

**UNIVERSITY OF CAPE TOWN  
FACULTY OF LAW  
- SHIPPING LAW UNIT -**

**Supervisor: Professor John Hare**

---

***Minor Dissertation:***

**The Payment and Insurance of Ransom:  
An Analysis of Legality, Morality and possible  
Solutions in the case of Ship Hijackings by Pirates**

---

Christian Hermanussen  
HRMCHR002

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

## **Acknowledgement**

Firstly, I would like to thank my supervisor and teacher, Prof. John Hare. He contributed greatly to the work by providing ideas and guiding me in a difficult field of law with scarce academic resources and various implications beyond the scope of Shipping Law. Additionally, I would like to thank John for introducing me to Shipping Law which I was never exposed to before and which I found to be extremely interesting.

I would like to extend my gratitude to my friends at UCT for their support along the way and for their patience for my endless stories about pirates.

Further, I want to thank my parents for their encouragement and support for my studies in Cape Town and thus making possible this wonderful year in South Africa. Danke!

Finally, I want to thank a very special someone for being there at all times and constantly contributing to the dissertation with great ideas and lots of time and patience. Ngiyabonga 'sthandwa sam'!

**Meinen Eltern**

**Beate Lohse-Hermanussen und Prof. Dr. Michael Hermanussen**

**Declaration**

Research Dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Masters of Shipping Law by Coursework in approved courses and a minor dissertation. The other part of the requirement was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission for LL.M. By Coursework – Dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this Dissertation conforms with those regulations.

Signature

Date:

Signed by candidate
---------------------

14.09.2011  
-----

## Table of Contents

Chapter One - Introduction .....	1
1. Background .....	1
2. Statement of the Problem .....	1
3. Objects and Purpose of Research .....	2
4. Methodology .....	2
5. Chapter Synopsis.....	2
Chapter Two - Piracy.....	4
1. Introduction.....	4
2. Pirates in History.....	4
3. Pirates in Law.....	5
3.1. The geographical limitation of piracy .....	6
3.1.1. UN Resolutions on the piracy problem in Somalia.....	7
3.1.2. The case of <i>The Andreas Lemos</i> .....	7
4. Pirates in Somalia.....	8
4.1. Causes of Somali Piracy .....	9
4.2. Purpose of Somali Pirates .....	10
4.2.1. Organisation and Investment.....	11
4.2.2. Consequences.....	12
Chapter Three - The Insurance of Ransom Payments .....	13
1. Introduction .....	13
2. History of Ransom Insurance.....	13
3. Marine Insurance.....	15
3.1. Standard Hull & Machinery Policies .....	16
3.1.1. Piracy .....	16
3.1.2. General Average.....	17
3.1.3. Sue & Labour .....	20
3.1.4. Conclusion .....	23
3.2. P&I Cover .....	23
4. Kidnap & Ransom Insurance .....	25
4.1. Structure of the Policy.....	25
4.2. Advantages for the Shipowner .....	26
5. Conclusion .....	26
Chapter Four - Illegality of Ransom Payments.....	27
1. Introduction.....	27
2. History.....	27
3. The American Approach .....	28

3.1. Foreign Corrupt Practices Act.....	29
3.2. Federal Statutes prohibiting the financing of Terrorism .....	29
3.2.1. United States definition of .....	30
3.2.2. Pirates as terrorists .....	31
3.3. Executive Order and Somalia Sanction Regulation .....	35
3.3.1. Executive Order .....	35
3.3.2. Office of Foreign Assets Control Regulations .....	36
3.3.3. Prohibition of Ransom Payments.....	37
3.3.4. Shortcomings .....	38
3.4. Federal Anti-Money Laundering Laws .....	39
3.5. Bank Secrecy Act .....	39
3.6. Conclusion .....	40
4. The Colombian Approach .....	40
4.1. The Anti-Abduction Act .....	40
4.2. The Decision of the Corte Constitucional.....	41
4.3. <i>Hargroves v Underwriters at Lloyd's of London</i> .....	43
4.4. The new legislation .....	43
4.4. Foreign Parties .....	44
5. International Approach.....	44
5.1. Convention against the Taking of Hostages.....	45
5.2. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation .....	45
5.3. Effect of the Convention for the Suppressing of the Financing of Terrorism .....	46
6. Conclusion .....	46
Chapter Five - Public Policy of Ransom Agreements and Ransom Insurance .....	48
1. Introduction.....	48
2. Public Policy .....	48
2.1. Law of Status .....	49
2.2. Criminal Law .....	50
2.3. Law of Contract.....	50
3. Public Policy and Ransom Agreements .....	51
4. Public Policy and insurance contracts.....	52
4.1. Limitation of insurance cover .....	53
4.1.1. Effect on Public Good.....	53
4.1.2. Speculative Risks .....	53
4.1.3. Incentive to increase the Risk .....	54
4.2. Ransom Insurance and Public Policy.....	54
4.2.1. Altering the risk.....	54
4.2.2. Breach of public policy .....	55

4.2.3. Conclusion .....	56
5. The German Perspective .....	56
6. Conclusion .....	58
Chapter Six - Discussion.....	59
1. Introduction.....	59
2. Prohibition of Ransom Payments.....	59
3. Insurance of Ransom Payments .....	61
3.1. Piracy and Armed Robbery at Sea .....	62
3.2. K&R Insurance.....	63
3.3. Marine Insurance.....	65
4. Recommendation.....	65
5. Conclusion .....	67
BIBLIOGRAPHY .....	68

## Chapter One

### INTRODUCTION

*In these morally muddied waters, there is no universally recognised principle of morality, no clearly identified public policy, no substantially incontestable public interest, which could lead the courts, as matters stand at present, to state that the payment of ransom should be regarded as a matter which stands beyond the pale, without any legitimate recognition.*

LJ Rix in *The Bunga Melati Dua*<sup>1</sup>

#### 1. Background

Piracy has been perceived as a menace of times long gone and has until recently been associated with romantic tales of one-legged and free-spirited men, roving the Caribbean Sea for bounty and gold. In recent years, however, a new type of pirate has emerged in one of the most lawless spots in the world. The pirates of Somalia increasingly threaten one of the busiest commercial shipping routes, thus forcing shipowners to pay higher insurance premiums or to reroute around the Cape. Either way, the current situation tremendously increases the costs of shipping in the Indian Ocean and threatens life of seamen.

The purpose of Somali pirates is to obtain high ransom sums. Their demands are frequently met by intimidated shipowners who then turn to their insurers for cover. This practise has led to enormous profits for both the insurers as well as the pirates. Until today, no solution has been found to break the vicious circle in which shipowners find themselves.

#### 2. Statement of the Problem

The legal dimensions of the practice of ransom payments and the insurance thereof still remain unclear. As Somalia lacks a functioning central government and effective

---

<sup>1</sup> “*The Bunga Melati Dua*” *Masefield AG v Amlin Corporate Member Ltd* [2011] 1 CLC 97 at 122.

law enforcement, it is ruled by local warlords and gangs – many of which are involved in acts of piracy. Thus, it is perceived that the payment of ransom effectively undermines Somali and international efforts to stabilise the country – this has been recognised by the international community.

The United States of America have responded by setting up a sanction program against certain individuals. A current discussion concerns whether pirates should be treated like terrorists in order to bar every transfer of money under the current anti-terror legislation, including the payment of ransom.

Also the insurance of ransom payments has been discussed with respect to its legality. The advantages of ransom insurance have widely been acknowledged, yet its moral foundations are still questioned. The issues which will be addressed in this dissertation are the legal problems connected with the payments of ransom and the insurance of such payments.

### **3. Objects and Purpose of Research**

The purpose of this research is to analyse the legal and moral implications of the payment and the insurance of ransom. The thesis will seek to describe the insurance policies which are currently used to cover ransom payments. The legal consequences of the payment of ransom will be examined in a comparative context. The discussion will also address the question of morality and public policy of the insurance of ransom.

The object of this research is to bring clarity to the current situation of shipowners and underwriters and it concludes with practical recommendations.

### **4. Methodology**

As the topic is subject to recent developments in the industry, the main source of latest information on the daily practice of ransom payments has been electronic resources. Standard literature of marine insurance and law of contract has been utilised in order to assess to legal aspects pertaining to the topic. The journal articles and applicable case law concerning the issue of ransom payments and insurance originate mainly from England and the United States due to their dominant position in the field. For a comparative analysis, recourse to German and Colombian law and literature has been made.

### **5. Chapter Synopsis**

This dissertation is divided into five parts.

Chapter II explains the origins and legal framework of piracy in general and the current situation of piracy in Somalia in particular.

Chapter III examines the current regime for insurance in cases of ransom demands made by pirates for the release of merchant vessels. A distinction will be drawn between the general standard marine insurance policies and the Kidnap & Ransom insurance.

Chapter IV examines various legal regimes which play a role in prohibiting the payment of ransom. A special focus is taken on the United States perspective and how it affects the current ransom practise of shipowners and cargo.

Chapter V analyses the possible question of public policy issues pertaining to ransom payments and ransom insurance. A brief synopsis of the German perspective will be outlined.

Finally, Chapter VI discusses various questions which were raised throughout the dissertation. In particular, the question on whether ransom should be prohibited as general policy and whether ransom could be insured will be addressed.

## Chapter Two

### PIRACY

#### 1. Introduction

Piracy is and has always been a threat to the sea leg of international trade. Its roots originate as far back as the time of the ancient Greeks. However, it is submitted that piracy has existed as long as goods have been traded on water. Today the the pirates of Somalia cause great concern to shipowners because of the effectiveness of their attacks and the importance of the area in which they operate.

The first part of this chapter gives a broad overview on the phenomenon of piracy in its historical context. Further, modern piracy will be examined with reference to definitions of modern public international law. The third part examines the phenomenon of piracy in Somalia, its historical roots, its purpose and the organisation and infrastructure of the pirate gangs, which currently operate around the Horn of Africa.

#### 2. Pirates in History

The term 'pirate' has its roots in ancient Greece. The word *peirato* was originally used to describe tribes of who lived on islands in the eastern Mediterranean Sea and who occasionally used to seize merchant vessels which passed by to close to the shore.<sup>2</sup> Later, in the times of the Roman Empire these tribes refused to acknowledge the Roman hegemony. Therefore, Rome declared war and regarded them as enemies of the State, a title which was not used for common criminals.<sup>3</sup> As such, these tribes were considered *hostes humani generis* – a term which is even today frequently used for pirates.<sup>4</sup> Also the first event of the hijacking for ransom was recorded in ancient Rome. It is said that the vessel of young Julius Caesar was once captured and released upon payment of 20 talents.<sup>5</sup>

---

<sup>2</sup>A P Rubin 'The Law of Piracy' (1986-1987) 15 *Denver Journal of International Law & Policy* 173 at 178

<sup>3</sup>*Ibid* at 181

<sup>4</sup>The description *hostes humani generis* goes back to the famous Roman Jurist Cicero. However, it has been argued that this statement has been grossly misinterpreted in modern times. *Hostes* could only be legally declared enemies and not common criminals such as robbers or thieves. Thus, a pirate in a modern understanding could never have been a *hostes* in Rome. See Rubin *supra* at 185.

<sup>5</sup>T Lennox-Gentle 'Piracy, Sea Robbery and Terrorism' (2010) 37 *Transport Law Journal* 199 at 202, citing J Whiting *The Life and Times of Julius Caesar* (2005) 7-8.

The first time that the term 'pirate' was used in a modern sense was in England in the 15<sup>th</sup> century.<sup>6</sup> At the time many maritime nations made use of pirates by issuing letters of marque which turned them into privateers and allowed them to raid vessels of enemy states.<sup>7</sup> Once this practice was abolished, many former privateers became illegal pirates.<sup>8</sup> It was the aim of both pirates and privateers to capture merchant vessels. For the former in order to rob the goods on board, for the latter to disrupt trade of an enemy State. Thus, acts of both mainly occurred in waters which were frequently used by merchant vessels.<sup>9</sup>

### 3. Pirates in Law

The law of piracy is old and well established in international law.<sup>10</sup> Today, the central legal body of the law on piracy is the United Nations Convention on the Law of the Sea (UNCLOS).<sup>11</sup> According to Art. 101 UNCLOS piracy is:

- (a) Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship 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 of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

---

<sup>6</sup>Rubin *supra* at 188/189.

<sup>7</sup>The term pirate was used in a confusing manner to describe both illegal pirates and licensed privateers. See Rubin *supra* at 191.

<sup>8</sup>It has been reported that after England and Spain made peace in the Treaty of London in 1604 many of the English privateers became pirates and kept on raiding merchant vessels. See W F Craven 'The Earl of Warwick, a Speculator in Piracy' (1930) 10 *The Hispanic American Historical Review* 457; C Jowitt 'Piracy and politics in Heywood and Rowley's Fortune by Land and Sea (1607–9)' (2003) 16 *Renaissance Studies* 217 at 218.

<sup>9</sup>D J Puchala *Of Pirates and Terrorists: What Experience and History teach* (2005) 26 Contemporary Security Policy 1.

<sup>10</sup>R Geiß, A Petrig *Piracy and Armend Robbery at Sea* (2010) 36; Rubin *supra* .

<sup>11</sup>Geiß at 40.

The key-features of the definition of piracy, for our purposes, are that a pirate acts for private ends as opposed to political, social or religious motives.<sup>12</sup> The second important criteria is the occurrence on the high seas or outside the jurisdiction of another State. As such, piracy envisages a geographical limitation.

### 3.1. The geographical limitation of piracy

Somalia has often been regarded as the “prototype of a failed State, which has no government capable of maintaining control over its territory and coastal waters”.<sup>13</sup> However, Somalia has always maintained itself as a sovereign State, therefore its coastal waters are not outside its jurisdiction.<sup>14</sup>

The high sea, on the other hand, is defined as:

All parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.<sup>15</sup>

An act of piracy within the economic zone of a State, however, is excluded from the high sea requirement.<sup>16</sup> The territorial sea stretches 12 nautical miles (nm)<sup>17</sup> into the sea, according to Art. 3 UNCLOS. Thus, any act of piracy within these 12 nm of the Somali coast cannot be prosecuted as such but only as an act of armed robbery at sea.<sup>18</sup> UNCLOS does not define armed robbery at sea and also other international legal instruments lack a unanimous definition. In short, however, it can be stated that armed robbery at sea is the equivalent to piracy, the only difference being that it is committed within territorial waters and thus within the jurisdiction of a sovereign State.<sup>19</sup>

The above mentioned distinction bears high relevance with respect to the prosecution of pirates by States which are not directly affected by a specific piratical act. Since piracy is regarded an international crime, many States have enacted legislation in order to prosecute pirates even if there is no national nexus to the State. Hence, many

---

<sup>12</sup> The private-end requirement will be discussed in Chapter IV.

<sup>13</sup> Geiss *op cit* at 63.

<sup>14</sup> *Ibid.*

<sup>15</sup> Art. 86 UNLOS.

<sup>16</sup> The economical zone extends up to 200 nm into the sea, pursuant to Art. 57 UNCLOS. This maritime zone is excluded for the high sea requirement by Art. 88 (2) UNCLOS.

<sup>17</sup> 1 nm equals 1.852 km (or 1.15 miles).

<sup>18</sup> Geiss *supra* at 64.

<sup>19</sup> *Ibid* at 73.

States have sent navy forces into the region of the Gulf of Aden in order to protect merchant shipping and detain pirates. In cases of armed robbery at sea, only the sovereign State has the right to prosecute – which in the case of Somalia proves to be impossible due to the lack of resources.

### 3.1.1. UN Resolutions on the piracy problem in Somalia

In the wake of the ongoing piracy threat in Somali waters the Security Council of the United Nations has adopted a series of resolutions,<sup>20</sup> the purpose of which is to extend the scope of enforcement powers to territorial waters of Somalia.<sup>21</sup> Section 7 of Resolution 1816 read:

States cooperating with the [Transitional Federal Government] ... may enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and use ... all necessary means to repress piracy and armed robbery at sea.

Thus, the distinction between piracy and armed robbery at sea in relation to Somalia has been diminished by allowing international naval forces to operate within territorial waters and detain pirates.

With regard to the law of marine insurance, however, the situation proves to be different as the purpose for the distinction between piracy and armed robbery at sea is the preservation of national sovereignty. For an assured shipowner and its underwriter, however, there is no difference in respect to whether the ship was captured on the high seas or during innocent passage in territorial waters.<sup>22</sup> Therefore, the distinction was challenged in the case of *The Andreas Lemos*.<sup>23</sup>

### 3.1.2. The case of *The Andreas Lemos*

In *The Andreas Lemos* the Court was concerned with the scope of piracy. The assured raised the issue that the high sea requirement in the definition of piracy in public

<sup>20</sup> Among other the most important were Resolution 1816; Resolution 1848 and Resolution 1851.

<sup>21</sup> Geiss *op cit* at 70.

<sup>22</sup> Innocent Passage means the transit through territorial waters according to Art. 17 UNCLOS.

<sup>23</sup> „*The Andreas Lemos*“ *Athens Maritime Enterprises Corp v Hellenic Mutual War Risk Assn Ltd* [1982] 2 Lloyd's Rep. 483.

international law bears no relevance for the law of marine insurance. Staughton J, in his decision, followed this argument by stating that:

In the context of an insurance policy, if a ship is, in the ordinary meaning of the phrase, “at sea” (per Lord Justice Kennedy), or if the attack upon her can be described as “a maritime offence” (per Lord Justice Vaughan Williams), then for the business purpose of a policy of insurance she is, in my judgement, in a place where piracy can be committed.<sup>24</sup>

This decision is supported by the English Marine Insurance Act,<sup>25</sup> where the term “piracy” is defined to include passengers who mutiny and rioters who attack the ship from the shore.<sup>26</sup> Thus, the distinction between piracy and armed robbery at sea in public international law does not apply to the law of marine insurance. However, it must be borne in mind that the decision of *The Andreas Lemos* was concerned with the traditional hull insurance. The applicability of this decision for Kidnap & Ransom<sup>27</sup> policies will be discussed at a later stage.<sup>28</sup>

For the purpose of this dissertation no distinction will be made between acts of piracy on the high sea and those within territorial waters of Somalia or any other State. Considering the outcome of *The Andreas Lemos* as well as the current legal situation derived from the UN resolutions, such a distinction would not serve any purpose. However, it will be discussed whether the distinction could be used for the K&R insurance.

#### 4. Pirates in Somalia

Pirates act for private ends. As such, they mainly operate, and have always done so, in areas with high commercial traffic. The Gulf of Aden has for hundreds of years been the major trading route between Europe and Asia.<sup>29</sup> The first seamen who used the famous monsoon winds to sail from the *Bab el Mandeb*<sup>30</sup> to the Strait of

<sup>24</sup> *The Andreas Lemos supra* at 490.

<sup>25</sup> English Marine Insurance Act of 1906.

<sup>26</sup> See 1<sup>st</sup> Schedule (Rules for Construction of Policy) Rule 8.

<sup>27</sup> For K&R insurance see Chapter III at para 4.

<sup>28</sup> See Chapter VI.

<sup>29</sup> W Bernstein *A Splendid Exchange* (2008) 32

<sup>30</sup> The *Bab el Mandeb* (arab. Gate of Grief) marks the end of the Red Sea and the Beginning of the Gulf of Aden.

Malacca<sup>31</sup> were the Ptolemaic Greeks merchants in 200 BC.<sup>32</sup>

Today, approximately 22.000 commercial merchant vessels pass the Gulf of Aden every year, carrying about 8 percent of the world's trade and 12 percent of the seaborne traded oil.<sup>33</sup>

On 17 November 2008,<sup>34</sup> the world was made aware of a new threat to international shipping when Somali pirates succeeded in hijacking a VLCC.<sup>35</sup> The *MV Sirius Star* is an oil tanker with a DWT of 318,000 t and has the capacity of carrying 2,2 million barrel of crude oil.

The *MV Sirius Star* was kidnapped about 450 nm south east of the Kenyan coast and was until then the largest vessel ever hijacked by Somali pirates. Apparently, the fact that she was fully laden and thus deep in the water enabled the pirates to board her.<sup>36</sup>

The vessel was released on 9 January 2009 upon payment of \$3 million in cash which was dropped off a plane onto the deck of the ship, anchored off Haradhere.<sup>37</sup>

This incident caused the world to consider a strategy against piracy in Somali waters and beyond. Until today, however, none of the measures taken by the international community has proven successful. The risk of being captured for ransom has increased and the pirates have expended their operational radius deep into the Indian Ocean.

#### 4.1. Causes of Somali Piracy

The current problem of piracy in Somalia has many reasons and it would be beyond the scope of this paper to examine the social and economical consequences of the breakdown of the Somali State and society and its influences on the establishment of a pirate industry.

It should be mentioned, however, that according to the general opinion the main

---

<sup>31</sup> The Strait of Malacca is the major channel for ships that pass from the Indian Ocean to the Pacific Ocean.

<sup>32</sup> Bernstein *op cit* at 38.

<sup>33</sup> Geiss *op cit* at 6.

<sup>34</sup> Time of the Report of the U.S. Navy 5<sup>th</sup> Fleet about the *Sirius Star* being held captive.

<sup>35</sup> Very Large Crude Carrier. Vessels of this class have a dead weight tonnage (DWT) between 200,000 and 320,000 t. The DWT indicates how much weight a vessel can carry including cargo, bunker fuel, fresh water, provisions, ballast water and crew.

<sup>36</sup> It has been reported that she had a freeboard of 9 m (distance from waterline to upper deck). See 'Saudi super-tanker taken to Somali pirate lair' (18 November 2008) *Google News*. Available at [http://www.google.com/hostednews/afp/article/ALeqM5hN1EMARGCe11pJ\\_7BXMKIedC\\_DVA](http://www.google.com/hostednews/afp/article/ALeqM5hN1EMARGCe11pJ_7BXMKIedC_DVA) [Last accessed on 10 August 2011].

<sup>37</sup> 'Saudi Tanker freed off Somalia' (9 January 2009) *BBC News*. Available at <http://news.bbc.co.uk/2/hi/africa/7820311.stm> [Last accessed on 10 August 2011].

factor was the breakdown of the local fishing industry.<sup>38</sup> The lack of a sovereign government in Somalia since 1991 led to a severe lack of control over the roughly 3.330 km coastline of the country. This situation attracted highly subsidised foreign fishing fleets to overfish local resources. According to UN estimates, foreign trawlers fished local resources of fish, worth about \$ 300m each year in Somali waters.<sup>39</sup> Thus, many local fishermen suddenly were put out of business. The first pirates in Somalia emerged in the 90s to protect the fishermen against foreign trawlers.<sup>40</sup> Today, however, since the pirates have managed to establish a highly sophisticated and equally lethal industry, no foreign trawler has recently been reported in the area. Thus, the pirates no longer defend their waters against intruders, they mainly prey on merchant vessels that pass through the Gulf of Aden.

#### 4.2. Purpose of Somali Pirates

The purpose of pirates is to obtain high ransom. As such, the kidnapping of vessels in Somalia functions as a business enterprise.<sup>41</sup> As already mentioned, the Gulf of Aden is the main trading route between Asia and Europe as well as the main passage for oil tankers which exit the Strait of Hormuz west bound. Since pirate attacks have been reported as far out as about 1000 nm off the East African coast,<sup>42</sup> not only vessels passing the Gulf of Aden are affected, but other vessels crossing the Indian Ocean are equally in danger.<sup>43</sup>

Today, 19 vessels and 377 seamen are held ransom within Somali waters.<sup>44</sup> In the first three months of 2011, 117 pirate attacks have been reported in the area, which is more than double compared to the same period in the previous year.<sup>45</sup>

The amount of ransom which is paid is generally treated confidentially. However, in 2010 a sum of between \$5m and of \$7m was paid to release the Greek tanker *Maran Centaurus*.<sup>46</sup> It has been estimated that ransom sums in 2011 have increased up to

<sup>38</sup> See I Tharoor 'How Somalia's Fishermen became Pirates' (18 April 2009) *Time Magazine*. Available at <http://www.time.com/time/printout/0,8816,1892376,00.html> [Accessed at 10 June 2011]; R Beri 'Piracy in Somalia: Addressing the Root Causes' (2011) 35 *Strategic Analysis* 452 at 454.

<sup>39</sup> Tharoor *supra*.

<sup>40</sup> *Ibid.*

<sup>41</sup> S Kenney 'Regional Shortcomings and Global Solutions: Kidnap, Ransom and Insurance in Latin America' (2007-2008) 14 *Connecticut Insurance Law Journal* 557 at 569.

<sup>42</sup> A Perry 'Somalia's Sea Wolfes' (1 August, 2011) *Time Magazine* 42 at 45.

<sup>43</sup> About 40 percent of the seaborne world trade are shipped on about 300 ships per day on the Indian Ocean. See Perry *ibid* at 45.

<sup>44</sup> See Homepage International Chamber of Commerce, Piracy News & Figures. Available at <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures> [Last accessed on 15 August 2011].

<sup>45</sup> Perry *supra* at 45.

<sup>46</sup> 'Somali Pirates free Greek Tanker after record Ransom' (18 January 2010) *BBC News*. Available at <http://news.bbc.co.uk/2/hi/africa/8464921.stm> [Last accessed on 3 August 2011].

\$10m.<sup>47</sup>

#### 4.2.1. Organisation and Investment

The pirates that operate in Somali waters have proven to be well organised, highly skilled in the usage of arms and other technical equipment as well as the navigation of their vessels. Their use of technically advanced equipment indicates that there is an investor behind most operations. The following section briefly examines the organisation and funding of pirate activities in Somalia.

##### 4.2.1.1. Organisation and *modus operandi*

The estimates of how many persons are actively involved in the piracy industry and in how many gangs or tribes varies. In 2008 it has been estimated that there were at least five pirate gangs and a total of 1.000 armed men who worked for either one of them.<sup>48</sup> Other sources claim that the pirates can be broadly distinguished into two groups according to tribal affiliation.<sup>49</sup> More recent sources state that more than 1.000 pirates have already been detained or killed.<sup>50</sup> The exact number, therefore, is impossible to estimate.

The pirate gangs usually operate in small bands armed with AK-47 and rocket-propelled grenades.<sup>51</sup> The weapons are purchased through arms dealers in Mogadishu or Yemen.<sup>52</sup>

To enable the pirates to stay at sea for longer periods of time, the gangs make use of trawlers which were previously hijacked. These trawlers carry water, food, arms and fuel for several days and serve as 'motherships'.

Once they find a suitable merchant vessel they attack with smaller 20-foot skiffs which are powered by a strong outboard engine, which is able to go up to 23 knots.<sup>53</sup>

Usually, the ransom negotiations start immediately after the vessel was hijacked. Delivery of the ransom money is undertaken by a plane or a helicopter, which drops a bundle on the deck of the vessel or into the water where it is picked up by the pirates.

---

<sup>47</sup> Perry *supra* at 46.

<sup>48</sup> Ho *supra* at 504, citing the East African Seafarers' Association in Mombasa. See also 'Pirates anchor hijacked Supertanker off Somalia Coast' (18 November 2008) *The Guardian*. Available at <http://www.guardian.co.uk/world/2008/nov/18/somalia-oil> [last accessed on 3 August 2011].

<sup>49</sup> Beri *supra* at 454.

<sup>50</sup> Perry *supra* at 44.

<sup>51</sup> Perry *ibid*; Ho *supra* at 504.

<sup>52</sup> Ho *ibid*.

<sup>53</sup> *Ibid*.

#### 4.2.1.2. Investment and Distribution of Ransom Money

According to interviews made with several pirates, most operations are funded by investors. Once the ransom is obtained the money is split. Usually, the investor obtains 70 percent of the ransom and the crew is left with 30 percent.<sup>54</sup> Other sources state that 30 percent goes to the pirate gang which attacked and captured the vessel, another 10 percent to the local community, another 10 percent to the ground gang which is guarding the captured vessel anchored offshore and the remaining 50 percent is the investor's share.<sup>55</sup> Either way, the investor is left with a greater share of the ransom without any personal risk of getting captured, injured or killed. Thus, the investment is becoming more lucrative as the ransom sums increase at a rapid pace.<sup>56</sup>

#### 4.2.2. Consequences

As a consequence, piracy has the effect of undermining any economical development in the country. After the collapse of the functioning Somali State in the early 90s and the consequential breakdown of the economical and social environment, the chances of an average Somali to sustain a life besides emigrating are slim. With increasing ransom sums, the pirate industry provides a lucrative business which attracts many young and desperate men, despite the fact that many have already been killed or detained.

The only solutions, envisaged by the international community, focus primarily on naval intervention, coupled with criminal prosecution. Shipowners have established best-practice guidelines addressing minimum speed requirements in certain areas, training of crew and special installations on deck. It has further been discussed whether armed personal should be contracted for the passage of certain areas. Legal solutions concerning the payment of ransoms have been discussed and partly enacted in some countries.<sup>57</sup> These solutions will be examined below.<sup>58</sup>

---

<sup>54</sup> R Kemp *Piracy* (2009) 231.

<sup>55</sup> L Rutkowski et al 'Mugged Twice: Payment of Ransom on the High Seas' (2010) 59 *American University Law Review* 1425 at 1430.

<sup>56</sup> Investors have earned up to \$ 355.000 dollars solely by investing in pirate operations, a sum which is a fortune in Somalia. See Perry *supra* at 44.

<sup>57</sup> See Chapter IV.

<sup>58</sup> See Chapter VI.

## Chapter Three

### THE INSURANCE OF RANSOM PAYMENTS

#### 1. Introduction

The first shipowners who were exposed to ransom demands by Somali pirates operated illegal fishing activities in Somali waters.<sup>59</sup> At the time the ransom sums were much lower<sup>60</sup> than they are today and shipowners were apprehensive to claim insurance cover, partly because they knew that their operations were illegal.

Today, the sums demanded can easily exceed \$5 million and are directed mainly towards merchant vessels. Thus, shipowners are more inclined to contact their underwriters or even to take out special ransom insurance cover. The following chapter examines the insurance instruments which are available to shipowners for the cover of ransom payments. The first part examines the historical background of the insurance of ransom payments. The second part analyses modern marine insurance policies and specialised K&R policies.

#### 2. History of Ransom Insurance

The origin of the insurance contract in the modern understanding dates back to medieval Italy, in particular the northern Italian cities in the 14<sup>th</sup> century. The concept of one person covering a pecuniary risk of another against the payment of a premium was unknown to Roman law.<sup>61</sup> The first insurance which covered the payment of ransom was developed in the field of marine insurance in order to protect captured seamen from being forced into slavery.

From the 16<sup>th</sup> to the 18<sup>th</sup> century one of the greatest threats to the crew of European merchant vessels, beside the general perils of the sea, was to be kidnapped by pirates of the Barbary States<sup>62</sup> and forced into slavery.<sup>63</sup> Often, however, Seamen were given the opportunity to pay ransom in exchange of being released.

---

<sup>59</sup> Tharoor *supra*.

<sup>60</sup> Early demands aimed at about \$10,000. See Ho *supra* at 502.

<sup>61</sup> JP Van Niekerk *The Development of the Principals of Insurance Law in the Netherlands* vol I (1998) 3.

<sup>62</sup> Barbary States was a term used in Europa referring to the states of northern Africa, such as Morocco, Algeria or Tunisia.

<sup>63</sup> G Schneider *Versicherungsschutz gegen Erpressungen*, VersR-Schriftenreihe 19 (2003) 7.

The earliest institution to administer the collection of ransom money was the *Santa Casa della Redenzione dei Cattivi* which was a state administered body in Naples founded in 1548. Soon other Italian cities followed.<sup>64</sup> At the same time in Spain ransom payments were administered through monastic orders.<sup>65</sup> These institutions, however, did not have the character of a modern insurance system.

The system was further developed by the northern European trading powers of the Early Modern epoch. Most of them, including the Hansa cities of Hamburg and Lübeck, the Netherlands after their independence from Spain, England and the Scandinavian countries of Denmark and Sweden were engaged in long distance trade southbound into the Mediterranean Sea. As a result, all of them suffered equally from Muslim corsairs off the Barbary Coast.

Hamburg was the first city-state which established its *Sklavenkasse* in May 1624.<sup>66</sup> The Assurance and Average Regulations of Hamburg from 1731 provided for the legal possibility for the insurance of ransom against the *Türkengefahr* (engl. Threat of the turks).<sup>67</sup> The *Sklavenkasse*, however, was administered by the Admiralty of the city and served as a mutual insurance between shipowners and crew.<sup>68</sup> Although the costs of paying ransom for seamen who were kidnapped by pirates increased dramatically in the following years, the profits of trade seemed to have outweighed the risk. Lübeck followed soon in 1627.

After the reform of the *Sklavenkasse* in 1629, shipowners were obliged to pay a much larger proportion of the contribution, depending on the ship's destination. Not only shipowners and crew contributed to the fund, but also alms collection in the church were used to fund the *Sklavenkasse*. The terms of cover contained certain duties for the shipowner such as the sailing in convoy or being escorted by naval forces in certain areas.<sup>69</sup>

Similar institutions were established in Denmark and subsequently in the Netherlands, although the latter remained largely privately organised.<sup>70</sup> Since the Netherlands at the time were a union of several states, a consensus was needed in

---

<sup>64</sup> Venice opened its 'Provveditori sopra Ospeladi e Luoghi Pii' in 1586 and Genoa its 'Magistrato per il riscatto degli Schiavi' in 1597. See M Ressel 'The North European Way of Ransoming: Explorations into an Unknown Dimension of the Early Modern Welfare State' Vol 35 (2010) 4 *Historical Social Research, Historische Sozialforschung* 125 at 126.

<sup>65</sup> The Trinitarians.

<sup>66</sup> See Ressel *supra* at 130.

<sup>67</sup> *Ibid* at 8.

<sup>68</sup> *Ibid*.

<sup>69</sup> R Neugebauer *Versicherungsrecht vor dem Versicherungsvertrag* (1990) 12

<sup>70</sup> Ressel *supra* at 137.

order to establish a system similar to the German and Danish *Sklavenkasse*. It has been reported that some states were opposed to the idea of paying ransom for the release of crew because it would encourage the corsairs to specifically look for Dutch vessels. Further, the ransom sums would increase and the North African states would lose their interest for peace with the Netherlands.<sup>71</sup> It will later be illustrated that similar arguments are presented today in favour of the prohibition of ransom payments to Somali pirates.<sup>72</sup>

It should be noted, however, that this early system of mutual ransom insurance connected with alms collection has been interpreted as an early form of state welfare and state responsibility towards its subjects or persons serving on board its vessel.<sup>73</sup> It has been submitted that the establishment of these specific institutions in northern Europe show a strong connection with the then newly developed protestant faith. As such, the *Sklavenkasse* was a measure to rescue Christians from slavery in the hands of the Muslim enemy.<sup>74</sup>

The insurance of ransom payments, therefore, was legal and a widely used tool in former times throughout Europe. This practice sheds light on the fact that kidnapping for ransom is not a modern phenomenon in the Gulf of Aden but has a long history in connection with piracy.

### 3. Marine Insurance

Today, there are various insurance instruments in place which are utilised to cover or to contribute to the payment of ransom.

Marine insurance can broadly be separated into indemnity and liability insurance. The shipowner's liability is covered by its P&I club.<sup>75</sup> Indemnity policies, on the other hand, are offered by private insurance companies and can further be divided into indemnity cover for the vessel, the cargo and the freight. The vessel herself is generally covered by standard Hull & Machinery policies,<sup>76</sup> the cargo by cargo policies<sup>77</sup> and the freight by their respective freight insurances.<sup>78</sup>

---

<sup>71</sup> Ressel *supra* at 137/138.

<sup>72</sup> See Chapter VI.

<sup>73</sup> M Ressel 'Conflicts between early modern European States about rescuing their own Subjects from Barbary Captivity' 2011 *Scandinavian Journal of History* 1 at 15.

<sup>74</sup> *Ibid* at 141.

<sup>75</sup> Protection & Indemnity Club. See below at 3.2.

<sup>76</sup> See IUA Hull 2003.

<sup>77</sup> See Institute Cargo Clauses.

<sup>78</sup> See Institute Time/Voyage Clause Freight.

### 3.1. Standard Hull & Machinery Policies

The main purpose of Hull & Machinery (H&M) insurance is to cover the damage sustained by the vessel caused by specific perils insured against.<sup>79</sup> Of pertinence are the coverage for piracy, general average and Sue & Labour expenses. It should be noted that standard H&M policies exclude certain causes, when defined as 'war risks'. These risks have to be insured separately.<sup>80</sup>

The latest standard hull policy is the International Hull Clause 2003 (IUA Hull 03).<sup>81</sup> Because this policy is likely to become the industry standard, and because it deals more extensively with piracy, this paper will solely refer to the IUA Clauses.<sup>82</sup>

#### 3.1.1. Piracy

Until recently, piracy was covered under the general hull policy.<sup>83</sup> Due to recent developments in Somali waters and earlier occurrences in the Strait of Malacca the insurance market has reconsidered its position on piracy cover and excluded piracy as a peril from the standard policies. On 16 December 2010, the Lloyd's Market Association<sup>84</sup> announced its decision to include the Indian Ocean, the Arabian Sea, the Gulf of Aden, the Gulf of Oman and the Southern Red Sea into the areas considered as war risk zones.<sup>85</sup>

The pertinent question is whether ransom payments can be covered under piracy as a peril insured against. Clause 2.1.5. provides that "this insurance covers loss of or damage to the subject-matter insured caused by ... piracy."<sup>86</sup> Thus, the aim of the clause is to cover any loss or damage that occurred to the ship. Ransom therefore is excluded.<sup>87</sup>

<sup>79</sup> H&M policies, however, cover more than that. The standard policy also includes cover for expenses which were made to minimise the loss (Sue & Labour), general average expenses, ¾ collision liability or salvage expenses.

<sup>80</sup> E.g. Institute War and Strikes Clauses.

<sup>81</sup> Issued by the International Underwriting Association, a body which represents most of the Underwriters which operate on the London market outside of Lloyd's.

<sup>82</sup> The most common hull clauses in practice are still the Institute Clauses.

<sup>83</sup> In older policies such as the pre-1983 Lloyd's Ship & Goods policy (S.G.) piracy was regarded as a war risk.

<sup>84</sup> The Lloyd's Market Association is the main representative body of the Underwriters at Lloyd's of London and as such represents most of the international hull underwriters.

<sup>85</sup> JWLAO16 (16 December 2010) published by the Joint War Committee of the Lloyd's Market Association.

<sup>86</sup> Clause 2.1.5.

<sup>87</sup> But see comments on the recovery of ransom under the Sue & Labour clause below.

### 3.1.2. General Average

It is widely accepted that ransom payments may be treated as general average expenses.<sup>88</sup> As such, the ransom can be recovered under cl. 8.1. of the standard hull policies which deals with the reimbursement of the vessel's proportion of general average.

#### 3.1.2.1. The principle of General Average

General average has a long-standing tradition in the maritime industry and dates back to the maritime legislation of the ancient Greeks.<sup>89</sup> Its rules were shaped throughout maritime history and its core primarily through British common law. Despite the existence of the York-Antwerp Rules,<sup>90</sup> many principles of general average are still grounded in the common law. The early authorities, establishing the principles of general average, stated that:

All losses which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionably by all who are interested.<sup>91</sup>

Therefore, general average is a system of contribution by the shipowner and cargo owners to reimburse anyone who made a sacrifice or incurred an expense for the benefit for all. The York-Antwerp Rules uphold this definition by stating that:

There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.<sup>92</sup>

It is submitted that even where the shipowner carries its own cargo and there are no

---

<sup>88</sup> J Spencer Hull 'Insurance and General Average' (2009) 83 *Tulane Law Review* 1227 at 1261.

<sup>89</sup> The first legal Documents mentioning General Average were the Rhodian Laws. See *Lowndes and Rudolf: General Average and York-Antwerp Rules* (2008) 00.01.

<sup>90</sup> The York-Antwerp Rules were formerly known as the York Rules and established at a conference in Glasgow in 1860. Later they were amended in 1890 and hence called the York-Antwerp Rules. The latest version was adopted in Sydney in 1994. The York-Antwerp Rules form the current international benchmark for general average liability and adjustment throughout the maritime world. See J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* (2009) § 22-4.

<sup>91</sup> *Birkley v Presgrave* 1 East 220 at 228.

<sup>92</sup> Rule A (1) York-Antwerp Rules.

other parties with an interest in the voyage, the shipowner can still declare general average for the purpose of recovering from its insurers.<sup>93</sup>

### 3.1.2.2. Essential Features of General Average

The essential features of general average are that:

- (i) The vessel has to be engaged in a common maritime adventure.<sup>94</sup> Sailing a vessel from one place to another along the Somali coast with the purpose of trading goods falls into the broad definition of being engaged in a common maritime adventure.
- (ii) The vessel has to find herself in a real and substantial peril which threatens the common safety of the adventure.<sup>95</sup> The capture of both ship and crew poses such a threat to the adventure.
- (iii) The payment of ransom would have to amount to an extraordinary sacrifice or expenditure.<sup>96</sup> A sacrifice has been defined as the wilful destruction of cargo or the ship.<sup>97</sup> An expenditure occurs when the shipowner or another party take on additional expenses in order to save the ship. The question whether the payment of ransom can be regarded as an expenditure has been widely addressed in both case law and academic writing.

The first case which dealt with the payment of ransom to pirates as general average was *Hicks v Palington*.<sup>98</sup> It was held that cargo which was given to pirates in order to release the vessel was subject to General Average contribution.

United States case law from the 19<sup>th</sup> century indicates a similar view. In *Barnard v Adams*<sup>99</sup> the Supreme Court held that any payment which is effected to pirates in order to release the vessel "is to be contributed for". In the case of *Peters v The Warren Insurance Company*, the Court opined that ransom payments are "a necessary means of deliverance from a peril

<sup>93</sup> *Montgomery and Co. V Indemnity Mutual Marine Insurance Co.* (1902) 1 K.B. 734.

<sup>94</sup> *Lowndes and Rudolf op cit* (2008) A.51.

<sup>95</sup> *Ibid* at A.20.

<sup>96</sup> *Ibid* at A.59.

<sup>97</sup> *Lowndes and Rudolf supra* at A.59.

<sup>98</sup> *Hicks v Palington* (1590) Moore's (QB) 297.

<sup>99</sup> *Barnard v Adams* 51 U.S. 270.

insured against, the acting directly upon the property.”<sup>100</sup>

Thus, it can be concluded that the payment of ransom is considered an expenditure subject to general average made by the shipowner.

- (iv) Finally, the expenditure must have been made intentionally or voluntarily<sup>101</sup> and reasonably<sup>102</sup>. The reason for the former requirements is to distinguish the expenditure from any accidental loss which is not the case of ransom payments.

The latter requirement could bear difficulties in case the ransom sum is unreasonably high. In such a case the cargo owners would only have to contribute to an amount which would have been reasonable.<sup>103</sup> In practice, however, it will be difficult to assess a reasonable amount of ransom, especially if the life of seamen are at stake which have no monetary value.

In conclusion, it is submitted that General Average proves to be a possible option for sharing the shipowner’s expenses for ransom payments among other parties. This is supported by the historical usage of general average as observed in the Digests of Justinian<sup>104</sup>, the Rhodian Law<sup>105</sup> as well as the Consulado del Mar<sup>106</sup>, all of which endorsed that ransom payments could be subject to general average contributions.<sup>107</sup>

### 3.1.2.3. German Legislation on General Average and Ransom

A noteworthy aspect concerning General Average and the payment of ransom is to be found in the German legislation. In § 706 (6) HGB<sup>108</sup> the legislator sets out that in cases where a ship and cargo are held ransom by enemies or pirates, such payment forms part of general average.<sup>109</sup> Thus, the payment of ransom is explicitly recoverable under general average at least under German law.

<sup>100</sup> *Peters v The Warren Insurance Company* 39 U.S. 99 at 110.

<sup>101</sup> *Lowndes and Rudolf* op cit at A.08.

<sup>102</sup> *Ibid* at A.94.

<sup>103</sup> *Ibid* at A.95.

<sup>104</sup> The Digest of Justinian was a compendium of Roman Law issued by order of the Roman Emperor Justinian I in 533.

<sup>105</sup> The Rhodian Law was a collection of pre-roman maritime laws which were established around 900 BC. The Digest later referred to the Rhodian Law as source for its maritime provisions.

<sup>106</sup> The Consulado del Mar was a body of codified maritime and trade provisions under the Crown of Aragon in Barcelona in 1494. It had an enormous influence in the western Mediterranean Sea.

<sup>107</sup> *Spencer supra* at 1265.

<sup>108</sup> *Handelsgesetzbuch* (Engl. Commercial Law Code).

<sup>109</sup> Wenn im Falle der Anhaltung des Schiffes durch Feinde oder Seeräuber Schiff und Ladung losgekauft werden. Was zum Loskaufe gegeben ist, bildet nebest den durch den Unterhalt und die Auslösung der Geiseln entstehenden Kosten die Große Haverei.

#### 3.1.2.4. Insurance Cover for General Average

Once it is established that ransom payments fall under the principles of general average, the standard hull insurance policy covers the shipowner's proportion of the expenses pursuant to cl 8.1. It reads:

The insurance covers the vessel's proportion of ... general average ... in case of general average sacrifice of the vessel the Assured may recover in respect if the whole loss without first enforcing their right of contribution from other parties.

Additionally, s 66 (4) of the Marine Insurance Act<sup>110</sup> reads:

Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.

From the above, it is observed that the payment of ransom is an expenditure and not a sacrifice. Hence, the shipowner may only claim for its proportion of the general average against its underwriters and not – as it is the case in extraordinary sacrifices – the entire sum.

A problem which may arise at this point concerns the contribution by cargo owners from different jurisdictions. Some countries, including the United States, prohibit any kind of direct or indirect transfer of money to certain individuals, who are knowingly connected to acts of piracy in Somalia. Since these difficulties arise in connection with the legality of ransom payment, they will be addressed at a later stage.<sup>111</sup>

#### 3.1.3. Sue & Labour

The recovery of ransom payments under the Sue & Labour clause has also been discussed and supported by case law. This standard clause in a hull policy reads:

---

<sup>110</sup> English Marine Insurance Act of 1906.

<sup>111</sup> See Chapter IV 4.3.4.

In case of any loss or misfortune it is the duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance ... the Underwriters shall contribute to charges properly and reasonably incurred by the Assured their servants or agents for such measures.<sup>112</sup>

The purpose of this clause is to encourage the assured to minimise the loss for which the insurer would be liable. This duty is also stated in s 78 (4) of the Marine Insurance Act.<sup>113</sup> It should be noted that in cases where the loss is caused by a peril which is deemed a 'war risk' and as such not included in the standard policy, the hull underwriter would not be held liable for Sue & Labour expenses which minimise such loss. Thus, ransom to Somali pirates would only be recoverable if the shipowner took out additional war risk cover.

The landmark case, which clarifies the issue of whether ransom payments are recoverable under the Sue & Labour clause is *Royal Boskalis Westminster NV v Mountain*.<sup>114</sup>

The facts concerned a group of Dutch companies (plaintiffs) which were contracted prior to the outbreak of the Gulf War in 1990 for dredging works in an Iraqi port near the Kuwait border. The contract was governed by Iraqi law and provided for Arbitration in Paris in the case of a dispute.

After Iraqi forces marched into Kuwait, which marked the beginning of the War, the United Nations imposed sanctions on Iraq. The Government reacted with the Law No. 57 by seizing all foreign assets. Since the plaintiffs dredging fleet was still operating within Iraqi waters, it was seized and several crew members were held in custody. The plaintiffs and the Iraqi Government reached an agreement which set out that the assets were to be released along with the crew upon payment of 24.5m Dutch guilders.<sup>115</sup> Additionally, the plaintiffs agreed to waive their right to claim for damages for expropriation under the arbitration clause in the dredging contract.

The fleet was insured on a standard hull insurance policy including 'war risks' and a standard Sue & Labour clause by the defendant, a Lloyd's syndicate on the London market. The plaintiffs sought to recover the amount of 84m Dutch guilders, which

---

<sup>112</sup> Clause 9.1 / 9.2.

<sup>113</sup> English Marine Insurance Act of 1906.

<sup>114</sup> *Royal Boskalis Westminster NV v Mountain* [1999] Q.B. 674.

<sup>115</sup> Approximately \$13,5 million.

was the estimated value of the waived claim. The defendants refused to pay and averred that the agreement to release the ships upon payment and the waiver is unenforceable in the arbitration court contract was conducted under duress. Consequently, the plaintiffs sued under the respective Sue & Labour clause in the policy. The clause read:

And in the case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandise, and ship or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurer, will contribute.<sup>116</sup>

The case did not specifically address the issue of ransom payments cover under Sue & Labour, but rather the waiver which was valued to a certain amount. The finding of the Court, nevertheless, is equally applicable to the ransom issue, since a waiver of a valued claim is effectively the same as the payment of a similar amount. Stuart-Smith LJ held “that expense involves the payment or disbursement of money or money’s worth and I do not see why the foregoing of a valuable claim cannot be an expense in money’s worth.”<sup>117</sup>

With reference to *Atchinson v Lohre*<sup>118</sup> the defendants submitted ransom payments cannot be recovered under the Sue & Labour clause. The case concerned a shipowner whose vessel had been salvaged. The shipowner sought to recover the salvage award under Sue & Labour. The Court held that the salvage award is assessed upon general principles of maritime law and not upon the *quantum meruit* basis<sup>119</sup> which is the benchmark for Sue & Labour. Therefore, the claim was dismissed. The defendants in *Royal Boskalis* submitted that ransom cover cannot be valued upon the *quantum meruit* principle and therefore not be covered under Sue & Labour.

However, Phill LJ held that “the fact that a payment cannot be valued as a *quantum meruit* does not, in my judgement, prevent a claim under the sue and labour

---

<sup>116</sup> *Royal Boskalis supra* at 696.

<sup>117</sup> *Ibid* at 685.

<sup>118</sup> *Ibid* at 696 citing *Atchinson v Lohre* 4 App. Cas. 755.

<sup>119</sup> *Quantum meruit* (lat. What one has earned) refers to the reasonable value of service and serves as a common law benchmark for the assessment of damages in contract law. In the law of salvage the award is assessed in proportion to the salvaged fund (value of ship, cargo, bunker fuel etc) irrespective of the service of the salvor.

clause.”<sup>120</sup>

Further, it was suggested that a Sue & Labour expenditure can only be incurred in respect of a single insured interest. Hence, where the entire ship is captured, all parties who have an interest in the vessel’s safety would have to negotiate a separate ransom sum which then would be recoverable under Sue & Labour.<sup>121</sup> However, such an argument is technical and not realistic. In conclusion the Court held that the waiver could be recovered under the respective Sue & Labour clause.<sup>122</sup>

Therefore, it is submitted that any ransom payment which is effected in order to prevent the vessel from damage and therefore “for the purpose of averting or minimising a loss which would be recoverable under this insurance”<sup>123</sup> is recoverable under the Sue & Labour clause.<sup>124</sup>

#### 3.1.4. Conclusion

With respect to the standard hull policies, the payment of ransom is recoverable both under general average expenditure as well as the Sue & Labour clause.

#### 3.2. P&I Cover

The P&I clubs are the shipowner’s liability insurers. They are associations of shipowners who agree to insure each other against their own liability.<sup>125</sup> They traditionally cover all liability claims arising *inter alia* from the carriage of cargo, pollution liabilities, loss of life and injury of seamen, damage to other property or wreck removal.<sup>126</sup> Therefore, it has been suggested that the clubs should contribute to the general average expenditure where they insure loss of life and personal injury of the crew.<sup>127</sup> As mentioned above, under general average every party who shares an interest in the safety of the voyage has to contribute to the expenditures or sacrifices. The P&I club is a direct beneficiary of the ransom payment if such expenditure saves the crew from bodily harm. A question which then arises, is how to ascertain the proportion which the club has to contribute, which proves to be difficult as the absence of injury is difficult to evaluate against the value of the released property.

---

<sup>120</sup> *Royal Boskalis supra* at 697.

<sup>121</sup> *Spencer supra* at 1260.

<sup>122</sup> *Royal Boskalis supra* at 674/675.

<sup>123</sup> See clause 9.1.

<sup>124</sup> See Gilman et al *Arnould’s Law of Marine Insurance and Average* 17<sup>th</sup> Edition (2008) at 25-21 (cited as *Arnould’s* in the following).

<sup>125</sup> Gard Handbook in P&I Insurance (1996) 20.

<sup>126</sup> *Ibid.*

<sup>127</sup> G Gauci 'Piracy and its legal Problems' (2010) 41 *Journal of Maritime Law & Commerce* 541 at 554.

An alternative method of obtaining the incurred ransom expenses would be the the Omnibus Rule. This provision is contained in most club Rules and refers to the discretion of the Board of the club, with respect to the coverage of claims which are not specifically named in the policy.<sup>128</sup> On occasion, P&I clubs might contribute on the basis of this discretion.<sup>129</sup>

Also, most P&I club Rules provide for the club's liability for unrecoverable general average expenditures<sup>130</sup> when the shipowner was in breach of the carriage contract.

It has been suggested that when a shipowner fails to train its crew properly according to Best Management Practices concerning piracy, the ship would be considered unseaworthy according to the Hague-Visby Rules.<sup>131</sup> In this case, the shipowner would be in breach of the carriage contract and cargo would have the right to refuse contribution.<sup>132</sup> As a basis of claim, this scenario could become more relevant with an increasing availability of advice and intelligence as a benchmark for Best Management Practice against piracy.

The clubs, however, will not be liable for unrecoverable expenses due to legislative prohibition of ransom payments such as specific sanction regulations.<sup>133</sup>

There have been cases where clubs have contributed a small portion to the ransom on the basis that they insured the lives of the crew and benefited from their release.<sup>134</sup> Whether the payment occurred under general average or under their respective club policy is unclear.

The extent and amount that P&I clubs contribute to the payment of ransom is unknown as such payments are subject to confidentiality. The Norwegian club *Skuld* states that the exact involvement of the clubs in these payments is confidential.<sup>135</sup>

With respect to the shipowner's obligation to create a safe working environment for its crew,<sup>136</sup> it will be discussed below whether the P&I clubs should play a more dominant role in the reimbursement of ransom payments as the shipowner's liability

<sup>128</sup> This provision is known as the „Omnibus Rule“; e.g. Rule 46 of the SKULD Rules.

<sup>129</sup> See Homepage of SKULD, Piracy FAQ. Available at <http://www.skuld.com/News/Archive/Skuld-News-Archive/Skuld-News-Archive-2009/Maritime-Security---Piracy-related-issues/> [last accessed on 18 July 2011].

<sup>130</sup> See Rule 41 of the Gard Rules; Rule 17.1 of the SKULD Rules.

<sup>131</sup> The Hague-Visby Rules are the internationally most common legal regime for the regulation of Carriage Contracts.

<sup>132</sup> This suggestion was made by Jonathan Hare, Senior Vice President and Counsel of Assuranceforeningen SKULD in an Email to the Author.

<sup>133</sup> See Chapter IV.

<sup>134</sup> Spencer *supra* at 1261.

<sup>135</sup> See Homepage of SKULD *supra*.

<sup>136</sup> See Art. IV (1) Maritime Labour Convention 2006.

underwriters.

#### 4. Kidnap & Ransom Insurance

A relatively new phenomenon among the products of the insurance industry is the Kidnap & Ransom (K&R) policy, a policy which can be described as a special cover for all expenses related to the event of abduction of persons for ransom. The first K&R policy was offered by a Lloyd's underwriter in 1932.<sup>137</sup> It became increasingly popular in the the 60s and 70s in the United States among celebrities and their families who were repeatedly victims of kidnappers. Due to the latest events, especially in the Gulf of Aden and off the East African coast, the K&R insurance is increasingly used by shipowners in order to protect themselves against the exposure of ransom payments.

##### 4.1. Structure of the Policy

The standard K&R policy contains four main components. The most important component is of course the cover for the ransom up to a certain limit. Second, the policy covers money which is lost in the process of transferring the ransom money to the pirates such as the case of theft. Third, all additional costs of the event are covered. These include any expenses relating to the release of the hostage or money delivering expenses. Finally, the policy usually covers costs for preventive training, consultations or risk management.<sup>138</sup> Depending on the circumstances the K&R policies can at times be tailored to an individual or a company according to their specification.<sup>139</sup> This might include the cover of crew wages during the time they are kidnapped, travel expenses, psychiatric or medical care of crew or any other kidnap-related expenses.<sup>140</sup>

The typical K&R policy in the marine insurance sector is a term valued policy, meaning it covers the shipowner for a specific term from 7 days (a typical voyage through the Gulf of Aden or along the East African Coast) up to a year.<sup>141</sup> It can be made for one ship or for the entire fleet.<sup>142</sup>

The policies generally provide a warranty that the existence of such policy remains

---

<sup>137</sup> Kenney *supra* at 560.

<sup>138</sup> *Ibid* at 561; M Clendenin '„No Concession“ with no Teeth' (2006-2007) 56 *Emory Law Journal* 741 at 752.

<sup>139</sup> Kenney *supra* at 562.

<sup>140</sup> Seacurus Insurance Bulletin – Issue 02 – March 2010. Available at [http://www.espadaservices.com/news\\_pr/Seacurus\\_Issue\\_02\\_V5.pdf](http://www.espadaservices.com/news_pr/Seacurus_Issue_02_V5.pdf) [Accessed on 20 July 2011].

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

confidential. The reason for confidentiality is that the exposure of the assured's ship leads to an even greater risk of being captured.

#### 4.2. Advantages for the Shipowner

The benefits for the shipowner regarding this insurance policy are manifold. On one hand, it provides legal certainty for the assured shipowner that all ransom sums and all additional costs are covered. On the other hand, most policies contain access to highly specialised personnel regarding negotiation and transfer of money.<sup>143</sup>

It has been estimated that the administrative costs around the ransom payment such as the negotiations, the delivery or the set up of additional security measures which are generally covered by a K&R policy are often much higher than the ransom itself.<sup>144</sup> Thus, the shipowner is not only protected against the lost ransom sum but also all kinds of previously unexpected costs.

#### 5. Conclusion

The underwriters who are most likely to cover ransom payments are the K&R insurers, as ransom is the very object of their policy. However, the purpose of these policies is to cover ransom for the release of persons and not of property such as the vessel or her cargo. Thus, in the case of the hijacking of the *MV Leopard* in January 2011, where the pirates only abducted the crew and left the ship unmanned, the K&R insurer would pay.<sup>145</sup>

In case of absence of such a specialised policy, the shipowner would then declare general average in order to obtain contributions from the various cargo owners. The shipowner's contribution is likely to be covered by its hull underwriters. Alternatively, the shipowner may attempt to recover the payment under the Sue & Labour clause in its hull policy. In cases where both ship and crew are captured, clearly both underwriters would contribute to the ransom payment – the exact proportion, however, is not clear.

As a final resort, the shipowner could turn to its P&I club for cover of unrecoverable general average expenses or a contribution under the Omnibus Rule.

<sup>143</sup> Seacurus Insurance Bulletin *supra*; Clendenin *supra* at 756.

<sup>144</sup> It has been estimated that the actual ransom sum only makes up about 25 – 30 percent of the total costs. See Lennox-Gentle *supra* at 210.

<sup>145</sup> See 'Official NATO Statement on M/V Leopard's Hijacking' (15 January 2011) Bosphorus Naval News. Available at <http://turkishnavy.blogspot.com/2011/01/official-nato-statement-on-mv-leopards.html> [Last accessed on 10 August 2011].

## Chapter Four

### ILLEGALITY OF RANSOM PAYMENTS

#### 1. Introduction

The prohibition of ransom payments has been discussed as a solution to the on-going threat of abductions. However, the implementation of the idea to break the kidnap industry by simply refusing to meet their demands has encountered various problematic issues. The first part of the following chapter will outline the historical background of the prohibition of ransom payments. Further, the approach of both the United States of America and Colombia will be examined as examples of modern attempts to address kidnapping.

#### 2. History

The system of the *Sklavenkassen*<sup>146</sup> showed that the payment of ransom was not prohibited in Europe but acknowledged as a legitimate measure to release kidnapped seamen from slavery.

Furthermore, the payment of ransom was an established alternative to the taking of prize. The law of prize allowed naval forces to capture enemy vessels and to have them sold in their domestic ports.<sup>147</sup> Since this system had a disruptive effect on valuable trade, the belligerent nations soon established the possibility for merchant vessels to be released upon issuing a ransom bill.<sup>148</sup> The master of the captured vessel was able to contractually bind the shipowner to pay out a certain amount of ransom to the captor. The ransom bill as such was recognised and enforceable in domestic Courts of the captured vessels' flag state. As security, the captor generally took one of the officers as hostage.

The ransom bill also served as evidence for the underwriters of the captured vessel as they usually insured against the capture by foreign enemies.<sup>149</sup>

---

<sup>146</sup> See Chapter III.

<sup>147</sup> The law of prize goes back to Hugo Grotius who established the idea that property taken from the enemy belongs to the taker in times of war. See D A Petrie *The Prize Game* (1999) at 40.

<sup>148</sup> Such a bill was usually issued by the master of the captured vessel to the master of the capturing vessel. See W Senior 'Ransom Bills' (1918) 34 *The Law Quarterly Review* 49.

<sup>149</sup> Phill LJ in *Royal Boskalis supra* at 698, citing *Arnould on Marine Insurance*, 1<sup>st</sup> ed. (1848), vol. 2,

As this system became increasingly expensive, the British parliament enacted the Ransom Act in 1782<sup>150</sup> which prohibited any further payment of ransom to captors.

Section 2 of the Act read

All Contracts and Agreements which shall be entered into ... by any Person or Persons for Ransom of any Ship or Vessel ... shall be absolutely void in Law, and of no Effect whatsoever.

The Ransom Act was repealed by s 152(4) of and sch 7 to the Supreme Court Act in 1981. Before the repeal was enacted, any ransom agreement was illegal and bore criminal consequences.<sup>151</sup> Effectively, any insurance of a ransom agreement would have been void.<sup>152</sup> Since the Act has been repealed it has been suggested that such payments are not only legal but also recoverable if insured against.<sup>153</sup>

### 3. The American Approach

A different approach has currently been adopted in the United States. The idea of imposing non-payment legislation has always been expressed in connection with kidnappings, especially those of children of wealthy families.<sup>154</sup> Today, especially with the American focus on international terrorism, United States legislation has increasingly attempted to address the problem of piracy by advocating a non-payment approach coupled with military intervention. This approach is primarily based on the opinion that pirates and terrorists make use of similar means<sup>155</sup> and could therefore be treated equally.<sup>156</sup> Alternatively, the large ransom sums could attract international terrorist organisations and as such undermine United States efforts to address international terrorism.

United States legislation provides for numerous Acts and Regulations, which deal with illegal transactions. Their focus, however, is manifold and seeks to address corruption, sanctioning of certain regimes and the financing of terrorist organisations. This chapter will discuss each legal instrument, which may assist in the prohibition

---

pp. 810-811, para. 304.

<sup>150</sup> 22 Geo. III cap. 25.

<sup>151</sup> Offenders had to pay a penalty of 500 Pounds according to s 2 and 3 of the Ransom Act.

<sup>152</sup> *Arnould's op cit* at para. 25-21.

<sup>153</sup> *Ibid.*

<sup>154</sup> E K. Alix *Ransom Kidnapping in America* (1978) 151.

<sup>155</sup> See Section 4.2.2.1.3. below.

<sup>156</sup> D R Burgess, Jr. 'Hostis Humani Generi: Piracy, Terrorism and a new International Law' (2005-2006) 13 *University of Miami International & Comparative Law Review* 293.

of ransom payments to pirates.

### 3.1. Foreign Corrupt Practices Act

The first legal measure having bearing on the prohibition of ransom payments is the in the Foreign Corrupt Practice Act (FCPA).<sup>157</sup> This essential regulation aims to prohibit corrupt practices which are intended to undermine the rule of law. As such, it prohibits any form of payment to foreign officials, political parties or governmental entities which seek to have the effect of or the intention to influence certain political acts of aforesaid persons or entities. It is however very unlikely that this provision finds application in cases of ransom payments to pirates as the pirates are operating as individual groups and not as foreign officials. The rule of law, to the extent that there is any in Somalia, is not affected by ransom payments.<sup>158</sup>

### 3.2. Federal Statutes prohibiting the financing of Terrorism

The central body of United States legislation, which deals with the financing of terrorism is the Antiterrorism and Effective Death Penalty Act of 1996.<sup>159</sup> § 2339A and § 2339B are specifically concerned with the “providing of material support or resources” to terrorists or to foreign terrorist organisations. “Material support or resources” are defined as:

any property, tangible or intangible, or service, including currency or monetary instruments, or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communication equipment, facilities, weapons, lethal substances, explosives, personnel, and transportation except medicine or religious materials;<sup>160</sup>

Therefore, it is apparent that any direct payment of ransom monies in cash or transferred via bank or *hawaladar*<sup>161</sup> would amount to the “providing of material

<sup>157</sup> US Code Title 15 s 78dd-1 to dd-3.

<sup>158</sup> Rutkowski et al *supra* at 1434.

<sup>159</sup> 18 U.S.C. Chapter 113B.

<sup>160</sup> 18 U.S.C. § 2339A (b) (1).

<sup>161</sup> A *Hawaladar* is a person who is involved in the traditional and informal system of money transactions known as *Hawala*. This system is predominantly used in the Middle East and East Africa. It has its roots in the Islam and is based on trust; therefore transactions are rarely documented. In the wake of the international war on terror, *Hawala* has often been associated with illegal funding of terrorists. See M de Goede 'Hawala Discourses and the War on Terrorist Finance' (2003) 21 *Environment and Planning* 513.

support and substances” and thus falls within the ambit of the Act.

### 3.2.1. United States definition of “terrorist”

The central question is whether Somali pirates fall under the definition of 'terrorist' or 'foreign terrorist organisation'. In defining the latter, the United States Department of State provides a list which is regularly updated and it contains all international organisations that are considered to be 'Foreign Terrorist Organisations'.<sup>162</sup> The only Somali organisation currently on this list is *Al-Shabaab*. Its link to local pirate gangs has yet to be proven.

The definition of 'terrorist' has proven to be difficult, especially its application to pirates. The United States Code, which is the central code for all federal legislation, provides several definitions of 'terrorism', which are not entirely congruent. The widest definition of terrorism is:

Premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.<sup>163</sup>

Another provision defines terrorism as:

Violent acts ... that are a violation of the criminal laws of the United States ... or that would be a criminal violation if committed within the jurisdiction of the United States ... [that] appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and ... occur primarily outside the territorial jurisdiction of the United States.<sup>164</sup>

Finally, the Antiterrorism and Effective Death Penalty Act provides a definition for what is considered to be a Federal Crime of Terrorism. According to the Act, terrorism is a crime that:

Is calculated to influence or affect the conduct of government by

<sup>162</sup> Homepage of the U.S. Department of State, Foreign Terrorist Organisations. Available at <http://www.state.gov/sct/rls/other/des/123085.htm> [Accessed at 29 June 2011].

<sup>163</sup> 22 U.S.C. § 2656f (d) (2).

<sup>164</sup> 18 U.S.C. § 2331 (1).

intimidation or coercion, or to retaliate against government conduct.<sup>165</sup>

The apparent difference between pirates and terrorists, according to the United States definition of terrorism and the aforementioned definition of piracy in UNCLOS,<sup>166</sup> is the fact that pirates are primarily motivated by “private ends”, whereas terrorists act for “political ends”.

### 3.2.2. Pirates as terrorists

The question of whether pirates can be regarded as terrorists has been widely discussed, especially in the United States literature. The starting point of the debate was the attack on *The Achille Lauro*, an Italian cruise ship which was seized by Palestinian terrorists while sailing from Alexandria to Port Said on 7 October 1985.<sup>167</sup> At the time, the law of piracy was well developed, in comparison to the law of maritime terrorism, which was non-existent.<sup>168</sup> Hence, the first articles which attempted to link piracy and terrorism did so in order to enable treatment of maritime terrorism to be synonymous to that of piracy.<sup>169</sup> Today, the purpose is reversed as opinions in the United States literature are increasingly attempting to treat pirates under the recently developed anti-terror legislation.

#### 3.2.2.1. Similarities between pirates and modern terrorists

It has been argued that modern internationally operating terrorists such as the members of *Al-Qaida* and other organisation are similar to pirates. As such, it has been submitted that the law of piracy is an ideal role model for the law of terrorism and vice versa.<sup>170</sup>

This argument is primarily based on three characteristics which are similar among pirates and terrorists. These characteristics include:

- (i) the concept of state versus non-state conflict,<sup>171</sup>
- (ii) similar pattern of evolution and internal organisation and
- (iii) use of similar means in order to archive their goals.

<sup>165</sup> 18 U.S.C. § 2332b (g) (5) (A).

<sup>166</sup> Art. 101 (a) UNCLOS; for further definition see Chapter II.

<sup>167</sup> M Halberstam 'Terrorism on the High Seas: The Achille Lauro, Piracy and IMO Convention on Maritime Safety' (1988) 82 *American Journal of International Law* 269.

<sup>168</sup> *Ibid* at 291.

<sup>169</sup> *Ibid* at 290/291.

<sup>170</sup> Burgess *supra* at 298.

<sup>171</sup> *Ibid*.

Below, it will be illustrated that the driving motives of pirates and terrorists are the crucial point of difference.

### 3.2.2.1.1. Concept of State versus non-State conflict

Pirates have been referred to as *hostis humani generis* by Cicero during the time of ancient Rome<sup>172</sup> - this term has survived ever since. The law of piracy outlawed acts of piracy as crimes against all mankind. It has been argued that pirates, like terrorists, have declared “war against the world” or “against civilisation itself”.<sup>173</sup> Therefore, both groups share the share a common enemy being the society at large. Hence, the concept of State versus non-State conflict.

### 3.2.2.1.2. Similar pattern of evolution and organisation

The history of many pirates, especially those of the famous 'Golden Age',<sup>174</sup> and the history of modern terrorism in the Middle East show striking similarities. The late 17<sup>th</sup> century showed a remarkable shift in the perception of piracy. Until then, most European countries, including England, contracted privateers to capture enemy vessels, preferably Spanish trading vessels. After England concluded a peace treaty with the Spanish Crown under James I,<sup>175</sup> privateering was immediately outlawed.<sup>176</sup> Thus, many privateers were put out of business. However, most of them simply continued to plunder merchant vessels, as this was the only profession familiar to them. There are strong similarities to the situation of United States trained and equipped *Mujahideen* in Afghanistan against the former Soviet Union and other cases of state-sponsored terrorism.<sup>177</sup>

Additionally, pirates and terrorist organisations show a very high level of organisation and hierarchy among the group.<sup>178</sup> Therefore, they are not just a loose band of robbers that proceed in an disorganised manner.<sup>179</sup>

---

<sup>172</sup> Rubin *supra* at 185. Although, it remains doubtful whether Cicero himself was referring to pirates in a modern sense since the origin of the word *peirata* (greek) or *pirata* (latin) referred to central and eastern mediterranean tribes which were at war with Rome for reasons of not being subordinate to Roman hegemony.

<sup>173</sup> Burgess *supra* at 308.

<sup>174</sup> 'Golden Age' of Piracy refers to the time after privateering was outlawed in many European countries by the end of the 17<sup>th</sup> century and many of the former privateers became illegal pirates.

<sup>175</sup> The peace was declared in 1689.

<sup>176</sup> Burgess *supra* at 312.

<sup>177</sup> Burgess *supra* at 303.

<sup>178</sup> As for pirates see Chapter II.

<sup>179</sup> M Rediker 'The Seaman as Pirate' in C R Pennell *Bandits at Sea* (2001) 142.

### 3.2.2.1.3. Similar means

The means which are employed by terrorists and pirates are perceived as similar. It is submitted that both generally act with tremendous violence in order to intimidate their victims and their tools are “homicide, terror, wanton destruction and disruption of trade.”<sup>180</sup> It seems that the latter submission is increasingly used to support arguments in favour of similar treatments for pirates and terrorists.

### 3.2.2.1.4. Motive

Modern terrorism and piracy, both today and during the Golden Age, are strikingly similar. However, the most important difference, regarding the various definitions, is the motivation that drives terrorists and pirates.

As observed above, the purpose of all pirate activity in Somalia is a pecuniary benefit from ransom payments. In earlier writings, it has been held that the purpose of piracy is “the intent to plunder *“animo furandi”*.”<sup>181</sup> Hackwoth submits that “when the acts in question are committed from purely political motives, it is hardly possible to regard them as acts of piracy”.<sup>182</sup> Furthermore, international instruments such as UNCLOS define that piracy is motivated by “private ends”<sup>183</sup>.

Finally, precedents have consistently held that piracy contains a notion of pecuniary gain. In the United States landmark case *U.S. v Smith*,<sup>184</sup> a case where the Supreme Court summarises older authorities such as English case law, Dutch writers and legal scholars, it was held that piracy, as defined by the law of nations is “robbery upon the sea”.<sup>185</sup> In the case of *Republic of Bolivia v Indemnity Mutual Marine Insurance Co*,<sup>186</sup> it was specifically held that a seizure of cargo by a politically motivated organisation did not amount to a loss by piracy because of the lack of satisfaction of personal greed or vengeance.

Terrorists, conversely, are motivated by either political or religious aims.<sup>187</sup> Put differently, “while terrorists are motivated by politics, pirates are motivated by money.”<sup>188</sup> At this point it should be stressed that research has evidenced that in fact most of the internationally known terrorists meet similar profiles. They are generally

<sup>180</sup> Burgess *supra* at 308.

<sup>181</sup> Oppenheim’s International Law (1955) 608.

<sup>182</sup> G H Hackwoth *Digest of International Law Vol. II* (1941) 681.

<sup>183</sup> Art. 101 (a) UNCLOS.

<sup>184</sup> *U.S. v Smith* 18 U.S. 153.

<sup>185</sup> *Ibid* at 162.

<sup>186</sup> *Republic of Bolivia v Indemnity Mutual Marine Insurance Co* [1909] 1 KB 785; Gauci *supra* at 547.

<sup>187</sup> J Xu ‘Piracy as a Maritime Offence’ 2007 *Journal of Business Law* 639 at 643.

<sup>188</sup> Lennox-Gentle *supra* at 212.

highly educated and often from middle-class or even wealthy backgrounds.<sup>189</sup> Pirates in Somalia on the other hand are for the most part poor and desperate fishermen who lost their former business.

Xu submits that “the means outweigh the motivation”<sup>190</sup> meaning that it does not matter whether an attack on a merchant vessel is done for the aim of personal gain or for political reasons. This finds truth in the subjective perception of a vessel's crew and other victims of such crimes. They understandably do not care and cannot be blamed for regarding such a distinction as superfluous. It should be borne in mind, however, that the motivation is the incentive to act, hence it is the motivation that drives a pirate to sea and capture a merchant vessel. A pirate who acts for personal gain will also weigh the consequences of his own actions against the risk. The terrorist conversely believes in a greater good of his or her actions. Therefore the immediate risk to life is less important. This is prevalent especially in religiously motivated terrorists. An obvious example is the terrorist who strikes with a bomb, wrapped around his waist in order to cause maximum damage. A pirate would never go to such measures as it would defeat the entire purpose of his attack – his personal increase of wealth. Therefore, it should be the principal goal of law and policy makers to understand and to bear in mind the motivation that distinguishes pirates and terrorists.

In the case of Somali pirates who clearly act in order to obtain ransom payments, the distinction makes a substantial difference with respect to possible legal solutions to the problem.<sup>191</sup> On the above premises, I submit that Somali pirates cannot be classified as terrorists.

### **3.2.2.2. Link between Somalia pirates and terrorist organisations**

An alternative ground for application of the anti-terror legislation would be a business link between recognised international terror organisation such as *Al-Qaida* or *Al-Shabaab*, and individual pirates or pirate groups. However, Rear Admiral Ted Branch, Director of Information, Plans and Security at the Office of the Chief of Naval Operations stated that “agencies have been looking for a link between terrorism and the piracy taking place off the Somali coast but had not detected

---

<sup>189</sup> C Russell and B Miller 'Profile of a Terrorist' in Y Alexander and L Z Freedman *Perspectives on Terrorists* (1983) at 45 – 60.

<sup>190</sup> Xu *supra* at 643.

<sup>191</sup> This issue will be discussed below in Chapter VI.

any.”<sup>192</sup> Furthermore, there appears to be an open rivalry between the pirate gangs and other Islamic groups in the area. It has been reported that while the Islamic Court Union held power in most of Somalia in the second half of 2006 it actually fought pirate activities.<sup>193</sup>

### 3.2.2.3. Conclusion

From the above it is apparent that due to the fundamental differences between pirates and terrorists, the entire anti-terror legislation, including the regulations concerning the funding of terrorists, finds no application in the case of ransom payments to pirates.

## 3.3. Executive Order and Somalia Sanction Regulation

The United States legislation authorises the government to establish binding law in some instances. Thus, both the President as well as the various Departments may enact binding laws.

In 2010 the Obama administration issued two important legal instruments, which have dramatically changed the legal environment of shipowners that are faced with ransom demands.

### 3.3.1. Executive Order

On 12 April 2010 President Barack Obama issued an Executive Order with the aim to block property of certain persons, which contribute to the conflict in Somalia.<sup>194</sup> The authority to issue the Order is derived from the International Emergency Economic Powers Act (IEEPA),<sup>195</sup> the National Emergency Act (NEA)<sup>196</sup> and the United Nations Participation Act (UNPA).<sup>197</sup> The reason for the enactment of the Order was the finding that the violence in Somalia, especially the acts of piracy and armed robbery at sea off the Somali coast posed a threat to the United States foreign policy and its security.<sup>198</sup>

The Order sets out that:

<sup>192</sup> J Romero et al. 'The Pirates of Puntland' (2009) *K&L Gates Report March*. Available at [http://www.klgates.com/files/Publication/ac22f46f-de64-41d5-a99c-8566b961c41e/Presentation/PublicationAttachment/fbdacf5a-55e1-408d-833b-a4bc8a15dc70/3\\_09\\_The\\_Pirates\\_of\\_Puntland.pdf](http://www.klgates.com/files/Publication/ac22f46f-de64-41d5-a99c-8566b961c41e/Presentation/PublicationAttachment/fbdacf5a-55e1-408d-833b-a4bc8a15dc70/3_09_The_Pirates_of_Puntland.pdf) [Accessed in 30 June 2011].

<sup>193</sup> J P Pham 'Pondering Somali Piracy' (23 April 2009) *World Defence Review*. Available at <http://worlddefensereview.com/pham042309.shtml> [Accessed on 4 July 2011].

<sup>194</sup> Executive Order 13536 (12 April 2010).

<sup>195</sup> 50 U.S.C. § 1702 (a).

<sup>196</sup> 50 U.S.C. § 1601.

<sup>197</sup> 22 U.S.C. § 287 (c).

<sup>198</sup> See Preamble of the Executive Order.

All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any overseas branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in (i) the persons listed in the Annex to this order; and (ii) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State.<sup>199</sup>

The Annex contains the Somali terrorist organisation *Al-Shabaab* and 11 Somali nationals, two of whom are apparently known as pirates.<sup>200</sup> Further information about the persons on the list have been subsequently published by the Office of Foreign Asset Control (“OFAC”).<sup>201</sup> The Order also vests power to the Secretary of Treasury and the Secretary of State to determine other individuals that are “engaged in acts that directly or indirectly threaten the peace, security or stability of Somalia.”<sup>202</sup> Any violation of the Executive Order may be subject to civil and criminal charges as set out in the three aforementioned Acts, which served as legal authority to issue the Order.<sup>203</sup>

### 3.3.2. Office of Foreign Assets Control Regulations

The OFAC forms part of the United States Department of the Treasury and it regulates and enforces the foreign policy in terms of trade and other economic related sanctions<sup>204</sup> against certain countries, regimes, terrorist organisations and other targets that are viewed as a threat to United States foreign policy and national security.<sup>205</sup>

On 5 May 2010 the OFAC incorporated the above mentioned Executive Order into its Sanction Regulations.<sup>206</sup> These Regulations are set out in Chapter V of Title 31 of the Code of Federal Regulations and provide sanctions against various regimes in the

<sup>199</sup> Section 1 (a).

<sup>200</sup> Abshir Abdillahi (No 1) and Mohamed Abdi Garaad (No 6) on the list. See B G Paulsen and E Lafferty 'Symposium: Maritime Catastrophes: Marine Investigation and Mass Claim Practice' (2011) 85 *Tulane Law Review* 1241 at 1245; Rutkowski *supra* at 1436.

<sup>201</sup> Paulson *ibid.*

<sup>202</sup> Section 1 (a) (ii) (A).

<sup>203</sup> IEEPA at § 1705 and UNPA at s 287c (b).

<sup>204</sup> Listed in Title 31 of the Code of Federal Regulations (C.F.R.) Chapter 5.

<sup>205</sup> See Homepage of the U.S. Department of Treasury, Terrorism and Financial Intelligence, Office of Foreign Assets Control. Available at <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx> [Accessed at 29 June 2011].

<sup>206</sup> 31 C.F.R. § 551.

world.

The authority to establish the Somalia Sanction Regulation was vested in the Secretary of Treasury in s 5 of the aforementioned Executive Order.

The consequences of a violation of the Regulations are partly set out in the Regulation itself and partly in other pieces of legislation. The transfer of money itself is rendered void<sup>207</sup> and the person who effected the transfer faces civil and criminal consequences.

### 3.3.3. Prohibition of Ransom Payments

The Sanction Regulation and the Executive Order find application with respect to ransom payments in two ways. On one hand, all “blocked” person are restricted to use their assets within reach of American authorities. On the other hand, every United States citizen, permanent resident alien or entity subject to United States law is prohibited to transfer monies to a “blocked” person.<sup>208</sup>

In relation to the “blocking” mechanism, it is important to mention the list of Specially Designated Nationals (SDN) of the OFAC. This list is continuously updated and contains all names of individuals and entities that are currently “blocked”, whether under a specific sanction program against a country or individually.<sup>209</sup>

Therefore, if the receiver of ransom money were to be on this list and thereby “blocked”, the payment itself would be a breach of the sanction program. The payer, if subject to United States law, would consequently be liable for a violation of the sanction.<sup>210</sup>

In light of the payment of ransom to pirates in Somalia, both the Order and the Sanction Regulation remain unclear. The Order specifically states that “acts of piracy or armed robbery at sea off the coast of Somalia threaten the peace, security and stability of Somalia.”<sup>211</sup> Hence, the Secretary of Treasury, in consultation with the Secretary of State, may determine individual pirates in order to be banned under the Order.<sup>212</sup> However, until now, only the above mentioned 11 persons are specifically “blocked”.

It has been argued that the ransom payment would not amount to a beach of sanction,

<sup>207</sup> 31 C.F.R. § 551.202 (a).

<sup>208</sup> 31 C.F.R. § 551.311.

<sup>209</sup> Homepage of the U.S. Department of the Treasury, Resource Center, Specially Designated Nationals List. Available at <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> [Accessed on 1 July 2011].

<sup>210</sup> Paulsen *supra* at 1250.

<sup>211</sup> Section 1 (b).

<sup>212</sup> Section 1 (a) (ii) (A) in connection with s 1 (b).

even if a person is “blocked”, as the definition of the prohibited transactions would not include non-voluntary payments such as ransom.<sup>213</sup> Such an argument, however, is not founded in the Order or any other piece of legislation.

Concerns within the maritime industry grew with the issuing of the Order and the United States administration saw the need to clarify the situation regarding the payments of ransom under the new regulatory regime. The clarification, however, remained informal.<sup>214</sup> In various meetings involving members of the Department of the State, the United States Coast Guard, the OFAC and the Chamber of Shipping in America, it was made clear that the Order only referred to the “blocked” persons on the list and was not extended to other persons involved in acts of piracy. Further, the Order only restricts persons and entities, which are subject to United States law. As such, a foreign shipowner would not be directly affected. A critical point, which must be clarified, is the question of a foreign ransom payer who has a United States office, which itself is not involved in the payment. Both the representative of the OFAC and of the State Department were of the opinion that in this case, the payer would not be liable. It is important to note that neither a United States subsidiary nor funds of the payer are involved. However, since these clarifications took place behind closed doors and were not published or made public (other than an informal record on the homepage of the Chamber of Shipping of America), the situation still remains unclear.

#### **3.3.4. Shortcomings**

There are many shortcomings in the current system of “blocking” persons in Somalia. On one hand, both the Order and the specific Somalia Sanction Regulation lack many formality features in comparison with other established sanctions. For instance, most sanction regimes contain a specific catalogue of legal consequences whereas the Somalia Sanction Regulation does not. Moreover, the Order has been criticised for being too vague or “murky”.<sup>215</sup>

Attempts, undertaken by the OFAC, the State Department and other United States institutions, to clarify the situation have rather raised further questions.<sup>216</sup> One of the major concerns of shipowners was the interpretation of the “U.S. nexus” requirement.

---

<sup>213</sup> Paulsen *supra* at 1251.

<sup>214</sup> See Monthly Report for the International Chamber of Shipping (April 1, 2010 to May 15, 2010). Available at [http://www.marisec.org/ics-isfcirculars/ics-isfcirculars10/ICSISF\\_10\\_31%20US%20DEVELOPMENTS%20\\_2\\_.pdf](http://www.marisec.org/ics-isfcirculars/ics-isfcirculars10/ICSISF_10_31%20US%20DEVELOPMENTS%20_2_.pdf) [Accessed on 1 July 2011].

<sup>215</sup> Paulsen *supra* at 1253.

<sup>216</sup> See Monthly Report of International Chamber of Shipping *supra*.

United States based shipowners and insurers carry a duty to exercise “due diligence” prior to the payment of any money to pirates in order to ensure that the ransom receiver is not among the “blocked” persons.

However, foreign shipowners and insurers are not off the hook. As mentioned above, the ransom is often redistributed among the various parties under general average. The question is whether a contribution under general average to the declaring shipowner amounts to a breach of the sanction or the Executive Order. It has been held that even such a contribution under general average would be subject to the Order and as such be prohibited.<sup>217</sup> The situation would be similar for United States insurers.

The practical shortcomings are self-evident as it is nearly impossible for a paying shipowner or insurer to find out whether the actual beneficiary of the ransom payment is “blocked”. Often pirates use false names when negotiating or the entire negotiation is carried out by middle-men.

The system has been in force for a relatively short period of time, therefore, it is difficult to draw a conclusion. For the time being, it has not altered the practice of paying ransoms to pirates and has in fact led to more confusion in the maritime industry. The effect is therefore doubtful.

#### **3.4. Federal Anti-Money Laundering Laws**

The Money Laundering Control Act of 1986 prohibits financial transactions of means which are deemed “proceeds of specified unlawful activities.”<sup>218</sup> In the usual course of business, the money that a shipowner or its insurer uses to pay the ransom will not originate from “specified unlawful activities”. This Act will therefore not apply to the case of ransom payments to pirates.

#### **3.5. Bank Secrecy Act**

The Bank Secrecy Act of 1970 (BSA)<sup>219</sup> is the main legislative body that deals with the detection and prevention of money laundering and is administered by the Financial Crimes Enforcement Network (FCEN) at the Department of Treasury.<sup>220</sup>

---

<sup>217</sup> See Monthly Report of International Chamber of Shipping *supra*.

<sup>218</sup> 18 U.S.C. § 1956 (a) (1).

<sup>219</sup> The BSA is unlike the other aforementioned Acts not separately regulated in the United States Code but contains several provisions in various different codes.

<sup>220</sup> Rutkowski *supra* at 1443/1444.

One of the central provisions of the BSA is that every transfer of money out of the United States which exceeds the amount of US\$10.000 has to be reported to the Department of Treasury.<sup>221</sup> The regulation applies to banks, funds, insurance companies, stock and commodity brokers and other financial service providers in order to insure that money which derives from criminal activities cannot be used via these channels. These entities are equally required to report any financial transaction involving sums that exceed US\$5.000 in case these transactions are “suspicious”.<sup>222</sup> It is unlikely that the payment of ransom will be considered “suspicious”, especially in case of an underwriter that offers K&R insurance.

### **3.6. Conclusion**

None of the legal instruments which are currently in force in the United States adequately address the piracy problem. The regulation concerning the Somalia sanctions, which seems to be the most promising, is causing more harm than relief. However, the very idea of all United States legislation on this topic is to prohibit ransom payments in one way or the other. In the further course of this dissertation the question whether such payments should be prohibited will be addressed in detail.<sup>223</sup> It is submitted, however, that the American approach is insufficient in its attempt to tackle the problem of hijackings off the Horn of Africa.

## **4. The Colombian Approach**

A strict approach has been taken by the Colombian legislator in the early 1990s. The country has long been considered the “kidnap capital of the world”.<sup>224</sup> The reason for this infamous title is primarily due to the economical, political and probably geographical situation of the country. Currently, the country suffers from an enormous kidnapping-industry, lead by powerful drug cartels and other organised criminal gangs, which is fuelled by generally high ransom demands which are regularly answered immediately.

### **4.1. The Anti-Abduction Act**

As a measure to address the kidnapping industry effectively, the Colombian Congress enacted the Anti-Abduction Act in 1993.<sup>225</sup> The Congress was convinced that “the

---

<sup>221</sup> 31 U.S.C. § 5316 (a).

<sup>222</sup> 31 C.F.R. §§ 103.15 – 103.20.

<sup>223</sup> See Chapter VI.

<sup>224</sup> Kenney *supra* at 558.

<sup>225</sup> Act 40 of 1993.

most effective means to combat abductions are to increase the penalties for abductions and kidnapping, and to prevent the negotiation for the payment of ransom.”<sup>226</sup>

Pursuant to the Act, a person could face up to five years of imprisonment if he or she paid “knowing that money is going to be destined to pay a ransom for the release of an abducted individual” or „participates in the transaction thereof“.<sup>227</sup> Further, “whoever participates in an insurance contract the purpose of which is to guarantee payment of a ransom in possible abduction cases, or who participates in the negotiation or intermediation of the ransom demanded thereof,” would face up to two years of imprisonment.<sup>228</sup> As such, the Anti-Abduction Act was clear and specific in respect of any kind of negotiation, payment and even the insurance or any kind of assistance in abduction cases.

#### 4.2. The Decision of the Corte Constitucional

In the same year, however, certain articles of the Act were declared unconstitutional by the Colombian Constitutional Court.<sup>229</sup>

The Court held that the State has a constitutional obligation to protect the life and the dignity of any individual as well as the freedom of movement. This protection can be exercised actively by providing a competent police force or passively by granting everyone the right to self-defend him or herself in cases where the State is unable to act. Specifically the latter forms part of the circumstances of justification according to the Colombian penal code.<sup>230</sup> The prohibition of paying ransom to a family member or friend grossly impedes this right and as such constitutes a failure of the State to comply with its obligation.

The Court further examined whether the life of an individual may be sacrificed for the greater good of society, which in this case was the absence of further abductions. With reference to the dignity of a person, the Court held that a person can never be

<sup>226</sup> *Hargroves v Underwriters at Lloyd's, London* 937 F. Supp. 595 at 600.

<sup>227</sup> Art. 7 (2) of the Anti-Abduction Act.

<sup>228</sup> Art. 12 of the Act reads „CELEBRACION INDEBIDA DE CONTRATOS DE SEGURO.- Quien intervenga en la celebración de un contrato que asegure el pago del rescate de un posible secuestro o en la negociación o intermediación del rescate pedido por un secuestrado, incurrirá en prisión de uno (1) a dos (2) años“.

<sup>229</sup> Sentencia C-542-93.

<sup>230</sup> „ En forma pasiva, permitiendo que los ciudadanos, que en ciertas circunstancias no pueden ser defendidas por el Estado, se defiendan por sí mismas, actuando bajo las justificantes de la legítima defensa o del estado de necesidad, figuras estas consagrados en el Código Penal.“ See Sentencia C-542-93.

made subject, but has always to remain the purpose of all State actions and thus concluded that the life and liberty of a kidnapped person cannot be sacrificed for the greater good of society unless he or she voluntarily agrees.<sup>231</sup>

The Court argued that the threat to the life of the kidnapped person was actual or eminent, whereas the threat to a greater good of society was merely potential.<sup>232</sup>

However, the Court distinguished between the payment of ransom by an individual and an insurer who underwrites the risk of being exposed to ransom demands and insures the payment. The Court held that

The payment of ransom is in itself a neutral act, neither good nor bad. It is the intention that determines the moral justification. Thus, someone who intervenes to pay ransom out of necessity to save a life or recover personal freedom, whether their own or someone else's, is following altruistic motives recognized universally as such by law. But in contrast, those who work without being in need, following exclusively vulgar (*innobles*) and base (*bajos*) motives, for their own enrichment or with the goal of enriching criminals or providing them with economic resources, is committing a crime. And cannot allege or demonstrate any justification. Only in these circumstances can Article 12 of Law 40 of 1993 be exercised and the norms in agreement with it.<sup>233</sup>

Thus, the payment of ransom itself was partly declared legal in Colombia. The Court gave clear instructions that the payment of ransom would be legal in "circumstances of justification of the action as provided by the criminal law, in which case they (the articles referring to the payment of ransom) are unenforceable."<sup>234</sup>

The insurance of ransom payments, however, remained prohibited because an insurer cannot aver circumstances of justification when paying out according to the policy.

---

<sup>231</sup> „El hombre, en síntesis, tiene dignidad porque es un fin en sí mismo y no puede ser considerado un medio en relación con fines ajenos a él.“ See Sentencia C-542-93.

<sup>232</sup> „hay que tener presente que el peligro de perder la vida es actual para el secuestrado; y el mal social que origina la entrega de dineros a los criminales, es potencial y sólo se concreta en nuevos secuestros por la incapacidad de las autoridades.“ See Sentencia C-542-93.

<sup>233</sup> Unofficial translation by Pax Christi Netherlands in M Moor & L Zumpolle "The Kidnap Industry in Colombia – Our Business?" (2001). Available at [www.ikvpaxchristi.nl/catalogus/uploaded\\_file.aspx?id=167](http://www.ikvpaxchristi.nl/catalogus/uploaded_file.aspx?id=167) [last accessed on 15 August 2011].

<sup>234</sup> *Hargroves supra* at 602, citing an English translation of C-542/93.

### **4.3. *Hargroves v Underwriters at Lloyd's of London***

The Anti-Abduction Act was subject to the decision of *Hargroves v Underwriters at Lloyd's, London*.<sup>235</sup> In that case Mr. Thomas Hargroves, an employee of the company Centro Internacional de Agricultura Tropical (CIAT), was kidnapped by the Colombian guerrilla organisation FARC<sup>236</sup>. CIAT had previously concluded a K&R insurance with the defendants. Due to the legally difficult environment in Colombia, the policy did not cover the actual ransom sum but offered professional advice and assistance during the negotiation.<sup>237</sup>

CIAT refused to pay ransom after consultation with governmental authorities because the company was not sure about the legal consequences of such a step. Likewise the insurer did not render any assistance in the negotiations for reasons of the unclear situation of article 12 of the Anti-Abduction Act. Art. 12 specifically prohibited both the insurance of ransom and the negotiation or intermediation of ransom payments.

After the Hargrove family who also negotiated with FARC finally paid out, Mr. Hargrove commenced civil actions against the underwriters of his employer in the United States, holding that if CIAT would have initiated negotiations much earlier with the support of the professional assistance, he would have been released much earlier and probably at a much lower ransom sum.

The subject-matter of the case concerned the question whether the Underwriters should have rendered assistance, hence what effect the Anti-Abduction Act and the previously made decision of the Constitutional Court had. The Court held that the defendants conducted themselves in a way which was in accordance with the advice rendered by the Colombian authorities. The question whether this advice was in accordance with the current Colombian law was barred under the Act of State doctrine and as such not subject to the Court.<sup>238</sup> The claim of Mr. Thomas Hargrove was therefore dismissed.

### **4.4. The new legislation**

In 2000 the Colombian Congress reinstated the overruled article 12 with article 172 of the Act 599 of 2000. Bearing in mind the decision of the Constitutional Court, the new article 172 prohibits all insurance contracts with the purpose of insuring ransom

---

<sup>235</sup> *Hargroves supra*.

<sup>236</sup> Fuerzas Armadas Revolucionarias de Colombia.

<sup>237</sup> *Hargroves supra* at 598.

<sup>238</sup> The Act of State doctrine bars any domestic Court from deciding over the actions taken by foreign governments.

payments, which are concluded for reasons other than humanitarian.<sup>239</sup> It is doubted that insurance companies pay out on humanitarian basis. Since there usually is an insurance policy in place, any payment is effected on a contractual basis. Thus, the typical K&R insurance remains illegal in Colombia.

#### 4.4. Foreign Parties

The prohibition to insure ransom payments in Colombia has not prevented foreign companies from seeking insurance cover abroad.<sup>240</sup> The Colombian government reacted by stating that in this case both parties cannot seek support from the judicial system of Colombia. In the aforementioned case of *Hargroves*, CIAT was advised by the Colombian authorities not to pay since payment upon an insurance policy constituted a breach of domestic law. The plaintiffs therefore took recourse in a United States Court.

#### 5. International Approach

The war against terror has not only affected the domestic legislation of countries such as the United States but also the United Nations. The General Assembly of the UN adopted several conventions with the aim to address the increasing threat of international and local terrorism.<sup>241</sup> A convention that may effect the payment of ransom to pirates is the International Convention for the Suppressing of the Financing of Terrorism.<sup>242</sup> Art. 2 of the Convention sets out what is considered an offence under the Convention. As such, the Convention prohibits that:

[Any] person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the Annex; or (b) any other act ... when the purpose of such act ... is to intimidate a

<sup>239</sup> Article 172 read: „Quien intervenga en la celebración de un contrato que asegure el pago del rescate de un posible secuestro, o en la negociación o mediación del rescate pedido por un secuestrado, **por razones diferentes a las humanitarias**, incurrirá en prisión de dos (2) a tres (3) años y multa de mil (1.000) a tres mil (3.000) salarios mínimos legales mensuales vigentes.“

<sup>240</sup> J Alvarez Botero and M C Madrinán Rivera 'El Secuestro como Riesgo Asegurable en Colombia' (2001) Pontificia Universidad Javeriana, Facultad de Derecho at 149. Available at <http://www.javeriana.edu.co/biblos/tesis/derecho/dere2/Tesis19.pdf> [last accessed on 15 August 2011].

<sup>241</sup> The United Nations Conventions on Terror are listed in the Annex to the International Convention for the Suppressing of the Financing of Terrorism.

<sup>242</sup> Resolution 54/109 of 9 December 1999.

population, or to compel a government or an international organisation to do or to abstain from doing any act.<sup>243</sup>

The second alternative obviously aims at the prohibition to fund any act of terrorism in the traditional understanding and is therefore not applicable to pirates. However, the first alternative prohibits any funding of penalized acts which are listed in the annexed treaties. The Annex to the Convention contains two Conventions among others that may apply to kidnappings conducted by pirates.

### **5.1. Convention against the Taking of Hostages**

The fourth Convention listed in the Annex is the Convention against the Taking of Hostages which was adopted by the General Assembly in 1979.<sup>244</sup> This Convention specifically declares the taking of a hostage a crime and defines such crime as

Any person who seizes or detains and threaten ... to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, ... a natural or juridical person, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.<sup>245</sup>

The Convention does not distinguish between different motives for the taking of hostages. It would therefore be equally applicable to pirates who kidnap solely for the purpose of ransom. Thus, the purpose of the Convention is not to specifically address terrorism or other crimes that generally use kidnapping as means of funding but is directed against the abduction of persons in general for reasons of the security of fundamental rights such as the right to life, liberty and the security of person.<sup>246</sup>

### **5.2. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation**

The eighth Convention listed in the Annex is the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation which was adopted in 1988.<sup>247</sup> This Convention declares an offence:

---

<sup>243</sup> Art. 2 (1) (a) and (b).

<sup>244</sup> Adopted on 17 December 1979 and entered into force on 3 June 1983.

<sup>245</sup> Art. 1 (1).

<sup>246</sup> See Preamble of the Convention.

<sup>247</sup> Adopted on 10 March 1988 and entered into force on 1 March 1992.

If [a] person unlawfully and intentionally (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship.<sup>248</sup>

Like the Convention Against the Taking of Hostages this Convention does not distinguish between different motives for the unlawful action. The background of this Convention, however, reveals that its main purpose is to address maritime terrorism as it was adopted as a reaction to the hijacking of the *Achille Lauro*.<sup>249</sup> Therefore, it would also include any act committed by pirates in order to kidnap and hold a merchant vessel for ransom.

### **5.3. Effect of the Convention for the Suppressing of the Financing of Terrorism**

The effect of the Convention for the Suppressing of the Financing of Terrorism would be to prohibit any kind of monetary support to persons who are involved in the acts set out on the aforementioned Conventions. Thus, pirates who are involved in the hijacking of a ship or the destruction of navigation equipment cannot be paid ransom without committing an offence under the Convention. However, this is dependent upon the ratifying member states of the UN to implement the content of the conventions into domestic law and to exercise the provisions. Apparently, until today these international tools have not been utilised to address piracy.<sup>250</sup>

## **6. Conclusion**

There is no universal approach towards the payment of ransom or rather the illegality of such payments as a mean to address kidnapping. The international framework of anti-terror conventions clearly focuses on the “war on terror” as proclaimed after the attacks of 11 September 2001, although most of the conventions were already in force prior to the event.

The domestic legislation especially in the United States faces various difficulties in its applicability against pirates, mainly because of the incongruity of the definitions of terrorists and pirates. The domestic legislation in Colombia failed entirely because

---

<sup>248</sup> Art. 3 (1) (a) and (b).

<sup>249</sup> Halberstamm *supra* at 291.

<sup>250</sup> J A Roach 'Agora: Piracy Prosecutions' (2010) 104 *American Journal of International Law* 397 at 408/409.

of a disregard of certain fundamental rights which were held to be violated by the Anti-Abduction Act.

The international conventions mentioned above could play a role in the struggle against piracy in Somalia if they were appropriately implemented and their provisions exercised by the UN member States. A discussion on whether the payment of ransom should be prohibited follows below.<sup>251</sup>

---

<sup>251</sup> See Chapter VI.

## Chapter Five

### PUBLIC POLICY OF RANSOM AGREEMENTS AND RANSOM INSURANCE

#### 1. Introduction

In 2010 Lord Justice Rix of the Court of Appeal in England was confronted with a claim of cargo owners against their indemnity underwriters. The cargo was stowed on board of the *Bunga Melati Dua* which unfortunately was captured in the Gulf of Aden. Both ship and cargo were released shortly after the shipowner paid the ransom demand.

The case involved various legal issues, including the question whether the payment of ransom constitutes a violation of public policy.<sup>252</sup> After a lengthy examination of case law and academic writing the Court concluded that this was not the case. The decision, nevertheless, gave a reason for a further assessment of the issue.

The following chapter will assess the doctrine of public policy and further examine whether the payment of ransom and the insurance of such payments constitute a violation of the doctrine.

#### 2. Public Policy

The first time the term *public policy* appeared in a modern codification of law, was in the drafting of the French Code Civil.<sup>253</sup> Art. 6 of the Code states that: "One cannot derogate from laws which affect public policy and good morals through an agreement."<sup>254</sup> Laws which affect public policy and good morals are understood as domestic rules, which have the character of *ius cogens* in the sense that they are compulsory and impose a restriction on the autonomy of will of individuals.<sup>255</sup>

Public policy, however, cannot be restricted to certain imperative laws within the legislation. The concept of public policy, or *ordre public*, goes further and contains a general standard that envisages a judicial discretion of the Courts to challenge

<sup>252</sup> *The Bunga Melati Dua supra* at 118.

<sup>253</sup> G Husserl 'Public Policy and Ordre Public' (1938/1939) 25 *Virginia Law Review* 37 at 38.

<sup>254</sup> „On ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes mœurs.“

<sup>255</sup> Husserl *supra* at 38.

agreements between individuals that offend such standard.<sup>256</sup> This standard has to be ascertained by the Court on a case to case basis.<sup>257</sup> According to standard legal dictionaries the standard for the assessment of public policy is “the wider interest of society”<sup>258</sup> or the “fundamental concern to the state and the whole of society”<sup>259</sup>.

The scope of application for the concept of public policy has been developed by case law. However, it must be borne in mind that issues which affect public policy are dynamic in nature and vary from country to country<sup>260</sup> as they are based upon principles of morality in society.<sup>261</sup> Over time three major fields of law have been identified to be subject to public policy concerns: The law of status, criminal law and the law of contract.

### 2.1. Law of Status

The most important field in old case law but still very useful for the understanding public policy is the law of status. In *Fender v Mildmay*<sup>262</sup> the Court was faced with the question of enforceability of a promise to marry. In this case Mr Mildmay, who at the time was married to Mrs Mildmay, had made a promise to the unmarried Miss Fender to marry her. The marriage was to take place once the *decree nisi*, obtained by his wife, was made absolute. However, while still being married he maintained sexual relations with Miss Fender. Later, upon final divorce of his marriage to Mrs Mildmay he refused to marry. Miss Fender claimed for damages for breach of promise of marriage.

The Court held that such a promise would be against public policy and dismissed the claim. It was argued, with reference to earlier decisions<sup>263</sup>, that the standard in determining such matters was the rule of morality. The Court argued that the very idea of the *decree nisi* is the reconciliation of the spouses which takes six months to become a *decree absolute*. The agreement to marry made such reconciliation more difficult and furthermore it was also made during immoral sexual relations which were considered adultery at the time. Hence, the agreement hindered the resuming to normal matrimonial life which was seen as contrary to public policy.<sup>264</sup>

<sup>256</sup> D Lloyd *Public Policy* (1953) 9.

<sup>257</sup> *Ibid.*

<sup>258</sup> Osborn's Concise Law Dictionary, 10<sup>th</sup> Ed. (2005).

<sup>259</sup> Black's Law Dictionary, 9<sup>th</sup> Ed. (2009).

<sup>260</sup> Husserl *supra* at 41.

<sup>261</sup> R L Carter 'Public Policy and Insurability' (1986) 39 *The Geneva Papers on Risk and Insurance* 145.

<sup>262</sup> *Fender v Mildmay* [1936] 2 K.B. 111.

<sup>263</sup> *Spiers v Hunt* [1908] 1 K.B. 720; *Wilson v Carnley* [1908] 1 K.B. 729.

<sup>264</sup> *Fender v Mildmay* at 125.

However, Lord Justice Greer, in his dissenting decision, described the character of public policy as “fluid” and made it clear that especially in the field of matrimonial relations, the concept of public policy had “suffered very considerable changes from time to time.”<sup>265</sup>

## 2.2. Criminal Law

The second important field of application of the concept of public policy is the principle that nobody should benefit from his own criminal activities.<sup>266</sup> In the case of *Beresford v Royal Insurance*,<sup>267</sup> the policyholder for a life insurance policy, Major Rowlandson, committed suicide, which was still regarded a felony at the time.<sup>268</sup> His niece claimed under the life insurance but the Court, on appeal, dismissed the claim. The policy upon which the claim was based did cover suicide as cause of death. Therefore, the Court *a quo* had valued the sanctity of contract higher than the committing of a crime.<sup>269</sup> The Court of Appeal, however, stated that it could not enforce any contract which was illegal or against public policy.<sup>270</sup> It referred to the *status quo* in the criminal law at the time and applied the public policy principle that nobody should benefit from a crime committed. Furthermore, because Major Rowlandson was the policyholder and therefore the contractual partner of the insurer, his niece could not be placed in a better position.

The Court's justification for applying public policy was the protection of the public.<sup>271</sup> Further, the Court cited *Ritter v Mutual Life Insurance*<sup>272</sup> with approval, which held that “a contract, the tendency of which is to endanger the public interests or injuriously affects the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice”.<sup>273</sup>

## 2.3. Law of Contract

The third field of application is the Law of Contract. It has been consistently held that contracts which are entered into under coercion are against public policy. This was the case in *Kaufman v Gerson*.<sup>274</sup> The defendant's husband had misappropriated

<sup>265</sup> *Fender v Mildmay supra* at 120.

<sup>266</sup> Lloyd *op cit* at 21.

<sup>267</sup> *Beresford v Royal Insurance Co Ltd* [1937] 2 K.B. 197.

<sup>268</sup> *Ibid* at 211.

<sup>269</sup> *Ibid* at 208.

<sup>270</sup> *Ibid* at 209.

<sup>271</sup> *Ibid* at 214.

<sup>272</sup> *Ritter v Mutual Life Insurance Co* (1898)169 U.S. 139

<sup>273</sup> *Ibid* at 154.

<sup>274</sup> *Kaufman v Gerson* [1904-7] All E.R. Rep. 896.

money of the plaintiff and therefore the plaintiff made her sign an agreement by which she would be obliged to return the money and the plaintiff would refrain from taking legal actions against the husband which would have led to his prosecution. The contract was made in France and as the witness – an expert in French law – stated, not illegal and thus enforceable under French law. However, the English Court held that an agreement that was obtained under coercion could not be enforced. Sir Richard Henn Collins, M.R., citing various authorities<sup>275</sup> with approval, argued that such a contract, although legal in the country of origin, would be in conflict with essential public or moral interests.<sup>276</sup> Thus, the Court was referring to a principle of English public policy in private international law that any foreign agreement which would be contrary to domestic policy could not be enforced.<sup>277</sup>

With regard to the aforementioned decision of *Kaufman v Gerson*,<sup>278</sup> it is noted that current public policy issues of most countries, at least in the western hemisphere, are similar. As the House of Lords stated:

But there is, at any rate in the abstract, every reason to think that in most cases English public policy will be at one with, and will be illuminated by, clearly established principles of international law.<sup>279</sup>

Therefore, public policy – for the purpose of this Chapter – is understood as rules of morality and a shield to protect society from danger, which affects the moral values of society and which are not positively set out in legislation. The effect of the doctrine of public policy is the ability of a Court to declare a contractual agreement as unenforceable within their jurisdiction.

### 3. Public Policy and Ransom Agreements

The effect for ransom agreements, in the light of the *Kaufman v Gerson*<sup>280</sup> decision, is obvious. For reasons of public policy an English Court will not uphold any agreement which is obtained with coercion of one of the parties. In the case of ransom agreements such as the ones established between a shipowner and pirates, the shipowner is invariably under coercion resulting from a threat to the life of its

<sup>275</sup> I.a. N Bentwich *Westlake's Private International Law* 3<sup>rd</sup> Edition (1925) § 215.

<sup>276</sup> *Kaufman v Gerson supra* at 899.

<sup>277</sup> Bentwich *op cit* at § 215; L Collins *Dacey & Morris's The Conflict of Laws* (2000) 32-227.

<sup>278</sup> *Kaufman v Gerson supra*.

<sup>279</sup> *Kuwait Airways Corp v Iraqi Airways Co (Nos 5 and 6)* [2002] 2 A.C. 883 at 973.

<sup>280</sup> *Kaufman v Gerson supra*.

employees, its ship and its interest in the cargo and the freight. In *Kaufman v Gerson* the plaintiff threatened the defendant's husband – who had misappropriated the plaintiff's money – with a justified legal action. In the case of Somali pirates the threat is much greater and not justified because the capturing of the vessel is an act, which is an internationally recognised crime. Hence, any English Court would find a ransom agreement obtained under these circumstances unenforceable.

This question, however, is not relevant because in case of a breach of agreement on the side of the shipowner, the pirates have other alternatives to enforce their interest. If the pirates however, breach the agreement, the shipowner cannot simply look to Somali Courts to enforce their contract. The entire operation lies completely outside the legal system and therefore any question regarding legality or morality of ransom agreements is superfluous. The question is of significance in light of the insurance of ransom payments, a question which will be addressed below.

Similarly, the question of public policy with respect to the payment of ransom is irrelevant, because of the lack of legal consequences which are to be expected if such a payment would indeed breach such policy. The core idea of public policy, as explained above, is to prevent the parties from enforcing an agreement which violates fundamental aspects of morality in society. The payment, on the other hand, is a one-sided transfer of money and not a mutual agreement. As such, it cannot be subject to the doctrine of public policy.

Therefore, the discussion of Lord Rix in *The Bunga Melati Dua*<sup>281</sup> indeed navigates in “muddied waters”<sup>282</sup> as it does not clearly distinguish between the questions of public policy of payment and public policy of insurance. The latter will be addressed in turn.

#### **4. Public Policy and insurance contracts**

Similar to any other agreement between two parties, an insurance policy is subject to the doctrine of public policy. The following sections examine the implications of the doctrine of public policy for the insurance contract in general and for the ransom insurance in particular.

---

<sup>281</sup> *The Bunga Melati Dua supra.*

<sup>282</sup> *Ibid* at 122.

#### 4.1. Limitation of insurance cover

As a general principle, an underwriter cannot cover the risk for a cause which itself is illegal as was the case in *Beresford v Royal Insurance*.<sup>283</sup> Generally, a standard policy would include an illegality clause thus excluding the cover if the risk was caused by the assured's illegal conduct. In England, however, a policy would be void even in absence of such a clause according to s 41 of the English Marine Insurance Act<sup>284</sup> which read:

There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.

The discussion regarding the doctrine of public policy and its application towards insurance contracts does not stop where the conduct of the assured amounts to illegal behaviour. It has been argued that the doctrine also serves in other cases which will be outlined below.

##### 4.1.1. Effect on Public Good

Berliner submitted held that the doctrine of public policy serves the public good and therefore every policy which negatively affects the public welfare or well-being should be considered void.<sup>285</sup> An example would be the coverage of trivial risks against a relatively high premium. These policies are considered to lead to a waste of resources and to negatively influence the attitude of the policyholder.<sup>286</sup> It is argued that an assured who pays a high premium to cover a trivial risk is more likely to act dishonestly towards its insurer.

##### 4.1.2. Speculative Risks

Another group of insurance policies, which have been regarded as contrary to public policy, are those, which cover speculative risks such as business risks.<sup>287</sup> It is, however, not entirely clear what is meant by "speculative risks" as every risk in essence is speculative, otherwise it would not be a risk. The examples cited include a

---

<sup>283</sup> Carter *supra* at 147.

<sup>284</sup> Marine Insurance Act of 1906.

<sup>285</sup> Carter *supra* at 148 citing B Berliner *Limits of Insurability of Risks* (1982) .

<sup>286</sup> *Ibid.*

<sup>287</sup> *Ibid* at 149.

variety of risks that are common in the industry in the usual course of business.<sup>288</sup>

#### **4.1.3. Incentive to increase the Risk**

The most important group with regard to the payment of ransom includes all types of insurance policies which carry an incentive either for the assured or for a third person to cause the covered damage and thus would increase the risk.

A distinction must be made between the two groups: The first being where either the policyholder alone or in cooperation with a third party wilfully inflates the claim knowing that the insurer will pay. The second concerns the situation where the mere existence of an insurance policy leads to an increase in events giving rise to the claim, which cause the policyholder to claim and thereby influencing the chances of the risk to materialise. It is submitted that the insurance of ransom payments falls into the latter category.

#### **4.2. Ransom Insurance and Public Policy**

The insurance of ransom payments has been regarded as an incentive for kidnappers to act.<sup>289</sup> The rationale is that the insured victims, their families or employers are less reluctant to pay even higher amounts because of the provided cover. An examination of the issue of public policy of ransom insurances in case law will be discussed below. It should be stressed, however, that all of the cited authorities emanate from the English law.

##### **4.2.1. Altering the risk**

The term public policy entails a judicial shield to protect the public moral and society values. If the mere existence of a certain policy evidently increases the occurrences of crime, such a policy affects the public safety opposed to the moral values of society. However, one has to consider the scenario where a kidnapper is incited by the existence of a K&R insurance policy and kidnapping is considered a crime. The scenario is no different from *Beresford v Royal Insurance*<sup>290</sup> where the existence of the life insurance was Major Rowlandson's incentive to commit suicide which was a felony at the time.<sup>291</sup>

Conversely, it has been submitted that the establishment of K&R insurances

---

<sup>288</sup> Carter *supra* at 150.

<sup>289</sup> *Ibid* at 152.

<sup>290</sup> *Beresford v Royal Insurance supra*.

<sup>291</sup> It should be stressed, however, that the existence of life insurances has not lead to an increase in suicides.

increases the risk if its existence becomes known.<sup>292</sup> Hence, many insurers include a warranty into their policies which deprives the assured of cover in case the existence of the policy is revealed.<sup>293</sup> Yet, it must be borne in mind that in regions where kidnapping for ransom is a widespread practice among criminal gangs, it is a known fact that almost all major foreign companies who employ people in those areas take out K&R insurance cover for their employees.

With regard to the incidents in Somali waters, it has been reported that the pirates, after hijacking a vessel, proceed very quickly and with great professionalism to negotiate the ransom payment.<sup>294</sup> In the case of the *Bunga Melati Dua* it was reported that:

It is clear that they [the pirates] take vessels in order to ransom them and invariably negotiate with the shipowner or other interested party for the release of the vessel, cargo and crew, in exchange for a payment which represents an economic proportion of the value of the property at stake.<sup>295</sup>

Thus, it can be argued that the existence of the policy alters the reluctance of shipowners to pay and as such provides a strong incentive for kidnappers, especially when the purpose of kidnapping is solely the financial benefit. Therefore, the existence of the policy alters the risk which it covers.

#### **4.2.2. Breach of public policy**

Case law on the question of whether the insurance of ransom payments constitutes a violation of public policy is scarce. The only recent case which addressed the issue was the aforementioned case of *Royal Boskalis*. However, the question of ransom insurance was only answered indirectly.

In this case it was held that ransom payments could be recovered under Sue & Labour. Thus, the Court implicitly agreed that the insurance of ransom would not constitute a violation of public policy.<sup>296</sup> However, the Court recognised that if the

---

<sup>292</sup> Clendenin *supra* at 754.

<sup>293</sup> *Ibid* at 755.

<sup>294</sup> In the case of *The Bunga Melati Dua* the vessel was released upon payment of \$2,000,000 ransom 11 days after it was captured.

<sup>295</sup> *The Bunga Melati Dua supra* at 101.

<sup>296</sup> *Royal Boskalis supra* at 720.

payment would be recoverable it could encourage such threats.<sup>297</sup>

In *The Bunga Melati Dua*<sup>298</sup> the Court was concerned with the question of whether the payment of ransom was a legitimate measure to regain cargo from being captured. Hence, the issue of public policy of ransom insurance was left aside.

The question has also scarcely been addressed in academic writing. Arnould's Law of Marine Insurance holds, with reference to the cases dealt with above, that:

There appears to be little doubt that where a payment which is not itself illegal under any relevant law is made to secure the release of the property, this can be recovered even though the persons demanding the payment are not acting lawfully in so doing. Thus, for example, payment to recover property from pirates or hijackers must, it is submitted, in general be recoverable.<sup>299</sup>

Thus, it can be concluded that the insurance of ransom payments does not breach public policy despite the fact that it possibly encourages further hijackings.

#### 4.2.3. Conclusion

The existing authorities – all of which were concerned with the English perspective – do not regard the insurance of ransom payments as a violation of public policy despite the fact that it possibly encourages further kidnappings and therefore endangers the public safety.

An analysis of the German perspective will now be outlined, which until 1998 differed remarkably with respect to question of public policy.

### 5. The German Perspective

In Germany the entire insurance market is supervised by a governmental agency called Federal Financial Supervisory Authority,<sup>300</sup> known by its abbreviation as BaFin. This agency was established in 2002 by the Financial Services and Integration Act. The aim of this act was to merge three previously existing supervisory agencies into one main body. Those former agencies included the Federal Banking

---

<sup>297</sup> *Ibid* at 699.

<sup>298</sup> *The Bunga Melati Dua supra*.

<sup>299</sup> *Arnould's op cit* at 25-21.

<sup>300</sup> Bundesanstalt für Finanzdienstleistungsaufsicht.

Supervisory Office<sup>301</sup> (BAKred), Federal Supervisory Office for the Securities Trading<sup>302</sup> (BAWe) and the Federal Insurance Supervisory Office<sup>303</sup> (BAV).

Anyone who wishes to offer insurance cover in Germany needs to comply with the standards set out in the Insurance Supervision Law<sup>304</sup> (VAG). This compliance is supervised by the BaFin, formerly by the BAV.<sup>305</sup> As an integral requirement for the permit to offer insurance, the insurer has to present to the authority the insurance policy it intends to offer.<sup>306</sup>

The BaFin, as governmental agency and legal successor of the BAV, has the authority to allow or to prohibit certain insurance practices within its discretion and the limits of the law. As such, it is empowered to refuse to grant permission to certain kinds of policies when it is of the opinion that they might constitute a violation of the law.

Until 1998 the then BAV considered the insurance of ransom payments a violation of the good morals (*gute Sitten*)<sup>307</sup> and thus void pursuant to § 138 (1) BGB.<sup>308</sup> It argued that the offer of such insurances would breach the *ordre public* because it would lead to an increase of kidnappings.<sup>309</sup> Further, private security agencies which would be involved could impede the investigation of the police and public prosecutors.<sup>310</sup>

After 1998 the BAV altered its position and allowed the offer of such policies with certain restrictions. The argument in favour of this sudden allowance was “new experiences in the EU”. Unfortunately, the BAV failed to further explain these new experiences.

The restrictions impose duties on both parties and can broadly be categorised into three parts:

---

<sup>301</sup> Bundesaufsichtsamt für das Kreditwesen.

<sup>302</sup> Bundesaufsichtsamt für den Wertpapierhandel.

<sup>303</sup> Bundesaufsichtsamt für das Versicherungswesen.

<sup>304</sup> Versicherungsaufsichtsgesetz.

<sup>305</sup> § 5 (1) VAG.

<sup>306</sup> § 5 (3) 2 VAG.

<sup>307</sup> See *Rundschreiben* 3/1998 (VA) 'Hinweis des BAV zum Betrieb von Lösegeldversicherungen' (21. July 1998).

<sup>308</sup> § 138 (1) BGB reads: Ein Rechtsgeschäft das gegen die guten Sitten verstößt, ist nichtig. (Engl.: A legal act that violates the good morals is void.)

<sup>309</sup> Schneider *op cit* at 11.

<sup>310</sup> *Ibid.*

(i) It is illegal for an insurer to advertise for the policy, to bundle the insurance together with other insurances and to offer such an insurance for longer than one year without reviewing the terms and especially the premium. Further, the premium has to be assessed in accordance with the economical situation of the assured.

(ii) The assured is obliged to consult an independent and competent security service provider for an assessment of the individual risk situation and to establish a safety plan. Further, the assured is obliged to maintain the existence of the policy confidential.

(iii) Finally, both the assured and the insurer are obliged to contact the police immediately upon any incident which might lead to a payout of the policy.

Thus, the BAV pre-1998 clearly prohibited the practice of insuring ransom payments and as such positioned itself close to the Colombian legislation. After 1998 it changed its perspective and allowed the practice restrictively without further argumentation. The underlying notion, however, is clear: The K&R insurance in Germany until today carries a notion of semi-legality due to obvious moral issues connected with such insurance practice.

## **6. Conclusion**

The agreement to pay ransom in exchange for releasing a hostage or captured property is void. It is a contract which is concluded under duress of one of the parties and is void as such, whether or not it violates public policy. The remaining question addresses the morality of the insurance agreements to cover ransom payments. Such contracts have been found to be legal and enforceable in English law, which in the case of marine insurance, is the internationally predominant law. Nevertheless, the concerns within the German insurance system pre-1998, its restrictions today and various academic writings on the topic illustrate that the topic is clouded with controversy.

## Chapter Six

### DISCUSSION

#### 1. Introduction

Earlier chapters have revealed numerous unanswered issues in connection with the payment and the insurance of ransom. In this chapter, several of these issues will be addressed. The first section will discuss the arguments against and in favour of the prohibition of ransom payments. The second section will address the questions surrounding the insurance of ransom payments. Finally, practical recommendations for the insurance industry will be formulated.

#### 2. Prohibition of Ransom Payments

The strongest argument in favour of the prohibition of ransom payments is that the payment meets the terms set by the kidnappers. As such, it encourages further abductions.

As demands are increased, these even higher payments fuel the industry and make further abductions more lucrative. Consequently, it creates a vicious cycle. In the case of Somalia it has been reported that the business of piracy has even attracted investors and this has led to an entire industry. Especially in the case of Somali pirates, a firm non-payment policy would immediately break this cycle. And whereas other criminal gangs use abduction for several purposes – among which are political pressure, exchange of incarcerated gang leaders or funding of further criminal acts – the only purpose for the pirates in Somalia is to obtain high ransom sums.

Prohibition would have devastating effects on the pirate industry. Firstly, further investments would be expected to stop as investors usually refrain from business with little outcome. Secondly, the lack of both investments and ransom will impair local gangs in meeting their expenses for arms, ammunition, fuel and equipment – all of which are needed in order to successfully hijack a VLCC such as the *Sirius Star*.

Finally, the expectations of a successful attack would decrease and pirates would refrain from further actions.

These arguments, which have been used both today as well as in former times, fall short of empirical evidence. As the Colombian Constitutional Court explained, close friends, families and even shipowners will always attempt to circumvent such prohibitions for humanitarian or moral reasons. Furthermore, a shipowner might also pay despite a legal prohibition for reasons of its reputation as an employer. Consequently, any prohibition by law will face serious difficulties concerning its enforcement.

Coupled with practical difficulties, the prohibition of ransom payments faces various constitutional issues such as the right to life, human dignity and the right to freedom of movement. By prohibiting the payment of ransom the State effectively bars the only realistic chance of the victim being released. In the case of *The Bunga Melati Dua*<sup>311</sup> it was held that the “safest, most timely and effective means to secure the release of a ship’s crew in such circumstances has proven to be, in case after case, to negotiate and subsequently pay a ransom.”<sup>312</sup> This possibility of paying ransom is denied to the friend, family or shipowner in their effort to release the victim.

Thus, any prohibiting State sacrifices the constitutional rights of the kidnapped person for the greater goal of fighting the kidnapping industry. But as the Colombian Constitutional Court convincingly stated: “While the threat to life and dignity of the kidnapped person are eminent, the danger to public order of the State is only potential.”<sup>313</sup>

The Court, however, left the door ajar for a voluntary acceptance of a kidnapped victim not to be released upon payment of ransom.<sup>314</sup> Hence, in cases where a seaman voluntarily joins an operation in an area where kidnapping for ransom is prevalent, being fully aware of the fact that the company follows a non-payment policy, it would be justified for the company not to pay. As such, the decision refers a margin of discretion to the shipowner not to pay. This does not, however, allow a State to criminally prosecute anyone who pays if the victim has accepted its fate. It is

---

<sup>311</sup> See Chapter V.

<sup>312</sup> *The Bunga Melati Dua supra* at 101.

<sup>313</sup> See Sentencia C-542-93.

<sup>314</sup> See Sentencia C-542-93.

unthinkable that criminal charges would depend on the voluntary decision of a kidnapped person, not to be “bailed” out.

In the light of the above, the U.S. approach appears problematic. The declared purpose of the U.S. administration of blocking certain individuals either under the anti-terror legislation or under the Somalia Sanction Regulations is to address the increasing threat of kidnappings and the further destabilisation of Somalia. The intention is to disrupt the means for funding the maintenance of the piracy infrastructure and the financing of further attacks. Thus, the argument is similar to the reasons behind prohibiting ransom payments and as such proves to be a non-payment approach in the disguise of a Sanction Regulation. This approach is in accordance with the general policy of the U.S. government neither to negotiate with terrorists nor to pay ransom. It has repeatedly been held that the payment of ransom undermines the U.S. foreign policy.<sup>315</sup> Hence, the Sanction Regulation is an elegant way to enforce a governmental policy upon private individuals and entities.

It would be beyond the scope of this dissertation to examine whether the legal framework to address piracy actually violates the U.S. Constitution. It can nevertheless be concluded that the U.S. approach towards the piracy problem in Somalia restricts shipowners in their ability to rescue their employees and thereby seriously puts the crew’s lives in danger

In conclusion, I submit that the prohibition of ransom payment and consequential criminal charges for any violation of such would breach fundamental principles of the State’s obligation to protect the dignity and life of a person. Therefore, the payment of ransom cannot reasonably be prohibited.

### **3. Insurance of Ransom Payments**

The insurance of ransom payments is a different issue altogether. As described above, the purpose of this insurance is twofold: On one hand, the ransom sum itself is covered. On the other hand, professional assistance in negotiating and delivering of the ransom and prior consultation is rendered. With respect to the latter functions, the K&R insurer does not differ from a private security company or even the police in

---

<sup>315</sup> See Clendenin *supra* at 741.

rendering assistance during the time of duress. The following part of the discussion will therefore only focus on the former function – the cover for the actual ransom sum.

The following discussion regarding the legitimacy of ransom insurance, will be divided into three parts. The first part examines the applicability of the distinction between piracy and armed robbery at sea in public international law for the purpose of ransom insurance. The second part examines the legitimacy and public policy issues of specific K&R insurance policies and the third part discusses the use of standard marine insurance instruments for the purpose of ransom insurance.

### **3.1. Piracy and Armed Robbery at Sea**

Public international law distinguishes between piracy and armed robbery at sea for reasons of national sovereignty of criminal prosecution. As explained above,<sup>316</sup> armed robbery at sea is an act similar to piracy but it is committed within the territorial waters of a coastal State. The right to prosecute the robbers only rests with the coastal State, whereas in the case of piracy on the high seas, every State has the right to prosecute.

This distinction, however, does not apply to the law of marine insurance. It has been held that it does not make any difference for the parties to a marine insurance policy whether the loss due to piracy occurred on the high sea or in territorial waters of a coastal State. The reimbursement of the assured shipowner bears no negative effect on the prosecution of the pirates by the coastal State.

The insurance of ransom payments, however, is different. Bearing in mind the effect that the payment of ransom has on the local kidnapping industry and the potential interest of a country to establish a domestic anti-kidnapping policy without interference of foreign ransom payers, it could be argued in favour of a distinction between piracy and armed robbery at sea.

In *Hargroves*<sup>317</sup> the U.S. Court held that the Act of State doctrine bars any Court from interfering with the conduct of foreign State authorities. The position is the same in the interference of prosecution authorities.

---

<sup>316</sup> Chapter II 3.1.

<sup>317</sup> *Hargroves supra*.

The Colombian government, knowing that their anti-ransom insurance policy is grossly undermined by foreign underwriters, provides that no judicial support can be expected from Colombia. The general advice to foreign companies is not to pay.

As territorial waters are in effect the extension of a country's territory at sea, the same holds true for the illicit capture of a vessel within these waters. Thus, a country's non-payment policy should be respected by both shipowner and its respective underwriter.

On the other hand, it can be argued that even ransom which is paid for a ship which was captured on the high sea affects the domestic policy. The rationale is that every pirate is based in some country. Consequently, every ransom payment eventually ends up in that country's economy. However, this would suggest that the shipowner, although sailing on the high sea, would have to submit itself to the law of the country from which the pirate originated, which is impossible.

In conclusion, a shipowner and its ransom insurer can be bound by the laws of their own countries, which might provide for a non-payment policy towards pirates in general or certain individuals such as the U.S. Sanction Regulations. They can also be bound by the law of the coastal State in case the vessel enters territorial waters. If the coastal State follows a non-payment policy or at least a non-ransom insurance policy such as Colombia, the shipowner and its insurer should be barred from paying out. The public international law distinction between armed robbery at sea and piracy therefore should indeed be made applicable to the law of insurance with respect to ransom insurance.

### **3.2. K&R Insurance**

Reports show that the K&R market has made considerable profits in recent years due to the increasing piracy threat around the Horn of Africa.

The K&R premiums in the marine sector are said to have increased tenfold, amounting to 1 percent of the insured ransom sum per voyage.<sup>318</sup> Thus, if the

---

<sup>318</sup> A Boden 'The Economic Costs of Maritime Piracy' ( December 2010). Available at [http://oceansbeyondpiracy.org/sites/default/files/documents\\_old/The\\_Economic\\_Cost\\_of\\_Piracy\\_Full](http://oceansbeyondpiracy.org/sites/default/files/documents_old/The_Economic_Cost_of_Piracy_Full)

shipowner is insured for a sum up to \$3 million, the premium for the voyage which takes between five and seven days is \$ 30,000.

Hence, the industry has benefited largely from this threat. However, it is the nature of an insurer to profit from the risk that the assured doesn't want to bear on its own. It also does not render the product immoral only because a criminal act is involved. Otherwise, any doctor who treats patients with injuries resulting from criminal acts or criminal lawyers defending suspects in a trial would equally be acting immorally. The difference in ransom insurance is that the underwriter contributes directly to the kidnapping industry. As argued above, a family member, friend or employer of the kidnapped victim has a personal relation to the victim and therefore his or her acts are based on altruistic motives. The insurer on the other hand acts upon a contractual obligation towards the assured. Thus, the justification of the shipowner as employer to pay the ransom does not apply to the insurer.

The Colombian Constitutional Court held that this very motive of the ransom insurer is the reason to prohibit this kind of ransom payment because it lacked the "humanitarian" motive which was required for its justification. Without this motive any payment is simply regarded as a direct contribution to the kidnapping industry.

Recalling the origins of ransom insurance, the humanitarian motive was the reason for the early *Sklavenkassen* in the cities of the Hansa. As mentioned above, the *Sklavenkasse* was a mutual insurance between shipowners and crew, administered by the Admiralty. Furthermore, it has been reported that also the society, through the church, contributed to ransom payments through alms collection. Thus, the payment for the release of the hostage was perceived as an early form of welfare and poor-relief and not as a business opportunity for private insurance companies.

Conversely, it must be borne in mind that the families of the kidnapped victims often lack the financial means to meet the demands. In the case of shipowners, however, this argument finds no application as it is assumed that an average shipowner has the means to pay.

In conclusion, I therefore submit that the payment of ransom should not be a marketable insurance available for private insurance companies. A practical

recommendation for the shipping industry will be formulated further below.

### **3.3. Marine Insurance**

Marine insurance, however, differs greatly from K&R insurances. The obvious reason is that hull and cargo underwriters only pay out for a loss or a prevented loss of the vessel or her cargo. The release of the crew does not naturally fall within the underwriter's liability. Thus, if a hull underwriter reimburses the payment of ransom under Sue & Labour, the purpose is to indemnify for expenses which were effected in order to release the insured subject. Therefore, the underwriter itself has an interest in the payment of ransom.

The situation is similar to the case of general average contributions. The underwriter, which covers the shipowner's or the cargo's share of general average, only reimburses for a contribution which eventually prevented the entire loss for which the underwriter also would have been liable.

I submit that a contribution or even the entire reimbursement of ransom payments through traditional instruments of marine insurance is legitimate.

### **4. Recommendation**

Bearing in mind both legal and moral issues surrounding the payment and the insurance of ransom, I conclude with the following recommendations for the marine insurance industry.

It has been argued in this paper that the only grounds upon which ransom for the release of the crew can be paid are humanitarian motives. As such the payer needs to have a legal or a moral responsibility towards the abducted crew. Hence, only the shipowner is able to effect such payments. It would, however, place a heavy financial burden on each shipowner if there is no legal possibility to obtain some sort of cover for the payment. Bearing in mind the origins of the ransom insurance and the fact that the early payers were associations of shipowners, it would be easily arguable to hold P&I clubs primarily liable. Also from a modern point of view it would make legal and commercial sense to place the burden on the clubs:

The shipowner has a legal obligation towards its employees to create a safe working environment. It can be argued that this obligation extends to duty to provide all necessary means in order to release the crew from abduction. As a legal obligation,

the payment thus falls within the liability of the P&I clubs as liability underwriters.

Commercially it would make sense because the P&I club is not a profit-making company. As such the additional fee which a shipowner would have to pay in order to be covered would be much lower than on the K&R market.

On the other hand, also the value of the ship and the cargo play an important role in the amount of ransom which is demanded. The clubs therefore should be able to take recourse against the respective hull and cargo underwriters. In the case of hull, the contractual nexus between shipowner and hull underwriter could be passed on to the shipowner's P&I club through subrogation. In the case of cargo no such nexus exists. However, this paper suggests that underwriters could engage in an inter-insurance agreement similar to the Inter-club NYPE Agreement for cargo claims.<sup>319</sup> Such an agreement would provide that hull and cargo contribute a fixed percentage to the ransom payment. Exceptions could be implemented for cases where the ship or the cargo is exceptionally valuable or especially low in value.

Such an approach would have several advantages:

On one hand, this system would have all advantages of a K&R insurance, being primarily that the assured shipowner is relieved of the exposure to immediate ransom demands which it might not be able to meet on the spot. The financial risk of having a vessel kidnapped remains calculable and the payment is guaranteed.

On the other hand, this system is based on more solid moral and legal grounds than the typical K&R insurance. As the P&I club merely is an association of shipowners, the cover of ransom payment by the clubs merely spreads the financial risk from one individual shipowner among others without anyone directly benefiting from it. As all shipowners share a common interest in the safety of the crew, the payment remains founded on humanitarian motives.

---

<sup>319</sup> The NYPE (New York Produce Exchange) is a widely used standard form for time charterparties. The members of the International Group of P&I agreed on an Inter-club Agreement to settle liabilities of owners and charterers in cargo claims on a fixed apportionment in order to avoid costly and long arbitration proceedings. The latest version of this agreement is from 1996.

## 5. Conclusion

The payment of ransom serves the illegal and life-threatening industry of piracy in Somalia and – though to a lesser extent – in other parts of the world. As such, it provides material support to that industry and fuels its growth. Ransom should only be allowed in law to persons who have a personal interest and legal or moral grounds. High on the list would be family members or friends who have a personal connection with the hostage or shipowners as employers who have a business interest or obligation relating to the safety or welfare of the hostages.

The insurance of ransom payments in cases of hijacked vessels should be restricted to P&I clubs as they are associations of shipowners who share a common and mutual interest in the safety of their crews. The clubs are not driven by profit, and further can take recourse against hull and cargo underwriters for contributions as the amount of ransom often depends on the value of ship and cargo.

Such a system would maintain the benefits of the current K&R policies for shipowners but alleviate moral difficulties.

Ransom payments should be seen as a temporary but not satisfactory solution. Whoever pays the ransom and in what way the payment is effected, the ransom aggravates the problem as a whole. The payment thus addressed the effect but does not root the cause.

## BIBLIOGRAPHY

### 1. Primary Sources

#### *a) Legislation*

English Merchant Shipping Act 1906

English Ransom Act of 1782 (22 Geo. III cap. 25)

English Supreme Court Act of 1981

United States Foreign Corrupt Practices Act of 1977 (United States Code Title 15 Chapter 2b para 78dd-1 to dd-3)

Antiterrorism and Effective Death Penalty Act of 1996 (United States Code Title 18 Part I Chapter 113B)

Presidential Executive Order 13536 (12 April 2010)

International Emergency Economic Powers Act (United States Code Title 50 Chapter 35)

National Emergency Act (United States Code Title 50 Chapter 34)

United Nations Participation Act (United States Code Title 22 para 287 (c) )

Somalia Sanction Regulation (Code of Federal Regulations Title 31 para 551)

Money Laundering Control Act of 1986 (United States Code Title 18 Part I Chapter 59 para 1956 (a) (1))

Bank Secrecy Act of 1970

German Commercial Code (HGB) of 1897

German Financial Services and Integration Act of 2002

German Insurance Supervision Law (VAG) of 1901

German Civil Code (BGB) of 1900

Colombian Anti-Abduction Act 40 of 1993

Colombian Act 599 of 2000

French Code Civil of 1804

#### *b) International Conventions*

United Nation Convention of the Law of the Sea

1833 UNTS 397 (10 Dec 1982)

International Convention for the Suppressing of the Financing of Terrorism

2178 UNTS 85 (9 Dec 1999)

Convention against the Taking of Hostages 1316 UNTS 205 (17 Dec 1979)

Convention for the Suppression of Unlawful Acts against the Safety of

Maritime Navigation 1678 UNTS 222 (10 March 1988)

York-Antwerp Rules of 1860

Hague-Visby Rules of 1924

**c) Insurance Policies and P&I club Rules**

International Hull Clause 2003 (IUA Hull 03)

GARD Rules 2011

SKULD Rules 2011

**d) Case Law**

*Barnard v Adams* 51 U.S. 270

*Beresford v Royal Insurance Co Ltd* [1937] 2 K.B. 197

*Birkley v Presgrave* 1 East 220

Corte Constitucional de Colombia, Sentencia C-542-93

*Fender v Mildmay* [1936] 2 K.B. 111

*Hargroves v Underwriters at Lloyd's, London* 937 F. Supp. 595

*Hicks v Palington* (1590) Moore's (QB) 297

*Kaufman v Gerson* [1904-7] All E.R. Rep. 896

*Masefield AG v Amlin Corporate Member Ltd* [2011] 1 CLC 97

*Montgomery and Co. V Indemnity Mutual Marine Insurance Co.*  
(1902) 1 K.B. 734

*Peters v The Warren Insurance Company* 39 U.S. 99 at 110

*Spiers v Hunt* [1908] 1 K.B. 720

*The Fusilier* (1865) Br & Lush 341

„*The Andreas Lemos*“ *Athens Maritime Enterprises Corp v Hellenic Mutual War Risk Assn Ltd* [1982] 2 Lloyd's Rep. 483

*Republic of Bolivia v Indemnity Mutual Marine Insurance Co*  
[1909] 1 KB 785

*Wilson v Carnley* [1908] 1 K.B. 729

## 2. Secondary Sources

### a) Books

Alix, Ernest K. *Ransom Kidnapping in America / 1874-1974*  
Southern Illinois University Press, 1978

Bentwich, Norman *Westlake's Private International Law* 7<sup>th</sup> Edition (1925)  
Sweet & Maxell, London

Bernstein, William *A Splendid Exchange* (2008) Atlantic Books, London

Collins, Lawrence *Dicey & Morris's The Conflict of Laws* 14<sup>th</sup> Edition (2000)  
Sweet & Maxwell, London

Cooke, Julian and Cornah, Richard *Lowndes and Rudolf: General Average and York-Antwerp Rules* 13<sup>th</sup> Ed. (2008) Sweet & Maxwell, London

Gilman et al *Arnould's Law of Marine Insurance and Average*, 17<sup>th</sup> Ed.  
(2008) Sweet & Maxwell, London

Garner, Bryan A. *Black's Law Dictionary* 9<sup>th</sup> Ed. (2009) Sweet & Maxwell, London

Geiß, Robin, Petrig, Anna *Piracy and Armend Robbery at Sea* (2010) Oxford University Press

Hackworth, Green H. *Digest of International Law Vol. II* (1941) United Stated Government Printing Office, Washington

Lloyd, Dennis *Public Policy* (1953) University of London, The Athlone Press, London

Longmans *Oppenheim's International Law* 8<sup>th</sup> Edition (1955) Green and Co

Neugebauer, Ralf *Versicherungsrecht vor dem Versicherungsvertrag* (1990)  
Klostermann, Frankfurt am Main

Pennell, Alejandro C. *Bandits at Sea* (2001) New York University Press, New York

Poland, Simon and Rooth, Thony *Gard Handbook on P&I Insurance* (1996)  
Assuranceforeningen Gard

Petrie, Donald A. *The Prize Game* (1999) Naval Institute Press, Annapolis

Woodley, Mick *Osborn's Concise Law Dictionary* 10<sup>th</sup> Edition (2005) Sweet & Maxwell, London

Schneider, Gabriele *Versicherungsschutz gegen Erpressungen* (2003) VersR-Schriftenreihe 19, Verlag Versicherungswissenschaft, Karlsruhe

Van Niekerk, J.P. *The Development of the Principles of Insurance Law in the*

*Netherlands Vol I* (1998) Juta & Co Ltd., Cape Town

**b) Articles**

Beri, Ruchita 'Piracy in Somalia: Addressing the Root Causes' (2011) 35 *Strategic Analysis* 452

Burgess, Jr. and Douglas R. 'Hostis Humani Generi: Piracy, Terrorism and a new International Law' (2005-2006) 13 *University of Miami International & Comparative Law Review* 293

Carter, Robert L. 'Public Policy and Insurability' (1086) 39 *The Geneva Papers on Risk and Insurance* 145

Clendenin, Meadow '„No Concession“ with no Teeth' (2006-2007) 56 *Emory Law Journal* 741

Craven, W. Frank 'The Earl of Warwick, a Speculator in Piracy' (1930) 10 *The Hispanic American Historical Review* 457

De Goede, Marieke 'Hawala Discourses and the War on Terrorist Finance' (2003) 21 *Environment and Planning* 513

Gauci, Gotthard 'Piracy and its legal Problems' (2010) 41 *Journal of Maritime Law & Commerce* 541

Halberstam, Malvina 'Terrorism on the High Seas: The Achille Lauro, Piracy and IMO Convention on Maritime Safety' (1988) 82 *American Journal of International Law* 269

Ho, Joshua H. 'Piracy around the Horn of Africa' (2009) 21 *The Korean Journal of Defence Analysis* 501

Husserl, Gerhart 'Public Policy and Ordre Public' (1938/1939) 25 *Virginia Law Review* 37

Jingjing Xu 'Piracy as a Maritime Offence' (2007) *Journal of Business Law* 639

Jowitt, Claire 'Piracy and politics in Heywood and Rowley's Fortune by Land and Sea (1607–9)' (2003) 16 *Renaissance Studies* 217

Kenney, Samantha 'Regional Shortcomings and Global Solutions: Kidnap, Ransom and Insurance in Latin America' (2007-2008) 14 *Connecticut Insurance Law Journal* 557

Lennox-Gentle, Thaine 'Piracy, Sea Robbery and Terrorism' (2010) 37 *Transport Law Journal* 199

Paulsen, Bruce G. and Lafferty, Ellen 'Symposium: Maritime Catastrophes: Marine Investigation and Mass Claim Practice' (2011) 85 *Tulane Law Review* 1241

Puchala, Donald J. 'Of Pirates and Terrorists: What Experience and History

teach' (2005) 26 *Contemporary Security Policy* 1

Ressel, Magnus 'The North European Way of Ransoming: Explorations into an Unknown Dimension of the Early Modern Welfare State' Vol 35 (2010) 4 *Historical Social Research, Historische Sozialforschung* 125

Roach, J.A. 'Agora: Piracy Prosecutions' (2010) 104 *American Journal of International Law* 397

Rubin, Alfred P. 'The Law of Piracy' (1986-1987) 15 *Denver Journal of International Law & Policy* 173

Russell, Charles A. and Miller, Bowman H. 'Profile of a Terrorist' in Y Alexander and L Z Freedman *Perspectives on Terrorists* (1983) Wilmington, Delaware, Scholarly Resources Inc.

Rutkowski, Lawrence et al 'Mugged twice? Payment of Ransom on the high seas' (2010) 59 *American University Law Review* 1425

Senior, W. 'Ransom Bills' (1918) 34 *The Law Quarterly Review* 49

Spencer, Johnathan 'Hull Insurance and General Average' (2009) 83 *Tulane Law Review* 1227

### **c) Electronic Resources**

#### **aa) Articles**

Boden, Anna 'The Economic Costs of Maritime Piracy' ( December 2010). Available at [http://oceansbeyondpiracy.org/sites/default/files/documents\\_old/The\\_Economic\\_Cost\\_of\\_Piracy\\_Full\\_Report.pdf](http://oceansbeyondpiracy.org/sites/default/files/documents_old/The_Economic_Cost_of_Piracy_Full_Report.pdf) [Last accessed on 12 August 2011].

Pham, J. Peter 'Pondering Somali Piracy' (23 April 2009) *World Defence Review*. Available at <http://worlddefensereview.com/pham042309.shtml> [Accessed on 4 July 2011].

Rice, Xan and Glendinning, Lee 'Pirates anchor hijacked Supertanker off Somalia Coast' (18 November 2008) *The Guardian*. Available at <http://www.guardian.co.uk/world/2008/nov/18/somalia-oil> [last accessed on 3 August 2011].

Tharoor, Ishaan 'How Somalia's Fishermen became Pirates' (18 April 2009) *Time Magazine*. Available at <http://www.time.com/time/printout/0,8816,1892376,00.html> [Accessed at 10 June 2011]

'Somali Pirates free Greek Tanker after record Ransom' (18 January 2010) *BBC News*. Available at <http://news.bbc.co.uk/2/hi/africa/8464921.stm> [Last accessed on 3 August 2011].

'Saudi super-tanker taken to Somali pirate lair' (18 November 2008) *Google News*. Available at [http://www.google.com/hostednews/afp/article/ALeqM5hN1EMARGCe11pJ\\_7BXMK1edC\\_DVA](http://www.google.com/hostednews/afp/article/ALeqM5hN1EMARGCe11pJ_7BXMK1edC_DVA) [Last accessed on 10 August 2011].

'Saudi Tanker freed off Somalia' (9 January 2009) *BBC News*. Available at <http://news.bbc.co.uk/2/hi/africa/7820311.stm> [Last accessed on 10 August 2011].

### **bb) Homepages**

Homepage International Chamber of Commerce, Piracy News & Figures. Available at <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures> [Last accessed on 15 August 2011].

Homepage of SKULD, Piracy FAQ. Available at <http://www.skuld.com/News/Archive/Skuld-News-Archive/Skuld-News-Archive-2009/Maritime-Security---Piracy-related-issues/> [last accessed on 18 July 2011].

Homepage of the U.S. Department of State, Foreign Terrorist Organisations. Available at <http://www.state.gov/s/ct/rls/other/des/123085.htm> [Accessed at 29 June 2011].

Homepage of the U.S. Department of Treasury, Terrorism and Financial Intelligence, Office of Foreign Assets Control. Available at <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx> [Accessed at 29 June 2011].

Homepage of the U.S. Department of the Treasury, Resource Center, Specially Designated Nationals List. Available at <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> [Accessed on 1 July 2011].

### **cc) Reports**

Seacurus Insurance Bulletin – Issue 02 – March 2010. Available at [http://www.espadaservices.com/news\\_pr/Seacurus\\_Issue\\_02\\_V5.pdf](http://www.espadaservices.com/news_pr/Seacurus_Issue_02_V5.pdf) [Accessed on 20 July 2011].

'Official NATO Statement on M/V Leopard's Hijacking' (15 January 2011) *Bosphorus Naval News*. Available at <http://turkishnavy.blogspot.com/2011/01/official-nato-statement-on-mv-leopards.html> [Last accessed on 10 August 2011].

Romero, Jorge et al. 'The Pirates of Puntland' (March 2009) *K&L Gates Report March*. Available at [http://www.klgates.com/files/Publication/ac22f46f-de64-41d5-a99c-8566b961c41e/Presentation/PublicationAttachment/fbdacf5a-55e1-408d-833b-a4bc8a15dc70/3\\_09\\_The\\_Pirates\\_of\\_Puntland.pdf](http://www.klgates.com/files/Publication/ac22f46f-de64-41d5-a99c-8566b961c41e/Presentation/PublicationAttachment/fbdacf5a-55e1-408d-833b-a4bc8a15dc70/3_09_The_Pirates_of_Puntland.pdf) [Accessed in 30 June 2011].

Monthly Report for the International Chamber of Shipping (April 1, 2010 to May 15, 2010). Available at [http://www.marisec.org/ics-isfcirculars/ics-isfcirculars10/ICSISF\\_10\\_31%20US%20DEVELOPMENTS%20\\_2\\_.pdf](http://www.marisec.org/ics-isfcirculars/ics-isfcirculars10/ICSISF_10_31%20US%20DEVELOPMENTS%20_2_.pdf) [Accessed on 1 July 2011].