

Recenti sviluppi della giurisprudenza inglese ed italiana in materia di pirateria

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Liberata 'Valle di Cordoba', la nave italiana sequestrata dai pirati al largo della Nigeria

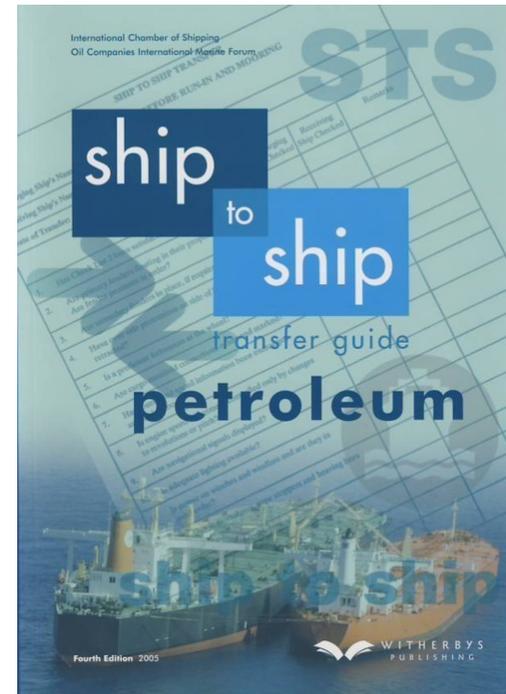
Roma - (Adnkronos) - Il rilascio effettuato dagli stessi sequestratori che in 18, armati di kalashnikov, **l'avevano catturata il 24 dicembre al largo di Lagos**. Il capitano ha denunciato il furto di parte del carico, piccole somme di denaro e oggetti d'oro. Non ci sono feriti.



*Trafigura Beheer BV v. Navigazione
Montanari Spa (Valle di
Cordoba) [2014] EWHC 129 (Comm)*

Valle di Cordoba noleggiata per il
trasporto di un carico di premium
motor oil da Abidjan (Costa d'Avorio)
a Lagos (Nigeria).

Mentre è in rada viene attaccata da
pirati che eseguono un trasbordo
(STS) di circa 5,300 mts del carico



Reclamo dei *charterers* vs. gli armatori

Charter party Beepeevoy 3 ("BP3") form integrato con Trafigura Chartering terms, che contengono una ITL (in transit loss) clause, che recita:

"In addition to any other rights which Charterers may have, Owners will be responsible for the full amount of any in-transit loss if in-transit loss exceeds 0.5% and Charterers shall have the right to claim an amount equal to the FOB port of loading value of such lost cargo plus freight and insurance due with respect thereto. In-transit loss is defined as the difference between net vessel volumes after loading at the loading port and before unloading at the discharge port."

Il contratto contiene inoltre anche una Clausola Paramount che richiama le Hague Visby Rules

Trafigura Beheer BV v. Navigazione Montanari Spa (Valle di Cordoba) [2014] EWHC 129 (Comm)

1. "*in-transit loss*" means loss that is incidental to the carriage of oil products and does not extend to losses such as those caused by the action of pirates.
2. In ogni caso gli armatori sono legittimati a far valere le eccezioni e difese fondate sulle Hague-Visby Rules per effetto del richiamo in *charter party* alla Paramount Clause

London Arbitration 4/13 (Lloyd's Maritime Law Newsletter, 16 April 2013)

Reclamo da parte degli armatori vs. i *charterers* per il rimborso di un premio assicurativo aggiuntivo per la copertura di *piracy risks* per transito nel Golfo di Aden seguendo le istruzioni dei *charterers*

Il *charterparty* aveva le seguenti clausole

- 1 *“Owners to pay for the insurance of the vessel.*

- 26 *“Owners to remain responsible for the [...] insurance [...] same as when trading for their own account”.*

- 56 *“Basic war risk insurance is to be for Owners' account. Any additional premium payable for trading to countries or waters or territories where an additional premium is payable to Owners war risk underwriters to be for Charterers' account [...] any crew war bonus including blocking and trapping to be for Charterers' account”.*

Conwartime form 2004 is deemed to be incorporated into this
Charterparty [...]

BIMCO Piracy Clause for Time Charter Parties 2009:

(a) The Vessel shall not be obliged to proceed or required to continue to or through any port, place, area or zone [...] which in the reasonable judgement of the Master and/or the Owners, is dangerous to the Vessel [...] due to any actual, threatened or reported acts of piracy and/or violent robbery and/or capture/seizure ...

(d) Costs...

(iii) if the underwriters of the Owners' insurances require additional premiums or additional insurance cover is necessary because the Vessel proceeds to or through an Area exposed to risk of Piracy, then such additional insurance costs shall be reimbursed by the Charterers to the Owners;...

Copertura assicurativa kidnap & ransom + loss of hire.

Richiesta di rimborso ai *charterers* in base alla BIMCO Piracy Clause, perché la copertura assicurativa ulteriore era “necessary” tenuto conto delle circostanze

- ✓ rischio concreto di pirateria
- ✓ ipoteca sulla nave che obbligava gli armatori a mantenere la copertura assicurativa in relazione a “usual marine risks”

Decisione degli arbitri: la copertura assicurativa integrativa era *entirely reasonable*, ma non “necessary” (nel senso che non era obbligatoria o inevitabile)

L’atto costitutivo di ipoteca obbligava gli armatori “to insure [...] against (a) fire and usual marine risks (including Excess Risks) (b) War risks and (c) Protection and Indemnity risks [...]”.

Rifiuto di eseguire gli ordini in base al C/P

Pacific Basin IHX Ltd. v Bulkhandling Handymax AS (The "Triton Lark") [2011] EWHC 2862 (Comm).

Charter party contenente la clausola Conwartime 1993

Cl. 1 *"War Risks" "acts of piracy ... which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the Vessel".*

Cl. 2 *"The Vessel, unless the written consent of the Owners be first obtained, shall not be ordered to or required to continue to or through, any ... area or zone ... where it appears that the Vessel ... in the reasonable judgement of the Master and/or the Owners, **may be, or are likely to be,** exposed to War Risks."*

Pirateria ed off hire

*Osmium Shipping Corporation v Cargill International SA (The
"CAPTAIN STEFANOS") [2012]*

Clausola 56 del charterparty

*Should the vessel put back whilst on voyage by reason of any
accident or breakdown, ..., **or capture/seizure, or detention or
threatened detention by any authority including arrest**, the hire
shall be suspended from the time of the inefficiency until the vessel is
again efficient in the same or equidistant position in Charterers'
option, and voyage resumed therefrom.*

Tesi degli armatori: "capture/ seizure" si riferisce solo ad ordini da parte delle autorità

Tesi dei noleggiatori "capture/seizure" è un *off-hire event* distinto da "*detention or threatened detention by any authority*", e gli atti di pirateria rientrano nella nozione di "capture/seizure".

Il Tribunale ha accolto la tesi dei charterers, sul presupposto che la clausola 56 andasse letta in base a "*plain and obvious meaning of the words used in the clause*".

In contrasto con *Cosco Bulk Carrier Co. Ltd v Team-Up Owning Co, Ltd, The "SALDANHA"* [2010]

nel quale la Corte ha esaminato una clausola simile e la nave è stata ritenuta *on hire* per tutta la durata del sequestro

Metall-Market 000 c. *Moormerland Ltd*

Ai sensi dell'art. 536 cod. nav. e della reg. A delle regole di York e Anversa, il pagamento del riscatto per la liberazione di una nave e del suo carico sequestrati dai pirati, fattispecie qualificabile come crimen iuris gentium, costituisce atto di avaria comune e quindi non sussiste il fumus boni iuris in relazione alla domanda di sequestro di tale nave, a garanzia del danno causato dalla ritenzione del carico da parte dell'armatore allo scopo di ottenere il pagamento del contributo di avaria comune.

Masefield AG -v- Amlin Corporate Member Ltd [2011]

There is no universal morality against the payment of ransom, the act not of the aggressor but of the victim of piratical threats, performed in order to save property and the liberty or life of hostages ... there is no universally recognised principle of morality, no clearly identified public policy, no substantially incontestable public interest, which could lead the courts .. to state that the payment of ransom should be regarded as a matter ... without any legitimate recognition.

South Africa: Are Merchant Shippers Hiring Pirates To Kill Pirates?’ – The Regulation Of Private Maritime Security Companies Operating In The Gulf Of Aden

Mondaq 17 dicembre 2013



“health warning” ... GUARDCON should not be used to engage local security personnel through a local agent. It is simply the wrong type of contract for that purpose.

If a PMSC is to be used as an intermediary to engage local security personnel, GUARDCON cannot be used without special adaptations. This is because GUARDCON contains provisions for liabilities, responsibilities and insurances that contemplate the direct employment and control of security personnel by the PMSC. The fact that only local security guards can be used changes the game, requiring careful consideration of the contract.

GUARDCON is designed exclusively for contractual arrangements between PMSCs and shipowners. If GUARDCON is to be used in any other circumstances then shipowners are strongly encouraged to check with their underwriters and P&I Club beforehand. The P&I Clubs that belong to the International Group have reviewed these Guidelines and prepared a Circular to their members indicating approval of amendments, where necessary, based on these Guidelines.

BIMCO will not issue any form of amended GUARDCON or any “special edition” of the contract for use in areas such as the Gulf of Guinea.

IMO 1405 – Guidance to Shipowners

REVISED INTERIM GUIDANCE TO SHIPOWNERS, SHIP OPERATORS AND SHIPMASTERS ON THE USE OF PRIVATELY CONTRACTED ARMED SECURITY PERSONNEL ON BOARD SHIPS IN THE HIGH RISK AREA

The increased threat to commercial shipping by Somalia-based pirates has led to extended use of armed guards and a marked expansion in the number of firms offering armed maritime security services for ships transiting the High Risk Area (HRA). The Organization, whilst not endorsing the use of privately contracted armed security personnel (PCASP), understands that shipping companies may find it difficult to identify reliable, professional private providers of armed security.

The decision on the employment of PCASP on board ships is a complex one for a shipowner. The absence of applicable regulation and industry self-regulation coupled with complex legal requirements governing the legitimate transport, carriage and use of firearms gives cause for concern. This situation is further complicated by the rapid growth in the number of private maritime security companies (PMSC) and doubts about the capabilities and maturity of some of these companies. Significant competence and quality variations are present across the spectrum of contractors offering services.

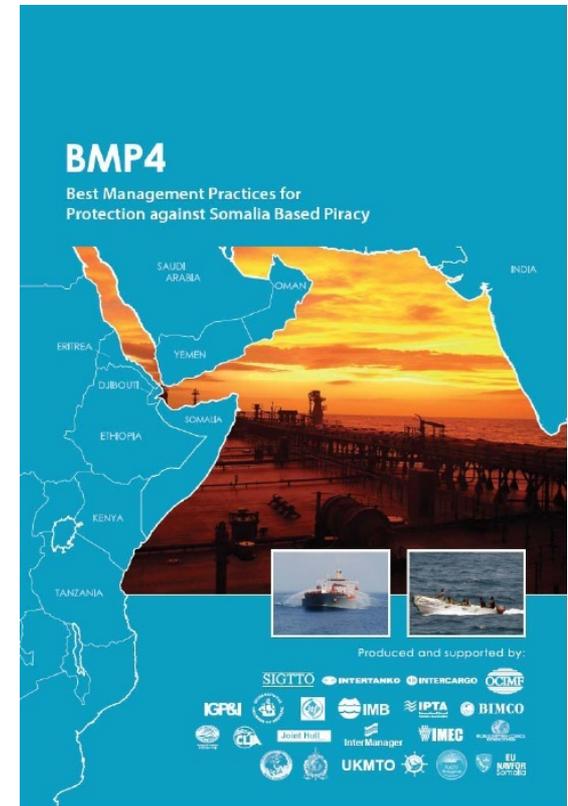
IMO 1405 Guidelines to shipowners

1.4 It is important to note that flag State jurisdiction and thus any laws and regulations imposed by the flag State concerning the use of PMSC and PCASP apply to their ships.

Furthermore it is also important to note that port and coastal States' laws may also apply to such ships.

1.5 The use of PCASP should not be considered as an alternative to Best Management Practices (BMP) and other protective measures.

Placing armed guards on board as a means to secure and protect the ship and its crew should only be considered after a risk assessment has been carried out. It is also important to involve the Master in the decision making process.



IMO 1443 Guidance to PMSC

Section 5.15 Use of Force

all reasonable steps should be taken to avoid the use of force and, if force is used, that force should be used as part of a graduated response plan, in particular including the strict implementation of the latest version of BMP

1. Il ricorso all'uso della forza in assenza di adeguata BMP potrebbe non essere giustificato

2. La mancata o non corretta implementazione di BMP potrebbe incidere su *due diligence* e *seaworthiness* della nave

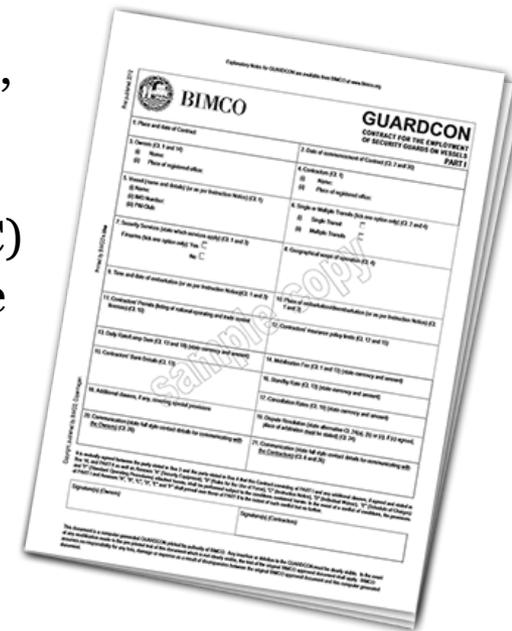
GUARDCON elaborato da BIMCO congiuntamente con
rappresentanti del mondo armatoriale, assicurativo, P&I,
legale

Standards ai quali devono attenersi i Contractor (PMSC)
con riguardo a copertura assicurativa, permessi e licenze

Responsabilità e controllo del Comandante

‘knock for knock’ clause

third-party liability





Guidelines for the use of GUARDCON when engaging PMSCs as intermediaries to employ local security guards within territorial waters (20 febbraio 2014)

BIMCO is fully aware that the industry has recently become more focused on the risk of pirate attacks taking place in the Gulf of Guinea. The type of pirate attacks taking place in this region are very different in character to those of Somalian pirate attacks in the Indian Ocean and require a different approach. The chief difference is that unlike the Somalian pirate attacks in the Indian Ocean on vessels in transit on the high seas, the attacks in areas such as the Gulf of Guinea often take place on vessels entering or leaving ports, or at anchor within the territorial waters of a littoral state. National law in the affected countries dictates that foreign security guards are not permitted to carry firearms on board merchant vessels within their territorial waters.

Shipowners who want armed security personnel to protect their ships in these areas must rely on local security or law enforcement forces (commonly marine police or naval personnel). It is also understood that in Nigeria, for example, the Navy will provide small patrol craft to protect shipping.



Guidelines for the use of GUARDCON when engaging PMSCs as intermediaries to employ local security guards within territorial waters (20 febbraio 2014)

To employ local military/police personnel as on board security guards a shipowner has two main options.

Firstly, the owner can use a local agent with direct links to the military/police in that country to employ local security guards.

Secondly, the owner can engage the services of a PMSC to act as an intermediary to employ local guards and to provide additional logistical and administrative support.