

Diploma in Law

Lecture 6: Executive Titles & Executive Warrants

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**Diploma in Law
(Malta)**

Introduction

- By 'executive title' one refers to a legal mechanism on the basis of which execution can be obtained, operating on the presumption that the result of the claim or issue at hand is no longer open to challenge.
- Thus, if party A is in possession of an executive title, he may enforce his claim by means of the issue of such executive title, generally an executive measure or an executive warrant.
- According to Article 252 an executive title can only take the form of one of the following five types of titles for it to be enforced: (i) judgements and decrees of the courts of justice, (ii) contracts, (iii) taxed bills and judicial fees and disbursements, (iv) awards of arbitrators and (v) bills of exchange and promissory notes.



Judgements and decrees of the Courts of Justice of Malta

- In order to best comprehend this first head of executive titles; it is fundamental to firstly distinguish between judgements and decrees.
- A judgement terminates an issue between contending parties. Although certain judgements given could be preliminary judgements, here the law seems to be referring to final judgements. As a rule, the judgement must constitute *a res judicata*.
- A decree on the other hand refers to any court pronouncement given during the course of proceedings, in order to facilitate or regulate the proceedings and thus lead to final judgement.

Contracts

- A contract is deemed to be an executive title only and if it is (i) received before a notary public in Malta OR before any public officer so authorised to receive AND (ii) it is in respect of a debt that is certain, liquid & due, and does not consist in the performance of an act.
- Such contracts can be executed without the need of recourse to the courts in order to obtain judicial acknowledgment of the debt.
- However, technically although such contracts are executive titles, it is still possible to obtain judicial acknowledgment of a certified amount i.e. another executive title. The Commercial Court in Chetcuti vs Vella (1984) held that this is a valid action but in such a case plaintiff would have to bear the costs of the case.



Contracts of Loan

- Contracts of loan with banks are also executive titles as held in *Cremona vs Mixter* (First Hall Civil Court, 1975). In fact, most of such deeds will usually contain an expression as to the effect of: “X jikkostitwixxi ruhu debitur veru, cert u likwidu a favur ta’ Y”.



Contracts of Overdraft

- The same court also held that a contract of overdraft does not create an executive title. The debt can never be thoroughly certain. Although an overdraft contract may state the amount up to which party X may debit his amount, for example €10,000, it may not necessarily be the amount of the actual debt. If party X overdrafts €1000, this will be the debt despite the fact that the overdraft contract was for €10,000. For the debt to be deemed 'actual' the bank would have to institute court action to seek judicial recognition of the actual amount due.



Contracts of Emphyteusis

- The same court held that for contracts of emphyteusis are executive titles wherein the ground rent is stated.



Performance of an Act

- One must keep in mind the fact that the law is here referring to executive title in respect of money debts, and not debts consisting in the performance of an act.
- Thus, if a person binds himself, by means of a contract, to the performance of an act, that contract may not be considered to be an executive title of which one can seek enforcement without having recourse to the courts.



Private Writings

- A money debt acknowledged in a private writing, although facilitating proof of such debt, is not an executive title for the purposes of the law.



Taxed Bills and Judicial Fees and Disbursements

- Whenever the courts deliver a final judgement, the registrar of the courts will issue a taxed bill of costs or taxxa. This is a bill of fees and expenses incurred by the parties and the fees due to their respective lawyers that constitutes an executive title.
- The parties & their lawyers may by taking executive action, immediately seek to recover those fees and expenses stated in the bill that are due to them.
- In so far as the parties' lawyers are concerned, the fact whether the case has been won or lost is irrelevant because fees will be equal. A client pays his lawyer who in turn acts on behalf of his client in order to recover the expenses due by the other party.



Awards of Arbitrators Registered with the Malta Arbitration Centre

- What is necessary to mention in this respect is that when an issue is referred to arbitration, the arbitrator's award is considered to have the same effects of a final judgement. Such an award is enforceable in the same way as all judgements and other executive titles are enforceable.



Bills of Exchange and Promissory Notes

- Prior to the 2004 amendments bills of exchange were not considered to constitute an executive title, unlike under Italian law. The only way to enforce a bill of exchange was through the *actio cambiaria*.
- However the amendments introduced a procedure whereby a bill of exchange or promissory note can be enforced by means of a judicial letter sent for that purpose.
- The *raison d'être* of the introduction of bills of exchange and promissory notes under Article 253 was to reduce litigation regarding relatively small transactions by consumers, while strengthening these instruments.
- In this case, the competent court (which depends on the value in the bill or note) may, upon application of the party against who an executive title is issued, suspend the execution of the bill or note in whole or in part.



An application may be made on the following grounds:

(i) Signature of bill or note is not of the person opposing the bill or note
OR neither of his mandator

(ii) Person opposing the bill or note brings forward grave and valid reasons to oppose execution.

Court will make its decision via decree that will not be subject to appeal.

Court may also decide that the person opposing the bill or note is to give security
within 20 days from the service of the judicial letter sent for the purpose of rendering the bill or note executable.



Micallef vs Pater Finance Co. Ltd (Court of Appeal, 11/01/2006)

The court here entered into a detailed discussion vis-à-vis sub-article bills of exchange and promissory notes.

Facts:

- Plaintiff pleaded grave and valid reasons to oppose execution by arguing that the bills in question represent a balance on a vehicle purchased by him, however the vehicle was affected by a 'difett mohbi'. P argued that the balance would not be paid until the D rectifies the problems.
- D countered P's plea by arguing that (i) there was no such hidden defect, (ii) even if there was it wouldn't be a grave and valid reason under 253(e) and (iii) P had other remedies such as those relating to guarantees. FH decided in favour of D, P appealed.



Legal principles

- Court noted that the legislator had long felt the need for the bill of exchange to be classified as an executive title. In fact, even though it wasn't recognised as an executive title, case law had practically always considered the bill of exchange as near to an executive title in nature. According to court, it was for these reasons why the 2004 amendments included it under this article.
- By virtue of the amendments the procedure of bills now distinguishes itself from other COCP provisions since now a creditor can quicken the recovery of amounts owing and need not institute an action.



- Grave and valid reasons for opposition:
- The doctrinal and jurisprudential principle is that institutor must either have a (i) real and absolute right (ex: defect of BoE requisite) OR (ii) or personal and relative (ex: bad faith or dolus) right in order to have grave and valid reasons to oppose the executive title.
- Local jurisprudence has shown that ‘grave and valid reasons’ should however never enter into the field of obligations. In fact, the execution of the BoE should not be suspended for credits that although are personal are not liquid.
- Appeal was not accepted.

Other Executive Rights

- Although the list seems exhaustive, one finds other executive titles not listed under the COCP.
- Example of these are:
- Mortgages in terms of the Merchant Shipping Act
- Government departments, in terms of a special law, may create an executive title by means of a judicial letter
- Head of Government departments may also write a letter accompanied by a sworn declaration that is an executive title.
- E.g: Commissioner of Inland Revenue and Commissioner of VAT



General Provisions Regarding the Enforcement of Executive Titles

- A distinction needs to be drawn between the execution of a judgement and the execution of the other four executive titles mentioned in Article 253.
- A judgement is an executive title par excellence. Its execution is directly and automatically enforceable. The general rule is enforcement after 2 days from the day of delivery as per Article 256.



- Article 255 provides the exception to the rule. Certain judgements may be enforced after 24 hours from delivery, due to their urgent nature.
- (i) Judgement on any collateral issue OR interlocutory decree provided time for enforcement is not stipulated
- (ii) Judgement rescinding the warrant of impediment of departure of ship OR warrant of seizure OR garnishee order relating to ships or merchandise.
- (iii) Judgement ordering the supply of maintenance
- (iv) Award of arbitrator in accordance with Arbitration Act.
- Furthermore, through Article 257 the court may on grounds of urgency, order the enforcement of any judgement even before the above time limits. In such case the order for enforcement may be made in the judgement itself.



Judgement issued by the Court of Appeal v. First Hall

- Although the law notes that judgements may be generally enforced upon the lapse of 2 days, this is only applicable to Court of Appeal decisions.
- In the case of a judgement delivered by the First Hall, one would have to wait until the lapse of the appeal period before proceeding with the enforcement of the judgement. If one attempts to enforce a judgement which isn't a res judicata, by the issue of an executive warrant before the lapse of the 30-day period, the execution of the warrant will be withheld until it is determined whether or not an appeal is going to be entered.
 - Fifth level
- One must also note that while an appeal automatically suspends the execution of a judgement of a lower court, a re-trial does not suspend the enforcement of a Court of Appeal judgement.



Article 256 – Other Executive Titles

- Before one can seek the enforcement of public deeds, taxed bills of costs and arbitration awards & bills of exchange and promissory notes, the creditor must file a judicial act against the debtor.
- This procedure of official intimation is essential for the enforcement of these executive titles.
- Example: If the enforcement of a contract of loan becomes necessary owing to default of payment, the creditor must file a judicial letter against the debtor, requesting payment, before he can enforce the contract through the means provided by law. Once debtor is so notified, the contract may be enforced after 2 days from the day of notification of the judicial letter.
- IMP: although before the judicial letter is filed it constitutes an executive title, yet, it cannot be enforced in the same way that a judgement can be.



Procedure for Enforcement of Executive Titles

- Judgements and decrees, (c) taxed bills and (d) awards of arbitrators of the Superior courts may be enforced within 10 years from the date it could have been enforced.
- Judgements and decrees, (c) taxed bills and (d) awards of arbitrators of the Inferior courts or Small Claim Tribunal may be enforced within 5 years from the date it could have been enforced.
- Contracts, (e) bills of exchange and promissory notes & judicial letters under Article 166A may be enforced within 3 years from the date it could have been enforced.



- Lapse of the amended periods does not render the executive title unenforceable, as the periods mentioned in the law are not equivalent to prescriptive periods.
- Once such periods expire, an application must be filed before the competent court requesting court to authorise such enforcement. The applicant must also confirm on oath the nature of the debt or claim sought to be enforced and that the debt is still due.
- The reason for such time periods is that the law presumes that after the lapse of such periods the debt would have, in all probability, been paid.

Galea Testaferrata Bonici v. Borg (Court of Appeal, 1995)

The court said that the (then) 5-year period commences to run from the date when the debt is due, and not from the date of the debtor's notification of the judicial letter. In this case, it was submitted that although the contract could strictly speaking be enforced because a judicial letter had been sent, however, since the period commenced from the day when the debt is due, the said period had already elapsed.



- The main argument was that since the law states that the period commences to run from the day on which the executive title could have been enforced, then the period runs from when the contract could be enforced i.e. after sending of judicial letter to debtor.
- However, court did not agree with this line of reasoning and held that when the law mentions “could have been enforced”, it should not be interpreted in the sense that the period for enforcement begins with the sending of the judicial letter but in the sense that the period begins to run from date when debt falls due. This is the moment that the executive title could be enforced.



Procedure for Enforcement when Debtor is Deceased

- This procedure for seeking court's permission in order to enforce an executive title also becomes necessary in another instance: when the original debtor has died, as per Article 259(1).
- If party A has a judgement against party B who then dies, this doesn't mean that it will no longer be possible for party A to enforce that claim and thus get paid. Party A would still have the right to obtain satisfaction of his credit from the heirs of party B; the original debtor who has died.
- The procedure generally entails: (i) filing application in court stating that party B has died, (ii) requesting court to authorise the enforcement of the executive title against party B's heirs, (iii) court informs heirs who will be given a time limit within which to file the reply and (iv) court will decide whether to allow the creditor to execute his title and against whom.



- Heirs may plead that for example: they are not heirs of X, that they may have renounced to his inheritance, that they are not the only heirs or that there are other persons who should contribute to the payment of the debt according to their share in the inheritance. If the debtor's heirs are not known, one must follow the procedure for the appointment of a curator. Such subject represents the heirs during the hearing of the application.
- Thus, when the creditor requests court's permission for the enforcement of the title, party A must also file another application requesting the court to notify heirs or presumed heirs or to appoint a curator to act on behalf of the inheritance. If the presumed heir who is notified with the second application does not reply with the specified period OR there is no known heir OR heir hasn't accepted inheritance, a curator will be appointed.
- Sub-article (3) notes that the time allowed to deliberate upon acceptance of inheritance will not operate as a stay of the execution proceedings.

Application of Actio Surrogatoria

- Article 263 is an application of the principle inherent in the actio surrogatoria, by means of which creditor may execute or enforce a debt owed to his debtor.
- For instance, if C owes money to B and in turn B owed money A, A may exercise the action pertaining to B in order collect the money that C owes to B that will be paid to him.
- Therefore, in applying the above principle to the sphere of enforcement of executive titles, if B has a judgement against C and A has a judgement against B, A may in execution of his judgement against B, step into the shoes of B and enforce on his behalf the judgement that B has against C. By means of this A is able to enforce the executive title that belongs to his debtor.
- Such enforcement must be backed by a writ of summons, served both the debtor and on his creditor.



Other Points on Enforcement

- Article 260 provides that an executive title may be enforced on both immovables and movables.
- Article 261 provides that two executive titles may be enforced by means of one instrument.



The Role of the Courts in the Enforcement of Executive Titles

- Article 264 has been in its current form from 1886. Sub-article (1) states that unless otherwise provided in the COCP, judgements are enforceable by the Court by which they are delivered, even though the execution is to place beyond the limits of the local jurisdiction of the court.
- Likewise, sub-article (2) notes that any other executive title under article 253 is enforceable by the court competent to take cognizance of the subject matter thereof.
- Vis-à-vis appeals, the judgement will be enforceable by the court of first instance independently of whether the CoA confirms, varies or reverses the judgement of the court of first instance.



The Provisional Enforcement of Judgements

- The rule under our law is that the court will not order the enforcement of a judgement unless it is a res judicata. However, it is still possible to ask for a provisional enforcement of a judgement, even though the time limit for appeal has not elapsed or an appeal has been filed.
- It is Article 266 that provides that a judgement (not being a res judicata) may be provisionally enforceable on demand of the interested 3rd party.



- In fact, the court in *Garden of Eden Garage Limited v. Awtorita' dwar it-Trasport ta' Malta* (First Hall Civil Court, 2011) held that nowhere is it stated in our Code that a party is prohibited from asking for the provisional execution of a judgement in parte, in the same way that our code doesn't prohibit the provisional execution of a part of a judgement subject to appeal.
- This remedy is exceptional and extraordinary since a factor that must be weighed by the court is that the Court of Appeal may reverse the first judgement.
- The application that must be filed before the First Hall or Court of Magistrates must be served on the opposite party who will be entitled to file an answer within 2 working days. The Court of First Instances will, after summarily hearing the parties, dispose of the application as soon as may be after the filing thereof. However, it must be noted that there are four difference scenarios to be considered as provided for under sub-article (3):



- (i) If application for provisional enforcement is filed before the delivery of the judgement by the first court, that court is to dispose of the application as soon as may be after such judgement is delivered
- (ii) If application is filed after the delivery of judgement by the first court but before the other party enters an appeal, again it is the court of first instance that is to decide whether or not to order the provisional enforcement of the judgement
- (iii) If the application has not been disposed of by the first court before the lodging of the record of proceedings before the appellate court (i.e. defendant has already appealed), the application will be disposed of by the CoA, because the appeal would have already been filed by the defendant. Thus, it is the CoA that will decide whether or not to allow provisional enforcement of first court's judgement.
- (iv) If demand for declaration of provisional enforcement is not made by the party interested before the court of first instance, such demand may be made to the appellate court at any time prior to the delivery of the judgement on appeal.

- The party requesting provisional enforcement has the burden of proof to show that even though the matter is still under appeal and subject to a potential reversal there will be greater prejudice in postponing or delaying execution if not granted provisionally as per sub-article (7).
- It is important to point out that where the Court of First Instance has declared a judgement to be provisionally enforceable, the appellate court may, at any time before delivering judgement, on the application of the interested party, confirm, vary or revoke the decision.
- Furthermore, the party against whom execution of a judgement was provisionally enforced may be entitled to damages and interest in the case of reversal or variation of such judgement (sub-article 8)
- Also, the court that ordered the provisional enforcement of the judgement, may at any time order the party entitled to such executive to give the opposite party sufficient security for the payment of damages and interest that may become due if the decision on provisional enforcement is reversed or varied. Where the judgement refers to the payment of moneys or security, the court may stay the execution if the interested party gives sufficient security for the execution of the judgement on it's becoming a res judicata.

Provisional Enforcement by Operation of Law

- The law clearly states that there are a number of judgements, some of which are always provisionally enforced, while other can never be provisionally enforceable.
- Article 267 lists those judgements that are always provisionally enforceable:
- (i) Any judgements regarding maintenance: if the court of first instance grants a maintenance order in favour one party, that judgement is by law enforced immediately, even if the other party files an appeal, because it would be unfair for the party in whose favour the maintenance order is granted, to remain without maintenance pending the appeal.
- (ii) Any judgement providing redress against infringement of an individual's right to life or providing remedies against illegal arrest or forced labour: these are human rights actions and therefore are always provisionally enforceable. If first court decides that X's arrest is illegal and government appeals, X cannot be kept in custody pending the appeal.
- (iii) Any interlocutory decree: since they are necessary for the proper administration or management of a case, they are always provisionally enforceable.



- On the other hand these judgements are never provisionally enforceable are:
- Article 270: judgements dealing with the registration of hypothecs in the Public Registry: here the law wants to avoid the possibility of a judgement being registered and then for example cancelled, depending on CoA's judgement. Such judgements can therefore only be registered and therefore enforced when there is a final and definite judgement.
- (ii) Judgements dealing with the ratification or cancellation of the registration of an act of civil status: if for instance, a marriage and is sought to be registered in the Public Registry, the Director of Public Registry will not only demand a copy of that judgement but also a certificate that there is no appeal from that particular judgement, as these judgements are not provisionally enforceable.
- (iii) Judgements on industrial patents: reference to this is found in the Commercial Code.



Final Points

- It is important to bear in mind the fact that if the court of first instance refuses to provisionally enforce a judgement, there is no possibility of that decision being overturned i.e. no appeal is allowed from that decision.
- A right of appeal is only possible in the case that the court of first instance has accepted to provisionally enforce the judgement.





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ADVOCATES

The Executive Warrants

• Executive titles, according to Article 273 may only be enforced by any of the following executive acts or warrants:

- (a) Warrant of seizure of movable property
- (b) Warrant of seizure of immovable property
- (c) Warrant of seizure of a commercial going concern
- (d) Judicial sale by auction of movable/immovable property OR of rights annexed to immovable property
- (e) Executive garnishee order
- (f) Warrant of ejection/eviction from immovable property
- (g) Warrant in factum
- (h) Warrant of sea vessels
- (i) Warrant of arrest of aircraft
- (j) Warrant in procincto.



Preparation and Issue of Executive Warrants

- The law provides (Article 274(1)) that these warrants must be issued by the court on demand if the party who seeks the issue of the warrant i.e. the creditor.
- The registrar is given the power to oversee the issuing of (i) a warrant of seizure and (ii) executive garnishee order if, in his opinion, the signature of the judge or magistrate cannot be obtained within a reasonable time. Verbal authorisation from the judge or magistrate must be first obtained.



- The judge or magistrate will then attach his signature under that of the registrar at the earliest opportunity as proof that the authority has been given. If such authorisation is not possible to achieve, the registrar will also be able to issue such warrant over his signature. However, this may still be subject to ratification by the judge or magistrate as soon as possible.
- In the latter scenario no action may impugn the regularity of such warrant on the ground that it was issued over the signature of a judge or magistrate.
- The demand for the issue of ANY warrant or order must be made by application wherein it must indicate the sum OR article due in virtue of the title. The remedies and/or provisions being demanded must be included.
- Sub-article (3) notes that if one enforces ANY executive title OTHER than a judgement, then one would also have to file a copy of the judicial act with which one sought the enforcement of that act. IMP: ex: A bound himself in contract to pay €10000 to B, but failed to do so.



- B wants to enforce that contract to obtain payment and must first file a judicial letter: B vs A asking A to pay.
- Attached to judicial letter must be a legal copy of the contract that must be filed in court
- Official letter is served on debtor and provided that debtor does not pay, B will seek to issue warrant by ordering a copy of the judicial letter from court, a copy of notice of service and a copy of the contract.
- When A enforces contract, he must get a copy of that judicial act, copy of notice of service and copy of contract and attach them to the warrant that is filed.
- Therefore, it is only the copy of the judgement that need not be filed because the judgement is checked by the court.

- When one speaks of copy, this does not mean a normal photocopy. Rather, a legal copy prepared or issued by the courts that must be acquired by the creditors and attached to the warrant* (applicable to precautionary acts).
- Finally sub-article (4) states that if by the same warrant or order the party seeks to also recover judicial costs, the amount thereof will be stated in the demand and the taxed bill of such costs will be attached thereto.

Powers of Executing Officer

- Court executing officer must call in 2 witnesses and exercise all powers reasonably required of him to execute the warrant. This even includes the breaking open of any outer or inner door or of any box or other thing in which there might be effects liable to seizure.
- Vis-à-vis the seizure of property of Government of Malta, the officer will not execute until 4 working days have lapsed from day on which he is communicated in writing.
- Prime Minister may establish a list property that cannot be subject to an executive or precautionary warrant.



Opposition

- No opposition to the execution of any warrant or garnishee order must be considered until execution has been effected.



Time for Execution

- No warrant or garnishee order may be executed other than during such time prescribed by the Minister responsible for justice. This is saving any exceptions laid down in the COCP. Regulations made may also allow execution other than during the prescribed time. This is all provided that for reasons of urgency to be confirmed on oath by the applicant, the court may allow the execution of any warrant or order at the first available opportunity to the party against whom it is issued, or to his lawful representative.



Service

- A copy of the warrant or order must be served by the court executing officer onto the party against whom it is issued OR his lawful representative, at the first available opportunity i.e. without delay
- On execution, the officer shall return it to the registrar together with a certificate stating whether the warrant or order was executed:
- Affirmative response: certificate will also state the details of execution o Negative response: reasons why execution was not effected.



Damages in Case of Nullity

- The nullity of any warrant OR order OR of the execution will entitle the party against whom the warrant or order is issued to an action for damages and interest against the person suing out execution if the nullity arises out of any act of such person, or against the court executing officer who executed the warrant or order if the nullity arises out of any act of the court executing officer.



How Executive Acts may be Impugned

- Article 281 notes that without prejudicing any right under the COCP or any other law, the person against whom an executive act has been issued OR any person having an interest may make an application to revoke the executive act, totally or partially, for any reason valid at law to the court issuing the act.
- The application must contain all desired submissions together with all documents sustaining such application.
- The opponent has 10 days to file a reply containing all submissions that such opposite party may wish to make together with all documents sustaining the reply that are within its ability to file. This is provided that the period may be shortened in urgent cases.



- In default of opposition the court will accede to the demand.
- Court will then decide on the application after hearing the parties and receiving such evidence as it may deem fit – within a period of not later than 1 month from filing of said application.
- An appeal from the decree issued by court may be made within 6 days from the date on which the decree is read out in open court. CoA will appoint appeal within 1 month and must be decided within 3 months of appointment.
- For such appeal the payment of security costs normally paid to file an appeal is not required.



The Warrants of Seizure of a Commercial Going Concern (Azjendi Kummercjali)



Introduction

- The warrant of seizure of a commercial going concern can also be a precautionary warrant or an executive warrant.
- According to the law, for the purposes of the title on executive warrants of seizure of commercial going concerns, such 'commercial going concerns' are any kind of commercial enterprise conducting a business activity and includes machinery, apparatus, goods, corporeal and incorporeal rights, movable property, immovable property, licences, copyright and good-will.
- While there is nothing in the law which states that such a definition also applies to the notion of precautionary warrants of such a nature, a reading of Article 848A(2) would seem to indicate that this is the case.
- Precautionary warrants of this nature may be revoked by means of a counter- warrant, in terms of Article 836



Precautionary Warrants of Seizure of a Commercial Going Concern

- The law states that a precautionary warrant of seizure of a commercial going concern may solely be issued to secure a debt or claims which could be frustrated by the sale, in whole or in part, of the said going concern.
- For this purpose, not other warrant may be issued against the going concern, unless it is this warrant of seizure.
- This means that the court cannot issue a garnishee order against the going concern, for example



- It is therefore up to the creditor to prove to the satisfaction of the court that such a warrant of seizure is being requested solely for the aforementioned purposes.
- The effect of a precautionary warrant of seizure of a commercial going concern is to preserve the totality of the assets of the going concern, including licences and good-will, so that such assets are not sold in part or in whole and are to be concurrently kept in business.
- However, the court shall not accept a demand for the issuing of a warrant if it is satisfied that there are other means to safeguard the amount due.
- The court shall not issue any such warrant unless it is satisfied that such warrant is necessary to protect the rights of the applicant who, prima facie, appears to have such rights



The Application of Other Provisions of the Law to Precautionary Warrants of Seizure of a Commercial Going Concern

- Article 848A makes it clear that the provisions of Articles 840, 842, 843, 844 and 848 all apply to this warrant in particular.
- Hereunder is a brief description of the aforementioned articles in question:
- Article 840 – The marshal (court marshal?) shall describe in detail the quality and number of things, as well as the weight, measure and value thereof, if applicable and if the applicant makes an express demand to this effect in the application for the issuing of the warrant;
- Article 842 – The court may give any order to prevent any loss, damage or deterioration of the things described, upon the application of any party, so long as due notice is given to the other party;



- Article 843 – The applicant is bound to bring the action in respect of the right stated in the warrant within twenty days from the issue of the warrant, and if the applicant fails, without just cause, to bring the action, the effects of the warrant shall cease and such applicant will be liable for all damages and interest;
- Article 844 – If the party against whom the warrant was executed allows the applicant, by means of a note filed in the registry, a time longer than twenty days, the warrant shall remain in force for the extended period of time;
- Article 848 – Saving the provisions of claims of the Government, no warrant of seizure can be issued by the Court of Magistrates (Malta) or the Court of Magistrates (Gozo) in its inferior jurisdiction unless the warrant is sued out by a demand that the credit or claim are judicially acknowledged, and the debt or claim exceeds €1,164.69, or the demand for such warrant is for an article which is property belonging to the person suing out the warrant

The Appointment of the Administrator and Expert, and the Rights and Duties of the Administrator

- When a demand is made for the issue of the precautionary warrant of seizure of a commercial going concern, the court shall, after hearing the parties, appoint an administrator.
- In order to effect such action, the court shall consider whether to allow the going concern to continue being run by the debtor, or by such persons as may be entrusted by the debtor with the assistance of the administrator, or by the administrator alone



- The administrator as appointed by the court must have, in the court's opinion, the necessary qualifications to run and administer the said going concern on his own.
- The court shall also appoint an expert under Article 89 and establish a short and peremptory time within which there shall be filed an itemised list, to be confirmed on oath, of the value of the whole property forming the capital of the commercial going concern
- The administrator is responsible for the commercial going concern and has the right to sell and administer the ordinary running of the concern, provided that for decisions of an extraordinary nature, he must file a demand in court to be granted such authorisation

- The administrator may also ask the court to authorise him to sell the said going concern, or even part of the going concern, if there are fears that it will incur a loss in market value.
- The administrator has the right to payment that the court may be of the opinion is due to him, in consideration of the value of the going concern and of the activity undertaken with regard to the running of the business.
- However, the law does not establish who should pay the administrator

Executive Warrants of Seizure of a Commercial Going Concern

- The movable or immovable property or the going concerns which are seized from the possession of the debtor are to be sold by public auction.
- Such auctions shall be held whenever the need arises, there being a sufficient amount of property to be sold.
- The demand for the seizure of a going concern shall be made by means of an application to be served on the debtor



The role of the court in a decree upholding the demand for the issue of a warrant of seizure of a commercial going concern is twofold:

- 1) It shall order the Registrar to appoint experts, according to Article 89, who may be required to enlist and evaluate all the assets of the going concern, and file a report regarding whether the going concern should be sold or put under administration for a period of time so as to pay back its debts;
- (2) It shall appoint a short and peremptory time for the filing of such appraisements and report and give such orders as may be necessary for the carrying out of these instructions



The Options of Sale or Administration

- Following the confirmation of the appraisements and reports on oath, the court shall, within one week, appoint the application for hearing
- After hearing the parties, the court shall decide whether the judicial sale by auction of the going concern should be carried out, either in whole or in part, or whether an administrator should be appointed to manage the said going concern until the amount due is paid



Sale of the Commercial Going Concern

- When the court decides on the holding of a sale, it shall appoint a time, date and place for the sale of the whole complex as a going concern.
- If a sale is to take place, then an administrator will be appointed to carry out the administration of the going concern until it is sold.
- However, if an administrator was already appointed in the proceedings of a precautionary warrant, then he will be confirmed as such.
- It must also be noted that Articles 308 – 311 COCP also apply in this case



Administration of the Commercial Going Concern

- On the other hand, if the court decides that administration of the going concern is required until the debts due are cleared, the court itself will appoint the administrator and give him orders where it may deem appropriate.
- The administrator, in this case, takes control of the going concern and shall have the right to sell and carry on trade in its day to day business, although he must ask the court for authorisation regarding any decision of an extraordinary nature
- Nonetheless, similarly to what is found under the precautionary warrant provisions, the administrator may demand the court to authorise him to sell the going concern if he believes that it will lose its market value



Conversion from a Precautionary Warrant to an Executive Warrant

- One must always keep in mind that under Article 838B(2), a precautionary warrant can become an executive warrant if the due procedure is followed.
- The law states that notwithstanding the provisions of Article 838B(1), precautionary warrants become executive warrants after the cause becomes *res judicata*, or when in accordance with Article 166B, such judicial letter constitutes an executive title
- In the case of a warrant of seizure of a commercial going concern, the creditor shall file a note within fifteen days from the cause becoming a *res judicata* in the acts of the same warrant, and demand an extension or reduction of the effects of the warrant to an amount equivalent to the legal costs, interest and the difference in the principal amount due in terms of the judgement
- Such note must be served upon the debtor and any interested third parties





**Diploma in Law
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