

# ARREST OF VESSELS IN MALTA

*Malcolm R. Pace*

## *A. JURISDICTION OF COMMERCIAL COURT AS ADMIRALTY COURT.*

The Vice-Admiralty Courts Act 1863<sup>1</sup> regulated in Malta a Vice-Admiralty Court as in other British Possessions of the time. Similar courts existed in Malta before this time. Its jurisdiction was analogous to that of the High Court of Admiralty of England and in general the Court took cognizance of all maritime causes, including those relating to prize. In many cases the jurisdiction of the Vice-Admiralty Court over such matters far exceeded the ordinary and fundamental limits of jurisdiction as established by Maltese general law. In this Court, proceedings were either by an action in personam or by an action in rem. Irrespective of who the shipowner was, the action in rem was exercised against the vessel which, as a separate distinct judicial entity, assumed the role of defendant in the proceedings and was considered to be the debtor. The flag of the vessel or the nationality or domicile of the plaintiff or the place where the occurrence giving rise to the claim took place, did not limit in any way the jurisdiction of the Vice-Admiralty Court in an action in rem. Jurisdiction was established by the mere fact of the vessel being within the territorial waters over which the authority of the court extended. The only fundamental requirement was that the vessel proceeded against was within the territorial waters and a warrant for arrest could be served and executed. Service of the warrant was considered to be notice to the shipowner of the proceedings. The vessel was represented by the master during the hearing of the cause.

The Commercial Court was also competent<sup>2</sup> to take cognizance of all controversies relating to acts of trade between any persons, including all transactions relating to vessels and navigation. There existed in Malta therefore two courts having jurisdiction over matters relating to vessels and navigation, but with a fundamental difference. The jurisdiction of the Commercial Court was established by a local law and was exercised in accordance with the provisions contained in the Code of Organisation and Civil Procedure.<sup>3</sup> The Vice-Admiralty Court possessed the jurisdiction established by The Vice-Admiralty Courts Act 1836, which was in part special and in part concurrent with the ordinary jurisdiction of the Commercial Court.

By the Colonial Courts of Admiralty Act 1890,<sup>4</sup> the Vice-Admiralty Courts Act of 1863 was repealed and authority was given to

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1. (26 Vict. c.24)
2. s.640 (b) Commercial Code Chapt. 17.
3. Chapt. 15 of the Revised Ed. of Laws of Malta.
4. (53 & 54 Vict. c.27)

effect a jurisdictional transfer where necessary. The Vice-Admiralty Court (Transfer of Jurisdiction) Ordinance no. III of 1892 (Chapter 41) was promulgated whereby it was enacted that the jurisdiction hitherto exercised by the Vice-Admiralty Court was to be exercised by the Commercial Court, whose original jurisdiction over maritime causes was thereby extended.

Various legal and procedural questions may arise as a result of the transfer of jurisdiction exercised by the Vice-Admiralty Court to the Commercial Court. On the application of the defendant in an action in rem in respect of any cause of damage and, on the institution of a cross-cause for damage sustained by the defendant in respect of the same collision, if the vessel of the defendant had been arrested or security given to him to answer judgment in the principal cause and, the vessel of the plaintiff could not be arrested in the cross-cause and security was not given to answer judgment therein, the Vice-Admiralty Court had the power, if it deemed fit, to suspend the proceedings in the principal cause until security was given in the cross-cause to answer judgment. The position of the original defendant who was the plaintiff in the cross-cause was therefore made secure in this manner. The Vice-Admiralty Court (Transfer or Jurisdiction) Ordinance No. III of 1892 however did not contain anything in respect of this matter and it may therefore be concluded that this particular rule of the Vice-Admiralty Court is no longer in force in so far as it provided that the mode of procedure is to be the same as that in force in the Commercial Court under the Code of Organisation and Civil Procedure. It is interesting to note that since 1980 it is now possible under Maltese law to set up a counter-claim by way of reconvention even when the procedure is by way of writ of summons.<sup>5</sup>

The Merchant Shipping Act XI of 1973 repealed<sup>6</sup> the Vice-Admiralty Court (Transfer of Jurisdiction) Ordinance Chapter 41 but ordained that the Commercial Court was to continue to exercise the jurisdiction hitherto exercised by the Vice-Admiralty Court, and to be regulated by the provisions of the same Ordinance until new rules are made.<sup>7</sup>

The Colonial Courts of Admiralty Act 1890<sup>8</sup> had limited the jurisdiction of the Colonial Courts of Admiralty to the Admiralty jurisdiction of England, as it existed at the time of the passing of that Act. Thus any subsequent extensions, amendments or repeal of the English jurisdiction after 1890 did not apply to the Colonial Courts of Admiralty.<sup>9</sup>

The Admiralty Court Act 1840<sup>10</sup> extended the jurisdiction of the Admiralty Court to cover actions in respect of mortgages, questions on title of ownership of vessels, possession, salvage, damages, wages, bottomry and as to salvage, towage or necessaries supplied to any foreign vessel.

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5. s.398 (1) COCP by Act XXXI.

6. s.376.

7. s.370 M.S.A. Act XI 1973.

8. (53 & 54 Vict. c.27).

9. Halsbury, Statutes Vol 1, Admiralty, P.15.

10. (3 & 4 Vite. c.65).

The Admiralty Court Act 1861<sup>11</sup> was passed to extend the jurisdiction and improve the practice of Admiralty in England and is still in existence to this date in Malta, although parts had by 1890 already been repealed in England,<sup>12</sup> because no further legislation has since been enacted on this subject in Malta. The 1861 Act indicated matters in which the Admiralty Court had jurisdiction such as claims for building, equipping or repairing of any vessels,<sup>13</sup> for necessaries supplied to any ship,<sup>14</sup> for any claim by the owner of goods for damage done to the goods,<sup>15</sup> and for damage done by any vessels.<sup>16</sup> The exercise of an action in rem no longer required as a condition, the existence of a right of maritime lien on the vessel. The jurisdiction in rem of the English Admiralty Court was at one time restricted to the enforcement of maritime liens. Jurisdiction was extended by the Act to cover matters between co-owners touching ownership, possession, employment, earnings of any vessel registered in England or Wales and to settle accounts between them,<sup>17</sup> over any claim by a seaman of any vessel for wages<sup>18</sup> and over any claim for any registered mortgage.<sup>19</sup> Meanwhile, the ordinary English jurisdiction was radically altered,<sup>20</sup> with the Court of Admiralty becoming part of the Supreme Court, Probate, Divorce and Admiralty.

The importance of the Vice-Admiralty Courts Act 1863 lies in the clarity in which it lists the heads of jurisdiction. With effect from the 1st July 1891, the Colonial Courts of Admiralty Act 1890 came into operation repealing the Vice-Admiralty Courts Act of 1863 and thereby abolishing the Vice-Admiralty Court in these Islands. This law, which empowered the enactment of Ordinance III of 1892<sup>21</sup> entitled the Vice-Admiralty Court (Transfer of Jurisdiction) Ordinance which came into operation on 10th June 1892, conferred the Admiralty jurisdiction upon the Commercial Court. While the jurisdiction was to continue to emanate from Imperial Statutes, the procedure to be followed in the Commercial Court was to be in accordance with that in force under the Code of Organisation and Civil Procedure.

It appears that the Admiralty jurisdiction enjoyed by the High Court of England as in 1890 is the jurisdiction extended upon the Maltese Commercial Court. When the 1890 Act repealed the Vice-Admiralty Courts Act 1863 the intention of the legislator was not to maintain its continued effect on the Colonial Court of Admiralty but to transfer it to the ordinary

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11. (24 Vict. Cap. 10).

12. s.14, 15, 17, 19, 20 & 22 were repealed in UK before 1890 – vide Halsbury, Statutes Vol 1, Admiralty. By the M.S.A. 1894, s.9, 12 & 24 were also repealed.

13. s.4

14. s.5

15. s.6

16. s.7

17. s.8

18. s.10

19. s.11

20. The Judicature Act 1873.

21. Chapt. 41 of the Revised Ed. of the Laws of Malta, since repealed by Act XI of 1973.

courts. The Admiralty jurisdiction was conferred on the Commercial Court in addition to its ordinary jurisdiction emanating from the Code of Organisation and Civil Procedure. The Admiralty jurisdiction conferred on the Commercial Court was limited to that enjoyed by the High Court of England at the time of the enactment in 1890 of the Act.<sup>22</sup>

Subsequent extensions of jurisdiction after 1890 in England, do not apply to Colonial Courts of Admiralty and have no effect on the jurisdiction of the Commercial Court, (such as the Administration of Justice Act 1920, The Supreme Court of Judicature (Consolidation) Act 1925, The Administration of Justice Act 1956 and The Supreme Court Act 1981.) Ever since the entry into force of the 1964 Independence Constitution of Malta, despite the power to improve the Admiralty jurisdiction by means of local legislation, this has not yet been used. The Merchant Shipping Act 1973 merely effected a formal change as the same Admiralty jurisdiction was retained. The Vice-Admiralty Ordinance 1892 was merely repealed by s.376 of the 1973 Act whereas s.370 (1) enabled the Commercial Court to continue to exercise the Admiralty jurisdiction hitherto exercised by virtue of Ordinance III of 1892. The Admiralty jurisdiction is useful in so far as it extends the jurisdiction of our Courts beyond the limits of the ordinary jurisdiction imposed by s.743 (1) of the Code of Organisation and Civil Procedure.

In terms of s.4 of the Admiralty Court Act 1861,<sup>23</sup> the vessel or the proceeds thereof must be under the arrest of the Court for there to be jurisdiction over any claim for the building, equipping, or repairing of any vessel.<sup>24</sup> By virtue of s.6 the Court has jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried to any port in England or Wales in any vessel and naturally applies to cargo vessels arriving in Malta, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master or crew of the vessel, unless the owner is domiciled in England or Wales or where applicable in Malta, at the time of the institution of the cause. But it is the defaulting vessel and not any other in which this vessel sends the cargo to the port of delivery that is liable to arrest in such a suit.<sup>25</sup>

S.11 provides that the Court shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act whether or not the vessel or the proceeds thereof are under the arrest of the said court. The jurisdiction over mortgages given to this Court by s.3 of the 1840 Act was conditional on the vessel being already under arrest or the proceeds thereof in the Registry. By

22. Cfr the judgment in *Barchi et v. Kaptan D'Amico* noe 24.5.1976 where the Commercial Court however delineated its Admiralty jurisdiction on the Vice-Admiralty Courts Act 1863.

23. 24 Vict. Cap. 10.

24. The Administration of Justice Act 1956 does not have this requirement in England.

25. "The Ironsides" 31 L.J. (Ad.) 129.

s.11 of the 1861 Act, a registered mortgage could have the vessel arrested at his own suit although he entered the Court without the advantage of a maritime lien.<sup>26</sup>

### *B. DEFENDANT IN AN ACTION IN REM*

The procedure against the vessel in Admiralty Courts appears to have originated simply as a needy and effectual means of compelling the wrongdoer to defend the action or to make recompense.<sup>27</sup> It is almost impossible to avoid personifying the vessel and speaking of her as the actual wrongdoer but this can be misleading.

The shipowner can represent his interest and appear in representation of the vessel as a defendant in an action in rem but the action does not become an action in personam if the action was started as an action in rem, the two actions being separate. The appearance given by the defendant in an action in rem is simply an appearance to protect his interest in the property under arrest.<sup>28</sup> When the plaintiff proceeds in rem and the proceeds of the property are found to be insufficient to meet the claim, it is not competent for the court to introduce upon the proceedings in rem, proceedings in personam to make good the excess, as the court cannot permit proceedings not justified by the original process.<sup>29</sup> The plaintiff however may commence an action in personam in a regular manner to recover damages unsatisfied by the action in rem.<sup>30</sup>

Damage wrongfully done by the vessel, while in possession of the charterer, is damage done by the shipowners or their servants. Vessels suffering damage from a chartered vessel are prima facie entitled to a maritime lien upon that vessel and look to the vessel as security for restitution.<sup>31</sup> On the other hand, it has also been reaffirmed that a vessel can only be made the subject of compensation for damages caused in a collision if these were caused by her owners.<sup>32</sup> Proceedings in rem are commenced by process served upon the vessel, which is considered to be notice to all persons having any interest therein and all such persons are therefore entitled to appear as defendants. The owner therefore has an interest in defending the proceedings brought in rem. The remedy afforded by proceedings in rem however cannot extend the property proceeded against. A shipowner appearing cannot be made personally responsible except for costs of the case, beyond the value of the vessel and the freight.<sup>33</sup>

Bail is to be considered as given not for the amount of damage done but for the value of the vessel proceeded against. On application the

26. Maclachlan "Treatise On the Law of Merchant Shipping" (1892) p.62.

27. Marsden "Collisions at Sea" p.74 Vol.4 British Shipping Laws.

28. William & Bruce "Admiralty Practice" 1869 p.68.

29. "The Hope" (1840) 1 W.R. ob 154.

30. "The Zephyr" (1827) 166 E.R. 160.

31. "The Lemington" (1874) 2 Asp. Mar. Law. Cas. 475.

32. "The Parlement Belge" (1880) 5 P.D.; "The Tasmania" (1883) 13 P.D. 110.

33. "The Victor" (1860) Lush 72.

court will order the amount to be reduced should bail be given for a sum beyond the value of the vessel and freight. It has been suggested<sup>34</sup> that it may be advisable to improve upon the traditional method of summoning the master on behalf of the vessel and on behalf of the owner by the addition of the words "and the owner in representation of his interest in the said ship."<sup>35</sup> The extent of the shipowner's interest would therefore be clearly restricted and confined to that of the vessel proceeded against.

### C. THE PROPER WARRANT FOR ARRESTING THE VESSEL

In English law the vessel must be arrested by service of the Writ and a warrant of arrest in order to get the action in rem properly under way. Usually service of the writ of summons is accepted and an undertaking is given to enter an appearance and provide bail or similar security. In terms of s.8 Chapter 41, after 1892 in Malta the mode of procedure in the Vice-Admiralty Court was to be the same as that in the Commercial Court. The point therefore arose whether a vessel should be arrested by a warrant of impediment of departure of a vessel or by means of a warrant of seizure. The warrant of impediment of departure may not have the effect of arresting the vessel as control of the ship remains in the hands of the master except only that the vessel is unable to sail.<sup>36</sup> The "warrant of arrest" found in English law is inexistence in Maltese Law. The Code of Organisation and Civil Procedure Chapter 15 provides for a warrant of impediment of departure and a warrant of seizure. Although there are certain differences the warrant of seizure is closer to the "warrant of arrest". The view has been expressed that a vessel could be kept under the jurisdiction of the court by means of either of these two warrants and a judgment could be given execution.<sup>37</sup>

In **Francesco Chirri v. Giuseppe Rodante**<sup>38</sup> the Commercial Court came to the conclusion after an examination of sections 849 and 285 to 305 of the Code of Organisation and Civil Procedure, that:

*"Jidher li l-mandat ta' qbid hu aktar vicin lejn il-'Warrant of Arrest' Ingliz fil-mod li jigi esegwit; però hemm xi differenzi wkoll dwar certi poteri mogħtija lill-Marixxall.*

*Il-mandat ta' impediment tas-safar tal-bastiment regolat mill-artikoli 858 sa 875 tal-istess Kodiċi, iservi biex jigi assikurat li l-bastiment jinżamm f'Malta sakemm tiġi assikurata l-pretenzjoni tal-attur. Dan jigi esegwit billi l-Marixxall jieħu l-miżuri*

34. Fenech Adami V. Christos, 6th April 1972.

35. Cfr Prof. J.A. Micallef "The Liability of the Ship in Admiralty Courts and the Position of Shipowners as Defendant in an Action in Rem." CMLV.

36. "The Mariner" Giacomo Strano v. Antonio Zahra noe 30th June 1975, Court of Appeal.

37. "The Paralos" Francesco Chirri v. Giuseppe Rodante 9th October 1977, Commercial Court per Mr Justice G Schembri.

38. *ibid.*

*meħtieġa kif awtorizzat bl-artikolu 862 (kif emendat bl-Att XXIII tal-1971) u billi jagħti l-avviż lill-Kontrollur tad-Dwana skond l-artikolu 859 (1).*

*Kemm bil-mandat ta' qbid u anke bil-mandat ta' impediment tas-safar tal-bastiment jiġi assikurat li l-bastiment jibqa' fit-territorju fejn din il-Qorti għandha ġurisdizzjoni, u b'hekk ir-'res' tibqa' passibbli għall-atti eżekuttivi wara li tingħata s-sentenza. Għaladarba hu hekk il-Qorti hi tal-fehma li fis-sistema proċedurali tagħna l-iskop tal-'Warrant of Arrest' Inġliż, jista' jintlaħaq jekk jiġi mahruġ wieħed miż-żewġ mandati fuq imsemmija skond il-għażla tal-attur."*

The defendants had pleaded the nullity of the Writ of Summons as it had not been preceded by the issue of a Warrant of Impediment of Departure and that therefore the Court did not have jurisdiction. The Court stated that the writ of Summons in an action in rem should be accompanied by one of the above mentioned warrants for the purpose of establishing the Court's jurisdiction. This indicates that the 'res' is already under the authority of the Court and ensures that it will remain within the territory during the proceedings. It is for this reason that in the Admiralty action the Warrant of Arrest is also issued upon the issue and service of the writ.<sup>39</sup>

By virtue of the Admiralty Court Act, 1840,<sup>40</sup>:

*"... whenever any ship or vessel shall be under arrest by process issuing from the said High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the Registry of the said Court, in either case the said Court shall have full jurisdiction to take cognizance of all claims and actions ..."*

S. 4 of the Admiralty Court Act 1861 is similar in this respect.

These provisions imply that the arrest of the vessel should precede the action but:

*"It is noteworthy that the Writ of Summons was unknown in Admiralty Cases before 1875, when it was first introduced ..."*<sup>41</sup>

It appears that when the Writ of Summons was introduced in UK in 1875 the procedure of the action in rem was modified by making it necessary for it to be commenced with the writ of summons.<sup>42</sup>

Even before 1890 therefore the procedure was that the writ of summons was issued before the arrest of the vessel and the position in England today is that "... service of the writ on the res will be acquired in order to get the action properly under way and arrest of the res is usually

39. McGuffie, Fugeman and Gray "Admiralty Practice" 1964 para 50 Vol. 1 British Shipping Laws.

40. s.3

41. op. cit. para 8.

42. "The Longford" (1889) 14 P.D. 34.

effected at the same time by virtue of a warrant of arrest which is also served upon the res.”<sup>43</sup>

In this case the plaintiff had not obtained the issue of either warrant prior to the writ of summons but the vessel was already prevented from sailing on account of other previous warrants. The point had to be determined therefore whether yet another warrant of impediment of departure is required in the case of a vessel which is already affected by similar prior warrants. On this matter the Commercial Court made reference to McGuffie:

*“When it is proposed to begin a second or subsequent action against property which is already under the arrest of the Court, a second or subsequent writ in rem must be taken out. But it is only if the second or subsequent plaintiff wishes to proceed to judgment before the first plaintiff is ready to do so that the second or subsequent plaintiff need take out a warrant of arrest and actually arrest the property for the second or subsequent time . . .”*<sup>44</sup>

Although not essential to obtain the issue of another warrant to establish jurisdiction, the Court stated that it would be prudent for the plaintiff to take all the available precautionary measures. After all, the danger remains that the previous warrant may be withdrawn, as a result of which, the vessel would otherwise be able to escape.

It is important to note that there is no available procedure in Malta to obtain “a caveat against release” similar to that found in the United Kingdom. During the proceedings the plaintiff nevertheless took the wise precaution of obtaining the issue of another warrant of impediment of departure of the vessel.

In **Giacomo Strano v. Antonio Zahra**<sup>45</sup> the defendant pleaded that the court had no jurisdiction by s.743 of the Code of Organisation and Civil Procedure since both parties were of foreign nationality. Furthermore it was claimed that the plaintiff had no right to ask for the issue of a warrant of impediment of departure of the vessel he was serving, while he was still employed as a member of the crew. A vessel which is not registered in Malta carried with it, whichever port it may go to, a presumption that it belongs to the country of origin where it is registered. Even though a judgment could eventually be executed on the bail or other security provided on behalf of the vessel to rescind the warrant of impediment of departure, the fact remains that none of the elements contemplated in s.743 could be satisfied to enable the jurisdiction of the court to be invoked. For the local courts to have jurisdiction the defendant must be domiciled in Malta, whereas when the warrant of impediment of departure of the vessel was issued the defendant was not in Malta. The action was instituted against the defendant

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43. op. cit. para 50.

44. op. cit. “Admiralty Practice” para 278.

45. “The Mariner” 30th June 1975, Court of Appeal.



although he was the owner of the vessel which was restrained from sailing and which could have been sold to satisfy the judgment creditor. Yet the possibility of execution of the judgment against the defendant is not of itself sufficient to give the local courts jurisdiction. This fact could be taken into account if the defendant was a citizen of a country to which s.743 (1) (g) applies.

Apart from the normal jurisdiction of the Commercial Court which was therefore inapplicable in this case, the Court of Appeal then considered the special jurisdiction of the Commercial Court in terms of the Vice-Admiralty Court (Transfer of Jurisdiction) Ordinance of 1892 (Chapter 41) as revoked by s.376 (3) of the Merchant Shipping Act 1973 saving the provisions of s.370 (1) of the said Act. The appellant submitted that the Commercial Court had jurisdiction since the vessel was in Maltese territorial waters when the action in rem against the vessel was commenced and in which the nationality of the vessel or that of its owners was irrelevant. In the Vice-Admiralty Court it was also possible to proceed in personam against the owners of the vessel. However the action of plaintiff was not instituted in rem as the request for the appointment of curators was to represent a person, namely, the owner of the vessel and not to represent the vessel itself. Had the action been exercised in rem the Commercial Court would have had jurisdiction as a Court of Vice-Admiralty which grants the possibility of an action against a vessel which is in Maltese territorial waters in the circumstances provided by law. Among the instances indicated in the Admiralty legislation there is that of claims for seamen's wages whether or not the vessel is foreign.<sup>46</sup>

The transfer of jurisdiction from the Vice-Admiralty Court to the Commercial Court did not extend the jurisdiction of the Commercial Court as regards an action in personam in that the Commercial Court was not granted the faculty of deciding cases against persons not domiciled in these Islands and during their absence from Malta. The only possible extension is that regarding the place where the incident giving rise to the action took place that is, even if it occurred outside territorial waters<sup>47</sup> such that a similar case could be comprised in and assimilated with that indicated in s. 743 (1) (e) of the Code of Organisation and Civil Procedure. This would however require the presence of the defendant in Malta. The distinctive feature of the Admiralty Court in England was the action in rem<sup>48</sup> and there was a time when the English Court did not permit proceedings in personam<sup>49</sup> until this was expressly allowed by statute and which in any case required the defendant to be served possibly even "out of the jurisdiction" if he is abroad.<sup>50</sup>

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46. The Admiralty Court Act, 1861 (24 Vict. c.10) Section 10; vide also The Vice-Admiralty Courts Act 1863 (26 Vict. c.24).

47. Cfr s.13 *op.cit.* 1863 Act.

48. Earl Jowetts "Dictionary of English Law".

49. The English & Empire Digest Vol. 1 P.12 No. 68; Halsbury's Laws of England (4th Ed.) p.208 - 301.

50. Cheshire Private International Law 9th Ed. p.85 et seq in terms of the Rules of the Supreme Court.

The Court of Appeal then considered appellant's submission that in issuing a bank guarantee to obtain the release of the vessel in view of the warrant of impediment of departure, the defendant had submitted himself to the jurisdiction of the court. The defendant claimed that the way the warrant had been issued showed that there was a possibility of an action in rem being instituted and he therefore gave a bank guarantee to obtain the release of the vessel without prejudice, whereas eventually the action was actually instituted in rem. Therefore once the writ of summons that followed was not made in the same terms as the warrant of impediment of departure, the latter expired and lost its effect. The court observed that in the warrant and in the issue of banns for the appointment of a curator there was no reference to the vessel being the debtor, but on the contrary it was stated that the claim was against the owner of the vessel and that it was with reference to this debtor that the bank guarantee was issued. There was no connection on the printed form of the warrant to show that the vessel was the debtor and in the form, the vessel merely appeared as one of the assets of the debtor which could satisfy the claim of the plaintiff.

The Court remarked:

*“Apparti li l-mandat ta’ impediment ta’ safar ta’ bastiment m’ghandux l-effett tal-‘arrest’ tiegħu peress li jibqa’ fil-kontroll tal-proprjetarju tramite l-kaptan, salv biss li l-bastiment ma’ jkunx jista’ jsiefer (arg. obiter Vol. XX.III.60 pag 61 fin-nofs u Vol XX.III.677 a pag. 679) u apparti jekk fil-każ in ezami il-kontramandat kellux jinħareġ imħabba n-nuqqas ta’ nomina ta’ prokuratur da parti tad-debitur (art. 837(2) Procedura Ċivili), jibqa’ dejjem il-fatt li l-azzjoni kif intentata ma kienitx fil-gurisdizzjoni tal-Qorti adita.”*

The fact that security was given for the vessel to be released normally does not prejudice the question of jurisdiction.<sup>51</sup> Naturally, it would be better in similar cases to state expressly that the security is being given without prejudice, but on the other hand the parties cannot impose jurisdiction on the court.

The action in rem is based on the serving of a writ of summons on the “res” (ship, cargo or freight) and the arrest of the “res” so that plaintiff could exercise his rights on the res by selling it under the authority of the court. The arrest is unnecessary according to English procedure if sufficient surety is provided to cover the plaintiff's claim which can only be exercised on the “res” and not on any other property of the owner. It is necessary therefore for plaintiff to ensure that the res is under the jurisdiction of the court to be served with the writ of summons. The vessel or other “res” has to remain in the territory where the court has jurisdiction for the eventual execution of the judgment. The “res” would be represented by the surety if any is given.

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51. Salvatore Liberto v. Dr Aduardo Amato et. Vol XXIV.I.1145.

#### D. WARRANT PRESUMES JURISDICTION

Apart from whether the jurisdiction of the Maltese Courts is thereby extended or derogated from, the courts normally give effect to exclusive jurisdiction clauses. In **Fenech Adami noe v. Christos noe**<sup>52</sup> to exercise jurisdiction notwithstanding the existence of an exclusive jurisdiction clause which is made use of by the defendant in bad faith or to circumvent the rights of others and by which a disclaimer of the Court's jurisdiction would deprive plaintiff of the only means of enforcing their claim. The Commercial Court<sup>53</sup> had admitted that the Court did possess a discretion as to whether or not to exercise jurisdiction but by means of its judgment declared itself not to have jurisdiction and allowed defendant's plea. The fact that a warrant of impediment of departure had been issued was considered by the court of no relevance because such a warrant does not create jurisdiction but presupposes it.<sup>54</sup> Even though there was jurisdiction of the court over foreign vessels, such jurisdiction could be excluded by agreement of the parties. An agreement by parties referring disputes to a specific court or tribunal is valid and usually binding on the parties as a rule. Our courts would still have limited jurisdiction for the ascertainment of damage and loss of cargo when such verification can only be made locally where the cargo has been discharged or more easily and expeditiously.<sup>55</sup>

In "The Beldis"<sup>56</sup> the development of jurisdiction in rem was examined. The arrest of a debtor or of a res was in the past considered to confer of itself jurisdiction in rem. Eventually the only factor that gave rise to jurisdiction in rem was the arrest of the vessel. The notion of the action in rem under English law has nothing to do with the notion of the real action found in continental laws of procedure.<sup>57</sup> The principal purpose of the English action in rem is for the claim to be satisfied by means of the vessel itself, which is therefore arrested. In fact the arrest constitutes the commencement of the proceedings and is the basis of the jurisdiction of the court. "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."<sup>58</sup>

The nationality of the vessel is completely irrelevant for the existence of the court's jurisdiction in rem, the vessel's presence in the country's territorial waters being the only requisite. The remedy in rem is not found on maritime lien but merely enables the claimant to arrest and detain the property and give him a charge upon it subject to other prior

52. withdrawn on 9 June 1972 before the Court of Appeal.

53. 6th April 1972.

54. *Louis Cornelius v. Carlo Valentini*, Vol XXVIII.III.749; *Ugo Pace noe v. Alfredo Benjacar noe* Vol. XXVIII.III.866.

55. *Carmelo Galea v. Dr. Paolo Grech et noe* Vol XXXIII.III.474.

56. (1936) 53 Lloyd's Rep. 255.

57. including our own which follows the Fenech and Neapolitan systems of procedure as hitherto had been followed.

58. Carver "Carriage of Goods by Sea" 10th ed. by R.P. Colinvaux p.936 Vols. 2 & 3

claims.<sup>59</sup> The ambit of the Admiralty proceedings in rem is therefore no longer considered coterminus with the ambit of the maritime lien. For a defendant to be allowed to take advantage of the exclusive jurisdiction of a foreign court, all the circumstances of the case and a number of factors must be examined by the court, such as in what countries the evidence is more readily available, the connection either party had with each country and whether the plaintiff would be prejudiced by having to sue in the foreign country, by losing security for his claim or by being unable to enforce his judgement.<sup>60</sup>

Should a decision be taken not to exercise jurisdiction the court could merely decline jurisdiction and order the non-suiting of the defendant by a judgment of "liberatio ab observantia iudicii" which would however leave the plaintiff completely unprotected. Alternatively the court could give such orders as it may deem fit to safeguard the plaintiff's interests considering all the circumstances of the case.<sup>61</sup> In "The Elefteria"<sup>62</sup> the court exercised its discretion by granting a stay, subject to appropriate terms as regards security.

In **Dr. H Peralta noe v. Stefanos Chatzakis noe**<sup>63</sup> plaintiff filed a writ of summons before the Commercial Court requesting that the master on behalf of the vessel and on behalf of the owners and charterers of the ship be condemned to pay the amount due under a loan agreement which constituted a first preferred mortgage over the vessel and to hand over possession of the vessel in accordance with the mortgage agreement. A warrant of impediment of departure of the vessel was obtained from the Commercial Court and subsequently also a precautionary warrant of seizure of the ship. The Commercial Court rejected the defendant's plea and upheld its jurisdiction.<sup>64</sup> On the basis of s.743 of the Code of Organisation and Civil Procedure<sup>65</sup> the Court stated that it would have declined jurisdiction without hesitation, were it not for the claim for possession of the vessel, both parties were not Maltese and the loan transaction had no local connection. Taking into account the nature of the action the Court declared it had jurisdiction if the action was in rem but no jurisdiction if the action was in personam. In actions in rem the jurisdiction of the court rested solely on the basis that the vessel was in the territorial waters and detained so that execution could be levied on it. While admitting that the court had jurisdiction to entertain the claim for possession the defendant contended that jurisdiction to entertain one claim did not in any way imply

#### British Shipping Laws.

59. "The Beldis" (1936) 53 Lloyd's Rep. 255.

60. Cfr "Teh Elefteria" (1969) 1 Lloyd's Rep. 237.

61. Prof. JM Ganado "Actions In Rem and Exclusive Jurisdiction Clauses" Article in Law Journal "Id-Dritt" Vol V May 1975 p.48 - 54.

62. (1969) 1 Lloyd's Rep. 237.

63. "The Maria 'A'" withdrawn before the Court of Appeal on 13 February 1976.

64. 5th December 1975.

65. Chapt. 15.

jurisdiction to entertain the other demand as they were two distinct claims which had to be considered separately. There was no doubt as to the "in rem" nature of the claim for possession but defendant maintained that the claim for the payment of the debt was a purely personal action and not an action in rem. The action for the payment of the debt was not an action for the sale of the vessel. There was no specific demand for a sale. The judgment condemning the defendant to pay the debt did not necessarily lead to the eventual sale of the vessel. The condemnation for the payment of the debt has as its legal consequence also the possibility of execution of other assets of the defendant apart from the vessel.

The notion of an action in rem in maritime law bears no relationship to the continental distinction between personal and real actions. A personal action for the payment of a debt for instance may easily qualify as an action in rem in a maritime case. The majority of actions in rem are intended for the enforcement of obligations and according to the continental classification would be regarded as personal actions. In terms of s.35 of the Admiralty Court Act 1861<sup>66</sup> the Admiralty Court has jurisdiction both in rem and in personam. It is not necessary in all cases in which a person has a right of action in the Court of Admiralty against any vessel to obtain a warrant for the arrest thereof in order to institute proceedings but a person may also proceed by way of personal action against the owners of the vessel.<sup>67</sup>

It can be argued that the Commercial Court has jurisdiction to entertain an action instituted by a foreign creditor in Admiralty against his debtor who happens to be in Malta even though this may be outside the ambit of s. 743 of the Code of Organisation and Civil Procedure provided that the matter fell within the jurisdiction of the Vice-Admiralty Court in 1892.<sup>68</sup> But the courts have not yet emphatically accepted this principle.

By the Admiralty Court Act of 1840<sup>69</sup> the High Court of Admiralty had full jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgages of any vessel under arrest or the proceeds of its sale deposited in the Court Registry. In terms of s. 11 of the Admiralty Court Act 1861,<sup>70</sup> however, the High Court of Admiralty was given jurisdiction to take cognizance of a claim whether or not the vessel or the proceeds thereof be under the arrest of the said court, in the case of a mortgage registered under the Merchant Shipping Act and this provision remains applicable to our Commercial Court.

Any judgment obtained in an action in rem can only be enforced on the vessel itself if the action is instituted only against the vessel, in the absence of any extension expressly made by law. Normally the action in rem is instituted against the Master "on behalf of the vessel and of her owners and charterers." The Master's representation in such a case is necessarily

66. (24 Vict. cap. 10).

67. Williams & Bruce "Admiralty Practice" p.186 et seq.

68. See Strano v. Zahra 30 June 1975, Court of Appeal.

69. (3 & 4 Vict. c.65).

70. (24 Vict. c.10).

limited to the vessel and does not extend to other assets. The main object of arresting a vessel is to cause an appearance on the part of her owners and to enable the court to enforce judgment against a vessel "without reference to the question whether her owners at the time of the arrest were or were not her owners when the collision occurred."<sup>71</sup> On the other hand, normally a judgment obtained against a person is enforceable against all the assets of that person. It does not appear however that in an action against the master on behalf of the vessel, the addition of the words "... and of her owners and charterers" makes any substantial difference to the nature of the action and execution of the judgment obtained is restricted to the particular vessel.<sup>72</sup>

The procedure followed before the English courts is markedly different to that followed in Malta. A writ of summons is first filed and an application for the arrest of the vessel is filed subsequently in England in actions in rem. In contrast the normal procedure in Malta is to obtain an impediment of departure against the vessel either before or after the filing of the writ of summons and usually also a precautionary warrant of seizure of the vessel is issued. Normally an application for the judicial sale of the vessel is made thereafter but plaintiff may ask for such an order also in the original writ itself.<sup>73</sup>

It is well established in our local case law<sup>74</sup> that the Commercial Court has jurisdiction by the mere fact of the vessel being within the territorial waters over which the authority of the court extends and "... molto di più quando la stessa è elevata sotto l'autorità di questa corte."<sup>75</sup>

In English cases there is frequently a joint demand in the same action, such as a request for a declaration of the validity of the mortgage and for the sale of the vessel<sup>76</sup> or a claim for the recovery of possession of the vessel and for its judicial sale. Notwithstanding the difference in procedure to English law it appears that the Commercial Court has jurisdiction in an action in rem made by a mortgage in Malta to obtain possession of the vessel<sup>77</sup> and or to enforce payment of the debt when the vessel is within the territorial waters and is subject to a court warrant.

In *Capitano Demetrio Nicolaki v. Dr Gius. Agius et*<sup>78</sup> the Commercial Court held that as a Court of Vice-Admiralty it is competent to consider any claim brought against a vessel, local or foreign and irrespective of who the shipowner is, when the vessel is present within territorial waters, and especially when the vessel is arrested under the authority of the

71. Marsden "Collisions at Sea" (1880) p.32, Vol. 4 British Shipping Laws.

72. Prof JM Ganado & Dr H Peralta "Jurisdiction in Actions by Mortgagees" Article in *Law Journal "Id-Dritt"* Vol VIII 1977 pp.60-66.

73. s.306 (1) Code of Organisation and Civil Procedure Chapt. 15.

74. "The Cité de Nancy" *Remigio Vadalà v. A. Zammit Cutajar* Vol XXV.III.677; *Mifsud v. Capitano Migliori* Vol XXV.III.762.

75. "The Despina" *Nicolaki v. Dr Agius noe* Vol XX.III.60.

76. "The Lord Strathcone" (1920) 21 *Lloyd's Rep.* 186.

77. "The Maria 'A'" *Dr H Peralta noe v. Stefanos Chatzakis noe* 17 February 1976 Commercial Court.

78. "The Despina" 1907 Vol XX.III.60.

Commercial Court.<sup>79</sup>

In **Angelo Barchi et v. Orazio D'Amico**, plaintiffs who were foreign crew members with the exception of one Maltese claimed payment of their wages in respect of the MV "Athena II" registered in Panama. The jurisdiction of the Court was said to be in terms of s. 370 of the Merchant Shipping Act XI of 1973 rather than being based on s. 743 of the Code of Organisation and Civil Procedure.

In any case of a foreign vessel it was said to be in the Courts' discretion whether to exercise jurisdiction.<sup>80</sup> This principle was also enunciated in the United States.<sup>81</sup> There have been instances according to Maltese case law where the local Court, notwithstanding that it had jurisdiction, declined to take cognizance of a case when it resulted that the parties had agreed to refer the matter to a foreign court in the event of a dispute. In this case the Court did not uphold the preliminary plea of lack of jurisdiction but reserved its discretion whether to take cognizance of the case in issue.

In **Francesco Chirri v. Giuseppe Rodante**<sup>82</sup> the Commercial Court held it had jurisdiction under s.370 of the Merchant Shipping Act 1973<sup>83</sup> to deal with a case instituted by the former master of a vessel for wages against a vessel constrained to remain in Malta by means of several warrants. It had been stipulated in the conditions of employment that all disputes relating to wages had to be submitted to the Court of the Republic of Panama for decision. The Court however has a discretionary power whether or not to deal with such cases wherein disputes are to be submitted to a foreign court as had been held in *Strano v. Zahra noe*.<sup>84</sup> In the case at issue the Court declared that it had jurisdiction to deal with the case, bearing in mind that the vessel was flying a flag of convenience, the probability of the vessel visiting the country to which disputes were to be submitted was rather remote, that the vessel was to be found in Malta subject to several warrants and a plaintiff could enforce his claim, besides the fact that plaintiff's claim, which related to a relatively small amount of wages, would not justify very high costs to prove his claim and therefore plaintiff would otherwise be deprived of his rights.

In **Stefanos Pateras noe v. Dr H Peralta noe and Dr F Farrugia noe**<sup>85</sup> the vessel did not figure among the defendants and had not been

79. Contrast the Commercial Court Judgments "The Eleni B" *Bugeja v. Foros*, 16 August 1977 and "The Athena II" *Barchi et v. D'Amico* 24th May 1976 per Mr Justice G Schembri.

80. Cfr also *Fortunato Policardi noe v. Dr Paolo Azzopardi et noe* Vol XXVIII.III.1264.

81. "The Hermine" US District Court of Oregon (1874) *Asp. Mar. Law Cases* Vol II p.380; vide also "The Leon XIII" English Court of Appeal 1883 *Asp. op. cit.* Vol V p.73.

82. "The Paralos" 9 October 1977 *op.cit.*

83. Act XI of 1973.

84. Court of Appeal, 30 June 1975. Vide also *Policardi noe v. Azzopardi et noe* 2 February 1934, Commercial Court; re "The Hermine" (U.S.D.C.1884) and "The Leon XIII" (1883) 8 P.D. 121.

85. "The Oceanic Winner" (Ex-"The Champion Colocotrinis") 2 October 1978, Commercial Court, per Mr Justice G Schembri.

summoned in court. The action was directed against two companies registered abroad summoned through curators. An action in rem has to be directed against the vessel itself when it is in territorial waters in such a way that the vessel could eventually be auctioned under the authority of the court. The Commercial Court held that it had no jurisdiction under s. 370 (1) of the Merchant Shipping Act XI of 1973 under which it could exercise as part of its ordinary jurisdiction, the jurisdiction formerly exercised as a Vice-Admiralty Court, to deal with a case concerning an order by Greek Courts about a vessel which was not a party to the suit in Malta and concerning companies registered abroad.

Plaintiff claimed that the Commercial Court could exercise its ordinary jurisdiction under s.743 (1) (c) of the Code of Organisation and Civil Procedure which stated that the court had jurisdiction over "any person, in matters relating to property situated or existing in these Islands." Our courts had interpreted this section as referring to actions having as their object something to be found in Malta. In this case the vessel had been at Malta Drydocks and plaintiff had issued a warrant of impediment of departure. It could not however be stated, by the way the writ of summons was drawn up, that it referred to the vessel that was to be found in Malta.

It was also alleged by plaintiff that the defendants had accepted the jurisdiction of the court when they had filed a writ of summons against the plaintiff demanding surety. The court held that defendant Dr Farrugia on behalf of the United Maritime No. 1 Tanker Transport Inc. had gone to court as a result of the issue of precautionary warrants of impediment of departure, being forced to institute proceedings to protect their interests, rather than taking the initiative. An action similar to the one instituted by the defendants did not imply acceptance of the court's jurisdiction. A warrant does not confer jurisdiction and the same applies to the relative procedures. As the Commercial Court stated:

*"Azzjoni intiża għar-revoka ta' mandat kawtelatorju, jew għall-protezzjoni kontra d-danni naxxenti mill-istess mandat, mat-turix li b'hekk min qed jagixxi jaċċetta il-gurisdizzjoni tal-Qorti li hargħet il-mandat. Dan hu wieħed mill-mezzi mogħtija mill-Ligi biex l-allegat debitur jipprotegi ruħu kontra il-hruġ ta' mandati kawtelatorji . . . bl-istess mod, azzjoni rigwardanti l-istess mandat għar-revoka tiegħu, jew depożitu biex jinħareġ kontro-mandat, ma' jirradikawx il-gurisdizzjoni."*

In the case at issue moreover, an express reservation had been made with reference to the jurisdiction of the court. The Commercial Court upheld defendants' plea that it had no jurisdiction and declared defendants non suited.

In **Carmel Bugeja noe v. Capt Kostantinos sive Kostos Foros noe**<sup>86</sup> the defendant pleaded that nowhere in the English legislation prevailing

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86. "The Eleni B" 16 August 1977, Commercial Court, per Mr Justice V Sammut.



upto 1890<sup>87</sup> is there mentioned the jurisdiction of the Vice-Admiralty Court in the case of the payment of insurance premiums and therefore an action in rem could not be instituted. The Court noted that in *Barchi et v D'Amico noe*<sup>88</sup> the Court as differently presided, had listed the instances contemplated in the 1863 Act<sup>89</sup> rather than stating that an action in rem can be exercised in respect of every maritime claim and had observed that: "L'eżistenza jew le ta' 'maritime lien' fuq il-vapur kien immaterjali għall-eżercizzju tal-azzjoni 'in rem' . . ."

*"The expression 'necessaries supplied' in s.6 of the Admiralty Court Act 1840,<sup>90</sup> which gave the Admiralty Court jurisdiction over foreign ships, though it is not to be restricted to things absolutely and unconditionally necessary for a ship in order to put to sea . . . must still be confined to things directly belonging to the ship's equipment necessary at the time and under the then existing circumstances for the service on which the ship is engaged. But the insurance of a vessel is something quite extraneous to its equipment for sea and however prudent it may be for an owner to insure, it is a prudence exercised for his own protection, and not for the requirements of the vessel, which is the sense in which the word necessaries is used in the statute . . ."*<sup>91</sup>

It has also been stated:

*"An insurance is not a necessary for a ship and therefore neither the broker nor the underwriter can proceed in rem against a foreign ship for premium."*<sup>92</sup>

The court therefore upheld defendant's preliminary plea and declared it had no jurisdiction.

At a time when there existed both the Vice-Admiralty Court and the Commercial Court, it was held<sup>93</sup> that *litis pendentia*:

*"si induce dalla citazione, colla quale il citato è chiamato a rispondere alla domanda dell'attore, innanzi la Corte, dalla quale quell'atto è spedito, e non da un atto cautelatorio."*

Moreover, the Court stated:

*"che l'arresto, sia della persona, sia di cosa ad esso appartenente, sebbene, nello antico Diritto dei Romani fosse*

87. including the Admiralty Court Act 1840 (3 & 4 Vict. c.65), the Admiralty Court Act 1861 (24 Vict. c.10) and the Vice-Admiralty Court Act 1863 (26 Vict. c.23 & 24).

88. 24 May 1976, Commercial Court.

89. which defined ship as "any description of vessel used in navigation not propelled by oars whether British or foreign."

90. (3 & 4 Vict. c.65).

91. "The Heinrich Bjorn" (1885) 10 P.D. 44.

92. Arnould "The Law of Marine Insurance and Average" 14th ed. 1954 Vols 9 & 10 British Shipping Laws.

93. Cap. Giorgio Arvanitis v. Cap. William Smith Commercial Court 19 Ottobre 1888.

*stato, anche in materia Civile, una specie di citazione, chiamata, citatio realis, cesso' pero di esserlo anche nel Diritto nuovo dei Romani, e non lo è stato mai nel Diritto moderno."*

Once a warrant has been issued in respect of the vessel and the transaction relates to an obligation in favour of a local person and which could therefore be enforced in these Islands, the Court had jurisdiction.<sup>94</sup>

### ***E WARRANT OF IMPEDIMENT OF DEPARTURE***

The object of a warrant of impediment of departure<sup>95</sup> is to secure a claim which might be frustrated by the departure of the debtor or any vessel.<sup>96</sup> In the application for the issue of a warrant of impediment of departure the applicant shall correctly state besides the name and surname, the occupation, approximate age and place of birth of the person restrained or other particulars, not being less than four so as to enable the persons on whom the warrant is served to establish the identity of the person so restrained. Often the particulars of the master on behalf of the vessel are indicated, besides the name of the vessel, her tonnage, other relevant information and the place where the vessel is lying. In cases of urgency however the applicant may declare that he is not in a position to indicate four particulars but must furnish such particulars within 15 days by way of a note under oath to be served within 48 hours on the Commissioner of Police, the Officer charged with the issue of passports and the Comptroller of Customs.

By the warrant of impediment of departure the Marshal is ordered to detain the vessel and to deliver to the Comptroller of Customs a copy of the warrant requiring him not to grant clearance to such vessel or to withdraw it if already granted. A copy of the warrant shall also be served on the master or other person in charge of such vessel. The Marshal is authorised to adopt, subject to the directives of the Registrar, all such measures as he may deem necessary for the due execution of the warrant. The applicant must state or note in the application that his claim might be frustrated by the departure of the vessel. Where the warrant is demanded after a debt or claim has been judicially acknowledged the applicant shall make reference in the application to the judgment acknowledging his debt or claim, and declare that the judgment has not been wholly fulfilled. In the case the warrant is demanded *pendente lite*, the applicant shall declare the fact of the pendency of the action.

When it is found that the warrant of impediment of departure was obtained upon a malicious demand, the court shall condemn the applicant to a penalty to be paid to the person against whose vessel the warrant shall have been issued,<sup>97</sup> independently of any action for damages

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94. "The Danae" Page v. Topp 7 April 1906 Commercial Court in virtue of Art. 749 (7) of the Code of Civil Procedure now s.743 (1) (g) COCP Chapt. 15.

95. Form No.23 is used in relation to impediments of departure of vessels.

96. other than a ship of war.

97. s.869 (2) COCP.

and interest. A foreigner obtaining the issue of a warrant of impediment of departure to protect a claim which does not fall within the jurisprudence of our courts does so vexatiously and maliciously and renders himself liable to a penalty.<sup>98</sup> An unsuccessful outcome in the action is not on its own sufficient to render the party liable to a penalty. For a penalty to be incurred, it is necessary that the plaintiff had absolutely no justification to obtain the issue of a warrant of impediment of departure.<sup>99</sup> The party suing out the warrant may be liable for damages and interest in all cases in which the warrant of impediment of departure is declared to have been unjustly obtained.<sup>100</sup> The failure to institute legal proceedings in support of a claim by a person who has obtained the issue of a warrant of impediment of departure, and the failure to satisfactorily prove the claim, are not enough to show that such demand was made maliciously to the extent of becoming liable for the payment of a penalty, but could give rise to liability for the payment of damages and interest.<sup>101</sup> The power of the courts to award damages and interest on the issue of precautionary warrants when the applicant does not conform to the provisions of the law is discretionary, and should not be exercised if the circumstances are such as to leave a reasonable doubt of the insolvency of the debtor.<sup>102</sup> Upon the demand by writ of summons of the person against whose vessel a warrant has been issued the court may, on good cause being shown, order the party suing out the warrant to give, within a time fixed by the court, sufficient security for the payment of the penalty and of damages and interest.<sup>103</sup>

A vessel may deliberately and easily avoid entering a jurisdiction where it would be subject to legal proceedings. It is therefore very useful, if not vital, at times for creditors whose claims are not secured by a mortgage on the vessel or who do not have a maritime lien or privilege, to be able to establish readily through their Counsel at which suitable port, where the vessel may be lying or any of its intended or likely destinations, the vessel may be arrested as security for the claim and the Admiralty jurisdiction invoked. Often the Court requires security from the plaintiff in the event of arrest as provisional seizure, in addition to the court costs and other expenses, which in some countries may be very high. In Japan the security to be lodged by plaintiff must be equivalent to roughly one-third of the value of the vessel or one-third of the amount of the alleged claim, whichever is the higher, to cover possible damage sustained by the vessel's owner.<sup>104</sup> This would inevitably rule out the possibility of arresting the vessel at a Japanese port where the claim is relatively small in relation to the value of the vessel. In contrast, in Malta while the amount of security

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98. "The Adelaide" Dr Gabriele Castorina noe v. Natale Tarco Vol XXXIII.III.499.

99. Louis Cornelius v. Carlo Valentini Vol XXVIII.III.749.

100. s.870 COCP.

101. Vincenzo Stivala v. Alfonso Landro Vol VI. p.66.

102. Giov. Falzon v. Banchiere Giov. Scicluna Vol XXVIII.III.1067.

103. s.871 COCP.

104. Lloyd's Maritime & Commercial Law Quarterly 3 (1981) 360.

required from plaintiff to cover damages for wrongful arrest is a matter for the Court's discretion, the legal requirement is far less stringent. A warrant of impediment of departure issued before the debt or claim has been judicially acknowledged shall cease to be in force if the applicant shall not bring his action within 4 working days from the day on which notice of the execution of the warrant has been given to him or within 10 working days from the issue of the warrant whichever is the earlier.<sup>105</sup> Moreover, the applicant shall be liable for damages and interest.

A warrant issued for the purpose of securing the enforcement of a judgment shall not cease to be in force when a deposit of security is given to safeguard the rights or claim. Unless the person restrained appoints an attorney to represent him in the action in addition to giving a deposit or security the warrant shall cease to be in force.<sup>106</sup> The law does not provide any other remedies except for the measures contemplated in the Code of Organisation and Civil Procedure for the effects of a warrant of impediment of departure to cease.<sup>107</sup> A warrant of impediment of departure remains in force for only six months from the day of issue unless it has already ceased to be in force for other reasons or an extension has previously been obtained.<sup>108</sup> In terms of s.875 no warrant of impediment of departure may be issued against any vessel wholly chartered in the service of the Government of Malta or employed in any postal service.

The Court of Magistrates or inferior courts cannot issue an impediment of departure in respect of any vessel.<sup>109</sup> Once a vessel has obtained clearance it is not possible to issue a warrant of impediment of departure in security of any right or claim against the master, engineer, seaman or other person regularly enrolled in all cases in which such person is exempted from personal arrest.<sup>110</sup> Nor is it possible for a warrant of seizure or warrant of impediment of departure to be issued against any person belonging to any vessel wholly chartered in the service of the Government of Malta if such person is in these Islands or in the waters of these Islands with the vessel to which he belongs.<sup>111</sup>

## *F WARRANT OF SEIZURE*

The applicant for a warrant of seizure is to bring the action in respect of the claim within four working days from the delivery of the notice of execution of the warrant. Otherwise the effects of the warrant shall cease.<sup>112</sup> The court may rescind the warrants unless the plaintiff shows during the hearing, *prima facie*, sufficient ground for the security obtained

105. s.872 COCP.

106. s.873 (2) COCP.

107. *Capitano Angelo Casella v. Neg. William Leonard* Vol VII p.202.

108. s.874 (1) COCP.

109. s.840 (1) COCP.

110. s.840 (3) COCP & s.361 (f) & (h), COCP.

111. *Cfr* s.361 (g) COCP.

112. s.849 (2) COCP Chapt. 15.

by that warrant. The applicant may be condemned by the court to pay damages and moreover a fine not exceeding LM100, should the applicant not bring the action in time or if he had not in any manner called upon the defendant to pay the debt or give sufficient security within the previous 15 days. If the plaintiff's claim is found to be groundless in fact and in law or the circumstances of the debtor were notoriously such as not to give rise to any reasonable doubt as to his solvency the applicant may be similarly liable.

The judicial sale by auction of the property seized shall not take place without a previous judicial acknowledgement of the debt or claim. The precautionary warrant of seizure has effect for six months after which it lapses unless renewed before that time.

The precautionary warrants of seizure and the warrant of impediment of departure shall be rescinded<sup>113</sup> if the party against whom they are issued makes such deposit or gives such security as according to the circumstances may be sufficient to safeguard the rights of the claimant.<sup>114</sup>

Any judgment rescinding a warrant of seizure, a garnishee order or warrant of impediment of departure of a vessel may be enforced after the lapse of 24 hours.

When there is an impediment of departure with regard to a vessel, it is often necessary for the case to be dealt with quickly, in view of the high cost incurred for each day the vessel is delayed. There are 6 working days in which to file the note of appeal and 12 working days when the procedure is by libel or petition. In practice, this means a month. In case of urgency, there are two alternative ways to abridge these time limits. The normal way is for the lawyer to be present when the judgment is being given and immediately after to ask the court verbally to abridge the time limit. In case of opposition by the other party, the matter is entirely at the discretion of the court. Alternatively, an application may be made before the same court to shorten the time limit. Often the 6 days would have elapsed already by the time the application is notified to the other party. This involves delay and therefore the other method is eminently better.

### *G DETENTION OF VESSELS UNDER M.S.A.*

In terms of s.371 (1)<sup>115</sup> where a vessel is to be or may be detained under the Merchant Shipping Act, any commissioned officer on full pay in the Naval or Military Service of the Republic of Malta,<sup>116</sup> or any Police Officer not below the rank of Inspector, or any officer of Customs, or any officer of the Ministry responsible for shipping, or any Maltese Consular Officer may detain the vessel. If the vessel after detention or after service on the Master of any notice of or order for detention proceeds to sea before it

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113. subject to the provision of s.873 & s.891 of the COCP and of s.357 of the M.S.A. 1973.

114. s.822 (2) COCP.

115. M.S.A. Act XI 1973.

116. as amended by L.N. 148 of 1975.

is released by the competent authority, the master of the vessel and also the owner and any person who sends the vessel to sea and who is party or privy to the offence shall be liable for each offence to a fine not exceeding LM200. Where a vessel is to be or has already been detained under this Act the officer authorised to clear the vessel outwards shall refuse to clear that vessel outwards.

By virtue of s.357 (1) where a warrant restraining a vessel is obtained in connection with a claim which may be subject to a limitation of liability<sup>117</sup> or security is given to prevent or obtain release from such a warrant, the Court may order the release of the vessel or security, provided sufficient guarantee or security has previously been given, whether in Malta or elsewhere, in respect of the claim. If the guarantee in relation to any claim was given in the port where the event giving rise to the claim occurred or, if that event did not occur in a port, the first port of call after the event occurred, or in the port of disembarkation or discharge in relation to a claim for loss of life or personal injury or for damage to cargo, the court shall order the release of the vessel or security if the relevant port is also in a country to which the International Convention relating to the Limitation of the Liability of Owners of Seagoing Ships<sup>118</sup> applies.

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117. in terms of Part IX of the Merchant Shipping Act 1973.

118. Signed in Brussels on 10 October 1957.