



**QORTI CIVILI
PRIM' AWLA**

**ONOR. IMHALLEF
RAYMOND C. PACE**

Seduta tat-30 ta' Novembru, 2010

Citazzjoni Numru. 90/2007

**Middlesea Insurance plc, kif surrogata fid-drittijiet tal-
assikurat taghha Bortex Clothing Industry Company
Limited, sia bis-sahha tal-polza ta' assikurazzjoni u kif
ukoll skont il-ligi.**

VS

Express Trailers Limited

Il-Qorti,

I. PRELIMINARI.

Rat ir-rikors gurantat tas-socjeta` Middlesea Insurance plc datat 25 ta' Jannar 2007 a fol. 1 tal-process fejn Patrick Muscat ippremetta:-

Illi s-socjeta` Bortex Clothing Industry Company Limited inkarigat lis-socjeta` konvenuta sabiex titrasportalha

Kopja Informali ta' Sentenza

konsenja ta' hwejjeg tal-ilbies tal-irgiel minn Malta ghar-Renju Unit (Dok. "A" u Dok. "B").

Din il-merkanzija kellha tingarr fil-*container* numru mija u wiehed u ghoxrin (121) tas-socjeta` konvenuta (Dok. "C").

Meta din il-merkanzija waslet ghand id-destinatarju, instab illi parti minn din il-merkanzija kienet nieqsa kif jirrizulta wkoll mir-rapport li kopja tieghu qed tigi hawn annessa u mmarkata bhala Dok. "D".

Ir-rikorrenti, skont il-polza ta' assikurazzjoni, indennizzaw lill-assikurat taghhom, Bortex Clothing Industry Company Ltd., fis-somma ta' tnejn u ghoxrin elf u tlieta u disghin Lira u tlieta u erbghin centezmu (Lm22,093.43), u ghalhekk gew issurrogati fid-drittijiet tieghu kontra s-socjeta` konvenuta responsabbli ghal dan in-nuqqas (Dok. "E").

Ghalkemm initerpellati sabiex ihallsu ghal dan in-nuqqas, il-konvenuti intimati baqghu inadempjenti.

L-esponenti jaf personalment b'dawn il-fatti kollha.

Illi ghalhekk l-istess socjeta` attrici talbet lis-socjeta` konvenuta tghid ghaliex din il-Qorti m'ghandhiex: -

1. Tiddikjarahom unikament responsabbli ghan-nuqqasijiet sofferti mis-socjeta` Bortex Clothing Industry Company Limited u li dwarhom l-istess socjeta` giet indennizzata kif premiss.
2. Tillikwida d-danni sofferti mill-assikurat u li ghalihom ghamlu tajjeb l-atturi fis-somma ta' tnejn u ghoxrin elf u tlieta u disghin Lira u tlieta u erbghin centezmu (Lm22,093.43).
3. Tikkundanna lill-istess konvenuti sabiex ihallsu lill-atturi s-somma hekk likwidata bhala danni sofferti mill-istess atturi, kif u ghar-ragunijiet premissi.

Bl-ispejjez, u bl-imghax legali mid-data li l-assikurat thallas u cioe` l-1 ta' Dicembru 2006, sal-effettiv pagament,

Kopja Informali ta' Sentenza

kontra l-konvenuti li jinsabu minn issa ngunti ghas-subizzjoni.

Rat il-lista tax-xhieda flimkien mad-dokumenti esebiti a fol. 4 sa 37 tal-process.

Rat ir-risposta guramentata tas-socjeta` konvenuta Express Trailers Limited datata 15 ta' Gunju 2007 a fol. 45 tal-process fejn gie exceptit:-

(1) Illi l-talbiet attrici huma infondati fil-fatt u fid-dritt u ghandhom jigi michuda minn din l-Onorabbli Qorti bl-ispejjez kontra s-socjeta` attrici ghas-segweni ragunijiet:

1. Illi *in limine litis*, trid issir il-prova tas-surroga.
2. Illi s-socjeta` eccipjenti ma ikkommattiet ebda nuqqas fil-konfront tal-assigurata tas-socjeta` attrici u, kwindi, is-socjeta` eccipjenti mhijiex risponsabbli lejn is-socjeta` attrici ghad-danni pretizi minnha.
3. Illi s-socjeta` eccipjenti mhijiex risponsabbli lejn l-attrici *stante* li jekk jirrizulta li huwa minnu li l-merkanizija in kwistjoni giet nieqsa kif allegat, dan sehk konsegwenza ta' forza magguri (*irresistible force* ossija *fortuitous event*) u/jew fatti ohra illi l-eccipjenti la kellha kontrol fuqhom u wisq anqas setghet tevita - u dan kemm skont il-**Kodici Civili (art. 1134, art. 1029)** u anke skont il-ftehim bejn is-socjeta` eccipjenti u s-socjeta` Bortex Clothing Industry Co Ltd ghall-garr tal-merkanzija in kwistjoni, li tinkorpora l-konvenzjoni internazzjonali maghrufa bhala **CMR (art. 17.2)**.
4. Illi s-socjeta` eccipjenti mhijiex risponsabbli versu l-attrici *stante* li jekk jirrizulta li huwa minnu li l-merkanizija in kwistjoni giet nieqsa, dan sehk f'stadju meta l-istess merkanizija ma kinetx fil-kontroll jew pussess jew fl-isfera ta' risponsabilita` tas-socjeta` eccipjenti u, kwindi, ma tirispondiex is-socjeta` eccipjenti ghall-allegati nuqqasijiet.

5. Illi subordinarjament u minghajr pregudizzju ghas-su-eccepjt, fil-ftehim relattiv ghall-garr tal-merkanzija in kwistjoni hija inkorporata l-konvenzjoni internazzjonali maghrufa bhala **CMR** li f'kwalunkwe kaz tillimita r-risponsabbilta tas-socjeta` eccipjenti u kwindi, *semmai*, ir-risponsabbilita` tas-socjeta` eccipjenti ma ghandhiex tissupera l-limiti imposti minn tali konvenzjoni.

6. Illi *in ogni caso*, in-nuqqas fil-merkanzija, kif allegat mis-socjeta` attrici (paragrafu 3), irid jigi ippruvat. Iridu jigu wkoll ippravati d-danni allegatament sofferti mill-assikurata tas-socjeta` attrici.

7. Illi minghajr pregudizzju ghas-su-eccepit, id-danni pretizi huma eccessivi.

8. Illi minghajr pregudizzju ghas-su-eccepjt, l-imghaxijiet mitluba mis-socjeta` attrici, *stante* li l-kawza odjerna hija wahda *da likwidarsi*, jekk huma dovuti, jibdeu jiddekorru mid-data tas-sentenza u mhux f'xi hin qabel.

9. Salvi eccezzjonijiet ulterjuri permessi mil-Ligi.

Rat il-lista tax-xhieda tas-socjeta` konvenuta a fol. 47 tal-process.

Rat li din il-kawza kienet appuntata biex tinstema' quddiem l-Assistent Gudizzjarju Dr. Josette Demicoli ghat-3 ta' Ottubru 2007 (fol. 50).

Rat il-verbali tas-seduti kollha mizmuma quddiem l-Assistent Gudizzjarju Dr. Josette Demicoli bix-xhieda kollha quddiemha prodotta u d-dokumenti pprezentati.

Rat il-verbali tas-seduti kollha mizmuma quddiem l-Assistent Gudizzjarju Dr. Gillian Portelli bix-xhieda kollha quddiemha prodotta u bid-dokumenti pprezentati.

Rat li din il-kawza giet appuntata quddiem din il-Qorti hekk presjeduta ghad-29 ta' April 2010.

Kopja Informali ta' Sentenza

Rat il-verbali tas-seduti mizmuma quddiem il-Qorti fid-29 ta' April 2010 u fit-23 ta' Gunju 2010 fejn meta ssejhet l-kawza dehru Dr. Paul Micallef Grimaud ghas-socjeta` konvenuta u Dr. Edward Woods ghas-socjeta` attrici li ddikjaraw li l-provi huma maghluqa. Id-difensuri talbu jaghmlu nota ta' osservazzjonijiet. Il-Qorti laghet it-talba u ppreffigiet terminu ta' tletin (30) gurnata mid-data tad-digriet lill-konvenut ghal tali nota, bin-notifika lid-difensur tal-kontro-parti li jkollu tletin (30) gurnata ghan-nota tieghu. Il-kawza giet differita ghas-sentenza ghat-30 ta' Novembru 2010.

Rat in-nota ta' sottomissjonijiet tas-socjeta` konvenuta Express *Trailers* Limited datata 19 ta' Lulju 2010 a fol. 142 tal-process.

Rat in-nota responsiva tas-socjeta` attrici datata 24 ta' Awwissu 2010 ghan-nota ta' sottomissjonijiet tas-socjeta` konvenuta a fol. 158 tal-process.

Rat ix-xhieda kollha hemm moghtija.

Rat l-atti 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 azzjoni maghrufa bhala *marine cargo claim*, fejn is-socjeta' konvenuta giet inkarigata mis-socjeta' Bortex Company Industry Co. Ltd. sabiex tittrasporta konsenja ta' hwejjeg tal-ilbies tal-irgiel minn Malta ghar-Renju Unit, liema hwejjeg kienu gew stivati fi *trailer* mgħobbi presso l-istess socjeta' speditrici u li hadet il-konsenja tieghu is-socjeta' konvenuta; gie allegat li waqt li t-*trailer* kien wasal fil-port ta' Genoa infetah u nsteraq minn terzi persuni mhux maghrufa.

Illi ghal dan in-nuqqas ghamlet tajjeb is-socjeta' attrici li assigurat il-merkanzija in kwistjoni u hallset l-ammont ta' Lm22,093.43 lis-socjeta' Bortex Company Industry Co. Ltd bhala valur tal-merkanzija li nstabet nieqsa u dan skont *survey* immarkat bhala Dok. "D". Is-socjeta' attrici giet surrogata fid-drittijiet tal-assigurat taghha (Dok. "E"), u istitwiet din il-kawza sabiex tirkupra l-ammont minghand is-socjeta' konvenuta, li qed tigi tenuta responsabbli ghal tali nuqqasijiet ghaliex bhala trasportatrici naqset li tikkonsenja l-merkanzija kollha fdata lilha lill-konsennatarji ndikati.

Illi dwar l-ewwel eccezzjoni dwar il-prova tas-surroga din giet ippruvata mid-Dok. "E" appena msemmi u ghalhekk din l-eccezzjoni qed tigi michuda.

Illi dwar il-mertu 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 jidher li mid-dokumenti esebiti konsistenti fi CMR Notes relattivi (Dok. "A" fol. 4 sa 8) r-relazzjoni bejn is-socjeta' Bortex Clothing Industry Co. Ltd (Bortex) u s-socjeta' konvenuta (*Express Trailers*) hija regolata bl-istess Konvenzjoni u ghalhekk jirrizulta li s-socjeta' intimata hija '*carrier*' ghal finijiet ta' l-istess CMR.

Illi jirrizulta li s-socjeta' konvenuta hadet konsenja tat-*Trailer* No. ETM 121 minghand is-socjeta' Bortex fejn kienet il-merkanzija u din ingarret u tghabbiet fuq l-m/v Malta Express fit-3 ta' Frar 2006 ghal Genoa fejn waslet fil-5 ta' Frar 2006 li kien il-Hadd. Dan it-*trailer* tnizzel fil-Genoa Multipurpose Terminal u gie hemm ipparkjat sabiex jittiehed mit-*trailer operators* ghar-Renju Unit. Dan il-mod ta' tragitt u d-desitinazzjoni gie maghzul mis-socjeta' konvenuta li kkonsidrat l-istess port bhala l-iktar wiehed sikur (Francis Vella – 19 ta' Ottubru 2009). Jirrizulta wkoll li l-ghazla tat-terminal saret mill-operaturi tal-bastiment u l-operaturi tal-port maghzul (Joseph Bugeja – Sullivan Maritime Limited – 9 ta' Lulju 2009 – agent lokali tas-socjeta' Grimaldi Napoli li topera l-vapur).

It-*trailers* tnizzlu bit-trakkijiet tas-socjeta' "Unica" operatrici tal-istess terminal u l-addetti tal-istess ghazlu fejn jipparkjaw l-istess *trailer*.

Illi t-Tnejn 6 ta' Frar 2010 meta mar Joseph Muscat, is-sewwieq inkarigat mis-socjeta' konvenuta (Dok. "FV 3"), sabiex jkompli t-tragitt lejn l-Ingilterra, sab li t-*trailer* kellu sigill differenti minn dak li kellu Malta, u nforma b'dan lil Francis Vella ghan-nom tas-socjeta' konvenuta, li qallu sabiex jikkomunika mal-agenti taghhom barra EUR Service srl, u huwa stess ikkomunika mal-kumpanija li tmexxi t-terminal ta' Genoa (Unica) u mal-agenti tal-vapur, izda ghalkemm gie verifikat mill-agenti tas-socjeta' konvenuta fil-prezenza tas-sewwieq li kien hemm diversi nuqqasijiet fil-merkanzija spedita, ma jidhirx li sar *survey* kongunt fuq il-post (Dok. "FV4" – fol. 94). Kif inghad, is-socjeta' konvenuta *tramite* Francis Vella (xhieda tas-16 ta' Jannar 2008 – fol. 88) informat lis-socjeta' Bortex b'dan u din minn naha taghha nformat lis-socjeta' attrici. Jirrizulta li sar *survey* meta l-merkanzija waslet ghand il-konsennatarji kif jidher mir-rapport datat 23 ta' Mejju 2006 (Dok. "D" – fol. 18) u fejn gew indikati n-nuqqasjiet kollha. Dan kollu jinsab ikkonfermat fl-affidavit tal-istess Joseph Muscat (22 ta' Jannar 2008 – fol. 97).

Illi huwa opportun li jinghad li 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 f'dan il-kaz is-socjeta' intimata hija "*carrier*" u hija tibqa' hekk responsabbli indipendentement mill-fatt illi hija tkun qabddet 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); "**Albert**

Abela vs S Mifsud & Sons Ltd” (P.A (RCP) 23 ta' Ottubru 2001) u **“Gasamamo Insurance Agency Limited nomine vs Sea Malta Company Limited proprio et nomine”** (A.I.C. (PS) – 17 ta' Novembru 2004. F'dan il-kuntest allura din il-Qorti thoss li l-istess socjeta' kienet u baqghet responsabbli ghat-tragitt kollu minn Malta sa l-Ingilterra, nkluz meta l-istess *trailer* kien fuq il-vapur u tnizzel l-art u dan anke sal-hin li s-sewwieq direttament inkarigat mis-socjeta' konvenuta ha effettivament pussess tal-istess *trailer*. F'dan il-kuntest dak kontenut fil-paragrafu 26 tan-nota ta' osservazzjonijiet tas-socjeta' intimata ma jbidel xejn mill-posizzjoni legali, ghaliex l-istess socjeta' konvenuta kienet u baqghet responsabbli bhala *carrier* tal-istess merkanzija ghad-durata tat-tragitt kollu minn Malta sal-Ingilterra kif fil-fatt kien pattwit.

Illi proprju fis-sentenza **“George Bonnici et nomine vs Joseph Vella et nomine”** (A.C. – 25 ta' Frar 2005) inghad li:-

“Kif sewwa osservat l-ewwel qorti, l-unika relazzjoni kuntrattwali in konnessjoni mal-garr ta' din il-merkanzija kien il-kuntratt konkluz bejn is-socjeta' Bortex u s-socjeta' konvenuta. Minn dan il-kuntratt ta' garr jirrizulta l-obbligu tas-socjeta' konvenuta li ggorr u tikkunsenja l-merkanzija fi stat tajjeb u minghajr nuqqasijiet; kull relazzjoni li l-istess socjeta' kjamata in kawza huwa ghalhekk res inter alios acta li bl-ebda mod ma jbidel jew ihassar l-obbligu tas-socjeta' konvenuta li jirrizulta kemm mir-regoli generali ta' l-obbligazzjonijiet kif insibuhom fil-ligi nostrana kif ukoll mir-regolamenti maghrufa bhala CMR Rules li, bi ftehim bejn il-kontraenti, kellhom jirregolaw il-kuntratt”.

Illi s-socjeta' intimata qed teccepixxi 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:-

Kopja Informali ta' Sentenza

“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 minn naha l-ohra 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 fil-ismijiet **“Compunet Limited vs B.A.S. Limited”** (P.A. (P.A. (RCP) – 30 ta' Gunju 2010), u **“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 jaghtu l-awturi **Hill u Massent** fil-ktieb taghhom **“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 judgement 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 circumstances and prevented the consequence”*. 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 tigi b'incident 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 tigi 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”**); **“Carmel Wismayer nomine et vs Chev. Anthony Falzon nomine”** – A. C. – 29 ta' April 1996); u **“Dr. Carmel Chircop nomine vs Av. Dr. Kevin F. Dingli nomine”** (P.A. (RCP) – 9 ta' Jannar 2001).

Illi ghal kuntrarju *“quando invece si ha la violazione di un dovere, ed una volontaria omissione di diligenza per cui non si prevedono le conseguenze della propria azione ed omissione 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 jsofrieħ il-proprietarju tal-oggett misruq, ammenoche’ ma jkunx hemm xi htija ta’ min kien depozitarju ta’ dak l-oggett li tiffa’ l-htija fuqu ta’ dak il-kaz fortuwitu” (“**C. Bianco –vs- Carmelo Ciantar**” - Vol XXXII pl p532; “**Giuseppe Lia –vs- Peter Endrich**” - Vol XLI pl 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 tagħha tmiss lil dawn il-prova li s-serq sar, u li dan kien ghalihom, mhux biss imprevidibbli, imma anke inevitabli. (Kollezz, XXXI p.iii 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:-

“Skont 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 jieħu l-mezzi kollha biex jevita kull hsara jew serq¹. 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 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

¹ Id.

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 segwita din il-linja rigida fl-interpretazzjoni tal-klausola 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 impossibbli lill-carrier li jimpediha anke bl-akbar diligenza. L-essenza tad-difiza hija l-imprevedibilita' u l-inevitabilita'.*"

Illi hawn issir referenza ghal dak li nghad 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 Forwarders Co. Limited**" (P.A. (GV)

– 29 ta' Ottubru 2004); **“Charles Borg nomine vs Francis Vella et nomine”** (P.A. (PS) 31 ta' Jannar 2003); **“Filtens 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 fil-rigward ta' l-Italja huwa maghruf li hemmhekk jigu rapportati 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:

- 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 rely 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 haulier 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 gwida 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-responsabilita' 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 il-vettura ma kienu

armati *b'anti-theft device* jew *alarm system*; ma giex irrangat *convoy* ta' zewg jew tlett vetturi u anqas ma gie rrangat *driving crew* ta' zewg persuni; jidher li sar arrangement mal-agenti tal-vapur sabiex il-merkanzija titwassal l-Italja, izda dan kien ser isir il-Hadd, meta skont is-socjeta' konvenuta stess is-sewwieq taghha ma setax jiehu pussess tal-merkanzija hlief it-Tnejn, u xorta wahda ghazlu dan il-mod u perjodu ta' tragitt. L-allegazzjoni tas-socjeta' konvenuta li hadd ma jithalla jidhol fit-terminal waqt il-hatt tieghu u jidher li hemm access ghall-istess terminal ghal kull min ikollu "*a proper pass*" u wkoll ghal sewwieqa li jkollhom dokumenti personali, u ma jidhirx li kien hemm xi problemi sabiex is-sewwieq jacedi mill-ewwel ghall-istess *trailer* jew inkella li jipprovdi protezzjoni ghall-istess.

Illi l-allegazzjoni tas-socjeta' konvenuta li t-terminal fejn kien ipparkjat it-*trailer* kien wiehed mill-iktar *safe* peress li kien jinsab *f'enclosed area*, li s-socjeta' konvenuta tallega li hija mghassa sew, kemm min nies (*security*), kemm *f'fence* gholi, u kemm ukoll *cameras*, ma jidhirx li huwa minnu ghaliex jirrizulta li fejn kien ipparkjat it-*trailer* l-ebda wahda minn dawn is-sistema ta' sikurezza ma hadmet, tant li hadd ma nduna li s-serq kien sehh hlief meta s-sewwieq mar biex jigbor it-*trailer*. Certament li ma jistax jinghad li t-*trailer* thalla pparkjat "*f'terminal mghammar b'sigurta' gholja*" (fol. 148) u , dan huwa iktar evidenti meta jidher li fl-istess jum kien hemm diversi *trailers* tas-socjeta' konvenuta stess li gew misruqa (para 34 tan-nota ta' osservazzjonijiet tas-socjeta' ntimata u tas-Surveyor Paul Ellul p.9 21 u 22). F'dan il-kuntest issir riferenza ghal dak li inghad f'paragrafu 8 tan-nota ta' osservazzjonijiet attrici (fol. 160). Fl-ahharnett issir riferenza ghall-fax mibghuta minn EUR Service Genova srl (agenti tal-konvenuti f'Genoa) lil Comesmar (l-agent tal-vapur f'Genoa), lil Multipurpose u kopja lis-socjeta' konvenuta, datata 6 ta' Frar 2006 (Dok. "H") fejn jinghad li:-

"....i danni conseguenti saranno portati a carico della compagnia marittima che voi rappresentate direttamente dalla espress trailers con la quale e' stato stipulato il contratto di trasporto".

Illi dan kollu jindika 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 it-tieni, it-tielet u r-raba' eccezzjonijiet tas-socjeta' intimata qed jigu lkoll michuda.

Illi s-socjeta' intimata qed issostni illi kwalsiasi responsabbilta' li tista' tigi determinata hija limitata a tenur ta' l-**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 wilful 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 wilful misconduct.”

Illi f'dan il-kaz is-socjeta' rikorrenti ssostni illi l-agir tas-socjeta' intimata jekwivali ghal *wilfull misconduct* fit-termini ta' l-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' “wilful 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'decizzjoni 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 ddriver ha wisq tul ta' zmien biex jaghmel il-vjagg, halla l-merkanzija mhux adegwament moghtija 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 'wilful misconduct' ma negligenza grassa."

Illi bl-istess mod, l-Onorabbli Qorti ta' l-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 fejn jokkorri dan, konsimilment ghas-sistema franciza, fil-kaz in specje, u fejn jokkorri, jista' jigi adoperat b'ekwivalenza ghal 'dolo' jew 'wilful misconduct.'*"

Illi fil-kawza fl-ismijiet "**Atlas Insurance Limited pro et noe vs Concorde International Freight Forwarders Limited**" (A.I.C (P.S) - 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-responsabilita` 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-wilful misconduct jew dik ta' l-equivalent default, li teskludi din id-difiza."

Illi fl-opinjoni ta' din il-Qorti, l-agir jew ahjar in-nuqqas tas-socjeta' Express Trailers Limited li tiehu dawk il-mizuri necessarji li kellha tiehu sabiex tigi evitata kull hsara jew serq tal-merkanzija li tagħha kienet responsabbli, jirrizulta f'negligenza grossolana ekwivalenti ghal "wilful misconduct" li jirrendi l-limitazzjoni tar-responsabbilta' ikkontemplata fl-**artikolu 23 (3) CMR** inapplikabbli għall-kaz odjern. F'dan is-sens huma wkoll is-sentenzi

“Compunet Limited vs B.A.S. Limited” u **“B.A.S. Limited vs Fahrenhiet Freight Fowarders Co. Ltd”** (P.A. (RCP) – 30 ta' Gunju 2010). Minhabba dan, il-hames eccezzjoni tas-socjeta' intimata qed tigi michuda.

Illi s-sitt eccezzjoni tas-socjeta' intimata hija fis-sens li s-socjeta' rikorrenti trid tipprova l-*quantum* tad-danni minnha reklamati, izda anke din l-eccezzjoni ghandha tigi michuda *stante* li n-nuqqas tal-istess merkanzija jirrizulta mis-*survey* immarkat bhala Dok. “D” (fol. 27) li bl-ebda mod ma gie kontradett mis-socjeta' intimata u dan fl-ammont ta' wiehed u hamsin elf, erba' mija u tlieta u sittin ewro u hamsa u tmenin centezmu (€51,463.85) ekwivalenti ghal Lm22,093.43.

Illi dwar is-sitt eccezzjoni din il-Qorti thoss li la darba t-talba nkludiet ukoll l-ammont rikjest, l-interessi relattivi fuq l-ammont hawn likwidat ghandu jiddekorri mid-data tan-notifika tal-azzjoni attrici lis-socjeta' intimata fil-31 ta' Mejju 2007.

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 r-risposta guramentata tas-socjeta' intimata datata 15 ta' Gunju 2007, **tilqa' t-talbiet attrici** b'dan illi:-

1. Tiddikjara lis-socjeta' intimata unikament responsabbli ghan-nuqqasijiet sofferti mis-socjeta' Bortex Clothing Industry Company Limited u li dwarhom l-istess socjeta' giet indennizzata kif premess.

2. Tillikwida d-danni sofferti mill-assikurat u li ghalihom ghamlu tajjeb l-atturi fis-somma ta' wiehed u hamsin elf, erba' mija u tlieta u sittin ewro u hamsa u tmenin centezmu (€51,463.85) ekwivalenti ghal tnejn u ghoxrin elf u tlieta u disghin Lira u tlieta u erbghin centezmu (Lm22,093.43).

Kopja Informali ta' Sentenza

3. Tikkundanna lill-istess konvenuti sabiex ihallsu lill-atturi s-somma hekk likwidata ta` wiehed u hamsin elf, erba' mija u tlieta u sittin ewro u hamsa u tmenin centezmu (€51,463.85) ekwivalenti ghal tnejn u ghoxrin elf u tlieta u disghin Lira u tlieta u erbghin centezmu (Lm22,093.43) bhala danni sofferti mill-istess atturi, kif u ghar-ragunijiet hawn decizi.

Bl-ispejjez, u bl-imghax legali mid-data tal-31 ta' Mejju 2007 sal-effettiv pagament, kontra s-socjeta' intimata.

Moqrija.

< Sentenza Finali >

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