

Kopja Informali ta' Sentenza



**QORTI CIVILI
PRIM' AWLA**

**ONOR. IMHALLEF
JOSEPH ZAMMIT MC KEON**

Seduta tal-31 ta' Mejju, 2012

Citazzjoni Numru. 723/2007

International Translation Agency Limited (C14310)

kontra

**C&C Express Limited (C32212) proprio, u qua agenti
tas-socjeta` estera TNT Express Holdings B.V.**

II-Qorti :

I. Preliminari

Rat ir-rikors guramentat presentat fl-4 ta` Lulju 2007
li jaqra hekk –

Kopja Informali ta' Sentenza

1. Illi nhar il-11 ta` April 2007 is-socjeta` rikorrenti nkarigat lis-socjeta` intimata proprio et noe sabiex tikkonsenja pakkett ta` dokumenti ossia tender bid ghal tender internazzjonali fl-ammont ta` mija u erbgha u tmenin elf u hames mitt Dollaru Amerikan (USD 184,500) li harget il-World Meteorological Organisation (WMO), sabiex jitwassal fl-indirizz "Mr. Andrei Iline, Chief Procurement Travel Office, World Meteorological Organisation, 7 Bis, Avenue de la Piax, Case Postale 2300, Geneva 2, 1211, Switzerland" bin-numru tal-konsenja 107306447 ;

2. Illi t-tender de quo ma kienx tender pubbliku, u kien riservat biss ghal numru limitat u esklussiv ta` socjetajiet li kienu mistiedna jifgħu t-tender tagħhom mill-WMO stess, liema socjetajiet li jinkludu lis-socjeta` attrici li giet mistiedna tiffa` t-tender tagħha a bazi tat-track record professjonali eccellenti tagħha f` dan il-qasam ;

3. Illi minkejja l-istruzzjonijiet cari tas-socjeta` rikorrenti, is-socjeta` intimata b`negligenza grassa, traskuragni professjonali u bi vjolazzjoni tal-obbligi kuntrattwali u legali tagħha, nhar it-13 ta` April 2007 naqset milli tikkonsenja t-tender tas-socjeta` rikorrenti fid-destinazzjoni ndikata mill-istess socjeta` esponenti fil-hin, u din l-ommissjoni kolpuza tal-istess socjeta` intimata wasslet sabiex it-tender bid tas-socjeta` esponenti tigi awtomatikament irrifjutata mid-destinatarju ;

4. Illi ghaldaqstant u unikament minhabba l-ommissjoni kolpuza tas-socjeta` intimata, is-socjeta` rikorrenti garrbet danni konsiderevoli konsistenti f`damnum emergens u lucrum cessans, u dan kif jigi ppruvat ahjar waqt il-mori tal-kawza ;

Ghaldaqstant tghid is-socjeta` intimata ghaliex dina l-Onorabbli Qorti m`ghandiex:

(1) *Tiddikjara lis-socjeta` intimata unikament responsabbli ghad-danni sofferti mis-socjeta` rikorrenti u dan stante l-ommissjoni kolpuza ta` l-istess socjeta` intimata ;*

(2) *Tillikwida d-danni konsistenti f`damnun emergens u lucrum cessans li gew sofferti mis-socjeta` rikorrenti f`somma li tista` tigi likwidata okkorrendo bl-operat ta` periti nominandi ;*

(3) *Tikkundanna lis-socjeta` intimata thallas lill-istess socjeta` rikorrenti s-somma hekk likwidata u dikjarata bhala dovuta minnhom in linea ta` danni hekk kif fuq imsemmi ;*

Bl-imghaxijiet legali u bl-ispejjez inkluzi dawk ta` l-ittra ufficjali datata 9 ta` Meju 2007 kontra l-istess socjeta` intimata li hija minn issa ngunta ghas-subizzjoni.

Rat il-lista tax-xhieda indikati mis-socjeta` rikorrenti.

Rat ir-risposta (li kienet mahlufa minn Diana Cassar) presentata fl-10 ta` Awissu 2007 li taqra hekk –

1. *Illi dwar il-fatti dikjarati fl-ewwel paragrafu tar-rikors promotorju tas-socjeta` rikorrenti, fil-11 ta` April 2007 is-socjeta` esponenti proprio inghatat l-inkarigu mis-socjeta` rikorrenti sabiex tikkonsenja pakkett li kien jizen 1.6kg, liema pakkett ingarr bin-numru tal-polza ta` l-inkarigu GD 107306447 WW li kopja taghha hija hawn annessa u mmarkata bhala “Dok. CC1” ;*

2. *Illi dwar il-fatti dikjarati fl-ewwel paragrafu tar-rikors promotorju tas-socjeta` rikorrenti, is-socjeta`*

esponenti mhijiex agent tas-socjeta` estera TNT Express Holdings B.V. u ma assumiet l-ebda inkarigu f`isem din is-socjeta` estera.

3. *Illi dwar il-fatti l-ohra dikjarati fil-bqija tad-dikjarazzjoni tar-rikorrenti dawn huma kollha kkontestati peress illi kwalsiasi dewmien li seta` kien hemm fil-wasla tal-konsenja in kwistjoni kienet dovuta ghal cirkostanzi li s-socjeta` esponenti ma setghatx tevita u li ghalihom ma kellha ebda tort jew htija. Id-dewmien li seta` kien hemm fil-konsenja tal-pakkett in kwistjoni gie kkawzat unikament minn dettalji zbaljati u/jew konfliggenti fil-kodici postali fl-indirizz tal-konsenjatarju pprovdoti lis-socjeta` esponenti minn rapprezentant tas-socjeta` rikorrenti stess bil-konsegwenza li l-pakkett twassal fi Zurich qabel ma twassal Geneva, kif ser jirrizulta aktar dettaljatament fil-kors tal-kawza ;*

4. *Illi fi kwalunkwe kaz is-socjeta` rikorrenti qdriet l-inkarigu taghha b`mod professjonali u skond l-arti u s-sengha rikjesta u addirittura appena saret taf illi l-kodici postali ndikat mir-rapprezentant tas-socjeta` rikorrenti kien zbaljat ghamlet mill-ahjar li setghet biex twassal il-pakkett f`indirizz Geneva skond ma xtaqet is-socjeta` rikorrenti, fl-aqsar zmien possibbli, u dan nonostante li l-pakkett kien diga` twassal Zurich bhala konsegwenza tad-dettalji zbaljati u/jew konfliggenti fil-kodici postali skond l-istruzzjonijiet originarjament moghtija mis-socjeta` rikorrenti ;*

5. *Illi jiena naf b`dawn il-fatti personalment u ninsab debitament awtorizzata nahlef din id-dikjarazzjoni ;*

6. *Ghaldaqstant is-socjeta` esponenti teccepixxi li gej –*

6.1 *Illi preliminarjament is-socjeta` esponenti ma ghandhiex ir-rapprezentanza tas-socjeta` estera TNT*

Express Holdings B.V. liema socjeta` ghandha s-sede taghha f`Neptunusstraat 41-63, 2132 JA Hoofddorp l-Olanda u ghalhekk, fi kwalsiasi kaz, fir-rigward taghha ghandu japplika d-dispost tar-Regolament tal-Kunsill tal-Komunita` Ewropeja No. 1348/2000 u/jew l-Att Dwar ir-Ratifika ta` Konvenzjonijiet dwar Proceduri Legali (Kap. 443 tal-Ligijiet ta` Malta) ;

6.2 Illi fil-mertu t-talbiet attrici huma nfondati fil-fatt u fid-dritt u ghandhom jigu michuda bl-ispejjez kontra s-socjeta` attrici peress illi kwalsiasi dewmien li seta` kien hemm fil-wasla tal-konsenja in kwistjoni kienet dovuta ghal cirkostanzi li s-socjeta` esponenti ma setghatx tevita u li ghalihom ma kellha ebda tort jew htija u konsegwentament ma jista` jkollha ebda responsabbilita` ghalihom ;

6.3 Illi minghajr pregudizzju ghas-suespost fir-rigward tal-quantum tad-danni allegati mis-socjeta` rikorrenti kemm bhala damnum emergens kif ukoll bhala lucrum cessans apparti li d-danni allegatament sofferti mis-socjeta` rikorrenti ghad iridu jigu ppruvati jigi except illi –

i. ir-responsabbilita` tas-socjeta` mittenti hija limitata a tenur tal-klawsola 11 (a) tal-kondizzjonijiet tal-garr taht il-polza ta` l-inkarigu relattiva ghal `17 drawing rights per kilo` (circa US\$20/Kilo). Il-pakkett in kwistjoni kien jizen 1.6 kg, u ghalhekk anki fil-kaz li jirrizulta xi dewmien attribwibbli lis-socjeta` esponenti (haga li qed tigi firmament ikkontestata), l-ammont massimu ta` danni li s-socjeta` esponenti tista` tigi kkundannata ghalihom huwa ta` US\$32 ;

ii. is-socjeta` esponenti qatt ma tista` tkun responsabbli ghad-danni konsegwenzjali reklamati mis-socjeta` rikorrenti in kwantu l-klawsola 12 tal-

Kopja Informali ta' Sentenza

kondizzjonijiet tal-garr taht il-polza ta` l-inkarigu relattiva teskludi b`mod kategoriku din ix-xorti ta` responsabbilta`.

6.4 Salvi eccezzjonijiet ulterjuri jekk ikun il-kaz.

Bl-ispejjez kontra s-socjeta` rikorrenti.

Rat il-lista tax-xhieda indikati mill-kumpannija konvenuta u l-lista ta` dokumenti esebiti.

Rat illi fl-udjenza tat-22 ta` Ottubru 2007 quddiem din il-Qorti diversament presjeduta, il-partijiet kienu diretti biex iuressqu provi dwar l-ewwel eccezzjoni.

Rat il-provi kollha li ressqu l-partijiet dwar l-ewwel eccezzjoni (minn fol 17 sa fol 56).

Rat is-sentenza preliminari moghtija minn din il-Qorti diversament presjeduta fis-27 ta` Marzu 2009 (fol 66 sa fol 73) fejn laqghet l-ewwel eccezzjoni u halliet il-kawza ghall-kontinwazzjoni u biex ir-rikorrenti jirregolaw il-posizzjoni taghhom fir-rigward tas-socjeta` TNT Express Holdings B.V., bl-ispejjez jibqghu riservati ghall-gudizzju finali.

Rat illi l-kumpannija attrici talbet illi tappella minn din is-sentenza.

Rat id-digriet tal-25 ta` Mejju 2009 fejn din il-Qorti diversament presjeduta tat permess biex isir appell.

Rat illi l-appell sar, kien hemm risposta, kien trattat u in segwitu deciz b`sentenza tal-Qorti tal-Appell moghtija fit-30 ta` Ottubru 2009. Id-decide kien ighid hekk –

... tiddisponi mill-appell interpost mis-socjeta` attrici billi tilqa' l-istess, thassar u tirrevoka s-sentenza preliminari moghtija mill-ewwel Qorti fis-27 ta' Marzu 2009, tichad l-eccezzjoni preliminari tas-socjeta` intimata C & C Express Limited (cioe` dik bin-numru 6.1. a fol. 9 tal-atti), u tibghat l-atti lura lill-ewwel Qorti ghall-kontinwazzjoni skond il-ligi. L-ispejjez relattivi ghal dan l-incident, inkluzi dawk marbuta mas-sentenza preliminari li tat l-ewwel Qorti, ghandhom jithallsu kollha mis-socjeta` konvenuta appellata.

Rat illi fl-4 ta` Frar 2010 li kienet l-ewwel udjenza fejn il-kawza kompliet tinstema` minn din il-Qorti kif presjeduta wara li kienu rimessi l-atti lilha id-difensur tal-kumpannija konvenuta ddikjara ill ibis-sentenza tal-Qorti tal-Appell ma kenitx sorvolata ghal kollox l-ewwel eccezzjoni taghha. Id-difensur tal-kumpannija attrici ma kienx tal-istess fehma. Ghalhekk il-Qorti halliet il-kawza sabiex tkun trattata u deciza l-eccezzjoni markata 6.1 fir-risposta guramentata.

Rat il-provvediment ta` din il-Qorti kif presjeduta moghtija fit-30 ta` Marzu 2010 (fol 108 sa fol 115) fejn ghar-ragunijiet hemm moghtija fl-ewwel lok cahdet il-pretensjoni tal-kumpannija intimata C & C Express Limited kif dedotta u dikjarat minnha fl-udjenza tal-4 ta' Frar 2010 (fol 102), fit-tieni lok, ordnat illi l-ispejjez ta' dan il-provvediment jibqghu a kariku tal-kumpannija intimata C & C Express Limited u halliet il-kawza ghall-provi tal-kumpannija attrici fil-mertu ghall-udjenza tal-10 ta` Gunju 2010.

Rat ix-xiehda bl-affidavit ta` Elizabeth Gatt (fol 123) u l-prospett tad-danni pretizi mill-kumpannija attrici (fol 124 sa fol 218).

Kopja Informali ta' Sentenza

Semghet ix-xiehda ta` Rashid Titouah (fol 221 sa fol 228) fl-udjenza tad-19 ta` April 2011.

Semghet ix-xiehda ta` Diana Cassar (fol 231 sa fol 234) fl-udjenza tat-28 ta` Gunju 2011 u l-kontroezami taghha (fol 238 sa fol 248) fl-udjenza tal-20 ta` Ottubru 2011.

Semghet is-sottomissjonijiet tal-ahhar mid-difensuri tal-partijiet fl-udjenza tas-17 ta` Novembru 2011

Rat in-nota ta` riferenzi tal-kumpannija konvenuta (fol 250 u fol 251).

Rat id-digriet taghha moghti fl-udjenza tas-17 ta` Novembru 2011 fejn halliet il-kawza ghas-sentenza ghal-lum.

Rat l-atti tal-kawza.

Ikkunsidrat :

II. Generali

Kif impostata, dik attrici hija azzjoni ghal danni. Mill-premessi, huwa evidenti illi l-azzjoni hija ghal danni *ex contractu*. Fl-ewwel talba, qeghda tintalab dikjarazzjoni ta` responsabilita` tal-kumpannija konvenuta kemm *de proprio* kif ukoll bhala agent ghal allegata omissjoni kolpuza. Fit-tieni talba, qeghda tintalab il-likwidazzjoni tad-danni tal-kumpannija attrici kemm fl-ghamla ta` *damnum emergens* kif ukoll

bhala *lucrum cessans*. It-tielet talba hija konsegwenzjali ghat-tieni talba. Min-naha taghha, il-kumpanija konvenuta mhux biss qeghda tikkontesta l-azzjoni attrici fil-mertu izda, bla pregudizzju, ghal dawk li huma danni, qeghda tikkontesta l-pretensjoni attrici ghal-likwidazzjoni ta' *damnum emergens* u ta' *lucrum cessans* ghax qedghda tinvoka l-applikazzjoni ta' l-*package limitation* li hemm fl-*airway bill*. Din il-Qorti tghid mill-ewwel illi r-relazzjoni guridika *ex contractu* bejn il-partijiet hija regolata bl-*airway bill* (li kopja taghha kienet esebita mill-kumpanija konvenuta bhala DOK CC1 a fol 11 u 12 tal-process). U fir-rigward tal-kumpanija konvenuta hija hekk regolata kemm fil-kwalita' taghha *de proprio* kif ukoll fil-vesti taghha ta' agent ta' TNT Express Holdings B.V. Tant dan huwa hekk (ara fol 12) li fid-*definition clause* tat-*terms and conditions of carriage*, l-espressjonijiet "*we, us and our*" ifissru "*subsidiaries, affiliates of TNT Holdings B.V. or TNT Express Holdings B.V. and their respective employees, agents and independent contractors*".

Ikkunsidrat :

III. L-Airway Bill.

Il-kawzali tal-istanza attrici hija allegata *ommissjoni kolpuza* da part ital-kumpanija konvenuta. Mill-premessi, huwa evidenti li dik tal-kumpanija attrici hija *a claim for delay*.

Mhuwiex kontestat illi fejn fl-*airway bill* in kwistjoni hemm indikati d-dettalji ta' l-mittent u tad-destinatarju mtela' mill-kumpanija attrici. Huwa evidenti wkoll illi kienet l-istess id illi mtliet kemm id-dettalji tal-mittent u tad-destinatarju. **Ghall-fini tal-mertu tal-kawza tal-lum, dawk rilevanti huma d-dettalji tad-destinatarju.**

Mid-dokument, jirrizulta hekk –

Name : Mr. Andrei Iline.

**Address : Chief Procurement and Travel Office,
World Meteorological Organization,
7 bis, Avenue de la Paix Case Postale**

2300

City : Geneva 2

Postal / Zip Code : 1211

Country : Switzerland

Contact name : Mr. Andrei Iline

Tel No. : 741227308346

Fost it-terms and conditions of carriage tal-airway bill, din il-Qorti tqis bhala rilevanti, kemm ghall-istanza attrici kif proposta kif ukoll ghall-fini tal-kontestazzjoni tal-kumpannija konvenuta, il-klawsoli li gejjin –

8. Incorrect Address and P.O. Box Numbers

If we are unable to deliver because of an incorrect address we will make all reasonable efforts to find the correct address. We will notify you of the correction and deliver or attempt to deliver the shipment to the correct address although additional charges may apply if the correct address is different to the one shown on the consignment label affixed to your shipment. Deliveries to post office numbers are only accepted if the telephonme number of the consignee is also provided and you agree in the event that we are unable to deliver the shipment at the first attempt then we may post the shipment to the consignee and proof of posting is sufficient proof of delivery

11. Extent of Our Liability

Subject to clause 12 below we limit our liability for any loss, damage or delay of your shipment or any part of it as follows :

a) Carriage by air

If the carriage of your shipment is solely or partly by air and involves an ultimate destination or a stop in a country other than the country of departure the Warsaw Convention 1929 (as amended by the Hague Protocol 1985) or the Montreéal Convention 1999 will be applicable. These international treaties govern and limit our liability for loss, damage or delay to your shipment to 17 special drawing rights per kilo (approximately US\$ 20 per kilo although the rate of exchange is variable) ...

If none of the limits of liability of the above conventions apply for any reason including breach of contract, negligence, willful act or default our liability to you for loss, damage, delay, misdelivery or non-delivery of your shipment or the part affected is limited to the actual loss incurred by you to acquire the shipment or the part affected with in every case an upper limit that does not exceed US\$ 20 per kilo.

12. Exclusions

12.1 We are not liable for any consequential or special damages or loss (including loss of income, profits, markets, reputation, use of contents or loss of an opportunity) or other indirect loss arising from the loss, damage, delay, misdelivery or non-delivery of your shipment even if we know that such damages or loss might arise.

12.2 We are not liable if your shipment or any part of it is lost, damaged, delayed or mis-delivered or not delivered at all as a result of :

a) circumstances beyond our control such as (but not limited to) ...

b) by your acts or omissions or those of third parties such as ...

Ikkunsidrat :

IV. Provi dwar I-Ewwel Talba

Ir-ragunijiet ghall-istanza tal-kumpannija attrici (ITA Ltd) huma mfissra bil-preciz fl-affidavit ta-*Chief Executive Officer* taghha, **Rachid Titouah**, a fol 42 u 43. *Inter alia*, jixhed hekk –

... *On the **11th April 2007**, (ara d-dokument a fol 130) ITA Ltd availed itself of the services of C & C Express Limited acting on behalf of TNT Express entrusting them with the punctual delivery of a bid for a translation contract with the World Meteorological Organisation (UN) ...*

Our Offer, in a sealed package was supposed to reach the address hereunder : (ara d-dokument a fol 131)

MR. ANDREI ILINE
CHIEF PROCUREMENT TRAVEL OFFICE
WORLD METEOROLOGICAL ORGANIZATION
7 BIS AVENUE DE LA PAIX, CASE POSTALE 2300
GENEVA 2, 1211
SWITZERLAND

*On the **13th April at 09:00 hrs**, after having tracked down the document (GD 107306447 WW) on the relevant website and found it had gone missing, Ms. Odette Camilleri Bonett, ITA administration officer, immediately contacted Ms. Jessica Ann Camilleri (Customer Care Representative – C & C Express / TNT). From the tracking system, Ms Camilleri Bonett saw that TNT Malta had been informed of this incident (missing package) on the **12th April at 14.20 hrs** but unfortunately TNT Malta failed to take any timely action.*

Ms. Jessica Camilleri read out the address over the phone to Ms. Camilleri Bonett and the latter was able to

confirm that 2 lines of the address were missing. It transpired that ITA had in fact written the full and correct address on the envelope but when C & C / TNT employees had scanned the envelope they had inadvertently omitted to reproduce the last two lines.

*At **09.45 hrs**, Ms. Camilleri Bonett emailed Ms. Jessica Camilleri to advise her that ITA's document – GD 107306447 WW needed to reach its destination by not later than **13.00 hrs on the 13th April 2007** as the closing date and time for acceptance of bids by World Meteorological Organisation (WMO) was set for **Friday 13th April, 3.00 pm Geneva time**. **The same day, at about 11.00 am**, ITA tracked the document and found it had reached TNT's offices in Geneva. **Ms. Camiller Bonett immediately phoned TNT Malta to inform them that the package was already in Geneva (TNT offices) and urged them to take action so that the pack is retrieved and a messenger appointed to deliver it to WMO offices in Geneva (5 km away from TNT offices) well within deadline. Instead of acting in that manner, TNT ignored calls for action and at about 2.00 pm, ITA tracked the whereabouts of the package and found that the pack was returned to Zurich !***

... ITA received an email from Mr. Carabott – Commercial Manager, TNT Malta, stating that it would be impossible to deliver the document before the deadline of the 13th April 2007.

*The envelope reached its destination (WMO offices in Geneva) on **14th April at 09.15 hrs**, after the expiry of the tender deadline ... Due to late delivery ITA was automatically disqualified from this call for offers ... (enfasi u sottolinear tal-Qorti)*

*Ir-ragunijiet tal-kumpannija konvenuta huma kjarament esposti fl-email li Steve Carabott, Commercial Manager, TNT Express (C & C Express Limited) tad-**19 ta' April 2007** a fol 18 baghat lill-ITA Ltd. L-email taqra hekk –*

*With reference to the above consignment, I would like to confirm that this was delivered in Geneva on **Saturday 14 April at 09.15 hrs** and signed for by **NASCIMENTO**.*

I regret to inform you that despite our best efforts, your consignment was delayed as a result of a mix-up caused by the post code numbers in the address which you supplied to us (Case Postale 2300 Geneva 2, 1211) and which, when inputted in our system, result in your consignment being routed to another destination in Switzerland (2300 is the post code for Zurich).

While we deeply regret this unfortunate delay and any inconvenience that that may have been caused to you and your organization I can assure you that it is an extremely rare occurrence that we do not meet our deadlines, and that in this case the delay was entirely beyond our control(enfasi u sottolinear tal-Qorti)

Issir riferenza ghal email ohra li l-istess Steve Carabott kien baghat lill-kumpannija attrici fit-**13 ta` April 2007 fis-1.34 p.m.** a fol 19. Taqra hekk –

... We are in contact with TNT Special Service in Zurich & Geneva to try to organize a special delivery today before 15:00 hrs. TNT advised that it is humanely impossible to arrive by 15:00 hrs as it takes a minimum of five hours to drive from Zurich to Geneva. TNT are at the moment in contact with the consignee and trying to arrange for a later time to deliver your document while still being considered as valid ...

Ghal xi raguni, illi jafu biss il-partijiet, la Odette Camilleri Bonett (min-naha ta` l-kumpannija attrici) u lanqas Jessica Ann Camilleri (min-naha tal-kumpannija konvenuta) ma tressqu biex jixhdu fil-kawza ghalkemm jirrizulta illi kienu direttament

involuti fir-ricerka tal-pakkett li wasal tard fejn kien destinat.

Min-naha tal-kumpannija konvenuta xehdet **Diane Cassar** l-*executive director*.

Diane Cassar tixhed illi x-xufier taghhom gabar il-*parcel* li kellu jigi konsenjat, flimkien mal-*airway bill* mimlija mill-klijent, mill-ufficini tal-klijent. Dan kien fil-**11 ta` April 2007**. Fl-*airway bill* hem mil-hin li ngabar u cioe` is-**12.45**. Kif l-*airway bill* waslet fl-ufficcju taghhom, l-impjegati tal-kumpannija konvenuta dahhlu manwalment fil-computer id-dettalji tad-destinatarju. Is-sistema taghhom hija integrata f`dik ta` TNT barra Bhala *postal code* kien inserit fis-sistema in-numru 2300. Skond ix-xhud, dak in-numru kien il-kodici postali ta` Zurich. Is-sistema accettat dak in-numru. Ghalhekk il-pakkett intbaghat bil-courier Zurich fit-**12 ta` April 2007** u dahal fil-hub ta` TNT go Zurich. Hareg biex jitqassam fit-**12 ta` April 2007**. Il-pakkett ma kienx konsenjat. Tghid ix-xhud - *we received information that it was the wrong address and all efforts were made to have that document delivered to the correct address.*

Ix-xhud kienet domandata jekk kenitx taf illi n-numru 2300 kien P.O. Box No. mhux Kodici Postali. Hija wiegbet illi ma kenitx taf. Kienet domandata wkoll jekk in-Numru 1211 kienx iddahhal fis-sistema taghhom, u x-xhud wiegbet – *I can` t answer the question.*

Ix-xhud ipprecizat illi - *when the client telephoned us to chase as to whether it has been received or not, we contacted the Zurich hub to find out if there was a delay and we did our best cause it was out for delivery to get it to the destination address as soon as possible.*

Ix-xhud tghid illi fit-12 ta` April 2007, kienu jafu li d-destinazzjoni ma kenitx Zurich. Ikkonfermat illi fit-13 ta` April 2007 fil-11.00 a.m il-parcel kien Geneva. Minflok kien konsenjat sat-3.00 p.m., intbaghat lura Zurich. Skond ix-xhud, ir-raguni kienet *operational procedure* ta` TNT li fuqhom C & C ma ghandha l-ebda kontroll u fejn C & C ma tista` tiddetta xejn lil TNT..

Se tigi riprodotta d-domanda li saret lix-xhud u r-risposta taghha (ara fol 244) –

Dr. Jonathan Thompson :

Why was it then resent to Zurich ? So it was in Zurich on the 12th, in Geneva on the 13th at 11.00 a.m. and instead of talking it to the offices to the delivery offices where it had to be delivered by 3:00 p.m. so that`s a good four hours later, this was for some reason sent back ... Why ?

Xhud :

There is an operational procedure ...

Ikkunsidrat :

V. Risultanzi dwar l-Ewwel Talba

Kien jinkombi lill-kumpannija konvenuta illi ggib il-prova sal-grad rikjest mil-ligi illi ma kenitx inadempjenti fl-ezekuzzjoni tal-obbligi taghha *proprio et nomine* fil-konfront tal-kumpannija attrici. Skond l-Art.20(1) tal-**Warsaw Convention 1929**, *the carrier shall not be liable if he proves that he and his agents have taken all necessary means to avoid the damage or that it was impossible for him or them to take such measures.*

Id-difiza li qeghda ggib il-kumpannija konvenuta hija li ma kenitx obligata taghti garanzija lill-klijent illi l-konsenjata kienet sejra ssir sat-3.00 p.m. tat-13 ta` April 2007. L-impenn taghha kien li taghmel il-possibbli li twassal il-pakkett fid-destinazzjoni u fil-hin.

Meta qieset b`reqqa l-assjem tal-provi, din il-Qorti tghid minghajr l-icken esitazzjoni li ghall-konsenja tardiva tal-pakkett, ma kienet b`ebda mod responsabbli l-kumpannija attrici u kienet responsabbli l-kumpannija konvenuta kemm *proprio* kif ukoll *nomine*. U r-responsabilita` taghha kienet tekwivali ghal *gross negligence* u dan bl-aktar mod lampanti.

Il-kumpannija konvenuta kienet taf illi l-kumpannija attrici kienet rinfaccjata bid-*deadline* tat-13 ta` April 2007 fit-3.00 p.m. *Eppure* fil-11 ta` April 2007 accettat li taghti servizz ta` konsenja lid-destinatarju.

Il-mili tal-*airway bill* li jirrizulta illi sar mill-kumpannija attrici sar korrettement. Huwa evidenti anke *ictu oculi* li n-numru 2300 kien abbinat ma` *Case Postale* u cioe` ma` Kaxxa Postali tal-Ittri (Post Office Box). Jekk l-impjegat tal-kumpannija konvenuta illi dahhal id-dettalji fis-sistema dahhal in-numru hazin ghax ma jafx x`tfisser *Case Postale* ghalkemm in-negozju tal-kumpannija konvenuta jinkludi l-konsenja ta` pakketti fl-esteru fejn l-gharfien tal-lingwi huwa essenzjali u vitali ghat-twettieq tajjeb tal-obbligi kontrattati allura l-mankanzi tal-kumpannija konvenuta kienu grossolani. Il-kumpannija konvenuta ma tista` timputa l-ebda *mix-up* lill-kumpannija attrici ghaliex il-*Postal Code* kien indikat **kjarament u korrettement** fl-*airway bill* – 1211. Mela din ma kenitx semplici distrazzjoni izda flaw cara fis-sistema tal-kumpannija konvenuta li ma tahsibx ghal *double check* tant semplici. Fl-*airway bill* kien hemm bizzejjed dettalji bhan-numru tat-telephone tal-klijent u tad-destinatarju sabiex f`kaz ta`

diffikulta` jew incertezza, wiehed jagixxi fil-pront. Minflok kellha tkun il-kumpannija attrici stess illi tissenjala n-*non-delivery* lill-kumpannija konvenuta mhux bil-maqlub. Is-sistema tal-kumpannija konvenuta falliet f` dan ir-rigward.

Din il-Qorti tirriskontra negligenza grossolana, mhux semplici leggerezza, fit-twettieq minn TNT tal-obbligi taghha. Rinfraccjat il-pakkett meta kien Geneva fil-11.00 a.m. tat-13 ta` April 2007, u ben edotti mill-fatt illi l-konsenja kellha ssir go Geneva stess dakinhar fit-3.00 p.m., lkoll fatti mhux kontradetti, TNT minflok ezegwiet il-konsenja baghtet il-pakkett Zurich biex spiccat mar lura Geneva l-ghada biex kien konsenjat tard. Ma taghmel l-ebda sens Diane Cassar meta tghid li dak kollu sar ghal *operational procedures* ta` TNT li C & C ma kellha l-ebda kontroll fuqhom. Jekk kien tassew hekk, allura dawn l-*operational procedures* jixhdu mankanzi grossolani li jesponu ghal danni ben oltre l-*package limitations* tal-*airway bill*.

Anke fil-kamp tal-garr tal-merkanzija bl-ajru, tirrizulta r-regola li "*the carrier shall be responsible for the acts and omissions of his agents as servants and of any other persons of whose services be made use of 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 and omissions were his own.*" Din ir-regola tirrifletti principju ewlieni fid-dritt civili tal-obbligazzjonijiet u cioe' li l-kontraent ma jistax johrog mir-responsabilita' ghall-ksur ta' kuntratt billi jallega nuqqas ta' persuna li gie mqabbad minnu fil-kors tal-esekuzzjoni tal-kuntratt [**Farrugia vs Attard noe** – Qorti tal-Appell Inferjuri – 28 ta` April 1998].

Din il-Qorti tghid illi l-principji tad-dritt illi japplikaw fil-kamp tat-trasport ta' merkanzija fuq l-art japplikaw *mutatis mutandis* ghat-trasport ta' merkanzija bl-ajru.

David Glass fil-ktieb "*The Divided Heart of the CMR Convention*" [1979] ighid –

"The carrier cannot hope, simply by showing 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."

L-istess linja hadu l-Qrati taghna : "**Thomas Smith Insurance Agency Limited noe vs MD Trucking Limited et**" [PA/TM – 18 ta' Frar 2004] ; "**Sullivan vs Grech**" [PA – 2 ta' Frar 2001] ; "**Galdes vs Bowman**" [PA – 25 ta' Janar 2002] ; "**Farrugia noe vs Gatt noe**" [Kummerc – 16 ta' Jannar 1984 : "*Mhux bizzejjed li c-cirkostanzi kienu straordinarji imma jridu jkunu tant straordinarji li jrenduha impossibbli lill-carrier li jimpedieha anke bl-akbar diligenza. L-essenza tad-difiza hija l-imprevedibilita' u l-evitabilita'.*"]

Skond l-**Art.1133 tal-Kap.16**, l-inosservanza ta' l-obbligi kontrattwali sija jekk ghandhom rapport mal-kuntratt tal-garr jew tad-depozitu, jew id-dewmien fl-ezekuzzjoni taghhom jirrendi lil min hu hekk obligat passibbli ghad-danni.

Kwindi l-ewwel talba qeghda tkun milqugha.

Ikkunsidrat :

VI. Likwidazzjoni u Hlas tad-Danni

Bla pregudizzju ghall-posizzjoni illi hadet ghar-rigward tal-ewwel talba, il-kumpannija konvenuta eccepjet

Kopja Informali ta' Sentenza

illi ghall-kaz tal-lum kellha tapplika l-*package limitation* li ssemmi l-*airway bill*.

Din il-Qorti tghid illi fuq l-iskorta tal-konkluzjonijiet taghha dwar responsabilita`, il-kumpannija attrici ghandha jedd tirreklama dawk id-danni li ghalihom ghandha dritt skond il-ligi generali, mhux skond il-*package limitation*.

L-Art.25 tal-Warsaw Convention 1929 (li ghaliha taghmel riferenza l-*airway bill de qua*) ighid hekk –

The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

Similarly the carrier shall not be entitled to avail himself of the said provision if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Dwar it-tifsira ta` "**wilful misconduct**" ara "**Regime of Liability in Private International Air Law – with Focus on the Warsaw System and the Montreal Convention of 28 May 1999**" Irene Larsen – www.rettid.dk/artikler/speciale-20020002.pdf Kapitolu 4.2.2 – Pg.19 sa 21

Fid-dritt civili taghna, il-ligi taghna ssib mudell fid-dritt kontinentali nkluz id-dritt Franciz. FI-interpretazzjoni ta' "*wilful misconduct or equivalent*" id-dritt Franciz ivarja mill-"*common law*" Ingliza. Fis-sentenza taghha tat-18 ta` Mejju 2005 fil-kawza "**Atlas Insurance Agency Ltd noe vs Express Trailers Ltd.**", il-Qorti tal-Appell (Sede Inferjuri) issostni li hemm differenza bejn il-kuncett ta' "*wilful misconduct*" kif mifhum f'gurdizzjonijiet tal-

common law, u l-kuncett ta' "dolus" kif mifhum fil-pajjizi fejn jopera kodici civili. Fid-dritt Franciz, "*gross negligence*" [*faute lourde*] titpogga fuq l-istess livell ta' "*wilful misconduct*" [*dol*] Fis-sentenza taghha tal-25 ta' Frar 1952 fil-kawza "**Zammit vs Petrocchino**", il-Qorti tal-Appell, fl-assenza *ut sic* tan-nozzjoni ta' "*wilful misconduct*" ekwiparat il-kuncett ta' *gross negligence* ma` dak ta' *dolus*.

Dak li jikkostitwixxi "*wilful misconduct*" jew "*equivalent to wilful misconduct*" ghandu jigi stabbilit mil-*lex fori* [fil-kaz odjern] il-ligi Maltija (ara – "Lloyds Malta Limited noe vs Air Malta plc**" – Qorti tal-Appell – 25 ta' April 2008).**

Ghalina f`din il-gurisdizzjoni, *wilful misconduct* ma ghandux jinghata is-sinjifikat li ghandu fil-Qrati Inglizi u Amerikani. Ghalina l-ekwivalenti ta' *wilful misconduct* huwa *faute lourde* ossija *gross fault* u dan in bazi tal-massima tad-Dritt Ruman "*culpa lata dolo aequiparatur*". Jekk allura din il-massima hi parti mil-*lex fori* l-kumpannija konvenuta *proprio et nomine* hija rinfaccjata b`responsabilita` bla limitazzjoni. Kif qalet il-Qorti tal-Appell (Sede Inferjuri) fis-sentenza taghha fil-kawza "**Atlas Insurance Ltd noe vs. Concorde International Freight Forwarders Ltd**" deciza fit-3 ta' Ottubru 2007, *fil-fattispeci, is-sottrazzjoni jew trafugament talmerkanzija 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-responsabbilita` ventilata mis-socjeta` appellanti, ma tarax kif tista' leggerment taccetta illi l-kwantun 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.*

Kwindi din il-Qorti tikkonferma illi m`ghandhiex topera l-package limitation tal-airway bill.

Il-kumpannija qeghda tippretendi risarciment ta' danni konsistenti minn *damnum emergens* u *lucrum cessans*.

Tibda mil-*lucrum cessans* u taghmel riferenza ghad-deposizzjoni in kontroezami ta' Rachid Titouah.

Mix-xiehda ta' Rachid Titouah, huwa manifest illi t-talba ghal risarciment ta' **lucrum cessans** b'ebda mod ma tista' tkun akkolta. Ic-*Chief Executive Officer* tal-kumpannija attrici xehed illi ressaq it-talba ghal *lucrum cessans* fuq il-premessa illi t-*tender* li kieku dahal fil-hin kien sejjer jinghata lill-kumpannija attrici. Fil-kaz tal-lum, baqa' ma rrizultax bhala prova jekk it-*tender* fil-fatt kienx inghata, jew ghal liema prezz, jew lil min. Inltre fid-danni ghal *lucrum cessans* kienu nkluzi spejjez illi l-kumpannija attrici kienet tinkorri lil kieku rebhet it-*tender*. Dawn huma kollha pretensjonijiet manifestament u evidentement insostenibbli legalment. **Ghalhekk il-pretensjoni tal-kumpannija attrici ghal risarciment f' *lucrum cessans* ta' €52,546.63 sejra tigi skartata ghal kollox ghaliex mhijiex dovuta** (ara DOK B a fol 124 u 125 tal-process).

Xort'ohra sejra tqis id-**damnum emergens**. Din il-Qorti sejra takkorda dawk id-danni li jirraprezentaw dak it-telf **effettiv u attwali** li l-kumpannija attrici nkorriet direttament biex thejji u tibghat it-*tender bid*. Dawn jirrizultaw li jammontaw ghal **€3112.35** u cioe' €2911.72 (fol 124 u fol 125) bhala spejjez li thallsu lill-impjegati tal-kumpannija attrici ghat-thejjija tat-*tender bid* + spejjez ohra kif specifikati a fol 124 u fol 125.

Ghar-ragunijiet kollha premessi, din il-Qorti qeghda taqta' u tiddeciedi din il-kawza billi –

Kopja Informali ta' Sentenza

Tichad l-eccezzjonijiet kollha fil-mertu tal-kumpannija konvenuta *proprio et nomine*.

Tiddikjara lill-kumpannija konvenuta *proprio et nomine* responsabbli ghad-danni effettivi u attwali illi l-kumpannija attrici garrbet fic-cirkostanzi u ghar-ragunijiet fuq riferiti ;

Tillikwida d-danni tal-kumpannija attrici fl-ammont ta` tlitt elef mija u tnax-il Euro hamsa u tletin centezmu (€3112.35) ;

Tikkundanna lill-kumpannija konvenuta *proprio et nomine* sabiex thallas lill-kumpannija attrici s-somma ta` tlitt elef mija u tnax-il Euro hamsa u tletin centezmu (€3112.35), bl-imghax legali b`effett mil-lum.

Tikkundanna lill-kumpannija konvenuta *proprio et nomine* sabiex thallas l-ispejjez kollha ta` din il-kawza, inkluzi dawk ta` l-ittra ufficjali datata 9 ta` Mejju 2007.

< Sentenza Finali >

-----TMIEM-----