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Lifting of Arrest of Foreign Ships in Italy

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- 1. The 1952 Arrest Convention and Italian Ship's Arrest legislation:
substantial and procedural means of lifting a ship's arrest order.**

- 1.1. General considerations on the law of ship's arrest**

Italy is a Contracting State to 1952 Arrest Convention (10.5.1952 Brussels Convention on Arrest of Seagoing Ships). The Convention was enacted in Italy with Law 25 October 1977 No. 880. According to the provisions of such uniform legislation a claimant might apply to the local Court in order to obtain an arrest order against a ship to secure one or more of the maritime claims listed under article 1.1 of the Convention, always provided that his claim is directed against either the registered owner of the ship or the ship owner (including bareboat or demise charterer) . Thus a 'maritime claim' against the time charterer or the voyage charterer or the manager of the ship could not be secured by way of a ship's arrest according to 1952 Arrest

Convention. Nor any such claim could be enforced or secured by way of an arrest according to Italian Code of Navigation, which provisions do not alter the fundamental rule of Italian common law stating that a debtor is liable for his obligations only with the assets falling in his property, unless a lien provided by the law attach a particular asset.

It should also be reminded that article 8 (2) of the Convention provides that a ship flying the flag of a non-Contracting state may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in Article 1 or of any other claim for which the law of the Contracting State permits arrest. The consequence of this rule in Italy, as in many other jurisdictions, is that a claimant is entitled to apply for an arrest order against a ship flying the flag of a Contracting state ONLY in respect of one or more of the maritime claims listed under article 1, while, on the contrary, a vessel flying the flag of a non-Contracting State might be arrested in respect of such maritime claims and many other different claims. In this sense the ratification of the Arrest Convention guarantees the State that its flagged tonnage shall not be exposed in the other Contracting States to arrest measures different than the ones previously agreed in the Convention.

1.2. The law of maritime liens in Italy

A different approach should be assumed in respect of claims secured by a lien or other likewise charges on ships. Under Italian law liens can only be granted

by the law, which, in our case, is the Code of Navigation. Contractual or possessory liens are not legal and therefore cannot be relied upon. The only sort of admissible possessory lien in our system is the 'right of retention' of an asset (including a ship or a container) to secure the fulfilment of payment obligations arising out of a contract of services rendered to such asset in favour of its owner or bailee. This possessory defence is anyway directly dependent from the possession of the asset itself and therefore is normally lost if and when the possession is lost. Legal maritime liens, on the contrary, afford a stronger protection to the claimant as they follow the ship or other asset also in the hands of third parties, including assignees, bailees and new owners. A maritime lien under Italian law will expire if not preserved within one year. The only admissible way to preserve a lien is to arrest the ship or cargo (or other asset) to secure the principal claim within and not later than one year from the date the credit arose, which coincides with the date the lien arose.

It is clear that when an arrest to preserve a lien is applied for, the claimant will not need anymore to assert a maritime claim according to the Arrest Convention. In the case of enforcement of lien, in fact, the Arrest Convention could not apply. It is not by chance that Article 9 of the Convention states that "nothing in the convention shall be construed as creating a right of action, which would not arise under the law applied by the Court which had seisin of the case, NOR AS CREATING ANY MARITIME LIEN which do not exist under such law or under the Convention on Maritime Mortgages and Liens, if the latter is applicable".

In order to establish whether a claim is assisted by a maritime lien our Supreme Court, pursuant to article 6 of our Code of Navigation, has established long time ago that the applicable law is the law of the flag that the ship was flying at the time the claim arose. Therefore, for example, only the French law of liens would determine if and when Italian or foreign claimants in Italy have a lien on a French flagged vessel.

When Italian law is applicable our article 552 of the Code of Navigation provides for the following maritime liens on ship and freight in order of priority:

- judicial expenses due to the State or incurred in the common interest of creditors to preserve the ship or in connection with the execution proceedings following a Court judgment; light dues, port and similar dues;
- claims arising out of crewing contracts of the master or the other members of the crew;
- claims arising out of anticipations made by the Ministry of Transport or by the Consular Authority to support and repatriate the members of the crew; credits in connection with National Pension Fund contributions;
- indemnities and compensations arising out of salvage services and ship's contributions to general average sacrifices or expenditures;
- indemnities arising out of collisions at sea or other casualties and those for damages to dock, port structures, canals and other navigable waters; indemnities due as a consequence of death or personal injuries to

passengers or members of crew and those arising out of damages or losses to cargo or baggage;

- credits arising out of contracts entered into or operations performed by the ship's master by virtue of his legal powers, also when owner of the ship, to maintain and preserve the vessel or to continue the voyage.

1.3. Fighting an arrest order before it is granted

A Court arrest order might be granted *ex parte* or *inter partes*. In the former case, which unfortunately is the most common in Italy, the Court will grant the arrest order immediately after an application is filed provided that the arrestor gives *prima facie* evidence of a genuine claim. When the arrest is applied for to preserve a lien or pursuant to 1952 Arrest Convention the arrestor does not need to provide evidence as to the lack of assets of the ship owner in Italy and, generally, the risk of insolvency of the Defendant during the duration of the merit proceedings. Usually the documentation supporting the arrest application can be simply produced in copy and even in foreign language, save for a free translation attached. Facsimile copies of documents are also admitted as a *prima facie* evidence. If the arrest order is granted *ex parte* the Court fixes with the same order an *inter partes* hearing providing that authenticated copies of the arrest application and of the arrest order being served upon the ship owner at his principal place of business or registered offices. Usually services via fax are authorised by the Courts in Italy so ship

owners should be aware that when any legal documents is received via fax from Italy proper action is taken promptly to understand what is about, which Court is involved, in relation to which vessel and which time limits should be preserved. As I shall have occasion to explain later in many cases the quicker is the reaction the higher are the chances of succeeding in lifting an arrest without necessity of guarantee being issued.

From the time an arrest order is granted *ex parte* to the time the ship owner is finally heard from the Court through his lawyers substantial time may pass. In the best scenario this time could be limited to two or three days following an application by the ship owner's lawyer to have the Court hearing anticipated. In other cases this period could be extended to two or three weeks up to a maximum provided by law of 45 days. This could generates heavy financial losses to the ship owner and in turn to mortgagee banks, suppliers and charterers. A prompt reaction by ship owner's claim departments, P&I Clubs and Defence Clubs is essential.

Only in very few cases the Courts decide to fix an *inter partes* hearing before granting the arrest order. This is due to the nature and function of the arrest itself which, of course, requires quick procedures to avoid the vessel sailing away from the port before an arrest order is enforced through the Public Marshall and the Harbour Master's Office. Such exceptional cases occur when the Court is not satisfied with the documentation disclosed. In such cases the ship owner is served with a Notice that a Court hearing has been fixed to hear both parties jointly in order to decide on the application of arrest, a copy of

which is attached to the Notice. In the majority of cases the service is performed via fax transmission. The default of the ship owner in appearing before the Court at the scheduled hearing will determine the issue of the arrest order almost automatically.

In the few cases where a ship owner is admitted to fight an arrest order before it is granted, possible defences are left to satisfy the Court that:

- a) the claim is totally ungrounded, or
- b) the claim is brought against a company which is different than the ship owner or the registered owner of the vessel, or
- c) the value of the claim is exorbitant, fighting in this latter case for a lower security demanded to be replaced simultaneously or immediately later with a bank or P&I guarantee.

An example of a case sub a) recently dealt with was that of a cargo receiver which applied for an arrest of a foreign vessel in connection with alleged damages to cargo, grounding the claim on the bill of lading issued to him by the NVOCC (Non Vessel Operating Common Carrier) instead that on the bill issued by the ship owner (the actual carrier). In cases like this, which falls partially sub a) and partially sub b) above, the claim grounding the arrest application is against a nominated carrier different than the actual carrier and the claim itself is not “arising out of an agreement relating to the carriage of goods” entered into between the arrestor and the ship owner but rather between the contracting carrier (the NVOCC) and the cargo interests.

Therefore it was successfully argued that art. 1.1 (e) of the Arrest Convention was not triggered. The arrest application was consequently rejected.

In another case, falling sub b) above, the arrest was applied against a ship for cargo claims arose when the ship was bareboat chartered to a different company. The bareboat charter party was subsequently assigned to another company and, a few months later, the arrest was applied for. It was again successfully argued that the maritime claim enforced was directed against the previous ship owner and not the present one. Claimants were even estopped from asserting a lien on the vessel as she was flying the Panamanian flag at the time the claim arose and Panamanian Code of Commerce does not provide for a lien in connection with damages or losses of cargo. The arrest application was rejected accordingly.

Finally a case sub c) above was dealt with against a receiver claiming far in excess of Hague-Visby limit of liability for damages to cargo. In such case the arrest was originally granted but only up to the limit provided by Hague-Visby Rules for that particular cargo. The total amount was reduced down to a fifth of the original claim and it became possible to arrange for a bank guarantee being issued. In such case the ship owner was in financial troubles and the premiums of P&I Club's cover were not paid up. The Club refused to issue a guarantee but the ship owner managed to obtain a guarantee from the mortgagee bank following our advice and negotiations. This is another example of how a quick reaction could save substantial losses.

1.4. Lifting an Arrest order after it is granted and enforced

This is the most frequent situation. Usually ship owners or their Defence Clubs instruct us when an arrest order is already granted and enforced. This occurs in Italy because in the vast majority of cases the ship owner become aware of an arrest order against his ship only when such measure is enforced by the Court Marshall. Which are the remedies afforded to a ship owner to fight an arrest when it is already granted (and enforced) ?

- A) The first step to be taken is to immediately file an application to the Court to have the Court hearing anticipated as early as possible. In many situations the arrestors agree voluntarily to an anticipation of hearing. In other cases an application to the Court is required. In any case a power of attorney is required but this could be obtained by the ship's master on behalf of the ship owner.
- B) The second step is to obtain and peruse all the possible documentation available (bills of lading, charter parties, master's receipts in case of bunker claims, invoices, tally sheets, delivery orders, contracts or agreements of any nature if relevant, latest correspondence, etc.). Most of these documents shall have to be translated into Italian so the quicker they are provided the better it is.
- C) It will be fairly soon clear if the arrestor's claim is genuine and it is not worth to fight it or if such claim is wrong and should be dismissed by the

Court sooner or later. In the former case it will only be a question of negotiating quickly a guarantee to be released to the arrestors avoiding further delay to the vessel's schedule. Sometimes it is possible to obtain an anticipated release of the vessel without any guarantee being given. This lucky situation occurs some times due to technicalities. It has been experienced that in many cases the arrest order is not served correctly (i.e. to the correct fax number or address, lacking of translation even in English language, to the wrong counter party, to the ship manager instead that to the ship owner). Last year representing the time charterers we obtained in Venice the release of a vessel, arrested to secure a claim of US\$ 600,000.00 in connection with damages to steel hot rolled coils, simply because the arrest order and the decree fixing the *inter partes* hearing were not served to the correct fax number of the ship owner who issued the bills of lading. We obtained an anticipation of the Court hearing to the following day and appeared in Court on behalf of the time charterers of the vessel successfully raising the exception.

In the second case above mentioned, i.e. when it is found that the claim is wrong and should be dismissed by the Court sooner or later, as soon as a reliable defensive strategy is agreed, two options usually become clear:

C.1. The ship is employed and cannot afford to loose more than one or two days in port.

C.2. The ship is temporarily not fixed or there are not imminent cancelling dates in other ports to be met and/or any day of delay would cost less than

the financial cost of a bank or cash security being given where P&I Club cover does not operate.

In case sub C.1. above a guarantee should NOT be given. As a matter of fact the release of a bank or P&I Club guarantee produces the withdrawal of the arrest order. The consequence is that there is no more arrest order to fight. On the other hand the guarantee will remain valid and enforceable for years afterwards and usually until a final Court judgement, an arbitration award or an amicable settlement is reached. If the guarantee is issued by a bank (usually an Italian bank will be required by arrestors in Italy) the funds of the ship owner will remain trapped in a bank account either in Italy or abroad to secure the bank's obligations vis-à-vis the arrestors. In case of a P&I Club LOG the reserves will be increased and premiums are likely to be increased upon such member. An alternative especially to bank guarantees applicable to many claims is to substitute the arrest of the vessel with an arrest of an amount in cash equivalent to the value of the claim. This might be particularly convenient in small claims or in claims for which the ship owner has no alternative but to place funds in a bank to obtain a bank guarantee. Instead of placing funds in a bank the ship owner could open a saving bank book in Italy (with higher interests accruing) made payable to the Court or even to himself but following a Court order. A substantial advantage is given by the fact that the vessel will be ordered free to sail while the arrest, still pending, could be fought against subsequently. A negative decision by the Court of first instance could even be successfully appealed. This strategy often plays a

strong impact on arrestors and their lawyers because they lose the advantage of the strong pressure produced on ship owners by the prolonged detention of the ship in port. The above mentioned remedy is afforded by article 684 of the Italian Civil Procedure Code and the vessel can be released in one or maximum two days.

In case sub C.2. above the same remedy could apply. Alternatively, following the anticipation of the Court hearing, an attempt could be done to fight the arrest on the merits aiming to a Court's Ordinance lifting the arrest previously granted. This is usually feasible when documents are clear enough to satisfy the Court that the claim is ungrounded, wrong or directed against a wrong party.

Technicalities might also play an important role from time to time.

If the arrest is confirmed then an appeal is possible within 15 days from the date the arrest was confirmed and usually discussed in further 10-14 days time depending on the Courts.

Counter-securities could also be an issue to discourage arrestors. They are not automatically imposed upon arrestors, as it is in Spain for example. Nevertheless if the Court is satisfied that the arrestor is himself a foreign company or has not enough assets in Italy to secure the payment of damages for wrongful arrest and costs in case the claim will be lost, then counter-securities are eventually obtained. Same results could be achieved in those cases where arrest orders are obtained in dubious or unclear situations at law

and evidences are brought forward to the Court about the daily economical loss of the ship owner produced by the prolonged detention of the vessel.

An arrest however obtained and confirmed becomes null and void under Italian law if the merit proceedings are not properly commenced before the Court of competent jurisdiction – including foreign Courts of course - within 60 days from the date the arrest order has been confirmed, always following the *inter partes* hearing. In some cases arrestors fail to properly or timely commence a merit proceeding abroad. A special procedure is provided under article 669-*novies* of the Italian Code of Civil Procedure to have the arrest dismissed and lifted following the above event. This is another circumstance which should be closely monitored by the ship owner's lawyer following an arrest procedure: if the arrest of ship was substituted with the arrest of a cash amount then the funds will be released and returned to their legitimate owners in due course.

Legal costs related to the arrest procedure are only granted in favour of ship owners and defendants in general following a rejection of the arrest application. In the contrary case, i.e. when the arrest is granted, no legal costs are allowed to the arrestors. Such costs could be eventually recovered with the final judgment deciding on the merit of the case, if heard in Italy.

2. Bank Guarantees and P&I Club Letters of Undertaking

Guarantees are offered by the ship owner to the arrestors directly and not to the Court. Only if the arrestor fails to accept the guarantee, which is an unlikely event, the ship owner could apply to the Court to have the guarantee approved and the arrest measure lifted. This is true both in cases of bank and P&I Club's guarantees. The latter are generally accepted in Italy also by the Courts although in some Courts less experienced in maritime matters a strong opposition by the arrestor could make the outcome not so automatic as thought.

In some cases involving cargo claims we managed to have the arrestor's approval to wording of guarantees providing that the guarantor will pay upon first written demand if and when the ship owner would have been found liable by a Court or an Arbitration panel. In those cases the ship owner was not the carrier, having ever issued bills of lading who were in fact issued by the time charterers. This guarantees are clearly not enforceable and, in fact, are not worthy the paper they are written on. This is another aspect which the arrestors should carefully look into before quickly accepting guarantees and releasing ships.

It should be noted that pursuant to article 3 (3) of the 1952 Arrest Convention a ship could not be arrested twice for the same maritime claim by the same claimant in any one or more of the jurisdictions of any of the

Contracting states. Therefore a successful result in fighting an arrest could prove to be even more favourable to owners.

3. Damages for wrongful arrest

This interesting issue is referred by Article 6 of the Arrest Convention to the law of the Contracting State in whose jurisdiction the arrest was made or applied for. Regrettably Italy, as United Kingdom, has a tradition of substantially exonerating the arrestors from a material risk of being found liable for damages for wrongful arrest. No express provisions could be found in the Code of Navigation while a general principle dictated in the Civil Procedure Code under article 96 states that an arrestor enforcing an arrest order without any right can be condemned to pay damages if he acted without the ordinary prudence. Clearly an arrestor acting under the scope of 1952 Arrest Convention is unlikely to be found lacking of a right of action or indeed acting without the ordinary prudence. There are no specific Court precedents on the subject. I recently settle at the last Court hearing a case on behalf of ship owners for damages for wrongful arrest which would have been the first ruling in Italy. In such case the arrestors obtained an arrest order pursuant to art. 1.1 (e) of the Convention against the new bareboat charterers of a vessel to secure a claim arose under the previous bareboat charter party. The cargo claim was addressed to a different ship owner and furthermore the flag of the vessel (Panama) did not provide for any lien for such type of claim. Therefore the arrestor acted without any right under the

Arrest Convention and without the ordinary prudence, having failed to ascertain the provisions of Panamanian law on liens and having disregarded our communications regarding the new bareboat charter party in force with a different ship owning company. The Court of first instance found in favour of the immediate dismissal of the arrest order originally granted *ex parte* by an honorary judge. Nevertheless, when the case for damages for wrongful arrest came before the Court, after a long trial the Judge suggested both parties to reach an amicable agreement because of the several doubts arising to him from both sides. This was due in fact to an unclear general rule on damages for wrongful Court actions provided for by Italian law and to the absolute lack of uniform interpretation of such rule.

4. The 1999 Arrest Convention and the future practical implications in the defence of ship owners' interests

On 1st march 1999 the diplomatic conference held at UNCTAD headquarters in Geneva approved the final text of the 1999 Arrest Convention. In fact, the bulk of the preparatory work for IMO and UNCTAD was performed by the Comité Maritime International (CMI) following the draft produced at its 1985 Conference (the so called "Lisbon Draft").

There were two main reasons for reforming the old 1952 Arrest Convention. The first was that, by 1984 it had become recognised that there were either gaps in the Arrest Convention 1952, or that its general drafting had led to

some ambiguities (an example is the key issue of the “list” of maritime claims: open or closed ? and interpretation of art. 3 on exercise of the power to arrest). The second reason to change was that once the new Mortgage and Liens Convention 1993 had been agreed, not only was the way open to consider arrest, but any redraft would naturally seek to achieve some harmonisation in drafting between the liens and mortgages instruments.

The 1999 Arrest Convention is still not in force in Italy nor in the ICS. It is nevertheless worthwhile to provide a brief summary of a few topic issues of this important document of uniform international law dealing with our subject.

Arrest of ships will be possible only for maritime claims listed under art. 1. That list is considerably wider than in the 1952 Arrest Convention, so that even though the list is effectively closed, it will significantly increase the number of claims which could be secured by way of arrest. Thus, art. 1.1(a) refers to claims for “loss or damage caused by the operation of the ship”. This is a very wide provision indeed and would include economic loss claims. Art. 1.1. (c) goes beyond mere “salvage” claims as in the 1952 Arrest Convention, by including claims arising from any salvage agreement (i.e. the LOF) and for special compensation (i.e. under art. 14 of 1989 Salvage Convention). Art. 1.1 (d) specifically now includes damage to the environment as a ground for arrest.

Some items in the old Arrest Convention list have been slightly extended. Thus, Art. 1.1 (g) now covers agreements relating to the carriage of

passengers, which could be highly relevant given the massive development of the cruise ship sector.. Art. 1.1 (l) extends goods and materials claims to cover “provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance”.

Completely new items are found in Art. 1.1 (q) (insurance premiums, including mutual insurance calls), Art.1.1 (r) (commissions , brokerages or agency fees) and Art. 1.1 (v) (disputes arising out of ship sales).

The exercise of the right of arrest, i.e. *which* ships may be arrested and *when*, is governed by Art. 3. In particular Art. 3 (1) (a) allows arrest where there is personal liability of the ship owner for maritime claim where that person is also the owner at the time of arrest. In addition, under Art. 3 (1) (b) the ship may also be arrested if the demise charterer at the time of the maritime claim is liable for the claim and is demise charterer (or ship owner) at the time of arrest. Art. 3 (1) (e) now makes a more general reference to maritime liens. A ship can be arrested if the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the law of the State where the arrest is applied for. This provision, should the new Arrest Convention be enacted in Italy, does not vary the regulation already in force under Italian common law and Italian maritime law, provided that the reference to the law of the State where the arrest is applied for (in our case Italian law) would be interpreted as including international private law and therefore art. 6 of the

Code of Navigation, sending the intended arrestor back to the law of the flag.

Art. 4 of the 1999 Arrest Convention deals with how a ship owner can obtain the release of its ship from arrest. Art. 5 deals with the possibility of a claimant re-arresting the same ship after it has been released and with multiple arrest of other ships to “top up” the security already provided. Art. 6 deals with the remedies which the ship owner may have against the claimant who has arrested its ship.

Art. 4(1) makes release from arrest mandatory when “sufficient security has been provided in a satisfactory form”. Unfortunately for ship owners (and their insurers) Art. 4 (2) provides that “in the absence of agreement between the parties as to the sufficiency and form of security, the Court shall determine its nature and the amount thereof”. This is already the case under Italian common law as we mentioned before. It follows that questions of whether cash or a P&I Club letter of undertaking are sufficient will be one ultimately for national courts, some of which might assume that cash is the only satisfactory form of security. Regrettably the attempt made by ICS and Greece to insert guidance as to other acceptable forms of security was defeated at the diplomatic conference.

Art. 6 (1) gives a Court discretion as to whether the claimant must provide security for any loss incurred by the ship owner (or demise charterer). Art. 6 (1) states that the liability (and security) may include loss as a result of the arrest having been wrongful “or unjustified”, or because excessive security

has been demanded and provided. Whether there is in fact any liability for loss resulting from arrest is, under Art. 6 (3), to be determined by the law of the place of arrest and the court of arrest, under Art. 6 (2), has the jurisdiction to determine that liability. It follows that there will not be complete uniformity of the law of arrest on this, as on some other issues.

A final consideration regarding the new Arrest Convention. It is better drafted than the old Convention presently in force and contains sufficient improvements to allow it to be recommended. It will increase the number of occasions on which ships might be arrested, but it might also serve to reduce disputes about when they might be released.

The challenges that ship owners and the shipping industry are today called to meet are those one of safety at sea, environmental issues and competition in freights. The two former aims are in some contradiction with the latter. Safety is given by new and/or well maintained tonnage while competition demands cut prices and lower costs and overheads. A solution can only be researched in good and stable financing programs. Financing might come out from the market but will continue to have its principal source in the banking system. A significant help to the institutional lessors and to the banks might come from a revised Arrest Convention able to strike a balance between the security requirements of the suppliers industry and those of the lessors and mortgagee banks.

Thanks for your attention.

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