QORTI CIVILI
(SEZZJONI TAL-KUMMERC)

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum il-Hamis 29 ta` Novembru 2018

Kawza Nru. 2
Rikors Nru. 605/2017 JZM

1. **Balticmax Holding Company Limited (C-70765) ;**

u

2. **Av. Jonathan Abela Fiorentino (k.i. 555482M), bhala mandatarju specjali ta` Arlie Sterling, detentur tal-Passaport Amerikan bin-numru 444918779, u wkoll bhala mandatarju specjali ta` Marsoft International A/S, socjeta` registrata fin-Norvegja bin-numru 937 657 927 u b`indirizz registrat ta` Inkognitogata 33A, 0256 Oslo, fin-Norvegja**

kontra

1. **Vroon Containers B.V., socjeta` registrata fl-Olanda bin-numru 22055081 u b`indirizz registrat ta` Haven Westzijde 21, 4511 AR Breskens, fl-Olanda;**

2. **Herman Marks, detentur tal-Passaport Olandiz bin-numru BURC14296;**

3. **Stefan Quist, detentur tal-Passaport Olandiz bin-numru NNPoJ28B3;**

4. **Balticmax Acquisition Corporation One Ltd (C-70766); u**

5. **Registratur tal-Kumpanniji**

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors guramentat prezentat fl-4 ta` Lulju 2017 li jaqra hekk :–

1. *Illi s-socjeta` rikorrenti Marsoft International A/S ("Marsoft") hija membru fis-socjeta` Balticmax Holding Company Limited (C-70765) ("BHC") u ghandha hamsin fil-mija (50%) tal-ishma fl-istess socjeta` waqt li l-membru l-iehor hija s-socjeta` intimata Vroon Containers B.V. ("Vroon"), li ghandha l-hamsin fil-mija (50%) l-ohra tal-ishma u dan kif jirrizulta mill-memorandum u l-istatut tas-socjeta` BHC (kopja hawn annessa "Dok. A");*

2. Illi is-socjeta intimata Balticmax Acquisition Corporation One Limited (C-70766) ("AC1") giet registrata bhala sussidjarja ta` BHC. AC1 ghandha diversi kumpanniji sussidjarji li huma proprjetarji ta` numru ta`

bastimenti, li jiffurmaw l-assi ta` din l-istruttura ta` kumpanniji, li l-beneficjarji taghha huma finalment Marsoft u Vroon in kwantu ghal hamsin fil-mija (50%) kull wahda;

3. Illi is-socjeta` BHC ghandha, u fiz-zmien relevanti ghal din il-kawza kellha, zewg diretturi, li huma r-rikorrent Arlie Sterling nominat mis-socjeta` rikorrenti Marsoft u l-intimat Herman Marks nominat mis-socjeta` Vroon;

4. Illi ad insaputa tar-rikorrenti Arlie Sterling u Marsoft, u minghajr l-awtorizzazzjoni tal-Bord tad-Diretturi u l-Laqgha Generali ta` BHC u AC1, l-intimati Vroon, Herman Marks, u Stefan Quist jew min minnhom qabdu u irregistraw mar-Registratur tal-Kumpanniji:

(i) avviz Form T (hawn annessa "Dok. C") li jindika li l-ishma ordinarji kollha li BHC ghandha fis-socjeta Balticmax Acquisition Corporation One Limited ("AC1") (ossija 2000 sehem b`valur ta` USD1 kull sehem) gew trasferiti lil Vroon b`effett mis-7 ta` April 2017,

(ii) risoluzzjoni datata is-7 ta` April 2017 (hawn annessa "Dok. D") iffirmata minn Herman Marks ghan-nom ta` BHC qua azzjonista ta` AC1 li tirrigwarda l-hrug ta` 50,000 ishma ordinarji godda f`AC1 favur Vroon u s-sostituzzjoni tal-memorandum u l-istatut ta` AC1 b` memorandum u statut gdid,

(iii) avviz Form H (hawn annessa "Dok. E") li jindika li nhargu 50,000 ishma ordinarji godda f`AC1 favur Vroon b`effett mis-7 ta` April 2017,

(iv) avviz Form K (hawn annessa "Dok. F") li jindika li gie appuntat l-intimat Stefan Quist, impjegat ta` Vroon, bhala direttur u segretarju ta` AC1 flimkien mad-diretturi Herman Marks u Arlie Sterling b`effett mis-7 ta` April 2017 biex b`hekk zdied direttur iehor appunat minn Vroon sabiex ikollha maggoranza fil-Bord tad-Diretturi, u

(v) Avviz Form I(1) (hawn annessa "Dok. G") li jindika li AC1 ma baqghetx single member company.

5. Illi l-effett ta` dawn it tibdiliet kien dak li BHC giet zvestita mhux biss mill-proprjetà tal-ishma ordinarji u cioe` 2000 sehem fis-socjeta` AC1 izda wkoll mill-kontroll ta` AC1 u b`hekk tas-sussidjarji kollha u l-assi kollha li ghandha AC1. Dan ifisser illi l-kontroll tal-grupp ta` kumpanniji li gie stabbilit biex ikun ta` Vroon u Marsoft in kwantu ghal 50% kull wahda, ittiehed illegalment minn Vroon in kwantu ghal 100% (ara l-organogram hawn anness Dok. H).

6. Illi l-atti kollha fuq imsemmija saru b`qerq bi hsara tal-jeddijiet ta` BHC u ta` Marsoft. Vroon kienet taf b`dan ghaliex l-atti li bihom saru dawn it-tibdiliet gew effettwati principalment minn Herman Marks li l-firma tieghu tidher fuq id-dokumenti kollha meta Herman Marks huwa membru tal-`group managing board` ta` Vroon li hija l-persuna li bbenefikat minn dawn l-atti.

7. Illi minghajr pregudizzju ghas-suespost, BHC, Marsoft u Vroon, iffirmaw ftehim datat 6 ta` Ottubru 2015 u msejjah `BHC Co-operation Agreement` (kopja hawn annessa `Dok. B`) intiz sabiex fost l-ohrajn jirregola r-relazzjoni tal-partijiet kif ukoll it-tmexxija tal-istess socjeta` BHC. Dan il-ftehim inter alia jiddisponi li "the overall strategic direction of the Business of BHC and its subsidiaries shall be determined by the Parties unanimously in a general meeting of the shareholders. Such strategic matters include the following: ..... the acquisition (by subscription or transfer) or the disposal of or granting of any option, charge or other encumbrance over any shares or securities of any company".

8. Illi fl-14 ta` Gunju 2017 ir-rikorrenti ottjenew il-hrug ta` mandat t`inibizzjoni numru 734/17 SM kontra l-intimati in konnessjoni mal-mertu ta` dan ir-rikors.

9. Illi ghal kull bwon fini jigi dikjarat li r-Registratur tal-Kumpanniji qed jigi mdahhal bhala intimat f`din il-kawza limitatament in relazzjoni mal-ordnijiet li dina l-Onorabbli Qorti jista` joghgobha taghti lill-

istess Registratur fil-kaz li takkolji t-talbiet tar-rikorrenti, u mhux sabiex jinzamm responsabbli flimkien mal-intimati l-ohrajn ghall-agir tal-istess intimati.

Ghaldaqstant, ir-rikorrenti noe umilment jitlob li, ghar-ragunijiet premessi u prevja kull dikjarazzjoni ohra xierqa u opportuna, din l-Onorabbli Qorti joghgobha:

(1) Tiddeciedi u tiddikjara li: t-trasferiment tal-ishma ordinarji fis-socjeta` Balticmax Acquisition Corporation One Limited (ossija 2000 sehem b`valur ta` USD1 kull sehem) minn Balticmax Holding Company Limited lil Vroon Conatiners B.V. u r-registrazzjoni ta` l-avviz Form T relattiv ("Dok. C"); ir-risoluzzjoni datata is-7 ta` April 2017 ("Dok. D") iffirmata minn Herman Marks ghan-nom ta` Balticmax Holding Company Limited qua azzjonista ta` Balticmax Acquisition Corporation One Limited li tirrigwarda l-hrug ta` 50,000 ishma ordinarji godda f` Balticmax Acquisition Corporation One Limited favur Vroon Containers B.V. u l-avviz relattiv Form H ("Dok. E") u s-sostituzzjoni tal-memorandum u l-istatut ta` Balticmax Acquisition Corporation One Limited b` memoramdum u statut gdid u l-avviz relattiv Form I(1) ("Dok. G") li jindika li Balticmax Acquisition Corporation One Limited ma baqghetx single member company; u l-hatra ta` l-intimat Stefan Quist, bhala direttur u segretarju ta` Balticmax Acquisition Corporation One Limited u r-registrazzjoni tal-avviz relattiv Form K ("Dok. F") saru b`qerq bi hsara tal-jeddijiet ta` Balticmax Holding Company Limited u ta` Marsoft International A/S;

(2) *Konsegwentement, tirrexxindi l-atti msemmija fl-ewwel talba li saru b`qerq bi hsara tal-jeddijiet ta` Balticmax Holding Company Limited u ta` Marsoft International A/S;*

(3) Tahtar u tinnomina kuraturi deputati sabiex jirrapprezentaw lil kull eventwali kontumaci fuq ir-rexissjonijiet imsemmija, u tiffissa terminu li fih ghandom isiru r-rexissjonijiet imsemmija u dan kollu previa kull provvediment iehor li lilha jidhrilha xieraq u opportun.

(4) Tordna lill-kumpannija intimata Balticmax Acquisition Corporation One Ltd biex taghmel dak kollu li hu necessarju sabiex ir-registri kollha tal-kumpannija, inkluz ir-registru tal-azzjonisti tal-istess kumpannija, jkunu jirriflettu r-rexxissjoni tal-atti fuq imsemmija.

(5) Tordna lir-Registratur tal-Kumpanniji biex jaghmel dak kollu li hu necessarju sabiex ir-Registru jkun jirrifletti r-rexxissjoni tal-atti fuq imsemmija inkluz, minghajr pregudizzju ghal generalità ta` din it-talba, il-kancellament mir-registru tal-avvizi Form T, Form K, Form H, Form I(1) u tar-risoluzzjoni datata is-7 ta` April 2017 iffirmata minn Herman Marks ghan-nom ta` Balticmax Holding Company Limited qua azzjonista ta` Balticmax Acquisition Corporation One Limited li tirrigwarda l-hrug ta` 50,000 ishma ordinarji godda favur Vroon Conatiners B.V. u s-sostituzzjoni tal-memorandum u l-istatut b` memorandum u statut gdid.

Bl-ispejjez, inkluzi dawk tal-mandat ta` inibizzjoni numru 734/17 SM mahrug fl-14 ta` Gunju 2017, kontra l-intimati jew min minnhom, li huma, jew ir-rapprezentanti taghhom, huma minn issa ngunti biex jidhru in subizzjoni, u b`rizerva ta` kwalunkwe azzjoni ohra spettanti lir-rikorrenti.

Rat il-lista tax-xhieda u l-elenku ta` dokumenti.

Rat ir-risposta gurmentata ta` Vroon Containers B.V. li kienet prezentata fis-7 ta` Awwissu 2017 u li taqra hekk :-

Illi fl-ewwel lok u b`mod preliminarju, din l-Onorabbli Qorti, u l-Qorti Maltija in generali, m`ghandhiex il-kompetenza illi tisma` din il-kawza ghaliex din l-azzjoni mhijiex wahda ta` gurisdizzjoni tal-qrati ta` Malta. Fil-fatt, l-azzjonijiet imsemmija mir-rikorrenti, u cioe` t-trasferiment tal-ishma ordinarji fis-socjeta` Balticmax Acquisition Corporation One Limited, socjeta` registrata Malta bin-numru C-70766 u bl-indirizz registrat f`Level 3, Valletta Buildings, South Street, Valletta, VLT 1103 ("AC1") (ossija 2000 sehem b`valur ta` USD 1 kull sehem) minn Balticmax Holding Company Limited, socjeta` registrata Malta bin-numru C-70765 u bl-indirizz registrat f` Level 3, Valletta Buildings, South Street, Valletta, VLT 1103 ("BHC") lil Vroon Containers B.V., socjetà registrata fl-Olanda bin-numru 22055081 u

b`indirizz registrat ta` Haven Westzijde 21, 4511 AR, Breskens, Olanda ("Vroon") u r-registrazzjoni tal-avviz `Form T` relattiv; il-hrug ta` 50,000 ishma ordinarji godda f`AC1 favur Vroon u r-registrazzjoni tal-avviz relattiv "Form H"; s-sostituzzjoni tal-memorandum u l-istatut ta` AC1 b`memorandum u statut gdid u r-registrazzjoni tal-avviz relattiv `Form I (1)`; u l-hatra tal-intimat Stefan Quist, bhala direttur u segretarju ta` AC1 u r-registrazzjoni tal-avviz relattiv "Form K2, huma kollha azzjonijiet fir-rigward tal-amministrazzjoni u l-ishma tas-socjeta` jew fis-socjeta` BHC. BHC kienet dahlet fi ftehim maghruf bhala il-`BHC Co-operation Agreement` datat 6 t`Ottubru 2015 flimkien ma` Vroon u Marsoft International A/S, socjeta` registrata fin-Norvegja bin-numru 937 657 927 u b`indirizz registrat ta` Inkognitogata 33A, 0256 Oslo, in-Norvegja ("Marsoft") (kopja diga` annessa fil-process u mmarkata "Dok. B"), liema ftehim jirregola r-relazzjoni bejn BHC, Vroon u Marsoft, u cioe` l-azzjonisti flimkien mal-istess socjeta` ta` liema huma azzjonisti, kif ukoll AC1, bhala parti mis-sistema kummercjali shiha, u dan kif urew ir-rikorrenti stess fir-rikors taghhom meta kwotaw l-Artiklu 4 ta` dan l-istess ftehim. Artiklu 4 jiddisponi li "Such strategic matters shall include the following:… (2) Any increase or reduction in the authorised or issued share capital of the Company;… (9) Any alteration to or amendment of the by-laws of the Company or AC1… (11)The acquisition (by subscription or transfer) or the disposal of or the granting of any option, charge or other encumbrance over shares or securities of any company";

Illi l-istess ftehim, u cioe` il-"BHC Co-operation Agreement", jissoprassjedi kwalunkwe provvedimenti ohra inkluz l-istatut tas-socjeta` hekk kif spjegat fl-Artiklu 10 fl-istess ftehim, u jiddisponi bic-car f`Artikolu 19 u 20 kif gej:

19. Governing Law : This Agreement and all matters related to this Agreement shall be gtoverned by and construed in accordance with Norwegian Law without giving effect to any choice or conflict of law provision or rule (whether of Norway or any other jurisdiction) that would cause the application of the laws of any other jurisdiction.

20. Dispute Resolution: Any dispute that may arise from this Agreement shall be settled in Oslo, in English, and in accordance with the Norwegian arbitration act of 14 May 2004 no. 25. The Parties undertake and agree that all arbitral proceedings will be kept strictly confidential.

Illi, ghalhekk jidher car li skont il-Ligi Maltija, partikolarment Kap. 12 tal-Ligijiet ta` Malta, kif ukoll il-Ligi Ewropea, din l-Onorabbli Qorti ma tistax tiehu konjizzjoni ta` dan ir-rikors ghaliex l-azzjonijiet imsemmija kif ukoll il-ftehim imsemmi mill-istess rikorrenti mhux biss huma rregolati mil-ligi Norvegiza, izda inekwivokkabilment regolati minn gurisdizzjoni tal-arbitragg Norvegiz u dan ad eskluzjoni ta` kwalunkwe gurisdizzjoni ohra, b`ghazla esplicita tal-partijiet inkluzi Marsoft u BHC;

Illi fit-tieni lok u b`mod preliminarju, u minghajr pregudizzju ghas-suespost, ma jidher bl-ebda mod car b`liema rapprezentanza qieghda tidher BHC fir-rikors promotur prezentat, u dan hekk kif ir-rapprezentanti legali tal-istess socjeta` BHC huma, sa fejn taf l-esponenti, ditta u professjonisti legali differenti minn dawk li qeghdin jirraprezentaw lir- rikorrenti u atturi ohrajn Arlie Sterling u Marsoft jew/u l-mandatarju specjali taghhom l-Av. Dr Jonathan Abela Fiorentino, u dan kif mhuri, ad ezempju, mill-minuti ta` Laqgha Generali tas-socjeta` BHC datata 1 t`April 2016 (kopja hawn annessa u mmarkata "Dok. VC 12) fejn l-istess ditta giet appuntata bhala rapprezentanta legali tal-istess socjeta` ghall-ewwel darba bi ftehim bejn l-azzjonisti skont l-istatut tal-istess socjeta` BHC (kopja diga` annessa fil-process u mmarkata "Dok. A");

Illi biex tinbidel r-rapprezentanza legali jew tigi appuntata rapprezentanza legali gdida ghas-socjeta` BHC tehtieg rizoluzzjoni straordinarja tal-Laqgha Generali tal-istess socjeta` BHC, u dan skont l-istess statut ta` BHC kif ukoll skont il-ftehim bejn il-partijiet Vroon, BHC u Marsoft u cioe` il-"BHC Co-operation Agreement", u din ma sehhitx;

Illi ma jezisti l-ebda lok ghall-kunflitt ta` interess, hekk kif miftihem fid-digriet interim ta` din l-Onorabbli Qorti tal- 21 ta` Gunju 2017, u li jirrigwardja wkoll dawn il-proceduri, fl-atti tar-rikors numru 304/2016/1 JZM fl-ismijiet `Abela Fiorentino noe vs Vroon Containers B.V. et` bejn Vroon u s-socjeta` BHC ta` liema hija azzjonista u ta` liema hija thaddan hamsin fil-mija (50%) tal-ishma, f`sitwazzjoni fejn is-socjeta` trid tbiddel ir-rapprezentanza legali jew tappunta rapprezentanza legali gdida fl-interessi taghha u ghalhekk Vroon bhala azzjonista ghandha tippartecipa f`tali

decizjoni jekk qatt ikun il-kaz, u b`hekk kwalunkwe decizjoni li ittiehdet, jekk ittiehdet, f`dan ir-rigward ma tistax tigi enforzata;

Illi fi kwalunkwe kaz, l-istatut ta` BHC, jispecifika f`paragrafu 9.2 illi "any director may represent the Company in judicial proceedings; provided that no proceedings may be instituted by the Company without the Board`s authority" u fl-istess hin, u minghajr pregudizzju ghal-bqija ta` dak li qieghed u ser jigi sottomess mill-esponenti, u skont l-istess digriet ta` din il-Qorti tal-21 ta` Gunju 2017 fl-atti tar-rikors numru 304/2016/1 JZM, ir-rikorrenti Arlie Sterling, bhala direttur fi hdan BHC, almenu kellu jaghti istruzzjonijiet lill-istess ditta legali illi thaddan ir-rappresentanza legali tas-socjeta` BHC jekk kien hemm il-hsieb illi BHC ghandha tissottometti kwalunkwe rikors jew proceduri legali godda, u mhux jqabbad unilateralment lill-istess mandatarju u/jew rapprezentant legali tieghu innifsu jew tas-socjeta` Marsoft illi taghha huwa ko-fondatur u/jew rapprezentant, biex jaghmel dan f`isimhom it-tlieta minghajr distinzjoni tal-persuni;

Illi l-kunflitt ta` interess hawnhekk qieghed jidher bic-car min-naha ta` Arlie Sterling u/jew Marsoft fejn qeghdin juzaw, u sahansitra jabbuzaw, mid-digriet interim ta` din l-Onorabbli Qorti tal-21 ta` Gunju 2017 fl-atti tar-rikors numru 304/2016/1 JZM fl-ismijiet `Abela Fiorentino noe vs Vroon Containers B.V. et` billi mhux talli jkomplu jiffrustraw l-interessi u l-operazzjonijiet ta` BHC u kif ukoll is-socjeta` intimata AC1 u s-sussidjarji taghha bhala direttur u/jew azzjonista, rispettivament tal-istess BHC, u kif ilhom jaghmlu ghal xhur shah, izda issa wkoll billi jiehdu decizjonijiet unilaterali ghal BHC, fl-isem ta` dan l-istess digriet interim, biex jkomplu jipprotegu l-interessi specifici taghhom bhala direttur u bhala ko-fundatur tas-socjeta` Marsoft, u ta` Marsoft innifisha, u b`dan kollu juzaw lil BHC u l-istruttura taghha biss biex jaghmlu hsara lil Vroon u lill-ufficjali taghha;

Illi, ghalhekk, jidher car li BHC m`ghandhiex lok biex taghmel din il-kawza ghax ma hemmx l-awtorizazzjoni necessarja fuq il-livell ta` socjeta`, u barra minn hekk, hemm kunflitt ta` interess bejn r-rikorrenti kollha u cioe` BHC, Arlie Sterling u Marsoft illi din l-Onorabbli Qorti ghandha tiehu in kunsiderazzjoni;

Illi, minghajr pregudizzju ghas-suespost, fil-principju, il-kostituzzjoni ta` BHC bhala socjeta` sehhet bil-hrug ta` ekwita` ta` USD 200,000 kull azzjonista, mhallsa miz-zewg partijiet Vroon u Marsoft li nghataw hamsin fil-mija (50%) tal-ishma ordinarji kull wiehed fi hdan BHC. Illi, barra minn dan Vroon kellha ftehim ta` Loan Notes ma` BHC, u cioe` zewg kuntratti ta` self datati 6 t`Ottubru 2015 (kopji hawnhekk annessi u mmarkati "Dok. VC 2" u "Dok. VC 3") fejn Vroon selfet l-ammont totali ta` USD 15,225,000 lil BHC. Dan l-ammont ta` flus kellu jintuza esklussivament ghas-sussidjarji ta` BHC u l-akkwist ta` vapuri fi hdan l-istruttura miftehma. Dan l-ammont imsellef unikament minn Vroon kellu jigi mhallas lura minn BHC u Marsoft ntrabtet illi jekk dan ma jsehhx skont it-termini tal-Loan Notes u/jew il- "BHC Co-operation Agreement" hija thallas lura l-ammont ta` USD 2,100,000 biex Vroon tkun tista` almenu tibda tithallas. F`dan kollu Marsoft ma kellhiex aktar partecipazzjoni ta` flus fl-istruttura hlief dik l-ekwita` inizzjali diga` msemmija;

Illi, fil-fatt, il-partijiet u cioe` Vroon, Marsoft u l-istess BHC, kellhom il-ftehim illi Vroon tithallas lura l-kontribuzzjonijiet kollha li ghamlet fi hdan l-istruttura inkluz bl-interessi u dan cioe` il-flus msellfa bis-sahha tal-Loan Notes miftehma bejn BHC u Vroon kif ukoll frott id-drittijiet ta` Vroon fi hdan il-`BHC Co-operation Agreement, u dan qatt ma sehh;

Illi, ghalhekk, fuq il-bazi tal-Loan Notes, Vroon hija kreditrici ta` BHC ghal-ammont ta` USD 12,225,000 u wkoll ta` spejjez legali, illi kellhom jithallsu minn BHC fi zmien 15-il gurnata mid-data tad-decizjoni u dan barra interessi sad-data tal- hlas, u dan kif deciz minn decizjoni tal-Arbitru f`Oslo moghtija fil-15 ta` Mejju, 2017 (kopja tad-decizjoni bin-Norvegiz kif ukoll traduzzjoni bl-Ingliz tal-istess hawnhekk annessi u mmarkati `Dok. VC 4`);

Illi, fuq il-bazi tal-istess `BHC Co-operation Agreement`, Vroon hija wkoll kreditrici ta` Marsoft ghal-ammont ta` USD 2,100,000 illi kellhom jithallsu mill-istess Marsoft fi zmien 14-il gurnata mid-data tad-decizjoni, u dan barra interessi sad-data tal-hlas, u spejjez tal-arbitragg ta` NOK 3,688,166 kif ukoll it-trasferiment ta` 2,49% tal-azzjonijiet ta` Marsoft fl-istess BHC fi zmien 14-il gurnata mid-data tad-decizjoni, li jaghtu maggoranza lill-istess Vroon fis-socjeta` BHC (kopja tad-decizjoni bin-Norvegiz kif ukoll traduzzjoni bl-Ingliz tal-istess hawnhekk annessi u mmarkati `Dok. VC 5`);

Illi dan kollu qatt ma gie mrodd lil Vroon kif inhu d-dritt ezekuttiv taghha, kemm minn BHC (minhabba ostakli ta` Arlie Sterling u l-istess Marsoft) u kemm minn Marsoft stess. Illi, ghalhekk, fil-prattika, Vroon ghandha minn tal-inqas maggoranza tal-ishma ordinarji f`BHC li suppost huma taghha, jekk mhux sahansitra l-ishma ordinarji kollha fi hdan BHC, hekk kif l-ishma ta` Marsoft f`BHC jghoddu bhala assi tal-istess Marsoft li bihom ghandhom ihallsu d-dejn ezekuttiv li ghandhom ma` Vroon. Illi, barra minn dan, BHC ghandha dejn tant sostanzjali fir-rigward ta` Vroon kif spjegat, illi l-assi kollha ta` BHC frankament qatt mhu ser ikunu bizzejjed biex ihallsu lura dan id-dejn;

Illi s-socjeta` BHC thaddan 15,737,500 cumulative redeemable preference shares, fis-socjeta` AC1 u li ghandhom rahan ta` sigurtajiet (pledge) favur l-istess Vroon skont il-ftehim bejn l-istess BHC, AC1 u Vroon, iffirmat il-27 ta` Jannar 2016 (kopja hawnhekk annessa u mmarkata "Dok. VC 6") u dan kif registrat mal-Malta Financial Services Authority (kopji tad-dokumenti hawnhekk annessi u mmarkati "Dok. VC 7" u "Dok. VC 8"), u dan kif diga qieghed jigi enfurzat mill-istess Vroon anki waqt dawn il-proceduri prezenti (kopja tal-att gudizzjarju mahrug skont l-Artiklu 122 tal- Att Dwar il-Kumpanniji (Kap. 186 tal-Ligi Maltija) hawnhekk anness u mmarkat "Dok. VC 9");

Illi fil-kuntest ta` dan kollu, ir-rikorrenti Arlie Sterling u Marsoft ilhom xhur, anzi snin u cioe` minn ftit xhur wara l-kostituzzjoni tas-socjeta` BHC, ma jaghmlu xejn iktar hlief jfixklu l-operat ta` BHC, AC1 u l-istruttura shiha biex fl-ahhar mill-ahhar din waslet fis-sitwazzjoni konflittwali odjerna;

Illi Vroon, min-naha taghha pruvat taghmel mill-ahjar li tista` biex tkompli l-operat tas-socjetajiet BHC u AC1 u s-sussidjarji taghha, anki billi hadet f`idejha l-immanigjar u l-operazzjoni ta` kuljum tal-operat ta` AC1 u s-sussidjarji taghha, anki minghajr hlas ta` xejn u b`telf ghaliha nnifisha;

Illi, b`kuntrast, Marsoft u Arlie Sterling ma ghamlu xejn hlief li xeklu kwalunkwe decizjoni li qatt pruvat tigi mehuda fis-socjetajiet BHC u AC1 u kwazi jizguraw il-falliment tas-socjetajiet msemmija;

Illi, fil-fatt minn Dicembru tas-sena l-ohra u cioe` 2016, kien hemm tentattivi min-naha ta` Vroon bhala azzjonista f`BHC u Bremer Landesbank Kreditanstalt Oldenburg – Girozentrale, bank esteru registrat u licenzjat gewwa l-Germanja ta` Domshof 26, 28105, Bremen, Germanja ("BLB") li huwa l-akbar kreditur ta` AC1 biex jigi miftiehem ftehim ta` likwidita` addizzjonali fi hdan AC1 biex b`hekk tkun tista` tkompli topera din is-socjeta` u l-vapuri fi hdan is-sussidjarji taghha. Kwalunkwe tentattiv f`dan is-sens kien dejjem gie mwaqqaf minn Arlie Sterling u/jew Marsoft, anki jekk l-istess BLB kien dispost ghal dan il-ftehim, u dan biss ghax m`ghandhom l-ebda interess li jaraw li l-istruttura tkompli topera u tissalva, u m`ghandhom xejn x`jitilfu;

Illi dak kollu li ghamlet is-socjeta` esponenti kien biex tissalvagwardja l-istruttura ta` BHC u s-sussidjari taghha u tonora l-obbligazzjonijiet tas-socjetajiet lejn il-krediturі, principarjament BLB, u ghalhekk ma jistax jintqal li dak kollu li ghamlet Vroon sehh bil-qerq u lanqas bi hsara tal-jeddijiet ta` BHC u/jew Marsoft.

Ghaldaqstant, u ghar-ragunijiet kollha premessi, is-socjeta` esponenti tissottometti bir-rispett illi :

a. Din l-Onorabbli Qorti m`ghandhiex il-gurisdizzjoni necessarja biex tisma` il-mertu ta` dan ir-rikors prezentat hekk kif huwa car illi l-istess mertu huwa regolat minn gurisdizzjoni tal-arbitragg norvegiz;

b. Minghajr pregudizzju ghas-suespost, BHC ma setghetx tissottometti dan ir-rikors kif ghamlet prezentement ghaliex BHC ghandha rapprezentanza legali indipendenti li diga` tista` tissalvagwardja d-drittijiet tas-socjeta` u d-digriet ta` din l-Onorabbli Qorti tal- 21 ta` Gunju 2017 fl-atti tar-rikors numru 304/2016/1 JZM fl-ismijiet `Abela Fiorentino noe vs Vroon Containers B.V. et` ma jaghtix il-lok illi Arlie Sterling jiehu r-riedni b`idejh fi kwalunkwe azzjoni anki fejn m`hemmx kunflitt ta` interess min-naha ta` Vroon u/jew Herman Marks u jmur kontra l-istatut tal-istess socjeta` BHC;

c. *Minghajr pregudizzju ghas-suespost, topponi ghat-talbiet kollha tar-rikorrenti li ghandhom jigu michuda.*

Salv eccezzjonijiet ulterjuri u b`riserva ta` kull azzjoni ulterjuri li ghandha s-socjeta` esponenti fil-ligi, bl-ispejjez kontra r-rikorrenti.

Rat ir-risposta guramentata li pprezenta l-konvenut Herman Marks fis-7 ta` Awwissu 2017 li taqra hekk :-

Illi fl-ewwel lok u b`mod preliminarju, din l-Onorabbli Qorti, u l-Qorti Maltija in generali, m`ghandhiex il-kompetenza illi tisma` din il-kawza ghaliex din l-azzjoni mhijiex wahda ta` gurisdizzjoni tal-qrati ta` Malta. Fil-fatt, l-azzjonijiet imsemmija mir-rikorrenti, u cioe` t-trasferiment tal-ishma ordinarji fis-socjeta` Balticmax Acquisition Corporation One Limited, socjeta` registrata Malta bin-numru C-70766 u bl-indirizz registrat f`Level 3, Valletta Buildings, South Street, Valletta, VLT 1103 ("AC1") (ossija 2000 sehem b`valur ta` USD 1 kull sehem) minn Balticmax Holding Company Limited, socjeta` registrata Malta bin-numru C-70765 u bl-indirizz registrat f` Level 3, Valletta Buildings, South Street, Valletta, VLT 1103 ("BHC") lil Vroon Containers B.V., socjetà registrata fl-Olanda bin-numru 22055081 u b`indirizz registrat ta` Haven Westzijde 21, 4511 AR, Breskens, Olanda ("Vroon") u r-registrazzjoni tal-avviz "Form T" relattiv; il-hrug ta` 50,000 ishma ordinarji godda f`AC1 favur Vroon u r-registrazzjoni tal-avviz relattiv "Form H"; s-sostituzzjoni tal-memorandum u listatut ta` AC1 b`memorandum u statut gdid u r-registrazzjoni tal-avviz relattiv "Form I (1)"; u l-hatra tal-intimat Stefan Quist, bhala direttur u segretarju ta` AC1 u r-registrazzjoni tal-avviz relattiv "Form K", huma kollha azzjonijiet fir-rigward tal-amministrazzjoni u l-ishma tas-socjeta` jew fis-socjeta` BHC. BHC kienet dahlet fi ftehim maghruf bhala il-`BHC Co-operation Agreement` datat 6 t`Ottubru 2015 flimkien ma` Vroon u Marsoft International A/S, socjeta` registrata fin-Norvegja bin-numru 937 657 927 u b`indirizz registrat ta` Inkognitogata 33A, 0256 Oslo, in-Norvegja (`Marsoft`) (kopja diga` annessa fil-process u mmarkata "Dok. B"), liema ftehim jirregola r-relazzjoni bejn BHC, Vroon u Marsoft, u cioe` l-azzjonisti flimkien mal-istess socjeta` ta` liema huma azzjonisti, kif ukoll AC1, bhala parti mis-sistema kummercjali shiha, u dan kif urew ir-rikorrenti stess fir-rikors taghhom meta kwotaw l-Artiklu 4 ta` dan l-istess ftehim. Artiklu 4 jiddisponi li "Such strategic matters shall include the following:… (2) Any increase or reduction in the

authorised or issued share capital of the Company;… (9) Any alteration to or amendment of the by-laws of the Company or AC1… (11) The acquisition (by subscription or transfer) or the disposal of or the granting of any option, charge or other encumbrance over shares or securities of any company";

Illi l-istess ftehim, u cioe` il-"BHC Co-operation Agreement", jissoprassjedi kwalunkwe provvedimenti ohra inkluz l-istatut tas-socjeta` hekk kif spjegat fl-Artiklu 10 fl-istess ftehim, u jiddisponi bic-car f`Artikolu 19 u 20 kif gej:

19. Governing Law: This Agreement and all matters related to this Agreement shall be gtoverned by and construed in accordance with Norwegian Law without giving effect to any choice or conflict of law provision or rule (whether of Norway or any other jurisdiction) that would cause the application of the laws of any other jurisdiction.

20. *Dispute Resolution: Any dispute that may arise from this Agreement shall be settled in Oslo, in English, and in accordance with the Norwegian arbitration act of 14 May 2004 no. 25. The Parties undertake and agree that all arbitral proceedings will be kept strictly confidential.*

Illi, ghalhekk jidher car li skont il-Ligi Maltija, partikolarment Kap. 12 tal-Ligijiet ta` Malta, kif ukoll il-Ligi Ewropea, din l-Onorabbli Qorti ma tistax tiehu konjizzjoni ta` dan ir-rikors ghaliex l-azzjonijiet imsemmija kif ukoll il-ftehim imsemmi mill-istess rikorrenti mhux biss huma rregolati mil-ligi Norvegiza, izda inekwivokkabilment regolati minn gurisdizzjoni tal-arbitragg Norvegiz u dan ad eskluzjoni ta` kwalunkwe gurisdizzjoni ohra, b`ghazla esplicita tal-partijiet inkluzi Marsoft u BHC;

Illi fit-tieni lok u b`mod preliminarju, u minghajr pregudizzju ghas-suespost, ma jidher bl-ebda mod car b`liema rapprezentanza qieghda tidher BHC fir-rikors promotur prezentat, u dan hekk kif ir-rapprezentanti legali tal-istess socjeta` BHC huma, sa fejn taf l-esponenti, ditta u professjonisti legali differenti minn dawk li qeghdin jirraprezentaw lir- rikorrenti u atturi ohrajn Arlie Sterling u Marsoft jew/u l-mandatarju specjali taghhom l-Av. Dr Jonathan Abela Fiorentino, u dan kif mhuri, ad ezempju, mill-minuti ta` Laqgha Generali tas-socjeta` BHC datata 1 t`April 2016 (kopja hawn annessa

u mmarkata "Dok. VC 1") fejn l-istess ditta giet appuntata bhala rapprezentanta legali tal-istess socjeta` ghall-ewwel darba bi ftehim bejn l-azzjonisti skont l-istatut tal-istess socjeta` BHC (kopja diga` annessa fil-process u mmarkata "Dok. A");

Illi biex tinbidel ir-rapprezentanza legali jew tigi appuntata rapprezentanza legali gdida ghas-socjeta` BHC tehtieg rizoluzzjoni straordinarja tal-Laqgha Generali tal-istess socjeta` BHC, u dan skont l-istess statut ta` BHC kif ukoll skont il-ftehim bejn il-partijiet Vroon, BHC u Marsoft u cioe` il-`BHC Co-operation Agreement`, u din ma sehhitx;

Illi ma jezisti l-ebda lok ghall-kunflitt ta` interess, hekk kif miftihem fid-digriet interim ta` din l-Onorabbli Qorti tal- 21 ta` Gunju 2017, u li jirrigwardja wkoll dawn il-proceduri, fl-atti tar-rikors numru 304/2016/1 JZM fl-ismijiet "Abela Fiorentino noe vs Vroon Containers B.V. et" bejn Vroon u s-socjeta` BHC ta` liema hija azzjonista u ta` liema hija thaddan hamsin fil-mija (50%) tal-ishma, f`sitwazzjoni fejn is-socjeta` trid tbiddel ir-rapprezentanza legali jew tappunta rapprezentanza legali gdida fl-interessi taghha u ghalhekk Vroon bhala azzjonista ghandha tippartecipa f`tali decizjoni jekk qatt ikun il-kaz, u b`hekk kwalunkwe decizjoni li ittiehdet, jekk ittiehdet, f`dan ir-rigward ma tistax tigi enforzata;

Illi fi kwalunkwe kaz, l-istatut ta` BHC, jispecifika f`paragrafu 9.2 illi "any director may represent the Company in judicial proceedings; provided that no proceedings may be instituted by the Company without the Board`s authority" u fl-istess hin, u minghajr pregudizzju ghal-bqija ta` dak li qieghed u ser jigi sottomess mill-esponenti, u skont l-istess digriet ta` din il-Qorti tal-21 ta` Gunju 2017 fl-atti tar-rikors numru 304/2016/1 JZM, ir-rikorrenti Arlie Sterling, bhala direttur fi hdan BHC, almenu kellu jaghti istruzzjonijiet lill-istess ditta legali illi thaddan ir-rappresentanza legali tas-socjeta` BHC jekk kien hemm il-hsieb illi BHC ghandha tissottometti kwalunkwe rikors jew proceduri legali godda, u mhux jqabbad unilateralment lill-istess mandatarju u/jew rapprezentant legali tieghu innifsu jew tas-socjeta` Marsoft illi taghha huwa ko-fondatur u/jew rapprezentant, biex jaghmel dan f`isimhom it-tlieta minghajr distinzjoni tal-persuni;

Illi l-kunflitt ta` interess hawnhekk qieghed jidher bic-car min-naha ta` Arlie Sterling u/jew Marsoft fejn qeghdin juzaw, u sahansitra jabbuzaw, mid-digriet interim ta` din l-Onorabbli Qorti tal- 21 ta` Gunju 2017 fl-atti tar-rikors numru 304/2016/1 JZM fl-ismijiet "Abela Fiorentino noe vs Vroon Containers B.V. et" billi mhux talli jkomplu jiffrustraw l-interessi u l-operazzjonijiet ta` BHC u kif ukoll is-socjeta` intimata AC1 u s-sussidjarji taghha bhala direttur u/jew azzjonista, rispettivament tal-istess BHC, u kif ilhom jaghmlu ghal xhur shah, izda issa wkoll billi jiehdu decizjonijiet unilaterali ghal BHC, fl-isem ta` dan l-istess digriet interim, biex jkomplu jipprotegu l-interessi specifici taghhom bhala direttur u bhala ko-fundatur tas-socjeta` Marsoft, u ta` Marsoft innifisha, u b`dan kollu juzaw lil BHC u l-istruttura taghha biss biex jaghmlu hsara lil Vroon u lill-ufficjali taghha;

Illi, ghalhekk, jidher car li BHC m`ghandhiex lok biex taghmel din il-kawza ghax ma hemmx l-awtorizazzjoni necessarja fuq il-livell ta` socjeta`, u barra minn hekk, hemm kunflitt ta` interess bejn r-rikorrenti kollha u cioe` BHC, Arlie Sterling u Marsoft illi din l-Onorabbli Qorti ghandha tiehu in kunsiderazzjoni;

Illi, minghajr pregudizzju ghas-suespost, fil-principju, il-kostituzzjoni ta` BHC bhala socjeta` sehhet bil-hrug ta` ekwita` ta` USD 200,000 kull azzjonista, mhallsa miz-zewg partijiet Vroon u Marsoft li nghataw hamsin fil-mija (50%) tal-ishma ordinarji kull wiehed fi hdan BHC. Illi, barra minn dan Vroon kellha ftehim ta` Loan Notes ma` BHC, u cioe` zewg kuntratti ta` self datati 6 t`Ottubru 2015 (kopji hawnhekk annessi u mmarkati "Dok. VC 2" u "Dok. VC 3") fejn Vroon selfet l-ammont totali ta` USD 15,225,000 lil BHC. Dan l-ammont ta` flus kellu jintuza esklussivament ghas-sussidjarji ta` BHC u l-akkwist ta` vapuri fi hdan l-istruttura miftehma. Dan l-ammont imsellef unikament minn Vroon kellu jigi mhallas lura minn BHC u Marsoft ntrabtet illi jekk dan ma jsehhx skont it-termini tal-Loan Notes u/jew il "BHC Co-operation Agreement" hija thallas lura l-ammont ta` USD 2,100,000 biex Vroon tkun tista` almenu tibda tithallas. F`dan kollu Marsoft ma kellhiex aktar partecipazzjoni ta` flus fl-istruttura hlief dik l-ekwita` inizzjali diga` msemmija;

Illi, fil-fatt, il-partijiet u cioe` Vroon, Marsoft u l-istess BHC, kellhom il-ftehim illi Vroon tithallas lura l-kontribuzzjonijiet kollha li ghamlet fi hdan l-istruttura inkluz bl-interessi u dan cioe` il-flus msellfa bis-sahha tal-Loan

Notes miftehma bejn BHC u Vroon kif ukoll frott id-drittijiet ta` Vroon fi hdan il-"BHC Co-operation Agreement", u dan qatt ma sehh;

Illi, ghalhekk, fuq il-bazi tal-Loan Notes, Vroon hija kreditrici ta` BHC ghal-ammont ta` USD 12,225,000 u wkoll ta` spejjez legali, illi kellhom jithallsu minn BHC fi zmien 15-il gurnata mid-data tad-decizjoni u dan barra interessi sad-data tal- hlas, u dan kif deciz minn decizjoni tal-Arbitru f`Oslo moghtija fil-15 ta` Mejju, 2017 (kopja tad-decizjoni bin-Norvegiz kif ukoll traduzzjoni bl-Ingliz tal-istess hawnhekk annessi u mmarkati `Dok. VC 4`);

Illi, fuq il-bazi tal-istess "BHC Co-operation Agreement", Vroon hija wkoll kreditrici ta` Marsoft ghal-ammont ta` USD 2,100,000 illi kellhom jithallsu mill-istess Marsoft fi zmien 14-il gurnata mid-data tad-decizjoni, u dan barra interessi sad-data tal-hlas, u spejjez tal-arbitragg ta` NOK 3,688,166 kif ukoll it-trasferiment ta` 2,49% tal-azzjonijiet ta` Marsoft fl-istess BHC fi zmien 14-il gurnata mid-data tad-decizjoni, li jaghtu maggoranza lill-istess Vroon fis-socjeta` BHC (kopja tad-decizjoni bin-Norvegiz kif ukoll traduzzjoni bl-Ingliz tal-istess hawnhekk annessi u mmarkati "Dok. VC 5");

Illi dan kollu qatt ma gie mrodd lil Vroon kif inhu d-dritt ezekuttiv taghha, kemm minn BHC (minhabba ostakli ta` Arlie Sterling u l-istess Marsoft) u kemm minn Marsoft stess. Illi, ghalhekk, fil-prattika, Vroon ghandha minn tal-inqas maggoranza tal-ishma ordinarji f`BHC li suppost huma taghha, jekk mhux sahansitra l-ishma ordinarji kollha fi hdan BHC, hekk kif l-ishma ta` Marsoft f`BHC jghoddu bhala assi tal-istess Marsoft li bihom ghandhom ihallsu d-dejn ezekuttiv li ghandhom ma` Vroon. Illi, barra minn dan, BHC ghandha dejn tant sostanzjali fir-rigward ta` Vroon kif spjegat, illi l-assi kollha ta` BHC frankament qatt mhu ser ikunu bizzejjed biex ihallsu lura dan id-dejn;

Illi s-socjeta` BHC thaddan 15,737,500 cumulative redeemable preference shares, fis-socjeta` AC1 u li ghandhom rahan ta` sigurtajiet (pledge) favur l-istess Vroon skont il-ftehim bejn l-istess BHC, AC1 u Vroon, iffirmat il-27 ta` Jannar 2016 (kopja hawnhekk annessa u mmarkata `Dok. VC 6`) u dan kif registrat mal-Malta Financial Services Authority (kopji tad-dokumenti hawnhekk annessi u mmarkati "Dok. VC 7" u "Dok. VC 8"), u dan

kif diga qieghed jigi enfurzat mill-istess Vroon anki waqt dawn il-proceduri prezenti (kopja tal-att gudizzjarju mahrug skont l-Artiklu 122 tal- Att Dwar il-Kumpanniji (Kap. 186 tal-Ligi Maltija) hawnhekk anness u mmarkat `Dok. VC 9`);

Illi fil-kuntest ta` dan kollu, r-rikorrenti Arlie Sterling u Marsoft ilhom xhur, anzi snin u cioe` minn ftit xhur wara l-kostituzzjoni tas-socjeta` BHC, ma jaghmlu xejn iktar hlief jfixklu l-operat ta` BHC, AC1 u l-istruttura shiha biex fl-ahhar mill-ahhar din waslet fis-sitwazzjoni konflittwali odjerna;

Illi l-esponenti Herman Marks, min-naha tieghu, bhala direttur ta` BHC u ta` AC1, prova jaghmel mill-ahjar li jista`, ghal-gid tal-istess socjetajiet, biex jkompli l-operat tas-socjetajiet BHC u AC1 u s-sussidjarji taghha, anki billi ha certu decizjonijiet bhala direttur favur l-interessi ta` BHC u/jew AC1;

Illi, b`kuntrast, Marsoft u Arlie Sterling ma ghamlu xejn hlief li xeklu kwalunkwe decizjoni li qatt pruvat tigi mehuda fis-socjetajiet BHC u AC1, u Herman Marks stess, u kwazi jizguraw il-falliment tas-socjetajiet msemmija;

Illi, fil-fatt minn Dicembru tas-sena l-ohra u cioe` 2016, kien hemm tentattivi min-naha ta` Vroon bhala azzjonista f`BHC u Bremer Landesbank Kreditanstalt Oldenburg – Girozentrale, bank esteru registrat u licenzjat gewwa l-Germanja ta` Domshof 26, 28105, Bremen, Germanja (`BLB`) li huwa wiehed mill-akbar krediturі ta` AC1 biex jigi miftiehem ftehim ta` likwidita` addizzjonali fi hdan AC1 biex b`hekk tkun tista` tkompli topera din is-socjeta` u l-vapuri fi hdan is-sussidjarji taghha. Kwalunkwe tentattiv f`dan is-sens kien dejjem gie mwaqqaf minn Arlie Sterling u/jew Marsoft, anki jekk l-istess BLB kien dispost ghal dan il-ftehim, u dan biss ghax m`ghandhom l-ebda interess li jaraw li l-istruttura tkompli topera u tissalva, u m`ghandhom xejn x`jitilfu;

Illi dak kollu li ghamel Herman Marks kien biex jissalvagwardja l-istruttura ta` BHC u s-sussidjari taghha u jonora l-obbligazzjonijiet tas-socjetajiet lejn il-krediturі, principarjament BLB, u ghalhekk ma jistax jintqal

li dak kollu li ghamel Herman Marks sehh bil-qerq u/jew bi hsara tal-jeddijiet ta` BHC u/jew Marsoft.

Ghaldaqstant, u ghar-ragunijiet kollha premessi, l-esponenti jissottometti bir-rispett illi :

a. Din l-Onorabbli Qorti m`ghandhiex il-gurisdizzjoni necessarja biex tisma` il-mertu ta` dan ir-rikors prezentat hekk kif huwa car illi l-istess mertu huwa regolat minn gurisdizzjoni tal-arbitragg norvegiz;

b. Minghajr pregudizzju ghas-suespost, BHC ma setghetx tissottometti dan ir-rikors kif ghamlet prezentement ghaliex BHC ghandha rapprezentanza legali indipendenti li diga` tista` tissalvagwardja d-drittijiet tas-socjeta` u d-digriet ta` din l-Onorabbli Qorti tal- 21 ta` Gunju 2017 fl-atti tar-rikors numru 304/2016/1 JZM fl-ismijiet `Abela Fiorentino noe vs Vroon Containers B.V. et` ma jaghtix il-lok illi Arlie Sterling jiehu r-riedni b`idejh fi kwalunkwe azzjoni anki fejn m`hemmx kunflitt ta` interess min-naha ta` Vroon u/jew Herman Marks u jmur kontra l-istatut tal-istess socjeta` BHC;

c. Minghajr pregudizzju ghas-suespost, jopponi ghat-talbiet kollha tar-rikorrenti li ghandhom jigu michuda.

Salv eccezzjonijiet ulterjuri u b`riserva ta` kull azzjoni ulterjuri li ghandu l-esponenti fil-ligi, bl-ispejjez kontra r-rikorrenti.

Rat ir-risposta li pprezenta l-konvenut Registratur tal-Kumpanniji fis-17 ta` Awwissu 2017 li taqra hekk :-

Illi in kwantu ghall-meriti fattwali tal-proceduri odjerni, partikolarment in kwantu ghall-fatt jekk il-kumpanija Balticmax Holding Company Ltd. (C 70765) timmeritax illi jigi applikat r-rimedju mitlub minnha fir-rikors promotur, l-esponent Registratur tal-Kumpanniji jirrimetti ruhu ghad-decizjoni ta` din l-Onorabbli Qorti peress li hu mhuwiex edott ghal-kollox mill-fatti kollha kif dikjarati mill-atturi.

Illi l-konvenut ihoss li l-uniku interess tieghu f`din il-kawza ghandu jikkoncerna dak li ghandu x`jaqsam ma` l-operat tieghu bhala Registratur tal-Kumpanniji, kif mitlub mill-Att, partikolarment fejn jikkoncerna r-registrazzjoni ta` dokumenti li jkunu mehtiega li jigu konsenjati jew notifikati lilu ghar-registrazzjoni skond xi wahda mid-dispozizzjonijiet tal-Att dwar il-kumpanniji.

Illi bhal ma gie issollevat mir-rikorrent stess fir-rikors promotur tieghu, ir-Registratur umilment ihoss illi forsi ma kellux ghalfejn ikun wiehed mill-legittimi kontraditturi fil-proceduri odjerni. Dan meta wiehed jikkunsidra l-fatt illi jidher bic-car illi l-bazi ta` dan il-kaz huwa disgwid intern u personali bejn il-partijiet komponenti tal-kumpanija.

Illi ghaldaqstant l-esponent jixtieq jissoleva illi lest illi joqghod ghal kull decizjoni jew ordni illi dina l-Onorabbli Qorti jidrilha xierqa u opportuni illi taghti cirkostanzi partikolari ta` dan il-kaz.

Illi l-konvenut m`ghandux jinzamm responsabbli ghall-ebda spejjez gudizzjarji konnessi ma` dan il-kaz.

Semghet ix-xhieda u rat il-provi l-ohra li tressqu fil-kors tal-kawza.

Rat illi l-kawza thalliet ghas-sentenza ghal-lum.

Rat in-noti ta` osservazzjonijiet li pprezentaw il-partijiet.

Semghet is-sottomissjonijiet tal-ahhar bil-fomm li ghamlu d-difensuri tal-partijiet fl-udejnza tat-12 ta` Lulju 2018.

Rat l-atti l-ohra tal-kawza.

II. Fatti

Balticmax Holding Company Limited **(BHC)** hija kumpannija li kienet registrata Malta fis-26 ta` Mejju 2015 minn Pal Leo Eckbo **(Eckbo)**. L-ghan principali taghha huwa dak li tixtri u tikri bastimenti tramite kumpanniji sussidjarji. Eckbo kien ukoll l-uniku azzjonista tal-kumpannija Marsoft International A/S (**Marsoft**), li hija n-Norvegja. Marsoft toffri servizzi ta` konsulenza finanzjarja fil-qasam marittimu b`attenzjoni partikolari ghal ristrutturar ta` flottot ta` bastimenti li jkunu ghaddejjin minn diffikultajiet finanzjarji. Marsoft titmexxa minn Arlie Sterling **(Sterling)**. Vroon Containers B.V. (**Vroon**) hija kumpannija registrata l-Olanda u topera l-bastimenti. Titmexxa minn Herman Marks **(Marks).** Balticmax Acquisition Corporation One Ltd **(AC1)** hija kumpannija registrata Malta u hija socjeta` sussidjarja ta` BHC. AC1 ghandha diversi sussidjarji li huma sidien ta` bastimenti. BHC hija l-unika azzjonista ta` AC1.

Kien Gunju 2015 meta AC1 ghamlet ftehim ta` self mal-bank Germaniz, Bremer Landesbank (**BLB**). Skont il-ftehim, AC1 setghet titlob self fl-ammont massimu ta` US$ 444 miljun sabiex tiffinanzja l-akkwist ta` 32 –il bastiment u tassikura likwidita` sabiex tmexxi n-negozju taghha. Dan il-ftehim kien jitlob impenn min-naha ta` min kien qed jissellef li jkun *incease in capital* apparti pattijiet ohra. Marsoft hejjiet Debt Programme. Vroon accettat li tikkopera ma` Marsoft fir-rigward tal-akkwist, tmexxija u thaddim ta` flotta ta` 32 bastiment tal-containers fejn BHC kienet *the beneficial owner*. Fl-14 ta` Awissu 2015, Marsoft u Vroon akkwistaw fi kwoti ta` 50% kull wahda ta` BHC. Marsoft gabet maghha l-progett waqt illi Vroon pprovdiet lil BHC b`*Loan Notes* u cioe b`*Senior Loan* fl-ammont ta` US$ 10.5 miljun u *Bridge Financing* fl-ammont ta` US$ 10.5 miljun, bil-*Bridge Loan* li kellu jigi rifuz ghas-saldu sal-ahhar ta` Dicembru tal-2015 (ara : Sec 2.2 tal-BHC Cooperation Agreement). Dan is-self kellu jintuza esklussivament minn AC1 ghall-akkwist tal-vapuri. Kollox kien rifless fis-*Senior Bridge Loan Note* u s-*Senior Loan Note* tas-6 ta` Ottubru 2015. Fis-17 ta` Awissu 2015, il-membri ta` BHC iffirmaw il-Memorandum and Articles of Association **(M&A)**.

L-Art 60 tal-M&A intitolat "*Reserved Matters*" li jaqra hekk :

"*Any of the following actions shall require the endorsement of at least two-thirds (2/3) majority of the members of the Board of Directors:*

…

ii. Any increase or reduction in the authorized or issued share capital of the Company;

…

vii. Any amendment of the Articles of Association of the Company;

…

For the avoidance of doubt, notwithstanding the fact that the Board of Directors has approved any of the actions mentioned in Clause 60 (i), (ii), (vii), (viii), (xi), or (xii) any such decision by the Board of Directors must be approved by the General Meeting of the Company."

Fis-6 ta` Ottubru 2015, sar il-BHC Co-operation Agreement **(Co-operation Agreement**) biex jirregola r-relazzjoni ta` bejn Marsoft, Vroon u BHC dwar it-tmexxija ta` BHC, ta` AC1 u tas-sussidjarji.

Ghal dak illi ghandu x`jaqsam mal-amministrazzjoni, b`referenza partikolari ghal x`wassal ghall-kawza tal-lum, il-klawsola 4 tal-Co-operation Agreement taqra:

…

*The Parties agree that the overall strategic direction of the Business of BHC and its subsidiaries shall be determined by the Parties **unanimously** in a general meeting of the shareholders. Such strategic matters shall include the following :*

…

2. Any increase or reduction in the authorised or issued share capital of the Company;

…

9. Any alteration to or amendment of the by-laws of the Company or AC1, except as foreseen in clause 5.3;

…

11. The acquisition (by subscription or transfer) or the disposal of or granting of any option, charge or other encumbrance over shares or securities of any company.

Kien patwit ukoll illi BHC kellha thallas lura lill-Vroon l-ammont misluf. Marsoft obbligat ruhha illi jekk BHC ma thallasx skont dak patwit fil-*Loan Notes* u/jew dak patwit fil-Co-operation Agreement, allura Marsoft kellha taghmel tajjeb hi. Clause 2.4 tal-Co-operation Agreement tghid :-

"*1. Marsoft and/or nomine will subscribe to and pay on 31 December 2015 to up to USD 2,100,000 of the Profit Participation Loan Notes. These funds to be used solely to reduce Vroon`s outstanding under the Vroon Bridge Financing.*

2. Marsoft will transfer no later than 6 January 2016 shares in BHC to Vroon in compensation. If there is a shortfall relative to the USD 0 target then Marsoft and Vroon will split the difference of the shortfall and Marsoft will transfer a percentage of shares in BHC equal to its portion of the shortfall, divided by USD 10,500,000 and multiplied by 10% of the Shares."

Skont Clause 5.1 tal-Co-operation Agreement, il-Bord tad-Diretturi :

> "*… shall at all times consist of up to 3 board members or such other number to be determined with the unanimous consent of the Parties. Vroon and Marsoft are each entitled to nominate and have elected one member to the board. The third member of the Board will be nominated by both Parties unanimously.*

Except as above provided, no person shall be elected as a Director of the Company to fill any vacancy among the Directors and neither the Parties not the continuing Directors shall have power to fill any such vacancy."

Eckbo rrizenja minn direttur ta` BHC, u kienu mahtura Sterling u Marks bhala diretturi, tal-ewwel appuntat minn Marsoft u l-iehor minn Vroon. Bhala tielet direttur, inhatar Dr Stanley Portelli fit-18 ta` Awissu 2015. Dr Portelli rrizenja minn direttur b`effett mit-28 ta` Dicembru 2015. U ma kienx sostitwit mill-azzjonisti, lanqas b`talba skont l-Art 136(7) tal-Kap 386.

Gara li n-negozju ma marx kif kien ippjanat tant illi BHC sabet ruhha f`diffikultajiet biex tkattar in-negozju u d-dhul taghha. Sal-31 ta` Dicembru 2015, id-data sa meta kellha tkun rifuza l-*Bridge Loan,* BHC kien ghad jonqosha trodd madwar US$ 5.2 miljun. Xejn ma thallas mill-ammont ta` US$ 10.5 miljun li kienu mislufa fis-*Senior Loan Note.* Ghalhekk Marsoft kellha taderixxi ma` dak li kien pattwit fis-sens illi kellha tislef l-ammont ta` US$ 2.1 miljun lil BHC sabiex din tkun parti mill-pendenza tal-*Bridge Loan*. Inoltre skont Clause 2 tal-Co-operation Agreement, Marsoft kellha tittrasferixxi favur Vroon 2.49% ta` l-ishma li kellha fil-BHC. B`dan it-trasferiment ta` ishma, Vroon kien ser ikollha total ta` 52.49%. Marsoft baqghet inadempjenti bil-konsegwenza li stagna n-negozju ta` BHC. B`zewg diretturi biss fil-bord, u b`sitwazzjoni ta` konflitt car bejn l-azzjonisti, ma setghet tittiehed ebda decizjoni. Dan l-istat ta` fatt wassal biex sar ftehim fis-27 ta` Jannar 2016 bejn BHC, Vroon u AC1 dwar ir-rahan favur Vroon ta` 15,737,500 *cumulative redeemable preference shares* ta` BHC. Dan il-ftehim kien iffirmat minn Sterling u Marks u kien debitament registrat fir-Registru tal-Kumpanniji ta` Malta. Id-*deadlock* bejn l-azzjonisti wassal ghall-presentata ta` proceduri arbitrali fin-Norvegja u kawzi Malta.

Ghar-rigward tal-kawzi li saru Malta, jirrizulta li fil-kors tal-kawza fl-ismijiet *Av Jonathan Abela Fiorentino noe vs Vroon Containers B.V. et. (Rik. Nru. 304/2016 JZM)* li kienet deciza minn din il-Qorti kif presjeduta fit-30 ta` Ottubru 2018 inghatat ordni *interim* fit-2 ta` Settembru 2016 bil-hatra ta` l-Av. Dr. Richard Galea Debono bhala t-tielet direttur. Tliet xhur Dr Galea Debono kellu jirrizenja minn direttur minhabba l-ambjent konflittwali qawwi

li kien hemm bejn Sterling u Marks. Dak li huwa rilevanti minn dik il-kawza ghall-fini tal-kawza odjerna huwa l-fatt illi wara dik ir-rizenja, BHC rega` giet b`zewg diretturi li ma jaqblu dwar xejn. Hemm ukoll pendenti quddiem din il-Qorti kif presjeduta kawza ghax-xoljiment u stralc ta` BHC promossa minn Vroon fl-ismijiet *Avv. Jean-Pie Gauci-Maistre noe vs Balticmax Holding Company Limited (Rik. Nru 1150/17 JZM).*

In kwantu ghall-proceduri legali li saru n-Norvegja, hemm ordni datat 7 ta` Jannar 2016 ghall-iffrizar ta` assi ta` Marsoft ghall-ammont ta` US$ 2.1 miljun Dollaru, oltre l-hlas tal-ispejjez legali. Fil-21 ta` Frar 2017, Arbitru gewwa Oslo ta decizjoni fejn laqa` talba ta` Vroon ghall-kundanna ta` Marsoft ghall-hlas ta` US$ 2.1 miljun. Dan il-hlas kellu jsir fi zmien 14-il jum mid-data tad-decizjoni. Kellhom jithallsu wkoll l-interessi sad-data tal-pagament effettiv, kif ukoll kellu jsir it-trasferiment ta` 2.49% tal-ishma ta` Marsoft go BHC fi zmien 14-il gurnata mid-data tad-decizjoni. Marsoft kienet ordnata wkoll sabiex thallas l-ispejjez legali kollha. Minkejja d-decizjoni, Marsoft baqghet inadempjenti. Kien hemm decizjoni ohra tal-Arbitru gewwa Oslo li nghatat fil-15 ta` Mejju 2017 fejn Vroon kienet kanonizzata bhala kreditrici ta` BHC fl-ammont ta` US$ 15,225,000, bl-interessi sad-data tal-hlas effettiv kif ukoll l-ispejjez legali. Il-hlas kellu jsir fi zmien hmistax 15-il gurnata mid-data tad-decizjoni. Billi d-decizjoni kienet giet registrata mac-Centru Malti tal-Arbitragg, id-decizjoni llum tikkostitwixxi titolu ezekuttiv gewwa Malta.

Ikompli jinghad illi b`ittra ufficjali tat-23 ta` Mejju 2017, Vroon avzat formalment lil BCH u lil AC1 illi ladarba BCH baqghet inadempjenti fl-obbligi taghha skont il-*Pledge Agreement* tas-27 ta` Jannar 2016, u billi baqghet ma hallsitx lil Vroon l-ammonti dovuti, Vroon kienet ser tghaddi sabiex tenforza d-drittijiet taghha skont il-*Pledge Agreement*.

III. <u>Il-grajjiet ta` qabel il-kawza tal-lum</u>

Din hija rassenja tal-grajjiet f`ordni kronologiku li wasslu ghall-kawza tal-lum :-

- **21 ta` Marzu 2017** – ittra li baghat Sterling lill-Bord tad-Diretturi ta` AC1 fejn esprima t-thassib tieghu illi l-kumpannija kienet fi stat illi ma tistax thallas id-djun taghha jew inkella li kienet tinsab fi stat imminenti fejn ma tkunx tista` aktar thallas id-djun taghha. Huwa ghalhekk stieden il-Bord tad-Diretturi sabiex jiddiskutu s-sitwazzjoni finanzjarja tal-kumpannija fil-laqgha tal-Bord ta` wara, u wissa illi jekk il-Bord ma kienx ser jiehu l-kwistjoni bis-serjeta` huwa kien ser jaghmel dak kollu fil-poter tieghu sabiex ihares l-interessi tal-kredituri, inkluz ukoll illi jibda proceduri ghal xoljiment u stralc. (fol. 912)

- **3 ta` April 2017** – e-mail ta` Silke Elfert ghal BLB mibghuta lil Sterling u Marks fejn tressqu diversi proposti sabiex ikun hemm aktar likwidita` fl-AC1. (fol. 453)

- **4 ta` April 2017** – e-mail ta` Christopher Savoye, rapprezentat legali u impjegat ta` Vroon, mibghuta lil Sterling u Marks fejn b`referenza ghall-e-mail ta` Silke Elfert (*supra*) ressaq il-proposti ta` Vroon. Il-proposti kienu dawn :-

    1. *BHC to sell and transfer all their ordinary shares in AC1 at par (2000 at USD 1,-) to VCBV and VCBV to provide a loan to AC1 amounting to USD 2mio to AC1 (on terms mentioned in Silke`s message); or*

    2. *AC1 to issue 50,000 new ordinary shares of USD 1 to VCBV against payment of USD 50K by VCBV; and VCBV to provide a loan to AC1 amounting to USD 1.95mio (on terms mentioned in Silke`s message); or*

    3. *BHC to sell and transfer all their ordinary shares in AC1 at par (2000 at USD 1,-) to VCBV; and AC1 to issue 50,000 new ordinary shares of USD 1 to VCBV against payment of USD 50K by VCBV; and VCBV to provide a loan to AC1 amounting to USD 1.95mio (on terms mentioned in Silke`s message)* (fol. 455)

- **6 ta` April 2017** : saret laqgha tal-Bord tad-Diretturi ta` AC1 fejn tressqu proposti bil-ghan illi tinstab soluzzjoni ghas-sitwazzjoni finanzjarja ta` BHC. Kienet diskussa l-proposta ta` Sterling kif dedotta fl-ittra tieghu tal-21 ta` Marzu 2017. Marks ma accettax il-proposta. Il-Bord irrigetta l-proposta ta` Sterling. Imbaghad Marks tkellem dwar proposti ta` finanzjament ulterjuri, precizament dik ta` Silke Elfert (*supra*), u l-proposti ta` Vroon skont l-email ta` Christophe Savoye (*supra*). Sterling rrigetta l-proposta ta` Marks. Billi ma kienx hemm qbil bejn id-diretturi, il-laqgha ghalqet bla ma ttiehdet ebda decizjoni dwar jekk il-proposta ta` Marks kellhiex tkun skartata jew inkella kellhiex tigi esplorata ulterjorment. (fol. 449 – 452)

- **10 ta` April 2017** – kienet prezentata fir-Registru tal-Kumpanniji rizoluzzjoni datata 7 ta` April 2017 iffirmata minn Marks ghan-nom ta` BHC bhala azzjonista ta` AC1 ghall-hrug ta` 50,000–il sehem ordinarju gdid f`AC1 favur Vroon. L-istess rizoluzzjoni approvat is-sostituzzjoni tal-M&A ta` AC1 b`iehor gdid. L-M&A il-gdid kien iffirmat minn Marks u minn Christopher Savoye. Fis-7 ta` April 2017 Marks hareg bil-firma tieghu prokura favur Christopher Savoye sabiex jagixxi bhala mandatarju specjali ta` Vroon.

- **10 ta` April 2017** – kienet prezentata fir-Registru tal-Kumpanniji Form T, li ggib il-firma ta` Marks, li biha nghata avviz dwar trasferiment ta` 2000 –il sehem b`valur ta` US$1 kull wiehed li BHC kellha fl-AC1 favur Vroon b`effett mis-7 ta` April 2017. (fol. 45)

- **10 ta` April 2017** – kienet prezentata fir-Registru tal-Kumpanniji Form H li biha nghata avviz dwar il-hrug ta` 50,000 –il sehem ordinarju gdid fl-AC1 favur Vroon b`effett mis-7 ta` April 2017. (fol. 68, 69).

- **10 ta` April 2017** – kienet prezentata wkoll fir-Registru tal-Kumpanniji Form K li biha nghata avviz tal-hatra ta` Stefan Quist, impjegat ta` Vroon, bhala direttur u Segretarju ta` AC1. B`hekk AC1 issa kellha tlett diretturi : Sterling, Marks u Quist. Gara li r-

rapprezentanti ta` Vroon kisbu l-maggoranza fil-Bord tad-Diretturi. Din il-hatra saret b`effett mis-7 ta` April 2017. (fol. 70)

- **10 ta` April 2017** – kienet ukoll prezentata Form I (1) li biha r-Registratur tal-Kumpanniji kien avzat illi AC1 ma baqghetx aktar *single member company*. (fol. 71)

- **17 ta` April 2017** – e-mail minn Camilleri Preziosi fejn ghaddewa credit advices lil Sterling u Marks dwar l-akkwist ta` 2000 ordinary shares go BHC u 50,000 ordinary shares go AC1 minn Vroon. (fol. 460)

- **17 ta` April 2017** – e-mail lill-Av. Dr Henri Mizzi ghal Camilleri Preziosi fejn kien mgharraf minn Sterling illi la l-Bord ta` BHC u lanqas dak ta` AC1 ma kien awtorizza ebda bejgh, xiri jew hrug ta` ishma u talab ghalhekk illi t-trasferiment jitwaqqaf. (fol. 925)

- **29 ta` April 2017** – ittra tal-Av. Dr. Richard Camilleri ghal Sterling lil Marks fejn Marks kien intimat biex jieqaf u jiddezisti mill-agir arbitrarju, abbuziv u llegali tieghu. Kien infurmat illi Sterling kien intavola procedure legali. (fol. 927)

- **1 ta` Mejju 2017** – e-mail minn Marks lill-Av. Dr. Jonathan Abela Fiorentino fejn Marks irribatta l-kontenut tal-ittra.

- **9 ta` Mejju 2017** – e-mail ta` Marks lil Sterling u lil Anke Strubing, rapprezentant ta` BLB, fejn spjega illi:

> "*Following the last shareholders meeting of AC1, I decided it was (and is) in the interest of AC1 and its key stakeholders, to adopt various resolutions and actions that have resulted in BHC selling its ordinary shares and AC1 increasing its ordinary issued share capital. Also another director has been appointed to the Board of AC1. These actions have been executed*

and formalised in Malta. In addition it is expected that Vroon Containers will exercise its pledge rights on about 15 million cum pref shares in AC1." (fol. 465)

- **10 ta` Mejju 2017** – bi twegiba ghall-e-mail ta` Sterling tal-10 ta` Mejju 2017, fejn talab minghand l-Av Dr Henri Mizzi spjegazzjoni tal-email ta` Marks tad-9 ta` Mejju 2017, Av Dr Henri Mizzi wiegeb illi hu ma kienx involut f`dak illi tkellem dwaru Marks. (fol. 464 *et seq.*)

IV. <u>Analizi</u>

Mix-xiehda ta` Sterling u Marks jirrizulta kjarament id-disgwid serju ta` bejniethom li skonfina fl-animosita`. Dan l-istat ta` fatt gab mieghu sitwazzjoni fejn ma setghux jittiehdu decizjonijiet fil-kumpannija ghaliex dak li jipproponi wiehed ikun oppost mill-iehor. Kien hemm tentattiv li jinhatar it-tielet direttur izda it-*tug of war* ta` bejn Sterling u Marks ghamlet mill-hatra nsuccess ghaliex kull wiehed minflok jara l-interessi ta` BHC beda jara l-interess tal-azzjonisti li minnhom kienu mahtura fil-bord.

Sterling u Marks jixhtu akkuzi kontra xulxin, kif huwa bil-wisq evidenti mix-xiehda taghhom. Sterling jallega illi Marks ha bosta decizjonijiet u inizjattivi unilaterlament bl-iskop illi ghal Vroon jiehu kontroll decisiv ta` BHC u ta` AC1 u cahhad lil Marsoft milli tiehu beneficcji minn BHC jew AC1. Il-Qorti mhijiex sejra tidhol fil-mertu ta` l-allegazzjonijiet kollha li ghamel Sterling billi whud imorru oltre l-merdtu ta` din il-kawza u ghalhekk sejra tillimita ruhha boss ghal dawn rilevanti ghall-provediment odjern.

Dwar il-qaghda finanzjarja difficli ta` BHC u ta` AC1, Sterling fisser illi huwa ma kellu l-ebda oggezzjoni ghall-fatt illi Vroon taghmel aktar kapital disponibbli. L-oggezzjoni tieghu ghall-proposta ta` Marks kienet ibbazata biss fuq il-fatt illi kif formolata kienet intiza sabiex taghti vantagg qawwi lil Vroon a skapitu ta` Marsoft. Sterling esprima ruhu wkoll fis-sens illi rinfaccjat b`din is-sitwazzjoni il-bank ma kellu ebda obbligu illi jibqa`

jaghmel disponibbli aktar kapital. Min-naha tieghu Marks oggezzjona ghall-proposta ta` Sterling illi jigu nkarikati esperti indipendenti sabiex jirrapportaw lura dwar il-qaghda ta` AC1 u jressqu pjanijiet dwar l-ahjar alternattiva ghal AC1.

Is-sitwazzjoni pprecipitat hesrem wara l-laqgha tal-Bord tas--6 ta` April 2017 meta minghajr l-approvazzjoni tal-Bord u minghajr pre-avviz ta` xejn, Marks awtorizza l-bejgh tal-ishma u t-tibdil l-iehor li gie fis-sehh fis-7 ta` April 2017. Malli Sterling sar jaf b`dan, huwa talab spjegazzjoni. Marks ikkonferma kull ma kien ghamel. Sterling hass illi ma kienx fadal triq ohra ghajr illi jintavola d-debiti proceduri sabiex jittutela l-interessi ta` Marsoft. Skont Sterling, l-atti ta` Marks mertu tal-kawza odjerna twettqu ad insaputa tieghu jew tal-Bord. Ebda laqgha ma approvat dawk l-atti u kien biss b`kumbinazzjoni illi Sterling intebah x`kien ghaddej. In segwitu Sterling talab u ottjena l-hrug ta` mandat ta` inibizzjoni li ppreceda l-kawza.

Sterling fisser illi l-atti in kwistjoni wasslu ghas-sitwazzjoni fejn Vroon kisbet il-kontroll shih (i.e. 100%) ta` AC1 waqt illi Marsoft m`ghandha ebda kontroll hlief fuq in-*non-voting preference shares*. Sterling ighid illi l-valur reali tal-flotta proprjeta` ta` AC1 imur oltre l-*book value*. Tenna wkoll illi l-valur tal-flotta zdied u allura mhux ser ikun hemm diffikultajiet biex id-dejn jigi saldat.

Min-naha tieghu, Marks jishaq illi dak kollu li sar min-naha tieghu kien fl-ahjar interess tal-kumpannija. Jixhet il-htija fuq Sterling billi akkuzah illi xekkel l-operazzjonijiet tal-kumpannija. Meta xehdu kemm Marks kif ukoll Stefan Quist fissru illi effettivament id-dejn li BHC ghandha ma` Vroon huwa ferm akbar mill-valur tal-ishma li BHC ghandha fl-AC1.

Fid-deposizzjoni tieghu, Marks jikkonferma illi kien hu illi ttrasferixxa favur Vroon l-ishma kollha li BHC kellha f`AC1. Jaccetta illi qabel sar it-trasferiment, la talab l-awtorizzazzjoni tal-Bord ta` BHC u lanqas dik tal-azzjonisti. Jaccetta li kien hu li appunta lil Stefan Quist bhala t-tielet direttur. Ir-ragunijiet tieghu kienu dawn :-

> "*In the end of February we won the arbitration gainst Marsoft and Marsoft has a number of obligations,*

> *including transferring BHC`s shares to Vroon. On the 7th April we are having an AC1 shareholders` meeting. The AC1 shareholders meeting, in the shareholders` meeting of AC1 there were a number of items on the agenda, including a resolution or proposal by Arlie Sterling to file for liquidation of AC1, 7th April. At that pont in time there were for two months written offers from BLB and Vroon Containers to rescue, to continue the operation of AC1 for an interim solution by injecting 4,000,000 Dollars of fresh money into AC1 and to continue the operations. Also, the arbitration between Vroon Containers and BHC had already taken place, although there was not a formal arbitration award at this date. Arlie filed for dissolution and he denied in that meeting all the proposals to accept the proposals of Vroon Containers and of the bank to continue the operations of AC1, and then there was not much alternatives in my opinion to secure the best interest of AC1 than selling the ordinary shares of AC1, exercising the share pledge by Vroon Contianers and then trying to rescue or buy some time for AC1 to continue, and that`s what I did. And also I wrote to Arlie following that meeting that I would take certain measures to protect the interst of the stakeholders in AC1, and this is the consequence of that.*" (fol. 1495)

Jirrizulta illi Vroon hallset is-somma ta` US$ 2000 ghall-valur nominali tal-ishma. L-ishma trasferiti favur Vroon kienu dawk biss li kellhom *voting rights.* Il-konsegwenza ta` l-akkwisti kien :-

> "*That the voting control of the shares would come with Vroon Containers and be exercised with a share pledge, also a direct shareholder of 15,200,000 or 15,500,000. I don`t recall exactly, but over 15,000,000 Dollars of shares.*" (fol. 1496)

Marks jikkonferma b`dak it-trasferimenta Marsoft tilfet kwalsiasi tip ta` kontroll illi seta` kellha fuq AC1.

Jidher car illi r-raguni li skattat id-decizjoni ta` Marks kien ir-rifjut ta` Sterling li jaccetta l-proposti ta` BLB u Vroon dwar finanzjament gdid, kif ukoll il-proceduri beda Sterling ghax-xoljiment u stralc. Marks kien ukoll motivat mill-fatt illi l-esitu tal-arbitragg ma kienx gie rispettat minn Marsoft u minn BHC. Marks ighid illi huwa ghazel illi "*I took the rope into my hands*" u "*… I took control of the situation*" (fol. 1499)

Irrizulta wkoll illi nonostante l-fatt illi sar it-trasferiment tal-ishma, Marks ma jiftakarx jekk iffirmax ukoll l-*instrument of transfer*. Inoltre, waqt illi t-trasferiment tal-ishma sehh b`effett mis-7 ta` April 2017, effettivament it-trasferiment sehh qabel ma Vroon hallset il-valur tal-ishma. Marks insista illi l-flus kienu trasferiti fis-7 ta` April 2017 pero` jista` jaghti l-kaz illi l-pagament dam ftit granet sakemm ghadda fl-10 ta` April 2017.

Mistoqsi jekk kienx ghadda ghadda d-dokumenti jew kienx ta avviz dwar l-ishma in kwistjoni, Marks wiegeb illi ma jiftakarx u li ghalkemm kien hu li ffirma d-dokumenti, ma kienx hu li ha hsieb jghaddi l-formoli relattivi. Dwar il-Form T, iddikjara li l-ishma gew trasferiti b`effett mis-7 ta` April 2017 u li t-trasferiment kien debitament registrat fis-7 ta` April 2017. Dr Henri Mizzi, *corporate advisor* ta` BHC, stqarr illi d-dokumenti ma waslux ghandu u hu ma kienx konsultat dwar li sar. Lanqas ma jirrizulta li l-atti qatt gew entrati fir-registri ta` BHC.

V. <u>L-ewwel (1) eccezzjoni preliminari</u>

Il-konvenuti qeghdin jilqghu **<u>in linea preliminari</u>** ghall-azzjoni attrici bl-eccezzjoni tal-gurisdizzjoni abbazi tal-BHC Co-operation Agreement. Il-konvenuti jikkontendu li l-ftehim jissupera kull disposizzjoni ohra. Jirreferu ghall-Artikoli 19 u 20 tal-ftehim :-

> *19.* ***<u>Governing Law</u>***
>
> *This agreement and all matters related to this Agreement shall be governed by and construed in accordance with Norwegian law without giving effect to any choice or conflict of law*

provision or rule (whether of Norway or any other jurisdiction) that would cause the application of the laws of any other jurisdiction.

20. ***Dispute Resolution***

Any dispute that may arise from this Agreement shall be settled by arbitration in Oslo, in English, and in accordance with the Norwegian arbitration act of 14 May 2004 no. 25. The Parties undertake and agree that all arbitral proceedings will be kept striclty confidential.

Il-konvenuti jghidu li din il-qorti m`ghandhiex gurisdizzjoni li tittratta u tiddeciedi l-kawza.

L-atturi jikkontestaw il-fondatezza tal-eccezzjoni billi jghidu illi l-Artikolu 20 tal-BHC Co-operation Agreement ma japplikax ghaliex il-qrati Maltin ghandhom gurisdizzjoni li jiddeciedu din il-vertenza a bazi tad-dispost tal-Artikolu 24(2) u (3), u l-Artikolu 25 (4) tar-Regolament Nru 1215/2012 tal-Parlament Ewropew u tal-Kunsill tat-12 ta` Dicembru 2012 dwar il-gurisdizzjoni u r-rikonoxximent u l-ezekuzzjoni ta` sentenzi fi kwistjonijiet civili u kummercjali (`**ir-Regolament**`) maghruf ahjar bhala l-`**Brussels recast**`. L-atturi jsostni l-argument taghhom illi din il-qorti ghandha gurisdizzjoni abbazi tal-Artikolu 22(2) u (3) u l-Artikolu 23(5) tal-Konvenzjoni dwar il-gurisdizzjoni u r-rikonoxximent u l-ezekuzzjoni ta` sentenzi fi kwistjonijiet civili u kummercjali (OJ L 331/3 tal-21 ta` Dicembru 2017), maghrufa ahjar bhala l-**Konvenzjoni ta` Lugano** (`**il-Konvenzjoni**`).

1. Il-gurisdizzjoni ta` dawn il-Qrati

Jirrizulta li l-konsiderazzjoni ta` din l-eccezzjoni ma kenitx trattata b`mod distint u distakkat mill-eccezzjonijiet fil-mertu.

Ma kienx hemm insistenza da parti tal-konvenuti li l-Qorti tittratta l-eccezzjoni tal-gurisdizzjoni *in limine litis* qabel tisma` l-provi dwar il-mertu.

Aktar minn hekk, il-konvenuti hallew lill-atturi jressqu l-provi taghhom dwar il-mertu liberament imbaghad ressqu l-provi taghhom dwar il-mertu.

Li kieku l-eccezzjoni kienet trattata qabel il-mertu, u li kieku kienet deciza favur il-konvenuti, il-kawza kienet tieqaf hemm.

Mill-mod kif svolga l-iter tal-kawza, hija l-fehma konsiderata ta` din il-Qorti illi bil-mod kif l-konvenuti ttrattaw l-eccezzjoni flimkien mal-mertu, huma **accettaw** il-gurisdizzjoni ta` din il-Qorti.

Dan huwa l-ispirtu tal-**Artikolu 26(1) tar-Regolament Nru 1215/2012 tal-Parlament Ewropew u tal-Kunsill tat-12 ta` Dicembru 2012 dwar il-gurisdizzjoni u r-rikonoxximent u l-ezekuzzjoni ta` sentenzi fi kwistjonijiet civili u kummercjali** illi jaqra :

> *Apparti mill-gurisdizzjoni li tohrog minn dispozizzjonijiet ohra ta` dan ir-Regolament, qorti ta` Stat Membru fejn il-konvenut ikun deher ghandha jkollha l-gurisdizzjoni. Din ir-regola m`ghandhiex tapplika meta d-dehra kienet saret biex tkun ikkontestata l-gurisdizzjoni, jew meta qorti ohra jkollha gurisdizzjoni eskluziva bis-sahha tal-Artikolu 24.*

Dan premess, il-Qorti tirrileva illi m`ghandhiex ghalfejn tinoltra ruhha fi studju approfondit tal-kwistjoni tal-gurisdizzjoni.

Din hija l-linja traccjata mill-Qorti tal-Gustizzja tal-Unjoni Ewropeja **(`CJEU`)**

Il-Qorti tirreferi ghad-decizjoni li tat il-CJEU fis-16 ta` Gunju 2016 fil-kaz ta` **Universal Music International Holding BV v Michael Tétreault Schilling and Others**, fejn inghad :-

> *45. Although the national court seised is not obliged, if the defendant contests the applicant`s claims, to conduct a comprehensive taking of evidence at the stage of determining jurisdiction, the Court has held that both the objective of the sound administration of justice, which underlies Regulation No 44/2001, and respect for the independence of the national court in the exercise of its functions require the national court seised to be able to examine its international jurisdiction in the light of all the information available to it, including, where appropriate, the defendant`s arguments (judgement of 28 January 2015 in Kolassa, C-375/13, EU:C:2015:37, paragraph 64).*
>
> *46. On the basis of the foregoing, the answer to the third question asked is that, in the context of the determination of jurisdiction under Regulation No 44/2001, the court seised must assess all the evidence available to it, including, where appropriate, the arguments put forward by the defendant.*

2. L-Art 741 u 742 tal-Kap 12

Fin-noti ta` sottomissjonijiet taghhom, il-partijiet jaghmlu argumenti taghhom dwar l-applikazzjoni tar-Regolament (*supra*) u ta` l-Konvenzjoni (*supra*) in relazzjoni mad-disposizzjonijiet tal-Kap 12.

L-**Art 741(1)(a) tal-Kap 12** jiddisponi illi *l-eccezzjoni tal-inkompetenza tal-qorti tista` tinghata meta l-kawza ma tkunx ta` gurisdizzjoni tal-qrati ta` Malta.*

Mill-**Art 742 tal-Kap 12**, ghall-fini tal-eccezzjoni kif prospettata, ighodd dan li gej :-

> *(1) 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 il-persuni hawn taht imsemmija :*
>
> *(f) kull persuna, ghal kull obbligazzjoni li tkun ikkuntrattat favur cittadin ta` Malta jew persuna li tinsab Malta jew korp li jkollu personalità guridika distinta jew assocjazzjoni ta` persuni inkorporati jew li jiffunzjonaw f`Malta, meta s-sentenza tista` tkun esegwita f`Malta;*
>
> *(2) Il-gurisdizzjoni tal-qrati ta` kompetenza civili mhijiex eskluza mill-fatt li qorti barranija tkun qeghda tittratta l-istess kawza jew kawza li ghandha x`taqsam maghha. Meta qorti barranija jkollha gurisdizzjoni konkorrenti, il-qrati jistghu fid-diskrezzjoni taghhom, jilliberaw lill-konvenut mill-osservanza tal-gudizzju jew iwaqqfu l-procedimenti f`kaz li l-azzjoni, jekk titkompla Malta, tkun vessatorja, oppressiva jew ingusta ghall-konvenut."*
>
> *(3) Il-gurisdizzjoni tal-qrati ta` kompetenza civili mhijiex eskluza mill-fatt li jkun hemm xi ftehim ta` arbitragg bejn il-partijiet, sew jekk il-procedimenti ta` arbitragg ikunu nbdew jew le, f`liema kaz il-qorti, bla hsara ghad-dispozizzjonijiet ta` kull ligi li tirregola l-arbitragg, ghandha twaqqaf il-procedimenti minghajr pregudizzju ghad-dispozizzjonijiet tas-subartikolu (4) u ghas-setgha li ghandha l-qorti li taghti kull ordni jew direttiva.*

Dan premess, tajjeb jinghad illi BHC u AC1 huma t-tnejn kumpanniji kostitwiti u registrati Malta. Ghandhom l-ufficju registrat taghhom gewwa Malta.

Fil-kawza tal-lum, BHC hija attrici waqt li AC1 hija wahda mill-konvenuti.

Il-vertenza tirrigwarda t-trasferiment ta` ishma ta` kumpannija registrata Malta, liema trasferiment kien registrat fir-Registru tal-Kumpanniji ta` Malta. Jekk it-talbiet attrici ikunu milqugha fil-mertu, l-ezekuzzjoni taghhom se ssir Malta.

Il-Qorti taghmel referenza ghas-sentenza li tat il-Qorti tal-Appell fit-30 ta` Settembru 2016 fil-kawza fl-ismijiet **C. & F. Building Contractors Limited v. Siegfried Generics (Malta) Ltd.**

Inghad hekk mill-Ewwel Qorti :-

> *Il-klawsola 12 hi pjuttost cara. Mhux biss il-ligi li tapplika ghal ftehim (proper law) hi l-ligi Svizzera, hemm stipulat ukoll illi l–gurisdizzjoni (forum) hi Zofingen fl-Isvizzera. Ghalkemm din il-parti tal-klawsola ma ghandhiex dicitura felici pero l-intenzjoni hi cara mill-istess titolu tal-klawsola li jqassam l-artikolu fi tnejn `applicable law and language/Court.*
>
> *Hija sinifikattiva, errudita u studjata s-sentenza ta` din il-Qorti diversament preseduta fl-ismijiet **Middlesea Insurance plc pro et noe vs Bianchi & Co. (1916) Ltd** (PA 27/02/2014) li dahlet funditus fil-principju dwar jekk klawsola gurisdizzjonali tizradikax ghal kollox u bla eccezzjoni l-gurisdizzjoni ta` dawn il-Qrati.*
>
> *Bla dubju l-kawza tirrigwarda zewg kumpaniji registrati f`Malta rigwardanti kuntratt ta` appalt ta` xoghlijiet li kellhom jigu ezegwiti f`Malta u fejn*

it-talba hi ghal hlas ta` bilanc ta` prezz tal-appalt u l-eccezzjoni fil-mertu hi dwar il-kwalita jew nuqqas ta` kwalita fl-esekuzzjoni ta` dan l-appalt. Dawn il-fatturi zgur jaghmlu l-gurisdizzjoni tal-Qrati Maltin aktar idonea u prattika biex jinstemghu u jigu evalwati l-provi senjatament meta fost il-kondizzjonijet kemm dawk konnessi ma` permessi relatati ma` entitajiet Maltin bhal Awtorita tal-Ippjanar u kif intqal diga l-eccezzjoni ta` nuqqas fl-esekuzzjoni tal-appalt hi marbuta intrisikament mas-sit fejn saru x-xoghljiet, cioe f`Malta.

L-artikolu 742(1) jirradika l-gurisdizzjoni tal-Qrati Maltin bil-fatt li z-zewg kumpaniji jinsabu registrati f`Malta u l-post ta` esekuzzjoni hu f`Malta kif ukoll il-hlas ghal appalt kellu jsir f`Malta.

Il-Qorti tirrefera ghas-segwenti brani mis-sentenza msemmija aktar il fuq li ccaraw il-kwistjoni dwar eccezzjoni simili.

Izda ghalkemm kien hemm xi ftit kazijiet fejn l-ezistenza ta` klawsola bhal dik wasslet biex il-Qorti qisitha bhala wahda tassattiva li tnehhi l-gurisdizzjoni taghha (Ara, per ezempju, Kumm. 6.10.1959 fil-kawza fl-ismijiet "Lucia noe vs Borg" (Kollez.Vol:XLIII.iii.870), il-bicca l-kbira tad-decizjonijiet huma fis-sens li l-Qrati Maltin ghandhom kull jedd li jezercitaw diskrezzjoni jekk iwarrbux il-gurisdizzjoni taghhom taht is-sahha ta` klawsola bhal dik (Ara, per ezempju, App. Civ. 9.12.1935 fil-kawza fl-ismijiet "Frendo vs Naudi et "(Kollez. Vol:XXIX.i.1317). Dan il-hsieb jaqbel sewwa ma` dak li tipprovdi espressament il-ligi taghna llum, u l-fehma l-izjed accettata hija li klawsola bhal dik ma tistax titfisser bhala li tezawtora ghal kollox u minn qabel il-gurisdizzjoni tal-Qorti li mqarr tistharreg il-kwistjoni (Ara, per ezempju, Kumm. 23.6.1994 GMA fil-kawza fl-ismijiet "John Bonello noe et vs John Ripard noe et" (konfermata fl-Appell imma ghal ragunijiet ohrajn

fis-7.10.1997), u fejn, ikkunsidrati ccirkostanzi, jkun jidher li l-partijiet tassew riedu din il-klawsola". (Vol. XXIV P I p 1067);

Fis-sentenza "PL Edoardo Frendo noe -vs- Dottor Roberto Naudi et noe", Appell, 9 ta` Dicembru 1935 (Vol. XXIX P I p 1317), ittiehdet il-veduta prattika illi :

"allavolja jkun hemm klawsola f`dak is-sens, il-Qrati taghna ghandhom gurisdizzjoni meta tkun kwistjoni ta` atti ta` avarea, jew ta` verifiki ta` danni li ma tistax issir hlief hawn Malta; jew almenu ma tistax issir quddiem it-tribunal ta` barra ahjar, u b`anqas spejjez, u f`anqas zmien milli quddiem it-Tribunal taghna." Ara wkoll flistess sens decizjonijiet a Vol. XVII P II p 33; Vol. XXIII P III p 484; "Gerald Bartoli noe –vsEmanuel Mathioudes noe", Appell Kummercjali, 29 ta` Lulju 1970);

Hu minnu li hafna mill-kawzi jirrigwardaw kwistjonijiet ta` avarija fil-kamp marittimu izda l-Qorti tqis li l-principju hu applikabbli b`mod estiz ghal kull vertenza. F`dawn ic-cirkostanzi l-Qorti tqis li l-fattispecie tal-kaz jitolbu li jkunu l-Qrati Maltin li jiddeciedu l-kwistjoni u salv il-kwistjoni tal-`proper law` imsemmija fil-klawsola din il-Qorti tqis li ghandha tiddeciedi l-kawza hi."

Il-Qorti tal-Appell ikkonfermat l-impostazzjoni tal-Ewwel Qorti :-

Illi din hi kawza fejn is-socjetà attrici qed titlob il-hlas tal-bilanc ta` prezz ta` appalt imwettaq fuq inkarigu tal-konvenut. In linea preliminari, is-socjeta` konvenuta issollevat in-nuqqas ta` gurisdizzjoni ta` dawn il-qrati peress illi, skont il-ftehim li wassal ghall-appalt, il-ftehim hu suggett ghal-ligi tal-Isvizzera u "the place of jurisdiction shall be Zofingen (Switzerland)", L-ewwel Qorti

cahdet din l-eccezzjoni wara li qieset illi l-fattispecie tal-kaz "jitolbu li jkunu l-qrati Maltin li jiddeciedu l-kwistjoni".

Is-socjeta` konvenuta appellat mis-sentenza u tissottometti li l-ftehim jorbot lill-partijiet – pacta sunt servanda – u f`kull kaz, ikun aktar utili li l-meritu jigi diskuss fil-qorti fi Svizzera.

Din il-Qorti tara li ghandha tikkonferma s-sentenza tal-ewwel Qorti. Huwa veru li fil-ftehim bejn il-partijiet hemm klawzola ta` gurisdizzjoni ta` pajjiz esteru, u li dawn il-klawzoli ghandhom jinghataw l-importanza taghhom, pero`, il-qrati taghna dejjem zammew id-dritt li jasserixxu l-gurisdizzjoni taghhom f`kaz li jqisu li l-qrati Maltin huma l-forum l-aktar konvenjenti biex jisma` l-kaz. Dan il-punt gie diskuss u deciz dan l-ahhar mill-Prim`Awla tal-Qorti Civili fil-kawza "Middlesea Insurance plc. v. Bianchi & Co. (1916) Ltd", deciza fis-27 ta` Frar, 2014, fejn saru dawn l-osservazzjonijiet.

Illi dwar il-kwistjoni tal-inkompetenza tal-Qrati ordinarji minhabba deroga mahluqa minn klawsola ta` gurisdizzjoni, il-ligi tal-Procedura tistabbilixxi li l-fatt wahdu li jkun hemm Qorti ohra barranija li jkollha gurisdizzjoni konkorrenti ma jeskludix minn qabel il-gurisdizzjoni tal-Qrati Maltin. Jidher li dak l-artikolu japplika fejn ikun hemm diga` kawza dwar l-istess haga jew konnessa maghha li qieghda tinstema` minn Qorti barranija. Jekk ma jkunx hemm kawza bhal dik diga` mibdija, jidher li s-setgha li Qorti Maltija tqis u tisma` l-kawza tiddependi mill-kriterji li normalment isejsu l-gurisdizzjoni tal-Qrati Maltin skont l-artikolu 742(1) tal-Kap 12.

Izda kif gie osservat minn din il-Qorti kif diversament presjeduta fil-kaz fl-ismijiet "Peter

Arrigo noe v Dr. Chris Cilia et. noe" (PA(JRM) - dec. fil-11 ta` Dicembru 2003).

Sa minn zmien ilu, il-Qrati taghna taw gharfien lill-klawsoli gurisdizzjonali, u dan l-izjed taht is-sahha tal-principju tal-liberta` kuntrattwali tal-partijiet u l-iehor li pacta sunt servanda, u jigifieri li jekk parti tkun intrabtet b`patt li kwistjoni kellha titresssaq quddiem qorti jew tribunal partikolari, dik ir-rabta ma setghetx tintesa jew titwarrab jekk mhux bi qbil bejn kulhadd (Ara, per ezempju, P.A. 12.3.1954 fil-kawza fl-ismijiet "Tonna Barthet vs Pace noe" Kollez. Vol: XXXVIII.iii.653).

Izda ghalkemm kien hemm xi ftit kazijiet fejn l-ezistenza ta` klawsola bhal dik wasslet biex il-Qorti qisitha bhala wahda tassattiva li tnehhi l-gurisdizzjoni taghha (Ara, per ezempju, Kumm. 6.10.1959 fil-kawza fl-ismijiet "Lucia noe vs Borg" (Kollez.Vol: XLIII.iii.870), il-bicca l-kbira tad-decizjonijiet huma fis-sens li l-Qrati Maltin ghandhom kull jedd li jezercitaw diskrezzjoni jekk iwarrbux il- gurisdizzjoni taghhom taht is-sahha ta` klawsola bhal dik (Ara, per ezempju, App. Civ. 9.12.1935 fil-kawza fl-ismijiet "Frendo vs Naudi et"(Kollez. Vol: XXIX.i.1317). Dan il-hsieb jaqbel sewwa ma` dak li tipprovdi espressament il-ligi taghna llum, u l-fehma l-izjed accettata hija li klawsola bhal dik ma tistax titfisser bhala li tezawtora ghal kollox u minn qabel il-gurisdizzjoni tal-Qorti li mqarr tistharreg il-kwistjoni (Ara, per ezempju, Kumm. 23.6.1994 GMA fil-kawza fl-ismijiet "John Bonello noe et vs John Ripard noe et" (konfermata fl-Appell imma ghal ragunijiet ohrajn fis-7.10.1997) , u fejn, ikkunsidrati c-cirkostanzi, jkun jidher li l-partijiet tassew riedu din il-klawsola". (Vol. XXIV P I p 1067);

Fis-sentenza "PL Edoardo Frendo noe -vs- Dottor Roberto Naudi et noe", Appell, 9 ta` Dicembru 1935

(Vol. XXIX P I p 1317), ittiehdet il-veduta prattika illi :

"allavolja jkun hemm klawsola f`dak is-sens, il-Qrati taghna ghandhom gurisdizzjoni meta tkun kwistjoni ta` atti ta` avarea, jew ta` verifiki ta` danni li ma tistax issir hlief hawn Malta; jew almenu ma tistax issir quddiem it-tribunal ta` barra ahjar, u b`anqas spejjez, u f`anqas zmien milli quddiem it-Tribunal taghna." Ara wkoll fl-istess sens decizjonijiet a Vol. XVII P II p 33; Vol. XXIII P III p 484; "Gerald Bartoli noe –vs- Emanuel Mathioudes noe", Appell Kummercjali, 29 ta` Lulju 1970);

Kif din il-Qorti kif diversament presjeduta irriteniet:

"Dan il-kriterju nsibuh abbraccjat f`bosta gurisdizzjonijiet ohra. Anzi dawn spiss imorru oltre l-aspett singolari tal-verifika tad-danni. Jitqiesu fatturi bhal konnessjoni diretta, reali u sostanzjali mal-pajjiz ta` l-iskarikazzjoni billi l-provi jistghu jigu rakkolti u stabbiliti ahjar, il-fatt tat-trapass taz-zmien, dubji dwar il-motivi tal-parti li teccepixxi n-nuqqas tal-gurisdizzjoni, l-ispejjez involuti u l-kwalita` ta` gustizzja fil-pajjiz xelt. Ara, fost ohrajn, "The Adolph Warski", 1976; "The El Awria" 1980, "The Pia Veste", 1984. "Materja bhal din hi mhollija fid-diskrezzjoni tal-gudikant adit millkaz" ("Joseph Felice Pace noe v Godwin Abela noe"- P.A. (PS) - dec. fit-28 ta` April 2003.

Fil-kaz Ingliz, The Eleftheria, (1970) citat minn Cheshire and North fil-ktieb "Private International Law" il-principji li huma applikati minn Qorti Ingliza rinfaccjata b`talba mill-vettural ghas-soprasessjoni minhabba "exclusive jurisdiction clause" huma :

" … (2) The discretion (to stay) should be exercised by granting a stay unless a strong cause is shown for not doing so. (3) The burden of proving such strong cause is on the plaintiff. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters :- (a) in what country the evidence on the issues of fact is situated, or more readily available , and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English Law in any material respects (c) With what country either party is connected and how closely. (d) Whether the defendants genuinely desire trial in the foreign country or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in a foreign court because they would be (i) depriced of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

Il-Qrati taghna stabbilew linja ta` principji gwida li huma kompatibbli mal-principji enuncjati fl-The Eleftheria fuq citat.

Hekk ad ezempju, johrog mir-ragunament tal-Imhallef A. Parnis fis-6 ta` Lulju 1911 fil-kawza "Giovanni Pace –vs- Gennaro Civitelli noe":-

"La Corte come presieduta ritiene che quella clausola nel commercio marittimo deve essere attesa quando colla stessa non venisse recato un grave pregiudizio al caricatore o ricevitore nel senso che il rinviarlo innanzi al tribunale del compartimento al quale appartiene il vapore lo metterebbe nella impossibilita` di proseguire la causa, e quando per

la natura delle circostanze per le prove da essere addottati, l`esercizio dell`azione in queste Isole importerebbe economia di spese e non sarebbe pregiudizievole alla difesa per parte del vapore e dei suoi proprietari. In altri termini la clausola escludente la competenza del tribunale e` soggetta ad eccezioni, avuto riguardo alla circostanza ed avuto riguardo al fine pel quale quella clausola e` stata introdotta."

"lli kif gie ritenut fil-kawza "Dr. Michael Scriha nomine vs Il Pamento Limited" (P.A. RCP. 9 ta` Jannar 2001) l-gurisprudenza nostrali hija konsistenti u tipprovdi, kif inghad inter alia fis-sentenza "John Galdes nomine vs Joseph Bowman nomine" (K. F. 21 ta` Gunju 1993) li :-

"Illi skont l-evoluzzjoni fid-dottrina li temani mill-gurisprudenza lokali jidher li tali kwalsoli bhal dik iccitata `supra` huma legalment validi pero` m`humiex assoluti dejjem. Di fatti f`numru ta` kazi l-Qrati irritenew li nonostante tali klawsola, xorta ghandom gurisdizzjoni in kwantu u limitatament ghal kostatazzjoni tan-nuqqas jew tal-hsara rriporatata fil-merkanzija de quo".

Illi dan isir peress li meta trid issir konstatazzjoni tal-kwalita` talmerkanzija, l-allegata mankanza jew difetti li setgha fiha, jew dwar nuqqasijiet dwar l-istess merkanzija, il-Qrati taghna konsistentement irritenew illi meta l-istess merkanzija tinsab hawn Malta, iddeterminazzjoni tad-domicilju reali, fejn trid issir l-ezami tal-istess merkanzija, huwa dejjem Malta, minhabba li jekk tali verifiki jsiru f`post iehor, fejn ovvjament ma hemmx tali merkanzija, dan issir hafna aktar difficli jekk mhux impossibbli. ("Robert Bonello nomine vs Agostina Mifsud et nomine". - K. S.S. 30 ta` April 1993- XXX D. iii. 373.- "Micallef et nomine vs Chev. Mifsud et nomine. - A.C. 26 ta` Ottubru 1991).

Illi tal-istess portata huma s-sentenzi "Negoziante Andrea Gatt vs Negoziante Gustavo Gollcher" (K. 14 ta` Novembru 1916 - XIII. iii. 484) fejn inghad illi "il domicilio reale e` quello determinato dal luogo della scaricazione della merce trattandosi di una contestazione riguardo la mancanza della merce o la deficienza del peso di essa, fatti che possono solo accettarsi alla scaricazione, ed innanzi al tribunal del luogo di scaricazione che tali questioni possono agevolamente svolgersi e defenirsi".

Illi kien ghalhekk u fuq dawn il-principji li l-Qorti fil-kawza Prokuratur Legali Edoardo Frendo vs Dottor Roberto Naudi et nomine" (A. K. 9 ta` Dicembru 1935 - XXIX E. i. 1317) sostniet li, nonostante il-klawsola dwar gurisdizzjoni esklussiva ta` Qorti estera, din il-Qorti xorta ghandha gurisidizzjoni li tisma` l-kaz, jekk dan ikun iktar kompattibbli ghad-determinazzjoni tal-pendenza, u iktar facli li tali kwistjoni tigi ezaminata b`mod iktar prattiku, kemm ghaliex l-oggetti jkunu hawn Malta, u kemm ghaliex tali sentenza tkun tista` tigi esegwita hawn Malta. Fil-kaz imsemmi, fil-fatt kien jittratta dwar konsenja ta` injam, li l-konvenut sostna li kienet ta` kwalita` inferjuri, u peress li tali merkanzija kienet Malta, mela allura l-istess Qorti kkonfermat il-gurisdizzjoni taghha. ("Galea vs Hammer" - XX.iii.32; - "Pace vs Civitelli" - XXI. iii. 71; "Thomas vs Angeland" - K. 20 ta` Jannar 1975); "P.L. Edoardo Frendo vs Dr. Robert Naudi" - A.C. 9 ta` Dicembru1935.

Izda kull kaz ghandu il-fattispecje partikolari tieghu u d-diskrizzjoni finali hija dejjem tal-Qorti. Sta ghalhekk ghall-attur li jikkonvinci lill-Qorti ghaliex huwa ghazel li jissorvola l-klawsola gurisdizzjonali fil-polza."

F`dan il-kaz, kif sewwa osservat l-ewwel Qorti, il-kawza tirrigwarda zewg kumpaniji registrati hawn

Malta, u ftehim ta` appalt li kellu jigi esegwit, kif fil-fatt sar, hawn Malta. Wahda mill-eccezzjonijiet fil-meritu tas-socjetà konvenuta hija li l-appalt ma giex ezegwit skont l-arti u s-sengha, li timplika li jridu jsiru kostattazzjonijiet fil-fond hawn Malta, kostattazzjonijiet ta` natura teknika, bil-Qorti, forsi, jkollha tirrikorri ghall-hatra ta` perit tekniku. Ghalkemm il-ftehim hu soggett ghal-ligi tal-Isvizzera, darba li l-bini sar Malta, l-istess bini jkun soggett ukoll ghal-ligijiet ta` Malta, specjalment dawk intezi ghat-tharis tas-sahha pubblika. Huwa car, ghalhekk, li huwa aktar kompatibbli ghad-determinazzjoni tal-pendenza, li l-kaz jinstema` Malta. Il-verifika tax-xoghol u tal-allegat nuqqasijiet ma tistax issir hlief hawn Malta, u din ic-cirkostanza timpingi manifestament favur il-gurisdizzjoni tal-qrati Maltin.

Is-socjetà konvenuta tghid li d-dokumentazzjoni u l-fatturi jinstabu kollha gewwa Zofingen, l-Isvizzera, pero`, dawn jistghu facilment jigu trasmessi lejn Malta bi spiza minima. Tghid ukoll li x-xhieda rilevanti jinsabu gewwa l-Isvizzera. Apparti l-fatt li llum wiehed jista` jiehu x-xhieda ta` persuna li tinsab barra minn Malta b`mezzi elettronici, bhal skype, li l-bini ta` dawn il-qrati hu attrezzat ghalih, l-iskomdu li xhud jista` jbati jekk ikollu ta` bilfors jingieb Malta, huwa zghir maqbul mac- cirkostanzi li l-appalt gie esegwit u jrid jigi ezaminat in situ hawn Malta.

Il-kwistjoni kuntrattwali relatata ma` allegat late delivery tista`, forsi, tigi mistharrga f`kull pajjiz, pero`, din il-Qorti ma tarax li ghandha tispezza s-smiegh tal-kawza, u darba li parti importanti tal-kawza tehtieg smiegh hawn Malta, il-kaz kollu hu desiderabbli li jibqa` jinstema` hawn Malta.

Il-fatt li l-proper law of contract tista` tkun il-ligi Svizzera, ma jwassalx ghall-konsegwenza li l-qrati li jisimghu l-kaz iridu bil-fors ikunu tal-istess pajjiz

esteru – ara l-kummenti ta` din il-Qorti f`dan is-sens fil-kawza "Maltrad (Holdings) Ltd. v. Coll", deciza fis-27 ta` Marzu, 2015.

Issa, fi stadju inoltrat tal-appell, is-socjeta` konvenuta ghamlet referenza ghall-konvenzjoni Europea tal-1968 (il-Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters), maghrufa komunement bhala l-Brussels I, u ghall-hekk imsejha Lugano Convention, iffirmata fl-1988, li tirrifletti l-ewwel konvenzjoni, izda testendiha ghan-Norvegja, l-Izlanda u l-Izvizzera.

Skont din l-ahhar konvenzjoni, li hi applikabbli ghall-kaz, meta f`kuntratt ikun miftiehem bejn il-partijiet liema pajjiz ghandu jiddetermina tilwima bejn l-istess partijiet, huma l-qrati ta` dak l-istat li jkollhom gurisdizzjoni esklussiva biex tisma` dik it-tilwima.

Din il-Qorti, pero`, tqis li, f`dan il-kaz, ir-regola msemmija ma tistax tigi attwata.

Skont l-istess konvenzjoni, il-qorti ta` dak l-istat fejn il-konvenut ikun deher ("enters an appearance"), ikollha f`kull kaz gurisdizzjoni, u dan sakemm ma jkunx deher biss ("solely") biex jikkontesta l-gurisdizzjoni tal-Qorti. F`dan il-kaz, is-socjetà konvenuta dehret quddiem il-qorti u ikkontestat mhux biss il-gurisdizzjoni tal-istess qorti, izda ressqet eccezzjonijiet fil-meritu. B`dan il-mod, hi issottomettiet ruhha ghall-gurisdizzjoni tal-qrati Maltin. Meta dehret fil-qorti, ma illimitatx ruhha biex tikkontesta l-gurisdizzjoni tal-qorti, izda dahlet fil-meritu tal-kwistjoni, ikkontrastat dak sottomess mis-socjetà attrici, u issottomettiet ghall-gurisdizzjoni tal-qorti Maltija dwar il-meritu.

3. Ir-Regolament *(supra)* u l-Konvenzjoni *(supra)*

Hemm qbil bejn il-partijiet illi ghall-kwistjoni tal-gurisdizzjoni ghandhom rilevanza kemm ir-Regolament, kif ukoll il-Konvenzjoni ; din tal-ahhar ghandha dispozizzjonijiet kwazi identici ghal dawk tar-Regolament. Il-Konvenzjoni tapplika ghall-kaz in dizamina ghaliex ghalkemm in-Norvegja mhijiex stat membru tal-UE, hija firmatarja tal-Konvenzjoni. Il-Konvenzjoni tghodd ghal Malta billi hija Stat membru tal-UE.

L-atturi jirreferu ghall-**Artikolu 24(2) u (3) u ghall-Artikolu 25(4) tar-Regolament, u ghall-Artikolu 22(2) u (3)** u l-**Artikolu 23(5) tal-Konvenzjoni**.

L-**Artikolu 24 tar-Regolament** ighid :-

> *Dawn il-qrati li gejjin ta` Stat Membru ghandu jkollhom gurisdizzjoni eskluziva, independentement mid-domicilju tal-partijiet :*
>
> *…*
>
> *(2) fi procedimenti li jkollhom bhala l-objettiv taghhom il-validità tal-kostituzzjoni, in-nullità jew ix-xoljiment ta` kumpanniji jew ta` persuni guridici ohra jew ghaqdiet ta` persuni fizici jew guridici, jew il-validità tad-decizjonijiet tal-organi taghhom, il-qrati tal-Istat Membru li fih il-kumpannija, il-persuna guridika jew ghaqda jkollha s-sede taghhom. Sabiex tiddetermina dik is-sede, il-qorti ghandha tapplika r-regoli taghha tad-dritt internazzjonali privat;*
>
> *(3) fi procedimenti li jkollhom bhala l-objettiv taghhom il-validità tad-dhul f`registri pubblici, il-qrati tal-Istat Membru li fih jinzamm ir-registru*;

L-**<u>Artikolu 25(4)</u>** jaqra:

> *Ftehim jew dispozizzjonijiet ta` strument ta` trust li jaghtu gurisdizzjoni m`ghandux ikollhom forza legali jekk dawn imorru kontru l-Artikoli 15, 19 jew 23, jew jekk il-qrati li l-gurisdizzjoni taghhom dawn iridu jeskludu jkollhom il-gurisdizzjoni eskluziva bis-sahha tal-Artikolu 24.*

Huwa ta` rilevanza ghall-kawza odjerna dak illi nghad fil-kawza fl-ismijiet **<u>Koza Ltd and Anor vs Akcil and Ors</u>**, deciza mill-Qorti tal-Appell Ingliza fit-18 ta` Ottubru 2017 ([2017] EWCA Civ 1609). Hemm kienet konfermata s-sentenza tal-Ewwel Qorti (Asplin J, ([2016] EWHC 3358 (Ch)) fejn kien affermat illi l-qorti kellha gurisdizzjoni sabiex tiddeciedi kawza mressqa minn kumpannija sussidjarja domiciljata l-Ingliterra kontra l-*parent company* u konvenuti ohrajn domiciljati fit-Turkija.

Huma bosta li jqisu din id-decizjoni bhala *leading judgment* ghall-fini tal-interpretazzjoni tal-Artikolu 24(2) tar-Regolament.

L-osservazzjoni kienet illi r-regola generali hija illi kawza trid tigi ntavolata quddiem il-qrati fejn ghandu domicilju l-konvenut. L-Artikolu 24 pero` jindika numru ta` eccezzjonijiet, li min-natura taghhom ghandhom jinghataw interpretazzjoni restrittiva.

Jinghad :-

> *24. The policy rationale for article 24(2), which guides its interpretation, is that it is desirable to centralise jurisdiction in relation to the identified subject matter in order to avoid conflicting decisions, for example as to the existence of a company or the validity of one of its decisions. The courts of the member state where the company has its seat are also recognised to be best placed to deal with such disputes: see Case C-372/07* ***Nicole Hassett v***

South Eastern Health Board *[2008] ECR I-7403 at [20] and [21].*

…

26. There is no dispute that the seat of Koza Limited, which is a company registered under the Companies Acts, is in England and Wales. No reliance is placed by the claimants on the first limb of article 24(2) i.e. that concerned with "the validity of the constitution, the nullity or dissolution of companies or other legal persons or associations of natural and legal persons". The question which arises therefore is whether the proceedings can be classified as ones which have as their object "the validity of the decisions of [Koza Limited`s] organs". It is common ground that Koza Limited`s shareholders in general meeting and its board of directors constitute organs of that company."

Fil-kaz mertu tal-kawza tal-lum, l-atturi qeghdin jattakkaw "*il-validita` tad-decizjonijiet tal-organi*".

Ma jidhirx li huwa kkontestat illi l-laqgha generali tal-azzjonisti u l-bord tad-diretturi huma organi kemm ta` BHC kif ukoll ta` AC1.

Fid-decizjoni kompla jinghad :-

28. It is common ground that when article 24(2) speaks of proceedings having an "object" it is not referring to the purpose of the proceedings. Rather that phrase is to be interpreted as "proceedings which are principally concerned with" one of the types of subject matter within the article. That was the view of Aikens LJ (with whom Etherton and Pill LJJ agreed)

in JP Morgan Chase Bank NA and another v Berliner Verkehrsbetriebe Anstalt des Öffentlichen Rechts [2010] EWCA Civ 390 in relation to the equivalent provision in the predecessor regulation, Council Regulation (EC) No 44/2001 at [83]. There is no reason why the same should not be the case in relation to article 24(2) of the Recast Judgments Regulation.

29. *In order to answer the question whether proceedings which raise multiple issues are "principally concerned" with one of the matters within article 24(2) the court has to undertake "an exercise in "overall classification" and make an "overall judgment" to see whether the proceedings are "principally concerned" with one of the matters set out in" the article: JP Morgan Chase at [87].*

30. *In JP Morgan Chase at [88] Aikens LJ, said that this interpretation of the corresponding article, article 22(2), of the predecessor regulation:*

"… fits with the wording of article 25. It also fits with the objective of article 22, which is to give exclusive jurisdiction to the courts of the state which will be best suited to dealing with the relevant issue, depending on which paragraph of article 22 is in play. It is only necessary to displace the general rule as to jurisdiction or the parties` own agreed jurisdictional choice if, making an overall judgment, it is clear that granting jurisdiction to the courts of the relevant state (where the land is, where the company has its seat, where the patent is registered, etc) will result in the sound administration of justice. In the context of article 22.2, this will not be the case unless,

overall, the proceedings are so closely connected with matters of local company law and internal corporate decision making in respect of the company that the proceedings should not be tried anywhere but in the courts of the state where the company has its seat."

31. It is to be noted that the final sentence of the passage I have cited from Aikens LJ`s judgment expresses the test in terms of the proceedings overall, and their connection with matters of local company law and internal corporate decision making. It is very far from a statement that the proceedings must exclusively relate to matters of local company law. Indeed it is difficult to see how such a test could be applied in any real dispute, where other legal issues will almost inevitably arise.

32. In Hassett (supra), two doctors who were sought to be made liable in proceedings for damages for personal injuries, sought indemnification against the Medical Defence Union (MDU) of which they were members. The MDU was a company incorporated in England. The MDU responded that its articles of association provided that any request for an indemnity came within its absolute discretion, and refused the requests. On the basis that the refusals infringed their rights under the articles of association, the doctors successfully joined the MDU as additional party to a claim which had been brought against them in Ireland by individual claimants (in fact via the health authority as an intervening party). The MDU then contended that its joinder should be set aside on the ground that, because the claims against it "concerned in essence the validity of decisions adopted by its board of management"

they fell within the scope of article 22(2) of Regulation 44/2001, with the result that jurisdiction lay exclusively with the courts of England and Wales and not the courts of Ireland.

33. *The Court of Justice characterised the question which it was asked by the Irish Supreme Court as being whether article 22(2) meant that proceedings in which one of the parties alleges that a decision adopted by an organ of the company infringes its rights under that company`s articles of association were proceedings concerned with the validity of the decisions of the organs of the company within the meaning of that provision. The Court of Justice had little difficulty in answering that question in the negative. At paragraph 23 of the judgment the court pointed out that if all disputes involving a decision by an organ of a company had to be treated as coming within the scope of the article, that would mean that all legal actions brought against a company, whether in matters relating to contract, or to tort or any other subject matter, would almost always come within the jurisdiction of the courts of the member state in which the company had its seat. Thus the provision had to be interpreted as covering only disputes in which a party is challenging the validity of a decision of an organ of a company. There was no indication that the doctors had raised any such challenge. In fact the challenge was to the way in which the power undoubtedly contained in the articles of association was to be exercised. As the court put it at paragraph 22, it was not "sufficient that a legal action involve some link with a decision adopted by an organ of a company".*

34. *Of more direct assistance is Case C-144/10 Berliner Verkehrsbetriebe, Anstalt des öffentlichen Rechts v JP Morgan Chase Bank NA [2011] 1 WLR 2087. There, the German public transport authority (BVG) brought proceedings in Germany seeking a declaration that a swap contract, which it had entered into with an American bank, and in respect of which the bank had brought enforcement proceedings in the English High Court pursuant to an English jurisdiction clause, was void because its subject matter was ultra vires the authority`s own statutes. It contended that, by virtue of article 22(2), the subject matter was one over which the courts of Germany, as the state in which it had its seat, had exclusive jurisdiction. The relief BVG sought in Germany also included an order, in the alternative, that the bank should release BVG from any obligation stemming from the swap contract (as compensation for negligent advice given by the bank), and for damages against the bank.*

35. *The Court of Justice recognised at [37] that Regulation 44/2001 conferred exclusive jurisdiction to adjudicate on disputes which relate to the validity of the decision of a company`s organs upon the courts where the company had its seat, and that those courts were best placed to adjudicate upon disputes which relate exclusively, or even principally to such a question. It went on, however, to state at [38]:*

"However, in a dispute of a contractual nature, questions relating to the contract`s validity, interpretation or enforceability are at the heart of the dispute and form its subject-matter. Any

question concerning the validity of the decision to conclude the contract, taken previously by the organs of one of the companies party to it, must be considered ancillary. While it may form part of the analysis required to be carried out in that regard, it nevertheless does not constitute the sole, or even the principal, subject of the analysis."

36. In that passage, the court is giving general guidance as to disputes which can be properly characterised as "of a contractual nature". Whilst issues about the validity of the decision to conclude the contract might well, in isolation or in other contexts, fall within Regulation 44/2001, in the particular context of contractual disputes they were not, in general, the principal concern of the proceedings.

37. The task for the court in each case is therefore to determine whether the proceedings relate principally to the validity of the decisions of an organ of the company. A mere link to a decision of the company, or an issue raised which is ancillary to the heart of a contractual or some other dispute, is insufficient to bring the proceedings within the exclusive jurisdiction.

Issir ukoll referenza ssir ghall-kaz ta` **Berliner Verkehrsbetriebe (BVG) Anstalt Des Offentlichen Rechts v JP Morgan Chase Bank N.A. & Anor** (Rev 2) [2010] EWCA Civ 390 (28 April 2010).

Fid-decizjoni saret referenza ghall-**Jenard Report** ghar-rigward ta` interpretazzjoni.

Inghad hekk :-

40. The Jenard report on what are now Article 22 and Article 25 makes four important general points. First, the provisions of Article 22 cannot be departed from either by agreement of the parties or by an implied submission to another jurisdiction. Secondly, any court of a state other than the state whose courts have the exclusive jurisdiction must declare of its own motion that it has no jurisdiction: Article 25. Thirdly, a failure to observe these rules is a ground to refuse recognition or enforcement of a judgment: Article 35. Lastly, and most importantly, Jenard comments that "the matters referred to in [Article 22] will normally be the subject of exclusive jurisdiction only if they constitute the principal subject matter of the proceedings of which the court is to be seised". He also puts it another way: "These rules [in Article 22]…take as their criterion the subject-matter of the action…".

41. In commenting on Article 22.2 in particular, Jenard states that the proceedings before the court having exclusive jurisdiction will be "…in substance concerned either with the validity of the constitution, the nullity or dissolution of the company, legal person or association, or with the decisions of its organs". The rationale for giving exclusive jurisdiction to the courts of the state where the company (or other legal entity within Article 22.2) is that the state concerned will have all relevant information concerning the company and it will be made public. This last point does not strike me as being particularly compelling, at least in proceedings in common law jurisdictions, where all relevant documents and information would have to be disclosed to the other parties involved. But that may not be so in other jurisdictions.

With regard to the words "principally concerned" in Article 25, Jenard makes the comment that they have the effect that a court is not obliged to reject jurisdiction "if an issue which comes within the exclusive jurisdiction of another court is raised only as a preliminary or incidental matter". This remark gave rise to argument before us. Did it follow that if a court of a member state was seised of proceedings in which one of the issues in it fell within one of the six paragraphs of Article 22, but that issue was not simply "preliminary" or "incidental", then those proceedings must therefore be "principally concerned" with a matter over which the courts of another member state had jurisdiction by virtue of Article 22? If it did, then the consequence must be, in accordance with Article 25, that the court seised must declare (of its own motion) that it had no jurisdiction.

Fuq l-istess binarju kienet id-decizjoni dwar *preliminary reference* li tat l-CJEU fis-7 ta` Marzu 2018 fil-kawza fl-ismijiet **E.ON Czech Holding AG v Michael Dědouch et** (Ref: C-560/16) fejn inghad :

21. By its first question, the referring court asks, in essence, whether Article 22(2) of Regulation No 44/2001 must be interpreted as meaning that an action, such as that in the main proceedings, for review of the reasonableness of the consideration that the principal shareholder of a company is required to pay to the minority shareholders of that company in the event of the compulsory transfer of their shares to that principal shareholder comes within the exclusive jurisdiction of the courts of the Member State in which that company is established.

22. In that regard, it should be borne in mind that, in the main proceedings, although the resolution of the general meeting of Jihočeská plynárenská concerned both the transfer of its shares to the principal shareholder and the determination of the amount of consideration to be paid to the minority shareholders, Mr Dědouch, Mr Streitberg and Mr Suda, in their action, merely challenge the reasonableness of that amount.

23. Even if that action should give rise to a decision that the amount is not reasonable, Czech law explicitly precludes that decision from being able to have the effect of invalidating the resolution of the general meeting in so far as it concerned that transfer or from being relied upon for the purposes of an application to have that resolution declared invalid.

24. Consequently, according to a literal interpretation of the wording of Article 22(2) of Regulation No 44/2001, it is by no means certain that such an action comes within the scope of that provision, since the rule of jurisdiction which that provision lays down is applicable in proceedings which have as their object the `validity of the decisions of [the] organs` of companies or legal persons.

25. According to the settled case-law of the Court, the provisions of Regulation No 44/2001 must be interpreted independently, by reference to its scheme and purpose (judgments of 13 July 2006, Reisch Montage, C-103/05, EU:C:2006:471, paragraph 29; of 2 October 2008, Hassett and Doherty, C-372/07, EU:C:2008:534, paragraph 17; and of

16 January 2014, Kainz, C-45/13, EU:C:2014:7, paragraph 19).

26. As regards the general scheme and context of Regulation No 44/2001, it should be recalled that the jurisdiction provided for in Article 2 of that regulation, namely that the courts of the Member State in which the defendant is domiciled are to have jurisdiction, constitutes the general rule. It is only by way of derogation from that general rule that the regulation provides for special and exclusive rules of jurisdiction for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Member State (judgments of 13 July 2006, Reisch Montage, C-103/05, EU:C:2006:471, paragraph 22, and of 12 May 2011, BVG, C-144/10, EU:C:2011:300, paragraph 30).

27. Those rules of special and exclusive jurisdiction must accordingly be interpreted strictly. As the provisions of Article 22 of Regulation No 44/2001 introduce an exception to the general rule governing the attribution of jurisdiction, they must not be given an interpretation broader than that which is required by their objective (judgments of 2 October 2008, Hassett and Doherty, C-372/07, EU:C:2008:534, paragraphs 18 and 19, and of 12 May 2011, BVG, C-144/10, EU:C:2011:300, paragraph 30).

28. As regards the objectives and the purpose of Regulation No 44/2001, it should be recalled that, as is apparent from recitals 2 and 11 thereof, that regulation seeks to unify the rules on conflict of jurisdiction in civil and commercial matters by way of rules of jurisdiction which are highly predictable. That

regulation thus pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Union, by enabling the applicant easily to identify the court in which he may sue and the defendant reasonably to foresee before which court he may be sued (judgments of 23 April 2009, Falco Privatstiftung and Rabitsch, C-533/07, EU:C:2009:257, paragraphs 21 and 22; of 17 March 2016, Taser International, C-175/15, EU:C:2016:176, paragraph 32; and of 14 July 2016, Granarolo, C-196/15, EU:C:2016:559, paragraph 16).

29. *Furthermore, as is apparent from recital 12 of that regulation, the rules of jurisdiction derogating from the general rule of jurisdiction of the courts of the Member State in which the defendant is domiciled supplement the general rule where there is a close link between the court designated by those rules and the action or in order to facilitate the sound administration of justice.*

30. *In particular, the rules of exclusive jurisdiction laid down in Article 22 of Regulation No 44/2001 seek to ensure that jurisdiction rests with courts closely linked to the proceedings in fact and law (see, with regard to Article 16 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), the provisions of which are essentially identical to those of Article 22 of Regulation No 44/2001, judgment of 13 July 2006, GAT, C-4/03, EU:C:2006:457, paragraph 21), in other words, to confer exclusive jurisdiction on the courts of a Member State in specific circumstances*

where, having regard to the matter at issue, those courts are best placed to adjudicate upon the disputes falling to them by reason of a particularly close link between those disputes and that Member State (judgment of 12 May 2011, BVG, C-144/10, EU:C:2011:300, paragraph 36).

31. Thus, the essential objective pursued by Article 22(2) of Regulation No 44/2001 is that of centralising jurisdiction in order to avoid conflicting judgments being given as regards the existence of a company or as regards the validity of the decisions of its organs (judgment of 2 October 2008, Hassett and Doherty, C-372/07, EU:C:2008:534, paragraph 20).

32. The courts of the Member State in which the company has its seat appear to be those best placed to deal with such disputes, inter alia because it is in that State that information about the company will have been notified and made public. Exclusive jurisdiction is thus attributed to those courts in the interests of the sound administration of justice (judgment of 2 October 2008, Hassett and Doherty, C-372/07, EU:C:2008:534, paragraph 21).

33. However, the Court has held that it cannot be inferred from this that, in order for Article 22(2) of Regulation No 44/2001 to apply, it is sufficient that a legal action involve some link with a decision adopted by an organ of a company (judgment of 2 October 2008, Hassett and Doherty, C-372/07, EU:C:2008:534, paragraph 22), and that the scope of that provision covers only disputes in which a party is challenging the validity of a decision of an organ of a company under the company law applicable or the provisions of its article of association governing the functioning of its

organs (judgments of 2 October 2008, Hassett and Doherty, C-372/07, EU:C:2008:534, paragraph 26, and of 23 October 2014, flyLAL-Lithuanian Airlines, C-302/13, EU:C:2014:2319, paragraph 40).

34. *In the present case, while it is true that, under Czech law, proceedings such as those at issue in the main proceedings may not lead formally to a decision which has the effect of invalidating a resolution of the general assembly of a company concerning the compulsory transfer of the minority shareholders` shares in that company to the majority shareholder, the fact nonetheless remains that, in accordance with the requirements of the autonomous interpretation and uniform application of the provisions of Regulation No 44/2001, the scope of Article 22(2) thereof cannot depend on the choices made in national law by Member States or vary depending on them.*

35. *On the one hand, the origin of those proceedings lies in a challenge to the amount of the consideration relating to such a transfer and, on the other, their purpose is to secure a review of the reasonableness of that amount.*

36. *It follows that, having regard to Article 22(2) of Regulation No 44/2001, legal proceedings such as those at issue in the main proceedings concern the review of the partial validity of a decision of an organ of a company and that such proceedings are, as a result, capable of coming within the scope of that provision, as envisaged by its wording.*

37. *Thus, in those circumstances, a court hearing such an application for review must examine the validity of a decision of an organ of a company in so far as that decision concerns the*

determination of the amount of the consideration, decide whether that amount is reasonable and, where necessary, annul that decision in that respect and determine a different amount of consideration.

38. *Furthermore, an interpretation of Article 22(2) of Regulation No 44/2001 according to which that provision applies to proceedings such as those at issue in the main proceedings is consistent with the essential objective pursued by that provision and does not have the effect of extending its scope beyond what is required by that objective.*

39. *In that regard, the existence of a close link between the courts of the Member State in which Jihočeská plynárenská is established, in the present case the Czech courts, and the dispute in the main proceedings is clear.*

40. *In addition to the fact that Jihočeská plynárenská is a company incorporated under Czech law, it is apparent from the file submitted to the Court that the resolution of the general meeting that determined the amount of the consideration forming the subject of the main proceedings and the acts and formalities relating to it were carried out in accordance with Czech law and in the Czech language.*

41. *Likewise, it is not disputed that the court with jurisdiction must apply Czech substantive law to the dispute in the main proceedings.*

42. *Consequently, bearing in mind the close link between the dispute in the main proceedings and the Czech courts, the latter are best placed to hear that dispute relating to the review of the partial validity of that resolution and the attribution, pursuant to Article 22(2) of*

Regulation No 44/2001, of exclusive jurisdiction to those courts is such as to facilitate the sound administration of justice.

43. *The attribution of that jurisdiction to the Czech courts is also consistent with the objectives of predictability of the rules of jurisdiction and legal certainty pursued by Regulation No 44/2001, since, as the Advocate General observed in point 35 of his Opinion, the shareholders in a company, especially the principal shareholder, must expect that the courts of the Member State in which that company is established will be the courts having jurisdiction to decide any internal dispute within that company relating to the review of the partial validity of a decision taken by an organ of a company.*

44. *Moreover, inasmuch as the principal shareholder of a company may change during the existence of that company, application of the general rule of jurisdiction of the courts of the Member State in which the defendant is domiciled, laid down in Article 2(1) of Regulation No 44/2001, to a situation such as that at issue in the main proceedings would not ensure that those objectives are achieved.*

45. *In those circumstances, the answer to the first question is that Article 22(2) of Regulation No 44/2001 must be interpreted as meaning that an action, such as that at issue in the main proceedings, for review of the reasonableness of the consideration that the principal shareholder of a company is required to pay to the minority shareholders of that company in the event of the compulsory transfer of their shares to that principal shareholder comes within the exclusive jurisdiction of the courts of the*

Member State in which that company is established.

Premessa din il-gurisprudenza, il-Qorti tosserva li l-atturi jaghmlu l-argument illi abbazi tal-Art 24(2) tar-Regolament, il-Qrati Maltin ghandhom gurisdizzjoni esklussiva illi jiddeciedu l-vertenza odjerna billi l-kawza tirrigwarda : il-validita` tad-decizjonijiet ta` organi, senjatament il-Bord tad-Diretturi, ta` BHC u AC1 ; il-laqgha generali ta` AC1 ; kemm BHC u kif ukoll AC1 huma kostitwiti Malta skont il-Kap 386 ; iz-zewg kumpanniji ghandhom is-sede u l-indirizz registrat taghhom gewwa Malta ; u l-kawza tittratta dwar il-validita` tal-atti registrati fir-Registru tal-Kumpanniji ta` Malta, liema registru jikkwalifika bhala registru pubbliku.

Il-Qorti tkompli tosserva li min-naha taghhom, il-konvenuti jaghmlu l-argument illi ma jista` qatt jinghad illi d-disposizzjonijiet jaghtu gurisdizzjoni lill-Qrati Maltin ghaliex minkejja li s-sede tal-kumpanniji koncernati tinsab Malta, diga` ttiehdu diversi proceduri gudizzjarji fin-Norvegja b`uhud jigu decizi finalment u ohrajn ghadhom pendenti. Il-konvenuti ghamlu accenn ghall-procedura ta` likwidazzjoni illi ssoggettat ruhha ghalihom Marsoft fin-Norvegja. Sar accenn ukoll ghall-procedura ta` sekwestru tal-assi ta` Eckbo fin-Norvegja. Il-konvenuti rrilevaw illi l-proceduri pendenti fin-Norvegja jirrigwardaw l-istess fatti illi jsawwru dan il-kaz u l-kwistjonijiet ta` bejn il-kumpanniji.

Il-konvenuti jirreferu ghall-**<u>Artikoli 27</u>** u **<u>28 tal-Konvenzjoni</u>**.

<u>L-Artikolu 27</u> jaqra :

1. Fejn il-procedimenti li jinvolvu l-istess suggett tal-kawza u li jkunu bejn l-istess partijiet jitressqu fil-qrati ta` Stati differenti marbuta b`din il-Konvenzjoni, kwalunkwe qorti, diversa mill-qorti li quddiemha gew istitwiti l-ewwel il-procedimenti, ghandha twaqqaf il-procedimenti ex officio sa meta tigi stabbilita l-gurisdizzjoni tal-qorti li quddiemha gew istitwiti l-ewwel il-procedimenti.

2. Fejn tigi stabbilita l-gurisdizzjoni tal-qorti li quddiemha gew istitwiti l-ewwel il-procedimenti, kwalunkwe qorti barra l-qorti li quddiemha gew istitwiti l-ewwel il-procedimenti ghandha tastjeni milli tassumi gurisdizzjoni favur dik il-qorti.

L-Artikolu 28 ighid :

1. Fejn ikunu pendenti kawzi relatati fil-qrati ta` Stati differenti marbuta b`din il-Konvenzjoni, kwalunkwe qorti, diversa mill-qorti li quddiemha gew istitwiti l-ewwel il-procedimenti, tista` twaqqaf il-procedimenti taghha.

2. Fejn dawn il-kawzi jkunu pendenti fl-ewwel istanza, kwalunkwe qorti, diversa mill-qorti li quddiemha gew istitwiti l-ewwel il-procedimenti, tista` wkoll, fuq applikazzjoni ta` wahda mill-partijiet, tastjeni milli tassumi gurisdizzjoni jekk l-qorti li quddiemha gew istitwiti l-ewwel il-procedimenti jkollha l-gurisdizzjoni fuq il-kawzi in kwistjoni u l-ligi taghha tippermetti l-konsolidament taghhom.

3. Ghall-finijiet ta` dan l-Artikolu, il-kawzi huma meqjusa bhala relatati meta tant ikunu konnessi mill-qrib li jkun espedjenti li jigu mismughin u decizi flimkien sabiex ikun evitat ir-riskju li jirrizultaw sentenzi irrikonciljabbli minn procedimenti separati.

Dawn id-disposizzjonijiet jittrattaw l-eccezzjoni ta` ***lis alibi pendens***.

Din il-materja kienet trattata diversi drabi mill-qrati taghna. Ghalkemm l-isfond trattata kien fil-kuntest lokali bl-applikazzjoni tal-**Art 793 tal-Kap 12**, l-insenjamenti tal-gurisprudenza jistghu jigu applikati wkoll ghall-**Artikoli 27 u 28 tal-Konvenzjoni**.

Tajjeb jinghad illi l-qrati taghna huma propensi jaccettaw is-soprasessjoni ta` kawza meta dan ikun spedjenti, fejn tinqala` kwistjoni li d-decizjoni taghha tinfluwixxi sostanzjalment fuq l-esitu ta` kawza, u fil-kazi meta jkun hemm lok ghas-soluzzjoni ta` xi punt li minnu tiddependi necessarjament il-kontinwazzjoni tal-kawza li tkun ser tigi soprassessa. (Kollez. Vol. XXXIX.I.467 ; Appell Civili – "**Cassar vs Xuereb**" – 12 ta` Marzu 1973 ; "Joseph **Gaffarena et vs Mixer Concrete Works Limited et**" – Prim`Awla tal-Qorti Civili – 27 ta` Mejju 2005). Id-diskrezzjoni li jokkorda jew jichad talba ghal soprassessjoni tispetta lill-gudikant li fil-provvediment illi jaghti ghandu jqis il-fatti u cirkostanzi ta` kull kaz (ara – Appell Civili – **Grech noe vs Buttigieg et noe** – 26 ta` Marzu 1984). Kien ritenut li m`ghandux ikun hemm soprasessjoni jekk parti fil-kawza tkun ser tbati pregudizzju (ara : Prim`Awla tal-Qorti Civili - **Amber Properties Limited vs Central Holidays (Travel Agents and Organisers) Limited et** - 25 ta` Marzu 2013).

Fil-provvediment illi tat din il-Qorti kif presjeduta fl-10 ta` April 2014 fil-kawza "**Agnes Gera de Petri Testaferrata Bonici Ghaxaq vs Annamaria Spiteri Debono pro et noe et**" (konfermata b`sentenza tal-Qorti tal-Appell tal-31 ta` Ottubru 2014) inghad hekk dwar is-soprasessjoni :

> "*Il-Qorti ghandha tilqa` talba ghas-soprasessjoni meta jkun spedjenti li taghmel hekk (ara Kollez. Vol. XXXIX.I.467 ; u Appell Civili – **Cassar vs Xuereb** – 12 ta` Marzu 1973), spedjenti fis-sens meta l-kwestjoni involuta fil-kawza pendenti quddiem qorti ohra tkun tali li d-decizjoni tista` tinfluwixxi l-meritu tal-azzjoni prezenti (ara – **Galea vs Galea** – Appell Inferjuri – 23 ta` April 1955).*
>
> *Is-soprasessjoni tkun indikata ghal dawk il-kazi meta jkun hemm lok ghas-soluzzjoni ta` xi punt li minnu tiddependi necessarjament il-kontinwazzjoni tal-kawza li tigi soprasseduta sa dik is-soluzzjoni (ara –**Azzopardi vs Critien pro et noe** – Prim`Awla tal-Qorti Civili – 12 ta` April 1962).*
>
> *Ikun hemm lok ghas-soprasessjoni meta l-ezitu tal-kawza li tigi soprasseduta jkun jiddependi jew*

*almenu jkun jista` jiddependi mill-ezitu ta` kawza ohra. Kwindi ma jistax ikun hemm lok ghas-soprasessjoni jekk ma tezistix din id-dipendenza jew almenu l-potenzjalita` ta` dipendenza ta` kawza fil-konfront ta` ohra. (ara – **Degaetano vs Galea et noe** – Appell Civili – 5 ta` Ottubru 1981).*

Qorti m`ghandhiex tordna s-soprasessjoni jekk il-parti avversarja tkun sejra tbati pregudizzju.

Is-soprasessjoni hija rimedju straordinarju u eccezzjonali, ghaliex tiffrena l-andament normali ta` kawza billi twaqqaf kawza. L-ispeditezza u l-gustizzja jesigu illi kull kawza tigi deciza fi zmien ragonevoli. Ghandha tigi applikata biss jekk hu necessarju fl-ahjar amministrazzjoni tal-gustizzja. (Kollez. Vol. XLI.I.507).

*L-ghoti tas-soprasessjoni tibqa` ghal kollox fid-diskrezzjoni tal-qorti (Kollez. Vol XXXII.II.197) u tkun tiddependi mic-cirkostanzi partikolari u specjali ta` kull kaz (ara – Appell Civili – **Grech noe vs Buttigieg et noe** – 26 ta` Marzu 1984)."*

Din il-Qorti tirriafferma l-principju li s-soprasessjoni huwa rimedju straordinarju li ghandu jigi applikat biss fejn ikun necessarju fl-interess tal-ahjar amministrazzjoni tal-gustizzja.

Issa tajjeb jinghad illi fi kwistjoni ta` gurisdizzjoni jew inkompetenza ta` qorti, minhabba deroga li tinholoq bhala rizultat ta` kompetenza konkorrenti ta` qorti ta` gurisdizzjoni ohra, il-Kap 12 jistabilixxi li l-fatt wahdu li jkun hemm qorti ohra barranija li jkollha gurisdizzjoni konkorrenti ma jeskludix *a priori* l-gurisdizzjoni tal-qrati ta` dawn il-Gzejjer.

Fis-sentenza ta` din il-Qorti diversament presjeduta tal-11 ta` Gunju 2013 fil-kawza **Dr Kenneth Grima noe vs Monet Limited et**, inghad illi l-Art 742(2) tal-Kap 12 japplika fejn ikun hemm diga` kawza dwar l-istess haga jew konnessa maghha li qeghda tinstema` minn qorti barranija. Inghad ukoll illi jekk ma jkunx hemm kawza bhal dik diga` mibdija – del resto kif

inhi din tal-lum – jidher li s-setgha li qorti Maltija tqis u tisma` l-kawza tiddependi mill-kriterji li jsejsu l-gurisdizzjoni tal-qrati taghna skont l-Art 742(1) tal-Kap 12.

Meta tqis il-fatti tal-kaz tal-lum, din il-Qorti ma ssibx li hemm lok ghall-applikazzjoni tal-Artikolu 27 u 28 tal-Konvenzjoni billi ma hemm ebda dipendenza ta` kawza fil-konfront ta` ohra. L-esitu tal-proceduri odjerni mhuwiex ser jincidi fuq il-procedimenti li huma pendenti – Malta jew fin-Norvegja. Ghalhekk tqis illi l-Artikoli 27 u 28 tal-Konvenzjoni ma japplikawx ghal din il-vertenza.

Il-konvenuti jaghmlu wkoll l-argument illi lanqas ma japplika ghall-kaz odjern id-dispost tal-Artikolu 24(3) tar-Regolament.

Il-Qorti ssib illi s-subartikolu (3) tal-Artikolu 24 effettivament ma japplikax ghall-kaz odjern.

Il-kawza tittratta l-legalita` tal-atti mwettqa. It-talba ghar-rexissjoni tar-registrazzjoni hija konsegwenzjali ghas-sejbien tal-illegalita` allegata.

4. <u>Punti ohra</u>

Fin-nota ta` sottomissjonijiet taghhom l-atturi qajmu l-punt illi, *dato ma non concesso*, illi l-Artikolu 20 tal-BHC Co-operation Agreement kellu japplika sabiex jirregola l-gurisdizzjoni, dan ghandu japplika biss ghar-rigward tal-ksur ta` obbligi kontrattwali u mhux ukoll vis-a`-vis ksur ta` obbligi *ex lege* u/jew *ex delicto* u cioe n-nullita` tal-atti minhabba nuqqas ta` awtorizazzjoni mehtiega u l-kwistjoni tal-qerq. Kienu citati l-Artikolu 7(2) (ex. Art 5) tar-Regolament u l-Artikolu 5 (3) tal-Konvenzjoni.

<u>L-**Artikolu 7 (2) tar-Regolament**</u> jitkellem dwar :

"*fi kwistjonijiet li ghandhom x`jaqsmu ma` tort, delitt jew kwazi delitt, fil-qrati tal-post fejn l-avveniment dannuz jkun twettaq jew jista` jitwettaq*"

L-**Artikolu 5 (3) tal-Konvenzjoni** jitkellem dwar:

"*f`materji relatati ma` responsabbiltà ghal danni, delitti civili jew kwazi-delitti civili, fil-qrati tal-post fejn l-incident dannuz sehh jew jista` jsehh*"

Il-konvenuti laqghu ghall-punt sollevat mill-atturi billi dahlu *funditus* fil-kwestjoni. Ghamlu l-argument illi l-Art 5(3) japplika meta l-proceduri huma ntizi li jwasslu ghal-likwidazzjoni tad-danni. Fatt dan, illi kif tajjeb jargumentaw il-konvenuti, mhuwiex il-kaz fil-proceduri odjerni. L-argument tal-konvenuti ikompli fis-sens illi kwistjonijiet relattivi ghal delitt jew kwazi-delitt jaqghu biss taht din il-kappa meta l-kwistjoni principali ma tkunx naxxenti minn kuntratt. Interessanti kienet id-decizjoni li tat il-CJEU fil-21 ta` April 2016 fil-kawza fl-ismijiet **Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH v Amazon EU Sàrl and Others** (C-572/14) fejn inghad:

"28 *Thus, art.5(3) of Regulation 44/2001 lays down a rule of special jurisdiction under which "in matters relating to tort, delict or quasi-delict", "a person domiciled in a Member State may, in another Member State, be sued … in the courts for the place where the harmful event occurred or may occur".*

29 The rule of special jurisdiction laid down by that provision must be interpreted independently and strictly (see judgments of 28 January 2015 in Kolassa v Barclays Bank Plc (C-375/13) EU:C:2015:37 at [43], and 21 May 2015 in Cartel Damage Claims(CDC) Hydrogen Peroxide SA v Akzo Nobel NV (C-352/13) EU:C:2015:335; [2015] Q.B. 906 at [37]).

30 In that connection, it must be recalled that, according to settled case law, the rule of jurisdiction laid down in art.5(3) of Regulation 44/2001 is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred or may occur, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings (see judgments of 16 May 2013 in Melzer EU:C:2013:305 at [26]; 3 October 2013 in Pinckney [2013] E.C.D.R. 15 at [27]; 5 June 2014 in Coty Germany EU:C:2014:1318 at [47]; 22 January 2015 in Hejduk [2015] E.C.D.R. 10 at [19]; and 28 January 2015 in Kolassa EU:C:2015:37 at [46]).

31 In matters relating to tort, delict and quasi-delict, the courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence (see judgments of 25 October 2012 in Folien Fischer AG v Ritrama SpA (C-133/11) EU:C:2012:664; [2013] Q.B. 523 at [38]; 16 May 2013 in Melzer EU:C:2013:305 at [27]; 18 July 2013 in ÖFAB, Ostergotlands Fastigheter AB v Koot (C-147/12) [2016] E.C.D.R. 23 395 [2016] E.C.D.R., Part 5 © 2016 Thomson Reuters (Professional) UK Limited EU:C:2013:490; [2015] Q.B. 20 at [50]; and 21 May 2015 in CDC Hydrogen Peroxide EU:C:2015:335 at [40]).

32 According to settled case law, the concept of "matters relating to tort, delict or quasi-delict" covers all actions which seek to establish the liability of a defendant and do not concern "matters relating to a contract" within the meaning of art.5(1)(a) of Regulation 44/2001 (see judgments of 27 September 1988 in Kalfelis

v Bankhaus Schroder Munchmeyer Hengst & Co (t/a HEMA Beteiligungsgesellschaft mbH) (189/87) [1988] E.C.R. 5565 at [17] and [18]; 13 March 2014 in Brogsitter v Fabrication de Montres Normandes EURL (C-548/12) EU:C:2014:148 at [20]; and 28 January 2015 in Kolassa v Barclays Bank Plc (C-375/13) EU:C:2015:37 at [44]).

…

35 Although art.5(1)(a) of Regulation 44/2001 does not require the conclusion of a contract, it is nevertheless essential, for that provision to apply, to identify an obligation, since the jurisdiction of the national court under that provision is determined by the place of performance of the obligation in question. Thus, the concept of "matters relating to contract" within the meaning of that provision is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another (see judgment of 14 March 2013 in Česka spořitelna as v Feichter (C-419/11) EU:C:2013:165:165 at [46]).

36 Consequently, the application of the rule of special jurisdiction providing for matters relating to a contract in art.5(1)(a) of Regulation 44/2001 presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant`s action is based (see judgments of 14 March 2013 in Česká spořitelna EU:C:2013:165 at [47], and 28 January 2015 in Kolassa EU:C:2015:37 at [39]).

…

39 Secondly, it must be determined whether a claim such as that at issue in the main proceedings

aims to establish the liability of the defendant, within the meaning of the case law cited in [32] of the present judgment.

40 Such is the case where a "harmful event", within the meaning of art.5(3) of Regulation 44/2001, may be imputed to the defendant.

41 Liability in tort, delict or quasi-delict can only arise provided that a causal connection can be established between the damage and the event in which that damage originates (see judgments of 30 November 1976 in Handelswekerij GJ Bier BV v Mines de Potasse d`Alsace SA (21/76) [1976] E.C.R. 1735 at [16], and 396 Austro-Mechana v Amazon [2016] E.C.D.R., Part 5 © 2016 Thomson Reuters (Professional) UK Limited 5 February 2004 in Danmarks Rederiforening v LO Landsorganisationen i Sverige (C-18/02) [2004] E.C.R. I-1417 at [32])."

Premess dan kollu, il-Qorti tosserva illi fil-kaz in esami l-agir lamentat huwa strettament marbut mal-obbligi kontrattwali. Dan johrog ben car mill-BHC Co-operation Agreement. Tghodd partikolarment il-klawzola 4 tal-ftehim intitolata "*Shareholders*". Din il-klawzola hija centrali ghal din il-vertenza tant illi l-atturi stess jibnu l-kaz taghhom fuqha. M`ghandux ikun hemm dubju illi l-kwistjoni tal-lum tittratta dwar obbligi kontrattwali u ghalhekk f`dan l-isfond trid tigi trattata l-kwistjoni tal-gurisdizzjoni tal-Qorti.

Jibqa` x`jigi determinat jekk il-Qrati Maltin ghandhomx gurisdizzjoni a bazi tal-Artikolu 24 2) tar-Regolament.

Li trid tara l-Qorti huwa jekk il-proceduri ghandhomx bhala l-obbjettiv principali ("*principally concerned*") taghhom il-validita` tad-decizjoni tal-organi tal-kumpanniji.

Analizzati bir-reqqa c-cirkostanzi partikolari illi jsawwru din il-vertenza, il-Qorti hija konkordi mal-atturi illi l-objettiv ewlieni ta` dawn il-proceduri huwa l-validita` tad-decizjoni tal-organi tal-kumpannija.

Ghalhekk, dawn il-proceduri jikkwalifikaw taht dak ravvizat fit-termini tal-Artikolu 24 (2) tar-Regolament.

Stabbilit dan, u billi tissussisti raguni sufficjenti a tenur tal-Artikolu 24(2) tar-Regolament u l-Artikolu 22(2) tal-Konvenzjoni, ghall-gurisdizzjoni esklussiva tal-Qrati fejn il-kumpannija ghandha s-sede taghha, l-ghazla tal-gurisdizzjoni kif miftehma bejn il-partijiet m`ghandiex tapplika.

Il-Qorti hija tal-fehma illi ghandha tieqaf hawn dwar dan il-punt billi kunsiderazzjonijiet ulterjuri ghar-rigward ikunu inutli.

In vista tal-assjem tal-premess, din il-Qorti tqis illi ghandha gurisdizzjoni esklussiva sabiex tittratta u tiddeciedi din il-kawza.

5. <u>Choice of Law</u>

Il-konvenuti jaghmlu insistenza fuq il-klawsola dwar *choice of law* - Artikolu 19 tal-BHC Co-operation Agreement. Madanakollu nonostante l-fatt illi kien jinkombi fuqhom l-oneru illi jgibu prova illi l-istat tad-dritt Norvegiz huwa differenti mid-dritt Malti m`ghamlu xejn minn dan. Mhuwiex kompitu ta` din il-Qorti illi taghmel tajjeb hi ghal fejn naqsu l-konvenuti.

Fi kwalunkwe kaz, il-kaz tal-lum huwa bbazat fuq agir abbuziv u llegali ta` Marks, li jmur ben oltre t-termini ta` dak li kien pattwit bejn il-partijiet. Ghalhekk mhux kwistjoni tal-applikazzjoni tac-*choice of law clause.*

Il-Qorti zzid tosserva illi abbazi tal-gurisprudenza sovracitata, partikolarment ghad-decizjoni fil-kawza **<u>Koza Ltd and Anor vs Akcil and</u>**

Ors, stabbilit illi l-Qrati Maltin ghandhom gurisdizzjoni esklussiva a tenur tal-Artikolu 24(2) tar-Regolament u l-Artikolu 22(2) tal-Konvenzjoni, ghandha tapplika l-ligi Maltija.

L-ewwel eccezzjoni preliminari qeghda tkun respinta fl-intier taghha.

VI. It-tieni (2) eccezzjoni preliminari

Il-konvenuti jikkontendu illi BHC ma setghetx tipprocedi bil-kawza odjerna peress illi *ma hemmx l-awtorizazzjoni necessarja fuq livell ta` socjeta`*.

L-atturi jikkontendu illi bhala effett tad-digriet *interim* li nghata minn din il-Qorti fil-kawza fl-ismijiet *Av Jonathan Abela Fiorentino noe vs Vroon Containers B.V. (Rik. Nru. 304/16 JZM)* fil-21 ta` Gunju 2017, BHC ghandha kull dritt tipprocedi b`kawza.

Il-Qorti sejra tirreferi ghall-parti operattiva ta` l-*interim order* :

"*tordna bhala mizura interim illi b`effett mil-lum u ghaz-zmien kollu li tibqa` pendenti l-kawza bejn l-istess partijiet bin-numru 304/16 JZM, Vroon Containers B.V. u Herman Marks m`ghandhom bl-ebda mod jippartecipaw fit-tehid tad-decizjonijiet da parti ta` Balticmax Holding Company Limited (C70765) in konnessjoni ma` materji li dwarhom Vroon Containers B.V. ikollha konflitt ta` interess, inkluz decizjonijiet dwar kawzi u proceduri legali fil-konfront tal-istess Vroon Containers B.V. u Herman Marks, u offerti u trasferimenti ta` ishma, u dan sabiex jitharsu l-interessi ta` Balticmax Holding Company Limited (C70765).*"

Il-provvediment huwa car u inekwivoku.

BHC kellha r-rekwiziti kollha li tkun parti fil-kawza tal-lum.

Il-Qorti ma ssibx illi hemm konflitt ta` nteress bejn Sterling u Marsoft. Marsoft ghandha interess dirett fil-kawza billi bl-azzjonijiet ta` Marks kienet svestita minn jeddijiet taghha fir-rigward ta` AC1. Ma jistax jonqos illi anke Sterling qua direttur ghandu nteress.

L-azzjoni kif intavolata setghet tigi proposta bhala kawza ta` aktar minn attur wiehed. Il-konferma bil-gurament saret minn attur minnhom kif tippermetti l-ligi.

It-tieni (2) eccezzjoni preliminari qeghda tkun respinta wkoll.

VII. Il-mertu

L-inkartament voluminuz illi jifforma l-atti ta` din il-kawza joffri kwadru tar-relazzjonijiet kummercjali ta` bejn Marsoft u Vroon. Mill-atti tohrog stampa cara tal-vertenzi kollha u tad-dizgwid bejn Sterling u Marks. Madanakollu tressqu provi li fil-verita` jmorru lil hinn mill-kuntest tal-vertenza. Din il-Qorti mhijiex sejra tissindaka dak li kien deciz minn organi gudizzjarjo ohra. Fl-istess waqt tghid illi dak li kien deciz u sar *res judicata* ghandu jigi rispettat mill-parti sokkombenti. Tghid ukoll illi ghandha tesercita kawtela fil-kaz ta` kawzi li ghadhom pendenti. Il-Qorti sejra tattjeni ruha strettament mal-kompitu kif adita fil-mertu.

Wara li ghamlet esami akkurat tal-atti, il-Qorti hija konkordi dwar il-fatt illi sehhew numru ta` vjolazzjonijiet da parti ta` Marsoft u ta` BHC ghal dak pattwit fil-BHC Co-operation Agreement ; ghalhekk il-kawzi li saru Oslo. Din l-inadempjenza pprecipitat is-sitwazzjoni lejn in-negattiv, u gabet tilwim u inkwiet bejn id-diretturi Sterling u Marks. Jirrizulta Sterling ha pozizzjoni fis-sens illi l-hlas favur Vroon kif pattwit fil-BHC Co-operation Agreement ma kellux isir ghaliex ghalkemm kien miftiehem illi kellhom jigu akkwistati 32 bastiment, effettivament kienu akkwistati inqas bastimenti minhabba nuqqas ta` likwidita`. Din is-sitwazzjoni gieghlet lil Vroon tistitwixxi procedura arbitrali kontra BHC ghall-hlas tad-debitu u kontra Marsoft ghall-inadempjenza kontrattwali taghha. Il-proceduri kienu decizi favur Vroon.

Is-sitwazzjoni pprecipitat ulterjorment meta waqt laqgha li saret fis-6 ta` April 2017 id-diretturi ma setghux jaqblu dwar il-pass illi kien imiss. Filwaqt illi l-minuti tal-laqgha jixhdu illi l-proposta ta` Sterling ma kenitx accettata, ma jghidux l-istess dwar il-proposta ta` Marks ghall-finanzjament. Effettivament il-minuti lanqas ma jghidu li l-proposti ta` Marks gew accettati. Fil-fatt gie registrat nuqqas ta` qbil min-naha ta` Sterling ghall-proposti ta` Marks.

Minn kif zvolgiet is-sitwazzjoni jidher bil-wisq evidenti illi t-theddida ta` Sterling illi kien ser imexxi bi proceduri ghal xoljiment u stralc ma nizlitx tajjeb ma` Marks. Ghalhekk, kif *del resto* accetta huwa stess, gab **<u>wahdu</u>** fis-sehh il-proposti kollha illi kienet ressqet Vroon fil-laqgha tas-6 ta` April 2017. Fil-fatt attwa l-proposti bir-registrazzjoni tal-atti relattivi l-ghada stress tal-laqgha. Marks ma ghamel ebda sforz sabiex jinnega li agixxa unilateralment u allura abbusivament. Anzi sostna li huwa agixxa fl-ahjar interess ta` BHC kontra l-agir ta` Sterling. Marks imputa li Sterling ried ixekkel il-hidma ta` l-kumpanniji.

Il-provi illi tressqu ma jhallu ebda dubju illi Marks innifsu iffirma u ssottometta ghar-registrazzjoni l-atti rizultanti mill-istess dokumenti.

Issir referenza ghax-xiehda li ta fil-kawza Rik. Nru. 304/16 JZM kopja ta` liema kienet esebita bhala parti mill-kawza tal-lum (fol. 1494-1499) :-

***Dr Richard Camilleri**: … Mr Marks, DOK AA13 is Form T, which is a notification of the transfer of all the ordinary shares which BHC has in AC1 to Vroon. Can you tell me how that came about?*

***Xhud**: Yes.*

***Dr Richard Camilleri**: Can you explain to the Court what you did?*

***Xhud**: I sold the shares.*

***Dr Richard Camilleri**: You sold the shares as a director of BHC to Vroon, of which you are a group director?*

***Xhud**: Of which I am director too, yes.*

***Dr Richard Camilleri**: And did you ask for authorisation? Did you obtain authorisation?*

***Xhud**: From whom?*

***Dr Richard Camilleri**: From the Board of BHC.*

***Xhud**: No, and not from the shareholders either.*

…

***Dr Richard Camilleri**: These were all the ordinary shares which BHC had in AC1. Is that correct?*

***Xhud**: Yes, that`s correct.*

***Dr Richard Camilleri**: The only voting shares.*

***Xhud**: That`s also correct.*

***Dr Richard Camilleri**: And by this move what are the consequesnces?*

***Xhud**: That the voting control of the shares would come with Vroon Containers …*

***Qorti**: … is Dr Camilleri correct when he states that in actual fact Marsoft, through that procedure, was put off completely out of AC1 or not?*

***Xhud**: That`s correct.*

***Dr Richard Camilleri**: And you also appointed a second director, who is a Vroon employee, no?*

***Xhud**: But I did after this.*

***Dr Richard Camilleri**: At the same time, DOK AA15. Can you see it?*

***Xhud**: On the same day we issued new shares, as we had agrred with the bank, 50,000 new shares, or promised the bank, and we appointed Stefan Quist as a director to AC1.*"

L-atturi jikkontendu illi l-agir ta` Marks jikkostitwixxi vjolazzjoni ta` obbligi naxxenti *ex contractu*, *ex lege* u *ex delicto*.

Relattivament ghall-obbligi *ex contractu*, issir referenza ghal klawsola 4 tal-BHC Co-operation Agreement li hija cara. Ma hemmx dubju li l-firmatarji kollha kieku konkordi illi kull decizjoni rigwardanti l-ishma kellha tittiehed b`decizjoni unanima tal-Bord. L-istess jghodd ghall-hatra tat-tielet direttur fuq il-Bord.

L-istess jirrizulta mill-Artikolu 60 tal-M&A tal-kumpannija li jesigi l-approvazzjoni tal-anqas zewg terzi tal-membri fuq il-Bord tad-Diretturi kemm ghaz-zieda u kif ukoll ghat-tnaqqis tal-*authorised* jew l-*issued share capital* kif ukoll ghall-emendi fl-istatut tal-kumpannija.

B`hekk bil-fatt illi Marks wettaq atti b`mod unilaterali sabiex jiffavorixxi azzjonista partikolari, l-istess azzjonista li kien hatru bhala direttur fil-Bord, u allura agixxa minghajr l-approvazzjoni tal-Bord, huwa wettaq ksur ta` obbligi *ex contractu.*

Relattivament ghall-obbligi *ex lege*, l-atturi jaghmlu referenza ghall-**Art 136A(1) tal-Kap. 386**

Issir referenza ghall-kaz **Howard v Herrigel** (1991) (2) SA 660 (A) fejn inghad:

> "*At common law, once a person accepts appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf. That is the general rule and its application to any particular incumbent of the office of director must*

necessarily depend on the facts and circumstances if each."

Hemm ukoll l-**Art 136A(3)(e) tal-Kap 386.**

Id-disposizzjoni ghandha zewg aspetti :

i) fejn diretturi jagixxu *ultra vires* il-poteri lilhom konferiti bis-sahha tal-istatut tal-kumpannija jew tal-ligi ; u

i) fejn diretturi juzaw il-poteri lilhom konferiti ghal skopijiet ulterjuri.

Dwar esercizzju ta` setghat *ultra vires*, issir referenza ghas-sentenza li tat il-Qorti tal-Kummerc fl-14 ta` Gunju 1951 fil-kawza fl-ismijiet **Giovanni Anastasi noe vs Kaptan Serafino Xuereb et**, fejn inghad :

"*Issa, skond l-artikolu 1763 Kodici Civili, Kap 23, (applikabbli ghas-socjetajiet kkemercjali taht l-art 1741 idem u taht l-art 127 Kap 17 Ediz. Riv.), jekk ma jkunx hem ftehim xort`ohra, il-jeddijiet setghat u obbligi ta` dawn l-amministraturi huma regolati bhal fil-ka ta` mandtarju, u skond l-art 1965 Kap 23, fil-mandat jidhlu biss l-attijiet ta` amministrazzjoni. Issa, f`dan il-kaz ma kienx hemm ftehim xort`ohra, u ghalhekk ghandu jigi ritenut li d-directors kellhom biss poteri ta` amministrazzjoni. Lanqas jista` jigi estiz il-mandat taghhom in forza ta` dak li tissejjah "implied authority"; ghaliex kif josserva l-Bowstead "Law of Agency", p. 79 din l-"implied authority" ta` "general agent" qatt ma tista` tigi estiza "outside the ordinary scope of his employment and duties". Issa, ma jistax jigi negat li d-decizjoni li ttiehdet f`dan il-kaz, … kienet toltrepassa ghal kollox il-limit ta` semplici amministrazzjoni. Decizjoni simili ma kienetx tmiss lid-"directors", imma evidentment kienet tmiss lix-"shareholders" f`general meeting (ara ghal dik li hi ligi Ingliza, sect. 278 (1) (b) Companies*

Act, 1948). Argument sussidjarju ghal din il-konkluzjoni, ghalkemm appena bzonnu, huwa illi l-istess kontraenti, meta riedu jirregolaw il-"kontinwazzjoni" tas-socjeta`, fil-klawsola 4 tal-kuntratt issubordinaw id-decizjoni dwar dina l-kontinwazzjoni mhux lill-Board of Directors, imam lix-"sharholders" f`"general meeting". Mela hu logiku li wiehed jargumenta li, fil-hsieb tal-kontraenti f`dak l-att, decizjoni simili ma ghandhiex tigi mehuda mill-Board of Directors, imma mix-"shareholders" f`"general meeting". Ghalhekk, fil-fehma ta` l-Imhallef sedenti, dik id-decizjoni tal-Board of Directors kienet invalida fiha nfisha, ghaliex "ultra vires".

Il-Qorti taghmel referenza ghall-principju li jemergi mill-**Art 137(4) tal-Kap 386**, fejn direttur huwa projbit milli jagixxi *ultra vires* il-poteri lilu konferiti bl-istatut tal-kumpannija, u ghalhekk ma jistax jaghmel atti minghajr l-approvazzjoni tal-organi kostitwiti tal-kumpannija. Ghalhekk fejn tinsorgi sitwazzjoni bhal din, il-validita` tal-azzjoni tista` tigi mpunjata abbazi tas-subincizi (4), (5) u (6) tal-Art 137 tal-Kap 386. Direttur illi jagixxi *ultra vires* jista` jkun li jwiegeb ghal danni skont l-**Art 147(1) tal-Kap 386**.

Dwar l-uzu ta` setghat ghal skopijiet ulterjuri, **Andrew Muscat** fil-ktieb tieghu **Principles of Maltese Company Law** (MUP – 2007 – Pg. 439) ighid :-

"*The improper purpose will always be to feather the directors` own nests or to preserve their own control, in which case it will also be a breach of the duty to act honestly and in good faith in the best interst of the company. Yet even if the directors act honestly for what they believe to be in the best interst of the company, they may still be liable for breach of duty if they exercise their powers for a purpose different from that for which the powers would have been conferred upon them.*"

Issir ukoll referenza ghad-decizjoni fil-kaz **Treasure Trove Diamonds Ltd v Hyman** (1928 AD 464 at 479) fejn inghad :

> "*… and the directors as occupying a fiduciary position towards the company must exercise those powers bona fide in the best interest of the company as a whole, and not for an ulterior motive …*"

Fuq l-istess linja kien il-pronunzjament fil-kaz **In Re Smith and Fawcett Ltd** [1942] Ch 304, [1942] 1 All ER 542 fejn Lord Greene tenna :

> "*The principles to be applied in cases where the articles of a company confer a discretion on directors ... are, for present purposes, free from doubt. They must exercise their discretion bona fide in what they consider – not what a court may consider – is in the interests of the company, and not for any collateral purpose. The question, therefore, simply is whether on the true construction of the particular article the directors are limited by anything except their bona fide view as to the interests of the company.*"

Fil-kawza **Howard Smith Ltd v Ampol Petroleum Ltd** [1974] AC 821, [1974] UKPC 3, Lord Wilberforce osserva:

> *"… to start with a consideration of the power whose excerise is in question … Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad*

line on which the case falls`.

… when a dispute arises whether directors of a company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the court, in their Lordships` opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial or, per contra, insubstantial an alleged requirement may have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount, the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme.`

… it is correct to say that where the self-interest of the directors is involved, they will not be permitted to assert that their action was bona fide thought to be, or was, in the interest of the company` pleas to this effect have invariably been rejected just as trustees who buy trust property are not permitted to assert that they paid a good price. No more, in their Lordships` view, can this be done by the use of a phrase – such as `bona fide in the interest of the company as a whole` or `for some corporate purpose.

…

The question which arises is sometimes not a question of the interest of the company at all, but a question of what is fair as between different classes of shareholders.`

Brenda Hannigan, fil-ktieb **Company Law (**OUP – 2016 – Pg. 202-203) tosserva :-

"Having carried out this exercise and identified the actual purpose for which the power was exercised, that actual purpose then has to be measured against the range of permissible purposes for the exercise of that power, as indicated by the articles or ascertained by the court, in order to decide whether that actual exercise was proper. Provided that the substantial purpose for which the power was exercised is a proper purpose, the exercise of the power is not invalidated by the presence of some other imporper, but insubstantial, purpose. For example, some incidental benefit obtained by a director does not invalidate the exercise of the power unless his self-interest was the substantial purpose for the exercise of the power. Equally, if the substantial purpose was improper, a director`s honest belief that he was acting in the interests of the company, is insufficient to validate the exercise of the power.

...

As is clear from Howard Smith Ltd v Ampol Petroleum Ltd the courts are alert to attempts by the directors to manipulate control of the company by the improper exercise of the power to allot shares."

L-atturi jsostnu illi l-agir ta` Herman Marks sar totalment in *mala fede* b`mod abbuziv, illegali u kontra l-obbligi mposti mil-ligi fuq id-diretturi **inkluz l-Art 136A tal-Kap 386**.

Inghad mill-atturi li l-iskop ewlieni ta` Herman Marks u Vroon kien illi jiksbu kontroll shih.

Ma hemmx dubju illi meta Marks wettaq l-atti mertu ta` din il-vertenza huwa kien qieghed jagixxi unikament fl-interessi ta` Vroon u sabiex jissalda d-debitu jew parti minnu li BHC kellha u ghad ghandha ma` Vroon. Fil-fatt kemm Marks kif ukoll Stefan Quist xehdu illi d-dejn ta` BHC jaqbez il-valur tal-assi illi ghandha l-istess BHC.

Marks u Vroon ghandhom kull interess illi jithallsu lura u li jezegwixxu s-sentenzi miksuba favur taghhom fin-Norvegja. Dan ma jaghti l-ebda dritt lil Marks li jaghmel dak li rrizulta li ghamel. Marks qua wiehed mid-diretturi ta` BHC kiser id-dmirijiet tieghu sabiex jassigura l-interessi ta` Vroon u gie f`konflitt ta` interess mill-aktar lampanti.

Dan l-agir huwa sanzjonat ukoll mill-**Art 136A tal-Kap 386**.

Decide

Ghar-ragunijiet kollha premessi, il-Qorti qeghda taqta` u tiddeciedi din il-kawza billi :-

Tichad l-eccezzjonijiet kollha.

Tilqa` l-ewwel u t-tieni talbiet fl-intier taghhom kif dedotti.

Tilqa` t-tielet talba. Tahtar lill-Avukat Dottor Anna Mifsud Bonnici sabiex tidher bhala kuratur ghall-eventwali kontumaci fuq l-atti ta` rexxissjoni li ghalihom tirreferi l-ewwel talba. Tordna li dawn l-atti ta` rexxissjoni jsiru fi zmien xahar mil-lum.

Tilqa` r-raba` u l-hames talbiet fl-intier taghhom kif dedotti.

Tordna lill-konvenuti Vroon Containers B.V. u Herman Marks sabiex *in solidum* bejniethom ihallsu l-ispejjez kollha ta` din il-

kawza, inkluzi dawk tal-Mandat ta` Inibizzjoni Numru 734/17 SM mahrug fl-14 ta` Gunju 2017.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur