QORTI CIVILI
(SEZZJONI TAL-KUMMERC)

ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON

Illum it-Tnejn, 30 ta` Novembru 2020

Kawza Nru. 6
Rikors Nru. 15/2018 JZM

Avv. Jean-Pie Gauci-Maistre (detentur tal-Karta tal-Identita` bin-numru 345384M) bhala mandatarju specjali ta` Vroon Containers B.V., socjeta` registrata fl-Olanda bin-numru 22055081 u b`indirizz registrat ta` Haven Westzijde 21, 4511 AR, Breskens, Olanda

kontra

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

u

b` digriet tal-10 ta` Dicembru 2018 gie kjamat fil-kawza Pal Leo Eckbo

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors prezentat fis-<u>7 ta` Settembru 2018</u> li jaqra hekk :–

A. <u>*Il-Fatti*</u>

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` registrazzoni "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 muri 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` r-rikorrenti Vroon u 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` mahruga 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-operotion 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 muri 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` 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-posizzjoni ta` segretarju tal-kumpannija (kif muri mill-Form K hawn annessa u mmarkata `Dok. I`) u fil-fatt din il-pozizzjoni 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 Compony, 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 mar-rikorrenti stess, u li b`hekk, b`Senior Loan Note u Senior Bridqe 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` investiment;

Illi dan l-ammont ta` hmistax-il miljun, mitejn u hamsa u ghoxrin elf Dollaru Amerikan (USD 15,225,000) 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-lngliz tal-istess hawnhekk annessi u mmarkati `Dok. N`) fejn gie kkonfermat li Vroon hija kreditrici ta` BHC ghall-ammont ta` tnax il-miljun mitejn, hamsa u ghoxrin elf dollaru Amerikan (U5D12,225,000) 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, li skont punt 1, ta` sub-artiklu 1, ta` artiklu 3 tal-lnterest on Overdue Payments Act tal-Ligijiet ta`Norvegja, huwa ta` 8.5% li jammonta ghal miljun, disgha u tletin elf, mija, hamsa u ghoxrin dollaru Amerikan (USD1,039,125) kull sena. Dan ifisser li BHC ghandha bzonn thallas lil Vroon iktar minn miljun u hames mitt elf dollaru Amerikan (USD1,500,000)) f` interessi u kuljum li din is-sitwazzjoni prekarja ma tittrangax tiswa s-socjeta` BHC iktar minn elfejn, tmien mija sitta u erbghin dollaru Amerikan (USD2,846). Din id-decizjoni hija registrata mac-Centru tal-Arbitragg Malti u hija titlu ezekuttiv f`Malta (dan kif muri mid-decizjoni tac-Chairman tac-Centru tal-Arbitragg Malti, kopja taghha hawnhekk annessa u mmarkata `Dok. O`)

Illi permezz ta` Pledge Agreement iffirmat bejn ir-rikorrenti, is-socjeta` intimata 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, datat nhar is-sebgha u ghoxrin (27) ta` Jannar tal-elfejn u sittax (2016) (kopja hawn annessa bhala Dok. `M`), is-socjeta` intimata tat b`rahan lis-socjeta` rikorrenti il-Cumulative Preference Shores taghha f`AC1- bhala sigurta` ghall-pagament tal-ammont misluf taht is-Senior Loan Note u s-Senior Bridge Loan Note;

llli skont kif kien innota tajjeb Dr Richard Galea Debono fin-nota ta` rizenja tieghu datata dsatax (19) ta` Dicembru elfejn u sittax, b`rizultat tal-fatt li BHC ma setghetx thallas is-somma surreferita, hija x`aktarx kienet waslet f`pozizzjoni ta` insolvenza u ghaldaqstant, peress li l-awdituri Pricewaterhouse Coopers kienu waslu sabiex jaghlqu l-kontijiet socjali tal-kumpannija BHC, kien ser ikun hemm l-obbligu li ssir disclosure dettaljata ta`din il-pozizzjoni. Pero`, bl-agir ta`Arlie Sterling tali kontijiet socjali baqghu ma gewx ipprezentati, minkejja l-obbligu legali ghal tali prezentazzoni, `il ghaliex li kieku gew ipprezentati dan kien iwassal sabiex ikun hemm kwalifika fl-accounts u titnehha l-going concern status ta` BHC.

B. ***<u>ll-BHC ma tistax thallas id-djun taghha a tenur tal-Artikolu 214(2)(a)(ii) tal-Kap. 386</u>***

Illi l-gurisprudenza dejjem ekwiparat l-Artikolu 214(2)(a)(ii) tal-Att dwar il-Kumpanniji (Kap. 386 tal-Ligijiet ta` Malta) mal-balance sheet test taht il-ligi Ingliza u dan it-test gie definit minn din l-Onorabbli Qorti, diversament preseduta, fis-sentenza Axel Johnson international AB noe vs Aluminium Extrusions Limited deciza fit-tmienja u ghoxrin (28) ta` Mejju tal-elfejn u tlieta (2003), liema definizzjoni giet konsegwentament ribadita f`sentenzi segwenti :

"Il-Ligi tghid li l-kumpanija tigi likwidata 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. Din tal-ahhar kondizzjoni tista` tigi verifikata permezz tal-balance sheets wara li jigi kunsidrat jekk l-assets are less than its liabilities. Izda "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 over a lengthy period (Re: European Life Assurance Society 1869 LR 9 Eq 122). Ghalhekk m`hemmx raguni ghaliex il-kredituri ghandhom joqghodu jistennew sakemm il-kumpanija tbiegh l-assets taghha biex forsi xi darba jithallsu."

Illi l-ammont ta` hmistax-il miljun, mitejn u hamsa u ghoxrin elf Dollaru Amerikan (USD 15,225,000) li kien misluf lill-BHC mir-rikorrenti sal-lum il-gurnata ghadu qatt ma gie mhallas lura fit-total tieghu u d-decizjoni li kienet giet moghtija mill-Arbitru Norvegiz f`Oslo u li tikkoncerna princpalment dan l-ammont, kif u koll il-miljuni dovuti f` interessi huma titolu ezekuttiv f`Malta, hekk kif spjegat iktar `il fuq f`dan ir-rikors;

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 manigment, fost l-ohrajn, u kif ser jigi muri ahjar fit-trattazzjoni tal-kaz;

Illi permezz ta` Masters Facilities Agreement datat hdax (11) ta`Gunju elfejn u hmistax (2015) (kopja hawn annessa bhala Dok. `P`), il-Bank Bremer Landesbank Kreditanstalt Oldenburg - Girozentrale - , li llum jissejjah Norddeutsche Landesbank - Girozentrale -, sellef lill-AC1 u/jew is-sussidjarji taghha l-ammont totali ta` erba` mija u hamsa u erbghin miljun dollaru Amerikan (USD 445,000,000), liema self jissejjah Term Loan A;

Illi l-AC1 naqqset milli tadempjixxi l-obbligazzjonijiet taghha taht il-Master Facilities Agreement u filfatt il-Bank baghat notice of default datata l-hmistax (15) ta` Gunju elfejn u sbatax (2017) (kopja hawn annessa u mmarkata `Dok. Q`), baghat ukoll notice of termination datata s-sebgha (7) ta` Lulju elfejn u sbatax (20L7) (kopja hawn annessa u mmarkata`Dok. R`) u li biha ttermina l-Master Facilities Agreement biex ikun jista` jimxi kontra l-AC1 ghall-ammont kollu dovut lilu u, fil-fatt, baghat zewg notices ohra datati l-erbgha u ghoxrin (24) ta` Jannar elfejn u tmintax (2018) (kopji hawn annessi u mmarkati `Dok. S` u `Dok. T`, rispettivament) fejn innotofika lill-AC1 li l-ammont totali dovut lilu inkluzi interessi hija dik ta` mitejn tmienja u disghin miljun, tmien mija u disghin elf u erba` mija u erbgha u ghoxrin punt wiehed u hamsin dollaru Amerikan (USD 298,890,424.51), u, li bl-ghan li tigi rekuperata din is-somma, ha jipprocedi biex ibiegh il-bastimenti tal-AC1 skont l-Artikolu 42 tal-Att dwar il-Bastimenti Merkantili (Kap. 234 tal-Ligijiet ta` Malta);

Illi l-Master Facilities Agreement jaghmel waterfall arrangement sabiex f`kaz ta` bejgh ta` wiehed mill-bastimenti li jappartjenu lill-AC1, mir-rikavat jithallsu l-ewwel l-ispejjez ta` dak il-bejgh, imbaghad jithallsu spejjez lill-Bank relatati mal- f` Master Facilities Agreement, imbaghad tithallas it-Term Loan A bl-interessi, u biss imbaghad illi jithallsu d-dividends, cioe` dawk dovuti lill-BHC. Issa, il-flotta tal-AC1 ghandha valur biss ta` xi mija tnejn u tletin miljun dollaru Amerikan (USD 132,000,000) u ghalhekk id-dhul globali ta-bejgh tal-flotta kollha lanqas biss ikopri l-pagamenti dovuti lill-Bank. Izda bil-mod kif inhi strutturata l-Master Facilities Agreement, jekk wiehed mill-vapuri jinbiegh ghal ammont li hu iktar minn l-ammont li kienet allokata mill-bank ghal dak il-vapur u li s-sussidjara in kwistjoni uzat, jaf ikun hemm opportunita` biex BHC tirkupra parti mid-dhul mill-bejgh, tramite d-distribuzzjoni ta` dividends;

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 AC1, gew terminati fis-sena elfejn u sbatax (2017) 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 Abeta Fiorentino, avukat, (detentur tal-Korta tal-Identita`

bin-numru 555482M) bhala mandatarju specjali ta` Arlie Sterling, detentur tal-Passaport Amerikan bin-numru 444918779 kontra Balticmox Acquisition Corporation One Ltd (registrata bin-numru ta` registrozzjoni 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, ghar-ragunijiet suesposti, jidher bic-car li minghajr dhul gdid u b`djun li huma dovuti u skaduti, u bl-interessi fuq l-istess dejjem jakkumulaw, l-assi tas-socjeta` intimata huma anqas mill-obligazzjonijiet taghha u ghalhekk tinstab f` pozizzoni fejn ma tistax thallas id-djun taghha skont l-Artikolu 214(2)(a)(ii) tal-Att dwar il-Kumpanniji (Kap. 385 tal-Ligijiet ta` Malta).

C. <u>Jezistu ragunijiet gravi bizzejjed li jiggustifikaw ix-xoljiment u konsegwentement l-istralc tal-BHC a tenur tal-Artikolu 214(2)(b)(iii) tal-Kap. 386</u>

Illi kif gie spjegat iktar `il fuq, iz-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, "li minhabba dizgwid serju li jolqot l-essenza tal-fiducja ta`bejn id-diretturi u l-azzjonisti... ma hemmx futur ghall-kumpannija intimata". Iktar minn hekk, bejn id-diretturi u l-azzjonisti kien hemm breakdown in mutual confidence and trust tant car u inekwivoku illi l-kumpannija intimata ma tistax tkompli l-ezistenza taghha. Dawn il-kliem tal-

Onorabbli Qorti jirriflettu b`mod car il-kaz odjern tas-socjeta` intimata;

lllì 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. lf 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 token."

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

llli 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 irrepparabli jidher anki fl-isfond ta` kazijiet pendent 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. ll-kawzi pendenti jibqghu dik taht l-Artiklu 402 tal-Att dwar il Kumpanniji (Kap. 386 tal-Ligijiet ta` Malta) u cioe` `Av Jonathan Abela Fiorentino (555482M) bhala mandatorju specjali ta` Marsoft lnternational A/S, socjeta` registrata fin-Norvegja bin-numru 937 657 927 u b`indirizz registrat ta` lnkognitogata 33A, 0256 Oslo, Norvegja vs. Vroon Containers B.V., socjeta` registrata fl-Olonda bin-numru 22055081 u b`indirizz registrat ta` Haven Westzijde 21, 4511 AR Breskens, fl-Olanda u Balticmix 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, socjeta` registrata fin-Norvegja bin-numru 937 657 927 u b`indirizz registrat ta` lnkognitogata 33A, 0256 Oslo, Norvegja

vs. Vroon Containers B.V., socjeta` 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-Possaport Olandiz bin-numru NNPoJ23B3, 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 irrizenja 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. U`). 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. V`) Dr Richard Galea Debono, frott il-kwalifiki u l-esperjenza vasta tieghu, spjega kif minhabba l-procedura illi dak iz-zmien kienet pendenti f`Oslo u cioe` dik prezentata mir-rikorrenti kontra s-socjeta` intimata (illi sussegwentement saret decizjoni res judicata favur ir-rikorrenti kif diga` msemmi iktar `il fuq) is-socjeta` kienet ser taqa` "f` pozizzjoni ta` insolvenzo" u kompla jghid li s-socjeta` intimata kienet ser "tinsab f` insolvenzo, u don bejn zewg azzjonisti li qishom kelb u qattus." Dan ikompli jaghti widen lis-sitwazzjoni gravi tas-socjeta` intimata;

Illi, barra minn dan kollu, fil-hmistax (15) ta` Awwissu tal-elfejn u sbatax (2017), is-socjeta` Marsoft, u cioe` s-socjeta` illi thaddan hamsin fil-mija (50%) tal-azzjonijiet fis-socjeta` intimata, applikat fil-Qorti Norvegiza biex il-beni taghha jitqieghdu taht proceduri tal-Qorti bhala proprjeta` falluta u din it-talba giet milqugha mill-Qorti Norvegiza b`decizjoni moghtija fis-sittax (16) t`Awwissu tal-elfejn u sbatax (2017) u cioe` gurnata biss wara (kopja certifikata tat-traduzzjoni fl-Ingliz tad-decizjoni hawnhekk annessa u mmarkata `Dok. W`). B`hekk Marsoft bhalissa qieghda 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 Herman Marks, rapprezentant tar-rikorrneti kif ukoll Direttur tal-BHC, 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;

D. <u>Dwar il-hatra ta` amminstratur provvizorju a tenur tal-Artikolu 228 tal-Kap. 385</u>

Illi din l-Onorabbli Qorti ghandha s-setgha illi b`ordni tahtar amministratur provvizorju f`kull zmien wara li jkun gie pprezentat rikors ghal stralc u qabel ma taghmel ordni ghal stralc.

lIli, apparti minn hekk, l-Artikolu 224(2) tal-Att dwar il-Kumpanniji (Kap. 386 tal-Ligijiet ta` Malta) jipprovdi illi "meta jkun sar ordni ghal stralc jew ikun inhatar amministratur provvizorju, skont id-dispozizzjonijiet tal-artikolu 228, ma tista` tittiehed ebda azzjoni jew jinbdew xi proceduri kontra l-kumpannija jew il-proprjeta` taghha hlief bil-permess tal-qorti u taht dawk il-kondizzjonijiet li tista` timponi l-qorti", f`dan is-sens hadd ma jigri l-ewwel biex jasal l-ewwel. Dan hu proprju li ghandha bzonn il-BHC in vista ta` kredituri diversi;

lIli, a kawza tad-decizjoni tal-Arbitru f`Oslo tal-hmistax (15) ta` Mejju tal-elfejn u sbatax (2017) li nghatat kontra l-BHC, u fejn gie kkonfermat id-dejn ta`tnax-il miljun mitejn, hamsa u ghoxrin elfdollaru Amerikan (U5D12,225,000) kif wkoll ta` spejjez legali u interessi li llum il-gurnata jammontaw ghal miljuni a favur tas-socjeta` rikorrenti;

lIli l-BHC thaddan numru ta` cumulative preference shares fis-socjeta` AC1 u tat b`rahan lis-socjeta` rikorrenti dawn l-istess ishma bhala sigurta` ghall-pagament ta` hmistax-il miljun, mitejn u hamsa u ghoxrin elf Dollaru Amerikan (USD 15,225,000);

lIli minkejja li hemm numru ta` ishma f`BHC li huma l-materja ta` kawza pendenti, cioe` `Balticmax Holding Company Limited (C 70765) u Av. Jonathan Abelo Fiorentino (555482M), bhala mandatarju specjali ta` Arlie Sterling, detentur tal-Passaport Amerikan bin-numru 444918779, u wkoll bhala mandatarju specjali ta` Morsoft lnternational A/S, socjeta` registrata fin-Norvegja bin-numru 937 657 927 u b`indirizz registrat ta` lnkognitogata 33A, 0256 Oslo, Norvegja vs. Vroon Containers B.V., socjeta` registrata fl-Olanda bin-numru 22055081 u b`indirizz registrat ta` Haven Westzijde 21, 4511 AR

Breskens, fl-Olonda, Herman Marks, detentur tal-Passaport Olandiz bin-numru BURC14296, Stefan Quist, detentur tal-Possaport Olandiz bin-numru NNPoJ28B3, Balticmax Acquisition Corporation One Ltd (C 70766) u Registratur tal-Kumpanniji` bin-numru 605/2017 JZM, u proprju ghalhekk ghadu mhux deciz lil min jappartjenu, m`hemm l-ebda tilwima jew dubbju li l-cumulative preference shares f`AC1 jappartjenu lill-BHC;

Illi dwar il-materja ta` dawn il-cumulative preference shares mirhuna, il-BHC tinstab stagnata minhabba illi, fl-ewwel lok, id-direttur taghha Herman Marks, permezz ta` interim order li nharget b`digriet ta` din l-Onorabbli Qorti fil-wiehed u ghoxrin (21) ta` Gunju tal-elfejn u sbatax (2017) fil-kawza bin-numru 304/16/1 JZM, gie impedit milli jippartecipa fit-tehid tad-decizjonijiet da parti ta` BHC in konnessjoni ma` materji li dwarhom is-socjeta` rikorrenti Vroon, ikollha konflitt ta` interess inkluz decizjonijiet dwar trasferimenti ta` ishma u, fit-tieni lok, id-direttur l-iehor tal-BHC, jigifieri Arlie Sterling, diga` wera bic-car li m`ghandu l-ebda intenzjoni li jirrispetta dan ir-rahan u jiehu decizjoni biex jigu trasferiti l-cumulative preference shares lil Vroon, u dan gie kkonfermat fid-decizjoni tal-Arbitru f`Oslo moghtija tal-hmistax (15) ta` Mejju tal-elfejn u sbatax (2017), ghalhekk, il-BHC qed tkompli tinkorri interessi, inadvertament, taghmel aghar il-posizzjoni finanzjarja diga` prekarja taghha u tinkombi fuqha obligazzjonijiet aktar oneruzi;

Illi, apparti minn hekk, il-Bank Bremer Landesbank Kreditanstalt Oldenburg - Girozentrale -, li llum jissejjah Norddeutsche Landesbank - Girozentrale -, diga` beda jipprocedi kontra l-assi tal-AC1, u cioe` l-flotta, sabiex jirrekupera d-dejn dovut lilu, tant li l-BHC, li zzomm mija fil-mija mill-ishma tal-AC1, ha tispicca zvestita mill-assi sottostanti dawn l-ishma. Filfatt sad-data tal-lum sittax-il (16) vapur gie mibjugh kif huwa kkonfermat mid-diversi Protocol of Delivery and Acceptance (kopji ta` dawn id-dokumenti hawn annesssi u mmarkati `Dok. XI`sa `Dok. X16`);

Illi bhala azzjonista f`ACL, u ghaldaqstant bhala beneficial owner ta` dawn l-24 bastiment, BHC ghandha interess sostanzjali fil-bejgh ta` dawn il-bastimenti. Klawsola 7.2 tal-ftehim maghruf bhala l-Master Facilities Agreement, datat hdax (11) ta` Gunju elfejn u hmistax (2015) principalment bejn Bremer Landesbank Kreditanstalt Oldenburg - Girozentrale, b`ufficcju f`Domshof 26,28195 Bremen, Federal Republic of Germany u AC1, (kopja hawn anness u mmarkat `Dok. P`) tipprovdi dwar il-bejgh tal-bastimenti; specifikatament dwar l`Order of

application in case of sales or other disposals`. Fir-raba` post ta` din l-order of application` hemm "...payment to the Original Borrower who shall use such funds for repayment to the Holding Company of the outstanding Equity in respect of the relevant Vessel and accrued but unpaid Preferred Dividends (in each case to enable the Holding Company to make the respective payments to the Investors". Fi kliem iehor, f`kaz ta` bejgh tal-bastimenti l-qligh ghandu jitqassam fl-ordni dettata minn klawsola 7.2, u propjament fir-raba` post, il-qligh li jsir mill-bejgh tal-bastimenti ghandu jmur ghall-hlas lill-Original Borrower (cioe` lil AC1) biex ihallas lil Holding Company (cioe` lil BHC) l-ekwiti` pendenti ta` BHC fuq il-bastiment in kwistjoni, kif ukoll Preferred Dividends sabiex BHC tkun tista` taghmel il-pagamenti dovuti lill-investituri.

Illi klawsola 7.1 tal-Master Facilities Agreement tipprovdi `standard order of application of earnings` li trid tigi segwita f` `cash sweep date`. Fit-tielet post jinsab klassifikat "payment of preferred dividends to the Holding Company (for distribution to the lnvestors) in an amount not exceeding during a calendar year twelve-point seven percent (12.7%) of the Equity provided by (and not yet repaid to) Holding Company to the Original Borrower and invested by the Original Borrower in the Additional Borrowers who own the Vessels (the "Preferred Dividends")." L-ebda hlas ta` din it-tip ma hu prezentament qed isir.

llli huwa fatt li Arlie Sterling ma jaqbilx li Vroon tithallas dak li hu dovut lilha skont il-`Loan Notes` kif ikkonfermat mill-Arbitragg Norvegiz u li Arlie Sterling ghamel minn kollox biex ma jonorax it-termini tal-Pledge Agreement. ln-nuqqas ta` rieda tieghu u t-tentattivi tieghu sabiex ifixkel il-pagamenti dovuti lil Vroon jew innutati fil-proceduri tal-arbitragg f`Oslo u jigu pruvati wkoll fil-proceduri quddiem din l-Onorabbli Qorti dan il-kaz odjern.

llli jekk b`xi mod il-bank Bremer Landesbank Kreditanstalt Oldenburg - Girozentrale -, li llum jissejjah Norddeutsche Landesbank - Girozentrale - jirnexxilu jbiegh kwalunkwe vapuri ghal ammont li huwa iktar min dak li huwa dovut lilu minn l-ammont allokat taht il-Moster Facilities Agreement ghal dak il-vapur partikolari, il-pozizzjoni ta` Arlie Sterling tpoggih f`kunflitt dirett mal-pagamenti dovuti lil Vroon minn introjtu ta` AC1 ghall-operazzjonijiet tal-bastimenti u l-bejgh ta` xi bastiment. Dan huwa kkonfermat mill-agir ta` Arlie Sterling li qed jaghmel minn kollox biex ifixkel esekuzzjoni tal-Pledge Agreement u l-

pozizzjoni tieghu li ma jaqbilx li d-djun jithallsu huwa dokumentat fid-diversi proceduri f`Malta u Norvegja.

Illi, ghalkemm il-ligi thalli ghal kollox f` idejn il-Qorti dwar jekk ghandux jinhatar amministratur provvizorju, il-gurisprudenza kemm-il darba kkunsidrat x`inhuma r-ragunijiet validi ghal tali hatra. Fis-sentenza Maltese Cross Financial Services Limited vs X, deciza fit-tmienja u ghoxrin (28) ta`Mejju tal-elfejn u hmistax (2015), l-Onorabbli Qorti qalet:

"il-Qorti tifhem il-premura tar-rikorrenti li sakemm tigi determinata finalment l-istanza taghhom tax-xoljiment u stralc, il-kumpannija titqieghed taht il-kontroll ta` amministratur provvizorju.

Din il-Qorti tghid illi bil-hatra ta` amministratur provizorju jigi preservat l-istat attwali tal-kumpannija sabiex jekk jigu ppruvati r-ragunijiet tar-rikorrenti ghax-xoljiment, u l-Qorti tghaddi ghall-istralc, kull kreditur jew kull persuna ohra li jkollha xi pretensjoni kontra l-kumpannija jitilqu lkoll mill-istess punt tat-tluq u kulhadd jiehu skont ma ghandu jedd ghalih; b`hekk hadd ma jigri l-ewwel biex jasal l-ewwel."

B`digriet moghti fil-wiehed u ghoxrin (21) ta` Gunju tas-sena elfejn u sbatax (2017) fil-procedimenti tal-kawza Dr 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 vs Balticmox Acquisition Corporation One Ltd (registrata bin-numru ta` registrazzjoni C 70766) bin-numru 352/17 JZM, din l-Onorabbli Qorti qalet ukoll illi "[i] l-funzjoni ewlenija tal-amministratur provizorju ghandha tkun illi jistabilixxi ordni fit-tmexxija tal-kumpannija sakemm il-qorti tipprovdi dwar jekk il-kumpannija ghandhiex tigi xjolta u stralcjata nkella, billi anke jippreserva l-assi taghha kontra r-riskju ta` sparpaljar jew ta`tnaqqis fil-valur b`azzjoni diretta jew indiretta tad-diretturi", u fuq din il-bazi kompliet biex appuntat amminstratur provvizorju ghall-AC1;

Illi bl-agir tieghu Arlie Sterling qieghed jabbuza mis-sitwazzjoni prezenti fil-Bord tad-Diretturi ta` BHC, ossija n-nuqqas tat-tielet direttur u l-Interim Order sabiex ma jonorax l-obbligi ta` BHC ghad-dannu tas-socjeta` intimata u l-kredituri taghha.

Illi, ghalhekk u tenut kont tal-assi u tal-obbligazzjonijiet li ghad ghandha l-BHC, fosthom li johorgu mill-AC1", dan jimmerita l-hatra ta` amminstratur provvizorju.

E. Talbiet

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 joghgobha :

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 rrelatat 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 tispecifika 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. Tordna l-amministratur provvizorju sabiex ghan-nom tas-socjeta` intimata, jonora t-termini u l-obligazzjonijiet tal-ftehimiet bejn is-socjeta` rikorrenti u dik mittenti inkluz izda mhux limitatament ghall-Pledge Agreement surriferit u mehmuz bhala Dok. `M`;

5. Tahtar l-istralcarju u tordna l-istralc mill-Qorti tas-socjeta` intimata Balticmax Holding Company Limited skont id-dispozizzjonijiet tas-Sub-Titolu I tat-Titolu ll tat-Taqsima V tal- Att Dwar il-Kumpanniji (Kap. 385 tal-Ligijiet ta` Malta);

6. 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. 385 tal-Ligijiet ta` Malta);

7. Taghti kull provvdiment 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 fl-10 ta` Dicembru 2018 u li taqra hekk :-

Illi s-socjeta` intimata tirrimetti ruhha ghall-provi li jigu prodotti, b`dana illi tirriserva illi taghmel dawk il-provi u sottomissjonijiet li jistghu jkunu utili ghall-ahjar istruzzjoni tal-process.

Rat illi fl-udjenza tal-10 ta` Dicembru 2018 kienet ordnata l-kjamata fil-kawza ta` Pal Leo Eckbo.

Rat ir-risposta li pprezenta l-kjamat fil-kawza fit-8 ta` Jannar 2019 u 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 tal-10 ta` Dicembru 2018 dina l-Onorabbli Qorti ordnat il-kjamata fil-kawza tal-esponenti Pal Leo Eckbo, li accetta n-notifika tar-rikors promotur ta` dawn il-proceduri permezz ta` nota pprezentata fl-atti tal-istess fid-19 ta` Dicembru 2018 b` ghoxrin (20) gurnata 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 jigi 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 <u>Fil-mertu</u>

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) l-ewwelnett, huma r-rikorrenti illi ghandhom igibu prova konvincenti illi dak li allegat minnhom huma 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 ma non concesso illi BHC ghandha diffikultajiet finanzjarji, ikun utli li wiehed jizen x`wassal ghalihom, ta` min hija rresponsabbilita` 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 fts-7 ta` Settembru 2018 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 fondamentali li fuqu kienu msejsa t-talbiet rispettivi, kien jikkoncerna l-agir abbuziv, 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-trattazzoni 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 Vroon, b`nuqqas ta` bwona fede, qed titlob ix-xoljiment u stralc ta` BHC ai termini tal-artikolu 214 tal-Att dwar il-Kumpanniji bhala rimedju ghal sitwazzoni li proprju hija stess ikkrejat, flimkien ma` Herman Marks;

Illi dwar in-nuqqasijiet li Vroon issemmi fir-rikors taghha, 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 ghaddha 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 Vroon issemmi ta` kif BHC mhix f`pozizzjoni li thallas id-djun taghha, fir-rikors taghha Vroon stess tghid li BHC m`ghadx ghandha sors ta` dhul minhabba li l-management agreements bejn BHC u AC1 gew terminati fl-2017. lzda huwa ferm ironiku li Vroon issa tirrikonoxxi li bit-terminazzjoni tal-

management agreements ikun qed jinqata` sors ta` dhul, meta kienet proprju hi flimkien ma` Herman Marks li riedu li tali management agreements jigu terminati! B`hekk allura huwa car u manifest li kienet Vroon li intenzjonalment u b`mod frawdolenti gabet lil BHC fis-sitwazzioni 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, specjalment issa li Vroon u Herman Marks gew zmaskerati. Dan huwa aktar u aktar possibbli anke grazzi ghall-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 anke ssir referenza ghalihom fir-rikors ta` Vroon, li jezistu rizervi dwar il-mod kif il-flotta giet mibjugha, inkluz dwar il-prezzijiet li ghalihom il-flotta inbieghet;

Illi in kwantu jirrigwarda t-talba ta` Vroon ghax-xoljiment u l-istralc ta` BHC ghaliex jezistu ragunijiet gravi bizzejjed li jiggustifikawh, Vroon donnu ssejjes din it-talba fuq is-sitwazzioni ta` deadlock fi hdan BHC. Issa, apparti li fil-fehma tal-esponenti hija proprju Vroon u Herman Marks li gabu din is-sitwazzjoni ta` deadlock tant li kienet proprju Marsoft li talbet l-intervent tal-Qorti, ir-realta` llum hija li jezisti l-ordni tal-Qorti moghti taht l-Artikolu 402 tal-Att dwar il-Kumpanniji proprju intiz sabiex jindirizza dik is-sitwazzjoni u li permezz tieghu l-Qorti appuntat lil Dr Richard Galea Debono bhala 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 bhala rimedju xxolji l-kumpannija u tipprovdi ghall-istralc konsegwenzjali taghha, partikolarment f`cirkostanzi fejn il-Qorti kienet gia` taf bil-proceduri odjerni ghall-ishalc ta` BHC. Il-Qorti pero` dehrilha li dan ma ghandhiex taghmlu u minflok ordnat il-hatra tat-tielet direttur b`poteri estensivi, minkejja dak li kien dikjarat mill-istess Av. Richard Galea Debono fin-nota pprezentata minnu meta rrizenja minn direttur wara li kien gie mahtur ukoll mill-Qorti ad interim fil-kors tal-istess proceduri. Fl-umli opinjoni tal-esponenti, dan juri li l-Qorti stess ghandha tama li s-socjeta`intimate ghad tista` tirkupra u timxi `l quddiem;

Illi s-sitwazzjoni reali koncernanti s-socjeta` intimata, u kif anke rrizultat fil-kors tal-kawzi l-ohrajn citati aktar qabel, hija li l-ewwel Vroon u Herman Marks ghamlu minn kollox bi ksur tal-ligi u tal-obbligi taghhom, inkluz dawk fiducjarji, sabiex jiehdu l-kontroll ta` BHC b`mod illegali u b`agir unilaterali, u finalment igibu fix-xejn l-istruttura ta` BHC, biex imbaghad, kif proprju qed jittentaw jaghmlu bil-procedura odjerna, joqtlu b`colpo di grazia lil BHC;

Illi dwar it-talba ghall-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;

Illi fir-rikors taghha, Vroon taghmel referenza ghal procedimenti tal-bank Norddeutsche Landesbank - Girozentrale kontra l-assi ta` ACl, ossija l-flotta u tikkummenta li BHC ser tispicca zvestita mill-assi sottostanti l-ishma li BHC ghandha f`AC1 (liema ishma ormaj gew determinati mill-Qorti bhala mija fil-mija tal-ishma wara li Herman Marks kien ittrasferihom illegalment u unilateralment favur Vroon in ezercizju ta` kunflitt ta` interess lampanti). Dwar dan fl-ewwel lok jigi osservat li BHC kienet ser tispicca zvestita mill-assi sottostanti l-ishma taghha fl-AC1, li kieku t-trasferiment abbuziv u illegali tal-ishma taghha da parti ta` Herman Marks thalla jsir. Fuq kollox, li kieku l-assi (ossija l-ishma) ta` BHC ma kienu jiswew xejn, il-ghala Vroon ghamlet minn kollox biex tiehu l-ishma kollha f`idejha u l-kontroll assolut tal-kumpannija, sahansitra b`mod illegali?! Fit-tieni lok, l-operat tal-flotta gie mfixkel minn Vroon proprju meta s-suq beda jmur ghall-ahjar. Inoltri kienet Vroon li waqqfet il-pjan ta` xiri ta` bastimenti kif kien miftiehem inizjalment ma` Marsoft u BHC.

Dan kien fil-fatt nuqqas da parti ta` Vroon fuq il-ftehim li kien sar dwar l-investiment li kellu jsir, liema nuqqas effettwa l-istess operat tal-flotta. Fit-tielet lok, jezistu wkoll dubbji dwar il-valur tal-flotta tant li l-bejgh taghha beda jsir minghajr ma` Marsoft (li llum l-esponenti dahal minflokha bhala azzjonist f`BHC) kienet taf bl-istess u allura ghal darb`ohra giet eskluza. F`dan ir-rigward, tajjeb illi jinghad illi, kif ser jigi pruvat il-mori tal-proceduri, fil-livell tal-kumpanija Balticmax Acquisition One (AC1) li taghha BHC hija l-unika azzjonista, kienet ittiehdet rizoluzzjoni biex jigu esplorati d-drittijiet u l-pretensjonijiet illi l-istess AC1 jista` jkollha fir-rigward tal-bank Norddeutsche Landesbank - Girozentrale fid-dawl tal-bejgh furzat tal-flotta ta` AC1.

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

Rat illi fl-udjenza tal-11 ta` Frar 2019 kienet akkordata talba tal-partijiet sabiex kull prova li tghodd ghall-fini tal-kawza bin-nru 1150/17 JZM pendenti quddiem din il-qorti tkun tikkostitwixxi prova ghall-fini ta` dan il-procediment.

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-sottomissjonijet finali fil-fomm.

Rat illi l-kawza thalliet ghal provvediment ghal-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 ghaliex din il-kawza kienet istitwita qabel is-16 ta` Marzu 2020.

III. Provi

1. Fatti

Balticmax Holding Company Limited **(<u>BHC</u>)** hija kumpannija li kienet registrata Malta fis-26 ta` Mejju 2015 minn Pal Leo Eckbo **(<u>Eckbo</u>)**. 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 (**<u>Marsoft</u>**), 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 ghaddejjin minn diffikultajiet finanzjarji. Marsoft kienet titmexxa minn Arlie Sterling **(<u>Sterling</u>)**.

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

Balticmax Acquisition Corporation One Ltd **(<u>AC1</u>)** 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 (**<u>BLB</u>**). 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 obbligat 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 rifuza 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-rahan 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 ghall-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 rreversibblii bejniethom.

Il-qorti hija tal-fehma li bhala diretturi, it-tnejn baqghu "aggrappati" mal-interess tal-azzjonisti li qeghduhom 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 ghall-esistenza nnfisha tal-kumpannija gew strategikament rimandati u/jew ostakolati ghal 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 ghaddiet 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-rizenja 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 proprejta` falluta minn *trustee* nominat mill-qrati fin-Norvegja.

Jirrizulta li l-ishma ta` Marsoft gew irkantati u kienu akkwistati minn Pal Leo Paul 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-solvibbilita` 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-qrati 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. <u>Id-dejn ta` BHC</u>

a) <u>Il-kreditu ta` Vroon</u>

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 ezekuttiv 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 ezegwit izda minkejja l-ezekuzzjoni tal-Mandat id-debitu ta` Vroon baqa` ma thallasx.

b) <u>Pendenzi ohra</u>

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

L-ammont ta` dan id-dejn mhuwiex 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. <u>L-assi ta` BHC</u>

Jirrizultaw l-assi li gejjin :-:

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. <u>Dritt/Ezami Komparattiv/Gurisprudenza</u>

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

a) <u>L-Art 218(1) tal-Kap 386</u>

Persuna li tkun trid titlob ix-xoljiment u l-istralc ta` kumpannija, trid toqghod ghal dak li jipprovdi l-**<u>Art 218(1) tal-Kap 386</u>** li jaqra hekk –

Talba lill-qorti (aktar `il quddiem imsejha "rikors ghal stralc") ghal -

(a) stralc ta` kumpannija mill-qorti skont l-artikolu 214(1)(a) ;

(b) xoljiment u stralc ta` kumpannija mill-qorti skont l-artikolu 214(2)(a) ; jew

(c) xoljiment u stralc ta` kumpannija skont l-artikolu 214(2)(b),

ghandha ssir b`rikors li jista` jsir jew mill-kumpannija wara decizjoni tal-laqgha generali jew mill-bord tad-diretturi taghha jew minn xi detentur ta` obbligazzjoni, kreditur jew kredituri, jew minn xi kontributorju jew kontributorji :

Izda rikors skont il-paragrafi (b) jew (c) jista` wkoll isir minn xi azzjonist jew direttur tal-kumpannija.

Fil-kaz tal-lum, Vroon marret ghax-xoljiment u ghall-istralc ta` BHC ghaliex hija kreditrici taghha, kif jirrizulta ppruvat li huwa l-kaz.

Ghalheklk ghandha *locus standi* sabhiex tippromwovi l-azzjoni.

Dan premess, ir-rikorrenti qeghda issejjes it-talba taghha abbazi : tal-<u>Art 214(2)(a)(ii) tal-Kap 386</u> ; u tal-<u>Art 214(2)(b)(iii) tal-Kap 386.</u>

b) <u>L-Art 214(2)(a)(ii) tal-Kap 386</u>

Meta tfassal il-mudell ghal-ligi taghna l-gdida dwar il-kumpanniji, dik li llum hija Kap 386 tal-Ligijiet ta` Malta, u li kellha tiehu post l-Ordinanza dwar Socjetajiet Kummercjali (Kap 168), il-qafas maghzul 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-**<u>Art 214(2)(a)(ii)</u>** jaghti lill-qorti diskrezzjoni li xxolji u tistralcja kumpannija *jekk il-kumpannija ma tkunx tista` thallas id-djun taghha.*

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

<u>Tnejn</u> 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 ezekuttiv kontra l-kumpannija b`xi wiehed mill-atti ezekuttivi msemmijin fl-artikolu 273 tal-Kodici ta` Organizzazzjoni u Procedura Civili ;

<u>jew</u>

(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-rikorrenti qeghda tistrieh fuq <u>iz-zewg subincizi</u> 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 specifikat **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 entited 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 **<u>Insolvency Law – Corporate and Personal</u> - <u>Andrew Keay</u>** u **<u>Peter Walton</u>** (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 demostrating 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) <u>L-Art 214(5)(b) tal-Kap 386</u>

Fit-test bl-Ingliz **<u>l-Art 214(5)(b) tal-Kap 386</u>** 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 **<u>tixbah</u>** dik tal-ligi taghna, **<u>ghalkemm mhijiex l-istess</u>**.

Il-qorti qeghda tirreferi ghal **<u>Sec 123(2)</u>** 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.

<u>Id-divergenza</u> tinsab fil-fatt illi waqt illi fil-ligi taghna, il-mizura hija semplici : *the company is unable to pay its debts <u>account being taken also</u> of contingent and prospective liabilities of the company,* fil-ligi Ingliza, il-kriterju <u>huwa divers</u> ghaliex 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` <u>sostanza</u>.

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 broaded 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 ta 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 acertained 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 erely 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) <u>Gurisprudenza</u>

Il-qorti sejra tirreferi ghal gurisprudenza 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` **<u>Byblos Bank SAL v. Al-Khudhairy</u>** [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 ***<u>In Re a Company 12209 of 1991</u>*** [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 sehhew 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: **<u>Ross & Anor vs Gaffney & Anor</u>**, High Court Chancery Division, 2 ta` Gunju 2016 ; **<u>BHS Group Ltd vs Retail Acquisitions Ltd</u>**, High Court Chancery Division, 5 ta` Mejju 2017)

f) <u>L-Art 214(2)(b)(iii) tal-Kap 386</u>

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

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

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

Il-ligi ma taghti l-ebda tifsira ta` x` inhuma **"<u>ragunijiet gravi bizzejjed</u>".**

Ghalhekk il-qorti m`ghandha tiskarta xejn.

Il-qorti m`ghandhiex toqghod fuq grajjiet li jkun sehhew 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`**<u>Sec 122 tal-Insolvency Act 1986 tal-Ingilterra</u>**, 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 <u>Sec. 122(1)(g)</u> li tghid illi : *the court is of the opinion that it is **<u>just and equitable</u>** 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 obbligata 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-qrati Inglizi biex ighidu x`ghandhom ifissru *just and equitable* ghall-fini ta` *winding up* ta` kumpannija jghin sabiex jiftah tieqa ghall-qrati 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 globali 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 tirrifjuta 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`ghandhiex 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 posittiv. 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 kompitu ta` din il-qorti li tispekula dwar il-fondatezza o meno tal-istanzi li kienu avvanzati 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-<u>Art 214(5)(a) tal-Kap 386</u>.

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-<u>Art 214(5)(b) tal-Kap 386</u>.

Tirrizulta ppruvata qaghda **<u>serja</u>** 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 llum 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-qaghda finanzjarja avversa ta` BHC hija xi sitwazzjoni tal-mument, u allura li ghad tista` taqleb lejn il-posittiv fil-futur qarib. Dan mhuwiex il-kaz.

BHC waqfet ghal kollox milli thallas, m`ghandhiex mnejn thallas, ma tat l-ebda rassikurazzjoni lill-kreditrici kanonizzata taghha li sejra taghmel hlas, u qeghda toqghod ghal kollox fuq l-esitu incert ta` proceduri pendenti quddiem il-Qorti fil-Germanja.

b) <u>Id-diskrezzjoni tal-qorti</u>

Il-qorti taghmel referenza ghall-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 ghandha "titqies" ("shall be deemed" fit-test Ingliz) li ma tkunx tista` thallas id-djun taghha. Ir-regoli huma cari u ma jhallu ebda lok ghall-provi in kuntrarju. Jekk il-kumpanija ma thallasx fi zmien 24 gimgha, hija titqies li ma tistax thallas id-djun taghha, u jekk tirrizulta din ic-cirkostanza, il-Qorti tista` tipprocedi ghall-istralc taghha."

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 insovlent 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-<u>Art 214(2)(b)(iii) tal-Kap 386</u>

L-awturi **<u>Jonathan Law u Elizabeth A Martin</u>** fid-**<u>Dictionary of Law</u>** (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 **"<u>Maurice Camilleri et noe vs Frederick Frendo noe et noe</u>"** 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-"**<u>Principles of Maltese Company Law</u>"** kien rilevat mill-awtur **<u>Andrew Muscat</u>** 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) kkrollaw 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 difficli li tkompli r-relazzjoni bejniethom. Il-kumpannija ma tistax tibqa` topera, u sahansitra 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-arrangament kien mistenni li l-affarijiet tal-kumpannija jitmexxew fi spirtu ta` hbiberija u koperazzjoni ghall-beneficcju komuni ta` dawk 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 maghhom, 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 <u>ukoll</u> 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 pendenti fil-Germanja AC1 (taht l-influwenza 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 tiddisponi mit-talbiet u mill-eccezzjonijiet billi :

1. 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 Balticmax Holding Company Limited (C70765).

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

3. Tahtar lir-Ricevitur Ufficjali bhala stralcjarju.

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

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

6. Tordna li l-ispejjez kollha ta` dan il-procediment, inkluzi l-ispejjez kollha tal-istralc 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 ghall-udjenza ta` nhar it-Tlieta 9 ta` Marzu 2021 fid-9.00 a.m.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur