



# STANDARD BULLETIN

SETTING THE STANDARD FOR SERVICE AND SECURITY

September 2011

## PIRACY SPECIAL EDITION

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^ Fishing vessel Feng Guo No 168 attacked and reportedly captured off Tromelin Island, October 2010

In this special edition of the *Standard Bulletin*, we examine current issues associated with piracy. Whilst piracy is an age-old scourge, the marked increase in pirate activity, particularly in the Gulf of Aden and Indian Ocean, threatens not only shipowners, but also seafarers and world trade.

Shipowners are increasingly relying on armed guards to protect their interests and we examine the International Maritime Organisation's recent guidelines on their use. From a legal perspective, we summarise the advice we provide to members to ensure armed guard contracts do not prejudice insurance cover. From a practical perspective, we examine the steps members can take to avoid a pirate attack that should form the foundation of any anti-piracy strategy. We also look at some charterparty issues and recent case law.

### THE CURRENT POSITION

According to the International Maritime Bureau Piracy Reporting Centre, this year alone there have been 304 attacks and 31 hijackings worldwide to date. Off Somalia, 362 hostages have been taken and seven killed. Overall, 19 ships and 377 hostages are currently being held by Somali pirates. The average cost of ransoms has increased significantly from around \$600,000 in 2008 to a current average of approximately \$3.5 to \$4.5 million. The highest ransom paid to date was reportedly \$9.5 million to release the *Samho Dream* in November 2010. The attacks have spread from the Gulf of Aden and Somali coastal areas to areas off Kenya, Tanzania, the Seychelles, Madagascar, Mozambique, Oman and the Maldives, extending as far as the west coast of India.

Pirates have changed their tactics to try to thwart anti-piracy efforts. Pirates now use captured merchant ships as motherships to launch attacks far from the Somali coast. Motherships are more effective attack platforms than smaller skiffs and they enable pirates to operate during the monsoon season. A further worrying trend has been an escalation in the levels of violence used against captured crews, with stories of keelhauling and other brutal methods of torture being reported. Piracy has gained an increasingly high political and public profile, and the maritime and mainstream media is filled with stories of heavily armed Somali pirates attacking and capturing merchant ships on a regular basis.

The military response to the threat of piracy has been reported extensively, but the shipping community itself is also responding in a number of ways.

Currently in its fourth edition, BMP is contained in a pocket-sized booklet that provides shipowners with practical advice to enable them to avoid, deter or delay piracy attacks. BMP includes information about the high-risk areas, risk assessments, typical pirate attacks, liaising with naval forces, planning and preparation, hardening ships against attack, and what to do during and after an attack by pirates. Further information about the steps members should take is provided in the next article.

## GUARDS AND SHIP PROTECTION DETACHMENTS

Guards are not only able to assist in the defence of a ship but are also able to provide practical advice and assistance to the master in relation to hardening the ship against attack. It has been reported that no ship deploying armed guards has been captured by pirates.

## LOBBYING

The shipping industry liaises with government through the United Nations, the International Maritime Organization and working groups, and also has an on-going relationship with the co-ordinators of military operations in the region. Lobbying has largely focused on increasing the effectiveness of the military response, establishing a proper framework for the prosecution and detention of pirates, promoting BMP, regional capacity building, and highlighting the effects of piracy on shipowners and world trade as well as on seafarers and their families. The Standard Club sponsors the 'Save our Seafarers' campaign ([www.saveourseafarers.com](http://www.saveourseafarers.com)), which aims to raise awareness of the human and economic cost of piracy.

The shipping industry is responding to the growing threat of piracy in the Gulf of Aden and Indian Ocean by recognising that the military is incapable of providing complete protection and by adopting a series of self-help measures. BMP provides practical steps that can be adopted to reduce the risk of a ship being taken and can be supplemented by the deployment of guards or military personnel. Both have been proven to be effective counter-piracy measures. Actions taken at sea have been supplemented by lobbying aimed at raising public and political awareness of a growing scourge that threatens not only shipowners but also seafarers and world trade.





# PIRATE ACTIVITY UPDATE



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For three years, the piracy scourge has been news within the maritime press, but would only become headline news in the mainstream media when a yacht was captured or possibly when a major national flagged ship is attacked. In 2010, pirates captured 1,181 seafarers and killed eight. Fifty-three ships were hijacked. Over the past four years, it is reported that 62 seafarers have died as a direct result of piracy in the Gulf of Aden and Indian Ocean.

Statistics from 2010 and so far in 2011 show that there have been no successful attacks on ships adhering to group transit times and speeds in the Gulf of Aden (GoA). Group transits are the most effective way for the limited number of warships to protect merchant shipping; however, the majority of attacks are now occurring far from the GoA, across the Indian Ocean. With only approximately 15 active warships patrolling such a vast area, merchant ships cannot be protected from pirate attack at all times.

Life has become more difficult for the pirates. The number of successful attacks in the past month is the lowest for many years and the number of ships held hostage is also at a low level. Some industry experts believe that the pirates will be using their forces with even more vigour with the monsoon lull about to end.

## THE METHOD OF ATTACK

- The common method of pirate attack has been for two or more small high-speed (up to 25 knots) open boats/'skiffs', to approach from the stern.
- Pirates will usually close in on their target at speed and board the ship as quickly as possible. Once on board, the pirates will seek to capture the crew and take control of the bridge.
- Attacks during darkness are rare and, to date, have had a low success rate. Many successful attacks have occurred around first or last light.
- Prevailing weather and sea state conditions can influence the pirates' ability to operate. Wind strengths in excess of 18 knots and wave heights above 2 metres are considered sufficient to provide protection for all but the most vulnerable ships.
- Pirates frequently use small arms fire and rocket propelled grenades (RPGs) to intimidate masters of ships to reduce speed. Maintaining full speed has proven to be a good defence against pirates boarding.

A small sample of recent attacks within the last three months illustrate how attacks are conducted:

- A chemical tanker was chased by five pirates armed with AK-47s in a skiff doing 24 knots. The master increased speed, took evasive manoeuvres, sent a distress message and activated the water jet from the fire monitor. Two of the pirates climbed the ship's side, cut the razor wire and came on board while the other three pirates remained in the skiff. All crewmembers took shelter in the citadel. The pirates entered the bridge by breaking the glass and the

protecting bars. The crew remained in the citadel for 3.5 hours. The ship was later searched and all the pirates were found to have departed. No crewmembers were harmed.

- A tanker was chased by a mothership and two skiffs with four pirates in one skiff and 10 pirates in the other skiff. The pirates fired upon the tanker with RPGs and guns and attempted to board. The tanker increased speed, took evasive manoeuvres and activated the Ship Security Alert System (SSAS). The master, two crew and the unarmed security team remained on the bridge while all the other crewmembers retreated to the citadel. The ship managed to evade the boarding, but due to the continuous firing by the pirates, two crewmen sustained serious injuries.
- A container ship spotted a mothership and two skiffs at a distance of 6nm from the ship. The alarm was raised, speed increased and crew were placed on standby. When the skiffs closed to 2.5nm, the master ordered the crew into the safe room and activated the SSAS. The skiffs continued to chase the ship at a speed of around 20 knots. The master took evasive manoeuvres and headed the ship into the swell. The skiffs finally aborted the attempted attack.
- A mothership approached a bulk carrier and launched a skiff with three armed pirates. As the skiff came to a distance of 800 metres, the master fired rocket flares, all crew mustered in the citadel and armed guards were deployed. The pirates kept on chasing the ship and the armed guards fired warning shots when the skiff closed to a distance of 600 metres. The pirates aborted the attack.
- A small bulk carrier was pirated approximately 320nm north-east of the island of Socotra, and between 30 and 50 pirates boarded the ship. Within 24 hours of being taken, it was used to launch an attack on another ship using a skiff with five pirates. This attack was repelled by armed force.

## WHAT HAPPENS FOLLOWING A SHIP'S CAPTURE BY PIRATES?

- Some or all of the crew may be restrained or forced to assist the pirates in operating the ship. The crew usually remain on the ship for the duration of the hijacking, although there is recent evidence that this is changing and some crew have been taken ashore.
- The ship will either be sailed back to a pirate port in Somalia or used in the Indian Ocean as a platform to launch attacks on other ships.
- The average time period to secure the release of a ship is about 200 days; sometimes it is a lot longer. One ship has been held captive for nearly one and half years.
- During the period of capture, there are recent reports of the crew being beaten and tortured, and subjected to inhumane conditions.
- Following release, crew have brought both physical and mental injury claims against their employer.

Further advice can be found on the MSC(HOA) website at: <http://www.mschoa.org>



## WHAT CAN BE DONE TO AVOID A HIJACKING?

The most effective way of avoiding a hijacking is to remain outside of high-risk areas. However, given that the majority of the Indian Ocean has been designated high risk, this may not be practical. Without doubt, the single most important thing that ships can do is be prepared and maintain a vigilant lookout.

Certain flag states have reportedly agreed to deploy state troops on their flagged ships and more nations will likely follow this example. Although this may deter piracy on these flagged ships, it is not a policy that can be adopted for all ships, given the numbers of ships registered in Panama or Belize, for example.

An increasing number of ships now carry private security personnel, many of whom are armed. The increase in the use of armed security personnel defending ships has been mirrored by the increased level of violence employed by pirates when attacking ships and the treatment of crew following a successful hijack.

## PREPARING THE SHIP AND CREW IN ADVANCE

Without blanket military protection from piracy in the Indian Ocean, it is important that all shipowners take steps to protect their ships and crews. It is well known that the most vulnerable ships are those with a low maximum speed, a low freeboard, and where ships and crews fail to adequately plan and implement protective measures in advance.

The IMO recently said that nearly 40% of ships transiting the high-risk areas were not complying with the Best Industry Management Practice Version 3 (BMP3); the military say that the level of non-compliant ship as approximately 20%. Between 17 January and 27 February 2011, the military found that of the ships transiting the GoA:

- 10% did not comply with BMP3
- 18% had not registered with the UKMTO or MSCHOA
- less than 20% had effective self-protection measures in place

Anecdotal evidence suggests that some companies are not prepared to even provide razor wire or flak jackets to the crew, even after the crews have requested them. Less than 20% of ships appear to be taking measures to harden their ships. If these statistics are correct, a significant number of shipowners are failing to take adequate precautions.

The latest version of Best Management Practices (BMP) should be used as a basic operational model when transiting high-risk areas. BMP version 4 (BMP4) has just been released and details can be found from the Standard Club website <http://www.standard-club.com/ProductsAndServices/page.aspx?p=260>. In addition, information and intelligence for the master is absolutely necessary. He needs to be kept informed about where the motherships are operating and where the latest attacks have occurred. The company security officers should be responsible for passing this information to the master.

Higher-speed ships, 15 knots and above, are not necessarily safe from attack, but speed is an effective form of defence. Maintaining full sea speed and employing passive countermeasures have often been shown to be effective.

Some members have asked what precautions should be taken when navigating in the seas at the edges of the high-risk areas, for example in the southern Tanzanian, Comoros Islands or northern Mozambique waters. Successful attacks have occurred in these waters, so vigilance and precautionary measures should be taken.

## FUTURE ACTION

It does not take a military person to see that the use of pirated motherships will increase. With the crew remaining hostage on board, these ships are able to carry hundreds of armed pirates, carrying heavier armaments such as heavy calibre machine guns or even anti-aircraft guns. Naval reports confirm that the crews are being forced to operate the ships at gunpoint and any military approach leads to the captured crews being paraded on deck and threatened with execution if the forces do not withdraw.

How will the lightly armed security guards react on the attacked ship? Consider as an example, a medium-range tanker used as a mothership, with enough MDO fuel to supply the pirate skiffs and their motherships for years. What are the navies or armed response units going to do then? The capture of a fast-feeder container ship could provide a reasonable platform for the pirates to attack another ship directly. The pirates would then be able to board directly ships even with high freeboards, with dozens or more pirates at one time, use substantial fire power and not have to worry about the sea conditions. Even attacks at night could be easier – a floodlit ship would enable such an event. This scenario has already been partially played out and firefights have already taken place. We have already seen that the pirates are increasingly adaptable.

The use of motherships has increased the range of the pirates' activity. Attacks on shipping close to Indian and the Maldiv Islands waters have occurred. These attacks may move towards Sri Lankan waters or further afield.

There have been some robust naval interventions, particularly when their own flagged ships are attacked. However, crew members have also been killed in the crossfire. Experts point out that storming a moving ship is fraught with difficulty and danger.

The recent threat by the pirates to take hostage seamen off the pirated ships and hold them ashore may complicate the situation even further.

The focus to date has been on the commercial costs incurred, and governments appear not to be concerned with the human cost. The United Nations' efforts through the IMO to galvanise action have failed to be effective. The real focus therefore for owners has to be on protecting their ships and crews.

Training the crew by preparing them in advance, ensuring that they have the resources to implement BMP4, and providing the additional support and intelligence, is still the best deterrent against piracy.

## PIRACY ATTACKS IN OTHER REGIONS

Some piracy attacks continue to occur in the Malacca Straits and South China Seas. However after the GoA and Indian Ocean, the most dangerous waters are around the coasts of Nigeria, Benin and the Gulf of Guinea, which include the sea around Cameroon and Equatorial Guinea. Since December 2010, there have been 20 attacks off Benin, nine of which have occurred since June 2011. The pirates or armed gangs appear to be targeting diesel fuel tankers, so there is a suspicion that this is more related to theft than to hostage-taking.

Recent attacks have taken place on a large tanker 23 miles off Cotonou during ship-to-ship transfer operations, on a number of small tankers attacked off the Benin coast and on a small tanker 30 miles off Nigeria. The anchorages around Lagos, close to the Niger Delta/Port Harcourt and Cotonou remain high-risk areas. It is also noteworthy that the majority of attacks have taken place at night. Often the ship itself and crew are hijacked and then later released. It is also reported that these attacks are often carried out in a particularly violent manner.

Sensible precautions should also be taken and these should include the relevant advice contained in BMP4. Good piracy advice and up-to-date information can be also found at the Maritime Security review website: <http://www.marsecreview.com/>

# IMO GUIDANCE ON THE USE OF ARMED GUARDS ON BOARD SHIPS



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The increasing threat of piracy off the coast of Somalia, the Gulf of Aden and the wider Indian Ocean is continuing to hamper trade within the region now known as the 'High Risk Area'. This has led to an increase in the number of Private Maritime Security Companies (PMSC) that offer armed guards for ships. The International Maritime Organisation (IMO) does not endorse the use of Privately Contracted Armed Security Personnel (PCASP), but understands that it can be difficult to select reliable and professional private security, especially when there are a wide variety of companies with varying levels of competence, discipline and experience.

Whether to engage the services of such companies is a difficult decision and should not be adopted as an alternative to Best Management Practice (BMP). A lack of security industry self-regulation, together with complicated legal requirements for the legitimate transport, carriage and use of firearms, can lead to an array of problems if the PMSC is not properly vetted before its services are engaged. The IMO has therefore published guidance in the form of Circular 1405 in order to assist shipowners, operators and masters when selecting armed security.



## SUMMARY OF THE GUIDANCE IN CIRCULAR 1405

### Laws, regulations and jurisdiction

The laws and regulations imposed by the flag state will apply to its ships, as will the applicable port and territorial law. Thorough investigation before contracting with armed security services is therefore advised, and shipowners should consult their flag state before placing PCASP on board to ensure that any statutory requirements are complied with.

### Risk assessment

Shipowners should undertake a diligent risk assessment before using PCASP and should ensure that all other methods of self-protection in BMP have been explored.

### Selection and vetting of PMSC

Shipowners should ensure that due diligence is conducted when researching potential contractors. Information on the PMSC's past experience, its understanding of the legal requirements and its knowledge of protecting ships from pirate threats are just some of the background checks that are recommended in the guidance. The vetting of PCASP is also advised and should encompass criminal background checks, medical assessments, drug and alcohol testing, and their ability to apply for travel documents.

### Training of PCASP

It is very important that the shipowner determines whether the PCASP have had adequate training. Evidence of ship-board familiarisation, their use of firearms and awareness of the appropriate use of force following guidelines recognised by the flag state are included in the list of recommendations.

### Insurance

Shipowners should check that PMSC hold insurance cover for themselves and their personnel, and third-party liability cover. Their terms of engagement must also not prejudice or potentially prejudice the shipowner's insurance cover. As any incident can have severe consequences, it is strongly advised that shipowners contact their insurers before contracting with security providers in order to assess the potential impact on their insurance cover. The guidance contains further information on this topic and it should be read carefully.

### PCASP team size, composition and equipment

The size of the PCASP team and the equipment to be used will be influenced by the latest threat assessment and the type of ship. The size of the team plus the crew should not exceed the number specified in the Ship's Safety Certificate and it is important that there is a clearly defined hierarchy within the team, which should comprise of a mix of different skills.

### Command and control

The command and control structure between the PCASP and the crew should be clearly defined and documented so that all parties understand their roles and responsibilities, as well as those of their colleagues. There should be a clear understanding that at all times the master remains in command and retains overriding authority. Amongst other recommendations in the guidance, there should be a transparent flow of information between all parties and a constructive mentality of co-operation.

### Management of firearms

The shipowner will want to ensure that the PCASP are responsible for their use of weapons and ammunition at all times when on board. Documented compliance with the relevant flag, coastal and port state legislation is paramount. Inventories of weapons and ammunition should be recorded, and procedures and controls for their safe storage should be organised.



### Rules for the use of force

The PMSC should provide an informative graduated response plan to an attack and possess a complete understanding of the rules for the use of force. The guidance states that the primary function of PCASP is the prevention of boarding using minimal force and that they are to take all reasonable steps to avoid the use of force. Any force that is applied should be consistent with applicable law and it should not exceed what is strictly necessary. Force should always be proportionate to the threat and appropriate to the situation. Firearms should not be used against persons except in self-defence or defence of others.

### Reporting and record-keeping

The master should maintain a fully documented log of every circumstance in which firearms are discharged. Suggestions of what should be recorded are listed in the circular and the importance of contemporaneous written statements from all persons present at an incident is highlighted in anticipation of legal proceedings.

#### RECOMMENDATIONS FOR FLAG STATES: CIRCULAR 1406

The interim recommendations provide considerations on the use of PCASP if and when a flag state determines that such a measure would be appropriate and lawful. They are not intended to endorse or institutionalise the use of armed personnel and do not address all the legal issues that may be associated with the use of PCASP on board ships.

The carriage of PCASP is subject to flag state legislation and it is for flag states to establish if and under which conditions it will be permitted. Flag states should take into consideration the possible escalation in violence when deciding on their policy and may need to clarify their national policy on the carriage of PCASP.

Both circulars were approved in the 89th session of the Maritime Safety Committee and will be reviewed in September 2011. The full IMO Circulars can be viewed using the following links:

[http://www.igpandi.org/downloadables/piracy/imo\\_circulars/MS.C.1-Circ.1405.pdf](http://www.igpandi.org/downloadables/piracy/imo_circulars/MS.C.1-Circ.1405.pdf)

[http://www.igpandi.org/downloadables/piracy/imo\\_circulars/MS.C.1-Circ.1406.pdf](http://www.igpandi.org/downloadables/piracy/imo_circulars/MS.C.1-Circ.1406.pdf)



# TO ARM OR NOT TO ARM, THAT IS THE QUESTION



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Whilst naval forces of different countries are deployed in the Gulf of Aden (GoA) and Indian Ocean region to protect trade routes, with only limited resources at their disposal to police such a large area, the level of piracy activity shows no sign of abating.

A number of high-profile hijackings in recent months have left shipowners looking for ways to combat the problem themselves, over and above following the Best Management Practice. The club has seen a large increase in enquiries from members who are considering using armed guards, whether military or private, in an attempt to protect the crew, ship and cargo from harm and to avoid the financial losses that a hijacking causes.

Once a controversial subject, there has been growing acceptance within the shipping industry that employing armed guards on ships in the GoA Indian Ocean region is an effective short-term solution for countering pirate attacks. To date, no ships with armed guards on board have been hijacked by pirates. The International Chamber of Shipping now accepts that operators must be able to defend their ships against rising pirate attacks through the use of private armed guards. However, critics are concerned by the capability of the armed guards offering their services, the legality of their use and the possibility that there will be an escalation of violence against crew.

Following the escalation of pirate attacks the IG and the Standard Club have now adopted a neutral position on the use of armed guards.

## CLUB COVER

There is no cover restriction or prohibition on the deployment of on-board security personnel, provided their use is acceptable to the flag state and other relevant authorities. However, it is important that the use of armed guards is discussed with the club, as well as other insurers, and we would always ask that members forward a copy of the security contract to us for review.

## THE SECURITY CONTRACT

In general terms, a member should not assume responsibility, under contract or otherwise, for liabilities arising or loss resulting from any act or omission for which they would not otherwise be liable, or they would otherwise be entitled to exclude or limit liability.

The provision of armed guards is under a contract for services to the ship. For liabilities to be covered, and to be poolable, members are obliged to use best endeavours to ensure that the security contract provides, as a minimum, reciprocal indemnities for liabilities arising from negligence or is on terms no less favourable to the shipowner than knock-for-knock.

## DUE DILIGENCE

In addition to considering the contractual issues, the club recommends that members carry out due diligence to ensure that reputable companies are used that subscribe to an international code of conduct and employ properly trained personnel who work in accordance with clear standard operating procedures and rules of engagement. In this regard, members should ensure that the master retains control at all times and has responsibility for the safety and security of the ship whilst armed guards are on board.

The security companies should also have appropriate insurance in place that will not only respond to liabilities arising under the contract with the shipowner but liabilities of their own staff, including medical expenses and kidnap and ransom cover.

## WEAPONS OF WAR

The type of weapons being brought on board by the armed guards should be considered. The weapons of choice tend to be bolt-action rifles, shotguns and handguns. For the pirates, these are AK47s and RPGs, which are cheap, readily available and reliable. None of these weapons are considered 'weapons of war' for the purposes of the club cover exclusion at rule 4.3. However, it is important to note that where heavier armaments are used, this could trigger the 'weapons of war' exclusion, and members would need to seek guidance from their war risk underwriters.

## CONCLUSION

The IG and Standard Club recognise the need for shipowners to protect their ships from pirate attack. Should a shipowner choose to employ private armed guards as part of their protection strategy, the club is familiar with the service contracts used and can offer advice to the shipowner. Please direct any queries to your usual club contact or the author, who will be happy to assist.

# THE CARRIAGE OF FIREARMS – SOUTH AFRICA



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There has been a dramatic rise in the use of armed security personnel for ships transiting high-risk piracy areas. Many shipowners regard this as a necessary step to maintain the security of the ship. However, it does present some difficult operational questions. A practical issue that frequently arises is how a port will respond to the carriage of firearms on board ship. To date, many states have been reluctant to condone the use of armed guards, with many feeling that it may lead to an escalation of violence. Accordingly, some countries have imposed restrictions on ships carrying firearms into port. This article considers both the necessary considerations when entering port in South Africa and the impact on club cover should these not be met. South Africa has become particularly problematic for carrying firearms, given its prevalence as a bunkering destination combined with a stricter application of local regulations.

## SOUTH AFRICAN FIREARMS CONTROL ACT

Under the South African Firearms Control Act (the Act), the master of a ship arriving in South Africa with firearms on board has an obligation to seek a permit 21 days prior to arrival. Previously, the South African police (SAP) and the various ports of entry into South Africa had the power to issue permits. However, this authority has now been withdrawn and permits can only be issued at the national level by the SAP.



Under the Act, failure to comply with this 21-day obligation carries stiff penalties, including large fines and criminal proceedings against the master. As such, the 21-day requirement presents a significant burden on shipowners, who may not have received their sailing orders until a few days before their estimated time of arrival in South Africa.

The South African police had previously taken a lenient approach to the enforcement of the Act and would grant the permits up to 96 hours prior to arrival. However, the 21-day notice period is now being applied more strictly.

## OBTAINING A PERMIT

For a ship to enter a port in South Africa carrying firearms, it is first necessary that they complete the SAP import application form. In addition to this form, the local agents must provide the following:

- full details of the ship
- a copy of the ship's International Safety Management certificate
- contact details for the ship's local agents
- details of the previous port of call and next port of call after South Africa
- copies of the master's passport and passports for the security guards on board
- dangerous cargo declaration if any
- a letter from owners or agents detailing why the firearms are required and the reasons why a late application is sought, if appropriate
- quantity and description of ammunition and firearms on board
- a copy of the firearm licence from the country of export and the export permit for the firearms and ammunition
- a letter from owners authorising the security guards to use firearms on board

The form and the above documents must then be presented to the SAP 21 days prior to arrival at the first South African port of call.

## PENALTIES FOR FAILING TO COMPLY

It is important to stress that the requirements in South Africa regarding the carriage of firearms on board are strict and the penalties for failing to comply with the Act not only include potentially large fines, but potentially a custodial sentence for the master. In some recent cases, masters have been arrested for failing to comply with the Act and fines have typically ranged from SAR50,000 (approximately \$7,000) to over SAR100,000. Therefore, it is important that before entering any South African port with firearms on board, the permit has been sought and supplied. Accordingly, we recommend that our local correspondents should be consulted if members require assistance.

## CLUB COVER

Fines for failing to comply with local customs regulations are covered under rule 3.16.2. However, should the fine be the result of any personal act or default on the part of the member or his managers, P&I cover would be subject to the discretion of the board. Furthermore, the obligation to mitigate under rule 6.20 is also important, as the member must take reasonable steps to avoid or minimise any liabilities. Should a member fail to take reasonable steps to avoid a fine, it is likely that recovery for such a fine will be subject to the discretion of the board.

## SUMMARY

With the increased piracy threat, it is apparent that many shipowners are turning to armed guards as a security measure when transiting high-risk piracy areas. Whilst owners may be able to easily arrange for armed guards on board and, in many instances, pass the costs on to charterers, this is by no means the end of the issue. It is essential that the owner and master are fully aware of and compliant with the requirements of any port they enter with firearms on board. Failure to appreciate these risks could result in a fine and, potentially, a custodial sentence for the master.



# CAPTURE OF CARGO BY PIRATES – A TOTAL LOSS?



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This article comments on the implications of the 2010 Court of Appeal decision of *Masefield v Amlin* [2011] EWCA CIV 24 (Bunga Melah Dua). The ruling is useful because it confirms the long-held opinion by those in the marine insurance business that where cargo is held temporarily by pirates, the cargo can neither be said to be an actual total loss nor a constructive total loss for the purposes of the Marine Insurance Act. The decision now provides clarity for cargo owners and their insurers on difficult issues surrounding insurance coverage in the event of piracy, and offers guidance for those in the wider shipping community on the legality of ransom payments.

## THE CIRCUMSTANCES

The case involved the seizure of the *Bunga Melati Dua* in the Gulf of Aden by Somali pirates on 19 August 2008 during a voyage between Malaysia and Rotterdam. Negotiations for the ship's release appeared to be progressing well, but on 18 September the cargo owner issued a notice of abandonment to their insurer. This notice was rejected by the insurer. Upon payment of a ransom, the ship, cargo and her crew were released on 29 September 2008.

## WAS THE CARGO A TOTAL LOSS?

The cargo owner argued that at the time the notice of abandonment was given, cargo was an actual total loss due to capture by the pirates or alternatively it was a constructive total loss. On this basis, they sought to recover the difference between the insured value of the cargo and its resale value. These arguments were rejected in the English Commercial Court and the cargo owner appealed.

It was unanimously agreed by the appeal court judges that the capture of a ship by pirates does not mean that the cargo is an actual total loss for the purposes of insurance coverage. For there to be an actual total loss, the cargo owner would have to show that it is impossible for the cargo to be salvaged physically and/or legally, regardless of cost. The judges said that it was possible that the ship and cargo would be recovered by the payment of a relatively small sum therefore there was no actual total loss. It was accepted that piracy is theft for the purposes of the Theft Act. However, this does not mean that it is impossible to recover the cargo.

## ARE RANSOM PAYMENTS ILLEGAL?

The cargo owners also argued that ransom payments should not be a factor in deciding whether it is possible for the cargo to be recovered, because such payments are against public policy and as such constitute bribes.

The judges disagreed. They ruled that ransom payments are legal under English law and morally justified on the basis that the only option in ensuring the effective release of the ship, cargo and crew is often the payment of a ransom.

## IMPLICATIONS OF THE DECISION

The *Bunga Melati Dua* is an example of a marine insurance contract that did not clearly define when losses due to piracy could be claimed. Following this decision, it is important for contracts of insurance to deal with all eventualities in the event of pirate attack in order to avoid any uncertainty in their interpretation.

In the absence of express agreement, where the recovery of a ship's cargo remains a possibility, no claims for the total loss of the cargo can be made against the cargo insurer. It is up to the parties in insurance contracts to clearly define the point at which a claim for the full insured value of the cargo will be possible.

From our members' perspective, this decision will provide some comfort as it clearly states that ransom payments are neither against public policy nor illegal. Such payments will continue to be treated as subject to general average and be capable of creating a claim under applicable insurance policies.



# THE IMPACT OF PIRACY: ON-HIRE OR OFF-HIRE?



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The average length of time that ships are held by pirates has increased over the last year. A ship captured today can expect to be held for an average of five months. The hire accrued during this period will be substantial and the off-hire clause of the charterparty will usually determine whether the charterer is obliged to pay hire. In this article, we look at how the off-hire provisions in a typical time charterparty are construed following the capture of a ship by pirates. Reference is made to the recent case of the *Saldhana*.

The question of whether a ship is considered off-hire when captured by pirates will depend in the first instance on the off-hire clause contained in the charterparty. In general, to be considered off-hire, a ship's full working must be prevented as a result of an event either defined or listed in the off-hire clause. It is for the charterer to prove that the circumstances fall within the scope of the off-hire clause.

Popular time charterparty forms such as NYPE and the Shelltime form were drafted before the re-emergence of piracy as a threat to shipping. Accordingly, their wording and apportionment of responsibility in the event of an act of piracy are not clear and can lead to confusion. A number of standard charterparties contain provisions relating to piracy in their war risks clause. A classic example is BIMCO's CONWARTIME 2004, which addresses piracy well in respect of insurance and deviation issues, but remains silent in terms of allocation of obligations and responsibilities in relation to hire.

The shipping industry has for a long time suspected that piracy does not constitute an off-hire event under standard contracts. It was recently clarified by the English courts in the *Saldhana* when the court upheld the finding of an arbitration tribunal that charterers, under an amended NYPE 1946 charterparty, failed to prove that an off-hire event had occurred. This judgment, which is analysed further in the following article, highlighted the inability of the old charter form's wording to tackle the modern development of piracy. Mr Justice Gross emphasised this fact and stressed that problems would be avoided if charterers and owners contract on clear terms that give meaning to their intentions.

## ‘OR BY ANY OTHER CAUSE...WHATSOEVER’

Where the off-hire clause contains the words ‘or by any other cause’ and it then lists various off-hire events, the court will interpret this list as being inclusive, restricting the definition of off-hire events. These clauses are generally not wide enough to include acts of piracy and the ship will remain on-hire until one of the listed events occurs.

However, where the word ‘whatsoever’ is added after ‘or by any other clause’, it is likely that this will be construed widely enough for a piracy event to render the ship off-hire.

Where there is no express reference to a piracy event in the off-hire clause, the charterer will consider whether the circumstances fit with any of the other listed off-hire events. In the *Saldhana*, the charterer argued that ‘default of the crew’ resulted in the capture of the ship and therefore the ship should be considered off-hire. The court found that there had been no default and to construe ‘default of the crew’ this widely would go against the historical drafting/interpretation of the clause and result in a drastic change in the liabilities of the owners.

## NEGLIGENCE

Negligence by the ship or the crew in causing the capture of the ship is unlikely to constitute off-hire unless wording to that effect is specifically included in the off-hire clause; for example, ‘failure to follow Best Management Practice, resulting in capture of the ship to count as off-hire’. In the absence of such a clause, claims by the charterer that the crew were negligent may result in damages equating to the amount of hire. However, in reality, the courts may be unlikely to conclude that the crew, who were captured and held captive by pirates, were negligent unless there were very clear and near reckless acts of negligence on their behalf.

## PIRACY CLAUSES

Both BIMCO and Intertanko have produced a series of clauses designed to deal with the questions posed by piracy in modern-day charterparties. BIMCO 2009 subclause (e) contains an express statement that a ship will remain on-hire for the first 90 days of a capture with all the obligations of the charterer remaining in force. Following this 90-day period, the hire will be suspended until the ship is released. It is important to emphasise that on expiry of the 90 days, only the obligation to pay hire is suspended. Charterers' other duties remain intact and in full force throughout the period of the capture.

On release it is not clear whether the hire accrues from the ship's release or when it reaches a port of refuge. This point may yet cause confusion, although provision (g) does provide that anything ‘done or not done’ in compliance with the clause will not be deemed a deviation. One would assume that hire is therefore payable from the instant pirates leave the ship.

The Intertanko time charter clause is drafted in the same fashion as the BIMCO clause, that is, all of charterers obligations including the payment of hire remain in force during a capture by pirates. One significant difference is that there is no 90-day period, and accordingly if a ship is captured, it will remain on-hire until release. Considering the length of time ships now spend captured, the Intertanko clause would seemingly protect the owner's hire indefinitely in contrast to the BIMCO clause.

## CONCLUSION

It is clear that standard off-hire clauses are frequently insufficient to cover situations involving piracy. The financial impact on a shipowner or charterer is likely to be significant and therefore we would recommend that members consider the inclusion of express wordings when ships could call in or near high-risk areas. Clauses such as those drafted by BIMCO and Intertanko are available, or alternatively bespoke clauses may be added to avoid ambiguity.

For further information and clauses relating to piracy, please consult the BIMCO website at: [https://www.bimco.org/Corporate/About/About\\_BIMCO.aspx](https://www.bimco.org/Corporate/About/About_BIMCO.aspx) or Intertanko's website at: <http://www.intertanko.com/>. Alternatively, please speak to your usual club contact who will be able to assist.

# THE SALDHANA



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In a decision handed down in the *Saldhana* case (Cosco Bulk Carrier Co. Ltd v Team-up Owning Co. Ltd [2010] EWHC 1340) on 11 June 2010, the High Court held that the off-hire provisions contained within a NYPE form charterparty did not extend to cover loss of time due to seizure by pirates. For off-hire to be accepted, an express provision would need to be incorporated.

## THE INCIDENT

On 22 February 2009, the *Saldhana* was seized by pirates whilst transiting the Gulf of Aden. The ship was held until a ransom was paid by ship interests on 25 April 2009, she resumed her voyage from an equivalent position to where she was captured on 2 May 2009.

The shipowner pursued the charterer for hire payments totalling \$3,622,500. The charterer refused payment on the basis that the incident fell within the following off-hire clause within the charter party:

'That in the event of the loss of time from **default and/or deficiency of men... detention by average accidents to ship or cargo... or by any other cause preventing the full working of the vessel**, the payment of hire shall cease for the time thereby lost...'

Following an arbitration, the tribunal reached a unanimous decision condemning the charterer to pay hire for the entire period. The charterer appealed to the High Court, attempting to bring itself within one or more of the following charterparty exceptions:

1. Default and/or deficiency of men
2. Detention by average accidents to ship or cargo
3. Any other cause

## THE APPEAL

Mr Justice Gross heard the case, addressing each exception in turn:

### 1. Default and/or deficiency of men

In the context of this case, 'deficiency' required a lack of crew numbers, whilst 'default' required a refusal by the ship's crew to perform their duties. The judge confirmed that no such default or deficiency of men took place within the meaning of the off-hire clause.

### 2. Detention by average accidents to ship or cargo

Mr Justice Gross could not accept that capture by pirates was an 'average accident', for two reasons: firstly, that for an 'average accident' to have taken place, damage was required. Any other construction of the term would have been contrary to the well-established view taken in the *Mareva AS*. Secondly, the judge adopted the arbitrator's opinion that a pirate attack could not be considered an accident.

### 3. Any other cause

The court held that the words 'any other cause' referred only to the same kind of losses as those detailed in the clause. For the court to consider causes beyond the scope of the specific causes listed, the phrase should have been amended to read 'any other cause whatsoever'. Hence, off-hire did not extend to the crew's failure to carry out their duties whilst under pirate duress. Furthermore, no delay had arisen out of the condition or efficiency of the ship, its crew or cargo, and thus charterers had not brought themselves within this clause.

## THE DECISION

Mr Justice Gross noted the addition of a bespoke clause dealing with seizure of the ship, but held that there was no reason to interfere with the meaning of the off-hire clause. He concluded that if parties had intended to cover piracy, then this could have been done easily and expressly within the existing 'seizures' or 'detention' clause. As a result, the judge held that charterers could not bring themselves within the ambit of the off-hire clause.

Charterer's appeal was dismissed and the arbitration award condemning charterers to pay \$3,622,500 in hire became final.

## PRACTICAL STEPS

Listed below are some practical steps our members can take at the time of negotiating charterparty terms to avoid a dispute on the payment of hire.

### 'Any other cause whatsoever'

In this instance, the addition of 'whatsoever' after 'any other cause' may have altered the outcome of the case. Whilst this addition to the NYPE off-hire clause may be considered favourably during negotiations, parties should be mindful that there would be greater potential for litigation than if the issue of piracy were dealt with expressly.

### Express provision

One way for all parties to achieve a greater degree of certainty and avoid the need for litigation would be by expressly providing for the risk of delay due to piracy within the charterparty.

### Standard piracy clause

BIMCO's Piracy Clause for Time Charter Parties 2009 provides a further option. This clause seeks to strike a balance between owners and charterers by providing a clear allocation of the costs of piracy. This clause allows for 90 days on hire; thereafter off-hire is agreed.

## CONCLUSION

At a time when the number of piracy attacks is increasing and the average duration of a hijacking can last for many months, it is in the interests of owners and charterers alike to ensure the charterparty provisions regarding piracy are carefully drafted.

The *Saldhana* provides a stark warning for the need for owners and charterers to carefully examine the provisions of standard form charterparties to ensure that piracy issues are adequately addressed within their provisions. This will minimise both the need for litigation and avoid any gaps in insurance cover in the event of a hijacking.



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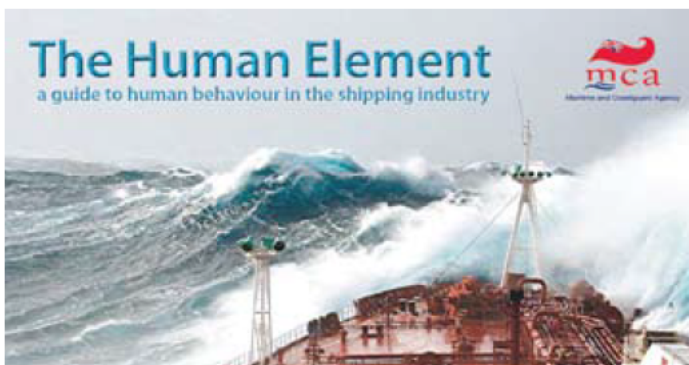
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