QORTI TAL-APPELL

IMHALLFIN

S.T.O. PRIM IMHALLEF MARK CHETCUTI
ONOR. IMHALLEF JOSEPH R. MICALLEF
ONOR. IMHALLEF TONIO MALLIA

Seduta ta' nhar l-Erbgha, 1 ta' Dicembru, 2021.

Numru 2

Rikors numru 453/14/1 MH

Attard Services Limited (C4113)

v.

Shell & MOH Aviation Fuels A.E.

Il-Qorti:

1. Rat ir-rikors guramentat li s-socjeta` attrici pprezentat fit-23 ta' Mejju, 2014, u li jaqra hekk:

> "1. Illi fis-sena 2011, in konformita` mal-obbligi legali taghha naxxenti mill-Avviz Legali numru 66 tal-2003 intitolat *The Airport (Groundhandling Services) Regulations, 2003,* Malta International Airport p.l.c. (C 12663) harget sejha ghall-offerti sabiex jinghataw licenzji lil operatur sabiex jipprovdi servizzi ta'

refueling tal-ajruplani gewwa l-ajruport internazzjonali ta' Malta bhala t-tieni operator fl-ajruport (Dok ASL 1).

2. Illi din is-sejha numerata MIA/07/11 kienet intiza sabiex f'pajjizna, jintaghzel it-tieni operator li jipprovdi servizzi ta' *refueling* tal-ajruplani ghal perjodu ta' seba' (7) snin.

3. Illi s-socjeta` rikorrenti kienet fethet diskussjonijiet mas-socjeta` intimata sabiex jilhqu arrangament sabiex jissottomettu offerta flimkien.

4. Illi l-partijiet lahqu ftehim bejniethom ibbazat fuq mudell ta' negozju (Dok ASL 2) li, a bazi tieghu, il-partijiet waslu sabiex jissottomettu offerta bil-ghan li jekk tintlaqa' l-offerta taghhom, flimkien joholqu kumpannija bl-isem ta' Malta Joint Venture Ltd, u joperaw in-negozju tramite l-istess kumpannija.

5. Illi s-socjeta` rikorrenti kienet anke rriservat l-isem tal-kumpannija proposta dakinhar stess li waslet fi ftehim mal-Korporazzjoni Enemalta dwar id-diffikoltajiet tal-uzu tas-servizzi essenzjali (Dok ASL 3).

6. Illi kif ser jigi ppruvat waqt il-gbir tal-provi, il-partijiet fil-fatt waslu fi ftehim bejniethom li wassalhom sabiex jissottomettu l-offerta taghhom fis-17 ta' April 20212.

7. Illi dwar il-ftehim ta' bejniethom, liema ftehim holoq obbligu kuntrattwali versu xulxin kif ukoll versu partijiet terzi, jinghad li wara l-ewwel komunikazzjoni mal-kumpannija intimata kienu nfethu d-diskussjonijiet dwar il-possibilita` li jintlahaq ftehim sabiex ikun hemm sottomissjoni bhala *joint venture* flimkien. Wara l-ewwel diskussjonijiet, kien intlahaq ftehim fuq dan il-principju, kif jirrizulta mid-dokument anness u mmarkat Dok ASL 4, li juri l-qbil li kien hemm bejn il-partijiet u *di piu*`, ir-responsabilitajiet li kull parti kienet qieghda taccetta li tezegwixxi. Minn hawn infethet it-tieni branka ta' diskussjonijiet aktar dettaljati, konsistenti fil-percentwali tal-ishma tal-operat li kull wiehed mill-partijiet kien ser jassumi u li qieghdin jigu ezebiti bhala Dok ASL 5. Mill-ftehim fuq il-percentwali, il-partijiet ghaddew ghal diskussjonijiet dettaljati ferm dwar l-operat shih konsistenti fl-analizi tad-dettalji minimi tal-operat maghruf bhala *in to plane,* liema document qieghed jigi ezebit u mmarkat bhala Dok ASL 6. Fl-istess zmien il-partijiet imlew is-sejha ghall-offerti b'kull parti tressaq dik id-dokumentazzjoni li kienet tispetta lilha sabiex tforniha necessarja ghall-offerta, bir-rimanenti jimtela' flimkien u b'hekk giet sottomessa l-offerta.

8. Illi l-offerta taghhom sottomessa ghas-sejha numerata MIA/07/11 kienet soggetta ghall-kundizzjoni li l-partijiet jilhqu ftehim mal-

Korporazzjoni Enemalta fuq l-uzu ta' servizzi essenzjali, liema uzu jew nuqqas tieghu fil-passat kien fir-raguni ghala l-partijiet jew min minnhom ma kinux dahlu joperaw fl-ajruport internazzjonali ta' Malta bejn l-2004 u l-2011.

9. Illi fid-19 ta' Lulju 2012, il-partijiet gew infurmati mill-Malta International Airport p.l.c. li l-offerta taghhom kienet giet milqugha u li kienu gew maghzula sabiex jipprovdu dawn is-servizzi gewwa l-ajruport internazzjonali ta' Malta (Dok ASL 7).

10. Illi fl-ghotja tas-sejha ghall-offerti, il-*joint venture* giet diretta tikkomunika mal-Korporazzjoni Enemalta sabiex tasal f'arrangament dwar l-uzu tal-infrastruttura mehtiega (l-uzu tas-servizzi essenzjali fuq imsemmi) sabiex is-socjeta` rikorrenti tkun tista' tipprovdi s-servizzi taghha.

11. Illi minnufih is-socjeta` intimata kienet ghamlet pressjoni fuq is-socjeta` rikorrenti sabiex hi tiftah u tikkonkludi l-ftehim u dak kollu necessarju mal-Korporazzjoni Enemalta. Dan jirrizulta ampjament mill-korrispondenza skambjata bejn il-partijiet odjerni ezebita bhala Dok ADL 8.

12. Illi wara diskussjonijiet dettaljati, fit-18 ta' Jannar 2013 intlahaq ftehim mal-Korporazzjoni Enemalta fejn gie mfassal pjan f'qafas ta' zmien determinat sabiex jitwettqu l-bidliet kollha necessarji li sa dak iz-zmien, kienu qieghdin jipprojbixxu li jinbeda b'mod vijabbli l-operat tat-tieni operator gewwa l-ajruport internazzjonali ta' Malta.

13. Illi hekk kif intlahaq dan il-ftehim, dakinhar stess, il-partijiet dahlu fi ftehim stipulat jibdew l-operat taghhom gewwa l-ajruport internazzjonali ta' Malta bhala t-tieni operator li jforni servizzi ta' *refueling* tal-ajruplani, Dok ASL 9.

14. Illi skont dan l-istess ftehim, l-operat kellu jibda sa mhux aktar tard mill-31 ta' Dicembru 2014, kif jirrizulta minn dokument ezebit precedentement immarkat Dok ASL 9 u li sa l-31 ta' Marzu 2014, il-partijiet kellhom jissottomettu *performance gurantee* fl-ammont ta' tliet mitt elf ewro (€300,000.00) bil-kundizzjoni li jekk din ma tigix ipprezentata *entro* t-terminu stabbilit, il-koncessjoni taqa' u l-Malta International Airport p.l.c. tkun libera li tohrog sejha ghall-offerti gdida. Dan jirrizulta mid-dokument li qieghed jigi ezebit u mmarkat bhala Dok ASL 10.

15. Illi fil-fatt, hekk kif intlahaq il-ftehim imsemmi mal-Korporazzjoni Enemalta, l-istess socjeta` intimata, tramite r-rapprezentant taghha, baghtet tifrah lis-socjeta` rikorrenti u kkonfermat li issa diffikoltajiet ma kienx ghad fadal, Dok ASL 11.

16. Illi minnufih wara t-18 ta' Jannar 2013, is-socjeta` rikorrenti bdiet tinsisti mas-socjeta` intimata sabiex jinbdew il-preparamenti biex il-*joint venture* tkun f'qaghda li tezegwixxi l-obbligi assunti minnha. Dan jirrizulta minn skambju ta' *e-mails* u korrispondenza, hawn ezebiti u mmarkati bhala dok ASL 12 kif ukoll minn struzzjonijiet verbali.

17. Illi fi Frar 2013, is-socjeta` rikorrenti giet mgharrfa mic-*Chief Executive Officer* tas-socjeta` intimata, Petros Zorapas, li s-socjeta` intimata kellha xkiel sabiex tkompli tonora l-obbligi kuntrattwali assunti kemm *verso* s-socjeta` rikorrenti, kif ukoll *verso* l-Malta International Airport p.l.c., dan kien b'mod verbali minkejja li sussegwentement jirrizulta anke minn *e-mail* ezebit bhala Dok ASL 13.

18. Minn hawnhekk, fuq insistenza tas-socjeta` rikorrenti ghal raguni l-ghaliex is-socjeta` intimata kienet qieghda tirtira mill-ftehim, mill-obbligi kuntrattwali kif ukoll mill-operat li tant hadmu sabiex jakkwistaw id-dritt ghalih, intalbet laqgha mas-socjeta` intimata, biss din ma gietx milqugha minnufih u kien hemm proposta li tinzamm *telephone conference* bejn il-partijiet kif ukoll Petra Koselska, li kienet ir-rapprezentanta tax-Shell Aviation fuq il-Bord tad-Diretturi intimata. Din it-*teleconference* kienet irrekordjata u kopja tat-traskrizzjoni tal-istess qieghda tigi ezebita u mmarkata bhala Dok ASL 14.

19. Illi mit-*teleconference* jirrizulta li d-diffikulta` li kellha s-socjeta` intimata kienet wahda li ma tikkoncernax lis-socjeta` rikorrenti, kienet problema interna tas-socjeta` intimata u l-istruzzjonijiet li kienu nghataw dakinhar, jew ahjar id-direzzjoni li hareg mill-istess, kienet li s-socjeta` intimata riedet issib mudell operattiv alternattiv ghal dak li kien gja` miftiehem mas-socjeta` rikorrenti.

20. Illi fil-gimghat li segwew, kien evidenti li s-socjeta` intimata kienet qieghda tbiddel il-parametri ta' dak gja` diskuss, il-kalkoli fuq liema kien intlahaq il-ftehim bejniethom u dan sabiex il-ftehim milhuq jigi mitfugh f'incertezza u dubju dwar il-vijabilita` tieghu.

21. Illi minn hawn 'il quddiem, is-socjeta` rikorrenti ghamlet minn kollox sabiex takkomoda u tipprova tasal fi ftehim mas-socjeta` intimata sabiex l-obbligi jigu ezegwiti u n-negozju ma jintilifx. Saru laqghat kemm gewwa Malta kif ukoll gewwa l-Grecja, saru proposti u kontro-proposti, telefonati u skambju ta' pataflun korrispondenza izda kien evidenti li s-socjeta` intimata ma riditx tkompli bl-obbligi assunti.

22. Illi f'tentattiv sabiex jigu kjarifikati d-dubji li kienu qieghdin jitqajmu mis-socjeta` intimata, kien gie mitlub u fil-fatt inzammet laqgha mal-Ufficcju ghall-Kompetizzjoni Gusta bil-partecipazzjoni ta'

ufficcjali mill-Awtorita` Maltija dwar ir-Rizorsi u naturalment rapprezentanti tas-socjeta` intimata, proprju dwar kif ir-regoli ta' kompetizzjoni setghu jolqtu l-operat tas-suq li fih kienet diehla topera l-*Malta Joint Venture Ltd.*

23. Illi l-posizzjoni tas-socjeta` intimata ma tbiddlitx u *di piu`* ma riditx taghti risposta diretta lis-socjeta` rikorrenti l-ghaliex kienet adottat din il-posizzjoni.

24. Illi fil-frattemp, il-partijiet gew infurmati mill-Korporazzjoni Enemalta li kienet ezegwiet l-obbligi assunti minnha b'rizultat tal-ftehim li hija kienet iffirmat mal-partijiet fit-18 ta' Jannar 2013 u ghalhekk, kull allegata diffikolta`, bizgha, intopp u/jew skonfort li seta' kien ravvizat mis-socjeta` intimata fl-operat propost kien gie rizolt b'rizultat tal-hidma li saret wara l-ftehim milhuq fit-18 ta' Jannar 2013.

25. Illi minkejja dan l-izvilupp, is-socjeta` intimata xorta wahda ma biddlitx il-pozizzjoni taghha u ma kinetx lesta tonora l-obbligi kuntrattwali u tippartecipa fil-preparamenti necessarji sabiex jithejja u jinbeda l-operat skond l-obbligi assunti.

26. Illi s-socjeta` rikorrenti gharrfet lill-istess socjeta` intimata li l-agir taghha kien ser jikkawza danni kbar kemm fit-telf ta' negozju kif ukoll fit-telf ta' reputazzjoni taghha mal-awtoritajiet Maltin, Dok ASL 15.

27. Illi s-socjeta` intimata sostniet li hi ma kellhiex rabta kuntrattwali mas-socjeta` rikorrenti u li setghet tohrog liberament mill-obbligi assunti mal-Malta International Airport p.l.c. billi title fil-*bid bond* li kienet giet ipprezentata mal-offerta li kienet tammonta ghas-somma ta' hamsin elf ewro (€50,000.00) u li nofsha nharget mis-socjeta` rikorrenti.

28. Illi s-socjeta` rikorrenti ma accettatx din il-pozizzjoni, tant li fit-22 ta' Jannar 2014, is-socjeta` rikorrenti interpellat lill-istess socjeta` intimata sabiex tonora kemm il-ftehim milhuq mas-socjeta` rikorrenti, kif ukoll l-obbligi assunti fil-konfront tal-Malta International Airport p.l.c. u fin-nuqqas, taddivjeni ghall-likwidazzjoni u hlas tad-danni, Dok ASL 16.

29. Illi minkejja din l-interpellazzjoni, is-socjeta` intimata baqghet ma biddlitx il-pozizzjoni taghha u gie deciz li b'mod ufficjali li l-Malta International Airport p.l.c. tigi nfurmata li l-obbligi assunti mill-partijiet fl-offerta taghhom sottomessa fis-17 ta' April 2012 u milqugha fid-19 ta' Lulju 2012 ma kinux ser jigu ezegwiti minhabba li s-socjeta` intimata ma riditx tezegwixxi l-obbligi minnha assunti, Dok ASL 17.

Ghaldaqstant is-socjetaq` rikorrenti ghar-ragunijiet suesposti umilment titlob lil din l-Onorabbli Qorti joghgobha –

1. Tiddikjara li bl-agir taghha, is-socjeta` intimata rrekat danni lis-socjeta` rikorrenti in kwantu tellfet lis-socjeta` rikorrenti l-opportunita` li tipprovdi servizzi ta' *refuelling* tal-ajruplani fl-ajruport internazzjonali ta' Malta a bazi tal-kuntratt mirbuh f'Lulju 2012, konsistenti dawn id-danni fix-xoghol li ezegwiet fuq dan il-progett kemm qabel kif ukoll wara li giet sottomessa l-offerta, f'telf ta' dhul, ta' bejgh, strutturi ta' negozju u profitti konsegwenzjali, fit-telf ta' sehmha mill-*bid bond*, kif ukoll danni reputazzjonali li s-socjeta` rikorrenti soffriet b'rizultat tad-decizjoni tas-socjeta` intimata li tirtira mill-ftehim milhuq mas-socjeta` rikorrenti.

2. Tillikwida d-danni subiti mis-socjeta` rikorrenti, okkorrendo bin-nomina ta' esperti nominati ghal dan il-fini.

3. Per konsegwenza, tikkundanna lis-socjeta` intimata thallas id-danni hekk likwidati fi zmien qasir u perentorju.

Bl-imghax legali u bl-ispejjez, inkluz dawk tal-ittra ufficjali tat-22 ta' Jannar 2014 kontra s-socjeta` intimata li minn issa hija ingunta in subizzjoni."

2. Rat ir-risposta guramentata li ressqet is-socjeta` konvenuta li in forza taghha eccepiet:

"1. Illi t-talbiet attrici huma nfondati fil-fatt u fid-dritt u ghandhom jigu michuda bl-ispejjez kontra l-istess socjeta` rikorrenti in kwantu mhuwiex minnu illi s-socjeta` intimata b'xi mod kisret xi obbligi kuntrattwali allegatament assunti minnha jew irtirat minn xi '*ftehim milhuq mas-socjeta` rikorrenti*'. Ghall-kuntrarju, is-socjeta` intimata kellha biss ftehim mas-socjeta` rikorrenti illi flimkien jissottomettu offerta b'risposta ghas-sejha numru MIA/07/11 pubblikata mill-Malta International Airport plc ("MIA") u dan il-ftehim l-istess socjeta` intimata SHELL & MOH Aviation Fuels SA ("Shell") onoratu sal-icken dettall kemm fil-formulazzjoni u l-eventwali sottomissjoni tal-offerta kif ukoll sussegwentement fil-konkluzjoni tal-kuntratt tal-MIA, u l-fatt illi l-kuntratt mal-MIA eventwalment gie terminat kien rizultat biss tal-fatt illi n-negozjati bejn il-partijiet odjerni dwar l-eventwali ftehim bejniethom fuq l-operazzjoni f'Malta imbaghad ma rnexxewx u ma waslux ghal rizultat accettabbli ghaz-zewg nahat, haga normalissima f'negozjati kummercjali;

2. Illi s-socjeta` attrici qed taghmel konfuzjoni apposta (u dan biex tipprova permezz ta' din il-kawza tirkupra a skapitu tas-socjeta` intimata l-investiment ta' hin, rizorsi u flus investiti li setghet ghamlet f'dan it-tender tal-MIA) bejn il-ftehim milhuq bejnha u bejn is-socjeta` intimata dwar il-partecipazzjoni kongunta fl-imsemmija sejha ghall-offerti u l-ftehim eventwali li kien ghad irid jintlahaq bejniethom dwar l-istruttura u l-operazzjoni infisha bhala '*second fuel provider'* tal-ajruport internazzjonali ta' Malta, l-arrangament u l-konfigurazzjoni tal-istruttura legali ta' bejniethom u numru ta' kwistjonijiet relatati ma' 'sourcing' u kunsinna tal-prodott finali lill-klijenti ahharin kif ukoll operazzjoni kongunta nfisha tal-*fuel groundhandling* fl-ajruport internazzjonali ta' Malta, liema ftehim kellu jintlahaq biss f'kaz li l-offerta taghhom tkun giet maghzula. Illi ghalhekk, filwaqt illi ma huwiex kontestat illi l-partijiet ftiehmu li jidhlu ghall-process flimkien u hekk ghamlu, iz-zewg partijiet kienu dejjem ben konsapevoli tal-fatt illi mhux talli ma kienx hemm ftehim bejniethom dwar l-operazzjoni eventwali f'Malta kieku jirbhu s-sejha ghall-offerti izda ghall-kuntrarju kienu, kif sejjer jigi ampjament ippruvat f'din il-kawza, bl-aktar mod car jafu li kieku l-offerta taghhom tintlaqa' mill-MIA kien ghadu jridu **jibdew** in-negozjati bejniethom sabiex jintlahaq tali eventwali ftehim dwar l-operat kongunt tan-negozju tal-*fuel groundhandling* fl-ajruport ta' Malta fir-rwol ta' 'second supplier' ta' fuel;

3. Illi di piu`, kif jixhdu l-istess dokumenti esebiti mal-att promotur, kien biss wara illi kien jidher car li ma kienx sejjer jintlahaq ftehim dwar tali operazzjoni kongunta f'Malta, u dan wara xhur ta' negozjati dettaljati u ezawrjenti bejn il-partijiet, u wara li s-socjeta` rikorrenti ndunat illi kienet investiet (d*el resto* bhall-istess socjeta` intimata) hafna rizorsi u energija fi progett li ma kienx sejjer jirnexxi (haga normalissima fil-kummerc ghaliex mhux kull *venture* li wiehed jinvesti fiha fl-ahhar mill-ahhar tirnexxi), illi konvenjentement is-socjeta` rikorrenti biddlet id-diskta u bdiet tghid *tramite* d-diretturi taghha li effettivament gja kien hemm ftehim bejn il-partijiet dwar kollox u li kienet is-socjeta` intimata li 'irtirat' minn dan il-fantomatiku ftehim b'allegat ksur tal-obbligi assunti minnha, asserzjoni li issa qed tirrepeti permezz ta' din il-kawza;

4. Illi bl-aktar mod car is-socjeta` intimata tikkontesta l-verzjoni tal-fatti redatta fir-rikors promotur kollu hlief ghall-ewwel tlett (1 sa 3) premessi tieghu u b'mod partikolari tichad illi d-dokument anness u mmarkat Dok ASL 2 mal-istess rikors guramentat huwa 'ftehim' milhuq bejn il-partijiet u kwindi dokument li jorbot lill-istess partijiet u ghalhekk teccepixxi illi ma kien hemm l-ebda ftehim bejn il-partijiet f'dan is-sens. Dak id-dokument, kif jidher anki minn semplice qari tieghu, huwa biss Rapport dwar il-mudell ta' negozju li l-partijiet issottomettew lill-MIA fl-offerta taghhom minghajr l-ebda l-icken indikazzjoni, hjiel jew prova (ghaliex ma kienx ghad

hemm l-ebda l-icken pass f'dan is-sens bejn il-partijiet u kwindi ma setghax ikun hemm tali prova) ta' ftehim vinkolanti bejn il-partijiet jew *commitment* bejniethom ghal dak il-mudell partikolari. Ir-realta` tal-fatti hija illi t-Tender in kwistjoni pubblikat mill-MIA (DOK SH 1) kien jitlob *sine qua non* illi l-offerenti jissottomettu proposta ta' 'organisational structure' kif ikun bi hsiebhom jahdmu jekk jirbhu l-offerta u l-offerenti hekk ghamlu unikament biex ikunu konformi mar-regolamenti tat-tender. Bejniethom izda l-pozizzjoni kjarament kienet dik li tidher mill-korrispondenza annessa (DOK SH 2) fi kliem l-istess direttur tas-socjeta` rikorrenti li halef ir-rikors guramentat Kenneth Attard, u dan qabel ma kellha originarjament taghlaq is-sejha ghall-9offerti (Ottubru 2011), ossija: '*I would suggest that we do not define specifically what thye of JV we would enter into for the purposes of the submission of the Tender and simply say that we will, if successful, form a JV. I know that this would beed to be decided and established at some point however for the purpose of submitting the bid I believe that we would be able to demonstrate sufficient dual strengths that would place us in a strong position. The costs are relatively low.'* Dak huwa d-Dokument 'ASL 2'.

5. Illi di piu`, wara dik il-korrispondenza, l-offerta nfisha sottomessa mill-partijiet lill-MIA (DOK SH 3) ma tistax tkun aktar cara dwar l-istat tan-negozjati bejn il-partijiet dwar il-mudell illi kellhom jadoperaw u dwar dan is-suppost ftehim bejn il-partijiet a fol 6 u a fol 13 taghha (enfasi f'dak id-dokument mizjuda);

6. Illi l-assenza totali ta' tali ftehim kienet wkoll ammessa mill-istess direttur tas-socjeta` attrici Kenneth Attard sahansitra hafna zmien wara ossija fl-24 ta' Jannar 2013 (DOK SH 4) meta jikteb illi kien fadal li **jibdew jigu diskussi** eventwali abbozzi ta' *shareholders' agreements* u *memorandum* ta' socjeta` ghal-liema email wiegbet l-ghada stess is-socjeta` rikorrenti (Petros Zorapas) u qablet illi kellhom jibdew in-negozjati: '*As regards next immediate actions I'm ok for starting*' u llum l-istess Kenneth Attard addirittura qieghed jghid li l-ftehim kien gja gie milhuq;

7. Salv eccezzjonijiet ulterjuri skont il-ligi u b'rizerva ta' kull dritt fil-ligi kontra s-socjeta` rikorrenti;

8. Bl-ispejjez ta' din l-istanza kontra l-istess socjeta` attrici minn issa ingunta in subizzjoni."

3. Rat illi b'digriet moghti mill-Prim Awla tal-Qorti Civili fl-10 ta' Novembru, 2014, il-Prim Awla tal-Qorti Civili ordnat li f'dan l-istadju

jitressqu l-provi u tinghata decizjoni dwar jekk kienx hemm ftehim bejn il-kontendenti.

4. Rat is-sentenza li tat il-Prim Awla tal-Qorti Civili fuq din il-kwistjoni fil-15 ta' Jannar, 2020, li in forza taghha cahdet l-eccezzjoni preliminari li ressqet is-socjeta` konvenuta u ordnat il-kontinwazzjoni tas-smigh tal-kawza.

5. Dik il-Qorti tat is-sentenza taghha wara li ghamlet is-segwenti konsiderazzjonijiet:

> "In this case plaintiff company Attard Services Ltd (hereinafter referred to as "ASL") is requesting payment of damages from defendant company Shell & MOH Aviation Fuels A.E. due to alleged shortcomings committed by the latter because of which allegedly it missed an opportunity to provide plane refuelling services at the Malta International Airport on the basis of a contract they were jointly awarded in July 2012. All this happened after plaintiff and defendant company had together agreed and submitted an offer to supply fuel at the said airport and after they were awarded the tender, defendant company unilaterally backed off from the agreement. Plaintiff company suffered negative consequences as a result of this including loss of earnings and sales as well as its reputation with the authorities concerned.
>
> On the other hand defendant company rejected plaintiff's claims as unfounded in fact and at law. It insisted that there was no breach of contractual obligations from its part and neither did it withdraw from an agreement between the parties as claimed by plaintiff company.
>
> **A. EVIDENCE**
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> 1. **Kenneth Attard, Director of plaintiff company**[1] testified that in 2011, in line with its legal obligations under A.L.66 of 2003 Malta International Airport p.l.c (hereinafter referred to as "MIA") issued a call for tender to grant licence to an operator for the provision of

[1] Affidavit at fol 470 et seq

refuelling services to planes at the airport just mentioned. This call number MIA/07/11 aimed at proving the choice of a second operator of such service and this for a period of 7 years. The closing date for the call for tender was the 26th October 2011.

As a director of ASL, the witness engaged in discussions with Justin Wake of Shell Aviation London to find out if they were interested to enter into an agreement with ASL in order to submit a joint offer to operate the concession in relation to the call for tender in question. In a short time Shell Aviation confirmed that their joint venture in Greece was interested and proposed a meeting between parties to start discussions.

In the beginning of September 2011 a meeting was held at the Shell & MOH office in Athens, Greece where the call for tender document was discussed with their representatives Petros Zorapas. Kyriakos Tzanidis and Nikos Daskalakis. The agenda for the meeting[2], set out by Shell & MOH itself indicated the detailed discussions that took place, and a presentation was even made[3].

At no stage prior to February 2013 was plaintiff company told, or given reason to understand that what was being discussed covered only the stage up to the submission of the tender bid and that afterwars discussions would have had to start afresh to reach an operative agreement. It was only when Shell & MOH wanted to withdraw from the agreement, in the second quarter of 2013 did they start saying that there was no agreement between parties. And only now in their sworn reply in this court case did they change their legal position claiming that discussions were split in two phases, that is, phase one up till the submission of the bid (for which they accepted that there was an agreement) and then phase two to reach an agreement regarding the operations part.

On the 7th October 2011, Petros Zorapas, in his capacity as Chief Executive Officer of Shell & MOH Aviation Fuels AE confirmed by email that he had received clearance from one of their shareholders to proceed with discussions aiming at reaching an agreement with ASL to submit the tender bid at MIA[4]. According to the witness, even here there were no indicated reservations to the effect that this consent was limited only to the phase up till the submission of the tender bid and that afterwards negotiations had to start afresh . Rather, according to him, the discussions that took place prove otherwise.

[2] Doc ASL 35 at fol 544 et seq
[3] Doc ASL 20 at fol 481 et seq
[4] Doc ASL 21 at fol 491

He evidence that discussions were held between the respective companies and the specifications of the tender were amply discussed. The discussions included the way in which the companies would operate, who would be responsible for what, under which structure was the operation to take place, the percentage shareholding which the company intended to retain and also details on how the operation itself was going to take place. These discussions covered anything commercially imaginable both from a technical and also an operational aspect, that is, back-office, billing and staffing operations, their expenses and the profit margin expected from the said operations. In fact Shell & MOH Aviation had sent them detailed accounts regarding cash flow and forecasts of profits and losses on the basis of which they could calculate the potential earnings on the basis of their agreement[5].

Discussions were so detaoled that upon the resquest of Shell & MOH Aviation itself, in October 2011 meetings were held with legal firm Fenech Farrugia Fiott regarding all aspects concerning the new joint venture and the effects of taxation on Shell & MOH Aviation based on the preinciples which both companies had agreed upon. Had they only been discussing issues regarding how to submit the tender bid only, these details would not have been necessary.

Following these long and exhaustive discussions, parties agreed on all aspects that concerned their commercial relationship and which were necessary for the submission of the tender bid and they also agreed on their future operations should their bid be upheld.

This agreement, which was then put forward to the parties' respective Boards, did not flag any reservations or conditions. This because, as is expected in cases where a tender bid is submitted, the aim is to have a successful outcome with the award of the tender and so this kind of agreement cannot leave any pending items but everything must be discussed before submitting the actual bid. At that stage, everything that had to be negotiated was considered in detail including the individual responsibilities of the parties, earning and operations expenses.

After an agreement was reached, the parties' respective Boards of Directors authorised them to submit the tender bid jointly. There was no doubt that this agreement was reached, in fact this was noted down in writing in correspondence dated 9th April 2012[6] which was signed from the representative of plaintiff company upon request of defendant company itself as a proof of what they ahd agreed upon.

[5] Vide doc 6a - fol 24 and Doc 6g - fol 42

[6] Doc ASL 5 at fol 23

The witness continued to state that the agreement reached by the parties covered all commercial aspects regarding the operations including the number of employees, their salaries, fees and other expenses without which the bid would not have been submitted.

The closing date of the call for tender was re-scheduled by MIA several times and from the 30th October 2011[7] it was extended to the 18th January 2012[8] and then to the 18th April 2012[9]. In view of the agreement reached between ASL and Shell & MOH Aviation and during the time when the tender document was being prepared, the witnesses went to Greece so that they go through the final preparations and obtain the final approvals and signatures from defendant company. During this visit, which took place in April 2012 they specifically went through all the documents that were going to be submitted in the name of the partners of the joint venture. At that point they proceeded to submit the tender bid to MIA. The witness also indicated how all that was agreed between them was indicated in the bid. At no point did defendant company raise any reservation.

The witness added that not only had an agreement been reached without any pending conditions but the tender bid itself explicitly indicated the pending materials that still needed to be resolved. In fact the bid stipulated the condition that plaintiffs and defendants had to reach an agreement for pipelines access with Enemalta Corporation – for which condition some time was requested to conclude the agreement. Once this agreement would be reached there would have been no other obstacles for the joint venture between ASL and Shell & MOH Aviation AE to execute their obligations should their offer be accepted.

The joint bid was submitted to MIA on the 19th July 2012. By means of a letter of acceptance MIA confirmed that the two parties had been accepted as the second supplier of fuel at MIA[10].

Another indication that according to the witness confirmed a full agreement reached between the parties is an email sent by Kyriakos Tzanidis on the 23rd July 2012[11] which confirmed the partnership between the two companies and the need to proceed by submitting the performance bond as part of the commitment of the joint venture to prepare the way for the commencement of operations.

Moreover from the multiple emails exchanged between the parties and also third parties there was no doubt according to witness that an agreement had been reached even though a lot of work still needed

[7] Doc ASL 20 at fol 484. See also extension till 30th November 2011 – Doc ASL at fol 22
[8] Doc ASL 23 at fol 495
[9] Doc ASL 24 at fol 496
[10] Doc ASL 7 at fol 52
[11] Doc ASL 26 at fol 522

to be done. But this pending work was only related to the setting up of the operations and not connected to reaching an agreement. Witness also referred to other emails which according to him indicated that an agreement had been reached between parties[12].

Not even at that stage, according to the witness, were there any indications of commercial or operational issues that still needed to be decided amongst the parties.

The witness added that when they were awarded the tender they started intensive negotiations with Enemalta Corporation to conclude an agreement. Such agreement was reached and a contract with the Corporation was signed on the 18th January 2013[13]. Up till the period leading to the signing of such contract the communication between the parties was limited to aspects concerning the conclusion of such agreement and on how to seek an extension of time from MIA so that they can start operating as a joint venture[14].

Since at that stage there were no other pending obstacles, plaintiff and defendant companies signed the concession agreement for a period of seven years and to start operating as soon as possible but not later than the 31st March 2013 or the long term delay scheduled for the 31st December 2014[15].

Moreover, after they signed this agreement the parties proceeded to reserve the name they had chosen for the joint venture[16]. The parties even celebrated the success of closure of the pending issues by means of a dinner organised by plaintiff company in the presence of representatives from defendant company. Even the Greek ambassador had attended.

In the following days Kyriakos Tzanidis congratulated the parties for this achievement whilst noting that the only pending issues were related to the scheduling of the start of operations[17]. Even Petros Zorapas declared the signing of the agreement with Enemalta as a success[18].

A while later Petros Zorapas requested copies of the agreements signed with Enemalta. These were sent to him along with a list of actions that at that stage still needed to be formalised including the registrtion of the joint venture with MFSA based on the Memorandum

[12] Email of the 13 th December 2012 at fol 61 and email of the 27 th November 2012 at fol 523
[13] Fol 524 et seq
[14] Doc ASL 33 at fol 539 et seq
[15] Doc 29 and Doc 29A at fol 528 et seq
[16] Doc ASL 3 at fol 20
[17] Doc ASL 11 (b) at fol 163
[18] Doc ASL 11 (a) at fol 162

& Articles of Association which had already been agreed upon and also the shareholders' agreement. Witness reiterated that even at that stage no representaives of defendant company mentioned any pending negotiations between them.

The witness also said that in the meantime they were also receiving enquiries from airlines including Turkish Airlines, which enquiries plaintiff company referred to defendant company as the party in the joint venture responsible for marketing. Even among other sections of defendant company it was known that an agreement between plaintiffs and defendants was in place[19].
Suddenly however there was complete silence from defendant company and this notwithstanding various efforts by plaintiff company to contact them. In February 2013 Petros Zorapas contacted the witness and told him that defendant company had unilaterally decided not to continue with this project because of internal issues within Shell & MOH Aviation. When the witness insisted that he is given a written explanation for this change of heart, Shell & MOH Aviation sent an email to that effect[20].

After further pressure from witness it was agreed to hold a teleconference between plaintiffs and defendants, this time with the direct involvement of Petra Koselska, Managing Director of the Board of Directors of Shell & MOH and a
representative of Shell Aviation in Shell & MOH Aviation. This was held on the 18th February 2013.

The witness said that from the transcript of the teleconference[21] it transpired that the reason for the withdrawal of defendant company was only based on internal issues which they had not evaluated and nothing more. He also stated that this decision of defendant company caused and continued to give rise to damages to plaintiff company because as a result of what happened plaintiff was not in a position to honour its obligations.

After this decision Shell & MOH Aviation committed themselves to try and come up with an alternative model which replaces the original one agreed to between the parties. The directors of plaintiff company even went to Greece to try and resolve this hurdle. Although progress was registered, Shell & MOH were not ready to commit themselves. Plaintiff company even proposed an agreement based on the discussions that took place in Greece but to no avail as
Shell & MOH refused to sign it.

[19] Doc ASL 31 – email 5th April 2013 at fol 534
[20] Doc ASL 13 – email dated 15th February 2013 at fol 166
[21] Doc ASL 14 at fol 169 et seq

Even subsequent attempts of alternative proposals made by plaintiff company failed. It was clear at that point, according to witness, that Shell & MOH were only interested in raising scenarios to discourage plaintiff company from honouring the obligations it had undertaken even with MIA.

Then by means of a letter addressed to MIA[22] defendant company unilaterally
annulled the seven year fuelling concession awarded by the tender with all the negative repercussions this brought on plaintiff company.

The witness also stated that in its sworn reply defendant company refers to an email dated 5th October 2011[23] citing it as evidence that discussions between the parties had not yet been concluded. But witness reiterated that this is not the case since the content of that email was surpassed by discussions that subsequently took place.

In **cross-examination**[24] he explained the process of negotiations, discussions and other preparatory work undertaken by both parties until they submitted the tender bid in 2012. He said that before taking that step they explored and agreed on all the important aspects of how they were going to operate including the costings.

He denied that the 100 milestone list included in it a lot of important material which was still pending between the parties. According to him, when they submitted the tender bid they had already declared that they had reached an agreement and there were no concerns. They indicated only one condition in the bid which was that they required time to discuss with Enemalta regarding access and storage. He referred to the 100 milestone list as a checklist.

He confirmed however that there was no formal agreement on the structure of the company which was intended to be set up and in fact this was not defined in the tender document. A draft Memorandum and Articles which was prepared was not accepted by defendant company.

The witness also said that there was no written agreement between parties yet but agreement was a verbal one. He insisted that parties had already agreed between them and it only needed to be formalised in writing. He said that about 6/8 months after the submission of the bid which reflected the entire agreement between parties, plaintiff company was expecting the said agreement to be formalised in writing. This was based on the level of trust which plaintiff company had towards defendant company.

[22] Letter dated 27 th March 2014 - Dok 17B at fol 208 et seq
[23] Doc SH 2 at fol 401
[24] Fol 929 et seq and fol 993 et seq

He also gave evidence about an exchange of emails between parties.

In **re-examination**[25] he explained that after defendant company decided to abandon the original project they accepted to explore the alternative model proposed by defendant company which was planned to grant a more active role to plaintiff and a lesser role to defendant because the latter had concerns related to competition issues.

He also mentioned that in November 2012 he had insisted with the representative of defendant Company Nikos so that their discussions are formalised but he recived no reply.

With regard to the 100 milestone list he insisted that the items therein indicated eg purchase of equipment, insurance, uniforms etc were not determining factors affecting the operations from Malta.

2. Evidence was also given by **Caroline Curmi, director of plaintiff company**[26] who said that she knew about the call for tender issued by MIA. In the past ASL had already participated for the call for tender for such service and it had done so with Shell Aviation Ltd. They had won the tender but since Enemalta had refused to reach an agreement regarding the central infrastracture, the 7 year tender fell through. The new call for tender was issued for another period between 2011-2018.

As board secretary of ASL she participated in internal discussions to decide whether or not plaintiff company should participate or not in the new call for tender issued in July 2011. They decided that ASL was interested to tender and that Kenneth Attard was the person chosen to focus on it. He was also delegated by the company to communicate with Shell Aviation to see if they were interested in submitting a joint bid.

Then during an internal meeting they had in August 2011 Kenneth Attard confirmed that he had made contact with Shell Aviation of London and they were interested in pursuing the matter but together with joint venture Shell & MOH Aviation.

In subsequent board meetings Kenneth Attard regularly kept them updated with the progress of discussions with Shell & MOH Aviation. During one of the meetings towards late 2011 Attard informed them about the approval of Shell & MOH and confirmed that they were going to bid jointly with ASL as a joint venture. The ASL Board approved the participation of the company in this joint venture and

[25] Fol 1001
[26] Affidavit at fol 547 et seq

proceeded to work together with Shell & MOH for this purpose. A copy of the letter dated 3rd October 2011 was presented to the Board[27].

Attard also kept the board updated with regard to the progress in discussions both with Shell & MOH and Enemalta Corporation regarding the feasibility and concerns which could be raised in view of past experiences.

During this process she had assisted Kenneth Attard among other things in the preparation of the tender document, various aspects regarding the joint venture between the two companies, the financial situation of the two companies, equipment, staff required to cover the operations, commercial plan for seven years.

Since the first draft of the joint venture needed to be approved by both partners of the joint venture, Kenneth Attard went to Greece in April 2012 and when he came back he informed the Board that the application of the call for tender had been approved and signed by the two members of the joint venture. The tender bid was submitted at MIA on the 18th April 2012. Later MIA informed them thet they were the preferred bidders subject to discussions with Enemalta. Discussions with Enemalta continued after the tender bid was submitted and regular meetings were held between ASL and Shell & MOH; this by means of visits by Petros and Kyriakos in Malta, Kenneth and George Attard in Greece, phone calls and tele-conferences. The witness was present for some of these meetings and teleconferences.

The week of the 18th January 2013 was a very intensive one with many meetings and during which all the remaining pendencies regarding the agreement were concluded; so much so that in the evening of the 18th parties organised a dinner to celebrate the success of these achievements. Till that period witness said that she was not informed by either of the parties that there were still issues that needed to be resolved.

It was only in February 2013 that Kenneth Attard informed the ASL Board of directors that Shell & MOH suddenly and unilaterally had decided not to proceed with the project and this for reasons that were not yet clear. On the 18th of that month, a telecoference call was held with Petros, Nikos and Petra Koselska and none of them mentioned any pendencies that still needed to be discussed. Even an alternative model was proposed but this was not enough to save the contract that was awarded to the joint venture because defendant company refused to move forward, even when all the concerns surrounding issues with Enemalta Corporation had been resolved.

[27] Doc ASL 4 at fol 21

3. Evidence was given by **George Attard, director of plaintiff company**[28]. He confirmed that in September 2011 he was present at the offices of Shell & MOH in Athens, Greece where they discussed details regarding the operations which were necessary to finalise their tender bid. Whilst the witness held meetings concerning the operational aspect with Kyriakos Tzanisdis, his brother Kenneth had meetings regarding the administative part of the tender.

Wintess had constant discussions with Petros Zorapas, CEO of defendant company and also with Nikos Dikeos, Head of the legal section of defendant company.

During the discussions held between the witness and Kyrios, focus was made in a model based on a staff composed of 18 workers and a system of four shifts. Besides, they also discussed other commercial matters related to the call for tender. These discussions were long and took about three months to be concluded.

These discussions were concluded and a verbal agreement was reached. That this agreement was reached is proven by the fact that not only a joint tender bid was submitted, but even when they were awarded the tender, the parties were so confident that an agreement with Enemalta would be reached that in December 2012, as agreed with Kyriakos Tzanidis, a mobile home was acquired to convert it into a mobile office. The witness referred to documentation proving all this[29].

Witness insisted that at no point, neither in Malta nor in Greece, did any of the parties mention that an agreement was not reached; not even in exchanged correspondence. For the witness it was evident that an agreement had been reached between the parties before the tender bid was submitted and that the only doubt which they had as to whether they will be able to start operations or not was connected to the issue of reaching an agreement with Enemalta.

Discussions between the parties were always open and there were never any reservations or conditions mentioned. Rather, discussions intensified after an agreement was reached with Enemalta. Everyone was focused on the date of the start-up of operations.

On the 18th January 2013 the witness was not present for the signing of the agreements with Enemalta but later that day Kenneth Attard informed him that they had successfully concluded all the remaining pendencies and that the following week they had to start implementing what they had agreed upon.

[28] Fol 550 et seq
[29] Fol 553 et seq

A week later, assisited by an ex-superintendent of Enemalta named Tonio Fenech continued to deal with the preparations for set-up of operations by conducting interviews of potential employees in the first two weeks of February 2013. The intention was that these employees (a total of nine) would commence work within three months. Interviews were held at their own offices.

Later however, defendamt company decided to withdraw from the agreement and started to change goalposts and proposed different models and structures.

4. Evidence was given by **Alan Caruana, ex-consultant within the Ministry of Finance**[30]. He spoke about some difficulties which had been an obstacle for the introduction of a second fuel supplier at the Malta International Airport. With regard to the specifics of the present case he remember that mainly they met representatives of plaintiff company but they had also spoken to someone from Greece. They were trying to identify what was blocking Shell from operating in Malta.

5. Evidence was given by **Louis Giordmaina, ex-Executive Chairman of Enemalta between 2012 and April 2013**[31]. He stated that the major obstacle for the introduction of a second fuel supplier was connected to infrastracture and aviation fuel storage because practically all the infrastracture available for storage belonged to Enemalta. This meant that if a second operator was going to enter the market and Enemalta was going to provide space for storage, the question was how were the storage fees going to be established. As far as he remembered this was the primary issue. He confirmed that agreement was reached between the parties to the case and Enemalta on the 18th January 2013 regading the storage of fuel and apportionment of expenses. Subsequently further discussions were held to discuss logistics but he did not remember any other details.

6. Evidence was given by **Major Martin Dalmas**[32] who explained that other than in the case of Enemalta, the last time that a concession was given by MIA was in 2012 to ASL together with Shell & MOH with the intention of forming a
joint venture to execute the granted concession. He said that bid conformed to the tender requirements but with the proviso that ASL and Shell & MOH still had to reach agreement on throughput charges. MIA had even issued a letter of acceptance and conceded a number of extensions upon request of the parties because they were still discussing throughput charges. MIA also started to put pressure on ASL and Shell & MOH to set target dates to sign the concession

[30] Fol 571 et seq
[31] Fol 582 et seq
[32] Fol 447 et seq Vol 2

agreement and to do the aviation insurance[33]. Eventually MIA was informd by both parties that since the joint venture could not work out they could not execute the concession agreement[34].

7. Evidence was given by **Tonio Fenech, ex-Minister responsible for Finance, Economy and Investment**[35]. He confirmed meeting the Attard brothers who had informed him about the problem they had been facing for years with Enemalta since it was impeding ASL from entering the market as a second fuel supplier at MIA[36]. This was against EU directives which required more than just one operator. The matter had also ended up in court and Government had lost the case. So ASL had sought him to try and reach an agreement about the matter.

8. Evidence was given by **Dr. Peter Fenech, legal counsel to plaintiff company**[37]. He said that he had been giving them advice about matters concerning aviation fuel since 2004/begining of 2005. He explained that Shell Aviation, whose local agent was plaintiff company had already been awarded the tender MIA/07/04 but since they did not manage to reach an agreement with Enemalta, it expired.

In 2012 MIA issued another call for tender MIA/11/12 inviting a second operator to enter the market as fuel supplier at the airport. Plaintiff company, this time partnering with Shell & MOH Aviation Fuels AE, as a joint venture which was in formation, submitted a joint tender bid which they were successfully awarded. The witness was present on the 18th January 2013 for a day of of talks which led to the signing of the agreements with Enemalta.

The witness was involved in the drafting of the agreements of the 18th January 2013 and as far as he knows, from the dicussions held and exchanged emails which he was part of, the only issues that were brought to his attention by parties were related to the fees for the use of Enemalta's infrastructure.

The witness added that present for the meetings, besides the Enemalta officers there were representatives of both parties, and for the witness what was discussed on the 18th January was the last and only obstacle left before full agreement was reached on the operation of the project.

After the 18th January the witness had advised plaintiff company to give a signed copy of the agreements to Shell & MOH Aviation Fuels

[33] Email dated 22nd January 2014 at fol 446
[34] Fol 206, 207 and 208 Vol 1
[35] Fol 460 et seq
[36] As far as he knows Shell were the original bidders and Attard Services Ltd were their representatives
[37] Affidavit at fol 600 et seq

A.E. for their records and also to proceed and reserve the name of Malta Joint Venture so that the partners could proceed with the formalities. In no correspondence that was subsequently exchanged did any party say or imply that the operations could not start because there were pending issues.

The first time that the witness was told that Shell & MOH Aviation Fuels A.E. began stating that they could not go ahead with the project was towards mid or end of February 2013 but even at that stage he was not yet aware of the reason why operations could not start. The first indications of the reason why Shell & MOH Aviation Fuels A.E. were encountering internal difficulties to honour their contractual obligations with Enemalta and with plaintiff company came through a phone call with Petra Koselska tof Shell & MOH Aviation Fuels A.E. But the reasons given were related to concerns on other matters and not on lack of agreement between the parties to the joint venture.

From then onwards the witnesses was aware that defendant company started to propose alternative models of operations to plaintiff company. But these were radically different from what was originally agreed between the parties and on which basis the tender bid was submitted. A new draft agreement was even prepared to reflect the position as changed by defendant company[38] but it never signed it. A request was also made by MIA to extend the date of beginning of operations.

9. Evidence was given by **Anthony sive Tony Fenech**[39] who had a long career in the aviation industry. On the 5th September 2012 he had a meeting with George Attard on behalf of plaintiff company and accepted its proposal to assist in setting up the operations, which was the sector he worked in. A number of meetings were held with Enemalta with the aim of determining the details of operation required by the parties to start operating[40]. During these meetings agreement was reached on a number of matters including quality control, office requirements, insurance etc[41].

On the same day they also discussed with Mr Tznidis potential crew members who could be recruited should the pendencies with Enemalta be resolved, because from what witness understood the Enemalta issues were the last remaining hurdles before the start of the operations. Also a number of employees were shortlisted and he was awaiting instructions from George Attard to inform the said employees that they were chosen. When he was given such instruction on the 21st January 2013, since all the pendencies with

[38] Fol 604 et seq
[39] Affidavit at fol 607 et seq
[40] Copy of the minutes filed at fol 609 et seq
[41] Fol 616 et seq

Enemalta had been resolved, he started contacting the drivers they had previously interviewed so that they could come along for the final interview with the aim that within a term of about 4 months they will be able to start after resigning from their respective jobs. On the 14th, 15th, 18th and 19th these final interviews were held but then he received a phonecall to halt everything since defendant company was backing off from the project.

10. Evidence was given by **Bernard Mallia, consultant to plaintiff company on economic and financial matters**[42]. He testified among other things about the joint bid which parties had submitted at MIA. He was kept regularly informed and updated about the progress of matters regarding this bid since it was his responsibility to ensure that the commercial operation would be competitive with Enemalta. He also spoke about the agreements with Enemalta of the 18th January 2013 and that one of them was about the price that had to be paid for the use of centralised infrastructure of Enemalta. He said that after these agreements were signed there were no other obstacles for the operations to start. In fact at that stage he went to the offices of ASL with a champagne bottle to celebrate this success and also to sign an agreements by virtue of which he and ASL agreed that his services were no longer necessary because operations were due to start shortly.

Later on in January or beginning of February Kenneth Attard had even contacted him to ask if he could introduce him to some people from the banking sector at the request of Shell & MOH itself so that they could start operating, and the witness complied accordingly.

However, much to his surprise, witness was again contacted by Kenneth Attard towards the end of February 2013 and he was informed that some issues regading the new concession had arisen and for which ASL requested his services once again. For this purpose two meetings were held on the 8th and 14th March 2013.

Since the agreement which had been reached between ASL and Shell & MOH had to go through changes due to internal issues of Shell & MOH, witness was requested to provide alternative commercial measures to propose to defendant company and on which basis the joint venture could operate. Shell & MOH had basically asked ASL to propose a sum in the basis of which they could be frontliners in leading the operations. He proposed two commercial models and to discuss in greater detail he even accompanied Kenneth and George Attard and Peter Fenech to Greece for meetings with Shell & MOH on the 26th March 2013. But at this stage Shell & MOH started changing the original parameters which they themselves had given to ASL at

[42] Affidavit at fol 631 et seq

tendering stage. Shell & MOH also started telling ASL that it was not commercially attractive for them to enter the market.

On their way to Athens airport witness remembers asking Kenneth Attard whether he thought that Shell & MOH were doing all this because they were genuinely interested in operating an alternative model or whether they had other motives including forcing ASL to withdraw from the project. But Attard replied that he did not think this was the case.

But, after there were further discussions and formulation of other commercial models, and yet again the witness accompanied Kenneth Attard to Greece in June 2013 it started to become clearer that Shell & MOH were no longer interested to honour the obligations they had commited themselves to with ASL and the Government of Malta. Rather they were trying to discourage ASL so that they themselves would back off from this project. The situation then reached a stalemate to the extent that they sent a representative in Malta to inform ASL about their position and inform the Maltese authorities that they were withdrawing from the concession.

11. Evidence was given by **Dr Lisa Abela**[43] who worked as a Director at the Malta Authority for Competition and Consumer Affairs and she investigated cases that could infringe competition laws. She had investigated a complaint filed by Shell and ASL in 2006 when they had jointly been awarded a tender to provide services to aeroplanes at the Malta International Airport and they needed to use Enemalta Infrastructure but Enemalta was refusing to provide access to them. They had concluded that Shell & ASL needed such access. Then in 2013
they had a meeting with these two companies so that the Department could intervene so that a solution is found.

12. Evidence was given by **Antoine Galea**, Chief Financial Officer at Enemalta[44]. He was involved in discussions with ASL and Shell in 2012 to plan an operative mechanism which had to be implemented by both sides in the fuel supply service at the airport. The problem was to share the infrastracture which was already limited and so it was not easy for two operators to operate. They discussed the whole spectrum of operations, that is, from the stage of procurement to storage and distribution. However he did not remember whether a final agreement was reached.

13. Evidence was given by **Philip Borg**, Manager of Enemed Co. Ltd, formerly known as the Petroleum Division of Enemalta Corporation[45].

[43] Fol 652 et seq
[44] Fol 658 et seq
[45] Fol 665 et seq

He said that discussions were held with ASL in September 2012 regarding the implementation of the refuelling operations at the airport[46]. Discussions were held regarding the use of infrastracture of Enemalta. He confirmed that agreement was reached on various aspects and contracts were accordingly signed. ASL had even enquired about the availability of space for the garaging trucks, office space etc.

14. Evidence was given by **Dr Tonio Fenech**[47] who said that he had rendered professional services to plaintiff and defendant companies in 2011 regarding tax and formation of a joint venture between them. Various emails were also exchanged in this respect[48].

15. Evidence was given by **Petros Zorapas**, Chief Executive of defendant company[49] who was the main negotiator on behalf of his company with regard to the project in question. He explained that the first contact between them and plaintiffs was around September 2011 when he met Mr Attard on behalf of plaintiff company. Latter had explained several aspects to them namely the market, supply, infrastructire of fuel aviation in Malta etc. He also said that he had subsequently discussed with the Board the possibility that together with ASL they submit a joint tender bid. The Board of directors of defendant company approved this.

In the discussions held with ASL before the tender bid was submitted, and because the original one month deadline was too short, they did not have enough time to understand and have awareness of the market, opportunities, price, clients etc. They only had a general idea. Then there was an extension between September 2011 and April 2012 and in that period parties focused on preparing all the documentation necessary so that they could submit a joint offer.

From its end MIA had requested many technical details including their experience etc and they even had to submit a business model. They had agreed on separating the companies and how the percentages were to be apportioned. This model submitted with the tender bid included several aspects of the discussions held between the parties but it was not signed. He said that at the moment when the tender bid was submitted there were still many other important documents about which discussions had been held but no agreement reached yet such as the shareholder agreement, supply agreement, the service level agreement between the Greek entity and the Maltese joint venture, the Board structure, the commercial service agreement, the technical service agreement, the tax model and the profit centre. With regard

[46] Agenda of discussions at fol 673 et seq
[47] Fol 688 et seq
[48] Fol 696 et seq
[49] Fol 719A et seq

to third entities such as MIA, Enemalta and MRA, the parties decided that they will first submit the tender bid and then they will deal with them later. So after submitting their bid in April 2012 they started to see how they could resolve the problems they had with these third parties. Three months later the tender was adjudicated in their favour and so they intensified the discussions with these entities to unblock the obstacles. Eventually agreement with these entities was successfully concluded.

In parallel, discussions were also held between the two parties to identify other aspects which regarded their own relationship. About 85 points were identified and they had to work on them to finalise them[50]. This list was prepared jointly after discussions between the parties.

In the last column of the list the witness indicated the progress which in his opinion was made. According to him some of the items had been concluded 100% but there were others were little or no progress at all was made such as the shareholder agreement, supply agreement and the commercial service agreement etc. He also mentioned discussions regarding which company was going to absorb the profit, that is either the Greek one or the local one.

He said that at the beginning of the negotiations in September 2011 it was the Board of Directors which gave him the approval because they were going to enter into a new airport and a new country. When the bid was submitted in April 2012 and later awarded to them, and after agreements with third parties were concluded, the final approval of the Board was still needed to proceed with the project and this in view of a final document which is sent to the same Board called Group Investment Proposal. This document was not yet developed till 18th January 2013. This was the most crucial approval and it was internally pending at the Board of defendant company. The witness was not involved in the Board decision and it was taken toward the end of January 2013 the decision was to stop the project. Among the reasons which led to this decision there were concerns about the viability and profitability of the project, commercial considerations, considerations relating to the implementation of the agreement signed in January 2013 and more specifically concerns regarding the supply agreement which had to be signed because at the time the supplier was Enemalta and at the same time it was a competitor. So it was not clear to the Board if this agreement with a competitor was feasible and if it ensured supply. Another important matter was price – part of the agreement was that Enemalta had to add the price level to leave room for profit to plaintiff and defendant company. This raised an issue of anti-competitiveness because there was a monopoly in the market and with this condition it became a duopoly. In view of these

[50] List at fol 716 et seq

evaluations the Board deemed that it did not want to proceed further with the project.

Defendant company then communicated this decision to plaintiff company in the beginning of February 2013 (c. 8th or 10th of the month). From then onwards it was defendant company itself which proposed to plaintiff company an alternative model which in principle was the same structure-wise but in a different way. They had a lot of discussions even with plaintiff company even in Athens.

In the beginning he understood that plaintiff company had taken stock all this and even accepted it; in fact Kenneth Attard had even sent him a note telling him that he was confident that a solution would be found. But in April 2013 plaintiff society approached them with a completely different model. At that point it became clear that notwithsanding the efforts of defendant company the gap continued to grow and it was becoming increasingly difficult to find a solution on an alternative model. Because of that, in July/August 2013 they informed plaintiff company that there was no reason to continue with negotiations.

From the beginning he insisted that discussions between parties are open and honest. They knew from the beginning that they were going to enter into a project without commitment to each other. The only commitment they agreed upon was that they submit a joint bid. And they had also agreed to work together in negotiations with third parties. There was a lot of information which they had exchanged throughout those two years but there was also a lot of data and information which not even plaintiff company had at first. During that period they identified new items, data and input which rendered the scenario different. Moroever there were even consequences with MIA and Enemalta as a result of the fact that plaintiff and defendant companies stopped their negotiations. Even the bid bond which had been paid to MIA was refunded because MIA acknowledged that parties' efforts to form the joint venture were unsuccessful.

In **re-examination**[51] he said that with regard to the original bid, although originally they had only a month to analyse the proposal, in view of the postponement of date for the submission of tender bid by MIA, they had about five months to do preparatory work.

During that period ASL and defendant company were focused on preparing the necessary documents to submit the bid. He also explained among other things the exercise that was done regarding the expenditure structure based on the information they had at the time. He acknowledged that previously, plaintiff company and Shell had participated in a similar tender process but Shell was a separate entity from defendant company Shell & MOH. As Shell & MOH this

[51] Fol 764 et seq

was the first time they were participating in the process. Although they used some information from the previous process this was limited. He also evidenced that after the submission of the bid, defendant company was regularly asking about the progress of the same and whether this was awarded or not.

He denied however that there was an agreement with ASL regarding *tar bucks.* Although they had discussed the matter with the insurance company, the latter informed them that it could not be covered so the parties themselves had to cover it. He also denied that there was a technical service agreement in place and that although there were discussions with a service provider no agreement was signed and there was not even a verbal agreement. There was only a confirmation that they will provide service if they proceed. There was therefore an understanding as to who had to do what but no formal agreement. He agreed that the tender bid indicated the composition of the Board as agreed by the parties.

He acknowledged that the submitted bid was conditioned upon a number of factors related to third parties which was indicated in the bid. They identified only those and not others because at that time it was those issues with third parties that were identified.

Regarding the 100 milestone list he confirmed that there were items which were classified as a priority, others as medium in importance and others less.

He also said that the Board of defendant company first gave the go-ahead before the tender bid was submitted and then after it was accepted by MIA they had another go-ahead to start negotiating with third parties, that is Enemalta and MIA. He acknowledged that these approvals were internal and was not sure if they were communicated to plaintiff company.

The witness added that the 100 milestone list was developed by both parties; the first version being in September/October 2012, that is, after the awarded tender but before the signing of the agreements with Enemalta and MIA.

After signing these agreements they were in a position to develop the project proposal and take it up with the Board of Directors. Between the time when the agreements were signed in January 2013 and the decision of the Board in February 2013 there was no other official communication with plaintiff company.

In **another session of evidence**[52] he insisted that at the stage of submission of the tender bid they had only managed to do research

[52] Fol 798 et seq

and analysis of what was available at that time and within the short time limits accorded. With this information they were not in a position to establish the exact cost of the project. The business model submitted with the tender was necessary for the purpose of the tender but there were still many operational issues which were not yet clear or known at the time eg into-plane, storage and supply areas.

Asked to explain the reason why the 100 milestone document was amended towards the end of February 2013, and therefore after signing the agreements with MIA and Enemalta, he answered that this was only for internal reasons because the alternative model was still open and they wanted to see what progress was done on the open items.

16. Evidence was given by **Nikolaos Dikaios, legal consultant of defendant company** since 1990[53]. He said that in December 2011 he was told that there was an opportunity which concerned the expansion of operations of Shell & MOH in Malta. The Chief Executive of the Joint venture Petros Zorapas sent him the relative documents of the tender offer that was issued by MIA for the supply of aviation fuel at the airport. At the time the operations of the Greek Shell & MOH Aviation Fuels AE was only in Greece and Malta did not fit in. But since Shell International was not interested in entering discussions on its own it referred the matter to the Greek joint venture so that it explores this opportunity.

The witness added that in January 2012 he was given the tender documents to give his legal advice and to prepare the necessary documents to participate in the call for tender. Among the documents submitted with the tender there was a business model which gave a general explanation of the idea that plaintiff and defendant companies were going to form a joint venture in Malta.

In the opinion of the witness, both plaintiff and defendant companies had the common aim of submitting a joint bid with the intention that if this was accepted, from there they proceed with preparations in the subsequent months so that a joint business could be established between them at the airport. This being that the submission of the bid was a pre-requisite before further considering the project but at the same tiem it was abundantly clear for them that in the period that followed they still had a lot of material to analyse including the market, market operators, source product, the relationship between the parties etc.

So according to witness it was known to all of the parties that in projects of this type, although there was the intention of persuing it, it was clear to all that there were still many obstacles and matters that

[53] Fol 721A et seq

needed to be resolved. Witness added that it was inherent in business negotiations like the one in question that althogh the initial will would be to follow the project, further evaluations and negotiations could lead to an ultimate conclusion that both or either of the parties declare that they will no longer pursue the project.

After the parties won the tender, delegations from both sides had intensive discussions including in Malta to identify and try to agree on matters which needed to be addressed so that they could activate their plan.
Within the internal relationship between the parties they had to address matters like shareholders' agreement, articles of association, resolution procedure in case of disagreement etc. But there were also issues that concerned third parties such as product supply, product storage, agreement with Enemalta, distribution, services which would be passed on to the joint venture, training, purchase of equipment, expenses involved, investigation into the vaiation market conditions in Malta, the political will of the Maltese Govt etc. All this had to be resolved before the defendant company would be in a position to consider whether the project was attractive or not.

At the end of the meeting they had in July, parties agreed to hold another meeting in September. With regard to third party issues, after September they realised that they had to give priority to various issues connected to fuel supply, and other third parties in connection with market conditions at the time. There was also the issue of the political will in Malta particularly the regulatory and competition authorities. So parties to the case actively tried to resolve these issues. In fact, around 90% of the activity revolved round these third party issues.

He acknowledged that the the supply and services agreement with Enemalta was concluded in January 2013 and even with MIA. He then referred to a number of emails which he was involved in[54]. These emails were interpreted by defendant company in the sense that once the agreements with the two external stakeholders were signed, they were to continue with the negotiations and discussions hoping that parties reach an agreement on all remaining matters pending between them so that the project could materialise. But their understanding of the situation was that if the project does not materialise at most they lose the bank guarantee (a calculated risk which they were aware of) but not that there would be other repercussions.

What happened was that after an evaluation carried out by the directors of Shell, they concluded that the fact that there was going to be a dependence on Enemalta, at least for a number of years if not more for the supply of fuel, together with other economic factors associated with that agreement, it was no longer attractive to proceed

[54] Fol 425 till 427

with the project as it was originally. Moreover Shell noted that it was risky to have a closed co-operation between Enemalta and the joint venture which was going to create a duopoly in terms of competition law and this was a risk which Shell decided not to take.

So in February 2013, after two years from when the initial interest was shown, Sgell decided that it was no longer viable to proceed with this project. After this development thet tried to find an solution by means of an alternative business model, which model could at least relieve Shell's concerns but which would still serve the purpose that they enter into the aviation market in Malta.

This alternative model was communicated to ASL together with the decision that the original model was no longer viable. The said model was analysed by ASL and the parties met in Athens towards the end of March 2013 and after extensive correspondence on the matter exchanged between Petros Zorapas and Kenneth Attard. Ultimately no agreement was reached on the alterntive model either. At that stage negotiations were formally closed and MIA and Enemalta were formally informed that they were no longer going to materialise the project. Enemalta had sent an acknowledgement and MIA had informed that that they took note of the fact that every effort was done to make the project possible and that they even released the bank guarantee.

The witness explained what in his opinion was the legal relationship between plaintiff and defendant company. He described it as a typical relationship between two prospective business partners who show interest in joining forces and to supplement each other but none of them could do it individually. So they concluded that this was an interesting business opportunity and that both wished to explore it further. In the present scenario however the parties needed to express themselves by means of a joint bid because this was the only way by means of which they could consider the project further. But after this step there were many other matters that still needed to be addressed and resolved. In fact, although in January 2013 the agreements with Enemalta and MIA were signed, these still could not be implemented at that stage. What happend was that after the critical issues (mainly with Enemalta) were resloved, and after two years had passed from the initial interest, Shell & MOH re-evaluated the whole project in the light of the developments that happened in the meatime and it decided, as it had the right to, that it was no longer interested in pursuing the project.

In **cross-examination**[55] he insisted that what they applied for in the joint bid was a common interest to enter the fuel aviation market in Malta. But at that stage there were still many factors, included

[55] Fol 809 et seq and fol 826 et seq

expenses involved, which were still not completely clear. So when they submitted the bid their intention was that if they win the tender, they would start the way to assess other factors which needed to be resolved for the project to succeed.

The witness did not know if a feasibility study was done by defendant company or not. He also gave his opinion about the agreement reached with Enemalta in January 2013.

17. Evidence was also given by **Meletios Aliferis**[56] who had been working with defendant company for a number of years and he was responsible among other things for planning and management of Service Level Agreements with third parties in accounts and information technology.

His involvement in the Malta project was primarily related with financial support from the economic and financial aspect of the project. He described the stages and process they undertook including deliberations and negotiations. He also explained that as an internal procedure, every contract they enter into must first be approved and then signed and this involved also the approval of the witness as a Finance Manager of the company. In the present case he never received an agreement for approval and so he understood that no contractual obligations were entered into by the parties. He also explained that when Shell decided that the proposed original model was not viable they considered an alternative model and discussions about it took place even in Athens in March 2013. When the viability of the project was no longer feasible for Shell and they declared so, they did not face any claims from third parties. Rather MIA, as a recognition of efforts made and good will shown by parties released the bank guarantee which was paid upon submission of the bid.

In **cross-examination**[57] he acknowledged that fuel prices and exchange rates change continuously even during the execution of the project. He also said that he had presented an economic model based on high and low scenario to his CEO which was presented to the Board of Directors.

Asked if he was aware of the fact that discussions had taken place regarding staff needs, fuel trucks and tyre expenses, leave and uniforms of employees, his answer was no. Also asked whether he knew that the 100 milestone list was updated in July 2013, that is after the project was abandoned, he replied that he was not responsible for this. He said as well that the Board of Directors did not have a business analysis before it submitted the bid because at that stage in

[56] Affidavit at fol 725 et seq
[57] Fol 830 et seq

his opinion there was nothing binding. And to check regarding banking facilities they based themselves on extremely optimistic high case scenarios. Since the project between the parties was still in its intial phases everything was based on assumptions.

18. Evidence was also given by **Kyriakos Tzanidis**[58], Supply and Operations Manager of defendant company. He had been working for defendant company for sixteen years. He explained his involvement in the project since the beginning in 2011. He explained that immediately certain critical issues emerged, primarily the issue of fuel supply because at the time the only infrastructure available in Malta belonged to Enemalta and there were no alternatives.

But up to the preparation of the joint tender bid from January 2012 till January 2013 there was no agreement in place with Enemalta. So when the tender bid was submitted in April 2012, the go-ahead from the Board of Dierctors of defendant company was based only on wide assumptions derived from their experience, but these had to be approved and validated by the Board at a later stage.

When the joint bid was submitted in April 2012 and the tender was adjudicated in summer of that year, representatives of defendant company, including the witness, came to Malta in September of that same year to meet the representatives of ASL so could start moving the project forward. After three days of intensive disussions it clearly emerged that although a lot of effort was done to date, there were still many issues of substance which were not yet clear or identified and which raised doubts.

On the 26th September 2012 a list of all open items was done and it was called the “100 milestones”[59] and it included the exploration of product purchase from Enemalta and to investigate other options on a wider scale in Malta and Italy. Although eventually the agreements with Enemalta were signed, and notwithstanding the progress in discussions with ASL there were still other critical matters that needed to be addressed including the product supply, storage and handling.

Till the date of the project was dropped in summer 2013, progress had been made about a number of critical matters but not completely and neither was there a finalised agreement nor an action which implements it. Discussions about an alternative plan were suggested by defendant company but this did not have a positive outcome either. In fact, the witness added, when discussions betwen ASL and defendant company were terminated, there was still a lot of work to be done in order for the model to be finalised and implemented.

[58] Fol 734 et seq
[59] Doc PZX 1 at fol 716 et seq

In **cross-examination**[60] asked why in the tender bid (page 12) it was declared that the only pendencies left were negotiations with third parties and itemisation of costs and charges, the witness insisted that there were many other matters that there was no agreement about. This was because at that time the aim was to win the tender and in the subsequent stage they try to agree on other details. Still, an ageement still had to be reached to establish a company and for this to happen there were still many pending materials even though parties had held discussions about them. When the tender bid was submitted there were many assumptions and estimated from defendant's part including re-fueling.

It was when the tender was adjudicated in their favour and when representatives of defendant company came to Malta in September 2012 that parties started to enter into some detail. They noted that there was a lack of basic insight regarding the client, volume etc. Although in the bid they had indicated a projection of 60% of the market in the first three years this was based on assumptions taken from public data, internet sources etc. He also insisted that the agreement with Enemalta did not solve all the problems and difficulties that still needed to be resolved such as the investigation of the supply options in Malta/Italy zones and exploration of shipping capability options. He insisted that not even the agreement with MIA regarding ground handling was enough to resolve pendencies because this was only considered to be only a step forward in teh discussions between the parties since otherwise everything would be stopped. He said that the agreements with MIA and Enemalta were not binding to them and this according to the explanation given by the lawyer of defendant company.

In **re-examination**[61] he answered that between July 2012 and September 2012 there was no progress between the parties and so defendant company took the inititative to prepare a list of pending items which still needed to be resolved. Also during that period plaintiff company dd not indicate that it was ready to start operating the project. When the 100 milestone list was prepared, plainiff company had no problem with it and also acknowledged the pendencies indicated.

19, Evidence was given by **Anastasios Chatzigeorgiou**[62], **Sales Manager of defendant company**. He had a limited role in the Malta project although internally he had discussions regarding aspects of sales and marketing of the project. He gave a detailed overview of the vast experience which defendant company had in the aviation industry (more than 25 years). Then he listed a number of insecurities which

[60] Fol 888 et seq
[61] Fol 922 et seq
[62] Fol 742 et seq

affected contracts with clients including volume of sales, gross margin, estimates of profitability etc. Specifically with regard to the Malta project he said that besides these factors there were other issues which rendered the prediction of profitability more insecure namely the duration of the concession for 7 years, the fact that they were going to enter a market which was formerly an Enemalta monopoly and the fact that supply, storage and management was going to be very dependent on the said monopoly of Enemalta.

In **cross-examination and re-examination**[63] he said that he never saw the tender document and his contribution to the project was limited. Asked whether the issues of insecurity surrounding the project were available to defendant company prior to the tender bid he said he did not have such information.

He also said that his sales department was not involved in the projections of the alternative model. He added that a number of factors were deemed risky and not only related to Malta but to any market such as tax and rate of exchange issues etc. He said that although some factors could have been known, others weren't or could change.

Considered that:

Today's judgement as premised is limited to **the first plea raised by the defendant Company** which states that -

"Illi t-talbiet attriċi huma nfondati fil-fatt u fid-dritt u għandhom jiġu miċħuda bl-ispejjeż kontra l-istess soċjetà rikorrenti in kwantu mhuwiex minnu illi s-soċjetà intimata b'xi mod kisret xi obbligi kuntrattwali allegatament assunti minnha jew irtirat minn xi "ftehim milħuq mas-soċjetà rikorrenti". Għall-kuntrarju, is-soċjetà intimata kellha biss ftehim mas-soċjetà rikorrenti illi flimkien jissottomettu offerta b'risposta għas-sejħa numru MIA/07/11 pubblikata mill-Malta International Airport plc ("MIA") u dan il-ftehim l-istess soċjetà intimata SHELL & MOH Aviation Fuels SA ("Shell") onoratu sal-iċken dettall kemm fil-formulazzjoni u l-eventwali sottomissjoni tal-offerta kif ukoll sussegwentement fil-konklużjoni tal-kuntratt mal-MIA, u l-fatt illi l-kuntratt mal-MIA eventwalment ġie terminat kien riżultat biss tal-fatt illi n-negozjati bejn il-partijiet odjerni dwar l-eventwali ftehim bejniethom fuq l-operazzjoni f'Malta imbagħad ma rnexxewx u ma waslux għal riżultat aċċettabbli għaż-żewġ naħat, ħaġa normalissima f'negozjati kummerċjali;

Thus defendant company claims that whilst there was an agreement between parties to jointly participate in the tender process for the supply of fuel to planes at the Malta International Airport, which agreement was effectively fully executed, there was no other futher

[63] Fol 863 et seq

agreement in place. It says that after the tender was awarded to parties in the case, the involved parties still had to negotiate the terms on how to operate and once these negotiations failed there should be no repercussions for which defendant company must carry or be held for any responsibility.

It is to be noted that as confirmed by plaintiff company itself[64], it is not basing its claims on pre-contractual liability but on alleged breached of an agreement concluded between parties after negotiations were held between them.

The relevant provisions of the law which are applicable to the case are those related to obligations in **article 960 *et seq* of the Civil Code** -

> *"960. A contract is an agreement or an accord between two or more persons by which an obligation is created, regulated, or dissolved."*
>
> *"966. The following are the conditions essential to the validity of a contract:*
>
> *(a) capacity of the parties to contract;*
>
> *(b) the consent of the party who binds himself;*
>
> *(c) a certain thing which constitutes the subject-matter of the contract;*
>
> *(d) a lawful consideration."*
>
> *"992. (1) Contracts legally entered into shall have the force of law for the contracting parties.*
>
> *(2) They may only be revoked by mutual consent of the parties, or on grounds allowed by law."*
>
> *"993. Contracts must be carried out in good faith, and shall be binding not only in regard to the matter therein expressed, but also in regard to any consequence which, by equity, custom, or law, is incidental to the obligation, according to its nature."*

In the case **Golden Bun Manufacturing Co. Ltd vs Korporazzjoni Maltija għall-Intrapriża et decided on the 26th November 2015** the Court said -

> *"Dritt*
>
> *Il-Qorti ser tenunzja xi prinċipji legali applikabbli li f'materja kontrattwali jagħmel li l-ftehim hu liġi għall-partijiet kontraenti (Art. 992(1) Kodiċi*

[64] Note of Submissions at fol 1089A

Ċivili; ara "Carmelo Bajada noe vs Fr. S. Cachia et noe" (A.K. deċiża fis-16 ta' Lulju 1973);

Il-principju kardinali li jirregola l-istatut tal-kuntratti jibqa' dejjem dak li l-vinkolu kontrattwali għandu jigi rispettat u li hi l-volonta` tal-kontraenti kif espressa fil-konvenzjoni li kellha tipprevali u trid tigi osservata. (Pacta sunt servanda). ("Gloria mart Jonathan Beacon et vs L-Arkitett u Nġineer Ċivili Anthony Spiteri Staines" – App Ċiv. Deċiża fil-5 ta' Ottubru 1998).

L-applikazzjoni ta' din id-dispozizzjoni, minkejja l-konsegwenzi iebsa li jistgħu jinsiltu minnha fil-prattika, ġejja mir-rispett li jrid jingħata lill-prinċipju li ftehim validu bejn il-partijiet għandu s-saħħa ta' liġi bejniethom (pacta sunt servanda), u l-ebda Qorti m'għandha tindaħal fi ftehim bħal dan diment li dak il-ftehim ma jkunx milqut b'xi difett li jġibu ma jiswiex. Madankollu, llum huwa aċċettat li l-applikazzjoni tar-regola minsuġa f'Kap 16 trid tiġi nterpretata wkoll fid-dawl ta' prinċipju ieħor ewlieni tad-dritt jiġifieri li l-kuntratti jiġu esegwiti in bona fede.

L-Artikolu 993 tal-Kap 16 jiddisponi:

"Il-kuntratti għandhom jigu esegwiti bil-bona fidi, u jobbligaw mhux biss għal dak li jingħad fihom, iżda wkoll għall-konsegwenzi kollha li ġġib magħha l-obbligazzjoni skont ix-xorta taghha, bl-ekwita`, bl-uzu jew bil-ligi".

Fil-kawza, Mark Calleja Urry et Vs Joseph Portelli et – Qorti Appell moghti fis-sena 2011, il-Qorti kkwotat is-sentenza tal-Qorti ta' l-Appell fejn qalet li:

"…..il-prinċipju jibqa' l-istess, ċjoe` dak tal-liberta` kuntrattwali bil-korollarju tiegħu li l-eċċezzjonijiet għal dik il-liberta` m'għandhomx jiġu estiżi li hemm mil-limiti tal-liġi li tistabilixxi l-eċċezzjoni…..Il-Kodiċi Ċivili li jagħti lill-kuntratti magħmulin skont il-liġi is-saħħa tal-liġi stess, li hija l-aqwa liġi, ċjoe` l-liġi tal-partijiet, il-mezz u l-miżura tal-indipendenza personali tagħhom fil-kamp kontrattwali, u li ma jistgħux jiġu mħassra ħlief bil-kunsens ta' xulxin jew għal raġunijiet magħrufin fil-liġi."

In order to reach its conclusion the Court will analyse the progression of talks and negotiations between the parties in relation to the call for tender MIA/07/11 because only they can and will shed ample light on the legal implications which follow therefrom.

Both parties agree that when the call for tender was issued in 2011 (original closing date being 26th October of that year but later extended to 18th April 2012) the initial talks that took place between them led to a common interest to participate jointly in the bid.

During a meeting held in September 2011 the Court notes that very detailed discussions took place between the parties. The outlined

agenda for that meeting[65] proposed discussions among other things on existing supply chain details, tender process details, import options, fuels market overview/competition, enemalta activities overview, potential agreement with Enemalta, aviation commercial licensing requirements, operational cost breakdown except into-plane and potential business models.

Following that meeting, Peter Zorapas on behalf of defendant Company wrote to plaintiff Company on the 3rd October 2011[66] confirming that following the September meeting, they were "very interested" in pursuing the business opportunity in the Malta aviation market. He proposed a business model for the consideration of plaintiff company which already at that stage outlined the suggested distribution of responsibilities between parties indicating matters of A/ITP, storage, supply, distribution, ownership of the product, licensing and administration to be taken care of by plaintiff company whereas the technical service agreement, covering the ITP operation with the necessary insurances and the conduct of the marketing activity of the business was to be taken care of by defendant company. Zorapas went so far to state that despite the time frames available they were prepared to act at a short notice and had adapted their schedules for the project already.

Subsequent to that it transpires that more discussions took place between the parties which covered a wider spectrum of issues. Kenneth Attard on behalf of plaintiff company referred to[67] – and no satisfactory proof to the contrary was brought – *"the manner in which respective companies would operate, who would be responsible for what, through which structure the operation would be carried out, the percentage shareholding our company would retain, as well as the details of how the operation on the ground would be carried out."* Emails exchanged between parties prior to submitting the tender discussed the number of staff required[68] and defendant company even sent workings on profit and loss forecasts for calculation of potential profits[69].

Evidence further shows that in October 2011 legal advice from a Maltese law firm was sought about all the issues regarding the formation of the new joint venture and the impact of tax on defendant company.

George Attard on behalf of plaintiff company also confirmed that during the discussions he participated in with representatives of defendant company prior to the submission of the tender bid the

[65] Email dated 7th September 2011 at fol 544,545
[66] Letter at fol 22
[67] Fol 471
[68] Emails at fol 26 et seq
[69] Fol 43 t seq

parties discussed in detail among other things the number of staff and the system of work shifts. Exchanges of emails filed by this witness prove this. On the 17th November 2011 Kyriakos Tzanidis on behalf of defendant company sent to Kenneth Attard their calculations for Malta net income before tax and into-plane costs[70]. On the 8th March 2012[71] Kyriakos Tzanidis confirmed that staff calculation, refuellers and investment plan will be sent shortly. In fact on the 4th April 2012[72] Tzanidis sent documents with staff calculation, refuellers and investment plan.

Following these negotiations and discussions which, in the opinion of the Court, were indeed undoubtedly very detailed and in no way superficial, evidence continues to show that an agreement was reached between parties to go forward with the submission of the tender. By virtue of letter dated 9th April 2012[73] defendant company confirmed the following without any reservations –

"We hereby confirm our intention, understanding and agreement to participate to the Tender proclaimed by "Malta International Airport plc" for the provision of aviation fuel and oil groundhandling services at Malta's International Airport (Advert No. MIA/07/2011) through an incorporated Joint Venture Company (hereinafter "NewcO") to be established between our Company and yourselves ("Attard Services Limited").

We also confirm our intention, understanding and agreement that "NewcO" shall be established in Malta as a Limited Liability Company (Societe Anonyme or equivalent) according to the laws of Malta, and that its shares shall be allotted on a 30/70 basis, with 30% belonging to Attard Services Ltd and 70% to Shell & MOH Aviation Fuels A.E. who shall therefore have a controlling interest over the NewCo."

The Court cannot but note that in its evidence defendant company seeks to tone-down and underplay considerably the level of commitment it undertook at the stage of submitting the joint tender bid with plaintiff company in April 2012. Peter Zorapas testified that since the deadline for the submission of the tender was short they didn't have enough time to explore the market properly, prices, clients etc so they only had a general idea of the whole scenario. Notwithstanding the fact that the original deadline set by MIA was extended from October 2011 until April 2012 Zorapas insists that this time frame was substantially and simply used to prepare the documentation required by MIA for the tender. He said that at the moment when the tender was submitted there were so many other

[70] Fol 553 et seq
[71] Fol 556
[72] Email at fol 32
[73] Fol 23

crucial matters between the parties that were not agreed upon such as the shareholder agreement, the supply agreement and the service level agreement.

The Court felt it necessary to list into some detail the preparatory work done by the parties prior to the submission of the tender to highlight its opinion that plaintiff company's claims hold ground. The Court deems that had it been just a question of having an agreement solely to participate in a bid and then to start negotiations on whether to bind itself further to execute the tender award if won – as claimed by defendant company - then it is hard to understand the necessity envisaged by both parties to go to such great lengths into the detail of the whole project **even prior to submitting the bid itself**. Moreover, taking into account that this a project worth millions of euros, which bidder, in the opinion of the court, would bother to submit a tender and invest so much effort, time, negotiations and make detailed analysis of the whole scenario etc if it has no idea whether it will subsequently execute the project if the tender is won? What was issued by MIA was not a mere request for expression of interest but a fully-fledged call for tender so the Court finds it hard to believe that defendant company agreed to submit to such process without committing itself to futher proceed with the execution of the tender if this is awarded in favour of the joint venture.

In fact taking a closer look at the tender document[74] itself which representatives of both parties duly signed for the provision of Aviation Fuel and Oil Groundhandling Services at MIA[75] the Court notes that they declared the following –

a. Parties confirmed that they had received approval from all the shareholders to submit an offer in the tender process;

b. Should their submission be favourably considered and they would receive a confirmation of acceptance the Joint Venture (JV) proposed by the parties "will be set up and registered in Malta shortly after receipt[76]" of letter of acceptance;

So, here it was not a question of maybe, but that the JV will be actually formed and registered. Moreso a detailed diagram was also attached.

c. Once registered, the Malta Joint Venture would then immediately proceed with pursuing the remaining requirements of obtaining relative permits, licences and agreements from the respective authorities and third parties;

[74] Folio 407 et. seq. DOk. SH3
[75] Fol 407 et seq
[76] Fol 412

So by their own declaration both parties to the tender admitted that the only pending requirements that needed to be sorted were issues related to third parties and the related competent authorities.

d. They gave a comprehensive overview of the business plan they had in mind including the strategy that *"After the initial year of starting up operations and increasing our market knowledge we expect our market share growth in subsequent years will be rapid and we seek to reach our target market share by year 3* [77]*";*

e. Defendant company declared that *"with regards to the physical into-plane service, agreement has already been reached with our long standing agents in Malta, namely Attard Services Limited. Attard Services Limited will set up a specific company, Attard Aviation Services Limited (AASL) that will be subcontracted with the physical ITP operations at Malta International airport, for and on behalf of the new Malta Joint Venture, servicing both local and international customers, investing in equipment and operating to the latest Joint Inspection Guideline (JIG) standards.....Key to this approach is having a well trained and motivated workforce, combined with reliable and well designed vehicles, operating to strict procedures and to the highest HSSE standards."*[78]*;*

The above declarations together with the rest of the proposal made in the tender bid are, in the opinion of the Court, not just vague, generic assertions of interest in a project but very concrete proposals to bring into effect the terms of the tender if awarded. The only reservation/condition that appears to have been made in the said tender is the issue of acquiring access to infrastracture by reaching a deal in that respect with Enemalta. In fact parties declared that *"We have not been able to conclude our negotiations with Enemalta Corporation to secure an agreed fair, transparent and non-discriminatory access charge for the use of this existing chain of infrastructure, within the time frame of the closing date for this Tender Document. We can confirm that so far, our discussions with Enemalta Corporation have covered considerable ground, however they remain inconclusive at this point in time*[79]*."* Parties had in fact requested approval to continue discussing and negotiating with Enemalta which in their own words would hopefully *"be successfully concluded in time for our proposed start-up operations."*

In this respect, it should be noted that the negotations with Enemalta did lead to a fruitful outcome with the signing of the agreement on the 18th January 2013 for access to aviation fuel storage and throughput. So the *"concern*" declared in the tender bid, which was also

[77] Fol 413
[78] Fol 413
[79] Fol 414

acknowledged as the only legal obstacle to the execution of the tender award in the letter of acceptance dated 19th July 2012[80], was at that stage resolved. Also on the same day the concession agreement with MIA was signed.

Moreover, it is to be noted that up till February 2013 when the relationship between the parties took a negative twist as will be elaborated shortly, the evidence continues to show that the discussions and communications that took place between the parties were all pointed towards the details of the start-up of operations and nothing else. Some examples worth noting are –

a. In November 2012[81] Kenneth Attard e-mailed Nikos Dikeos and Petros Zorapas urging them to formalise the parties' position regarding the shareholders agreement which had been discussed some time before;

b. Email dated 13th December 2012[82] written by Petros Zorapas to Enemalta and Ministry of Finance representatives wherein he confimed once again that parties current commitment to commence operations was set for the 18th January 2013. Moreover in the same email Zorapas went as far as stating that *"we have informed the aviation market that we expect to be in a position to open commercial discussions with them over the coming weeks and no later than the end of the year (2012), and to be in a position to physically offer supply early in March 2013[83]."* This reflects and is indicative that the parties were very clear and determined about the way forward with the operations;

c. In an exchange of correspondence between Petros Zorapas and the Greek Ambassador in Malta on the 9th January 2013[84], the open issues that were indicated by Zorapas had nothing to do with any pending agreement with plaintiff company but with the setting-up of operations. Moreso one of the attached emails dated 31st December 2012 sent by Kenneth Attard to Mr Louis Giordmaina from Enemalta - and with which Petros Zorapas and other representatives of defendant company were copied - stated that the commitment of the joint venture to commence operations was set for the 18th January 2013;

d. Email dated 15th January 2013[85] which indicated that several meetings were set with banks with regard to project finance;

[80] Fol 52
[81] Fol 27
[82] Fol 62 et seq
[83] Underlining by emphasis of the court
[84] Fol 541 et seq
[85] Fol 59

e. In an email dated 22nd January 2013[86], days after signing the agreements with Enemalta and MIA, Kyriakos Tzanidis on behalf of defendant Company said this to Kenneth Attard of plaintiff Company – *"I am fully aligned of all progress and agreements signed. Indeed it is a major achievement, all of our issues were passed successfully[87] and as initially scheduled.....The difficult part is over now. From now on we have many issues but known to us so do not worry[88]."*

f. From the evidence of Anthony sive Tony Fenech it transpires that interviews were conducted to employ the required workers. Not only were preliminary interviews carried out but there was even a shortlisting of candidates and the final interviews were also conducted in mid-February 2013.

g. In an email dated 5th April 2013 regarding the interest shown by the Turkish airlines for fuel[89], Anastasios Hatigeorgiou on behalf of defendant company suggested to Kenneth Attard that he could go ahead and "*be explicit as far as our presence in the market. Meaning that we are at the stage that we are organising our operations in MLA after having gained the concession tender[90].....Turkish Airlines is a valuable customer for shell aviation and it is appropriate to have the contact with their contracting company."*

In the light of all the above, particularly the evident commitment of the parties' in very practical terms towards finalizing pendencies in order to commence the operations as awarded by the tender, lead the Court to the only conclusion that there effectively was an agreement between plaintiff company and defendant company about the whole project and not just up till submission of tender stage. The fact that it was not yet formalised in writing, or that the Board of Directors of defendant company had not yet formally given its final approval to defendant company (which is anyway an internal matter of defendant company) does not in any way mean that no agreement had been reached between the parties for all intents and purposes of the law.

In the opinion of the Court, the above evidence contradicts the position adopted by defendant company that the final agreement between the parties had yet to be reached. It is true that there were pending items that still needed to be tackled between them even after the award of the tender (indicated in the so-called critical 100 milestone list) but resolving these pendencies was part and parcel of the whole package of the tender deal already agreed upon between the parties prior to the submission of the tender bid. That is, after the award of the tender the parties had to bring to completion all the remaining items that were

[86] Fol 163
[87] Underlined by emphasis of the court
[88] Underlined by emphasis of the court
[89] Fol 534 dok ASL 31
[90] Underlined by emphasis of the court

> not finalised but this always within the ambit of the agreement that by then was already in place between them. And once the only obstacle that parties agreed upon with regard to the execution of the tender award – the agreement with Enemalta – was surmounted in January 2013 there was no valid reason at law for any party to withdraw from its legal obligations to honour the tender award.
>
> What results from the evidence is that the sudden twist in the relationship between the parties came about on the 18th February 2013 during a telephone conversation between the representatives of both parties[91] wherein defendant company informed plaintiff company that it did not intend to pursue with the Malta project as per original plan. Having seen the transcript of the said conversation the Court cannot but note that the reasons brought forward for this decision had nothing to do with the absence of an agreement already in place between the parties. Rather it is clearly a situation where defendant company had a change of mind and heart about the whole Malta project and this for reasons which it itself admitted prior knowledge of, namely competition/monopoly issues. In fact it was an internal unilateral decision which as Petra Koselska states, *"it really has been a Shell decision, MOH was also not pleased[92]."* It was defendant company that ultimately pulled out of the deal already agreed upon and this inevitably will have legal repercussions. It is true that after this decision of defendant company there were subsequent discussions between the parties based on an alternative model proposed by defendant company but these negotiations failed once again.

6. Rat ir-rikors tal-appell tas-socjeta` konvenuta li in forza tieghu, ghar-ragunijiet minnha premessi, talbet illi din il-Qorti:

> "tirrevoka s-sentenza moghtija mill-Prim Awla tal-Qorti Civili fil-kawza fl-ismijiet premessi fil-15 ta' Jannar 2020 prevja l-akkoljiment tal-eccezzjoni sollevata minnha dwar in-nuqqas ta' ftehim milhuq bejn il-kontendenti jew li l-istess socjeta` appellanti kisret xi obbligi kuntrattwali assunti fil-konfront tas-socjeta` appellata, u c-cahda tat-talbiet attrici, bl-ispejjez taz-zewg istanzi kontra s-socjeta` attrici appellata".

7. Rat ir-risposta tas-socjeta` attrici li in forza taghha, ghar-ragunijiet minnha premessi, talbet illi din il-Qorti:

[91] Fol 169 et seq
[92] Fol 176

> "Toghgobha tichad l-appell u tikkonferna s-sentenzi tal-15 ta' Jannar 2020 moghtija mill-Onorabbli Prim' Awla tal-Qorti Civili fl-ismijiet premessi bl-ispejjez taz-zewg istanzi kontra l-appellant noe."

8. Semghet lid-difensuri tal-partijiet;

9. Rat l-atti kollha tal-kawza u d-dokumenti esebiti;

Ikkunsidrat:

10. Qabel xejn tinnota li ghalkemm kien sar qbil li l-proceduri jsiru bil-lingwa Ingliza, tul is-smigh tal-kawza quddiem l-ewwel Qorti saru diversi proceduri u sottomissjonijiet bil-lingwa Maltija, u hemm qbil li din is-sentenza tista' tinkiteb b'din il-lingwa.

11. Illi f'din il-kawza s-socjetajiet kontendenti dahlu f'diskussjonijiet sabiex, wara li harget sejha ghall-offerti biex jinhatar operatur sabiex jipprovdi servizzi ta' *refuelling* tal-ajruplani gewwa l-ajruport internazzjonali ta' Malta, jaghmlu offerta flimkien wara li bejniethom jiffurmaw kumpanija Maltija ghal dan il-ghan. Jidher li d-diskussjonijiet kienu mxew gmielhom tant li kienu anke ressqu l-offerta taghhom ghall-kunsiderazzjoni tar-regolatur u l-offerta, milli jidher, kienet qed tigi kunsidrata favorevolment taht certi kundizzjonijiet.

12. Wara xi zmien, is-socjeta` konvenuta ddecidiet li tirtira minn dan il-progett, u s-socjeta` attrici qed tfittex id-danni li garrbet meta s-socjeta` konvenuta rtirat mill-“ftehim” li, skont hi, kienu waslu ghalih il-partijiet, ftehim li kellu jwassal ghan-negozju kif mitlub mill-ajruport internazzjonali ta’ Malta.

13. L-ewwel Qorti fis-sentenza taghha sabet li kien jezisti ftehim bejn il-partijiet tant li osservat illi “*it was defendant company that ultimately pulled out of the deal already agreed upon and this will inevitably have legal repercussions*”.

14. Is-socjeta` konvenuta ma taccettax li kien hemm “*deal already agreed upon*”, u ressqet appell ghax fil-fehma taghha kienu biss diskussjonijiet li, veru li kienu fi stat avvanzat, izda ma kienx ghadu ntlahaq ftehim ahhari.

15. Din il-Qorti ezaminat l-atti u ghalkemm ma tistax taccetta li bejn il-partijiet kien hemm “*a deal already agreed upon*”, fil-fehma taghha d-diskussjonijiet kienu waslu fi stat tant avvanzat li, almenu f’ghajnejn is-socjeta` attrici, inholqot aspettattiva legittima li ftehim sejjer ikun hemm. Dan ifisser li bejn il-partijiet kien hemm ftehim prekontrattwali.

16. Fil-kuntest tan-nozjoni ta' responsabilita` prekontrattwali, il-gurisprudenza Maltija, ghall-ewwel, ma tantx wriet predisposizzjoni li taccetta l-principju. Fl-ewwel kaz fejn il-materja kienet diskussa fid-dettall, dik fl-ismijiet "**Giuffrida noe v. Borg Olivier noe**", deciza mill-Onorabbli Qorti tal-Appell fit-3 ta' Marzu, 1967 (Vol. L1.1.130), ma giet espressa ebda veduta favur jew kontra l-applikazzjoni tan-nozjoni, peress li gie deciz li dik ma kinitx materja li setghet tigi deciza fil-kawza. F'dik il-kawza kumpanija Taljana dahlet f'negozjati mal-Gvern Malti ghall-bini ta' lukanda f'Manoel Island. Hekk kif id-diskussjonijiet kienu qed jersqu lejn it-tmien, il-Gvern iddecieda li jwaqqaf id-diskussjonijiet u jittermina n-negozjati. Il-kumpanija Taljana fethet kawza kontra l-Gvern Malti fejn talbet dikjarazzjoni li hi kienet onorat il-kundizzjonijiet kollha impost mill-Gvern biex jintlahaq ftehim u talbet, kwindi, lill-Qorti tordna lill-Gvern jersaq ghall-kuntratt finali. Il-Qorti bdiet billi cahdet it-tieni talba ghax osservat li ladarba ma kienx hemm weghda ta' kuntratt, cioe`, ma kienx hemm konvenju jew weghda formali ghall-kuntratt, hi ma setghetx iggieghel lill-ebda parti tiffirma kuntratt finali. Wara li l-Qorti ntalbet taghti sentenza fuq l-ewwel talba, b'intiza li dik id-dikjarazzjoni tkun tista' tintuza bhala bazi f'kawza ohra ghad-danni bbazata fuq responsabilita` pre kontrattwali, il-Qorti tal-Appell dahlet f'dibattitu twil u akkademiku dwar l-applikazzjoni ta' dik id-duttrina fil-kuntest tal-Kodici Civili Malti (li, kuntrarjament ghal dak Taljan, ma ghandhiex disposizzjoni *ad hoc* fir-rigward), izda spiccat biex ma esprimietx opinjoni ghax osservat li, f'kull

kaz, dik il-kawza ma kinitx wahda addattata biex fiha tinghata decizjoni fuq dak il-punt, u dan peress li, fis-sistema guridiku Malti, il-Qrati ma jistghux jaghtu semplici dikjarazzjonijiet ta' responsabilita`, imma tali dikjarazzjonijiet iridu jinghataw fil-kuntest ta' rimedju specifiku li jkun mitlub u jkun jista' jinghata mill-Qorti; fil-kaz, ir-rimedju mitlub hu abbinat mad-dikjarazzjoni (kundanna ghall-iffirmar tal-kuntratt finali) ma setax jinghata, u kwindi ma kienx hemm lok li tinghata d-dikjarazzjoni mitluba fl-ewwel talba li kienet marbuta ma' u preordinata ghar-rimedju specifiku mitlub fit-tieni talba. Minhabba dan l-ostakolu procedurali, il-Qorti tal-Appell ma tatx opinjoni dwar l-applikabilita` *o meno* tal-principju ta' responsabilita` pre-kontrattwali fil-ligi Maltija, ghalkemm l-istudju li hi ghamlet tal-istitut huwa wiehed interessanti u lodevoli. Dik l-Onorabbli Qorti espremiet ukoll id-dubji taghha dwar kemm dak il-principju, anke jekk jitqies applikabbli fil-ligi Maltija, jista' jkun applikabbli fil-konfront tal-Gvern, u dan peress li l-Qrati ma jistghux jindahlu fl-ezercizzju tad-diskrezzjoni tal-Gvern li jiffirma jew le kuntratti mal-privat.

17. L-Onorabbli Qorti tal-Kummerc kellha okkazjoni tezamina l-kwistjoni fil-kawza "**Cassar v. Campbell Preston noe**", deciza fid-19 ta' Novembru, 1971, li wkoll kien jikkoncerna kaz ta' recess ta' negozjati li kienu fi stat avvanzat. Dik il-Qorti osservat li ma jista' jkun hemm ebda responsabilita` ghad-danni ladarba l-ftehim ma kienx gie konkluz, u wissiet kontra l-applikazzjoni ta' duttrina li taccetta responsabilita` fuq agir

pre-kontrattwali, “biex ma jinholoqx dak il-principju li minflok jiffacilita` l-inkoraggiment ghan-negozju, ikun ta’ xkiel ghal kull min jipprova jagevola kwalunkwe inizjattiva diretta ghall-konkluzjoni tal-istess ftehim”.

18. Il-kawza “**John Pullen et v. Manfred Gunther Matysik noe**”, deciza mill-Onorabbli Qorti tal-Appell fis-26 ta’ Novembru, 1971, tista’ tghid li hija applikazzjoni ta’ din id-duttrina, izda d-decizjoni ma nghatatx a bazi ta’ xi responsabilita` pre-kontrattwali, izda fuq il-bazi ta’ weghda li ma gietx attwata. Din l-Onorabbli Qorti osservat illi “It is obvious that whatever defendant had in mind, the plaintiffs were surely justified in understanding that they were going to have the concession without any difficulty”. Darba, allura, li kien hemm dik il-weghda li ma gietx onorata, il-ksur ta’ dik l-obbligazzjoni kellha twassal ghar-responsabilita` ghad-danni. Tajjeb li jinghad li fil-kawza ma kienx hemm weghda formali, imma l-Qorti osservat li l-atteggjament tal-partijiet u l-istadju avvanzat tat-trattattivi, kienu holqu obbligazzjoni bejn il-partijiet.

19. Wara dan kien hemm kazijiet ohra fejn il-Qrati taghna, minghajr ma kkommettew ruhhom favur jew kontra l-applikazzjoni tal-principju, cahdu talbiet ghad-danni wara li osservaw li f’kull kaz, it-trattattivi ma kinux waslu f’dak l-istat li jimmeritaw responsabilita` ghad-danni f’kaz ta’ recess ingustifikat. Hekk fil-kawza “**Caruana v. Vella**” deciza mill-Prim Awla tal-Qorti Civili fit-28 ta’ Jannar, 1983, intqal li persuna li nghatat ghajnuna

biex tipprova issib job fuq *oil-rig*, ma tistax tfittex lil dik il-persuna l-ohra ghad-danni meta l-impjieg ma haditux, u dan peress li l-weghda tal-impjieg qatt ma kienet konkretizzata, u d-danni li sofra l-attur kienu rizultat tal-ghaggla tieghu meta "zarma l-hanut li kellu meta ma kellu xejn konkret f'idejh".

20. Fil-kawza "**Frank Portelli v. Michael Falzon noe**", deciza mill-Prim Awla tal-Qorti Civili fit-18 ta' Mejju, 2001, talba ghar-rifuzjoni ta' spejjez inkorsi wara li l-attur ma nghatax kuntratt mill-Gvern wara li gie mitlub iressaq offerta, giet michuda ghax, fil-fatt, l-offerta qatt ma kienet giet definittivament accettata, u n-negozjati ma kinux lahqu dak l-istat avvanzat li kienu jaghtu affidament li l-kuntratt kien se jinghata.

21. Aktar ricenti, il-Prim Awla tal-Qorti Civili fil-kawza "**Elia Grixti v. Mark Grech noe et**", (NA mhux pubblikata), deciza fit-3 ta' April, 1998, kienet ghamlet studju ta' dan il-principju, u ddikjarat ruhha propensa li taccetta din ir-responsabilita` jekk jikkonkorru zewg elementi komplimentari, li hi spjegat b'dan il-mod:

> "(1) li l-parti l-wahda li tkun inkorriet in buona fede certu spejjez bl-aspettattiva ta' ftehim vinkolanti bejnha u bejn parti ohra; u
>
> (2) dik il-parti l-ohra li tkun b'kapricc u kwazi malafede jekk mhux necessarjament b'ingann jew b'qerq, itterminat in-negozjati fi stadju fejn il-kunsens reciproka tal-partijiet kien identiku dwar il-kondizzjonijiet essenzjali tal-ftehim, izda ma sehhx b'konsegwenza ta' dan il-kapricc. Fil-kaz fejn hemm ir-rekwizit essenzjali tal-formalita` irid infatti kwazi jirrizulta mill-provi illi l-unika raguni l-ghala ma hemmx ir-rabta vinkolanti huwa proprju

> n-nuqqas ta' dik il-formalita` rikjesta mil-ligi u ghal bqija il-ftehim gie konsolidat".

22. F'parti ohra tas-sentenza, din il-Qorti kompliet tosserva li jkun hemm ir-responsabilita` meta n-negozjati jintemmu b'kapricc u meta dawn "kienu fi stadju ferm avvanzat tant illi wiehed jkun seta' jikkonkludi li effettivament kien hemm il-kunsens tal-partijiet fuq l-elementi essenzjali tal-obbligazzjoni".

23. Din kienet l-ewwel darba li dawn il-Qrati mhux biss esprimew ruhhom pozittivament dwar l-applikazzjoni ta' dan il-principju fil-kuntest Malti, izda ppruvaw ukoll jelenkaw b'mod sistematiku l-elementi li ghandhom japplikaw ghall-kaz. Il-fatt li, fic-cirkostanzi tal-kaz, il-Qorti ma sabitx li jezistu l-elementi rikjesti biex issib ir-responsabilita`, ma jnaqqas xejn mill-isforz li ghamlet dik il-Qorti biex l-applikazzjoni ta' dan il-principju meta c-cirkostanzi tal-kaz hekk jimmeritaw, ikun wiehed sistematiku u uniformi.

24. Dik l-istess Qorti, diversament presjeduta, hadet attegjament differenti fil-kawza "**Carmelina Busuttil et v. Salvatore Muscat noe**", deciza fit-28 ta' Ottubru, 1998, (AJM mhix pubblikata), li kienet tikkoncerna negozjati ghal proroga ta' koncessjoni enfitewtika li kienu gew interrotti mill-padrun dirett. Il-Qorti giet mitluba tillikwida danni b'rizultat ta' agir delittwali taht l-Art. 1031 tal-Kodici Civili. Il-Qorti rrifjutat

li tikkunsidra l-agir taht dak l-artikolu ghax osservat li n-negozjati ma jistghu qatt inaqqsu d-dritt tal-padrun dirett “li, anke minghajr ebda raguni, ma jikkonkludux il-kuntratt mehtieg sabiex jinghata effett ghal dik it-talba”. Ma giex ezaminat jekk, bhala fatt, kinux jezistu l-elementi mehtiega biex ikun hemm il-*culpa in contrahendo*, u dan wara li l-Qorti enfasizzat li l-padruni diretti kienu “fid-dritt li jaghzlu li jikkoncedu jew ma jikkoncedux proroga tal-koncessjoni enfitewtika. Il-fatt li ghazlu li jichdu tali talba huwa biss espressjoni tal-volonta` taghhom sanzjonata bil-ligi”.

25. Din il-Qorti, kif issa presjeduta, hija propensa taccetta li l-principju li min jirricedi, minghajr gustifikazzjoni, minn trattattivi li jkunu waslu fi stat avvanzat ghandu jaghmel tajjeb ghad-danni, ghandu jkun ammess fl-Ordinament Guridiku Malti, u ghal dan l-iskop il-principji kif elenkati mill-Prim Awla tal-Qorti Civili fil-kawza “**Grixti v. Grech noe**” ghandhom jittiehdu bhala bazi. Qabel xejn, pero`, din il-Qorti sejra tezamina, fid-dettall, in-natura u l-iskop tal-istitut kif espressi fid-duttrina u l-gurisprudenza kontinentali, u tghid ghaliex din il-Qorti thoss li l-accettazzjoni ta’ dan l-istitut ma jmurx kontra l-principji ta’ dritt privat kif espressi fl-Ordinament Guridiku Malti.

26. Fil-kawza “**Saviour Fiteni et v. Louis Mazzitelli et**”, deciza mill-Qorti tal-Appell (Sede Inferjuri) fit-2 ta’ Gunju, 2003, dik il-Qorti ghamlet dawn ir-rimarki fuq dan il-kuncett:

> "L-appellati eccepew illi ma jezistix il-kuncett ta' 'pre-contractual liability'. Huwa veru li dan il-kuncett ma nsibuhx kodifikat fil-ligijiet taghna, bhal ma jezistu f'ligijiet ta' gurisdizzjonijiet ohra. Eppure din il-materja ma hijiex aljena ghall-Qrati taghna u fil-fatt giet trattata proprju f'materja koncernanti weghda ta' lokazzjoni ta' haunt. Dan b'applikazzjoni ta' dawk in-nozzjonijiet ta' dritt traccjati fid-decizjonijiet li ghalihom gja saret referenza. Dan jemergi tant car mill-ezami tas-sentenza tal-Qorti ta' l-Appell, Sede Kummerc, tas-26 ta' Novembru 1971 fil-kawza fl-ismijiet '**John Pullen pro et noe – vs – Manfred Gunter Matysik et**'.
>
> Fiha, kif bhal f'dan il-kaz, irrizulta vjolazzjoni tal-weghda kkuntrattata u lezjoni tad-drittijiet tal-atturi. Ghal dawk li huma danni gie kemm rimarkat illi '*it is clear that at law these are those flowing from the breach by defendant of his obligation arising from a valid agreement 'de inuendo contractu'.'*
>
> Fiha wkoll gie affermat il-hsieb tal-ewwel Qorti, kwalifikat fis-sens illi '*the damaged to which plaintiffs are entitled are, however, to be restricted to the actual losses they incurred up to the time that the negotiations broke down whether they consist in actual expenses incurred or depreciation of material or otherwise but are not to include any profits which they would have derived from the concession of the boutique as in that way they would be benefitting from an obligation which never came intom existence*."

27. Id-duttrina ta' *culpa in contrahendo* fil-kontinent tal-Ewropa hadet svolta pozittiva wara l-pubblikazzjoni tal-ktieb fuq il-materja minn **Rudolf von Jhering** fl-1861. Kien dan il-gurista Germaniz li ta validita` legali lit-teorija ta' *culpa in contrahendo*. L-iskoperta tieghu hi ben deskritta mill-awtur **Fabio Fortinguerra** fil-ktieb "La Responsabilita` Precontrattuale" (Cedam 2002 Ed.p.41) fejn jispjega l-argument ta' **Jhering** b'dan il-mod:

> "In altri termini …….. la vendita di *res extra commercium* determina senza dubio l'impossibilita` di adempiere, ma fa sorgere al comtempo, in capo all'alienante, l'obbligo al risarcimento che si ricollega al contratto.
>
> Tale obbligo, a sua volta, discende dalla colpa (*Verschuldung*) del venditore, peraltro presunta, in quanto indipendente dal fatto che quest'ultimo sappia o meno che il bene alienato sia *extra*

> *commercium*: Jhering, infatti, sostenne che fosse configurabile la colpa laddove un soggetto si accingesse a stipulare un contratto senza essersi preventivamente informato dell'esistenza di tutti i requisiti necessari per la sua validita`.
>
> La 'scoperta giuridica' attribuita a Jhering fu di straordinaria importanza: se l'obbligo di risarcimento in capo a colui il quale aliena un cosa *extra commercium* trovava il suo fondamento su una colpa commessa prima della conclusion del contratto, ogni qual volta sarebbe sorta una *culpa in contrahendo*, sarebbe sorto quell'obbligo."

28. Din it-teorija ntghogbot u giet accettata u segwita mill-guristi ta' dak iz-zmien, fosthom il-Faggella u ir-Rubino, li huma whud mill-guristi Taljani li taw spinta lil din id-duttrina fil-bidu tas-seklu ghoxrin. Hekk il-Fagella ("I periodi precontrattuale e la responsabilita` precontrattuale" 1918 Ed. P. 36) jghid:

> "Il puro e semplice recesso, senza che le trattative abbiano avuto il loro svolgimento e il loro esito, positivo o negativo, importa violazione di quell tacito accordo precontrattuale, e questa violazione rende arbitratio e intempestivo il recesso."

29. Il-Kodici Civili Taljan tal-1865 ma kellu ebda disposizzjoni fuq din il-haga (din giet introdotta fil-Kodici Civili l-gdid tal-1942) izda dan in-nuqqas ma zammx lill-Qrati Taljani milli japplikaw id-duttrina ta' *culpa in contrahendo*. It-Tribunale di Napoli, presjedut mill-imsemmi Faggella, kien wiehed mill-aktar attivi f'dan ir-rigward. Il-Qorti suprema tal-Italja, pero`, wkoll accettat din id-duttrina u f'wahda mid-decizjonijiet l-aktar famuzi li l-Corte di Cassazione tat kienet dik moghtija fis-6 ta' Frar, 1925 fejn intqal li:

> "La parte che, senza giustificato motivo recede dalle trattative precontrattuali deve risarcire l'altra parte delle spese incontrate,

> dovendosi intendere che in consenso a trattare per la conclusione di un contratto comporti l'impegno, se non a concludere il contratto definitivo, certo a non recedere senza giustificato motivo."

Il-gurista Taljan Rava ("I Contratti in Generale", 1932 Ed. P. 146) jghid li:

> "Il fatto di essere in rapporto precontrattuali, e cioe` in trattative con una persona, non autorizza affatto a danneggiarla …… L'applicazione dell'art. 1151 non viene affatto eslusa ne` limitata per il fatto che il danno e' stato arrecato nel period precedente ad un contratto".

30. Ovvjament, anke dak iz-zmien, kien hemm fl-Italja fehmiet kuntrarji, fosthom il-Carrara, li a bazi tal-volonta` libera tal-partijiet kien jichad li kontraent jista' qatt jinstab responsabbli ghal xi danni qabel ma jorbot il-volonta` tieghu mal-kunsens vinkolanti. Minkejja dan, il-maggoranza tal-awturi Taljani ta' qabel il-kodici l-gdid, kienu favur l-introduzzjoni ta' dan il-principju, tant li l-gurista Fortinguerra (op.cit. p. 70) jghid:

> "Il nostro codice del 1865 non conteneva una disposizione volta a disciplinare il comportamento delle parti nel corso delle trattative e nella formazione del contratto. La dottrina, quella piu` sensibile, tuttavia, ammetteva, sia pure tra notevoli incertezze e contrasti, la possibilita` di parlare di una responsabilita` precontrattuale in singole ipotesi di rottura delle trattative, revoca della proposta e vendita di cosa altrui, senza pero`, che si giungesse giammai alla formulazione di una regola generale. Tale responsabilita`, in genere, veniva ricondotta nel genus piu` ampio dell'illecito aquiliano, cosi` applicandosi l'art. 1151 del codice civile abrogato" (ekwivalenti ghall-Artikolu 1031 tal-Kodici Civili Malti).

31. Dan in-nuqqas fil-Kodici Civili Taljan gie sodisfatt bl-introduzzjoni tal-Art. 1337 fil-Kodici Civili l-gdid mahrug fl-1942, li jghid testwalment li "Le parti, nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi secondo buona fede". Il-gurista Taljan Del

Fonte (“Buona Fede prenegoziale e principio costituzionale di solidarieta`” 1983 Ed. p. 125) jghid li, b’rizultat ta’ l-introduzzjoni ta’ dan l-artikolu:

> “Risulta cosi` sancito che anche durante lo svolgimento delle trattative si puo` incorrere in responsabilita` per violazione del dovere di buona fede: a differenza che sotto il vigore del codice abrogato, e` risolto positivamente il quesito se sia ammessa, nell’ordinamento vigente, la culpa in contrahendo come figura generale”.

32. Jidher, ghalhekk, li filwaqt li anke taht ir-regim tal-Kodici Civili tal-1865 kien gie accettat, bhala principju li ebda kontraent ma seta’ jieqaf mit-trattattivi mal-kontraent l-iehor minghajr gusta kawza, id-dibattitu principali kien jekk dan il-principju kellux iwassal ghal dak generali ta’ *culpa in contrahendo*, fis-sens li kontraent kien ikun responsabbli mhux biss jekk iwaqqaf in-negozjati minghajr raguni valida, izda kull meta, fil-kors tat-trattattivi, jagixxi kontra l-principju ta’ *bona fide* (per ezempju, nuqqas ta’ informazzjoni fuq l-oggett *in vendita*; nuqqas ta’ kunfidenzjalita`; “*dovere di avviso*”, u obbligi ohra simili); id-dibattitu gie rizolt pozittivament (jigifieri, favur il-principju generali ta’ *culpa in contrahendo*) bl-introduzzjoni tal-klawsola favur komportament b’*bona fide* anke matul l-istadju tan-negozjati. Nonostante l-fatt li l-Art. 1337 tal-Kodici Civili Taljan gie espress b’manjiera generika ghal tal-apposta, il-gurisprudenza Taljana xorta wahda baqghet tikkonsidra l-ksur ingustifikat tat-trattattivi bhala l-unika fattispecie li fih wiehed jista’ jikkontempla responsabilita` prekontrattwali, u kwindi responsabilita` ghad-danni.

Hekk, per ezempju, il-Qorti ta' Cassazione, f'sentenza moghtija fis-17 ta' Jannar, 1981, osservat:

> "la mala fede e` atta a sostenere la responsabilita` precontrattuale ai sensi del'art. 1337 c.c. quando si concretizzi in un comportamento idoneo a far sorgere nell'altro contraente il ragionevole affidamento nella futura conclusione del contratto seguito dalla interruzione delle trattative senza giustificato motivo".

33. Isegwi, allura, li l-ksur ingustifikat tat-trattattivi, bhala element aktar ampju tad-duttrina ta' *culpa in contrahendo*, kien u ghadu zgur accettat mid-duttrina u l-gurisprudenza Taljana (jigifieri, anke minn qabel il-promulgazzjoni tal-Kodici Civili tal-1942) bhala fonti ta' responsabilita` ghar-rimbors tad-danni inkorsi.

34. Il-Kodici Civili Franciz, il-*Code Napolèon*, ukoll bhal dak Taljan tal-1865 u bhal dak Malti vigenti, ma jikkontjenix klawsola li tistieden lill-kontraenti ghal komportament leali waqt it-trattattivi, pero`, mhix biss id-duttrina hija favur l-accettazzjoni tal-principju ta' responsabilita` ghad-danni minhabba ksur ingustifikat tat-trattattivi, izda l-gurisprudenza Franciza hija wkoll konformi. Il-gurista Taljan, Guido Alpa, fil-ktieb "Appunti sulla responsabilita` precontrattuale nella prospettiva della comparazione giuridica" (1981 Ed. p. p 716), wara li jaghmel referenza ghall-gurisprudenza Franciza jikkonkludi li fi Franza l-posizzjoni hi hekk:

> "a) nella fase preliminare dei 'pourparlers', in cui si discutono I contenuti del contratto, si impongono alle parti obbligazioni di lealta` e di rettitudine, non riferite al contratto di futura conclusione, ma alla condotta delle parti nella fase stessa della trattativa; b) la fase della trattativa, che ha la funzione di consentire alle parti di esaminare i

> rischi e i vantaggi dell'affare, puo` comportare responsabilita` solo per esistenza di una colpa in contrahendo palese ed indiscutibile, altrimenti si apparterebbe un grave danno alla liberta` individuale e alla sicurezza dei traffici; c) la rottura della trattativa deve essere ingiustificata e contraria all'affidamento della parte danneggiata".

35. Hekk ukoll l-awtur A. M. Musy ("Responsabilita` Precontrattuale (Culpa in contrahendo)") 1998 Ed. p. 93, wara li jirreferi ghall-kazistika Franciza jikkonkludi li:

> "La Cassazione francese ha ammesso la responsabilita` di chi interrompe senza alcuna ragione legittima delle trattative gia in stato avanzato."

36. Id-duttrina u gurisprudenza Franciza, bhala dik Taljana, jibbazaw l-argumenti taghhom fuq il-fatt illecitu, sancit bir-regoli ta' delitt u kwazi-delitt, tant li l-gurisprudenza titkellem fuq agir mhux ta' *bonus pater familias*, u li tehtieg dejjem prova tar-rabta ta' kawzalita` bejn il-fatt illecitu u d-danni.

37. Il-posizzjoni fi Franza u fl-Italja giet analizzata peress li, kif inhu risaput, il-Kodici Civili Malti hu bbazat fuq dak Taljan tal-1865, li, da parti tieghu, kien ibbazat fuq dak Franciz tal-1800. L-assimilazzjoni ta' dawn il-Kodici fl-Ordinament Malti kienet facli peress li z-zewg Kodici huma bbazati fuq id-Dritt Ruman, li kien u ghadu s-sies tal-ligi civili ta' Malta, tant li d-dritt Ruman kien u ghadu jissejjah bhala l-*ius commune* ta' Malta. Kif intwera, dawn it-tliet kodici ma ghandhom ebda riferenza ghal komportament prekontrattwali tal-partijiet, izda dan ma zammx lill-Qrati

Francizi u dawk Taljani tal-epoka milli jaccettaw il-principju li min jikser minghajr gustifikazzjoni t-trattattivi li jkunu waslu f'certu stadju jkun responsabbli ghad-danni.

38. Fuq kollox, ma kienx difficli wisq ghal gurisprudenza li taccetta, bhala principju, li wiehed ghandu jkun leali, onest u solidali waqt il-fazi tat-trattattivi, ghax zgur li ebda Qorti ma kienet se taccetta l-kuntrarju. Kif jghid it-Trabucchi ("*Il nuovo diritto onorario*" 1959 Ed. p. 498), "*nessun altro vincolo giuridico stringe i soggetti che non sia quello della convivenza nel mondo giuridico*", u s-"*solidarieta` reciproca*" li ghandha tipprevali fis-socjeta`, giet kemm-il darba proposta bhala r-raguni socjali ta' dan il-principju. Kif jghid il-Del Fonte (op cit. p. 159), il-principju tal-*bona fide* joqghod ghall-:

> "obbligo di collaborazione, di cooperazione, obbligo solidaristico (positivo) finalizzato alla tutela ed alla realizzazione di valori personalistici".

39. Il-limiti tal-bona fidi, kif jghid il-Perlingieri ("Introduzione alla problematica della 'proprieta`'", Jovene, 1971, Ed. p. 188) tirrapprezenta:

> "lo strumento con il quale l'interesse pubblico circoscrive il diritto del titolare (o piu` ampiamente una situazione giuridica) sacrificandono l'estensione e determinandone il contenuto concreto".

40. Ghalkemm il-Kodici Civili Malti, bhal dak Franciz u dak Taljan tal-1865, huwa bazat fuq il-principju ta' volonta`, fuq il-kunsens u l-obbligi li jitwieldu biss mill-manifestazzjoni tieghu, il-bniedem ma jghix wahdu izda

f'socjeta` u ghalhekk, filwaqt li ghandu dritt jezercita d-drittijiet tieghu personali, dawn irid jezercitahom fil-limiti taghhom u minghajr ma jikkaguna hsara lil haddiehor. Dan hu principju accettat fl-Ordinament Guridiku Malti, u nsibu applikazzjoni generali tieghu mhux biss fid-delitt u kwazi-delitt (Artikolu 1030 *et seq* tal-Kodici Civili), izda wkoll fil-proprjeta`, fejn ghalkemm ihaddem il-principju li proprjetarju jista' jinqeda u jaghmel li jrid bi hwejgu (rifless fil-principju li l-proprjeta` twassal ghal-*ius utendi, fruendi et abutendi*), dan jista' jaghmlu fil-limiti tal-bonvicinat, basta, jigifieri, li bl-ezercizzju tad-drittijiet tieghu ma jikkawzax hsara lil haddiehor. Hekk fil-kawza klassika "**Bugeja v. Washington**" deciza mill-Onorabbli Qorti tal-Appell fil-5 ta' Mejju, 1897 (Kollez. Vol. XVI.i.38), intqal li:

> "Il diritto de proprietario di usare liberamente del suo fondo e di farvi le modificazioni che crede conveniente cessa la ove si reca grave molestia al vicino."

Dan il-principju gie abbraccjat dan l-ahhar minn din il-Qorti fil-kawza "**Vella v. Mifsud**" deciza fis-27 ta' Gunju, 2003.

41. Dan il-principju ta' buon vicinat li jilminta l-poteri tal-proprjetarju fuq il-gid tieghu, mhix espressa fil-kodici civili, pero`, hija limitazzjoni mehtiega mill-fatt li l-bniedem ma jghix wahdu, izda f'socjeta`, u jrid, bl-agir tieghu, jirrispetta d-drittijiet ta' haddiehor. Id-dritt li jirrecedi mit-trattattivi huwa dritt ta' kull kontraent, u, bhala tali, dan id-dritt jista' jitqies

bhala formanti parti mill-patrimonju ta' kull kontraent, izda bhal kull proprjeta` ohra, trid tigi mwettqa bil-bona fede u b'rispett lejn id-drittijiet ta' haddiehor. Ghalhekk, din il-Qorti tikkondividi l-opinjoni li min minghajr gustifikazzjoni legittima jwaqqaf in-negozjati li jkunu waslu f'certu stadju avvanzat, ghandu anke hawn Malta, iwiegeb ghad-danni li kienu taw lok ghalihom bl-agir tieghu.

42. Il-principju ta' solidarjeta`, fuq kollox, qieghed ukoll isib applikazzjoni fil-ligi Maltija, tant li, ghalkemm in principju, kuntratt li hu rizultat rieda hielsa tal-partijiet, huwa validu u jitqies, anzi, ligi bejn l-istess partijiet (Art. 992 Kodici Civili), il-legislatur, konxju tar-rwol socjali tieghu, diga` intervjena biex, fl-interess tal-kontraent hekk imsejjah, aktar debboli, jimmodifika jew sahansitra jwaqqa' kuntratt li jista' jitqies mhux gust. L-ewwel evidenza ta' din it-tendenza legislattiva kien l-Att dwar il-Kuntratti fuq l-Ghatba tal-Bieb (Kap 317) li taghti lill-konsumatur li jkun iffirma kuntratt mhux fil-hanut jew fil-post tan-negozju tal-kummercjant, id-dritt li fi zmien hmistax-il gurnata, ghal raguni tkun xi tkun, ihassar dak il-kuntratt altrimenti meqjus validu. Il-Legislatur hass li dawn il-kuntratti, generalment iffirmati fid-dar tal-konsumatur wara zjara mis-*salesman* tan-negozjant, ikunu gew iffirmati wara certa "insistenza" mis-*salesman*, li avolja ma tekwivalix ghal vjolenza, tista' twassal lill-kontraent aktar dghajjef li jaccetta kuntratt li ma jkunx ta' vantagg jew utilita` ghalih. Ezempji ohra ta' dan it-tip ta' intervent tal-Legislatur (li jista' jissejjah

“cooling off period”) huma r-Regolamenti tal-2000 dwar il-Protezzjoni ta’ Xerrejja f’Kuntratti ta’ Time Sharing fi Proprjeta` Immobbli (reg. 7 tal-A.L. 269/2000 – L.S. 409.02 mibdula bl-A.L. 109/2011, reg 8), u r-Regolamenti tal-2001 dwar Bejgh mill-Boghod (reg. 6 tal-A.L. 186/01 – L.S. 378.08 – imhassrin bl-A.L. 439 tal-2013).

43. Dan l-ahhar, bis-sahha tal-Att XXVI tal-2000 li emenda l-Att dwar l-Affarijiet tal-Konsumatur (Kap 378), il-Qrati Maltin inghataw l-opportunita` li jvarjaw kuntratti li jkunu saru bejn negozjant u konsumatur, fis-sens li jistghu jwarrbu mill-kuntratt klawsoli u kundizzjonijiet li jistghu jitqiesu mhux gusti, u fost il-konsiderazzjonijiet li jistghu jaghmlu l-Qrati biex jiddeciedu jekk klawsola hijiex gusta jew le, hemm il-“bargaining power” rispettiva tal-partijiet, il-pressjoni li tkun saret fuq il-konsumatur u n-nuqqas ta’ konoxxenza jew nuqqas ta’ hila tal-istess konsumatur. B’hekk kwalunkwe klawsola jew kundizzjoni “accettata” minn kontraent aktar dghajjef mill-iehor, tista’ tigi mwarrba mill-Qrati jekk titqies mhux gusta, u dan b’harsien tal-principju ta’ solidarjeta` li jistmerr agir ta’ persuna li japprofitta ruhu mid-dghjufija ta’ persuna ohra.

44. Din it-tendenza legislattiva tindika sforz biex l-aspettativi legittimi tal-kontraenti jigu, kemm jista’ jkun, protetti. Applikat dan il-principju, persuna li tkun qed tittratta ma’ persuna ohra, u jkun intlahaq stadju fejn in-negozjati gew kwazi konkluzi pozittivament, ghandu jkollu l-aspettativa

legittima tieghu li l-kuntratt jigi effettivament konkluz, protetta bil-ligi, fissens li dak il-kontroparti li, minghajr raguni gusta, iwaqqaf hesrem dawk it-trattattivi, ghandu jwiegeb ghad-danni. Hekk kif l-ezercizzju ta' dritt isib il-limitazzjoni tieghu fir-rispett tad-drittijiet ta' haddiehor, hawn ukoll id-dritt li wiehed jerga' lura mit-trattattivi isib kwalifikazzjoni fil-htiega ta' rispett ghal aspettativa legittima tal-parti l-ohra. Kontra l-oggezzjoni li l-principju ta' responsabilita` prekontrattwali jista' jfixkel il-kummerc hieles din il-Qorti tosserva li dan il-principju ilu accettat u segwit fi Franza, fl-Italja u fil-Germanja, fost pajjizi ohra, u ma jidhirx li dan il-principju kien ta' xkiel ghall-kummerc f'dawk il-pajjizi. Kif jghid il-Bessone ("Rapporto precontrattuale e doveri di correttezza" Giuffre`, 1971 Ed. p. 245),

> "lungi dal compromettere ruolo ed utilita` sociale della trattativa, l'operare di un oculato regime di responsabilita` per recesso assicura un migliore andamento del mercato, con il fatto stesso di contenere il rischio di iniziativa degli operatori avveduti e di scoraggiare i contegni sleali o poco corretti".

45. L-accettazjoni ta' dan il-principju m'ghandhiex issib ostakolu millfatt li fil-ligi Maltija m'ghandniex artikolu bhall-Artikolu 1337 tal-Kodici Civili Taljan. L-ewwelnett, dan in-nuqqas ma zammx lill-Qrati Francizi u dawk Taljani tal-epoka li, b'mod car u inekwivoku, jaccettaw dan il-principju. Fit-tieni lok, nuqqasijiet simili qatt ma zammew lil dawn il-Qrati li jintroducu principji u azzjonijiet li ma jiffurmawx parti mill-Kodici Civili taghna, meta jhossu li tali principju huwa gust u ta' gieh ghal Ordinament Guridiku; l-aktar ezempju car, hija l-*actio de in rem verso*, azzjoni bbazata

fuq l-arrikiment ingust, li llum tifforma parti mill-gurisprudenza kostanti lokali, u zgur hadd ma jazzarda jghid li din l-azzjoni ma tifformax parti mill-Ordinament Malti, ghalkemm ghal zmien twil ma kienet tissemma' imkien fil-Kodici Malti. Din l-azzjoni hija wkoll ibbazata fuq il-gustizzja u llum il-gurnata nghatat gharfien fl-Artikoli 1028A u 1028B tal-Kodici Civili: ara d-decizjoni ta' din il-Qorti fil-kawza "**Said v. Testaferrata Bonici**" (1936) riportata fil-Kollez. Vol. XXIX.11.1105.

46. Fit-tielet lok, dan il-principju jista' jsib l-applikazzjoni tieghu fil-kuncett ta' delitt u kwazi-delitt, u anke llum, fl-Italja, jinghad li l-Artikolu 1337 huwa esposizzjoni specifika tal-principju generali ta' *neminem laedere* sancit anke fil-Kodici Civili Malti. Hekk il-gurista R. Sacco ("Il Contratto" Utet 1975 Ed. p. 676) jghid:

> "Se l'art 1337 non esistesse, la slealta` meriterebbe di essere ripressa ex art. 2043? E consegwuentemente l'art.1337 interpreta l'art 2043, per far comprendere che il danno arrecato con la slealta` precontrattuale e` 'ingiusto'? A nostro giudizio la risposta da dare a questi due quesiti e` posittiva".

47. Il-gurisprudenza Taljana hi wkoll konformi mat-teorija li "La responsabilita` precontrattuale in tutte le ipotesi riconlucibili alla previsione dell'art. 1337 c.c., va qualificata come responsabilita` per fatto illecito, in quanto non si correla alla violazione di obblighi negoziali" (Cass. 12 ta' Awwissu, 1947; Cass. 6 ta' Marzu, 1976; Cass. 6 ta' Marzu,

1992; Cass. 12 ta' Marzu, 1993). Il-Corte di Cassazione fl-Italja f'sentenza moghtija fit-30 ta' Awwissu, 1995, osservat ukoll:

> "La responsabilita` precontrattuale, configurabile per la violazione del precetto posto dall'art. 1337 c.c. – a norma del quale le parti, nello svolgimento delle trattative contrattuali, debbono comportarsi seconda buona fide – costituisce una forma di responsabilita` extracontrattuale, che si riconnette alla violazione della regola di condotta stabilita a tutela del corretto svolgimento dell'iter di formazione del contratto, cosicche` la sua sussitenza, la risarcibilita` del danno e la valutazione di quest'ultimo devono essere vegliati alla stregua degli art. 2043 e 2056, tenendo peraltro conto delle caratteristiche tipiche dell'illecito in questione."

Tajjeb li jinghad li l-qrati Taljani, dan l-ahhar, qed ixaqilbu lejn l-aspett kontrattwali ta' din l-azzjoni.

48. Biex ikun hemm responsabilita` ghad-danni wara ksur mhux gustifikat tat-trattattivi, irid ikun hemm, skont id-duttrina Taljana, tliet elementi: "affidamento di una delle parti sulla conclusione del contratto, recesso senza giusta causa dell'altro contraente, danno". (Cass. 12 ta' Gunju, 1959).

49. Ghar-rigward tal-ewwel element, il-gurista Fortinguerra (op. cit. p. 116) jispjega:

> "Occorre precisare che se da un lato e` vero che ogni trattativa genera la aspettativa, o meglio la speranza di un futuro contratto, dall'altro, e` pur anche vero che, in tale ipotesi non e` ancora corretto parlare di affidamento vero e proprio, atteso che, laddove cosi` non fosse, sarebbe necessario sostenere l'improbabile esistenza di un dovere di non recedere mai senza giusta causa, ogni qualvolta si dia inizio alle trattative.

> Pertanto, allorquando si richiede l'esistenza di un affidamento meritevole di tutela, ci si riferisce non tanto alla vaga speranza che si pervenga alla conclusione di un affare ovvero alla certezza di raggiungere un determinato risultato, atteso che nelle trattative e` inevitabile che sussista la prima cosi come non sussista la seconda, quando piu` propriamente ad uno stadio delle trattative tale per cui appare praticamente raggiunto l'accordo, salva la manifestazione formale del consenso e sempre che non sopravvengono elementi nuovi precedentemente non valutati che rendono giustificato il recesso".

50. Il-gurisprudenza Taljana hadet posizzjoni rigida fir-rigward u biex jista' jinghad li nholoq l-affidament versu l-konkluzjoni tal-kuntratt, jehtieg li jkun hemm kwazi qbil fuq l-elementi kollha tal-kuntratt maghdud ma' cirkostanzi ohra li jaghtu 'l dak li jkun x'jifhem li l-kuntratt se jigi konkluz.

51. Din il-posizzjoni tidher illustrata minn decizjoni tat-Tribunale di Napoli tat-23 ta' Dicembru, 1971, fejn jinghad:

> "In tema di compravendita immobiliare, in mancanza di un'immissione nel possesso del futuro compratore o della corresponsione di una caparra (od anticipo del prezzo), o della predisposizione dei documenti necessari all'alienazione e della redazione (sia pure in minuta) dell'atto di trasferimento, le trattative consistenti nella sola predeterminazione del prezzo e dell'oggetto dell'eventuale compravendita non fanno sorgere quell'affidamento nella conclusion del contratto che e` presupposto primario della culpa in contrahendo".

52. Fi kliem iehor, irid jirrizulta mhux biss l-istat avvanzat tat-trattattivi, izda cirkostanzi ohra, (bhal, frekwenza tal-kuntatti, manifestazzjoni ma' terzi tal-posizzjoni raggunta, applikazzjonijiet ma' awtoritajiet amministrattivi, preparazzjoni awtorizzata ta' dokumenti jew twettiq ta'

xoghol), li jindikaw l-gheluq tan-negozjati hlief ghal manifestazzjoni puntwalizzata tal-kunsens.

53. Fil-fatt, il-gurista Fortinguerra (op. cit. p. 117), wara ezami tal-gurisprudenza Taljana in materja, jikkonkludi li biex ikun hemm dan l-affidament, hu mehtieg li:

> "Le trattative hanno raggiunto una ulteriore fase, totalmente vicina alla conclusion dell'accordo da ritenere conforme a buona fede far ricadere sul soggetto recedente le spese sostenute ed il danno subito dall'altra".

54. It-tieni element jirrikjedi agir li jmur kontra l-*bona fide* u li jwassal ghal ksur ingustifikat tat-trattattivi. Id-duttrina u l-gurisprudenza Taljana huma uniformi li l-kejl biex jigi determinat jekk kienx hemm jew le agir skont ma titlob il-*bona fide* huwa wiehed oggettiv, u l-Qorti trid tara jekk il-komportament ta' dak il-kontraent segwiex jew le dak li kien mistenni minnu skont ic-cirkostanzi. Kif jghid il-Fortinguerra (op. cit. p. 90):

> "La buona fede di cui e` parola nell' art 1337 c.c. e` quella cosidetta oggettiva, vale a dire quella che …… non corrisponde ad uno stato soggettivo interno del soggetto, bensi`, si identifica per taluni in una regola di condotta, per altri in un criterio di valutazione a posteriori di una determinato comportamento".

55. Agir kontra l-*bona fide* mhux mehtieg li jkun rizultat ta' *dolo*, u l-*colpa* tal-kontraent (meta jirrizulta li jkun hemm ksur tad-dover tal-korrettezza) ghandha twassal ghar-responsabilita` ghad-danni. Kwindi, mhux mehtieg li l-kontraent jagixxi b'intenzjoni li jqarraq jew kwazi b'hazen, izda kull meta jirrizulta agir doluz jew kolpuz li jwassal ghat-

temm mhux gustifikat tat-trattattivi li jkunu fi stadju avvanzat, il-konsegwenza ghandha tkun responsabilita` ghad-danni li jirrizultaw. Dwar meta l-irtirar mit-trattattivi ghandu jitqies mhux gustifikat, ma jistax jigi stabbilit minn qabel, imma l-konkluzjoni tkun tista' tigi raggunta biss wara analizi tac-cirkostanzi partikolari tal-kaz u wara applikazzjoni ta' dawk il-kriterji li l-kontraent kien oggettivament mistenni minnu li jadotta f'dawk ic-cirkostanzi.

56. It-tielet element huwa d-dannu, li ghandu jkun pruvat li segwa b'konsegwenza diretta ta' dak il-ksur ingustifikat tat-trattattivi. Fejn tali azzjoni hi bbazata fuq delitt u kwazi delitt, irid jigi ppruvat in-ness ta' kawzalita` bejn il-ksur tat-trattattivi u danni, u din il-prova tikkombi lill-attur li jallega d-danni. Kif qalet il-Corte di Cassazione f'decizjoni moghtija fl-1 ta' Frar, 1995:

> "La responsabilita` precontrattuale, che, tra l'altro, ricorre quando l'interruzione delle trattative sia priva di ogni ragionevole giustificazione cosi da sacrificare arbitrariamente il logico affidamento della controparte sulla conclusione del contratto, essendo riconducibile alla piu` ampia categoria della responsabilita` extracontrattuale, presuppone anche la prova, a carico di colui che agisce per il risarcimento del danno, della malafede del recedente."

57. Dan il-principju japplika anke ghas-sistema maltija fejn ir-responsabilita` *aquiliana* hija bazata fuq il-prova tal-kolpa jew id-*dolo*, liema prova trid issir minn dak li qed jallega li kien il-vittma ta' agir skorrett.

58. Ghar-rigward tad-danni l-istess Corte di Cassazione, f'sentenza moghtija fl-4 ta' April, 1960, u kemm-il darba segwita, osservat:

> "L'obbligo del risarcimento derivante dall'ingustificata rottura delle trattative va contenuto nei limiti del c.d. interesso negativo …., e va perpetuato limitatamente alle spese che la controparte ha sostenuto in previsione delle conclusione del contratto e alle perdite sofferte per altre occasioni che siano venute meno o rifiutate, sempre che, naturalmente le une u le altre siano dipendenti dalle trattative non riuscite."

59. Dawn iz-zewg kapi ta' danni huma mqabbla mad-*damnum emergens* u mal-*lucrum cessans* li solitu jigu kompensati meta tirrizulta responsabilita` taht delitt jew kwazi-delitt. Fil-fatt, mal-ewwel kap jidhlu l-ispejjez kollha inkorsi filwaqt li mat-tieni kap jidhol it-telf li jkun rizultat tal-okkazjonijiet mitlufa. Dawn id-danni huma konformi ma' dak li tipprovdi l-ligi taghna fl-Artikolu 1045 tal-Kodici Civili. Il-prova tal-*lucrum cessans,* mhux dejjem tkun wahda facli li tigi sodisfatta, ghax irid jigi muri li verament kien hemm opportunitajiet alternattivi u tajbin, liema opportunitajiet ma gewx sfruttati minhabba l-kwazi certezza ta' konkluzjoni ta' kuntratt ma' dik il-parti li, minghajr gustifikazzjoni, kisret it-trattattivi li kienu waslu fi stadju avvanzat. Kif jispjega l-gurista Fortinguerra (op. cit. p. 305):

> "Ed e` proprio la dimostrazione dell'esistenza di un negozio di rimpiazzo, alternativo a quello sul quale sono state impiegate risorse in trattative rivelatesi inutili, che costituisce l'elemento ineliminabile per ottenere la risarcibilita` stessa del lucro cessante, che, pertanto, non sara` neppure prospettabile nell'ipotesi in cui la trattativa abbia ad oggetto un prestazione assolutamente infungibile."

60. Il-prova ma tridx tkun wahda bbazata fuq ipotesi jew fuq kongetturi, izda jrid jigi muri pozittivament li kienu jezistu opportunitajiet ohra li ma gewx mehuda in konsiderazzjoni jew gew abbandunati precizament minhabba n-negozjati li kienu ghaddejjin u li mbaghad twaqqfu minghajr gusta kawza. Il-prova trid issir minn dak li jallega li gie pregudikat u jrid jaghti indikazzjoni cara tat-telf finanzjarju li garrab.

61. Fil-qosor, allura, ikun hemm raguni biex tigi akkolta r-responsabilita` ghad-danni wara ksur tat-trattattivi, f'kull kaz meta t-trattattivi jkunu waslu f'dak l-istat avvanzat fejn il-partijiet ikunu mhux biss waslu f'akkordju fuq l-elementi essenzjali tan-negozju, izda c-cirkostanzi jkunu jindikaw rieda li l-partijiet jikkonkludu formalment il-kuntratt; raggunt dak l-istat, il-kontraent li, b'hazen jew traskuragni, jittermina n-negozjati minghajr raguni gusta, valutata oggettivament, ikollu mhux biss jirrifondi dawk l-ispejjez legittimament minfuqa mill-parti l-ohra, izda jrid jaghmel tajjeb ghal dawk id-danni li huma konsegwenza diretta u immedjata tal-ksur tat-trattattivi, cioe`, il-qligh li kienet taghmel dik il-parti l-ohra li kieku impenjat ruhha fi trattattivi alternattivi; il-prova tal-*malafede* u tad-dannu, trid issir mill-attur li qed jallegaha.

62. Din, fil-fehma ta' din il-Qorti, tista' tkun il-posizzjoni applikabbli fl-Ordinament Guridiku Malti u ghandha tkun accettata mill-Qrati Maltin, mhux biss bhala applikazzjoni specifika tad-duttrina ta' *neminem laedere*,

izda b'harsien ukoll ghal principju ta' solidarjeta` u *bona fide* li ghandu, fin-nuqqas ta' ostakolu legislattiv, japplika fir-relazzjonijiet kollha ta' bejn dawk li huma soggetti ghal dak l-Ordinament.

63. Din il-Qorti, ghal kull buon fini, tirreferi ghal dak li osservat il-Qorti tal-Magistrati (Malta) fil-kawza "**Spiteri v. Associated Supplies Ltd**", deciza finalment mill-Onorabbli Qorti tal-Appell (Sede Inferjuri) fl-20 ta' Ottubru, 2003, li jista' jitqies innovattiv daqs kemm jaqbel mal-principju enuncjat, u cioe`:

> "Illi fit-trattattivi preliminari bejn venditur u kompratur, huwa l-onus tal-partijiet li jidhlu ghal dawn it-trattattivi b'animu limpidu u b'buona fede assoluta li ghandhom izommuhom tul it-trattattivi u anke oltre l-konsolidament kontrattwali;
>
> Illi jirrizulta li l-attur li ttratta mas-socjeta` kovnenuta hu bniedem komuni injar mill-finezzi xjentifici li taghhom hija responsabbli s-socjeta` konvenuta, liema socjeta` hi tenuta tispjega sewwa u kif dovut is-sitwazzjoni xjentifika lill-kompratur potenzjali;
>
> Illi l-minimu li kompratur jirrikjedi f'cirkostanzi bhal dawn hu li tal-flus li qed ihallas hu jircievi s-servizz mitlub minghajr umiljazzjonijiet, raggieri jew intoppi inutli;
>
> Illi l-obbligu tal-venditur, molto piu` bhal ma hu fil-kaz odjern meta ma tezistix dik il-konsapevolezza xjentifika minn wiehed mill-partijiet li tirrendi ghalhekk wahda mill-parti vulnerabbli aktar mill-ohra, allura l-venditur irid m'hux biss jiggwida lill-kompratur potenzjali biex ipoggieh f'posizzjoni li jeffetwa l-ghazla informata li hi l-aktar idonea ghalieh, izda li dejjem jagixxi in buona fede fil-konfront tieghu u ma jindirizzahx lejn decizjonijiet li jistghu b'xi mod ikunu ta' pregudizzju ghalieh u minghajr ma l-kompratur potenzjali jkun qed jara tali pregudizzju;"

64. Ricentement, din il-Qorti ghamlet studju qasir ta' dan l-istitut u approvat in-nozjoni bhala applikabbli ghal Malta. Is-sentenza hija "**L-Avukat Peter Fenech noe v. Dipartiment tal-Kuntratti**", deciza fid-29

ta' April, 2016. Din il-Qorti hadet zvolta differenti tal-materja u qieset ir-responsabilita` bhala wahda kuntrattwali. Saru dawn l-osservazzjonijiet fil-kontest tal-materja issa in diskussjoni:

> "…….meta partijiet jidhlu fi trattattivi bil-hsieb li jintrabtu b'kuntratt bejniethom, ga` f'dak il-waqt jinholoq kuntratt: mhux il-kuntratt li bil-hsieb tieghu jkunu qeghdin jinnegozjaw izda ftehim *de innuendo contractu* li bis-sahha tieghu l-partijiet jintrabtu, mhux illi jaghtu l-kunsens ghall-kuntratt li dwaru jkunu qeghdin jittrattaw, izda illi jinnegozjaw *in bona fide* u illi ma jirtirawx min-negozjati ghal raguni li ma tkunx tiswa fil-ligi jew li tkun *in mala fide*. Jekk parti tonqos minn dan l-obbligu imnissel mill-kuntratt – jew pre-kuntratt – *de innuendo contractu*, ikollha taghmel tajjeb ghad-danni li tkun garrbet il-parti l-ohra. Il-kejl ta' dawn id-danni ma huwiex il-valur tal-kuntratt li ma sehhx, appuntu ghax dak il-kuntratt ma sehhx u ma holoq ebda rabta, izda dak li jissejjah l-'interess negativ', i.e. id-danni li l-parti l-ohra ma kinitx iggarrab li kieku ma dahlitx fin-negozjati: l-ispejjez li tkun dahlet fihom biex taghmel jew tqis l-offerta u, possibilment, l-opportunitajiet mitlufa."

65. Huwa f'dan il-kuntest li t-talba attrici f'din il-kawza trid issa tigi mistharrga. Huwa car li bejn il-partijiet n-negozjati kienu waslu fi stat avvanzat. Il-Bord tad-Diretturi taz-zewg socjetajiet kienu qablu li tintefa' l-offerta flimkien, u ghalkemm kien fadal xi affarijiet li fuqhom kien ghad fadal biex jintlahaq ftehim, dawn kienu jirrelataw mal-operazzjoni u mhux mal-ftehim ta' bejn il-partijiet. L-istadju kien milhuq fejn kien car li l-ghaqda kienet sejra ssir, u li kien fadal kienu dettalji ta' kif dik l-ghaqda kienet sejra topera. Il-*bona fide* irid li n-negozjati kellhom jitkomplew, u s-socjeta` konvenuta ma kellhiex tirtira minghajr ragunijiet validi. Li jrid issa jigi diskuss u deciz huwa jekk is-socjeta` konvenuta kellhiex dawn ir-ragunijiet validi, u jekk le, id-danni li ghandha thallas.

66. Jirrizulta li kien sar qbil anke kif jinqasmu l-ishma fil-kumpanija l-gdida u li din il-kumpanija tkun regolata skont il-ligijiet ta' Malta. Ma kienx kaz ta' diskussjonijiet b'mod generali, izda kien intlahaq qbil fuq id-dettalji u l-aspetti teknici tal-ghaqda. Kien anke intlahaq ftehim mal-kumpanija Enemalta ghall-access u *storage* tal-*fuel*, u l-*bona fide* kienet tirrikjedi impenn miz-zewg nahat biex jigi konkluz il-ftehim. Kif qal Kyriakos Tzanidis, f'isem is-socjeta` konvenuta: "*I am fully aligned of all progress and agreements signed. Indeed it is a major achievement all of our issues were passed successfully and as initially scheduled. The difficult part is over now. From now on we have many isses but known to us so do not worry."* Ghal xi raguni li ghadha trid tigi mistharrga, is-socjeta` konvenuta itterminat in-negozjati. Dan ovvjament ma jfissirx li bejn il-partijiet kien hemm xi akkordju maghluq. Ir-rapprezentant tas-socjeta` attrici stess jghid li kien ghad fadal li l-ftehim jigi redatt bil-miktub, u hu principju fil-kummerc li meta partijiet ghall-kuntratt ikollhom il-hsieb jirriducu l-ftehim ghall-kitba, l-istess ftehim ikun maghluq meta issir il-kitba.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell tas-socjeta` konvenuta billi tichad l-istess u, ghalkemm ghal ragunijiet differenti, tikkonferma s-sentenza tal-ewwel Qorti u tghid li bejn il-partijiet kien hemm ftehim *de ineundo contractu* li l-ksur tieghu minghajr ragunijiet validi jista' jaghti lok ghad-danni kif qed titlob is-socjeta` attrici – dan

jiddependi mill-provi u ghalhekk l-atti qed jigu rimessi ghall-quddiem l-ewwel Qorti biex din tisma' u tiddeciedi l-kaz fil-meritu.

L-ispejjez tal-kawza marbuta ma' din id-decizjoni, inkluzi dawk tal-ewwel Qorti, jithallsu mis-socjeta` konvenuta appellanti Shell & MOH Aviation Fuels A.E.

Mark Chetcuti Prim Imhallef	Joseph R. Micallef Imhallef	Tonio Mallia Imhallef

Deputat Registratur
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