– ART. 19 REGULATION (EC) NO. 861/2007: PROCEDURE TO BE GOVERNED BY THE PROCEDURAL LAW OF THE MEMBER STATE IN WHICH THE PROCEDURE IS CONDUCTED –
– ART. 7(1) AND ART. 9(1) CHAPTER 380 LAWS OF MALTA: DECISION ACCORDING TO EQUITY –
– EQUITY NOT TO OVERSHADOW BASIC PROCEDURAL NORMS AND/OR RULES OF EVIDENCE –
– ART. 562 CHAPTER 12 LAWS OF MALTA: "ONUS PROBANDI INCUMBIT EI QUI DICIT NON EI QUI NEGAT" –
– BURDEN OF PROOF: PREPONDERANCE OF THE EVIDENCE & BALANCE OF PROBABILITIES –
– "QUOD NON EST IN ACTIS NON EST IN MUNDO" & "NON REFERT QUID NOTUM SIT JUDICI SI NOTUM NON SIT IN FORMA JUDICII" –
– MALTESE JUDICIAL SYSTEM: ADVERSARIAL RATHER THAN INQUISITORIAL –
– CONTUMACIOUS STATE OF THE DEFENDANT: MEANS OPPOSITION NOT ACCEPTANCE –
– CONTUMACIOUS STATE OF THE DEFENDANT: PLAINTIFF STILL NEEDS TO PROVE HIS CASE –
– DYNAMIC & STATIC INTERNET PROTOCOL (IP) ADDRESSES –
– ART. 993 CHAPTER 16 LAWS OF MALTA: PRINCIPLE OF GOOD FAITH –
– ART. 1234 CHAPTER 16 LAWS OF MALTA: PRESUMPTION OF LAW –
– DEFENDANT COMPANY OUGHT TO HAVE INVESTIGATED MATTER FURTHER –
– CONTRACTUAL BREACH: BURDEN OF PROOF RESTS WITH PARTY ALLEGING BREACH –

SMALL CLAIMS TRIBUNAL
(EUROPEAN SMALL CLAIMS PROCEDURE)

ADJUDICATOR
ADV. DR. KEVIN CAMILLERI XUEREB

Sitting of Wednesday, 21st of March, 2018

Claim Number: **6 / 2016**

IVAN BLAZEK

VERSUS

PERSONAL EXCHANGE INTERNATIONAL LIMITED

The Tribunal,

Having seen the Claim Form (Form A) filed by the plaintiff on the 25th November, 2016 whereby the same, in line with Regulation (EC) no. 861/2007, requested the Tribunal to condemn defendant company to pay him the sum of three hundred, seventy seven euros (€377.00c) for the reasons explained under Section 8.1 of the said

Claim Form (see *fol*. 7). Plaintiff demanded the costs of the proceedings as per Section 7.3.1 (see *fol*. 6) and also statutory interest on the amount of €377.00c as per Section 7.4 (see *fol*. 6) running from the 22nd of October, 2011 as per Section 7.4.2 (see *fol*. 6) of the Claim Form.

Having seen that the defendant company, although duly notified with the relative acts of the proceedings (see *tergo* of *fol*. 19)[1], the same has not filed any response (Form C) in terms of Article 5(3) and/or 5(6) of Regulation (EC) no. 861/2007.

Took cognizance of all the acts and documents relating to the case and having noted that the claimant required no oral hearing in the present proceedings (*vide* section 8.3 of the Claim Form at *fol*. 8).

Took also cognizance of its decree dated 13th of November, 2017 (*fol*. 20) issued in terms of Art. 7(1)(a) of Regulation (EC) no. 861/2007 and that the plaintiff complied thereto as evidenced by his email to the Tribunal's deputy registrar dated 30th of November, 2017 (*fol*. 23) and the information therewith enclosed (*foll*. 25–54).

The Tribunal considers:

As to the factual aspects of this case, these may be succinctly described as follows: the plaintiff had opened a betting account with MyBet.com[2] on the 20th of August, 2011 and deposited €80.00c therein. In the following two (2) days, plaintiff placed four (4) bets and after the 22nd of August, 2011 the said bets were settled as winnings. Thereafter, MyBet.com operator informed plaintiff that the relative account was opened from an IP address[3] that had already been operated previously. The operator, thus, informed plaintiff that the account shall be closed and the relative winnings nullified due to breach of MyBet.com's terms and conditions. Plaintiff informed MyBet.com's operator that he had done nothing illicit or wrong, arguing that an IP address was solely one of many ways of determining the user's (i.e., plaintiff's) identity (such as name, postal address, email address, credit card number,

[1] The Court Executive Officer's declaration dated 16th January, 2017 states that he had notified the defendant company but could not indicate the date when service was effected. This was due to the fact that the relative postal pink card (affixed at *tergo* of *fol*. 19 of the acts of the proceedings) indicated that service was duly performed but it showed no specific date thereof.

2 'MyBet.com' is operated, managed and administered by the defendant company, Personal Exchange International Limited, as evidenced by the documentation exhibited by the plaintiff at *foll*. 23–26 of the acts of the proceedings (after the Tribunal's decree dated 13th of November, 2017 at *foll*. 20–21).

[3] An Internet Protocol address (IP address) is a unique string of numbers separated by full stops that identifies each computer using the Internet Protocol to communicate over a network.

etc.). Plaintiff claims that the said operator did not investigate his identity by other means but solely based the decision on the allegedly identical IP address issue. Plaintiff demanded that further checks be made before a final decision regarding the winning was entertained by MyBet.com. Plaintiff stressed that he informed the operator that this was his sole IP address and the only account opened in his name. However, the winnings were rendered ineffective and invalidated all-the-same by MyBet.com. Plaintiff, aggrieved by these circumstances, filed the present proceedings requesting the full balance of his account at the time of its suspension, including his winnings, in the global amount of €377.00c.

As already pointed out above, although duly notified with the relative acts of these proceedings, the defendant company did not activate itself and formally contest the plaintiff's allegations. This omission does not signify that the defendant is tacitly accepting plaintiff's claim or that the Tribunal ought to automatically deem satisfactory and/or proven the plaintiff's allegations. This shall be discussed in some detail further below, since the Tribunal feels impellent that, at this stage, certain introductory issues are, first and foremost, clarified.

Therefore, before delving into the merits of the present case – for a better comprehension of this decision and its eventual progression towards judgment – some observations need to be highlighted and explained (since the plaintiff is *a pro se* litigant, not aided and/or assisted by legal counsel).

In line with Art. 19 of Regulation (EC) no. 861/2007, "*Subject to the provisions of this Regulation, the European Small Claims Procedure shall be governed by the procedural law of the Member State in which the procedure is conducted*." This signifies that the procedural rules and principles applicable to this case are those found under Maltese domestic law since Malta is "*the Member State in which the procedure is conducted*."

This Tribunal is principally regulated by its own special Statutory Act, being the "Small Claims Tribunal Act" (Chapter 380 of the Laws of Malta) wherein there is explicitly provided, *inter alia*, under Art. 7(1) thereof that, "*The Tribunal shall determine any claim or counter-claim before it principally in accordance with equity*." Furthermore, under Art. 9(1) of the said Act, as to the procedural conduct of the cases, there is asserted that the adjudicator "*shall regulate the proceedings before a Tribunal as he thinks fit in accordance with the rules of natural justice*." These two provisions appear to give very wide discretionary powers to the Tribunal and its Adjudicator.

However, numerous decisions of the Maltese Courts have firmly established, and on several occasions reiterated, that such provisions, although bestowing a certain degree of discretion, cannot transcend or eclipse basic fundamental procedural norms.[4] This is because "æquitas legem sequitur" (equity follows the law) and "æquitas nunquam contravenit legem" (equity cannot go contrary to law). Thus, even though this Tribunal is vested with the power and authority to decide the merits of the cases that come before it in accordance with the principles of equity, the Tribunal cannot ignore or discard necessary and core procedural rules of evidence.[5]

Therefore, fundamental procedural rules such as "onus probandi incumbit ei qui dicit non ei qui negat" (the burden of the proof lies upon him who affirms, not him who denies) and "actore non probante reus absolvitur" (when the plaintiff does not prove his case, the defendant is absolved) cannot be overlooked by this Tribunal and be replaced by any flexible rule of equity. Turning a blind-eye to such procedural requirements will not fare well with the basic principles of procedural justice expected to be embraced, administered and advocated by this Tribunal.

The latter two legal Latin maxims (i.e., "onus probandi incumbit ei qui dicit non ei qui negat" and "actore non probante reus absolvitur") are enshrined within Art. 562 of the Maltese "Code of Organisation and Civil Procedure" (Chapter 12 of the Laws of Malta). The "Code of Organisation and Civil Procedure" is that piece of domestic legislation that lays down the procedural norms, rules of evidence, legal mechanisms, juridical tenets and legal principles that local Courts and Tribunals must religiously observe as imperative evidentiary beacons in deciding civil cases. As a natural corollary, Art. 562 is one which must also be followed and adhered to by this Tribunal notwithstanding the above-cited provisions of Chapter 380 of the Laws of Malta.

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[4] Among several others, one is referred to the judgments *in re* **Emanuel Borg et v. Anna Clews et** (Court of Appeal, 27th February, 2009); **Maltacom plc v. Silvan Industries Limited et** (Court of Appeal, 28th November, 2007); **Martin Paul Vella et v. Chris Micallef** (Court of Appeal, 6th October, 2010); **George Muscat noe v. Anton Zammit et** (Court of Appeal, 21st February, 2017); **Middlesea Insurance plc v. Waldorf Auto Services Co Ltd et** (Court of Appeal, 17th November, 2017); and **A.l.M. Enterprises Limited v. U.C.I.M. Co Ltd et** (Court of Appeal, 17th November, 2017).

[5] In the case *in re* **Negte. Francesco Saverio Caruana v. Onor. Negte. Emmanuel Scicluna nomine** (Court of Commercial Appel, 16th February, 1876 – Vol.VII, 522) it was stated thus: "*la discrezione, però, non puo tradursi in arbitrio; anzi al contrario nel fare uso della discrezione accordata è mestiere che risulti essere giusta, e fatta con discernimento e giudiziosamente secondo l'esigenza del caso e lo spirito della legge. Di fatti la discrezione secondo i dottori non è che 'discernere per legem quid sit justum'.*"

Art. 562 states that, "*Saving any other provision of the law, the burden of proving a fact shall, in all cases, rest on the party alleging it*." This provision must per force be read in line with Art. 558 of the mentioned Code which states that "*All evidence must be relevant to the matter in issue between the parties*" and Art. 559 of the said Code which holds that, "*In all cases the court shall require the best evidence that the party may be able to produce*." In other words, the party who alleges a fact must produce tangible evidence in support of such allegation (Art. 562) and such evidence must be relevant to the case (Art. 558) and the best evidence the party can produce (Art. 559). Even though Art. 9(2)(b) of Chapter 380 stipulates that an adjudicator "*shall not be bound by the rules of best evidence*" a certain minimum standard with respect to the nature of the evidence must be met by the party alleging a fact-in-issue, so much so that the cited provision continues to provide and qualify that the adjudicator must be "*satisfied that the evidence before him is sufficiently reliable for him to reach a conclusion on the case before him*."[6]

Inherent in the last observation made in the preceding paragraph, there is the question of the burden of proof or, as is it is legally known, the "onus probandi". This *onus* is the duty of a party during proceedings (in this case the plaintiff) to produce the evidence that will substantiate the claims it has made against the opposite party (in this case the defendant company). Saving what shall be stated at a later stage, this burden (*onus*) is shifted from one party to the other solely when a party initially burdened with the same manages to substantially prove its allegations. In that case, the burden of proof switches (or shifts) to the other side who must counter produce evidence to rebut the evidence submitted by its adversary (i.e., "reus in excipiendo fit actor"). Thus, fulfilling the burden of proof effectively attracts the benefit of assumption, passing the burden of proof off onto the opposing party.

The present proceedings are of a civil nature and thus the *onus* on the plaintiff is not that he must prove his allegations against the defendant company beyond reasonable doubt. That *onus* is demanded in proceedings of a criminal nature by the prosecuting party. Here, the relative standard is that the plaintiff must prove his claim on 'preponderance of the evidence', also known as 'balance of probabilities'. This standard is met if the proposition is more likely to be true rather than not true. The standard is satisfied if there is greater chance that the proposition submitted by a party (and backed-up by sound evidence) is true rather than false. Lord Denning J.,

[6] This is why in a relatively recent judgment, delivered by the Court of Appeal (inferior jurisdiction) on the 21st of February, 2017 in re **George Muscat noe v. Anton Zammit et** there was affirmed as follows: "*Statements generici m'humiex provi sufficjenti, u l-ekwità ma tistax taghmel tajjeb ghan-nuqqas ta' provi*."

in the case of «**Miller v. Minister of Pensions**» ([1947] 2 All ER 372), described it simply as "*more probable than not*."[7] Also interesting is the assertion by Lord Hoffman J. In the case of «**Re B**» ([2008] UKHL 35) wherein there was stated thus: "*If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened*."[8]

From the Tribunal's viewpoint, it is rather like a pair of scales – to win the case one needs to tip them a little bit past level. Therefore, if a judge reaches the conclusion that it is fifty per cent (50%) likely that the plaintiff is in the right, the plaintiff will have his case rejected or dismissed. On the other hands, if the judge reaches the conclusion that it is fifty one per cent (51%), or more, likely that the plaintiff is in the right, then the plaintiff will win the case. In the present case, it is the plaintiff who is 'burdened' to prove his allegations against the defendant company.

Moreover, it must be also underlined that the person who is ultimately to decide any issue of a factual nature must, necessarily, base his reasoning, findings and eventual decision, on the evidence formally produced before him and not by means of any ulterior investigations conducted *motu proprio* or *ex officio* (i.e., of his/her own initiative). This is all implicitly enshrined in our domestic legal system in the Latin

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[7] The complete citation by Lord Denning J. reads thus: "*If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not*."

[8] The Tribunal observes that Maltese procedural norms (as enshrined in Chapter 12 of the Laws of Malta) were modelled, in their majority, upon Anglo-Saxon procedural principles and norms, which were adopted by the Maltese legislator (and applied by Maltese Courts and Tribunals) during the English dominion of the Maltese islands. In this regard, in his monograph entitled "Storia della Legislazione in Malta", the Maltese jurist **PAOLO DE BONO** (Malta, 1897) describes that under British rule, "*Varie altre leggi parziali, riguardanti l'organizzazione, il procedimento, le prove giudiziarie, furono pubblicate sino al 1850. Nel quale anno la commissione legislativa nominata il 7 agosto 1848 presentò il progetto del codice di leggi organiche e di procedura civile*." (p.320) and that, "*Il diritto probatorio è in gran parte modellato sul sistema inglese, giá introdotto nell'isola sin dall'anno 1825. Ma i singoli provvedimenti sono alcune volte superiori a quelli delle leggi inglesi medesime*." (p.322). In a footnote to this latter comment, this jurist asserts, *inter alia*, that, "*Ma lo studio delle opera de' giuristi inglesi è in questo ramo indispensabile. Ai giovani raccomando specialmente la lettura del BEST, 'The principles of the law of evidence' 8th edizione curata dal LELY (Londra 1893). È un'opera che tratta metodicamente la materia, esponendo i canoni fondamentali del diritto probatorio inglese, tracciandone le sorgenti, e mostrandone il nesso*." (pp.322–323). As a tangible example of episodes where domestic Courts have resorted to English doctrine on the Law of Evidence reference is made to **Lawrence Sive Lorry Sant v. In-Nutar Guze' Abela** (First Hall of the Civil Court, 27th April, 1993) and **Michael Agus v. Rita Caruana** (First Hall of the Civil Court, 10th March, 2011), among numerous others.

maxims[9] of "quod non est in actis non est in mundo" (what is not kept in records of the case does not exist), "secundum acta et probata non secundum privatam scientiam" (according to the evidence and not according to private knowledge of the deciding authority) and "non refert quid notum sit judici si notum non sit in forma judicii" (it matters not what is known to the judge, if it be not known in a judicial form or manner).[10]

The above tenets are directly and intimately linked to the fact that Maltese Law embraces a predominantly adversarial, rather than an inquisitorial, procedural system. This is a system where the parties advocate their own case, or positions, before an impartial and equidistant person (a judge, a magistrate, an adjudicator, an arbitrator, *etc*.), who attempts to determine the truth and pass judgment accordingly on the evidence submitted exclusively by the contending parties.[11] In contrast, under the inquisitorial system, the judge, magistrate, *etc* takes a more vigorous and active role in the proceedings and in the gathering of the evidence (the quantity and/or quality thereof).

Under Maltese law, as embraced by domestic case-law, it is a known tenet that a party in civil proceedings is not expected to be guided by the Court or Tribunal

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[9] Reference to Latin maxims and principles derived from Roman Law are pertinent since, as asserted *in re* **Dr. Giovanni Messina ed altri v. Com. Giuseppe Galea ed altri** (First Hall of the Civil Court, 5th January, 1881 – Decision Nº 122 in *Kollez*. Vol. IX–308), Roman Law was, and still is, the "ius comune" (common law) of Malta and "*nei casi non proveduti dalle nostre leggi, dobbiamo ricorrere alle leggi Romane*". As an example where Maltese Courts or Tribunals made reference to and application of Roman maxims and tenets one is invited to see, *inter alia*, **Vincent Curmi noe v. Onor. Prim'Ministru et noe et** (Constitutional Court, 1st February, 2008); **John Patrick Hayman et v. Edmond Espedito Mugliett et** (Court of Appeal, 26th June, 2009); **Anthony Caruana & Sons Limited v. Christopher Caruana** (Court of Appeal, 28th February, 2014); **Coleiro Brothers Limited v. Karmenu Sciberras et** (First Hall of the Civil Court, 13th February, 2014); and **Sebastian Vella et v. Charles Curmi** (Court of Appeal, 28th February, 2014).

[10] Reference is made to the domestic decisions, among several, *in re* **Carmelo Zammit v. Kummissjoni ghall-Kontroll ta' l-Izvilupp** (Commercial Appeal, 10th of April, 1995); **F. Advertising Limited v. Simon Attard et** (Court of Appeal, 21st of May, 2010); and **Micahel Debono et v. Joseph Zammit et** (First Hall, Civil Court, 30th of June, 2010). Moreover, the Italian author **AURELIO SCARDACCIONE** ("Le Prove", UTET 1965; §3, p.8) asserts that, "*il giudice nella formazione o preparazione del materiale, che a lui occorre per pervenire alla decisione della controversia, sceglie i fatti su cui giudicare e, nell'operare tale scelta, si avvale solo dell'attività probatoria svolta dalle parti nell'ambito del processo*." Another Italian author, **CARLO LESSONA** ("Trattato Delle Prove in Materia Civile", UTET 1927; Vol.I, §45, p.59), states that, "*la scienza personale del giudice, da lui già posseduta od acquistata stragiudizialmente intorno ai fatti sui quali si controverte non è legittima fonte di prova, perchè la legge non la contempla; perchè anzi, pel sistema della legge, il giudice non conosce i fatti se non quali glie li presentano le parti*."

[11] **MARVIN E. FRANKEL** ("Partisan Justice", Hill & Wang, 1978 edition; p. 43) states that: "*The adversary lawyers are strong, active, creative; the adjudicators are passive, receptive. The parties are equipped and knowledgeable; the decision-makers work with what they are given … the evidence not produced by counsel is not produced. Its existence is unknown to the court. The 'facts' will be reconstructed from the materials the parties supply, and no others.*"

regarding the quantity or quality of the evidence to be exhibited. That is purely up to the party submitting the relative evidence. The Court or Tribunal is only permitted to decide on the evidence it has before it and is not allowed to raise any awareness of either of the parties with respect to any possible *lacunæ* or potential inadequacies in the evidence submitted.[12] Lord Thomson LJ-C, in «**Thomson v. Corporation of Glasgow**» (1962 SC [HL] 36 at 52), stated that, "*It is on the basis of two carefully selected versions that the Judge is finally called upon to adjudicate . . . He is at the mercy of contending sides whose whole object is not to discover truth but to get his judgment. That judgment must be based only on what he is allowed to hear. He may suspect that witnesses who know the "truth" have never left the witness-room for the witness-box because neither side dares risk them, but the most that he can do is to comment on their absence*." (*cfr*. **HEYDON J. D.**, "Cross on Evidence", 8th Australian edition, LexisNexis Butterworths Australia, 2010, §17135, p.531). Therefore, as put by Lord Denning in «**Jones v. National Coal Board**» ([1957] 2 QB 553) – wherein he characterised the adversarial system – if the person who is to decide the matter takes an active part in the proceedings while the evidence is being gathered, "*he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well*."[13]

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[12] This is so because, "*nel processo civile vige il così detto principio dispositivo in conseguenza del quale il giudice decide esclusivamente in base alle prove fornite in giudizio dalle parti*." (*cfr*. **FRANCESCO GAZZONI**, "Manuale di Diritto Privato", XI ed., 2004; p.102). Therefore, "*le parti sono, e devono essere, su di un piede di parità i protagonisti e gli artefici del processo poiché loro è la res de qua agitur, e su di loro, infine, ricadranno gli effetti del giudizio*" (*cfr*. **GIROLAMO MONTELEONE**, "Manuale di Diritto Processuale Civile", CEDAM 2007; Vol. I, p.20). "*È, dunque, infedele alla legge quel giudice che, anche in buona fede, si sovrappone alle parti assumendo di fatto la veste di contraddittore, che non gli compete; quel giudice che strumentalizza le parti ed il processo per un fine ad esso esterno, qualunque esso sia (politico, ideologico, economico, di sentimento, persecutorio, ecc. ecc.); quel giudice che finge di vivere il contraddittorio ed il processo, ma giunge in realtà con la soluzione precostituita in tasca*." (*ibid.*, p.31). Additionally the same author holds that, "*Il giudice, come ben sapiamo, è un terzo che non sa nulla (e nulla deve sapere) dei fatti controversi; nel nostro ordinamento assume anche la veste del pubblico impiegato, cioè di burocrate, per cui egli in linea di principio, oltre ad ignorare i fatti, si limita a svolgere il suo lavoro senza particolari entusiasmi per le vicende riguardanti le parti. In queste condizioni è quanto meno azzardato pensare che il giudice possa con esito proficuo sostituirsi nell'acquisizione delle fonti di prova alle parti, che invece conoscono assai bene i propri affari, sanno come e dove cercare le prove, e rischiano in prima persona*." (*ibid*., p.269).

[13] The full citation is the following: «*In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries ... And Lord Greene M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations. If a judge, said Lord Greene, should himself conduct the examination of witnesses, "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict ... The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal"*.» Other cases which followed this *dicta* are, *inter alia*, **Barry Victor**

In other words, the present Tribunal – as with all judicial or quasi-judicial bodies in Malta – is only permitted to reach its decision entirely and solely upon the evidence produced by the parties.[14] At no stage of the proceedings was this Tribunal allowed to guide (or advice) any party thereto in regard to the quantity and/or quality of the evidence it was putting forward for eventual scrutiny, saving any elucidation thereof as permitted and prescribed by Art. 7(1)(a) of Regulation (EC) no. 861/2007 (*vide* Tribunal's decree dated 13th November, 2017 at *fol*. 20).[15]

Having explained the above applicable principles, the Tribunal considers and observes as follows:

As to the defendant company's position in these proceedings, it is an established principle of law that failure of the defendant to file a reply and contest proceedings renders him contumacious.[16] This state of a party in judicial proceedings is generally considered to reflect defendant's disrespect for the authority of the Court or Tribunal

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Randall v. The Queen (Cayman Islands) [2002; UKPC 19 (16 April 2002)] and **Peter Michel v. The Queen** [2009; UKPC 41]. Also interesting is the following literature on the subject of judicial intervention: "Judges Ought To Be Active Referees And Not Mere Spectators" by **DAVID HOPE** (September, 2012); "Partisan Justice: A Brief Revisit" by **MARVIN FRANKEL** ('Litigation Journal' 1989; Vol. 15, No. 4); and "The role of the judge in the court-room: the common law and civil law compared" by **HEIN KÖTZ** ('South African Law Journal' 1987; Vol. 35). See also the LLD thesis entitled "The Maltese Judge: A Neutral Referee of an Inquisitor in the Production of Civil Testimony?" by **MARIA DE MARTINO** (Faculty of Laws – University of Malta, May, 2014).

[14] The Italian authors **ANTONIO CARRATTA** and **MICHELE TARUFFO** ("Poteri Del Giudice", Zanichelli ed., 2011; p.478) write thus: "*il giudice è infatti vincolato a decidere* secundum probata, *non* secundum conscientiam, *e quindi non poteva* supplere de facto, *potendo utilizzare solo le informazioni che avesse acquistato* uti iudex, *ossia nell'ambito del processo.*"

[15] In the said decree the Tribunal had asked information from the plaintiff and demanded from the same "*to explain why he filed proceedings against «Personal Exchange International Ltd». In this respect, the claimant is requested to explain what connection, if any, exists between «Personal Exchange International Ltd» and «myBet.com» and to exhibit any documentation supporting such claim*" and this because "*The claimant's explanation under Section 8.1 and the documents here-above listed speak of a relationship with «myBet.com» whereas the present proceedings were instituted against «Personal Exchange International Ltd». The documents exhibited by the claimant are completely silent regarding this latter company and the same do not explain «Personal Exchange International Ltd»'s participation in the matter*."

[16] Contumacious is derived from the Latin word "contumelia". According to **DIZIONARIO ETIMOLOGICO** (Rusconi Libri, revised edition, 2004; p.257) – "*contumàce*" is described/defined as follows: "*dal latino 'contumax' (= arrogante) forse collegato a 'temnere' (= disprezzare) o a 'tumere' (= essere gonfio, in questo caso di orgoglio)*." This principle is described in detail *in re* **Joseph Vella noe v. John Vella**, (Court of Appeal, 21st May, 1993) wherein there was stated that it is based upon "*il-presuppost li l-konvenut bin-nuqqas tieghu wera contumelia u dispett ghas-sejha tal-Qorti. Meta huwa gie konvenut fl-avviz, citazzjoni, rikors, libell jew petizzjoni u hija din id-dizubbidjenza animata psikologikament b'dawk il-fatturi ta' contumelia u dispett li l-ligi trid tirreprimi u timponixxi. In kwantu contumelia bhal dik hi element ta' disordni socjali. Dan gie ricentement ribadit minn din il-Qorti (Sede Civili) fis-sentenza taghha tal-14 ta' Jannar, 1993 fl-ismijiet Pauline Grech noe vs. Nazzareno Zammit*." (see also **Dr. Giannella Caruana Curran v. Stephen Chetcuti et**, Court of Appeal, 20th April, 2005; **Dr. Christopher Muscat v. Raymond Bugeja noe**, First Hall, Civil Court, 16th March, 1999; **Inginier Emmanuel Farrugia v. Felix Agius et noe**, Court of Magistrates (Malta) 11th July, 2005).

(as the case may be), as he would have turned down his right, and obligation, to explain his position regarding the claim, thus assisting the Court or Tribunal in its assessment of all relevant points of fact and of law arising in the dispute under examination (*vide* **Geoffrey Carachi v. Saviour Fenech**, Civil Court, First Hall, 24th October, 2003). This notwithstanding, and in line with defendant's rights of defence, the contumacious state has always been interpreted as outright contestation of the claim (*vide* **Antonio Debono et v. Paolo Borg**, Civil Court, First Hall, 2nd April, 1955 and also **Anthony Grech et v. Joseph Farrugia et**, Court of Appeal, 17th February, 2004).

Therefore, the defendant's lack of formal and active participation in the proceedings does not translate into an acceptance of the plaintiff's allegations or claim, whatever they may be. Such an omission renders the person who is ultimately to decide the matter at hand, to a certain extent, more responsible. This due to the fact that s/he must ascertain that the plaintiff's allegations are well founded in the absence of a formal contestation thereof. According to established legal doctrine, "*la contumacia vale resistenza, che il contumace tacitamente respinge le domande dello avversario ... il contumace affida al giudice la propria difesa ... questa difesa deve limitarsi ad esaminare se le forme del rito sian rispettate, se l'assunto della parte presente sia fondato in fatto ed in diritto*" (**SALVATORE LA ROSA**, "Il Contumace nel Giudizio Civile", Filippo Tropea ed. 1887; §118, p.175). Domestic case-law on the matter, like the case *in re* **Giuseppe Gerada v. Salvu Attard** (Commercial Appeal, 6th November, 1959), holds that, "*Ghalkemm il-konvenut jibqa' kontumaci, dan ma jaghtix lok ghall-prezunzjoni ta' abbandun tal-liti, ghad-difett ta' eccezzjonijiet legittimi, jew ghal adezjoni ghad-domanda; imma, inveci, ghas-suppozizzjoni ta' rimessjoni ghall-gustizzja tat-tribunal*." On the same lines is the decision reported in **Volume XXIX-III-35** (Maltese Court's Decisions) which states thus: "*ghalkemm il-konvenut jibqa' kontumaci dana ma jfissirx illi huwa abbanduna kull eccezzjoni li seta' jaghti fil-kawza u ammetta d-domandi. Il-gudikant ghandu jezamina jekk it-talba hiex gustifikata indipendentement mill-kontumacja tal-konvenuti.*" In the case *in re* **Id-Direttur tar-Registru Pubbliku v. Ermelina Silos Mendoza et** (First Hall, Civil Court, 16th November, 2010) there was held that the party (defendant) who is in a contumacious state "*titqies li halliet ix-xorti taghha f'idejn il-Qorti biex taghmel haqq ghall-kaz taghha*." Also in this vein is the decision *in re* **Carmela Zahra armla v. Direttur tax-Xogholijiet Pubblici** (Court of Appeal, 28th February, 1975; not published).

Therefore, in the light of the above, the defendant company's position in these proceedings shall be construed as a direct opposition to the plaintiff's allegations and claim.

The evidence submitted by the plaintiff may be summarised as follows:

- an email dated 22nd August 2011 sent by the «MyBet.com» Team's Customer Support to the plaintiff wherein there is, *inter alia*, stated that, the defendant company had established that the plaintiff's account ('ivanblazek') "*had the same IP address as account nadwora*" and that, consequently, the registration of plaintiff's account was in violation of defendant company's terms and conditions (as per point 3.8 of the terms and conditions[17]) and that all the winnings were going to be retained (as per point 7.2 of the terms and conditions [18]). The email refers to the general terms and conditions issued by the defendant company, which portions thereof were cited in the same email (see *foll*. 10–12);

- an email dated 22nd August, 2011 (at *foll*. 13–14) by the plaintiff to «MyBet.com» Team (as a response to the former one) stating that he did not breach any terms and conditions, stressing that "*this is my first and only account opened with myBet, it is exclusively my account operated by me in my own name with my own money. I am not aware of any connection to the account nadwora or its holder you suggest I might have and live in a one-person household.*" Moreover, plaintiff stated that, "*It seems you have determined I am the same person who opened the nadwora account and therefore concluded I opened multiple accounts which would no doubt be grounds for the measures being taken. However, you have made this conclusion based solely on the allegedly matching IP address, whereas your own terms state «The identity of a user is established through the following criteria: name, postal address, e-mail address, IP address, and credit or cash card number». Only one of the six means mentioned points to your conclusion, while you haven't bothered to confirm my identity by any other means, such as requesting an ID or payment verification from me. Moreover, I would consider an IP check the least reliable, as it is only dependant on the internet service*

[17] In the email submitted by the plaintiff, this specific point reads thus: "*You may only register once as a customer with us, and only manage one player account. You are not permitted to register again using another name or another e-mail address. In particular you are not permitted to register third parties - even if they give their consent in that respect. This also applies, among other things, to friends and relations. You are not permitted to sell, transfer or acquire your account*." (see *fol*. 11)

[18] In the email submitted by the plaintiff, this specific point reads thus: "*We shall not tolerate any fraudulent activities. If we are of the opinion, at our reasonable discretion, that you are attempting to defraud us, another user of our services or another person in any way, for example by way of payment fraud, or by transferring funds to other players, or if we suspect a fraudulent payment, for example by way of using stolen credit cards or other fraudulent activities or prohibited transactions (such as money laundering) or if you violate the terms and conditions of business, we reserve the right to temporarily block you and/or exclude you in full from using our services; retain winnings and credits in part or in full and to forward the information (in conjunction with your identity) to the police and other pertinent authorities. Our data protection guidelines contain further information on this procedure*." (*fol*. 11).

provider (who can recycle/swap IPs among users), as opposed to a government issued ID with address, or a verification from the strictly regulated banks/payment providers. That said, I will refrain from speculating on why you only came with this announcement once several of my bets have been settled as winning, when comparing two IP addresses is a fast and surely computerised check that doesn't take days. Due to the given reasons, I request you reconsider and verify the suspected fraudulent behaviour further, before jumping to conclusions. Otherwise I will have to turn for help to your regulatory authorities, as I firmly believe I have not breached any terms or service, intentionally or otherwise, let alone attempted fraud of any kind. Needless to say, I find such accusations insulting and would like to believe they are only a consequence of overdone security." (see *foll*. 13–14);

- an email dated 14th September, 2011 by the plaintiff to «MyBet.com» Team reminding them that he did not received any reply after his email of 22nd August, 2011. In this email plaintiff states: "*I have waited for over 3 weeks now, yet didn't receive any kind of reply from you. I would expect and appreciate a higher level of communication from a licensed operator. By doing this you are not only withholding my legitimate funds, but also restricting my ability to meet the wagering requirements for the bonus money I legitimately claimed in accordance with your terms. I am willing to wait for additional 24 hours before I file a complaint with LGA, although I believe the completely unreasonable waiting time and no communication attitude you have shown deserves a complaint on its own.*" (at *fol*. 13);

- an Account Statement (opened by the plaintiff with «MyBet.com») wherein there are listed a number of transactions dating from 20th August, 2011 to 4th October, 2011 (at *fol*. 17).

Having examined all the evidence and having considered the plaintiff's allegations, along with the justification tendered by the defendant company for closing the relative account and nullifying plaintiff's winnings, the Tribunal tends to agree with the plaintiff. From the evidence submitted, the plaintiff has managed to tilt the pair of scales (described earlier) in his favour, shifting the *onus probandi* upon the opposing party.

The defendant company solely nullified the plaintiff's winnings (and giving the impression that there was some sort of fraudulent activity on plaintiff's part) by merely stating that an identical IP address was used in connection with plaintiff's account. No specific details were provided by the defendant company. It appears

that the defendant company did not investigate further the matter and did not communicate with the plaintiff, by requesting further information and/or clarifications on the issue. Defendant company appears to have simply terminated plaintiff's account and discontinued communication with him by basing itself on one mode of identity verification, unilaterally concluding that its terms and conditions were violated (by citing point 3.8 of its terms and conditions), assigning blame upon the plaintiff and, in between the lines, implying some illegal and/or fraudulent behaviour (by citing point 7.2 of its terms and conditions).

The defendant company's terms and conditions speak of a player's identity verification by means of his name, his postal address, his e-mail address, his IP address, credit or cash card numbers. In this case, the defendant company unilaterally decided to take rather drastic measures by solely basing itself on the IP address. Apart from this, the defendant company simply, and in a very generic fashion, stated that the plaintiff's account ('ivanblazek') "*had the same IP address as account nadwora*"without providing further information, notwithstanding the plaintiff's emails (above cited) demanding a reasoned explanation for the relative decision for the de-registration of his account and winnings. The least the defendant company could have done in these circumstances was to provide the plaintiff with a reasonably detailed explanation of the situation. By merely referring to some clauses in its general terms and conditions and holding that "*We have established that your account ivanblazek had the same IP address as account nadwara*" (see *fol*. 10) is deemed, by this Tribunal, to be insufficient. Surely, as a service provider, the defendant company was under a general duty to provide reasons for its decision, also in line with the principle of good faith as per Art. 993 of the Maltese Civil Code.[19]

[19] Art. 993 of the Civil Code states: "*Contracts must be carried out in good faith, and shall bebinding not only in regard to the matter therein expressed, but alsoin regard to any consequence which, by equity, custom, or law, is incidental to the obligation, according to its nature*." Thus it is a fundamental rule under Maltese Law that in any contractual inter-relationship the principle of good faith must reign. In contract law, the implied covenant of good faith and fair dealing is a general presumption that the parties to a contract will deal with each other honestly, fairly, and in good faith, so as to not impair the right of the other party or parties to receive the benefits of the contract. It is implied in every contract in order to reinforce the express covenants or promises of the contract. The Italian Court of Cassation (case no. 960 of 18th February, 1986) held that, "*La buona fede, intesa in senso etico, come requisito della condotta, costituisce uno dei cardini della disciplina legale delle obbligazioni e forma oggetto di un vero e proprio dovere giuridico, che viene violato non solo nel caso in cui una delle parti abbia agito con il proposito doloso di recare pregiudizio all'altra, ma anche se il comportamento da essa tenuto non sia stato, comunque, improntato alla diligente correttezza ed al senso di solidarietá sociale, che integrano, appunto, il contenuto della buona fede* " (*cfr*. **GIANLUCA FALCO**, "La Buona Fede e l'Abuso del Diritto", Giuffrè ed. 2010; p.9). The same Court (case no. 20399 of 18th October, 2004) asserted moreover that, "*il comportamento seconda buona fede e correttezza del singolo contraente è finalizzata, nel rispetto del contemperamento dei rispettivi interessi, ad una tutela delle posizioni aspettattive dell'altra parte; in tale contesto è legittimo configurare quali componenti del rapporto obbligatorio i doveri*

Although this Tribunal admits that it is no expert in the field, from the research it conducted on the subject-matter at hand, it results that there are primarily two forms of Internet Protocol (IP) addresses: a Dynamic IP address, which means that it is subject to change, and a Static IP address, which, as the nomenclature denotes, is unchanging. Most of the time, a computer user's IP address does not alter or change, even though technically it is classified as a Dynamic IP address, but it may do so if, for example, routers are switched or changed. Moreover, as the research showed this Tribunal, every time a person utilises a laptop, a computer or other similar device on a Wi-Fi (wireless) network, that person is switching his or her IP addresses, i.e., that person will be using the IP address of whatever network he or she is on. This is because the IP address of that person's laptop, computer or similar device does not belong to that laptop, computer or device, but pertains to the network to which it is connected to (in simpler words, the laptop, computer or device is just borrowing it for a while). That is the reason why a person will have a different IP address at a coffee shop than the IP address the same person will have at a hotel on the corner or at his or her own home. Basically, different networks will provide different IP addresses.

Due to this flexible and mutating feature of an IP address, the Tribunal considers the defendant company's decision thereupon as being rather one-sided, drastic and premature. Nothing in the acts of these proceedings shows that the defendant company sought to ascertain – in a sober manner and/or in an objective fashion – the true nature of the predicament at hand, but that it elected to be judge, jury and executioner at the same time, without giving heed to the plaintiff's explanations and requests.

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strumentali al soddisfacimento dei diritti delle parti contraenti, *cosicchè è stato ritenuto che anche la mera inerzia cosciente e volontaria*, *che sia di ostacolo al soddisfacimento del diritto della controparte*, *ripercuotendosi negativamente sul risultato finale avuto di mira nel regolamento contrattuale degli opposti interessi*, *contrasta con i doveri di correttezza e di buona fede e può configurare inadempimento* " (*ibid*., p.286). The same court (case no. 3185 of 19th November, 2014) underlined that, "*la buona fede nell'esecuzione del contratto si sostanzia, tra l'atro, in un generale obbligo di solidarietá che impone a ciascuna delle parti di agire in modo da preservare gli interessi dell'altra a prescindere tanto da specifici obblighi contrattuali, quanto dal dovere extracontrattuale del* neminem lædere, *trovando tale impegno solidaristico il suo limite precipuo unicamente nell'interesse proprio del soggetto, tenuto, pertanto, al compimento di tutti gli atti giuridici e/o materiali che si rendano necessarì alla salvaguardia dell'interesse della controparte nella misura in cui essi non comportino un apprezzabile sacrificio a suo carico* " (*ibid*., p.286). These *dicta* are embraced by the Maltese Court as mirrored *in re* **Carmelo Bonello et v. Concetta Farrugia** (Court of Appeal, 28th February, 2007) and *in re* **Michael Gatt et v. Joseph Portelli** (Court of Appeal, 9th July, 2008), among others.

Since the defendant company – as a basis for it decision to render ineffective plaintiff's account and his winnings – implied (see email dated 22nd of August, 2011) that there was no room for any "*fraudulent activities*" on the part of any user who may be "*attempting to defraud us, another user of our services or another person in any way*" (i.e., point 7.2 above cited), one reasonably would have expected the same to provide the plaintiff (after he expounded his stance in various emails – see *supra*) with more detailed and reasoned information backing its decision. It appears that the defendant company restricted itself to the brief information contained in its email (of 22nd August, 2011) without asserting whether it had performed any other security check (as for example, any device fingerprinting, location mismatches, hotlists, Know-Your-Client checks, velocity thresholds to verify any unusual patterns, unusual data information, identity fraud, *etc*.).

In view of the above, the Tribunal deems the defendant company's attitude rather radical, extreme and draconian. In the light of the stated circumstances (as portrayed by the evidence tendered), it is felt that the plaintiff ought to have been given sufficient and more detailed reasons for the de-registration of his account and that the defendant company ought to have investigated further the matter before taking any final decision in connection therewith.

The defendant company was alleging that the plaintiff breached the terms and conditions he subscribed to when opening the relative betting account. Thus it was up to the defendant company to prove any form of alleged misconduct in connection therewith (since the principle of good faith is presumed in favour of the plaintiff as per Art. 1234 of the Maltese Civil Code[20]), and this in line with the maxim of "reus in excipiendo fit actor."[21] Undoubtedly, there was a relationship of a contractual nature existent between the parties. This being so, that party which elects to declare that relationship terminated and/or rescinded ought to demonstrate that there was a valid reason for doing so. In other words, a party pursuing a claim for breach of contract will have to persuade the judge that the other party did not carry out their

[20] Art. 1234 Civil Code holds that: "*Any person having in his favour a presumption established by law, shall be exempted from any proof as to the fact forming the subject-matter of the presumption.*" The Italian author **FRANCESCO RICCI** ("*Delle Prove*", UTET, 1891, §34; pp.52-53) writes that, "*L'attore che ha a favore della sua domanda una presunzione è dispensato dall'onere della prova* […] *Effetto della presunzione é, come si esprime la Cassazione di Torino (decis. 16 febbraio 1855, vii, 1, 176), di far considerare la cosa presunta come provata sinchè non si dimostri il contrario. La parte, quindi, cui una presunzione è opposta, non può limitarsi ad asserire il contrario, ma deve distruggere la presunzione stessa con una chiara e indubitata prova della fatta impugnativa*."

[21] This maxim means that the burden of proof weighs on the plaintiff, but the defendant, in objecting, becomes a plaintiff.

obligations under the agreement. In such a scenario, evidence will be required to prove a breach of contract, which could come in a variety of forms (i.e., including written, oral, expert, photographic, *etc*). No such evidence exists in this case. Surely, the defendant company's email of 22nd August, 2011 (see *fol*. 10) does not meet the necessary legal standard.

On a final note, it must be observed that if the defendant company selected to actively (and not passively) participate in the present procedures, by contrasting the plaintiff's claim in an influential manner (i.e., by providing its own version of events and submitting evidence in support thereof), the story might have been diverse. But as stated earlier, this Tribunal can only emit a decision on the evidentiary material making up these proceedings.

THEREFORE, in the light of the above considerations and for the above-mentioned reasons, this Tribunal decides the present case by accepting plaintiff's claim and consequently condemns defendant company to pay the plaintiff the amount of three hundred, seventy seven euros (€377.00c) with statutory interest on the said amount running, as demanded, from the 22nd of October, 2011 until final payment.

All the expenses connected with these proceedings are to be borne by the defendant company.

Finally, the Tribunal orders that a copy of this judgment is served upon the parties in terms of Article 13 of Regulation (EC) no. 861/2007.

***Sgnd*. ADV. DR. KEVIN CAMILLERI XUEREB**
Adjudicator

***Sgnd*. ADRIAN PACE**
Deputy Registrar