

QORTI TAL-APPELL

IMHALLFIN

**S.T.O. PRIM IMHALLEF SILVIO CAMILLERI
ONOR. IMHALLEF TONIO MALLIA
ONOR. IMHALLEF JOSEPH AZZOPARDI**

Seduta ta' nhar il-Gimgha 28 ta' April 2017

Numru 20

Rikors numru 533/13 JZM

HSBC Bank Malta plc (C3177)

v.

**Standard Chartered plc, bank esteru registrat fir-Renju Unit,
bin-numru ufficjali ta' registrazzjoni 00966425, u
b'digriet tas-7 ta' Ottubru 2013 l-isem tal-konvenut gie jaqra
"Standard Chartered Bank, bank esteru registrat fir-Renju Unit"**

Il-Qorti:

Rat ir-rikors guramentat ipprezentat mis-socjeta' attrici HSBC Bank

Malta plc fl-4 ta' Gunju 2013, li jaqra hekk:

"1. Illi fl-24 ta' Awissu 2011 fuq struzzjonijiet moghtija minn socjeta' estera bl-isem Ahmed Mansoor AL A Ali Co BSC (C), il-Bank konvenut hareg *letter of credit* ossia Documentary Credit (DC) Number 682010006026-L a favur tas-socjeta' Emirates Aircrete Industries Co. Corporation Ltd (C 51943) ghall-import ta' US\$

680,000.00 (+/- 5%), liema strument sussegwentement gie modifikat sabiex jirrifletti import ta' US\$ 866,000.00 (+/- 10%);

"2. Illi fis- 7 ta' Dicembru 2011, il-Bank konvenut hatar u awtorizza lill-Bank attur sabiex jawtorizza l-izbank tal-import kopert bl-imsemmi *letter of credit* mill-imsemmi beneficjarju u dan diment li l-istess Bank attur ikollu d-dokumentazzjoni kollha ndikata fl-istess strument, kopja ta' liema qed tigi hawn annessa;

"3. Illi l-Bank attur gie anke awtorizzat sabiex jiskonta jew jaccelera l-hlas;

"4. Illi wara li l-Bank attur ghamel l-accertamenti kollha necessarji fil-kaz u rrizultalu illi kien hemm ir-rekwisiti kollha necessarji u sodisfacenti sabiex isir il-hlas a favur tal-imsemmi beneficjarju;

"5. Illi in effetti fl-14 ta' Novembru 2011 kienu gew prezentati lill-Bank attur id-dokumenti kollha relattivi li kienu konformi mal-imsemmija *letter of credit*, liema dokumenti gew mgħoddija mill-Bank attur lill-Bank konvenut fit-18 ta' Novembru 2011 u liema dokumenti kienu accertati bhala konformi ma' dak kollu previst fl-imsemmija *letter of credit*;

"6. Illi l-Bank konvenut accetta dawn id-dokumenti fis-7 ta' Dicembru 2011 u kkonferma illi l-pagament da parti tieghu kien ser jigi avanzat lill-Bank attur fit-30 ta' Jannar 2012;

"7. Illi sadanittant il-Bank attur ircieva talba mill-beneficjarju Emirates Aircrete Industries Co. Corporation Ltd sabiex isir il-pagament dovut lilu taht l-imsemmi strument ta' kreditu u konsegwentement il-Bank attur ipproceda bil-pagament billi ma kien hemm xejn li fil-fehma tieghu u dik tal-Bank konvenut kien ta' ostaklu sabiex isir l-imsemmi pagament; il-Bank attur f' dawn ic-cirkostanzi kellu l-konfort bil-fatt illi l-Bank konvenut kien gja accetta d-dokumenti kollha u relattivi għall-imsemmija *letter of credit* u fuq kollox kellu ukoll konferma ta' meta il-Bank konvenut kien mistenni jagħmel l-pagament ossia rimbors a favur il-Bank attur;

"8. Illi fuq kollox il-Bank attur kien konsapevoli illi a tenur tal-UCP 600 Rules u senjatament l-art. 7 [c] u l-artikolu 12b tal-istess regoli, li japplikaw għall-kaz in ezami, il-Bank konvenut kien u għadu legalment obligat li jhallas il-Bank attur;

"9. Illi fil-25 ta' Jannar 2012 il-Bank attur gie avzat mill-Bank konvenut illi l-imsemmija soċjeta li talbet il-hrug tal-istrument ta' kreditu hawn fuq imsemmi u cioe Ahmed Mansoor ALA Ali Co BSC (C) kienu rregistraw xi thassib tagħhom rigward l-awtenticita' ta' whud mid-dokumenti sottomessi mill-beneficjarji ndikati fl-imsemmija *letter of credit* u li l-istess Bank konvenut kien ukoll qed jissuspetta fl-awtenticita' tal-imsemmija dokumenti;

“10. Illi billi kien gja sar il-pagament a favur tal-imsemmi beneficjarju kif hawn fuq spjegat, fis-26 ta' Jannar 2012 il-Bank attur informa lill-Bank konvenut illi r-rimbors da parti tal-Bank konvenut kien f'kull kaz dovut u mistenni entro d-data indikata tat-30 ta' Jannar 2012;

“11. Illi fis-27 ta' Jannar 2012 il-Bank konvenut avza lill-Bank attur li ma kienx f'qaghda li jirimborsa l-ammont dovut lill-Bank attur billi kien gie vjetat jaghmel l-imsemmi hlas b'ordni mahruqa mill-Qrati tal-Bahrain fuq talba tal-imsemmija Ahmed Mansour AL Ali BSC;

“12. Illi l-ordni tal-Qorti ta' Bahrain mhijiex ta' xkiel biex il-Bank konvenut jonora l-obbligi tieghu fil-konfront tal-Bank attur fuq ordni tal-Qrati tal-lok ta' pagament a tenur tal-letter of credit;

“13. Illi l-bank konvenut qatt ma gab ragunijiet ohra ghaliex dan il-pagament m'ghandux isir;

Jghid ghalhekk il-Bank konvenut ghaliex ghar-ragunijiet kollha hawn fuq premissi u prevja kull dikjarazzjoni necessarja u opportuna fil-kaz, din l-Onorabbli Qorti m'ghandhiex :-

“1. Tiddikjara illi l-Bank attur huwa kreditur tal-Bank konvenut u b'hekk intitolat ghar-rimbors ta' dawk l-ammonti kollha li huwa hallas lill-imsemmi beneficjarju Emirates Aircrete Industries Co. Corporation Limited (C-51943) a tenur tal-*letter of credit* ossia Documentary Credit (DC) Number 682010006026-L fit-30 ta' Jannar 2012.

“Bl-ispejjez kontra l-Bank konvenut li jibqa ngunt ghas-subizzjoni u b'riserva li l-Bank attur jipprocedi ghall-likwidazzjoni u kundanna tal-hlas tal-ammonti u imghaxijiet relattivi talvolta dovuti lilu f'giudizzju separat”.

Rat ir-risposta guramentata tas-socjeta' konvenuta Standard Chartered Bank, bank esteru registrat fir-Renju Unit, tat-23 ta' Settembru, 2013, li permezz taghha gie except is-segwenti:

“1. Preliminarjament illi din il-Qorti m'ghandhiex gurdizzjoni biex tiehu konjizzjoni tal-kawza stante li si tratta ta' socjeta' li mhix registrata Malta, mhix prezenti Malta, m'ghandha l'ebda assi Malta li fuqhom f'kaz ta' ezitu favorevoli ghas-socjeta' attrici tkun tista' tesegwixxi fuqhom u ghal ragunijiet ohra imsemmija fl-Artikolu 742 tal-Kodici tal-Organizzazzjoni u Procedura Civili kif jigi spjegat dettaljatament waqt it-trattazzjoni tal-kawza b'dan li s-socjeta'

konvenuta ghandha konsegwentement tigi lliberata mill-osservanza tal-gudizzju.

“Illi inoltre l-Artikolu 2 para 1 tad-Direttiva tal-Unjoni Ewropea numru 44/2001 jistipula illi **“persons should be sued in the member state where they are domiciled”** u ghalhekk ghal din ir-raguni wkoll dejjem ghar-rigward tal-eccezzjoni dwar in-nuqqas ta’ gurdizzjoni ta’ din il-Qorti s-socjeta’ konvenuta ghandha tigi lliberata mill-osservanza tal-gudizzju la darba kemm Malta kif ukoll ir-Renju Unit huma t-tnejn membri tal-Unjoni Ewropea u firmatarji tal-Konvenzjoni Ewropea

“2. Minghajr pregudizzju ghall-ewwel eccezzjoni u in via preliminari wkoll illi f’kaz li l-Qorti ma tilqax l-ewwel eccezzjoni s-socjeta’ eccipjenti mhix il-legittimu kuntraditur billi kien Standard Chartered Bank Bahrain Branch illi kien hareg il-letter of credit meritu tal-kawza u qatt is-socjeta’ eccipjenti u se mai din il-kawza kellha tigi ntavolata kontra Standard Chartered Bank Bahrain u/jew is-socjeta Maltija, il-Beneficjarja, klijenta tal-Bank attur, jew kontra ohrajn, u qatt kontra s-socjeta’ eccipjenti, kollox kif jigi spjegat iktar dettaljatament waqt it-trattazzjoni tal-kawza.

“3. Minghajr pregudizzju ghall-ewwel zewg eccezzjonijiet u in via preliminari wkoll is-socjeta’ esponenti qed titlob is-soprasessjoni ta’ din l-Onorabbli Qorti ai termini tal-Artikolu 792 et seq tal-istess Kodici billi bhalissa u qabel ma gew intavolati dawn il-proceduri nb dew proceduri gudizzjarji li ghadhom pendent quddiem il-Qorti Superjuri tal-Bahrain fuq l-istess meritu u li fihom il-bank attur huwa wkoll parti, kollox kif jigi spjegat dettaljatament waqt it-trattazzjoni tal-kawza.

“4. Minghajr pregudizzju ghall-ewwel tlett eccezzjonijiet, u in via preliminari wkoll, il-UCP 600 rules li l-bank attur ghamel riferiment ghalihom fil-paragrafu numru 8 tar-rikors guramentat, bl-ebda mod ma japplikaw fil-konfront tas-socjeta eccipjenti u dan kif ser jigi spjegat izjed dettaljatament waqt it-trattazzjoni ta’ din il-kawza.

“5. Bla pregudizzju ghall-ewwel erbà eccezzjonijiet u fil-mertu, il-letter of credit li kien hareg Standard Chartered Bank Bahrain a favur il-beneficjarja s-socjeta’ Maltija fuq il-*letter of credit*, kienet ibbazata fuq dokumenti formanti parti integrali tal-istess letter of credit, bhal ma kienu l-bill of lading, packing list, invoice, certificate of origin u dokumenti ohra li ghalkemm mad-daqqa t`ghajn deheru li kienu awtentici, `il quddiem irrizultaw li setghew jekk mhux probabilment ukoll kienu foloz jew iffalsifikati u kien biss meta gie skopert dan l-allegat qerq, cirkostanza dina, li sfortunatament giet skoperta meta l-ammont imsemmi fil-*letter of credit*, ghalkemm ma kienx ghadu gie trasferit minn SCB Bahrain Branch lil Bank Malti, dan ta’ l-ahhar, kien gja trasferixxa dawn il-flejjes lill-kumpannija Maltija Beneficjarja, kumpannija registrata hawn Malta bl-isem ta’ Emirates Aircrete Industries Co. Ltd. li kienet il-klijenta tal-bank attur. Kien biss immedjatament wara li gie skopert dan il-qerq illi s-socjeta tal-Bahrain,

the applicant, li taht l-awtorizzazzjoni taghha SCB Bahrain Branch harget il-*letter of credit*, u cioe` Ahmed Mansoor AL A Ali Co BSC (C), il-klijenta tal-istess bank, illi kienet talbet u otteniet l-hrug ta' Mandat ta' Inibizzjoni mill-Qorti Superjuri tal-Bahrain kontra Standard Chartered Bank Bahrain sabiex din tigi inibita milli titrasferixxi l-ammont miftiehem fil-*letter of credit* li kellu jigi trasferit lis-socjeta' attrici u kienet din, f'dak l-istadju, l-unika raguni ghaliex dan it-trasferiment baqa` ma sehhe, ordni din, illi l-Bank tal-Bahrain ma seta'bl-ebda mod ma joqghodx ghaliha.

“Illi ghalhekk ghandu jirrizulta illi l-*letter of credit* kienet wisq probabbli affetwata bi frodi imputabbli unikament ghas-socjeta' Maltija, billi din ta' l-ahhar apparentement irnexxilha tidhak b`kulhadd inkluz allura l-bank attur li tieghu kienet klijenta, tant illi minghandha rceviet l-ammont miftiehem fil-*letter of credit*, filwaqt li l-merkanzija li s-socjeta' Maltija kienet intrabtet li tghaddi lis-socjeta' fil-Bahrain, dejjem skont kif gie miftiehem fil-*letter of credit* u li a bazi tal-istess ftehim kellha tithallas, baqghet qatt ma ghaddiet il-merkanzija u minflok sparrixxiet u hadd ma jaf fejn jinsabu d-diretturi u/jew is-sidien taghha, raguni ohra ghaliex qatt ma giet notifikata bil-proceduri inizjati gewwa l-Bahrain.

“Di piu, jidher ukoll illi minbarra li l-persuni kollha interessati jidhru li gew defrodati mis-socjeta' Maltija, u cioe` s-socjeta' applikanti gewwa l-Bahrain, SCB Bahrain, kif ukoll il-bank attur, li lkoll imxew skond dak patwit fil-*letter of credit*, kienu wkoll it-tlieta li huma kellhom il-kunsens taghhom ivvizjat bi zball billi kieku xi hadd minnhom kien jaf jew seta' ntebah bil-manuvri malinji tal-beneficjarju, certament ma kinux jimxu fuq il-kontenut u l-obbligazzjonijiet miftehema fil-*letter of credit*, sabiex allura, il-ftehim kontenut fl-istess ma jghoddx kif jigi spjegat izjed dettaljatament waqt it-trattazzjoni tal-kawza.

“In segwitu ghal hrug tal-Mandat ta' Inibizzjoni gewwa l-Qorti tal-Bahrain, is-socjeta' Ahmed Mansoor AL A Ali Co BSC (C) inizjat proceduri legali gewwa l-Bahrain mhux biss kontra s-socjeta' Maltija beneficjarja u SCB Bahrain izda wkoll kontra l-Bank attur liema kawza ghadha pendenti, li sfortuna pero` li kwazi sentejn wara l-ftuh ta' din il-kawza, s-socjeta' Maltija ghadha sal-lum ma tistax tigi notifikata bil-kawza wieqfa minhabba f`hekk.

“La darba allura, s-socjeta' attrici hija wkoll parti ta' dawn il-proceduri, bhala konvenuta flimkien mas-socjeta' Maltija klijenta taghha, kellha kull interess li taghmel l-almu taghha biex tinnotifika lill-klijenti taghha stess hawn Malta billi kienet is-socjeta' Maltija biss li kienet agixxiet bl-akbar mala fede u litteralment serqitilha mal-USD 1,000,000 u n-nuqqas taghha milli almenu tipprova tinnotifikaha, ma tistax ma tigix interpretata bhala negligenza grossolana billi kienet biss is-socjeta' Maltija hatja tal-qerq u hadd iehor. Kien ukoll wisq facli ghal bank attur illi iharrek lil min dahak bih, il-klijent tieghu stess, il-kumpannija registrata Malta bl-ufficju taghha f'it distanza boghod mill-wiehed mill-

branches taghha stess u dana m`ghamlitux, qed jigi sottomess, ghall-unika raguni illi kienet taf ben tajjeb illi l-amministraturi u/jew il-beneficjarji ta' l-istess kumpanniji, zewg persuni ta' nazzjonalita Torka u li dwarhom kellha taghmel *due diligence* biex tara x`hobz jieklu qabel ma tivversalhom mal-USD1,000,000, kienu ghosfru ; u meta kienu jafu wkoll illi din il-kumpannija ma kelliex hlief *paid up share capital* ta' €1,500 u kienet ilha rregistrata hawn Malta biss ftit xhur qabel ma saret il-*letter of credit* bir-*registered address* taghha probabilmment xejn hlief indirizz *brass plate*.

“Jigi sottomess illi kienu ghal dawn ir-ragunijiet illi s-socjeta' attrici, konsapevoli ta' dana kollu u minghajr speranza li hi setghet qatt tirkupra dan l-ammont minghandha, li flok mexxiet kontra minn dahak biha u harab, iddecidiet illi tipprova tirrikupra l-ammont minghand min ikun, hlief minghand min kellha u ghalhekk flok harket lill-klijent taghha, harket lis-socjeta' konvenuta. Ma rnextliex tidhol mill-bieb u issa qed tipprova tidhol mit-tieqa. Forsi ghalhekk ukoll illi m`ghamlet xejn sabiex tikkoopera fil-proceduri tal-Bahrain, istitwiti wkoll kontra taghha, al menu sabiex il-klijenta taghha tigi notifikata!

“Minn dana kollu ghandu jirrizulta illi din il-Qorti ghandha tkun moralment konvinta illi dawn ic-cirkostanzi ma jistghux ma jwasslux ghal konvinciment morali illi s-socjeta' Maltija bil-manuvri taghha irnexxielha tappropria ruhha indebitament u b`mod illegali l-ammont ta' circa €1,000,000 u allura hija s-socjeta' Maltija biss u hadd iehor partikolarment is-socjeta' eccipjenti li ghandha tbatl l-konsegwenza ta' dan l-ghemil.

“Is-socjeta' esponenti tenni illi l-principju generali tal-ligi Maltija li, *fraus omnia corrumpit*, la darba ppruvat a sodisfazzjon tal-Qorti, ghandu jwassal illi meta l-fraus huwa ppruvat f`obligazzjoni bilaterali u *letter of credit* m`hi xejn hlief ftehim bilaterali, bil-*quid pro quo*, dan ghandu jwassal lill-Qorti tiddikjara illi l-*letter of credit* ghandha tigi mhassra/hija nulla jew annullabli, kif jigi spjegat izjed dettaljatament waqt it-trattazzjoni tal-kawza.

“6. In vista ta' dan kollu u billi t-talbiet attrici huma nfondati fil-fatt u fid-dritt dawn ghandhom jigu michuda bl-ispejjez kontra l-istess socjeta' attrici.

“7. Is-socjeta' konvenuta minn issa tiriserva d-dritt li tressaq eccezzjonijiet ulterjuri skond il-ligi”.

Rat is-sentenza in parte tat-28 ta' April, 2016, fl-ismijiet premissi, li permezz taghha, il-Prim'Awla tal-Qorti Civili, iddecidiet illi tichad l-ewwel

u t-tieni eccezzjonijiet tal-bank konvenut, bl-ispejjez tas-sentenza jibqghu riservati ghall-gudizzju finali.

Dik il-Qorti tat is-sentenza taghha wara li qieset ix-xhieda mressqa quddiemha u ghamlet is-segwenti konsiderazzjonijiet:

**“III. L-ewwel eccezzjoni
(Gurisdizzjoni)**

“B`din l-eccezzjoni, kien eccepit illi din il-Qorti m`ghandhiex gurisdizzjoni sabiex tiehu konjizzjoni tal-kawza stante li l-konvenuta hija socjeta` li mhijiex registrata Malta, mhijiex prezenti Malta, m`ghandha l-ebda assi Malta li fuqhom fil-kaz ta` ezitu favorevoli ghas-socjeta` attrici tkun tista` taghmel ezekuzzjoni fuqhom, kif ukoll ghal ragunijiet ohra ndikati fl-Art 742 tal-Kap 12. Inltre skont l-Art 2(1) ta` UE Council Regulation 44/2001 maghruf bhala **Brussels 1** *“persons should be sued in the member state where they are domiciled.”* Ghalhekk tghid illi ghandha tigi liberata mill-osservanza tal-gudizzju ladarba kemm Malta kif ukoll ir-Renju Unit huma t-tnejn membri tal-UE.

“Dwar il-gurisdizzjoni, il-Qorti tosserva li l-UCP 600 ma jsemmi xejn dwar il-kwistjoni ta` gurisdizzjoni.

“Ghalhekk il-Qorti trid tqis u tevalwa dak li jstipola l-Brussels 1.

“Ghaliex huwa EU Regulation, il-Brussels 1 jaghmel parti mil-ligijiet Maltin b`effett dirett, ghad-differenza ta` Directive.

“Skont l-Art 3 tal-Brussels 1:

“1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

“2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.

“L-Annex I tal-istess Regulation ighid illi ghal Malta, l-artikoli li mhumiex applikabbli ai termini ta` l-Artikolu 3(1) huma l-Artikoli 742, 743 u 744 tal-Kodici ta` Organizzazzjoni u Procedura Civili (Kap 12 tal-Ligijiet ta` Malta) u l-Artikolu 549 tal-Kodici tal-Kummerc (Kap 13 tal-Ligijiet ta` Malta).

“In vista ta’ dan, huma l-artikoli minn 2 sa 7 ta’ r-Regulation li huma applikabbli ghal dan il-kaz, fejn sa dan l-istadju hemm konvenuta wahda li hija persuna domiciljata fir-Renju Unit, hekk kif irrizulta mix-xiehda ta’ Zoi Karali.

“Analizi tal-Brussels 1 saret fis-sentenza li tat din il-Qorti (PA/FS) fid-9 ta’ Jannar 2012 fil-kawza fl-ismijiet “**Av. Dr. Edward DeBono noe v. No Stop Technology Limited (C49765)**”.

“Inghad hekk :-

“L-artikolu 2(1) ta’ l-EC Regulations 44/2001 jghid hekk :

“1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”

“Ghalhekk, generalment il-gurisdizzjoni tissejjes fuq id-domicilju tal-parti mharrka. Madanakollu, imbaghad l-artikolu 5 jitkellem dwar Special jurisdiction u jghid hekk :

“A person domiciled in a Member State may, in another Member State, be sued :

“1.

“(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question ;

“(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be :

“in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

“in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

“(c) if subparagraph (b) does not apply then subparagraph (a) applies ...”

“Wara jtkellem fuq maintenance, tort, delict or quasi-delict, civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, dispute arising out of the operations of a branch, agency or other establishment.

“Interessanti huwa dak li jsemmi l-artikolu 23 ta’ l-EC Regulation 44 ta’ l- 2001 li f’ Malta kien applikabbli mill-1 ta’ Mejju, 2004. Dan l-artikolu jghid hekk

“1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any Disputes which have arisen or which may arise in

connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

- (a) in writing or evidenced in writing; or
- (b) in a form which accords with practices which the parties have established between themselves; or
- (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned..."

"... Kif qalet din il-Qorti kif presjeduta, fid-decizjoni taghha tat- 23 ta' Jannar, 2007 fil-kawza fl-ismijiet **Mrbookmaker.com Ltd. (C27649) vs Stichting De Nationale Sporttotalisator, Entita' Estera**, wara ezami tal-Brussels Regulations, persuna b`domicilju fi Stat Membru ghandha tigi imfittxija f`dak l-Istat Membru u dan ghall-fini ta' l-artikolu 2 (1). Il-preambolu 11 ta' l-istess regolamenti jghid :

"The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground ...The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction."

"Fil-kawza deciza mill-Qrati Ewropej fl-ismijiet **Kalfelis vs Schroder**, Case 189/1987 (Reports 1988 page 05565) inghad li "all exceptions to the rule that the defendant must be sued in the state of his domicile are to be construed narrowly". Dan kien bazat fuq il-principju tad-dritt generali tal-konvenut, ossija dak li jigi imharrek fid-domicilju tieghu (Ara f`dan is-sens ukoll is-sentenza tal- European Court of Justice fil-kawza "**Athanasios Kalfelis vs Bankhaus Schroder, Munchmeyer, Hengst and Co.**", deciza mill-Fifth Chamber fis-27 ta' Settembru 1988, Case no 189/87 European Court Reports 5565, u s-sentenza lokali fl-ismijiet **Bell Med Limited C26412 Vs Pari Mutuel Urban** deciza mill-Qorti ta' L-Appell Civil Superjuri fit-18 ta' Settembru 2009.

"Il-Qorti tirreferi ghall-kawza deciza fit-30 ta' Gunju, 2011 minn din il-Qorti presjeduta mill-Imhallef Mark Chetcuti fl-ismijiet **Avukat Dr. Edward DeBono nomine vs No Stop Technology Limited** (Citazz. Nru. 1049/10) fejn intqal:

"L-abdikazzjoni ghal gurdizzjoni ta' forum skond il-principji normali legali kif enunzati fil-Council Regulation 44/2001 hi eccezzjoni ghar-regola u bhala tali trid tirrizulta b`mod car u univoku. Din hi l-interpretazzjoni kostanti kif tirrizulta mill-gurisprudenza Maltija u hi l-istess anki fil-forum Ewropew fejn fis-sentenza deciza mill-**First Chamber tal-European Court of Justice** fit-12 ta' Ottubru 2008 fl-ismijiet **Nicole Hassett vs South Eastern Health Board and Cheryl Doherty vs North Western Health Board** gie stipulat is-segwent:

18. Moreover, as is stated in the 11th recital in the preamble to Regulation No. 44/2001, jurisdiction based on the defendant's domicile – in accordance with the general rule – **must always be available, save in a few well defined situations** in which the subject

*matter of the litigation or the autonomy of the parties warrants a different linking factor. **Such situations must accordingly be interpreted strictly.***

“Jidher ghalhekk li l-eccezzjonijiet ghal artikolu 2 fuq riferit ta’ din l-EC Regulation ghandhom jigu interpretati b` mod ristrett.”

“Sentenza oħra rilevanti hija dik illi tat din il-Qorti (PA/SM) fl-4 ta’ Dicembru 2014 fil-kawza **“Alpha Briggs Mediterranean Limited (C38859) v. Briggs Environmental Services Limited”** .

“Inghad hekk :-

“10.2 Ir-regolament tal-Unjoni Ewropea 44/2001 :

“10.2.1. Illi dan ir-Regolament ghandu forza ta’ Ligi f`Malta u hu applikabbli b`mod dirett ;

“10.2.2. Illi dan ir-Regolament japplika ghal kaz odjern billi dan hu kwistjoni ta’ natura civili u mhux eskluż mill-operat tal-istess Regolament;

“10.2.3. Illi dan ir-Regolament japplika wkoll a bazi tal-artiklu 742 (6) tal- Kap 12 tal-Ligi ta’ Malta ;

“10.2.4. Illi l-artiklu 2 tal-imsemmi Regolament jstabilixxi li : “persons domiciled in a Member State shall, whatever their nationality, be sued in the Courts of that Member State”;

“10.2.5. Illi dan gie ribadit mill-First Chamber tal-Qorti Ewropea tal-Gustizzja fil-kaz “Nicole Hassett vs South Eastern Health Board u Cheryl Doherty vs North Western Health Board tat-2 t`Ottubru, 2008, citati mill-istess socjeta’ intimata, (ara foll 80);

“10.2.6. Illi kif komplet tirribadixxi l-istess qorti indikata fil-paragrafu precedenti fil-kawza numru C - 281/02 minnha wkoll citata fl-istess nota: (ara foll 80);

“It must be observed, first, that Article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principle it lays down except in the cases provided for by the Convention”;

“10.2.7. Illi ghalhekk ghandu jkun pacifiku li kemm ir-Regolamenti in dizamina u l-kazistika Ewropea li tinforzha, jirrikjedu li wiehed ghandu jigi mharrek fl-istat Membru fejn l-istess intimat ikun domiciljat;

“10.2.8. Illi jirrizulta li s-socjeta’ intimata:

“10.2.8.i. Hi registrata l-Iskozja, (ara fol 52);

“10.2.8.ii. Topera wkoll l-Iskozja, (ara fol 50);

“10.2.9. Illi l-ftehim tal-1 t`April, 2008, pattwit bejn il-partijiet ma jstabilixxi l-ebda klawsola rigwardanti l-gurisdizzjoni bejn il-kontendenti f`kaz ta` dizgwid;

“10.2.10. Illi l-oggett tal-istess ftehim kellu jigi ezercitat fl-Oman;

“Ikkunsidrat :

“11.0. Illi minn ezami tal-fatti kif fuq sintetikament esposti jirrizulta segwenti:

“11.1. Illi l-ftehim pattwit fuq riferit gie konkluz f`Malta;

“11.2. Illi s-socjeta` rikorrenti hi registrata u topera f`Malta;

“11.3. Illi s-socjeta` intimata hi registrata fl-Iskozja;

“11.4. Illi l-oggett meritu tal-ftehim hekk pattwit kellu jigi ezegwit l-Oman, (ara foll 77);

“Ikkunsidrat:

“12. Illi tenut kont tas-suespost ghandu jkun pacifiku li l-anqas l-artiklu 5 tar-Regolament Ewropei Numru 44/2001, ma` japplikaw ghall-vertenza odjerna”.

“L-eccezzjoni ghal Reg 2(1) tal-Brussels 1 tinsab raffigurata fl-Art 5: -

“A person domiciled in a Member State may, in another Member State, be sued:

1. “(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

“(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

“- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

“- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

“(c) if subparagraph (b) does not apply then subparagraph (a) applies ;

“2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

“3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seized of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

“5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;

“6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;

“7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

“(a) has been arrested to secure such payment, or

“(b) could have been so arrested, but bail or other security has been given;

“provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage”.

“Din il-Qorti qieset l-Art 5 sabiex tevalwa jekk il-kaz tal-lum jidholx fil-parametri ta’ d-disposizzjoni u b’hekk ikun hemm eccezzjoni ghar-regola generali li persuni b`domicilju fi Stat membru tal-Unjoni ghandhom, independement minn nazzjonalita’ taghhom, jigu mharrka fl-Istat Membru fejn huma domiciljati.

“Ta’ rilevanza dwar jekk fil-kaz ta’ *letters of credit* tapplikax xi wahda mill-istanzi stipulati fl-Art 5 hija l-konsiderazzjoni ta’ decizjoni li nghatat ftit xhur qabel ma’ dahlu fis-sehh l-emendi ghall-Brussels Convention 1968 bil-Brussels 1. Il-Qorti qed tirreferi ghas-sentenza moghija mis-Supreme Court of Judicature Cour of Appeal (Civil Division) on Appeal from the High Court of Justice Queens Bench Division (Commercial Court) fit-28 ta’ Jannar 2000 fil-kawza bejn **“Credit Agricole Indosuez (appellant)”** u **“Chailease Finance Corporation” (respondent)**.

“Il-punti in disputa kienu :

“(1) whether England was "the place of performance of the obligation in question" for the purpose of Article 5(1) of the Brussels Convention and

“(2) whether the bill of sale and acceptance of sale required to be presented by Chailease to CAI under an irrevocable stand-by letter of

credit were non-conforming documents by reason of the fact that the date of delivery stated therein was 21 August 1998 when the credit stated that it was in respect of the sale agreement of a vessel for delivery during 17-20 August 1998.

“Il-fatti ta’ dan il-kaz kienu :-

“CAI kienet bank Franciz bi *branch* go Geneva. Din il-*branch* irrilaxxjat *letter of credit* a favur il-beneficjarju Chailease. Meta l-beneficjarju pprezenta d-dokumenti Geneva f’zewg okkazonijiet separati, dawn gew rifjutati. Fit-tielet okkazoni, regghu gew ipprezentati d-dokumenti necessarji flimkien ma’ struzzjonijiet li l-pagament kellu jsir *by transmission to Chailease’s account at the Midland Bank in London*. Id-dokumenti kienu regghu gew rifjutati u saret kawza. It-termini tal-*letter of credit* kienu jawtorizzaw lill-beneficjarju li jaghzel fejn kellu jseh il-pagament.

“Dwar l-ewwel punt li jista’ jassisti lil din il-Qorti fil-kwistjoni li ghandha quddiemha nghad hekk :-

“THE FIRST ISSUE

“7. *It was and is the plaintiff’s contention that its claim is based upon the failure of CAI to pay money and that, for the purposes of Article 5(1) of the Brussels Convention, the place of performance of the obligation in question was London in accordance with the instructions given to CAI upon the third presentation.*

“8. *So far as material, the Convention provides:*

“Article 2.

“Subject to the provisions of this Convention persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.

“Special Jurisdiction.

“Article 5

“A person domiciled in a Contracting State may, in another Contracting State be sued :-

1. *“matters relating to a contract in the Courts for the place of performance of the obligation in question ..”*

“9. *Thus, whereas, Article 2 prima facie required that the defendant, as a legal person domiciled in France, should be sued in that country, it was open to Chailease to establish the special jurisdiction of the English court under Article 5 on the basis that England was the place of performance of the obligation in question.*

“What was the obligation in question ?

“10. The European Court of Justice has held that, in order to identify the obligation in question, one must identify the obligation "which corresponds to the contractual right on which the plaintiff's action is based" see **Custom Made Commercial Limited -v- Stawa Metallbau** [1994] ECR I-2913 and 2957 (para 23), affirming **de Bloos -v- Bouver** [1976] ECR 1947 at p.1508 (paras 11,14); and see generally **Kleinwort Benson -v- Glasgow City Council** [1997] per Lord Goff of Chieveley at 163H-164G.

“11. The judge held that the relevant obligation was the obligation of CAI to pay the plaintiff in London pursuant to its instruction on the occasion of the third presentation. He said:

“It is true that that obligation does not arise unless and until conforming documents are presented to the bank, and that on the facts of this case that presentation had to take place in Geneva. But, provided that conforming documents have been presented to the bank in Geneva, the contractual right on which the beneficiaries' action is thereafter based is the right to receive payment in London. No doubt the bank has a separate obligation to examine documents presented and to take up only conforming documents, although I should have thought that is likely to be a duty which is owed to the applicant for the credit, rather than to the beneficiaries. The beneficiary has no need to rely upon such a separate obligation. If conforming documents are presented, the bank owes an autonomous duty to the beneficiary to make payment to it at the place designated for payment. The beneficiary's entitlement is contingent not upon examination of the documents but upon their objective conformity. If the documents are, objectively judged, conforming, then the bank is obliged to pay the beneficiary at the designated place of payment. In the event that it does not do so, then the contractual obligation whose performance is sought in the ensuing judicial proceedings (employing the language used in *Shenavai -v- Kreischer* [1987] ECR 239 at para 18 on pages 255-6) is the obligation to pay the beneficiary at the designated place of payment.”

“12. For CAI, Mr Males QC has attacked those conclusions of the judge on the following basis. He submits that on the true construction of the letter of credit contract, and in accordance with the principles on which Article 5(1) is based, the 'obligation in question' was the bank's obligation to examine and take up conforming documents, which obligation was to be performed in Switzerland ('at our counters in Geneva'). He submits that the bank's obligation following receipt of conforming documents in Geneva, to pay 'as per your instructions' was dependent on and no more than secondary to that principal obligation. That being so, he relies upon the judgment of the European Court of Justice in ***Shenavai v. Kreischer***, para 19:-

“... in a particular case of a dispute concerned with a number of obligations arising under the same contract and forming the basis of the proceedings commenced by the plaintiff ... it will be the principal obligation which will determine ... (the Court's) jurisdiction”

“He cites also the approach of the House of Lords in ***Union Transport -v- Continental Lines*** [1992] 1 WLR 15 and the references in the judgment of Lord Goff of Chieveley to the "more fundamental obligation" and "the real ground of complaint".

"13. Mr Males also submits that such a conclusion gives proper weight and effect to UCP 500 and the various articles within it which condition the bank's obligation to pay upon the proviso that the stipulated documents are presented, as well as emphasising the need for examination of such documents to ascertain whether they comply with the credit.

"14. Mr Males referred us to the decision in **Bank of Baroda -v- Vysya Bank** [1994] 1 Lloyd's Rep 87 in which, for the purposes of Article 4 of the Rome Convention on governing law, Mance J held that the performance which is characteristic of the contract of a letter of credit is the acceptance of conforming documents at the place of presentation, observing in that context that the place of payment under the credit is generally insignificant. Whilst acknowledging that the decision in that case was concerned with a different test, Mr Males relies upon it (a) as recognising the importance to banks and beneficiaries of a simple and clear test, a consideration which he submits is also applicable to 5(1) of the Brussels Convention, (b) as demonstrating that the principal matter with which such a contract is concerned is the presentation and acceptance of documents and (c) as demonstrating that to hold that the relevant obligation for the purposes of Article 5(1) is that of payment would mean that in many letter of credit cases there would be no substantial connecting factor between the dispute and the forum of the court called upon to hear it, contrary to the broad principle underlying Article 5(1) that a close connecting factor should be present to establish the special jurisdiction provided for: see *Shenavai -v- Kreischer* at para 18 and **Martin Peters Bauunternehmung GmbH -v- Zuid Nederlandse Aannemers Vereniging** [1993] ECR 987 at paras 9-11.

15. Forceful as Mr Males' submissions have been, I do not consider that they can succeed. In the **Kleinwort Benson** case at p.164E-G Lord Goff stated:

"(4) It follows that, in order to identify the relevant court, it is necessary first to identify the obligation in question. This was made plain in **Ets. A. de Bloos s.p.r.l. -v- Societe en Commandite Par Actions Bouyer ...** in which the European Court of Justice held, at p.1508, para. 11, that the word "obligation" in article 5(1) refers to "the contractual obligation forming the basis of the legal proceedings."

"16. The Court of Justice subsequently affirmed that "the obligation" "cannot be interpreted as referring to any obligation whatsoever arising under the contract in question, but is rather that which corresponds to the contractual right on which the plaintiff's action is based:" See **Custom Made Commercial Limited -v- Stawa Metallbau G.m.b.H.** (Case C288/92) [1994] ECR 1-2913 2957 (para 23)."

See also the observation of Lord Clyde at p.181C: "Moreover the reference is to 'the obligation in question'. That is a reference not to the contract but the obligation which is at the heart of the dispute."

"17. The claim in this case is based on the contractual right of Chailease to be paid, conditional on presentation of conforming documents prior to expiry of the credit. Where a claim is based upon failure to pay money, the obligation in question is the obligation to pay the money, and the place of payment is the place of performance for the purposes of Article 5(1): see the **Custom Made Commercial** case

referred to by Lord Goff at paras 23 and 29; see also **Briggs: Civil Jurisdiction and Judgments**(2nd ed) 1997 paras 2.136-137.

“18. It seems to me that the attempt of Mr Males to characterise the obligation of CAI to accept the conforming documents as the principal obligation, with payment merely dependent upon (and therefore secondary to) it, must fail. It certainly does not seem to me that he can derive assistance from the **Bank of Baroda -v Vysya**.. The test for ascertaining the jurisdiction with which the contract has the closest connection for the purposes of the Rome Convention, which was at issue in that case, is a different test for a different purpose from that under Article 5(1) of the Brussels Convention. In the Custom Made Commercial case, the European Court of Justice considered, and expressly rejected, the argument that Article 5(1) does not apply to the place of performance of a payment obligation because so to apply it would confer jurisdiction on a court which otherwise had no connection with the dispute.

“19. So far as the obligation of CAI to examine and take up documents is concerned, Chailease do not sue or otherwise base their cause of action upon an allegation of breach of that obligation; they base it simply upon the refusal to pay. As Mr Page put it in argument, provided CAI pays under the letter of credit, it is a matter of complete indifference to Chailease whether it takes up or examines the documents. It is the failure to pay which is `the real ground`, if not the only ground, of Chailease`s complaint.

“20. In **Shenavai -v- Kreischer** the European Court of Justice was concerned with contracts of employment, which it was acknowledged (at para 16 of the judgment) differ from other contracts by virtue of `certain particularities`, on account of which the court best suited to resolve disputes under such contracts is the court of `the place in which the characteristic obligation of such contract is to be performed`. However, the Court stated

“17. When no such particularities exist, it is neither necessary nor appropriate to identify the obligation which characterizes the contract and to centralize at the place of performance thereof jurisdiction, based on place of performance, over disputes concerning all the obligations under the contract. The variety and multiplicity of contracts as a whole are such that the above criterion might in those other cases create uncertainty as to jurisdiction, whereas it is precisely such uncertainty which the Convention is designed to reduce.

“18. On the other hand, no such uncertainty exists in most cases if regard is had solely to the contractual obligation whose performance is sought in the judicial proceedings. The place in which that obligation is to be performed usually constitutes the closest connecting factor between the dispute and the court having jurisdiction over it; it is this connecting factor which explains why, in contractual matters, it is the court of the place of performance of the obligation which has jurisdiction.” (emphasis added)

“I have emphasised the word `usually` because it seems to me clear that the Court was there explaining the broad rationale for the special jurisdiction rule in Article 5(1), rather than indicating that it is necessary in all cases that the obligation sued on should be demonstrably the closest connecting factor. Thus, it also seems clear to me that, following the

decision in Shenavai -v- Kreischer, in contract cases other than those concerning contracts of employment it is neither necessary nor appropriate to identify the obligation which characterises the contract, but rather to identify the contractual obligation of which performance is sought (in this case payment).....Accordingly, it seems clear to me that the obligation in question in these proceedings is the obligation to make payment under the credit.”

“Imbaghad il-Qorti komplet telabora dwar fejn kien il-*place of performance* ta’ l-obbligazzjoni, ossija l-*place of payment*.

“Jidher illi l-kaz kien sottolineat illi huma l-qrati tal-post tat-twettiq ta’ l-obbligazzjoni tal-pagament, li ghandhom gurdizzjoni jisimghu u jiddeciedu kaz dwar *letter of credit*.

“Issa minn ezami tal-Art 5 jidher ukoll illi ladarba *letter of credit* ma tinkwadrax ruhha taht *bejgh ta’ oggetti jew provvista ta’ servizzi* kif ikkontemplati fis-subinciz (b) tal-Art 5, ghandu japplika bhal fil-kawza fuq riferita dak stipulat fis-subinciz (a) tal-Art 5(1) ossija illi l-qorti tal-post tat-twettiq ta’ l-obbligazzjoni ghandha gurdizzjoni. L-obbligu kien li l-bank attur jwettaq l-obbligu tieghu bil-pagament li sar Malta. Ghalhekk din il-Qorti ghandha gurdizzjoni sabiex tismà u tiddeciedi din il-kawza fid-dawl ta’ l-eccezzjoni ghar-regola generali stabbilita’ fl-Art 2(1) tar-Regulation.

“Din il-Qorti mhijiex sejra tidhol fil-kwistjoni ta’ l-applikabbilita’ o meno ta’ l-Art 5(5) tar-Regulation li jipprovi li jista’ jkun hemm gurdizzjoni f’ dak li ghandu x` jaqsam mà kwistjoni li torigina mill-operazzjonijiet ta’ fergha, agenzija jew stabbiliment iehor, fil-qrati tal-post li fih jkunu jinstabu l-fergha, l-agenzija jew l-istabbiliment, peress illi l-konvenut huwa Standard Chartered Bank registrat r-Renju Unit, u Standard Chartered Bank Bahrain mhuwiex parti fil-kawza. L-Art 2(1) tar-Regulation mhuwiex applikabbli.

“L-ewwel eccezzjoni qeghda tkun respinta.

**“IV. It-tieni eccezzjoni
(Legittimu kontradittur)**

“Bit-tieni eccezzjoni, il-bank konvenut qieghed jeccepixxi li kien Standard Chartered Bank Bahrain Branch li hareg il-*letter of credit* mertu tal-kawza mhux il-bank konvenut; ghalhekk il-kawza kellha tkun intavolata kontra Standard Chartered Bank Bahrain Branch u/jew is-socjeta’ Maltija beneficjarja, klijenta tal-bank attur jew kontra haddiehor.

“Hemm qbil bejn il-kontendenti li Standard Chartered Bank Bahrain Branch kien l-*issuing bank*. Anke abbazi tad-dokumenti esebiti, il-kuntatti li saru kienu bejn HSBC Bank Malta plc u Standard Chartered Bank Bahrain Branch. Irrizulta wkoll illi kieku kellha titnehha l-*injunction* imposta mill-Qorti ta’ Bahrain, Standard Chartered Bank

Bahrain Branch kien lest jipprocedi bil-hlas lill-bank attur. Bhala fatt qed jistenna l-ezitu tal-pendenza gudizzjarja pendenti fil-Bahrain.

“Ghandu jinghad li sal-lum il-provi kienu kkoncentrati dwar jekk Standard Chartered Bank Bahrain Branch hijiex entita’ separata u distinta mill-bank konvenut ghall-fini ta’ din il-kawza.

“Il-bank konvenut isostni illi skont ir-regoli ta’ I-UCP 600, huwa espressament dikjarat illi branch ta’ bank ghandha titqies bhala entita’ separata mill-*Head office*. Madanakollu l-bank attur laqa ghal dan billi sostna li dawk ir-regoli japplikaw ghal *letter of credit rules* u ghandhom jigu wzati ghall-iskop ta’ l-istess regoli biss.

“Kienet citata sentenza tal-High Court ta’ New Delhi fil-kawza “**Tata Motors Ltd v. Jsc Vtb Bank**”, fejn inghad illi l-Art 3 tal-UCP 600 “*has to be limited for the purpose of documentary credits and not to make branches of a bank separate entitites in all respects.*”

“Din il-Qorti hija tal-fehma li l-Art 3 tal-UCP 600 ghandu jigi ezaminat fil-kuntest tieghu, u mhux jigi estiz ghal materji ohra, fosthom id-determinazzjoni ta’ jekk *branch* ghandux ikun meqjus b`personalita’ guridika separata mill-*head office*.

“Din il-Qorti qieset dak li qalu l-esperti legali esteri tal-partijiet dwar jekk skont il-ligi tal-Bahrain, *branch* ta’ bank titqiesx bhala entita’ separata.

“Il-Qorti tghid mill-ewwel li l-opinjoni espressi mill-konsulenti ghall-fini ta’ *proof of foreign law* kienu konfliggenti u jaslu ghal konkluzjonijiet opposti.

“Il-Qorti rat xi siti elettronici fosthom, dak amministrat mill-*Bahrain Economic Development Board* fejn jinghad illi *a foreign company branch* (bhalma rrizulta li hija registrata *Standard Chartered Bank Bahrain*) giet definita bhala:

“A branch of a foreign company which is incorporated and registered outside the Kingdom of Bahrain may be registered as an operational office, a representative office, or a regional office.

“8.1 Main features of a Foreign Company Branch :

- The parent company shall bear all liability of its branch in Bahrain*
- Business operations are allowed only for an operational offices*
- Representative and regional offices are only permitted to undertake marketing and promotion*
- Banking, insurance and investment activities are allowed (operational offices only)*
- Local office presened is required*
- Minimum share capital is not applicable*
- Branch manager is required*

- *A local sponsor is required only for an operational office, with the exception of branches licensed by Central Bank of Bahrain (CBB) or the Committee For Organizing Engineering Professional Practice (COEPP)*”.

“Mis-sit tal-Ministry of Industry and Commerce ta’ The Kingdom of Bahrain irrizulta wkoll illi:

“Foreign Company Branch -A branch of a foreign company which is incorporated and registered outside the Kingdom of Bahrain, may be established as an operational office or as a representative office. The limits of liability are the same as the parent company. Local operations are allowed only for an operational office. A representative office is only permitted to undertake marketing and promotion. A branch of a foreign company requires a registered branch manager. A local sponsor is required only for an operational office.”

“Anke f`siti elettronici privati li jassistu lil persuni interessati jaghmlu negozju fil-Bahrain, fosthom *MoIC Centrs – Bahrain Investors Center* jaghtu l-istess definizzjoni ta’ *Foreign Company Branch*:

“A branch of a foreign company which is incorporated and registered outside the Kingdom of Bahrain, may be established as an operational office, a representative office, or a regional office.

“Main features of this company type are :

- *Limits of liability same as the parent company*
- Local operations are allowed only for an operational office*
- *Representative and regional Office are only permitted to undertake marketing and promotion*
- *Banking and insurance activities are allowed (operational offices only)*
- *Local office presence is required*
- *Minimum share capital is not applicable*
- *Branch manager is required*
- *A local sponsor is required only for an operational office*

“Fl-istess sens huwa l-artikolu ta’ *Info-Prod Research (Middle East) Ltd* li dwar id-diversi *business forms and structures* f` Bahrain spjega li bhala *legal structures for non-Bahrainis* jezistu xi eccezzjonijiet ghar-regolazzjoni rigida ezistenti dwar *foreign participation* fosthom l-eccezzjoni tal-branch of foreign company :

“The Law of Commercial Companies provides that companies established outside Bahrain may open branches or offices in Bahrain provided that the approval of the Minister of Commerce and Agriculture is obtained and a local sponsor is appointed. The Minister will not grant approval unless he is satisfied that the parent company is financially sound and will assume full responsibility for liabilities of the branch. The sponsor must be a Bahraini merchant, either a

company or an individual. The Companies Law exempts branch offices of foreign companies from having a Bahraini sponsor if these offices use Bahrain as a regional center or as a representative office for their business activities. (ara wkoll is-sit <http://www.albawaba.com/business/bahrain-legal-bank-trade-systems>)

“Fil-Pag 88 tal-ktieb **Middle East and Arabic Countries : Company Laws and Regulations Handbook Vol I. Strategic Information and Basic Laws (International Business Publishing USA 2013 Edition updated)** a branch of foreign companies fil-Bahrian hija deskritta:

“The law of commercial companies provides that companies established outside Bahrain may open branches or offices in Bahrain provided that the approval of the Minister of Commerce and Agriculture is obtained and a local sponsor is appointed. The Minister will not grant approval unless he is satisfied that the parent company is financially sound and will assume full responsibility for liabilities of the branch. The sponsor must be a Bahraini merchant, either a company or an individual. The Company Law exempts branch offices of foreign companies from having a Bahraini sponsor if these offices uses Bahrain as a regional center or a registration office for their business activities.”

“Referenza qed issir ukoll ghad-decizjonijiet ikkwotati mill-bank konvenut, precizament dawk rapportati fil-pagna 3 sa 6 tad-dokument imhejji mill-espert legali tal-bank konvenut.

“Minn qari ta’ dak li kien deciz fil-Cassation case number 189/1995 u fil-Cassation case number 9/2007, jidher li dak li gie sottolinjat kien illi *branch* ta’ bank fil-Bahrain ghandha tigi kkunsidrata bhala “*financial institution with its own balance sheet in which it records all its operations, profits, losses, rights and obligations, ...and that the financial institution is not empowered to transfer its profits abroad except within specified limits.*” Minn dawn is-sentenzi li rrizulta kien li “*the existence of separate accounts in this manner invalidates the contention that the accounts of the Bahrain branch are unified with those of its head office or any of its other branches.*” Jidher ghalhekk li l-Qrati fil-kawzi citati ma ddikjarawx illi l-Bahraini Branch ghandha personalita’ legali u guridika li hija distinta minn dik tal-Main Office ta’ l-istess Bank izda li *per se*, il-branch topera b` mod separat u distint mill-operazzjonijiet tal-Main Office.

“Il-Qorti rat ukoll il-kummenti tal-espert legali tal-bank attur li ddikjara li dawn is-sentenzi inghataw qabel ma sehew emendi sostantivi fis-sistema legali rilevanti ghal dan il-mertu u ghalhekk dawn ma jstghux jitqiesu li ghadhom applikabbli.

“FI-isfond ta’ dan kollu, din il-Qorti taghmel referenza ghal decizjoni “**Smith, Stone and Knight Limited v. Birmingham**” ([1939] 4 All ER 116.

“Hemm kienet qed tigi trattata l-kwistjoni dwar jekk kellhiex tigi applikata r-regola *to protect the fact of separate corporate identities*, li fil-kawza giet *circumvented because the subsidiary was the agent, employee or tool of the parent*.

“Li huwa nteressanti minn din il-kawza, ghalkemm il-punt in kwistjoni ma jikkoincidix mà dak in ezami, huma sitt kwesiti li gew avvanzati minn Atkinson J sabiex jassistu lil Qorti dwar jekk kumpanija kinitx biss agent jew *nominee ta' parent company*. Dawn huma :-

- “(a) *Were the profits treated as profits of the parent?*
- “(b) *Were the persons conducting the business appointed by the parent?*
- “(c) *Was the parent the head and brain of the trading venture?*
- “(d) *Did the parent govern the venture, decide what should be done and what capital should be embarked on the venture?*
- “(e) *Did the parent make the profits by its skill and direction?*
- “(f) *Was the parent in effectual and constant control?”*”

“Fil-kaz taht ezami, fuq l-iskorta tal-provi, jidher li risposti ghal dawn il-kweziti jistghu jinghataw biss ghad-domandi bl-ittri c, d, e, u f. Ir-risposta ghalihom hija li kien il-bank tal-Bahrain li kien involut fl-operazzjoni bankarja, ha hsiebha mill-bidu nett u li l-*head office* kienet qeghda allegatament tagixxi ta' messaggier meta kien hemm bzonni sabiex jigu osservati r-regoli ta' kif tintbaghat *letter of credit* tramite *authenticated SWIFT messages*.

“Din il-Qorti hija tal-fehma li ghalkemm mhijiex fil-kompetenza taghha li tiddeciedi jekk skont il-ligi ta' Bahrain, *branch* ghandhiex personalita' guridika separata u distinta minn dik tal-*Main Office*, jirrizulta li *branch* hija ufficcju fejn, tramite l-istess, kumpanija barranija tkun tista' topera negozju fil-Bahrain.

“Irrizulta wkoll illi l-*branch* tigi trattata bhala separata mill-*main office* fi kwistjonijiet bhalma huma, fost ohrajn, taxxi, licenzji u anke transazzjonijiet partikolari li jigu effettwati fl-istess *branch*.

“Irrizulta li r-registrazzjoni u l-licenzja ta' l-*branch* hija kompletament separata u distinta minn dik tal-*head office*.

“Irrizulta li jinzammu *records* separati u distinti minn dawk tal-*head office*.

“Madanakollu rrizulta wkoll li l-*main office* tinzamm responsabbli ghal-*liabilities* ta' l-*branch* sabiex ir-registrazzjoni ta' l-*branch* tkun wahda valida.

“Jidher li *branch as such* ma tistax tibdel il-*policies* tal-*main office* jew tagixxi b` mod kuntrarju ghal dak li tordna l-*main office*.

“Jirrizulta wkoll illi fil-Bahrain *branch office* tista’ topera f` isimha u tista’ tharrek jew tigi mharrka hi stess.

“Din il-Qorti tifhem illi fil-proceduri li saru Bahrain kienet il-*branch* li giet notifikata bl-atti ghalkemm in-nomenklatura utilizzata fl-*occhio* kienet dik ta’ Standard Chartered plc. Jidher li sar hekk ghaliex l-operazzjoni bankarja in kwistjoni saret permezz tal-*branch* kif ukoll ghaliex il-*branch* tal-Bahrain setghet tigi mharrka hemm.

“Minkejja li bhala l-*issuing bank*, l-iStandard Chartered Bank Bahrain Branch kienet involuta fil-kwistjoni taht ezami ma jfissirx illi l-bank konvenut registrat fir-Renju Unit ma kellux ikun konvenut fil-kawza tal-lum.

“Dan qed jinghad ghaliex peress li l-bank konvenut kien involut fl-operazzjoni anke jekk allegatament agixxa bhala messaggier bejn il-bank Malti u l-*branch* tal-Bahrain huwa imperattiv li l-bank konvenut ikun parti fil-procediment tal-lum sabiex iwiegeb ghall-istanza attrici.

“Tajjeb jinghad illi fl-istadju attwali tal-kawza l-Qorti qeghda tillimita ruhha illi tiddeciedi l-eccezzjonijiet preliminari. Ghadha ma bdiex tqis il-mertu tal-kwistjoni. Ghadhom ma tressqux provi sabiex jistabilixxu fuq bilanc ta’ probabilitajiet l-involviment tal-bank konvenut vis-à-vis il-bank attur. Tirrileva biss illi meta bdew isiru diskussjonijiet dwar il-kwistjoni *at higher levels* dahlu fix-xena direttament ufficjali gholja tal-bank attur ukoll. Lanqas ma tressqu provi konklussivi fl-istadju attwali tal-kawza dwar ir-relazzjoni ta’ bejn il-bank attur u Standard Chartered Bank Bahrain Branch sabiex jigi stabbilit jekk fil-kaz illi Standard Chartered Bank Bahrain Branch ikun inadempjenti in linea generali u in partikolari fil-konfront tal-bank attur, jidholx fix-xena l-bank konvenut. Dawn huma provi li jolqtu direttament il-mertu u li l-Qorti ghadha ma semghetx. Aktar milli kif topera Standard Chartered Bank Bahrain Branch skont il-ligi tal-Bahrain, tkun trid issir il-prova ta’ kif skont il-ligijiet bankarji hija regolata r-relazzjoni bejn il-bank attur u dak konvenut dan tal-ahhar kemm de proprio kif ukoll vis-à-vis il-fergha tieghu fil-Bahrain. Ghalhekk il-bank konvenut huwa legittimu kontradittur tal-bank attur.

“Il-Qorti qeghda tichad it-tieni eccezzjoni wkoll”.

Rat ir-rikors tal-appell tas-socjetà konvenuta tat-18 ta’ Mejju, 2016, li permezz tieghu appellat is-sentenza hawn fuq imsemmija fejn, filwaqt li ghamlu referenza ghall-provi gia prodotti u rrizervaw id-dritt li ggib provi ulterjuri skont il-ligi, talbet li din il-Qorti tilqa’ l-appell taghha, thassar is-

sentenza hawn fuq imsemmija u minflok tilqa' l-ewwel eccezzjoni preliminari taghha dwar in-nuqqas ta' gurisdizzjoni u tichad it-talbiet attrici hekk kif dedotti fl-att promotur bl-ispejjez taz-zewg istanzi kontra s-socjetà attrici appellata.

Rat ir-risposta tal-appell tal-Bank attur appellat li permezz taghha ssottometta illi din il-Qorti ghandha tichad l-appell interpost mis-socjetà konvenuta appellanti, bl-ispejjez kontra taghha.

Rat li l-ewwel Qorti fl-20 ta' Gunju, 2016, ddegretat ir-rikors tas-socjetà konvenuta tat-3 ta' Mejju, 2016, fejn peress li t-talba tinkwadra ruhha fid-dispost tal-Artikolu 231(1) tal-Kodici ta' Organizzazzjoni u Procedura Civili (Kap. 12 tal-Ligijiet ta' Malta), laqghet it-talba taghha u taghtha permess tinterponi appell minn dik il-parti tas-sentenza li kienet tirrigwarda t-tieni eccezzjoni tal-legittimu kontradittur.

Rat ir-rikors tal-appell tas-socjetà konvenuta tat-8 ta' Lulju, 2016, li permezz tieghu appellat is-sentenza hawn fuq imsemmija fejn, filwaqt li ghamlet referenza ghall-provi già prodotti u rrizervat id-dritt li ggib provi ulterjuri skont il-ligi, talbet li din il-Qorti tilqa' l-appell taghha, thassar is-sentenza hawn fuq imsemmija u minflok tilqa' t-tieni eccezzjoni preliminari taghha dwar li mhix il-legittimu kontradittur u tichad it-talbiet

attrici hekk kif dedotti fl-att promotur bl-ispejjez taz-zewg istanzi kontra s-socjetà attrici appellata.

Rat ir-risposta tal-appell tal-Bank attur appellat li permezz taghha ssottometta illi l-aggravvju avanzat mill-Bank appellant huwa infondat fil-fatt u fid-dritt u li din il-Qorti ghandha tichad l-appell interpost mis-socjetà konvenuta appellanti, bl-ispejjez kontra taghha.

Rat il-verbal tas-seduta tad-9 ta' Frar, 2017, fejn wara li d-difensuri tal-partijiet ittrattaw l-appell quddiem din il-Qorti, l-istess appell gie differit ghas-sentenza ghal-lum.

Rat l-atti kollha tal-kawza, inkluz ix-xhieda u d-dokumenti esebiti mill-partijiet.

Ikkonsidrat:

Illi permezz ta' din il-kawza, is-socjetà attrici qeghda tfittex dikjarazzjoni mill-Qrati Maltin, li hija kreditrici tal-Bank konvenut, registrat fir-Renju Unit, u li b'hekk hija intitolata ghar-rimbors tal-ammonti mhallsa minnha lill-beneficjarja Emirates Aircrete Industries Co. Corporation Limited (kumpanija registrata Malta C-51943), a tenur tal-*letter of credit* ossia *Documentary Credit (DC) Number 682010006026-L* fit-30 ta' Jannar,

2012, mahruġa mill-istess Bank fil-Bahrain, fuq struzzjonijiet ta' soċjetà estera bl-isem Ahmed Mansoor Al A Ali Co BSC(C). Il-Bank konvenut qiegħed iressaq zewg eccezzjonijiet preliminari, dawk dwar in-nuqqas ta' ġurisdizzjoni tal-Qrati Maltin u dwar li mhux il-legittimu kontradittur, li kif ingħad ġew miġħuda mill-ewwel Qorti, li allura jiffurmaw il-mertu tal-appell odjern.

L-ewwel appell tal-Bank konvenut jitratta l-aggravju tiegħu dwar il-ġhala jsostni li l-ewwel Qorti ma kenitx ġustifikata illi tiddetermina illi kellha l-ġurisdizzjoni sabiex tiegħu konjizzjoni tal-kawza, dan meta l-istess Bank mhuwiex registrat Malta, m'għandu l-ebda assi Malta li sentenza eventwalment tkun tista' tigi ezegwita fuqhom, u għal raġunijiet oħra msemmija fl-Artikolu 742 tal-Kodici t'Organizzazzjoni u Procedura Civili (Kap. 12 tal-Liġijiet ta' Malta), u għaldaqstant kellha tigi mharrka fl-istat membru fejn tinsab domiciljata.

Jgħid ukoll li l-ewwel Qorti qieset li ladarba l-UCP 600 (l-aħhar regoli ta' Uniform Customs and Practice li jirregolaw *letters of credit*) ma jsemmi xejn dwar il-kwestjoni tal-ġurisdizzjoni, għalhekk strahet fuq dak li jgħid ir-regolament 44/2001.

Fil-principju l-appellant jaqbel li l-artikoli rilevanti tar-regolament 44/2001 huma l-Artikoli 2 sa 7 tal-istess regolament, u jirreferi għall-eżercizzju

mwettaq mill-ewwel Qorti, fejn qieset xi sentenzi li setghu kienu relevanti għall-kaz odjern u studjat l-effett tal-Artikolu 5 tal-istess regolament, biex tara jekk kienx hemm lok li tigi applikata l-eccezzjoni għar-regola li persuni domiciljati fi stat membru għandhom, indipendentement min-nazzjonalità tagħhom, jigu mharrka fl-istat membru li jinsabu domiciljati fih, izda, skont hu, waslet għall-konkluzjoni zbaljata. Dan peress li hija kkonkludiet li fill-kaz odjern, il-kwistjoni bejn il-partijiet kienet ticcentra fuq l-Artikolu 5(1)(a), in kwantu li l-fatt li kellu jsir il-hlas hawn Malta, gie ekwiparat mal-*place of performance of the obligation in question*. Dan meta fil-fehma tieghu, l-applikazzjoni tal-principji taht l-Artikolu 5, kellhom iwasslu lill-ewwel Qorti għall-konkluzjoni li l-Qorti Maltija ma setghet qatt ikollha guriisdizzjoni.

Dan jinghad mill-Bank appellant peress li jishaq li trid issir distinzjoni bejn l-obbligu tas-socjetà attrici appellata fil-kapacità tagħha ta' *second advising bank, nominated bank* u *confirming bank*, fil-konfront tal-beneficjarju u l-obbligu ta' Standard Chartered Bank, Bahrain Branch, fil-kapacità tagħha ta' *issuing bank*.

Jishaq li wiehed irid izomm f'mohhu n-natura kuntrattwali tal-*Letter of Credit*, bejn ir-rikjedent u l-beneficjarju, kif ukoll li tezisti relazzjoni kuntrattwali bejn il-varji banek li huma involuti fit-trasferiment ta' fondi, li huma differenti minn xulxin. B'hekk fil-fehma tieghu, il-mertu mhuwiex

il-hlas li l-beneficjarju kellu jircievi mis-socjetà attrici, izda l-hlas li kellu jsir mill-*issuing bank* lill-*confirming bank*, liema obbligazzjoni fil-fehma tieghu, kellha ssir fil-Bahrain, liema post jargumenta, kellu l-gurisdizzjoni fuq il-kaz odjern.

Jagħmel referenza wkoll għall-Artikolu 5(5) tar-Regolament, fejn jingħad:

“as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated”.

Dan sabiex jinsisti li l-uniku post fejn il-Bank konvenut, domiciljat fir-Renju Unit, seta' jigi mharrek dwar il-kwistjoni relatata ma' wahda mill-ferghat tieghu, hija fil-Qrati fejn tinsab tali fergha, cioè fil-Bahrain. Isegwi billi jislet parti mix-xhieda ta' Zoi Karali, sabiex jishaq li l-ligi ta' Bahrain tagħmel distinzjoni bejn fergha ta' bank barrani rregistrat gewwa l-Bahrain u l-*Head Office* tal-bank barrani. L-istess bank appellant jagħmel referenza wkoll għar-rapport tal-espert *ex parte* Noor Hassan Radhi li tishaq li skont il-precedent imwaqqaf fil-gurisprudenza tal-Qrati ta' Bahrain, hija tikkonkludi li m'għandhiex raguni sabiex tiddubita li fergha ta' bank fil-Bahrain hija meqjusa bhala entità legali separata mill-*Head Office* tal-istess bank. Tgħid dan peress li kien deciz mill-*Cassation Court of Bahrain* li anke l-assi huma meqjusa separati u

anzi huma *ring-fenced*, liema principji, fin-nuqqas ta' provvediment espress fil-ligi, ghandhom jitqiesu applikabbli.

L-appellant isostni li l-istess UCP 600 rules li japplikaw ghall-*letter of credit*, ukoll jaghmlu distinzjoni bejn il-ferghat ta' banek li jkunu registrati f'pajjizi differenti u jittrattaw l-imsemmija ferghat bhala entitajiet indipendenti minn xulxin. Dan kollu kellu jwassal ghall-konkluzjoni li l-fergha ta' Bank barrani registrat gewwa l-Bahrain huwa meqjus bhala istituzzjoni separata u indipendenti mill-*Head Office*, b'dan illi dan tal-ahhar mhux rikonoxxut jew regolat mill-ligijiet tal-Bahrain u ghalhekk il-kawza odjerna qatt ma kellha tigi intavolata kontra s-socjetà appellanti, hawn Malta. Dan jinghad mhux biss peress li s-socjetà appellanti m'ghandha ebda rabta guridika mal-partijiet, izda stante wkoll li m'hemm ebda raguni l-ghala l-Qrati Maltin ghandhom iqisu lilhom infushom kompetenti biex jisimghu din il-kawza.

L-appellant jinsisti li *letters of credits*, li huma indipendenti mill-kuntratt t'oggetti u/jew servizzi, ma jaqghux taht il-binarij elenkati fl-Artikolu 5 tar-Regolament 44/2001 u ghalhekk *il-place of performance of contract* huwa kompletament irrilevanti. B'dan illi huwa meqjus minnu, li jekk xejn huwa l-Artikolu 5(5) li japplika ghal dak li ghandu x'jaqsam mal-operat ta' ferghat, f'liema kaz il-Qrati ta' fejn tinsab tali fergha (f'dan il-

kaz tal-Bahrain) ghandhom il-gurisdizzjoni u ghandhom il-kompetenza biex jiehd u konjizzjoni tal-kawza.

Ghalhekk jinsisti li s-*special jurisdiction clause* tar-Regolament 44/2001, ma japplikax u li qatt ma kellu jigi mharrek hawn Malta, izda l-kawza kellha tigi istitwita l-Ingilterra, il-post ta' domicilju tal-konvenut Standard Chartered Bank, ai termini tal-Artikolu 2 tal-istess Regolament, u anke ghal din ir-raguni, dawn il-Qrati m'ghandhomx gurisdizzjoni biex jisinghu l-kawza odjerna. B'dan illi, jekk din il-Qorti ssib li l-bank appellat ma setghax jintavola l-pretensjonijiet tieghu fil-Bahrain, kellha tintavolaha gewwa l-Ingilterra u mhux Malta.

Trattat issa l-aggravju relattiv, l-ewwel ma jigi osservat minn din il-Qorti, huwa n-nuqqas tal-partijiet originarjament involuti fil-hrug tal-*letter of credit* in kwantu ma ghamlu ebda referenza ghal-ligi applikabbli f'kaz ta' dizgwid jew disputa bejniethom. Fin-nuqqas ta' ghazla maghmula mill-partijiet ikkoncernati, jispetta lill-Qorti li tanalizza l-kwistjoni tal-gurisdizzjoni applikabbli ghall-kawza pprezentata quddiemha.

In tema legali, qabel xejn, tajjeb jinghad illi l-materja in ezami hija regolata bid-disposizzjonijiet tar-Regolament tal-Kunsill (KE) Numru 44/2001 tat-22 ta' Dicembru 2000, dwar gurisdizzjoni u rikonoxximent u ezekuzzjoni ta' sentenzi f'materji civili u kummercjali li ghandhom

ikomplu jghoddu fil-kwistjonijiet li jaqghu fl-ambitu ta' dak ir-Regolament, kif publikat fil-Gurnal Ufficjali tal-Kommunitajiet Ewropej tas-16 ta' Jannar, 2001. Dan l-istrument legali, sewwasew minhabba li huwa Regolament, illum jaghmel parti mis-sistema tal-ligijiet ta' Malta. Ghalhekk Qorti Maltija trid issegwi r-regoli li johorgu mill-istrument legali hawn qabel imsemmi li huwa enforzabbli f'Malta bhala stat membru fl-Unjoni Ewropea. Isegwi li, f'dan il-kaz, il-Qorti, trid tapplika r-regoli li johorgu mill-istrument legali tar-Regolament tal-Kunsill (KE) 44/2001, li illum jaghmel parti mis-sistema tal-ligijiet ta' Malta b'effett dirett u li kif sewwa spjegat mill-ewwel Qorti, ixejjen l-applikabbilita' tal-Artikolu 742 tal-Kap. 12 tal-Ligijiet ta' Malta.

Applikat il-principju li l-kwistjoni preliminari hawn sollevata, ghandha tigi determinata mir-Regolament tal-Kunsill (KE) Numru 44/2001, ikun utli li jigu elenkati xi principji rilevanti, stabbiliti permezz tal-istess Regolament:

L-Artikolu 2 para. 1 tar-Regolament 44/2001 rilevat mis-socjeta' appellanti jghid hekk:

“Bla pregudizzju ghal dan ir-Regolament, persuni b'domicilju fi Stat Membru ghandhom, independentament min-nazzjonalita taghhom, jigu mfittxija fil-qrati ta' dak l-Istat Membru”.

Izda l-principju li l-gurisdizzjoni hi dipendenti mid-domicilju tal-persuna, dan mhux wiehed assolut. Dan jinghad peress li kif jirrizulta mir-*recital* 12 tal-preambolu tal-istess Regolament, b'zieda mad-domicilju tal-konvenut, ghandu jkun hemm bazi alternattiva ta' gurisdizzjoni bbazata fuq ir-rabta mill-qrib bejn il-Qorti u l-azzjoni jew sabiex tkun iffacilitata amministrazzjoni tajba tal-gustizzja.

Il-possibilita li persuna domiciljata fi stat membru tigi mharrka fi stat membru iehor hi espressament kontemplata mill-istess Regolamenti fuq riferiti (Artikolu 3 jipprovdi li persuni domiciljati fi stat membru, jistghu jigu mfittxija fil-qrati ta' stat membru iehor biss bis-sahha tar-regoli 2 sa 7 tat-tieni Kapitolu);

Fil-fatt l-Artikolu 5 tal-istess direttiva jipprovdi hekk:

“Persuna domiciljata fi Stat Membru tista’, fi Stat Membru iehor, tkun infittxija:

“1.(a) f’materji li ghandhom x’jaqsmu ma’ xi kuntratt, fil-qrati tal-post tat-twettieq ta’ l-obbligi f’dak il-kaz;

“(b) ghall-iskopijiet ta’ din id-disposizzjoni u sa kemm ma jkunx miftiehem mod iehor, il-post tat-twettieq ta’ l-obbligi f’dak il-kaz ghandu jkun:

“— fil-kaz ta’ bejgh ta’ oggetti, il-post fl-Istat Membru fejn, skond il-kuntratt, l-oggetti gew kunsinjati jew suppostli kienu kunsinjati,

“— fil-kaz ta’ provista ta’ servizzi, il-post fl-Istat Membru fejn, skond il-kuntratt, fejn gew provduti jew suppost li kienu provduti servizzi

“(c) jekk is-sub-paragrafu (b) ma japplikax, japplika is-sub-paragrafu (a)”.

Filwaqt li l-Artikolu 5 (5) jghid:

“5. *F’dak li ghandu x’jaqsam ma’ kwistjoni li torigina mill-operazzjonijiet ta’ fergha, agenzija jew stabbiliment iehor, fil-qrati tal-post li fih jkunu jinstabu l-fergha, l-agenzija jew l-istabbiliment;*”.

F’dan il-kaz, il-bank attur qieghed jitlob rifuzjoni ta’ hlas li ghamel lis-socjetà beneficcjarja Maltija, Emirates Aircrete Industries Co. Corporation Ltd, a bazi ta’ *letter of credit* mahruġa mill-fergha tal-bank appellant fil-Bahrain, diment li l-bank attur ikollu d-dokumentazzjoni kollha hekk kif indikat fl-istess strument. Il-bank attur ghamel il-verifiki mehtiega u kien sodisfatt li l-hlas seta’ jsir lill-beneficcjarju indikat fil-*letter of credit*, kif wara kollox kien sodisfatt il-bank appellanti qabel ma gie processat il-pagament lill-beneficcjarju fil-15 ta’ Dicembru, 2011.

Din il-Qorti bhal dik ta’ qabilha, hija konvinta li ladarba l-*letter of credit*, ma tinkwadrix ruhha taht bejgh ta’ oggetti jew ta’ provvista ta’ servizzi, kif provdut taht l-Artikolu 5(1)(b), f’liema kaz, l-Artikolu 5 para.(1)(c) jipprovdi li s-sub-paragrafu (a) ghandu japplika. Dan is-sub-paragrafu jipprovdi li l-kawza tista’ tigi istitwita fejn kellu jigu mwettaq il-kuntratt. Dan, kif espost mill-bank appellat, kien ritenut mill-Qorti Ewropea tal-Gustizzja fit-3 ta’ Mejju, 2007 fl-ismijiet **Color Drack GmbH v. Lezz International Vertriebs GmbH**.

Skont il-*letter of credit* li a bazi taghha giet istitwita l-kawza odjerna, il-bank attur kellu jwettaq l-obbligu tieghu illi jhallas lill-beneficjarju hawn Malta. F'dan il-kuntest, hija wkoll meqjusa tassew rilevanti l-osservazzjoni maghmula mill-England and Wales High Court fit-18 ta' Novembru, 2013, fil-kawza fl-ismijiet **Taurus Petroleum Limited v. State Oil Marketing Company of the Ministry of Oil, Republic of Iraq**, fejn saret referenza ghal sentenza ohra fejn kienet mistharrga l-materja ta' gurisdizzjoni proprju f'kaz relatat ma' *letter of credit*, fejn inghad:

“25. In Power Curber, Lord Denning MR and Griffiths LJ held that the situs of the debt constituted by an irrevocable unconfirmed credit advised through Bank of America, Miami, to North Carolina National Bank, Charlotte, under which the issuing bank ("NBK") contracted to honour drafts drawn on the Bank of America, Miami, was the place of payment -- North Carolina. NBK had refused to pay the outstanding sum due under the credit when the party who had procured it obtained in Kuwait a provisional attachment of the sums payable under the credit which by Kuwaiti law prevented NBK from making further payment. After starting but then discontinuing proceedings to enforce payment in North Carolina, the beneficiary ("PCIL") sought and obtained summary judgement against NBK in London. On appeal to the Court of Appeal, it was argued that NBK had an arguable defence on the basis that Kuwaiti law was the proper law of the credit or the situs of the debt and under that law payment of the sum sued for was unlawful. Lord Denning MR held that the proper law of contract was the law of North Carolina where payment was to be made on behalf of the issuing bank – this being the law with which the contract had the closest connection. Lord Denning went on:

“Nor can I agree that the lex situs of the debt was Kuwait. It was in North Carolina. A debt under a letter of credit is different from ordinary debts. They may be situate where the debtor is resident. But a debt under a letter of credit is situate in the place where it is in fact payable against documents.”. (enfasi mizjuda minn din il-Qorti).

Hekk ukoll f'dan il-kaz, huwa ritenut li l-hlas fuq il-*letter of credit* kien miftiehem li jsir hawn Malta u jsegwi li dawn il-Qrati ghandhom gurdizzjoni ai termini tal-Artikolu 5(1)(a) tar-Regolament, bhala l-post tat-twettieq tal-obbligazzjoni.

Din il-Qorti taqbel mal-principju espost mill-bank appellant, in kwantu t-transazzjoni li ssehh permezz ta' *letter of credit* ghandha titqies indipendentement mill-kuntratt ta' bejgh bejn l-applikant u l-beneficjarju. Izda, jinghad ukoll, fuq il-bazi tal-gurisprudenza estensiva citata mill-ewwel Qorti, li fi kwalunkwe kaz, wiehed ghandu jqis it-talbiet attrici fil-kuntest tal-obbligi li l-istess attur ikun qed ifittex li jitwettaq, li f'dan il-kaz huwa l-hlas a bazi tal-*letter of credit*. Ghalhekk, huwa ritenut ukoll minn din il-Qorti, illi l-gurdizzjoni effettiva taghha f'dan il-kaz hi bbazata fuq konnessjoni cara bejn il-Qorti u l-azzjoni, in kwantu l-bank attur appellat qiegheed jitlob rifuzjoni ta' hlas imwettaq minnu f'Malta u li Standard Chartered Bank Bahrain fil-principju, accetta li ghandu obbligu li jirrifondi.

Sa fejn il-bank appellant jinvoka l-applikabbilita' tal-Artikolu 5(5) tar-Regolament, jinghad li, kif gustament tirrileva s-socjeta' appellata, ghal dak li ghandu x'jaqsam mal-operat ta' fergha, huma persuni domiciljati fi stat membru li jistghu jigu mfittxija fil-qrati ta' stat membru iehor (Artikolu 3 tar-Regolamenti). F'dan il-kaz il-fergha tinsab fl-Istat ta' Bahrain, li

certament mhux stat membru fl-Unjoni Ewropea, u ma jista' qatt ikun applikabbli ghalih.

In kwantu l-bank appellant fl-ewwel appell tieghu, jaghmel referenza ghax-xhieda ta' Zoi Karali u r-rapport tal-espert Dr Noor Hassan Radhi, dwar id-distinzjoni bejn fergha rregistrata fil-Bahrain u l-*Head Office* tal-bank barrani, dawn mhumiex meqjusa rilevanti ghall-fini ta' dan l-aggravju u ser jigu trattati aktar 'il quddiem.

Ghalhekk in kwantu l-ewwel appell tal-Bank appellanti jissejjes fuq in-nuqqas ta' gurisdizzjoni tal-Qrati Maltin, jirrizulta bhala infondat, u ser jigi michud.

Imiss issa li jigi mistharreg it-tieni appell tal-bank appellanti, dak fejn tigi attakkata s-sentenza tal-ewwel Qorti, bhala mhux gustifikata, fejn iddeterminat li kien il-legittimu kontradittur. Huwa jishaq li kien Standard Chartered Bank Bahrain Branch u mhux il-bank appellant li kien hareg il-*letter of credit* mertu tal-kawza u ghalhekk il-kawza kellha ssir kontra l-branch f'Bahrain u/jew is-socjetà Maltija beneficcjarja, u mhux kontrih, peress li hu ma kellu ebda involviment sostantiv fil-*letter of credit*. Il-bank appellant jishaq li huwa kellu rwol limitat ghal dak ta' *first advising bank* fis-sens li kien il-messagier li rcieva d-dokumenti minghand HSBC Bank u ghaddihom lill-fergha tagghom f'Bahrain. Jishaq li l-pagament

lill-HSBC kellu jsir direttament mill-fergha tagghom fil-Bahrain u ghalhekk diffiċli ghalih biex jifhem kif il-bank appellat qiegħed jippretendi li jigi dikjarat bhala kreditur tal-bank konvenut appellant.

L-appellant jikkontendi li l-ewwel Qorti kienet qieset il-fatti sew meta stqarret li l-fergha tal-bank f'Bahrain kien l-*issuing bank* u li kienu saru diversi kuntatti bejn il-bank f'Bahrain u l-bank Malti attur. Gustament osservat ukoll li kieku kellha titnehha l-ingunzjoni imposta mill-Qorti ta' Bahrain, Standard Chartered Bank Bahrain branch kienet lesta li thallas lill-bank attur. Il-kwistjoni principali tibqa', izda, jekk Standard Chartered Bank Bahrain *branch* hix entità separata u distinta mill-bank appellant għall-finijiet ta' din il-kawza. Il-bank appellant jishaq illi skont l-Artikolu 3 tal-UCP 600, li huma applikabbli għall-*letter of credit* in kwistjoni, "*branches of a bank in different countries are considered to be separate banks*". Għalhekk ladarba l-partijiet addottaw dawn ir-regoli UCP 600, fil-kuntratt ta' bejniethom, cioè fil-*letter of credit*, dawn ir-regoli għandhom jiqiesu bhala l-ligi applikabbli għall-fini tal-istess kuntratt. Isegwi l-argument tal-appellant, illi l-bank appellat ma jstax imexxi l-azzjoni attrici fil-konfront tiegħu, li għall-fini tal-UCP 600 rules huwa entità separata mill-fergha tal-istess bank fil-Bahrain, li kellha l-obbligu tal-hlas ai termini tal-istess *letter of credit*.

Jikkontendi wkoll li l-ewwel Qorti kienet zbaljata meta rreferiet għall-kawza fl-ismijiet **Tata Motors Ltd v. JSC VTB Bank** deciza mill-*High Court of New Delhi*, hekk kif ukoll l-ewwel Qorti rriteniet li l-Artikolu 3 tal-UCP 600 kellu jitqies limitatament fil-kuntest ta' *documentary credits*, ladarba l-pretensjonijiet tal-bank appellat jissejjsu proprju fuq u huma naxxenti minn *documentary credit*, li jwassal għall-argument tiegħu li l-fergħa ta' Bahrain għandha titqies bħala bank separat minnu. Jishaq illi anke jekk wiehed kellu jikkoncedi li l-Artikolu 3 tal-UCP 600 għandu jigi ezaminat limitatament fil-kuntest tiegħu u ma jigix estiz għal materji oħra, fosthom jekk *branch* għandhiex titqies li għandha personalità guridika separata mill-*Head Office*, għia ladarba l-kawza tikkoncerna proprju *documentary credit*, dik il-Qorti kellha tasal għall-konkluzjoni li l-appellanti ma hux il-legittimu kontradittur.

Il-bank appellant jilmenta in kwantu l-ewwel Qorti rinfaccata bi provi konfliggenti dwar il-*proof of foreign law*, strahet fuq provi li ma kienux jirrizultaw mill-atti, bħal siti elettronici, fosthom dak amministrat mill-Bahrain Economic Board, tal-Ministry of Industry and Commerce ta' The Kingdom of Bahrain u siti privati oħra, liema sorsi ma gew citati minn ebda wiehed mill-partijiet. Għalhekk jilmenta illi meta l-Qorti għamlet dan, hija effettivament skartat il-provi taz-zewg partijiet u għazlet minflok provi li ma jirrizultawx mill-atti, u dan bi ksur tal-principju *quod non est in actis non est in mundo*. Isegwi li l-partijiet ma kellhomx l-opportunità li

jikkontroezaminaw jew li tal-inqas jaghmlu sottomissjonijiet dwar il-provi li l-ewwel Qorti ghazlet li tistrieħ fuqhom. Dan meta l-istess Qorti kellha l-obbligu, skont l-appellant, li ttiprova tisset il-konkluzjonijiet li qablu fuqhom il-partijiet u tiddeciedi li filwaqt li tadotta posizzjoni, tiskarta l-oħra a bazi tal-provi migjuba quddiemha.

Ilment iehor tal-bank appellant jiccentra ruħu dwar id-decizjoni tal-ewwel Qorti li fid-determinazzjoni tal-kwezit jekk Standard Chartered Bank Bahrain *Branch* kenitx entità separata jew le, ghazlet li taghmel analogija ma' kumpanija sussidjarja u mhux fergha, u jekk dik il-kumpanija kenitx agent jew *nominee* tal-*parent company*. Dan meta d-decizjoni kellha tkun limitata għall-kwezit dwar jekk fergha ta' bank hix entità separata skont il-UCP 600 Rules, kif inghad qabel, u għalhekk jigi argumentat li l-analogija tal-ewwel Qorti kienet irrilevanti għad-decizjoni li kellha taghmel. Inoltrè l-bank appellant jghid li l-partijiet qablu li l-operat tal-fergha fil-Bahrain huwa separat u distint mill-operat tal-kwartieri generali tal-bank appellant f'Londra. Filwaqt, izda, li l-posizzjoni tieghu hija li dan il-fatt jikkorabora l-posizzjoni tieghu illi fergha għandha titqies bhala entità separata u distinta mill-kwartieri generali, mhix it-tezi ta' ebda parti li Bahrain *Branch* kien xi agent jew *nominee* tal-bank appellant.

L-appellant jghid ukoll li meta l-ewwel Qorti qieset in-natura tan-negozju bankarju, qieset li fergha tigi trattata bhala separata mill-*main office*, fi kwistjonijiet bhal taxxi, registrazzjoni, licenzji u anke negozji partikolari li jigu effettwati mill-istess *branch*, kif ukoll iz-zamma ta' *records*; sahsitra li din il-fergha tista' topera f'isimha u tharrek jew tigi mharrka f'isimha. Ghalhekk il-bank appellant jishaq li ma jsegwix li huwa ghandu jwiegeb ghat-talba tal-bank appellat, ladarba l-istess Qorti rriteniet li huwa agixxa biss ta' messaggier bejn il-bank Malti u l-fergha ta' Bahrain.

Il-Bank appellant jinsisti li wiehed ghandu jzomm quddiem ghajnejh in-natura kontrattwali tal-*Letter of Credit*, kif ukoll li tezisti relazzjoni kuntrattwali bejn il-varji banek illi huma involuti. Ladarba l-hlas mitlub mill-bank appellat bhala l-*confirming bank*, kellu jsir mill-fergha fil-Bahrain, bhala l-*issuing bank*, l-obbligazzjoni ghall-fini ta' determinazzjoni ta' min hu legittimu kontradittur ma setghetx tkun ghajr li l-fergha tal-bank f'Bahrain naqset li thallas skont l-obbligi taghha ai termini tal-*letter of credit* u ebda entità ohra.

Jirribadixxi wkoll li l-ligi ta' Bahrain taghmel distinzjoni bejn fergha ta' bank barrani registrat hemm, u l-*Head Office* tal-bank barrani u dan kif spjegat fi kliem ix-xhud Zoi Karali:

- i. li l-bank fil-Bahrain huwa licenzjat mill-Bank Centrali ta' Bahrain sabiex jopera u joffri s-servizzi kollha li jaghti Bank;
- ii. li ma jitqisx bhala sussidjarja fil-Bahrain, izda fergha tal-kumpanija fir-Renju Unit, b'dan li ghandu certifikat ta' inkorporazzjoni u registrazzjoni fil-Bahrain, li fit-termini tar-regolament tal-UCP ifisser li huwa entità separata, li jista' jitharrek separatament taht il-ligi ta' Bahrain;
- iii. it-transazzjonijiet li jsiru fil-Bahrain mhumieq riflessi fil-kotba tar-Renju Unit u ghalhekk il-kotba jinzammu separati;
- iv. m'hemm ebda relazzjoni bejn depozitant li jiftah kont fil-Bahrain mal-ufficcju tal-istess bank fir-Renju Unit;
- v. il-Qrati ta' Bahrain meta jirreferu ghal Standard Chartered Bank jirreferu ghal-fergha fil-Bahrain, in kwantu atti gudizzjarji jigu servuti fuq l-istess bank fil-Bahrain;
- vi. Bahrain hija gurdizzjoni unika fejn ma taghrafx fergha ta' kumpanija barranija, in kwantu dik il-fergha barra mit-territorju ta' Bahrain hija meqjusa bhala entità separata.

Il-bank appellant jirreferi wkoll ghar-rapport tal-espert *ex parte* Noor Hassan Radhi, sabiex ikompli jsostni l-argument tieghu, fejn jinghad ukoll li l-fergha tinghata numru ta' registrazzjoni kummercjali separat mill-Ministeru tal-Industrija u Kummerc, fil-Bahrain. Inoltrè l-avukat Radhi tispjega li l-ligi ta' Bahrain (bhal dik Maltija) tirrifletti s-sistema ta' ligi civili, in kwantu hija kodifikata u f'kaz ta' lacuna, il-Qrati jagixxu skont il-precedent. Tispjega li l-oghla Qorti fil-Bahrain, hija l-*Cassation Court*, li tezamina s-sentenzi tal-Qorti tal-Appell, fuq punti ta' ligi. Ghalkemm is-sentenzi tal-oghla Qorti, ma jorbtux lill-Qrati Inferjuri, fil-prattika dawn il-Qrati juzawhom bhala linja gwida meta jiddeciedu l-kawzi quddiemhom. Tghid ukoll li t-twegiba ghall-kwistjoni dwar jekk fergha ta' bank fil-Bahrain ghandhiex titqies entità legali separata mill-*Head Office* ta' dak l-istess bank tinsab fis-sentenzi tal-*Cassation Court* li jikkostitwixxu precedent, cioè dawk li jgibu referenza 189/1995 u 9/2007. Il-Qorti tal-Appell tal-Bahrain iddecidiet li fergha ta' bank fil-Bahrain ma kellhiex tirrispondi ghall-obbligi tal-*Head Office* tal-istess istituzzjoni finanzjarja. Il-kreditur tal-*Head Office* appella minn din is-sentenza, izda l-*Court of Cassation* ikkonfermat is-sentenza tal-Qorti tal-Appell, in kwantu rriteniet li l-assi tal-fergha tal-Bahrain kienu separati (*ring-fenced*) mill-assi tal-*Head Office* u ta' ferghat ohra tal-istess istituzzjoni finanzjarja. Finalment l-istess espert tikkonkludi illi: "...I have no reason to doubt that the Bahraini branch of an overseas bank is

deemed to be a separate entity from (a) the main office of that bank, and/or (b) other branches of such main office in other jurisdictions”.

Isostni li fuq bilanc ta' probabilitajiet irnexxilu juri li taht il-ligi tal-Bahrain fergha ghandha titqies entità separata mill-kwartieri generali tal-bank, b'dan illi taht l-istess ligi tal-Bahrain il-kwartieri tal-bank f'Londra m'humiex marbuta li jaghmlu tajjeb ghall-obbligazzjonijiet tal-fergha. Ghalhekk ukoll, il-bank appellant jghid li mhux legittimu kontradittur u ghandu jigi lliberat mill-osservanza tal-gudizzju peress li l-fergha *Standard Chartered Bank Bahrain*, kien l-uniku bank li kien involut mal-*letter of credit*, inkluz il-korrispondenza kollha. Isegwi li *Standard Chartered Bank Bahrain* kellu jigi mharrek fil-proceduri odjerni u mhux il-bank appellant. Dan konsidrat ukoll li l-uniku kuntatt li kellu l-bank appellant kien sabiex il-fergha fil-Bahrain tkun tista' tibghat *authenticated swift message* “*to transmit the opening of the credit to HSBC Malta directly*”. Fin-nuqqas ta' rabta guridika bejn il-partijiet, dwar il-pagament jinsisti li l-kawza qatt ma kellha ssir kontra l-bank appellant hawn Malta.

Finalment l-appellant jissottometti li, il-fatt li l-bank appellat ghamel tmintax -il xahar shah jistinka sabiex jottjeni l-ammont li hallas lis-socjetà frawdolenti *Emirates Aircrete Industries Co. Corporation Limited*, socjetà li kienet ilha inkorporata f'Malta ghal ftit xhur, b'*share capital* ta' €1,500,

li dwarha ma sarx id-*due diligence* kif suppost, fdahha bi kwazi miljun euro u qatt ma kkomunika jew talab l-intervent ghal dan il-hlas minghand il-*Head Office* gewwa l-Ingilterra, ghandu wkoll iwassal li l-uniku ness guridiku dwar il-problema li nqalghet dwar il-*letter of credit* kienet dejjem bejn HSBC Malta u Standard Chartered Bank Bahrain. Jghid li l-bank appellat ma ppartecipax fi proceduri li hemm pendent fil-Bahrain u minflok qieghed jittanta c-cans tieghu permezz tal-proceduri odjerni.

Ghalkemm permezz ta' dan l-appell il-Bank appellant jishaq li ladarba l-*letter of credit* inharget mill-fergha tal-bank tal-Bahrain l-azzjoni attrici setghet issir biss kontra l-fergha tal-Bahrain, peress li l-bank appellant kellu rwol limitat, hija l-fehma ta' din il-Qorti li minkejja kemm kien limitat ir-rwol tieghu fit-transazzjoni kollha, f'dan l-istadju ghadu ma giex mistharreg il-mertu tal-pretensjonijiet attrici ghall-hlas ta' kreditu. Fuq kollox, kif irrizulta mix-xhieda ta' Zoi Karali, in kontro-ezami taghha, wara li nqalghet il-problema, f'certu stadju, d-diskussjonijiet gew skalati f'livell gholi taz-zewg banek rispettivi f'Londra, proprju peress li l-banek involuti huma ta' statura internazzjonali. Ghalhekk kif gustament irriteniet l-ewwel Qorti huwa meqjus importanti li f'dan l-istadju tal-kawza l-bank appellanti jibqa' parti sabiex iwiegeb (jekk ikun il-kaz) ghat-talbiet attrici. Dan minkejja l-accettazzjoni tal-bank ta' Bahrain li jekk kemm -il darba titnehha l-ingunzjoni imposta mill-Qorti ta' Bahrain, il-fergha

partikolari tkun disposta li thallas. Din l-accettazzjoni trid tigi mistharrga fil-kuntest kollu tar-rizultanzi fil-mertu.

In kwantu l-bank appellant jishaq li skont l-Artikolu 3 tal-UCP 600, li jipprovdi li “*Branches of a bank in different countries are considered to be separate banks*”, importanti li jigi nnotat li, kif jirrileva l-bank appellat, dan l-artikolu huwa wiehed interpretattiv ghall-iskop tal-istess regoli, b'dan illi kull fergha hija meqjusa li topera indipendentement minn fergha ohra li tista' tkun ukoll involuta fl-istess kreditu. Din is-separazzjoni izda, bejn id-diversi ferghat ma taghtix lill-istess ferghat il-personalit  guridika indipendenti. Din il-Qorti, bhal ta' qabilha, tqis relevanti s-sentenza tal-Qorti ta' *New Delhi High Court* fil-kaz **Tata Motors v. JSC VTB Bank**, deciza fil-21 ta' Frar, 2013, fejn inghad specifikament:

“29. The view taken by the learned Single Judge is pedantic. Article 3 of UCP 600 requires it to be treated that each branch of a bank in a different country is a separate branch. But the same has to be limited for the purpose of “documentary credits” and not to make branches of a bank separate entities in all respect. It is settled law that the juristic entity is the Corporation and not its branch. Issues pertaining to jurisdictions, vesting Courts with the authority to entertain suits, and the law pertaining to territorial jurisdiction has not to be confused with the concept of juristic entities and likewise, provisions dealing with documentary credits and the deeming effect thereof, which is limited to documentary credits, cannot be expanded to other areas. Article 3 of UCP 600 is a mere enabling provision which allows the same bank's branch offices in different countries to perform additional roles in a documentary credit. For example, branch at place 'X' of bank 'A' can act as an advising bank and the branch at place 'Y' of the same bank 'A' can act as a confirming bank for the same documentary credit. Without this interpretative provision in Article 3 of UCP 600, which we find was in fact introduced in UCP 500, this could not be done. It was meant to facilitate the same juristic bank to perform two

roles at its two different branches because this is the necessity in international transactions.

“30. We simply highlight that the official ICC Commentary clarifies the aforesaid in the following words:-

“It is often the case that the branches of the same bank in different countries are involved in the same documentary credit transaction. Through the use of the term „separate banks“, this interpretation makes it clear that for purposes of these rules these branches of banks should be treated as separate banks.”.

Ghalhekk din il-Qorti, bhal ta' qabilha, tqis li l-Artikolu 3 tal-UCP 600 ghandu jigi ezaminat fil-kuntest tieghu, u mhux jigi estiz ghal materji ohra, fosthom id-determinazzjoni ta' jekk fergha ghandhiex personalità guridika separata mill-*Head Office* u ghalhekk ma tqisx dan il-parti tal-aggravju tal-Bank appellanti bhala gustifikat.

Imiss li jigi trattat l-ilment tal-Bank appellanti in kwantu jinghad minnu li wara li l-ewwel Qorti qieset il-provi konfliggenti dwar il-*proof of foreign law*, ghaddiet biex ikkonsidrat provi li ma kienux jirrizultaw mill-process, senjatament minn siti elettronici u sorsi ohra li ma kenux citati mill-partijiet fil-kors tal-kawza. Hawn ukoll ma ssibx li l-bank appellanti ghandu ragun f'dan ir-rigward. Jibda billi jinghad illi kif huwa principju ormai assodat illi:

“...l-accertament tal-fatti, l-apprezzament u l-valutazzjoni dwarhom, huma rizervati lill-gudikant. U allura, bhal f'kull kaz iehor din il-Qorti ta' revizjoni normalment ma tindahalx jekk issib li l-apprezzament huwa ezenti minn vizzji logici”.

(Ara f'dan is-sens sentenza ta' din il-Qorti, Sede Inferjuri, tal-24 ta' Novembru, 2003, fil-kawza fl-ismijiet **Anthony Degiovanni noe et noe v. Mark Lombardo et**).

Hekk ukoll l-istess Qorti fis-sentenza taghha tad-9 ta' Jannar, 2008, fil-kawza fl-ismijiet **Anthony Mifsud et v. Victor Calleja et**, kienet irriteniet:

“Huwa konsakrat kemm fid-duttrina legali, kif ukoll fil-gurisprudenza, illi fil-kwadru tal-principji espressi fil-Kapitolu 12, il-gudikant, f' sede civili, hu fakoltizzat bid-diskrezzjoni li japprezza l-elementi probatorji akkwiziti u li jispigola minnhom dawk il-fonti ta' provi li hu jidhirlu l-aktar idoneji biex isostni d-decizjoni tieghu. F' dan l-ezercizzju l-unika limitazzjoni li ghandu l-gudikant adit fil-mertu hu dak legali li jipprovdi motivazzjoni kongruwa manifestanti r-ragunijiet u l-kriterju logiku segwit. Dan skond ma jiddetta l-Artikolu 218, Kapitolu 12”.

Issa f'dan il-kaz jirrizulta li l-ewwel Qorti hadet in konsiderazzjoni r-rapporti *ex parte* tal-kontendenti fil-kawza dwar il-*proof of foreign law* u kkonsidrat l-istess fid-dawl tal-argumenti mressqa mill-partijiet u ddecidiet l-istess eccezzjoni fid-diskrezzjoni taghha, f'dak li huma fatti u fid-dawl tal-ligi u mmotivat sewwa d-decizjoni taghha. Ghalkemm huwa minnu li ghamlet referenza ghal xi siti elettronici, fil-verità l-opinjoni legali mressqa mill-bank appellat iprovdiet ir-referenza ghal numru ta' siti elettronici, fosthom tal-Ministry of Industry and Commerce tal-Bahrain u Central Bank of Bahrain. Din il-Qorti ma ssib xejn barra minn norma li l-Qorti ghamlet ukoll ir-ricerka taghha sabiex tikkjarifika s-sitwazzjoni sabiex tifhem ahjar is-sitwazzjonijiet tal-partijiet; dan fil-verità huwa

meqjus normali fit-twettiq tal-funzjoni tal-gudikanti. F'dan il-kuntest, din il-Qorti ssib tassew rilevanti r-referenza li ghamlet l-ewwel Qorti għall-ktieb **Middle East and Arabic Countries: Company Laws and Regulations Handbook Vol I. Strategic Information and Basic Laws (International Business Publishing USA 2013 Edition updated)** fejn *a branch of foreign companies* fil-Bahrian hija deskritta:

*“The law of commercial companies provides that companies established outside Bahrain may open branches or offices in Bahrain provided that the approval of the Minister of Commerce and Agriculture is obtained and a local sponsor is appointed. **The Minister will not grant approval unless he is satisfied that the parent company is financially sound and will assume full responsibility for liabilities of the branch.** The sponsor must be a Bahraini merchant, either a company or an individual. The Company Law exempts branch offices of foreign companies from having a Bahraini sponsor if these offices uses Bahrain as a regional center or a registration office for their business activities”.* (enfasi mizjuda minn din il-Qorti)

Fir-rigward tal-ilment tal-bank appellant li l-ewwel Qorti zbaljat meta ghamlet l-analogija ma' kumpanija sussidjarja u jekk dik il-kumpanija kenitx agent jew *nominee* tal-*parent company*, jigi pprecizat illi meta dik il-Qorti kienet qeghda taghmel il-konsiderazzjonijiet taghha qieset decizjoni partikolari u tenniet *“Li huwa nteressanti minn din il-kawza, **ghalkemm il-punt in kwistjoni ma jikkoincidix ma' dak in ezami**”* (enfasi mizjud minn din il-Qorti). Dan ifisser, li dik il-Qorti tat id-debita importanza lil dak il-kaz, ben konxja tal-fatt li ma kenitx qeghda tpoggih fl-istess keffa bhal dak in ezami, izda qieset biss dak li kien ritenut rilevanti għall-kaz odjern.

Din il-Qorti tat qies ta' dak rizzultanti mill-provi, hekk kif esposti mill-bank appellant, in kwantu l-attività tal-fergha ta' Bahrain tehtieg li jkollha registrazzjoni u licenzja separata minn dik tal-kwartieri generali sabiex tkun tista' topera fil-Bahrain. Il-hlas ta' taxxi, transazzjonijiet partikolari u zamma ta' records fil-fergha ta' Bahrain huma distinti mill-attività tal-istess bank f'Londra. Minkejja dan kollu, huwa ritenut li dawn l-attivitàjiet, fihom infushom, ma jinvestux lill-fergha bil-personalità guridika distinta minn dik tal-bank intimat.

Filwaqt li b'referenza ghad-distinzjoni maghmula bejn fergha ta' bank barrani registrat fil-Bahrain u l-*Head Office* tal-istess bank barrani, kif spjegat mix-xhud imressaq mill-bank appellant Zoi Karali, il-punti elenkati minnha huma ritenuti pjuttost ta' natura regolatorja imposti mill-ligi tal-Bahrian. Hekk ukoll dwar dak rizzultanti mir-rapport tal-espert *ex parte* Noor Hassan Radhi, ghandu jinghad li, kif gustament rilevat mill-bank appellat, ma tressqet ebda prova ta' disposizzjoni espressa tal-ligi li tipprovdi illi fergha ta' bank esteru tgawdi minn personalità guridika distinta u awtonoma. Anzi kif rilevat mill-espert *ex parte* inkarigata mill-bank appellat, Ma'awia T. El Nayal, skont il-licenzja mahruga mill-Bank Centrali tal-Bahrain, il-fergha tal-bank f'Bahrain hija registrata bhala fergha ta' kumpanija inkorporata fir-Renju Unit.

Din il-Qorti, wara li qieset ukoll ir-rapport tal-espert Noor Hassan Radhi, imressaq mill-bank appellant, ma tirradikax fiha l-konvinzjoni li l-fergha tal-bank appellant gewwa l-Bahrain tista' titqies bhala persuna guridika indipendenti mill-bank gewwa l-Ingilterra. Dan qieghed jinghad peress li l-konkluzjoni milhuqa minn din l-ahhar espert hija principalment imsejsa fuq il-principju ta' precedent a bazi ta' zewg sentenzi tal-*Cassation Court*. Izda fil-verità dawn is-sentenzi jiddistingwu bejn l-operat, iz-zamma tal-kontijiet, il-profitti u t-telf maghmul mill-fergha, l-awditjar, kif ukoll l-assi taghha li huma separati minn dawk tal-*Head Office* tal-istess bank barrani. Din id-distinzjoni fl-operat ukoll ma jwassalx ghall-kreazzjoni ta' entità guridika distinta. Fuq kollox, ebda wahda mis-sentenzi citati ma tghid illi l-fergha f'Bahrain ghandha personalità legali u guridika distinta mill-*Head Office* tal-istess bank. Ghalhekk sa fejn il-bank appellant kien qieghed jikkontendi permezz tat-tieni eccezzjoni tieghu, li mhux legittimu kontradittur, in kwantu jtenni li l-fergha fil-Bahrain ghandha personalità guridika distinta minnu, huwa meqjus li l-prova mressqa mill-bank appellant mhix wahda konklussiva. Isegwi li f'dan l-istadju lanqas tregi s-sottomissjoni tal-bank appellant li mhux marbut li jaghmel tajjeb ghall-obbligazzjonijiet tal-fergha.

F'dan l-istadju, lanqas ma huma ritenuti meritevoli l-argumenti tal-bank appellant li l-bank appellat naqas milli jwettaq *due diligence* kif suppost fuq is-socjetà beneficjarja jew il-fatt li l-bank appellat ma ppartecipax fil-

proceduri pendent i fil-Bahrain u ghazel li ma jissottomettix ruhu għall-gurisdizzjoni tal-qrati tal-Bahrain.

Għalhekk lanqas dan l-aggravju tal-bank appellant li mhux legittimu kontradittur għall-pretensjonijiet attrici ma jimmerita li jintlaqa'.

Għaldaqstant, għar-ragunijiet premessi, tiddisponi mill-appelli interposti mill-Bank konvenut billi tichad l-istess u għalhekk tikkonferma fis-shih is-sentenza tal-ewwel Qorti.

L-ispejjez ta' dawn l-appelli għandhom jithallsu mill-Bank konvenut appellanti.

L-atti qeghdin jigu rinvjati quddiem il-Prim'Awla tal-Qorti Civili għall-prosegwiment tas-smigh tal-kawza fil-mertu, skont il-ligi.

Silvio Camilleri
Prim Imhalled

Tonio Mallia
Imhalled

Joseph Azzopardi
Imhalled

Deputat Registratur
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