QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF MARK CHETCUTI
ONOR. IMĦALLEF CHRISTIAN FALZON SCERRI
ONOR. IMĦALLEF JOSETTE DEMICOLI

Seduta ta' nhar il-Ħamis, 7 ta' Diċembru, 2023.

Numru 34

Rikors numru 54/23/1

Arkema France

v.

Klesch Chemicals Limited (C-54433)
u Klesch Group Limited (C-41548)

Il-Qorti:

1. Din hija deċiżjoni dwar appell imressaq minn Klesch Group Ltd kontra deċiżjoni mogħtija mill-President tal-Bord taċ-Ċentru dwar l-Arbitraġġ ta' Malta, fit-18 ta' April, 2023, li permezz tagħha ġiet ordnata r-reġistrazzjoni f'Malta ta' deċiżjoni ta' arbitraġġ barrani, mogħtija fl-24 ta' Novembru, 2015, minn tribunal ta' arbitraġġ fi ħdan il-Qorti Internazzjonali

ta' Arbitraġġ tal-Kamra Internazzjonali tal-Kummerċ (ICC), u dan fl-ismijiet ta' ***Klesch Chemicals Limited and Klesch Group Limited v. Arkema France*** **(ICC Każ Nru. 19308/MCP/DDA)**.

Daħla

2. B'ittra datata 20 ta' Jannar, 2016 (f'paġna 453 tal-atti), Arkema France ressqet talba lir-Reġistratur taċ-Ċentru dwar l-Arbitraġġ ta' Malta (minn issa 'l hemm imsejjaħ bħala "ċ-Ċentru") għar-reġistrazzjoni tad-deċiżjoni ta' arbitraġġ barrani msemmija fil-paragrafu ta' qabel dan, u dan b'riħet ir-**Regolament 54 tar-Regoli dwar l-Arbitraġġ (L.S. 387.01)**.

3. Bi tweġiba tat-8 ta' Frar, 2016 (f'paġna 380 tal-atti), Klesch Chemicals Limited u Klesch Group Limited oġġezzjonaw għar-reġistrazzjoni tad-deċiżjoni ta' arbitraġġ barrani, u dan fuq is-saħħa tal-**paragrafu (1)(e) tal-Artikolu V tal-Konvenzjoni tan-Nazzjonijiet Uniti Dwar l-Għarfien u l-Eżekuzzjoni ta' Deċiżjonijiet ta' Arbitraġġ Barranin**, iffirmata fi New York fl-10 ta' Ġunju, 1958 (minn issa 'l hemm imsejħa bħala "l-Konvenzjoni ta' New York tal-1958").

4. F'dak l-istadju, Klesch Chemicals Limited u Klesch Group Limited sejsu l-oppożizzjoni tagħhom fuq tliet argumenti ewlenin. Dawn kienu: (i) li skont il-liġi Franċiża, id-deċiżjoni kienet għadha mhijiex vinkolanti

(“*binding”*) bejn il-partijiet; (ii) li f’dak iż-żmien kien hemm proċeduri pendenti quddiem il-Qorti tal-Appell f’Pariġi għat-twarrib tad-deċiżjoni li Arkema France kienet qed tfittex li tikseb ir-reġistrazzjoni tagħha f’Malta; u (iii) li f’dak iż-żmien kien hemm ukoll proċeduri pendenti quddiem l-istess Qorti tal-Appell f’Pariġi u dan għas-sospensjoni tal-eżekuzzjoni ta’ dik id-deċiżjoni.

5. B’ittra datata 11 ta’ Frar, 2019 (f’paġna 376 tal-atti), Klesch Chemicals Limited u Klesch Group Limited infurmaw lir-Reġistratur taċ-Ċentru, li b’deċiżjoni mogħtija fit-22 ta’ Jannar 2019, il-Qorti tal-Appell f’Pariġi kienet iddeċidiet kontrihom u li f’dak l-istadju huma kienu ngħataw parir li kellhom biżżejjed raġunijiet sabiex iressqu appell ieħor quddiem il-Qorti ta’ Kassazzjoni fi Franza (il-Qorti Suprema Franċiża). Peress li qalu li kienu fil-proċess li jressqu dak l-appell, insistew li l-proċeduri ta’ quddiem iċ-Ċentru kellhom jibqgħu sospiżi sakemm ikun hemm deċiżjoni finali mill-Qorti ta’ Kassazzjoni.

6. Wara li t-talbiet ta’ Klesch Chemicals Limited u Klesch Group Limited ġew ukoll miċħuda mill-Qorti ta’ Kassazzjoni Franċiża, b’ittra tal-10 ta’ Diċembru, 2021 (f’paġni 368 u 369 tal-atti), Arkema France bagħtet tinforma lir-Reġistratur taċ-Ċentru b’dan l-iżvilupp u talbet lill-President tal-Bord sabiex imexxi bir-reġistrazzjoni ta’ dik id-deċiżjoni.

7. B'ittra tal-20 ta' Diċembru, 2021 (f'paġna 365 tal-atti), Klesch Group Limited wieġbet għall-ittra ta' Arkema France, u għal darb'oħra tenniet l-oppożizzjoni tagħha għar-reġistrazzjoni tad-deċiżjoni ta' arbitraġġ tal-24 ta' Novembru, 2015, u dan fuq is-saħħa tal-**paragrafu (1)(e) tal-Artikolu V tal-Konvenzjoni ta' New York tal-1958**. F'dan l-istadju r-raġuni wara l-oppożizzjoni kienet waħda biss, *viz*. li d-deċiżjoni li Arkema France kienet qiegħda tfittex li tikseb ir-reġistrazzjoni tagħha f'Malta kienet għadha mhux vinkolanti bejn il-partijiet għaliex kienet milquta minn '*difett*', minħabba li fi kliemha kien hemm ambigwità fil-kap tal-ispejjeż.

8. B'nota konġunta mressqa fil-15 ta' Settembru, 2022 (f'paġna 217 tal-atti), il-partijiet stqarrew li ma kienx fadlilhom provi xi jressqu, u l-proċedura tħalliet għas-sottomissjonijet finali tal-partijiet. Minkejja dan però, meta ġiet biex tressaq in-nota ta' sottomissjonijiet tagħha (f'paġni 188 sa 199 tal-atti), Klesch Group Limited fissret li kien hemm raġuni oħra għalfejn il-President tal-Bord taċ-Ċentru kellu jiċħad it-talba ta' Arkema France.

9. F'dan ir-rigward, Klesch Group Limited, fissret li l-ambigwità li hemm fil-kap tal-ispejjeż ser tkun qed twassal biex jintrifes il-prinċipju taċ-ċertezza legali, u li b'hekk ir-reġistrazzjoni tad-deċiżjoni tal-24 ta' Novembru, 2015, hija wkoll kontra l-ordni pubbliku ta' Malta. Fi kliem ieħor, Klesch Group Limited, kienet qed tqajjem difiża ġdida li d-deċiżjoni

tal-arbitraġġ tal-24 ta' Novembru, 2015, lanqas ma setgħet tiġi rreġistrata u dan fuq is-saħħa tal-**paragrafu 2(b) tal-Artikolu V tal-Konvenzjoni ta' New York tal-1958**.

10. B'deċiżjoni mogħtija fit-18 ta' April, 2023, il-President tal-Bord taċ-Ċentru ddeċieda hekk:

> *«4.1. In view of the foregoing reasons, the Chairman of the Malta Arbitration Centre hereby rejects the objections of Respondent Companies Klesch Chemicals Limited and Klesch Group Limited and orders the registration of the award dated 24th November 2015 in the names Klesch Chemicals Limited and Klesch Group Limited v. Arkema France (ICC Case Number 19308/MCP/DAA).»*

11. Ir-raġunijiet ewlenin li wasslu għal din id-deċiżjoni huma dawn:

> *«3.1. In the present case Respondent Companies Klesch Chemicals Limited and Klesch Group Limited rely on Article V(1)(e) of the New York Convention which provides that recognition of an award may be refused if, "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."*
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> *3.2. The proceedings brought by Klesch Chemicals Limited and Klesch Group Limited before the French Courts to set aside the award and suspend its enforcement are now definitely concluded and there is no doubt that the award in now final and definitive in France. The second and third objections of Klesch Chemicals Limited and Klesch Group Limited are thus superseded. Nonetheless Klesch Chemicals Limited and Klesch Group Limited insist on their objection that the award should not be recognised and registered in Malta on the ground that it is ambiguous as regards the order for costs and in their view that this ambiguity precludes the enforceability of the award. In this connection, Respondent Companies argue that in the decision on costs at page 95 of the award, the debtor is referred to merely as "Klesch" without specifying whether it relates to Klesch Chemicals Limited or Klesch Group Limited, and that even if the arbitral tribunal intended to refer to both entities, it is not clear what portion of liability for costs each company is bound to bear.*
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> *3.3. In its award the arbitral tribunal decided as follows:*

- *Klesch Chemicals shall pay Arkema an amount of EUR 73,640,928.00 plus interest at the French legal rate from the date of the award until the date of full payment, for invoices that Kem One upstream failed to pay to Arkema;*

- *Klesch is not liable for Arkema's losses related to the Vauvert mine;*

- *Klesch is not liable for Arkema's losses related to the insolvency; and*

- *Klesch is not liable for any harm to Arkema's reputation.*

With respect to the costs of the arbitration:

- *Klesch shall pay Arkema an amount of USD 375,000.00 plus interest at the French legal rate from the date of the award until the date of full payment, corresponding to 75% of Arkema's share of the fees and expenses of the arbitrators and the ICC administrative expenses which were fixed at USD 1,000,000 by the Court;*

- *Klesch shall pay Arkema an amount of EUR 4,818,816.75 plus interest at the French legal rate from the date of the award until the date of full payment, corresponding to 75% of Arkema's reasonable legal and other costs.*

3.4. In support of its objection, Respondent Companies rely on the legal opinion of Professor Denis Mouralis. In its note of submissions, Klesch Chemicals Limited argues that the award does not indicate whether KCL or KGL is responsible for the payment of the costs of the award, or whether this should be apportioned between the said parties, and if so in which proportion. Similarly, in its note of submissions, Klesch Group Limited argues that that the award creates unquestionable doubts as to whether the award does indeed condemn Klesch Group Limited to pay (all or part) of the costs and whether the arbitral tribunal ever intended to condemn Klesch Group Limited to the payment of such costs. According to Respondent Companies, these interpretative difficulties are twofold, namely, (i) whether the award condemns one or the other or both of KGL and KCL to pay the costs; and (ii) in the latter case (i.e. if both), whether the award on costs applies to KGL and KCL jointly and severally or just severally and, if severally, in what proportions between them. Respondents argue that Arkema is therefore attempting to use these proceedings to acquire, assert and subsequently enforce a right which it does not have; a right which is not clearly determined and which Arkema failed to clarify in the appropriate forum as it failed to request a clarification of the award in terms of Article 35(2) of the ICC Rules within the prescribed term. Klesch Group Limited argues that it was discharged of all claims made by Arkema against it in the arbitration proceedings including Arkema's

demands for a declaration of the joint and several liability of KGL with KCL in relation to its claims, and that it was only KCL that was singularly condemned to pay EUR 73,650,928 to Arkema. Furthermore, it notes that there are various instances in the award where the reference to Klesch is a clear reference to KCL alone (to the exclusion of KGL) and that on a balance of probability, therefore, the tribunal must have intended to refer to KCL in the award on costs and not to KGL, nor to both KGL and KCL because it would make no logical sense to condemn an innocent party that has been cleared of all claims made against it to the payment of costs. KGL further submits that the obligation to pay the costs of the arbitration is not a commercial obligation and hence joint and several liability does not apply. In the light of the alleged ambiguity, Klesch Group Limited argues that the award on costs is unenforceable in Malta: "how can the award on costs be deemed to be binding on any party if it fails to clearly identify who that party (or those parties) is (or are)?" Although KGL recognises that it cannot be said that the award itself is not "final and binding" in terms of Article 34(6) of the ICC Rules, nor is it contested that the procedures to set aside the award in terms of French law have been exhausted, KGL argues that the award cannot be deemed to have yet become binding on either party due to its inherent ambiguity (unless and until clarified). Finally KGL and KCL argue that none of the interpretative ambiguities can be resolved by the Chairman of the Malta Arbitration Centre. It notes that "it falls beyond the competence and jurisdiction of the MAC, as exequatur authority, to resolve the ambiguities (both in relation to the identity of the debtor in the award on costs and in relation to joint and several vs several liability) in the award" (paragraph 27 of KGL's note of submissions) and that "this ambiguity cannot be resolved by the MAC because it requires an alteration of the award on costs."

3.5. On its part Applicant Company relies on the legal opinions of Professor Laurent Aynes and Professor Maxime Julienne. It argues that any ambiguity in the award is not a ground for non-recognition and that the final arbitration award is not ambiguous. Arkema France notes that "Klesch" in the order for costs refers to both Klesch Chemicals Limited and Klesch Group Limited and that their liability for costs is joint and several. Arkema France argues that at paragraph 3 of the award (page 1), the arbitral tribunal refers to both Klesch Chemicals Limited (Claimant 1) and Klesch Group Limited (Claimant 2) as "the Claimants or Klesch" and that it is therefore clear that the order for costs relates to both. It points out that even the Paris Court of Appeal in its decision of the 22 January 2019 noted that: "the arbitrators ordered 'Klesch' to pay part of the arbitration costs and Arkema's legal costs. However, according to paragraph 3 of the award, the first claimant (Klesch Chemicals) and the second claimant (Klesch Group) are referred to thereinafter as 'the Claimants or Klesch.' It follows that the order to pay the costs applies to both companies, such that Klesch Group has an interest in the annulment of the award." Moreover, throughout the award, the word "Klesch" is used to refer to both Respondents Klesch Chemicals Limited and Klesch Group Limited, and it is only where the

arbitral tribunal wished to differentiate between the two that it specified between "Klesch Chemicals" and "Klesch Group". This is so in paragraph 328 of the award, where it is stated that "The Arbitral Tribunal therefore concludes that Klesch Chemicals, but not Klesch Group, shall pay Arkema an amount of EUR 73,640,928." Applicant Company further argues that both Klesch Chemicals Limited and Klesch Group Limited are liable for costs jointly and severally since the prayer for relief made by Arkema requests the arbitral tribunal to "order Klesch Chemicals and Klesch Group jointly and severally to pay Arkema… all costs and expenses" and both companies had filed a joint request as to the payment of arbitral and procedural costs to them jointly, without distinguishing the costs specific to each of them. Furthermore, Arkema argues that under French law, there is a presumption of joint and several liability in commercial matters and that there can be no doubt in this case that the obligation to pay the costs of the arbitration is commercial in nature. Without prejudice to the above, Arkema argues that each Respondent is at least liable to pay 50% of amount of the costs of the arbitration awarded by the award.

3.6. In the Chairman's view the objection of Klesch Chemicals Limited and Klesch Group Limited to the registration of the award is unfounded. In the first place, Article V(1)(e) of the New York Convention relied upon by Respondent Companies requires that "the award has not yet become binding on the parties, or has been set aside or suspended by the competent authority of the country in which, or under the law of which, the award was made." In the present case, following the decision by the French Cour de Cassation of 27 January 2021 the award can no longer be set aside or suspended by the competent authority of the country where the award was made. Neither can it be said that the award is not binding on the parties in terms of Article V(1)(e) of the New York Convention. Any ambiguity in the award or part of an award is not a ground for non-recognition and where none of the non-exhaustive grounds under the Convention are proved to exist, Article III of the New York Convention imposes an obligation upon Contracting States to recognise awards from other Contracting States. Rule 57(3) of the Arbitration Rules provides that, "if the application is made in accordance with these rules and the respondent is properly notified directly or through a curator ad litem, recognition of a foreign award may only be refused if the respondent proves the operation of any of the grounds stated in Article V of Part III of the Second Schedule to the Act." In the Chairman's view, the argument put forward by KGL and KCL that an award cannot be deemed to be binding on any party if it fails to clearly identify who that party (or those parties) is (or are) is outside of the scope of Article V(1)(e) of the New York Convention, but is simply a question of interpretation of the award which may arise at enforcement stage. Indeed, the general understanding of the phrase "the award has not yet become binding on the parties" used in Article V(1)(e) of the New York Convention is that the award is no longer open to challenge. A discussion on the meaning of this phrase may be found in the Guide on the Convention on the Recognition and Enforcement of

Foreign Arbitral Awards (Gaillard and G. Bermann eds., Special Edition, Brill Nijhoff, 2017, pages 223 - 228) where it is stated inter alia as follows:

> *"6. Some courts have assessed the binding nature of the award by reference to the law of the country in which the award was rendered. For instance, in a case where a party opposed enforcement on the ground that the award had not been duly delivered to it, and hence was allegedly not binding, a Swiss Court decided that 'the issue whether an arbitral award has become binding on the parties, for instance by rendition, oral communication, written statement or communication to the parties or by the expiry of the time-limit for a legal means [of appeal] is governed in first instance by the law applicable to the arbitration…*
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> *7. Under a second approach, sometimes referred to as an 'autonomous approach', courts have relied on their own interpretation of what a binding award under article V(1)(e) should be. In the majority of cases, courts following this approach have ruled that an award shall be considered as binding if it is no longer open to ordinary means of recourse, namely those where the substance of the award is reviewed, even if extraordinary means of recourse are still available, including actions to set aside. For example the Swiss Federal Tribunal ruled that foreign arbitral awards are binding on parties under article V(1)(e) when they 'can no longer be appealed by ordinary means.' Likewise, in a case where the place of arbitration was London, a Dutch court held that because 'no ordinary means of recourse [could] be made against the arbitral award in question', the award had become binding on the parties within the meaning of the Convention.' In Hong Kong, courts have ruled that an award is 'binding' when it is 'no longer open to appeal on the merits…*
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> *…*
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> *12. Furthermore, regardless of the approach followed, courts assessing the binding nature of an award have often paid particular attention to the parties' intention resulting from the arbitration agreement or the arbitration rules… a Spanish Court ruled that 'the binding nature of the award must be examined under the rules governing the arbitration rather than under the norms of the State where the arbitration took place or where the award was rendered.' The Court went on to state that 'pursuant to [the ICC] Rules, the binding character of the award ensues from the submission to the ICC arbitration and the valid waiver of any means of recourse implied in the submission to [ICC] institutional arbitration,' and on that basis, decided that the award was binding."*

In view of the foregoing, the fact that a part of the award may be ambiguous does not mean that the award "has not yet become binding" in terms of Article V(1)(e) of the New York Convention, and in the present case it results that no further recourse against the award is possible in France. At paragraph 34 of its note of submissions KGL also recognises that it cannot be said that the award is not final and binding in terms of Article 34(6) of the ICC Rules and that it is not contested that the procedures to set aside the award in terms of French law have

been exhausted.

3.7. Furthermore it is worth noting that Maltese law draws a distinction between recognition and registration of the award on the one hand and the enforcement of the award on the other. While recognition and registration of a foreign arbitral award has been left in the hands of the Chairman of the Malta Arbitration Centre who is to decide whether there is any valid ground of objection in terms of the Article V of the New York Convention, the enforcement of the award rests with the Courts of Malta. This results clearly from Article 74 of the Arbitration Act which provides that foreign arbitration awards which are registered by the Centre shall "be enforced by the courts of Malta in the same manner as if such awards were delivered under Part IV of this Act." At enforcement stage, an issue which may arise in relation to the question whether the order on costs may be enforced against both KCL and KGL or in which proportion, may be resolved by the Maltese Courts which have the authority to decide whether the award confers an executive title on the issue of costs against both Respondent Companies or just one of them. In this connection it is to be noted also that in their reply dated 8th February 2016 Respondent Companies themselves argue that "it is beyond the remit or powers of the Chairman of the Malta Arbitration Centre to attempt to give an interpretation to or clarify the intent of the award" a point which is also made again by Klesch Group Limited in its final note of submissions. In its submissions concerning the issue of public policy, which is dealt with below, Klesch Group Limited itself also notes that it would have a remedy at enforcement stage: "If the MAC were to accept the registration of the Award it would effectively defer the question as to whether it is KGL or KCL or both that are responsible for the payment of costs to the court seized with the enforcement proceedings that Arkema will initiate once the Award is registered. Were Arkema to sue out an executive warrant or warrants against KGL in relation to the award on costs (as it would be expected to do if the Award is registered in its current form), KGL will have a remedy in terms of article 281 of the COCP to request, by application, that the executive act in question be impugned for "any reason valid at law"" (paragraph 46 and 47 of KGL's note of submissions).

3.8. With reference to the interim order of the German Courts of 20th December 2022 (exhibited by KGL on 10th January 2022) it is to be noted that, as evident from its title, the application before the German Courts was for enforcement of the award against KGL: "In the matter of Arkema France versus Klesch Group Limited concerning enforcement of a judgment" so much so that even in its letter of 10th January 2023 KGL states that the proceedings in Germany are for recognition and enforcement of the award. In this order, the Schleswig-Holstein Regional Court expresses the preliminary view "that 'Klesch' was intended by the arbitral tribunal to refer to both the respondent and Klesch Chemicals Limited. This should be sufficiently clear from the naming of the parties under clause 1.A.1 of the arbitral award" and ordered the appointment of experts on French law to express an

opinion with regard to the extent of liability of KGL and/or KCL arising from the award on costs after noting that it [i.e. the German Court] "can answer the question to be evaluated according to French law, as to whether the award against the respondent in this instance has been made against same as a joint or several debtor, but only after an evaluation by a suitable expert of, in particular, both the case law relating to French law and the literature published on the subject." It therefore appears that the German enforcement authority did not consider the ambiguity of the part of the award dealing with the extent of liability of KGL and/or KCL for costs as an a priori bar or obstacle to recognition and enforcement of the award.

3.9. Finally, it is to be noted that in its final note of submissions filed on the 14th November 2022, Klesch Group Limited attempts to raise a further objection in terms of Article V(2)(b) of the New York Convention dealing with the defence of public policy. In essence it argues that the recognition and enforcement of an ambiguous award would be in breach of the principle of legal certainty which is a fundamental aspect of the rule of law and, therefore, a rule of public policy. It further elaborates on this point in its note of submissions, which point is also mentioned briefly in the final note of submissions of Klesch Chemicals Limited.

3.10. In the first place it is to be noted that this ground of objection was not raised in the original statement of objections of Respondent Companies filed on 8th February 2016, and in terms of Rule 55(1) of the Arbitration Rules the respondent has ten working days to state in writing whether there are any reasons why the award should not be registered. Neither was the public policy objection raised by Klesch Group Limited in its letter of 20th December 2021 where it once again raised its objections to the registration of the award following the decision of the French Cour de Cassation of 27th January 2021. In any case the Chairman considers that the objection to the registration of the award on grounds of public policy is unfounded since any possible ambiguity in the award on costs does not offend some sacrosanct principle in Malta. As noted in the Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Gaillard and G. Bermann eds., Special Edition, Brill Nijhoff, 2017, page 254),

> *"although different jurisdictions define public policy differently, case law tends to refer to a public policy basis for refusing recognition and enforcement of an award under article V(2)(b) of the New York Convention when the core values of a legal system have been deviated from. Invoking the public policy exception is a safety valve to be used in those exceptional circumstances when it would be impossible for a legal system to recognise an award and enforce it without abandoning the very fundaments on which it is based. In the words of the often-quoted judgment of the Second Circuit of the United States Court of Appeals in Parsons, 'enforcement of foreign arbitral awards may be denied on [the basis of public policy] only where enforcement would violate the forum state's most basic notions of morality and justice."*

> *The simple fact that an enforcing authority, which in Malta are the Courts of Malta, may have to interpret an order for costs in an award does not raise any public policy concerns. It is also premature for Klesch Group Limited to argue that the award "cannot effectively be enforced by the Maltese Courts" (paragraph 46 of KGL's note of submissions) as there is no reason to doubt that a Maltese Court tasked with enforcement would be able to decide whether the order on costs is to be enforced against KGL or not. It is also quite contradictory for Klesch Group Limited to assert that the Maltese Courts seized with proceedings for the enforcement of the award "do not have jurisdiction nor competence to resolve the issue" (paragraph 49 of KGL's note of submissions) when they previously assert that neither the Chairman of the Malta Arbitration Centre has the power to resolve the issue and that there exists a remedy at enforcement stage from the Courts of Malta (paragraph 46 and 47 of KGL's note of submissions). Furthermore, Respondent Companies could have made a request themselves to the arbitral tribunal for an interpretation of the award on costs in terms of Article 35(2) of the 2012 ICC Rules of Arbitration.»*

12. Klesch Group Limited appellat minn din id-deċiżjoni fil-5 ta' Mejju, 2023, u talbet biex din il-Qorti tħassar għalkollox id-deċiżjoni taċ-Ċentru u b'hekk tħassar ir-reġistrazzjoni tal-lodo arbitrali tal-24 ta' Novembru 2015, fl-arbitraġġ fl-ismijiet ta' *Klesh Chemicals Limited (Malta) et v. Arkema France* (Każ Nru. 19308/MCP/DAA), jew inkella tħassar ir-reġistrazzjoni ta' dik il-parti tal-lodo arbitrali li hija dwar il-kap tal-ispejjeż.

13. L-appellanti qed tressaq dan l-appell fuq is-saħħa ta' tliet aggravji, li fil-qosor ħafna huma dawn: (i) li l-premessa taċ-Ċentru li l-lodo arbitrali huwa vinkolanti bejn il-partijiet hija żbaljata, b'dana li r-reġistrazzjoni ma kellhiex issir skont is-**subinċiż 1(e) tal-Artikolu V tal-Konvenzjoni ta' New York tal-1958**; (ii) li l-oġġezzjoni fuq is-saħħa tas-**subinċiż 2(b) tal-Artikolu V tal-Konvenzjoni ta' New York tal-1958** setgħet titqajjem minnha f'kull stadju tal-proċeduri; u (iii) li r-reġistrazzjoni tal-lodo bil-mod

ta' kif inhu mfassal ser tkun qed twassal għat-tkasbir tal-prinċipju taċ-ċertezza legali li huwa prinċipju ta' ordni pubbliku, b'dana li ċ-Ċentru ma messux ordna dik ir-reġistrazzjoni fuq is-saħħa tas-**subinċiż 2(b) tal-Artikolu V tal-Konvenzjoni ta' New York tal-1958**.

14. Arkema France wieġbet għal dan l-appell fl-14 ta' Awwissu, 2023, u fit-tweġiba tagħha nsistiet li dan l-appell għandu jiġi miċħud u li d-deċiżjoni appellata għandha tiġi kkonfermata għalkollox.

15. Inżamm smigħ fit-23 ta' Novembru, 2023 u minn hemmhekk il-kawża tħalliet biex tingħata d-deċiżjoni llum.

Konsiderazzjonijiet:

16. L-**ewwel aggravju** mressaq minn Klesch Group Limited huwa mibni fuq l-argument li l-lodo arbitrali mhuwiex vinkolanti minħabba l-ambigwità li qed tgħid li hemm fil-kap tal-ispejjeż, u li b'hekk m'għandux jingħata għarfien u eżekuzzjoni f'Malta fuq is-saħħa tas-**subinċiż 1(e) tal-Artikolu V tal-Konvenzjoni ta' New York tal-1958**.

17. F'dan ir-rigward, l-appellanti qiegħda tilmenta li fid-deċiżjoni tiegħu ċ-Ċentru gerfex *«il-finalità»* tal-proċeduri ordinarji tal-appell mal-kwistjoni dwar jekk il-lodo arbitrali huwiex *«vinkolanti»* bejn il-partijiet. Tfisser li s-

subinċiż 1(e) tal-Artikolu V tal-Konvenzjoni ta' New York tal-1958 jitkellem dwar ċirkostanza li fiha l-lodo arbitrali ma jkunx għadu ġie vinkolanti (*binding*) bejn il-partijiet u mhux fejn il-lodo arbitrali ma jkunx finali (*final*).

18. Għalkemm il-kumpanija appellanti tistqarr li mhijiex qiegħda tikkontesta li r-rimedji ordinarji ta' appell fuq il-mertu tal-kawża ġew eżawriti fi Franza, madankollu tisħaq li dan il-fatt waħdu m'għandux jinftiehem li l-lodo arbitrali huwa vinkolanti bejn il-partijiet u sabiex issaħħaħ dan l-argument, hija tirreferi għall-**Artikolu 72(5) tal-Att dwar l-Arbitraġġ**.

19. Issostni li sakemm ikun hemm kwistjonijiet ambigwi fid-deċiżjoni, dak il-lodo, anke jekk ikun finali, ma jistax jitqies li jkun vinkolanti u konklussiv. Biex tagħti eżempju hija tirreferi għall-**Artikolu 825 tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili**, u tgħid li jekk ikun hemm żbalji ta' kalkolu jew ta' kliem, jew inkella espressjonijiet li ma jkunux ċari jew li jistgħu jinftiehmu xort'oħra minn dak li riedet tfisser il-Qorti, il-liġi tippermetti proċedura sabiex dik is-sentenza, għalkemm finali, tkun tista' tiġi kkoreġuta jew iċċarata qabel ma din issir vinkolanti u b'hekk eżegwibbli bejn il-partijiet. Ittenni għalhekk li ċ-Ċentru żbalja meta mexxa bir-reġistrazzoni tal-lodo u ċaħad l-oġġezzjoni tagħha fuq is-sies tas-**subinċiż 1(e) tal-Artikolu V tal-Konvenzjoni ta' New York tal-1958**.

20. Tissokta billi targumenta li f'kull każ, kien fid-dmir taċ-Ċentru li jinvestiga jekk kienx hemm xi mod kif l-ambigwità fil-lodo arbitrali tiġi ċċarata jew inkella li jwettaq dak l-eżerċizzju huwa stess bil-għajnuna ta' esperti dwar il-liġi Franċiża, biex ikun jista' jiċċara d-deċiżjoni dwar il-kap tal-ispejjeż, qabel ma jgħaddi biex jaċċetta r-reġistrazzjoni tal-lodo. Tilmenta li minflok għamel hekk, iċ-Ċentru ħasel idejh mill-kwistjoni tal-ambigwità u tefagħha f'ħoġor il-Qrati Maltin billi rraġuna li l-liġi Maltija tagħmel distinzjoni bejn l-għarfien tal-lodo u l-eżekuzzjoni tal-istess, u li huwa fl-istadju tal-aħħar li hija ser ikollha ċ-ċans li topponi għall-eżekuzzjoni tal-istess lodo quddiem il-Qrati bis-saħħa tal-**Artikolu 281 tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili.**

21. Dwar dan l-aħħar punt, tilmenta li hija m'għandha l-ebda ċertezza li ser ikollha ċ-ċans li tikkontesta l-eżekuzzjoni tal-lodo fil-proċeduri tal-eżekuzzjoni, u dan billi l-ġurisprudenza dwar ir-rimedju taħt l-**Artikolu 281 tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili** mhijiex konsistenti. Tfisser li hemm deċiżjonijiet li taw tifsira dejqa lil dan ir-rimedju, filwaqt li hemm oħrajn li tawh tifsira aktar wiesgħa, u minħabba f'hekk targumenta li hija m'għandha l-ebda garanzija li ser ikollha ċ-ċans li titlob kjarifika dwar l-ambigwità fil-kap tal-ispejjeż tal-lodo. Iżżid li hemm saħansitra wkoll dubju dwar jekk il-Qrati għandhomx kompetenza li jagħmlu kjarifika bħal dik, u fid-dawl ta' dan kollu tisħaq li ċ-Ċentru ma kellux jirreġistra l-

lodo qabel ma tissolva l-kwistjoni ambigwa li tgħid li hemm dwar il-kap tal-ispejjeż.

22. Il-Qorti wara li għarblet dawn l-argumenti kollha tal-kumpanija appellanti jidhrilha li l-ilmenti f'dan l-aggravju, mhux biss mhumiex mistħoqqa, iżda huma saħansitra fiergħa.

23. Jissokta jingħad li ladarba dawn il-proċeduri huma dwar l-għarfien ta' deċiżjoni ta' arbitraġġ li ngħatat fi Franza, allura l-liġi applikabbli għandha tkun il-**Konvenzjoni tan-Nazzjonijiet Uniti Dwar l-Għarfien u l-Eżekuzzjoni ta' Deċiżjonijiet ta' Arbitraġġ Barranin**, iffirmata fi New York fl-10 ta' Ġunju, 1958, jew kif inhi aħjar magħrufa bħala l-Konvenzjoni ta' New York tal-1958.

24. Ir-**Regolament 1215/2012 tal-Parlament Ewropew u tal-Kunsill Dwar il-Ġurisdizzjoni u r-Rikonoxximent u l-Eżekuzzjoni ta' Sentenzi fi Kwistjonijiet Ċivili u Kummerċjali** jagħmilha ċara li l-Konvenzjoni ta' New York tal-1958 għandha tipprevali fuq dak ir-Regolament, tant li fl-**Artikolu 73(2) tar-Regolament** insibu mniżżel li dak kollu li hemm fir-Regolament m'għandux jaffettwa l-applikazzjoni tal-Konvenzjoni ta' New York tal-1958 (ara f'dan is-sens il-**premessa 12 tar-Regolament 1215/2012** u paġna 414 tal-ktieb ta' **Trevor Hartley**, ***'Civil Jurisdiction and Judgements in Europe',*** mitbugħ mill-istamperija tal-Università ta'

Oxford, fis-sena 2017, kif ukoll ***Giovanni Sidoti v. European Insurance Group Limited*** deċiża mill-Qorti tal-Appell fil-11 ta' Marzu, 2016 meta kien għadu jopera r-**Regolament tal-Kunsill (KE) Nru 44/2001**).

25. Kif tixhed anke d-daħla tal-Konvenzjoni ta' New York tal-1958, li ġiet ratifikata f'Malta fit-22 ta' Ġunju, 2000, u li bdiet tifforma parti integrali mil-liġi Maltija, wara li ġiet trasposta fit-**Tielet Taqsima tat-Tieni Skeda tar-Regoli Dwar l-Arbitraġġ**, l-għan ewlieni wara din il-Konvenzjoni huwa li timponi obbligu fuq il-firmatarji tagħha li jirrikonoxxu kull lodo arbitrali li jaqa' fl-isfera ta' applikabilità ta' dik il-Konvenzjoni, u li dawk id-deċiżjonijiet jiġu eżegwiti daqslikieku ngħataw fi proċeduri ta' arbitraġġ domestiku.

26. Tassew, minn qari kontestwali tal-**Artikoli III, IV** u **V tal-Konvenzjoni ta' New York tal-1958**, jidher biċ-ċar li din il-Konvenzjoni ġiet imfassla b'tali mod li l-għarfien u l-eżekuzzjoni ta' deċiżjonijiet ta' arbitraġġi barranin għandha tkun ir-regola, filwaqt li ċ-ċaħda għall-istess għandha tkun biss l-eċċezzjoni. Kemm hu hekk, ingħad mhux darba li l-Konvenzjoni hija kkaratterizzata minn *«pro-enforcement bias»* (ara ***Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Company***, deċiża fis-26 ta' Marzu, 2002 mill-Qorti tal-Appell, '*Ninth Circuit'*, tal-Istati Uniti tal-Amerika).

27. Xempju ta' dan huwa l-**Artikolu III tal-Konvenzjoni**, li fih insibu li: ***«[k]ull Stat Kontraenti <u>għandu jagħraf id-deċiżjonijiet ta' arbitraġġ bħala vinkolanti</u> u jsegwihom skont ir-regoli ta' proċedura tat-territorju fejn id-deċizjoni kollha sseħħ, <u>skont il-kondizzjonijiet stabbiliti f'dawn l-artikoli li ġejjin</u>».*** Minn dan l-Artikolu joħroġ il-prinċipju li filwaqt li huwa fil-kompetenza tal-Istati Kontraenti li jfasslu l-proċedura li biha wieħed jista' jitlob l-għarfien u l-eżekuzzjoni ta' lodo arbitrali barrani, madankollu l-kundizzjonijiet dwar jekk lodo arbitrali barrani għandux jiġi rikonoxxut u eventwalment eżegwit għandhom ikunu dawk **<u>biss</u>** li huma speċifikament imsemmija fil-Konvenzjoni (ara paġna 60 tal-pubblikazzjoni tal-Kunsill Internazzjonali għall-Arbitraġġ Kummerċjali (ICCA) ***'ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges'***, ippublikat fl-Aja, fis-sena 2011).

28. Huwa wkoll mifhum li hekk kif l-applikant iressaq il-lista ta' dokumenti misjuba fl-**Artikolu IV tal-Konvenzjoni** (trasposta f'**Regolament 54 tar-Regolamenti dwar l-Arbitraġġ**), l-applikant ikun diġà akkwista mad-daqqa t'għajn il-jedd għall-għarfien u l-eżekuzzjoni tal-lodo, u li minn dak il-mument 'il quddiem huwa biss f'każ li jkun hemm xi waħda jew aktar mir-raġunijiet misjuba fl-**Artikolu V tal-Konvenzjoni**, li l-lodo jista' ma jiġix rikonoxxut u eżegwit (ara ***Yukos Oil Co. v. Dardana Ltd*** mogħtija mill-Qorti tal-Appell tal-Ingilterra u Wales fit-18 ta' April,

2002, [2002] EWCA Civ 543, u paġna 74 tal-***ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges***).

29. Wara kollox, dawn il-prinċipji li għadha kif qiegħda ssir referenza għalihom huma kristallizzati f'**Regolament 57(3) tar-Regolamenti dwar l-Arbitraġġ** li jaqra hekk:

> *«[j]ekk l-applikazzjoni tkun magħmula skont dawn ir-regoli u l-intimat ikun notifikat bil-mod ġust, direttament jew permezz ta' kuratur ad litem, l-għarfien tad-deċiżjoni ta' arbitraġġ barranija jista' jiġi miċħud biss jekk l-intimat iġib provi li hemm ir-raġunijiet imsemmija fl-Artikolu V tat-Tielet Parti tat-Tieni Skeda li tinsab ma' l-Att».*

30. Peress li kif qed ngħidu, l-ispirtu tal-Konvenzjoni huwa favur l-għarfien u l-eżekuzzjoni ta' deċiżjonijet ta' arbitraġġ u mhux bil-kontra, huwa wkoll magħruf li r-raġunijiet misjuba fl-**Artikolu V tal-Konvenzjoni**, mhux biss għandhom jitqiesu li huma tassattivi (i.e. eżawrjenti), iżda fuq kollox għandhom jiġu mfissra b'mod dejjaq kemm jista' jkun (ara ***Adamas Managment & Services Inc. v. Aurado Energy Inc.*** mogħtija mill-*Queen's Bench of New Brunswick, Trial Division* ġewwa l-Kanada, fit-28 ta' Lulju, 2004).

31. Huwa miżmum ukoll li l-eżistenza nfisha ta' xi waħda mir-raġunijiet imsemmija fl-**Artikolu V tal-Konvenzjoni** ma jorbotx idejn il-ġudikatur li jkun qiegħed jistħarreġ it-talba għall-għarfien u l-eżekuzzjoni ta' deċiżjoni ta' arbitraġġ. Dan għaliex fl-aħħar mill-aħħar taqa' fis-setgħa

diskrezzjonali tiegħu li jiddeċiedi jekk għandux xorta waħda jawtorizza l-għarfien ta' dik id-deċiżjoni (ara ***Nigerian National Petroleum Coproprationv. IPCO (Nigeria) Ltd.*** mogħtija mill-Qorti tal-Appell tal-Ingilterra u Wales fit-28 ta' Ottubru, 2008, [2008] EWCA Civ 1157 u paġna 21 tal-pubblikazzjoni, ***'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Explanatory Documentation prepared for Commonwealth Jurisdictions by Profs K.W. Patchett',*** ippublikat mis-Segretarjat tal-Commonwealth, fis-sena 1981).

32. Il-każijiet li fihom għandha tiġi miċħuda t-talba għall-għarfien u l-eżekuzzjoni ta' lodo barrani huma għalhekk tabilħaqq eċċezzjonali u f'kull każ, il-piż tal-prova dwar l-eżistenza ta' xi waħda mir-raġunijiet misjuba fl-**Artikolu V tal-Konvenzjoni**, li huwa meqjus bħala «*sostanzjali*», jaqa' dejjem fuq spallejn min ikun qiegħed jopponi għall-għarfien u l-eżekuzzjoni tal-lodo (ara ***Encyclopaedia Universalis S.A. v. Encyclopaedia Brittanica, Inc.*** mogħtija mill-Qorti tal-Appell *'Second Circuit',* tal-Istati Uniti tal-Amerika, fil-31 ta' Marzu, 2005).

33. Fil-konkret, is-**subinċiż 1(e) tal-Artikolu V tal-Konvenzjoni**, li dwaru huwa l-ewwel aggravju, jitlob imbagħad lill-parti li kontriha jkun qiegħed jintalab l-għarfien u l-eżekuzzjoni ta' lodo barrani sabiex *«iġġib prova»* li: (i) *«id-deċiżjoni tkun għadha ma saritx vinkolanti fuq il-partijiet»*,

jew inkella (ii) li d-deċiżjoni *«tkun twarrbet jew ġiet sospiża minn awtorità kompetenti fil-pajjiż fejn, jew li taħt il-liġi tiegħu, tkun ingħatat»*.

34. Fil-każ tal-lum, għalkemm il-kumpanija appellanti qiegħda ssejjes l-ewwel aggravju tagħha fuq għadd ta' argumenti, il-Qorti tqis li meta jingħasar kollox, l-argumenti tagħha huma b'xi mod jew ieħor imsejsa fuq il-premessa li d-deċiżjoni li tagħha Arkema France talbet l-għarfien, ma tistax titqies li hija vinkolanti bejn il-partijiet sakemm ma tiġix reġistrata miċ-Ċentru, u li ċ-Ċentru ma jistax jirreġistra dik id-deċiżjoni sakemm ma jiġix iċċarat il-kap tal-ispejjeż tal-lodo, li skont il-kumpanija appellanti huwa ambigwu.

35. Fil-fehma tal-Qorti, raġunament bħal dan huwa wieħed ħażin u dan għal aktar minn raġuni waħda.

36. Ibda biex, mhuwiex f'loku l-argument tal-kumpanija appellanti li huwa l-att innifsu tar-reġistrazzjoni tal-lodo arbitrali li jagħmel id-deċiżjoni barranija bħala waħda vinkolanti bejn il-partijiet. Li kieku kien hekk, l-ebda lodo barrani ma jista' jitqies li huwa vinkolanti bejn il-partijiet, bil-konsegwenza li kull meta ssir talba għar-rikonoxximent u r-reġistrazzjoni ta' lodo barrani f'Malta, il-parti li kontriha tintalab ir-reġistrazzjoni tista' dejjem topponi għall-għarfien tal-lodo barrani fuq is-saħħa tas-**sub-inċiż 1(e) tal-Artikolu V tal-Konvenzjoni ta' New York tal-1958**. Tifsira bħal

din tistona ferm mal-ispirtu tal-Konvenzjoni, u raġunament fieragħ daqs dan ma tantx jixħet dawl sabiħ fuq l-appellanti.

37. Għalkemm huwa veru li s-**sub-inċiż (1)(e) tal-Artikolu V tal-Konvenzjoni** ma fihx il-kelma *«finali»,* u minflok juża l-kelma *«vinkolanti»,* ironikament, l-imħuħ wara dan l-artikolu fissru li r-raġuni għalfejn intgħażlet il-kelma *«vinkolati»* fuq dik *«finali»,* kienet li t-tifsira tal-kelma *«vinkolanti»* hija anqas oneruża minn dik *«finali»*. Kemm hu hekk, huwa u jfisser għalfejn intgħażlet il-kelma «*vinkolanti»* minflok dik *«finali»,* il-President tal-grupp responsabbli mit-tfassil tal-**Artikolu V(1)(e) tal-Konvenzjoni** kien qal li:

> *«The Working Party agreed that an award should not be enforced if under the applicable arbitral rules it was still subject to an appeal which had a suspensive effect, but at the same time felt that it would be unrealistic to delay the enforcement of an award until all the time limits provided for by the statutes of limitations had expired or until all possible means of recourse, including those which normally did not have a suspensive effect, have been exhausted and the award has become 'final'»* (***Travaux préparatoires, Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/SR.17, paġ 3***).

38. Kemm minn kif tixhed din is-silta, kif ukoll minn dak li ngħad f'għadd kbir ta' sentenzi barranin dwar dan is-suġġett, jirriżulta biċ-ċar li, bil-kuntrarju ta' dak li qiegħda targumenta l-kumpanija appellanti, deċiżjoni ta' arbitraġġ barrani titqies bħala *«vinkolanti»* fil-kuntest tas-**subinċiż (1)(e) tal-Artikolu V tal-Konvenzjoni**, hekk kif din ma tkunx għadha soġġetta għal ebda forma ta' appell jew proċeduri ordinarji li bihom tkun

tista' tiġi attakkata fil-mertu (ara ***X v. Y*** mogħtija fil-21 ta' Frar, 2005 mit-Tribunal Federali fl-iŻvizzera u ***Diag Human SE v. Czech Republic*** mogħtija mill-Qorti tal-Kummerċ tal-Ingliterra u Wales fit-22 ta' Mejju, 2014, [2014] EWHC 1639 (Comm)). Naturalment, huwa meħtieġ li stħarriġ bħal dan jitwettaq dejjem fid-dawl tal-liġi jew aħjar ir-regolamenti li jkunu għażlu l-partijiet fil-ftehim għall-arbitraġġ.

39. Fil-każ tagħna, minn ħarsa lejn paragrafu 11 tat-Termini ta' Referenza tal-arbitraġġ, li wassal għad-deċiżjoni li tagħha qed jintalab l-għarfien (f'paġna 562 u 563 tal-atti), jidher biċ-ċar li Klesch Chemicals Limited bdiet il-proċedura tal-arbitraġġ fuq is-saħħa ta' ftehim għax-xiri u l-bejgħ tal-ishma (*share purchase agreement*), li l-istess Klesch Chemicals Limited iffirmat ma' Arkema France fit-23 ta' Mejju, 2012. Mill-istess paragrafu jirriżulta li fi **klawsola 10.10(b)** ta' dak il-kuntratt, il-partijiet kienu qablu fuq żewġ punti importanti. Dak tal-ewwel hu li l-proċeduri ta' arbitraġġ kellhom ikunu regolati bir-**Regolamenti ta' Arbitraġġ tal-Kamra tal-Kummerċ Internazzjonali** *(Rules of Arbitration of the International Chamber of Commerce)*, filwaqt li dak tat-tieni huwa mbagħad li: ***«[t]he award of the arbitral tribunal shall be final and binding upon the Parties, and each Party hereby waives and all rights to appeal or challenge the award in so far as such waiver can be validly made.»***

40. Il-kumpanija appellanti Klesch Group Limited hija wkoll firmatarja tat-Termini ta' Referenza tal-arbitraġġ u f'paragrafu 81 ta' dawk it-Termini (ara paġna 576 tal-atti), tniżżel li r-regoli tal-proċedura applikabbli għal dik it-tilwima kellhom ikunu r**-Regolamenti tal-Arbitraġġ tal-Kamra tal-Kummerċ Internazzjonali tal-2012**.

41. Jekk imbagħad nagħtu ħarsa lejn ir-**Regolamenti tal-Arbitraġġ tal-Kamra tal-Kummerċ Internazzjonali tal-2012**, naraw li f'**paragrafu 6 tal-Artikolu 34** insibu mniżżel li: ***«[e]very award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.»***

42. Kif ingħad bosta drabi oħra f'każijiet simili, ġaladarba l-kumpanija appellanti qablet li l-arbitraġġ kellu jkun soġġett għar-**Regolamenti tal-Arbitraġġ tal-Kamra tal-Kummerċ Internazzjonali tal-2012**, allura hija kienet qiegħda tintrabat bil-quddiem li dak l-arbitraġġ kellu jkun *«vinkolanti»* fuqha minnufih u dan hekk kif jingħata (ara f'dan is-sens ***International Trading and Industrial and Investment Company v. Dyncorp Aerospace Technology*** mogħtija mill-Qorti tad-Distrett ta' Columbia ġewwa l-Istati Uniti tal-Amerika fil-21 ta' Jannar, 2011). Il-kumpanija appellanti għalhekk ma tistax tmur lura minn kelmtha jew

treġġa' l-arloġġ lura.

43. F'kull każ, il-kumpanija appellanti stess stqarret fir-rikors tal-appell tagħha li hija mhijiex qed tikkontesta li, *«r-rimedji ordinarji ta' appell fuq il-mertu tal-kawża bejn il-partijiet ġew eżawriti ġewwa Franza».* Din l-istqarrija ma saritx biss fir-rikors tal-appell (f'paragrafu 23), iżda saret ukoll fin-nota ta' sottomissjonijiet tagħha li ressqet quddiem iċ-Ċentru (paragrafi 33 u 34, f'paġna 195 tal-atti) u fil-verbal li sar mill-avukati tal-partijiet fis-seduta tat-23 ta' Marzu, 2022 (f'paġna 283 tal-atti).

44. Il-fatt ta' kemm id-deċiżjoni tal-arbitraġġ m'għadx tista' tiġi kkontestata fi Franza tirriżulta wkoll minn stqarrija maħlufa tal-avukat Geoffroy P. Lyonnet (f'paġni 370 sa 372 tal-atti), li fiha fisser kif wara li l-kumpanija appellanti tilfet il-proċeduri għat-twarrib tad-deċiżjoni *(action to set aside)* quddiem il-Qorti tal-Appell f'Pariġi, kif ukoll quddiem il-Qorti ta' Kassazzjoni Franċiża, il-kumpanija appellanti ma fadlilha l-ebda rimedji oħra quddiem il-Qrati Franċiżi u b'hekk il-lodo huwa finali, irrevokabbli u vinkolanti kemm fuq Klesh Chemicals Limited u kif ukoll fuq Klesch Group Limited. Ta' min jgħid li din l-istqarrija maħlufa mhux biss hija kkorroborata bil-fehmiet tal-avukati Franċiżi, il-Professur Laurent Aynès u Maxime Julienne (f'paġna 316 tal-atti), iżda hija wkoll sa ċertu punt ikkonfermata mill-Professur Mouralis li fit-tieni opinjoni legali tiegħu ammetta li:

> *«[i]n its judgment dated 22 January 2019, the Paris Court of Appeal refused to set the award aside, which automatically made it enforceable in France, according to Article 1527, paragraph 2, of the French Code of Civil Procedure»* (f'paġna 246 tal-atti).

45. Kif rajna aktar kmieni, huwa mifhum li l-kelma «*vinkolanti*» fil-kuntest tas-**subinċiż 1(e) tal-Artikolu V tal-Konvenzjoni**, tirreferi għal dak l-istat ta' fatt li fih id-deċiżjoni ta' arbitraġġ ma tibqax soġġetta għal ebda forma ta' appell jew proċeduri ordinarji li bihom tkun tista' tiġi attakkata fil-mertu. F'dan il-każ, dan l-istat ta' fatt huwa ppruvat, u għalhekk huwa kollu ta' xejn li l-kumpanija appellanti qed tibqa' tħambaq li l-lodo li Arkema France talbet l-għarfien tiegħu f'Malta għadu mhuwiex vinkolanti skont is-**sub-inċiż 1(e) tal-Artikolu V tal-Konvenzjoni**.

46. Daqstant ieħor ma jista' jwassal imkien lill-kumpanija appellanti, l-ilment li ċ-Ċentru naqas milli jiżgura li jiċċara l-ambigwitajiet li tgħid li hemm fil-kap tal-ispejjeż tal-lodo, qabel ma jordna r-reġistrazzjoni tiegħu. Dak li għandu jagħmel iċ-Ċentru fi proċeduri għall-għarfien ta' deċiżjoni ta' arbitraġġ barrani huwa biss li jistħarreġ jekk dik id-deċiżjoni tissodisfax il-kundizzjonijiet għall-għarfien skont il-Konvenzjoni ta' New York tal-1958, u xejn aktar. Ma kienx għalhekk fil-kompitu taċ-Ċentru li jgħid kif għandu jinftiehem il-kap tal-ispejjeż tal-lodo.

47. Fuq kollox iċ-Ċentru lanqas ma saritlu xi talba biex jagħmel dak li l-kumpanija appellanti qiegħda tippretendi li kellu jsir. Dan biex ma

jingħadx ukoll li kienet il-kumpanija appellanti stess li ironikament wissiet liċ-Ċentru li ma kienx fil-kompitu tiegħu li jinterpreta l-kap tal-ispejjeż (ara b'eżempju: (i) it-tieni paragrafu tat-tieni paġna tat-tweġiba tat-8 ta' Frar, 2016, f'paġna 381 tal-atti; (ii) il-paragrafu ta' qabel tal-aħħar fir-risposta tal-20 ta' Diċembru, 2021, f'paġna 365 tal-atti; u (iii) paragrafi 27 sa 31 tan-nota ta' sottomissjonijiet, f'paġni 194 u 195 tal-atti).

48. Il-kumpanija appellanti ma tistax tbiddel l-argumenti tagħha bħal qasba tixxejjer mar-riħ, u fid-dawl ta' dan il-Qorti tqis li l-kritika tagħha lejn iċ-Ċentru hija bil-wisq inġusta.

49. L-ewwel aggravju qiegħed għalhekk jiġi miċħud kollu kemm hu.

50. Fit-**tieni aggravju** l-kumpanija appellanti tgħaddi biex targumenta li l-oġġezzjoni tagħha fuq is-saħħa tas-**subinċiż 2(b) tal-Artikolu V tal-Konvenzjoni ta' New York tal-1958** setgħet titqajjem minnha f'kull stadju tal-proċeduri, u dan anke jekk ma qajmitx din il-preġudizzjali fit-tweġiba tagħha li ressqet skont **Regolament 55 tar-Regoli Dwar l-Arbitraġġ**. Tfisser li bid-differenza għall-ewwel paragrafu, it-**tieni paragrafu tal-Artikolu V tal-Konvenzjoni** ma jitlobx li oġġezzjoni bħal din titressaq b'talba speċifika f'xi terminu u żżid li din l-oġġezzjoni setgħet saħansitra titqajjem miċ-Ċentru, *ex officio*. Fid-dawl ta' dan, tilmenta li ċ-Ċentru żbalja meta ddeċieda li l-oġġezzjoni tagħha fuq il-bażi tas-**subinċiż 2(b)**

tal-Artikolu V tal-Konvenzjoni, kellha bilfors titqajjem fit-tweġiba oriġinali tagħha.

51. Mingħajr ma hemm għalfejn jingħad ħafna, il-Qorti tqis li dan l-aggravju huwa fieragħ għalkollox. Fil-fehma tal-Qorti, il-kumpanija appellanti jew ma qratx sewwa d-deċiżjoni appellata, jew inkella qed tipprova titlewwem fuq ix-xejn.

52. Il-Qorti qed tgħid hekk għaliex minn imkien fid-deċiżjoni appellata ma jirriżulta li ċ-Ċentru ddeċieda li l-oġġezzjoni tagħha fuq il-bażi tas-**subinċiż 2(b) tal-Artikolu V tal-Konvenzjoni**, kellha bilfors titqajjem fit-tweġiba oriġinali tagħha. Imbilli ċ-Ċentru osserva li l-kumpanija appellanti ressqet dan l-argument għall-ewwel darba fin-nota ta' sottomissjonijiet finali tagħha, dan ma jfissirx li ċ-Ċentru qal li hija ma setgħetx tqajjem dik l-oġġezzjoni.

53. F'kull każ, dan l-aggravju lanqas ma jista' jkun ta' xi fejda għall-kumpanija appellanti u dan għaliex minn kif jidher minn paragrafu 3.10 tad-deċiżjoni appellata, iċ-Ċentru stħarreġ xorta waħda l-argumenti tagħha li tqanqlu fuq il-bażi tas-**subinċiż 2(b) tal-Artikolu V tal-Konvenzjoni**. Tant hu hekk, li t-tielet aggravju ta' dan l-appell huwa dwar dawk il-konsiderazzjonijiet.

54. Dan it-tieni aggravju għalhekk qiegħed jiġi miċħud ukoll.

55. Jifdal biss **it-tielet aggravju**, li qiegħed jissejjes fuq l-argument li ċ-Ċentru kellu jirrifjuta li jirreġistra l-lodo fuq il-bażi tas-**subinċiż 2(b) tal-Artikolu V tal-Konvenzjoni**, u dan billi l-ambigwità li qed tqis li hemm fil-kap tal-ispejjeż ser tkun qiegħda xxellef il-prinċipju taċ-ċertezza legali, li fi kliemha huwa wieħed mill-pilastri tal-ordni pubbliku.

56. Dwar dan, il-kumpanija appellanti filwaqt li tistqarr li hija taqbel maċ-Ċentru li fiha nfisha, l-ambigwità fil-lodo, ma tikser l-ebda prinċipju ta' ordni pubbliku f'Malta, targumenta li fil-mument li ċ-Ċentru ddeċieda li jirreġistra l-lodo, dan il-lodo sar eżegwibbli u minħabba f'hekk inkiser il-prinċipju fundamentali dwar il-ħtieġa taċ-ċertezza legali fil-proċeduri legali jew ġudizzjarji. Tgħid li ċ-Ċentru stess *«ammetta»* li fil-forma tiegħu, il-kap tal-ispejjeż tal-lodo *«ma jistax jiġi eżegwit għaliex huwa ambigwu u jeħtieġ li jiġi ċċarat»,* u tfisser li skont iċ-Ċentru huwa xogħol il-Qrati Maltin li fl-istadju tal-eżekuzzjoni ser ikollhom iqisu jekk tistax tiġi msewwija dik l-ambigwità.

57. F'dan l-isfond, ittenni li ċ-Ċentru naqas milli jikkunsidra, jekk il-Qrati Maltin kellhomx is-setgħa jew il-kompetenza li jinterpretaw huma stess x'kienet l-intenzjoni tat-tribunal arbitrali fil-kap tal-ispejjeż. Filwaqt li tgħid li l-Qrati Maltin m'għandhomx dik is-setgħa jew kompetenza għaliex l-

arbitraġġ kien wieħed barrani u regolat bil-liġi barranija, iżżid li f'kull każ, hemm ir-riskju li l-eżerċizzju tal-interpretazzjoni jbiddel is-sustanza tal-istess deċiżjoni kif mogħtija mit-tribunal arbitrali, u b'hekk il-Qrati Maltin ikunu qed jaqbżu 'l barra mil-limiti tal-awtorità u kompetenza tagħhom fl-att ta' kjarifika tal-lodo.

58. Filwaqt li tammetti li l-irwol taċ-Ċentru huwa li jirreġistra u mhux li jeżegwixxi l-lodo arbitrali, il-kumpanija appellanti ttenni li bl-att tar-reġistrazzjoni, il-lodo ser ikun qiegħed isir eżegwibbli f'Malta, u minħabba f'hekk iċ-Ċentru ma messux aċċetta r-reġistrazzjoni qabel ma ra kif setgħet tiġi solvuta l-ambigwità fil-lodo. Tilmenta li b'dak li għamel, iċ-Ċentru tefa' f'ħoġor il-Qrati, deċiżjoni li hija ambigwa, li x'aktarx ma tistax tiġi solvuta mill-istess Qrati, u dan bil-konsegwenza li ġie mwarrab għalkollox il-prinċipju tal-ordni pubbliku tal-ħtieġa taċ-ċertezza legali fi proċeduri ġudizzjarji.

59. Il-Qorti tqis li anke dan l-aggravju mhuwiex fejjiedi, biex ma ngħidux ukoll fieragħ.

60. L-ewwel nett, għandu jingħad li matul iż-żminijiet, il-Qrati barranin taw bosta sentenzi li fihom fissru kif il-parti li tkun qiegħda tikkontesta l-għarfien u l-eżekuzzjoni ta' arbitraġġ, ma tistax tqajjem id-difiża fuq il-bażi tas-**sub-inċiż 2(b) tal-Artikolu V tal-Konvenzjoni**, jekk il-kwistjoni li fuq

is-saħħa tagħha tkun qiegħda ssejjes dik id-difiża, setgħet titqajjem quddiem it-tribunal ta' arbitraġġ (ara paġna 256 tal-pubblikazzjoni bl-isem ***UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)***, ippublikat fis-sena 2016).

61. Il-Qorti jidhrilha li dik il-pożizzjoni għandha tapplika bis-sħiħ għal dan il-każ, u dan speċjalment meta jiġi kkunsidrat li skont it-**tieni paragrafu tal-Artikolu 35 tar-Regolamenti tal-Arbitraġġ tal-2012 tal-Kamra tal-Kummerċ Internazzjonali**, il-kumpanija appellanti setgħet fi żmien ta' 30 jum mid-data li fiha ngħata l-lodo, tressaq talba għall-interpretazzjoni ta' dak il-lodo. Il-kumpanija appellanti m'għamlet xejn minn dan u mhuwiex sew li issa qed tipprentedi li ċ-Ċentru ma kellux jagħraf il-lodo, fuq raġuni li fuq kollox hija biss il-fehma soġġettiva tagħha.

62. Daqstant ieħor li mhuwiex sewwa li l-kumpanija appellanti qed tipponta subgħajha lejn il-kumpanija appellata billi targumenta li la kienet Arkema France li rebħet l-arbitraġġ, allura kien fl-interess tagħha, li tressaq talba għall-interpretazzjoni tal-kap tal-ispejjeż skont l-**Artikolu 35(2) tar-Regolamenti tal-Arbitraġġ tal-Kamra tal-Kummerċ Internazzjonali tal-2012**. Kemm mit-tip ta' provi li ressqet, kif ukoll fis-sottomissjonijiet tagħha, jidher li għal Arkema France l-kap tal-ispejjeż tal-lodo huwa ċar u ma jeħtieġ l-ebda interpretazzjoni. Il-pożizzjoni ta'

Arkema France baqgħet dejjem konsistenti, u għalhekk ma kien jagħmel l-ebda sens li Arkema France tressaq talba għall-interpretazzjoni tal-kap tal-ispejjeż. Bl-invers, jekk il-kumpanija appellanti ġenwinament ħasset li l-kap tal-ispejjeż ma kienx ċar, hija kienet fid-dmir li tressaq talba għall-interpretazzjoni skont l-**Artikolu 35(2)**. Il-kumpanija appellanti iżda m'għamlet xejn minn dan, u issa ma tistax tirkeb fuq in-nuqqas tagħha biex topponi għall-għarfien u l-eżekuzzjoni fuq il-bażi tas-**subinċiż 2(b) tal-Artikolu V tal-Konvenzjoni**.

63. Lil hemm minn dan u f'kull każ, il-Qorti taqbel għalkollox mad-deċiżjoni appellata li l-oġġezzjoni tal-kumpanija appellanti fuq il-bażi tas-**subinċiż 2(b) tal-Artikolu V tal-Konvenzjoni** mhijiex fejjieda.

64. Fil-fehma tal-Qorti, it-tifsira mogħtija miċ-Ċentru lill-fraži *«ordni pubbliku»* hija tajba u tirrifletti sewwa dak li l-Qrati Matlin jifhmu b'din il-fraži. Tassew, ingħad kemm-il darba li deċiżjoni hija meqjusa li tmur kontra l-ordni pubbliku: «*jekk toħloq kunflitt ma' dawk il-prinċipji ewlenin tal-ordni ġuridiku li huma l-qofol tas-sistema legali billi jħarsu l-valuri l-aktar fondamentali tas-soċjetà fejn ikun fis-seħħ dak l-ordni*» (ara ***Avukat Dottor Edward Debono noe. v. Jean Pierre sive Jean Borg***, mogħtija mill-Qorti tal-Appell fit-30 ta' Settembru, 2016).

65. L-ebda tiġbid ta' immaġinazzjoni ma jista' jwassal lil din il-Qorti biex

tikkonkludi li d-deċiżjoni, li l-kumpanija appellanti qed topponi r-reġistrazzjoni tagħha, toħloq kunflitt mal-prinċipji ewlenin tal-ordni ġuridika ta' pajjiżna. Kif ingħad qabel, ir-raġuni miġjuba mill-kumpanija appellanti, u sewwasew l-ambigwità fil-kap tal-ispejjeż tal-lodo, hija biss il-fehma soġġettiva tagħha, u li fuq kollox ġiet ikkontestata b'żewġ pariri legali mressqa minn Arkema France. Nuqqas ta' qbil dwar l-interpretazzjoni ta' deċiżjoni ma jwassalx b'daqshekk għall-ksur tal-ordni pubbliku, anke jekk dik id-deċiżjoni tiġi eventwalment eżegwita mill-kreditur.

66. F'kull każ, u bħalma jiġri fi kwalunkwe titolu eżekuttiv ieħor, huwa fid-dmir tal-Qorti li quddiemha tintalab l-eżekuzzjoni tal-lodo, li tiddeċiedi jekk dak li ser ikun qiegħed jintalab jaqax fil-parametri tal-parti dispożittiva tal-istess lodo.

67. Mhux veru mbagħad li ċ-Ċentru qal li l-kap tal-ispejjeż tal-lodo *«ma jistax jiġi eżegwit għaliex huwa ambigwu u jeħtieġ li jiġi ċċarat».* Bil-kontra ċ-Ċentru rribatta dan l-argument u fisser li:

> *«It is also premature for Klesch Group Limited to argue that the award "cannot effectively be enforced by the Maltese Courts" (paragraph 46 of KGL's note of submissions) as there is no reason to doubt that a Maltese Court tasked with enforcement would be able to decide whether the order on costs is to be enforced against KGL or not»* (f'paragrafu 3.10 tad-deċiżjoni appellata).

68. Jekk xejn, l-ordni pubbliku f'Malta jitlob li deċiżjoni finali li għaddiet

f'ġudikat, irrispettivament jekk ingħatatx f'Malta jew barra minn xtutna, iġġib magħha l-finalità, u għalhekk din jistħoqqilha illi tiġi rispettata u sussegwentement eżegwita.

69. B'ċertu sogħba, il-Qorti tinnota li l-kumpanija appellanti qed tipprova tagħmel minn kollox biex taħrab l-effetti ta' deċiżjoni li nqatgħet kontriha. Dawn il-manuvri huma ta' għajb għaliha, u peress li l-Qorti jidhrilha li dan l-appell huwa ħolqa minn katina sħiħa li biha l-kumpanija appellanti qiegħda tipprova xxekkel l-eżekuzzjoni tal-lodo, il-Qorti tqis li hemm lok għall-applikazzjoni tas-sanzjoni kif misjuba f'**paragrafu 10 ta' Tariffa A tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili**.

70. L-appell ser ikun qiegħed għalhekk jiġi miċħud għalkollox.

Deċiżjoni

Għaldaqstant għal dawn ir-raġunijiet, il-Qorti qiegħda **tiċħad** l-appell imressaq minn Klesch Group Limited u tikkonferma għalkollox id-deċiżjoni appellata, bl-ispejjeż kollha kontra l-istess Klesch Group Limited.

Billi l-Qorti jidhrilha li dan l-appell huwa wieħed fieragħ u vessatorju, Klesch Group Limited qiegħda tiġi wkoll ikkundannata li tħallas €1,000 lir-

Reġistratur tal-Qorti skont **paragrafu 10 ta' Tariffa A** mehmuża mal-**Kodiċi ta' Organizzazzjoni u Proċedura Ċivili**.

Mark Chetcuti Prim Imħallef	Christian Falzon Scerri Imħallef	Josette Demicoli Imħallef

Deputat Reġistratur
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