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### Ship Arrest Pending Enforcement of Arbitration Award in Italy

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#### **1. Uniform law on Arbitration. The Conventions governing the International Commercial Arbitration.**

1.1 The advantages of arbitration over traditional litigation in national courts for parties to international contracts wishing to settle their disputes are well known. One of the main advantages is without any doubt the existence of multilateral and bilateral international conventions on the recognition and enforcement of foreign arbitral awards, the most famous being of course the New York Convention of 1958 which succeeded the 1927 Geneva Convention and the 1923 Geneva Protocol. There are of course important multilateral international conventions such as for instance in Europe the Brussels Convention or the Lugano Convention, however their application is much more limited than the New York Convention of 1958 to which today more than a hundred countries have adhered to.

1.2. The New York Convention is generally considered as the most successful international convention in the field of international private law. It has been interpreted and applied in more than 700 court decisions in which the national courts have generally supported the Convention to a large extent. These decisions are reported and commented upon in the *Yearbook Commercial Arbitration* which has devoted since 1976 a separate section on them. According to the leading commentator of the New York Convention, Professor Albert van den Berg, the enforcement of an arbitral award has been refused in less than 5% of the cases. This being said, although Article III of the Convention clearly lays down a general obligation of the Contracting States to recognize and to enforce the foreign arbitral awards subject to the conditions set forth under Articles IV and V, the interpretation and application of the Convention in some Contracting States has been sometimes problematic. Some authors



consider in this respect that *"the principal weakness of the New York Convention seems to be its failure to define certain terms"* such as for instance "arbitral awards" or "public policy".

## **2. National or Domestic Rules**

Should neither multilateral conventions nor bilateral conventions on recognition and enforcement of arbitral awards be binding upon the state in which a party intends to enforce an award, then that party should examine the question of enforcement under the national or domestic rules of the particular country or state.

Due to the number of multilateral and bilateral conventions and, in particular, to the constantly increasing number of states which are parties to the New York Convention, this situation becomes very rare.

However, it is important to mention that even if a country is a party to a convention such as for instance the New York Convention, consideration may still have to be given to the national or domestic rules which in some countries implement the Convention. For instance, in the United States the Convention has been implemented by federal law that is to say the Federal Arbitration Act (FAA). In other countries such as for instance Switzerland, the New York Convention is, on the contrary, directly applicable and did not need to be implemented internally.

In the United States, when neither the New York Convention nor the bilateral conventions ("FCN Treaties") are applicable, one has to refer either to Chapter I of the FAA or to the various state laws on enforcement of arbitral awards.<sup>1</sup>

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<sup>1</sup> In Italy arbitration is governed by a set of provisions laid down by the Code of Civil Procedure. Specific rules apply to international arbitrations (such being those where either party was resident of, or had his actual seat in, a foreign State at the date of execution of the arbitration agreement, or at least a major part of the obligations arising from the contract had to be fulfilled abroad). Furthermore, particular provisions are dictated for the recognition and enforcement of foreign awards (it should be noted that Italy has ratified the most important international Conventions on the subject, such as the New York Convention on Commercial Arbitration of 1958 and the Geneva Convention of 1961).

Pursuant to Law no. 25 of 5th January 1994, the Italian law on arbitration has recently undergone extensive reform which should, *inter alia*, facilitate international arbitration proceedings. The above law both modified a number of the existing articles of the code of civil procedure and added a whole new chapter relating to international arbitration (articles 832 - 838). Amongst specific points of interest introduced by the new law is the fact that no specific approval is required for an international arbitration clause, unlike in relation to a "national" one. Arbitrators in "international" proceedings are also now to be permitted to make their award in the course of a conference held by video-telephone. One of the most important innovations of the new law, however, lies in the fact that a stream-lined procedure has been created for the recognition and



### **3. The 1958 New York Convention on the recognition and enforcement of foreign arbitration awards: the Enforcement of foreign arbitration awards in Italy.**

We have seen that the use of arbitration in international trade (and maritime trade) is widely accepted also in order to avoid unfamiliar courts in unfamiliar jurisdictions: however, one of the problems likely to arise is that in such an unfamiliar jurisdiction the final award is to be enforced, at least in case the losing party fails to comply spontaneously with the award. From this point of view the 1958 New York Convention is aimed at making properly-rendered arbitration awards easy to enforce abroad. Therefore, a prevailing party in an international arbitration can seek out the jurisdiction where a losing party's assets are located, recognise the arbitral award there, and attach those assets as if the award were a local court judgement. Before the New York Convention gained world-wide acceptance, many foreign tribunals were reluctant to recognise arbitral awards rendered against their nationals. Furthermore, many foreign tribunals lacked the legal procedures to enforce awards. The latter was not the case of Italy: our Code of Civil Procedure contains a set of rules dedicated to the recognition and to enforcement of foreign judgements and foreign awards, even if the

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execution in Italy of foreign arbitration awards. In this case an application must be made directly to the President of the Court of Appeal who will merely check compliance with a number of formalities before issuing an order for recognition and execution. The only pre-requisites for the latter are that the dispute relates to a subject matter that may be considered by way of arbitration in Italy, and that the award does not contain provisions which are contrary to "public policy".

It should, however, be noted that in the event of a successful challenge to such an order, the case will proceed by way of ordinary civil proceedings. In addition to the provisions relating to international arbitrations, changes have also been made in relation to the law governing arbitration in general. An arbitration agreement may now, for example, be entered into by way of telex or telegraph, and, more importantly, the arbitration clause may be contained in a separate document to the contract itself. Moreover, the validity of the arbitration clause can be considered separately from the rest of the contract, meaning that the arbitrators will now be able to act in cases where the validity of the contract itself is at issue. One of the most significant changes in the law, however, is the fact that jurisdiction in arbitration proceedings will no longer be excluded merely by the fact that proceedings are pending in the courts in relation to a case which is "connected" to the subject matter of the arbitration. Previously, case law reflected the tendency for arbitration cases to be "drawn" before the courts in such circumstances, and which was often used as a tactical manoeuvre to delay the duration of a dispute.

The parties may now also agree that in the event that the Court of Appeal should declare the arbitration award invalid, the case will be referred back for a second arbitration on the merits, unlike the previous practice, which was for the Court of Appeal to proceed to hear the case on the merits once it had decided that the award was null and void.



enacting of the New York Convention implied that such rules were partially – even if not expressly - abrogated.

Italy is a Contracting State to the 1958 New York Convention, which was enacted with Law 19<sup>th</sup> January 1968 no. 62 and is in force as of 1<sup>st</sup> May 1969.

According to article I of the Convention, the same applies “*to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.*”

In Italy the New York Convention is applied *erga omnes* in respect of either Contracting or non Contracting States.<sup>2</sup> Accordingly, Italy is bound to apply the Convention to any arbitral award regardless the fact that the same was issued or not in another Contracting State. In addition, in various judgements our authorities and in particular ***our Supreme Court stated that it is not necessary that the parties to the arbitration must be nationals of the State where the arbitration took place, or nationals of a contracting state. From this point of view, Italy is bound to apply the Convention even in case the arbitral award was issued in a non contracting state, and even if the parties of such an arbitration were not citizens of such a state, nor citizen of any contracting state.***

The application of the Convention is therefore unlimited, both under the point of view of “space”, and under the point of view of the involved subjects: it is applied *erga omnes*<sup>3</sup>.

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<sup>2</sup> When acceding to the Convention, Italy made no reservation at all notwithstanding what provided under article I para. 3 of the Convention, with relevant effects also with reference to domestic law. Actually, it is remarkable that, notwithstanding the fact that under Italian conflict -of - laws regulations a reciprocity clause exists (see article 16 of the preliminary disposition to the Italian Civil Code), at that time (1968) Italy did not declare that it would apply the Convention to awards issued only in the territory of another contracting State, and did not use the faculty expressly provided under article I para. 3 of the Conventions.

<sup>3</sup> However, being parties to the same Convention does not imply that construction and implementation of the Convention is the same among all the Contracting States. Lack of uniformity in interpretation and implementation of the Conventions is wide spread and for this reason the Working Group on arbitration of UNCITRAL (the United Nations Commission on International Trade Law) is examining possible means to achieve the objective of ensuring a uniform interpretation of some issues of the Convention, above all the issue of “form” (which shall be examined in para 3 below) so that the form responds to the needs of international trade. These “possible means” include also the adoption of a declaration, resolution, or statement addressing the interpretation of the New York Convention that would reflect a broad understanding of the form requirement.



#### 4. The procedure to obtain the award recognition.

As I mentioned before until the new law on arbitration was enacted (1994) Italy had not complied with the requirement under article III of the New York Convention.<sup>4</sup>

Domestic arbitral awards are enforced through an easy and quick “exequatur procedure”. Before 1994 in case where enforcement of a foreign arbitral award was sought, a civil procedure was to be started before the Court of Appeal of the place where execution was to be levied, serving a writ of summons onto the defendant and substantially waiting for a substantial period of time (usually at least three or four years) to have the award enforceable. In the procedure of recognition Italian Courts applied indeed article V of the Convention, whose text reads as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;

or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;

or

(d) The composition of the arbitral authority or the arbitral procedure was not in

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<sup>4</sup> Article III states that “each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards”.



accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;

or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country;

or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

The above article limits dramatically the range of objections which can be raised by the defendants: however, the necessity of starting a civil procedure in order to have the arbitral award recognised was contrary to what the New York Convention provided under article III.

The procedure is modelled on that contained in the Brussels Convention. It can be summarised in brief as follows:

1. The request for the recognition and enforcement of a foreign award must be submitted to the President of the Court of Appeal, in the district of which the defendant is domiciled or in Rome if the defendant is seated abroad. For this purpose, it is necessary to join to the above request the award and the arbitration clause (or the contract in which said clause is embodied). Both documents must be exhibited either in original or through a certified copy.

The proceeding is rather quick. The President, after having verified the formal regularity of the award, declares that the award is enforceable, unless:

- i) the dispute could, according to Italian law, not be submitted to arbitration; or
- ii) the content of the award is against the public order.

2. Against the decree of the President, which declares that the award is enforceable, the defendant can, within 30 days from the notification of the decree, ask that the decree be revised by the Court of Appeal. In such a case, an ordinary proceeding of first instance will



follow. Likewise, the revision of the denial of recognition can be required. The Court of Appeal can annul or revoke the recognition or the enforcement of the award, if the opposing party can prove that:

- i) the parties were unable to stipulate the arbitration clause, or the clause was not valid pursuant to the law specified by the parties or, in the absence of a choice of law, by the law of the State where the award has been issued; or
- ii) the party against which the recognition of the award has been requested, was not informed of the appointment of the arbitrators or of the proceeding, or was unable to submit its defenses; or
- iii) the award has pronounced on a dispute which was not contemplated by the arbitration clause, or the award has pronounced beyond the limits laid down in the clause; nevertheless, the parts of the award regarding questions covered by the clause can be recognized and declared enforceable, if they can be separated from the questions which were not included in the clause; or
- iv) the appointment of the board or the arbitration proceeding did not comply with the provisions laid down by the parties or, in the absence of such provisions, with the law of the place where the proceeding took place; or
- v) the award has not become binding, or has been declared void, or has been suspended by any competent authority of the State where it had been pronounced, or by any competent authority of the State in accordance with the law of which it had been pronounced.

In the case mentioned under v), if the annulment or the suspension of the award has been requested to the foreign competent authority, the Court of Appeal can stay the proceeding for the recognition or the enforcement of the award. If the proceeding has been stayed, the Court can, upon request of the party which has required the enforcement, order that an appropriate guarantee be given by the other party.

In addition to the aforementioned cases, the Court can refuse the recognition or the enforcement in the same cases under which the President of the Court can reject the request for the recognition of the award, previously examined. It should be noted that, in any event, the provisions laid down by international conventions shall prevail on the rules previously examined.

3. Following the decree of recognition (or the judgment rejecting the request of revision), the enforcement proceeding can be started: ie, a formal summon to pay can be served on the defendant and, in case of non payment within 10 days, the seizure of the assets (movable or immovable) through the Court's bailiff, and subsequent sale through public auction, can be requested.



4. Practically, for the purpose of obtaining the recognition and the enforcement of a foreign award, the following documents are necessary:

- the original or a certified copy of the award;
- the original or a certified copy of the contract, in which the arbitration clause is embodied;
- a power of attorney, duly legalized by the Italian Consulate, or complying with the requirements laid down by the Hague Convention of 1965 ("Apostille").

As regards any certified copy of the award or of the contract, such a copy must be authenticated by a public Notary or by the Italian Consulate: the public Notary's seal should then be legalized through the "Apostille" (Hague Convention of 1965) or by the competent Italian Consulate.

## **5. The limit of the public order**

As indicated, one of the main issue to be determined under article V of the Convention is the concept of *public order* preventing an award to be enforced. The concept of public policy, or public order, differs in civil law systems from the concept in common law, even if the meaning of this expression is to some extent vague and indistinct. Both article 16 of the 1980 Rome Convention on the law applicable to contractual obligations and article 27 of the Brussels Convention make reference to "public policy" or public order: in particular the latter article states "*A judgement shall not be recognised: 1. if such recognition is contrary to public policy in the State in which recognition is sought (omissis).*"

Usually a difference is made between domestic public order (which consists of high standard of morality and social conduct in a civilised society in general, and in that society in particular) and international public order/policy (which consists in the protection of fundamental principles of international community and the most fundamental principles inspiring the law). Article V of the Convention is constructed by our authorities as making reference to the international public order.

As far as "public order" is concerned, our authority have stated the following principles:

- i. the procedure bringing to the award is not relevant;
- ii. the fact that a procedure connected to the arbitral procedure is pending before an Italian Court is not relevant;
- iii. the fact that the award was issued by two arbitrators is not relevant (under Italian law the panel of arbitrator must be composed of an odd number: one, three, five...)
- iv. the fact that the reasons of the decision were not specified is not relevant,



v. the fact that the arbitrators decided only on certain issues, separating and postponing any decision on other issues, is not relevant.

However, it must be noted that a recent decision issued by the President of the Milan Court of Appeal refused the enforcement of an award since the same was obtained by a shipowner who, according to English law, appointed its arbitrator, who remained as sole arbitrator (and issued the award) failing the opponent to appoint its own arbitrator. This decision was highly criticised by our literature.

Nevertheless, usually our courts have used the concept of public order very sensibly and usually from this point of view problems are not likely to arise.

## **6. “Protective measures” pending recognition and enforcement.**

Article 39 of the 1968 Brussels Convention reads as follows:

During the time specified for an appeal pursuant to Article 36 and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures taken against the property of the party against whom enforcement is sought.

The decision authorising enforcement shall carry with it the power to proceed to any such protective measures

Article 47 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters similarly states:

1. When a judgment must be recognised in accordance with this Regulation, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required.

2. The declaration of enforceability shall carry with it the power to proceed to any protective measures.

3. During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined,



no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Under the 1958 New York Convention there is no similar provision: Sometimes it is advisable to “seize” ships or other assets (bunkers, freights) before or pending the enforcement procedure in order to secure the applicant’s credit. In the loop of law and Convention the problem is whether a Court order granting an arrest of assets (including ships) can be obtained before filing the application for the enforcement of the award, and whether execution can be started while pending the appeal procedure.

Considering that the *exequatur* procedure of a foreign award must be similar to the procedure to enforce an Italian arbitral award, indeed the case our firm and the undersigned was involved in 1999 obtained the first (and as far as we know, the last ) precedent on the matter.

On behalf of Dutch interests we obtained in 1999 an arrest order of the mv “Radomyshil” from the Italian Court of Venice before starting the recognition procedure, which was then started before the competent Court of Appeal (in Rome). The opponents tried to challenge the decision sustaining *inter alia* that the competent Court to issue the arrest order was not the local Court but the Court of Appeal of Rome (i.e. the same court of the recognition), applying the above article from the Brussels Convention.

However, the Examining judge confirmed our opinion and the decision was published by Italian law review “*Diritto marittimo*” as the first precedent in favour of this theory. This avoids having to refer to the Court of the recognition to obtain an arrest, enabling the arrestor to file his arrest application directly to the Court where the vessel is lying. The practical implications are numerous. Basically in Italy the Courts of recognition of foreign awards, being Appeal Courts, are not familiar with arrest procedures. Moreover the time frame of an action in the Appeal Court is often longer and more complicated than in local first instance courts. Avoiding Appeal Courts will ensure prompt and smoother answers to arrest application to secure claims pending enforcement or recognition of arbitral awards. Subsequently both the Court of Appeal of Genoa (12.2.2000, *Morviasputnik vs. Azov Shipping*) and the Court of Appeal of Rome (15.07.2003, *Martingale vs. Azov Shipping*) reversed this jurisprudence. There is yet no Supreme Court ruling on this matter.



## **7. The 1952 Arrest Convention and Italian Ship's Arrest legislation.**

Italy is also, as it is commonly known, a Contracting State to 1952 Arrest Convention<sup>5</sup>. 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 the 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.

Therefore, in case the "winning party" in an arbitration seeks to enforce the award in Italy and intends to arrest a vessel of a losing party which belongs to a Contracting State to 1952 Arrest Convention, this Convention shall apply, and therefore the vessel can be arrested only in case the award decides about a maritime claim listed under art. 1(1). On the other hand for execution proceedings in general this limitation does not exist, and any vessel can be attached as soon as the award is declared enforceable.



## 8. 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. 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.

Thank you for your attention.

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Advocate

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<sup>5</sup> 10.5.1952 Brussels Convention on Arrest of Seagoing Ships. The Convention was enacted in Italy with Law 25 October 1977 No. 880.