

# Shipping 2021

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# Shipping 2021

**Contributing editors****Kevin Cooper and Kirsten Jackson****MFB Solicitors**

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Lexology Getting The Deal Through is delighted to publish the thirteenth edition of *Shipping*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Angola, Ecuador, Mozambique, Portugal, Russia and United Arab Emirates.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Kevin Cooper and Kirsten Jackson of MFB Solicitors, for their continued assistance with this volume.



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# Italy

Filippo Pellerano and Francesco Gasparini

Studio Legale Mordiglia

## NEWBUILDING CONTRACTS

### Transfer of title

- 1 | When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

Normal practice in Italy is that transfer of ownership of the ship under construction is governed by provisions to this effect agreed by the parties in the contract.

Most commonly, it is agreed that ownership will be transferred upon delivery; in this case pre-delivery instalments are secured by refund guarantees or by a mortgage on the ship under construction.

Although not common, it is also possible to agree that ownership will be transferred step by step, concurrent with payment of pre-delivery instalments.

In the absence of any contractual clause (which in practice will occur very rarely), it has been held that ownership will pass upon delivery (see Court of Cassation judgment No. 4350/1998).

### Refund guarantee

- 2 | What formalities need to be complied with for the refund guarantee to be valid?

There are no specific rules regarding the wording of refund guarantees and common international standards are generally followed.

As to form, the refund guarantee must be in writing and an authenticated Society for Worldwide Interbank Financial Telecommunication message is often required. No permission from financial, banking or currency authorities is required for an Italian bank to issue a refund guarantee.

### Court-ordered delivery

- 3 | Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

If the yard refuses to deliver the vessel, the most effective remedy available to the party is to file an application in the local courts to obtain a court order for delivery or seizure, or both.

To do so, the applicant must provide written proof of its right to have the vessel delivered.

Furthermore, the court can grant the order with provisional enforceability if there is a serious danger in delay. It is on the applicant to request provisional enforceability and present arguments concerning the prejudice that a delay would cause.

## Defects

- 4 | Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

The claim of the shipowner against the shipbuilder for damages caused by defects of the vessel lies in contract. Under article 1490 of the Italian Civil Code, the seller must guarantee the purchaser in respect of hidden and apparent defects of goods. The parties can agree to extend the duration of the guarantee or to fix a maximum cap for the damages to be paid.

In the case of purchase from the original shipowner, the purchaser can, alternatively, sue the shipowner according to article 1490, or bring a claim against the shipbuilder in tort. It is also possible for the purchaser to become an assignee of the shipowner's rights, so that the purchaser can bring a direct action against the shipbuilder under contract law.

A third party that has sustained damage can, alternatively, bring an action in tort against the shipowner or shipbuilder.

## SHIP REGISTRATION AND MORTGAGES

### Eligibility for registration

- 5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

Under article 143 of the Code of Navigation, registration of a ship in the Italian registry is subject to the following requirements:

- the ship is owned, for at least half of the shares of property, by an Italian or European person or entity; or
- the new build or ship previously registered in a non-European country is owned by a non-European person or entity that directly assumes the operation of the ship through a branch in Italian territory.

For ships under construction, there is a separate registry (article 234 of the Code of Navigation). The shipbuilding contract and a declaration that construction has been started must be registered. The registration is made in the name of the builder or the buyer, depending on who holds title in construction.

- 6 | Who may apply to register a ship in your jurisdiction?

The only party who may apply to register a ship is the shipowner, who can be a private or public entity.

## Documentary requirements

### 7 | What are the documentary requirements for registration?

If the nationality requirements as per article 143 of the Code of Navigation are met, the documents required for the registration of the vessel are those listed in article 315 of the Regulation for Maritime Navigation, namely:

- the document that certifies the ownership of the vessel;
- the tonnage certificate; and
- the authorisation for using the specific name of the vessel.

## Dual registration

### 8 | Is dual registration and flagging out possible and what is the procedure?

Italian law excludes, in principle, the possibility of applying for registration of a ship that is already registered in another country. However, if the vessel registered in a foreign country is bareboat chartered to someone who fulfils the requirements of article 143 of the Code of Navigation, and the foreign registry allows it, the vessel could be entered in a special Italian registry.

Flagging out in relation to a bareboat charter is also possible, but subject to prior notice as per article 156 of the Code of Navigation, in order to protect creditors.

## Mortgage register

### 9 | Who maintains the register of mortgages and what information does it contain?

Maritime mortgages are recorded in the registry in which the vessel is registered. For vessels that are bareboat chartered, the registration of mortgages remains in the primary registry.

## LIMITATION OF LIABILITY

### Regime

#### 10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

Italy has not ratified the Convention on Limitation of Liability for Maritime Claims (LLMC). According to the Italian law provision on limitation of liability (article 275 of the Code of Navigation), the amount of limitation is equal to the value of the vessel (ie, the insured value) at the time the limitation is applied for, provided the limitation fund cannot be less than one-fifth nor higher than two-fifths of the value of the ship at the beginning of the voyage to which the limitation refers, plus the profits earned on the voyage.

However, by means of Legislative Decree No. 111/2012, the Italian government has enacted the provisions of EU Directive 2009/20/EC on the insurance of shipowners for maritime claims. The decree also introduces into Italian law a new regime of limitation of liability of shipowners. Articles 7 and 8 of the decree have introduced, for vessels with a gross tonnage (GT) of more than 300GT, limits of liability identical to those provided for under Chapter II of the LLMC Convention, as amended by the protocol of 1996. The decree was not amended in order to enact in Italy the new limits that took effect from June 2015.

The decree has given rise to a number of problems including:

- the definitions of those entitled to limitation (which does not correspond to the one of the LLMC);
- the absence of a list of credits that are subject to limitation and those excepted from limitation; and
- the absence of any provisions regarding cases where a shipowner may lose title to the limitation.

In addition to the above, the decree does not contain procedural rules applicable to limitation proceedings. The procedural rules contained in the Code of Navigation – adopted having in mind the old regime provided under the Code of Navigation and which remains valid for vessels of 300 GT or less – should, in our view, remain in force. This solution was adopted by a decision of the Court of Nola in 2017.

For vessels with a gross tonnage of less than 300 GT, article 275 of the Code of Navigation remains applicable. However, such regime is based on the value of the vessel rather than tonnage. A recent decision of the Court of Appeal of Palermo in 2019 has confirmed the principle that the value of the vessel for the purpose of limitation corresponds to the insured value. The same decision has also confirmed that it is lawful that two different regimes of limitation are presently existing in Italy and that it is reasonable and consistent with the Constitution that (according to the regime of the Code of Navigation) the right to limitation is lost in case of gross negligence or wilful misconduct of the owner only (and not also of his or her servants or agents).

## Procedure

### 11 | What is the procedure for establishing limitation?

Pursuant to the rules of the Code of Navigation, a shipowner who intends to avail him or herself of the benefit of limitation must present an application with the relevant documents to a judge, along with a cash deposit for the limitation fund. After ascertaining the existence of the conditions required by the applicable law, a tribunal will declare the limitation procedure open. A shipowner is entitled to constitute a limitation fund even before legal proceedings have been instituted by claimants but not before a claim has been purported. In fact, among the documents that the shipowner must present to the court is included the list of the claimants and the amount of each claim relating to the specific voyage.

## Break of limitation

### 12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

The rules concerning the circumstances in which the limit can be broken are, currently, confused, because Decree No. 111/2012 does not include a rule similar to article 4 of the LLMC Convention. It is also impossible to refer to article 275 of the Code of Navigation, because article 12 of Decree No. 111/2012 has restricted its application to vessels under 300 GT.

The creditors have 15 days from the date when the judgment which that establishes the fund is published to lodge an appeal in which they can raise issues also in respect of shipowner's title to limitation.

Should the right to limitation be overruled, the shipowner is entitled to recover the fund and all creditors are entitled to enforce their claim in full on all assets and properties of the shipowner. As of May 2020, there is no case law in Italy on limitation being broken.

## Passenger and luggage claims

### 13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Pursuant to article 8 of Decree No. 111/2012 in relation to credits arising from a single event, the limitation of liability of the owner of a passenger ship in relation to the death or personal injury of a passenger is equal to 175,000 special drawing rights multiplied by the number of passengers that the vessel can carry.

The EU recently implemented two important pieces of legislation on passengers' rights, namely Regulation (EU) No. 1177/2010 concerning the rights of passengers when travelling by sea and inland waterways and Regulation (EC) No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents, implementing the Athens

Convention 1974 relating to the Carriage of Passengers and their Luggage by Sea, as amended by the protocol of 2002 on the carriage of passengers (according to the 2006 International Maritime Organization guidelines for implementation of the Athens Convention).

## PORT STATE CONTROL

### Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

From a national point of view, the port state control officer is the harbour master.

Italy is party to the Paris Memorandum of Understanding on Port State Control of 1982 (Paris MoU).

For EU member states such as Italy, the provisions of the Paris MoU are reinforced by Directive No. 2009/16/EC on port state control, which substantially endorses the content of the Paris MoU. Italy put this directive into effect by means of Legislative Decree No. 53 of 24 March 2011.

### Sanctions

15 | What sanctions may the port state control inspector impose?

According to the Paris MoU, when deficiencies are found that render the ship unsafe to proceed to sea or that pose an unreasonable risk to safety, health or the environment, the ship may be detained. The harbour master will issue a notice of detention to the master, which will also contain the information that the ship's owner or operator has the right of appeal.

### Appeal

16 | What is the appeal process against detention orders or fines?

The appeal must be filed to the territorially competent regional administrative tribunal within 60 days of the notification of detention and made against the Ministry of Transport. A complaint may also be addressed by all the interested parties (including classification societies, flag states and International Safety Management Code operators) to the harbour master's headquarters.

## CLASSIFICATION SOCIETIES

### Approved classification societies

17 | Which are the approved classification societies?

Pursuant to Legislative Decree No. 104/2011, which implemented in Italy Directive 2009/15/EC, if a classification society meets certain special requirements, the Italian administration can authorise it to become an approved classification society and perform statutory activities (ie, activities relating to the implementation and enforcement of statutory regulations on safety, security and environmental protection) on its behalf. The classification societies authorised by the Italian flag are RINA Services SpA, Bureau Veritas SA and DNV GL AS.

### Liability

18 | In what circumstances can a classification society be held liable, if at all?

The only precedent is the decision rendered by the Tribunal of Genoa in 2010 in a case regarding the claim of a charterer against a classification society for the damages suffered due to the detention of the vessel, after an inspection under the Paris MoU had been carried out.

The Genoa Tribunal held that the liability of the classification society could be based on the reliance placed by the charterer on the class certificate in deciding to charter the Redwood and upheld the claim. However, such decision has been overruled by the Court of Appeal of Genoa (though for reasons related to the merits of the case and not to the legal principle mentioned above). The decision of the Court of Appeal was then confirmed by the Italian Supreme Court of Cassation in March 2018.

## COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

### Wreck removal orders

19 | Can the state or local authority order wreck removal?

Pursuant to article 73 of the Italian Code of Navigation, in the event that the wreck of a vessel in a port, bay, canal or within the territorial sea is, in the judgement of the maritime authority, a danger or hindrance to navigation, the maritime authority can order the owner to effect, at his or her own expense, the removal of the wreck, and fix the date for the removal.

If the owner does not comply with the order by the fixed date, the authority itself carries out the removal and can sell the wreck on behalf of the state.

If the situation is urgent, the authority can immediately act on behalf, and at the expense of, the owner. In all cases, the owner will eventually be responsible for the costs of removal.

### International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

The 1910 Collision Convention is in force. Jurisdiction will be founded on the 1952 Brussels Convention on Civil Jurisdiction in Collision Matters. Therefore, an Italian court will have jurisdiction if Italy is:

- the place where the defendant has his or her habitual residence or place of business;
- the place where arrest has been effected of the defendant ship or of any other ship belonging to the defendant that can be lawfully arrested, or where arrest could have been effected and bail or other security has been furnished; or
- the place where the collision occurred.

The Court of Cassation (judgment No. 4686 of 9 March 2015) held that the special criteria of jurisdiction of the Collision Convention 1952 prevail over the general discipline of Brussels I. Brussels I, as well as the new Brussels I bis, do not affect any conventions to which the member states are parties and that govern jurisdiction in relation to particular matters.

A party can claim all damages that are immediate and direct consequences of the collision, including physical damages and loss of earnings.

Italy has ratified the 1989 London Convention on Salvage, which, therefore, applies as a general rule. By Judgment No. 7149 dated 13 March 2020, the Italian Supreme Court clarified a number of issues relating to 1989 London Salvage Convention:

- first, the Court confirmed that the Convention applies also to purely domestic salvage cases;
- second, the Court stated that the Convention can be supplemented by national legislation on certain issues indicated in the Convention itself, one of which being the joint liability of the owners of the salvaged goods;
- third, the Court considered the long-debated issue of the existence or not of joint liability of the owners of the salvaged goods. In this respect the Court restated the law by holding that: (1) the owner of the ship is the 'main debtor' and therefore can be liable also for the portion of the salvage award relating to cargo, and (2) cargo owners are liable only for the portion of the salvage award relating to their own goods.

The limitation period for enforcing salvage claims in our jurisdiction is two years from the day on which the salvage operations are completed (article 500 of the Code of Navigation).

The salvor can arrest the salvaged ship (or a sister ship) under the 1952 Brussels Convention on the arrest of ships. They can also arrest the cargo within 15 days of discharge and before it has been lawfully delivered to a third party.

So far, Italy has not enacted the Nairobi International Convention on Removal of Wrecks 2007.

Italy has ratified the International Convention on Civil Liability for Oil Pollution Damage as amended in 1992 (CLC Convention), as well as the Fund Convention as amended in 1992 and the supplementary Fund Protocol of 2003.

Furthermore, a general obligation of clean-up is imposed by the Code of Environment (Legislative Decree No. 152/2006) on the party responsible for pollution of the sea. In case of omission, the clean-up is carried out by the public administration, which can then claim relative costs from the responsible party (article 250 of the Code of Environment).

Italy has not ratified the Nairobi International Convention on the Removal of Wrecks, 2007, which entered in force in 2015.

Finally, EU Regulation No. 1257/2013 provides for a new discipline in ship recycling. The regulation introduces the same standards for ship recycling as imposed by the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (not yet in force), and establishes a list of recycling facilities authorised to conduct ship recycling operations. The Regulation entered into force in 2013 and has been applicable since 31 December 2018.

## Salvage

21 | Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory local form of salvage agreement. According to Regulation (EC) No. 593/2008 (Rome I), the applicable law for salvage agreements is chosen by the parties. Thus, Lloyd's standard form of salvage agreement is acceptable.

There are no specific rules on who may carry out salvage operations, which can be performed by occasional or professional salvors or by the Italian coastguard.

## SHIP ARREST

### International conventions

22 | Which international convention regarding the arrest of ships is in force in your jurisdiction?

The International Convention Relating to the Arrest of Sea-Going Ships 1952 is in force. The 1999 version of the Convention has not been ratified by Italy.

### Claims

23 | In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

Under the Brussels Convention 1952, a vessel registered in a contracting state can only be arrested for maritime claims as defined and listed in article 1 of the Convention. Ships flying the flag of a non-contracting state can be arrested in Italy for any claim.

Sister ships can be arrested in Italy while, save for exceptional cases, associated ships cannot.

Italian courts are, in fact, very reluctant to pierce the corporate veil, as it is a settled rule that each company is a separate and autonomous business entity, liable only for its own debts and with its own assets. It has been held by Italian courts that, under article 3(1)(2) of the 1952 Brussels Convention, it is possible to arrest a ship when the shares of the owning company are owned by the same companies or persons owning the ship in respect of which the maritime claim arose. The burden of proof of ownership is on the claimant.

The possibility of obtaining an arrest of the vessel if the debtor is a person other than shipowner is controversial.

It is disputed whether article 3, paragraph 4 of the Brussels Convention may be interpreted as allowing the arrest of the vessel even when the claim is not assisted by a lien on the vessel. The trend of the Italian courts is more favourable to claimants, and arrests are usually granted even in the absence of a lien on the vessel (see Tribunal of Savona in 2019). There have been however recent decisions in the opposite direction (see Tribunal of Venice and Tribunal of Oristano in 2019).

However, according to some recent decisions of the Italian courts, article 3.4 of the Brussels Convention allows the arrest of the supplied vessel only when the debtor (other than the shipowner) has control over the vessel, like a time or bareboat charterer, but in no other cases.

In a recent case of a claim against the bareboat charter of the arrested vessel, on the assumption that the claim was assisted by a lien, the arrest has been granted even if the debtor was a bankrupt company and despite the provisions of the bankruptcy law which prohibits the claimants to bring enforcement and precautionary proceedings after the bankruptcy is declared (Tribunal of Ravenna in 2020).

### Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

Maritime liens are recognised in Italy both by international and domestic legislation.

Italy is, in fact, party to the 1926 Convention on Maritime Liens and Mortgages, but not to the 1993 International Convention on Maritime Liens and Mortgages.

As for domestic legislation, maritime liens are listed in articles 552 (liens on the ship and the charter) and 561 (liens on cargo) of the Italian Code of Navigation.

Liens on the ship and freight are provided for the following claims:

- judicial expenses due to the state or made in the interests of the creditors;
- credits arising from seafarers' employment contract;
- credits for sums anticipated by Italian authorities for repatriation of seafarers and payments to social security bodies;
- indemnities for salvage and general average;
- indemnities for maritime accidents; and
- credits arising from contracts entered by the master for the conservation of the ship.

Liens on cargo are provided for the following claims:

- judicial expenses due to the state or made in the interests of the creditors;
- credits of the customs agency related to such cargo;
- indemnities for salvage and general average;
- credits arising from the contract of carriage; and
- sums due for obligations undertaken by the master on the cargo for supplies, repairs or other urgent need for prosecution of the voyage.

## Wrongful arrest

### 25 | What is the test for wrongful arrest?

A claimant may be liable for damages for wrongful arrest if the claim for which the arrest has been granted does not exist and if he or she has acted without due care.

## Bunker suppliers

### 26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

Article 1(k) of the Brussels Convention 1952 provides the right to arrest a ship in respect of a maritime claim arising out of goods or material wherever supplied to a ship for her operation or maintenance. Thus, when the debtor is the shipowner itself, the claimant may secure the claim with an arrest of the supplied vessel.

More controversial is the possibility to obtain an arrest of the vessel in case the debtor is a person other than shipowner, like the charterer. It is disputed whether article 3, paragraph 4 of the Brussels Convention may be interpreted as authorising the arrest of the vessel even when the claim is not assisted by a lien on the vessel. The trend of the Italian courts is more favourable to claimants and arrest are often granted even in the absence of a lien on the vessel.

However, according to some recent precedents of the Italian courts, article 3.4 of the Brussels Convention authorises the arrest of the supplied vessel only when the debtor (other than the shipowner) has control over the vessel, like the charterer, but in no other cases.

## Security

### 27 | Will the arresting party have to provide security and in what form and amount?

A court may, at its discretion, order the applicant to provide a counter-security in favour of the owner to cover damages if the arrest is eventually found to be wrongful. However, although contemplated by the Code of Civil Procedure, counter-security is not frequently ordered.

### 28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

When granting an arrest, the judge must also state the amount for which the arrest has been granted. The security that the court orders the arrested party to provide is, therefore, equal to that sum.

The form of security is usually agreed by the parties. If they fail to reach an agreement, the form of security is decided by the judge, and will normally be a cash deposit. The judge may also authorise the release of the ship against other forms of security, such as a bank guarantee.

Although it is very unlikely to happen, the amount of the security can in theory exceed the value of the ship.

Nonetheless, in such case the owner can apply to the court, giving evidence of the value of the ship, to reduce the amount of the arrest.

## Formalities

### 29 | What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

To make an arrest application, the lawyer must be empowered by a duly authenticated power of attorney.

A power of attorney issued abroad needs be notarised and legalised by apostille (except for some European states such as Belgium, France, Germany, etc), while a power of attorney issued in Italy must be authenticated by a notary or, if signed before the lawyer, by the lawyer him or herself.

Translation may be required from time to time by the judge.

Italy is a signatory country of the Apostille Convention 1961 and also ratified the Brussels Convention 1987 abolishing the legalisation of documents in the member states of the European Communities.

When filing an arrest application, the original copy of the power of attorney must be attached, but in case of emergency a scanned copy might be accepted upon condition of filing the original as soon as possible.

No further formalities are required and therefore, if a scanned copy of the power of attorney is provided and found acceptable by the court, an arrest application could be, in theory, filed by the following day (applications can be filed Monday to Saturday from 8am to 1pm).

This does not take into consideration that drafting and preparing an arrest application will generally require at least a couple of days.

## Ship maintenance

### 30 | Who is responsible for the maintenance of the vessel while under arrest?

Normal practice is that the shipowner, being already in possession of the vessel and responsible for its maintenance and operations, continues to take care of it while under arrest.

In particular circumstances, such as the vessel being abandoned, the court will appoint a custodian according to article 676 of the Italian Code of Civil Procedure, who will guard the vessel and be responsible for its maintenance. The court can also decide to appoint the claimant as custodian.

## Proceedings on the merits

### 31 | Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

Rules related to jurisdiction are not affected by the arrest procedure in Italy. It is, therefore, possible to arrest a vessel in Italy and then carry out arbitration or start proceedings on the merits in another country. However, proceedings on the merits must be started within 60 days from the day the order of arrest is issued by the court.

## Injunctions and other forms of attachment

### 32 | Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

Yes. According to article 646 of the Code of Navigation, the court or, in case of particular urgency, the harbour master or judicial police, can take suitable measures in order to prevent the ship from leaving the port.

### Delivery up and preservation orders

33 | Are orders for delivery up or preservation of evidence or property available?

Yes, it is possible to preserve property or evidence by means of an arrest ordered by the court according to articles 670 and 671 of the Italian Code of Civil Procedure.

### Bunker arrest and attachment

34 | Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

It is possible to arrest bunkers in Italy, although it is unusual in practice as major practical problems arise in connection with evidence of property of the bunker and the actual enforcement of the arrest.

## JUDICIAL SALE OF VESSELS

### Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

As stated by article 474 of the Italian Code of Civil Procedure, enforcement proceedings can only be commenced on the basis of an enforceable judgment or notarial deed.

### Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

Rules concerning the judicial sale of a vessel can be found in articles 643 to 686 of the Code of Navigation and articles 483 to 542 of the Italian Code of Civil Procedure.

The procedure for carrying out the judicial sale of a vessel must start with service by the court bailiff on the shipowner of an order to pay and a deadline to do so, with the notice that, in case of non-compliance, the creditor will proceed with the attachment of the debtor's goods. To do so, the creditor must be in possession of an enforceable title, usually a judgment.

If the debtor fails to pay within the deadline, the creditor will be entitled to serve a writ of attachment to the debtor and the master of the vessel, through the bailiff. The same writ of attachment must be sent to the harbour master of the port where the ship is registered, so that it can be recorded in the registry. The procedure can be joined by other creditors, in accordance with articles 499 and 500 of the Italian Code of Civil Procedure.

Once the vessel is attached, it cannot leave the port without the specific permission of the court. If the debtor persists in not paying, a creditor is entitled to apply for the judicial sale of the vessel not before 30 days and not after 90 days from the date of attachment. The application must be served, through the bailiff, on the debtor and on all other creditors who joined the procedure.

Within 30 days of the application being served, it must be filed at the competent court so that an expert can perform a survey in order to render an estimated value of the vessel. After hearing all interested parties, the judge will then order the sale of the vessel. The sale is carried out by means of a public auction. The sale operations can be delegated by the judge to a notary public, a lawyer or an accountant.

The judicial sale of the vessel may be ordered even when the vessel is under arrest and if, in the opinion of the judge, there is a danger that the vessel is lost or deteriorated pending the arrest proceedings.

After the sale, the judicial seizure is transferred from the vessel to the proceeds of the sale.

### Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

The order of priority of claims on the proceeds of a judicial sale of a vessel is as follows:

- legal costs related to the entire proceedings for the sale of the vessel;
- creditors with privileges or maritime liens;
- mortgagees;
- unprivileged or unsecured creditors who intervene promptly in the proceedings;
- unprivileged or unsecured creditors who do not intervene promptly in the proceedings; and
- all other unsecured claims.

### Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

Judicial sale of a vessel will extinguish prior liens, mortgages and other encumbrances. As provided by article 678 of the Code of Navigation, after the judicial sale the judge will issue a decree adjudicating the vessel to the new shipowner. In addition, with the same decree the judge will order the competent registry to delete any mortgage on the vessel.

### Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

Pursuant to article 157 of the Italian Code of Navigation, in the case of award of a ship to a non-EU entity, the successful bidder must file a notice to the registry in which the vessel is registered, within 60 days from the date of award, to obtain deletion from the registry.

### International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

Italy is party to the 1926 Convention on Maritime Liens and Mortgages, but not the 1993 Convention.

## CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

### International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

The Hague Rules of 25 August 1924 on bills of lading were ratified by Italy on 7 October 1938 and entered into force on 7 April 1939.

On 22 August 1985 Italy ratified the protocols of 1968 and 1979 (Hague-Visby Rules), which entered into force on 22 November 1985.

The Hague-Visby Rules are to be considered as 'special' Italian law, and overrule the Code of Navigation's 'general' laws.

Italy has not ratified the Hamburg Rules or the Rotterdam Rules.

## Multimodal carriage

42 | Are there conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

In cases of combined or multimodal transport, Italian courts have stated that the Civil Code shall apply.

Italy has also ratified the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention) and the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention).

## Title to sue

43 | Who has title to sue on a bill of lading?

According to Italian law, only the legitimate holder of the original bill of lading has title to sue. Once the bill of lading has been surrendered to the carrier against delivery of the goods, the cargo owner can also sue.

Therefore, the shipper cannot sue unless he or she has retained possession of the original bill of lading or has become an assignee of the rights of the consignee or cargo owner.

Insurers may bring a suit in their own name, but must be properly subrogated in the rights of their assured by means of a receipt and assignment of rights.

## Charter parties

44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

According to case law, the clauses of a charter party are only binding on the third-party holder of the bill of lading if the charter party is specifically mentioned in the bill of lading. The courts consider as sufficiently specific the mention of the place of issue and the date of the charter party.

With regard to arbitration or jurisdiction clauses, case law states that such clauses must be specifically incorporated into the bill of lading, with a clause worded as follows: 'all terms and conditions of the charter party dated on... in..., including the arbitration or jurisdiction clause apply.'

## Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

Certain judgments of Italian courts have stated that identity of carrier clauses are to be considered null and void pursuant to article 3(8) of the Hague-Visby Rules, although none of these judgments are recent.

## Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

Article 2049 of the Civil Code and article 274 of the Code of Navigation set the rules governing the vicarious liability of the shipowner for the acts or omissions of the crew. On the basis of such rules, the shipowner can, in principle, be held liable towards cargo interests even if he is not the contractual carrier.

However, in January 2019, the Tribunal of Genoa held that a claim in tort against the actual carrier (shipowner) other than the contractual carrier was subject to the same regime, the Hague Visby Rules, governing the liability of the carrier including the one-year time bar period. Such decision was rendered also on the basis of a non-recent judgment of the Court of Cassation (1983), according to which the Hague-Visby Rules applies both to the actual and the contractual carrier, and under the Himalaya clause included in the bill of lading which gave the shipowner the benefit of all contractual and law provisions applicable to the carrier. Indeed, if a properly drafted Himalaya clause is included in the contract, shipowners can rely on the terms and conditions of the bill of lading even if they are not the contractual carriers.

## Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

Deviation, if not reasonable or not effected under article 4(4) of the 1924 Brussels Convention, is considered a breach of contract that entitles the claimant to damages. The deviation, if made solely in the carrier's interest, excludes the possibility to benefit from the carrier's limitation of liability. Therefore, the carrier should prove that the deviation occurred to save human life, for humanitarian reasons or from force majeure. If the issue is disputed the courts will decide on a case-by-case basis.

## Liens

48 | What liens can be exercised?

Liens can be exercised on a ship and on cargo.

Liens on a ship are regulated by article 552 of the Code of Navigation, which states that they can be exercised for:

- judicial expenses due to the state or done in the interest of creditors for conservative actions on the vessel;
- duties of anchorage, lighthouse, port and other duties and taxes of the same type;
- pilotage, custody and maintenance of the ship after arrival in the last port;
- credits arising from the crew contract or from the contract of employment of the master;
- credits for the sums advanced by the ministry or the consular authority for the maintenance or repatriation of crew members;
- credits for social security contributions;
- indemnities for salvage and general average;
- indemnities for collision and damages to port, dry docks and navigable ways;
- indemnities for death or injuries of passengers or crew and for loss or damage of cargo and baggage; and
- credits arising from the contract or operations carried out by the master, even when he or she is the shipowner, for the maintenance of the ship or for the prosecution of the voyage.

Liens on cargo are regulated by article 561 of the Code of Navigation and can be exercised for judicial expenses due to:

- the state;
- customs duties;
- indemnity for salvage and the sum due to general average;
- credits arising from the contract of carriage, including discharging expenses and storage costs; and
- for the master's obligations on the cargo in the case that he or she needs to collect money for the prosecution of the voyage.

## Delivery without bill of lading

- 49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

The carrier incurs liability under the contract if it delivers the cargo without production of the original bill of lading. In principle, limitation of liability should be excluded under article 1693 of the Civil Code and article 422 of the Code of Navigation, because wrongful delivery could be considered as a voluntary default of the carrier.

## Shipper responsibilities and liabilities

- 50 | What are the responsibilities and liabilities of the shipper?

The shipper could be liable for deficiency in packaging, not providing the carrier with customs documentation, false declarations regarding the nature of goods and false declarations regarding the carriage of hazardous goods.

## SHIPPING EMISSIONS

### Emission control areas

- 51 | Is there an emission control area (ECA) in force in your domestic territorial waters?

Italy is a member of the IMO and has adopted the International Convention for the Prevention of Pollution from Ships (MARPOL), which was ratified by Law No. 662 of 29 September 1980 and Law No. 438 of 4 June 1982. Annex VI of the Convention, which sets emissions limits for ship exhausts, entered into force on 19 May 2005.

The EU adopted Directive 2012/33/EU, which modified earlier Directive 1999/32/EU, regarding the sulphur content of marine fuels. Through Legislative Decree No. 112/2014, Italy has adapted its legislation to comply with Directive 2012/33/EU.

### Sulphur cap

- 52 | What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

In 2014, by means of several amendments and integrations of the already existing Code of Environment (Legislative Decree No. 152/2006), Italy has implemented Directive 2012/33/EU, which contains the applicable cap on the sulphur content of fuel oil. The directive contains different caps depending on the geographical areas in which the vessel is navigating:

- pursuant to article 4a of the Directive, member states shall take all necessary measures to ensure that marine fuels are not used in the areas of their territorial seas, exclusive economic zones and pollution control zones if the sulphur content of those fuels by mass exceeds 0.1 per cent from 1 January 2015; and
- outside the emission control areas, the sulphur content by mass shall not exceed 0.5 per cent from 20 January 2020.

According to article 296 of the Code of Environment, in case of combustion of marine fuels with a sulphur content above the prescribed caps the master and the shipowners are jointly punished with a fine between €15,000 and €150,000. Most serious violations may also result in the suspension of the professional title of the master and the ban from the Italian ports of the master and the vessel.

## SHIP RECYCLING

### Regulation and facilities

- 53 | What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

There is no domestic regime on ship recycling. However, EU Regulation No. 1257/2013 provides for a new regime on ship recycling. The regulation introduces the same standards of ship recycling as are imposed by the Hong Kong Convention (not yet in force) and establishes a list of recycling facilities authorised to conduct ship-recycling operations. The regulation entered in force in 2013 and is applicable since 31 December 2018. The updated European list of ship recycling facilities was issued in January 2020. With effect from December 2018, the list also includes an Italian facility, San Giorgio del Porto (SGdP).

SGdP is the main ship recycling facility in Italy and is the first and only shipyard entered in the Italian Register of Naval Demolishers. SGdP dealt with the dismantling and recycling of the *Costa Concordia*, one of the most important green ship recycling projects ever carried out in Europe.

## JURISDICTION AND DISPUTE RESOLUTION

### Competent courts

- 54 | Which courts exercise jurisdiction over maritime disputes?

There are no specific courts in which shipping disputes are litigated, although the courts of the main maritime districts have divisions that mainly deal with these types of claims and have significant experience in maritime matters.

Choice of forum clauses will be considered valid by Italian courts if they comply with the provisions set out by article 25 of Council Regulation (EC) No. 1215/2012, which replaced Council Regulation (EC) No. 44/2001. In particular, article 25 provides that an agreement on jurisdiction is valid if it is concluded:

*in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.*

In accordance with article 25, choice-of-forum clauses included in a bill of lading are usually considered valid and binding by Italian courts. By a recent judgment the Court of Cassation also affirmed the validity of a jurisdiction clause included in a multimodal document of transport.

In the event that proceedings are commenced before an Italian court with no jurisdiction, this must be challenged by the defendants in their first pleadings.

### Service of proceedings

- 55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

The service of court proceedings abroad is governed by the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

Should the service be performed on a person resident or domiciled in a country not party to the Convention, it shall be performed through diplomatic channels.

If the service cannot be performed under the Convention or through diplomatic channels, article 142 of the Code of Civil Procedure applies. In this case, the service is effected directly by registered mail to

the addressee, and another copy is forwarded by the public prosecutor to the Ministry of Foreign Affairs, which will execute the service. Within the EU, Regulation No. 1393/2007 applies.

## Arbitration

### 56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

There are no domestic arbitral institutions in Italy dealing with maritime arbitration. Arbitration clauses in shipping contracts, even if between Italian parties, very often provide for arbitration in London.

Arbitration can be instituted in Italy according to article 806 et seq of the Italian Code of Civil Procedure and it can be 'ritual' (*arbitrato rituale*) or 'informal' (*arbitrato irrituale*). The main difference between the two procedures is that in ritual arbitration the arbitrators actually replace the ordinary courts and their award is enforceable, like a judgment, while in informal arbitration the arbitrators are deemed to act as agents to whom the parties have delegated the function of settling the dispute by means of a document (the award) that is in the nature of a settlement agreement rather than a judicial decision. An award in informal arbitration cannot, therefore, be directly enforced, but must be litigated like a contract and effected through the enforcement of the judgment rendered on it.

Under Italian law, arbitration clauses must be in writing (ie, in a document signed by the parties), and Italian courts are very strict in enforcing such provisions.

Since September 2013, compulsory mediation has been in force in Italy for certain kinds of claims. As far as shipping is concerned, mediation is compulsory for insurance claims and must be carried out before any proceedings against insurers are brought in court.

## Foreign judgments and arbitral awards

### 57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

The rules on the recognition and enforcement of judgments rendered in other EU member states are set out by Regulation (EC) No. 1215/2012. For all other countries, international and bilateral conventions may apply (eg, judgments rendered in Denmark, Iceland, Norway and Switzerland will be recognised and enforced according to the Lugano Convention 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (succeeding the Lugano Convention 1988), which is, in fact, very similar to EU legislation).

If EU Regulation No. 1215/2012 or international conventions do not apply, Italian courts will apply articles 64 to 71 of Italian Law No. 218/1995, which provides a test that only considers the regularity of proceedings followed in rendering the judgment, without any consideration of the merits.

Regarding the enforcement of foreign arbitral awards, Italy is a signatory party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Pursuant to this Convention, Italian courts will consider the arbitral awards rendered in another contracting state as directly binding in Italy. Enforcement will be provided by means of an exequatur procedure that involves a petition being filed with the competent court of appeal, whose decision on whether to grant or reject the enforcement of the award can be challenged by any interested party within 30 days.

As far as awards rendered in countries not party to the 1958 New York Convention are concerned, Italian courts will apply articles 839 to 840 of the Italian Code of Civil Procedure, whose test for recognition and procedure for enforcement are very similar to those described above.

## Asymmetric agreements

### 58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

The Italian Supreme Court held in Judgments Nos. 9314/2008 and 3624/2012 that asymmetric jurisdiction and arbitration clauses are valid and enforceable under Italian law.

The only exceptions are set by article 1341 of the Italian Civil Code, which provides that jurisdiction and arbitration clauses included in general terms and conditions drafted by one party are ineffective if not specifically approved in writing by the other party, and article 33 of the Italian Consumer Code, which provides that jurisdiction and arbitration clauses in contracts entered between a company and a consumer are considered invalid if not favourable to the consumer.

## Breach of jurisdiction clause

### 59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

Under Italian law, the defendant must raise the objection of lack of jurisdiction of Italian courts at the beginning of his or her case.

Italian law does not provide for anti-suit injunctions.

### 60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

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## LIMITATION PERIODS FOR LIABILITY

### Time limits

#### 61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

Limitation periods depend on the nature of the claim. According to article 2951 of the Italian Civil Code, a one-year time limit applies to claims arising under a contract of domestic rail or road carriage. If a claim arises under a contract of domestic sea carriage, the time limit will be six months if the carriage is within Europe or Mediterranean countries (article 438, paragraph 1 of the Code of Navigation). Otherwise, the time limit is one year (article 438, paragraph 2 of the Code of Navigation).

When the contract of carriage by sea is governed by the Hague-Visby Rules, the one-year time limit of article 3(6) will apply.

Other limitation periods in shipping are one year for charter parties (six months or one year for voyage charter or contracts of carriage), two years for collision damages and salvage remunerations, and three years for oil pollution damages.

The general rule for liability in tort provides a five-year time limit.

Time limits cannot be extended or shortened by agreement between the parties but, if the claimant serves a writ of notice of claim with a request of payment, domestic law time limits may be interrupted and a new period will commence.

The one-year time limit of article 3(6) of the Hague-Visby Rules can be extended by agreement.

### Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

Courts or arbitral tribunals cannot extend the time limits provided by internal laws or international conventions.

## MISCELLANEOUS

### Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

Italy ratified the Maritime Labour Convention 2006 on 12 September 2013.

However, the regulations of the Convention must be implemented with some amendments to national legislation, which are currently being examined by Parliament.

### Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

The Italian Civil Code provides that a party can only require the termination of a contract where the performance has become too onerous for contracts in which there is a lapse of time between stipulation and performance, if the performance has become too onerous for one of the parties and if this is due to unforeseeable events. The concept of 'too onerous' must be examined in light of the economic conditions of the whole contract.

### Other noteworthy points

65 | Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

No.

## UPDATE AND TRENDS

### Key developments of the past year

66 | Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

The covid-19 pandemic has crucially impacted the performance of contractual obligations worldwide, thus raising the question of whether the pandemic itself could exclude contractual liability for non-performance of the contract under applicable law or force majeure clauses.

As far as Italian law is concerned, rather than providing a definition of 'force majeure', the Italian Civil Code states in general terms in what circumstances the debtor is exempted from liability for failing to perform its contractual obligations. Article 1218 provides that the debtor is liable for damages arising from his (or her) failure to perform unless he proves that such failure was due to a cause 'not imputable to him'; article 1256 provides that the debtor is relieved of its obligation when performance becomes totally and irreversibly impossible 'for a cause not imputable' to the debtor; article 1463 provides that if the contract entails mutual obligation and one of them becomes impossible (as per article 1256), then the contract is terminated.

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The burden of proof is apportioned as follows: the creditor must establish that the debtor failed to perform its contractual obligation; at that stage it is for the debtor to prove that the non-performance or the delay in performing was due to a cause 'not imputable' to him or her.

The concept of 'non-imputability' is, therefore, crucial to determine whether the debtor can be exempted from liability for his failure to perform. Three elements concur in this concept (ie, in the definition of 'force majeure'), namely

- the circumstances must be 'extraordinary'– this element has an objective nature and is based on the appreciation of factors (eg, frequency, impact and intensity) that can be measured and classified;
- they must be 'unforeseeable' this element is of subjective in nature, but must be assessed by reference to the normal average capacity and diligence of the contracting party to foresee such events);
- they must be beyond the debtor's control and not involve the debtor's negligence.

As said, the Civil Code does not provide a definition of force majeure event; also, it does not list specific cases. Orders by public authorities (factum principii) are not to be considered automatically as force majeure events; they can be force majeure to the extent that they meet the above-mentioned requirements.

In the past, following some natural disasters, the legislator qualified those events as 'force majeure events' pursuant to article 1218 Civil Code, as it happened in 2012 when an earthquake hit the Italian region of Emilia-Romagna.

Owing to the recent events related to the covid-19 outbreak, article 91 of Decree-Law 18/2020 introduced a new provision stating that: 'Compliance with the containment measures set out in this decree is always considered for the purposes of excluding, pursuant to and for the purposes of articles 1218 and 1223 of the Italian Civil Code, the liability of the debtor'. In such respect, it must, however, be noted that:

- according to such provision, force majeure is taken into consideration only in relation to the 'compliance with the containment measures', and not to the epidemic event as a whole;
- these restrictions do not constitute per se cases of force majeure since they must be 'considered' by the judge; and
- causation must always be established; the debtor must show how the restriction actually affected his or her operations and his or her ability to perform.

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