

TERRORISM ON THE HIGH SEAS



The threat

A recent on-line Al Qaeda propaganda publication has once again highlighted the potential threat posed to global shipping by terrorism. The inaugural edition of "Resurgence" contains an article ominously entitled "On targeting the Achilles Heel of Western Economies". The article highlights the vulnerability of certain key global maritime chokepoints through which the majority of world energy is shipped every day. In particular, the article states *"Even if a single supertanker (or even an ordinary westbound cargo-vessel) were to be attacked in one of the chokepoints or hijacked and scuttled in one of these narrow sea lanes, the consequences would be phenomenal: a spike in oil prices, an increase in shipping rates, more expensive maritime insurance, and increased military spending to ensure the safety of these sea passages."*

Energy crisis

The threat evidenced in the Al-Qaeda publication is worrying for the global shipping industry and for the world's energy supply. Indeed, a secure energy supply is fundamental to the world economy. According to the 2014 BP Statistical Review of World Energy, global primary energy consumption "accelerated" in 2013 for all fuels¹. Oil remains the world's leading fuel, accounting for 34.2% of total global energy consumption in 2013². The BP Review reports that global oil consumption grew in 2013 by 1.4 million barrels per day (b/d), with the US recording the largest increment to consumption at +400,000 b/d, followed by China at +390,000 b/d³. Similarly, global oil trade grew by 1.7% in 2013 with particularly high growth occurring in Europe and emerging economies⁴.

1-4 <http://www.bp.com/content/dam/bp/pdf/Energy-economics/statistical-review-2014/BP-statistical-review-of-world-energy-2014-full-report.pdf>



The 2013 figures for natural gas tell a similar story with both global natural gas consumption and trade growing by 1.4% and 1.8% respectively in 2013⁵. The BP Review also reports that growth was experienced by both importer and exporter countries, with Qatari exports growing by 2.7% and German and Chinese imports growing by 14% and 32.4% respectively⁶.

Both importer and exporter countries rely on the safe transportation by sea of oil and gas. Of particular importance are the Strait of Hormuz and the Strait of Malacca. Strategically located between Oman and Iran, the Strait of Hormuz provides an important connection between the Arabian Gulf, the Gulf of Oman and the Arabian Sea. According to the US Energy Information Administration (EIA), the Strait of Hormuz is considered the world's most important oil chokepoint with a daily oil flow of approximately 17 million b/d in 2011⁷. More than 85% of oil travelling through the Strait is destined for the Asian markets with China accounting for a significant proportion⁸. The Strait of Malacca is also geographically important linking the Indian Ocean to the South China Sea and the Pacific Ocean. The EIA reports that the Strait of Malacca had an estimated flow of 15.2 million b/d in 2011, with crude oil constituting approximately 90% of flows⁹. Should either of these areas come under attack the potential consequences would be devastating.

Uncertain waters

Terrorist incidents involving vessels are not an unknown or a new phenomenon. There have been several significant terrorist attacks on vessels in recent years. The most notable incidents include the attack on the US warship the *USS COLE* in 2000, the

attack on the French crude oil carrier the *M/T LIMBURG* off the coast of Yemen in 2002, the attack on the passenger ship the *DON RAMON* in Filipino waters in 2005 and the attack on the Japanese very large crude oil carrier the *M STAR* whilst transiting the Strait of Hormuz in 2010. It is believed that all of these attacks were carried out by terrorist organisations.

Policing the sea

The International Ship and Port Security code (the ISPS Code) was introduced as a direct consequence of the security concerns raised by the tragic events of 11 September 2001. This July marked the 10 year anniversary of the Code's entry into force via a series of amendments to the Safety of Life at Sea Convention 1974 (SOLAS). The ISPS Code marked an important development in the field of international maritime security since it introduced for the first time wide-ranging maritime security obligations for SOLAS contracting countries.

Broadly speaking, the ISPS Code applies to all passenger ships engaged on international voyages, cargo ships of 500 or more gross tonnage, mobile offshore drilling units and port facilities serving all such vessels and units¹⁰. The key objectives of the ISPS Code are to:

- Facilitate the detection and prevention of security threats within an international framework.
- Establish the roles and responsibilities of all parties concerned.
- Permit the collection and interchange of security information.
- Provide a methodology for assessing and measuring security.

- Ensure that sufficient and adequate security measures are in place.

The ISPS Code envisages that the above objectives will be achieved through the appointment of appropriate security officers and/or personnel on board vessels, in each port facility and within each shipping organisation. These individuals will be responsible for preparing and putting into practice the security plans that will be approved for each vessel and port facility. The ISPS Code consists of two parts, Part A and Part B. Part A contains mandatory provisions regarding the appointment of security officers for shipping companies, individual vessels and port facilities. Part A also includes security issues to be addressed in security plans prepared for both vessels and port facilities. Part B contains non-mandatory guidance and recommendations for preparing vessel and port facility security plans.

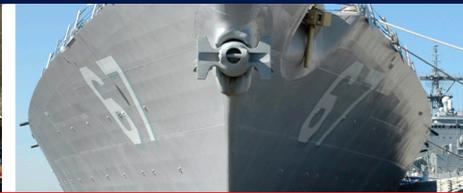
Having initially met with some scepticism upon its introduction, over the last 10 years the ISPS Code has become an accepted part of modern shipping. Today the majority of the world's merchant vessels and port facilities comply with the ISPS Code. Vessels are no longer left to fend for themselves in the face of an attack and port facilities are now required to take various precautions to protect vessels, for example, imposing access controls to ensure that only individuals with genuine and legitimate business are permitted access to vessels.

Further, given the fact that there has not been a 9/11 shipping equivalent, the ISPS Code can be regarded as a success. However, a number of challenges remain. In a presentation given in April 2014 entitled "*After 10 years of ISPS Code: Disparity in global implementation*", the IMO highlighted

5-6 <http://www.bp.com/content/dam/bp/pdf/Energy-economics/statistical-review-2014/BP-statistical-review-of-world-energy-2014-full-report.pdf>

7-9 <http://www.eia.gov/countries/regions-topics.cfm?fips=wot&trk=p3>

10 <https://www.gov.uk/maritime-security#ships-that-must-comply-with-maritime-security-requirements>



the following challenges that the ISPS Code still faces:

1. The lack of national legislation and guidelines on implementing the ISPS Code.
2. Use of the ISPS Code as a means to address all maritime security threats.
3. The difficulty of selecting an appropriate risk assessment methodology.
4. The difficulties of disseminating good practices on port facility security.
5. The key question of “Who audits the auditor?”.
6. The difficulties encountered by ships after calling at a high-risk port¹¹.

These challenges highlight the fact that the ISPS Code is perhaps not as user friendly as it could be and that it is not a panacea for all threats posed to the shipping community. While the ISPS Code has certainly succeeded in raising awareness of maritime security issues within the shipping community, there are gaps which have been identified.

Key legal considerations for the maritime community

A key issue for the maritime community is the way in which contracts of carriage deal with acts of terrorism and how this might impact rights and liabilities within the shipping chain. In particular, charterparties may contain

provisions allowing for the termination or suspension of the charterparty in the event of a terrorist attack. By way of example, the Supplytime 2005 charterparty contains a *Force Majeure*¹² clause according to which a party may avoid liability for loss, damage or delay arising out of a terrorist attack. However, there are some important conditions imposed upon the party seeking to rely on this provision. In particular, the clause makes it clear that the party must have been hindered or prevented from performing some or all of its obligations under the charterparty. The burden of proof will be on the invoking party to evidence this. The party must also show that it has taken reasonable steps to avoid or minimise the effects of a terrorist attack. Again, the burden of proof will be on the invoking party to show that it has put in place adequate systems and procedures to combat terrorist attacks. Finally, the invoking party is required to inform the other party within two working days of the terrorist incident. The invoking party will need to comply with all of these requirements in order to rely on this provision.

In addition to charterparty considerations, the maritime community should also be aware of its exposure under international conventions and any exemptions that may be available. For example, the International Convention on Civil Liability for Oil Pollution Damage (the CLC) imposes strict liability on tanker owners for damage caused by oil spills. However, there is an

important exception for third party acts. Pollution caused by terrorism may be considered as such a third party act and it may therefore be possible for owners to avoid liability on this basis. Finally, parties should also consider reviewing their insurance arrangements in order to ensure that they have adequate war risks protection. Insurance policies may contain awkward warranties which can be breached unwittingly, causing cover to be lost and exposure to risk.

Conclusion

The threat from Al Qaeda is a stark reminder that the maritime community remains vulnerable to terrorist attacks at sea, and vessels transporting energy should be particularly alive to the risks. While steps have been taken in the last 10 years to raise awareness and minimise the risk of attack within the global maritime community at large, there is room for improvement and all interested parties should continue to place emphasis on the enhancement of maritime security. Parties should also review the provisions contained in their contracts of carriage and insurance policies regarding terrorism and ensure that they are aware of the steps they need to take in the event of a terrorist incident.

¹¹ <http://www.seasecurity.org/wp-content/uploads/IMO-Presentation-SAMI-PORT-SECURITY.pdf>

¹² 32. *Force Majeure*

“Neither party shall be liable for any loss, damage or delay due to any of the following force majeure events and/or conditions to the extent the party invoking force majeure is prevented or hindered from performing any or all of their obligations under this Charter Party, provided they have made all reasonable efforts to avoid, minimize or prevent the effect of such events and/or conditions:

[...]

(c) any circumstances arising out of war, threatened act of war or warlike operations, acts of terrorism, sabotage or piracy, or the consequences thereof [our emphasis added];

The party seeking to invoke force majeure shall notify the other party in writing within 2 working days of the occurrence of any such event/condition.”



For more information, please contact the authors of this Briefing:

Paul Dean

Partner, London
T: +44 (0)20 7264 8363
E: paul.dean@hfw.com

Tessa Huzarski

Associate, London
T: +44 20 7264 8000
E: tessa.huzarski@hfw.com

HFW's London office is part of an international network of 13 offices in 11 countries. For further information about shipping & offshore related issues in any other jurisdiction, please contact:

James Gosling

Partner, London
T: +44 (0)20 7264 8382
E: james.gosling@hfw.com

Paul Apostolis

Partner, Singapore
T: +65 6411 5343
E: paul.apostolis@hfw.com

Hazel Brewer

Partner, Perth
T: +61 (0)8 9422 4702
E: hazel.brewer@hfw.com

Stanislas Lequette

Partner, Paris
T: +33 1 44 94 40 50
E: stanislas.lequette@hfw.com

Paul Hatzer

Partner, Hong Kong
T: +852 3983 7666
E: paul.hatzer@hfw.com

Jeremy Shebson

Partner, São Paulo
T: +55 (11) 3179 2903
E: jeremy.shebson@hfw.com

Jeremy Davies

Partner, Geneva
T: +41 (0)22 322 4810
E: jeremy.davies@hfw.com

Nick Poynder

Partner, Shanghai
T: +86 21 2080 1001
E: nicholas.poynder@hfw.com

Dimitri Vassos

Partner, Piraeus
T: +30 210 429 3978
E: dimitri.vassos@hfw.com

Gavin Valley

Partner, Melbourne
T: +61 (0)3 8601 4523
E: gavin.valley@hfw.com

Simon Cartwright

Partner, Dubai
T: 971 4 423 0520
E: simon.cartwright@hfw.com

Nic van der Reyden

Partner, Sydney
T: +61 (0)2 9320 4618
E: nic.vanderreyden@hfw.com

Lawyers for international commerce

hfw.com

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