

**Piracy: high seas,
violent theft and private ends**

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The word "piracy" conjures up images of cutlasses, eye-patches, the Jolly Roger, and the like; however, piracy is a problem which still exists in the modern world. Last year there were 276 reported actual and attempted attacks by pirates. Between January and June this year there were 127 reported attacks. For both periods the majority of those incidents occurred in or about the waters of Indonesia and Bangladesh. Last year there were 12 reports of such incidents in the Straits of Malacca; in the first half of this year there were three. The types of vessels attacked were not all junks, dhows and fishing vessels. The most frequently attacked vessels in the first half of this year were: bulk carriers, container vessels and chemical/product tankers.¹

Piracy is a crime under international law and municipal law. Article 100 of the *United Nations Convention on the Law of the Sea* 1982 is the most recent embodiment of the international law's condemnation of piracy. However, piracy is by no means new to international law. By the sixteenth century international law writers had developed the concept that nationals who committed piracy on the high seas placed themselves beyond the protection of their state. Pirates were therefore regarded not as the nationals of any state but as the enemies of the human race (*hostes humani generis*) and, consequently, were able to be tried by the courts of any state for the crime of piracy.² Under the laws of the Commonwealth of Australia piracy is proscribed under Part IV of the *Crimes Act* 1914 (Cth).

This paper considers piracy not in its criminal context but in a civil context. Since at least the mid seventeenth century piracy has been regarded as one of the perils of the sea under a marine insurance policy.³ It is principally in this regard that much judicial ink has been spilt in determining what piracy is and whether particular acts constitute piracy under the terms of a policy of insurance.

With regard to contracts for the carriage of goods by sea, it should be noted that the *amended Hague Rules* (as adopted in Australia),⁴ the *Hague-Visby Rules* and the *Hague Rules* do not use the word "pirates"; however, they all exclude a carrier from responsibility for loss and damage arising or resulting from "perils, dangers and accidents of the sea or other navigable waters" (art. 4(2)(c)) and from "act of public enemies" (art. 4(2)(f)). The leading texts state that piracy is probably

¹ The statistics and information regarding piracy attacks are contained in ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships*, Annual Report, 1 January – 31 December 2005 and Report for the Period 1 January - 30 June 2006.

² Grotius, *De Jure Belli ac Pacis*, Volume II, chapter 20, §40.

³ *Pickering v Barkley* (1649) Sty. 132; 82 ER 587. This is now found in the *Marine Insurance Act* 1909 (Cth), s 9(2).

⁴ Sections 8 and 9 *Carriage of Goods by Sea Act* 1991 (Cth).

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included in acts of public enemies.⁵ The argument supporting this conclusion is that since pirates are *hostes humani generis* under international law, it follows that they are public enemies.⁶ In any event, as Carver points out, “pirates” would fall into the “perils of the sea” exception.⁷ The expression “enemies” is also found in charter parties (see for example NYPE93, clause 21). The word “enemies” is wider than the expression “public enemies”, therefore, it probably includes “pirates”.

When “pirate” or “piracy” is contained in the terms of an agreement, like an insurance policy, courts do not seek to define it according to any technical or legalistic meaning. The rule here, as with the interpretation of contracts generally, is that the words must be interpreted according to their plain, ordinary and popular sense.⁸ In this regard it is open to a court to have recourse to a dictionary.⁹

“Pirate” is relevantly defined as:

one who robs or commits illegal violence at sea or on the shores of the sea (Macquarie Dictionary); and

a person who robs and plunders on or from the sea; gen. a plunderer, a despoiler, a bandit (New Shorter Oxford English Dictionary).

“Piracy” is relevantly defined as:

robbery or illegal acts of violence by the personnel of private ships or aircraft committed against another ship or aircraft (Macquarie Dictionary); and

robbery, kidnapping or violence committed at sea or from the sea without lawful authority, esp. by one vessel against another; similar behaviour in other forms, esp. hijacking (New Shorter Oxford English Dictionary).

The cases which have considered the meaning of “pirate” or “piracy” in an agreement have generally focused on three issues:

1. whether piracy must take place on the high seas;
2. whether piracy must involve some type of violent theft; and
3. whether pirates must act for their own private ends.

⁵ Boyd et al, *Scrutton on Charterparties and Bills of Lading*, (20th edition, Sweet & Maxwell) (**Scrutton**), art. 114; and Colinvaux, *Carver's Carriage by Sea*, (13th edition, Stevens & Sons) (**Carver**), para. 536.

⁶ Scrutton, n.5, pg 442, n.91; and Carver, n.5, para. 536.

⁷ Carver, n.5, para. 536.

⁸ *Minuco v London and Liverpool and Glove Insurance Co Ltd* (1925) 36 CLR 513 at 518.

⁹ See for example *Athens Maritime Enterprises Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Andreas Lemos)* [1983] QB 647.

The High Seas

There is ample authority that piracy in breach of international law can only occur outside the jurisdiction of a State. Article 19 of the *Geneva Convention on the High Seas* 1958 provides that a State may seize a pirate ship and arrest any persons on board. The article also provides that the courts of the State which carried out the arrest may decide upon the penalties to be imposed. The *Geneva Convention* and the *United Nations Convention on the Law at the Sea* 1982, which contains similar provisions, effectively codify what had for many years been customary international law. Under international law “high seas” means “international waters”.

While this emphasis on the high seas may have been a necessary ingredient for international law, it is not apparent that, for the purpose of the definition of “piracy” in an agreement, the actions alleged must have taken place in international waters. In *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd*¹⁰ the Court of Appeal divided on the question whether piracy had to take place on the high seas.

In that case the defendant issued a policy of insurance as to goods shipped on a vessel for carriage from Para, at the mouth of the Amazon River, to Puerto Alonzo, on the River Acre (a tributary of the Amazon River). None of the carriage took place on the high seas. The policy insured against particular perils including pirates. During the carriage, the ship was boarded by certain individuals on the river and the goods were seized (for further details see pages 7 to 8, below).

Vaughan Williams LJ said:

Whatever the definition of piracy may be, in my opinion piracy is a maritime offence, and what took place on this river, running partly in Brazil and partly in Bolivia, far up country, did not take place on the ocean at all. That distant place was not the theatre on which piracy could be committed. It is a region which cannot be said to be, like the ocean, under the jurisdiction of no particular power. It was under the jurisdiction of either Brazil or Bolivia. That part of the river is not the highway of the world, where ships of all nations can go protected only by the law of nations. It is a place where, if any ships go, they go, not on the sea, but on a river running in occupied territory which is under the government of a specific nation which has jurisdiction there. I wish to add one word in relation to the distinction between piracy jure gentium¹¹ and piracy by municipal law. Whatever other limitation there might be in this policy, it could, in my opinion, only extend to piracy jure gentium, and not to robbery on a river which at that point had been running through land for a long distance and had to run for a further distance, and both banks of which there belonged to Bolivia.¹²

¹⁰ [1909] 1 KB 785.

¹¹ Literally “by the law of nations”, i.e. under international law.

¹² *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785 at 799.

Farwell LJ was equivocal as to Vaughan Williams LJ's opinion, declining either to dissent or assent on the issue.¹³

Kennedy LJ rejected Vaughan Williams LJ's opinion. His Lordship stated that the policy in question was a "riverine" policy upon goods which were to be carried upon a river and not upon the open seas. He added:

*... there might be a loss by "piracy" within the meaning of such a policy as that in question, though that loss was not upon the open sea. ... I doubt whether the insurance company who entered into this policy could be heard to say that they meant by that word something which could not possibly happen during the voyage in reference to which the policy was effected.*¹⁴

He concluded:

*In the case, however, of this policy, so far as their intention went, the parties could not have meant by the term 'piracy' something taking place in the open sea, because that meaning would be inapplicable to the particular voyage; and I am disposed to think that there may be 'piracy' in such a locality as that of this voyage.*¹⁵

The differing opinions were later considered by Staughton J in *Athens Maritime Enterprises Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd: The Andreas Lemos*.¹⁶ In that case the owners of the vessel *Andreas Lemos* entered her in the defendant association for insurance against particular risks, including for loss caused by piracy. Late in the night of 22 June 1977, while she was at anchor in the Chittagong Roads, within the territorial waters of Bangladesh, she was boarded by a group of armed men who removed some of her equipment (for further details, see page 7, below).

The owners of the vessel sought indemnity for the loss, which the defendant denied. Counsel for the defendant submitted that piracy had to occur on the high seas (i.e. international waters), as opposed to the territorial waters of any state. On the other hand, counsel for the owners submitted that "high seas" should be understood as the area over which the English Court of Admiralty had administered justice. In this respect "high seas" included international waters, territorial waters, and rivers as far as the tide reached up to the first bridge.¹⁷

In rejecting the defendant's submission Staughton J said:

It is by no means self-evident that similar considerations point to the same definition of piracy for domestic purposes, and in particular for the interpretation of contracts of insurance. ... A ship owner whose property

¹³ Ibid.

¹⁴ *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785 at 802.

¹⁵ *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785 at 803.

¹⁶ [1983] QB 647.

¹⁷ For a more fulsome account of the ambit of the English Court of Admiralty's jurisdiction see *The Tolten* [1946] P 135 per Scott LJ at 154 and following.

*is taken by robbers is not much concerned whether that takes place in or outside territorial waters. Nor should I have thought that the precise location was of much concern to insurers, save to the extent that a robbery is a good deal more likely on board a ship in port or estuary, than it is twelve miles out or more.*¹⁸

In rejecting the owner's submission, Staughton J placed reliance on the view of Kennedy LJ in *Republic of Bolivia*. He concluded:

*But I see no reason to limit piracy to acts outside territorial waters. In the context of an insurance policy, if a ship is, in the ordinary meaning of the phrase "at sea" (per Kennedy LJ), or if the attack upon her can be described as "a maritime offence" (per Vaughan Williams LJ), then for the business purposes of a policy of insurance she is, in my judgment, in a place where piracy can be committed.*¹⁹

Recently the issue regarding piracy and the high sea was raised in a Singaporean case: *Bayswater Carriers Pte Ltd v QBE Insurance (International) Pte Ltd*.²⁰ In this case the plaintiff was the owner of a tug boat which was insured with the defendant against loss by piracy. While the tug was moored at anchorage 0.9 nautical miles from shore, she was boarded by an armed gang and then hijacked. The gang eventually released the crew. However, the owner never saw the tug again. The owner claimed under the policy. The insurer submitted that there was no piracy, as the actions occurred within territorial waters and not on the high seas. The judge, adopting the opinion of Staughton J in *Andreas Lemos*, rejected this submission and held that the tug had been lost as a result of piracy.

Violent Theft

Violent theft is a matter which, one could reasonably think, does not admit of much argument; however, that has not been so. In a number of early cases courts considered the question whether the violent theft amounting to piracy could be committed by people already on board the vessel in question.

*Palmer v Naylor*²¹ concerned an action upon an insurance policy on advances for the transport of Chinese emigrants from China to Peru, for their outfit and for their provisions, to be repaid upon their arrival at a port in Peru on board a particular vessel. The policy insured against certain perils, including "pirates, rovers, thieves ... and all other perils, losses and misfortunes ...". During the voyage the Chinese emigrants murdered the master and some of the crew, took control of the ship and her provisions, and sailed the ship to another destination.

The court concluded that these acts were "either direct acts of piracy or acts so entirely *ejusdem generis*²², that, if not reducible to the special words of the policy,

¹⁸ *The Andreas Lemos* [1983] QB 647 at 655.

¹⁹ *The Andreas Lemos* [1983] QB 647 at 658

²⁰ [2006] 1 SLR 69.

²¹ (1854) 10 Ex. 382; 156 ER 492.

²² 'Of the same kind'.

they are clearly included within the general words at the end of the peril clause".²³ In the course of argument, Maule J said: "If a party of emigrants on a voyage to Australia change their minds and prefer going to California, and to effect their object murder the captain and crew and seize the vessel, that would be an act of piracy".²⁴

In *Brown v Smith*²⁵ a vessel employed in the African slave trade, was subject to an insurance policy against perils including "barratry of the Masters and mariners, and all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of said goods and merchandizes, and ship, etc., or any part thereof." In 1801, while off the coast of Africa in Majumbo Bay, the vessel was seized by some mutinous crew members who abandoned the master during a visit to shore. Crew members unwilling to join the mutiny were then sent ashore by whaleboat. The mutineers were unable to navigate the ship, their intention being to deliver her to the French at Cayenne. They forced the Boatswain to navigate the ship for them. With the assistance of one or two trusted sailors, the Boatswain secretly decided to take the vessel on a different course, delivering her and the mutineers to the British authorities in Barbados. While there, the cargo was sold and the ship reduced to a hull and rigging.

The question in this case was whether the owner of the vessel was entitled to recover any sum under the policy for the loss of the vessel. The judgment is almost non-existent and no reference is made to piracy in the argument (which is reported). However, this case came to stand for the principle that "under the risk of pirates and rovers, the underwriters are, it seems, liable for mutinous seizure and carrying away of the ship by the crew".²⁶

This was accepted in *Kleinwort v Shepard*,²⁷ although it is probably only obiter dictum. In that case a voyage policy from Macao to Havana contained a declaration: "warranted free from capture and seizure, and the consequences of any attempt thereat." However, the perils insured against included "enemies, pirates, rovers and thieves". The voyage was for the carriage of Chinese emigrants from Macao to Havana. While on the high seas, the emigrants seized control of the ship and her provisions. The insured claimed the full amount under the policy, being £7,300. The court decided that while the emigrants' acts constituted piracy, this was a loss by seizure and therefore the insurer was not obliged to make payment. The court said that it was likely that the declaration was included in the policy to overcome the effect of *Palmer v Naylor*.

There is also authority that where a crew seizes control of a ship and its cargo, this constitutes barratry: *Dixon v Read*.²⁸ However, this decision does not give any consideration to whether the acts constituted piracy.

²³ *Palmer v Naylor* (1854) 10 Ex. 382 at 389; 156 ER 492 at 495.

²⁴ *Palmer v Naylor* (1854) 10 Ex. 382 at 388; 156 ER 492 at 495.

²⁵ (1813) 1 Dow. 349; 3 ER 725.

²⁶ Per Crompton J during argument in *Kleinwort v Shepard* (1859) 1 El. & El. 447 at 452; 120 ER 977 at 979, referring to *Arnould on Insurance*, volume II pg 841.

²⁷ (1859) 1 El. & El. 447 at 452; 120 ER 977 at 979.

²⁸ (1822) 5 B. & Ald. 598; 106 ER 1309.

"Violent theft" was also an issue in *The Andreas Lemos* but in this case it was not as to who committed it, but rather whether acts amounted to violent theft. While the vessel was anchored in the Chittagong Roads a gang of armed intruders, who climbed on board using grapnels, stole various items of equipment in the vessel's fore-castle. They were seen by a sailor on watch, who was on his round checking the ship's safety. The intruders had long knives with which they threatened the sailor as he ran aft, raising the alarm. Officers and crew armed themselves and ran forward. There they found six to seven people holding long knives. When the intruders saw that one of the crew held a gun and that one of the officer's had fired the ship's rockets, they took fright and jumped into the sea.

Staughton J referred to a number of authorities to the effect that there cannot be piracy without "threat of force" or "forcible robbery". He concluded that "theft without force or a threat of force is not piracy under a policy of marine insurance".²⁹ His Lordship inferred that the intention of the armed intruders was to steal without violence, that they anticipated the possibility of resistance or interference by a night watchman and that, if that possibility arose, they intended to use force or threat of force. He pointed out that the theft was complete before the intruders were discovered or at any rate before any force or threat of force occurred. His Lordship concluded:

*The case is, in my judgment, one of clandestine theft which was discovered; force or threat of force was used by the men to make good their escape.*³⁰

There is also authority that a frustrated attempt to commit piracy constitutes piracy under international law: *In Re Piracy Jure Gentium*.³¹ While one commentator seems to regard this as authoritative with respect to the definition of "piracy" in an agreement,³² this decision was confined only to the question of international criminal law.

Private Ends

There is authority that an act of piracy must be motivated by private ends and not by some public end, for example destabilising the government of a particular state. Therefore, acts of war, civil disturbance, or terrorism do not constitute "piracy".

In *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd*³³ (see pages 3 to 4, above) the goods insured were provisions and stores which belonged to the Bolivian government. The goods were intended for the Bolivian troops engaged in establishing the authority of their government in a particular territory known as Colonias. This territory had earlier been ceded by Brazil to Bolivia. Bolivia had largely failed to establish any governing presence there and, consequently, the inhabitants of the region, who were mostly Brazilian, established what they called the Free Republic of el Acre. The Bolivian government sent an expedition to

²⁹ *The Andreas Lemos* [1983] QB 647 at 660.

³⁰ *Ibid.*

³¹ [1934] AC 586.

³² Carver, n.5, para. 235.

³³ [1909] 1 KB 785.

Colonias to re-establish its authority. With the co-operation of the Brazil, the Bolivia arranged for the goods to be sent by river, in order to supply its troops. Certain Brazilians, who are keen to prevent the establishment of the Bolivian government's authority in the region, fitted out an expedition which travelled up the Amazon in armed vessels for the purpose of resisting the Bolivian troops and re-establishing the independent republic. One of these vessels stopped the vessel carrying the goods. The goods were seized. The Bolivian government brought an action on the policy claiming that it had suffered loss through pirates.

At trial Pickford J held that this did not constitute piracy. His Lordship relied upon the following quotation in *Halls' International Law*:

*Besides, though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private, as contrasted with public, ends. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a state. The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular state.*³⁴

His Lordship concluded that since the goods were seized for a politically motivated purpose, it did not constitute piracy under the policy and, therefore, the Republic of Bolivia was not entitled to indemnity under the policy. This decision was upheld on appeal.

Pickford J's conclusion was accepted in *Banque Monetaca & Carystuiaki v Motor Union Insurance Company Ltd.*³⁵ In this case a Greek schooner, *The Filia*, had broken down of the coast of Turkey in the Black Sea. She had to anchor off Kerassounde for repairs. This region of Turkey was controlled by a notorious Nationalist leader called Osman Agha, whose men boarded the schooner, took possession of her, and imprisoned the master, crew and passengers. The owners, who never saw the schooner again, claimed a total loss upon the policy issued by the defendant.

The policy extended to war risks but not to piracy. The insurer argued that the loss was caused by piracy. Roche J, relying upon the judgment of Pickford J in *Republic of Bolivia*, rejected the insurer's submission. After referring to the hostile operations between the Greek army and the Nationalist or Kemalists Turks, his Lordship said:

I am satisfied that Osman Agha was on the side of the Turks, and was in real alliance with Kemalists in Asia, and I am satisfied and find that he did capture and seize this Greek vessel under cover of and largely upon motives of a political character. That is to say that he desired it to effect a stroke against the Greeks. It may be, and I dare say it was, the case that

³⁴ *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785 at 791.

³⁵ (1923) 14 Ll L Rep 48.

*personal gain was also a motive, but the action in my view was dominantly political and military.*³⁶

In giving judgment for the plaintiffs, his Lordship concluded:

*But the whole matter appears to have been part of a political movement, and the act was not the act of brigands, who were killing at the time. They were killing from hatred and revenge and not from a scheme of brigandage.*³⁷

The results in these two cases are, with respect, correct. However, one can never be entirely certain of the motivation of a person committing violent theft at sea. Unless there were well known hostilities between two nations at the time such an act takes place, it would be difficult to determine whether such an act was committed for private or public ends. It is not difficult to imagine that in the breakdown of government authority pirates act with a combination of motives, perhaps both private and public.

As to that combination of motives, Dr Lushington had earlier said in *The Magellan Pirates*:

*I think it does not follow that, because persons who are rebels or insurgents may commit against the ruling power of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed towards other persons. It does not follow that rebels or insurgents may not commit piratical acts against the subjects of other states, especially if such acts were in no degree connected with the insurrection or rebellion.*³⁸

In *Banque Monetaca* the court attempted to deal with this difficulty by referring to the “dominant” purpose of the attackers. While Roche J’s conclusion in that case is undoubtedly correct, trying to determine a pirate’s motivation in less clear circumstances is little more than guesswork.

Conclusion

The words “pirate” and “piracy” are not to be construed in accordance with a strict international criminal law meaning. They are to be understood in the popular meaning given to those words. However, the cases clearly illustrate that “piracy” can take on different meanings depending upon the nature of the agreement in which it is contained. While the number of cases involving the interpretation of the words “pirate” and “piracy” are relatively few, the constant activity of pirates in our world make it almost inevitable that cases of this nature will continue to come before the courts.

³⁶ *Banque Monetaca & Carystuiaki v Motor Union Insurance Company Ltd* (1923) 14 LI L Rep 48 at 50.

³⁷ *Ibid.*

³⁸ (1853) 1 Sp. Ecc. & Ad. 81 at 83; 14 ER 47 at 48.