Looking Further Into Piracy Cases: Maritime Law as a Tool to Regulate Shipping Disputes

I. How Disputes Caused by Piracy Falls into the Scope of Maritime Law

In 2013, people around the world went out from theaters; awed by the intensity and tension of Captain Phillips and several of his crews when they tried to survive a 2009 Somali pirate attack. The movie was a big hit, scoring 93% in Rotten Tomatoes and Tom Hanks performance acting as the Captain was praised by many critics.

But was the ending of the movie really is the end of Captain Phillips and his vessel Maersk Alabama? The end of the movie was a happy ending (-ish), with some navy guy shot two of the pirates and arrested the leader. Captain Phillips, albeit shocked, was safe and sound and suffered no more than just some non-serious wounds. Maersk Alabama was saved and the bad guys were defeated. However, again, is it really the ending? It could be, yes, but most likely, it would not be.

Let's take a look at the very reason why Maersk Alabama set sail at the first place. MV Maersk Alabama is a cargo ship, which means it would not set sail if it were not for carrying some cargo. Therefore, at this point, we have reached a certain point where we agreed that Maersk Alabama and his Captain Phillips was sailing because it was carrying some cargo. Why would it be carrying cargo? Therefore, there must be someone who owned the cargo and/or someone who wanted to buy the cargo.

Piracy cases do not occur just to the Maersk Alabama. There are numerous shipping activities throughout the world, and, inevitably, some of the activities will require ships to sail through areas prone to piracy. Consequently, there would also be ships hijacked by pirates. These ships are just mere tools of transportation. Far beyond the shipping activity, there are contracts made between parties, namely charter parties and/or bills of lading. There are also contracts made

between a consignor and a consignee concerning deliveries of a certain cargo, where of course the consignee will be waiting anxiously for his bought goods to be delivered on time and the consignor will be waiting anxiously for his sold goods to be delivered by the ship he chartered so that the contract he made with the consignee will be completed. When there is an act of piracy, like what happens to the Maersk Alabama, the problem does not stop at how the captain and the crew manages to escape from the evil grasps of the pirates. After the vessel is freed, the parties in the contracts start to blame each other. Well, they can't possibly blame the pirates. These pirates will be prosecuted, but will not have the obligation to indemnify the suffered parties. The pirates clearly are at fault, but there must be someone who also is at fault that leads to the ship being exposed to the pirates. It can be the stupid master who does not exercise anti-piracy precautions, it can be the reckless charterer (and the consignor, for most cases) who orders the ship to sail to an area prone to piracy, or it can be the consignee, for reasons that can be fabricated by the lawyers of any of the parties, as long as the consequences can be blamed to someone and their loss can be indemnified. The findings of who is at fault and who is liable for the hijacking would then fall to the hands of maritime law.

Maritime law *is not* law of the sea. Sometimes people make that mistake, thinking that maritime law and law of the sea are used interchangeably, especially people whose mother language is not English. Before we go any further, it must first be established that no, maritime law is not law of the sea. The difference is quite fundamental. Maritime law is dealing with shipping activities, whereas law of the sea deal with territorial zone of states. Maritime law is a part of private international law, whereas law of the sea is a part of public international law.

Getting back to our topic, now what would happen after the captain and the crews of the hijacked ship finally were saved? The

dispute concerning who is at fault commences, and there must be a tool to facilitate the settlement of this dispute.

II. Arbitration as a Means of Dispute Settlement

We have talked about shipping activities. Now, of course these activities are done internationally from one country to another. The consignee and the consignor in practice would be companies from different states with their own law. For example, a certain goods are to be sent from Singapore to Kenya. The shipper is Singaporean company while the consignee is Kenyan company. This would then beg the question: when a dispute arises, whose law is to be used to govern the proceedings? The shipper would prefer his law and the seat of the proceeding in his city, and the consignee will also want the law and the seat of the proceeding in his own city. In these circumstances, it would be difficult to determine which court has the jurisdiction to settle the dispute.

In light of the reasons above, usually parties engaged in an international contract would prefer arbitration as a means of a dispute settlement if any arises between them. Arbitration is the prime option for companies that are involved in an international contract because of two main reasons: the neutrality and the enforcement.

As has been stated above, one of the problems faced with entities dealing with private international law is when a dispute arises; the question of which court has the jurisdiction could be a stalemate. International arbitration gives the parties an opportunity for both parties to choose a 'neutral place' to settle their disputes. In most cases, to ensure that arbitration proceedings will be invoked when a dispute arises, the parties include an arbitration clause within their contract, stating that disputes concerning the contract will be settled in arbitration. When the clause is valid and the dispute is inside the scope of the clause, even the court will not be able to settle it. The law will obligate the two parties to settle the dispute in arbitration.

The second reason is the enforcement. Because of the abundant benefit, arbitration has been recognized as a means to settle commercial disputes all over the world. The issuance of treatises, such as the New York Convention, ensures the enforcement of arbitration award not only in the place where it is made but also in every single country that applies such treatises.

Those are just two main reasons that make arbitration a more preferable choice for people dealing with commercial disputes, in our context, shipping industry.

III. Bills of Lading and Charter Parties and How Piracy Claims Can be Correlated with the Parties

There are two contracts governing shipping industries: bills of lading and charter parties. Charter party is a contract concluded between a shipowner and a charterer concerning a chartering of a ship, whereas bill of lading, as how it is characterized by Lord Loughborough in *Mason v Lickbarrow* (1794) 1 H. Bl. 359 as: *the written evidence of a contract of the carriage and delivery of goods sent by sea for a certain freight.*

It is clear as day that pirates are not involved in these kinds of contract, and of course, even the commonest of person can know that private lawsuits are lawsuit concerning contracts. How then, it can be connected between these contracts, the parties involved in them, and the pirates?

The pirates are not a new story, proven of the existence of cases concerning these activities within the 17th centuries, namely *Pickering v Barkley* (1648) Style 132 and *Morse v Slue* (1671) 1 Vent 190. However, the fact that pirates have been a problem from so long ago does not mean that they are not a threat now. wenty first century prone areas of maritime piracy and armed robbery against ships are identified to be in 10 different regions of the world namely (1) East Africa, (2) Indian Ocean, (3) West Africa, (4) Arabian Sea, (5) Malacca Strait, (6) South China Sea, (7) Latin America and the Caribbean, (8)

Mediterranean Sea, (9) North Atlantic, and (10) regions that are classified "Others" where the occurrence of the two crimes are at a very low rate or even rare. In 2011, there are 544 attempted attacks, 11.3% increased in statistics compared to the number of attacks in 2010. Because of these facts, people dwelling in shipping industries finally accept that pirates are a part of their daily business, not so different from storms or stevedores strikes. These people must learn to coexist with pirates but at the same time must find a way that the other party they conclude a contract with will not just blame the pirates as an 'unforseeable event' everytime and just get away with it. The tool for them to connect the act of pirates as a third party to the contract itself is by including a piracy clause inside the charter party and/or bill of lading, or clauses that will put the blame on the other party if piracy occurs.

For example, INTERTANKO Piracy Clause requires the master of the ship, if the he determines that the ship would be exposed to the risk of piracy, to:

a. Take reasonable preventive measures
b. To follow instructions and recommendations from the flag state
c. To take a safe alternative route if needed

Of course, the wording of the clause is not this simple, but more or less, this is how piracy clause works: giving an obligation not to be pirated to one of the parties, where, in this context, the master of the ship. If, then, ultimately, the ship is hijacked and it is proven that the master did not do one or more of the three things that the clause requires him to do, then he and his employer will be liable for the damages suffered by the charterer caused by the piracy act.

Masefield AG v Amlin Corporate Member Ltd., known also as the Bunga Melati Dua case, is a piracy case occurred in 2011 that can picture quite perfectly on how would happen to the parties when a ship is hijacked. The Bunga Melati Dua was to be bound to Rotterdam from Malaysia carrying a cargo of bio diesel when it was captured by

pirates off the horn of Africa. After a month of seizure, the pirates started to negotiate a ransom with the ship owners.

The cargo owners then, having an insurance covering piracy and theft, issued a notice of total abandonment of the cargo to the insurers, aiming to be indemnefied by seeing the cargo to be an actual loss under section 57(1) and 60 (1) of Marine Insurance Act. The cargo owners claim $7 million to the insurers, basing their claim on *Dean v Hornby* (1854), where the cargo was regarded as an actual loss even if it is later recovered. However, the insurers stated that the cargo would be retrieved, seeing that the pirates are negotiating the ransom with the ship owners and in practice, the ship and the cargo are released after the payment of ransom has been done, therefore it would not be reasonable to treat the cargo as an actual and total loss. The court ruled in favor to the insurers, stating that the case of *Dean v Hornby* is not applicable to the case of the Bunga Melati Dua, as the the ship was never restored to the owners nor did they have the chance to regain possession.

In the case it can be seen how even parties outside the contract, which is the insurers, can be dragged down to an act done by also a party outside the contract, which is the pirates. At the end of this article, it would be clear that piracy is not just about how to survive during the seizure, not just how you shut down all the engines of the ship to convince the pirates that the ship is broken, or not how you finally can go back home to your family after the navy saves you. It is much more complicated than that: companies throwing claims at each other, million dollars of money at stake, and intercontinental disputes most likely will follow.