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# Incisive Risk

## Piracy off Aden and Somalia: an overview of legal issues for the insurance industry

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### Introduction

Attacks on merchant vessels off the coast of Somalia so far this year number nearly 100, with forty ships seized. At the time of writing some 330 crew members on between sixteen and twenty merchant ships remain held against the will of their owners and crew off the coast of Somalia, south of the Gulf of Aden. Most of these vessels are held near the now-booming township of Eyl. Others, including *The Faina*, are held further south off Haradhere. *The Faina*, loaded as she seems to be with tanks and munitions and bound, so it is said, for Kenya or Sudan, finally brought this outbreak of lawlessness to public attention in the West. The European Union responded by setting up a naval cell and committing warships to the protection of commercial shipping off Somalia. The Russian and Indian navies are looking to get involved. The United Nations has issued Resolution 1838 giving authority for military assets to be deployed in Somali territorial waters and for the use of "the means necessary" to repress any act of piracy. This was extended for a further year by Resolution 1846. Collateral sanctions are in place. Mutterings about military options can hardly be of comfort to the detained crew members and their families.

The shipowning community might be forgiven for expressing a sense of frustration. Had a similar response been offered six months ago, that might have nipped this phenomenon in the bud. Humanitarian concerns aside, the economic need for a response is indisputable: 22,000 ships transit through the Gulf of Aden each year. Keeping that waterway free of obstructions is vital. The additional 15 days added to a Gulf – Europe voyage by rounding the Cape of Good Hope will, even at today's lower freight rates, add to consumer costs at a time when the West can least afford it. Maersk have nonetheless elected to send their tanker fleet on that longer course. With *The Sirius Star* now detained, carrying a cargo of crude estimated to be 25% of Saudi Arabia's daily output, such caution is understandable.

The purpose of this note is to flag up some of the legal issues raised by this phenomenon, in particular such questions we are being asked to consider as may impact the insurance market. Most are very much live, all will depend on the policy provisions and it may not be appropriate to give definitive answers in some of the more contentious areas.

### *Is the payment of a ransom wise?*

There has been no seizure to date off Somalia of which we are aware, where payment of a ransom has not led to release of the ship and crew. However, there is political opposition to doing so; Foreign Secretary David Miliband is reported to have said: "*There is a strong view of the British Government, and actually the international community, that payments for hostage-taking are only an encouragement to further hostage-taking.*" While that view of cause and effect may be correct in isolation, to date no viable alternative course of action has been proposed to secure those currently held.

### *Is the payment of a ransom legal?*

These vessels, their cargoes and crew members are being held, quite literally, to ransom. The solution on offer to avoid the potential for loss which that situation creates is to pay that ransom. To date, a single sum has been sought for each vessel, cargo and crew. As a matter of English law there are two potential pitfalls with ransoms. One is the anti-terrorist legislation and the other is the Proceeds of Crime Act ('POCA').

Under UK anti-terrorist legislation it is an offence to provide funds which the provider knows or has reasonable cause to suspect may be used for the purpose of terrorism. The definition of terrorism extends to acts outside the UK and covers actions which might not be violent in themselves but which can, in a modern society, have a devastating impact. As to motive, the Act adopts a wide view, recognising that terrorism may have religious or ideological as well as political motivation. However, by making disclosure under Section 21 one escapes exposure to the offences of funding or arranging funding.

Recent announcements by an individual claiming to be a spokesman for those engaged in this activity include claims that their behaviour is all about money; they are self-confessed thieves and no more. The claim that over-fishing by foreign vessels leading to local impoverishment, for which in part they blame such government as Somalia possesses, does not mean their actions are politically motivated; that is merely a justification for the lawless conduct. Their targets certainly appear indiscriminately chosen, a feature emphasised by the seizure of a Saudi tanker, *The Sirius Star*, followed on 24 November by the seizure of a Yemeni vessel.

On the other hand, Somalia is a country ravaged by civil war and one of the powerful local groups, the Al Shebbab ("the Youth" in Arabic) is engaged in an insurgency against the Transitional Federal Government. Al Shebbab is categorised by the US government as a Sunni fundamentalist affiliate of al Qaida. In contrast to its predecessor, the Union of Islamic Courts, Al Shebbab does not tolerate piracy. The respected journalist, Aiden Hartley, reports that Al Shebbab condemns piracy under Islamic law, though it has yet to translate that into action on the ground (*The Spectator*, 6th December). There is a risk of treating the co-existence of Al Shebbab and the pirates as evidence of a joint venture; in truth, the co-existence of these two may be no more than a pragmatic reflection of two facts; Al Shebbab may be fully occupied with the land war, and the arms they need for that can only reach them by sea. Relations between that group and the pirates therefore remain a matter of speculation; no evidence that Al Shebbab is receiving funds generated by the ransom stream has reached us.

On 25 November, *The International Herald Tribune* reported that the head of U.S. military operations in Africa had indicated he has no evidence that Somali pirates are connected to al-Qaida. U.S. Army General William Ward, commanding Africom, a US Defense Department regional command, acknowledged that the turmoil on the high seas reflected a country in political chaos, Somalia having had no functioning government since 1991. Asked about alleged connections between pirates and al-Qaida, General Ward said, "*I think that's a concern that we all would have.*" But, he reportedly added, "*I do not have any evidence that pirates have links to al-Qaida.*" Thus on present information it is strongly arguable that this phenomenon is 'merely' extortion and not terrorism.

In terms of the POCA, once the ransom is in the hands of the pirates it will become the "*proceeds of a crime*" but the money laundering legislation is not there to punish the payers of a ransom demand and paying a ransom does not, of itself, constitute a breach of this statute.

One further pitfall requires consideration case by case, being the impact of UN sanctions on the question of legality. As indicated, the UN response is an evolving one; this point can only be realistically assessed against the then-current sanctions regime.

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### *What is the peril?*

The likely peril here is piracy.

Absent an endorsement (see below) War Risks cover expressly excludes piracy (see ITC 1995 clause 5.1.6). If those engaged are not acting as terrorists or from a political motive, the perils of those so motivated, which ones are traditionally covered under War risks, have no relevance. Capture, seizure, arrest and detainment are also named perils under War risks cover. These are conventionally seen as state or political acts. When carried out by pirates, they too are excluded from the scope of War cover.

A number of less than persuasive arguments have been raised to suggest this phenomenon is not piracy. To the extent (which is limited) that any seizures have taken place within territorial waters, the Commercial Court has already dismissed the argument that piracy is confined to the high seas in *The Andreas Lemos* case. Provided the vessel is at sea, the peril may arise. As for the fact that the pirates' modus operandi is colloquially referred to as "hijacking" (a term which the Oxford Dictionary applies to aircraft and lorries, but not expressly to vessels) a mere label cannot transform an act of piracy into some form of terrorism. Indeed, there is an overlap here with the previous question; the classic definitions of piracy from the 19th and 20th century emphasise that the pursuit, by violent means, of gain against the world at large rather than against an individual nation, is a hallmark of piracy.

### *Who is liable to pay the ransom?*

A discussion seems to have started inside the insurance industry prompted by the cost of these ransoms. Since 1983, in English wordings piracy has been a named peril in the Institute Hull clauses (see ITC 1983 clause 6.1.5). The position in the US is different. In 2005, owners using certain more recent English forms were given the option of excluding piracy, violent theft and barratry from Hull cover, and adding them back to the War cover. This option does not appear to have been widely adopted, perhaps because the more recent forms are not themselves much used.

Thus the burden of ransom payments seems for the most part to have been absorbed, at least for now, by the Hull market in London, suggesting that remains the more common source of coverage for the peril of piracy. There seems to be an element of 'ransom inflation' as the amounts paid are reported or widely speculated about. The ancillary costs, never small, are rising dramatically: the cost of negotiating and actually arranging delivery of the ransom cannot be overlooked.

### *Are these costs recoverable in General Average?*

Assuming the payment is neither illegal nor, so far as different, contrary to public policy, the first alternative is to treat this expenditure as General Average expense. Of course, if properly so treated, the payment may not be treated as a sue and labour expense (see ITC 1983 clause 13.2). If correctly characterised as an extraordinary cost incurred so as to ensure that the continuation of the common venture, the ransom payment and related costs would appear recoverable in General Average for cargo's proportion, assuming an absence of actionable fault on the part of the shipowner. So far as enforcement of the right to GA is concerned provided a successful release of the ship and cargo is secured, GA security should be collected in the usual way prior to the discharge of the cargo at destination.

Although for obvious reasons the humanitarian focus remains on freeing the crew members, the exposure of cargo insurers, under sue and labour (see below) or under GA, suggests that cargo interests are be more directly interested in hijacking resolution where, as is clearly the case, the hijacked vessel's cargo is at risk.

### *What about sue and labour?*

An alternative and also cogent analysis, and one supported by no less authority than *Arnould* in the 17th edition, is that the payment of a reasonable ransom, which is certainly an archetypal "unusual or extraordinary expense" is a sue and labour expenditure, if made to recover the vessel from capture by pirates.

On the same assumptions as above, the criminality of the pirates' conduct should not prevent a ransom from being recoverable under that principle, assuming the policy contains a sue and labour clause and covers the peril which the ransom was paid to mitigate. As *O'May* points out, an obligation to sue and labour also rests on the cargo owner (see, for example, the Duty of Assured in ITC (A) 1983 clause 16). Thus the corresponding obligation on the cargo insurer, to make good an expense paid in these circumstances, will arise there.

The position under specialised policies covering kidnap and ransom of crew will be a matter for policy interpretation. Some are said to have the advantage of including named responders, loss in transit cover for the ransom itself, and an expressed willingness to meet costs up front. It remains to be seen how these perform in the unusual (though recently not unforeseeable) scenario of assets (ship and cargo) and lives (the crew) being held as a package. The possibility of double insurance cannot be discounted.

### What about hire?

The average hijacking is taking about 45 days to resolve. Whether hire remains payable during the hijacking will depend on the terms of the underlying charterparty. It does not follow that just because an owner was following charterer's orders as to route or service that hire will remain payable. Issues may arise over deviation clauses and whether these excuse payment of hire in all cases where the vessel departs from the normal route, whatever the reason for that departure may be. Even with the comfort of a loss of hire policy which responds in this situation, a large part of the delay may be uninsured. Whether the policy does respond is again a matter of its terms, which vary widely. The Institute Freight Clauses (both Time and Voyage) 1995 do not include a Sue and Labour clause.

### Wilful misconduct?

Insurers may decline a loss if it is attributable to wilful misconduct: see Section 55(2) of the Marine Insurance Act. That was considered in the context of capture by insurgents in *Papadimitiou v Henderson*. The Court concluded that a neutral ship continuing a chartered voyage notwithstanding the knowledge of risks – the judge cited submarines in the Channel approaches during the Great War – was not within section 55(2). However, deliberately directing the ship towards a known blockade might give rise to an inference that the Assured was not attempting to complete the chartered voyage. If so, that would constitute wilful misconduct. There is a debate as to whether recklessness is a halfway house between those two positions, and whether that constitutes misconduct but owners following legitimate charterers' orders should not be troubled with this issue.

### Other issues

Naturally, other questions touching on ship operations, such as the legality of armed guards, owners' options in declining orders for the Gulf of Aden, safe port warranties and so on are also being raised with us. These are not likely to concern most insurers, but may interest charterers' liability insurers. For comments on these, please ask for our latest Shipping E-brief, on which parts of this article are based.

At an international level, the US recently called for a 'holistic approach' to this phenomenon. The insurance market may be in a position to respond. While ransom demands represent a potential source of friction between differing interests which lawyers may relish, the immediate concern is to secure release of the trapped vessels. That requires common sense and the sort of imaginative response at which the market has in the past excelled.

### Conclusion

The point was recently made that if civilian aircraft were seized with this regularity the situation would not be tolerated. This is true and at last signs of government action are apparent, even if only because of a belated realisation of the damage this phenomenon is doing to the smooth passage of the world's trade. The most deserving victims – the detained crew members – should be better served and the insurance industry may be the one to show a lead in delivering that.

Our response to the piracy phenomenon has been coordinated by Shipping partner, Steve Askins. The Insurance Group response is being coordinated by Simon Todd and Joe O'Keeffe, drawing on their prior experience of such incidents, with input from fellow partner and Special Counsel Alan Weir. Please feel free to contact any of them directly or speak to your usual contact in the Insurance, Shipping or International Trade teams.

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