

**Claims in tort against the
actual carrier: will the Hague
Visby Rules apply?
The Italian Courts perspective**

m/v ALTINIA – 6.5.2014 Gulf of Aden



Time Charter Party

Ship Brokers		THE BALTIc AND INTERNATIONAL MARITIME COUNCIL (BIMCO) GENERAL TIME CHARTER PARTY	
		PART 1	
		1. Place and Date of Charter 2014	
2. Owners/Disponent Owners/Place of business (State full name, address, telex and fax No.) [Redacted] 45018 Porto Tolle (RO)		3. Charterers/Place of business (State full name, address, telex and fax No.) [Redacted] 00187 Roma	
4. Vessel's Name MV ALTONIA (see also enclosure 1 and 2)		5. Vessel's Description (See enclosed particulars)	
6. Period of Charter (Cl. 1(a)) See Rider Clause 1		Flag:	
6(b). Margin on Final Period (Cl. 1(a)) See Rider Clause 1		Year Built:	
7. Optional Period and Notice (Cl. 1(a)) See Rider Clause 1		Class:	
8. Delivery Port/Place or Range (Cl. 1(b)) See Rider Clause 2		M/Tons Deadweight (Summer):	
8. Earliest Delivery Date/Time (Cl. 1(a)) 00.01 h, it 1st January 2014		GT/TNT:	
10. Cancellation Date/Time (Cl. 1(b)(ii))		Grain/Bale Capacity:	
11. Notices of Delivery (Cl. 1(e)) 15/10/750 days preliminary and 1/2 days definitive		Speed capability in knots (about):	
12. Intended First Cargo (Cl. 1(f)) See also Rider Clause 34		Consumption in mtons at above speed (about):	
13. Trading Limits and Excluded Countries (Cl. 2(a)) See Rider Clause 8		(Speed and Consumption on Summer diet in good weather, max windspeed 40/0)	
14. Exempted Countries (Cl. 2(b)) See Rider Clause 8			

Owners and Charterers entered into
a **time charter party** dated January
1st 2014

Bill of lading

BILL OF LADING		DOCUMENTO 9	
Shipper ITALIAN CONTINGENT ISAF KABUL		Country of Origin U.A.E.	Bill of Lading No. 06/14
Consignee (if "to order" so indicate) ITALIAN ARMED FORCES (SALERNO)		Shipper's Ref.	
Notify Party (no claim shall attach for failure to notify) 1) AS CONSIGNEE 2)			
Place of Receipt JEBEL ALI, DUBAI (U.A.E.)	Intended Port of Discharge SALERNO (ITALY)	Place of Delivery	No. of Bills of Lading TWO
Markings & Numbers E.I. N 34	Description of Goods & Pkgs. MILITARY VEHICLES: TRUCKS AND TRAILERS LOADED WITH MILITARY CARGO PLUS NO. MIL. LOADED ON TOP OF AIS STEEL STRUCTURE AS PER ATTACHED LIST	Gross Weight M.T. 324.010	Measurements
N. 40 X 20'	CONTAINERS MILITARY EQUIPMENT AS PER ATTACHED LIST	M.T. 201.844	
N. 03 X 20'	IMO CONTAINERS MIL. EQUIPMENT AS PER ATTACHED LIST	M.T. 13.590	
N. 20	MILITARY SHELTERS AS PER ATTACHED LIST	M.T. 72.240	
CARGO AS PER ATTACHED RIDER. USED MATERIALS. REMARKS AS PER CARGO LIST.			
SI ATTESTA LA BUONA ESECUZIONE DEL TRASPORTO. O RIGI NAL			
Freight, Seacht, Charges etc. AS PER AGREEMENT		Carriage Value Declaration: Refer to Clause 6 (2) (b) + (c) on reverse side	
For delivery please apply to: At delivery and time of receipt		RECEIVED by the carrier the Goods as specified above in apparent good order and condition unless otherwise stated, to be compared to such plan as signed, collected or permitted bills and subject to the terms and conditions appearing on the back and reverse of this Bill of Lading to which the Consignor agrees by accepting this Bill of Lading, any text provision and customs formalities. This declaration given above is accepted by the shipper and the consignee, recipient, quantity, condition, appearance and value of the Goods are declared to be correct. One of the original Bills of Lading shall be presented to the Carrier at his agent or destination before the cargo shall be released.	
Place and date of Issue DUBAI, 2 nd APRIL 2014		Signed on behalf of the Carrier TASMEER ALI 132605477 13 APR 2014	
Any dispute arising under this Bill of Lading shall be referred to the "Court" of Arbitration in the City of London, England, and the Rules of Arbitration of the International Chamber of Commerce (ICC) shall apply.		SIGNED BY AS CARRIERS	

On 29 April 2014 a **cargo of military equipment was loaded on board** the Altinia in Jabel Ali (UAE) bound to Salerno (Italy)

Cargo Insurance policy

COPIA Broker

Assitalia - La Associazione d'Italia S.p.A. - Gruppo GENERALI - Capitale sociale Euro 11 milioni 141.196.000 - Sede e Direzione Generale: 20121 Milano - Corso d'Italia, 33 - Impresa autorizzata all'esercizio delle assicurazioni e Rassicurazioni contro i danni con Decr. del Min. Ind. Comm. Art. 16 ottobre 1923 (R.D. 22 ottobre 1923 n. 349)

Polizza per l'assicurazione delle merci nel trasporto terrestre

ed. 2001
(stipulata per conto dell'avente interesse)

RAMO TRASPORTI

AGENZIA DI MONZA ZONA 1884 POLIZZA N. 054 87 262215 Sostituisce Polizza N. 11
Rinnova

Alle Condizioni Generali e Particolari della presente polizza - valide queste ultime se richiamate barrando la casella ☐ - ed alle Condizioni Aggiuntive che prevarranno sulle precedenti, la Società sottoscritta assicura [redacted]
[redacted] Codice fiscale 00891230153

Indirizzo di [redacted] per conto degli aventi diritto, le seguenti merci, affidate al Contraente per il trasporto e per le quali il Contraente stesso abbia ricevuto mandato a provvedere all'assicurazione, [redacted]

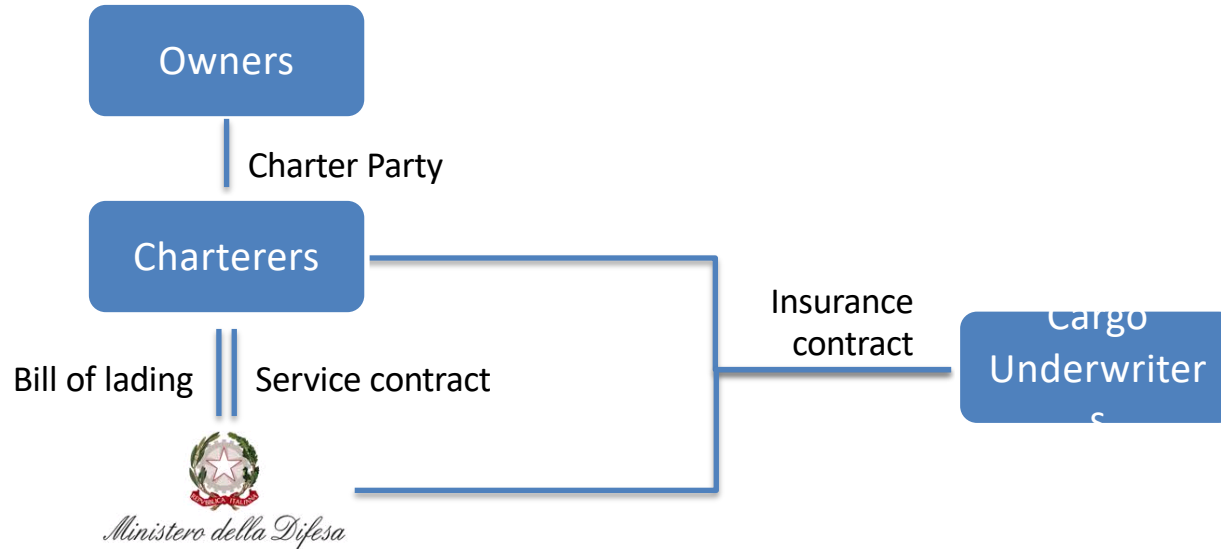
Limiti territoriali: Repubblica italiana, Stato Città Vaticano, Rep. S. Marino, (VEDI PATTI SPECIALI)

Somma massima assicurata per singolo mandato/spedizione: (VEDI PATTI SPECIALI)

La polizza di assicurazione non è valida se non è stata presentata una o più dichiarazioni sullo stesso mezzo odore nello stesso luogo:

Both Charterers and the Ministry of Defence were **insured** parties under the cargo insurance cover

Summary of contractual positions



Fire in the engine room - salvage

- **Owners** concluded a **salvage contract** on LOF terms with Salvors
- **Salvors** towed the vessel to the nearest **port of refuge**
- **Owners paid** the vessel's contribution to salvors
- **Cargo underwriters released a security** in favour of the Salvors and then settled the salvage claim paying €6Mln as cargo contribution

Fire in the engine room - causes



Veniva altresì accertato che le portine di chiusura del vano ove sono alloggiate le pompe combustibile, denominato "hot box", erano state rimosse e poste nelle adiacenze del motore.



The fire was caused by a leakage of fuel from the fuel pump, coming into contact with an hot surface

Such leakage should have been contained within the «**hot box**»

The cover of the box had been removed by the crew during maintenance operations and not replaced

Fire in the engine room - causes

Circular SMS n° 8 dated 18.06.09

OGGETTO: ISTRUZIONI PER MANUTENZIONE E CONTROLLO PERDITE POMPE COMBUSTIBILE

OBJECT: INJECTION PUMP CHECK AND MAINTENANCE INSTRUCTIONS

Tutte le navi devono applicare le seguenti istruzioni per la corretta manutenzione e controllo delle pompe combustibili:

For the correct maintenance of fuel injections pump, all ships need to apply the following instructions:

1. Accertarsi periodicamente che le pompe combustibili non presentino perdite o anomalie; se previsto dal costruttore e relative monografie i carter di contenimento perdite devono essere riposizionati correttamente subito dopo il controllo o manutenzione.

Verify periodically the fuel injection pumps leakages and anomalies; if requested by the makers as per design of the engine the closure carter must be repositioned in the original position

2. seguire scrupolosamente le procedure e le scadenze indicate dalle case costruttrici sui documenti monografici;

Follow the correct procedure and maintenance schedule, in accordance with Maker's instructions (monography, technical cards, maintenance schedule etc.).

Inserire questa Circolare nell'apposito raccoglitore.

Please include this circular in the appropriate folder, and send a receipt of this message.

Taglio di Po, 16 giugno 2009

D.P.A.



The crew conduct was in breach of the specific instructions given by the crew manager providing for the hot box cover to be replaced after every inspection/maintenance

Cargo Underwriters' claim

By a Writ of Summons dated 10 June 2016 Cargo Underwriters:

- **Claimed for the reimbursement** of the salvage compensation paid in favour of the Salvors
- Made reference to the provisions of Italian law governing **tort claims** (art. 2051 cod. civ., art. 274 cod. nav., art. 2049 cod. civ.)
- With the clear intent to **circumvent the application of Hague Visby Rules**

The Owners' defences

The Owners object to the claim on the grounds that the **claim** is **subject to the application of the Hague Visby Rules**

- a) *Ex proprio vigore* (Court of Cassation judgement 26.7.1983 no. 5121)
- b) Under the contract of transport («Himalaya» clause)

Court of Cassation 26.7.1983 n. 5121

*«According to art. 4 no. 2 and also according to art. 4.5 **not only the carrier but also the ship («ni le navire»**, i.e. the owner of the vessel not being the contractual carrier) is responsible for an excepted perils (e.g. the crew negligence)...»*

*“Otherwise, it would have been strange that in the **same piece of legislation** – which is the result of a delicate balance between conflicting interests of carriers and merchants – the position of the carrier is safeguarded whilst **the vessel**, which is an essential part of the service, **is deprived of an adequate defence**»*

Himalaya Clause

5. CERTAIN RIGHTS AND IMMUNITIES FOR THE CARRIER AND OTHER PERSONS

(1) The Carrier shall be entitled to sub-contract on any terms whatsoever the whole or any part of the Carriage.
(2) The Merchant undertakes that no claim or allegation shall be made against any Person or Vessel whatsoever, other than the Carrier, including, but not limited to, the Carrier's servants or agents any independent contractor and his servants or agents, and all others by whom the whole or any part of the Carriage, whether directly or indirectly, is procured, performed or undertaken, which imposes or attempts to impose upon any such Person or Vessel any liability whatsoever in connection with the Goods or the Carriage of the Goods, whether or not arising in contract, bailment, tort, negligence, breach of express or implied warranty or otherwise; and if any claim or allegation should nevertheless be made to indemnify the Carrier against all consequences thereof, without prejudice to the foregoing every such Person and Vessel shall have the benefit of all provisions herein benefitting the Carrier including clause 20 hereof, the jurisdiction and law clause, as if such Terms and Conditions (including Clause 20 hereof) were expressly for his benefit and in entering into this contract the Carrier, to the extent of these provisions, does so not only on his own behalf but also as agent or trustee for such Persons and Vessels and such Persons and Vessels shall to this extent be or be deemed to be parties to this contract. Without prejudice to the generality of the foregoing, if the Carriage is Port to Port, Terminal Operators shall have the benefit of all provisions herein benefitting the Carrier, including the exceptions and limitations set out in clause 6(1) and 8(2) hereof, in relation to any port storage or handling services provided whether before loading or after discharge and regardless of whether the Carrier's responsibility for the Goods has yet to commence or has ceased.
(3) The Merchant shall indemnify the Carrier against any claim or liability (and any expense arising therefrom) arising from the Carriage of the Goods insofar as such claim or liability exceeds the Carrier's liability under this bill of lading.
(4) The defences and limits of liability provided for in this bill of lading shall apply in any action against the Carrier whether the action be founded in contract, bailment, tort, breach of express or implied warranty or otherwise.

The clause **forbids** the Merchant to bring **claims against any party other than the contractual carrier** (i.e. the Charterers).

The clause **entitles** a wide range of parties, including **the actual carrier**, i.e. the owner of the carrying vessel, to **benefit of the same rules, exceptions and limitations** which would apply to a claim against the **contractual carrier**

Owners' defences

Hague Visby Rules: only applicable regime



- ✓ Time bar (art. III.6 HVR)
- ✓ Excepted perils – fire / crew negligence (art. IV.2 HVR)

The decision of the Tribunal of Genoa

- A **claim against the actual carrier cannot be** framed as a claim in tort

«On the other hand, an unequal liability regime would arise which would exclusively penalize the shipowner not being the contractual carrier - not subject to any limitations and exclusions of liability – compared to the shipowner also being the carrier: who on the other hand, would fully benefit from the exclusions and limitations of liability provided for by the conventional regime»

- The **general lawfulness of the Himalaya clause** has been mutually agreed upon by international (House of Lords, 13 March 2003, the "Starsin") and local jurisprudence (Tribunal, 30 September 2015, m/v "MSC Prague")