THE SHIPPING LAW REVIEW

TENTH EDITION

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PREFACE

The aim of the tenth edition of this book is to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple 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, including international trade sanctions, ocean logistics, offshore, piracy, shipbuilding, ports and terminals, marine insurance, environmental and regulatory issues, decommissioning and ship finance.

We have 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.

Each of these jurisdictional chapters 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, as are the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims.

In addition, the authors 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 also examined. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction in the coming year.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations Conference on Trade and Development estimating that the operation of merchant ships contributes about US$380 billion in freight rates to the global economy, amounting to about 5 per cent of global trade overall. The significance of maritime logistics in facilitating trade and development has become increasingly apparent in the past year. Heightened and unstable freight rates, port closures, congestion and evolving shipping requirements as a result of covid-19 and the Ukraine conflict have all had far reaching effects beyond the shipping sector itself. As the international shipping industry is responsible for the carriage of over 80 per cent of world trade, with over 50,000 merchant ships trading internationally, the elevated shipping expenses and challenges to global logistics we have experienced this year have exacerbated inflation and supply chain disruptions, adding to the ongoing global crisis and hampering the maritime industry's covid-19 recovery. We have seen

global maritime trade, which plunged by approximately 4 per cent in 2020, recover at an estimated rate of 3.2 per cent. In 2021, shipments reached 11 billion tonnes, a value slightly below pre-pandemic levels.

The disruption caused by the pandemic and the war in Ukraine have 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.

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 2023

Chapter 9

PIRACY AND COMPLEX ENVIRONMENTS

Michael Ritter, William MacLachlan and Richard Neylon[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 therefore appears apt 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 April 2023, 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 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). Subsequently (as of 1 January 2023), the Indian Ocean HRA was removed. This reflected the decline in risk, although the need to follow BMP 5 remains and the Joint War Committee has maintained its listing.

That is not to say that 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 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 coast[4] and, in December 2018, United Kingdom Maritime Trade

1 Michael Ritter, William MacLachlan and Richard Neylon are partners at HFW.

2 [1982] 2 Lloyd's Rep 48.

3 www.lmalloyds.com/lma/jointwar.

4 As reported by the European Union Naval Force Somalia.

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, BIMCO[5] and Intertanko published Interim Guidance,[6] which includes steps for defending against water-borne improvised explosive devices. Furthermore, an additional Maritime Security Transit Corridor was established, as shown on the revised British Admiralty Chart Q6099. This remains in place.

The southern Red Sea and Bab al-Mandeb are not the only areas of potential risk for shipping in the region. 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. Furthermore, *Syra* was reportedly attacked at Bir Ali, Yemen, in October 2020, *Hankuk Chemi* was seized by Iranian forces (reportedly in response to funds frozen pursuant to sanctions held in Korean banks).

The Joint War Committee has also maintained the following HRA in the Gulf of Guinea: on the west, from the coast of Togo 6° 06' 45" N, 1° 12' E; south, to high seas point 0° 40' S, 3° E; and east, to Cape Lopez Peninsula, Gabon 0° 40' S, 8° 42' E.

That said, there was a marked downturn in piracy incidents in the Gulf of Guinea during 2022, with the International Chamber of Commerce's International Maritime Bureau Piracy Reporting Centre reporting only 19 incidents in 2022, down from 35 in 2021 and 82 in 2020. In part, this may be a result of projects such as Deep Blue. However, there seems to have been a recent spike in activity, with two kidnappings in December 2022 and March 2023, and a cargo theft incident in April 2023. Any owner affected by a kidnapping incident should also be aware of Nigeria's recent legislative changes in the area , including the Terrorism (Prevention and Prohibition) Act 2022 and the Money Laundering (Prevention and Prohibition) Act 2022, and the impact these have on the payment of ransom.

In view of these incidents, BMP West Africa, launched in March 2020,[7] should continue to be followed. 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.

5 The Baltic and International Maritime Council.

6 https://www.ics-shipping.org/wp-content/uploads/2018/01/interim-guidance-on-maritime-security-in-the-southern-red-sea-and-bab-al-mandeb.pdf.

7 https://www.ics-shipping.org/publication/best-management-practices-to-deter-piracy-and-enhance-maritime-security-in-the-red-sea-gulf-of-aden-indian-ocean-and-arabian-sea/.

The fourth hotspot remains South East Asia, where mainly small tankers and fishing vessels continue to be targeted. The boarding vessels either steal possessions or cargo or kidnap the crew. In many cases, 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 are complicated operations, as is the resupply and recovery operation when a vessel has been held for a long period. All require careful planning, operational security and, often, bespoke contracts.

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 McCafferty[10] confirmed in June 2011, when Somali piracy and ransom payments were at their peak, that 'there has not been any

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.

evidence of a link between the pirates and al-Shabaab, the terrorists in Somalia'.[11] However, owners considering paying a ransom must nonetheless 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 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] With incidents off Yemen and in South East Asia involving potentially terrorist actors, this due diligence is as important as ever when there is an English nexus to an incident in these areas. However, even for Nigerian incidents, this due diligence should be carried out to avoid the contravention of English law.

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

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

12 [2018] UKSC 36.

13 [2015] UKSC 24.

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

coast of Somalia. As amended, this Order names various individuals and one organisation (al-Shabaab). By a notice of 7 April 2023, President Biden 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 Court of Appeal dismissed the appeal,[17] holding that any agreement not to sue by virtue of charterers' payment of the premium under the charter was not incorporated into the bills of lading so as to apply to the bill of lading holder. To hold otherwise the Court held, would be to allow cargo underwriters to escape liability for a risk that they had agreed to insure. A further appeal to the Supreme Court is pending.

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 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'*.[18] 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.

15 https://www.federalregister.gov/documents/2023/04/10/2023-07692/continuation-of-the-national-emergency-with-respect-to-somalia.

16 [2020] EWHC 3318 (Comm).

17 [2021] EWCA Civ 1828.

18 [2001] 1 Lloyd's Rep 147.

In the piracy context, the High Court of England and Wales (EWHC) offered guidance on the Conwartime 1993 clause in *The 'Triton Lark'*,[19] 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'[20] 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. Furthermore, 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'*,[21] piracy is not an off-hire event under an unamended NYPE[22] 1946 Clause 15, although the addition of 'whatsoever' to the clause may lead to a different result. However, following *The 'Captain Stefanos'*,[23] 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'*,[24] in which Stephen Hofmeyr QC sitting as a Deputy High Court judge held that various expenses, including crew wages and 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),[25] 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 Court[26] 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*,[27] 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.

19 [2011] EWHC 2862 (Comm) and [2012] EWHC 70 (Comm).
20 [2012] EWHC 1888 (Comm).
21 [2010] EWHC 1340.
22 New York Produce Exchange form.
23 [2012] EWHC 571 (Comm).
24 [2014] EWHC 3445 (Comm).
25 [2016] EWCA Civ 708.
26 [2017] UKSC 68.
27 [2019] EWHC 910 (Comm).

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. Furthermore, the EWCA, in *The 'Lehmann Timber'*,[28] 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 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.

28 [2013] EWCA Civ 650.

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. While the risk of attack from groups based in Somalia and Yemen is perhaps reduced, it 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 reducing over time and many owners, having already reduced the number of armed guards on board, are increasingly questioning whether they still need to incur the expense and administrative burden of carrying them at all. These 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 for each transit 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 forces[29] are permitted to carry weapons, the model commonly adopted is for a PMSC to procure the deployment of 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, where permitted, 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 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 taken regarding 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 the MOU should not be transferred to another company without the Navy's express consent; and that 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

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

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. 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 firearms with their guards anywhere other than the Indian Ocean and Gulf of Aden 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, Guardcon is unsuitable for use in West Africa without considerable amendment (see further below).

In preparing BIMCO's Special Circular No. 1 – 20 February 2014, which sets out recommended amendments to Guardcon when used in West Africa, BIMCO's 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 PMSC's cover for liabilities and contractual indemnities under its own contract. Although, when operating in West Africa, some owners may prefer to go directly to a local agent to procure local guards, the advantage of using an established PMSC is that it is likely such a PMSC will take on some of the owner'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. The International Group of P&I Clubs have taken this exercise one step further and have produced their own version of the contract called 'GUARDCON West Africa', which incorporates the recommended amendments.

To coincide with the 10th anniversary of the publication of Guardcon, BIMCO launched its new Standard Contract for Security Escort Vessels, known as SEV-Guardcon.[30] Following many of the principles of Guardcon, SEV-Guardcon is aimed at circumstances

30 HFW's Elinor Dautlich was part of the Guardcon drafting committee and supported BIMCO in the drafting of SEV-Guardcon, together with broad representation from the shipping, insurance and maritime security communities.

where owners hire the services of a security escort vessel on which are carried security guards authorised by the relevant littoral state, for example when transiting the Gulf of Guinea. The insurance provisions follow closely the market standard arrangements set out in original Guardcon; while the liabilities and indemnities provisions reflect provision of the services by an independently operated security escort vessel, as opposed to a security team carried on board the transiting merchant vessel.

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.

VII WAR RISKS AND THE WAR IN UKRAINE

Although not piracy, it would be remiss not to briefly touch upon the war in Ukraine, given the relevance to owners and war risk insurers.

The invasion of Ukraine (and the subsequent declaration of martial law) meant the cessation of port activities, departure permissions for vessels being withdrawn or withheld, pilots becoming unavailable, the laying of sea mines around the coast of Ukraine and increased naval activity in the Black Sea. The result was that many commercial vessels became stranded in Ukrainian ports. This grim situation was exacerbated by several commercial vessels being physically damaged as a result of missile, rocket and projectile strikes with, in some cases, the unfortunate loss of life to seafarers. In the same way as certain piracy hotspots are listed by the Joint War Committee, JWLA 29 and 30 published in 2022 added Russia and Sea of Azov and Black Sea waters, plus Ukrainian inland waters, as Listed Areas.[31]

Immediate response was required (from across the shipping, insurance, risk management and legal communities) to deal with this initial situation. This immediate response included evacuating crews from many of the vessels that were stranded (moving the crews out of Ukraine), backfilling evacuated vessels with skeleton or replacement crews, and dealing with those vessels that had been physically damaged.

It also involved the analysis of legal rights and liabilities, and taking actions to manage those. Discussions and disputes quickly emerged across many of the contractual chains and insurance policies (involving those stranded vessels and their cargoes), and these largely focused around legal themes such as frustration, *force majeure*, off-hire, unsafe port and implied indemnities.

The establishment of the Black Sea Grain Initiative, signed in July 2022, allowed for vessels in the ports of Odessa, Yuzhny and Chornomorsk (which were carrying foodstuffs and ammonia cargoes) to leave. It also allowed for vessels to enter Ukraine and trade foodstuffs from those three ports. The establishment of the initiative took many commentators by surprise (particularly as it relied upon cooperation between Ukraine and Russia) and it has proved successful, albeit not quite as far-reaching as many had hoped. It did not allow for all stranded vessels to depart from Ukraine. Those vessels that were not loaded with foodstuffs,

31 https://www.lmalloyds.com/lma/jointwar.

which were not able to load foodstuffs and which were not in those three ports, were not able to depart. At time of writing, many of those vessels remain stranded, particularly those in the Bug River.

For many of those remaining stranded vessels, 24 February 2023 was an important date as the first-year anniversary of the war was the trigger on which owners will or will likely seek to rely on to claim a constructive total loss (CTL) under the terms of their policies. This, in turn, may give rise to discussion, debate and potentially dispute, as to whether policy conditions have been met, whether any sue and labour requirements have been met, and if the CTL and notice of abandonment is accepted, whether insurers wish to exercise their entitlement under section 63(1) of Marine Insurance Act 1906, to take over the assured's interest in the vessel, and if so on what terms. This may give rise to opportunities for other parties to purchase vessels at a potential discount.