QORTI CIVILI PRIM`AWLA

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum il-Hamis 15 ta` Dicembru 2016

Kawza Nru. 6
Rik. Nru. 1082/13 JZM

Brian Tonna bhala stralcjarju tas-socjeta` European Insurance Group Limited (C-35708)

kontra

Luciano Rotondi, Andrea Ratti, Enzo Resciniti, Bruno Lago (flimkien id-"Diretturi Ufficjali") u Vincenzo Viscione, Paolo Viscione u Giovanni Sidoti, (flimkien id-"Diretturi Mohbija") (lkoll flimkien id-"Diretturi"

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors prezentat fil-<u>11 ta` Novembru 2013</u> li jaqra hekk :–

<u>Introduzzjoni</u>

*1. Wara li kienet ilha rregistrata Malta mill-21 ta` Frar 2005 (Kopja tac-certifikat ta` registrazzjoni hawn anness u mmarkat Dok "A"), EIG giet illicenzjata mill-Malta Financial Services Authority ("**MFSA**") biex tipprovdi servizzi ta` assikurazzjoni b`effett mit-22 ta` Novembru 2007 (Kopja tal-licenzja hawn annessa u mmarkata Dok "B"). L-awtorizzazzjoni kienet biex EIG tkopri riskji fl-Italja, b`dan li ma setghetx ikollha stabbiliment hemmhekk.*

2. B`effett mis-26 ta` April 2010, EIG giet ipprojbita mill-awtoritajiet Taljani (Istituto per la Vigilanza sulle Assicurazioni Private e di Interesse Collettivo ("ISVAP")) li tidhol f`aktar kuntratti ta` assikurazzjoni fl-Italja (Kopja tal-provvediment tal-ISVAP hawn anness u mmarkat Dok "C").

3. Il-licenzja li kellha EIG biex tipprovdi servizzi ta` assikurazzjoni giet irrevokata mill-MFSA fit-12 ta` Lulju 2010 (Kopja tal-ittra annessa u mmarkata Dok "D").

4. B`effett mis-6 ta` Awwissu 2010, EIG tqieghdet f`amministrazzjoni mill-MFSA: l-amministratur mahtur kien Raphael Aloisio, ta` Deloitte (Kopja tal-ittra annessa u mmarkata Dok "E").

5. Ir-rikorrent Brian Tonna gie mahtur mill-MFSA bhala stralcjarju ta` EIG b`effett mid-29 ta` Settembru 2011 (Kopja tal-ittra annessa u mmarkata Dok "F").

6. EIG hi nsolventi.

7. Ir-rikorrent jghid li d-Diretturi Ufficjali jew min minnhom, kif ukoll id-Diretturi Mohbija bhala l-persuni li skont id-direzzjoni u/jew istruzzjonijiet taghhom id-Diretturi Uficcjali ta` EIG kienu normalment jagixxu, kienu jafu, jew kellhom ikunu jafu qabel ix-xoljiment tal-EIG, li ma

kienx hemm prospett xieraq li l-EIG setghet tevita x-xoljiment minhabba l-insolvenza taghha. Ghalhekk ir-rikorrent Brian Tonna qed jitlob ir-rimedju kontemplat fl-artikolu 316 tal-Kap. 386 kontra d-Diretturi Ufficjali, jew min minnhom, u kontra d-Diretturi Mohbija.

EIG bhala kumpannija

8. Kif inghad, EIG twieldet bhala kumpannija fil-21 ta` Frar 2005 (Ara Dok "A").

9. Il-kapital azzjonarju awtorizzat u mahrug tal-EIG kien ta` hames mitt Liri Maltin (Lm500) maqsum f`hames mitt (500) sehem ta` lira Maltija (Lm 1) il-wahda, interament sottoskritt kif gej: (i) COMPAGNIA GENERALE SERVIZI E FINANZA CO.GE.S.FIN. LIMITED (kumpannija Ngliza bin-numru 5265693) ("**COGESFIN**") (Id-direttur ta` COGESFIN huwa Paolo Viscione sa mid-29 ta` April 2011. Il-kapital azzjonarju ta` COGESFIN huwa ta` GBP 4,701,000 maqsum f`4,701,000 sehem ta` lira Sterlina (GBP 1) il-wahda, interament sottoskritt kif gej: (i) Giovanni Sidoti b`erba` mija u sebghin elf u mitt (470,100) ishma; u Paolo Viscione b`erba` miljun mitejn u tletin elf u disa` mitt (4,230,900) sehem (ara kopja tal-prospett annwali ta` COGESFIN sad-data 31 ta` Awissu 2012, hawn annessa u mmarkata Dok "G") b`erba` mija disgha u disghin (499) ishma; u (ii) Prof. Luciano Rotondi bir-rimanenti sehem wiehed. L-ewwel direttur ta` EIG kien l-istess Prof. Luciano Rotondi (Kopja tal-ewwel memorandum u statut ta` assocjazzjoni tal-EIG hawn anness u mmarkat Dok "H").

10. Fil-5 ta` Novembru 2007, il-kapital azzjonarju awtorizzat tal-EIG zdied ghal hames miljun u hames mitt elf Ewro (€5,500,000) maqsum f` hames miljun u hames mitt elf (5,500,000) sehem ta` Ewro (€1) il-wiehed. COGESFIN issottskriviet ghal hames miljun erba` mija u tmienja u disghin elf u tmien mija u erbghin (5,498,840) ishma ohra ta` Ewro (€1) is-sehem (Kopja tal-Form H dwar l-ghoti ta` ishma rregistrata mar-Registratur tal-Kumpanniji hija hawn annessa u mmarkata bhala Dok "I").

11. Il-kompozizzjoni ufficjali tal-Bord tad-Diretturi tal-EIG tbiddlet minn zmien ghal zmien. It-tibdil huwa rifless fid-dokument hawn anness u mmarkat Dok "J". Apparti d-Diretturi Ufficjali, id-Diretturi Mohbija kienu jaghtu struzzjonijiet u jiddirigu lid-Diretturi Ufficjali, jew min minnhom u

dawn, jew min minnhom, kienu normalment jagixxu skont tali direzzjoni u struzzjonijiet.

<u>L-operat ta` EIG jitwaqqaf mill-awtorijiet u EIG titqieghed f`amministrazzjoni</u>

12. Kif indikat iktar `l fuq, il-licenzja li l-EIG kienet inghatat biex tipprovdi servizzi ta` assikurazzjoni fis-suq Taljan giet irrevokata mill-MFSA b`effett mit-12 ta` Lulju 2010 (Kopja tal-ittra mibghuta mill-MFSA lid-diretturi ta` EIG biex tinfurmhom bid-decizjoni hawn annessa u mmarkata Dok "D"), u dan wara li fis-26 ta` April 2010 l-ISVAP kienet ordnat lill-EIG li ma tidholx f`aktar kuntratti fl-Italja (Kopja tal-provvediment mahrug mill-Istituto per la Vigilanza sulle Assicurazioni Private e di Interesse Collettivo ("ISVAP") fis-26 ta` April 2010 hawn anness u mmarkat bhala Dok "C"). L-MFSA spjegat ir-ragunijiet li wasslu ghar-revoka tal-licenzja fid-dettal fl-ittra tal-10 ta` Gunju 2010 lid-diretturi ta` EIG (Kopja hawn annessa u mmarkata Dok "K").

*13. Sussegwentement u b`effett mis-6 ta` Awwissu 2010, l-MFSA hatret lil Raphael Aloisio tad-ditta Deloitte (l-"**Amministratur**") biex jiehu f`idejh l-attiv u l-kontroll tal-kummerc tal-EIG skont id-dispozizzjonijiet tal-artikoli 28(1)(c) u 28(1)(d) tal-Att dwar il-Kummerc tal-Assigurazzjoni (Kap.403 tal-Ligijiet ta` Malta) (Kopja tal-ittra tal-hatra tal-Amministratur hawn annessa u mmarkata Dok "E"). Fis-17 ta` Ottubru 2011, l-Amministratur ipprezenta rapport finali lill-MFSA (Kopja hawn annessa u mmarkata Dok "L"), fejn identifika, fost affarijiet ohra, l-kwistjonijiet serji li kienet qed tiffaccja l-kumpannija.*

<u>Il-hatra ta` stralcjarju</u>

14. B`effett mid-29 ta` Settembru 2011, ir-rikorrent Brian Tonna, CPA, ta` Nexia BT, The Penthouse, Suite 2, Capital Business Centre, Entrance C, Triq Taz-Zwejt, San Gwann SGN 3000 (l-"**Istralcjarju**") inhatar mill-MFSA bhala stralcjarju tal-EIG ai termini tal-artikolu 28(1)(f) tal-Att dwar il-Kummerc tal-Assigurazzjoni (Kap.403 tal-Ligijiet ta` Malta) ai fini tal-likwidazzjoni tal-affarijiet tal-EIG (Kopja tal-ittra tal-hatra tal-Istralcjarju hawn annessa u mmarkata Dok "F"). L-inkarigu tal-Amministratur gie fi tmiemu mal-hatra tal-Istralcjarju.

<u>Dikjarazzjoni ta` stat ta` insolvenza</u>

15. Il-verifiki li kien beda jaghmel l-Amministratur u li kompla jinvestiga u jevalwa l-Istralcjarju wasslu lill-Istralcjarju biex jikkonferma li l-EIG kienet fi stat ta` insolvenza qabel ma dahlet fl-amministrazzjoni. L-avviz dwar l-istat tal-insolvenza tal-EIG gie ppublikat fi tlett gazetti gurnalieri, jigifieri: The Times of Malta (fil-21 ta` Settembru 2012); In-Nazzjon (fis-26 ta` Settembru 2012); u l-Orizzont (fit-2 ta` Ottubru 2012), kif ukoll fuq is-sit elettroniku tal-EIG (Kopji tal-publikazzjonijiet hawn annessi u mmarkati bhala Dok "M" sa Dok "P").

<u>Id-Diretturi kienu jafu, jew kellhom ikunu jafu, li ma kien hemm l-ebda prospett xieraq li l-EIG tevita x-xoljiment minhabba l-insolvenza</u>

16. Kif ser jirrizulta mill-provi, id-Diretturi, jew min minnhom, kienu jafu, jew kellhom ikunu jafu qabel ix-xoljiment tal-EIG, li ma kienx hemm prospett xieraq li l-EIG setghet tevita x-xoljiment minhabba l-insolvenza taghha.

17. Minkejja dan id-Diretturi baqghu jmexxu n-negozju ta` EIG bir-rizultat li t-telf zdied ferm aktar milli kellu. Kif juru l-kontijiet hawn annessi u mmarkati Dok "P" sa Dok "T", l-EIG soffriet telf sostanzjali liema telf baqa` jizdied kull sena sa minn meta giet irregistrata u kemm qabel, kif ukoll wara, li bdiet tinnegozja.

Ghaldaqstant ir-rikorrent umilment jitlob li din l-Onorabbli Qorti, ai termini u ghall-finijiet tal-artikolu 316 tal-Kap. 386:

i. tiddikjara li ma kienx hemm prospett xieraq li l-EIG tevita x-xoljiment minhabba l-insolvenza taghha ;

ii. tiddikjara li d-Diretturi, jew min minnhom, kienu jafu, jew kellhom ikunu jafu qabel ix-xoljiment tal-EIG, li ma kienx hemm prospett xieraq li l-EIG tevita x-xoljiment minhabba l-insolvenza taghha ;

iii. tiddikjara lill-intimati responsabbli li jaghmlu pagament favur l-attiv tal-EIG, kif din l-Onorabbli Qorti jidhrilha xieraq ; u

iv. tordna l-hlas ta` dan l-ammont.

Bl-ispejjez.

Rat id-dokumenti li kienu prezentati mar-rikors promotur.

Rat ir-risposta tal-intimat Enzo Resciniti li kienet prezentata fis-<u>17 ta` Frar 2014</u> li taqra hekk :–

01 Illi preliminarjament u minghajr ebda pregudizzju, qed tigi ssollevata l-eccezzjoni tan-nuqqas ta` gurisdizzjoni u kompetenza ta` din l-Onorabbli Qorti biex tisma` u tiddeciedi r-rikors fl-ismijiet premessi;

02 Illi dan stante illi l-esponenti, Enzo Resciniti, jirrisjedi fl-Italja u senjatament f`Via di Casal Bruciato Nro 10, Roma, u dan kif jidher ben evidenzjat mill-kopja tal-karta tal-identita` Taljana tal-istess esponenti li qed tigi hawn mehmuza u mmarkata bhala Dokument 'ER01';

03 Illi in vista tal-fatt li l-esponenti ma jirrisjedix Malta u stante l-fatt li dan ir-rikors huwa talba ghad-dikjarazzjoni ta` responsabbilita` u ghall-hlas tal-attiv tas-socjeta`, European Insurance Group Limited (C-35708), allura din l-Onorabbli Qorti m`ghandha ebda gurisdizzjoni u m`hijiex kompetenti sabiex tisma` u tiddeciedi dan ir-rikors;

04. Illi wkoll in via preliminari u assolutament ukoll minghajr ebda pregudizzju ghall-premess, il-kwistjoni dwar l-allegat nuqqas da parti tal-intimat, Enzo Resciniti, diga` giet deciza minn Qorti Taljana u senjatament mit-Tribunale di Roma Terza Sezione Civile permezz ta` sentenza moghtija mill-istess tribunal fit-2 ta` Mejju 2013, li kopja taghha qed tigi hawn annessa u mmarkata bhala Dokument ER02;

05. Illi assolutament minghajr ebda pregudizzju ghall-premess, jekk stess kien hemm xi nuqqas da parti ta` xi hadd, dan in-nuqqas zgur ma jahtix ghalih l-esponenti u dan stante li hu qatt ma kellu x`jaqsam xejn mas-socjeta` Novvosad Insurance and Financial Services Limited (Socjeta` rregistrata fir-Renju Unit) li kienet il-broker tas-socjeta` European Insurance Group Limited (C-35708) u li l-fatt ghandha tinzamm responsabbli ghall-akkadut fil-konfront ta` European Insurance Group Limited (C-35708);

06 Illi l-esponenti qatt ma okkupa rwoli ufficjali fis-socjeta` Novvosad Insurance and Financial Services Limited (Socjeta` rregistrata fir-Renju Unit) li fil-fatt ghandha tinzamm responsabbli in pieno ghall-akkadut, ghal liema akkadut l-esponent zgur qatt ma kellu x`jaqsam xejn mieghu, wisq inqas ma jista` jigi qatt ippruvat li l-istess esponenti seta` qatt kellu xi intenzjoni frawdolenti, kif qed jimplika r-rikorrenti;

07 Illi tajjeb li jigi rilevat li l-lat finanzjarju tas-socjeta` Novvosad Insurance and Financial Services Limited (Socjeta` rregistrata fir-Renju Unit), li fil-fatt kienet u ghandha tinzamm responsabbli ghall-akkadut, kien jiggestih l-intimat l-iehor u cioe` Paolo Viscione, u definitivament mhux l-intimat;

08 Illi l-esponenti qatt ma kellu poter li jaccedi ghall-informazzjoni fir-rigward tal-kontijiet bankarji tal-istess Novvosad Insurance and Financial Services Limited (Socjeta` rregistrata fir-Renju Unit) u qatt ma kellu l-jedd li jiffirma sabiex jeffetwa prelevamenti jew depoziti ta` fondi fil-kont tal-istess Novvosad Insurance and Financial Services Limited (Socjeta` rregistrata fir-Renju Unit), wisq inqas johrog xi cekkijiet tal-istess Novvosad Insurance and Financial Services Limited (Socjeta` rregistrata fir-Renju Unit);

09. Illi in vista tal-premess, u in vista tal-fatt li s-sitwazzjoni li sabet ruhha fiha s-socjeta` European Insurance Group Limited (C-35708) hija htija esklussivament tas-socjeta` Novvosad Insurance and Financial Services Limited (Socjeta` rregistrata fir-Renju Unit) u in vista tal-fatt li l-esponenti qatt ma kellu ebda rwol ufficjali fl-istess socjeta` Novvosad Insurance and Financial Services Limited (Socjeta` rregistrata fir-Renju Unit), l-agir tal-esponenti qatt u f`ebda punt ma jista` jitqies bhala li jilledi b`xi mod id-doveri tal-istess intimat fil-konfront tar-rikorrenti;

10. Illi inoltre l-kondotta tal-istess esponenti zgur u f`ebda punt ma tista` titqies li setghet qatt saret b`xi intenzjoni frawdolenti jew inkella b`xi mod tmur kontra d-doveri tieghu ta` direttur u minhabba f`hekk it-talba li qed jaghmel ir-rikorrenti fil-konfront tal-intimat, Enzo Resciniti ghandha tigi michuda bl-ispejjez kontra l-istess rikorrenti;

11. Illi l-mod kif mexa l-esponenti b`mod ma jista` qatt u b`ebda mod jinkwadra ruhu f`ambitu ta` kondotta li a bazi taghha din l-Onorabbli Qorti tista` b`xi mod thoss ruhha gustifikata li 'it lifts the corporate veil', kif donnu qed jitlob l-istess rikorrenti, meta talbet lil din l-Onorabbli Qorti tordna lill-intimat ihallas lura l-attiv tas-socjeta` rikorrenti, meta fil-fatt l-esponenti qatt ma kkontrobwixxa ghal tali attiv, wisq inqas kellu xi sehem minnu ;

12. Illi dak li nghad fi-paragrafu precedenti jissahhah minhabba l-fatt li tali ordni tal-Qorti, jekk stess tinghata, teffetwa b`mod mhux ekwu l-protezzjoni li taghti l-ligi lill-ufficjali ta` kumpannija li jispiccaw vittma tac-cirkostanzi, bhala ma gara fil-kaz tal-esponenti;

13. Illi assolutament minghajr pregudizzju ghall-premess, ghandha tingieb prova fin ghall-grad rikjest mil-ligi tal-quantum tad-danni allegatament sofferti mis-socjeta` European Insurance Group Limited (C-35708);

14. Illi, minghajr pregudizzju, l-allegazzjonijiet kif imnizzla fil-paragrafi 16 u 17 tar-rikors originali, qed jigu michuda bl-akbar qawwa u zgur li b`ebda mod dawk l-allegazzjonijiet ma jistghu b`xi mod jigu anke remotament imputabbli lill-intimat, Enzo Resciniti, u dan anke in vista tal-fatt li l-fatti li setghu pprecipitaw is-sitwazzjoni, okkorrew qabel ma l-istess intimat, Enzo Resciniti, gie appuntat direttur u cioe` Lulju 2009;

15. Illi, minghajr pregudizzju, tajjeb li jigi ssollevat li l-intimat, Enzo Resciniti, fil-fatt kull ma ghamel bhala direttur kien biss hdax-il xahar, perijodu li seta` jintuza biss mill-intimat sabiex jambjenta ruhu dwar is-sitwazzjoni u zgur qatt ma tista` titqies bhala sufficjenti li jittiehdu xi passi rimedjali da parti tal-istess intimat, Enzo Resciniti;

16. Illi in vista ta` dan zgur ma seta` la qatt kellu b`xi mod x`jaqsam mal-akkadut izda dahal fuq 'fait accompli', li minkejja l-isforzi tieghu biex forsi jsalva s-sitwazzjoni, is-sitwazzjoni kienet iddeterjorat b`mod tali, li l-

istess intimat ma seta` fil-fatt jaghmel xejn konkret dwarha u dan anke in vista tal-perijodu pjuttost qasir (hdax-il xahar) (li hames xhur minnhom kien sorveljat minn ufficjali tal-ISVAP u l-Guardia di Finanza, li jfisser li l-perijodu effettiv tat-tmexxija tal-istess Enzo Resciniti kien biss ta` tmienja jew disa` xhur) li fil-fatt dam bhala direttur tas-socjeta` rikorrenti;

17. Illi ghalhekk l-intimat, Enzo Resciniti, zgur u b`ebda mod ma seta` jaghmel xejn sabiex b`xi mod jirranga s-sitwazzjoni, kif qed tippretendi l-istess rikorrenti;

18. Illi minhabba f`hekk l-istess intimat, Enzo Resciniti, b`ebda mod ma jista` jitqies li qatt seta` b`xi mod kellu x`jaqsam mal-akkadut, u dan apparti dak li ser jigi ribadit f`dan ir-rigward fil-paragrafu sussegwenti;

19. Illi, minghajr pregudizzju, oltre dak rilevat fil-paragrafu precedenti, tajjeb li jigi rilevat, li fid-29 ta` Marzu 2010, kienet saret spezzjoni da parti ta` ufficjali tal-ISVAP u tal-Guardia di Finanza Taljana u li minn dik id-data kulma sehh fis-socjeta`, European Insurance Group Limited (C-35708), sehh kompletament bil-kunsens u bl-approvazzjoni tal-istess ufficjali kemm tal-ISVAP, kif ukoll tal-Guardia di Finanza;

20. Illi ghalhekk effettivament il-perijodu totali ta` meta l-esponenti, Enzo Resciniti, kien direttur effettiv kien biss ta` madwar tmienja jew disa` xhur, perijodu li zgur u b`ebda mod ma jista` b`xi mod jitqies bhala sufficjenti sabiex l-agir tieghu jista` b`xi mod jipprecipita sitwazzjoni li ma kinitx ezistenti qabel ma lahaq l-istess esponenti u li ghalhekk ma jistax u b`ebda mod jinzamm responsabbli ghaliha;

21. Salv eccezzjonijiet ulterjuri jekk ikun il-kaz.

Rat id-dokumenti li kienu prezentati mar-risposta.

Rat ir-risposta ta` Fabio Solano, Paolo Viscione, Vincenzo Viscione u Bruno Lago li kienet prezentata fit-<u>28 ta` Marzu 2014</u> li taqra hekk :–

<u>Eccezzjonijiet</u>

1. Illi fl-ewwel lok u preliminarjament ***in-nuqqas ta` gurisdizzjoni*** *ta` dawn il-Qrati billi l-forum kompetenti biex tisma` din il-kawza a tenur tal-****Art. 5 tar-Regolamenti 44/2001*** *hija dik Taljana u dana mhux biss billi l-intimati kollha huma residenti fl-Italja izda anke billi jidher li l-allegazzjonijiet tar-rikorrenti huma diretti lejn allegazzjoni ta` agir u azzjonijiet li sehhew l-Italja u mhux Malta – tant huwa hekk li l-kawza odjerna giet diretta biss lejn id-diretturi Taljani tal-kumpannija u mhux ukoll lejn id-diretturi Maltin;*

2. Illi fit-tieni lok u preliminarjament ***in-nuqqas ta` gurisdizzjoni*** *anke minhabba l-lis pendens a tenur tal-****Art 27 tar-Regolamenti 44/2001****. U dana billi jidher li hemm kawzi fuq l-istess fatti gja` fl-Italja billi dawn l-akkuzi fil-fatt gew attribwiti wkoll lejn il-figura tal-Amministratur tal-Kumpannija (precedessur tal-likwidatur), fost il-kawzi li hemm l-Italja, inkluzi fost ohrajn kawza derivanti minn rapport maghmula minn EIG kontra Resciniti; u kawza ta` Cogesfin kontra l-Amministratur tal-kumpannija t-tnejn f`Ruma.*

3. Illi fit-tielet lok ***selecta una via non datur recorsum ad alteram****. L-esponenti gja` gie notifikat b`zewg kawzi ohra fejn l-allegazzjoni jitratta l-istess fatti u l-istess mertu u l-likwidatur attur ghalhekk ghandu jaghzel b`liema kawza jipprocedi.*

4. Illi fir-raba` lok u bla pregudizzju ghal premess il-****preskrizzjoni duennali*** *billi jirrizulta li (a) l-MFSA appuntat Amministratur sabiex jiehu kontroll tal-kumpannija fis-6 ta` Awwissu 2010; u (b) l-Amministratur kien qed jipprospetta agir frawdolenti fir-rapport tieghu datat Ottubru 2011;

5. Illi fil-hames lok u qabel xejn fil-mertu huwa l-obbligu tal-likwidatur rikorrenti jgib prova konklussiva tal-fatti kollha tal-kaz inkluz partikolarment li fil-fatt is-socjeta` European Insurance Group Limited kienet insolventi qabel ma l-MFSA u/jew l-Amministratur minnha appuntat ha kontroll effettiv tas-socjeta` - l-esponenti f`dan ir-rigward jissottomettu li s-socjeta` saret insolventi biss minhabba l-interferenza negligenti tal-MFSA u/jew l-Amministratur;

6. Illi fis-sitt lok u qabel xejn fil-mertu huwa l-obbligu tal-likwidatur rikorrenti jindika x`inhi l-allegazzjoni diretta fil-konfront ta` kull intimat biex dawn ikunu f`pozizzjoni li jressqu l-eccezzjonijiet u provi appoziti ghal dawk l-allegazzjonijiet u b`hekk il-Qorti tkun tista` taghti smigh xieraq lill-esponenti;

7. Illi l-esponenti jinsistu li ma huwiex sewwa li huma kollha jigu mharrka u t-tajn mwaddba b`mod indiskriminat u bl-iktar mod nebuluz fuq kulhadd meta evidentement l-intimati kollha kellhom rwoli differenti fil-kumpannija. Partikolarment kontra whud mill-intimati u terzi ohra qabel ma gie mahtur amministratur izda mal-hatra tieghu l-amministratur ma ghamel xejn u bl-ebda mod ma mexxa dawk il-kawzi;

8. Illi fis-seba` lok u fil-mertu l-pretenzjoni tal-likwidatur giet mressqa unikament bhala tarka biex jostor l-izbalji fatali li saru mill-amministratur tal-kumpannija mahtur mill-MFSA u l-istess MFSA li waqfet diversi pagamenti necessarji milli jsiru;

9. Illi fit-tmien lok u bla pregudizzju ghal premess l-esponenti jichdu kategorikament li kienu b`xi mod responsabbli ghall-fatti kif allegati mir-rikorrenti, liema allegazzjonijiet huma nfondati fil-fatt u fid-dritt;

10. Illi fid-disgha lok l-esponenti jopponu ghall-ispejjez inutli li qed jikkawza l-likwidatur billi ghamel tlett kawzi l-intimati meta seta` facilment ipproceda b`kawza wahda u b`hekk naqqas l-ispejjez ghal kulhadd. Partikolarment in kwantu l-likwidatur qieghed jallega li l-kumpannija hija nsolventi ghandu jaghti garanzija tajba li meta jirrizulta li l-esponenti ma jahtu xejn ghall-allegazzjonijiet tieghu huwa jkun f`pozizzjoni li jirrifondi lura l-ispejjez gudizzjarji extra gudizzjarji lill-esponenti;

11. Salv eccezzjonijiet ohra skont il-ligi.

<u>Dwar il-fatti</u>

12. Illi l-fatti deskritti b`mod lakoniku fl-ewwel hames paragrafi tar-rikors attrici ma humiex kontestati;

*13. Illi dwar is-**sitt u s-seba` paragrafu** attrici sta ghall-likwidatur igib prova li l-kumpannija EIG fil-fatt hija nsolventi u inoltre li din l-insolvenza ma kinitx ikkagunata minhabba l-izbalji, serji maghmula kemm mill-MFSA u kemm mill-Amministratur minnha mahtur. **Sa kemm l-esponenti kellhom il-kontroll effettiv tas-socjeta` EIG ma kinitx fi stat insolventi**, izda kellha assi likwidi ta` `l fuq minn tlettax-il miljun Euro. Sa kemm l-esponenti kellhom xi kontroll tal-kumpannija l-falliment tal-EIG ma kinitx inevitabbli. Kien proprju ghalhekk li l-intimati Bruno Lago kien ha r-rwol ta` managing director fl-ahhar xhur izda kienet l-awtorita` MFSA stess li fixklet ix-xoghol tieghu billi kienet qed topponi ghal kull pagament inkluz pagamenti necessarji u nkontrovertibbli bhal hlasijiet ta` taxxa;*

14. Illi l-fatti deskritti fil-paragrafi tmienja sa ghaxra ma humiex kontestati;

*15. Il-fatti deskritti fil-**hdax-il paragrafu** huma kontestati u sta ghar-rikorrenti jgib prova ghall-allegazzjoni tieghu dwar l-imsejjha diretturi mohbija;*

16. Illi l-fatti deskritti fil-paragrafi tnax sa erbatax ma humiex kontestati ghalkemm irid jinghad li dawn id-decizjonijiet taw lok ghal kawzi f`diversi Qrati u Tribunali f`diversi fora;

*17. Illi l-fatti deskritti fil-paragrafu **hmistax** huma kontestati fis-sens li sta ghar-rikorrenti jgib prova tal-insolvenza minnu allegata u ta` min din l-insolvenza hija t-tort; jigi rilevat inoltre li minkejja li l-amministratur mahtur mill-MFSA iddikjara li l-EIG kienet insolventi madwar sentejn ilu sal-lum il-likwidatur ghadu qatt ma pproduca rendikont tal-amministrazzjoni tieghu fejn iddikjara dan formalment.*

*18. Illi l-fatti deskritti fil-paragrafu **sittax** huma assolutament infondati. Sta ghal-likwidatur rikorrenti sabiex qabel xejn jispjega r-rizultanzi tieghu b`mod dettaljat u jorbot dawn ir-rizultanzi specifikament mal-intimati esponenti mhux jillimita ruhu ghal dikjarazzjonijiet generici;*

19. Illi jekk xi hadd agixxa b`mod hazin kien l-Amministratur li halla u gab fix-xejn dawk il-passi li l-esponenti kien ha sabiex jipprova s-

sitwazzjoni, illi l-esponenti (jew uhud minnhom) gja` kienu soggetti ghal investigazzjoni mill-awtoritajiet Taljani li fl-ahhar mill-ahhar u ma nstab xejn fil-konfront taghhom;

20. Illi fir-realta` jrid jinghad li qari korret tar-rapport tal-Amministratur jikkonferma li l-problemi kollha tal-EIG nhalqu meta l-MFSA ndahlet fil-gestjoni tal-kumpannija u waqfet pagamenti essenzjali bhal pagamenti tat-taxxi u dawk ghal servizzi essenzjali u baqghet izzomm dawn il-pagamenti minkejja diversi nterpellanzi. Dan kollu kif sahansitra jirrizulta mir-rapport ahhari tal-Amministratur;

21. Illi inoltre l-Amministratur kien ghamel divresi sejhiet fl-Italja li waslu ghal "paniku" u possibilment agir frawdolenti mill-policyholder ta` assikurazzjoni mill-Kumpannija, billi fil-perijodu li l-Amministratur kellu l-gestjoni tal-kumpannija is-sejhiet li saru ghall-hlas fuq poloz kien ferm iktar (kwazi d-doppju) mis-sejhiet li kienu jsiru precedentement.

22. Jirrizulta ampjament mid-dikjarazzjonijiet tal-istess Amministratur partikolarment fil-Final progress report 17 October 2011 illi sabiex jevita r-responsabbilta` ghall-izbalji tieghu jakkuza lil kulhadd bi zbalji, huwa sinifikattiv infatti li sahansitra jasal biex jakkuza l-avukati Taljani mqabbda minnu stess bi frodi u qerq. Intant jigi rilevat li l-esponenti gew skagonati minn kull htija l-Italja meta l-prosekutur Taljan iddecieda ma jipprocediex bl-akkuzi li tressqu kontrihom u dana wara investigazzjoni approfindita.

23. Iktar minn hekk jigi rilevat li l-amministratur u l-likwidatur jahtu talli ma hadux passi sabiex jassiguraw li d-debituri principali tas-socjeta` EIG Ltd. ihallsu d-djun taghhom skont il-ligi.

24. Illi fl-ahhar mill-ahhar ghandu jirrizulta ampjament li l-esponenti Bruno Lago gie mdahhal f`dawn il-proceduri semplicement bhala stratagemma tal-likwidatur sabiex ma jhallasx id-djun (inkluz ta` pagi mhux imhallsa) li huma dovuti lill-esponenti u li l-likwidatur qed jirrifjuta jirrikonoxxi illegalment u minghajr ebda raguni valida fil-ligi.

Bl-ispejjez u bl-ingunzjoni in subizzjoni tar-rikorrenti.

Rat illi wara li kien accertat li l-intimati kollha kienu notifikati, il-partijiet kienu diretti sabiex jittrattaw l-eccezzjonijiet dwar il-gurisdizzjoni tal-qorti.

Rat illi l-intimati Luciano Rotondi, Andrea Ratti u Giovanni Sidoti ma pprezentawx risposta.

Rat illi din il-kawza nstemghet flimkien ma` l-kawzi bin-nru 1083/2013 JZM u 1084/2013 JZM, bil-provi jkunu komuni u jghoddu ghat-tlieta.

Semghet ix-xhieda u rat il-provi l-ohra.

Rat il-verbal tal-partijiet fejn qablu illi European Insurance Group Limited kienet kumpannija registrata fir-Registru tal-Kumpanniji ta` Malta bin-nru C 35708.

Rat in-nota li pprezenta l-attur noe fl-4 ta` Novembru 2015 fejn iddikjara li l-gurisdizzjoni ta` din il-qorti kienet ibbazata fuq l-Art 742 tal-Kap 12.

Rat il-verbal tal-partijiet fejn qablu li l-intimati kollha mhux cittadini Maltin, mhux residenti Malta, u huma residenti u domiciljati fl-Italja.

Rat il-verbali tal-udjenzi.

Rat in-noti ta` osservazzjonijiet.

Semghet is-sottomissjonijiet bil-fomm.

Rat id-digriet li tat fl-udjenza tat-12 ta` Mejju 2016 fejn halliet il-kawza ghas-sentenza dwar l-eccezzjonijiet tal-gurisdizzjoni tal-qorti.

Rat l-atti l-ohra tal-kawza.

II. Is-sentenza tal-lum

Bis-sentenza tal-lum, qeghdin ikunu decizi l-eccezzjonijiet dwar il-gurisdizzjoni ta` l-qorti.

Fil-kaz tal-intimat Enzo Resciniti :
l-ewwel, it-tieni u t-tielet eccezzjonijiet.

Fil-kaz tal-intimati Bruno Lago, Vincenzo Viscione u Paolo Viscione :
l-ewwel u t-tieni eccezzjonijiet.

Fattwalment l-eccezzjonijiet huma bbazati fuq il-pretiza illi ladarba l-intimati huma kollha residenti u domiciljati l-Italja, u tenut kont tal-mertu tal-istanza tar-rikorrent noe, huma l-qrati Taljani li ghandhom gurisdizzjoni mhux dawk Maltin.

Fil-kaz ta` l-intimati Bruno Lago, Vincenzo Viscione u Paolo Viscione inghatat ukoll l-eccezzjoni li din il-qorti m`ghandhiex gurisdizzjoni ghaliex diga` kienu istitwiti u huma pendenti quddiem il-qrati Taljani kawzi dwar l-istess mertu.

III. Provi

Avv. Dott. Amadeo Barletta pprezenta affidavit bhala konsulent legali tas-socjeta` CoGesFin li hija *primary shareholder* ta` EIG Limited.

Xehed illi fl-Italja saru diversi kawzi dwar EIG Limited. Kien hemm procediment kriminali (*procedimento penale number 19066/11)* li gie imwaqqaf wara li saret rikjesta mill-prosekutur li kienett milqugha mill-*Giudice delle Indagini Preliminare.* Fil-procedura li saret Napli, saru akkuzi kontra Solano Fabio, Viscione Vincenzo, Mario Girardi, Bruno Lago, Luciano

Rotondi, Paolo Vicione, Oscar Russo, u Luciano Sorice dwar *"associazione criminale e esercizio abusive dell` attivita` assicurattiva"* u *"ostacolo alla attivita` di vigilanza del regolatore"*. Kien hemm procediment iehor penali bin-numru 19072/11 li beda fuq talba specifika ta` Brian Tonna bhala stralcjarju ta` EIG Limited fejn l-akkuza kienet ta` mizapproprjazzjoni minn Paolo Viscione. Il-procedura saret kontra Paolo Viscione, Oscar Russo, Paolo Balsamini u Ottavio Di Barbaro. L-investigazzjoni kienet konkluza u l-akkuzati kienu qeghdin jistennew id-data tas-smigh tal-kawza.

Stqarr illi hemm pendenza quddiem it-Tribunal Amministrattiv ta` Ruma (Procedimento TAR) liema kaz sar minn EIG Limited kontra d-decizjoni ta` ISVAP ghal sospensjoni tal-licenzja ta` EIG Limited. CoGesFin intervjeniet fil-kawza. Hemm ukoll kawza pendenti quddiem il-qrati civili bin-nru 77861/2011 li saret minn CoGesFin kontra Deloitte li kienet l-istralcjarju ta` EIG Limited. CoGesFin qed tallega li Deloitte ghandha tinzamm responsabbli ghal amministrazzjoni hazina. Deloitte tat l-eccezzjoni ta` l-gurisdizzjoni u kellha tinghata sentenza dwar dan.

Xehed li hemm procedura ohra civili bin-nru 61013/2011 fl-ismijiet Nif Global Services Ltd gia` Nowosad Insurance & Financial Service Ltd vs Deloitte u EIG –European Insurance Group Limited, fejn qed jintalab li Deloitte tinzamm responsabbli li ddistruggiet il-portofolio tal-klijenti ta` Nowosad. Deloitte tat l-eccezzjoni ta` l-gurisdizzjoni li pero` kienet michuda. Il-kawza kienet deciza kontra Nowosad minhabba li l-azzjoni kienet prezentata hazin. Fil-kawza EIG Limited ipprezentat kontrotalba u ssottomettiet ruhha ghall-gurisdizzjoni tal-qorti Taljana.

Kompla jixhed illi saret *denuncia* minn Bruno Lago fil-kwalita` tieghu ta` *Presidente del Consiglio di Amministrazione della Societa` European Insurance Group Limited* kontra Enzo Reciniti li kien *general manager* tal-kumpannija. Dan il-kaz kien arkivjat.. Hemm proceduri civili ohra istitwiti minn EIG Limited kontra Enzo Resciniti ; u ohrajn kontra Antonio Resciniti u Giuseppe Resciniti. Dawn iz-zewg kawzi kienu decizi kontra EIG Limited minhabba "*carenze di attivita` difensiva da parte di EIG Ltd"*.

<u>Av. Dott. Marisa Attard</u> - direttur - Pensions and Insurances Supervision Unit – MFSA – xehdet illi EIG Limited hija kumpannija ta` l-assigurazzjoni li giet awtorizzata mill-MFSA fit-22 ta` Novembru 2007 sabiex tiehu hsieb class 1 accident, class 3 land vehicles, class 10 motor liability insurance, class 14 credit insurance, u class 15 suretyship insurance.

Xehdet illi qabel tigi licenzjata kumpannija bhal EIG Limited, trid tkun segwita procedura li hija regolata bl-Insurance Business Act. Tintalab informazzjoni bhal kif ser topera,, il-metodu fejn ser topera, u l-pajjizi fejn ser topera. Jintalab taghrif dwar min ser imexxi, id-diretturi u l-*qualifying shareholders*. Ikun hemm *personal questionnaire* fejn tinkiseb informazzjoni dwar il-persuni bhal fejn kienu joqghod fl-ahhar ghaxar snin u min kienu l-*private bankers* taghhom. Hemm informazzjoni ohra li titlob l-Awtorita` sabiex tkun sodisfatta li l-business plan tal-applikanti ikun sostenibbli u jkun jista` jitwettaq.

Stqarret illi l-licenzja li harget fil-kaz ta` EIG Limited kienet sabiex tassikura riskji barra minn Malta.

Spjegat li wara li nghatat il-licenzja, il-kumpannija baghtet notifika lill-MFSA li xtaqet topera b`negozju ta` assigurazzjoni fl-Italja. Saru zewg notifiki : fl-20 ta` Dicembru 2007, indikat tlett klassijiet ta` assigurazzjoni - li accident, credit u suretyship ; imbaghad fil-11 ta` Frar 2008, indikat dawn il-classes - motor land vehicles,u motor liability.

Spjegat li mbaghad MFSA baghtet notifika lir-regolatur Taljan fejn skont il-protokolli li jezistu nghatat, kien rikjest certifikat ta` solvibilita`.

Fissret illi l-licenzja harget skont il-ligi ta` Malta. L-approvazzjoni tal-MFSA tfisser li l-kumpannija tkun tista` topera wkoll barra minn Malta, bl-approvazzjoni tal-MFSA. Wara li ssir in-notifika, il-*host jurisdiction state* ghandu dritt li jimponi *general good provisions* li huma kundizzjonijiet ta` kif il-kumpannija ghandha topera go dak il-pajjiz. Mil-lat ta` *operations*, il-*hosting state* ghandu mod kif jista` jidderiegi dawk il-kumpanniji. Kull sena iridu jinghataw l-*audited financial statements,* u l-*prudential reporting* li jrid isir lill-MFSA. Il-kumpanniji ta` l-assigurazzjoni jridu jaghtu lill-MFSA kull tliet xhur *management accounts*, *computations* tas-*solvency* kif ukoll informazzjoni illi l-assi tal-kumpannija qed jaghmlu tajjeb ghal-*liabilities.*

Ikkonfermat illi Dok B a fol 7 tal-process hija l-licenzja li l-MFSA harget fit-22 ta` Novembru 2007. Rega` harget fis-27 ta` Novembru 2008 ghax kien hemm bdil fl-indirizz registrat. EIG Limited ma bdietx topera mill-ewwel. Bdiet topera Novembru 2008. Skont l-Insurance Business Act,

jekk kumpannija tonqos milli topera, u ma tibdiex tahdem fi zmien sena mid-data ta` l-awtorizzazzjoni, il-licenzja tigi revokata.

Ikkonfermat Dok MF1.

Qalet illi fl-Italja, EIG Ltd kienet tahdem bl-intermedjarji. Kienet tahdem ukoll permezz ta` *electronic portals.* Minn investigazzjonijiet li ghamlet MFSA, irrizulta li l-ikbar intermedjarju kien *broker* Ingliz li kien jahdem l-Italja bi *freedom of establishment.* EIG Ltd operat bis-sahha tal-licenzja li nghatat mill-MFSA wara li l-*business plan* li pprezentat kien approvat mill-MFSA. In-notifika li rceviet MFSA biex topera fl-Ewropa kienet abbazi ta` *freedom of services.* In-notfika li saret skont il-protocol ta` bejn l-MFSA u l-ISVAP. Li kieku l-kumpannija kienet ser topera *by way of freedom of establishment,* irid ikollha *set up* fil-*host jurisdiction* ossija billi jkollha ufficini u *general representative.* Meta kumpannija topera *by way of freedom of services*, mhux suppost ikollha prezenza fil-pajjiz. Spjegat izda li meta l-ISVAP ghamlu spezzjonijiet irrizulta li l-mod kif kienet qed topera EIG Ltd iktar kien jixbah lill-operat li normalment wiehed jassocja ma` *freedom of establishment* ; minn hemm bdew jinqalghu diffikultajiet.

Xehdet illi l-licenzja ta` l-EIG Ltd kienet revokata fit-12 ta` Lulju 2010. Ir-revoka saret mill-MFSA. Kien appuntat amministratur skont l-Insurance Business Act. L-istralcjarju kien appuntat sena wara bil-poteri li ghandha MFSA skont il-ligi. L-amministratur kien Deloitte mentri l-likwidatur kien Brian Tonna.

Qalet illi hemm dritt ta` appell mid-decizjoni tal-MFSA li tirrevoka l-licenzja. Fil-fatt sar appell. Meta l-licenzja tkun revokata, irid isir *runoff* tal-*claims* li jkollha, jithallas dak li hu dovut skont il-poloz, izda ma tistax tkompli tohrog poloz godda. MFSA hasset il-bzonn li tipprotegi l-*policy holders* skont l-Art 28 ta` l-Insurance Business Act. L-istralc ghadu ghaddej.

Fil-**<u>kontroezami,</u>** xehdet illi l-maggor parti tal-krediturі ta` EIG Ltd huma Taljani, ghalkemm kien hemm xi krediturі Maltin.

<u>Stefano Sablone</u> - bhala konsulent legali ta` r-rikorrent bhala likwidatur ta` EIG Ltd – ghamel riferenza ghall-proceduri kriminali bin-numru 19066/11 li gew arkivjati, u qal illi dawn kienu biss procediment wiehed mid-diversi li ttiehdu. Infatti saret procedura ohra kriminali bin-

numru 39568/2012 kontra Paolo Viscione, Luciano Sorice u Oscar Russo fejn instabu hatja. Il-fatt illi kaz jigi arkivjat, mhux eskluz illi jistghu jsiru nvestigazzjonijiet ohra fil-futur. Dwar il-procedura kriminali bin-numru 19072/11, din ghadha tistenna decizjoni dwar il-kontinwazzjoni ta` investigazzjoni. Dwar il-proceduri quddiem it-TAR ta` Ruma, il-konsegwenza hija illi l-provvediment ta` ISVAP li jipprjobixxi EIG Ltd milli tkompli bin-negozju taghha ta` assigurazzojni ghadu effettiv.

Xehed illi l-proceduri civili bin-numru 77861/2011 ma jistghux jigu nfurzati kontra EIG Ltd u r-rikorrent mhux involut. Dwar il-procedura civili bin-numru 61013/2011, fisser illi bid-decizjoni numru 20528/14 tas-17 ta` Ottubru 2014, il-Qorti ta` Ruma cahad it-talba ghal danni fuq punt ta` procedura, minghajr ma` dahal fil-mertu, ghaliex sab illi l-kawza kellha ssir kontra EIG Ltd u mhux kontra Deloitte, u li l-fatt li kien hemm kjamata fil-kawza, ma kienx bizzejjed biex isewwi n-nuqqas. Ghall-istess ragunijiet, il-Qorti ma ttrattatx il-kontrotalba ta` EIG Ltd. Bil-fatt li kien hemm kontrotalba, EIG Ltd accettat il-gurisdizzjoni tal-Qrati Taljani fir-rigward ta` dik il-kawza biss.

Stqarr illi ma jaf xejn dwar l-ilment ta` Bruno Lago kontra Enzo Reciniti. Fil-kawza civili kontra Enzo Resciniti, id-decizjoni ma dahlitx fil-mertu. Dwar il-proceduri kontra Antonio Resciniti u Giuseppe Resciniti, Brian Tonna ma kienx parti. Dawn il-kawzi kollha kienu trattati fuq punti preliminary u ta` procedura.

<u>Ir-rikorrent</u> xehed illi huwa *accountant* u socju tad-ditta Nexia BT. B` effett mid-29 ta` Settembru 2011, huwa gie mahrug bhala stralcjarju tas-socjeta` European Insurance Group Limited mill-Awtorita` ghas-Servizzi Finanzjarji ta` Malta ai termini ta` l-Art 28(1)(f) ta` l-Att dwar il-Kummerc ta` l-Assigurazzjoni. Qabel il-hatra tieghu, l-affarijiet ta` EIG Ltd kienu qed jigu amministrati minn Raphael Aloisio ta` Deloitte li kien inhatar mill-MFSA bhala Amministratur mis-6 ta` Awissu 2010 biex jiehu f` idejh l-attiv u l-kontroll tal-kummerc ta` s-socjeta`. Mal-hatra tieghu, intemm l-inkariku tal-amministratur. EIG Ltd ghadha fi stralc.

Qal illi EIG Ltd kienet registrata Malta fil-21 ta` Frar 2005 skont il-Kap 386. Kienet licenzjata mill-MFSAa` b` effett mit-22 ta` Novembru 2007 biex tipprovdi servizzi ta` assigurazzjoni. Il-licenzja tatha l-awtorizzazzjoni biex tkopri riskji fl-Italja abbazi ta` *freedom to provide services.* Ma kenitx awtorizzata taghti servizzi abbazi ta` *freedom of establishment* peress li ma

setax ikollha ufficcju fl-Italja. Il-licenzja kienet revokata mill-Awtorita` fit-12 ta` Lulju 2010. Id-diretturi ta` EIG Limited ipprezentaw appell fit-Tribunal ghas-Servizzi Finanzjarji ta` Malta kontra d-decizjoni ta` l-Awtorita` li tirrevoka l-licenzja. Il-Compagnia Generale Servizi Finanza CO GE S FIN LIMITED (l-azzjonista maggoritaja ta` l-EIG) dahlet fil-procediment li wasal fl-istadju tal-ahhar tieghu.

Xehed illi fil-bidu ta` l-inkarigu tieghu, kien necessarju li jiehu *handover* minghand l-amministratur. Fost dokumenti ohra, inghata kopji tal-minuti tal-laqghat ta` l-azzjonisti u tal-bord tad-diretturi ta` l-EIG li lkoll kienu saru Malta. Ircieva kopja tar-rapport finali li l-amministratur kien ipprezenta lill-MFSA` fis-17 ta` Ottubru 2011 b`rendikont tal-hidma. Ir-rapport jikkomprendi *statement of affairs* li jindika *estimated net liability position to realise* sal-21 ta` Frar 2011 ta` EUR 31.5 miljun. Sa Settembru 2011, dan l-ammont kien stmat li zdied ghal kwazi EUR 33 miljun. Huwa baqa` jinvestiga u wasal ghal konkluzjoni li EIG Ltd kienet fi stat ta` insolvenza qabel dahlet *in administration*. Huwa ordna li jigi ppubblikat avviz dwar l-istat ta` insolvenza taghha fi tlett gazzetti kif wkoll fis-sit elettroniku taghha.

Qal illi ezamina l-kontijiet taghha ghas-snin 31 ta` Dicembru 2005 sa 31 ta` Dicembru 2009 li kienu ppreparati mill-accountants u awdituri ta` EIG Ltd ta` dak iz-zmien. Kif juru car il-kontijiet, EIG garrbett telf sostanzjali li baqa` jizdied kull sena, sa minn meta giet registrata kif ukoll wara li bdiet attivament tbiegh poloz ta` assigurazzjoni fis-suq Taljan.

IV. <u>Regolament tal-Kunsill Ewropew Nru 44/2001 tat-22 ta` Dicembru 2000 dwar gurisdizzjoni, u r-rikonoxximent u ezekuzzjoni ta` sentenzi fil-materji civili u kummercjali – maghruf ukoll bhala "Brussels 1"</u>

Ir-rikorrent noe jikkontendi illi din il-Qorti ghandha gurisdizzjoni sabiex tisma` u tiddeciedi l-mertu ta` din il-kawza abbazi tal-Art 742 tal-Kap 12. Skont ir-rikorrent noe, Brussels 1 ma japplikax ghall-kaz tal-lum. Min-naha taghhom, l-intimati jsostnu li Brussels 1 huwa applikabbli, ad eskluzjoni tal-Art 742 tal-Kap 12.

Il-Qorti tirreferi ghall-**<u>Art 1 u (2)(b) ta` Brussels 1</u>** li jghid :-

1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to :

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.

V. Gurisprudenza tal-ECJ

Kaz indikat mir-rikorrent noe u li huwa rilevanti sabiex jigi stabbilit jekk kawza dwar kummerc hazin (Art 316 – Kap 386) taqax fl-eskuzjoni tal-applikazzjoni ta` Brussels 1 skont l-Art 2(b) huwa dak ta` **Gourdain v Nadler (Case 133/78 (19790 ECR 733)**

Dak kien kaz li kien jinvolvi l-applikazzjoni tal-Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters tal-1968 (kif emendata) jew kif kienet maghruf il-**Brussels Convention**. Madanakollu l-Art (2)(b) tal-Brussels 1 huwa l-istess bhal ma kien skont il-Brussels Convention u ghalhekk l-insenjament li johrog minn din id-decizjoni tal-ECJ japplika *mutatis mutandis.*

Din hija d-domanda li kienet postal ill-ECJ :-

"Is a judgment given by French civil courts on the basis of Article 99 of the French Law No 67-563 of 13 July 1967 against the de facto manager of a legal person for payment into the assets of a company in liquidation to be regarded as having been given in bankruptcy proceedings, proceedings relating to the winding-up of insolvent companies or other legal persons and analogous proceedings (subparagraph 2 of the second paragraph of Article 1 of the Convention) or is such a judgment a decision given in a civil and commercial matter (first paragraph of Article 1 of the Convention)?"

Il-Qorti qalet illi :-

The Convention, the particular aim of which is to secure the simplification of formalities governing the reciprocal recognition and

enforcement of judgments of courts and tribunals and to strengthen in the Community the legal protection of persons who are established there has laid down as a matter of principle that its scope includes "civil and commercial matters" without however defining this expression.

However because of the special nature of certain matters and of the profound differences between the laws of the Contracting States the Convention does not apply to certain fields including "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" without the meaning of these concepts being defined either.

As Article 1 serves to indicate the scope of the Convention it is necessary, in order to ensure, as far as possible, that the rights and obligations which derive from it for the Contracting States and the persons to whom it applies are equal and uniform, that the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned.

By providing that the Convention shall apply "whatever the nature of the court or tribunal" the first paragraph of Article 1 shows that the concept of "civil and commercial matters" cannot be interpreted solely in the light of the division of jurisdiction between the various types of courts existing in certain States.

The concepts used in Article 1 must be regarded as independent concepts which must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems.

As far as concerns bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings, according to the various laws of the Contracting Parties relating to debtors who have declared themselves unable to meet their liabilities, insolvency or the collapse of the debtor`s creditworthiness, which involve the intervention of the courts culminating in the compulsory "liquidation des biens" in the interest of the general body of creditors of the person, firm or company, or at least in supervision by the courts, it is necessary, if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the Convention, that they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings for the "liquidation des biens" or the "règlement judiciaire".

In order to answer the question referred to the Court by the national court it is therefore necessary to ascertain whether the legal foundation of an application such as that provided for in Article 99 of the French Law is based on the law relating to bankruptcy and winding-up as interpreted for the purposes of the Convention. The application under Article 99, called an application to make good a deficiency in the assets, for which special provision is made in a law on bankruptcy and winding-up is made only to the court which made the order for the "règlement judiciaire" or the "liquidation des biens".

It is only the "syndic" — apart from the court which can make the order of its own motion — who can make this application on behalf of and in the interest of the general body of creditors with a view to the partial reimbursement of the creditors by respecting the principle that they rank equally and by taking account of any preferential rights lawfully acquired.

In this application, which derogates from the general rules of the law of liability, the de jure or de facto managers of the company are presumed to be liable and they can only discharge this burden by proving that they managed the affairs of the company with all the requisite energy and diligence.

The period of limitation of three years for the application runs from the date when the final list of claims is drawn up and is suspended for the duration of any scheme of arrangement which may have been entered into and begins to run again if such a scheme is terminated or declared void.

If the application directed against the manager of the company succeeds it is the general body of creditors which benefits, some assets being added to the funds to which they are entitled, as happens where the "syndic" establishes a claim which benefits the general body of creditors.

Furthermore, the court may order the "règlement judiciaire" or the "liquidation des biens" of those managers who have been made responsible for part or all of the liabilities of a legal person and who do not discharge the said liabilities, without having to verify whether the said managers are business men and whether they are unable to meet their liabilities.

It is quite apparent from all these findings that the legal foundation of Article 99, the object of which, in the event of the winding-up of a commercial company, is to go beyond the legal person and proceed against its managers and their property is based solely on the provisions of the law of bankruptcy and winding-up as interpreted for the purpose of the Convention.

A decision such as that of a French civil court based on Article 99 of the French Law No 67-563 of 15 July 1967 ordering the de facto manager of a legal person to pay a certain sum into the assets of a company must be considered as given in the context of bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons or analogous proceedings within the meaning of subparagraph 2 of the second paragraph of Article 1 of the Convention.

L-interpretazzjoni tal-Art 2(b) skont dan il-pronunzjament hija li sabiex wiehed jara tapplikax il-Brussels Convention qabel, u l-Brussels 1 wara, trid issir analizi *subject matter* fil-kuntest tas-siggetti ndikati fl-Art 2(b) jew proceduri relatati mal-istess.

Din l-interpretazzjoni kienet segwita minn decizjonijiet ohra.

Decizjoni li tat l-ECJ fit-12 ta` Frar 2009 kienet referenza li saret lilha dwar l-interpretazzjoni ta` l-Art 3(1) tal-Insolvency Regulation 1346/2000 u l-Art 2(b) ta` Brussels 1. Fil-kawza "**Christopher Seagon, in his capacity as liquidator in respect of the assets of Frick Teppichboden Supermärkte GmbH vs Deko Marty Belgium NV**" il-Qorti kienet domandata *inter alia* :

(1) Do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor`s assets have been opened have international jurisdiction under Regulation [No 1346/2000] in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State ?

Il-posizzjoni tal-ECJ kienet illi diversa hija l-gurisprudenza tal-ECJ, partikolarment referenzi li saru sabiex jigi determinat x`jaqa` taht Brussels 1 u dak li jaqa` taht l-Insolvency Regulation 1346/2000. Inghad :-

16 It is clear from the order for reference that the action to set a transaction aside is governed in German law by Paragraph 129 et seq. of the Insolvency Code (Insolvenzordnung) of 5 October 1994 (BGB1. 1994 I, p. 2866). Only the liquidator may bring such an action in the event of insolvency with the sole purpose of protecting the interests of the general body of creditors. Under the provisions of Paragraphs 130 to 146 of that code, the liquidator may challenge acts undertaken before the insolvency proceedings were opened which are detrimental to the creditors.

17 The action to set a transaction aside at issue in the main proceedings is therefore intended to increase the assets of the undertaking which is the subject of insolvency proceedings.

18 It is appropriate to examine whether these actions to set a transaction aside are included within the scope of Article 3(1) of Regulation No 1346/2000.

19 In that connection, it must be noted, as a preliminary point, that the Court has held, in its case-law relating to the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36), that an action similar to that at issue in the main proceedings is related to bankruptcy or winding-up if it derives directly from the bankruptcy or winding-up and is closely connected with the proceedings for the `liquidation des biens` or the `règlement judiciaire` (see Case 133/78 Gourdain [1979] ECR 733, paragraph 4). An action with such characteristics does not therefore fall within the scope of that convention.

20 It is exactly that criterion that is used by recital 6 in the preamble to Regulation No 1346/2000 in order to delimit the purpose of the regulation. Thus, according to that recital, the regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings.

Fil-kaz "**C-111/08 –** "**SCT Industri AB i likvidation** v **Alpenblume AB"** l-ECJ kellha dan il-kwesit :-

Is the exclusion under Article 1(2)(b) of Regulation [No 44/2001] of bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings from the scope of that regulation to be interpreted as meaning that it covers a decision given by a court in one Member State (A) regarding registration of ownership of shares in a company having its registered office in Member State A, the shares having been transferred by the liquidator of a company having its registered office in another Member State (B), where the court based its decision on the fact that, in the absence of an international agreement on the mutual recognition of insolvency proceedings, Member State A does not recognise the liquidator`s powers to dispose of property situated in Member State A ?

Ir-ruling tal-ECJ tat-2 ta` Lulju 2009 ighid :-

20 In that regard, it should first of all be noted that, with regard in particular to bankruptcy and other similar proceedings, these were excluded from the scope of the Brussels Convention both on account of the special nature of the subject-matter concerned, which necessitates specific rules, and because of major differences between the legislation of the Contracting States (see, to that effect, Case 133/78 Gourdain [1979] ECR 733, paragraph 3, and Report by Mr Jenard on the Brussels Convention (OJ 1979 C 59, p. 1)).

21 In its case-law relating to the Brussels Convention, the Court has thus held ***that an action is related to bankruptcy if it derives directly from the bankruptcy and is closely linked to proceedings for realising the assets or judicial supervision*** *(see Gourdain, paragraph 4). An action with such characteristics does not, therefore, fall within the scope of that convention.*

22 The case-law also indicates that, in so far as Regulation No 44/2001 now replaces the Brussels Convention in relations between the Member States, with the exception of the Kingdom of Denmark, an interpretation given by the Court concerning that convention also applies to the regulation, where its provisions and those of the Brussels Convention may be treated as equivalent (see, inter alia, Case C-180/06 Ilsinger [2009] ECR I-0000, paragraph 41).

23 In the scheme established by Regulation No 44/2001, Article 1(2)(b) of that regulation has the same position and performs the same role as point 2 of the second subparagraph of Article 1 of the Brussels Convention. Moreover, the wording of those two provisions is identical.

24 In view of such equivalence between a provision of the Brussels Convention and a provision of Regulation No 44/2001, it is necessary, in accordance with recital 19 in the preamble to the latter, to ensure continuity in the interpretation of those two instruments, as such continuity is also the means to ensure observance of the principle of legal certainty, which constitutes one of the cornerstones of those instruments (Ilsinger, paragraph 58).

25 In the light of the foregoing ***it is therefore the closeness of the link, in the sense of the Gourdain case-law, between a court action such as that at issue in the main proceedings and the insolvency proceedings that is decisive for the purposes of deciding whether the exclusion in Article 1(2)(b) of Regulation No 44/2001 is applicable.***

26 It is clear, in the present case, that that link is particularly close.

27 First, according to the order for reference, the dispute in the main proceedings concerns solely the ownership of the shares which were transferred in insolvency proceedings by the liquidator on the basis of provisions, such as those enacted by the Swedish Law on insolvency (Konkurslagen) No 672 of 1987 (SFS 1987, No 672), which derogate from the general rules of private law and, in particular, from property law. In particular, such provisions provide that, in the case of insolvency, debtors lose the right freely to dispose of their assets and the liquidator has to administer the assets in insolvency on behalf of the creditors, which includes effecting any necessary transfers.

28 In other words, the transfer at issue in the main proceedings and the action for restitution of title to which it gave rise, are the direct and indissociable consequence of the exercise by the liquidator – an individual who intervenes only after the insolvency proceedings have been opened – of a power which he derives specifically from the provisions of national law governing that type of proceedings.

29 That is also evident from the fact that in the case in the main proceedings – as is clear from the documents before the Court – the assets of the undertaking which was subject to the insolvency proceedings increased following the sale of the shares at issue by the liquidator.

30 Second, it is not disputed that, in the judgment of which recognition is sought before the referring court, the ground on which the Austrian court held invalid the transfer of the shares at issue in the main proceedings relates, specifically and exclusively, to the extent of the powers of that liquidator in insolvency proceedings and, in particular, his power to dispose of the assets situated in Austria. The content and scope of that decision are therefore intimately linked to the conduct of the insolvency proceedings. That link is, moreover, not weakened by the fact that, in the case in the main proceedings, the insolvency proceedings had been closed when the action for restitution of title was brought before the Austrian courts.

31 In those circumstances, ***it must be held that an action such as that at issue in the main proceedings derives directly from insolvency proceedings and is closely linked with them, so that it does not fall within the scope of Regulation No 44/2001.***

32 Having regard to the specific legal situation at issue in the case in the main proceedings and taking into account the close link between the action

pending before the referring court and the insolvency proceedings, the principles set out in recitals 2, 7 and 15 in the preamble to Regulation No 44/2001 do not affect that assessment.

33 In the light of all of the foregoing considerations, the answer to the question referred is that the exception provided for in Article 1(2)(b) of Regulation No 44/2001 must be interpreted as applying to a judgment of a court of Member State A regarding registration of ownership of shares in a company having its registered office in Member State A, according to which the transfer of those shares was to be regarded as invalid on the ground that the court of Member State A did not recognise the powers of a liquidator from a Member State B in the context of insolvency proceedings conducted and closed in Member State B." (enfazi ta` din il-qorti).

Fil-kaz **C-292/08 – "German Graphics Graphische Maschinen GmbH v Alice van der Schee, acting as liquidator of Holland Binding BV**" l-ECJ kellha referenza b`dan il-kwesiti fost ohrajn :-

Must Article 1(2)(b) of the [Regulation No 44/2001], read in conjunction with Article 7(1) of [Regulation No 1346/2000], be interpreted as meaning that it follows from the fact that an asset to which a reservation of title applies is situated, at the time of the opening of insolvency proceedings against the purchaser, in the Member State in which those insolvency proceedings are opened, that an action brought by the seller based on that reservation of title, such as that of German Graphics, must be regarded as an action which relates to bankruptcy or the winding-up of an insolvent company, within the meaning of Article 1(2)(b) of the [Regulation No 44/2001], and which therefore falls outside the material scope of that regulation ?

Fir-ruling tal-10 ta` Setembru 2009 l-ECJ qalet hekk :-

21 By its second and third questions, which should be examined together, the referring court asks, in essence, whether as a result of the opening of insolvency proceedings against a purchaser, where the asset covered by the reservation of title is situated in the Member State of the opening of those proceedings, an action brought by the seller against that purchaser based on the reservation of title clause is excluded from the scope of application of Regulation No 44/2001.

22 In order to answer those questions, it is necessary to refer to the recitals in the preamble to Regulation No 44/2001. The second of those recitals states that certain differences between national rules governing

jurisdiction and recognition of judgments hamper the sound operation of the internal market. The seventh recital in the preamble to that regulation provides that its scope must cover all the main civil and commercial matters. The 15th recital in the preamble to that regulation makes clear the need, in the interests of the harmonious administration of justice, to ensure that irreconcilable judgments will not be given in two Member States.

23 ***Those recitals indicate the intention on the part of the Community legislature to provide for a broad definition of the concept of `civil and commercial matters` referred to in Article 1(1) of Regulation No 44/2001 and, consequently, to provide that the article should be broad in its scope****.*

24 Such an interpretation is also supported by the first sentence of the sixth recital in the preamble to Regulation No 1346/2000, according to which that regulation should, in accordance with the principle of proportionality, be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings.

25 Consequently, the scope of application of Regulation No 1346/2000 should not be broadly interpreted.

26 That stated, it must be noted that, in its case-law relating to the Brussels Convention, ***the Court has held that an action is related to bankruptcy if it derives directly from the bankruptcy and is closely linked to proceedings for realising the assets or judicial supervision*** *(see Case 133/78 Gourdain [1979] ECR 733, paragraph 4). An action with such characteristics does not, therefore, fall within the scope of that convention (see Case C-339/07 Seagon [2009] ECR I-0000, paragraph 19).*

27 In so far as Regulation No 44/2001 has now replaced the Brussels Convention in relations between Member States, the interpretation provided by the Court in respect of the provisions of the Brussels Convention also applies to the provisions of Regulation No 44/2001 whenever both sets of provisions may be regarded as equivalent. It is also clear from the 19th recital in the preamble to Regulation No 44/2001 that continuity of interpretation should be ensured between the Brussels Convention and Regulation No 44/2001 (Case C-167/08 Draka NK Cables and Others [2009], ECR I-0000, paragraph 20).

28 In the scheme established by Regulation No 44/2001, Article 1(2)(b) of that regulation has the same position and performs the same role as

point 2 of the second subparagraph of Article 1 of the Brussels Convention. Moreover, the wording of those two provisions is identical (Case C-111/08 SCT Industri [2009] ECR I-0000, paragraph 23).

29 In the light of the above it is therefore the closeness of the link, in the sense of the case-law resulting from Gourdain, between a court action such as the one at issue in the main proceedings and the insolvency proceedings that is decisive for the purposes of deciding whether the exclusion in Article 1(2)(b) of Regulation No 44/2001 is applicable.

30 It should be noted that, in a case such as the one at issue in the main proceedings, that link is neither sufficiently direct nor sufficiently close to exclude the application of Regulation No 44/2001.

31 It appears from the order for reference that German Graphics, the applicant in the proceedings before the Landgericht Braunschweig, has requested the recovery of assets owned by it and that the only question before the court relates to the ownership of certain machines situated on the premises of Holland Binding in the Netherlands. The answer to that question of law is independent of the opening of insolvency proceedings. The action brought by German Graphics sought only to ensure the application of the reservation of title clause in its own favour.

32 In other words, ***the action concerning that reservation of title clause constitutes an independent claim, as it is not based on the law of the insolvency proceedings and requires neither the opening of such proceedings nor the involvement of a liquidator.***

33 In those circumstances, the mere fact that the liquidator is a party to the proceedings is not sufficient to classify the proceedings brought before the Landgericht Braunschweig as proceedings deriving directly from the insolvency and being closely linked to proceedings for realising assets.

34 It must, therefore, be held that a claim such as that brought by German Graphics before the Landgericht Braunschweig does not fall outside the scope of application of Regulation No 44/2001.

....

38 Regard being had to all of the above considerations, the answer to the second and third questions is that the exception provided for in Article 1(2)(b) of Regulation No 44/2001, read in conjunction with Article 7(1) of Regulation No 1346/2000, must be interpreted, account being taken of the provisions of Article 4(2)(b) of the latter regulation, as meaning that it does not

apply to an action brought by a seller based on a reservation of title against a purchaser who is insolvent, where the asset covered by the reservation of title is situated in the Member State of the opening of those proceedings at the time of opening of those proceedings against that purchaser." (enfazi ta` din il-qorti).

Fil-kaz ta` "**F-Tex SIA** v **Lietuvos-Anglijos UAB Jadecloud-Vilma**", l-ECJ kellha dan il-kwesit fost ohrajn :-

1. Having regard to the judgments of the Court of Justice in [Case 133/78] Gourdain [[1979] ECR 733] and in [Case C-339/07] Seagon [[2009] ECR I-767], do Article 3(1) of Regulation No 1346/2000 and Article 1(2)(b) of Regulation No 44/2001 have to be interpreted in such a way that :

(a) a national court hearing insolvency proceedings has exclusive jurisdiction to hear an actio Pauliana which derives directly from the insolvency proceedings or is closely connected with them, and exceptions to such jurisdiction can be founded only on other provisions of Regulation No 1346/2000 ;

(b) an actio pauliana by the sole creditor of an undertaking in respect of which insolvency proceedings have been initiated in one Member State, that :

– is brought in another Member State,

– arises from a right of claim against third parties assigned to him by the liquidator on the basis of an agreement for consideration, restricting in that way the extent of the liquidator`s claims in the first Member State, and

– does not give rise to a danger for other possible creditors,

is to be classified as a civil and commercial matter under Article 1(1) of Regulation No 44/2001 ?

Fir-ruling tad-19 ta` April 2012 saret analizi ta` Brussels 1 u tal-Insolvency Regulation :-

18 In the second part of the first question, which it is appropriate to examine first, the referring court asks, in essence, whether an action brought against a third party by the creditor of a debtor who is the subject of insolvency proceedings, in circumstances where that creditor is acting on the basis of an assignment of claims which has been granted by the liquidator appointed in those proceedings, is covered by Regulation No 1346/2000, inasmuch as such an action derives directly from those proceedings and is

closely connected with them, or is covered by Regulation No 44/2001, inasmuch as that action falls within the concept of a civil or commercial matter.

Initial observations

19 First of all, it is necessary to define the respective scopes of Regulation No 44/2001 and Regulation No 1346/2000.

– Regulation No 44/2001

20 The first paragraph of Article 1 of the Brussels Convention, which was replaced by Regulation No 44/2001, provided that that Convention applied in civil and commercial matters whatever the nature of the court or tribunal. The second paragraph of Article 1 of that Convention excluded certain specific matters including, in point 2 thereof, `bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings`.

21 Both the Report on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, drawn up by Mr Jenard (OJ 1979 C 59, p. 1), and the Report on the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to that Convention and to the Protocol on its interpretation by the Court of Justice, drawn up by Mr Schlosser (OJ 1979 C 59, p. 71), stated that the matters referred to by that exclusion were to be covered by a separate Convention. Mr Schlosser`s report stated, in paragraph 53, that the two Conventions were intended to dovetail completely with each other, avoiding any problems of interpretation.

22 In Gourdain, delivered in connection with the Brussels Convention, the Court defined the scope of the exclusion in question. In paragraph 4 of that judgment, it held that it is necessary, if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the Brussels Convention, that they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings for realising the assets or judicial supervision.

23 In the judgment in Case C-111/08 SCT Industri [2009] ECR I-5655, which was delivered after the entry into force of Regulation No 44/2001, the Court held that, in so far as that regulation replaces the Brussels Convention, an interpretation given concerning that Convention also applies to the regulation where the provisions in question may be treated as

equivalent, which is true of Article 1(2)(b) of the regulation and point 2 of the second paragraph of Article 1 of the Brussels Convention, the wording of which is identical. Using again the criterion that an action is related to bankruptcy or winding-up if it derives directly from the bankruptcy or winding-up and is closely connected with proceedings for realising the assets or for judicial supervision, the Court stated that it is the closeness of the link, in the sense of the case-law deriving from Gourdain, between a court action and the insolvency proceedings that is decisive for the purposes of deciding whether that exclusion is applicable (see, to that effect, SCT Industri, paragraphs 22 to 25).

– *Regulation No 1346/2000*

24 Regulation No 1346/2000 reproduces, in identical terms, the provisions of the Convention on Insolvency Proceedings, opened for signature by the Member States at Brussels on 23 November 1995.

25 In Seagon, the Court, as the referring court observes, examined the criteria for establishing whether an action comes within the scope of Article 3(1) of Regulation No 1346/2000.

26 In paragraph 20 of that judgment, the Court pointed out that it is exactly the criterion defined in Gourdain that is used by recital 6 in the preamble to Regulation No 1346/2000 in order to delimit the purpose of the regulation. According to that recital, the regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings.

27 The Court deduced that, taking into account that intention of the legislature and the effectiveness of the regulation, Article 3(1) thereof must be interpreted as meaning that it also confers on the courts of the Member State which has jurisdiction to open insolvency proceedings international jurisdiction to hear and determine actions which derive directly from those proceedings and which are closely connected with them (Seagon, paragraph 21).

28 It must be added that that dual criterion is also used in the first subparagraph of Article 25(1) of Regulation No 1346/2000, which governs the recognition and enforcement of judgments concerning the course and closure of insolvency proceedings. The second subparagraph of Article 25(1) provides that the first subparagraph also applies to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court. According to Article 25(2) of Regulation

No 1346/2000, judgments other than those referred to in Article 25(1) are governed by Regulation No 44/2001, provided that that regulation is applicable.

– The relationship between Regulation No 1346/2000 and Regulation No 44/2001

29 It follows from all of the above considerations, first, that Article 1(2)(b) of Regulation No 44/2001 excludes from the scope of that regulation, which, in accordance with recital 7 in its preamble, is intended to apply to all civil and commercial matters apart from certain well-defined matters, only actions which derive directly from insolvency proceedings and are closely connected with them. It follows from the same considerations, second, that only actions which derive directly from insolvency proceedings and are closely connected with them are covered by Regulation No 1346/2000.

30 In order to answer the second part of the first question it is therefore necessary to establish whether the action in the main proceedings, in view of the findings of the referring court, must be regarded as satisfying that dual criterion.

The links between the action in the main proceedings, on the one hand, and the insolvency of the debtor and the insolvency proceedings, on the other hand

31 The action in the main proceedings seeks the return by the defendant of sums which it received from a debtor before insolvency proceedings were opened in respect of the latter. The applicant bases its action on the assignment of claims which was granted to it by the liquidator appointed in those proceedings. The subject-matter of that assignment was the right to have a transaction set aside which the German Insolvency Code confers upon the liquidator with regard to acts undertaken before the insolvency proceedings have been opened which are detrimental to the creditors participating in those proceedings.

32 It is apparent from the case-file that an action to set a transaction aside, governed under German law by Paragraph 129 et seq. of the Insolvency Code, may be brought only by the liquidator, with the sole purpose of protecting the interests of the general body of creditors. According to the German Government, the right to have a transaction set aside may, however, be assigned provided that that assignment takes place for consideration which is regarded as equivalent, for the benefit of the general body of creditors.

33 In that regard, it must be pointed out that the Court has held, in connection with an action by which the applicant, in his capacity as liquidator, requested, by way of an action to set a transaction aside by virtue of the debtor`s insolvency, the repayment of a sum paid by the latter, that such an action is covered by Article 3(1) of Regulation No 1346/2000 (see, to that effect, Seagon, paragraph 28).

34 Furthermore, in SCT Industri, the Court held, in connection with the recognition of a judgment which held that a transfer granted by the liquidator appointed in insolvency proceedings was invalid on the ground that the liquidator had no power to dispose of the assets transferred, that such a matter is covered by the concept of bankruptcy or winding-up for the purposes of Article 1(2)(b) of Regulation No 44/2001 (see, to that effect, SCT Industri, paragraph 33).

35 However, the present main proceedings can be distinguished from the situations which gave rise to those judgments.

36 Unlike the applicant in the case which gave rise to the judgment in Seagon, the applicant in the main proceedings is not acting as a liquidator, that is to say as a body responsible for insolvency proceedings, but as the assignee of a right.

37 Furthermore, unlike the case which gave rise to the judgment in SCT Industri, the present main proceedings do not relate to the validity of the assignment granted by the liquidator and the liquidator`s power to assign his right to have a transaction set aside is not disputed.

38 It must therefore be examined whether, in view of the specific characteristics of the action brought by the applicant in the main proceedings, that action has a direct link with the insolvency of the debtor and is closely connected with the insolvency proceedings.

39 In their observations submitted to the Court, Jadecloud-Vilma and the European Commission maintain that the origin and content of the action brought by the assignee are, in essence, the same as those of an action to set a transaction aside brought by the liquidator.

40 It is true that it cannot be denied that the right on which the applicant in the main proceedings bases its action is linked with the insolvency of the debtor as it has its origin in the right to have a transaction set aside conferred on the liquidator by the national law applicable to insolvency proceedings. Nevertheless, the question arises whether the right

acquired, once it becomes owned by the assignee, retains a direct link with the debtor`s insolvency.

41 That question may, however, remain open if it is evident that, in any event, the exercise by the assignee of the right acquired is not closely connected with the insolvency proceedings.

42 It must be stated that, as observed by F-Tex and the Lithuanian and German Governments, the exercise of the right acquired by an assignee is subject to rules other than those applicable in insolvency proceedings.

43 First, unlike the liquidator, who is, as a rule, required to act in the interest of the creditors, the assignee can freely decide whether to exercise the right of claim he has acquired. As the referring court has stated, F-Tex was not legally obliged to enforce the claims taken over.

44 Second, the assignee, when he decides to exercise his right of claim, acts in his own interest and for his personal benefit. Like the right of claim which serves as the basis for his application, the proceeds of the action which he brings become owned by him personally. The consequences of his action are therefore different from those of an action to set a transaction aside brought by a liquidator, which is intended to increase the assets of the undertaking which is the subject of insolvency proceedings (Seagon, paragraph 17).

45 The fact that, in the main proceedings, the benefit granted by F-Tex in consideration for the assignment by the liquidator of his right to have a transaction set aside took the form of an obligation to pay the liquidator a percentage of the proceeds obtained from the claim assigned does not alter that analysis, since it is merely a method of payment. Such a contractual stipulation is within the power of the parties as it is not disputed that the liquidator and the assignee could freely choose to express the consideration paid by the assignee in the form of a fixed sum or a percentage of any sums recovered.

46 Furthermore, under German law, which is, in the main proceedings, the law applicable to the insolvency proceedings, the closure of the insolvency proceedings has no effect on the exercise by the assignee of the right to have a transaction set aside which he has acquired. According to the German Government, that right may be exercised by the assignee after the closure of the insolvency proceedings.

47 Having regard to its characteristics, the action in the main proceedings is not therefore closely connected with the insolvency proceedings.

48 Consequently, and without the need to rule on the existence of any direct link between that action and the insolvency of the debtor, it must be held that that action is not covered by Article 3(1) of Regulation No 1346/2000 and, symmetrically, that it does not concern bankruptcy or winding-up for the purposes of Article 1(2)(b) of Regulation No 44/2001.

49 Accordingly, the answer to the second part of the first question is that Article 1(1) of Regulation No 44/2001 must be interpreted as meaning that an action brought against a third party by an applicant acting on the basis of an assignment of claims which has been granted by a liquidator appointed in insolvency proceedings and the subject-matter of which is the right to have a transaction set aside that the liquidator derives from the national law applicable to those proceedings is covered by the concept of civil and commercial matters within the meaning of that provision.

Fil-kaz **C-157/13 – "Nickel & Goeldner Spedition GmbH** v **"Kintra" UAB"** l-ECJ kellha dan il-kwesit *inter alia* :-

Where an action is brought by an insolvency administrator, acting in the interests of all the creditors of the undertaking and seeking to restore the undertaking`s solvency and to increase the amount of the assets of the insolvent undertaking so that as many creditors` claims as possible may be satisfied — whilst it should be noted that the same effects are also sought, for instance, by an insolvency administrator`s actions to set transactions aside (actio Pauliana), which have been recognised as closely connected with the insolvency proceedings — and given the fact that in the case at issue payment of a sum owed is claimed under the [CMR] and the Lithuanian Civil Code (general provisions of civil law) for the international carriage of goods that was performed, is that action to be considered to be connected closely (by direct link) with the applicant`s insolvency proceedings, must jurisdiction to hear it be determined in accordance with the rules of Regulation No 1346/2000 and does it fall within the exception to the application of Regulation No 44/2001?

Fir-ruling tal-4 ta` Settembru 2014 inghad hekk :-

20 By its first question the referring court asks, in essence, whether an action for the payment of a debt based on the provision of carriage services brought by the insolvency administrator of an insolvent undertaking in the course of insolvency proceedings opened in one Member State and directed against the recipient of those services, established in another Member State,

falls within the scope of Regulation No 1346/2000 or of Regulation No 44/2001.

21 In this respect, it should be noted that, relying inter alia on the preparatory documents relating to the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36), which was replaced by Regulation No 44/2001, the Court has held that that regulation and Regulation No 1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the application of that regulation in so far as they come under `bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings` fall within the scope of Regulation No 1346/2000. Following the same reasoning, actions which fall outside the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001 (judgment in F-Tex, C-213/10, EU:C:2012:215, paragraphs 21, 29 and 48).

22 The Court also noted that, as inter alia recital 7 in the preamble to Regulation No 44/2001 states, the intention on the part of the EU legislature was to provide for a broad definition of the concept of `civil and commercial matters` referred to in Article 1(1) of that regulation and, consequently, to provide that the article should be broad in its scope. By contrast, the scope of application of Regulation No 1346/2000, in accordance with recital 6 in the preamble thereto, should not be broadly interpreted (judgment in German Graphics Graphische Maschinen, C-292/08, EU:C:2009:544, paragraphs 23 to 25).

23 Applying those principles, the Court has found that ***only actions which derive directly from insolvency proceedings and are closely connected with them are excluded from the scope of Regulation No 44/2001.*** *Consequently, only those actions fall within the scope of Regulation No 1346/2000 (judgment in F-Tex, EU:C:2012:215, paragraphs 23 and 29 and the case-law cited).*

24 ***As regards the application of that distinction, the Court has held that an application to make good a deficiency in the assets, which, under French law, may be taken by the insolvency administrator against the managers of the company in order to have them declared liable, must be considered to be an action which derives directly from insolvency proceedings and is closely connected with them. In order to reach that conclusion, the Court relied, in essence, on the consideration that that action was based on provisions***

derogating from the general rules of civil law (see, in the context of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial proceedings, judgment in Gourdain, 133/78, EU:C:1979:49, paragraphs 4 to 6). The Court has adopted a similar view in relation to an action to set a transaction aside which, in German law, may be taken by the insolvency administrator in order to challenge acts undertaken before the insolvency proceedings were opened which are detrimental to the creditors. It noted, in that context, that the action was based in the national rules relating to insolvency proceedings (judgment in Seagon, C-339/07, EU:C:2009:83, paragraph 16).

25 By contrast, the Court has held that an action brought on the basis of a reservation of title clause against an insolvency administrator has only an insufficiently direct and insufficiently close link with insolvency proceedings on the ground, in essence, that the question of law raised in such an action is independent of the opening of insolvency proceedings (judgment in German Graphics Graphische Maschinen, EU:C:2009:544, paragraphs 30 and 31). Similarly, an action brought by an applicant on the basis of an assignment of claims granted by an insolvency administrator and relating to the right to have a transaction set aside conferred on the latter by the German insolvency law was considered to be not closely connected with the insolvency proceedings. The Court noted in that respect that the exercise of the right acquired by an assignee of the right acquired is subject to rules other than those applicable in insolvency proceedings (judgment in F-Tex, EU:C:2012:215, paragraphs 41 and 42).

26 It is apparent from that case-law that ***it is true that, in its assessment, the Court has taken into account the fact that the various types of actions which it heard were brought in connection with insolvency proceedings. However, it has mainly concerned itself with determining on each occasion whether the action at issue derived from insolvency law or from other rules.***

27 It follows that the decisive criterion adopted by the Court to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof. According to that approach, it must be determined whether the right or the obligation which respects the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings.

28 In the main proceedings, it is not disputed that the action at issue is an action for the payment of a debt arising out of the provision of services in

implementation of a contract for carriage. That action could have been brought by the creditor itself before its divestment by the opening of insolvency proceedings relating to it and, in that situation, the action would have been governed by the rules concerning jurisdiction applicable in civil and commercial matters.

29 The fact that, after the opening of insolvency proceedings against a service provider, the action for payment is taken by the insolvency administrator appointed in the course of those proceedings and that the latter acts in the interest of the creditors does not substantially amend the nature of the debt relied on which continues to be subject, in terms of the substance of the matter, to the rules of law which remain unchanged.

30 It is therefore necessary to hold that the action at issue in the main proceedings does not have a direct link with the insolvency proceedings opened in relation to the applicant.

31 Therefore, and with it being necessary to examine whether the action is closely connected with the insolvency proceedings, it must be held that that action is not covered by Article 3(1) of Regulation No 1346/2000 and, following the same reasoning, that it does not concern bankruptcy or winding-up for the purposes of Article 1(2)(b) of Regulation No 44/2001.

32 Consequently, the answer to the first question is that Article 1(1) of Regulation No 44/2001 must be interpreted as meaning that an action for the payment of a debt based on the provision of carriage services taken by the insolvency administrator of an insolvent undertaking in the course of insolvency proceedings opened in one Member State and taken against a service recipient established in another Member State comes under the concept of `civil and commercial matters` within the meaning of that provision." (enfazi ta` din il-qorti)

VI. <u>Dottrina</u>

Fil-ktieb : "**<u>European Insolvency Regulation – De Gruyter Commentaries on European Law</u>**" issir analizi ta` dak li jaqa` fil-Brussels 1 u dak li jaqa` taht l-EIR (European Insolvency Regulation 1346/2000).

Il-kommentatur Klaus Pannen jindika *punti chiave* li jistghu jassistu lill-qrati sabiex jistabilixxu azzjoni taqax taht wiehed jew l-iehor miz-zewg Regolamenti. Ighid :-

"What remains problematic is distinguishing betweent he sphere of applicability of Council Regulation (EC) No 44.2001 and that of the EIR. In principle, all judgements on claims that could be asserted even without insolvency proceedings should be governed by the Council Regulation (EC) No 44/2001, and all judgements that in any way whatsoever presuppose insolvency proceedings should be governed by the EIR. The Gourdain vs Nadler decision of the ECJ also provides three criteria for classifying insolvency related proceedings :

-the exclusive jurisdiction of the insolvency court;
-the liquidator`s standing to sue on the claim;
The allocation of the proceeds of the lawsuit to the creditors as a whole;

But whether a judgement is to be considered as insolvency related proceeding can only be decided in the individual case.

Examples of insolvency –related proceedings are:

-actions to avoid (avoidance actions) acts detrimental to the creditors as a whole;

-bankruptcy-law related lawsuits seeking to impose personal liability on the managing director (e.g the French action en comblement du passif);

-lawsuits concerning the priority of a claim;

-disputes between the liquidator and the debtor concerning the inclusion of an asset in the insolvency estate;

-an action for (official) recognition of a claim in the schedule of creditors` claims;

-the approval of an insolvency plan (Sec 248 InsO);

-a judgement concerning a discharge of residual debt (Sec 300 InsO0;

-the approval of a debt adjustment plan (Sec 308 InsO) and

- actions involving the liquidator`s liability for damages, the direct and sole reason for these being the carrying out of the insolvency proceedings.

Examples of proceedings that not insolvency related :

-criminal prosecution that can be pursued in conjuction with insolvency proceedings , e.g. insolvency (criminal) offences pursuant to Sec 283 et seq StGB (German Criminal Code) because such offences are not being pursued directly because of the insolvency proceedings;

- actions to recover property in the possession o f the debtor;
-actions to determine the legal validity or the amount of a claim pursuant to general laws.

The concept of insolvency-related proceedings must be construed strictly".

Il-Qrati tal-Istati Membri tal-EU ukoll kellhom okkazjoni jaghmlu l-analizi fuq riferita. Fil-Qrati Inglizi kien trattat il-kaz "**Oakley v Ultra Vehicle Design Look**" [2006 – BCC 57].

L-awtur Chan Ho kiteb dwar din id-decizjoni : "**Interfacing the Insolvency Regulation with the Judgments Regulation: Oakley v Ultra Vehicle Design Look**" fejn qal :-

1 As a general rule, the operations of Council Regulation (EC) 1346/2000 on Insolvency Proceedings (`the Insolvency Regulation`) and Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (`the Judgments Regulation`) are mutually exclusive in that the Judgments Regulation does not deal with insolvency matters.

2 The English High Court had occasion to consider the precise demarcation and interface between the Insolvency Regulation and the Judgments Regulation in the recent case of Oakley v Ultra Vehicle Design.

…

Although it is unnecessary to my decision, and goes beyond the scope of the matters argued before me, I must add that, in the course of considering the points raised while preparing this judgment, I have come to the view that the Insolvency Proceedings Regulation would not govern this claim in any event. Procedurally, of course, the application is made within the insolvency proceedings constituted by the CVA and governed by sections 1 to 7 of the Insolvency Act 1986. If the liquidator of UMIL had issued a similar application under Section 168(3) it would have been within the winding-up proceedings which are main proceedings. But the scope of the matters which

are the subject of the Insolvency Proceedings Regulation is to be understood from recital 6, article 25 and the corresponding provision of the Judgments Regulation, article 1.2(b)… On [the basis of the decision of the European Court of Justice in Gourdain v Nadler,] it has been held that a claim by a liquidator to recover pre-liquidation debts, although made in the course of the winding-up and so, in a sense, relating to it, does not derive directly from it and is therefore not excluded from the Brussels Convention (and therefore now not from the [Judgments] Regulation) by article 1.2(b)... ***By contrast, proceedings by a liquidator against a director or a third party to set aside a transaction as having been effected at an undervalue or on the basis of wrongful or fraudulent trading would be claims deriving directly from the winding-up and therefore excluded from the Brussels Convention and now from the Judgments Regulation.*** *(*enfazi ta` din il-qorti)

L-istess awtur jirreferi ghal kaz iehor : "**Mazur Media Ltd and others v Mazur Media GmbH and others**" [2004 - EWHC 1566) u jaghmel analizi korrelatata mal-kaz ta` "**Oakley v Ultra Vehicle Design Limited**" (op. cit.). Ighid :-

A case in point, though not cited to the court, is Mazur Media v Mazur Media. The court held that it had jurisdiction under Article 23 of the Judgments Regulation because the claim fell within the scope of the jurisdiction clause in the assignment agreement. The implicit premise of this holding is that the subject-matter of the claim, namely the ownership of assets in the possession of a company in liquidation, fell within the subject-matter jurisdiction of the Judgments Regulation. Obviously, the German company in liquidation was party to the English proceedings; but that did not change the fact that the claim fell within the subject-matter jurisdiction of the Judgments Regulation, and not the Insolvency Regulation. The parallel between Mazur Media and the present case is thus exact. The former involved a determination of whether a company in liquidation owned certain movables in its possession, while the latter involved a determination of whether a company in liquidation owned certain movable in the possession of a third party. Just as the claim in Mazur Media fell within the subject-matter jurisdiction of the Judgments Regulation, so the claim in the present case fell outside the subject-matter jurisdiction of the Insolvency Regulation.

Relevanti huwa dak sottolinjat minn Philip R. Wood fil-ktieb "**Conflict of Laws and International Finance"** (Thomson – Sweet & Maxwell) :-

The most important express esclusions are (emphasis added) :

...

(b) ***bankruptcy*** *proceedings, relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings. These are covered by separate European Regulation. The bankruptcy exception is construed narrowly. It would not cover claims by a liquidator to recover debts or claims for misfeasance by directors or the construction of a pre-liquidation contract even though raised in the winding-up. All of these could arise outside insolvency proceedings.* ***It would cover claims to avoid a preference or a liquidator claim against a director for fraudulent or wrongful trading, since these are directly insolvency matters....****In UBS AG vs Omni Holding AG (2000) 1 WLR 916, UBS was the agent of a syndicate of banks which lent money to a German and Jersey company secured on shares and on a put option against a Swiss company Omni. The documents were governed by English law with English forum selection. UBS enforced its security and exercised the option. Omni went into liquidation in Switzerland. UBS claimed damages for breach of the option, but the liquidator alleged that the proceeds of the sale of the pledged shares should be deducted and that the issue should be tried in Switzerland. Held: the claim of UBS was within the Lugano Convention and should be heard in the English courts as agreed. The issue arose out of a pre-liquidation arrangement and was not excluded by the bankruptcy exception in the Convention since it did not relate directly to the winding-up of an insolvent company, even though it was a dispute over a liquidation claim. "* (enfazi ta` din il-qorti).

L-awturi Miguel Virgos and Francisco Garcimartin fil-ktieb "**The European Insolvency Regulation : Law and Practice**" [Kluwer Law International – 2004] jmorru dritt fuq il-kriterju li ghandu jghodd ghall-interpretazzjoni tal-Art1 u 2(b) ta` Brussels 1 :-

Article 1(2)(b) ... excluded the core insolvency proceedings themselves and the European Court of Justice clarified that other proceedings arising in the context of an insolvency will also be excluded if they derive directly from the bankruptcy or winding-up and are closely connected with the insolvency proceedings....for the purpose of establishing jurisdiction, the test of exclusion of "insolvency matters" from the Reglation 44/2001 on Civil Jurisdiction and Enforcement is the same as the test of inclusion in the Insolvency Regulation.

Madanakollu jkomplu billi jghidu :-

This naturally only with regard to insolvency proceedings covered by the Insolvency Regulation. The insolvency regulation does not apply to all kinds of insolvency proceedings, but only to those listed in its Annexes, furthermore, certain debtors (credit institutions, insurance undertakings, investment undertakings) are excluded from its scope. If the insolvency proceedings opened are not included in that list or the debtor is not an eligible debtor, the test of exclusion from the Regulation 44/2001 will be satisfied, but not the test of inclusion in the Insolvency Regulation. In such cases, the Directives on the restructuring and winding-up of credit institutions or insurance undertakings (regarding non-eligible debtors) or the Private International Law rules of the Member States regarding unlisted proceedings will be applicable."

VII. <u>Konsiderazzjonijiet</u>

Dan premess, il-Qorti sejra tara jekk l-azzjoni tal-lum hijiex analoga (*analogous*) ghal insolvenza u allura ghandhiex tapplika l-eskluzjoni tal-Art 1(2)(b) ta` Brussels 1.

Ir-rikorrent jiddikjara car li dik tal-lum hija azzjoni skont l-**<u>Art 316 tal-Kap 386</u>** u cioe` **<u>kummerc hazin</u>**.

Id- disposizzjoni taqra :-

(1) Id-disposizzjonijiet ta` dan l-artikolu japplikaw meta kumpannija tkun giet xolta u tkun insolventi u jkun jidher li persuna li kienet direttur tal-kumpannija kienet taf, jew kellha tkun taf qabel ix-xoljiment tal-kumpannija, li ma kienx hemm prospett xieraq li l-kumpannija setghat tevita x-xoljiment minhabba l-insolvenza taghha.

(2) Il-qorti, fuq ir-rikors tal-istralcjarju ta` kumpannija li ghaliha japplika dan l-artikolu, tista` tiddikjara li persuna li kienet direttur kif imsemmi fis-subartikolu (1) tkun responsabbli li taghmel pagament favur l-attiv tal-kumpannija kif il-qorti jidhrilha xieraq.

(3) Il-qorti ma ghandhiex tilqa` rikors taht dan l-artikolu jekk tkun sodisfatta li l-persuna li kienet direttur kienet taf li ma kienx hemm prospett xieraq li l-kumpannija setghet tevita x-xoljiment minhabba l-insolvenza taghha u skont dan tkun hadet kull pass li kellha tiehu sabiex tnaqqas it-telf potenzjali ghall-kredituri tal-kumpannija.

(4) Ghall-finijiet tas-subartikoli (2) u (3), il-fatti li direttur ta` kumpannija ghandu jkun jaf jew jaccerta ruhu minnhom, il-konkluzjonijiet li ghandu jilhaq u l-passi li ghandu jiehu huma dawk li jkunu maghrufa jew accertati, jew li jintlahqu jew jittiehdu, minn persuna li b`mod ragonevoli tkun diligenti li jkollha kemm-

(a) it-taghrif generali, hila u esperjenza li b`mod ragonevoli jkunu mistennija minn persuna li tmexxi l-istess funzjonijiet kif jitmexxew minn jew moghtija lil dak id-direttur fir-rigward il-kumpannija; kif ukoll

(b) it-taghrif generali, hila u esperjenza li ghandu d-direttur.

(5) Ghall-finijiet ta` dan l-artikolu, direttur jinkludi persuna li skont id-direzzjoni jew istruzzjonijiet taghha d-diretturi tal-kumpannija normalment jagixxu.

Huwa car li d-disposizzjoni tapplika meta kumpannija tkun giet xolta, u tkun insolventi, u jkun jidher li persuna li kienet direttur kienet taf, jew kellha tkun taf, qabel ix-xoljiment tal-kumpannija, li ma kienx hemm prospett xieraq li l-kumpannija setghet tevita x-xoljiment minhabba l-insolvenza taghha.

Fis-sentenza li tat fil-25 ta` Ottubru 2013 fil-kawza "**Electronic Products Limited vs Emanuel Micallef et**", il-Qorti tal-Appell qalet :-

… din il-Qorti tirrileva illi l-kuncett ta` kummerc bi frodi jinsab deskreitt fl-Artikolu 315 tal-Kap. 386 tal-Ligijiet ta` Malta, cioe`, l-Att dwar il-Kumpaniji, waqt li l-kuncett ta` kummerc hazin huwa deskritt fl- Artikolu 316 tal-istess Kap. 386. Skont dawn l-artikoli, ikun hemm kummerc bi frodi meta jkun jirrizulta li xi negozju tal-kumpanija jkun tmexxa bil-hsieb ta` frodi ta` krediturі tal-kumpanija jew ta` krediturі ta` xi persuna ohra jew bil-ghan ta` frodi, filwaqt li jkun hemm kummerc hazin meta persuna li kienet direttur ta` kumpanija tkun agixxiet filwaqt li tkun taf, jew kellha tkun taf qabel ix-xoljiment tal-kumpanija, li ma kienx hemm prospett xieraq li l-kumpanija setghet tevita x-xoljiment minhabba l-insolvenza taghha. Dawn l-artikoli tal-ligi Maltija gew mehuda kelma b`kelma mil-ligi Ingliza li tirregola x-xoljiment tal-kumpaniji (The Insolvency Act, 1986), u l-artikoli ekwivalenti fil-ligi Ingliza huma l-Artikolu 213 (`fraudulent trading`), u l-Artikolu 214 (`wrongful trading`).

Iz-zewg kuncetti ta` kummerc bi frodi u kummerc hazin jixxiebhu, bid-differenza tkun li f`kaz ta` kummerc bi frodi irid jirrizulta li kien hemm il-hsieb li jigu ppregjudikati l-krediturital-kumpanija. F`kaz li jirrizulta kummerc bi frodi jew hazin, il-ligi tkontempla it-tnehhija tar-responsabilita` limitata tad-diretturi, bir-responsabilita` personali taghhom tkun kompluta u ampia f`kaz li jirrizulta kummerc bi frodi.

L-azzjoni skont l-Art 316 tista` ssir **biss** b`rikors ta` l-istralcjarju.

Il-kaz tal-lum huwa aktar simili ghal dak ta` "**Gourdain vs Nadler"** (op. cit.) peress li hemm il-bidu tal-azzjoni kienet tispetta lill-istralcjarju biss.

Il-fatt ukoll li l-azzjoni tista`tigi intavolata biss meta l-kumpannija tkun giet xjolta u tkun insolventi jkompli jikkonferma li l-procedura taqa` fl-eskluzjoni ta` Brussels 1 li jirreferi ghal *proceedings relating to the winding up of insolvent companies or other legal persons.*

Fuq l-istegwra tal-principji fuq esposti, din il-Qorti tqis li l-azzjoni tal-lum hija direttament konnessa ma` proceduri ta` *winding up of insolvent companies.* Ghalhekk m`hemmx gurisdizzjoni ta` din il-Qorti abbazi ta` l-Art 1 u 2(b) ta` Brussels 1.

Dan premess, lanqas ma tapplika l-European Insolvency Regulation 1346/2000 peress li din ma tapplikax ghas-suq tas-servizzi tal-assikurazzjoni, li kien in-negozju propju ta` EIG Limited.

Premess dan ukoll, il-Qorti hija konsapevoli li d-Direttiva 2009/138/EC : "**On the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)**" taghti l-ghazla fl-Art 293 illi l-amministraturi u likwidaturi "*shall be entitled to exercise within the territory of all the Member States all the powers which they are entitled to exercise within the territory of the home Member State"* izda dik ghazla li jrid jaghmel l-istralcjarju.

Fil-kaz tal-lum, l-istralcjarju ghazel li jsejjes il-gurisdizzjoni ta` din il-Qorti fuq l-Art 742(1)(b) tal-Kap 12. Il-Qorti sejra tara ghandux ragun fid-dritt.

<u>L-Art 742(1)(b) tal-Kap 12</u> ighid :-

Bla hsara ta` fejn il-ligi tiddisponi espressament xort` ohra, il-Qrati Civili ta` Malta, minghajr ebda distinzjoni jew privilegg, ghandhom gurisdizzjoni biex jisimghu u jiddeciedu l-kawzi kollha li jirrigwardaw … kull persuna, sakemm jew ghandha d-domicilju taghha jew tkun toqghod jew tkun qeghda Malta.

Ir-rikorrenti noe jaghmel l-argument li ghalkemm mhuwiex kontestat li l-intimati mhux domiciljati Malta, din il-Qorti ghandha gurisdizzjoni li tisma` u tiddeciedi l-kawza billi EIG Limited li hija socjeta` Maltija. Ghalhekk japplika l-Art 742(1)(b) tal-Kap 12.

L-argument tar-rikorrent noe huwa kontestat mill-intimati li jikkontendu li l-Art 742 (1)(b) tal-Kap 12 mhux applikabbli.

Il-Qorti taghmel riferenza ghas-sentenza ta` din il-Qorti (**<u>PA/LSO</u>**) tas-26 ta` Setembru 2013 fil-kawza "**<u>Mario Schembri et vs Dr. Anthony Galea Debono et noe</u>**" fejn inghad hekk :-

L-artikolu 742 tal-Kap 12 jibda biex jiddisponi li

(1) Bla hsara ta` fejn il-ligi tiddisponi espressament xort` ohra, ilQrati Civili ta` Malta minghajr ebda distinzjoni jew privilegg, ghandhom gurisdizzjoni biex jisimghu u jiddeciedu l-kawzi kollha li jirrigwardaw il-persuni hawn taht imsemmija" u jelenka l-kazijiet fejn il-gurisdizzjoni tal-Qrati taghna, f`materja li tkun fil-kompetenza rispettiva taghhom, tigi radikata.

Illi jibda biex jinghad li, minkejja l-mod kif l-artikolu 742(1) huwa mfisser, il-kwistjoni ta` jekk Qorti Maltija ghandhiex is-setgha li tisma` u tqis kawza mressqa quddiemha (u li lmertu taghha jaqa` fil-kompetenza taghha)* ***trid titqies b`riferenza ghall-kwalitajiet tal-persuna mharrka, l-izjed fejn ir-raguni tal-gurisdizzjoni hija mibnija fuq il-prezenza tal-parti mharrka f`Malta.*** *Din it-tifsira m`hija xejn ghajr l-applikazzjoni tal-massima guridika ewlenija li actor sequitur forum rei u tal-ohra li tipprovdi ubi te invenio, ibi te convenio."

… Indubbjament ilkonvenut Palmer ma jaqax taht il-persuni mdahhlin flartikolu 742(1) (a) u lanqas dawk imdahhlin fl-artikolu 742(1)(b) peress li ma jirrizultax li ghandu c-cittadinanza Maltija jew li hu domiciljat f`Malta. Fuq dawn iz-zewg subartikoli, gie ritenut li l-kriterju ta` gurisdizzjoni mhuwiex daqstant ic-cittadinanza imma d-domicilju tal-konvenut.

Fis-sentenza ta` din il-Qorti (**PA/JRM**) tas-16 ta` Ottubru 2003 fil-kawza "**Angelo Cutajar and Sons Ltd v Dr. Anthony Cremona noe**" inghad hekk :-

Illi jibda biex jinghad li, minkejja l-mod kif l-artikolu 742(1) huwa msawwar, il-kwestjoni ta` jekk Qorti Maltija ghandhiex is-setgha li tisma` u tqis kawza mressqa quddiemha (u li l-mertu taghha jaqa` fil-kompetenza tagjha) trid titqies b`riferenza ghall-kwalitajiet tal-persuna mharrka, l-izjed fejn ir-raguni tal-gurisdizzjoni hija mibnija fuq il-prezenza tal-parti mharrka f`Malta. Din it-tifsira m`hija xejn ghajr l-applikazzjoni tal-massima guridika ewlenija li actor sequitur forum rei u tal-ohra li tipprovdi ubi te invenio, ibi te convenio;

Illi, fil-kaz partikolari u mill-provi li tressqu s`issa wiehed irid ifittex jekk (a) jirrizultax li l-obbligazzjoni li biha ntrabat l-imharrek hijiex wahda li giet kontrattata f`Malta jew inkella jekk kellhiex tigi ezegwita f`Malta, u (b) jekk, minhabba l-fatt li l-imharrek ma jinsabx f`Malta fizikament, il-"prezenza" tieghu hijiex mod iehor stabilita fil-persuna tal-Kuraturi Deputati mahturin biex jidhru ghalih fl-atti tal-kawza u fl-atti l-ohrajn konnessi u ancillari;

Illi m`ghandu jkun hemm l-ebda dubju li l-ewwel tliet (3) cirkostanzi kontemplati fil-paragrafi (a), (b) u (c) tas-sub- artikolu (1) tal-artikolu 742 ma japplikawx ghal dan il-kaz. L-im_arrek proprio ma jaqa` taht l-ebda wahda mill-kategoriji ta` persuni li jistghu jitqiesu bhala persuni li l-Qrati Maltin jistghu jezercitaw gurisdizzjoni dwarhom minhabba n-nazzjonalita`, id-domicilju jew li accettaw li joqoghdu ghall-gurisdizzjoni tal-Qrati Maltin.

Fis-sentenza ta` din il-Qorti (**PA/NA**) tat-22 ta` Gunju 2001 fil-kawza "**Catharina Harvey vs Dr. Peter Caruana Galizia noe"** inghad hekk :-

10. Nigu issa ghall-aspetti ta` dritt. Fis-sentenzi moghtijin mill-ewwel Qorti, meritu ta` dawn iz-zewg appelli, gie ritenut, b`mod pjuttost sempicistiku li galadarba l-ligi talprocedura nostrali giet estiza, ghall-fini ta` gurisdizzjoni, biex tikkomprendi wkoll gurisdizzjoni bbazata fuq prezenza u billi l-ligi taghna – u specifikament fl-artikolu 742 tal-Kap. 12, kif emendat u

mwessa` bl-Att XXIV tal-1995 – tuza l-kliem "kull persuna", allura minn dan jidher li jkun bizzejjed, ghall-fini ta` gurisdizzjoni, li almenu l-attrici kienet, bhal f`dan il-kaz, prezenti f`Malta fil-mument li gew istitwiti l-kawzi. L-ewwel Qorti hawn ghamlet ukoll riferenza ghad-decizjoni ta` din il-Qorti, kif diversament presjeduta, fil-kawza fl-ismijiet "Sixt – vs – Sixt" moghtija fl-14 ta` Frar 2000, fejn skond l-ewwel Qorti – skorrettement fil-fehma ta` din il-Qorti – "gie accettat il-principju illi l-fatt li wahda mill-partijiet kienet qed toqghod Malta kien sufficjenti biex il-Qrati taghna jigu investiti b`gurisdizzjoni" u ziedet ukoll tghid li "din il-Qorti thoss illi ma jistax ikun mod iehor ghax id-dicitura tal-ligi sew fit-test Malti sew f`dak Ingliz hija daqstant cara".

Din il-Qorti ezaminat is-sentenza "Sixt – vs – Sixt" (Citazzjoni Numru: 44/1197) u fl-ewwel lok sabet li bhala stat ta` fatt f`dak il-kaz kemm l-attur kif ukoll il-konvenuta kienu t-tnejn Malta fil-mument li giet intavolata c-citazzjoni u ma kenitx ghalhekk qeghda tipprospetta li kellha gurisdizzjoni a bazi tal-prezenza ta` wahda jew wiehed biss mill-partijiet, sija jekk ikun attur/attrici jew konvenut/konvenuta fil-kawza.

Tant hu hekk li dik il-Qorti accettat li kellha gurisdizzjoni wara li rriteniet li "jidher ghalhekk `prima facie` li l-attur kien korrett meta intavola l-kawza odjerna semplicement a bazi talpresenza tieghu u tal-konvenuta fil-gzejjer Maltin."

Din il-Qorti, anzi bil-maqlub ta` dak li gie ritenut mill-ewwel Qorti, u s`hawn l-appellant ghandu ragun fl-aggravju tieghu, tirritjeni li meta fl-artikolu 742, tal-Kap. 12, il-ligi tirreferi ghal "kull persuna" u tabbinaha, fost ohrajn, ma` mera presenza, linja hawn qeghda necessarjament, tirreferi ghall-presenza tal-parti konvenuta fuq il-principju ta` "ubi te invenio, ibi te convenio". Diversament ikun tassew ifisser, kif tajjeb argomenta l-appellant, li jkun bizzejjed ghall-parti attrici li tkun jew tigi Malta u tharrek lil min trid indipendentement minn kull konsiderazzjoni ohra rigwardanti l-parti konvenuta – haga dina li legalment hija inaccettabbli.

Fil-kaz Sixt – vs – Sixt (ibid. supra), gie osservat ukoll in propozitu illi, "… l-attur akkwista dar f`Ghawdex u jigi f`dawn il-gzejjer minn zmien ghall-iehor u l-konvenuta tirrisjedi hawnhekk ghal-preijodi twal fis-sena minhabba illi t-tifel minuri jattendi skola lokali. Meta giet ipprezentata din il-kawza l-kontendenti nzertaw it-tnejn f`dawn il-gzejjer"…

11. Applikat dak li gie ritenut fid-decizjoni `Sixt – vs – Sixt`, mutatis mutandis, ghall-kaz in ezami, naraw li lappellant kien mhux biss iqatta`, billi jirrisjedi, diversi perijodi ta` zmien f`Malta biex ikun hdejn martu imma sahansitra xtara dar Malta u anke ghamel il-hsieb, f`xi zmien, li

jaddotta tarbija tramite proceduri li kellhom jinbdew Malta. Naturalment bil-fatt li jigi stabbilit li l-Qrati taghna ghandhom gurisdizzjoni biex jisimghu u jiddeciedu kawza jew kawzi ta` din ix-xorta, ma jfissirx li kienet applikabbli u kellha tigi applikata ghall-fatti tal- kaz il-ligi Maltija. Pero` una volta li jigi sufficjentement stabbilit li kien hemm presenza tal-parti konvenuta, allura dan ifisser li gurisdizzjoni jkun hemm da parti ta` dik il-Qorti.

Fis-sentenza ta` din il-Qorti tat-30 ta` Mejju 1995 (u kkonfermata mill-Qorti tal-Appell fl-14 ta` Jannar 2002) fil-kawza "**Av. Dr. Kevin Dingli noe vs Av. Dr. Joseph Bonnici noe**" inghad hekk mb`riferenza ghall-Art 742(1) tal-Kap 12 :-

Fil-kuntest ta` dan l-Artikolu din il-Qorti trid tezamina din il-kawza tirrigwardax xi persuna f`xi wahda mis-sub-incizi ta` l-istess Artikolu 742 sub-artikolu 1.

Huwa minnu li dina l-kawza ghandha bhala zewg kontendenti, zewg persuni li l-ebda wahda minnhom ma hija cittadina Maltija jew domiciljata hawn Malta.

Pero` tirrigwarda b`mod indirett, pero` vitali socjeta` li ddomicilju taghha huwa zgur Malta.

Il-vitalita` tar-rigward huwa konsegwenza li l-azzjoni hija proprju intavolata biex tiddermina kif dina s-socjeta` sejra jkollha hajja, sejra titmexxa, stante illi persuna legali tagixxi biss permezz tad-diretturi li jidderiegi f`isimha. "

Imbaghad il-Qorti tal-Appell irriteniet :

Din il-Qorti, anke jekk mhux ezattament kif komposta, kellha l-opportunita` illi tanalizza l-Artikolu 742 tal-Kapitolu 12 tal-Ligijiet ta` Malta b`mod partikolari fir-rigward tas-sub-inciz (1) li tieghu jghid illi: "Bla hsara ta` fejn il-ligi tiddisponi espressament xort`ohra, l-Qrati Civili ta` Malta minghajr ebda distinzjoni jew privilegg ghandhom gurisdizzjoni biex jisimghu u jiddeciedu l-kawzi kollha li jirrigwardaw il-persuni hawn that imsemmija."

Jigi notat illi l-ligi titkellem dwar persuni li jaqghu taht il-gurisdizzjoni tal-Qrati Civili ta` Malta. Ma titkellimx biss dwar persuni li jistghu jagixxu bhala atturi jew jissejhu bhala konvenuti quddiemha. Titkellem dwar kawzi li jirrigardaw dawn il-persuni. Dan allura mhux necessarjament ifisser - ghalkemm generalment u bhala regola hekk hu l-kaz -

illi l-oggett u l-meritu tal-kawza jkun dritt kontestat bejn ilkontendenti li finalment il-Qorti trid tiddeciedi lil min minnhom jappartjeni. Ifisser li l-Qorti hi wkoll kompetenti u ghandha gurisdizzjoni f`kawzi li fihom il-partijiet ikunu qeghdin jikkontestaw meritu li d-determinazzjoni tieghu, apparti li jiddefinixxi l-interess taghhom fih, ikun ukoll direttament jirrigwarda terza persuna li ma tkunx parti fil-kawza u jista` jaffettwa d-drittijiet taghha. F`dawk il-kazijiet il-Qorti tkun kompetenti tikkunsidra dak il-meritu jekk it-terza persuna tkun cittadina ta` Malta hawn domiciljata, anke li kieku altrimenti ma kienitx tkun kompetenti."

F`dik il-kawza allura din il-Qorti waslet ghall-konkluzzjoni illi kellha gurisdizzjoni li tittratta meritu li kien jirrigwarda linteressi ta` minuri, cittadina ta` Malta, domiciljata Malta, nonostante li l-genituri taghha kienu t-tnejn persuni li ma kienux cittadini Maltin, ma kienux domiciljati Malta u ma kienux residenti Malta. Bl-istess argument f`din il-kawza li kienet bejn zewg persuni li ma kienux cittadini Maltin u lanqas ma kienu residenti f`Malta, din il-Qorti kellha gurisdizzjoni tikkonsidra l-meritu in kwantu dan kien jirrigwarda persuna Maltija residenti Malta u cioe` socjeta` limitata debitament registrata f`dawn il-Gzejjer. Infatti l-partijiet kienu azzjonisti f`din is-socjeta` "Glovegold Shipping Ltd." u l-meritu jirrigwarda proprju l-kontestazzjoni dwar il-kariga ta` direttur ta` din listess socjeta` u li jimpingi direttament allura fuq l-amministrazzjoni taghha. Indubbjament allura l-meritu ta` din il-kawza jirrigwarda persuna - anke jekk morali - li zgurtoqghod u tirrisjedi f`Malta.

Din il-Qorti ma tarax ghaliex ma ghandhiex tadotta interpretazzjoni ta` din ix-xorta fiz-zmien ta` globalizzazzjoni tal-kummerc u nformazzjoni u mezzi ta` komunikazzjoni. Kien pero` sa hawn li din il-Qorti estendiet l-interpretazzjoni tradizzjonali ta` l-Artikolu 742 ghax dan kien, fil-fehma taghha, konsentit mid-dicitura tieghu. Mhux korrett li jinghad kif inghad f`xi gjudikati recenzjuri li din il-Qorti fehmet b`dik linterpretazzjoni illi l-ligi riedet taghti gurisdizzjoni lill-Qrati Maltin biex jisimghu u jiddeciedu l-kawzi kollha li jirrigwardaw ic-cittadini ta` Malta. Mhux minnu li riedet tatihom protezzjoni shiha, kienu fejn kienu, anke jekk ma kienux residenti f`Malta u anke jekk ma kienux konvenuti quddiemha, sakemm il-meritu tal-kawza jkun jirrigwarda lilhom sakemm ikunu domiciljati Malta. Il-gudizzju ta` din il-Qorti kien biss fis-sens illi l-Qrati Maltin kellhom gurisdizzjoni illi jiddeciedu l-kawzi kollha li jirrigwardaw il-persuni msemmija fis-sub-incizi (a) sa (j) ta` l-Artikolu 742 sakemm ikunu jissodisfaw ir-rekwiziti kollha ta` dawk is-sub-incizi anke dawk il-persuni li ma jkunux il-partijiet fil-kawza. Allura f`dan il-kaz anke jekk il-partijiet fil-kawza ma jkunux huma stess jikkwalifikaw taht xi wahda minn dawn is-sub-incizi. Dan ifisser illi kawza bejn zewg partijiet li ma jkunux cittadini ta` Malta u ma jkunux domiciljati jew joqghodu Malta li l-meritu taghha jirrigwarda cittadin ta` Malta illi jkun stabilixxa d-domicilju

tieghu band`ohra ma tkunx taqa` taht il-gurisdizzjoni tal-Qrati Maltin sakemm naturalment ma tkunx tikkwalifika taht xi sub-inciz iehor mill-Artikolu 742.

Dawn il-precizazzjonijiet kienu mehtiega proprju biex ikun iccarat mhux biss il-hsieb ta` din il-Qorti fil-kawza fl-ismijiet* ***"Raymond Calleja vs l-Avukat Dottor Raymond Pace et nomine"*** *deciza fil-31 ta` Jannar 1996 li ghaliha saret riferenza aktar `il fuq u li l-konsiderandi taghha, fejn pertinenti, kellhom jitqiesu li saret riferenza ghalihom f`din is-sentenza, imma wkoll biex ma tinghatax interpretazzjoni aktar wiesgha minn dik illi l-legislatur intenda fid-dicitura ta` l-Artikolu taht ezami.

Ghalhekk – in succinct – dak li qed jirrizulta minn din il-gurisprudenza huwa li jista` jaghti l-kaz li l-Qrati Maltin ghandhom gurisdizzjoni illi jiddeciedu l-kawzi kollha li jirrigwardaw il-persuni msemmija fis-subincizi (a) sa (j) ta` l-Art 742 sakemm ikunu jissodisfaw ir-rekwiziti kollha ta` dawk is-subincizi anke dawk il-persuni li ma jkunux il-partijiet fil-kawza.

Fil-kaz tal-lum, l-azzjoni kienet inizjata minn stralcjarju li huwa residenti u domiciljat Malta kontra diversi intimati li huma kollha domiciljati u residenti l-Italja. Din il-Qorti qeghda tintalab *inter alia* li tiddikjara lill-intimat responsabbli ta` ksur tal-Art 316 tal-Kap 386 ghad-dannu ta` EIG Ltd. Din tal-ahhar hija kumpannija registrata Malta bl-ufficcju registrat taghha Malta. L-element tal-presenza huwa sodisfatt.

Din il-Qorti hija tal-fehma li ghandha gurisdizzjoni biex tisma` u tiddeciedi l-mertu ta` din il-kawza abbazi tal-Art 742(1)(b) tal-Kap 12.

In kwantu ghat-tielet eccezzjoni tal-intimat Enzo Resciniti din sejra tkun respinta billi Brussels 1 mhix invokabbli ghall-kaz tal-lum.

In kwantu jirrigwarda l-Art 742(2) tal-Kap 12, il-Qorti tosserva li fin-nota ta` osservazzjonijiet ta` whud mill-intimati saret riferenza ghal din id-disposizzjoni li taqra :-

Il-gurisdizzjoni tal-qrati ta` kompetenza civili mhijiex eskluza mill-fatt li qorti barranija tkun qeghda titratta l-istess kawza jew kawza li ghandha x`

taqsam maghha. Meta qorti barranija jkollha gurisdizzjoni konkorrenti, il-qrati jistghu fid-diskrezzjoni taghhom, jilliberaw lil-konvenut mill-osservanza tal-gudizzju jew iwaqqfu l-procediment f` kaz li l-azzjoni, jekk titkompla malta, tkun vessatorja, oppressiva jew ingusta ghall-konvenut.

Abbazi tal-provi, irrizulta illi :-

(i) Kien hemm procediment kriminali (*procedimento penale number 19066/11)* li gie imwaqqaf u li kien sar kontra Solano Fabio, Viscione Vincenzo, Girardi Mario, Lago Bruno, Rotondi Luciano, Vicione Paolo, Russo Oscar u Sorice Luciano fuq *"associazione criminale e esercizio abusive dell` attivita` assicurattiva"* u *"ostacolo alla attivita` di vigilanza del regolatore"*

(ii) Kien hemm procediment iehor penali bin-numru 19072/11 li gie inizjat fuq talba specifika ta` Brian Tonna bhala stralcjarju ta` EIG Limited fejn l-akkuza kienet dwar mizapproprjazzjoni minn Paolo Viscione, Russo Oscar, Balsamini Paolo u Di Barbaro Ottavio. Din ghadha pendenti.

(iii) Saret procedura ohra kriminali bin-numru 39568/2012 kontra Paolo Viscione, Luciano Sorice u Oscar Russo fejn instabu hatja .

(iv) Inghatat sentenza fl-20 ta` april 2015 fil-kawza penali (*riparazione per l`ingiusta detenzione)* mehuda kontar Girardi; filwaqt li hemm pendenzi penali (*riparazione per l-ingiusta detenzione)* li ghadhom pendenti fir-rigward ta` Vincenzo Viscione, Fabio Solano u Bruno Lago

(v) Hemm pendenza quddiem it-Tribunal Amministrattiv ta` Ruma (Procedimento TAR) liema kaz gie miftuh minn EIG Ltd kontra id-decizjoni ta` ISVAP ghal sospensjoni tal-licenzja ta` EIG.

(vi) Hemm ukoll pendenza quddiem il-Qrati Civili bin-numru 77861/2011 li hija kawza miftuha minn CoGesFin Ltd kontra Deloitte bhala stralcjarju ta` EIG Limited.

(vii) Hemm procedura ohra civili bin-numru 61013/2011 fl-ismijiet NIf Global Services Ltd gia` Nowosad Insurance & Financial Service Ltd v Deloitte u EIG –European Insurance Group Limited. Spjega li din hija kawza fejn qed jintalab li Deloitte tinzamm responsabbli li ddistruggiet il-portofoljo tal-klijenti ta` Nowosad. Dan il-kaz gie deciz fuq punt procedurali.

(viii) Saret *denuncia* ta` Bruno Lago fil-kwalita` tieghu ta` *Presidente del Consiglio di Amministrazione della Societa` European Insurance Grop*

Limited kontra *Enzo Resciniti* li kien *general manager* tal-kumpanija. Dan il-kaz gie arkivjat u imwaqqaf mill-imhallef.

(ix) Hemm proceduri civili istitwiti minn European Insurance Group Limited kontra Enzo Resciniti u ohra kontra Antonio Resciniti u Giuseppe Resciniti. Dawn iz-zewg kawzi gew decizi kontra EIG Ltd fuq punti procedurali.

Is-suddetti procedimenti ma jikkoncernawx l-intimati kollha. Infatti ma jirrizultax li hemm procediment kontra Andrea Ratti. Lanqas ma jittrattaw proceduri ghal kummerc hazin fis-sens ta` *wrongful trading* istitwiti barra. Madanakollu, jista` jinghad li xi kawzi barra ghandhom konnessjoni ma` dik tal-lum.

Dan premess din il-Qorti tqis illi huwa wisq prematur li tuza d-diskrezzjoni taghha skont l-Art 742(2) tal-Kap 12. Fl-istadju attwali tal-kawza, ma sarux provi li wasslu lill-Qorti biex tikkonkludi li l-prosegwiment tas-smigh tal-kawza Malta jivvessa, jopprimi jew ikun ingust fil-konfront tal-intimati.

Uhud mill-intimati jirreferu ghall-kawza fl-ismijiet "**Barletta noe vs Malta Financial Services Authority"** (Nru 276/2012) u ghall-Art 792 tal-Kap 12 ("*Meta titressaq kawza quddiem qorti kompetenti, wara li tkun tressqet kawza ohra fuq l-istess oggett quddiem qorti kompetenti ohra, il-kawza mressqa l-ahhar tista` tigi mibghuta lil dik il-qorti l-ohra."*). Fil-fehma ta` din il-Qorti, l-Art 792 ma japplikax ghall-kaz odjern peress li dik il-kawza ma tirrigwardax *wrongful trading* izda bdil tad-decizjoni li hadet l-MFSA meta hatret stralcjarju.

Decide

Ghar-ragunijiet kollha premessi, il-Qorti qeghda taqta` u tiddeciedi hekk :-

Tichad l-ewwel, it-tieni u t-tielet eccezzjonijiet tal-intimat Enzo Resciniti.

Tichad l-ewwel u t-tieni eccezzjonijiet tal-intimati Bruno Lago, Paolo Viscione u Vincenzo Viscione.

Tiddikjara li ghandha gurisdizzjoni sabiex tisma` u tiddeciedi din il-kawza abbazi tal-Art 742(1)(b) tal-Kap 12 tal-Ligijiet ta` Malta.

Bl-applikazzjoni tal-Art 223(3) tal-Kap 12, tordna li kull parti tbati l-ispejjez taghha.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur