

Removal of the HRA – a Liner Carrier's Perspective

- **Introduction/disclaimers**
- **From the start**
- **In retrospect**
- **Removal: what now?**
- **Questions**

Introduction

Although some in the audience may regard it as a disqualification to speak on any topic, I am a lawyer by profession, a maritime lawyer.

Aside from my legal work as a lawyer, principally as an Admiralty and shipping litigator, my maritime industry experience is overwhelmingly in liner shipping. As an operator of both owned and chartered tonnage, that means mostly containers, but some break bulk and project cargo. I have had only limited exposure to dry bulk or liquid bulk trades.

Most of my industry experience has been in the geo-politically stable, and, in maritime security terms, benign waters of the SW Pacific region.

However, as per my bio accompanying the materials for this event, I do have direct personal experience of piracy in the HRA. Through the usual convoluted ownership and flagging structures, I was actually a minority owner of the ship referred to in that bio. I was the beneficial owner of a little over two 64ths of the ship in old money, which my co-owners frequently assured me was represented by the ratings ablutions compartment and the rust scale inside the bottom tanks. I can however assure you that when it came to pirating of the ship, even that small ownership interest made it all very real, both personally and commercially.

You may have seen that I have also served for 14 years (and continue to serve) as a naval reservist in the RNZN – as a Maritime Trade Operations officer, or NCAGS as the US navy knows it.

Part of my naval service included almost 6 months during 2016 as the RNZN's first ILO at UKMTO, Dubai. Although Somali piracy had been largely suppressed by my time in Dubai, I nonetheless boarded and briefed the masters of exactly 301 ships of all types and flags, all of which had, of course, transited the HRA as part of their voyages to UAE ports.

I acknowledge that this rather eclectic mix of experiences makes me that most dangerous of presenters: someone who knows a bit about lots of things, but not much about anything at all – as the Brits say, a jack of all trades, but master of none. That, and the time available, mean that I can do little more than highlight some issues and hopefully provoke discussion from those in the audience much more knowledgeable and qualified than I am.

As a final introductory disclaimer, I should say that in speaking today I do so only as an individual. I am proud both to work for Matson Navigation Company, Inc. and its subsidiaries; and to serve in the RNZN, but the views expressed are entirely my own.

So, against that background, I now want to turn to the substance of my presentation.

From the start

As we approach the removal of the HRA at the beginning of next year, and if only on the basis that those who fail to learn from history are doomed to repeat it, I think it is worth reminding ourselves of some aspects of the origins of the HRA.

What now appear as the neatly charted lines on UK Hydrographic Office chart Q6099 derived from the work of a surprisingly wide range of what I have referred to on the slide as “sponsors”. It is unnecessary for present purposes to analyse the process by which the HRA as we know it came into being, but I have mentioned some of the many participants and interests that led to that outcome.

My list doesn’t include the UN whose Security Council Resolutions provided an internationally acceptable basis for intervention, or the consensus-building within NATO and the EU that led to military and other actions giving practical meaning and effect to the HRA. However, in any assessment of the HRA as it has existed over its lifetime, we should not overlook the high levels of international and inter-governmental common intent to deal with the problem of piracy in this region.

As a shipping industry person, my perspective is probably more from the other end of the telescope. I remind you of the industry groups and interests whose work generated the very first edition of BMP, promulgated back in February 2009:

- International Association of Independent Tanker Owners (INTERTANKO)
- International Chamber of Shipping (ICS)
- Oil Companies International Marine Forum (OCIMF)
- Baltic and International Maritime Council (BIMCO)
- Society of International Gas Tanker and Terminal Operators (SIGTTO)
- International Association of Dry Cargo Ship Owners (INTERCARGO)
- International Group of Protection and Indemnity Clubs (IGP&I)
- Cruise Lines International Association (CLIA)
- International Union of Marine Insurers (IUMI)
- Joint War Committee (JWC)
- International Maritime Bureau (IMB).

My slide also mentions some of the specific concerns that promoters or supporters of the HRA sought to address, being major components of maritime commerce. A cynic would call these vested interests, and of course they are. But the ability of all parts of the shipping industry to coalesce their separate and not always compatible aspirations into the creation of the HRA is, in my view, something of which the industry can be quite proud.

I suspect that it was precisely because vested interests were the driver for the HRA that it was able to be adjusted from time to time, and its geographical scope commensurately reduced as piracy was progressively suppressed – although probably not with the speed or pragmatism that some of the States around it (and around the wider VRA) would have liked, which is something I will touch on further.

In retrospect (or “What has the HRA ever done for us...”).

Turning to the year-to-year operation of the HRA, I was looking for some sort of a headline to announce what I consider to have been some of its important features in operation. Initially I was going to sub-title this slide “Look back in Anger”, which is the name of a 1950s play by John Osborne,

one of the so-called “angry young men” of British post-WW2 theatre. It tells the story of a tempestuous and failing relationship between a working class husband and his more upper class wife from a military family. It seemed like a nice analogy for those invested in the HRA: merchant shipping is, of course, the work-a-day, working class partner. So far as the upper class military comparison is concerned, I wasn't sure whether that was represented by the actual military, the comparatively glamorous CMF, EUNAVFOR, and previously OP ATALANTA ships and aircraft roaring around the region leaving merchant vessels in their wake; or whether the upper class military role in the play should be assigned to the insurance industry which (in London at least) used to be quite heavily populated by pukka ex-servicemen in regimental ties.

However, I soon realised that this sub-title would never work, because any anger the shipping industry might have about the need for the HRA should, of course, be directed at the pirates themselves and the interests behind them. The HRA is not the problem, but rather has been a major contributor to its solution.

Instead I paraphrased a line from a movie that older Brits in the audience might recall, Monty Python's *Life of Brian*. Set in Biblical times, there is a scene in which a fictional group of Judean dissidents against the Roman occupation of their country are huddled in a clandestine meeting, railing against their invaders. The seemingly unanswerable question “what have the Romans ever done for us...” is, much to the chagrin of the protest leader, met with an unexpectedly long list of enduring benefits. In the movie, these include mention of Roman aqueducts, running water, sanitation, a legal system, peace and stability, and so on: not at all what the Judean rebels wanted to be hearing!

Coming back to the HRA, my own view is that for all the industry may have resented the need for its existence, the HRA has, to date, similarly bestowed some real, and hopefully enduring benefits on global shipping. My slide lists what I perceive as some of those contributions.

Possibly because my own shipping industry experience has been centred in such a low security, geopolitically benign corner of the Pacific, the ISPS regime had never featured very prominently in the conduct of our regional trades. I had previously really only been exposed to exercising ISPS – the high point of which was a call from the master of one of our ships which had just been boarded on arrival into Pago Pago, American Samoa. Our master handed over the phone to someone who announced himself in a broad American accent as Master Chief so-and-so of the local USCG detachment, followed by the immortal words: “are you the CSO? I'm standing on the bridge of your ship, with a weapon pointed at the head of your Captain: what are you going to do...”. Apart from that, and more recently, one of the smaller Pacific island nations to which Matson's ships trade has, bizarrely but creatively, been using elevation of security levels under ISPS as a means of COVID 19 infection control through its ports. Otherwise ISPS isn't a daily feature of shipping life in the SW Pacific.

In stark contrast, when I was working with UKMTO, Dubai, and pounding the ports of the UAE visiting ships, it became every evident to me what a central role CSOs play in the maintenance and management of ship security. The HRA has provided, if not a test-bed, then certainly an enhanced context for ISPS as a whole, and CSOs in particular to demonstrate their real necessity and value. If anyone was interested in my opinion, I would say that the framework of the HRA has, in some respects anyway, enabled ISPS to prove its fitness for purpose.

Another facet of the HRA has been the growth and evolution of private armed security teams. Again, I should acknowledge that putting armed personnel on board ships to deter, and if need be defeat armed attackers of those ships, is neither rocket-science (or even RPG-science...) nor

revolutionary. My sense is that the AST circus has largely left town, and moved on to the Gulf of Guinea. But, along the way, the HRA has accelerated and fostered the evolution of private security for shipping. In the early days of the HRA solutions had to be found to the problems of merchant ships carrying arms and ammunition, and of when and how AST personnel and their equipment could be embarked and disembarked from their clients' ships. Once practical solutions, such as pre-positioned floating armouries, had been conceived, it became possible to formulate legal and commercial arrangements to regularise practises. I also believe that the experiences of the HRA have been a driver in BIMCO's development of a suite of security escort vessel and security personnel forms of contract and standard clauses.

Although more an open question than an actual benefit, the HRA has also been a focal point for consideration of the rights and needs of the Littoral States whose territorial waters it adjoins. Understandably, those Littoral states have been the most vociferous in seeking changes, especially reductions in the extent of the HRA. At the very least, recourse to the HRA construct has forced global shipping interests (and their governments) to reflect on the tensions between (on the one hand) freedom of navigation as an enabler of maritime commerce, and (on the other hand) policing of piracy and maritime crime as both a logistical constraint and an added cost to the conduct of international shipping.

Insurance has probably been the most obvious, and perhaps the most ambiguous consequence of the HRA. The conventional view is that the insurance industry has done very well out of the HRA, getting the best of both worlds. On the one hand, there has been uplift in premiums from the passage of ships through a designated high risk (and axiomatically high premium) area; on the other hand, underwriters have probably enjoyed reduced and continually reducing actual underwriting losses from the piracy risk involved, as the HRA has progressively achieved its protective and risk-management purposes. Like most ship operators, I will do anything I responsibly can to save costs, and if there is a way to push back on premium levels, then I will happily pursue it. However, any negativity towards insurers is, in my own case, tempered by the recognition that when my company's ship was pirated in 2010, our Hull and Machinery underwriters could not be faulted for their swift, comprehensive and ultimately effective response to our predicament. To this day I believe that the ransom they eventually paid on our behalf to retrieve our ship and its crew certainly exceeded the true market value of the ship, and therefore the real policy value to which we were entitled – which is not the kind of insurance story you often hear.

Moving to the next point on my slide, I'm not sure that I see my colleagues in the legal profession in quite the same way. To be fair (which is something we lawyers strive to avoid...), the legal complexities of contracts and arrangements for transiting the HRA, and especially for dealing with an actual piracy event, are not of the lawyers' making. Shipping documents, which in the ordinary course, are notoriously extensive and comprehensive, have needed to be further developed to cater for the HRA and the kinds of piracy and maritime crime it was designed to mitigate. Moreover, and once a piracy event has occurred, the resultant regulatory regime became somewhat of a licence to print money. My own experience when pirated was having to deal with no fewer than 9 separate Government agencies just in relation to the ransom payment, let alone any other aspect of the people and assets caught up in the piracy. The agencies most interested in any ransom ranged from the local NZ Police Financial Investigation Unit all the way up to the US Office of Foreign Assets Control.

There are two other legal developments derived from the HRA.

One, to use the rather quant terminology of certain UKHO bulletins on piracy in this region, is "legal finish". Expressed in more conventional terms, it is possible that the HRA has also been the crucible

for development of better and more comprehensive regimes to deal with maritime criminals in general, and pirates (in the traditional “High Seas” sense of that term) in particular. In the earlier days of the HRA, navies apprehending Somali pirates would simply send them on their way, probably to re-equip, re-arm and re-offend, for no better reason than their lack of confidence in their own states’ legal systems to deal with such offending. New laws to address some of the jurisdictional, and especially extra-territorial gaps in the system have been developed; conventions entered into; and domestic laws strengthened to reach further into international waters, and the high seas zones of any designated area like the HRA. My own country brought into law earlier this year a new Maritime Powers Act to extend its reach, where warranted and permitted, beyond our territorial waters and EEZ.

The other is in the private law space. It took 8 years from the boarding by armed men of a ship called the *Brillante Virtuoso* in July 2011 near the coast of Yemen for ensuing litigation to be determined by the English High Court, but in 2019 a ruling on the ship master’s adherence to BMP was delivered. Not an entirely black and white outcome, but some broader principles around a master’s duty of good faith in either avoiding or responding to piracy were promulgated in the judgement. I am sure that there are other superior court decisions delivered in other jurisdictions respecting aspects of piracy and efforts to control it, but the point is that the HRA has bequeathed us some legal principles to guide similar future events.

Finally in relation to this slide, I want to quickly mention a few intangible benefits deriving from the whole HRA experience.

Firstly, the breadth and depth of industry engagement in the problem, as previously noted. That simple line marked on the UKHO chart delineating the HRA is to some degree a continuing driver as much as it is a consequence of industry collaboration. It has provided a focal point for industry’s generally if belated successful response to Somali piracy.

Second, and perhaps a sub-set of that collaboration, has been the attention paid to at least this one pirate-driven plight of seafarers. One of my most enduring memories as an ILO at UKMTO, Dubai was, on all but one of the 301 ship visits I undertook, their sheer gratitude that someone actually gave a damn. These were all wholly unsolicited “cold calls” on busy ship masters and chief officers, yet their appreciation was palpable, and quite humbling to me. Although it is somewhat off-topic, I have to say that it is regrettable that similar levels of concern and practical support could not have been given to the same seafaring community during COVID. Despite trumpeting their commitment to the maintenance of economic activity and maritime commerce during the pandemic, many governments – regrettably including my own - did absolutely nothing to relieve seafarers of the burdens of border closures and travel restrictions, nor gave them any ability to get off their ships and return to their homes in reasonable timeframes. A little of the HRA ethos as it relates to seafarers could have gone a long way to mitigating COVID effects on seafarers.

Third and last on this slide, the HRA has thrown into sharp perspective the nature of the flag state. Historically and traditionally, ships wore the flag of a state to ensure protection. In some countries, notably the US via its Jones Act cabotage regime, a national merchant fleet is viewed as a strategic asset, even a *de facto* part of the nation’s overall military capability. Closer to the middle of the spectrum, the HRA and the IRTC saw navies come into the region specifically to protect their countries’ fleets and the commercial interests associated with them. At the other end of that spectrum, the very discernible outliers were the acknowledged flags of convenience, who happily went on collecting the registration and corporate administration fees, but who were quite incapable of bringing anything practical to the counter-piracy table.

Removal: what now?

I could probably be forgiven for leaving my last slide blank: I doubt that my crystal ball is any more reliable than most other peoples' here. It remains to be seen what happens once the HRA ceases to exist. Possibly nothing, although is nothing a good or a bad outcome? A genuine return to the pre-piracy *status quo*, maybe?

To try and populate that uncertain future space, my slide mentions some issues I though worthy of comment.

In dipping into some of the shipping, and the maritime security industries media on the topic, I found some interesting commentary regarding perceptions of change in the most recent years of the HRA. That change is from the actual risks of piracy in this region in its earlier period – say 2008 to 2012; to what today is merely the threat of piracy – for example if or when the long-running war in Yemen unequivocally renders Yemen a failed state with the same propensity for Somali style piracy (if that hasn't already occurred). So, is the dichotomy risk vs threat, and if so does it matter?

As a liner carrier, my contracts such as charter parties and my bills of lading are drafted to allocate the consequences and costs of a whole range of risks eventuating. As a consumer of insurance, risk should in my mind be an actuarially calculable potentiality, enabling cost benefits of cover or not to be assessed. I think piracy was such a potentiality, and such a risk in the early days of the HRA.

Threat, on the other hand, is an identifiable adverse capability, but with less measurability, far less discernible certainty of eventuating. Threat is something that may be harder to provide against in any meaningful commercial way. Threat is really more the domain of the military.

If I am even partly correct in those views, then it is to be hoped that the navies – CMF and others - who have contributed so well to the suppression of Somali piracy will not use the removal of the HRA to discontinue those suppressive actives. Reduction in our piracy risks in a matter for us and our underwriters. By contrast, while the threat remains in this region, we had better hope that the navies do too.

[In the interests of time, I won't say anything more about what may lie in store legally].

I can't conclude without some further comment on insurance. The same shipping industry media just mentioned, and other published industry reaction to the removal of the HRA, is generally pessimistic about the prospects of any noticeable reduction in insurance premiums for owning or operating shipping in this region. I don't have any reason to offer a more optimistic view. All I can say is that the removal of the HRA also removes at least one justification for increasing premiums – but I have no doubt that other justifications will be found by underwriters to take its place.

Finally, I want to close with one last question: given current maritime security hotspots and issues around the world, including but not limited to the Black Sea, and the South China Sea, if another maritime security threat comparable in its effects with Somali piracy arose, could the same unity of purpose and effort that gave rise to the HRA be achieved?