



**QORTI CIVILI PRIM`AWLA**

**ONOR. IMHALLEF  
JOSEPH ZAMMIT MCKEON**

**Illum it-Tlieta 31 ta` Jannar 2017**

**Kawza Nru. 8  
Rik. Gur. Nru. 408/16 JZM**

**Fimbank plc (C17003)**

*kontra*

**(1) Arex LLP, socjeta` registrata l-Ingilterra bin-numru ta` registrazzjoni numru OC 347513 bl-indirizzi, 112 Princes Garden, London UK, W3 OLJ u 6<sup>th</sup> Floor, 32, Ludgate Hill, London, Ir-Renju Unit ;**

**(2) Dr Joseph Mizzi u P.L. Helen Valenzia li b`digriet tas-26 ta` Mejju 2016 gew mahtura bhala kuraturi deputati sabiex jirraprezentaw lil assenti Atilla Dogan (detenrut tal-passaport numru U 05067748 bl-indirizz Arayoloud Flora, Everlert Fulyo Blk D 37, Atasehir, Istanbul, it-Turkija ;**

**(3) Dr Benjamin Valenzia u P.L. Mario Mifsud Bonnici li b`digriet tas-26 ta` Mejju 2016 gew mahtura bhala**

kuraturi deputati sabiex jirraprezentaw lil assenti Suheyla Dogan (detentur tal-passaport numru U 01523679) bl-indirizz Arayoloud Flora, Everlert Fulyo Blk D 37, Atasehir, Istanbul, it-Turkija ;

(4) Dr Leontine Calleja u P.L. Davina Sullivan li b`digriet tas-26 ta` Mejjju 2016 gew mahtura bhala kuraturi deputati sabiex jirraprezentaw lil assenti kumpannija A.S.D. Enerji Madencilik Petrol Urunleri Sanayi ve Dis Ticaret Anonim Sirketi, bl-indirizz Kayisdagi Caddessi Bilgi, Plaza no 111, Kat 4, Daire 8, Kucukbakkalkoy – Kadikoy, Istanbul, it-Turkija

**Il-Qorti :**

## **I. Preliminari**

Rat ir-rikors guramentat prezentat fl-24 ta` Mejjju 2016 li jaqra hekk :-

1. *Fit-30 ta` Mejjju 2013, il-bank rikorrenti FIMBank p.l.c. (“Fimbank”) dahal fi ftehim mas-socjeta` Arex LLP permezz ta` liema Arex LLP inghatat facilita` bankarja konsistenti f`Uncommitted Revolving Import Trade Finance Facility (ara Dok FIM 1). Dan il-ftehim gie sussegwentement suggett ghal numru ta` emendi: L-ewwel emenda saret fit-30 ta` Novembru 2014 (ara Dok FIM 2), it-tieni emenda saret fit-22 ta` Dicembru 2014 (ara Dok FIM3) u t-tielet emenda saret fl-10 ta` Mejjju 2015 (ara Dok FIM4) (dawn il-ftehemiet, meta jittiehdu flimkien u ser jigu msejha bhala il-“Facilita”). Skont din il-Facilita` s-socjeta` Arex LLP nghatat l-opportunita` li tissellef sa massimu ta` US \$7,000,000. Il-Facilita` giet operata tramite kont bankarju li gie miftuh minn Fimbank bin-numru 004250-CCNT-USD-010, liema kont dejjem gie gestit f`Dollari Amerikani.*

2. *Fit-30 ta` Mejjju 2013, is-socjeta` intimata, A.S.D. Enerji Madencilik Petrol Urunleri Sanayi ve Dis Ticaret Anonim Sirketi (“ASD”) dahlet fi ftehim mal-Fimbank fejn ikkostitwixxiet ruhha bhala garanti solidali flimkien mal-Arex LLP ghall-hlas lura ta` kwalunkwe dejn mhux*

saldat li jista` jkollha sa massimu ta` US \$7,000,000 oltre` l-imghaxijiet u l-ispejjez (ara Dok FIM5). Bl-istess mod, fit-30 ta` Mejju 2013, l-intimati Dogan ukoll dahlu fi ftehim mal-Fimbank fejn ikkostitwixxew ruhhom bhala garanti solidali flimkien mal-Arex LLP ghall-hlas lura ta` kwalunkwe dejn mhux saldat li jista` jkollha sa massimu ta` US \$7,000,000, oltre l-imghaxijiet u l-ispejjez (ara Dok FIM6) (iz-zewg skritturi ser jigu msejha bhala l-**“Garanzija”**).

3. *Ai termini tal-Facilita`, u kif spjegat b`mod dettaljat fl-emenda li saret fl-10 ta` Mejju 2015, l-ammonti mislufin minn Fimbank kellhom jigu mhallsa f`erbgha hlasijiet mensili bejn Mejju 2015 u Gunju 2015 (ara klawzola 6.1 tal-Dok FIM4). Madankollu, id-dejn baqa` ma thallasx skont il-Facilita` u l-ammont pendenti, inkluz l-interessi sas-26 ta` April 2016 kien ta` USD 654,052.98 ekwivalenti ghal €573,227.85 u dan skont ir-rata tal-kambju ta` 1.1410.*

4. *In-nuqqas ta` hlas tad-dejn hawn fuq deskritt, kien jikkostitwixxi Default skont il-Facilita`. B`mod partikolari issir referenza ghall-klawzola 6 tad-dokument FIM1 li jipprovidi:*

*“6.1 The Lender may by written notice to the Borrower terminate its duty to make the Facility available to the Borrower or if the Facility shall have been advanced demand the immediate repayment thereof (together with interest thereon, and all other sums due under this Facility Letter or the Security Documents) on the occurrence of one of the following events:*

*6.1.1 The Borrower and/or Guarantors shall fail to pay to the Lender any amount (whether in respect of principal or interest or otherwise) payable to the Lender under the Facility or any of the documents set out in the Security Documentation clause on the due date of payment”*

5. *Fis-16 ta` Lulju 2015, is-socjeta` Fimbank baghtet ittra lis-socjeta` Arex LLP (ara Dok FIM 7) liema ittra kienet intitolata “Notice of Default Re: Facility Letters dated 3 May 2013, 30 November 2014, 22 December 2014 and 10 May 2015”. F`din l-ittra, Fimbank infurmat lil Arex LLP li l-hlas tad-dejn li kellu jsir taht il-Facilita` ma sarx, bil-konsegwenza li Arex LLP naqset milli tonora l-obbligi kuntrattwali taghha. Fimbank infurmat lil Arex LLP li l-ittra kienet qed tintbaghat bhala Notice of Default ai termini tal-klawzola 6 tal- Facilita`. Fimbank talbet lis-socjeta` Arex LLP thallasha l-ammont ta` USD 602,077.70, liema ammont jinkludi l-imghax sas-16 ta` Gunju 2015, fi zmien sebat ijiem mid-data ta` l-ittra. Fimbank*

*infurmat ukoll lis-socjeta` Arex LLP li l-Facilita` giet itterminata b`effett immedjat. Fimbank kienet precedentement diga` baghtet notice of default lil Arex LLP (Dok FIM 9). Dan il-hlas, sad-data ta` llum, ghadu ma sarx.*

6. *Fis-16 ta` Lulju 2015, Fimbank baghtet ittra lil A.S.D. kif ukoll ittra ohra lil Atila Dogan u Suheyla Dogan, bhala garanti skont il-Garanzija fejn talbithom ihallas id-dejn li gie arrekat mis-socjeta` Arex LLP ai termini tal-Facilita` u cioe` ta` USD 602,077.70, liema ammont jinkludi l-imghax sas-16 ta` Gunju 2015, fi zmien sebat ijiem mid-data ta` l-ittra (ara Dok FIM 8). Fimbank kienet precedentement diga` baghtet korrespondenza lil A.S.D, lil Atila Dogan u Suheyla Dogan titlobhom jhallsu l-ammont dovut skont il-Facilita` (Dok FIM 10- FIM 12). Dan il-hlas, ukoll, sad-data ta` llum, ma sarx.*

7. *Nonostante dawn id-diversi interpellazzjonijiet mill-Bank rikorrenti, l-intimati naqsu mill-obbligi kuntrattwali taghhom li jhallsu l-ammonti dovuti skont it-termini tal-Garanzija. Fimbank ipprocediet biex ipprezentat ittra ufficjali fil-Prim` Awla tal-Qorti Civili fis-6 ta` Awwissu 2015 (numru 2776/15) izda ma sar l-ebda hlas tad-dejn dovut. Illi ghaldaqstant, is-socjeta` Fimbank ma kellhiex ghazla ohra li tipprocedi gudizzjarjament biex tirkupra d-dejn li ma thallasx.*

8. *Fil-fehma ta` Fimbank, l-intimati m`ghandhomx eccezzjonijiet x`iressqu ghal din it-talba.*

9. *L-esponenti jaf personalment il-fatti kif esposti f`din it-talba u qieghed ukoll jahlef kontestwalment it-traduzzjoni ta` dan l-att bil-lingwa Ingliza.*

10. *Jghidu ghalhekk, l-intimati ghaliex din l-Onorabbli Qorti m`ghandhiex:*

10.1 *tiprocedi ghas-sentenza skont it-talbiet ta` Fimbank b`dispensa tas-smiegh tal-kawza ai termini ta` l-artikolu 167 et seq tal-Kap. 12 tal-Ligijiet ta` Malta; u*

10.2 *tiddikjara li Arex LLP kissret l-obbligi kuntrattwali taghha skont il-Facilita`; u*

*10.3 tiddikjara li l-intimati Dogan u ASD, jew min minnhom, kisru l-obbligi kuntrattwali tagghom taht il-Garanzija; u*

*10.4 tiddikjara li l-bilanc dovut lil Fimbank mill-intimati, jew min minnhom, huwa ta` USD 654,052.98 ekwivalenti ghal €573,227.85 oltre l-imghaxijiet applikabbli skont il-Facilita` sa mis- 26 ta` April 2016; u*

*10.5 tordna lill-intimati, jew min minnhom, jhallsu lill-Fimbank l-ammont ta` USD 654,052.98 ekwivalenti ghal €573,227.85 oltre l-imghaxijiet applikabbli skont il-Facilita` sa mis- 26 ta` April 2016.*

*Bl-ispejjez, u bl-imghax skont il-Facilita` mis-26 ta` April 2016 sad-data tal-pagament effettiv kontra l-intimati li huma minn issa ngunti ghas-subizzjoni.*

Rat il-lista tax-xhieda u l-elenku tad-dokumenti prezentati mar-rikors guramentat.

Rat ir-risposta guramentata prezentata fis-27 ta` Gunju 2016 minn Dr Leontine Calleja u P.L. Davina Sullivan bhala Kuraturi Deputati biex jirrapprezentaw lill-assenti kumpanija A.S.D. Enerji Madencilik Petrol Urunleri Sanayi ve Dis Ticaret Anonim Sirketi li taqra :-

*1. Illi l-esponenti fil-prezent mhumix edotti mill-fatti u jirriservaw illi jipprezentaw risposta ulterjuri fi stadju iehor tal-proceduri, jekk ikun il-kaz.*

*2. Salv provi u eccezzjonijiet ulterjuri jekk ikun il-kaz, meta jkun jafu bil-fatti kollha.*

*Bl-ispejjez kontra s-socjeta` rikorrenti.*

Rat il-lista tax-xhieda u l-elenku tad-dokumenti.

Rat ir-risposta guramentata li pprezentaw fl-4 ta` Lulju 2016 Dr Benjamin Valenzia u P.L. Mario Mifsud Bonnici bhala Kuraturi Deputati sabiex jirraprezentaw lill-assenti Suheyla Dogan li taqra :-

1. *Illi f'dan l-istadju l-esponenti mhumiex edotti mill-fatti u ghalhekk jirriservaw illi jipprezentaw risposta ulterjuri fl-istadju meta jkunnu jistghu jaghmlu dana.*

2. *Illi l-esponent permezz ta` posta registrata fil-25 ta` Gunju 2016 baghat kopja tal-atti ta` dan ir-rikors guramentat lil Suheyla Dogan fl-indirizz indikat mis-socjeta` rikorrenti (ara Dok hawn anness u mmarkat bhala Dok. BV1).*

3. *Illi in linea preliminari qed tigi eccepita n-nullita` tal-procedura sommarja specjali adottata taht l-Artikolu 167 et seq tal-Kap. 12 tal-Ligijiet ta` Malta minhabba illi n-notice in bold ma gietx ikkancellata u ghalhekk il-procedura ghandha tigi kkunsidrata bhala wahda ta` rikors guramentat ordinarju u ghalhekk saru dawn l-eccezzjonijiet fiz-zmien indikat fl-istess rikors.*

4. *Illi minghajr pregudizzju ghas-suespost fic-cirkostanzi partikolari tal-kaz fejn qed jigu mharrka kuraturi deputati m`ghandhomx isiru bi procedimenti sommarji specjali ghaliex il-kuratur deputat mhuwiex f'pozizzjoni li jressaq eccezzjonijiet prima facie kif titlob il-ligi minhabba illi hu mhux edott mil-fatti. Ghaldagstant din il-kawza m`ghandhiex tinstema` bi proceduri sommarji sabiex Suheyla Dogan (li hija assenti u s`issa mhux rintraccabli) tinghata smigh xieraq.*

5. *Is-socjeta` rikorrenti ghandha taghti breakdown dettaljat ta` kif waslet biex hadmet is-somma li qed titlob.*

Rat l-elenku tad-dokumenti.

Rat il-verbal tal-udjenza tal-11 ta` Lulju 2016 fejn il-Qorti pprovdiet hekk :-

*In vista tan-natura tal-azzjoni u fuq kollox il-prezenza ta` kuraturi mahtura mill-Qorti li qeghdin jidhru ghal persuni assenti minn dawn il-Gzejjer, il-Qorti mhijiex ser tkompli tqis il-kawza bil-procedura sommarja specjali izda ser tittrattaha bhala kawza bil-procedura ordinarja.*

Rat ir-risposta guramentata li pprezentaw fit-2 ta` Novembru 2016 Dr Joseph Mizzi u P.L. Helen Valenzia Kuraturi Deputati sabiex jirraprezentaw lill-assenti Atilla Dogan li taqra :-

*Illi l-kuraturi qeghdin jaghmlu tentattiv sabiex jikkuntatjaw lil Atilla Dogan fl-indirizz provdut, pero` sal-lum dawn it-tentattivi ghad ma kellhomx ezitu pozittiv u ghalhekk mhumiex edotti ghal fatti tal-kaz.*

*Ghaldaqstant f`kaz li jirnexxielhom jaghmlu kuntatt jirriservaw li, bl-awtorizzazzjoni ta` din l-Onorabbli Qorti, jipprezentaw eccezzjonijiet fi stadju ulterjuri.*

Semghet ix-xiehda u rat il-provi l-ohra li tressqu fil-kors tal-kawza.

Rat id-digriet li tat fl-udjenza tat-28 ta` Novembru 2016 fejn halliet il-kawza ghas-sentenza ghal-lum.

Rat l-atti l-ohra tal-kawza.

## **II. Provi**

Kienet prezentata x-xiehda bl-affidavit ta` **Andrea Batelli**.

Xehed illi fit-30 ta` Mejju 2013, sar ftehim bejn Fimbank plc u l-konvenuta Arex LLP, fejn din inghatat facilita` bankarja konsistenti minn *Uncommitted Revolving Import Trade Finance Facility* skont Dok FIM 1. Il-ftehim originali kien emendata diversi drabi : fit-30 ta` Novembru 2014 (Dok FIM 2), fit-22 ta` Dicembru 2014 (Dok FIM 3) u fl-10 ta` Mejju 2015 (Dok FIM 4). Skont din tal-ahhar, l-ammonti mislufa minn Fimbank kellhom jithallsu lura b'erba` hlasijiet mensili bejn Mejju 2015 u Gunju 2015 (klawzola 6.1 tal-Dok FIM 4).

Skont il-ftehim, Arex LLP nghatat l-opportunita` li tissellef sa massimu ta` US \$7,000,000. Dan is-self kien qed jigi operat tramite kont bankarju li kien miftuh minn Fimbank bin-numru 004250-CCNT-USD-010,

liema kont dejjem gie gestit fid-Dollaru Amerikan. Skont Dok FIM 5, fit-30 ta` Mejju 2013, il-konvenuta A.S.D. Enerji Madencilik Petrol Urunleri Sanayi ve Dis Ticaret Anonim Sirketi (“**ASD**”) ghamlet ftehim ma` Fimbank fejn ikkostitwixxiet ruhha bhala garanti solidali flimkien ma` Arex LLP ghall-hlas lura ta` kwalunkwe dejn mhux saldat sa massimu ta` US \$7,000,000 oltre l-imghaxijiet u l-ispejjez. Fl-istess data, sar ftehim iehor fejn il-konvenuti Dogan dahlu bhala garanti solidali flimkien ma` Arex LLP ghall-hlas lura ta` kwalunkwe dejn mhux saldat sa massimu ta` US \$7,000,000, oltre l-imghaxijiet u l-ispejjez (Dok FIM 6). Is-self baqa` ma thallasx skont il-ftehim, u l-ammont dovut, inkluz l-interessi sas-26 ta` April 2016, kien ta` US \$654,052.98 ekwivalenti ghal €573,227.85 u dan skont ir-rata tal-kambju ta` 1.1410.

Xehdet illi skont klawzola 6 ta` Dok FIM 1, in-nuqqas fil-hlas lura tas-self kien jikkostitwixxi *default* :

*“6.1 The Lender may by written notice to the Borrower terminate its duty to make the Facility available to the Borrower or if the Facility shall have been advanced demand the immediate repayment thereof (together with interest thereon, and all other sums due under this Facility Letter or the Security Documents) on the occurrence of one of the following events:*

*6.1.1 The Borrower and/or Guarantors shall fail to pay to the Lender any amount (whether in respect of principal or interest or otherwise) payable to the Lender under the Facility or any of the documents set out in the Security Documentation clause on the due date of payment”*

Komplet tghid illi fis-16 ta` Lulju 2015, Fimbank baghtet ittra lil Arex LLP (Dok FIM 7). L-ittra kienet intitolata : “Notice of Default Re : Facility Letters dated 3 May 2013, 30 November 2014, 22 December 2014 and 10 May 2015”. Fl-ittra Arex LLP kienet infurmata li l-hlas tad-dejn li kellu jsir taht il-Facilita` ma kienx sar, bil-konsegwenza li Arex LLP naqset milli tonora l-obbligi kuntrattwali taghha. Fimbank infurmat lil Arex LLP li l-ittra kienet qed tintbaghat bhala *Notice of Default* ai termini tal-klawzola 6 tal-Facilita`. Fl-istess ittra, Fimbank talbet lil Arex LLP sabiex thallasha fi zmien sebat ijiem mid-data tal-ittra l-ammont ta` US \$602,077.70, liema ammont kien jinkludi l-imghax sas-16 ta` Gunju 2015. Arex LLP kienet infurmata wkoll illi l-Facilita` kienet qeghda tigi terminata b`effett immedjat.

Il-hlas lura baqa` ma sarx.



Komplet tixhed illi fis-16 ta` Lulju 2015, Fimbank baghtet ittra lil A.S.D., u ittra ohra lil Atilla Dogan u Suheyla Dogan, fejn bhala garanti kienu nterpellati jhallsu fi zmien sebat ijiem mid-data tal-ittra d-dejn ta` Arex LLP skont il-Facilita` u cioe` US \$602,077.70, liema ammont jinkludi l-imghax sas-16 ta` Gunju 2015 (Dok FIM 8). Qabel l-ittri tas-16 ta` Lulju 2015, Fimbank baghtet *notice of default* lil Arex LLP (Dok FIM 9) kif ukoll korrespondenza lil A.S.D, lil Atilla Dogan u Suheyla Dogan fejn intalab il-hlas ta` l-ammont dovut skont il-ftehim. (Dok FIM 10 sa FIM 12).

In segwitu kienet prezentata ittra ufficjali nru 2776/2015 fis-6 ta` Awissu 2015. Pero` l-konvenuti kollha baqghu inadempjenti. Ghalhekk saret din il-kawza.

**Av. Dr. Sarah Engerer** - *legal counsel* ta` l-bank attur ghal dawn l-ahhar hames snin – ikkonfermat illi d-dokumenti a fol 50 sa fol 77 huma kopji tad-dokumentazzjoni originali. Qalet illi Fimbank kellha *uncommitted revolving trade finance facility* ma` l-konvenuta Arex LLP. Bhala *guarantors* kien hemm il-konvenuti l-ohra. F`Mejju 2015, Arex LLP ma baqghetx thallas l-ammonti dovut skont kif patwit. Sas-26 ta` April 2016, hemm bilanc dovut ta` US \$654,042.98 (kapital u interessi). Wara l-presentata tar-rikors guramentat, baqa` ma sar l-ebda hlas. Ipprezentat kopji ta` *statements of accounts* (Dok SE). Spjegat li d-dokumenti a fol 65 sa 77 huma *notices of default* li ntbaghtu minn Fimbank lill-konvenuti fejn intalab il-hlas immedjat ta` l-ammont dovut. Minkejja dawk in-*notices of default*, baqa` ma sar l-ebda hlas.

Fil-**kontroezami**, xehdet illi l-hlasijiet kienu jsiru minn Arex LLP mhux mill-*guarantors*. Il-modalita` tal-hlas kienet determinata fil-*facility agreements*.

### III. **Rizultanzi**

Skont il-ftehim tat-30 ta` Mejju 2013, il-qrati Maltin ghandhom gurisdizzjoni li jisimghu u jiddeciedu din il-kawza. Il-klawsola 15.1 tal-kuntratt tghid :-

*“This Facility Letter shall be governed by and construed in accordance with Maltese law and for the Lender’s exclusive benefit, the Borrower hereby submits to the jurisdiction of the Maltese Courts and waives any objection to Proceedings in the Maltese Courts on the grounds that the Proceedings have been brought in an inconvenient forum.”*

Abbazi tal-ftehim bejn Fimbank u Arex a fol 15 et seq tal-process, jirrizulta li fit-30 ta` Mejju 2013, Fimbank tat lil Arex : *“an uncommitted revolving import trade finance facility...up to a maximum amount of US \$ 7,000,000”* sabiex isir finanzjament *“by way of outward payments up to US \$ 7,000,000 the procurement of coal (the `Goods`) mainly from Ukraine to Turkey (or other acceptable countries), from acceptable supplies ... shall include the financing of any related freight costs covering the delivery of financed goods to end buyers, against presentation of invoice and if applicable a copy of bill of lading ...”* (klawsola 1).

L-ammonti flimkien ma` l-interessi kellhom jithallsu *“within 210 days from drawdown date from sale proceeds received in the Borrower`s account with the Lender...The Facility shall be prepaid in full, with interest immediately upon the non-receipt of payment by the Lender for any reason whatsoever.”* (klawsola 2)

Jirrizulta li l-kuntratt jahseb ghal meta jkun hemm *default*, u cioe` fejn nuqqas ta` hlas ikun raguni ghal Fimbank li ttemm il-facilita`. Ighid :-

*“6.1 The Lender may by written notice to the Borrower terminate its duty to make the Facility available to the Borrower or if the Facility shall have been advanced demand the immediate repayment thereof (together with interest thereon, and all other sums due under this Facility Letter or the Security Documents) on the occurrence of one of the following events:*

*6.1.1 the Borrower shall fail to pay to the Lender any amount (whether in respect of principal or interest or otherwise) payable to the Lender under the Facility or any of the documents set out in the Security Documentation clause on the due date of payment;*

*6.1.2 the Borrower shall fail to duly and punctually perform or discharge any duty or liability under the Facility or any of the Security Documents.”*

Il-klawsola 6 hija kundizzjoni rizoluttiva espressa, li jahseb ghaliha l-**Art 1067 tal-Kap 16.**

Il-Qorti taghmel riferenza ghas-sentenza ta` din il-Qorti (**PA/GC**) tal-10 ta` Gunju 2011 fil-kawza **“Mario Blackman vs Kevin Micallef et noe”** fejn saret riferenza ghas-sentenza li tat il-Qorti tal-Appell fid-9 ta` Ottubru

2001 fil-kawza “**Albert Mizzi noe vs Nutar Joseph Darmanin noe**” u ghas-sentenza tal-Qorti tal-Appell fil-kawza “**Francis Abela vs Karl Bonello**” tal-31 ta` Mejju 2002 fejn inghad illi :-*“kundizzjoni rizzoluttiva espressa, il-Qorti ma taghtix zmien lill-parti inadempjenti biex tispurga n-nuqqas taghha. Fejn invece il-kundizzjoni rizzoluttiva m`hijiex espressa imma wahda tacita f`dan il-kaz il-kuntratt ma jinhallx ipso jure.”* Kienet citata wkoll id-decizjoni ta` din il-Qorti (**PA/PS**) tat-28 ta` Marzu 2003 fil-kawza “**Paul Borg et vs John Abela et**” li kienet ghamlet referenza ghas-sentenza tal-Qorti tal-Appell tad-29 ta` Jannar 1965 fil-kawza “**Romeo Giulio Fenech Pace et vs Francis Sciberras**” fejn inghad illi :- *“kif gie drabi ohra rimarkat, biex il-patt jinghad espress dak li jkun ried jigi stipulat espressament mhux biss l-obbligu ghall-ghoti jew ghemil ta` xi haga izda rizzoluzzjoni ta`, jew dekadenza, tal-kuntratt jekk dak l-obbligu ma jigix adempit.”* (ara wkoll is-sentenza li tat il-Qorti tal-Appell fis-26 ta` Frar 1937 fil-kawza “**Giuseppe Agius vs Maria Calleja noe**”).

Dan premiss, u stabbilit fil-kuntratt in ezami kien hemm patt kommissorju espress, il-Qorti trid tara jekk kenitx segwita l-procedura stabbilita fil-kuntratt ghal istanzi ta` *default*.

Fil-kuntratt hemm specifikat kif trid issir notifika valida ta` Arex LLP u dan billi *“any notice, demand or any other communication shall be sent to the borrower 6th Floor, 32 Ludgate Hill, London, United Kingdom and shall be deemed to have been received in the case of a telex or fac message at the time of despatch thereof and in the case of a letter sent by prepaid post on the expiry of four days after the same is posted.”*

Fil-klawsola 8 tal-ftehim jinghad :-

*“8.1. Upon the occurrence of a Default, without the need of an authorisation and/or confirmation from the competent court, all obligations between the parties will be accelerated and all amounts due from the Borrower to the Lender and vice versa shall be immediately due and payable. All obligations will be converted by the Lender into US Dollars at the rate of exchange at which the Lender would be able, acting in a reasonable manner and in good faith, to purchase such currency.”*

Fl-istess kuntratt, jinghad kif kellhom jithallsu l-interessi kemm meta l-pagamenti jsiru kif patwit, kemm ukoll meta jkun hemm *default* :

*“3.1 The Borrower will pay interest on the daily balance of the Facility outstanding from time to time at 3.50% per annum above the One Month London InterBank Offered Rate for USD as conclusively certified by the Lender, such interest to be compounded for a yearly basis.*

*Accrued interest shall be paid on (i) the repayment dates stated in Clause 2.1 and (ii) on any date when a prepayment or other repayment of the Facility is payable, and shall be calculated on the basis of the actual number of days elapsed on the basis of a 360 day year.*

### *3.2 Default Interest*

*In the event of default by the Borrower in accordance with the provisions of Clause 6 of this Facility Letter, interest shall accrue on the daily balance of the sum due and payable, but unpaid by the Borrower under the Facility, from the due date to the date of actual payment (both before and after judgement) at the rate of 5% PER ANNUM ABOVE THE One Month London Interbank Offered Rate for USD or equivalent in any other currency, as conclusively certified by the Lender, such interest to be compounded on a yearly basis.*

*Default interest shall be debited to the Borrower’s account on a yearly basis or on the repayment date of each drawdown whichever is the earlier but shall remain immediately due and payable.”*

Tajjeb li jigi rilevat illi fil-kors tat-twettieq tal-kuntratt, saru diversi emendi ghall-ftehim tal-bidu ; l-ahhar emenda kienet dik tal-10 ta` Mejju 2015 (fol 38 et seq). Hemm Arex LLP accettat li ma kenitx ghamlet il-hlasijiet kif miftiehem, u ghalhekk talbet *re-scheduling of the terms of payment indicated in clause 6.1*. Tajjeb jinghad illi Fimbank kien digha` hareg *notice of default* fid-29 ta` April 2015, izda minkejja dan, accetta *tol re-schedule the terms of payment*. Fl-emenda tnizzel illi :-

*“4.1 The Borrower acknowledges itself as the true and lawful debtor in favour of the Lender, which accepts, in the sum of USD 741,218.94 including interest and charges accrued, as a debt certain, liquidated and due (the Debt).”*

Il-patt kien illi l-ammont dovut jithallas bil-mod segwenti :

*“6.1 The Debt and interest and charges accrued after the date of this Addendum, shall be repaid in four (4) monthly instalments as indicated below and the remaining amount shall be settled in full by 25th June 2015 as follows :*

- 1) 14th May 2015 – US \$ 150,000*
  - 2) 28th May 2015 – US \$ 200,000*
  - 3) 11th June 2015 – US \$ 150,000*
  - 4) 25th June 2015 – US \$234,594*
- together with any other outstanding interest and charges.”*

Kien miftiehem izda l-effett ta` l-emenda kellu jintemm jekk ikun hemm *default* kif stipulat fl-artikolu 6.1.1 tal-ftehim tat-30 ta` Mejju 2013 kif ukoll fil-kaz li jkun hemm ksur ta` obbligi ravvizati f`din l-istess emenda. (ara klawsola 8 tal-ftehim).

Ghal darb` ohra, kien hemm patt kommissorju espress.

Dan premess, jirrizulta ppruvat illi minkejja dak li kien espressament patwit bejn Fimbank u Arex LLP, din ta` l-ahhar baqghet inadempjenti u ma hallsitx kif kienet kontrattwalment obbligata taghmel. Ghalhekk Fimbank baghtet ittra datat 16 ta`Lulju 2015 b`*notice of default* (fol 67). Ghalkemm ghadda t-terminu ndikat fl-ittra, Arex LLP baqghet inadempjenti. Il-Qorti ssib kienet segwita l-procedura ta` notifika bil-miktub, u cio` nonostante Arex LLP kompliet fl-inadempjenza taghha.

Fimbank ipprezenta l-konteggi ta` kif wasal ghas-somma ta` EUR 654,052.98c inkluzi interessi li ghaddew sas-26 ta` April 2016. (fol 110 sa fol 112).

Il-konteggi ma kienux kontestati.

Il-Qorti rat il-konteggi u ssib li huma korretti u ppruvati.

L-imghaxijiet li ddekorrew wara s-26 ta` April 2016 sad-data tal-hlas effettiv ser jibqghu riservati.

Il-Qorti qeghda taccetta bhala tajba r-rata tal-kambju bejn il-US\$ u l-€ utilizzata mill-bank attur.

**Ghalhekk il-Qorti qeghda tilqa` t-talbiet attrici kif dedotti kontra l-konvenuta Arex LLP.**

**Daqstant ghal dak li jirrigwarda Arex LLP.**

**Tghaddi biex tqis il-posizzjoni tal-konvenuti l-ohra fil-vesti taghhom ta` garanti ta` Arex LLP.**

Fil-kuntratt ta` bejn Fimbank u ASD tat-30 ta` Mejju 2013, kien hemm *jurisdiction* u *choice of law clauses* tal-ewwel faur il-qrati Maltin u t-tieni favur il-ligi Maltija (klawsola 12 - fol 47).

Kien miftiehem illi l-ammont garantit ma kellux ikun ta` aktar minn US \$7,000,000 eskluzi interessi li jkunu dovuti fid-data tal-pagament u spejjez ohra. (klawsola 2.2 tal-ftehim a fol 43).

Fil-klawsola 2.3 kien miftiehem illi :

*“As a separate and independent stipulation, the Guarantor agrees to indemnify the Bank on demand for any damages, losses, costs and expenses arising from any failure on the part of the Borrower to perform any obligation to the Bank and the Guarantor so agrees to indemnify the Bank even in the event that any obligation of the Borrower to the Bank ceases to be valid and enforceable against the Borrower for any reason whatsoever including, but without limitation, any legal limitation or any disability or incapacity of the Borrower. In such an event, the Guarantor shall be liable towards the Bank as if that Obligation was fully valid and enforceable and as if the Guarantor were the principal debtor in respect thereof and shall pay all sums due to the Bank within 7 days of a demand in writing by the Bank.”*

Dwar il-metodu ta` kif pagament jintalab mill-garanti, il-ftehim ighid hekk :-

*“10.1 All the indebtedness shall be due by the Guarantor under this Guarantee as a debt, certain, liquidated and due on the 7th day following the Bank’s first writtend emand to the Guarantor to pay. All demands shall be sent to the address or facsimile or other numbers as are stated above as the same may be changed by notice in writing by one party to the other.*

*10.2 The statements by the Bank of the amount due under this Guarantee shall be binding on the Guarantor and shall be conclusive evidence of the sum due, saving only manifest error.*

*10.3 All payments shall be made to the Bank without any withholding for taxes (and in so far as this obligation exists under any law the payment shall be grossed up by the amount of withholding) and without set-off for any amounts which may be then owing to the Guarantor by the Borrower or the bank. The Guarantor authorises the Bank to apply any credit balance the Guarantor may have with the bank towards the satisfaction of the Indebtedness. The Bank shall notify the Guarantor forthwith of the exercise of this right giving full details relating thereto.”*

Il-ftehim jispecifica l-modalita` tan-notifika tal-garanti :-

*“11. Every notice, request, demand, letter or other communication hereunder shall be in writing and shall be delivered by hand or by post or through any other communication methods including telex, telefax or otherwise and shall be deemed to be received in case of post within 7 days of dispatch or in case of other methods immediately upon confirmed transmission.”*

Apparti ASD, kien hemm garanti ohra u cioe` il-konvenuti l-ohra.

Dawn kellhom kuntratt kwazi identiku ghal dak ta` bejn Fimbank u ASD.

L-uniku differenza kienet illi l-pagamenti kellhom isiru fi zmien hamest ijiem minflok sebat ijiem (ara klawsoli 2.3 u 10 tal-ftehim).

Jirrizulta li fis-16 ta` Lulju 2015 intbaghtet ittra registrata lill-konvenuti Dogan skont dak li kien miftiehem fil-kazi ta` *default* (fol 65-66 u fol 69-70).

Ma kenitx ipprezentata l-ittra li ntbaghtet lil ASD bhala *notice of default*. Ghal din il-Qorti din kienet tikkostitwixxi l-ahjar prova.

L-unika ittra li ntbaghtet lil ASD u li giet ezebita kienet ittra datata 29 ta` April 2015 (fol 76-77).

Madanakollu din l-ittra ta` *default* kienet superata bl-emenda ta` bejn Fimbank u Arex LLP tal-10 ta` Mejju 2015.

**Hija l-fehma tal-Qorti illi Fimbank ma ressaqx il-prova sal-grad rikjest mil-ligi li kien hemm osservanza ta` dak li kien kontrattwalment stipulat fil-klawsola 10.1 tal-ftehim tat-30 ta` Mejju 2013 fil-konfront ta` ASD.**

**Ghaldaqstant qeghda tichad it-talbiet tal-bank attur fil-konfront ta` ASD.**

Fil-kaz tal-konvenuti Dogan, il-Qorti ssib li saret prova sal-grad rikjest mil-ligi (fol 65-66 u 69-70).

**Billi ghadda z-zmien stipolat mill-ftehim ghall-fini ta` notifika valida, qeghda tilqa` t-talbiet attrici kif dedotti kontra dawk il-konvenuti.**

### **Decide**

**Ghar-ragunijiet kollha premessi, il-Qorti qeghda tipprovdi dwar it-talbiet u dwar l-ecezzjonijiet billi taqta` u tiddeciedi hekk :-**

**Tichad it-talba numerata 10.1.**

**Tilqa` t-talba numerata 10.2.**

**Tilqa` t-talba numerata 10.3 limitatament fil-konfront tal-konvenuti Dogan.**



Tilqa` t-talba numerata 10.4 fil-konfront tal-konvenuti hlief ghall-konvenuta A.S.D. Enerji Madencilik Petrol Urunleri Sanayi ve Dis Tiscaret Anonim Sirketi.

Tilqa` t-talba numerata 10.5 fil-konfront tal-konvenuti hlief ghall-konvenuta A.S.D. Enerji Madencilik Petrol Urunleri Sanayi ve Dis Tiscaret Anonim Sirketi.

Tikkundanna lill-konvenuti Arex LL.P., Atilla Dogan u Suheyla Dogan sabiex *in solidum* bejniethom ihallsu l-imghax kontrattat b`effett mis-26 ta` April 2016 sad-data tal-effettiv pagament.

Tordna lill-bank attur sabiex ihallas l-ispejjez tal-konvenuta A.S.D. Enerji Madencilik Petrol Urunleri Sanayi ve Dis Tiscaret Anonim Sirketi.

Tordna lill-konvenuti Arex LL.P., Atilla Dogan u Suheyla Dogan sabiex *in solidum* bejniethom ihallsu l-ispejjez l-ohra ta` din il-kawza.

Tordna li l-kuraturi deputati jithallsu skont il-ligi.

Onor. Joseph Zammit McKeon  
Imhallef

Amanda Cassar  
Deputat Registratur