



**QORTI CIVILI  
PRIM' AWLA**

**ONOR. IMHALLEF  
LINO FARRUGIA SACCO**

Seduta tad-9 ta' Jannar, 2012

Citazzjoni Numru. 1048/2010

Avukat Dr. Edward DeBono bhala Mandatarju ta' l-Assenti  
Franz J. Abel bhala stralcjarju tas-socjeta` estera assenti  
Anubis Electronic GMBH, socjeta` estera registrata fil-  
Germanja ghan-nom u in rapprezentanza ta' l-istess  
VS  
No Stop Technology Limited (C49765)

Il-Qorti,

**A. RIKORS:**

Rat ir-rikors tar-rikorrent *nomine* li bih espona:

1. Illi r-rikorrenti *nomine* huwa kreditur tas-socjeta' intimata fis-somma ta' €106,176.86 (mija u sitt elef mija u sitta u sebghin Ewro u sitta u tmenin centezmu) oltre l-imghax legali mit-8 ta' Mejju, 2007, skond *invoices* numri 541837, 543461, 543460, 545905, 546184, 546494, wara li jitnaqqsu l-*credit notes* numri 798728, 799026, 798727, 798724, 797920 u 797928 rapprezentanti bejgh u konsenja ta' diversi partiti ta'

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Typhoon B Products u A Products mibjugha u konsenjati lis-socjeta` intimata;

2. Illi dan id-debitu huwa cert, likwidu u skadut u jirrizulta mill-*invoices* anness mar-rikors guramentat u immarkati bhala dokumenti ED1 sa ED12;

3. Illi l-intimat gie interpellat diversi drabi biex ihallas dan id-debitu anki b'ittra legali tas-17 ta' Awwissu, 2010, dan baqa' inadempjenti;

4. Illi fic-cirkostanzi tal-kaz jikkonkorru l-elementi preskritti mill-Artikoli 167/170 tal-Kap. 12 tal-Ligijiet ta' Malta sabiex dan ir-rikors jigi deciz bid-dispensa tas-smigh billi l-konvenuti m'ghandhom ebda eccezzjoni valida fil-ligi xi jressqu kontra t-talba tar-rikorrenti;

5. Illi r-rikorrenti nomine jafu personalment il-fatti ghal dak li jirrigwarda dak kollu premess. Dwar dan jistrieħu wkoll fuq ix-xhieda ta' dawk il-persuni kollha indikati fil-lista tax-xhieda annessa ma' dan ir-rikors;

Ir-rikorrent *nomine* talab lill-Qorti:

- i. Tipprocedi ghas-sentenza skond it-talba ta' l-atturi bid-dispensa tas-smigh tar-rikors *ai termini* ta' l-Artikoli 167/170 tal-Kap. 12 tal-Ligijiet ta' Malta;
- ii. Tikkundanna lill-intimati sabiex ihallsu s-somma ta' €106,176 (mija u sitt elef mija u sitta u sebghin Ewro u sitta u tmenin centezmu) oltre l-imghax legali mit-8 ta' Mejju, 2007, skond *invoices* numri 541837, 543461, 543460, 545905, 546184, 546494, wara li jitnaqqsu l-*credit notes* numri 798728, 799026, 798727, 798724, 797920 u 797928 rapprezentanti bejgh u konsenja ta' diversi partiti ta' Typhoon B Products u A Products mibjugha u konsenjati lis-socjeta` intimata.

Bl-ispejjez komprizi dawk ta' l-ittra legali tas-17 ta' Awwissu, 2010 u tal-Mandat ta' Sekwestru Nru.: 1533/10 u dan bl-ingunzjoni tal-konvenuti ghas-subizzjoni.

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Rat il-lista tax-xhieda u d-dokumenti prezentati mir-rikorrent *nomine*.

Rat il-verbal tat-22 ta' Novembru, 2010 li minnu jirrizulta li s-socjeta` intimata giet awtorizzata tipprezenta risposta guramentata.

## **B. RISPOSTA:**

Rat ir-risposta guramentata tas-socjeta` intimata li biha esponiet:

1. Illi preliminarjament din il-Qorti m'ghandhiex gurdizzjoni tisma' u tiddeciedi t-tilwima *de quo* u dana *ai termini* ta' l-artiklu 23 tal-*Council Regulation (EC) 44/2001* tat-22 ta' Dicembru 2000;

2. Illi preliminarjament ukoll u minghajr pregudizzju ghas-suespost, ir-rikorrenti *nomine* jridu jgibu prova li l-assenti Franz J. Abel huwa s-stralcjarju tal-falliment tas-socjeta` Anubis Electronic GMBH;

3. Illi minghajr pregudizzju ghas-suespost, mid-dokumenti ezebiti mir-rikorrenti *nomine* flimkien mar-rikors guramentat tagghom ma jirrizultax illi s-socjeta` intimata kienet ordnat partiti ta' Typhoon B Products u A Products minghand is-socjeta` Anubis Electronic GMBH u mill-istess dokumenti lanqas ma jirrizulta li s-socjeta` Anubis Electronic GMBH kienet bieghet u ikkonsenjat partiti ta' Typhoon B Products u A Products lis-socjeta` intimata, hekk kif allegat mir-rikorrenti *nomine* fir-rikors guramentat tagghom;

4. Illi minghajr pregudizzju ghas-suespost, is-socjeta` intimata m'ghandha thallas l-ebda ammonti lir-rikorrenti *nomine* u dana *stante* li s-socjeta` Anubis Electronic GMBH kienet inadempjenti u kisret l-obbligazzjonijiet taghha versu s-socjeta` intimata;

5. Salv eccezzjonijiet ulterjuri li jistghu jitressqu skond il-ligi;

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Bl-ispejjez kontra r-rikorrenti *nomine* li gew ingunti ghas-subizzjoni.

Rat il-lista ta' xhieda u d-dokument prezentati mis-socjeta` intimata.

Rat l-atti kollha tal-kawza.

Semghet l-abili difensuri.

Ikkunsidrat

Illi fl-24 ta' Ottubru, 2011 il-Qorti halliet il-kawza ghas-sentenza fuq l-eccezzjoni dwar il-gurisdizzjoni (l-ewwel eccezzjoni).

### **C. PROVI:**

Gie prezentat affidavit bl-Ingiliz ta' Davide Santoro, fejn issemma li s-socjeta` intimata originarjament inkorporata u registrata fl-Italja u wara ri-domiciljata f'Malta u registrata f'Malta bl-isem fir-rikors. Hu kien *manager*, amministratur u rapprezentant, inkluz fix-xoghol mal-attrici u l-kumpaniji assocjati. Kienu ftehm li l-intimata tkun id-distributur ufficjali fl-Italja ta' "*My Guide*". Kienet Saret insistenza li hu jiffirma l-ftehim, u kellu konferma li No Stop Technology S.p.a. kienet id-distributur ufficjali fl-Italja ghal "*My Guide*". Kienu jinhargu invoices tal-prodotti ordnati jew ghan-nom ta' My Guide Limited jew ghan-nom tas-socjeta` rikorrenti, ghax dawn iz-zewg ditti kienu propjeta` ta' l-istess persuni. Id-dokumenti mahrug in ghall-iskop tal-kawza odjerna u ghal dik tal-1049/10 jirreferu ghall-istess prodotti u ghall-istess *contact persons* u anke l-format ta' l-*invoices* kwazi identici. Fost kundizzjonijiet ohra tad-*Distributor Agreement* kien hemm klawsola 7(4) li taskrvi gurisdizzjoni esklussiva lill-Qrati Germanizi. Kellha tapplika l-ligi Germaniza taht l-Artikolu 7(3) tad-*Distributor Agreement*, Dokument NST01. Dawn kienu kundizzjonijiet imposti minn "*My Guide*" u ghalhekk Anubis Electronic GMBH ma setghetx tfittex lis-socjeta` intimata f'Malta. Semma li kien ordna progotti ta' *GPS navigation*.

Jirrizulta mid-Dokument NST01, artikolu 7 a fol 29 tal-process jghid hekk:

“3) *This agreement is formed by German Law ...*

4) *Legal venue is the competent Courts in Germany and all proceeding shall be conducted in English.*”

Gie prezentat affidavit ta' Dr. Christian Pisani li semma li z-zewg kumpaniji attrici huma fi stat ta' stralc u li kellhom flus dovuti lilhom mis-socjeta` intimata. Fil-kazijiet ma kienx hemm ftehim bil-miktub ghall-konsenja ta' l-oggetti. B'riferenza ghad-*Distributor Agreement* imsemmi minn Davide Santoro, hu stqarr li ma hemmx *Standard Distributor Agreement* fil-files tas-socjetajiet attrici, u li l-ftehim imsemmi minn Santoro mhux iffirmit minn ebda parti. L-istess Santoro fid-Dokument NST02 jirreferi ghal No Guide GmbH u mhux ghal My Guide Limited. Insista li s-socjeta` intimata hija registrata f'Malta. Insista li ma kien hemm ebda ftehim bejn il-partijiet dwar gurdizzjoni. Zied li dak li qed tistrieħ fuqu s-socjeta` intimata, u cioe` l-artikolu 7(4) tad-*Distributor Agreement* u cioe` li “*legal venue is the competent courts in Germany and all proceedings shall be conducted in the English language*” jivvjola *section 184* l-ewwel sentenza tal-*German Courts Constitution Act* ghax proceduri huma mmexxija bil-Germaniz biss. Ghalhekk ikkonkluda li ma kien hemm ebda ftehim validu bejn il-partijiet dwar gurdizzjoni.

Meta xehed Dr. Christian Pisani qal li hu kien imqabbad mill-istralcarju biex jigbor fondi msemmija fil-kaz, u dan dejjem bhala avukat. Jaf dwar in-nies milli ezamina l-process. Hu qatt ma ltaqa' ma' Davide Santoro. Cahad li s-socjeta` intimata kellha l-agenzija esklussiva fl-Italja. Qatt ma kien ra d-*Distributor Agreement* u sostna li fi kwalunkwe kaz ma jirreferix ghal Anubis. Ma kellux x'jaqsam mal-*invoices*. L-ammonti msemmija ghadhom dovuti. Semma li ppruvaw ifittxu l-ftehim biex jippruvaw jistabilixxu gurdizzjoni Germaniza, izda peress li ma sabu ebda ftehim dwar dan, kellhom jiprocedu fil-qrati Maltin.

## D. KUNSIDERAZZJONIJIET:

### **D1. Fatti fil-qosor:**

Is-socjeta` rikorrenti tallega li hi kreditrici tas-socjeta` intimata. Is-socjeta` rikorrenti qiegghedha fi stadju ta' falliment. Is-socjeta` intimata kienet registrata gewwa l-Italja pero` giet ridomiciljata f'Malta, u illum tinsab registrata mal-MFSA. Giet eccepita n-nuqqas ta' gurdizzjoni ta' din il-Qorti li tisma' u tiddecieda l-kwistjoni *de quo* u dan *ai termini* ta' l-artikolu 23 tal-*Council Regulation* (EC) 44/2001 tat-22 ta' Dicembru, 2000.

### **D2. Distributor Agreement:**

Is-socjeta` intimata tinsisti li kien sar ftehim bejn iz-zewg partijiet u li esebit bhala Dokument NST01 fol 27 sa 30, intestat *Distributor Agreement*. Davide Santoro, *manager*, amminstratur u rapprezentant tas-socjeta` intimata, fl-affidavit tieghu semma li hu kien ircieva u ffirmat d-*Distributor Agreement*, izda bhala stat ta' fatt, dan mhux iffirmit. Hu interessanti li wara li permezz ta' nota tas-socjeta` rikorrenti giet esebita s-sentenza tat-30 ta' Gunju, 2011 deciza minn din il-Qorti presjeduta mill-Imhalled Matr Chetcuti fl-ismijiet **Dr. Edward DeBono nomine vs No Stop Technology Limited**, esebita fol 97 *et* tal-process, u dana fit-28 ta' Settembru, 2011, ma giet sottomessa ebda nota f'dan ir-rigward, u ghalhekk kull m'ghandha din il-Qorti, kopja ta' ftehim allegatament iffirmit, sostnut fl-affidavit ta' Davide Santoro, michud minn Dr. Christian Pisani izda li bhala stat ta' fatt ma hemm ebda firma fuqu. Kien a bazi ta' dak il-ftehim li s-socjeta` intimata sostniet dak li nghad fl-artikolu 7.4. fejn jissemma "*legal venue is the competent courts in Germany and all proceedings shall be conducted in the English language*".

### **D3. EC Regulation 44/2011:**

Dan jitkellem "*On the jurisdiction and recognition and enforcement of judgments in civil and commercial matters*". Dan l-istrument legali illum jaghmel parti mis-

sistema tal-ligijet ta' Malta b'effett dirett. Isegwi l-artikolu 5 tat-Trattat li jwaqqaf il-Komunita` Ewropeja. Fl-imsemmija Regolamenti hemm il-hsieb li sentenza moghtija minn Qorti ta' Stat imsieheb tinghata gharfien u ezekuzzjoni fi Stat imsieheb iehor, anke jekk id-debitur ikun domiciljat f'art ohra.

L-artikolu 2(1) ta' l-*EC Regulations* 44/2001 jghid hekk:

*"1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."*

Generalment il-gurisdizzjoni tissejjes fuq id-domicilju tal-parti mharrka. Infatti l-artikolu 5 jitkellem dwar *Special jurisdiction* u jghid hekk:

*"A person domiciled in a Member State may, in another Member State, be sued:*

*1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;*

*(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:*

*. in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered, . in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,*

*(c) if subparagraph (b) does not apply then subparagraph (a) applies;..."*

Wara jitkellem fuq *maintenance, tort, delict or quasi-delict, civil claim for damages or restitution* which is based on an act giving rise to criminal proceedings, *dispute arising out of the operations of a branch, agency or other establishment.*

Interessanti huwa dak li jsemmi l-artikolu 23 ta' l-*EC Regulation* 44 ta' l-2001 li f'Malta kien applikabbli mill-1 ta' Mejju, 2004. Dan l-artikolu jghid hekk:

*"1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a*

*Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:*

- (a) in writing or evidenced in writing; or*
- (b) in a form which accords with practices which the parties have established between themselves; or*
- (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned..."*

Fil-kaz in ezami, waqt li s-socjeta` intimata ssostni likien hemm ftehim u cioe` *Distributor Agreement* li jinsab a fol 27 et u tirreferi b`mod partikolari ghall-artikolu 7.4. is-socjeta` rikorrenti tinsisti li tali ftehim qatt ma ezista u infatti tirrileva li m`hemm ebda firma fuq l-istess, u wara dak sostnut mis-socjeta` rikorrenti, xorta wahda baqghet ma giet qatt prodotta kopja ffirmata ta' l-imsemmi ftehim. Hu ovvju li min jallega jrid jipprova, u ghalhekk kien jaspetta lis-socjeta` intimata li ggib il-provi dwar id-*Distributor Agreement bhala vinkolanti bejniet is-socjeta` rikorrenti u dik intimata*. Kif inghad fuq, fl-artikolu 2(1) ta' l-*EC Regulations 44/2001* "*persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*"

Kif qalet din il-Qorti kif presjeduta, fid-decizjoni taghha tat-23 ta' Jannar, 2007 fil-kawza fl-ismijiet **Mrbookmaker.com Ltd. (C27649) vs Stichting De Nationale Sporttotalisator, Entita` Estera**, wara ezami tal-*Brussels Regulations*, persuna b`domicilju fi Stat Membru ghandha tigi imfittxija f`dak l-Istat Membru u dan ghall-fini ta' l-artikolu 2 (1). Il-preambolu 11 ta' l-istess regolamenti jghid:



*“The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground ...The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.”*

Fil-kawza deciza mill-Qrati Ewropej fl-ismijiet **Kalfelis vs Shroder**, Case 189/1987 (*Reports* 1988 page 05565) inghad li *“all exceptions to the rule that the defendant must be sued in the state of his domicile are to be construed narrowly”*. Dan kien bazat fuq il-principju tad-dritt generali tal-konvenut, ossija dak li jigi imharrek fid-domicilju tieghu (Ara f’dan is-sens ukoll is-sentenza tal-*European Court of Justice* fil-kawza **“Athanasios Kalfelis vs Bankhaus Schroder, Munchmeyer, Hengst and Co.,** deciza mill-*Fifth Chamber* fis-27 ta’ Settembru 1988, Case no 189/87 *European Court Reports* 5565, u s-sentenza lokali fl-ismijiet **Bell Med Limited C26412 Vs Pari Mutuel Urban** deciza mill-Qorti ta’ L-Appell Civil Superjuri fit-18 ta’ Settembru 2009.

Il-Qorti tirreferi ghall-kawza deciza fit-30 ta' Gunju, 2011 minn din il-Qorti presjeduta mill-Imhalled Mark Chetcuti fl-ismijiet **Avukat Dr. Edward DeBono nomine vs No Stop Technology Limited** (Citazz. Nru. 1049/10) fejn intqal: *“L-abdikazzjoni ghal gurdizzjoni ta’ forum skond il-principji normali legali kif enunzati fil-Council Regulation 44/2001 hi eccezzjoni ghar-regola u bhala tali trid tirrizulta b’mod car u univoku. Din hi l-interpretazzjoni kostanti kif tirrizulta mill-gurisprudenza Maltija u hi l-istess anki fil-forum Ewropew fejn fis-sentenza deciza mill-**First Chamber tal-European Court of Justice** fit-12 ta’ Ottubru 2008 fl-ismijiet **Nicole Hassett vs South Eastern Health Board and Cheryl Doherty vs North Western Health Board** gie stipulat is-segwenti:*

*18. Moreover, as is stated in the 11th recital in the preamble to Regulation No. 44/2001, jurisdiction based on the defendant’s domicile – in accordance with the general rule – **must always be available, save in a few well***

***defined situations in which the subject matter of the litigation or the autonomy of the parties warrants a different linking factor. Such situations must accordingly be interpreted strictly.***

Il-fatt wahdu lil kien hemm on going business relationship bejn il-partijiet ma jiggustifikax li s-socjeta' konvenuta qatt accettat, kif qed tippremetti issa, li assoggettat ruhu ghal kondizzjonijiet unilaterali ta' gurisdizzjoni imposta f'dokument li ma jiforma parti minn ebda ftehim anqas implicitu bejn il-partijiet, mehtieg qabel ma jkun sar in-negozju f'dan il-kaz ta' distributorship agreement li f'ebda hin hlief waqt din il-kawza s-socjeta` konvenuta qatt uriet li accettatu flimkien mal-kundizzjonijiet hemm imposti."

Ukoll, kif imsemmi mill-istess intimata:

"fis-sentenza fl-ismijiet **Powell Duffryn plc and Wolfgang Petereit (C-214/89)** (moghtija fl-10 ta' Marzu 1992) l-ECJ spjegat l-artikolu 17 tal-*Brussels Convention* (illum l-artikolu 23 tal-*Council Regulation (EC) 44/2001*) u tenniet illi:

*"Pursuant to Article 17 of the Brussels Convention an agreement conferring jurisdiction must be either in writing or evidenced in writing or, in international trade or commerce, in a form which accords with usage in that area and of which the parties are or ought to be aware.*

*As the Court held in Case 24/76 Estasis Salotti vs. Ruwa [1976] ECR 1831, paragraph 7, the purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established."* [paragrafi 23 u 24 tas-sentenza]."

Il-Kap 12 tal-Ligijiet ta' Malta jipprovdi fl-Artikolu 742(1)(b) li l-Qrati Maltin huma kompetenti biex jisimghu u jiddeciedu kawzi li jirrigwardaw "*kull persuna, sakemm jew ghandha d-domicilju taghha jew tkun toqghod jew tkun qeghda Malta*".

Ma irrizultax li kien hemm ftehim ta' arbitragg iffirmit bejn il-partijiet, u ghalhekk japplika dan l-artikolu. Is-socjeta`

intimata tinsab domiciljata Malta u registrata mal-MFSA.  
Kif semmiet ir-rikorrenti :

“Illi fil-kawza **Dr. Mark Fenech noe vs Jean Clarke**, fil-Qorti ta' l-Appell Kummercjali u preseduta mill-Hon. Joseph A. Herrera, Hon Carmel A. Agius u Hon. Giuseppe Mifsud Bonnici, deciza fis-6 ta' April 1992, il-Qorti qalet li l-Qrati Maltin kellhom il-kompetenza li jiddeciedu fuq din il-vertenza ghalix ghalkemm il-kontendenti kienu cittadini Inglizi, il-kriterju li jikkonferixxi l-kompetenza lill-qrati taht l-Artikolu 742, mhuwiex ic-cittadinanza imma huwa id-domicilju tal-persuna konvenuta. Il-Qorti ziedet li billi il-konvenuta kienet tinsab Malta ma kien hemm l-ebda dubbju li l-gurisdizzjoni kellha tigi ezercitata.

“Kif jidher car mil-artikolu 742 Kap 12, il-gurisdizzjoni ta' dawn il-qrati hija determinata mill-persuni li jkunu partijiet in kawza. Il-kriterju m'hijiex tant ic-citadinanza imma d-domicilju tal-persuna konvenuta quddiem il-qrati, tant li anki cittadin Malti li huwa domiciljat barra minn Malta, ma jaqax fil-gurisdizzjoni.”

#### **E. KONKLUZJONIJIET:**

In vista ta' dak li nghad hawn fuq, speċjalment taht “D3”, il-Qorti tichad l-eccezzjoni tas-socjeta` intimata li l-Qorti m'ghandhiex gurisdizzjoni li tisma' u tiddeciedi t-tilwima *de quo ai termini* ta' l-artikolu 23 tal-Council Regulation (EC) 44/2001 tat-22 ta' Dicembru, 2000 u senjatament minhabba l-fatt li s-socjeta` intimata ma rnexxilhiex tipprova li kien jezisti xi *Distributor Agreement* bejn il-partijiet b'inkluzjoni ta' xi klawsola ta' xi gurisdizzjoni esklussiva partikolari.

Minhabba l-istess *Regulations* tal-44/2001 artikolu 2(1) kif ukoll l-artikolu 742 (1)(b) tal-Kap 12 il-Qorti tiddikjara li ghandha gurisdizzjoni tisma' l-kawza.

Spejjez ta' din il-vertenza ghas-socjeta` intimata.

Il-kawza tibqa' differita ghall-kontinwazzjoni tal-provi ta' l-attur ghat-12 ta' Marzu, 2012 fid-9.45 a.m.

Kopja Informali ta' Sentenza

**< Sentenza In Parte >**

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