QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF MARK CHETCUTI
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO
ONOR. IMĦALLEF ANTHONY ELLUL

Seduta ta' nhar it-Tnejn, 18 ta' Marzu 2024

Numru 1

Rikors numru 432/2023/1

SOCAR, SOCAR Trading S.A. & SOCAR Overseas Ltd [qabel magħrufa bħala SOCAL Overseas LLC]

v.

Palmali International Company Limited (C40887) u Dr Vincent Galea bħala kuratur *ad litem* tal-assenti Mubariz Mansimov (magħruf ukoll bħala Mubariz Gurbanoglu) permezz ta' digriet tal-Prim'Awla tal-Qorti Ċivili tal-14 ta' Settembru 2021 u b'nota tat-8 ta' Awwissu 2023 Melin Fadliev Vasviev iddikjara li huwa l-mandatarju ta' Mubariz Mansimov

1. Din hija deċiżjoni dwar appell ta' Mubariz Mansimov kontra deċiżjoni taċ-Chairman taċ-Ċentru dwar l-Arbitraġġ ta' Malta fid-19 ta' Lulju 2023, li biha ordna r-reġistrazzjoni f'Malta ta' deċiżjoni ta' arbitraġġ barrani.

2. Fil-qosor il-fatti huma dawn:

i. Socar et 'appellati' talbu r-reġistrazzjoni f'Malta ta' deċiżjoni ta' arbitraġġ barrani tas-26 ta' Jannar 2021, wara arbitraġġ li sar f'Londra skont il-London Maritime Arbitration Association Terms 2017.

ii. Id-deċiżjoni ta' arbitraġġ ingħatat kontra Mubariz Mansimov 'l-appellant' u l-kumpanija intimata Palmali International Holding Company Limited 'Palmali'. Kumpanija involuta fil-qasam marittimu.

iii. B'deċiżjoni tad-19 ta' Lulju 2023, iċ-Chairman taċ-Ċentru tal-Arbitraġġ ċaħad l-oġġezzjonijiet tal-appellant u ordna r-reġistrazzjoni f'Malta tad-deċiżjoni ta' arbitraġġ barrani fil-konfront tal-appellat u ta' Palmali.

iv. B'rikors preżentat fit-8 ta' Awwissu 2023 Mubariz Mansimov appella mid-deċiżjoni taċ-Chairman taċ-Ċentru dwar l-Arbitraġġ ta' Malta. L-appellant talab lil din il-qorti sabiex tħassar id-deċiżjoni peress li ma kellux jeżerċita l-ġurisdizzjoni fil-konfront tal-appellant, u wkoll ma ngħatax smigħ xieraq waqt il-proċeduri ta' arbitraġġ f'Londra.

3. <u>L-ewwel aggravju</u> tal-appellant hu dwar iċ-ċaħda tal-eċċezzjoni tan-nuqqas ta' ġurisdizzjoni taċ-Chairman, li jordna r-reġistrazzjoni tad-deċiżjoni. F'dan ir-rigward l-appellant għamel referenza għall-artikolu 742 tal-Kap. 12 u l-artikolu III tal-Konvenzjoni tan-Nazzjonijiet Uniti dwar l-Għarfien u l-Eżekuzzjoni ta' Deċiżjonijiet ta' Arbitraġġ Barranin addottata fl-10 ta' Ġunju 1958, li jipprovdi:

> *"Kull Stat kontraenti għandu jagħraf id-deċiżjonijiet ta' arbitraġġ bħala vinkolanti u jsegwihom skont ir-regoli ta' proċedura tat-territorju fejn id-deċiżjoni ikollha sseħħ, skont il-kondizzjonijiet stabbiliti f'dawn l-artikoli li ġejjin. Ma għandhomx jiġu imposti kondizzjonijiet iktar ta' piż jew jintalab ħlas jew drittijietogħla għall-għarfien jew eżekuzzjoni ta' deċiżjonijiet tal-arbitraġġ li l-Konvenzjonitgħodd għalihom milli soltu jiġu imposti fuq l-għarfien u l-eżekuzzjoni ta'deċiżjonijiet ta' arbitraġġ domestiċi"*.

4. L-appellant isostni li l-kwistjoni tal-ġurisdizzjoni hi ta' natura proċedurali u għalhekk għandu japplika l-art. 742 tal-Kap. 12, li tipprovdi:

> *"(1) Bla ħsara ta' fejn il-liġi tiddisponi espressament xort'oħra, il-Qrati Ċivili ta' Malta mingħajr ebda distinzjoni jew privileġġ, għandhom ġurisdizzjoni biex jisimgħu u jiddeċiedu l-kawżi kollha li jirrigwardaw il-persuni hawn taħt imsemmija ...."*

5. L-appellant isostni li ġialadarba mhuwiex ċittadin Malti; m'għandux id-domiċilju tiegħu, residenza jew presenza f'Malta; il-proċedura mhijiex dwar ħwejjeġ li jinsabu f'Malta; m'għandhomx konnessjoni ma' obbligazzjoni kkuntrattata f'Malta jew li kellha tiġi eżegwita f'Malta jew favur ċittadin Malti jew persuna li tinsab Malta; l-appellant ma tax il-kunsens li joqgħod għall-ġurisdizzjoni tal-Qrati ta' Malta, allura l-oġġezzjoni tiegħu dwar ġurisdizzjoni hi ġustifikata.

6. Iċ-Chairman taċ-Ċentru dwar l-Arbitraġġ ta' Malta, irraġuna hekk:

> *"3.3. As regards the first ground of objection, the Respondent Curator argues that in the present case the requirements of Article 742 et seq. of the Code of Organization and Civil Procedure are not satisfied since the Applicant Companies and the Respondent Mr. Mubariz Mansimov, whom the Curator is representing, are not domiciled in Malta and no obligation was contracted in Malta. Furthermore, it is argued that the Applicant Companies failed to show that at the moment of their request for registration of the award, Mr. Mubariz Mansimov had property or funds in Malta on which the award may be executed.*
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> *3.4. In the Chairman's view this ground of objection is legally unfounded since Article 742 and the rules of jurisdiction in the Code of Organization and Civil Procedure are not applicable to the present proceedings. The present proceedings are not proceedings on the merits but proceedings for the recognition of an arbitral award decided in another Contracting State. Such recognition proceedings do not require a determination as to the jurisdiction of the court of the Contracting State where recognition of the award is sought on the basis of national jurisdictional rules. Respondents submitted to the jurisdiction of the arbitral tribunal in London by virtue of Clause 8 of the T&SD referred to*

above (attached to the application of Applicant Companies dated 14th June 2021), which therefore gave jurisdiction to the arbitral tribunal to decide the merits of the dispute between the Parties. Once that award was delivered it became entitled to recognition and enforcement in other Contracting States, including Malta, under the New York Convention unless the respondents are able to prove the operation of any one of the available grounds of objection listed in Article V of the of the New York Convention. The first objection raised by the Curator is not one of the defences permitted by the New York Convention, and hence it is irrelevant whether the Parties are domiciled in Malta and whether an obligation was contracted in Malta. It also not relevant for recognition purposes under the New York Convention whether Mr. Mubariz Mansimov had property or funds in Malta on which the award may be executed, though in practice recognition of an award is usually sought to pave the way for enforcement in the State where recognition of the arbitral award is sought. Furthermore, although not juridically relevant, it appears that Mr. Mubariz Mansimov has assets (shares) in Malta since he is a shareholder in Palmali Holding Company Limited, a company registered in Malta (see Document VG3 attached to the note of submissions of the defendant curator)".

7. Skont art. 74 tal-Att dwar l-Arbitraġġ (Kap. 387) deċiżjoni ta' arbitraġġ barrani li għaliha japplika t-trattati li hemm fit-Tieni Skeda tal-Att, jiġu esegwiti mill-Qrati ta' Malta *".... hekk kif dawn jiġu reġistrati għand iċ-Ċentru bl-istess mod bħallikieku dawk id-deċiżjonijiet kienu ngħataw taħt it-Taqsima IV"*. Taqsima IV tirregola l-arbitraġġ domestiku.

8. L-art. 742 jirregola l-ġurisdizzjoni tal-Qrati Ċivili ta' Malta dwar smigħ u deċiżjoni ta' kawżi quddiemhom. L-appellanti m'għamlu referenza għall-ebda disposizzjoni fil-Kap. 387 li tagħmel l-artikolu 742 tal-Kap. 12 applikabbli għall-proċedura taħt l-art. 74 tal-Kap. 387. Hu għalhekk ċar li l-kwistjoni dwar ġurisdizzjoni mhijiex meqjusa bħala regola ta' proċedura għall-finijiet tal-proċedura li l-appellati pproponew għar-reġistrazzjoni f'Malta tad-deċiżjoni arbitrali barranija. Għall-finijiet ta' reġistrazzjoni f'Malta ta' deċiżjoni ta' arbitraġġ barrani, m'hemm bżonn l-ebda konnessjoni ma' Malta.

9. Inoltre, l-art. 742 jagħmilha ċara li japplika fir-rigward ta' kawżi quddiem il-Qrati Ċivili Maltin. Il-proċedura taħt l-art. 74 tal-Kap. 387 issir quddiem iċ-Chairman taċ-Ċentru tal-Arbitraġġ. Il-fatt li l-Kap. 12 jinkludi fih regoli dwar l-eċċezzjoni ta' inkompetenza f'kawżi quddiem il-Qrati Ċivili Maltin, ma jfissirx li dawk ir-regoli japplikaw awtomatikament fir-rigward tal-proċedura taħt l-art. 74 tal-Att dwar l-Arbitraġġ.

10. Filwaqt li tribunal f'arbitraġġ domestiku għandu s-setgħa jiddeċiedi *inter alia* dwar oġġezzjoni dwar in-nuqqas ta' ġurisdizzjoni (art. 32 tal-Kap. 387), m'hemmx disposizzjoni bħala fil-proċedura kontemplata fl-art. 74 tal-Kap. 387 għar-rikonoxximent u eżekuzzjoni ta' deċiżjoni arbitrali barranija. Il-fatt li f'art. 74 hemm referenza għat-Taqsima IV tal-Att, ma jfissirx li art. 32 japplika wkoll għall-proċedura speċjali taħt l-art. 74.

11. Ir-reġistrazzjoni f'Malta ma teħtieġx il-presenza ta' assi tad-debitur f'Malta. Madankollu l-appellati ikkonfermaw li pproponew il-proċedura taħt art. 74 tal-Kap. 387 għaliex l-appellant għandu assi f'Malta (ara wkoll paragrafu 3.4 tad-deċiżjoni appellata). Fil-fatt f'mandat ta' sekwestru li l-appellati ippreżentaw fis-17 ta' Mejju 2018 (numru 821/2018) qabel beda l-arbitraġġ f'Londra, jissemmew diversi kumpaniji reġistrati f'Malta li fihom l-appellant hu sid ta' ishma (fol. 403). Ovvjament l-għan wara r-reġistrazzjoni tad-deċiżjoni barranija f'Malta hi sabiex l-appellati jkollhom titolu eżekuttiv rikonoxxut u eżegwibbli f'Malta kontra l-appellant u l-kumpanija intimata l-oħra. L-eżekuzzjoni f'Malta ssir fuq ħwejjeġ li jinsabu f'Malta. Għalhekk jekk il-proċedura speċjali kontemplata fl-art. 74 tal-Kap. 387 hi għall-grazzja tal-argument biss kawża u għaliha japplika l-art. 742 tal-Kap. 12, ukoll bis-saħħa ta' paragrafu (ċ)[1] iċ-Chairman kellu ġurisdizzjoni biex jisma' u jiddeċiedi l-applikazzjoni tal-appellati.

12. Għalhekk tiċħad l-ewwel aggravju.

[1] *"(ċ) Kull persuna, f'kawża dwar ħwejjeġ li qegħdin jew li jinsabu f'Malta"*

13. Fit-tieni aggravju l-appellant jilmenta li l-proċeduri ta' arbitraġġ li saru f'Londra m'osservawx id-dritt għal smigħ xieraq u għalhekk id-deċiżjoni tmur kontra l-ordni pubbliku. Spjega li kien ġie arrestat fil-15 ta' Marzu 2020 u baqa' taħt arrest fit-Turkija matul il-proċeduri ta' arbitraġġ. B'hekk l-aċċess tiegħu għall-avukat kien wieħed limitat. Matul dak il-perjodu kellu wkoll mard li affetwa l-ħila tiegħu li jieħu deċiżjonijiet, kif konfermat mill-affidavit ta' Dr Sabancioglu. L-appellant u l-kumpanija appellata kellhom ukoll diffikultajiet finanzjarji serji, li wassal li ma setax iħallas lill-avukat tiegħu. Għalhekk fil-perjodu rilevanti ma setax jidher u jiddefendi lilu nnifsu. L-avukat ma setax ikompli jiddefendi lill-appellant għaliex ma tħallasx.

14. Il-konsiderazzjonijiet taċ-Chairman jinkludu dawn:

> *"3.11. Applying to the above principles to the legal order of Malta, which safeguards the right to a fair hearing in Article 39 of the Constitution of Malta and Article 6 of the European Convention on Human Rights, recourse to public policy to oppose the recognition of a foreign arbitral award may be resorted to in exceptional cases where there is a clear breach of basic procedural fairness and the right to defend oneself as recognised by the Constitution and the ECHR.*
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> *3.12. The issue which needs to be decided in the present proceedings is precisely whether there was such a breach by the London arbitral tribunal of basic procedural fairness and the right to fair hearing in the arbitral proceedings which led to the award. On this point, in his note of submissions, the respondent Curator notes as follows:*
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> > *8. With regard to the last defence, it is submitted that Mr. Mansimov was not permitted, due to his arrest, to put forward the best possible defence in the proceedings before the London Arbitration. From the outset, a difference must be made between voluntary indifference to proceedings and non-voluntary indifference to proceedings. In the former, any judicial authority, be it a Tribunal or Court has the duty to continue hearing the case and come to a conclusion. In the latter case, even though the duty to decide is still imposed on the deciding authority, has to balance the rights of the plaintiff with those of the defendant.*

9. It results from these proceedings that Mr Mansimov was incarcerated in a high security Turkish prison during the pandemic. During this time, the London Arbitration proceedings were ongoing as were also criminal proceedings. Mr Mansimov was the person who knew the workings and dealings between Palmali and Socar and his input and knowledge was essential in any arbitration proceedings against Palmali. During this time too Mr Mansimov had to prepare for his defence in the criminal case put forward against him by the State of Turkey. The affidavit put forward in these proceedings by Advocate Ceren Muge Arsan is quite informative in this regard. Moreover, during this period of incarceration Mr. Mansimov's health was deteriorating so much so that Dr Sabancioglu stated that he was suffering from severe depressive anxiety, insomnia and sleep problems. For these issues, Mr. Mansimov was administered anti-depressants and other medicine. The said medical doctor said that Mr Mansimov had difficulties in making decisions, and that he was in constant fatigue and mental fatigue (surmenage). Dr Sabancioglu also described the fact that prisoners, when taken out of the prison for medical examinations, upon returning back to prison had to be kept in quarantine for 14 days. Despite the fact that Mr. Mansimov was assisted by lawyers in the arbitration proceedings for a period of time, the fact of his incarceration led to great financial difficulties and as a result, representation was not continued. It is true that the Arbitration Tribunal followed the Habib Bank Limited v Central Bank of Sudan (2007) WLR 470 and Braspetro Oil Services Co vs FPSO Construction Inc (2007) All ER (D) 89 (Jun) cases, however, these two cases did not deal with the same exact situation we have in this case where the defendant could not participate actively in the defence because of his situation as proven in this case. It is the curator's view that these two cases bear no relevance to the facts in hand. What is obvious in this case is that Mr Mansimov's rights to a fair trial were seriously prejudiced in the arbitration proceedings in London.

10. Therefore, the curator humbly submits that this judgement should not be enforced in Malta."

3.13. In support of his defence, the Respondent relies upon the evidence of Mr. Omer Aral, Mr. Mansimov's Turkish lawyers Isenbike Bilgili and Mr. Caka Kul, Nuray Perker, head of treasury of the Palmali Group of Companies, and medical doctor Dr. Ekrem Sabanciouglu, who followed and treated Mr. Mansimov during his stay in prison and describes the medical problems he suffered from during this time. Respondent also relies on the affidavit of Advocate Ceren Muge Arsan who speaks generally about the difficulties she encountered to communicate with clients in prison though this witness makes no mention of Mr. Mansimov himself.

3.14. On their part Applicant Companies argue in essence that there was no breach of the basic principles of the Maltese legal framework

concerning the right to a fair trial. They argue that all the evidence adduced clearly shows that the proceedings leading to the T&SD Award were fair since Mr. Mansimov participated in the proceedings, was legally represented throughout, was given all the opportunity to defend himself in the most ample manner and the arbitration proceedings were conducted and determined in such a manner as to give account to all the evidence and arguments that the Respondents therein, including Mr. Mansimov, put forward. Applicant Companies also argue that in any case, in the proceedings leading to the T&SD Award, the arbitrators acted in accordance with the principles of natural justice and did not act in an arbitrary manner. Furthermore they argue that if the arbitral tribunal had acted differently, this would have violated SOCAR's rights as it would not have been afforded a remedy within a reasonable time.

3.15. Applicant Companies rely primarily on the evidence of Mr Robert Lambert, SOCAR's legal counsel throughout the T&SD Arbitration, together with the voluminous supporting documentation attached to his affidavit.

3.16. The Chairman notes that the procedural steps before the arbitral tribunal are documented in detail at page 7 et seq of the award itself. Some salient points concerning the steps in the proceedings will be set out below but this is not an exhaustive summary of all that happened in the arbitration proceedings and reference should be made to the award together with the exhibited documentation for a more detailed and complete account of the procedural history of the London proceedings. Applicant Companies were represented in the arbitration proceeding by Clifford Chance LLP and they served their Statement of Case on 6th July 2018. Respondents Palmali International Holding Company Limited and Mubariz Mansimov were first represented by Lax & Co. LLP and they served their Defence and Counterclaim on 1st October 2018. A case management conference took place on 27th November 2018. Respondents submitted further information relating to the defence and counterclaim on 3rd April 2019. On 13th August 2019 the arbitral tribunal was informed that Withers LLP had replaced Lax & Co. LLP as the Respondents' legal representatives. On 30th August 2019, the Claimants served their Statement of Reply and Defence to Counterclaim. Subsequently on 9th October 2019, the arbitral tribunal laid down a procedural timetable leading up to a substantive hearing fixed for the 5th to the 21st October 2020. On 29th November 2019 the Respondents served an amended Defence and Counterclaim, and a Reply to Defence to Counterclaim. The proceedings proceeded normally with applications and rulings by the tribunal on preliminary matters.

3.17. Complications began on the 21st February 2020 when Withers LLP applied for an indefinite stay of the proceedings on the basis that criminal and tax investigations had been commenced in Turkey against the Palmali Group and Mr. Mansimov. On 26th February 2020 Withers LLP then gave notice that they were no longer acting tor the Respondents. On the following day, 27th February 2020, the Tribunal received a communication from representatives of the Respondents in Turkey seeking a stay until at least 10th March 2020 to instruct other solicitors to take over the handling of the case. The Tribunal reverted on 28th February 2020 making it clear that, generally, a change of legal representation was not a valid reason for a party to delay progress with a procedural timetable, and urging the Respondents to appoint other lawyers as a matter of urgency, but giving the Respondents a week to take instructions and to appoint new lawyers. On 6th March 2020 Preston Turnbull LLP wrote to the Tribunal, stating that they had been approached to act as the Respondents' legal representatives, and they subsequently formally confirmed on 11th March 2020 that they were instructed to represent the Respondents in the arbitration proceedings. Preston Turnbull LLP sought a stay of the proceedings until 23rd March 2020, on the basis of Mr Mansimov's ill-health and their difficulties in obtaining instructions.

3.18. On 15th March 2020 Mr Mansimov was placed under detention in Turkey. This development led to subsequent requests by Preston Turnbull LLP for extensions of time to take instructions and carry out procedural steps. The Claimants opposed many of these requests. The Tribunal, balancing the need to progress the arbitration with the need to take account of difficulties alleged on behalf of the Respondents, granted various extensions of time in accordance with the Respondents' requests.

3.19. On 15th April 2020 the Claimants made an application regarding alleged deficiencies in the Respondents' document production. The Tribunal granted the Respondents extensions of time to deal with the application, and the Respondents eventually provided responsive documents to the Claimants on 29th July 2020. The arbitral tribunal noted that Mr. Mansimov was able to swear an affidavit on 23rd July 2020 for the purpose of the proceedings before it.

3.20. On 24th April 2020 the Tribunal issued directions as to an adjusted procedural timetable, nothing that: (a) the Respondents were no longer pursuing an application for an indefinite stay; (b) the proceedings had effectively been stayed since early March; (c) the Respondents had put forward proposals for an adjustment to the procedural timetable, taking

account of recent developments, and (d) neither side was suggesting that the October 2020 hearing would be jeopardised. The timetable was subsequently modified on a number of occasions, with the Tribunal largely granting the Respondents' requests for extensions of time.

3.21. The Claimants filed their witness statements on 26th June 2020. The Respondents were not able to provide their statements at that time, and the Tribunal granted them a number of extensions of time to do so. On 24th July 2020, Respondents confirmed that they have exchanged witness statements with the Claimants. Claimants filed their reply witness statements on 14th August 2020 but Respondents were not in a position to do so. On 24th August 2020 Preston Turnbull LLP stated that they were still awaiting instructions regarding reply statements, and would seek leave to serve such statements in due course. By its directions issued on the same day, the arbitral tribunal stated that it would consider any such application made, but that Respondents should treat any such application as a matter of urgency, given the imminence of the October 2020 hearing. No application was subsequently made by the Respondents to adduce reply witness statements. On 24th August 2020 the Parties, by agreement, filed expert reports on Azeri law.

3.22. On 4th September 2020 the Tribunal directed that the October 2020 hearing would take place virtually, with lawyers, party representatives and witnesses participating via video conference, and with the Tribunal sitting at the International Dispute Resolution Centre in London. The Tribunal noted that (a) it remained unclear whether Mr Mansimov would be participating as a witness, and directed the Respondents to clarify the position by 9 September 2020; (b) directed the parties to liaise as to a hearing schedule and a hearing protocol, and (c) fixed a pre-hearing conference call for 16 September 2020. The Tribunal stated that it "strongly encourages the respondents, via their legal representatives, to participate fully in the making of final arrangements for the hearing."

3.23. On 15th September 2020 the Respondents served expert evidence on Turkish law. On the same day Preston Turnbull LLP emailed the Tribunal saying that they were in a difficult position regarding the conference call due to take place the next day. They stated that they were without funding for their fees; were considering whether to remove themselves from the record, and would not attend the conference call on 16th September 2020. The Tribunal reverted by email on 15th September encouraging the Respondents to participate and directed Preston Turnbull to remind Respondents that the conference call would go ahead on 16th September. Clifford Chance attended the Pre-Hearing

Conference Call of 16th September for the Claimants but the Respondents did not attend. The Tribunal issued directions for the October 2020 hearing. On the next day, 17th September 2020, the Claimants served their Reply Witness Statements on Respondents and on 23rd September they served their responsive Turkish law expert evidence.

3.24. It appears that there was no action by Respondents but on 29th September 2020 Preston Bull sent an email in advance of the October 2020 hearing which e-mail is reproduced at page 17 of the arbitration award and, due to its importance to this case, it merits to also be set out in full here:

> *"Dear Sirs,*
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> *As has become apparent to the Tribunal, the Respondents have found it extremely difficult to provide on-going instructions to us in relation to this reference. Separately, the Respondents have also run out of funding for this matter. Given that we are now just under a week away from the Merits Hearing, we wish to make the below submissions in light of the circumstances surrounding the Respondents' approach to the hearing and the limited assistance that Preston Turnbull can provide during that hearing.*
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> *Whilst Clifford Chance for the Claimants have consistently attempted to belittle the external factors affecting the Respondents' ability to properly defend itself, the unavoidable fact remains that several cumulative factors have combined to have a catastrophic impact on our clients' ability to defend these arbitration proceedings. The Tribunal will also be aware that the Claimant is the state owned oil company of Azerbaijan and appears to have virtually unlimited resources to deploy. The Claimants' Schedule of costs in the SOS hearing was over US$9.25m, whereas the Respondent in the SOS hearing struggled to fund costs of US$1.5m.*
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> *On 15 March 2020 Mr Mansimov was arrested and detained by the Turkish Authorities. Since that time he has been detained in prison, denied bail and with very limited access to visitors. He has no phone or IT equipment, so hard copies of papers have to be taken to him, often translated from English. The practical effects being that it has been very difficult to obtain instructions from our clients but also the company lost its figurehead at a crucial time both financially and commercially, with the global pandemic seriously affecting our clients' business.*
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> *The actions of the Claimants – from the breach of the Overarching Agreement which led to the illegitimate pressure put on Mr Mansimov to sign the heavily unfair and burdensome TSD Agreement – have placed the Respondents in critical financial difficulty. As has been outlined by Mr*

Mansimov and Mr TC Beriker witness evidence, the Claimants took these actions deliberately, knowing full well that withdrawing the indirect routes of funding into the vessels that they have agreed to be joint venture partners of, would cripple Palmali and potentially kill their shipping business. It is the Respondents' position that the Claimants knew that they would not be able to withstand the financial pressure stemming from Claimant's failure to honour the Overarching Agreement and have been bombarding our clients on three separate fronts, litigating practically the same points in each arbitration, all of which has further drained our clients' funds.

Our clients were forced into a hearing in the SOS reference in June in circumstances where Mr Mansimov, being the key witness, was in jail with no ability to participate in the hearing. Despite our efforts to highlight such obvious prejudice caused by Mr Mansimov's absence, that hearing nevertheless went ahead at the Claimant's insistence. The Respondents are facing a similar situation here before this Tribunal, but with the added financial difficulties that have made it impossible to even attempt to overcome the prejudice caused by Mr Mansimov's absence. At this stage, it is simply impossible to estimate when Mr Mansimov would be at liberty to attend a hearing before the Tribunal.

As it stands, it is no exaggeration to state that Palmali is on its last legs financially, with a number of its vessels under arrest by creditors and its Chairman in prison. There are no alternative resources available to secure those creditors' interests so the vessels are inactive under arrest with no ability to generate income. On any view, the Tribunal must appreciate that these are extremely challenging circumstances for a company attempting to prepare for a multi-million dollar dispute against a state owned company with endless funds.

Our clients' financial position has been an inescapable hindrance and with its worsening over recent months, with the extended period of incarceration of Mr Mansimov and the continued effects of the coronavirus pandemic, we have been unable to obtain any funding to allow us to continue the defence of this arbitration. Furthermore, at this late stage, and with the Respondents unable to fund any alternative legal team or to provide instructions to us on several key issues, we regret to confirm that we will not be able to attend the hearing on behalf of the Respondent. The Tribunal will already be aware that Counsel for the Respondents are unable to attend the hearing, for the same reasons. However, our non-attendance should not take away from the fact that the effect and outcome of this hearing are monumental to the Respondents.

We invite the Tribunal to consider the skeleton arguments submitted by the Respondent in the SOS reference and the transcripts of that hearing (attached). The Respondent's witnesses were cross-examined by Yash Kulkarni QC on behalf of the Claimants [an error for "Respondent"] on

effectively the same issues during the SOS hearing and the Respondents formally challenge the Claimants' evidence on the same basis in this hearing. The Tribunal will not have the benefit of the SOS Tribunal in being able to assess the witness evidence first hand but we trust that, on balance, it will become clear to this Tribunal that there must not have been an Overarching Agreement, in the absence of which the parties' commercial relationship makes no sense. Detailed explanations are set out in the Respondent's Closing Submissions in the SOS Reference, which we invite the Tribunal to examine closely.

Clifford Chance will invite the Tribunal to take a legalistic view, through which they ask the Tribunal to be tunnel visioned as to the facts of the matter before them. The Respondent invites the Tribunal to assess the parties' relationship through a more commercial lens, bearing in mind also of how business is conducted in the relevant parts of the world, i.e. Turkey/Azerbaijan, to determine the existence of an Overarching Agreement. Establishing the existence of this Agreement is the first step in fairly resolving the ongoing disputes between the parties. We also invite this Tribunal to delay publication of its award until it has had the opportunity to consider the contents of the SOS award, which is expected to be published at any time.

We fully appreciate the challenges before the Tribunal and both we and the Respondents apologize sincerely for not being able to assist the Tribunal in a more productive manner. We continue to be on the record and are instructed to pass on any messages to the Respondents. Furthermore, if the Tribunal has any particular questions that they would benefit from putting to the Respondents, we remain at hand to assist as best we can."

3.25. The arbitral tribunal responded on 29th September 2020 stating that: (a) it would give due consideration to the points made in Preston Turnbull's email (whilst taking account of any responsive submissions made by the Claimants); (b) its understanding was that the Respondents would not be represented, and would not be appearing or calling witnesses, at the October 2020 hearing, but Preston Turnbull should confirm the position, and (c) since Preston Turnbull had stated that they remained on the record, the Tribunal would proceed on the basis that all communications and materials related to the proceedings should continue to be copied to Preston Turnbull on behalf of the Respondents and that if the Claimants or Respondents contended that some other course should be followed, they were to inform the Tribunal immediately.

3.26. On 29th September 2020 Claimants served their Skeleton argument on the arbitral tribunal and on Preston Turnbull. On 30th September Preston Turnbull confirmed that the Respondents would not

be represented, and would not be appearing or calling witnesses at the October 2020 hearing. On 1st October 2020 the Tribunal noted that in the circumstances it would be following the guidance in the Habib Bank [2007] 1 WLR 470 and Braspetro [2007] All ER (D) 89 (Jun) cases, and stated that it might impose additional requirements regarding the hearing, in particular that it might wish to question the Claimants' witnesses itself.

3.27. The October hearing took place. The Claimants were represented by Clifford Chance. Witnesses and expert witnesses were brought by the Claimants and were questioned by the Tribunal. The Respondents and their lawyers did not appear. On the 19th and 20th October 2020 the Claimants made their closing oral submissions and answered questions from the Tribunal. However the Respondents did not participate further in the proceedings and did not make written comments in responses to the arbitral tribunal's orders subsequent to the October 2020 hearing.

3.28. The Curator for the Respondent argues that Mr Mansimov's inability to participate in the arbitration proceedings, notably the October hearing, due to the fact that he was incarcerated in a Turkish prison during the Covid-pandemic, coupled with the fact that criminal proceedings against him were ongoing and he was also facing financial difficulties, breached his right to a fair hearing.

3.29. The Chairman considers that the incarceration of Mr Mansimov is undisputed and the added complications caused by the Covid-19 pandemic have been adequately proved. Whether Mr. Mansimov was truly the only the person who knew the workings and dealings between Palmali and SOCAR and whether he was truly incapable of communicating with his lawyers in connection with merits of the London arbitration proceedings is not as clear, and also unclear is the allegation that his health problems at the time were sufficiently serious for him to take decisions. In their note of submissions, the Applicant Companies bring various arguments by reference to the testimony of Mr. Robert Lambert and the supporting documentation exhibited with his affidavit to show that Mr. Mansimov was capable of communicating with his lawyers. For example, Applicant Companies argue that Mr. Mansimov was able to prepare and sign a detailed affidavit in the T&SD Arbitration, even though he was in prison at the relevant time (Robert Ian Lambert affidavit, page 24 para 87(a)); Mr. Mansimov also swore an affidavit on 7th July 2020 for the purpose of the proceedings commenced against him by Sberbank in Malta in which he stated as follows: "[…] I am currently being held on remand at Silivri Closed Prison in Türkiye. I am allowed access to my lawyers […]" (Robert Ian Lambert affidavit page

24 para 87(b)); Mr. Mansimov signed change of address forms to amend the registered address of certain Palmali entities in Malta whilst he was in prison (Robert Ian Lambert affidavit page 24 para 87(c)). Applicant Companies also point out that Preston Turnbull LLP confirmed that Mr. Mansimov had access to his lawyers whilst he was in prison. Here they refer to the email of Preston Turnbull to the arbitral tribunal dated 29th June 2020, in which they sought "additional time to liaise with our clients and their Turkish lawyers to obtain Mr Mansimov's response from prison" (Robert Ian Lambert affidavit page 24 para 87(e)). Applicant Companies also contest the gravity of the medical condition of Mr Mansimov with reference to the expert opinion from Dr. Anthony Peel.

3.30. However, even if the above allegations made by Respondent were to be considered sufficiently proved, upon a review of what took place in arbitral proceedings, in the Chairman's view, it cannot be safely concluded that there has been a breach of the right to a fair trial by the arbitral tribunal. In particular, the Chairman notes that although in their email of 29th September 2020, Preston Turnbull LLP highlight the difficulties faced by Mr. Mansimov and the difficulty they faced in dealing with their client due to his incarceration in Turkey and his alleged lack of funds, they did not request an adjournment of the October hearing. On the contrary they suggested that the arbitral tribunal may proceed in the manner they set out in their email message above. They also confirmed that they continued to be on record and were thus still the legal representatives of the Respondents at the time of the October hearing. It was only after the October hearing, on 6th November 2020, that Preston Turnbull gave notice that they were coming off the record as the Respondents' legal representatives. Here they asked not to copied with any further correspondence and provided the contact details of the Turkish legal team including Caka Kul and Isenbike Bilgili that testified in these proceedings. The Chairman considers that the failure to expressly request an adjournment of the October sitting at a time when Mr Mansimov was still represented by his own legal counsel in the arbitration proceedings, and the impression given that to the arbitral tribunal that it was to go ahead with the hearing, is prejudicial to his argument that his right to a fair hearing was breached. The situation might have been different if the arbitral tribunal was faced with a duly substantiated request for an adjournment of the October hearing and the arbitral tribunal refused to grant it, but the email of 29th September 2020 suggested that the October sitting should go ahead with the arbitral tribunal being invited to take note of the Respondent's closing submissions in the SOS Arbitration including the skeleton arguments and the transcripts of the SOS Arbitration hearing, and also challenging the Claimants' evidence on the same basis as in the SOS Arbitration.

Furthermore, prior to this, on 29th July 2020, at a time when Mr. Mansimov was already incarcerated, Preston Turnbull LLP had written to the Tribunal to confirm that "The Respondents agree to the revised Procedural Timetable as proposed by the Claimants." That timetable reconfirmed that the hearing would take place on 5 - 21 October 2020 (see Robert Ian Lambert's affidavit page 14 paragraph 51).

3.31. In its award the arbitral tribunal itself gives its reasons for proceeding with the October hearing in the absence of the Respondents. At paragraphs 62 and 63 the arbitral tribunal notes as follows:

> *62. It is a matter of regret that the Respondents did not appear at the October 2020 hearing, because the Tribunal had, on a number of occasions, encouraged the Respondents to participate fully in the proceedings. Nonetheless, the Tribunal was satisfied that it was appropriate to go ahead with the hearing in the absence of the Respondents, in particular for the following reasons:*
>
> *a. The Respondents had been, through their lawyers, on notice of the October 2020 hearing since it was fixed a year previously, and were actively participating in the proceedings until shortly before the hearing. They would have been fully aware of the hearing, and steps leading up to it.*
>
> *b. There was no application by Respondents to adjourn the hearing. Preston Turnbull's message of 29 September 2020 was premised on the hearing going ahead, and made no suggestion that it should be postponed.*
>
> *c. It is, of course, extremely unfortunate for the Respondents that Mr Mansimov has been detained by the Turkish authorities. The possible difficulties which this may have caused were kept in mind by the Tribunal, who made every reasonable allowance for his difficulties. It has not been explained by the Respondents if any steps could have been taken to permit him to participate remotely in a hearing. Importantly, there has been no suggestion that postponing the October 2020 hearing would make it any more likely that Mr Mansimov could participate. Indeed, Preston Turnbull's message of 29 September 2020 states that "...it is impossible to estimate when Mr Mansimov would be at liberty to attend a hearing".*
>
> *d. Whilst Mr Mansimov's absence from the hearing was regrettable, the Tribunal had a sworn affidavit containing his evidence. In so far as the Respondents contend that they have been prejudiced by his non-attendance, it could equally be said that Claimants have been prejudiced by not being able to cross-examine him.*
>
> *e. The Tribunal has taken into consideration what has been said on behalf of the Respondents about their financial difficulties. Without seeking to*

minimise the possible impact of such difficulties, the Tribunal has not been provided with any detailed, up to date information as to the Respondents' finances, and cannot assess whether such difficulties have impacted upon the Respondents' participation in these proceedings. The Claimants have drawn attention to recent participation by a Palmali entity in litigation in the English Commercial Court against Litasco SA (Palmali Shipping SA v Litasco SA - in which judgement was given on 1 October 2020:[2020] EWHC 2581(Comm)), which, the Claimants submit, suggests that the Palmali Group can finance litigation when it wishes to do so. Furthermore, there has been no suggestion from the Respondents that they would be in any better position to finance their participation if progress in this arbitration was delayed.

f. The Tribunal has before it a considerable amount of material setting out the Respondent's position. The Respondents have provided detailed statements of a case, and witness statements in this arbitration. Furthermore, as explained above, the Tribunal has, at the Respondents' request, taken account of Palmali's detailed written submissions, and transcripts of the witness evidence in the SOS Arbitration, covering identical issues regarding the existence of the Overarching Agreement.

g. Finally, up until 5 November 2020, after the hearing had taken place, the Respondents had the benefit of lawyers on the record. Steps were taken to ensure that Preston Turnbull, on behalf of the Respondents, were kept informed of all developments relating to the proceedings. Subsequently, the Respondents' representatives have been copied in on all correspondence relating to the arbitration. Before and after Preston Turnbull coming off the record, the Respondents have also been given numerous opportunities to comment on matters relating to the proceedings, and those opportunities, since at least 29 September 2020 have not been taken up.

63. The Tribunal adopted the following approach, given the Respondents' absence from the hearing:

a. The Claimants were required to prove their case in the normal way, on the basis of detailed submissions and evidence. The procedure followed was not a summary or default process.

b. As explained above, the Tribunal took due account of the materials provided on behalf of the Respondents in these proceedings, and the materials from the SOS Arbitration which the Respondents asked for the Tribunal to consider.

c. The Tribunal kept in mind the guidance given in the Habib Bank and Braspetro cases, directing Clifford Chance to identify and explain the Respondents' case on key issues, and to draw the Tribunal's attention to points which might be to the benefit of the Respondents.

d. The Tribunal itself questioned Claimants' witnesses, and sought to test the Claimants' case.

3.32. It should also be noted that the arbitration proceedings had commenced two years before, in May 2018, and both sides had filed pleadings and witness statements. In circumstances where Preston Turnbull LLP had told the Tribunal that "it is simply impossible to estimate when Mr Mansimov would be at liberty to attend a hearing before the Tribunal" (Exhibit RIL-34) the arbitral tribunal was entitled to consider fairness for both Parties and could not be expected to stay and delay the proceedings indefinitely, particularly in circumstances where the Respondents themselves had not made an express request for an adjournment of the October hearing and the lawyers of the Respondents were still on record.

3.33. Finally, given that the burden of proving a breach of the right to a fair trial lies with the Respondent, the Chairman notes that the best evidence as regards the allegations made by Respondent, would have been the testimony of Mr. Mansimov himself. For example in relation to the assertion made by witness Nuray Perker that "Mr. Mansimov is the only person who was privy to the details of the partnership between Palmali and Socar and the business between the two entities" (an allegation which the Chairman does not find convincing) Mr. Mansimov could have explained what knowledge he had on the dealings between Palmali and Socar which were not known to members of his management team and staff. However, Mr. Mansimov did not testify in these recognition proceedings. At the sitting of 28th March 2023, the Curator for Respondent requested that Mr. Mansimov be allowed to file a witness statement. However, after the Applicant Companies objected to such request and the lawyers of the Parties were allowed to discuss the matter with the foreign counsel of the Parties, the request by the Curator that Mr Mansimov be allowed to testify in these proceedings was then withdrawn.

3.34. In view of all the above considerations, it is the Chairman's view that the Respondent has not sufficiently proved that the arbitral tribunal breached his right to defend himself and that the arbitral award should therefore be denied recognition in Malta on grounds of public policy in terms of Article V(2)(b) of the New York Convention".

15. L-atti juru li ma saret l-ebda talba lill-arbitri sabiex is-seduti ta' Ottubru 2020 ikunu posposti. Seduti li kienu ilhom żmien li ġew iffissati biex jinstema' l-każ fil-meritu. Għalkemm id-ditta ta' difensuri tal-appellant (Preston Turnbull) bagħtet tgħarraf lill-arbitri li l-appellant ma kellux il-mezzi finanzjarji sabiex iħallashom, xorta baqgħu fil-każ tant hu hekk li f'email tad-29 ta' Settembru

2020 għamlu sottomissjonijiet relatati mal-każ. Imbagħad fit-30 ta' Settembru 2020 id-ditta tal-avukati li kienet qiegħda tieħu ħsieb l-interessi tal-appellant u Palmali, infurmat lill-arbitri li ma kinux ser jattendu għas-seduti miftehma ta' Ottubru 2020 relatati mal-meritu tal-każ. Kienet deċiżjoni tad-ditta ta' avukati li ma jipparteċipawx fis-seduti *online* li fihom instemgħu provi dwar il-meritu. Rilevanti wkoll li l-appellant kien xehed permezz ta' affidavit u l-appellati ma kellhomx l-opportunità li jagħmlulu kontro-eżami. Madankollu t-tribunal ta' arbitraġġ xorta ħa in konsiderazzjoni dik il-prova. Inoltre, Preston Turnbull baqgħet tiġi infurmata b'dak kollu li kien għaddej fil-proċeduri u tingħata materjal relatat mal-proċeduri ta' arbitraġġ. M'hemmx prova li l-appellant jew il-kumpanija Palmali għamlu xi ħaġa sabiex għas-seduti li saru f'Ottubru 2020 jattendi rappreżentant tagħhom jew biex ikunu assistiti minn avukati oħra. Għalkemm l-appellant kien arrestat, mhemmx provi li l-kumpanija tiegħu waqfet topera. Fl-ebda stadju tas-smigħ matul ix-xahar ta' Ottubru, ma saret xi talba minn Preston Turnbull dwar is-smigħ minkejja li sa dak iż-żmien *on record* baqgħu l-avukati tal-appellant u Palmali.

16. Kien fis-6 ta' Novembru 2020 li Preston Turnbull tat avviż li ma kinitx ser tkompli tassisti lill-appellant u Palmali u talbu lit-tribunal tal-arbitraġġ biex ma jibqax jibgħat korrispondenza lilhom u minflok jibagħtuha lil Isenbike Bilgili, Caka Kul, Nuray Perker, u Zihni Bilgehan. It-Tribunal tahom l-opportunità li jikkummentaw dwar il-posizzjoni wara li ħarġet Preston Turnbull, iżda ma jirriżultax li kien hemm reazzjoni.

17. Apparti l-fatt li qalu li ma kienx magħruf meta l-appellant seta' jattendi għal seduta, mhemmx provi li l-appellant ipprova jagħmel xi arranġamenti differenti sabiex jipparteċipa fl-abritraġġ. Inoltre, lanqas mhemm provi dwar il-qagħda finanzjarja li l-appellant igħid li sab ruħu fiha. Issemmiet ukoll il-qagħda ta' saħħa tal-appellant. Dwar dan fiż-żmien rilevanti meta kellhom isiru s-seduti għall-provi dwar il-meritu, ma jirriżultax li Preston Turnbull għamlet xi talba. Lanqas m'hemm prova li l-appellant kien qiegħed jirċievi xi kura medika jew kien fl-impossibilità li jikkomunika ma' Preston Turnbull jew persuni oħra ta' fiduċja tiegħu jew uffiċjali fil-kumpanija Palmali. Inoltre, quddiem ċ-Chairman taċ-Ċentru dwar l-Arbitraġġ ta' Malta, l-appellant ingħata l-opportunità li jixhed u jagħti l-verżjoni tiegħu dwar dak li ġara u fiex sab ruħu iżda eventwalment għażel li ma jixhedx.

18. Magħmula dawn il-konsiderazzjonijiet, ir-raġunament u deċiżjoni taċ-Ċhairman fir-rigward tal-allegazzjoni tal-appellant li ma kellux smigħ xieraq fil-proċeduri tal-arbitraġġ f'Londra, huma flokhom.

<u>Deċiżjoni</u>.

Għal dawn il-motivi tiċħad l-appell u tikkonferma d-deċiżjoni tac-Chairman taċ-Ċentru tal-Arbitraġġ, bl-ispejjeż kontra l-appellant.

Mark Chetcuti Prim Imħallef	Giannino Caruana Demajo Imħallef	Anthony Ellul Imħallef

Deputat Reġistratur
ss