

Kopja Informali ta' Sentenza



**QORTI CIVILI  
PRIM' AWLA**

**ONOR. IMHALLEF  
MARK CHETCUTI**

Seduta ta' l-24 ta' Novembru, 2011

Citazzjoni Numru. 811/2011

**Norddeutsche Landesbank Girozentrale, Bank esteru  
registrat il-Germanja, kif rapprezentat hawn Malta  
mill-mandatarju specjali l-Avukat Louis Cassar  
Pullicino**

**VS**

**Chem-Ist Shipping Limited**

**Il-Qorti,**

Rat ir-rikors gumentat tal-bank attur tad-19 ta' Awwissu 2011 li jghid hekk:

1. Peress illi s-socjeta' konvenuta hija sid tal-bastiment m.v. "Violet", liema bastiment jinsab registrat hawn Malta bin-numru ufficjali 9474292;
2. Peress illi s-socjeta' attrici hija kreditur ipotekarju tas-socjeta' konvenuta in segwitu ta' kuntratti ta' self konkluzi

kemm bejn il-bank attur u s-socjeta' konvenuta permezz ta' Loan Agreement tat-18 ta' Settembru 2008 u anke bejn il-bank attur u kumpanniji ohra assocjati mas-socjeta' konvenuta u ghal liema self is-socjeta' konvenuta ikkostitwiet ruhha bhala garanti solidali mad-debitur principali;

3. Peress illi l-obbligi tas-socjeta' konvenuta naxxenti mis-self u garanziji rispettivament gie kawtelat inter alia b'registrazzjoni ta' ipoteki navali ossia Mortagage "A" fit-22 ta' Settembru 2008 u ipoteka navali ohra ossia Mortgage "B" fit-22 ta' Settembru 2008 fir-registru tal-bastiment m.v. "Violet", proprjeta tas-socjeta' konvenuta u dan a tenur tal-pattijiet u kondizzjonijiet pattwiti bejn il-kontendenti f'zewg Deed of Covenants ffirmati fl-istess jum;

4. Peress illi s-socjeta' konvenuta hija inadempjenti fl-obbligi taghha naxxenti mill-kuntratti ta' self billi naqset li thallas ammonti li kienu dovuti kif jirrizulta f'avviz datat 25 ta' Mejju 2011 u konsegwentemet permezz ta' avviz ossia Notice of Default datata 10 ta' Gunju 2011 il-bank attur interpella lis-socjeta' konvenuta sabiex ihallas l-ammonti indikati fl-istess avviz fit-terminu hemm indikati u finnuqqas avza li kien sejjer jittermina l-facilitajiet li kienu nghataw;

5. Peress illi s-socjeta' konvenuta naqset li thallas l-ammonti dovuti minnha a tenur tal-avviz moghti lilha permezz tan-Notice of Default, il-bank attur imbaghad ipproceda b'avviz iehor fit-28 ta' Gunju 2011 intestat Notice of Acceleration and Demand u li permezz tieghu il-bank attur ta avviz lis-socjeta' konvenuta illi l-facilita ta' self avanzat lilha kien qed jigi terminat b'effett immedjat u interpella lis-socjeta' konveuta sabiex thallas l-ammont dovut ta' US\$ 13,810,099.78 sa mhux aktar tard mill-14 ta' Lulju 2011;

6. Peress illi permezz ta' Notice of Demand tad-19 ta' Lulju 2011 il-bank attur interpella lis-socjeta' konvenuta ukoll sabiex thallas ammonti ohra li kienet tenuta thallas ukoll bhala garanti ta' self iehor kif indikati fl-istess avviz u

f'ammonti rispettivi ta' US\$ 6,536,709.79 u US\$ 6,759,230.52;

7. Peress illi l-ebda ammonti ma thallsu lill-bank attur;

8. Peress illi a tenur ta' Sailing Advice datat 16 ta' Lulju 2011 il-bank attur avza lis-socjeta' konvenuta sabiex il-bastiment m.v. "Violet" ma jbahharx lejn l-ibhra territorjali tat-Turkija izda li l-istess bastiment jivjagga lejn l-ibhra territorjali Maltin izda s-socjeta' konvenuta injorat ghal kollox dan l-avviz u effettivament idderigiet lill-Kaptan tal-imsemmi bastiment sabiex isalpa lejn it-Turkija fejn il-bastiment jinsab fil-prezent fit-tarzna VGB Shipyard f'Yalova, it-Turkija;

9. Peress illi l-bank attur sussegwentement ipproceda sabiex jaghti lis-socjeta' konvenuta avviz iehor fit-18 ta' Lulju 2011 ossia Sailing Instruction kif kien intitolat li jaghmel a tenur tal-artiklu 19.6.2.1 tal-Loan Agreement u l-artikolu 11(A) tad-Deed of Covenants u f'liema avviz il-bank ghal darba ohra talab formalment lis-socjeta' konvenuta sabiex il-bastiment jitlaq immedjatament mill-ibhra territorjali fit-Turkija u jidderigi l-bastiment lejn u gewwa port hawn Malta izda s-socjeta' konvenuta injorat din is-sejha u fil-prezent il-bastiment "Violet" ghadu fit-Turkija;

10. Peress illi l-bank attur ghandu dritt jiehu pussess tal-imsemmi bastiment m.v. "Violet" u dan a tenur tal-artikolu 9A tad-Deed of Covenants u anke a tenur tal-artikolu 42(1)(a) tal-Kap. 234 u ghalhekk permezz ta' Notice of Possession datata 29 ta' Lulju 2011, il-bank avza lis-socjeta' konvenuta li kien qed jezercita d-dritt li jiehu pussess tal-imsemmi bastiment u li kien bi hsiebu jaghti struzzjonijiet lill-Kaptan sabiex jitlaq lejn Malta;

11. Peress illi meta r-rapprezentanti tal-bank attur ghamlu tentattiv li jtilghu abbord il-bastiment m.v. "Violet" fit-tarzna VGB Shipyard gewwa t-Turkija fid-29 ta' Lulju 2011 proprju sabiex jikkonsejaw lill-Kaptan dan l-avviz ossia Notice of Possession, huma gew impeduti milli jtilghu abbord il-bastiment u ghad li kien hemm sitt

## Kopja Informali ta' Sentenza

persuni abbord lanqas kien evidenti jekk dawn kienu membri tal-ekwipagg o meno; dan l-avviz sussegwentement gie notifikat lis-socjeta' konvenuta fl-ufficju registrat taghha hawn Malta fit-3 t'Awwissu 2011;

12. Peress illi s-socjeta' konvenuta qeghda tirrifjuta li taghti l-pussess tal-imsemmi bastiment lis-socjeta' attrici u dan minghajr ebda raguni valida skond il-ligi;

13. Peress illi l-agir tas-socjeta' konvenuta jikkostitwixxi ksur tal-obbligi assunti minnha a tenur tad-Deed of Covenants fl-artikolu 9A oltre li jmur kontra dak li jipprovdi espressament l-artikolu tal-Kap. 234 tal-Ligijiet ta' Malta;

Tghid ghalhekk is-socjeta' konvenuta ghaliex dina l-Onorabbli Qorti ma ghandhiex ghar-ragunijiet kollha premessi:

1. Tiddikjara u tiddeciedi illi kawza tal-inadempjenza da parti tas-socjeta' konvenuta fl-ezekuzzjoni tal-obbligi assunti mis-socjeta' konvenuta fil-Loan Agreement tat-18 ta' Settembru 2008 u d-Deed of Covenants tat-22 ta' Settembru 2008, il-bank attur qua mortgagee ghandu dritt jiehu pussess tal-bastiment m.v. "Violet";

2. Tipprefigi terminu qasir u perentorju sabiex is-socjeta' konvenuta tikkonsenja l-bastiment m.v. "Violet" lill-bank attur jew lir-rapprezentanti tieghu nominat ghal dan l-iskop u fin-nuqqas tawtorizza lill-bank attur sabiex jiehu pussess tal-istess bastiment m.v. Violet inkluz li jinnomina agenti u ekwipagg ghal dan l-iskop u tordna lis-socjeta' konvenuta li ma taghmel xejn sabiex tostakola jew timpedixxi b'mod dirett jew indirett lis-socjeta' attrici milli tiehu l-pussess tal-bastiment m.v. "Violet";

3. Taghti daww l-ordnijiet u rimedji kollha opportuni sabiex il-bank attur ikun f'qaghda li jiehu pussess f'idejh tal-bastiment m.v. "Violet";

Bl-ispejjez kontra s-socjeta' konvenuta li tibqa' ingunta minn issa sabiex tidher in subizzjoni;

Rat ir-risposta guramentata tas-socjeta' konvenuta li tghid hekk:

1. Illi preliminarjament u qabelxejn, is-socjeta' intimata qedha tecepixxi n-nuqqas ta' gurdizzjoni ta' din l-Onorabbli Qorti u dana billi din il-Qorti qedha tigi mitluba halli tiddecidi fuq talbiet li jikkoncernaw bastiment li l-bank rikorrent qed jammetti li m'hux fl-ibhra territorjali Maltin;

2. Illi fil-kaz li jezistu dawk ic-cirkostanzi kontemplati fil-ligi ai termini tal-artikolu 42 tal-Kap. 234, l-istess artikolu ma jirrikjedix li s-socjeta' attrici ghandha jkollha dana d-dritt li tiehu pussess ta' vapur sancit b'xi awtorizzazzjoni tal-Qorti u ghaldaqstant l-azzjoni attrici hija fl-ewwel lok fierghha u per konsegwenza din il-Qorti ghandha tichad it-talbiet rikorrenti. Minhabba l-istess raguni, anke jekk din il-Qorti tkompli tisma' l-kawza odjerna, ghandha xorta wahda tikkonsidra dan meta tigi ghal 'capo spese';

3. Illi madanakollu s-socjeta' rikorrenti xorta wahda m'hijiex iggustifikata fil-proceduri li qed tiehu sabiex tiehu pussess tal-vapur de quo u dana peress illi l-inadempjenza li qedha tigi allegata mis-socjeta' rikorrenti fil-kawza odjerna u li fuqa qed tibbaza l-azzjoni taghha ma sehhitx htija tas-socjeta' intimata u dana hekk kif ser ikollha l-opportunita' li tipprova s-socjeta' intimata waqt it-trattazzjoni ta' din il-kawza liema pretensjoni, fost pretensjonjiet ohra, gja' giet dedotta f'kawza li giet intavolata gewwa t-Turkija mis-socjeta' intimata kontra inter alia, is-socjeta' rikorrenti;

4. Illi di piu, u minghajr pregudizzju ghas-suespost, is-socjeta' rikorrenti m'ghamlet l-ebda procedura skond il-ligi sabiex tottjeni titolu ezequttiv fil-konfront tas-socjeta' intimata, is-socjeta' intimata ghad ma gietx innotifikata b'dokument igguramentat bl-ammont dovut minnha liema ammont jista' wkoll dejjem jigi kkontestat minnha u li qed jigi kkontestat minhabba dak li gja gie spjegat fir-risposta numru tlieta (3) u ghalhekk l-azzjoni hekk kif impressqa hija wahda intempestiva;

5. Illi, mighajr pregudizzju ghas-suespost, is-socjeta' intimata tecepixxi illi t-talbiet hekk kif impressqa huma guridikament m'hux proponibbli u dana, aparti mir-ragunijiet suesposti, ghaliex is-socjeta' rikorrenti kellha qabel xejn tressaq ittra ufficjali sabiex trendi l-ipoteka navali titolu ezekuttiv u dana taht l-artikoli 253 u 256(2) relattivi tal-Kap. 12 tal-Ligijiet ta' Malta skond ma tirrikjedi l-artikolu 42(2) tal-Kap. 234 u ghalhekk isegwi li t-talbiet rikorrenti ma jistghux jintlaqghu minn din il-Qorti ghaliex sabiex is-socjeta' rikorrenti jkollha l-jedd skond il-ligi li tiehu l-pussess effettiv tal-bastiment u tibda bl-esekuzzjoni tal-mandat skond il-ligi, is-socjeta' rikorrenti jrid ikollha titolu ezekuttiv fil-konfront tas-socjeta' intimata haga li s-socjeta' rikorrenti ma kellix meta ressqet il-kawza odjerna;

6. Salv linji difenzjonali ulterjuri hekk kif permessi mill-ligi;

Rat l-atti kollha tal-kawza inkluz ix-xiehda, dokumenti, semghet it-trattazzjoni tad-difensuri tal-kontendenti u hadet konjizzjoni tan-noti ta' sottomissjonijiet tal-partijiet;

Rat il-verbal tas-16 ta' Settembru 2011 tal-kawza numru 810/2011MCH fejn il-partijiet qablu illi l-verbali u l-provi kollha inkluz dawk dokumentarji jkunu japplikaw u jiformaw parti mill-atti tal-kawza numri 811/2011MCH u 812/2011MCH;

Rat li l-kawza thalliet ghas-sentenza ghal 24 ta' Novembru 2011.

### **Ikkunsidrat**

Illi t-talba attrici hi imsejsa madwar kuntratt ta' self datat 18 ta' Settembru 2008 maghmul bejn il-bank attur u s-socjeta' konvenuta, riportat a fol. 6 et seq. tal-process (Dok. A). In garanzija tal-hlas is-socjeta' konvenuta ftehmet hekk fi klawsola 12:

12.1 From the Drawdown Date on and during the entire Security Period the Outstanding Indebtedness and the Swap Exposure shall be secured as follows:

12.1.1 The Borrower shall execute the Mortgage on the Vessel in favour of the Lender and cause the registration thereof in the register book maintained at the register of ships of the Malta and another first class ships register accepted by the Lender.

Inoltre ftehm u wkoll li f'kaz ta' 'default' liema raguni ta' nuqqas hu spjegat ampjament fi klawnsola 21 tal-istess kuntratt u jinkludu nuqqas ta' hlas taht dan il-ftehim jew ftehim iehor in garanzija, il-kreditur ikollu fost id-drittijiet l-oħra tieghu, skond artikolu 19.6.2.1

19.6.2.1 direct the Vessel to any destination or port as the Lender may request (and should the Borrower fail to comply with such request the Lender is authorised to give binding orders to the master and the crew of the Vessel and to do all such things and to give all such declarations towards authorities or private persons in the name of the borrower and to receive such declarations which are necessary to achieve such purpose in the name and for the account of the Borrower);

Fit-22 ta' Settembru 2008 konsegwenti ghal ftehim ta' self u in kawtela tal-imsemmi self bhala debitori principali u kemm bhala garanti ghal debiti ta' kumpaniji oħra assocjati mas-socjeta' konvenuta l-istess socjeta' konvenuta irregistrat ipoteka navali cioe Mortgage 'B' u 'C' (tal-process) fir-registru tal-bastiment m.v. Violet. Fl-istess jum il-kontendenti iffirraw Deeds of Covenant konsistenti fi 'First u Second Priority Mortgage' fuq il-vapur Violet proprjeta tas-socjeta' konvenuta (Dok. D u E tal-process) fejn huma regolati l-ipoteki navali. Fi klawnsola 7 tal-First Priority Mortgage a fol. 43 tal-process hemm miktub hekk:

7. UPON the happening of any of the following events the security created by this Deed shall become immediately enforceable, all amounts becoming due without the necessity of any written or verbal demand being made by the Mortgagee and without the necessity of a court declaration to the effect that an Event of Default has taken place; and those amounts which become due only upon a demand in writing shall become due following such

Kopja Informali ta' Sentenza

demand without the necessity of any court declaration to the effect that an Event of Default has taken place.

Klawsola 8 tghid hekk:

The Mortgage shall in so far as the Owner's obligations under the Loan Agreement are concerned be considered due and enforceable upon any Event of Default having occurred according to the sole discretion and option of the Mortgagee. The Mortgagee shall in such a case serve a written notice to this effect to the Owner and any sum or amount outstanding under the Loan Agreement shall be considered immediately due and payable.

Fi klawsola 9 imbaghad, fost il-poteri tal-kredituri hemm hekk:

9. UPON the security created by this Deed becoming due and immediately enforceable pursuant to Clause 7 hereof, the Mortgagee may put into force and exercise all the powers possessed by them as Mortgagee of the Vessel and in particular:-

- A. To take real or constructive possession of the Vessel.
- B. To require that all policies contracts and other records relating to the Insurances (including details of and correspondence concerning outstanding claims) be forthwith delivered to such brokers as the Mortgagee may nominate.
- E. To take any action of a general or specific nature in connection with the Vessel so as to ensure its safety whether she is in port or at sea at home or abroad even while the Vessel is under the exclusive control and management of the Owner including and without limitation to co-operate with any port department or authority, tug company or harbour operator, to engage seamen and officers to carry out specific functions at the expense and on behalf of the Owner, to appoint or engage agents, shore suppliers, berth operators and other such persons to fulfil specific functions for and on behalf of the Owner and the Owner undertakes to follow the instructions of any person so appointed, not in any way to obstruct, directly



or indirectly the requirements of the Mortgagee, to maintain all Insurances and to keep all crew until such time as may be necessary to ensure the proper and continuing administration of the Vessel.

F. To sell the Vessel or any share therein with or without prior notice to the Owner and with or without the benefit of any charterparty by public auction or private contract at such place and upon such terms as the Mortgagee in its absolute discretion may determine with power to postpone any such sale and without being answerable for any loss occasioned by such sale or resulting from postponement thereof.

Il-bank attur qed jallega illi s-socjeta' konvenuta naqset milli thallas ammonti dovuti skond il-Loan Agreement u baqghet inadempjenti nonostante l-interpellazzjonijiet li sarulha. Ghalkemm l-istess bank attur ai termini tal-Loan Agreement u l-Priority Mortgage Agreement interpellat lis-socjeta' konvenuta biex il-vapur Violet proprjeta tas-socjeta' konvenuta soggett ghall-ipoteka navali favur il-bank attur jbahhar lejn Malta, is-socjeta' konvenuta injorat dan l-avviz u l-vapur ittiehed it-Turkija. Inoltre meta l-bank attur ipprova jiehu pussess tal-vapur skond it-termini tal-Priority Mortgage Agreement, dan gie impedut mill-persuni abbord l-istess vapur. B'din il-kawza l-bank attur qed jitlob lil Qorti li tordna li l-vapur jigi konsenjat lil bank attur prevja d-dikjarazzjoni li s-socjeta' konvenuta naqset li tottempera ruhha mal-Loan Agreement u l-mortgage agreement fuq riferit. Il-patt bejn il-kontendenti tal-pussess u konsegwenti bejgh hu rifless anki fil-Kapitolu 234 artikolu 42(1)(a).

Is-socjeta' konvenuta laqghet b'zewg eccezzjonijiet ta' natura preliminari.

### **Eccezzjoni ta' nuqqas ta' gurdizzjoni**

Is-socjeta' konvenuta qed tissottometti illi din il-Qorti ma ghandhiex gurdizzjoni tiddeciedi fuq talbiet dwar bastiment li mhux fl-ibhra territorjali Maltin.

## Kopja Informali ta' Sentenza

Din il-Qorti tirrileva li din l-eccezzjoni mhix wahda in rem izda wahda personali kontra kumpanija registrata fis-Registru tas-Socjetajiet ta' Malta bin-numru C-35650. L-artikolu 742(b) tal-Kapitolu 12 ighid hekk: Il Qrati Maltin ghandhom gurisdizzjoni fuq "kull persuna, sakemm jew għandha d-domicilju tagħha jew tkun toqgħod jew tkun qegħda Malta".

Il-kelma 'persuna' f'dan l-artikolu mfissra fil-Kapitolu 249 tal-Ligijiet ta' Malta "tinkludi korp jew ghaqda ohra ta' persuni sew jekk dak il-korp jew dik l-ghaqda jkunu persuna guridika, skond id-disposizzjonijiet tat-Tieni Skeda tal-Kodici Civili, sew jekk le".

Hu indubitat illi s-socjeta' mharrka (persuna ai finijiet tal-ligi) hi kumpanija Maltija bl-ufficju registrat tagħha hawn Malta kif jidher mill-ipoteki navali Dok. B u C fil-process u mill-istess notifika tal-atti ai termini tal-artikolu 19A tad-Deed of Covenant (Dok. D fol. 46 tal-process).

Dan l-artikolu 19 tad-Deed of Covenant dwar gurisdizzjoni jghid hekk:

19. A. This Deed shall be governed by Maltese law and the parties hereto agree that any legal action or proceeding arising out or in connection with the Mortgage or this Deed may be brought in the Courts of the Federal Republic of Germany and/or in the Courts of Malta to whose non-exclusive jurisdiction the parties hereby submit or in the courts of any country wherein the Vessel may for the time being be situated, each of which shall have jurisdiction to hear and determine any such legal action or proceeding.

C. If any legal action or proceeding arising out of or in connection with the Mortgage or this Deed or the other Security Documents is begun in Malta any writ, judgement, notice of proceeding or other legal process shall sufficiently be served on the Owner if served on or delivered to anyone director or:

Corporate Services Limited,

Kopja Informali ta' Sentenza

5/2, Merchants Street,  
Valletta, Malta.  
Telephone No. +35621222097  
Fax No. +35621234941

whom the Owner hereby nominates as its attorney in Malta for these purposes and who has accepted this nomination by a Letter of Acceptance for Service of Process Purposes in the form set out hereto as Annex II. The Owner covenants with the Mortgagee not to revoke its appointment of such director or person as its legal representative in Malta for the purposes aforesaid and in the event of such director's or person's resignation or in any case where such director or person is unable to fulfil such capacity to procure that the Mortgagee is informed in writing forthwith, that another suitable person resident in Malta is appointed legal representative in such director or person's place and that the Mortgagee is informed promptly of the name and address of such substitute.

D. The submission by the owner to the jurisdiction mentioned in sub-Clause (A) above shall not nor shall be construed so as to exclude the right of the Mortgagee to begin any legal action or proceeding arising out of or in connection with the Mortgage or this Deed in whatsoever jurisdiction it may deem fit.

Din il-kundizzjoni taghmel il-ligi Maltija applikabbli ghad-Deed of Covenant li tirregola l-ipoteka navali registrata f'Malta pero taghti l-fakulta tal-ghazla tal-forum lil kull parti firmatarja fi kwistjoni in konnessjoni mal-istess Deed of Covenant. F'dan il-kaz il-bank attur ghazel li juza' l-forum Malti.

Il-Qorti tirreferi wkoll in linea generali ghal artikolu 2(1) tal-EU Regulation 44/2001 dwar il-gurisdizzjoni fejn il-principju generali hu illi persuna domiciljata f'pajjiz membru tal-Unjoni Ewropeja ghandu jitharrek fil-Qorti tal-pajjiz fejn ikun domiciljat.

## **Eccezzjoni tat-titolu ezekuttiv**

Is-socjeta' intimata qed tattakka l-proceduri odjerni billi ssostni illi l-bank attur ma segwiex il-procedura skond il-ligi biex jottjeni t-titolu ezekuttiv fis-sens li ghadha ma gietx notifikata b'dokument igguramentat bl-ammont dovut liema ammont jista' u qed jigi kontestat. Inltre bla pregudizzju l-bank attur ma pprezentax ittra ufficjali biex irendi l-ipoteka navali titolu ezekuttiv taht l-artikoli 253 u 256(2) tal-Kap. 12 skond ma jitlob l-artikolu 42(2) tal-Kapitolu 234. Kwindi l-bank attur qabel ma jottempera ruhu mal-ligi ma jistax jiehu pussess effettiv tal-bastiment u jibda jezegwixxi l-mandat.

Din l-eccezzjoni hi maqsuma fi tnejn. L-ewwel parti tikkoncerna l-procedura allegatament necessarja biex tirrendi l-pretensjoni attrici f'titolu ezekuttiv.

Harsa lejn l-impostazzjoni tal-premessi u talbiet juru illi dak li qed jitlob il-bank attur hu li jigi dikjarat illi s-socjeta' konvenuta naqset li tottempera ruhha ma ftehim cioe obligazzjoni ta' hlas kif miftiehem fil-Loan Agreement u konsegwenti dritt tal-bank attur li jidderiegi l-vapur f'port tal-ghazla tieghu (artikolu 19.6.2.1 fol. 25), u wkoll li jiehu pussess ta' assi mobbli tas-socjeta' konvenuta konsistenti fil-vapur Violet proprjeta tal-istess socjeta' kovenuta, kif pattwit fid-Deed of Covenants (artikoli 9A u 9F fol. 43 u 44 tal-process).

Il-Loan Agreement u d-Deed of Covenant jistabilixxu c-cirkostanzi meta jsir dovut il-bilanc tad-debitu kollu cioe dak imsejjah bhala 'default'. Il-Loan Agreement jelenka r-ragunijiet li fihom id-debitur jitqies li naqas mill-obbligi tieghu u jirrendi l-bilanc dovut immedjament. Dawn ir-ragunijiet ta' 'default' huma elenkati u miftiehma f'artikolu 21 tal-loan agreement (fol. 26 tal-process) fosthom 21.1 cioe nuqqas ta' hlas ta' 'instalment' mill-'principal' jew 'interest' jew nuqqas ta' hlas qua garanti ghal terzi.

Imbaghad skond id-Deed of Covenant li tistabilixxi l-garanzija tal-hlas, artikolu 8 (fol. 43 tal-process) ighid testwalment hekk:

8. The Mortgage shall in so far as the Owner's obligations under the Loan Agreement are concerned be considered due and enforceable upon any Event of Default having occurred according to the sole discretion and option of the Mortgagee. The Mortgagee shall in such a case serve a written notice to this effect to the Owner and any sum or amount outstanding under the Loan Agreement shall be considered immediately due and payable.

Kwindi hu konvenut bejn il-partijiet illi l-kreditur hu obligat biss li jaghti 'written notice' lid-debitur dwar in-nuqqas, qabel ma jersaq biex jezegwixxi, fin-nuqqas ta' adempiment tad-debitur.

Jidher mill-atti li n-notifika bil-miktub saret permezz ta' diversi intimazzjonijiet. Illi jirrizulta illi permezz ta' ittra tal-25 ta' Mejju 2011 il-Bank ta avviz ossia Demand for Payment of the total sum of USD 1,768,216.00 liema pagament kellu jsir mhux aktar tard minn erbatax-il gurnata mill-istess avviz, liema pagament baqa' ma sarx. Il-Bank imbaghad ipproceda b'Notice of Default fl-10 ta' Gunju 2011 u ta avviz lid-debitur sabiex jirrimedja din l-inadempjenza fi zmien hmistax- il gurnata. Billi din l-inadempjenza baqghet ma gietx rimedjata il-Bank imbaghad ipproceda b'Notice of Acceleration and Demand fit-28 ta' Gunju 2011 fejn inter alia s-sidien konvenuti gew avzati illi l-facilitajiet avanzati bis-sahha tal-Loan Agreement kienu gew terminati u li l-Bank kien bi hsiebu jipprocedi sabiex jezercita d-drittijiet tieghu jekk ma jsirx il-hlas tal-ammonti dovuti sal-14 ta' Lulju 2011.

Illi billi baqa' ma sar l-ebda pagament jirrizulta illi l-Bank ta lis-socjeta' konvenuta Sailing instruction fit-18 ta' Lulju 2011 sabiex jidderigi lill-Kaptan tal-bastiment sabiex ibahhar lejn Malta u li pero giet injorata ghal kollox mis-socjeta konvenuta, segwita b'Notice of Possession fid-29 ta' Lulju 2011 li giet debitament notifikata lis-socjeta konvenuta hawn Malta fil-5 ta' Awwissu 2011 u sussegwentment giet anke notifikata fit-Turkija tramite procedura permezz ta' Nutar Pubbliku.

Kwindi l-bank attur ottempera ruhu mal-ftehim dwar l-esigibilita tas-somom dovut u ma kellu bzonn jirrikorri ghal ebda procedura ohra salv dak miftiehem. L-ewwel parti tal-eccezzjoni tas-socjeta' konvenuta ghalhekk ma ghandhiex bazi. Il-Qorti tqis illi l-principju 'pacta sunt servanda' ghandu jkun applikabbli b'konvinzjoni f'kaz bhal dan.

It-tieni parti tal-eccezzjoni hi illi l-bank attur ma rrendiex l-ipoteka navali ezegwibbli ai termini ta' dik li jstipula l-artikolu 42(2) tal-Kapitolu 234

L-artikolu 42(1) tal-Kapitolu 234 jaghti d-dritt lil kreditur, f'kaz ta' default tad-debitur ta' xi kondizzjoni fl-ipoteka navali jew dokument jew arrangament imsemmi fih illi 'wara li jaghti avviz bil-miktub' lid-debitur jipprocedi bil-pussess u bejgh tal-vapur. L-artikolu 42(2) irendi 'ipoteka navali registrata' titolu ezekuttiv ghal finijiet tal-artikolu 253 tal-Kapitolu 12. L-argument tas-socjeta' konvenuta hu illi ladarba ipoteka navali qua titolu ezekuttiv ai termini tal-artikolu 253 tal-Kapitolu 12 ser tigi ezegwita, l-ewwel li jrid isir hu illi t-titolu jigi rez ezegwibbli skond l-artikolu 256 cioe entro jumejn minn notifika ta' ittra ufficjali lid-debitur.

Il-Qorti tqis li l-artikolu 42(1) hu car bizzejjed li jorbot id-dritt ghal pussess u l-bejgh ma' talba bil-miktub biss. Din hi l-uniku formalita rikjesta. Hu car illi l-Kapitolu 234 hi ligi specjali w in kwantu tali, tista' tidderoga mill-principji generali b'regolamenti ad hoc li jirregolaw sitwazzjonijiet partikolari. F'dan il-kaz il-parti tal-artikolu tal-ligi cioe 42(1) li jirregola l-procedura antecedenti ghall-pussess hi mfissra b'mod car cioe talba bil-miktub lid-debitur biex jirrilaxxa pussess tal-vapur ghax l-istess debitur naqas skond ma jipprovdi l-istess artikolu 42(1). L-artikolu 42(2) imbaghad ma tissubordinax dak li jghid l-ewwel subinciz ghal xi procedura ohra. Kull ma tghid hu illi ghal finijiet tal-ligi, ipoteka navali ghandha s-sahha ta' titolu ezekuttiv bhat-titoli msemija fl-artikolu 253 tal-Kapitolu 12 jekk din l-ipoteka hi registrata u dan biex tassigura l-ezegwibilita ta' debitu cert likwidu u dovut jew jekk valur massimu hu imsemmi espressament fl-att li jikreja sigurta u registrat fis-Shipping Registry. B'hekk dan is-subartikolu kull ma

jagħmel hu li jillimita c-cirkostanzi fejn ipoteka navali titqies li hi titolu eżekuttiv imma ma jimponix xi kundizzjoni oħra biex trendiha eżegwibbli. Jigi relevat li dan it-titolu eżekuttiv mhux elenkat ma' dawk fl-artikolu 253 u l-artikoli sussegwenti li jirregolaw l-eżegwibilita tagħhom. Lanqas ma hemm stipulat fl-artikolu 42(2) illi l-kreditur irid isegwi xi procedura partikolari kif irid il-Kapitolu 12. Għalhekk ma jistghux japplikaw proceduri intizi għat-titoli eżekuttivi speċifikament elenkati fl-artikolu 253 meta dan it-titolu partikolari mhux imsemmi hemm u hemm procedura speċifikata għalih fil-ligi speċjali li fih hu stabbilit cioè l-artikolu 42(1) tal-Kap. 234. Jista' jissemma' b'paragun l-artikolu 166A tal-Kapitolu 12 fejn it-titolu eżekuttiv jigi rez eżegwibbli kif jistabilixxi l-istess artikolu biss stante li mhux imsemmi mat-titoli eżekuttivi fl-artikolu 253 u għalhekk il-procedura stabbilita fl-artikolu 256 ma tapplikax għalih lanqas. Il-Qorti tirrileva illi l-bejgh eventwali tal-vapur b'mod privat jew bhala Court approved sale mhux bil-procedura ta' subbasta stante li f'dan il-kaz, il-proceduri huma in personam u mhux konsegwenti għall-arrest tal-vapur, mhux ser jigu trattati f'din l-istanza billi dak li qed jintalab hu biss it-tehid tal-pussess.

B'dawn l-argumenti l-eccezzjoni tas-socjeta' konvenuta ma haqqhiex tigi milqugha.

### **Eccezzjoni li l-jedd tal-pussess skond l-artikolu 42 tal-Kap. 234 ma għandux bżonn li jigi sancit mill-Qorti**

Din il-Qorti tqis li din l-eccezzjoni hi bla bazi billi t-talba tal-bank attur qed issir b'konsegwenza tar-rifjut tas-socjeta' konvenuta li tagħti l-pussess tal-vapur tal-bank attur skond kif pattwit fl-eventwalita ta' 'default'. Jekk id-debitur jonqos milli jottempera ruhu ma' obligazzjoni assunta mhix lecita għal kreditur li jiehu l-ligi b'idejh ghax jista' jesponi ruhu għal proceduri penali, izda għandu jitlob li l-Qorti tawtorizzah li jagħmel dak li hu intitolat għalih bi dritt. Il-kreditur mhux jitlob konferma tal-jedd izda l-infurzar tiegħu b'sentenza tal-Qorti.

Issir referenza ghal dak li jghidu l-awturi **Graeme Bowtle and Kevin McGuinness** fil-ktieb '**The Law of Ship Mortgages**' (LLP 2001):

**3.109** The taking of possession is distinct from the mere acquisition of possession by a mortgagee in a coincidental manner, or the passive receipt of freight and other amounts payable with respect to the ship. The question of whether the mortgagee has taken possession depends upon whether the mortgagee has removed from the mortgagor the power and duty of managing the ship.<sup>1</sup> The right to possession is one of the two key rights of a mortgagee, the other being the right to sell the ship and apply the proceeds to the balance owing to the mortgagor.<sup>2</sup>

**3.110** Clearly a mortgagee may take possession where the mortgage debt is due and there is a default in payment. However, the right to take possession also arises where the mortgagee's security becomes significantly impaired,<sup>3</sup> although the debt is not yet due,<sup>4</sup> and the perceived threat to the mortgagee's security arises by reason of the act of some third party (as, for instance, by way of the institution of execution).<sup>5</sup> It is not necessary that proceedings be commenced to enforce the mortgage before possession is taken.<sup>6</sup>

**7.14** If the owner does not pay the amount demanded and the mortgagee decides to enforce the security of the mortgage, then it has two principal options. Either it can take possession of the ship and then sell the ship under its power of sale, or it can arrest the ship and apply to the court for a judicial sales.

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<sup>1</sup> See, generally, *Noyes v. Pollock* (1885) 30 Ch. D. 336 (C.A.); *Mexborough U.D.C. v. Harrison* [1964] 2 All E.R. 109 (C.A.).

<sup>2</sup> *Japp v. Campbell* (1887) 57 L.J. Q.B. 79 – right of a mortgagee of the majority of shares in a ship to assume possession of the ship.

<sup>3</sup> *The "Manor"* [1907] P. 339 (C.A.); but compare *The "Innisfallen"* (1866) L.R. 1 A. & E. 72 – a mortgagee not in possession cannot maintain an action for distraint; *Cory Bros & Co. V. Stewart* (1886) 2 T.L.R. 508 (C.A.).

<sup>4</sup> *The "Blanche"* (1887) 6 Asp. M.L.C. 272, 58 L.T. 592 (Adm.).

<sup>5</sup> *Dickinson v. Kitchen* (1858) 8 E. & B. 789, 120 E.R. 293 (Q.B.); *The "Marriott"* (1861) 30 L.J. Ch. 571 (C.A.).

<sup>6</sup> *The "Manor"* [1907] P. 339 (C.A.).



**7.17** If the mortgage debt is due and the owner has defaulted in payment then the mortgagee may enforce its security. The situation is less clear where the default relates to some other undertaking under the mortgage or collateral documentation. In *The "Cathcart"*<sup>7</sup> the ship was arrested by the mortgagee. However, it was released from arrest by the court because the mortgage debt was not then due. In *The "Blanche"* the mortgagee commenced proceedings for possession but Butt, J. ordered the ship's release, saying<sup>8</sup>:

"I am prepared to hold that the mortgagee was not entitled to take possession before the money secured by the mortgage is due. True the property in the ship is his. but the equities interfere and prevent his taking possession."

The suggestion in this case is that defaults not related to payment may not give right to possession, unless either actual prejudice to the mortgagee can be shown from the mortgagor's remaining in possession or there is an express right to possession given where there is any default. In the absence of such an express right to possession, the standard provision in the deed or covenant providing for the acceleration of the mortgage debt<sup>9</sup> (so that it becomes immediately due and payable in full) upon the occurrence of any default would usually be sufficient to overcome any objection as to whether there is a right to possession where the default under a mortgage is not specifically related to payment.

**7.25** Although in real property mortgages the mortgagee generally applies to the court for an order for possession, this is not the practice in the case of ship mortgages. When the power to take possession has become exercisable, the mortgagee may take possession of the ship wherever the ship may be, whether it is in port or at

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<sup>7</sup> (1867) L.R. I A. & E. 314.

<sup>8</sup> (1887) 58 L.T. 592 (Adm.), at p. 593.

<sup>9</sup> See the discussion of penalty interest and acceleration at para. 7.12.

sea.<sup>10</sup> If the ship is in port and has been abandoned by the owner, or the owner has agreed to deliver possession to the mortgagee, then the mortgagee may take actual possession of the ship by placing a master and crew appointed by the mortgagee or the mortgagee's agents on board the ship. However as Kelly, C.B. said in *Rusden v. Pope*<sup>11</sup>:

"[The mortgagee] cannot take possession of a ship at sea, and it is therefore in such a case sufficient if he does anything else which manifests his title."

Accordingly, if the ship is at sea, or it is not possible for other reasons for the mortgagee to take actual possession of the ship, the mortgagee may take constructive possession by giving notice or possession to the parties concerned (who will usually be the owner the master, the managers, the charterer and the insurers).

**7.26** Where the master agrees to comply with the mortgagee's orders, then the ship will be in the constructive possession of the mortgagee. If the master and the owner reject the notice of possession and the master continues to comply with the orders of the owner, then the mortgagee will not have taken possession and will have to wait until the ship reaches port, when it can attempt to take actual possession<sup>12</sup> or obtain a court order from the court having maritime jurisdiction in that port giving possession of the ship to the mortgagee.

F'dan il-kaz, ghalkemm jidher illi l-bank attur ottjena 'constructive possession' tal-vapur, qed jigi impedit milli jiehu pussess fiziku. Hu minnu illi fl-ahhar paragrafu tal-kwotazzjoni gia citata l-awtur jirreferi lil mortgagee biex

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<sup>10</sup> Although in England a mortgagee may take possession of the ship without any order from the court provided he does so without using force, this is not always the position. In other countries, where it may be unlawful for a mortgagee to take possession at all or it may be necessary to obtain an order from the court having maritime jurisdiction permitting the mortgagee to take possession.

<sup>11</sup> (1868) L.R. 3 Exch. 269, at p. 278. See also *Benyon v. Godden* (1878) L.R. 3 Ex. D. 263.

<sup>12</sup> If the mortgagee of real property takes possession forcibly then, although he may incur penalties under the criminal law, once he has done so he has possession for civil purposes: 32 *Halsbury's Laws of England*, para. 612; *Lows v. Telford* (1876) 1 App. Cas. 414 (H.L.). There would appear to be no reason why this should not be the case in relation to a ship.

jiehu passi biex jiehu pussess fil-Qorti tal-pajjiz li fih jinsab il-vapur. Dan ikun ovvjament il-mezz l-aktar effikaci u semplici ghax l-eventwali sentenza tista' tigi ezegwita immedjatament. Pero din il-Qorti tqis li tali gurdizzjoni mhix esklussiva speċjalment meta azzjoni bhal din in kwistjoni hi wahda in personam kontra sid il-vapur domiciljat f'Malta, u meta l-istess ftehim bejn il-partijiet jaghtu ghazla tal-gurdizzjoni. Hu minnu illi in segwitu ghal sentenza favorevoli jistghu jinsorgu diffikultajiet ta' esekuzzjoni tas-sentenza fil-gurdizzjoni fejn jinsab il-vapur pero dik mhix ostakolu ghal kawza prezenti u sal limiti li tista' twassal is-sentenza ta' din il-Qorti. Ghalhekk anki din l-eccezzjoni qed tigi michuda.

## **Mertu**

Stabbilit illi l-bank attur ghandu il-jedd li jitlob li jinghata l-pussess tal-vapur Violet in forza ta' dak li jghidu d-Deed of Covenants miftehma bejn il-partijiet u l-ipoteki navali rregistrati mis-socjeta' konvenuta, kif ukoll in virtu ta' dak li jistipula l-artikolu 42 tal-Kapitolu 234.

Stabbilit ukoll illi l-bank attur ottempera ruhu mal-formalitajiet mehtiega skond l-istess Deed of Covenants dwar in-notifika necessarja sabiex jittiehed il-pussess tal-imsemmi vapur irid issa jigi stabbilit fil-mertu l-pretensjoni li waslet ghat-talba tat-tehid tal-pussess materjali tal-vapur. Dan jikkonsisti skond l-istess ftehim ta' self u Deed of Covenants fil-prova illi kien hemm 'default' da parti tas-socjeta' konvenuta. Ix-xiehda tad-direttur tal-bank attur Claudia Hermann ma jhalli ebda dubbju li kien hemm default konsistenti f'nuqqas ta' hlas ta' loan fuq zmien twil da parti tas-socjeta' konvenuta. Del resto anki fin-noti ta' eccezzjonijiet u ta' sottomissjonijiet tas-socjeta' konvenuta imkien ma jinghad li ma hemmx default konsistenti f'nuqqas ta' pagament tal-loan.

Inoltre lanqas ma hu qed jigi kontestat ir-rifjut li jinghata l-pussess tal-vapur mas-socjeta' konvenuta lis-socjeta' attrici. Dan gie konfermat mill-istess direttur tal-bank attur li xehdet illi s-socjeta' konvenuta naqset li tordna li l-vapur Violet ibahhar lejn Malta anzi gie dirett ghal port Tork fejn

jinsab 'laid up' u fejn rapprezentanti tal-bank attur gew mrazzna milli jiehu pussess effettiv tal-vapur. Skond l-istess xhud il-vapur illum jinsab wieqaf u mhux jiggenera introjtu u bla assikurazzjoni, ragunijiet ohra skond il-ftehim ta' self u Deed of Covenant li jaghtu lok ghal 'default' u konsegwenti dritt ta' pussess lil bank attur.

Dak li qed tikkontendi s-socjeta' konvenuta hu illi r-raguni tad-default, cioe nuqqas ta' hlas seh minhabba pratici doluzi jew frawdolenti maghmula mill-bank attur u terzi u ghalhekk giet prezentata kawza ghad-danni fit-Turkija. Il-Qorti tqis illi din il-kawza ma tinfluix fuq it-talbiet attrici kif promossi b'din l-azzjoni stante li d-drittijiet o meno tas-socjeta' konvenuta huma diretti mhux lejn il-vapur u l-pussess mitlub mill-bank attur izda lejn l-assi tal-bank attur f'kaz ta' ezitu pozittiv fil-kawza ghad-danni promossi mis-socjeta' konvenuta.

Inoltre semplici eccezzjoni f'din il-kawza hi d-'default' mhux imputabbli ghas-socjeta' kovenuta izda ghal terzi hi insufficienti biex din il-Qorti tissindika tali pretenzjoni li tried tigi promossa b'azzjoni ad hoc specjalment meta l-kawza ta' dan id-defunt hu frodi jew dolo da parti tal-bank attur li rrendew is-socjeta' konvenuta fl-impossibilita li tezegwixxi l-obbligu taghha ta' hlas tad-debitu.

## **Decide**

Ghalhekk il-Qorti, filwaqt li tichad l-ewwel u raba u l-hames eccezzjonijiet tas-socjeta' konvenuta dwar il-gurisdizzjoni u l-proponibilita tal-azzjoni u dan ghar-ragunijiet moghtija, tichad ukoll it-tieni u t-tielet eccezzjonijiet tas-socjeta' konvenuta dwar in necessita tal-azzjoni u l-fatt li bejn il-partijiet jsiru proceduri ohra f'Qorti ta' gurisdizzjoni ohra wkoll ghar-ragunijiet moghtija fis-sentenza, tilqa' t-talbiet attrici kif dedotti u tiddikjara li l-bank attur ghandu d-dritt jiehu pussess tal-bastiment m.v. Violet skond l-obbligi assunti mis-socjeta' konvenuta fil-Loan Agreement tat-18 ta' Settembru 2008 u zewg Deeds of Covenants tat-22 ta' Settembru 2008 u ghal finijiet t-tieni talba tordna lis-socjeta' konvenuta biex fi zmien gimgha mis-sentenza tikkonsenja bla xkiel il-bastiment

Kopja Informali ta' Sentenza

m.v. Violet lil bank attur jew l-agenti tieghu u fin-nuqqas tawtorizza lil bank attur jiehu pussess tal-istess bastiment m.v. Violet inkluz li jinnomina agenti w ekwipagg ghal dan l-iskop u tordna lis-socjeta' konvenuta li ma taghmel xejn sabiex tostakola jew timpedixxi b'mod dirett jew indirett lis-socjeta' attrici milli tiehu pussess tal-bastiment m.v. Violet.

Bl-ispejjez kontra s-socjeta' konvenuta.

**< Sentenza Finali >**

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