



SMALL CLAIMS TRIBUNAL

ADJUDICATOR: DR PHYLLIS AQUILINA LL.D.

Sitting of Wednesday 14th December, 2016.

Claim Number: 92/2016PA

**Europe Reg Services Ltd
vs
Alexander Brücher**

The Tribunal,

Having seen the Notice of Claim filed on 16th March 2016 in virtue of which Plaintiff Company declared that it provides trade directory services; that Defendant requested Plaintiff Company to provide him with services in the year two thousand and fifteen (2015); that the service was installed and provided in October of said year; that Plaintiff Company repeatedly requested payment from Defendant, who however failed to settle the dues. Plaintiff Company thus requested this Tribunal to condemn Defendant to pay in its favour the sum of four hundred and fourteen Euro and twelve cents (€414.12), with costs.

Having seen the invoice and its translation (Doc. 'A'), an untitled list of terms and conditions (Doc. 'B') and Plaintiff Company's quotation for the provision of services, duly signed by Defendant (Doc. 'C'), annexed to the Notice of Claim.

Having seen that Plaintiff Company filed a translation of its Notice of Claim into the German language.

Having seen that Defendant was served with the Notice of Claim, and the Notice of Hearing, of this case, on 4th November 2016, but did not file a Reply.

Having seen that Defendant appeared personally before the Tribunal, and with the assistance of a translator, confirmed that he was served with a copy of the Notice of Claim, and that he was opting not to instruct a Legal Counsel to represent him in these proceedings.

Having seen that the Tribunal explained to Defendant the procedure applicable before this Tribunal, including Defendant's right to file a Reply within eighteen (18) days from the date of service, and that in the absence of such Reply, Defendant would be considered to be in a contumacious state in this proceedings, which state this Tribunal will consider as a contestation of the Claim, and that in such state, he would not be entitled to produce evidence, but he would have the right to make final oral submissions before the Tribunal.

Having seen the Defendant's confirmation, following said explanation duly translated, that he will not instruct a Legal Counsel, nor file a Reply.

Having heard the testimony of Patrick Zilm, Managing Director and Legal Representative of Plaintiff Company who declared that his company markets services for German companies from Malta, operating an internet platform where these German companies have their details registered and advertised on the web. He declared that the entry service into this database is free of charge, but clients must then pay for additional services. He explained that Plaintiff Company had sent out a quotation to Defendant to improve his service, and that said quotation was returned to Plaintiff Company, duly signed as requested. He reported that the terms and conditions were found on the

website. He claimed that Defendant failed to pay the annual fee due, and that following receipt of the invoice Defendant had called Plaintiff Company's customer service to inform that he was refusing to pay as he did not get anything out of it. Zilm declared that Defendant had all opportunity to retract from the contract, following his signing the quotation, but he had not done so.

Having heard the oral submissions of both parties.

Considers that:

It is an established principle of law that failure of Defendant to file a Reply and contest proceedings renders him contumacious. This state of a party in judicial proceedings is generally considered to reflect Defendant's disrespect for the authority of the Court or Tribunal, as he would have turned down his right, and obligation, to explain his position regarding the Claim, thus assisting the Court or Tribunal in its assessment of all relevant points of fact and law arising in the dispute under examination.¹ This notwithstanding, and in line with Defendant's rights of defence, the contumacious state has always been interpreted as outright contestation of the Claim.²

In this case, the Tribunal has taken note of Defendant's attendance for the hearing, despite his residing permanently abroad, and his providing, on his own initiative and at his own expense, an interpreter to translate proceedings into the English language for his benefit. The Tribunal considers that, in this case, Defendant showed due respect towards the authority of this Tribunal, cooperating throughout the hearing of the case, and explaining his decision not to instruct a Legal Counsel.

Considering thus that Plaintiff Company's Claim is contested, the Tribunal must now consider whether its claim for payment is founded in law and in fact.

¹ **Geoffrey Carachi vs Saviour Fenech**, Civil Court First Hall, 24.10.2003

² *'Il-kontumacja tal-konvenut ma taghtix lok ghall-presunzjoni ta' abbandun tal-kawza, u ghalhekk il-gudikant ghandu jezamina l-gustizzja tad-domandi ta' l-attur minghajr ma jiehu kont tal-kontumacja tal-*

Both Plaintiff Company and Defendant are ‘traders’ in terms of both the Commercial Code³, as well as the Consumer Affairs Act⁴, and their relationship, if at all, arises within the scope of their respective business operation.

On a procedural level, the Tribunal investigated of its own motion whether it is competent according to law to determine this commercial claim⁵.

Art. 3(2) of the Small Claims Tribunal Act⁶ lays down that ‘*Subject to subarticle (5)*⁷, the Small Claims Tribunal shall have jurisdiction to hear and determine only all money claims of an amount not exceeding five thousand euro (€5,000)’. **Art. 56A** of the Code of Organisation and Civil Procedure states that ‘*Notwithstanding any of the provisions of this Code, the inferior courts shall not take cognizance of any claim falling within the jurisdiction of the Small Claims Tribunal established under the Small Claims Tribunal Act.*’

On the other hand, **Art. 547** of the Commercial Code provides that ‘*Commercial jurisdiction shall be exercised by the Civil Court, First Hall, in accordance with the provisions contained in the Code of Organization and Civil Procedure.*’ ‘*[C]ontroversies relating to obligations and contracts between traders*’ ‘*are of a commercial nature*’.⁸

Art. 32(2) of the Code of Organization and Civil Procedure, following amendments in virtue of Acts XXIV of 1995 and XXXI of 2002, provides that ‘*The Civil*

konvenut’, **Antonio Debono et vs Paolo Borg**, Civil Court First Hall, 2.4.1955 ; see also **Anthony Grech et vs Joseph Farrugia et**, Court of Appeal, 17.2.2004

³ Chapter 13 of the Laws of Malta

⁴ Chapter 378 of the Laws of Malta

⁵ **Art. 548(a)**, Commercial Code

⁶ Chapter of the Laws of Malta

⁷ ‘*Causes involving questions of ownership of immovable property, or relating to easements, burdens or other rights annexed to such property, even though the claim does not exceed five thousand euro (€5,000), and causes of ejectment or eviction from immovable property shall not fall within the jurisdiction of the Tribunal*’

⁸ *Ibid.*

Court shall take cognisance of all causes which are expressly assigned by law to the said Civil Court’.

A strict interpretation of this last provision would mean that neither the inferior courts, nor this Tribunal, have competence to hear and determine claims of a civil or commercial nature. Clearly, this provision conflicts with the provisions of **Art. 47** and **Art. 56A** of the Code of Organisation and Civil Procedure, which set out the scope of competence of the Court of Magistrates (in its civil jurisdiction), and this Tribunal, respectively.

This conflict was very clearly and succinctly identified and explained in the judgment **Atlas Insurance PCC Limited vs GMC Transport Company Limited et**⁹. This Tribunal embraces the legal appreciation of the Court of Magistrates (Malta) in this cited judgment, particularly in regard to the changes which the legislator introduced over the years in **Art. 32(2)** of the Code of Organisation and Civil Procedure. This Tribunal is of the view that (i) the clear stipulation that this Tribunal has exclusive competence (‘**all** money claims’) up to €5,000 both in its constituting Act, as well as in the Code of Organisation and Civil Procedure; and (ii) the clear stipulation that the Court of Magistrates (in its civil jurisdiction) has exclusive competence to determine other claims whose value does not exceed €15,000, and which do not concern immovable property, or rights over immovable property, indicate very clearly that the abrogation in virtue of Act XXXI of 2002 of the exclusion of these causes from the scope of competence of the Civil Court, was a legislative *lapsus*. A different conclusion would lead to the absurd conclusion that the inferior courts, and this Tribunal, lack any competence to determine civil causes altogether.

Concluding thus that this Tribunal is competent to determine this cause, it will now consider the merits.

⁹ Court of Magistrates (Malta), 27.10.2014

Plaintiff Company's Managing Director and representative related before the Tribunal the services which Plaintiff Company provides, giving the impression that Defendant was already one of its clients, receiving an entry-level service, and that Plaintiff Company had offered him an improved service for a charge, which he accepted with his signing and returning the offer-quote document to Plaintiff Company.

From the acts of these proceedings, the Tribunal however understands that the commercial enterprise Bug.Gewerbe-Meldung.de [described as '*a service of Europe Reg Services Ltd*'] has identified Defendant as a trader operating in the Federal Republic of Germany, and sent him an offer for the provision of a listing in its Commercial Directory. This business enterprise registration offer was sent to Defendant in the German language, with his identification details already put in, and with the proposed terms of the offer explained in very small print in the middle of the sheet containing the offer, followed by a request to return the duly signed offer form by fax or by post (Doc.'C', fol.12 as translated in fol.13). The content of this offer does not include the terms and conditions of the proposed contract (*'Our General Terms and Conditions apply. These can be found under the following link: Burg.Gewerbe-Meldung.de/agb'*). Nor does it include a direct and clear link to the terms and conditions set out in clauses one (1) to nine (9) of the 'Contract' document (Doc.'B', fol.4 to 7, as translated into the English language in fol.8 to 11).

Although this Offer document states that *'Since the internal dissolution of decentralised commercial directories, the branch office in Leipzig has taken over the handling of commercial directories in the Federal Republic of Germany'* (fol.13), it does not explain the involvement of Plaintiff Company as a contracting party.

Furthermore, there is no evidence whatsoever in the acts of the proceedings about the so-called entry level, free of charge, registration, which Defendant had, and the improved registration which he subsequently accepted to order. On the other hand, it is clear that the offer for the provision of the service originated from the service provider itself.

The Tribunal further notes that this Business Enterprise Registration Offer does not mention that Europe Reg Services Limited is a limited liability company registered in Malta, or that it is regulated by Maltese law, or that the ensuing contractual relationship was to be regulated in terms of Maltese law, or that the competent forum to determine disputes arising in connection therewith were to be the Courts of Malta.

Further considers that:

Defendant does not contest that the signed and returned to Plaintiff Company the Business Enterprise Registration Offer. Considering that this solicitation, and the communication of acceptance, were not carried out at the business premises of either parties, nor in their own, or representatives', physical presence, any resulting contract falls within the definition of an 'Electronic Contract'¹⁰, and is thus regulated by Articles 9, 10 and 11 of the Electronic Commerce Act¹¹, and the First Schedule to said Act, besides the general principles of the law of contract in civil and commercial law.

The general rules regulating contractual commercial obligations arising between are set out in **art. 110 to 118** of the Commercial Code (Chapter 13 of Laws of Malta). In virtue of this general law, *'a contract stipulated by means of correspondence, whether by letter or telegram, between parties at a distance, is not complete if the acceptance has not become known to the party making the offer within the time fixed by him or within such time as is ordinarily required for the exchange of the offer and the acceptance, according to the nature of the contract and the usages of trade generally.'*¹² **Art. 112** of the Commercial Code lays down that *'A delayed acceptance or an acceptance subject to conditions, additions, restrictions or alterations shall be deemed to be and shall count as a refusal of the original offer and as a new offer.'*

¹⁰ "electronic contract" means a contract concluded wholly or partly by electronic communications or wholly or partly in an electronic form, see Electronic Commerce Act, Chapter 426 of the Laws of Malta, art. 2)

¹¹ Chapter 426 of the Laws of Malta

¹² **Art. 110**, Commercial Code

In this case, Plaintiff Company's Business Enterprise Registration Offer stipulated that the Offer could be accepted on the part of Defendant through a '***Reply free of charge by fax by 12/10/2015 to ... or by post to the address given***'.

From the exhibited signed Offer document, Defendant appears to have signed it on 14th October 2015, and thereafter despatched it to Plaintiff Company. Plaintiff Company did not prove its subsequent acceptance of that '*new offer*' (**art. 112**, Commercial Code).

Moreover, Plaintiff Company failed to prove that it actually executed the allegedly contracted service. No documentary or electronic evidence of the directory registration, satisfying all the requirements listed in the 'Outline of entry', is exhibited in the acts of the proceedings.

On a different level, whilst Plaintiff Company was not required to provide Defendant the information regarding the matters set out in the First Schedule to the Electronic Commerce Act (see **art. 11** of this special law), the Tribunal is concerned that the terms and conditions which Plaintiff Company claims to regulate this contractual relationship do not appear to have been communicated in a sufficiently clear, comprehensive and unambiguous manner, to Defendant. The Business Enterprise Registration Offer says that the proposed entry will be a '*Standard entry incl. free illustrated entry*' but later on adds, in very small print, that '*This is not a non-chargeable register, but a chargeable offer ... Signature implies firm order of the service package for three years. The cost of the service package amounts to €348 net, plus VAT per annum*'. Finally, the receiver was solicited to '***Reply free of charge by fax by ...***' giving him the impression that no payment would be immediately due, when in fact §6 – Costs in Doc.'B' states that '*costs become due by billing for a year in advance ... Billing shall ensue directly after the order is placed and then at the commencement of each further year ...*'. This contrasts sharply with Patrick Zilm's declaration that the entry-level registration was free of charge.

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After considering all these points of law and fact, the Tribunal is not morally convinced, on a balance of probabilities, that the fee which Plaintiff Company is claiming, is lawfully due.

Thus, for the aforementioned reasons, the Tribunal rejects Plaintiff's Claim.

Either party is to bear its own costs.

Advocate Phyllis Aquilina, LL.D.
Adjudicator