

General average and Somali Pirates

For many centuries piracy at sea has caused serious and recurrent problems for international navigation. Counter measures against piratical attacks, often involving extensive use of violence, have not been able to wipe out the practice. In an international legal context piracy has been subject to universal jurisdiction allowing all States to arrest and prosecute pirates on the high seas. The law of the sea system combining territorial with personal jurisdiction is, at least in theory, a valuable solution for the problem. There are nevertheless many practical aspects that can undermine that solution such as a lack of necessary means or of interest in taking actions or still the use of flags of convenience. This last decennium, the world has witnessed a sharp rise in piracy attacks off the coast of Somalia and in the Gulf of Aden infringing highly on the safety of commercial maritime transport. Countless ships, crew and cargo sailing through the Gulf of Aden en route to their destination, run the risk of being held hostage by Somali pirates for large sums of ransom money. Data provided by the International Maritime Bureau for 2009 indicate that 217 ships were subject to pirate attacks (of which 47 were taken hostage) whilst the total amount of ransom exceeded 60 million US dollars. The shipping business in general experiences some immediate effects of this situation as was shown by a substantial increase of maritime insurance rates for navigation in the area concerned as well as by higher freight rates for maritime transport towards or through the area. So far pirates have not been fundamentally deterred by a considerable deployment of anti pirate activities through military action. Attacks have gradually become more organized and ambitious, extending deep into the Indian Ocean beyond the 600 nm line originally considered to be the maximum Somali pirate frontier. At present attacks have been reported as far out as 900 nm and more from the shore. Faced with this harsh reality, the international community has reacted in a manner that is both vigorous and extensive. Fleets hailing from various states have been seconded to the troubled region in order to keep their commercial vessels out of harm's way. Others, acting under the aegis of the UN Security Council's Chapter VII authority, have gone further than merely protecting vessels flying their flag. The shipping industry too has been responsive by the development of best practices and even the use of privately contracted armed security personnel. In some cases regular armed forces have also been deployed on board merchant vessels (e.g. Yemenite army troops).

The question arises whether certain expenditure experienced because of piratical attacks leading to various sorts of damage (including the payment of substantial amounts of ransom money) should be borne only by the ship's interests or whether the cargo interests can be called to contribute according to the general average system. This issue was dealt with in the "Lehman Timber" case decided on appeal by the Court of The Hague, December 1, 2009.

The 'Lehmann Timber' is a Gibraltar flagged ship owned by Moormerland Ltd of Gibraltar and operated on a bareboat charter by Vitorio Shipping Company Ltd of Cyprus. The ship went on her first voyage at the end of April 2008 from Changshu, China, via Warnemünde, Germany to her final destination in St. Petersburg, Russia. She was carrying a mixed cargo of hatch covers and steel coils to be delivered respectively in Warnemünde and St. Petersburg. On the 28th of May 2008, the ship was hijacked in the Gulf of Aden by armed Somali pirates demanding payment of a ransom for the release of the ship, otherwise they would sink her. After receiving payment of USD 752.250, more than one month later, the pirates abandoned the ship and she left her anchorage near Eyl, Eastern Somalia. Soon after the ship called at a port of refuge (Salalah in Oman) being assisted by a tugboat since the ship experienced serious engine problems due to excessive speed exercised by the pirates trying to avoid an

intercepting warship. After repairs the ship continued her voyage towards Europe. The owner declared general average for the damage incurred as a consequence of the piratical attack. The general average adjuster requested the cargo interests for a General Average Guarantee from the cargo insurers and for a General Average Bond from the holders of the bills of lading. The consignees at Warnemünde provided for such a guarantee after which the cargo of hatch covers was normally discharged and delivered there without further delay. The cargo interests at St. Petersburg (Metall-Market) however did not provide a similar guarantee but agreed to pay the general average adjuster a certain amount to serve as guarantee which finally they were unable to do. Four different bills of lading covered the transport of the steel coils for Metall-Market (MM). For three of them, MM was not insured; with respect to the fourth one the cargo insurer signed a General Average Guarantee but MM refused to sign a General Average Bond. Following this flat refusal and not having received any guarantee for the cargo of steel coils the owner exercised a possessory lien after having the ship transferred to the nearby port of Hamina in Finland where the goods were discharged. MM arrested the ship for damage caused by non delivery of the cargo. The ship was released by a Finnish judge after which she left the port. She was however arrested again whilst in the port of Tanger, Morocco. Again the ship was released, however for a third time to be arrested in the port of Rotterdam, the arrest being disputed by the owner in court.

In the course of the judicial procedures involved one of the fundamental problems was the question whether the expense made following the hijacking of the ship could be declared general average. According to the York- Antwerp Rules (YAR; the B/L refer to the 1994 version) there is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure (Rule A). Compared to the requirements of the YAR it is clear – according to the Court – that the expenses incurred by the owner following the piratical attack are in conformity with Rule A of the YAR. Indeed, the presence of heavily armed pirates on board of the vessel is an unmistakable dangerous situation. The payment of the ransom – the amount of which is not exorbitant anyhow- was an adequate means to chase off the danger and to allow the ship to continue her “common maritime adventure”. Payment was made following a rational decision and was an extraordinary expenditure for the owner. The Court agreed with the owner that due to the piratical threats not only the life of the crew members was at stake but that there was equally a common danger for ship and cargo, since the pirates threatened to sink the ship if the ransom would not be paid. Moreover the ransom money was not merely paid to have the crew released but also to make sure that the pirates would leave the ship and that she could get on with her voyage.

One could argue that payment of the ransom was illegal and thus not acceptable as general average. However only ransom to be paid to political or terrorist organisations is considered to be illegal and since a basic aspect of the concept of piracy is that it must be for private reasons, the payment was justified to get rid of the pirates. The view that expenses connected to hijacking of the ship by pirates is, by the way, also accepted in the law of the United Kingdom (Koninklijke Boskalis Westminster N.V. v. Mountain [1999] QB 674).

The Court therefore allowed that the owner rightfully declared a situation of general average and that the cargo must contribute in the extraordinary expenses made by the owner. The latter also has the right to exercise a possessory lien on the cargo which was acceptably executed in another port than the final port of destination given the expectation that it would not be possible to maintain the lien in St. Petersburg. The use of a possessory lien is a

common present day practice in order to oblige cargo interests to sign the General Average Bond and to provide security from the insurers through a General Average Guarantee.

Finally the Court decided to release the “Lehman Timber” without any further obligations for the owner and the charterer so that she could finally return to sea again after 8 months of lying idle.

Prof. Dr. Eddy Somers
Head Department of Public International Law
Ghent Law School
Ghent University