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## Paying Ransoms – Could the US make this more difficult?

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According to a number of reports in trade press and recent comments from the US State Department, the US administration seems to be flying a kite to test national and industry reaction to an initiative which may use existing UN Resolutions and the US OFAC (Office of Foreign Assets Control) Regulations (“Regulations”) to allow them to take action, including the banning of ships involved from US ports, against shipowners who pay ransoms to Somali pirates.

It is difficult to comment in detail because the full scope of the US proposals have not been aired. Indeed, if the reaction is strong enough no formal proposal may be forthcoming. However, our understanding from industry and other sources is that the US is considering having certain pirate leaders named as “designated” people. These may be named at a UN level, using UN Resolution 1844 (on which see below).

Given this approach to ransom payments, it is interesting to note that the High Court in London recently issued a judgment in a case (*Masefield v Amlin Corporate Member Limited* 2010 EWHC 280 (Comm)) which involved the hijacking of the *Bunga Melati Dua* in 2008. One of the issues was whether the payment of a ransom was contrary to public policy as a matter of English law. It is worth highlighting the words of Mr Justice Steele (at paragraph 60 (iii) in his judgment), where he made it clear that he did not think it right to categorise the payment as contrary to public policy:

*“So far as harm is concerned it is truth that payments of ransom encourage a repetition, the more so if there is insurance cover: the history of Somali piracy is an eloquent demonstration of that. But if the crews of the vessels are to be taken out of harms way, the only option is to pay the ransom. Diplomatic or military intervention cannot usually be relied upon and failure to pay may put in jeopardy other crews.”*

## Resolution 1844

Resolution 1844, adopted by the Security Council in November 2008, is one of a series of UN Resolutions which deal with the deteriorating situation in Somalia (beginning with 751) and in general terms implores member states to impose travel bans and to freeze the assets of named individuals and entities who:

- (i) import weapons into Somalia
- (ii) through their actions, undermine the security and stability of Somalia
- (iii) prevent humanitarian aid from reaching those who it is targeted at in Somalia.

One key element of the Resolution is that member states are able to nominate such individuals or entities to the relevant Committee established by the UN. In their most recent report in January 2010, the Committee referred to the citing of the Eritrean government by the US, who, it is believed, have previously named three Al Shebab commanders, although it is not clear whether those nominations have been accepted by the UN.

It is understood that the US will also be looking to name either individual war lords or groups (perhaps by clan or sub-clan) involved in piracy, on the basis that their actions are undermining and/or threatening the stability and security of Somalia. It is believed that the OFAC Regulations could then be used to impose sanctions on any entity paying ransoms to those designated people.

The sanctions could be:

- (i) the banning from the US of vessels freed from pirates following the payment of ransom
- (ii) the freezing of assets of the shipowners if they have a registered presence in the US.

The difficulties these sanctions could cause for shipowners are compounded by the fact that during the recent collapse of the freight market, many shipowning companies registered a presence to avoid Rule B Attachments in New York. These attachments are a freezing type injunction employed by companies seeking security for claims for litigation in other jurisdictions. The threat of action against companies with offices registered in the US may therefore have some teeth.

## The rationale behind such a move

It is difficult to understand the rationale behind this move. It appears the motives may be:

- (i) to persuade the pirates that there is no economic benefit in piracy
- (ii) to force the industry to take greater steps to prevent piracy.

## Persuade pirates that there is no economic benefit in piracy

US legislation would not seek to make the payment of a ransom illegal in other countries. Instead it would aim to impose sanctions after the event. There are precedents where the US has imposed sanctions which can interrupt what would otherwise be regarded as normal trade. Cuba is a good example and the shipping sanctions being imposed on shipping companies involved in the delivery of refined petroleum products to Iran show how wide ranging these sanctions can be.

US proposals appear to assume that the pirates approach a hijacking in a rational way. They clearly do not. Even if they became aware of such new law, they would simply assume that if the shipowners could not pay, the fact that they have captured cargo and have shown themselves perfectly happy to wait for months for ransoms to be paid demonstrates a belief that money will eventually be paid from somewhere.

Perhaps a better approach would be to increase the risk to pirates by ensuring that national laws are robust enough to prosecute pirates and would be pirates. Reports often appear in the press of pirates being captured by naval forces only to be released at a later date without prosecution. It would be better to address this “catch and release” policy before we criminalise the shipowners. Having said that, at the time of writing there have been encouraging reports of the French handing twenty two recently captured pirates to the Puntland authorities and Kenya sentencing eight others to twenty years in prison. It remains to be seen if this will continue.

## Force the industry to take further steps to prevent piracy

One rationale for this initiative could simply be that it is a way to change the shipowners’ approach to self-protection. There has been criticism voiced by US Admirals to the effect that shipowners are in the main not adopting Best Management Practice Guidelines and a plaintive cry that shipowners should “do more” to help themselves.

These steps may include having armed guards on board and it appears to be US policy to move towards the arming of US-flagged vessels. Raising the stakes

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for other shipowners, particularly those with US registered offices or whose vessels regularly call at US ports, through new regulations may pressurise them into taking more robust steps to protect their vessels from hijackings, and thus negate the need to pay a ransom. This may clash with the flag state policy or indeed give rise to the other issues, not least the fear that the violence could escalate. Recent events in the Indian Ocean, with reported fire fights between pirates and Spanish fishing trawlers, highlight this fear.

## Effects

Fundamentally it cannot be in anyone's interest to criminalise the victims of a hijacking. The effects of a US move to introduce these Regulations could have serious consequences for those that are affected by piracy, while doing little to address the issue of preventing piracy and dealing with those responsible. The reality is that shipowners are driven by a commercial imperative to free their ships, and, as long as the ransoms remain a minor percentage of the values involved, that will remain the case. Introducing additional hurdles could see the practice of paying ransoms driven underground or elaborate structures being put in place to avoid falling foul of new regulations.

It is interesting that the US is focussing on Somalia alone, notwithstanding the fact that piracy can and does happen elsewhere. Furthermore, this legislation would be specific to shipping and does not address extortion in the wider sense. The issue is further complicated by the fact that in the US the act of "hostage taking" of a US national overseas is regarded as terrorism under the Patriot Act and knowingly paying money to those involved in terrorism is a criminal act.

Laws attempting to ban ransom payments and indeed freezing assets of families involved have been introduced elsewhere, notably Colombia and Italy, although these too have generated debate. In Colombia these laws were subsequently subject to a Court ruling that allows ransoms where humanitarian factors demand them. Furthermore, these bans were accompanied by the outlawing of kidnap and ransom insurance, which is now a well-established insurance product in the Lloyds market.

It is therefore difficult to see how the US could take unilateral action against a shipowner without also condemning various insurance companies specialising in this area. Even if such a move was possible it is, of course, made more complicated in shipping in the sense that losses incurred by piracy are a legitimate insured peril and payable under ordinary hull and/or war policies (depending where the risk falls). This then is the real crux of this problem – who pays the ransom and how will the Regulations affect them?

## Who pays the ransom?

The shipowner may take the lead in any negotiations but ultimately would look to his usual insurer (in the absence of a dedicated kidnap and ransom policy) to pay ship's proportion of the ransom, either as a sue and labour expense or in General Average. If the latter (i.e. when the vessel is laden) then cargo interests (and more likely their insurers) will pay cargo's proportion. Crew, of course, do not contribute to the ransom despite the fact that the threats are essentially made against them.

There are also circumstances (although rare) where the time charterer agrees to bear the cost of a ransom and takes out applicable insurance on the basis that they are bearing the risk of time. Where Time Charters were entered into before the global economic downturn, some of the exposures to losses over a three to four month hijacking are considerable. They can be in excess not only of the final ransom payment, but also of the original, higher demand.

## Conclusion

Even if the legislation singles out the shipowner, questions remain as to exactly who the Regulations would cover. Would they cover the shipowning company, the managers and other ships under management in the same group? What about those companies where the technical management is done by a different third party company? The key issue appears to be the payment of a ransom, in which case what consideration will be given to the cargo interests who may in fact pay a greater proportion of the ransom in certain circumstances? Further how would the Regulations apply to the insurers themselves?

It is difficult to see how the Regulations could be formulated (save that the US has a reputation of making them as wide-ranging as possible). Putting that aside there is also the very real difficulty of a shipowner knowing exactly to whom he is paying a ransom and whether this person is a nominated individual as per UN guidelines. A shipowner will have done well if during the course of a negotiation he is able to determine which Somalian clan and sub-clan he is dealing with, letting alone identify the individual with whom he is dealing.

Penalising the shipowner, who is but one stakeholder in a maritime venture, would appear not to be the most sensible way to deal with the continued burden of piracy and ransom demands. The reward side of the equation for pirates continues to rise and although the coalition naval forces appear to have adopted a more aggressive approach to the issue, there appears no commensurate increase in risk to a pirate of being arrested and taken for prosecution. If national governments want to introduce new policy perhaps that is a better place to start. Some fifty pirates have been captured in the past week, thirty five by the French navy. It will be interesting to see what happens to them.

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