



MALTA

**QORTI CIVILI
PRIM' AWLA**

**ONOR. IMHALLEF
TONIO MALLIA**

Seduta tat-18 ta' Frar, 2004

Citazzjoni Numru. 1093/2001/1

**Thomas Smith Insurance Agency Limited bhala agenti
tas-socjeta' Societa' Italiana assicurazioni e
Riassicurazzioni (SIAT) kif surrogata fid-drittijiet ta'
Zammit & Cachia Ltd.**

Vs

**MD Trucking Limited u b'digriet tas-27 ta' Novembru,
2001 gie msejjah fil-kawza Raymond Buttigieg.**

Il-Qorti,

Rat ic-citazzjoni pprezentata mis-socjeta' attrici li in forza taghha, wara li ppremettiet illi Zammit & Cachia Ltd inkarigat lis-socjeta' MD Trucking Ltd sabiex tiehu hsieb it-trasport ta' 80 *bags shelled hazelnuts* u 50 kaxxa *shelled walnuts* (CMR Dok A).

Kopja Informali ta' Sentenza

Ippremettiet li meta l-imsemmi t-*trailer* ta' MD Trucking wasal f'Malta l-imsemmi importatur sab kien hemm nuqqasijiet fil-merkanzija.

Ippremettiet li s-socjeta' attrici fil-kwalita' taghha ta' assicuratrici ta' Zammit & Cachia Ltd. hallset l-ammont ta' erba' t'elef disa' mija erba' u tletin liri Maltin u seba' centezmi (LM 4,934.07) lill-istess assicurata taghha bhala kumpens ghal danni li soffriet l-assicurata taghha kif jidher mill-annessa kopja ta' rcevuti u surrogi dok C u D.

Ippremettiet illi s-socjeta konvenuta hija responsabbli ghan-nuqqasijiet u konsegwenti danni.

Talbet ghalhekk biex is-socjeta konvenuta tghid ghaliex ghar-ragunijiet fuq premissi:

1. M'ghandhiex tigi dikjarata responsabbli ghan-nuqqasijiet in kwistjoni.
2. M'ghandhiex tigi kkundannata thallas lis-socjeta' attrici s-somma ta' LM4,934.07 liema ammont huwa dovut kif fuq spjegat.

Bl-ispejjez kontra s-socjeta' konvenuta inkluz dawk ta' l-ittra bonarja datat 29 ta' Marzu, 2001 li minn issa huma ngunti ghas-subizzjoni u bl-imghaxijiet mid-data tal-pagament maghmul mis-socjeta' attrici.

Rat in-nota ta' l-eccezzjonijiet tas-socjeta' konvenuta li in forza taghha eccepjet illi:

1. T-talbiet attrici huma nfondati fil-fatt u fid-dritt stante illi s-socjeta' konvenuta m'hijiex responsabbli ghad-danni reklamati mill-attur billi ma' kien hemm l-ebda negligenza tas-socjeta' konvenuta.
2. Salvi eccezzjonijiet ulterjuri.

Rat id-digriet ta' din il-Qorti tas-27 ta' Novembru, 2001, li in forza tieghu ordnat il-kjamata fil-kawza ta' Raymond Buttigieg a spejjez tas-socjeta' konvenuta;

Kopja Informali ta' Sentenza

Rat in-nota ta' l-eccezzjonijiet tal-kjamat fil-kawza li in forza taghha ecepixxa:

1. Illi huwa mhux responsabbli ghan-nuqqasijiet u danni mertu tal-kawza peress li huwa kien impjegat mad-ditta konvenuta.

2. Illi t-talbiet attrici ghandhom jigu michuda fil-konfront tieghu peress li dawna huma infondati fil-fatt u fid-dritt peress li dawna ma gewx ikkawzati minnu.

3. Illi bla pregudizzju ghall-eccezzjonijiet fuq imsemmija huwa ma huwiex responsabbli ghan-nuqqasijiet u danni mertu tal-kawza peress li huwa agixxa b'mod responsabbli u ha l-prekawzjonijiet kollha mehtiega fil-kaz.

4. Illi n-nuqqasijiet u danni mertu tal-kawza kienu rizultat ta' serq li sofru l-esponent minn terzi persuni meta huwa kien fl-Italja, ta' liema serq huwa ghamel id-debita denunzja mal-*Carabinieri*, u ma ghandux jigi misjub responsabbli huwa.

5. Salvi eccezzjonijiet ohra.

Rat id-dikjarazzjonijiet guramentati tal-partijiet;

Semghet il-provi li ressqu l-partijiet;

Rat l-atti kollha tal-kawza u d-dokumenti esebiti;

Semghet lid-difensuri tal-partijiet;

Rat li l-kawza thalliet ghal-lum ghas-sentenza;

Ikkunsidrat;

Is-socjeta' Zammit & Cachia Limited ordnat konsenja ta' gellewz mill-Italja, u din il-konsenja kienet tikkonsisti fi 80 xkora "*shelled hazelnuts*", u 50 kaxxa "*shelled walnuts*"; il-konsenja kollha tingieb Malta f'*container* u giet inkarigata s-socjeta' konvenuta M.D. Trucking Ltd ghal dan l-iskop. Din il-konsenja partikolari kellha tingabar minn Avellino,

gewwa l-Italja, u peress li s-socjeta' konvenuta kellha tigbor diversi merkanzija ta' klijenti ohra, il-*container* in kwistjoni kien wiehed "*groupage*" li spicca mgħobbi b'merkanzija ta' diversi importaturi lokali.

Il-merkanzija tad-ditta Zammit & Cachia giet debitament mgħobbija fuq il-*container*, u meta d-*driver* kien kwazi għabba dak kollu li kellu jgħabbi qabad it-triq lura għal Malta. Meta wasal vicin Bari, fuq l-*autostrada* 16, huwa waqaf jistrieħ f'kumpless tal-pompa tal-petrol tal-marka ESSO. Id-*driver*, il-kjamat fil-kawza, Raymond Buttigieg, raqad fl-istess *trailer*. Fl-4.00a.m. qam u saq it-*trailer* lejn Santeramo in Colle biex jgħabbi kunsejna ohra, izda meta fetah il-bibien ta' wara tat-*trailer*, sab li kellu merkanzija nieqsa. Id-*driver* għamel rapport l-għassa tal-Pulizija tal-lokal u baqa' jsuq lejn Malta. Hawn Malta, infetħ il-*container* u peress li l-merkanzija kollha destinata għad-ditta Zammit & Cachia Ltd kienet nieqsa, din is-socjeta' ma hadet konsenja ta' ebda parti mill-merkanzija destinata lilha, u wara li għamlet *claim* lis-socjeta' assikuratrici tagħha, is-socjeta' attrici, dik ikkumpensata fis-somma ta' LM4934.07, u wara li giet surrogata fid-drittijiet ta' l-assigurat tagħha, is-socjeta' attrici qed titlob rifussjoni tas-somma imħallsa mingħand min hu responsabbli għannuqqas.

Jidher mill-assjem tal-provi li t-trasport in kwistjoni huwa regolat bir-regolamenti tas-CMR, u dan mhux biss għax hu kkonfermat minn ufficcjali tas-socjeta' attrici, izda jirrizulta wkoll mad-dokument ta' trasport li fl-intestatura tiegħu jindika li hu soggett għar-regolamenti tas-CMR.

Fil-kuntest ta' l-involvement tad-*driver*, Raymond Buttigieg, tajjeb li jigi ccarat, għal kull bon fini, li skond l-artikolu 3 tar-regolamenti tas-CMR, "*for the purposes of this convention 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*".

Dan l-artikolu wara kollox, jirrifletti principju kardinali fid-dritt civili ta' l-obbligazzjoni, u cioe', li kontraent ma jistax johrog mir-responsabbilta' ghall-ksur tal-kuntratt billi jallega nuqqas ta' persuna li gie mqabbad minnu fil-kors ta' l-esekuzzjoni tal-kuntratt – ara Farrugia vs Attard noe, deciza mill-Onorabbli Qorti ta' l-Appell (Sede Inferjuri) fit-28 ta' April, 1998. F'dan il-kaz id-*driver* in kwistjoni kien gie mqabbad mis-socjeta' konvenuta biex isuq it-*trailer* in kwistjoni u jghabbi l-merkanzija ta' diversi klijenti taghha, u kwindi kienet persuna imqabbad mis-socjeta' konvenuta biex tghinha tesegwixxi d-diversi kuntratti li accettat; ghan-nuqqasijiet taghha, kwindi, twiegeb is-socjeta' konvenuta. A tenur tal-principju enuncjat, is-socjeta' konvenuta ma tistax tehles mir-responsabbilta' semplicement ghax ma kellhiex x'taqsam mas-serqa u t-telf tal-merkanzija bis-serq, ghax it-trasportatur jista' jinzamm responsabbli ghall-atti u ommissjonijiet ta' dawk il-persuni li jutilizza ghall-iskop tat-trasport.

Il-bazi tar-responsabilita' tat-trasportatur tinsab fl-artikolu 17(1) tar-regolamenti ta' CMR li jghid:

“The carrier shall be liable for the total loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery”.

Gie ppruvat illi d-ditta Zammit & Cachia Ltd. ordnat konsenja ta' gellewz mill-Italja u dawn gew konsenjati u mghebbija fuq it-*trailer* li sussegwentament insteraq. Id-ditta konvenuta u d-*driver* qed jecepixxu li mhumix responsabbli ghal dak li gara peress li qdew dmirijethom bl-akbar diligenza u l-merkanzija ntilfet b'forza magguri jew accident. Din id-difiza issib l-applikazzjoni taghha fl-artikolu 17 (2) fejn it-trasportatur hu ezonorat mir-responsabbilta' minhabba *“circumstances which the carrier could not avoid and the consequences of which he was unable to prevent”*, u dan hu l-meritu tal-kawza. F'dan il-kuntest, ovvjament titqies importanti x-xhieda tad-*driver* bhala l-unika persuna li kienet fuq il-lok ta' l-incident meta sehhet is-serqa.

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 serq. 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"*

Il-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 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."

Hekk ukoll l-awtur David Glass (*"The Divided Heart of the CMR Convention"* 14 E.T.L. 1979) jghid li *"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.”
Il-Qrati taghna donnhom qed isegwu din il-linja rigida fl-interpretazzjoni tal-klawsola relattiva tas-CMR – ara “Sullivan vs Grech”, deciza minn din il-Qorti fit-2 ta' Frar, 2001, “Galdes vs Bowman” deciza minn din il-Qorti fil-25 ta' Jannar, 2002 u “Farrugia noe vs Gatt noe”, deciza mill-Onorabbli Qorti tal-Kummerc fis-16 ta' Jannar, 1984, fejn intqal li *“mhux bizzzejjed 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.”*

Hu interessanti li f'din l-ahhar kawza, is-serqa grat waqt li z-zewg *drivers* tat-*trailer* kienu reqdin fil-kabina tat-*trailer* waqt il-lejl, izda xorta wahda dik l-Onorabbli 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.

In konnessjoni mal-pajjiz ta' l-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:

- 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."*

Dawn il-*guidelines* fil-fehma ta' din il-Qorti ghandhom jigu addattati b'mod generali f'kull kaz ta' trasport ta' merkanzija fuq l-art. Din il-Qorti tqies dawn il-mizuri bhala necessarji biex trasportatur ikun jista' jipprova jehles mir-responsabilita'; dawn il-mizuri, fil-fehma tal-Qorti, ghandhom jitqiesu bhala *sine qua non* ghal kull vjagg, u n-nuqqas tat-trasportatur li jadopera xi wahda minn dawk il-mizuri, ghandha twssal ghall-konkluzzjoni li t-trasportatur

ikun responsabbli ghal dak li jigri. Fi kliem iehor, din il-Qorti tqis dawk il-*guidelines* bhala li 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*".

F'dan il-kaz, jirrizulta li uhud minn dawn il-*guidelines* ma gewx segwiti: it-*trailer* ma kienx installat b'*anti-theft advice*, ma giex irrangat *convoy* ta' zewg jew tlett vetturi, jew, ta' l-anqas, jintbaghtu zewg sewwieqa mat-*trailer*, u , fuq kollox, id-*driver* ma waqafx f'*car park* li jkollha ghassiesa. Din l-ahhar kundizzjoni hija ferm importanti, speċjalment f'lok bhall-Italja, fejn is-serq minn *trailers* lahaq numru allarmanti u l-metodi saru aktar professjonali. Id-*driver* in kwistjoni ipparkja f'*petrol station*, u ghalkemm kien hemm vetturi ohra ta' l-istess tip hemm ipparkjati, huwa naqas li josserva obbligu mixhut fuqu, u cioe', li jieqaf biss fejn hemm sistema adegwata ta' sigurta'. Postijiet bhal dawn jezistu l-Italja, u sta ghad-*driver* li jimmanigja r-rotta tieghu biex, meta jkun wassallu l-hin biex jieqaf, ikun vicin parkegg bhal dan. Mhiex skuza li mhiex il-prattika li t-trasport minn Malta jsegwu il-mezzi ta' sigurta' indikata; jekk mhux qed isir hekk, qed tigi adoperata sistema hazina u meta t-trasport ikun se jinvolvi waqfien fl-Italja (li fil-kaz ta' Malta, dan jigri kwazi dejjem), iridu jittiehdu l-prekawzjonijiet kollha mehtiega. Il-fatt li d-*driver* ipparka t-*trailer* b'mod li l-bibien tal-*container* gew kwazi imissu mal-hajt, kienet manuvra tajba, izda la jidher li saret b'mod adegwat (tant li s-serqa saret xorta wahda), u lanqas ma hi bizzzejjed biex tissostitwixxi l-mizuri li fil-fehma tal-Qorti kellhom jittiehdu. Is-serq, skond l-awturi fil-materja, mhux oggettivament adegwat biex jevita li l-htija tintefa' fuq it-trasportatur, izda irid jirrizulta li ttiehdu l-mizuri kollha adegwati biex jigi evitat serq; f'dan il-kaz, dawn il-mizuri ma ttiehdux u, kwindi, s-socjeta' konvenuta hija responsabbli ghan-nuqqasijiet (u dana peress kif gia' gie ossevat, li l-kuntrattur tat-trasport huwa responsabbli ghall-atti jew ammissjonijiet tan-nies imqabbda minnu).

Rigward l-ammont ta' danni rikjest, id-ditta assikuratrici hallset l-ammont kollu ta' telf ta' merkanzija soffert mid-ditta Zammit & Cachia Ltd. Pero', skond ir-regoli tas-CMR, it-trasportatur hu responsabbli biss ghal 8.33 DSRs per gross kilo ta' merkanzija mitlufa. Dana jigi cirka LM1.40 kull kilo ta' merkanzija (ara "Galdes noe vs Bowman noe" deciza minn din il-Qorti fil-25 ta' Jannar, 2002). Mill-provi jirrizulta li l-piz tal-merkanzija kien ta' 2500 kilos. B'hekk il-valur li d-ditta konvenuta ghandha thallas lid-ditta attrici hu ta' 2,500 kilos x LM1.40 u cioe', LM3,500.

Ghal kull bon fini, jinghad li s-socjeta' attrici mhux qed tallega li l-klawsola in kwistjoni hija nulla. Veru li l-Qrati taghna gieli illimitaw l-effetti ta' klawsola ta' ezoneru, izda mhux ta' klawsola ta' limitazzjoni ta' danni. Hekk fil-kaz "Atlas Insurance Agency Ltd vs Advanced Shipping Ltd" deciza mill-Onorabbli Qorti ta' l-Appell (Sede Inferjuri) fis-7 ta' Lulju, 2003, intqal li "Id-dottrina in materja turi li mhux il-klawsoli kollha ta' ezoneru huma leciti, u ma jistghu qatt ikunu leciti sal-punt li bihom ikun hemm dak li jissejjah "*assicurazione delle colpe proprie*" (ara wkoll "Camilleri vs Mifsud et" deciza mill-Onorabbli Qorti ta' l-Appell fit-8 ta' Marzu, 1957, u "Woods noe vs Curmi noe" deciza minn din il-Qorti fis-27 ta' Gunju, 2003).

Min-naha l-ohra, din il-Qorti ma tiskontra xejn hazin illi l-partijiet jiftiehm, minn qabel, x'ghandhom ikunu d-danni f'kaz ta' xi nuqqas, u, fil-fatt, kemm il-darba f'kuntratti ta' certa importanza issib klawsola li tillikwida minn qabel id-danni f'kaz ta' dewmien jew ksur tal-kuntratt, u dawn jigu onorati mill-Qrati. Hafna drabi din tiehu l-forma ta' penali, li meta tkun hekk kontrattata tirraprezenta kumpens ghad-danni minhabba non-ezekuzzjoni ta' l-obbligazzjoni (ara "Spiteri vs Sammut" deciza minn din il-Qorti fit-2 ta' Lulju, 2003). L-artikolu 1138 tal-Kodici Civili, fil-fatt, espressament jippermetti ftehim simili, meta jghid, "*Meta l-ftehim jistabbilixxi illi l-parti li tonqos mill-esekuzzjoni tieghu ghandha thallas somma determinata bhala danni, ma tistax tigi moghtija lill-parti l-ohra somma akbar jew izghar*". Il-klawsola u kwistjoni hija parti mill-konvenzjoni li giet inkorporata bhala parti mill-ftehim. Il-kondizzjonijiet hemm inkorporati huma ben maghrufa man-nies midhla

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fit-trasport u, kwindi, japplikaw bhal kull parti ohra ta' l-istess ftehim.

Peress li d-*driver* tal-vettura kien gie kjamat fil-kawza, il-Qorti tqis li fir-relazzjoni interna bejn is-socjeta' konvenuta u d-driver il-htija ghandha tinqasam b'mod ugwali bejniethom, peress li, bhala fatt, it-tnejn naqsu mill-obbligi imposti fuqhom. Fil-konfront tas-socjeta' attrici, pero', ir-responsabbilta' taghhom hija *in solidum*, prezunta dejjem f'obligazzjonijiet kummercjali.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi minn din il-kawza billi previa li tichad l-eccezzjonijiet kollha li gew sollevati mis-socjeta' konvenuta u mill-kjamata fil-kawza, tilqa' it-talbiet attrici u tikkundanna lis-socjeta' konvenuta u lill-kjamata-in-kawza jhallsu *in solidum* bejniethom lis-socjeta' attrici s-somma ta' LM3,500 (tlett t'elef u hames mitt liri Maltin) in linea ta' danni, bl-imghaxijiet legali mit-18 ta' Dicembru, 2000, sal-gurnata tal-pagament effettiv.

L-ispejjez tal-kawza jithallsu kollha mill-konvenut u l-kjamat fil-kawza *in solidum* bejniethom.

< Sentenza Finali >

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