



CIVIL COURT (FIRST HALL)
MADAM JUSTICE
HON. AUDREY DEMICOLI LL.D.

Application Nr **320/2022 (AD)**

PLOUTOS LTD
(NUMRU TA' REĠISTRAZZJONI 310407G,
SOĊJETA' ESTERA ĠEWWA L-AWSTRIJA)

VS

TIPICO CO LTD (C 34286)

Sitting held on Thursday, 9th February 2022

The Court:

1. This is a partial judgement regarding the first preliminary plea raised by the defendant company Tipico Co Ltd in paragraph 1 of its sworn reply filed on the tenth (10th) June 2022, following the sworn application filed by the plaintiff company Ploutos Ltd instituting these proceedings, on the eleventh (11th) April 2022;

Preliminaries and Facts of the Case

2. The parties to this suit entered into a franchise agreement on the fifteenth (15th) November 2013, by virtue of which they bound themselves by a number of obligations within the sphere of online gaming. Ploutos Ltd terminated this franchise agreement on the basis that the agreement was allegedly causing it to suffer financial loss, namely due to the fact that the defendant company allegedly did not adhere, neither to the Malta Gaming Authority Regulations regarding Outsourcing by Authorised Persons under Maltese Law, nor to the Gaming Authority requirements in Austria. Ploutos Ltd is alleging that the defendant company remained in default, even after repeatedly being called upon to rectify its position at law;
3. Due to the fact that the plaintiff company had incurred large expenses relative to this agreement, Ploutos Ltd is claiming that it is entitled to compensation in terms of Article 24 of the Austrian Commercial Agency Law, and this especially in view of the fact that the defendant company is still benefitting from the investment made by the plaintiff company along the years, whilst the plaintiff company continues to incur damages and severe financial losses;
4. Thus, by virtue of this suit, the plaintiff company is requesting this Court:
 - a. To declare and decide that the defendant company did not adhere to the agreement entered into by the parties;
 - b. To declare and decide that the defendant company acted in an abusive and illegal manner in relation to the plaintiff company, as a consequence of which the plaintiff company had to terminate the franchise agreement dated fifteenth (15th) November 2013;
 - c. To declare and decide that the defendant company should compensate the plaintiff company due to the fact that the defendant company is still benefitting from the investment and expenses incurred

by the plaintiff company along the years to create a distribution market and generate more online betting activity;

- d. To declare and decide that due to the abusive and illegal acts carried out by the defendant, the plaintiff company suffered financial damages, which can only be attributed to the actions of the defendant company;
 - e. To declare and decide that the defendant company is responsible for damages suffered by the plaintiff company, including but not limited to the expenses incurred by the plaintiff company, loss of income and profits of the same plaintiff company, and unjustified enrichment of the defendant company due to its own abusive actions;
 - f. To liquidate damages suffered by the plaintiff company, through the appointment of Court-appointed experts;
 - g. To order the defendant company to pay the plaintiff company the damages thus liquidated, with interest up to the date of effective payment;
5. By virtue of a reply filed on the tenth (10th) June 2022, the defendant company raised a number of pleas, including the preliminary plea being addressed in this judgement, namely:

That this Honourable Court does not have the jurisdiction to hear and determine this dispute, since the merits of this case derive from an agreement dated 15th November 2013 referred to as “Brokerage Agreement”, which agreement provides that, “the place of jurisdiction of any disputes arising from this agreement is the registered office of the broker [Ploutos GmbH]” (clause 17), and therefore in Austria. That therefore, in terms of the applicable Articles of Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) (the ‘Brussels

Recast Regulation), the Austrian Courts have exclusive jurisdiction to take cognisance of this case, as would be amply proven as the case progressed, such that the defendant company should consequently be discharged ab observantia judicii;

6. During the Court sitting held on the 10th June 2022, the parties requested that judicial proceedings relative to this application be conducted in the English language. The Court upheld the request for judicial proceedings to be conducted in the English language;
7. During the same sitting held on the 10th June 2022, it was decided that the Court would first hear submissions of evidence and final submissions in relation to the first plea submitted by the defendant company.

The Court

8. Having seen the acts filed by the parties;
9. Having seen that, during the sitting held on the 27th September 2022 the parties declared that they had no further evidence to submit regarding the preliminary plea relating to the lack of jurisdiction of this Court to hear this case;
10. Having seen the note of submissions filed by the defendant company regarding the preliminary plea being addressed in this judgement, dated 17th October 2022;
11. Having seen the note of submissions filed by the plaintiff company regarding the same preliminary plea, dated 9th November 2022;
12. Having heard further submissions by the parties regarding the first preliminary plea raised by the defendant company during the sitting held on the 10th November 2022;

13. Having seen that the case was adjourned for a decision on the first preliminary plea raised by the defendant;

14. Considers as follows:

Considerations made by the Court

15. Issues relative to jurisdiction and the recognition and enforcement of judgements in civil and commercial matters across the European Union were, until 2015, regulated by Council Regulation (EC) No 44/2001 of 22 December 2000, more commonly known as the **Brussels I Regulation**. It was felt, however, that:

Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters, and to ensure rapid and simple recognition and enforcement of judgements given in a Member State, are essential.¹

With this aim, the European Parliament and the Council of the European Union, upon recommendation of the European Commission, decided that the Brussels I Regulation should be recast, into what today is Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, more commonly known as the **Brussels I (Recast) Regulation**, in a solid attempt “to improve the application of certain of its provisions, to further facilitate the free circulation of judgements and to further enhance access to justice”²;

¹ Regulation (EC) Nr 1215/2012, Preamble, para 4

² Ibid, para 1

Choice of Jurisdiction under the Brussels I (Recast) Regulation

16. One of the main changes between the Brussels I Regulation and the Brussels I (Recast) Regulation was precisely the rule regarding choice of jurisdiction clauses in contracts. Under the Brussels I Regulation, Article 23 stated that:

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. [...]

On the other hand, under the Brussels I (Recast) Regulation, Article 25 states:

1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. [...]

17. It is evident that the two changes are therefore the following:

(a) The parties agreeing on a choice-of-court clause need now not necessarily be domiciled in a Member State of the European Union in

order to choose a Court in a Member State of the European Union as the Court having jurisdiction to hear a particular claim; and

- (b) It is specifically underlined that the choice-of-court agreement can only be opted out of if it is substantially declared null and void under the law of the Courts to which it gives jurisdiction. It is the Court of the chosen Member State that would be called about to decide whether it is null and void, rendering, therefore, the validity of the choice-of-court clause separate from the contractual relationship as a whole. In fact, Article 25(5) of the Brussels I (Recast) Regulation further establishes that:

5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

18. In addition, Recital 11 forming part of the Preamble to the Brussels I Regulation and Recital 15 forming part of the Preamble to the Brussels I (Recast) Regulation, which are identical, explain:

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

*common rules more transparent and avoid conflicts of jurisdiction.*³

19. Thus it transpires that a choice-of-court clause in a contract, under the Brussels I (Recast) Regulation, must, as a general rule, be followed, **unless** such clause is declared null and void in substance in terms of law of the Member State agreed upon by the parties;

Applicability of the Brussels I (Recast) Regulation

20. Article 288 of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2012/C 326/01)⁴ states:

A regulation shall have general application. It shall be binding in its entirety and directly applicable to all Member States.

It thus follows that Malta, as a Member State of the European Union, is bound by the Brussels I (Recast) Regulation in matters concerning jurisdiction and recognition and enforcement of judgements in civil and commercial matters, meaning that the Maltese Courts, in circumstances such as the one before this Court, must apply this legal instrument as binding and directly applicable to Malta as a Member State;

21. It is true that, under Chapter 12 of the Laws of Malta, Article 742(1) confers jurisdiction on the civil courts of Malta, *“to try and determine all actions, without any distinction or privilege, concerning [...]”*:

[...]

³ Emphasis added by this Court.

⁴ Official Journal C 326, 26 October 2012, p. 0001-0390

(b) any person as long as he is either domiciled or resident or present in Malta;

[...]

However, Article 742(6) then expressly states:

(6) Where provision is made under any other law, or, in any regulation of the European Union making provision different from that contained in this article, the provisions of this article shall not apply with regard to the matters covered by such other provision and shall only apply to matters to which such other provision does not apply.

It is therefore clearly indicated under Maltese Law that, whilst the general rule is that established in Article 742(1) of Chapter 12, in situations which are regulated by European Union Regulations (such as the Brussels I (Recast) Regulation), the exception under Article 742(6) of Chapter 12 would apply, meaning that the Maltese Courts would apply the provisions of the relative EU Regulation, and not domestic legislation;

22. With these elements in mind, the Court now turns to the facts of the case in question:

Application of the Legal Principles to the case before this Court

23. By virtue of the franchise agreement entered into on the fifteenth (15th) November 2013, the parties had agreed that:

Zwischen den Parteien wird österreichisches Recht vereinbart.

Gerichtsstand für etwaige Auseinandersetzungen aus dieser Vereinbarung ist der Sitz des Vermittlers.⁵

which, translated to the English language, reads:

Austrian law is agreed between the parties.

The place of jurisdiction for any disputes arising from this agreement is the registered office of the broker.⁶

24. The plaintiff company is listed in terms of the same agreement as ‘Vermittler’ or ‘the Broker’, whereas its registered office is indicated as being in Austria⁷;
25. It is therefore clearly indicated that the parties agreed that, in case of any disputes arising from this agreement, the Courts which should hear such dispute would be the Austrian Courts;
26. The fact that this case is a dispute arising from the agreement, is not being contested, and, in truth, is obvious from the very sworn application by virtue of which this case was initiated, wherein the claims are related to the fact that the plaintiff company had to bow out of the franchise agreement due to the defendant company’s alleged non-adherence to the terms of the same agreement;
27. The validity of the jurisdiction clause itself is not being contested in these proceedings, either. The defendant company claims that the plaintiff company did not even contest the validity of the jurisdiction clause in proceedings brought between the same parties by the plaintiff company itself in Austria, but rather, submitted itself to the jurisdiction of the Austrian courts. In fact, the defendant company exhibits a solemn declaration

⁵ See **Doc B** attached to the sworn application, fol 21 of the case file

⁶ See English translation attached to **Doc B**, attached to the sworn application, fol 34 of the case file

⁷ See **Doc B** attached to the sworn application, fol 9 / 22 of the case file

released by **Alexander Stücklberger**, attorney-at-law for the defendant company in Austria, who confirms that two civil litigation matters were brought by the plaintiff company in connection with the franchise agreement in Austria, one of which was ruled in favour of the defendant company, while the other was settled by the parties out of Court. He states:

I may thus confirm that the jurisdiction clause in Section 17 of the Brokerage Agreement had neither been challenged by Ploutos GmbH nor by the respective judges conducting the Ploutos Cases. As a matter of fact and when filing the first Ploutos Case (see para 5 above), Ploutos GmbH expressly referred to the jurisdiction clause in the Brokerage Agreement to establish the court's jurisdiction (see page 10 of the Declaratory Action).⁸

This is further confirmed in a document filed by the plaintiff company itself before the District Court in Vienna requesting the Court to declare the defendant company liable for damages incurred as a result of its lack of adherence to its obligations in terms of the franchise agreement, wherein the plaintiff company declared that,

The territorial jurisdiction of the court applied to results from the jurisdiction agreed in the contract between Ploutos GmbH and Tipico, as the “registered office of the Broker” stated in the contract refers to the registered office of Ploutos GmbH and this is the company headquarters at the address specified on the first page, Breitenseer Str. 3, 1140 Vienna.

[...]

⁸ See **DocTCL1**, fol 96 of the case file

In the event of rejection on the basis of lack of jurisdiction, a referral to the Bezirksgericht (District Court) Innere Stadt Wien is requested as the court with territorial jurisdiction on the basis of the branch office at Operngasse 20, 1040 Vienna.

[...]

The applicability of Austrian law results likewise from the aforementioned brokerage agreement concluded.⁹

28. It is therefore evident that, by application of the legal principles outlined above, in consideration of the fact that: (a) the plaintiff company itself submitted itself to a jurisdiction clause in the franchise agreement; (b) the fact that the issue between the parties relates to the franchise agreement in which the choice of jurisdiction clause was agreed to by both parties; (c) the fact that this is a matter which falls within the ambit of Brussels I (Recast) Regulation; and (d) the fact that the substantial validity of the jurisdiction clause is not being contested by either party, the Court cannot possibly reach another a conclusion other than that **the Maltese Courts do not have territorial jurisdiction to hear this case;**

29. The plaintiff company refers to a series of case law which the Court feels it should address:

(a) ***Seagull Maritime Security Limited vs Unitaf PTE Limited et***¹⁰ – This case related to arbitration in the United Kingdom. Arbitration is expressly excluded from the Brussels I (Recast) Regulation¹¹. In fact, no reference was made by the Court to this Regulation, and the Court relied solely on Chapter 12 of the Laws of Malta;

⁹ See **Doc TCL4**, fol 146 for English translation, and fol 156 for the original text in the German language

¹⁰ Appl Nr 1188/2020, Civil Court (First Hall), Hon Judge Francesco Depasquale, 26th January 2022 (final judgement)

¹¹ See Article 1(2)

- (b) **Camilleri vs Zammit noe**¹² – This case was brought and decided prior to Malta’s accession to the European Union. Malta was therefore not yet bound by EU Legislation at the time, and the Court could not have decided the case on the basis of EU Legislation;
- (c) **John Mifsud et vs Pierre Debono et**¹³ – In this case, the parties had submitted themselves to the jurisdiction of the States or Federal Courts located in Miami-Dade County, Florida, and not of a Member State of the EU, therefore the Brussels I (Recast) Regulation could not be applied, and the Court could not verify whether it had jurisdiction other than in terms of Article 742 of Chapter 12 of the Laws of Malta;
- (d) **Maltrad (Holdings) Limited vs Norbert Coll**¹⁴ - This case concerned a choice-of-law clause, and not a choice-of-jurisdiction clause as in the present case. In fact, the Court held, *“Ic-choice of law clause hija pero’, differenti mic-choice of jurisdiction clause, u meta partijiet fuq kuntratt ma jiftehimx fuq ġurisdizzjoni, l-għażla ta’ liġi applikabbli hi biss waħda mill-fatturi li jridu jittieñdu in konsiderazzjoni biex jiġi deċiż mill-qorti l-ġurisdizzjoni kompetenti biex tisma’ l-każ.”* This notwithstanding, the Court affirmed that, *“Il-partijiet għamlu referenza wkoll għall-Artikolu 742 tal-Kodiċi ta’ Organizzazzjoni u Proċedura Ċivili (Kap 12 tal-Liġijiet ta’ Malta), pero’, dan mhux aktar applikabbli fejn ikun japplika ir-Regolament tal-Unjoni Ewropea.”* This precisely confirms the legal principles outlined above, and expressly negates that claimed by the plaintiff company;
- (e) **Sberbank vs Palmali International Holding Two Company Limited et**¹⁵ - This case concerned parties domiciled in Malta and in Turkey, some of whom had entered into an agreement which indicated the British Courts as having jurisdiction in case of disputes relative to the

¹² Court of Appeal, 4th May 1998

¹³ Appl Nr 768/2016, Civil Court (First Hall), Hon Judge Lawrence Mintoff, 10th April 2017 (appealed)

¹⁴ Appl Nr 832/2009, Court of Appeal (Superior Jurisdiction), 27th March 2015

¹⁵ Appl Nr 1077/2019, Civil Court (First Hall), Hon Judge Joseph Zammit McKeon, 18th March 2021 (final judgement)

agreement. It is true that the Court decided that it had jurisdiction to hear the case on the basis of Article 742(1) of Ch 12 of the Laws of Malta, regardless of the jurisdiction clause included in the agreement between the parties, but this was due to the fact that (a) the action instituted did not revolve around an action born *ex contractu*, but one which was *ex delicto*. In fact, the action stemming from breach of contract had been brought in London, in accordance with the jurisdiction clause; and (b) not all parties to the suit had signed the agreement in which the jurisdiction clause had been established. The Court's considerations in this judgement are therefore not applicable to the facts of the case being examined;

(f) ***Peter Arrigo Ltd vs Av Dr Christopher Cilia et***¹⁶ - This judgement was given prior to Malta's accession to the European Union. The Court could therefore not have applied any other law other than Maltese Law in order to determine whether or not it had jurisdiction to hear the case;

(g) ***Falco Privatstiftung, Thomas Rabitsch v. Gisela Weller-Lindhorst***¹⁷ - This case did not concern a jurisdiction clause in terms of Article 23 of the Brussels I Regulation, but was a reference for a preliminary ruling for an interpretation of Article 5 of the Brussels I Regulation;

30. The Court notes that what the plaintiff company fails to understand is that, in terms of the Brussels I (Recast) Regulation, Article 25 automatically applies in this case, rendering the jurisdiction clause agreed upon by the parties applicable to disputes relating to the agreement, and it is not up to the Court to choose and decide whether or not to adhere to such jurisdiction. The Court is **bound** by the jurisdiction clause, **unless** the substantial validity of the jurisdiction clause is compromised, which is not the case in the case at hand;

¹⁶ Appl Nr 2581/2000, Civil Court (First Hall), Hon Judge Joseph R Micallef, 11th December 2003

¹⁷ C-533/07, European Court of Justice (Fourth Chamber), 23rd April 2009 (ECLI:EU:C:2009:257)

31. Reference is made to the judgement given by the Court of Appeal (Superior Jurisdiction) in the names **Cassar Fuel Limited vs AOT Trading AG**¹⁸, wherein the Court held:

Ir-regolament 1215/212 UE huwa bbażat u simili tasew għal dak preċedenti (44/2001). Jiġi ppreċiżat ukoll li, bħala regolament, għandu effett dirett bħala liġi hawn Malta u għandu jipprevali fuq kull liġi domestika li tista' tkun f'kunflitt miegħu. Tant hu hekk li, l-Artikolu 742(6) tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili (Kap 12 tal-Liġijiet ta' Malta) jipprovdi li, meta dispożizzjoni ssir taħt xi liġi oħra jew f'xi Regolament tal-Unjoni Ewropea fejn ikun hemm dispożizzjoni differenti minn dik li tinsab f'dak l-artikolu, id-dispożizzjonijiet ta' l-Artikolu 742 m'għandhomx japplikaw dwar l-affarijiet li jaqgħu taħt dak ir-regolament u għandhom japplikaw biss għal affarijiet li dwarhom dak ir-regolament ma japplikax. Isegwi li sa fejn il-partijiet, kif ukoll l-ewwel Qorti għamlu referenza għall-Artikolu 742 tal-Kap 12 tal-Liġijiet ta' Malta, dan l-Artikolu mhux aktar applikabbli fejn ikun japplika r-Regolament tal-Unjoni Ewropea.

Furthermore, with regards to Article 25 of the Brussels I (Recast) Regulation, the Court of Appeal held:

Dan il-provvediment jagħti għarfien lill-klawsoli ġurisdizzjonali pattwiti, u b'rispett għall-prinċipju ta' pacta sunt servanda, ladarba l-partijiet ikunu qablu liberalment li kull kwistjoni għandha titressaq quddiem qorti partikolari, dak il-ftehim jorbot lill-partijiet.

¹⁸ Appl Nr 820/2015, Court of Appeal (Superior Jurisdiction), 27th January 2021

32. Thus, in view of the above, **the Court declares that the first plea raised by the defendant company is justified, and that this Court does not have jurisdiction to hear and determine this dispute.**

Decide

33. For these reasons, the Court upholds the first plea raised by the defendant company, and declares that the first plea raised by the defendant company is justified, and that this Court does not have jurisdiction to hear and determine this dispute. The defendant company is thus being discharged *ab observantia judicii*.

Costs pertinent to these proceedings are to be borne by the plaintiff company.

Read.

Hon Madam Justice Dr Audrey Demicoli LL.D.

Deputy Registrar