration Agreement (Article 4.1 of the Arbitration Agreement).*

14. *The Arbitration Tribunal ("Tribunal") was constituted in accordance with the Arbitration Agreement (in particular Article 1.1, 2.1 and 4.1 of the Arbitration Agreement) and the Arbitration Act (in particular Article 21 of the Arbitration Act).*

15. *The Tribunal was constituted as follows:*

- *On the 17th November 2015 Ing. Joseph Buhagiar was confirmed as co-arbitrator.*
- *On the 4th January 2016 Dr Michael Frendo was confirmed as the presiding arbitrator of the Tribunal upon nomination by the Centre.*
- *On the 28th March 2016 Mr. Craig Gardner was confirmed as co-arbitrator.*

Agreed Timetable and Procedures

16. *The Tribunal was constituted on the 28th March 2016.*
17. *A proposed timetable and set of procedures for the arbitration was drawn up by the Parties on the 8th July 2016, (the 'Step Plan Final') and was agreed to and adopted by the Tribunal.*

Written Submissions

18. *0n the 25th May 2016, Respondent filed its Statement of Defence and Counter Claim.*
19. *The Respondent filed witness statements from: Ivan Piccinino, Prof Alex Torpiano, John Cassar, Benjamin Muscat, Luke Coppini.*
20. *0n the 22n June 2016, Claimant filed its Statement of Defence to a Counter-Claim.*
21. *Claimant filed witness statements from: Carol Cassar, Ruben Vassallo, Tihomir Georgeiv, Nicholas Zammit, Josef Camilleri, Joseph Sammut, Kevin Muscat, Martin Galea, Noel Camilleri, John Papagiorcopulo.*
22. *On the 26th January 2017, Respondent filed a Note of Submissions.*
23. *On the 30th January 2017, Claimant filed a Note of Submissions.*
24. *On the 7th February 2017, Claimant filed a Note of Submissions.*
25. *On the 13th February 2017, Respondent filed a Note of Submissions.*
26. *On the 28th March 2017, Respondent filed a Note of Submissions.*
27. *On the 15th June 2017, Claimant filed a Note of Submissions.*
28. *On the 15th June 2017, Respondent filed a Note of Submissions.*
29. *On the 1st August 2017, Claimant filed a Note of Submissions.*

30. *On the 1st August 2017, Respondent filed a Note of Submissions.*

Part Two

Oral Hearings

31. *The Oral Hearings were held at the Centre on the 11 th July 2016, 12th July 2016, 13th July 2016, 14th July 2016 and 15th July 2016.*

32. *And on the 20th January 2017, 23rd January 2017, 24th January 2017 and 25thJanuary 2017.*

33. *And on the 6th March 2017, 8th March 2017.*

34. *The hearings were recorded and transcribed.*

Determinations of the Arbitration Tribunal in the course of the proceedings

35. *In the course of the proceedings, the Tribunal unanimously pronounced itself in various rulings, which are delineated hereunder.*

36. *On the 12th July 2016, the Tribunal, having seen Respondent's position in an email of the 11th July 2016; Claimant's position in an e-mail reply of the 11th July 2016; the Step Plan Final as submitted by Dr Marisa Vella in the e-mail of the 8th of July 2016; and having taken note that in the first sitting of the Arbitration proceedings Dr Massimo Vella and Dr Marisa Vella stated that the Step Plan Final is an agreed joint submission of both parties, decided that it is the responsibility of each of the Parties to submit its evidence in support of its claim, defence, counter-claim and defence of the counter-claim in accordance with the provisions of the Arbitration Act and of the Code of Organisation and Civil Procedure. The Tribunal further stated that it shall not substitute its judgement for that of the Parties in this regard. The Tribunal was to remain guided by the Step Plan Final indicated above and agreed to by both Parties.*

37. *0n the 12th July 2016, the Tribunal, having seen Claimant's request in an e-mail of the 6th July 2016; Respondent's response to the said request in an e-mail of the 8th July 2016 and Article 31 of the Arbitration Act, decided to accede to Claimant's request so that Item 6 of the Claim for nineteen thousand, seventy three euro and fifty-one euro cents (€19,073.51)* 'Preliminaries on Claimant's Invoices' *be increased to fifty-five thousand, two hundred ninety-four euro and twenty-six euro cents (€55,294.26). The Tribunal furthermore granted Respondent, within a period of twenty (20)*

days from the date of this Decision, the right to amend its Statement of Defence on Claim 6 and to submit further statement/s in support of its defence.

38. *In its hearing of the 6th March 2017, the Tribunal, having taken cognizance of an issue which arose in the sitting of the 25th January 2017 in relation to the admissibility of evidence in a particular part of the testimony of Mr Nazzareno Vassallo where he related discussions between himself and Perit David Felice, and having examined the submissions of Vassallo Builders Limited of the 7th February 2017 and those of Tigné Contracting Limited of the 13th February 2017, referring to Article 560 (1) of the Code of Organisation and Civil Procedure, decided to disallow the part of the evidence in the testimony of Mr Nazzareno Vassallo where he refers to his discussions with Perit David Felice, considering such evidence to be superfluous. It ordered that this specific part of the above-indicated testimony therefore not form part of the records of this Arbitration.*

39. *On the 8th March 2017, in accordance with Article 41 of the Arbitration Act, the Tribunal declared the hearings closed.*

40. *On the 20th March 2017 the Tribunal submitted to the Parties, to allow for comments in their submissions, the technical results of the Report of 8th November 2016 of Prof. Ing Joseph Buhagiar, the technical expert forming part of the Tribunal. The full Report was submitted to the Centre and forms part of this Award.*

41. *In the course of the Arbitration, the Parties proceeded with the Arbitration and did not raise any objection to any part of the proceedings and/or rulings given by the Tribunal.*

42. *In reaching its conclusions in this Award, the Tribunal has taken into account all written submissions, documents, evidence, reports and oral submissions filed or carried out in the course of these proceedings.*

Part Three

The Facts of the Case

43. *A review of the disputing Parties' submissions, witness statements and oral testimony given at the hearing indicates that, with some exceptions, the Parties agree on the facts of the case.*

44. *Below is a summary of the facts that are most relevant to the dispute at hand, either as agreed, not disputed or as determined by the Tribunal.*

Time-Line Background

General

45. *The MCI Main Contractor for Block TIO Finishes and Works ("the MCI Agreement") entered into by both Parties on the 12th June 2008 is a 1999 FIDIC Red Book contract, intended for building and engineering works designed by the Employer.*

46. *In the MCI Agreement, Tigné Contracting Ltd. the '("Employer") engaged Vassallo Builders Ltd. the ("Contractor") as its Main Contractor.*

47. *AOM was appointed by the Employer to act as the Engineer for the purposes of the MCI Agreement.*

48. *As part of the MCI Agreement, the Contractor gave a performance guarantee, Bank Guarantee No: G63TFC16117 for the amount of three hundred thousand euro (€300,000), set to expire on the 30th April 2016.*

49. *Upon the request of the Employer the performance guarantee was extended until the 31st October 2016.*

50. *Amongst the various work packages in the MCI Agreement, there were work packages C 242 - Metal and Timber Works, and C 239 - Cladding and Paving and C 247- Pool Filtration/ M&E.*

51. *On the 24th June 2011 a letter was sent from Ben Muscat of TCL to Vassallo Builders Ltd. wherein they informed them that management services incurred by them will be charged to Vassallo Builders Ltd.*

52. *On the 12th March 2012 a letter was sent from Ben Muscat of TCL to Jonathan Buttigieg of VBL advising them of the total costs they had incurred in relation to management fees as a result of an absence of adequate resources by the Contractor.*

53. *On the 9th of May 2012 AOM issued Certificate No 27 for the total amount of €439,945.71 - amongst the amounts certified in the certificate was the amount of €12,745.51 for an Extension of Time.*

Metal Works

54. *Design intent drawings were submitted to the Contractor for work package C 242 - Metal and Timber Works and these drawings included Balustrade Type BOIMesh Balustrade ("BOI Type B02 - Clear Glass Balustrade ("B02"), collectively the metal railings, and Type B03 the screens/ louvres ("B03").*

55. *Between February - November 2009 shop drawings for railings type BOI and B02 were submitted and work began on the type B03 screens / louvres.*

56. *Between February-March 2010 the railings type BOI and B02 were installed.*

57. *0n the 3rd November 2010 a site visit was organized between the Parties to discuss the rust that had developed on railings type BOI and B02.*

58. *On the 9th November 2010 a letter was written by the Engineer to the Contractor requesting they dismantle the above mentioned defective steel works and make good the defects.*

59. *The type B03 screens/louvres also showed rust and, on the 14th February 2011, aoM instructed the Contractor to dismantle all the steel screens in order to make good all the defects.*

60. *Remedial works were carried out by the Contractor to types BOI, B02 and B03 but the rust re-surfaced.*

61. *On the 6th February 2012 a letter was written by the Engineer to the Contractor requesting the Contractor to submit a detailed and conclusive proposal as to how to implement and remedy the defective steel works and resolve the issue. A request was made by the Employer to the Contractor to submit this proposal by no later than 13th February 2012, in the absence of which alternative methods would be taken by the Employer.*

62. *On the 29th March 2012 a letter was written by Ben Muscat of TCL to Nazzareno Vassallo of VBL notifying VBL that should the information requested by the Engineer in the letter of 6th February 2012 not be received, the Employer reserves the right to carry out the works himself or using others as set out in Clause 11.4(a) of the MCI Agreement.*

63. *On the 6th May 2013 a letter was written by George Dimech of aoM to Ivan Piccinino of TCL attaching valuation certificate Nr28 and detailing the conditions under which the certificate would be released.*

64. *On the 11th June 2013 a judicial letter was sent to Vassallo Builders Ltd informing them of Tigné Contracting Ltd.'s intention to avail itself of Clause 11.4(a) of the MCI Agreement.*

65. *On the 6th September 2013 a tender was issued for the remedial works. The tenderers Aluserv XN-TEQ were engaged by the Employer to remedy the works done by the Contractor.*

The Pools and Terraces

66. *The work related to the terraces and external areas of the penthouses was defined in work package C 239 - Cladding and Paving.*

67. *The Works to the penthouse pools was covered by work package G - Pool Finishes and was inserted into the MCI contract at a later stage by means of Site Instructions Sl 125 and SI 145.*

68. *0n the 22nd of September 2010 water tightness certificates were submitted by the Contractor in respect of the external areas of penthouses 18, 20, 57 and 59.*

69. *By the end of 2010 the works on the pools and terraces of penthouses 20, 57 and 59 were completed and taken over. The works on the pool and terrace of penthouses 18 was taken over by early 2011.*

70. *Water ingress problems developed in penthouses 18, 20, 57 and 59.*

71. *On the 8th June 2011 aoM issued site instruction SI 526 informing VBL Builders Ltd. that there are leaks, to identify the sources of the leaks and to undertake remedial works to rectify this.*

72. *On the 15th November 2012 a letter was written by Ivan Piccinino of TCL to aoM and Vassallo Builders Ltd. regarding the* 'defective works in TIO Penthouses' *specifically penthouses 20, 57 and 59 and requested from them a clear and unequivocal response to resolve the issue within 7 days from the date of the letter.*

73. *0n the 4th February 2013 a third party Perit Fortunato Said was consulted by Tigné Contracting Ltd. to provide a report with findings as to what could be causing the water ingress.*

74. *On the 5th December 2013 an email was sent from Tigné Contracting Ltd to aoM with Vassallo Builders Ltd in copy requesting aoM to* 'formally advise the Contractor that, in view of the above, we have no option other than to

refer to Clause 11.4 of the Contract and engage a third party Contractor to carry out all the necessary remedial works, keeping record of the costs incurred' in respect of 'water ingress from the penthouse pools'.

Vassallo Builder's Claim

75. In their statement of claim VBL submit that the Claimed Amount is being withheld by the Respondent without just cause.

76. They request that TCL pay them the Claimed Amount together with legal interest with effect from when the relative amounts became due, as well as the arbitral costs and expenses.

77. VBL has indicated the breakdown of the Claimed Amount as follows:

Claim for Remedial Works done to Balconies

78. VBL holds that they are owed two hundred fifty thousand euro (€250,000) excluding VAT for the costs they incurred in order to carry out remedial works to the metal railings.

79. VBL submit that the FIDIC Red Book 1999 edition, is by definition a contract "for Construction, for Building and Engineering Works, Designed by the Employer". *Furthermore, VBL submit that under Clause 4.1 of the MCI Agreement, the third paragraph, it is amply clear that the Contractor* "shall not otherwise be responsible for the design or specification of the Permanent Works". *VBL's argument is essentially based on the fundamental principle that the design is the sole responsibility of the Employer and his delegates.*

80. Furthermore, Clause 17.3(g) of the same MCI Agreement holds that the "design of any part of the Works by the Employer's Personnel or by others for whom the Employer is responsible" *constitutes an Employer's Risk.*

81. According to VBL, the Architect only provided them with "Design Intent" *drawings and the term* "Design Intent" *does not feature anywhere in the FIDIC Red Book. In their view it was the responsibility of the Respondent to provide the remaining design.*

82. VBL's position on the issue is that the rust that formed on the railings type BOI and B02, and the type B03 louvres cannot be attributed to it, but rather was the result of a 'defective design' *on the part of the Engineer/Architect appointed by the Respondent and that it is entitled to recover the cost of the remedial works in question.*

Retention

83. *In sum, VBL's position here is that there are no further outstanding works for which it is liable and hence the retention is due.*

    VBL contends that the amount of retention still being held by TCL amounts to two hundred sixty-five thousand eighteen euro and twenty-three euro cents (€265,018.23) excluding VAT. This is evidenced by Certificate No 28.

84. *Clause 14.9 entitled* 'Payment of Retention Money' *of the MCI Agreement provides that:*

    When the Taking-Over Certificate has been issued for the Works, the first half of the Retention Money shall be certified by the Engineer for payment to the Contractor. If a Taking-Over Certificate is issued for a Section or part of the Works, a proportion of the Retention Money shall be certified and paid. This proportion shall be two-fifths (40%) of the proportion calculated by dividing the estimated contract value of the Section or part, by the estimated final Contract price.

    Promptly after the latest of the expiry dates of the Defects Notification Periods, the outstanding balance of the Retention Money shall be certified by the Engineer for payment to the Contractor. If a Taking-Over Certificate was issued for a Section, a proportion of the second half of the Retention Money shall be certified and paid promptly after the expiry date of the Defects Notification Period for the Section. This proportion shall be two-fifths (40%) of the proportion calculated by dividing the estimated contract value of the Section by the estimated final Contract Price.

    However, if any work remains to be executed under Clause 11 [Defects Liability], the Engineer shall be entitled to withhold certification of the estimated cost of this work until it has been executed.

85. *VBL submits that in terms of Clause 14.9 above the entire retention money became due on the 6th June 2012, upon the expiry of the defects notification period.*

Amounts Not Technically Approved

86. *In sum, VBL submits that the deduction for amounts not technically approved in the amount of eighty-two thousand nine hundred sixty-four euro and thirty-two euro cents (€82,964.32) excluding VAT is unwarranted.*

87. *VBL states that the taking-over certificate was ultimately issued and that the Works were accepted by the Respondent and therefore that the amount should not be withheld.*

The Performance Guarantee

88. *In sum, VBL maintains that the performance guarantee in the amount of three hundred thousand euro (€300,000) excluding VAT is being withheld by the Respondent.*

89. *According to VBL the latest taking-over certificate was issued by the Engineer on the 6th June 2011. Furthermore, the Appendix to Tender which forms part of the MCI Agreement specifies a defects notification period of three hundred and sixty-five (365) days.*

90. *VBL, contends that it has fulfilled all of its obligations under the MCI Agreement and consequently the performance security ought to have been released on the 6th June 2012.*

91. *Furthermore, VBL submits that in terms of Clause 11.9 of the MCI Agreement a Performance Certificate is to be issued by the Engineer in view of its fulfillment of all its obligations under the MCI Agreement.*

92. *Clause 11.9 entitled 'Performance Certificate' states that:*

Performance of the Contractor's obligations shall not be considered to have been completed until the Engineer has issued the Performance Certificate to the Contractor, stating the date on which the Contractor completed his obligations under the Contract.

The Engineer shall issue the Performance Certificate within 28 days after the latest of the expiry dates of the Defects Notification Periods, or as soon thereafter as the Contractor has supplied all the Contractor's Documents and completed and tested all the Works, including remedying any defects. A copy of the Performance Certificate shall be issued to the Employer.

Only the Performance Certificate shall be deemed to constitute acceptance of the Works.

93. *VBL maintains that the Engineer's failure to issue a Performance Certificate in terms of the Agreement without just cause places TCL in breach of its obligations under the Agreement and consequently VBL is entitled to payment*

of the sum of three hundred thousand euro (€300,000) representing the performance security.

Extension of Time

94. *In sum, VBL submit that the amount of twelve thousand seven hundred forty-five euro (€12,745) excluding VAT was paid but subsequently, and inexplicably it was reversed and deducted from other amounts certified as due to them.*

Preliminaries on Miscellaneous Site Instructions and Variation Orders

95. *In sum, this item of claim amounts to ten thousand nine hundred thirty-three euro and seventy-four euro cents (€10,933.74) excluding VAT representing the five per cent (5%) management fee on a number of site instructions and variation orders issued by the Engineer.*

96. *Clause 14.7 of the Particular Conditions of the Agreement provides that Management fees shall be as follows:*

    5% on certified Gross Value of Works (Excluding VAT) to cover Preliminaries and to be paid by the Employer

    8% on certified Gross Value of Works (Excluding VAT) to cover for overheads and profits, to be paid by the Employer

97. *The Respondent paid the eight per cent (8%) management fee pertaining to the overheads and profits but refused to pay part of the management fee pertaining to the preliminaries.*

Preliminaries on Claimant's Invoices

98. *This claimed amount was originally of nineteen thousand seventy-three euro and fifty-one euro cents (€19,073.51) excluding VAT. This was later amended and increased to the amount of fifty-five thousand two hundred and ninety-four euro and twenty-six euro cents (€55,294.26) excluding VAT.*

99. *In sum, VBL contend that this amount represents the thirteen per cent (13%) management fee due to them in terms of the MCI Agreement on Certificates 18 to 28. VBL present Doc VBL JB 6.1 containing a detailed calculation of how the said amount was arrived at and Doc VBL JB 6.2 in support of their claim.*

100. *VBL maintains that TCL had regularly paid the management fee but began to withhold payment from Certificate 18 onwards.*

Management Fees

101. In essence, VBL claim that they are entitled to management fees for the amount of forty-five thousand two hundred twenty-eight euros and two euro cents (€45,228.02) excluding VAT.

102. VBL submit that this amount relates to items on which they are entitled to receive the thirteen (13%) management fee due in terms of Clause 14.7 of the Particular Conditions of the Agreement quoted in the claim above.

103. VBL present Document VBL JB 7.1 in support of their claim. According to VBL, the first two items listed in this document are the 'Metal Works Price Adjustment' *and the* 'Amounts Not Technically Approved'. These *both form part of their claim in this arbitration and therefore the payment of the management fee on these amounts will depend on whether the Tribunal finds them to be due.*

104. VBL, continues to state that the last three items listed in the aforementioned document, the 'Arithmetic error to be added to the Final Certificate'*, the* 'UVglass Panels' *and the* 'Fire Doors' *relate to items for which the principal amount was paid by the Respondent, but the management fees were not.*

<u>Metal Works Price Adjustment</u>

105. In sum, VBL argue that the tender document issued by TCL contained an error, namely that the quantities for the type BOI and B02 railings were swapped.

106. VBL continues to explain that it was only after the MCI Agreement was signed by the Parties that this error was found and the variances in this error amount to one hundred sixty-seven thousand nine hundred eighty-one euro and thirty five euro cents (€167,981.35) excluding VAT, which is the amount being claimed.

107. According to VBL, the type BOI railings were reduced from three hundred seventy-two thousand sixty seven euro and fifty euro cents (€372,067.50) to sixty-six thousand two hundred ninety three euro and eighty-four euro cents (€66,293.84), whereas the type B02 railings were increased from forty-one thousand five hundred eighty euro (€41,580.00) to two hundred two thousand, one hundred fifty-four euro (€202,154.00). The overall effect was therefore that the total price was inexplicably reduced by one hundred sixty-

seven thousand nine hundred eighty-one euro and thirty-five euro cents (€167,981.35).

Finance Charges

108. *In sum, this amount of one hundred thirty thousand five hundred forty-one euro and seventy-seven euro cents (€130,541.77) excluding VAT relates to finance charges which the Respondent has failed to pay. This claim was increased in the course of the proceedings, and Claimant requested instead payment of one hundred seventy-six thousand five hundred thirty-six euro and sixty euro cents.(€176,736.60).*

109. *According to VBL, Clause 14.8 entitled* 'Delayed Payment' *of the Agreement provides that:*

    If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [Payment], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the date for payment specified in the Sub-Clause 14.7 irrespective (in the case of its sub-paragraph (b) of the date on which any Interim Payment Certificate is issued).

    Unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the annual rate of three percentage points above the discount rate of the central bank in the country of the currency of payment, and shall be paid in such currency.

    The Contractor shall be entitled to this payment without formal notice or certification, and without prejudice to any other right or remedy.

110. *VBL submits that all the payments claimed in these proceedings ought to have been settled by the 6th of June 2012 which is when the defects notification expired and therefore that finance charges on the outstanding payments began accruing from this date.*

TCL's Defence

111. *In sum Tigné Contracting Ltd. submit that the metal works found in work package C 242 carried out by the Claimant as its Main Contractor were rusting and deteriorating.*

112. Furthermore, they submit that during the execution of works there was also a problem with the ingress of water from the pools and terraces of the penthouses as a result of the Claimant's work.

113. In essence, the position of the Respondent is that the Claim ought to be rejected in view of the two main problems above and also in view of the additional works, site supervision and management expenses and that it is entitled to payment by way of counter-claim together with legal interest thereon with effect from when the relative amounts became due together with costs for legal representation and assistance.

114. The Respondent's defence to the Claimed Amount is as follows:

Nullity of Claim for Remedial Works done to Balconies

115. The Respondent contends that this amount is not due to the Claimant and in turn has filed a counter-claim under this head for the cost of the remedial works which must be carried out as a result of the Claimant's failings in this respect.

116. In sum the Respondent says that the Claimant failed to develop the design intent in accordance with the technical specifications found in work package C242.

117. That the Claimant failed to submit the required documentations for specifications or when documents were submitted, the Engineer was required to request revisions from Claimant, which remained unsatisfactory. Respondent maintains that the Claimant failed to amend the shop drawings, amend the prototypes, put in place a Quality Assurance/Quality Control Scheme and that there was no effective corrosion protection system in place.

118. As a result, remedial works were required as rust started to become evident.

119. Remedial works were carried out by the Claimant, but these works also developed rust.

Retention

120. In sum TCL maintains that this amount is not due to Claimant since the Respondent has suffered defects in the works which remain unremedied.

121. TCL maintains that in lieu of this Clause 14.9 of the MCI Agreement they are entitled to retain part of the Retention sum as, 'if any work remains to be

executed under Clause 11 [Defects Liability], the Engineer shall be entitled to withhold certification of the estimated cost of this work until it has been executed'.

<u>Amounts Not Technically Approved</u>

122. In sum, TCL maintains that this amount is not due as a result of repetitive defaults on the part of the Claimant.

123. TCL continues to substantiate this statement by showing that the Claimant either failed to submit, submitted late or submitted the technical submissions to the Engineer after works commenced, going against the terms of the MCI Agreement.

<u>The Performance Guarantee</u>

124. TCL contends that the Performance Guarantee is not due to the Claimant as the Final Payment Certificate as defined in the MCI Agreement has not been issued.

125. TCL maintains that according to the MCI Agreement, before a Final Payment Certificate can be issued there must first be a Performance Certificate issued in terms of Clause 11.9, which in essence states that such certificate shall be issued to certify the performance of the Contractor's obligations, including remedying of defects, and such certificate shall signify acceptance of the works.

126. TCL continues to state that once a Performance Certificate is issued, then in terms of Clause 14.11 of the MCI Agreement the Contractor can apply for the Final Payment Certificate under Clause 14.13.

127. TCL therefore argues that the triggering event for the release of the performance security has not taken place, as the Engineer has not issued a Performance Certificate nor a Final Payment Certificate.

<u>Extension of Time</u>

128. In sum, TCL maintains that this amount is not due to the Claimant as they have already effected payment to the Claimant.

129. Through the proceedings TCL note that VBL do not contest that the amount has been paid but rather what they maintain is that this amount was subsequently deducted but do not show what it was deducted from.

Preliminaries on Miscellaneous Site Instructions and Variation Orders

130. In sum, TCL maintain that VBL failed to manage the project in a satisfactory manner and that project management services were lacking throughout the duration of the Works. On this basis the amount is not due.

131. TCL further maintain that this failure became most evident towards the end of the project when the apartments were in the process of being taken over.

132. Furthermore, TCL maintain that the payment of eight per cent (8%) was done purely as a concession to narrow the gap on the outstanding claim and therefore the payment was made in an effort to settle instead of as a payment in consideration of management services.

Preliminaries on Claimant's Invoices

133. In sum, TCL maintain that this amount is not due on the basis that VBL failed through the course of the project to carry out management services in a satisfactory manner.

134. Furthermore, TCL contest the figure claimed and state that the correct calculation is the amount of twenty-four thousand seven hundred and seventy six euro and sixty-four euro cents (€24,776.64) excluding VAT.

Management Fees

135. In sum, TCL hold that this amount is not due. They maintain that they used their own personnel to manage the contract at their own expense and which costs are part of their counter-claim.

136. Furthermore, TCL claims that the calculation of Management Fees includes amounts which were not certified and not approved.

Metal Works Price Adjustment

137. In sum TCL maintains that this amount is not due to VBL on the basis that VBL varied the quantities on three items in the BOQs, namely the BOI, B02 and B03 railings resulting in the overall amount due to VBL being reduced.

138. Furthermore, TCL argues that the additional works to the rusting railings were not done and that this is still a problem faced by TCL to date.

139. It is further argued by TCL that, in any case, the amount for the metal works price adjustment is one hundred forty thousand eight hundred and thirty-eight euros (€140,838.00) and not the one hundred sixty seven thousand nine hundred and eighty-one euro and thirty-five euro cents (€167,981.35) as is being claimed.

Finance Charges

140. In sum, TCL contend that this amount is not due to Claimant on the basis that the principal amount is contested and no interest should be due in this respect.

141. Furthermore, TCL claims that further explanation in reaching this sum is required and further submits that the Engineer did not make a general determination that interest is payable on late payments but only limited his determination to specific late payments.

Tigné Contracting Ltd's Counter-Claim

142. The Respondent's Counter-Claim and their main arguments are grouped under the below headings:

Remedial Works Expenses on the Metal Railings

143. In sum, TCL contends that the remedial works done by the Claimant to the type BOI and B02 railings and the type B03 screens/louvres were not done in terms of the MCI Agreement and were done without the approved method statements from the Engineer.

144. They submit that even before the remedial works had even been completed rust could already be seen.

145. Faced with this problem, the Engineer and the Respondent informed the Claimant that third parties would be engaged to carry out the works at the cost of the Claimant as per 11 A(a) of the MCI Agreement.

146. Third party, Aluserv-XN-TEQ JV was engaged after a bidding process at a cost of seven hundred forty-one thousand five hundred fifty-six euros (€741,556) excluding VAT, which amount is being claimed by the Respondent. A reduction in the counter claim to seven hundred thousand four hundred seventy-eight euro (€700,478) excluding VAT was made by application filed by the Respondent on the 13th January 2017.

Remedial Works Expenses on the Pools and Terraces of various Penthouses as a result of Water Ingress

147. *In sum TCL contends that during the execution of the works by the Contractor and post-commissioning, water ingress problems started to become evident in penthouses numbers 18, 20, 57 and 59. As a result the Engineer issued a number of site instructions for remedial works to be carried out.*

148. *TCL submit that the Claimant carried out some remedial works but that the problems persisted nonetheless. This gave the Respondent no other option but to intervene and carry out remedial works itself at the cost of the Claimant.*

149. *Remedial works were carried out to Penthouse 18 amounting to seventy-three thousand eighty hundred ninety-nine euro (€73,899) including VAT.*

150. *Remedial works were carried out to Penthouse 59 amounting to seventy-three thousand eight hundred fifteen euro and eighty-seven euro cents (€73,815.87) including VAT.*

151. *Remedial works were carried out to Penthouses number 20 and 57 amounting to one hundred eleven thousand seven hundred twenty-six euro and thirty-six euro cents (€111,726.36) including VAT, plus twelve thousand seventeen euro (€12,017) including VAT.*

152. *The amounts claimed above reflect a reduction in the original counter claim of two hundred eighty-nine thousand eight hundred eighty-nine euro and eighty-nine euro cents (€289,889.89) including VAT. The new amounts reflect the application filed by the Respondent on the 13th January 2017 reducing the total claim to two hundred seventy-one thousand four hundred fifty-eight euro and thirty-three euro cents (€271,458.33) including VAT.*

Additional Works

153. *In sum, the Respondent claims that it incurred various costs for additional work amounting to a total of five thousand six hundred eighty-four euro and fortyseven euro cents (€5,684.47) inclusive of VAT. These are detailed in the below sub-headings:*

Removal and Re-fixing of Gates/Security Railings

154. Works to the amount of one thousand eight hundred twenty-nine euro (€1,829.00) inclusive of VAT.

Cost of Repairs to Lifts

155. Works to the amount of eight hundred forty-two euro and fifty-four euro cents (€842.54) inclusive of VAT.

Removal of Vanity units to be Sprayed

156. Works to the amount of eighty-four euro and ninety-six euro cents (€84.96) inclusive of VAT.

Plumbing and Electrical Works T1 OF 03

157. Works to the amount of eight hundred twenty euro and ten euro cents (€820, 10) inclusive of VAT.

Remedial Works to Apartment Tl OF 02

158. Works to the amount of one thousand nine hundred eighty-six euro and thirteen euro cents (€1,986.13) inclusive of VAT.

Security Hours Charged

159. Works to the amount of one hundred twenty-one euro and seventy-four euro cents (€121.74) inclusive of VAT.

<u>Site Supervision and Management</u>

160. In sum, the Respondent maintains that, according to the terms of the MCI Agreement, the Claimant had to manage the execution of all the works under the various work packages and in turn the Claimant received a percentage payment for such services.

161. The Respondent continues, that when it became evident that the Claimant was also defaulting on this obligation, the Respondent was left to carry out these management services itself.

162. In addition, TCL contend that they incurred extra site supervision and management fees in connection with the remedial works and will be incurring a percentage fee on the total cost of the remedial works for the railings and for the pools by engaging the services of a project manager to oversee these remedial works.

163. TCL presented a table of the costs they incurred to employ personnel to do this work during the period from June 2010 to June 2011 for the amount of twenty-nine thousand four hundred fifteen euro and seventy-eight euro cents (€29,415.78) inclusive of VAT.

Vassallo Builder's Defence to TCL's Counter-Claim

164. The Claimant contends that the Respondent's counter-claim is null and void and seeks the rejection of the counter-claim in toto, including arbitral costs, legal representation and assistance costs. Claimant also reserved the right to raise any other pleas in the course of the proceedings.

165. Their main arguments are grouped under the headings below:

The Nullity of the Counter-Claim insofar as it relates to the Metal Railings Remedial Works Expenses

166. Clause 11.4 of the Agreement provides that:

> If the Contractor fails to remedy any defect or damage within a reasonable time, a date may be fixed by (or on behalf of) the Employer, on or by which the defect or damage is to be remedied. The Contractor shall be given reasonable notice of this date.
>
> If the Contractor fails to remedy the defect or damage by this notified date and this remedial work was to be executed at the cost of the Contractor under Sub-Clause 11.2 [Cost of Remedying Defects], the Employer may (at his option):
>
> (a) carry out the work himself or by others, in a reasonable manner and at the Contractor's cost, but the Contractor shall have no responsibility for this work; and the Contractor shall subject to Sub-Clause 25 [Employer's Claims] pay to the Employer the costs reasonably incurred by the Employer in remedying the defect or damage;
> (b) require the Engineer to agree or determine a reasonable reduction in the Contract Price in accordance with Sub-Clause 35 [Determinations];

167. VBL argue that the remedies under Clause 1 1.4 (a) and (b) quoted above are alternative to each other and mutually exclusive.

168. They maintain that by virtue of Certificate 28 the Respondent invoked Clause 11.4 (b) above when the Engineer deducted eighty-two thousand nine hundred sixty-four euro and thirty-two euro cents (€82,964.32) out of a

total one hundred sixteen thousand four hundred thirty-one euro (€116,431) from the said certificate in connection with the alleged defects in the rusting metal. It therefore follows that the Respondent is now effectively precluded from invoking the remedy under 11.4 (a) which is the basis of its counter-claim.

169. *They submit that the correct approach to be adopted by the Tribunal in assessing whether the Respondent's claim for payment for the costs incurred to carry out the metal remedial works is the legal maxim* electa una via, non datur recursus ad alteram *and therefore that according to this maxim Respondent's entire claim in relation to the remedial works is null and void.*

The Water Ingress

170. *With regard to the water ingress, VBL maintains that the amount claimed by the Respondent are at times not backed by any invoices or detailed investigation and are* "merely hypothetical".

171. *VBL explains that it was only responsible for part of the works carried out in the said penthouses and that there is no clear evidence establishing their responsibility for the alleged problems.*

Additional Works

172. *In sum, the Claimant is refuting in its entirety the claims set out below:*

Removal and Re-fixing of Gates/Security Railings:

173. *According to the Claimant it is unclear what works were carried out in this regard other than a handwritten note on an invoice which states that* 'the gate was too heavy to open' *and that the Respondent wanted to make* 'the gate lighter'.

174. *The Claimant maintains that the gates were manufactured in accordance with the Respondent's design as issued by his Engineer/ Architect.*

175. *Furthermore, the Claimant maintains that no instruction was issued by the Engineer/Architect to carry out the alterations within a prescribed time limit and hence this is another instance where the Respondent ignored the procedures outlined in the contract.*

Cost of Repairs to Lifts:

176. According to the Claimant the supply and installation of the lifts in the Block TIO complex never formed part of the Agreement.

177. The Claimant maintains that the Respondent never allowed the Claimant to use the lifts during the course of the works and it was only during the Taking Over stage that one lift was made available to the Owners when they were moving into their apartments and carrying out some works directly themselves.

178. The Claimant goes on to state that the cause of repairs being claimed are for reasons such as Job 78645- power failures and Job 78653- lost communication after power off and continues to state that it cannot be proved that this damage was not occasioned by third parties.

179. Lastly, the Claimant points out that this is another case where the Respondent ignored the procedures outlined in the MCI Agreement.

Removal of Vanity Units to be Re-Sprayed:

180. In sum the Claimant points out that it is unclear what works were carried out by the Respondent and furthermore why SIS, which is a mechanical and electrical contractor, was carrying out spraying works to vanity units when such work is normally performed by carpenters and joiners.

181. Lastly, once again the Claimant maintains that no instruction was issued by the Engineer to rectify the defects within a prescribed time period and again this is an instance where the Respondent ignored the procedures outlined in the MCI Agreement.

Location of Hot Water Heater (Geyser):

182. In sum, the Claimant states that the Respondent is charging the Claimant for the re-location of a Hot Water Heater in an unspecified apartment.

183. The Claimant maintains that initially when the installation work was carried out by SIS it was installed in the location specified in the designs of the Engineer.

184. According to the Claimant, the Respondent directly engaged SIS, Claimant's subcontractor, to relocate the geyser and, because of this, the Claimant was not given the opportunity to instruct his subcontractor to carry out the work.

185. Lastly, the Claimant states that no instruction was issued by the Engineer to rectify the defects within a prescribed time-period and this is an instance where the Respondent ignored the procedures outlined in the MCI Agreement.

Remedial Works to Apartment TIO F02:

186. According to the Claimant, the Respondent is charging the Claimant for works carried out to this apartment which included the redecoration of certain areas within the apartment.

187. Lastly, the Claimant states that no instruction was issued by the Engineer to rectify the defects within a prescribed time-period and this is an instance where the Respondent ignored the procedures outlined in the MCI Agreement.

Security Hours Charged:

188. According to the Claimant the Respondent is charging them for a number of hours for security when the Claimant was carrying out some remedial works well within the defects notification period.

189. The Claimant maintains that the FIDIC contract allows the Claimant access to the site well within such period and that they were never informed by the Respondent that this period would be subject to a charge for security. The Claimant continues to maintain that had they been told at the onset of the Agreement they would have built in contingencies into their price for such risks.

Site Supervision and Management Services

190. In sum the Claimant maintains that the costs which the Respondent is claiming are costs which the Respondent incurred as a result of his Taking Over process with the individual apartment owners.

191. According to the Claimant, at no point was the Respondent's team asked to co-ordinate with the Claimant's subcontractors as opposed to coordinating with the management team of the Claimant.

192. As a result, the Claimant disclaims any responsibility for works ordered directly by the Respondent to the Claimant's subcontractors.

Part Four

Considerations

193. The Tribunal has considered and addressed the following issues:

The Remedial Metal Works Claim

194. The Tribunal will first seek to address the assertion by the Claimant that the amounts detailed in their claim are being withheld 'without just cause'*. In order to ascertain this the Tribunal will first assess VBL's claim for the* 'Remedial Works done to Balconies' *for the amount of two hundred fifty thousand euro (€250,000) excluding VAT.*

195. In summary, VBL maintain that the rust is not attributable to their work but rather is the result of a 'defective design' *on the part of AOM, which they followed. VBL therefore claim that they are entitled to be paid for the remedial works they carried out.*

196. The Tribunal acknowledges that the MCI Agreement by which the Parties are bound is based on the 1999 FIDIC Red Book contract, intended for building and engineering works designed by the Employer.

197. However, although the design is not the responsibility of the Contractor in terms of FIDIC Red Book, the technical specification of the C-242 Metal and Timber Works Package D Clause 1.2, comprised in the MCI Agreement itself clearly states that 'The Contractor will be expected to develop the design intent shown on these drawings in shop drawings for the whole of the works'. *Clauses 1.2 to 1.9 of the aforementioned specifications made it explicitly clear that the drawings prepared by aoM were* 'design intent' *drawings, to be fully developed by the Contractor for approval by aoM. The fact that the MCI Agreement was a FIDIC Red Book did not preclude this methodology being adopted by the Parties in terms of the MCI Agreement.*

198. Furthermore, VBL, in their submissions, argued that the aoM acting as both the Architects and Designer, as well as the MCI Agreement (FIDIC) Engineer, in the same project represents a conflict of interest. The Tribunal ascertained that it is industry practice that, in FIDIC contracts, the 'Consulting Engineer' *carries out* 'detailed design and preparation of contract documents' *and* 'should recommend to his Client the advantages of a full professional service providing continuity from inception to completion of a project'. *(See The Role of the Consulting Engineer during*

Construction, FIDIC website http://fidic.org/node/753). This type of dual role is also seen in other similar construction contracts such as the NEC Engineering and Construction Form of Contracts and the JCT Joint Contracts Tribunal Standard Form of Contracts. The role aoM performed as both FIDIC Engineer and Architect/Designer under the FIDIC MCI Agreement is in line with common industry practice and no issue or conflict can be seen to arise in relation to the claims at hand.

BOI and B02 Railings

199. *The Tribunal also refers to the* 'Report of Prof. Ing. Joseph Buhagiar prepared on the 8th of November 2016' *which compares a metal railing installed by VBL Builders Limited with a metal railing that was remedied by Aluserv XN-TEQ ("Aluserv"). The Report which is attached hereto as Annex A and forms an integral part of this Award, makes the following important observations on the type BOI and B02 railings.*

200. *Sealer: The BS 5493-1977 standard in its appendix A clearly states that:*

"Cavities and crevices should be avoided or, if unavoidable, filled with weld metal or mastic. Any large cavities that will become inaccessible when the structure has been completed should be sealed with weld metal; where required, the seal should be tested by internal air pressure. Another method is to fill the cavities with concrete which is vibrated into position. Small spaces may be filled with mastic or rust-inhibitive paste or steel packings coated with an inhibitive paint". *In the VBL-installed metal railing there was no evidence of a sealer sealing the crevice. On the other hand, in the Aluserv-remedied metal railings evidence of a sealer was observed. It could not be verified if the sealer observed was mastic.*

Stripe Coat: The BS 5493-1977 suggests a paint stripe. There was no evidence that this was applied on the VBL-installed metal railings. In fact, at a particular corner a paint thickness of 57 µm was found. In the case of the Aluserv-remedied metal railing, at the corner, a paint coating thickness of 261 µm was found.

Galvanizing thickness: The BS 5493-1977 standard required a nominal galvanizing thickness of 100 µm whilst the tender "Non-Discretionary Finishes TIO Metal and Timber Works" *specified a zinc coating of at least 85 µm. Both the VBL-installed and the Aluserv-remedied metal railings met*

both the standard and tender with an approximate coating thickness of circa 170 pm and 360 µm respectively.

Paint thickness: The BS 5493-1977 standard required a nominal paint thickness of 60 to 100 µm whilst the tender "Non-Discretionary Finishes TIO Metal and Timber Works" *specified a paint thickness of at least 50 µm. The VBL-installed and the Aluserv-remedied metal railings met both the standard and tender with an approximate coating thickness of circa 90 µm and 320 µm respectively.*

Crevice: In the case of the VBL-installed metal railing the surfaces in the crevice were left untreated. On the other hand, the Aluserv-remedied metal railing had the two mating surfaces in the crevice coated with zinc.

201. *From the Report it can be concluded that VBL did not follow many of the design considerations given by the BS 5493: 1977 standard as indicated in Paragraph 2.9 in C-242 Metal and Timber Works Package D, forming part of the MCI Agreement. Furthermore, simple recommendations like proper sealing of crevices and the application of a stripe coat were disregarded. The way the railings were manufactured by VBL meant that any untreated surface found within the crevice were vulnerable to corrosion such that water seeped into the crevice. This meant that the sealing of the crevice became extremely critical in order not to have any corrosion nucleation and propagation.*

202. *Furthermore, VBL was responsible for achieving the contractual obligation under the technical specification of the C-242 Metal and Timber Works Package D, Clause 2.9 to* 'guarantee' *a* 'life to first maintenance (10-20 years)'.

203. *Ultimately, Aluserv were able to achieve the required BS 5493-1977 standard based on the same design specifications provided to VBL in the original tender. In his affidavit at paragraph 60, Ivan Piccinino states that* 'The tender, referred to as PM052. contained drawings and specifications identical to those found in the C242 (MCI) Package'. *This statement was not contested.*

204. *Aluserv placed their bid along with two other bidders, 'Steel Structures' and 'J.S. Dimech' and were the only bidder who could provide a guarantee in line with the Package specifications. The prices of the three bidders were very close as can be seen in Par 63 of the same affidavit. The bids related to the*

same specifications as of the original tender, and in fact the pricing was similar for all three bidders, and therefore one cannot argue that the price for the work done by Aluserv was as a result of over-specification. On this basis, any possible overdesign by Aluserv over the required British Standard cannot be seen as having been provided at an extra cost.

205. *While there is no doubt that the design intent issued by AOM was not an easy one to execute, it is also important to note that, as proven, the design specifications were not impossible to achieve. It cannot therefore be said that the design of the railings was* 'defective'.

206. *It is our conclusion that the corrosion attack on the railings manufactured by VBL Builders Ltd. was a result of poor workmanship combined with a disregard of very important recommendations given by BS 5493: 1977 and that ultimately a synergy of improper welding and sealing is to blame for the corrosion observed on the originally installed metal railings.*

B03 Louvres/Screens

207. *The defective design argument presented by VBL on the B03 louvres/screens is being considered separately.*

208. *According to the C-242 work package, in relation to Galvanized Steel and Wrought Iron Elements for Non-Structural Steel, paragraph 2.9* "The preferred method of protection shall be zinc-coating, either through hot-dip galvanizing, or, particularly for large elements, by metal spraying, in both cases after finished fabrication." *This* "preferred method" *refers to the objective of protecting all steel elements* "against corrosion in an exposed polluted and coastal external environment, defined in accordance with BS5493 by any suitable means that can guarantee a life to first maintenance (10 to 20 years)".

209. *In relation to the choice made by the Claimant, Professor Alex Torpiano of aoM in his affidavit paragraph 49 states that "*It is not clear why, in the case of the galvanized louvres, protection by hot-dip galvanizing was not adopted since this would have protected also the internal surfaces of the hollow tubes. This was the primary reason why the Consultant had opted to leave the ends uncapped at tender stage, given that a hot-dip solution would have ensured an all-round protection to the steel elements."

210. In the evidence of Jonathan Buttigieg of the 20th January 2017, p21, he is asked the following question:

Dr. Marisa Vella: 'So as opposed to other methods, the hot dip galvanization method would reach the inside evenly and more entirely than the cold galvanization method?'

Mr Jonathan Buttigieg: 'I would assume so'.

211. It was this change by VBL in the method of corrosion protection system from hot dip galvanizing to cold galvanization that gave rise to aoM's decision to instruct VBL to cap the ends of the louvres.

212. Ultimately, it was VBL, as the Contractor which was contractually obliged to create louvres with a life to first maintenance of 10 to 20 years, and, within the specification of BS5493. it was the responsibility of VBL, and not aoM, to come up with a solution that provided this life span.

213. It cannot therefore be said that the design of the louvres was 'defective'.

<u>Conclusion on the Remedial Works Claim</u>

214. The Contractor's General Obligations under the MCI Agreement in Clause 4.1 states that 'The Contractor shall design (to the extent specified in the Contract), execute and complete the Works in accordance with the Contract and with the Engineer's instructions, and shall remedy any defects in the Works.

215. The fundamental obligation of the Contractor is to produce good work in the performance of its contractual obligations — "The Contractor shall design (to the extent specified in the Contract), execute and complete the Works in accordance with the Contract and with the Engineer's instructions..." *(Clause 4.1, MCI Agreement) - and, if it produces defective work, in accordance with Clause 11.1 MCI Agreement, to successfully remedy these defects. The quality of the works is therefore the responsibility of the Contractor as per the terms of the MCI Agreement.*

216. The works were not in accordance with the MCI Agreement and constituted a non-performance of the Contractor's obligations, Hence, in accordance with Clause 1 1.2 of the MCI Agreement, entitled 'Cost of Remedying Defects', the costs of remedying such defects shall be borne by the Contractor:

All work referred to in sub-paragraph (b) of Sub-Clause 11.1 [Completion of Outstanding Work and Remedying Defects] shall be executed at the risk and cost of the Contractor, if and to the extent that the work is attributable to:

(b) Plant, Materials or workmanship not being in accordance with the Contract.

217. It therefore follows that the cost for remedial works cannot be claimed by the Contractor.

218. On the basis of the foregoing the Tribunal dismisses this claim.

<u>The Remedial Metal Works Counter-Claim</u>

219. TCL's case in this regard is that the remedial works done by the Claimant to the type BOI and B02 railings and the type B03 screens/louvres were done without approved method statements from the Engineer. They maintain that even before the remedial works were completed by VBL, rust could be seen. As a result, they had no choice but to inform VBL that third parties would be engaged to carry out the works at the cost of VBL under Clause 11.4(a) of the Agreement. TCL have claimed the cost of these expenses in their counter-claim in the amount of seven hundred thousand four hundred and seventyeight euro (€700,478) excluding VAT.

On the other hand, VBL submit that the correct approach to be adopted by the Tribunal is that TCL have invoked Clause 11.4(b) and are therefore precluded from claiming the cost of the remedial works under Clause 11.4(a). Electa una via, non datur recursus ad alteram*.*

220. Clause 11.4 of the Agreement entitled 'Failure to Remedy Defects'*, states that:*

If the Contractor fails to remedy any defect or damage within a reasonable time, a date may be fixed by (or on behalf of) the Employer, on or by which the defect or damage is to be remedied. The Contractor shall be given reasonable notice of this date.

If the Contractor fails to remedy the defect or damage by this notified date and this remedial work was to be executed at the cost of the Contractor under Sub-Clause 11.2 [Cost of Remedying Defects], the Employer may (at his option):

(a) carry out the work himself or by others, in a reasonable manner and at the Contractor's cost, but the Contractor shall have no

responsibility for this work; and the Contractor shall subject to Sub-Clause 2.5 [Employer's Claims] pay to the Employer the costs reasonably incurred by the Employer in remedying the defect or damage;

(b) require the Engineer to agree or determine a reasonable reduction in the Contract Price in accordance with Sub-Clause 3.5 [Determinations]; or

221. *In this regard it is important to examine the letter of the 6th May 2013 from AOM to Ivan Piccinino with the attached Certificate No. 28 (Doc VBL02).*

222. *The money withheld in the said Certificate related to items that had not been* 'technically approved' *due to the failure by VBL to submit documentation as required under the MCI Agreement in respect of the Metal Works. These items were identified in the Certificate as* 'Amount withheld for 'non- technically approved' *items. Therefore, the issue of reduction here was not related to a failure* "to remedy any defect or damage within a reasonable time" *but to something altogether different.*

223. *Therefore it cannot be concluded that the Engineer (or the Respondent) invoked Clause 11.4(b) with the issuing of Certificate No. 28.*

224. *Furthermore, Certificate No. 28 was an interim Certificate. In this regard, Clause 14.6 entitled* 'Issues of Interim Payment Certificates' *which states that:*

. . . . . The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate. A Payment Certificate shall NOT be deemed to indicate the Engineer's acceptance, approval, consent or satisfaction.

225. *Therefore, the reduction cannot be interpreted as an exercise by the Employer of option 11.4(b).*

226. *According to FIDIC- A Guide for Practitioners by Axel-Volkmar Jaeger, Gotz Sebastian Hok (Springer 2010) P.312-313:*

If the Contractor fails to remedy any occurring defects the Employer shall first fix a date, on or by which the defect or damage is to be remedied. The Employer shall give reasonable notice of this date. If the Contractor fails to remedy the defect by this notified date, the Employer has the choice of three options.

Sub-Clause 11.4 clearly states what has to be done before taking action.

227. *The Tribunal is satisfied that the Respondent fulfilled these requirements* 'before taking action' *and makes reference to the letter of the 29th March 2012 Doc dB-I from Ben Muscat the CEO of TCL to Mr. Nazzareno Vassallo VBL. The Tribunal finds that in this letter the Respondent did* 'fix a date on or by which the defect or damage is to be remedied' *and gave* 'reasonable notice' *of this date:*

228. "Under the terms of clause 11.4 of the Contract the Employer hereby notifies the Contractor that should firm proposals, complete with method statements, a detailed programme for carrying out the works and all other information requested by the Engineer not be received within 42 days from the date of receipt of this notification the Employer reserves the right to carry out the works himself or using others all as set us in clause 11.4(a) of the Contract."

229. *The Tribunal also makes reference to the Respondent's judicial letter of 1 1 th June 2013 Doc TCL 9 in which the Respondent makes clear its intention to avail itself of Clause 11.4(a) after the time period it gave to VBL to remedy the defects would have elapsed.*

230. *In view of the above the Tribunal is satisfied that the Respondent has correctly availed itself of Clause 1 1.4(a).*

231. *Clause 1 1.4(a) states that works carried out by the Employer or by third parties engaged by the Employer would be 'at the Contractor's cost'. The cost of the remedial works carried out under Clause 11.4(a) of the MCI Agreement are to be borne by the Contractor.*

232. *On the basis of the foregoing the Tribunal awards the Respondent costs in the amount of six hundred ten thousand eight hundred eighty-nine euro (€610,889) excluding VAT. 'Annex B', which forms an integral part of this Award, provides a detailed calculation of how the Tribunal determined this amount.*

<u>The Retention Money Claim</u>

232. *VBL submits that, in terms of Clause 14.9 of the MCI Agreement, the entire retention money in the amount of two hundred sixty-five thousand eighteen euro and twenty-three euro cents (€265,018.23) excluding VAT became due on the 6th June 2012, when the defects notification period expired.*

233. *Clause 14.9 of the Agreement entitled* 'Payment of Retention Money'*, states that:*

"When the Taking-Over Certificate has been issued for the Works, the first half of the Retention Money shall be certified by the Engineer for payment to the Contractor. If a Taking-Over Certificate is issued for a Section or part of the Works, a proportion of the Retention Money shall be certified and paid. This proportion shall be two-fifths (40%) of the proportion calculated by dividing the estimated contract value of the Section or part, by the estimated final Contract price.

Promptly after the latest of the expiry dates of the Defects Notification Periods, the outstanding balance of the Retention Money shall be certified by the Engineer for payment to the Contractor. If a Taking-Over Certificate was issued for a Section, a proportion of the second half of the Retention Money shall be certified and paid promptly after the expiry date of the Defects Notification Period for the Section. This proportion shall be two-fifths (40%) of the proportion calculated by dividing the estimated contract value of the Section by the estimated final Contract Price.

However, if any work remains to be executed under Clause 11 [Defects Liability], the Engineer shall be entitled to withhold certification of the estimated cost of this work until it has been executed …"

234. *Claimant's argument that* 'the outstanding balance of the Retention Money' *becomes due upon the* 'latest expiry of the Defects Notification Periods' *is flawed because the defects arising from Claimant's initial work were not successfully remedied by Claimant and so it would be incorrect to conclude that no works remained to be executed under Clause 11.*

235. *It was because VBL was unable to remedy the defects that TCL invoked Clause 11.4 (a) of the Agreement.*

236. *Therefore the Tribunal concludes that while the retention money did not become due on 6th June 2012, it becomes due when the Respondent's chooses to opt for a third party to complete the Works at the cost of the Contractor and not choose to make a reduction under the Agreement.*

237. *The Tribunal finds that the Retention amount of two hundred sixty-five thousand eighteen euro and twenty-three euro cents (€265,018.23), excluding VAT, is due to the Claimant.*

The Amount not Technically Approved Claim

238. VBL submits that the deduction for amounts not technically approved in the amount of eighty-two thousand nine hundred sixty-four euro and thirty-two euro cents (€82,964.32) excluding VAT is unwarranted.

239. On the other hand, the Respondent maintains that the Claimant's repetitive defaults to submit technical submissions as per the terms of the MCI Agreement - see for example Certificate No 28 and covering letter (Doc VBL 02) - justify the amount being withheld due to a lack of technical submissions.

240. It is important to state that these metal works for which the disputed amount for 'not tehnically approved items' *are being withheld is related to the much larger claim by the Respondent.*

241. In this context, this claim becomes due when the Respondent chooses to opt for a third party to complete the Works at the cost of the Contractor and not choose to make a reduction under the Agreement.

242. Having considered the foregoing the Tribunal finds that the amount of eighty-two thousand nine hundred sixty-four euro (€82,964.32) excluding VAT is due to the Claimant.

The Performance Guarantee Claim

243. VBL submit that the performance guarantee in the amount of three hundred thousand euro (€300,000) is due. They argue that the amount became due on the 6th June 2012 upon the expiry of the defects notification period.

244. Furthermore, VBL submits that in terms of Clause 11.9 of the MC1 Agreement a Performance Certificate is to be issued by the Engineer in view of its fulfillment of all its obligations under the MC1 Agreement.

245. Clause 11.9 entitled 'Performance Certificate' states that:

> Performance of the Contractor's obligations shall not be considered to have been completed until the Engineer has issued the Performance Certificate to the Contractor, stating the date on which the Contractor completed his obligations under the Contract.
>
> The Engineer shall issue the Performance Certificate within 28 days after the latest of the expiry dates of the Defects Notification Periods, or as soon

thereafter as the Contractor has supplied all the Contractor's Documents and completed and tested all the Works, including remedying any defects. A copy of the Performance Certificate shall be issued to the Employer.

Only the Performance Certificate shall be deemed to constitute acceptance of the Works.

246. *The Tribunal cannot agree with VBL's argument that the Performance Certificate is due in terms of the Agreement simply because they argue that the defects notification period expired on the 6th June 2012. As stipulated in the Clause above a Performance Certificate shall be issued to certify the performance of the Contractor's obligations, including remedying of defects, and such certificate shall signify acceptance of the Works.*

247. *VBL failed to remedy the outstanding defects in terms of the Agreement and hence the Performance Certificate did not become due on the 6th June 2012 as VBL are claiming.*

248. *Notwithstanding this, the Tribunal concludes that, following the Employer's choice to avail itself of the option indicated in Clause 11.4(a) of the MCI Agreement, there are actually no longer any outstanding Works in terms of the MCI Agreement, the outstanding defects having been remedied by third parties. Therefore, there are no further obligations that VBL have to carry out under the MCI Agreement.*

249. *Ordinarily, under the MCI Agreement, the triggering event for the release of the performance security, in terms of Clauses 14.11, 14.12 and 14.13, would be the issuance of the Final Payment Certificate under this Agreement.*

250. *At this point, this Award represents closure of the issues and obligations between the Parties and hence serves to settle all pending amounts due in terms of the MCI Agreement.*

251. *On the basis of the foregoing, the Tribunal finds that the Performance Security in terms of Clause 4.2 of the Agreement in the amount of three hundred thousand euro (€300,000) is to be released to the Claimant.*

<u>The Extension of Time Claim</u>

252. *VBL submit that the amount of twelve thousand seven hundred forty-five euro (€12,745) excluding VAT, an amount paid to them by TCL was paid in virtue of Certificate 27. But subsequently, and inexplicably it was reversed and deducted from other amounts certified as due to them.*

The Tribunal note that Certificate 27 was an interim certificate and as, such under Clause 14.6 entitled 'Issue of Interim Payment Certificates'*:*

"The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate. A Payment Certificate shall NOT be deemed to indicate the Engineer's acceptance, approval, consent or satisfaction."

253. *Neither of the Parties dispute that in Certificate 27 the Engineer approved the payment of the amount of €12,745, which amount was certified and paid as evidenced in Doc TCL02.*

254. *In an email sent on the 22 nd of May 2014 by Luke Coppini to Johnathan Buttigieg (Doc VBL 4.3) the Extension of Time item was re-inserted in the category* 'Amounts still in dispute' *with the annotation that this amount was* 'certified and paid in Certificate 27'.

255. *The Tribunal also examined Certificate 28: the Extension of Time costs are clearly identified as being included within the Certificate 28 total under the heading* 'Commercial Determinations'.

256. *Consequently, the Tribunal regard this as conclusive evidence that payment has been made and finds that the amount of €12,745 excluding VAT is not due to the Claimant.*

Preliminaries on Miscellaneous Site Instructions and Variation Orders Claim

257. *In sum, this item of claim amounts to ten thousand nine hundred thirty-three euro and seventy-four euro cents (€10,933.74) excluding VAT representing the 5% management fee on a number of site instructions and variation orders issued by the Engineer.*

258. *VBL submit that the correct approach to be adopted by the Tribunal is that TCL must pay the 5% management fee that has fallen due in terms of Clause 14.7 of the Particular Conditions of the MCI Agreement:*

5% on certified Gross Value of Works (Excluding VAT) to cover Preliminaries and to be paid by the Employer

8% on certified Gross Value of Works (Excluding VAT) to cover for overheads and profits, to be paid by the Employer

259. TCL have paid the 8% management fee pertaining to the overheads and profits but is refusing to pay part of the management fee pertaining to the preliminaries.

260. Under the MCI Agreement, in order for TCL to make a claim for foregoing costs, it has to adhere to Clause 2.5 'Employer's Claim' which states that:

"If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor. However, notice is not required for payments due under Sub-Clause 4.19 [Electricity, Water and Gas], under Sub-Clause 4.20 [Employer's Equipment and Free-Issue Material], or for other services requested by the Contractor.

The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. .."

261. TCL failed to produce evidence that such a notice has ever been issued within the prescribed timescale and has, additionally, failed to demonstrate sufficient reasoning why such a deduction can be properly made.

262. Having considered the foregoing the Tribunal finds that the amount of ten thousand nine hundred thirty-three euro and seventy-four euro cents (€10,933.74) excluding VAT is due to the Claimant.

Preliminaries on Claimant's Invoices Claim

263. In sum, VBL are claiming fifty-five thousand two hundred and ninety-four euro and twenty-six euro cents (€55,294.26) excluding VAT representing the 13% management fee due to them in terms of the MCI Agreement on certificates 18 to 28.

264. TCL contest both the payment, and the calculation of the amount due made by VBL. With regard to the calculation, according to TCL the amount is twenty-four thousand seven hundred and seventy-six euro and sixty-four cents (€24,776.64) excluding VAT.

265. VBL have submitted documents VBL JB 6.1 and VBL JB 6.2 in support of their claim.

266. The provisions within the MCI Agreement for TCL to make a claim for foregoing costs are contained within Clause 2.5 'Employer's Claim' that requires that:

"If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor. However, notice is not required for payments due under Sub-Clause 4.19 [Electricity, Water and Gas], under Sub-Clause 4.20 [Employer's Equipment and Free-Issue Material], or for other services requested by the Contractor.

The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim"

267. The Tribunal note that T CL has failed to produce evidence that such a notice has ever been issued within the prescribed timescale and, additionally, has failed to demonstrate sufficient reasoning why such a deduction can be properly made.

268. Having considered the foregoing the Tribunal find that the amount of fifty-five thousand two hundred and ninety-four euro and twenty-six euro cents (€55,294.26) excluding VAT is due to the Claimant.

The Management Fees Claim

269. In essence, VBL claim that they are entitled to management fees for the amount of forty-five thousand two hundred twenty-eight euros and two euro cents (€45,228.02) excluding VAT. VBL submit that this amount relates to items on which they are entitled to receive the 13% management fee due in terms of Clause 14.7 of the Particular Conditions of the MCI Agreement.

270. Clause 14.7 of the Particular Conditions of the MCI Agreement stipulates a:

5% on certified Gross Value of Works (Excluding VAT) to cover Preliminaries and to be paid by the Employer

8% on certified Gross Value of Works (Excluding VAT) to cover for overheads and profits, to be paid by the Employer

271. The Tribunal has considered the evidence presented in support of this claim, Document VBL JB 7.1, which amounts are not contested by the Respondent.

272. *The provisions within the MCI Agreement for TCL to make a claim for foregoing costs are contained within Clause 2.5* 'Employer's Claim' *that requires:*

> "If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor. However, notice is not required for payments due under Sub-Clause 4.19 [Electricity, Water and Gas], under Sub-Clause 4.20 [Employer's Equipment and Free-Issue Material], or for other services requested by the Contractor.
>
> The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim."

273. *The Tribunal note that TCL has failed to produce evidence that such a notice has ever been issued within the prescribed time-scale and, additionally, has failed to demonstrate sufficient reasoning why such a deduction can be properly made.*

274. *On the other hand, in this Award the Tribunal has ascertained that the Metal Price Adjustment due to the Claimant is one hundred forty-nine thousand and fifty-three euro and thirty-one euro cents (€149,053.31) and not the amount of one hundred sixty-seven thousand nine hundred eighty-one euro and thirtyfive euro cents (€167,981.35) which represents the sum indicated by Claimant. Therefore the 13% management fee needs to be calculated on an amount which takes into account this reduction of the Metal Price Adjustment sum. This means that the thirteen per cent (13%) is to be calculated on the sum of three hundred twenty-eight thousand nine hundred seventy-nine euro and eighty-three euro cents (€328,979.83) and not on the amount of three hundred forty-seven thousand nine hundred and seven euro and eighty-seven euro cents (€347,907.87) originally indicated in paragraph 7 of the Claim of the Claimant.*

275. *Having considered the foregoing the Tribunal find that the amount of forty-two thousand seven hundred sixty-seven euro and thirty-eight euro cents (€42,767.38), excluding VAT, is due to the Claimant.*

<u>The Metal Works Price Adjustment Claim</u>

276. VBL submit that the tender document issued by TCL contained an error, the quantities for the type BOI and B02 railings had been swapped and it was only after the MCI Agreement had been signed by the Parties that this error was noticed.

277. The Tribunal notes that Claimant, which submitting the tender and Respondent which accepted the offer, entered into the MCI Agreement, duly agreed to and signed with, inter alia, the particular page referencing the rates for the BOI, B02 and B03 being initialed by the Parties.

278. That being said, after reviewing and analysing the rates on page reference TIO Metal Timber works Pg 20, the Tribunal's opinion is that a genuine error was made in the pricing of items TIO - L 13 Steel railing type BOI, TIO - L 14 Steel railing type BOI - L 15, TIO - L 14 Steel railing type BOI - L 16, in that the BOI rate was swapped with the B02 and B03 rates. It appears that this error was not noted by the Respondent's quantity surveyor during the tender checking process.

279. The quantities of items BOI and B02 were then revised, apparently by instruction, although no written evidence has been produced to support this. However it should be noted that the Claimant has not contested the fact that he was instructed to change the quantities.

280. The pertinent Clause within the MCI Agreement that relates to the measurement and evaluation of the works is Clause 12, in particular Clause 12.3 entitled 'Evaluation'. *Clause 12.3 is unamended within the* "Particular Conditions"*.*

281. In sum, Clause 12.3 states that the contract rates apply to the evaluation of the works. However, a new rate shall be appropriate for an item if one of factors detailed in Clause 12.3. (a) & (b) are present:

(a) (i) the measured quantity of the item is changed by more than 10% from the quantity of this item in the Bill of Quantities or other Schedule,

(ii) this change in quantity multiplied by such specified rate for this item exceeds 0.01% of the Accepted Contract Amount,

(iii) this change in quantity directly changes the Cost per unit quantity of this item by more than 1%, and

(iv) this item is not specified in the Contract as a 'fixed rate item';

or

(b) (i) the work is instructed under Clause 13 [Variations and Adjustments],

(ii) no rate or price is specified in the Contract for this item, and

(iii) no specified rate or price is appropriate because the item of work is not of similar character, or is not executed under similar conditions, as any item in the Contract.

282. Having considered the foregoing, the Tribunal takes the view that the evaluation of the Type BOI and B02 railings should be revalued in accordance with the above, specifically (a) (i) and (ii) of the MCI Agreement, noting it is established that there was a mistake within the original tender.

283. Therefore it considers fair and reasonable that the Claimant be reimbursed at the rates that should have been entered within the tender for the BOI and B02 railings.

284. Having considered the foregoing, the Tribunal finds in favour of the Claimant in the sum of one hundred forty-nine thousand and fifty-three euro and thirty-one euro cents (€149,053.31) excluding VAT, the calculation of which is explained in Annex C which constitutes an integral part of this Award.

Finance Charges Claim

285. VBL submit that finance charges are due from the Respondent as per the terms of the MCI Agreement.

286. Clause 14.8 entitled 'Delayed Payment' *of the Agreement provides that:*

"If the Contractor does not receive payment in accordance with Sub-Clause14.7 [Payment], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the date for payment specified in the Sub- Clause 14.7 irrespective (in the case of its sub-paragraph (b) of the date on which any Interim Payment Certificate is issued.

"Unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the annual rate of three percentage points

above the discount rate of the central bank in the country of the currency of payment, and shall be paid in such currency.

"The Contractor shall be entitled to this payment without formal notice or certification, and without prejudice to any other right or remedy."

287. The Tribunal also examined Documents VBL JB 10.1 and VBL CC 05 submitted by VBL and finds that the terms of Clause 14.8 support VBL's calculation for their claim for finance charges.

288. That being said, not all that is being claimed by the Claimant in terms of finance charges, falls within the remit of this Clause. The Clause states that finance charges are due on late payment of amounts certified within an interim certificate, the certificate in question being Certificate 28. The Tribunal cannot support VBL's argument that all the payments claimed in this arbitration by Claimant ought to have been settled by the 6th June 2012. Having reviewed the various claims the Tribunal concludes that the claims for the Performance Guarantee, Retention, Amounts Not Technically Approved, Remedial Metal Works, Management Fees and the Metal Works Price Adjustment were not included within interim Certificate 28 and consequently no finance charges are due on these payments.

289. The Tribunal considers that finance charges are due on the following claims that are included within Clause 14.7 (Payment) of the MCI Agreement. Although these elements are not directly included within the gross amount of Certificate 28, they are calculated based on the gross value stated on the certificate, namely Preliminaries on Miscellaneous Sis and VORs and Preliminaries on Claimants Invoices and Management Fees.

290. With regard to the calculation of finance charges as indicated in the MCI Agreement, reference is made to Bank of Valletta Limited v Anna's Trading Company Limited u Raymond u Rosaria miżżewġin Falzon (Qorti tal-Appelli Civili (Superjuri), December 2002, Appell Ċivili Nru. 160/1997/1 at P. 10) where the Court of Appeal held that "In commercial matters, the commercial law shall apply: Provided that where no provision is made in such law, the usages of trade or, in the absence of such usages, the civil law shall apply *(Article 3 of the Commercial Code Chapter 13 of the Laws of Malta):*

"Our Courts permit, and declare as legal, stipulations in an overdraft contract even where the creditor debits compound and not simple interest.

"Amongst other judgments, this Court shall mention Dennis Degiorgio v Guido Sant Furnier Qorti tal-Kummerc 1980 'Notwithstanding that the civil law considers null an agreement of compound interest for a period less than one year, this banking usage prevails over these civil law rules. ″

291. *Reference is also made to the publication FIDIC Contracts: Law and Practice by Baker, Mellors, Chalmers and Lavers (Routledge 2009) P.456:*

"An express entitlement to compound financing charges is significant. The absence of such a contractual provision would throw into doubt, at least in some jurisdictions, the Contractor's ability to claim compound interest. For example, under English law, the court Secretary of State for Transport v BirseFarr Joint Venture [1993] 62 BLR 36 held that compound interest can only be awarded upon the basis of a contractual provision to pay compound interest."

″

292. *The Tribunal applied Clause 14.7(b) as amended by the Particular Conditions of the MCI Agreement to establish the 7th of July 2013 as the date of on which the Finance Charges started to run.*

293. *Having considered the foregoing the Tribunal concludes that finance charges are due to the Claimant in the amount of eleven thousand two hundred seventy-four euro and three euro cents (€11,274.03) as set out in Annex D which forms an integral part of this Award.*

The Pools & Terraces Water Ingress Counter-Claim

294. *TCL submit that during the execution of the works by the Contractor and post commissioning, water ingress problems started to become evident in penthouses 18, 20, 57 and 59. As a result the Engineer issued a number of site instructions for remedial works to be effected. They submit that the Claimant carried out some remedial works but that the problems persisted nonetheless. This gave the Respondent no other option but to intervene and carry out remedial works itself at the cost of the Contractor in the amount of two hundred seventy-one thousand four hundred fifty-eight euro and thirtythree euro cents (€271,458.33) including VAT.*

295. *VBL, on the other hand maintain that they were not responsible for all the works carried out to the said penthouses and that there is no clear evidence establishing their responsibility for the water ingress.*

296. *With regard to this Claim, reference is made to Clause 11.4(a) of the Agreement entitled* 'Failure to Remedy Defects', *which is the Clause which TCL are relying on as the basis of their claim. The Clause states that:*

> If the Contractor fails to remedy any defect or damage within a reasonable time, a date may be fixed by (or on behalf of) the Employer, on or by which the defect or damage is to be remedied. The Contractor shall be given reasonable notice of this date.
>
> If the Contractor fails to remedy the defect or damage by this notified date and this remedial work was to be executed at the cost of the Contractor under SubClause 11.2 [Cost of Remedying Defects], the Employer may (at his option):
>
> (a) carry out the work himself or by others, in a reasonable manner and at the Contractor's cost, but the Contractor shall have no responsibility for this work; and the Contractor shall subject to Sub-Clause 2.5 [Employer's Claims] pay to the Employer the costs reasonably incurred by the Employer in remedying the defect or damage;

297. *In this regard, Understanding the New FIDIC Red Book: A Clause-by-clause Commentary by Jeremy Glover, Christopher Thomas, Simon Hughes (Sweet & Maxwell 2006) P.244 and 255 states that:*

> "The need to notify the Contractor plays a critical role in sub-cl. 11.4 and the Employer will be required to follow the procedures set out in sub-cl. 11.4 with care before exercising the options at (a), (b) or (c), It is suggested that, if the Employer purported to exercise the options in sub-cl. 11.4 without giving the Contractor reasonable notice, then the Employer may not later be able to rely upon the provisions of sub-cl. 11.4. "

298. *The publication Construction Law in the United Arab Emirates and the Gulf by Michael Grose (John Wiley & Sons 2016) p.334, also examines FIDIC contract clause 11.4, and states that:*

> "The implication of the options specified at Sub-Clause 11.4(a) and (b)- which, unlike elsewhere in the Conditions including Sub-Clause 11.4(c), are not expressed to be without prejudice to any other rights- is that the Employer is not entitled to exercise them unless the Contractor has first had an opportunity to remedy under Sub-Clause 11. 1 [Completion of Outstanding Work and

Remedying Defects] and then has had reasonable notice of a further fixed date by which the work shall be executed. This is consistent with the Contractor having a right as well as an obligation to execute, complete and remedy defects in the Works'.

299. *Further reference is made to a commentary by Corbett & Co. International Construction Lawyers (2016), P.4:*

"Under Sub-Clause 11. I(b), the Contractor is required to remedy defects or damage which have been notified by the Employer, or (on his behalf) by the Engineer having been notified under Sub-Clause 111(b), the Contractor is both obliged and entitled to carry out the remedial work, including the right of access under Sub-Clause 11.7. The Employer should not remedy the defects or damage himself, unless and until he is entitled to do so under Sub-Clause *11.4."*

300. *The Tribunal reviewed the evidence submitted by the Parties with regard to this claim and, with regard to the satisfaction of the requirements of Clause 1 1.4 (a), highlights the following:*

301. *TCL directly instructed VBL's subcontractor Pool & Spa to remedy the defects as confirmed in Doc IP38 and Doc VBL C09. Doc IP38 is email correspondence between TCL's Ivan Piccinino and VBL's Johnathan Buttigieg:*

"On the 13/06 1 reported (via email) that the pools were losing water at an abnormal rate and consequently I asked you to instruct your subcontractor Pool & Spa to make the necessary tests to determine the source and recommend the necessary remedial works...

"Consequently, on the 21/06 in the evening (7.15 pm) I instructed Pool & Spa directly to carry out these investigations."

Doc VBL C09 is a letter sent on the 30th August 201 1 by Ivan Piccinino of TCL to John Papagiorcopolo of VBL 'in the absence of a follow up from your end, MIDI had no alternative other than to resolve the issue by approaching third parties. Pool & Spa were engaged and the works were carried out for penthouses 18 and 57...and deemed to be successful'.

302. *In both these communications, TCL did not adhere to the requirements of Clause 11.4 (a).*

303. *TCL wrote to VBL on the 15th November 2012 Doc IP 45 in respect of defective works in penthouses 20, 57 and 59. The letter states that:*

> The three penthouses... are suffering from water ingress and from other pool related issues, which issues have surfaced over the past one and a half years and remain unresolved till this day and continues by requesting 'a) a clear and unequivocal response from [VBL's] end to resolve this issue once and for all, b) by mobilizing [VBL's] resources and [VBL's] responsible Engineer within 7 days from the date of this letter' and concluded by stating that 'should the above time-frame not be adhered to, the Company would have no other option other than to engage third parties in order to protect its interests. Furthermore during the lapse of such period, the Company reserves the right to take any and all action at law against both the Contractor and the Architect without any further notice'.

304 *Although this may be considered a notification to the Contractor in terms of Clause 11.4 the question arises whether the 7 days' notice constitutes a* "reasonable time" *period as required by that Clause.*

305. *In Go West Ltd. V Spigarolo & Anor EWCA Civ 17 (31 January 2003),the English Court of Appeal stated that what is reasonable time had "to be assessed...having regard to all the circumstances of the particular case."*

306. *The Maltese Courts have also developed similar reasoning in this regard. See, in particular,* Noel Cefai eżerċenti I-kummerċ bħala Green Care Trading vs John E. Sullivan għan-nom u f'isem s-soċjetà kummerċjali Sullivan Shipping Agencies Ltd. (Qorti Ċivili Prim' Awla Onor. Imħallef Lorraine Schembri Orland, 22 ta' Marzu, 2016 Rikors Ġuramentat Nru 765/2010 P. 25) "What is 'a reasonable time is a question of fact that has to be determined by the Court according to the particular circumstances of the case'.

307. *In this context, having regard to the facts and circumstances of this particular case, the Tribunal cannot conclude that '7 days' amounts to a* 'reasonable time' *as required by Clause 11.4 of the (FIDIC) MCI Agreement.*

308. *Furthermore, additionally the wording of Doc IP 45 is not in line with the requirement of 11.4 FIDIC in that it indicates a time for* "mobilization" *but does not give a clear time period within which the works have to be concluded successfully by the Contractor before the Employer exercises the option to remedy itself or ask third parties to remedy the defect, at the expense of the Contractor.*

309. *Doc IP40 sent on the 5th December 2013 constitutes a communication from TCL to AOM, with VBL in copy, requesting AOM to formally advise VBL that they will be exercising their right under Clause 11.4 of the Agreement and will be engaging third parties to carry out the remedial works in respect of* 'water ingress from the penthouse pools'. 'As the Engineer administering this contract, formally advise the Contractor that, in view of the above, we have no option other than to refer to Clause 11.4 of the Contract and engage a third party Contractor to carry out all the necessary remedial works, keeping record of the costs incurred.'

310. *This mail to aoM from TCL sent on the 5th of December 2013 further shows, by own admission of the Respondent, that no formal notice according to Clause 11.4 had yet been given to VBL up to that date.*

311. *While noting that this request is only in respect of Water Ingress from the penthouse pools and does not mention the terraces, this communication between the Employer with the Engineer does not constitute a notice to the Contractor in accordance with the requirements of 11.4 of the FIDIC MCI Agreement.*

312. *The Tribunal also notes that this set of events contrasts sharply with Respondent's clear and successful invocation of Clause 11.4 (a) with regard to the metal works, both giving VBL a reasonable time to remedy their defect and, in default, clearly stating the Employer's intention to remedy the defect itself or through third parties under 11.4(a), further confirmed through a judicial letter.*

313. *As the Civil Code (Chapter 16 of the Laws of Malta) clearly states, in its Article 992(1)): "*Contracts legally entered into shall have the force of law for the contracting parties." *The Parties chose to regulate their relationship according to the terms of the FIDIC MCI Agreement and these terms, including Clause 11.4, are to be enforced in the contractual relationship between them.*

314. *On the basis of the foregoing, the Tribunal concludes that TCL did not adhere to the requirements of Clause 11.4 of the MCI Agreement with respect to both the penthouse pools and terraces. This claim is therefore dismissed.*

The Additional Works Claim

315. *In sum, TCL submit that they are entitled to the reimbursement of additional costs incurred for six aspects of works in the amount of four thousand eight hundred seventeen euro and thirty-five euro cents (€4,817.35) exclusive of VAT.*

316. *The Tribunal has considered the evidence presented and has also taken into consideration the contractual remedies contained within the Agreement under Clause 11.4 entitled* 'Failure to Remedy Defects' *and the Employers ability to make a claim against the Contractor under Clause 2.5 entitled* 'Employer's Claims'. *Both clauses set out procedures to follow in respect of making a claim against the Contractor.*

317. *Clause 11.4 of the Agreement entitled 'Failure to Remedy Defects' states that:*

...

If the Contractor fails to remedy any defect or damage within a reasonable time, a date may be fixed by (or on behalf of) the Employer, on or by which the defect or damage is to be remedied. The Contractor shall be given reasonable notice of this date.

If the Contractor fails to remedy the defect or damage by this notified date and this remedial work was to be executed at the cost of the Contractor under Sub-Clause 112 [Cost of Remedying Defects], the Employer may (at his option):

...

318. *Clause 2.5 of the Agreement entitled* 'Employer's Claims' *states that:*

If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor. However, notice is not required for payments due under Sub-Clause 4.19 [Electricity, Water and Gas], under Sub-Clause 4.20 [Employer's Equipment and Free-Issue Material], or for other services requested by the Contractor.

The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim.

319. *Having considered the foregoing, the Tribunal finds that:*

320. *Removal & Re-fixing of Gates: no evidence was presented showing that the Respondent has issued proper notice under Clause 11.4 to the Claimant in respect of remedying defects or under Clause 2.5 Employer's Claim and as such this claim is not substantiated.*

321. *Damage to T 10B Lifts: there is no evidence presented that the Respondent has issued proper notice under Clause 25 Employer's Claim and as such this claim is not substantiated.*

322. *Removal of Vanity Units to be Resprayed: there is no evidence presented that the Respondent has issued proper notice under Clause 11.4 to the Claimant in respect of remedying defects or under Clause 2.5 Employer's Claim and as such this claim is not substantiated.*

323. *Location of Hot Water Heater (Geyser): there is no evidence presented that the Respondent has issued proper notice under Clause 11.4 to the Claimant in respect of remedying defects or under Clause 2.5 Employer's Claim and as such this claim is not substantiated.*

324. *Remedial Works to Apartment TIOF 02: there is no evidence presented that the Respondent has issued proper notice under Clause 11.4 to the Claimant in respect of remedying defects or under Clause 2.5 Employer's Claim and as such this claim is not substantiated.*

325. *Security Hours charged: there is no evidence presented that the Respondent has issued proper notice under Sub-Clause 2.5 Employer's Claim and as such this claim is not substantiated.*

326. *Having considered the foregoing, the Tribunal find that the amount is not due to the Respondent and this claim is hereby dismissed.*

<u>The Site Supervision and Management Claim</u>

327. *In sum, TCL submit that they are due the sum of twenty-four thousand nine hundred twenty-eight euro and sixty-three euro cents (€24,928.63) exclusive of VAT for costs they incurred to perform the work which the Claimant was contracted to do.*

328. *According to the Agreement the Claimant had to manage the execution of all the works under the various work packages and in turn the Claimant received a percentage payment for such services. TCL has presented a table of the*

costs they incurred to employ personnel to do this work during the period from June 2010 to June 2011 Doc TCL17.

329. The Tribunal considered the evidence presented, and noted that TCL have never issued an Employer's Claim under Clause 2.5 as is required for any such claim:

If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor. However, notice is not required for payments due under Sub-Clause 4.19 [Electricity, Water and Gas], under Sub-Clause 4.20 [Employer's Equipment and Free-Issue Material], or for other services requested by the Contractor.

The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim.

330. Having considered the foregoing, the Tribunal find that the amount is not due to the Respondent and this claim is hereby dismissed.

Costs of the Arbitration and of Legal Fees

331. The costs of the arbitration are to be borne equally between the Parties. Each Party is to bear the cost of its own legal fees.

Interest

332. The Tribunal has determined that, in all cases in this Award, interest shall run from the date of the Award.

333. In all cases in this Award, interest shall be at the rate of eight per cent (8%) per annum."

L-Appell

6. Is-soċjetà appellanta intavolat l-appell tagħha fil-15 ta' Marzu, 2019 fejn qiegħda titlob lil din il-Qorti sabiex:

"9.1 ...tibdel, tirrevoka u tikkanċella s-segwenti kapi tal-lodo arbitrali deċiż fis-26 ta' Frar 2019 u ċioé dawk il-kapi fejn:

9.1.1 It-Tribunal Arbitrali ċaħad il-kontro-talba tas-soċjetà appellanta fir-rigward tal-perkolazzjoni tal-ilma;

*9.1.2 It-Tribunal Arbitrali ċaħad il-kontro-talba tas-soċjetà appellanta fir-rigward tal-*management fees;

9.1.3 It-Tribunal Arbitrali laqa' l-pretensjoni tas-soċjetà appellata ntestata "Preliminaries on Miscellaneous Site Instructions and Variation Orders Claim";

9.1.4 It-Tribunal Arbitrali laqa' l-pretensjoni tas-soċjetà appellata ntestata "Preliminaries on Claimant's Invoices Claim";

*9.1.5 It-Tribunal Arbitrali laqa' l-pretensjoni tas-soċjetà appellata ntestata "*Management Fees"; *u*

9.1.6 It-Tribunal Arbitrali laqa' l-pretensjoni tas-soċjetà appellata ntestata "Metal Works Price Adjustment".

9.2 Jekk kemm-il darba jintlaqgħu dawn l-aggravji, din l-Onorabbli Qorti għandha tagħti dawk id-direttivi li jidrilha xierqa u opportuni sabiex, jekk ikun il-każ, jiġi deċiż il-mertu sostantiv.

9.3 Bl-ispejjeż kontra s-soċjetà appellata"

7. Tgħid li l-aggravji tagħha huma fir-rigward tal-kapijiet tal-lodo arbitrali fejn ġew deċiżi l-partijiet tal-kontrotalba li jirrigwardaw (i) il-perkolazzjoni ta' ilma; (ii) u l-partijiet tat-talba li jirrigwardaw (a) il-*Preliminaries;* (b) *Management fees;* u (ċ) *Metal Works Price adjustment.*

Ir-Risposta tal-Appell

8. Is-soċjetà appellata wieġbet permezz ta' risposta ppreżentata fid-9 ta' April, 2019, fejn issottomettiet li għandu jiġi miċħud l-appell interpost mis-soċjetà appellanta, bl-ispejjeż kontriha.

Konsiderazzjonijiet ta' din il-Qorti

9. Din il-Qorti ser tgħaddi qabelxejn sabiex tikkonsidra l-ewwel sottomissjoni tas-soċjetà appellata fir-rigward tal-inammissibilità tal-appell odjern, liema sottomissjoni jekk tinstab li hija valida, għandha ġġib fix-xejn l-imsemmi appell. Tirrileva li skont l-artikolu 3.1 tal-ftehim iffirmat fit-8 ta' April, 2015, bejn il-partijiet u li kopja tiegħu tinstab annessa mal-Avviż Konġunt tal-Arbitraġġ, kull parti għandha d-dritt li tinterponi appell mil-lodo arbitrali u dan skont kif jipprovdi l-Kap. 387 tal-Liġijiet ta' Malta.

10. Is-subartikolu 70A(1) jibda billi jipprovdi kif ġej:

> *"70A. (1) Parti fil-proċedimenti tal-arbitraġġ tista' tappella lill-Qorti tal-Appell fuq punt ta' liġi li jitnissel minn deċiżjoni finali magħmula fil-proċedimenti kemm-il darba –*
>
> *(a) il-partijiet ma eskludewx espressament dan id-dritt tal-appell fil-ftehim tal-arbitraġġ jew mod ieħor bil-miktub; jew*
>
> *(b) minkejja kull ħaġa msemmija fil-ftehim tal-arbitraġġ, il-partijiet ma ftiehmux espressament li ma għandhom jingħataw l-ebda raġunijiet fid-deċiżjoni skont l-artikolu 44(3)."*

11. Il-Qorti tibda billi tikkonsidra jekk ir-rekwiżiti stabbiliti permezz ta' dan is-subartikolu ġewx sodisfatti. Mill-ftehim ta' bejn il-partijiet fuq imsemmi, ma jirriżultax li l-partijiet eskludew id-dritt tal-appell, tant hu hekk li l-istess ftehim li kien intiż sabiex jirregola l-mod kif il-vertenzi eżistenti bejn il-partijiet għandhom jiġu riżolta permezz tal-proċedura ta' arbitraġġ, ta wkoll lil kull parti d-dritt ta' appell skont id-dispożizzjonijiet tal-Kap. 387 tal-Liġijiet ta' Malta. Għalhekk ir-rekwiżit stabbilit permezz tal-ewwel paragrafu tas-subartikolu

sużitat jinstab sodisfatt. Huwa wkoll sodisfatt permezz tal-istess ftehim ir-rekwiżit li jipprovdi għalih il-paragrafu (b) tal-istess subartikolu, u dan għaliex m'hemm l-ebda klawsola fil-ftehim ta' arbitraġġ li sar bejniethom fejn il-partijiet qegħdin jaqblu li t-Tribunal m'għandu jagħti l-ebda raġuni għad-deċiżjoni tiegħu.

12. Ġaladarba sorvolati l-ewwel kundizzjonijiet fejn b'hekk il-partijiet m'għandhom l-ebda ostakolu sabiex jappellaw mil-lodo arbitrali fuq punt ta' liġi, għandhom jiġu kkunsidrati wkoll id-dispożizzjonijiet tas-subartikolu 70A(3) tal-Kap. 387 fir-rigward ta' dawk l-appelli li huma ammissibbli fuq punt ta' liġi, għaliex hawn ukoll mhux kull appell huwa ammissibbli:

> *"(3) Il-Qorti tal-Appell għandha tikkunsidra l-appell biss jekk il-Qorti tkun sodisfatta*
>
> *(a) li d-deċiżjoni dwar il-punt ta' liġi taffettwa sostanzjalment id-drittijiet ta' waħda jew iktar mill-partijiet;*
>
> *(b) li l-punt ta' liġi huwa wieħed li t-tribunal kien mitlub jiddeċiedi fuqu jew mod ieħor iddependa fuqu biex jasal għad-deċiżjoni;*
>
> *(ċ) li fuq il-bażi ta' dak li jirriżulta mill-fatti fid-deċiżjoni, id-deċiżjoni tat-tribunal dwar il-punt ta' liġi hija prima facie miftuħa għal dubju serju;*
>
> *(d) li abbażi ta' reviżjoni tar-rikors, kull risposta u d-deċiżjoni, l-appell ma jidhirx li hu dilatorju u vessatorju,*
>
> *u fil-każijiet l-oħra kollha il-Qorti għandha tiċħad l-appell"*

13. Iżda qabelxejn għandu jiġi kkunsidrat dak li jipprovdi għalih is-subartikolu 70B(1) tal-Kap. 387 li jitlob kif ġej dwar il-mod li bih għandhom jiġu mfissra l-aggravji tal-appellant:

"70B. (1) Appell taħt l-artikolu 70A għandu jidentifika l-punt ta' liġi li għandha tittieħed deċiżjoni fuqu u għandu jispeċifika t-tifsira li r-rikorrent jallega li hi t-tifsira korretta tal-punt ta' liġi identifikat".

14. Għaldaqstant din il-Qorti qabelxejn ser tgħaddi sabiex tinvestiga jekk l-appell interpost mis-soċjetà appellanta għandux jinstema' jew saħansitra jiġi miċħud mill-ewwel.

15. L-ewwel aggravju tas-soċjetà appellanta huwa fir-rigward tal-kap tal-lodo arbitrali fejn ġiet deċiża l-kontrotalba dwar il-perkolazzjoni tal-ilma. Is-soċjetà appellanta ssostni li t-Tribunal huwa żbaljat legalment fejn sab li hija ma kinitx ottemporat ruħha mal-art. 11.4 tal-ftehim tal-appalt u tgħid li dan għaliex fost oħrajn ma ħax inkonsiderazzjoni provi li ressqet hi stess. Tkompli tgħid li r-raġuni li ta t-Tribunal kienet waħda li ssolleva hu stess u li ma kinitx tagħmel parti mid-difiża tas-soċjetà appellata. Tissottometti li dan ma setax jagħmlu t-Tribunal u għalhekk kien legalment żbaljat. Din il-Qorti mill-ewwel tgħid li s-soċjetà appellanta qiegħda hawn tonqos milli tħares id-dispożizzjonijiet tas-subartikolu 70B(1) għaliex naqset milli tiddentifika l-punt ta' liġi li jirrikjedi deċiżjoni minn din il-Qorti, u wisq inqas milli tagħti t-tifsira li skont hi għandha tingħata lil dak il-punt ta' liġi. Il-Qorti għalhekk mhix ser tieħu konjizzjoni tal-ewwel aggravju tagħha.

16. L-istess il-Qorti tosserva fir-rigward tat-tieni aggravju li s-soċjetà appellanta tgħid jirrigwarda l-kap tal-lodo arbitrali li jittratta dik il-parti tal-kontrotalba dwar il-*Management Fees.* Tgħid li hawn it-Tribunal żbalja meta għamel difiża li ma kinitx tressqet mis-soċjetà appellata, jiġifieri meta stqarr li

hija kienet hawn ukoll naqqset milli tibgħat avviż ai termini tal-artikolu 2.5 tal-kuntratt ta' appalt. Iżda l-Qorti tgħid li għal darb'oħra ma tħarsux id-dispożizzjonijiet tas-subartikolu 70B(1) tal-Kap. 387 mis-soċjetà appellanta u għalhekk il-Qorti tastjeni milli tieħu konjizzjoni ta' dan l-aggravju wkoll.

17. It-tielet aggravju tas-soċjetà appellanta huwa fir-rigward tal-kap tal-lodo arbitrali li ddeċieda t-talba dwar dak li ssejjaħ *Preliminaries.* Hija tagħti tliet raġunijiet għaliex kienet qiegħda tressaq l-appell tagħha fir-rigward dan il-kap: (i) għal darb'oħra t-Tribunal ddeċieda fuq il-ħtieġa tan-notifika meta ma kien hemm l-ebda kontestazzjoni fir-rigward minn xi parti; (ii) it-Tribunal żbalja fuq punt legali meta ddeċieda li kien hemm bżonn avviż skont l-artikolu 2.5; (iii) it-Tribunal ma ssodisfax ir-rekwiżit tas-subartikolu 44(3) tal-Kap. 387 u kiser ukoll il-prinċipji bażiċi ta' dritt meta ddikjara li hija ma kinitx ippruvat li seta' jsir it-tnaqqas mill-pretensjoni tas-soċjetà appellata; u (iv) it-Tribunal naqas milli jikkonsidra ammissjoni tas-soċjetà apellata li l-ammont pretiż kellu jiġi ridott. Il-Qorti tgħid li dak li ġie deċiż minnha fir-rigward tal-ewwel żewġ aggravji, jgħodd hawn ukoll għall-punti (i), (ii) u (iv) stante li s-soċjetà appellanta mhijiex qiegħda tiddentifika l-ebda punt ta' liġi fl-argumenti tagħha u saħansitra tidħol fil-mertu tal-vertenza ta' bejn il-partijiet. Għal dak li jirrigwarda l-punt (iii), l-argument miġjub mis-soċjetà appellanta jolqot l-apprezzament tal-provi li għamel it-Tribunal u l-konklużjoni li wasal għaliha abbazi ta' dak l-apprezzament u għal din ir-raġuni l-aggravju mhuwiex ammissibbli. Il-Qorti tgħid li jekk is-soċjetà appellanta mhijiex qiegħda taqbel mal-imsemmi apprezzament u konklużjoni, ma tistax tinvoka d-dispożizzjonijiet tas-

subartikolu 44(3) tal-Kap. 387 favur tagħha sabiex b'hekk tiġġustifika li l-appell tagħha qed isir fuq punt ta' liġi.

18. Ir-raba' aggravju tas-soċjetà appellanta jolqot dik il-parti tal-lodo arbitrali fejn it-Tribunal iddeċieda dwar dak li jissejħu *Management Fees.* Is-soċjetà appellanta tikkontendi li: (i) it-Tribunal għal darb'oħra mar *ultra vires* il-kwistjoni li kienet tressqet quddiemu u ddeċieda dwar il-ħtieġa ta' notifika meta ma kien hemm l-ebda kontestazzjoni; (ii) it-Tribunal żbalja meta ddeċieda li kien hemm bżonn avviż skont l-artikolu 2.5; u (iii) fejn ġie deċiż li s-soċjetà appellanta ma kinitx ippruvat li seta' jsir it-tnaqqis, it-Tribunal ma ottemporax ruħu mar-rekwiżit tas-subart. 44(3) tal-Kap. 387 u l-prinċipji bażiċi ta' dritt. Dan kollu tgħid skont l-argumenti miġjuba aktar kmieni fis-sitt paragrafu tar-rikors tal-appell. Iżda hawn ukoll is-soċjetà appellanta terġa' tressaq l-istess argumenti kif applikati fir-rigward tal-aggravji l-oħra, u għalhekk il-Qorti tista' biss issib li mill-ġdid qiegħda tonqos milli tiddentifika punt ta' liġi li dwaru għandha tiddeċiedi din il-Qorti.

19. Is-sitt aggravju tas-soċjetà appellanta huwa fir-rigward tal-kap tal-lodo arbitrali fejn ġiet deċiża dik il-parti tat-talba dwar dak li jsir riferiment għalih bħala *Metal Works Price Adjustment.* Filwaqt li s-soċjetà appellanta tagħmel riferiment għall-paragrafi 4.6 u 4.7 tar-rikors tal-appell, issostni li t-Tribunal kien falla legalment meta fassal pretensjoni tas-soċjetà appellata skont kif kien jidhirlu hu u skont argument li dik is-soċjetà appellata qatt ma ġabet, u dan filwaqt li invoka l-artikolu 12.3 tal-kuntratt, u ddeċieda li kellu jerġa' jsir kalkolu mill-ġdid. Iżda f'dan kollu s-soċjetà appellanta qiegħda tonqos milli

tindika liema huwa dak il-punt ta' liġi li hi qiegħda titlob lil din il-Qorti sabiex tiddeċiedi dwaru. B'hekk dan l-aħħar aggravju wkoll ifalli l-eżami tas-subartikolu 70B(1).

Decide

Għar-raġunijiet premessi l-Qorti tiddikjara l-appell bħala irritu u null, u tastjeni milli tieħu konjizzjoni ulterjuri tiegħu.

L-ispejjeż tal-imsemmi lodo arbitrali jibqgħu kif deċiżi mill-Arbitru, filwaqt li dawk tal-appell odjern għandhom jitħallsu mis-soċjetà appellanta.

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Reġistratur