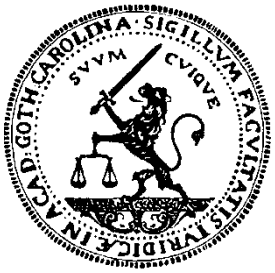

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The increased risk of piracy presenting new challenges for marine insurance market

Master thesis
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Contents

Summary

The recent events of piracy, especially in the Gulf of Aden raised the concerns of the international community, shipping businesses as well as the marine insurance industries. The drastic increase in piratical incidents and the costs associated with them started a discussion as to the piracy coverage under modern marine insurance policies. Piracy has oscillated through history between being treated as marine peril and war risks peril. The confusion as to the right placement of the peril of piracy is still noticeable, as various insurance markets have adopted different approaches. In London, until 2005 piracy was insured under ordinary hull coverage. However, the persistent nature of the piratical attacks has induced the London underwriters to start transferring it to the war risks policies. In the US, piracy has been treated as a war risk peril and considering the recent events, it is likely to remain as such. In addition, Somali pirates have introduced a new form of piracy, as their new target is the payment of ransom, demanded in exchange for the vessel, or even recently only for the kidnapped crew members. Therefore, the marine insurance markets must have accommodated such claims very quickly. It remains uncertain whether the ransom payments are covered by the ordinary hull or war risks policies. However, the insurance markets have introduced new products, in order to meet the needs of owners of vessels transiting through the dangerous areas. The policy that insures the shipowner against the ransom payment, as well as the other costs associated with the piratical seizure is K&R policy. Furthermore, recently a new loss of hire/earnings due to piracy cover has been offered in order to protect shipowners, charterers and cargo owners against the losses resulting from ship detention that can last for several months. In addition, the attacks of Somali pirates became very violent and often result in the injury or even death of crewmembers. Therefore, the P&I Clubs are also facing the challenge posed to them by Somali pirates. Furthermore, the discussion has been initiated as to the possible P&I Clubs contribution to the ransom payments. In relation to the cargo insurance, the London cargo insurance market still insures the piracy under the ordinary cargo clauses. Contrary, to the US, where the cargo underwriters have followed the approach of hull insurers and cover piracy under the war risks policies. Considering the increasing number of piratical attacks and the new challenge that the marine insurance markets face nowadays, it might be expected that the London cargo insurance market will also remove piracy from the standard cargo clauses. This paper will examine the various marine insurance policies offered by London and American markets in order to verify how the risk of piracy can be insured.

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Lund

Abbreviations

AIHC	American Institute Hull Clauses
AIHWRSC	American Institute Hull War Risks and Strikes Clauses
AIMU	American Institute of Marine Underwriters
ATL	Actual Total Loss
BIMCO	Baltic and International Maritime Council
CTL	Constructive Total Loss
EO	Executive Order
FC&S	Free of Capture and Seizure
FPAAC	Free of Particular Average – American Conditions
FPAEC	Free of Particular Average- English Conditions
GA	General Average
ICC	Institute Cargo Clauses
IHC	International Hull Clauses
IMB PRC	International Maritime Bureau Piracy Reporting Centre
IMB	International Maritime Bureau
IMO	International Maritime Organization
ITCH	Institute Time Hull Clauses
IVCH	Institute Voyage Hull Clauses
IWSCH	Institute War and Strikes Clauses Hulls

JCC	Joint Cargo Committee
K&R	Kidnap and Ransom
LoH	Loss of Hire
MAR	Marine Policy
MIA	Marine Insurance Act
NYPE	New York Produce Exchange
OFAC	Office of Foreign Assets Control
P&I	Protection and Indemnity
SG	Ship and Goods
SUA	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
USC	Code of Laws of the United States of America

1 Introduction

1.1 Background

Pirates have been troubling sailors persistently for as long as maritime commerce has existed between states.[1] Indeed piracy dates back to the beginning of seafaring.[2] In the earliest history, pirates would attack ships and rob anything of any value to them. However, it was understood quite quickly by pirates that in addition to theft, they might also seek a gain by engaging themselves in the activities such as maritime kidnapping, which could result in the payment of ransom.[3] One of the most famous of such kidnappings, was an abduction of Julius Caesar's vessel, when pirates noticing the wealth of the men, demanded ransom, which was eventually paid. Unfortunately, the captors did not have opportunity to enjoy the money paid to them for long, as just after the release they faced the justice, which in the eyes of Caesar had a form of crucifixion.[4] The golden times of piracy took place in the 16th–19th centuries, when states themselves encouraged pirates to harass merchant vessel of the enemies. However, the problems occurred in the time of peace, when piratical activities were forbidden. Consequently, the decommissioned pirates, out of the frustration attacked the vessels without any discrimination, those who belonged to the patron states and those of former enemies. It has been suggested that this was the reason why pirates became the enemies of all human kind – *hostes humani generis* - and indeed the enemy of civilization itself.[5] Many might think that the concept of piracy can only be related to the former times and associate it with the image of buccaneers with hooks replacing their hands, wooden legs and eye patches. Contrary to this belief, piracy still exists and is considered to be the biggest threat to the maritime world today.[6]

It is believed that the objectives of pirates today are very similar to those in the past.[7] Contemporary pirates similarly are looking for the financial gain. Therefore, some are aiming to steal some cash or portable goods.[8] Others target is rather a ship and potentially all cargo found on board. The stolen cargo can be sold on the black market and vessel after being repainted either might be sold too or might be used for further piratical activities.[9] The

[1] Azubuike, L., "International law regime against piracy" in *Annual Survey of International and Comparative Law* Vol.15(2009) p.46
[2] Iglesias Baniela, S., "Piracy: Somalia an area of great concern" in *The Journal of Navigation* Vol.63 (2010) p.191
[3] Lennox-Gentle, T., "Piracy, sea robbery, and terrorism: enforcing laws to deter ransom payment and hijacking" in *Transportation Law Journal* Vol.37 (2010) p. 203
[4] *Ibid.* at p. 204
[5] Azubuike, L., *supra note* 1at p.47
[6] Iglesias Baniela, S., *supra note* 2 at p.191
[7] *Ibid*. at p.192
[8] Gabel, G.D., "Smoother seas ahead: the draft guidelines as an international solution to modern-day piracy" in *Tulane Law Review* Vol.81 (2007) p.1436
[9] *Ibid.* at p.1437

recent phenomena of Somali piracy has shown that piratical attacks have changed their nature, as pirates' aspiration is not to steal any more. Contemporary pirates would rather hijack a vessel with cargo and crew on board and demand the ransom for the ship release. However, it is argued that historical analysis of the roots of piracy suggests that factors behind piracy remain the same. The elements that have impact on the development of piratical activities are mostly: large sea spaces, favourable geography, lawless states, corruption, conflicts, weak economy, poverty, open markets where the stolen goods can be easily traded and willingness of the shippers to pay the ransom.[10]

It has been suggested that the end of 20th century was characterised by the explosion of piracy worldwide.[11] It has also been argued that such a sudden increase in piratical incidents was triggered by the fact that nowadays ninety percent of world trade is run through limited number of maritime channels, which provide targets for pirates.[12] In the beginning of the 21st century, the waters that were affected the most by the piratical incidents were the waters of South East Asia, mostly the South China Sea and the Straits of Malacca.[13] The factors established above had an impact on such situation: high shipping traffic, archipelago nature, low economic development and internal conflicts.[14] According to the International Maritime Bureau (IMB)[15] in 2006, there were 50 attacks in Indonesian waters and 11 in the Straits of Malacca. The number of attacks in Indonesia was systematically decreasing until 2010, when again the number went up to 40. However, the number of the attacks in the Straits of Malacca has been kept low since 2008.[16] Although as it is confirmed by the IMB, pirates are still active in the South East Asia, nowadays, the eyes of whole world are mostly turned toward Somali waters.

In the recent years, Somalia's coast has been gradually climbing the chart as one of the most dangerous waters in the world in terms of maritime piracy. Somalia has the longest coastline in Africa with 33,000 km, which borders the Gulf of Aden, a major route in the world trade. The importance of this area is inestimable as more than 20,000 ships pass it through, to go to and return from Suez Canal every year.[17] Such significant location, combined with the disastrous situation within the country[18] created perfect setting for

[10] Iglesias Baniela, S., *supra note* 2 at p.192
[11] Gabel, G.D., *supra note* 8 at p.1438
[12] *Id.*
[13] Ndumbe Anyu J., Moki, S., "Africa: the piracy hot spot and its implications for global security" in *Mediterranean Quarterly* Vol.20, Issue 3 (2009) p.96
[14] Hong, N., Ng, A., "The international legal instruments in addressing piracy and maritime terrorism: A critical review" in *Research in Transportation Economics* Vol.27 (2010) p.52
[15] International Maritime Bureau is a special division of the International Chamber of Commerce, established to act as a focal point in the fight against al types of maritime crime, look at http://www.icc-ccs.org/home/imb, last accessed on 04/03/2011
[16] ICC International Maritime Bureau, Piracy and armed robbery against ships. Annual Report 1January 2010 – 31 December 2010, p.5
[17] Ndumbe Anyu J., Moki, S., *supra note* 13 at p.103
[18] UN Secretary-General Ban Ki Moon suggested in 2008 that piracy is a symptom of the state of anarchy which has persisted in Somalia for over 17 years. Somalia is considered to

becoming "new premier hot spot for maritime piracy in the world".[19] As a result, the number of piratical incidents within this area has increased drastically, from 10 in 2006 to 139 in 2010.[20] It has been suggested that pirates of the Horn off Africa, similarly to those in the South East Asia attempt to seize goods that pass along their coast in order to strengthen their personal economic situation. However, it has also been argued that Somali pirates revived a type of piratical incidents, although well known before, not popularized in the modern times: demanding ransom for the vessel, cargo and for the crew of the captured ship.[21] Two of the most remarkable attacks of pirates off the African coast were seizures of the Saudi Arabian oil tanker – *MV Sirius Star* and the US flagged - *MV Maersk Alabama*. Those hijackings have confirmed the state of piracy in the region and they have initiated the discussion as to the impact of such piratical incidents on the shipping businesses and the marine insurance markets.[22]

MV Sirius Star was a supertanker hijacked in November 2008. She was loaded with crude oil and had 25 crewmembers on the board. She was the largest ship that was hijacked by pirates and the farthest out to sea they have successfully struck. This hijacking highlighted the vulnerability of even the largest vessels and pointed out the widening capabilities of Somali pirates.[23] The demanded ransom of $25 million was the second largest request ever made by pirates. The highest amount to be demanded so far was $30 million for the return of the Ukrainian *Faina*[24], although eventually around $3 million was paid for her release. *MV Sirius Star* with her crew and cargo was finally released in January 2009 after the negotiated ransom of $3 million was dropped from low flying aircraft on to her deck. However, the hijacking of *MV Sirius Star* was considered to be the most brazen act of piracy in the world.[25] The maritime world has been shaken again and again the question had to be asked what should be done to limit such incidents. Unfortunately, it seems that the international community failed to decrease

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be a "failed state". The civil war that started in 1991 and is still ongoing destroyed the country, deprived its people of their homes and livelihoods and created an economy that is run by pirates. Somalia is lacking any coordinated governmental body. In addition, Somalia is one of the world's poorest country, where no industry or infrastructure exists. Consequently, Somalia must rely on the funds from abroad. Furthermore, foreign fishing vessels took the advantage of the chaos within the country and have fished in Somali waters without providing any compensation for it, look at Silva, M., "Somalia: state failure, piracy and the challenge to the international law" in *Virginia Journal of International Law* Vol.50 (2010) pp 558-561

[19] Ndumbe Anyu J., Moki, S., *supra note* 13 at p.103

[20] ICC International Maritime Bureau, *supra note* 16 at p.5

[21] Douse, C.M., "Combating risk on the high sea and analysis of the effects of modern piratical acts on the marine insurance industry" in *Tulane Maritime Law* Vol.35 (2010) p. 271

[22] Jeffrey, R.S., "An efficient solution in a time of economic hardship: the right to keep and bear arms in self-defense against piracy" in *Journal of Maritime Law and Commerce* Vol.41 (2010) p.511

[23] Baily, V.,(editor) "Saudi giant tanker seized" in *Africa Research Bulletin* Vol.45, Issue 11 (2008) p.18043

[24] *Ibid.* at p.18044

[25] Baily, V., (editor) "Saudi supertanker freed" in *Africa Research Bulletin* Vol.45, Issue12 (2009) p.18083

the number of piratical incidents. Contrary, it seems that pirates are more self-confident than ever and their demands are higher. In November 2010, Somali pirates were reported to be paid the highest sum so far, amounting to $9 million, in exchange for *Samho Dream*, South Korean supertanker.[26] Although the initial request ($20 million) was lower than in the case of *MV Sirius Star* or *Faina*, it seems that pirates are not that easy to negotiate with and are not willing to lower the amounts significantly.

Another attack that has brought so much fear into the shipping businesses and marine insurance markets was hijacking of *Maersk Alabama*. In April 2009, Somali pirates surprised the marine world again and showed that they are ready to take their activities to another level. They seized the US-flagged vessel, the *Maersk Alabama*, with 24 crewmembers, all of whom were American citizens, carrying a cargo consisting of emergency food relief.[27] Initially, the crew managed to fight back, however, pirates fled and took the captain as hostage. Fortunately, rescue campaign commenced by the American warship ended successfully, as the captain was freed.[28] It has been suggested that hijacking of *Maersk Alabama* has again raised the concerns of the shipping businesses and marine insurance markets. It is believed that the cumbersome nature of taking goods or crew from large freights and ships, illustrated by the events aboard *Maersk Alabama* has created a new type of loot demanded by pirates: ransom for the cargo and for the crewmembers themselves.[29]

The examples illustrate the scale, intensity, capability and new ambitions of Somali pirates. These activities have focused the attention of the shipping businesses as well as the marine insurance industries on the increasing risk of piracy and the structure of insurance coverage for it.[30] Therefore, pirates are not any mythical characters to marine insurance underwriters nowadays. Contrary, pirates by their stubborn persistence mostly in Somalia are driving up claims for cargo loss and ship damage.[31] In addition, as reflected in the examples of *Sirius Star* and *Maersk Alabama*, when pirates seize the ship they usually hold the crew hostage and demand ransom money for the return of crew, vessel and cargo. Therefore, the marine insurance market should not only provide coverage to the damage of hull or cargo but should also facilitate the claims for ransom payments. Consequently, shipowners, cargo owners and their insurers have an increasing interest in establishing how piracy risk can be covered and whether there is a place within the marine

[26] http://www.bbc.co.uk/news/world-africa-11704306, last accessed on 04/03/2011
[27] Ndumbe Anyu J., Moki, S., *supra note* 13 at p.108
[28] Rutkowski, L., Paulsen, B., Stoian, J., "Mugged Twice?: Payment of ransom on the high seas" in *American University Law Review* Vol.59 (2010) p.1426
[29] Douse, C.M., *supra note* 21 at p.271
[30] JLT, Piracy. Coverage and response, White Paper prepared for shipowners and operators p. 3
[31] Desimone, R., "Marine insurance buyers, sellers join to thwart modern-day pirate threat" in *National Underwriter* (2008) p.17

insurance markets for such a product as Kidnap and Ransom (K&R) policy.[32]

It is suggested that as it has been through its history, the marine insurance market will continue to respond to the rise in piratical activities.[33] The author will attempt in this thesis to investigate whether this statement is substantially true and whether the marine insurance industries are cooping with a new challenge created for them by Somali pirates.

1.2 Purpose

The objective of this thesis is therefore, to establish whether the marine insurance market offers sufficient coverage against the risk of piracy. In order to fulfil this purpose, the author intends to critically examine the definition of piracy for the purposes of marine insurance agreements. The author will attempt to establish whether the contemporary piratical incidents fall within such definition. The author's intention is also to present insurance policies covering the risk of piracy, with special focus paid to the K&R policy. In addition, this paper aims to discuss the marine insurance implications, when the ransom payment, rather than theft of the ship or cargo is the objective. The author will also consider the legality of the ransom payments. The purpose of this thesis is also to investigate whether the loss of the cargo or ship if the ransom is not paid is recoverable under the policies. Furthermore, in this paper the author will attempt to identify whether the ransom might be recovered if it is demanded for the safe return of the crew taken a hostage. All these issues will be examined in the light of English and American law.

1.3 Disposition

This paper starts out with the brief introduction to the problem of piracy, providing short history of piratical activities, as well as description of contemporary piracy. In the subsequent chapter author intends to evaluate piracy definition provided by the international law, criminal law, shipping business and definitions operating within the marine insurance industries. In the following chapter, the historical coverage of piracy offered by marine insurance markets will be presented. Thereafter, in the main section the marine insurance policies covering risk of piracy will be assessed in order to establish whether the insurance markets provide sufficient coverage against the risk of contemporary piracy. To fulfil the purpose, the main chapter will be divided into sub-chapters, each presenting different category of insurance, such as hull insurance, war risks insurance, kidnap and ransom, loss of hire, P&I and cargo insurance. The subsequent section is designed to provide author's analysis, which will lead to the presentation of the answers to the unclear issues discussed in this thesis. The conclusion will provide the

[32] http://www.internationallawoffice.com/newsletters/detail.aspx?g=d7bfc76e-f617-4200-8e7a-71ea9818937a, last accessed on 04/03/2011

[33] Douse, C.M. *supra note* 21 at p.287

summary of the identified problems, with suggested by the author solutions and will present author's final remarks.

1.4 Methodology

This paper will follow different methodological approaches. For the purposes of research, traditional legal approach will be adopted, which is peculiar to the legal science. The legal method will be used to obtain, select and classify the relevant materials. Using this method the pertinent literature will be studied, such as textbooks and journal articles. The quantitative method has been adopted to analyze the statistics prepared by the IMB in order to illustrate the full picture of piratical activities and areas affected by them in the introductory chapter. The qualitative method has been used to reflect the factors that had impact on the development of piracy in the particular regions, as well as the effect that piracy has on the marine insurance industries, which has lead to the recent developments within these sectors. To examine all legal materials dogmatic method will be used. Furthermore, the comparative method, which is used to study various legal phenomena, will be also adopted. The method is adopted to interpret legal developments that pertain to different legal systems, as well as adapting one legal system to another. Such method will be applied in order to compare the marine insurance coverage under the policies offered in two markets – London and American market. This paper is considered to be of analytical and descriptive nature.

1.5 Delimitations

For the purposes of this thesis only the standard marine insurance policies offered by two markets: London and American, will be examined, therefore the relevant law in respect to these policies will be studied. Although the insurers in other countries might have different approaches, also worth noticing, the author has decided to limit the scope of this thesis only to two markets: London, since most policies are purchased in England and the US market, since the American underwriters have slightly different approach as to the piracy coverage and intention of the author is also to compare such approaches and establish what are the advantages and disadvantages of them. In respect to the P&I insurance, only the Rules of one of the Clubs located in the UK will be studied. Although the Rules might differ slightly between the Clubs, in general, piracy coverage under them is analogues.

2 Piracy definition

In this chapter, various definitions of piracy will be presented in order to identify what is considered to be an act of piracy. It has been suggested that the words "piracy" and "pirates" are lacking uniform definition. It has also been added that those terms are particularly difficult to define for the purposes of marine insurance agreements.[34] Therefore, author's intention is to verify such a suggestion. In order to do so, definitions developed by the international law, criminal law, shipping business and definitions operating within the marine insurance markets will be examined and compared in order to establish whether they are consistent. Firstly, the author will look at the non-commercial definitions in order to establish whether any of them might provide any guidelines or background to the definition for marine insurance purposes. It is believed that the precise definition has very big impact on the possible insurance claim and universal definition used for many purposes will simplify the recognition of the act of piracy necessary for the insurance coverage.

2.1 International law definition of piracy

The legal framework of the international law on piracy is primarily found in the United Nations Convention on the Law of the Sea (UNCLOS).[35] Article 101 of the UNCLOS defines piracy as

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

It has been argued by many commentators that such definition is too narrow.[36] The definition covers only actions conducted on the high seas and

[34] Passman, M.H., "Interpreting sea clauses in marine insurance contracts" in *Journal of Maritime Law and Commerce* Vol.40, Number 1 (2009) pp 59-60

[35] The United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994

[36] Lennox-Gentle, T., *supra note* 3 at p.205, Treves, T., "Piracy, law of the sea, and use of force: developments off the coast of Somalia" in the *European Journal of International Law* Vol.20 (2009) p.402, Murphy, M., "Piracy and UNCLOS: does international law help regional states combat piracy?" in Lehr, P., *Violence at se. Piracy in the age of global terrorism* (New York: Routledge, 2007) pp 158-164, Fink, M.D., Galvin R.J., "Combating

undertaken by one ship against another.[37] Consequently, some of the activities of Somali pirates might fall out of the scope of this definition as sometimes they take place in whole or in part in the territorial waters. Another problem arising out of such limitations was related to the increase of the distance of territorial waters up to 12 nautical miles[38] and introduction of the EEZ, which stretches from the seaward edges of the state territorial waters up to 200 nautical miles[39]. Such regulations have shrunk the high seas, the only area where piracy under UNCLOS definition can occur.[40] More rarely the activities of Somali pirates do not satisfy the requirement of presence of the second ship, as usually very fast skiffs are used that come either from the main land or from the "mother ships".[41] The definition has also been criticized for the "private ends requirement", as it excludes politically motivated acts. Therefore, the Convention most likely cannot be used against terrorists.[42] As it can be easily noticed, the definition of piracy provided by the UNCLOS has met criticism. Furthermore, it has been argued that such technical and highly specific definition of piracy is not useful in the insurance context, therefore, the UNCLOS definition will not provide any beneficial guidelines to the marine insurance markets.[43]

In addition, it is important to mention that the US, contrary to England is not a party to the UNCLOS.[44] However, while the US has yet to ratify the Convention, its provisions remain very important to the country. Firstly, the US is the signatory to the Geneva Convention[45]. The Geneva Convention piracy provisions were incorporated into UNCLOS almost without any amendments.[46] Therefore, piracy definition remained the same. Additionally, the regulations of piracy as set in the UNCLOS has became customary international law and should be followed by the US and other non-signatory states.[47] Furthermore, the 18 USC § 1651(2006) provides that "whoever on the high seas, commits the crime of piracy as defined by the laws of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life". Therefore, following the laws of nations and its ratification of the Geneva Convention, the US shall respect the definition of piracy provided by the UNCLOS. However, in the recent decision in *United States v Said*[48], the definition of piracy was revised and the argument that court should look into the current international definition of piracy was

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pirates off the coast of Somalia: current legal challenges" in *Netherlands International Law Review* (2009) p.370

[37] Treves, T., *supra note* 36 at p.402

[38] UNCLOS, Part II, Section 2, Article 3

[39] UNCLOS, Part V, Article 57

[40] Murphy, M., *supra note* 36 at p.158

[41] Treves, T., *supra note* 36 p.402

[42] Fink, M.D., Galvin R.J., *supra note* 36 at p.375

[43] Passman, M.H., *supra note* 34 at p.70

[44] http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea, last accessed on 10/03/2011

[45] 1958 Geneva Convention on the High Seas, Geneva, 29 April 1958. In force 30 September 1962

[46] Murphy, M., *supra note* 36 at p. 158

[47] Jeffrey, R.S., *supra note* 22 at p. 519

[48] No. 2:10cr57,2010 WL 3893761, 2010 AMC 2034 (E.D.Va.Aug.17,2010)

rejected.[49] The United States District Court for the Eastern District of Virginia held that "the definition of piracy in the international community is unclear and not consistent with Congress' understanding of § 1651 as recognized by the Supreme Court".[50] Instead, court supported the definition introduced in *the United States v Smith*[51], where piracy has been defined as the robbery upon the sea, suggesting that such definition is "clear and authoritative".[52] Such judgement has brought even more confusion. Since the international definition of piracy was already unclear, by such decision, it has also been made uncertain what guidelines should be followed by the courts in the US. Thus, it seems that it is very unlikely that UNCLOS definition will provide any background to the definition of piracy for the purposes of marine insurance agreements in the US.

It has been suggested that the international community has attempted to eliminate the restrictions created by the UNCLOS in respect to the piracy definition, [53] by providing a broader definition of unlawful acts against the safety of navigation, under Article 3 of Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA).[54] A piratical act could be contemplated as an offence under SUA, where a person unlawfully and intentionally seizes or exercises control over a ship, performs an act of violence against a person on the board of a ship, destroys a ship or causes damage to a ship or its cargo, including destruction or damage to navigational facilities or threatens to do so.[55] However, it has been argued that, unlike UNCLOS, which is considered as reflective of customary international law, the SUA convention is only binding on state parties to the Convention. Therefore, it does not affect non-signatory states. Fortunately, most countries in the world, including both England and the US are parties to the SUA Convention.[56] Nevertheless, considering the fact the SUA definition does not define only an act of piracy but all unlawful acts against the safety of navigation, it might be of little use for the purposes of marine insurance agreements.

2.2 Criminal law definition of piracy

It has been suggested that piracy is a crime against the domestic laws of states. However, this will vary from state to state.[57] Many maritime nations

[49] Douse, C.M. *supra note* 21 at p.274
[50] No. 2:10cr57,2010 WL 3893761, 2010 AMC 2034 (E.D.Va.Aug.17,2010) 11, 2010 AMC, at 2050
[51] 18 U.S. (5 Wheat.) 153,162,2009 AMC 1184, 1190 (1820)
[52] No. 2:10cr57,2010 WL 3893761, 2010 AMC 2034 (E.D.Va.Aug.17,2010) 11, 2010 AMC, at 2050
[53] The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988. In force 1 March 1992
[54] Buhler, P.A, "New Struggle with an old menace: towards a revised definition of maritime piracy" in *Currents: International Trade Law Journal* Vol. 8 (1999) p.67
[55] SUA Convention, Article 3
[56] http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx, last accessed on 10/03/2011
[57] Miller, M.D., *Marine War Risks* (London: LLP, 2005) p.207

criminalize piracy under their own municipal laws. Some countries, such as the US and England define the crime of piracy in accordance with international law. The 18 USC § 1651(2006), where it is stated that the piracy is a crime and in order to define such a crime the courts should look into the international law, has already been examined. English piracy regulations appear to be in conformity with the American statute. Chapter 26, section (1) of the Merchant Shipping and Maritime Security Act 1997 provides that

> "For the avoidance of doubt it is hereby declared that for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, the provisions of the United Nations Convention on the Law of the Sea 1982 that are set out in Schedule 5 shall be treated as constituting part of the law of nations".

As it has been showed, both countries, the US and England have adopted the definitions developed by the international law for the purposes of their criminal codes. However, there are nations, especially those affected by the piratical incidents that have adopted their own definition of piracy independent from international law definition. One of such states is the Philippines, which declares that

> "Any attack upon or seizure of any vessel, or the taking away of the whole or part thereof or its cargo, equipment, or the personal belongings of its complement or passengers, irrespective of the value thereof, by means of violence against or intimidation of persons or force upon things, committed by any person, including a passenger or member of the complement of said vessel, in Philippine waters, shall be considered as piracy. The offenders shall be considered as pirates and punished as hereinafter provided."[58]

Therefore, it can be noticed that the Philippine criminal code extends the definition to the acts committed by any person, including passenger or a crewmember and to the territorial waters of Philippines. Although, some countries might have developed more precise definition of piracy, the problem arises if such definition could be used for the marine insurance purposes and if it could, which nation's definition should be applied. It should be considered that an insurance agreement might be entered in one country for a vessel flagged in another, while the loss, resulting out of the piratical attacks will occur either in the territorial waters of a third state or on the high seas.[59] Such problem might be simple removed by a clause specifying choice of law in the marine insurance contract. However, if the contract is lacking such provision, the identification of the correct criminal definition of piracy will create further uncertainties. In addition, it is not clear whether the criminal law definition might be applied to the commercial contracts.

[58] Presidential Decree No.532 August 8, 1974, Anti – piracy and anti-highway robbery law (Philippines), Section 2(d)
[59] Passman, M.H., *supra note* 34 at p.72

2.3 Shipping business definition of piracy

It has been suggested that IMB offered much broader definition of piracy.[60] For statistical purposes, the IMB defined piracy and armed robbery as "An act of boarding and 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 the act".[61] Such definition has been adopted by the IMB as numerous of the piratical attacks take place within the jurisdiction of states and piracy as defined in the UNCLOS, does not address such problem.[62] However, in the most recent report, the IMB has abandoned its definition and adopted the definition developed by the UNCLOS.[63]It has been suggested that such approach might have been influenced by the fact that the IMB definition was not based on any legal precedent.[64] It has also been argued that the definition seemed to be accepted by the shipping industries but was not recognized in the international law, neither in the domestic law of any state.[65].

Nevertheless, it has been established that IMB has always accepted the definition laid down by the UNCLOS. However, the IMB has been looking at the crime of piracy, as well as crime of armed robbery committed onboard ships since 1991. At that stage, prior to the Assembly Resolution A.922 (22) being adopted on 29/11/2001[66], there was no definition of the acts of crime being committed onboard a ship inside a jurisdiction. Therefore, the IMB had to adopt its definition, which took into account all criminal acts of piracy and armed robbery onboard ships. The International Maritime Organization (IMO) definition of armed robbery was only adopted on 29/11/2001 with A922 (22), which was revoked and superseded by A. 1025 (26) in 2010[67]. Consequently, IMB distinguished in the recent report between piracy and armed robbery on the sea and presented the definition of piracy deriving from Article 101 of the UNCLOS and definition of armed robbery introduced by the Assembly Resolution A.1025 (26). [68]

The Head Officer of the International Maritime Bureau Piracy Reporting Centre (IMB PRC), who suggested that the phrase used by the IMB is

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[60] Dillon, D., "Maritime Piracy: defining the problem" in *SAIS Review*, Vol.25, Number 1(2005) p.156

[61] ICC International Maritime Bureau, Piracy and armed robbery against ships. Annual Report 1January 2010 – 31 December 2008, p.3 or ICC International Maritime Bureau, Piracy and armed robbery against ships. Report for the period 1 January – 30 September 2009, p.4

[62] *Ibid.* p.3 and p.4 (analogously)

[63] ICC International Maritime Bureau, *supra note* 16 at p.3

[64] Passman, M.H., *supra note* 34 at p.68

[65] Zou, K., "New developments in the international law of piracy" in *Chinese Journal of International Law* Vol. 8, No.2 (2009) p.327

[66] Assembly Resolution A.922 (22) Code of practise for the investigation of the crimes of piracy and armed robbery against ships, adopted on 29 November 2001 by IMO

[67] Assembly Resolution A.1025(26) Code of practice for the investigation of the crimes of piracy and armed robbery against ships, adopted on 2 December 2009 by IMO

[68] Email interview with Cyrus Mody, ICC IMB manager

"piracy and armed robbery", which includes both the UNCLOS and IMO definitions, correctly reflects the range of attacks against vessels today. Adding that for the purposes of statistics, such definition is appropriate. However, for the purposes of prosecution of a particular case the UNCLOS or IMO definition (as incorporated into domestic law) will need to be applied.[69]

It has been argued that the courts considered that international and criminal definitions of piracy are not always precise when interpreting insurance contracts. They rather tend to follow business meaning of piracy.[70] Thus, the definition used by the IMB for the statistical purposes might be more appropriate while interpreting piracy in insurance clauses rather than those developed by the international law or criminal law. However, since it has been established that such definition refers to both acts: piracy and armed robbery it might be assumed that it cannot be used for the purposes of marine insurance agreements, which require accurate description.

2.4 Definition of piracy for the purposes of marine insurance agreements

The precise and appropriate terminology "represents a critical ingredient in insurance law".[71] Therefore, the construction of the words and phrases for the purposes of marine insurance agreements is a crucial aspect of the subject of insuring the risk of piracy. The words 'piracy' or 'pirates' must be defined with precision and must be distinguished from piracy-like risks.[72] It has already been established that there are various definitions of piracy and that none of them is entirely clear and sufficient for the purposes of marine insurance contracts. Thus, it is necessary to identify the definition of piracy used by the marine insurance markets, which might not necessarily be in agreement with the definitions presented previously.

In *Republic of Bolivia v Indemnity Mutual Marine Insurance Company Ltd*[73], Pickford J. ruled that

> "The plaintiffs (…) have referred to me several definitions of piracy, some given by writers on international law and some by writers on criminal law. I am not sure that the definitions so given are necessarily in point on the question as to the meaning on the word in a policy of insurance (…) I am not at all sure, that what might be piracy in international law is necessarily piracy within the meaning of the term in a policy of insurance. One has to look at what is the natural and clear

[69] Email interview with Noel Choong Head ICC International Maritime Bureau IMB Piracy Reporting Centre (PRC)
[70] Passman, M.H., *supra note* 34 at p.67
[71] Thomas, R., "Insuring the risk of maritime piracy" in *Journal of International Maritime Law* Vol.4 (2004) p.356
[72] *Id.*
[73] [1909] 1 K.B. 785

> meaning of the word 'pirates' in a document used by businessmen for business purposes; and I think that, looking at it in that way, one must attach to it a more popular meaning, the meaning that would be given to it by ordinary persons, rather than the meaning to which it might be extended by writers on international law."[74]

Therefore, courts must have established a definition that would be appropriate for the marine insurance agreements. Consequently, in order to define piracy, the rules of insurance contracts must have been considered, alongside the various definitions, which have been examined in the previous sub-chapters.[75] Since in both countries, the US and England marine insurance agreements, similarly to any other insurance agreements are contracts, they must be interpreted using the same rules of construction as any other contracts.[76] Passman has argued that to define the words 'pirates' and 'piracy' in marine insurance contracts, three doctrines should be taken into consideration: reasonable expectations, usage of trade and *contra proferentem*.[77]

The reasonable expectations doctrine is a principle that relies on the 'reasonable expectations of the insured'. Under the doctrine of reasonable expectations, courts often grant coverage to an insured even when the express language of the policy does not provide coverage.[78] Thus, courts should interpret marine insurance contracts to provide the coverage that the insured assumed to purchase, if such assumption was reasonable. In the case of piracy, courts should consider what parties reasonably could expect from the term of piracy to mean. Both, American courts[79] as well as English courts[80] have followed the doctrine of reasonable expectations for defining piracy.[81] According to the usage of trade principles, courts in order to interpret ambiguous terms might look into their popular meaning in the industry in which the term is used. Therefore, when defining piracy for the purposes of insurance policies, it is necessary to look into its meaning within the shipping industry.[82] In accordance with the doctrine of *contra proferentem*, ambiguities in contract language are construed against the drafter, in this case against the insurer.[83] Hence, when interpreting the piracy, the lack of clarity of such term will be used against the insurer, who had possibility when drafting the policy to do it more precisely.

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[74] [1909] 1 K.B. 785 at 790
[75] Passman, M.H., *supra note* 34 at p.62
[76] Hodges, S., *Law of Marine Insurance* (London: Cavendish Publishing Ltd, 2004) p.1, Schoenbaum, T.J., *Admiralty and Maritime Law* (St.Paul: West Group, 2001) p.915
[77] Passman, M.H., *supra note* 34 at pp.62-63
[78] Ware, S.J., "A critique of the reasonable expectations doctrine" in *University of Chicago Law Review*, Vol. 56, Number 4 (1989) p.1461
[79] For example in *Charles E.Dole v Merchants Mutual Marine Insurance*, 51 Me.465,1863 WL 1315 at 2
[80] For example in *Republic of Bolivia v Indemnity Mutual Marine Insurance Company Ltd*[1909] 1 K.B. 785
[81] Passman, M.H., *supra note* 34 at p.64
[82] *Id.*
[83] *Id.*

As long as the definition of piracy is precise and the parties have defined it in the contract itself, the problems would not occur. However, if the term piracy appears in the policy, as it is most of the time, without further clarifications, it is necessary to establish what parties meant by it. The construction of marine insurance agreements is governed by the applicable law, specified in the policy.[84] Therefore, author will look into English and American case law in order to establish the definitions of piracy for the marine insurance purposes in both countries, taking into consideration the doctrines discussed heretofore.

2.4.1 Definition of piracy for the purposes of marine insurance agreements in England

Until the beginning of the 20th century, the law on piracy for the purposes of interpreting contracts or other commercial documents was rather unclear. However, during the 20th century, there were many developments, which introduced the new meaning of piracy for the purposes of marine insurance industries.[85] The first attempt took place, while codifying the insurance law through the Marine Insurance Act (MIA) 1906. It has been suggested that MIA 1906 provides only little assistance as it does not contain the complete definition but it rather provides partial clarification.[86] The term 'pirates' is define in the Rule 8 for the Construction of Policy in Schedule 1, which says that "The term 'pirates' includes passengers who mutiny and rioters who attack the ship from the shore." The MIA 1906 did not remodel existing law of marine insurance; it rather codified previous decisions and customary practise.[87] Hence, the term of piracy as adopted in the Rule 8 has its roots in the existing courts decisions. It has been suggested that the earliest case that considered the issue of piracy in respect to the marine insurance was *Nesbitt v Lushington*[88]. The court in this case had to decide whether the plaintiffs were entitled to recover under the circumstances, when the vessel was attacked by the land-born rioters that took the control over the ship. Afterwards, the rioters would not leave the vessel until the cargo that was on the board was sold for a price of circa three-quarters of the invoice value.[89]Although the court ruled that the loss was not covered by the specific wordings of the policy applicable in this case, it was decided that the act itself was a piracy. It was held that "Whatever would be robbery at land is piracy at sea. Obliging the owners of corn by force to sell it on shore for a particular price imposed by the buyers themselves, would certainly be robbery."[90] Therefore, it can be noticed that such decision had an impact on the definition introduced by the MIA 1906, while describing pirates as "rioters who attack the ship from the shore". The other pre-MIA 1906 case

[84] Thomas, R. *supra note* 71 at p.356
[85] Passman, M.H., *supra note* 34 at p.65, Miller, M.D., *supra note* 57 at p.213
[86] Thomas, R., *supra note* 71 at p.356
[87] Gold, E. Chircop, A., Kindred, H., *Maritime Law* (Toronto: Irwin Law Inc. 2003) p.305
[88] (1972) 4 TR 783
[89] *Ibid.* at 785
[90] *Ibid*. at 786

that influenced Rule 8 of the Construction of Policy was *Palmer v Naylor.*[91] In this case, the Chinese emigrants, while being transported from China to Peru took over a vessel, killing captain and part of the crew. Afterwards they landed on the nearest island and they escaped. The ship never completed her voyage.[92] The court held that "(…) the murder of the captain and part of the crew and the seizure of the vessel by the emigrants (…) was, if not a piratical act, one *ejusdem generis*, and therefore within the perils insured against".[93] Hence, the case failed to clarify whether passengers or crewmembers might be considered as pirates. However, the MIA 1906 recognized the importance of clarification of such issue and has included 'passengers' into the definition of piracy.

Although some matters are addressed in the Rule 8, the definition of piracy is by no means exhaustive. The courts have been facing difficulties with defining piracy for the purposes of marine insurance agreements after the MIA 1906 had been passed. The *locus classicus* on the subject of piracy is *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd*[94], where the court had to interpret meaning of the word 'piracy' as an insured peril.[95]The case was concerned with the supplies for the claimant's government that were insured under policy also covering the risk of loss from piracy. Such supplies were taken by rebels who, though not politically organized, had intentions to set up independent government in the territory of Bolivia. Although the court held that this was not a loss caused by the incident of piracy, within the meaning of policy,[96] it addressed several problems related to the interpretation of the term 'piracy' for the purposes of marine insurance agreements. As it has been previously established, the court suggested that the definitions offered by the international law, as well as criminal law are not appropriate, while interpreting insurance policy clauses.[97] The Court of Appeal added that

> "even assuming that the acts of those who seized the goods came with the legal definition of piracy for some purposes, the word "pirates", as used in the policy, must be construed in its popular sense, and in that sense it meant persons who plunder indiscriminately for their private gain, not persons who simply operate against the property of a particular State for a public end (…)".[98]

Another problem that was considered, was related to the place where the piracy can occur. The attack happened "on a branch river running into another branch river of the Amazon".[99] The court decided that such incident

[91] (1854) 10 Ex 382
[92] *Ibid.* at 383
[93] *Id.*
[94] [1909] 1 K.B. 785
[95] Hodges, S., *supra note* 76 at p.212
[96] Anonymous, "Insurance. Marine Insurance. Meaning of 'piracy' in policy" in *Harvard Law Review* Vol.22, Number 6 (1909) p.454
[97] [1909] 1 K.B. 785
[98] [1909] 1 K.B. 792 (C.A.) at 787
[99] *Id.*

could not constitute piracy as understood for the purposes of marine insurance industries. It was stated "After all, this was a policy of marine insurance, (…). Whatever the definition of piracy may be, (…) is a maritime offence, and what took place on this river (…) far up country, did not take place on the ocean at all".[100] Summarizing, the case has established that the piracy is a maritime offence that cannot occur on the inland waters and must be committed for the private gains, not political causes. It has been suggested that *the Republic of Bolivia* case represented a significant progress in the law of piracy for the purposes of insurance policies. It has also been added that the judges had attempted to provide directions on the law that will benefit insured and assured alike. However, the facts of both cases had enabled them to deliver the full definition of piracy that the commercial men would have wished.[101]

Consequently, some unclear matters have been revised in later cases. In *Banque Monetaca & Carystuiaki v Motor Union Insurance Company Ltd*[102], piracy was distinguished from seizure. In the case of *Re Piracy Jure Gentium*[103] the question was asked, whether actual robbery is an essential element of crime of piracy. It was decided that there is no such a requirement and an attempt to commit a piratical robbery equals piracy.[104] The case that advanced the definition of piracy considerably was *Athens Maritime Enterprises Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd. (The Andreas Lemos).*[105]In this case, the armed men came on board of the ship with intentions to steal, however, they did not meet any resistance and they managed to complete the theft before resorting to force in order to escape. The crime of theft was committed within the territorial waters and within the port limits.[106] The issues discussed in this case were concerned with the questions whether force or threat of force is an essential element of piracy and whether there are any geographical limitations as to the place where the crime of piracy might occur.[107]

In relation to the first issue, Mr Justice Staughton held that "(…) theft without force or a threat of force is not a piracy under a policy of marine insurance".[108]It was added

> "the association, by the word "piracy" insures the loss caused to shipowners because their employees are overpowered by force, or terrified into submission. It does not insure the loss caused to shipowners when their night-watchmen is asleep (…) and thieves steal clandestinely. The very notion of piracy is inconsistent with clandestine theft. (…) It is not necessary that the thieves must raise the pirate flag

[100] [1909] 1 K.B. 792 (C.A.) at 798
[101] Miller, M.D., *supra note* 57 at p.215
[102] (1923) 14 Ll.L. Rep. 48
[103] [1934] A.C. 586
[104] Miller, M.D., *supra note* 57 at p.216
[105] [1982] 2 Lloyd's Rep. 483
[106] Rose, F.D., *Marine Insurance: Law and Practice* (London: LLP, 2004) p.280
[107] Hodges, S., *supra note* 76 at p.212
[108] [1983] Q.B. 647 at 661

and fire a shot across the victim's bows before they can be called pirates. But piracy is not committed by stealth".[109]

While answering the second question it was decided that, there was no reason to limit piracy to acts outside territorial waters. Mr Justice Staughton proposed that it was not his intention to abandon the rules of public international law on the topic of piracy. However,

> "(…) a different rule for the purposes of interpreting contracts of insurance, will not give rise to the disastrous consequences (…). A shipowner whose property is taken by robbers is not much concerned whether that takes place in or outside territorial waters. Nor should (…) the precise location [be] of much concern to insurers, save to the extent that robbery is a good deal more likely on board a ship in port or estuary, than it is 12 miles out or more."[110]

Therefore, the case has established that piracy can occur on the territorial waters and that the act of piracy comprise a theft with the use of force or threat of force, but not without.

Concluding, the English case law, supported by the MIA 1906 defines piracy for the purposes of the marine insurance agreements as maritime[111] crime of robbery[112] or attempt to it[113], accomplished through force or the threat of force[114], for private ends[115] and committed by rioters or the passengers who mutiny[116], irrespectively of the location (excluding inland waters)[117]. Therefore, definition of piracy proposed for the purposes of marine insurance has extended the limits established by the UNCLOS to those acts that happen also on the territorial waters or in the EEZ(s) and to those who might be also committed by the passengers. However, neither UNCLOS's definition nor the marine insurance definition recognizes an act committed for the political motives as a piracy.

2.4.2 Definition of piracy for the purposes of marine insurance agreements in the US

The law of marine insurance has never been codified in the US.[118] Thus, there are no relevant statutes to look into for the guidelines as to the

[109] [1983] Q.B. 647 at 662
[110] *Ibid*. at 657
[111] *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 K.B. 792 (C.A.) at 798
[112] *The Andreas Lemos* [1983] Q.B. 647 at 661
[113] *Re Piracy Jure Gentium* [1934] A.C. at 586
[114] *The Andreas Lemos* [1983] Q.B. 647 at 661
[115] *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 K.B. 792 (C.A.) at 787
[116] MIA 1906, Rule 8 Construction of Policy of Schedule 1
[117] *The Andreas Lemos* [1983] Q.B. 647 at 657
[118] Schoenbaum, T.J., *supra note* 76 at p.921

definition of piracy. The basis for marine insurance law that courts should take into consideration lie in the federal maritime law as decided in *Insurance Co v Dunham*[119], as well as English law that might provide applicable rules because "of the special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business", as ruled in *Queens Insurance Co. of America v Globe & Rulges Fire Insurance Co*. [120] Hence, in order to establish the definition of piracy for the purposes of marine insurance industries in the US it is necessary to look into the relevant case law.

One of the first, most significant cases was *Charles E.Dole v Merchants Mutual Marine Insurance*.[121]The case was concerned with taking of an American merchant ship – *the Golden Rocket* by a Confederate vessel. Three litigations have aroused out of this capture.[122] The Supreme Judicial Court of Maine argued that the definition of piracy did not have to be limited to the one established by the international law. Instead, it was suggested

> "(…) the words 'piracy' in a policy of insurance, must be understood as referring to those only who are guilty of piracy as defined by the 'law of nations'. But we can perceive no ground for such a restriction. The parties to the contract must be presumed to have understood the laws, at least of this country; and so far as any kind of piracy, whether by the statutes or by the law of nations, could affect marine risks, it must be considered as embraced in that term when used in contracts relating to such risks, unless there is some limitation or exception".[123]

While defining the act of piracy itself, the court supported the definition introduced by *United States v Palmer*[124], where piracy was simply defined as robbery on the high seas.[125] The issue that court was concerned with was whether the act of capturing only vessels belonging to one nation would amount to the piracy. The court decided that "No one has ever contended that a man could not be convicted of robbery, unless he has general purpose to rob everybody. Such a rule is no more applicable to robbery on the seas, than on the land".[126] In addition, "if there is a mutiny of the crew, for the purpose of feloniously taking the ship, and they succeed it is piracy". Summarizing, the case has introduced piracy definition consisting of two elements: (1) robbery (2) that takes place on the high seas. However, it has also established that the act to be considered as piracy does not have to be random. In addition, it has been determined that the crewmembers that attempt to take over the vessel might also be defined as pirates.

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[119] 78 U.S. (11 Wall.) 1, 20 L.Ed. 90 (1870)
[120] 263 U.S. 487, 493, 44 S.Ct. 175, 176, 68 L.Ed. 402 (1924)
[121] 51Me. 465,1863 WL 1315 (1863) , 6 Allen 373,395,88 Mass.373,395 (Mass.1863), 7 F.Cas.837,849 (C.C. Mass.373.1864)
[122] Passman, M., H., *supra note* 34 at p.75
[123] 51Me. 465,1863 WL 1315 (1863) at 468
[124] 16 U.S. 610, 1818 WL 2444 (U.S.Mass)
[125] *Ibid*. at 468
[126] *Ibid.* at 469

The Massachusetts State Court litigation has proposed more detailed definition, which would describe pirates as

> "depredators and plunders, who do not merely make war on the ships or vessels of a particular country, or seek to destroy or take forcible possession of the property only of citizens of any one nation or government, but who commit robbery and pillage upon all persons and property found on the high seas *lucri causâ*, and who may therefore properly be designated as *hostes humani generis*."[127]

Thus, it can be noticed that court would not consider as piracy the crime that is committed out of the political motives, while no robbery is present. The Federal Circuit Court for the District of Massachusetts came to the same conclusion as the courts previously deciding on the case. It confirmed that an insurance law was governed by the rules of commercial agreements. However, it was held that the maritime commercial law did not derive from the domestic law of any nations but rather from the law of nations.[128] The issue of piracy has been further addressed in *Fifield v The Insurance Company of the State of Pennsylvania*[129]. The court distinguished between privateering and piracy, by suggesting that

> "the distinction between privateering and piracy is the distinction between captures jure belli under colour of governmental authority and for the benefit of a political power organized as a government de jure or de facto, and mere robbery on the high seas committed from motives of personal gain, like theft or robbery on land".[130]

Therefore, the definition of piracy excludes the acts arising out of the political motives, such as terroristic activities.

The case that was concerned with the geographical limitations where piracy can occur was *Britannia Shipping Corporation v Globe & Rutgers Fire Insurance Company*.[131] The case involved a tug boat that was stolen from the harbour. The court had to consider whether such act could be counted as piracy.[132] It was ruled that the act can only occur on the 'high seas'. However, the term 'high seas' should be used in its popular sense. The court cited the opinion of Mr. Justice Field given in *United States v Rodger*[133], where it was stated that "the term 'high seas' does not, in either case, indicate any separate and distinct body of water, but only the open waters of the sea or ocean, as distinguished from ports and havens and waters within narrow headlands on the cost".[134]In addition, it was added that "repeatedly

[127] 6 Allen 373,395,88 Mass.373,395 (Mass.1863) at 392
[128] F.Cas.837,849 (C.C. Mass.373.1864) at 843
[129] 47 Pa. 166,1864 WL 4665
[130] *Ibid*. at 4
[131] 138 Misc. 38,40-41,24 N.Y.S.720
[132] *Ibid.* at 722
[133] 150 U.S. 249, 14 S. Ct. 109, 37 L.ED. 1071
[134] 138 Misc. 38,40-41,24 N.Y.S. 720 at 723

throughout its opinion the court emphasizes the fact that the term 'high seas' refers only to open and uninclosed waters as distinguished from those surrounded or inclosed between narrow headlands or promontories".[135] The case where the most exhaustive definition of piracy for the purposes of marine insurance agreements was provided was *S.Felicione & Sons Fish Company v Citizens Casualty Company of New York*[136]. The case was titled "bizarre saga of the seas" as it involved double murder and ship scuttling by a shipmaster of another vessel.[137] The court had to decide whether the act of shipmaster was a piracy. The proposed definition of piracy described it as "robbery, murder or forceable depredation on the high seas without lawful authority, in the spirit and intention of universal hostility".[138] It can be noticed that the court added to the definition established in the previous cases a requirement of general aggression. It also extended it to the crimes other than robbery. However, the court decided that the shipmaster could not be defined as 'pirate' since his action did not rise to the level of general aggression against all human kind required by the definition of piracy.[139]

Summarizing the case law examined above, the courts decisions have established some indicators that should be taken into the consideration when defining a crime of piracy for the purposes of marine insurance policies. Consequently, piracy is a crime of depredation, which is not limited to robbery[140], committed not for political motives, but for private gains[141], on the high seas, which should be understood as any open waters (other than inland waters, port, harbours, etc.)[142] and in "the spirit of universal hostility"[143].

Therefore, similarly to the English definition, but contrary to the definition introduced by the UNCLOS, piracy might occur on the territorial waters and in the EEZ(s). In addition, piracy is not limited to robbery, as murder or other acts of depredation might count to it too. The element that is consistent with the definition introduced by the UNCLOS is private gains requirement.

Most elements of piracy as defined by the American courts are rather consistent with the definition developed by the English case law. In both states, it has been decided that the courts should follow the definition of piracy commonly used within the shipping businesses, slightly deviating

[135] 138 Misc. 38,40-41,24 N.Y.S. at 724
[136] 430 F.2d 136 (5th Cir. 1970)
[137] *Ibid.* at 137
[138] *Ibid.* at 138
[139] *Id.*
[140] *S.Felicione & Sons Fish Company v Citizens Casualty Company of New York* 430 F.2d 136 (5th Cir. 1970)
[141] *Fifield v The Insurance Company of the State of Pennsylvania* 47 Pa. 166,1864 WL 4665
[142] *Britannia Shipping Corporation v Globe & Rutgers Fire Insurance Company*138 Misc. 38,40-41,24 N.Y.S. 720
[143] *S.Felicione & Sons Fish Company v Citizens Casualty Company of New York* F.2d 136 (5th Cir. 1970)

from those introduced by the international law and criminal law. However, some indicia developed by the American courts might be in conflict with the English definition, which does not require general or universal hostility against all. In addition, English case law does not clarify whether any act of depredation might be considered as piracy. However, there are also elements that have been incorporated into the English definition, but have not been touched upon in the American courts. It has not been clarified whether for an act to be defined as piracy a use of force is necessary. Therefore, as it has been previously established, in the absence of the American court's decisions, the English decision might be applied.

To sum up, in this chapter after examining various definitions of piracy, it has been established that they lack consistency. It has been proved that since the courts while interpreting the piracy for the marine insurance clauses, has never been satisfied with the definition offered by the international law, have developed different definitions, considered to be more appropriate for the purposes of commercial agreements. Furthermore, it has been showed that English and American courts have approached the issue of piracy similarly, establishing analogous definitions.

3 Marine insurance, insurance policies and piracy coverage – historical overview

In this chapter, the development of marine insurance will be discussed briefly. Furthermore, the introduction of the standard marine policies will be presented. In addition, the historical coverage of the risk of piracy will be also illustrated.

3.1 Introduction to marine insurance

Marine insurance is considered to be the earliest form of risk coverage and very ancient sector of maritime law.[144] Modern marine insurance began to expand in England during the 17th century. Over 300 years of tradition and many of the practices introduced by Lloyd's of London[145] shaped the marine insurance business. Over those years, the principles of marine insurance remained constant and procedures have been changing in order to follow the commercial and shipping world. Eventually, the legal decisions that have established marine insurance principles were codified in the MIA 1906.[146] Since then, the MIA 1906 has been governing the marine insurance law in England. In the US, marine insurance has been developing slowly. The English marine insurance companies have always dominated. The first marine insurance company formed in the US was established in 1792. However, it was not until 1845 when the marine insurance market in the US expanded. Unfortunately, during the Civil War, the market suffered an economic downturn and most of the insurances were purchased abroad. In 1920, the marine insurance market in the US was reborn, when the American Hull Insurance Syndicate was founded, which now has many subscribing insurance companies.[147] As it was previously mentioned marine insurance law has never been codified in the US. The courts when deciding on the cases concerning marine insurance must look into the maritime federal law and the English law.[148]

In the beginning of 19th century, four categories of marine insurance could be identified: cargo, hull, freight and builder's risk. By middle of the 19th century, marine insurance was divided into three main branches, which were

[144] Gold, E. Chircop, A., Kindred, H., *supra note* 87 at p.297
[145] Lloyd's is the world's leading specialist insurance market, look at http://www.lloyds.com/Lloyds/About-Lloyds/What-is-Lloyds, last accessed on 17/03/2011 Its roots date back to 1688 and Lloyd's Coffee House where the modern marine insurance was born., look at http://www.lloyds.com/Lloyds/About-Lloyds/Explore-Lloyds/History, last accessed on 17/03/2011
[146] Douse, C.M., *supra note* 21 at p.277
[147] Schoenbaum, T.J., *supra note* 76 at p.920
[148] *Ibid.* at p.921

cargo, hull and freight insurance. However, protection and indemnity (P&I) insurance, which is impossible to omit when defining modern marine insurance at that stage was only a footnote to hull insurance.[149] It was not until 1874 when the first indemnity club was established to provide cover for liability for loss of or damage to cargo, then known as indemnity risk. Consequently, the mutual protecting societies that have existed already since 1855 amended their regulations and provided indemnity cover. Therefore, they became, what are known today as P&I Clubs.[150] Since then, the modern insurance is divided into three main categories: hull, cargo and P&I insurance.[151]

3.2 Marine insurance policies

As it has been established, marine insurance covers typically the loss or damage to vessel or cargo and third party liabilities. Hull or cargo coverage is underwritten in the contract of marine insurance.[152] As it is provided by the Section 22 of the MIA 1906 "(…) a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act". In 1779, Lloyd's adopted standard forms of insurance policies, the S policy for insurance on the ship and the G policy for the good's insurance. By the following year a new form, known as the SG Form of Policy was approved. The SG Form, a copy of which is Scheduled to the MIA 1906[153] has remained substantially unchanged until recent years.[154] The MIA 1906 has adopted the Lloyd's form of policy as an example but is not a required policy.[155] Policies come in a variety of different clauses forms. Each of such clauses must serve two purposes. First they should identify the risk covered under policy and second should limit the risk covered by the insurer.[156] The London insurance market has developed the London Institute Clauses for coverage of hull and machinery, cargo and war risks.[157] The most common forms in the US are the American Institute Clauses, which were the products of the Forms and Clauses Committee of the American Institute of Marine Underwriters (AIMU).[158] The P&I Clubs do not issue policies per se. Ships become insured once they are accepted by the Club and certificate evidencing this fact is issued.

[149] Hayden, R.P., Balick, S.E., "Marine Insurance: Varieties, combinations and coverages" in *Tulane Law Review* Vol. 66 (1991-1992) p.314
[150] Gold, E., Chircop, A., Kindred, H., *supra note* 87 at p.340
[151] Hayden, R.P., Balick, S.E., *supra note* 149 at p.314
[152] Bennett, H., *The Law of Marine Insurance* (Oxford: Oxford University Press, 1996) p. 20
[153] Gauci, G., "Piracy and its legal problems: with specific reference to the English law of marine insurance" in *Journal of Maritime Law and Commerce* Vol.41 (2010) p.545
[154] Gold, E. Chircop, A., Kindred, H., *supra note* 87 at p.300
[155] King, O.R., Ocean Piracy and its impact on insurance. CRS Report for congress. December 3, 2008, p.5
[156] Douse, C., M. *supra note* 21 at p.279
[157] Gold, E., Chircop, A., Kindred, H., *supra note* 87 at p.300
[158] Hayden, R.P., Balick, S.E., *supra note* 149at p.319

Although no policy is provided, coverage is detailed in the Club's Rules that function as policy language.[159]

3.3 Piracy coverage under marine insurance

Historically, piracy in England has oscillated between being covered as marine risk and war risk. The SG Form, introduced by Lloyd's, covered pirates and rovers within the listed perils. However, it became common to add a Free of Capture and Seizure Clause (FC&S), excluding such risk from the standard form of marine insurance. [160] As a result, the Institute War and Strikes Clauses had to be obtained in addition to the SG Form, insuring the peril of piracy under the war policy[161] in order to maintain insurance protection against piracy.[162] Thus, the FC&S clause was used as a mechanism that allowed the insurers to limit the perils, including piracy from the policy and force the shippers to purchase additional coverage, paying extra premium for war risks insurance.[163] However, it was not until 1898 that the London market decided that marine risks and war risks should be insured separately. Consequently, it was established that all marine policies should contain a FC&S Clause that would exclude war risks.[164] At this point, piracy was excluded from the FC&S Clause, thus it remained a marine peril until 1937, when the clause was amended and piracy exemption was removed, transferring piracy into war risks policy.[165] In 1983, the old SG Form was amended by the Lloyd's MAR Form, along with its attended war and strike clauses. It has been suggested that such changes have been generated after the UNCTAD criticized the SG Form and suggested that the form was a barrier to the development of the international base for the marine insurance contracts.[166] The MAR form moved back the risk of piracy to the marine policy.[167] Such developments have the advantage of including risk of piracy and risk of theft under one policy without making unnecessary distinction between these two.[168] In addition, since 1983, in relation to hull insurance, piracy could be insured under number of standard forms (Institute Clauses) as a marine peril. However, since 2005, the new possibility has been offered in terms of the Institute Time Clauses Hulls (ITCH), Institute Voyage Clauses Hulls (IVCH) and International Hull Clauses (IHC) to transfer again the risk of piracy to the war risks policies.[169] It seems that there is growing tendency to insure piracy under war risks insurance nowadays. In the US, historically piracy was one of the named

[159] Hayden, R.P., Balick, S.E., *supra note* 149 at p.326
[160] Rose, F.D., *supra note* 106 at p.279
[161] Miller, M.D., *supra note* 57 at p.207
[162] Douse, C.M. *supra note* 21 at p.280
[163] *Id.*
[164] Thomas, R., *supra note* 71 at p.356
[165] Douse, C.M. *supra note* 21 at p.280
[166] Hayden, R.P., Balick, S.E., *supra note* 149at p.325
[167] Miller, M.D., *supra note* 57 at p.207
[168] *Id.*
[169] Gauci, G., *supra note* 153 at p.545

perils in the hull policy. Therefore, it was a marine peril. However, the American Institute Hull Clauses (AIHC), which were established in 1977, listed specifically pirates as a covered war peril.[170] Hence, the risk of piracy was transferred to the war policies and it remains as a war peril. In relation to the cargo insurance in England, piracy in the first instance was insured as marine and consequently "all risk" peril. This was changed in 1937, resulting from the effects of the Spanish civil war on the marine insurance industry, when piracy was excluded. In 1982 under Institute Cargo Clauses (ICC) (A), piracy again became an "all risk" peril.[171] The American Institute Cargo Clauses exclude risk of piracy, transferring it to the war (cargo) insurance.[172] P& I Clubs normally excluded war risks. In spite of this, the war risks for the purposes of the P&I insurance did not include piracy.[173] Therefore, P&I Clubs have also offered protection against the risk of piracy.

In this chapter it has been illustrated how the modern insurance has evolved. In addition, it has been described what form marine insurance contract should take to be enforceable. Furthermore, the most common standard policies have been presented, as well as their historical development. Finally, the historical coverage of the piracy under those policies has been briefly discussed. It has been shown that the marine insurance market has been changing and developing in order to follow the shipping business. Therefore, it is necessary to look into modern insurance policies in order to identify whether the marine insurance markets are managing to handle a new challenge, which has been created by the increasing risk of piracy.

[170] Knudsen, J.E., "The hull policy today: thoughts from the claim world" in *Tulane Law Review* Vo. 75 (2001) p.1617
[171] Gauci, G., *supra note* 153 at p.545
[172] Agate, P., *The role of the insurance market in tackling piracy*, Swinglehurst Limited Presentation, slide 8, available at http://www.itp.net/events/piracybriefing/pdf/Paul%20Agate,%20Swinglehurst.pdf, last accessed on 19/03/2011
[173]Gauci, G., *supra note* 153 at p.545

4 Modern marine insurance and piracy coverage

In this chapter, the insurance of risk of piracy under different marine insurance policies will be examined. In order to fulfil the purpose of this chapter firstly the marine insurance contract will be defined. In the subsequent sections, various marine insurance policies will be analyzed in order to establish whether the assured might recover the loss resulting from the piratical attack under such policies. Each sub-chapter will briefly introduce the reader to the particular type of policy. Furthermore, the policy will be studied in order to establish whether it provides sufficient coverage against the risk of piracy.

4.1 Introduction to marine insurance agreements

It is of crucial importance to identify what is considered as marine insurance agreement. In England the definition is to be found in the s. 1 of the MIA 1906, which defines the contract of marine insurance in following terms "A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to extent thereby agreed, against marine loss, that is to say, the losses incident to the marine adventure". Therefore, the contract of marine insurance is a contract of indemnity, the fundamental principle upon which the whole contract is founded. The rights and liabilities of the parties and the recoverable amounts are governed by this basic principle too.[174] Furthermore, the principle of indemnity ensures that the assured is not unjustly enriched through recovery in excess of measure provided by the contract.[175] The US case law suggests that marine insurance is an agreement within admiralty jurisdiction[176] and that is recognized as necessary to a vessel so the unpaid insurance premiums give rise to maritime lien.[177] As it has already been established there are not many guidelines in the American law as to the marine insurance principles, however, those developed by the English law might also apply to the marine insurance agreements in the US.

Most marine insurance contracts provide coverage against specific perils, unless the policy is "all risk". Regardless of the type, all policies require the assured to prove a loss by causality compatible with the nature of insurance.[178] There are different types of marine insurance, since the

[174] Hodges, S., *supra note* 74 at p.1
[175] Bennett, H., *supra note* 152 at p.10
[176] DeLovio v Boit 7 F.Cas. 418, 1997 A.M.C. 550 (C.C.D. Mass.1815) (No.3776) in Schoenbaum, T.J., *supra note* 76 at p.915
[177] Angelina Casualty & Co v Exxon Corporation 876, F.2d 40, 1989 A.M.C. 2677 (5th Cir. 1989) in Schoenbaum, T.J., *supra note* 76 at p.915
[178] Bennett, H., *supra note* 152 at p.10

shipowner himself requires at least three different types: protection against loss or damage to the ship and its equipment, financial compensation in the event of loss of income if the vessel is unemployed and third party liability.[179] Separately, the cargo owner also requires protection of the cargo.[180] Such marine insurance contracts are embodied in marine policies, which in the clauses that are inserted, provide the actual terms of the coverage[181].

Hence, in order to establish whether the assured is to be indemnified for the loss suffered because of the piratical attack, the marine insurance policy must specify if the agreed coverage also includes the risk of piracy. In the further sections of this chapter, various marine insurance policies will be studied in order to identify whether they insure against such risk.

4.2 Hull insurance

4.2.1 Introduction to hull insurance

Policy that insures hull of the vessel is known as a 'property cover'. Its purpose is to insure the shipowner (or anybody that has an insurable interest) against physical loss or damage to the vessel.[182] The term 'vessel' comprises both the hull and the machinery, including equipments, bunker, etc.[183] The assured under the hull policy shall be indemnified against physical loss or damage to the insured vessel proximately caused by covered perils enumerated in such policy. In addition, hull policy also insures against general average (GA) loss, sue and labour expenses and salvage charges resulting from the listed perils.[184] The measure of recovery under the hull policy is restricted by the 'agreed value' of the vessel stipulated in the policy.[185]

The standard terms and conditions for hull and machinery insurance that are used by most underwriters in London are set out in the Institute Clauses, Hulls. There are four standard ICH forms in use: ITCH 83 and 95, IVCH 83 and 95. Both sets might be used, however, it seems that 95 are not widely applied and the 83 forms remained more favoured. In addition, on 01/11/2002 the Joint Hull Committee of the Institute of London Underwriters launched the new IHC, which were amended in 2003. [186] Hence, currently there are two systems available - the assured might insure the vessel under ICH (83 or 95) or IHC. However, the new clauses are

[179] Gold, E., Chircop, A., Kindred, H., *supra note* 87 at p.312
[180] *Id*
[181] *Id.*
[182] Douse, C.M. *supra note* 21 at p.279
[183] Gold, E., Chircop, A., Kindred, H., *supra note* 87 at p.312
[184] Lemon, R., "Allocation of marine risks: an overview of the marine insurance package" in *Tulane Law Review* Vol. 81 (2006-2007) p.1468
[185] *Ibid*. at p.1469
[186] Gold, E., Chircop, A., Kindred, H., *supra note* 87 at p.333

expected to supersede the ICH in due course.[187] In the US, the AIHC form is in general use for hull and machinery insurance.[188] The AIHC were introduced in 1977, however, they were amended in 2009. For the purposes of this sub-chapter ITCH 83 and 95, IVCH 83 and 95, IHC and AIHC will be analyzed.

4.2.2 Piracy coverage under hull insurance

It has already been established that piracy through history has oscillated between being treated as a marine peril and a war peril. Such developments have been related to the fact that piracy is a risk related to the sea, however, is also a risk that arises from the acts of men against ships, cargo and persons on board.[189] The confusion as to the right placement of piracy peril in the policies is also reflected in the different coverage under various policies. As a result different insurance regimes in respect to piracy evolved in different markets.

4.2.2.1 Piracy coverage under hull insurance in England

The London marine insurance market has included piracy in the insured perils clause of hull and machinery policies. Therefore, English underwriters treat piracy as a marine peril. The ITCH 83 in Clause 6 provides that "This insurance covers loss of or damage to the subject-matter insured caused by: (...) 6.1.5 piracy." Similarly, under IVCH 83 Clause 4.1.5, piracy is insured. The Institute Clauses introduced in 1995 also consider piracy as marine peril. ITCH 95 list piracy in Clause 6.1.5 and the IVCH 95 also provide coverage to the piracy in Clause 4.1.5. Thus, both, Institute Clauses 83 and 95 provide coverage to the peril of piracy. However, none of these policies actually defines it. The IHC have also failed to provide solution to such problem, listing piracy in Clause 2.1.5 as insured peril, but not defining it either. Since the ITCHs, IVCHs and IHC are subject to the English law, the definition of piracy for the purposes of marine insurance agreements developed by the English courts should be taken into consideration. It has been proved already that such definition is far from being clear and comprehensive. Hence, the shipowner while purchasing such coverage is facing a risk of being uninsured if the act causing the loss falls out of scope of the definition of piracy.

It has already been established that piracy only takes place if it is motivated by private gain, not political objectives. Most of the time contemporary pirates see a good business in the ship's hijacking, however, it might also occur that the act is politically motivated. In such circumstances the assured will not be able to rely on the piracy coverage under hull policy as such attack falls out of the scope of piracy definition. In addition, the risk of loss

[187] Gold, E., Chircop, A., Kindred, H., *supra note* 87 at p.333
[188] Schoenbaum, T.J., *supra note* 76 at p.925
[189] Luttenberger, A., "Covering the risk of piracy and armed robbery at sea" p.5, at http://www.fpp.edu/~mdavid/TVP/Seminarske%200809/ICTS2005CD/papers/Luttenberger.pdf, last accessed on 10/04/2011

resulting from "any person acting from a political motive" is excluded by the Strikes Exclusion Clause in ITCH 83 (Clause 24.2), IVCH 83 (Clause 21.2), ITCH 95 (Clause 25.2) and IVCH 95 (Clause 22.2) Moreover, the IHC Terrorist, Political Motive and Malicious Act and Exclusion Clause 30.2 specifies that this insurance does not cover losses arising from any person acting from a political motive either.

It has also been suggested that the 'piratical attack' might rather fall under the definition of riot than piracy, which is an excluded peril under all discussed policies. (ITCH 83 Clause 24.1, IVCH 83 Clause 21.1, ITCH 95 Clause 25.1, IVCH 95 Clause 22.1 and IHC Clause 29.4)[190] The definition of riot is to be found in Part 1, Section 1(1) of the Public Order Act 1986, which states that

> "Where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot."

It seems that if the element of the required number of rioters is fulfilled, the attack of the 'pirates' might be considered as a riot. Hence, it would be excluded from the hull policy coverage.

In addition, it has been suggested that the damage caused by a piratical act will fall under the coverage of the peril of piracy as long as the pirates do not intend primarily to destroy the ship. If pirates act for destructive purposes, when for example ransom is not paid to them, then such act might not be considered as piracy, but rather as "use of any weapon or the detonation of an explosive by any person acting maliciously", therefore, the peril excluded under the hull policies[191] (ITCH 83 Clause 26, IVCH 83 Clause 22, ITCH 95 Clause 23, IVCH 95 Clause 23 and IHC Clause 30.3).

If the assured fails to prove that the loss resulted from the act of piracy, there is still a possibility of recovering under "violent theft" or "barratry" headings. Under ITCH 83 Clause 6.1.3 "the violent theft by persons from outside the vessel" is listed and in Clause 6.2.5 "barratry of Master, Officers or crew" is enumerated. The IVCH 83 in Clauses 4.1.3 and 4.2.4 cover "violent theft by persons from outside the vessel" and "barratry of Master, Officers and crew", respectively. ITCH 95 included "violent theft by persons from outside the vessel" in Clause 6.1.3 and "barratry" in Clause 6.2.4. Similarly, Clauses 6.1.3 and 6.2.5 of IVCH 95 provide coverage to those two perils. Under the IHC, "violent theft by persons from outside the vessel" in Clause 2.1.3 and "barratry of Masters, Officers or Crew" in Clause 2.2.5 are also included as insured perils. Hence, if the shipowner is not able to recover under the definition of piracy, then there is possibility of recovery under the elements of piracy, which are also listed in the perils

[190] Gauci, G., *supra note* 153 at p.551
[191] *Id.*

clause. Nevertheless, since those two perils are not defined either, the difficulties related to the lack of clear definitions might also prevent from recovering under hull policies.

The hull policies might not provide sufficient coverage to the assured, if the attack of 'pirates' do not fall under the definition developed by the insurance market, neither is categorized as violent theft, nor barratry. In addition, the shipowner faces a risk of being attacked by 'pirates' who might follow some political principles and consequently loss caused by them will not be covered either. The shipowner might also not be able to recover if the attack is categorized as riot or use of weapon by person acting maliciously, not piracy. Therefore, the shipowner's insurance under hull policies mostly relies on the interpretation of the act that caused the loss and is rather uncertain.

4.2.2.2 Hull insurance and ransom payments

In addition, in the light of recent events it seems that new form of piracy became prominent, where obtaining a ransom rather than theft of ship or cargo, is the objective.[192] Thus, even if the attack constitutes and act of piracy falling into scope of the marine insurance definition, neither ship nor cargo will necessarily be damaged, if the ransom is paid. Two issues arise for consideration: whether the ransom is recoverable under the hull policies and if the ransom is not paid and ship or cargo is lost, whether such loss is recoverable.[193] Furthermore, it has been argued that payment of ransom might be illegal, therefore, could not be recovered under the marine insurance policies. Hence, firstly it must be considered whether paying ransom to pirates is legal under English law.

4.2.2.2.1 Legality of ransom payment in England

It has been argued that if the payment of ransom was illegal, then there could be a breach of warranty of legality which is specified in section 41 of the MIA 1906, which provides that "there is an implied warranty that the adventure insured is lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner". However, it has also been argued that since the adventure is to be a marine adventure, ransom payment might not be a part of it. In addition, it has been added that the condition "as far as the assured can control the matter" might also suggest that the ransom payment will not breach the warranty of legality.[194] The payment of ransom was statutorily prohibited in England by Ransom Act 1782, which made unlawful for a British subject to enter into a ransom contract. However, according to the Act it was legal for British privateer who captured enemy ship to request and receive ransom money. The Act was repealed in 1864 and since then there is no direct prohibition of paying

[192] Todd, P., "Piracy for ransom: insurance issues" in *Journal of International Maritime Law* Vol.15 (2009) p.316
[193] *Id.*
[194] Gauci, G., *supra note* 153 at p.558

ransom.[195] Under Section 15(3) of the Terrorism Act 2000 a person commits an offence if he provides money or other property for the purposes of terrorism. Thus, if an attack is considered as terroristic attack rather than act of piracy, then the ransom paid might not be legal and assured might not be able to recover it under the hull insurance. The issue of legality of ransom payment was discussed in *Masefield AG v Amlin Corporate Member Ltd*[196], where it was provided that "it is to be observed that there is no legislation against payment of ransom, which is therefore not illegal."[197] Furthermore, the case has also established that the payment of ransom was not contrary to the UK public policy.[198] In the judgment it was stated that it would not be right to categorize the ransom payment as contrary to public policy, since

> "it is true that payments of ransom encourage a repetition, the more so if there is insurance cover: the history of Somali piracy is an eloquent demonstration of that. But if the crews of the vessels are to be taken out of harm's way, the only option is to pay the ransom. Diplomatic or military intervention cannot usually be relied upon and failure to pay may put in jeopardy other crews".[199]

It seems that ransom payment is not illegal in the England as long as it is not paid to terrorists, therefore, it might be recovered under insurance policies. Accordingly, is necessary to establish whether the ransom payment is insured under such policies.

4.2.2.2.2 Ransom demand as theft

It has already been demonstrated that the hull policies also insure against the violent theft. In *Masefield AG v Amlin*[200] it was suggested that "As a matter of English criminal law a demand for ransom against return of property may well constitute a theft".[201] On the appeal, it was stated that the basic definition of theft that is to be found in the section 1(1) of the Theft Act 1968, which provides that "A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it". Under such definition the ship's hijacking with intention to return the property to the owner cannot constitute a theft since the owner is not permanently deprived of her. It has been argued that taking the ship with intention to hold her for ransom falls under the definition provided in section 6(1), which states that "A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights(…)".

[195] Chuah, J., "Pirate's ransom – to pay or not to pay" in *International Trade Law* Vol.56 (2009) p. 46
[196] [2011] WL 197285
[197] *Ibid.* at 63
[198] [2010] EWHC 280 Comm at 61
[199] *Ibid.* at 60
[200] *Ibid.*
[201] *Ibid*. at 65

Hence, the pirates might be considered to intend to permanently deprive the shipowner of the ship, which is detained and is expected to be released after the ransom payment and the ship hijacking for ransom purposes might be characterized as theft. Furthermore, in non-maritime case *R v Raphael*[202] the question was asked "What is the position if A intends to return the car to B if B is prepared to pay a reward to A for doing so?"[203] The answer to such question was as follow:

> "(…) if when A takes the car he intends to return it to B, whether or not B is prepared to pay the reward, you may think he would not have the intention of permanently to deprive B of it. If on the other hand he intends to return the car only if he receives the reward, and if he does not do so, to keep the car or dispose of it, you may think he would have the intention permanently to deprive B of it".[204]

Therefore, applying the situation of the ship hijacking for ransom to the test developed in *R v Raphael* it seems that ransom request should be categorized as theft and demanded ransom might be recoverable under such peril. However, it is not clear whether the English criminal law definition applies to the marine insurance policies since the authorities on such matter are inconsistent.[205]

4.2.2.2.3 Salvage, general average and sue and labour expenses

Furthermore, it has been suggested that the ransom paid for the purposes of releasing a ship from pirates can also be recoverable as GA contribution, sue and labour expenses or under the heading of salvage charges.[206] The ITCH 83 in Clause 11, IVCH 83 in Clause 9, ITCH 95 in Clause 10, IVCH 95 in Clause 8 and IHC 2003 in Clause 8, all cover "the vessel's proportion of salvage, salvage charges and/or general average". In addition, Clause 13.2 of ITCH 83, Clause 11.2 of IVCH 83, Clause 11.2 of ITCH 95, Clause 9.2 of IVCH 95 and Clause 9.2 of IHC provide that "underwriters shall contribute to charges properly and reasonably incurred by the Assured, their servants or agents" for measures taken to minimize the loss which would be recoverable under the insurance. It is a duty of the assured to take such measure, and expenses that arise out of such duty are known as sue and labour expenses.

4.2.2.2.4 Ransom payment as salvage operation

The discussed hull policies insure against the salvage charges. Moreover, the MIA 1906, Section 65 deals with the salvage and salvage charges, providing in Section 65(1) that "Subject to any express provision in the

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[202] [2008] EWCA Crim 1014
[203] *Ibid.* at 50
[204] *Id.*
[205] [2011] EWCA Civ 24 at 59
[206] Gauci, G., *supra note* 153 at p.552

policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils". Section 65(2) adds that

> "Salvage charges mean the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred".

Consequently, to establish whether the ransom payment may be recovered as salvage charges, it is necessary to identify when the act of salvage arises and if ransom payment falls under the definition of it.

The basic definition suggests that there are three elements that are required to claim the salvage award. Firstly, there must be a service to maritime property that is in danger. Secondly, the service must be voluntary in nature. In addition, salvage efforts must be at least partially successful.[207] The definition of salvage is also to be found in the Article 1(a) of the Salvage Convention 1989[208] that England is part to[209], which states that "Salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever". Therefore, it is essential to verify whether the ransom payment might constitute a salvage operation. It seems clear that the payment to pirates to release the vessel might be considered as an act to assist a vessel in danger. In addition, piratical activities definitely create such danger than a salvage operation is required.[210] Furthermore, if the operation is successful and the vessel is safely returned to the shipowner, the salvage charges might be claimed. Thus, it could be suggested that the ransom payment is a salvage operation. On the other hand, it has been argued that it is very unlikely that the payment of ransom will constitute a salvage expense, when is paid by the assured or his agent or any other person employed by him. It has been suggested that such claim would fail, as the ransom paid by the assured will not satisfy the conditions lie down in MIA Section 65(2)[211], which particularly states that expenses rendered by the assured do not constitute salvage charges, but may be recovered as GA contribution.

There are no authorities that would provide the guidelines whether the salvage charges claim for ransom payment under hull insurance will be successful. Taking into consideration the fact that the payment most likely is going to be made by the assured (shipowner), such claim will not be

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[207] Rapp, G.C., "Salvage awards on the Somali coast: who pays for public and private rescue efforts in piracy crisis?" in *American University Law Review* Vol.59 (2010) p.1404
[208] International Convention on Salvage, London, 28 April 1989. In force 14 July 1996
[209] http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx, last accessed on 08/04/2011
[210] Rapp, G.C., *supra note* 207 at p.1409
[211] Gauci, G., *supra note* 153 at p.552

successful. In addition, it must be remembered that salvage charges might be only recovered if the salvage operation was initiated to prevent the loss caused by peril insured under the policies. It is has been already showed that piracy, as well as the violent theft and barratry are insured by the ITCHs, IVCHs and IHC. It has also been proved that lack of comprehensive definition of piracy might put an assured in the position of being uninsured against 'piratical attacks' if those do not fall under the definition established in Chapter 2.4.1 of this paper.

4.2.2.2.5 Ransom payment as general average act

When the ship is carrying cargo, the shipowner and cargo owner will share a common interest in preservation of both.[212] In most cases, the ransom is to be paid by the shipowner. Nevertheless, it is argued that there could be a greater pressure placed on the high value cargo owner to contribute to it through GA. The establishment whether the ransom payment is recoverable in GA from other interests, is entirely independent from the insurance contracts. However, if the piracy constitutes an insured peril under hull policy and ransom payment is declared as the GA act then a shipowner who pays might be able to claim the entire amount under hull policy, taking into consideration the fact that the insurer will be subrogated in respect of cargo or other contributions.[213] It has already been established that the hull policies insure against the GA contribution. Moreover, Section 66(4) of MIA 1906 provides that:

> "Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute".

To verify whether contribution to ransom payment is recoverable under the heading of GA contribution, it is essential to identify if it falls under the definition of GA act.

There must be four elements present for the act to constitute a GA under York Antwerp Rules 2004[214] and the MIA 1906 definitions.[215] The York-Antwerp Rules in Rule A state that "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". In a marine insurance context, section 66 of the MIA 1906 provides a similar definition. Section 66(2) provides that "there is a general

[212] Todd, P., *supra note* 192 at p.316
[213] *Id.*
[214] York Antwerp Rules 2004, Vancouver, 4 June 2004, set of rules governing application of principle of general average
[215] Spencer, J., "Hull insurance and general average – some current issues" in *Tulane Law Review* Vol. 83 (2009) p.1262

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".

Therefore, there must be: (a) a peril, (b) extraordinary sacrifice (c) that is voluntary and (d) for common benefit. Hence, to establish whether the ransom payment constitutes a GA act, four elements presented above should be identified. First, it seems clear that armed pirates constitute a peril. In addition, it seems that ransom payment is an extraordinary expenditure, since it is not reasonable foreseeable that such sacrifice will be unavoidable to complete the voyage. Furthermore, there is no legal duty or pre-contractual obligation to pay the ransom, therefore, it is voluntarily incurred. Finally, ransom is paid to release, both the ship and the cargo, thus, there is a common benefit. Thus, if there are other parties to the marine adventure, the ransom payment might be declared as GA act.[216] Concluding, when such circumstances arise, the parties to the adventure might be required to contribute to the ransom payment and such contribution will be recoverable under the heading of GA contribution of hull policies.

Unfortunately, issue of piracy and GA has not been widely addressed in English courts. However, it has been suggested that ransom payment have long been viewed as GA act, as it was decided already in 1590 in *Hicks v Palington*[217]that ransom paid to the pirates was subject to GA contribution.[218] More recently, this issue was addressed in *Royal Boskalis Westminster NV v Mountain*[219], where it was decided that any reasonable payment made to hijackers to secure the release of the vessel and cargo represents GA sacrifice.

Although the GA is widely criticized for its archaic form, surprisingly, there has been a consensus that ransom payment is a subject to GA contribution.[220] It has been argued that although there is not much case law on the GA and piracy, it is generally accepted within the shipping industries that incurring expenses to secure the release of the vessel and cargo (such as ransom payment) constitutes GA act. It has also been added that such expenses are not only limited to the ransom itself, but also might include costs associated with delivering the ransom to pirates.[221] It has been suggested that when the GA is declared, once the ransom is paid, it appears that cargo interests have been willing to contribute. On the other hand, P&I underwriters so far have been reluctant to contribute in respect of crew.[222] It

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[216] Spencer, J., *supra note* 215 at p.1262
[217] 1590 Moore's QB R 297
[218] Kendall, W., Kendall, L., " The consequences to shipping of a resurgence of violence at sea: piracy, terrorism, war or self-defense?" in *European Journal of Economics, Finance and Administrative Sciences* Issue 24 (2010) p.140
[219] [1999] QB 674
[220] Spencer, J., *supra note* 215 at p.1262
[221] Steer, J., "Piracy and general average – a look at some of the pitfalls" in *Maritime Risk International* Vol. 23 (2009) p.14
[222] Townsend, P., "No romance in modern piracy" in *Maritime Risk International* Vol. 23 (2009) p.10

appears that ransom payment will in general fall under the GA act definition. Furthermore, since the GA contribution is insured under the wording of the discussed policies, the shipowner should be able to recover ransom payment through GA under ITCH 83 and 95, IVCH 83 and 95 and IHC.

4.2.2.2.6 Ransom payment as sue and labour expenses

If the vessel is carrying a cargo, the cargo owner might have to contribute to the ransom payment if GA is declared. However, if there are no other parties to the voyage, the shipowner will not be able to rely on the GA contribution clause, but instead might recover the ransom under the heading of sue and labour expenses.

Under the discussed hull policies it is a duty of the assured to take reasonable measures to prevent or minimise the loss, which would be recoverable under these policies. The insurer should compensate the expenses that the shipowner incurs in order to take such measures. In addition, MIA 1906 78(1) provides that "Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause(…)".

Therefore, to establish whether the shipowner will be able to recover the amount paid to pirates for the release of the vessel under sue and labour clause, it is necessary to identify whether the ransom payment might be regarded as preventive measure and the amount paid could be considered as sue and labour expense. The court discussed this issue in details in *Royal Boskalis Westminster NV v Mountain*[223]. In the court's judgement it was stated that "unless the payment of ransom is illegal, it is recoverable from underwriters and, although the precise basis for the recovery is not altogether clear, it does seem to be accepted that it can be under sue and labour clause".[224] To support such argument the view of the editors of *Arnould*, p. 791, para. 913A was cited by Lord Justice Stuart- Smith:

> "Where the assured is forcibly deprived of possession or control of the insured property, it generally makes no difference whether those who deprive him of it are acting lawfully or unlawfully, as the perils covered by standard policies are in most cases not subject to any limitation in this respect. Problems may, however, arise over the suing and labouring clause, where the steps the assured has taken (or which it is said he ought to have taken) are of an illicit nature (…) There appears to be little doubt that where a payment which is not itself illegal under any relevant law is made to secure the release of property, this can be recovered even though the persons demanding the payment are not acting lawfully in so doing. Thus, for example, payment to recover property from pirates or hijackers must, it is submitted, in general be recoverable. Similarly,

[223][1997] C.L.C 816 , [1999] Q.B. 674
[224] [1997] C.L.C 816 at 824

> where payment is made to the authorities in a country to obtain the release of property detained by them it can generally make no difference whether or not the laws there in force have been properly applied."[225]

Therefore, the case has established that the amount paid as ransom can be recovered under sue and labour clause as an expense incurred to minimise the total loss. Such view was recently applied in *Masefield AG v Amlin Corporate Member*[226], where it was confirmed that the payment of ransom is recoverable as sue and labour expense.[227] Concluding, it seems that the courts have affirmed that the ransom paid to the pirates to release the vessel is considered to be minimising measure and the amount paid is a suing and labouring expense, therefore, it is recoverable under sue and labour clause, if such is incorporated to the policy.

4.2.2.2.7 Failure to pay ransom

It should also be considered whether the shipowner might rely on the hull insurance if the ransom is not paid or if the ransom negotiations fail and consequently there is damage to the vessel. It has already been established that piracy risk is insured in the London market under the hull policies as marine peril, however, it recently became common to exclude piracy from the cover and transfer the risk to the war risks policies. Therefore, the insurance against the physical damage to the ship will depend on the coverage purchased. It has been suggested that in such circumstances, when the ransom is not delivered to pirates, the assured might be considered as failing to take measures necessary to minimise a loss, as required under section 78(4) of the MIA 1906.[228] Such argument was considered in *The Netherlands v Youell and Hayward*[229], where it was rejected that section 78(4) amounts to the warranty and it was established that it is not a contractual obligation either.[230] It was decided by the court that a failure to comply with section 78(4) would only arise if it broke the chain of causation, so the proximate cause of the loss would no longer be an insured peril.[231] Therefore, it has been argued that taking into consideration the decision in *The Netherlands v Youell and Hayward*, it is very unlikely that such provision will apply to the case of piracy, since the damage to the vessel would be still caused by pirates.[232]Summarizing, if the shipowner suffers a loss resulting from the physical damage to the vessel, caused by pirates who did not receive the demanded ransom, he will still be able to recover such loss under the relevant marine policy.

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[225] [1997] C.L.C 816
[226] [2010] EWHC 280 (Comm)
[227] *Ibid*. at 63
[228] Todd, P., *supra note* 192 at p.319
[229] [1997] 2 Lloyd's Rep 440
[230] Todd, P., *supra note* 192 at p.319
[231] [1997] 2 Lloyd's Rep 440 at 457-59
[232] Todd, P., *supra note* 192 at p.319

4.2.2.3 Piracy coverage under hull insurance in the US

In the US, the War Strikes and Related Exclusion Clause excludes the peril of piracy from the AIHC cover. Contrary to the London underwrites, the American underwrites under AIHC do not have an option to either list peril in the named perils clause or to exclude it by using a separate exclusion form.[233] Therefore, American marine insurance market treats piracy as a war risk. Consequently, the shipowner in order to insure the risk of piracy must acquire additional coverage in the form of war risks policy. Such policies will be discussed in the subsequent chapter.

4.2.3 Advantages and disadvantages of piracy coverage under hull insurance

There are some particular advantages for the assured of including the peril of piracy into hull policies. The most obvious one is the lack of additional premiums charged for piracy coverage. Such coverage also simplifies the insurance of risk of piracy, as only one insurance policy is required. However, as it has already been established there are potential implications related to the lack of sufficient piracy definition. In such situation, the shipowner faces a risk of being uninsured. In addition, the ransom that is paid and exceeds the insured value is irrevocable. Furthermore, it has been argued that such coverage is less favourable since piracy claims under hull policy normally are subject to deductibles, therefore, there might be portion of the claim that is not covered by the insurance policy. Moreover, when piracy is insured under hull policies, then the hull and machinery record is exposed to the cost of any ransom settlement. If the loss record is bad, the premiums paid for further insurance policies will be higher.[234]

Such arguments, as well as the increasing number of piratical incidents have been considered by the marine insurance markets. It has been showed that since 1983 London market has treated piracy as marine peril. However, in 2005 the exclusion clauses were introduced for use with ITCH 83 and 95, ITVH 83 and 95 and IHC that remove piracy from the perils clause (it also removes the violent theft and barratry of master officers or crew). It has also been suggested that the piracy might be put back into war risks insurance.[235] Currently, it seems that London underwriters have started large-scale transition from covering piracy as marine peril to covering it as war risk. It has even been suggested that in London now around 80% of piracy cases are transferred from hull policies to war risks policies.[236] Considering the fact that number of acts of piracy persists, the London market might eventually transfer the peril of piracy to war risks policies entirely.

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[233] Knudsen, J., *supra note* 170 at p. 1617
[234] JLT, *supra note* 30 at p. 5
[235] http://www.hfw.com/publications/article/piracy-at-sea-some-legal-and-insurance-ramifications, last accessed on 02/04/2011
[236] http://goliath.ecnext.com/coms2/gi_0199-10465839/Marine-insurers-transfer-piracy-risks.html, last accessed on 08/04/2001

4.3 War risks insurance

4.3.1 Introduction to war risks insurance

The underwriters might exclude from the hull coverage the warlike risks by the incorporation of exclusion clauses. Such exclusions require the shipowner to obtain separate war risks insurance in order to maintain full hull insurance if the ship is subject to warlike conditions or when the vessel transits a geographic area where the risk to the ship is greater, resulting from the political instability or hostile conditions in that area.[237] War risks insurance is designed to provide coverage to the loss or damage of the vessel, as well as some other expenses incurred, resulting from the peril listed in the policy.[238]

Furthermore, war risks insurance might provide coverage to the hull against a danger in the war risks zones. The war risks zones are established in London by the Joint War Committee (JWC).[239] According to the Hull War, Strikes, Terrorism and Related Perils Listed Areas published on 16/12/2010 some of the waters considered to be war risks zones included: Indian Ocean, Arabian Sea, Gulf of Aden, Gulf of Oman and Southern Red Sea. The list specifies that the waters of this region are enclosed: on the north-west by the Red Sea, south of Latitude 15° N, on the west of the Gulf of Oman by Longitude 58° E, on the east Longitude 78° E and on the south, Latitude 12° S, excepting coastal waters of adjoining territories up to 12 nautical miles offshore unless otherwise provided. Such waters are listed next to Somali coastal waters up to 12 nautical miles offshore. Shipowners must notify the underwriters every time they are travelling through such area and underwriters, if they accept to cover such risk, will charge an additional premium for each trip. A special feature of the war risks policies is the right of the insurer to suspend the cover under certain, critical circumstances. In addition, the underwriters are entitled to change the trading limits set out in the war risks policies at any time.[240]

To provide coverage to the hull against war risks, the London insurance market has developed the Institute War and Strike Clauses Hulls - Time 1983 and 1995 (IWSCH – Time) and Institute War and Strike Clauses Hulls – Voyage 1983 and 1995 (IWSCH – Voyage). In the US, the most common form used to insure war risks is American Institute Hull War Risks and Strikes Clauses 1977, amended in 2009 (AIHWRSC). For the purposes of this sub-chapter IWSCH – Time 83 and 95, IWSCH – Voyage 83 and 95 and AIHWRSC will be examined.

[237] Lemon, R., *supra note* 184 at p.1496
[238] *Id.*
[239] King, *supra note* 155 at p.6
[240] Gold, E., Chircop, A., Kindred, H., *supra note* 87 at p. 317

4.3.2 Piracy coverage under war risks insurance

4.3.2.1 Piracy coverage under war risks insurance in England

The London underwriters started to transfer the risk of piracy from hull policies to war risks policies by the incorporation of Violent Theft, Piracy and Barratry Exclusion Clause that is to be used with ITCH 83 and 95, IVCH 83 and 95 and IHC. Such clause deletes violent theft by persons from outside the vessel, piracy and barratry of Master, Officers or Crew from the perils clause and transfers these three perils to the exclusion clause in the hull policies. Consequently, shipowners to maintain the coverage for the piracy must obtain one of the Institute War and Strikes Clauses (Hulls). The IWSCHs originally did not provide coverage to the peril of piracy, neither violent theft nor barratry, since these perils were covered by the hull policies. However, Violent Theft, Piracy and Barratry Extension Clause amended the IWSCHs in 2005. The Extension Clause provides that three new clauses shall be inserted to the peril clause in IWSCHs and are as follow: Clause 1.7 violent theft by persons from outside the Vessel, Clause 1.8 piracy and Clause 1.9 barratry of Master, Officers or Crew. Thus, the shipowner purchasing the additional coverage to the hull policy that excludes violent theft, piracy and barratry will have to obtain the IWSCH amended by the Extension Clause in order to be insured against the peril of piracy. In addition, IWSCHs provide coverage to the perils that were discussed in the Chapter 4.2.2.1, such as in Clause 1.4 riots and in Clause 1.5 any terrorist or any person acting maliciously or from a political motive. Therefore, it seems that the IWSCH's comprehensive perils clause provides the solution to the problem of the piratical attacks being defined as other peril excluded from the hull policies. Furthermore, there is no need to distinguish precisely between the perils.

In addition, it must be remembered that the IWSCHs are purchased as additional coverage to the hull policies, therefore the relevant Institute Clauses are incorporated to the insurance, unless otherwise provided and with some exemptions listed in the IWSCHs Clause 2 on incorporation. Even so, the IWSCHs incorporate clauses on GA and salvage, sue, and labour, the clauses under which the ransom payment might be recovered.

Although it might seem that the shipowner who obtained the IWSCH is fully insured against the risk of piracy, such insurance might be still a subject to the Navigation Limitations for Hull War, Strikes, Terrorism and Related Perils Endorsement which provides in Clause 1 that "unless and to the extent otherwise agreed by the Underwriters (…), the vessel or craft insured hereunder shall not enter, sail for or deviate towards the territorial waters of any of the Countries or places, or any other waters described in the current List of Areas of Perceived Enhanced Risk (Listed Areas) (…)".Somalia and part of Indian Ocean were for the first time listed in the List of Areas published on 03/03/2006. As piracy was spreading in this

region, the waters covered by the list were expanding, as the Gulf of Aden was added in 2008. Consequently, in the most recent List of Areas, published in 2010 to the Somali waters, Gulf of Aden and part of Indian Ocean, also Arabian Sea, Gulf of Oman and Southern Red Sea were added. Therefore, under the Navigation Limitations for Hull War, Strikes, Terrorism and Related Perils Endorsement, the shipowner shall not enter these waters. Clause 2(b) provides that in the event of breach of such condition,

> "the underwriters will not be liable for any loss, damage, liability or expanse arising out of resulting from an accident or occurrence otherwise covered under this insurance during the period of breach, unless notice of such breach is given to the Underwriters as soon as practicable and any amended terms of cover and any additional premium required by them are agreed".

However, a breach is allowed under the Clause 2(a) which states that the assured might be still insured under the policy while entering the waters listed, if the notice is given to the underwriters and underwriters accept it and amend the terms of cover if required. The underwriters in such circumstances may request additional premium. Hence, the shipowner although insured against the peril of piracy and other war risks might not be able to recover the loss, if the attack happened on the waters that are excluded from the policy coverage, unless notice of entering such waters is given to underwriter and accepted by him. Such insurance might be costly, as an additional premium to the hull insurance and war risks insurance will be charged.

In addition, according to Clause 5 of IWSCH – Voyage 83 and IWSCH – Time 83 and Clause 6 of IWSCH – Voyage 95 and of IWSCH – Time 95 on termination, the insurance might be cancelled by the underwriters giving 7 days notice. Furthermore, the insurance might be cancelled automatically upon the occurrence of any hostile detonation of any nuclear weapon of war or upon the outbreak of war between any of the global powers: the UK, the US, France, The Russian Federation and The People's Republic of China or upon the requisition, either for title or use or pre-emption. Thus, it seems that the shipowner might still be exposed to the lack of coverage if the underwriters cancel the insurance and the new coverage is not yet purchased or when the insurance is cancelled automatically.

4.3.2.2 Piracy coverage under war risks insurance in the US

In the US under the AIHC 1977, amended in 2009, piracy has always been treated as the war risk, therefore, it has been excluded from the hull coverage. Although piracy is listed as an insured peril (line 101), War Strikes and Related Exclusions Clause that also lists piracy (line 326) "shall be paramount and shall supersede and nullify any contrary provisions of the Policy". Hence, piracy is an excluded peril and consequently, as it is

common nowadays in the London market shipowners in the US must obtain additional coverage.

The form used most frequently is American Institute Hull War Risks and Strikes Clauses 1977 (AIHWRSC), amended in 2009. The AIHWRSC provide in lines 5-7 that the policy covers "the risks, which would be covered by the attached policy [AIHC] in the absence of the War, Strikes, and related exclusions clause contain therein but which are excluded". Therefore, piracy is covered by the policy. The AIHC and AIHWRSC, similarly to Institute Clauses do not provide the definition of piracy. In order to identify whether act of piracy caused the loss, the definition established in Chapter 2.4.2 of this paper must be considered. However, in addition to peril of piracy, in line 7 it is provided that the risks should be construed as also including other perils, such as: riots (line10) and malicious acts (line 11). Furthermore, the AIHC that is incorporated to the war policy provide insurance against assailing thieves (line 101) and barratry of the Master and Mariners (line 103).

Neither AIHC nor AIHWRSC 1977 before they were amended covered risk of persons acting for political purposes or terrorists. In addition, such perils were not excluded either. It has been suggested that the absence of any specific reference to terrorism or similar politically motivated violent acts created an ambiguity of cover, especially considering the extent of the damage that such an act can cause.[241] This presented a gap between the marine risks and war risks coverage, as the person acting from political motives or terrorists were neither included nor excluded.[242]

Consequently, AIHC and AIHWRSC were amended in 2009. AIHC, as amended, exclude now: "any act perpetrated by terrorist or any act carried out by any person or persons acting primarily from a political, religious or ideological motive" (lines 328-329) "and any threat of terrorist activity, actual or perceived, including closure of ports or blockage of waterways resulting therefrom" (line 330). Such perils are picked by amended AIHWRSC, providing coverage to both acts (lines 21-24). Therefore, the new AIHWRSC provide comprehensive insurance against the risk of piracy and remove the problems related to the unclear definitions.

Similarly, to IWSCHs, the AIHWRSC are subject to Navigation Limitations and might be cancelled at any point or automatically as a result of the same factors as specified in IWSCHs. Therefore, the same conditions apply to both policies.

It has been established that under policies available in the English market the ransom payment is recoverable under the headings of GA or sue and labour clause. However, such payment might be recovered as long as it is legal. The AIHC also provide coverage to the GA contribution and sue and

[241] Danoff, E., "Marine Insurance for loss or damage caused by terrorism or political violence" in *University of San Francisco Maritime Law Journal* Vol.16 (2003-2004) p.81
[242] *Id.*

labour expenses, therefore the ransom might be recoverable under such headings. Nevertheless, it is not entirely clear whether under American law ransom payment is lawful.

4.3.2.3 Legality of ransom payments in the US

There are many provisions in the US that prohibit payments that would contribute to the conflicts or support unlawful activities. However, none of them actually addresses the issue of legality of ransom payments to pirates. It has been suggested that ransom payment is not illegal, as long as it is not paid to the person, organization or foreign government listed on Office of Foreign Assets Control's (OFAC) list of Specially Designated Nationals and Blocked Persons (the SDN list). The document includes number of Somali citizens and other individuals residing in Somalia.[243] Therefore, ransom paid to the body specified on the list will be unlawful. It has also been argued that Foreign Corrupt Practices Act (FCPA) prohibits any domestic concern, or its officers, directors, employees or agents from making payment intended to undermine the rule of law in foreign country. However, such payment must be made to the political entity. Considering the fact that Somali pirates operate mostly as independent groups, not politically linked, the FCPA does not necessarily apply to ransom payments to pirates.[244]

Furthermore, on 13 April 2010, Executive Order (EO) Number 13536 concerning Somalia, blocking property of certain persons contributing to the conflict in Somalia, was issued by US president Barack Obama. It has been suggested that the EO created confusion and uncertainty within insurance and shipping businesses.[245] The EO specifically prohibits in Section 1(i) "the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order". Hence, to the extent that pirates are identified as blocked persons, the provision prohibits payment of ransom to such individuals.[246] The persons are listed in the Annex attached to the EO. At this moment, there are eleven individuals listed and one entity.[247] The list can be expanded at any time.

It appears that there are two approaches as to the EO: broad interpretation according to which the payment of ransom is illegal under American law and the narrow interpretation, which suggests that such order does not prevent from paying the ransom, unless the 'pirate' that money should be paid to, is listed in the Annex. It has been argued that the part of the EO that determines that piracy threatens peace and security in Somalia, might

[243] Rutkowski, L., Paulsen, B., Stoian, J., *supra note* 28 at p.1430
[244] *Ibid.* at pp 1432-1433
[245] Woods, J., Mulhearn, M., Krishna, H., "Impact of president Obama's April 13, 2010 executive order on Somalia and piracy on US and non-US insurance companies", available at http://www.clydeco.com/knowledge/articles/president-obamas-executive-order-on-somalia-and-piracy-on-us-and-non-us-insurance-companies.cfm, last accessed on 14/04/2011
[246] Rutkowski, L., Paulsen, B., Stoian, J., *supra note* 28 at p.1436
[247] http://www.whitehouse.gov/sites/default/files/2010somalia.annex_.pdf, last accessed on 18/04/2011

suggest that any person operating as a pirate off the coast of Somalia is a 'designated person' blocked by the EO and ransom payment to such person will be considered as illegal. On the other hand, such understanding might be too broad.

The EO only applies to specifically identified individuals and groups, not to any person who could possibly be listed in the Annex, but it is not.[248] Therefore, it seems that it is very unlikely that the ransom paid to pirates would be illegal, as the list of persons blocked is rather limited. In addition, it has been suggested that ransom payments are generally delivered to pirates in cash and it is very unlikely that pirates will be accepting bank transfers any soon. Hence, it seems that it will be rather impossible to identify whether the payment has been made to the blocked person.[249] The author believes that it seems that the EO does not specifically establishes that ransom payments to pirates are illegal, thus, taking into consideration all provisions addressing the issue it seems that it is legal to pay ransom money, as long as pirates that amount is to be paid to, are not listed in the Annex to the EO. However, it should be mentioned that under Title 18 USC § 2339 C it is prohibited to finance an act that could be consider as an act of terrorism.[250] Thus, similarly to the provisions under English law, if the act is categorized rather as a terroristic attack not the piratical act, the ransom payment will be unlawful. Otherwise, the payment will not be illegal. Consequently, the loss resulting from the ransom payment, in the lack of American authorities, following provisions developed by the English courts is recoverable under the headings of GA or sue and labour expenses.

Summarizing, it has been established that the London insurance market followed the practise developed by the American insurance market, covering more often the risk of piracy under the war risks policies. It has been proved that IWSCHs, as well as AIHWRSC provide comprehensive coverage to the peril of piracy under the perils clause, listing piracy, as well as other warlike perils. Furthermore, it has been established that in both countries, ransom payments are legal, although they might be subject to some limitations, therefore are recoverable as either GA or sue and labour expenses. It has been established that the war risks policies are subject to many conditions, such as navigation limitations and cancellation provisions. Therefore, although problems related to the definition of piracy are avoided, the war risks policies do not provide an absolute coverage to the assured.

4.3.2.4 Advantages and disadvantages of piracy coverage under war risks insurance

There are some particular advantages of insuring the peril of piracy under the war risks policy. Firstly, such coverage provides clarity, as all perils that the attack of 'pirates' could be considered as: terrorism, violent theft, barratry, riots or malicious acts are included in the perils clause. Thus, problems that might arise out of the lack of clear definition are avoided.

[248] Woods, J., Mulhearn, M., Krishna, H., *supra note* 245
[249] Rutkowski, L., Paulsen, B., Stoian, J., *supra note* 28 at p.1437
[250] *Ibid.* at p.1438

Moreover, war risks policy is not a subject to deductibles, contrary to hull policy. In addition, the hull record will not be exposed to the possible ransom payment. However, it is the war record that it will be exposed to ransom claims.[251] As the biggest disadvantage of the coverage of piracy under war risks policies will be considered the additional premium paid to the underwriters for the policy itself, as well as any entrance to the waters specified in the list of areas published by JWC, if the policy is a subject to navigation limitations. Such navigation limitations also provide lack of flexibility, as the shipowner might have to search for another possibilities of avoiding the risk of loss resulting from piratical attack, such as re-routing, which might be also very costly and also requires additional time.

Additionally, since war risks insurance is very specialized area, there are not many underwriters available that are willing to undertake such insurance. There are few underwriters in the London market and even fewer in other markets.[252] Furthermore, it has also been established that the war risks policy might be cancelled at any time or even automatically when special circumstances listed in the policy arise. Such cancellation policy seems rather disadvantageous to the shipowners. In addition, neither hull policy, nor the war risks policy provides the wording that will directly cover the ransom payment. Thus, considering the amounts paid to the pirates recently and number of hijackings, it is necessary to look at the specialized policies that will provide an evident insurance against the loss resulting from ransom payment, known as K&R policies.

4.4 Kidnap and ransom insurance

4.4.1 Introduction to kidnap and ransom insurance

Since 2008, when piracy in Gulf of Aden started spreading drastically and enormous ransom demands started being made, the marine insurance markets begun to offer new products – K&R policies. However, such policies are not entirely novel. Many companies with businesses in the countries where kidnapping for ransom is rather popular activity, have been obtaining K&R coverage for years. [253] The first insurance company to offer K&R policy was Lloyd's of London Syndicate and such product development followed a highly publicized kidnapping of prominent aviator's son in 1932. However, K&R policies did not become very popular until the early 1960s when the kidnapping of bank executive's wives spread

[251] JLT, *supra note* 30 at p. 5
[252] Gold, E., Chircop, A., Kindred, H., *supra note* 87 at p. 318
[253] Paulsen, B., Stoian J., "Piracy: and international problem in search of a solution. Legality and insurance issues", published for ABA Section of International Law's 2009 Fall meeting p. 17

out.[254] In the 1970s and 1980s, the K&R insurance was the single most important growth area in Lloyd's. Nowadays, around 80% of Fortune 500 companies purchase K&R policies. It has been suggested that annual K&R premium payments are estimated at more than $250 million of which Lloyd's of London syndicate Hiscox enjoys 60% to 70% market shares.[255] Currently, almost all leading insurance companies, in both, London and American markets offer K&R policies.[256] Considering the recent events, the marine insurance industries familiarized themselves with K&R policies very quickly too. The K&R policies are designed to provide coverage against the ransom payment, as well as other expenses that might be incurred by shipowner and are related to the ransom demands.

4.4.2 Kidnap and ransom insurance against ship ransom

It is not entirely clear to what extent the shipowner might recover the ransom money under the ordinary hull policies or even war risks policies. It has been identified that if the vessel is with cargo, then the ransom money can be recovered under GA contribution heading. Furthermore, if the vessel is not chartered, it is possible to claim under sue and labour expenses clause. However, it has also been suggested that none of the discussed policies provide an absolute coverage, as many conditions must be satisfied. To remove the uncertainties and as an alternative to seeking reimbursement under hull and war risks policies, shipowner might purchase K&R insurance.[257] It has been contemplated that even if the ransom payment is recoverable under the ordinary insurance policies, the other costs involved in the process will not be covered. It has also been argued that the ransom payment might just account for 25-30% of the costs of the incident.[258] In order to insure other expenses, K&R policy must be obtained.

The coverage under the K&R insurance depends on the wording of policies.[259] One of such insurance policies is CrewSEACURE, which has been developed by Seacurus in cooperation with Lloyd's of London non-marine K&R insurers – Cooper Gay.[260] For the purposes of this sub-chapter

[254] Clendenin, M., "'No concessions' with no teeth: how kidnap and ransom insurers and insureds are undermining US counterterrorism policy" in *Emory Law Journal* Vol.56 (2006) p.750
[255] *Id.*
[256] *Id.*
[257] Aon Hong Kong (Marine & Logistics) "Solution to the 'Pirate Alley' Kidnap and ransom cover" p. 3, available at http://www.seatransport.org/seaview_doc/SV_88/Solution%20to%20the%20Pirate%20Alley.pdf, last accessed on 15/04/2011
[258] Lloyd's news and insight, "Surge in piracy prompts demand for K&R cover", available at http://www.lloyds.com/News-and-Insight/News-and-Features/Archive/2008/10/Surge_in_piracy_prompts_demand_for_broader_cover_28102008, last accessed on 15/04/2011
[259] Gauci, G., *supra note* 153 at p.560
[260] http://www.seacurus.com/insurance_solutions.php#proseacure, last accessed on 15/04/2011

the sample wording of the K&R policies that could be accessed by the author will be analyzed, as well as the description of the policies available at the websites of the leading marine K&R insurance providers: Hiscox, Travelers of the US and Jardine Lloyd Thompson (JLT).[261]

The shipowners, when purchasing K&R insurance will be mostly concerned with the insured losses under the policy. All K&R policies provide the coverage to the ransom payment up to policy limits.[262] However, the ransom to be recoverable should be surrendered under duress.[263] The policies are usually provided based on a loss peril limit of $3m or $5 m.[264] The K&R policy also provides coverage to the loss in transit of ransom by confiscation, destruction, disappearance, seizure or theft while a person authorized to do so is conveying it to those who have demanded it.[265] Furthermore, the fees and expenses of the response consultants for an insured event are covered too.[266] It has been suggested that such coverage includes interaction, negotiation and news management.[267] It has also been provided that while facing the ship hijacking, it is of crucial importance to set up effective professional negotiation with pirates. It is crucial to ensure smooth management of the relationship between the shipowners, cargo owners and other businesses. On the other hand, it is critical to provide comprehensive and sensitive support to the families of those who are kidnapped. Since, all these activities are very time consuming, the reliable expertise in crisis management is essential for fast response. Such consultations might be costly.[268] All these expenses should be recoverable under the K&R policies. The costs of the response consultants are covered without any limits by all markets to allow as much time as it is required to negotiate satisfactory ransom payment.[269] It has been suggested that typically the cost of response varies between $250,00 - $350,000 per event.[270]

In addition to ransom payment, loss of ransom in transit and consultancy costs, K&R policies insure additional costs, which vary slightly from each other.[271] The various markets offer some if not all of the following: salary of

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[261] http://uk.reuters.com/article/2010/04/01/piracy-insurance-idUKLNE63001I20100401?sp=true, last accessed on 15/04/2011

[262] Brown, T., "Marine K&R Insurance, Frequently Asked Questions" in *Seacurus Insurance Bulletin*, Issue 2 (March 2010) p.2, AKE, Special Risk Insurance, Griffin Underwriting, Maritime Plus Kidnap, Extortion, Products extortion, detention and hijack insurance,

[263] *Ibid.* in Griffin Underwriting, Insured Losses (1)

[264] Brown, T., *supra note* 262 at p.2

[265] AKE, Special Risk Insurance (Insured losses (2)) Griffin Underwriting, Maritime Plus Kidnap, Extortion, Products extortion, detention and hijack insurance (Insured losses (2))

[266] AKE, (Insured losses (3)), Griffin Underwriting (Insured losses (3))

[267] Schuoler, B., (Travelers) and Harris, M., (ASI Global), Piracy for ransom: the full story and the hidden costs, White Paper on Protecting against the growing risks and costs of maritime piracy and ransom, Summer 2009, p.2

[268] *Id.*

[269] Brown, T., *supra note* 262 at p.3

[270] *Id.*

[271] *Id.*

covered persons during and for 60 days after release, salary for replacement crew, costs of independent negotiator and interpreter, cost of travel and accommodation for the shipowners, interest on loans raised to pay the ransom.[272] Most K&R policies also provide coverage to the costs of ransom delivery.[273] The delivery of ransom, regardless if it is made by sea or air, is very costly. To deliver ransom by sea it is necessary to employ the suitable vessel with crew onboard, which might be expensive and dangerous. When ransom is delivered by air, it is parachuted to a land or sea drop site.[274] The costs incurred include aircraft and crew hire. Such costs are also recoverable under K&R. Furthermore, the K&R insurance might provide coverage to the fees for independent psychiatric, medical and dental care[275] In addition, rest and rehabilitation expenses that occur within six consecutive calendar months following the release of kidnapped, incurred by him or his family might be recoverable.[276]K&R policies might also cover legal liabilities, such as: settlements or awards, fees and judgements imposed upon and paid by the assured as a result of an action brought against him, solely and directly as result of a kidnapping.[277] Additionally, some insurers under K&R policies provide coverage for personal injuries or death.[278]

Other important features of K&R policies are events that trigger the policy. A demand for ransom from the shipowner will trigger a claim, if the demand is made after kidnapping, extortion – threatening to kill, injure or abduct a person or cause physical damage to the property, detention or hijacking and the ransom payment is a condition of releasing the captives or not carrying out the threats.[279] Considering the fact that piratical incidents occurring currently are characterized by ransom demands made in exchange for the hijacked vessels and the crew that often is threaten to be killed or injured, the K&R policy seems to provide comprehensive coverage against the contemporary pirates. Nevertheless, it must be noticed that the K&R is also a subject to the conditions and exclusions. The K&R underwriters will not be liable in respect of physical damage or loss that would be covered under any other insurance (such as hull insurance, war risks insurance or P&I insurance), regardless of the fact whether such insurance is obtained or not. Thus, the shipowner must revise the available insurance covers in order to establish whether he is fully covered against all possible losses suffered as result of piracy. The K&R might be considered as the policy filling in the gap created by the lack of clarity as to the ransom coverage, however, it might still not provide an absolute insurance to the shipowner. The policy is also a subject to many conditions, one of them is that the knowledge of the existence of the policy is restricted at all times.[280] It has been suggested that the existence of such coverage is highly confidential and permission must be

[272] Brown, T., *supra note* 262 at p.3
[273] *Id.*
[274] Schuoler, B., (Travelers) and Harris, M., (ASI Global), *supra note* 267 at p.3
[275] AKE, (Insured losses (4(d)), Griffin Underwriting (Insured losses (4(d))
[276] AKE, (Insured losses (4(n)),
[277] Brown, T., *supra note* 262 at p.3
[278] *Ibid*. at p.4
[279] AKE, (Insured events)
[280] Brown, T., *supra note* 262 at p.5

given from K&R underwriters regarding disclosure of the coverage to other underwriters to avoid coverage issues.[281]

4.4.3 Advantages and disadvantages of kidnap and ransom insurance

The K&R policies are very advantageous as they provide certainty to the assured that the ransom paid to pirates will be recovered under such policy, as well as other expenses resulting from the piratical attack. It has been proven that the list of insured losses in the K&R policies is rather exhaustive.[282] However, the biggest disadvantage of the policy is its cost.[283] The shipowner who wishes to purchase a comprehensive insurance package to insure all possible losses resulting from piratical attack, faces premiums paid for hull insurance, war risks insurance with additional premiums paid for entering the excluded waters and the costs of purchasing K&R policy, which is very pricey itself. Therefore, the necessity of obtaining K&R coverage must be considered. It has been suggested that the choice, whether to purchase the K&R coverage or simply rely on the hull or war risks policies leads to the issue of liquidity. It is a very small number of the vessels that are actually seized by pirates, but if they are, such seizure might be very costly.[284] It has been established that purchasing K&R policy ensures the shipowner that not only a ransom, but also other related expenses will be recovered. It has also been shown that it is not entirely certain whether the ransom expenses will be recovered under the hull or war risks policies and even if they will, they will be limited just to the payment itself. Certainly, it is a hard choice for the shipowners and it seems that so far there has been no solution, which would provide the satisfactory mechanism for all shipowners.

4.5 Loss of hire/earnings insurance

4.5.1 Introduction to loss of hire/earnings policies

A damage to the vessel and its equipment resulting from piratical attack might be recovered under either hull or war risks policies. Furthermore, ransom payment might be recoverable also under hull or war risks policies and in addition, under K&R policy, if such is obtained. However, none of these policies provides coverage to the loss of hire/earnings caused by suspension of the ship's operation while the vessel is detained. Consequently, the marine insurance market has developed additional coverage policy: loss of hire/earnings due to piracy policy.

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[281] JLT, *supra note* 30 at p. 6
[282] *Id.*
[283] *Id.*
[284] Paulsen, B., "Piracy. Insurance and hard choices" in *Maritime Risk International* Vol.23 (2009) p.19

The ordinary LoH coverage insures the shipowner against the loss of earnings as a result of the ship being off hire, resulting from the vessel having been damaged on account of a marine casualty caused by an insured peril under the hull policy, loss of hire due to any other cause is not covered.[285] Originally, such type of insurance was created to provide coverage for ships on time charterparties, but nowadays may cover the shipowner's loss of income, regardless of the nature of the ship's employment.[286]

A claim against the LoH insurer has to be calculated on the number of days, which the ship has been deprived of income. The daily loss of income should be calculated on the basis of fixed amount, if such amount is provided in the insurance agreement. If the amount is not stated, the calculation will be based on the amount of hire that is payable under the ship's current contract of employment.[287]

4.5.2 Loss of hire/earnings due to piracy insurance

It has been suggested that in average the vessel attacked by pirates is detained for 60 days.[288] Therefore, the parties to the voyage face the loss of earnings resulted from the vessel being suspended from operation within this period. Thus, it seems that it should be of crucial importance to shipowner/charterer to obtain loss of hire/earnings insurance. However, it has already been established that under ordinary LoH coverage, if such is obtained only the physical loss that occurred as the result of damage caused by the peril insured in the hull policy might be recoverable. As it was identified previously, currently piracy is excluded from hull policies in the US and in most cases in London market. In addition, nowadays the piratical attacks do not result in the physical damage to the vessel, but in the delay following seizure. In such circumstances, the basic LoH policy will not pay for loss of hire or earnings in such circumstances.[289]

Consequently, the Lloyd's broker Aon has designated a policy to "fill in the gap in cover". The extended loss of hire/earnings policy is created to cover against piracy for shipowners, who in the event of contract frustration, might suffer a loss of charter revenues; charterers who must pay the hire for the vessel even though the vessel is detained; cargo owners, who are facing contract cancellation if the goods are held up; as well as all other interested

[285] Lemon, R., *supra note* 184 at p.1477
[286] Gold, E., Chircop, A., Kindred, H., *supra note* 87 at p.315
[287] *Id.*
[288] Lloyd's News and insight, Piracy insurance policy fills gap in cover available at http://www.lloyds.com/News-and-Insight/News-and-Features/Archive/2008/12/Piracy_insurance_policy_fills_gap_in_cover, last accessed on 17/04/2011
[289] Marsh, Piracy. A growing problem in Global Marine Practice, p. 3, available at http://www.marsh.co.uk/research/documents/Piracy-A.GrowingProblemflyer.pdf, last accessed o 20/04/2011

persons to the marine adventure with insurable interest.[290] The insurance market provides loss of hire/earnings due to piracy policy either as stand-alone policy or as the extension to existing LoH policy.[291] Yet additional coverage also means additional premiums to be paid. Thus, the necessity of purchasing such coverage must be taken into consideration.

4.5.3 Piracy and off hire clauses

Time charterparties usually contain off-hire clauses that may be triggered when the vessel is damaged. A charterer may therefore be able to put the vessel off-hire, i.e. not pay hire for the time lost. Otherwise, the lack of payment leads to breach of contract. The standard off hire clauses do not usually provide that a seizure by pirates is an off hire event.[292] There are two popular additional charter clauses for time charterers that address the issue of piracy: 'Conwartime 2004' and 'Piracy Clause for Time Charter Parties 09/03/2009' both designed by BIMCO. Conwartime 2004 defines war risks to include an act of piracy in addition to wide list of other perils. The Piracy Clause for Time Charter Parties is designed specifically with regard to the risk of piracy and is to be included in the charters that already have war risk clause, but such clause excludes piracy.[293] The piracy clause specifically provides that "if the Vessel is attacked by pirates any time lost shall be for the account of the Charterers and the Vessel shall remain on hire". Thus, the charterer in the event of piratical attack is still obliged to pay the hire to the shipowner. In addition, in the recent case *Cosco Bulk Carrier Co. Ltd v Team-Up Owning Co. Ltd. (The Saldanha)*[294] the court has ruled that piracy does not entitle the charterer to put the vessel off-hire under clause 15 of the NYPE. In the judgment, it was stated that

> "Should parties be minded to treat seizures by pirates as an off-hire event under a time charterparty, they can do so straightforwardly and most obviously by way of an express provision in a 'seizures' or 'detention' clause. Alternatively and at the very least, they can add the word "whatsoever" to the wording 'any other cause', although this route will not give quite the same certainty as it presently hinges on *obiter dicta* , albeit of a most persuasive kind".

It seems that as long as piracy is not specified in the charterparty as an event that will allow the charter to declare that the vessel is off hire, the charterer is obliged to pay the hire to shipowner. Thus, the loss of hire/earnings due to piracy insurance is advantageous to the charterer. On the other hand, such argument should be taken into consideration by the shipowner, who might

[290] Marsh, *supra note* 289 at p.3
[291] *Id.*
[292] Todd, P., *Maritime Fraud* (London: Informa Professional, 2003) p.50
[293] Marsh, Charterparty piracy clauses and maritime insurance in *Marsh's Global Marine Practice*, p.3, available at http://global.marsh.com/documents/CharterpartyPiracyTechnicalpaper_May09.pdf, last accessed on 19/04/2011
[294] [2010] EWHC 1340

protect himself from the loss of hire, by incorporating the piracy clause to the charterparty.

Since mostly charterers might seek the loss of hire/earnings insurance against piracy, it is important to discuss the allocation of insurance premiums between the parties. In the absence of any other allocation of risk, the owner should obtain hull and war risks policies and P&I insurance, as charter hire/freight covers all owner's costs, including the insurance premiums. Normally the standard charter forms include the provision that specify that in the case of voyage charterparty, charter shall reimburse any increase in premium or additional premiums between the date of fixture and ship arrival at any of the areas listed by the JWC; and in the case of time charter usually charterer shall reimburse entire cost of additional premium.[295] Both clauses mentioned previously, Conwartime 2004 and BIMCO Piracy Clause allocate the expense of additional insurance to charterers. Piracy Clause states that "If the underwriters of the Owners' insurances require additional premiums or additional insurance cover is necessary because the Vessel proceeds to or through an Area exposed to risk of Piracy, then such additional insurance costs shall be reimbursed by the Charterers to the Owners". In most cases, other time charters include analogous provisions, while voyage charters include equivalent to Conwartime – Voywar 2004 or similar.[296] Therefore, premiums paid for obtaining the loss of hire/earning insurance due to piracy are likely to be covered by the charterer. Similarly, the charterer might have to reimburse the K&R insurance premiums.

4.6 Protection and indemnity insurance

4.6.1 Introduction to protection and indemnity insurance

In addition to the hull insurance, ransom insurance and loss of hire/earnings insurance, the shipowner, in order to recover all possible losses resulting from the piratical attack requires also the third party liabilities insurance. The previously discussed policies do not protect the shipowner against the damage to cargo in the custody of insured, injury/death of passengers or crewmembers.[297] To insure such liabilities the shipowner must obtain the P&I coverage.

The P&I insurance has been created in response to the need for shipowner's third part liabilities coverage, liabilities that were not recoverable under standard hull policies. The original aim of P&I insurance was to provide protection to the shipowners against liability in respect of personal injury and death, one-quarter collision not covered by hull insurance and excess collision liability. The modern P&I policies cover wide range of liabilities

[295] Marsh, *supra note* 289 at p.4
[296] *Id.*
[297] King, O.R., *supra note* 155 at p.6

and losses.[298] P&I coverage is designed to insure the shipowner against specified types of liability that arise out of the shipowner's use and operation of the insured vessel.[299] A major part of the P&I market is composed of the P&I Clubs, which are mutual, non-profit, insurance companies.[300] P&I Club is an association of shipowners and charterers, where the members are both assureds and insurers, contributing to claim, via so-called calls.[301] Although P&I Clubs generally operate in the similar manner to other mutual insurers, the formality of their operation differs slightly. Clubs usually do not issue policies, the ship is insured once it is accepted by the Club. The terms of the liability coverage are specified in the Club's Rules, which operate as policy language.[302] There are currently thirteen P&I Clubs that are members of the International Group of P&I Clubs, which provides liability insurance for more than 90% of the world's shipowners. There are eight P&I Clubs in England and one P&I Club in the US.[303] For the purposes of this sub-chapter the Rules of the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited P&I Club (known as UK P&I Club), as is it one of the oldest Clubs, and the Rules of the American Club will be studied in order to establish what protection against piracy the P&I Clubs offer to the shipowners.

4.6.2 Protection and indemnity insurance against piracy

Piracy is not covered by the P&I Clubs as named peril since P&I insurance provides coverage against the liabilities that are set out in the 'risks covered' rule, not the 'insured perils 'clause.[304] Therefore, to establish whether the shipowner might rely on the P&I insurance while facing the risk of piratical incident it is necessary to establish what type of third party liabilities might arise out of the piratical seizure and in what circumstances the P&I insurance will pay out when such liabilities are declared.

It has been illustrated in the introductory chapter that contemporary pirates are usually armed, violent and use sophisticated methods. Consequently, the crew on board is placed in the dangerous situation, which sometimes ends in drastic way, as crew members might be either injured or killed. Thus, potential liabilities that might arise from piracy include injury, illness or death of crew. In addition, the crew repatriation and substitution might also be necessary in such circumstances. Furthermore, the liabilities can extend to pollution or wreck removal, if the pirates destroy the vessel, when for

[298] Gold, E., Chircop, A., Kindred, H., *supra note* 87 at p.316
[299] Lemon, R., *supra note* 184 at p.1480
[300] Hayden, R.P., Balick, S.E., *supra note* 149 at p.326
[301] Hazelwood, S.J., Semark, D., *P&I Clubs: Law and Practice* (London: Lloyd's List, 2010) p.1
[302] Hayden, R.P., Balick, S.E., *supra note* 149 at p.326
[303] Gold, E., Chircop, A., Kindred, H., *supra note* 87 at p.345
[304] Carden, N., *Piracy and armed robbery at sea – how best protect seafarers. Piracy and P&I insurance.* Presentation, slide 11, available at http://ec.europa.eu/transport/maritime/events/doc/2010_03_03_piracy/2010_03_03_igp-i.pdf, last accessed on 25/04/2011

example, ransom is refused to be paid and such destruction might lead to the ecological catastrophe or the ship sinking. Hence, it is essential to look into the Clubs' Rules to establish whether the P&I Clubs provide the coverage of such liabilities.

The UK P&I Club in its Rules provides coverage to the liabilities resulting from injury and death of seamen (Rule 2, Section 2), such as: damages or compensation for personal injury or death of any seamen, and hospital, medical, funeral and other expenses that are incurred by the shipowner in relation to such injury or death. Rule 2, Section 3 provides coverage against liability to pay damages or compensation for illnesses and death of seamen. Rule 2, Section 4 covers repatriation and substitution expenses and Rule 2, Section 5 covers loss of any damage to the effects of seamen and others. Thus, the UK P&I Club provides the coverage against the liabilities that are the most likely to arise as result of piratical attack. Moreover, the Club also covers pollution liabilities in Rule 2, Section 12 and wreck liabilities in Rule 2, Section 15.[305]

The American P&I Club lists the liabilities that are covered in Rule 2. Similarly, to the UK P&I Club, it provides coverage to the liabilities discussed above: liability for loss of life, injury and illness (Section 1), repatriation and substitution expenses (Section 2), liability in respect of wrecks (Section 7), discharge of oil or other substance (Section 14).[306]

The shipowner's liabilities might also extend to the liability to cargo owner for cargo loss, damage or other responsibility. The UK P&I Club's Rule 2, Section 17 and the American P&I Club's Rule 2, Section 8 provide coverage against such liabilities.

It has been established that the P&I Clubs provide coverage of third party liabilities that might arise from the piratical attacks. However, it is also required to identify in what circumstances the P&I Clubs will pay for such liabilities. The Rules provide that the shipowner is insured against the liabilities that arise out of events occurring during the period of entry of a ship in the Association. The Rules are subject to various exclusions and one of them is exclusion of war risks. Rule 5 E of the UK P&I Club Rules states that the shipowner shall not be indemnified against any liabilities when such arise as result of one of the perils listed. Point (ii) provides that excluded are: capture, seizure, arrest, restrain or detainment. In spite of this, it is specified that piracy and barratry are exempted from such exclusion. The American Club Rules also exclude the war risks from the Club's coverage. However, similarly to the UK Club they do not eliminate piracy (Rule 3, Section 1(1) (ii)). Thus, under the Rules of both Clubs, third party liabilities arising from the act of piracy will be covered. Unfortunately, similarly to the

[305] The UK P&I Club, List of Correspondents, Rules and Bye-laws 2011, available at http://www.ukpandi.com/knowledge-developments/article/rules-bye-laws-list-of-correspondents-2010-211/, last accessed on 25/04/2011

[306] The American P&I Club Rules, available at http://www.american-club.com/go.cfm/by_laws_rules_class_i_p_and_i%20losses, last accessed on 25/04/2011

other discussed policies, there is no definition of piracy developed by the P&I Clubs for the purposes of their insurance. The definitions established for the purposes of marine insurance markets in England and in the US will apply. Consequently if the act falls under the scope of such definition the P&I Club will pay out. Otherwise, if the act is considered to be an act of terrorism or other warlike risks listed in the exclusion clauses, the liabilities will be exempted.

The most claims that were made to the P&I Clubs so far, in respect to piracy, were regarding the crew injury or death, cargo loss or damage to it. Such claims were made in relation to the piratical attacks that mostly occurred in the Malacca Straits or other areas where the pirates' primary intention was to rob the vessel. However, Somali pirates do not intend to cause any damage, neither to the ship/cargo nor to the crew, as long as ransom is paid to them. Therefore, most likely the vessel is to be returned to the shipowner untouched and with safe and healthy crew on board. It has been suggested that there were only few claims made so far in respect to the Somali pirates, as it is not entirely clear whether the P&I Clubs should pay out when the pirates' primary target is actually a ransom. It has been recently argued that P&I Clubs should contribute to ransom through GA.[307]

4.6.3 Protection and indemnity insurance and general average

It has previously been identified that the ransom payment might be declared as GA act and the parties to the maritime adventure must contribute to it. It has already been suggested that so far the P&I Clubs have been reluctant as to their contribution.

The GA act might be declared if there is an extraordinary sacrifice or expenditure, made voluntarily for the common benefit and for the purposes of preserving the common maritime adventure, from the unforeseeable peril. Therefore, it could be argued that P&I Clubs that insure for potential liabilities of the shipowner, such as crew injuries or death or pollution damage, shall be exposed to a claim for GA from the shipowner,[308] if the ransom which can be considered as an extraordinary sacrifice or expenditure is paid in exchange for the crew that otherwise could be injured or killed. It has been argued that it seems logical to include the P&I Clubs into the contributing parties, since they have very strong interest in releasing the crew and preventing any major pollution damages.[309] On the other hand, the P&I Clubs disagree that they shall not directly contribute through GA to ransom. They argue that it is confirmed that GA is apportioned to property interests and GA always involves threat to life, since it involves a threat to safety of the ship, therefore, safety of those who are on the board. In

[307] Gauci, G., *supra note* 153 at p.554
[308] *Id.*
[309] Bruce, J., "Who pays the bill for piracy?" in *Maritime Risk International* Vol.23 (2009) p.8

addition, normally contribution to GA by P&I Clubs is not required, since ransom is an expense, not a liability.[310] Moreover, the GA should only be apportioned between the owners of the property liberated by the ransom payment – the property interests and P&I Clubs do not belong to them.[311] The Clubs will contribute to cargo's proportion of ransom, if the ransom is adjusted in GA and cargo owner refuses to pay because the ship is considered to be unseaworthy, since it is insecure.[312]

Thus, the ransom payments are normally excluded from the P&I coverage under the heading of GA contribution. So far, there have been no cases, neither in the English nor in American courts that will provide guidelines as to the legal liabilities of P&I Clubs to contribute to the ransom payment through GA. However, it has been suggested that such dispute is not far, since there is an increasing tension around the P&I Clubs contribution.[313]

4.6.4 Protection and indemnity insurance and sue and labour expenses

The P&I Clubs also provide coverage against the sue and labour expense, the UK P&I Clubs in Rule 2, Section 25 and American P&I Club in Rule 2, Section 17. The sue and labour expenses are the expenses incurred by the shipowner in order to minimise the damage. It has been argued that in the circumstances when the crew is removed from the vessel and the ransom is paid in respect of crew alone, it would not be reasonable to place such risk on the hull insurers. The only purpose of ransom payment is to save the crew and hull underwriters did not agree to bear it.[314] Considering, the fact that paying the ransom decreases the chances that the P&I Club will have to pay out under the insurance, it might be believed that the ransom should be recoverable under the heading of sue and labour expenses. Although as it is specified in the Clubs' Rules, the reimbursement of ransom payment as sue and labour expense would involve the discretion of Club's Board of Directors.[315] The Rule provides that the expenses are recoverable only "to the extent that those costs and expenses have been incurred with the agreement of the Managers or to the extent that the Directors in their discretion decide that, the Owner should recover from the Association".[316] Therefore, it is not certain whether ransom would be recovered, as sue and labour expense under the P&I insurance. In addition, so far there are no authorities that would provide any guidelines.

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[310] Carden, N, *supra note* 304 at slide 20

[311] MacDonald, J., "Piracy, ransom and general average" in *Journal of International Maritime Law (*2009) Vol. 15 p.373

[312] Carden, N, *supra note* 304 at slide 19

[313] Bruce, J., *supra note* 309 p.8

[314] Todd, P., *supra note* 192 p.320

[315] Adams, C., (Director of Steamship Insurance Management Services Limited), *Piracy from the P&I Perspective.* Presentation 6th May 2010, slide 10 available at www.bmusf.org/ChrisAdam.ppt, last accessed on 28/04/2011

[316] Rule 2, Section 25 A of the UK P&I Club Rules, equivalent to be found in Rule 2, Section 17 of the American P&I Club Rules

4.7 Cargo Insurance

4.7.1 Introduction to cargo insurance

In the previous sub-chapters, various insurance policies have been discussed that provide coverage against the risk of piracy to the shipowners. It has been mentioned on the several occasions that except of the shipowner, there are other parties to the marine adventure that might also require the insurance against the piratical attacks. One of such parties is the cargo owner, who will be seeking to insure his cargo against various perils, including the risk of piracy, therefore will require purchasing the adequate cargo policy.

The marine cargo insurance provides property insurance to the cargo owner (or anybody with insurable interest in it) in the same way as the hull policy provides coverage to the shipowner, therefore covers the physical loss or damage to the cargo.[317] The cargo policies are mostly written to provide all risks coverage, subjects to some exemptions. Under all risk insurance, the assured does not have to prove the exact nature or cause of the accident, it is enough just to prove that at the time when cargo policy was underwritten, the cargo was in good order and condition, and after the completion of voyage, it was found damaged. The burden of proof shifts to underwriter who must prove that the damage was caused by the factor that is excluded from the all risk policy. The modern cargo policies expanded the cover and often attach from the moment cargo leaves the custody of seller and continue until cargo is delivered to consignee, therefore it provides coverage over the entire shipping period.[318] The cargo policies might be designed to cover a particular voyage, a specific period or a commodity. They might be issued for single cargo risk or to cover automatically all shipments of insured.[319]

In England, a typical marine cargo policy is underwritten on the terms of the Institute Cargo Clauses (ICC).[320] The ICC that are currently used, were introduced in 1982. However, they were modified by Joint Cargo Committee (JCC) and as result the revised ICC 2009 were introduced in the beginning of 2009 to run parallel with the ICC 1982 for the initial period.[321] In the US market, the cargo policy that is the most commonly used is the American Cargo Clauses 2004, which amended AIMU Cargo Clauses 1966. For the purposes of this sub-chapter ICC 82, ICC 09 and AIMUCC will be discussed, in order to identify whether they provide coverage against the risk of piracy to the cargo owners.

[317] Lemon, R., *supra note* 184 at p.1478
[318] *Ibid.* at p. 1479
[319] King, O.R., *supra note* 155 at p.5
[320] Dunt, J., *Marine Cargo Insurance* (London: Informa Law, 2009) p.5
[321] *Ibid.* at p.6

4.7.2 Cargo insurance against the risk of piracy in England

4.7.2.1 Institute Cargo Clauses

The London marine cargo insurance market mostly insures the cargo owners under ICC 82 or 09. The most common standard policy is the ICC (A), which is an "all risk" policy, contrary to the ICC (B) and ICC(C) where the perils insured against are enumerated and described.[322] Consequently, to establish whether the cargo owner might recover the loss resulting from the piratical attack under the ICC (A), ICC (B) or ICC(C), it is necessary to look into the exemption clauses in the ICC(A) and the insured peril clauses in ICC(B) and (C).

Although the ICC (A) is an "all risk" policy, it is still a subject to the various limitations.[323] Clause 1 of ICC (A) 82 and 09 specifies that: "This insurance covers all risks of loss or damage to the subject matter insured except as excluded by the provisions of Clauses 4, 5, 6 and 7". In order to identify whether the piracy is an insured risk it is necessary to look into the specified clauses. Both versions of ICC (A) in Clause 6 exclude the war risks, providing that excluded are "6.1 war, civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power, 6.2 capture, seizure, arrest, restraint or detainment (piracy excepted), and the consequences thereof or any attempt thereat, 6.3 derelict mines, torpedoes, bombs or other derelict weapon of war". Thus, it seems that piracy is expressly exempted from the War Exclusion Clause and therefore is insured under ICC (A) 82 and 09. As it has already been established, piracy definition might not necessarily cover the act that caused the loss, as it might be rather regarded as: one of the acts listed in the War Exclusion Clause, riot - excluded by Clause 7.2 or terrorism - excluded by Clause 7.3. Furthermore, Clause 7.4 of the ICC (A) 09 also excludes the loss "caused by any person acting from political, ideological or religious motive". Hence, the piracy coverage under the ICC (A), similarly to the coverage under hull policies, mostly depends on the interpretation of the act causing the loss.

In order to insure the war risks, excluded by the War Exclusion Clause the cargo owner might purchase additional coverage – the Institute War Clauses (Cargo), also available in two versions, from 1982 and 2009. Such Clauses are only limited to the war risks and to obtain also coverage of the risk of riot, terrorism or other risks excluded by the Strikes Exclusion Clause, it is necessary to purchase the Institute Strikes Clauses (Cargo) 1982 or 2009.

[322] Chuah, J., *Law of International Trade* (London: Sweet & Maxwell Limited, 2005) p. 404
[323] *Id.*

In addition, the ICC (A) does not cover consequential loss, delay or loss of market.[324] Clause 4.5 of ICC (A) excludes the coverage of "loss, damage or expense caused by delay, even though the delay [is] caused by a risk insured against". It has previously been discussed that in average the vessels are detained for 60 days, when captured by pirates. Such detention will cause the delays and consequently the possible losses to the cargo owner. Nowadays, many companies operate 'just in time' systems and maintain minimal stock, therefore, any detention will have significant impact. The cargo owners' loss will not only be limited to the value of cargo, but detention might cause potentially large consequential interruption loss that could be many multiples of the cargo value.[325] In such circumstances, the cargo owner cannot rely on the ICC (A) policy. To obtain the adequate coverage, the cargo owner might purchase the previously discussed the loss of hire/earnings insurance. The policy has been studied in the Chapter 4.5 of this paper.

Contrary to ICC (A), ICC (B) and (C) only cover the risks that are listed in the perils clause. Neither ICC (B) nor ICC (C) expressly covers the risk of piracy. Both policies are also subject to the War Exclusion Clauses, which do not expressly exempt the piracy from such exclusion. Therefore, it seems very unlikely that the cargo owner who purchases other insurance than ICC (A) will be insured against piratical attacks.

4.7.2.2 Cargo insurance and general average

If the GA is declared, when the ransom is paid to the pirates in order to save the vessel, crew and cargo, the cargo owner might be called to contribute to it. It has been suggested that so far the cargo owners have been willing to contribute to this expense.[326] Thus, it is necessary to establish whether such contribution is recoverable under ICC (A), (B) and (C). It has been argued that GA is based in equity, not insurance, therefore, any contribution to the ransom, might be or might not be recoverable under the ICC, depending upon the coverage purchased.[327]All discussed cargo policies provide coverage against the GA contribution. However, as it has already been established the ICC (A) covers the risk of piracy, contrary to the ICC (B) and (C). Therefore, the reimbursement of the cargo owner's contribution is subject to contribution arguments, provided under ICC.[328] Hence, the contribution seems to be recoverable under the ICC (A), but is unlikely to be reimbursed if ICC (B) or ICC(C) is attached to the cargo.

[324] Kowell, J., *Ocean Marine Cargo Insurance and Modern Piracy on the High Seas*, presentation for Marsh Global Marine, available at http://community.rims.org/RIMS/OregonChapter/UploadedImages/Piracy%20on%20the%20High%20Seas.pdf, last accessed on 30/04/2011
[325] Townsend, P., *supra note* 222 p.10
[326] *Id.*
[327] *Id.*
[328] Steer, J., *supra note* 221 at p.14

4.7.2.3 Cargo Piracy Notice of Cancellation

The London market in 2008 introduced the Cargo Piracy Notice of Cancellation Clause, which might be incorporated into the cargo policy. The Clause provides that

> "Where this insurance covers piracy and/or general average, salvage and sue an labour charges arising from piracy, such cover may be cancelled by insurers giving 7 days notice in writing, cancellation to take effect on the expiry of 7 days (10 days in respect of reinsurance) from midnight of the day on which the notice is issued by insurers. Insurers agree to reinstate this coverage subject to agreement between insurers and the insured prior to the cancellation taking effect as to any new rate of premium and/or conditions and/or warranties. Such cancellation shall not affect any insurance, which has attached before the cancellation takes effect. If the cancellation is in relation to specific geographical areas, such areas will be clearly defined by insurers in the notice of cancellation".

Hence, even if the cargo owner purchases the ICC (A) in order to insure his cargo against the risk of piracy, the underwriters might insert to the policy the Cancellation Clause, which will allow the insurers to cancel the coverage before the insurance is attached and request additional premiums for the insurance reinstatement.

4.7.3 Cargo insurance against the risk of piracy in the US

In the American marine cargo insurance market, the standard cargo policies that are used by most underwriters are the American Institute Cargo Clauses. The most recent policies were issued in 2004 and are divided into American Institute Cargo Clauses "all risks", American Institute Cargo Clauses Free of Particular Average – American Conditions (FPAAC), American Institute Cargo Clauses Free of Particular Average – English Conditions (FPAEC) and American Institute Cargo Clauses with Average. All of these policies are subject to many limitations, such as FC&S Warranty Clause, incorporated into all listed policies, which warrants the policies free from various warlike risks, including piracy. Therefore, the American Institute Cargo Clause "all risks", contrary to London market do not provide coverage against piracy to the cargo owners.

The cargo owner in order to insure the risk of piracy must obtain the additional war risks coverage. The American market offers War Risks Insurance (Form No. 3S), to be attached to Certificate or Special Policy and insures against the risk of piracy (line 3). In addition, there are also available War Risks Only Open Policy (Cargo) from 1981 and 1993. Both war risks policies insure against piracy risk. Thus, it seems that the American marine cargo insurance market, similarly to the hull insurance market treats piracy not as marine peril (as in England), but as a war peril. The war risks (cargo)

policies except of the risk of piracy insure also against the wide list of warlike perils. Similarly to the case of war risks (hull) insurance, problems related to the lack of comprehensive definition of piracy are avoided if the peril of piracy is insured under the war risk (cargo) policy, as it is not required to distinguish precisely between the perils.

However, neither the American Institute Cargo Clauses, nor the war risks (cargo) insurance covers the risk of delay. Consequently, as in the London market, the American cargo owners will require loss of hire/earnings coverage to insure against the possible losses caused by the delay resulting from the vessel's detention.

The war risks (cargo) insurance in the US also insures against the GA contribution. If the cargo owner is called to contribute to ransom payment, such expense should be recoverable under the war risks (cargo) policies.

4.7.4 Cargo insurance against piracy and total loss

The assured's entitlement to the insurance reimbursement depends also on the type of loss he suffered.[329] Section 56(1) of the MIA 1906 specifies that loss may be either total or partial. In addition, section 56(2) states that the total loss might be either an actual total loss (ATL) or constructive total loss (CTL). Section 57 provides that ATL arises "where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof". CTL is defined in Section 60 which states

> "that there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred".

In order to make a claim for total loss in such circumstances, the assured must give a notice of abandonment to the insurers, as provided in s.62 (1). Such conditions are also incorporated to the ICC (A), (B) and (C) 1982 and 2009 as all policies provide that

> "no claim for constructive total loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account of its actual total loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter insured to the destination to which it is insured would exceed its value on arrival".

[329] Chuah, J., *supra note* 322 at p. 432

When pirates deprive the owner from cargo or damage it to such extent as it is of no use to him, the ATL will be declared. However, recently the question has arisen whether the cargo owner might serve the notice of abandonment to the insurers, consequently to make a claim for CTL under the cargo policies. It has already been proven that Somali pirates do not intend to cause any damage to neither the vessel, nor cargo, but their primary target is a ransom. Therefore, most likely the vessel and cargo will be returned to their owners unharmed. However, as it has been discussed the long term detention is most likely to cause loss of earnings resulting from delay. Such loss is not covered by the policy. In addition, the biggest loss might be suffered by the owners of perishable cargo, such as food products or seasonal products. In such circumstances, it seems rather reasonable for the cargo owners to serve the notice of abandonment and make a claim for total loss. Such issue has recently been discussed in *Masefield AG v Amlin Corporate Member Ltd*[330].

The claimant in *Masefield v Amlin* was the owner of two parcels of bio-diesel, which were on the board of the vessel seized by Somali pirates. The goods were insured under open cover policy – "all risk", therefore, insured against the risk of piracy. The claimant served the notice of abandonment during the negotiations that were carried with the pirates, about a month after seizure and 10 days before the ransom was paid and vessel was released. The claimant's primary case regarded the issue whether capture of the cargo and transferring the vessel and cargo to Somali waters by pirates were sufficient to found a claim for ATL as the assured was irretrievably deprived of cargo. The alternative case was concerned with issue whether CTL could have been declared as cargo has been reasonably abandoned on account of its ATL appearing to be unavoidable.[331] The court to decide on such issue adopted the objective test, which was to be assessed on the facts of the case. It has been stated that "what degree of probability is sufficient for these purposes? The short answer, in my judgment, is that an assured is not irretrievably deprived of property if it is legally and physically possible to recover it (and even if such recovery can only be achieved by disproportionate effort and expense)".[332]

It has been argued in the case that "for the purposes of establishing irretrievable deprivation the assured must establish that the recovery is impossible."[333]It has been decided that such requirement was not fulfilled, as the claimant believed that the cargo could have been released after the ransom payment, therefore, the ATL could not have been established. In addition, it was stated that to declare the CTL the requirement laid down in s.60 of MIA 1906 must be satisfied: the subject matter must be abandoned and actual total loss must appear unavoidable. It was argued that such conditions could not have been fulfilled as

[330] [2011] WL 197285
[331] Keith, M., "Hijacking by Somali pirates: some important issues for marine insurers" in *Shipping and Transport International* Vol.8 (2010), p.10
[332] 2010 WL 517040 at 31
[333] *Ibid.* at 35

> "in the first place the vessel and its cargo were not abandoned in the relevant sense. What is required is not a notice of abandonment in the sense of Section 61, 62 and 63 of the Marine Insurance Act but the abandonment of any hope of recovery.[334] (…) No such abandonment has occurred. To the contrary, the shipowners and the cargo owners had every intention of recovering their property and were fully hopeful of doing so".[335]

In addition, "there was no reasonable basis for regarding an ATL as unavoidable".[336] Consequently, it was decided that the claimant had not make a claim for neither the ATL, nor CTL. Summarizing, the case has established that in the event of piratical seizure, cargo owners will not be able to recover under the cargo policies the constructive total loss, as the notice of abandonment given during the negotiations with pirates cannot be served with the belief that the ATL is unavoidable as cargo is still recoverable after the ransom payment. However, it could be argued that it could have been decided differently if the cargo insured was of different nature. Since the number of piratical attacks persists, it might be expected that more cases will arise regarding such matter.

[334] 2010 WL 517040 at 55
[335] *Ibid*. at 56
[336] *Ibid.* at 57

5 Analysis and Conclusion

The purpose of this section is to analyse recent piratical activities illustrated in the introductory chapter: examine whether such incidents fall under the definition of piracy developed by the marine insurance markets in England and the US and to identify what possible insurance claims might by made and whether they will be successful under various marine insurance policies discussed previously. In addition, it will be verified whether shipowner/cargo owner is more likely to recover under the insurance policies offered by London or American market, or whether there are no substantial differences that the assured should be concerned with.

5.1 Piracy definition

It has been argued that the piracy coverage under various policies mostly depends on the definition of the act of piracy. Furthermore, it has been identified that there are many various definitions of piracy, developed for different purposes, which are not necessarily appropriate for the purposes of marine insurance agreements. Consequently, it has been attempted to establish definitions for both discussed marine insurance markets, London market and American market.

As a result it has been determined that in London market piracy is a crime of robbery or attempt to it, accomplished through force or threat of force, for private ends and committed by the rioters or the passengers who mutiny, irrespectively of the location (excluding inland waters). In the US the definition does not differ significantly, as piracy is a crime of depredation, which is not limited to robbery, committed not for the political motives, but for private gains, on the high seas, which should be understood as any open waters (others than inland waters, port, harbours, etc.) and in the spirit of universal hostility. Thus, it is crucial to apply the activities of Somali pirates to such definitions, in order to determine whether they fall within their scope.

In both countries, it is required that piracy should be an act of robbery or attempt to it, however, in the US the definition is extended to crime of depredation, which is not to be limited only to robbery. As it has already been demonstrated, Somali pirates commit various acts of depredation, such as robbery, battery and murdering. Their primary objective is the financial gain and the other acts are simply incidental to the robbery or attempt to it. Furthermore, it has been previously discussed that the ransom, which is a main objective of contemporary pirates might be considered as theft, thus an element of the robbery, which also requires a force, or threat of force, which at the time of vessel seizure is also present. Hence, the first requirement of both definitions will be satisfied. It has also been identified that both definitions, exclude the persons acting for the political motives and terrorists. In the author's opinion, Somali pirates should not be considered

as terrorists, but rather criminals of "the more common sort". It seems that their only intention is to simply receive ransom money and they actions are not based on any political motives. It has even been suggested that many pirates or their representatives while negotiating the ransom amount, specifically state that they are only interested in receiving money, not in any political or religious cause.[337] Ignoring the fact that Somali pirates seem to know the law, it is rather apparent that they do not act on the behalf of any political or religious organization, but they are driven by financial motivation. There are specific factors behind such situation, which are related to the conditions within the country. Therefore, the second requirement of piracy definitions will be also satisfied. Both definitions expanded the area where piracy can occur, as defined by the UNCLOS. For the purposes of marine insurance agreements, piracy might occur irrespectively of the location, excluding inland waters. The acts of Somali pirates are likely to fall even within the limitations specified by the UNCLOS definition as the Somali pirates have proven on several occasions that they are capable of sailing much further to seize the vessels than their predecessors and most of the attacks take place on the high seas. Thus, the third requirement will be also fulfilled.

The English definition also requires the attack to be characterised by force or threat to force. It has been illustrated that the contemporary pirates are well equipped and well prepared for the attacks, in addition to being capable of committing any crime, such as battery or murder, in order to reach their target. Hence, the piratical attacks committed by Somali pirates are most of the time violent and satisfy the final requirement of English definition. The definition developed for the purposes of marine insurance businesses in the US also asks for the general aggression against all, therefore the attack should not be pointed towards specific person or vessel, because of its nationality or other factors. The examples presented in the introductory chapter confirm that the Somali pirates attack the ships regardless of their nationality, thus the attacks are rather random and fulfil the last requirement. Summarizing, it appears that Somali pirates will easily fall within the frames created by the definitions of piracy for the purposes of marine insurance markets in England and in the US. Consequently, the assured should be able to recover the losses related to the piracy under the marine policies, if such provide coverage of the peril of piracy.

Although it seems that most acts of Somali pirates will fall within the scope of piracy definition for the purposes of marine insurance agreements, it has been proved that the lack of universal definition creates ambiguities as to the piracy coverage. The solution might be in drafting a statutory definition, which will provide clear guidelines. It must be remembered that the last statutory definition was offered more than hundred years ago, by the MIA 1906, which is considered by many commentators to be outdated. Taking into consideration the fact that the recent attacks have been surprising the whole world with the advancement of technology and use of variety of

[337] Chuah, J., *supra note* 195 at p.46

sophisticated methods, it is very unlikely that the hundred-and-five years old definition of piracy will be able to deal with the issue satisfactorily. It seems that marine insurance markets, as well as the shipowners are looking forward to new, comprehensive definition that will remove the uncertainties and will meet the market expectations. However, this author's research has yielded no information hinting that the formulation of such a definition is forthcoming any time soon.

In the previous chapter, various policies have been examined, identifying whether they cover piracy. It has been established that the modern marine insurance market is facing problems with accommodating the loss resulting from ransom payments, as it is not entirely clear whether such payments are recoverable. None of the policies, except of the specialized K&R policy, neither expressly covers nor excludes the ransom from its clauses. Consequently, many ambiguities arise out of this loophole. In the next section, the possible claims will be presented in relation to physical damage to the vessel, ransom payment, loss of hire, third party liabilities and physical damage to the cargo, in order to identify whether they will be facilitated by the marine insurance market.

5.2 Modern marine insurance and piracy coverage

The attacks of Somali pirates hardly ever cause a physical damage to neither the vessel, nor the cargo. However, if they do, the loss resulting from such damage might be recovered under the hull policy if such policy includes piracy coverage. Otherwise, the peril is placed within the war risks cover, which might be purchased for the additional premiums. It has been argued that the attacks of Somali 'pirates' might be defined as acts falling out of scope of piracy definition, but rather as a war like peril excluded from the standard hull policies. In the analysis above it has been determined that Somali pirates are very likely to fall within the extent of the definition, therefore, the ordinary coverage within the hull policies should be sufficient for the recovery of the damage to the vessel. Nevertheless, the increasing number of piratical incidents triggered to transfer the risk to the war risks cover, which is a subject to limitations, as well as the additional premiums for obtaining it, as well as the premiums for entering the excluded waters. Thus, the transfer of piracy risk to the war risks clauses seems rather disadvantageous to the shipowners as the protection offered by the hull policies seemed sufficient.

Before 2005 when the risk started being transferred to the war risks policies, it was more convenient to the shipowners to insure their vessels in the London market than in the American market. However, it did not come as a surprise that also in England the risk has been almost entirely moved, considering the numbers of attacks, as well as the costs associated with them. It can be suggested that the American insurance market was already prepared for such circumstances and the English market simply adjusted the

policies to a new challenge, created by Somali pirates. In spite of this, such amendments were not generated to facilitate the shipowner's needs and fears but rather to protect the marine insurance market from massive insurance claims.

It has been illustrated on several occasions that the primary target of Somali pirates is a ransom, which might be recoverable under the marine policies, however, such recovery is not entirely certain, since, as it has already been stated, none of the policies expressly includes or excludes the ransom payment from the coverage. Instead, it has been accepted that ransom should be recoverable as the GA contribution, if there are other parties to the voyage or sue and labour expenses if the vessel is in ballast. Hence, the shipowner should be able to rely on the hull insurance if such covers piracy, or most likely nowadays on the war risks insurance, if facing ransom payment. If the shipowner decides to rely entirely on the hull/war risks policies, must expect the awaiting time of recovery in GA to cover the costs of piracy. The GA is declared after the ransom payment and prior to the end of the voyage. Following such declaration, the general adjusters must assess the relative shares for vessel and cargo. Such process might last for months and if it is disputed, might take much longer.[338] Since the adjustment of GA is totally independent from the insurance contract, the shipowner cannot be certain as to the recovery of the ransom payment under the heading of GA. It has been identified that the GA might only be declared if the sacrifice, such in this case ransom payment saves the venture. If pirates regardless of the fact that they are paid the ransom will destroy the vessel, the ransom will not be recoverable. Thus, summarizing all arguments the ransom insurance under hull /war risks insurance is rather vague.

In view of the foregoing attacks it would be beneficial for the owners of vessels transiting the dangerous areas, such as Gulf of Aden, to purchase K&R policy, which provides the certainty as to the recovery of the ransom payment. In addition, such policy covers a wide range of losses associated with the ship detention. It might be observed that the marine insurance markets quickly facilitated the ransom claims by offering the new product for the additional premium and keeping uncertain whether the ransom payments are insured under the hull policies. Although it might be suggested that such development was initiated in order to meet the needs of the shipowners transiting the affected by piracy waters, which is substantially true, it must be noticed that the insurance markets also see a good business in the piracy spread.

With regards to K&R coverage, there are no significant differences between the American and English marine insurance markets. However, the differences might lie in the legality of ransom payments. In England, ransom payments to pirates are not considered illegal. Although similar conclusion has been reached in respect to the US law, it has been illustrated that there were some concerns after the EO Number 13536 had been passed.

[338] Paulsen, B., *supra note* 284 at p.19

Although author believes that the EO does not expressly provide that such payments are illegal in general, the payments will be unlawful if the person is identified on the list of individuals or entities, available in the Annex to the EO. Therefore, there is a minor possibility of being prohibited to make such payment. The refusal of ransom payment might lead to the vessel destruction. Nevertheless, since it is not shipowner's obligation to incur sue and labour expenses that would minimise the damage to the insured property, the assured will be able to recover the loss resulting from the physical damage to the vessel under the relevant marine policy. However, in such circumstances the human factor should not be omitted. The shipowner might insure third parties liabilities under the P&I coverage, usually with the P&I Club, which will pay out if such liability arise out of the peril covered by the Clubs Rules. Thus, since the P&I Clubs cover liabilities resulting from the piratical attack, it might be assumed that the Clubs will also pay out if the crew is injured or killed if the ransom is not delivered to the pirates. On the other hand, not the insurance should be an issue that party with insurable interest should be concerned with, but the value of human life or health. Such arguments were taken into consideration by the court in *Masefield v Amlin*[339] where it was decided that the ransom payment, although encourages the piratical activities, in most cases is the only tool that can be used to save the lives of crewmembers. Therefore, the same argument should be taken into consideration by the American courts, when deciding as to the legality of ransom payments to Somali pirates, if such issue arises.

In most piracy cases, pirates detain vessels as long as the negotiations are carried and until they are paid the agreed amount. Within this period, the parties to the venture are exposed to the loss resulting from the loss of hire or earnings. It has been identified that the ordinary hull or war risks policy will not provide coverage neither in England, nor in the US. Hence, to insure such risk, it is essential to obtain the loss of hire/earnings policy, which was characterised as the policy designed to fill in the gap. Certainly, such policy provides the protection that is excluded by other policies. However, before obtaining the policy the shipowner should consider the necessity of purchasing such cover and look into the charterparty which might already provide the protection against the piratical seizure as it might impose the obligation on the charterer to pay the hire, even if the vessel is detained. On the other hand, it must be for the charterer consideration to obtain the protection, as he might be exposed to the detention and still might be obliged to pay the hire.

The shipowner's liabilities that might arise from the piratical attack towards the crewmembers or other parties are insured under P&I Clubs coverage. Any claim in relation to the crew injury or death, which as it has been already illustrated is not uncommon, should be facilitated. What it has been recently disputable is the P&I contribution to the GA, in relation to the crew. The author believes that the P&I Clubs argue correctly as to the fact

[339] [2010] EWHC 280 Comm, [2011] EWCA Civ 24

that they are not required to contribute through GA, as such contribution is adjusted in relation to the property owners and P&I Clubs are not such interests. In addition, the P&I Clubs do not insure the properties but the liabilities, which would exclude the Clubs from the contribution through GA. Nevertheless, it is certain that the P&I Clubs have a very strong interest in the release of the crewmembers, therefore, some contributions should be required from them. It seems that the law fails to deal with such issue. Furthermore, in the introductory chapter it has been reflected that Somali pirates created a new type of piracy, when the crewmembers or even only one individual (for example a captain as in the case of *Maersk Alabama)* are removed from the vessel, and the ransom is requested only in the respect of these individuals. Since the property insurers are not concerned with such risk, it must be considered whether the P&I Clubs will pay out in respect of the ransom paid for the release of the crew. In such circumstances, it might be argued that there are no other parties to the venture and it might be also disputed that the venture itself might be completed if the crew is substituted, therefore the GA cannot be declared. The P&I Clubs also insure against the sue and labour expenses, however, such insurance is at the discretion of the Directors of the Club. It appears that in such circumstances the Clubs should be legally obliged to pay out if it is only a crew that the ransom is paid to release. For the purposes of this paper, the Rules of American P&I Club and Rules of the UK P&I Club were studied and no substantial differences in respect to the piracy coverage were identified.

The cargo owners might also suffer a loss resulting from the piratical attacks that might be insured in the London market, under the ICC (A), which is an "all risk" policy. Contrary, in the US, the "all risk" AIMU cargo clauses exclude piracy from the cover and transfer it to the war risks (cargo) policy. Therefore, it seems that London market provides coverage that is more advantageous to the cargo owners. On the other hand, the American Clauses provide more clarity, since piracy is listed within wide list of war like perils, when in the London market the cargo owner might face the problems related to the definition of piracy. Since Somali pirates are likely to fall within the scope of the definition, such difficulties should not arise. Although London cargo underwriters have not followed the approach of the hull insurers and still have not transferred the peril of piracy to war risks policy, considering the number of piratical attacks and their violent nature, it might be expected that such transition will also take place. Furthermore, the ordinary cargo policies do not insure against a delay, which is very likely to occur when the vessel is detained. In such circumstances, the cargo owner cannot rely on the ordinary policy but can only recover under the loss of hire/earnings coverage if such is obtained. The issue that has been disputable recently was the possibility of declaring the CTL by the cargo owner on the account that the ATL is unavoidable. Although in *Masefield v Amlin*[340] such argument was rejected, the case was concerned with the cargo of bio-diesel that was likely to be returned undamaged. It should be considered whether the case could have been decided differently if the cargo constituted of products,

[340] [2010] EWHC 280 Comm, [2011] EWCA Civ 24

which would be destroyed to the extent to be considered as ATL once they are released. The definition of the CTL specified that such loss might be declared if the ATL seems unavoidable. Therefore, if it seems that even if the cargo is released after the ransom is paid to the pirates, the time after the seizure might suggest that the released cargo will no longer be *as to cease to be a thing of the kind insured*. Hence, the ATL would seem unavoidable. It might be argued that in such circumstances the court could have decided differently. However, it might be proposed that loss has occurred as result of delay not piracy and consequently is not recoverable. Furthermore, the CTL definition provides that CTL might also arise if the expenses of the expenditure to save the cargo exceed its value. The cargo detained by the pirates might not necessarily be of such high value as in the case of *Masefield v Amlin*[341], but it might be significantly lower. Therefore, if the ransom is requested for the release of the cargo, it might be suggested that the notice of abandonment is to be served and CTL is to be declared. Consequently, the CTL might be recoverable under the cargo policies.

5.3 Conclusion

Summarizing, the marine insurance market responded quickly to the increasing risk of piratical incidents, providing in addition to the standard covers such as hull, cargo, war risks policies and P&I coverage, the specialized marine policies, such as K&R insurance or loss of hire/expenses policies. It appears that the shipowner/cargo owner might obtain a sufficient coverage that will allow him to recover the losses suffered as result of the piracy. Nevertheless, it has been established that such insurance might be very costly, in addition to the fact that to obtain such coverage many different policies must be acquired. If they are issued by one underwriter, most of the problems might be avoided. However, often the policies are purchased from different underwriters what might lead to the gaps within the coverage or double insurance. Therefore, the contemporary regime might leave the shipowner confused and uncertain as to the actual insurance. To identify what actually is insured under the obtained policies, will require very deep and careful studies of such policies, what is certainly not what most shipowners are expecting and looking forward to.

Firstly, the lack of comprehensive universal definition seems to create many uncertainties and considering the international nature of such agreements as marine insurance contracts, such deficiency is disadvantageous for both insurers and assureds. Hence, the introduction of statutory definition of piracy for the purposes of marine insurance market might remove such ambiguities. The marine insurance contracts are governed by the law of country where the agreements are concluded and it is specified in the policies. It has been established that London market is the biggest marine insurance market, therefore the MIA 1906 piracy definition should be revised, as it does not address the issue of contemporary piracy sufficiently. In addition, it has been established that the American courts tend to look

[341] [2010] EWHC 280 Comm, [2011] EWCA Civ 24

into the English law of marine insurance and such development will be also advantageous to the marine insurance market in the US. Furthermore, it could be argued that since law fails to provide the comprehensive and unambiguous definition, the underwriters themselves could resolve such problem, by defining piracy within the policy clauses. Such description will ensure the shipowner/cargo owner whether they are protected against the piratical incidents. The certainty will also allow to purchase the adequate, additional coverage, if such is required and to avoid the gaps within the coverage and the double insurance.

Secondly, since recently the problems have been arising out of the insurance of ransom, piracy definition should cover the issue and explicitly provide whether the ransom payment is recoverable. So far, the only policy that addresses such matter is the K&R policy, which provides certainty to the assured in respect to the ransom coverage. Unfortunately, there are not many authorities that could be cited addressing the ransom insurance problems and Somali piracy. Since the Somali pirates seem not to give up easily and appear to the international community as to continue their activities in the region, it might be expected that more cases will arise that will deal with the issues discussed in this paper. This is certainly not a reason to be happy about, since it has been illustrated in this thesis how big impact piracy has on the shipping businesses, marine insurance markets as well as those who are the most vulnerable at the moment of seizure – the crew on board. The marine insurance developments in relation to piracy coverage seem to protect the insurance markets from the ransom claims. What is forgotten, is that unfortunately human lives very often depend on such ransom payments. Therefore, the ransom insurance might have another function as it has impact on the length of detention, the health and even lives of seafarers. However, the issue of piracy encouragement comes across as many would argued that such approach will only support development of piracy, not only in Somalia, but also in other "failed states".

It seems that so far, no perfect solution has been found and it might be assumed that actually there will be none. It might be suggested that hitherto the marine insurance markets have been trying to cope with the new challenge posed to them by Somali pirates. There might be many opposing views, whether they have succeeded in doing so or not. Nevertheless, it seems that it is not entirely clear where the law stands at this moment, therefore recent activities have also created a challenge for new developments of the law of marine insurance that the shipowners and cargo owners all over the world are awaiting.

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