**Modern Piracy at Sea: A Global Challenge**

**by Paul Apostolis and John Knott**

**Piracy in 2007 and 2008**

The Singapore and Malacca Straits, which were once considered to be among the most dangerous places in the world because of piracy, are now much safer for merchant vessels as a result of cooperation between nations in south-east Asia. The main sources for statistics about piracy at sea are the Singapore-based Information Sharing Centre of the members of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia ("ReCAAP"), and the Piracy Reporting Centre of the International Maritime Bureau ("IMB") in Kuala Lumpur. Figures differ slightly between these sources, partly because the two organisations use different definitions of piracy—which we shall examine shortly— and ReCAAP's records relate only to Asia, whereas the IMB gives global coverage. But while the number of reported piracy incidents in Asia overall, and in south-east Asia in particular, has declined in recent years, the number of attacks worldwide increased during 2008, largely owing to unprecedented activity by pirates in the waters off Somalia. And while the majority of successful attacks by pirates in south-east Asia involve the boarding of ships and the stealing of money and various articles, the Somali pirates consistently try to capture vessels and hold them and their crews for ransom.

ReCAAP reported a drop in piracy incidents in Asia in successive years from 200 actual and attempted incidents in 2004, through 148, 135, 100, and down to 96 during 2008. Meanwhile, the IMB reported a total of 293 incidents worldwide during 2008—an increase of more than 11 per cent from 2007, and the highest annual figure since the Bureau started collating details in 1992. Last year, there were 49 actual ship hijackings, with 889 crew members being taken hostage, a large proportion being from the Philippines. Of these hijackings, 42 were carried out in the Gulf of Aden and off Somalia's east coast. Africa also created the second highest group of reported incidents, with five vessels hijacked off Nigeria, where a further 27 ships were

boarded and 39 crew members were kidnapped.  And the IMB noted that true figures for Nigeria, including details of incidents not formally reported to them, would have been even higher.

**Causes of Somali piracy**

The initial cause of piracy attacks in the Gulf of Aden and off the east coast of Somalia—where the in-shore sea is rich in lobsters, sharks, and pelagic fish with high unit values such as tuna and mackerel—is sometimes attributed to efforts by Somali fishermen to restrict illegal fishing by foreign trawlers, and sometimes to retaliation for the illegal and well-documented dumping of toxic waste by vessels of various nations.  But whatever the initial cause may have been, it is clear that the Somali pirates are now motivated by the prospect of acquiring large sums of money by hijackings—which is the most lucrative form of activity available to them.  It is this feature which justifies describing the participants as pirates (who are after personal gain), rather than as terrorists (who by definition are politically motivated).  The distinction is important for many reasons, including the scope of many insurance policies, and the legality of ransom payments.

**Terminologies**

We drew attention earlier to differences between the IMB and ReCAAP in the definitions of piracy on which they base their respective methodologies.  ReCAAP, established in 2006 between 16 countries in Asia, follows the International Maritime Organisation in adopting the definition in Article 101 of the United Nations Convention on the Law of the Sea of 10 December 1982 ("UNCLOS").  This essentially restricts piracy to acts occurring on the high seas.  On that basis, an act which is otherwise equivalent to piracy, but which occurs within a country's territorial waters, would be classed simply as armed robbery.  This contrasts with the situation under the IMB's wider and more robust definition, which also includes acts occurring within a country's territorial waters.  The IMB's definition is:

> "An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in furtherance of that act."

**Marine Insurance Policies**

For the purpose of marine insurance policies subject to English law, the IMB's definition—insofar as it does not restrict piracy to incidents occurring on the high seas—comes closer to the test applied by English courts in cases such as *The Andreas Lemos* [1982] 2 Lloyd's Rep. 283. There, Mr Justice Staughton found that there was compelling authority that in public international law, piracy could only occur outside the jurisdiction of any state. However, he considered that the fact that for international law, piracy was restricted to the high seas, was not relevant to domestic disputes involving the interpretation of insurance contracts. He further held that for the latter purpose "the high seas" was not synonymous with simply the areas outside territorial waters, or (more widely) with all areas within the common law jurisdiction of the Court of Admiralty. Rather, if a ship was, within the ordinary meaning of the phrase "at sea", or if an attack on her could be described as "a maritime offence", then for the business purpose of a marine insurance policy the ship was in a place where piracy could be committed.

A point to bear in mind is that *The Andreas Lemos* was fought in the context of the then standard English Marine Policy with an FC&S (free of capture and seizure) exclusion clause attached. Until 1983, the standard war risks policies used in the London market covered losses caused by piracy that fell within a hull policy FC&S exclusion. Since that time, and as a result of strong criticism of the wording of marine policies generally, new policy wordings were introduced by both Lloyd's and the Institute of London Underwriters. The Institute Time Clauses (Hulls) were revised in October 1983, and from that time they included cover against piracy as a hull risk.

This feature remained unchanged when the clauses were again revised in 1995. In those ITC wordings there is cover for the perils of "violent theft by persons from outside the vessel" under Clause 6.1.3, and for "piracy" under Clause 6.1.5. Subsequently, the International Hull Clauses ("IHC") became available, having been introduced in 2002 and amended in 2003. The corresponding clauses in both versions of the IHC are 2.1.3 (violent theft) and 2.1.5 (piracy). But there is no definition of either peril in any of the wordings. A later development is the ability of underwriters to transfer piracy cover [back] into war risk policies, using clauses

drafted by the Joint Hull Committee and the Joint War Committee. One benefit of this, similar to a benefit of having hull insurance and war risks cover with the same underwriter, is to avoid difficulties in differentiating between piracy and terrorism. Use of the additional clauses is optional, and most hull and war risks policies do not incorporate them. A surprising number of policies are still written on the basis of the 1983 Clauses, which are preferred by many owners.

**War Risks**

In their basic forms, the ITC (Hulls) 1983 and 1995 wordings, and the IHC 2003 wording, all exclude the consequences of war and civil war (etc); capture or seizure of a vessel other than as an act of piracy; and acts of terrorism or of a person acting maliciously or from a political motive—but they do so in slightly different terms. Both sets of war and terrorism exclusion clauses are classed as "paramount" and they claim to "override anything contained in this insurance inconsistent therewith." A more detailed commentary on the clauses, and on corresponding war risks cover, is outside the scope of this article, but we note that the clauses contain expressions (including "maliciously", and "political motive") which are largely subjective and which have not been examined to any great extent by the courts, and which accordingly may well give rise to disputes as to the extent of cover. As noted above, however, if piracy cover is put back into war risks insurance, or cover for both is with the same underwriter, this should remove some areas of difficulty.

**Effects of Somali Piracy**

The severe disruptions and uncertainties caused by the actions of the Somali pirates have had a number of consequences, some of which could scarcely have been foreseen. A development in April 2008 was the capture by French special forces of six pirates who had hijacked the super-yacht *Le Ponant*, and the retrieval of part of a ransom that had been paid. The French achieved further success in September when they released hostages who had been held on the hijacked yacht *Carré d'As IV,* an occasion when French forces captured more pirates. Shortly afterwards the French navy started a limited convoy system, escorting merchant vessels through the Gulf of Aden. Subsequently, many other nations have deployed naval vessels on specific anti-piracy duties, either independently or as part of the European Union's NAVFOR Somalia (Operation Atalanta) formed in December 2008, or with the Combined

Maritime Force's more recent Combined Task Force 151, both dedicated to ensuring safe passage for merchant shipping through the Gulf of Aden, and curtailing piracy. Among the more spectacular developments have been the deployment of naval vessels by Russia and the Peoples Republic of China, and similar plans made by Japan and South Korea, adding to the help already given by warships from India, Pakistan and Malaysia, among others. It is only by international cooperation that piracy off Somalia can be eradicated, as Somalia itself—where rival clans, Islamist insurgents, and weak government forces are fighting among themselves; and where half the population is starving—is in no position to patrol its own territorial waters.

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