MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF
PHILIP SCIBERRAS

Seduta tad-9 ta' April, 2010

Appell Civili Numru. 32/2009

Alpha 22 Limited u MLS-Multinational Logistic Services Limited

vs

Hasan Akincioglu u Antmarin Inc

Il-Qorti,

Fit-22 ta' Settembru, 2009, it-Tribunal Arbitrali fic-Centru Malti ta' l-Arbitragg ippronuncja s-segwenti decizjoni 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 Contracts") whereby

Respondents were to provide ship-husbanding services to Claimants in a number of ports listed in the contracts.

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 Contracts, Respondents challenged the Tribunal'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, three, namely Messrs Sassower, Goksel and Togay, failed to attend and the parties agreed at the hearing that witness statements previously filed by these three gentlemen 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, Teoman and Yazoglu, all called by Claimants and from Mr Akincioglu, one of the Respondents to this reference. All these witnesses had previously filed witness statements which were before the Tribunal in evidence. During Mr Teoman's oral evidence, it transpired that Counsel for Claimants had passed to Mr Teoman the witness statement previously filed by Mr Akincioglu. On objection being made by Counsel for the Respondents, the Tribunal rejected Respondents' Counsel's request that Mr Teoman's witness statement be ruled inadmissible but ordered Counsel for the Claimants to desist from asking questions of Mr Teoman on the basis of the disclosed part of Mr Akincioglu's witness statement.

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 Contracts, 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: USD4,420,000. 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 Three contracts were before us in evidence in this reference. In broad terms, all three contracts set out ship-husbanding services which Agents were to provide to the Principal, in stipulated ports over a specified period, in connection with the Principal's provision of services in the Mediterranean to the United States Navy. The first contract, dated 15 March 1999, was between MLS -Mediterranean Logistic Services Ltd, as Principal on the one part and, as Agent on the other, Mr Hasan Akincioglou and Antmarin Pazarlama Denizcilik Ltd. This contract covered the port of Akzaz (also known as Marmaris) in Turkey ("the Akzaz/Marmaris contract"). A contract between the same parties was concluded on the same date

covering the port of Antalya, again in Turkey ("the first Antalya contract"). Both of these contracts were, in all relevant respects identical and, under clause 8.1 of each contract, they were to terminate exactly one year later, i.e. on 31 March 2000. The third contract, again for the port of Antalya, was for a different period, i.e. for one year between 1 April 2001 and 30 March 2002 ("the second Antalya contract"). Significantly, the second Antalya contract contained a clause, clause 1.8, which did not appear in either of the other two contracts: the full text of that clause appears presently in this Award.

17 Claimants pointed to three contractual clauses, namely clauses 1.2, 7.2 and 1.8, which were particularly relevant to its claims; these clauses are set out in full here.

18 The Akzaz/Marmaris contract and both the first and second Antalya contracts 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 all three Subject Contracts by clause 12.4, which made the OPM "an integral part" of the Subject Contracts. 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 Contracts:

"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 to MLS 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 Akzaz/Marmaris contract and both the first and second Antalya contracts contained the following clause 7.2, 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, both of which were referred to prominently in the Claimants' written submissions, the second Antalya contract also contained the following clause, clause 1.8, which read in full:

*"**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 co-operate 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 Contracts 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, which appeared in all three contracts, 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 All three contracts 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 2005 in all the ports covered by the Subject Contracts and in other Turkish ports visited by American naval vessels even beyond 2002, i.e. even beyond the date on which the second Antalya 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.

25 It was also common ground between the parties that on 9 February 2005, that is to say five months prior to the declaration of arbitration under this reference, the Respondents informed the Claimants by e-mail addressed to MLS (Multinational Logistic Services) Ltd, that Antmarin Inc, the second Respondent, would no longer be acting as "sub-agent (contractor of MLS Ltd) at the ports of Antalya, Aksaz, Mersin and other southern Turkish ports effective from 31 March 2005."

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 Contracts was a company called MLS - Mediterranean Logistic Services Ltd. The Respondent Mr Akincioglou 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 Akincioglou, 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 USD 1,500,000.

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 USD2,920,000.

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 Contracts?

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 Contracts, 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?*** We had put before us in evidence three contracts, one for the Port of Akzaz and two others for the port of Antalya. We were told by Mr Akincioglou, however, that Marmaris and Akzaz were two names for the same port; it was clear from Mr Akincioglou's e-mail of 9 February 2005 terminating ship-husbanding services for MLS (Multinational Logistic Services) Ltd that Respondents had been providing such services also at ports not covered by the Subject Contracts, namely "...Mersin and other southern Turkish ports..." These assertions were neither denied nor contested by Claimants

40 ***For how long?*** The Subject Contracts were each for a fixed period: the one for Akzaz for the period between 15 March 1999 and 31 March 2000; the two for Antalya respectively for the same period as the contract for Akzaz, and for the period between 1 April 2001 and 31 March 2002. 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 February 2005. At the merits stage of this reference, some effort was made by the Respondents to persuade us that any services they provided to the Claimants outside the strict time confines of the Subject Contracts were provided as general and customary ship's agents on an *ad hoc* basis. We were unpersuaded by this suggestion, for which no expert evidence of custom was provided. The Respondents clearly provided services outside the periods provided for in the Subject Contracts through the same software and under the same procedures as they had done during the periods of the Subject Contracts. Moreover, we found it instructive that on 9 February 2005, Mr Akincioglou terminated the second Respondent's (Antmarin's) relationship with MLS in terms which indicated a contractual relationship: "...will not be acting as sub-agent (contractor) of MLS Ltd...", with similar language being used in an e-mail to the US Navy two days later: "..we have submitted our termination notice to MLS Ltd, as being their sub-contractor at Southern Turkish ports..."

41 For these reasons, we **find** that the agency relationship between Claimants and Respondents covered Antalya, Akzaz, Mersin and all Southern Turkish ports in which Respondents actually carried out ship-husbanding services for the Claimants between 15 March 1999 and 31 March 2005, i.e. the date on which that relationship was terminated by the Respondents by e-mail of 9 February 2005.

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 1.5 million in damages in respect of the first and for USD2.92 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 USD4.42 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 Contracts; "other applicable law"; an Agent's general duty to account under general international agency practice; and the agency relationship as recorded in the Subject Contracts themselves.

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 Contracts 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 legal advisers, who should safely be assumed to be *parti pris.* Third, we found the reliance on expert evidence as to the public law responsibilities under Turkish fiscal and corporate law to retain records mildly unhelpful. This was a claim for private law remedies by Claimants against Respondents bound together by a contract governed by English law: our task is to decide that commercial dispute not to assist Claimants in policing Turkish fiscal or corporate legislation.

46 This brings us to the terms in the Subject Contracts themselves: did these contracts expressly contain the duties on which Claimants rely? The answer of the Tribunal is that they

clearly did - and we so **find.** All three contracts contained the obligation to return property, in clause 9.5. All three contracts also incorporated, at clauses 1.2 and 12.4, the MLS-OPM which, at paragraph 7 clearly established a disclosure procedure. The second Antalya contract also expressed the duty to disclose in clause 1.8, a clause which we were persuaded simply highlighted a duty already imposed through the incorporation of the MLS-OPM into the Subject Contracts. These terms - clauses 1.8 and 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 periods expressly covered by the Subject Contracts. 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 Contracts.

47 For these reasons, we **find** that the Respondents were contractually bound to disclose documents as set out in clause 1.8 and paragraph 7 of the MLS-OPM throughout the period between 15 March 1999 and 31 March 2005 for ship-husbanding services provided by the Respondents in the ports of Antalya, Akzaz, Mersin and all Southern Turkish 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 These findings are 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 Contracts ought to be made. Given our view that clause 1.8 of the Subject Contracts and 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 Contracts between 1999 and 2005. 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 took the view 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 only example of invoices provided to MLS was one provided by a company with which the Respondents were closely associated. 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 Contracts 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 the Respondents' explanations -in essence that the items of property were of no commercial value - compelling: 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 clause 1.8 and paragraph 7 of the MLS-OPM throughout the period between 15 March 1999 and 31 March 2005 for ship-husbanding services provided by the Respondents in the ports of Antalya, Akzaz, Mersin and all Southern Turkish ports in which 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 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 Contracts? 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 Contracts? 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 Contracts?

58 The Claimants did quantify their damages: USD 1.5 million in respect of non-disclosure of documents and USD2.92 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 five* 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 Contracts 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 USD500,000.*

*"**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 1,500,000, 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 Contracts, 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":* 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 Contracts.

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 Contracts. 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 Contracts, 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 Contracts. 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 Jurisdiction, 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] that the agency relationship between Claimants and Respondents covered Antalya, Akzaz, Mersin and all Southern Turkish ports in which Respondents actually carried out ship-husbanding services for the Claimants between 15 March 1999 and 31 March 2005; and

[c] that the Respondents were contractually bound

[i] to disclose documents as set out in clause 1.8 and paragraph 7 of the MLS-OPM throughout the period between 15 March 1999

and 31 March 2005 for ship-husbanding services provided by the Respondents in the ports of Antalya, Akzaz, Mersin and all Southern Turkish 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 clause 1.8 and paragraph 7 of the MLS-OPM throughout the period between 15 March 1999 and 31 March 2005 for ship-husbanding services provided by the Respondents in the ports of Antalya, Akzaz, Mersin and all Southern Turkish ports in which 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 Contracts.

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's 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.**"**

L-appell tar-rikorrenti huwa identiku ghal dak ta' l-appell fl-ismijiet "Alpha 22 Limited *et* -vs- Ciampaolo Lonzar *et*", (International Arbitration Numru 830/2006), kontestwalment deciz. Fih ukoll l-appellanti qeghdin jitolbu r-revoka ta' l-Arbitragg Numru 829/2006 bl-istess serje ta' aggravji f'dak l-appell l-iehor sottomessi;

A skans ta' ripetizzjoni din il-Qorti jidhrilha li jkun sufficjenti ghall-iskop u rizoluzzjoni tal-prezenti appell illi taghmel applikabbli *mutatis mutandis* l-istess konsiderazzjonijiet minnha zvolti f'dak l-appell l-iehor fuq imsemmi.

Ghal motivi espressi fl-appell fuq indikat din il-Qorti qed tichad l-appell prezenti u tikkonferma l-lodo, bl-ispejjez tal-prezenti appell jibqghu ghall-istess ragunijiet konsiderati f’dak l-appell l-iehor (Numru 31/09) a kariku tas-socjeta` appellanti.

< Sentenza Finali >

----------TMIEM----------