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# **Piracy and risk reduction**

**presented by**

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## **Piracy and risk reduction**

**Dennis L. Bryant**

The marine industry is replete with risks: groundings, collisions, fire, etc. Piracy is a risk that everyone thought, until recently, was largely of historical interest. Starting in the last years of the twentieth century, piracy has reappeared: first in the Straits of Malacca, then off Nigeria and certain ports of South America. Now, it is a highly visible problem in waters off the coast of Somalia.

For centuries, marine insurers regularly provided insurance against losses caused by piracy. As piracy faded into history, so did piracy insurance. It never really went away, but few shipowners asked for it and fewer claims were made for piracy losses. Piratical attacks are now on the rise, as are piracy claims. Whether these claims are handled by means of hull and machinery insurance, war risk insurance, protection & indemnity insurance, or otherwise is both outside my expertise and beyond my remit. I am more concerned with risk reduction, so that there are fewer claims for losses due to piracy.

### **Opposing piracy**

Piracy is a crime. It is theft, invariably accompanied by violence, occurring on the high seas. I suggest that piracy be fought in a manner similar to crime-fighting ashore. If crime becomes a problem in a particular neighborhood, it is generally fought by undertaking the same series of steps: (1) increased law enforcement presence; (2) prosecution of offenders; (3) increased self-defense measures by those in the neighborhood; and (4) addressing the root causes of crime (generally poverty). The fight against the Somali pirates is proceeding largely along these same lines. Additionally, efforts have commenced to reduce uncertainty within the commercial risk pool, which is comprised of owners, operators, charterers, cargo owners, mortgagees or other financial interests, and insurance carriers.

#### **1. Increased law enforcement presence**

When piracy first started in waters off the coast of Somalia, governments worldwide resisted implementation of counter-piracy naval patrols, which have not been

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used since the early 1800's. As a result of the recent uptick in piratical attacks, though, there has been a dramatic change. Warships from various nations (with helicopters and surveillance aircraft) are finally patrolling off the coast of Somalia and in the Gulf of Aden. International cooperation in counter-piracy measures is increasing. Attempts to bolster the government of Somalia have commenced. Negotiations with neighboring countries (primarily Kenya) are developing venues where suspected pirates may be brought to trial. Attempts are even being made to freeze pirate assets.

The Contact Group on Piracy off the Coast of Somalia (CGPCS) has been established to develop and implement counter-piracy coordination measures. Members include: Australia, China, Denmark, Djibouti, Egypt, France, Germany, Greece, India, Italy, Japan, Kenya, the Republic of Korea, the Netherlands, Oman, Russia, Saudi Arabia, Somalia TFG, Spain, Turkey, the United Arab Emirates, the United Kingdom, the United States, and Yemen. Observers include: the African Union, the European Union, the North Atlantic Treaty Organization, the UN Secretariat, and the International Maritime Organization. Under the loose umbrella of the Combined Maritime Forces, warships and other assets to patrol the western Indian Ocean and associated waters are provided by governments of Belgium, China, Denmark, France, Germany, Greece, India, Iran, Italy, Japan, the Netherlands, Pakistan, Portugal, Russia, Saudi Arabia, Spain, Turkey, Ukraine, the United Kingdom, and the United States, among others.

The maritime industry had been pressing for measures such as these for some time. It took some high-visibility seizures and attempted seizures to capture the attention of the mass media, the public, and the politicians. More assets and greatly increased cooperation between the various naval forces are vital. There is evidence that recent increases in the number of naval vessels and improved international cooperation in their deployment has resulted in a material decrease in the number of successful piratical attacks in these waters.

## **2. Prosecution of offenders**

A significant gap in the counter-piracy effort continues to be prosecution. Individuals, particularly if poor and disenfranchised, will continue to engage in piracy so long as it is profitable and has few consequences. Piracy off the Horn of Africa has clearly been profitable, with hundreds of millions of dollars having been paid in ransom over the past few years. This year, approximately a dozen suspected pirates have been killed in conflicts with various naval patrols in the area. This seems to have been seen by the pirates as just another cost of doing business – at least so far.

The missing element has been the rule of law. Piracy is an international crime. In fact, it was the first internationally-recognized crime. There have been several practical problems though. Piracy has been off the agenda for so long that many nations do not have statutes directly addressing the crime. Some nations have narrowly defined

the crime so that it only applies to piratical attacks against ships flying their flag. Other nations just don't want to be bothered with all of the difficulties involved with bringing the suspects to court thousands of miles from the scene of the attack and then marshalling all the witnesses and evidence that would be required to conduct a trial. Several nations have even offered the lame excuse that, if a suspect was brought to justice in a distant nation, the pirate upon eventual release from jail would claim asylum, asserting that he would be subjected to inhumane treatment if returned to Somalia.

Of the prosecutions that have taken place, the lion's share have been in Kenya, which has mutual assistance agreements with the United States and various European nations. Several suspected pirates are being prosecuted in Yemen for assaults undertaken in that nation's waters. Several suspected pirates are also being tried in France, Belgium, the Netherlands, and Spain for assaults on ships of those countries. One suspected pirate is being prosecuted in the United States. That individual is the lone survivor of the four who boarded the US-flag container ship *Maersk Alabama*. Both the Seychelles and Mauritius have been approached about entering into mutual assistance agreements similar to the one adopted by Kenya so as to allow trials of suspected pirates in those nations, but nothing has been finalized to date. A proposal has also been made for establishment of a special international court to try suspected pirates.

No one ever said that fighting piracy would be easy, but it is one of the obligations of nationhood. Each country has a duty to bring its criminal statutes and judicial procedures up to date to effectively address this international crime. It will only get worse if ignored.

### **3. Increased self-defense measures**

Ashore, when an area becomes recognized as having a crime problem, people avoid it if possible. If avoidance is not an option, they take various commonsense self-defense measures. They don't go walking alone. They lock their doors. They bar their windows. They install burglar alarms. They establish neighborhood watches. One thing that is not done is to pass out guns to all the local residents.

The maritime industry has been slow to adopt similar measures. While I do not advocate the carriage or use of lethal weapons on commercial vessels, there are a variety of other options. First, the use of lookouts must be increased. There is no reason that pirates should be able to board a ship undetected in high-risk waters such as the Gulf of Aden. If this requires the ship to carry more than the usual number of crew, so be it. Second, the ship should transit the high-risk area at the highest reasonable speed. Third, the ship should check in with the naval forces in the area. They can't protect you if they don't know that you are in the area. Fourth, the ship should, to the extent possible, operate within the designated corridors. Fifth, the ship should participate in

an organized convoy, if possible. Sixth, the crew should conduct regular counter-piracy drills and an extra drill should be conducted just prior to the ship entering high-risk waters. Sixth, the fire hoses should be laid out on the fantail and kept charged during the transit of high-risk waters. Seventh, if the ship regularly transits high-risk waters, the owner/operator should invest in non-lethal devices such as electric fencing, the long-range acoustic device (LRAD), and remote-controlled fire monitors. Eighth, if approached by a threatening craft, the ship should notify the owner and operator, as well as the naval authorities. The ship should be brought up to maximum speed and maneuvered evasively. The crew should be mustered and a team sent to the fantail to man the firehoses. Ninth, if boarded by armed pirates, the crew should consider cooperating fully with their demands. Most Somali pirates are armed with automatic weapons and rocket-propelled grenades. They may also be emboldened by the use of narcotics. Recently, there has been a noticeable uptick in the level of violence in piratical boardings, resulting in the injury and death of several crewmembers. Once the pirates gain access to the ship, active resistance may not be the best course of action.

For the ship owner, operator, and master, the ultimate goal is to NOT be attacked. In this respect, the ship should appear to the pirates as a difficult target. The pirates will then move on to an easy mark, leaving you undisturbed.

### **USCG Maritime Security Directive**

The Coast Guard is requiring US-flag vessels transiting high-risk waters to prepare a detailed security plan to address the hazards posed by potential terrorism, piracy, or armed robbery at sea. Security protocols must be submitted to the Coast Guard. The Coast Guard will then work with the owners and operators in the development and approval of individual security plans for these vessels. Once the security plan is approved, the ship owner or operator must implement the plan and the ship must be operated in accordance therewith while in high-risk waters. The designation of high-risk waters in the Maritime Security Directive has not been released, but certainly includes the Gulf of Aden and waters of the Indian Ocean off the coast of Somalia, as well as the Straits of Malacca and waters off the coast of Nigeria.

The Directive provides a list of security options, largely incorporating best management practices endorsed by the maritime industry. One point on which the Directive deviates from the industry recommendations is with regard to carriage of weapons. The Directive does not require, but strongly encourages carriage of weapons on US-flag vessels transiting very high-risk waters, particularly the Gulf of Aden and off the coast of Somalia. Best management practices advocated by the Coast Guard include, but are not limited to those mentioned above. A more complete list of best management practices is posted on the Maritime Administration website at [http://marad.dot.gov/documents/Best\\_Management\\_Practices\\_to\\_Deter\\_Piracy.pdf](http://marad.dot.gov/documents/Best_Management_Practices_to_Deter_Piracy.pdf).

## **Arguments against the carriage of weapons**

Personally, I am opposed to carriage of weapons on commercial vessels. Such a practice raises safety issues for the crew, which is not trained in their use. If a special team is embarked, then there are problems integrating that team with the regular crew. Ships are dangerous enough, with sophisticated equipment and, many times, hazardous cargoes, without introducing weapons. There are numerous practical difficulties in getting weapons on board and then off ships, not only in foreign ports, but even in the United States. Arms export licenses may be needed from the State Department. Such licenses are almost impossible to acquire because consent for such export must be obtained from each nation at which the vessel will make a port call.

Finally, there is the very real possibility that an individual on the ship who injures or kills a suspected pirate may be arrested and prosecuted by a foreign government. One need only recall the unfortunate incident in the Suez Canal on March 24, 2008. The *Global Patriot*, a Military Sealift Command-chartered US-flag ship with an embarked Navy security team was approached by three small boats. A verbal warning was issued, but ignored or not understood by persons on the small boats. Warning shots were then fired. Tragically, one of the shots intended as a warning hit and killed an individual on one of the small boats. Fortunately for the US vessel and its crew, the individuals involved (US military personnel) were entitled to sovereign immunity, so there was no prosecution, although the US Government paid substantial reparations for the incident.

More recently, on September 7, 2009, the German warship *Brandenburg* was on counter-piracy patrol in the Gulf of Aden. A suspicious skiff with five persons on board was sighted. A helicopter was launched. It observed the persons on the skiff throwing ladders and weapons overboard. The skiff was ordered to stop, but continued at speed. An interpreter exhorted the skiff to stop, but to no effect. Warning shots were fired across the bows of the skiff, but still it continued to flee at high speed. Authorization was then given for the helicopter to fire into the skiff so as to disable it. The shots were fired. The skiff stopped and was boarded by military personnel using an RHIB. They found one of the four persons on the skiff had been wounded by the gunfire. Despite immediate medical treatment, the wounded individual died. Due to a lack of evidence that the individuals on the skiff were pirates, they were put ashore in Somalia along with the body of the deceased. No claims or legal action ensued as a result of this incident.

The same outcome possibly would not obtain if the ship involved had been in regular commercial service with armed crewmembers or private security guards. While we are generally familiar with criminal and tort liability under US law, it is uncertain what laws would be applied if the ship and its crew were detained by a foreign government, such as Somalia or Yemen. Legislation has been introduced in the US Congress that would immunize US crewmembers from prosecution by the federal

government for deaths or injuries occurring in defending the vessel against piratical attack. Such legislation, if adopted, would not protect those mariners from prosecution by a foreign government.

#### **4. Tackling the root causes**

The piracy problem in waters off the coast of Somalia has two primary causes. First is the widespread poverty and lack of legitimate work throughout the region. Second is the total absence of an effective government since at least 1991. Both of these root causes are outside the capability of the marine industry (or the naval patrols) to address. International diplomacy and funding is vital to bringing a stable government to the region and to getting the people there back to meaningful, productive, and lawful work. Unfortunately, international diplomacy has shown minimal progress in restoring stability in Somali. While numerous countries and non-governmental organizations have pledged funds for relief efforts and nation-building in Somalia, little money has actually been appropriated for that purpose. We are thus left with a few thousand peace-keepers on the ground, trying to keep the transitional government from being overwhelmed by various rebel groups. The combination of good intentions and empty promises foretell that the Somali piracy problem will be with us for some time.

#### **Reducing uncertainty within the commercial risk pool**

If a ship comes under piratical attack and incurs damages, the issue from a commercial perspective is how those damages are spread across the risk pool. Damages may arise from delay, physical damage to the ship and its cargo, physical and/or psychological injuries incurred by persons on board the ship, environmental damage, injury to third parties, and payment of ransom to the pirates (along with the costs of negotiation of the ransom terms and transfer of the monies to the pirates, who do not accept checks or electronic fund transfers). The commercial risk pool includes, but is not limited to, the owner, the operator, the charterer(s), the cargo owners, the mortgagee or other financial interests, and the various insurance carriers. The general rules for allocation of damages within the commercial risk pool are very complex and depend on the circumstances and nature of the loss and the relationship between the parties.

A basic requirement, though, for the owner/operator to shift some or all of the liability to third parties other than insurers is evidence that the owner/operator was not negligent and that the vessel was seaworthy. As regards damages arising from a piratical attack, it is expected that the owner/operator will be required to show that it had followed the best management practices discussed above. For owners and operators of US flag vessels, there will also be a requirement that the vessel had implemented a security plan approved by the US Coast Guard. Recovery from insurance carriers will depend on the terms of the policy.

One of the better methods of reducing uncertainty with regard to shifting liability within the commercial risk pool is to be more specific in the drafting of controlling documents. Thus, for example, a charter party should include specific clauses addressing responsibility for reduction in the risk of piratical attack and allocation of liability between parties in the event that damages are incurred as the result of such an attack. Tariffs and bills of lading should also be amended to take up the issue of allocation of damages. Facing the piracy problem squarely in advance is vastly superior to leaving your fate to a court or arbitration panel after the fact. Parties should also bear in mind that, while waters off Somalia are the current epicenter of piracy, the problem can be encountered in many other locations worldwide.

## **Conclusion**

In conclusion, and to state the obvious, there is no easy solution to the piracy problem. It is a complex situation requiring a long and multi-pronged response. Measures can be taken in the short-term, though, to reduce risks. Many of those measures are in the hands of the various governments and government agencies. Other measures, though, such as non-lethal self-defense practices, can and must be undertaken by ship owners, operators, and masters. The only viable way to reduce the risks presented by piracy is through full and active participation by all the stakeholders.

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