

A Study on the Legal Nature of Piracy Ransoms

Ziqi Shen*

School of International Law, East China University of Political Science and Law, Shanghai, China

**Corresponding author*

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Abstract: Despite a decline in the overall number of piracy attacks due to the routine deployment of government escorts, the persistent security threats and economic losses inflicted by pirates remain a concern. Pirates commonly seize ships and cargoes, along with kidnapping hostages, to demand substantial ransoms, leading to financial losses for the ransom payers. This paper explores the legal nature of piracy ransoms within the framework of maritime law, emphasizing the concept of cost-sharing to establish a maritime risk-sharing mechanism. This study focuses on three critical aspects of piracy: the definition of piracy, the legitimacy of pirate ransom payments, and the characterization of pirate ransoms. Recognizing the legality of paying pirate ransom is a prerequisite for characterizing the ransom, and this paper delves into these interconnected dimensions. The analysis suggests that pirate ransoms should be identified as a form of general average for apportionment. This approach aims to balance the interests and risks of both shipowners and cargo owners, safeguarding the enthusiasm of key stakeholders in maritime shipping. Ultimately, this promotes the survival and healthy development of the shipping industry as a whole.

1. Introduction

Since the inception of human seafaring and maritime trade, the threat of piracy has persisted throughout history. As shipping technology advances and international trade grows, traditional pirates, once notorious for violence and robbery, have transformed into modern counterparts employing sophisticated weaponry to hijack ships, abduct hostages, and extort ransoms.

According to the International Maritime Bureau's (IMB) annual report on global piracy, the number of pirate attacks worldwide has shown a noteworthy decline from 2018 to 2022: 201, 162, 195, 132, and 115 incidents per year, respectively.[1] A comparative analysis with data from the 2006 to 2010 period (with annual incidents of 239, 263, 293, 406, and 445, respectively) indicates a substantial reduction. ¹This positive trend can be attributed to the proactive involvement of countries' maritime affairs, marine police, navy, and civil organizations in anti-piracy initiatives. However, this decline in reported attacks should not lead the maritime community to lower its guard. The latent threat of piracy remains, and the industry should remain vigilant, recognizing that factors such as geopolitics, economic crises, and environmental degradation could potentially drive pirates

¹ Piracy & Armed Robbery Report, published in IMB Piracy Reporting Centre. source: <https://www.icc-ccs.org/piracy-reporting-centre>, accessed on 10 June 2023.

to desperate measures, prompting sudden attacks on merchant ships. For individual vessels and crews, each piracy incident constitutes a disaster, giving rise to persistent legal issues that demand attention. The following exploration delves into the legal intricacies surrounding piracy ransoms, aiming to contribute to a comprehensive understanding of the challenges faced by the maritime industry in addressing this enduring menace.

2. Piracy

The term "pirate" finds its roots in the Latin word "pirata," which evolved from the Greek words "peiratēs" (meaning "bandit, robber") and "peirein" (meaning "intent to attack"). At the global level, there is no unified definition of "piracy," as it is dispersed across international treaties and national legislations.

Piracy's initial definition emerged in Article 15 of the Convention on the High Seas. Subsequently, Article 101 of the United Nations Convention on the Law of the Sea (UNCLOS) adopted the formulation of the 1958 Convention on the High Seas, providing a comprehensive definition:

"Piracy consists of any of the following acts:

(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)."

Additionally, Article 8 of the Rules of Interpretation of Policies of the British Marine Insurance Act 1906 includes passengers who mutiny and rioters attacking the ship from the shore within the term "Pirates." A landmark interpretation of "piracy" occurred in the case of Republic of Bolivia v. Indemnity Mutual Marine Assurance Co., Ltd. [1909], wherein the Court of Appeal held that "a pirate robs or murders merely for the gratification of his own selfish desires, and appropriates illegally to his own use the property which he has seized from others, and does not exclusively rob the property of a State for a political purpose."

The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia builds on the basic definition of "piracy" in the 1982 United Nations Convention on the Law of the Sea. It excludes aircraft as an object of piracy offenses and introduces the concept of armed robbery as:

"any illegal act of violence or detention, or any act of depredation, committed for private ends and directed against a ship, or against persons or property on board such ship, in a place within a Contracting Party's jurisdiction over such offenses."

The primary distinction between piracy and armed robbery lies in the location of the offense. Piracy emphasizes the high seas or maritime areas not under the jurisdiction of any sovereign state, while armed robbery against ships emphasizes offenses committed in places where sovereign states have jurisdiction.²

To combat the criminal act of piracy, the International Maritime Bureau (IMB) defines "piracy" as:

² Piracy Risk, an Unignorable Risk, published in Chinese Shipping. source: <http://www.zgsyb.com/news.html?aid=548190>, accessed on 11 June 2023.

"an act of boarding or attempting to board a ship, which is clearly accompanied by an intent to commit theft or other crime, and which is clearly accompanied by the use of violence in the course of such an act."

The IMB does not categorize the area of piracy occurrence as either the high seas or territorial seas, asserting that as long as boarding occurs at sea with violence used to rob the ship, it qualifies as an act of piracy—a broader definition.

3. Legitimacy of Pirate Ransom Payments

Pirate ransom, denoting the fee paid by a specific entity to pirates for the release of controlled property and hostages during incidents of piracy, raises crucial legal considerations.[2]The characterisation of pirate ransom is a prerequisite for the ship's request for assessment of the ransom, and the legality of ransom payments is a prerequisite for the characterisation of the ransom. This section examines the varying international perspectives on the legality of ransom payments.

International attitudes towards the legality of ransom payments lack uniformity. The United States and like-minded countries assert that piracy is inherently illegal, viewing ransom payments as an endorsement of piracy. They contend that such payments contravene the public policy of combating piracy and may even fuel more attacks. These nations have criminalized dealings with pirate leaders and advocated for a collective international stance against paying pirate ransoms.[3]

In contrast, modern legislation in countries such as the United Kingdom, Germany, and the Netherlands explicitly acknowledges the legality of pirate ransom. For instance, the United Kingdom distinguishes between acts of piracy and acts of terrorism, explicitly allowing ransom payments in cases of piracy.[4]Legal frameworks, such as the "Kidnap and Ransom" insurance policy, further support shipowners by compensating them for additional losses incurred through ransom payments.[5]A notable legal case, *Masefield AG v Amlin Corporate Member Ltd*, affirmed the legality of pirate ransom payments, considering it consistent with the public interest at the time.³

In this article, it is believed a distinction should be made between the illegality of piracy and the legality of the payment of ransom, thus making it clear that the law should punish piracy rather than considering the act of paying ransom by the victims as illegal just because it may inadvertently encourage piracy. This paper argues that the legality of ransom payments can be discussed from various perspectives, including the complexity of maritime situations, the balance of interests, and the legislative approaches of different countries.

3.1 Complexity of the Maritime Environmental Situation

Somalia, which is in the eastern part of Africa and guards the Gulf of Aden, was in a state of anarchy for a long time, leading to an increasing frequency of piracy in the waters around the Gulf of Aden since 2008. In recent years, global piracy attacks have shifted from Somalia in East Africa to West Africa, and hotspot attack areas have shifted from the Gulf of Aden to the Gulf of Guinea. The main reason for this is that there are no peacekeeping warships escorting and cruising in the waters. And West African countries do not allow foreign armed security personnel to enter, coupled with the high price of local naval escorts and poor communication between the ship's personnel and the local escort.⁴The maritime environment's complexity, as exemplified by the situation in Somalia and the Gulf of Aden, underscores the challenges faced by shipowners.

All of the above factors give pirates an opportunity to take advantage of the situation and also make rescue at sea more difficult, making the chances of a successful rescue at sea far less than

³ [2010] EWHC 280 (Comm), [2011] EWCA Civ 24.

⁴ Piracy Risk, an Unignorable Risk, published in Chinese Shipping. source: <http://www.zgsyb.com/news.html?aid=548190>, accessed on 11 June 2023.

those on land. The difficulty of sea rescue, combined with potential legal repercussions if ransom payments are deemed illegal—face the risk of losing both goods and human beings without legal protection, places those paying the ransom in an unfair and precarious situation.

3.2 Economic Benefits and Trade-offs:

The economic rationale behind pirate seizures—extortion through ransom—must be considered. When national authorities cannot effectively counter piracy, paying ransom becomes a form of self-help to safeguard legitimate interests, which may effectively avoid further loss of property and hostage safety. The law cannot blame people for the act of preserving their own rights. If the legitimacy of ransom payment is denied, it will not be conducive to the self-help of shipowners and relevant interested parties. This will not only jeopardise the safety of the ship's cargo and the hostages, but may even potentially impact the entire shipping industry.

Starting from the perspective of balancing interests, when a legitimate interest is in a danger of damage that cannot be avoided without sacrificing another legitimate interest, only the smaller interest can be sacrificed in order to preserve the larger interest.[6] From the viewpoint of the personal safety of the hostages, the preservation of human life, freedom and dignity is an essential value of the law. Paying ransom means exchanging ransom for the preservation of the ship's cargo and hostages, which is a justifiable trade-off between property and personal interests, and between small and large public interests. And if we do not pay the ransom and take other means of rescue, from the economical efficiency perspective, the cost of money may not be less than the ransom. Therefore, the payment of ransom can be said to be the only pragmatic and feasible approach in the absence of alternative effective solutions.

3.3 National Legislation and Jurisprudence

Article 699 of the Dutch Maritime Code and article 706 of the German Commercial Code both affirm the legality of the payment of ransom to pirates in the form of law. Article 699 of the Dutch Maritime Code states: "Anything given to pirates for the purpose of claiming or redeeming a ship or cargo from them shall always be considered as ransom." Article 706 of the German Commercial Code states: "If a pirate ransom is paid for the simultaneous seizure of the ship, the cargo and the hostages, the ransom may be included in the general average even if there is a purpose to free the hostages, and is to be apportioned between the ship, the freight and the cargo."

In 2011, the *Masefield v. Amlin* case clarified the legality of ransom payments. The case has been decided by the British High Court and the Court of Appeal on two separate occasions. The British House of Lords further endorsed this stance in a report on Somali piracy, in which it recommended that "the payment of ransom is not a criminal offence under English law. Using the superior skills of expert negotiators, it is possible to minimise the threat to hostages and property, while potentially reducing the amount of the ransom to a minimum." Similarly, in their judgement, the judges clearly concluded that "the payment of ransom is not unlawful under English law". And Mr Justice David Steel of the High Court held that "the reality is that political or military involvement is not always effective, and the payment of ransom is the only effective course open to the shipowner in order to save the lives of hostages taken by pirates."⁵

In conclusion, the prevailing legal position is that while not universally recognized, many states implicitly permit ransom payments in practice. Considering the complexity of the maritime environment, the economic benefits and trade-offs involved, and the varied legislation across nations, ransom payments emerge as a pragmatic, effective, and reasonable solution. The

⁵ [2010] EWHC 280 (Comm), [2011] EWCA Civ 24.

subsequent sharing of losses between shipowners and cargo owners necessitates a fair and reasonable characterization of ransom to ensure equitable outcomes. The following section explores the characterization of pirate ransom as a general average for apportionment, aiming to strike a balance between the interests and risks of all stakeholders in maritime shipping.

4. Characterization of Pirate Ransom

In the realm of insurance for the carriage of goods by sea, understanding "risk" equates to the "cause" of goods loss, while "loss" corresponds to the "result" of the risk leading to the destruction of goods. Marine insurance losses are categorized as total and partial, with total loss further divided into actual total loss and constructive total loss, and partial loss further divided into particular average and general average. The following analysis aims to characterize pirate ransom within this framework.

4.1 Total Loss

Total loss occurs when the insured subject is completely destroyed, losing its original use after a sea loss. Total loss is divided into actual total loss and constructive total loss.

4.1.1 Actual Total Loss

Actual total loss means that the subject matter of the accident is lost, or seriously damaged and lost its original form, utility. In the event of a pirate attack, the pirates seized the ship cargo, control the hostage purpose is to demand ransom. Based on the specific "rules of the trade" of piracy, the delivery of a certain amount of ransom as a condition for the release of the ship's cargo and the guarantee of the personal safety of the hostages, the pirates do not generally destroy the ship's cargo. Upon receipt of the ransom, pirates usually honour their unwritten promise to release the shipment and the hostages. The owner of the ship and the families of the hostages are likely to regain control and ownership of the ship through negotiation with the pirates and payment of the ransom. Accordingly, the physical loss of the subject matter constituting the requirement of actual total loss cannot be found, and the pirate ransom cannot be characterised as an actual total loss.

4.1.2 Constructive Total Loss

Article 246 of the Maritime Law of the People's Republic of China provides that "Where a ship's total loss is considered to be unavoidable after the occurrence of a peril insured against or the expenses necessary for avoiding the occurrence of an actual total loss would exceed the insured value, it shall constitute a constructive total loss." It can be seen that constructive total loss contains the following elements: (1) causing partial loss but not yet forming actual total loss; (2) actual total loss is inevitable, and the cost required to avoid the occurrence of actual total loss exceeds the insurance value. In the event of a pirate attack, the pirates offered a ransom price to the shipowner after seizing the ship's cargo and controlling the hostages. After negotiations between the two parties, the actual amount of ransom paid is usually far less than the value of the ship's cargo, not to mention the life and safety of the hostages, which cannot be measured in monetary terms.

As in the case of the oil tanker *Sirius Star*, which was attacked and hijacked by Somali pirates in 2008, the ship was valued at about \$150 million and was carrying 2 million barrels of crude oil worth \$100 million at the time of the hijacking. The pirates initially demanded a ransom of \$25 million, but after negotiations, the Saudis eventually paid a ransom of up to \$3 million, which was

only 12 per cent of the amount demanded.⁶

In the context of the analysis of the pirate hijacking of the tanker Sirius, the element of "unavoidability of actual total loss" could not be satisfied. According to the value comparison analysis, the element of "the cost of avoiding the actual total loss exceeded the value of the insurance" was also not satisfied. The constructive total loss element could not be satisfied. Thus, the pirate ransom cannot be characterised as a constructive total loss.

4.2 Particular Average

Particular average is a particular loss or injury caused by the subject matter of a marine insurance policy to a risk covered by the insurance, which means a particular loss other than the general average. Particular average involves particular average borne by a single party alone.

When the ship is empty, it means that the pirates hijacked only the ship. The pirates demand a ransom, and the shipowner pays the ransom to preserve the ship. In this situation, only the shipowner incurs a ransom loss, which is recognised as a particular average. In the scenario where the ship is carrying goods and people, pirates hijack the ship, seize the goods and kidnap the hostages. In such a context, the object of ransom necessarily includes the ship, the cargo and the hostages.[7] For a uniform pirate ransom price, it is difficult to divide the proportions of ship, cargo and hostages. Therefore, this loss is not a matter of unilateral interest solely. Rather, it is borne by multiple parties and cannot be deemed to be a particular average.

4.2.1 General Average

General average is an ancient legal system of maritime law, which is based on the fair apportionment of costs and losses of maritime risk sharing mechanism. Shipowners and cargo owners, as joint participants in maritime transport, share benefits and risks. Identifying pirate ransom as a general average for apportionment allows for a reasonable distribution of risk among the parties. This is conducive to achieving a balance between the interests of shipowners and cargo owners, thereby protecting the incentives of each subject to engage in maritime shipping and promoting the survival and healthy development of the shipping industry as a whole.[8]

According to the provisions of article 193 (1) and article 199 (1) of the Maritime Law of the People's Republic of China, it is generally considered that general average includes the following three constituent elements:(1) Common Danger to Ship, Goods, and Other Property; (2) Intentionality and Reasonableness of Measures to Pay Ransom; (3)Ransom as a Specific and Additional Payment.[9]

This paper divides pirate ransom into two categories: ransom for ships and cargo and ransom for human life.

(1) Nature of Ransom for Ship and Cargo

1) Common Danger to Ship, Goods, and Other Property

In this case, it should be clear that the danger must be real and should be an objective fact that endangers the ship, goods and other property. It is argued that the modern-day pirate is motivated by ransom. Based on industry practice, pirates do not usually damage ships and cargo or harm hostages. Therefore, the element of "facing real danger" can not be satisfied. However, it is contended when pirates hijack the ship, the danger stems from the seized goods facing the consequences of the ship can not be returned. Although the pirates do not make direct damage to the ship and cargo, but the fact that the ship and cargo is held by pirates means that the owner of the ship and the owner of cargo lose the possession and control of the goods. The possibility of destruction of the ship and

⁶ Release of the tanker Sirius Star hijacked by Somali pirates, published in Liberation Army Daily. source: <http://mil.news.sina.com.cn/2009-01-11/0731538287.html>, accessed on 10 June 2023.

cargo exists in all cases where the ship's cargo cannot be rescued. The risk of losing ownership is not fundamentally different from the risk of physical damage to the ship's cargo. Consequently, the danger posed by the hijacking of ships and cargos should be recognised as real.

Due to the complexity of piracy scenarios, discussions are categorised below.[7]

a) The pirates only looted the goods. In this case, only a separate loss of the goods arises and it is related only to the interests of the owner of the goods. Therefore, can not be recognised as a common peril;

b) Piracy against a ship carrying cargo. Due to the indivisibility between the goods and the ship, the ship and the goods will be controlled at the same time, which means that the ship and the goods are exposed to common peril. This satisfies the constituent element of general average - "exposure of ship and cargo to a common peril";

c) Pirates only kidnap people on board and hold them as hostages for ransom. As in the case of the robbery of Captain Phillips of the United States in 2009. This situation is similar to the first scenario. It relates only to the interests of the employer of the ship, the family of the hostages. Therefore, common risk cannot be recognised;

d) The pirates board the ship, seize the ship and its cargo and kidnap the hostages for ransom. At this point, the ship, the cargo and the hostages are exposed to the risk of destruction and damage. It should therefore be recognised as a common peril.

2) Intentionality and Reasonableness of Measures to Pay Ransom

This element refers to an action which the perpetrator knows that taking a measure will result in damage to the ship or cargo, but which he is obliged to take in order to reduce the common risk to the ship and cargo.

When a pirate attack occurs, shipowners know that paying ransom to the pirates will result in additional financial losses. However, they still pay the ransom in order to redeem the hijacked ship's cargo. Moreover, when compared with the value of the constructive total loss, the amount of ransom ultimately paid is usually within a reasonable range, and it is a reasonable and practicable judgement that it is the least cost for the greatest value. Thus, payment of ransom to pirates is often the most cost-effective and reasonably practicable measure.

3) Ransom as a Specific and Additional Payment

Specific sacrifice or expense implies an "abnormal loss", i.e., an unforeseen loss that was not foreseeable by the shipowner. It is also required that the sacrifice or expense was a direct result of the general average act. Under Rule C of the York-Antwerp Rules and Article 193(2) of the Chinese Maritime Law, it is made clear that only losses and expenses that are a direct consequence of a general average arising from a common sea loss can be treated as a general average. The current prevailing standard of judgement for determining the direct consequences consists of two aspects, either of which can be satisfied: whether the loss was or should have been foreseen, and whether the loss was an inevitable consequence of the general average act of loss at sea.

With regard to piracy attacks, it is not possible for a shipowner to foresee before sailing whether or not he will encounter a pirate attack. Therefore, pirate hijacking incidents should be attributed to accidents. The pirate ransom or other rescue costs are directly caused by the act of piracy is not a normal loss, is occurring in the normal operation of the ship outside the legal obligations outside the special losses. Therefore, the ransom for the ship's cargo fulfils the element of "special sacrifice or expense", and should be recognised as a general average.

(2) Nature of Ransom for Hostages

The ransom for hostages can be divided into two parts: ransom for crew members and ransom for passengers. Due to the inestimable value of the hostages' lives, it cannot be simply equated with a ransom for shipments. There are special rules for determining the amount.

1) Regarding Ransom for Crew

The relationship between the crew and the shipowner is of employment. The Labour Law of the People's Republic of China stipulates that the employer has the obligation to ensure the safety and health protection of the workers. The article 22 of Regulations of the People's Republic of China on the crew of the ship, the shipowner also has the obligation to actively save the crew of the ship. I hold that in the case of the crew is hijacked, the obligation should be interpreted expansively, including the obligation to pay ransom to rescue the hijacked crew, the shipowner should actively rescue the hijacked crew in order to ensure the personal safety of the crew as far as possible.[2]Therefore, The shipowner's payment of ransom to rescue hijacked crew members fulfills the legal obligation to ensure their safety. However, it is considered a unilateral loss of the ship and does not qualify as a general average.

2) Regarding Ransom for Passengers.

The author argues that the risk to the lives of the passengers was a separate risk, unrelated to the safety of the ship. [2]Therefore, it does not satisfy the element of general average that "the ship and cargo are exposed to a common peril". Furthermore, theoretically, the general average system regulates the apportionment of loss among the owner of the ship, the owner of the cargo and the owner of the property on board the ship, and is not applicable to the relationship of passenger transport. Under the institutional rules of maritime law, the liability of the ship in the carriage of passengers by sea is a system of full fault liability. Although Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974, provides that the carrier shall be strictly liable to the passengers within the limits of liability, it also excludes acts caused by third parties.[10] Piracy is an act of a third party, which the shipowner cannot foresee or avoid. Therefore, the shipowner has no statutory obligation to pay the ransom for the passengers, which is usually borne by the shipowner and his family. It is concluded that the ransom for the passengers was only a loss to a person with a particular interest and does not constitute a general average.

However, it is worth noting that in cases where pirates board a ship and take the ship's cargo and hostages (according to the vast majority of actual cases, the hostages are generally crew members), the ransom is clearly indivisible, and it is challenging and difficult to make a clear distinction between the ransom percentage for the ship, the cargo and the hostages. One view is that the payment of the ransom not only enabled the release of the ship's cargo, but also ensured the safety of the crew. The portion of the ransom paid for the crew should therefore be deducted and the apportionment reduced proportionately. Another viewpoint is that the ransom for hostages should be included and apportioned among all the beneficiaries of the sea voyage. The author prefers the latter view. Considering the duty of the crew to manage the ship and cargos, when the crew is hijacked, there is no one to steer the ship and manage the cargos. It is very easy to lead to the real danger for the particular ship and the goods carried. Therefore, in the carriage of goods by sea, the crew is not only equipped for the shipowner's own interests, but is also a guarantor for the realisation of the cargo owner's interests.[9]If the ransom for hostages is excluded from the overall ransom, the calculation of the general average will be very complex, which is not in line with economic efficiency. Therefore, in the case of a ship, its cargo and its crew being hijacked by pirates, the safety of the crew should not only be the sole responsibility of the shipowner, which means that the ransom for the crew should be shared by all beneficiaries.

In summary, pirate ransom includes ransom for ships and goods and ransom for hostages. According to the elements of general average, the ransom for ships and goods should be deemed as general average. Taking into account the contribution of the crew and the simplicity and efficiency of the accounting, the hostage ransom, although not inherently recognized as a general average, should be included in the apportionment of costs.

5. Conclusion

Piracy is unequivocally recognized as an unlawful act. However, the legality of paying ransom to pirates varies across different jurisdictions. This paper, considering the intricate maritime environment, the economic intricacies of trade-offs, and the evolving legislative landscape globally, contends that the act of paying ransom has legitimacy. The foundation for qualifying ransom lies in the legality of the payment.

Examining the elements of general average, this paper asserts that pirate ransom should be classified as general average. This classification facilitates a fair distribution of risks and property losses among shipowners and cargo owners during maritime transport. Such a fair apportionment aims to strike a reasonable balance between the interests and risks of both parties. By doing so, it seeks to elevate the enthusiasm of all stakeholders in the transport business and contribute to the flourishing development of the shipping industry. The recognition of the legality of ransom payments and their qualification as general average is imperative for fostering a secure and thriving maritime environment.

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