COVERING THE RISK OF PIRACY AND ARMED ROBBERY AT SEA

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ABSTRACT

Piracy and armed robbery attacks against vessels and seafarers have been on increase and are becoming ever more violent and audacious. The paper provides analysis of the definition of piracy contained in the United Nations Convention on the Law of the Sea, as well as of the anti-piracy measures under auspices of the International Maritime Organization. The author points out that acts of piracy or acts of maritime violence represent problems of individual states in the first instance, because most of these acts take place in waters within national jurisdictions. Beyond prevention and suppression and the management of security risk, there is a need that the owners and operators obtain insurance against piracy and the associated risks. The paper considers the cover available for piracy as an insured peril pointing out the importance for owners and operators to have in place the insurance providing cover for piracy and other forms of maritime violence.

1 INTRODUCTION

Piracy and armed robbery continue to survive as a contemporary phenomenon and little about it merits in historical or romantic terms. In its historical contexts “piracy” was used in a technical and narrow sense to indicate a particular criminal conduct at the sea. In the modern world the word “piracy” as a generic term embraces not only piracy in its strict sense but also all kinds of criminal and violent acts at the sea, so that very generally the word “piracy” in its contemporary usage refers to any criminal act of violence. An act of seizure, or a terrorist attack, or theft of and from the ship, or any attack on a ship complement, or a ransom demand, is likely in common parlance to be described as a piratical attack.

2 PIRACY VS. ARMED ROBBERY

Piracy, as defined in the United Nations Convention on the Law of the Sea (UNCLOS), 1982 in Article 101, consists of any of the following acts:
(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers if private ships or private aircraft, and directed:
(i) on high seas, against another person or aircraft, or against persons or property on board such ships or aircraft;
(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or an aircraft with the knowledge of facts making it a pirate ship or aircraft;
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(c) any act inciting or of internationally facilitating an act described in sub-paragraph (a) or (b)."

Thus the ingredients of the definition of piracy are contained in sub-paragraphs (a) and (b), while sub-paragraph (c) specifies categories of persons who may be characterized as pirate because their association with pirate vessel or with those who voluntary participate in the operation of pirate vessel.

According to the Annex, paragraph 2.2 to the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, under auspice of the International Maritime Organization (IMO), armed robbery against ships means “any unlawful act of violence or any act of depredation, or threat thereof, other than the act of “piracy”, directed against a ship or against persons or property on board such ship, within a States jurisdiction over such offence."

Therefore, the difference in use of terms between piracy and armed robbery is that piracy is confined to acts committed in the high seas or outside the jurisdiction of any State and armed robbery limits to illegal acts within a State’s jurisdiction.

3 SOURCES OF LAW


The United Nations Convention on the Law of the Sea reveals the duty of all States to cooperate in the repression of piracy on the high seas or any other place outside jurisdiction of any State.

A pirate ship or aircraft is a ship or aircraft is intended by the persons in a dominant control to be used for committing the acts of piracy. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of persons guilty of acts of piracy. The acts of piracy committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by private ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived and a ship or aircraft may retain its nationality although it has become a pirate ship or aircraft.

On the high seas, or any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by a piracy and under control of piracy, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

In the case where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure. A seizure on account of piracy may be carried out only by warships or military aircraft or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

A warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity, is not justified in boarding it unless there is a reasonable ground of suspecting the ship is engaged in piracy, except where acts of interference derive from powers conferred by a treaty. Where a warship is verifying the ship’s right to fly a flag, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board of the ship, which must be carried out with all possible considerations. If suspicions prove to
be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained. The hot pursuit of a foreign ship may be undertaken when the competent authorities of a coastal State have good reasons to believe that the ship has violated the laws and regulations of that State.


The purpose of the SUA Convention, adopted on 10 March 1988 and with the entry into force on 1 March 1992, is to ensure that appropriate action is taken against persons committing unlawful acts against the ship. These include seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship which are likely to destroy or damage it. The Convention obliges governments to extradite or prosecute alleged offenders.

The Protocol adopted on 10 March 1988 and entered into force on 1 March 1992 extends the requirements of SUA Convention to fixed platforms such as those engaged in the exploitation of offshore oil and gas.

3.3 Measures to prevent and suppress piracy and armed robbery against ships

The resolution adopted on 4 November 1993 urges Governments to recommend to vessels registered under their flags precautionary measures for the avoidance of such attacks, and procedure to be followed if they occur, including the immediate reporting in order to prevent and suppress piracy and armed robbery against ships at sea. Further urges to establish and maintain close liaison with neighbouring States to facilitate the apprehension of all persons involved in piratical attacks and to instruct national rescue co-ordination centres or other agencies involved.

3.4 Recommendations to Governments for preventing and suppressing piracy and armed robbery against ship

The circular, first issued in 1993, was revised in 1999 on the basis of the recommendation of regional seminars and workshop on Piracy and armed robbery conducted by IMO in Brazil 1998 and Singapore in 1999.

The recommendations point out as an imperative gathering accurate statistics of the incidents of piracy and armed robbery against ship, collating these statistics under both type and area to assess the nature of the attacks with special emphasis on types of attack, accurate geographical location and modus operandi of the wrongdoers and disseminating or publishing these statistics to all interested parties in a format that is understandable and usable. Governments should involve representative of shipowners and seafarers in developing measures to prevent and suppress piracy and armed robbery against ships.

The aim of the recommendation is to neutralize the activities of pirates and armed robbers, as these people are criminals under both international law and national laws, and this task generally fall to the security forces of the States involved. States should develop Action Plans focused on the action to take in case of the attack and also on dealing with any pollution that may result from the attack. All attacks, or threats of attacks, should be reported immediately by radio to the nearest rescue co-ordination centre (RCC) or coast radio. The recommendations are pointing out on how to investigate piracy incidents, as well
3.5 Guidance to shipowners and ship operators, shipmasters and crews preventing and suppressing acts of piracy and armed robbery against ships

This circular was first adopted in 1993 and revised in 1999 and 2002 on basis of the outcome of the Sub-Committee on Radiotelecommunications and Search and Rescue (COMSAR) to make rescue co-ordination centre (RCCs) and others concerned aware of the dangers in alerting pirates/terrorists that a distress alert or the communication has been transmitted by the effected ship following a piracy and/or terrorist alert. The recommendation aims at bringing to the attention of shipowners, masters and crews the precautions to be taken to reduce the risk of piracy on the high sea and armed robbery against ships at anchor, off ports or when underway through a costal State's territorial waters. It indicates steps that should be taken to reduce the risk of such attacks, possible response to them and the imperative need to report attacks, both successful and unsuccessful, to the authorities of the relevant coastal State and to the ship's own maritime administration. The guidance elaborates reducing the temptation for piracy and armed robbery pointing out the need to eliminate large sum in ship's safe, stressing the need of discretion by masters and members of the crew. Ships should have a ship security plan and there are recommendations dealing with routing and delaying anchoring, precautions at anchor or in port, as well as watchkeeping and vigilance. The circular is improving the communication procedure, radio watchkeeping and response, standard ships message format, lighting, secure areas, alarms and use of distress flares, use of distress flares and evasive manoeuvring and use of hoses and fire alarms. Furthermore, the circular marks all possible phases of piracy or robbery attack, with indication of countermeasures to be taken.

3.6 Directive for Maritime Rescue Co-ordinating Centres (MRCCs)

The Maritime Rescue Co-ordination Centres (MRCCs) are the first point of contact between the ship and coastal authorities concerned following the master's decision to request assistance. According to the Directive the message on alert from ships under attack or threatened with attack should be in accordance with the format prescribed. On receiving message the MRCC should take action regarding the Security Force Authority (SFA) and/or other MRCC, depending on the position of the attack or threat of attack. Furthermore, elaborated were action to be taken concerning the ship under attack, action concerning other ships and additional action, if needed.

3.7 Interim Procedures for MRCCs on receipt of Receipt of Distress Alert

The Maritime Safety Committee noted in the Circular of 20 June 2002 that the reception of distress alerts from distance area is a common problem and approved interim procedures for MRCCs and coast stations (CSs) procedures upon reception of a digital service calling (DSC) alerts and Inmarsat alerts.

3.8 Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships

The purpose of the Code is to provide IMO Member States with the paper to facilitate the investigation of the crimes of piracy and armed robbery against ships. It outlines the role of
investigators as people appointed by relevant State(s) to intervene in an act of piracy and armed robbery against ship, during and/or after the event. The Code deals with the training of investigators, investigative strategy, dealing with the initial report and the investigation.

3.9 Measures to prevent the registration of phantom ships

The Resolution, adopted on 29 November 2001, invites governments to ensure that adequate safeguards are in place to prevent the registration of “phantom” ships and to exhaust all means available to them to obtain evidence that a ship previously registered under another State’s flag has been deleted, or that consent to the transfer of the ship has been obtained from the State’s register. No registration should take place of the ship until sufficient evidence has been received and particular attention should be paid to the proof of ownership.

It is of utmost importance to ensure that ships of all States meet international rules and standards so as to give full effect to UNCLOS, especially with provisions concerning the nationality of ships as well as provision of other relevant conventions, with emphasizing the role of an effective port State control.

4 INSURANCE COVER

4.1 Maritime or war peril

Piracy is a risk connected with the sea, but also that arises from the acts of men against ships, cargo or persons on board. In the history of marine insurance the piracy peril has fluctuated between being treated as a marine peril and a war peril.

With the new MAR policy for cargo in 1982 and hulls in 1983 new and separate Institute Clauses were introduced for marine and war perils. In contemporary markets, piracy is not included as an insured risks cause under the new war risk clause, and consequently returned to be a marine cover. Piracy is theft, malicious damage or infliction of death or personal injury committed violently. Theft without force of the threat or force is not piracy under a policy of marine insurance.

4.2 Contemporary insurance covers

Cover for piracy under all risk cover, and nominated perils standard forms frequently incorporate the piracy peril. Where not specified, piracy may be added to standard cover negotiation.

Thus, in the Institute Time Clauses Hulls, Institute Voyage Clauses Hulls, Institute Time Clauses Freight, Institute Voyage Clauses Freight, Institute Fishing Vessels Clauses, Institute Yacht Clauses, Institute Time Clauses – Hulls Port Risks and International Hull Clauses 2002 (as emended 2003) piracy is identified as a specific peril with the coverage extending to loss or damage to the subject matter caused by the peril. The cover is also provided in the American Institute Clauses, although the term “pirates” is used rather than “piracy” and the same term is now used in SG policy.

The Institute Cargo Clauses (A) is an “all risks” cover and the piracy peril is accordingly incorporated. This is reinforced stating that piracy is excepted from the provision of the “war exclusion clause”. The same pattern is valid for Institute Container Clauses – Time and Institute Commodity Trade Clauses (A).

The Institute Cargo Clauses (B) and Institute Cargo Clauses (C), which are nominated perils cover, make no express reference to piracy either in the risk clause or general exclusion clause. Consequently there is no cover under standard terms, but nothing to prevent
additional cover for piracy. The Institute Bulk Oil Clauses and Institute Coal Clauses also do not provide standard cover for piracy.

4.3 The importance to provide insurance cover

Shipping may find itself the target of groups and organizations who are prepared to engage in any means, whether consequences, to achieve their objectives. Security has consequently emerged as major concern in contemporary shipping, with security risk standing alongside with long-established categories of marine, war and strike insurable risks.

In the Marine Insurance Act, 1906 there is no definition of “piracy” and it only points out that the term “pirates” includes passengers who mutiny and rioters who attack the ship from the shore. War risks included the insured perils of capture, seizure, or arrest and consequences thereof, or war-like operations, whether before or after a declaration of war and piracy is an excluded peril.

Definitely, insurance is predominantly a question of prudence and not obligation. With the regard to the nature of prevailing maritime world, it is unquestionably prudent for owners and operators to have in place insurance providing cover for piracy and armed robbery, as well as other forms of maritime violence.

5 REPORTS ON ACT OF PIRACY AND ARMED ROBBERY

While in its history merchant captains known as pirates where frequently commissioned by states to attack and rob foreign commercial shipping, modern piracy is strictly limited to act committed by private ends. Even today, piracy is often described as armed robbery, which it is but is also more than dishonest appropriation accompanied by violence or threat of violence.

The International Maritime Bureau Piracy Reporting Centre (IMB-PRC) was set up in 1992 at the request of shipowners who wanted a centre to which the attacks against ship could be reported and passed to law enforcement agencies without incurring delays to vessels. Namely, the collation of information on piracy is important to understanding the scale of the problem and devising response strategies.

Today the simplest and most common kind of attack that pirates employ is to board a merchant vessel, rob crew and steel cargo, usually done while vessel is in the port. A more sophisticated play is to rob the crew and steal cargo while the vessel is at the sea when pirates board ship during night and rob crew of its belongings and cargo at gunpoint. The most sophisticated action is to steal an entire vessel, re-flag it, and use as a “phantom ship” which will then steal the cargo of subsequent freighters.

Pursuant to the Maritime Safety Committees instruction the Secretariat of IMO is issuing reports and analysis of all incidents of piracy and armed robbery. Most attacks against ships occur in the territorial sea and therefore do not constitute piracy as defined in UNCLOS. According to the International Maritime Bureau (IMB) what makes piracy a tempting crime is difficulty of effective law enforcement and the unwillingness of many countries to prosecute pirates caught in their own territorial waters for acts of piracy committed under another countries jurisdiction. It should be noted that IBM uses the expression “piracy” also to describe acts of armed robbery against ships.
CONCLUSIONS

Piracy is definitely an unlawful act and the absence of lawful authority is the fundamental test. There are two essential elements i.e. violence and personal gain. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in place beyond the jurisdiction of any State.

The act of piracy consists in the pursuit of private, as contrasted with public ends and it represents a serious threat to the lives of seafarers, the safety of navigation, the marine environment and the security of coastal States. It also impacts negatively on entire shipping industry, leading also to increase of insurance rates.

Acts of maritime violence represent problems of individual states in the first instance, because most of these acts take place in waters within national jurisdictions. Notwithstanding, an act of piracy or armed robbery affect different national interests i.e. that of the flag State of the ship, the State in whose maritime zone the attack took place, the State of suspected origin of the perpetrators, the State of the nationality of persons on board, the State of ownership of the cargo and also the State of nationality of persons where the crime was prepared, planned, directed or controlled.

In author’s opinion, the issue of piracy and armed robbery can not be resolved unless relevant authorities mutually coordinate and cooperate. For those reasons more pronounced harmonization of the activities of different stakeholders is required, whereby the role of IMO is particularly important.

The author points out the deficiency of various law provisions which often lack common definition of piracy and armed robbery, while a number of other terms are used within the same or similar meanings. The author advocates strict application of UNCLOS and Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships definitions of piracy and armed robbery, while other acts should align their usage of terms with cited wording.

Further problems ensue from the implementation of law. In author’s opinion major obstacles for coastal States in the suppression and combating piracy and armed robbery at the sea involve the lack or shortage of trained personnel and equipment, the obsolesce or inadequacy of most national legislations, and weak maritime law enforcement capability of national agencies.

In conclusion, the need of providing insurance against piracy and armed robbery risk by providing relevant insurance cover is pointed out. The activities of loss prevention are welcome in that sense as they contribute to reducing the damage incidents, thereby reducing the insurance costs.

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Biography

Axel Luttenberger was born in Opatija (Croatia) in 1957. After completing his secondary education in Opatija, he studied at the University of Rijeka, where he got a degree in Law in 1980. Having completed his apprenticeship at the District Court in Rijeka (1981-1982), he worked as legal attorney for marine insurance company (1983-1993) and passed the Bar Examination (1986). He specialized in Law of the Sea and Maritime Law at the University of Split, where he received the Master Degree (1983) and Ph.D. (1993). His academic carrier begun at the University of Rijeka, Faculty of Tourism and Hospitality Management in 1993, where he worked as lecturer and then as assistant professor. From 1993 to 2001 he was also the Mayor of Opatija, and from 1995 to 1997 Member of Croatian Parliament and its Law Committee. As from 2002 he is an assistant professor of the Maritime Law at the Faculty of Maritime Studies of Rijeka.