

SHIP ARREST IN ITALY (QUESTIONS 1 TO 9)

By Alberto Batini*
BATINI TRAVERSO GRASSO & ASSOCIATI
a.batini@btglegal.it
www.btglegal.it
Via Assarotti 11/9
16122 Genova, Italy
Tel.: +39 348 7902191
Mobile: +44 750 1961608
Fax: +39 010 8375896



(QUESTIONS 10 TO 26)

By Alberto Serino*
Studio Legali Consociati
alberto.serino@slconsociati.com
www.slconsociati.com
Naples, Milan, Ravenna, Genoa
Tel: +39 081.4288242
Fax: + 39 081.5518341



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 there 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 irrespective of her flag?

A ship can be arrested irrespective of her flag.

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

A ship can be arrested irrespective 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.

**Alberto Batini is Senior Partner. He joined the firm in 1990. He graduated from the University of Pisa Law School and admitted to the Bar in 1993 and to the Supreme Court. He specializes in Ship Arrest, Admiralty Law and Marine Insurance Law and Litigation.*

Former assistant solicitor with Sinclair Roche & Temperley, London – 1991/1992. Former assistant claims handler at Standard Steamship Owners P&I Club, Charles Taylor & Co., London – 1992. University of Southampton – Faculty of Law – Institute of Shipping Law – 18th Maritime Law Degree, 1992/1993. Post graduate Doctorate (PHD) in Shipping and Transport Law – University of Trieste and Genoa from 1995. Vice-President of the Ibero-American Institute of Maritime Law (IIDM) – Italian Section since 1998. Editorial Articles in Shipping and Transport Law. Permanent Member of the Steering Committee of the Italian Association of Maritime Law (IAMA) and active member of the Italian Working Group for Maritime Liens and Mortgages and Arrest of Ships at CMI Conferences.

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

There is no need for the applicant to put up a security in order to have the *ex-parte* arrest application examined by the Court.

It is nevertheless open to the dealing Judge to possibly make the effects of the ship arrest subject to a counter-security on the part of the applicant in order to restore possible damages of the respondent. If the applicant fails to put up such security within the period of time set by the Judge (usually a few days), the ship arrest then loses all its binding effects (article 669*novies*, para. 3, of the Italian Civil Procedure Code).

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

The difference is substantial and arises when for instance the arresting vessel has in the meantime changed her ownership with the result that the action can be addressed against a party other than the applicant's debtor. By implication of law the maritime lien attaches to the vessel from the moment a cause of action arises and it is extinguished only with the fulfilment of the underlying claim or as a result of the statutory time bar.

Besides, according to the majority of domestic case law and scholars, only the existence of a maritime lien consents the application of article 3(4) of the international convention relating to the arrest of sea-going ships (Brussels 1952) in respect of claims vs. charterers basically on the grounds that article 9 of said convention does not create maritime liens.

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

According to those listed in article 552 of the Italian navigation code, Italy recognizes maritime liens, which are mainly the same considered by the international Convention for the Unification of Certain Rules relating to Mortgages and Liens (Brussels 1926) which Italy is party to:

- judicial expenses of the state or made in favour of all creditors for arresting or preserving the vessel; anchorage, lights and harbour dues; pilotage duties; costs for preserving the ship at the last port;
- crew's and master's wages;
- expenses advanced by the state for victualling and repatriating the crew, and credits for compulsory contributions to the pension system;
- salvage rewards and sums due by the vessel as a contribution to a general average;
- sums due to: collisions, hits, casualties occurring during navigation; damage to ports, yards and navigable ways; indemnities due to passengers and crew for death or personal injuries; loss or damage to cargo and baggage
- claims resulting from contracts entered into by the master for preserving the vessel or continuing her voyage.

According to article 575 of the Italian Code of Navigation, it is noteworthy that maritime liens always have priority over ship mortgages in terms of ranking. However, it is the ship's flag that determines the state law under which the assessments are made, like establishing a maritime lien or how it is ranked.

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

An advance of 24 hours is usually enough to prepare and draft the arrest application and have it despatched, along with relative exhibits, electronically (Italy has now adopted and implemented on-line civil trial system: see § 15 below) to the competent Courthouse for immediate scrutiny from a judge.

This in an ideal world.

Often the supporting documentation is in a foreign language and hence needs to be translated into Italian. However, this activity can be quickly arranged by our law firm staff. Another factor that may delay the presentation of the file in the Court is the collection of the Power of Attorney from a foreign arrestor (see § 14 below).

It is also important to note that the Italian Courthouse are only open on weekdays. So, a file sent on Friday afternoon will be examined by a judge only on next Monday morning.

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

The response is affirmative.

No Italian lawyer can plea in Court without a written Power of Attorney (PoA) duly executed by the client.

If the PoA is granted abroad, same must be notarised and apostilled as per the Convention abolishing the Requirement of Legalisation for Foreign Public Documents (Hague 1961) unless the document in question is issued in some EU countries (i.e., Belgium, Denmark, Estonia, France, Ireland, and Latvia) where the apostille formalities have been completely abolished on the basis of the Brussels 1987 Convention (not yet in force but applied provisionally amongst those Member States including Italy). The same is true for Germany by virtue of the bilateral convention signed in Rome on 7 June 1969, and Austria as per the agreement supplementing the 1954 Hague Convention relating to the law on civil procedure and signed in Vienna on 30 June 1975.

In urgent affairs, when there is not enough time to get a duly authenticated PoA (in original or at least in digital copy) from abroad, an expedient is generally represented by the appointment of a domestic agency who can, in turn, appoint the Italian lawyer pursuant to article 77 of Italian Civil Procedure Code. As the appointment comes from an entity (corporation or individual) located in the Italian territories, the legalisation of the agent's signature can be made by the same retained lawyer. The arrest application must be accompanied by the supporting documentation that establishes prima facie evidence of the claim for which the security (ship arrest) is being sought. As stated in § 13 above, a translation of foreign language documents should accompany the application for the judge's benefit.

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

In 2003, the IT Department of the Italian Ministry of Justice developed a plan to implement the on-line civil trial, which today consents immediate interoperability between lawyers and judges through the clerk's offices. The reform has imposed mandatory electronic transmissions of all communications (digitally signed to ensure authenticity, non-repudiation and integrity) from lawyers to judges and vice-versa with reference to first and second instance proceedings and also in Supreme Court cases since February 2016.

Presently, Italian lawyers have now full online access to up-to-date information handled in the Court Management System and to legal acts and documents stored in the File System. Therefore, they are enabled to file all the papers electronically with the undoubted advantage that original documents (with the exception of domestic PoAs issued and authenticated in Italy) are no longer needed to be in the lawyers' hands when the case is filed in Court. Only in face of specific objections the judge may order the arresting party to disclose the original of the document whose copy has been challenged in terms of authenticity.

Apostille formalities apply only to PoAs issued abroad in countries that are signatories of the Hague 1961 (see § 14 above).

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

The mere presence of the vessel in the national waters makes the Courthouse, whose district encompasses the port of call, competent for the examination of the arrest application. It is not necessary that the said Court (or any other domestic Court) has jurisdiction over the merit of the case. However, it must be brought to the attention of the competent state Court or arbitral Tribunal within a maximum of 60 days (see § 23 below).

The adjudicatory jurisdiction for the merit of the case is ruled in compliance with the relevant international private law aspects governing dispute settlements or article 7 of the Brussels 1952.

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

The party who has been affected by a ship arrest can challenge the relative order in the court by appointing a lawyer. The lawyer can present defence submissions and explains the legal grounds on which the arrest is inadmissible, unlawful, or excessive (e.g., the figure indicated in the order has to be reduced).

The judge will set a hearing for oral discussion and/or grant a certain number of days for exchanging written pleadings. Then, with the final ruling, the judge will either confirm the *ex-parte* order (setting the period of time within which the arrestor must commence the substantive proceedings) or revoke it ruling on the legal fees and costs to be reimbursed by the arresting party (article 669sexies, para. 2, of the Italian Civil Procedure Code). Another possible option open to the court is the modification of its previous ruling. For instance, regarding the amount up to which the arrest is granted or the placement of bail to cover potential damages for wrongful arrest.

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

The arrested party always has the faculty to ask for the replacement of the ship with cash funds in the form of bank deposits, which remain frozen until the judge has ruled over the legitimacy of the arrest (in the meantime the vessel is allowed to leave national waters).

Such faculty is admitted by both our domestic civil procedure rules (article 684) and Brussels 1952 (article 3.3).

The litigants can alternatively agree on a bank guarantee or a P&I LOU, but in such cases, the ship arrest proceedings are discontinued, and the case is closed. Whereas putting up a cash security deposit, though perhaps time consuming, consents the arrested party to continue challenging the opponent's application and gets back the security in case of success.

19. Does security need to cover interest and costs?

Like the arrest order (which is commonly granted for the principal amount plus an extra 15-20% to cover late interests and legal costs), the security provided in cash to lift the ship arrest also considers the interests and legal costs into account.

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

Yes, provided that the arrestor is consenting.

Only cash in the form of bank deposit makes such consent instead no longer needed.

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

It is a matter of a few hours.

If the ship arrest order contains a provision granting the faculty to the arrestor's attorney to communicate directly to the harbour master about the waiver to the ship arrest (*eg.* further to an agreement reached meanwhile with the arrested party and its lawyers), the procedure of release is actually even faster.

22. Is there a procedure to contest the arrest?

The arrested party has the right to challenge the arrest order granted *ex-parte* to avoid its subsequent confirmation and even after, once this has been confirmed, by presenting an appeal before the Court in full sittings within 15 calendar days (article 669terdecies Italian Civil Procedure Code).

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

Once the arrest order is (conclusively) granted, the substantive action has to be instituted in the Court or, wherever applicable, in arbitration within a maximum period of 60 calendar days from the

date on which the order has been granted (article 669^{octies} of the Italian Civil Procedure Code). Otherwise, the same can be revoked further to a specific motion of the arrested party.

It is worth mentioning that the arrested party can moreover solicit the lift of the arrest if the substantive proceedings are subsequently discontinued for whatever reason or the right, for which the security has been initially sought, but not fully recognised at the end of the day, despite being timely instituted (article 669^{novies} of the Italian Civil Procedure Code).

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

If the claim, for which a vessel has been arrested, has subsequently been rejected by the court or arbitrator hearing the case on merit, the arrestor could be held liable in terms of damages suffered by the opponent. However, the mere rejection of the claim does not suffice as the party claiming damages must prove gross negligence or bad faith from the arrestor's side (article 96 Italian Civil Procedure Code).

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

The exercise in question is quite hard as our domestic Courts are reluctant to pierce the corporate veil unless the party interested in the assessment can offer conclusive and unequivocal evidence of impropriety linked to avoidance or concealment of a liability through the use of the company structure.

Therefore, the corporate veil in Italy is pierced very rarely due to the severity of the onus of proof and the number of tests to be met.

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

In very few cases, our Courts have authorised the sale of the arrested vessel *pendente lite*.

In those precedents the physical conditions of the ship were very poor, and there was a serious risk of her sinking.

The ship auction procedure may be regrettably time consuming.

**Alberto Serino is involved in international marine litigation including charterparty and bill of lading disputes, arrest of ships, P&I and FD&D work. His litigation practise covers a broad variety of disputes with a particular emphasis on insurance and commodity cases as well as on issues relating to freight forwarding, carriage of goods by road, ship agency, pilotage. He has represented foreign clients for the recognition and enforcement in Italy of foreign arbitration awards and Court decisions. In the course of his professional career he has appeared as expert witness before foreign Courts (Canada, Germany and France) on topics related to Italian law and jurisdiction.*