

# **Latest developments in Italian case law on ship arrests, container detention claims, jurisdiction clauses**

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## Arrest pursuant to Article 3.4 Brussels Arrest Convention: still a thorny issue



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## **Court of Genoa (*Alpha Trading c. Venezia Shipping* 2010)**

The Venezia D, flying the Dutch flag and owned by a company registered in the Netherlands, had been time chartered to an Italian company, which subsequently went into liquidation and became unable pay various including bunker suppliers

One of the charterer's creditors had supplied bunkers while the time charter party was in force and sought the arrest in Genoa, invoking Article 3(4) of the convention. At the time, the vessel was no longer time chartered.

## Court of Genoa (*Alpha Trading c. Venezia Shipping* 2010)

Full applicability of Article 3.4 of the Convention to arrests arising from claims vs. the charterer regardless of the fact that at the time of the arrest the charter-party is already terminated.

- a) the Convention does not explicitly require the actual existence of the contract at the time of the application
- b) owners can seek some form of protection from risks of arrest arising from charterer's operations by asking the charterer to provide a suitable performance guarantee,
- c) owners are likely aware of the employment of the ship and can therefore foresee the liabilities arising from the conduct of the charterer.

The decision bypasses the notoriously difficult issue of the wording of the security to be issued for the release of the ship when the arrest originates from a claim against the charterer and the party seeking the release is the registered owner.

In order to obtain release of the vessel the owners provided security by depositing a bank book in court; the creditor could obtain payment only against an enforceable judgment.

The claimants commenced proceedings on the merits and the shipowners objected that the security could only be released against an enforceable title and pursuant to enforcement procedure.

The court held that the judge had the power to order that the security be released immediately in favor of the claimant in respect of the claim against the vessel's time charterer, and that such a release could take place automatically, not through enforcement procedure.



**Court of Venice**  
**(*Istanbul Shipping Inc. c. Happy Cruise Sa***  
**M/V Happy Dolphin 2011)**

The existence of a maritime claim is sufficient to allow the arrest of a ship regardless of whether the claim is secured by a lien:

- A. the uniformity sought by the Convention would be undermined if ships flying different flags were subject to a different regime based on the existence of a lien (an issue governed by the law of the flag under Italian law).
- B. if the Convention had required the existence of a lien it would have specified so; article 3.4 would be redundant if a lien was necessary because in this case the creditor would already be entitled to arrest a ship not belonging to the debtor

## Court of Udine (“*the Anagenisi*” 2014)

Opted for the restrictive view. According to the Court:

- since the Convention does not create new liens, the option is between rejecting the arrest application based on article 3.4. if the creditor without a lien is unable to enforce the claim on the ship, or considering the arrest just as a tool to exert pressure to settle the claim to obtain the release of the ship.
- the wording of the Convention is in principle consistent with the latter interpretation, as the only requirement stipulated by the Convention is the existence of a maritime “claim”.

## Court of Udine (“*the Anagenisi*” 2014)

Pursuant to art. 31.1. of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objective and purpose”. The aim of the Convention is to enable the claimant to successfully recover a maritime claim.

It is not conceivable that the Convention permitted arrest of the ship independent of the subsequent enforcement, which is, according to the court “the natural development and prosecution of the arrest”.



## Court of Venice 2016

The physical bunker supplier had no title to seek the arrest of the ship.

The shipowners had ordered the bunker from OWB and no contractual relationship existed with the Cyprus physical supplier.

- The delivery receipts were not signed by the master of the vessel, the only one who had the power to enter into agreements on behalf of the shipowners, but by the vessel's chief engineer.
- the invoice issued by the physical supplier was addressed specifically to OWB and only generically to the «vessel and/or master and/or shipowners and/or charterers and/or managers».

## Container detention/demurrage



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## Container detention/demurrage

Settled case-law that:

- a) the supply of containers gives rise to a contract of lease, separated from the contract of carriage (compare with French case-law)
- b) the charges must be agreed upon; the agreement can be evidenced by the indication of the daily detention fee on the front of the bill of lading, or by exchanges of correspondence between the owners and the shipper.
- c) if there is no convincing evidence of such an agreement, the charges can be assessed by the Court, possibly on the basis of equity.

## Who is liable for the demurrage?

### Shipper vs. freight forwarder

Owners generally address their requests of payment of detention charges to the party appearing as shipper on the bill of lading; freight forwarders are often requested to settle the charges since the under Italian law they act in their own name and on behalf of the principal and frequently appear as shipper in the B/L.

Possibility for freight forwarders to successfully challenge the claim proving that

- i. the forwarder acted on behalf of a principal whose identity was fully disclosed at some stage of the stipulation of the contract of carriage
- ii. the stipulation of the contract of lease cannot be qualified as ancillary to the contract of carriage

## What happens if owners is late in alerting the shipper or in taking the measures available for the disposal of the cargo and the release of the containers?

Under Italian Law (article 1227 Civil Code) the debtor is entitled to ask the Court to reduce the amount of damages in proportion to the extent of damages which could have been avoided by the creditor if mitigating measures had been taken.





## Cassazione n. 12888/2009 *Ari c. Gilnavi*

Owners are bound to promptly inform the shipper since the Italian civil code (article 1690) and maritime code (article 450) contain provisions specifically aimed at enabling the carrier to seek and receive instructions from the shipper, and dispose of the goods in case no receiver shows up asking delivery of the goods.

## Cassazione n. 12888/2009 Ari c. Gilnavi

- ✓ although the aforesaid provisions refer to contracts of carriage, they nonetheless apply to the contract for the lease of the containers, since the two contracts are inherently intertwined
- ✓ a duty of promptness in alerting the shipper about any delay at discharging port is an application of the duty of good faith and diligence in performing the contract.
- ✓ wherever the carrier does not inform within a reasonable deadline the shipper he will lose the right to seek the payment of detention charges, since the contract of lease of the containers would be in this case brought to termination (see also English law *Cottonex v. MSC* 2016)

**Grazie di**  **a tutti!**