

Qorti tal-Appell
(Kompetenza Inferjuri)

Imħallef Anthony Ellul

Appell numru: 2/2015

Integra Gaming Limited (appellanti)

Vs

PT Games Limited (appellata)

12 ta' Novembru, 2019.

1. L-attriċi appellat minn deċiżjoni tat-Tribunal tal-Arbitraġġ tat-22 ta' Diċembru, 2014 li biha ċaħdet it-talba tagħha għad-danni li tallega li sofriet minħabba li l-konvenuta naqset milli tosserva l-kundizzjonijiet li kellha fil-liċenzja Class 4 li kienet ingħatat mill-Malta Gaming Authority. Jirriżulta li fl-10 ta' Marzu, 2001 il-kontendenti iffirmaw Services Agreement li bih il-konvenuta obligat ruħha:

".... to provide access, hosting and maintenance services and related services to the online Gaming Platform, subject to the Client honouring the terms and conditions of this Agreement in full, and further subect to the provisions below"

2. L-aggravji tal-attriċi huma:

"i. Illi fl-ewwel lok, l-Arbitru naqas milli japprezza u japplika korrettament il-prinċipju ta' pacta sunt servanda kif jemani mill-artikoli 992 et seq. tal-Kap. 16 tal-Liġijiet ta' Malta b'dan illi, fl-applikazzjoni errata ta' dan il-prinċipju, naqas milli jagħraf u japplika l-obbligi kuntrattwali tal-kumpannija appellata versu l-kumpannija appellanti, liema obbligi jirriżultaw ictu oculi mis-Services Agreement;

ii. Illi fit-tieni lok, l-Arbitru naqas milli japprezza u japplika korrettament il-provvedimenti tar-Regolamenti dwar Logħob minn Distanza (Legislazzjoni Sussidjarja Numru 438.04 tal-Liġijiet ta' Malta)".

3. Permezz ta' twegjiba preżentata fid-29 ta' April, 2015 il-konvenuta tat ir-raġunijiet għalfejn l-appell għandu jkun miċħud. Ipproponiet ukoll appell incidental peress li t-Tribunal ċaħad l-ewwel eċċezzjoni li kienet fis-sens li skont klawżola 9 tal-kuntratt, il-konvenuta qatt ma setgħet tinzamm responsabbli għal danni li sofriet l-attriċi.

4. Il-konvenuta ssostni li m'hemmx punt ta' liġi fl-aggravji. Għalkemm wieħed jista' jiddubita kemm fil-fatt l-ewwel aggravju jikkwalifika bħala punt ta' liġi, il-qorti xorta ser tikkunsidra u tiddeciedi dwaru.
5. Bit-tieni aggravju lil-attriċi ilmentat li t-Tribunal m'applikax regolament 44 tal-Legislazzjoni Sussidjarja 438.04. Aggravju li l-qorti tqies li hu punt ta' liġi skont l-artikolu 70A peress li l-ilment hu li t-Tribunal naqas milli japplika l-imsemmija regolamenti.
6. Ovvjament fejn fl-aggravji l-attriċi iżzerżaq 'l hawn u 'l hemm xi ktritika għall-apprezzament tal-provi li għamel it-Tribunal, ser jiġu skartati stante li m'hemmx appell fuq punti ta' fatt.
7. Bl-ewwel aggravju l-attriċi qegħda ssostni li l-konvenuta kellha obbligu kuntrattwali u li joħroġ mil-liġi li tipprovdi pjattaforma li hi konformi mal-liġi, fosthom li l-*licensee* jkollu dak li fl-industrija tal-*gaming* jissejñu bħala *reality checks*. Liċenzja class 4 hi tat-tip, "*.... to host and manage remote gaming operators, excluding the licensee himself*" (ara l-Ewwel Skeda tal-Liġi Sussidjarja 438.04).
8. Fid-deċiżjoni, it-Tribunal spjega l-fatti b'dan il-mod:-

"There is little or no contrast between the parties as the facts of the case. The dispute involves the interpretation and application of contractual and legal provisions based on those facts.

It appears well settled that Henrik Piski and others had been approached by Paytech Services Limited with a view to purchasing Integra, a Maltese registered company aiming for a Class 1 gaming licence.

Integra entered into 2 separate agreements. One was with Playtech Services Limited and the agreement was a licence to use Playtech's gaming software in Malta. The other agreement which is the subject of the present arbitration is a hosting service agreement, whereby PT undertook to provide the platform for the operation by Integra of Playtech's online gaming software. At this point Integra started operations and was offering an online gambling service to its customers.

At some point the plan appeared to be that the purchase would depend on the issue of a full licence, but it appears that there was a change of course and Mr Piski and his partners went ahead with the purchase while Integra still had a provisional licence covered by a letter of intent from LGA. The letter was extended twice subject of certain conditions they met. The last extension was granted on 17 November 2011. When the

six month term expired, in June 2012, LGA refused to extend it again, and effectively Integra lost its operating authorization and after a while had to shut down its operation.

It is noted that one of the major elements impeding the issue of a full licence to Integra, was the inability of the software to generate the so called reality checks. These are player protection features which tend to discourage unrestrained gambling online. The features are established by regulation, and LGA attaches significant importance to their presence on the gaming program, and demands strict and detailed compliance with the legal requirements on this point”.

9. Punti ta' fatt li dwarhom m'hemmx jedd ta' appell (ara artikolu 70A tal-Kap.387).

10. Tajjeb li fil-qasir jsir aċċenn għal x'inhuma *reality checks* fis-settur ta' *remote gaming*. Kull tant hin fuq l-iscreen għandu temporajament tigi sospiza l-logħba u l-persuna li qegħda tilgħab tara avviz li jagħti ċerti dettalji bħal per eżempju kemm ilu jilgħab, kemm rebaħ u tilef matul dak il-ħin u l-persuna li qegħda tilgħab trid tikkonferma li qrat il-messaġġ. Dawn huma kollha intiżi sabiex il-persuna tilgħab b'mod responsabbli.

11. Fil-konsiderazzjonijiet it-Tribunal ikkonkluda li:

*"Had Integra alleged that PT ought to have provided the reality checks under the Services Agreement, then the Arbitrator would have had to scrutinise the said agreement to verify whether such assertion is founded. As it is, although the Arbitrator will comment 'obiter' on the subject, he need not strictly speaking express himself on the matter, because it does not appear to be the causa petendi, which at the risk of repeating, is the **failure of PT to meet its own licence conditions**. It is being stated obiter that Integra could not quote any reference to reality checks or software modification in the Services Agreement, and neither could the Arbitrator spot any”.*

12. Il-qorti ma taqbilx mal-konkluzjoni tat-Tribunal. Sa mill-bidunett tal-proċeduri l-ilment tal-attriċi ma kienx biss '*failure of PT to meet its own licence conditions*'. Fid-dikjarazzjoni tal-fatti li pprezentat l-attriċi qalet:-

*"PT Games failed to comply with the conditions imposed on it and thereby impeded the issuance of a full license in favour of Integra **in breach of its obligations arising in terms of the Services Agreement** and in terms of the Remote Gaming Regulations, Subsidiary Legislation 438.04 of the Laws of the Malta”.*

13. Mill-kliem "*in breach of its obligations arising in terms of the Services Agreement*”, hu ċar li l-attriċi kienet qegħda tilmenta li l-konvenuta kisret l-obbligi kuntrattwali skont il-*Class Four Services Agreement* iffirmit f'Marzu

2011. Hu veru li sa dak l-istadju tal-proċediment ma kienx magħruf x'kienet l-obbligazzjoni tal-konvenuta, iżda dak ġie spjegat fil-kors tas-smiegħ tal-proċeduri. L-obbligazzjoni kienet li fuq il-pjattaforma tagħha, il-konvenuta tipprovdi r-*reality checks*.

14. L-attriċi ssostni li l-obbligi kuntrattwali tal-konvenuta "*... jirriżultaw ictu oculi mis-Services Agreement*". Pero' t-Tribunal ikkonkluda obiter li, "*... Integra could not quote any reference to reality checks or software modifications in The Service Agreement, and neither could the Arbitrator spot them*". Għalhekk irrispettivament mill-posizzjoni li ħa t-Tribunal, xorta kkonkluda li ma saritx prova li kien hemm obbligu kuntrattwali li l-konvenuta tagħmel ir-*reality checks*. Dak hu punt ta' fatt li m'hemmx jedd ta' appell dwaru.

15. Fir-rikors tal-appell l-attriċi għamlet riferenza għall-klawżoli 2.3(b) u 2.4 tal-kuntratt. Fil-fehma tal-qorti l-ewwel waħda m'għandha x'taqsam xejn mar-*reality checks*, in kwantu tidher li qegħda timponi fuq il-konvenuta l-obbligu li tiżgura li l-Gaming Platform tkun tiffunzjona. Imbagħad klawżola 2.4 tipprovdi:

"PT Games will, once the Class Four Licence is granted to it in virtue of the LOI Certificate as detailed above, undertake its obligations as a Class Four Licence holder in a regular and diligent manner and in accordance with all reasonable requests, policies, instructions and directions of the Client".

16. Madankollu fil-preliminari tal-kuntratt li ffirmaw il-kontendenti hemm dikjarat li l-attriċi, "*... has been licensed by Playtech to use the Playtech online gaming software set forth in Schedule 'C' to this Agreement*". Kif tajjeb osserva t-Tribunal, ir-*reality checks* għandhom x'jaqsmu mas-*software* li pprovdiet Playtech u mhux mas-servizz ta' *hosting* li pprovdiet il-konvenuta. Is-servizz ta' *hosting* hu spjegat fi skeda 'A' tal-istess kuntratt.

17. Għall-qorti hi rilevanti l-klawżola 2.5 tal-kuntratt li ffirmaw il-kontendenti u li tipprovdi:-

"It is hereby expressly agreed that the Client shall at all times be solely responsible for the management and maintenance of the Website and any activity therein..... Client

*further warrants and undertakes to PT Games that it has obtained and will during the Term maintain, at its own expense, any and all permits, consents, licenses and authorizations which may be necessary for Client's operations and the Website and **that Client alone is, and shall at all times be and remain, fully and exclusively responsible for the operation of the Website in accordance with all applicable laws**".*

18. Hekk ukoll skont klawżola 1.11 ta' skeda 'A' tal-kuntratt (*Hosting Services*):

*"The Client's Online Gaming Software shall be installed on PT Games Online Service System solely for the purpose of providing Client with hosting services hereunder. Client shall be solely responsible for the management and maintenance of the Website and any activity therein. Client is aware of the legal issues relating to the operation of online gambling sites, and understands that PT Games is not warranting in any way or manner that the services or products offered by the Online Gaming Software are legal in any jurisdiction..... Client further warrants and undertakes to PT Games that it has obtained and will during the Term maintain, at its own expense, any and all permits, consents, licenses and authorizations which may be necessary for Client's operations and the Website and **that Client alone is, and shall at all times be and remain, fully and exclusively responsible for the operation of the Website in accordance with all applicable laws**".*

19. Għalhekk skont dik il-klawżola dak kollu li kellu x'jaqsam *online gaming software* u *website* kienu r-responsabbilta esklussiva tal-attriċi. Ir-*reality checks* huma parti integrali f'kull *website* li fiha *games of chance*. Għalhekk b'applikazzjoni ta' dawk il-klawżoli, ir-*reality checks* kienu responsabbilta tal-attriċi.

20. Il-qorti tosserva wkoll li Henrik Jozsef Piski tal-kumpannija attriċi, ma pprezentax korrispondenza li fiż-żmien rilevanti kien qiegħed jinsisti mal-konvenuta sabiex tipprovdieh bir-*reality checks*. Jekk l-obbligu kuntrattwali kien biss fuq il-konvenuta, probabbilment il-korrispondenza kienet tkun mal-konvenuta u mhux direttament ma' Playtech. Mill-korrispondenza rriżulta li Piski kien qiegħed jitlob lil Playtech għalihom (ara per eżempju email datata 29 ta' Marzu, 2012 li kiteb lil Asaf Cohen ta' Playtech). Saħansitra meta l-konvenuta waqfet is-servizz ta' *hosting* minħabba arretrati ta' *fees* li kienu dovuti lilha mill-attriċi, fl-14 ta' Awissu, 2012 Piski bagħat email lil Iosif Galea (uffiċjal tal-Awtorita) fejn infurmah li kien għadu jistenna lil *Playtech*, "*to deliver the reality check so that we can get finally our license*". Kompla, "*I must admit that I am not really enjoying with Playtech*". Prova oħra li turi li l-attriċi kienet taf li l-konvenuta ma kellha l-ebda obbligu kuntrattwali li tipprovd i l-*automatic reality*

check. Altru milli r-reality checks huma "c..... estraneji għall-kuntratt ta' bejn il-kumpannija appellanti u Playtech", kif allegat l-attriċi fir-rikors tal-appell.

21. Hu minnu li permezz ta' ittra datata 17 ta' Novembru, 2011 il-Lotteries & Gaming Authority infurmat lill-attriċi li kienet qegħda tingħata *'Letter of Intent to grant Integra Gaming Limited a Class 1 Remote Gaming Licence running on Class 4 Licensee – PT Games Limited (LGA/CL4/322/2007)'*. Fiha intqal ukoll li dik l-ittra kienet soġġetta għall-kundizzjonijiet li jissemmew fiha, fosthom "3. *The Conditions listed in Appendix 1 and Appendix 2 hereto*". Il-kundizzjonijiet f'Appendix 1 jinkludu, **"4. This Letter of Intent is conditional on the satisfactory compliance of all the conditions issued to the Class 4 platform"**. Kif ser jiġi spjegat hawn taħt, skont ir-regolamenti li kienu japplikaw fiż-żmien rilevanti, il-konvenuta bħala *licensee* Class 4 xorta kellha obbligu li tiżgura li l-*games of chance* hosted fuq il-pjattaforma tagħha, ikollha l-*automatic reality checks*. Pero' dak ma jfissirx li jinpiġi fuq l-obbligi kuntrattwali tal-konvenuta. Il-qorti diġa' kkonkludiet li l-konvenuta ma kellhiex obbligu kuntrattwali li tipprokura l-*automatic reality check* fuq il-*website* tal-attriċi. Għalhekk hu inutli li l-attriċi tipprova tiggranfa ma' dik il-kundizzjoni sabiex tikkonvinċi lill-qorti li l-konvenuta hi responsabbli għal xi danni. L-*automatic reality check* hi *feature* li trid tkun fil-*websites of games of chance* u mhux fuq il-pjattaforma fejn isir *hosting* ta' dik il-*website*. Kif rajna, il-konvenuta ma kellhiex x'taqsam mal-*website* tal-attriċi.

22. **Fit-tieni aggravju** l-attriċi għamlet riferenza għall-paragrafu 44 tal-Legislazzjoni Sussidjarja 438.04 (*Remote Gaming Regulations*), u li kien jipprovdi:

"(1) Where the game is displayed on a screen the licensee shall cause to be displayed on the screen, at all times during the game, a counter which automatically updates and shows the player's account balance.

(2) (a) The licensee shall also make available to every player an automatic reality check at intervals of one hour.

Display of counters.

(b) *The automatic reality check shall:*

1. (i) *suspend play;*
2. (ii) *clearly indicate for how long the player has been playing;*
3. (iii) *display the player's winnings and losses during such period of time;*
4. (iv) *require the player to confirm that the player has read the message;*
5. (v) *give an option to the player to end the session or return to the game".*

23. L-attriċi tilmenta li t-Tribunal naqas milli jikkunsidra dik id-disposizzjoni.

24. Il-konvenuta ssostni li skont dak ir-regolament hu "... *hu ċar illi l-obbligu li jiġu pprovduti r-reality checks huwa obbligu tad-detentur ta' liċenzja li qed joffri l-logħob lill-ġugaturi, jiġifieri Integra*".

25. Fid-deċiżjoni tat-Tribunal il-Legislazzjoni Sussidjarja 438.04 issemmiet biss f'paġna 19 tad-deċiżjoni, u dan b'riferenza għall-argument tal-attriċi fin-nota ta' sottomissjonijiet li, "*m. The above clearly indicates a recognition, understanding and commitment by PT Games of its obligation towards Integra with regard to the provision of a Platform which satisfies the criteria established by law*". Fil-footnote saret riferenza għall-Legislazzjoni Sussidjarja 438.04 mingħajr ma ssemma xi regolament partikolari. Argument li sar fir-rigward tal-provi li tressqu fil-kors tal-proċeduri ta' arbitraġġ. It-Tribunal ikkonkluda:

"This is indeed correct, PT did just that, but this does not mean that PT undertook to modify the software provided by Playtech. It was Playtech that made that undertaking and did not deliver. At this point the Arbitrators makes it clear that since Playtech is not a party to these proceedings, he is expressing only what appears from the exhibited correspondence, and this of course without having heard any contestation from Playtech itself for the obvious reason just mentioned herein".

26. Il-qorti m'għandhiex dubju li bħala persuna li għandha *Class 4 Remote Gaming License*, wieħed mid-dmirijiet tal-*licensee* hu li tiżgura li fuq l-iscreen ikun hemm l-*automatic reality check*. F'dawk ir-regolamenti d-definizzjoni tal-kelma *licensee* kienet, "***a person to whom the Authority has issued a remote gaming licence***". Ir-regolamenti ma kinux jagħmlu distinzjoni bejn l-erba' klassijiet ta' liċenzji li jissemmew fl-Ewwel Skeda tar-Regolamenti. Peress li l-konvenuta kienet *licensee* (liċenzja li daħlet fis-seħħ fis-26 ta' Frar, 2010 u kienet għall-perjodu ta' ħames snin), kellha responsabbiltà li tiżgura li l-*website* li jiġu hosted fuq il-pjattaforma tagħha jkollhom l-*automatic reality check* bil-*features* li jissemmew f'paragrafu 44(2). Dan kien fl-interess suprem tal-

konvenuta stess bħala *I-license holder*. Pero' b'daqshekk ma jfissirx li dak l-obbligu kellu xi konsegwenza fuq ir-relazzjoni kuntrattwali ta' bejn il-partijiet. Il-fatt li fil-*website* ma kienx hemm l-*automatic reality check*, semmai seta' kien ta' preġudizzju għal-liċenzja li kellha l-konvenuta vis-a-vis l-Awtorita'. Pero' b'daqshekk ma jfissirx li kien hemm *breach of contract*, kif spjegat iktar qabel f'din is-sentenza.

27. Il-konvenuta ressqet **appell incidentali** minn dik il-parti tad-deċiżjoni tat-Tribunal li ċaħad l-ezzezzjoni tal-konvenuta li japplikaw klawżoli 9 tal-*Class Four Service Agreement* u 4.4 ta' Skeda A tal-istess kuntratt. Dik l-eċċezzjoni kienet li l-attriċi ma kellhiex jedd għad-danni minħabba l-imsemmija klawżoli li huma klawżoli ta' eżoneru. It-Tribunal qal:

"The courts have consistently held that these clauses are not valid... The pleas was set up as a blanket defence to throw the claim out as being non-actionable. In deciding whether the claim is actionable or not, the Arbitrator must first decide whether in principle the exemption clause is valid in law, independently as to whether non-performance of the obligation is proven or not. What is being decided here in principle, and not related to the facts of the case (these will of course be dealt with under the second main defence) is whether that type of exemption is valid or not. The Arbitrator holds that whatever the facts of the case, PT may not rely on clause 9 to have the claim declared non actionable".

28. Wieħed mill-ilmenti tal-attriċi hu li l-konvenuta kienet responsabbli għall-*breach of contract*. Sentenza rilevanti li kkunsidrat klawżoli ta' eżoneru hi tal-Prim'Awla fil-kawża **Farrugia Wismayer vs Agius et** tal-10 ta' Jannar, 2019. Il-konvenuta għamlet riferenza għas-sentenzi tal-Prim'Awla, **Fruitland Company Limited vs W.J. Parnis England Ltd nomine** tal-25 ta' Settembru, 2003 u **Av. Edward Woods noe vs Joseph Curmi** tas-27 ta' Ġunju, 2003. Il-brani li rriproduċiet fl-appell incidentali jagħmluha ċara li klawżola ta' eżoneru tista' tapplika biss favur id-debitur jekk ikun wettaq l-obbligi tiegħu. F'dan il-każ l-attriċi ilmentat li l-konvenuta kienet inadempjenti f'obbligu kuntrattwali li tallega li wassal sabiex l-Awtorita ma tagtihix *Class 1 remote gaming license*. Hu f'dak is-sens il-klawżoli ta' eżoneru fuq imsemmija ma jistgħux jiġu applikati. Dan skont il-ġurisprudenza.

29. Hu veru li t-Tribunal irraġuna li:-

*"In deciding whether the claim is actionable or not, the Arbitrator must first decide whether in principle the exemption is valid in law, independently as to whether non-performance of the obligation is proven or not. What is being decided here in principle, and not related to the facts of the case (these will of course be dealt with under the second main defence) is whether that type of exemption is valid or not. **The Arbitrator holds that whatever the facts of the case, PT may not rely on clause 9 to have the claim declared non-actionable.** The Arbitrator finds this defence to be unfounded".*

30. Meta tqies il-ġurisprudenza jidher li hu validu l-argument li mhux bilfors li klawżoli ta' dik ix-xorta huma għal kollox invalidi irrispettivament mill-fatti tal-każ. Pero' li hu żgur hu li għall-finijiet ta' din il-kawża meta tqies l-ilment tal-attriċi, klawżoli 9 tal-kuntratt u 4.4 ta' Skeda 'A' tal-istess kuntratt, ma jistgħux jiġu applikati. Għaldaqstant, il-qorti ma ssib l-ebda raġuni għalfejn għandha tvarja d-deċiżjoni tat-Tribunal għalkemm ma taqbilx għal kollox mar-raġunament. Pero' jibqa' l-fatt li klawżoli ta' dik ix-xorta m'humiex leċiti sal-punt li l-iskop tagħhom hu li jeżoneraw lill-parti f'kuntratt min-nuqqasijiet tagħha stess fit-twettiq tal-obbligi kuntrattwali.

31. Aggravju ieħor tal-konvenuta hu li l-attriċi kellha tkun ikkundannata tħallas l-ispejjeż kollha. Aggravju li l-qorti tqies li hu fieragħ. Fid-deċiżjoni tat-Tribunal l-konvenuta ma ħarġitx rebbieħa f'kollox. It-Tribunal iddeċieda kontra l-konvenuta dwar l-eċċezzjoni li minħabba l-klawżoli ta' eżoneru li hemm fil-kuntratt ma kinitx responsabbli għad-danni. Għalhekk altru milli kien hemm raġuni valida sabiex jikkundanna lill-konvenuta tħallas terz tal-ispejjeż.

Għal dawn il-motivi:

- 1. Tiċhad l-appell tal-attriċi bl-ispejjeż kontra tagħha.**
- 2. Tiċhad l-appell incidental tal-konvenuta bl-ispejjeż kontra tagħha.**
- 3. Tordna li l-atti jintbagħatu lura quddiem it-Tribunal tal-Arbitraġġ sabiex jissokta bis-smiegħ dwar ir-rikonvenzjoni.**

Anthony Ellul.