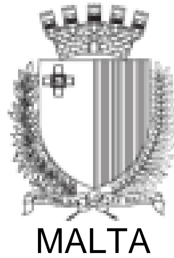

MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF
GINO CAMILLERI

Seduta tat-22 ta' Novembru, 2012

Appell Civili Numru. 11/2012

Gasan Enterprises Limited (C467)

vs

Integrated Business Systems Limited (C18440)

Il-Qorti

Fl-10 ta' Jannar 2012 il-Bord tal-Arbitraġġ iddecieda l-Arbitragg numru 1534/08 LCP fil-kaz fl-ismijiet "Gasan Enterprises Limited (C467) vs Integrated Business Systems Limited (C18440)" f'liema decizjoni intqal kif gej:-

The Claim

In its Statement and Notice of Arbitration submitted to the Malta Arbitration Centre (hereinafter referred to as the

"Centre") on the 2 June 2008 Gasan Enterprises Limited (hereinafter referred to as the "Claimant") claimed that:

Claimant had two very important deadlines to meet, that is June 2007 by which time it was necessary to implement the dual pricing system and subsequently, 1 January 2008 by which date Malta was to be officially part of the euro zone and accordingly all business had to be transacted in Euro;

Claimant considered various software products available on the market at the time. The decision was taken to opt for Microsoft Navision Software system which was supplied locally by Integrated Business Systems Limited as their supplier since they undertook to customise the product to Claimant's needs and to transfer prior existing data. As a matter of fact the Microsoft Navision was more expensive than other similar products available on the market.

In October 2006 a Software Sales and Service Agreement was signed between the Claimant and Respondent, for the installation, development and implementation of a software product, namely Microsoft Dynamics – NAV Version 4 SP 3 for the Automotive Section;
In terms of the Project Plan annexed to the said Agreement, the Go-Live date should have been 19 weeks after the 19 October, that is, on or about the 5 March 2007;

In accordance with the progressive payment scheme as set out in Appendix 3 to the Agreement, Claimant paid to the Respondent a deposit on signing of the said Agreement, amounting to twenty four thousand one hundred and eighty seven Euros cents (EUR 24,187.88) (equivalent to Lm10,383.74);
The deadline of 5 March 2007 was extended to 31 March 2007 by mutual agreement so that the project could start on 1 Aprl 2007;
This date was not met and the dealine was extended to "go live" on the 14 May 2007;

Nothwithstanding that Respondent did not meet the 14th May 2007 deadline, another attempt to come to an amicale solution was amde and for this purpose Claimant granted a further extension to Respondent tot he 11th June 2007;
This extension would have given Claimant four (4) days within which to carry out the conversion of date from the existing BULL 7000 System to the newly acquired system. This demonstrates the short time frames within which the Claimant were forced to operate;

This nothwithstanding, Respondents defaulted yet again and Claimant travelled to Italy in order to ascertain whether date would eventually be imported into the new Software System;

At this point Claimant decided to bring in Microsoft directly and for this purpose a meeting was held at Microsoft Offices, Malta, on the 4th July 2007, wherein Respondents agreed to commit themselves to the date of 20 July 2007, then 27 July and then again 3 August 2007. A meeting was held at Gasan premises on the 3rd August whereby we agreed that testing would be done on the 10th August (Microsoft Representative was also present at the 3/8 meeting);

On the 10th August 2007 a meeting was convened between Mr Tim Camilleri from Respondent company and Mr David Wallbank and Mr Michael Borg Costanzi from Claimant Company. During this meeting Respondents' attempts to demonstrate the new system failed. Within minutes Claimant had identified various flaws int eh system. Mr Tim Camilleri as a representative of Respondent company could not address any queries raised by Claimants. None of the propgramemrs engaged by Respondent company were present for this meeting;

This series of missed deadlines and pointless extensions proved to tbe of dteriment to Claimant's business and left Claimant in the serious predicament of not meeting the dealines established by law for the euro conversion;

At this point, in view of the legal dealines for Euro conversion and the attendant serious consequences for Claimant's business, Claimant had no alternative other than to cotnract third parties to take all ncesaary steps to ensure that Claimant was prepared for the Euro Conversion withint he time limits establsihed by law;

By means of a legal letter dated 10 September 2007, legal councsel to Claimants called upon Repsondents to regund the sum of twenty four thousand one hundred and eithy seven Euros and eighty euro cents (EUR 24.187.88). Subsequently a meeting was convened with Respondents with a view to an amicable settlement. Howver these attempts prove to be futile;

The Claimants also sent a judicial letter to Respondents dated 12 February 2008 wherein once again they called upon them to refund the deposit. Once again respondendent fauled to refund the said amount.

On the basis of the abvoe, Claimant is seeking the following relief from the Centre:

a decleration that the Respondent is in Breach of Contract;

Consequent thereto that Respondent be ordered to regund to Claimant the deposit made in the sum of twenty four thousand and one hundred and eighty seven euros and eighty eight euro cents (€24,187.88), equivalent to Lm10,383.74 together with interest and expenses;

That Respondent be ordered to pay claimant legal costs of representation, including those of the judicial letter dated 12 February 2008; and

The liquidation of damanges that are to be paid by responent to claimant.

The Defence

Integrated Business Systems Limited (the "Respondent") replied to the claim through its Statement of Defence drafted in the Maltese language wherein t held that:

There are no procedural pleas and the arbitration can be determined in relation tot he merits of the case;

The dealines agreed to between the parties for the implementation of the project were not met due to various factrs that were not withint he contraol of Respondence, including thefact that the date migration took long to take place as a result of problems int he quality of thedate;

The reasons for delay in iplementation are technical and complex and, without needing to say mych at this stage, Respondent contests taht the Claimant had a right to terminate the agreement and hole Respondent liable;

Respondent submites that the Arbitrator should conclude that the dealy was not their fault and, consequently, they ahve a right to expect full payment for the services according to the agreement.

On the basis of the abvoe, Respondent submitted that teh Arbitrator should reject the claim brought by Claimant with expenses against the same Claimant.

For sake of clarity the Arbitrator points out that Respondent did not submit a counter-claim in these proceedings.

Considerations

Jurisdiction, competence and preliminary pleas

The parties submitted tot he jurisdiction and competence of the Arbitrator and no preliminary please were raised by Respondent. Hence the considerations of the Arbitrtoar in this award will be limited to the facts on the merits of the claim.

The Merits and the Claim

Claimant asserts that the parties tot hese procedings entred into a Software Sale and Service Agreement (the "Agreement") in October 2006. Altough the Agreement submitted by Claimant and marked as Document "GEL1" is stated to ahve been entered into on "this day of 2004" (vide opening paragraph on p.2) and later on to have been "made and signed in duplicate ... this day of 2006" (vide closing paragraph on p.8) there is no contestation by Respondent to the fact asserted by Claimant that the Agreement was in fact entered into in October 2006 and that the Agreement was binding ont he Parties.

Another uncontesed fact is the payment that was made by Claimant to Respondent upon signing of the Agreement of the 33% of the contract price, amounting to the sum of twenty four thousand and one hudnred and eighty seven Euros and eighty eight Euro cents (Euro 24,187.88) in accordance with the progressive payment shceme set out in Appendix 3 to the Agreement.

Claimant further submits that the deadline imposed on the Respondent under the Project Plan annexed to the Agreement as "Appendix 2", namely the Go-Live Date of 19 weeks from the 19 October 2006 was extended by mutual consent of the parties on various occasions. With respect to the last agreed deadline, in the words of Claimant "a meetingwas held at Microsoft Offices, Malta, on the 4th July 2007, wherein Respondents agreed to commit themselves to the date of 20 July 2007, then to 27 July and then again 3 August 2007. A meeting was held at Gasan premises on the 3rd August whereby we agreed that testing would be done on the 10th August (Microoft Representative was also present at the 3/8 meeting.)"

Therefore, on admission of Claimant, Claimant consented to a deadline that would not have made it possible for Claimant to reach its intended target of June 2007, which Claimant submits was a "very important deadline [for Claimant] to meet ... by which time it was necessary to implement the dual-pricing system [imposed by law in view of Malta's adoption of the Euro currency]."

Consequently it is the opinion of the Arbitrator that any allegation by Claimant to the effect that Respondent is liable for Claimant's impossibility to meet its June 2007 deadline cannot be upheld.

Claimant goes on to submit that, notwithstanding the said extension of the "Go'Live Deadline", Respondent failed tdeliver the product. In fact Claimant submits that when a demonstration was carried out on the 10th August 2007, in accordance witht he verbal agreement reached on the 3 August 2007, the system fauled and a number of flaws were identified int he system and these could not be addressed by the Respondent's representative, i.e. Mr Timothy Camilleri, who was present for the meeting. As a result of this further failure by Respondent to meet the established dealine imposed on Claimant by law and which was getting nearer at this stage with the prospect of serious consequences upo failure to meet such deadline, Claimant submits that it had no option but to contract third parties to deliver the services which Respondent had been contracted to deliver, thus terminating the Agreement.

There can be no doubt that the evidence produced int hese proceedings clearly shows that up to August 2007 Respondent was nowhere near performing the obligations undertaken by virtue of teh Software Sales and Service Agreement. Altough from th evidence it is clear that the Claimant agreed to a number of xtensions beyond the original areed deadline of 5 March 2007, and that consequently no argument can be raised by the Claimant in this respect on account of the agreement to grant such extensions, it is, however, relevant to point out that up to the point when various extensions were being granted for the Respondent to complete the project between Marcha nd June 2007, Respondent did not at any material time during such period inform Claimants that they were not in a position to complete the project within the agreed timedgrame and statutory deadlines which were of concern tot he Claimants. Nor did the Respondent justify such delay due to any reasons whichwere attricutable to the Claimants. This state of affairs is further confirmed by

the fact that at no stage did the Respondent send Claimant any notice pursuant to articile 4.2 of the Agreement which provides:-

"The Contractor shall forthwith inform the Customer in writing int he event that the implementation of the Project is delayed for reasons imputable to the Customer, an in any such case the Contractor shall in no way be responsible for the consequences of any such delay."

Consequently and whilst it can be argued, on the one hand, that any delay beyond the original March 2007 dealdine was accepted by the Claimant, it is also relevant to point out that such extensions were granted by the Claimant in good faith and in the knowledge or expectation that Respondent could delvier and complete the project within ar easonable byt extended time frame absent any reason or indication that the Repsondenct would not be in a position to completed the project within a reasonable time beyond the agreed deadline.

But despite various other extensions between March and June 2007 which did not yield any substatinal progress towards the completion of the project, Claimant decided to bring in Microsoft directly into the picture and meetings were held at Microsoft Offices ont he 4th July during which meeting Respondent agreed to a new deadline of 20th July 2007, then to 27th July 2007 and subsequently to the 3rd August 2007. During a meeting held on the 3rd August 2007, the parties agreed that testing would be carried out on the 10th August 2007. But during such meeting the new system did not perform and the Claimant could immediately and readily identitfy a number of shortcomings int he system.

Respondent has submitted that the meetings held on the 10th August 2007 was not intended to be a "User Acceptance Test Meeting" and could ot therefore have formed the basis for any decision to be taken by Claimant to terminate unilaterally the Agreement. It is relevant to point out, however, that in an email dated 8th August 2007, Timothy Camilleri informed David Wallbank:-

"As agreed, we eill be coming round later this morning to restore the Gasan database on your server. This will take a few hours. We plan to commence User Acceptances testing tomorrow morning on Parts Management toeghether eith you and your staff. Once there, believe we should also take the opportunity to set dated for the remainder of the project, namely user training, data migration and go live."

In his reply to this email, David Wallbank states:-

"Further to our conversation of yesterday I would like to confirm that we had requested in our email of 12.06.2007 still has to happen before we can commence any UAT. Also we would need to restore data as a June 2007 to test how long the actual export of date will take and use that date for testing purposes."

It is clear therefore that apart from the fact that the parties were not really n the same wavelength as to the status of the project and possible completion dates, nevertheless in the eyes of Timothy Camilleri, some sort of User Acceptance Testing in connection with the Parts Management was intended to be made on the 10th August 2007.

Whatever the nature of the aid meeting held on the 10th August 2007, the system was not performing adequately when demonstrated to the Claimant and even if one were to accept the submission of the Respondent that the 10th August meeting was not in fact User Acceptance Test Meeting, there was every indication during such meeting that Respondent was not yet in a position to deliver the system as required by the Claimant and that further input would be required by the Respondent with obvious and necessary delays. This in the view of the Arbtirator constituted sufficient justification for the Claimant to terminate the Agreement, given the iminent and statutory Euro changeover in January 2008, a termination which in the light of the evidence cannot be said to have been taken for unjustified, capricious or unreasonable reasons.

It is relevant to point in this cotnext that in commercial contracts, the implied resolutive condition produces the dissolution of the contract ipso jure and that there would be no basis at law for the Respodnent to have claimed and entitlement to be afforded time to clear such delay. (Art 117 of the Comemrcial Code).

The Panel has carefully considered the evidence produced by the Respondents to determine whether there was any reason which could justify such delay on its part, particularly any reasones which could be attricuted to the Claimant, but finds that the evidence does not support the line of defence of the Respondnet. If at all an on the basis of the evidence given by David Galea who was a programmer employed by the Respondent between January 2005 and January 2008, the reason for such delay and, failure to deliver the system was due to the fact that "... more experiences developers who could understand and build the date ports – the date transfer routines" were required and that moreover at the stage when the Respondent submitted its proposal to the Claimant, the development stage was short in comparison with what was really needed when the design was made. The witness moreover confirmed that the Claimant provided the Respondent with any required documentation of information he confirmed that such data was always given within a reasonable time.

Liquidation of Damages

From the evidence produced by the Claimant, it would appear that the a claim is being made in respect of reimbursement of the depoist paid on contract in the sum of EUR. 24,187.88 together with damanges incurred consisting of travel expenses incurred in connection with the trip to Italy to convert the data and incremented costs incurred in connection with the appointment of an alternate supplier. Neverthelss the Arbitrator notes that no evidence has been submitted by the Claimant to quantify such expenditure and in the absence of any such

evidence, the Arbitrator is not in a position to liquidate any such damanges claimed.

Conclusion

For all the above reasons the Arbitrator finds in facour of the Claimant and whilst rejecting the defences of the Repsondent, declares that:-

The respondent acted in breach of contract;

Orders the respondent to pay and reimburse the Claimant the sum of EUR 24,187.88 with interst from the date of service of the judicial letter of the 10th September 2007;

Denies the Claimant's demand to liquidate pecuniary losses incurred by the Claimant;

Costs to be borne by the Respondent.

Is-socjeta' intimata Integrated Business Systems Limited qed tappella minn din id-decizjoni u fir-rikors tal-Appell taghha gie sottomess:-

Illi s-socjeta' appellanti bieghet u trasferiet a favur tas-socjeta' appellata sistema tal-informatika ossia *Microsoft Navision Software* flimkien mal-licenzji relattivi. Inoltre, l-istess socjeta' appellanti obbligat ruhha illi tipprovdi a favur tas-socjeta' appellata dawk is-servizzi konnessi mal-installazjzoni u modifikazzjoni tas-sistema surreferita, u dan ai termini u skond il-kondizzjonijiet maqbula bejn il-partijiet fis-*Software Sale and Service Agreement* iffirmat bejn il-partijiet f'Ottubru 2006;

Illi s-socjeta' appellata hallset lis-socjeta' appellanti s-somma ta' erbgha u ghoxrin elf, mija u sebgha u tmenin Euro u tmienja u tmenin centezmu (€ 24,187.88), liema somma tirraprezenta hlas parzjali tas-sistema tal-informatika ossija *Microsoft Navision Software*, inkluzi l-licenzji relattivi, u tas-servizzi konnessi mal-installazzjoni u implimentazzjoni tal-istess;

Illi ftit wara l-iffirmar tas-*Software Sale and Service Agreement* is-socjeta' appellanti debitament ikkunsinnat is-software u licenzji relattivi u bidet il-process ta' installazzjoni u implimentazzjoni tal-istess;

Illi ftit wara l-iffirmar tas-*Software Sale and Service Agreement* is-socjeta' appellanti debitament ikkunsinnat is-software u licenzji relattivi u bidet il-process ta' installazzjoni u implimentazzjoni tas-sistema skond it-termini tal-istess ftehim;

Illi ghar-ragunijiet illi l-Arbitru kellu l-opportunita' shiha illi jiskontra, l-implimentazzjoni tas-sistema ma gietx kompletata entru t-terminu miftiehem, u konsegwentement is-socjeta' appellanti unilateralment itterminat il-kuntratt vigenti bejn il-partijiet, ossia s-*Software Sale and Service Agreement*;

Illi permezz ta' *Notice of Arbitration* u *Statement of Claim* ipprezentati mis-socjeta' appellata nhar it-2 ta' Gunju 2008, l-istess socjeta' appellata talbet, ghar-ragunijiet moghtija fl-istess *Notice of Arbitration u Statement of Claim*, is-segwenti:-

Declaration that respondents are in breach of contract;

Consequent thereto order respondents to refund to the claimants the deposit made of twenty four thousand one hundred and eighty seven Euros and eighty eight Euro cents [EUR 24,187.88] (Equivalent to LM 10,383.74) together with interest and expenses;

Order respondents to pay claimants legal cost of representation including those of the judicial letter dated 12 February 2008;

Liquidate an amount of damages to be paid by respondents to claimants.

Illi permezz tar-risposta taghha, is-socjeta' appellanti rriteniet is-segwenti:

Ma hemmx kwistjonijiet procedurali u l-arbitragg jista' jsir fuq il-mertu.

Fil-qosor, id-dati mifthema mill-partijiet ghall-implimentazzjoni tal-progett soggett ta' dawn il-proceduri ma ntlahaqx minhabba diversi fatturi mhux fil-kontroll tal-intimati, fosthom il-fatt illi d-data migration dam peress illi kien hemm problem bil-kwalita' tad-data.

Minhabba illi r-ragunijiet ghad-dewmien fl-implimentazzjoni huma teknici u ghalhekk kumplessi, mhuwiex il-lok f'dan l-istadju tal-proceduri illi jinghad wisq aktar hlief illi l-intimati jikkontestaw illi r-rikorrenti kellhom dritt li jwaqqfu l-kuntratt u jzommu lill-intimati responsabbli.

L-intimati formalment jindikaw illi fil-fehma taghhom l-arbitru ghandu jsib illi d-dewmien ma kienx htija taghhom u, konsegwentement, ghandhom id-dritt jippretendu hlas komplet ghas-servizzi skond il-ftehim.

Illi permezz ta' decizjoni moghtija mill-Arbitru nhar l-10 ta' Jannar 2012, l-istess arbitru ddecieda illi, ghar-ragunijiet moghtija fl-istess decizjoni:

The respondent acted in breach of contract;

Orders the respondent to pay and reimburse the Claimant the sum of EUR 24,187.88 with interest from the date of service of the judicial letter of the 10th September 2007.

Denies the Claimant's demand to liquidate pecuniary losses incurred by the Claimant.

Costs to be borne by the Respondent.

Illi s-socjeta' appellanti thossha aggravata b'din id-decizjoni u ghaldaqstant qieghda tinterponi s-segwenti appell:-

Illi l-aggravju huwa car u manifest u jikkonsisti fis-segwenti u senjatament fl-interpretazzjoni u applikazzjoni hazina tal-ligi mill-Arbitru mahtur mic-Centru Malti ta' l-Arbitragg;

Illi l-pern tad-decizjoni appellata ticcentra fuq is-segwenti konkluzjoni milhuqa mill-Arbitru:-

It is relevant to point in this context that in commercial contracts, the implied resolutive condition produces the dissolution of the contract ipso jure and that there would be no basis at law for the Respondent to have claimed an entitlement to be afforded time to clear such delay. (Art. 117 of the Commercial Code). [enfasi mizjud]

Illi l-Artikolu 117 tal-Kapitolu 13 tal-Ligijiet ta' Malta huwa marbut intrinsikament mal-Artikolu 1066 tal-Kap. 16 tal-Ligijiet ta' Malta, liema Artikolu jfisser il-kondizzjoni rizoluttiva skond is-segwenti:-

Il-kondizzjoni rizoluttiva hija dik illi, meta ssehh, tholl l-obbligazzjoni u terga' tqieghed il-hwejjeg fl-istess stat bhal kieku l-obbligazzjoni ma kienet giet qatt maghmula. [enfasi mizjud]

Din il-kondizzjoni ma twaqqafx l-esekuzzjoni tal-obbligazzjoni, izda, jekk il-grajja mahsuba fil-bkondizzjoni tigri, il-kreditur ikun obbligat irodd dak li jkun ircieva.

Illi dak l-Arbitru naqas milli josserva huwa illi s-socjeta' appellata qatt ma rrestitwiet, offriet illi tirrestitwixxi jew iddepozitat taht l-awtorita' tal-Qorti l-*Microsoft Navision Software* u l-licenzji relattivi in *idem corpus*, *in tantundem* jew *per equivalente*, liema prodotti, kif jirrizulta wkoll mill-provi migjuba quddiem l-istess Arbitru, kellhom il-valur nominali ta' tnejn u ghoxrin elf, disgha mija u wiehed u tmenin Lira Maltin (LM 22,981) ekwivalenti ghal tlieta u hamsin elf, hames mija u wiehed u tletin Euro u tlieta u tletin Euro centezmu (€53,531.33), liema ammont jeccedi ferm dak l-ammont pretiz mis-socjeta' appellata;

Illi kif inhu ben ritenut fil-gurisprudenza nostrana, il-kondizzjoni rizoluttiva ggib maghha zewg effetti, senjatament *l'effetto liberatorio u l'effetto recuperatorio*. Dan iffisser illi l-hall tal-obbligazzjoni mhux talli tnehhi kwalsiasi effetti futuri tal-obbligazzjoni kuntrattata, imma

addirittura thassar kompletament l-ezistenza guridika tal-istess obbligazzjoni u tpoggi lill-partijiet f'dik il-posizzjoni li kienu jkunu fiha li kieku l-partijiet qatt ma dahlu fl-obbligazzjoni, ossia l-partijiet jigu rritornati ghall-istatus quo ante;

Illi f'dan ir-rigward, issir referenza ghas-sentenza moghtija mill-Prim'Awla tal-Qorti Civili nhar is-7 ta' Mejju, 1955 fl-ismijiet Emmanuele Falzon vs Avukat Dr Joseph A. Micallef et noe, fejn il-qorti kkunsidrat illi:

r-rizoluzzjoni tal-bejgh iggib maghha li l-kontraenti ghandhom jigu mqeghda fil-posizzjoni anterjuri ghall-kuntratt, u jirrestitwixxu lil xulxin dak kollu li jkunu rcevew bis-sahha u in konsegwenza tal-bejgh. Ir-rizoluzzjoni ghandha effett retroattiv, u, kif jinnota l-Giorgi, *la sentenza che dichiara risolto il contratto riconsce uno stato giuridico pre-esistente, e cancellando tutte le conseguenza del contratto opera 'ex tunc', non gia 'ex nunc', l'annichilimento del contratto medesimo* ghalhekk kull parti ghandha tkun restitwita *in pristinum*;

Illi fl-istess sentenza succitata, l-Onorabbli Prim'Awla tal-Qorti Civili, filwaqt illi ghamlet referenza ghall-insenjamenti ta' Luigi Mosco, irriteniet:

Ghaliex, kif josserva Luigi Mosco fil-Monografija tieghu "La Risoluzione del Contratto per Inadempimento" (pag 275) *il permanere delle prestazioni nel patrimonio degli accipienti risulta stornito di causa.* U dana r-rifless huwa necessarjament applikabbli anki ghall-venditur, f'kaz ta' bejgh; ghaliex anzi, kif jinnota Pacifici Mazzoni, *il venditore e' primieramente tenuto a restituire la parte di prezzo che avesse ricevuto, e che dopo la risoluzione non avrebbe piu' titolo per ritenere;*

Illi fil-kaz odjern, ir-rekwizit tal-Artikolu 1066, senjatament illi l-partijiet jigu rritornati ghall-istatus quo ante, zgur illi ma jistax jinghad illi gie sodisfatt bid-decizjoni moghtija u dana peress illi, filwaqt illi l-Arbitru ordna lis-socjeta' appellanti sabiex tirrifondi lis-socjeta' appellata l-ammont ta' erbgha u ghoxrin elf, mija u sebgha u tmenin Euro u

tmienja u tmenin Euro centezmu (€24,187.88), ma saret l-ebda referenza kwalsiasi ghar-ritorn *in idem corpus, in tantundem jew per equivalente* tal-prodotti mibjugha u kkonsenjati lis-socjeta' appellata fuq inkarigu taghha stess;

Illi kif ritenut minn Azala et al, fejn il-prodotti ma jistghux jigu restitwiti *in idem corpus,* bhal ma huwa l-kaz odjern, r-restituzzjoni ghandha tigi ordnata:

In tantundem se si tratto' di una prestazione di genere; e nella peggiore delle ipotesi, per equivalente se l-obligato non e' in grado di attuarla (la restituzione) in uno dei due modi predetti.

Illi fil-kaz de quo, minhabba n-natura tal-prodotti mibjugha u kkonsenjati lis-socjeta' appellata, ossija minhabba illi s-software u licenzji relattivi jkunu registrati mill-kumpannija barranija li tfornihom fuq l-utent ahhari, li f'dan il-kaz kienet is-socjeta' appellata, is-socjeta' appellata la setghet tirritorna l-prodotti *in idem corpus* u wisq anqas *in tantundem*, pero' dan ma jfissirx illi kellu jigi kompletament skartat il-fatt illi l-prodotti setghu jigu rritornati *per equivalente*;

Illi gjaladarba l-Arbitru kkonkluda illi, a bazi tal-kondizzjoni rizoluttiva tacita, l-obbligazzjoni bejn il-partijiet giet mahlula, l-istess Arbitru kellu jaccerta ruhu illi l-istess partijiet jigu rritornati ghall-istatus quo ante, u dan permezz tar-restituzioni a favur tas-socjeta' appellanti tal-prodotti mibjugha u kkunsinjati lis-socjeta' appellata;

Illi ghaldaqstant, wara l-kunsiderazzjoni ta' dak kollu premess, kien jispetta l-Arbitru illi jichad it-talba ghar-rifuzjoni tal-ammont ta' erbgha u ghoxrin elf, mija u sebgha u tmenin Euro u tmienja u tmenin Euro centezmu (€24,187.88) maghmula mis-socjeta' appellata, u dana peress illi kif jirrizulta inkontestatament mill-atti tal-arbitragg il-valur tal-prodotti mibjugha u kkonsenjati lis-socjeta' appellata bil-wisq jeccedi l-ammont mitlub mill-istess socjeta' appellata, u konsegwentement, fic-cirkostanzi tal-kaz, l-Arbitru kellu, sabiex jigu osservati r-

rekwiziti legali u procedurali tal-kundizzjoni rizoluttiva, jichad it-talba tas-socjeta’ appellata ghar-rifuzjoni, u dana sabiex il-partijiet jigu rritornati, kemm jista’ jkun, ghall-istat illi kienu fih qabel ma dahlu fl-obbligazzjoni de quo;

Ghaldaqstant is-socjeta’ appellanti, fil-waqt illi taghmel referenza ghall-provi gja prodotti kif ukoll ghal provi ulterjuri producibbli f’dan l-istadju, titlob bir-rispett lil dina l-Onorabbli Qorti sabiex joghgobha tibdel id-decizjoni moghtija mill-Arbitru fl-ismijiet premessi nhar l-10 ta’ Jannar, 2012, u konsegwentement tghaddi sabiex, ghar-ragunijiet premessi u sabiex jigi osservat ir-rekwizit tal-Artikolu 1066 tal-Kap. 16 tal-Ligijiet ta’ Malta, tichad it-talba ghar-rifuzjoni tal-ammont ta’ erbgha u ghoxrin elf, mija u sebgha u tmenin Euro u tmienja u tmenin Euro centezmu (€24,187.88), u dan taht dawk il-provvedimenti kollha li dina l-Onorabbli Qorti jidhrilha xierqa u opportuni, bl-ispejjez taz-zewg istanzi kontra l-appellati.

Is-socjeta’ appellata Gasan Enterprises Limited fir-risposta taghha ssottomettiet**:-**

Illi s-sentenza appellata hija gusta u timmerita konferma bl-ispejjez kontra s-socjeta` appellanti ghas-segwenti ragunijiet:

Qabel xejn jigi rilevat illi huwa principju ben assodat, li l-Qorti ta’ l-Appell bhala regola m’ghandhiex tiddisturba d-diskrezzjoni ezercitata mill-ewwel Qorti fl-apprezzament li hija tkun ghamlet tal-provi migbura minnha stess [Frendo et vs Agius et., Appell Civili (Sede Superjuri) Numru 863/1995] deciza fis-7 ta’ Ottubru 2008. Huwa principju stabbilit li l-Qorti ta’ l-Appell ma tiddisturbax leggerment l-apprezzament tal-provi li jkun sar mill-Qorti ta’ l-ewwel istanza jekk din il-Qorti tara li l-Ewwel Qorti setghet, legalment u ragjonevolment, tasal ghall-konkluzjoni li tkun wasslet ghaliha. Il-Qorti ta’ l-Appell, bhala norma tiddistruba l-apprezzament tal-provi li tkun ghamlet l-Ewwel Qorti jekk ikun jidhrilha, wara ezami akkurat tal-provi li tkun ghamlet, li dak l-apprezzament maghmul mill-Ewwel Qorti kien <u>manifestament zbaljat</u> b’mod li jekk jithalla jibqa’ jreggi tkun sejra ssir ingustizzja ma’ xi parti

jew ohra [John Grima vs Victor u Doris konjugi Borg, Appell Civili (Sede Superjuri) Numru 876/2001, deciza fot-28 ta' Novemnru 2008];

L-appell odjern zgur ma jimmerita l-ebda riapprezzament ghaliex is-sentenza appellata hija wahda ghal kollox korretta, gusta u attendibbli.

Is-socjeta' appellata m'hijiex sejra toqghod terga tirrepeti in dettall il-provi kollha migjuba minnha li kkonvincew lill-ewwel Qorti fuq il-pretiza taghha imma sejra tistrieh a skans ta' ripetizzjoni fuq dina l-Onorabbli Qorti sabiex tiehu konjizzjoni ta' dawn il-provi kif migbura fin-nota ta' sottomissjonijiet taghha ghal-liema qed issir pjena riferenza.

Appell improponibbli ghaliex ma hemmx punt ta` ligi

Fi kwalunkwe kaz, l-appell intavolat ghandu jigi rigettat ghar-raguni li m'huwiex ibbazat fuq punt ta` ligi. B'mod preliminari jigi ribadit il-principju li appelli minn decizjonijiet ta` arbitri fi proceduri arbitrali huma regolati mill-Att dwar l-Arbitragg (Kap 387 tal-Ligijiet ta` Malta) – ghal-liema Att hemm referenza espressa fil-kuntratt mertu tal-kawza – u senjatament fl-artikoli 70 u 70A tal-istess Att. L-artikolu 70A jghid bic-car illi f'kaz bhal dan, parti fil-procedimenti ta` l-arbitragg tista` tappella lill-Qorti biss fuq punt ta` ligi. Tali restrizzjoni timmilita konta l-validita` formali tal-appell interpost mis-socjeta` appellanti u dan ghaliex jekk wiehed jezamina sew il-fatti tal-kaz, id-decizjoni arbitrali *de quo* u d-dicitura tar-rikors ta` appell odjern wiehed ma jistax ma jasalx ghall-konkluzjoni lil hawn ma hawnx verament punt ta` ligi.

Jigi rilevat illi s-socjeta` appellanti stess donnha ntebhet b'tali fatt *stante* li pprezentat ragjunament sfurzat u mgebbed ghall-ahhar biex tipprova tohloq sembjanza ta` 'punt ta` ligi' – hekk biss jista`, bir-rispett kollu, jinftiehem l-aggravju msejjes fuq 'kundizzjoni rizoluttiva' li fuqu biss jistrieh dan l-appell odjern.
Il-konkluzjonijiet tal-Arbitru huma s-segwenti:

'For all the above reasons the Arbitrator finds in favour of the Claimant and whilst rejecting the defences of the Respondent, declares that :-

The respondent acted in breach of contract;

Orders the respondent to pay and reimburse the Claimant the sum of EUR 24,187.88 with interest from the date of service of the judicial letter of the 10th September 2007.

Denies the Claimant's demand to liquidate pecuniary losses incurred by the Claimant.

Costs to be borne by Respondent.'

Ghalhekk il-pern tad-decizjoni appellata ticcentra fuq il-ksur tal-obbligazzjonijiet pattwiti da parti ta` Integrated Business Systems Limited, cioe` is-socjeta` appellanti, u mhux kif inhuma jipprovaw jallegaw fuq kundizzjoni rizoluttiva.

Fil-verita` l-Arbitru ragunijiet dettaljat ta` kif wasal ghad-decizjoni gusta tieghu, izda dan is-socjeta` appellanti ghogobha tiskartah. Ta` rilevanza per ezempju hija s-segwenti gustifikazzjoni:

'Whatever the nature of the said meeting held on the 10th August 2007, the system was not performing adequately when demonstrated to the Claimant and even if one were to accept the submission of the Respondent that the 10th August meeting was not in fact a User Acceptance Test Meeting, there was every indication during such meeting that Respondent was not yet in a position to deliver the system as required by the Claimant and that further input would be required by the Respondent with obvious and necessary delays. This in the view of the Arbitrator constituted sufficient justification for the Claimant to terminate the Agreement, given the imminent and statutory Euro changeover in January 2008, a termination which in the light of the evidence cannot be said to have

*been taken for unjustified, capricious or unreasonable reasons.’ (*enfazi mizjud)

L-Arbitru jkompli imbaghad biex jaghti aktar motivazzjoni lid-*decide* bis-segwenti:

‘The Panel has carefully considered the evidence produced by the Respondent to determine whether there was any reasons which could be attributed to the Claimant, but finds that the evidence does not support the liine of defence of the Respondent. If at all and on the basis of the evidence given by David Galea who was a programmer employed by the Respondent between January 2005 and January 2008, the reason for such delay and failure to deliver the system was due to the fact that ‘… more experienced developers who could understand and build the date pots – the data transfer routines’ were required and moreover at the stage when the Respondent submitted its proposal to the Claimant, the development stage was short in comparison with what was really needed when the design was made. The witness moreover confirmed that the Claimant provided the Respondent with any required documentation of information he confirmed that such data was always given within a reasonable time.’

L-Arbitru ddecida billi laqgha t-talbiet tas-socjeta` attrici b’dan illi sab li s-socjeta` appellanti kienet kisret l-obbligi kuntrattwali minnha assunti bi ksur tal-principju tal-*pacta sund servanda*. Bizzejjed li wiehed jiccita s-segwenti sentenza f’dan ir-rigward, Paris Francis et vs Maltacom plc, deciza fis-7 ta` Ottubru 2004, mill-Prim Awla tal-Qorti Civili :

“Dan hu konformi mal-principju li darba bejn il-partijiet hemm ftehim li jirregola r-relazzjonijiet ta’ bejniethom, hu prezunt li qabel ma ffirmaw dak il-ftehim qiesu c-cirkostanzi tal-kaz u ta’ l-interessi taghhom, u allura darba ffirmaw il-kuntratt, huwa dak il-kuntratt li jissanzjona r-relazzjonijiet ta’ bejn il-kontendenti, u mhux xi principju iehor, ancorhe’ bazat fuq l-ekwita’. Il-principju tar-rispett ghal volonta’ tal-partijiet huwa wiehed fondamentali u dak

li ftehmu fuqu il-partijiet ghandu "forza ta' ligi" ghalihom …u l-Qorti m'ghandhiex tuza d-diskrezzjoni taghha biex tissostitwixxi ghal dak li ftehmu l-partijiet bil-volonta' taghha."

Tajjeb li wiehed jezamina wkoll u b'aktar reqqa d-disposizzjonijiet tal-ligi 'kjamati in kawza' mis-socjeta` appellanti. Nibda billi niccita l-artikolu 117 tal-Kodici tal-Kummerc (Kap. 13 tal-Ligijiet ta` Malta) li jittratta l-kondizzjoni rizoluttiva tacita:

'Fil-kuntratti kummercjali, il-kondizzjoni rizoluttiva tacita msemmija fl-artikolu 1068 tal-Kodici Civili tholl il-kuntratt ipso jure, u l-qorti ma tistax taghti zmien lill-konvenut sabiex jigi mehlus mill-mora :

Izda dan l-artikolu ma japplikax ghal kuntratti ta` proprjeta` immobbli jew ghal kuntratti ta` enfitewsi jew ghal kuntratt li l-hall taghhom, fil-nuqqas ta` wahda mill-partijiet milli thares l-obbligi taghha, jkun regolat b'ligi b'mod specjali.'

L-artikolu 117 tal-Kodici tal-Kummerc hawn fuq imsemmi jaghmel referenza ghall-artikolu 1068 tal-Kodici Civili (u mhux ghall-artikolu 1066 citat mis-socjeta` appellanti) li jghid hekk :

'Il-kondizzjoni rizoluttiva tinghadd dejjem bhala li giet maghmula fil-kuntratti bilaterali, fil-kaz li wahda mill-partijiet tonqos ghall-obbligazzjoni taghha :

Izda, f'dak il-kaz, il-kuntratt ma jinhallx ipso jure, u l-qorti tista` skond ic-cirkostanzi, taghti zmien xieraq lill-konvenut, bla hsara ta` kull disposizzjoni ohra tal-ligi dwar il-kuntratt tal-bejgh. '

In linja mal-principju '*lex specialis derogat generalis'* l-artikolu 117 tal-Kap 13 tal-Ligijiet ta` Malta ben citat mill-arbitru jiehu s-sopravvent. In fatti l-artikolu 117 tal-Kap 13 jirreferi ghall-artikolu 1068 tal-Kap 16 u jiddisponi sempliciment li f'kaz ta` kuntratti kummercjali il-kondizzjoni rizoluttiva tacita msemmija fl-artikolu 1068 tal-Kodici Civili

tholl il-kuntratt *ipso jure* – u dan hu ezattament dak li ghamel l-arbitru fil-kaz in dezamina.

Li kieku ghall-grazzja tal-argument kellha tigi attwata il-proposta tas-socjeta` appellanti li tiricievi hi xi kumpens dan ikun kaz klassiku ta` arrikiment indebitu. Is-socjeta` konvenuta ma tistax tirrikkixxi ruhha ingustament min-nuqqas taghha fl-inadempjenza tal-obbligazzjonijiet kuntrattwali minnha assunti, u dan ghaliex *'nemo debet ex alieno damno lucrari.'*

Interpretazzjoni Ristretta

Addizzjonalment ghal dak fuq premess, jigi umilment sottomess illi, regolanti kull konsiderazzjoni ta` dan l-appell, ghandu jkun hemm is-sens u destinazzjoni ta` interpretazzjoni ristretta li jikkontempla l-Kap. 387 tal-Ligijiet ta` Malta, li minnu nnifsu huwa wiehed difensiv tal-validita` ta` kull Lodo sa fejn ikun possibbli.

Minn varji artikoli, partikolarment l-artikolu 71 ta` l-Att dwar l-Arbitragg, wiehed jinnota li l-Qorti ghandha thares b'mod restrittiv lejn appelli li jsiru ghat-twarrib ta` decizjoni tat-tribunal, b'mod illi, anke jekk umilment ma ghandux ikun il-kaz fl-appell *de quo,* fejn ikun hemm xi nuqqas ta` kjarezza jew cirkostanzi simili, l-Att jikkontempla illi fejn dan huwa possibbli ghandhom jintbaghtu lura lill-arbitru sabiex jiehu l-azzjoni xierqa sabiex jigu evitati r-ragunijiet ghat-twarrib ta` decizjoni jew ghall-konsiderazzjonijiet godda.

Jerga jigi ribadit il-fatt illi kif fuq inghad din is-sottomissjoni mhux qed issir minhabba li hemm xi nuqqas ta` kjarezza jew sitwazzjonji smili fil-Lodo appellat, izda ghall-kompletezza tas-sottomissjonijiet maghmula sabiex jigi sottolineat kemm kull appell maghmul *ai termini* ta` l-Att dwar l-Arbitragg tal-1996 ghandu jigi trattat f'termini restrittivi.

Konkluzjonijiet

Jidher ghalhekk fil-kaz *de quo* ma hemmx lok ta` appell mil-lodo ta` l-arbitru u dan ghaliex jirrizulta li dan l-appell mhuwiex fondat fuq ‘punt ta` ligi.’ F’dan ir-rigward jistghu jigu mizjuda dawn l-osservazzjonijiet agguntivi minn certa gurisprudenza dwar ligijiet ohra li similment bhal f’dan il-kaz jikkoncedu dritt ta` appell fuq punt ta` ligi:

‘Is-semplici applikazzjoni tal-ligi ghall-fattijiet tal-kawza ma tikkostitwix dak il-punt ta` dritt li trid il-ligi. Hemm bzonn li tkun involuta kwistjoni ta` dritt illi l-Qorti t’Isfel, fissati l-fatti, tkun ikkunsidrat l-aspetti guridici ta` din il-kwistjoni bhala principju legali u ppronunzjat ruhha dwar dik il-kwistjoni hekk kusidrata; altrimenti kwalunkwe sentenza tkun appellabbli, ghaliex f’kull sentenza hemm applikazzjoni tal-ligi ghall-fatti’ – Francesco Borg vs Carmelo Sultana, Appell Inferjuri, 30 ta` April 1938 (Kollez. Vol. XXX PI p936).

‘Jekk Tribunal ikun sempliciment enuncja d-disposizzjoni tal-ligi ma hemmx punt ta` dritt li dwaru jista` jsir appell. Jekk pero` t-Tribunal ikun skorrettement enuncja l-principju tal-ligi u mbaghad jaqta` dik il-kwistjoni ta` fatt in bazi ghal dik l-enuncjazzjoni zbaljata allura jkun hemm sostanzjalment kwistjoni ta` dritt u l-appell jista` jsir, u l-Qorti ta` l-Appell tista` tirrevedi dak l-apprezzament ta` fatt maghmul in bazi ghall-ipotesi skoretta tal-ligi – Nikola Mallia vs Nikola Borg, Appell Civili, 20 ta` Marzu 1953 (Kollez. Vol. XXXVII PI p126).’

Certament mhux sufficjenti s-semplici kritika tad-decizjoni sfavorevoli, formulata bi prospettazzjoni ta` interpretazzjoni diversa u allura izjed favorevoli, minn dik ta` l-arbitru. Dan ghaliex talba konsimili ma tistax hlief titraduci ruhha in sostanza f’rikjesta ta` accertament ex novo tal-fatti, u dan huwa inammissibbli. Fil-kaz de quo, gjaladarba ope legis din il-Qorti mhix abilitata li tindaga ulterjorment fil-fatti probatorji, ic-censura dedotta mill-appellanti quddiem din il-Qorti fil-kontestatazzjoni tal-Lodo tal-arbitru, u in kwantu din tattjeni ruhha sic et simplicitur ghall-valutazzjoni tal-provi, ma` tista` qatt tkun ammissibbli [vide Stanley Spiteri vs Eileen Bonett, Appell Civili, 4 ta` Ottubru 2006].

Finalment, is-socjeta' appellata tissottometti bl-akbar sens ta' responsabbilta', li l-aggravji mressqa mis-socjeta' appellanti huma kollha ta' natura frivola u vessatorja u huma intizi biss biex jiddilungaw inutilment din il-vertenza ghalhekk huwa umilment awspikat li din l-Onorabbli Qorti joghgobha tinforza s-subartikolu (4) tal-artikolu 223 tal-Kap. 12 tal-Ligijet ta' Malta billi tikkundanna lis-socjeta' appellanti li thallas l-ispejjez ghal darbtejn kif hemm provdut;

Ghaldaqstant u ghar-ragunijet suesposti s-socjeta' attrici appellata, filwaqt li taghmel pjena riferenza ghall-atti processwali kollha, ghall-provi migbura u s-sottomissjonijiet maghmula, umilment titlob li dina l-Onorabbli Qorti tichad dan l-appell, bl-ispejjez taz-zewg istanzi kontra s-socjeta' konvenuta appellanti u tikkonferma d-decizjoni moghtija mill-arbitru Dr Louis Cassar Pullicino fl-intier taghha.

Rat l-atti l-ohra kollha tal-appell inkluzi l-atti tal-arbitragg numru 1534/2008, li wassal ghal dan l-appell.

Rat id-dokumenti kollha esibiti.

Semghet it-trattazzjoni tal-abbli difensuri tal-partijiet.

Rat li dan l-appell gie differit sabiex tinghata s-sentenza.

Ikkonsidrat:-

Permezz tal-imsemmija decizjoni tieghu, l-Arbitru wasal ghall-konkluzjoni li s-socjeta' appellanti Integrated Business Systems Limited kienet kissret il-kuntratt li kellha mas-socjeta' appellata Gasan Enterprises Limited, u konsegwentement l-Arbitru ordna li s-socjeta' appellanti thallas u tirrifondi lis-socjeta' appellata Gasan Enterprises Limited is-somma ta' €24,187.88 liema somma tirrappresenta d-depożitu imħallas mis-socjeta' appellata u dana bl-interessi mid-data tan-notifika tal-ittra uffiċjali tal-10 ta' Settembru 2007. Inoltre l-Arbitru ordna li l-ispejjeż jitħallsu mis-socjeta' appellanti Integrated Business

Systems Limited. L-arbitru ċaħad it-talba tas-socjeta' appellata Gasan Enterprises Limited għal-hlas tad-danni allegatment sofferti minnha.

Il-presenti hu l-appell li s-socjeta' Integrated Business Systems Limited qed taghmel mill-imsemmi lodo tal-Arbitru. L-aggravju tas-socjeta' appellanti jirreferi b'mod partikolari għal dik il-parti tad-deċiżjoni fejn l-Arbitru jghid illi "i*t is relevant to point in this context that in commercial contracts, the implied resolutive condition produces the dissolution of the contract ipso jure and that there would be no basis at law for the Respondent to have claimed an entitlement to be afforded time to clear such delay. (Art. 117 of the Commercial Code).*"

F'dan ir-rigward l-appelanti jsostnu li l-Arbitru naqas milli jinnota illi s-socjeta' appellata qatt ma rrestitwiet, offriet li tirrestitwixxi jew iddepozitat taht l-awtorita' tal-Qorti l-*Microsoft Navision Software* u l-licenzji relattivi in *idem corpus*, *in tantundem* jew *per equivalente*, liema prodotti, dejjem skond l-appellanti, kellhom il-valur nominali ta' tnejn u ghoxrin elf, disgha mija u wiehed u tmenin lira maltin (Lm22,981) ekwivalenti ghal tlieta u hamsin elf, hames mija u wiehed u tletin euro u tlieta u tletin centezmu (€53,531.33), liema ammont jeccedi b'hafna dak l-ammont li kienet hallset bhala depositu s-socjeta appellata lis-socjeta' appellanti.

Hawn ghandu jinghad li l-appellanti ma rrilevawx li l-imsemmija prodotti, jew ahjar is-software u l-licenzji, prettament m'ghanmdhomx valur kummercjali. Din waheda hi raguni valida sabiex m'ghandux jithallas lill-appellanti l-valur tal-imsemmija prodotti u lanqas parti minnu. In effett it-talba tal-appellanti mhux li jithallas lura lilhom il-valur tal-imsemmija prodotti izda t-talba taghhom hi fis-sens li huma m'ghandhomx jigu ordnati jhallsu lura d-depozitu lill-appellati.

L-appellanti jsostnu li in effett il-kondizzjoni rizoluttiva tacita ggib maghha zewg effetti, senjatament *l'effetto liberatorio u l'effetto recuperatorio*, u ċioe il-hall tal-obbligazzjoni, li mhux talli jnehhi kwalsiasi effetti futuri tal-

obbligazzjoni kuntrattata, imma addirittura jhassar kompletament l-ezistenza guridika tal-istess obbligazzjoni u jpoggi lill-partijiet f'dik il-posizzjoni li kienu jkunu fiha li kieku l-partijiet qatt ma dahlu fl-obbligazzjoni, ossia l-partijiet jigu rritornati ghall-istatus quo ante. Hu ghalhekk li l-appellanti jghidu li huma m'ghandhomx jigu mgieghla jirritornaw id-depositu lill-appellati stante li, skond huma, l-valur tal-prodotti suppliti minnhom jeccedi bil-bosta l-imsemmi depositu. Dan jindika li l-appellanti stess jgharfu li in efett il-valur tal-prodotti m'ghandux jithallas lura lilhom izda semmai m'ghandhomx jigu mgieghla jroddu lura d-depositu lilhom imhallas. In effett mhux f'kull kaz ghandu ikun hemm resitutio in integrum u li l-partijiet ghandhom jirrivertu ghall-istatus quo ante. F'certi kazijiet il-Qorti ghandha l-jedd li takkorda zmien lid-debitur biex jesawrixxi l-obbligi tieghu versu l-kreditur. F'certi kazijiet ohra, bhal dak presenti, r-risdoluzzjoni tacita ggib maghha biss ix-xoljiment tal-kuntratt.

In-natura stess tal-prodotti suppliti lis-socjeta' appellata, ċioe' software u l-licenzji relattivi li jigu registrati mid-ditta supplenti ta' barra, fuq l-utent ahhari u kwindi l-istess prodotti huma bla valur kummercjali u ghalhekk is-socjeta' appellate la setghet tirritorna l-prodotti *in idem corpus* u wisq anqas *in tantundem* u lanqas *per equivalente* peress li in effett hu impossibli li jinghata valur lill-prodotti in kwestjoni.\

Is-socjeta' appellata, fir-risposta taghha, tibda sabiex tissottmetti li l-Qorti tal-Appell ma għandhiex tiddisturba d-diskrezzjoni tal-Arbitru in partikolari ghar-rigward tal-apprezzament tal-provi maghmula minnu. Is-soċjetà appellata ukoll tissolleva il-kwestjonijiet li l-appell odjern mhux ibbażat fuq punt ta' liġi, li l-konklużjonijiet tal-arbitru jiċċentraw fuq il-ksur ta' obbligi pattwiti da parti tas-socjeta' appellanti u li l-Qorti tal-Appell trud tevalwa b'mod ristrettiv l-appelli li jsiru għat-twarrib ta' deċiżjoni tat-tribunal.

Konsiderazzjonijiet ohra

Hu ormai pacifiku li Qorti ta' revizjoni ma tiddisturbax l-apprezzament tal-provi dwar il-fatti li tkun ghamlet l-ewwel Qorti, f'dan il-kaz li jkun ghamel l-arbitru. Tali apprezzament isir mill-gdid biss jekk jirrizultaw ragunijiet validi u gravi. Fil-kaz in ezami hu zgur li ma jirrizultawx tali ragunijiet, anzi jista facilment jingħad illi ma jirrizulta xejn żbaljat fl-apprezzament tal-provi li ghamel l-Arbitru. Hu minnu ukoll li fi proceduri ta' arbitraġġ, bħalma hu l-każ odjern, jista' jsir appell minn deċiżjonijiet arbitrali fuq punt ta' liġi biss. F'dan ir-rigward jista jinghad li l-presenti appell effettivament jittratta punt ta' ligi u cioe' x'inhuma l-effetti tal-kondizzjoni rizoluttiva tacita u kif dawn ghandhom jigu applokati lill-kaz in ezami.

L-Arbitru kkonkluda illi s-soċjetà appellata kellha raġuni suffiċjenti u allura kienet iġġustifikata tittermina l-ftehim li kien hemm bejnha u s-soċjetà appellanti għaliex din tal-aħħar kisret l-obbligi kuntrattwali tagħha. F'dan ir-rigward l-Arbitru jirreferi għall-Artikolu 117 tal-Kodiċi tal-Kummerċ li jipprovdi li *fil-kuntratti kummerċjali, il-kondizzjoni riżoluttiva taċita msemmija fl-artikolu 1068 tal-Kodici Civili tħoll il-kuntratt ipso jure, u l-Qorti ma tistax tagħti żmien lill-konvenut sabiex jiġi meħlus mill-mora.* Dan ifisser illi l-ligi tal-kummerc timponi fuq in-negozjant aderenza aktar rigoruza ghall-obbligazzjonijiet kontrattwali minnu assunti b`mod illi tesigi r-risoluzzjoni ipso jure tal-kuntratti fejn wiehed mill-kontraenti jkun inadempjenti.

Jigi rilevat li fil-kawża odjerna s-socjeta appellata Gasan Enterprises Limited bħala l-parti li lejha l-obbligazzzjoni ma ġietx esegwita, għażlet illi titlob il-ħall tal-kuntratt u mhux li ġġiegħel lil Integrated Business Solutions tesegwixxi l-obbligazzjoni in toto, b'talba għar-rifużjoni tad-depożitu. Inoltre l-istess socjeta' appellata Gasan Enterprises issostni li kellha tqabbad "supplier" terz sabiex iwettaq is-servizz illi oriġinarjament kellhom jitwettqu mill-appellanti u kwindi kellha thallas ghas-servigi rezi mit-terz.

Effettivament l-Arbitru ddikjara li l-kuntratt bejn il-partijiet kien xolt minħabba inadempjenza tas-soċjetà appellanti.

Fl-opinjoni ta' din i-Qorti m'għandhiex raġun is-soċjetà appellanti ssostni li l-Arbitru kellu jiċħad it-talba tal-appellati għar-rifużjoni tal-ammont ta' erbgħa u għoxrin elf, mija u sebgħa u tmenin ewro u tmienja u tmenin ċenteżmu magħmula mis-soċjetà appellata. Kif ben tajjeb ikkonkluda l-arbitru, is-soċjetà appellanti kienet inadempienti u kwindi kienet il-kaġun tax-xoljiment tal-kuntratt. Effettivament is-socjeta' appellanti Integrated Business Solutions mhux qed tappella mis-sejbien ta' inadempjenza kontrattwali da parti tagħha u llimitat l-appell taghha fuq il-kwestjoni tar-rifuzjoni da parti taghha trad-depositu li hija thallset mill-appellati.
Kif gia rilevat hawnhekk si tratta ta' fornitura ta' *software* u l-licenzji relattivi, liema prodotti ma setgħux jiġu ritornati lis-soċjetà appellanti, u għalhekk, skond l-appellanti, l-Arbitru kellu jichad it-talba ghar-rifuzjoni tal-imsemmi depositu peress illi l-valur tal-prodotti mibjugha u kkonsenjati lis-socjeta' appellata kien bil-wisq jeccedi l-imsemmi depositu. In effett dan l-appell hu dwar dik il-parti tad-deċiżjoni tal-Arbitru li ordnat ir- rifuzjoni tal-istess depożitu. Inoltre ghandu ukoll jigi nnotat li l-valur li taghti s-socjeta' appellanti ma giex sufficjentement pruvat li hu l-valur reali tal-prodotti in kwestjoni. Il-valur li taghti s-socjeta' appellanti tal-imsemmija prodotti hu tlieta u hamsin elf, hames mija u wiehed u tletin euro u tlieta u tletin centezmu (€53,531.33). Ghandu ukoll jigi enfasizzat li l-kuntratt inhall tort tas-socjeta' appellanti. Barra minn hekk is-socjeta' appellanti naqset li tipprova li s-socjeta' appellata qed taghmel jew għamlet użu tas-software u tal-liċenzji li kisbet tramite taghha.

Finalment ghandu jinghad li t-talba tas-soċjetà appellata, kif kontenuta fir-risposta tal-appell tagħha, timmerita li tigi respinta stante li hu zgur li ma jirrizultax li t-talbiet u l-aggravji sottomessi f'dan l-appell mill-appellanti huma frivoli u vessatorji u intizi biss biex jiddilungaw il-kawza.

Ghal dawn il-motivi kollha

Tiddeciedi dan l-appell billi tikkonferma in toto d-decizjoni appellata tal-Arbitru u dana in kwantu l-Arbitru sab li kien hemm ksur tal-kuntratt da parti tas-soċjetà appellanti u in kwantu giet ordnata r-rifużjoni da parti tal-appellanti lill-appellati s-somma ta' euro erba u ghoxrin elf mija u sebgha u tmenin u tmienja u tmenin centezm (€24,187.88) u dana bl-imghaxxijiet kollha kif decizi mill-istess Arbitru. Tikkonferma ukoll l-istess decizjoni in kwantu din ċaħdet it-talba għad-danni tas-soċjetà appellata.

L-ispejjez kollha taz-zewg istanzi jithallsu mis-socjeta' appellanti.

< Sentenza Finali >

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