



**QORTI CIVILI
PRIM' AWLA**

**ONOR IMHALLEF
DR FRANCESCO DEPASQUALE
LL.D. LL.M. (IMLI)**

**Seduta ta' nhar it-Tnejn
Sitta (6) ta' Lulju 2020**

Rikors Numru 28/2013 FDP

Fl-ismijiet

Trasporti e Movimenti Terra Ltd (C 50149)

Vs

Schembri Infrastructure Ltd (C 17388)

Il-Qorti:-

1. Rat ir-rikors datat 15 ta' Jannar 2013, li permezz tiegħu s-soċjeta' rikorrenti talbet is-segwent:

ILLI s-soċjeta' rikorrenti kienet permezz ta' ftehim redatt in iskritt, datat sebgha u ghoxrin (27) ta' Awwissu elfejn u ghaxra (2010) (Dok A), giet inkarigata mis-soċjeta' intimata sabiex thaffer mina fil-Kappara;

ILLI s-soċjeta' intimata minkejja diversi interpellazzjonijiet nonostatne li sal-lum gia' saru hlasijiet ammontanti ghal tlett mija u tletin, disgha mija u hamsa u ghoxrin Euro (€ 330,925) qed turrifjuta li thallas l-ahhar fatturi ghal xoghol kommess' mis-soċjeta' rikorrenti ammontanti ghal mitejn u hamsa u erbghin elf, tlett mija u sitta u tletin Euro u ghoxrin centezmu (€ 245,363.20) kif jirrizulta mill-prospett anness (dok B) nonostante li dan id-debitu hu rikonoxxut;

Tgħid għalhekk is-soċjeta' intimata il-għaliex, dina l-Qorti ma għandhiex "previa kwalsiasi dikjarazzjoni neċessarja u opportuna u għar-raġunijiet fuq premissi.

1. TIKKUNDANNA lis-soċjeta' intimata thallas lis-soċjeta' rikorrenti s-somma ta' mitejn u ħamsa u erbgħin elf, tlett mija u sitta u tletin Euro u għoxrin ċenteżmu (€ 245,363.20);

Bl-ispejjeż tal-preżenti, tal-mandat ta' sekwestru ppreżentat kontestwalment u bl-imghax mit-tnejn (2) ta' Mejju elfejn u tnax (2012) sad-data tal-pagament effettiv, kontra s-soċjeta' intimata minn issa ingunta in subbizzjoni.

2. Rat illi fit-23 ta' Jannar 2013, is-soċjeta' intimata, qabel ma ressqet risposta, intavolat rikors sabiex, ai termini tal-Artikolu 15 tal-Att dwar l-Arbitraġġ, il-proċeduri odjerni jiġu differiti *sine die* pendenti l-eżitu ta' proċeduri arbitrali, liema rikjesta giet miċhuda fil-21 ta' Frar 2013.
3. Rat ir-risposta ġuramentata tas-soċjeta' intimata ippreżentata fit-13 ta' Marzu 2013 fejn laqgħet għal dak mitlub billi qalet is-segwent:

1. *In via preliminari in nuqqas ta' gurdizzjoni ta' din l-Onorabbli Qorti, dan stante li l-atturi qegħdin jitolbu l-ħlas ta' prezz ta' xogħolijiet imwettqa skont kuntratt ta' subappalt tas-27 ta' Awissu 2010, kopja ta' liema kuntratt gie eżebit mill-istess atturi, liema kuntratt fih klawnsola arbitrali li taqra kif ġej:*

"9.2. SETTLEMENT OF DISPUTES 9.2.1. CONCILIATION

The Parties shall seek to resolve in good faith any dispute or difference arising between them in respect of any matter connected with this Agreement. If the parties cannot resolve any such dispute or difference within fourteen days, or such a period as the parties may subsequently agree in writing, then such dispute shall be submitted to their respective designated representatives under this Agreement.

If such settlement is not possible the matter will be referred to Arbitration by the Malta Arbitration Centre. The Parties agree that in the event that the resolution of a dispute cannot be obtained without recourse to arbitration in the terms of this Clause, the Arbitration board made up of three Arbiters (3) shall decide said dispute, which decision shall be absolute, binding and not subject to appeal

2. *Mingħajr preġudizzju għas-suespost jiġi eċċepit li l-ammont mitlub mill-attriċi ma huwiex dovut kemm għaliex l-ammont mitlub ma huwiex*

gustifikat mix-xogħolijiet li filfatt saru kif ukoll għaliex għad għandu jiġi aċċertat jekk l-attriċi qdiex l-obbligi tagħha skont il-liġi u dan peress li l-klijent finali ta bidu għal proċedura ta' arbitraġġ kontra l-konvenuta għaliex qiegħed jallega li x-xogħolijiet ma sarux skont is-sena u l-arti;

3. *Mingħajr preġudizzju għas-suespost jiġi eċċepit ulterjorment li anke f'każ li jirriżulta li l-konvenuta għandha tħallas xi somma flus lill-attriċi, din għandha d-dritt li żżomm kull pagament sakemm jiġi determinat jekk il-penalitajiet li qiegħda timponi l-korporazzjoni Enemalta fil-konfront tal-konvenuta humiex imputabbli lill-attriċi u f'dak il-każ sa liema ammont, stante li l-attriċi għandha l-obbligu li tindennizza lill-intimata u dan b'applikazzjoni tal-klawsola numru 8.1.(c) tal-kuntratt ta' sub appalt li jaqra kif ġej:*

"..The Parties agree that in the event that the completion of execution of works is delayed for reasons imputable to the Contractor, all and any penalties, fees or charges as may reasonably be imposed upon the Employer by the employer in the Main Agreement by reason of said delay shall be chargeable by the Employer In this agreement against the Contractor who shall indemnify the Employer in full for said penalties fees or charges. To this effect the Contractor hereby authorises the Employer to withhold any balance due by the Employer to the Contractor for the execution of works in such event that any penalties as are mentioned in this paragraph are imposed or threatened to be imposed by the employer in the Main Contract. For the avoidance of any doubt, the Parties hereby agree that the Contractor's liability for payment of penalties shall be limited specifically to those penalties actually imposed on and incurred by the Employer under the Main Contract."

4. *Illi t-talbiet attriċi huma kompletament infondati fil-fatt u fid-dritt u għandhom jiġu miċħuda bl-ispejjeż kontra l-atturi li huma minn issa ingunti in subizzjoni*
5. *Salv eċċezjonijiet ulterjuri jekk ikun il-każ.*

Fatti

1. *Il-fatti fil-qosor ħafna huwa li bil-kuntratt ta' sub appalt mertu tal-kawża l-kumpannija attriċi Trasporti e Movimenti Terra Ltd kienet giet inkarigata mill-kumpannija Schembri Infrastructures Limited sabiex tagħmel xogħolijiet ta' skavazzjoni b'sub appalt. Schembri Infrastructures Limited kienet rebħet appalt fejn kellha twestjaq xogħolijiet għall-Korporazzjoni Enemalta li kienu jinkludu l-iskavi li*

ġew subappaltati lill-attriċi. Ġara li l-Korporazzjoni Enemalta tterminat il-kuntratt inter alia għaliex kienet qiegħda tgħid li kien hemm dewmien fl-esekuzzjoni tal-proġett u tal-iskavi u mponiet penalitajiet u saħansitra wkoll wasslet biex tiżbanka garanzija bankarja li kienet inġhatat mill-kumpannija Schembri Infrastructures Limited. Għalhekk skont il-kuntratt bejn il-partijiet f'din il-kawża f'dan il-każ, il-kumpannija Schembri Infrastructures Limited hi intitolata li tingħata indennizz mingħand l-attriċi.

2. *Għandu jkun għalhekk ċar li fil-preżent il-konvenuta għanda d-dritt iżżomm f'idejha l-ammonti kollha talvolta dovuti lill-attriċi u li l-attriċi għandha l-obbligu li tindennizza lill-konvenuta kontra talba li qed issirilha mill-Korporazzjoni Enemalta.*

Provi

4. Rat illi fis-27 ta' Ġunju 2013 il-kawża ġiet differita għall-provi.
5. Rat illi bejn il-31 ta' Ottubru 2013 u il-5 ta' April 2016 saru ħdax-il seduta fejn ma sar assolutament xejn għajr illi l-Qorti tiġi infurmata illi hemm arbitraġġ pendenti.
6. Rat illi fil-5 ta' April 2016 il-Qorti għaddiet biex ikkancellat il-kawża minn fuq il-listi tagħha.
7. Rat illi fil-11 ta' April 2016 sar rikors ta' ri-appuntament da parte tas-soċjeta' rikorrenti, li ġie milqugħ fil-25 ta' April 2016.
8. Rat illi fl-14 ta' Diċembru 2016 ġie ippreżentat l-affidavit ta' **Giovanni Tidona**, rappreżentant tas-soċjeta' rikorrenti. (fol 72)
9. Rat ix-xhieda ta' **Christopher Bartolo**, Site Foreman tal-Korporazzjoni Enemalta, mogħtija fis-7 ta' Frar 2017. (fol 103)
10. Rat illi fl-20 ta' Ġunju 2017, il-Qorti ddikjarat il-provi tas-soċjeta' rikorrenti bħala magħluqa.
11. Rat l-affidavit tal-**Perit Mark John Scicluna**, impjegat tas-soċjeta' intimata inkarigat fl-eżekuzzjoni tal-proġett 'Excavation and Construction of a Service Galley – Kappara/Swieqi/St. Andrew's', ippreżentat fis-7 ta' Novembru 2017. (fol 110)
12. Rat ix-xhieda ta' **Rodianne Brincat**, Senior Accounts Clerk tas-soċjeta' intimata, mogħtija fit-12 ta' Diċembru 2017. (fol 161)
13. Rat il-kontro eżami ta' Giovanni Tidona illi saret fit-18 ta' April 2018 (fol 171) u fid-29 ta' Mejju 2018. (fol 178)

14. Rat ix-xhieda ta' **Dr Fiona Galea Farrugia**, Registratur ta' Ċentru dwar l-Arbitraġġ ta' Malta, prodotta mis-soċjeta' intimata u mogħtija fis-16 ta' Ottubru 2018. (fol 185)
15. Rat illi fit-3 ta' Lulju 2019, dina l-Qorti, kif komposta, ħadet konjizzjoni tal-atti għall-ewwel darba, fejn il-partijiet għarrfu lill-Qorti illi kien hemm żewġ arbitraġġi pendenti, wieħed 3520/13 fl-ismijiet 'Schembri Infrastructures Ltd vs Trasporti u Movimenti Terra Ltd, u ieħor 3200/12 fl-ismijiet Schembri Infrastructures Ltd ve Enemalta plc, fejn l-aħħar arbitraġġ imsemmi gie deċiż u huwa soġġett għall-appell quddiem il-Qorti tal-Appell Inferjuri.
16. Rat illi, wara ordni ta' dina l-Qorti tas-6 ta' Novembru 2019, fis-27 ta' Novembru 2019 is-soċjeta' intimata ipprezentat is-segwenti dokumentazzjoni:
 - a. Notice of Arbitration Nru 3520/20 bejn is-soċjeta' Schembri Infrastructures Ltd u Trasporti e Movimenti Terra Limited.
 - b. Statement of Claim tas-soċjeta' Schembri Infrastructures Ltd fl-Arbitraġġ 3520/13.
 - c. Statement of Defence tas-soċjeta' Trasporti e Movimenti Terra Limited fl-Arbitraġġ 3520/13.
 - d. Id-deċiżjoni Arbitrali 'Schembri Infrastructures Limited vs Enemalta plc' (3200/12) mogħtija fit-13 ta' Mejju 2016.
 - e. Kjarifika għad-Deciżjoni Arbitrali 3200/16 mogħtija fl-20 ta' Dicembru 2016.
17. Jirrizulta illi fis-27 ta' Novembru 2019 il-partijiet qablu illi l-kawża setgħet tithalla għas-sottomissjonijiet finali.
18. Rat illi fid-29 ta' Jannar 2020, is-soċjeta' rikorrenti ipprezentat sentenza tal-Qorti tal-Appell (Kompetenza Inferjuri) datata 17 ta' Jannar 2020 għall-appelli taż-żewġ partijiet fid-deċiżjoni arbitrali '**Schembri Infrastructures Limited vs Enemalta plc**' (3200/12) mogħtija fit-13 ta' Mejju 2016, fejn filwaqt illi ż-żewġ appelli ġew miċhuda, d-deċiżjoni arbitrali ġiet konfermata fl-interjiet tagħha.
19. Rat is-sottomissjonijiet tas-soċjeta' rikorrenti ipprezentati fid-29 ta' Jannar 2020.
20. Rat illi minħabba fil-pandemija Covid-19, il-Qorti w ir-Registru ġew ordnati magħluqa u għalhekk is-soċjeta' intimata ma setgħetx tippreżenta s-sottomissjonijiet tagħha.
21. Rat illi fit-12 ta' Ġunju 2020 is-soċjeta' intimata ipprezentat is-sottomissjonijiet tagħha.
22. Rat illi fit-2 ta' Ġunju 2020 il-kawża ġiet differita għas-sentenza.

Ikkunsidrat

23. Jirrizulta, mill-assjem tal-provi prodotti quddiem din il-Qorti tul is-sebgha snin illi ilha għaddejja l-kawża, illi l-partijiet fil-kawża odjerna kienu daħħlu fi ftehim fis-27 ta' Awissu 2010 fejn is-soċjeta' intimata, illi kienet rebħet tender maħruġ mill-Enemalta Corporation għal "*construction of a Service galley running through Kappara, St Julians and St Andrews*" ftehmet mas-soċjeta' rikorrenti sabiex, din ta' l-aħħar, tkun responsabbli "*exclusively (for) the excavation of the galley*".
24. Jirrizulta illi x-xogħlijiet ta' l-iskavar beda għaddej u s-soċjeta' rikorrenti gabet l-ingenji tagħha u impjegat nies biex tibda x-xogħol ta' l-iskavar filwaqt illi s-soċjeta' intimata bdiet tagħmel il-parti tagħha fil-proġett, għalkemm is-soċjeta' rikorrenti tilmenta illi f'varji istanzi, hija naqqset milli tonora dak illi kellha tagħmel.
25. Jirrizulta, illi mument minnhom, fis-26 ta' Marzu 2012, is-soċjeta' Enemalta, avżat lis-soċjeta' intimata illi x-xogħol kien waqa' lura ħafna u għalhekk, f'każ illi ma tottemperax ruħha ma' dak li kellha tagħmel fi żmien ġimghatejn, il-kuntratt kien ser jiġi terminat.
26. Jirrizulta illi, fl-ittra tagħha, il-Korporazzjoni Enemalta kellha dan xi tgħid lis-soċjeta' intimata:

On numerous occasions, Enemalta has reported various shortcomings on your end, and not only were such shortcomings drawn to your attention every time, but Enemalta has also repeatedly urged you and instructed you to regularize your position. However, you have either excessively delayed, or failed altogether, to rectify the situation.

Particularly, Enemalta notes the following:

The Commencement Notice for the Works was issued by Enemalta to the Contractor on the 12 February 2010. The Bank Guarantee was submitted on the 21 February 2010.

- The contract period for the completion of Phase 1 of the Works was 52 weeks, and the contract period for the completion of Phase 2 of the Works was 52 weeks, the two periods running sequentially giving a total Contract Period of 104 weeks.

The Contract Completion Date for the whole of the Works, that is for both Phase 1 and Phase 2, is 21 February 2012.

The Contractor has failed to discharge its obligations under the Contract, for the following reasons:

- 1. Failure to complete Phase 1 of the Works within 52 weeks.*

This Phase is yet to be completed, and according to the Contractor's latest Programme of Works, 28 February 2012, will not be completed before the end of 2012.

2. *Failure to complete the whole of the Works that is Phases 1 and 2, within 104 weeks.*

The works on Phase 2 have only recently started, almost at the end of the contractual period allowed for both Phases.

According to the Contractor's latest Programme of Works, dated 28 February 2012, the Works will not be completed before May 2013; 15 months later than the Contract Completion Date.

3. *Numerous and very serious contraventions by the Contractor related to Health and Safety on Site which were brought to your attention by Enemalta and by the Health & Safety Site Supervisor, and your flagrant and continued disregard of Instructions issued to you by Enemalta to make good your defaults.*
4. *The Contractor's failure to take in hand the Rock Stabilisation works to make safe those areas (at least 4 in number) where rock falls have occurred or where the Geotechnical Engineering Consultant engaged by Enemalta has identified unstable and unsafe ground conditions. Your continued delay to carry out these works is endangering the lives of your own operatives as well as the lives of anyone else who may be in the Tunnel.*

The above clearly shows that you have systematically failed to discharge your obligations under the Contract, leaving Enemalta with no option but to terminate the Contract on the basis of default by the Contractor.

Enemalta may only re-consider its decision to terminate the Contract if, and only if, by the date of termination notified above, you have:

- *Taken action to address and remedy all the Health & Safety issues which have been brought to your attention by Enemalta and the Health & Safety Supervisor, as per the attached report dated 22 March 2012.*
- *Commenced rock stabilisation works in accordance with the recommendations detailed in the Report prepared by Perit Anthony Cassar, dated 7 November 2011.*

- *You have progressed works on site at Kappara and Pembroke in line with the Programme of Works dated 28 February 2012 which Programme was agreed to at our meeting of the 21 February.*

Failure to rectify the situation within 15 days from date of this notice as outlined above shall lead to the termination of the Contract, and Enemalta reserves the right to take all actions allowed under the Contract and Law to safeguard its interests, including but without limitation the right to deduct the value of any expense, loss or damage the Corporation may set up or sustain by reason of, or in connection with, your breach of the Contract.

27. Jirriżulta illi eventwalment it-tender mogħti lis-soċjeta' intimata ġie terminat.
28. Jirriżulta illi, sussegwentement, is-soċjeta' intimata bdiet proċeduri ta' Arbitraġġ kontra l-Enemalta, permezz ta' Arbitraġġ Nru 3200/12 fl-ismijiet '**Schembri Infrastructures Limited vs Enemalta Corporation**'.
29. Jirriżulta illi fit-12 ta' Ġunju 2012, is-soċjeta' rikorrenti kitbet legalment lis-soċjeta' intimata fejn għarrfitha li "*you are being formally requested by not later than one week from today to pay at this Office the outstanding amount of €350,759.34*". (fol 35)
30. Jirriżulta illi, fis-7 ta' Awissu 2012, s-soċjeta' intimata rrispondiet għal tali rikjesta tramite l-konsulent legali fejn għarrfet lis-soċjeta' rikorrenti illi kien hemm diżgwid dwar il-bilanċ dovut u li kellhom pendenza mal-Enemalta li fuqha kellhom arbitraġġ għaddej. Għalhekk, is-soċjeta' intimata qalet illi "*because the outcome of arbitrations are never certain and because some of the allegations made by Enemalta referer to your obligations under the subcontract, clients will be exercising their contractual rights and will be withholding payment of all balances outstanding to your client until and to the extent determined by the proceedings against Enemalta.*"
31. Jirriżulta illi, minn dakinhar 'l hinn, ma sar ebda rikjesta biex proċeduri jinbdeu permezz ta' arbitraġġ u, s-soċjeta' rikorrenti eventwalment intavolat il-proċeduri odjerni fil-15 ta' Jannar 2013.
32. Jirriżulta illi fl-4 ta' Marzu 2013, ossija wara illi dina l-Qorti kienet, fil-21 ta' Frar 2013, caħdet it-talba tas-soċjeta' intimata biex il-kawża odjerna tiġi differita *sine die* sabiex il-kwistjoni tiġi riżolta quddiem it-tribunal arbitrali, is-soċjeta' intimata ippreżentat arbitraġġ kontra s-soċjeta' rikorrenti.
33. Jirriżulta illi, fil-proċeduri li bdiet is-soċjeta' intimata, ossija Azzjoni 3520/2013 fl-ismijiet '**Schembri Infrastructures Ltd vs Trasporti e Movimenti Terra Limited**', is-soċjeta' intimata talbet is-segwent:

1. A declaration that the Claimant is authorised to withhold any outstanding balance due to the Respondent and this in so far and to the

extent that Enemalta Corporation has imposed or threatened to impose penalties under the Main Contract;

2. A decision ordering the Respondent to indemnify and hold harmless the Claimant against any penalties, fees or charges imposed by Enemalta Corporation against the Claimant pursuant to the Works comprised in the Main Contract;

3. A decision liquidating and ordering the granting of security to the Claimant in warranty of the Respondent's obligation to indemnify and hold harmless the Claimant.

4. A declaration that the Respondent has breached the contract by proceeding judicially against the Claimant and a consequential Order restraining the Respondent from undertaking any further judicial proceedings in connection with the contract or any sums claimed by the Respondent thereunder.

5. A declaration that by breaching the contract as aforesaid the Respondent has caused damages to the Claimant, and an order ordering the payment of those damages that the Tribunal may liquidate.

6. With costs including the costs of this arbitration, the costs of legal assistance by lawyers and the costs and expenses in connection with any judicial acts or proceeding filed by the parties in connection with the facts as set out in this arbitration.

It is understood that the Claimant is not, at this stage, requesting the Arbitral Tribunal to liquidate the pending balance (if any) due to the Respondent or any penalties to which the Respondent would be liable, since these questions can only be answered once the pending arbitration proceedings between Enemalta Corporation and Schembri Infrastructures Limited are concluded. Accordingly Claimant expressly reserves the right to bring further arbitration proceedings against the Respondent for the collection of any sums that would be due to the Claimant by the Respondent under the Contract.

34. Jirrizulta illi sa lllum, sebgħa snin wara, dana l-Arbitraġġ għadu pendent.

35. Jirrizulta illi, nelfrattemp, l-arbitraġġ bejn is-soċjeta' intimata u l-Enemalta plc, li abbażi tiegħu s-soċjeta' intimata intavolat il-proċeduri ta' l-arbitraġġ fuq imsemmija ġie deċiż erbgħa snin ilu, fit-13 ta' Mejju 2016, u, wara appell intavolat miż-żewg kontendenti, kkonfermat in toto mill-Qorti tal-Appell fis-17 ta' Jannar 2020.

Difizi

36. Jirrizulta illi s-soċjeta' intimata, fid-difiza minnha mressqa qajjmet tlett difizi, ossija s-segwenti:

- a. Illi dina l-Qorti ma għandhiex ġurisdizzjoni peress illi, abbażi tal-kuntratt ta' sub appalt tas-27 ta' Awissu 2010, kwalsiasi diżgwid kellu jittressaq quddiem Arbitraġġ.
- b. Illi l-ammont mitlub ma huwiex dovut stante illi hemm arbitraġġ pendenti bejn is-soċjeta' intimata u terz, ossija Enemalta, li abbażi tagħha jrid jiġi stabbilit jekk s-soċjeta' rikorrenti qdietx l-obbligi tagħha.
- c. Illi s-soċjeta' intimata għandha dritt żzomm il-flejjes dovuti sakemm jiġi determinat jekk il-penalitajiet imposti fuq is-soċjeta' intimata huwa imputabbli lis-soċjeta' rikorrenti

37. Il-Qorti ser tgħaddi biex tikkunsidra dawna t-tlett difiżi separatament.

38. Il-Qorti, madanakollu, tħoss illi qabel ma tgħaddi biex tagħmel l-osservazzjonijiet tagħha, l-ewwel u qabel kolloxx, għandha tistieden lill-konsulenti legali sabiex jiddesistu fil-futur milli jagħmlu argumenti bla sens u bla bażi illi joffendu l-intelligenza ta' kwalsiasi individwu, aħseb u ara ta' dina l-Qorti. Dana qiegħed jingħad b'referenza partikolari għall-argument imressaq fis-sottomissjoniet finali tagħhom illi r-rikors huwa null għax sar bil-Malti filwaqt illi r-rappreżentat tas-soċjeta' rikorrenti huwa Taljan u ma jifhimx bil-Malti.

39. Il-Qorti tifhem, bħalma ċertament għandhom jifhmu l-konsulenti legali tas-soċjeta' intimata, illi s-soċjeta' rikorrenti hija soċjetà Maltija, u għalhekk l-atti ġudizzjarji kellhom isiru bil-Malti w li l-atti ġudizzjarji huma dejjem redatti mill-abbli konsulenti legali tal-partijiet, u għalhekk ċertament Giovanni Tidona kien a korrent ta' dak illi rrediġa l-konsulent legali tiegħu u kkonferma dak illi ġie lilu spjegat.

40. Il-Qorti tosserva wkoll illi, mill-banda l-oħra, meta ġie biex jagħmel l-affidavit tiegħu, Giovanni Tidona għamlu bil-lingwa Ingliża, indikazzjoni ċara illi meta eventwalment ġie biex jgħid il-fatti tal-każ kif jaf hu, huwa għażel li għamel dan bl-Ingliż li kienet lingwa illi huwa jaf, għalkemm mhux neċessarjament in kontroll tal-lingwa biżżejjed biex jixhed bl-Ingliż fil-Qorti.

41. Għalhekk, għal darba oħra, il-Qorti tteġġeg lill-konsulenti legali biex jillimitaw l-argumenti tagħhom għal dawk legalment bis-sens u ma jaħlux il-ħin tal-Qorti inutilment!

• **Il-Qorti ma għandhiex Ġurisdizzjoni stante illi kellhom jittiehdu proċeduri permezz ta' arbitraġġ**

42. Il-Qorti tosserva illi, a tenur tal-ftehim tas-27 ta' Awissu 2010, il-partijiet kienu ftehm u s-segwent:

The parties shall seek to resolve in good faith any dispute or difference arising between them in respect of any matter connected with this Agreement. If the parties cannot resolve any such dispute or difference within 14 days, or such a period as the parties may subsequently agree in writing, then such dispute shall be submitted to their respective designated representatives under the Agreement

If such settlement is not possible the matter will be referred to Arbitration by the Malta Arbitration Centre. The Parties agree that in the event that the resolution of a dispute cannot be obtained without recourse to Arbitration in terms of this Clause, the Arbitration board made up of three Arbiters (3) shall decide said dispute and which decision shall be absolute, binding and not subject to appeal.

43. Il-Qorti tosserva illi, kif fuq ġia' indikat, fit-12 ta' Ġunju 2012, is-soċjeta' rikorrenti kienet interpellat lis-soċjeta' intimata tħallas l-import totali ta' €350,759.34, ossija l-import ta' cheque ta' €100,000 maħruġ mis-soċjeta' intimata u eventwalment mhux onorat mill-Bank, kif ukoll bilanċ ta' €250,759.34 dovut.
44. Jirriżulta s-soċjeta' intimata kienet irrispondiet għal tali rikjesta billi qalet illi kienet ser iżżomm il-flejjes stante illi kellha pendenza mas-soċjeta' Enemalta, illi magħha hija kellha kuntratt li imbagħad, parti minnu, tagħtu b'sub appalt lis-soċjeta' rikorrenti.
45. Jirriżulta illi, minn dakinhar, is-soċjeta' intimata ma għamlet ebda tentattiv sabiex tibda arbitraġġ mas-soċjeta' rikorrenti.
46. Jirriżulta ċar illi l-oġġezzjoni għall-ħlas kien unikament indirizzat mis-soċjeta' intimata u, kif qalet il-Qorti tal-Appell fil-kawża '**Calibre Industries Ltd vs Muscat Motors Ltd**' deciża fil-25 ta' Frar 2005, "*kien jinkombi fuq is-soċjeta' konvenuta li tibda hi stess proċeduri ta' arbitraġġ biex il-vertenza tiġi solvuta.*"
47. Il-Qorti tifhem illi, la darba s-soċjeta' intimata espremiet il-fatt illi kien hemm diverġenza u la darba naqqset milli tirreferi dina l-kwistjoni għall-arbitraġġ skond il-ftehim, kienet hija stess illi kienet in vjolazzjoni tal-ftehim ta' arbitraġġ, u għalhekk is-soċjeta' rikorrenti kellha kull dritt illi, aktar minn hames xhur wara l-aħħar korrispondenza tas-soċjeta' intimata, u wara li s-soċjeta' intimata ma għamlet xejn, nediet il-proċeduri odjerni.
48. Il-Qorti tosserva illi r-regoli huma hemm biex jiġu osservati u mhux abbużati – fil-każ odjern, is-soċjeta' intimata kellha obbligu illi tmexxi b'arbitraġġ in vista tal-oġġezzjonijiet illi hija ressqet u, la darba ma ressqet ebda arbitraġġ fi żmien raġjonevoli, hija għażlet illi ma tenforzax l-effetti tal-klawsola tal-esklussivita tal-arbitraġġ u kkonċediet lis-soċjeta' rikorrenti id-dritt illi tipproċedi bl-azzjoni odjerna.

49. Il-Qorti ma tistax ma tosservax illi s-soċjeta' intimata għazlet illi tmexxi bil-proċeduri ta' arbitraġġ BISS wara illi l-azzjoni odjerna inbdiet aktar minn sitt xhur wara li s-soċjeta' rikorrenti talbet għall-ħlas ta' dak lilha dovut.
50. Huwa ċar illi s-soċjeta' intimata riedet tabbuża bil-proċeduri ta' arbitraġġ li kien hemm bejnha u s-soċjeta' Enemalta, u riedet ittawwal kemm jista' jkun il-proċeduri odjerni – u jidher li sfortunatament, irnexxielha għax l-kawża odjerna ilha pendenti għal aktar minn sebgħa snin u nofs.
51. Għalhekk, din d-difiża qiegħda tiġi miċhuda minn dina l-Qorti.
- **L-ammont mitlub ma huwiex dovut stante illi hemm arbitraġġ pendenti bejn is-soċjeta' intimata u terz, ossija Enemalta, li abbażi tagħha jrid jiġi stabbilit jekk s-soċjeta' rikorrenti qdietx l-obbligi tagħha**
52. Is-soċjeta' intimata qiegħda targumenta illi, qabel ma jiġi stabbilit jekk iridx isir ħlas, wieħed irid jara jekk is-soċjeta' rikorrenti kinetx qdiet l-obbligi tagħha ai fini tal-kuntratt.
53. Jirrizulta illi, a tenur tal-ftehim ta' bejn il-partijiet, is-soċjetà rikorrenti kienet inkarigata mill-iskavar tal-gallarija b'mezzi minnu pprovduti, kif del resto kkonfermat mill-Perit tas-soċjeta' intimata stess, il-Perit Mark John Scicluna, fl-affidavit tiegħu (fol 110) filwaqt illi s-soċjeta' intimata kellha obbligi oħra.
54. Huwa hawnhekk opportun illi jiġi eżaminat d-deċiżjoni arbitrali bejn is-soċjeta' intimata u l-Enemalta, mogħti fit-13 ta' Mejju 2016 u kkonfermat mill-Qorti tal-Appell fis-17 ta' Jannar 2020, partikolarment dwar żewġ kwistjonijiet prinċipali: “*Termination of Contract*” u “*Bad Workmanship*”.
55. Jirrizulta illi dwar ir-raġuni għat-terminazzjoni tal-kuntratt d-deċiżjoni arbitrali kellha dan xi tgħid:

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. Amongst other things it mentions:-

a) A disagreement on the proposed mode of payment for works carried out and certified. This dispute, which was eventually sorted out, could have

easily been solved prior to the Order to Start Works as the Company had all the necessary documentation in its possession and had been informed of the Acceptance of the Tender some time before the Order to Start Works.

b) The absence of a survey necessary for the works to be carried out. SIL insisted that this survey should have been carried out by Enemalta, respondent however countered that this was in the contractor's remit. Eventually SIL carried out this survey at its own expense. One here must also observe, as mentioned in para a) above, that this dispute could have easily been sorted out prior to receipt of the Order to Start Works as the contractor had all the necessary documentation in his possession a long time prior to such a date and could have discussed the issue with Enemalta with the aim to reach an agreement as eventually was reached, and this without causing delays.

c) The problem relating to the place from where the works had to start from or from where was the tunnel accessible. Actually Para 9.6 of Section A1 "General Requirements" (Page 20 of the Tender Document) specifically lays down in bold lettering that "Access to tunnel is strictly from Msida entrance unless agreement would be found between the prospective contractors working at Kappara DC This agreement should be subject to the consent of Enemalta." SIL had objected to start drilling from Msida side as it alleged that the existing tunnel was too small and there were cables attached to the sides of the tunnel thereby impeding access for the machinery. The Tender document invites the proposer to visit the site to become acquainted with any problem before the Notice to Start Work. This, the proposer/contractor, obviously never did and hence any delays which were the result of Enemalta trying to satisfy the contractor by providing an alternative access, can only rest on the Contractor's shoulders. Eventually the Kappara Distribution Centre was proposed and agreed upon.

Unfortunately when these and other problems were somehow sorted out, works could not start as the Contractor did not have in his possession a 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.

Furthermore 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 SEL'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.

56. Il-Qorti ma tistax ma tosservax illi, fid-difiża tagħha għal dak mitlub mis-soċjeta' Enemalta, imkien ma qatt tattribwixxi xi responsabbilta' ta' dewmien lis-soċjeta' rikorrenti. Apparti minn hekk, jidher ċar mid-deċiżjoni arbitrali, illi s-soċjeta' intimata qabbdet lis-soċjeta' rikorrenti ben oltre erbgħa xhur WARA illi kellha suppost tibda bix-xogħolijiet, u għalhekk ċertament is-soċjeta' rikorrenti ma tista' bl-ebda mod titqies bħala responsabbli għal xi dewmien – fatt li jidher aċċettat anke mis-soċjeta' intimata meta ma attribwiet ebda responsabbiltà lis-soċjeta' rikorrenti fi proċeduri miġjuba kontra tagħha.

57. Jirrizulta illi s-soċjeta' intimata tipprova tikkontendi wkoll illi s-soċjeta' rikorrenti għamlet xogħol ħażin u għalhekk kellha dritt għall-indenniz. Dwar 'Bad Workmanship', l-Arbitraġġ kellu dan xi jgħid:

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. 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.

58. Jirrizulta illi s-soċjeta' intimata, illi allegat li kellha dritt iżzomm il-flejjes stante illi s-soċjeta' Enemalta saħqet li x-xogħol sar ħażin, attwalment insistiet fil-proċeduri arbitrali illi x-xogħol ma sarx ħażin u kien ġie aċċettat mill-Enemalta, **u l-Arbitraġġ qabel ma tali argument tas-soċjeta' intimata.**

59. Jirrizulta, għalhekk, illi minn imkien ma jirrizulta illi, b'xi mod, is-soċjeta' rikorrenti tista' tiġi meqjusa b'ħala responsabbli għal xi dewmien, kif tagħti x'tifhem is-soċjeta' intimata.

60. Jirrizulta, anzi, illi d-dewmien kien riżultat tad-dewmien tas-soċjeta' intimata biex tingaġġa s-servizzi tas-soċjeta' rikorrenti – 4 xhur! Kif ukoll nuqqasijiet, fost oħrajn, ta' "problems with disposal of waste" u "health and safety issues", li kienu

obbligi illi s-soċjeta' intimata kienet obligat ruħha li tieġu hsieb fil-ftehim mas-soċjeta' rikorrenti, u li jidher li naqqset milli tonora.

61. Jirrizulta, għalhekk, illi dina d-difiża ma tistax tiġi kkunsidrata favorevolment minn dina l-Qorti peress illi ma jirrizultax li s-soċjeta' rikorrenti naqset minn xi obbligi tagħha!

- **Illi s-soċjeta' intimata għandha dritt iżzomm il-flejjes dovuti sakemm jiġi determinat jekk il-penalitajiet imposti fuq is-soċjeta' intimata huwa imputabbli lis-soċjeta' rikorrenti**

62. Jirrizulta illi, bħalma intqal fid-difiża fuq ġia' ikkunsidrata minn dina l-Qorti, ma jirrizultax ippruvat mid-deċiżjoni arbitrali fuq imsemmija, illi s-soċjeta' rikorrenti tista' b'xi mod, titqies bħala li kkontribwiet għad-dewmien.

63. Jirrizulta, mill-provi, illi għalkemm kien hemm xi mument meta l-apparat waqaf jaħdem minħabba fi ħsarat, ix-xogħolijiet da' parte tas-soċjeta' rikorrenti baqgħu għaddejnin regolarment u ttawlu unikament minħabba nuqqasijiet attribwibbli unikament lis-soċjeta' intimata, bħalma kienu ssegwenti:

- a. Nuqqas ta' installazzjoni ta' Extractors ta' arja effiċjenti u tħaffir ta' shafts fejn rikjesti;
- b. Nuqqas ta' '*rock stabilisation works*' illi kellhom isiru mis-soċjeta' intimata;
- c. Nuqqas ta' '*drainage works*' da parte tas-soċjeta' intimata meta kien hemm ammont ta' ilma li kellu jitneħħa;

64. Jirrizulta għalhekk bl-aktar mod ċar illi s-soċjeta' rikorrenti ma kellha ssofri ebda penalitajiet, stante illi xogħolha kienet qiegħda tagħmlu – kienet is-soċjeta' intimata li ma għamlitx xogħolha, u eventwalment spiċċat biex tilfet il-kuntratt illi kien ingħatalha!

- **Sottomissjoniet ulterjuri.**

65. Jirrizulta illi, fis-sottomissjonijiet tas-soċjeta' intimata, tqajjmet difiża ġdida, ossija illi t-talba attriċi ma ġietx ippruvata.

66. Il-Qorti tosserva illi, fid-difiża oriġinali tagħha, s-soċjeta' intimata QATT ma ikkontendiet illi l-ammont ma kienx dovut, iżda saħqet BISS illi s-soċjeta' intimata kellha dritt iżzomm tali flejjes bħala indennizz għat-terminazzjoni tal-kuntratt tagħha mill-Enemalta.

67. Għalhekk, il-Qorti ma tifhimx kif, fl-aħħar mument, sebgha snin wara li bdiet il-kawża odjerna, is-soċjeta' intimata intebħet illi kellha xi difiża oħra xi tressaq.

68. Madanakollu, il-Qorti tosserva illi fid-dokument li jistabbilixxi kemm għadu dovut, ossija Dok B eżebit mar-rikors promotur (fol 18), hemm indikat illi pagament ta' €100,000, li wara rriżulta ma ġiex onorat mill-Bank tas-soċjeta' intimata, kien qed jitqies bħala mħallas – indikazzjoni illi s-soċjeta' intimata ma kellha ebda oġġezzjoni għall-bilanċ dovut, dak il-ħin illi għamlet il-pagament. Il-fatt illi eventwalment tali cheque spicċa “*referred to drawer*” iżda sussegwentement imħallas mis-soċjeta' intimata QABEL ma nbdew il-proċeduri odjerni, hija indikazzjoni ċara illi s-soċjeta' intimata kienet qiegħda żżomm lura l-ħlas UNIKAMENT għax kellha pendenza mal-Enemalta, u xejn aktar, kif del resto kkonfermat minnha stess fid-difiża tagħha.
69. Il-Qorti tosserva illi fl-ebda stadju tal-kawża odjerna ma s-soċjeta' intimata ikkontestat l-importi dikjarati fl-Istatement eżebita mis-soċjeta' rikorrenti mar-rikors promotur, u di fatti lanqas il-Perit tagħhom l-Perit Mark John Scicluna (fol 110), jew inkella is-Senior Accounts Clerk tas-soċjeta' intimata, Rodianne Brincat (fol 161) ma qatt ikkontestaw l-ammonti indikati f'tali statement.
70. Għalhekk, il-Qorti ma tara ebda raġuni għaliex ma għandhiex tqis l-ammont indikati f'tali statement bħala ippruvati, fejn juri illi s-soċjeta' intimata hija debitrice tas-soċjeta' rikorrenti fl-ammont ta' €245,363.20.

Konkluzjoni

Il-Qorti,

Wara illi rat l-atti kollha proċesswali,

Wara illi rat is-sottomissjonijiet ta' l-abbli difensuri tal-partijiet,

Tgħaddi biex taqta' u tiddeċiedi l-vertenza odjerna billi;

Tiċhad l-eċċezzjonijiet kollha tas-soċjeta' intimata,

Tiddikjara s-soċjeta' intimata Schembri Infrastructures Limited debitrice tas-soċjeta' rikorrenti Trasporti e Movimenti Terra Ltd fl-ammont ta' mitejn u ħamsa u erbghin elf, tlett mija u sitta u tletin Euro u għoxrin ċenteżmu (€245,363.20) rappreżentanti xogħol minnha magħmul lis-soċjeta' intimata u mhux imħallas, u għalhekk;

Tikkundanna lis-soċjeta' intimata Schembri Infrastructures Limited thallas lis-soċjeta' rikorrenti Trasporti e Movimenti Terra Ltd l-ammont ta' **mitejn u hamsa u erbghin elf, tlett mija u sitta u tletin Euro u ghoxrin ċenteżmu (€ 245,363.20).**

Bl-ispejjeż kif mitluba kontra s-soċjeta' intimata.

Imghax mill-15 ta' Jannar 2013 sad-data tal-pagament effettiv kontra s-soċjeta' intimata.

Francesco Depasquale LL.D. LL.M. (IMLI)
Imhalef

Rita Sciberras
Deputat Registratur