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Piracy a brief overview

By

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Outline

- Context
 - Definitions of piracy
 - Part 1. Coverage: general observations
 - Part 2. International and domestic law
 - The perils of Dane-geld
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Context

- Piracy off Somalia of global concern
- According to Chatham House (ex. Royal Institute for International Affairs):
 - Navies of 17 States now patrolling Somalia's seas
 - But: 79 ships attacked in 2009 (as at 17/4)
 - 19 ships taken hostage (as at 17/4)
 - Deterioration since; doubling of attacks 2009 over 2008, wider geographical extent (south)
 - Why is this still happening? Part 2

Context

- But piracy is more widespread:
 - Malacca Straits (long standing problem e.g. Gulf of Siam incident)
 - Attacks, kidnappings and theft off Nigeria (cf Civil war/terrorism, not piracy?)
 - Violent but low level theft in several ports and anchorages worldwide (the historical model)
 - Somalia is now different in scale and in character

Context: Somalia

- **The pretext** : Legend of over-fishing, lack of other income (but the lure of easy wealth)
 - **The opportunity**: Breakdown of government and rule of law (lawless state, easy access to land facilities, no land based or coastal policing)
 - **The means**: Availability of weapons from the civil wars in Somalia and modern communications
 - Capability as seafarers to operate off shore in small boats (skiffs) and from “mother ships”
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Definition of piracy: what is not required?

- Wooden leg
- Eye patch
- Parrot
- Jolly Roger



- How has piracy become trivialised? And why?
- Geographical distance? (Caribbean)
- Temporal distance ? (1780s)




Definition of Piracy

Article 101 1982 United Nations Convention on the Law of the Sea to be treated as part of the Law of Nations ("UNCLOS")

“(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship and directed

- (i) on the high seas, against another ship or aircraft , or against persons or property on board such ship ...;*
- (ii) against a ship, ... persons or property in a place outside the jurisdiction of any State...”*



Definition of piracy


“An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act..” (IMB)

- However, “piracy”, does *not* have a legal definition in marine insurance law (but guidance MIA and “Andreas Lemos” ; “at sea”, threat of violence)
- RFC MIA 1906 Pirates **“includes passengers who mutiny and rioters who attack ship from the shore”**

Part 1: Coverage

- Brief overview:
 - Hull (ITC 1983, 1995, IHC, Norwegian Plan, US 1977, DTV/ADS?)
 - War (ITC Hulls War)
 - K&R (Lloyd's Market?)
 - P&I (SSM Club)

1. Hull Insurance

- Hull Risks: modern split peril of nature, of the seas (broadly)
 - Lloyds SG form : piracy and war
 - ITC Hulls 1995: piracy (barratry), not war, and violent theft by persons outside the vessel.
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Hull Insurance

- IHC 2003 : piracy
- 2005 wordings: transfer of Piracy, Barratry and Violent Theft to War policies (logic, human agency)
- (not much used at the time; driver piracy in Malacca Strait?)

2. War Insurance

- War Risks: modern split perils of human agency
- Graduated scale:
 - War, civil war, revolution, rebellion, etc
 - Hostile act by belligerent power..
 - Capture, arrest, seizure, restraint, detainment...

War Insurance

- Note: also covers riots or civil commotions.
- So count your pirates !
 - 11 equals pirates - (hull pays)
 - 13 equals riot - (war pays)
- Public Order Act (criminal law standard)

P& Insurance

- P& I Coverage: excludes terrorism, includes piracy. Example: Rule 21 SSM Rules
- “*War Risks*”

Unless otherwise agreed in writing with the Managers on such terms as they may require, there shall be no recovery from the Club in respect of a Member’s liabilities, costs or expenses (irrespective of whether a contributory cause of the same being incurred was any neglect on the part of the Member or on the part of the Member’s servants or agents) when the incident in respect of which such liability arises, or such costs or expenses are incurred, was caused by:

- ***war, civil war, revolution, rebellion, insurrection or civil strife arising therefrom, or any hostile act by or against a belligerent power or any act of terrorism;***
- ***capture, seizure, arrest, restraint or detainment (barratry or piracy excepted) and the consequences thereof or any attempt thereat;”***

P&I Insurance

- Potential claims:
 - Cargo claims – theft/damage to cargo; delayed delivery
 - Crew liabilities – death; personal injury, loss of personal effects (psychological damage- Maersk)
 - Pollution / wreck removal (huge liabilities)?

P&I Insurance

Possible defence: Rule 24 SSM Rules:-

Imprudent Trading (ie the mere voyage itself)?

No claim shall be recoverable from the Club if it arises out of or is consequent upon an entered ship:

.... carrying contraband, blockade running or being employed in an unlawful trade, or

..... performing any voyage or being employed in any trade which in the opinion of the Directors is imprudent, unsafe, unduly hazardous or improper....

- Possible discretionary payments
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K&R

Separate K&R cover for crew – on the increase ?..

Standard K&R policies should cover:-

- Injury/Loss of Life
- Payment of Ransom
- Emergency Team Expenses

But: (very) costly (USD X per transit?)



K&R

- Obligation of confidentiality (at risk of loss of cover)
Warranty?
- Why buy it? Do ship owners buy it?
- *“Kidnap and ransom risks are not adequately covered by conventional Hull, War and P&I Cover....”* (Hiscox 60% of market; others St Paul/Travelers, Chubb, AIG)

So who pays?

- Sue and labour : duty to avert/minimise loss (s.78 MIA)
- Physical loss and damage:
 - Hull: Piracy is a marine risk, unless the conduct causing loss is riot (12 or more persons), civil commotion, an act of terrorism or has a political motive
 - War: Piracy is excluded from war cover unless the conduct amounts to a riot or civil commotion or terrorism

So who pays?


- Ransom:
 - Should all contribute?
 - Hull (maybe War)
 - Cargo
 - People P&I (risks: personal injury and death, wreck removal, pollution). Clubs say no.
 - (General average, as mechanism)

 - Ships with no cargo? Just sue and labour

Uninsured losses

- Ships: Loss of use (off hire)
- Cargo: Loss of market (delay)

But bear in mind illegality

- Where payment is to release from captivity and demand is *for personal gain*: **legal in UK**
 - Illegal in other States: Russia, USA, others?
 - Can cargo be compelled to indemnify in such destination?
 - Can cargo decline to put up GA and insist on delivery of cargo without security at destination (Bond, Gtee?)
 - Where payment is to release from captivity and demand is for *political purposes or to fund terrorism*? **illegal in UK**
 - Cf: Somalia Piracy and Nigeria Piracy
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Part 2. Force :Public International Law; domestic law

- Touch on a few themes State and private force:
- International Legal Framework/ legal powers to use State force
 - do States/navies have sufficient powers to deal with the problems off Somalia?
- Is there sufficient practical guidance to ships?
- The use of guards and armed guards (wise/effective? views of States?)
- A few words on coverage
- Conclusions

International Legal Framework

- UNCLOS: UN Convention on Law of the Sea 1982 (1994):-
 - Art 100: “ **all States shall co-operate to the fullest possible extent in the repression of piracy on the High Seas...**”
(duty?) Inter State agreement
 - Art 101 et seq: definition of piracy and supplementary provisions
 - Art 105: “**..every State may seize a pirate ship...or a ship..taken by piracy and under the control of pirates, and arrest the persons..on board**” (but note only on the High Seas)
 - Art 110 confers the right to warships to board vessels engaged in piracy on the High Seas. (Appropriate force can be used).

International Legal Framework

- SUA: Convention for the Suppression of Unlawful Acts against Safety of Maritime Navigation 1988 (and SUA for Offshore structures)
- 1988 Convention created to deal general criminality, inc piracy (after “Achille Lauro”) (widely supported 150/140 States)
- 2005 Protocols focussed on terrorism (after 9/11) (NYIF)
- Legal basis for action against person (pirates/terrorists)
- Main purpose: “ **to ensure that anyone committing unlawful acts against the safety of navigation will not be given shelter in any country but will be either prosecuted or extradited to stand trial..**”
- Provide for extradition, mutual assistance, cooperation, information sharing

International Legal Framework

- SUA is intended to complement practical security measures previously adopted by IMO including:
 - SOLAS (Intl Convention for Safety of Life at Sea), and
 - ISPS (International Ship and Port Facility Security Code), developed in response to the 9/11 attacks in the US (applies to the 148 Governments who are parties to SOLAS)


UN Resolutions

- UN has been active. Security Council Resolutions (the “anti piracy mission”): 1816 (6 /2008), 1838 (10/2008), 1846 (11/2008), 1851 (12/2008). Many detailed provisions (major focus has been protection of WFP).
- Nutshell: these gives war ships of the cooperating States right to pursue and capture pirates **in Somali waters** (cf. UNCLOS High Seas), and in the case of 1851 to pursue **on land in Somalia** (astonishing, precedent?)
- Also encourage the use of “ship-riders”, law enforcement personnel with view to processing pirates through the criminal justice system (somewhere)

Detention and Arrest

- Per Chatham House :
- Detention by military has its weaknesses. For example:
 - Some nations have to release pirates unless their actions threaten national interests or citizens (Germany , Denmark) (“catch and release”, a cause of frustration)
 - Detention of pirates by the military is governed by ECHR (for those States that are party) (staggering!)
 - BUT at least not a breach of ECHR for military to hold pirates (before “arrest” by criminal authorities)

Jurisdiction to Prosecute

- Universal under UNCLOS, but may be permissive not compulsory (so say some States)
 - Preference is to prosecute locally, if possible for example under understandings (bilateral US/UK/NAVFOR) with Kenya, now a key focus for criminal process (but: backlog, inadequate resources etc)
 - Prosecutions burdensome and (in reality) unwelcome for both: Navies and Shipowners (time, witnesses, translators, crew, officers, due process, operational priorities)
 - So though some States favour prosecution, some favour concentration on prevention and disruption only
- 

Detention, Arrest , Prosecution

- Sad reality?:
 - majority are detained, disarmed but released
 - (August 08/May 09: 320 pirates captured, 175 released)
 - majority will never face trial (lack of evidence/legal hurdles)
 - will therefore return to the “trade”
 - dangers of piracy and risk of capture massively outweighed by prospects and rewards of success

So is the legal framework weak?

- There is a perception in the Shipping industry that navies are weak and able to do little to combat piracy. Is this the impetus for use of guards/armed guards?
- Chatham House nonetheless observes (22/4):
 - “navies have sufficient powers under international law to combat piracy and they are permitted to use reasonable force against pirates. It is important that this fact is well publicised”

Too complacent?



Practical Guidance (the “Military” terms)

- EUNAVFOR: coordinating body that operates MSCHOA
- MSCHOA: Maritime Security Centre Horn of Africa:
 - Set up as part of European Security Defence Policy to combat piracy in Horn of Africa
 - EU NAVCO: Sept 2008 Coordinating Cell operated in Brussels to coordinate naval forces operating in the area
 - EU NAVFOR ATALANTA: Nov 2008 EU naval mission to prevent and deter piracy and safeguard merchant ships
 - UKMTO : UK Maritime Trade Operation in Dubai. Point of contact between the merchant trade and the military (Combined Military Forces); operates voluntary reporting by ships, tracks ships, provides security information direct to ships

Practical Guidance: lots !

- IMO Maritime Safety Committee
- MSC Circ 623/Rev.3: Piracy and Armed Robbery Against Ships (2002)
- Provides guidance to shipowners, masters, crews to prevent or suppress pirate attacks.
- Detailed (very) recommendations on cash, ship plans, routing, anchoring, watch keeping, lighting, secure areas, alarms, flares, manoeuvring, water hoses.
 - **“..carrying and use of firearms for personal protection or protection of a ship is strongly discouraged”**
- IMO MSC met in London 27/5 to 5/6 (then possible revisions to MSC Circ 623 on the agenda)

Practical Guidance

- “Best Maritime Practice”, issued February 09, August 09
- Supported by Intertanko, ICS, OCIMF, BIMCO, SIGTTO, Intercargo, IGP&I, CLIA, IUMI, JWC, IMB
- Complements IMO Circ 623
- Interesting read. Sets out detailed military style planning/recommendations (see above terms).
- Shows not all ships are equal. Those at greatest threat:
 - Low speed, Low freeboard, Inadequate planning and procedures, Visibly low state of alert, Evident slow response
 - Few successful attacks at night; dawn and dusk greatest risk; few successful attacks over 15 knots.

Practical Guidance

- “Best Maritime Practice”:
 - Sets out coordination through UKMTO and MSCHOA
 - Recommends (among other things):
 - Use of water cannon, razor wire, dummies, “passive defence equipment”
 - Use of Internationally Recommended Transit Corridor
 - If boarded offer no resistance; keep calm and cooperate with pirates
- “...use of private security guards.. discretion[ary].. But the use of armed guards “not recommended””**

Guards and armed guards

- The UK position: Opposed to the use of armed guards;
 - Requires adherence to MSC-Circ 623/Rev.3 (2002)
 - Firearms Act 1968, prohibits
 - Firearms (Amendment) Acts 1997, requires handing in of weapons or disposal by 1/2/1998
 - MCGA Notice MSN 1704 1998 (re Firearms Acts)
 - MGN 298 2005; detailed recommendations, very much like MSC 623 (above) in form and content
 - Nutshell: rely on navies for protection; no arms/ armed guards

Guards and armed guards

- General views of States: No consensus, but is the tide turning in favour of armed guards?
- A selection at June 2009:
 - Those who favour use of arms or (armed) guards: USA, Belgium? . Others?
 - Those who may tolerate use of arms: Liberia, Marshall Islands, Bahamas (licence, none yet), Greece
 - Those who (currently) oppose use/discourage of arms: Cyprus, Malta, St Vincent & Grenadines UK (remains strongly opposed), Italy, Denmark

Guards and armed guards – difficult issues with armed guards

- Probable escalation of violence (one “mother ship” found with plastic explosive per BIMCO)
- Risk of major maritime casualty; grounding, pollution, explosion, fire, deaths and personal injury
- Who is authorised/suitable to be an armed guard? No vetting system
- Who decides what armed guards will or will not do? Erosion of the Masters ultimate discretion/control? (breach of SOLAS)
- When are armed guards permitted to use them, to threaten or to kill?

A few words on Coverage

- What issues might arise where owner decides to use armed guards for the Gulf of Aden/ Horn of Africa?
- If crew carry arms or if armed guards are carried as supplementary crew, is the coverage at risk?
- Plainly wise to inform all insurers (Hull, War, P&I,(K&R?))
- Potential problems of disclosure (for new policies).
Increased hazard, material fact?


Coverage

- Possible illegality arguments where Flag State *prohibits* carrying/use of arms?
- Section 41 MIA 1906
 - “There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner”

Coverage

- Protection & Indemnity cover
 - no exclusion of armed guards, no prohibition?
 - but most Club Rules exclude losses arising out of or consequent upon..
“performing any voyage or being employed in any trade which in the opinion of the Directors in imprudent, unsafe, unduly hazardous or improper”

Conclusions

- A long list of relevant laws, regulations, Conventions, Resolutions permit disruption and prevention of piracy by States
 - Huge cooperative naval venture underway off Somalia
 - Little progress thus far with prosecutions and convictions; “catch and release” is cause of frustration
 - Use of (lethal) military force risks enflaming situation
 - Use of private force likewise; widely discouraged officially
 - Use of arms or armed guards may lead to coverage difficulties
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Conclusion : Kipling

*It is always a temptation to a rich and lazy nation,
To puff and look important and to say:
"Though we know we should defeat you, we have
not the time to meet you.
We will therefore pay you cash to go away."*

*And that is called paying the Dane-geld;
But we've proved it again and again,
That if once you have paid him the Dane-geld
You never get rid of the Dane.*

For "Dane" read "pirate".

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