

tion of a better understanding and greater respect by the social conscience for the freedom of the individual to conduct his life in conformity with what he professes to believe.

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ACTIONS 'IN REM' AND EXCLUSIVE JURISDICTION CLAUSES

J.M. GANADO

It is my intention in the present Article to deal with one particular aspect of exclusive jurisdiction clauses. As a rule, the Courts have given effect to such clauses, independently of the point as to whether the jurisdiction of the Maltese Courts is thereby extended or derogated from. However, the point has arisen as to whether in the presence of such a clause, the Court still possesses a discretion to exercise jurisdiction, if it considers that the clause is being made use of in bad faith or, at least, in order to try to circumvent the rights of others. This particular point was discussed *ex professo* in a case 'Dr. Edward Fenech Adami noe. vs. Arsemis Christos noe.' which was withdrawn on the 9th June, 1972 before the Court of Appeal as the parties had arrived at an amicable compromise. In the absence of the judgment of the Court of Appeal, it becomes doubly useful to examine in some detail the main points that were discussed in that case.

A. consignment of cigarettes had been loaded on a ship with a Panamanian registration for delivery to consignees in Yugoslavia. Plaintiff alleged that the cigarettes had never been delivered to the consignees and, after having obtained from the Court the issue of an impediment of departure against the ship, claimed payment of

the value of the goods from the ship. The defendant pleaded that the Maltese Court did not have jurisdiction to take cognisance of the case on the ground that according to the Bill of Lading all disputes between the parties were to be decided by the Courts of London or Rotterdam. In fact, the Bill of Lading stated as follows:

'All claims arising on this Bill of Lading, as well as on the above charter party, shall be brought either before the Court of London or the Court of Rotterdam at Carriers' option to be declared within 14 days of the day of claimant's written request.'

It may be pointed out that plaintiffs were a Belgian Company and neither of the parties was connected in any way with Malta.

The Commercial Court, by means of its judgment of the 6th April 1972, allowed defendant's plea, declaring itself not to have jurisdiction. The Court accepted the validity and efficacy of the clause in the Bill of Lading.¹ It examined the various cases mentioned under s. 743 of the Code of Civil Procedure, concluding that the particular case did not fall within those provisions in the light of the interpretation given by case-law.²

With regard to the provisions of the Merchant Shipping Act, the Court considered that the fact that a warrant of impediment of departure had been issued was of no relevance, because such a warrant presupposed jurisdiction and did not create it.³ Although there was jurisdiction over foreign ships, such jurisdiction could be excluded by agreement and the Court, therefore, found itself devoid of jurisdiction.

It was plaintiff's contention that, even if the Clause in the Bill of Lading were to be regarded as valid, the Court would still have jurisdiction to take cognisance of the case if it was satisfied that a disclaimer of the Court's jurisdiction would deprive plaintiffs of the only means of enforcing their claim. In this case, the defendant company possessed only one ship and it was evident that the ship would never go to London or Rotterdam to submit herself to being arrested in those ports. In the hearing before the Court of Appeal, this contention was elaborated further and this particular aspect deserves detailed examination.

¹The judgments raised upon by the Commercial Court are those mentioned in this note and in notes (2), (3) and (4) *infra* Vol. XXIX.I.1317; XXX.II.373; XXXI.III.239; Vol. XXXIII.III.474; Vol. XVIII.III.66

²Vol. XXVI.I.37; XXXII.II.164; Vol. XXXIII.III.497; Vol. XXVIII.III.1017

³Vol. XXVIII.III.744, 749; Vol. XXVIII.III.866

It is an accepted principle that the mere presence of a ship, albeit of foreign nationality, in Maltese territorial waters confers jurisdiction on the Commercial Court, as a Court of Vice-Admiralty jurisdiction, in regard to actions *in rem* made by any person. The relevant law was Ordinance III. of 1892 (Chap. 41 of the Laws of Malta)⁴ which conferred on the Commercial Court the jurisdiction arising from the Colonial Courts of Admiralty Act 1890. One of the cases in regard to which Admiralty jurisdiction was exercisable referred to 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.

The development of jurisdiction *in rem* was examined in the 1936 judgment 'The Beldis'.⁵ Originally, the notion had been accepted that the arrest of a debtor or of a *res* (in the Admiralty jurisdiction sense) of itself conferred jurisdiction *in rem*. Subsequently, the idea of personal arrest was set aside but the importance of the arrest of the *res* remained; in fact, it was the only factor that radicated jurisdiction *in rem*.

One must bear in mind that the notion of the action *in rem* under English Law has no connection whatsoever with the notion of the real action as accepted in continental laws of procedure, including our own. The English action *in rem* is the action brought before the Admiralty Division of the High Court against a ship or other things, such as cargo or freight, connected with a ship, or against an aircraft, and its principal purpose is that the claim be satisfied by means of the *res* itself. Therefore, the object is arrested so that the plaintiff's claim can be satisfied thereby. The arrest in fact is the commencement of the proceedings and indeed the basis of the Court's jurisdiction.

As is stated by Carver 'Carriage of Goods by Sea':⁶

'By means of this remedy the person suing can at once obtain the property proceeded against as security for the claim, before that has actually been established and judgment obtained.'

and

'A claim for breach of a charter party by refusing to perform the agreed voyage was within the meaning of s. 2 of the Act of 1869,

⁴Now abrogated by the Merchant Shipping Act 1973 (Act XI of 1973). Vide infra.

⁵Vide Vol. 18, pg. 598 of the Reports of Maritime cases.

⁶Carver, 'Carriage of Goods by Sea', 10th Edition by R.P. Colinvaux, p. 936.

so were claims for not delivering in accordance with the contract.⁷

For the existence of the jurisdiction *in rem* of the Court, the nationality of the ship is completely irrelevant. The only requisite that is necessary is that the ship be in the country's territorial waters.⁸ Although at one time, a belief had grown up that the ambit of Admiralty procedure *in rem* was coterminous with the ambit of the maritime lien, this belief was soon displaced by the judgment of the Court of Appeal in 'The Heinrich Bjorn' and in 'The Beldis'.⁹ In the latter judgment it was clearly stated that the remedy *in rem* was not founded upon a maritime lien, but merely enabled the claimant to arrest and detain the property and gave him a charge upon it, subject to other prior claims from the time of the arrest.

Despite the existence, in the charter party or in the Bill of Lading, of a clause similar to the one quoted above, the Courts retain the discretion as to the exercise of their jurisdiction.¹⁰

It is almost a platitude to state that all contracts must be performed in good faith and that bad faith constitutes an exception to every rule. When one of the parties acts in bad faith, he would be thereby violating the contract and, therefore, would not be able to enforce the contract against the other party. The abusive exercise of a right, especially when that right is of a procedural nature, is an abuse *contra legem* and in the light of the doctrine of the *abus de droit*, it is universally repressed by the Courts. Under the law of Procedure, the requirement of a juridical interest for the making of an action is based on the concept that one should not abuse of his substantive rights when these are not backed by an interest recognised by law. Similarly, for a defendant to be allowed to take advantage of the exclusive jurisdiction of a foreign tribunal, the Court must examine all the circumstances of the case and especially the following factors:

- (i) Did the defendant genuinely desire trial in the foreign country or was he taking procedural advantages by trying to have

⁷ Carver *op. cit.* p. 939.

⁸ Carver, *op. cit.* p. 941.

⁹ The Heinrich Bjorn (1886) 11 A.C. 270 and The Beldis (1936) p. 51.

¹⁰ Reference may be made to an article by Bissett-Johnson in the International & Comparative Law Quarterly of October 1970 and to the case-law therein quoted especially 'The Eleftheria' (1969) All England Reports pg. 601.

the case heard by the foreign Courts?

- (ii) Would the plaintiff be prejudiced by having to sue in the foreign country, by losing security for his claim or by being unable to enforce his judgment there?

In this particular case, it was alleged that the defendants had acted in a fraudulent manner. The defendants had in no way attempted to honour their obligations towards the plaintiffs; indeed, after the issue of the warrant of impediment of departure by the Commercial Court in Malta, the defendant ship had tried to escape from Maltese territorial waters, was intercepted by a vessel of the Malta Armed Forces and forced to return to harbour. It was alleged that the defendant wanted to continue to evade plaintiffs' rights and was asking for the assistance of the Court to be able to continue the fraudulent behaviour. The criteria aforementioned were some of those put forward by Mr. Justice Brandon in the case 'The Eleftheria'¹¹ aforequoted and it seems that such criteria were very apposite and deserving of being followed.¹²

The Commercial Court had admitted that the Court did possess a discretion as to whether to exercise jurisdiction or not.¹³ The Court had felt that once there was the clause in the Bill of Lading, such discretion was not to be exercised. It must be submitted, however, that the Court's discretion arises only when there is a specific clause excluding jurisdiction, as otherwise the Court seized of the case would have no option but to deal with its merits. In this case, this was not some clause specifically agreed

¹¹Weekly Law Reports (1969) p. 1077.

¹²The other factors were the following:

- (a) In what countries the evidence on the issues of fact is situated or more readily available and the effect of that on the relative convenience and expense of trial;
- (b) Whether the law of the foreign Court applies and, if so, whether it differs from English Law in any material respects;
- (c) With what country either party is connected and how closely;
- (d) Would the plaintiff be prejudiced by having to sue in the foreign country, as he would be faced with a time-bar not applicable in England or he would be unlikely to get a fair trial for political, racial, religious or other reasons.

¹³It had been accepted by the Malta Courts that a Court would normally, exercise jurisdiction in regard to matters which have to be dealt with locally, such as the ascertainment of a state of fact in Malta.

upon between the parties for some particular reason, in order to avoid serious inconveniences or some abuse in their inter-relations, but was just a clause which happened to be in the printed form of the Bill of Lading. It is submitted that such a consideration is to be taken into account by the Court in exercising its discretion as to declining jurisdiction or not.

One must now consider the eventuality that a Court decides not to exercise jurisdiction. One must try to establish what orders the Court should give in this regard. One alternative would be for the Court to merely decline jurisdiction and order the non-suiting of the defendant by a judgment of *liberatio ab observantia judicii*. This would leave the plaintiff completely unprotected but would be giving effect entirely to the exclusion its jurisdiction. Another alternative would be for the Court to give such orders as it may deem fit to safeguard the plaintiff's interests. In the aforementioned case 'The Eleftheria', Mr. Justice Brandon stated as follows:

'The question whether to grant a stay or not, and if so on what terms, is one for the discretion of the Court. Having arrived at the clear conclusion which I have stated, I shall exercise my discretion by granting a stay, subject to appropriate terms as regards security'.

The above quotation indicates that the English Court in that case adopted the second alternative. However, in exercising its discretion, even on the point as to whether security should be ordered or not, the Court must consider all the circumstances of the case. If the necessity or reasonableness of issuing proceedings in disregard of the exclusive jurisdiction clause is not explained to the Court's satisfaction, then possibly the Court would not feel called upon to order that security be given, but on the other hand the existence of one or more Courts possessing exclusive jurisdiction may be a reason for the ship never to enter the territorial waters of the particular country or countries and that factor in itself should be considered. This is entirely a question of fact to be dealt with according to the details of each particular case.

The new Merchant Shipping Act enacted by Act XI of 1973 left the jurisdiction of the Commercial Court unchanged. In fact, s. 370 provides that the Commercial Court *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 Ju-

isdiction) Ordinance.¹⁴ The Minister responsible for shipping has been authorised to make rules to regulate the procedure to be followed by or before the Commercial Court in any matter falling within the jurisdiction of that Court by virtue of s. 370 and, until such rules are made, the provisions hitherto applicable under Chap. 41 (namely ss. 3, 4, 5) shall continue to apply.

It is therefore clear that there is no break in continuity through the enactment of the new Merchant Shipping Act. In fact, a Court with Vice-Admiralty jurisdiction existed in Malta since the beginning of the British domination.¹⁵ Side by side with the Vice Admiralty Court there also existed the Commercial Court whose jurisdiction was regulated by the Code of Organisation and Civil Procedure. That Code specifically referred to claims concerning maritime matters and conferred relative jurisdiction on the Commercial Court. Therefore, there existed two Courts, whose jurisdiction partially overlapped. In cases covered by such partial overlapping there was concurrent jurisdiction of the two courts. This state of affairs was remedied by the Colonial Courts of Admiralty Act 1890 and Ordinance III of 1892, which vested on the Commercial Court the jurisdiction hitherto exercised by the Vice Admiralty Court. Apart from the special procedure for Preliminary Acts, the procedure to be followed was the ordinary one established by the Code of Civil Procedure.

The position had not suffered any change through the enactment of the 1973 Merchant Shipping Act which in this respect has confirmed the Commercial Court's jurisdiction as hitherto obtaining.

¹⁴ Chap. 41 of the Laws of Malta.

¹⁵ Reference may be made to a Government Notice of the 16th November 1826 and to the Vice-Admiralty Courts Act 1863 (26 Vict.c.24).