

Diploma in Law

Lecture 6: Precautionary & Executive Acts

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**Diploma in Law
(Malta)**

Today's lecture:

The effects, formalities, different forms, and execution of the following acts which can be both precautionary and executive:-

- The Warrant of Seizure
- The Warrant of Seizure of a Commercial Going Concern
- The Garnishee Order



Precautionary vs Executive Acts

830.(1) The **precautionary** acts referred to in the last preceding article are the following:

- (b) warrant of seizure;
- (c) warrant of seizure of a commercial going concern;
- (d) garnishee order;

273.The **executive** titles mentioned in article 253 may, according to circumstances, be enforced by any of the following executive acts:

- (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 or of immovable property or of rights annexed to immovable property;
- (e) executive garnishee order;

Precautionary acts / atti kawtelatorji

Title VI COCP

829. It shall be lawful for any person, without the necessity of any previous judgment, to secure his rights by one or more of the following precautionary acts, which shall be issued and carried into effect on the responsibility of the person suing out the act, provided he shall have complied with the conditions prescribed by this Code.

- Broadly defined as a security / guarantee **pending proceedings**
- Main aim of precautionary acts is for creditors to safeguard their rights and increase the effectiveness of the judicial process
- Precautionary warrants preserve a situation and provisionally regulate it.
- They prevent the **dissipation / disappearance** of assets, hence why a judgment is not needed for a precautionary act to be issued

Executing precautionary acts

Once an application is filed, it is served on party, who has 10 days to file a reply (in urgent cases this period may be reduced)

No reply = court usually accedes to the pleas

Court issues PWs provisionally for a short period and under terms and conditions until it decides in a definitive manner. This can include conditions to preserve the object in question.

Appoints application for hearing, decides on merits after hearing evidence, by no later than 1 month from filing of application, confirmation on oath, and notification of parties.

The applicant is bound to bring the action in respect of the right stated in the warrant within 20 days from the issue of the warrant. If not, the effects of the warrant shall cease and he shall be liable for all damages and interest.

Converting Precautionary Warrants into Executive Warrants

Art. 838B COCP

Reminder: Unless rescinded / withdrawn, precautionary warrants remain in force for 15 days after the cause becomes res judicata.

Notwithstanding this, precautionary warrants become executive warrants immediately after the case becomes res judicata, or when a 166A judicial letter becomes an executive title.

For warrants of seizure; of seizure of a commercial going concern; garnishee orders; or arrests of sea vessels, the creditor must file a note within 15 days from res judicata requesting an extension / reduction in the warrant's effects to account for legal costs, interest, and any difference in the principal amount due in line with the judgment.

Executive acts / atti eżekuttivi

Art. 273 COCP

As listed in article 273 COCP but also other provisions (e.g. 166A). Their main purpose is to enforce & execute a finalised claim

Only issued upon demand (via application) and in virtue of an executive title

Executive titles are the legal tool allowing practical execution of the claim or issue in question - e.g. bills of exchange, contracts, judgments. They assume that the claim or issue can no longer be challenged. Listed in article 253 COCP

Executing executive acts

The Executing Officer

- The court executing officer first calls in 2 witnesses to begin the exercise of his powers in executing the warrant. This can include breaking open any outer / inner door / box where the movables to be seized are found.
- The officer is expected to act as soon as practicable within the time and date limitations set by regulations.
- The officer must deliver a copy of the warrant at the first available opportunity to the party against whom it is issued / his lawful representative.
- Once executed, the warrant is returned to the registrar with a certificate of execution / non-execution where it was not possible to execute.

The Warrant of Seizure - Precautionary

Mandat ta' Qbid



The Warrant of Seizure - Precautionary

Mandat ta' Qbid

Physically removes items in possession of the debtor and places them under court authority.

When precautionary, a warrant of seizure may only be granted in respect of movables.

Court orders the Registrar to seize the movables from the place indicated by means of an official consignee. Court may give any order to prevent loss, damage, or deterioration.

The applicant is bound to bring the action in respect of the right stated in the warrant within 20 days from the issue of the warrant. If not, the effects of the warrant shall cease and he shall be liable for all damages and interest.

An application for such warrant can only be filed in the Court of Magistrates if:

- accompanied by a demand of judicial acknowledgment to the credit / claim
- credit / claim **exceeds** €1,164.69 or the demand is for an object belonging to the applicant

In this case only, actions must be brought about immediately - i.e. in parallel with the issue of the warrant.

Warrant of Seizure of Movables - Executive

Mandat ta' Qbid

If acceded to, the warrant shall contain the following court orders:-

- day, place, and time for the judicial sale by auction, made in conjunction with the creditor's lawyer / legal procurator, and subsequently the seizure and removal of the movables from the debtor; **OR**
- the seizure from the debtor and then the appointment of the judicial sale by auction;
- if necessary, the execution after legal hours / Sundays / public holidays;
- if necessary, empowerment of the court executing officer to force open the place;
- the transport of the movables and the storage places indicated by the consignee;
- the appointment of the consignee and his taxing and payment by the creditor;
- if necessary, the appointment of experts to evaluate the movables seized;
- if necessary, the appointment of an auctioneer.

The Warrant of Seizure - Precautionary

Mandat ta' Qbid

Generally speaking, this warrant cannot be subject to a judicial sale without an executive title / judicial acknowledgment, **unless**:

- the movables seized are perishable or deteriorating; **and**
- the debtor is insolvent or cannot continue to trade and maintain the asset.

In this case, the applicant files an application requesting the sale pendente lite.

The court will consider all circumstances related to the nature of the claim, and any steps which the debtor may have taken to secure the claim or preserve the asset.

The Warrant of Seizure - Executive

Mandat ta' Qbid



Warrant of Seizure of Movables - Executive

Mandat ta' Qbid

Seizure of any movable is contemplated, including shares, licences, and insurance policies.

The following may **never** be seized unless specifically mentioned:

- clothes for daily wear, bedding, utensils, furniture considered necessary for the decent living of the debtor & his family
- personal documents & books relating to the profession of the debtor / spouse / children
- registers and minute-books of notaries
- tools necessary for the exercise / teaching of any science / art of the debtor / spouse / children
- animals / tools required for agriculture, or fruit
- aircraft / vessels chartered in service of the state
- sacred vestments / vessels used in a consecrated church / belonging to a priest / order
- property of the MPF or AFM

Warrant of Seizure of Movable - Executive

Mandat ta' Qbid

The court executing officer is to attach to the warrant a detailed description of the movables seized:

- where merchandise is seized, it is to be weighed, measured, or gauged;
- where money, securities, or jewelry are seized, they are to be weighed or their nominal value stated and lodged in the registry by means of a schedule asap;
- where papers are seized, they must be sealed and delivered to the Registrar.

During execution, the creditor / debtor / interested party may demand that the court executing officer takes photos / films the movables (at their expense).

Other creditors of the debtor cannot oppose the execution of the warrant / sale of the movables, but they can then enforce their claim on the proceeds of the sale.

Once the warrant is executed and the movables are transferred to the consignee, no other warrants may be executed on them.



Warrant of Seizure of Movable - Executive

Mandat ta' Qbid

The Consignee

Upon execution, movables seized are to be transferred to and kept by a **consignee**, who holds the movables in a storage place as authorised by the Registrar until ordered to do otherwise. The consignee issues a receipt for the movables he receives. So warrants are executed by the court executing officer & consignee together.

A person **cannot** be appointed as a consignee if they are:

- the creditor
- the spouse of the debtor / creditor or closely related
- directly / indirectly employed by the creditor
- the person claiming to own the movables seized

Consignee is responsible for the proper preservation of the movables and cannot use / allow their use unless so ordered - bound to act as *bonus paterfamilias*.

If he fails in this, he has to explain himself to the court and may be liable to damages, interest, and arrest of up to 3 months.

Warrant of Seizure of Immovables

Mandat ta' Qbid

Can only be an executive act.

Must be requested by means of an application containing a detailed description of the property demanded including its history and any burdens attached to it, as well as a site plan.

When issued, the court:

- orders the Registrar to appoint experts as necessary to appraise the property
- appoints a day, time, and place for the judicial sale
- orders the Registrar to inform the Public Registry & Lands
- orders the Public Registry to register the decree
- appoints a public auctioneer

Warrant of Seizure of Immovables

Mandat ta' Qbid

The debtor then has 20 days to file a sworn separate appraisement and demand that a new appraisement is not made. The creditor can oppose this, in which case the court will hear both and decide on the appointment of the expert.

The expert is appointed by the court unless the parties agree on an expert between them.

The expert drafts a valuation of the property, together with a detailed description, including any burdens or rights on it, and confirms it on oath. The debtor is bound to give him any information required.

The expert's appraisal cannot be contested.

Following the sale by auction, the proceeds are deposited in court, and a competition commences for the distribution of the proceeds. **The person filing the warrant does not get priority ranking - it is the law that decides on ranking.**

Rapid-fire Quiz - True or False?

1. A precautionary warrant of seizure may apply to both movable and immovable property.
2. A warrant automatically gives priority in court auction distribution.
3. Seized immovable property can be appraised by an expert selected by the parties
4. **Movables** seized under a PW can never be sold by judicial auction.
5. The Court of Magistrates can issue warrants regardless of claim value.



Rapid-fire Quiz - True or False?

1. A precautionary warrant of seizure may apply to both movable and immovable property.

False

2. A warrant automatically gives priority in court auction distribution.

False

3. Seized immovable property can be appraised by an expert selected by the parties

True

4. Movables seized under a PW can never be sold by judicial auction.

False

5. The Court of Magistrates can issue warrants regardless of claim value.

False



Case Study

Facts of the case:

ABC Ltd. is owed €16,000 by Peter Borg, who runs a bar in Nadur, but is facing insolvency. Borg's remaining assets are 3 industrial fridges filled with perishable stock.

1. What precautionary remedy can ABC Ltd. seek while they make their claim in court?
2. What additional application should ABC Ltd. file at this stage?
3. What must ABC Ltd. prove to the court's satisfaction?
4. If both requests are acceded to, what will happen next?

The Warrant of Seizure of a Commercial Going Concern - Precautionary



The Warrant of Seizure of a Commercial Going Concern - Precautionary

Art 848A COCP

May only be issued to secure a debt / claims which could be frustrated by the sale of said going concern. If issued, no other form of warrant may be issued against the same going concern.

PW is only issued if the court is satisfied that there are no other means to safeguard the claim and it is necessary to protect the applicant's prima facie rights.

Effects: Warrant puts the going concern under protective terms by preserving the totality of its assets, including licences / good-will by ordering its keeping in business, and prohibiting its sale, in whole / part.



The Warrant of Seizure of a Commercial Going Concern - Precautionary

Art 848A COCP

When a demand for this warrant is made, the parties are heard and an **administrator** is appointed. An administrator must have the necessary qualifications to run and administer the activity alone.

An **expert** is also appointed and tasked with filing in court an itemised list and report, confirmed on oath, of the value of the whole property forming the capital of the activity.

The court then decides if the activity is to continue being run by the debtor, by the administrator, or by persons entrusted by the debtor and assisted by the administrator.



The Warrant of Seizure of a Commercial Going Concern - Precautionary

Art 848A COCP

When issued and executed, the court marshal must draft a detailed inventory of the things found as part of the activity.

The court may give any order to prevent any loss / damage / deterioration of any thing described.

The applicant is bound to bring the action in respect of the right stated in the warrant within 20 days from the issue of the warrant. If not, the effects of the warrant shall cease and he shall be liable for all damages and interest.

If the debtor allows it, the warrant can remain in force for a period longer than 20 days.



The Warrant of Seizure of a Commercial Going Concern - Precautionary

Art 848A COCP

The administrator is responsible for the activity and can administer the ordinary running of the business. For extraordinary decisions, he must seek the court's authorisation.

If the administrator believes the activity will incur a loss in market value, he may also seek the court's permission to sell it in its entirety.

The administrator must be paid for the activity he has been appointed to undertake upon completion of his duty.



The Warrant of Seizure of a Commercial Going Concern - Executive



The Warrant of Seizure of a Commercial Going Concern - Executive

Art 312 et seq COCP

An **executive** warrant is demanded by means of an application to be served on the debtor.

It has the effect of seizing all movable & immovable property of the going concern to satisfy the acknowledged, res judicata executive title.

If the demand is upheld, the court will order the Registrar to appoint experts to:

- evaluate assets (unless already made under a PW); and
- report on whether the going concern should be sold or put under administration for a period of time to pay its debts.

The reports must be detailed and confirmed on oath.



The Warrant of Seizure of a Commercial Going Concern - Executive

Art 312 et seq COCP

Once the expert reports are filed, the court shall appoint the application for hearing and shall decide **whether to proceed with the judicial sale by auction / appoint an administrator to manage the going concern.**

- **If it is to be sold:** the court decides on the date, place, and time for the sale of the whole activity and an administrator is appointed until its sale.
- **If put under administration:** an administrator is appointed (or confirmed if already appointed in a PW) with the same rights as those listed under the PW.



Rapid-fire Quiz - True or False?

1. An administrator is always tasked with the management of a seized going concern.
2. A going concern seized under a PW can be sold.
3. A going concern seized under an EW is always sold off.
4. Intellectual property (e.g. branding, trademarks) and social media accounts of a going concern (e.g. restaurant) seized under warrant are not considered part of its assets for the purposes of the warrant.

Rapid-fire Quiz - True or False?

1. An administrator is always tasked with the management of a seized going concern.

False

2. A going concern seized under a PW can be sold.

True

3. A going concern seized under an EW is always sold off.

False

4. Intellectual property (e.g. branding, trademarks) and social media accounts of a going concern (e.g. restaurant) seized under warrant are not considered part of its assets for the purposes of the warrant.

False





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CAMILLERI PREZIOSI
ADVOCATES

The Garnishee Order - Precautionary



The Garnishee Order - Precautionary

Mandat ta' Sekwestru Kawtelatorju - Art. 849 et seq COCP

An order issued by the court by which the creditor attaches moneys / movable property belonging to the debtor to a third party - **the garnishee**. The GO will order the garnishee to not release funds / assets and instead deposit them in court to preserve them until the claim is confirmed.

The parties in a GO application are:

1. **The Creditor (Sekwestrant)**: brings the application
2. **The Debtor (Sekwestrat)**: allegedly owes the creditor
3. **The Garnishee (Sekwestratarju)**: the third party into whose hands the moneys / movables are attached.

The Garnishee Order - Precautionary

Mandat ta' Sekwestru Kawtelatorju

Effects of the Precautionary Garnishee Order:

Effects are the same as that of an executive GO, that is that up until the money is deposited in court, all accounts are frozen and no transfer of movables may be made. The only difference is that where the garnishee is a bank, a precautionary GO does not apply to money payable by the bank in execution of such guarantee.

The applicant is bound to bring the action (i.e. lawsuit on the merits) in respect of the right stated in the warrant within 20 days from the issue of the warrant. If not, the effects of the warrant shall cease and he shall be liable for all damages and interest.

The Garnishee Order - Precautionary

Mandat ta' Sekwestru Kawtelatorju

Cannot be issued against:

- salaries or wages (limit of €1233p/m).
- benefits, pensions, or allowances
- charitable grants or donations made by Government
- Any sum due for maintenance
- Loans for main dwellings and bank guarantees

The Court may give any order it deems necessary to prevent the loss, damage, or deterioration of the things so garnisheed.



The Garnishee Order - Precautionary

Mandat ta' Sekwestru Kawtelatorju

Judicial sequestration - *over and above the garnishee order*

May be requested at any point during proceedings - through it the court orders the deposit of the thing in court or to be delivered to a third party who is bound to restore it when so ordered.

Such order may also impact immovable property where its possession / ownership is disputed, or where it is necessary to preserve the rights of the creditor.

A sequestrator (not the garnishee) is appointed by court or with the parties' consent, and shall have the same liabilities as the garnishee.

The Garnishee Order - Precautionary

Mandat ta' Sekwestru Kawtelatorju

Real life case study - App. No. 1137/2022AD Hotel San Antonio Ltd v Mc Gowan et

- The plaintiff (Hotel) had filed an application for the issue of a PGO against Mr & Mrs Mc Gowan to caution the amount of €18,906.93.
- The respondents filed an application requesting its revocation on the basis of Articles 381, i.e. that in Mr Mc Gowan's case, the PGO froze the bank account where he received his pension (sole source of income), and in Mrs Mc Gowan's case, the PGO froze the bank account where she received her salary (sole source of income).
- Consequently, they had no means to maintain their basic needs, and asked that Mr Mc Gowan's account is released from the PGO and with respect to Mrs Mc Gowan, that the PGO be limited to the amount set by law.

The Garnishee Order - Precautionary

Mandat ta' Sekwestru Kawtelatorju

Real life case study - App. No. 1137/2022AD Hotel San Antonio Ltd v Mc Gowan et

The court analysed these arguments and held that:

- the law required that the bank accounts needed to be exclusively used to receive pensions. In this case, Mr Mc Gowan also received payments from his daughter, and PayPal.
- the income highlighted by Mrs Mc Gowan could not be identified as salary, but simply funds, and the court could not distinguish between the two.

Therefore the respondents' requests were rejected.

The Garnishee Order - Executive



The Garnishee Order - Executive

Mandat ta' Sekwestru Eżekuttiv - Art. 849 et seq COCP

An order issued by the court by which the creditor attaches moneys / movable property belonging to the debtor to a third party - **the garnishee**. The GO will order the garnishee to deposit them in court for the creditor to withdraw them.

The executive GO requires a res judicata judgment / executive title. The creditor files an application which must contain (on pain of nullity):

- details of the debtor including ID / C-number
- the amount / thing due and under which title
- a warning to the garnishee to not pay / deliver the moneys / things to the debtor, under penalty of damages or interest
- an order to the garnishee to deposit the moneys / things within 19 days from service.

The Garnishee Order - Executive

Mandat ta' Sekwestru Eżekuttiv - Art. 849 et seq COCP

A GO is executed by deliver of a copy thereof by the court executing officer to the garnishee & the debtor.

The Garnishee:

- must deposit the moneys / things as ordered (penalty: damages, interest, 3 months arrest)
- can retain any costs incurred in case of moneys
- can have a privileged claim over the things so lodged in respect of costs

Deposit is then notified to the creditor and debtor.

The Garnishee Order - Executive

Mandat ta' Sekwestru Eżekuttiv - Art. 849 et seq COCP

Cannot be issued against:

- salaries or wages (limit of €1233p/m)
- benefits, pensions, or allowances
- charitable grants or donations made by Government
- Any sum due for maintenance
- Loans for main dwellings and bank guarantees

A garnishee order cannot be extended & remains in force up to such time as it is satisfied or revoked.



Rapid-fire Quiz - True or False?

1. A request for an executive GO is automatically upheld.
2. A garnishee can retain any costs incurred.
3. A precautionary GO cannot be contested.
4. Wages can be subject to a GO.



Rapid-fire Quiz - True or False?

1. A request for an executive GO is automatically upheld.

False

2. A garnishee can retain any costs incurred.

True

3. A precautionary GO cannot be contested.

False

4. Wages can be subject to a GO.

True





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