



**QORTI CIVILI
PRIM' AWLA**

**ONOR. IMHALLEF
RAYMOND C. PACE**

Seduta tat-30 ta' Gunju, 2010

Citazzjoni Numru. 798/2006

Compunet Limited (C 21611).

vs.

B.A.S. Limited (C 444).

Il-Qorti,

I. PRELIMINARI.

Rat ir-rikors guramentat ta' Compunet Limited datat 25 ta' Awwissu 2006 a fol. 1 tal-process fejn esponiet:-

Illi s-socjeta' rikorrenti ordnat merkanzija konsistenti f'tghamir eletroniku minghand Hyundai ImageQuest Europe GmbH ghal valur ta' hmistax-il elf tliet mija u tminja u tmenin ewro (€15,388) [ekwivalenti ghall sitt elef sitt mija u sitt Liri Maltin (Lm6,606) [rata ta' kambju Lm0.4293], hekk kif iddettaljat fl-*invoice* hawn anness u mmarkat bhala Dok "A".

Illi l-istess prezz gie mhallas mis-socjeta` rikorrenti fil-15 ta' Mejju 2006 (Dok. "B").

Illi sabiex dan l-istess tghamir jingarr mill-*warehouses* go Hamburg tal-istess Hyundai ImageQuest Europe GmbH sal-istabbiliment tar-rikorrenti fil-Mosta tqabbd u l-intimati B.A.S. Limited.

Illi fil-15 ta' Marzu 2006 tghabbiet il-merkanzija msemija ghal go *trailer-container* ipprovdut mill-istess socjeta` intimamta.

Illi fil-15 ta' Marzu filghaxija s-sewwieq tat-*truck* li kien qiegħed igorr it-*trailer container* ipparkja l-istess *truck* fil-*parking strip* tat-triq maghrufa bhala Databankweg te Amersfoort vicin Utrecht l-Olanda.

Illi matul il-lejl bejn il-15 u s-16 ta' Marzu din il-merkanzija insterqet (ara rapport magħmul lill-Pulizija mis-sewwieq tat-*truck* - Dok "C" li jinkludi wkoll '*translation*' mhux ufficjali tal-istess rapport).

Illi s-sewwieq tat-*truck* induna biss illi l-imsemmija merkanzija insterqet fis-16 ta' Marzu 2006, *stante* illi baqa' rieved fil-kabina tat-*truck*.

Illi sabiex jigi sgassat dan il-*container* ikun hemm hoss qawwi hafna illi ma jistax ma jqajjimx lis sewwieq illi kien rieved go kabina.

Illi sabiex din il-merkanzija tinhatt minn gol *container* kien hemm bzonn illi jintuza '*palletizer*' minhabba l-piz konsiderevoli ta' kull pallet ta' merkanzija.

Illi sabiex tinhatt din il-merkanzija kien ikun hemm ammont konsiderevoli ta' storbju u caqliq tat-*truck*, hekk kif ikun ippruvat u spjegat ahjar fil-mori ta' din il-kawza. Minhabba dan l-istorbju u caqliq mhuwiex rajjonevoli u possibbli li s-sewwieq baqa' rieved hekk kif gie allegat.

Kopja Informali ta' Sentenza

Illi minghajr pregudizzju ghas-suespost, id-driver ma kellu qatt jiparkja t-*truck* b'tagħbija ta' merkanzija bhal dik imsemmija u jhalliha go *parking strip* ordinarju fejn m'hemm l'ebda forma ta' '*security*'.

Illi għaldaqstant is-socjeta' B.A.S Limited bhala '*carrier*' taht is-CMR Convention hija responsabbli għat-telf tal-imsemmija merkanzija u għandha thallas l-ammont ta' sitt elef sitt mija u sitt Liri Maltin (Lm6,606), konsistenti fil-prezz tal-merkanzija.

Illi għalhekk l-istess rikorrenti talbu lill-intimati jghidu għaliex din il-Qorti m'għandhiex:-

1. Tiddikjara illi s-socjeta` intimata B.A.S. Limited hija responsabbli għat-telf tal-imsemmija merkanzija u konsegwentament.

2. Tikkundanna l-istess socjeta` intimata thallas l-ammont ta' sitt elef sitt mija u sitt Liri Maltin (Lm6,606) valur tal-istess mekanzija.

Bl- ispejjez.

Rat il-lista tax-xhieda u dokumenti esebiti minn fol. 5 sa 13 tal-process.

Rat li din il-kawza kienet appuntata għas-smigh għas-seduta tas-16 ta' Jannar 2007.

Rat ir-risposta guramentata tas-socjeta` esponenti B.A.S. Limited datata 16 ta' Ottubru 2006 a fol. 19 tal-process fejn gie eccepit:-

1. Illi s-socjeta` konvenuta topera negozju ta' garr ta' merkanzija lejn Malta mill-kontinent u vici versa.

2. Illi fl-operat ta' dan in-negozju, is-socjeta` konvenuta inkarigat lill-Fahrenheit Freight Forwarders Co. Limited (C 17421) sabiex iggib Malta minn Hamburg, merkanzija tas-soejeta` attrici permezz ta' *trailer*.

3. Illi l-merkanzija msemmija giet misruqa mil-istess *trailer* minn persuni mhux mgharufa fil-lejl ta' bejn il-15 u s-16 ta' Marzu 2006.

4. Illi ghaldaqstant it-talbiet attrici huma nfondati fil-fatt u fid-dritt u ghandhom jigu michuda bl-ispejjez kontra s-socjeta` attrici peress illi kif ser jigi ppruvat aktar dettaljatament waqt il-kawza s-socjeta` esponenti mhix responsabbli ghat-telf tal-merkanzija in kwistjoni *stante* li din giet nieqsa minhabba cirkustanzi li s-socjeta` esponenti ma setghetx tevita u li ghalihom ma kellha ebda tort jew htija u ghalhekk ma jista' jkollha ebda responsabbilta` lejn is-socjeta` attrici.

5. Illi minghajr pregudizzju ghas-suespost is-socjeta` attrici ghad trid tipprova l-*quantum* tad-danni minnha reklamati u subordinatament anki f'kaz illi s-socjeta` esponenti kella tigi tenuta responsabbli (haga li qed tigi fermament ikkontestata mis-socjeta` esponenti), kwalsiasi responsabbilta` li tista' tigi determinata hija limitata *a tenur* tar-regolamenti tal-**Convention on the Contract for International Carriage of Goods by Road (CMR)**.

6. Illi ahna debitament awtorizzati nahilfu din id-dikjarazzjoni.

Salv eccezzjonijiet ulterjuri.

Rat il-lista tax-xhieda tas-socjeta` intimata a fol. 21 tal-process.

Rat il-verbal tas-seduta mizmuma fis-16 ta' Jannar 2007 fejn il-Qorti nnominat bhala Perit Legali lil Dr. Ian Vella Galea sabiex jirrelata dwar it-talbiet attrici wara li jiehu konjizzjoni tal-eccezzjonijiet fir-risposta guramantata tas-socjeta' konvenuta (fol. 28).

Rat il-verbali tas-seduti mizmuma quddiem il-Perit Legali Dr. Ian Valla Galea, bix-xhieda kollha quddiemu prodotta u d-dokumenti pprezentati.

Kopja Informali ta' Sentenza

Rat in-nota ta' sottomissjonijiet ta' Compunet Limited datata 31 ta' Lulju 2008 a fol. 110 tal-process.

Rat in-nota ta' sottomissjonijiet tas-socjeta` B.A.S. Limited ipprezentata *seduta stante* fid-9 ta' Ottubru 2008 a fol. 121 tal-process.

Rat ir-rapport tal-Perit Legali Dr. Ian Vella Galea pprezentat fil-11 ta' Gunju 2009 u mahluf fis-seduta tas-7 ta' Ottubru 2009 a fol 149 *et sequitur* tal-process.

Rat il-verbal tas-seduta tad-22 ta' April 2010 fejn meta ssejhet il-kawza deher Dr. Nicholas Valenzia ghas-socjeta` attrici rapprezentanta minn Brian Zarb Adami u Dr. Roderick Zammit Pace ghas-socjeta` konvenuta li rrimettew ruhhom ghar-rapport. Il-kawza giet differita ghas-sentenza ghat-30 ta' Gunju 2010

Rat id-digriet ta' din il-Qorti datat 14 ta' Jannar 2008 fil-kawza fl-ismijiet **“B.A.S. Limited vs Fahrenheit Freight Fowarders Co. Ltd.”** (Rik. Gur. Nru. 59/07/RCP) fejn il-Qorti ordnat il-konnessjoni tal-kawzi b'dan li l-provi f'dik il-kawza jghoddu bhala provi f'din il-kawza u vice versa.

Rat il-provi prodotti fil-kawza **“B.A.S. Limited vs Fahrenheit Freight Fowarders Co. Ltd.”** (Rik. Gur. Nru. 59/07/RCP) li qed tigi deciza wkoll illum.

Rat ix-xhieda kollha hemm moghtija.

Rat ir-rikorsi kollha pprezentati mill-partijiet u d-digrieti relattivi.

Rat id-dokumenti esebiti.

Rat l-atti kollha l-ohra tal-kawza.

II. KONSIDERAZZJONIJIET.

Illi din hija kawza fejn is-socjeta' attrici inkarigat lis-socjeta' konvenuta sabiex igorr taghmir elettroniku minn Hamburg

ghall-mahzen tas-socjeta' attrici, u qed titlob id-danni kkawzati lilha peress li l-istess merkanzija ma waslitx Malta ghaliex insterqet waqt li t-*trailer container* li kien qed igorr l-istess merkanzija gie misruq, u ghalhekk s-socjeta' attrici qed titlob li s-socjeta' konvenuta tigi misjuba responsabbli ghad-danni u sabiex tigi kkundannata thallas l-istess danni.

Illi jidher li m'hemm l-ebda kontestazzjoni dwar il-fatt illi l-garr tal-merkanzija in kwistjoni sar taht ir-regolamenti tal-**Convention on the Contract for International Carriage of Goods by Road (CMR)** li illum hija parti mill-Ligi Maltija permezz tal-**Kap. 486**, u ma hemmx dubju li l-partijiet qablu li r-relazzjoni ta' bejniethom hija suggetta ghall-istess Konvenzjoni u ghalhekk jirrizulta li s-socjeta' intimata B.A.S. Limited hija '*carrier*' ghal finijiet ta' l-istess CMR.

Illi l-**artikolu 3 ta' l-istess CMR** jipprovdi li:-

“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”,

Illi jirrizulta li is-socjeta' B.A.S. Limited qabdet lis-socjeta' Fahrenheit Freight Forwarders Limited sabiex iggor l-istess merkanzija ghal Malta permezz ta' 'trailer', u din il-Qorti taqbel mal-konkluzjoni tal-perit legali fis-sens li s-socjeta' intimata, minkejja li assigurat ruhha li s-socjeta' Fahrenheit Frieght Forwarders Limited, kienet idonea u ta' esperjenza f'dan ix-xoghol, xorta wahda r-responsabbilta' sabiex l-istess merkanzija titwassal ghad-destinazzjoni taghha tibqa' fil-konfront tas-socjeta' attrici l-istess socjeta' konvenuta u dan peress li l-imsemmi **artikolu 3 CMR** jipprovdi ghar-responsabbilta' tal-'carrier' indipendentement mill-fatt illi l-'carrier' tkun qabdet persuna ta' hila ghal dak ix-xoghol jew servizz *o meno*. F'dan is-sens ukoll huma s-sentenzi **“George Bonnici et**

nomine vs Joseph Vella et nomine” (P.A. (RCP) – 12 ta' Dicembru 2001) u **“Albert Abela vs S Mifsud & Sons Ltd**” (P.A (RCP) 23 ta' Ottubru 2001)

Illi s-socjeta' intimata B.A.S. Limited qed tecepixxi wkoll li mhiex responsabbli ghat-telf tal-merkanzija in kwistjoni in kwantu din giet nieqsa minhabba cirkustanzi li hi ma setghetx tevita u li ghalihom ma kellha l-ebda tort jew htija; f'dan il-kuntest hija qed tistrieħ fuq l-**artikolu 17.2 CMR** li jipprovdi *“inter alia”* illi:-

“The carrier shall, however, be relieved of liability if the loss, damage or delay was caused ... through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.”

Illi min-naha l-oħra jinghad li l-**artikolu 17.1 CMR** jipprovdi li:-

“The carrier shall be responsible 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.”

Illi f'dan il-kuntest huwa relevanti dan li nghad fis-sentenza fl-ismijiet **“Charles Borg noe vs Francis Vella et noe et”**(P.A. (PS) – 31 ta' Jannar 2003) fejn gie affermat li:-

“F'sitwazzjoni bhal din l-oneru tal-provi jinkombi b'logicita' lit-trasportatur (Art 18 (1)).

Fl-ispjega li jagħtu l-awturi **Hill u Massent** fil-ktieb tagħhom **“CMR: Contracts for the International Carriage of Goods by Road”**, Lloyd's of London Press Ltd, 1984, pagna 68, *“ic-cirkostanzi”*, li ghalihom jirreferi l-artikolu citat 17 (2), jkopru zewg sitwazzjonijiet distinti, definiti bhala *“force majeure”* u *“cas fortuit”*. Dwarhom jinghad dan:-

“The former indicates something imposed upon the carrier by a third party with either de facto or de jure coercive power. This would include Act of State, governmental

requisition or the effect of strikes or other industrial action. However, it will also cover an accidental occurrence which is foreign to the normal course of events in the environment in which it occurs, an event which is neither within the power of man nor his judgment to foresee or prevent, such as an accident of nature. 'Cas fortuit', on the other hand, is an accidental occurrence due to chance, which is extraneous to the carrier's normal activities, and which it is not possible to foresee or prevent, but which occurs during and in the course of performance of the contract, as for example, a fire in a warehouse".

Illi fil-kaz odjern dan jidher li jirriverti ruhu fil-punt mhux tant jekk il-vettural kienx negligenti jew le, izda jekk f'kaz ta' serq huwa *"could have avoided the circumstance and prevented the consequence"*¹. Jekk jigi accertat li dan seta' jaghmlu, *"then he will be liable although judged by negligence standards he was not behaving unreasonably in failing to overcome the risk"* (**"Michael Galley Footwear Ltd –vs- Dominic Laboni"** (1982) 2 All E.R. 200; **"Thermo Engineers Ltd –vs- Ferrymasters Ltd"** (1981) 1 Lloyd's Rep. 200).

Illi fil-ligi taghna dawn l-istess kuncetti – 'force majeure' u 'cas fortuit' huma kodifikati fl-artikolu 1029 tal-Kap. 16 li jipprovdi li *"kull hsara li tigri b'accident jew b'forza magguri, ibatiha, fin-nuqqas ta' disposizzjoni espressa tal-ligi li tghid il-kuntrarju, dak illi fuq il-persuna jew il-beni tieghu tigri l-hsara"*.

Illi fil-kazijiet ezaminati l-iskrutinju li jsir huwa dak li jigi ezaminat jekk l-att kienx precedut minn att jew ommissjoni kolpuza. Jekk ma hemm l-ebda konnessjoni bejn il-fortuwitu u l-eghmil, doluz jew kolpuz ta' l-agent, allura issehh l-effikacija tal-kaz fortuwitu bhala "mezzo liberatore della responsabilita' (**"Ciantar –vs- Gatt, A.I.C - 15 ta' Mejju 1926)**.

¹ Enfasi mizjuda

Illi ghal kuntrarju *“quando invece si ha la violazione di un dovere, ed una volontaria ommissione di diligenza per cui non si prevedono le conseguenze della propria azione ed ommissione e si viola il diritto altrui, senza volerlo ed anche senza avvedersene, allora si ha non il caso fortuito, ma la colpa ed il quasi delitto”* (**“Publio Azzopardi –vs- Antonio Arcicovich et”** A.K - 14 ta' Novembru 1919; **“Bezzina –vs- Grech et”**, K - 7 ta' Gunju 1938; **“Costantino Fenech –vs- Camillo Gatt”** - P.A. - 17 ta' Mejju 1902; **“Micallef noe –vs- Gasan nomine”** K. - 20 ta' Jannar, 1930).

Illi gie ritenut illi *“s-serq ghandu jkun ekwiparat ghal kaz fortuwitu u ghalhekk ghandu jsofrieb il-proprietarju tal-oggett misruq, ammenoche ma jkunx hemm xi htija ta' min kien depozitarju ta' dak l-oggett li titfa' l-htija fuqu ta' dak il-kaz fortuwitu”* (**“C. Bianco –vs- Carmelo Ciantar”** - Vol XXXII pl p532; **“Giuseppe Lia –vs- Peter Endrich”** - Vol XLI plII p998).

Illi f'dan il-kaz jirrizulta li ma huwiex kontestat li s-serq sar u ghalhekk kif jinghad fil-Konvenzjoni u anke fil-gurisprudenza taghha tmiss lil dawn il-prova li s-serq sar, u li dan kien ghalihom, mhux biss imprevidibbli, imma anke inevitabli. (Kollez, XXXI plII p168).

Illi f'kawza simili fl-ismijiet **“Thomas Smith Insurance Agency Limited noe vs MD Trucking Limited et”** (P.A (TM) - 18 ta' Frar 2004) gie ritenut li:-

*“Skond il-gurista Jan Ramburg (**“The Law of Carriage of Goods: Attempts of Harmonization”** - 9E.T.L. 1974), il-bazi ta' responsabbilta' enuncjata fis-CMR mhix eskluza billi dak li ikun agixxa diligentament, izda hemm oneru akbar mixhut fuq it-trasportatur, li jrid jiehu l-mezzi kollha biex jevita kull hsara jew serq². L-awtur **S. Zamara (**“Carrier Liability”** Am. J. of Comp Law 1975) jghid li “the courts have been reluctant to admit as a defense that the carrier has simply not been negligent. Instead, they place***

² Id.

a heavy burden on the carrier to show specifically how the unavoidable circumstance caused the loss”.

Illi huwa pacifiku li l-grad ta' diligenza rikjesta f'kazijiet simili mit-trasportatur hu deskritt hekk mill-awtur **Malcolm A. Clarke** fil-ktieb **“International Carriage of goods by Road: CMR”**

“There is a temptation to exonerate the carrier on this ground, if he has taken all ‘reasonable steps’ to avoid the event causing loss... This would sit easily with the general duty of exercising reasonable care of cargo, which, it has been suggested will be implied in a contract to carry goods by road. But the defense in article 17 (2) makes no mention of reasonable steps and such steps are probably insufficient. What the carrier must show is more akin to the plea of impossibility of performance of a 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. It need not however, like the concept of force majeure in France, be unforeseeable (sic) although many events will, by the very fact that they are foreseeable, be avoidable by the carrier of whom such a high standard is required.”

Illi jirrizulta li mill-istess giurisprudenza qed tigi segwieta din il-linja rigida fl-interpretazzjoni tal-klawsola relattiva tas-CMR (**“Sullivan vs Grech”** P.A. - 2 ta' Frar, 2001; **“Galdes vs Bowman”** P.A. - 25 ta' Jannar, 2002; u **“Farrugia noe vs Gatt nomine”** – K - 16 ta' Jannar, 1984) fejn intqal li *“mhux bizzejjed li c-cirkostanzi kienu straordinarji imma li jridu jkunu tant straordinarji li jirrenduha mpossibbli lill-carrier li jimpediha anke bl-akbar diligenza. L-essenza tad-difiza hija l-imprevedibbilta' u l-inevitabbilta.”*

Illi hawn issir referenza ghal dak li inghad fis-sentenza ghal dak li jghid l-awtur **David Glass – The Divided Heart of the CMR Convention** 14 E.T.L. 1979) u cjoe:-

“The carrier cannot hope, simply that ordinary care was taken, to escape liability. He must show that in respect of the particular loss or damage, no failing on his part could have contributed to it. It follows that a high degree of proof is required on his part, normally by proving the actual cause and showing how it arose with no fault on his part”. Dan gie adottat mill-Qrati taghna fil-kawza **“Bernard Sullivan et nomine vs Emmanuel Grech et nomine”** (P.A. (DS) – 2 ta' Frar 2001); **“John Galdes nomine vs Joseph Bowerman”** (P.A. (DS) 25 ta' Jannar 2002) u **“Farrugia nomine vs Gatt nomine”** (K. – 16 ta' Jannar 1984) u **“Elmo Insurance Agency Limited et vs Fahrenheit Freight Fowarders Co. Limited”** (P.A. (GV) – 29 ta' Ottubru 2004); **“Charles Borg nomine vs Francis Vella et nomine”** (P.A. (PS) 31 ta' Jannar 2003); **“Filtions Clothing Company Limited vs Sullivan Shipping Agencies Limited et”** (P.A. (RCP) – 27 ta' April 2006); u **“Atlas Insurance Agency Limited proprio et nomine vs Falcotrans Limited”** (P.A. (RCP) – 26 ta' April 2007).

Illi huwa interessanti li fil-kawza **“Thomas Smith Insurance Agency Limited noe vs MD Trucking Limited et”** is-serqa grat waqt li z-zewg *drivers* tat-*trailer* kienu reqdin fil-kabina tat-*trailer* waqt il-lejl, izda xorta wahda dik il-Qorti sabet lill-*carrier* responsabbli. Anke f'dan il-kaz, is-serqa saret waqt li d-*driver* kien rieqed fil-kabina tal-vettura fil-hin tal-lejl.

Illi fil-rigward tal-Italja huwa maghruf li hemmhekk jigu rraportati hafna serqiet tant li fil-1981, il-Federazzjoni Internazzjonali tat-Trasportaturi fuq it-Triq (il-FIATA), harget “notes of guidance” biex jigu evitati serqiet f'dak il-pajjiz. Estratt minn dawn in-noti jghidu hekk:-

“How can theft be prevented”

A. MEASURES TAKEN PRIOR TO THE START OF AN INTERNATIONAL ROAD TRANSPORT:

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1. *An anti-theft device must be installed in the vehicle which must be used even during the shortest absence of the driver from his vehicle.*
2. *Engagement of Reliable drivers' who are handed envelopes containing papers likely to be of use to the police in the case of theft. These envelopes must always remain in the possession of the drivers.*
3. *NEVER TO DIVULGE the nature and value of consignments to strangers.*
4. *To arrange, whenever possible, a CONVOY of 2 to 3 vehicles or have a driving crew of 2 persons.*

B. DURING THE JOURNEY

1. *Never to give a LIFT to hitchhikers.*
2. *Whenever the driver notices something out of the ordinary he must stop at a busy place and, if necessary, ring the police.*
3. *Driver must stop AT GUARDED CAR PARKS, even for short breaks (or else relay on the brotherhood of vehicle drivers during the performance of customs and other formalities). In fact in one case, it was held that a road hauler whose vehicle had been left unguarded for two hours on the customs car park at an Italian border station outside office hours and was stolen, was liable for the theft. The Court decided that the driver did not take adequate safety measures to prevent the theft of the vehicle and could not rely on Art. 17.2. of the CMR. That the vehicle was left locked up in a customs area was not sufficient evidence of careful securing.*
4. *Driver must never STOP IN A REMOTE AREA.*
5. *Driver should refrain from travelling alone at night, even on motorways.*

6. *Driver must be alert in restaurants, coffee houses etc.*

7. NO DELIVERY of goods, if possible, after office hours or on Friday evenings.”

Illi hija l-fehma ta' din il-Qorti, anke a bazi tal-gurisprudenza citata li dawn il-linji kwida ghandhom jigu addattati b'mod generali f'kull kaz ta' trasport ta' merkanzija fuq l-art. Din il-Qorti tqis dawn il-mizuri bhala necessarji biex trasportatur ikun jista' jipprova jehles mir-responsabbilta' tant li ghandhom jitqiesu bhala *sine qua non* ghal kull vjagg, b'dan li n-nuqqas tat-trasportatur li jadopera xi wahda minn dawk il-mizuri, ghandha twassal ghall-konkluzjoni li t-trasportatur ikun responsabbli ghal dak li jigri. Dan ifisser li dawn il-linji gwida ghandhom jigu segwiti u adoperati f'kull kaz ta' trasport fuq l-art, u n-nuqqas li jigu adoperati dawk il-mizuri ta' sigurta' ikun necessarjament ifisser li l-att tat-terzi ma jkunx jista' jitqies bhala wiehed “*which literally 'could not' be avoided by the carrier*”.

Illi fil-kaz in ezami jirrizulta li whud minn dawn il-*guidelines* ma gewx segwiti: la *t-trailer* u anqas l-vettura ma kienu armati *b'anti-theft device* jew *alarm system*; ma giex irrangat *convoy* ta' zewg jew tliet vetturi u anqas ma gie irrangat *driving crew* ta' zewg persuni; is-sewwieq ma pparkjax gewwa *guarded car park* izda ipparkja fit-triq *f'remote area* u *in oltre* l-vettura tieghu biss kienet ipparkjata hemm.

Illi jrid jinghad ukoll illi din kienet l-ewwel darba li s-sewwieq hadem f'dik iz-zona u li l-Fahrenheit Freight Forwarders Limited ma tawhx indikazzjoni ta' kif inhu l-post fejn saret is-serqa. *In oltre*, ghalkemm is-sewwieq ra illi kien hemm *cameras* mal-fabbrika, dawn kienu qeghdin jaghtu ghal fuq il-fabbrika ghas-sigurta' tal-istess u mhux tal-vettura. Fil-fatt is-sewwieq xehed illi zewg *cameras* kienu qed jaghtu ghal fuq il-fabbrika li kellu jghabbi minnha filwaqt illi fabrika ohra li kien ipparkjat hdejha kellha wkoll zewg *cameras* pero' ma jafx jekk kienux qed jghatu ghal fuq il-vettura.

Illi jrid jigi nnutat ukoll illi s-sewwieq stqarr illi normalment hu jgorr frott u skont hu ghal dik it-tip ta' merkanzija m'hemmx bzonn *security measures*. Illi wkoll, s-sewwieq ma ha l-ebda mizuri ta' sigurta' bhal per ezempju illi jipparkja bil-bibien ta' wara kwazi jmissu ma' hajt b'mod illi l-bibien ma jkunux jistghu jinfethu. Certament ma jistax jinghad illi s-sewwieq ha l-mezzi kollha biex jevita kull hsara jew serq.

Illi ghalhekk din il-Qorti tikkondividi l-opinjoni tal-perit legali li minn ezami tal-fatti ma jistax jinghad illi ghat-trasportatur is-serqa kienet imprevedibbli u inevitabbli u kwindi l-eccezzjoni *ai termini* ta' l-**artikolu 17.2 CMR** qed tigi michuda. Ghalhekk l-ewwel erba' eccezzjonijiet tas-socjeta' intimata B.A.S. Limited ghandhom qed jigu lkoll michuda.

Illi l-hames eccezzjoni tas-socjeta' intimata B.A.S. Limited hija fis-sens li s-socjeta' rikorrenti trid tipprova l-*quantum* tad-danni minnha reklamati u illi kwalsiasi responsabbilita' li tista' tigi determinata hija limitata *a tenur* tar-regolamenti tas-CMR.

Illi fir-rigward tal-ammont mitlub mis-socjeta' rikorrenti, u cioe' s-somma ta' sitt elef sitt mija u sitt Liri Maltin (Lm6,606), ekwivalenti ghal hmistax-il elf tliet mija u tmienja u tmenin ewro (€15,388), dan l-ammont jirrizulta mid-dokumenti annessi mar-rikors guramentat bhala Dok. "A" u Dok. "B" u cioe' l-fattura relattiva ghall-merkanzija in kwistjoni u dokument li jindika l-hlas relattiv *da parte* tas-socjeta' rikorrenti u kif ukoll mis-*survey report* mmarkat bhala Dok. "BV2" a fol. 36 tal-process.

Illi s-socjeta' intimata qed issostni illi kwalsiasi responsabbilita' li tista' tigi determinata hija limitata *a tenur* tal-**artikolu 23 (3) CMR** li jillimita l-kumpens pagabbli relattivament ghall-piz tal-merkanzija. Da parti taghha, s-socjeta' rikorrenti qed tinvoka l-**artikolu 29 (1) CMR** li jipprovdi illi:-

“The carrier shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his willful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to willful misconduct.”

Illi f'dan il-kaz is-socjeta' rikorrenti ssostni illi l-agir tas-socjeta' intimata jekwivali ghal *willful misconduct* ai termini tal-imsemmi artikolu 29(1) CMR u kwindi l-ammont ta' danni minnha sofferti m'ghandux jigi limitat.

Illi fil-kawza fl-ismijiet “**Joseph Bowman noe vs Anthony Mizzi et noe et**” (P.A. (TM) 20 ta' Marzu 2003), il-Qorti qalet illi:-

“mhux kull ordinament guridiku ghandu kuncett ta' “willful misconduct”, u kull stat kien, allura, invita jaddotta kuncett li hu simili ghal dan u li huwa parti tas-sistema guridika tieghu. Il-Qorti ta' Cassazione ta' Franza, b'decizjoni moghtija fit-8 ta' Jannar, 1974, osservat li, fil-kuntest tas-sistema franciza, dik il-frazi ghandha tirreferi ghal negligenza grassa (faute lourde), u sabet lid-driver hati ta' din it-tip ta' negligenza meta baqa' diehel fuq wara ta' trailer iehor, li kien qed isuq quddiemu fl-istess lane bhal tieghu. F'kazijiet ohra, il-Qrati Francizi dejjem uzaw dan it-test ta' faute lourde, u hekk, per ezempju, il-Qorti tal-Appell ta' Parigi, f'decizjoni moghtija fis-17 ta' Frar, 1973, osservat li kien hemm negligenza kbira meta d-driver ha wisq tul ta' zmien biex jaghmel il-vjagg, halla l-merkanzija mhux adegwatament mghottija waqt li kien niezel is-silg, u rrifjuta li jaghmel konsenja bejn is-26 ta' Dicembru u t-3 ta' Jannar. Din il-Qorti tikkondividi dan it-tagħlim u tekwepara ‘willful misconduct’ ma’ negligenza grassa.”

Illi bl-istess mod, l-Onorabbli Qorti tal-Appell fil-kawza fl-ismijiet “**Atlas Insurance Agency Limited nomine vs Express Trailers Limited**” (18 ta' Mejju 2005) qalet illi *“anke fis-sistema legali Malti dan il-kuncett tal-gross negligence jew faute lourde mhux aljen ghalina, u allura*

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fejn jokkorri dan, konsimilment ghas-sistema franciza, fil-kaz in specje, u fejn jokkorri, jista' jigi adoperat b'ekwivalenza ghal 'dol' jew 'willful misconduct.'

Illi fil-kawza fl-ismijiet “**Atlas Insurance Limited pro et noe vs Concorde International Freight Forwarders Limited**” (A.I.C - 3 ta' Ottubru 2007) inghad li:-

“Fil-fattispeci, is-sottrazzjoni jew trafugament tal-merkanzija turi nuqqas ta' dik l-akkortezza rigoruza fid-diligenza tas-socjeta` appellanti u allura din il-Qorti, ankorke kellha tintrattjeni ruhha mid-difiza tal-limitazzjoni tar-responsabbilta` ventilata mis-socjeta` appellanti, ma tarax kif tista' leggerment taccetta illi l-kwantum tad-danni jigi limitat in relazzjoni mal-piz tal-merce, meta hu hekk apparenti, fil-fattispeci, illi kien hemm negligenza, razenti l-willful misconduct jew dik tal-equivalent default, li teskludi din id-difiza.”

Illi fl-opinjoni ta' din il-Qorti, l-agir jew ahjar in-nuqqas tas-socjeta' Fahrenheit Freight Forwarders Limited li tiehu dawk il-mizuri necessarji li kellha tiehu sabiex jigi evitat kull hsara jew serq tal-merkanzija li taghha kienet responsabbli jirrizulta f'negligenza grossolana ekwivalenti ghal “willful misconduct” li jirrendi l-limitazzjoni tar-responsabbilta' ikkontemplata fl-**artikolu 23 (3) CMR** inapplikabbli ghall-kaz odjern. Minhabba dan il-hames eccezzjoni tas-socjeta' intimata B.A.S. Limited qed tigi michuda.

Illi ghalhekk it-talbiet attrici qed jigu milqugha

III. KONKLUZJONI.

Illi ghalhekk ghal dawn il-motivi, din il-Qorti, taqta' u tiddeciedi, billi filwaqt li tichad l-eccezzjonijiet kollha tas-socjeta' intimata, **tilqa' t-talbiet attrici** b'dan illi:-

1. Tiddikjara illi s-socjeta` intimata B.A.S. Limited hija responsabbli ghat-telf tal-imsemmija merkanzija u konsegwentament.

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2. Tikkundanna l-istess socjeta` intimata thallas l-ammont ta' hmistax-il elf tliet mija u tminja u tmenin euro (€15,388), ekwivalenti ghal sitt elef sitt mija u sitt Liri Maltin (Lm6,606) valur tal-istess mekanzija.

Bl-ispejjez kontra s-socjeta' konvenuta.

Moqrija.

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-----TMIEM-----