
NATIONAL REPORT

THE MEANING OF 'SHIP' IN JUDICIAL SALES IN MALTA

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Introduction

Because of its geographical location in the centre of the Mediterranean, Malta has since time immemorial served as a maritime centre. Straddling major shipping routes, Malta has attracted ships to its shores, whether for supplies, repairs or to load or discharge cargo. This tradition has continued in more recent times and developed further when large transshipment facilities were constructed, turning Malta into a maritime hub. Maltese law and court practice operate together in such a manner that renders Malta an interesting and attractive jurisdiction for the arrest of ships and, in some cases, for their judicial sale. Judicial sales of vessels in Malta are either carried out through the traditional open auction method¹ or, alternatively, through private treaty,² which is a more recent legal development.

In recent cases concerning judicial sales, the courts have looked at the question as to what precisely is included in a judicial sale of a ship that is sold in Malta – is everything on board acquired by a buyer, irrespective of who owns those items at the time of the sale? The question is particularly relevant with respect to bunkers that are on board the vessel when sold, with bunker suppliers typically claiming that ownership of the bunkers was not transferred to the shipowner and that, as a consequence, since ownership did not pass, they retain rights over those bunkers that are not impacted by the judicial sale. The Maltese courts have also looked at this question with respect to specialised equipment that, although on board the vessel did not belong to the shipowner at the time that the vessel was sold. When considering the sale of a yacht by private treaty, the court was faced with the question of whether personal items of the ultimate owner and his guests that were on board at the time of the sale were included in the sale or not.

The *Orca II*

The principle that, for the purposes of forced judicial sales, a vessel must always be taken as a whole was established in local jurisprudence some time ago. The *Orca II*³ is the landmark judgment on this point. In its judgment, the Commercial Court stated as follows:

¹ In accordance with arts 313–57 ff of the Code of Organization and Civil Procedure (ch 12 of the Laws of Malta).

² The procedure for a court-approved private sale of a vessel or aircraft in Malta has been discussed in previous editions of this journal. See (2014) 20(4) *JIML* 474–76 and (2012) 18(3) *JIML* 356–58.

³ *Doctor of Laws Hugh Peralta as special attorney on behalf of the foreign entity Valkyrie Shipping Corporation of Panama, as owners of the vessel Orca II v Louis Muscat Baron as special attorney of Ronasons International Limited* (Commercial Court) (4 November 1986) 942/86 JH.

The arrested vessel is one unit with all its equipment and accessories and she cannot be broken up into pieces for the purpose (the enforcement) of a warrant (of arrest).⁴ For the purposes of the said warrant (of arrest), it is one object only that has been seized: 'A ship and any other Vessel is a *res connexa*; it is a whole which is made up of various distinct parts'.⁵ As Targa⁶ points out, *habent et naves quasi membra*. When one therefore refers to a ship or vessel, one includes by that word not merely the body or frame of the ship, but its tackle, apparel, munition, ordnance, which, though temporarily separated therefrom are destined for her permanent use because, as Mancini points out, it would be prejudicial to navigation to deal in a ship as distinct from its appurtenances as this would lessen considerably the value of the one and of the others.

The Commercial Court went on to confirm that the warrant of seizure on the vessel did not need to be issued on the individual parts of the ship and that the forced sale could, therefore, proceed with regard to the ship as a whole.

However, what is more relevant is the point made by Professor Cremona⁷ that 'the parties may ... distinguish, in any transaction effected by them, the ship from any article or from the articles which are an accessory thereof provided however they do so by means of an express declaration' – clearly indicating that it would be acceptable as a matter of Maltese law for, say, a provider of equipment for the ship to retain ownership over the equipment provided to that ship until full payment is received by the creditor. This all comes to the fore in a forced sale of a vessel, where such creditors will vie with competing creditors to have 'their' equipment removed from the ship, excluded from the forced sale and returned to them. In jurisdictions such as Malta's, where 'self-help' is generally frowned upon, such creditors will need to seek recourse from the courts to recover their 'belongings'. They will succeed in their action only if: (i) as will be seen in the following judgment, they bring their action before the forced sale takes place; and (ii) they demonstrate successfully to the court that the arrangement described by Professor Cremona was indeed entered into between them and the shipowner. Such creditors will carry the burden of proof as well as the related costs and risks of having such equipment removed from the ship.

Success in off-loading items of a ship in the circumstances described above will only succeed if the rules of 'accession'⁸ do not apply. If the equipment or other item provided to the ship becomes 'untied to or incorporated' with the ship and cannot be separated without 'considerable damage', the creditor will not succeed in claiming the item back. In such cases, the creditor will enjoy a claim for compensation⁹ and will have no choice but to compete with the other creditors for the proceeds of the sale of the vessel. Whether the debt owed to such a creditor will enjoy the status of a special (maritime) privilege over the ship or otherwise¹⁰ will depend on the nature of the debt.¹¹

The Zebbug

In the case of the *Zebbug*,¹² the Court of Appeal was required to delve into the question again, albeit from a different angle. The court was requested to examine whether bunkers that were on board the *Zebbug* at the time of the sale *sub hasta* were to be considered as included in that judicial sale by auction and, therefore, whether they were acquired by the buyer together with the ship. The bunker supplier was claiming a right over the bunkers that it supplied to the *Zebbug*. The bunker supplier

⁴ At the time, it was a warrant of seizure that was used to serve (in part) the purpose of a warrant of arrest and allow the judicial sale of a vessel in Malta.

⁵ The Court is quoting here from Felice Cremona in *F Cremona Notes on Maltese Maritime Law (Part I)* revised edn 1974 by George Schembri, University of Malta Press, 10 ff.

⁶ Carlo Targa *Ponderazioni sopra la contrazione marittima, Part II*, n.i. Genoa, Stamperia del Casamara (1750).

⁷ Cremona (n 5) 10.

⁸ Civil Code (ch 16 of the Laws of Malta) arts 566 ff.

⁹ *ibid* art 573(2).

¹⁰ Under the Merchant Shipping Act (ch 234 of the Laws of Malta) art 50.

¹¹ If the equipment qualifies as needed for the 'preservation of the ship', then such debt will qualify as a privileged debt in certain circumstances. See Merchant Shipping Act (n 10) art 50(g).

¹² Application Number 879/2006SM *Falzon Service Station Limited v MV ZEBBUG*, decided by the Court of Appeal on 6 March 2017.

brought its claim, as the court observed, *subsequent to* the judicial sale – and this was the crucial point. The Court of Appeal held that, *vis-à-vis* the buyer of the *Zebbug*, the contract that had been entered into between the bunker supplier and the previous shipowner was a *res inter alios acta* and, therefore, of no relevance to the buyer. The court stated that the bunker supplier's claim could not be exercised against the vessel, thereby reaffirming the principle that whatever forms part of the vessel and is on board at the time of the judicial sale is to be assumed to form an integral part of the vessel and consequently treated as part of and included in the sale of the vessel. The second point that the Court of Appeal made was that the bid made by the buyer was for the vessel and included its bunkers: in other words, the buyer had every reason to assume that the bunkers were being included in from the sale, particularly when no 'reserve' was made during the auction on this point¹³ and neither was any claim on the bunkers brought in court by the bunker supplier prior to the sale.

Interestingly, the court seems to have suggested *obiter dicta* that the position may have been different had the bunker supplier brought its claim and took remedial action *prior* to the sale of the vessel, meaning that the above-mentioned assumption that all on board is assumed to be included in the sale is an assumption *juris tantum* and not *juris et de jure*.

The MVB Ladybug

These proceedings concerned the private court-approved sale of the *MVB Ladybug*.¹⁴ A number of trailers were on board the vessel at the time the proceedings were instituted. The court was asked to exclude the trailers from the forced sale of the *MVB Ladybug*. The First Hall of the Civil Court, faced with no contestation, had no hesitation in accepting the request from the trailer operator and excluded the trailers from the sale of the vessel. In contrast to the previous judgment, the request for the removal of items from on board the vessel preceded the sale and was agreed on between the parties concerned without dispute: the fact that the items were trailers/containers that could easily be identified as belonging to the claimant and not forming part of the ship surely must have contributed to the amicable resolution reached in these proceedings.

The Indian Empress

The case of the *Indian Empress*¹⁵ also dealt with the sale by private treaty of a vessel in Malta. The spotlight was once again placed on the question of what items are to be considered as included in a 'forced' judicial sale of a ship. This case had a somewhat lively narrative and attracted considerable media attention. The owner of the *Indian Empress*, a 100-metre super yacht,¹⁶ had been facing financial difficulties for some years, eventually defaulting on loan repayments owed to Barclays Bank, the mortgagee. The bank and numerous other unpaid creditors sought to enforce their rights against the yacht and arrested her in Malta. No less than 14 warrants of arrest were served on the yacht. Eventually, the bank filed an application in court for the yacht to be sold through the court-approved sale procedure. Previous attempts for the yacht to be sold by judicial auction had failed. It was at this point that the mortgagee stepped in and requested the Maltese court to approve the sale of the yacht to a private buyer for a fixed price.

During the hearing that followed, a considerable amount of debate arose as to whether the so-called 'personal effects' of the ultimate owner and his guests could be excluded from the sale. These personal items included a baby grand piano (allegedly signed by Sir Elton John), paintings, cricket bats signed by world famous players and personal items of clothing.

¹³ The record of the judicial sale by auction indicates that the vessel was sold *tale quale as it lies and without reserve*.

¹⁴ *Doctor of Laws Ann Fenech as special attorney on behalf of the foreign entity Hyundai Heavy Industries Co Ltd and Hyundai Samho Heavy Industries Co Ltd v The Vessel MVB Ladybug and KPI Bridge Oil* intervening in the procedure in statu et teminis by virtue of a decree dated 1 April 2014 (First Hall Civil Court) (8 April 2014) 179/2014.

¹⁵ *Doctor of Laws Tonio Fenech as special attorney on behalf of the foreign bank, Barclays Bank plc, registered in England v The Vessel M/Y Indian Empress IMO Number 1006245* (First Hall Civil Court) (25 September 2018).

¹⁶ Length overall.

Submissions were made to the court that, according to both law and practice, judicial sales of vessels in Malta take place on a 'where is – as is' basis, with all there is on board. In a forced judicial sale (unlike a voluntary sale), the buyer is not normally presented with a list of items indicating the items that are to be considered as forming part of the ship and her appurtenances. So it is not always clear what is and what is not to be considered as included in the sale.

During the ensuing proceedings for the yacht's sale, the legal representatives of the yacht appeared in court and claimed that certain personal effects belonged to the ultimate owner and not to the yacht-owning company, whilst others belonged to his guests. During the hearing, the lawyers engaged with the court and debated the question as to whether the personal items that did not belong to the yacht-owning company but to the company's ultimate beneficial owner and his guests, which happened to be left on board the yacht, could be excluded from the sale. The court wanted to tread carefully when dealing with this problem to ensure that no exceptions were made to the general principle, adopted in practice when dealing with the sale of vessels. The court was saved the trouble of having to decide the point because the advocates appearing for the proposed buyer went on to declare that the buyer did not have any interest nor was it vaunting any rights over the personal effects on board the yacht. The court nevertheless did make some interesting remarks *obiter dicta* when moving to decide what was to become of those personal effects. The court declared that the guiding principle, in both a judicial sale by auction and a court-approved private sale, is that a ship is sold in its totality and everything on board the ship is to be considered an integral part of the ship and included in the sale.

The court held that, once all of the parties had agreed on the sale, any remaining personal items should be deposited in court. Separate proceedings, dealing with the personal items, could then be instituted by the interested parties. Through its decision on the matter, the court sought to arrive at a practical solution suitable for the execution creditor, the shipowner and the buyer. Whilst not willing to compromise the rule that a ship in a forced sale is sold in its entirety, the court applied a degree of flexibility to this rule by ordering the personal items to be deposited with an appointed depository.¹⁷

It is likely that the court arrived at such a decision in order to deter any claimant claiming ownership of the personal effects from acting against the yacht, in an attempt to enforce the relative claim. Therefore, simultaneously preserving the sacrosanct rule that, after a court-approved private sale, all claims or demands against the ship may only be enforced against the proceeds of the sale.

The Leonidas K

A more recent case related to the sale by auction of the merchant vessel the *Leonidas K*.¹⁸ In this case, the buyer was claiming that all equipment on board the vessel was included in the sale. In this judicial sale by auction, the execution creditor who instigated the judicial auction sale recorded (prior to the sale) that a piece of expensive equipment (consisting of a mechanical excavator) on board the vessel may not belong to the debtor and may not form part of the ship. The auctioneer too brought this fact to the attention of the bidders during the auction. The bidder who successfully bid and acquired the vessel in the auction went on, nevertheless, to claim that the acquisition of the vessel included the mechanical excavator. Judicial proceedings on this point followed. After examining the salient facts surrounding the point, the court decided that this equipment was excluded from the judicial sale and that ownership did not pass to the buyer.

Conclusion

These questions are essentially linked to and concerned with the definition or meaning of the term 'ship' in the context of a court-approved sale or a judicial sale by auction.

¹⁷ Note 15.

¹⁸ *Doctor of Laws Nicholas Valencia noe vs. The Vessel Leonidas K* (First Hall Civil Court) (Judicial Sale by Auction no. 14/2018).

The applicable provisions in the Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta) do not provide any strict definition of the word 'ship' nor do they offer any guidance on the matter in the context of a forced sale. In the absence of such a definition, recourse may be made to other relevant legislative instruments, namely the Merchant Shipping Act.¹⁹ When defining the term 'ship' in the context of a ship serving as a security for a debt or any other obligation, Article 37A(2) of the Merchant Shipping Act states that: 'A ship shall include together with the hull, all equipment, machinery and other appurtenances as accessories belonging to the ship, which are on board or which have been temporarily removed therefrom'.

The question that arises here is whether 'personal effects' typically found on board yachts (such as jewellery or a premium selection of wines) can be considered as 'accessories [or] appurtenances belonging to the ship': and, even if so, it is not entirely clear whether these can be excluded from the sale if it is proven to the satisfaction of a court that such items do not belong to the owner-debtor.

In the words of Prof Cremona:

[i]t is difficult to give a complete list of all the things which are to be considered as being appurtenances of a ship, for whether a given thing is so or not depends on a number of circumstances; but it may be said that in general whatever is found on and is destined for the permanent use of a ship is to be considered as included in the meaning thereof ...²⁰

One final observation is the possible defence of *accessio*,²¹ which will enable the rebuttal of a claim for the removal of a thing from on board a ship (even if there is proof that it did not belong to the owner-debtor) if that item is deemed to have become 'united' or 'incorporated with' the ship and cannot be removed from it without causing a degree of damage or excessive costs.²² In such cases, the owner of that item relinquishes his right to recover the thing and instead will have a right to compensation. It is difficult to establish whether such a right to compensation lies against the previous owner-debtor or against the buyer. The authors are of the view that, if the ship is sold by court approval to a buyer who has not been made aware that on board the ship there are items belonging to others, the right to compensation cannot be advanced against him. The corollary of that rule will hold true: if the buyer is made aware, then he will tweak his bid accordingly and be responsible for compensating the buyer.

In essence, what is important is that any claim that is made by an owner to remove his items on board a ship that has been subjected to a forced sale in Malta will need, in order to succeed, to correspond with the following basic rules:

- Clear evidence will need to be brought proving that title in the items has remained vested in the claimant.
- Any claim must be brought by the claimant prior to the forced sale and must be brought to the attention of the buyer or buyers, whether in an auction or private sale.²³
- The items claimed can be removed from the vessel without damage to avoid of the application of the rules of *accessio*.

¹⁹ Merchant Shipping Act (n 10).

²⁰ Cremona (n 5) 10–11.

²¹ Civil Code (n 8) arts 566 ff.

²² *ibid* art 573(2). See also *Scicluna et v Commissioner for Revenue*, Court of Appeal, 25 Nov 2015, Appeal Number 49/2009/AE.

²³ In a judicial sale by auction, it is the auctioneer who (having obtained prior instructions from the Court) will need to raise this during the auction, while in a judicial sale by private treaty the items excluded from the sale will need to be indicated by the Court in its decision approving the sale.