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Cargoes Transport to Tunisia based on Cost and Freight Free Out Terms

We refer to the various problems, threat of arrests, securities provisions, and claims encountered by the ship owners/sea carriers operating in the Tunisian market.

Recently, our office obtained an excellent award rendered by the Cour de Cassation - Chambres Reunies and which clarified the shipowners/sea carrier's liability when transporting cargoes under **the Cost and Freight Free Out Terms**.

FACTS:

On 29/12/2002 the M/V "YTHAN" berthed at Gabes port and discharged a cargo of barley to Office des Cereales (who are the main importers of cereals to Tunisian and who also are a state company)

At the end of discharging a shortage had been calculated.

Office des cereals have of course detained the BG in this respect.

Then Office des Cereales brought the case before court of 1st degree.

COURT'S ARGUMENTS:

On June 2005 the court of 1st degree dismissed Office des Cereales case on basis the following arguments:

- The cargo had been carried by virtue of the B/L dd 18/12/2002
- The cargo had been discharged by the receivers employees and servants / STAM stevedores
- The master had issued letters of protest in respect of the cargo's spillage by the receivers servants
- The process server's writ proves that there was an important quantity of barley spilled on quay

- The court surveyor confirmed that at the vessel's berthing the hatches were sealed and the seals were conform
- On the light of the above the shortage that had been calculated was due to the bad handling of the cargo by the stevdores, and consequently the sea carrier's liability could not be involved in this case

On the October 2006 court of 2nd degree (appeal) invalidated the 1st degree decision and condemned the shipowners/sea carrier jointly with the guarantor bank to pay the shortage value to cargo receivers.

On May 2008 the Cour de Cassation (High Court) invalidated the appeal decision and deferred the case to another chamber of court of appeal.

On April 2011 court of appeal (2nd appeal) and it confirmed the 1st degree judgment.

On October 2014 the Cour de Cassation – Les Chamber Reunies - had dismissed Office des Cereales cassation.

However, the most important issue in this decision are the court's arguments and the basis of this decision.

The "Chambres Reunies" of the Cour de Cassation argued as follows:

- The transport of this cargo had been effected on basis of the sale terms **Cost and Freight Free Out.**

- **This term/clause had been mentioned in the B/L** and as long as it is mentioned clearly in the B/L **it should be effective**.

- On that basis, the cargo had been loaded by the shippers in the loading port and the holds have been sealed upon the completion of the loading.

- So, the quantity on board had been determined by the shippers and mentioned on the B/L.

- At the discharge port, the hatches seals have been inspected and found conform and intact.

- Then the cargo's ownership had been transferred to the cargo receivers on board.

- So, the Cost and Freight Free Out term reflects that the cargo had been loaded by the shippers in the loading port and the loading fees are on shippers' account.

- Then, the discharging at the discharge port is effected by the receivers and their servants (stevedores) and any cargo spillage or loss during discharging is considered as caused by them.
  In addition, the discharge fees are on the receivers account.

- The sea carrier had only transported the cargo within the same condition as loaded and furnished by shippers, and it is discharged by receivers, consequently the ship owners/sea carrier could not be held liable for the shortage, and this shortage is incumbent either on the shippers in the loading port or on the receivers in the discharge port.

- In view of that, the ship-owners/sea carrier's liability is limited to the transport operation only.

- On the other side mentioning that term/clause on the B/L will be also in compliance with art 16 of HR...

COMMENTS:

These arguments and decision have been taken by the "Chambre Réunies" of the Cour de Cassation which represents the last stage of the legal actions and any decision rendered by the "Chambres Réunies" is considered as a Jurisprudence.

As you may notice the fact that the clause **Cost and Freight Free Out** was mentioned in the B/L the Cour de Cassation took it into consideration, but more than that it based its decision on it.

Moreover, we notice with great interest that the court de cassation is giving more attention to the sales contract (incoterms) and this not only because the clause C&F Free out is mentioned in the B/L but also because the code de Commerce Maritime – CCM- is creating a chapter ..... for the maritime sales contracts, and consequently the maritime sales terms may have an impact on the maritime transport, the risks and liabilities as well.

In our opinion, this is an excellent outcome with Office des Cereales cases, and it could be a start for further defense in the future against these receivers.

Now and further to this good court decision, and since Office des Cereales use to buy the cargo on Cost and Freight and / or Cost and Freight Free Out, we would like to recommend to members for the future operations in Tunisia to mention the sale term ''Cost and Freight Free Out'' on the B/L.

Not only this, but we also recommend that they mention how the quantity on the B/L had been determined by draft or by shore scale (as mentioned in the attached prototype of B/L)

Such clauses may help members to limit their liability for cargoes transport to Office des Cereales just to the transport only, and any operation before or after the transport should be incumbent on the shippers and/or the cargo receivers and their servants

You will find here attached copy of the magazine ''Infos Juridiques la Revue du droit'' article/comments about this court decision, a free translation of it and also the free translation of the award N° 4203.2013 rendered by Chambers Reunies of the Cour de Cassation on 16/10/2014.

Best regards

Elias Mami

Budd Tunisie

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قرار هام

ما هو نظام مسؤولية الناقل البحري في نظام بيع Cout et Fret Out؟

شحن بضاعة/ الناقل البحري / أخطار حصول خسارة أو أضرار بالبضاعة/ الفصل 16 من اتفاقية هامبورغ/ النقص الحاصل للبضاعة/ خطأ وتقصير بإهمال أعوان التفريغ

لا نزاع أنّ عملية النقل قد تمت طبقا لنظام البيع وأن ذلك النظام يقتضي شحن "Coutet Fret out" وأنّ ذلك النظام يقتضي شحن البضاعة على ظهر الباخرة من طرف الشاحن وهو الذي يقوم برصفها وشحنها بعنابر الباخرة ثم ختمها برصاص الإرسال ويتولى الناقل البحري نقلها على حالتها ويسلمها للمرسل إليه على ظهر السفينة وهي مختومة برصاص الإرسال ويتولى المرسل إليه تفريغها بوسائله الخاصة وبالتالي فإن أخطار حصول خسارة أو أضرار بالبضاعة تنتقل من البائع إلى المشتري بمجرّد ترصيف البضاعة على متن الباخرة بميناء الشحن وان هذا النظام يعدّ في حد ذاته تحفظا على معنى أحكام الفصل 16 من اتفاقية هامبورغ وأنّ الناقل البحري لا يتدخل في عملية الشحن والترصيف والتفريغ.

وتماشيا ومبدأ نظام البيع المتعلق بعملية نقل البضاعة للمدّعي في شأنها فإنّ الناقل البحري (المعقب ضده الآن) لا يتحمل أية مسؤولية في خصوص الأضرار التي من شأنها أن تحدث للبضاعة المنقولة سواء في ميناء الشحن أو في ميناء التفريغ طالما أنه تسلّم البضاعة على حالتها بأختامها وتسلمها المرسل اليه على ظهر السفينة على تلك الحالة وأنّ هذا الأخير هو الذي يتولى تفريغها بوسائله الخاصة.

وعلى خلاف ما ذهب إليه الطاعن في مستندات طعنه فانه وعملا بهذا الشرط المدرج في وثيقة الشحن لا يتدخل الناقل البحري في عملية الشحن ولا ترصيف ذلك أنّ الأعمال المذكورة يقوم بها أعوان تابعون للمرسل أو المرسل إليه وبالتالي فإنّ الناقل البحري لا يتحمل أية مسؤولية في خصوص أيّ ضرر أو نقص حاصل للبضاعة سواء في ميناء الشحن أو ميناء التفريغ باعتبار أنه سلم البضاعة كما تسلمها بأختامها.

والحالة تلك فإنّ المسؤولية يتحملها المرسل إليه أي المشتري في صورة تعلق الأمر بنقص ناتج عن التفريغ أو البائع إذا ما تعلق الأمر بنقص ناشئ عن الشحن.

وإنّ محكمة البداية حين بيّنت مناط مسؤولية الناقل البحري في نظام البيع " Cout et Fret out" على الوجه السالف الذكر قد أحسنت تكييف الوقائع وأحكمت تطبيق القانون وورد حكمها معللا.

ولا نزاع في أنّ قرينة المسؤولية المحمولة على كاهل الناقل البحري والمنصوص عليها بالمادة الرابعة من اتفاقية هامبورغ هي قرينة بسيطة قابلة للدحض متى توصل الناقل البحري إلى إقامة الحجة على خلافها أي متى توصّل هذا الأخير إلى إثبات انتفاء مسؤوليته عن الأضرار الحاصلة للبضاعة.

ويتبين أنّ الناقل البحري قد أوفى بجميع الإلتزامات المحمولة على كاهله باعتباره قد نفّذ التزامه المتمثل في نقل البضاعة وإيصالها على الحالة التي تسلّمها عليها وهي مشحونة في عنابر الباخرة الحاملة لأختامها والتي وضعت عليها بميناء الشحن وقد أثبت الناقل البحري بصفة قاطعة بأنّ النقص الحاصل للبضاعة مرده خطأ المرسل إليه ومستخدميه الذين تولوا عملية تفريغ البضاعة وما تخلل تلك العمليات من خروقات تسببت في تناثر كميات كبيرة من البضاعة حسبما أكده تقرير الإختبار البحري بواسطة الخبير ورود البضاعة إلى ميناء التفريغ حاملة أختامها التي وضعت على عنابر الباخرة بميناء الشحن ومنها كانت سليمة وهو ما يقصي إمكانية تعرض البضاعة للنقص أثناء الرحلة البحرية وقد أكدت المعاينة المجراة بواسطة الأستاذ الخبير بتاريخ 21 /01 /2003 حسب رقيمه عدد 7141 أنّ النقص المسجل في كميات الشعير مرده خطأ وتقصير وإهمال أعوان التفريغ التابعين للمرسل إليه (المعقب) وأعوان مقاول التفريغ الذي يعمل لحساب هذا الأخير مثلما هو ثابت من تقرير الإختبار.

ويتبين أنّ ربان الباخرة قد قام بالاحتراز على عمليات التفريغ في مناسبتين الأولى بتاريخ 8 جانفي 2003 والثانية بتاريخ 21 جانفي 2003 تضمنت احتجاجه على المداونة العتيقة للبضاعة التي هي بصدد التفريغ من الباخرة

ويتبين أنّ محكمة الحكم المطعون فيه قد أحسنت تطبيق أحكام المادة 16 من معاهدة هامبورغ المتعلقة بالنقل الدولي للبضائع بحرا حين اعتبرت أنّ الناقل البحري لا يتدخل في عملية الشحن والترصيف والتفريغ وفقا لنظام البيع المذكور والذي يعدّ تحفظا في حدّ ذاته علاوة أنّ الناقل البحري أقام الحجة على انتفاء مسؤوليته عن الأضرار الحاصلة للبضاعة وفقا لأحكام المادة الرابعة من اتفاقية هامبورغ.

قرار تعقيبي مدني عدد 4203-2013 بتاريخ 16 أكتوبر 2014

Free Translation

The sea carrier's liability based on the terms

Cost & Freight Free Out

Cargo loading / the sea carrier/ Risks of damages and losses to the cargo/ Article 16 of Hamburg Rules/ the shortage caused to the cargo / Faults, remissness and negligence of stevedores.

No doubt, the transport has been effected by virtue of the sale terms and that these terms stipulate that the cargo's loading should be effected on basis cost freight free out; which means that the cargo's loading should be effected on basis Cost and Freight Free Out, which means that the cargo's loading on board should be effected by the shippers who should load the cargo, stow it in the holds, and seal the hatches.

Whereas, the sea carrier carries the cargo on board within the same conditions, then he **delivers it on board with sealed hatches.**

Then, the sea carrier carries the cargo on board within the same conditions then he delivers it on board with sealed hatches.

Then the cargo receivers discharge the cargo with their own means, and consequently the risks of damages and losses are transferred from the sellers to the buyers once the cargo is stowed on board in the loading port.

Whereas, this clause is in itself a reserve in compliance with article 16 of Hamburg Rules, and the sea carrier does not interfere in the cargo's loading, stowing and discharging.

In conformity with the terms of cargo's selling on basis of the cost and freight free out Principle, the sea carrier (the defendant in this case) does not bear any liability in respect of any damages that could be caused to the cargo either in the loading or in the discharge port since he received the cargo within the same state and sealed and then the receivers took delivery of the cargo on board within the same state with their own means.

On the other side and contrary to the claimants' arguments of appeal and by virtue of this clause in the B/L (cost and freight free out) the sea carrier does not interfere in the cargo's loading and stowing operations.

Indeed, such operations are effected by the shippers and the cargo receivers' servants and on that basis the sea carrier cannot bear any liability in respect of the damages or the shortages caused to the cargo either in the loading or with the discharging ports because he delivered the cargo in the same state and condition as he received it with the seals.

Accordingly, in case of shortage in the discharge port, it is the receivers who should be liable and if the shortage is caused in the loading, it is the shippers who are liable.

So, the court of 1st degree when it clarified the obligation/liability of the sea carrier under the cost and freight free out'' terms, it had very well adjusted the facts and implemented the law, so its decision is justified.

No doubt, that the sea carrier's obligation of proof which is mentioned in the art 04 of H.R is a simple proof and it can be refuted whenever this latter is able to prove that his liability for the damages caused to the cargo is not involved.

Accordingly, it is clear that the sea carrier had honored all this obligations, since he exerted the necessary diligence to carry the cargo within the same state and condition as received by him with the same hatches seals that have the shortage caused to the cargo is due to the fault of cargo receivers and their servants who handled and discharged the cargo, including the spillage of huge quantities as confirmed by the cargo surveyor and who also confirmed that at the discharge port the hatches were sealed with the same seals put with the loading port and intact.

Such confirmation reflects that the shortage could not be occurred during the sea transport.

Moreover, the court surveyor confirmed also in his report dated 21/01/2003 by virtue of the order n°7141 that the shortage calculated for the cargo of barley is due to the stevedores negligence and who have acted on receivers' behalf (the claimants in this case).

It also appeared that the master had protested in respect of the discharging operations twice, the 1st time on January 08th, 2003 and the second time on January 21st, 2003.

It is clear that the contested court decision had well implemented the article 16 of Hamburg Rules related to the International sea transport of cargoes, when it considered that the sea carrier is not involved in the loading stowing and discharging operations which is based on the cost and Freight Free out terms and which is in itself considered as a reserve, in addition to the proofs adduced by the sea carrier which demonstrate that he is not liable as per article 4 of H.R provisions.

Cassation decision n°4230 – 2013 dated October 16th 2014.