MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF
PHILIP SCIBERRAS

Seduta tad-9 ta' April, 2010

Appell Civili Numru. 31/2009

Alpha 22 Limited u MLS-Multinational Logistic Services Limited

vs

Ciampaolo Lonzar u Domar Srl

Il-Qorti,

Fit-22 ta' Settembru, 2009, it-Tribunal Arbitrali fic-Centru Malti ta' l-Arbitragg ippronuncja s-segwenti lodo fl-ismijiet premessi:-

> **"*Introduction***
>
> 1 By letter dated 27 July 2005, Claimants gave notice to arbitrate against Respondents in a dispute which arose between the parties in the context of a number of contracts concluded in

1999 ("the Subject Contract") whereby Respondents were to provide ship-husbanding services to Claimants in an area described in the contract.

2 By the same letter of 27 July 2005, Claimants gave Respondents notice that they had appointed Dr Mario Demarco, of Valletta, Malta, an Advocate at the Bar in Malta, as Arbitrator and called upon Respondents to appoint a second Arbitrator within the period prescribed by the Malta Arbitration Act 1996. By letter of 29 August 2005, Respondents appointed Dr Joseph Schembri, also of Valletta, Malta and also Advocate at the Bar in Malta, as second Arbitrator. By letter of 14 August 2007, the Registrar of the Malta Arbitration Centre appointed Professor Charles Debattista, of Southampton, United Kingdom, and Advocate at the Bar in Malta and a Registered European Lawyer with the Bar of England and Wales, as the third Arbitrator and Chairman of the Tribunal.

3 With the Tribunal constituted in compliance with clause 11 of the Subject contract, Respondents challenged the ribunal's jurisdiction in submissions filed on 11 February 2008, a challenge rebutted by Claimants in submissions received by the Malta Arbitration Centre on 12 March 2008. Further submissions challenging the Tribunal's jurisdiction were received by the Malta Arbitration Centre from Respondents on 24 March 2008. Respondents requested that a hearing limited to their challenge of jurisdiction be held independently of the merits - and Claimants did not object to this manner of proceeding.

4 A hearing limited to jurisdiction was consequently held in Malta on 19 and 20 May 2008, leading to a Final Award on Jurisdiction dated 15 December 2008, a Final Award against which Respondents lodged an appeal to the Court of Appeal in Malta. This appeal is still in progress.

5 On 15 December 2008, the Tribunal also issued an Order for Directions setting out the schedule and procedure for the filing of submissions on the merits of the claims.

6 Following a series of exchanges between the parties, a pre- hearing meeting was held in Malta on 28 April 2009 in order to finalise the manner in which the hearing on the merits would be conducted. As a result of discussions at this pre-hearing meeting, the hearing on the merits was scheduled by Order dated 29 April 2009 for the week of 3 August 2009.

7 On 22 May 2009, Respondents applied for a postponement of the hearing on the merits to a date after 2 October 2009, the date on which the appeal against the Tribunal's Final Award on Jurisdiction was due to be heard in the Malta Court of Appeal. Having taken representations from the parties regarding this request for a postponement, the Tribunal refused the request by Order of 1 June 2009.

8 The hearing on the merits was held at the Malta Arbitration Centre in Valletta, Malta between 3 and 7 August 2009, concurrently but not consolidated with two other references which the Claimants had brought against other Respondents. Both parties to this reference were legally assisted and represented by counsel at the hearing.

9 The parties had prior to the hearing given notice that eight witnesses were to give oral evidence. Of these eight witnesses, however, four, namely Messrs Sassower, Scaffa, Walter and Riccardo Lonzar, failed to attend and the parties agreed at the hearing that witness statements previously filed by these four intended witnesses would not now be admitted in this reference.

10 In addition, Dr Anton Micallef and Mr Stefan Bonello Ohio had been invited by Respondents to give evidence of fact but these gentlemen had declined the invitation to appear in this capacity. It was made clear by the Tribunal at the hearing that Counsel for the Respondents and the Tribunal were free to draw any inferences they deemed appropriate from the absence of Dr Micallef and Mr Bonello Ohio as witnesses of fact.

11 In consequence, oral evidence was heard at the hearing from Messrs Rafaraci, Santarelli, Greco, all called by Claimants and from Mr Giampaolo Lonzar, one of the Respondents to this reference. All these witnesses had previously filed witness statements which were before the Tribunal in evidence.

12 Throughout the examination of the witnesses it was necessary for the Tribunal repeatedly to remind Counsel that the claims in this reference were based on certain undertakings in an Agency Agreement between the parties. The Tribunal consequently advised Counsel on both sides to limit their examination of witnesses to questions of fact related directly to those undertakings and not to roam into any other tensions which might underlie relationships between the parties at a corporate level. Similar advice was given to Counsel in respect of their oral submissions, heard by the Tribunal on the last day of the hearing, i.e. 7 August 2009.

13 The seat of this Arbitration is Malta.

14 Having considered all the written submissions filed by the parties, having heard the oral representations made by counsel on behalf of the parties, having considered written evidence submitted by the parties both before and at the hearing, and having read the transcripts of the

hearing, this is the Tribunal's **FINAL AWARD ON THE MERITS OF THIS REFERENCE.**

Factual Background to the dispute

15 In essence this reference arises from allegations by the Claimant Principals that Respondent Agents have failed to perform two particular obligations arising, *inter alia,* from the Subject Contract, namely an obligation to disclose documents, and an obligation to return certain items of property. Damages are sought from the Respondents in a considerable amount: USD4,650,000. By way of background, it is useful to state that the parties to this reference had been, but no longer were by the time arbitration was declared in 2005, in a corporate relationship.

16 One contract, dated 26 March 1999, was before us in evidence in this reference. In broad terms, this contract set out ship-husbanding services which Agents were to provide to the Principal, "in Italy as well as in the ports [sic] of Trieste" between 1 April 1999 and 30 March 2000, in connection with the Principal's provision of services in the Mediterranean to the United States Navy. The contract was between MLS - Mediterranean Logistic Services Ltd, as Principal on the one part and, as Agent on the other, Mr Giampaolo Lonzar and Domar Sri.

17 Claimants pointed to three contractual clauses as being particularly relevant to this reference, namely clauses 1.2 and 7.2; and also clause 1.8, a clause which the Tribunal could not find in the Subject Contract.

18 The Subject Contract contained the following clause 1.2:

*"**1.2** The Agent undertakes to act at all times in good faith and in the best interests of MLS as well*

as the US Government. For its better guidance, the Agent shall be governed in its activities by the rules and regulations contained in the Code of Conduct for Agents annexed hereto as Schedule 1 in the Operational Procedures Manual (MLS OPM). "

19 The MLS OPM was expressly annexed to the Subject Contract by clause 12.4, which made the OPM "an integral part" of the Subject Contract. The MLS OPM, which was in evidence before us, contained, at paragraph 7, the following procedures to be carried out after a ship's departure from any of the ports covered by the Subject Contract:

"g. Make photocopies of all checks, credit card slips, DD Forms 1155s, and/or signed invoices received and retain for agency records.
"h. Send checks/credit card slips and supporting documentation toMLS CPA via TNT. ...
"i. Upon request, the agent must provide, furnish, and when necessary grant access to MLS and/or its designated representatives, copies of all documentation, including but not limited to purchase/sales invoices, quotations and receipts, etc, without exceptions, relevant to the provision of MLS services."

20 The Subject Contract contained the following clause 1.2, also referred to in Claimants' written submissions:

*"**7.2** The Agent, its officers, employees and any person answerable to it by virtue of this agreement shall at all times act in the best interests of MLS; strive to provide it with the best possible levels of service; and, ensure not to harm or damage the integrity of MLS and/or bring it into disrepute. "*

21 In addition to these two clauses, the Claimants' written submissions also referred to a clause referred to as clause 1.8, a clause which as indicated above the Tribunal could not find in the Subject Contract. This clause was said by Claimants to read as follows:

*"**1.8** The agent undertakes to provide furnish and, whenever necessary, grant access to MLS and/or its designated representatives, copies of all documentation, including but not limited to purchase/sales invoices, quotations and receipts etc, without exception -whatsoever, relevant to the provision of services subject matter of this agreement, upon simple demand by MLS.*
"In the event of an audit undertaken by MLS and/or its auditors or similar personnel, of the Agent's activities arising in virtue of this agreement, the Agent undertakes and binds itself to cooperate with MLS and the auditors in the execution of the audit and this by allowing them to have sight and copy of all relevant documentation, including fiscal documents, in respect of services rendered by the Agent in virtue of this agreement. Any breach or default of this clause or any attempt by the Agent to delay its cooperation hereunder, shall be considered a serious breach of the agreement and MLS reserves the right to terminate the agency. "

22 While clause 9.5 of the Subject contract did not figure in the Claimants' written submissions, it became clear during the hearing that this clause was at least as relevant as the clauses above cited to one of the Claimants' requests of the Tribunal. That clause read in full as follows:

"**9.5** *Upon termination of this agreement, the Agent shall without delay return to MLS all items, documents and any other property belonging to it. The Agent shall become liable in addition to any damages, losses, harm and/or suffering which*

may result from a breach of this clause, to a penalty ofUSD2,OOOper day for each day that the breach continues to subsist. "

23 The Subject Contract stated, at clause 11.5, that *"all disputes arising under this Agreement shall be governed by English law. "*

24 It was alleged by Claimants - and never denied by Respondents - that Respondents carried out ship-husbanding services for the Claimant Principals between 1999 and 2004, i.e. beyond the date on which the Subject Contract expired. Moreover, it was common ground between the parties that all such services were carried out through software systems established through the MLS OPM and through access codes provided by MLS under for the operation of procedures under that Manual. It was, however, alleged by the Claimants, but strongly denied in evidence before us by the Respondents, that the Respondents had also acted as the Claimants' Agent in Croatia.

25 It was common ground between the parties that on 24 August 2004, that is to say a year prior to the declaration of arbitration under this reference, the Claimants informed the Respondents by letter addressed to Mr Giampaolo Lonzar as Director of MLS (Multinational Logistic Services) Ltd and of Domar srl that the Respondents' appointment as the Claimants' Agent "for the ports of Trieste, Croatia, Slovenia, Bosnia and Serbia/Montenegro was terminated with immediate effect."

26 There were two Claimants in this reference, namely Alpha 22 Ltd and MLS-Multinational Logistic Services Ltd (MLS). The Principal named in the Subject contract was a company called MLS - Mediterranean Logistic Services Ltd. The

Respondent Mr Giampaolo Lonzar was a Director of this company. That company went into dissolution and then changed its name to Alpha 22, the first Claimant in this reference, when it transferred its business under a document put before us in evidence and termed a "Transfer of Business Agreement" dated 31 December 2004, to a company called MLS Limited. Throughout the hearings, both at the jurisdiction stage and at the merits stage, Alpha 22 was referred to as MLS 1 and the second claimant was referred to as MLS 2. It was common ground that, while Mr Giampaolo Lonzar, one of the Respondents in this reference, was a Director in MLS 1, he played no role in MLS 2.

The Parties' Claims

27 The **Claimants'** requests to the Tribunal fall under three main heads, namely disclosure of documents, return of property and costs of the arbitration.

28 ***Disclosure of documents*** As for the first, viz. disclosure, the Claimants have asked the Tribunal to:

[a] declare and confirm that Claimants or their advisors or auditors of international repute appointed by the Tribunal be granted access to all the Respondents' information and documentation required for audit and reconciliation purposes by Claimants in terms of the agency relationship as well as in terms of any other applicable law or contractual arrangement that existed between the parties in the execution of all services under the Contract for the US Navy in all the Ports in Turkey for the period 1 January 2000 to 31 March 2005;

[b] declare and confirm Respondents jointly and severally responsible for damages in the event

that they fail for whatever reason to fulfil the Tribunal's order as set out in claim (a) above;

[c] order Respondents to pay Claimants, within a time-limit to be established by the Tribunal, such damages, with interest, that they have incurred singly and/or jointly as a result of Respondents' failure to abide by the order made by the Tribunal pursuant to claim (a) above. This head of damages was quantified by Claimants at the hearing in the figure of USD1,000,000.

29 ***Return of property*** Here, the Claimants asked the Tribunal to:

[a] order Respondents to return and to deliver to Claimants all property held by Respondents to date belonging to either or both of the Claimants;

[b] order Respondents to pay Claimants such damages as have been incurred by way of pre-liquidated damages for failure to return Claimants' property as contractually obliged to do in terms of the agency agreement. This head of damages was quantified by Claimants at the hearing in the figure of USD3,650.000.

30 *Costs* The Claimants asked the Tribunal to:

[a] declare and confirm Respondents jointly and severally liable to pay all costs, fees (including but not limited to counsels' fees) incurred by Claimants in the pursuit of their claims and these arbitration proceedings;

[b] order Respondents to pay all costs, fees (including but not limited to counsels' fees) incurred by Claimants in the pursuit of their claims and these arbitration proceedings.

31 The **Respondents** for their part had two simple requests:

[a] that the Tribunal should dismiss all of the Claimants' claims and requests; and

[b] that the Tribunal should award all the costs and fees of this arbitration, including counsels' fees, against the Claimants.

32 At the hearing, Claimants requested leave to stay their request for damages for failure to disclose documents on the ground that they would find it difficult to quantify their loss until they had had an opportunity to examine documents yet to be disclosed. For their part, the Respondents urged the Tribunal to proceed on the basis of claims which had been on the record since January 2008: in effect, Respondents argued that Claimants should either pursue their claims now or withdraw them for ever. After considering the parties' representations on this point, the Tribunal ruled that the reference would proceed on the basis of the claims as set out in the Claimants' written submissions, which the Respondents had legitimately come to the hearing to rebut.

The Issues before the Tribunal

33 Having carefully read the written submissions and having considered equally carefully the oral submissions of the parties, it appears to the Tribunal that the resolution of this dispute depends on the answers to the following seven questions:

1 Was there an agency relationship between these claimants and these respondents?

2 If there was such a relationship,
[a] which ports did it cover; and
[b] for what period?

3 Again if there was such a relationship, did it impose the duties alleged by Claimants to have been breached by Respondents, i.e.

[a] The duty to disclose documents; and

[b] The duty to return property?

4 Were the respondents in breach of any such duties?

5 Whether or not the respondents were thus in breach, did any such breach cause the Claimants proven loss, harm or suffering?

6 Whether or not any such breach caused any such proven loss, were the Claimants entitled to the sums set out "in addition" at

[a] clause 7.4 and

[b] clause 9.5

of the Subject contract?

7 Which party is to bear the costs of this arbitration?

Issue One: Was there an agency relationship between these claimants and these respondents?

34 Respondents made two points here. First, Alpha 22, also known in this reference as MLS 1, with whom the Respondents had contracted as Mediterranean Logistic Services Ltd., had no *locus standi* because it was in liquidation and the liquidator was not before us. Secondly, MLS-Multinational Logistic Services Limited, known in this reference as MLS 2, had no *locus standi* because the only basis for such standing was the "Transfer of Business" agreement dated 31 December 2004, which agreement the Respondents said was invalid under the law governing it, i.e. Maltese Law.

35 Much of this ground had been covered in the hearing leading to the Tribunal's Final Award on Jurisdiction and it seemed to the Tribunal at this merits stage that it would appear to follow, at any rate *prima facie,* that if, as we held in the Final Award on Jurisdiction, both Claimants had *locus standi* to enforce the agreement to arbitrate, they would equally have *locus standi* to enforce the contract in which that agreement to arbitrate resided.

36 As far as concerned the *locus standi* of the first Claimant, Alpha 22, it remains our view, given that we have heard nothing new in this regard at this stage of the proceedings, that Alpha 22 does have *locus standi* to bring this claim - and we so **find.**

37 As far as concerns the *locus standi* of the second Claimant, MLS-Multinational Logistic Services Limited, care was taken in the Final Award on Jurisdiction, not to preclude the parties' right to make any argument which the parties might wish to make at the merits stage regarding the impact of the "Transfer of Business" agreement on the merits or quantum of the Claimants' substantive claim. Nowhere in the Respondents' filed submissions at this merits stage do we, however, find any counterclaim for a declaration by the Tribunal that we find the "Transfer of Business" agreement null and void. Neither did Respondents come to the Tribunal at the merits stage armed with any declaration of such invalidity by any court of competent jurisdiction. In the absence of such counterclaim or declaration, it appears to us that, as a Tribunal resolving disputes arising out of an Agency Agreement, we must take at face value the document put before us as a "Transfer of Business" agreement: we consequently **find** that the second Claimant does have *locus standi* to bring this claim.

38 Before we leave the issue of the two Claimants' *locus standi* to bring the claims, it would be helpful at this juncture briefly to address two related points made by Respondents at the hearing. Respondents repeatedly and rhetorically asked why the claims had been brought at all; they also suggested that the answer to that question, insofar as it related to the breakdown of the corporate relationship between the parties, constituted a breach of a general duty of good faith. It appears to the Tribunal that these considerations were quite irrelevant to the task before it. Claims based on an Agency Agreement subject to English law had been brought before the Tribunal. The central question before us was whether the Respondents were responsible towards the Claimants for having failed to perform their obligations under that contract as alleged by the Claimants. The question before us was not *why* the Claimants had brought these claims, but *whether* they were justified under the Subject Contract in bringing them. As for the suggestion that the Claimants were restricted in bringing claims based on contract by some general principle of good faith, this was clearly and notoriously an argument which cannot run under English law, the law governing the Subject contract, which law recognises no such generally-stated and all-pervasive principle in the absence of express contractual stipulation.

Issue Two: If there was such a relationship,
[a] which ports did it cover; and
[b] for what period?

39 ***Which ports?*** The Subject Contract appointed the Respondents as Agents "in Italy as well as in the ports of Trieste". The Claimants claimed before us that the Respondents also acted as their Agents in Croatia, an allegation denied by Mr Lonzar before us, although he did

appear to concede in his witness statements that his agency agreement extended to Koper. At any rate for other ports in Croatia, however, Mr Lonzar explained that where he *had* provided services to US Navy vessels in Croatia, he had done so in a supervisory role to another company which *was* acting as the Claimants' Agent in Croatia. For their part, the Claimants offered no explanation why, if the Respondents were truly appointed as Agents for Croatia, the Subject Contract did not say so. Claimants appeared to us to be relying, for the extension of the Subject Contract to Croatia, on their own letter of termination of 24 August 2004. We found this unilateral attempt at extending the express geographical ambit of the Subject Contract unpersuasive.

40 ***For how long?*** The Subject Contract was for a fixed period, i.e. to 30 March 2000. It was not seriously contested by the Respondents at the jurisdiction stage of this reference, where the same issue arose in a different context (i.e. over which contracts did we have jurisdiction?) that the Respondents had in fact conducted themselves as though they were in an agency contract between March 1999 and August 2004.

41 For these reasons, we **find** that the agency relationship between Claimants and Respondents covered Trieste, Koper, and any other Italian ports in which Respondents actually carried out ship-husbanding services for the Claimants between 1 April 1999 and 24 August 2004, i.e. the date on which that relationship was terminated by the Claimants.

Issue Three: Again if there was such a relationship, did it Impose the duties alleged by Claimants to have been breached by Respondents, i.e.

[a] The duty to disclose documents; and

[b] The duty to return property?

42 The claimants have asked for orders to disclose documents and to return property; they have also asked for USD 1.0 million in damages in respect of the first and for USDS.65 million in respect of the second. We shall come later in this Award to the matter of how these figures have been quantified under the contract.

43 For the present, however, it is necessary to state that, in the Tribunal's view, while the explicit requests made by the Claimants were for orders for disclosure and the return of property, there is clearly lurking just beneath the surface of these requests clear allegations of breach of contract by the Respondents. As we shall be finding later in this Award, the contract clearly imposes a duty to disclose documents and a duty to return property: the Claimants would need no Award from an arbitral tribunal declaring what the contract clearly states if the Claimants were not *also* saying that Respondents had breached these obligations. Indeed, Claimants spared no effort during the hearing in proving precisely that, namely that documents had not been disclosed and that property had not been returned. Moreover, Claimants had quantified their claim in damages at USD4.65 million. Either these damages were contingent on future breaches - in which case they could not be awarded under English law because they have not yet been suffered - or they had been suffered, in which case the loss for which these damages had been quantified would need to be proven. In either case, breach of the Agency Contract was key to the Claimants' case, as was explicitly recognised in Claimants' reference in its first request to the "terms of the agency relationship as well as in terms of any other applicable law or contractual arrangement that existed between the parties." This reference was about a claim for orders and damages based on breaches of contract.

44 The question here is, therefore, whether the Respondents were bound to disclose documents and to return property by virtue of no fewer than four different sources relied on by Claimants in their submissions and at the hearing, namely (and in what is in our view ascending order of significance), contractual arrangements "other" than the Subject Contract; "other applicable law"; an Agent's general duty to account under general international agency practice; and the agency relationship as recorded in the Subject Contract itself.

45 The first three of those possible four sources of obligation are relatively easy to dispense with. First, no evidence was put before us by Claimants for any contract other than the Subject Contract as the basis of the obligations to disclose documents and to return property. Second, despite repeated references to a generally recognised agents' duty to account, no independent expert evidence was ever presented by Claimants to prove the existence of such a customary duty. This is not to say that such a duty does not exist: it is simply to say that its existence has not been proved by means other than questions put to the parties or their employees, who should safely be assumed to be *parti pris.*

46 This brings us to the terms in the Subject Contract itself: did this contract expressly contain the duties on which Claimants rely? The answer of the Tribunal is that it clearly did - and we so **find.** Clause 9.5 contained the obligation to return property. The Subject Contract also incorporated, at clauses 1.2 and 12.4, the MLS-OPM which, at paragraph 7 clearly established a disclosure procedure. Claimants also relied on a clause 1.8 which expressly contained a duty to disclose documents. This clause was not, however, contained in the Subject Contract. The absence of

the clause was not, however, fatal to the Claimants' case: had the contract contained the illusory clause 1.8, this would simply have highlighted a duty already imposed through the incorporation of the MLS-OPM into the Subject contract. These terms -paragraph 7 of the MLS-OPM as for disclosure and clause 9.5 as for the return of property - clearly imposed both obligations on which the Claimants rely, at any rate for the period between 1999 to 2000 expressly covered by the Subject Contract. We take the view, however, that these terms also governed the periods and the ports for and in which the Respondents carried out ship-husbanding services outside the strict geographical and temporal confines of the Subject Contract.

47 For these reasons, we **find** that the Respondents were contractually bound to disclose documents as set out in paragraph 7 of the MLS-OPM throughout the period between 1 April 1999 and 30 March 2004 for ship-husbanding services provided by the Respondents in the ports of Trieste, Koper and any other Italian ports in which Respondents actually carried out ship-husbanding services for the Claimants. We also **find** that the Respondents were contractually bound to return property belonging to the Claimants at the end of that period.

48 This finding is not the same as stating, of course, either that Respondents were in breach of these duties or that, whether or not they were in breach, such breach had caused the Claimants any loss. To those matters we now turn.

49 Before we do, however, a brief comment regarding clauses 1.2 and 7.2 of the Subject contract ought to be made. Given our view that paragraph 7 of the MLS-OPM imposed the duty of disclosure of documents on which Claimants rely,

the question whether a similar duty was imposed by the other two clauses referred to in this context by Claimants, i.e. clauses 1.2 (a duty to act in good faith and best interests) and 7.2 (a duty to act in best interests and not to harm integrity and reputation) falls away -and for that reason we expressly decline to make any finding in regard to these clauses. We do, however, take the view that, had Claimants' case not been secured through other, much clearer, contractual terms, these clauses too would impose obligations both to disclose relevant documents and to return property belonging to the Claimants.

50 Having established the legal source of the two obligations relied on by Claimants, the next question is whether the Respondents were in breach.

Issue Four: Were the respondents in breach of any such duties?

51 Claimants allege that Respondents were in breach of their obligations to disclose documents and to return property belonging to Claimants under the contractual terms which, as we have found, were imposed on Respondents by the Subject contract between 1999 and 2004. The documents Claimants were particularly concerned about were invoices supporting entries of services entered into the computer software envisaged in the MLS-OPM; the property Claimants alleged was still with the Respondents was comprised of the following items: security and identity badges; software discs for use with the procedures envisaged by the MLS-OPM; company credit cards and company stationary. The Respondents, for their part, deny they were in breach of either obligation.

52 As far as concerned the duty to disclose documents, the Respondents' denial of breach

took various forms: either no such demands were made, at any rate before the breakdown of the corporate relationship which had existed between the parties; or such demands as were made were made in bad faith *because of the* breakdown of that corporate relationship; or such demands as were made were not "necessary" within the terms of paragraph 7(i) of the MLS-OPM; or Claimants already had all the information to which they were entitled because that information was included in the computer-generated entries sent to the Claimants through the routine procedures under the MLS-OPM; or such demands as were made were complied with, i.e. invoices supporting the computer entries were in fact provided.

53 As for the obligation to return the Claimants' property, Respondents' counsel suggested that the four items of property allegedly still in the Respondents' possession were of no commercial value: security and identity badges had never actually been used and were in any event time-limited and long expired; credit cards had also lapsed; software discs were worthless without passwords which had since been changed; and Respondents either did not have or no longer had MLS stationary.

54 The burden of proof generally lies on the Claimant: here, however, the Claimants were in the difficult position of having to prove two negatives, i.e. that Respondents had *not* disclosed documents and that Respondents had *not* returned property. In this situation, it falls to the Respondents to provide some evidence showing that they had, at any rate on a balance of probabilities, complied with their duties.

55 We cannot say that we were satisfied that the Respondents had in fact discharged this fairly low level of proof. As a Tribunal, we did not find particularly persuasive the wide variety of

alternative ways in which breach was denied; neither were we impressed by the fact that the Respondents could not point us to a single example of an invoice supporting any of the supplies organised by the Respondents under the Subject Contract or for any period beyond. We were, in particular, not persuaded that the Claimants were in any way fettered by a supposed duty of good faith towards the Respondents in deciding whether or not to make such a demand for disclosure. Only clear words would impose such a duty in a contract governed by English law - and clause 1.2 in the Subject contract imposed such a duty only on the Respondents, not on the Claimants. As for the allegation that property belonging to the Claimants was still in the Respondents' possession, again here we did not find compelling the Respondents' argument that the items of property were of no commercial value: this assessment was not for the Respondents to make but for the Claimants, whose property these items were.

56 For these reasons, we **find** that the Respondents were in breach of their obligations to disclose documents as set out in paragraph 7 of the MLS-OPM throughout the period between 1 April 1999 and 30 March 2004 for ship-husbanding services provided by the Respondents in the ports of Trieste, Koper and any other Italian ports in which the Respondents actually carried out ship-husbanding services for the Claimants. We also **find** that the Respondents were in breach of their obligation to return property belonging to the Claimants at the end of that period.

Issue Five: Whether or not the respondents were thus in breach, did any such breach cause the Claimants proven loss, harm or suffering?

57 Breach of an established obligation does not, however, take the Claimants far enough. As indicated earlier in this Award, Claimants have come to us in search of remedies based on breach. For them to drive home their request for remedies, however, they need to establish not only that the Respondents are in breach but that those breaches have caused a demonstrable loss. Had the Claimants been successfully sued or otherwise pursued for liabilities which had been incurred because of the Respondents' breaches under the Subject contract? Had the Claimants incurred losses such as the procuring of alternative and more expensive suppliers of similar services? Had the Claimants lost contracts with the US Navy or other powers because of the Respondents' breaches of the Subject contract? Causation is key here: what actually happened *because of the* Respondents' breaches, what actual loss occurred *because of* them? Claimants did not, in our view, even begin to establish their case here: obligation and breach do not suffice; demonstrable loss caused by breach of such obligations is central to the Claimants' case and on this score, we **find** that Claimants have not proven that any loss clearly ensued as a result of the Respondents' breaches of the contractual duties relied upon by the Claimants.

Issue Six: Whether or not any such breach caused any such proven loss, were the Claimants entitled to the sums set out "in addition" at

[a] clause 7.4 and

[b] clause 9.5

of the Subject contract?

58 The Claimants did, of course, quantify their damages: USD 1.0 million in respect of non-disclosure of documents and USD3.65 million in respect of the failure to return property. We have two comments to make, the first relating to the link

between this issue and ***issue Jive*** above; the second relating to the manner of quantification itself.

59 First, quantifying damages is not, of course, the same as proving loss. The fact that a contract provides a mathematical formula for the quantification of loss does not discharge the Claimants' duty to prove a direct causal link between proven loss and the breach alleged. The presence, therefore, of clause 7.4 in respect of the duty to disclose documents and of clause 9.5 in respect of the obligation to return property does not alter the fact that Claimants here have simply failed to draw a direct link between the Respondents' breaches of contract and a demonstrable and proven loss.

60 Secondly, there is a serious problem with each of the two clauses in the Subject contract on the basis of which Claimants sought to quantify their damages. For the sake of convenience, the text of clauses 7.4 and 9.5 are set out in full below:

*"**7.4** The breach of any of the provisions of this clause or of the Code of Conduct in Schedule 1* [i.e. the MLS-OPM] *shall render the Agent liable, in addition to any damages, losses, harm and/or suffering which may arise from such breach, to the payment of a penalty to MLS in the amount of USDS00,000.*

*"**9.5** Upon termination of this agreement the Agent shall without delay return to MLS all items, documents and any other property belonging to it. The Agent shall become liable in addition to any damages, losses, harm and/or suffering which may result from a breach of this clause, to a penalty ofUSD2,OOOper day for each day that the breach continues to subsist. "*

61 A problem immediately arises with regard to clause 7.4: it was not at all clear to the Tribunal why the figure of USD500,000 in clause 7.4 led to a claim of USD 1,000,000, at any rate in the absence of clear evidence of loss in that amount being caused by the Respondents' failure to disclose documents.

62 There is, however, a problem common to both clauses which is more fatal to the Claimants: neither clause is enforceable under the law governing the Subject contract, i.e. English law. It is trite law in England that penalty clauses are unenforceable: the purpose of damages being compensatory rather than punitive, there needs to be a clear quantitative link between loss caused by breach and damages awarded. It follows that a penalty clause cannot be enforced. On the other hand, a genuine attempt at pre-estimating loss through a so-called "liquidated damages" clause *is* enforceable: such clauses are honest devices intended to avoid unnecessary cost, effort and expense in quantifying losses after breach. The use of the phrases "penalty clause" or "liquidated damages clause" does not of itself dictate which side of the line a particular clause falls. It is clear, however, that an enforceable clause does need to be a genuine attempt at pre-estimating real loss. It is clear to the Tribunal that clauses 7.4 and 9.5 fall on what is for the Claimants the wrong side. The fatal words are the words *"in addition'7:* if the sums set out are to be levied in addition to *"any damages, losses, harm and/or suffering which may result from a breach"* (words used in both clauses) then the sums set out cannot be a genuine pre-estimate of real loss but a penalty - and therefore unenforceable. For these reasons, we **find** that the Claimants are not entitled to the sums set out "in addition" at clauses 7.4 and 9.5 of the Subject contract.

63 ***Conclusion on Remedies Requested*** The Claimants have asked us to order the Respondents to disclose documents and to return property. As we have indicated earlier in this Award, lying behind these requests is the suggestion by the Claimants that the Respondents have failed to disclose and return as they were bound to do under the Subject Contract. The Claimants have also requested damages in respect of such failure. Claimants fail before us in both requests, i.e. orders and damages, and in respect of both breaches, i.e. disclosure and return of property. Insofar as the Claimants have asked for orders specifically asking that Respondents should perform their contractual duties to disclose and to return, these requests amount to requests for orders specifically to perform contractual obligations: these requests can only be granted under English law, the law governing the Subject Contract, if damages are an inadequate remedy - and the adequacy of damages as a remedy is here established by the Claimants' very own request for a considerable amount of damages in this reference. Then, insofar as the Claimants have asked for damages, these requests fail too because the Claimants have failed to prove any loss resulting from breach and because the contract clauses seeking to liquidate those damages amount to penalty clauses unenforceable under English law, again the law governing the Subject Contract. For these reasons, set out in greater detail throughout this Award and here briefly summarised, the Claimants claims are dismissed in full.

Issue Seven: Which party is to bear the costs of this arbitration?

64 The merits of this reference having gone against the Claimants, the costs of this reference since the Final Award on Jurisdiction of 15 December 2008 are to be borne by the Claimants.

Should the parties not agree on the quantum of Respondents' costs since the Final Award on Jurisidction, the Tribunal reserves jurisdiction to assess such costs.

65 The costs of this Award, including the costs and fees of the Malta Arbitration Centre and the costs and fees of the Tribunal, will be borne by the Claimants, again the merits of the reference having gone against them.

66 Finally, for the avoidance of any doubt, the Tribunal reserves the jurisdiction to set aside, alter or modify any and every costs order made in this Award or in the Tribunal's Final Award on Jurisdiction of 15 December 2008 were the Maltese Court of Appeal to reverse that Award on Jurisdiction.

FINDINGS

For the reasons set out above, we find as follows:

[a] that both claimants have standing to bring these claims; and

[b] the agency relationship between Claimants and Respondents covered Trieste, Koper, and any other Italian ports in which Respondents actually carried out ship-husbanding services for the Claimants between 1 April 1999 and 24 August 2004, i.e. the date on which that relationship was terminated by the Claimants; and

[c] that the Respondents were contractually bound

[i] to disclose documents as set out in paragraph 7 of the MLS-OPM throughout the period between 1 April 1999 and 30 March 2004 for ship-husbanding services provided

by the Respondents in the ports of Trieste, Koper and any other Italian ports in which Respondents actually carried out ship-husbanding services for the Claimants; and
[ii] to return property belonging to the Claimants at the end of that period; and

[d] that the Respondents were in breach of their obligations to disclose documents as set out in paragraph 7 of the MLS-OPM throughout the period between 1 April 1999 and 30 March 2004 for ship-husbanding services provided by the Respondents in the ports of Trieste, Koper and any other Italian ports in which the Respondents actually carried out ship-husbanding services for the Claimants; and

[e] that the Respondents were in breach of their obligation to return property belonging to the Claimants at the end of that period; but

[f] that the Claimants have not proven that any loss clearly ensued as a result of the Respondents' breaches of the contractual duties relied upon by the Claimants; and

[g] that the Claimants are not entitled to the sums set out "in addition" at clauses 7.4 and 9.5 of the Subject contract.

AWARD

NOW WE, CHARLES DEBATTISTA, MARIO DEMARCO AND JOSEPH SCHEMBRI, having taken upon ourselves the burden of this reference and having carefully and conscientiously considered the submissions and representations of the parties, DO MAKE AND PUBLISH THIS OUR FINAL AWARD as follows:

[i] that all Claimants’ claims are dismissed; and

> [ii] the Respondents' costs in preparing and presenting this reference since the Final Award on Jurisdiction of 15 December 2008 are to be borne by the Claimants, with jurisdiction reserved should the parties not agree on the quantum of such Respondents' costs; the Claimants to bear their own costs in preparing and presenting this reference since 15 December 2008; and
>
> [iii] The costs of this Award, including the costs and fees of the Malta Arbitration Centre and the costs and fees of the Tribunal, are to be borne by the Claimants;
>
> [iv] for the avoidance of any doubt, jurisdiction is also reserved to set aside, alter or modify any and every costs order made in this Award or in the Tribunal's Final Award on Jurisdiction of 15 December 2008 were the Maltese Court of Appeal to reverse that Award on jurisdiction.
>
> This is the Award of the duly constituted Tribunal achieved by majority view. The minority arbitrator has chosen not to sign the Award.**"**

Is-socjetajiet rikorrenti appellaw lil din il-Qorti biex jimpunjaw il-lodo arbitrali fit-termini tas-suddivizjoni segwenti:-

1. Il-lodo ghandu jitqies invalidu in kwantu mhux konformi ma' l-Artikolu 31 (1) tal-Mudell ta' Ligi fuq l-Arbitraggi Kummercjali Internazzjonali (l-Ewwel Skeda tal-Kapitolu 387). Huma jispjegaw din il-kontenzjoni taghhom bil-motiv illi l-lodo naqas milli jipprovdi raguni l-ghala wiehed mill-Arbitri formanti l-komposizzjoni tat-Tribunal ghazel li ma jissottoskrivix l-istess lodo;

2. Il-lodo jmur kontra d-disposizzjonijiet ta' l-Artikolu 34 (2) (a) (ii) u 34 (2) (b) (ii) ta' l-istess Mudell ta' Ligi. L-appellanti jitraducu din l-impunjattiva taghhom ghal

lezjoni tal-principju ta' gustizzja naturali b'dawn il-prospettazzjonijiet:-

(i) Huma ma gewx moghtija l-opportunita li jaghmlu s-sottomissjonijiet taghhom fuq il-punt sollevat mill-istess Tribunal in referenza ghall-ezistenza, o meno, tal-provvediment ghall-prestazzjoni specifika. Fil-kuntest jaggungu illi la dan il-punt kien wiehed deciziv, in-nuqqas ta' opportunita` arrekatilhom pregudizzju;

(ii) It-Tribunal naqas milli jikkonsidra l-materja sottomessa minnhom taht punt 3 (a) ta' l-Istatement of Claim in mertu ghar-rimedju pretiz illi l-kontro-parti jipprovdu access ghad-dokumenti taghhom. Dan, lanqas meta huma talbu ghal lodo addizzjonali fuq dan l-istess punt;

Tnehhi l-ewwel pregudizzjali mqanqla tan-nullita ghall-fatt li l-appell gie redatt bil-lingwa Ingliza, aktar tard irtirata, l-appellati wiegbu ghall-gravami sottoposti billi b'mod generali u preliminari jqajmu l-irritwalita ta' l-appell in kwantu l-appellanti jinterponu hwejjeg kontradittorji – *ab omissa decisionis* u *ultra petita* – u wkoll, in kwantu dawn naqsu milli jindikaw ir-regola ta' gustizzja naturali li huma jallegaw li giet vjolata;

Fl-ispecifiku, imbaghad, l-appellati jwiegbu b'dawn is-sottomissjonijiet, koncizament riprodotti:-

1. Il-lodo jipprovdi raguni sufficjenti il-ghala wiehed mill-Arbitri ma ffirmax il-lodo;

2. L-Artikolu 34 (2) (a) (ii) ghandu l-iskop uniku u limitat illi jittutela dawk il-kazijiet fejn parti tista' turi li tqeghdet fi zvantagg procedurali *ab initio* l-procediment ta' l-arbitragg;

3. L-interpretazzjoni li l-appellanti jakkordaw lill-Artikolu 34 (2) (b) (ii) imur kontra d-dispost ta' l-Artikolu 58 ta' l-Att dwar l-Arbitragg. Dan ghal raguni illi dan l-ahhar

artikolu espressament ried illi l-artikolu l-iehor predett ikun imqieghed fuq il-livell ta’ smigh xieraq u minghajr ebda konnotazzjoni ma’ l-Artikolu 18 tal-Mudell ta’ Ligi;

4. Id-decizjonijiet citati tal-Qrati Inglizi ma jistghu jkunu ta’ ebda soljev ghaliex il-posizzjoni fattwali hi li (i) l-appellanti talbu rimedju taht para. 3(a) u gie deciz li skond il-ligi Ingliza l-appellati teknikament kissru l-obbligi kontrattwali taghhom, b’dan pero li dejjem skond l-istess ligi Ingliza t-Tribunal wasal ghall-konkluzjoni illi l-appellanti ma kienux intitolati ghall-ebda rimedju, u (ii) il-pretensjoni ta’ l-appellanti ma hijiex li t-Tribunal introduca xi haga gdida wara li ntemm is-smigh izda li t-Tribunal “*did not deal with the issue as set out in claim 3(2)*”. Dejjem fuq il-fehma ta’ l-appellati fl-istess korp tar-risposta taghhom, l-appellanti ghandhom konfuzjoni shiha meta jallegaw *omissa decisione* u fl-istess waqt jammettu illi d-decizjoni ttiehdet izda bi ksur tar-regola ta’ gustizzja naturali;

Il-Qorti ser tittanta biex, premessi l-aggravji fuq riportati u t-twegiba ghalihom, kemm jista’ jkun izomm l-istess ordni li fihom tqajmu s-singoli punti ta’ impunjattiva devoluti lilha;

Hu dispost mill-Artikolu 31 (1) tal-Mudell ta’ Ligi illi “d-decizjoni ghandha ssir bil-miktub u tkun iffirmata mill-arbitru jew arbitri. Fi procediment ta’ arbitragg fejn ikun hemm aktar minn arbitru wiehed, tkun bizzejjed il-firma tal-maggoranza tal-membri kollha tat-tribunal ta’ l-arbitragg, sakemm jigi dikjarat ghaliex xi firma ma tkunx tidher fuq id-decizjoni”;

Skond l-assunt ta’ l-appellanti l-fatt li fil-lodo gie dikjarat illi “*the minority arbitrator has chosen not to sign the Award*” ma kienx jibbasta biex tezisti konformita mal-vot tal-ligi fl-artikolu riprodott. Huma difatti jsostnu u jinsistu illi ghall-konvalida tal-lodo l-ommissjoni tal-firma mill-arbitru minoritarju kellha tigi sostanzjata b’raguni. Ghal dan l-appellati jirribattu illi minnha nnifisha d-dikjarazzjoni hi

spjegattiva tar-raguni sottintiza illi l-arbitru minoritarju ghazel li ma jiffirmax ghaliex ma kienx jaqbel ma' l-espressjoni ta' fehma taz-zewg Arbitri l-ohra;

Il-Qorti tosserva l-ewwelnett illi a differenza tal-mankata sottoskrizzjoni tas-sentenza minn xi qorti, in-nuqqas ta' sottoskrizzjoni ta' xi wiehed fost l-Arbitri ma ggibx l-inezistenza tal-lodo. Ghaldaqstant, dan hu pjenament validu jekk iffirmat mill-maggoranza ta' l-Arbitri. Fit-tieni lok, hu agguntivament rikjest illi r-rifjut ta' l-Arbitru dissenzjenti li jissottoskrivi dak il-lodo bizzejjed li jkun indikat b'semplici dikjarazzjoni. Fil-kaz partikulari din id-dikjarazzjoni li ma tistax ma tkunx interpretata bhala wahda ta' rifjut saret *in calce* ghal lodo u qabel is-sottoskrizzjoni mill-Arbitri l-ohra. Fil-hsieb tal-Qorti, kif inhu hekk espress, il-lodo huwa validu u skond l-espressa volonta tal-ligi u, bejn il-partijiet, anke minghajr il-firma ta' wiehed mill-Arbitri;

Din il-fehma tal-Qorti hi msahha wkoll mill-fonti gurisprudenzjali li taghmel is-sentenza fl-ismijiet "**L-Unur Tieghu Sir Archibald Campbell *nomine* -vs- Surgeon Captain Vincent Tabone M.D. *et nomine***", Prim' Awla, Qorti Civili, 31 ta' Awissu 1962 per Imhallef A. V. Camilleri, u fejn fiha gie kkumentat dan li gej:-

"Ukoll, peress li '*nemo potest cogi precise ad factum'*, in-nuqqas ta' firma fil-lodo ta' l-arbitru in minoranza, jekk tigi mill-arbitri in maggoranza menzjonata fil-korp tal-lodo bir-raguni li tista' tkun rifjut jew impossibilita ma tipprovokax l-invalidita ta' l-istess 'award', ghar-raguni li huwa jkun ha parti fis-smigh tal-provi, formazzjoni u diskussjoni sabiex tigi raggunta l-volonta ta' l-istess korp, anke jekk tipprevali l-maggoranza";

Taht dan il-profil l-ewwel ilment qieghed jitqies insostenibbli;

Ghall-konsiderazzjoni ta' l-impunjattiva koncepita bit-tieni motiv ta' aggravju huwa ferm opportun li jigu qabel xejn registrati dawn il-preliminari:-

1. L-ommessa pronuncja tirrikorri meta l-lodo jonqos li jiddeciedi fuq xi kwestjoni ritwalment sottoposta ghall-ezami ta' l-Arbitru u li kienet tinnecessita pronuncjament ta' akkoljiment jew ta' rigett. S'intendi, il-vizzju ta' *omissa decisione* ma jissussistix, u, anzi, hu eskluz meta, kif ritenut minn din l-istess Qorti, "il-kwestjoni tkun esplicitament jew implicitament assorbita f'xi parti tas-sentenza u tkun giet evalwata mill-gudikant, anke jekk, forsi, b'motivazzjoni li ma tkunx irragunat specifikament fuq xi sottomissjoni tal-parti". Ara "**Joseph Spiteri -vs- Il-Kummissarju tat-Taxxa fuq il-Valur Mizjud**", 30 ta' Jannar, 2009;

2. Mill-banda l-ohra l-ultra jew l-extra petizzjoni tirrikorri meta l-gudikant jippronuncja ruhu oltre l-limiti tal-pretensjoni jew fuq kwestjoni estraneja ghall-oggett tal-gudizzju. Ara s-sentenza ta' din il-Qorti fl-ismijiet "**Pirella Supermarkets Limited -vs- SISA Malta Limited**", Appell minn Arbitragg, 6 ta' Gunju, 2008. Wisq naturalment, ghall-ezami dwar jekk it-tribunal ippronunzjax ruhu oltre l-mitlub, ikun jokkorri qabel xejn li jigi accertat jekk il-kwestjoni gietx prospettata lill-Arbitri wara ezami tal-kweziti posti fl-Istatement of Claim, u in bazi ghall-interpretazzjoni taghhom, tiddetermina jekk il-lodo ddecidiex *ultra petitum* meta mkejjel mal-kweziti effettivament proposti;

3. Maghdud dan, ukoll jekk b'daqshekk il-Qorti tkun qed tasserixxi l-ovvju, ma jista' qatt ikun dubitat illi kull tribunal ghandu dejjem jirrispetta r-regola fondamentali ta' gustizzja naturali *audi alteram partem* b'mod li jkun asiskurat li kull parti tinghata l-possibilita li tesponi l-assunti rispettivi taghha u li tipproduci l-provi ghas-sostenn taghhom. Agguntivament ukoll, li l-partijiet ikunu jafu r-rizultanzi istruttorji li l-Arbitri ser jezaminaw ghall-formazzjoni tal-konvinciment taghhom. Fi kliem iehor, kull parti ghandha tinghata l-opportunita shiha li tipprezenta u tiddefendi bil-massimu tal-ghodod

procedurali l-kaz taghha, in kwantu agir xort'ohra jikkostitwixxi vjolazzjoni tar-regola. Opportunement, ta' min ifakkar pero illi fejn il-partijiet jonqsu milli jaghmlu uzu minn din l-istess opportunita huma certament, kif wisq sewwa ritenut, "ma jkunux jistghu jilmentaw li ma jkunux inghataw smigh xieraq skond il-Konvenzjoni u skond il-Kostituzzjoni izda setghu biss ilumu lilhom infushom illi jkunu tilfu, kienet x'kienet ir-raguni, l-opportunita taghhom skond ir-regoli procedurali li jiggvernaw il-process". Ara "**Joseph Grech -vs- L-Avukat Generali**", Qorti Kostituzzjonali, 20 ta' Dicembru, 2000. Dan, ghal din il-Qorti, hu bil-wisq ragjonevoli ghaliex jekk parti tonqos milli tiddiskuti jew tiddibatti xi punt partikolari skond il-mezzi ta' difiza fil-poter dispositttiv taghha, ma tistax legittimament tillanja minn lezjoni tal-principju bil-motiv ta' xi mankata koncessjoni ta' difiza;

Espressi l-predetti preliminari u spjanat ukoll it-terren ta' l-impunjattiva in kwantu bazat fuq id-dispost ta' l-Artikolu 34 (2) (a) (iv) in referenza ghall-Artikolu 31 (1), jridu issa jigu investigati l-ilmenti ta' l-appellanti minnhom arginati fuq l-Artikoli 34 (2) (a) (ii) u 34 (2) (b) (ii) tal-Mudell ta' Ligi;

Ghall-appellanti l-lodo hu impunjabbli skond ir-rimedji disponibbli f'dawn l-ahhar imsemmija disposizzjonijiet ghal raguni illi huma ma thallewx iressqu l-kaz taghhom [Artikolu 34 (2) (a) (ii)] u, ukoll, ghaliex id-decizjoni ta' l-arbitragg hi konfliggenti ma' l-ordni pubbliku ta' l-Istat [Artikolu 34 (2) (b) (ii)]. Evidentement, kemm jekk ezaminati *singulatim* kemm ukoll jekk f'kombinazzjoni ma' l-Artikolu 18 tal-Mudell ta' Ligi jew l-Artikolu 58 (b) ta' l-Att, ghal liema jalludu l-partijiet, il-konkluzjoni precipitata minnhom hi wahda ta' ipotesi li fil-procediment ta' arbitragg ghandu jithares il-principju ta' smigh xieraq b'mod li jkun konsentit lil kull parti l-izvolgiment dijalettiku tad-deduzzjonijiet jew tal-kontro-deduzzjonijiet u dan matul il-kors shih tal-process. In essenza, dawk id-disposizzjonijiet jirriaffermaw, mod jew iehor, il-principju inderogabbli tal-kontradittorju, ben konoxxut in kwantu ta' ordni pubbliku. Huwa propju minhabba dan illi l-istess

principju hu impost bhala limitu ghall-attivita` decizorja u hu deducibbli bhala motiv tat-twarrib tad-decizjoni jew jinstab li tezisti vjolazzjoni tal-precett kontenut f'dawk id-disposizzjonijiet;

Kif risaput, ghall-accertament dwar jekk tezistix vjolazzjoni ta' dik in-natura u portata hu necessarju li wiehed jifli l-argomenti li fuqhom hi fondata d-decizjoni u dan biex minnha jigi ricerkat jekk il-parti li tavvanza l-lanjanzi kellhiex, jew le, il-possibilita li tiddiskuti fuq fatti u cirkostanzi li mill-ezami kritiku taghhom tkun skaturiet ir-*ratio decidendi*. Fuq kollox, jekk l-appellanti rnexxielhomx jikkontrapponu elementi argomentattivi qawwija u perswasivi li kapaci jinducu lil din il-Qorti ghall-konvinciment divers;

Qabel xejn ta' min jippremetti l-prospettazzjonijiet fl-argoment sottomess mill-appellanti u li jidher li huma artikolati b'din id-dikotomija. Minn naha l-wahda huma jissuggerixxu illi tissussisti l-inkombenza istruttorja sollevata mill-istess Tribunal fejn dan ikkwalifika l-pretiza taghhom bhala wahda ta' "*specific performance of an obbligation to provide disclosure*" u li allura dwarha, skond huma, ma nghatawx il-possibilita li jkunu edotti minnha bil-konsegwenza li ma tqeghdux in grad li jifformolaw il-konkluzjonijiet u d-difizi finali taghhom dwarha. Fl-istess waqt, mill-banda l-ohra, huma jisottomettu wkoll illi l-Arbitri ommettew li jikkonsidraw fil-konkret il-kwestjoni, ghalihom determinanti, minnhom deferita lill-istess Arbitri bi claim 3 (a) esposta fl-Istatement of Claim, ossija dik "*as to whether Respondents had failed to provide access to information and documentation required for audit and reconciliation purposes*", bil-konsegwenza illi, allura, l-Arbitru ma zammewx ruhhom fil-limiti tal-kontenut ta' l-inkariku ricevut;

Il-Qorti jkollha tistqarr illi hi kemm xejn wahda perplessa b'din l-impostazzjoni fl-argoment ta' l-appellanti ghaliex difficilment tista' tintravvedi l-ko-ezistenza ta' allegata

ommissjoni ta’ xi punt deciziv u ta’ allegata ultra petizzjoni. B’danakollu, bhala parti mill-kompitu taghha l-Qorti xorta wahda behsiebha tirriezamina l-lodo biex tassikura jekk verament tezistix l-interpretazzjoni l-wahda jew l-ohra;

Hi l-fehma ponderata ta’ din il-Qorti illi l-lodo huwa wieħed car, elaborat u akkurat fuq il-punt taht konsiderazzjoni. Minnu jinzel illi bhala parti mill-ezercizzju tal-konsiderazzjoni tal-kwezit post lit-Tribunal mill-kumpanija appellanti dan htieglu jezamina l-kontenut ta’ l-*agency contract* bejn il-partijiet u in partikulari jekk kienx hemm da parti ta’ l-appellati ksur ta’ xi patt tieghu. Jirrizulta, fuq l-evalwazzjoni ta’ l-istess Tribunal illi bhala materja ta’ obbligu kontrattwali “*Respondents were contractually bound to disclose documents*” (para. 47) u, specifikatament, “*invoices supporting entries of services entered into the computer software envisaged in the MLS-OPM*” (para. 51). Finalment, it-Tribunal iddetermina illi hu ma kien xejn konvint mil-linja difensjonali tar-Respondents fuq din il-materja (para. 55) u ghadda biex iddecieda illi dawn kienu “*in breach of their obligations to disclose documents as set out in paragraph 7 of the MLS-OPM throught the period between 1 April 1999 and 30 March 2004 for ship-husbanding services ...*” (para. 56);

Kif taraha din il-Qorti, huwa lampantement ovvju mill-ispunti premessi estratti mil-lodo illi t-Tribunal ma naqasx milli jikkonsidra u jitratta l-kwezit lilu sottomess mill-appellanti fit-termini ta’ l-Istatement of Claim, u dan wara li ppresta debita attenzjoni lid-djalettika processwali tal-partijiet quddiemu. L-Arbitri la eccedew il-mandat taghhom, la estendew il-pronuncjament taghhom ghal xi kwezit estraneju ghal dak lilhom devolut, u wisq anqas hallew insoluta xi kwestjoni partikolari, oggett ta’ l-arbitragg. Taht dan il-profil mhix accettabbli c-censura ta’ nuqqas ta’ korrispondenza bejn il-mitlub u d-deciz. Pjuttost, il-Qorti ssib illi, fil-kumpless, l-Arbitri qaghdu fil-limiti ta’ l-inkariku ricevut u ma ddecidewx ‘il barra minn dak lilhom espressament jew implicitament sottomess;

Irid jigi sottolinejat imbaghad illi l-osservanza tal-principju ma’ liema jappiljaw l-appellanti, anke bir-rikorrenza ghall-kazistika tal-Qrati Inglizi, ma jimplikax illi l-partijiet ghandhom ikunu edotti mill-elementi ta’ valutazzjoni u ta’ l-argomentazzjoni li l-Arbitri, purke dejjem fil-parametri tal-mitlub, ikunu ser jintendu jadottaw ghab-bazi tal-gudizzju taghhom. Dan ghaliex dik l-istess valutazzjoni tibqa’ dejjem prerogattiva taghhom rientranti fil-poter diskrezzjonali prudenti affidat lil kull tribunal;

Ic-cirkostanzi ezaminati u approfonditi jwasslu lil din il-Qorti ghall-konkluzjoni unika illi fil-kaz in ispecje l-lodo ma jirrikorri fl-ebda vizzju ta’ nullita u, konsegwentement, tat-twarrib tieghu kif hekk pretestwosament ippostulat mill-appellanti. Anke jekk forsi l-Qorti ser tirrikorri f’ripetizzjoni, mil-lodo *de qua* hu sew individwat l-oggett tal-kontroversja deferita lill-Arbitri f’rapport mal-prospettazzjoni tat-talbiet u tad-difizi tal-partijiet li ppromwovew il-gudizzju. Agguntivament, il-Qorti hi sodisfatta wkoll illi dawk l-istess talbiet u difizi gew ivvalutati u motivati kif imiss u fir-rispett shih tal-principju tal-korrispondenza bejn il-mitlub u d-deciz. Mhux allura ghal din il-Qorti li taccetta l-kritika ta’ l-appellanti ta’ l-ezistenza ta’ karenzi fil-lodo kemm taht dan l-aspett, kif ukoll taht l-aspett l-iehor ventilat ta’ ksur tal-principju ta’ smigh xieraq. Verament ma jidherx li jezisti kaz fejn il-parti sokkombenti f’gudizzju ma tippretendix li giet kommessa ingustizzja jew pregudizzju fil-konfront taghha. Dan, pero, mhux necessarjament u bilfors ghandu jitrasmoda f’aggravju ta’ lezjoni tal-principju ta’ gustizzja naturali.

Ghal motivi kollha su-affermati din il-Qorti qed tichad l-appell fid-diversi impunjattivi tal-lodo Arbitrali u konsegwentement tikkonferma l-istess lodo, bl-ispejjez ta’ din il-procedura kontra s-socjetajiet appellanti.

< Sentenza Finali >

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