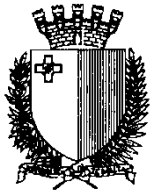

THE COURT OF MAGISTRATES (MALTA)
MAGISTRATE DR. MARSE-ANN FARRUGIA LL.D.

Sitting of Monday 23rd November, 2015

Application number: 225/2013 MLF

Maltajets Limited

vs

MaltaTicket.com Limited

The Court,

Having seen the application filed by the plaintiff company whereby it requested this Court to condemn the defendant company to pay the plaintiff company the sum of six thousand seven hundred and sixty Euro and seventeen cents (€6760.17), which represents the balance left from a larger amount, of the value of tickets sold in the name of the plaintiff company, and which amount is due to the plaintiff company.

Having seen the reply of the defendant company, wherein it pleaded:

1. Preliminarily, respondent company submits that this Court is not competent to hear the dispute on the ground that: in the contract between the applicant and the respondent, the parties agreed that any dispute concerning the interpretation

of this contract shall be decided by a Court of Arbitration under the Arbitration Act Cap 387 of the Laws of Malta; and,

2. The applicant's claims are unfounded in fact and in law, as will be shown during this trial and proved by witnesses and other evidence.
3. Without prejudice to the foregoing, the applicant's claim is frivolous and vexatious, and therefore respondent company is reserving any right to payment of damages due to it.

Having heard the evidence and having seen all the records of the proceedings and documents exhibited in these proceedings, only with respect to the first plea of the defendant company that this Court is not competent *rationae materiae* to hear this dispute.

Having heard the oral submissions made by the defence lawyer of the plaintiff company and the representative of the defendant company;

The Court made the following considerations:

The Facts

1. On the 1st April 2012, the parties entered into a private agreement wherein the plaintiff company appointed the defendant company as *"Exclusive Seller and Exclusive Provider of admission tickets for each Event",* subject to the terms and conditions contained in the same agreement.[1]
2. Clause 6 of this agreement states *inter alia* the following:
   "... ... (iv) the parties consent to submit interpretational disputes to the Malta Arbitration Centre to be resolved according to their regulations.

[1] See the agreement between the parties at page 10 of the court-file.

(v) without prejudice to the above, if legal action is needed to enforce this Agreement, it may only be brought in the Courts of Malta, the prevailing party will be entitled to recover costs. … …"

3. On the 25th April 2012, the plaintiff company and a third party, who is not a party to these proceedings, entered into a memorandum of understanding, to jointly organize the Australian Pink Floyd Show, which was going to be held in Malta on the 14th July 2012, utilizing the services of the defendant company, who was also a signatory to this memorandum of understanding.[2]

4. A dispute arose between the parties, although no evidence was brought before this Court of the facts which led to this dispute.

5. The dispute led to the present proceedings, wherein the plaintiff company is requesting the defendant company to pay it a sum of money, which represents the outstanding balance from a larger amount, of the value of tickets sold in the name of the plaintiff company, and which amount is allegedly due to the plaintiff company.

Considerations made by this Court

As already stated above, this judgment is limited to the first preliminary plea of the defendant company that this Court is not competent *ratione materiae* to decide the dispute before it, because of the arbitration clause existing in the agreement between the parties.

The question which this Court has to decide is whether the claim being made by the plaintiff company in the present proceedings, is a dispute on the interpretation of the agreement, between the parties, in which case, the Malta Arbitration Centre has jurisdiction – which is

[2] See page 11 of the court-file.

the submission of the defendant company – or whether the dispute concerns the enforcement of the agreement between the parties, in which case the Maltese courts are competent – which is the submission of the plaintiff company.

The Court is obliged to determine the preliminary plea of the defendant company on the basis of the evidence it has in the court file. From the acts of the proceedings, especially the initial application of the plaintiff company, it is clear that the plaintiff company is alleging that in terms of the agreement, the defendant company owes it money, and hence the question before the Court is whether this claim for payment by the plaintiff company is justified or unjustified, a question involving the enforcement of the agreement. The plaintiff company is not requesting the Court to interpret the contract because there is a dispute between the parties as to the interpretation of one of its clauses.

The defendant company is submitting that in order for this Court to determine whether the claim for payment by the plaintiff company is justified, it has to interpret Clause 4 of the agreement between the parties, which clause regulates *"payment to the organizer"*, i.e. payment to the plaintiff company. Therefore, according to this argument, the issue before this Court is one of interpretation, and the Malta Arbitration Centre is has jurisdiction to determine the dispute. However, in the opinion of this Court, such a wide interpretation of the phrase *"interpretational disputes"* in Clause 6(iv), stultifies the subsequent Clause 6(v), relating to enforcement of the agreement, because it is obvious that in order to enforce or otherwise the agreement, a Court of law must to some extent to give its interpretation to the clauses of the agreement. If the parties had wanted to subject all kinds of disputes to jurisdiction of the Malta Arbitration Centre, they would have said so.

Hence, in the opinion of the Court, the claim being made by the plaintiff company is one of enforcement of the agreement, in terms of Clause 6(v) of the agreement, and hence the Maltese Court are competent to hear and determine this claim.

Moreover, in the case **Cobra Investments Limited vs. Stephen Caruana**, decided on the 8th November 2013, the Court of Appeal (in its Inferior Jurisdiction)[3] held as follows as regards pleas of defendants of lack of jurisdiction of the ordinary courts because of an arbitration clause in the agreement:

"Is-sub artikolu (3) tal-artikolu 742 tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili (Kapitolu 12 tal-Liġijiet ta' Malta), pero' jipprovdi kif gej – "(3) Il-gurisdizzjoni tal-Qrati ta' kompetenza civili mhijiex eskluza mill-fatt li jkun hemm xi ftehim ta' arbitraġġ bejn il-partijiet, sew jekk il-proċedimenti ta' arbitraġġ ikunu nbdew jew le, f'liema każ il-qorti, bla ħsara għad-disposizzjonijiet ta' kull liġi li tirregola l-arbitraġġ, għandha twaqqaf il-proċedimenti, mingħajr preġudizzju għad-disposizzjonijiet tas-subartikolu (4) u għas-setgħa li għandha l-qorti li tagħti kull ordni jew direttiva."

... ... L-imsemmija disposizzjonijiet kjarament jiddisponu li l-Qorti ordinarja ghandha dejjem kompetenza li tiddeciedi kwestjonijet relatati ma ftehim li jinkorpora fih klawsola arbitrali. Ghalhekk klawsola arbitrali ma teskludix il-kompetenza tal-qorti ordinarja anke jekk ikun gia nbeda procediment quddiem l-arbitragg. Inoltre l-qorti tista tghati kwalunkwe ordni li jidhrilha xierqa fir-rigward tal-istess arbitragg. Jidher li l-ghan tal-imsemmi artikolu 742(3) hu li tigi enfasizzata r-regola li fi kwalunkwe kaz hi dejjem il-qorti ordinarja li hi fdata bl-interpretazzjoni bit-thaddim ta' klawsola arbitrali. Hawnhekk ir-rwol tal-qorti principalment hu regolatorju, pero' ghandha ukoll il-kompetenza li tiddeciedi kwestjoni li jistghu jkunu koperti mill-klawsola arbitrali.

Ghandu jinghad li l-ewwel Qorti, fis-sentenza appellata ghamlet referenza ghall-artikolu 15(3) tal-Kapitolu 387 tal-Ligijiet ta' Malta. Hu rilevanti li f'dan l-istadju jigi riprodott testwalment dan l-artikolu li jipprovdi - "Minkejja kull disposizzjoni li hemm fil-Kodici ta' Organizazzjoni u Procedura Civili, jekk parti fi ftehim ta' arbitragg, jew xi persuna li taghmel it-talba permezz jew bis-setgha tal-parti, tibda xi procedimenti legali f'qorti kontra

[3] *Per* Judge Gino Camilleri.

kull parti ohra fi ftehim ta' arbitragg jew xi persuna li taghmel it-talba permezz jew bis-setgha ta' dik il-parti, dwar kull haga miftehma li tigi riferita ghall-arbitragg, kull parti f'dawk il-procedimenti legali tista` f'kull zmien qabel ma tressaq xi eccezzjonijiet jew tmexxi mod iehor fil-procedimenti, titlob lil dik il-qorti li twaqqaf il-procedimenti, u dik il-qorti jew imhallef taghha, kemm –il darba ma jkunx sodisfatt li l-ftehim ta' arbitragg ikun sar inoperattiv jew ma jistax jitkompla, ghandha tordna li jitwaqqfu l-procedimenti. Rikors jista` jsir minkejja li l-kwistjoni ghandha tigi riferita lill-arbitragg biss wara li jigu ezawriti proceduri ohra ta' rizoluzzjoni ta' kwistjonijiet."

Ghalhekk skond dawn il-provedimenti, fil-kaz li parti ghall-ftehim ta' arbitragg, tipprocedi kontra l-parti l-ohra ghall-istess ftehim, quddiem xi qorti, l-parti citata ghandha zmien sa kemm tippresenta n-nota tal-eccezzjonijiet taghha, biex il-procediment quddiem il-qorti jitwaqqaf u tali talba trid eventwalment tigi milqughha. Dan ghandu jitqies bhala terminu perentorju stante li jekk l-imsemmija talba ma ssirx qabel l-imsemmi stadju, l-process quddiem il-Qorti jibqa ghaddej sakhemm il-kwestjoni tigi deciza b'mod finali.

Ghalhekk il-parti li tkun giet citata ghandha l-fakolta' li taghzel jew li tkompli bil-process quddiem il-Qorti ordinarja jew li titlob li dak il-process quddiem il-Qorti ordinarja jitwaqqaf sabiex il-kwestjoni tigi deciza mill-arbitragg. F'dan il-kaz it-talba sabiex il-procediment quddiem il-Qorti jitwaqqaf trid issir tassattivament entro l-imsemmi terminu. Hawnhekk l-artikolu hu ta' natura tassattiva u cioe' t-talba ghat-twaqqif ghandha ssir b'rikors presentat qabel ma jigu presentati l-eccezzjonijiet. Kwindi jekk tali rikors ma jigix presentat il-procediment quddiem il-qorti ordinarja ghandu jibqa ghaddej.

Sewwa ghamlet l-ewwel Qorti li applikat dawn il-provedimenti, li wassluha biex tirrigetta l-eccezzjoni in kwestjoni. L-ewwel Qorti, f'dan ir-rigward, ikkonsidrat li talba ghall-waqfien ta' proceduri quddiem qorti minhabba l-ezistenza ta' klawsola arbitrali, ma tistax titressaq quddiem l-istess qorti per via d'eccezione izda, ghandha issir talba specifika b'rikors qabel ma tigi presentata n-nota tal-eccezzjonijiet. L-ewwel Qorti rriteniet, korretement, li l-artikolu 15(3) tal-Kap. 387 jikkomplimenta l-artikolu 742(3) tal-Kap.12 tal-Ligijiet. Kwindi, fi kwalunkwe kaz, it-talba biex l-ewwel Qorti twaqqaf il-procediment quddiemha ma kelliex issir fin-nota tal-eccezzjonijiet izda kellha ssir qabel ma tigi pesentata l-istess nota. F'dan il-kaz it-talba ghat-twaqqif tal-procediment zgur li ma saritx qabel il-presentata tal-

eccezzjonijiet u kwindi l-istess ghandha titqies li ma saritx fit-terminu li trid il-ligi. Kwindi, skond l-ewwel Qorti, t-talba tal-konvenut ghall-waqfien ta' dawn il-proceduri "hi proceduralment inammissibbli u ghaldaqstant ma tistax tigi milqugha."

Ghalhekk hu car li l-ligi ddelineat norma preciza ta' procedura li ghandha dejjem tigi segwita. Din il-Qorti tqis li, hawnhekk, il-konkluzjonijiet li waslet ghalihom l-ewwel Qorti huma, fi kwalunkwe kaz, gusti u ekwi anke tenut kont tac-cirkostanzi kollha partikolari tal-kaz."

From the considerations of the Court of Appeal, cited above, it is clear that *"(t)he jurisdiction of the courts of civil jurisdiction is not excluded by the fact that there exists among the parties any arbitration agreement, whether the arbitration proceedings have commenced or not, in which case the court, saving the provisions of any law governing arbitration, shall stay proceedings without prejudice to the provisions of sub-article (4) and to the right of the court to give any order or direction."* (Article 742(3) of the Code of Organisation and Civil Procedure – Chapter 12 of the Laws of Malta. Consequently, in the light of this Article and of the considerations in the judgement of the Court of Appeal cited above, the plea of the defendant company that this Court is incompetent *ratione materie,* because of the existence of an arbitration clause between the parties is legally inadmissible. This is because the ordinary civil courts are always competent to determine issues relating an agreement which incorporates an arbitration clause. In such cases, the Civil Court should stay the proceedings or give any order or direction as provided in Article 742(3) of Chapter 12.

Secondly from the very clear wording of the law contained in Article 15(3) of the Arbitration Act (Chapter 387), it is clear that in the case of the filing of a civil case, where the defendant wants to stop the court from continuing hearing the case because of an arbitration clause in an agreement between the parties, he should first of all file an application requesting the Court to stop hearing the case, before he files his reply with containing his pleas in defence or in any other way participates in the proceedings. There can be no doubt that the legislator wanted Article 15(3) to be interpreted in this manner, because Article 15(8) of the Arbitration Act – introduced by Act XXXI of 2002 - provides as follows: *"Upon the filing of an application to stay proceedings in terms of subarticle (3), any time limit for the filing of any statement of defence or other response, whether arising at law or by order of any*

court or tribunal or otherwise, shall be interrupted and shall commence to run again from the date on which the applicant is served with the decision of the Court to dismiss the application, and this irrespective of whether an appeal on such decision is filed by any party."

In this case, the defendant company clearly did not comply with the requirement stipulated in Article 15(3) of the Arbitration Act (Chapter 387), but contrary to what is prescribed in that Article, once the defendant company was notified on the 14th January 2014 with the application initiating these proceedings of the plaintiff company, on the 26th February 2014, it filed its reply containing its pleas – including pleas on the merits – to the claim being made by the plaintiff company. The defendant company never filed an application to this Court to stop the proceedings, due to the arbitration clause in the agreement between the parties – more precisely Clause 6(iv) of the agreement – but instead raised as a preliminary plea in its reply that this Court is not competent to determine the dispute.

In the light of the above considerations, the procedure adopted by the defendant company as regards its first preliminary plea is also legally inadmissible and unfounded at law.

Conclusion

For all these reasons, the Court is rejecting the first preliminary plea of the defendant company, and orders the continuation of the proceedings according to law.

The expenses related to this first preliminary plea and to this judgment are to be borne by the defendant company.

Magistrate **Deputy Registrar**