

PIRACY AND GENERAL AVERAGE

In relation to marine insurance



University of Oslo
Faculty of Law

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1. Introduction

1.1 Choice of topic

The objective of this thesis is to analyze the term piracy in relation to marine insurance and shipowner`s possibilities to recover cost incurred by piracy.

The increase in piracy attacks has resulted in uncertainty amongst shipowners and battles between insurers about the insurance cover related to piracy. As a result of this, the Norwegian Marine Insurance Plan (NMIP and the Plan) of 1996 version 2010 has extended the range of what is considered to be piracy as opposed to armed robbery. The piracy term is elaborated and analyzed below. It is of importance for the shipowner to know to what extent the insurance cover an attack and make sure that there are no gaps in the cover provided. Further it is of great importance for the insurers to establish what incidents they are liable for. The aim is to analyze both these perspectives of piracy.

The costs incurred by a piracy attack are extensive. The shipowner will try to recover parts of his loss and expenses from the other involved interests in the common marine adventure. The analysis below is based on the shipowner`s right to declare General Average (GA) if a ship is attacked by pirates. Further, the problem of reluctance from the interests involved to contribute to the cost incurred is discussed.

A legal battle that is likely to emerge in the future is the interests involved, and especially their insurers, attempted defense against liability by claiming that the ship was not seaworthy when it was attacked by pirates. This problem is analyzed below in the context of applicable Norwegian and English rules.

The second chapter of the thesis introduces an overview of the piracy problem and the legal sources and case law of relevance to this thesis are established in chapter three. Chapter four concentrates on the piracy term. Finally, in the fifth chapter the recovery of ransom and ransom related costs incurred by piracy is analyzed.

2. The piracy problem

2.1 Modern age piracy

Seaborne piracy continues to be a significant issue mainly for transport vessels. Today, the threat of piracy is particularly present in the waters between the Red Sea and the Indian Ocean, off the Somali coast and around the Horn of Africa, and also in the Strait of Malacca and Singapore and Nigeria.

Marine piracy attacks and hijackings increased by 200% in 2009 compared to 2008. According to the annual piracy report released by the International Chamber of Commerce's (ICC) International Maritime Bureau (IMB) there were 406 incidents of piracy in 2009. This resulted in 49 successful hijackings. The Gulf of Aden outside Somalia continues to be the most exposed place in the world for piracy attacks and hijackings.¹

The costs of using an alternate route to avoid passes through the Gulf of Aden and the Suez Canal are enormous. The alternative is to sail around the tip of Africa, which is a significantly longer journey. For example, routing one single tanker from Saudi Arabia to the United States around the Cape of Good Hope adds approximately 2346 nautical miles to each voyage and about USD 3,5 millions in annual fuel costs.²

¹ Lloyds - News and features 2009/360

² Piracy impact on Insurance by Siemens, Pollack and Freiheit

As a joint effort to overcome or at least decrease the piracy attacks, several maritime operations have been effectuated. EU's first maritime military operation, "Atlanta in the Gulf of Aden", was initiated in December 2008. Norway has been a part of this operation with the frigate "Fridtjof Nansen" from August 2009.³ The presence of naval vessels means that the pirates cannot operate with complete impunity. Although the presence of EU's NAVFOR task force has made it more difficult for the pirates to operate, it can be said that the success has been limited. The pirates have responded by extending their area of operation and picking their targets more carefully and/or abandoning their efforts when the navy appears. The area is vast and therefore hard to police, and with some 22.000 ships transiting the Gulf of Aden each year, the number of ships to monitor is huge. Altogether it has been made more difficult to attack, but no ships are immune and targets include all kinds of vessels. It is also feared that the pirates will respond to the increasing naval presence by becoming more violent against the hostages

There are several challenges that arise out of the piracy problem. One of the main challenges in regard of the piracy activity is finding solutions to prevent pirates operations and find methods to hold the pirates accountable for their actions. In some instances this is related to the governmental limitations (especially in Somalia) in countries where piracy is widespread. In the wake of the Somalia civil war there has been a surge of piracy. Somalia has in practice no functional government, so the pirates face near to no risk of being prosecuted in their home country. As a result, the pirates have no incitement to stop their operations. Experts have stated that the only permanent way to end the piracy threat is to have a well functioning, resourced and respected government in the piracy exposed countries.

Another challenge is how shipowners should hinder the threat of piracy and prepare for a potential attack. Guidelines for shipowners to deter piracy have been published. The Best Management Practices (BMPs) to prevent piracy in the Gulf

³ Ministry of Defense – prop. 1 S (2009-2010)

of Aden and off the coast of Somalia has been adopted in March 2009 by various representatives in the maritime industry.⁴ The purpose of the document is to assist companies and ships in avoiding piracy attacks and deterring attacks.

A third major challenge is the establishment of who is liable for the cost incurred by piracy. Once a ship has been hijacked, several economic interests are directly affected. First of all the owner of the vessel and the owner of the cargo are affected. There is also a potential environmental responsibility.

2.2 Recovery of costs incurred by piracy

The different interests involved in carriage of goods by sea form a common maritime adventure. In order for the common venture to be profitable for all the involved parties, this requires that all interests involved divide unexpected costs according to the interest's value in the venture. The concept of GA is based on this assumption. If the common venture is threatened during a voyage the carrier is obliged to avert or minimize the loss or damage to his best efforts. The costs incurred by the actions taken to prevent or minimize the peril may give rise to a GA act. This means that the costs incurred are apportioned between the involved interests after their value in the common venture. The shipowners, charterers and cargo owner will naturally be interested in knowing to which extent they are covered by their insurances for losses, damages, liabilities and expenses as a result of an attack.

⁴ Best Management Practices to Deter Piracy in the Gulf of Aden and off the Coast of Somalia (Version 2- august 2009)

The safe return of the crew and the ship normally requires a ransom payment to the pirates. This payment may give rise to both GA and insurance issues that are difficult to solve. The right of the shipowner to declare GA is usually found in the contract of carriage, which typically incorporates a version of the York-Antwerp Rules. The surge in piracy has made contributors to a GA act question their liability for a contribution in the event of piracy.

Altogether the complex situation of piracy poses significant challenges to all the parties involved in a maritime venture.

3. Legal Sources

3.1 Introduction

This thesis will primarily be an analysis of the framework concerning piracy and the problems related to the recovery of costs incurred by piracy. Under this heading the individual legal sources within marine insurance are briefly commented. This is to give an overview over the sources of law, including the legal sources for the application of the law, their relevance⁵ and what meaning the conclusions from these can be assigned.

In contrast to other areas of maritime law such as the Maritime Codes, there are no common international or Scandinavian legal sources in the marine insurance law area.⁶ Since there is no common international legal basis, marine insurance is based on the individual country's legal sources. In practice this is however solved through extensive standard-form contracts.

This paper will be based on the Norwegian framework with some cross references to the English framework where this is of particular relevance to the thesis.

In Norway marine insurance raises some distinct problems in relation to the sources of law and the application of the legal sources. The framework for this specific problem is that some of the normal sources of law, such as laws and preparatory works are not as prominent as in other legal areas⁷. This is because the Norwegian marine insurance policies are mainly based on private-law contracts together with the commentary to these contracts. This affects the method for the application of law in the sense that the interpretation of the contract is of a greater significance than normal.

⁵ Eckhoff (2001) p. 25

⁶ Falkanger (2004) p. 476*

⁷ Eckhoff (2001) p. 15

3.1.1 Insurance Contracts Act

In Norway insurance is primarily governed by the Insurance Contracts Act⁸ (ICA). Even though the ICA does not contain specific rules in relation to marine insurance, marine insurance and war risk insurance fall within the scope of the ICA's general insurance term (skadeforsikringsbegrep). Therefore, marine insurance is in principle subject to the mandatory rules in the ICA part A, cf. ICA section 1-3 first paragraph. However, professional insurance contracts are excepted from the law's mandatory rules, cf. ICA section 1-3 second paragraph litra a to e.

The exception in ICA section 1-3 second paragraph letter c is especially of interest, because it regulates ships which are obliged to register either in the Norwegian Ordinary Register (NOR) or the Norwegian International Register (NIS)⁹. The reasoning behind this exception is according to the preparatory documents¹⁰ that the shipowners as assureds traditionally are professional players in the insurance markets compared to other groups of assureds in general and in particular compared to consumers.

If other terms are agreed, the ICA will constitute the applicable background rules of law. The contents of the rules in the ICA is on the other hand not practical in relation to marine insurance, consequently, the law is given a limited application in the insurance market.¹¹

As a result of this participants from all involved interests together have drafted the NIMP to provide a total and comprehensive legal framework for marine insurance.

⁸ Norwegian Insurance Contracts Act

⁹ Norwegian Maritime Code section 11 second paragraph

¹⁰ NOU 1987: 24 p. 40-41

¹¹ Commentary to NMIP 1996 version 2010 p. 10

3.1.2 The insurance contract and its commentary

The most essential source in the marine insurance area is the contract between the insurer and the person effecting the insurance. Extensive standard-form contracts found the basis of the legal position between the parties. A significant feature of the Norwegian marine insurance market is the use of conditions in the form of the NMIP. The Plan is a so-called agreed document being constructed by a committee consisting of participants from the involved parties in the maritime industry. The latest version, NMIP of 1996 version 2010, entered into force on the 1st of January 2010. This thesis will be based on the latest version of the Plan and compared to the previous version of 2007, where the Plan has been revised.

The Plan is a result of freedom of contract which is regulated in ICA section 1-3 second paragraph *litra c*. Thus the Plan is only binding if it is regulated by contract between the parties.

The Plan is supplemented by published commentaries. The latest version of the commentaries is the Commentary to Norwegian Marine Insurance Plan of 1996 Version 2010. The commentary as a whole has been thoroughly discussed and approved by the Revision Committee, and is regarded as a part of the standard document by the Committee.¹²

Preparatory works to a standard contract are generally regarded as a relevant source of law, when interpreting such a contract.¹³ According to the Commentary, the Commentary shall carry more interpretive weight than is normally the case with preparatory works of statutes.¹⁴ It has been argued that the similarity to legislation rather than to contract implies that it would be more correct to interpret the Plan according to principles for interpreting laws than contracts.¹⁵ Norwegian

¹² Commentary to NMIP 1996 version 2010 section 1-4 last paragraph

¹³ Woxholth (2006) p. 436-437.

¹⁴ Commentary to NMIP 1996 version 2010 section 1-4 last paragraph

¹⁵ Wilhelmssen (2007) p. 29*

court practice shows that it is rather clear that the courts are accepting the Commentary as a relevant factor for interpretation of the Plan. For instance in the STOLT CONDOR case published in ND 1978.139, the following is stated:

“The statements made in the Commentary must be binding when it comes to definite solutions that the committee has agreed upon, that it was difficult express or give an precise legal basis for in the Plan. However, the Commentary shall not be taken equally in a literal sense if it relates to more general explanations and interpretations: here the Commentary can only be of relevance to the extent the argumentation is convincing to whom that has the authority to settle the dispute”.

This statement is based on the previous Plan of 1964. It is expressed in case law that the same view is still applicable according to the 1996 version of the Plan. For example the case published in ND 2000.442 states:

“By using the 1996 version of the Plan as a legal basis for their insurance contract, the Plan with its solutions must be regarded as accepted, regardless of whether these solutions has been stated in the Plan or its Commentary, and regardless of these solutions correspond with the solutions stipulated in a previous version of the Plan”.

Cargo insurance is not covered in NMIP. In Norway the main set of clauses that cover cargo insurance is the 1995 “Norwegian Cargo Clauses” (CICG).

Another insurance contract of interest to this thesis is the most commonly used insurance clauses in the English market. Frequently Norwegian ships carry insurance on English term or divide the cover between Norwegian terms and English terms. The statutory basis of UK Marine Insurance Law is the Marine Insurance Act of 1906 (UK MIA). The English market is split between Lloyd’s

and the insurance companies which effect insurance on identical conditions¹⁶. Lloyd's is a society of members, both corporate and individual, who underwrite in syndicates on whose behalf professional underwriters accept risk¹⁷. It is therefore not an insurance company in its traditional sense.

The main set of insurance clauses covering hull insurance is the Institute Times Clauses (Hull) (ITCH). The majority of the market is insured on ITCH 1983, instead of the amended 1995 version. When referring to English terms in this thesis I will refer to ITCH 1983, since these are most commonly used. Cargo insurance is dominated by the 1982 Institute Cargo Clauses (ICC).

3.1.3 Case law of relevance for the thesis

To my knowledge there is very little Norwegian case law concerning piracy and GA in relation to piracy. There are however some relevant Norwegian arbitration awards. ND 1990.140 – Peter Wessel and the arbitration award rendered on 8 May 2009 between Dolphin Drilling and DNK (Bulford Dolphin) are of interest to this thesis.

Further, there is relevant English case law both in relation to piracy and GA. Generally there is some reluctance to consider foreign case law as a relevant source of law¹⁸. If foreign case law should be considered it has to be based on a general interpretation of the law. However it is seen as acceptable to use foreign case law as arguments, in areas where there are little Norwegian case law. For the purpose of this thesis the following arbitrations awards and foreign cases will be used as arguments/contribution to the Norwegian legal sources, not as a legal source per se.

¹⁶ Wilhelmsen (2007) p. 36*

¹⁷ www.lloyds.com

¹⁸ Eckhoff (2001) p 160 flg., Fleischer (1981) p. 12

3.1.4 Legal literature

There is some legal literature about piracy. For the most part however, piracy is just mentioned as a problem that involves different areas of maritime law. The problem is more closely discussed in articles. Especially Wilhelmsen¹⁹, Challenges in modern marine insurance of shipowners interests: piracy and terrorism, is of interest to this thesis.

GA is thoroughly addressed in both Norwegian and English legal literature. GA in relation to piracy is however barely mentioned in the literature. GA is among others discussed by Falkanger²⁰, Rose²¹, Arnould²² and Soyer²³. These works are the ones that are of most relevance to the problems that are analyzed in this thesis.

¹⁹ Wilhelmsen (2009)

²⁰ Falkanger*(2004)

²¹ Rose (2005)

²² Arnould 1997)

²³ Soyer (2006)

4. Piracy – terminology

4.1 Introduction

To determine the scope of the insurance cover for piracy, the term piracy must be defined. The definition of piracy is not identical throughout the world's insurance market. An important aspect is whether the policy considers an act of piracy as a war risk and hence falls under the war risk insurance or whether it is determined as a marine peril, placed under the marine insurance. Norwegian policies consider piracy to be a war risk. Under English policies piracy is considered a marine risk, while terrorism is considered a war risk, hence the characterization of the act is important.

The definition of piracy under the different policies divides what is legally determined as an act of piracy as opposed to armed robbery and terrorism. As mentioned there is no universal definition of piracy and the term has been disputed in the maritime industry.

A merchant ship and its cargo are of great value and the journey at sea involves risks. The risk involved is spread through different types of insurances. Large ships normally carry at least three separate types of insurance. Physical risk to the insured vessel and machinery is covered by the hull insurance. The cargo insurance covers the risk of damage to the transported goods or merchandise. Liability for damage or injuries to crew and passengers and damage or loss to other property is covered by the Protection & Indemnity insurance (P&I). In addition it has become usual to carry a loss of hire insurance. This insurance covers loss of income.

There is a distinction between the types of perils the individual insurances cover. The insured perils are divided into two different insurances, the marine risk insurances and the war risk insurances. Thus, the question is whether piracy is considered a marine risk or a war risk. That will depend on what terms apply to the insurance. Under most insurance terms, especially in the English market, the term

piracy is defined as a marine risk. This means that piracy is covered under the marine risk insurance. However in Norway the prevailing terms defines piracy as a war risk, cf. NMIP § 2-9.

4.1.1 Defining the term piracy

The differentiation between maritime crimes makes the definition of the piracy term crucial, since the term defines the scope of the cover under the separate insurance.

According to NMIP § 2-8 first subparagraph an “insurance against marine perils covers all perils to which the interest may be exposed” with the exceptions listed in letters (a) to (d). This means that the marine risk insurance is based on the all risk principle, i.e. that the insurance covers all risks unless they are specifically excluded.²⁴ The exclusion of special interest in this relation is the exclusions in letter (a) which concerns the “perils covered by an insurance against war perils in accordance with § 2-9”.

The insurance against war risk is based on the named perils principle. This means that all the risks that are covered is defined in § 2-9 first subparagraph letters (a) to (e). The paragraph states:

“An insurance against war peril covers:

(a) war or war-like conditions, including civil war or the use of arms or other implements of war in the course of military exercises in peacetime or in guarding against infringements of neutrality,

²⁴ Wilhelmssen (2007) p. 80*

- (b) capture at sea, confiscation and other similar interventions by a foreign State power. Foreign State power is understood to mean any State power other than the State power in the ship`s State of registration or in the State where the major ownership interests are located, as well as organizations and individuals who unlawfully purport to exercise public or supranational authority. Requisition for ownership or use by a State power shall not be regarded as an intervention.*
- (c) riots, sabotage, acts of terrorism or other social, religious or politically motivated use of violence or threats of the use of violence, strikes or lockouts,*
- (d) piracy and mutiny,*
- (e) measures taken by a State power to avert or limit damage, provided that the risk of such damage is caused by a peril referred to in paragraphs (a)-(d)....”*

Accordingly, piracy is considered a war peril and covered by the war insurance, cf. *litra d.*

The English system is similarly divided between the marine perils and war perils. However the English terms for marine and war risk are both based on the named peril principle²⁵.

²⁵ Wilhelmssen (2007) p. 81*

4.2 Norwegian Marine Insurance Plan of 1996 version 2007

As mentioned above, the NIMP of 1996 version 2010 entered into force 1st of January 2010. In order to analyze what constitutes piracy in the amended version of the Plan, a summary of the 2007 version is necessary.

According to the 2007 version of the Plan piracy is understood as “illegal use of force by private individuals on the open sea against ships with crew, passengers and/or cargo”²⁶. The definition of the piracy term in the Plan`s 2007 version is derived from the Norwegian translation of the U.N. Convention on the Law of the Sea (UNCLOS)²⁷. Piracy is defined in the UNCLOS art. 101:

“Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers 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;

any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).”

²⁶ Commentary to NMIP 1996 version 2007 p. 40 first paragraph

²⁷ Ibid p. 40

This definition is used by the International Maritime Organization (IMO). The UNCLOS definition restricts what is considered as acts of piracy to the “high seas” and “outside the jurisdiction of any state”. The Norwegian translation use the term “open sea”. The Norwegian term is derived from UNCLOS` term, thus the meaning of the term is considered to be the same²⁸. Attacks that occur in ports or territorial waters are consequently not an act of piracy according to this definition. These kinds of acts are considered armed robbery. Armed robbery against ships is defined by IMO as: “any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of “piracy”, directed against a ship or against persons or property on board such ship, within a State’s jurisdiction over such offences”²⁹.

UNCLOS art. 101 must be viewed together with the UNCLOS art. 105. The article states that any state has the opportunity to prosecute pirates that are captured outside the jurisdiction of any state.³⁰ This has led to the discussion that the term piracy in the Plan only covers attacks outside the coastal states` jurisdiction, or at least outside their limit of territorial waters. However, the term “open sea” was derived from Brækhus /Rein`s interpretation of the corresponding clause in the Plan of 1964.³¹³² In 1964, the international laws concerning jurisdiction of the coastal state where not as clear as they are today. There has also been uncertainty as to the interpretation of the term “open sea” if the term is not linked to rules of jurisdiction. This has altogether caused an uncertain state of law on this particular area.

²⁸ This is only a matter of translation back and forth through English and Norwegian.

²⁹ Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships (MSC/Circ. 984 art. 2.2)

³⁰ UNCLOS art. 105

³¹ Brækhus (1993) p. 80*

³² Commentary to NMIP version 2010 p. 40 first paragraph

A significant number of the attacks reported to the International Maritime Bureau (IMB) Piracy Reporting Centre are considered as armed robbery because they take place in ports or territorial waters. Since there are different views about what is considered to be piracy or armed robbery, the IMB operates with a wider definition of the term piracy: “An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act”³³. The IMB definition is broad and includes any attack or attempted attack on a ship, whether it is anchored, berthed or at sea.

4.3 Norwegian Marine Insurance Plan of 1996 version 2010

The new version of the Plan contains the same wording as the 2007 version. Thus piracy falls under the war risk, cf. NMIP § 2-9 letter d. However the Commentary to the term piracy is revised in the 2010 version. Since the piracy attacks have become more frequent there has been a need to adjust to the modern age piracy term and clarify the geographical line between armed robbery and piracy.

4.3.1 What actions constitute piracy

The first question is what actions forms piracy. The Norwegian term used in NMIP is “sea robbery”(sjørøveri). The term is not defined in the Commentary. Nor is the term directly described in any Norwegian case law that is publicly available. To my knowledge, the only case where the topic is touched upon is the arbitration award “Peter Wessel” published in ND 1990.140. The question in the award was whether the costs incurred because of a bomb threat to the ferry “Peter Wessel”

³³“Piracy and Armed Robbery Against Ships,” Annual Report, ICC, IMB, 2009

should be covered by the marine or war insurer. Of relevance for this thesis is the court's decision that the war risk insurer was not liable if the motive behind the action could not be established. Furthermore, if the motive behind the action is of a political or social character this makes it a war risk. This demonstrates that motive could be a relevant factor when establishing what composes a war risk.

English case law however has described the term in several cases. The term is described both as an interpretation of the acts that constitute piracy and where piracy could occur geographically. Since the latter is defined in the Commentary to the Plan, only the former is relevant for our purpose. As mentioned in relation to the relevant case law above, English case could be used as an argument in default of Norwegian case law.

The case that primarily defines piracy dates back to 1696, *R. v. Dawson*³⁴. This case has principal value and is commonly accepted also today. The case is based on a criminal law perspective, but is still relevant for defining what constitutes piracy from a maritime law perspective. The judge, Sir Charles Hedges, described piracy as a "sea term for robbery, piracy being a robbery committed within the jurisdiction of admiralty". The judge found the word "robbery" decisive in order to form piracy. The word "robbery" is as an example defined as: "Felonious taking of money, personal property, or any other article of value, in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."³⁵ This means that an economic profit is the motive for the action.

Immediately it seems as piracy must involve an actual robbery. However it was stated by the Privy Council in 1934, in the *Re Piracy Jure Gentium*³⁶ that "an

³⁴ *R. v. Dawson* 1696 St. Tr. 5, cf. Miller (2005) p. 208

³⁵ Black's Law Dictionary

³⁶ *Re Piracy Jure Gentium* (Jure gentium = by law of nations) is a statement by a board of High Court judges.

actual robbery is not an essential element of the crime of Piracy”.³⁷ It is sufficient to establish that the robber had an intention to perform an act of piracy. This statement does not have legal effect per se, but is instructive for the English Courts` view of what piracy is. The background for these kinds of statements made by a council was that legal literature had little impact at that time. The opinion of the Board indicates that there can be an act of piracy even if only goods are damaged by an attack. Accordingly, it is not necessary that the robbers actually obtain profit from their actions.

The same position has been taken in Norwegian legal literature. The word “robbery” presumes that a theft occurs³⁸, however, the Commentary implies that this is not a requisite. The Commentary states that “...also an action that merely results in property damage or personal injury may constitute piracy”³⁹. This implies that there could be an act of piracy without an actual theft occurring.

Since modern pirates are known for captivating crew, it is of interest to establish whether holding the crew or passengers hostage in demand for ransom falls under the term piracy⁴⁰. The Norwegian Criminal Code section 267 describes “robbery” as taking possession of an object by using force or threat that cause severe fear of violence against someone’s person. Modern age pirates are known for threatening to kill the hostages if the ransom demand is not paid. Such a threat must clearly be understood to cause fear. Hence, may hostage taking in demand for ransom may be considered as a robbery and falls under the term piracy.

Another question is whether an act could be regarded as piracy if no one is taken hostage. For example, if the crew escape and the ship is held for ransom. The difference in this situation is that the threat used to obtain the ransom is not directed against someone’s person. It is stated in legal literature that even if this

³⁷ Re Piracy Jure Gentium 1934 A.C. 586 cf. Miller (2005) p. 216

³⁸ Wilhelmssen (2009) p. 181

³⁹ Commentary to NMIP version 2010 p. 42 fourth paragraph

⁴⁰ Wilhelmssen (2009) p. 181 – 8.15

seems to fall outside the ordinary language understanding the situation must be regarded in “the context of marine insurance of the shipowners interest”.⁴¹This means that a broader understanding must be applicable. The shipowner has an interest in protecting the ship which is of great value. At the same time it is in the interest of the shipowner as carrier to protect the cargo onboard the ship against any damage or theft. Since the shipowner is liable for the cargo and has owner interest in the ship, it must be regarded as piracy even if no person is directly threatened.

It has also been raised as a potential problem whether it's an act of piracy if the objective of the act only is to take hostages⁴². The perils described in NIMP § 2-9 are clearly described as an action that is directed towards the ship. If the ship is of no interest to the pirates it can be questioned if this is covered by § 2-9. The strict wording of the paragraph suggests that the actions must be directed against the ship. However, this could lead to difficult considerations of policy. Another aspect is that this could be hard to prove. If the act generally fulfills the terms to be considered as a war risk it may seem random whether the act is considered as directed against the ship or only the crew onboard. If the action is only considered as directed against the crew this would in principle fall under the marine risk cover. This would mean that the marine risk insurer become liable for an action that is clearly comparable to actions that are considered to be covered by the war risk insurer. The legal status of this problem has not been clarified. Considerations of policy weigh in the direction of considering an action directed towards the crew as an act of piracy.

In conclusion it can be said that the term piracy should be given a wide meaning when interpreted. In addition to a robbery, a situation where the crew is held for ransom or the ship with its cargo is held for ransom could constitute piracy.

⁴¹ Wilhelmssen (2009) p. 181 – paragraph 8.16

⁴² Memorandum from Professor Hans Jacob Bull to DNK in relation to the Dolphin Drilling arbitration case. This problem was however not tried in the case.

4.3.2 Geographical occurrence

Illegal use of force is the concurrent factor for both armed robbery and piracy. Hence, the character of the illegal use of force is the same, whether the attack is carried out within or outside the economic zone or the limits of territorial waters of a coastal state. The term piracy is limited. This may cause somewhat random results as to who is liable for the costs and damages incurred with an attack. Policy considerations and predictability may weigh in the direction that if two ships were attacked, one outside and one inside the territorial limits, this situation should be regarded equally.

If the ship carry insurance based on English terms and an attack takes place inside the territorial waters there may be no cover. Piracy is excluded from the war risk insurance and the marine risk insurer is only liable if it takes place on the high seas. Violent theft is on the other hand also covered under the marine risk insurance. If the attack is not violent and takes place within the territorial waters, the shipowner is in principle not covered. However this starting point has been modified by English case law. In the English case *Andreas Lemos*⁴³, the judge stated that the term piracy must be understood from a marine insurance perspective. In the marine insurance perspective view, the judge saw no reason to limit piracy to acts outside the territorial waters of the coastal state. It was further stated that if: “a ship is in the ordinary meaning of the phrase “at sea”, or the attack upon her can be described as “a maritime offence”, then for the business purposes of a policy of insurance she is, in my judgment, in a place where piracy can be committed”.

In Norway, the issue is whether the marine risk or war risk insurer is liable.⁴⁴ This makes the division discussable for both insurers and shipowners. This is discussable although, as mentioned above, that the cover for total loss and loss of

⁴³ *Andreas Lemos* (1982) 2 *Lloyds Rep* 483

⁴⁴ *Wilhelmsen* (2009) p. 186

hire is wider under the war risk insurance. On the other hand, it has been argued that the limitation of the cover to concern only attacks outside the territorial water is rational, because inside the territorial water the coastal state has jurisdiction and attacks will be regulated by the coastal state law. The problem has turned out to be that the countries where the piracy risk is greatest are countries without a stable or organized government. The lack of an organized government has resulted in as little as no possible consequences for operating pirates.

Due to the problems related to the piracy term as mentioned above the Commentary to the Plan has been revised. There is a consensus in the committee revising the Commentary that the geographical limitations are not practical for the piracy problem that we experience today⁴⁵. Since the geographical limit is no longer appropriate, the piracy term shall from now on be disengaged from its former meaning. Thus, the term piracy is no longer limited to the “open sea” or the definition in UNCLOS § 101. Since the definition of piracy is extended the war risk insurer has taken on a greater risk than what was covered under the old terms of the Plan. The reason that this burden has been placed on the war insurer is that they have, according to the insurance terms, the opportunity of trading limits. The marine risk insurer does not have that same possibility according to the Plan.

The trading limits can be changed with immediate effect if there are changed circumstances, cf. NMIP § 15-9. Additional premium can also be demanded as a term for service in limited trading areas⁴⁶. Since the marine risk insurer does not have the same opportunity to spread the risk, it is considered most reasonable to address the additional risk on the war risk insurer.

⁴⁵ Commentary to NMIP version 2010 p. 40

⁴⁶ Ibid p. 40

4.3.3 Terminology – new definition

Since the piracy term has been extended, the question is what is considered as piracy under the new term. The detachment from the definition in UNCLOS § 101 and the term “open sea” means that piracy as an insured war risk can also take place within the limits of the territorial waters of the coastal state. Where the new geographical line shall be drawn has however been discussed. The Commentary to the Plan has some directions. According to the Commentary there is still necessary to draw a line between piracy and armed robbery, which is considered a marine risk. Distinguishing between merchant vessels and offshore installations is relevant when defining the terms above⁴⁷.

4.3.4 Merchant vessels

According to the revised Commentary, illegal use of force constitutes piracy as long as the vessel is in transit between two ports. There are no geographical limitations as long as the ship is traveling between two ports. Thus it is irrelevant whether an attack takes place inside or outside the coastal state`s territorial waters. It is also considered irrelevant whether the ship is on the “high seas” or the “open sea” which is the Norwegian term. This means first of all that illegal use of force in straits and rivers can be considered as piracy.

Secondly, an attack carried out on lakes that have a waterway connection to a sea or a river can be considered an act of piracy⁴⁸. If the lake does not have a waterway connection and is totally surrounded by land an attack would be considered as armed robbery or theft, since this falls outside the cover of § 2-9.

⁴⁷ Commentary to NMIP version 2010 p. 41 first paragraph

⁴⁸ Ibid p. 41

In my opinion this may have consequences in one of the areas where piracy occurs most frequently. For example in Nigeria this new deviation can cause random results depending on where an attack takes place geographically. In Nigeria most of the piracy attacks occur on the rivers or lakes. For example the river Niger runs in to Nigeria in the north east part of the country and runs out in the Gulf of Guinea and the Niger Delta. This means that an attack can occur in the middle of the country on the river Niger and still be construed as piracy. The same will be the case for the Lagos Lagoon where there is a lot of maritime traffic. On the other hand you have the Lekki Lagoon which is situated near the shore of the Gulf of Guinea, but without a waterway to the Gulf. This means that an attack in Lekki Lagoon will be considered an armed robbery.

The difference if an attack takes place on a lake with or without waterways to the sea is therefore whether the cost are covered by the marine risk insurance or the war risk insurance.

Attacks on large merchant vessels with cargo are relatively insignificant in Nigeria. Attacks are mainly directed at smaller ships shuttling employees and material belonging to the oil companies in Nigeria.⁴⁹ This often takes place on lakes without waterway connection. The new definition of piracy may in this relation cause random results as to who is liable for an attack.

4.3.5 Port entrance

The question is how near shore an attack can take place to be considered as piracy. In conformity with the old definition of piracy there has to be drawn a line between piracy and armed robbery. The most important factor for this deviation is how near shore the attack takes place. A central element in the concept of piracy attacks on

⁴⁹ www.wikipedia.no, - location of piracy in Nigeria

merchant vessels is that the illegal use of force takes place at sea in such a way that makes it difficult for the port state authority to assist⁵⁰. Consequently, an attack has to take place outside the port limit to be considered as piracy.

Illegal use of force inside the port limit will be considered as armed robbery. The Commentary further states that “regardless of whether the ship is sailing in the port area or is anchored and moored, and regardless of whether the ship is lying at anchor at an ordinary anchorage for this port”⁵¹, this will be regarded as armed robbery. The same applies if an attack occurs while the ship is loading or discharging in a port terminal. The reasoning behind this deviation is that the port authority can assist in these attacks and that this is comparable to ordinary crime. Hence this is defined as armed robbery.

4.3.6 In transit

As mentioned above the key element in the piracy definition is that a ship is in transit when the attack takes place. In principle war risk cover is excluded if the ship is anchored. However, it can be relevant for the ship to have war risk cover if it is anchored temporarily⁵². As a consequence, ships that are temporarily anchored outside the port limit are covered by the war risk insurance, regardless if this anchorage is normally used by the port. When applying this limit, it can be seen as favorable for the ship to choose anchorage outside the port limit if this is possible, for example if the ship has to wait in line for loading or discharging.

This will especially be relevant for the cover if the ship is insured by Den Norske Krigsforsikring for Skib (The Norwegian Shipowners' Mutual War Risk Insurance Association - DNK). DNK provides a kidnap and ransom insurance under its

⁵⁰ Commentary to NMIP version 2010 p. 41

⁵¹ Ibid first paragraph

⁵² Ibid third paragraph

normal war risk cover. DNK state that these terms are standard and not customized to the assured⁵³. The cover provided in the DNK policy is no further discussed in this thesis, since these terms are not public.

Sometimes ships discharge their goods without entering the port, e.g. at a loading buoy outside the port main area. It has been stated in the Commentary that an attack that takes place when a ship is in this position can also be considered as piracy. The same is applicable if the ship is in the process of so called dynamic positioning⁵⁴. The reasoning behind this rule is the same as above. It will be more difficult for the port authority to assist when the ship is situated outside the ports limits.

4.3.7 Port limits

It varies whether or not the port`s limits are defined. If the limit is not defined it will be a discretionary matter based on the nature of the illegal use of force whether the act is considered piracy. The decisive factor is whether the nature of the used force has a civil peril character or a war peril character. It is likely to be understood as a civil peril if the attack seems unorganized and reminiscences ordinary crime. Ordinary crime is classified as a civil peril and must be covered by the marine risk insurance. These kinds of attacks shall not be covered by the war risk insurer because the state port authority can assist⁵⁵. On the other hand it is reasonable to apply the war risk cover in ports where the state port authority hardly exists. Absent or missing port authority creates more war like conditions, especially since the pirates/criminals get a greater opportunity to organize their operations.

⁵³ Interview with DNK – Irene Phillips/Iris Østreng

⁵⁴ Commentary to NMIP version 2010 p. 41 third paragraph

⁵⁵ Ibid p. 41 last paragraph

It is also relevant what kind of weapons the criminals possess. If heavy weaponries are used during an attack it is highly probable that a more organized group is behind the attack. At least in developing countries refined weapons are only found amongst organized criminal groups such as pirates. Attacks that are classified as armed robbery are more often only executed with “home made” weapons such as knives/machetes and bats. Consequently, the revising committee has decided that “in countries with limited infrastructure where ports are poorly organized there may, depending on the circumstances, be reason to let piracy cover attacks on ships that are temporarily anchored relatively close to land”⁵⁶.

The Commentary does not further elaborate what countries fall under the category of “having limited infrastructure”. The decisive circumstances are whether the use of force has a nature of a war peril because of the form of organization and the use of sophisticated weapons. Hence it must be difficult for the state port authority to handle the use of force. Since this exclusionary provision is not clarified, it may cause doubtful cases.

In my opinion, the new categorization is in reality somewhat diffuse. The old definition had a clear line drawn at the limit of the territorial waters of the costal state. Although this limit could cause random results it made it clear what constituted piracy.

It could be natural to divide developing countries and industrialized countries into two categories. Developing countries are characterized for their lack of industrialization. What defines a country as a developing country has several factors. Normally the prosperity of a country is measured by countries gross national product per capita (GNP), which is the sum of domestic consumption and investments plus net exports. However the GNP can not provide a clear picture of a country`s infrastructure. For example Somalia has little or no infrastructure and

⁵⁶ Commentary NMIP version 2010 p. 41 last paragraph

will most definitely be considered as a country with limited infrastructure by insurers. Nigeria on the other hand is considered as a developing country but has a much more functional infrastructure and state authority. There are also countries that are considered as semi developed, for example Indonesia. Insurers might refuse to indemnify losses that are incurred outside the coast of Nigeria or Indonesia. Insurers' view on this problem is not clear.

When talking to DNK in January 2010, I was told that they have not composed any guidelines to establish which countries will fall under the "limited infrastructure" category. Neither is it probable that DNK will compose such guidelines⁵⁷. That leaves the problem to be solved on a case by case basis. This may cause an uncertain situation mainly for the insurers and lead to a legal battle of unknown dimensions.

There is no doubt that insurers will try to utilize a situation where the interpretation of the insurance terms is unclear. If there is a possibility to avoid liability, there is a little cost in comparison for the insurers to invoke exemption from liability. For the shipowner the situation will still be uncertain as to who is liable for their incurred losses. A shipowner who has divided his insurance between the English and the Norwegian market, could in worst case scenario be without cover when attacked by pirates.

⁵⁷ Interview with DNK – Irene Phillips/Iris Østreng

4.3.8 Offshore units

Offshore installations generate earnings by means of stationary operations in a field. This means that the criteria that ships has to be “en route” is not suitable for offshore installations, dynamic positioned ships⁵⁸ and other types of vessels that operate stationary in a field. As long as these kinds of installations or ships are in operation they are not in transit. Consequently is the term “en route/underway” excepted from the definition of piracy concerning offshore units⁵⁹.

Illegal use of force towards an offshore unit falls within the scope of piracy when the unit is operating in a field. This applies regardless of where the offshore unit is situated. There is no longer a criterion that the unit is positioned at the “open sea”. Similar to the criteria for ships, an attack is regarded as piracy provided that the unit is situated outside the port limit. The reasoning for this exception is that such a situation has the nature of a war peril, because the attack requires some organization and takes place in an area where assistance from state port authority is difficult to provide.

This particular expansion means that piracy also includes illegal use of force in a river delta. For example in Nigeria this expansion will become relevant. Several offshore units are situated in the Niger Delta and the Gulf of Guinea. The IMB Piracy Reporting Centre has registered attempted and successful hijackings on offshore units in this particular area.

If a unit is transferred to another field or being moved from a field to or from the location in which it is to be laid up or repaired, an attack during this voyage may constitute piracy. Hence, these situations are covered by the war risk insurer. The prevailing condition is that the moving takes place outside the port limit. However it is considered as a marine peril if an attack occurs while a unit is laid up or

⁵⁸ Ships or semi-submersible mobile offshore units that are controlled by a computer system in order to maintain the same position at sea by the help of its own propellers.

⁵⁹ Commentary to NMIP version 2010 p. 42 second paragraph

repaired at a shipyard. This also applies if the unit is being repaired near the shipyard⁶⁰. I assume that this requirement includes that the repair has to be connected to a shipyard but can be carried out elsewhere of practical considerations.

4.3.9 By means of a ship

Similar to the old version of the Plan, the 2010 version requires the attack to be executed by pirates who access the ship at sea with their own vessel or disguise themselves as part of the crew or passengers onboard before hijacking the ship⁶¹. This means that both one-vessel situations and two-vessel situations can be considered as piracy. This was not mentioned expressly in UNCLOS art. 101 but it was common to understand that only the two-vessel situation was comprised by the article. This interpretation was based on the term “private ship or aircraft”, where “private” was interpreted as being a ship other than the one being attacked. However it is now clear that a one-vessel situation also can be regarded as piracy.

4.3.10 “Private ends”

Finally the Commentary states that the objective of an attack is normally economic profit. However, as mentioned above, it is not necessary that an actual theft occurs. An attack that only causes damage to property or personal injury is also included. The presence of motive to rob is not imposed as a requirement in the concept of piracy⁶².

⁶⁰ Commentary to NMIP version 2010 p. 41 third paragraph

⁶¹ Ibid p. 42 fourth paragraph

⁶² Wilhelmsen (2009) p. 183

The “private ends” criteria make it easier to separate piracy from terrorism and measures taken by a foreign state power. The key distinction appears to be the motives and objectives behind the attack. Pirates` motives are mainly the forcible seizure of property or persons to secure private and personal gain. Terrorists on the other hand have a political motivation and intention to cause death, injury and damage. The difference between these categories may be relevant in order to determine which insurance policy applies and in evaluating the legality of a ransom payment.

Norwegian insurance terms have collected all these categories under the war risk cover because of the difficulty that may occur when trying to determine what group the attackers belong to, cf. NMIP § 2-9. This is practical as it is often that “piracy is organized by persons who purport to exercise government authority”⁶³. The same distinction problem occurs in the grey areas where it is difficult to separate personal and political motive e.g. where hostages are taken to provide funding through ransom payments for terrorist activity.

More important is evaluating the legality of the ransom payment. Paying ransom to pirates is allowed by Norwegian law. However there is a prohibition against founding terrorism. Therefore paying ransom to terrorists will as a starting point be illegal. In England this question has been argued by insurers in court. The English High Court decided in January 2010 in the case *Masefield AGP vs Amlin Corporate Member Ltd* [2010] EWHC 280 that the payment of ransom is legal according to English law. This judgment should finally put an end to the discussion about the legality of the measures taken to release a captured ship in the English insurance market ⁶⁴.

USA on the other hand seems to initiate sanctions against shipowners who have paid ransom in the event of piracy. The sanctions include banning ships from US

⁶³ Commentary to NMIP version 2010 p. 42 fourth paragraph

⁶⁴ www.Lloydslist.com - commentary to the judgement by Gosling*(2010)

ports and freeze assets of registered US shipowners, if ransom is paid to Somali pirates⁶⁵. The motion is not carried (April 2010), so the consequences are unknown at this point. However on April 13th the White House released an immediately effective Executive Order. The order forbids U.S. persons from contributing funds, goods, or services from any of the twelve named persons/entities identified in the Order⁶⁶. The Order does not mention ransom payments directly but this could be interpreted from the ordinary meaning of the text in the Order. To the extent that a pirate is identified as a blocked person, any payment to such pirate by a U.S. person will now be illegal⁶⁷.

4.3.11 Summary

In summing up, an act of piracy from a marine insurance perspective according to the NMIP version 2010 is an act:

- Of illegal use of force at sea that comprises violence, theft or damage
- Which occurs on the sea, outside the port limits, exceptions for countries with limited infrastructure
- Which does not have a political motive

⁶⁵ www.incelaw.com

⁶⁶ Executive Order No. 13536

4.4 Is the new definition adequate?

The aim of revising the Plan was to promote clarity and practicability when it comes to the borderline between the hull and war covers according to the NMIP. However, there are split views on how successful this revision has been. In most cases the new definition of the term piracy is more suitable to cope with the threat of piracy. This is because the war insurers have taken on a greater liability. This extended liability makes the new definition at first sight more practicable since more of the actual attacks will fall under the war insurers cover. In most relations the new definition has come a long way in addressing the insurance problems related to piracy.

On the other hand, the definition can be confusing. The diffuse definition can cause many random decisions that do not have a general consensus throughout the insurance market. This could be confrontational as long as the definition is unclear. The altered definition is no longer comparable to what fall under the definition of piracy according to English terms. The English insurance market definition of piracy is still derived from the UNCLOS definition. Hence, piracy is connected to the “high seas”. This could be problematic for a shipowner if for example the ship carries marine risk insurance under Norwegian terms and war risk insurance under English terms. Then there might be a gap in the cover, and the shipowner is not covered for an act of piracy at all. On the other hand this could lead to double insurance, which would be unnecessary.

Another problem is that the new definition in reality is not easier to apply, which was one of the main objectives with the revision. The definition used in the 2007 version of the Plan had a clear division between piracy and armed robbery when crossing the border of the territorial waters of the coastal state. Although this division has been criticized because two attacks that in practice are the same act are covered by two different insurers, at least for the insurers this division was easy to apply. However the problem was that this caused many random results. Attacks

were defined mainly according to geography. I cannot see that this problem is solved by the new definition. Especially the exception of countries that are distinguished as “having limited infrastructure” is problematic, since this is not elaborated in the Commentary. The hot-spots for piracy are in countries that are less developed than most of the western world. However there is a huge difference between the development in for example Somalia and Nigeria. There is a possibility that the war insurer will deny liability near shore for attacks in Nigeria because they find this country`s infrastructure to be developed.

Before any guidelines are established this division can cause random decisions based on the war insurer`s discretion. It remains to be seen if guidelines or an industry code will be established, which may clarify the remaining confusion and establish a practical system for both the shipowners and the insurers. Eventually, if the maritime industry does not establish guidelines that clarify the cover, prospective case law and arbitrations will have to establish the applicable interpretation of the new piracy term.

4.5 Alternative general definition of piracy

From the insurer and the assured point of view it may be easier to act in accordance with one common definition for piracy for the world`s insurance market. A definition that defines all maritime crime can be more suited to meet the challenges of the modern piracy problem. It has been claimed from an English point of view that one alternative is to define maritime crime according to four categories. The categories could be divided into: corruption, sea robbery, piracy and maritime terrorism⁶⁸. The reasoning behind this division is that each category of these listed maritime crimes requires different solutions.

⁶⁸ Dillon (2005) p. 155

Since there are diffuse distinctions in existing definitions of piracy, the targeting of resources is difficult. Corruption often takes place by extortion by government officials in ports. A ship can be denied to leave port because they are accused of being in violation of safety or environmental rules. This problem is easiest resolved by handling the problem of government corruption. The next category, sea robbery, is best handled by the police in the coastal state. Thirdly, piracy requires support from the coastal port authority and the navy. Maritime terrorism requires multi-national strategies, because foreign interests located all over the world could be potential targets. It is particularly feared that oil installations and ships are targeted as terrorist targets.

By dividing the maritime crimes into these four categories, policymakers can target resources in a better way and concentrate on finding solutions to this problem that involves every segment in the maritime business. The four categories will then include⁶⁹:

- 1) Corruption – Acts of extortion or collusion against marine vessels by government officials and/or port authorities.
- 2) Sea robbery – Attacks that take place in port while the ship is berthed or anchored.
- 3) Piracy – Actions against ships underway and outside the protection of port authorities in territorial waters, straits and the high seas.
- 4) Maritime terrorism – Crimes against ships by terrorists organizations.

The definition establishes categories with limited exceptions that enable insurers to make discretionary decisions. This could at the same time simplify the contact between the shipowner and the insurer because it would be easier to establish the insurer that is liable.

⁶⁹ Dillon (2005) p 157

On the other hand, how obtainable it is to establish a common definition is discussable. As long as the English system and the Norwegian system categorize piracy respectively as a marine peril and a war peril, a general definition seems farfetched.

4.6 Conclusions

In conclusion the new definition of piracy in NMIP version 2010 has come a long way in promoting clarity and practicability for the insurance market. The remaining problem is the exceptions that are not elaborated in the Commentary, leaving room for discretionary decisions. Before the market establishes guidelines of interpretation, it will be difficult to predict what issues that will arise between shipowners and insurers.

5. General Average

5.1 Introduction

As mentioned above, the most practicable way to release crew and ship that are detained by pirates is to pay the ransom demanded. Since the ransom payment and related negotiations represent a great cost, the first question of interest is whether the shipowner can declare General Average (GA) to apportion the cost incurred to the other interests involved in the venture. This is in practice covered by the interests insurances.

Another question is whether the contributing parties can decline the contribution on the basis that the GA act arises because of the shipowner's actionable fault. The discussion below will view these problems according to Norwegian and English law and insurance conditions.

The concept of costs of measures to avert or minimize loss is somewhat wider than the concept of GA, cf NMIP §§ 4-7-4-12. For the purpose of this thesis piracy is only discussed in relation to GA.

5.2 What is General Average

A ship sailing from one destination to another carrying cargo involves different interests. The interests involved are the ship, cargo and freight, and together these interests form a common venture.⁷⁰ This common venture is at risk of encountering danger during a voyage. If a danger occurs that threatens the common venture or parts of it, the carrier is obliged to try to minimize losses. A GA situation can be

⁷⁰ Falkanger (2004) p. 466*

described as a situation that “occurs where a danger threatening a common venture justifies action taken for the benefit of the interests imperiled”.⁷¹

If the actions taken are justified this forms a GA act. GA acts are either an extraordinary sacrifice or an extraordinary expenditure. An extraordinary sacrifice is for example if the cargo has to be jettisoned in order to save the ship. An example of an extraordinary expenditure can be towing the ship to a port of safety for repairs.

The persons who suffer extraordinary expenses are entitled to claim contribution from the other interests in the common venture to apportion the costs according to the value of each respective interest. The contribution costs allocated to the different interests can also be claimed by the interest’s respective insurer.

5.3 Legal basis

5.3.1 York-Antwerp Rules

The right to declare GA usually arises from the contract of carriage. The main legal basis is the York-Antwerp Rules (YAR rules), dated from 1877, and amended in 2004. The YAR rules are not based on a convention, but adopted by the Comité Maritime International (CMI). The rules are incorporated into the contract of carriage.

⁷¹ Rose (2005) p. 2

The legal basis for when a GA act arises is found in YAR Rule A. The rule states:

“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 the peril the property involved in a common maritime adventure”.

5.3.2 Incorporation of the YAR Rules in Norway and England

In Norway the YAR rules are also incorporated into the Norwegian Maritime Code (NMC), cf. section 461 first paragraph. The code states that:

“Unless otherwise agreed, allowance in general average of damages, losses and expenses and the apportionment thereof shall be governed by the York-Antwerp Rules 1994.”

This means that under Norwegian law the rules are applicable even if they are not incorporated in the contract of carriage.

The English system operates with a general average definition in the Marine Insurance Act 1906, section 66. The most relevant provisions are as follows:

“(1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.”

The definition does not contain a reference to the YAR rules unlike the Norwegian rules. The English system is therefore not in principle adjusted in accordance with the YAR rules. It is, however, clear that the YAR rules and the English statutory definition is modeled closely.⁷²The acceptance of the YAR rules are shown by their frequent incorporation into contracts, although they do not have a binding force. In practice the adjusting of GA according to English terms are acknowledged to be based on the YAR rules.⁷³

5.3.3 Insurance terms – Regulation of General Average

The Plan covers the hull and loss of hire interest. The acceptance of GA costs is found in the Plan, cf. §§ 4-7 and 4-8. The Plan states that the insurer is liable for any GA contribution and that the GA shall be adjusted according to YAR rules, cf. § 4-8 last paragraph. One important factor is that the liability of the insurer is “for the costs of measures taken on account of a peril insured against...”, cf § 4-7. This means that if measures are taken to prevent a war peril the war insurer is liable. Piracy is as mentioned above a war peril according to the Plan. Thus, the war-risk hull and loss of hire insurer are liable for a GA-contribution caused by an act of piracy.

⁷² Lowndes & Rudolf (2008) p. 81

⁷³ Rose(2005) p. 11-12

Cargo insurances, on the other hand, do not mention what rules that are applicable for the adjustment of a general average contribution. The most commonly used cargo insurances are the 1995 Norwegian Cargo Clauses (CICG) and the 1982 Institute Cargo Clauses (ICC). For the 1995 CICG the YAR rules are applicable according to NMC § 461. The 1995 CICG covers piracy as an act to avert or minimize loss in the A, B and C Clauses, cf. § 18 that does not exclude piracy. For the 1982 ICC it is regarded as the general practice to adjust a GA contribution in accordance with the YAR Rules. The ICC does however only provide cover under the A Clauses, cf. ICC (A) that includes cover for piracy.

5.4 The individual General Average requirements

The YAR rule A contains five cumulative conditions that must be present in order to form a GA act. These conditions are elaborated below.

5.4.1 Intentional

The first criterion is that the sacrifice or expenditure must have been intentionally made or incurred. This means that the act must have been chosen by the free will of the person who makes the decision to act and not have been forced upon him⁷⁴. The act can neither be accidental. Collectively the act must be founded on a weighted reasoning trying to minimize the loss.⁷⁵

Generally it is the master that has the authority to decide whether or not a sacrifice or expenditure should be made or incurred. If an emergency arise or the master for some reason is absent, it is treated equally if a decision is made by mate or other onboard the ship. The criterion is that it would be treated as a GA act if the same decision had been made by the master. In the event of piracy an act must be regarded as intentional, even if it is not the master onboard the ship that makes the decision to act. The master is deprived the control over the ship and the decision to act must be made by the shipowner.

⁷⁴ For example Rt. 1947 p. 223 – the decision to discharge the cargo onboard the ship was made by the authorities. Therefore the act was forced upon the master and not intentionally made by him. GA contribution was denied.

⁷⁵ Lowndes & Rudolf (2008) p. 82

5.4.2 Peril

The next criterion is that there must be a peril present. Thus, the ship and cargo must be exposed to a real danger. The danger must threaten the existence of the ship and its cargo⁷⁶. It is irrelevant whether the danger has occurred or threatens to occur. A problem is that it is not straight forward to determine the degree of danger necessary to constitute a GA act. In principle the ship and cargo shall be able to handle the ordinary perils of the sea. The peril is characterized as real if the act is seen as the only way to avert or minimize the damage to the ship and its cargo.⁷⁷

5.4.3 Common maritime adventure

The third condition is that there must be a common maritime adventure. Traditionally the ship is owned by one interest and the cargo by another. This means that in order to form a GA act the present peril must threaten the existence of the property that is involved in the common adventure. There is also a criterion that the nature of the adventure is maritime. This means that the danger encountered must threaten the adventure during a voyage at sea.⁷⁸ If a peril is encountered on land it will not be regarded as a GA act.

5.4.4 Extraordinary

The fourth stipulation is that the sacrifice or expenditure must have been extraordinary. The shipowner is liable for the safe transport of the goods to its destination in return for freight. In order to be regarded as extraordinary the expense or sacrifice must fall outside the ordinary duties that are stipulated in the

⁷⁶ Rose (2005) p. 22

⁷⁷ Ibid

⁷⁸ Ibid p.20 section 2.7

contract of carriage.⁷⁹ Extraordinary expenses could be for example port of refuge expenses and salvage charges.

5.4.5 Reasonable

Finally, the last criterion is that the extraordinary sacrifice or expenditure must be reasonably made. What is seen as reasonable is a question of what costs a prudent shipowner/master would have incurred, based on the information the master had available at the time the act was executed. For example if cargo is jettisoned to avert a peril, the reasonableness of the action would i.a. depend on the cargo that is jettisoned. It must generally be considered reasonable to sacrifice cargo of low value or cargo that would stabilize the ship. The situation as a whole has to be regarded in order to act as a prudent person.

5.5 Piracy and General Average

The question in this relation is whether piracy gives rise to a claim for GA. Originally, the pirates' mission was to seize the ship or steal the cargo onboard. Modern age piracy has however concentrated on the demand for ransom. Therefore, the main question of interest in relation to the piracy issue today, is if a ransom payment made because of piracy can be considered a GA sacrifice.

⁷⁹ Lowndes & Rudolf (2008) p. 108

5.5.1 Ransom payment

It is generally accepted that a ransom payment may constitute a sacrifice that gives rise to a GA act. This acceptance is based on different countries' case law. Although the mentioned case law below is old, it is principal cases that are still regarded as applicable law.

As early as in the year 1590 in the English case of *Hicks v Pailington*⁸⁰, the court stated that "where cargo is voluntarily given up to pirates by way of composition, the sacrifice is a subject for general average contribution". The decisive factor in this case was that the cargo was given up by way of composition. This is regarded as the same as a ransom payment⁸¹. The same view has been stated in early cases in the United States. The court's view in the case *Barnard v. Adams* (51 U.S 270 (1850)) was that "the ransom from pirates is to be contributed for; the loss is inevitable, and indeed actual".

To my knowledge there is no Norwegian case law discussing this question. However, it is relatively clear that also Norwegian insurers⁸² in practice accept that the costs incurred by an act of piracy can be included in a general average claim.

5.5.2 Extra costs

In the recent piracy cases off the coast of Somalia and Nigeria there are large additional costs incurred in addition to the ransom payment. To actually be able to free the ship and crew, assistance by expert negotiators and transport of the ransom are necessary. The question is if these extra costs can also be included in the general average claim.

⁸⁰ 1590 Moore's QB R 297

⁸¹ Lowndes & Rudolf (2008) p. 111

⁸² Ransom is accepted as a GA sacrifice by DNK, Gard, Skuld and Norwegian Hull Club.

5.5.3 General Average requirements – ransom payments and extra costs

In order for the ransom payment and the extra expenses to be admitted as GA the five cumulative conditions in the YAR rule A, as mentioned above, must be fulfilled.

First of all there is clearly a common maritime adventure. Secondly, when the ship is captured and the pirates are in control of the ship, this must be regarded as a peril which threatens the common safety. When the crew is no longer in control of the vessel the operation is compromised, and the ship and cargo are no longer safe. Thirdly, the expenses are made intentionally to regain control of the ship and cargo. The relevant factor is that the costs are not incurred accidentally. Next, the costs must be considered as extraordinary. The costs could not have been foreseen in the ordinary duties the shipowner has undertaken in the contract, and are therefore extraordinary. Finally, the costs are required to be reasonable. What is considered as reasonable cannot be established on a general basis, but must be considered on a case to case basis. Relevant factors would be the risk of damage to the vessel and its cargo, and the risk of the pirates harming the hostages.⁸³

Another question is if costs incurred by assessing a threat of an attack also fulfill the GA conditions. This problem was partly discussed in the arbitration award rendered on 8 May 2009 between Dolphin Drilling and DNK (Bulford Dolphin) in relation to costs incurred to minimize loss. The drilling rig “Bulford Dolphin” was attacked by pirates/rebels on 31st of March 2007. On 7th of April was the rig again threatened with further attacks and hijackings. On June 3rd the crew returned the rig. After this a company was engaged to assess the present threat and recommend security measures and guard the rig. These costs were claimed for indemnification⁸⁴. This was claimed as a cost incurred to avert or minimize loss, cf. NMIP § 4-12. The insurer was not considered liable for the loss of hire claim.

⁸³ Wong (2009) p. 2

⁸⁴ The arbitration award between Dolphin Drilling and DNK p. 2 (8 May 2009)

However the court stated that the costs could have been claimed in the period the rig was being repaired, if a causal connection between the security company's efforts and saved costs for the insurer could be proved. Accordingly, the court opens for the possibility of compensation for costs incurred for the assessment of a threat. Since this was an attack against a rig, GA is not applicable because this is not a common venture. However I assume that a corresponding argument could be raised in relation to GA if a ship was involved. By assessing the threat of an attack the venture could be saved for future expenses.

In conclusion a ransom payment and negotiating and transport costs can be admitted as GA sacrifice. Although, what is considered as reasonable must be established on a case to case basis.

5.6 Exceptions from liability to contribute - actionable fault defense

The general acceptance that piracy related costs constitutes a GA and that the payment of ransom is legal, new issues emerge. GA contributors are trying to exclude liability for their contribution. This is called the "actionable fault defense". The contributing parties are speculating that the shipowner could be at fault for the piracy attack. The most common allegation is that the shipowner is at fault for not exercising due diligence in making the ship seaworthy for a journey in piracy infected waters.

The next section will discuss the "actionable fault defense" from a Norwegian and English law perspective and in relation to international conventions. According to the Norwegian rules there are specific safety regulations that have to be followed on a journey at sea. English rules on the other hand state that the ship must be considered "seaworthy" when a journey is commenced.

5.6.1 Actionable fault defense

The legal basis for the actionable fault defense is the YAR Rule D. The Rule states:

“Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault”.

According to the rule, the party at fault for the peril that is encountered can not claim contribution from the other interests that are not at fault. There is, however, a requirement that the fault is actionable. This means that the fault would give the party from whom the contribution is claimed a cause of action towards the claimant. The question in this relation is if the shipowner is in breach of contract, common law or international conventions if certain safety measures are not taken to avert a piracy attack.

The actionable fault defense might be based on the fact that the shipowner has failed to provide proper equipment to obstruct a piracy attack⁸⁵. Another argument is that the crew has not been properly trained to avert an attack. Finally, an argument can be that there is need for armed guards onboard the vessel sailing in areas where the risk of an attack is high.⁸⁶

The IMB Piracy Reporting Center has reported a decrease in the successful hijackings, although the total number of attempted attacks has increased⁸⁷. The

⁸⁵ Steer (2009)

⁸⁶ Potts (2009)

⁸⁷ ICC (2010)

IMB finds that this is owed to the presence of navy forces and the training of the crew in how to prepare the ship for transit in piracy waters and how to respond to an actual attack. For example the “STOLT STRENGTH” was hijacked in November 2008 and released in April 2009 after long negotiations. As early as in June 2009 the ship was once again exposed to an attack. However, this time the ship managed to escape from the pirates due to a fast response by the crew. It has been expressed by the shipowner that it was the training of the crew after the first attack that resulted in the successful escape the second time.

5.6.2 Norwegian regulations

In order for the contributors to a GA act to avert liability in relation to Norwegian law, the ship must be considered to be in breach of the applicable safety regulations. In relation to hull and loss of hire insurance the legal basis is the Plan § 3-22. The legal basis for cargo insurance in Norway is found in the CICG § 21.

According to the Plan a safety regulation is defined as a “rule concerning measures for the prevention of loss”, cf. § 3-22 first paragraph. The applicable rules could be issued by public authority, found in the insurance contract or made by the classification society. The CICG also refers to safety regulations issued by public authority in addition to the regulations stipulated in the contract, cf. § 21.

The term “safety regulations” has replaced the term “seaworthiness” that was used in the Plan prior to the 2007 version. The reason for this replacement was that the Norwegian Ship Safety and Security Act of 16 February 2007 no. 09 entered into force (SSA). The SSA does not refer to the term “seaworthiness” and the 2010 version of the Plan is now fully in accordance with the terms used in the SSA⁸⁸. The concept of seaworthiness assert for discretionary interpretations. The intention

⁸⁸ Commentary to NMIP version 2010 p. 84

behind the SSA safety regulations was that these should be easier to interpret, in order to obtain shipowners with sufficient knowledge about the requirements that apply to a ship⁸⁹.

In relation to piracy and the insurance cover under the Plan, the rules set out in the SSA are the ones of relevance. First of all it is important to emphasize that the SSA only applies for ships (and oil rigs and other movable installations according to the provisions of the Act) that sail under Norwegian flag, unless a foreign ship sails in Norwegian waters, cf. SSA §§ 2 and 3. The required safety regulations in the SSA are related to four specific divisions, which are technical and operational safety, personal safety, environmental safety and terrorism protection.

5.6.2.1 Safety and terrorism preparedness measures

The framework for the SSA rules are international conventions, primarily regulated by IMO. The International Convention for the Safety of Life at Sea (SOLAS convention) is of relevance for the SSA rules. The SOLAS convention implemented a new chapter, as a measure of preparedness because of the increased threat of terror, cf. chapter XI.2. IMO also developed the International Ship and Port Facility Security Code (ISPS-code) which include binding rules and guidelines for terrorism preparedness.

The SSA requires that all Norwegian flagged ships undertake preparatory measures in order to prevent attacks on ships. This is elaborated in the SSA § 39.

It is required to assess the ships` vulnerability and compose a safety and antiterrorism plan (SSP). This also implies that both the shipowner and the crew must have required training.

⁸⁹ Ot. prp. no. 87 (2005-2006) p. 54-55

The question in this relation is what kind of measures a ship must take before transiting piracy exposed areas. The necessary requirements are further elaborated in the Regulations on security and terrorism preparedness on board ships and mobile offshore drilling units to the SSA⁹⁰. The Regulations are based on the ISPS-code and the EC 725/2004 (EU`s implementation of the ISPS-code).

The Regulations stipulates that ships must follow the alert level that is determined by Norwegian authorities, cf. § 15. The maritime venture has to operate in accordance to the alert level, unless an even higher alert level has been determined in the SOLAS convention chapter XI-2, rule 4.3. The Norwegian authority that sets the alert level is the Norwegian Maritime Directorate. The alert levels are divided into three. The Regulation defines the levels as:

- ”a) Preparedness Level 1: The level where a minimum of relevant security and terrorism emergency preparedness should be maintained at all times.*
- b) Preparedness Level 2: The level where additional measures for safety and terrorism preparedness should be maintained for a certain period of time due to a temporarily increased risk of incidents that may threaten security.*
- c) Preparedness Level 3: The level where further specific security and terrorism emergency preparedness should be maintained for a limited period of time when an event that may threaten the safety is imminent or likely.”*

⁹⁰ FOR 2004-06-22 no 972

The Norwegian Maritime Directorate has rated Nigeria, Somalia and the Gulf of Aden to alert level 2⁹¹, as a consequence of the surge in the piracy attacks in these areas. The same preparedness level is applicable according to the SOLAS convention.

The preparedness levels are relative terms. When a specific area is raised to one of the preparedness levels, the shipowner is obliged to apply the measures that are described in the individual SSP. When talking to the Norwegian Maritime Directorate⁹² I was told that they recommend the ships to follow the BMP guidelines. It is also recommended to register passage with the MSCHOA. The guidelines are not decreed by law. It is however likely that a breach of these guidelines will be considered negligent by the shipowner. The Norwegian Maritime Directorate supports this view. This means that a ship sailing in piracy infested waters without following the BMP guidelines may be in risk of losing insurance cover if the ship is attacked.

5.6.2.2 Breach of safety regulations

In case of breach of the safety regulations the insurer is as a starting point free of liability. The insurer can only be held liable if “it is proved that the loss is not a consequence of the breach, or that the assured was not responsible for the breach”, cf § 3-25 first sentence. The rule is applicable if ordinary negligence can be established.⁹³The Plan stipulates that there must be a causal connection between the breach of safety and the loss incurred. If the damage has incurred although the safety regulations have been followed, the insurer does not have the right to limit his liability. The meaning of the wording “it is proved” in § 3-25 means that it is the assured that carries the burden of proof. Thus, it is the shipowner that has to

⁹¹ www.sjofartsdir.no – Preparedness level (beredskapsnivå)

⁹² Interview with Norwegian Maritime Directorate – Morten Alsaker Lossius

⁹³ Commentary to NMIP version 2010 p. 91

establish that the loss has not incurred by his fault or negligence. Since the burden of proof is placed on the shipowner, the insurer can be tempted to invoke breach of safety regulations in the case of a piracy attack. It may be seen as a last resource to limit liability.

The safety regulations the shipowners are obliged to follow also entail a duty to supervise that the crew onboard the ship follows the instructions given⁹⁴. It is not possible to establish exactly to what extent the shipowner is obliged to supervise his crew. This will depend on what risks the ship is vulnerable to on each single journey that is commenced⁹⁵.

An exception from the above, is made in § 3-25 first section second sentence. If the shipowner and the master or a member of the crew is the same person the rule in § 3-25 first sentence can only be applied if the negligence is not “of a nautical nature”. By the wording “nautical nature” is understood the general rules of navigation and port and canal regulations etc. Thus, if the SSP imply how far from land the ship must be distanced and other navigating requirements this would be relevant. If the master fails to navigate according to the regulations this could not limit liability, as this would be a nautical error by the master of the ship.

In conclusion, a breach of safety regulation according to the SSA may give the insurer freedom of liability. Such breach may be established if the BMP guidelines are disregarded when transiting piracy areas. As mentioned above the party at fault can not claim contribution to a GA claim. A breach of safety regulations must be seen as an actionable fault. Accordingly, the other interests can use the actionable fault defense to avert a contribution to a GA claim made by the shipowner.

⁹⁴ Commentary to NMIP version 2010 p. 91

⁹⁵ ND 1980.91 Hålogaland TOTSHOLM

5.6.3 English regulations

The English system is founded on warranties as opposed to the Norwegian safety regulations. Warranties are presumptions and conditions to the insurance cover⁹⁶. The legal bases for warranties is the UK MIA section 33. Warranties can be expressed or implied. If a warranty is disregarded the insurer is free from liability, cf. section 33 third paragraph.

The concept of seaworthiness is an implied warranty. This means that the warranty is applicable without being included in the insurance policy. The question in this relation is if an unseaworthy vessel transiting piracy areas, could free cargo and hull interests form a GA contribution.

In the contract of carriage, the parties often agree on different terms than the ones that are incorporated in the UK MIA. There is for example no similar warranty of seaworthiness for time charters⁹⁷. Nevertheless, the UK MIA section 39 fifth paragraph stipulate that if a ship commences on a time voyage in an unseaworthy state, and the assured has knowledge about this, the insurer is not liable. A breach of an implied warranty discharges the insurer from liability. Since this is considered to be a severe consequence for the assured marine policies often contains a "held cover clause". This clause implies that the assured is covered even if a warranty is breached provided that additional premium is paid and the insurer is given immediate notice⁹⁸.

For cargo insurance covered by the ICC 1982 clauses A, B and C the seaworthiness concept is consumed in section 5. The clauses exclude cover only if the assured had knowledge about the state that made the ship unseaworthy. It is also required that there is a causal connection between the unseaworthy state and the loss or damage. This is a milder sanction than pursuant to the UK MIA.

⁹⁶ Wilhelmsen (2001) p. 129

⁹⁷ Wilhelmsen (2007) p. 139*

⁹⁸ Wilhelmsen (2001)p. 136

When it comes to hull insurance cover in the English market the ITCH 1983 do not contain any regulations about seaworthiness. The IHC 2003 contains a provision in section 13, which implies that the assured must act in accordance with rules that the Classification Society recommends. These rules are comparable to the Norwegian safety regulations imposed on Norwegian ships in the SSA⁹⁹.

Although the various insurances contain different provisions about seaworthiness and safety regulations in the English market, international conventions will also regulate the concept of seaworthiness. In the following the concept of seaworthiness will first be discussed in the elucidation of the UK MIA and then according to the Hague-Visby rules.

5.6.3.1 UK Marine Insurance Act

The UK MIA contains an implied warranty of seaworthiness for voyage policies for ships. Section 39 provides the following definition of seaworthiness:

“A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.”

The duty implied on the shipowner is to provide a ship that is fit for its purpose¹⁰⁰. The seaworthiness term applies to the structure of the vessel, equipment, crew and stowage¹⁰¹. Thus, a ship could be in satisfactory condition, but still be unseaworthy e.g because the crew is not experienced enough for the voyage the ship is about to engage on.

⁹⁹ Wilhelmssen (2007) p. 139

¹⁰⁰ Soyer (2005) p. 50

¹⁰¹ The drafter of the Act, Chalmers and Archibald, (1922) p. 64

The ship must be seaworthy at the commencement of the voyage, cf. UK MIA section 39 first paragraph. Best efforts to make the ship seaworthy are not adequate to fulfill the duty. However, the standard does not require perfection. It is adequate that the ship has the standard that could be expected of a prudent shipowner.

The reasoning behind the concept of seaworthiness is that if a shipowner fails to comply with the rules and cost incur as a consequence of this, he should bear the loss. The duty to provide a seaworthy ship also promotes safety at sea. Finally the rules provide protections for the shipper who place property onboard the ship.

Section 39 requires the vessel to be able to encounter “ordinary” perils. The term “ordinary” must mean that the peril is a statistical risk. It cannot be considered as a requirement that the peril is common. For example, fire is a statistical risk which imposes a potential danger to the ship. It is required that the ship has fire-detection and fire-fighting equipment onboard to prevent damage if a fire occurs. If a ship lacks any equipment to prevent fire the ship would probably be deemed unseaworthy¹⁰². The last years` surge in piracy has made the potential risk of encountering pirates high in certain waters. The risk of piracy has become so high that it could be said that it is a statistical risk to encounter pirates when transiting piracy infested waters.

If piracy is seen as a statistical risk it can be claimed that a ship must have adjusted equipment and trained crew in order to be deemed fit to meet the potential perils during the voyage. However a counter argument is that it is only the perils *of* the sea that the shipowner must prepare the ship against, not the perils *on* the sea. This would mean that it is only the ordinary risks of nature the ship and crew must be able to handle.

¹⁰² Steer (2009) p. 2

If it is accepted that piracy is a peril that the ship and crew must be fit to encounter, the question is what measures could reasonably be required by the shipowner in order to make the ship seaworthy. BMP establishes guidelines to handle an attack. Training and drills are suggested to make the crew better equipped to handle the situation. If the requirements from BMP are implemented this would often mean that the pirates would withdraw from the attack, when they encounter resistance. It has been experienced that physical non-lethal methods such as water cannons, barbed wire, and greasing or electrifying handrails are effective. There should be little doubt that if the BMP requirements are fulfilled, the ship must be regarded as seaworthy in relation to piracy. However they could be seen as unreasonable. The BMP refers to requirements that are set out in the SOLAS convention. If the ship sails under a European flag the SOLAS convention is applicable. The BMP requirements are based on requirements made in the SOLAS convention and altered to deter the risk of piracy. This would weigh in the direction that the BMP requirements must be seen as reasonable.

Armed guards has been considered by many shipowners, but this has however been generally been warned against. The BMP requirements do not suggest the use of armed guards and underwriters are generally against this. Therefore it must be relatively clear that for ships which sail under a European flag armed guards on board the vessel to deter piracy cannot be required to make the ship seaworthy.

5.6.4 International conventions

The Hague-Visby rules are a set of international rules for the carriage of goods by sea. The Hague-Visby Rules are incorporated in Norwegian law by the Norwegian Maritime Code chapter 13. The same set of rules is also incorporated into English law by the Carriage of Goods by Sea Act, 1971. Pursuant to article 3 (1) of the Hague-Visby Rules, the shipowner is obliged to make the ship seaworthy. The article states:

“1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

(a) Make the ship seaworthy;

(b) Properly man, equip and supply the ship;

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.”

The relevant difference in the concept of seaworthiness set out in the Hague-Visby Rules compared to the rules in the UK MIA is that the shipowner duty is to exercise “due diligence” to make the ship seaworthy. Due diligence to make the ship seaworthy can be defined as a “genuine, competent and reasonable effort of the carrier to fulfill the obligations set out in paragraph (a), (b) and (c) of article 3 (1)”¹⁰³. The shipowner`s duty is therefore confined to his best effort to equip the ship and train the crew.

What is considered as sufficient to qualify as a best effort, must depend upon what can be expected of a prudent shipowner. The English Court of Appeal stated in the *Kaptain Sakharov* case from 2000¹⁰⁴ that due diligence has been properly executed if “the carrier, his servants, agents and independent contractors have exercised all

¹⁰³ Tetley (2004) p. 3

¹⁰⁴ Lloyds Rep. 255 at p. 266

reasonable skill and care to ensure that the vessel was seaworthy at the commencement of its voyage, namely, reasonably fit to encounter the ordinary incidents of the voyage...”

It can be asked what the difference is in the duty to only provide due diligence to make the ship seaworthy and actually making the ship seaworthy. The problem is if due diligence can have been exercised if the ship is deemed to be unseaworthy¹⁰⁵. However the rules do not stipulate an absolute obligation. The duty only exists before and at the beginning of the journey. Thus, are the rules according to the Hague-Visby convention less comprehensive than the rules in the UK MIA. Since the Hague-Visby Rules require less to make the ship seaworthy, it may be unreasonable to apply the GMP guidelines as a standard. However it is likely that the ship must possess some non-lethal equipment on board the vessel.

Looking back on the example above where fire and piracy was compared, this could also be relevant when establishing if the crew is competent. In the American case *Liberty Shipping Lim. Procs*¹⁰⁶, the crew was not trained to fight fire. The court stated that: “the failure of the Liberty to use due diligence to provide a trained, competent and informed crew constitutes privity and neglect of the owner”. Accordingly, the ship was unseaworthy. This shows that even if the Hague-Visby rules are applied the shipowner is obliged to equip the vessel and have competent crew in order to be seaworthy.

Regardless of what rules are applicable the term seaworthiness and due diligence are relative terms. This means that they evolve as time passes. Therefore, expectations to follow the technological developments and upgrading the vessel and crew according to modern perils of the sea may be reasonable.

¹⁰⁵ Tetley p. 5

¹⁰⁶ 1973 AMC 2241 (W.D. Wash. 1973)

To conclude, the Hague-Visby rules may provide a lower standard for what could be demanded of the shipowner to deter piracy. However it is likely that both the vessel and the crew must be prepared to face the problem of piracy in order to be covered by the insurers for a general average contribution.

5.6.4.1 SOLAS convention influence on the seaworthiness term

The SOLAS convention has been adopted and ratified by a majority of the world's flag states. The ISPS code is included in the conventions chapter XI-2. For contraction states the ISPS code implicates the concept of seaworthiness. A consequence of this ratification is that the code will determine the minimum standard that has to be present in order to have a seaworthy vessel¹⁰⁷. This means that a SSP has to be established.

5.7 Conclusion

How courts would view this problem is uncertain. It is probably inevitable that GA contributors in the future will try to avoid payment by imposing the actionable fault defense.

One example is the MALASPINA CASTLE case. The vessel was captured on April 6th 2009 outside Somalia. The ship transported iron for a Chinese company called Hangzhou Cogeneration Import and Export Co. The ship was released for a ransom payment of USD 1.8 million. In addition the shipowners had incurred USD 2 million in negotiating and delivery costs. Hangzhou is disputing their contribution and the case is now in arbitration in London. Since the case is solved by arbitration it is not public. It has been expressed that it is likely that Hangzhou

¹⁰⁷ Soyer (2005) p. 110

is arguing that the ship was unseaworthy¹⁰⁸. Irrespective of whom the arbitration panel sides with, this case is likely to have an effect on future disputes. Relying on GA contributions to cover ransom may become risky or at least a lengthened process if the actionable fault defense is used.

To conclude the concept of seaworthiness may be implied in the case of piracy. If implied, the BMP requirements could be a reasonable guidelines when measuring if the vessel was seaworthy or not. However it could be of relevance whether Norwegian, English or international rules are applicable. Generally the Norwegian rules and the Hague-Visby convention seems less comprehensive than the UK MIA. Either way, it is at least inevitable that the increase in piracy attacks and ransom payments would lead to disputes concerning this problem.

5.8 What about P&I contribution?

Currently, the GA contribution is divided between the hull interests and the cargo interests of a common marine adventure. The reasoning behind this division is that hull and cargo are interests that can be measured after their value at the time the GA act occurred. Loss of human life and personal injury is covered by P&I insurance. P&I insurers are however not considered a contributor to a GA claim in principle. This is because human life is characterized as an interest whose value is not possible to measure.

Ransom is paid in order to free the vessel, cargo and crew. Normally, the crew is the highest priority at all times for a shipowner that encounters a piracy attack. The question is whether liability for the costs incurred with an attack should involve the

¹⁰⁸ By average adjuster Spencer from Spencer Co in New York and lawyer John Woods with the law firm Clyde & Co - <http://www.businessinsurance.com/article/20090726/ISSUE01/307269980>

P&I insurer. This problem has been addressed by cargo interests because the piracy bills have become frequent and costly¹⁰⁹.

The division in a GA contribution between the interests involved in the maritime adventure is based on case law which dates back the year 1590. The life of the crew was not the shipowners highest priority back then. It can be argued that P&I insurers benefits from the release that this should lead to the P&I insurers acceptance of a proportional liability for the ransom payment.¹¹⁰

P&I insurers cover life salvage claims, when life is saved together with property¹¹¹. If a salvage act and a GA act are compared they could be viewed as somewhat similar. When human life is saved in a salvage operation the P&I insurers are obliged to contribute. Both in a salvage situation and a piracy situation are human life saved from a current peril. Thus, it may be reasonable that these two situations should be treated equally, making P&I insurers also partly liable for a GA act.

Piracy also raises a possibility for environmental damage. When a ship is hijacked it is normal that the pirates direct the ship to shallow waters near shore. This creates a risk of grounding which could lead to leakage and a positional pollution damage, which the P&I insurer would be liable for. It could be argued that the P&I insurer has a great interest in avoiding such damage and for that reason should contribute with the other interests involved.

On the other hand it would still be problematic to value human life. It would be hard to find a system that fairly could value the contribution that should be apportioned to the P&I insurer. This is probably the most reasonable argument for the P&I insurers to still avoid contribution. However, since this problem is solved in other areas, it should be manageable. A possible solution may be to apply the

¹⁰⁹ Frank (2009) p. 1

¹¹⁰ Ibid.

¹¹¹ e.g. Gard Statutes 2010 Rule 33

same system as for a salvage act if life is saved. Or simply define P&I interest as a percentage in the common adventure, which they are held liable for.

Another aspect that should be taken into consideration is that P&I insurers may become liable to cover cargo`s contribution in GA where this is unrecoverable due to the shipowners breach of safety regulations or the ship is deemed unseaworthy¹¹². If the vessel is proven unseaworthy it would be a breach of contract.

To conclude the rules that except P&I insurers from a GA contribution seems somewhat outdated and in need of an update. The modern age piracy does not only turn on property but also life. This factor should be seen as relevant since the whole common maritime adventure is vulnerable to piracy.

5.9 Consequences of the battle between insurers

The question is what the consequences are if the recovery of ransom payments become uncertain.

First of all there is a risk that the battle of apportioning these costs could cause an increased danger to the crew. This is because the shipowners could become more apprehensive towards paying ransom¹¹³. Shipowners have focused on the safe release of the crew in as short time as possible. This has lead to high ransoms. If the life of the crew was not the shipowners number one priority the costs would probably be lower. The danger is if shipowners start to change their highest priority if they are sure to end up in a dispute with insurers about their contribution.

¹¹² e.g Skuld Statutes 2010 section 6.1 and 6.2

¹¹³ Frank (2009) p. 1

Another aspect is that shipowners start to take out specific cover for ransom payments. This can be covered through individualized kidnap and ransom insurances. These insurances generally cover the ransom payment and additional costs incurred by a piracy attack. This could spare the shipowners of the uncertain recovery and ensure no gaps in the cover. However, the negative side is that these insurances are very expensive. Cover for one single transit through the Gulf of Aden can cost up USD to 20.000¹¹⁴. Another new separate insurance product on the market is the so called “Vessel Shield”.¹¹⁵This insurance seeks to secure the ship, train the crew and help with finding the safest route through piracy prone areas, in addition to coverage for ransom payments.

In conclusion it is a probable danger that shipowners start to disregard the crew as their highest priority if a vessel is hijacked. All the interests in a joint maritime adventure are in it to earn money. If this factor is sufficiently complicated other factors may be given a lower priority.

¹¹⁴ Munich Re Group (2008)p. 22

¹¹⁵ eg. Willis.com

6. Closure

Piracy will continue to cause major challenges for both shipowners and insurers. Before the piracy problem is handled nationally by the countries in the piracy prone areas the maritime industry will have to continue to develop measures to deter the threat. The thesis has focused on the problems with terminology and liability for the costs incurred with an attack. The revised version of the Plan shows that maritime industry tries to find solutions encountered with the piracy problem. The widened definition of the term piracy has come a long way in clarifying who is liable when attacked. At the same time new issues arise when contribution to the piracy bill is claimed. In anticipation of clarifying case law, it remains to be seen if the insurers will try to oppose future claims.

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