

OUR KNOWLEDGE / PUBLICATIONS / PIRACY OVERVIEW 2010



As another full year in the pirate calendar ends, the depressing cycle seen in 2009 has been repeated. The small green shoots of hope seen in lower levels of activities in January and February 2010 quickly shrivelled and the year ended with alarming levels of attacks, not only in greater numbers but with a more extensive geographical spread than previously seen. The number of hijacked vessels still in the hands of the pirates at the end of 2010 was 26, a figure that could have been much higher had it not been for the dozen or so vessels that were boarded by pirates but where protracted hijackings were avoided by the use of the citadel.

Duration of attacks

During 2010, 21 vessels were released, with an estimated total ransom of around US\$75 million being paid. The average duration of a hijacking calculated by reference to the last six ships released (ending with the *Marida Marguerite* on 27 December) stands at 255 days. The corresponding rolling six ship average for the previous year was 93 days. Only six ships were released in less than 100 days and none of those occurred after May. A thought should go out in particular to the crews of the *Iceberg* (hijacked 29 March) and the *Rak Africaan* (hijacked 11 April).

Assuming that a hijacking costs three times the ransom paid in terms of loss of hire, loss of opportunity, cargo losses etc, then the total costs to the stakeholders of those vessels involved must be close to US\$400 million. The additional costs in terms of security, additional premiums and deviation to the industry are considerable. Lloyd's List estimated the annual cost to the industry at US\$16 billion. The human cost and the trauma suffered by the crew kept confined in one room for over six months cannot be calculated.

In another recent article in Lloyd's List, Mark Harris of ASI Global, a company with considerable experience in kidnapping and latterly maritime hijackings, was quoted as saying that shipowners owed a duty to each other to keep ransom payments to a minimum. The statement is no doubt based on the morality of paying ransoms at all and that is fully understood by everybody involved.

But is it right? Further, if it is not right, but is the basis upon which negotiations are carried out, does it follow that it is the reason for the ever-lengthening duration of the hijackings? This is a debate that the industry has not had but, in the face of a rapidly deteriorating picture, perhaps it should. Whilst the crew bear the brunt as the leverage in the negotiations, the financial victims of the extortion remain, for the most part, the hull (or war) and cargo underwriters. General Average has been around for hundreds of years and, in maritime casualties, it is the way that the benefits are balanced. Traditionally, crew do not contribute to the GA part. If the present approach to the negotiations (following what has been referred to as the "Mexican kidnapping template") is a reason for the present situation, then is it time to question whether what is being done is right?

If, at the outset, all the stakeholders (including the P&I Clubs) ask themselves (as they would in any other maritime casualty) what their potential combined exposure will be assuming a five or six month hijacking and the answer is US\$10 million or US\$15 million (the Actuarial Profession in October put the average at US\$9m), then surely those stakeholders would ask why it makes sense for them to lose that sum in the face of a ransom payment of say US\$3.5 million. Nowhere else in shipping would that make sense.

Of course, it is not as simple as that and the inevitable consequence would be an increase in ransoms. The first and obvious retort to that is that ransoms are increasing anyway. Like housing sales in a rising market, ransoms are often based on the price obtained in a previous case. However, if the cost of the ransom is truly balanced between the stakeholders, there is perhaps a reasonable expectation that the overall cost to the industry would decrease, as it would be accompanied by a decrease in the duration of the hijacking. If nothing else, it reduces the suffering of the crew.

Whilst the industry may have some influence on the reward side, the risk to the pirates remains minimal. The IMO reported in July 2010 that over 700 pirates had been caught and released by the military. Extrapolated over the year, that would mean a total of 1,400 pirates who have been interdicted in some way by the military but then released. There is no criticism of the military, who can only respond according to the mandate given to them by national governments. It is refreshing to see that France adopted new piracy laws, making it easier for their military forces to arrest any pirate attacking any ship. However, the law does not go as far as to allow them to receive pirates taken by other European ships for prosecution in France. Piracy prosecutions still make headline news in Europe and the US because of their rarity. This year has seen successful piracy prosecutions in Holland, Germany and the US, but the total number involved is fewer than 20 pirates.

Citadels

2010 was also the year of the citadel being adopted increasingly as a defensive tactic. The high profile case of the *Taipan* in particular and the amendment to the Best Management Practice Guidelines gave a greater profile to the citadel and not just in areas where there was at least a possibility of fast military intervention. By the end of the year, at least 12 vessels were reported to have successfully used the citadel and many of these were deep in the Indian Ocean. The threat of military action seemed to be a potent deterrent to the pirates remaining on board. However, the pirates' ability to adapt means this remains a strategy which requires considerable forethought and planning. If the threat continues in 2011, there is a risk that we will see more aggressive tactics in trying to breach citadels and it must be a matter of time before the owners' luck runs out. BMP Guidelines are clear and ship operators and masters are "..... strongly advised to check directly with MSCHOA regarding the use of citadels.....".

Armed guards

The debate on armed guards continues. The trend towards arming ships grows. There is no doubt that some owners are being driven towards army ships as a result of purely commercial factors. Shipowners are in competition and good business is being lost to those who have taken steps to arm ships that can compete for East Africa business. Shipowners are increasingly pushed to reconsider previously held principles that they would not arm their vessels.

The pool of armed men and weapons is finite and an increase in demand will undoubtedly put pressure on the reputable maritime security companies. The last thing the industry needs is a decrease in quality. There is a clear need for the development of a standard MARSEC (US Maritime Coast Guard Security) Contract which can be adopted across the board. This would give comfort to underwriters and owners alike. The unique selling point remains that ships with armed guards have not been hijacked. It is the mantra of the MARSEC Companies, but it does not make the use of armed teams any less controversial.

[Click here to read an article covering the use of armed guards and the legal issues involved.](#)

Mother ships

The other worrying development, caused in part by the duration of the hijackings and in part by the difficulties that the pirates are having in operating deep in the Indian Ocean, has been the use of other hijacked commercial vessels as mother ships. This allows them to operate at much greater limits of endurance at far less physical risk. Vessels that have been used as mother ships include the *Samho Dream* (a VLCC) and, more recently, the *Izumi*, the *York*, and the *Polar* (also laden with oil). The evolving picture is of gangs using one vessel to hijack the next. This represents a serious threat to the citadel tactic where military intervention is not on hand. It is a credible next step that crew members from the hijacked mother ship could be transferred to the blacked out bridge of the second ship (where the crew are in a citadel). This would negate that crew's intention to defeat a hijacking, particularly if the vessel was then towed, however crudely, towards Somalia.

Legal developments

Perhaps the most significant legislative development of the year was the Executive Order on Somalia and piracy, issued by the US on 13 April. This is now better understood and companies work with the US Office of Foreign Assets Control ("OFAC") to ensure that they do not fall foul of its provisions. However, it is frustrating that OFAC will not give any clarification as to whether the Order does not apply to secondary payments i.e. indemnity payments by insurers of cargo or charterers, where the ransom has been paid by a non-US person to the pirates. This can and does act as a hindrance to the willingness of other stakeholders to engage in the process.

In the *Saldanha* case (see article at here), where Ince & Co acted for the successful owners, we saw clarification under English law on the issue of payment of hire under a time charter during a hijacking. In a more recent, arbitration, a London Tribunal was asked to consider whether a refusal to transit the high risk area in November 2008 by an owner relying on the Conwaritime Clause was valid. The Tribunal accepted that the Gulf of Aden was "dangerous" and determined that an analysis of the danger should not be calculated by reference to an increase of the statistical analysis of the threat between the date of the charter and the date the order was given. They also considered whether

the decision made by the owners was "reasonable" and answered that by reference to the existing authorities on the issue of discretionary decision-making. It was said that such a decision could not be made arbitrarily and that it was necessary to look at the basis of the decision and the information available to the decision maker. Those findings may yet get an airing in the High Court in London.

Comment

Perhaps the removal of the Islamic Courts in Somalia in 2006/07, which enabled the pirates to flourish, is now regretted. But that genie cannot be put back in the bottle and perhaps the shipping industry can do little more than watch and wait as the international community looks for solutions ashore. In the meantime, the commercial world must adapt to an evolving foe that shows no sign of fatigue and indeed, if the use of the mother ships becomes the norm, may be revitalised. This is now a long term problem with worrying signs of being copied, particularly off the coast of Nigeria, albeit to a lesser extent. On that basis, it is perhaps right that the industry should take a long hard look at whether the current approach to hijackings is the right one and try to get ahead of a game that it is, at the moment, losing.

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