

SHIP ARREST IN ITALY (Questions 1 to 9)



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1. Please give an overview of ship arrest practice in your country.

Italy is a party to the 1952 Arrest Convention, ratified in 1979. Moreover the Italian Code of Navigation provides a set of domestic rules applicable when the Convention does not apply in whole or in part. Arrest is possible in Italian Ports also where there is no jurisdiction on the merits. The procedure is fairly quick and informal. No counter security is required. Appeal is possible and usually heard and decided in few weeks. P&I Clubs Letters of Guarantee are widely accepted if issued by one of the IG Pool. Alternatively bank guarantees or cash deposit are available to release the vessel.

2. Which International Convention applies to arrest of ships in your country?

The 1952 Brussels Convention on Arrest of Sea Going Ships has been ratified on 9.11.1979 in Italy and applies to all vessels flying the flag of one Contracting State. It will also apply, pursuant to article 8, to those vessels flying the flag of a non-Contracting State in respect of any claim for which the law of the Contracting State seized with the case permits arrest. In addition our Code of Navigation provides subsidiary rules applicable when the Convention cannot be applied in whole or in part or to arrest issues not ruled by the Convention (articles 643-686).

3. Is there any other way to arrest a ship in your jurisdiction?

A Vessel may be detained pursuant to an arrest order issued within a criminal proceeding by a Prosecuting Judge (i.e. when the Vessel can be considered as *corpus delicti*) or pursuant to an administrative detention order of a Public Authority (i.e. the Harbour master Office in case of damage to public properties like a berth, a quay, a light buoyancy).

4. Are these alternatives e.g. *saisie conservatoire* or freezing order?

In respect of the same claim usually arrest orders are alternatives and not cumulative. It is anyway possible that under special circumstances, where different interests are involved, a single event generates more detention orders (i.e. in a pollution case arising out of collision the interest of the State and those of cargo owners, the colliding vessel, the salvors, the victims). From a strict procedural profile an arrest order under the 1952 Arrest Convention for a particular maritime claim is always alternative to any likewise detention order to secure the same claim.

5. For which types of claims can you arrest a ship?

A Vessel can be arrested in Italy for any maritime claim among those listed under art. 1(1) of the 1952 Arrest Convention. For Vessels flying the flag of a non-Contracting State an arrest is possible also in respect of any other claim for which the law of the court seized with case permits arrest. This in Italy includes any debt of a contractual or non contractual nature but in this case the arrest can only be obtained if the Vessel is owned by the debtor.

6. Can you arrest a ship irrespectively of her flag?

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7. Can you arrest a ship irrespectively of the debtor?

A ship can be arrest irrespectively of the debtor but, if the debtor is a State or other Public body, then the ship might be regarded as immune from arrest. Whether and to what extent immunity may be invoked is left to the law of the forum arresti. Immunity is related to the ownership or operation of the ship, not to the nature of employment. For example the fact that a privately

owned ship is employed on a liner service which is of public interest should not justify immunity from arrest.

8. What is the position as regards sister ships and ships in associated ownership?

Sister-ships, meaning ships owned by the same Company owning the particular ship in respect of which the maritime claim arose, can be arrested under art. 3 (1) of the Arrest Convention. A similar principle is provided at Italian domestic law (art. 2740 Italian Civil Code). Ships in associated ownership (or management) cannot be arrested unless the Claimant can pierce the corporate veil. This is not impossible in Italy but is certainly a difficult exercise, which implies a rigorous burden of proof on identity of shareholders and management of the two companies.

9. What is the position as regards Bareboat and Time-Chartered vessels?

In cases where the bareboat charterer is liable in respect of a maritime claim and not the registered owner, the situation is different if the Arrest Convention applies or not. If the Convention applies, art. 3 (4) enable arrest of such ship or any other ship in the ownership of the bareboat charterer, but no other ship in the ownership of the registered owner. The last sentence of Article 3, para. 4 seems to extend the rule to any case in which a person other than the registered owner of the ship is liable (i.e the time charterer, the ship manager, etc.). This is anyway in conflict both with the literal meaning of the provision and with the travaux préparatoires of the Convention. When Italian domestic law applies arrest of a ship under bareboat charter to secure a claim against the bareboat charterer, the time charterer or the ship manager is not possible unless the Claimant has a maritime lien assisting his claim. The main reason for this is that a creditor cannot arrest a ship to secure a claim if he can never be authorised to enforce the final judgment on the merit against the registered owner and auction the vessel. This is the worldwide unsolved problem of the Arrest Convention and Italy is no exception. Only maritime liens give right to enforce a claim against the vessel, even if she is property of someone different than the liable party. Not all maritime claims under the Arrest Convention are maritime liens under the different national domestic law systems. Not the 1926 Liens and Mortgages Convention enjoyed a wide acceptance around the world. The Lisbon Draft attempted to clear things as well as the 1999 Arrest Convention, not yet in force.

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SHIP ARREST IN ITALY (Questions 10 to 26)



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10. Do your Courts require counter-security in order to arrest a ship?

No security is required as a preliminary condition to seek an arrest of ship. The Judge may order the applicant to tender a countersecurity, although this is rather uncommon at the time of the filing of the application, and a security is normally requested only where the Court considers that the arrest is controversial, or the merits of the claim have not been assessed with sufficient depth.

11. Is there any difference in respect to arresting a ship for a maritime claim and a maritime lien?

If the claim is secured by a maritime lien, this may operate to allow the arrest of a vessel even if it has changed ownership, the doctrine being that the lien attaches to the property at the time the cause of action arises and remains so attached until satisfied or time barred. Maritime liens take priority over registered mortgages, yet need not be registered themselves.

12. Does your country recognise maritime liens? Under which International Convention, if any?

Italy is a signatory to the 1926 Liens and Mortgages Convention, and recognizes a list of maritime liens under article 552 of the Italian code of navigation, which largely coincide with the list contained under article 1 of the 1926 Convention. The existence of a lien over the ship is determined by the law of the flag of the ship at the time the claim or credit arose, pursuant to art. 6 of Italian Navigation Code.

13. What lapse of time is required in order to arrest a ship since the moment the file arrives to your law firm?

Instructions should be received possibly 48 or 24 hours before the moment of the presentation of the application. It should be considered in this respect that it is crucial to file the application early in the morning in order to try to have the case heard the same day, and in many Courts it is impossible to file the arrest application after noon.

14. Do you need to provide a POA, or any other documents of the claim to the Court?

The presentation of an application as well as any legal activity before major Italian Courts are made by a solicitor by virtue of a power of attorney. Powers of attorney issued outside Italy must be legalized and apostilled pursuant to Hague Convention 5 October 1961, or alternatively legalized by the Italian Embassy or Consulate in the country of issuance. The apostille is unnecessary, though, for powers of attorney released in countries party to the Brussels Convention 1987 which abolished the need of the apostille for deeds issued inside the EU; the apostille may be furthermore excluded by virtue of bilateral agreements. Italian solicitors have the authority to legalize powers of attorney, provided that they have had the opportunity to identify the party signing the deed. (1) In arrest or urgent proceedings an option is furthermore provided by article 77 c.p.c. which permits the possibility of an agency appointment, generally made in practice by appointing (by fax or e-mail) as agent for urgent matters (including the one for which the measure is sought) a lawyer who in turns appoints (usually) another lawyer of the firm as attorney in law. A formal duly legalized power of attorney is often disclosed at a later stage in order to prevent exceptions and technicalities.

(1) Cassazione n. 5840/2007, Alpina Versicherung A G c. Royal & Sun Alliance.

15. What original documents are required, what documents can be filed electronically, what documents require notarisation and/or apostille, and when are they needed?

Original documents are not required, and could be disclosed in case the defendant contests the truthfulness of the copy disclosed. The notarization and/or apostille are required only for the POA.

16. Will your Courts accept jurisdiction over the substantive claim once a vessel has been arrested?

Arrest is admitted regardless of the fact that Italian Courts have jurisdiction for the merits of the case: the Italian Court competent for the arrest is the Court of the port of call, and the application is subject to the condition that the vessel is within Italian territorial waters.

(2) Italian Courts however do not acknowledge jurisdiction on the substantive claim unless they have jurisdiction by virtue of the application EU Regulation on jurisdiction, or jurisdiction exists pursuant to article 7 of the 1952 Arrest Convention.

17. What is the procedure to release a ship from arrest?

An application should be filed before the court seeking an order releasing the ship. It is common practice however to ask the court, along with the arrest order, for authorization to inform the harbor master that the ship is free to leave (upon receipt of proper security or following a settlement agreement) with no need for a formal release order.

Such authorization is generally granted by the courts more familiar with ship arrest procedures, and this considerably simplifies the release.

18. What type of security needs to be placed for the release?

Either under Italian law or pursuant to the provisions of the Brussels Convention 1952 owners may obtain the release of the ship arranging the issuance of a suitable guarantee.

The options available are two: escrow or bank guarantee (or Club's LOU).

The first solution implies that the sums are deposited into a special bank account and authorization from the Court is sought to shift the arrest from the ship to the sums.

19. Does security need to cover interest and costs?

Yes.

20. Are P&I LOUs accepted as sufficient to lift the arrest?

P&I LOUs are generally accepted and considered suitable to lift the arrest.

21. How long does it take to release the ship?

A few hours if an application is required, otherwise just a very short time if the authorization as per question 17 above is given.

22. Is there a procedure to contest the arrest?

Yes, the party intending to challenge the arrest has 15 days to file an appeal, before the same court (a board of 3 judges decides on the application)

23. Which period of time will be granted by the Courts in order for the claimants to take legal action on the merits?

Where the arrest is confirmed, the applicant is compelled to commence the proceeding for the merits (unless one is already pending) before the Court having jurisdiction within a deadline which is set by the Court up to a maximum of 60 days.

24. Do the Courts of your country acknowledge wrongful arrest?

Damages for wrongful arrest are uncommon and awarded only when it is clear that the applicant sought the arrest acting in bad faith or with gross negligence, disregarding the evidence available, or intentionally providing the Court with partial or misleading background information.

25. Do the Courts of your country acknowledge the piercing and lifting of the corporate veil?

Italian Courts have started in the last few years (and in very few cases) to recognize the possibility of lifting the corporate veil, but this is quite exceptional, and the burden of proof resting on the applicant is severe. Italian law is indeed very strict in the definition of ownership in the context of companies and in applying the principle of autonomy of companies which are distinct

(2) Court of Venice, 25 August 2001, *El Sayed Aly Alla c. Sayed Nasr Navigation Lines*

and separate entities. As a result Italian Courts are reluctant to pierce the corporate veil, and the applicant intending to do so must be able to prove that the company structure has been actually created or employed with the purpose to frustrate creditors' actions.

26. Is it possible to have a ship sold *pendente lite*; if so how long does it take?

The sale of the ship *pendente lite* has been authorized in few instances where the applicants successfully proved that the value of the ship under arrest was dramatically deteriorating and the costs (custody, berth and port dues, maintenance of the ship and so forth) were being disproportionate compared to the likely sale value. The proceeds of the sale are of course in this case frozen until the applicant obtains a judgment.

**Claudio's main areas of practice are commodities, marine cargo and goods in transit claims (charterparties, bills of lading, CMR and multi-modal transports, GAFTA, FOSFA and Incograin contracts) and related insurance disputes in both court and arbitration proceedings. Fluent in English and French, he assists some among the major traders, marine insurers, carriers and freight forwarders in Italy and Europe, and has represented clients in court proceedings and arbitrations in several jurisdictions; he is an accomplished and well-known lecturer, both nationally and internationally, on the legal aspects of shipping and trading. Claudio is the author of a two widely used handbooks on cargo insurance and international sale of soft commodities. He is a regular contributor of Il Diritto Marittimo, Maritime Risk, Gaffaworld, Forwarder.com and International Law Office. He is Vice Chair of the Land Transport Committee of the International Bar Association and is member of the editorial board of Diritto e Trasporti.*