MALTA

QORTI TAL-APPELL

(Kompetenza Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tat-03 ta' Frar, 2021

Appell Inferjuri Numru 80/2019 LM

Peak Media Limited (C 53617)
("is-soċjetà appellanta")

vs.

Betsson Services Limited (C 44114)
("is-soċjetà appellata")

Il-Qorti,

<u>Preliminari</u>

1. Dan huwa appell magħmul mis-soċjetà rikorrenti **Peak Media Limited (C 53617)** (minn issa 'l quddiem "is-soċjetà appellanta"), mid-deċiżjoni mogħtija mit-Tribunal tal-Arbitraġġ fi ħdan iċ-Ċentru dwar l-Arbitraġġ ta' Malta (minn issa 'l quddiem "it-Tribunal"), fid-29 ta' Awwissu, 2019, (minn issa 'l quddiem "id-deċiżjoni appellata"), li permezz tagħha t-Tribunal iddeċieda illi:

"*In view of the foregoing the Tribunal disposes of the arbitration in the following manner:*

1. *It cannot issue a finding against Respondent for having failed to satisfy and fulfil its obligations arising from the binding agreement between the Parties. The Tribunal has not found any wrongdoing in this respect, on the part of the Respondent.*
2. *The Tribunal does however find that the provisions of Clause 8.6 of the White Label Agreement are applicable to this case.*
3. *Due to the finding in paragraph 1 of this* decide *and for the reasons provided above, the Tribunal does not award damages arising out of breach of contract.*
4. *The Tribunal does however find that through the application of clause 8.6 of the White Label Agreement, the Respondent is to pay compensation under the clause unto Claimant, which the Tribunal is liquidating in the amount of one hundred and ninety-seven thousand euro (€197,000).*
5. *In line with more recent judgments on the matter of interests in respect of claims* in illiquidis *(including with reference to Emanuel Fenech et vs Omar Zammit – decided by the Court of Appeal on 26th January 2018), the Tribunal finds that the amount in any case to Claimant was known to Respondent from the beginning of this dispute, that the computation of the relative amount due on the basis of Clause 8.6 of the Agreement depended exclusively on Respondent's input and that whilst Respondent itself invoked the applicability of clause 8.6 of the Agreement in its defence, it concurrently claimed that no amount was due to the Claimant, and that hence, interest at the applicable rate of eight percent (8%) per annum is therefore to be applied in respect of the afore-mentioned sum of one hundred and ninety-seven thousand euro (€197,000), and thus payable by Respondent to Claimant, with effect from the filing of the statement of claim, being the 11th November 2014 to the date of effective payment.*
6. *On the matter of costs, the Tribunal notes that whilst the Claimant has been 'successful' in its claim, the compensation awarded represents a small percentage of Claimant's expectations (circa 4%), as well as the fact that, Respondent primarily pleaded that no amount was due to Claimant and that the quantification of the amount due on the basis of article 8.6 of the Agreement was dependant on Respondent's input. The Tribunal therefore holds that the costs of this arbitration, as per taxed-bill of costs issued by the Malta Arbitration Centre which is being attached hereto and marked as docuument 'MAC 1', are to be*

> *borne, as to eighty percent (80%) by Claimant and twenty percent (20%) by Respondent."*

Fatti

2. Fit-8 ta' Lulju, 2011 ġie ffirmat ftehim, minn issa 'l quddiem "il-Ftehim", bejn is-soċjetà Green Wave Consulting AB tal-Iżvezja u s-soċjetà intimata, hawnhekk appellata, **Betsson Services Limited (C 44114)**, magħruf bħala '*White Label Agreement*'. Fit-22 ta' Settembru, 2011 kien ġie ffirmat ftehim ieħor li permezz tiegħu Green Wave Consulting AB ċediet id-drittijiet u l-obbligi kollha tagħha naxxenti mill-Ftehim lis-soċjetà rikorrenti, hawnhekk appellanta **Peak Media Limited (C 53617)** u s-soċjetà intimata kienet irrikonoxxiet lis-soċjetà rikorrenti bħala l-kontroparti kontraenti fuq il-Ftehim. Permezz tal-Ftehim, is-soċjetà rikorrenti kellha d-dritt topera l-*website* www.harrycasino.com u www.harrycasino.co.uk fuq is-sistema CasinoEuroSolution tas-soċjetà intimata. Is-sit Harry Casino kien sit imħaddem *online,* li beda jopera fl-istess sena meta ġie ffirmat il-Ftehim, liema sit kien maħsub għall-użu minn *players* fl-Ingilterrra. Skont it-termini tal-Ftehim, is-soċjetà rikorrenti kellha l-obbligu li,

> *"... at its own cost, market and promote the Casino White Label Site in the Allowed Territory to the best of its ability and with the view of making Casino White Label Site a successful long-term venture."*

L-applikazzjoni tas-soċjetà rikorrenti ġiet approvata mill-Uffiċċju tal-Proprjetà Intellettwali tal-Unjoni Ewropea, u l-marka kummerċjali "HARRYCASINO" ġiet

approvata skont it-termini tal-klassifikazzjoni ta' Nizza. Is-soċjetà rikorrenti spjegat li fit-tielet kwart tas-sena 2013, hija ppreżentat lis-soċjetà intimata l-baġit għas-snin 2014, 2015 u 2016, minħabba fl-obbligi kuntrattwali li hija kellha sabiex tibda tirrevedi u tinnegozja *in buona fede* t-termini tal-Ftehim għall-estensjoni tal-kuntratt b'sentejn. Il-Klawsola 8 tal-Ftehim kienet tispeċifika li l-Ftehim kien validu għal perijodu ta' tliet snin, u wara l-iskadenza tat-terminu oriġinali, il-Ftehim seta' jiġi awtomatikament imġedded għal perijodi sussegwenti ta' sentejn kull wieħed, sakemm ma jkunx itterminat minn xi wieħed mill-partijiet bil-miktub tal-anqas 120 ġurnata qabel l-iskadenza tat-terminu. Klawsola 8 tal-Ftehim tistipula wkoll li l-partijiet kellhom jibdew jinnegozjaw u jevalwaw it-termini tal-Ftehim *in buona fede* fi tmiem it-tieni sena tal-ewwel perijodu ta' tliet snin tal-kuntratt. Is-soċjetà rikorrenti ma tat l-ebda avviż bil-miktub lis-soċjetà intimata fi żmien 120 jum jew aktar qabel it-terminazzjoni tat-terminu oriġinali tal-Ftehim, u bl-istess mod is-soċjetà intimata ma bagħtet l-ebda korrispondenza bil-miktub lis-soċjetà rikorrenti f'dak il-perijodu. Is-soċjetà rikorrenti qalet li għalhekk, il-Ftehim ġie awtomatikament imġedded għal perijodu ta' sentejn b'effett mit-8 ta' Lulju, 2014.

3. Jirriżulta però li fis-6 ta' Ġunju, 2014, is-soċjetà intimata bagħtet ittra lis-soċjetà rikorrenti fejn infurmatha li l-Ftehim kien ser jiġi tterminat abbażi tal-Klawsola 8.2.5 ta' dak il-Ftehim, u fejn is-soċjetà intimata ġibdet l-attenzjoni tas-soċjetà rikorrenti għall-fatt li l-liġi l-ġdida Ingliża li kienet tesiġi li s-soċjetà intimata tapplika u tikseb liċenzja, kellha tidħol fis-seħħ fl-1 ta' Lulju, 2014. Is-soċjetà rikorrenti rrispondiet għal din l-ittra billi ġibdet l-attenzjoni tas-soċjetà

intimata li l-liġi ċitata mis-soċjetà intimata fl-ittra tagħha ma kinitx antiċipata li tidħol fis-seħħ qabel l-1 ta' Diċembru, 2014, u għalhekk żgur li ma kinitx effettiva fit-30 ta' Ġunju, 2014. Is-soċjetà rikorrenti spjegat li l-klawsola 8.2.5 tistipula illi,

> *'... save where it is reasonable for that Party to apply for and obtain such a licence, permit or approval it does so without delay and the Agreement shall not terminate."*

Skont is-soċjetà rikorrenti, is-soċjetà intimata ma weġbitx għall-imsemmija ittra, partikolarment b'riferiment għad-dħul fis-seħħ fl-Ingilterra tal-*Gambling (Licensing and Advertising) Act* jew b'riferiment għall-possibilità li jkun hemm applikazzjoni għal-liċenzja. Is-soċjetà intimata qalet biss li fit-30 ta' Ġunju 2014, hija kienet ser tieqaf tipprovdi l-White Label Casino Service għal HarryCasino.com skont it-termini tal-kuntratt iffirmat fit-8 ta' Lulju, 2011 bejn Betsson Services Limited u Green Wave Consulting AB. Il-'*Casino White Label Site*' kienet "*the website corresponding to Partner Domain, which website shall be operated by a Betsson Group company.'* F'dik l-istess ġurnata, is-soċjetà intimata nediet is-servizz MrSmithCasino.com, filwaqt li fl-1 ta' Lulju, 2014, itterminat unilateralment il-Ftehim u għalqet is-sit elettroniku www.harrycasino.com. Is-soċjetà rikorrenti spjegat li s-sit elettroniku l-ġdid, MrSmithCasino.com huwa fil-parti l-kbira tiegħu replika tas-sit www.harrycasino.com, u għalhekk interpretat l-aġir tas-soċjetà intimata bħala wieħed li kien maħsub biex jelimina r-reputazzjoni ta' HarryCasino u Harry Affiliates, filwaqt li l-klijenti jibdew jaħsbu li s-sit il-ġdid u s-servizzi offruti fuqu huma operati mill-istess intrapriża, b'tibdil biss fl-isem. Minkejja dan, fl-24 ta'

Lulju, 2014, is-soċjetà rikorrenti offriet lis-soċjetà intimata l-opportunità li jintlaħaq ftehim amikevoli bejniethom bi ħlas ta' €5.17 miljun, liema offerta ġiet rifjutata mis-soċjetà intimata, għalkemm b'ittra tal-31 ta' Lulju 2014, is-soċjetà intimata stqarret li jekk kien hemm xi danni dovuti, dawn kienu limitati għall-ammont kif ikkalkulat skont il-klawsola 8.6 tal-Ftehim, u tali klawsola ma tkoprix kumpens tat-tip *lucrum cessans.* Imma s-soċjetà rikorrenti m'aċċettatx din il-proposta, u kien għalhekk li din istitwiet il-proċeduri arbitrali, li minnhom ġie intavolat dan l-appell.

<u>Mertu</u>

4. Is-soċjetà rikorrenti istitwiet proċeduri quddiem it-Tribunal wara li bejn il-partijiet kien hemm qbil dwar il-Ftehim li permezz tiegħu s-soċjetà rikorrenti kellha tipprovdi għadd ta' servizzi lis-soċjetà intimata, partikolarment dawk marbuta mal-kummerċjalizzazzjoni tas-sit Casino White Label għas-suq Brittaniku. Il-klawsola 8.2.5 tal-Ftehim tipprovdi għat-terminazzjoni tal-istess Ftehim f'każ li xi aġenzija governattiva timponi rekwiżit ġdid jew tvarja r-rekwiżiti imposti fuq xi wieħed mill-partijiet għall-Ftehim, partikolarment fejn l-interessi kummerċjali ta' dik il-parti jistgħu jiġu affettwati negattivament b'dak it-tibdil. Is-soċjetà intimata infurmat lis-soċjetà rikorrenti li l-Ftehim bejn il-partijiet kien qiegħed jiġi tterminat b'effett mit-30 ta' Ġunju, 2014, minħabba li fl-Ingilterra kien ser jidħol fis-seħħ il-*Gambling (Licensing and Advertising) Act,* li jipprovdi li persuna li tkun ser toffri attivitajiet ta' logħob remot fl-Ingilterra, sabiex tagħmel dan irid ikollha l-liċenzja relattiva maħruġa

mill-awtoritajiet kompetenti. Is-soċjetà rikorrenti wieġbet li din il-liġi l-ġdida ma kinitx ser tidħol fis-seħħ qabel Novembru tal-2014, u sa dakinhar, il-partijiet setgħu jibqgħu joperaw fit-territorju Ingliż mingħajr il-ħtieġa li japplikaw għal tali liċenzja. F'din l-ittra, is-soċjetà rikorrenti talbet lis-soċjetà intimata ma titterminax il-ftehim bejn il-partijiet, għaliex il-klawsola 8.2.5 tal-Ftehim ma setgħetx tiġi invokata qabel id-dħul fis-seħħ tal-imsemmija liġi l-ġdida. Minkejja dan is-soċjetà intimata baqgħet tinsisti li l-Ftehim bejn il-partijiet kellu jiġi tterminat. Is-soċjetà rikorrenti spjegat li l-liġi invokata mis-soċjetà intimata daħlet fis-seħħ fl-1 ta' Novembru 2014, u l-ħtieġa li ssir applikazzjoni għal liċenzja sabiex wieħed ikun jista' jopera fis-suq Ingliż, ma daħlitx fis-seħħ qabel dik id-data. Is-soċjetà rikorrenti spjegat li in vista tal-pożizzjoni tas-soċjetà intimata li n-nuqqas ta' liċenzja kien ser ikun detrimentali għall-interessi kummerċjali tagħha, is-soċjetà intimata applikat għal liċenzja sabiex tkun tista' topera fis-suq Ingliż, u dan *ai termini* tal-*Gambling (Licensing and Advertising) Act.* Is-soċjetà rikorrenti spjegat li bħala konsegwenza diretta tad-deċiżjoni tas-soċjetà intimata li tittermina l-Ftehim, hija sofriet danni finanzjarji sinifikanti, li għalihom għandha twieġeb is-soċjetà intimata. Is-soċjetà rikorrenti spjegat li f'każ li l-Ftehim jiġi tterminat mis-soċjetà intimata abbażi tal-klawsola 8.2.5, wara d-dħul fis-seħħ tal-liġi l-ġdida fl-Ingilterra, kull applikazzjoni da parti tas-soċjetà intimata għall-akkwist ta' liċenzja taħt il-liġi Ingliża, għandha tiġi interpretata bħala manuvra li saret *in mala fede.* Is-soċjetà rikorrenti spjegat li l-mekkaniżmu għat-terminazzjoni immedjata kkontemplat fil-klawsola 8.2.5 tal-Ftehim hija suġġetta għal li jkun inkiseb parir legali speċjalizzat, li jkun jikkonferma li l-parti li tkun qiegħda

tfittex li tittermina l-Ftehim, mhijiex ser tkun tista’ teżerċita d-drittijiet jew tippresta l-obbligi tagħha wara d-dħul fis-seħħ tal-liġi l-ġdida, li tkun sejra taffettwa l-interessi kummerċjali ta’ dik il-parti.[1] Żiedet tgħid li f’dan il-każ ma jirriżultax li s-soċjetà intimata kienet kisbet xi parir legali speċjalizzat f’dan is-sens. Is-soċjetà rikorrenti spjegat li wara li ġie tterminat il-Ftehim bejn il-partijiet, is-soċjetà intimata għamlet użu mill-proprjetà intellettwali tas-soċjetà rikorrenti mingħajr awtorizzazzjoni, bil-ħsieb li teqred il-marka HarryCasino. Kompliet tgħid li din l-imġiba da parti tas-soċjetà intimata tikkostitwixxi ksur serju u intenzjonat tal-Ftehim, liema ksur ikkawża danni sinifikanti lill-operat tagħha, u li wassal għal telf ta’ qligħ u dannu irreparabbli għar-reputazzjoni tagħha. Fil-proċeduri mibdija quddiem it-Tribunal, is-soċjetà rikorrenti talbet li jiġi dikjarat u deċiż li s-soċjetà intimata naqset milli tissodisfa u tonora l-obbligi tagħha kif naxxenti mill-Ftehim bejn il-partijiet; li jiġi dikjarat li s-soċjetà intimata sofriet danni u li s-soċjetà intimata hija responsabbli għad-danni kollha sofferti mis-soċjetà rikorrenti; u li jiġu likwidati l-imsemmija danni u li s-soċjetà intimata tiġi kkundannata tħallas l-imsemmija danni, bl-imgħaxijiet u bl-ispejjeż legali kontra s-soċjetà intimata.

5. Is-soċjetà intimata wieġbet li t-talbiet tas-soċjetà rikorrenti għandhom jiġu miċħuda stante li huma infondati fil-fatt u fid-dritt. In linea preliminari, is-soċjetà intimata eċċepiet li dawn il-proċeduri għandhom jiġu ddikjarati nulli

[1] Il-Klawsola 8.2.5 ta’ dan il-Ftehim tgħid hekk: *“A Party may terminate this Agreement immediately, if: Territory’s Government Agency imposes a new requirement or varies any existing requirement (including any requirement that that Party be qualified for or hold or maintain any license, permit or approval) which in that Party’s reasonable opinion, having taken specialist legal advice prevents, or substantially prevents, that Party from continuing to exercise its rights or perform its obligations under this Agreement in the manner originally contemplated by the Parties or this Agreement or materially detrimentally affects the commercial interests of that Party, save that where it is reasonable for that Party to apply for and obtain such a license, permit or approval it does so without delay and the Agreement shall not terminate;”*

għaliex ma ġewx intavolati *ai termini* tal-klawsola 11 tal-Ftehim, li tgħid li l-partijiet għandhom ifittxu li jirrisolvu t-tilwim li jista' jkun hemm bejniethom permezz ta' negozjati bejn il-partijiet, u li huwa biss wara li jgħaddi t-terminu ta' 60 ġurnata mit-talba bil-miktub sabiex jibdew tali negozjati, li l-partijiet ikunu jistgħu jibdew proċeduri ulterjuri għas-soluzzjoni tat-tilwim bejniethom. Is-soċjetà intimata qalet li l-liġi Ingliża bl-isem '*Gambling (Licensing and Advertising) Act'* kienet fis-seħħ fiż-żmien meta hija tterminat il-Ftehim mar-rikorrenti abbażi tal-Klawsola 8.2.5. Żiedet tgħid li l-interessi kummerċjali tagħha kienu ser jiġu affettwati negattivament f'każ li hija kellha tapplika għal liċenzja ġdida taħt il-liġi Ingliża u tkompli topera taħt il-Ftehim eżistenti bejn il-partijiet. Eċċepiet ukoll li fiċ-ċirkostanzi ma kienx raġonevoli għaliha li tintalab takkwista liċenzja ġdida taħt il-liġi Ingliża u li tkompli topera taħt il-Ftehim, kif ukoll li hija ma kienet teħtieġ l-ebda parir speċjalizzat biex tittermina l-Ftehim. Qalet ukoll li hija kienet korretta meta tterminat il-Ftehim abbażi tal-klawsola 8.2.5, u hija fl-ebda ħin ma aġixxiet *in mala fede,* jew b'mod li kien ta' preġudizzju għad-drittijiet tal-proprjetà intellettwali tas-soċjetà rikorrenti. Eċċepiet ukoll li s-soċjetà rikorrenti naqset milli tispeċifika x'tip ta' danni qiegħda titlob li tingħata, filwaqt li qalet li mhux minnu li s-soċjetà rikorrenti sofriet xi danni. Is-soċjetà intimata kkonkludiet billi qalet li mingħajr preġudizzju għall-eċċezzjonijiet sollevati minnha, f'każ li jiġi stabbilit li hemm xi danni dovuta lis-soċjetà rikorrenti, dawn id-danni għandhom ikunu limitati għal dak stipulat fil-klawsola 8.6 tal-Ftehim. Il-Klawsola 8.6 tal-Ftehim tgħid illi,

> *"In the event that Betsson terminates the agreement before the agreed termination date, and Partner is not in material breach or default, then Betsson agrees to pay*

> *the Partner a revenue share on the Players on the same terms as the then current Revenue Share in place between the parties. Betsson shall then pay such revenue share for a period of twelve months following the termination."*

6. Permezz ta' lodo parzjali mogħti fid-19 ta' Novembru, 2015, it-Tribunal ċaħad l-eċċezzjoni preliminari dwar l-allegat ksur tal-proċedura eċċepit mis-soċjetà intimata, u għalhekk ipproċeda biex jisma' l-kawża fil-mertu. Mill-provi jirriżulta li s-soċjetà Green Wave Consulting AB kienet daħlet f'relazzjoni kummerċjali mas-soċjetà intimata permezz tal-Ftehim iffirmat fit-8 ta' Lulju 2011, li ġie msejjaħ '*CasinoEuro White Label Agreement'*. Permezz ta' ftehim addizzjonali ffirmat fit-22 ta' Settembru, 2011, Green Wave Consulting AB assenjat id-drittijiet u l-obbligi kollha tagħha naxxenti mill-imsemmi Ftehim lis-soċjetà rikorrenti, li topera bl-isem 'HarryCasino'. Is-soċjetà intimata kienet ittentat tittermina l-Ftehim billi l-invokat l-Artikolu 8.1 tal-Ftehim, imma s-soċjetà rikorrenti kienet sostniet li n-notifika ta' din it-terminazzjoni saret erronjament lil Green Wave Consulting AB, u għaldaqstant f'dak il-punt, il-Ftehim ġie mġedded sat-8 ta' Lulju, 2016. Imma sussegwentement s-soċjetà intimata infurmat lis-soċjetà rikorrenti li l-Ftehim kien qiegħed jiġi tterminat b'effett mit-30 ta' Ġunju, 2014 f'nofsillejl, *ai termini* tal-Klawsola 8.2.5 tal-Ftehim wara li l-Ingilterra introduċiet il-*Gambling (Licensing and Advertising) Act,* li jipprovdi li persuni li jkunu joffru attivitajiet ta' logħob remot fit-territorju Ingliż, għandhom jassiguraw li jiksbu l-liċenzja mill-awtoritajiet kompetenti. Is-soċjetà rikorrenti laqgħet għal dan billi infurmat lis-soċjetà intimata li dan l-Att kien ser jidħol fis-seħħ wara Novembru 2014, u li sa dakinhar, il-partijiet setgħu jibqgħu joperaw fit-territorju Ingliż mingħajr il-

ħtieġa li japplikaw għal liċenzja. Is-soċjetà rikorrenti talbet lis-soċjetà intimata ma tieħu l-ebda passi oħra sabiex tittermina l-Ftehim għaliex il-Klawsola 8.2.5 ma setgħetx tiġi invokata qabel id-dħul fis-seħħ tal-imsemmija liġi. Minkejja dan, is-soċjetà intimata għalqet is-sit 'Casino White Label' u tterminat ir-relazzjoni tagħha mas-soċjetà rikorrenti. Jirriżulta li l-*Gambling (Licensing and Advertising) Act* li s-soċjetà intimata invokat biex itterminat il-Ftehim, ġie fis-seħħ fl-14 ta' Mejju, 2014, u sussegwentement kumpannija oħra mill-grupp ta' kumpanniji tas-soċjetà intimata applikat għal liċenzja taħt il-*Gambling (Licensing and Advertising) Act* li kien daħal fis-seħħ.

Id-Deċiżjoni Appellata

7. Permezz tal-lodo arbitrali mogħti fid-29 ta' Awwissu, 2019, it-Tribunal iddeċieda l-vertenza li kellu quddiemu, wara li għamel is-segwenti konsiderazzjonijiet:

*"**The Facts of the Case***

These are laid out in the claim and are by and large not contested by Respondent.

Green Wave Consulting AB had entered into a contractual relationship with the Respondent company by virtue of a 'Casinoeuro White Label Agreement' dated the 8th July 2011 (hereinafter the 'White Label Agreement').

By virtue of an additional agreement dated the 22nd September 2011, Green Wave Consulting AB effectively assigned all its rights and obligations arising from the White Label Agreement to the Claimant company (which operates under the brand name 'Harry Casino').

The Respondent had attempted to terminate the agreement by giving notice under article 8.1 of the agreement, but this was repudiated by the Claimant on the basis that the notice had erroneously been given to Green Wave Consulting AB, which had been substituted by virtue of the above mentioned assignment. As a consequent result, at that point, the White Label Agreement was extended to the 8th July 2016.

Respondent subsequently informed the Claimant that it was terminating the Agreement with effect from the 30th June 2014 at 12:00pm in terms of the clause 8.2.5 on the basis of the introduction of The Gambling (Licensing and Advertising) Bill, United Kingdom, which provides inter alia *that person/s undertaking remote gaming activities in the UK would need to apply for the appropriate licence/s from the relevant Authority/ies;*

By means of a response letter dated the 12th June 2014 Claimant informed the Respondent that it was anticipated that The Gambling (Licensing and Advertising) Bill would not come into force before November 2014. As such, until such date, the Parties could continue to operate within the UK without the need to apply for the relative licence/s. Accordingly, in virtue of the same response letter, the Claimant company called upon the Respondent to refrain from taking any further steps to terminate the Agreement on the basis of the fact that Clause 8.2.5 could not be invoked until the effective date of entry into force and implementation of The Gambling (Licensing and Advertising) Bill.

Notwithstanding the intimations set out by the Claimant in its response letter, the Respondent company, by virtue of a letter dated the 25th June 2014 confirmed its intention to terminate the Agreement and to unilaterally shut down the 'Casino White Label Site'. This factually took place.

The UK Gambling (Licensing and Advertising) Bill was in force at the time that the defendant company terminated the Agreement based on clause 8.2.5. It received the royal assent on the 14th May 2014.

A 'sister company' from Respondent's group of companies proceeded to apply for a UK licence in terms of The Gambling (Licensing and Advertising) Bill.

The Arguments

Both sides filed exhaustive written arguments and it now behoves the Tribunal to list and briefly describe the arguments made, and to reach its conclusions about each such argument. As will be illustrated infra*, many of the arguments advanced by both*

sides, have turned out to be unhelpful toward the determination and solution of the issue, which, it must be said, is in reality relatively far more straight forward than Claimant postulated, and rendered a number of Respondent's counter arguments unnecessary. This notwithstanding, the Tribunal has reported these arguments as well, as will be seen also infra*.*

The case turns principally on whether the termination of the White Label Agreement was effected in conformity with the contract or not. That is the starting point and pivot of these proceedings. The second and only other issue is to decide on the consequences of the first finding. The parties produced copious evidence and made detailed submissions in respect of both issues.

Claimant

The termination of the White Label Agreement on the 30th June 2014 was premature in that the UK Gambling (Licensing and Advertising) was not to come into effect before the 1st November 2014. Consequently, the termination under 8.2.5 of the White Label Agreement is a breach of that agreement because it was given at a time when the legislation contemplated in that clause was not yet in force.

(2) Claimant does not dispute the application of clause 8.2.5 and demands that clause 8.6 should be applied in full.

Respondent

Respondent went to great pains to produce explanations in the first place to explain why the application of clause 8.2.5 was fair. Respondent made a prodigious effort to justify the material detriment which it alleges it would have suffered had it continued to support Harry Casino in the UK and went into great financial detail explaining what this would cost the Respondent. It also attempted to explain that although the UK law was not immediately effective, it had received the royal assent and was therefore law in the UK. Respondent further explained in detail that extensive preparations were required in order to meet the UK licence conditions and requirements, and that the decision to terminate had to be taken at once.

(2) Respondent agrees with this and refers to this in its submissions (besides having also made reference thereto (albeit on a without prejudice basis), in its statement of defence). It makes this statement subject to the rider "Naturally such clause 8.6 would come into play only in the event that this Tribunal concludes that the

elements of Clause 8.2.5 were not satisfied and that Betsson could not terminate by virtue of such clause."

Arbitral Panel

The Tribunal finds that the answer to this issue is found squarely in clause 8.6 of the White Label Agreement.

8.6 "In the event that Betsson terminates the agreement before the agreed termination date". *(1)* *indeed, Betsson did exactly that.*
"And Partner is not in material breach or default" *(2)* *this is in fact the case; Claimant cannot answer for the acts of the UK House of Commons.*

"Then Betsson agrees to pay (omissis) ..." *The answer to all questions of propriety, and of timeliness are all found in this clause. It is a straightforward clause, which does not require elaborate construction or interpretation. Indeed as has been consistently upheld by our Courts, the terms of a contract regulate the relationship between the parties concerned and when the language used in any term is easily understood and clear, no room is left for interpretation. In a nut-shell, by virtue of this clause Betsson reserved the right to terminate the contract at any time, whatever the reason, subject to its obligation to pay the compensation mentioned in the same clause, about which, more in the second part of the deliberations.*

Here the Tribunal notes that Claimant has been less than clear in its position. Claimant cannot challenge the correct application of 8.2.5, and accept a termination under the same clause, in one breath. This is just being pointed out as a matter of accuracy because in fact, this contradiction does not affect the above finding in any case.

It is unfortunate that both parties devoted time, energy and resources toward debating the applicability and timeliness of Clause 8.2.5, as also from Respondent's side, matters justifying the application of that clause. Clause 8.6, which takes care of all situations where Betsson terminates before time, and the Partner is not at fault, needs no justification. Clause 8.6 is clear in its application and hence, in terms of Maltese law, as confirmed by Maltese case-law, a further interpretation beyond what is clearly agreed to and established between the respective parties concerned, is not permitted. If that is what takes place, the consequences are known. All that was needed was the ascertainment that all the elements of clause 8.6 did subsist,

and all that was henceforth required was the assessment of what Respondent's decision to terminate the Agreement, was going to cost it.

It may be argued that this construction of clause 8.6 would render superfluous the existence of clause 8.2.5. Possibly this might be loose drafting. Yet the Tribunal notes that had the parties wished to somehow exempt clause 8.2.5 from the consequences of clause 8.6, a specific reservation in that sense would have been entered. There is clearly no such reservation, and consequently, if the facts surrounding the termination under said 8.2.5 fall squarely within the two parameters of clause 8.6, there is nothing left to be said.

For this reason, the Tribunal rejects Respondent's argument, that the proper invocation of clause 8.2.5 would exempt it from the consequences of clause 8.6. This is where the Tribunal feels that both sides went astray. Clause 8.6 of the Agreement is worded in such manner that there is no issue of timeliness or of propriety to be debated or considered. On the basis of the afore-mentioned clause, Respondent, reserved unto itself the right to terminate, and therefore, can quite simply terminate at any time, but when the Partner is not 'in material breach or default', Respondent faces a cost which it must pay, as a direct consequence of Respondent's decision to prematurely terminate the Agreement. In other words, Respondent does not enjoy a free ride out of the White Label Agreement under circumstances which trigger clause 8.6. The Tribunal feels that although, as already noted, this tends to make clause 8.2.5 and other similar contemplated and allowed instances of premature termination of the Agreement, useless, the concept is equitable. Clause 8.6 of the Agreement is a self-contained disposition (what may be termed as an 'umbrella clause') which kicks in when the circumstances specifically established in the said clause result and is hence not affected by, or dependant, on any other established conditions within the Agreement. Respondent is entitled to withdraw from the White Label Agreement if it feels that incoming legislation may adversely impact its business in a material way. This is not a case of force majeure*. Respondent is not OBLIGED to terminate.*

Respondent chooses to terminate because it chooses to protect its business interests. However, Claimant did not bring about any of this, and it is not equitable that Respondent should be able to quit an agreement because that is what suits its interests, and let Claimant suffer the consequences of Respondent acting in Respondent's sole interest. For respondent to exercise its right, it pays the 'price' agreed upon in the Agreement. It is fair and just that Claimant should be

compensated in these circumstances, as clearly and unequivocally established by clause 8.6 of the Agreement.

As established above, in virtue of clause 8.6 of the Agreement, the parties had jointly, a priori*, agreed to and determined Claimant's rights of redress and the enforceable consequences, should Betsson opt to terminate the Agreement before the agreed termination date. Claimant (as the successor of Green Wave Consulting AB), had willingly and voluntarily agreed to the defined 'formula' for compensation, should Betsson prematurely terminate the Agreement, and Claimant may thus not validly expect to be compensated beyond such agreed and established parameters.*

Nevertheless, merely for the sake of completeness, after having considered the evidence brought forward, the Tribunal deems that the consequences of the changes in the regulatory requirements introduced as a result of the UK Gambling (Licensing and Advertising) Act 2014, materially detrimentally affected the commercial interests of the terminating party (Betsson), when considered in the ambit of the frame-work of the existing Agreement between the parties. However, as indicated above, the Tribunal deems that the applicability of clause 8.6 of the Agreement is not dependant on the determination of this aspect, since the said clause clearly and unequivocally, establishes and curtails the remedy available to Claimant in the event that Betsson should terminate the Agreement before the agreed date of termination.

Conclusion on the matter of contractual liability

The Tribunal concludes this issue by finding that Respondent was entitled to terminate the White Label Agreement at any time and given that the Claimant was not in breach of its obligations, Respondent must compensate Claimant on the basis of and as clearly established by clause 8.6 of the Agreement.

Compensation due by the Respondent to Claimant

In this part the Tribunal shall analyse the various arguments brought forward by the parties in order to elaborate their respective positions.

Clause 8.6 reads as follows:

"In the event that Betsson terminates the agreement before the agreed termination date, and Partner is not in any material breach or default, then Betsson agrees to pay the <u>Partner a revenue share on the Players on the same terms as the then</u>

current Revenue Share in place between the parties. Betsson shall then pay such revenue share for a period of 12 months following the termination."

As some of the words in this clause are "defined terms" *it is apt to refer to such definitions at this point.*

***Revenue Share** shall mean the part of Casino result payable to Partner as the consideration under this agreement as stipulated in detail in Appendix 1 of this agreement.*

Which then requires a definition of the term "Casino Result"

***Casino Result** shall mean revenue, as described in Appendix 1 to this agreement generated by Players using the Casino White Label Site.*

Which then requires a definition of the term "Players" and "Casino White Label Site".

***Players** shall be persons registered with the Casino White Label Site.*

***Casino White Label Site** shall mean the website corresponding to Partner Domain, which website shall be operated by a Betsson Group Company.*

Which then requires a definition of the term Partner Domain.

***Partner Domain** shall mean www.harrycasino.com and www.harrycasino.co.uk which domain names are owned by Partner.*

According to appendix 1 "The Partner shall receive Partner Revenue Share equivalent to 55% of the Casino Result. *This was later raised to 60%.*

The "Casino Result" is described as follows:

"Casino Result for a month shall mean the real money revenue generated by Players (i.e. Player bets less winnings) for that month as a result of them using the Casino White Label Site after deducting all of the following costs for the same month:

Licensing costs and fees, third party royalties, and gaming tax (with approximate percentages subject to adjustment mentioned in clause 3.1; as well as deduction for bonuses and payment processing fees referred to in clauses 3.2 and 3.3).

The Tribunal shall now analyse the way this issue has been addressed by the Parties adding its views thereon.

Claimant

In calculating the compensation, it appears that there were discrepancies between the manner of its calculation by Respondent. Reference was made to the offer of €70,000 by Sam Brown, and the statement made by Alvin Abdilla that the compensation due amounted to €197,000. Claimant further notes that according to Document AX 8, revenue share for the first six months of 2014 was €135,786, and that was for half a year. Also said that Revenue for 2013 was double this sum.

Betsson have consistently applied Clause 8.6 of the Agreement in different ways in order to reduce their exposure but without ever providing a clear mathematical equation as to how they are arriving at the various and wide-ranging figures they proposed. They refer to unquestionable calculations and tagging players, yet they never presented any of the calculations or the figures with respect to the players tagged from Harry Casino. Figures they choose to rely upon, which only they have access to and which they failed to present.

As explained by Alvin Abdilla (page 23 of his testimony of the 10th October 2018) "So Harry Casino clients were tagged. So were able to pull out the data from the database. Because we had these clients tagged." *(It is based on this figure (which was not presented in these proceedings) that Alvin Abdilla came up with his application of Clause 8.6. These calculations were not presented in these proceedings, yet we know that the calculations differ to those of Sam Brown.*

*Furthermore, Betsson were fully aware and in control of their actions. They dragged their feet with the approval of the budgets; they stalled on their contractual obligation to enter into negotiations with Peak Media for the renewal of the Agreement and then when the Agreement was automatically renewed, they informed Peak Media that they would be terminating the Agreement nonetheless. This left Peak Media in a position where they could not continue the marketing initiatives due to Betsson's planned actions. As confirmed by documents submitted to these proceedings Peak Media had secured investment of between one million euro (€1,000,000) and one million two hundred thousand euro (€1,200,000) (a copy of which is included in the acts of this arbitration ARB 4175-2014 and marked "**Doc.AX5**") which funds were secured for marketing initiatives as reflected in the budgets presented by Peak Media to Betsson (a copy of which is included in the acts of this arbitration ARB 4175-2014 and marked "**Doc. AX1**").*

Had Peak Media continued the marketing initiatives, the losses suffered by Peak Media following Betsson's unilateral and illegal termination of the Agreement would

have been far greater. Betsson were well aware of this and have consistently attempted to profit off this situation. By creating a situation in which Peak Media could not continue investing in their marketing initiatives Betsson stunted Harry Casino's growth. Alvin Abdilla under cross examination himself stated that "If you don't spend any marketing obviously you will have an effect on revenues." *... They then attempted to use this situation in their favour when applying Clause 8.6 of the Agreement to bring down the amount of contractual damages.*

In terminating the Agreement in the way they did, Betsson caused irreparable damage to Harry Casino and Harry Affiliates. The message sent out by Betsson was that Harry Casino and Harry Affiliates ceased to exist. This led to a breakdown of trust with partners and players who from that point on were led to believe that they were dealing with a third party. The redirect undid all the online marketing work of the previous years. Therefore, anyone who established a business relationship with Harry Casino or Harry Affiliates, over the years would soon discover that they had ceased to exist. This could only serve to damage the player and partner confidence in the brand.

Betsson created a situation which prevented Peak Media from investing in marketing initiatives, systematically took actions which could only create distrust with Harry Casino players encouraging them to leave Harry Casino and then went on to apply Clause 8.6 by tagging those remaining players that had their accounts transferred to MrSmithCasino in order to establish an amount to pay Peak Media.

Respondent

Therefore, contrary to Peak's requests and claims, any damages that would be due to Peak by Betsson are limited, as stipulated in the said Clause 8.6, to the Revenue Share generated by players introduced by Peak and this for a period of 12 months following termination. As explained by Alvin Abdilla on the 10th October 2017, therefore more than 12 months after the termination of the Agreement in 2014, players that had been introduced by Peak were tagged. Consequently, it was a simple exercise for Betsson to calculate the actual revenue share that would be due to Peak for the 12-month period following termination, which revenue share amounts to one hundred and ninety-three thousand euro (€193,000).

In its note of submissions, in an attempt to discredit the abovementioned amount of €193,000 calculated by Betsson in accordance with the terms of Clause 8.6, Peak refers to an offer of €70,000 made by Betsson to Peak on a 'without prejudice' *basis*

prior to the commencement of these arbitral proceedings. With all due respect, Peak should have known better than to submit as evidence in these proceedings correspondence between the parties marked as 'without prejudice'*, let alone make submissions with respect to an amount that was offered on a without prejudice basis. Placing the ethical aspect of the matter aside, an offer made on a without prejudice basis is exactly that – a non-binding offer which may not be availed of by the other party so as to prejudice the offering party's position in litigation proceedings. A* 'without prejudice' *offer is put forward with the sole intention of avoiding or terminating proceedings and should not and cannot be interpreted as an admission of responsibility or as evidence. Therefore, Betsson humbly submits that this arbitral tribunal should not take cognizance of such arguments brought forward by Peak.*

Peak argues that Betsson did not provide evidence of the tagged players or of the revenue generated during this period. With all due respect, the above evidence was given by Alvin Abdilla (a financial representative of Betsson) under oath.

These same figures were not contested in that Alvin Abdilla was not cross-examined by Peak in this respect. It is an accepted principle that if a witness is not cross-examined and his testimony is not contested, such testimony is to be taken as truthful and valid. Since the above-quoted calculation was not contested by Peak it is therefore to be considered true and correct.

Notwithstanding the provisions of Clause 8.6, Peak claims to have suffered damages and is entitled to receive compensation in excess of €5 million. Peak therefore totally ignores the effects and limitations set by Clause 8.6 of the Agreement, however without providing any valid reason or justification as to why this Arbitral Tribunal should not apply Clause 8.6 and proceed to award damages beyond the equivalent of 12 months revenue share, <u>always in the event that Betsson's termination is declared invalid or premature.</u>

In any event, without prejudice to the above, even if Clause 8.6 had to be declared inapplicable, it results that Peak suffered absolutely no damages as a result of the termination of the Agreement. With all due respect, Peak's claim for damages appears to be nothing but a poor attempt at obtaining compensation in circumstances which are contemplated and regulated by the Agreement and as a result of Betsson's actions which are completely in accordance with the provisions of the same Agreement.

Peak alleges that as a result of the termination of the Agreement it suffered damages in the form of loss of income and loss of brand value in that its players and partners allegedly lost trust in Peak. It appears therefore that Peak are basing such alleged damages on the incorrect presumption that players and partners resulting from the Casino White Label Site pertain to Peak. Reference is made to the Agreement which clearly explains the modus operandi *relative to the Casino White Label Site, namely that the site is owned and operated by Betsson; that the relative Betsson brands are owned by Betsson; that the players' data is owned by Betsson; and that only the partner's domain, in this case the URL* www.harrycasino.com *and* www.harrycasino.co.uk *are owned by Peak and this for the sole purpose of being linked to the Casino White Label Site:*

1.1.13 'The Casino' shall mean www.casinoeuro.com*, a website owned and operated by a Betsson Group Company and which website Betsson is authorised to promote;*

1.1.6 'Casino White Label Site' shall mean the website corresponding to Partner Domain, which website shall be operated by a Betsson Group Company;

1.1.3 'Betsson Brands' shall mean brands, trademarks and trade names owned by Betsson or any other Betsson Group Company, including the brands 'Betsson', 'CasinoEuro', 'CherryCasino', 'Affiliate Lounge' and related brands, whether registered as trademark or not;

1.1.8 'Partner Domain' shall mean www.harrycasino.com *and* www.harrycasino.co.uk*, which domain names are owned by Partner.*

Peak's role in the accordance with the Agreement was to market and promote the Casino White Label Site. Peak would receive a revenue share, as defined in the Agreement, specifically for this purpose. Betsson would operate the website. It is extremely clear that Peak has no rights with respect to the website, Betsson's brands or the players;

6.1 "All rights and interests in and to the software, hardware, Casino, Casino White Label Site, CasinoEuro Solutions, Betsson Brands, the databases, including but not limited to Players' Data, and any copies thereof, and all documentation, code and logic, which describes and all comprises Casino White Label Site (except the rights in the Partner Domain), **shall remain the sole property of Betsson** and/or Betsson Group companies or a third party, as

the case may be. Partner shall be allowed to access necessary components on a need-to-know basis."

In fact, Peak's access to the website and the players' data was also limited in accordance with the Agreement to that which is strictly necessary for Peak to carry out its obligations, so much so that Peak was even prohibited from communicating with Betsson's players, which restriction applies unlimitedly even after the termination of the Agreement:

6.2 "Partner shall only be allowed to access necessary components of Casino White Label Site and CasinoEuro Solution strictly in order to carry out its obligations under this Agreement. Partner shall not copy, modify, allow any third party to access, reverse engineer or abuse in any other way any part or component of Casino White Label Site, CasinoEuro Solution, the databases, including Players' Data, or any other data, information, documentation, hardware or software that is made available to Partner in relation to this Agreement, whether initially or during the period of validity of this Agreement.

6.3 Through the co-operation, Partner shall have access to Players' Data necessary for Partner to carry out its obligations and rights of this Agreement. **Partner is prohibited from using such Players' Data for any other purposes other than to carry out its obligations and rights of this Agreement. In particular, Partner shall not contact players by telephone, direct mail, e-mail or by using any other means of communication, whether or not with the intention to convert them to a different website, and/or games provider or for any other reason that is not previously approved of in writing by Betsson. This obligation shall subsist after the termination of this Agreement for any reason whatsoever.**

Therefore, how can Peak claim that the players who played on the Casino White Label Site are its players or that it has any form of right over such players' data? It results clearly from the Agreement that Peak simply owned the domain name, whilst everything else was owned and controlled by Betsson. Peak's obligation in accordance with the Agreement was to generate traffic towards the site, which was owned and controlled by Betsson and which would remain in Betsson's ownership and control following termination, together with all the players.

The same applies with respect to the site's partners, referred to as affiliates. In a nutshell, affiliates are third party sites which, by agreement with another site, direct

traffic to the latter site in return for a commission or revenue share. It clearly results from the evidence submitted, that prior to entering into the Agreement Peak had not affiliate system or programme. It also results very clearly that Peak did not have its own affiliate platform, but it relied upon Betsson's, in the sense that it created another White Label site or skin named Harry Affiliates which was linked to Betsson's platform in such a way that when affiliates signed up with Harry Affiliates they would effectively be signing up with Betsson's affiliate programme and were consequently Betsson's affiliates.

*Peak's Pal Anderson and Betsson's Claire Tribert are in agreement with respect to the fact that the Harry Affiliates site is a skin linked to Betsson's platform, however Pal Anderson is nevertheless, with all due respect, under the wrong impression that, '**We owned the whole relationship with our affiliates'**. We made deals with them, we made sure that they got paid, all the payments that we made to these affiliates, they came from Harry Casino and no one else. So this relationship was made by us …'. However, referring back to Clause 6.1 of the Agreement, quoted above, '**All rights and interests in and to the … Betsson brands … the databases, including but not limited to Players' Data … shall remain the sole property of Betsson …'**. Once again, 'Betsson Brands' shall mean brands, trademarks and trade names owned by Betsson … including the brands … 'Affiliate Lounge' …'.*

Therefore, post termination of the Agreement, Peak effectively has no rights over or with respect to the players' data; the Betsson Brands, including Affiliate Lounge; or over the relative databases. Notwithstanding the fact that Peak's sites Harry Casino and Harry Affiliates were both skins linked to Betsson's platforms; notwithstanding that the Agreement clearly stipulates that Betsson's platforms are owned and operated by Betsson; notwithstanding the fact that the Agreement also stipulates clearly that Peak has no rights with respect to the databases, including players' data; notwithstanding the fact that the Agreement stipulates that post termination Peak can make no use of players data and in fact is even prohibited from making any contact with the players; and notwithstanding the fact that (as shall be elaborated further on) the Casino White Label Site had to be shut down upon termination of the Agreement; Peak nevertheless alleges that post termination it had a right to such data pertaining exclusively to Betsson.

Effectively, in terms of the Agreement, no data that existed on Betsson platforms pertained to Harry Casino – it all pertained to Betsson. Therefore, there was no data to be returned to Peak. Moreover, it is only natural and consequential that, upon

termination of the Agreement, if Peak had to, 'start up with Harry Casino again', then they had to start from zero. Betsson retained the right to everything that pertains to Betsson and in terms of the Agreement, ***everything pertained to Betsson****, with the exception of the Partner Domain.*

*Peak's only proprietary rights resulting from the Agreement are with respect to its domain (*www.harrycasino.com*) and (*www.harrycasino.co.uk*) referred to as the Partner Domain. The Agreement never intended Peak's Partner Domain to benefit from its relationship with Betsson post termination. Peak's primary obligation to generate traffic to the site was fulfilled by creating a brand, however the brand which Peak created was intended to be utilised in the context of the Agreement. Any benefit which resulted to Peak's brand post termination was incidentally advantageous to Peak, however this was also regulated post termination:*

8.7 Upon termination of this Agreement for any reason:

8.7.1 **Casino White Label Site shall be shut down;**

8.7.2 Partner shall immediately inform the Players and/or agree that Betsson informs the Players that their current login details of the Casino White Label Site may be used at the Casino (www.casinoeuro.com) or any other website owned by Betsson or by another Betsson Group Company as may be instructed by Betsson by a notice posted on the Casino White Label Site **/ website corresponding to Partner Domain.** Partner shall maintain the said notice on every page of the Casino White Label Site / website corresponding to Partner Domain clearly and prominently displayed and on pages where a login exists – next to such login. Betsson shall have the right to instruct Partner to amend the above-mentioned notice or to provide a different link, as may be instructed by Betsson. **Partner shall abide by any of such instructions. The obligation of Partner under this clause shall subsist for 6 months after termination of this Agreement.**

Therefore, the Agreement clearly stipulates that upon its termination, the Casino White Label Site ***had to be shut down*** *and that:*

(1) Peak had to inform the Players or agree that Betsson informs the Players that their current login details of the Casino White Label Site may be used at any of Betsson's sites;

(2) This had to be done by means of a notice posted on the Casino White Label Site or the ***website corresponding to the Partner Domain;***

*(3) Peak was to abide by such obligations **for a period of 6 months** post termination.*

From the evidence submitted it results that Betsson acted in accordance with its rights as resulting from the Agreement.

Betsson had the right to shut down the Casino White Label Site. Therefore, Peak cannot claim that it could have kept on operating via the same Casino White Label Site and consequently generate revenue from the site. The Agreement provides for the shutting down of the site and hence this is in no way tantamount to a breach of the Agreement. In any case, and without prejudice to the above, the only remedy available to Peak would be to seek damages as per Clause 8.6 in the event that the Agreement is found to be prematurely terminated. The re-opening of the Site is not contemplated.

Betsson also has the right to post a notice on the Casino White Label Site or on the website corresponding to the Partner Domain. Betsson in fact posted a notice on the Casino White Label Site informing players that their current login details shall no longer be used at the Casino White Label Site and may be used at a different site pertaining to Betsson. Peak was in fact aware of this and accepted that Betsson had a contractual right in this respect:

> '… The database, the ones who are signed up by Harry Casino. It was sent to thousands. So in terms of the termination as far as I understand from the contract, Betsson are to inform the players that they can now use log-in details in a different casino. No doubt about that. So what they did here is they informed the players, they can now log in on Mr Smith.'

*It is very important to note that this same clause of the Agreement grants Betsson the right to post such notice also **on a website corresponding to the Partner Domain.** This implicitly signifies that Peak had the right to link their Partner Domain (the URL* www.harrycasino.co *and/or* www.harrycasino.co.uk*) to another site of their choice, be it their own site or a third party site in the form of another white label agreement with a third party website owner.*

Nevertheless, it results from the evidence submitted that Peak failed to link their domain as aforesaid, although they were not prohibited from doing so by Betsson or the Agreement.

In fact, from the evidence submitted it results that Peak did not even attempt to start afresh with their domain. In the circumstances, Peak's allegations with respect

to damages allegedly suffered as a result of their domain not being utilised are, with all due respect, contradictory and self-defeating. On the one hand Peak is claiming damages as a result of the fact that Betsson's Casino White Label Site (to which the Partner Domain was linked) was shut down and also as a result of the fact that Betsson's players continued to play on another site owned by a company related to Betsson, whilst on the other hand Peak did not link the Partner Domain to another platform and did not even attempt to link the Partner Domain to another platform, therefore Peak cannot claim that Betsson prejudiced the Partner Domain in that no players were logging onto or playing with Peak, as Peak's Partner Domain was not available. It was not linked to a platform and consequently there was no site for players to log onto and play on. Naturally, this is being said without any prejudice to the fact that the shutting down of the Casino White Label Site and other consequent actions subsequent to the termination as described above, were all as contemplated in the Agreement.

This exact scenario was in fact contemplated and accepted by Peak's Pal Anderson, who explained that Peak could have linked the Partner Domain to another third party platform after termination of the Agreement, however he alleges that this was not done as Peak did not have enough time and post termination events were not in accordance with the Agreement:

'Pal Anderson: The White Label with Betsson they are not unique with offering their services when it comes to casino engine. There are loads of options in the market. It took roughly, I would say between 2 and 3 months to build Harry Casino brand on Betsson platform. That's the time it took roughly to build the site on that engine.

If we would have enough time we could have changed the brand the platform to the Harry Casino Brand so that when customers go in to Harry Casino, yes we would have informed them that you can log-in with your own details on Mr Smith Casino. That's ok. But you can also sign up here with a new account and continue playing. When you do the rakings on the search engines it would be Harry Casino not Mr Smith.

So given enough time, given the right circumstances the things that were supposed to be done according to the contract we would have continued with a new platform and the ranking would have continued everything we had done.'

With all due respect, nothing prevented Peak from linking their domain to another platform. In fact, no evidence was submitted indicating that they attempted to link their domain to another platform but were prevented from doing so. Peak did not

even try to link to another platform. By Pal Andersson's own admission, it only took 2 to 3 months to build their brand on the Casino White Label Site, however at the same time he states that Peak required more time. How long did Peak require? What was restricting Peak's allegedly required time? Effectively, following termination of the Agreement, Peak could have immediately linked its domain to a new platform and build up its brand again on such new platform within the 2 to 3 month period it had taken to build up its brand on the Casino White Label Site. Naturally, Peak nevertheless had to honour its obligations post termination, such as to direct Betsson's players to another site and not to communicate with any of Betssons' players.

Arbitral Panel

The Tribunal duly notes this and deplores Claimant's action in so doing. 'Without prejudice' *communications with a view to reaching an amicable settlement have no place in the records of litigation. The Tribunal discards the information as unsafe, unhelpful and inadmissible.*

After having analysed the several documents submitted, the Tribunal must concede that the only document on which it can rely is in fact document AA4 submitted by Alvin Abdilla during the hearing of the 10th October 2017.

The Tribunal does not share the Respondent's view, that when a witness is not cross-examined on a point by the adversary party, that point would be deemed to have been conceded. There are several reasons for which a party may decide against cross-examination in toto or in parte. The failure to cross-examine is therefore not an admission of the evidence in issue.

The crux of the matter here is that the structure of the agreement, which makes the Claimant practically a broker or a marketer of a facility provided in its entirety by the Respondent, renders the said Claimant quite helpless in matters such as the quantification of revenue from the operation. Unquestionably, this does not entitle the Respondent to behave in an unreasonable manner. Had the Respondent been asked in detail to submit workings of the results of the tagged players, it would have been obliged to do so. It would of course be noted, that had it been so requested and obliged, the process of verifying the authenticity of the information would have been indeed cumbersome and would have necessitated a long drawn out audit with full access to the Respondent's systems. The reality is that in such matters, the Respondent was always going to be in full control of the data, and this could not be

held against it by Claimant, simply because claimant was aware of this position from the outset. The White Label Agreement is what it is. Although in this respect, the Agreement may be perceived as very much a one-way road in the Respondent's favour, the Agreement is the agreed 'contract' willingly entered into between the parties. The role played by the Claimant in the whole environment of the White Label Agreement is quite marginal.

The reason why the Tribunal will rely on Alvin Abdilla's testimony is precisely beause it is the only evidence that there is on the point, that it is not controverted by contrary evidence, and has been confirmed under oath by the person who compiled it, and who explained how he concluded the figures. In his evidence, Abdilla confirms that the data is factual, and drawn from tagged players. It is not the result of a projection or an estimate. Abdilla was not perceived by the Tribunal to have wavered or to have committed any glaring contradictions. He was subjected to long sessions in cross-examination, but not on this particular point. He came close to losing his composure on a few occasions, but that was mainly the result of the cross-examination technique that he was being subjected to.

The Tribunal is therefore unaware of any factors which might somehow undermine his credibility as a witness.

The Tribunal takes note of this lament. Having given it due consideration the Tribunal limits itself to the finding that the basis of this position is mainly hypothetical. What may or may not have happened had the investment been implemented cannot be quantified.

The evidence shows that Respondent had long decided to terminate the White Label Agreement on the basis that it felt that the particular operation was not showing signs of growth.

Whether or not the investment would have made a difference remains moot and, in any eventuality, as previously established, the consequential damages payable by Respondent to Claimant are clearly established by and regulated, in virtue of Clause 8.6 of the agreement.

The Tribunal has quoted the Respondent's reply to these points in extenso. This because it holds that the reasoning therein expounded is in the main, irrefutable. The only part with which the Tribunal has already had occasion to reject supra is the short underlined part whereby Respondent argues that clause 8.6 would not apply if

the premature termination is for reasons contemplated in clause 8.2.5 of the Agreement.

Beyond that, the Tribunal notes that the various clauses of the White Label Agreement cited by the Respondent do indeed support Respondent's position. Respondent is correct in holding that Claimant had no rights over any part of the operation or of its components. Claimant's rights were limited to the ownership of its domain. Yet to quite an extent, even these rights were circumscribed by other rights which the Respondent held.

With regard to the closing down of the site, Respondent's rights under clause 8.7.2 of the White Label Agreement appear to fully support the stand taken by Respondent and the actions that it took. The Tribunal cannot find fault with Respondent's actions or consider that it has exceeded its rights under the White Label Agreement.

Claimant's attempts to determine its claimed value and that of its brands are irrelevant for the purpose of these proceedings, since as previously established, the compensation due by Respondent to Claimant, in the event of a premature termination of the Agreement by Respondent, is unequivocally determined and regulated by Clause 8.6 of the Agreement, which is based on the revenue share on the Players on the same terms as the then current Revenue Share in place between the parties, for a period of twelve months following the termination and hence such clause, neither requires, nor allows further interpretation beyond what was clearly agreed to between the parties.

Conclusion on the Matter of Compensation under Clause 8.6

The Tribunal concludes this part by accepting the evidence of Alvin Abdilla for the reasons referred to above and declaring that Respondent is to pay Claimant the sum of ***one hundred and ninety-seven euro (Eur 197,000).***

Non-Contractual Liability

Claimant advances the theory that this Tribunal is competent to adjudicate on matters which fall outside the strict purview of the contract. It argues that:

'Article 14 of the Arbitration Act (Chapter 387 of the Laws of Malta) (the '**Arbitration Act'**) states that 'A domestic arbitration agreement is an arbitration agreement which does not fall under Part V of this Act, and in particular under Article 1(3) of the Model Law.'

Article 55 of the Arbitration Act states that 'the Model Law shall form part of the Laws of Malta and shall be enforceable as such.' *Furthermore, Article 56 of the Arbitration Act states that '*(1) for the purposes of interpreting the Model Law, reference may be made: (a) to the works of the United Nations Commission on International Trade Law; and (b) to the preparatory documents of the Model Law.'
Article 1(3) of the Model Law defines when arbitration is to be considered as 'international arbitration', which is when in an arbitration (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; … or (c) 'the parties have expressly agreed that the subject-matter of the arbitration agreement related to more than one country.' *Then such arbitration is to be considered as an international arbitration.*

Whilst this classification may seem innocuous, its importance cannot be overstated. An arbitration agreement may relate to disputes concerning a 'defined legal relationship, whether contractual or not', *and the* travaux preparatories *indicate that this expression* 'should be given a wide interpretation so as to cover all non-contractual commercial cases occurring in practice (eg. Third party interfering with contractual relations; infringement of trademark or other unfair competition).'

The Tribunal understands that the thrust of this submission is that the current arbitration is an international arbitration, and international arbitrations allow the arbitrators to rule on matters which are also extra contractual.

Using this proposition as a springboard, Claimant has also advanced claims pertaining to alleged breaches of the Cap. 15 pertaining to intellectual property, consisting in the unlawful use of the Harry Casino's trademark, and the damage to the Harry Affiliates brand.

Respondent replied that:

'Finally, in its note of submissions Peak claims that Betsson acted in breach of the Commercial Code, specifically Article 32 dealing with unfair competition, alleging that Betsson's brand MrSmithCasino is similar to and causes confusion with Peak's brand and is hence in breach of the same Article. Firstly, Peak is factually incorrect in alleging that Mr SmithCasino is Betsson's brand. As already explained above, Mr SmithCasino is a brand of BML Group Limited (C34836) which is a separate company from the respondent company, Betsson Services Limited (C44114), and it is not a party to these proceedings. The brand in question does not pertain to the respondent company, therefore it is not the legitimate defendant with respect to

such allegations. Secondly, with all due respect, the Arbitral Tribunal is to decide these proceedings strictly in accordance with the claimant's requests and its respondent's pleas. The claimant put forward five requests, the first being a declaration by the Tribunal that Betsson did not satisfy and fulfil its obligations **as arising from the binding Agreement between the parties**, whilst the remaining four requests are for the consequential liquidation and payment of damages as a result of the first request. Therefore, Peak's request is based on an alleged failure by Betsson to fulfil its contractual obligations. None of Peak's requests are with respect to a breach of the Commercial Code and consequently this Arbitral Tribunal cannot evaluate and decide upon such allegations as it would otherwise be acting *ultra petita*. Moreover, and without prejudice to the above, the Tribunal does not have the juridical competence to decide upon such a claim as Clause 11 of the Agreement refers to Arbitration with respect to any disputes relating to the Agreement. The Agreement does not make reference to the Commercial Code and any breach of the same Code is not a dispute which relates to the Agreement.'

On the matter posited by the Claimant that this arbitration is an international arbitration subject to the model law, which allows for an extensive interpretation of a tribunal's powers, the Tribunal remains unconvinced. One must inter-alia *consider that the original Agreement did contain an international element as Green Wave was a Swedish company. This foreign element was nevertheless eliminated by virtue of the assignment to the present Claimant which is a Maltese company.*

Reference is also being made to the indicated 'relief or remedy sought' by Claimant in virtue of these proceedings, whereby it requested this Tribunal: 'to decide and declare that the respondent company did not satisfy and fulfil its obligations <u>as arising from the binding Agreement between them</u>' *(underlining being made by the Tribunal for emphasis purposes). The aforesaid is clearly the basis of Claimant's claim in virtue of these proceedings, since the subsequent 'requests' are the direct outcome/consequence thereof, namely: the declaration that as a result thereof, Claimant suffered damages, the declaration that the Respondent is responsible for the said damages, the liquidation of the said damages and the order for Respondent to pay such liquidated damages to Claimant.*

Moreover, as results from the respective exchanges between the parties prior to the 'escalation' to these proceedings and particularly from Claimants' Notice of Arbitration and its Statement of Claim, which are obviously the basis of and circumscribe its claims to be investigated and determined by this Tribunal, it is

evident that Claimant's grievance is based on the fact that it is claiming that it suffered significant financial damages 'as a direct consequence of the respondent company's unilateral and unlawful decision to prematurely terminate the Agreement'.
The alleged breaches related to the operation of the Mr SmithCasino brand, are evidently not deemed to be a 'direct consequence' *of Respondent's decision to terminate the Agreement.*

Moreover, as established above, Claimant's assertion that Respondent's decision to prematurely terminate the Agreement should be deemed as an unlawful act, has been rejected, since it results that Respondent acted within the parameters of the rights granted to it, in virtue of the very same Agreement.

One must also consider the fact that the operation of the Mr SmithCasino brand does not pertain to Respondent, but to another company (BML Group Limited), which was not a party to the Agreement, nor is it a party to these proceedings and that Claimant's role in the execution and operation of the Agreement was to generate traffic to and exclusively promote, the gaming sites controlled by Betsson, that the resulting growth in subscribers/participants was for the benefit of the said gaming site (which would remain in Betsson's ownership and control following termination of the Agreement, together with all the players), that the Casino White Label Site is owned and operated by Betsson, that the relative Betsson brands and the players' data are owned by Betsson, that Claimant was expressly prohibited from contacting players (even if not intended to convert them to a different website or games provider or for any other reason that is not previously approved by Betsson – which obligation subsisted after the termination of the Agreement for any reason) and that upon termination of the Agreement for whatever reason, the Casino White Label Site was to be shut down.

Claimant also stated in its note of submissions that 'The repercussions to the Harrycasino brand go beyond the Harrycasino website and the Agreement.' *Also bearing in mind that the referral to these arbitration proceedings arose on the basis and strength of the Agreement, and that Claimant's contention/dispute was that Respondent did not have the right to terminate the Agreement, this Tribunal does not deem that claimant may extend its grievance* 'beyond the Agreement'.

On the basis of the aforesaid considerations and particularly: (a) that as declared by Claimant itself, its current claim for damages was based and hence dependant, on the finding that respondent's notice of termination, was in breach of respondent's

obligations arising from the Agreement, and (b) that the consequences of an early termination of the Agreement by Respondent before the agreed termination date, and hence the rights pertaining to Claimant in such an eventuality, were specifically and clearly, jointly established and agreed to between the parties, in virtue of the very same Agreement, the Tribunal deems that the 'claim' in respect of an alleged breach of Articles 32 and 32A of the Commercial Code, do *not fall within the remit of these proceedings and may thus not be adhered to.*

All of this is obiter and being placed on record in the Tribunal's attempt to demonstrate that it has taken note and addressed all the issues raised.

The solution of the issue is found in the foregoing parts of this award, which have found that Respondent acted within the terms of the White Label Agreement and did not exceed its rights in so doing. It had specifically worded rights enabling it to act in the manner that it acted. Claimant invested Respondent with these rights by virtue of the White Label Agreement and may not now be heard to complain because those rights were in fact exercised. The legal maxim 'volenti non fit iniuria' *applies with full force here.*

Peak Media Valuation

A considerable part of the Claimant's submissions is dedicated to a valuation of the company, including its intellectual property. The Tribunal confesses to some surprise at this. The Tribunal can only interpret this as an attempt by Claimant to claim damages amounting to the value of the operation. Claimant cites figures in excess of five million euro in the various models presented as representing the value of the company.

The Tribunal is somewhat perplexed in that, as seen above, Claimant accepted the application of clause 8.6 and even stated in its submissions that 'Clause 8.6 needs to be applied in full.' *As results from the Agreement, nowhere does that clause entertain the notion of a valuation of the company or of the operation. As already seen, clause 8.6 is concerned with revenue sharing for a period of twelve months from termination.*

Claimant's exercises and arguments, in its attempt to determine its claimed value and that of its brands and the aspect of the applicable methodology for ascertaining such value, are not relevant for the purpose of these proceedings, since as established above, the applicable 'formula' for compensation due by Respondent to Claimant, in the event of a premature termination of the Agreement by Respondent,

was clearly agreed to, determined and regulated by Clasue 8.6 of the Agreement, which is simply based on the revenue share on the Players on the same terms as the then current Revenue Share in place between the parties, for a period of twelve months following the termination. From the foregoing it is clearly apparent that Claimant's exercise in this respect was not of relevance or assistance for the purpose of the determination of these proceedings.

Conclusion

In view of the foregoing the Tribunal disposes of the Arbitration in the following manner:

1. *It cannot issue a finding against Respondent for having failed to satisfy and fulfil its obligations as arising from the binding Agreement between the Parties. The Tribunal has not found any wrongdoing in this respect, on the part of the Respondent.*
2. *The Tribunal does however find that the provisions of Clause 8.6 of the White Label Agreement are applicable to this case.*
3. *Due to the finding in paragraph 1 of this* decide *and for the reasons provided above, the Tribunal does not award damages arising out of breach of contract.*
4. *The Tribunal does however find that through the application of Clasue 8.6 of the White Label Agreement, the Respondent is to pay compensation under that clause unto Claimant which the Tribunal is liquidating in the amount of one hundred and ninety-seven thousand euro (Eur 197,000).*
5. *In line with the more recent judgments on the matter of interests in respect of claims* in illiquidis*, the Tribunal finds that the amount in any case due to Claimant was known to the Respondent from the beginning of this dispute, that the computation of the relative amount due on the basis of Clause 8.6 of the Agreement depended exclusively on Respondent's input and that whilst Respondent itself invoked the applicability of clause 8.6 of the Agreement in its defence, it concurrently claimed that no amount was due to Claimant, and that hence, interest at the applicable rate of eight percent (8%)* per annum *is therefore to be applied in respect of the afore-mentioned sum of one hundred and ninety-seven thousand euro (Eur 197,000) and thus payable by Respondent to Claimant, with effect from the filing of the statement of claim, being the 11th November 2014 to the date of effective payment.*
6. *On the matter of costs, the Tribunal notes that whilst the Claimant has been 'successful' in its claim, the compensation awarded, represents a small*

percentage of Claimant's expectations (circa 4%) as well as the fact that, Respondent primarily pleaded that no amount was due to Claimant and that the quantification of the amount due on the basis of article 8.6 of the Agreement was dependant on Respondent's input. The Tribunal therefore holds that costs of this arbitration, as per taxed-bill of costs issued by the Malta Arbitration Centre which is being attached hereto and marked as document 'MAC1', are to be borne, as to eighty percent (80%) by Claimant and twenty percent (20%) by Respondent.

L-Appell

8 Is-soċjetà rikorrenti ppreżentat l-appell tagħha fid-29 ta' Ottubru 2016, fejn talbet lil din il-Qorti sabiex,

"... jogħġobha tirriforma s-sentenza fl-ismijiet ***Peak Media Limited (C 53617)*** **vs** ***Betsson Services Limited (C 44114)*** *Arbitraġġ numru 4175/2014 deċiża nhar id-29 ta' Awwissu 2019 iżda notifikata lis-soċjetà appellanta nhar il-15 ta' Ottubru 2019, billi filwaqt li tikkonferma l-punti tnejn (2) u ħamsa (5) fil-Konklużjoni tad-Deċiżjoni hawn appellata; tirriforma l-punt erbgħa (4) fil-Konklużjoni tad-deċiżjoni fis-sens li ssib lis-soċjetà appellata responsabbli ta' kumpens li jeċċedi l-ammont ta' €197,000, u li fin-nuqqas ta' dan, tikkonferma l-ammont ta' €197,000 stabbilit mid-Deċiżjoni; tirrevoka, tħassar u tannulla l-kumplament tas-sentenza u ċioe l-ewwel (1) punt, it-tielet (3) punt u s-sitt (6) punt fil-Konklużjoni tad-Deċiżjoni billi konsegwentement tilqa' l-aggravji mressqa, tilqa' t-talbiet kollha tas-soċjetà appellanta u tgħaddi sabiex tiċħad l-eċċezzjonijiet kollha tas-soċjetà intimata fl-intier tagħhom bl-ispejjeż taż-żewġ istanzi kontra s-soċjetà appellata.*

Bl-ispejjeż taż-żewġ istanzi kontra s-soċjetà appellata."

9. Is-soċjetà appellanta tgħid li tħossha aggravata bid-deċiżjoni tat-Tribunal u tissolleva għadd ta' aggravji: (i) li t-Tribunal għamel interpretazzjoni żbaljata tal-klawsola 8.6 tal-Ftehim meta kkonkluda li d-danni kuntrattwali jammontaw

għal €197,000; (ii) li t-Tribunal wasal għal konklużjoni żbaljata wkoll meta filwaqt li rrikonoxxa l-applikabilità tal-klawsola 8.6 tal-Ftehim (White Label Agreement), u llikwida l-kumpens li għandu jitħallas fl-ammont ta' €197,000, fl-istess waqt naqas li jiddeċiedi dwar u jillikwida d-danni kollha mitluba fit-tieni u t-tielet talbiet tal-*Istatement of Claim* tas-soċjetà appellanta, inkluż id-danni extra-kuntrattwali; (iii) it-Tribunal ma kienx raġonevoli fid-deċiżjoni tiegħu dwar l-ispartizzjoni tal-ispejjeż.

10. B'riferiment għall-ewwel aggravju tagħha li jolqot il-kwistjoni tad-danni kuntrattwali, is-soċjetà appellanta tgħid li t-Tribunal ma seta' qatt jaċċetta u jagħmel bħala tiegħu l-evidenza mogħtija minn Alvin Abdilla u b'hekk jiddeċiedi li s-soċjetà appellata għandha tħallas l-ammont ta' €197,000 f'danni u dan għaliex skont is-soċjetà appellanta, tul il-proċeduri arbitrali, is-soċjetà appellata applikat konsistentement id-dispożizzjonijiet tal-klawsola 8.6 b'mod stort u erronju u b'mod li jħares l-esiġenzi tagħha, mingħajr ma pprovdiet il-metodoloġija u l-formula matematika sabiex turi kif waslet għaċ-ċifra tad-danni kuntrattwali b'mod trasparenti. Is-soċjetà appellanta tgħid li kienet is-soċjetà appellata stess li qalet li fil-31 ta' Lulju, 2014 kienet għamlet kontro-offerta ta' €70,000, liema ammont kien ġie kkalkolat minn rappreżentant tagħha, Sam Brown, u li kien bl-applikazzjoni tal-istess formula matematika, li fil-proċeduri arbitrali s-soċjetà appellata offriet is-somma ta' €197,000, li kienu l-bażi tal-likwidazzjoni li għamel it-Tribunal. Is-soċjetà appellanta qalet li s-soċjetà appellata waslet għal riżultati ferm differenti minkejja li applikat l-istess formula matematika fiż-żewġ istanzi. Qalet ukoll li jekk wieħed jaqra l-kontroeżami ta' Alvin Abdilla, wieħed jirrealizza li dan lagħab bin-numri għall-

gwadann tas-soċjetà appellata, u dan naqas milli juża l-istess metodoloġija għall-istess xenarju u binarju, bil-konsegwenza li ma kienx hemm *constant* fil-metodoloġija u għalhekk ir-riżultat mogħti ma kienx wieħed 'reali'. Is-soċjetà appellanta għamlet riferiment għax-xhieda mogħtija mir-rappreżentant tagħha Anders Wikner, li spjega b'mod analitiku l-metodoloġija implimentata mis-soċjetà appellata, li fil-fehma tas-soċjetà appellanta wasslet għal riżultat stort, għaliex li kieku kienet ġenwina u żammet metodoloġija waħda u kostanti, ir-riżultat kien ikun ferm differenti. Is-soċjetà appellanta tgħid ukoll li s-soċjetà appellata naqset milli tagħti kalkoli dwar kif waslet għat-*tagged players* ta' HarryCasino, u minkejja li hija s-soċjetà appellata biss li għandha aċċess għal din l-informazzjoni, tali informazzjoni baqgħet qatt ma ġiet ippreżentata. Is-soċjetà appellanta tgħid li għalhekk it-Tribunal adotta bħala tiegħu l-informazzjoni mogħtija lilu minn Alvin Abdilla, mingħajr verifiki ulterjuri dwar kif saret din il-komputazzjoni. Is-soċjetà appellanta qalet li t-Tribunal kien ferm leġġer meta kkonkluda li l-istruttura tal-Ftehim kienet waħda fejn hija kienet qiegħda taġixxi bħala sensara jew *marketer* tal-faċilità pprovduta mill-appellata, u għalhekk is-soċjetà appellanta ma kellha l-ebda kontroll fuq il-kwantifikazzjoni tad-dħul iġġenerat mis-soċjetà appellata u li fuqu kellha ssir il-komputazzjoni tad-danni li għandhom jitħallsu lilha. Is-soċjetà appellanta qalet li t-Tribunal ħa l-eħfef triq u għadda biex jiddeċiedi fuq l-ammont ta' danni kif ippreżentati mis-soċjetà appellata u llikwidati minnha stess, mingħajr ma analizza jew ikkalkula huwa stess iċ-ċifri ppreżentati mis-soċjetà appellata. Is-soċjetà appellanta tgħid li mhuwiex minnu li x-xhieda li ngħatat minn Alvin Abdilla ma kinitx kontradetta, għaliex lil dan ix-xhud sarlu kontroeżami fit-tul,

minn fejn ħareġ ċar li fejn jaqbillu dan uża metodoloġija partikolari u fejn jaqbillu uża oħra. Żiedet tgħid li din il-metodoloġija ġiet kontradetta minn dak li xehed Aders Winker, li bix-xhieda tiegħu wera li s-soċjetà appellata ma kinitx leali fil-metodi li applikat biex waslet għal tali ċifri. Qalet ukoll li dan l-aspett ġie skartat kompletament mit-Tribunal fid-deċiżjoni mogħtija minnu, meta kellu jkun ovvju li fil-matematika użata kellu jkun hemm metodoloġija waħda u kostanti, b'tali mod li r-riżultat mogħti ma jħalli lok għall-ebda interpretazzjoni. Il-pern ta' dan l-aggravju tal-appellanta huwa li fil-fehma tagħha, is-soċjetà appellata ppreżentat ċifra li t-Tribunal adotta u għamel bħala tiegħu mingħajr raġuni valida u mingħajr ma vverifika dan l-ammont, filwaqt li warrab il-fatt li kien hemm ineżattezzi matematiċi fil-kalkolu adoperat mis-soċjetà appellata, u b'hekk ingħatat ċifra storta u skorretta. Is-soċjetà appellanta qalet li mid-dokument AX8 esebit, jirriżulta li r-*revenue share* għall-ewwel sitt xhur tal-2014 kien ta' €135,876, u li kellu wieħed jipproġetta dan l-ammont fuq sena sħiħa, kien jasal għal *revenue share* ta' €271,752. Żiedet tgħid li dan jikkombaċja mal-*projections* tar-*revenue share* totali għas-sena ta' wara t-terminazzjoni tal-Ftehim, li ġew esebiti minnha u li saru bi qbil bejn iż-żewġ partijiet fil-kawża meta dawn ġew biex jinnegozjaw it-tiġdid tal-Ftehim u fejn kien hemm qbil li r-*revenue share* kellu jinħadem fuq 60% tar-*revenue* totali. Qalet li l-*actual revenue* totali dovut lilha fl-2013 kien ta' €447,959 kif ikkonfermat fl-*audited financial statements* għall-2013, u għalhekk kieku wieħed kellu jistrieħ fuq l-*audited financial statements* għas-sena 2013, l-ammont ta' danni kuntrattwali kellu jkun ta' €447,959. Is-soċjetà appellanta tgħid li min-naħa tagħha hija ressqet evidenza korraborattiva dwar il-mod kif

għandhom jinħadmu d-danni skont il-klawsola 8.6 tal-Ftehim, liema evidenza twarrbet mit-Tribunal, li minflok għażel li jieħu l-eħfef triq mingħajr ma jidħol fi kwistjoni ta' matematika. Qalet li għalhekk it-Tribunal ma kienx korrett meta qal li l-ammont ta' €197,000 huwa l-ammont ta' danni li għandhom jiġu likwidati *'because it is the only evidence that there is on this point, that it is not controverted by contrary evidence',* meta mill-atti tal-arbitraġġ jirriżulta li s-soċjetà appellata kienet illikwidat id-danni b'mod li mhuwiex konsistenti, għaliex drabi oħra qalet li l-ammont ta' danni li għandu jitħallas lis-soċjetà appellanta kien ta' €70,000. Is-soċjetà appellanta qalet li t-Tribunal ma ta l-ebda spjegazzjoni dwar kif adotta dawn id-danni u għamilhom tiegħu, u qalet li f'dan ir-rigward iż-żewġ partijiet ressqu provi u korrispondenza li għaddiet bejn il-partijiet mingħajr preġudizzju, u għalhekk it-Tribunal ma kellu l-ebda bażi għalfejn jiskarta xi prova u jadotta oħra. Is-soċjetà appellanta qalet li għalhekk din il-Qorti għandha ssib lill-appellata responsabbli għad-danni kuntrattwali arrekati lilha kaġun tat-terminazzjoni prematura tal-Ftehim f'ammont ferm ogħla minn dak li ġie kkwantifikat mit-Tribunal.

11. B'riferiment għat-tieni aggravju sollevat minnha, is-soċjetà appellanta tgħid li t-Tribunal wasal għal konklużjoni legali żbaljata meta filwaqt li rrikonoxxa l-applikabilità tal-Klawsola 8.6 tal-*White Label Agreement,* u llikwida l-kumpens dovut lilha fl-ammont ta' €197,000, fl-istess waqt naqas li jiddeċiedi u jillikwida d-danni kollha mitluba fit-tieni u t-tielet talbiet tal-*istatement of claim* tal-appellanta, inkluż id-danni extra-kuntrattwali. Żiedet tgħid li minkejja li s-soċjetà appellata kellha kull dritt li tittermina l-Ftehim bejn

il-partijiet, dan ma jfissirx li s-soċjetà appellata aderiet mal-obbligi u l-kundizzjonijiet kollha tal-Ftehim, u huwa dan in-nuqqas li jirrendi lis-soċjetà appellata responsabbli għall-ħlas tad-danni, kemm dawk kuntrattwali kif ukoll dawk extra-kuntrattwali. Tgħid li t-Tribunal kien żbaljat meta qal li t-tentattivi li saru minnha sabiex tistabbilixxi l-valur tal-marki kummerċjali tal-Betsson, huma irrilevanti għall-iskop ta' dawn il-proċeduri, għaliex id-danni li jridu jitħallsu huma regolati bil-Klawsola 8.6 tal-Ftehim. Tgħid li skont l-istess Ftehim, it-terminazzjoni hija mingħajr preġudizzju għad-drittijiet miksuba minn kull wieħed mill-partijiet matul il-perijodu ta' validità tal-Ftehim. Tgħid li dan ifisser li l-partijiet ħallew id-drittijiet tagħhom fermi u salvi għal kull eventwalità fil-perijodu ta' validità tal-Ftehim, u d-danni extra-kuntrattwali sofferti minnha jinkludu l-fatt li hija spiċċat f'pożizzjoni li ma setgħetx tkompli l-inizjattivi tal-*marketing* tagħha minħabba l-pjanijiet u l-aġir tas-soċjetà appellata; li hija rnexxielha tattira investiment ta' bejn miljun u 1.2 miljun euro maħsuba għal skopijiet ta' *marketing* u li l-appellata ppruvat tapprofitta ruħha minn din is-sitwazzjoni; li minħabba s-sitwazzjoni maħluqa mis-soċjetà appellata, hija ma setgħetx tibqa' tinvesti f'inizjattivi ta' *marketing,* u għalhekk waqaf it-tkabbir ta' HarryCasino. Qalet li dan ġie ammess minn Alvin Abdilla li waqt il-kontroeżami tiegħu stqarr li jekk wieħed jieqaf jinvesti u jonfoq fuq il-*marketing,* wieħed ser jara effett negattiv fuq id-dħul tal-kumpannija. Is-soċjetà appellanta qalet li kienet is-soċjetà appellata li bdiet twassal il-messaġġ li l-marki Harry Casino u Harry Affiliates m'għadhomx jeżistu, u dan l-aġir wassal għal nuqqas ta' fiduċja da parti tal-imsieħba u l-*players,* li minn dak il-mument 'il quddiem ħadu l-impressjoni li kienu qegħdin jinnegozjaw ma' terza

persuna, b'tali mod li x-xogħol ta' *marketing* li kien sar sfuma fix-xejn, u kull min fis-snin preċedenti stabbilixxa relazzjoni ma' HarryCasino u Harry Affiliates, sab li dawn m'għadhomx jeżistu. Is-soċjetà appellanta qalet li dan ikkawżalha dannu fir-rigward tal-*brand* ikkreata u kkultivata minnha, u li hija ma kellhiex l-opportunità li ssalva għaliex l-appellata ħadet *over* is-sitwazzjoni u tat lill-*players* x'jifhmu li kien hemm *take-over,* meta fil-fatt il-*brand* u x-xogħol kollu li sar mis-soċjetà appellanta ġew ikkanċellati ħesrem. Is-soċjetà appellanta qalet ukoll li s-soċjetà appellata ħolqot sitwazzjoni fejn Peak Media ma setgħetx tinvesti f'inizjattivi ta' *marketing* u sistematikament ħadet azzjonijiet li kkreaw nuqqas ta' fiduċja fir-rigward ta' *players* ta' Harry Casino, li ġew imħeġġa jitilqu lil Harry Casino. Is-soċjetà appellanta żiedet tgħid li *ai termini* tal-klawsola 8.7.2 tal-Ftehim, hija kellha l-obbligu tinforma lill-*players* jew inkella tilħaq ftehim mas-soċjetà appellata sabiex tkun hi li tinforma lill-*players* li d-dettalji personali tagħhom għal-*login* fuq is-sit Casino White Label jistgħu jintużaw fuq www.casinoeuro.com, jew fuq kull sit ieħor tas-soċjetà appellata. Qalet li minkejja dan, l-appellata injorat l-obbligi tagħha taħt il-klawsola 8.7.2 tal-ftehim, u fit-30 ta' Ġunju 2014, mingħajr kunsens tas-soċjetà appellanta, unilateralment ħadet id-deċiżjoni li tirridirezzjona l-*websites* www.harrycasino.com u www.harrycasino.co.uk għal www.mrsmithcasino.co.uk. Qalet li dan l-aġir mhux biss jikser l-obbligazzjonijiet assunti mill-appellata skont it-termini tal-Ftehim, iżda jikser ukoll l-artikoli 32 u 32A tal-Kodiċi Kummerċjali. Is-soċjetà appellanta qalet li s-soċjetà appellata għażlet li timxi b'dan il-mod sabiex l-obbligu tagħha li tħallas ir-*revenue share* għal perijodu ta' sena wara t-terminazzjoni tal-ftehim, jiġi

mxejjen b'detriment finanzjarju għas-soċjetà appellanta. Is-soċjetà appellanta kompliet tgħid li kien hemm danni extra-kuntrattwali li ġew sofferti minnha li huma tip ta' danni ben diversi u distinti mill-kumpens ikkontemplat taħt il-klawsola 8.6 tal-Ftehim, u t-Tribunal ma ħa l-ebda konsiderazzjoni tagħhom. Żiedet tgħid li d-danni likwidati għandhom ikunu marbutin b'*nexus* ta' kawża u effett mal-vjolazzjoni u għandhom ikunu konsegwenza diretta u immedjata ta' dik il-vjolazzjoni, u bħala tali riżarċibbli. Is-soċjetà appellanta tgħid li hija ġabet provi biżżejjed fir-rigward tad-danni extra-kuntrattwali arrekati lilha, u minkejja li tistrieħ fuq il-provi miġjuba minnha quddiem it-Tribunal, dawn ma swew għalxejn għaliex it-Tribunal iddeċieda li tali ksur mhux riżultat dirett jew konsegwenza diretta tad-deċiżjoni tas-soċjetà appellata biex tittermina l-Ftehim. L-appellanta qalet li bħala konsegwenza diretta tat-terminazzjoni tal-Ftehim, hija sofriet danni kuntrattwali u extra-kuntrattwali, u f'dan il-każ japplika l-artikolu 1125 tal-Kodiċi Ċivili, li jistipula li kull min jonqos li jeżegwixxi obbligazzjoni li huwa jkun ikkuntratta, huwa obbligat li jħallas id-danni. Tgħid li l-liġi mkien ma tistipula li min jitlob il-ħlas ta' penali skont il-kuntratt, ma jistax jitlob ukoll il-ħlas tad-danni. Kompliet tgħid li fil-ġurisprudenza tagħna huwa aċċettat li l-fatt dannuż li minnu toriġina l-azzjoni akwiljana tavvera ruħha meta wieħed jagħmel att volontarjament u jonqos li jipprevedi l-effett dannuż ta' dak l-att meta l-effett seta' jiġi evitat. Qalet ukoll li fil-ġurisprudenza tagħna huwa aċċettat li jiġu likwidati danni kuntrattwali kif ukoll penali fl-istess deċiżjoni. Is-soċjetà appellanta qalet li min-naħa tagħha hija ppruvat l-eżistenza, il-kwalità u l-kwantità tad-danni sofferti minnha, u għar-raġunijiet spjegati, kemm fil-proċeduri arbitrali kif ukoll fin-nota ta' sottomissjonijiet

tagħha, hemm raġunijiet validi fil-liġi li jagħtu sostenn lil din il-pretensjoni tagħha. Kompliet tgħid li hija stabbiliet bil-provi li hemm ness bejn it-terminazzjoni tal-Ftehim u d-danni arrekati lilha, u m'hemm ebda inkompatibbilità fit-talbiet tagħha għaliex ladarba d-danni ġew stabbiliti u ppruvati, m'hemm xejn li jżommha milli titlob il-ħlas tad-danni, kemm dawk kuntrattwali kif ukoll dawk extra-kuntrattwali.

12. B'riferiment għat-tielet aggravju tagħha, is-soċjetà appellanta tgħid li hija ħassitha aggravata mill-parti tal-lodo arbitrali li ddeċidiet li l-ispejjeż tal-arbitraġġ skont it-*taxed bill of costs* għandhom jinqasmu kwantu għal 80% għandhom jitħallsu minnha, u kwantu għal 20% mis-soċjetà appellata. Qalet li ladarba t-Tribunal sab li d-dispożizzjonijiet tal-Klawsola 8.6 tal-White Label Agreement huma applikabbli għall-każ odjern u għalhekk hija obbligata tħallas l-ammont ta' €197,000 f'kumpens likwidat mill-istess Tribunal, u ladarba t-Tribunal stess ikkonkluda li r-rikorrenti kienet "*successful in its claim",* dan ifisser li s-soċjetà appellata għandha tinżamm responsabbli għall-ispejjeż kollha, fid-dawl tal-artikolu 15(2) tal-Att dwar l-Arbitraġġ, li jipprovdi li normalment il-parti telliefa tiġi kkundannata għall-ispejjeż. Is-soċjetà appellanta kompliet tgħid li għal din ir-regola ġenerali hemm *caveat* li jgħid li t-Tribunal tal-Arbitraġġ jista' jaqsam l-ispejjeż bejn il-partijiet jekk dan jistabbilixxi li l-qsim f'ishma jkun raġonevoli, wara li wieħed jevalwa ċ-ċirkostanzi kollha tal-każ, filwaqt li s-subartikolu (2) iżid li l-ispejjeż tar-rappreżentanza u l-assistenza legali għandhom jiġu stabbiliti mit-Tribunal wara li dan iqis iċ-ċirkostanzi kollha tal-każ u jistabbilixxi liema parti għandha ssofri dawk l-ispejjeż, jew jaqsam dawk l-ispejjeż jekk iqis li tali qsim ikun raġonevoli.

Is-soċjetà appellanta qalet li konsegwenza ta' dan, it-Tribunal għandu diskrezzjoni kważi totali li jaqsam l-ispejjeż legali kif jidhirlu xieraq, għajr għal-limiti li timponi fuqu r-raġonevolezza. Żiedet tgħid li minkejja li teżisti tali diskrezzjoni, għal dak li jirrigwarda spejjeż, il-prinċipju ġenerali jibqa' li min jitlef jissoporta l-ispejjeż. Qalet li in vista ta' dan, mhux raġonevoli li jingħad li l-ispejjeż f'din il-kawża għandhom jinqasmu 80% mill-parti rebbieħa u 20% mill-parti telliefa. Kompliet tgħid li d-deċiżjoni tat-Tribunal ma tagħmel l-ebda distinzjoni bejn id-drittijiet dovuti lit-Tribunal u l-ispejjeż legali, tenut kont li fil-każ odjern il-parti rebbieħa ser tispiċċa tagħmel telf mill-arbitraġġ li kien aġġudikat favuriha. Tgħid ukoll li din id-deċiżjoni ma tagħtix motivazzjoni u raġuni għal kif it-Tribunal wasal għall-ispartizzjoni tal-ispejjeż tat-Tribunal, għajr għall-fehma espressa mit-Tribunal li l-pretensjoni oriġinali tagħha kienet ferm ogħla mill-ammont finalment likwidat mit-Tribunal. Is-soċjetà appellanta spjegat li meta wieħed jikkonsidra l-mod kif ġew maqsumin l-ispejjeż skont it-taxxa relattiva, u meta wieħed jikkonsidra l-ammonti mħallsa, hija ser tispiċċa mċaħħda mill-ammont 'mirbuħ' minnha f'danni likwidati mill-istess Tribunal, peress li l-imsemmija taxxa hija waħda eżorbitanti u għalhekk hija ser tispiċċa tħallas fi spejjeż dak li ġie likwidat favur tagħha. Is-soċjetà appellanta qalet li dan ma kienx l-ispirtu tad-deċiżjoni tat-Tribunal, li ddikjara li hemm danni sofferti minnha u kkawżati lilha da parti tas-soċjetà appellata.

Ir-risposta tal-appell

13. Fir-risposta tal-appell tagħha, is-soċjetà appellata qalet li d-deċiżjoni appellata hija ġusta u għandha tiġi kkonfermata minn din il-Qorti, filwaqt li l-appell intavolat minn Peak Media għandu jiġi miċħud. Qalet li l-każ odjern jittratta appell minn lodo f'arbitraġġ volontarju u għalhekk japplika għalih l-artikolu 70A (1) tal-Kap. 387, li jgħid li f'dawn il-każijiet hemm jedd ta' appell mid-deċiżjoni finali fuq punt ta' liġi li jitnissel minn deċiżjoni finali magħmula fil-proċedimenti tal-arbitraġġ. Żiedet tgħid li f'dan il-każ, l-aggravji mressqa mis-soċjetà appellanta saru fuq punti ta' fatt. B'riferiment għall-ewwel aggravju tas-soċjetà appellanta, is-soċjetà appellata qalet li dan huwa msejjes fuq l-allegazzjoni li t-Tribunal illikwida l-ammont ta' danni kuntrattwali, filwaqt li warrab l-provi ppreżentati mis-soċjetà appellanta dwar kif kellhom jiġu likwidati l-istess danni. Qalet li l-allegazzjoni tas-soċjetà appellanta li l-arbitri f'dan il-każ naqsu milli jikkonsidraw il-provi kollha prodotti fil-kompletezza tagħhom, mhux punt ta' liġi. Is-soċjetà appellata kompliet tgħid li quddiem din il-Qorti ta' reviżjoni, ma jistax jitqajjem l-aggravju li l-valutazzjoni tar-riżultanzi probatorji ma saritx kif kellha ssir mit-Tribunal.

14. B'riferiment għat-tieni aggravju tas-soċjetà appellanta, li jgħid li t-Tribunal naqas milli jiddeċiedi u jillikwida d-danni extra-kuntrattwali sofferti minnha, għaliex is-soċjetà appellata ma aderietx mal-obbligi u l-kundizzjonijiet kollha tal-Ftehim, is-soċjetà appellata tgħid li dan ukoll huwa punt ta' fatt u mhux punt ta' liġi. Is-soċjetà appellata tagħmel riferiment għad-deċiżjoni ta' din il-Qorti diversament preseduta fl-ismijiet **EuroShops Limited u Maurice**

Gruppetta *vs.* Attard & Co (Industrial) Limited, tas-17 ta' Ġunju, 2016, fejn ġew ċitati deċiżjonijiet tal-Qrati Ingliżi li stabbilew li l-kwistjoni dwar jekk hemmx ksur ta' obbligi kuntrattwali jew le, hija kwistjoni ta' fatt.

15. B'riferiment għat-tielet aggravju tas-soċjetà appellanta, is-soċjetà appellata qalet li l-kwistjoni dwar l-ispartizzjoni tal-ispejjeż hija wkoll punt ta' fatt, għaliex it-Tribunal għandu d-diskrezzjoni li jaqsam l-ispejjeż skont iċ-ċirkostanzi tal-każ.

Is-soċjetà appellata qalet li s-soċjetà appellanta naqset milli tħares id-dispożizzjonijiet tal-artikolu 70B tal-Kap. 387, jiġifieri li tidentifika l-punt ta' liġi li għandha tittieħed deċiżjoni fuqu, u li tispeċifika t-tifsira li hija tallega li hija t-tifsira korretta tal-punt ta' liġi identifikat. Is-soċjetà appellata qalet li f'dan il-każ u in vista tas-suespost, l-appell odjern huwa irritu u null inkwantu ma sarx fuq punt ta' liġi u lanqas ma ġie identifikat il-punt ta' liġi li għandha tittieħed deċiżjoni fuqu, kif ukoll ma ġietx speċifikata t-tifsira li s-soċjetà appellanta tallega li hija t-tifsira korretta tal-punt ta' liġi identifikat. Żiedet tgħid li f'kull każ, l-aggravji mressqa mis-soċjetà appellanta għandhom jiġu miċħuda. B'riferiment għall-ewwel aggravju sollevat mis-soċjetà appellanta, is-soċjetà appellata qalet li l-offerta ta' €70,000 kienet saret minnha 'mingħajr preġudizzju' u mingħajr ma saru ebda kalkoli, bil-ħsieb li jintlaħaq ftehim u jiġu evitati dawn il-proċeduri. Spjegat li fl-istadju li saret dik l-offerta, ħadd ma seta' jkun jaf kemm kienu d-danni li attwalment kellhom jitħallsu, għaliex tali kalkolu kien għadu ma sarx, u f'kull każ, abbażi tal-klawsola 8.6 tal-Ftehim, dan il-kalkolu seta' jsir biss wara t-trapass ta' tnax-il xahar mit-terminazzjoni tal-

Ftehim. Kompliet tgħid li fil-mument li saret l-imsemmija offerta, dan it-terminu kien għadu ma bediex jiddekorri, u kien għadu għadda biss perijodu qasir minn dik is-sena. Is-soċjetà appellata qalet li għalhekk għandu jirriżulta li mhuwiex minnu li l-komputazzjoni tad-danni saret b'mod li mhux konsistenti, u din l-allegazzjoni tas-soċjetà appellanta saret biss biex tiskredita l-ammont ta' danni kuntrattwali kif likwidati. B'riferiment għall-allegazzjoni li s-soċjetà appellata naqset milli tipprovdi l-metodoloġija u l-formula matematika dwar kif waslet għaċ-ċifra tad-danni kuntrattwali u l-kalkoli mħaddma minnha, is-soċjetà appellata qalet li din l-evidenza ġiet ippreżentata minn Alvin Abdilla fix-xhieda tiegħu tal-10 ta' Ottubru, 2017. Is-soċjetà appellata għamlet riferiment għax-xhieda mogħtija minn Alvin Abdilla, li qal li ċ-ċifra maħduma minnu hija bbażata fuq ċifri attwali u fuq ir-*revenue* tas-soċjetà appellata. Spjega li sar *tagging* tal-*players* ta' Harry Casino sabiex setgħet tinġabar id-*data* relattiva. Is-soċjetà appellata għamlet riferiment għall-*projections* li s-soċjetà appellanta ppreżentat bħala provi korraborattivi, u tgħid li wieħed ma jistax jistrieħ fuq *projections* meta s-soċjetà appellata stess ippreżentat il-kalkoli bbażati fuq data fattwali. Tgħid li f'dan ir-rigward it-Tribunal għamel analiżi korretta tas-sitwazzjoni meta qal li d-data ppreżentata minn Abdilla hija fattwali, u miġbura minn *tagged players,* filwaqt li la hija bbażata fuq stimi u lanqas fuq *projections.* It-Tribunal qal ukoll li Abdilla ma kkontradixxiex lilu nnifsu, u ġie meqjus li huwa xhud kredibbli. Qalet li għalhekk jirriżulta ċar li t-Tribunal warrab il-*projections* ippreżentati mis-soċjetà appellanta, għaliex lit-Tribunal irriżultalu wkoll li s-soċjetà appellata spjegat fit-tul u fid-dettall dwar kif waslet għaċ-ċifra tad-danni kuntrattwali, filwaqt li kienet is-soċjetà appellanta li

naqset milli tikkontesta ċ-ċifri ppreżentati mis-soċjetà appellata fir-rigward tat-*tagged players.*

16. B'riferiment għat-tieni aggravju tas-soċjetà appellanta, is-soċjetà appellata tgħid li d-deċiżjoni tat-Tribunal kienet ċirkoskritta mit-talbiet li saru mis-soċjetà appellanta stess, u f'dan il-każ l-ewwel talba tas-soċjetà appellanta kienet sabiex it-Tribunal jiddeċiedi li s-soċjetà appellata naqset milli tonora l-obbligi tagħha naxxenti mill-Ftehim li jorbot lill-partijiet. Qalet li għalhekk jirriżulta li t-talba tas-soċjetà appellanta kienet speċifikament u unikament dwar il-Ftehim ta' bejn il-partijiet abbażi tal-fatt li s-soċjetà appellata naqset milli tonora l-obbligi kuntrattwali tagħha. It-talbiet l-oħra tas-soċjetà appellanta kienu għall-eventwali likwidazzjoni u ħlas tad-danni sofferti bħala riżultat ta' dak li ġie mitlub fl-ewwel talba, u dan ifisser li l-pretensjonijiet tal-appellanta huma bbażati fuq ir-relazzjoni kuntrattwali bejn il-partijiet. Is-soċjetà appellata qalet li għalhekk huwa kontro-sens li s-soċjetà appellanta titlob danni extra-kuntrattwali meta t-talba primarja tagħha kif impostata hija għall-ħlas ta' danni b'riżultat ta' inadempiment kuntrattwali. Is-soċjetà appellata kompliet tgħid li l-pretensjoni għall-ħlas ta' danni extra-kuntrattwali ma setgħetx tiġi kkunsidrata mit-Tribunal jew minn din il-Qorti, għaliex id-deċiżjoni tagħhom hija marbuta mat-talbiet kif imressqa mis-soċjetà rikorrenti. Is-soċjetà appellata qalet li t-Tribunal kien ċar li mill-provi miġjuba ma jirriżulta l-ebda inadempiment kuntrattwali, u r-rimedju applikabbli għall-każ odjern huwa dak ikkontemplat bil-klawsola 8.6 tal-Ftehim, u għalhekk id-danni li għandhom jitħallsu lis-soċjetà appellanta huma dawk deskritti u limitati fl-istess klawsola, u xejn iżjed. Is-soċjetà appellata qalet li l-pretensjoni għall-ħlas

tad-danni f'dan il-każ ġejja mill-fatt li hija għażlet li tittermina l-Ftehim bejn il-partijiet qabel id-data miftiehma, u l-uniku rimedju applikabbli f'dan il-każ huwa r-*revenue share* ġenerat mill-*players* li s-soċjetà appellata għandha tħallas għal perijodu ta' tnax-il xahar wara t-terminazzjoni. Kompliet tgħid li għalhekk it-Tribunal kien korrett meta kkonkluda li "*Claimant's attempts to determine its claimed value and that of its brands are irrelevant for the purpose of these proceedings, since as previously established, the compensation due by Respondent to Claimant, in the event of a premature termination of the Agreement by Respondent, is unequivocally determined and regulated by clause 8.6 of the Agreement.*"

17. B'riferiment għad-dettalji mogħtija mis-soċjetà appellanta dwar id-danni extra-kuntrattwali allegatament sofferti minnha, is-soċjetà appellata tgħid li mhux minnu li s-soċjetà appellanta ma setgħetx tkompli bl-inizjattiva tal-*marketing* minħabba fl-aġir tas-soċjetà appellata, meta jirriżulta li s-soċjetà appellanta lanqas biss ippruvat tpoġġi d-*domain* tagħha fuq pjattaforma oħra u għalhekk ma kien hemm l-ebda *website* alternattiv li fuqu setgħu jilagħbu l-ġugaturi. Is-soċjetà appellanta allegat li hija sofriet danni meta s-soċjetà appellata ħarġet il-messaġġ li Harry Casino u Harry Affiliates m'għadhomx jeżistu, u li dan l-aġir wassal għal nuqqas ta' fiduċja bejn il-*partners* u l-*players.* Is-soċjetà appellata qalet li f'dan ir-rigward, jidher li s-soċjetà appellanta qiegħda tibbaża tali allegati danni fuq il-preżunzjoni żbaljata li l-ġugaturi u l-*partners* tal-Casino White Label Site jappartjenu lis-soċjetà appellanta, meta fil-verità mill-Ftehim ta' bejn il-partijiet jirriżulta li dan mhux il-każ għaliex l-soċjetà appellanta kienet biss proprjetarja ta' www.harrycasino.com u ta'

www.harrycasino.co.uk. Is-soċjetà appellata żiedet tgħid li skont it-termini tal-Ftehim bejn il-partijiet, hija kellha kull jedd li tagħlaq is-siti Casino White Label meta jiġi terminat il-Ftehim bejn il-partijiet u li tinforma lill-ġugaturi li jistgħu jaċċedu sit ieħor bl-istess *login details.* Is-soċjetà appellanta tgħid li r-*redirection* tas-sit elettroniku saret sabiex is-soċjetà appellata ċċaħħadha minn dak li huwa dritt u proprjetà tagħha, imma s-soċjetà appellata tgħid li f'dan ir-rigward is-soċjetà appellanta kienet biss proprjetarja tad-*domain* u dejjem setgħet tużah fuq pjattaforma oħra. Kienet għażla tas-soċjetà appellanta li ma tkomplix tagħmel użu minn dan id-*domain,* u ta' ħadd iżjed. Is-soċjetà appellata tgħid ukoll li l-każistika ċċitata mis-soċjetà appellanta b'riferiment għall-azzjoni akwiljana, hija irrilevanti għal dawn il-proċeduri għaliex il-prinċipji ġenerali li jirriżultaw minn tali ġurisprudenza jistipulaw li biex ħsara mġarrba waqt it-twettiq ta' kuntratt titqies li hija akwiljana u mhux kuntrattwali, irid jintwera li l-ħsara ma kellha x'taqsam xejn mar-relazzjoni kuntrattwali bejn il-partijiet. Tgħid li f'dan il-każ, is-soċjetà appellanta llimitat it-talbiet tagħha sabiex is-soċjetà appellata tiġi dikjarata li ma wettqitx l-obbligi tagħha taħt il-Ftehim bejn il-partijiet, u f'dan ir-rigward huwa ċar li l-bażi tal-azzjoni hija waħda kuntratttwali u minn imkien ma jirriżulta li d-danni allegatament sofferti mill-appellanta għandhom rabta ma' att delittwali jew kważi-delittwali.

18. B'riferiment għat-tielet aggravju dwar il-kap tal-ispejjeż, is-soċjetà appellata tgħid li t-Tribunal għandu l-fakoltà li jaqsam l-ispejjeż b'mod raġonevoli u skont iċ-ċirkostanzi tal-każ u fil-fatt dan hu dak li għamel it-Tribunal fid-deċiżjoni tiegħu. F'dan il-każ, minkejja li s-soċjetà appellanta tgħid li hija sofriet danni u jistħoqqilha kumpens ta' aktar minn €5 miljuni, il-

kumpens likwidat mit-Tribunal jirrappreżenta biss perċentwal żgħir ta' dak li kienet qiegħda tippretendi is-soċjetà appellanta, meta kien ċar sa mill-bidu tal-proċeduri arbitrali bejn il-partijiet, li l-uniċi danni li setgħu jitħallsu lis-soċjetà appellanta kienu dawk *ai termini* tal-Ftehim kif jirriżultaw mill-Klawsola 8.6. Is-soċjetà appellata tgħid li l-ispejjeż telgħu fl-ammont li telgħu tort tas-soċjetà appellanta, għaliex kif inhu ben magħruf, l-ispejjeż jinħadmu *ad valorem* fuq il-pretensjoni mressqa, li f'dan il-każ kienet teċċedi l-ħames miljun Euro. Is-soċjetà appellata kkonkludiet li kien għalhekk li t-Tribunal iddeċieda li l-ispartizzjoni tal-ispejjeż għandha tkun fil-proporzjon ta' 80%-20%.

<u>Konsiderazzjonijiet ta' din il-Qorti</u>

19. Qabel tgħaddi biex tikkonsidra l-aggravji mressqa mis-soċjetà appellanta, flimkien mas-sottomissjonijiet magħmula mis-soċjetà appellata fit-tweġiba tagħha, fid-dawl tal-konsiderazzjonijiet magħmula mit-Tribunal fid-deċiżjoni appellata, din il-Qorti sejra tikkonsidra l-eċċezzjoni ta' nullità tar-rikors tal-appell sollevata mis-soċjetà appellata, li ssostni li ladarba dan huwa lodo minn arbitraġġ volontarju, japplika għalih l-artikolu 70A (1) tal-Kap. 387, li jgħid li f'każ bħal dan hemm dritt ta' appell biss fuq punt ta' liġi, imma jirriżulta li f'dan il-każ, l-aggravji sollevati mis-soċjetà appellanta huma kollha fuq punti ta' fatt. Is-soċjetà appellata tgħid li s-soċjetà appellanta qiegħda tallega li fil-komputazzjoni tad-danni li għandhom jitħallsu lilha, l-arbitri skartaw u warrbu provi miġjuba mis-soċjetà appellanta, u l-kwistjoni dwar jekk l-arbitri għamlux valutazzjoni xierqa tal-evidenza prodotta quddiemhom, mhix waħda li

għandha tidħol fiha din il-Qorti ta' reviżjoni. Barra minn hekk is-soċjetà appellata tgħid ukoll li *ai termini* tal-artikolu 70B tal-Kap. 387, is-soċjetà appellanta kellha tidentifika il-punti ta' liġi li fil-fehma tagħha għandha tittieħed deċiżjoni dwarhom u tispeċifika t-tifsira korretta tal-punt ta' liġi identifikat.

20. Din il-Qorti tirrileva li kif għamlet drabi oħra meta sabet ruħha ffaċċjata bl-eċċezzjoni tan-nullità ta' rikors ta' appell minn lodo arbitrali minħabba li fil-fehma tal-parti appellata, l-appell ma jkunx sar fuq punt ta' liġi iżda fuq punt ta' fatt, hija jkollha tagħmel evalwazzjoni wiesgħa tat-talbiet li jsiru fl-aggravji sabiex tiddetermina jekk l-appell ikunx jirrispetta l-limiti imposti bid-dispożizzjonijiet tal-Kap. 387. Din il-Qorti temmen bis-sħiħ li ladarba wara proċeduri li jkunu nġabu fi tmiemhom permezz ta' proċeduri arbitrali, ikun hemm parti li tibqa' mhix sodisfatta bil-lodo li jkun ingħata u tersaq quddiem din il-Qorti b'għadd ta' aggravji dwar dik id-deċiżjoni, il-Qorti għandha l-obbligu li ma tkunx restrittiva fl-interpretazzjoni tagħha ta' x'inhu 'punt legali', u tindirizza l-aggravji mressqa. Huwa b'dan il-mod biss li l-ġustizzja tidher li qiegħda ssir. F'dan il-każ, l-aggravji huma bbażati fuq l-interpretazzjoni mit-Tribunal ta' klawsoli kuntrattwali fi ftehim li kien jorbot lill-partijiet, kif ukoll fuq jekk l-arbitri kinux korretti meta ddeċidew li f'dan il-każ l-ebda danni extra-kuntrattwali mhuma dovuti. It-tielet aggravju tas-soċjetà appellanta huwa dwar l-ispartizzjoni tal-ispejjeż. Il-Qorti tinsab sodisfatta li f'dan il-każ id-determinazzjoni tal-aggravji sollevati mis-soċjetà appellanta jikkostitwixxu punti ta' liġi, li ladarba jiġu finalment determinati, sejrin jaffettwaw

sostanzjalment id-drittijiet ta' xi wieħed mill-partijiet, u dawn il-punti ta' liġi t-Tribunal intalab jiddeċiedi dwarhom jew li b'xi mod iddependa fuqhom sabiex wasal għad-deċiżjoni tiegħu, u għalhekk għandhom jiġu eżaminati bir-reqqa li jixirqilhom. Is-soċjetà appellata tgħid ukoll li dan ir-rikors ta' appell huwa null għaliex s-soċjetà appellanta naqset milli tidentifika l-punti ta' liġi li għandha tittieħed deċiżjoni dwarhom, jew milli tispeċifika t-tifsira korretta tal-punti ta' liġi identifikati. Din il-Qorti mhix tal-istess ħsieb, għaliex minn qari tar-rikors tal-appell jirriżulta mhux biss x'inhuma l-lanjanzi li qiegħda tibbaża ruħha fuqhom is-soċjetà appellanta, iżda anki x'tifsira kellha tingħata fil-fehma tagħha mill-arbitri għal dawn l-aggravji mqajma minnha. Huwa għalhekk li dawn l-eċċezzjonijiet ta' nullità sollevati mis-soċjetà appellata qegħdin jiġu miċħuda, u l-Qorti sejra tgħaddi sabiex tikkonsidra l-aggravji sollevati mis-soċjetà appellanta.

21. Din il-Qorti tibda billi tfakkar lill-partijiet li meta huma għażlu li jirrikorru għal proċeduri arbitrali, f'dan il-każ b'mod volontarju, huma għamlu dan b'għarfien sħiħ li d-deċiżjoni li kellha tingħata kienet ser tkun ibbażata fuq prinċipju tal-ekwità, u bl-applikazzjoni ta' dan il-prinċipju mhux biss jitwarrbu ċerti formaliżmi riġidi applikati mill-Qrati tagħna, iżda anki jagħti latitudni wiesgħa lill-arbitri sabiex dawn jassiguraw li l-lodo arbitrali jkun wieħed li jagħmel ġustizzja bejn il-partijiet. Sabiex jintlaħaq dan il-għan, l-arbitri jistgħu jaċċettaw evidenza, dokumenti u l-produzzjoni ta' xhieda li mhux neċessarjament ikunu jistgħu jinstemgħu minn Qorti minħabba l-mod kif jiġu applikati r-regoli proċedurali quddiem mill-Qrati. Huma dawn fost il-vantaġġi

ewlenin ta' proċeduri arbitrali, u fost l-aktar fatturi mfittxija fid-dinja tal-kummerċ meta jinqala' diżgwid u jkun hemm il-ħtieġa ta' riżoluzzjoni tat-tilwim li jinqala'. F'dan il-każ, kif jirriżulta mill-inkartament anness mal-atti proċesswali ta' dan l-appell, il-partijiet kellhom l-opportunità li jressqu l-provi kollha li riedu jressqu sabiex jagħmlu l-każ tagħhom quddiem it-Tribunal, liema provi din il-Qorti kellha tanalizza sabiex tiżgura li ssir ġustizzja bejn il-partijiet. Il-Qorti tqis li f'dan l-istadju jkun ta' siwi li tagħmel riferiment għal dak li qalet din il-Qorti diversament preseduta f'deċiżjoni mogħtija fil-21 ta' Frar, 2017, fl-ismijiet **George Muscat noe *vs.* Anton Zammit**, fejn il-Qorti qalet li "l-ekwità ma tistax tagħmel tajjeb għan-nuqqas ta' provi." Din il-Qorti tqis li wara li eżaminat il-provi kollha prodotti quddiem it-Tribunal, baqgħet mhux konvinta mill-pożizzjoni li ħadet is-soċjetà appellanta f'dawn il-proċeduri.

L-Ewwel Aggravju: *interpretazzjoni żbaljata tal-Klawsola 8.6 tal-Ftehim; ebda spjegazzjoni tal-formula matematika użata*

22. Is-soċjetà appellanta tgħid li t-Tribunal kien żbaljat meta dan aċċetta u għamel tiegħu x-xhieda mogħtija minn Alvin Abdilla, li d-danni li għandhom jitħallsu abbażi tal-klawsola 8.6 tal-Ftehim, għandhom ikunu fl-ammont ta' €197,000, u dan meta l-istess xhud naqas milli jġib prova tal-metodoloġija u l-formula matematika użata minnu sabiex wasal għal din iċ-ċifra. Is-soċjetà appellanta tgħid li s-soċjetà appellata oriġinarjament kienet għamlet offerta ta' kumpens fl-ammont ta' €70,000, liema offerta ma ġietx aċċettata minnha, u dan ifisser li l-formuli matematiċi adoperati mis-soċjetà appellata jagħtu ċifri differenti u jwasslu għal riżultati differenti. Is-soċjetà appellanta allegat li Alvin

Abdilla mmanipula ċ-ċifri u n-numri għall-gwadann tas-soċjetà appellata, u dan naqas milli jagħti informazzjoni dettaljata dwar kif inkisbet id-*data* dwar it-*tagged players* ta' Harry Casino, li hija informazzjoni li nżammet fil-pussess tas-soċjetà appellata. Is-soċjetà appellanta tgħid li l-arbitri adottaw dawn iċ-ċifri mingħajr m'għamlu ebda verifiki ulterjuri dwarhom. Is-soċjetà appellanta tgħid li min-naħa tagħha hija m'għandha l-ebda kontroll fuq informazzjoni marbuta mal-kwantifikazzjoni tad-dħul iġġenerat mis-soċjetà appellata. Qalet li t-Tribunal m'għamel l-ebda kalkolu f'dan ir-rigward, u dan warrab il-fatt li kien hemm dawn l-ineżattezzi matematiċi. Is-soċjetà appellanta qalet li r-*revenue share* fl-ewwel sitt xhur tal-2014 kien jammonta għal €135,876, u għalhekk li kieku wieħed kellu jestrapola dawn iċ-ċifri fuq perijodu ta' sena sħiħa, id-dħul iġġenerat fl-2014 kellu jkun ta' madwar €271,752. Is-soċjetà appellanta spjegat li l-partijiet kienu qablu bejniethom li r-*revenue share* kellu jinħadem fuq 60% tar-*revenue* totali, u li l-*actual revenue* fl-2013 kien ta' €447,959.

23. Il-Qorti tosserva kif is-soċjetà appellanta ppruvat targumenta li l-*actual revenue* ġġenerat fl-2013 jekwivali għad-danni kuntrattwali li suppost jitħallsu lilha taħt il-klawsola 8.6 tal-Ftehim, tant hu hekk li argumentat li d-danni kuntrattwali li għandhom jitħallsu lilha kellhom jammontaw għal €447,959. Dan meta tul il-proċeduri li nstemgħu quddiem it-Tribunal irriżulta li r-*revenue share* li fuqu kellu jiġi bbażat il-kumpens li jrid jitħallas lill-appellanta, kellu jinħadem fuq 60% tal-*actual revenue* ġġenerat. Is-soċjetà appellanta semmiet ukoll l-offerta ta' €70,000 li sar riferiment għaliha mix-xhud Sam Brown, liema offerta saret 'mingħajr preġudizzju' fi stadju qabel inbdew il-proċeduri quddiem it-Tribunal, sabiex tipprova tipperswadi lil din il-Qorti li l-

komputazzjoni matematika adoperata mis-soċjetà appellata sabiex tasal għall-kwantifikazzjoni tal-kumpens dovut taħt il-klawsola 8.6 tal-Ftehim hija waħda li ma toffri l-ebda *constant* u li tagħti riżultati differenti u mhux ta' min wieħed jorbot fuqhom. Din il-Qorti ma tistax taqbel ma' din il-pożizzjoni li qiegħda tieħu s-soċjetà appellanta, li diġà nġibditilha l-attenzjoni mit-Tribunal għall-mod kif ippruvat tippreżenta din l-offerta, li saret 'mingħajr preġudizzju', u li aktarx li saret mingħajr ma sar kalkolu matematiku skont it-termini tal-Ftehim, bħallikieku dan kien il-kumpens ikkomputat mill-appellata abbażi ta' formuli matematiċi li ħadd ma jaf x'inhuma.

24. Din il-Qorti tirrileva li kif spjegat is-soċjetà appellata, il-kalkolu tal-kumpens li għandu jitħallas lis-soċjetà appellanta abbażi tal-klawsola 8.6 tal-Ftehim seta' jsir biss wara li jgħaddu tnax-il xahar mit-terminazzjoni tal-Ftehim. Lit-Tribunal irriżultalu, u din il-Qorti taqbel ma' dan, li l-evidenza mogħtija minn Alvin Abdilla kienet ibbażata fuq ċifri attwali u fuq ir-*revenue* attwalment iġġenerat mis-soċjetà appellata fil-perijodu rilevanti, u dan ix-xhud spjega li huwa ġabar id-*data* rilevanti permezz ta' *tagging* tal-ġugaturi ta' HarryCasino. Jirriżulta li din il-komputazzjoni kienet ibbażata fuq qligħ attwali u mhux fuq figuri mbassra jew *projections*, kif għamlet is-soċjetà appellanta anki f'dawn il-proċeduri.

25. Il-Qorti tinnota kif minkejja li s-soċjetà appellanta għadha qiegħda tinsisti li l-kumpens li għandu jitħallas lilha jrid ikun ferm ogħla mill-€197,000 likwidati favur tagħha mit-Tribunal, hija ma ġabet l-ebda prova li mhix stima jew *projection* li tippreċiża d-danni kuntrattwali dovuti lilha kemm għandhom

ikunu. F'punt minnhom is-soċjetà appellanta tagħmel riferiment għall-*actual revenue* ġġenerat mis-soċjetà appellata fl-2013, u tgħid li dak huwa l-kumpens li għandu jitħallas lilha, mingħajr konsiderazzjoni għall-fatt li l-kumpens li hija kellha jedd tirċievi taħt il-klawsola 8.6 huwa bbażat fuq ir-*revenue share* u mhux l-*actual revenue* tal-*players,* u li dan ir-*revenue share* jista' jiġi estratt mid-*data* li tinsab fil-pussess tas-soċjetà appellata. Kienu dawn il-fatturi li għamlu x-xhieda ta' Alvin Abdilla kredibbli u fattwali u kienu dawn ir-raġunijiet li wasslu lit-Tribunal jadotta ċ-ċifra ppreżentata minn Abdilla. Wara kollox jirriżulta li kien hemm għadd ta' xhieda oħra, fosthom Christian Saliba, li spjegaw li l-prestazzjoni tas-soċjetà appellata ma kinitx fil-livelli mixtieqa, u saħansitra kien hemm xejriet li jindikaw li kien ser ikun hemm telf għas-soċjetà appellata li kieku din żammet fis-seħħ il-Ftehim oriġinali li kellha mas-soċjetà appellanta. Dan kollu jindika li s-soċjetà appellanta ma setgħetx tibbaża ruħha fuq *projections* futuri għaliex ix-xejriet tan-negozju ma kinux pożittivi jew fil-livelli mixtieqa. In vista ta' dawn il-konsiderazzjonijiet, il-Qorti tqis li dan l-ewwel aggravju tas-soċjetà appellanta mhuwiex ġustifikat, u tiċħdu.

It-tieni aggravju: *komputazzjoni tad-danni extra-kuntrattwali*

26. Is-soċjetà appellanta tgħid li t-Tribunal kien żbaljat għaliex wara li kkonkluda li hija kellha titħallas kumpens *ai termini* tal-klawsola 8.6 tal-Ftehim, naqas milli jiddeċiedi u jillikwida l-kumpens dovut lilha skont il-kumplament tat-talbiet tagħha. Tgħid li minkejja li s-soċjetà appellata kellha jedd tittermina l-Ftehim, hija ma ġietx eżonerata mill-obbligu li timxi mat-termini u l-

kundizzjonijiet kollha imposti fuqha permezz tal-Ftehim, u f'dan ir-rigward is-soċjetà appellata għandha tagħmel tajjeb għad-danni sofferti mis-soċjetà appellanta minħabba f'din l-inadempjenza kuntrattwali. Is-soċjetà appellanta ssostni li t-terminazzjoni tal-kuntratt saret mingħajr preġudizzju għad-drittijiet miksuba minn kull wieħed mill-partijiet matul il-perijodu tal-Ftehim u tgħid li min-naħa tagħha hija sofriet danni extra-kuntrattwali, fost l-oħrajn għaliex ma setgħetx tkompli għaddejja bil-kampanja tal-*marketing* tagħha, tilfet il-fiduċja tal-imsieħba u tal-ġugaturi tagħha, għamlet *marketing* li sfuma fix-xejn għaliex is-siti Harry Casino u Harry Affiliates ġew magħluqin mis-soċjetà appellata, u dan kollu kkawża danni għall-*brand* maħluqa u kkumerċjalizzata minnha. Is-soċjetà appellanta tgħid li hija kellha l-obbligu li tinforma lill-*players* li l-*login details* tagħhom setgħu jintużaw fuq pjattaforma oħra, imma s-soċjetà appellata għamlet manuvri sabiex il-ġugaturi li jippruvaw jidħlu fuq is-siti ta' Harry Casino jiġu *redirected* lejn siti oħra li bdew jitħaddmu mis-soċjetà appellata. Iddeskriviet is-sitwazzjoni bħala waħda ta' żamma ta' 'ostaġġ' da parti tas-soċjetà appellata, u għalhekk hija għandha jedd għal danni naxxenti minn kulpa akwiljana. Is-soċjetà appellanta tgħid li f'dan il-każ japplikaw id-dispożizzjonijiet tal-artikolu 1125 tal-Kodiċi Ċivili li jistipula li kull min jonqos milli jeżegwixxi obbligazzjoni li jkun ikkuntratta, huwa obbligat għall-ħlas tad-danni. Tgħid ukoll li fis-sistema tagħna, mhux eskluż li min jitlob il-ħlas ta' penali skont il-kuntratt, ikollu wkoll jedd għall-ħlas tad-danni.

27. Is-soċjetà appellata laqgħet għal dan l-aggravju billi qalet li f'dan il-każ, id-deċiżjoni tat-Tribunal kienet ċirkoskritta għat-talbiet li saru mis-soċjetà appellanta, u t-talba li saret mis-soċjetà appellanta kienet sabiex it-Tribunal

jiddikjara li kien hemm ksur tal-Ftehim bejn il-partijiet. It-talbiet l-oħra li saru għal-likwidazzjoni u l-ħlas tad-danni, huma riżultat ta' din l-ewwel talba, u li dan ifisser li l-pretensjonijiet tal-appellanta huma bbażati fuq ir-relazzjoni kuntrattwali bejn il-partijiet. Saħqet li l-Qorti hija limitata bit-talbiet kif imressqa mill-parti attriċi f'kawża, u f'dan il-każ l-uniċi danni li s-soċjetà appellanta għandha jedd għalihom huma danni marbuta mal-fatt li s-soċjetà appellata għażlet li tittermina l-Ftehim qabel iż-żmien miftiehem. Kompliet tgħid li l-uniku kumpens ikkontemplat f'din l-eventwalità huwa l-ħlas ta' *revenue share* għal perijodu ta' tnax-il xahar wara t-terminazzjoni tal-kuntratt. Is-soċjetà appellata qalet ukoll li f'dan il-każ kien hemm nuqqasijiet min-naħa tas-soċjetà appellanta, fosthom li din naqset milli tipprova tpoġġi d-*domain* tagħha fuq pjattaforma oħra, u toffri *website* alternattiv li fuqu jistgħu jilagħbu l-ġugaturi, u dan sabiex ittaffi d-danni li setgħet kienet esposta għalihom. Is-soċjetà appellata qalet li f'dan ir-rigward mhux minnu li hija għamlet *redirection* tas-sit elettroniku sabiex iċċaħħad lis-soċjetà appellanta minn dak li huwa dritt tagħha, għaliex is-soċjetà appellanta tibqa' s-sid tad-*domain* u setgħet tużah fuq pjattaforma oħra.

28. Din il-Qorti tibda billi tirrileva li s-soċjetà appellanta ma ġabet l-ebda prova tad-danni allegatament subiti minnha. Issemmi diversi istanzi ta' danni extra-kuntrattwali sofferti minnha, iżda mingħajr ma ġġib provi u eżempji konkreti ta' dawn id-danni u l-kwantifikazzjoni tagħhom. Il-pretensjoni tas-soċjetà appellanta meta istitwiet dawn il-proċeduri kienet għall-ħlas ta' kumpens fl-ammont ta' madwar ħames miljun Euro, imma s-soċjetà appellanta naqset milli tispjega fid-dettall kif waslet għal dan il-*quantum* ta'

danni. Tgħid li hija ħadmet sabiex tattira investiment b'*marketing budget* ta' madwar miljun Euro, imma mbagħad naqset milli ġġib provi konkreti marbuta ma' dan, kif ukoll naqset milli tispjega kif bit-terminazzjoni tal-Ftehim ġie affettwat l-investiment attirat minnha, jew, pereżempju, jekk l-imsemmija flus setgħux jiġu allokati għal proġetti oħrajn li kienet involuta fihom s-soċjetà appellanta. Imma apparti din in-nuqqas ta' prova, il-Qorti tirrileva li għandha raġun s-soċjetà appellata tgħid li f'dan il-każ, it-talbiet tas-soċjetà appellanta kienu ċari fl-*istatement of claim* tagħha, fejn hija talbet lit-Tribunal:

"1. *To decide and declare that the respondent company did not satisfy and fulfil its obligations as arising from the binding agreement between them;*
2. To declare that the claimant company suffered damages;
3. To declare that the respondent company is responsible for the damages suffered by the claimant company;
4. To liquidate the damages suffered by the claimant company, with the aid of experts if need be;
5. Order the respondent company to pay to the claimant company the duly liquidated amount of dmaages within such time-frame/s as may be established by the Tribunal."

29. Imkien f'dawn it-talbiet ma ġie indikat li s-soċjetà appellanta qiegħda tivvanta xi pretensjoni għal danni extra-kuntrattwali, jew intqal li l-pretensjonijiet tas-soċjetà appellanta huma bbażati fuq dak li jipprovdi l-Kodiċi tal-Kummerċ jew il-Kodiċi Ċivili. Għall-kuntrarju, li kieku t-Tribunal ippronunzja ruħu f'dak is-sens, tali deċiżjoni kienet teżorbita t-talbiet tas-soċjetà appellanta, li kif jirriżulta jikkonċernaw l-inadempiment ta' obbligi kuntrattwali naxxenti mill-Ftehim ta' bejn il-partijiet, u talba għad-danni hija regolati bil-

klawsola 8.6 tal-Ftehim. Din il-Qorti tqis għalhekk li t-tieni aggravju mressaq mis-soċjetà appellata mhuwiex mistħoqq, u tiċħdu.

It-Tielet Aggravju: dwar il-kap tal-ispejjeż

30. It-Tribunal iddeċieda li l-ispartizzjoni tal-ispejjeż tal-kawża għandha ssir fil-proporzjon ta' 80% li għandhom jitħallsu mis-soċjetà appellanta, filwaqt li 20% għandhom jitħallsu mis-soċjetà appellata. Is-soċjetà appellanta tgħid li t-Tribunal ħa din id-deċiżjoni wara li ddeċieda li s-soċjetà appellanta kienet *'successful in its claim'* u li bħala regola ġenerali hija l-parti telliefa li għandha tagħmel tajjeb għall-ispejjeż tal-kawża. Is-soċjetà appellanta tgħid li minkejja li t-Tribunal għandu diskrezzjoni dwar kif għandhom jinqasmu l-ispejjeż, il-prinċipju ġenerali jibqa' dejjem li hija l-parti telliefa li għandha tagħmel tajjeb għall-ispejjeż. Tgħid li f'dan il-każ l-ispejjeż tal-arbitraġġ huma eżorbitanti, u bl-ispartizzjoni tal-ispejjeż kif saret mit-Tribunal, hija ser tispiċċa tagħmel telf minn dan l-arbitraġġ li ġie aġġudikat favur tagħha, għaliex dak li ġie likwidat favur tagħha bħala danni ser jispiċċa jitħallas minnha fi spejjeż.

31. Is-soċjetà appellata wieġbet għal dan l-aggravju billi qalet li l-pretensjoni tas-soċjetà appellanta hija għall-ħlas ta' kumpens fl-ammont ta' €5 miljuni, u l-*quantum* tad-danni li ġew aġġudikati favur is-soċjetà appellanta huwa ferm inqas mis-somma pretiża. Tgħid ukoll li s-soċjetà appellanta kienet ben konsapevoli tal-fatt li l-ispejjeż jiġu kkomputati *ad valorem* u għalhekk kien

minħabba l-pretensjoni eżorbitanti tagħha li l-ispejjeż tal-kawża telgħu daqshekk.

32. Din il-Qorti tirrileva li bħala regola ġenerali, japplika l-prinċipju li l-ispejjeż tal-kawża għandhom jinġarru mill-parti telliefa, imma t-Tribunal għandu d-diskrezzjoni li japporzjona tali spejjeż bil-mod kif jidhirlu hu, jekk iqis li tali spartizzjoni tkun waħda raġonevoli. F'dan il-każ jirriżulta li għad li t-Tribunal ikkunsidra li għandu jilqa' t-talbiet tas-soċjetà appellanta, u l-kumpens kif likwidat li għandu jitħallas lis-soċjetà appellanta huwa ferm inqas mill-pretensjoni oriġinali tagħha, it-Tribunal xorta waħda kkonkluda li l-ispejjeż tal-proċeduri arbitrali għandhom jiġu sopportati mis-soċjetà appellanta, meta dan ser ikun ifisser li parti sostanzjali mid-danni li ġew likwidati favur tagħha, ser jitħallsu minnha bħala spejjeż. Din il-Qorti tqis li dan m'għandux ikun. Il-kumpens li jirriżulta li għandu jitħallas lis-soċjetà appellanta huwa dovut lilha *ai termini* tal-Ftehim bejn il-partijiet, u ġie likwidat favur tagħha wara li s-soċjetà appellata għażlet li tittermina dan il-Ftehim qabel il-waqt. Kien dan l-aġir da parti tas-soċjetà appellata li wassal biex is-soċjetà appellanta tistitwixxi l-proċeduri arbitrali, liema proċeduri ġew deċiżi favur tagħha. Li kieku s-soċjetà appellanta kienet b'xi mod responsabbli jew kellha twieġeb għat-terminazzjoni tal-Ftehim bejn il-partijiet, ċertament li ma kien ser ikun hemm l-ebda aġġudikazzjoni ta' kumpens favur tagħha. Il-Qorti tqis li għalhekk mhuwiex raġonevoli li jiġi deċiż li l-parti l-kbira tal-ispejjeż għandhom jinġarru mis-soċjetà appellanta, partikolarment meta l-ispejjeż huma konsiderevoli u ser iwasslu biex is-soċjetà appellanta tirċievi bilanċ ferm żgħir mill-ammont li ġie

likwidat favur tagħha. Għalhekk din il-Qorti qiegħda tiddeċiedi li sabiex l-ispartizzjoni tal-ispejjeż issir b'mod li jirrifletti l-prinċipju tal-ekwità, l-ispejjeż għandhom jinqasmu 50%-50% bejn il-partijiet.

Decide

Għar-raġunijiet premessi, din il-Qorti qiegħda tiddeċiedi dwar l-appell tas-soċjetà appellanta billi:

1) Tiċħad l-ewwel żewġ aggravji tas-soċjetà appellanta;

2) Tilqa' t-tielet aggravju tas-soċjetà appellanta u tiddeċiedi li l-ispejjeż tal-proċeduri arbitrali għandhom jinqasmu 50%-50% bejn il-partijiet, filwaqt li l-ispejjeż ta' dan l-appell għandhom ikunu a karigu, kwantu għal żewġ terzi mis-soċjetà appellanta, u kwantu għal terz mis-soċjetà appellata.

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Reġistratur