MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF
PHILIP SCIBERRAS

Seduta tat-8 ta' Jannar, 2010

Appell Civili Numru. 20/2009

HSBC Bank Malta plc

vs

Bank Centrali ta' Malta

Il-Qorti,

Fit-8 ta' Lulju, 2009, it-Tribunal Arbitrali fic-Centru Malti ta' l-Arbitragg ippronunzja s-segwenti Lodo fl-ismijiet premessi:-

> **"A. Introduction**
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> 1. **By Notice of Arbitration** filed on the 27th October 2008, the claimant, HSBC Bank Malta p.l.c.[1] referred a dispute it had with the respondent, The Central Bank of Malta[2], to

[1] Hereinafter abbreviated as HSBC
[2] Hereinafter abbreviated as CBM

arbitration having agreed beforehand with the respondent on the composition of the Panel.

2. On the 13th September 2007 the parties entered into a contract for the Frontloading of European Banknotes and Coins[3] in anticipation of the adoption of the Euro by Malta.

3. On the 30th November 2007 a burglary took place at the Balzan Branch of HSBC when the sum of EUR 1 million was stolen.

4. The dispute concerns the issue of risk for the loss of frontloaded Euro cash delivered to the claimant by the respondent subsequent to the said armed robbery which occurred at the Balzan branch of the claimant.

5. Claimant contends that the Agreement makes no express provision on the issue of risk and who is to bear the risk of destruction, loss or theft of the front loaded Euro cash prior to the Euro changeover date and that consequently in accordance with the provisions of the Civil Code, the risk of loss, destruction or theft rests with the respondent as owner of the frontloaded Euro cash at the time of the robbery.

6. The claimant is requesting the following relief or remedy:

(i) A declaration and decision that the Agreement contains no express provision which regulates the issue of risk of loss, destruction or theft of the front loaded Euro cash delivered by the respondent to the claimant pursuant to the Agreement;

(ii) A declaration and decision that the claimant as depositary of the frontloaded Euro cash is not liable for the theft of frontloaded Euro cash from

[3] Hereinafter abbreviated as The Agreement

the Balzan Branch which occurred on the 30th November 2007 and that consequently the respondent must suffer any loss resulting from the theft;

(iii) Consequent to the above, a declaration and a decision that the respondent had no right at law to debit the claimant's account and appropriate the sum so taken.

(iv) An Order whereby the respondent is condemned to pay and refund to the claimant (i) all amounts debited from claimant's account with the respondent (i.e. the sum of Lm429,300 equivalent to €1,000,000) together with interest from the 30th November 2007 up until 24th December 2007 amounting to the sum of Lm1,196.32,9 (equivalent to €2,786.68) and (ii) interest at the applicable rate according to law on the amount of €1,002,786.68 from the 24th December 2007 up to date of effective payment.

With costs.

7. **The Statement of Claim** also filed by the claimant on the 27th October 2008 states:

(a) The parties have on the 13th September 2007 entered into the Agreement which was intended by the parties to regulate the preparations necessary for the Euro cash changeover in Malta on the 1st January 2008.

(b) Subsequent to the conclusion of the Agreement, the claimant submitted an order to the respondent for a total amount of Euro 414,251,055 and thereafter the respondent delivered Euro cash to the claimant as requested, which cash was, on the strict instructions of the respondent, kept separate from the claimant's own funds until 1st January 2008.

(c) In accordance with Article 13 of the Agreement, ownership of the front loaded Euro cash remained vested in the respondent and such ownership would only be transferred to the claimant on the day the Euro was adopted on 1st January 2008.

(d) On the 30th November 2007 an armed robbery occurred at the Balzan branch of claimant which resulted in the theft of one million Euro (Euro 1,000,000) of the frontloaded Euro cash. Due notification was given by the claimant to the respondent in accordance with Article 8 of the Agreement.

(e) Disputes have arisen between the parties relating to the risk of loss or theft of the said amount of one million Euro.

(f) The claimant contends that the Agreement makes no express provision on the issue of risk and who is to bear the risk of destruction, loss or theft of the front loaded Euro cash prior to the Euro changeover date and that consequently in accordance with the provisions of the Civil Code, the risk of loss, destruction or theft rests with the respondent as owner of the front loaded Euro cash at the time of the robbery.

(g) The claimant contends that on the 24th December 2007 the respondent has illegally debited the claimant's account with the respondent in the sum of Lm429,300 (equivalent to €1,000,000) together with interest from 30th November 2007 in the sum of Lm1,196.32 (equivalent to €2,786.68).

8. The claimant submitted the following documents with its Statement of Claim:

Doc A: copy of email correspondence dated 24th July 2007 between Charles Saliba at CBM and Patrick Lanzon at HSBC with attachments.
Doc A1: first draft frontloading agreement;
Doc A2: first draft annexes to above;
Doc A3: draft sub-frontloading agreement;
Doc A4: first draft Notes Held to Order Agreement;
Doc B: copy of email correspondence between Paul Ciangura at CBM and Patrick Lanzon at HSBC with attachment;
Doc B1: copy of letter attachment with above;
Doc C: copy of email correspondence between Paul Ciangura at CBM and Patrick Lanzon at HSBC;
Doc D: copy of signed Frontloading Agreement signed 13th September 2007;
Doc E: copy of letter dated 5th November 2007 sent by Paul Ciangura at CBM;
Doc E1: copy of draft side letter attached to letter dated 5th November 2007 sent by Mr Paul Ciangura at CBM to HSBC;
Doc F: copy of letter dated 7th December 2007 sent by Mr Shaun Wallis to Governor CBM;
Doc G: copy of letter dated 12th December 2007 sent by Mr Michael C Bonello to Mr Shaun Wallis;
Doc H: copy of letter dated 14th December 2007 sent by Dr Max Ganado and Dr Louis Cassar Pullicino for HSBC to the Governor CBM;
Doc I: copy of letter dated 21st December 2007 sent by Dr Louis Cassar Pullicino for HSBC to Governor CBM;
Doc J: copy of letter dated 28th December 2007 sent by Dr Louis Cassar Pullicino for HSBC to Governor CBM;
Doc K: copy of letter dated 18th February 2008 sent by Dr Louis Cassar Pullicino for HSBC to Governor CBM;
Doc L: copy of letter dated 21st February 2008 sent by Dr Pio Valletta for Governor CBM to Dr Louis Cassar Pullicino.

9. The respondent filed a **Statement of Defence** on the 12th November 2008 contending that the loss of this cash is to be borne by HSBC for the following reasons:

(a) The "Guideline of the European Central Bank" copy of which is attached as Document A1 forms an integral part of the "Contract for the Frontloading of the Euro banknotes and coins".

(b) This is borne out by the fact that the said Frontloading agreement refers repeatedly to ECB Guideline" (Vide Art 1, 3, 6 of this Guideline).

(c) According to Article 14 of the said Document A1, it is stated quite clearly that eligible counterparties (in this case HSBC) shall bear the risk of destruction, loss, theft and robbery of frontloaded euro bank notes and coins from the moment when such bank notes and coins leave the vault of the future Eurosystem NCB[4]".

(d) Consequently the main point at issue is that according to the contract for the Frontloading of the bank notes and coins coupled with the application of the terms and conditions of the Guideline Document A1 which forms an integral part of the Frontloading agreement the loss of the said Bank Notes and coins as a result of the robbery shall be borne solely and exclusively by HSBC.

10. As a result of the above Respondent claimed that:

"The stolen money which was at the time of the robbery in the legal possession of HSBC who *(sic)* is to suffer this loss in terms of the Frontloading Agreement and Guideline mentioned above."

[4] National Central Bank

And

"Furthermore CBM as a logical legal consequence of the above had the right to debit on 24th December 2007 HSBC's account with CBM in the sum of Lm429,300 equivalent to €1,000,000 together with interest from 30th November 2007 in the sum of Lm1,196.32 equivalent to €2,786.68".

11. Respondent filed the following documents with the Statement of Defence:

Doc A1: Guideline of the ECB on certain preparations for the Euro cash changeover and on frontloading and sub-frontloading of Euro banknotes and coins outside the Euro area.
Doc B: Pledge Agreement over eligible collateral;
Doc C1: copy of letter dated 4th December 2007 sent by Philip Farrugia at HSBC to Euro Cash Changeover project Team;
Doc C2: copy of a letter dated 7th December 2007 sent by Shaun Wallis at HSBC to Commissioner of Police;
Doc. C3: copy of letter dated 2nd January 2008 from David Pullicino at CBM to Shaun Wallis in reply to a letter by Ganado & Associates dated 28th December 2008;

12. A preliminary meeting was convened by the Panel for the 27th November 2008 and several sittings were accordingly scheduled and held. Meanwhile, the claimant filed three affidavits on the 9th December 2008 by Patrick Lanzon, Mark Azzopardi Bencini and Mario Bartolo respectively. Subsequently, Dr Stephanie Sciberras, legal counsel to the respondent, filed two affidavits on the 12th January 2008 - one by David Pullicino and one by Godfrey Huber

B. Evidence

1. Patrick Lanzon

Patrick Lanzon occupies the post of Head of Payments and Cash Management with the claimant. He stated that he was informed by Paul Ciangura at CBM that CBM wished to proceed with the signing of the Frontloading Agreement prior to obtaining the clearance of the European Central Bank (ECB) on the understanding that all relevant obligations have been incorporated in the Frontloading Agreement and that therefore the ECB might subsequently only require refinements or clarifications to the Frontloading Agreement. He confirmed that after some further amendments had been made to the initial draft he received a final electronic version from Paul Ciangura on the 6th September 2007 and the agreement was signed by both parties on the 13th September 2007.

He further stated that subsequently Paul Ciangura had written to him by letter dated 5th November 2007 requesting HSBC to review and agree to a Side Letter to be annexed to the original Frontloading Agreement dated 13th September 2007. He claimed this Side Letter imposed further obligations on HSBC which were not previously included in the Frontloading Agreement. He stated that when the robbery occurred at HSBC's Balzan branch on the 30th November 2007, HSBC had not "agreed on, signed and accepted the contents of the Side Letter".

2. Mark Azzopardi Bencini

This witness occupies the post of Branch Manager (Balzan) with HSBC.

He declared that before and on the 30th November 2007 Euro notes delivered at HSBC Balzan

branch were being kept in the vault of the same branch under lock and were kept sealed in order to ensure there is no co-mingling of Euro notes frontloaded by the CBM with other funds held by the HSBC Balzan Branch.

He stated that on the 30th November 2007, at around 12.35pm, armed robbers walked into the HSBC Balzan Branch and requested at gunpoint that he open the vault. "Faced with this irresistible force, I was forced to comply with the request and they escaped with contents from the vault which included Euro one million (€1,000,000) of frontloaded Euro notes".

3. Mario Bartolo

Mario Bartolo occupies the post of Manager Operational Security at HSBC.

Mario Bartolo described in his affidavit how the supply of Euro notes, coins and starter kits (coin packets) was organised prior to €-day, that is 1st January 2008. The total in Euro notes entrusted to HSBC by CBM was €399,000,000 and this was distributed by cash vans under Police escort to HSBC's various branches well in advance on the Euro changeover date "as there would be a higher risk of hold-up in transit if distribution was crammed into the final weeks".

He explains that he was concerned at the way in which CBM was planning to conduct inspections to ensure that frontloaded euro cash was stored separately from HSBC's Euro currency holdings. He requested a list of CBM auditors with a passport sized photo and insisted that each inspector should present a letter of authorisation signed by the CBM Governor.

He subsequently received on the 23rd November 2007 an e-mail from Francis Bugeja, the manager

CBM Internal Audit Office with details of the proposed "snap-checks". He then hand-delivered to the CBM chief auditor a comprehensive list of HSBC branches that held frontloaded cash and the amount of frontloaded euro notes and coins that could be found and inspected in each branch listed.

Mario Bartolo confirmed that all frontloaded euro cash was being kept in a safe/vault environment separate from other cash or property in line and in accordance with the requirements previously specified by the CBM. He stressed that during meetings and in correspondence exchanged, "no one at CBM had ever complained or objected to the fact that HSBC has started to distribute the frontloaded Euro cash to its branches in advance of the Euro adoption date or as to the high value distributed to individual branches".

Mario Bartolo stated that he had examined the closed circuit television (CCTV) footage of the Balzan branch robbery that took place on the 30th November 2007 and declared as the HSBC's security officer that "HSBC's staff at Balzan branch had no choice but to submit to the demands of the armed robbers as to do otherwise would have endangered their lives and those of HSBC customers present on the premises at the time". He further elaborated that in his considered opinion, after over 35 years of security experience, that "the level of logistical organisation, preparedness and determination evidenced in the course of this hold-up is unprecedented in the local scene and could not have been resisted, involving as it did no less than six (6) armed men".

The witness finally referred to, as Document N, a DVD disc showing camera footage which captured episodes of the hold-up[5].

4. Paul Ciangura

This witness, an official of CBM, was called to give evidence by the claimant. He confirmed that he has sent a memo to all the banks on the 28th August 2007[6] advising that CBM "was proposing to move forward with the signing in anticipation of the ECB clearance, assuming that no material changes will be requested". He further stated that on the 14th August 2007 CBM referred the frontloading and the sub-frontloading agreement to the ECB for their approval. On the 4th September 2007 "the ECB gave us their feedback". "On one contract, the sub-frontloading contract, they did not recommend any changes. Regarding the other two contracts[7], they suggested minor changes which we discussed with the banks and they were finally included in the frontloading agreement".

The witness confirmed that the 13th September 2007 frontloading agreement signed with HSBC was in fact approved by the ECB. He then added that the first recommendations were from one of the ECB's committees called *Banko* and that they were not aware that there were various committees in the ECB. "Subsequently we (CBM) received another note from ECB stating that there were still certain items which they would prefer to be included. They requested the contract to be amended again. But they suggested that instead of amending the contract, which has already been

[5] This document was actually filed by Dr Louis Cassar Pullicino for claimant by note submitted on the 15lh January 2009.

[6] Dok B1 with statement of Claim

[7] There was also a contract regulating the relationship between the CBM and the Bank of Italy.

signed and since the coins have already been received by the banks, we could issue either a memorandum of understanding with the banks or a side letter. And we decided to issue a side letter".

5. David Pullicino

This witness is the Deputy Governor of the Central Bank of Malta. In this capacity he was Deputy Chairman of the Central Bank of Malta's ESCB[8] Steering Committee, a committee responsible for monitoring activities relating to the financial system in Malta's preparation and changeover to the Euro. Although the logistics plan related to the frontloading process fell within his responsibilities, "I was however not directly involved in any specific Committee's activities".

David Pullicino stated that he learnt of the robbery at the Balzan HSBC branch on the same day and later became involved in discussions that took place between CBM and HSBC related to the need for extra security and HSBC's requirement to return frontloaded Euro notes to CBM held in excess of requirements.

In cross-examination[9], David Pullicino explained that the changeover process in Slovenia, which was the latest example, was used as a model. He also dwelt on the system adopted for ensuring that on 1st January 2008, the banks had a very large stock of Euro notes available for their customers as it was expected that, within the first fourteen days, 90% of currency in circulation would be exchanged. It was expected of the banks to co-operate in this changeover but no particular financial help was offered to them by the CBM to assist in the distribution and security issues. The

[8] European System of Central Banks
[9] Sitting held 20lh January 2009

banks had to bear all these costs apart from the cost of the original convoy of the Euro notes from the airport to HSBC and Bank of Valletta plc as it was considered more feasible to divert a substantial amount directly to the vaults of these two banks rather than first to CBM and then on to these two banks at a later stage.

David Pullicino also insisted that according to the changeover guidelines, the banks were responsible "from our vaults outwards basically" and quoted Clause 14[10] to the effect that "it is clear that the responsibilities for the frontloaded notes in terms of costs, insurance, security, risk from our vaults outwards was with the banks".

He confirmed that he was involved in the discussions which occurred after the 30th November 2007 robbery and that these centred on issues of security and return of excess cash. He recalled that HSBC requested CBM to bear the cost of the insurance excess and to bear the cost of security outside their branches. It was then agreed to provide at Government's expense one person security outside every branch as, if another robbery took place, it would upset the smooth running of the (changeover) operation. This was provided for the period commencing beginning December until mid-January.

David Pullicino also confirmed that agreement was also reached for HSBC to return 150 million Euro in notes to CBM from the total frontloaded amount of 399 million as HSBC felt 241 million was sufficient.

6. Godfrey Huber

[10] ECB guidelines

Godfrey Huber occupies the post of Director Finance and Banking Division at Central Bank of Malta. This includes the Currency Issue Office.

The witness stated that during the Euro changeover period, he headed the Euro Cash Changeover Project Team. This team was responsible for the procurement and frontloading of euro notes to banks to replace the Maltese currency in circulation at the time of changeover. To this end, the Euro Cash Subcommittee was formed headed by Paul Ciangura, Senior Manager CBM. The subcommittee had the role of conducting consultations and entering into arrangements with the credit institutions with regard to the implementation of the changeover process.

The witness recalled that on August 9th 2006 he gave a presentation of the European Central Bank (ECB) Frontloading Guideline. "The aim of my presentation was to highlight the exact requirements set out by the ECB with regard to frontloading and sub-frontloading of Euro banknotes supplies by the Eurosystem".

Godfrey Huber further stated that on the 30th November 2007, he received a phone call from Patrick Lanzon at HSBC informing him about the robbery at the Balzan HSBC branch and that an amount of around €1,000,000 in frontloaded Euro banknotes had been stolen. This was then confirmed in writing in terms of Article 8 of the frontloading contract. "Following the telephone call, I immediately informed top management and proceeded to call the European Central Bank (ECB) in line with the requirements set out in Article 9.3(a) of the Frontloading Guideline. Subsequently after having consulted with the ECB the procedure laid down in Article 4.10 of the Frontloading Guideline was implemented whereby HSBC was debited with the nominal value of the

stolen banknotes. In terms of the Guideline this amount was due to Banca D' Italia that had supplied the euro banknotes".

In cross-examination[11] Godfrey Huber gave some background to the pre-changeover arrangements. He confirmed that it was a *"sine qua non"* for the banks to participate in the changeover process. CBM never considered the scenario where one of the banks might have refused to participate. He also confirmed that no incentives or remuneration or compensation was offered to the banks.

He admitted that the banks had in fact raised the issue about the cost of transport, storage and staff.

As to the presentation he had given in August 2006, Godfrey Huber explained that the scope of the presentation was to clarify that the ECB guidelines were to be the main rules that were to guide this process. The CBM was obliged to follow the Guideline and to apply it rigidly with no room for interpretation. The witness confirmed that at that stage no drafts or contractual terms which were ultimately reflected in the frontloading agreement were circulated or discussed. The agreement was first circulated around March 2007 - perhaps.

7. During the 15th January 2008 sitting, Dr Louis Cassar Pullicino for the claimant filed a note with copies of various email exchanges as well as a copy of the DVD disc indicated by Mario Bartolo in his affidavit.

8. During the 20th January 2009 sitting and following a request by the Panel, Dr Louis Cassar Pullicino for claimants filed a copy of e-mail exchanges between Dr Chantelle Marie Coleiro

[11] Sitting held 15th January 2009

and Pierre Griscti establishing that "HSBC was frontloaded with € notes on the 31st October 2006 *(recte* 2007) and we started distributing cash to our branch network on the 5th November 2006 *(recte* 2007)".

C. Submissions by HSBC

Dr Louis Cassar Pullicino for the claimant filed a note of submissions on the 5th March 2009.

He maintained that:-

i) The Agreement is absolutely silent in the particular issue of risk and thus the risk for the frontloaded Euro cash remains with its owner.

ii) In consequence of the above HSBC was merely a depositary and not liable for the loss resulting from the burglary on the 30th November 2007.

iii) The decision to changeover to the Euro was a Government decision and CBM was charged with regulating the process. From the evidence provided HSBC had no option but to cooperate even though there were costs, direct and indirect, which were not reimbursable. In consequence CBM were in the driving seat throughout the negotiating process and drafted the Agreement after it sought and obtained approval from the ECB.

iv) An analysis of the Agreement reveals that the Guideline was not incorporated in the contract itself. Article 1.1 of the Agreement was intended as a preamble and has the characteristic of a declaration rather than a binding obligation and there is no wording in it that expressly incorporates the whole Guideline in the Agreement. Where the parties desired to incorporate specific clauses of the Guideline they

incorporated these specifically e.g. Articles 6 and 9.

v) The Guideline does provide that contractual arrangements should reflect the various rules and procedures of the Guideline (e.g. Article 10 and 4(9)). However the Guideline is only intended to bind Central Banks. In the absence of an express and full incorporation the parties remain bound by the terms and conditions in the contract between them and not the Guideline except for those articles specifically included.

vi) CBM had requested HSBC to sign a side letter dated *5* November 2007 which sought to "clarify" article (1) of the Agreement to effectively incorporate the Guideline in the Agreement and "inter alia" a further clause relating to the risk for destruction, loss, theft and robbery. HSBC maintains these are not clarifications but an attempt to introduce new clauses and this itself is an admission that the Agreement does not contain any agreement transferring risk from the owner (CBM) to HSBC.

vii) The Agreement is clear in this regard and there is no room for interpretation (Article 1002 of the Civil Code) *(Vide Paul Camilleri vs. Joseph Glenville et and Godwin Navarro vs. Saviour Baldacchino).*

viii) Reference is made to Article 11 of the Agreement and HSBC maintains that this is not applicable as this is not a blank cheque, but is subject to the parties agreeing to any changes.

D. Submissions by Central Bank of Malta

Dr Vincent Falzon for the respondent filed a note of submissions on the 6th April 2009.

He maintained that:-

(i) The whole issue depends on whether the parties intended to include the Guideline as part and parcel of the 13th September 2007 Agreement or not.

(ii) It is absurd to hold that Articles 1, 3, 6 and 8 of the Agreement, which refer to the Guideline, do not reflect the intention of the parties to incorporate the Guideline in the Agreement.

(iii) Because provision for payment for the frontloaded cash by HSBC (Art 7); because in virtue of the Pledge Agreement (Doc. B), HSBC is giving collateral for the cash, because the whole transaction was the transfer and delivery of the cash to HSBC for which HSBC had agreed to pay the price, (HSBC) "was the absolute owner and possessor of the frontloaded cash to be used in the banking transaction with its customers."

(iv) To resolve the matter one must have recourse to the legal rules governing the interpretation of contracts. CBM quotes English authors and judgements and concludes that the rule is that when a transaction is contained in more than one document all the deeds relevant to the transaction are to be read together and treated as one document.

(v) "Consequently the various articles of the Guideline mentioned in the September Agreement are to be considered part and parcel of the frontloading transactions."

(vi) Consequently Article 14 of the Guideline applied and the risks fall on HSBC.

(vii) Evidence that there was a presentation to HSBC by CBM regarding the Guideline had been given and not contradicted.

(viii) Reference was made to the side letter and to the fact that HSBC had only refused to sign because it objected to the introduction of the penalty clause.

(ix) For the above reasons CBM maintained that HSBC must carry the risks resulting from the burglary.

E. Established sequence of events

The Panel has established the following principal events in chronological order leading to the issue in dispute:

(a) 13th September 2007: signing of the final version of the Frontloading Agreement between the CBM and HSBC following discussion and various drafts;
(b) 31st October 2006: physical frontloading of Euro notes by CBM to HSBC, Qormi;
(c) 5th November 2007: commencement of distribution of Euro notes by HSBC to branch network;
(d) 5th November 2007: date of request by CBM for HSBC to sign a side letter amending the 13th September 2007 agreement - which included a new clause placing the risk of destruction loss, theft or robbery of frontloaded Euro banknotes on HSBC from the moment they leave CBM.
(e) 30th November 2007: armed robbery at Balzan HSBC Branch resulting in theft of one million Euro of the frontloaded euro cash;
(f) 7th December 2007: letter by Shaun Wallis HSBC refusing to sign the side letter Document El;
(g) 12th December 2007: letter by Michael C Bonello, Governor CBM, advising that HSBC is bound by the Guideline and by Article 14 in particular;

(h) 24th December 2007: CBM debits HSBC's account with the amount of €1,000,000 plus MTL1,196.32 interest. In all €1,002,786.67[12];
(i) 28th December 2007: HSBC through Ganado & Associates requests reimbursement of €1,002,786.67 from CBM;
(j) 18th February 2008: HSBC repeats it request for reimbursement and advises that it has been indemnified by its insurers for the whole amount of the frontloaded Euro notes taken in the Balzan branch armed robbery less €102,765 excess;
(k) 21st February 2008: CMB replies through Farrugia Gatt and Falzon standing firm to the "previously communicated position" and refusing reimbursement;
(l) 27th October 2008: HSBC commences arbitration proceedings.

F Considerations

1. Applicable Law

Article 15 of the Agreement states that the Agreement shall be governed by Maltese Law and Article 14 of the Agreement states, inter alia, that the applicable substantive law shall be Maltese Law.

2. Point at Issue

(i) The point at issue is which of the parties is to bear the risk of the loss of the frontloaded Euro notes resulting from the robbery that took place at the Balzan Branch of HSBC on the 30th November 2007.

(ii) In order to arrive at a decision the Panel has to first decide whether the Agreement deals with the question of who is to bear the risk for such a burglary.

[12] Vide Dok J

(iii) The Agreement consists of fifteen articles and seven annexes, of which Annex 1 is a copy of the Guideline of the European Central Bank of 14th July 2006 ("Guideline").

(iv) The body of the Agreement does not contain any wording that deals with the question of risk for loss of the frontloaded Euro notes in case of robbery etc. However Annex 1 (the Guideline) contains a specific article (Art. 14) which states the "Eligible Counterparties (in this case HSBC) shall bear the risk of destruction, loss, theft and robbery of frontloaded Euro banknotes and coins from the moment when such banknotes and coins leave the vaults of the future European NCB (in this case CBM)".

(v) In the body of the Agreement there are various references to the Guideline (in the Definitions and in Articles 1, 3, 6, 8 and 9). The most important of these is in Article 1.1 which reads:

> "The parties to this Agreement hereby establish that:
>
> The Central Bank shall apply the Guideline of the European Central Bank of 14th July 2006 on certain preparations for Euro cash changeover and on frontloading and sub-frontloading of Euro banknotes and coins outside the Euro areas (EC B/2006/09 - OJ EU L 207/39 (hereinafter referred to as the ECB Guideline)) as the Official Regulations for the cash Changeover."
>
> Among the Definitions in the Agreement is one relating to the Guideline which reads:-
>
> "Guideline means the Guideline of the European Central Bank of 14th July 2006 on

certain preparations for the Euro cash changeover and on frontloading and sub-frontloading of Euro banknotes and coins outside the Euro area (ECB/2006/9) (Annex 1 attached).

The other Articles incorporate specific parts of the Guideline in the Agreement to be binding on the parties to the Agreement.

(vi) It is the CBM's contention that the Guideline forms "an integral part of the Agreement" because the Agreement "refers repeatedly to the Guideline".

(vii) HSBC contends that the Agreement makes no express provision for risk and who is to bear the cost of any loss and consequently the provisions of the Civil Code apply and such risk is to be borne by the Owner.

(viii) The Panel has studied the Agreement and Annex 1 very carefully. It has considered the wording of Article 1.1 of the Agreement. This Article is headed "General" and appears to the Panel not to be one that creates any obligation on HSBC, but merely "establishes" that CBM intends to apply the Guideline as the Official Regulations for the cash changeover. There is no wording that actually incorporates the entire Guideline into the Agreement. Annexes form part of an agreement only when there is a reference to them in the text of an agreement, either as a whole or in part, according to the specific reference in such agreement. In this case, later on in the Agreement (Articles 3, 6, 8 and 9), there is the incorporation of specific Articles of the Guideline into the Agreement and these are specifically made to apply between the parties. If the parties wanted to incorporate the Guideline *"in toto"* into the Agreement, then in the definition when reference to Annex 1 is made, they would have used

wording such as "which document shall form an integral part of this Agreement" or similar. In this case no such wording incorporates Annex 1 *"in toto"* in the Agreement. The panel considers that the text of the Guideline was annexed to the Agreement so that the Articles specifically incorporated in the Agreement (Articles 3, 6, 8 and 9) could be understood.

The Panel also considered that in Article 20 sub-paragraph 2 of the said Guideline it is specifically stated:

"*20 (2) This Guideline is addressed to the NCBs of participating members state"*

and it is therefore clear that when issuing the said Guideline the ECB was establishing the norms which regulate the CBM when preparing for the Euro Cash Changeover.

In fact Article 2 of the said Guideline specified:

"2 (1) The rules and procedures concerning frontloading and sub-frontloading laid down in this guideline shall be applied to frontloading and sub-frontloading arrangements regardless of whether a future Euro system NCB (1) borrows the bank notes and coins be frontloading; or (2) produces or procures them. "

There is no doubt that the Guideline created an obligation on the CBM to follow the terms and conditions stated therein. It is also clear that for all frontloading and sub-frontloading exercises , contractual arrangements must be made between the NCB and the eligible counter parties, in this case HSBC, and there is also no

doubt that the CBM was obliged to follow the said Guideline in establishing arrangements.

However, CBM did not incorporate the Guideline as an integral part of the agreement with HSBC, nor did it make a direct reference to or incorporate clause 14 of the Guideline relating to risk of destruction, loss, theft or robbery.

(ix) The Panel also took into consideration the existence of the "side letter" that the Central Bank sent to the Banks (not only to HSBC) stating that CBM had been requested by the European Central Bank to do so, as it felt that certain articles mentioned in the Guideline "were not spelt out clearly in the Agreement".

In fact the side letter itself in Article 1 states

> "It is clarified that by virtue of Article 1(1) of the original agreement the Credit institution committed itself to be bound by all obligations which according to the ECB Guideline have to be made binding on a counterparty (as defined in the said Guideline and which definition Credit Institution fulfils)".

It then stipulates that: *"further obligations binding on the Credit Institution are additional to the Original Agreement".* Among these is one relating to which party is to bear the risk of destruction, loss, theft or robbery which is similar to Article 14 of the Guideline.

The Panel feels that it must observe that it is not within its jurisdiction to judge whether, as a result of Article 11 of the Agreement, HSBC was obliged to sign the side letter.

> One would have expected that this side letter, as was the case with the drafts leading up to the signed frontloading agreement, would have been the subject of discussions and negotiations between the parties leading to an eventual agreement. This was not the case and CBM expected HSBC to agree and sign the side letter without any reservation. HSBC categorically refused, albeit after the robbery.
>
> The proper action for CBM in this regard might have been, in the opinion of the Panel, one of specific performance, which is not within the competence of this Panel.
>
> However the Panel cannot but infer from the above that the ECB, like the Panel, was also of the opinion that the Agreement as signed did not incorporate the whole text of the Guideline and in particular the clause about risk for loss.

(x) In its submissions CBM strongly emphasised that one has to have recourse to the legal rules governing the interpretation of contracts.

(xi) As stated above, the Agreement is governed by Maltese Law. The Panel therefore referred to Title IV Subtitle I part III of the Civil Code.

(xii) Whether, as claimed by CBM, the intention of the parties should be examined or not in this dispute, depends on whether Section 1002 of the Civil Code applies or not. In other words whether there is room for interpretation or not according to Maltese Law.

Section 1002 reads as follows:-

> **1002.** Where, by giving to the words of an agreement the meaning attached to them by usage at the time of the agreement, the

> terms of such agreement are clear, there shall be no room for interpretation.

This Section has been interpreted at length by Maltese Courts.

The Panel makes reference to John Zammit et vs Michael Zammit Tabona et noe (App. 28th February 1997) where the Court of Appeal interpreted Section 1002 in the following terms:

> "Meta l-kliem ta' l-att huma cari, l-interpretu ghandu joqghod ghal dawn il-kliem u mhux jirrikorri ghall-kongetturi" (Vol. XXXVI,P.I.,p.191). Skond kif osservat il-Prim' Awla tal-Qorti Civili fil-kawza "Sciberras Trigona - vs - Aneico" deciza fis-6 ta' Ottubru, 1883, "quando le parole dell'atto sono chiare si deve stare alla lettera dell'atto." U f'dan il-kaz kif jiddikjaraw u jaqblu l-kontendenti, il-kiem fuq riportati huma cari u univoki - anke jekk huma jaslu ghall-konkluzjonijiet dijametrikament opposti dwarhom. Pero' fl-applikazzjoni tar-regoli ta' interpretazzjoni m'hijiex l-interpretazzjoni tal-kontendenti ghall-kliem tal-konvenzjoni jew is-sens divers minnhom lilhom moghti li jiswa imma hu l-qari oggettiv tal-gudikant li jaghti lill-kliem is-sens ordinarju tieghu fil-kuntest ta' kif gie uzat mill-kontraenti li ghandu jghodd. Jekk ghall-gudikant id-dicitura uzata ma tistghax ma twassalx oggettivament ghal sens car u univoku, hu dan is-sens li ghandu jfisser il-volonta' espressa mill-kontraenti fil-konvenzjoni taht ezami. Hu biss "meta t-termini tal-kuntratt huma oskuri li jrid jigi konsidrat dak li l-partijiet kontraenti riedu ..... Hija norma ta' interpretazzjoni stabbilita mill-ligi, illi meta l-espressjonijiet fil-konvenzjoni skond is-sens lilhom attribwit mill-uzu fl-epoku tal-kuntratt,

> huma cari, m'hemmx lok ghall-ebda interpretazzjoni". (Vol. XXXIV, P.I. p.27)

This judgement was quoted by the Court of Appeal in Vincent Aquilina vs Caterine Micallef (App. 12th May 1997)

In Gloria, mart Jonathan Beacom et vs L-Arkitett u Ingenier Civili Anthony Spiteri Staines (App. 5th October 1998) the Court of Appeal further clarified its understanding of the meaning of Section 1002 in these words:-

> "U meta l-kliem tal-konvenzjoni mehud fis-sens li ghandu skond l-uzu fiz-zmien tal-kuntratt hu car, ma hemmx lok ghall-interpretazzjoni (artikolu 1002). Il-principju kardinali li jirregola l-istatut tal-kuntratti jibqa' dejjem dak li l-vinkolu kontrattwali ghandu jigi rispettat u li hi l-volonta' tal-kontraenti kif espressa fil-konvenzjoni li kellha tipprevali u trid tigi osservata. *Pacta sunt servanda."*
>
> "Illi l-gurisprudenza nostrali hi kostanti filli rriteniet li mhix ammissibbli prova testimonjali kontra jew in aggunta ghall-kontenut ta' att miktub, u hi talvolta ammessa biss biex tikkjarixxi l-intenzjoni tal-partijiet meta din hi espressa b'mod ambigwa". (Vol XXXIV, p.III p. 746).

In Carmelo Grech vs Julian Zammit Tabona noe (App. 4th December 1998), the Court of Appeal explained the importance of honouring the written agreement in these words:-

> "Dan qed jinghad ghaliex fejn il-konvenzjoni tirrizulta cara u mill-volonta tal-kontraenti liberament espressa, tirrizulta inekwivoka, mhux lecitu ghall-Qorti illi tinterpreta tali konvenzjoni jew tattribwilha motivazzjoni ulterjuri li la tirrizulta mid-dicitura tal-ftehim u

> lanqas minn cirkostanzi ohra. Jigifieri fejn is-sinjifikat tal-konvenzjoni jkun car u fejn il-fatti li jkunu wasslu ghal dak il-ftehim kif ukoll fatti sussegwenti ma jpoggux fid-dubju l-volonta tal-kontraenti ma kienx lecitu ghall-gudikant illi jaghti lil dik l-iskrittura sinjifikat divers minn dak liberament espress mill-kontraenti."

This sentiment was also strongly expressed in two judgements delivered by the First Hall of the Civil Court (Mr Justice Philip Sciberras). The first was: Godwin Navarro et noe vs Saviour Baldacchino (PA 28th February 2003) when Judge Sciberras stated:-

> "Is-sens guridiku jiddetta illi l-ftehim bil-miktub ghandu jorbot lill-firmatarji fit-termini stretti tieghu u ma ghandux jigi mibdul jew cirkuwit b'mera assunzjoni soggettiva ta' xi parti fost il-kontraenti."

The second was: Paul Camilleri vs Joseph Glenville et noe (PA 28th April 2003) when Judge Sciberras stated:-

> "Dan anke ghaliex meta l-kontraenti jkunu taw espressjoni bil-kitba lill-volonta' taghhom l-ebda ngerenza ma hi tollerabbli biex timla l-lacuna ta' dak li wiehed mill-kontraenti seta' kellu in forma mentis izda li b'danakollu ma gietx ukoll hekk minnu espressa".

Having considered the fact that earlier in the award it had arrived at the opinion that there was no wording in the Agreement which was of the same import of Article 14 of the Guideline and having arrived at the opinion that the only part of the Guideline incorporated into the Agreement are those to which specific reference is made, the Panel is of the opinion

that Section 1002 of the Civil Code applies and that there is no room for interpretation.

However, even if for the sake of argument, Section 1002 did not apply to this case and therefore Section 1003 of the Civil Code were to apply, the Panel can find no evidence that the parties intended to include Article 14 of the Guideline in the Agreement.

It must be emphasised that the intention must be identical in both parties minds as was so clearly stated in the abovementioned judgements given by Mr Justice Sciberras.

CBM has provided evidence (vide Article 10 to the Preamble of the Guideline) that it was obliged to incorporate "the conditions laid down in the Guideline" in its contracts with the local banks. But as stated in Article 20(2) of the Guideline itself, "The Guideline is addressed to the NCB's of participating Member States," and thus it was not relevant to HSBC, as the Guideline "in toto" was not incorporated in the Agreement.

There is evidence that Godfrey Huber gave a seminar to representatives of the Banks in 2006 concerning the contents of the Guideline but no evidence was produced to the effect that that special emphasis was made on Article 14 during this Seminar.

It was up to CBM to choose whether to incorporate in its contracts all the Guideline or only certain articles. In fact, in the sub-frontloading agreement (Article 7) Article 14 of the Guideline is substantially and specifically set out while in the Agreement no mention or reference is made.

It may be that CBM intended to include, directly or indirectly, Article 14 of the Guideline but for some reason it did not.

On the other hand HSBC was "expected" to participate in the frontloading exercise - "it was a *sine qua non"* (vide Godfrey Huber's evidence in cross examination). It results from the evidence of Paul Ciangura that the draft of the Agreement was prepared by CBM and submitted to HSBC, who do not seem to have had any substantial input in it. HSBC may have noticed that Article 14 of the Guideline has been omitted but it was not its duty to point this out especially, as results from Paul Ciangura's evidence, it is clear that the European Central Bank had approved the wording. It is this wording that was agreed to by HSBC and the Panel has seen no evidence that HSBC had the intention of agreeing to anything other than this wording.

G. Depositary

1. Article 13 in the Frontloading Agreement provides that the ownership in the frontloaded Euro notes is only to be transferred to HSBC on the 1st January 2008.

2. Consequently, if no clause relating to risks for the burglary was never incorporated, directly or indirectly, in this Agreement, from moment of delivery on the 31st October 2007 up to the 31st December 2007,the funds were held by the claimant as custodian and the relationship between the parties is regulated by the institute of deposit as defined in the Civil Code:

> **1891.** Deposit, in general, is a contract whereby a person receives a thing belonging to another person subject to the

> obligation of preserving it and of returning it in kind.

3. The Panel is aware that in this specific case there was no obligation of returning the "thing" in kind as on the 1st January 2008, ownership passed to the depositary. Nonetheless, it is felt that prior to that date the law relating to deposit should be considered as applicable, where not otherwise modified by the contract.

4. The obligations of the depositary are spelt out in Art 1899 and 1900 of the Civil Code:

> **1899.** A depositary must, for the custody of the thing deposited, use the same diligence which he uses for the custody of his own things.
>
> **1900.** (1) The provisions of the last preceding article shall be applied more rigorously:
>
> (a) if the depositary has himself offered to receive the deposit;
> (b) if he has stipulated for a reward for the custody of the deposit;
> (c) if the deposit has been made solely in the interest of the depositary;
> (d) if it has been expressly agreed that the depositary shall be answerable for every kind of negligence

5. The responsibility for theft, loss or destruction is regulated by Article 1901:

> **1901.** A depositary is in no case answerable for accidents resulting from irresistible force, unless he has been put in default for delay in restoring the thing deposited; nor shall he be answerable, in the latter case, if the thing

would have equally perished in the possession of the depositor.

The Panel is convinced that the claimant has reached the degree of diligence expected by Article 1899, however rigorously applied, and despite the fact that none of the parameters in Article 1900 apply.

The Panel is also convinced, having seen the video recording and heard the evidence of Mark Azzopardi Bencini, that the theft qualifies as *irresistible force* in terms of Article 1901. Hence no fault can be attributed to the claimant.

6. The Panel has noted that the claimant had insured the funds held on deposit against theft and other perils and has been indemnified for the loss by its insurers less the excess due under the policy of USD152,000[13] equivalent at time of payment to €102,765[14].

Consequently the claimant can only claim that it has been deprived of the use of its money following the debit to its account effected by the CBM on the 30th November 2007 up to the 24th January 2008 and can only claim interest of the full amount up to that date.

The claimant contends that the insurance re-imbursement proceeds should be eventually transferred to the legal owner of the frontloaded cash at the time of the robbery and the Panel agrees with this contention.

H. Conclusion

The Panel consequently:

[13] Vide Note submitted by claimant on the 15th January 2009
[14] Vide letter by Ganado & Associates dated 18.2.2008 (Document K)

(i) Upholds the first remedy sought by the claimant and declares that the Agreement contains no express provision which regulates the issue of loss, destruction or theft of the front loaded Euro cash delivered by CBM to HSBC pursuant to the said Agreement.

(ii) Upholds the second remedy sought by the claimant and declares that HSBC as depositary of the frontloaded Euro cash is not liable for the theft of the frontloaded Euro cash from the Balzan Branch which occurred on the 30th November 2007 and that consequently CBM must suffer any loss resulting from the theft.

(iii) Upholds the third remedy and declares and decides that CBM had no right at law to debit HSBC's account and to appropriate the sum so taken.

(iv) Partially upholds the fourth remedy sought by the claimant and condemns CBM:

(a) to refund HSBC the sum of €1,000,000.00 (one million euro) debited on the 24th December 2007 saving the right for CBM to accept HSBC's offer of the insurance monies as offered.

(b) to refund HSBC the sum of €2,786.68 (two thousand seven hundred and eighty six Euro and sixty eight cents) also debited on the 24th December 2007 as interest for the period 30th November 2007 to 24th December 2007;

(c) to pay HSBC interest at the rate of 8% per annum on the sum of €1,002,786.68 (one million two thousand seven hundred and eighty six Euro and sixty eight cents) for the period from the 24th December 2007 to the

25th January 2008, date of receipt by HSBC of the insurance monies.

(d) To pay HSBC interest at the rate of 8% per annum on the sum of €102,765.00 (one hundred two thousand seven hundred and sixty five Euro) (insurance excess) and also on the sum of €2,786.68 (two thousand seven hundred and eight six Euro and sixty eight cents) debited by CBM as per (b) above with effect from the 24th December 2007 up to date of final payment.

v) Rejects the claim for costs due to the *sui generis* nature of the dispute and decides that the costs of the Malta Arbitration Centre as well as the fees due to the arbitrators are to be split equally between the parties whilst each party is to bear the cost of its own legal adviser's fees.**"**

Tnejn huma l-aggravji prettament ta' indoli legali proposti mill-Bank Centrali bl-appell tieghu fil-kontestazzjoni tal-lodo tal-panel ta' Arbitri u, cjoe:-

1. Id-decizjoni illi l-ECB Guideline (Annex 1) ma kienx jifforma parti integrali tal-"Frontloading Agreement" bejn il-partijiet mhix bazata fuq principji ta' logika legali. Fuq il-fehma interpretativa tieghu l-Bank appellanti jissottometti illi d-dicitura ta' Artikolu 1 tal-ftehim imsemmi ma jhalli l-ebda dubju illi l-Guideline kien applikabbli fl-interita tieghu, kompriz allura l-artikolu 14 ta' dan l-ahhar imsemmi dokument li kien jghabbi r-riskju tas-serqa fuq il-kontro-parti;

2. Kuntrarjament ghal dak dedott mill-Arbitri, il-ftehim bejn il-partijiet ma kellux minn natura ta' Depozitu, kif jinzel mid-definizzjoni tal-kuntratt kontenuta fl-Artikolu 1891 tal-Kodici Civili;

Fit-twegiba ta’ l-appell tieghu l-Bank HSBC, filwaqt li jikkonfuta l-assunti sottomessi bl-aggravji, appella incidentalment fuq il-kap ta’ l-ispejjez u talab li l-istess jigu riformati fis-sens li dawn jigu interament addossati fuq il-Bank Centrali appellant;

Ma jistax ikun dubitat illi l-punt centrali involut fil-kwestjoni sottomessa ghall-ezami u decizjoni tal-panel ta’ Arbitri kien jirriverti fuq il-konsiderazzjoni jekk il-kondizzjonijiet tal-Guideline tal-Bank Centrali Ewropew kienux, ghall-fatt li l-Guideline jissemma fl-artikolu 1.1 tal-kuntratt tat-13 ta’ Settembru 2007 bejn il-partijiet u ghall-fatt li kien inkorporat bhala wiehed mill-Annexes tieghu, jifformaw *quid unum* mal-pattijiet l-ohra kontenuti fil-precitat kuntratt;

Evidentement, kif kien aspettat, il-materja devoluta kienet maggorment tippartecipa minn konsiderazzjoni tar-regoli ta’ interpretazzjoni applikabbli ghall-kuntratt specifiku intervenut, s’intendi wkoll, b’riflessjoni ghall-kwestjonijiet ta’ fatt rizultanti mill-istruttorja tal-kaz quddiem l-Arbitri;

Huwa opportun illi jigi rilevat, qabel xejn, illi kif jinsab rikonoxxut, “fid-dritt dwar il-materja ta’ interpretazzjoni tal-kuntratt meta l-partijiet ma jkunux spjegaw ruhhom car jew ikunu spjegaw ruhhom ekwivokament, jew fil-kaz li posterjorment ghall-kuntratt jintervjeni avveniment li jkollu bhala konsegwenza kwistjoni li ma tkunx giet preveduta u li hemm bzonn tigi maqtugha, allura l-Qrati jkunu obbligati jinterpretaw il-konvenzjoni, u din ghandha tigi primjerament interpretata skond l-intenzjoni tal-partijiet li jkunu hadu sehem fil-kuntratt u li tkun tidher car mill-kumpless tal-kwestjonijiet” (“**Onor. Edgar Cuschieri *nomine* -vs- Perit Gustavo R. Vincenti**”, Appell Civili, 13 ta’ Frar, 1950). Issokta jigi kkummentat f’din l-istess decizjoni illi “f’materja hekk difficli bhal ma hija l-interpretazzjoni tal-kuntratt, il-legislatur, sabiex jevita l-konsegwenzi fatali dovuti ghall-arbitriju tal-gudikant, nizzel fil-ligi certi regoli direttivi”, ahjar kompendjati fl-Artikoli 1002 sa 1011 tal-Kodici Civili;

Premess dan, hija l-kontenzjoni tal-Bank appellant illi l-artikolu 1.1 tal-Frontloading Agreement huwa daqstant car li ma hemmx lanqas il-htiega ta' xi kjarifika jew interpretazzjoni. Huwa, anzi, jinsisti illi r-rizoluzzjoni tal-punt in kontroversja ma setghetx ma ssirx hlief fuq il-bazi tal-kliem car ta' dak l-istess artikolu, kif avvalorat bid-dokument tal-Guideline anness mieghu. Dan anke ghaliex, skond l-Bank appellanti, l-intenzjoni li donnha, u x'aktarx, tohrog minnhom tikkorrispondi ghall-intenzjoni originali tal-partijiet kontraenti. Hu b'dawn is-sottomissjonijiet li l-Bank Centrali jikkritika r-rikostruzzjoni mill-Arbitri tal-volonta` kontrattwali tal-partijiet, b'dan illi jgib ukoll 'il quddiem, ghall-attenzjoni u analisi ta' din il-Qorti, l-interpretazzjoni diversa tieghu;

Fil-hsieb ponderat ta' din il-Qorti meta fil-process interpretativ ta' l-imsemmi artikolu, jigi applikat il-metodu letterali tal-kliem (Artikolu 1002, Kodici Civili) mhux bilfors li, kif arguwit mill-Bank appellanti, temergi b'tant certezza u immedjat mill-espressjoni adoperata l-volonta kuntrattwali tal-partijiet u b'tali mod li jkun jista' jigi sostenut il-principju "*in claris non fit interpretatio*". Il-fehma ta' din il-Qorti fil-kuntest hi sussidjata mir-riflessjonijiet li jinzlu:-

(i) mill-ko-ordinament tal-klawsoli varji tal-kuntratt u l-aktar dak tar-riskontru, senjalat ukoll mill-Arbitri illi, fejn xtaqu u riedu, il-partijiet ghamlu espressa referenza ghal certi provvedimenti singoli tal-Guideline. Salv ghal kaz fejn ikun jidher li l-volonta negozjali tirrizulta mill-kliem tal-konvenzjoni, manifestament u inekwivokabilment certa, li ma huwiex, fl-opinjoni tal-Qorti, il-kaz hawnhekk, il-procediment investigativ tal-kumpless tal-klawsoli varji hi wkoll necessarja fejn l-interpetazzjoni hi komposta fuq il-bazi letterali tas-singola klawsola, specjalment wahda ta' indoli generali. Dan qed jigi sottolinejat in kwantu t-test ta' certa disposizzjoni, apparentement car, jista' ma jkunx hekk, meta raffrontat mad-disposizzjonijiet l-ohra tal-kuntratt, jew paragunat ma' xi mgieba diversa tal-

kontraenti li intendew ir-rapport ta' bejniethom f'sens iehor, kif hekk proprju jirrizulta mill-osservazzjoni li ssegwi;

(ii) mir-riljev li ghandha tinghata s-*side letter* tal-5 ta' Novembru 2007 (fol. 102), li, incidentalment, baqghet ma gietx sottoskritta b'approvazzjoni mill-Bank HSBC, u fejn il-Bank appellanti ppretenda illi b'zieda ghal Ftehim originali kellu jkun inkorporat bhala klawsola gdida l-addossar tar-"*risk of destruction, loss, theft or robbery of frontloaded euro banknotes and coins*" fuq l-HSBC. Tinsorgi hawn id-domanda illi jekk tabilhaqq il-Guideline kien haga wahda mal-Ftehim u parti integrali tieghu xi htiega kien hemm ghal dik is-*side letter* f'dawk it-termini meta l-istess qaghda kienet diga` prospettata mill-artikolu 14 tal-Guideline, u li fuqu, a propozitu, dik il-klawsola gdida proposta kienet hekk modellata. Evidentement, ir-risposta ghal din il-mistoqsija ma tistax ma ssahhahx il-konvinzjoni illi l-partijiet qatt ma ftehmu jew riedu, fiz-zgur sal-mument tal-perfezzjoni tal-kuntratt, illi l-provvedimenti kollha tal-Guideline ikunu assorbenti *tout ensemble* fil-Ftehim. Almenu, ma jidherx li l-intenzjoni komuni kienet dik li l-okkorrenza tas-serqa li sehhet tkun dixxiplinata bil-mod prevvist mill-Guideline fl-artikolu 14 tieghu u li dan jkun estiz ukoll ghal din l-ipotesi, li ma kienetx lanqas prevvista fl-assenza ta' klawsola kontrattwali espressa *ad hoc*. Verament, ikollu jinghad illi dik il-klawsola gdida mahsuba fis-*side letter* ma kienet xejn intiza biex issahhah dak diga` appattwit daqs kemm li timla l-lakuna ta' dak li thalla barra mill-Ftehim. Ukoll din ir-rilevanza tissokta timmanifesta illi, kuntrarjament ghal dak dedott mill-Bank Centrali, l-artikolu 1.1 tal-Ftehim ma kienx lanqas ghall-istess bank joffri certezza;

Anke minn dawn ir-riflessjonijiet ghandu jikkonsegwi illi d-denunzja mill-Bank appellanti tal-vizzju fir-ragonament tal-panel ta' l-Arbitri mhix sostenibbli ghaliex dak li ghal Bank appellanti huwa is-sens car tal-kliem fl-artikolu 1.1 tal-Ftehim, fir-realta` ma huwiex hekk u ma jikkorrispondix ghal vera intenzjoni presupposta f'dan il-kaz. Intenzjoni din li riedet tkun ukoll komuni, tal-partijiet kollha fil-kuntratt u mhux ma' dak biss li xi wahda mill-partijiet kellha

f'rasha. B'zieda mal-kazistika elenkata fis-sentenza appellata, hi d-decizjoni fl-ismijiet "**John Bartolo *et* -vs- Alfred Petroni *et***", Appell, 7 ta' Ottubru, 1997;

Ukoll, fil-konsiderazzjoni tat-tieni aggravju, lanqas ma jidher li l-obbjezzjoni legali tal-Bank Centrali fih kontenuta hi hekk sostenibbli. Hu dispost fl-artikolu 13 tal-Frontloading Agreement illi t-trapass tal-proprjeta` tal-"*frontloaded euro coins and notes*" kellu jghaddi lil HSBC bhala "*credit institution*" fil-jum li jigi adottat l-ewro, ossija l-1 ta' Jannar, 2008. Jinzel minn dan illi, kif sewwa osservaw l-Arbitri, il-Bank HSBC kellu sa dik id-data d-detenzjoni ta' dawk il-flejjes ghaliex il-pussess taghhom baqa' f'idejn il-Bank Centrali, u tali kien igib il-qaghda ghal dik tal-figura guridika tad-"Depozitu";

Issa f'dan l-istadju l-Bank Centrali jissottometti illi l-Artikolu 1891 tal-Kodici Civili applikat ghall-fattispeci mill-Arbitri jimmilita kontra l-banka appellata. Huwa jibbaza din id-deduzzjoni tieghu fuq il-kliem tad-definizzjoni tal-kuntratt fl-imsemmi artikolu, jigifieri, l-obbligu fid-depozitarju li l-haga "jikkustodiha u jroddha lura in natura";

Hu t-taghlim tal-**Pothier** ("**Del Deposito**", Cap. 1, para. 9) illi biex ikun hemm depozitu "*fa d'uopo che lo scopo principale della tradizione sia unicamente che quegli cui vien fatta la tradizione s'incarichi della custodia di essa. Questo scopo forma il carattere essenziale del contratto di deposito, che lo distingue dagli altri contratti.*" Ara "**Rev. Sac. Don Vincenzo Borg -vs- Giuseppe Caruana *et***", Prim' Awla, Qorti Civili, 5 ta' Ottubru, 1950. Fuq il-bazi ta' dan it-taghlim jikkonsegwi illi, fundamentalment, l-oggett tal-kuntratt ta' depozitu hu l-kustodja u l-konservazzjoni tal-haga fl-istat li d-depozitarju irceviha;

Kif sewwa, imbaghad, rilevat mill-Bank appellat fir-risposta ta' l-appell tieghu, ix-xhieda ta' David Pullicino, Deputy Governor tal-Bank Centrali, tillustra illi f'dan il-kaz din il-

kustodja u konservazzjoni kien hemm ghaliex, u apparti l-fatt li l-*euro coins* u *euro notes* kienu qed jinzammu mill-Bank appellat b'mod separat mill-flejjes l-ohra ta' l-istess Bank, parti sostanzjali tal-flus li kienu *in excess* gew ikkonsenjati lura lill-Bank Centrali;

Determinata din il-qaghda, mill-kumplament jigi osservat illi meta s-serqa minn terzi tal-flejjes mill-Bank appellat tinstab li kienet hekk akkompanjata minn vjolenza, u minaccja ghall-persuni jezisti l-estrem tal-kaz fortuwitu u dan hu kawza ta' ezoneru tad-depositarju mir-responsabilita. Ara Artikolu 1901, Kodici Civili. Ara wkoll is-sentenza fl-ismijiet "**Charles Bianco -vs- Carmelo Ciantar**", Appell Kummercjali, 17 ta' April, 1944. F'din l-eventwalita` japplika l-principju *res perit dominus*;

Kwantu ghall-appell incidentali tal-Bank appellat, kull ma tista' tirrileva din il-Qorti hu li, konsiderat il-mertu tal-kontroversja, ma jistax jinghad illi l-kap ta' l-ispejjez ma giex sewwa definit fis-sentenza appellata. Anzi, l-Qorti hi tal-hsieb illi l-ezercizzju tad-diskrezzjoni adoperat mill-Arbitri ma kellux ikun oggett ta' aggravju, lanqas wiehed incidentali. Kif kellha okkazjoni tosserva din il-Qorti, il-principju generiku stabbilit fl-Artikolu 223(1) tal-Kapitolu 12 mhux assolut jew inflessibbli. Anzi, din ir-regola generali hi soggetta ghal dik id-diskrezzjoni prudenzjali tal-gudikant, f'dik li hi l-ispartizzjoni u temparament ta' l-ispejjez, fejn fil-kaz "jindahlu kwistjonijiet difficli tal-ligi" jew inkella "ghal xi raguni tajba ohra". Ara Artikolu 223 (3) tal-Kodici ta' Procedura u s-sentenza ta' din il-Qorti kif presjeduta fl-ismijiet "**Anthony Balzan *et* -vs- Michael Abela**", 6 ta' Frar, 2008.

Ghal motivi kollha predetti u fis-sens ukoll tal-konsiderazzjonijiet tal-panel ta' l-Arbitri din il-Qorti qed tirrespingi sew l-appell principali tal-Bank Centrali, kif ukoll l-appell incidentali tal-HSBC u, konsegwentement, tikkonferma s-sentenza appellata. Kull parti tbati l-ispejjez ta' l-appell introdott minnha.

< Sentenza Finali >

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