

ADMIRALTY JURISDICTION AND PROCEDURE ACT

John Bonello

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BACKGROUND TO THE DRAFT BILL

1 Admiralty Jurisdiction in Malta

Art. 370 of the Merchant Shipping Act¹ (MSA) provides that:

(1) The Civil Court, First Hall, shall continue to exercise, as part of its ordinary jurisdiction and in accordance with the mode of procedure in force in that court, the jurisdiction hitherto exercised by it by virtue of the Vice-Admiralty Court (Transfer of Jurisdiction) Ordinance.

(2) The Minister may by rules regulate the procedure to be followed by or before the said court in any matter falling within the jurisdiction of that court by virtue of this article and such other related matters, including the fees payable in connection with proceedings before the said court, as the Minister may deem it expedient so to regulate:

Provided that until rules made under this article otherwise provide, the provisions of articles 3, 4 and 5 of the Ordinance aforesaid shall continue to have effect notwithstanding the repeal by this Act of that Ordinance.

By virtue of this provision, the Civil Court has the power to exercise jurisdiction *in rem* over ships and other vessels, their cargo and freight. This is the only instance whereby Maltese courts can exercise jurisdiction *in rem*. Under Art. 742 of the COCP, our courts can exercise jurisdiction *in personam* when an action is directed against a defendant who falls within a class that is included under that provision.

From a substantive law point of view, it is to be noted that Vice-Admiralty Courts followed the 1840 and 1861 Imperial Statutes that provided for a list of claims that could be brought *in rem*. From a historical point of view it is worth noting that an 1890 Act abrogated the existence of Vice-Admiralty Courts in the colonies and the aforementioned Vice-Admiralty Court (Transfer of Jurisdiction) Ordinance was enacted in 1892 to bring into effect the provisions of this Act in Malta.

It has been held that jurisdiction *in rem* can only be exercised if the *res* is under the authority of the court. This has been confirmed in the judgment in the names *S. Mifsud & Sons Ltd vs M.V. Euridika et* delivered in November 2001. However the authority on the matter of “arrest” is the judgment in the names *Chirri vs Rodante*

¹ Cap. 234 of the Laws of Malta

delivered in 1978 whereby it was held that the scope of the warrant of Arrest that may be issued in England can be attained if the *res* is served with either a warrant of impediment of departure or with a warrant of seizure.

Malta has not adhered to the 1952 International Convention Relating to the Arrest of Sea-Going Ships (the 1952 Convention). The practice in Malta is that the plaintiff requests the issuance of both precautionary warrants prior to the filing of the action.

2 Jurisdiction of the Courts under EC Law

Following Malta's accession to the European Union in May 2004, the *corpus legis* of the EU became applicable to Malta. Moreover, it is to be noted that Regulations have direct effect.

The issue of jurisdiction of the courts of the Member States has been in the limelight since the first years of the process of European integration. The 1968 Brussels Convention provided for uniform rules of jurisdiction in civil and commercial matters and for the enforcement of judgments in such matters. The Convention applied to all Member States of the EC and any new EU Member State became party to it.

Council Regulation (EC) 44/2001² of the 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is today in place instead of the Brussels Convention.³

This Regulation provides in Art. 2 § 1 that "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State".

This implies that if an action *in rem* is brought before the Maltese Courts, either against a ship that is registered in another EU Member State or against a ship whose owners or charterers are domiciled in another EU Member State, the provisions of this Regulation might be invoked. Whatever the decision in such a case, in all

² OJ L12 16 January 2000 p1

³ Denmark has however opted out of this Regulation and therefore relations with Denmark in this respect are still regulated by the Brussels Convention

probability the institute of the action *in rem* under Maltese Law would be destabilised. The Regulation however, provides in Art. 71 that the international obligations on jurisdiction of the courts assumed by the Member States ought to prevail in case of conflict with the rules laid down therein.

Therefore, this labyrinth can somehow be averted through adherence to the 1952 Convention.

3 The proposed reform

Practitioners have called for a comprehensive overhaul of this system particularly in view of the fact that the heads of jurisdiction under the aforementioned Imperial Statutes are not enough to cover present day needs.

Hence, it is being proposed that a new article on jurisdiction *in rem* is introduced in the Code of Organisation and Civil Procedure⁴ (COCP) and that a list of maritime claims, based on Art. 1 of the 1952 Convention would be introduced in the MSA. Furthermore, there should be a right of action *in rem* in respect of the other liens that are recognised by the MSA but are not found under the 1952 Convention. Thus, in view of the fact that liens rank before maritime claims in case of competing claims, lienors would have a right to institute an action, at par with other lienors. As the law stands, a lienor who has a high-ranking claim can only file an action if this falls within the purview of the claims listed in the 1840 and 1861 Imperial Statutes. One can of course proceed *in personam* if the claim can be framed within one of the heads of jurisdiction provided in Art. 742 of the COCP.

Accordingly, Malta would do away with the 1840 and 1861 Imperial Statutes which until this day are being invoked before our Courts, notwithstanding their repeal in the UK.

Certain amendments ought to be made to clear the position of ships that are under a bareboat charter agreement. Likewise, certain amendments to Art. 181A(3) of the COCP are needed. Although this provision has proved to be quite effective since its

⁴ Cap. 12 of the Laws of Malta

introduction in 1995, it seems to imply that an action can be filed by and against a ship *qua* inanimate object.

The right to reconvention in actions *in rem* is to be expressly excluded.

4 The warrant of impediment of departure

The warrant of impediment of departure, which in the past was also available to secure the presence of debtors in Malta, is today available only in respect of ships.

The present draft is proposing that the warrant of Arrest be introduced following adherence to the 1952 Convention in the form of amendments to provisions in the COCP relative to the warrant of impediment of departure. Certain provisions that are in force shall remain applicable for the new warrant.

5 The 1952 Arrest Convention

Overview of the Convention

The 1952 Convention is the product of a CMI initiative. It was agreed to in Brussels in May 1952 and entered into force in February 1956. To date it is force in over 70 countries⁵ including 17 EU Member States.

Art. 1 – Maritime Claims

Art. 1 defines “maritime claim”, “arrest”, “person” and “claimant”. Undoubtedly, the most important definition is that of maritime claim. It is being proposed that this would be included in Art. 370 of the MSA which would serve as the basis for the exercise of jurisdiction *in rem* under a new article 744A in the COCP and for the issuance of a warrant of Arrest. The notion of arrest under the 1952 Convention seems to be of a precautionary nature. The proposed Act seeks to amend that part of the COCP that deals with precautionary and not executive warrants.

⁵ W Tetley *International Maritime and Admiralty Law* (Les Éditions Yvon Blais Inc Québec 2002) 418

Art. 2 – Powers to detain Ships

Art. 2 provides that a ship belonging to a State party to the 1952 Convention can only be arrested in respect of a maritime claim recognised by the Convention. This however does not limit the authority of a contracting party to prohibit a ship from proceeding to sea on the basis of Port-State Control and other similar powers. The MSA has an *ad hoc* mechanism to detain ships on public law grounds.

Art. 3 – Sister-ship arrest

This article provides for the possibility of sister-ship arrest in case of any maritime claim but not in respect of claims related to disputes on the title to or ownership or disputes between co-owners of any ship as to the ownership, possession, employment or earnings of a ship. For there to be a sister-ship arrest, the ship shall be in the same ownership of the person liable. Paragraph 2 provides clearly that a ship shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

Art. 4 – Arrest to be made by Court

The Convention provides that the Arrest is to be made by a Court. It is to be noted that all warrants provided for in the COCP are issued by the Court.

Art. 5 – Security

Art. 5 provides for the possibility of allowing the release of the ship upon sufficient security being deposited in Court. This is already provided for in Art. 830(2) as a general provision applicable in respect of all precautionary acts. One is to note however, that as a matter of fact, the MSA provides for exceptions to this rule in cases subject to limitation of liability.

Art. 6 – Damages

The Convention provides that any issues of damages arising out of improper or illegal issuance of a warrant of Arrest are to be determined by the same jurisdiction

where the arrest was made or applied for. This is in line with the provisions of the COCP.

Art. 7 – Merits

The Convention provides that State parties shall establish jurisdiction to determine the case that gave rise to the Arrest on the merits either generally or at least in seven particular instances. The proposed new Art. 844A would give jurisdiction to the Courts to hear and determine any claim recognised by the 1952 Convention. As regards resort to Arbitration, the proposed sub-article 744A(5) makes applicable *mutatis mutandis* the provisions on this matter that already exist under Art. 742 of the COCP dealing with jurisdiction *in personam*.

Art. 8 – Applicability

Art. 8 sets down the minimum standard of application of the Convention. It is being proposed that, in line with the current position, the Maltese Courts would have jurisdiction to arrest any ship, in respect of any relevant claim, irrespective of whether she belongs or not to a State that is party to the 1952 Arrest Convention.

Art. 9 – Liens

The Convention lays down that it is not providing for the creation of any maritime lien or other causes of privilege. This position is congruent with the relevant articles of the MSA which provide for liens and their ranking. It is being proposed that in case of claims that may be brought *in rem* which however do not give rise to a lien under the MSA, would be treated in the same way as “statutory liens” under English Law. These rank after any other cause of privilege. However, it is worth noting that the proposed Act would do away with the anomaly existing under our law that certain lienors cannot proceed *in rem*.

Art. 10 – Power to make certain reservations

State parties are allowed to make certain reservations to the Convention regarding claims related to disputes on the title to or ownership or disputes between co-owners of any ship as to the ownership, possession, employment or earnings of a ship or mortgage or hypothecation of ships. No reservations are contemplated in the proposed Act.

Art. 14 – Entry into force

This Convention shall come into effect between a new adherent and the other contracting parties six months after the date of the deposit of the instrument of ratification. Under Art. 1 of the proposed Act, the Minister responsible for justice with the concurrence of the Minister responsible for shipping shall establish when the provisions of the Act shall come into force.

The 1999 Arrest Convention

It is to be noted that in 1999 a new Convention on the Arrest of Ships was agreed to in Geneva. This Convention is not yet in force. In view of what has been said above as regards certain provisions of EU law, it is advisable that Malta should first become a party to the 1952 Convention and then take any other steps if and when deemed opportune. Such new obligations would be implemented by means of further amendments to the relevant laws.

Accession to Convention – Parliamentary Resolution

Art. 375 of the MSA provides for a list of Conventions which the Government is allowed to ratify or to accede to. Although the 1999 Arrest Convention is listed, the 1952 is not. Therefore, it is advisable for the Government to resort to the provisions of sub-article (4) which provides that the House of Representatives may by resolution add to the list of treaties or conventions included in the said article.

6 Consequential amendments

In view of these substantial amendments, certain consequential amendments are to be made to various provisions of the COCP. Basically, all references to the warrant of impediment of departure should be amended so as to refer to the warrant of Arrest.

Moreover, certain amendments should be made in view of the fact that the Aircraft (Application of Laws) Ordinance⁶ makes the warrant of impediment of departure applicable to aircraft. This however, does not fall within the purview of this work.

⁶ Cap. 80 of the Laws of Malta

THE DRAFT BILL

A BILL entitled

AN ACT to amend various laws on jurisdiction in Admiralty matters

BE IT ENACTED by the President, by and with the advice and consent of the House of Representatives, in this present Parliament assembled, and by the authority of the same, as follows:-

1. (1) The short title of this Act is the Admiralty Jurisdiction and Procedure Act, 200X

(2) The provisions of this Act shall be deemed to have come into force on that date established by the Minister responsible for justice with the concurrence of the Minister responsible for shipping, and different dates may be appointed for the different parts or provisions hereof.

Part I

2. This Part amends and shall be read and construed as one with the Code of Organisation and Civil Procedure.

3. Immediately after article 744, there shall be inserted a new article 744A as follows:-

“744A. (1) Save as otherwise expressly provided by law, the Civil Court shall have jurisdiction in respect of any maritime claim or other right of action, according to the provisions of article 370 of the Merchant Shipping Act, against any ship or other vessel, irrespective of her nationality or registration, or the nationality or domicile of her owners, master or charterers, and on account only of her presence in Malta:

Provided that no such jurisdiction may be exercised over any ship of war or over any ship or other vessel that is in non-commercial service on account of any Government.

(2) This jurisdiction shall be known as the jurisdiction “*in rem*”.

(3) The jurisdiction exercised by virtue of this article may also be exercised *mutatis mutandis* in respect of the cargo laden on, or the freight of, the ship or other vessel and such ship or other vessel or any other thing upon which jurisdiction *in rem* is exercised shall be referred to as the “*res*”.

(4) No action shall be validly initiated unless the *res* upon which jurisdiction *in rem* is to be exercised is brought under the authority of the court upon execution of a warrant of Arrest of a Ship when this warrant can be validly issued under the provisions contained in Sub-Title IV of Title VI of Book Third of this Code:

Provided that in the case of claims in respect of which no such warrant of Arrest of a Ship can be issued, a warrant of seizure shall for all intents and purposes have the like effect of putting the *res* under the authority of the court.

(5) The provisions of sub-articles (2) to (5) of article 742 of this Code shall apply to the jurisdiction conferred by virtue of this article.”

4. Immediately after article 744A, there shall be inserted a new article 744B as follows:-

“744B. The provisions of Sub-Title 1 of Title VIII of Part I of Book Second of this Code shall not apply to actions instituted by virtue of the jurisdiction conferred by article 744A.”

5. In article 181A, sub-article (3) shall be deleted and substituted as follows:-

“When a written pleading is to be filed by or against the owner or master of a ship or other vessel it shall be sufficient if there is designated the name of such ship or other vessel, as the case may be and it shall not be necessary to mention the name of any person to represent such ship or other vessel:

Provided that the provisions of this sub-article shall also apply in respect of a bareboat charterer who at the time of the filing of the action has the control of such ship or vessel;

Provided further that written pleadings to which this sub-article refers shall be served in accordance with the provisions of article 187(7).”

6. In article 29, a new paragraph shall be added immediately after paragraph (g) of sub-article (2):

“(h) for establishing the manner in which proceedings *in rem* are to be conducted.”

7. Article 855 shall be deleted and substituted as follows:-

“855. A warrant of Arrest of a Ship may only be issued to secure a claim which could be frustrated by the departure of the ship or vessel and to bring the ship under the authority of the court for all intents and purposes of law:

Provided that no warrant of Arrest of a Ship shall be issued unless the court is satisfied that *prima facie* the claim upon which the demand is founded is actionable before the civil courts of Malta for it may be considered a maritime claim under the provisions of subarticle (1) of article 370 of the Merchant Shipping Act.

8. Article 856 shall be deleted and substituted as follows:-

856. By the warrant of Arrest of a Ship the marshal is ordered to detain a ship or other vessel. A copy of the warrant shall be served on the defendant and on the Comptroller of Customs and the officer responsible for ports in terms of law. Upon service of the warrant it shall not be lawful for the Comptroller of Customs and the officer responsible for ports in terms of law to give clearance to the ship or other vessel and they shall withdraw any clearance already granted:

Provided that the Comptroller of Customs or the officer responsible for ports in terms of law may at any time until the warrant is rescinded or otherwise extinguished, bring to the attention of the court, by note to be filed in the registry of the court any material fact concerning safety, navigation and port operation and request any remedy they deem opportune including the rescission of the warrant if it is advisable that the ship is to leave the port without delay because of any peril it represents.

9. Articles 862, 863 and sub-article (3) of article 870 shall be deleted.

10. Immediately after article 870, there shall be inserted a new article 870A as follows:-

“870A. Nothing in this Sub-Title shall prevent that any other warrant, either precautionary or in execution of an executive title be issued in respect of a ship.”

Part II

11. This Part amends and shall be read and construed as one with the Merchant Shipping Act.

12. There shall be substituted the following for article 370 of the Merchant Shipping Act:-

“370. (1) A claim arising out of one or more of the following shall be considered a maritime claim:

- (a) any claim to the possession or ownership of a ship or to the ownership of any share therein;
- (b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
- (c) any claim in respect of a mortgage of a ship or any share therein;
- (d) any claim for damage done by a ship either in collision or otherwise;
- (e) any claim for loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship;
- (f) any claim for loss of or damage to goods, including baggage, carried in a ship;
- (g) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;
- (h) any claim in the nature of towage;
- (i) any claim in the nature of salvage;
- (j) any claim in the nature of pilotage;
- (k) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
- (l) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;
- (m) any claim by a master or member of the crew of a ship for wages;
- (n) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;

- (o) any claim arising out of an act which is or is claimed to be a general average act;
- (p) any claim arising out of bottomry;

(2) Any claim secured by a special privilege upon the ship which is recognised by this Act, which claim is not one of the claims listed in the preceding sub-article, is to be considered as a right of action for the purpose of article 744A of the Code of Organisation and Civil Procedure.

(3) Any claim under this article, except a claim that is brought under the provisions of paragraphs (a), (b) or (c) of sub-article (1), may be brought against the person or persons who at the time when the claim arose had an interest in the ship, either on account of ownership or of a bareboat charter agreement:

Provided that if in such cases the ship in whose respect the maritime claim arose is not found in Malta, an action may be directed to any other ship that belongs in its entirety to the same person or persons who would be liable had the ship in whose respect the maritime claim arose been found in Malta.

(4) In interpreting the provisions of this article and in determining the existence or otherwise of a maritime claim, the court shall follow, as far as practicable, the principles of substantive law found in this Act.”

Objects and Reasons

To provide for new provisions in respect of the jurisdiction *in rem* of the Civil Court in the Code of Organisation and Civil Procedure and to bring into effect the provisions of the Convention Relating to the Arrest of Sea-Going Ships, 1952 in lieu of the Warrant of Impediment of Departure. The Bill also provides for new provisions in lieu of article 370 of the Merchant Shipping Act in respect of actions that may be brought *in rem*.

The amended Sub-title IV of Title VI would be as follows:-

OF THE WARRANT OF ARREST OF A SHIP

~~855. A warrant of impediment of departure of any ship or vessel may only be issued to secure a debt or a claim which could be frustrated by the departure of the ship or vessel.~~

A warrant of Arrest of a Ship may only be issued to secure a claim which could be frustrated by the departure of the ship or vessel and to bring the ship under the authority of the court for all intents and purposes of law:

Provided that no warrant of Arrest of a Ship shall be issued unless the court is satisfied that *prima facie* the claim is actionable before the civil courts of Malta under the provisions of sub-article (1) of article 370 of the Merchant Shipping Act.

~~856. By the warrant of impediment of departure the marshal is ordered to detain a ship or other vessel and to deliver to the Comptroller of Customs and the officer responsible for ports in terms of law a copy of the warrant enjoining him not to grant a clearance to such ship or vessel, or, if already granted, to withdraw it.~~

By the warrant of Arrest of a Ship the marshal is ordered to detain a ship or other vessel. A copy of the warrant shall be served on the defendant and on the Comptroller of Customs and the officer responsible for ports in terms of law. Upon service of the warrant it shall not be lawful for the Comptroller of Customs and the officer responsible for ports in terms of law to give clearance to the ship or other vessel and they shall withdraw any clearance already granted:

Provided that the Comptroller of Customs or the officer responsible for ports in terms of law may at any time until the warrant is rescinded or otherwise extinguished, bring to the attention of the court, by note to be filed in the registry of the court any material fact concerning safety, navigation and port operation and request any remedy they deem opportune including the rescission of the warrant if it is advisable that the ship is to leave the port without delay because of any peril it represents.

857. A copy of the warrant shall also be served on the person whose ship or vessel is detained or the master or other person in charge of such ship or vessel or the agent of such ship or other vessel.

858. The warrant shall contain a warning to all persons served with it, that in case of disobedience, such persons shall be guilty of contempt of court.

859. The marshal is authorised to adopt, subject to the directives of the court or of the registrar, all such measures as may be deemed necessary for the due execution of the warrant.

860. In order to obtain the issue of the warrant the applicant shall, in addition to the sworn statements required under articles 831 and 832, state on oath that by the departure of the ship or vessel, his claim could be frustrated.

861. A warrant may be demanded and obtained in security of a debt or any other claim whatsoever amounting to not less than three thousand liri, either before or after such debt or claim has been judicially acknowledged.

~~862. Where the warrant is demanded after a debt or claim has been judicially acknowledged, the applicant shall, in the application, make reference to the judgment acknowledging the debt or claim and, besides the sworn statements under articles 831, 832 and 860, declare on the same oath that the judgment has not been fulfilled or that it has not been wholly fulfilled.~~

~~863. Where the warrant is demanded *pendente lite* besides the circumstances referred to in article 860 the applicant shall also declare on the same oath the fact of the pendency of the action, giving the necessary details for the identification of the said action.~~

864. Where it is found that the warrant was obtained upon a demand maliciously made, the penalty in terms of article 836(8) shall not be less than three thousand liri.

865. In all cases in which a warrant is declared to have been unjustly obtained, the party suing out the warrant may be liable for damages and interest and this in addition to the penalty in terms of articles 836 and 864.

866. It shall be lawful for the court, on good cause being shown, upon the demand by application by a person whose ship or vessel is detained, the master, the person in charge, or the agent of the ship or vessel against which a warrant has been issued, to order the party suing out the warrant to give, within a time fixed by the court, sufficient security, in an amount not less than three thousand liri, for the payment of the penalty, damages and interest, and, in default, to rescind the warrant.

867. A warrant issued before the debt or claim has been judicially acknowledged shall cease to be in force if the applicant, within six working days from the issue of the warrant, fails to bring his action for the acknowledgement of the debt or claim. Moreover the applicant shall be liable for damages and interests:

Provided that where a person whose ship or vessel is detained, the master, person in charge or agent of the ship or vessel against which a warrant has been issued, shall have, by means of a note filed in the registry, granted an extension of such time, the warrant shall remain in force for the time so extended.

868. (1) Where the warrant has been issued for the purpose of securing the enforcement of a judgment, the warrant shall not cease to be in force by the deposit or security mentioned in article 830, but only on the payment, or the unconditional deposit in court free from the effects of any garnishee order, of the amounts due in terms of the judgment including interests and judicial costs.

(2) Nor shall the warrant cease to be in force, in any other case, unless, in addition to the deposit or security, there be appointed a regular attorney or mandatory to judicially represent the ship or vessel.

869. (1) A warrant which has not ceased to be in force for other reasons, shall remain in force for one year to be reckoned from the day on which it was issued, unless within such time the person suing out the warrant shall have, upon an application to that effect, obtained an extension.

(2) Such extension may be granted more than once, but it may not be granted for more than one year each time.

(3) The decree allowing the extension shall state the date up to which the warrant shall remain in force.

(4) The decree allowing the extension shall be served on the persons mentioned in articles 856 and 857.

(5) None of such persons shall incur any liability if, after the expiration of the said time, whether original or extended, and before the decree of any such extension has been served on him, shall act as if the warrant had ceased to be in force.

(6) The absence of a demand for an extension shall not be a bar to the issue of a fresh warrant.

870. (1) No warrant shall be issued against any ship or vessel wholly chartered in the service of the Government of Malta or employed in any

postal service either by the Government of Malta or by any other government.

(2) No warrant shall be issued against any ship of war.

~~(3) A warrant of impediment of departure of a ship or vessel shall, on an application by the Malta Maritime Authority, be rescinded if the court is satisfied that because of the nature of its cargo or of its length, draught or other circumstances concerning safety, navigation or port operation, it is advisable that the ship or vessel should leave port without delay.~~

870A. Nothing in this Sub-Title shall prevent that any other warrant, either precautionary or in execution of an executive title be issued in respect of a ship.