Qorti ta' l-Appell
(Kompetenza Inferjuri)

Imħallef Anthony Ellul

Appell numru:- 23/2016

Schembri Infrastructures Limited (C- 17388)

Vs

Korporazzjoni Enemalta, illum Enemalta plc (C65386)

17 ta' Jannar, 2020.

1. **Din is-sentenza titratta appell tas-soċjetà rikorrenti u appell inċidentali tal-intimata minn deċiżjoni tat-Tribunal tal-Arbitraġġ fl-Arbitraġġ Numru 3200/2012 tat-13 ta' Mejju 2016, li kien ġie varjat b'deċiżjoni addizzjonali tal-20 ta' Diċembru 2016.**

2. Fil-qosor, il-proċeduri quddiem l-Arbitru żvolġew kif ġej:

   2.1. Permezz ta' *Notice of Arbitration* ippreżentata mis-soċjetà rikorrenti fl-20 ta' Lulju 2012 u s-sussegwenti *Notice of Claim* ippreżentata fil-5 ta' Settembru 2012, is-soċjetà rikorrenti ppremettiet illi:

   > `*The claim arises from the termination by respondent of a contract of works with Reference No. TD/T/95/2007 (**Dok A** herewith attached) entered into by the parties for the excavation and construction of a service Gallery in Kappara / Swieqi / St Andrews which contract of works was terminated by the respondent by means of a letter dated 20th April 2012 sent to the directors of claimant.*
   >
   > *...*
   >
   > *Claimant is not contesting the fact of the termination itself, but contests the reasons given by Enemalta for termination, and submits that in the absence of material breaches sufficient to justify termination in terms of the contract the employer is required to compensate the Contractor as required by section 1640(2) of the Civil Code. In any case, Contractor has not been paid his dues representing the expenses and work of the Contractor under section 1640(3) of the Civil Code and these are sought independently of any finding on a breach of the contract.*

...

Claimant disputes completely the facts as stated in Enemalta's correspondence and will show that the Respondent terminated the contract for its own convenience and not because of any material breach on the part of the Claimant.

Whilst the various Health and Safety issues were adequately resolved or in the course of being resolved (irrespectively of whether fault existed on the part of the Contractor or otherwise, which fault is denied) the Contractor was progressing substantially in accordance with the agreement between the parties. Nonetheless Respondent proceeded to terminate the contract unilaterally. In particular, and in so far as concerns the deadline for the project completion, it will be shown that the time periods mentioned in the letter fo the 20th April 2012 were in fact superseded by the agreement between the Paries which was achieved on the 21st February 2012. The Contract completion Date of the 20th February 2012 is thus irrelevant for a deteremination of fault. This is stated, however, completely without prejudice to the fact that delays were principally the fault of Enemalta and not of the Contractor who proceeded to carry out the works in accordance with all necessary haste in accordance with his contractual obligations. This will be proven during the hearing. It should however be clear that the Respondent was not entitled to terminate the Works on the basis of the failure to complete Phase 1 of the works within 52 weeks and the whole of the Works within 104 weeks when following the lapse of both periods(as a result of the fault of the Respondent) the parties had expressly agreed to an amended programme of works that foresaw the completion of the works in 2013.

Respondent has failed to pay Claimant for all expenses, material and works performed by claimant up to the termination of the contract. In fact, Respondent, throughout the project systematically underpaid the Claimant even when the bills of quantities were agreed upon. This will be demonstrated in detail throughout the arbitration.

Respondent has also failed to appear on the liquidation and payment of damages arising out of the wrongful termination of the said contract of works.

Respondent has also illegally and abusively (because he was not entitled so to do) called in and cashed a bank guarantee issued by Bank of Valletta plc and the refund of this sum is requested together with interests and costs.

...

Claimant therefore seeks:

(1) An order for payment of a sum to be liquidated by this Arbitral Tribunal representing payment and compensation for all expenses, material and works performed by claimant up to the termination by the respondent of the contract of works for Excavation and Construction of a Service Gallery – Kappara / Swieqi / St Andrews – Contract with Reference No. TD/T/95/2007;

(2) A declaration that respondent had no valid reason at law to terminate the said contract of works and an order for the liquidation and payment of all damages, including lost profits, occasioned by the wrongful termination of the contract of works; and

(3) A declaration that Respondent was not entitled to call in and cash the bank guarantee number G35TFC19865 issued by Bank of Valletta plc and order that respondent is to pay and refund to claimant the sum guaranteed or such other sum as may be determined by the Arbitral Tribunal;

with legal interest on the said sums from the date of termination of the contract and with all costs against respondent, including the costs and expenses of lawyers and other professionals engaged by Claimant to assist it in the prosecution of the claim.'

2.2. Permezz ta' *Statement of Defence* datat 5 ta' Ottubru 2012 l-intimata eċċepiet illi:

`**2.** *A reply to the points at issue:*

The Respondent respectfully submits that:
2.1 The Claimant failed to discharge its obligations in terms of the Contract thereby giving the Respondent a basis for termination in terms of the Contract, and in terms of section 1640(3) of the Civil Code;

2.2 Rectification measures referred to in Respondent's letter of 26 March 2012 were not carried out by Contractor;

2.3 The amounts being claimed are not due since they are to be set-off against a greater amount claimed in the counter-claim filed concurrently with this statement of defence.

3. *The relief or remedy sought:*

3.1 That the termination was valid in accordance with the terms of the Contract and in terms of section 1640(3) of the Civil Code;

3.2 That the Respondent be declared not responsible to pay any amounts claimed by the Claimant, given that such amounts are to be set off against a greater amount claimed in the counter-claim filed concurrently with this statement of defence;

3.3 That the Respondent was entitled to call in and cash the bank guarantee in terms of the Contract; and

3.4 That the amounts claimed by the Respondent in the counter-claim filed together with this statement of defence be declared as due together with interests and costs for legal representation and assistance.'

2.3. Kontestwalment mal-*Statement of Defence*, l-intimata ppreżentat ukoll *Counter-Claim* konsistenti fis-segwenti:

`*1.10 As a result of the Contractor's failure to complete the works in accordance with the terms of the Contract, the Respondent has incurred and continues to incur damages which are hereby being claimed as due from the Claimant pursuant to this counter-*

claim. The Respondent further claims penalties that have become due under the Contract as a consequence of the delay in completion of the works.

1.11 The damages being claimed consist of the following:

1.11.1 additional costs incurred by Respondent to complete the works;
1.11.2 costs incurred by Respondent for the remedial works carried out as a result of bad workmanship and as a result of carelessness, negligence and failure to comply with the terms of the Contract; and
1.11.3 costs incurred, if any, in connection with Third Party Claim.

1.12 The penalties claimed as due under the Contract are the following:
1.12.1 penalty for delay pursuant to clause 10.2, Section A1 – General Requirements of the Contract.

2.4. Konsegwentement, l-intimata talbet lit-Tribunal Arbitrali sabiex:

`*5.1 declare the said third party [Mr. Carmelo Mifsud] as a joinder in these proceedings in accordance with Articles 961 and 962 of Cap 12 of the Laws of Malta;*

5.2 declare that the Respondent has validly terminated the Contract and that accordingly the Claimant is:
5.2.1 responsible for the damages resulting from the additional costs incurred by Respondent to complete the works which were not completed by the Claimant;
5.2.2 responsible for the damages in connection with the remedial works carried out as a result of bad workmanship and as a result of the Contractor's carelessness, negligence and failure to comply with the terms of the Contract;

5.3 declare the Claimant responsible for the damages resulting from the Third Party Claim if the claim of the Third Party relating to the alleged encroachment is determined in favour of the Third Party;

5.4 liquidate the quantum of damages suffered by the Respondent as a result of 5.2.1, 5.2.2 and 5.3 above;

5.5 order the Claimant to pay the amount of damages so liquidated;

5.6 declare the Claimant responsible for the payment of the penalties set out under clause 10.2 Section A1 – General Requirements of the Contract;

5.7 liquidate the quantum of penalties for the delay;

5.8 order the Claimant to pay to the Respondent the penalties for delay as liquidated;

5.9 order the Claimant to pay interest at the applicable highest rate set out by law;

5.10 order the Claimant to pay interest at the applicable highest rate set out by law;

5.11 find the Claimant responsible for the cost of these proceedings and of legal representation and assistance and order the Claimant to pay the same.

With due reservation of any other claim by Respondent against Claimant.

2.5. Ir-rikorrenti sostanzjalment wieġbet illi r-rikonvenzjoni tal-intimata għandha tkun miċħuda bl-ispejjeż.

2.6. Premezz ta' provvediment mogħti fit-30 ta' Settembru 2013, it-talba tal-intimata għall-kjamat in kawża ta' Carmelo Mifsud kienet miċħuda.

2.7. B'deċiżjoni tat-13 ta' Mejju 2016 it-Tribunal tal-Arbitraġġ iddeċieda:-

`*a)* *SIL are owed the balance of €378,028.39 for works carried out.*

b) *Enemalta are entitled to recover:-*
a. €1,033,016 for additional works carried out following the termination of the contract.
b. €3,579.08 for damages caused to its property at the Kappara Distribution Centre by SIL.

Total due to Enemalta €1,036,595.08
Received from Bank Guarantee €318,099.00
Balance due to Enemalta for damages.....€718,496.08
Due to SIL for works €378,028.39
Overall balance due by SIL to Enemalta.....€340,467.69

The arbitral tribunal declares that the above represents the conclusions of the Chairman Judge Alberto Magri and Architect Franco Montesin as a member in as much as the member of the Tribunal Architect Joseph Bugeja has filed a dissenting opinion as explained hereunder....'

3. Permezz ta' rikors ippreżentat fis-6 ta' Settembru 2016, l-intimata talbet lit-Tribunal tal-Arbitraġġ sabiex jagħti deċiżjoni speċifikament u limitatament dwar il-kap tal-ispejjeż u d-drittijiet tal-arbitraġġ stante li tali kwistjonijiet ma ġewx deċiżi fil-lodo tat-13 ta' Mejju 2016.

4. Permezz ta' rikors ieħor ippreżentat ukoll fis-6 ta' Settembru 2016, ir-rikorrenti rrilevat li għal xi raġuni, fil-kalkoli tiegħu, it-Tribunal ħalla barra s-somma ammessa mill-Enemalta stess fl-ammont ta' €88,389.46 li tinsab elenkata fil-prospett bħala dovuta. Talbet għalhekk lit-Tribunal Arbitrali jemenda dan l-iżball ta' kalkolu billi tiżdied is-somma ta' €88,389.46 mal-ammonti dovuti lill-esponenti u jsiru l-aġġustamenti konsegwenzjali.

5. Fl-istess jum, is-soċjetà rikorrenti appellat ukoll mil-*lodo* arbitrali quddiem din il-Qorti. Hija fissret l-aggravji tagħha kif ġej:

i. it-Tribunal Arbitrali żbalja meta ddeċieda illi *Enemalta are entitled to recover €1,033,016 for additional works carried out following the termination of the contract;*

ii. it-Tribunal Arbitrali ddeċieda ħażin meta ddeċieda li l-*final bill* kienet saret finali ai termini tal-artikolu 18 tal-*General Conditions of Contract* u għalhekk ħass li ma kellux għalfejn jidħol fil-bqija tal-kont mitlub mill-appellanti;

iii. it-Tribunal Arbitrali attribwixxa d-dewmien kollu mhux ammess mill-Enemalta bħala kawżata mill-appellanti u dan mingħajr effettivament ma daħal fil-kwistjoni kif kien marbutli jagħmel;

iv. it-Tribunal għamel żball ta' kalkolu meta naqas milli jattribwixxi lill-appellanti r-*retentions* li kienu dovuti lilha skont il-kuntratt.

Talbet għalhekk lil din il-Qorti:

> `*tirriforma l-lodo arbitrali tat-13 ta' Mejju 2016 fl-arbitraġġ fl-ismijiet premessi dan billi (i) tirrevedi l-likwidazzjoni tas-somma dovuta lill-appellanti għax-xogħol li għamel udan billi in aġġunta mas-somma ġie likwidata iżżid ħlasijiet indikati fil-kont datat 26 ta' Lulju, 2012 u mibgħut mal-ittra tal-Perit Mark John Scicluna tas-16 ta' Awissu 2012; (ii) tħassar dik id-dispożizzjoni tal-lodo arbitrali li permezz tagħha iddeċidiet li l-Enemalta għandha tiġbor is-somma ta' lill-appellanti is-somma [sic.] 1,033,016 for additional works carried outfollowing the termination of the contact u tiddeċiedi li l-enemalta ma jistħoqqilha li tiġbor ebda somma taġt din il-parti tat-talba, (iii) tikkundanna lill-Enemalta tħallas lill-esponenti il-bilanċ riżultanti u (iv) tikkundanna lill-Enemalta tħallas l-ispejjeżtal-appell u tal-arbitraġġ u tikkonferma il-lodo arbitrali fil-bqija.*
>
> *Bl-ispejjeż taż-żewġ istanzi kontra l-istess appellata.'*

6. Filwaqt li l-appellata wieġbet illi l-appell intavolat mis-soċjetà appellanti għandu jkun miċħud, ippreżentat appell inċidentali u lmentat:-

i. ċaħad il-kontro-talba tagħha *in parte* fir-rigward tal-ispejjeż addizzjonali biex jitlesta x-xogħol;

ii. ċaħad il-kontro-talba tagħha *in toto* fir-rigward tal-ispejjeż inkorsi minħabba xogħol ħażin u traskurat;

iii. ċaħad il-kontro-talba tagħha *in toto* fir-rigward tal-penali għad-dewmien.

Talbet għalhekk lil din il-Qorti:

> `*tiċħad l-appell intavolat minn Schembri Infrastructures Limited mil-lodo arbitrali datat 13 ta' Mejju 2016 (ħlief għall-aggravju dwar ir-retention money li dwaru s-soċjetà appellata kkonfermat li hemm qbil mal-posizzjoni tas-soċjetà appellanti) u tgħaddi biex tibdel l-imsemmi lodo arbitrali billi tilqa l-appell inċidentali mressaq mill-Enemalta plc b'dan illitilqa' dik il-parti tal-kontro-talba tal-Enemalta plc dwar l-ispejjeż addizzjonali fl-intier tagħha (u mhux biss in parte), tilqa' dik il-parti tal-kontro-talba tal-Enemalta plc dwar ix-xogħol magħmul ħażin u b'mod traskurat u dik il-parti tal-kontro-talba tal-Enemalta plc dwar il-penali għad-dewmien.*
>
> *Bl-ispejjeż taż-żewġ istanzi kontra s-soċjetà Schembri Infrastructure Limited.'*

7. <u>L-appellanti wieġbet illi l-appell inċidentali hu null</u>.

8. B'digriet tal-10 ta' April 2019, din il-Qorti ordnat lill-partjiet jippreżentaw nota qasira li fiha jispjegaw il-punti prinċipali tal-appell, appell inċidentali u tweġibiet rispettivi.

9. Permezz ta' nota ppreżentata fl-10 ta' Mejju 2019, filwaqt li s-soċjetà appellata tgħid li m'hemm l-ebda nullità fl-appell inċidentali tagħha u semmiet il-punti prinċipali tat-tweġiba, qalet ukoll li fl-20 ta' Diċembru 2016 ingħatat deċiżjoni addizzjonali li biha ġie deċiż, (i) li kien hemm żball fil-kalkolu tal-ammont finalment dovut lilha `*fis-sens illi l-ammont ta' retention ta' €88,389.46 kellu jkun pagabbli lis-soċjetà Schembri Infrastructure Limited*'; u (ii) kif kellhom jinqasmu l-ispejjeż tal-arbitraġġ. Tgħid għalhekk li <u>r-raba' aggravju tal-appell prinċipali hu llum eżawrit</u>.

10. Permezz ta' nota riassuntiva ppreżentata mill-appellanti fl-istess jum, din tal-aħħar ikkonfermat li stante korrezzjonital-kalkoli permezz ta' lodo addizzjonali, dak li hija tirreferi għalih bħala `*it-tmien'* aggravju tagħha huwa sorvolat.

11. Effettivament, permezz ta' deċiżjoni addizzjonali tal-20 ta' Diċembru 2016 it-Tribunal tal-Arbitraġġ iddeċieda:

> `...
>
> ***Mistake in calculation***
>
> *...*

As there is consensus between the parties to the arbitration on the above matter the Arbitral Tribunal grants the request made in the application above mentioned and orderes that the award delivered on the 13th May 2016 be amended so that in the "Conclusion" on page 27 of the award, the amount owed to Schembri Infrastructures Limited (SIL) should be corrected to read €466,417.85 and that consequently the Overall balance due by Schembri Infrastructures Ltd to Enemalta should read €252,078.23.

Court Costs

... in the light of the gains and losses of either party this arbitral tribunal decides that the arbitration costs should be borne as to 57% by Schembri Infrastructures Ltd and as to 43% by Enemalta plc.'

Konsiderazzjonijiet.

12. Il-Qorti se tibda biex tikkunsidra l-eċċezzjoni tal-appellanti li l-appell inċidentali hu null.

L-Allegata Nullità tal-Appell Inċidentali.

13. Fit-tweġiba għall-appell inċidentali, l-appellanti ssostni li hu null għaliex ma jsegwix il-proċedura kontemplata fl-Att dwar l-Arbitraġġ (Kap. 387). Targumenta li l-Kap. 12 tal-Liġijiet ta' Malta ma japplikax, lanqas b'mod residwali inkwantu fejn il-Kap. 387 ried li japplika l-Kap. 12, għamel referenza diretta għalih. Iżżid li l-Kap. 387 ma jagħtix dritt ta' appell inċidentali iżda biss fakultà ta' appell fi żmien ħmistax-il jum min-notifika tal-*lodo* arbitrali. Tgħid li fil-każ in eżami, il-*lodo* arbitrali ġie notifikat lill-partijiet fil-23 ta' Awwissu 2016 b'dan illi l-partijiet kellhom sas-7 t' Awissu 2016 sabiex jappellaw minnu. Tikkonkludi għalhekk li l-appell tal-intimata ma setax ikun preżentat bħala appell inċidentali u bħala appell skont il-Kap. 387 huwa *fuori termine.*

14. L-intimata wieġbet illi l-appell inċidentali m'huwiex null. Tikkontendi li: (i) l-ebda waħda mid-dispożizzjonijiet tal-artikolu 789 tal-Kap.12 ma hi sodisfatta; (ii) l-artikolu 240 tal-Kap. 12 jikkontempla appell inċidentali fil-każ ta' kull appell mingħajr ebda distinzjoni u jrid jinqara flimkien mal-Kap. 387; u li (iii) din il-Qorti rrikonxxiet li appell inċidentali jista' jsir minn *lodo* arbitrali u fil-fatt ingħataw diversi sentenzi dwar appelli inċidentali minn *lodo* arbitrali.

15. B'riferenza għall-argument li l-ebda waħda mid-disposizzjonijiet tal-artikolu 789 tal-Kap. 12 m'hi sodisfatta sabiex jiġi dikjarat li l-appell inċidentali hu null, f'dan il-każ il-kwistjoni hi jekk skont il-liġi parti f'proċediment ta' arbitraġġ għandhiex

jedd li tippreżenta appell inċidentali. Għalhekk ir-riferenza għall-artikolu 789 m'hijiex rilevanti. Jekk ma jeżistix jedd ta' appell inċidentali, l-appell xorta hu null irrispettivament x'igħid l-artikolu 789.

16. Dwar it-tielet argument, l-appellata tirreferi prinċipalment għall-każ ***Recoinvest Limited vs Catherine Ripard***, deċiż minn din il-Qorti diversament presjeduta fit-12 ta' Ottubru, 2007 (mhux 2017 kif erronjament indikat mill-appellata). F'dak il-każ inqal limitatament illi:

> *'Il-Qorti ta' l-Appell kienet ittrattat u ddecidiet il-mertu ta' l-appell mill-Lodo. Ricoinvest Ltd pero` f'dak l-istadju ma appellatx mil-lodo* ***lanqas ma ghamlet appell incidentali kif setghet taghmel*** *u lanqas ressqet l-aggravi li hi ressqet quddiem Arbitru fit-talbiet addizzjonali taghha.'* (enfasi ta' din il-Qorti)

17. Madanakollu, f'dak il-każ ma jidhirx li kien hemm eċċezzjoni simili għal dik li tat l-appellanti. Dan lanqas ma kien is-suġġett tad-deċiżjoni l-oħra ċitata mill-appellata fl-ismijiet ***Rossignaud Norman Et Vs Zrinzo Joseph M Et*** mogħtija minn din il-Qorti fis-26 ta' Jannar 2018.

18. Appell inċidentali minn sentenza hu kontemplat fl-artikolu 240 tal-Kap. 12. L-appellata m'għamlet l-ebda riferenza għal disposizzjoni tal-liġi fil-Kap. 387 li tipprovdi li jista' jsir appell inċidentali. Min-naħa l-oħra per eżempju il-Kap. 387 jikkontempla l-possibilta' ta' rikonvenzjoni (ara artikolu 30 tal-Kap. 387).

19. L-artikolu 70A jipprovdi li jista' jsir appell fuq punt ta' liġi u l-appell għandu, *"... jidentifika l-punt ta' liġi li għandha tittieħed deċiżjoni fuqu u għandu jispeċifika t-tifsira li r-rikorrent jallega li hi t-tifsira korretta tal-punt ta' liġi identifikat"* (artikolu 70B(1) tal-Kap. 387). Imbagħad subinċiż (2) ta' dik id-disposizzjoni jipprovdi:

> *"(2) Bla ħsara għal dak li hemm speċifikament provdut fl-artikolu 6 tat-Taqsima B tar-Raba' Skeda, appell għandu jsir* ***fi żmien ħmistax-il ġurnata minn meta tiġi riċevuta d-deċiżjoni finali*** *jew, jekk kien hemm xi proċess ta' arbitraġġ ta' appell jew reviżjoni, mid-data meta l-parti kienet notifikata bir-riżultat ta' dak il-proċess, jew meta l-proċess kien mod ieħor kompletat, jew minn meta jkun skada ż-żmien għalih".*

20. Għalhekk l-appellata kellha żmien ta' ħmistax-il jum sabiex tappella minn meta rċeviet id-deċiżjoni finali. L-artikolu 240 tal-Kap. 12 tipprovdi għall-appell inċidentali minn **sentenza** u għandu jsir fi żmien 20 jum minn meta l-appellat ikun notifikat bir-rikors tal-appell. Fil-Kap. 12 deċiżjonijiet li jingħataw minn arbitri reġistrati maċ-Ċentru Arbitraġġ ta' Malta, m'humiex deskritti bħala sentenza (ara artikolu 253 tal-Kap. 12). Skont dik id-disposizzjoni sentenzi huma dawk li jingħataw mill-qrati tal-ġustizzja. Il-Kap. 387 stess jagħmel distinzjoni bejn *'deċiżjoni'* ta' arbitraġġ u sentenza tal-Qrati.

21. L-appellata ippreżentat l-appell inċidentali sbatax-il ġurnata wara n-notifika tar-rikors tal-appell. Bir-raġunament tal-appellata jkun ifisser li filwaqt li l-appellant għandu biss 15 il-jum sabiex jappella, l-appellat għandu 20 jum sabiex jipproponi appell inċidentali. Il-qorti taraha stramba li l-leġislatur seta' kellu l-intenzjoni li l-appellant ikollu inqas żmien sabiex jappella minn min jipproponi appell inċidentali.

22. Magħmula dawn il-konsiderazzjonijiet hi l-fehma tal-qorti li appell inċidentali ma jeżistix taħt l-Att dwar l-Arbitraġġ (Kap. 387).

23. Pero' fil-każ in eżami jirriżulta li għalkemm it-Tribunal tal-Arbitraġġ ta' deċiżjoni fit-13 ta' Mejju 2016, liema deċiżjoni ġiet notifikata lill-partijiet fit-23 ta' Awissu 2016 u hija s-suġġett tal-appell prinċipali u l-appell inċidentali in kwistjoni, fis-6 ta' Settembru 2016 kull wieħed mill-partijiet ippreżenta rikors sabiex korrezzjoni fid-deċiżjoni. Da parti tagħha l-intimata talbet li jiġi deċiż il-kap tal-ispejjeż stante li l-*lodo* ma kienx ikopri dan l-aspett, filwaqt li r-rikorrenti talbet korrezzjoni fil-kalkolu stante li s-somma ta' *retention money* fl-ammont ta' €88,398.46, ammess bħala dovut mill-Enemalta, ma kinitx inkluża fid-deċiżjoni tat-Tribunal tal-Arbitraġġ. B'deċiżjoni tal**-20 ta' Diċembru 2016** t-Tribunal tal-Arbitraġġ ordna korrezzjoni. Għalhekk skont l-artikolu 70B tal-Kap. 387 it-terminu tal-appell ma jistax jitqies li ddekorra qabel dakinhar.

24. Għal din ir-raġuni, l-appell tal-appellata ser jiġi kkunsidrat. Hu veru li l-appell ma sarx permezz ta' rikors, madankollu il-forma mhu ta' l-ebda preġudizzju għall-appellanti li talbet in-nullita' (artikolu 789(1)(c) tal-Kap. 12 li rrispettivament japplikax jew le għal finijiet ta' proċeduri ta' arbitraġġ, jipprovdi għall-prinċipju li bih issir ġustizzja fil-meritu).

25. Għaldaqstant, tiċħad l-eċċezzjoni.

APPELL TAR-RIKORRENTI.

26. Fir-rigward ta' l-ispejjeż addizzjonali, id-deċiżjoni tat-Tribunal tal-Arbitraġġ tipprovdi:

> *'Enemalta is claiming compensation for such additional costs incurred by it when it instructed Polidano Brothers Ltd to carry out the works which had been left undone by SIL on the date of termination of the Contract. The amount claimed is €1,622,672.72 being the difference between the amount paid out to Polidano, namely €3,168,182.15 and the amount actually due to SIL for the same works had they been carried out it according to the Contract, namely €1,629,029.43.*
>
> *SIL is objecting to this amount for the following reasons:*

a) The works were given to Polidano by Direct Order without respecting Public Procurement Regulations as laid down in Subsidiary Legislation 174.04. Moreover the involvement of the Director of Contracts by Enemalta was irrelevant and unnecessary.
b) The manner in which Polidano carried out the works, using a Tunnel Boring Machine instead of a Road Header, unnecessarily increased the costs of the works in that Polidano had to fill in the bottom part of the tunnel (now being of a circular shape) as against the method used by SIL, which did not require such additional work.

Enemalta correctly submitted in reply, that Subsidiary Legislation 174.04, above mentioned, lists Enemalta Corporation as one of the Contracting Authorities, (vide Schedule 2), covered by the said regulations. Consequently it requires the intervention of the Department of Contracts, and in particular, the Director of Contracts, when awarding contracts to the public as specified in the said Regulations. In fact the proviso to Article 37(1) of the said Regulations states that "public contracts required by those contracting authorities listed in Schedule 2, shall be issued, administered and determined by the Department of Contracts…" This intervention, in fact, is apparent in the introductory part of the Tender document where the Director of Contracts and Public Procurement Regulations are specifically mentioned.

Having established the right of the Director of Contracts to be involved in the public procurement of contracts for the execution of works or supply of services to Enemalta as a Contracting Authority, it must be said that the Regulations above mentioned do not provide for the situation which resulted following the termination of the Contract granted to SIL. The Director of Contracts, in fact, does not seem to have been given the power to intervene when a public contract has been terminated prematurely. When Enemalta terminated the contract awarded to SIL this brought about a situation where Enemalta, as a contracting authority, had a project which had been and now could be the subject of a new public contract for the excavation of the remaining one and a half kilometre of tunnel which had been left undone by SIL. The said works were certainly of a value in excess of €120,000 and therefore the procurement of the necessary works "shall be made by public contract after a call for tenders in accordance with these regulations"(Art. 25(1) Of the Public Procurement Regulations). It follows that no excuse or reason could be brought forward to justify the granting of a Direct Order to Polidano Brothers Ltd, "without recourse to a prior call for competition" (Art. 2 of the said Regulations) and thereby dispensing with the requirements of a "contest" "pursuant to a formal notice or an E.U. notice." (also Art 2) as laid down in the Procurement Regulations.

Enemalta are claiming payment of the sum above mentioned by way of damages after they were in breach of the Procurement Regulations by awarding the contract to Polidano Bros by means of a Direct Order. This should not and cannot be allowed because if it were allowed, the undersigned would be sanctioning a state of illegality. Enemalta should therefore have either approached the tenderer next in line or issued a new call for tenders. The argument that a new call for tenders would have taken a long time is irrelevant as this is required by law. The argument that the tenderer next in line would not have accepted because of the time which had elapsed, which, naturally, would have had an effect on the tender price, is not acceptable as this contractor was never approached and so we cannot assume that he would have refused.

The law provides that where any person fails to discharge an obligation which he has contracted, he shall be liable in damages both for non performance of the obligation and were competent, for the delay in the performance thereof.

Nevertheless this principle shall always respect the legal maxim that the injured party should do his utmost to minimise the damages suffered. In view of this the undersigned feel, that now, that the works have been carried out and the option of issuing another call or asking the tenderer next in line, to carry out the works, is no longer available, the compensation due to Enemalta for the extra costs incurred in carrying out the additional works should be calculated by comparing the price offered by the tenderer next in line with that offered by SIL taking into consideration the certified amount due to SIL for the works performed prior to the termination of the contract.

On the 1st August 2008 Edward Schembri, on behalf of SIL sent a note to Enemalta Corporation wherein it is stated that SIL "offer(s) to execute and maintain the whole of the said works in conformity with the said Conditions of Contract, Specifications and Schedules for the sum of €3,240,984.82 (including VAT)." As stated above SIL only executed part of the contract and was certified as being owed by Enemalta €1,260,000. Consequently pricewise SIL did not carry out 61% of the contract.

According to the submissions by Enemalta the difference between the offer made by SIL and the 2nd tenderer was in the region of €1,700,000. Hence the total amount offered by the second tenderer must have been in the region of €4,940,984. Sixty one percent of the amount offered by the second tenderer amounts to €3,014,000. Consequently if from this amount we are to deduct the remaining balance due to SIL, had he carried out the works, namely €1,980,984, the additional cost to Enemalta, if the second tenderer were chosen, would amount to ***€1,033,016****. This is the amount due to Enemalta in respect of additional costs above mentioned.'*

27. Permezz tal-ewwel aggravju tagħha, is-soċjetà appellanti tilmenta li t-Tribunal żbalja meta ddeċieda illi *Enemalta are entitled to recover €1,033,016 for additional works carried out following the termination of the contract* u dan għas-segwenti raġunijiet:

(a) li x-xogħlijiet addizzjonali in kwistjoni ngħataw lil terz (Polidano Brothers) a bażi ta' kuntratt li l-istess Tribunal irritjena li huwa illegali u li kwindi sar a riskju tal-Enemalta. Hemm fl-opinjoni tal-esponenti kontradizzjoni evidenti fis-sens li jekk il-kuntratt ġie kategorizzat bħala illegali allura ebda parti min-nefqa mhi rekuperabbli;

(b) li mingħajr preġudizzju għal dan, it-Tribunal Arbitrali naqas milli jikkunsidra il-punt imqajjem minn din il-parti li fil-fatt ix-xogħlijiet li saru mit-terz kienu materjalment differenti minn dak li kellu jwettaq l-appellant skont il-kuntratt oriġinali u li kwindi d-differenza fil-ħlas tax-xogħlijiet differenti ma jistax jiġi klassifikat bħala dannu soffert;

(c) li mingħajr preġudizzju għas-suespost, li ma saritx prova skont il-liġi dwar id-danni li l-Enemalta kienet qegħda titlob taħt dan il-kap;

(d) li, dejjem mingħajr preġudizzju għas-suespost, għandu jirriżulta li l-klawsoli kontrattwali premessi milli-arbitri fid-deċiżjoni tagħhom ma jagġtux id-dritt lill-Enemalta li tirkupra dawn l-ispejjeż; u

(e) li fl-aħħar nett u dejjem mingħajr preġudizzju għas-suespost, dwar il-likwidazzjoni tad-dannu reklamat mill-Enemalta, irriżulta li l-membri tekniċi tat-Tribunal ma qablux bejniethom dwar il-kwistjoni tal-likwidazzjoni ta' dawn id-danni u għalkemm huwa minnu li d-deċiżjoni ttieħdet minn żewġ membri minn tlieta, tenut kont anke taċ-ċirkostanzi indikati mid-dissenting arbitrator, ma huwiex ġust u lanqas skont il-liġi li titħalla d-deċiżjoni fuq dan il-punt kif deċiż mill-arbitri.

28. Taħt il-paragrafu **(a)** l-appellanti ssostni li **<u>l-Enemalta ma tistax tibbaża r-rikonvenzjoni għad-danni fuq kuntratt illegali</u>**. Sostanzjalment issostni li ladarba it-Tribunal tal-Arbitraġġ iddetermina li bħala stat ta' fatt it-tieni kuntratt mogħti lil Polidano Bros kien wieħed illegali, b'applikazzjoni tal-massima legali *ex turpi causa non oritur actio,* l-ebda parti mill-ispejjeż li għamlet l-Enemalta ma tista' tkun irkuprata minnha. Issostni li dak il-prinċipju hu wieħed assolut u la jipprovdi eċċezzjonijiet u lanqas ma jipprovdi għal xi possibilità ta' likwidazzjoni artifiċjali bl-għan illi jingħata kumpens lil min ikun aġixxa illegalment.

29. Il-qorti ma taqbilx mar-raġunament tal-appellanti. Il-fatt li t-Tribunal tal-Arbitraġġ ikkonkluda li l-kuntratt li ngħata lil Polidano ma kellu qatt jingħata b'*direct order* iżda wara sejħa għal tenders, ma jfissirx li l-ebda ammont ma kien dovut lill-appellata. It-Tribunal tal-Arbitraġġ ta spjegazzjoni ċara ta x'wasslu biex jillikwida s-somma ta' €1,003,016 f'danni (ara paġni 22 sa 23 tad-deċiżjoni). Kif tajjeb osserva t-Tribunal:

> *"The law provides that where any person fails to discharge an obligation which he has contracted, he shall be liable in damages both for non performance of the obligation and where competent, for the delay in the peformance thereof. Nevertheless this principle shall always respect the legal maxim that the injured party should do his utmost to minimize the damages suffered. In view of this the undersigned feel, that now, that the works have been arried out and the option of issuing another call or asking the tenderer next in line, to carry out the works, is no longer available, the compensation due to Enemalta for the extra costs incurred in carrying out the additional works should be calculated by comparing the price offered by the tenderer next in line with that offered by SIL taking into consideration the certified amount due to SIL for the works performed prior to the termination of the work".*

30. Hu ovvju li ġialadarba l-appellanti kienet *in breach* tal-obbligi tal-kuntratt ta' appalt u l-appellata kienet ġustifikata li tittermina l-appalt, kellha jedd tippretendi

d-danni mingħand l-appellanti. Danni li jinkludu l-ispiża żejda li l-appellanti kellha tinkorri sabiex jitlesta l-proġett. Il-fatt li t-Tribunal tal-Arbitraġġ ikkonkluda li l-kuntratt li ngħata lil Polidano Brothers Ltd kien illegali minħabba li ngħata *by direct order*, ma jfissirx li l-appellata kellha tagħmel tajjeb għall-ispiża żejda konsegwenza tal-*breach of contract* min-naħa tal-appellanti. Dak m'huwiex il-mod kif issir il-ġustizzja. Meta tikkunsidra li l-appellanti għamlet l-offerta tagħha fil-bidu ta' Ġunju 2008 u fl-20 ta' April, 2012 l-Enemalta tterminat il-kuntratt ta' appalt, probabbilment l-appellata kien ser ikollha tħallas iktar spejjeż sabiex jitlesta x-xogħol li m'għamlitx l-appellanti. It-Tribunal tal-Arbitraġġ għamel il-kalkoli fuq it-tieni l-aħjar offerta li saret wara dik tal-appellanti, u llikwida danni fl-ammont ta' €1,033,016. Il-qorti ma tista' tara xejn ħażin fl-eżerċizzju li għamel it-Tribunal u f'kull każ m'hemmx aggravju dwar il-metodu li wża t-Tribunal biex illikwida dik is-somma. Dan apparti li fl-eżerċizzju ta' likwidazzjoni t-Tribunal ma ddetermina l-ebda punt ta' liġi, u għalhekk il-metodu li ntuża mhuwiex appellabbli (artikolu 70A tal-Kap. 387).

31. **It-tieni ilment** tal-appellanti hu li x-xogħol li sar mit-terz kien materjalment differenti minn dak li kellu jwettaq l-appellanti skont il-kuntratt oriġinali, u għalhekk id-differenza fil-ħlas ta' xogħlijiet differenti ma jistax ikun klassifikat bħala danni. L-appellanti targumenta li x-xogħlijiet li twettqu minn Polidano Brothers Limited ma kinux *'l-istess xogħlijiet oriġinarjament prospettati'*. Aggravju li hu fuq punt ta' fatt, li dwaru m'hemmx jedd ta' appell (ara artikolu 70A(3) tal-Kap. 387). Il-qorti ma tistax tiddeċiedi dan l-aggravju jekk ma tikkunsidrax il-provi. Eżerċizzju li ma jistax isir ġialadarba appell jista' jsir biss fuq punt ta' liġi tax-xorta li jissemma fl-artikolu 70A(3) u li ma jinkludix apprezzament mill-ġdid tal-provi. Tant dak l-aggravju hu fuq punt ta' fatt, li l-appellanti għamlet riferenza għall-provi, minn fejn issostni li rriżulta li *"meta l-Enemalta tat it-tieni kuntratt lil Polidano Bros, hija bidlet il-proġett radikalment"*.

32. **It-tielet ilment** hu li, *"... ma saritx prova skont il-liġi dwar id-danni li l-Enemalta kienet qegħda titlob taħt dan il-kap"* fir-rigward ta' €1,033,016 bħala *additional works carried out following the termination of the contract*. Hawn ukoll ma jeżistix punt ta' liġi li dwaru jista' jsir appell. Dik hi materja ta' provi, li bilfors tinvolvi l-apprezzament tagħhom. Jekk il-qorti kellha tagħmel eżerċizzju simili tkun qegħda tippermetti appell fuq punt ta' fatt, meta jeżisti **biss** jedd ta' appell fuq punt ta' liġi li jkun ġie determinat mit-Tribunal.

33. **Ir-raba' ilment** tal-appellanti hu li l-klawżoli kuntrattwali ma jippermettux lil Enemalta sabiex tirkupra dawk l-ispejjeż. Fin-nota tal-10 ta' Mejju 2019 dak l-aggravju ġie spjegat hekk, *`ll-klawsoli kuntrattwali jipprekludu lill-Enemalta li*

tirkupra danni ulterjuri ladarba imponiet il-penall'. Sostanzjalment tikkontendi li klawżola 17 tal-*General Conditions for the Execution of Works in Malta* tipprovdi penali ta' €58 għal kull jum dewmien sa massimu ta' 10% tal-valur tal-kuntratt filwaqt li klawżola 18 tipprovdi għall-possibiltà li jintalbu danni mingħand il-kuntrattur f'każ li jiġi tterminat. B' referenza għal-artikolu 1120 tal-Kap. 16 tikkontendi li ladarba l-penali huma danni pre-likwidati ntiżi sabiex jagħmlu tajjeb għad-danni sofferti, l-applikazzjoni tal-penali teskludi danni a tenur tal-klawsoli 17 u 18 u vice versa. L-appellanti tgħid li fil-fatt il-klawżola 19 tal-istess *General Conditions* tipprovdi għall-possibilità ta' talba ta' danni u penali fl-istess waqt għaċ-ċirkostanzi limitati ta' abbandun ta' xogħol da parti tal-kuntrattur li ma kienx il-każ u lanqas ma hemm allegazzjoni f'dan is-sens. Tilmenta li t-Tribunal Arbitrali naqas għal kollox li jqis dan l-argument liema kwistjoni ġiet evitata peress li effetivament l-ebda penali ma ngħataw lill-Enemalta. Iżda tinsisti li din il-kwisjtoni ma setgħatx tiġi evitata għaliex it-Tribunal kellu f'kull każ jiddeċiedi jekk l-appellata setgħatx titlob danni u penali kumulattivament.

34. Da parti tagħha l-appellata wieġbet li l-klawżola applikabbli li tirregola l-penali mhix dik ċitata mis-soċjetà appellanti fir-rikors tal-appell iżda hija l-klawżola 10.2 ta' *Section A1* fil-*General Requirements* li tistipula illi "*A penalty clause of €25 per day inclusive of Sundays and Public Holidays will be imposed on the Contractor for failing to complete the Contract by the time stated in his tender offer.'* Fil-fehma tal-appellata hija din il-klawżola li tirregola għal penali għal dwemien biss u tipprevali fuq il-klawżola 17. Għalhekk, m'huwiex minnu li l-penali u d-danni huma reklamabbli fl-alternattiv stante li l-penali għal dewmien ma jipprekluduwhiex milli tirreklama ukoll spejjeż oħra li hi nkorriet per konsegwenza tat-terminazzjoni. Tgħid li fil-fatt, l-artikolu 1133 tal-Kap. 16 tal-Liġijiet ta' Malta jagħmilha ċara illi d-debitur tal-obbligazzjoni għandu jkun ikkundannat għad-danni, sew minħabba nuqqas mill-eżekuzzjoni tal-obbligazzjoni kemm ukoll minħabba d-dewmien fl-eżekuzzjoni tagħha. Tikkonkludi għalhekk li l-appaltant jista' jitlob, kumulattivament, danni għall-inadempjenza kuntrattwali u penali għad-dewmien. Tgħid li l-ispejjeż addizzjonali huma ukoll legalment reklamabbli ai termini tal-artikolu 1640(3) tal-Kap. 16. F'dan is-sens tirreferi għall-dak deċiż mill-Prim' Awla tal-Qorti Ċivili fl-14 ta' Jannar 2016 fil-każ fl-ismijeit ***Charles Elia Muscat et vs Elton Debono***.

35. It-Tribunal tal-Arbitraġġ iddeċieda:

> *'Enemalta is claiming compensation in terms of the Penalty Clause for delays in the execution of the works calculated on the days of Stoppages (less one month for which Enemalta is accepting liability). This claim amounts to €9,775.*
>
> *The Contract speaks of this type of damages both in Section A1 – General Requirements where Article 10.2 specifically lays down that: "A penalty clause of*

€25 per day inclusive of Sundays and Public Holidays will be imposed upon the Contractor for failing to complete the contract by the time stated in his tender offer." (p. 20). As well as in clause 17 of the General Conditions of Contract for the Execution of Works in Malta attached to the Contract, where it is laid down that "If the work is not completed and delivered within the time specified in the contract, the Contractor shall be liable to a penalty of €58 per diem or the equivalent of one percent (1%) per week ……" Clause 23 of the General Conditions, however, disposes of this apparent discrepancy by stating that "Should there be any discrepancy between the General Conditions and any Special Conditions or Specification of any contract, the special conditions or specifications shall be followed in preference to the General Conditions." It follows that Enemalta was correct in applying the penalty clause mentioned in paragraph 10.2 mentioned above.

The Penalty Clause forms part of the contract and is meant to compensate the owner for any delay which might occur in the completion of the works and the delivery thereof. In this case Enemllta is claiming compensation for delays without any specific relationship to the completion of the project as the Contract was terminated prematurely. The Contract having been terminated, the Contractor was placed in a situation where he could never complete the works, so, one may ask, how can damages for delay in completion be computed. The situation presented by what happened in this particular instance is reflected in what is summed up in the judgement delivered on the 31st October 2001 by Mr Justice Joseph R. Micallef sitting in the First Hall Civil Court in the case "Mario Galea et vs Renald Casha". The Court held that: "Minhabba li l-klawżola penali hija accessorja ghall-ftehim ewlieni, jekk kemm-il darba l-ftehim ewlieni jintemm, tintemm mieghu l-imsemmija klawżola b'effett minn dak inhar li jintemm il-ftehim li hija taghmel parti minnu. Mat-tmiem taghha, jieqfu wkoll l-effetti taghha, billa la darba l-obbligazzjoni li kienet intalbet ma hijiex mistennija li tigi izjed imwettqa minhabba l-hall tal-ftehim, daqstant iehor ma jaghmilx sens li jibqghu fis-sehh l-effetti ta' klawżola li tikkastiga d-dewmien fit-twettiq ta' dik l-obbligazzjoni."

In view of the above the damages being claimed by Enemalta for delays cannot be allowed.'

36. L-artikolu 1120 tal-Kap. 16 jipprovdi kif ġej:

'1120. (1) Il-penali hija l-kumpens tal-ħsara li jbati l-kreditur minħabba n-nuqqas tal-esekuzzjoni tal-obbligazzjoni prinċipali.

(2) Il-kreditur jista' jaġixxi għall-esekuzzjoni tal-obbligazzjoni prinċipali minflok ma jitlob il-penali li fiha jkun waqa' d-debitur.

(3) Hu ma jistax jitlob il-ħaġa prinċipali u l-penali flimkien, ħlief meta l-penali tkun ġiet miftiehma għad-dewmien biss.'

37. Fil-fehma ta' din il-Qorti, dan l-artikolu ma jistax jinftiehem fis-sens illi ndipendentement minn dak deċiż fil-*lodo*, it-talba għal danni u penali b' mod kumulattiv tirrendi l-istess bħala insostennibbli *a priori*, kif jidher li qegħda tippretendi l-appellanti.

38. Jirriżulta li rrispettivament minn dak mitlub mill-appellata fir-rikonvenzjoni, it-Tribunal tal-Arbitraġġ **ċaħad a *priori* t-talba għall-penali**. Għalhekk, hija l-fehma ta' din il-Qorti li kwalsiasi deċiżjoni dwar jekk setgħux jintalbu u

konsegwentement jiġu akkordati danni u penali kumulattivament, kif sostnut mill-appellata, jew alternattivament, kif sostnut mill-appellanti, kien ikun biss eżerċizzju akkademiku.

39. F'kull każ l-appellanti xorta m'għandhiex raġun. It-tielet subinċiż tal-artikolu 1120 tal-Kap. 16 jagħmilha ċara li l-ħaġa prinċipali u l-penali flimkien ma jistgħux jintalbu flimkien **ħlief meta l-penali tkun ġiet miftiehma għad-dewmien biss**. Dan huwa l-każ preżenti.

40. Kif diġa ingħad aktar 'l fuq, il-klawżola applikabbli u li taħta qed tiġi avvanzata l-pretensjoni tal-appellata għall-penali, ossija l-klawżola 10.2 ta' *Section A1* fil-*General Requirements,* tistipula illi:-

> "*A penalty clause of €25 per day inclusive of Sundays and Public Holidays will be imposed on the Contractor* ***for failing to complete the Contract by the time stated in his tender offer****.'*

41. Huwa manifest li r-rikonvenzjoni għall-penali hija għalhekk għal dewmien biss. It-talbiet l-oħra tal-appellata għal danni m'humiex għad-dewmien *per se* iżda għal spejjeż addizzjonali sabiex ix-xogħol li oriġinarjament kellu jitwettaq mill-appellanti sar minn kuntrattur ieħor, danni għal xogħol ħażin, u ħsarat. Għaldaqstant, tiċħad ir-raba' aggravju.

42. **Il-ħames ilment** hu li l-membri tekniċi tat-Tribunal ma qablux bejniethom dwar il-kwistjoni tal-likwidazzjoni tad-danni u għalkemm huwa minnu li d-deċiżjoni ttieħdet minn żewġ membri minn tlieta, tenut kont ukoll taċ-ċirkostanzi li issemmew mid-*dissenting arbitrator*, ma huwiex ġust u lanqas skont il-liġi li titħalla d-deċiżjoni fuq dan il-punt kif deċiż mill-arbitri.

43. L-artikolu 44(4) tal-Kap. 3787 jipprovdi li:

> *'Deċiżjoni għandha tkun iffirmata mill-arbitri u għandu jkun fiha d-data meta u l-post fejn jitqies li tkun ingħatat id-deċiżjoni. Meta jkun hemm tliet arbitri u wieħed minnhom jonqos milli jiffirma, id-deċiżjoni għandu jkun fiha r-raġuni għal dak in-nuqqas ta' firma.'*

44. Il-fatt li ngħatat *dissenting opinion*, ma jfissirx li d-deċiżjoni kellha tkun skont dik l-opinjoni.

45. L-appellanti tippretendi li din il-Qorti għandha tħassar id-deċiżjoni appellata abbażi ta' tali *dissenting opinion.* Fil-fehma tal-Qorti dik mhi xejn għajr stedina sabiex tagħmel apprezzament tal-fatti mill-ġdid u tasal għall-konklużjoni li hi konformi ma' dik l-opinjoni. Dan m'huwiex possibbli. Id-dissenting opinion hi bażata fuq il-fatt li:

"1. The Award does not take into sufficient account delays during the course of the works that cannot be attributed to the Contractor. These include such extra work as the detailed surveys (much more detailed than the indicative sections/plans of the tender) that are necessary for the Contractor to do the Setting-out as specifically required in the contract. Also, delays due to the encountering of rock faults/dangerous fissuring cannot be attributed to the Contractor considering that scarce technical data was made available at tender stage. Similarly, the sewer leak and re-mobilisation shift to the Pembroke entrance, in my opinion, are not attributable to the Contractor. These should reflect in the quantification at page 23 as shown below".

46. L-opinjoni hi bażata fuq apprezzament ta' provi, u l-liġi tipprekludi appelli fuq punti ta' fatt. Għaldaqstant, tiċħad ukoll dan l-aggravju.

47. **L-appellanti tilmenta wkoll** li t-Tribunal tal-Arbitraġġ żbalja meta ddeċieda li l-*final bill* sar finali skont l-artikolu 18 tal-*General Conditions of Contract*, u kkonkluda li ma kellux għalfejn jidħol fil-bqija tal-kont mitlub mill-appellanti. Tikkontendi li ladarba l-partijiet qablu li jissottomettu d-diżgwid ta' bejniethom quddiem it-Tribunal il-partijiet qablu li jissottomettu l-kwistjonijiet kollha kemm legali u kif ukoll tekniċi quddiem l-istess Tribunal Arbitrali. Tgħid li naturalment, il-kwistjonijiet tekniċi kienu jinkludu wkoll il-valutazzjoni tax-xogħol.

48. Dwar il-valur tax-xogħol imwettaq mill-appellanti qabel it-terminazzjoni, id-deċiżjoni appellata tgħid is-segwenti:

'***Balance due to SIL***

There seems to be a discrepancy between what SIL billed Enemalta for works carried out up to date of termination of the Contract and the certified amount which the employer accepted. SIL claims that the value of work performed up to termination date amounts to €1,478,534.93. The amount certified by Enemalta totals €1,261,923.03. The figure claimed by SIL appears on Doc. SIL-25, which document was prepared by Architect Mark John Scicluna and lays down in detail the various works and other items for which the claimant company was expecting payment. Document SIL-018 entitled "Comparison between Bills and Payments amounts and dates" gives the amount for "Cumulative Payments" at €883,894.64 thereby showing a balance due to SIL of €594,640.29.

Architect Martin Attard Montalto, on behalf of Enemalta, filed a copy of a letter which had been sent by Architect Gail Woods to SIL on the 30th August 2012 (Vide Doc. MAM4.c.1) wherein it is stated that the Enemalta architect had measured the works carried out giving a total of €1,261,923.03. Consequently, according to Enemalta, the outstanding balance due to SIL for works carried out amounts to €378,028.39.

It must be pointed out that there is no apparent disagreement between the parties on the amount already paid to SIL. In fact both parties agree that up to the date of termination SIL had received the sum of €883,894.64.

Apart from the fact that the amount mentioned in Doc.SIL-25 exceeds the valuation made by Enemalta, it does not appear that SIL has made any vigorous submissions to contest the final Bill prepared by Enemalta's Architect. (In this

regard see also paragraphs 2.4.1.1 to 2.4.1.4 of the Nota ta' Sottomissjonijiet filed by claimant company on the 6th May 2015.) In any event it must be pointed out that Paragraph 18 of the said General Conditions provides that in the event of termination of the Contract for reasons mentioned in the said paragraph, "When the work is tendered for in a lump sum, (as in the case under examination) the portion of the work that shall have been actually delivered at the date such declaration was made will be valued by the Chairman, which valuation, after being approved by the Corporation shall be final."

In view of the above the undersigned are of the opinion that the balance still due by Enemalta to SIL, on the Contract de quo, for works carried out up to termination date, including costs of materials, amounts to €378,023.39 as declared by Enemalta. Naturally any payment due to SIL has to take into consideration what is provided in Sub Article (3) of Article 1640 namely "the usefulness of the works executed and the damages sustained." This also in view of what is stated in the concluding part of paragraph 18 of the said General Conditions where it is specifically stated that "The Contractor shall in addition be liable to pay the Corporation (now The Company) or the Corporation shall be further entitled to deduct the value of any expense, loss or damage (including any difference between the contract price of the work to be done under the contract, or such portion thereof as may not have been delivered at the date of such declaration as aforesaid and the price which the Corporation may have to pay for similar work provided in lieu of such portion as may not have been delivered) the Corporation may set up or sustain by reason of, or in which connection with, the Contractors breach of the Contract." This is the subject matter of the counter claim filed by Enemalta.'

49. L-appellanti ma tagħti l-ebda motivazzjoni legali għalfejn it-Tribunal ma kellux japplika l-artikolu 18 tal-*General Conditions* u fl-ebda waqt ma tikkontesta l-interpretazzjoni tal-istess klawżola li ġiet mogħtija mit-Tribunal. Tippretendi iżda li ladarba l-partijiet issottomettew il-kwistjoni għall-arbitraġġ, it-Tribunal kellu jinjora l-istess klawżola u jikkunsidra t-talba tagħha skont il-kont finali eżebit in atti bħala SIL-25 mal-affidavit tal-Perit Mark John Scicluna. Huwa manfiest li dan l-aggravju ma jreġix in kwantu huwa għal kollox priv minn motivazzjoni valida.

50. Apparti n-nuqqas ta' bażi legali għal dan l-aggravju, u bla ħsara għall-fatt li appell lil din il-Qorti huwa limitat għal punt ta' dritt determinat mit-Tribunal, huwa minnu li fil-paragrafi 2.4.1.1 to 2.4.1.4 tan-nota ta' sottomissjonijiet tagħha l-appellanti ma fissret assolutament l-ebda raġuni għalfejn it-Tribunal kellu jistrieħ fuq l-ammont pretiż minnha u mhux fuq l-ammont ċertifikat mill-appellata. Fiċ-ċirkostanzi, hu żbaljat li l-appellanti tippretendi li t-Tribunal kellu jagħmel dak li hija m'għamlitx u jinoltra ruħu f'tali kwistjoni meta l-ftehim bejn il-partijiet kien jipprovdi li f'każ ta' terminazzjoni tal-kuntratt dovuta għall-inadempjenza tal-kuntrattur, dan tal-aħħar kien intitolat biss għall-ħlas ta' ***`work that that shall have been actually delivered'*** kif stmata mic-*Chairman*, liema somma ssir finali ladarba tiġi approvata mill-Korporazzjoni. Għaldaqstant, tiċħad ukoll dan l-aggravju.

51. **Ilment ieħor** tal-appellanti hu li t-Tribunal Arbitrali attribwixxa d-dewmien kollu bħala kawżat mill-appellanti mingħajr ma effettivament daħal fil-kwistjoni kif kien marbut li jagħmel. L-appellanti tammetti li dan huwa aspett li jirrigwarda l-fatti, iżda tikkontendi li l-Kap. 387 jassumi li t-Tribunal kun analizza l-punti kollha ta' fatt b' diliġenza u wasal għall-konklużjonijiet tiegħu wara li qies il-punti ta' fatt kollha fl-intier tagħhom.

52. Dwar il-kwistjoni tad-dewmien, it-Tribunal tal-Arbitraġġ iddeċieda:

> '***Termination of Contract***
>
> *As already pointed out above by completion date the works subject of the contract were far from executed. In fact by February 2012 less than the excavation of the first phase had been completed, besides the fact that no finishing works on this part of the project had been carried out. This failure on the part of SIL gave Enemalta the right to terminate the contract as laid down in Clause D1.9.1.6 of the Contract. SIL is nevertheless contesting its responsibility for any delays in starting to execute the works as well as any delays occurring during the actual execution thereof.*
>
> *In its defence SIL put forward various reasons why the works did not start within the prescribed time as set out in the Order to Start Works ...*
>
> *Unfortunately when these and other problems were somehow sorted out, works could not start as the Contractor did not have in his possession the tunnelling machine. This machine only arrived in Malta in late June of 2010 and boring started on the 22nd June, that is, four months after the date when SIL had to start works. SIL, in its defence, states that it could not have the tunnel boring machine on site immediately as it would have incurred enormous costs represented by the rent paid on the machine, pending the solution of the preliminary problems. In this regard, the undersigned are of the opinion that, as stated above, following the Letter of Acceptance received by SIL on the 21st January 2010, the Contractor should have made all the necessary preparations to make sure that when the Order to Start Works was eventually issued, he would have been in a position to start boring. Actually one might also point out that till the Order to Start Works SIL did not alert Enemalta of any impediments to the initiation of the project.*
>
> *Further more besides the above delays it must be pointed out that, during the progress of works, various stoppages resulted giving rise to further delays. The following are examples of the causes which interrupted the works:-*
>
> *a) Leaks from the drainage system which passed over the tunnel.*
> *b) Instability in the rock layers.*
> *c) Places where there was no rock.*
> *d) Problems with disposal of waste.*
> *e) Health and safety issues.*
>
> ***Naturally the parties do not agree as to who should bear responsibility for these delays resulting in the non completion of the contracted works within the time frame agreed upon. SIL alleges that Enemalta was responsible for the delays prior to the starting of works as well as for the stoppages during the execution of works and consequently argues that it was precluded from honouring its contractual obligations due to Enemalta's lack of co-operation and ineffectiveness. On the***

other hand Enemalta, whilst admitting responsibility for one month of delays (vide evidence of Architect Martin Attard Montaldo p. 27), argues that the major part of the delays in the progress of the works should be attributed to the contractor who failed to find remedies when problems arose or did not act promptly when advised to do so.

As pointed out above any delays before works were commenced rest with the contractor. Delays during the execution of the works could be attributed to either or both parties in the dispute. All in all, however, the undersigned feel that even if one were to accept SIL's reasoning, the part of the project not executed by February 2012 would never have been carried out in the time during which the stoppages occurred as the days required to terminate the job by far exceeded the days attributed to delays. Consequently SIL would still be in default even if one were to allow an additional time for the execution of the works equivalent to the whole period of delays.[1]

53. Għal darb'oħra l-Qorti terġa ttenni li appell minn deċiżjoni ta' Tribunal tal-Arbitraġġ jista' jsir biss fil-każijiet kontemplati fl-Artikolu 70A(3) tal-Att dwar l-Arbitraġġ (Kap. 387). F'dan l-aggravju l-appellanti ma qajmitx punt ta' liġi tat-tip li teżiġi l-liġi sabiex il-parti telliefa tkun tista' tappella quddiem din il-Qorti. Din il-Qorti ma tistax tagħmel apprezzament ta' provi, u dan hu ċar minn paragrafu (ċ) tal-istess disposizzjoni. Il-fatti jridu jkunu dawk li jirriżultaw fid-deċiżjoni.

54. F'dan l-aggravju l-appellanti tikkritika l-mod kif it-Tribunal tal-Arbitraġġ ikkunsidra l-materja dwar dewmien, għaliex fil-fehma tagħha ma kienx ikkunsidra l-punti ta' fatt fl-intier tagħhom. Pero' dak l-ilment mhuwiex il-punt ta' liġi li minnu jista' jsir appell skont l-artikolu 70A(3) tal-Kap. 387. Mhux kull punt ta' liġi hu appellabbli, u dan hu evidenti mill-imsemmija disposizzjoni.

55. Għal dak li jikkonċerna l**-aħħar aggravju** (ara paragrafu 20 tar-rikors tal-appell), ġie eżawrit bid-deċiżjoni addizzjonali li ngħatat fit-23 ta' Ottubru, 2019.

<u>APPELL TAL-APPELLATA</u>.

56. **L-ewwel ilment** hu dwar l-ispejjeż addizzjonali li l-appellata qalet li għamlet sabiex tlesta x-xogħol li kellu jsir mill-appellanti wara li l-appellata tterminat l-appalt. L-appellata ilmentat **li t-Tribunal tal-Arbitraġġ stqarr li l-proċedura negozjata minn Polidano Brothers Limited kienet illegali meta ma sar xejn illegali.**

[1] Enfażi tal-Qorti.

57. L-appellanti oġġezzjonat għall-ħlas ta' dawk l-ispejjeż għaliex issostni li dawk ix-xogħlijiet ingħataw lill-kuntrattur ieħor mingħajr ma kienu osservati l-*Public Procurement Regulations* (Leġislazzjoni Sussidjarja 174.04).

58. Min-naħa tagħha l-appellata qalet li ma kellha l-ebda alternattiva oħra ħlief li toħroġ *direct order* lil Polidano Brothers li kien il-kuntrattur li kien għadu kif rebaħ *tender* għal tħaffir ta' mina bejn il-Magħtab u St. Andrews, li kienet set tingħaqad mal-mina li kellha titħaffer mill-appellanti. Tgħid li din il-proċedura li tissejjaħ *negotiated procedure* hija rikonoxxuta skont il-liġijiet tal-Unjoni Ewropea u lokali u sabiex tintuża hemm bżonn il-kunsens tad-Direttur tal-Kuntratti skont l-artikolu 39(3) tar-Regolamenti dwar il-Kuntratti Pubbliċi. Dan tal-aħħar jista' wkoll skont l-artikolu 73, jawtorizza proċedura negozjata mingħajr il-ħtieġa ta' pubblikazzjoni preċedenti ta' avviż dwar kuntratt tal-UE. Issostni għalhekk li t-Tribunal kien għal kollox skorrett meta ddeċieda li l-proċedura ma' Polidano kienet awtomatikament skorretta sempliċement għaliex ma nħariġx dan l-avviż. Tinsisti li hija aġixxiet fuq ir-rakkomandazzjoni tad-Direttur tal-Kuntratti u għalhekk ma jistax jingħad li hi aġixxiet b'xi mod li jista' jiġi kkunsidrat illegali.

59. It-Tribunal tal-Arbitraġġ ikkonkluda li wara li l-appellata tterminat l-appalt li kienet tat lill-appellanti, kellha ssir sejħa pubblika oħra għal *tenders* (ara fol. 21 tad-deċiżjoni finali);

> *"The Director of Contracts, in fact, does not seem to have been given the power to intervene when a public contract has been terminated prematurely. When Enemalta terminated the contract awarded to SIL this brought about a situation where Enemalta, as a contracting authority, had a project which had been and now could be the subject of anew public contract for the excavation of the remaining one and a half kilometre of tunnel which had been left undone by SIL. The said works were certainly of a value in excess of €120,000 and therefore the procurement of the necessary works 'shall be made by public contract after a call for tenders in accordance with these regulations." (Art. 25(1) of the Public Procurement Regulations). It follows that no excuse or reason could be brought forward to justify the granting of a Direct Order to Polidano Brothers Ltd, 'wihout recourse to a prior call for competition' (Art. 2 of the said Regulations) and thereby dispensing with the requirements of a 'contest' 'pursuant to a formal notice or an EU notice' (also Art 2) as laid down in the Procurement Regulations".*

60. Pero' t-Tribunal tal-Arbitraġġ naqas milli jikkunsidra li skont regolament 25(5) tal-L.S. 174.04, l-appellata kellha jedd li taddotta l-proċedura negozjata diment li tfittex il-kunsens tad-Direttur tal-Kuntratti.[2] Disposizzjoni li fid-deċiżjoni finali ma tissemmiex. Skont id-definizzjoni li nsibu f'regolament 2, f'proċedura negozjata:

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[2] *"In all cases in which the authorities listed in Schedule 2 wish to adopt the restricted or negotiated procedure in order to carry out their procurement, the prior consent of the Director shall be required".*

"...contracting authorities consult the economic operators of their choice and negotiate the terms of a contract with one or more of these". Għalhekk kuntrarjament għal dak li kkonkluda t-Tribunal, mhux bil-fors kellu jsir il-proċess kompetittiv ta' *tender* skont ir-regolamenti (ara regolament 25(1)), diment li hemm iċ-ċirkostanzi meħtieġa sabiex issir il-proċedura negozjata li tissemma f'regolament 73. L-appellanti stess taċċetta dan (ara tweġiba li ppreżentat għall-appell tal-appellata). Proċedura li pero' tista' tintuża biss f'dawk iċ-ċirkostanzi speċjali kontemplati fl-istess regolamenti. Proċedura negozjata m'hijiex in-norma iżda l-eċċezzjoni. Għalhekk kellha issir prova sħiħa li kien hemm il-kunsens tad-Direttur tal-Kuntratt u l-eżistenza ta' waħda miċ-ċirkostanzi kontemplati f'regolament 73, sabiex issir dik il-proċedura speċjali.

61. Madankollu f'dan il-każ ma xehedx id-Direttur tal-Kuntratti sabiex jikkonferma li kien ta l-kunsens tiegħu biex l-appellanti ssegwi dik il-proċedura. Fatt konfermat mill-appellata stess f'paragrafu 4.8 tat-tweġiba. Prova li fil-fehma tal-qorti kienet meħtieġa għall-finijiet tar-regolament 25(5) tal-L.S. 174.04, u wkoll sabiex jiġi determinat kienx hemm waħda miċ-ċirkostanzi kontemplati taħt regolament 73 sabiex tkun addottata dik il-proċedura, iktar u iktar meta tikkunsidra li l-kwistjoni hi dwar kuntratt pubbliku u meta tqies il-valur konsiderevoli tax-xogħol li ngħata lil Polidano Ltd. Prova li faċilment setgħet issir irrispettivament ta' dak li seta' xehed uffiċjal tal-appellata. F'dan ir-rigward lanqas ma ġiet preżentat dokument ffirmat mid-Direttur tal-Kuntratti bil-kunsens tiegħu u a bażi ta' liema paragrafu tar-regolament 73 kien ingħata l-kunsens. Lanqas ma saret riferenza għal xi ittra li biha l-Enemalta għamlet it-talba lid-Direttur tal-Kuntratti sabiex jagħti l-kunsens tiegħu u li biha issostanzjat it-talba sabiex tkun awtorizzata taddotta dik il-proċedura.

62. F'dan ir-rigward l-oneru tal-prova kien fuq l-appellata ġialadarba qegħda ssostni li d-Direttur tal-Kuntratti ta l-kunsens tieghu u li kien hemm l-elementi meħtieġa sabiex il-kuntratt lit-tieni kuntrattur jingħata permezz tal-proċedura negozjata. Proċedura li m'hijiex dik normali ta' sejħa għal *tenders*. Billi m'hemmx il-prova li l-qorti tqies bħala dik essenzjali, l-appellata ma tistax tirnexxi fit-talba tagħha.

63. Fin-nota li l-appellata ippreżentat fl-10 ta' Mejju, 2019 argumentat li t-Tribunal tal-Arbitraġġ ma kienx kompetenti sabiex jiddeċiedi jekk il-ftehim li sar bejn l-Enemalta u t-tieni kuntratt, kienx irregolari. Il-qorti ma tara l-ebda raġuni għalfejn it-Tribunal ma setax jiddeċiedi ġialadarba kienet parti mill-kwistjoni ta' bejn il-kontendenti fir-rigward tad-danni li l-appellata tippretendi mingħand l-appellanti.

64. Fl-aħħarnett il-qorti tosserva li l-argument li sar f'paragrafu 9.8 tal-appell tal-appellata, mhu xejn għajr apprezzament ta' fatt li dwarha m'hemmx jedd ta' appell.

65. **It-tieni ilment** hu dwar spejjeż li l-appellata qalet li kellha tħallas minħabba xogħol li tallega li sar mill-appellanti mhux skont is-sengħa u l-arti.

66. L-appellata issostni li l-punti ta' ditt li fuqhom jissejjes dan l-aggravju huma (i) in-nuqqas ta' motivazzjoni tal-*lodo* Arbitrali fir-rigward; u (ii) li hija posizzjoni legali aċċettata fil-ġurisprudenza nostrana li l-appaltatur jibqa' responsabbli għax-xogħol ħażin u traskurat li jkun wettaq ukoll jekk dan sar bil-barka tal-appaltant u taħt is-superviżjoni ta' perit.

67. Dwar din il-materja fid-deċiżjoni finali tat-Tribunal tal-Arbitraġġ intqal:

> '***Bad workmanship***
>
> *Enemalta is claiming the sum of €619,413.16 in respect of expense allegedly incurred by it to make good bad workmanship in the works executed by SIL up to date of termination of the contract. It is being alleged that the new contractor inherited a disastrous situation were various works were not up to standard and others were not according to specifications. These defects, Enemalta states, had to be made good by the new contractor who naturally billed Enemalta for them.*
>
> *SIL objects to this part of the counter claim for the following reasons:-*
>
> *a) The works which allegedly have been described as bad by Enemalta are visible and since this work has been accepted by Enemalta and also set down in the bill for works carried out as payable to the contractor without reservations, then once these works have been accepted, Enemalta cannot now complain that the works were defective.*
> *b) Trimming and back filling was always part of the work undertaken by SIL as this was necessitate by the excavation method used which involved a Road Header. This method of excavation was approved by the technical persons at Enemalta who also were, or should have been, aware of the necessity of such finishing works. The said works consisting of trimming and back filling, which would have been part of the contract price, were never carried out by the contractor as his contract had been terminated and he was asked to vacate the site immediately.*
>
> ***The undersigned agree with these submissions and therefore feel that no further compensation should be given for works carried out by the new contractor to make good the alleged bad workmanship as the***

works billed were approved and the finishes would have been part of the price quoted by SIL in tendering for this work.[3]

68. Jirriżulta li fin-nota ta' sottomissjonijiet tagħha tat-8 ta' Ġunju 2015, l-appellata argumentat li l-kuntrattur jibqa' responsabbli għax-xogħol ħażin u traskurat li jkun wettaq ukoll jekk dan sar bil-barka tal-appellata u taħt is-superviżjoni ta' perit.[4]

69. Effettivament, fil-ġurisprudenza insibu:

> *'(1) Bhala l-ewwel principju huwa dottrinalment u gurisprudenzjalment ricevut illi l-appaltatur ghandu lobbligu li jezegwixxi x-xoghol lilu kommess fis-sens li huwa ghandu l-obbligu wkoll li jara li dan ix-xoghol ikun sejjer isir utilment u mhux b'mod li 'l quddiem juri difetti. "L'imprenditore ha l'obbligo di eseguire bene l'opera commessagli, secondo i dettami dell'arte sua, e deve prestare almeno una capacita` ordinaria" (**Kollez Vol XXVII pI p373**). Dan fis-sens li hu "ghandu jiggarantixxi lbonta` tax-xoghol tieghu" (**Kollez Vol XL pI p485**).*
>
> *(2) "L-appaltatur li jezegwixxi hazin ix-xoghol li jifforma l-oggett ta' l-appalt huwa responsabbli ghad-dannu kollu li jigi minn dik l-esekuzzjoni hazina" (**Kollez. Vol XXXVII pIII p883**). Ghax kif jinsab ritenut ukoll "f'kaz bhal dan hu ghandu mill-ewwel ma jaghmilx ix-xoghol jew ikollu jirrispondi ghad-difetti li jigu 'l quddiem" (**Mario Blackman - vs - Carmelo Farrugia et - vs - Carmelo Farrugia et noe**", Appell Kummercjali, 27 ta' Marzu 1972).*
>
> *(3) Dan hu hekk avolja jkun hemm l-approvazzjoni tax-xoghol (**Kollez. Vol XLI pI p667**) jew l-appaltatur ikun mexa skont l-ispecifications jew l-istruzzjonijiet lilu moghtija mill-kommittent. "E` dovere dell'appaltatore di resistere ad ordini che egli vedesse pregiudizievoli alla solidita` e contrarii alle buone regole dell'arte" (**Kollez Vol .XXV pI p727**). Kif ahjar imfisser u spjegat, "l-appaltatur hu obbligat u hu dejjem responsabbli li jaghti lill-appaltant opra sodisfacenti, u ma jistax jallega li x-xoghol sar mhux sewwa ghax hu ghamlu kif ried il-kommittent, billi l-appaltatur hu obbligat jirrezisti ghal kwalunkwe intromissjoni tal-kommittent" (**Kollez. Vol XLII pII p1003**).*
>
> *(4) Huwa pacifiku wkoll illi l-hlas tal-prezz tal-appalt jew il-hlas akkont ma jfissrux necessarjament approvazzjoni tax-xoghol jekk dan fil-fatt jirrizulta difettuz (**Kollez. Vol. XLI pII p892**) …*
>
> *... Kif gie stabbilit bil-gurisprudenza surriferita, huwa l-obbligu primarjament tal-appaltatur li jesegwixxi tajjeb l-appalt u jekk avverat li dak ix-xoghol ma kienx ser isir skont il-grad rikjest mil-ligi kellha tiehu passi rimedjali biex tilqa' ghall-eventwali responsabbilta` imposta fuqha bl-istess ligi.*[5]

70. Madanakollu, ir-rikovenzjoni għad-danni rappreżentanti xogħol li sar ħażin ma ġietx miċħuda biss minħabba li x-xogħol kien visibbli u ċċertifikat milL-Enemalta. Fil-*lodo* ġie deċiż ukoll li, `*the finishes would have been part of the price quoted by SIL in tendering for this work'* u għalhekk l-Enemalta xorta kienet se tħallas

[3] Enfażi tal-Qorti.
[4] Punt 7.24 u 7.25.
[5] ***Bollicine Limited vs Invicta Limited***, sentenza finali mogħtija mill-Prim' Awla tal-Qorti Ċivili fis-27 ta' Frar, 2014.

għalih. **Il-fatt li l-appellata ma taqbilx ma dik il-konklużjoni bħala punt ta' fatt ma jagħtihiex jedd ta' appell.**

71. Il-qorti żżid li t-Tribunal qal ukoll li jaqbel mar-raġunament tal-appellanti, li kien bażat fuq punti ta' fatti ċjoe' li x-xogħol li dwaru kienet qegħda tilmenta l-appellata kien viżibbli u ġie approvat. Jekk ix-xogħol li minnu l-appellata tilmenta kien jidher u ġie approvat minnha, ma jistax wara li jittermina l-appalt u jagħti l-kumplament tal-proġett lil ħaddieħor, tilmenta dwar il-kwalita' tax-xogħol li għamel l-ewwel kuntrattur. Wieħed irid jiftakar li f'kuntratt ta' dik ix-xorta ikun hemm involuti nies tekniċi għaż-żewġ naħat, u l-approvazzjoni tax-xogħol li wieħed jista' jara b'għajnejh hi prova b'saħħitha ħafna li dak ix-xogħol sar skont is-sengħa u l-arti u li l-Enemalta kienet kuntenta bih.

72. L-ilment li din il-parti tad-deċiżjoni m'hijiex daqstant elaborate hu mingħajr bażi, għaliex wieħed xorta jifhem x'wassal lit-Tribunal sabiex jiċħad it-talba.

73. **It-tielet ilment** jitratta l-penali għal dewmien.

74. L-appellata tilmenta li m'huwiex minnu li tterminat il-kuntratt b'mod prematur iżda ħalliet lill-appellanti tkompli wara d-data tat-tlestija kontemplata fil-kuntratt; '*għalhekk wieħed jista' fil-fatt japplika penali għad-dewmien bl-istess mod li ġew ikkalkulati mill-Enemalta f'dan il-każ.'* Tgħid li abbażi tad-deċiżjoni ċitata mit-Tribunal stess, it-talba tagħha kellha tiġi milqugħa *in toto* mhux tiġi miċħuda.

75. Jirriżulta li:

- fis-6 ta' Ġunju 2008 ħarġet sejħa għall-offerti TD/T/95/2007;
- fil-5 ta' Awissu 2008 l-appellanti għamlet l-offerta;
- l-appellata bagħtet *letter of acceptance* lill-appellanti datata 31 ta' Diċembru 2009;
- L-*Order to Start Works* inħareġ fis-26 ta' Frar 2010;
- Is-sejħa għall-offerti kienet tirrikjedi żmien ta' tlestija għall-proġett kollu ta' 104 ġimgħat, ossija, żewġ fażijiet ta' 52 ġimgħa kull waħda. Għalhekk l-ewwel fażi tal-proġett kellha titlesta sal-aħħar ta' Frar 2011 **u t-tieni fażi sal-aħħar ta' Frar 2012**;
- il-kuntratt ġie tterminat permezz ta' ittra li l-Enemalta bagħtet lill-kuntrattur nhar il-Ġimgħa **20 ta' April 2012**;
- għall finijiet ta' dewmien l-appellata tikkonċedi li l-appellanti ma kinitx responsabbli għall-perjodu bejn il-5 t' Awissu 2010 u s-6 ta' Settembru 2010 u għaldaqstant ħadet bħala data tat-tlestija tal-ewwel fażi s-**26 ta'**

Marzu 2011. B' hekk, l-appellanti tikkalkula il-penali fuq 391 ġurnata bejn **is-26 ta' Marzu 2011 u l-20 ta' April 2012 fl-ammont totali ta' €9,775**.

76. It-Tribunal qal:-

> *"In this case Enemalta is claiming compensation for delays without any specific relationship to the completion of the project as the Contract was terminated prematurely. The Contract have been terminated, the Contractor was placed in a situation where he could never complete works, so, one may ask, how can damages for delay in completion be computed"*.

77. Sabiex wieħed ikun jista' jikkunsidra l-ilment tal-appellata, bifors irid jikkunsidra l-fatti li ssemmew hawn fuq. Pero' m'hemmx jedd ta' appell fuq żball dwar punti ta' fatt. Din il-qorti ma tistax tasal għall-konklużjoni li tippretendi l-appellata, mingħajr ma tagħmel apprezzament ta' provi. Eżerċizzju li ma jistax isir f'dan l-istadju.

Għal dawn ir-raġunijiet tiċħad l-appell tal-appellanti bl-ispejjeż kontriha u tiċħad l-appell tal-appellata bl-ispejjeż kontriha.

Anthony Ellul.