

# IS PIRACY TERRORISM?

**M**aritime piracy has been on the radar of the shipping trade press for some time, but now has moved to the front pages of major American newspapers and been the subject of major cable network news programs. This can be traced to three incidents.

In late November 2008, *M/V Biscaglila* became the first American-controlled (though not U.S.-flagged) vessel to be hijacked by Somali pirates. Shortly before that, a Saudi-controlled supertanker, the *M/T Sirius Star* was brazenly hijacked (the sheer size of the vessel and value of its cargo attracted media attention) and then the U.S.-flagged, U.S.-crewed *M/V Maersk Alabama* was hijacked. The incident involving the *Maersk Alabama* played out over network news, quickly morphing from a hijacking to a hostage drama, ending with the rescue of the ship's captain, the killing of three pirates and the capture and now prosecution in the United States of a young captured pirate.

While many in the industry welcomed the attention the *Maersk Alabama* incident brought to the scourge of piracy, not all the effects of this publicity have been positive in this author's view. Up until the *Maersk Alabama* incident, virtually all hijackings in the Gulf of Aden have played out in a similar way. The hijacking has occurred, the parties have negotiated for the release of the vessel and crew, and the parties have usually reached an agreement on ransom and achieved such release in a 45- to 60-day time period. Rarely, if ever, has there been a report of violence following the initial attack and, but for one death reportedly due to a heart attack, there has been no loss of life among crew. Without minimizing the ordeal of the crew and the psychological toll on them, their families and all those associated with the ship's venture, the hijacking negotiations have played out like a business negotiation—albeit a costly one. How much longer that will be the case, though is anyone's guess. It did not take long for rhetoric to triumph over reality in the days following the *Maersk Alabama* incident. Before long, the mass media was equating piracy with terrorism. Political leaders followed—while the *Maersk*

*Alabama* incident was still unfolding, Secretary of State Hilary Clinton advocated the use of the financial weapons governments use to combat terrorism, such as freezing assets, against pirates. While one can hardly quarrel with governments taking steps to combat and thwart piracy at sea, they need to tread carefully. Pirates are criminals, but are they terrorists? Does the distinction even matter? The answer to the first of question is “no” and the answer to the second is an even more resounding “no.”

Under current United States law, the payment of ransom to pirates—at least those known to operate off the coast of Somalia—is not illegal. The United States has a number of laws that deal with the funding of “terrorism” but, in this author's view, none clearly prohibit the making of ransom payments to Somali pirates.

## FCPA AND OFAC REGULATIONS

The two most important sources of law in this regard are the Foreign Corrupt Practices Act (“FCPA”) and the regulations on financial assistance to designated foreign nationals promulgated by the Office of Foreign Asset Controls (“OFAC”). The FCPA expressly makes it illegal for any domestic concern or for any officer, director, employee, or agent of such domestic concern, to make payments intended to undermine the rule of law in a foreign country. Specifically, such domestic concerns and officers thereof are prohibited from making payments of any money, or any offer, gift, promise to give, or authorization of the giving of anything of value to any (1) foreign official, (2) foreign political party or (3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office for certain prohibited purposes.

The list of prohibited purposes pro-



Lawrence Rutkowski,  
Partner,  
Seward & Kissel LLP

scribed include: (1) influencing any act or decision of such foreign official, party, official, or candidate in his official capacity, (2) inducing such foreign official, party, official thereof, or candidate to do or omit to do any act in violation of the lawful duty of such official, or (3) securing any improper advantage; or (4) inducing such foreign official, party, official thereof, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such

government or instrumentality in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person. It is clear from the law that the intent was to prevent U.S. firms from engaging in acts intended to influence the acts or decisions of foreign officials, political parties, etc. Nowhere in the FCPA does it refer to gifts to private persons except in the context of those to be shared with foreign government officials, foreign parties or officials thereof and only if such individuals are expected to affect or influence any act or decision of such government or instrumentality in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

If a pirate gang seizes a vessel and consists solely of freelancers operating wholly outside the law of Somalia, the payment of ransom by the vessel owner clearly would not be intended to influence or undermine the Somali government's actions or policies. Hence, the FCPA should not apply to ransom payments to such pirates.

In addition to the FCPA, OFAC administers a series of regulations that impose economic sanctions against hostile targets to further U.S. foreign policy and national security objectives. OFAC is responsible for promulgating, developing, and administering the sanctions for the Secretary under eight federal statutes. All U.S. bank regulatory agencies cooperate in ensuring financial institution compliance with regulations

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issued by OFAC in furtherance of the relevant federal statutes. The sanctions embodied in these regulations are targeted at certain foreign governments, political parties, terrorist groups and numerous individuals. There are no specific regulations that deal with the issue of ransom payments to kidnapers or pirates operating off the coast of Somalia. In fact, Somalia currently is not one of the nations whose governments are targeted by U.S. sanctions or the regulations. Hence, the critical step for a vessel owner is to ensure that any ransom proceeds that are paid do not go to any person, organization or group on OFAC's list of Specially Designated Nationals and Blocked Persons (the "SDN List"). The SDN List is a 413-page document and includes a number of Somali citizens and individuals residing in Somalia. The list is primarily intended to be used by banks and regulatory agencies, but it also serves as the default list of those persons to whom payments are restricted in any capacity. A vessel owner will need to ensure that if it obtains any information on the identity of the group controlling the pirates or the individuals who receive

payment, that such individuals are not listed on the SDN List prior to payment.

#### **FEDERAL STATUTES PROHIBITING FINANCING OF TERRORISM**

The relevant restrictions on financing terrorism are found in the Antiterrorism and Effective Death Penalty Act (the "AEDPA"). The AEDPA specifically prohibits activities that would result in providing material support or resources to designated "foreign terrorist organizations." While "foreign terrorist organizations" are not defined in the statute itself, the term "international terrorism" is defined in U.S. law. To be "international terrorism" within the meaning of the statute, the prohibited activity must be intended to (1) coerce or intimidate a civilian population, (2) influence the policy of a government by intimidation or coercion or (3) affect the conduct of a government by assassination or kidnapping. Thus, by its own terms the statute does not apply to activity intended solely for one's private or personal pecuniary gain. In contrast, private or personal gain is a required element to the crime of piracy under the various federal anti-piracy

statutes.

Some questions have been raised as to whether Section 2339(C) of the AEDPA may in fact prohibit ransom payment. Section 2339(C) explicitly prohibits a party from providing and collecting funds with the intention that such funds be used, or with the knowledge such funds would be used to engage in certain violent acts or to carry out a violation of one of certain treaties, including the Suppression of Unlawful Acts against the Safety of Maritime Navigation Convention. Although arguably broader in sweep than the SRCPA or OFAC regulations, the statute's legislative history makes clear that this provision was intended to prevent financing of terrorist groups and activities. Moreover, there has been no announcement by the Executive Branch that it intends to seek to prosecute pirates as terrorists under the AEDPA but therein lies the concern.

#### **ANTI-MONEY LAUNDERING LAWS**

A brief mention of money laundering is merited. Even if one agrees with the conclusion that, based on current law, piracy in the Gulf of Aden is not terror-

ism, one need still consider whether the payment of ransom might run afoul of anti-money laundering statutes. The principal federal statute detailing the rights and obligations of individuals, banks and financial institutions with respect to money laundering is the Bank Secrecy Act ("BSA"). The BSA provides extensive guidance for filing of various required reports of certain transactions. Subsequent to the BSA's passage, several other federal statutes have been enacted to enhance and amend the BSA's provisions, including the Patriot Act. A review of the applicable statutes and the regulatory pronouncements there under reveals that the focus of these statutes is primarily on establishing the fundamental requirements for recordkeeping and reporting by private individuals, banks and financial institutions to aid the United States government in identifying transfers of U.S. currency and money instruments into or out of the U.S. The Money Laundering Control Act of is the statute that formally defines money



laundering as a federal crime and details the basic requirements for violation of the statute. The elements that constitute a violation of the MLCA are: (1) the defendant conducted a financial transaction; (2) such financial transaction involved the use of proceeds of a "specified unlawful activity"; (3) the defendant knew the property involved in such transaction were proceeds of some form of unlawful activity; and (4) defendant knew such transaction was designed to conceal or disguise the source, ownership, etc., of the proceeds. If ransom funds are to be derived from a vessel owner's own assets or the proceeds of a loan from a legitimate bank, then such a ransom payment is almost certainly not derived from one of the specified unlawful activities. Moreover, the purpose of any such ransom payment would not be a financial transaction intended to conceal or disguise the source or ownership of the proceeds. Against this backdrop, it is clearly evident that payment of a ransom to the pirates would not in itself constitute a

violation of the federal anti-money laundering statute.

#### CONCLUSION

Simply put, if piracy is terrorism, than a United States shipowner and perhaps others (irrespective of the flag of the owned vessel) would be prohibited from paying ransom. There are those who think that the payment of ransom merely encourages further piracy and outlawing it would have a deterrent effect on piracy. That is unlikely, especially if making the payment of ransom illegal is made unilaterally or on a country by country basis. After all, piracy is already illegal as a matter of international law. But what happens to the shipowner, his crew or his vessel if piracy is declared terrorism? If he cannot negotiate for his crew's release what does he do? These are not academic questions. The *Maersk Alabama* incident was truly unique. Most hijackings will not unfold the same way and it is unrealistic to expect a U.S. Navy vessel will be at the scene ready to act especially when the crew might not be American and the vessel's flag might not be the Stars and Stripes.

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