

COURT APPROVED PRIVATE SALE OF VESSELS IN MALTA

The Blankenese *The Ladybug*

A Comment previously published in this *Quarterly*¹ has described the novel procedure prescribed in the Maltese Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, which offers creditors of an indebted vessel a fast-track and simple remedial mechanism, namely that of requesting the superior Courts of Malta to approve the private sale of the vessel. Article 358 of Chapter 12 stipulates that the creditors making this request to the courts must possess an executive title and the sale must be in favour of an identified buyer at a determined price.² The law also lays down a number of requisites in order for the court to approve the said sale. First, it is mandatory for the applicant to submit two appraisals confirming the value of the vessel by independent and reputable valuers, and it is also incumbent on the applicant to adduce to the court evidence that such private sale is in the interest of all known creditors and that the price offered by the proposed buyer is reasonable in the circumstances of the case.³

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1. J Scerri-Diacono, "Private, Court-Approved Sales of Vessels and Aircraft in Malta" [2012] LMCLQ 356.

2. Article 358 of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, publicly available: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lomamp;itemid=8577.

3. *Ibid*, Art.359.

Since then, the Maltese courts have handed down a number of decisions approving private sale of vessels and a healthy body of judgments has started to grow, thereby creating legal certainty and breathing confidence into the procedure. As the body of jurisprudence continues to grow, the Maltese courts have started to focus on some of the finer points and other nuances of this mechanism.

One such decision is that of the First Hall Civil Court in *The Blankenese*,⁴ where the allegation was made that the mortgagee was requesting the court to sell the ship to a company of which the same mortgagee was in control. Another decision is that of the same court in *The Ladybug*,⁵ where the court delved into the practical application of the mechanism and sought to draw the red lines that cannot be crossed in opposing the private sale of the vessel.

In *The Blankenese*, the court held that there is nothing in the Maltese Companies Act that prohibits a shareholder from acquiring property of a company in which he is a shareholder, and went on to make a distinction between the physical individual shareholder and a duly incorporated company which is separate and distinct from its members. It specifically stated that parties alleging bad faith on the part of the buyer must prove bad faith before the court and it emphasised that the price being paid by the buyer was as good as or superior to the valuations produced by the mortgagee, so the court was convinced that the valuations were reasonable and true.

In *The Ladybug* the court recognised from the outset that Art.358 of Chapter 12 offers a creditor with an executive title a *sui generis* mechanism to execute this executive title. The court also made it amply clear that any execution creditor who decides to make use of this mechanism is not abusing the law, even though such execution creditor could have decided to have the vessel sold publically by a judicial auction. The court recognised that the private sale of vessels is a legitimate remedy according to Maltese law. There is, however, an important caveat to this: the court emphasised that creditors who decide to apply for the approval of a private sale of a vessel cannot abuse this mechanism or use it frivolously to the detriment of other creditors or the debtor himself. The court continued to build on this principle and went on to say that all parties must be given the opportunity to be heard and to make all the relevant submissions. The court then went on to say that the primary obligation of the creditor making use of this remedy is to provide two valuations of the vessel to the satisfaction of the court. It is further incumbent on the creditors to prove that the determined price of the sale is reasonable and that the sale is in the interest and for the benefit of all known creditors. These two elements are two sides of the same coin; they are indispensable in protecting the interest of all parties and thereby inspire confidence in the courts when approving a private sale of a vessel.

4. *Joint Stock Company Rietumu Banka, a foreign bank registered in Latvia locally represented by its special mandatory Dr Paul Micallef Grimaud as duly authorised, v The vessel MV Blankenese, registered in Malta, IMO number 8412390, having call sign number 9HUF6, having gross tonnage of 2882, property of Blankenese Shipping Limited, a company having its registered office at 18/2 South Street, Valletta*, which is publicly available in the Maltese language at: www.justiceservices.gov.mt/courtservices/Judgements/search.aspx?CaseJudgmentID=82764&func=judgementdetail.

5. *Dr Ann Fenech for and behalf of the Companies Hyundai Heavy Industries Co Ltd and Hyundai Samho Heavy Industries Co Ltd v The Vessel MV B Ladybug and KPI Bridge Oil, intervened pending proceedings*, which may be publically available in the Maltese language at: www.justiceservices.gov.mt/courtservices/Judgements/search.aspx?func=pdftext

The court admitted that the execution creditor has an interest that his credit is satisfied but said that, if the value of the vessel is not enough to satisfy all his credit or the credit of all known existing creditors, this element alone is not enough to stall the private sale of the vessel. In view of this, creditors are not compelled to prove that all known creditors will be paid from the proceeds of the private sale of the vessel; they must simply show that the private sale of the vessel is in the interest of all known creditors.

Furthermore, the court said that, in order to prove that the value of the sale of the vessel is reasonable, it should rest on the valuations which are put forward before it and that, once that the execution creditor puts forward valuations which are credible, the court has no need to nominate a court expert to verify such valuations. If the debtors or other creditors are not satisfied with the purchase value of the sale of the vessel, it is incumbent on them to rebut this by providing the court with adequate technical and financial proof that discredits the valuations. In simple terms, they must exhibit tangible credible proof before the court to sustain their claim that the court should not approve the private sale of the vessel. Further to this it can be deduced from the judgment that physical surveys of vessels give the court comfort with the valuation given; in this case the court found that physical surveys of a vessel are the best proof for valuing the vessel.

The court pointed out that the law does not require the execution creditor to offer the vessel for sale on the open market for determination of its value. If anything, the court added, it is up to the other creditors or the debtor himself, during the pending proceedings, to try to find a buyer willing to purchase the vessel at a higher price than that proposed by the execution creditor. The *raison d'être* of the court is based on the presumption that the execution creditor has an interest to sell the vessel at the best price possible; and the assumption that a person acts in good faith should not be excluded in a court-approved private sale. It must be said that the court has had no hesitation in throwing out cases where a creditor attempted to use the legal mechanism (described above) as a means of obtaining court approval of a dubious sale. In a more recent, strongly-worded decision,⁶ the court castigated a creditor that failed to bring all facts surrounding the sale to light and, taking the cue from Canadian and Hong Kong decisions,⁷ it held that in such circumstances the proposed sale was not reasonable and in the general interest of the creditors.

These two recent cases clearly show the pragmatic and transparent approach adopted by the Maltese courts when approving a private sale of a vessel. They outline the court's willingness to exercise its discretion in the proceedings with regard to a private sale.

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6. *Malta Towage Ltd v MV Irmak* (25 August 2014) Unreported (First Hall Civil Court).

7. *International Marine Banking Co v The Dora* [1977] 1 FC 633 (FCTD) and *Den Norske Bank ASA v Owners of the Ship Margo L* [1997] HKEC 767.

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