



QORTI TAL-MAGISTRATI (MALTA)

MAGISTRAT

Dr. Victor George Axiak LL.D. Dip. Tax

Seduta tal-11 ta' Novembru, 2019

Rikors Numru: 342/2014 VGA

Atlas Insurance PCC Limited (C-5601)

vs

Customs and Freight Agency Limited (C-17475) f'isimha proprju u fil-kwalita' taghha ta' agent tas-socjeta' estera Passalacqua e C s.r.l.

Il-Qorti,

1. Rat ir-rikors ipprezentat mill-kumpanija rikorrenti fil-15 ta' Ottubru 2014 li permezz tieghu sejjhet lill-kumpanija intimata pro. et. noe. sabiex tghid 'l ghaliex din m'ghandhiex tigi kkundannata minn din il-Qorti:

“Thallas is-somma ta' disa' t'elef sitt mija u sebghin ewro u ghaxar centezmi [€ 9,670.10] rapprezentanti d-danni li ghalihom ghamlet tajjeb is-socjeta' attrici Atlas Insurance PCC Limited bhala indennizz a favur tal-assigurata taghha Eros Trading Limited, ghal liema hlas l-imsemmija socjeta' attrici kienet debitament surrogata fid-drittijiet tal-assigurata taghha skond ma jirrizulta mill-anness subrogation form li qieghed jigi ezebit u markat bhala Dok. A, u dan rizultat ta' danni imgarrba sussegwenti ghal konsenja mibghuta lejn Catania, Sqallija, gewwa l-Italja, permezz tat-Trailer bin-numru AC 93729, fejn fil-lejl ta' bejn 15 u 16 ta' Ottubru 2013, parti mill-istess konsenja insterqet waqt li kienet taht il-

kustodja u l-kontroll tas-socjeta' konvenuta pro et noe. Bl-ispejjez u bl-imghax legali b'effett mill-lum sad-data tal-effettiv pagament, kontra s-socjeta' konvenuta pro et noe li hija minn issa ingunta ghas-subizzjoni taghha."¹

2. Rat ir-risposta tal-intimata pro. et. noe pprezentata fis-16 ta' Jannar 2015 li permezz taghha eccepjet is-segwenti:
 - *"Illi jigi eccepit li s-socjeta' intimata Customs and Freight Limited proprio ma hijiex il-legittimu kontradittur u ghalhekk ghandha tigi liberata mill-osservanza tal-gudizzju.*
 - *Illi minghajr pregudizzju ghas-suespost l-intimati ma humiex responsabbli mill-akkadut u dan stante li l-allegat serq tal-merkanzija sar fuq il-bastiment li bih ingarret il-merkanzija u ghalhekk hemm lok tal-kjamata in kawza tal-kumpanija li tiggstixxi l-bastiment li garr l-istess merkanzija.*
 - *Illi s-socjeta' intimata tirrispingi l-allegazzjonijiet u l-pretenzjonijiet kollha migjuba kontra taghha bhala infondati fil-fatt u fid-dritt.*
 - *Illi l-konvenuti taw servizz kif gie mitlub, stabbilit u accettat mill-atturi u m' humiex responsabbli tal-akkadut.*
 - *Illi fi kwalunkwe kaz ir-responsabilita' tas-socjeta' intimata ghandha tigi regolata bil-kundizzjonijiet tal-Convention for the International Carriage of Goods by Road u senjatament artikoli 17 et seq.*
 - *Illi minghajr pregudizzju ghas-suespost, qed jigi kontestat il-quantum tad-danni mitluba fit-talba u ghandhom jingiebu prova dwar l-allegat danni sofferti.*
 - *B' riserva ghal-prezentata ta' eccezzjonijiet ulterjuri permessi bil-Ligi.*"²
3. Rat it-traskrizzjoni tax-xhiedha ta' Joseph Mangion tal-26 ta' Frar 2015 li nghatat quddiem din il-Qorti diversement presjeduta³.
4. Rat it-traskrizzjoni tax-xhiedha ta' Giovanni Pietroburgo tad-19 ta' Ottubru 2015 li nghatat quddiem din il-Qorti diversement presjeduta⁴.
5. Rat it-traskrizzjoni tax-xhiedha ta' Joseph Hammett tat-3 ta' Dicembru 2015 li nghatat quddiem din il-Qorti diversement presjeduta⁵.

¹ Fol. 1

² Fol. 9

³ Fol. 13-15

⁴ Fol. 56-77

⁵ Fol. 93 - 101

6. Rat it-traskrizzjoni tax-xhiedha ta' Kevin Attard tal-20 ta' Gunju 2016 u in kontro-ezami fis-seduta tal-18 ta' Ottubru 2018 li lkoll nghatat quddiem din il-Qorti diversement presjeduta.^{6 7}
7. Rat it-traskrizzjoni tax-xhiedha ta' Joseph Bugeja tat-12 ta' Jannar 2017 li nghatat quddiem din il-Qorti diversement presjeduta⁸.
8. Rat it-traskrizzjoni tax-xhiedha ta' Leonard Brincat tal-15 ta' Gunju 2017 li nghatat quddiem din il-Qorti diversement presjeduta⁹.
9. Rat it-traskrizzjoni tax-xhiedha ta' Gianstefano Passalacqua tal-26 ta' April 2018 li nghatat quddiem din il-Qorti diversement presjeduta¹⁰
10. Rat id-dokumenti esebiti li jikkonsistu f'*subrogation form* datata 26 ta' Settembru 2013¹¹, *marine cargo claim form* (Dok. JM 1)¹², *survey report tas-surveyors* Taljani Gastaldi International S.r.l (Dok. JM 2)¹³, ittra datata 17 ta' Jannar 2014 mibghuta minn Joseph S Mangion ghan-nom tar-rikorrenti inkluz maghha kopja tas-*CMR Consignment Note* (Dok. JM 3)¹⁴, korrispondenza bejn il-partijiet (Dok. JM 4)¹⁵, polza tat-taghbija (Dok. JB 1)¹⁶, lista ta' *containers* (Dok. JB 2)¹⁷ u *email* datata 10 ta' Jannar 2017 (Dok. JB 3), *incoming log sheet for full and empty trailers and full containers* (Dok. LB1)¹⁸, *loading list* (Dok. LB 2)¹⁹ u lista ohra (Dok. LB 3)²⁰.
11. Rat in-nota tat-30 ta' Gunju 2016 li permezz taghha l-intimata esebiet sentenza tat-Tribunal ghal Talbiet Zghar fl-ismijiet *Customs & Freight Agency Limited v Sullivan Maritime Limited pro et noe* moghtija fil-21 ta' Marzu 2016 mit-Tribunal ghal Talbiet Zghar²¹.

⁶ Fol. 105-113

⁷ Fol. 191 - 210

⁸ Fol. 125-131

⁹ Fol. 141-145

¹⁰ Fol. 170 - 187

¹¹ Fol. 2 prezentat mal-avviz tat-talba

¹² Fol. 16-17 ezebit minn Joseph Mangion u ukoll minn Giovanni Pietroburgo Dok. GP 1 fol. 78-91

¹³ Fol. 18 – 38 ezebit minn Joseph Mangion

¹⁴ Fol. 39 – 48 ezebita minn Joseph Mangion

¹⁵ Fol. 49 – 52 ezebiti minn Joseph Mangion

¹⁶ Fol. 132 prezentat minn Joseph Bugeja

¹⁷ Fol. 133 u 134 prezentati minn Joseph Bugeja

¹⁸ Fol. 146 – 147 prezentat minn Leonard Brincat

¹⁹ Fol. 148 prezentat minn Leonard Brincat

²⁰ Fol. 149 ppresentat minn Leonard Brincat

²¹ Fol. 115 – 119

12. Rat in-nota ta' sottomissjonijiet tar-rikorrenti pprezentata fl-10 ta' Jannar 2019²².
13. Rat in-nota ta' sottomissjonijiet tal-intimata pprezentata fit-28 ta' Frar 2019²³.
14. Rat li l-kawza thalliet ghas-sentenza fis-seduta tal-28 ta' Frar 2019.
15. Rat li b'ordni tal-Prim Imhallef tal-10 ta' Mejju 2019, moghtija bis-sahha tas-setghat mghoddija lilu bl-artikolu 11(3) tal-Kap. 12 tal-Ligijiet ta' Malta, il-kawzi civili kollha li kienu pendenti quddiem din il-Qorti diversement presjeduta, inkluz din il-kawza, gew assenjati lil din il-Qorti kif presjeduta b'effett mill-14 ta' Mejju 2019.
16. Rat u fliet il-bqija tal-atti processwali kollha u kkunsidrat l-provi kollha li gew imressqa quddiemha inkluz provi dokumentarji.

Ikkunsidrat

17. Illi l-kawza titratta talba ghar-risarciment tad-danni wara serqa ta' parti minn konsenja ta' zraben (sewwasew erbgħa u erbgħin kaxxa li kien fihom total ta' elf u sitta u hamsin par zarbun) minn fuq *trailer* gewwa l-port ta' Catania. Il-konsenja kienet giet fdata minn Eros Trading Limited, cioe' l-assigurata tal-kumpanija rikorrenti, lil Customs and Freight Agency Limited (l-intimata), sabiex din tittrasportaha minn Malta għal għand il-klijent tagħha gewwa Ruma, l-Italja. It-talba għad-danni (għall-ammont ta' €9,670.10) saret kemm kontra l-kumpanija Customs and Freight Agency Limited ((‘il quddiem f’din is-sentenza riferuta ukoll bhala “Customs and Freight”) u kif ukoll kontra din tal-ahhar bhala agent tal-kumpanija estera Passalacqua e C s.r.l. (‘il quddiem f’din is-sentenza riferuta ukoll bhala “Passalacqua”).
18. Illi l-intimati resqu risposta wahda bejniethom għalkemm mhux l-eccezzjonijiet kollha jirrigwardaw lilhom it-tnejn. Fis-succint l-intimati qajjmu sostanzjalment din id-difiza:
 - Li b’mod preliminari, Customs and Freight m’hijiex il-**legittimu kontradittur**
 - Li z-zewg intimati ma’ jahtux għall-akkadut għaliex **l-allegat serq sar fuq il-bastiment** u kwindi għandha tigi kjamata in kawza l-kumpanija li tiggessixxi l-bastiment
 - Li z-zewg intimati **taw servizz kif mitlub u accettat** mill-assigurata tar-rikorrenti

²² Fol. 212 - 225

²³ Fol. 227- 236

- Li r-responsabilita taz-zewg intimati ghandha **tigi regolata bil-kundizzjonijiet tal-Convention of the International Carriage of Goods by Road** u senjatament Artikoli 17 *et. seq.*
- Li minghajr pregudizzju, **il-kwantum tad-danni** huwa kontestat u ghandha tingieb il-prova dwar l-allegat danni sofferti

Eccezzjoni numru wiehed: Legittimu kontradittur

19. Illi fuq dan il-punt preliminari, il-linja difensjonali li qabdu l-intimati matul il-kawza, konfermata fin-nota ta' sottomissjonijiet finali taghhom, hija illi:
 - Customs and Freight ma' kienetx il-*carrier* responsabbli ghat-trasportazzjoni tal-merkanzija
 - Customs and Freight kienet biss "*forwarding agent*" ghall-intimata l-ohra Passalacqua, li kienet il-*carrier*, u kwindi r-responsabilita' ta' Customs and Freight waqfet fil-punt illi l-merkanzija dahlet fil-Port ta' Malta u tghabbiet fuq il-bastiment.
20. Illi kontra dak ritenut mill-kumpanija rikorrenti fin-nota taghha, ma' jidhirx illi din il-Qorti diversament presjeduta kienet cahdet din l-eccezzjoni preliminari²⁴;
21. Illi mill-assjem tal-provi li ngabru quddiemha huwa car kristallin ghal din il-Qorti illi din l-eccezzjoni preliminari ma' tista qatt tintlaqa' billi huwa evidenti, anzi evidentissimu, illi l-*carrier* f'dan il-kaz kien proprju Customs and Freight u hadd izjed.
22. Illi huwa fatt mhux kuntestat bejn il-partijiet illi l-merkanzija kellha tingabar minghand l-esportatur gewwa Malta sabiex titwassal ghad-destinatarju (*consignee*) gewwa Tivoli, l-Italja. It-tragitt inizjalment kellu jkun bit-triq ghall-port gewwa Malta, imbaghad bil-bahar ghall-port ta' Katanja, ghal darb'ohra bil-bahar ghall-port ta' Napli u finalment bit-triq ghall-indirizz tad-destinatarju gewwa Tivoli.
23. Illi l-kuntratt vinkolanti bejn il-partijiet huwa dak li johrog mill-*International Consignment Note* esebita a fol 40 (b'verzjoni aktar cara esebita a fol 52). Din il-*consignment note* (iktar 'l quddiem riferuta ukoll bhala "*CMR Note*") hija suggetta ghad-disposizzjonijiet tal- Konvenzjoni dwar il-Kuntratt ghall-Garr Stradali Internazzjonali ta' Merkanzija tal-1956 ('il quddiem riferuta ukoll bhala "Konvenzjoni CMR") li giet ratifikata mill-Gvern Malti u b'effett mill-20 ta' Marzu, 2008 bdiet taghmel parti mill-ligi Maltija taht il-Kap. 486 tal-Ligijiet ta' Malta.

²⁴ Fol. 213

24. Illi mill-provi rrizulta illi s-“*sender*” illi jidher fuq is-CMR Note kienet filfatt Eros Trading Limited, l-assigurata tar-rikorrenti, u mhux l-isem indikat bhala “Trend-Set Trading”. F’dan ir-rigward **Joseph Hammett**, direttur ta’ Eros Trading Limited, xehed illi dan l-isem huwa filfatt *code name* li internament jindika dak is-*salesperson* li ha hsieb dan ix-xoghol.²⁵ L-istess xhud ikkonferma ukoll illi l-merkanzija kienet proprjeta’ ta’ Eros Trading Limited, li l-*packing list* li tidher taht l-intestatura ta’ “Trend-Set Trading”²⁶ kienet filfatt ippreparata u maghmula minn Eros Trading Limited u li l-kwantitajiet indikati fil-lista kienu ccekkjati minn haddiema ta’ Eros Trading Limited.²⁷
25. Illi skond l-intimati, Customs and Freight kienet *forwarding agent* ta’ Passalacqua u xogholha kien biss li wara li tramite is-*subcontractor* taghha tigbor il-merkanzija mill-klijent u twassalha gewwa l-port f’Malta ghat-taghbija fuq il-bastiment, tipprovdi ukoll servizzi ta’ logistika sabiex il-merkanzija tingarr minn Passalacqua bhala *carrier* li din imbaghad tqabbad lil terzi ohra bhal per eżempju terzi li joperaw l-bastimenti ghat-tragitti fuq il-bahar (f’dan il-kaz, Grimaldi Atlantica S.p.A). Fin-nota finali tagghom l-intimati jammettu illi fl-industrija tal-Ġarr Stradali Internazzjonali tal-Merkanzija *forwarding agent* jista jiehu ukoll ir-rwol ta’ *carrier* izda jishqu illi ma’ kienx hekk f’dan il-kaz u dan ‘l ghaliex Customs and Freight kellha biss ir-rwol ta’ agent ta’ Passalacqua.
26. Illi in sostenn ta’ dan l-argument taghha, fost affarijiet ohra Customs and Freight:
- tghid fin-nota finali taghha illi “*tant kienu jafu rapprezentanti tas-socjeta’ Eros Trading Limited li kien Passalacqua Trasporti li ser ikun qed jaghmel it-trasport necessarju li kienu huma stess li marru jiltaqghu ma Passalacqua innifsu fl-ufficcju tieghu il-Fgura. Ghaldaqstant il-klijent kien infurmat bir-relazzjonijiet kummercjali li kienu qed jinholqu ma’ Passalacqua u kien wara li nghatat il-konferma anke tal-prezz li Customs and Freight ghamlet il-booking necessarju ta’ dan it-trailer*”²⁸ Din l-asserzjoni pero ma’ gietx debitament ippruvata fl-atti tal-kawza.
 - tghid illi fis-*survey report* ta’ Gastaldi International s.r.l., Customs and Freight giet indikata bhala l-*forwarding agent* mentri Passalacqua giet indikata bhala *road carrier* u Grimaldi-Atlantica S.p.A. di Navigazione giet indikata bhala *sea carrier*. Bir-rispett pero, ghalkemm dan huwa

²⁵ Fol. 99

²⁶ Fol. 31

²⁷ Fol. 6-8

²⁸ Fol. 232

minnu, il-kumpanija in kwistjoni ma' kienetx ingaggata biex tidentifika min huwa *carrier* u min huwa sempliciment agent u l-unika kompetenza taghha kienet illi tistabilixxi b'mod forensiku l-kawza tat-telf tal-merkanzija u rendikont ezatt tal-merkanzija li nstabet nieqsa`.

- tghid ukoll fin-nota finali taghha illi *“hija prassi komuni li isem il-kumpanija li tkun qed toffri s-servizzi taghha ikollha isimha fuq il-bill of lading pero dan ma jassumix l-oneru ta' carrier ghaliex dan huwa responsabilita' tat-trasportatur”* u li din il-polza tat-taghbija tikkonferma illi f'dan il-kaz *“kien hemm combined transport u cioe' tal-art u tal-bahar b'Passalacqua bhala road carriers u Grimaldi Atlantica S.p.A. tal-bahar”*²⁹ F'dan ir-rigward pero ghandu jinghad illi l-polza tat-taghbija in kwistjoni hija estranja ghall-kuntratt principali vinkolanti bejn l-assigurata u Customs and Freight li huwa regolat biss bil-Konvenzjoni CMR u xejn izjed. Jekk xejn, il-polza tat-taghbija hija prova tat-tragitt li kellu jsir permezz tal-bahar u tal-fatt illi l-merkanzija tghabbiet fuq il-bastiment pprovdut mill-*Carrier* (pero *carrier* fil-kuntest tal-garr tal-merkanzija fuq il-bahar u mhux fil-kuntest tal-Konvenzjoni CMR) fil-kwantitajiet imsemmija. L-istess polza ghalhekk bl-ebda mod ma' tikkonsisti f'xi prova illi Grimaldi Atlantica S.p.A. jew Passalacqua huma *carriers* ghall-finijiet tal-Konvenzjoni CMR.

27. Illi f'dan ir-rigward fl-*Article 2* tal-Konvenzjoni CMR hemm provdut b'mod car illi fejn il-vettura (f'dan il-kaz, *trailer*) li qed ggorr il-merkanzija tingarr permezz tal-bahar ghal parti mill-vjagg U l-merkanzija ma' tigix mhotta mill-vettura, il-Konvenzjoni CMR tapplika ghall-vjagg tal-garr kollu inkluz it-tragitt fuq il-bahar salv ghal dak provdut mill-*proviso* u fl-*article 14*:

“2.1. Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of article 14 are applicable, the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage. Provided that to the extent it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other means of transport was not caused by act or omission of the carrier by road, but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport, the liability of the carrier by road shall be determined not by this Convention but in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage of the goods alone had been made by the sender with

²⁹ Fol. 234

the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport. If, however, there are no such prescribed conditions, the liability of the carrier by road shall be determined by this Convention.”

28. Illi imbaghad skond l-*Article 3*:

“3. For the purposes of this Convention the carrier shall be responsible for the acts of omissions of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment, as if such acts or omissions were his own.”

29. Illi inoltre skond *Article 9.1*:

“9.1. The consignment note shall be prima facie evidence of the making of the contract of carriage, the conditions of the contract and the receipt of the goods by the carrier.”

30. Illi kuntrarjament ghal dak li jghidu l-intimati fin-nota finali tagghom (a fol 232), m’huwiex il-kaz illi Customs and Freight indikat lil Passalacqua bhala carrier fuq is-CMR Note. Jirrizulta filfatt precizament bil-maqlub u cioe’ illi l-carrier gie indikat bhala Customs and Freight, u hadd izjed.

31. Illi sussegwentement tqajjem ukoll l-argument tas-*successive carrier*. Fil-kontro-ezami tieghu **Kevin Attard**, direttur ta’ Customs and Freight, xehed kif gej:

“Hija kwistjoni ta’ terminologija. Jekk inti qed tghid carrier u transporter huma differenti, mela naqbel mieghek. Jekk jiena nghidlek li carrier huwa l-persuna li qed igorr l-merkanzija minn post sa post iehor designat sakemm ghandu responsabbilta’ tieghu, igifieri f’dak il-kaz li huwa sa Tivoli, ghalfejn hemm zewg kumpaniji miktubin fuq is-CMR? Hija facli. Ghaliex? Ghax hemm l-ewwel persuna li hija Customs and Freight Agency li gabar ix-xoghol jew fit-trailer jew whatever the case is sal-port. Imbaghad ghandek is-second carrier li huwa Passalacqua, igifieri jien r-responsabbilta’ tighi hija, u din hi sagro santa hadd ma jista’ jinnegaha, mill-gabra ta’ Hal Far sal-port sakemm dahhaltu fil-gate Lab Wharf. Hemmhekk gie accettat u giet ittaljat fuq it-trailer ... hawn fuq il-vapur sorry. F’dak il-kaz meta mbaghad wasal fid-destinazzjoni li hija in transit li f’dan il-kaz hija wkoll a grey patch, li hija xi haga cara, li meta kien qieghead in transit u dan irrizulta b’responsabbilta’ kbira Passalacqua li kien hemm it-trailer miftuh, u dan irraporta, tajjeb, mela dan

f'dan ir-rigward trid tara min kien ir-responsabbilta' ... ta' min kien ir-responsabbilta' waqt li kien hemm in-nuqqas. Kieku jiena at any point in time, nizek minn Half Far, waqaf il-Marsa, fetah il-bieb, ha tlett kaxxi ... erbgha kaxxi, hemmhekk iva dak huwa r-responsabbilta' ta' Customs and Freight Agency Limited. U jiena inxurjat ghal dan l-affarijiet mal-istess kumpanija li qed tirrapprezenta inti."

F'dan ir-rigward ix-xhud pero huwa skorrett. Huwa minnu illi fuq is-CMR Note apparti illi Customs and Freight giet indikata bhala *Carrier*, giet indikata ukoll Passalacqua bhala *Successive Carrier* imma dan ma' jgibx b'daqshekk illi awtomatikament ir-responsabilita' tal-intimati giet apporzjonata bejniethom skond min gabar ix-xoghol u wasslu sal-port u skond min imbaghad kompla bit-tragitt. F'dan ir-rigward hija l-Konvenzjoni CMR li tirregola r-responsabilita' tas-*successive carriers*. Skond *Article 34*:

"34. If carriage governed by a single contract is performed by successive road carriers, each of them shall be responsible for the performance of the whole operation, the second carrier and each succeeding carrier becoming a party to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note."

Permezz ta' dan l-artiklu l-Konvenzjoni stabbilit ukoll illi kemm il-*main carrier* u kif ukoll *is-successive carriers* jsiru responsabbli indaqs ghat-tragitt kollu. Gie kkonfermat ukoll permezz ta' guriprudenza ricenti illi *successive carrier* li jissodisfa r-rekwiziti kollha sabiex jigi rikonoxxut bhala tali taht il-Konvenzjoni ghandu jigi hekk rikonoxxut anke jekk il-*main carrier* jew inkella l-*carriers* l-ohra ta' qablu jkunu effettivament *carriers* fuq il-karta ossia jkunu biss *contractual carriers* u ma' jkunux effettivament wettqu il-garr huma.³⁰

Naturalment il-*carrier* li jkun verament responsabbli ghal xi danni kkawzati lill-klijent jista' imbaghad jigi obligat li jhallas u jirrizarci d-danni li jkunu soffew *carriers* ohra li jkunu gew sfurzati ihallsu l-kumpens taht l-istess Konvenzjoni.

Huwa pero bl-accettazzjoni tal-merkanzija u tal-*consignment note* illi *successive road carrier* jidhol responsabbli ukoll ghal-*performance of the whole operation*. *Article 35.1* imbaghad jipprovdi dwar kif tali accettazzjoni ghandha tigi manifestata:

³⁰ C&J Veldhuizen Holding B.V. v Beurskens Allround Cargo B.v., S&S 2016/1 (Qorti Suprema tal-Olanda – 11 ta' Settembru 2015)

“35.1 *A carrier accepting the goods from a previous carrier shall give the latter a dated and signed receipt. He shall enter his name and address on the second copy of the consignment note. Where applicable, he shall enter on the second copy of the consignment note and on the receipt reservations of the kind provided for in article 8, paragraph 2.*”

Illi kif sew qalet ir-rikorrenti fin-nota finali taghha, ma' ngabu l-ebda provi ta' xi dokumenti li gew skambjati bejn il-*carriers* u ghalhekk “*ir-responsabilita' tal-merkanzija waqt it-tragitt kollu, mill-warehouse minn fejn telaq it-trailer sa' Ruma, kienet tas-socjeta' intimata proprju*”³¹

32. Illi ghalhekk din **l-ewwel eccezzjoni preliminari qeghda tigi michuda** billi l-kumpanija intimata Customs and Freight Limited proprio hija filfatt l-unika legittimu kontradittur f' din il-kawza.

Eccezzjoni numru tnejn: l-allegat serq sar fuq il-bastiment

33. Illi t-tieni eccezzjoni mressqa mill-intimati hija fis-sens illi entrambi ma' jahtux ghall-akkadut ghaliex **l-allegat serq sar fuq il-bastiment** u kwindi ghandha tigi kjamata in kawza l-kumpanija li tigestixxi l-bastiment.
34. Illi ghal kull bwon fini ghandu jinghad illi talba formali ghal *kjamata fil-kawza* tal-kumpanija li tigestixxi l-bastiment qatt ma saret f' dawn il-proceduri u in oltre ix-xhud Joseph Bugeja, rappresentant ta' Sullivan Travel li jirrapprezenta lil Grimaldi Group jghid li ma saru ebda' proceduri kontrihom fuq dan l-incident (a fol. 130).
35. Illi f' dan ir-rigward jerga jigi kkwotat l-*Article 2* tal-Konvenzjoni CMR li jirregola x'jigri meta fir-rigward ta' garr ta' merkanzija bit-triq, parti mit-tragitt isir b' mezz iehor ta' transport bhal perezempju bil-bahar. F' dan il-kaz jekk *inter alia* l-merkanzija tintilef jew tinsteraq waqt parti mit-tragitt bhal per ezempju fuq il-bahar u diment illi fl-ebda stadju l-merkanzija ma' tigi mhotta mill-vettura, ir-responsabbiltà tal-*carrier* tigi regolata mill-Konvenzjoni CMR li kif ga inghad skond l-*Article 3* tigi merfugha kollha kemm hi mill-istess *carrier* anke ghall-azzjonijiet jew omissjonijiet tal-agenti tieghu jew ta' persuni li jingagga. Madanakollu jekk il-*carrier* jipprova illi t-telf/serq tal-merkanzija sehħ mhux minhabba xi att jew omissjoni tieghu imma b' tort tal-*carrier* tal-merkanzija fuq il-bahar, allura r-responsabilita' tal-*carrier* ma' tibqax regolata bil-Konvenzjoni CMR imma tigi regolata taht il-ligi li tirregola l-kuntratt ghall-garr tal-merkanzija bil-bahar li jkun sar bejn is-*sender* u l-*carrier*.

³¹ Fol. 220

36. Illi madanakollu mill-provi m'hemmx l-icken dubbju li kuntrarjament ghal dak sostnut fl-eccezzjoni tal-intimati, is-serqa ma' saritx fuq il-bastiment matul it-tragitt bil-bahar imma fil-Port ta' Katanja, meta t-trailer kien diga lahaq tnizzel fuq l-art.
37. Illi mix-xhiedha ta' **Joseph Bugeja**, *General Manager* tal-kumpanija Sullivan Travel li tirrapprezenza lil Grimaldi Group, moghtija fit-12 ta' Jannar 2017 irrizulta li meta t-trailer ttella' fuq il-vapur huwa kien issiggillat u meta t-trailer tnizzel minn fuq il-vapur fil-port ta' Katania ma kienx hemm rimarki jew riservi. Ix-xhud esebixxa provi dokumentari in konferma ta' dan konsistenti f' *tally sheet* li jikkonferma li t-trailer tela' ssiggillat (a fol. 133) u email datata 10 ta' Jannar 2017 (fol. 134) li jikkonferma li ma kienx hemm ebda' rimarki tad-danni. Fl-istess email hemm miktub "*Catania is an open port therefore trailer, upon discharging will be positioned in free area without any sort of custody.*"
38. Illi dwar is-serqa nnifisha, mill-provi rrizulta illi waqt li t-trailer li kien qed igorr il-merkanzija kien gewwa l-port ta' Katania fil-lejl ta' bejn l-14 u l-15 Ottubru 2013 saret serqa ta' numru ta' oggetti li kienu jinstabu go fih. Din is-serqa induna biha xufier tal-kumpanija Passalacqua (li ma' kienx peri ix-xufier li kellu r-responsabilita' ta' dan it-trailer) li b'kumbinazzjoni innota li kien sar sgass peress li s-sigilli fuq it-trailer kienu miftuhin. Din il-persuna ghamlet rapport f' dan is-sens lir-rapprezentanti ta' Passalacqua li min-naha taghhom irrapportaw l-akkadut lill-Customs and Freight. Sussegwentement, sar *survey report* minn Gastaldi International S.r.l. fil-presenza ta' haddiema ta' Passalacqua li mhux biss rega stabilixxa l-akkadut imma anke ddetermina l-kwantita' u l-valura tal-merkanzija li ma' nstabitx, ossia li kienet insterqet.³²
39. Illi jirrizulta ben pruvat allura illi s-serqa ma' saritx fuq il-bastiment u ghalhekk din it-**tieni eccezzjoni ghalhekk qed tigi michuda.**

Eccezzjoni numru erbgħa: servizz mogħti kif mitlub u accettat

40. Illi r-raba' eccezzjoni hija fis-sens illi z-zewg intimati taw servizz kif mitlub u accettat mill-assigurata tar-rikorrenti. Din l-eccezzjoni pero, anke jekk b'xi mod kellha tigi ppruvata (li ma' gietx), min-natura taghha ma' xxejjinx it-talba tar-rikorrenti u ma' tispustjax ir-responsabilita' tad-danni minn fuq il-carrier ghal fuq il-klijent. Ghaldaqstant din l-eccezzjoni qeghda tigi ukoll michuda.

Eccezzjoni numru hamsa: ir-responsabilita' tal-intimati ghandha tigi regolata bil-Konvenzjoni CMR, senjatament l-artikoli 17 et. seq.

³² Fol. 19 et. seq.

41. Illi dwar din il-hames eccezzjoni, kif diga inghad, hija l-kumpanija intimata Customs and Freight wahedha, bhala *carrier*, illi hija responsabbli inkluz ghall-azzjonijiet jew omissjonijiet tal-agenti tieghu jew ta' persuni li jingagga. Inoltre fir-rigward tar-risarciment tad-danni, *Article 17.1* jipprovdi kif gej:

“17.1 The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery.”

42. Illi jezistu pero certu cirkustanzi, regolati mill-Art. 17.2 sa' Art. 17.5 li jekk jigu ppruvati, jeliminaw ir-responsabilita' tal-*carrier* ghad-danni:

“17.2. The carrier shall, however, be relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.

3. The carrier shall not be relieved of liability by reason of the defective condition of the vehicle used by him in order to perform the carriage, or by reason of the wrongful act or neglect of the person from whom he may have hired the vehicle or of the agents or servants of the latter.

4. Subject to article 18, paragraphs 2 to 5, the carrier shall be relieved of liability when the loss or damage arises from the special risks inherent in one more of the following circumstances:

(a) use of open unsheeted vehicles, when their use has been expressly agreed and specified in the consignment note;

(b) the lack of, or defective condition of packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed;

(c) handling, loading, stowage or unloading of the goods by the sender, the consignee or person acting on behalf of the sender or the consignee;

(d) the nature of certain kinds of goods which particularly exposes them to total or partial loss or to damage, especially through breakage, rust, decay, desiccation, leakage, normal wastage, or the action of moth or vermin;

(e) *insufficiency or inadequacy of marks or numbers on the packages;*

(f) *the carriage of livestock.*”

43. Illi ghalkemm mhux cara, b'din il-hames eccezzjoni l-intimati donnhom qeghdin jinwokaw xi wahda mil-limitazzjonijiet fuq imsemmija. Mill-provi ma' jirrizulta pero l-ebda cirkustanza minn dawk imsemmija fl-Artikolu 17.4 u din il-Qorti m'ghandhiex ikollha l-kompitu li toqghod tipprova taqta' x'riedu jfissru ezattament b'din l-eccezzjoni l-kumpaniji intimati izjed u izjed meta dawn lanqas biss iccarawha, meta kellhom opportunita' jaghmlu hekk matul il-kawza u fin-nota finali tagghom.
44. Illi kif sew qalet ir-rikorrenti fin-nota finali taghha, fir-rigward tal-punt illi skond l-*Article 17.2 il-carrier* jinheles mir-responsablita' legali ghar-risarciment tad-danni jekk dawn isehhu “*through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent*”, il-gurisprudenza lokali (fosthom fis-sentenza kwotata **Prokuratur Legali Madeleine Firman noe vs Concorde International Freight Forwarders Limited et** (QPA:694:2002:TM, deciza 30 ta' Marzu 2006)) u kif ukoll guristi barranin jaqblu illi l-*carrier* jrid jiehu l-mezzi kollha sabiex jevita kull hsara jew serq u li dan igorr piz tqil ghaliex jrid jipprova b'mod konkret kif id-danni gew ikkawzati f'tali cirkustanzi straordinarji u kif kien impossibbli ghalih illi jimpedihom.
45. Illi fil-kawza fl-ismijiet **Bernard E. Sullivan pro et noe vs Emanuel Grech pro et noe** (QPA:677:86:DS, deciza 2 ta' Frar 2001) il-kaz kien ukoll jitratta serq waqt li kien qed isir it-trasport f' pajjiz esteru. F' din is-sentenza l-Qorti ikkwotat b'mod estiz ir-rapport tal-perit gudizzjarju Dr Tonio Mallia (illum Imhallel) fejn jghid hekk:

“ 11. *Lanqas ma jista' jinghad li serq minn terza persuna hija haga mhux fil-kontroll tad-debitur. Il-kuntratt in kwistjoni kien regolat mis-CMR Convention, cioe', il-Convention on the Contract for International Carriage of Goods by Road u, skond l-Artikolu 17.2 ta' din il-Konvenzjoni, t-trasportatur ma jkunx responsabbli ghan-nuqqas jekk dan jigri “through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.” Kif ighid l-awtur Malcolm Clarke fil-ktieb tieghu “International Carriage of Goods by Road: CMR”, pagna 78, “What the carrier must show is more akin to the plea of impossibility of performance of contract which involves an event which renders the contract not merely more onerous but completely impossible of performance. Writers on the CMR are agreed that the event must be one which literally could not be avoided by the carrier.” F'dan il-kaz ma*

jirrizultax li kienu jezistu cirkostanzi, indipendenti mill-volonta' tad-debitur, li jaghmlu l-obbligazzjoni "impossible of performance". It-trailer wehel Reggio tort tad-ditta konvenuta u kieku din u/jew l-agentioccorrendo, kwistjoni interna bejnu u d-ditta konvenuta izda, fil-konfront tad-ditta attrici, d-ditta konvenuta m'onoratx il-kuntratt u, kwindi, hi responsabbli. Hu risaput li t-tort tat-terz li jkun imqabbad mid-debitur tal-obbligazzjoni huwa tort tal-istess debitur, ghax it-terz jezonera lid-debitur meta jkun indipendenti mill-obbligazzjoni u mhux mqabbad minn jew agent tad-debitur [ara "Farrugia vs Attard noe", deciza mill-Onorabbli Qorti tal-Appell (Sede Inferjuri) fit-28 ta' April 1998]."

46. Illi fil-kaz in ezami t-trailer minn fejn insterqu l-oggetti tal-kumpanija assicurata Eros Trading Limited insterqu waqt li dan kien ipparkjat gewwa l-port ta' Katanja li huwa miftuh. Is-serqa giet innotata b'kumbinazzjoni minn xufier iehor ta' Passalacqua. Effettivament it-trailer thalla wahdu ipparkjat bil-lejl gewwa area li hija accessibbli ghal kulhadd. Dan seta kien facilment evitat anke ghaliex il-kumpanija Passalacqua kellha enclosure gewwa Katanja u mil-provi ma harigx ghalfejn f' dan il-kaz din il-facilita' ma intuzatx.

47. Illi l-Qorti taqbel mas-sottomissjonijiet maghmula mir-rikorrenti fin-nota finali taghha fejn din irrimarkat illi ma ttiehdux il-prekawzjonijiet necessarji mill-kumpanija intimata sabiex jigi evitat is-serq u lanqas ma' gew osservati *best practices* jew linji gwida bhal dawk mahruqa fl-1981 mill-Federazzjoni Internazzjonali tat-Trasportaturi fuq it-Triq (FIATA). It-trailer thalla wahdu ghal xi hin, ma kienx ipparkat gewwa post b' livell minimu ta' sigurta' bhal nghidu ahna xi *warehouse* jew garaxx u ma kienx armat b'*anti-theft device*. Huwa car illi l-intimata ma haditx il-prekawzjonijiet minimi necessarji sabiex ma jsrix l-iscgass u din il-Qorti tikkunsidra li l-istess ma tistax tibbenefika minn ezenzjoni ta' responsabilita' ghaliex jirrizulta li kien hemm elementi ta' negligenza da parti taghha jew tal-persuni inkarigati minnha.

48. Illi finalment fuq dan il-punt, fi kwalunkwe kaz skond Article 17.3 tal-Konvenzjoni:

"17.3 The carrier shall not be relieved of liability ... by reason of the wrongful act or neglect of the person from whom he may have hired the vehicle or of the agents or servants of the latter.

49. Illi ghalhekk in kwantu qeghda tinvoka xi wahda mill-limitazzjonijiet elenkati fl-Art. 17.2 *et. seq.* tal-Konvenzjoni, **din il-hames eccezzjoni qeghda tigi michuda.**

Eccezzjoni numru sitta: kontestazzjoni tal-kwantum tad-danni

50. Illi ghar-rigward ta' din is-sitt eccezzjoni, l-intimati ikkontestaw il-kwantum tad-danni u talbu lir-rikorrenti iggib prova dwar l-allegat danni sofferti.

51. Illi skond is-*survey report* ta' Gastaldi International S.r.l. li sar fil-presenza ta' haddiema ta' Passalacqua, wara li sar esercizzju dettaljat gie ddeterminat li l-kwantita' tal-merkanzija li ma' nstabitx ossia li kienet insterqet kienet dik ta' erbgha u erbghin kaxxa kontenenti elf u sitta u hamsin par zarbun ghall-valur totali ta' **Eur 8,589.60**³³. Dan il-valur gie stabbilit abbazi tal-fattura numru YL34/3 mahruqa mill-kumpanija assigurata lill-kumpanija Taljana li xtrat il-merkanzija³⁴.

52. Illi fin-nota finali taghhom l-intimati jishqu illi din is-somma qeghda tigi kkuntestata ghaliex "*kien biss wara l-incident li Customs and Freight giet moghtija dokumenti kemm tiswa l-merkanzija*".

53. Illi skond *Article 23* tal-Konvenzjoni CMR:

"23.1. When, under the provisions of this Convention, a carrier is liable for compensation in respect of total or partial loss of goods, such compensation shall be calculated by reference to the value of the goods at the place and time at which they were accepted for carriage."

2. The value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to the current market price or, if there is no commodity exchange price or current market price, by reference to normal value of goods of the same kind and quality.

...

4. In addition, the carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in proportion to the loss sustained in case of partial loss, but no further damage shall be payable."

54. Illi inoltre skond *Article 24*:

"24. The sender may, against payment of a surcharge to be agreed upon, declare in the consignment note a value for the goods exceeding the limit laid down in article 23, paragraph 3, and in that case the amount of the declared value shall be substituted for that limit."

55. Illi mis-CMR Note ma' jidhirx li l-valur tal-merkanzija kienet giet innizzla u mill-provi ma' jidhirx li jezisti xi *commodity exchange price* jew xi *current*

³³ Fol. 82

³⁴ Fol. 85

market price ghall-merkanzija in kwistjoni. Lanqas ma' ngiebet xi prova tan-normal value of goods of the same kind and quality. L-intimati jilmentaw, kemm *per via di eccezione* u kif ukoll fin-nota finali taghhom illi l-ammont mitlub huwa eccessiv. Pero huma ma' jghidux ghalfejn dan l-ammont huwa esagerat u lanqas ma' ressuq provi f'dan ir-rigward. Fin-nuqqas ta' dan, il-Qorti ghalhekk tghaddi biex tqis il-valur tal-merkanzija fuq l-*invoice* (cioe' **Eur 8,589.60**) bhala l-valur tal-merkanzija "*at the place and time at which they were accepted for carriage.*" Din il-prassi tidher li giet ukoll accettata f'diversi pajjizi firmatarji tal-Konvenzjoni.

56. Illi fir-rigward pero tas-*survey fees* ta' €1,080.50 (bil-VAT inkluz) ir-rikorrenti ma' gabet l-ebda prova illi hija hallset dan l-ammont. Is-*subrogation form* (a fol 2) tindika biss l-ammont ta' €8,589.60 (ossia' l-valur tal-merkanzija misruqa) bhala l-ammont li r-rikorrenti hallset lill-assigurata taghha u lanqas ma' giet esebita xi fattura jew ricevuta fir-rigward tas-*survey fees*. L-unika darba li jissemma l-ammont tas-*survey fees* huwa fil-fatt fl-ittra mibghuta mir-rikorrenti lill-Customs and Freight li tinsab a fol 39 tal-process. Inoltre huwa ferm dibattibbli kemm "*survey fees*" jistghu jitqiesu bhala "*other charges incurred in respect of the carriage of goods*" fil-kuntest tal-Article 23.4 tal-Konvenzjoni CMR. Il-Qorti ma' thossx pero li f'dan l-istadju ghandha tizvolgi izjed fuq dan il-punt galadarba kif inghad xorta wahda ma' ngabux provi sufficjenti li jiggustifikaw t-talba ghar-risarciment tal-ammont imsemmi.

57. Illi ghalhekk din is-sitt eccezzjoni qeghda tintlaqa' *in parte* u d-danni risarcibbli ghandhom jigu limitati ghall-valur ta' Eur 8,589.60.

Eccezzjoni numru tlieta: infondati fil-fatt u fid-dritt

58. Illi t-tielet eccezzjoni tal-intimati hija wahda generika fejn qed tirispingi l-pretensjonijiet tar-rikorrenti bhala infondati fil-fatt u fid-dritt. Il-Qorti ma' tara l-ebda utilita' f'eccezzjoni bhal din galadarba l-intimati ressuq diversi eccezzjonijiet ohra specifici u dettaljati intizi li jxejjnu t-talbiet tar-rikorrenti. Ghalhekk il-Qorti qeghda tichad din l-eccezzjoni,

Decide

59. Il-Qorti qeghda ghalhekk tiddisponi minn din il-kawza billi:

- (a) Tichad l-eccezzjonijiet kollha ghajr l-eccezzjoni numru sitta li qed tigi milqugha *in parte*;
- (b) Tilqa' t-talbiet tar-rikorrenti limitatament fis-sens illi tikkundanna lill-kumpanija Customs and Freight Agency Limited (C17475) *proprio* sabiex thallas lill-kumpanija rikorrenti s-somma ta' tmint elef hames mija disa' u tmenin euro u sittin centezmu (Eur 8,589.60) rapprezentanti danni li ghamlet tajjeb ghalihom bhala indennizz a favur tal-assikurata taghha;

- (c) **Bl-imghax fuq din is-somma dekoribbli mill-15 ta' Ottubru 2014 bir-rata ta' hamsa fil-mija (5%) fis-sena ai termini tal-*Article 27.1* tal-Konvenzjoni CMR;**

- (d) **Fir-rigward tal-ispejjez dawn ghandhom jigu ssopportjati kif gej: 90% mill-intimata Customs and Freight Agency Limited *proprio* u 10% mir-rikorrenti.**

Dr. Victor George Axiak LL.D.
Magistrat

Mario Azzopardi
Deputat Registratur