



Canada has maintained a liberal commercial policy with Cuba since the Cuban Revolution of 1959. In the last decade, Canadians have invested in Cuba in areas such as real estate, tourism, health and technological assistance. This has enabled Cuban tramp ships to call on Canadian ports on a regular basis, and has even enabled the establishment of a liner service from Canada's eastern ports to La Habana.

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Simultaneously, Cuban vessels have continued to supply their ships with bunkers throughout the world. Cuba, through Cuflet Chartering, has chartered vessels from Greek, Israeli, and other shipowners, and it has contracted with ship repaired in Canada and worldwide. Despite the embargo pressures imposed by the American Helms Burton legislation, and the withdrawal of Soviet assistance, Cuba has managed to survive commercially, but it has encountered major difficulties in honouring its contractual commitments. Due to its internal policies, freight monies and export revenues are immediately allocated to social priorities, and are not preserved to maintain and consolidate its merchant shipping fleets—2E This creates a situation of major delays and defaults which are of great concern to foreign shipowners, bunker suppliers, ship repairers, and affected creditors in related areas: To exacerbate the problem, Cuba has a tendency to shift its shipping interests from one Ministry to another. Up until 1995, entities such as Cuflet Chartering and Empresa de Navegacion Mambisa have been transferred from the Ministry of Transport to the Ministry of Fisheries, under a body presently named PESPORT. This latter has assumed control of various Cuban shipping fleets (FRIOMAR, CORAL, POSEIDON, CUFLET) and related shipping activity

During the year 1995, the jurisdiction of PESPORT was in turn reduced to the management and control of fishing fleets, and ANTARES, Asociacion de Navieras de Cuba, was created to manage and control the merchant shipping lines. These bureaucratic changes create havoc to creditors who seek payment for outstanding debts. Lines of communication are constantly discontinued, personnel replaced, and disquieting silences are created which only add to the anxiety of creditors.

A further development that has contributed to the insecurity of creditors has been the registration of Cuban ships in flags of convenience jurisdictions in the last five years. The Empresa de Navegacion Mambisa fleet has been substantially dismembered, and its remaining ships registered in Malta, Cyprus and Belize. The fleets under FRIOMAR, TRANCARGO-CORAL and others have all suddenly acquired flag of convenience registrations. 46 From a juridical point of view, Canada enjoys the privilege of being imbued with two great legal traditions. The Common law and English admiralty recourses constitute the law of the land. However, added to this tradition, the Civil Code and the Code of Civil Procedure of Quebec supplement the Common Law recourses. Thus, in Canada, there are four extraordinary

recourses which may be invoked by creditors to protect their claim against defaulting debtors who do not have permanent assets in the jurisdiction prior to judgement.

The first is the action in rem, or the arrest proceeding directed against the debtor ship. The second recourse is the sistership arrest, introduced in Canada in 1992. The third recourse is the Mareva Injunction, which requires the creditor to provide an undertaking for damages. The fourth recourse is the seizure before judgement (saisie avant jugement). This latter recourse is derived from the Civil Law and the Quebec Code of Civil Procedure. The seizure before judgement has been utilised efficiently in the Province of Quebec against Empresa Cubana de Fletes (Cuflet) which is the chartering arm of Cuba. This entity does not own ships, and is thus immune to attack by way of an action in rem or sistership arrest. Moreover, the seizure before judgement does not require the presentation of security for eventual damages which is imposed by the Mareva Injunction. More particularly, during the month of February 1993, Mr. George Argirakis, solicitor and partner at the prestigious English firm of solicitors, Richards, Butler, instructed us to act on behalf of FBI Clubs and Greek shipowners against Cuflet. This latter

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had chartered two ships from Greek shipowners, and accumulated a large debt of \$2.5 Million for unpaid charter hire. Cuflet admitted the debt, and signed an agreement setting out instalment payments during the year 1992. Unfortunately, nothing was paid by December, 1992.

At the end of the month of February 1993, the ship "BAHIA DE LA HABANA" entered Canadian territorial waters, and berthed at Port Cartier, Province of Quebec. This vessel appeared in the Lloyd's Register as the property of Empresa de Navegacion Mambisa (Mambisa) and the Government of the Republic of Cuba. This information further appeared in Lloyd's World Shipowning Groups.

A writ of seizure before judgement was presented in front of the Quebec Superior Court against Mambisa, Cuflet and The Government of the Republic of Cuba. The Superior Court Judge granting the seizure (Mr. Justice Melancon) was satisfied that the doctrine of sovereign immunity

could not be invoked, and on this ground, allowed the writ to be issued. The "BAHIA DE LA HABANA" was seized, and allowed to sail, under seizure, from Port Cartier to the Port of Montreal, Province of Quebec, Canada.

Mambisa attacked the seizure in two stages. The first was based on a jurisdictional issue. Mambisa claimed that the charterparties entered into with Cuflet provided that in the event of a dispute the only appropriate jurisdiction would be England, on account of the London arbitration clauses found in the charterparties. The issue was argued at length, but the Quebec Superior Court judge (Mr. Justice Comery) held that as the debt was admitted by Cuflet, there was no dispute between the parties, and the London arbitration clauses in the charterparties did not apply.

The second attack by Mambisa was to quash the seizure on grounds that the property seized, the Ship "BAHIA DE LA HABANA" did not belong to Cuflet or the Government of the Republic of Cuba, that Mambisa and the Government of the Republic of Cuba were not liable for the debts of Cuflet, and that since no fraud was alleged, in support of the seizure, there were no grounds for a seizure before judgement.

After considerable cross examination on affidavits presented by representatives of the Greek shipowners,

stated that Mambisa had possession and use of the ship, and the right to dispose of same. Mambisa had assumed all the risk generally associated with an owner under the bareboat charter it entered into with the Spanish shipbuilder. Moreover, the vessel was registered under the Cuban flag as represented by the Ministry of the Interior of the Republic of Cuba. Mr. Justice Tingley quoted Lloyd's "World Shipowning Groups" as follows:

"Shipping is also the international industry par excellence. Though the subject of increasing regulation at operational levels, shipping still enjoys considerable freedom of movement. Ships change flags, shipowners move their operating base, subsidiaries are established, vessels change hands, restructurings are announced, there are bankruptcies and takeovers, buy-outs and sell-offs - and all on an increasingly international scale. Liberia may have the world's largest fleet, but who owns these ships and where are they based? A ship may fly the Cyprus flag but be owned by Russians. A German owner may operate out of Monte Carlo, register his ship in Panama, bareboat it out to the Philippines, and delegate the operation to managers in Hong Kong. The variety is kaleidoscopic. It is also baffling, even to those within the industry".

The learned judge concluded that Mambisa enjoyed all the incidents of ownership and the obligations of an owner.

He next proceeded with his analysis of the relationship between Mambisa and Cuba. At pages 2535/2536, he states:

"What then is the relationship between Mambisa and Cuba? The former was created as a consolidated state company by the latter in 1961 to take certain shipping assets seized from private corporations and banks following the revolution in 1959 and, with these assets, to operate a shipping business for Cuba. By its charter, it has one director who is responsible for the "government and control" of the company. That person is appointed by Cuba and may be removed by it. Cuba may also remove the company's management. The company was created for an unspecified period but may be dissolved at any time by decree. In substance, Mambisa is a creature of Cuba and subject to its complete control and governance. It is a state controlled agency, an arm of Cuba. From the evidence so far, adduced in these cases, the Court concludes that the property is in reality the property of Cuba. Mambisa mandate is to operate and administer the property given or assigned to it by Cuba for the benefit of Cuba. Mambisa is an agent of Cuba for the purpose of carrying on a shipping business world wide. Mambisa's debts are Cuba's debts and obligations. There is nothing in Mambisa's charter to prevent a creditor from reaching the

the case was presented in front of Mr. Justice Tingley of the Quebec Superior Court (Med Coast Shipping Ltd. et al v. The Government of the Republic of Cuba et al., 1993, A.M.C. 2530).

On the issue of ownership of the "BAHIA DE LA HABANA", the learned Judge

On the second issue, relating to the liability of the Republic of Cuba for the debts of Cuflet, the learned Judge stated that since Cuflet's debt arose from the contractual obligations to pay assumed by State Corporations of Cuba, including Mambisa and Cuflet. Since Cuflet and Mambisa were agents or departments of Cuba, this latter was liable for the debts claimed.

On the issue of fraud, the learned Judge held that the failure or refusal to pay an acknowledge debt when due constituted a fraud.

Shortly after the decision was rendered (April 6, 1993) - Mambisa appealed the decision - Cuflet appointed lawyers in Montreal, and a second attempt was made to quash the seizure. During examinations of a representative of Cuflet in Montreal, in preparation of a second hearing, the suggestion was made to organise a meeting between representatives of the Greek shipowners and Cuflet. This suggestion was adopted by both parties, and after several meetings, the parties agreed to settle their differences. An agreement was reached on a figure, and payment effected. Mambisa dropped its appeal.

The "BAHIA DE LA HABANA" sailed from Montreal on November 21, 1993, nine months after she was seized in Port Cartier. The decision of Mr. Justice Tingley had immediate repercussions for creditors world wide. The decision permitted a foreign creditor of Cuba to invoke the Canadian Courts (in the Province of Quebec) to enable it to obtain satisfaction for its debt by seizing a Cuban asset (ship or other asset of value). Thus a series of creditors, including bunker suppliers, ship repairers, banks and others, sought relief in the Province of Quebec, Canada. The majority of the claims were eventually settled prior to the institution of legal proceedings, based on the "BAHIA DE LA HABANA" decision.

Today, Cuba continues to struggle to pay its creditors. Substantial sums remain unpaid to bunker suppliers, shipowners and ship repairers. However, since 1993, closer bonds resulting from extensive negotiations have been created and greater co-operation has been shown between Cuban entities and its foreign creditors. Both the Cuban entities and the creditors realise that paralysing Cuban assets exacerbates the problems. The seizure or arrest of a ship, whether in Canada or elsewhere prevents the Cubans from raising freight revenue which in turn prevents the payment of debts. Since both parties ultimately realise the consequences of drastic measures, Cuban shipping interests have generally attempted to resolve their debts with elaborate payment schedules which have to be continuously monitored by their creditors. During Cuba Maritime '98 in November 1998, Antares attempted to put forward a positive face towards maritime creditors yet, within three months of this Conference, the managing director of Cuflet Chartering was replaced, thus creating renewed uncertainty and suspicion. Today, debts remain unpaid, a trickle of payments subsists and the heated negotiations continue.