QORTI CIVILI – PRIM'AWLA

ONOR. IMHALLEF DR. MIRIAM HAYMAN LL.D.

Rikors Guramentat Nru.: 600/2017 MH

Illum, 19 ta' Gunju, 2019

Bet-at-home.com Entertainment Limited (C35055)

Vs.

Vectra S.A. (KRS 0000089460)

Il-Qorti;

Rat **ir-rikors**[1] tal-kumpannija attrici li gie prezentat fit-3 ta' Lulju 2017 li permezz tieghu esponew:

1. *"Illi s-socjeta' rikorrenti hija operatur ta' loghob tal-azzard online awtorizzat mill-Malta Gaming Authority (MGA) u tiggestixxi, topera u toffri ghall-pubbliku l-istess loghob tal-azzard tramite sit tal-internet li jinsab fuq id-domain bl-indirizz www.bet-at-home.com;*

[1] Folio 1

2. *Illi s-socjeta' intimata hi internet service provider (ISP) fil-Polonja u tipprovdi servizzi tal-internet fil-Polonja, li hu wiehed minn fost il-pajjizi minn fejn gugaturi jistghu jaccedu ghas-sit tal-internet sureferit li jinsab fuq id-domain bl-indirizz www.bet-at-home.com;*

3. *Illi ghal diversi granet matul ix-xhur ta' Mejju u Gunju 2017, minghajr ebda raguni jew gustifikazzjoni valida fil-ligi u ghalhekk b'mod abbusiv u illegali, s-socjeta' intimata bblukkat l-access ghas-sit tal-internet li jinsab fuq id-domain bl-indirizz www.bet-at-home.com u/jew wettqet redirection mid-domain bl-indirizz www.bet-at-home.com ghal fuq is-sit tal-Ministeru tal-Finanzi fil-Polonja, b'mod ghalhekk li gugaturi fil-Polonja li ppruvaw jidhlu u jaccedu ghas-sit tal-internet li jinsab fuq id-domain bl-indirizz www.bet-at-home.com ma nghatawx access;*

4. *Illi tali agir mhux talli m'huwiex awtorizzat jew gustifikat fil-ligi izda fil-fatt hu bi ksur ta' diversi Regolamenti tal-Unjoni Ewropea;*

5. *Illi dan l-agir tas-socjeta' intimata kkawza u qieghed jikkawza danni lis-socjeta' rikorrenti, kif se jigi ppruvat waqt il-kawza;*

6. *Illi Gerald Fineder jaf b'dawn il-fatti personalment;*

7. *Illi ghalhekk kellha ssir din il-kawza.*

Ghaldaqstant, in vista tas-suespost, is-socjeta' rikorrenti titlob bir-rispett lil din l-Onorabbli Qorti joghgobha:

1. *Tiddikjara u tiddeciedi illi l-agir in kwistjoni tas-socjeta' intimata hu abbusiv u illegali;*

2. *Tordna lis-socjeta' intimata sabiex b'mod immedjat tieqaf u tiddesisti milli twettaq tali agir in kwistjoni;*

3. *Tiddikjara u tiddeciedi li s-socjeta' rikorrenti sofriet danni kawza tal-agir in kwistjoni da parte tas-socjeta' intimata;*

4. *Tillikwida d-danni hekk sofferti mis-socjeta' rikorrenti kawza tal-agir in kwistjoni da parte tas-socjeta' intimata, occorendo bin-nomina ta' periti;*

5. *Tikkundanna u tordna lis-socjeta' intimata thallas lis-socjeta' rikorrenti dawk id-danni hekk likwidati.*

Bl-imghax u bl-ispejjez a karigu tas-socjeta' intimata li hi minn issa ngunta in subizzjoni."

Rat **ir-risposta**[2] tal-kumpannija konvenuta li giet prezentata fis-6 ta' Dicembru 2017 li permezz taghha esponew:

1. *"Illi preliminarjament, qed tiġi ssolevata l-eċċezzjoni tan-nuqqas ta` ġurisdizzjoni ta` din l-Onorabbli Qorti biex tisma` u tiddeċiedi r-rikors fl-ismijiet premessi.*

[2] Folio 14

2. *Illi wkoll in linea preliminari, il-liġi li għandha tapplika għall-vertenza de quo hija l-liġi tal-Polonja, u dan kif rikjest inter alia mir-regolament (KE) Nru 864/2007 Tal-Parlament Ewropew u tal-Kunsill.*

3. *Illi wkoll in linea preliminari u mingħajr preġudizzju għas-suespost, l-kumpannija attriċi trid iġġib prova illi hija s-sid tas-sit tal-internet mertu ta' din il-kawża.*

4. *Illi mingħajr preġudizzju għas-suespost, u fil-mertu, it-talbiet attriċi kif dedotti fil-konfront tal-kumpannija esponenti għandhom jiġu respinti fit-totalita` tagħhom stante illi huma nfondati fil-fatt u fid-dritt u dan kif ser jirriżulta aħjar waqt it-trattazzjoni tal-kawża u senjatament minħabba s-segwenti raġunijiet:*

   i. *Illi l-esponenti ma kisret l-ebda liġi jew regolament kif allegat fir-rikors promotur.*

   ii. *Illi mingħajr preġudizzju għall-premess, mhuwiex minnu illi l-kumpannija intimata ibblukkat l-aċċess għas-sit tal-internet in kwistjoni.*

   iii. *Illi mingħajr preġudizzju għall-premess, mhuwiex minnu li l-kumpannija attriċi soffriet xi danni;*

   iv. *Illi mingħajr preġudizzju għall-premess, kemm-il darba l-kumpannija attriċi soffriet xi danni, l-esponenti ma hijiex responsabbli għal tali danni.*

Għaldaqstant, għar-raġunijiet hawn imsemmija u hekk kif ser jiġi elaborat matul is-smiegħ tal-proċeduri odjerni, it-talbiet attriċi għandhom jiġu miċħuda fit-totalita` tagħhom minn dina l-Onorabbli Qorti prevja kwalsiasi provvedimenti illi jidhrilha xierqa u opportuni fiċ-ċirkostanzi.

Salv eċċezzjonijiet ulterjuri skont kif tippermetti l-liġi,

Bl-ispejjeż kontra l-kumpannija attriċi illi minn issa hija nġunta in subizzjoni."

Rat li fis-seduta tal-11 ta' Jannar, 2019 il-partijiet talbu lil Qorti biex tgħaddi biex *in primis* tiddeċidi l-eċċezzjoni mressqa fuq ġurisdizzjoni.

Konsegwentement din hi sentenza preliminari relattata mal-eċċezzjoni mressqa li taqra:-

1"Illi preliminarjament, qed tiġi ssolevata l-eċċezzjoni tan-nuqqas ta` ġurisdizzjoni ta` din l-Onorabbli Qorti biex tisma` u tiddeċiedi r-rikors fl-ismijiet premessi.

Rat ukoll li minħabba hekk il-partijiet ġew mogħtija xahar żmien kull wieħed biex jissottomettu noti ta' sottomissjonijiet.

Rat l-atti kollha tal-kawza.

Semgħet it-trattazzjonijiet

Ikkonsidrat

Illi l-liġi nostrana applikabbli hija l-artikoli 741 u 742 *et seq* tal-Kap 12 tal-Ligijiet ta' Malta.

Illi *a priori* għandu jingħad illi l-partijiet jaqbblu illi fil-kaz odjern illi l-artikoli appena msemmija mhux applikabbli għal kaz in ezami fis-sens illi l-ġurisdizzjoni applikabbli hija dik regolata ai termini ta' l-artikoliu 7(2) tar-Regolament 1215/2012EC cioe' ir-**Regolament tal-Parlament Ewropew u tal-Kunsill tat-12 ta' Diċembru, 2012 dwar il-Ġurisdizzjoni u r-Rikonoxximent u l-Eżekuzzjoni ta' Sentenzi fi kwistjonijiet Ċivili u Kummerċjali** minn issa 'l quddiem imsejjħa ir-regolament jew Recast.

Huwa paċifiku illi ir-regolament imsemmi, anke misjuba *in common parlance* bħala *Brussels Recast,* huwa applikabbli b'mod dirett f'pajjizna in vista tal-fatt illi Malta bħala Stat Membru ta' Unjoni Ewropea hija direttament milquta bil-provedimenti/regolamenti tiegħu.

Huwa ukoll paċifiku bejn il-partijiet li hawn si tratta ta' vertenza naxxenti minn danni, tort, *delict* or *quasi- delict*. Dan huwa ċar mit-talbiet imressqa li magħhom il-Qorti hija strettament marbuta.

Tibda l-Qorti biex tagħmel referenza għal dak li insibu fil prambolu ta' l-istess Regulation dwar l-iskop ta' l-istess Recast-

"(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(16) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.".

M'għandux jkun hemm dubbju li dan il-ftehim bejn l-iStati Membri, illum f'forma ta' regulazzjoni tal-Parlament Ewropew u l-Kunsill ta' l-Ewropa, huwa intiż biex joħloq srtuttura ta' armonizażżjoni f'dik li għandu jkun il-*forum* appropju fejn isir it-tixlija.

Insibu illi l-Recast Regulation ġie in vigore fl-10 ta' Jannar, 2015. Qabilha fuq l-istess tematika kien hemm il-Brussels I, li ġiet rimpjazzata bir-Recast li bħal il-Konvenzzjoni ta' Lugano[3] hija maħsuba ukoll biex tarmonizza l-ġurisdizzjoni appropja fost l-oħrajn f'kwistjonijiet li huma ta' natura ta' Dritt Privat Internazzjonali.

Kif ġia espost fir-Recital tar-Recast ċitat il-prinċipju generali mħaddan fejn si tratta ta' ġurisdizzjoni huwa dak ta' *actor sequitur forum rei*, ġia bħaż-żewġ regimi legali internazzjonali imsemmija ta' qabblu, għalhekk illi li huwa d-domiċilju tal-mixli li għandu jiddettermina l-*forum* korett li għandu jkun adit biex jikkonsidra u jiddettermina l-vertenza mressqa.

Għal dan il-prinċipju generali, l-aktar imħaddan f'kwistjonijiet naxxenti minn vertenzi kontrattwali, l-istess Recast taħseb għal hekk imsejjħa *special jurisdiction rules* li jsegwi li l-ġurisdizzjoni alternattiva ta' *lex loci damni* li għandha marbuta magħha il-ħsieb tal-prossimita' ta' obbligazzjoni/vertenza ma Stat membru fejn issir ix-xilja, din ir-regola hija waħda maħsuba u sanċita fl-artikolu 7(2) ta' l-istess Recast.

Għandu jiġi notat illi fil-kwistjonijiet relattati u marbuta ma *tort, delitti u kwazi delitti,* in vista tal-prosimita' tal-kelma tar-Regola ġia stabbilta' fl-artikolu 5(3) ta' dak li kien ir-Regolament applikabbli Brussels1, ma dak li segwih u ħadlu postu 'l hekk imsejjaħ Recast, ma l-artikolu 7(2) ta' dak ta' l-aħħar, kull referenza għal ġurisprudenza tal-Qorti Ewropea li jirrigwarda l-ewwel regolament jibqgħu applikabbli ghal-artikolu 7(2) in vigore llum.

[3] Tas-16 ta' Settembru, 1988

L-artikoli tar-Recast vigenti għas-soluzzjoni ta' din il-vertenza huma:-

"Article 4

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

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.

Article 5

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 of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1) shall not be applicable as against the persons referred to in paragraph 1.

SECTION 2

Special jurisdiction

Article 7

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

(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 point (b) does not apply then point (a) applies;

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;*"*

Huwa paċifiku bejn il-partijiet li hawn hija applikabbli dik ir-regola hawn fuq emfasizzata ċioe' dik li tolqot ir-regola speċjali għal ġurisdizzjoni generali applikabbli bħala eċċezzjoni għal dik mħaddna tal-*lex domicilli* tal-konvenut. Minn naħa tieghu r-regolament 7(2) juri biċ-ċar lil-ġurisdizzjoni hija radikata taħt żewg aspetti, *lex loci damni* u *lex loci delictii* u dan kif se jidher li ġie żvillupat mill-Qorti Ewropea.

Hu miżmum illi il-pern u t-termini ta' l-azzjoni hija deduċibbli mir-rikors ġuramantat u t-talba tieghu;-

Fil-każ **Jonathan Ellul et vs Jesmond Mercieca et deċiż fl-14 t'April 2016**[4] ingħad hekk-

"Illi huwa wkoll miżmum bħala prinċipju ġenerali li n-natura u l-indoli tal-azzjoni għandhom jinstiltu mit-termini ta' l-att li bih ikunu nbdew il-proċeduri[5]*. Normalment, b'dan wieħed jifhem li dak li kellu f'moħħu min ikun fetaħ il-kawża jkun irid jirriżulta mill-att promotur innifsu u mhux minn provi li jitressqu iżjed 'il quddiem fil-kawża*[6]*. B'dan il-mod, jekk id-difett fit-tfassila tal-att li bih tkun inbdiet il-kawża ma jgibx preġudizzju serju lill-parti mħarrka, allura ma jistax jingħad li l-att promotur huwa milqut min-nuqqas ta' siwi jew li l-proċedura ma tkunx tista' tiġi salvata, imbasta li dan ma jaffettwax is-sustanza tal-azzjoni jew tal-eċċezzjonijiet*[7]*;*

Imbagħad fil-każ **George Micallef vs Anthony Grima et deċiż fid-29 t'April 2016** il-Qorti tal-Appell qalet hekk[8]-

"In tema legali din il-Qorti tikkunsidra opportuni s-segwenti prinċipji identifikati mill-ġurisprudenza interpretattiva u li huma relevanti ghad-determinazzjoni tal-vertenza soggett ta' dan l-appell. "L-indoli tal-azzjoni tiġi dežunta mhux tant mill-kliem piu o meno eżatti ta' l-att istituttiv tal-ġudizzju, imma mill-iskop li għaliha huwa intiż il-ġudizzju [Vol.XXXIV.III.746].

……

"Biex tiġi fissata n-natura vera ta' l-azzjoni li tigi eżerċitata wieħed irid iħares

[4] Rik Gur 1190/10MCH
[5] App 07/03/1958 fil-kawza fl-ismijiet **Tabone vs DeFlavia** (Kollez. Vol: XLII.i.87)
[6] App 30/03/1998 fil-kawza fl-ismijiet **Raymond Bezzina vs Anthony Galea** (mhix pubblikata)
[7] PA 24/06/1961 fil-kawza fl-ismijiet **Falzon vs Spiteri et** (Kollez. Vol: XLV.ii.696)
[8] Rik Nru 4/14

mhux lejn il-kliem kemm lejn dak li sostanzjalment ġie mitlub[9] *biċ-ċitazzjoni, jiġifieri l-fondament u l-oġġett tal-pretensjoni fiha dedotta. Vol.lXXXV.II.776]." [App.S Carmelo Scicluna et vs Angelo Scicluna, 27 Frar 2015]."*

Huwa ċar mill-qari ta' l-att promotur li din hija kawza msejjsa fuq allegat aġir abusiv da parti tas-soċjeta' estera konvenuta u li kawza ta' hekk is-soċjeta' atttriċi qegħda tippretendi danni minnha sofferti. Illi m'hemmx għalhekk kontestazzjoni dwar il-fatt li l-artikolu li għandu jidettermina l-eżami ta' l-eċċezzjoni preliminari mressqa jaqa taħt id-dettami ta' l-artikolu 7(2) ċitat.

Interessanti ukoll illi l-istituti u l-ażżjonijiet ta' it-*tort, delict u kwazi delict* huma f'dan l-artikolu mitfugħa f'keffa waħda, bla ebda distinzzjoni bejn kunċett legali u ieħor mħaddan fil-ġurisdizzjonijiet diversi ta' l-iStati membri. Ir-raguni ta' dan huwa li Qorti Ewropea, l-CJEU/ECJ għal bosta drabi spjegaw li dawn il-kunċetti għandhom jingħataw interpretazzjoni awtonoma minn dik marbuta magħhom f'kull ġurisdizzjoni ta' kull stat membru fejn fil-fatt huma applikabbli.[10] Ir-*ratio* wara dan il-ħsieb ta' interpretazzjoni jibqa dejjem dik ta' armonizazzjoni fl-applikabilta' għal kull stat membru.

Għalhekk ingħad fid-deċizzjoni **Kalfelis**[11]**:-**

"In order to ensure uniformity in all the Member States, it must be recognized that the concept of "matters relating to tort, delict and quasi-delict" covers all actions which seek to establish the liability of a defendant and which are not related to a "contract" within the meaning of Article 5 (1)."

[9] Sottolinear tal-Qorti
[10] Ara **Folien Fischer AG and Fofitec AG vs RitramaSpA** 2012 E.C.R. (Case C-133/11); **Zuid-Chemie(2009) E.C.R.** (Case C-189/08) para 19; **eData Advertising and Others** (2011) ECR para 38
[11] (**Kalfelis vs Schroder** 1988) E.C.R. (Case 189-87) para 19Oliver

Stabbilit il-pern ta' din il-eċċezzjoni u dak li għandu jidettermina il-kors lil Qorti trid tagħmel biex tasal għal ġurisdizzjoni ġusta, jibqa biex jiġu stabbilit skont l-artikolu 7(2) tar-Recast fejn hu il-post li jaqa fit-terminu ta' "*the place were the harmful event occurred or may occur",* fil-fatt l-"*bone of contention"* bejn il-partijiet.

Fl-istudju intitolat **EU on top Court on International Jurisdiction on tort cases: localising pure international Fiancial Loss, continued**[12]insibu:

"Conclusion

The two Austrian cases discussed above, Lober and Volkswagen, show that international jurisdiction based on the ***Erfolgsort***[13] *in cases purely financial damage will depend on a comprehensive assessement of all the evidence before the court seized. The CJEU did not offer a more general catalogue of circumstances on which claimants can rely inorder to determine the jurisdiction of courts in tort claims claiming financial damages. It is clear , however , that it is not enough to rely only on the confluence of domicile and location of a bank account in which damage is directly suffered.* ***A claimant should state additional circumstances that justify derogation from the main rule that only the court of the defendant's domicile has jurisdiction."***

[12] **Oliver Schotel**; Associate Amsterdam: 12.10.2018 EU LAW.
[13] **Place where the damage occurred.**

Fl-imsemmija kawzi f'**Lober**[14] insibu li hawn si tratta ta' sinjura Lober li kienet domiċiljata ġewwa l-Awstrija u kull pagament li għamlet fil-konfront ta' *securities* mixtrija saru minn kont li kien bażat ġewwa bank Awstrijak. Il-Qorti ħadet ukoll is-segwenti fatturi biex wasslet biex tistabilixxi l-ġurisdizzjoni appropja:

"1.the securities were purchased on the Austrian secondary market;

2.the prospectus in relation to the securities at issue was notified with the Austrian Finanacial supervisory authority;

3.Ms Lober relied on misleading prospectus when making an investment decision; and

4.the contract obliging her to make the investmet, which resulted in the definitive reduction in her assets, was signed in Austria."[15]

Il-Qorti hawn sabet ghal gurisdizzjoni Awstrijaka

Minn naħa l-oħra fid-deċiżjoni **Volkswagen** il-fatturi li ddetterminaw il-ġurisdizzjoni kienu li nvestitur ilmenta li minħabba li kellu Volkswagen *securities* investiti fil-kont bankarju tiegħu ġewwa l-Awstrija, u inkwantu il-misrappresentanza tas-soċjeta' Volkswagen fil-konfront ta' magni *diesel*, huwa spiċċa soffra telf finanzjarju fl-investimenti direttament ġewwa l-Awstrja. Pero l-ġurisdizzjoni ġusta ġiet determinata li kienet gewwa l-Germanja nkwantu għal fatt li is-suq regolarizzat fil-konfront ta' dawn is-*securities* ukoll 'l hekk imsejjaħ il-*global note* ukoll l-*issuer* ta' l-istess kienu lokalizzati ġewwa il-

[14] Case C-304/17
[15] Ibid.

Germanja. Għalhekk il-Qorti straħet fuq dawk imsejjħin ir-*relevant connecting factors* biex tasal għal ġurisdizzjoni koretta. Qieset li it-telf finanzjarju ġewwa l-Awstrija kien biss wieħed indirett.

Ikkonsidrat

Illi l-Qorti għalhekk se tieħu spunt wara ezami ta' dawn id-deċizjonijiet riferuti (u oħrajn li se jiġu msemmija aktar 'l quddiem) u tqies li fl-ewwel lok għandha tħares lejn il-provi mressqa lilha s'issa in determinazzjoni ta' l-eċċezzjoni mressqa, dana dejjem fl-isfond ta' dak stabbilit illi l-Qorti f'dan l-ezerċizzju hija tenuta tifli l-fatti kollha ta' kull kaz speċifiku.

Il-kumpanija konvenuta Vectra resqet l-afidavit ta' ċertu **Dariusz Nowosadko**[16] li in suċċint spjega li hu membru tal-*management board* tal-Vectra S.A. Spjega li din is-soċjeta' topera fl-industrija ta' telekomunikazzjoni u tipprovdi fost l-oħrajn servizzi ta' *internet* lil konsumatur ġewwa il-Polonja. Qal li dan is-servizz provdut kien biss tramite il-*Polish cable infrastructure* u li Vectra ma kienetx tipprovdi dan is-servizz lil persuni residenti ġo pajjizi oħra. Qal għalhekk li Vectra ma kellha ebda relazzjoni kuntrattwali ma sidien ta' *domains* jew *internet platforms*. Ukoll illi Vectra ma lanqas ma kienet tipprovdi servizzi bħal ma huma *hosting*.

[16] Folio 26

Spjega lil klijenti ta' Vectra setgħu jaċċedu *third party domains, internet platforms* jew applikazzjonijiet simili bl-uzu ta' l-*internet connection* provduta minn Vectra. Isegwi li anke jekk klijenti ta' Vectra jista jkollhom arrangamenti ma sidien *ta'* dawn *id-domains*, xorta Vectra ma kellha ebda relazzjoni ma dawn id-*domains, providers* ta' *internet platforms* jew *application*s inkluz għalhekk ma s-soċjeta' attriċi.

Żid illi sakemm is-soċjeta konvenuta bdiet tirċievi ittri mingħand is-soċjeta' attriċi biex tiddesiti mill-aġir ta' l-allegat *blocking*, qatt qabel ma kienet semgħet bl-istess soċjeta' estera.

Għal ittri mibgħuta mis-soċjeta' attriċi lil Vectra biex tiddesiti milli tibbloka l-aċċess tal-klijenti għas-soċjeta' attriċi minn fuq is-siti tagħha, qal li Vectra wieġbet billi innegat dan l-aġir. Qal li għal ittra simili mibgħuta Vectra wiegbet li ma kientx qegħda tezerċita *" any traffic discriminatory management practices"*[17].

Da parti tagħha s-soċjeta' attriċi presentat affidavit redatt minn **Gerald Fineder**[18] direttur ta' l-istess. Igħid li hija soċjeta' liċenzjata mill-Malta Gaming Authority. Spjega li fil 5 ta' Mejju, 2017 il-*customer service* tagħhom beda jirċievi lanjanzi mingħand klijenti tagħhom polakki li ma setgħux jaċċedu l-*web site* tagħhom relattiva. Dawn il-klijenti stqarru li l-*internet provider* tagħhom kienet is-soċjeta' konvenuta bbazata ġewwa il-Polonja. Qal li fil-fatt l-

[17] Folio 27 tergo
[18] Folio 35

istess soċjeta' Polakka kienet anke ħarget stqarrija li kient qed tadotta *blocking measures* a bazi ta' l-artikolu 15f(5) tal-*Polish Gambling Act.*

Qal li meta irċeva din l-informazzjoni u ċioe li Vectra kienet qed tezerċita dan it-tip ta' ***blocking***, huma bagħtu diversi ittri lil istess soċjeta' estera tramite l-avukati Polakki minnhom inkarigati biex din tiddesisti fl-aġir tagħha.

Igħid li aktar tard għalkemm Vectra innegat aġir da parti tagħha ta' *blocking,* ammettiet li kienet skontrat ċertu istanzi ta' diffikulta' ta' aċċess għal ċertu siti minħabba *network failures* u *short tests of blocking measures*.

Qal li fit-12 ta' Gunju, 2017 il-klijenti tas-soċjeta' attriċi irraportaw lil istess li issa setgħu jaċċedu għas-siti tagħha tramite l-*Vectra internet connection.*

Pero dan l-aġir ta' *blocking* reġa' ġie ripettut bi blokkar ieħor da parti ta' Vectra, ukoll fis-7 ta' Gunju, 2017 u għalhekk is-soċjeta' attriċi reggħet kellha ilmenti mas-soċjeta' konvenuta ta' nuqqas ta' aċċess mill-klijenti għas-siti tagħha ta' *on line gaming*.

Qal lis-soċjeta' attriċi soffriet danni monetarju minħabba l-aġir ta' Vectra.

Ikkunsidrat ulterjorment.

Tqies li mill-qari tan-noti ta' sottomissjonijiet huwa ċar lil punto di partenza tal-partijiet dwar l-ġurisdizzjoni tal-Qorti ġusta tistrieħ fuq l-interpretazzjonii tal-frazi misjuba fl-artikolu 7(2) tar-Recast *" the place where the harmful event occurred or may occurr"*

Ħarsa lejn ir-*recital* 12 ta' l-istess regolament insibu illi;

"In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action in order to facilitate the sound administration of justice."

Jidher li allura il-ħsieb kien u hu li biex tiġi assikurata l-aħjar amministrazzjoni tal-ġustizzja illi ix-xilja ssir fil-lok fejn jkun jinstab l-aħjar u l-aktar irbit bejn il-Qorti tax-xilja u l-lok fejn seħħ id-dannu, biex b'hekk ikunu aktar aċċessibbli l-provi u l-makinarju ġudizzjarju li fuq kollox igħin kemm lil attur u l-konvenut biex jressaq bl-aktar mod faċli, effiċċjenti u effettiv il-kaz jew id-difiza tagħhom bl-inqas intopp u xkiel possibbli u b'hekk il-kors tal-ġustizzja jkun wieħed aktar effikaċi u effettiv.

Fil-fehma tal-Qorti huwa logiku u mistenni lil ġurisdizzjoni għandha tkun vestita fil-lok fejn tinstab l-evidenza, fejn hemm allura l-aħjar konnessjoni bejn il-fatt dannuz, d-danni sofferti u l-Qorti adita, li ġia minnu jassigura ġustizja

aktar spedittiva u inqas ingombrusa b'sistemi mtawla bħal ma huma xhieda b'ittri rogatorji per ezempju.

Fl-*landmark judgement* moghtija taħt ir-*regime* l-antik inkorporata taħt l-ewwel regulazzjoni Brussels1 fil-kawza **Bier**[19] intqal:_

"7 article 5 of the convention provides : ' a person domiciled in a contracting state may , in another contracting state , be sued : . . . (3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred '.

8 that provision must be interpreted in the context of the scheme of conferment of jurisdiction which forms the subject-matter of title ii of the convention.

9 that scheme is based on a general rule, laid down by article 2, that the courts of the state in which the defendant is domiciled shall have jurisdiction.

10 however, article 5 makes provision in a number of cases for a special jurisdiction, which the plaintiff may opt to choose.

11 this freedom of choice was introduced having regard to the existence, in certain clearly defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it , with a view to the efficacious conduct of the proceedings .

12 thus in matters of tort, delict or quasi-delict article 5 (3) allows the plaintiff to bring his case before the courts for ' the place where the harmful event occurred'.

[19] Handelskwekerij GJ Bier NV vs SA Mines de Potasse d'alsace (1976) E.C.R. (Case 21/76)

13 in the context of the convention , the meaning of that expression is unclear when the place of the event which is at the origin of the damage is situated in a state other than the one in which the place where the damage occurred is situated as is the case inter inter alia with atmospheric or water pollution beyond the frontiers of a state .

14 the form of words ' place where the harmful event occurred ' , used in all the language versions of the convention , leaves open the question whether , in the situation described , it is necessary , in determining jurisdiction , to choose as the connecting factor the place of the event giving rise to the damage , or the place where the damage occurred , or to accept that the plaintiff has an option between the one and the other of those two connecting factors .

15 as regards this, it is well to point out that the place of the event giving rise to the damage no less than the place where the damage occurred can , depending on the case , constitute a significant connecting factor from the point of view of jurisdiction .

16 liability in tort, delict or quasi-delict can only arise provided that a causal connexion can be established between the damage and the event in which that damage originates.

17 taking into account the close connexion between the component parts of every sort of liability, it does not appear appropriate to opt for one of the two connecting factors mentioned to the exclusion of the other , since each of them can , depending on the circumstances , be particularly helpful from the point of view of the evidence and of the conduct of the proceedings .

18 to exclude one option appears all the more undesirable in that, by its comprehensive form of words, article 5 (3) of the convention covers a wide diversity of kinds of liability .

19 thus the meaning of the expression ' place where the harmful event occurred ' in article 5 (3) must be established in such a way as to acknowledge that the plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it .

20 this conclusion is supported by the consideration, first, that to decide in favour only of the place of the event giving rise to the damage would , in an appreciable number of cases , cause confusion between the heads of jurisdiction laid down by articles 2 and 5 (3) of the convention, so that the latter provision would, to that extent, lose its effectiveness .

21 secondly, a decision in favour only of the place where the damage occurred would , in cases where the place of the event giving rise to the damage does not coincide with the domicile of the person liable, have the effect of excluding a helpful connecting factor with the jurisdiction of a court particularly near to the cause of the damage .

22 moreover, it appears from a comparison of the national legislative provisions and national case-law on the distribution of jurisdiction - both as regards internal relationships, as between courts for different areas , and in international relationships - that , albeit by differing legal techniques , a place is found for both of the two connecting factors here considered and that in several states they are accepted concurrently .

23 in these circumstances, the interpretation stated above has the advantage of avoiding any upheaval in the solutions worked out in the various national systems of law, since it looks to unification, in conformity with article 5(3) of the convention , by way of a systematization of solutions which , as to their principle,, have already been established in most of the states concerned .

24 thus it should be answered that where the place of the happening of the event which may give rise to liablity in tort , delict or quasi delict and the place where that event results in damage are not identical, the expresson ' place where the harmful event occurred ' , in article 5 (3) of the convention , must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it .

25 the result is that the defendant may be sued, at the option of the plaintiff , either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage .

...

Operative part

On those grounds

The court

In answer to the question referred to it by the gerechtshof, the hague, by judgment of 27 february 1976, hereby rules :

Where the place of the happening of the event which may give rise to liability in tort , delict or quasidelict and the place where that event results in damage are not identical , the expression ' place where the harmful event occurred ' , in article 5 (3) of the convention of 27 september 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters , must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it .

The result is that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts

for the place of the event which gives rise to and is at the origin of that damage."

Minn hawn huwa deduċibbli li allura hawn il-Qorti Ewropea ħalliet ix-xelta tal-ġurisdizzjoni tax-xilja f'idejn l-attur. Fl-opinjoni ta' din il-Qorti tali interpretazzjoni tista twassal għal inċertezza fil-konfront tal-mixli ukoll tista tagħti spunt mhux negliġibbli ta' kunċett kemm xejn odjuz ta' *forum shopping*.

Forsi ġudizzju aktar qarib għal dak li kienet il-vera spirtu tar-regolament u jneħħi l-perikolozita' ta' l'hekk imsejjaħ *forum shopping* bi pregudizzju ovvju għal konvenut hu dak li l-istess Qorti tat fir-referenza li rċeviet mill-Qorti tal-Cassassjoni Taljana fl-ismijiet **Marinari vs Lloyds Bank and Other**[20]**,** hawn insibu kunċett żvillupat dwar ***initial damage*** li jkun seħħ ġo gurisdizzjoni partikolari ad differenza minn dannu li jitħass f'ġurisdizzjoni oħra sussegwenti. Tħoss il-Qorti li dan fil-fatt fih innifsu huwa żvilup ieħor fuq it-teorija adottata f'Shevill li għalih se ssir referenza aktar 'l quddiem.

"1 By order of 21 January 1993, received at the Court on 26 July 1993, the Corte Suprema di Cassazione (Supreme Court of Cassation) referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, of Ireland, and of the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and — amended text — p. 77) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1, hereinafter 'the Convention') a question on the interpretation of Article 5(3) of the Convention.

[20] Case C-364/93 19/09/1995

2 That question was raised in the course of proceedings between Mr Marinari, who is domiciled in Italy, and Lloyds Bank, whose registered office is in London.

3 In April 1987, Mr Marinari lodged with a Manchester branch of Lloyds Bank a bundle of promissory notes with a face value of US $752 500 000, issued by the Negros Oriental province of the Republic of the Philippines in favour of Zubaidi Trading Company of Beirut. The bank staff, after opening the envelope, refused to return the promissory notes and advised the police of their existence, stating them to be of dubious origin, which led to Mr Marinari's arrest and sequestration of the promissory notes.

4 Having been released by the English authorities, Mr Marinari sued Lloyds Bank in the Tribunale di Pisa, seeking compensation for the damage caused by the conduct of its staff. The documents forwarded by the national court show that Mr Marinari is claiming not only payment of the face value of the promissory notes but also compensation for the damage he claims to have suffered as a result of his arrest, breach of several contracts and damage to his reputation. Lloyds Bank objected that the Italian court lacked jurisdiction on the ground that the damage constituting the basis of jurisdiction ratione loci had occurred in England. Mr Marinari, supported by Zubaidi Trading Company, applied to the Corte Suprema di Cassazione for a prior ruling on the question of jurisdiction.

5 In its order for reference, the Corte Suprema di Cassazione raises the issue of the jurisdiction of the Italian courts in relation to Article 5(3) of the Convention, as interpreted by the Court of Justice.

6 It observes that, in Case 21/76 Bier v Mines de Potasse d'Alsace [1976] ECR 1735, the Court considered that the term 'place where the harmful event occurred' was to be understood as intended to cover both the place where the

damage occurred and the place of the event giving rise to it, and that Mr Marinari contends that the expression 'damage occurred' relates not only to the physical result but also to damage in the legal sense, such as a decrease in a person's assets.

7 It also notes that in Case C-220/88 Dumez France and Tracoba v Hessische Landesbank [1990] ECR 1-49, the Court held that account should not be taken, for the purpose of determining jurisdiction under Article 5(3) of the Convention, of indirect financial damage. The national court, in those circumstances, questions whether that also applies where the harmful effects alleged by the plaintiff are direct, not indirect. s In those circumstances, it decided to stay the proceedings pending a preliminary ruling on the following question

'In applying the jurisdiction rule laid down in Article 5(3) of the Brussels Convention of 27 September 1968, as interpreted in the judgment of the Court of Justice of the European Communities of 30 November 1976 in Case 21/76 Handelskwekeńj G. J. Bier BV v Mines de Potasse d'Alsace SA [1976] ECR 1735, is the expression "place where the harmful event occurred" to be taken to mean only the place in which physical harm was caused to persons or things, or also the place in which the damage to the plaintiff's assets occurred?'

9 By way of derogation from the general principle laid down in the first paragraph of Article 2 of the Convention that the courts of the State where the defendant is domiciled are to have jurisdiction, Article 5 provides: 'A person domiciled in a Contracting State may, in another Contracting State, be sued: . in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

…

10 As the Court has held on several occasions (in Mines de Potasse d'Alsace, cited above, paragraph 11, Dumez France and Tracoba, cited above, paragraph 17, and Case C-68/93 Shevill and Others v Presse Alliance [1995] ECR 1-415, paragraph 19), that rule of special jurisdiction, the choice of which is a matter for the plaintiff, is based on the existence of a particularly close connecting factor between the dispute and courts other than those of the State of the defendant's domicile which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.

11 In Mines de Potasse d'Alsace (paragraphs 24 and 25) and Shevill (paragraph 20), the Court held that where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred'in Article 5(3) of the Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places.

12 In those two judgments, the Court considered that the place of the event giving rise to the damage no less than the place where the damage occurred could constitute a significant connecting factor from the point of view of jurisdiction. It added that to decide in favour only of the place of the event giving rise to the damage would, in an appreciable number of cases, cause confusion between the heads of jurisdiction laid down by Articles 2 and 5(3) of the Convention, so that the latter provision would, to that extent, lose its effectiveness.

13 The choice thus available to the plaintiff cannot however be extended beyond the particular circumstances which justify it. Such extension would negate the general principle laid down in the first paragraph of Article 2 of the Convention that the courts of the Contracting State where the defendant is domiciled are to have jurisdiction. It would lead, in cases other than those expressly provided for, to recognition of the jurisdiction of the courts of the plaintiff's domicile, a solution which the Convention does not favour since, in the second paragraph of Article 3, it excludes application of national provisions which make such jurisdiction available for proceedings against defendants domiciled in the territory of a Contracting State.

14 Whilst it has thus been recognized that the term 'place where the harmful event occurred' within the meaning of Article 5(3) of the Convention may cover both the place where the damage occurred and the place of the event giving rise to it, that term cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere.

15. Consequently, that term cannot be construed as including the place where, as in the present case, the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State.

16 The German Government submits, however, that, in interpreting Article 5(3) of the Convention, the Court should take account of the applicable national law on non-contractual civil liability. Thus, where, under that law, an actual adverse effect on goods or rights is a precondition for liability (as, for instance, under paragraph 823(1) of the Bürgerliches Gesetzbuch — the German Civil Code), the 'place where the harmful event occurred' means both the place of that adverse effect and the place of the event giving rise to

it. On the other hand, it considers that where national law does not make redress conditional upon an actual adverse effect upon property or a right (as, for instance, under Article 1382 of the French Civil Code and Article 2043 of the Italian Civil Code), the victim may choose between the place of the event giving rise to the damage and the place where he suffered financial damage.

17 The German Government also considers that that interpretation would not be such as to lead to a multiplication of courts enjoying jurisdiction. Nor would it lead systematically to the result that the court for the place where the financial damage was suffered would be the same as the court of the plaintiff's domicile. Moreover, it would not enable the victim, by moving his assets, to determine the competent court, since account would be taken of the location of his assets when the obligation of reparation arose. Finally, that interpretation has the advantage of not according preference to the laws of certain States at the expense of others.

18 It must, however, be noted that the Convention did not intend to link the rules on territorial jurisdiction with national provisions concerning the conditions under which non-contractual civil liability is incurred. Those conditions do not necessarily have any bearing on the solutions adopted by the Member States regarding the territorial jurisdiction of their courts, such jurisdiction being founded on other considerations.

19 There is no basis for interpreting Article 5(3) of the Convention by reference to the applicable rules on non-contractual civil liability, as proposed by the German Government. That interpretation is also incompatible with the objective of the Convention, which is to provide for a clear and certain attribution of jurisdiction (see Case 241/83 Rosier v Rottwinkel [1985] ECR 99, paragraph 23, and Case C-26/91 Handte v

Traitments Mécano-Chimiques des Surfaces [1992] ECR 11-3967, paragraph 19). The delimitation of jurisdiction would then depend on uncertain factors such as the place where the victim's assets suffered subsequent damage and the applicable rules on civil liability.

20 Finally, as regards the argument as to the relevance of the location of the assets when the obligation to redress the damage arose, the proposed interpretation might confer jurisdiction on a court which had no connection at all with the subject-matter of the dispute, whereas it is that connection which justifies the special jurisdiction provided for in Article 5(3) of the Convention. Indeed, the expenses and losses of profit incurred as a result of the initial harmful event might be incurred elsewhere so that, as far as the efficiency of proof is concerned, that court would be entirely inappropriate.

21 The answer to the national court's question should therefore be that the term 'place where the harmful event occurred' in Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ***does not, on a proper interpretation, cover the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State****.*

...

THE COURT, in answer to the question referred to it by the Italian Corte Suprema di Cassazione by order of 21 January 1993, hereby rules: ***The term 'place where the harmful event occurred' in Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters does not, on a proper interpretation, I - 2742 MARINARI v LLOYDS BANK AND ANOTHER cover the place***

where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State."

Deċizjoni oħra minn referenenza ngħatat fil-kawza ukoll imsemmija mill-partijiet fin-nota tagħhom hekk imsejjħa ***eDate***[21]**,** din kienet tirrigwarda ksur ta' *personality rights* u kompliet fil-fehma ta' din il-Qorti tizvillupa in-nozzjoni ta' ġurisdizzjoni kif ennunċjata fid-deċizzjonijiet msemmija.

"It is settled case-law that the rule of special jurisdiction laid down, by way of derogation from the principle of jurisdiction of the courts of the place of domicile of the defendant, in Article 5(3) of the Regulation is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings (Zuid-Chemie, paragraph 24 and the case-law cited).

41 It must also be borne in mind that the expression 'place where the harmful event occurred' is intended to cover both the place where the damage occurred and the place of the event giving rise to it. Those two places could constitute a significant connecting factor from the point of view of jurisdiction, since each of them could, depending on the circumstances, be particularly helpful in relation to the evidence and the conduct of the proceedings (see Case C-68/93 Shevill and Others [1995] ECR I-415, paragraphs 20 and 21).

42 In relation to the application of those two connecting criteria to actions seeking reparation for non-material damage allegedly caused by a defamatory publication, the Court has held that, in the case of defamation by means of a newspaper article distributed in several Contracting States,

[21] C-509/09 G.C. 25/10/2111

the victim may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all of the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised (Shevill and Others, paragraph 33).

43 *In that regard, the Court has also stated that, while it is true that the limitation of the jurisdiction of the courts in the State of distribution solely to damage caused in that State presents disadvantages, the plaintiff always has the option of bringing his entire claim before the courts either of the defendant's domicile or of the place where the publisher of the defamatory publication is established (Shevill and Others, paragraph 32).*

44 *Those considerations may, as was noted by the Advocate General at point 39 of his Opinion, also be applied to other media and means of communication and may cover a wide range of infringements of personality rights recognised in various legal systems, such as those alleged by the applicants in the main proceedings.*

45 *However, as has been submitted both by the referring courts and by the majority of the parties and interested parties which have submitted observations to the Court, the placing online of content on a website is to be distinguished from the regional distribution of media such as printed matter in that it is intended, in principle, to ensure the ubiquity of that content. That content may be consulted instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that*

person's Member State of establishment and outside of that person's control.

46 *It thus appears that the internet reduces the usefulness of the criterion relating to distribution, in so far as the scope of the distribution of content placed online is in principle universal. Moreover, it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State.*

47 *The difficulties in giving effect, within the context of the internet, to the criterion relating to the occurrence of damage which is derived from Shevill and Others contrasts, as the Advocate General noted at point 56 of his Opinion, with the serious nature of the harm which may be suffered by the holder of a personality right who establishes that information injurious to that right is available on a world-wide basis.*

48 *The connecting criteria referred to in paragraph 42 of the present judgment must therefore be adapted in such a way that a person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all of the damage caused, depending on the place in which the damage caused in the European Union by that infringement occurred. Given that the impact which material placed online is liable to have on an individual's personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests, the attribution of jurisdiction to that court corresponds to the objective of the sound administration of justice, referred to in paragraph 40 above.*

49 *The place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the*

centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.

50 *The jurisdiction of the court of the place where the alleged victim has the centre of his interests is in accordance with the aim of predictability of the rules governing jurisdiction (see Case C-144/10 BVG [2011] ECR I-0000, paragraph 33) also with regard to the defendant, given that the publisher of harmful content is, at the time at which that content is placed online, in a position to know the centres of interests of the persons who are the subject of that content. The view must therefore be taken that the centre-of-interests criterion allows both the applicant easily to identify the court in which he may sue and the defendant reasonably to foresee before which court he may be sued (see Case C-533/07 Falco Privatstiftung and Rabitsch [2009] ECR I-3327, paragraph 22 and the case-law cited).*

51 *Moreover, instead of an action for liability in respect of all of the damage, the criterion of the place where the damage occurred, derived from Shevill and Others, confers jurisdiction on courts in each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.*

52 *Consequently, the answer to the first two questions in Case C-509/09 and the single question in Case C-161/10 is that Article 5(3) of the Regulation must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all*

the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.

...

On those grounds, the Court (Grand Chamber) hereby rules:

1. ***Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.***

Għalhekk hawn naraw żvillup ieħor fil-konfront ta' l'hekk imsejjaħ *mosiac concept,* ċioe' dak li l-attur jista jirrikorri għal aktar minn ġurisdizzjoni waħda, li ssib il-limitazzjoni fil-konfront tar-rizultat ta' l-azzjoni n kwantu jekk tingħazel il-ġurisdizzjoni fejn inħass id-dannu, ad differenza ta' minn fejn origina, allura huma biss dawk id-danni naxxenti f'dak l-iStat membru li jistgħtu jkunu akkordati kontra l-mixli.

Interessanti dak li nsibu fl-istudju appropju bl-isem **Cyber tort Brussels Recast under Brussels 1 Bis Regulation**[22]**,** studju li jagħti varji soluzzjonijiet għat-tisjib tal-ġurisdizzjoni ġusta f'kwistjonijiet ta' tfittix ta' dannu:-

"The tort rule was first interpreted by the Court of Justice in Bier v Mines de Potasse d'Alsace (1976), which involved environmental damage caused by negligence. In that case, the Court ruled that, what is now art. 7(2) of Brussels I BIS Regulation, allows the claimant to bring an action, at his option, either before the courts of the place where the damage occurred, or before the courts of the place of the event which gives rise to and is at the origin of that damage, in other words that is where the event giving rise to damage produces its harmful effects upon the victim.

One of the reasons given by the Court for that duplication of jurisdiction is that the place of damage often coincides with the place of the defendant's domicile under art. 4(1), so that having that location as the sole connecting factor under art. 7(2) would render this provision ineffective. Secondly, a decision in favor only of the place where the damage occurred would, in cases where the place of the event giving rise to the damage does not coincide with the domicile of the

[22] **Themis Competition 2016 Semi-Final C: International Judicial Cooperation in Civil Matters-European Civil Procedure; Team Romania**, page 4 et. seq.

person liable, have the effect of excluding a helpful connecting factor with the jurisdiction of a court particularly near to the cause of the damage.

The findings in Bier were revised by the ECJ in Shevill[23]*, where the Court has further limited the scope of the forum damni. ECJ ruled that the courts of the Member State where damage occurred may only adjudicate the claim in respect of the portion of the damage that occurred in that State. By contrast, the courts of the Member State where the event giving rise to damage occurred can adjudicate the whole dispute. This restriction is based on the consideration that court of the place where damage occurred is the best placed to assess the libel committed in that State – and not elsewhere – and to determine the extent of the corresponding damage.*

The case of Shevill involved an action for non-material damages allegedly caused by the distribution of a defamatory newspaper article in several Member States. The claimant, a United Kingdom national resident in England, considered the article defamatory and brought libel proceedings before the English High Court in respect of the copies of the newspaper distributed and sold in England and Wales. The publisher, a company incorporated under French law and registered in Paris, sought to challenge the jurisdiction of the High Court on the grounds that no harmful event within the meaning of art. 7(2) had occurred in England.

The Court ruled that in such context, the victim may bring an action for damage to his reputation against the publisher, either before the court of the place

[23] ECJ (C-68/93, (1995) ECR-415.

where the publisher is established – place where the event giving rise to damage occurred, in which case the court has jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Member State where the publication was distributed and where the victim claims to have suffered injury to his reputation – place where the damages occurred, in which case the courts have jurisdiction to rule solely in respect of the harm caused in the States of the court seised, the so-called 'Mosaic principle'.

But these findings are misleading in one aspect: the fact that the claimant may sue before the courts of the state where the publisher is established already follows from art. 4 Brussels I BIS Regulation, and not from art. 7(2). However, it follows from Article 7(2) that the claimant may sue at the place in which the publication originated. This might mostly be the country where the publisher is established; however, this is not necessarily the case.

The 'Shevill doctrine' considers the necessity to concentrate lawsuits aiming at full compensation to just one – or maximally two – jurisdiction(s). However, it also allows the claimant to bring a lawsuit where he has been defamed, albeit the lawsuit is limited to the harm caused in this jurisdiction. In conclusion, Shevill strikes a fair balance between the interests of the publisher and of the allegedly defamed person: the publisher of the contested statement may choose the country where to establish his business and – at least to a certain degree – where to publish his article, and may calculate the risk of running into a lawsuit in these places."

Fl-istess studji msemmi insibu referenza għal tlett teoriji oħra żvillupati fil-konfront ta' dik li għandħa tkun l-għazla ġusta ta' ġurisdizzjoni ghax-xilja ċioe' l-*access based doctrine, targeting doctrine* u *casual approach doctrine,*

dana dejjem fil-konfront ta' danni naxxenti minn personality rights infringements.

Jispjega dan l-istudju li fl-*access based test* konvenut jista jiġi mixli *"...in any jurisdiction where the infringing content could be accessed online. Despite presenting undeniable advantages to the plaintiffs, the access approach has been criticized for several reasons. It has been contended, in particular, that it opens the door to jurisdictional abuse (e.g. pursuing of various insignificant claims, forum shopping by the right holders) and that it undermines the principle of a close connection between the court seised and the action, enshrined in recital 16 of Regulation 1215/2012. Furthermore, it would fail to strike a fair balance between the interests of the claimants and the interests of the defendants, as the latter could not reasonably foresee in which of the available jurisdictions would the former choose to sue."*

Fir-rigward ta' 'l hekk imsejjaħ *targeting doctrine* ġie spjegat hekk:- ... *that jurisdiction should be vested only in the courts of those Member States towards which the harmful activity has been directed, which implies intent to target a specific audience on the part of the potential infringer. In its previous case-law, the Court of Justice provided several criteria in order to determine the targeting intention. In Lagardère Active Broadcast it ruled that amongst the parameters taken into account ought to be included, `in particular, the actual audience, the potential audience and the language version of the broadcast` (that case involved acts of broadcasting by a television station, but we consider them applicable to a website as well). In Donner it mentioned, again, the the language of the website as a relevant factor, alongside its content and the distribution channels of a trader.*

Pammer and Hotel Alpenhof case dealt with jurisdiction regarding contracts concluded with consumers, under Article 17(1)(c) of Regulation 1215/2012, but the Court here also provides a series of criteria for determining whether a certain activity is directed towards a Member State that may be transposed in torts cases: the international nature of the activity at issue, such as certain tourist activities; mention of telephone numbers with the international code; use of a top-level domain name other than that of the Member State in which the trader is established, for example '.de', or use of neutral top-level domain names such as '.com' or '.`eu`."

Mentri l-*"causal event` method, the place of the harmful event would be only the place from where the defendant acted to initiate the allegedly infringing activity. This test has been objected to, based on the fact that it would weaken the position of the right holders since in the majority of cases the place from where the defendant acted would be situated in foreign jurisdictions. Also, most of the time, it would lead to the same result as the `defendant's domicile` rule, as usually the act of infringement takes place where the alleged perpetrator is established".*

Esposti dawn il-linji adottati mill-Qorti Ewropeja u kitbiet ta' studjuzi fir-rigward, huwa faċilment deduċibbli li t-tisjib tal-ġurisdizzjoni ġusta mhux faċli u lanqas konformi n vista tal-ħsiebijiet kollha mressqa u żvillupati varji fir-rigward.

Il-Qorti tista pero tislet l-ħsieb illi biex wieħed jiddetermina il-*forum* ġust huwa neċessarju lli jsir eżami tal-fatti kollha lilha esposti, anke jekk s'issa huma kemm xejn limitati għal żewġ affidavits u tara ukoll r-rikors u r-risposta guramentata. Din il-konsiderazzjoni ġiet ukoll meqjusa fil-Qorti Ewropea, anke jekk fil-kaz li se jiġi ċitat l-konvenut kien saħansitra ressaq provi fil-mertu, anke f'dan il-kaz il-Qorti riedet li fl-ezami ta' eċċezzjoni ta' ġurisdizzjoni jiġu

eżaminati kull prova u sottomissjoni mressqa mill-konvenut f'dan ir-rigward. Dan ingħad fid-deċizzjoni fl-ismijiet **Universal Music International Holding BV v Michael Tetreault Schilling and Others**[24], fejn inghad hekk:-

45. Although the national court seised is not obliged, if the defendant contests the applicant`s claims, to conduct a comprehensive taking of evidence at the stage of determining jurisdiction, the Court has held that both the objective of the sound administration of justice, which underlies Regulation No 44/2001, and respect for the independence of the national court in the exercise of its functions require the national court seised to be able to examine its international jurisdiction in the light of all the information available to it, including, where appropriate, the defendant`s arguments (judgement of 28 January 2015 in Kolassa, C-375/13, EU:C:2015:37, paragraph 64).

46. ***On the basis of the foregoing, the answer to the third question asked is that, in the context of the determination of jurisdiction under Regulation No 44/2001, the court seised must assess all the evidence available to it, including, where appropriate, the arguments put forward by the defendant***[25]

Ikkonsidrat;

Bla dubbju u n linea generali r-Recast jinsisti fuq r-regola ġia ben stabblita fir-regolament ta' qablu illi għandu jkun d-domiċilju tal-mixli li jiddetermina l-forum ġust. Dan kif rajna huwa ntiż biex l-istess konvenut jkollu ċertezza ta' fejn jista jirrinfaċja x-xilja, ukoll minħabba r-rabta ta' provi li jistghu jkunu, u

[24] CJEU 16/06/2016 ; Case C12/15.
[25] Enfasi ta' din il-Qorti.

fil-maggor parti ta' drabi huma, f'dik il-ġurisdizzjoni biex b'hekk tiġi garantita l-aħjar amministrazzjoni tal-ġustizja. Din hija regola soda li ssib partenza biss fl-eċċezzjonijiet stabbiliti u li għandhom, la hemm dipartenza mir-regola generali, kif ingħad jiġu nterpretatati b'mod ristrettiv.

Kif rajna varji huma t-teoriji mħaddna u kull kaz jimerita ezami *n funditus* biex jiġi stabbilit dak il-lok fejn ġie generat id-dannu, u ukoll in linea ma Shevill u oħrajn fejn inħass, li f'bosta drabi ma jkunux u mhux neċessarjament huma l-istess lok, aktar u aktar meta si tratta ta' dannu generat tramite siti, *web sites,* għalhekk fid-dinja vasta tal-internet li ma taf ebda limitu ta' ġurisdizzjoni fl-operat intrinsiku tagħha.

Tqies illi-

1. Mill-fatti liha s'issa mressqa jirrizulta illi, u fuq dan hemm qbil bejn il-partijiet, illi ma hemm ebda relazzjoni kuntrattwali bejn l-istess;
2. Illi ma nġabet ebda prova li qabel l-inċident li wassal għal din ix-xilja li kien hemm xi tip ta' relazzjoni oħra bejn il-partijiet;
3. Vectra tipprovdi servizzi ta' użu ta' internet lil klijenti tagħha biss ġewwa l-Polonja;
4. Vectra m'għandhiex ebda relazzjoni jew tipprovdi ebda servizz ta'/jew *websites, domains* jew *platforms* lis-soċjeta' attriċi*;*
5. Vectra tipprovdi *internet connections* li tramite tagħhom wieħed jista jaċċedi *domain* u *platforms* bħal ma huma dawk użati mill-klijenti tas-soċjeta' attriċi;
6. Vectra l-ewwel ma semgħet bis-soċjeta' attriċi kien meta rċeviet mingħandha ittri legali li ddiffidewha milli tkomppli fl-aġir tagħha ta' *blocking* u *re-directing* ta' l-aċċess tramite l-internet għal klijenti tagħha għal fuq *platforms* tas-soċjeta' attriċi;

7. Vectra nnegat kull aġir abbusiv jew illegali fil-konfront tas-soċjeta' attriċi;
8. Il-klijenti tas-soċjeta attriċi irraportawlha għal diversi drabi li kellhom diffikolta' li jaċċedu s-siti ta' logħob minħabba aġir ġia spjegat;
9. Is-soċjeta' attriċi tinsiti illi l-istess soċjeta' konvenuta ammetiet l-aġir tagħha b'dikjarazzjoni pubblika, *press release*;
10. Illi s-soċjeta' attriċi ma nkorriet ebda dannu materjali fil-ġurisdizzjoni Polakka.
11. Illi s-soċjeta' attriċi m'ghandha ebda konessjoni mal Polonja u l-operat kollu tagħha huwa bbażat fil-ġurisdizzjoni Maltija.
12. Illi s-soċjeta' attriċi żżomm l-assi tagħha f'pajjiżna u inkorriet hawn d-danni minnha reklamati.

Jiġi nnotat illi fin-nota tagħhom is-soċjeta' konvenuta/intimata tressaq l-argument illi skontha għandu jorbot r-rabtiet tas-soċjeta' attriċi mal-Polonja billi tgħid illi huma ngaġġaw avukati polakki li saħansitra kitbulhom bil-lingwa Polakka, ukoll li l-aġir tagħha kieku biss effettwa biss il-klijenti tagħha reġistrati ġewwa l-Polonja fejn hi registrata l-istess soċjeta' konvenuta. Iżid ukoll, pero dan ma ġiex pruvat, illi s-soċjeta' attriċi għandha konnessjonijiet oħra mal Polonja. Tgħid ukoll illi n vista tad-domiċilju tagħha ġewwa l-Polonja għandha tkun din il-ġurisdizzjoni li tipprevalixxi.

Vectra targumenta għalhekk illi minn dak espost għandu jiġi eskluss kull *ground of connecting factor* bejn id-disputa nnifisha u l-Qrati *siesed* għalhekk dawk Maltin. Tqies li x-xilja tagħha fil-ġurisdizzjoni maltija mhux konduċenti għal aħjar amministrazzjoni tal-ġustizzja.

Minn naħa l-oħra s-soċjeta' attriċi tressaq l-argument illi hi registrata Malta u għandha awtorizzazzjoni li topera fis-settur tal-logħob t'azzard *online* mill-Malta Gaming Authority fil-qafas tal-ligijiet Maltin.

Targumenta ukoll illi bl-aġir ta' Vectra, bl-imblukaar u *redirecting* ta' l-aċċess għas-siti ta' internet użat minnha, għalhekk bir-rizultat ta' impossibilta ta' aċċess għas-siti ta' logħob mill-klijenti tagħha, Vectra kkagunatilha dannu fil-ġurisdizzjoni maltija.

Tgħid l-attriċi li għalkemm id-dannu origina fil-Polonja, l-effett dirett dannuz tagħha ġie registrat u soffert **biss** ġo pajizna.

Tinsisti li l-assi tagħha qegħdin ġewwa Malta u m'għandha ebda impjegati, liċenzji, uffiċċji jew servizzi ġewwa l-Polonja. Tgħid ukoll li lanqas *customer service* m'għandha f'dan il-pajjiz.

Ikkunsidrat

Illi fl-ewwel lok hija l-fehma tal-Qorti li l-argument imressaq mis-soċjeta' Vectra li l-ġurisdizzjoni Polakka hija arġinata bil-fatt ta' ingaġġar ta' avukati polakki hu għal kollox dgħajjef u pwerili. Daqstant ieħor il-fatt li nbagħat lilhom ittri legali bil-lingwa polakka.

Illi mill-ġurisprudenza suriferita huwa paċifiku lil Qorti tista tislet il-fattur illi l-ġurisdizzjoni attribwita bl-artikolu 7(2) tar-Recast hija l-eċċezzjoni għar-regola u għandu jkollu interpretazzjoni restrittiva. Pero lanqas m'għandu jiġi interpretat b'mod li jwassal għal tneħħija ta' l-utilita' u effikaċja tiegħu. Għalhekk mhux awtomatiku li f'kawzi bħal dawk in ezami li għandu jkun il-*lex domiċilii* tal-konvenut li jidettermima il-forum ġust kif hi tal-fehma s-soċjeta' konvenuta.

Tqies lil Qorti għandha tfittex dawk il-*links, relevant connecting factors, area of interests, initial damage,* dan fid-dawl ta' dak espost preċedentement biex tasal għal ġurisdizzjoni ġusta tal-Qorti li għandha tkun adita bis-smiegħ tal-kawza.

Kif għamlet il-Qorti Ewropea, din il-Qorti tasal biex tiddistingwi il-lok fejn seħħ immedjatament id-dannu ad differenza tal-lok fejn verament inħass id-dannu. Hu paċifiku li dan ta' l-ewwel originu ġewwa l-Polonja pero kellu effett dirett, immedjat u biss ġewwa Malta n kwantu s-soċjeta' attrici ma tirritjeni ebda assi jew konessjoni oħra ġol Polonja, anzi m'għandha ebda tip ta' rbiet ma dik il-ġurisdizzjoni u l-klijenti tagħha anke jekk barranin, jutilizaw servizz minnha offrut lokalment. Fil-fatt dan n-nuqqas ta' rbiet hu aċċettat anke minn Vectra. Dan bil-fors kien fatt prevedibbli għas-soċjeta' konvenuta, tant li tibqa nsistenti fuq in-nuqqas ta' relazzjoni mas-soċjeta' attriċi; lanqas kienet tafha qabel l-inċident *de quo*. L-intimata taf biss dawk il-gugaturi li juzaw is-servizzi ta' *internet* provdut minnha, bħala *internet provider*. L-effetti ta' l-aġir tagħha pero inħass b'mod dirett u immedjat ġo pajjizna. Il-konvenuta bilfors kellha konoxxenza ta' l-effett li jista jkollu l-aġir tagħha u ċioe' li kien se jkollu effett f'dik il-ġurisdizzjoni estera lil klijenti tagħha kienu qegħdin jaċċedu tramite s-servizz minnha mogħtija għaliex is-servizzi minnha provduti jagħtu aċċess ampju għal ġurisdizzjonijiet oħra.

Il-Qorti ġia espremiet ir-riservi tagħha dwar id-doppja jew multi ġurisdizzjoni kif żvillupata fil-ġurisprudenza esposta għalkemm tqies ukoll li f'dinja fejn l-azzjoni u l-effett tagħha huma spartiti bejn pajjiż u ieħor hija soluzzjoni ekwa u ġusta. Tqies li kull kawza għandha t-tifsila tagħha u għalhekk tillimita u tinċidi fuq d-danni li jistgħu jiġi akkordati minn ġurisdizzjoni għal oħra.

Fid-dinja hekk imsejħa ta' l-*internet* waħda *ubiquitous*, fis-sens ta' l-effett tagħha immedjat ma l-erba' kantunieri tad-dinja, fil-mument li metaforikament Vectra għafset il-buttuna biex taffettwa l-*blocking* u r-*redirecting* ta' l-aċċess għal klijenti tas-soċjeta' attriċi, hi allegatament kkagunat reazzjoni ta' telf pekunjarju, skont it-tezi attriċi, li inħass fil-*portfolio* finanzjarju li l-attriċi għandha ġewwa pajjiżna.

Għalhekk adottata l-linja ukoll *ubiquitous*[26] stabbilita f'Shevill u oħrajn, il-Qorti hija tal-fehma li għal aħjar amministrazzjoni tal-ġustizzja, prossimita' ta' provi, konnessjoni tad-dannu mal-lokalita' u prevedibilta' tas-soċjeta konvenuta għal dak li hu l-effett ta' l-aġir tagħha, għandha tkun il-Qorti Maltija li tgawdi l-ġurisdizzjoni għas-smiegħ ta' din il-kawza u **dan fil-konfront tad-danni sofferti f'din il-ġurisdizzjoni.**

Konsegwentement tiċħad l-ewwel eċċezzjoni bi spejjez għas-soċjeta' konvenuta.

Onor. Dr. Miriam Hayman LL.D.
Imhallef

Victor Deguara
Dep. Reg.

[26] Ara **International Review of Law, Computers & Technology**; Vol 26, 2012-issue 2-3: Current Development in Cyber Law (SLS Cyberlaw Section 2011)