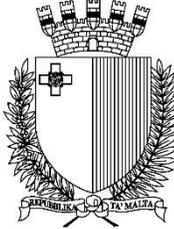


skont il-ftehim iffirmit bejn il-partijiet id-deċiżjoni tal-arbitri għandu tkun finali u mhux sogġetta għal appell quddiem xi qorti - ikkunsidrat dak li ftehm il-partijiet, il-Qorti hija għalhekk prekluzi milli tirrevedi l-lodo arbitrali stante li l-partijiet b'mod ċar eskludew kull dritt ta' appell quddiem qorti



MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tas-17 ta' Jannar, 2024

Appell Inferjuri Numru 20/2023 LM

AX Construction Limited (C 17438)
('l-appellanta')

vs.

Ingenia Malta Limited (C 47971)
('l-appellata')

Il-Qorti,

Preliminari

1. Dan huwa appell magħmul mis-soċjetà rikorrenti **AX Construction Limited (C 17438)** [hawnhekk 'is-soċjetà appellanta'] minn deċiżjoni tat-

Tribunal tal-Arbitraġġ [minn issa 'l quddiem 'it-Tribunal'] fi ħdan iċ-Ċentru dwar l-Arbitraġġ ta' Malta [minn issa 'l quddiem 'iċ-Ċentru'] tat-13 ta' Jannar, 2023, [minn issa 'l quddiem 'il-lodo arbitrali'], li permezz tiegħu t-Tribunal iddeċieda l-pretensjonijiet tagħha u dawk tas-soċjetà intimata **Ingenia Malta Limited (C 47971)**, [hawnhekk 'is-soċjetà appellata'], fil-konfront ta' xulxin billi ddikjara:

*"In summary the arbitrators conclude that the total sum due to Ingenia by AX is €63,567.89 plus €120,575.86 or the total sum of **€184,143.75**.*

Cost of the arbitration, as per Taxed bill of Costs issued by the Malta Arbitration Centre, which forms an integral part of this award and is being hereto attached and marked as Document Letter X, are to be borne by AX.

Interest is to start from the date of this decision."

Fatti

2. Il-partijiet kienu ffirmaw skrittura fit-18 ta' Diċembru, 2013 fejn is-soċjetà appellata ntrabtet sabiex tagħti lis-soċjetà appellanta diversi servizzi nklużi dawk ta' *"...engineering design, value engineering, preparation of bills of quantities, specifications, tender documents, overseeing, advising on and certification of execution drawings, O&M Manuals and built-in drawings, project management and any works required for the successful implementation of the Mechanical, Electric and Plumbing (MEP) services"* in konnessjoni mal-proġett li s-soċjetà appellanta kienet qiegħda twettaq fil-kumpless magħruf bl-isem 'Hilltop Gardens Retirement Village' fil-lokalità magħrufa bħala s-Simblija limiti tan-Naxxar. Hekk kif inqala' xi diżgwid bejn il-partijiet, is-soċjetà appellanta kienet interpellat lis-soċjetà appellata għall-fini ta' medjazzjoni *ai termini* tal-iskrittura suriferita, u anki għal-likwidazzjoni u ħlas ta' danni minnha

sofferti, iżda din kienet naqset li tottempora ruħha ma' dak mitlub minnha, u għalhekk is-soċjetà appellanta pprezentat l-proċeduri ta' arbitraġġ odjerni fil-konfront tagħha.

Mertu

3. FI-Avviz tal-Arbitraġġ tagħha, is-soċjetà appellanta filwaqt li rrilevat li kienet qamet kwistjoni bejn il-partijiet, issottomettiet li l-pretensjoni tagħha kienet waħda għall-ħlas ta' spejjeż u danni sofferti rizultat tas-segwent:

- “i) Failure by the Defendant to issue tenders as envisaged by the Agreement signed;*
- ii) Negligence and grave errors in the designs provided, which led to the incurring of significant costs and damages;*
- iii) Failure on the part of the defendant company and the engineers and professionals within its employ to exercise the duty of care and diligence required by the profession and envisaged by the agreement signed;*
- iv) Negligence, errors and in many cases complete failure by the Defendant to carry out its supervisory, project management and measurement duties and other duties within its agreed scope;*
- v) Abandonment of the contract by the defendant;*
- vi) Other instances of operating without care and diligence in the carrying out of the services by the defendant, to be indicated in the statement of claim;*

AMOUNT INVOLVED: a sum constituting costs and damages suffered, to be liquidated by the Tribunal;”

Fit-Talba tagħha pprezentata fil-31 ta' Mejju, 2016, is-soċjetà appellanta filwaqt li fessret f'iktar dettal in-nuqqasijiet tas-soċjetà appellata fil-konfront tagħha, talbet sabiex titħallas għas-segwent:

- “1. All costs, damages and any further indebtedness to be liquidated by the arbitration tribunal as resulting from the above, if and where necessary through the appointment of a technical expert, including but not limited to the following:*

- *The price of redundant works and additional works carried out by the Claimant Company as a result of the grave errors in the designs and calculations provided by the Respondent Company;*
- *The cost of services provided by employees and consultants of the Claimant Company in the preparation of tender documents, in the absence of such services having been carried out by the Respondent Company as contracted;*
- *The cost of supervision, certification and project management services provided by employees and consultants of the Claimant Company, in the absence of such services having been carried out by the Respondent Company as contracted;*
- *the projected savings lost by the Claimant Company throughout the lifetime of the development as a result of the grave errors in design and calculations provided by the Respondent Company*

2. *The payment of such liquidated sum together with legal interest in terms of law;*

With costs and with full reservation of any further rights of the Claimant Company in terms of the Agreement signed and at law, including any and all rights to claim compensation for any errors or defects attributable to the Respondent Company which have yet to be uncovered and/or which will result in the future.”

4. Is-soċjetà appellata pprezentat ir-Risposta tagħha fl-20 ta' Ġunju, 2016 fejn eċċepiet is-segwent: (i) il-pretensjonijiet tas-soċjetà appellanta kienu nfondati fil-fatt u fid-dritt u kienu ntiżi sabiex tikseb gwadan finanzjarju ngust u mhux mistħoqq; (ii) hija kienet ottemporat ruħha mal-obbligi kollha assunti fil-ftehim ta' bejniethom tat-18 ta' Diċembru, 2013; (iii) hija kienet dejjem aġixxiet bħala *bonus paterfamilias* skont il-kura, id-diligenza u l-*standards* tal-industrija rikjesti; (iv) hija mhijiex responsabbli lejn is-soċjetà appellanta għal spejjeż, danni jew mod ieħor; (v) mingħajr preġudizzju, is-soċjetà appellanta kellha ġgib prova li hija kienet allegatament dovuta lejha għal spejjeż, danni jew b'xi mod ieħor; (vi) mingħajr preġudizzju, kienet proprju s-soċjetà appellanta li kienet debitorici lejha minħabba n-nuqqas ta' *osservanza* tal-obbligi tagħha; (vii) salv eċċezzjonijiet ulterjuri.

Flimkien mar-Risposta tagħha, is-soċjetà appellata pprezentat kontro-talba fejn ippremettiet li s-soċjetà appellanta kienet qiegħda (a) ingustament tirrifjuta li tgħaddi l-fatturi relattivi fir-rigward tax-xogħol li tiegħu hija l-appellata kienet wettqet superviżjoni, sabiex b'hekk hija kienet miżmuma milli toħroġ rendikont tad-drittijiet dovuti lilha għas-servizzi ta' *project management*; (b) tonqos milli tħallasha għas-servizzi rezi skont il-fatturi rilaxxjati u skont dawk li kien għad ser jiġu rilaxxjati. It-talbiet tagħha kif imfissra fil-kontro-talba huma dawn:

- "1. A declaration confirming that payment is due by the plaintiff company for works carried out by the respondent company and an order for payment of same.*
- 2. The liquidation of the amounts still due by the plaintiff company to the respondent company, together with an order for payment of same notably:*
 - (a) Five (5) pending invoices issued and not yet settled amounting to eighteen thousand, five hundred and sixteen euro and thirty-seven cents (€18,516.37), copies of which are attached herewith and progressively marked **Doc IML2 to Doc IML6**;*
 - (b) Project management fees for works related to Lifts, BMS, Pools and Genset;*
 - (c) Invoices related to the final application of the measurement fee which is being completed;*
 - (d) Invoices related to the commissioning of the works which amount to fifteen thousand euro (€15,000.00) which is being completed;*
 - (e) Invoices for design variants not recognised;*
 - (f) Other invoices to be defined.*

With expenses and interest."

5. Is-soċjetà appellanta wiegħbet għall-kontro-talba tas-soċjetà appellata fil-25 ta' Awwissu, 2017, fejn eċċepiet is-segwentanti: (i) ma kienx minnu li r-rifjut tagħha sabiex tgħaddi l-fatturi u d-dokumentazzjoni rikjesti kien wieħed mhux gustifikat; (ii) hija ma kinitx debitrice tas-soċjetà appellata; (iii) mingħajr

preġudizzju, ir-rikjesti għall-ħlas taħt il-punti 2(ċ) u 2(d) kienu intempestivi u mhux ġustifikati għaliex fost raġunijiet oħra kienu jirreferu għal xogħlijiet li ma kienux ġew eżegwiti sal-aħħar; (iv) mingħajr preġudizzju, kull talba magħmula taħt il-punt 2(e) ma kinitx ġustifikata, għaliex fost affarijiet oħra hija ma kellhiex tħallas fatturi li ma kienux għadhom inħarġu, u jekk maħruġa ma kellhomx jitħallsu. Għalhekk hija talbet is-segweni mit-Tribunal:

- “1. That the Tribunal declares that the Respondent is not responsible for the payment of the invoices attached to the Counter-Claim;*
- 2. That the Tribunal declares that the Respondent is not responsible for any project management fees;*
- 3. That the Tribunal declares that the Respondent is not responsible for any measurement fees;*
- 4. That the Tribunal declares that the Respondent is not responsible for any fees claimed for the commissioning of works;*
- 5. That the Tribunal declares that no sum is due by the Respondent for design variants or any other invoices*
- 6. That the Tribunal consequently refutes all the Claimant’s claims as contained in its counter-claim as unjustified at fact and at law;*
- 7. That the Tribunal orders the Claimant to pay all costs and expenses in connection with this procedure;*
- 8. With full reservation of any further defences;”*

Il-Lodo Arbitrali Appellat

6. Sabiex wasal għad-deċiżjoni tiegħu, it-Tribunal għamel is-segweni konsiderazzjonijiet:

“Arbitrators’ Considerations

In its original writ AX requested that respondent pay damages as AX claims that respondent:

- 1. abandoned its brief resulting in damages to the Claimant and*

2. *that it was negligent and committed grave errors in designs and calculations of:*
- a) The designs for rain water catchment system*
 - b) The fire and reserve water reservoir*
 - c) The heating and cooling systems*
 - d) Bus bars in the apartments*
 - e) Over design of air conditioning systems in the apartments and common areas.*
 - f) Other instances of negligence and grave errors in the design.*
 - g) The price of redundant works and additional works carried out by the Claimant as a result of the grave errors in the designs and calculations provided by the Defendant.*
 - h) The cost of services provided by employees and consultants of the Claimant company in preparation of the tender documents.*
 - i) The cost of supervision, certification and project management services provided for by the Claimant.*
 - j) The projected savings lost by the Claimant throughout the lifetime of the development as a result of the grave errors in designs and calculation.*

AX requested the payment of such liquidated sum by respondent.

Then in its note of submissions AX calculated in part the amounts allegedly due as well as requested a further liquidation arbitrio boni viri.

The calculation of damages suffered is summarized as follows:

The amount of EUR10,000 plus VAT for the works in relation to the rectification of the issue in the kitchen design not permitting separate heating in the kitchen and restaurant.

EUR47,595.47 (including VAT) for the purchase of air conditioning units for the rooms within the Hilltop Gardens Retirement Village.

EUR1,652 (including VAT) for professional fees due to consultants engineers for consulting and calculating load on the apartments and restaurant as per (i) and (ii) above.

Cost of additional piping and valves to the mechanical rainwater system to divert the rainwater away from the reservoir EUR20,859.44.

Cost of remedial works to the SPA installation amounting to EUR19,586.10 excluding VAT.

Discount given to SPA operator due to underperformance of plant. The total discount given amounts to EUR55,917 excluding VAT.

AX submit that from the documentation and evidence produced there are other damages which have not yet been liquidated and therefore the applicant company requests this Tribunal to liquidate same arbitrio boni viri.

Total claim of liquidated damages is: Euro155,610.01. (VAT is allegedly due on various of the amounts claimed).

Respondent has replied that no amount is due. Respondent also filed a counter-claim wherein Ingenia claimed that applicant AX owes Ingenia the following amount:

The claimed outstanding contractual debts due by AX Construction Ltd to Ingenia Malta Ltd amount up to €63,567.89 apart from legal interests; the additional costs claimed by Ingenia Malta Ltd amount to a total of €127,431.26, excluding VAT where applicable.

Hence, the total counterclaim amounts to €190,999.15 (one hundred ninety-nine hundred and ninety-nine and 15 cents) apart from interest, VAT where applicable and legal expenses.

The arbitrators duty is to examine each of the claims submitted by the parties and to reach a conclusion as to whether they are justified or not.

Each claim will be examined in turn starting with the claims submitted by AX Construction Ltd.

Claim 1:

Euro10,000 for the works in relation to the rectification of the issue in the kitchen design not permitting separate heating in the kitchen and restaurant.

To succeed with this claim AX have to show that the design by Ingenia was faulty and that as a result of such design AX suffered a loss of Euro10,000.

The arbitrators conclude that this claim is unjustified and not substantiated. In general if there was an error one would first expect AX to clearly state in writing what that error was and ask Ingenia to rectify. There is no real evidence about the loss suffered by AX. In his final note AX claimed this sum of €10,000 as exclusive of VAT whereas the Purchase Order presented as evidence showed otherwise i.e. that the amount quoted was inclusive of VAT, meaning €8,474.58 plus VAT as against €10,000 plus VAT as claimed by AX. The kitchen in question is not the main kitchen where food is prepared and thus different heat loads are experienced but rather a satellite kitchen serving within the restaurant area. It was thus a viable design especially from the

economic perspective. Ingenia confirmed that they had forwarded the design, after discussing it with AX and his consultant Ing Joe Cassar and after receiving the latter's approval, as per the existing approval procedures in June 2014 and no feedback or complaints were subsequently received during the entire project. The project was inaugurated on 11th December 2015 whereas a quote for works was dated 19th March 2017 followed by a Purchase Order dated 5th April 2017 which was presented as evidence of the expense. Moreover no fiscal receipt document (original or otherwise) was presented and which would have been considered as a more appropriate and valid evidence that the works had actually been carried out and paid for. AX have failed to show that the design presented by Ingenia was faulty. Technically there was nothing wrong with the design. Finally the arbitrators note that during the sitting of the 14th March 2019, AX in his statement about this issue of cooling in the kitchen and cooling and heating in the restaurant, replied that his engineer would have to answer.

Claim 2:

EUR47,595.47 (including VAT) for the purchase of air conditioning units for the rooms within the Hilltop Gardens Retirement Village.

The arbitrators conclude that this claim too is unjustified. AX first claimed that the air conditioners were over-designed and then they said that various air-conditioners were under-designed. AX had no right to merely purchase other air-conditioners and demand payment from Ingenia. Ingenia exhibited reports to show that the calculations in relation to the size of the air-conditioners were correct. Again, if AX felt that there was an error in the calculations one would have expected AX to contact Ingenia and ask them to review the calculations not merely purchase new air-conditioners.

Changes in the building such as the physical characteristics of the walls and roof slabs naturally caused deterioration of the building fabric performance and this, besides the demolishing of the penthouse which led to higher thermal loads, must have contributed to the said shortfalls in performance. Ingenia cannot be blamed if structural changes were decided by AX after it had made its calculations and proposed modifications by Ingenia were not pursued by AX. AX failed to submit independent evidence of alleged failings which forced AX to purchase other air-conditioners.

Ingenia further confirmed that sizing of the airconditioning units was based on ASHRAE international standards and that the sources of their design calculations had been subjected to the approval and control of AX's MEP consultant Ing Joe Cassar. Ingenia further explained that the temperature parameters were based on international scientifically-based proposals. Ingenia had no requests to change such

design temperatures that international literature provides for dwellings especially those occupied by elderly people.

The arbitrators also note Ingenia's statement in their 'Final note of submissions' whereby they state that "More importantly, it is not clear why only some apartments and not all were problematic" and this in view that interventions were not carried out in certain apartments on the upper floors which are subjected to higher heat loads as opposed to corresponding apartments on the lower floors which had air-conditioners replaced whereas interventions were carried out on certain other apartments facing north and practically always in the shade and naturally subjected to less thermal loads.

Ingenia's design work in this regard was also submitted to and for the review of independent auditor Prof Ing Francesco Ruggiero - Professor of Environmental Technical Physics at the Faculty of Architecture of the Polytechnic of Bari (Italy) and Chair of "Methods and techniques of environmental analysis I and II" at the degree course in Architecture. Prof Ing Ruggiero attested that Ingenia's work was "according to the rules of good art technique" and "according to the requirements and recommendations of ASHRAE and according to the current UNI-EN standards".

Claim 3:

EUR1,652 (including VAT) for professional fees due to consultants engineers for consulting and calculating load on the apartments and restaurant as per (i) and (ii) above.

This claim is unjustified. AX cannot unilaterally claim such fees. It was Ingenia's job to make such calculations and to establish heat loads within the apartments. Before AX can claim costs for amounts due to new consultant engineers it had to show that the work done by Ingenia was faulty.

Claim 4:

Cost of additional piping and valves to the mechanical rainwater system to divert the rainwater away from the reservoir EUR20,859.44.

This claim is unjustified. Ingenia cannot be blamed and charged for additional piping and valves for the mechanical rainwater system. The original design of the rainwater management system by Ingenia seems to have been subjected to a number of modifications by AX all along until the mentioned modification to divert the rainwater for the said cost of €20,859.44. The arbitrators also note Ingenia's statement that the amount being requested by AX is overestimated since it includes elements which do not form part of the alleged claim (i.e. €8,521.28 against the claimed €20,859.44).

The reservoir was designed by the architects and Ingenia cannot be blamed for the alleged lack of capacity even though Ingenia proved this to be otherwise. Ingenia has shown that there was no lack of capacity to which no calculations were produced by AX to prove otherwise. In fact Ingenia submitted calculations that show that the maximum quantity of water that can be stored in a month of maximum rainfall is practically half the capacity of the reservoir and this without consideration to daily consumption. There is also the fact that AX's land was fully utilised for this scope. The arbitrators also note that notwithstanding Ingenia initially designed interceptor chambers to deviate rainwater to the road in the event of a violent downpour, these interceptors had been eliminated from the design by AX and then requested to be re-inserted within the rainwater management system. Ingenia also confirm that all rainwater from the square and the three blocks still flow to the reservoir.

Claim 5:

Cost of remedial works to the SPA installation amounting to EUR19,586.10 excluding VAT;

The arbitrators are not convinced that there was an error on the part of Ingenia that forced AX to carry out remedial work. Ingenia showed from the relative accounting document that the amount claimed by AX for the corresponding works was incorrect and was actually Eur14,274.28 and that when subtracting the amount attributed to the original design i.e. Eur7,128.52, the extra cost for the alleged remedial works was in fact Eur7,145.76 and not Eur19,586.10. Ingenia explains in its 'final note of submissions' that this claim was based on a variation which was requested by AX's Head of Maintenance during the execution of the project as a design upgrade of the heating system of the pool. The upgrade consisted in the introduction of three additional pumps, each pump feeding separately the underfloor heating, the pool heat exchanger and the Calorex post-treatment battery - this versus Ingenia's preferred option of having one pump which would have enabled the management of the three mentioned utilities by a simpler layout while saving on capital costs in a facility requiring lower domestic hot water production. Ingenia also states that this was not a remedial action but rather a non-essential upgrade requested by AX Construction Ltd. In fact according to AX both the Hydrotherapy pool (which also has three pumps feeding the respective utilities) and the SPA are still not operating as expected.

Nonetheless in the arbitrators' opinion, using only one primary pump for the SPA instead of the additional three dedicated pumps for each circuit may lead to difficulty in balancing the respective flows to each circuit and hence the upgrade was necessary.

Such upgrade should however be considered as a variation in quantities for the additional cost of Eur7,145.76 to AX.

One mentions here that Steve Bajada who was present on the project site on behalf of Ingenia for most of the time, during his testimony of the 24th October 2017, stated that "... in relation to the spa heating and temperature control equipment failed – TCA said it was a design problem and the supplier said that it was a problem with the installation." Steve Bajada also stated that the civil contractor applied the screed at the hydrotherapy pool against the manufacturer's recommendation leaving the underlying tubes without insulation thus leading to heat loses. Regarding the commissioning plan for the pools, Steve Bajada stated that as far as he knows, TCA presented a commissioning plan at a very late stage and this was sent back to be revised. Steve Azzopardi of Titan International during his testimony on 30th April 2018 mentioned with respect to the SPA, that the sizing of the pipework was changed in addition to the increase in the number of the said pumps but nonetheless the problem with the heating of the SPA persisted. Ingenia stated during the cross examination sitting of 20th May 2020 that they found there was a problem with the regulation devices (hardware/software) of the SPA and hydrotherapy pools.

Claim 6:

Discount given to SPA operator due to underperformance of plant. The total discount given amounts to EUR55,917 excluding VAT.

This claim in relation to the discount given to the spa operator has not been substantiated and is unjustified. AX did not have the right to agree on a discount and blame Ingenia. A discount was contractually given to the tenant on the basis of "...with discounts being given ex gratia to aid the startup of the operation". Also the premises were being leased on 'as is' basis as per clauses 3.2 of each of the two lease agreements exhibited by AX - this implying that AX was not obliged to give the discounts as claimed in his 'note of submissions'. The alleged underperformance and the reason for the discount have not been substantiated by AX. Changes to the structure and layout of the SPA after Ingenia made calculations should not be used to force Ingenia to pay damages.

The hydrotherapy pool and spa were designed and specifications were made in the respective tender documentation by Ingenia to which the contractor was referred to in Ingenia's "conditions for acceptance" of the equipment offered, and eventually installed, by the contractor. Such conditions for acceptance were made by Ingenia as a reassurance that the equipment offered by the contractor met all stipulated specifications since they had no knowledge on the equipment offered and due to the

fact that they developed their tender specifications on highly specialised brands for air treatment of spa's and hydrotherapy pools. Nonetheless, the contractor, being the local importer and official service centre for its offered brand Calorex, gave assurance of its product quality and of its direct handling of the equipment warranty operation and technical assistance services. It was therefore the responsibility of the contractor to ensure that the thermo-hygrometric parameters set out in the specs were achieved by its equipment and this as requested by Ingenia in their conditional approvals. Besides AX introduced "an opening cover with a system of motorized shutters not sealed to the external" over the SPA area which inherently led to heat regulation issues.

Thus the arbitrators reject all the claims made by AX.

Claims by Ingenia

Before analysing each quantified counter-claim made by Ingenia, the arbitrators will make the following observations on other non-quantified claims made by AX, namely:

A) as explained by Ingenia's 'on-site' technical person Steve Bajada's evidence, there were a number of shortfalls on the part of AX and his PM team, during the lifetime of the project which hindered the proper progress and execution of the works for which Ingenia were commissioned as consultants. For instance there was a complete lack of responsive action on the part of the Claimant's PM team to the multitude of reports on improper works which were noted during his continuous presence on site. Lack of action by the PM Team on non-conformance reports issued by Ingenia, PM Team's arbitrary decisions without Ingenia's knowledge and the continuous introduction of changes to design specifications by AX without prior consultation with Ingenia and without waiting for amended shop drawings thus avoiding variation costs, negatively affected the project on various aspects. Steve Bajada claimed that he was very cautious initially in accepting the 'challenge' since he was aware of AX's reputation of not being an easy person to work with and of his personal interference in projects. Furthermore Steve Bajada explains that the PM Team created a barrier between Ingenia and MEP contractor TCA JV and this in the arbitrators' opinion, further hindered effective management of the contractor by Ingenia especially on a technical level.

B) As Ingenia explained the initial project brief was that of reaching 60% gold energy certification which entailed high energy efficient measures and equipment to be incorporated in the project. Due to the budgetary estimate of €12 million to achieve this goal, AX did not approve of such high energy efficient project because of the cost which was reduced by ca. 50%. This measure taken by AX to reduce the budget to such

an extent contrasts with his claim of projected savings lost throughout the lifetime of the development as a result of grave errors in design and calculations made by Ingenia. The hefty reduction in budget could only lead to a major technological drift which coupled with systematic downgrading forced Ingenia to reconsider technological choices including those involving energy efficiency. Downgrading on energy efficient technology to reduce the capital outlay of the project was also the result of a change in AX's commercial strategy whereby apartments would be leased out or sold and thus the resulting higher operating costs are borne by the end users. For instance installation of photovoltaic panels was eliminated and less energy efficient airconditioning systems were installed. In general the MEP budget was reduced to a minimum.

C) Reference is made to AX's claim on the 31st May 2016 wherein it alleged that Defendant Company failed to prepare the tender documents for services within its remit which in turn had to be carried out by Claimant at its cost. In his evidence AX claimed that Ingenia's contribution towards the formulation of the tender was next to nothing and at the same time he says that all that Ingenia had done were Designs, Bills of Quantities and Specifications. Besides Ingenia's proof of their submissions, AX's consultant Ing Joe Cassar confirmed in his evidence of 12th March 2018 that Ingenia did submit design, tender documentation and Bills of Quantities (BOQ's). No evidence of correspondence with Ingenia was brought forward by AX demanding additional documentation for the compilation of the tender issue. Ingenia also confirmed that they were paid in full for this part of their contractual obligations with no penalties for late submissions. Hence the arbitrators conclude that this claim is not justified.

D) During his evidence, AX's engineering consultant Ing Joe Cassar pointed out that Ingenia had no say in the choice of the MEP contractor, were not made privy of the rates submitted in the relative BOQ's submitted by the contractor and that changes were required by AX up to the end of the project. Apart from other issues declared throughout the arbitration sessions held, the foregoing is indicative that Ingenia were restrained from executing their role as consulting engineers effectively and this to their detriment. For instance, when the MEP contractor TCA entered the site to start executing works, Ingenia was prevented from having any direct relationship with this contractor thus compromising its effectiveness of its role on site. Ingenia explained how tensions arose from requests made by AX during his daily visits on site with the resulting lack of adequate work planning leading to eventual conciliatory meetings which led to the parties agreeing to a further remuneration for additional services

rendered by Ingenia. However, Ingenia stated that issues still arose due to the attitude and procedures adopted and expected by AX.

E) AX also claims that every time a redesign was requested, Ingenia did not always come up with a corresponding new detailed design reflecting the requested changes. From various evidence given during sittings, the arbitrators conclude that requests for design changes were sometimes demanded of Ingenia to be carried out and submitted within impractical short periods of time for effective revision of design drawings to be made especially when such demands occurred on a frequent basis.

F) Regarding the issue of the busbars alleged by AX that these were incorrectly designed by Ingenia and therefore had to be changed to cater for future increase in electrical loads, the arbitrators notice that during the sitting of 14th March 2019, when AX was asked whether following the original plans, Ingenia were instructed to cater for new designs with changes to increase the electrical loads in the apartments, his reply was that the power was only changed by a small amount and doesn't recall there was a request to double the power, instead he requested that one should ask that question to the Engineer. When asked whether he considers it to be substantial to double the power requirement per apartment his reply was once again to ask the Engineer. As for the change from gas to electricity supply for the main kitchen, and thus further loading of the busbars, AX stated that he doesn't recall whether his original request was for gas or electricity - this notwithstanding Ing Fabio Stivala's (on behalf of Ingenia) statement that AX was informed on the basis of Maltese law, that gas is not allowed at basement level. Therefore, the arbitrators conclude that there is no basis for claiming a design shortfall by Ingenia but rather as Ingenia explained the changes requested by AX following their design dictated the necessary upgrade in the busbars. As Ingenia concluded, the main reason for the necessary changes in the busbars was the relocation of the main kitchen from Block B to Block C and its subsequent transition from LPG to electrical power operation since the other variations introduced for the apartments could have been catered for with the initial busbars albeit exhausting any prudent reserve for future increases in power requirements.

G) Another issue raised by AX was that of the electrical energy meters as specified by Ingenia were unacceptable to the electricity service provider Enemalta and that these had to be changed at the former's expense. The arbitrators hereby note that one does not pay for the actual meters per se provided by Enemalta but rather pay for the service provided by it i.e. the installation charges. Ingenia stated that the energy meters specified by them were based on the design approach requested of them i.e. to have accurate and multifunctional meters compatible with the Building

Management System (BMS) intended for indoor home operation, including apartments, meant to be operated in hotel mode. Nevertheless, once AX decided to change his business strategy on the apartments from one of hotel management to that of sale or lease-out of individual apartments, such meters became sub-meters which weren't approved by Enemalta. Since it results that AX did not inform Ingenia of this change in his business strategy, Ingenia approved the meters they had specified in their design.

H) During his testimony, Michael Warrington claimed that Ingenia designed the plumbing system whereby they insisted to use the PPR system resulting in an "enormous number of failures". It was actually established that it was Fiona Carr of the PM Team who had requested the change from the HDPE to PPR plumbing system. Ingenia conditioned their approval of the PPR system in that the contractor was to pay special attention to the clamping systems and joints as recommended by the manufacturer. The proper installation of the plumbing system to preclude failures through leakages was ultimately the contractor's responsibility.

From the evidence presented by Ingenia, notwithstanding the lack of payments due to them by AX and the dispute notified by AX to Ingenia on 2nd September 2015, the arbitrators conclude that Ingenia supported the project, as they were contractually obliged to do, by way of their consultancy services throughout its duration and up until 22nd December 2016. On 2nd December 2016 Ingenia sent to AX Construction the document which certified the completion of works and the snags pending list which had to be cleared by the MEP contractor TCA JV and which was valued at €169,583.90. As testified by Ingenia, they never received any feedback from AX as to whether the said amount should be deducted from the MEP contractor's monies due or otherwise.

The claimed outstanding contractual debts due by AX Construction Ltd to Ingenia Malta Ltd amount up to €63,567.89 apart from legal interests; the additional costs claimed by Ingenia Malta Ltd amount to a total of €127,431.26, excluding VAT where applicable.

Hence, the total counter-claim amounts to €190,999.15 (one hundred ninety-nine hundred and ninety-nine and 15 cents) apart from interest, VAT where applicable and legal expenses.

The arbitrators conclude that almost all the amounts claimed are due to Ingenia. Ingenia started work 5 months before the contracted time and continued to work after the original stipulated time. AX failed to show that the work was not completed or defective.

*The contractual amount of **€63,567.89** apart from legal interests claimed by Ingenia as being due to them by AX, is split up as follows:*

*a. Five unpaid invoices four of which relating to the contractual component of “Project management, quality control, progress certificates” i.e. measurement fees @ 1% and one other for a ‘Revision of external works’ (amounting to €1,240) totalling to **€18,516.37**. The arbitrators see no justification for these payments to be further withheld by AX and thus conclude that this amount is due to Ingenia for respective services rendered.*

*b. Unpaid AFP 11 for the contractual component of Project management, quality control, progress certificates amounting to **€14,263.55**. The arbitrators conclude that this amount is due to Ingenia for respective services rendered.*

*c. Unpaid fee for the Testing and Commissioning contractual component of **€15,000**. The arbitrators conclude that this amount is due to Ingenia for respective services rendered.*

*d. Balance due on the contractual component of detailed design, review of tender offers amounting to **€5,000**. The arbitrators conclude that this amount is due to Ingenia for respective services rendered.*

*e. Unpaid fee amounting to **€10,787.97** for the contractual component of Project management, quality control, progress certificates on unbundled works namely: Lifts, BMS, Pools and Genset. The arbitrators conclude that this amount is due to Ingenia for respective services rendered since these items form part of the MEP design brief contracted to Ingenia. Ingenia confirmed that such works were included as part of the original tender prepared by them for all the MEP works, except for the photovoltaic system which system AX decided not to install. Ingenia further explains that following AX’s decision to award parts of the main MEP tender to separate contractors, namely: Mekanika Ltd for lifts, AIS Technology Ltd for BMS, Muzzi Group srl for pools and Lexcorp International for the generator set whereas the main MEP tender was awarded to TCA JV, Ingenia had to redraft new and separate tender documents for each of these respective parts of the original MEP tender package. Ingenia was further involved in consultancy related works for the execution of these mentioned systems which were separated from the main MEP tender.*

*The additional costs claimed by Ingenia for additional services requested of them by AX throughout the duration of the project and which amount to a total of **€127,431.26** excluding VAT where applicable, are split up as follows namely:*

1. *Extra costs due to the imposition of an unforeseen non-contractual Project Management Plan (PMP) Imposition by a Project Management Team commissioned by AX notwithstanding Ingenia's contractual role of Project Manager on the project's MEP works. This in itself introduced new procedures pertaining to the control and request of information and imposed on Ingenia the formal submission to the Project Management Team of every document and calculation drawn up. Such procedures directly impacted Ingenia's services. The arbitrators conclude that indeed this PMP imposition resulted in an extra load of man-hours and therefore the resulting amount of **€40,106.25** is due to Ingenia by AX.*

2. *Extra costs incurred by Ingenia due to fifteen substantial variations to which regular modifications were added. The arbitrators opine that such an amount of variations is considered to be quite excessive, so much so that during his evidence Ing Fabio Stivala stated that he stopped being on site on Ingenia's behalf due to the frequent changes which were being imposed by the client and in actual fact stayed on until the thirteenth variation M. In addition to the amount of variations with regular modifications added, evidence of the pressure put on Ingenia by AX was presented, whereby the latter demanded feedback immediately or within 24 hours. These variations were requested by AX to optimise costs by way of changing the constructive, marketing and business use strategies of the complex. The relative amount claimed by Ingenia for unduly cut or totally refused requested amounts totals to **€46,356**. The arbitrators conclude that this amount is due to Ingenia by AX.*

3. *Project Management fee for works such as drainage networks carried out by civil contractors and outside the scope of work of the appointed MEP contractor. Project management of these works was done before the MEP contractor's presence on site i.e. during period 04/07/2014 to 30/11/2014. The arbitrators conclude that the amount of **€11,194.72** claimed for the relative services rendered is due to Ingenia by AX.*

4. *Extra cost due to Steve Bajada's site attendance over contractual duties claimed by Ingenia for the sum of **€21,547.91** being 50% of Steve Bajada's remuneration. Ingenia claim that the employment of Steve Bajada on full time basis went far beyond their contractual obligations and that such full time deployment requested of it was intended to remedy the endemic lack of planning activity by AX. Reference is hereby being made to Appendix 4 "Consultant's Offer 5/11/2013" clause 15 which states (typos corrected) "Project management during the construction phase of the MEP works shall be performed during the installation of MEP works and complying with progress and needs on full time basis". The arbitrators conclude that this clause does not necessarily imply physical presence on site on full time basis as argued by AX since*

project management involves office based activities besides site visits, this notwithstanding the consistent deployment on site of a technical person (Steve Bajada) by Ingenia. In his evidence AX claimed that he had insisted on having supervision by Ingenia on full-time basis and that the appointed person for this function was not an engineer. The arbitrators remark that a) AX was given Steve Bajada's CV following which he approved the latter's employment and b) that supervision is not project management although the former is part of the latter. Contractually project management and not supervision is mentioned in the related clause (i.e. clause 15 of Appendix 4 of the AX/Ingenia Agreement). With respect to Ingenia's project management function however, it is evident that such function was overruled by the introduction of the Project Management Team introduced by AX. Furthermore, as also remarked by Ing Fabio Stivala in his evidence, Steve Bajada was a more valuable asset with respect to technical supervision due to his hands-on technical experience. Steve Bajada was effectively on site on full time basis. Nonetheless AX recognised that Vito Pasqualini visited the site often. Apart from the role played by Ingenia with respect to on-site supervision, the arbitrators remark that it is also within the remit of the contractor to deploy its technically competent personnel to supervise and check the quality of their own works. The arbitrators opine that the request for full time presence of Ingenia on site by AX is not justified when considering that the size of the said project would normally entail the presence of a project manager/supervisor on site two or three times a week depending on the project phase. This was also referred to in Ing Fabio Stivala's testimony on 8th May 2019 namely "A project like this would need a supervisor to go on site two or three times a week depending on the phase for a minimum of two to four hours."

The arbitrators therefore conclude that this claimed sum is due to Ingenia by AX.

*5. Extra cost due to the contractual period overrun requiring extended project management services by Ingenia. The overrun period claimed by Ingenia is 03/07/2016 to 22/12/2016 i.e. ca. 6 (six) months. However Ingenia started on the projects 5 (five) months ahead of the MEP contractor's presence on site for which it claimed the relative sum as per point 3) above. Therefore the arbitrators hereby opine that notwithstanding it concludes that any overrun period should be paid to Ingenia by AX, the overrun period claimed should be 1 (one) month rather than 6 (six) months so that the amount due to Ingenia by AX should be pro-rated at one sixth of the claimed amount of €8,225.88 i.e. **€1,370.98**.*

*In summary the arbitrators conclude that the total amount due to Ingenia for additional services requested of them by AX throughout the duration of the project amounts to **€120,575.86** and not **€127,431.26**."*

L-Appell

7. Is-soċjetà appellanta appellat mil-lodo arbitrali quddiem din il-Qorti permezz ta' rikors ntavolat fl-24 ta' Frar, 2023 fejn qiegħda titlobha sabiex:

“i. Tikkonferma l-Lodo arbitrali għal dak li għandu x'jaqsam mas-segwenti:

Extra cost due to the contractual period overrun requiring extended project management services by Ingenia. The overrun period claimed by Ingenia is 03/07/2016 to 22/12/2016 i.e. ca. 6 (six) months. However Ingenia started on the projects 5 (five) months ahead of the MEP contractor's presence on site for which it claimed the relative sum as per point 3) above. Therefore the arbitrators hereby opine that notwithstanding it concludes that any overrun period should be paid to Ingenia by AX, the overrun period claimed should be 1 (one) month rather than 6 (six) months

lżda tħassar il-parti fejn likwidata l-ammont tal-imsemmija xahar u ċioe is-segwenti parti; so that the amount due to Ingenia by AX should be pro-rated at one sixth of the claimed amount of €8,225.88 i.e. €1,370.98;

ii. Tilqa' pjenament it-talbiet tas-soċjetà appellanti;

iii. Tilqa' l-eċċezzjonijiet tas-soċjetà appellanti għal-kontra talbiet tas-soċjetà Ingenia Malta Limited;

iv. Tiċħad għal kollox it-talbiet (fil-kontro-talba) tal-istess is-soċjetà Ingenia Malta Limited.

U dana bl-ispejjeż taż-żewġ istanzi kontra s-soċjetà appellata u bir-riserva ta' kull jedd li s-soċjetà esponenti tista' jkollha skont il-liġi.”

8. It-twegiba tas-soċjetà appellata giet sfilzata b'digriet ta' din il-Qorti tal-25 ta' Mejju, 2023 stante t-tardività tagħha. Madanakollu l-Qorti semgħet lill-avukati difensuri taż-żewġ partijiet jittrattaw *viva voce* dwar l-appell odjern.

Konsiderazzjonijiet ta' din il-Qorti

9. Din il-Qorti tibda billi tirrileva li skont il-klawsola 10.2 tal-ftehim iffirmat bejn il-partijiet fit-18 ta' Diċembru, 2013, kif citata saħansitra mis-soċjetà appellanta fl-Avviż tal-Arbitraġġ tagħha quddiem it-Tribunal, kull kwistjoni li tista' tqum bejn l-istess partijiet fir-rigward ta' dak il-ftehim, għandha tiġi riżolta amikevolment bejniethom jew permezz ta' arbitraġġ b'mod finali. Il-Qorti ħadet ukoll in konsiderazzjoni dak li jipprovdu il-'General Conditions (Appendix 1)' annessi mal-imsemmi ftehim, u li għalihom l-istess klawsola 10.2 tagħmel riferiment. Tirrileva li skont il-kundizzjoni numru 44 tagħhom dwar il-proċedura tal-arbitraġġ, il-partijiet ftehm li *"The arbitrations shall be conducted in Malta as per the rules & conditions of the Malta Arbitration Center. The arbitrator's decision shall be final and not subject to further appeal in any court of law."* (enfazi tal-Qorti). Ikkunsidrat dak li ftehm il-partijiet, il-Qorti hija għalhekk prekluzi milli tirrevedi l-lodo arbitrali stante li l-partijiet b'mod ċar eskludew kull dritt ta' appell quddiem qorti.

Decide

Għar-raġunijiet premeżzi l-Qorti tastjeni milli tiegħu konjizzjoni tal-appell odjern, filwaqt li tiddikjarah irritu u null.

Filwaqt li l-ispejjeż tal-proċeduri arbitrali għandhom jibqgħu kif deċiżi, l-ispejjeż tal-preżenti proċeduri għandhom ikunu a karigu tas-soċjetà appellanta.

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Registratur