

THE SHIPPING LAW
REVIEW

EIGHTH EDITION

Editors

Andrew Chamberlain, Holly Colaço and Richard Neylon

THE LAWREVIEWS

THE SHIPPING LAW
REVIEW

EIGHTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors

Andrew Chamberlain, Holly Colaço and Richard Neylon

THE LAWREVIEWS

PUBLISHER

Clare Bolton

HEAD OF BUSINESS DEVELOPMENT

Nick Barette

TEAM LEADERS

Jack Bagnall, Joel Woods

BUSINESS DEVELOPMENT MANAGERS

Katie Hodgetts, Rebecca Mogridge

BUSINESS DEVELOPMENT EXECUTIVE

Olivia Budd

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Hannah Higgins

PRODUCTION AND OPERATIONS DIRECTOR

Adam Myers

PRODUCTION EDITOR

Caroline Fewkes

SUBEDITOR

Martin Roach

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

© 2021 Law Business Research Ltd

www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at May 2021, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-83862-828-4

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADAME GONZÁLEZ DE CASTILLA & BESIL

A KARITZIS & ASSOCIATES LLC

ANDRADE DIAS & ASSOCIADOS – SOCIEDADE DE ADVOGADOS, SP, RL

ASIALEGAL LLC

BAE, KIM & LEE LLC

BLACK SEA LAW COMPANY LLC

BLOOMFIELD LP

BOSE & MITRA & CO

COSTA, ALBINO & LASALVIA ADVOGADOS

FRANCO & ABOGADOS ASOCIADOS

GAUCI-MAISTRE XYNOU

GORRISSEN FEDERSPIEL

HARRIS & CO MARITIME LAW OFFICE

HESKETH HENRY

HFW

IN LAW OFFICE

JORQUIERA & ROZAS ABOGADOS

MAPLES GROUP

MESTRE ABOGADOS

MORGAN & MORGAN

PALACIOS, PRONO & TALAVERA

PPT LEGAL

SABATINO PIZZOLANTE ABOGADOS MARÍTIMOS & COMERCIALES

STUDIO LEGALE MORDIGLIA

TMI ASSOCIATES

VERALAW (DEL ROSARIO RABOCA GONZALES GRASPARIL)

CONTENTS

PREFACE.....	vii
<i>Andrew Chamberlain, Holly Colaço and Richard Neylon</i>	
Chapter 1	SHIPPING AND THE ENVIRONMENT 1
<i>Thomas Dickson</i>	
Chapter 2	INTERNATIONAL TRADE SANCTIONS 13
<i>Daniel Martin</i>	
Chapter 3	COMPETITION AND REGULATORY LAW 22
<i>Anthony Woolich and Daniel Martin</i>	
Chapter 4	OFFSHORE 32
<i>Paul Dean, Alistair Loweth and Nicholas Kazaz</i>	
Chapter 5	OCEAN LOGISTICS..... 40
<i>Catherine Emsellem-Rope</i>	
Chapter 6	PORTS AND TERMINALS 47
<i>Matthew Wilmsburst</i>	
Chapter 7	SHIPBUILDING 53
<i>Vanessa Tattersall and Simon Blows</i>	
Chapter 8	MARINE INSURANCE 64
<i>Jonathan Bruce, Alex Kemp and Jenny Salmon</i>	
Chapter 9	PIRACY 75
<i>Michael Ritter and William MacLachlan</i>	
Chapter 10	DECOMMISSIONING IN THE UNITED KINGDOM 85
<i>Tom Walters</i>	

Contents

Chapter 11	SHIP FINANCE	95
	<i>Gudmund Bernitz and Stephanie Koh</i>	
Chapter 12	AUSTRALIA.....	103
	<i>Gavin Vallely, Simon Shaddick, Alexandra Lamont and Tom Morrison</i>	
Chapter 13	BRAZIL.....	123
	<i>Geoffrey Conlin, Bernardo de Senna and Carolina França</i>	
Chapter 14	CAYMAN ISLANDS	134
	<i>Sherice Arman and Christian La-Roda Thomas</i>	
Chapter 15	CHILE.....	145
	<i>Ricardo Rozas</i>	
Chapter 16	CHINA.....	161
	<i>Nicholas Poynder and Jean Cao</i>	
Chapter 17	COLOMBIA.....	175
	<i>Javier Franco</i>	
Chapter 18	CYPRUS.....	184
	<i>Zacharias L Kapsis and Antonis J Karitzis</i>	
Chapter 19	DENMARK.....	232
	<i>Jens V Mathiasen and Thomas E Christensen</i>	
Chapter 20	ENGLAND AND WALES.....	245
	<i>Andrew Chamberlain and Holly Colaço</i>	
Chapter 21	FRANCE.....	262
	<i>Mona Dejean</i>	
Chapter 22	GREECE.....	278
	<i>Paris Karamitsios, Dimitri Vassos and Stella-Efi Gougoulaki</i>	
Chapter 23	HONG KONG	289
	<i>Nicola Hui and Winnie Chung</i>	

Chapter 24	INDIA.....	314
	<i>Amitava Majumdar, Damayanti Sen, Anuj Dhowan, Pabitra Dutta, Rishabh Saxena and Ruchir Goenka</i>	
Chapter 25	ISRAEL.....	339
	<i>Yoav Harris and John Harris</i>	
Chapter 26	ITALY.....	349
	<i>Pietro Palandri and Marco Lopez de Gonzalo</i>	
Chapter 27	JAPAN.....	363
	<i>Jumpei Osada, Masaaki Sasaki and Takuto Kobayashi</i>	
Chapter 28	MALTA.....	373
	<i>Jean-Pie Gauci-Maistre, Despoina Xynou and Deborah Mifsud</i>	
Chapter 29	MEXICO.....	389
	<i>Ramiro Besil Eguia</i>	
Chapter 30	NEW ZEALAND.....	402
	<i>Simon Cartwright and Zoe Pajot</i>	
Chapter 31	NIGERIA.....	422
	<i>Adedoyin Afun</i>	
Chapter 32	PANAMA.....	440
	<i>Juan David Morgan Jr</i>	
Chapter 33	PARAGUAY.....	450
	<i>Juan Pablo Palacios Velázquez</i>	
Chapter 34	PHILIPPINES.....	460
	<i>Valeriano R Del Rosario, Maria Theresa C Gonzales, Daphne Ruby B Grasparil and Jennifer E Cerrada</i>	
Chapter 35	PORTUGAL.....	476
	<i>Mateus Andrade Dias</i>	
Chapter 36	RUSSIA.....	488
	<i>Igor Nikolaev</i>	

Contents

Chapter 37	SINGAPORE.....	497
	<i>Toby Stephens, Pooja Kapadia, Magdalene Chew, Edwin Cai and Vanesse Koh</i>	
Chapter 38	SOUTH KOREA	526
	<i>Jong Ku Kang and Joon Sung (Justin) Kim</i>	
Chapter 39	SPAIN.....	539
	<i>Anna Mestre and Carlos Górriz</i>	
Chapter 40	SWITZERLAND	551
	<i>William Hold</i>	
Chapter 41	UKRAINE.....	560
	<i>Eugeniy Sukachev, Anastasiya Sukacheva and Irina Dolya</i>	
Chapter 42	UNITED ARAB EMIRATES	573
	<i>Yaman Al Hawamdeh</i>	
Chapter 43	UNITED STATES	589
	<i>James Brown, Michael Wray, Jeanie Goodwin, Thomas Nork, Chris Hart, Alejandro Mendez, Melanie Fridgant and Svetlana Sumina</i>	
Chapter 44	VENEZUELA.....	612
	<i>José Alfredo Sabatino Pizzolante</i>	
Appendix 1	ABOUT THE AUTHORS.....	625
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	657
Appendix 3	GLOSSARY.....	663

PREFACE

The aim of the eighth edition of this book is to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple jurisdictions. We have again invited contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

As with previous editions of *The Shipping Law Review*, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry: competition and regulatory law, sanctions, ocean logistics, piracy, shipbuilding, ports and terminals, offshore shipping, marine insurance, environmental issues, decommissioning and ship finance.

Each jurisdictional chapter gives an overview of the procedures for handling shipping disputes, including arbitration, court litigation and any alternative dispute resolution mechanisms. Jurisdiction, enforcement and limitation periods are all covered. Contributors have summarised the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims. We have also asked the authors to address limitation of liability, including which parties can limit, which claims are subject to limitation and the circumstances in which the limits can be broken. Ship arrest procedure, which ships may be arrested, security and counter-security requirements, and the potential for wrongful arrest claims are also included.

The authors review the vessel safety regimes in force in their respective countries, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, as are the local rules in respect of collisions, wreck removal, salvage and recycling. Passenger and seafarer rights are examined, and contributors set out the current position in their jurisdiction. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction during the coming year. This year, we welcome Costa, Albino & Lasalvia Sociedade de Advogados as the new contributors of the chapter focusing on maritime law within Brazil. There are also two new jurisdictions in this edition – Israel (Harris & Co) and Mexico (Adame Gonzalez De Castilla Besil) – and Portugal makes a return, with Andrade Dias & Associados as the new contributors.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations Conference on Trade and Development (UNCTAD) estimating that the operation of merchant ships contributes about US\$380 billion in freight rates within the global economy, amounting to about 5 per cent of global trade overall. Between 80 per cent and 90 per cent of the world's trade is still transported by sea (the percentage is even higher for most developing countries) and, as of 2019, the total value of annual world shipping

trade had reached more than US\$14 trillion. Although the covid-19 pandemic has had a significant effect on the shipping industry and global maritime trade (which plunged by an estimated 4.1 per cent in 2020), swift recovery is anticipated. The pandemic truly brought to the fore the importance of the maritime industry and our dependence on ships to transport supplies. The law of shipping remains as interesting as the sector itself and the contributions to this book continue to reflect that.

Finally, mention should be made of the environmental regulation of the shipping industry, which has been gathering pace this year. At the International Maritime Organization's (IMO) Marine Environment Protection Committee, 72nd session (MEPC 72) in April 2018, it was agreed that international shipping carbon emissions should be cut by 50 per cent (compared with 2008 levels) by 2050. This agreement will now lead to some of the most significant regulatory changes in the industry in recent years, as well as much greater investment in the development of low-carbon and zero-carbon dioxide fuels. The IMO's agreed target is intended to pave the way for phasing out carbon emissions from the sector entirely. The IMO Initial Strategy, and the stricter sulphur limit of 0.5 per cent mass/mass introduced in 2020, has generated significant increased interest in alternative fuels, alternative propulsion and green vessel technologies. Decarbonisation of the shipping industry is, and will remain, the most important and significant environmental challenge facing the industry in the coming years. Unprecedented investment and international cooperation will be required if the industry is to meet the IMO's targets on carbon emissions. The 'Shipping and the Environment' chapter delves further into these developments.

We would like to thank all the contributors for their assistance in producing this edition of *The Shipping Law Review*. We hope this volume will continue to provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

Andrew Chamberlain, Holly Colaço and Richard Neylon

HFW

London

May 2021

PIRACY

*Michael Ritter and William MacLachlan*¹

I INTRODUCTION

Piracy is defined in Article 101 of the United Nations Convention on the Law of the Sea 1982 (UNCLOS) as ‘any illegal act of violence or detention . . . committed for private ends by the crew . . . of a private ship . . . directed . . . against another ship . . . or against persons or property on board such ship’ on the high seas or in a place outside the jurisdiction of any state. This leaves open the issue as to whether incidents such as the hijack of the *Fairchem Bogey* from off the Salalah breakwater or of tankers from West African anchorages are piracy incidents under the UNCLOS. As a matter of English law, according to *The ‘Andreas Lemos’*,² there is ‘no reason to limit piracy to acts outside territorial waters’. It appears apt, therefore, that ‘piracy’ is used as an overarching label covering Somali or Gulf of Aden attacks and West African and South East Asian incidents, albeit that they are different in nature and that the legal definition of piracy may depend on the insurance policy or contract in question.

As at March 2021, the last successful hijack of a major commercial vessel off the Somali coast was the *Smyrni* on 10 May 2012. A combination of armed guards, increased naval presence and adherence by ship owners to the Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea (BMP 5, published June 2018) are often cited as the chief drivers behind the drop in the number of incidents. There has also been some improvement in stability and capacity building onshore in Somalia. The continued decline of the piracy threat in this region prompted the co-sponsors of the BMP to reduce the boundary of the high-risk area (HRA) to longitude 65° E latitude 5° S. This reduction was mirrored in part by the Joint War Committee in December 2015 when it adjusted its HRA to longitude 65° E latitude 12° S.³

The Indian Ocean/Gulf of Aden HRA was further reduced in March 2019 (the changes came into effect on 1 May 2019). The current HRA comprises the waters bound by the following coordinates:

- a* on the north-west, by the Red Sea, south of latitude 15° N;
- b* on the west of the Gulf of Oman, longitude 58° E;
- c* on the east, longitude 65° E; and
- d* on the south, latitude 12° S.

That is not to say that Somali piracy and other security risks in the region are no longer a concern: the costs in terms of routing, additional premiums and hardening measures and

1 Michael Ritter and William MacLachlan are partners at HFW.

2 [1982] 2 Lloyd’s Rep 48.

3 www.lmalloyds.com/lma/jointwar.

who pays for them – the owners or the charterers – are a subject of daily debate. There were also reports of pirate attacks in April 2019 against a Yemeni dhow and Korean and Spanish fishing vessels off the Somali coast⁴ and, in December 2018, United Kingdom Maritime Trade Operations reported an armed security team firing on a number of skiffs near Point A of the International Recommended Transit Corridor. In some cases, the aggressors are believed to have come from Yemen rather than Somalia.

As a response to incidents in the Southern Red Sea and Bab al-Mandeb, and threats arising from the Yemeni conflict, the International Chamber of Shipping, BIMCO⁵ and Intertanko have published Interim Guidance,⁶ which includes steps for defending against water-borne improvised explosive devices. Further, an additional Maritime Security Transit Corridor has been established, as shown on the revised British Admiralty Chart Q6099. The latest version of the Joint War Committee Listed Areas guidance specifically refers to the tensions in the Gulf region since May 2019 and the Iranian–US foreign policy relationships.

On 12 May 2019, *Andrea Victory*, *A Michel*, *Amjad* and *Al Marzoqah* were victims of a coordinated attack at Fujairah anchorage; on 13 June 2019, *Front Altair* and *Kokuka Courageous* were attacked while en route through the Persian Gulf and, on 19 July 2019, *Stena Impero* was boarded and subsequently detained in Iran. This marks a worrying trend that may well trigger liabilities under both contracts of carriage and insurance policies. The potential involvement of state actors or connections with Iran also potentially brings into play a greater political element than in piracy issues, as well as potential sanctions issues.

In response to the foregoing, the Joint War Committee acted quickly to issue JWLA-024 and added Oman, the United Arab Emirates and the Arabian Gulf to the listed HRAs. There was also a marked increase in international naval presence. The area remains one of concern, with vessels reporting approaches, and further detentions, including *Rabigh 3* briefly detained by suspected Houti rebels in November 2019 and *SC Taipei* reportedly boarded in April 2020. Further, *Syra* was reportedly attacked at Bir Ali, Yemen, in October 2020, *Hankuk Chemi* was seized by Iran forces (reportedly in response to funds frozen pursuant to sanctions held in Korean banks) and *Helios Ray* suffered damage in February 2021 (albeit Iran denied responsibility to the United Nations).

There also continue to be numerous attacks in the Gulf of Guinea, in particular off Nigeria (now more than 200 nautical miles offshore). The Joint War Committee again responded, issuing JWLA25 in September 2020, increasing the relevant HRA as follows:

- a* on the west, from the coast of Togo 6° 06' 45" N, 1° 12' E; south to
- b* high seas point 0° 40' S, 3° E; then east to
- c* Cape Lopez Peninsula, Gabon 0° 40' S, 8° 42' E.

Precise figures are unclear, due in part to suspected under-reporting; however, the International Chamber of Commerce's International Maritime Bureau Piracy Reporting Centre reported 82 incidents in the Gulf of Guinea in 2020, involving at least 130 crew being kidnapped in 22 separate incidents, a record. Worryingly, the number of crew being taken remains high, and every attack seems to involve the use of firearms. In 2021 so far, there have been at least three successful attacks, with 15 crew members taken from each of two vessels and, sadly, one

4 As reported by the European Union Naval Force Somalia.

5 The Baltic and International Maritime Council.

6 www.imo.org/en/OurWork/Security/Documents/Maritime%20Security%20in%20The%20Southern%20Red%20Sea%20and%20Bab%20al-Mandeb.pdf.

crew member lost their life as the pirates worked to breach the citadel. In one case, all the deck and engineering officers were kidnapped, leaving only the Able Seaman, the Ordinary Seaman, cook and messman on board. Should this become the norm, third-party assistance may be required to get vessels safely to a port of refuge.

The situation in the Gulf of Guinea is compounded by the lack of a coherent regional or international naval force, coupled with the fierce opposition by the littoral states of the Gulf of Guinea to any encroachment by foreign navies into their respective maritime boundaries, and their inability to offer comprehensive protection against the pirate threat within their own territorial waters (although, arguably, this is improving). Additionally, the prohibition on the use of foreign armed guards and the lack of prosecution of those responsible for kidnap contribute to favourable conditions in which pirates can prosper and are not disincentivised. Also in the region, there were reports of three attacks in Benin (crew kidnapped from two vessels) in the first quarter of 2020 and at least two further incidents in which crew were taken in the Gulf of Guinea. In response to the continued incidents in the Gulf of Guinea, BMP West Africa was launched in March 2020.⁷ A number of large shipping interests are becoming more vocal in their calls for action. It is hoped this will prompt an improvement in the security situation.

The third hotspot is still South East Asia, where mainly small tankers and fishing vessels are targeted. The boarding vessels either steal possessions or cargo or kidnap the crew in conditions in which the pirates appear to go relatively unchecked. Worryingly, many of these incidents have reportedly been perpetrated by Abu Sayyaf (an ISIS affiliate). This type of 'terrorist' incident gives rise to many more issues than a standard 'criminal' kidnap.

II PRACTICAL RESPONSE

For those owners unfortunate enough to have their vessels taken by pirates, there are several immediate practical steps to be taken, always keeping in mind the need to avoid any action that might put the crew in jeopardy.

A crisis management team should be established and, when a marine kidnap-for-ransom negotiation ensues, the assistance of a professional response consultant should be sought. Insurers should be alerted and the families appropriately informed. Press comment should be kept to a minimum. In cases of cargo theft, up-to-date vessel positions and the close monitoring of any other vessels in the vicinity might also prove important. To this end, and with a view to future prosecutions, there is additional benefit in maintaining links with various international organisations and law enforcement agencies.

Once a deal is reached in principle, the cashing and transportation of any ransom is a complicated operation (further complicated by covid-19 restrictions), as is the resupply and recovery operation when a vessel has been held for a long period. Both require careful planning, operational security and, often, bespoke contracts.

⁷ www.ics-shipping.org/docs/default-source/resources/bmp-west-africa-best-management-practices-to-deter-piracy-and-enhance-maritime-security-off-the-coast-of-west-africa-including-the-gulf-of-guinea.pdf?sfvrsn=10.

III COMPLIANCE AND LEGAL

Under English law, the payment of ransoms to pirates is not unlawful. This has been affirmed by the Court of Appeal in *Masefield AG v. Amlin*,⁸ in which Lord Justice Rix held that ‘there is no legislation against the payment of ransoms, which is therefore not illegal’ nor is there any ‘universal morality against the payment of ransom, the act not of the aggressor but of the victim of piratical threats, performed in order to save property and the liberty or life of hostages’. It is also widely accepted that ‘if the crews of the vessels are to be taken out of harm’s way, the only option is to pay the ransom’ (Justice Steel, at first instance).⁹ Unfortunately, the payment of a ransom is invariably the only viable option to secure the safe release of vessel, cargo and crew. However, as the judgment acknowledges, the position may be different in relation to terrorism. There are also sanction regimes in place that can have an effect.

Under Sections 15 to 18 of the Terrorism Act 2000, it is illegal to cause money to be paid to any person if there is ‘reasonable cause to suspect’ that the payment will or may be used for the purposes of terrorism, or to become concerned in an arrangement where such money is paid. There are certain defences available, including that of authorised disclosure; this is a complex area in which specific advice should be sought.

Despite rhetoric from certain quarters, no substantiated link between Somali pirates and al-Shabaab has been made. Indeed, Dr Campbell McCafferty¹⁰ confirmed in June 2011, when Somali piracy and ransom payments were at their peak, that ‘there has not been any evidence of a link between the pirates and al-Shabaab, the terrorists in Somalia’.¹¹ However, owners considering paying a ransom must carry out due diligence in each case to ensure that they have no reasonable cause to suspect terrorist involvement.

In July 2018, the Supreme Court of the United Kingdom considered the meaning of ‘reasonable cause to suspect’ under Section 17(b) of the Terrorism Act 2000, in *R v. Lane and Letts*.¹² The Court held that ‘the requirement that there exist objectively assessed cause for suspicion focuses attention on what information the accused had. As the Crown agreed before this court, that requirement is satisfied when, on the information available to the accused, a reasonable person would (not might or could) suspect that the money might be used for terrorism’.

The Proceeds of Crime Act 2002 also falls for consideration in this respect; however, in our view, the narrow definition of ‘criminal property’ under Section 340 means it is likely to be of very limited application. As is made clear in *R v. GH*,¹³ the Section 327, 328 and 329 offences are not triggered until the property alleged to be criminal property is in fact ‘criminal property’. To quote the Supreme Court:

it is that pre-existing quality which makes it an offence for a person to deal with the property, or to arrange for it to be dealt with, in any of the prohibited ways. To put it in other words, criminal property for the purposes of Sections 327, 328 and 329 means property obtained as a result of or in connection with criminal activity separate from that which is the subject of the charge itself. In

8 [2011] EWCA Civ 24.

9 [2010] 1 Lloyd’s Rep 509.

10 Then Head of Counter-Terrorism and UK Operational Policy, Ministry of Defence.

11 www.publications.parliament.uk/pa/cm201012/cmselect/cmcaff/1318/11062902.htm.

12 [2018] UKSC 36.

13 [2015] UKSC 24.

everyday language, the sections are aimed at various forms of dealing with dirty money (or other property). They are not aimed at the use of clean money for the purposes of a criminal offence, which is a matter for the substantive law relating to that offence.

Additionally, the Counter Terrorism and Security Act 2015, which came into force on 16 February 2015, makes it an explicit offence (as per Section 17A of the Terrorism Act 2000) for insurers to reimburse a payment made by the assured to a person when they have reasonable cause to suspect that the money paid by the assured was handed over in response to a demand made wholly or partly for the purposes of terrorism. This makes it even more important for the assured to ensure they carry out appropriate due diligence on any hostage taker.¹⁴ As noted above, the incidents off Yemen and in South East Asia involving Abu Sayyaf mean such due diligence is as important as ever when there is an English nexus. However, even for Nigerian incidents, this should be carried out to avoid contravention of English law. Further, those involved in Nigerian cases should be aware of legislation enacted in 2019, and additional reporting obligations around piracy, kidnap and the payment of ransoms.

One must also be mindful of other relevant legal regimes, including any jurisdiction the ransom might pass through and the United States. President Obama issued Executive Order 13536 on 12 April 2010 addressing the deterioration of the security situation and the persistence of violence in Somalia, and acts of piracy and armed robbery at sea off the coast of Somalia. As amended, this Order names various individuals and one organisation (al-Shabaab). By a notice of 3 April 2020, President Trump extended Executive Order 13536 for a further year.¹⁵

There has also been one decision by the High Court of England and Wales that is relevant to post-release litigation. In late 2020, the Court considered litigation arising from the hijack of the *Polar* in 2010.¹⁶ Specifically, the ability of owners to recover general average contributions from cargo interests in circumstances where certain insurance policies were in place in respect of the risk of piracy and paid for by charterers (by attempting to draw an analogy to the *The Evia (No. 2)* and *The Ocean Victory* rulings). The Court held that although this prevented a recovery from charterers, it did not prevent a recovery from cargo interests. The case is pending appeal.

IV SHIPPING OPERATIONS

Piracy does not just affect those unfortunate enough to be hijacked but the daily operations of all owners and charterers transiting areas where there is a risk of piracy. Questions of responsibility for costs arising from piracy will usually depend on the wording of the charter party.

At the most basic level, these costs take the form of increased insurance premiums and, as with most issues, the question is 'who pays?'. London Arbitration 4/13 considered the wording of the BIMCO Piracy Clause for Time Charter Parties 2009, which reads: 'If the

14 www.legislation.gov.uk/ukpga/2015/6/section/42/enacted.

15 www.whitehouse.gov/briefings-statements/text-notice-continuation-national-emergency-respect-somalia-2/. The US Executive Order was renewed on 1 April 2021: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/01/notice-on-the-continuation-of-the-national-emergency-with-respect-to-somalia/>

16 [2020] EWHC 3318 (Comm).

underwriters of the owners' insurances require additional premiums or additional insurance cover is necessary because the Vessel proceeds to or through an Area exposed to risk of Piracy, then such additional insurance costs shall be reimbursed by the charterers.' Contrary to the brokers' position and market interpretation, the tribunal held that kidnap and ransom, and loss of hire insurance, were not 'necessary' and so charterers were not required to reimburse the cost of the premium to the owners. In response, BIMCO amended the 2009 Piracy Clause in 2013 and placed these costs specifically on charterers.

To avoid HRAs, vessels will often change their route, whether by way of slight alterations or, in the most extreme cases, by passing via the Cape of Good Hope as opposed to the Suez Canal. This raises the issue of whether the vessel has deviated and who pays for the additional time and bunkers.

In the absence of any specific contractual right, the owners are obliged to proceed via the quickest or shortest route unless they can demonstrate that the charterers' orders would jeopardise the safety of the vessel in accordance with the common law principles set out in *The 'Hill Harmony'*.¹⁷ Otherwise, it is likely that the owners will be found to have breached their duty to proceed with utmost despatch and so be liable for damages.

In the piracy context, the High Court of England and Wales (EWHC) offered guidance on the Conwartime 1993 clause in *The 'Triton Lark'*,¹⁸ holding that the owners could refuse such an order only if there was a real risk of a piracy event occurring in respect of that specific vessel. Before refusing such an order, the owners are required to carry out an assessment of the risk to the vessel and whether this risk could be mitigated by adopting suitable anti-piracy measures. If a real likelihood of a risk of a piracy event occurring is established, the owners are entitled to take an alternative route at the charterers' expense. This will not amount to a deviation.

*The 'Paiwan Wisdom'*¹⁹ considered the Conwartime 2004 clause. The EWHC held that there was no requirement that the level of piracy or war risk had to have grown between the date of execution of the charter party and the voyage orders being issued before the owners were entitled to refuse a routing order. Further, while naming the Gulf of Aden committed the owners to proceeding via the Gulf, it did not automatically commit them to calling at unnamed ports in the region, in that case Mombasa.

Whether a vessel is on-hire or off-hire has also been the subject of litigation. Again, this depends on the terms of the charter party. To claim that the vessel is off-hire, the burden is on the charterer to show they come within the listed events. As a result of *The 'Saldanha'*,²⁰ piracy is not an off-hire event under an unamended NYPE²¹ 1946 Clause 15, although the addition of 'whatsoever' to the clause may lead to a different result. However, following *The 'Captain Stefanos'*,²² it is clear that piracy is highly likely to be caught by a 'capture/seizure' provision under an amended NYPE 1946.

The leading piracy case in 2014 was *The 'Longchamp'*,²³ in which Stephen Hofmeyr QC sitting as a Deputy High Court judge held that various expenses, including crew wages and

17 [2001] 1 Lloyd's Rep 147.

18 [2011] EWHC 2862 (Comm) and [2012] EWHC 70 (Comm).

19 [2012] EWHC 1888 (Comm).

20 [2010] EWHC 1340.

21 New York Produce Exchange form.

22 [2012] EWHC 571 (Comm).

23 [2014] EWHC 3445 (Comm).

bunkers consumed during the period of the hijacking, were recoverable as part of an owner's general average claim. This was a departure from average adjusting practice. The decision was successfully appealed to the Court of Appeal of England and Wales (EWCA),²⁴ with the crew and bunker costs being disallowed from the owners' general average claim on the basis that there was no true alternative course of action and a delay (and so the crew and bunker costs) would have resulted in any event. The Supreme Court²⁵ has since considered the case and overturned the EWCA (by a majority of 4:1), holding that the bunkers and crew wages were recoverable by the owners as substituted expenses under Rule F of the York-Antwerp Rules 1974.

Finally, in 2019, in *Eleni Shipping Limited v. Transgrain Shipping BV*,²⁶ the EWHC looked again at off-hire in the context of the Somali hijack of the *Eleni P* over a period of about seven months. In short, Mr Justice Popplewell held that (1) 'capture' in the context of the off-hire events only applies to a capture by an authority (and not pirates), but that (2) under Clause 101 of the charter (the piracy clause), the obligation to pay hire is suspended when a vessel is kidnapped by reason of piracy.

V RECOVERY

Obtaining clear and comprehensive evidence immediately following the release of a vessel and crew is vital to ensuring any future recovery or defending any claim, as well as bringing pirates to justice. For this reason, we usually advise that a lawyer or master mariner (or both) attend the port of refuge to debrief the crew and collect evidence relevant to any future legal action. We also recommend that appropriate law enforcement agencies be invited by the owners to attend the vessel at the port of refuge.

When a ransom has been paid to secure the release of a vessel, cargo and crew, the owners will often seek to recover this and their associated release expenses in general average (GA) from cargo interests. Case precedent stretching back to *Hicks v. Pallington* in 1590 confirms that ransom payments can be the subject of GA. Further, the EWCA, in *The 'Lehmann Timber'*,²⁷ held that an owner is entitled to require a GA bond and GA guarantee before releasing the cargo and (overturning the first instance decision) that they can recover their reasonable costs of exercising a lien until security is provided, including the cost of storage. The arbitration award (as referenced in the first instance judgment) also allowed the cost of the tow to Salalah, in addition to the ransom, in GA.

In the context of cargo theft in West Africa, it is unclear whether a cargo owner could declare GA in respect of the stolen cargo and whether this could amount to a GA sacrifice. It is likely the key battleground will be, first, in arguing that the 'sacrifice' was voluntary and, second, whether any property other than the cargo was at risk. In the event that a ransom is paid in respect only of kidnapped crew members who have been taken ashore, this will usually not be a GA event.

Cargo interests will often allege that the owners failed to exercise due diligence to make the vessel seaworthy (e.g., by effecting appropriate training and vessel hardening) and, therefore, that the hijack was a result of actionable fault by the owners. As a result, they

24 [2016] EWCA Civ 708.

25 [2017] UKSC 68.

26 [2019] EWHC 910 (Comm).

27 [2013] EWCA Civ 650.

argue no GA contribution is payable. For this reason, it is important for the owners to secure evidence of the measures in place at the beginning of the voyage and the witness evidence. This unseaworthiness argument is yet to succeed before the English courts.

In the West Africa context, under their cargo insurance policies, cargo owners, as the assured, will also have various sue and labour obligations that may extend to taking reasonable steps to try to recover the cargo. In many cases, it is difficult to identify or locate the cargo or the vessels involved in the ship-to-ship transfers; in some cases, however, the crew are able to identify the lightering vessels, or the stolen cargo has been successfully located.

One difficult issue that owners face when there is no kidnap and ransom policy in place is which, if any, of their insurances will respond to a crew kidnapping. Unlike Somalia, in these cases there is no property at risk and any ransom paid will be in respect of individuals only. This often leads to a debate between protection and indemnity insurers and war or hull underwriters as to who, if either, should reimburse an owner in respect of the ransom and associated expenses.

Perhaps the most interesting of all the potential recovery avenues is offered by the detention of various pirates. To the extent that it is possible to piggyback the criminal prosecution with a civil claim, this may offer the owners and insurers a chance of recovery, particularly if it can be proven that money used to pay a ransom was paid into a particular bank account.

VI ARMED GUARDS

The use of privately contracted armed guards on merchant vessels was key in reducing the number of attacks off Somalia and in the Indian Ocean. The risk of attack from groups based in Somalia and Yemen is perhaps reduced but remains real and unpredictable, and many owners still engage armed guards on their vessels as standard practice, particularly as fierce competition among private maritime security companies (PMSCs) has kept rates low. However, demand for PMSCs in this region is reduced and owners increasingly question whether they still need to incur the expense and administrative burden of carrying armed guards or whether they can at least have smaller teams. Such questions must be decided case by case and, as long as the risk remains, it is up to each owner to conduct a risk assessment in each case and secure each vessel as it deems appropriate.

Despite the continued threat in West Africa, the successful East African model cannot simply be transferred to the Gulf of Guinea. Nor can it be replicated in South East Asia, where there is little scope for the operation of PMSCs and demand for their services is accordingly limited. PMSCs are in demand in West Africa, particularly in the Gulf of Guinea; however, the operational difficulties and risks they face in this region are much greater. In the Gulf of Guinea, where only local constabulary and military forces²⁸ are permitted to carry weapons, the model commonly adopted is for a PMSC to procure the deployment of (1) a vessel protection detachment (VPD) from the applicable local force either on board the merchant vessel or alongside in an escort vessel (as local law dictates), and (2) a security officer engaged by the PMSC to act as a liaison officer between the ship and the VPD and local authorities. The security officer will have no formal control over the local VPD (who will operate in accordance with their own command structure and their own rules of engagement). Various detentions in Nigeria have shown that extreme caution should be exercised when taking

28 Exactly who is allowed to carry firearms, how and where differs between each littoral state.

VPDs on board and deploying security officers. There should be no suggestion that the security officers are mentoring or training the VPD. Close attention should also be paid to the visas used by any security officer. Real care should also be had to the way in which the VPD and any escort vessels are contracted. In Nigeria, this should be only through a local company holding a valid memorandum of understanding (MOU) with the Nigerian Navy. The Nigerian Navy periodically revises the terms of its MOU, most recently making explicitly clear that (1) the MOU should not be transferred to another company without the Navy's express consent and (2) no company holding an MOU may merge with another not holding an MOU without the express consent of the Navy. Owners operating in Nigeria should ensure that their PMSC has engaged a local company with a valid MOU and that the company is operating in compliance with the terms of its MOU. No matter the jurisdiction, owners should ensure that the VPD has been drawn from the constabulary or military authority with appropriate jurisdiction and authority over the waters in which the vessel is to pass and that all necessary permits and permissions have been obtained by the PMSC and remain up to date. Even if the owners believe they have the correct permits and permissions in place for the carriage of a VPD, matters can be further complicated by competing government agencies and officials, as was demonstrated by the arrest of the crew and armed guards of the *Myre Seadiver* for alleged arms smuggling, the detention by Nigerian authorities of certain vessels and the arrest of private security personnel for alleged illegal activity.

The territorial waters of the littoral states extend to 12 nautical miles from their respective base lines and their exclusive economic zones to 200 nautical miles; however, anyone operating in the Gulf of Guinea must be alive to how these states, particularly Nigeria, interpret their territorial waters (as covering territory in excess of 12 nautical miles).

Those owners operating solely in international waters off West Africa cannot ignore the prohibition on non-local armed guards. To date, the United Kingdom has not allowed armed guards on UK-flagged ships in international waters off West Africa, although it will respect the laws of the coastal states and, if local military or constabulary forces can be deployed from those states in accordance with their laws, they may be deployed on a UK vessel. In addition, the United Kingdom does not issue export control licences to UK PMSCs for the deployment of armed guards anywhere other than the HRA of the Indian Ocean and, although non-UK PMSCs are often not restricted in the same way in international waters, they still do not have the logistical support of the network of vessel based armouries (VBAs) that they enjoy in East Africa and they run the risk of arrest for infringement of local laws in much the same way as was demonstrated off India by the detention of the *Seaman Guard Ohio*.

In response to what, at the time, was a rapid growth in the number of PMSCs offering services on a wide array of contracts, in March 2012, BIMCO launched its Standard Contract for the Employment of Security Guards on Vessels, known as Guardcon. This quickly became BIMCO's second-most used standard contract. It set a benchmark for the provision of security services, which was rapidly adopted by the shipping industry. However, it is unsuitable for use in West Africa without considerable amendment. BIMCO declined requests to produce a revised standard contract for use in West Africa and instead issued, by Special Circular (No. 1) on 20 February 2014, a set of guidelines for owners contemplating using Guardcon for the provision of PMSC services in this region.

In preparing the guidelines, the drafting subcommittee considered a number of issues, fundamental to which was the structured knock-for-knock liability regime and corresponding PMSC insurance provisions of Guardcon. The key issue was whether Guardcon could cover the liabilities and indemnities for the actions of the local forces as the need arose by means

of the PMSCs' cover for liabilities and contractual indemnities under their own contracts. Although some owners may prefer to go directly to a local agent to procure local guards, the advantage of using a PMSC is that it is likely the PMSC can take on some of the shipowner's risk by including local forces as part of its group for the purposes of the knock-for-knock regime and for the purposes of the PMSC's insurances. In addition, it can assist with the owner's due diligence and further 'de-risk' the situation by sourcing the local personnel itself using its expertise and contacts.

As a final note, a recurring question for the industry has been the use of VBAs in the Red Sea and the Gulf of Aden. Although the UK's Export Control Office, part of the Department for International Trade, began approving VBAs for use by licensed PMSCs in 2013 case by case, it continues to be up to each PMSC to ensure that it has done its due diligence and that the VBA is operated in compliance with all applicable laws, including those of its flag state. It is worth noting that many flag states do not allow vessels registered with them to be used as floating armouries.

ABOUT THE AUTHORS

MICHAEL RITTER

HFW

Michael Ritter is a partner in the HFW shipping and transport team. Mike predominantly advises shipowners, their insurers and salvors on issues arising from marine casualties (collisions, fires, groundings, etc.), in particular in relation to jurisdiction, limitation of liability and wreck removal. Post casualty response, he also advises on the underlying liabilities both in tort and any underlying contracts of carriage, the defence of cargo claims and prosecution of general average and inter-ship collision recoveries. He also increasingly advises on dry shipping issues.

In relation to his hostile environment work, Mike was heavily involved in the release of the crews of eight vessels kidnapped in the Gulf of Guinea and in two of the Fujairah anchorage attacks in 2019, and a further seven Gulf of Guinea kidnappings and two Persian Gulf attacks in 2020, as well as various non-marine kidnap, extortion and related risks and vessel detentions. In connection with these cases, he has advised both owners and insurers in relation to the Terrorism Act 2000. In 2021, he has assisted two of the three owners who have suffered a Gulf of Guinea kidnap.

Mike was recognised as a 'rising star' in 2019 by *The Legal 500* for his handling of casualty response work, in 2020 for casualty work, including hostage matters, and is part of the Hostage Support Partnership, which was commended by the United Nations Security Council on 7 November 2017 in Security Council Resolution 2383 (2017) for its work securing the release of the 26 hostages from the vessel *Naham 3*, who were held for four and a half years in Somalia.

WILLIAM MACLACHLAN

HFW

William MacLachlan is a partner at HFW advising a wide variety of companies and financial institutions on a range of transactional shipping matters in both the commercial shipping and yachting industries. He has particular expertise in shipbuilding contracts, ship repair contracts, and sale and purchase of vessels, and spent eight months seconded to a leading European shipbuilder. William also has extensive experience of work in the field of private security and complex environments, acting for shipowners, private maritime security companies (PMSCs) and other stakeholders, including advising on and drafting contracts for the provision of security services, advising on standard operating procedures and rules for the

use of force, drafting stand-alone agreements in respect of the provision of bespoke security services to the offshore industry and advising PMSCs and their logistics providers on the full spectrum of contractual, compliance and licensing issues.

HFW

Friary Court
65 Crutched Friars
London EC3N 2AE
United Kingdom
Tel: +44 20 7264 8000
Fax: +44 20 7264 8888
william.maclachlan@hfw.com
michael.ritter@hfw.com
www.hfw.com

an LBR business

ISBN 978-1-83862-828-4