Arrest of the ship, Insolvency, Bankruptcy : impact of the EU Law

Based on the ruling of 29 June 2011

1) An European law requirement ?
2) Uncertainties in the arrest of the ship procedure

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1) An European law requirement ?

According toRegulation 1346/2000 of May 29th, 2000, insolvency proceedings ordered in a Member States produce their effect in all others Member States. Its article 5 and the circular of March 17th 2003state that *"The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties".*

The right in rem is for instance defined as *"the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage"(Article 5§2.a of the foregoing Regulation)* and its article 5§3 specifies that it means also *"The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem".*

Contrary to the previous provisions, the arrest of the ship intends to prevent the departure of the ship. It is only a detention of the ship without direct legal effect and this is confirmed by French law: *"it does not infringe the right of the owner"*.Logically,the arrest of the ship is not subjected to the publication requirement of Article 5 of the foregoing Regulation. Indeed, such a formality would be alert the owner, incite him to run away and it would destroy the efficiency of the measure (the arrest of the ship). The arrest of the ship is so completely inconsistent with any publication formalities.

The non-application of Article 5 of the foregoing Regulation could also be deducted from the existence of others measures specifically concerning the ship in insolvency proceedings. There is in particular its article 11 which states *"The effects of insolvency proceedings on the rights of the debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept".*

All this argumentation explains why article 3 of the International Convention Relating to the Arrest of Sea-Going Ships of 1952does not deal with publication formalities and only states *«a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail ».*

So, the summary procedure of the arrest of the ship is completely justified. Indeed, as we said, any formality would be heavy and would eliminate the effect of surprise, condition of the efficiency of the arrest of the ship procedure.

II] Uncertainties in the arrest of the ship procedure

Although the procedure of the arrest of the ship seems simple, numerous judicial uncertainties are not excluded: if some were solved through case law, others require that we make the report for lack of being able to remedy it theoretically.

a) Arrest under maritime law / under general rules of law

The basis and functions of the arrest under general rule of law and under maritime law are close. However the particular nature of the ship engendered its submission to specific regulations according to the terms of the Law of January 3rd, 1967 relative to the status of ships. In France, specific regulations regarding arrest of the ship were articles 29 and 30 of the foregoing law. Indeed article 29 had been repealed by article 7 of ordinance N° 2010-1307 (Octobre 28th, 2010).

In international law, under the Brussels Convention of 1952, some conditions are provided for the withdrawal of the arrest. Firstly, the law of the place of the seizure is applicable for several questions and the authorization of the competent judicial authority of the State of seizure is necessary.

The arrest of the ship permits to obtain an immediate guarantee of payment. In this rough procedure, the Brussels Convention of 1952 provides the major provisions; thus all others details are subjected to the maritime law of 3 January 1967. It is so extremely hard for judges to deal with points which are solved neither by international law nor by internal law. No articulation between these two bodies of rules has been made and the procedure of the arrest under common rule of law is inadequate with this particular entity *(the ship)*.

b) Arrest and levying execution

In France, although the procedure of the arrest and the levying execution are different, most of the levying executions begin with an arrest. Indeed, to be able to act on a ship, it is necessary to detain it. In common law, in order to distinguish these two procedures, different terms have been created: “arrest” is equivalent of the French arrest of the ship and “attachement” is equivalent to the levying execution *(translations of “arrest” and “levying execution” are the same word in French)*

Contrary to the procedure of the arrest of the ship, the “attachement” is a difficult procedure. The latter supposes a title and all the necessary guarantees to secure the transfer of ownership. Thus lots of provisions are concerning the “attachement” whereas it is not frequently used.

Finally, we could say the absence of articulation between these procedures is a major problem and there is a strong uncertainty in this field. The legislator intervention is strongly needed.