MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF
PHILIP SCIBERRAS

Seduta tat-12 ta' Dicembru, 2007

Appell Civili Numru. 4/2003/1

Casino Employees' Union;
u b' digriet tal-31 ta' Mejju 2004 Tony Zarb u Emanuel Micallef fil-kwalitajiet taghhom ta' Segretarju Generali u Deputat Segretarju Generali tal-General Workers Union in rappresentanza ta' l-istess Union, assumew l-atti tal-kawza minflok Casino Employees' Union

vs

Dragonara Casino Limited

Il-Qorti,

Fil-15 ta' Dicembru, 2002, it-Tribunal Arbitrali fic-Centru Malti ta' l-Arbitragg ippronunzja s-segwenti decizjoni fl-ismijiet premessi:-

"1. Appointment of Arbitration Tribunal

In conformity with an Arbitration Agreement entered into between the two parties on 1 July 2002, the Company appointed Alfred Mallia Milanes and the Union appointed Edward Privitera to represent them on the Arbitration Panel. In conformity with the provisions of the said arbitration agreement the two appointed members of the arbitration panel appointed J. R. Aquilina as Chairman of the Tribunal.

The original intention was to have this arbitration as a private arbitration, (see original letter of appointment of Chairman and letter containing joint terms of remit, at Appendix 2 and 3 respectively, both dated 12 August 2002), but it was later jointly agreed by the parties that the arbitration would be registered with the Malta Arbitration Centre, and run under the aegis of that Centre in terms of the Arbitration Act - Chapter 387 - Act II of 1996 as amended by ACT XVIII of 1999. By 12 September 2002 all three arbitrators had taken their oath of office.

2. Registration of Dispute

The Company and the Union completed the statutory forms and registered the case with the Malta Arbitration Centre, on the 20 August 2002.

3. Joint Terms of Remit

On 12 August 2002 the parties submitted the terms of remit in a joint letter signed by representatives of both parties. The same joint terms of remit together with the Agreement entered into between the parties on the 1 July 2002, (Appendix 4) which contain various pertinent provisions were then communicated by the Malta Arbitration Centre to the Arbitration Panel on the **16 September 2002.**

The joint terms of remit read as follows:

a) **0002A** - The Tribunal is enjoined to examine the outstanding claim made by the Casino Employees' Union and the Company's rejection of the same claim for employees to be paid their normal salaries for periods of time when they stopped working at the gaming tables following the issue of a written directive by the Union.

b) **0002B** - The Tribunal is enjoined to examine sub-articles 5.1, 5.2, 5.3, 5.6.2, 5.6.3 first paragraph only and part of Appendix F (all indicated in red) of the draft industrial agreement negotiated between the parties and give an award on the implementation of the whole agreement including the above sub-articles as may be amended by the Tribunal.

On 4 September 2002 the Company applied to withdraw articles 5.1, 5.2 and 5.6.2 contained in item b) above. The Union confirmed that it had no objection to the request. Thereafter the Company submitted revised pages of the negotiated agreement to reflect the agreed change in the joint terms of remit. These pages were signed by a Union representative.

On the 24 September 2002 the Union submitted a request to include a new item in the terms of remit. On 25 September 2002 the Company wrote to the Registrar of the Malta Arbitration Centre objecting to the requested change in the terms of remit. The Malta Arbitration Centre upheld the Company's objection, by letter dated 25 September 2002 to the Arbitration Panel (Appendix 5)

4. Representation during Proceedings

The Company was represented by Anthony DeGiovanni who was assisted by Dr A Borg Cardona

The Union was represented by John Grech Mallia and Joseph Camilleri who were assisted by Dr M Tanti Dougall

5. Arbitration proceedings

Between 4 September 2002 and 13 November 2002 the Arbitration Tribunal held eleven public sittings during which both the parties presented documents and witnesses in support of their case. The Arbitration Tribunal also held six private sittings to discuss and decide the case. The documents and transcripts of verbal evidence are filed with other documents relevant to this case, and are currently in the custody of the Malta Arbitration Centre together with tape recordings of the public proceedings.

6. Decision on the request made by the Union in its final submissions for a stay of the proceedings

The Tribunal

a) read and considered the request by the Union made in the last paragraph of its final submissions wherein the Union is requesting a stay of the proceedings of this Tribunal

b) considered the absence of documented evidence in support of the Union's claim

c) noticed the absence of any related reservations in the joint terms of remit signed on 12 August 2002 at a time when the cases which allegedly impinge on the subjects referred to this Tribunal were already being heard by the Industrial Tribunal. The civil court case instituted by Dragonara Casino Ltd on the 18 October 2002 refers to a matter placed before such an Industrial

Tribunal, an acknowledged fact prior to and after 12 August 2002

d) considered the fact that the Union failed to make any such request during any of the eleven sittings of this Tribunal when the facts were already known to the Union

e) considered the fact that an invitation and a proposal by the Union side to the company side to agree to a whole/partial reconsideration of the situation was met by a refusal from the company side

f) considered the oral pleadings by counsel of both parties at Sitting No 11 of the Tribunal

Therefore, the Tribunal **unanimously** decided to reject the claim for a stay in the proceedings and continued with its considerations of all the outstanding matters and subjects contained in the joint terms of remit referred to it by the Malta Arbitration Centre in order to give an award as it is statutorily required to do.

7. Award

Considerations of the Tribunal in relation to item **0002A** as contained in the joint terms of remit- **`Payment for period of stoppage of work.**

The Tribunal

i.) read the written statement of case dated 10 September 2002 submitted by the Union and the transcript of the verbal submissions made by John Grech Mallia on 26 September 2002

ii.) read the written statement of case dated 11 November 2002 submitted by the Company

iii.) read all the relevant transcripts of evidence given during the sittings

iv.) made reference to article 2 of the Conditions of Employment (Regulations) Act 1952 and in particular to the definition of "hours of work"

v.) discussed the relevant contents of the document marked No 7 Collective Agreement submitted by the Company, wherein the following sentence was highlighted "This agreement cancels and supercedes any other verbal and or written agreement that may have been valid prior to the effective date of this agreement"

vi.) discussed the different industrial practices in Malta in relation to the payment of wages during industrial action

vii.) read the decision dated 25 January 1991 of the Appeal Court (Sede Civili) Cit 1249/84F Alfred Buhagiar nomine Malta Union of Teachers vs Minister of Education enclosed with the Company's final written submissions dated 8 November 2002.

viii.) read the final submissions by the parties and considered the oral pleadings by counsel of both parties at the Sitting No 11 of the Tribunal

Therefore, the Tribunal **unanimously** decided that since there is no statutory or contractual obligation on the Company to pay employees who in furtherance of a trade dispute obeyed a legitimate trade union directive, left their place of work and remained away from their place of work until the end of their shift, the Company should not be directed to refund the workers concerned the deductions it effected from their wages. For this reason the Union's claim is rejected.

Considerations of the Tribunal in relation to item b) as contained in the joint terms of remit. **(Rest breaks, Retroactivity, Appeals and the implementation of the whole negotiated agreement)**

The Tribunal

i) read the transcript of the verbal submissions made by John Grech Mallia on 26 September 2002

ii) read the written preliminary statement of case dated 11 November 2002 submitted by the Company

iii) read the written statement of action October submitted by the Union

iv) read the transcripts of all the related evidence given during the sittings

v) read and discussed the contents of all the relevant documents submitted by both parties

vi) read the final submissions by the parties and considered the oral pleadings by counsel of both parties before the Tribunal

Therefore, the Tribunal Arbitrators Aquilina and Mallia Milanes consenting, and Arbitrator Privitera dissenting agreed (Sec 43 (1)) of the Act as follows:-

- **0002B - 5.3 - Rest Breaks** - Although the agreed sub article on Rest Breaks guarantees an aggregate of 1¾ hours to employees engaged in gaming table duties and in return for monetary compensation gives the desired flexibility to meet customers' demands, it fails to include any provision for a balanced distribution of breaks during shift times.

The Tribunal noted that the Casino Manager confirmed that it is self-defeating for the Company to abuse the system of rest breaks.

The Tribunal also noted that employees who gave evidence confirmed that when required they had stayed on at the gaming tables for periods of up to 1½ hour, when requested to do so by management. None of the witnesses in the grades of Dealer/Inspector and Inspector highlighted any instances of abuse. Indeed these witnesses confirmed that missed breaks are invariably compensated for by more frequent breaks later on during the shift. The two witnesses in the grade of Pit Boss did highlight the difficulty of taking the agreed breaks during the morning shifts only

Arbitration No. 50 of the Malta Arbitration Tribunal dated Tuesday 3 December 1968, which was submitted as evidence by the Company, was concluded with an agreement wherein both parties agreed to have rest breaks of 1 hour and 2 hours of gaming table duty at varying times of the year. This is significant because even so far back, it was an agreement between both parties and not an award by the Tribunal entrusted to hear the case.

From the evidence it is also apparent that even recently employees have always co-operated in the matter and voluntarily stayed beyond the present agreed limit of 45 minutes at the gaming tables, whenever work and customer's requirements made it necessary to do so.

Furthermore the Tribunal noted the statement made by the Company representative during the sittings that the increase in wages beyond the original offer from Lm1 per week per year for three years was first raised to Lm2.00, and then again later increased by a second upward revision to

Lm2.50 only as a "quid pro quo" after agreement with union representatives had been reached on the rest breaks. This was never challenged by the Union representatives at the negotiation stage, as is evident from the Minutes of the negotiation meeting held on the 19 February 2002, and therefore the point merits highlighting that the union had skillfully taken the company way beyond the company's original offer.

However it is also noted that this particular subject was emotively the strongest stand that the union and some of the witnesses took throughout the entire proceedings before the Tribunal, and consequently this item also came under a closer and more in-depth scrutiny by the Tribunal at its deliberation stage.

Although the Tribunal acknowledges the need for flexibility and notes the price that the company was negotiated to pay for it by the union, the Tribunal is nevertheless **unanimously** very reluctant to allow the Company a completely free hand in the distribution of rest breaks.

For these reasons the Tribunal decided, Arbitrators Aquilina and Mallia Milanes consenting, Arbitrator Privitera dissenting, that the negotiated agreement on rest breaks as contained in article 5.3 is to be amended in favour of the union to establish a clear and unequivocal compromise, as hereunder to regulate the periods of duty at gaming tables to a maximum of 1½ hours at any one time, when the exigencies of service so require

"5.3 *Rest Breaks*

Employees who work on table games in activities described by the job titles of Dealer/Inspector and Inspector shall have an aggregate of one and three-fourths (1¾) hours paid rest break during

each shift of gaming duty. The rest breaks should in normal circumstances follow a pattern of fifteen minutes rest break before or after a period of forty-five minutes gaming duty. When the demand for gaming activities so requires Dealer/Inspectors and Inspectors may be directed by the Company, to take rest breaks after a maximum of 1½ hours-gaming duty. Employees in activities described by the job title of Pit Boss shall have an aggregate of one hour paid rest break during their shift. This one-hour rest break may be split into four periods of fifteen minutes each at the complete discretion of the Company. Employees entitled to rest breaks are not entitled to additional breaks for meals".

Furthermore the Tribunal directs that in order to ensure the exercise of fair play in the utilisation of this flexibility provision, in the event that the union feels that there has been any alleged consistent abuse of the above reworded paragraph there should be full and unrestricted recourse to the rights mandated in the provisions of "Section 4 - Settlement of Disputes" of the Collective Agreement to put swiftly into operation compulsory private conciliation and/or compulsory private arbitration as necessary.

Arbitrator Privitera's dissenting opinion is to be found at Appendix I to this Award.

0002B - 5.6.3 - Retroactivity - A Union's claim for retroactivity is a subject to discussion between the negotiating parties and there is no statutory or contractual obligation for back-to-back collective agreements. It is quite obvious to the Tribunal that whilst the Company made every effort to avoid retroactivity by giving very early and sufficient notice of its intention in writing and acting in advance of target dates in its requests to the Union and in responding promptly to the Union's requests, the Union for various reasons did not

manage to finalise negotiations within the time limit. It seems that the Union lulled into a false sense of security by past concessions relied heavily on its perceived right to the retroactive application of selected articles of the provisions of the collective agreement as had been enjoyed heretofore. Indeed the use of the term "Konswetudini" in the Maltese language used in the union's arguments is to a considerable degree of interpretation much stronger than the English phraseology of "customary practice". However, the letter of invitation from the company to the union had made it abundantly clear that management wanted to avoid any repetition of retroactivation of any negotiated increases.

The voluntary offer of two months ex-gratia payment for the months of April 2002 and May 2002 made by the Company is a conciliatory and fair settlement of the four months difference between the agreed expiry and commencement dates of the two agreements.

The Tribunal notes that the union representatives had pointed out to the company that it would be very difficult to obtain their members' agreement to the negotiated document in the absence of agreement on full retroactivity.

The Tribunal **unanimously** decided that there is no automatic right, no statutory right and no contractual right to retro-activity, especially in the special circumstances of this case.

The Tribunal also noted with satisfaction the company's conciliatory counter-offer. Since the Company did not at any stage withdraw its offer to commence payment of increases with effect from April 2002 and submitted no claim in view of the delayed commencement of the agreement, the Tribunal **unanimously** agreed that whilst the collective agreement which is herein being

determined should come into effect as directed in the pertinent part of this award, the Company is directed to honour its offer of a voluntary ex-gratia payment for the period between 5 April 2002 and 31 May 2002, and thereafter as stipulated by paragraph 1 of the Agreement between the two parties dated 1 July 2002.

0002B - Article 19 - Appendix F - Page 7 - Disciplinary appeal for serious offences - The Union and the Company went to great lengths to design a disciplinary procedure that safeguards the independence of the Disciplinary Boards for serious offences.

The Tribunal could not help noticing some perceived hesitancy and ambivalence in the way that the Union defended its stand against the elimination of internal appeals for serious offences.

The Tribunal is satisfied that the procedure agreed between both parties during negotiations allows employees a more than acceptable procedure for processing appeals in case of serious offences. The Tribunal is also satisfied that access to effective cogent external redress remains available to both parties, and that this mechanism is more impartial, independent and fairer than any internal tribunal could ever be.

For these reasons, and also because the Tribunal is not in favour of mechanisms which unduly prolong disciplinary procedures especially in cases where workers who are suspended on half pay are concerned, the Tribunal **unanimously** endorses the negotiated document to eliminate internal appeals in case of serious offences.

Implementation of negotiated agreement - In view of the fact that as manifested by the joint terms of remit there is no dispute on the

remainder of the articles, sub articles and appendices contained in the negotiated collective agreement submitted with the terms of remit to the Tribunal and since both parties requested the Tribunal to implement the remainder of the provisions the Tribunal endorses the joint request for the implementation of the whole collective agreement as amended by the foregoing, and as explained in further detail below, with immediate effect. This part of the award should not be interpreted in any way to exclude the payment with effect from the 5 April 2002 deemed in the foregoing paragraphs.

The Tribunal has decided to endorse the Chairman's copy of the collective agreement submitted with the joint terms of remit to serve as the official document which binds both parties, as amended during the proceedings, and as further amended by the provisions of the preceding paragraphs.

During Sitting No 6 held on the 8 October 2002 (vide minutes of the sitting) it was agreed between the two parties to substitute Page 7, 8, 9, 10, 11, 12, 13, and 14, and all such substituted pages (whiter paper, typed on both sides and punched as distinct from the original), are jointly signed by Joe Camilleri for and on behalf of the union and Anthony Degiovanni for and on behalf of Dragonara Casino Ltd.

Para 5.3 Rest Breaks is substituted by the text referred to in the forgoing paragraphs.

The Tribunal noticed typing errors in Page 13 paragraph 5.6.2 Increase in rate of pay. The tribunal called the two parties to a sitting held at Capua Palace Hospital on Sunday 15 December 2002 at 1900 hours. Mr John Grech Mallia for the Casino Employees Union was informed over the telephone on the evening of Saturday 14

December 2002 regarding the calling of the meeting and the subject to be discussed, as was Mr Anthony Degiovanni for Dragonara Casino Ltd. Neither Mr John Grech Mallia nor any other representative of the Casino Employees Union turned up for the meeting at the appointed time. The tribunal waited for 30 minutes, during which time the Tribunal attempted to contact Mr John Grech Mallia through the switchboard of the Casino as well as on his personal mobile phone and on his home phone number. The Tribunal decided that the typing error was a self-evident matter that did not really require any representatives either from the company or from the union to be present. However, since Mr Degiovanni turned up, the sitting proceeded in the absence of any representative of the Casino Employees Union. Mr Degiovanni, who was reminded that he was giving evidence under oath, produced copies of the minutes of the negotiations on the point under review which showed that the Tribunal had correctly understood the typing error.

The Tribunal proceeded to correct the typing error, and the corrections are signed by the three members. The Tribunal also agreed that in consonance with the decision in the foregoing paragraphs the text in red at the start of paragraph 5.6.2 is to be read in black as part of the Agreement as this refers to the agreed payment of salary increase offered by the company with effect from 5 February 2002.

Re Appendix F Page 7 - in consonance with the decision taken in the foregoing paragraphs the word "both" lying between the text Disciplinary Boards for .... And .... non-serious has been deleted in the final test, together with the words in red text reading "and non-serious offences".

The final approved version of the collective agreement is attached as Appendix 6 with this Award.

The original pages (now substituted pages) have been filed with the Malta Arbitration Centre for safekeeping.

8. Costs

The Arbitration Tribunal has estimated that the total value of the dispute, on the basis of the company's claim during the proceedings of a Lm30,000 cost of the implementation of the increases for the first three years in the collective agreement, and the effect of this benchmark arrangement over the six year duration of the agreement, and other payments and expenses and concomitant benefits will well exceed Lm60,000.

In this respect and in conformity with Tariff B of the First Schedule (Rule 17) of Part I - Domestic arbitration - of the relevant Act, anent fees payable to arbitrators, the Tribunal deems that the Chairman's fees amount to Lm1,250, while the other members' fees amount to Lm 625 each.

Since, at an early sitting of the Tribunal the company acknowledging the union's financial position had generously and voluntarily offered to carry the full costs of the arbitration itself, the Tribunal exempts the union side from any payments deemed in this award.

The Company is also to pay the Secretary upon presentation of a commercial invoice, as well as the Malta Arbitration Centre's fees on presentation of the letter's invoice.

> This award is hereby deemed to have been given at the Malta Arbitration Centre this 15 December 2002.**"**

Minn din id-decizjoni ta' l-Arbitru appellat il-Union b' talba lil din il-Qorti biex id-decizjoni titwarrab ghal motivi prevvisiti mis-subparagrafi (a) (iii) u (a) (i) tas-subinciz (1) ta' l-Artikolu 70 tal-Kapitolu 387;

Kif imfisser mill-Union appellanti fir-rikors ta' l-appell taghha l-impunjattiva minnha promossa taht subparagrafu (a) (iii) tal-precitat artikolu tal-ligi hi maghmula tikkonsisti fil-fatt illi c-cahda tat-talba taghhom ghas-sospensjoni tal-prolazzjoni tad-decizjoni korrelatata mat-talba numru 0002B gabet sitwazzjoni ta' gudizzju fuq materja li ghadha mertu ta' kawzi ohra *sub-judice* quddiem it-Tribunal Industrijali u l-Prim' Awla tal-Qorti Civili. Kwantu ghall-impunjattiva tad-decizjoni fuq il-motiv li l-ftehim ta' arbitragg ma kienx validu skond dik il-ligi li l-partijiet ghamluh suggett ghaliha [subpara. (a) (i)], l-Unjon appellanti tisssottometti b' argument illi l-Arbitri kienu mitluba jikkonsidraw bhala kopja abbozz ta' Ftehim Kollettiv li dwaru kien hemm il-htiega li finalment ikun approvat mill-haddiema, membri taghha, ghalbiex l-istess ftehim ikun validu u effettiv. Taht dan il-kap ta' aggravju l-Union appellanti tamplifika b' zieda permezz tan-Nota ta' Sottomissjonijiet taghha quddiem din il-Qorti (fol. 198) illi l-istess "*joint terms of remit*" kien invalidu ai termini ta' l-Istatut taghha in kwantu mhux sottoskritt miz-zewg rapprezentanti legali taghha imma minn wiehed minnhom biss;

Il-kumpanija appellata ma pprezentat ebda risposta formali, pero` b' rikors ipprezentat fl-20 ta' Marzu 2003 (fol. 21) talbet lil din il-Qorti tiddikjara l-appell inammissibbli ghar-raguni illi skond il-procedura maqbula bejn il-partijiet "*for the settlement of disputes*", huma kienu ntrabtu "*not to appeal any decision in any Tribunal or*

Court of Law" (para. 2.4). Dan s' intendi b' referenza ghad-decizjoni ta' l-Arbitragg;

Fil-hsieb ponderat ta' din il-Qorti r-rikorrenza li s-socjeta` appellata taghmel ghar-rinunzja ta' l-appell prevvista mill-ftehim mhix attendibbli. L-Artikolu 69A (2) ta' l-Att ta' l-1996 dwar l-Arbitragg jipprovdi li kontra d-decizjoni arbitrali jista' jsir appell lil din il-Qorti jew (i) b' talba li d-decizjoni titwarrab skond id-disposizzjonijiet ta' l-Artikolu 70, jew (ii) fuq punt ta' ligi a norma ta' l-Artikolu 70A. Dikjaratament, l-appell *de quo* hu artikolat fuq uhud mill-ipotesijiet stabbiliti fl-Artikolu 70, ilkoll kwalifikabbli bhala "*errores in procedendo*". F' qaghda bhal din, ankorke l-partijiet ikunu volontarjament qablu li d-decizjoni arbitrali tkun inappellabbli, l-istess decizjoni tibqa' xorta wahda soggetta ghall-impunjattiva, nonostante kwalsiasi rinunzja preventiva. B' dan, il-Qorti ma tridx tfisser illi l-patt maqbul ta' l-inappellabilita` ma jiswa xejn. Trid sempliciment tispjega illi dak il-patt ghandu jkun konsiderat bhala li hu limitat biss ghar-revoki ta' sentenzi arbitrali fejn l-appell propost minnhom ikun bazat fuq censuri ta' "punt ta' ligi" li jitnissel mid-decizjoni finali fit-termini ta' l-Artikolu 70A, ossija ghall-"*errores in iudicando*". F' kaz bhal dan ir-restrizzjoni voluta mill-partijiet ghall-appell mid-decizjoni arbitrali hi hekk possibbli in kwantu d-dritt ta' appell, ghalkemm jikkostitwixxi certament principju generali tal-process skond il-Kodici ritwali, mhux kostituzzjonalment garantit. Fil-kaz ta' vizzji fil-procediment ghal xi wahda mir-ragunijiet dettaljati fl-Artikolu 70 l-qaghda hi diversa billi mhux immaginabbli illi kien fl-intendiment tal-partijiet illi jirrinunzjaw minn qabel ghall-vizzji prospettati f' dak l-artikolu. Wara kollox, in linea ta' principju, ir-rinunzja li d-decizjoni titwarrab ghal xi wiehed minn dawk il-vizzji tista' ssir biss, u se mai, wara l-ghoti tad-decizjoni, u mhux qabel;

Eliminata l-pregudizzjali ventilata mis-socjeta` appellata, il-Qorti trid issa tezamina jekk l-aggravji sottoposti lilha mill-Union appellanti ghandhomx fundament;

Huwa forsi opportun illi b’ introduzzjoni preliminari l-Qorti taghmel dawn ir-riljevi:-

(1) Konformement ma’ l-akkordju aktar generali kostitwit mill-“*Procedure for the settlement of disputes*”, il-partijiet lahqu ftehim kompromissorju b’ effetti merament processwali biex il-kuntrasti ta’ bejniethom jigu devoluti ghall-arbitragg. Permezz tieghu huma ffakoltizzaw lill-*panel* tat-tliet Arbitri s-setgha li jitrattaw u jiggudikaw dwar il-materji, ahjar dettaljati f’ para. 3 tad-decizjoni arbitrali;

(2) Jikkonsegwi illi l-oggett tal-gudizzju arbitrali ried jigi determinat b’ riferiment ghall-kweziti li l-partijiet issottomettew lill-Arbitri u in relazzjoni ghall-interpetazzjoni ta’ l-istess, ukoll in bazi ta’ dawk l-atti successivi mill-partijiet ghal precizazzjoni taghhom;

(3) Attiz allura l-applikabilita` tal-principju bejn il-mitlub u dak deciz, l-Arbitri huma inibiti milli jezaminaw aspetti godda tal-vicenda li ma jkunux gew riferiti lilhom;

Maghmula dawn ir-rilevanzi, jirrizulta bl-ewwel motiv ta’ aggravju illi, skond l-Union appellanti, l-Arbitri vvjolaw id-dispost tas-subpara. (iii) tas-subinciz (1) ta’ l-Artikolu 70 ghaliex, kif ulterjorment spjegat minnhom fin-Nota ta’ sottomissjonijiet, hi identifikanti fil-kors tal-procediment anomalija fit-talba 0002B ghal fatt tal-pendenzi kontemporanji ta’ proceduri quddiem tribunali ohra u, nonostante li talbu s-sospensjoni tal-procediment arbitrali fuq dik il-materja specifika, l-Arbitri ssoktaw bil-prosegwiment ta’ l-istess procediment u ghaddew ghal decizjoni li, kif kwalifikata mill-Unjoni appellanti, hi wahda zbaljata;

In meritu ghal dan l-aggravju kif koncepit mill-Unjoni appellanti, il-Qorti qeghda hawn taht tiddisponi minnu b’ dawn il-konsiderazzjonijiet:-

(1) L-ewwel nett, jekk wiehed joqghod ghal dak li ddikjara Anthony De Giovanni ghas-socjeta` appellanti fl-Affidavit tieghu (fol. 48) jirrizulta li l-mertu tal-kwestjoni quddiem it-Tribunal Industrijali kienet tinvolvi materja taht il-Ftehim Kollettiv antik u mhux dak gdid li kien riferut ghall-attenzjoni u decizjoni ta' l-Arbitragg. La l-kontroversja ma kienetx l-istess fiz-zewg procedimenti ma jinftiehemx kif id-decizjoni f' wahda setghet taffettwa u jkollha effett fuq dik tal-procediment quddiem l-Arbitri;

(2) Wisq anqas jinftiehem, imbaghad, kif jista' qatt jigi accettat l-argoment illi, fil-parametri tas-subparagrafu (iii), id-decizjoni ttrattat kwestjoni mhux ikkontemplata jew imdahhla fil-patt kompromissorju jew kien fiha konkluzjonijiet dwar kwestjoni li tmur 'l hemm mill-iskop li ghalih kellu jsehh l-arbitragg. Fiz-zgur dan mhux il-kaz hawnhekk. Bl-ghazla ta' dak l-arbitragg ritwali l-partijiet riedu li jkollhom decizjoni suxxettibbli li tkun ezekuttiva skond il-precett ta' l-Artikolu 69A (1) fuq dawk it-talbiet ifformulati fil-"*joint terms of remit*". Ma jistax jinghad allura illi l-Arbitri arrogaw xi funzjoni gurisdizzjonali li ma kellhomx jew li ma nghatatx lilhom ill-partijiet, ghar-raguni, *sic et sempliciter*, illi l-Arbitri cahdu t-talba ta' l-appellanti ghas-sospensjoni;

(3) Dan biex ma jinghadx ukoll illi hu wisq dubitat kemm setghet tigi invokata dik is-sospensjoni. Jekk wiehed joqghod dejjem ghall-"*Procedure for the settlement of disputes*", bonarjament maqbula, qajla taghmel sens is-sospensjoni ta' process fl-ipotesi fejn, kontrattwalment, il-kompetenza tat-tribunal wiehed teskludi dik ta' l-iehor;

(4) Hu, imbaghad, dejjem tajjeb li jigi sottolinejat illi l-pronunzjament "*ultra compromissum*" ghal liema jirreferi s-subparagrafu (iii) ghandu dejjem jitqies, b' mod esklussiv, fil-qafas tal-kweziti effettivament proposti lill-Arbitri ghad-decizjoni taghhom. Jista', tutt' al piu, ir-raguni dedotta mill-Unjoni appellanti tammonta ghall-argoment difensiv izda dan ma jista' qatt jinkwadra ruhu bhala denunzja ta' vizzju ta' extra jew ultra petizzjoni. Pjuttost il-kuntrarju hu l-kaz. Kif taraha din il-Qorti l-Arbitri rrispettaw

il-principju su-affermat bejn dak mitlub lilhom u d-decizjoni moghtija, u tali jidher li ghamluh ukoll fir-rispett ta' dak l-obbligu imperanti tal-motivazzjoni adegwata u razzjonali;

Dak li appena ghadu kif gie espost ghandu sostanzjalment ikollu applikabilita` wkoll fir-rigward tat-tieni motiv ta' aggravju u mhux il-kaz li l-Qorti toqghod terga' tirrepeti hawn l-istess konsiderazzjonijiet. Agguntivament, pero`, ma tistax tonqos milli tirrileva, u anke tissottolineja, illi jekk fil-kors tal-procediment arbitrali l-parti ma tqajjemx il-kwestjonijiet specifici issa minnha mqanqla b' impunjattiva in sede appell, hi prekluza milli f' din l-istess sede tinserixxi dawn l-istess kwestjonijiet b' motiv ta' aggravu. Din l-osservazzjoni qed titqajjem ghar-raguni illi ma jirrizultax li quddiem l-Arbitri gew x' imkien sollevati mill-Union appellanti kwestjonijiet fuq l-irritwalita` tal-"*joint terms of remit*" ghal fatt tad-deficjenzi fis-sottoskrizzjoni tieghu (punt dan li lanqas biss tqajjem fl-appell proprju) jew ghax il-Ftehim Kollettiv kien soggett ghal "*voting rights*" tal-haddiema rapprezentati mill-Unjon appellanti u allura l-Arbitri ma setghux jaghtu "*award on the implementation of the whole agreement*" kif fit-"*terms of remit*" stipulat. Apparti li ma tqanqlux quddiem l-Arbitri, u, apparti wkoll, li kienu jesorbitaw mil-limiti tal-ftehim kompromissorju, kif gja rilevat mill-Qorti f' decizjonijiet ohra taghha, ikun sovversjoni tad-dritt kieku kellha din il-Qorti tippermetti li tikkonsidrahom meta, kif inhu l-kaz, f' ebda parti tas-sentenza attakkata ma kien hemm imsemmi, u wisq anqas decizi, l-kwestjonijiet li issa qed jigu sollevati f' dan l-istadju inoltrat. Dejjem tajjeb li jitfakkar li hu doveruz fuq din il-Qorti illi, prevjament, u qabel kull konsiderazzjoni ohra, taccerta ruhha illi l-kwestjonijiet gew devoluti u prospettati mill-Arbitri.

Fis-sens tal-konsiderazzjonijiet kollha suesposti, u prevja r-rigett tal-pregudizzjali ta' l-inammissibilita` sottomessa mis-socjeta` appellata, l-appell qed jigi michud u s-sentenza ta' l-Arbitri kkonfermata. Fic-cirkostanzi, il-Qorti thoss li huwa xieraq li l-ispejjez ta' dan l-appell jibqghu bla taxxa bejn il-partijiet.

< Sentenza Finali >

----------TMIEM----------