



## **SUMMARY OF THE ARBITRATION CASE**

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### **1. STATEMENT OF FACTS**

The legal relationships between the Claimant “Company A” and Respondent “Company B” started as result of the bidding procedure initiated by the Steering Council of social project for building 52 houses for non-Serbian minorities in one of the Kosovo municipalities. The Project was co-financed by the Respondent and other donors. After the bidding process, the offer of Claimant was considered as most economically advantageous bidder and Claimant was selected as most successful Offeror and it has been awarded with contract. Upon conclusion of bidding procedure, the Claimant and Respondent signed the Contract on Construction Services.

During the execution of works of this project, the construction works conducted by the Claimant were considered with defects and below contracted standards required by Respondent and as consequence of this the parties arranged several meetings. In addition to this, during conduction of construction works, the parties aiming to settle their disagreements established the Mutual Commission for finding mutual solution. In order to find mutual solution, the Commission decided to conduct a test of concrete works in an independent laboratory. Upon conduction of these tests it has resulted that concrete works contain defects. Thus, the parties were agreed to repair defects of construction works and to deconstruct several houses, in order to reconstruct them. But, despite the efforts of parties, the contracted works were not completed in satisfactory manner. According to the Claimant, the reasons for failing to perform works were beyond its control.

As result of this, the Respondent issued valid instruction for improvement of unsatisfactory works, by giving to Claimant extra terms for improvement of works. On 14 March 2014, the Respondent issued valid instructions regarding the deconstruction and reconstruction of houses from the Group 1 and the deconstruction term was set on 12 April 2014. Whilst, the Claimant undertook the obligation to reconstruct these houses until 28 April 2014. In this stage, the Claimant has demolished tiles and foundations of houses included in the Group 3 and 4, but it failed to repair houses from other groups.

The Claimant has sent a letter to Respondent by addressing its reasons and position, but these reasons were not admitted from Respondent. On 16 April 2014, the Respondent submitted to Claimant a note titled "The Notification for Nonperformance of Contract".

On 21 May 2014, the Respondent issued the Notification for Nonperformance of Contract in accordance with article 12, paragraph 1, of the Contract and on 17 July 2014, finally has terminated the contract.

On 23 July 2014, the Claimant submitted the statement of claim to the Permanent Tribunal of Arbitration, attached to the Kosovo Chamber of Commerce ("PTA") against Respondent by claiming payment of 65,862.88 EUR on behalf of completed construction works in accordance with the Contract with Respondent. On 8 January the Claimant has filed the Request for Injunctive Relief.

Moreover, on 24 July 2014 it submitted with the PTA, the request for a payment of amount of 34,111.00 EUR for additional works, wages and security measures of the site, which form total in value of 99,973.88 EUR.

On 14 August 2014, the Respondent submitted statement of defense with the PTA and its counterclaim by requesting from Claimant compensation of damages in amount of 605,984.22 EUR. Moreover, on 14 January 2014, the Respondent has filed the amended statement of defense and its response on the request for Injunctive Relief.

## **2. LEGAL ASSESSMENT**

### **a) Applicable Law and Jurisdiction of the TPA of the KCC**

According to Clause B3 which refers to Clause C 1.4, the governing law of the Contract is Kosovo applicable legislation and none of the parties has challenged the jurisdiction of the TPA and the Arbitral Tribunal after reviewing the Contract concluded that it has jurisdiction to decide over the merits of this case.

Moreover, the Arbitral Tribunal confirmed that the language that will be used in arbitration proceedings is English and the place of arbitration will be Prishtina.

### **b) Review of the Claim**

The Arbitral Tribunal considers that on 27 December 2013, the Claimant requested payment of 243,935,59 EUR for conclusion of works determined with the Construction Contract. Pursuant to the Situation Report compiled by parties were applied some reductions and abovementioned general amount was reduced in value of 190,282.05 EUR. The Respondent refused to accept the amount above, due to defects of the construction works conducted by Claimant. The Respondent notified the Claimant, that the construction works represent only 70% of the required works, express in monetary value of 124,419.17 EUR. Based on this fact, the Claimant prepared two improved invoices for this amount.

The Claimant claimed that it was agreed with Respondent that initial amount requested from the Claimant will be paid totally from the Respondent and defected works will be improved from Claimant after improvement of weather conditions. On the other side, the Respondent contested existence of this agreement. Thus, the parties do not contested payment of 124,419.17 EUR after issuance of invoices by the Claimant.

The initial claim has been rejected by the Arbitral Tribunal due to the fact that the Claimant has requested payment for defected works.

#### **c) Review of the Amended Claim and Counterclaim**

The award on merits of Amended Claim and Counterclaim envisages legal and factual review of termination of the Contract by Respondent. The Amended Claim is based on grounds that the Respondent was not entitled to terminate the Contract. Contrary to this, the Counterclaim envisages that the Respondent was entitled to terminate the Contract. The Arbitral Tribunal reviewed termination of the Contract in two points of view, namely (i) procedural aspect and (ii) material aspect.

The Arbitral Tribunal accepted the position of the Respondent, from the procedural point of view that the Contract was terminated on 17 July 2014, after 21 days of first term consisted at 14 days as envisaged by the Contract. Therefore, the Arbitral Tribunal concluded that from formal point of view the Respondent has honored conditions determined by the Contract.

In respect of material point of view, the Arbitral Tribunal concluded that the Respondent has terminated the Contract after several valid instructions for improvement of construction works by Claimant and as result of this the Respondent was entitled to terminate the Contract due to nonperformance of contract by the Claimant. Thus, the Arbitral Tribunal concluded that the Respondent has validly terminated the contract and as consequence of this the Amended Counterclaim has been rejected as unfounded. Moreover, the Arbitral Tribunal approved this claim requested from the Respondent.

#### **d) Review of scale of financial penalties and other damages requested by the Counterclaim**

The Arbitral Tribunal assessed the scale of financial penalties and damaged claimed in the Counterclaim, by making reference to Articles 250 and 256 of the Law on Obligational Relationships, as legal basis for mitigating the penalties claimed by the Respondent. The Arbitral Tribunal decided to mitigate the financial penalties attributed to Claimant, due to following reasons:

- 1) Responsibility of supervisory “Company C”, i.e. the supervisory company has failed to supervise construction works properly;
- 2) Responsibility of the Respondent to mitigate damages;
- 3) Patterns of delays has impacted the progress of works
- 4) Lack of design of works and ambiguous design;

Due to circumstances mentioned above, the claims for compensation of damages caused by the Claimant towards Respondent in value of 297,406.89 EUR were partially accepted by the Arbitral Tribunal, namely 20% which is expressed in value of 60,000.00 EUR.

### **3. AWARD**

The Arbitral Tribunal rejected the Claim and the Amended Claim submitted by Claimant, while it has partially accepted the claim requested by the Respondent through Counterclaim, namely 60,000.00 EUR in the name of compensation of damages which represents 20% of amount alleged by the Respondent. Moreover the Arbitral Tribunal decided that the Claimant is obliged to pay procedural expenses in value of 27,712.48 EUR.

The Arbitral Tribunal issued this Award on 22.04.2015, in Prishtina.