



**QORTI CIVILI
(SEZZJONI TAL-KUMMERC)**

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum it-Tnejn, 30 ta` Novembru 2020

**Kawza Nru. 5
Rikors Nru. 1150/2017 JZM**

**Avv. Jean-Pie Gauci-Maistre
(detentur tal-Karta tal-Identita`
bin-numru 345384M) bhala
mandatarju specjali ta` Herman
Marks, detentur tal-passaport
Olandiz bin-numru BURC1429G**

kontra

**Balticmax Holding Company
Limited (registrata bin-numru
ta` registrazzjoni C 70765)**

u

**b` digriet tat-8 ta` Jannar 2019
gie kjamat fil-kawza Pal Leo
Eckbo**

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fil-21 ta' Dicembru 2017 li jaqra hekk :-

Illi s-socjeta` intimata Balticmax Holding Company Limited hija socjeta` privata limitata stabbilita taht il-ligijiet ta` Malta li giet registrata fis-sitta u ghoxrin (26) ta` Mejju tal-elfejn u hmistax (2015) fir-Registru tal-Kumpanniji bin-numru ta` registrazzjoni "C 70765" u dan kif jirrizulta mic-Certifikat ta` Registrazzjoni tas-socjeta` intimata mahrug taht l-Att dwar il-Kumpanniji (Kap. 386 tal-Ligijiet ta` Malta) (kopja hawn annessa u mmarkata bhala `Dok. A`);

Illi s-socjeta` intimata Balticmax Holding Company Limited ("BHC") giet kostitwita originarjament bhala kumpannija b`membru wiehed u cioe` Paul Eckbo kif mhuri mill-anness kopja tal-istatut originali tas-socjeta` hawnhekk mmarkat bhala "Dok. B". Fis-sbatax (17) ta` Settembru tal-elfejn u hmistax (2015) gew registrati mar-Registratur tal-Kumpanniji zewg trasferimenti ta` azzjonijiet minghand l-azzjonist Paul Eckbo ghall-azzjonisti attwali tas-socjeta` u cioe` Vroon Containers B.V., socjeta` registrata fl-Olanda bin-numru 22055081 u b`indirizz registrat ta` Haven Westzijde 21, 4511 AR Breskens, fl-Olanda ("Vroon") kif ukoll Marsoft International A/S, socjeta` registrata fin-Norvegja bin-numru 937 657 927 u b`indirizz registrat ta` Inkognitogata 33A, 0256 Oslo, Norvegja ("Marsoft"). Dawn iz-zewg azzjonisti, prezentement, jhaddnu mitejn elf (200,000) azzjoni ordinarja ta` valur nominali ta` Ewro (€1) imhallsin ghal kollox kull wiehed, anki b`rizultat ta` zieda fil-kapital azzjonarju (zewg "Form T" u zewg "Form H" mahruqa mill-MFSA hawnhekk annessi u mmarkati bhala "Dok. C", "Dok. D", "Dok. E" u "Dok. F" rispettivament);

Illi bi ftehim datat is-sitta (6) t`Ottubru tal-elfejn u hmistax (2015) maghruf bhala il-BHC Co-operation Agreement (kopja hawn annessa u mmarkata bhala "Dok. G") bejn l-istess socjeta` intimata BHC u z-zewg azzjonisti taghha Vroon u Marsoft, l-azzjonisti komplew jirregolaw ir-relazzjoni ta` bejniethom fi hdan is-socjeta` u fost l-ohrajn kellhom id-dritt jappuntaw direttur kull wiehed flimkien mat-tielet direttur indipendenti. Kif mhuri fl-estratt mehud minn fuq is-sit elettroniku tar-Registratur tal-Kumpanniji hawnhekk anness u mmarkat bhala "Dok. H", is-socjeta` ghandha zewg diretturi u cioe` l-attur Herman Marks li gie appuntat minn Vroon u Arlie Sterling li gie appuntat minn Marsoft;

Illi Dr Stanley Portelli kien appuntat bhala d-direttur indipendenti fis-socjeta` intimata fit-18 t`Awwissu tal-elfejn u hmistax (2015) izda l-istess Dr Portelli rrizenja minn Direttur fit-tmienja u ghoxrin (28) ta` Dicembru tal-elfejn u hmistax (2015) u fl-istess data rrizenja wkoll mill-pozizzjoni ta` segretarju tal-kumpannija (kif muri mill-Form K hawn annessa u mmarkata "Dok. I") u fil-fatt din il-posizzjoni ghadha vakanti sal-lum il-gurnata, u dan minhabba l-agir tal-azzjonista Marsoft u d-direttur appuntat minnha Arlie Sterling;

Illi s-socjeta` intimata giet inkorporata biex tkun maggorment socjeta` "holding" li, principalment ghandha attivita` kif spjegat sussegwentement (l-istatut prezenti tas-socjeta` intimata hawnhekk anness u mmarkat bhala "Dok. J"):

"to acquire, hold and sell shares, stocks, bonds, debentures, interests, or securities of or in any other undertaking in and/or outside Malta, (whether such shares be fully paid up or not) where the so doing may seem desirable in the interest of the Company, and in such manner as may from time to time be determined, solely in the name of, for and on behalf of the Company and the carrying out of such other acts and entering into such agreements as may be necessary, desirable connected or ancillary in respect of the above investment.";

Illi s-socjeta` intimata BHC kienet, fil-fatt, dahlet f`zewg kuntratti ta` self ma` wahda mill-azzjonisti taghha stess u cioe` Vroon, u li b`hekk, b` Senior Loan Note u Senior Bridge Loan Note it-tnejn datati sitta (6) t`Ottubru elfejn u hmistax (2015) (kopji hawnhekk annessi u mmarkati `Dok. K` u `Dok. L` rispettivament) Vroon selfet l-ammont totali ta` hmistax il-miljun, mitejn u hamsa u ghoxrin elf Dollaru Amerikan (USD 15,225,000) lil BHC ghall-uzu ta` investment. Dan l-ammont qatt ma gie mhallas lura fit-total tieghu lill-kreditrici Vroon minn BHC kif miftiehem skont l-istess kuntratti u fil-fatt dan kien oggett ta` decizjoni tal-Arbitru f`Oslo moghtija fil-hmistax (15) ta` Mejju tal-elfejn u sbatax (2017) (kopja tad-decizjoni bin-Norvegiz kif ukoll traduzzjoni bl-Ingiliz tal-istess hawnhekk annessi u mmarkati "Dok. M") fejn gie konfermat li Vroon hija kreditrici ta` BHC ghall-ammont ta` hmistax il-miljun, mitejn u hamsa u ghoxrin elf Dollaru Amerikan (USD 15,225,000) u wkoll ta` spejjez legali, illi kellhom jithallsu minn BHC fi zmien hmistax (15)-il gurnata mid-data tad-decizjoni u dan barra interessi sad-data tal- hlas. Din id-decizjoni hija registrata mac-Centru tal-Arbitragg Malti u hija titlu ezekuttiv f`Malta (dan kif mhuri mid-

decizjoni ta-Chairman ta-Centru tal-Arbitragg Malti, kopja taghha hawnhekk annessa u mmarkata "Dok. N");

Illi s-socjeta` intimata ghandha wkoll kredituri ohrajn illi huma interessati illi jirkupraw flushom u dawn jinkludu socjetajiet illi ghamlu xoghol ghall-istess socjeta` intimata bhal ditti ta` avukati kemm Maltin kif ukoll Norvegizi kif ukoll OSM Maritime AS, socjeta` Norvegiza illi toffri xoghol ta` amministrazzjoni u managment, fost l-ohrajn, u kif ser jigi muri ahjar fit-trattazzjoni tal-kaz;

Illi barra minn dan, BHC m`ghandhiex prezentement sors ta` dhul hekk kif il-maghrufa management agreements u cioe` `l hekk imsejjah Shipman 2009 Standard Ship Management Agreement tal-ghaxra (10) ta` Lulju tal-elfejn u hmistax (2015) bejn BHC u Balticmax Acquisition Corporation One Ltd (C-70766) u bl-indirizz registrat ta` Level 3, Valletta Buildings, South Street, Valletta, VLT 1103, Malta ("AC1") li hija socjeta` sussidjarja ta` BHC, gew terminati din is-sena mill-amministratur provvizorju tal-istess socjeta` AC1 Dr Richard Galea Debono li kien gie mahtur minn din l-Onorabbli Qorti precedentement u cioe` skont digriet tal-Qorti datat wiehed u ghoxrin (21) ta` Gunju tal-elfejn u sbatax (2017) fil-kawza b` rikors numru 352/17/1 JZM bejn Av. Jonathan Abela Fiorentino, avukat, (detentur tal-Karta tal-Identita` bin-numru 555482M) bhala mandatarju specjali ta` Arlie Sterling, detentur tal-Passaport Amerikan bin-numru 444918779 kontra Balticmax Acquisition Corporation One Ltd (registrata bin-numru ta` registrazzjoni C 70766) et ghal liema kawza giet sussegwentement ceduta, u ghalhekk dan ikompli juri illi l-istess socjeta` BHC m`ghandhiex prospettiva valida illi qatt ser tkun tista` thallas id-dejn taghha;

Illi kif gie spjegat iktar `il fuq, z-zewg azzjonisti Vroon u Marsoft jhaddnu hamsin fil-mija (50%) tal-azzjonijiet fis-socjeta` intimata kull wiehed, u fl-istess hin il-Bord tad-Diretturi huwa maghmul minn zewg diretturi appuntati miz-zewg azzjonisti nfushom. Jidher car illi s-socjeta` intimata tinsab ukoll f`sitwazzjoni ta` "deadlock" assolut, fejn l-azzjonisti kif ukoll il-Bord tad-Diretturi ma jaqblu fuq xejn fir-rigward tas-socjeta` u anki fl-isfond tal-falliment tal-istruttura kummercjali li huma kienu qablu fuqha u li spiccat fix-xejn meta s-socjeta` intimata ma zammitx mal-obbligi taghha;

Illi l-Onorabbli Qorti diversi drabi kkonfermat illi l-kaz maghruf bhala "deadlock" huwa raguni gravi valida li ghalih tista` tigi ggustifikata ordni ta` xoljiment u stralc ta` kumpanija. Fil-fatt, f`kaz wiehed biss

minn bosta, u cioe` 643/2011 JZM Ludwig Calleja (433173M) u Claire Calleja (337374M) kontra Samuel Abela (275962M) u L S Pacifico Engineering Company Limited (C49292) deciza fl-erbatax (14) ta` Lulju tal-elfejn u sittax (2016), l-Onorabbli Qorti qalet, anki fl-isfond ta` diversi kazijiet kwotati fl-istess decizjoni, illi minhabba dizgwid serju li jolqot l-essenza tal-fiducja ta` bejn id-diretturi u l-azzjonisti...ma hemmx futur ghall-kumpanija intimata. Iktar minn hekk, bejn id-diretturi u l-azzjonisti kien hemm breakdown in mutual confidence and trust tant car u inekwivoku illi l-kumpanija intimata ma tistax tkompli l-esistenza taghha. Dawn il-kliem tal-Onorabbli Qorti jirriflettu b` mod car il-kaz odjern tas-socjeta` intimata.

Illi Profs. Andrew Muscat fil-ktieb tieghu "Principles of Maltese Company Law", jikkumenta is-segwenti :

"A company would usually be in a deadlock situation if it becomes impossible to manage its affairs because the voting power at board and general meetings is divided between two opposing groups. A deadlock situation typically arises where a company has two shareholders who are its only two directors and the shareholders hold an equal number of voting shares. If they disagree on major questions in respect of the management of the company, they may be unable to break the deadlock both at board meeting and at general meeting level. Management and other decisions vital to the company will cease to be taken."

Illi dan t` hawn fuq jiddeskrivi perfettament is-sitwazzjoni prezenti tas-socjeta` intimata u fil-prattika jezisti "stalemate" assolut tal-istess socjeta` ;

Illi fil-fatt it-tielet direttur indipendenti ma kienx appuntat mis-socjeta` innifisha minhabba li qatt ma kien hemm ftehim, kif ukoll l-ebda xoghol fi hdan is-socjeta` qatt ma seta` jkompli jsehh minhabba din is-sitwazzjoni, u dan id-"deadlock" u dizgwid irreparabli jidher anki fl-isfond ta` kazijiet pendenti fil-Qrati Maltin bejn l-istess azzjonisti u s-socjeta` intimata innifisha illi gew prezentati mis-socjeta` Marsoft bil-hsieb ahhari li l-istess socjeta` intimata dejjem tigi maqtula u li juru bic-car kif ir-relazzjoni professjonali u personali ta` bejn l-azzjonisti kif ukoll id-diretturi tinsab tassew hazina u dan b` mod irrimedjabbli. Il-kawzi pendenti jibqghu dik taht l-Artiklu 402 tal-Att dwar il Kumpaniji (Kap. 386 tal-Ligijiet ta` Malta) u cioe` "Av Jonathan Abela Fiorentino (555482M) 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, Norvegja vs. Vroon

Containers B.V., socjetà registrata fl-Olanda bin-numru 22055081 u b`indirizz registrat ta` Haven Westzijde 21, 4511 AR Breskens, fl-Olanda u Balticmax Holding Company Limited (C 70765)" bin-numru 304/2016 JZM kif ukoll "Balticmax Holding Company Limited (C 70765) u Av. Jonathan Abela Fiorentino (555482M), bhala mandatarju specjali ta` Arlie Sterling, detentur tal-Passaport Amerikan bin-numru 444918779, u wkoll bhala mandatarju specjali ta` Marsoft International A/S, socjetà registrata fin-Norvegja bin-numru 937 657 927 u b`indirizz registrat ta` Inkognitogata 33A, 0256 Oslo, Norvegja vs. Vroon Containers B.V., socjetà registrata fl-Olanda bin-numru 22055081 u b`indirizz registrat ta` Haven Westzijde 21, 4511 AR Breskens, fl-Olanda, Herman Marks, detentur tal-Passaport Olandiz bin-numru BURC14296, Stefan Quist, detentur tal-Passaport Olandiz bin-numru NNPoJ28B3, Balticmax Acquisition Corporation One Ltd (C 70766) u Registratur tal-Kumpanniji" bin-numru 605/2017 JZM;

Illi f`wiehed mill-kazijiet u cioe` 304/2016 JZM, l-Onorabbli Qorti kienet appuntat, b`mizura interim, lil Dr Richard Galea Debono bhala t-tielet direttur indipendenti fis-socjeta` intimata izda dan irriżenja fis-sbatax (17) ta` Dicembru tal-elfejn u sittax (2016) wara inqas minn sitt (6) xhur (kopja tal- Form K hawnhekk annessa u mmarkata "Dok. O"). Fin-nota ta` rizenja tieghu pprezentata lill-Onorabbli Qorti datata dsatax (19) ta` Dicembru tal-elfejn u sittax (2016) (kopja tan-nota hawnhekk annessa u mmarkata "Dok. P") Dr Richard Galea Debono, frott il-kwalifiki u l-esperjenza vasta tieghu, spjega kif minhabba l-procedura illi dak iz-zmien kienet pendent f`Oslo u cioe` dik prezentata minn Vroon kontra s-socjeta` intimata (illi sussegwentement saret decizjoni res judicata favur Vroon kif diga` msemmi iktar `il fuq) is-socjeta` kienet ser taqa` "f`posizzjoni ta` insolvenza" u kompla jghid li s-socjeta` intimata kienet ser "tinsab f`insolvenza, u dan bejn zewg azzjonisti li qishom kelb u qattus." Dan ikompli jaghti widhen lis-sitwazzjoni gravi tas-socjeta` intimata;

Illi, barra minn dan kollu, fil-hmistax (15) ta` Awissu tal-elfejn u sbatax (2017), is-socjeta` Marsoft, u cioe` is-socjeta` illi thaddan hamsin fil-mija (50%) tal-azzjonijiet fis-socjeta` intimata, applikat fil-Qorti Norvegiza biex il-beni taghha jitqiegħdu taht proceduri tal-Qorti bhala proprjeta` falluta u din it-talba giet milqughha mill-Qorti Norvegiza b`decizjoni mogħtija fis-sittax (16) t`Awissu tal-elfejn u sbatax (2017) u cioe` gurnata biss wara (kopja certifikata tat-traduzzjoni fl-Ingiliz tad-decizjoni hawnhekk annessa u mmarkata `Dok. Q`). B`hekk Marsoft bhalissa qiegħda tigi amministrata bhala proprjeta` falluta minn trustee imqabbda mill-Qorti Norvegiza u li jidher li m`ghandhiex intenzjoni li tiehu decizjoni dwar il-likwidazzjoni tas-socjeta` intimata.

Illi hekk kif sar jidher car illi s-socjeta` intimata mhijiex f`sitwazzjoni li tista` thallas id-djun taghha l-esponenti informa lill-Bord tad-Diretturi u aktar tard lill-azzjonisti tas-socjeta` b`dan kollu, u dan diversi drabi, izda l-ebda passi ma ttiehdu peress li l-azzjonisti u d-diretturi ma jaqblux bejniethom u jinsabu f`sitwazzjoni ta` `deadlock` anki f`dan il-waqt;

Illi, ghar-ragunijiet relevanti imsemmija, u mhux biss, kif ser jigi pruvat fit-trattazzjoni tal-kaz, jidher car illi s-socjeta` intimata tinsab f`sitwazzjoni irreparabbli fejn effettivament ma tistax thallas id-djun taghha, u ghalhekk, l-esponenti qieghed jitlob ix-xoljiment u l-istralc konsegwenzjali tas-socjeta` intimata minn din l-Onorabbli Qorti u dan ai termini tas-sub-paragrafu (ii) tal-paragrafu (a) tas-sub-artikolu (2) tal-Artikolu mitejn u erbatax (214) tal-Att Dwar il-Kumpanniji (Kap. 386 tal- Ligijiet ta` Malta);

Illi, ghar-ragunijiet relevanti imsemmija ohra, u mhux biss, kif ser jigi pruvat fit-trattazzjoni tal-kaz, jidher car ukoll illi s-sitwazzjoni ta` bejn l-azzjonisti in primis kif ukoll konsegwentement ta` bejn id-diretturi tas-socjeta` intimata tinsab irreparabilment imkissra u b`hekk hemm sitwazzjoni ta` deadlock li ma jistax jigi solvut u li gab lis-socjeta` intimata f`sitwazzjoni ta` stall komplut, u ghalhekk, l-esponenti qieghed jitlob ix-xoljiment u l-istralc konsegwenzjali tas-socjeta` intimata minn din l-Onorabbli Qorti u dan ai termini tas-sub-paragrafu (iii) tal-paragrafu (b) tas-sub-artikolu (2) tal-Artikolu mitejn u erbatax (214) tal-Att Dwar il-Kumpanniji (Kap. 386 tal- Ligijiet ta` Malta);

Ghaldaqstant, ghar-ragunijiet fuq moghtija u mhux biss, l-esponenti jitlob umilment u bir-rispett li, prevja kwalunkwe dikjarazzjoni ohra xierqa, necessarja u opportuna, din l-Onorabbli Qorti joghghobha :

1. Tiddikjara u tordna x-xoljiment u l-konsegwenzjali stralc tas-socjeta` intimata Balticmax Holding Company Limited skont is- sub-paragrafu (ii) tal-paragrafu (a) tas-sub-artikolu (2) u r-relatat sub artikolu (5) tal-Artikolu mitejn u erbatax (214) tal-Att Dwar il-Kumpanniji (Kap. 386 tal- Ligijiet ta` Malta).

2. Tiddikjara u tordna x-xoljiment u l-konsegwenzjali stralc tas-socjeta` intimata Balticmax Holding Company Limited skont is-sub-

paragrafu (iii) tal-paragrafu (b) tas-sub-artikolu (2) tal-Artikolu mitejn u erbatax (214) tal-Att Dwar il-Kumpanniji (Kap. 386 tal- Ligijiet ta` Malta).

3. Tordna l-hatra ta` Amministratur Provvizorju sabiex jaqdi dawk il-funzjonijiet u setghat in konnessjoni mal-amministrazzjoni skont kif din l-Onorabbli Qorti joghgobha li ghandha tispecifica fl-ordni taghha skont ic-cirkustanzi tal-kaz u dan skont l-Artikolu mitejn u tmienja u ghoxrin (228) tal- Att Dwar il-Kumpanniji (Kap. 386 tal- Ligijiet ta` Malta).

4. Tahtar l-istralcarju u tordna l-istralc mill-Qorti tas-socjeta` intimata Balticmax Holding Company Limited skont id-disposizzjonijiet tas-Sub-Titolu I tat-Titolu II tat-Taqsima V tal- Att Dwar il-Kumpanniji (Kap. 386 tal- Ligijiet ta` Malta).

5. Tordna n-notifika tar-Rikors Promotur lir-Registratur tal-Kumpanniji skont is-Sub-Artikolu tmienja (8) tal-Artikolu mitejn u tmintax (218) tal-Att Dwar il-Kumpanniji (Kap. 386 tal- Ligijiet ta` Malta).

6. Taghti kull provvediment iehor li jidhrilha xieraq u opportun.

Rat il-lista tax-xhieda.

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

Rat ir-risposta li pprezentat il-kumpannija ntimata fid-9 ta` Frar 2018 li taqra hekk :-

Illi r-rikors odjern ma hu xejn ghajr abbuż serjissimu tal-procedura da parti tar-rikorrent Herman Marks, li huwa direttur tas-socjeta` intimata imma, kif ser jigi ppruvat fil-kors tas-smiegh ta` dan ir-rikors, qieghed bl-iktar mod abbużiv u illegali, u bi ksur flagranti tal-obligi fiducjarji tieghu lejn is-socjeta` , jagixxi unikament fl-interess tas-socjeta` Vroon Containers BV – is-socjeta` li appuntatu bhala direttur fuq il-bord tas-socjeta` intimata.

Illi fil-fatt dan ir-rikors ma huwa xejn hlief l-ahhar anella f`katina twila ta` passi li ttiehdu sabiex Vroon Containers BV abbużivament timmisapproprija ruhha mill-assi tas-socjeta` intimata, u jekk it-talbiet kontenuti f`dan ir-rikors ser jigu akkoliti, sejra fil-fatt jirnxxielha f`dan id-disinn abbużiv.

Eccezzjoni Preliminari

Illi dan ir-rikors ma setax jigi propost ghax imur direttament kontra decizjoni ta` din l-istess Onorabbli Qorti fil-kawza bl-ismjiet: Av. Jonathan Abela Fiorentino, avukat (detentur tal-Karta tal-Identita` bin-numru 555482M) 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, finNorvegja kontra 1. Vroon Containers B.V., socjeta` registrata fl-Olanda binnumru 22055081 u b`indirizz registrat ta` Haven Wsetzijde 21, 4511 AR Breskens, fl-Olanda, u Balticmax Holding Company Limited (C-70765) Rikors numru 304/16 JZM, fejn din il-Qorti ddecidiet:

"Riferibbilment ghar-raba` talba tar-rikorrent, 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)."

Illi b`hekk ma jistax Herman Marks jilbes il-kappell ta` direttur ta` Balticmax Holdings Company Limited u jipproponi din il-kawza, liema kawza zgur li Vroon Containers BV ghandha interess fiha.

Ghal dir-raguni biss ir-rikors odjern ghandu jigi michud bl-ispejjez.

Sfond fattwali

1. Illi s-socjeta` intimata *Balticmax Holding Company Limited* (iktar`l quddiem imsejha "BHC") kienet l-azzjonista ta` mija fil-mija (100%) tal-azzjonijiet f` *Balticmax Acquisition Corporation One Limited* (C70766) (Iktar`l quddiem imsejha "AC1") liema socjeta kienet il-holding company f` 24 socjeta` sussidjarja, liema socjetajiet susddjarji ghandhom registrati f` isimhom rispettivament bastiment kull wiehed. Igifieri, is-socjeta` intimata kienet il-beneficial owner ta` dawn l-24 bastiment, tramite is-sussidjarja taghha AC1. (Dan huwa spjegat wkoll mill-anness dokument immarkat bhala Dok. BHC1).

2. Illi fi hdan is-socjeta` AC1 fil-fatt is-socjeta` BHC kellha 2,000 ordinary shares u 15,737,500 non voting preference shares.

3. Illi kif jirrizulta minn Dok. BHC2, u kif ser jigi ppruvat fil-kors tal-kawza ir-rikorrent unilaterlament minghajr ebda approvazzjoni tal-Bord ta` BHC fis-7 t` April 2017 biegh l-2,000 Ordinary Share lis-socjeta` li appuntatu bhala direttur fuq BHC – cioe` lil Vroon Container BV, bir-risultat li Vroon b`hekk hadet control tal-flotta kollha li qabel kienet ta` BHC. Ara wkoll Dok BHC3.

4. Illi l-istess Herman Marks wkoll jiffirma parti mill-managing board ta` Vroon.

5. Illi rinfaccata b`dan l-agir ta` Herman Marks li jmur kontra kull interess tas-socjeta` BHC, l-istess socjeta` intavolat procedura quddiem din l-istess Onorabbli Qorti, fl-ismijiet *Balticmax Holding Company Limited* (C 79765) u Av Jonathan Abela Fiorentino (555482M) bhala mandatarju specjali ta` Arlie Sterling detentur ta` passaport Amerikan bin-numru 444918779 u wkoll bhala mandatarju specjali ta` *Marsoft Internationa A/S vs Vroon Containers BV* u Herman Marks, Stefan Quist, *Balticmax Acquisition Corporation One Ltd* (C 70766) u Registratur tal-Kumpaniji Rik. Nru 605/2017JZM, fejn dan it-trasferiment qed jigi attakkat.

6. Illi barra minn hekk hemm ukoll procedura ohra pendenti bejn l-azzjonisti, cioe dik msemmija iktar`l fuq, cioe` Rikors Numru 304/16JZM.

Eccezzjonjiet Ohra

7. *Illi in vista ta` dawn iz-zewg proceduri legali li gia` gew prezentati quddiem din l-istess Onorabbli Qorti, li jaffettwaw in-natura essenjali tas-socjeta` BHC, din il-Qorti, minghajr pregudizzju ghal dak gia` eccepit, ghandha tistenna l-ezitu ta` dawn iz-zewg kawzi, qabel ma tkun f`posizzjoni li tikkunsidra dan ir-rikors. Fil-fatt jekk dil-Qorti tghaddi biex tikkunsidra dan ir-rikors tkun qed tinnega minn issa kull access ghall-gustizzja lis-socjeta` esponenti, u dil-proceduri tkun qed isservi sabiex jittiehed it-tapit minn tat saqajn is-socjeta` esponenti in kwantu jirrigwarda il-proceduri li gabet quddiem din il-Qorti l-istess socjeta`.*

8. *Illi bhala ezitu ta` dawn il-kawzi ghandu jirrizulta li l-arlogg irid jitregga lura, jew jinghata rimedju iehor li din il-Qorti jidhrilha xieraq a favur tas-socjeta` esponenti, u jkun biss f`dak il-punt li wiehed irid jara jekk jissustixxux l-elementi rikjesti mill-artikolu 214 (2)(a)(ii) jew 214 (2) (b)(iii). Kieku ma jkunx hekk, kull darba li jkun hemm kawza a bazi tal-artikolu 402 bejn zewg azzjonisti li ghandhom hamsin fil-mija tal-ishma ta` socjeta` kull wiehed, allura l-intimat fil-kawza a bazi tal-artikolu 402, jaqbad u jintavola kawza ai termini tal-artikolu 214 (2) (b) (iii) u jitlob ix-xolkiment a bazi ta` "deadlock"! Dan zgur mhux dak lit rid il-ligi jew tesigi l-gustizzja.*

9. *Illi barra minn hekk, u minghajr pregudiuzzju ghas-suespost, jirrisulta li Herman Marks, kif ser jigi ppruvat fil-kors tal-kawza, kien responsabbli ghal diversi nuqqasijiet serji fil-qadi tieghu bhala direttur tas-socjeta` BHC. Fil-fatt l-istess Herman Marks:*

(i) *Agixxa unilateralment ta` struzzjonijiet lis-segretarju tal-kumpanija sabiex jirregistra is-suppost rizenja ta` Paul Eckbo mill-bord ta` Balticmax Acquisition Corporation One Ltd u l-hatra tal-istess Marks bhala Chairman fuq il-bord ta` Balticmax Acquisition Corporation One Ltd.*

(ii) *Hareg "rizoluzzjonijiet" iffirmati minnu biss fejn iddikjara li impjegati ta` Vroon kellhom electronic banking authority fuq il-kontijiet li BHC u Balticmax Acquisition Corporation One Ltd kellhom ma` Bremer Landesbank.*

(iii) *Unilateralment irrifjuta offerta minn Bremer Landesbank sabiex jestendu t-terminu tal-Master Finance Agreement.*

(iv) *Ibblokka l-hatra ta` independent Company manager ghal BHC – kontra dak li kien gie pattwit bejn il-partijiet.*

(v) *Ha \$2 miljuni mill-kontijiet ta` BHC ghal Vroon minghajr l-awtorizzazzjoni tal-Bord tas-socjeta` esponenti.*

(vi) *Kien responsabbli ghall-approvazzjoni tal-hlas ta` circa \$0.9 miljun f` technical management expenses, liema spejjez qatt ma gew approvati mill-Bord.*

(vii) *Ha iktar minn \$200,000 mill-fondi ta` BHC sabiex hallas ghall-spejjez legali ta` Vroon, minghajr il-kunsens tal-Bord tas-socjeta` esponenti.*

(viii) *Abbuзивament ittermina il-management agreement bejn BHC u Balticmax Acquisition Corporation One Ltd fit-22 ta` Mejju 2017;*

(ix) *Arbitrarjament appunta lil Andersch, hallas ghalihom minn Balticmax Acquisition Corporation One Ltd, sabiex jaghmlu "independent" business review tas-socjeta` esponenti u tas-socjeta` Balticmax Acquisition Corporation One Ltd. u forna lill-istess b` informazzjoni li hu kien jaf li ma kenitx korretta.*

Illi dawn l-atti kien in addizzjoni mal-fatt li biegh l-ishma tas-socjeta` esponenti fis-socjeta` Balticmax Acquisition Corporation One Ltd lil Vroon, u hareg ishma godda fl-istess socjeta` a favur l-istess Vroon, u appunta impjegat ta` Vroon fuq il-bord tal-istess Balticmax Acquisition Corporation One Ltd, u qabad u biddel l-istatut ta` din is-socjeta` ukoll.

10. *Illi u bhala resultat tal-azzjonjiet tal-istess Herman Marks, is-socjeta` esponenti tinsab fis-sitwazzjoni li fiha tinsab, u kwindi ma jistax issa jkun Herman Marks li javvanza t-talba ai termini tal-artikolu 214, u jipprova jinqeda b` rimedju li taghti l-ligi ghal sitwazzjoni li gab huwa stess. L-artikoli tal-ligi jridu jigu uzati in bona fede u ma jistghux jigu abbuзati kif qed jittenta jaghmel l-istess Herman Marks. Min jigi quddiem il-Qorti sabiex jitlob protezzjoni jridu ikollu idejh nodfa – haga li Herman Marks zgur m`ghandux kif ser jigi pruvat fil-kors tal-kawza.*

Illi in vista tas-suespost it-talbiet kif kontenuti fir-rikors promotur ghandhom jigu michuda bl-ispejjez.

Rat illi fl-udjenza tad-9 ta` April 2018, kienet milqugha talba li ghamlet is-socjeta` estera Vroon Containers B.V. sabiex tkun awtorizzata, bhala kreditrici tal-kumpannija intimata, taghmel sottomissjonijiet skont l-Art 218(6) tal-Kap 386.

Rat il-provvediment li tat fil-31 ta` Mejju 2018 fejn kienet michuda l-ewwel eccezzjoni preliminari tal-kumpannija ntinata.

Rat illi fl-udjenza tas-6 ta` Novembru 2018, ir-rikorrent noe rtira t-tielet talba.

Rat illi fl-udjenza tat-8 ta` Jannar 2019, kienet ordnata l-kjamata fil-kawza ta` Pal Leo Eckbo.

Rat ir-risposta li pprezenta l-kjamat fil-kawza fl-24 ta` Jannar 2019 li taqra hekk:-

1.0 Osservazzjoni preliminari

Illi fuq talba tal-Av. Richard Galea Debono u tenut kont tan-nuqqas ta` oppozizzjoni da parti tar-rikorrent nomine, fis-seduta tat-8 ta` Jannar 2019 dina l-Onorabbli Qorti ordnat il-kjamata fil-kawza tal-esponenti Pal Leo Eckbo, li ta ruhu b`notifikat tramite l-esponent nomine waqt l-istess b`ghoxrin (20) gumata ghar-risposta;

Illi ghalhekk l-esponenti qed iressaq din ir-risposta tieghu ghat-talbiet kontenuti fir-rikors ghax-xoljiment u stralc tas-socjeta` intimata, kif ordnat mill-Qorti;

Illi qabel ma jigi ndirizzat il-mertu tal-proceduri miftuha kontra Balticmax Holding Company Limited ("BHC"), jigi qabel xejn dikjarat li l-esponent nomine jinsab debitament awtorizzat sabiex jirrapprezenta

lill-kjamat fil-kawza Pal Leo Eckbo bhala mandatarju specjali tieghu ai fini ta` dawn il-proceduri;

Jinghad ukoll illi l-interess ta` Pal Leo Eckbo li jikkontesta t-talba ghal stralc tas-socjeta` Balticmax huwa fil-vesti tieghu ta` azzjonist b` hamsin fil-mija tal-azzjonijiet tas-socjeta`, li allura ghandu interess u premura illi jassigura illi BHC ma tigix mqieghda fi stralc sakemm ma jirrizultawx tassew ragunijiet impellenti ghal dan, liema ragunijiet ma jissussistux.

2.0 Fil-mertu

Illi minn qari tar-rikors, jidher illi r-raguni ewlenija moghtija ghall-istralc ta` BHC hija li mhix f`qaghda li thallas id-djun taghha. L-esponenti jissottometti illi

(i) illi l-ewwelnett, huwa r-rikorrenti illi ghandu jsib prova konvincenti illi dak li allegat minnu huwa minnu;

(ii) illi fil-fatt, l-esponenti jsostni illi mhux il-kaz, illi BHC ma tistax thallas id-djun taghha u dan ghaliex BHC ghandha, biss biss, diversi pretensjonijiet kontra terzi li jistghu jissarrfu fi dhul ghas-socjeta` ;

(iii) illi, dato rna non concesso illi BHC ghandha diffikultajiet finanzjarji, ikun utli li wiehed jizen x`wassal ghalihom, ta` min hija r-responsabbilita` ghal dan u x`mezzi jista` jkun hemm - li ma jwasslux ghall-istralc - biex wiehed jindirizza tali diffikultajiet;

Illi jibda biex jinghad illi l-procedura odjerna ghax-xoljiment u stralc tas-socjeta` Balticmax Holding Company Limited giet prezentata fil-21 ta` Dicembru 2017 u cjioe` qabel ma gew decizi zewg proceduri ohrajn li jikkoncernaw fost l-ohrajn l-istess partijiet fil-procedura odjerna, ossija l-kawza fl-ismijiet Av. Jonathan Abela Fiorentino noe et vs. Vroon Containers B.V. et, rikors numru 304/2016 JZM taht l-Artikolu 402 tal-Att dwar il-Kumpanniji deciz fit-30 ta` Ottubru 2018, u l-kawza fl-ismijiet Balticmax Holding Company Limited et vs. Vroon Containers B.V. et, rikors guramentat numru 605/2017 JZM deciz fid-29 ta` Novembru 2018. Dawn iz-zewg kawzi llum ghaddew in gudikat u huma finali;

Illi fost l-ohrajn, f` dawk iz-zewg kawzi appena citati l-punt ewlieni u fundamentali li fuqu kienu msejsa t-talbiet rispettivi, kien jikkoncerna l-agir abbużiv, unilaterali u illegali da parti ta` Vroon Containers B.V. ("Vroon") u Herman Marks, liema agir fil-kaz ta` Herman Marks kien imur kontra l-obbligi tieghu li huwa kellu u ghandu fil-konfront tas-socjeta` intimata bhala direttur taghha, meta huwa wkoll ufficjal gholi fi Vroon u allura jinsab f` kunflitt ta` interess car u manifest;

Illi l-esponenti jkollu c-cans jidhol f` aktar dettall dwar tali agir fil-kors tat-trattazzjoni ta` dan il-kaz. F` dan l-istadju jinghad biss pero` li filwaqt li dak il-mertu gja` gie ampjament trattat fil-kawzi citati, dina l-Onorabbli Qorti esprimiet ruhha dwar tali agir da parti ta` Herman Marks u Vroon fis-sentenza fil-kawza bin-numru 605 /2017 JZM;

Illi f` dawn ic-cirkostanzi allura huwa ferm ironiku li proprju Herman Marks, b`nuqqas ta` bwona fede, qed jitlob ix-xoljiment u stralc ta` BHC ai termini tal-artikolu 214 tal-Att dwar il-Kumpanniji bhala rimedju ghal sitwazzjoni li proprju hu stess ikkreja, flimkien ma` Vroon;

Illi dwar in-nuqqasijiet li Herman Marks isemmi fir-rikors tieghu, ta` min wiehed jistaqsi min kien responsabbli ghalihom, meta wiehed jikkonsidra fost l-ohrajn li bl-azzjonijiet li ha Herman Marks il-kontroll finanzjarju u amministrattiv ta` BHC ghadha f` idejn Vroon u l-impjegati taghha, trallaltro minghajr l-approvazzjoni tal-Bord tad-Diretturi ta` BHC. Dan jghodd ukoll allura ghal dak li jikkoncerna kredituri ta` BHC u l-mod kif tali krediti kienet qed tassumihom BHC;

Illi bhala wiehed mill-ezempji li Herman Marks isemmi ta` kif BHC mhix f` pozizzjoni li thallas id-djun taghha, fir-rikors tieghu Marks stess jghid li BHC m`ghadx ghandha sors ta` dhul minhabba li l-management agreements bejn BHC u ACI gew terminati fl-2017. Izda huwa ferm ironiku li Marks issa jirrikonoxxi li bit-terminazzjoni tal-management agreements ikun qed jinqata` sors ta` dhul, meta kien proprju hu flimkien ma` Vroon li riedu li tali management agreements jigu terminati! B`hekk allura huwa car u manifest li kienu Marks u Vroon li intenzjonalment u b`mod frawdolenti gabu lil BHC fis-sitwazzjoni prezenti;

Illi minkejja dan kollu, hija l-umli opinjoni tal-esponenti li jekk BHC tinghata c-cans li tirkupra dak li hu taghha, tezisti l-possibilita` reali u

fattibbli li s-sitwazzjoni ta` BHC titranga, speċjalment issa li vron u Herman Marks gew zmaskerati. Dan huwa aktar u aktar possibbli anke grazzi għall-ordni li dina l-Onorabbli Qorti tat ricentement fil-proceduri taht l-Artikolu 402 tal-Att dwar il-Kumpanniji.

Illi dan qed jinghad ukoll fil-kuntest tal-bejgh tal-flotta tal-bastimenti, li jezistu rizervi dwar il-mod kif il-flotta giet mibjugha, inkluz dwar il-prezzijiet li għalihom il-flotta inbiegħet;

Illi in kwantu jirrigwarda t-talba ta` Marks għax-xoljiment u l-istralc ta` BHC għaliex jezistu ragunijiet gravi bizzejjed li jiggustifikawh, Marks donnu jsejjes din it-talba fuq is-sitwazzjoni ta` deadlock fi hdan BHC. Issa, apparti li fil-fehma tal-esponenti huma proprju Vron u Herman Marks li gabu din is-sitwazzjoni ta` deadlock tant li kienet proprju Marsoft li talbet l-intervent tal-Qorti, ir-realta` illum hija li jezisti l-ordni tal-Qorti mogħti taht l-Artikolu 402 tal-Att dwar il-Kumpanniji proprju intiz sabiex jindirizza dik is-sitwazzjoni u li permezz tiegħu l-Qorti appuntat lil Dr Richard Galea Debono bħala t-tielet direttur u Chairperson tal-Bord ta` BHC b`poteri ferm estensivi;

Illi ta` min josserva li fil-proceduri taht l-Artikolu 402 tal-Att dwar il-Kumpanniji dina l-Onorabbli Qorti kellha l-poter li bħala rimedju xxolji l-kumpannija u tipprovdi għall-istralc konsegwenzjali tagħha, partikolarment f`cirkostanzi fejn il-Qorti kienet għa` taf bil-proceduri odjerni għall-istralc ta` BHC. Il-Qorti pero` dehrilha li dan ma għandhiex tagħmlu u minflok ordnat il-hatra tat-tielet direttur b`poteri estensivi, minkejja dak li kien dikjarat mill-istess Av. Richard Galea Debono finnota pprezentata minnu meta rriżenja minn direttur wara li kien gie maħtur ukoll mill-Qorti ad interim fil-kors tal-istess proceduri. Fl-umli opinjoni tal-esponenti, dan juri li l-Qorti stess għandha tama li s-socjeta` intimata għad tista` tirkupra u timxi `l quddiem;

Illi s-sitwazzjoni reali koncernanti s-socjeta` intimata, u kif anke irtizultat fil-kors tal-kawzi l-ohrajn citati aktar qabel, hija li l-ewwel Vron u Herman Marks għamlu minn kollox bi ksur tal-ligi u tal-obbligijiet tagħhom, inkluz dawk fiducjarji, sabiex jieħdu l-kontroll ta` BHC b`mod illegali u b`agir unilaterali, u finalment igibu fix-xejn l-istruttura ta` BHC, biex imbagħad, kif proprju qed jittentaw jagħmlu bil-procedura odjerna, joqtlu b`colpo di grazia lil BHC;

Illi dwar it-talba għall-hatra ta` amministratur provvizorju, fl-umli opinjoni tal-esponenti din it-talba tinsab ormaj sorvolata in vista tal-hatra ta` Dr Richard Galea Debono minn dina l-Onorabbli Qorti fl-ordni moghti taht l-Artikolu 402 tal-Att dwar il-Kumpanniji;

Għaldaqstant, in vista tas-suespost, fl-umli opinjoni tal-esponenti t-talbiet kontenuti fir-rikors promotur ta` Vroon Containers B.V. għandhom jigu michuda bl-ispejjez.

Rat illi fl-udjenza tal-21 ta` Jannar 2020 kienet milqugħa talba tal-partijiet sabiex ix-xiehda ta` persuni li nghatat fi proceduri gudizzjarji ohra bejn il-partijiet u cioe` nru. 15/18 JZM, nru. 13/19 JZM u nru. 304/16/3 JZM tkun tghodd ukoll bhala prova fil-kawza tal-lum.

Semghet ix-xhieda.

Rat l-atti kollha tal-kawza u d-dokumenti esebiti mill-partijiet kollha inkluz in-noti ta` osservazzjonijiet skambjati bejn il-partijiet.

Semghet is-sottomissjonijiet finali fil-fomm.

Rat illi l-kawza thalliet għal provvediment għal-lum.

Rat l-atti l-ohra.

II. L-Avviz Legali 373 tal-2020

Fil-15 ta` Settembru 2020 kien ippubblikat fil-Gazzetta tal-Gvern u dahal fis-sehh l-Avviz Legali 373 tal-2020.

Id-disposizzjonijiet ta` dan l-Avviz Legali mhumiex applikabbli għaliex din il-kawza kienet istitwita gabel is-16 ta` Marzu 2020.

III. Provi

1. **Fatti**

Balticmax Holding Company Limited (**BHC**) hija kumpannija li kienet registrata Malta fis-26 ta` Mejju 2015 minn Pal Leo Eckbo (**Eckbo**). Kienet kostitwita sabiex tixtri u tikri bastimenti permezz ta` kumpanniji sussidjarji li taghhom kellha l-kontroll bhala *holding company*.

Eckbo kien ukoll l-uniku azzjonista tal-kumpannija Marsoft International A/S (**Marsoft**), li hija kumpannija registrata fin-Norvegja. Marsoft kienet toffri servizzi ta` konsulenza finanzjarja fil-qasam marittimu, in partikolari fir-ristrutturar ta` flotot ta` bastimenti li jkunu ghaddejnin minn diffikultajiet finanzjarji. Marsoft kienet titmexxa minn Arlie Sterling (**Sterling**).

Vroon Containers B.V. (**Vroon**) hija kumpannija registrata l-Olanda u topera fil-qasam tal-bastimenti merkantili. Titmexxa minn Herman Marks (**Marks**).

Balticmax Acquisition Corporation One Ltd (**AC1**) hija kumpannija registrata Malta. Hija socjeta` sussidjarja u kontrollata minn BHC tant li hija l-unika azzjonista taghha. AC1 ghandha diversi kumpanniji sussidjarji li kull wahda hija sid ta` bastiment.

Fil-11 ta` Gunju 2015, AC1 ghamlet kuntratt ta` self maghruf bhala *Master Facilities Agreement* mal-bank Germaniz, Bremer Landesbank (**BLB**). Skont il-kuntratt, AC1 setghet titlob b`self sa massimu ta` US\$ 444 miljun ghall-finanzjament tal-akkwist ta` 32 bastiment kif ukoll sabiex ikollha bizzejjed likwidita` ghat-tmexxija tan-negozju taghha. Fost obbligi ohra, il-kuntratt kien jimpenja lid-debitur sabiex jikkommetti ruhu ghal zieda fil-kapital azzjonarju. Ghal dan il-ghan, Marsoft hejjiet *Debt Programme*. Vroon accettat li tikkopera ma` Marsoft fl-akkwist, tmexxija u thaddim ta` flotta ta` 32 bastiment tal-containers fejn BHC kienet *the ultimate beneficial owner*.

Fl-14 ta` Awissu 2015, l-ishma ta` BHC kienu trasferiti in kwantu ghal 50% lil Marsoft u in kwantu ghal 50% lil Vroon. Il-kontribuzzjoni ta` Marsoft f` BHC kienet il-progett. Min-naha taghha Vroon ipprovdiet

lil BHC b` *Loan Notes* : u cioe` *Senior Loan* ta` US\$ 10.5 miljun u *Bridge Loan* ta` US\$ 10.5 miljun. Il-*Bridge Loan* kellu jigi rifuz ghas-saldu sal-31 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, Marsoft u Vroon iffirmaw il-Memorandum and Articles of Association (**M&A**) ta` BHC.

Fis-6 ta` Ottubru 2015, kien iffirmat il-BHC Co-operation Agreement (**Co-operation Agreement**) li kellu jirregola d-direzzjoni u t-tmexxija ta` BHC, AC1 u tas-sussidjarji. Kien miftiehem ukoll illi BHC kellha trodd lura lil Vroon is-self (ara : Clause 2.4 tal-Co-operation Agreement). Marsoft obligat ruhha illi jekk BHC tibqa` nadempjenti fil-*Loan Notes* u/jew dak patwit fil-Co-operation Agreement, allura Marsoft kellha taghmel tajjeb hi.

Wara li sar l-M&A il-gdid ta` BHC, u cioe` dak li kien jirrifletti l-ftehim bejn Marsoft u Vroon, Eckbo ma baqax direttur ta` BHC. Kienu mahtura zewg diretturi : Sterling min-naha ta` Marsoft ; u Marks min-naha ta` Vroon. Bhala tielet direttur, inhatar Dr Stanley Portelli fit-18 ta` Awissu 2015. Dr Portelli baqa` direttur sat-28 ta` Dicembru 2015 ghax irrizenja b`effett minn dakinhar u ma kienx sostitwit.

Sal-31 ta` Dicembru 2015, kellha tkun rifiuza l-*Bridge Loan* kollha. Sa dik id-data, 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 lil Vroon 2.49% tal-ishma li kellha f` BHC sabiex b`hekk Vroon kien ikollha 52.49% tal-ishma. Marsoft baqghet inadempjenti.

In-negozju ta` BHC waqaf minhabba konflitt evidenti bejn iz-zewg diretturi, li kienu jirriflettu l-interessi taz-zewg azzjonisti ta` BHC. B`zewg diretturi biss fil-bord, ma setghet tittiehed ebda decizjoni. Dan il-fatt wassal sabiex fis-27 ta` Jannar 2016 sar kuntratt bejn BHC, Vroon u AC1 dwar ir-raham favur Vroon ta` 15,737,500 *cumulative redeemable preference shares* ta` BHC. Il-ftehim kien iffirmat minn Sterling u Marks u kien registrat fir-Registru tal-Kumpanniji ta` Malta.

Id-*deadlock* bejn l-azzjonisti wassal għall-proceduri arbitrali u/jew gudizzjarji kemm fin-Norvegja kif ukoll f` Malta.

Anke minn harsa mad-daqqa t`ghajn tax-xiehda ta` Sterling u Marks, jirrizulta dizgwid gravi u rreversibbli bejniethom.

Il-qorti hija tal-fehma li bhala diretturi, it-tnejn baqghu "aggrappati" mal-interess tal-azzjonisti li qeghdhom bhala diretturi ta` BHC, minflok poggew fuq nett, kif kienu legalment obbligati, l-interess ta` BHC, qabel kull konsiderazzjoni ohra.

Il-konsegwenza tad-disgwid kienet tant gravi li fl-assenza ta` t-tielet direttur kull decizjoni fil-bord tad-diretturi anke dawk vitali għall-esistenza nnfisha tal-kumpannija gew strategikament rimandati u/jew ostakolati għal snin ghaliex kull ma kien ikun propost minn naha kien ikun oppost min-naha l-ohra.

Bis-sahha ta` *interim order* tat-2 ta` Settembru 2016 fl-atti tal-kawza fl-ismijiet "**Av Jonathan Abela Fiorentino noe v. Vroon Container B.V. et.**" (Rik. Nru. 304/2016 JZM) il-Prim` Awla tal-Qorti Civili għaddiet sabiex tahtar lill-Av. Dr. Richard Galea Debono bhala t-tielet direttur ta` BHC. Tliet xhur biss wara, Dr Galea Debono kellu jirrizenja minn direttur minhabba l-ambjent konflittwali qawwi li kien hemm bejn Sterling u Marks. Il-konsegwenza ta` din ir-rozenja kienet illi baqa` jippersisti d-*deadlock* fil-bord tad-diretturi. Minkejja l-ostinazzjoni ta` Sterling u Marks, u tal-azzjonisti li kienu qeghdin ikopru u/jew javvallaw l-operat taghhom, Dr Galea Debono rega` kien mahtur mill-qorti bhala tielet direttur fil-bord tad-diretturi ta` BHC b` effett bit-30 ta` Ottubru 2018.

Kien hemm ukoll proceduri legali fin-Norvegja.

B`lodo arbitrali li nghatat f`Oslo fil-15 ta` Mejju 2017 Vroon kienet kanonizzata bhala kreditrici ta` BHC fl-ammont ta` US\$ 15,225,000, bl-ispejjez u bl-imghax sad-data tal-hlas effettiv. Il-hlas kellu jsir fi zmien hmistax 15-il gurnata mid-data tad-decizjoni. Il-lodo

kienet registrata mac-Centru Malti tal-Arbitragg u ghalhekk tikkostitwixxi titolu ezekuttiv skont il-Kap 12.

Fil-15 ta` Gunju 2017 BLB baghat *notice of default* ghar-raguni li AC1 kienet baqghet inadempjenti fit-twettieq tal-obbligazzjonijiet taghha skont il-*Master Facilities Agreement*.

Fis-7 ta` Lulju 2015 BLB ittermina l-*Master Facilities Agreement*.

Kif jirrizulta mill-ittri tal-24 ta` Jannar 2018 BLB hija kreditrici ta` AC1 fl-ammont komplessiv ta` US\$298,890,424.51.

Tajjeb jinghad illi l-*Master Facilities Agreement* jaghmel *waterfall agreement* fejn hija determinata l-gradwazzjoni tal-krediti fil-kaz li jsir il-bejgh tal-bastimenti. Hemm stabbilit illi l-ewwel jithallsu l-ispejjez tal-bejgh, imbaghad jithallas BLB ghall-ispejjez tal-*Master Facilities Agreement*, imbaghad tithallas it-*Term Loan A* inkluzi l-interessi, finalment jithallsu id-dividendi dovuti lil BHC.

Fil-15 ta` Awissu 2017 Marsoft marret quddiem il-Qrati fin-Norvegja sabiex il-beni taghha jitqieghdu taht il-kontroll tal-qorti billi kienet qeghda tiddikjara stat ta` falliment. It-talba kienet akkolta fis-16 ta` Awissu 2017. Marsoft qeghda tkun amministrata bhala proprjeta` falluta minn *trustee* nominat mill-qrati fin-Norvegja.

Jirrizulta li l-ishma ta` Marsoft gew irkantati u kienu akkwistati minn Pal Leo Eckbo, li ghalhekk illum jippossjedi 50% tal-ishma ta` BHC.

2. Financial Statements

BHC qatt ma pprezentat *audited accounts* u *financial statements* ghaliex l-awdituri baqghu ma nghatawx l-informazzjoni kollha li kienu jehtiegu dwar il-qaghda finanzjarja ta` BHC.

Sterling u Marks wahhlu wiehed fl-iehor ghaliex din l-informazzjoni qatt ma marret ghand l-awdituri.

L-Awditur David Valenzia xehed illi l-awdituri kienu jehtieg informazzjoni sabiex fl-audit jaslu biex jiddeterminaw jekk BHC setghetx tibqa` tgawdi l-*status* ta` *going concern*. Pero` din l-informazzjoni baqghet qatt ma waslet ghand l-awdituri. Qal illi fil-kontijiet ta` BHC kellu jitnizzel ukoll id-dejn li BHC kellha ma` Vroon. B` hekk kienet ser tirrizulta l-insolvenza ta` BHC billi ma kellhiex mnejn thallas id-dejn ma` Vroon.

3. L-istat attwali ta` BHC

Ghas-solvibilita` taghha, BHC tiddependi ghal kollox mill-introjtu li jigi mis-sussidjarja taghha.

Bhala fatt illum BHC tinsab minghajr ebda ntrojtu. Ilha hekk sa mill-2017 meta kienu terminati *s-service agreements* biex tmexxi l-flotta li kienet ta` AC1. Ma hemmx qbil bejn il-partijiet dwar ir-raguni ghaliex kienu terminati. Sterling u Eckbo jallegaw illi kien Marks illi temm l-ewwel *service agreement* waqt illi Marks jghid li *s-service agreements* kienu terminati mill-bank meta AC1 ma hallsitx id-dejn li kellha. Il-konsegwenza tad-*default* kienet illi BLB qabad il-bastimenti li nbieghu kollha. Il-bank zamm ir-rikavat tal-bejgh bhala pagament parzjali tal-pendenzi li AC1 kellha mal-bank.

Illum AC1 ma ghandhiex aktar assi propju ghaliex il-bastimenti nbieghu kollha biex jaghmlu tajjeb ghad-dejn li kellha.

Lanqas ma jidher li ghandha prospetti ta` negozju.

Skont il-pattijiet tal-*Master Finance Agreement*, mir-rikavat tal-bejgh tal-flotta, BHC kellha tircieva s-somma ta` madwar US\$ 2 miljuni. Dan l-ammont inzamm pero` minn BLB. U ma jidhirx li hemm prospett li tigi rilaxxjata qabel ma jintemmu l-proceduri gudizzjarji li AC1 bdiet kontra BLB quddiem il-qrati fil-Germanja. Barra minn hekk jista` jaghti l-kaz li finalment BHC ma tiehu xejn minn din is-somma minhabba l-*preference shares* li hemm favur Vroon.

4. Il-kawza fil-Germanja

Fil-qradi tal-Germanja, AC1 qeghda tittenta timpunja l-validita` tal-kuntratt li kien sar bejn AC1 u BLB, u konsegwentement tipprova tattakka l-validita` tal-bejgh tal-bastimenti li tallega li sar minn BLB b`mod arbitrarju. Qeghda tattakka wkoll il-prezz tal-bejgh tal-bastimenti li huwa allegat li kien inqas mill-prezz tas-suq. Saret talba ghal-likwidazzjoni u hlas tad-danni kontra BLB. Il-bank qed jikkontesta dawn il-pretensjonijiet.

Sterling kien awtorizzat b`rizoluzzjoni tal-bord tas-16 ta` April 2018 sabiex jigbor kull informazzjoni u jiehu azzjoni kontra l-bank dwar il-bejgh tal-bastimenti. Kellu jzomm il-bord aggjornat dwar il-process kollu.

L-ispejjez tal-kawza fil-Germanja sal-lum lahqu l-ammont ta` US\$305,000 u thallsu fl-intier taghhom minn Pal Leo Eckbo.

Il-kawza kienet promossa f` Novembru 2018 u sa Jannar 2020 ma kienx ghadu beda s-smigh.

Sterling u Eckbo jallegaw li kien hemm kolluzjoni bejn Vroon u BLB. Marks cahad din l-allegazzjoni. Fisser illi Vroon kellha dmir li tikkopera mal-bank sabiex ikun facilitat il-bejgh tal-bastimenti. Fl-istess waqt ma kenitx involuta fil-bejgh innifsu.

Tajjeb jinghad illi Vroon waqqfet AC2. Permezz ta` AC2, bi ftehim ma` BLB, baqghet taghmel immaniggjar tal-bastimenti. Thallset ta` dawn il-prestazzjonijiet.

5. Id-dejn ta` BHC

a) Il-kreditu ta` Vroon

B`lodo arbitrali moghti f` Oslo fil-15 ta` Mejju 2017, Vroon kienet ikkanonizzata kreditrici ta` BHC fis-somma ta` US\$15,225,000 oltre l-imghax u l-ispejjez. Il-lodo kien debitament registrat fic-Centru Malti tal-Arbitragg u sar titolu ezekuttiv b`effett mill-10 ta` Novembru 2017.

Fit-22 ta` Frar 2019 Vroon ipprezentat rikors ghall-hrug ta` mandat ta` sekwestru eżekuttiv nru. 247/19 kontra BHC ghall-ammont komplessiv ta` US\$12,762,951.62 (sorte u imghaxx.

It-talba ghall-hrug tal-Mandat kienet milqugha fl-1 ta` Marzu 2019. Il-Mandat kien debitament eżegwit izda minkejja l-eżekuzzjoni tal-Mandat id-debitu ta` Vroon baqa` ma thallasx.

b) Pendenzi ohra

Jirrizulta dejn ma` OSM li kienet *sub-contractor* ta` BHC.

L-ammont ta` dan id-dejn mhux maghruf.

Hemm ukoll possibilita` ta` djun ohra ma` terzi liema ammonti ma jirrizultawx mill-kotba ta` BHC.

Issemma dejn ta` BHC ma` OSM li kienet *subcontractor* taghha. Pero` l-entita` tal-ammont dovut mhux maghruf.

6. L-assi ta` BHC

Jirrizultaw l-assi li gejgin :-:

- i. 15,225,000 *Cumulative Redeemable Preference Shares* illi BHC ghandha f` AC1. Dawn l-ishma tqeghdu b` rahan ghand Vroon bhala sigurta` ghad-drittijiet ta` din skont is-*Senior Loan Note* u skont is-*Senior Bridge Loan Note*.
- ii. 52,000 *Ordinary Shares* li b` effett tal-provvediment tad-29 ta` Novembru 2018 fl-atti tal-kawza Rik. Nru. 605/17 Vroon kellha tittrasferixxi favur BHC.
- iii. US\$ 3000 fi flus.

IV. Dritt/Ezami Komparattiv/Gurisprudenza

Qabel tghaddi sabiex tqis il-mertu, ikun opportun jekk issir referenza u analizi tad-disposizzjonijiet tal-Kap 386 li huma rilevanti għall-vertenza tal-lum.

a) L-Art 218(1) tal-Kap 386

Bil-provvediment tagħha tal-31 ta` Mejju 2018 il-qorti ddikjarat illi r-rikorrent noe għandu *locus standi* sabiex jippromwovi l-azzjoni skont l-Art 218 tal-Kap 386.

Qieghed jintalab ix-xoljiment u l-istralc ta` BHC abbazi : tal-Art 214(2)(a)(ii) tal-Kap 386 ; u tal-Art 214(2)(b)(iii) tal-Kap 386.

b) L-Art 214(2)(a)(ii) tal-Kap 386

Meta tfassal il-mudell għal-ligi tagħna l-gdida dwar il-kumpanniji, dik li illum hija Kap 386 tal-Ligijiet ta` Malta, u li kellha tiehu post l-Ordinanza dwar Soċjetajiet Kummerċjali (Kap 168), il-qafas magħzul kien dak tal-Companies Act Ingliza 1985.

Fil-ligi Ingliza, ix-xoljiment u l-istralc ta` kumpanniji kien trattat b` legislazzjoni *ad hoc* u cioe` l-Insolvency Act 1986. Meta sar l-Att XXV tal-1995 dwar il-Kumpanniji, id-disposizzjonijiet li jirregolaw ix-xoljiment u l-istralc kienu integrati fil-ligi l-gdida, mhux kif sar fl-Ingilterra.

L-Art 214(2)(a)(ii) jagħti lill-qorti diskrezzjoni li xxolji u tistralcja kumpannija jekk *il-kumpannija ma tkunx tista` thallas id-djun tagħha.*

Id-disposizzjoni trid tingara flimkien ma` l-**Art 214(5)** li jghid liema huma s-sitwazzjonijiet fejn il-ligi taghna tqis illi kumpannija ma tkunx tista` thallas id-djun taghha.

Tnejn huma c-cirkostanzi definiti fil-ligi :-

(a) *jekk id-dejn dovut mill-kumpannija jkun baqa` ma thallasx ghal kollox jew f`parti wara erbgha u ghoxrin gimgha mill-ezekuzzjoni ta` titolu ezequttiv kontra l-kumpannija b`xi wiehed mill-atti ezequttivi msemmijin fl-artikolu 273 tal-Kodici ta` Organizzazzjoni u Procedura Civili ;*

jew

(b) *jekk ikun ippruvat ghas-sodisfazzjon tal-qorti li l-kumpannija ma tkunx tista` thallas id-djun taghha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpannija.*

Ir-rikorrent qieghed jistrieħ fuq iz-zewg subincizi tal-Art 214(5).

c) L-Art 214(5)(a) tal-Kap 386

Fil-ligi taghna li *kumpannija ma tkunx tista` thallas id-djun taghha ghandu sinjifikat preciz u definit, mentri fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha.*

Fil-Pag 859 ta` **Boyle & Birds` Company Law** (Eighth Edition – Jordans – 2012) jinghad illi :-

There are two principal, although not exclusive or exhaustive, tests of insolvency : a company is insolvent if it unable to pay its debts as they fall due ("cash flow insolvency") ; it is also insolvent if its liabilities exceed its assets ("balance sheet insolvency") ...

B` mod aktar ristrett, fil-ligi taghna dak previst mill-Art 214(5)(a) **jixbah** dak maghruf bhala *cash flow insolvency* fil-ligi Ingliza.

Filwaqt illi fil-ligi taghna huwa specificat **bil-preciz** x` m` ghandhiex taghmel kumpannija debitrici sabiex ma tkunx meqjusa li ma tistax thallas id-djun taghha, fil-ligi Ingliza il-kriterju huwa aktar generali, ghaliex dik l-ghamla ta` insolvenza ssehh meta kumpannija tkun *unable to pay its debts* **as they fall due.**

Il-qorti sejra taghmel riferenza ghad-dottrina Ingliza, ghax tiswa biex tkun tista` tasal mhux daqstant biex tghid jekk jirrizultax ppruvat dak stipulat fl-Art 214(5)(a), izda biex tasal ghal decizjoni dwar jekk ghandhiex tghaddi ghal dikjarazzjoni ta` xoljiment u l-istralc.

Fil-Pag 860 ta` **Boyle & Birds` Company Law** (op. cit.) jinghad illi :-

Failure to pay a debt which is due and not disputed amounts to evidence of cash flow insolvency. Thus a company which has a policy of late payment of bills could find itself the subject of a petition for a winding-up order or administration order. Such a petition will not be struck out at an early stage as a form of improper pressure and an abuse of the process of the court, because, as Staughton LJ explained in Taylor`s Industrial Flooring (1990. BBC 44 at 51) creditors, not late payers, are more worthy of insolvency law`s protection.

"Many people today seem to think that they are lawfully entitled to delay paying their debts when they fall due or beyond the agreed period of credit, if there is one ... This can cause great hardship to honest traders, particularly those engaged in small businesses recently started. Anything which the law can do to discourage such behaviour in my view should be done.

Fil-Pag 17 tal-ktieb **Insolvency Law – Corporate and Personal - Andrew Keay u Peter Walton** (Pearson Longman – 2003) jinghad hekk dwar *cash flow insolvency* fil-kuntest tal-Insolvency Act 1986 –

The court, in examining whether a company is suffering cash flow insolvency, will consider whether the company is actually paying its debtors. Courts must take into account what current revenue the company has as well as what the company can procure by realising assets within a relatively short time ... A company can rely upon money which might be obtained from the sale of assets or upon money which might be obtained on the strength of its assets ... It is possible that sometimes a debtor might be able to establish solvency by demonstrating

that funds can be obtained through an unsecured loan. In considering whether a person or a company is insolvent, the debtor`s whole financial position must be studied ... and a temporary lack of liquidity does not necessarily mean that the company is insolvent ...

At one time courts were rather strict on what they required to be established before they were willing to deem a person or a company insolvent, but in more recent times they have become more liberal as far as creditors are concerned and have held that a debtor is insolvent if a creditor is able to prove that he or she has not paid an undisputed debt after a demand has been made ... and this is the case even if there is other evidence which suggests that the value of the assets outweighs liabilities ...

Whether a company is cash flow insolvent is principally a question of fact and one which may be established in any number of ways, such as the existence of a large number of outstanding debts and unsatisfied judgments ... or there is lack of assets on which execution can be levied ...

It has been said that a debtor is not regarded as solvent just because if sufficient time were granted the debts could be paid off ...

d) L-Art 214(5)(b) tal-Kap 386

Fit-test bl-Ingliz **L-Art 214(5)(b) tal-Kap 386** jaqra :-

For the purposes of subarticle (2)(a)(ii), a company shall be deemed to be unable to pay its debts ...

if it is proved to the satisfaction of the court that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company.

Fl-Insolvency Act 1986 Ingliza, insibu disposizzjoni li **tixbah** dik tal-ligi taghna, **ghalkemm mhijiex l-istess**.

Il-qorti qeghda tirreferi ghal **Sec 123(2)** tal-Insolvency Act 1986 li tghid –

A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company`s assets

is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

Huwa evidenti li ghad li hemm xebh, iz-zewg disposizzjonijiet mhumiex identici.

Id-divergenza tinsab fil-fatt illi waqt illi fil-ligi taghna, il-mizura hija sempliċi : *the company is unable to pay its debts account being taken also of contingent and prospective liabilities of the company*, fil-ligi Ingliza, il-kriterju huwa divers ghalix il-qorti tkun trid tqis illi *the value of the company`s assets is less than the amount of its liabilities ... billi tiehu kont ta` ... contingent and prospective liabilities.*

Id-differenza bejn iz-zewg ligijiet mhijiex kosmetika jew ta` drafting izda ta` sostanza.

Premessa d-distinzjoni bejn iz-zewg ligijiet, il-qorti sejra tirreferi ghad-dottrina Ingliza dwar kif din ittrattat il-koncett ta` contingent u dak ta` prospective liabilities.

Il-qorti sejra tirreferi ghal dak li d-dottrina Ingliza tirreferi ghalih bhala **balance sheet insolvency** fl-ambitu ta` **Sec 123(2)** tal-Insolvency Act 1986.

Fil-Pag 19 tal-ktieb **Insolvency Law – Corporate and Personal** (op. cit.) jinghad hekk dwar *balance sheet insolvency* :-

In determining whether the assets are outweighed by the liabilities a court is able to take into account contingent and prospective liabilities, but not contingent and prospective assets [Byblos Bank SAL v. Al-Khudhairy (1986) 2 BCC99, 549 (CA)] It has been said that "liabilities" is a broadened term compared with "debts" [Re A debtor (No 17 of 1966) (1967) Ch 590 ; (1967) 1 All ER 668]. "Liabilities" is defined for the purposes of winding up in rule 13.12 (4) to mean "a liability to pay money or money`s worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution". Then rule 13.12 (3) states that it is immaterial whether the liability is present or future, whether it is certain or contingent, or whether its amount is

fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion.

Clearly with this test it is only possible to take into account the assets owned by the company including the uncalled capital of the company [Re National Livestock Insurance Co (1858) 26 Beav 153 ; 53 ER 855 ...

Fil-Pag 114 tar-Raba` Edizzjoni (2011) ta` **Principles of Corporate Insolvency Law** (Sweet & Maxwell) **Roy Goode** ighid hekk

The idea underlying this test ... is that it is not sufficient for the company to be able to meet its current obligations if its total liabilities can ultimately be met only by the realisation of its assets and these are insufficient for the purpose ...

Fil-Pag 130 ikompli hekk –

The mere excess of liabilities over assets is not in itself determinative. What has to be shown is that by reason of the deficiency of its assets the company has reached the point of no return.

Fil-Pag 134 sa 136, l-awtur jittratta n-nozzjoni ta` **contingent liability** u jghid hekk –

To give the phrase "contingent liability" any meaning we must restrict it to a liability or other loss which arises out of an existing legal obligation or state of affairs but which is dependent on the happening of an event which may or may not occur. Many of the cases have stressed the need for the liability to arise out of an existing obligation.

... in considering whether there is a contingent liability the court has regard to the existing commercial situation, not merely an existing legal obligation. In this regard, assistance can be derived from Financial Reporting Standard 12 which defines a contingent liability in the following terms :

(a) "A possible obligation that arises from past events and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the entity`s control ; or

(b) a present obligation that arises from past events but is not recognised because :

(i) it is not probable that a transfer of economic benefits will be required to settle the obligation ; or

(ii) the amount of the obligation cannot be measured with sufficient reliability.”

... the term “contingent liabilities” is ultimately not a term of art and its precise meaning will depend on its context. The court is thus entitled to have regard to commercial realities ...

Fil-Pag 136 u 137, l-awtur jittratta n-nozzjoni ta` **prospective liability** u jghid hekk –

... The phrase “prospective liability” is neither a legal nor an accounting term of art. It has been judicially defined as : “ ... a debt which will certainly become due in the future, either on some date which has already been determined or some date determinable by reference to future events.”

... it has been described ... as unmatured liability which will inevitably ripen into a debt with the passage of time. Such a definition encompasses all forms of debitum in praesenti, solvendum in futuro including an indisputable claim for unliquidated damages which remains only to be quantified and will result in a debt far more than a nominal amount. “Prospective liability” thus embraces both future debts, the sense of liquidated sums due, and unliquidated claims.

e) **Gurisprudenza**

Il-qorti sejra tirreferi ghal giurisprudenza tal-qrati Inglizi kif tghodd kemm ghall-cash flow test kif ukoll ghall-balance sheet test.

Fid-decizjoni li nghatat mill-Court of Appeal fil-kaz ta` **Byblos Bank SAL v. Al-Khudhairy** [1987] inghad hekk :-

“If a debt presently payable is not paid because of lack of means, that will normally be sufficient to prove that the company is unable to pay its debts. That will be so even if, on an assessment of all the assets

and liabilities of the company, there is a surplus of assets over liabilities. That is trite law."

Fuq nota simili inghad minn Lord Justice Hoffmann fil-kaz **In Re a Company 12209 of 1991** [1992] BCLC 865, 868 :-

"A company`s non-compliance with a statutory demand, or non-satisfaction of execution of a judgment debt, is a matter that can be proved quite simply, usually by a single short witness statement. If proved, it establishes the court`s jurisdiction to make a winding up order, even if the company is in fact well able to pay its debts. If however a debt which has been made the subject of a statutory demand is disputed on reasonable grounds, the petitioner is adopting what has been called a high-risk strategy, and the petition may be dismissed with indemnity costs."

Tnejn mill-kawzi fl-Ingilterra fejn kien imfisser b`reqqa dak illi ghandu jigi mistharreg meta ssir talba ghal xoljiment u stralc ghar-raguni ta` nsolvenza huma : **Cheyne Finance Plc (No.2)** deciz fis-17 ta` Ottubru 2007 : u **BNY Corporate Trustee Services Ltd vs Eurosail-UK 2007-3BL Plc** deciz fit-30 ta` Lulju 2010. It-tnejn kienu decizi mill-High Court (Chancery Division) – England and Wales.

Il-punti saljenti illi hargu miz-zewg decizjonijiet citati kienu migbura fil-kawza li kienet deciza mill-Court of Appeal fit-3 ta` April 2014 fil-kaz ta` **Bucci vs Carman (Liquidator of Casa Estates (UK) Ltd**, EWCA Civ 383, fejn inghad hekk :-

"In my judgment the following points emerge from the decision of the Supreme Court in Eurosail (and in particular the judgment of Lord Walker) :

i) The tests of insolvency in s 123(1)(e) and 123(2) were not intended to make a significant change in the law as it existed before the Insolvency Act 1986 : para 37.

ii) The cash-flow test looks to the future as well as to the present : para 25. The future in question is the reasonably near future ; and what is the reasonably near future will depend on all the circumstances, especially the nature of the company`s business: para 37. The test is flexible and fact-sensitive : para 34.

iii) *The cash-flow test and the balance sheet test stand side by side: para 35. The balance sheet test, especially when applied to contingent and prospective liabilities is not a mechanical test: para 30. The express reference to assets and liabilities is a practical recognition that once the court has to move beyond the reasonably near future any attempt to apply a cash-flow test will become completely speculative and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test : para 37.*

iv) *But it is very far from an exact test: para 37. Whether the balance sheet test is satisfied depends on the available evidence as to the circumstances of the particular case: para 38. It requires the court to make a judgment whether it has been established that, looking at the company`s assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due: para 42.*

*In the course of his judgment in Eurosail Lord Walker approved what he described as the "perceptive judgment" of Briggs J in **Re Cheyne Finance plc**(No 2) [2007] EWHC 2402 (Ch), [2008] 2 All ER 987, [2008] Bus LR 1562. Two of the points that Briggs J made bear on our case :*

i) *Cash-flow solvency or insolvency is not to be ascertained by a blinkered focus on debts due at the relevant date. Such an approach will in some cases fail to see that a momentary inability to pay is only the result of temporary illiquidity. In other cases, it will fail to see that an endemic shortage of working capital means that a company is on any commercial view insolvent, even though it may continue to pay its debts for the next few days, weeks, or even months: para 51.*

ii) *Even if a company is not cash-flow insolvent, the alternative balance-sheet test will afford a petitioner for winding up a convenient alternative means of proof of a deemed insolvency: para 57."*

Fil-kawza **BNY Corporate Trustee Services Ltd & Ors v Neuberger** li kienet deciza fid-9 ta` Mejju 2013 mis-Supreme Court Ingliza, saret analizi fid-dettall tal-izviluppi illi sehew fil-ligi Ingliza fir-rigward tal-Art. 123 tal-Insolvency Act.

Ghal dak li ghandu x` jaqsam mal-*cash flow test* kien imfisser hekk :-

*“The changes in form served, in my view, to underline that the “cash flow” test is concerned, not simply with the petitioner’s own presently-due debt, nor only with other presently-due debts owed by the company, but also with debts falling due from time to time in the reasonably near future. What is the reasonably near future, for this purpose, will depend on all the circumstances, but especially on the nature of the company’s business. That is consistent with **Bond Jewellers, Byblos Bank and Cheyne Finance**. The express reference to assets and liabilities in my view a practical recognition that once the court has to move beyond the reasonably near future (the length of which depends, again, on all the circumstances) any attempt to apply a cash-flow test will become completely speculative, and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test. But it is still very far from an exact test, the burden of proof must be on the party which asserts balance-sheet insolvency.”*

(ara wkoll: **Ross & Anor vs Gaffney & Anor**, High Court Chancery Division, 2 ta` Gunju 2016 ; **BHS Group Ltd vs Retail Acquisitions Ltd**, High Court Chancery Division, 5 ta` Mejju 2017)

f) L-Art 214(2)(b)(iii) tal-Kap 386

Skont din id-disposizzjoni, kumpannija **ghandha** tkun xjolta jekk il-qorti tkun tal-fehma li hemm **ragunijiet gravi bizzejjed**.

Il-ligi thalli lill-qorti **diskrezzjoni wiesa`** sabiex tistabilixxi hi jekk fil-fehma taghha jirrizultawx fatti u cirkostanzi **“gravi bizzejjed”**.

Jekk tistabilixxi l-gravita`, allura minn hemm `il quddiem, il-qorti ma jkollhiex aktar diskrezzjoni u **tkun obligata** taghmel id-dikjarazzjoni ta` xoljiment u konsegwenti stralc tal-kumpannija.

Il-ligi ma taghti l-ebda tifsira ta` x` inhuma **“ragunijiet gravi bizzejjed”**.

Ghalhekk il-qorti m`ghandha tiskarta xejn.

Il-qorti m` ghandhiex toqghod fuq grajjiet li jkun sehew sad-data tal-presentata tar-rikors promotur tal-azzjoni, izda ghandha taghti piz ukoll ghal kull ma jigri anke wara sa meta tigi biex taghti d-decizjoni taghha.

F` **Sec 122 tal-Insolvency Act 1986 tal-Ingilterra**, tirrizulta lista ta` cirkostanzi li jwasslu ghax-xoljiment u ghall-istralc ta` kumpannija.

Tajjeb jinghad illi fl-Insolvency Act 1986 ma hemmx disposizzjoni bhall-Art 214(2)(b)(iii) tal-Kap 386. Il-wahda li tqarreb l-aktar lejha hija Sec. 122(1)(g) li tghid illi : *the court is of the opinion that it is **just and equitable that the company should be wound up.***

Huwa evidenti anke mad-daqqa t` ghajn li d-disposizzjoni fil-ligi taghna hija **aktar stretta** fis-sens illi fil-kaz taghna l-qorti ghandha xxolji u tistralcja meta fil-fehma taghha ikunu jirrizultaw ragunijiet gravi bizzejjed, mentri fil-ligi Ingliza, il-kriterju li fuqu l-qorti trid tibni l-fehma taghha huwa dak tal-gustizzja u l-ekwita`. L-istrettezza tad-disposizzjoni fil-ligi taghna taghmel hafna sens anke ghaliex jekk il-qorti tesprimi l-fehma li hemm ragunijiet gravi bizzejjed, allura minn hemm tkun obligata tordna x-xoljiment u l-istralc tal-kumpannija.

Il-qorti tghid li r-riferenza ghal Sec 122(1)(g) tal-Insolvency Act 1986 hija utili ghaliex il-linja li hadu l-qorti Inglizi biex ighidu x` ghandhom ifissru *just and equitable* ghall-fini ta` *winding up* ta` kumpannija jghin sabiex jiftah tieqa ghall-qorti taghna fl-interpretazzjoni taghhom x` jistghu jkunu ragunijiet gravi bizzejjed.

Ghax kull kaz ghandu l-istorja tieghu, il-qorti trid tibni l-fehma taghha fuq il-fatti u cirkostanzi ta` kull kaz.

V. Risultanzi

a) Dwar l-Art 214(2)(a)(ii) u l-Art 214(5)(a) u (b)

Ghalkemm la saru (u lanqas kienu prezentati lir-Registratur tal-Kumpanniji) la *audited accounts* u lanqas *financial statements*, l-Awditur David Valenzia u l-Avukat Dr Richard Galea Debono xehdu li BHC mhijiex f` qaghda li thallas id-djun taghha. Fost ir-ragunijiet hemm il-fatt li ghal snin shah spiccat bla ebda prospett ta` dhul.

Fir-realta` BHC m`ghandiex assi effettivi, ghaliex l-uniku asset taghha li kellha u cioe` AC1 hija nsolventi billi l-assi taghha nbieghu kollha. Barra minn hekk, il-*preference shares* li BHC ghandha f` AC1 huma mertu ta` plegg favur Vroon. Id-depoziti li prezentement ghandha l-bank u l-flus li ghad trid tircievi, jekk jirnexxielha, minghand BLB huma farka hdejn l-ammont gloabli li BHC ghandha xi thallas fi djun.

Bhala fatt sabiex tibqa` tissussisti, BHC tiddependi ghal kollox fuq il-finanzjament taz-zewg azzjonisti taghha u cioe` Vroon u Eckbo. Tal-ahhar wera disponibbilita` jekk Vroon tohrog ukoll is-sehem taghha, haga li Vroon qeghda turrifjuta bl-aktar mod car u inekwivoku li taghmel principalment ghaliex hija kreditrici ta` BHC u mhux probabbli li tithallas. Ghalhekk mhijiex disposta "*titfa` aktar ilma go barmil bla qiegh*". Sahansitra l-kawza li kienet istitwita quddiem il-qrati fil-Germanja kienet finanzjata minn Eckbo de proprio.

Sar l-argument li BHC m`ghandiex titqies insolventi ghaliex ghandha prospett ta` dhul sostanzjali. L-argument huwa fondat fuq dak li jista` jirrizulta mill-kawza fuq riferita istitwita fil-Germanja fil-kaz ta` esitu positiv. Mill-kronologija ta` kif zvolgew il-fatti, jirrizulta car li l-proceduri fil-Germanja kienu biss tentattiv sabiex BHC tkompli ttawwal iz-zmien u ma thallasx id-dejn li ghandha ma` Vroon. Filwaqt illi l-proceduri odjerni gew intavolati fil-21 ta` Dicembru 2017, il-proceduri fil-Germanja kienu prezentati f` Novembru 2018. Sal-lum il-procediment tal-Germanja ghadu fl-istadju tal-bidu, mhux maghruf meta ser jara t-tmiem definittiv tieghu, u l-esitu huwa ncert.

Mhuwiex komputu ta` din il-qorti li tispekula dwar il-fondatezza o meno tal-istanzi li kienu avanzati quddiem il-qrati esteri. Madanakollu ghandha kull jedd tafferma li bhal ma jista` jkun cans li AC1 tirnexxi fl-istanza taghha, daqstant iehor l-esitu ta` dak il-procediment jista` jkun sfavorevoli ghaliha. Jekk dan tal-ahhar ikun il-kaz, BHC ser tibqa` fi stat ta` insolvenza. Konferma ta` dan hija d-deposizzjoni ta` Sterling. Intant pendenti l-ezitu ta` dawk il-proceduri, qeghdin ikomplu jakkumulaw l-interessi fuq id-dejn li BHC ghandha ma` Vroon, apparti pendenzi ohrajn.

Meqjus dan ix-xenarju bhala sfond, jirrizulta sodisfatt dak rikjest fl-Art 214(5)(a) tal-Kap 386.

Infatti jirrizulta ppruvat li lodo arbitrali li Vroon kisbet favur taghha fin-Norvegja kontra BHC, u li sar gudikat, kien registrat fic-Centru Malti tal-Arbitragg fl-10 ta` Novembru 2017. B`hekk sar titolu ezekuttiv ghall-finijiet u effetti kollha tal-Kap 12. Bis-sahha ta` dak it-titolu ezekuttiv, Vroon kisbet il-hrug ta` mandat ta` sekwestru ezekuttiv kontra BHC fit-22 ta` Frar 2019, liema mandat, ghalkemm jirrizulta li kien ezegwit fl-4 ta` Marzu 2019, baqa` ma sar ebda pagament fl-ambitu tieghu mid-debitrici BHC lill-kreditrici Vroon fi zmien 24 gimgha mill-ezekuzzjoni.

Jirrizulta sodisfatt anke dak rikjest fl-Art 214(5)(b) tal-Kap 386.

Tirrizulta ppruvata qaghda **serja** ta` nuqqas ta` likwidita` li ilha tippersisti mill-2017. Il-konsegwenza ta` din il-qaghda finanzjarja negattiva kienet illi kreditrici bhal Vroon li mhux biss hija azzjonista ta` BHC izda li ghandha titolu ezekuttiv favur taghha kontra BHC baqghet ma thallset assolutament xejn minn dak dovut lilha.

Fix-xiehda taghhom kemm Sterling kif ukoll Eckbo kkonfermaw mhux biss illi BHC hija debitrici ta` Vroon izda li m`ghandhiex mnejn thallas lil Vroon.

Huwa fatt ippruvat li la fid-data tal-prezentata tar-rikors promotur u lanqas illum BHC m`ghandha likwidita` jew assi.

Ghalkemm AC1, li tappartjeni lil BHC, tinsab fi proceduri gudizzjarji legali, li l-finalita` taghhom hija l-kisba ta` danni, l-esitu ta` dawk il-proceduri jibqa` wiehed incert li ma joffri ebda garanzija ghas-sostenn finanzjarju future ta` BHC.

Ma jistax jinghad li l-qagħda finanzjarja avversa ta` BHC hija xi sitwazzjoni tal-mument, u allura li għad tista` taqleb lejn il-posittiv fil-futur qarib.

Dan mhuwiex il-kaz.

BHC waqfet għal kollox milli thallas, m` għandhiex mnejn thallas, ma tat l-ebda rassikurazzjoni lill-kreditrici kanonizzata tagħha li sejra tagħmel hlas, u qegħda toqghod għal kollox fuq l-esitu incert ta` proceduri pendenti quddiem il-Qorti fil-Germanja.

b) Id-diskrezzjoni tal-qorti

Il-qorti tagħmel referenza għall-pag. 913-914 ta` **Boyle & Birds` Company Law** (op. cit.) fejn inghad illi :-

*Unpaid creditors of a company may consider commencing winding-up proceedings against the company as an alternative to suing for payment. As a debt collection mechanism, winding up proceedings may be swifter and, for the individual creditor, less expensive than a claim that may come to trial for sometime ; on the other hand, winding up is a collective procedure for the benefit of creditors generally and it does not benefit specific creditors individually (**F. Oditah "Winding Up Recalcitrant Debtors" 1995 LMCLQ 107**) ...*

Fis-sentenza li tat fit-18 ta` Settembru 2009 fil-kawza "**Avukat John Refalo noe vs Garden of Eden Limited**" il-Qorti tal-Appell qalet hekk :-

"L-Artikolu 214 tal-Att dwar il-Kumpaniji jiddetermina kif u meta kumpanija għandha "titqies" ("shall be deemed" fit-test Ingliz) li ma tkunx tista` thallas id-djun tagħha. Ir-regoli huma cari u ma jhallu ebda lok għall-provi in kuntrarju. Jekk il-kumpanija ma thallasx fi zmien 24 gimgha, hija titqies li ma tistax thallas id-djun tagħha, u jekk tirrizulta din ic-cirkostanza, il-Qorti tista` tipprocedi għall-istralc tagħha."

Brenda Hannigan tghid hekk fil-ktieb **Company Law** (Lexis Nexis - Butterworths - 2003) :-

"winding up or liquidation ... is the process by which the assets of the company are collected in and realised, its liabilities discharged and the net surplus, if there is one, distributed to the persons entitled to it. Only when this has been done is the company`s existence finally terminated by a process known as dissolution ... Insolvent winding up occurs essentially when companies are unable to pay their debts in full. When a company cannot pay its debts in full, difficult problems arise as to how the assets that are available should be distributed. In theory ... the law tries to maintain an equality between creditors so that assets are pooled and distributed pari passu ie rateably according to the size of each creditor`s claim."

L-awtrici tirreferi ghall-Cork Committee Report dwar *good modern insolvency law*.

Kien specifikat li l-ghanijiet huma :-

"... to recognise that the world in which we live and the creation of wealth depend upon a system founded on credit and that such a system requires, as a correlative, an insolvency procedure to cope with its casualties; ... to relieve and protect where necessary the insolvent, and in particular the individual insolvent, from any harassment and undue demands by his creditors ... at the same time, to have regard to the rights of creditors whose own position may be at risk because of the insolvency; ... to realise the assets of the insolvent which should properly be taken to satisfy his debts, with the minimum of delay and expense; to distribute the proceeds of the realisations among the creditors in a fair and equitable manner, returning any surplus to the debtor; to ensure that the processes of realisation and distribution are administered in an honest and competent manner, To recognise that the effects of insolvency are not limited to the private interests of the insolvent and his creditors, but that other interests of society or other groups in society are vitally affected by the insolvency and its outcome and to ensure that these public interests are recognised and safeguarded, ... to provide the means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country."

Fil-pagna 216 tal-ktieb **Insolvency Law – Corporate and Personal** (op. cit.) jinghad hekk :-

While a creditor is able to establish the fact that a company is unable to pay its debts ... it does not mean that a winding-up order will be automatically made ; the court has an unfettered discretion ... The company might be able to establish that it is solvent thereby rebutting the presumption of insolvency relied on by the creditor. Nevertheless a court may still make a winding up order if the company does not dispute the fact that it owes money to the creditor who has requested payment because non payment gives rise to a legitimate suspicion of inability to pay ...

Il-qorti taghti piz lid-dikjarazzjoni bil-gurament li ghamlu Sterling u Eckbo fejn minghajr l-icken esitazzjoni xehdu li BHC m`ghandhiex mnejn thallas id-djun taghha, inkluz dak ta` Vroon.

Il-qorti sejra tezercita d-diskrezzjoni taghha favur ix-xoljiment u l-istralc ta` BHC.

c) L-Art 214(2)(b)(iii) tal-Kap 386

L-awturi **Jonathan Law u Elizabeth A Martin** fid-**Dictionary of Law** (7th Ed.) ighidu :-

"A compulsory winding-up on grounds of fairness under the Insolvency Act 1986 [s 122(1)(g)] ... may occur, for example, when the purpose of the company cannot be achieved, when the management is deadlocked or has been guilty of serious irregularities, or, in small companies run on the basis of mutual trust between members, when the majority have exercised their legal rights in breach of a common understanding between the members when the company was formed."

Fil-kawza "**Maurice Camilleri et noe vs Frederick Frendo noe et noe**" li kienet deciza mill-Prim`Awla tal-Qorti Civili fl-4 ta` Lulju 2003 inghad illi :-

"... bla dubju ta` xejn, meta tavvera ruhha sitwazzjoni ta` `deadlock` ta` socjeta` kummercjali dina ghandha titqies bhala raguni gravi bizzejjed li ghandha twassal ghax-xoljiment tas-socjeta`.

Fil-"**Principles of Maltese Company Law**" kien rilevat mill-awtur **Andrew Muscat** illi :-

"A company would usually be in a `deadlock` situation if it becomes impossible to manage its affairs because the voting power at board and general meetings is divided between two opposing groups. A deadlock situation typically arises where a company has two shareholders who are its only two directors and the shareholders hold an equal number of voting shares. If they disagree on major questions in respect of the management of the company, they may be unable to break the deadlock both at board meeting and at general meeting level. Management and other decisions vital to the company will the cease to be taken."

Fil-provvediment li tat il-Prim`Awla tal-Qorti Civili fl-1 ta` Novembru 2012 fil-kawza "**Av. Dr. Henri Mizzi noe v. Robert Damkjaer (Malta) Limited**" saret enfasi fuq l-importanza u l-htiega li jkun hemm relazzjoni ta` fiducija u integrita` bejn l-azzjonisti ta` kumpannija sabiex l-objects taghha u allura n-negozju taghha jkunu jistghu jitwettqu u jsir progress. Fin-nuqqas, it-tilwim u l-antagonizmu jwassal ghal ordni ta` xoljiment u stralc.

Il-Qorti qalet hekk :-

"F` dan l-istadju m`hemmx htiega li l-qorti toqghod tindaga tort ta` min il-kumpannija tinsab fl-istat li hi. L-ezercizzju li trid taghmel hu li tara jekk jezistux ic-cirkostanzi kontemplati mil-ligi biex il-kumpannija tigi xjolta. M`hemmx dubju li r-relazzjonijiet bejn l-azzjonisti u d-diretturi (li kienu l-istess azzjonisti u li issa lkoll irrizenjaw minn tali kariga) krollaw ghal kollox. Relazzjoni ta` fiducja u integrita bejn l-azzjonisti hi essenzjali biex in-negozju tal-kumpannija jkun success, u biex ir-relazzjoni tkompli. Meta l-partijiet jibdew jaghmlu allegazzjonijiet kontra xulxin is-sens komun jghidlek li hu diffiqli li tkompli r-relazzjoni bejniethom. Il-kumpannija ma tistax tibqa` topera, u sahsitra Mark Ellul Sullivan stess ikkonferma li dan l-ahhar in-negozju waqaf ghal kollox. Dan ifisser li bhalissa l-kumpannija hi dormant. Fl-antagonizmu li jezisti bejn il-partijiet, ix-xoljiment tal-kumpannija hu l-uniku rimedju li fadal. Fil-fatt ma gie propost l-ebda rimedju alternattiv. Fl-arrangement kien mistenni li l-affarijiet tal-kumpannija jitmexxew

fi spirtu ta` hbiberija u koperazzjoni ghall-beneficju komuni ta` daww involuti. M` huwiex aktar possibbli li z-zewg partijiet ikomplu jahdmu flimkien ghall-gid komuni. L-istat ta` animosita` li ilu jirrenja ghal diversi snin tipprekludi li ssehh xi rikonciljazzjoni u li l-affarijiet tal-kumpannija jitmexxew f` ambjent ta` serenita` u koperazzjoni. Dak li kien inizjalment mahsub li jsehh bil-konkluzjoni tal-ftehim varji li gew iffirmati, ma jistax jigi iktar miksub. Ghalhekk it-talba tar-rikorrenti hi gustifikata."

Fil-provvediment li tat i-Prim` Awla tal-Qorti Civili fil-kawza "**Tina Petersone et v. Norvik (Malta) SICAV p.l.c.**" 17/06/2014) inghad illi raguni gravi ohra ghall-fini tal-Art 214(2)(b)(iii) hija meta jkun hemm *breakdown in mutual confidence* :

"Fuq punt wiehed iz-zewg partijiet huma konkordi u cioe` li hemm "ragunijiet gravi bizzejjed" ghax-xoljiment u l-istralc tal-kumpannija intimata. Fil-mod u l-manjiera kif svolgew il-fatti, u l-konsegwenzi li gabu magghom, din il-Qorti hija konvinta minn fatt : illi bejn id-diretturi u s-sid tas-sub-funds li jaghmlu l-kumpannija intimata kien hemm a breakdown in mutual confidence tant car u inekwivoku illi l-kumpannija intimata mhux biss ma tistax tkompli bl-esistenza taghha. Fic-cirkostanzi il-Qorti sejra tapplika l-Art 214(2)(b)(iii) tal-Kap 386."

Apparti l-fatt determinat (fuq l-iskorta tal-provi) li BHC mhijiex f` qaghda skont il-ligi taghna li thallas id-djun taghha, din il-qorti ssib li hemm ukoll ragunijiet gravi bizzejjed li jiggustifikaw ordni ta` xoljiment u stralc, senjatament *deadlock* bejn l-azzjonisti li kien rifless fid-decizjonijiet li hadu (jew ma hadux) id-diretturi li nhatru mhux biex iharsu l-interessi ta` BHC izda tal-azzjonisti.

Irrizulta kull azzjonista kien jippossjedi 50% tal-ishma.

Irrizulta li minhabba dizgwid serju li jolqot l-essenza tal-fiducja ta` bejn id-diretturi u l-azzjonisti, BHC waqfet ghal kollox milli twettaq effettivament l-*objects* li ghalihom kienet kostitwita.

Il-qorti tqis illi d-disgwid tant huwa gravi li ma hemmx futur ghal BHC anke ghaliex fil-kawza li hija pendent fil-Germanja AC1 (taht l-influenza morali u finanzjarja ta` Eckbo) qeghda timputa agir hazin da

parti ta` Vroon kontra l-interess ta` AC1 u finalment BHC favur BLB u taghha.

Rinfaccjata b`kobba li nrexxielhom ihabblu l-azzjonisti, l-unika triq li tirrifletti l-buon sens fis-sinjifikat l-aktar wiesgha tal-kelma huwa x-xoljiment u l-istralc ta` BHC.

Fl-istralc kull min ghandu *claim* inkluzi l-azzjonisti jkunu jistghu jressquha ghall-konsiderazzjoni tal-istralcjarju, u jekk tkun tirrizulta fondata, twassal ghal decizjoni, bl-approvazzjoni tal-qorti.

Fil-kaz tal-lum, il-qorti sabet illi l-inkwiet ta` bejn l-azzjonisti tal-intimata, li kienu wkoll id-diretturi taghha, huwa ben delineat mill-assjem tal-provi. Kull parti timputa l-htija ghad-disfatta lill-parti l-ohra. Waqt il-gbir tal-provi, issemma` minn kollox. Jekk tghodd kollox ma ghandux ikun hemm l-icken dubju li l-intimata ma tistax tiehu r-ruh.

Il-qorti sabet illi bejn azzjonisti b`ishma ndaqs fil-kumpannija ntimata, parita` li kienet riflessa wkoll fl-ghadd tad-diretturi, tant kien hemm problemi u kwistjonijiet, li waslu *to a point of no return* fejn il-kumpannija oggettivament ma tistax tibqa` topera.

Tghid illi d-dizgwid bejn id-diretturi, u l-konflitti bejn l-interess personali tal-azzjonisti u dawk tal-kumpannija ntimata kellhom effett tant negattiv li l-kumpannija intimata ngabet fuq irkoptejha u ma setghetx iddawwar ir-rota lejn il-posittiv.

Iddur kemm iddur mal-fatti ta` dan il-kaz jirrizultaw "ragunijiet gravi bizzejjed" ghax-xoljiment u l-istralc tal-kumpannija intimata.

Fil-mod u l-manjiera kif svolgew il-fatti, u l-konsegwenzi li gabu maghhom, din il-qorti tibqa` konvinta minn haga certa u cioe` illi bejn id-diretturi u l-azzjonisti kien hemm a breakdown *in mutual confidence and trust* tant car u inekwivoku illi l-kumpannija intimata ma tistax tkompli bl-esistenza taghha.

Provvediment

Ghar-ragunijiet kollha premessi, il-qorti qeghda tid-disponi mit-talbiet, mill-bqija tal-eccezzjonijiet tal-kumpannija ntimata, u mill-eccezzjonijiet tal-kjamat fil-kawza, billi :-

Tichad il-bqija tal-eccezzjonijiet tal-kumpannija ntimata.

Tichad l-eccezzjonijiet tal-kjamat fil-kawza.

Tiddikjara li jirrizulta ppruvat ghas-sodisfazzjon taghha kull ma jiggustifika l-applikazzjoni tal-Art 214(2)(ii)(a), tal-Art 214(5)(a) u (b), u tal-Art 214(2)(b)(iii) tal-Kap 386 tal-Ligijiet ta` Malta kontra l-kumpannija ntimata Balticmax Holding Company Limited (C70765).

Tordna x-xoljiment u l-konsegwenzjali stralc tal-kumpannija ntimata Balticmax Holding Company Limited (C70765) b`effett mil-lum.

Tahtar lir-Ricevitur Ufficjali bhala stralcjarju.

Taghti lill-istralcarju s-setghat u d-dmirijiet kollha li huma previsti fil-Kap 386 tal-Ligijiet ta` Malta.

Tordna lill-istralcarju sabiex jipprezenta rapport tal-hidma tieghu sa zmien tliet (3) xhur mil-lum.

Tordna li l-ispejjez kollha ta` dan il-procediment, inkluzi l-ispejjez kollha tal-istralc, u komprizi l-ispejjez u d-drittijiet tal-istralcjarju, ghandhom jithallsu mir-rikorrent noe, mill-kumpannija ntimata, u mill-kjamat fil-kawza *in solidum* bejniethom.

**Thalli l-istralc għall-udjenja ta` nhar it-Tlieta 9 ta` Marzu
2021 fid-9.00 a.m.**

**Onor. Joseph Zammit McKeon
Imhallef**

**Amanda Cassar
Deputat Registratur**