

Mariners use code in fight for security

Maritime security has become a key issue for operators and legislators. Both are struggling to find the most effective way of dealing with the threat following the events of September 11 and the attack on the Limburg vlcc. Philip Roche of international law firm Norton Rose reviews the issues

Since September 11 there has been a change in the way the international community has looked at the security of ports and shipping. The attack on the Limburg off the coast of Yemen demonstrated, if demonstration were needed, that the terrorists will attack shipping if they are given the opportunity. If this is correct, then tankers carrying cargoes of inflammable polluting substances are likely to be high on the terrorists' list of targets. The International Maritime Organisation (IMO) has responded quickly (in terms of international agreements), with amendments to Chapter XI of Safety of Life at Sea Convention (SOLAS) that will bring the International Ship and Port Security Code (ISPS code) into force (unless a number of members object) in July 2004. This code has been covered exhaustively in the maritime press and was featured in the previous two issues of Tanker Operator. This article will, therefore, consider how the ISPS code and terrorism are likely to affect the everyday trading of ships in this new environment.

Implications of the ISPS Code

In the face of an increased terrorist threat, the introduction of the code is clearly justified. However, it will undoubtedly add another tier of bureaucracy for the long-suffering ship owner/manager and another set of requirements to be fulfilled, bringing potential liabilities, delays and additional costs. The code itself will not be straightforward to implement as it involves new company and ship organisations, new security equipment and much investment in training and implementation. Many of the requirements of the code will be novel to the seafarer and will thus be more difficult than the ISM Code to implement effectively. Furthermore, the code is non-negotiable. Vessels engaged in international trade must comply by July 2004 or risk being unable to trade to those countries that have ratified and are applying the code.

Port State Control

Failure to comply with the code will be regarded very seriously by the USA, Canada, Australia and the EU, whose enhanced port state control systems, coupled with enhanced security awareness and sensitivity, will be quick to detect unsatisfactory ships in this respect. Failure to comply will probably lead to the vessel being denied entry to the ports of that country. In such cases, the charterers will have good grounds to claim that the vessel is unseaworthy because of a failure of the ship's organisation or a lack of documentation. Given that the cargo would have to be transhipped to another vessel capable of calling at the ports of that country, any consequential claims are not likely to be small.

Insurance

The introduction of a code with which shipowners must comply will also lead to questions about insurance cover, both P&I and war and strikes insurance. It is not yet known whether P&I or hull insurers will make compliance with the code a condition of cover, as was the case with P&I insurers over the ISM code. If so, failure to comply with the requirements and certification of the code may have serious consequences for the shipowner.

Furthermore, in the situation of a successful terrorist attack on the vessel, will it be possible for insurance cover to be denied and could claims for unseaworthiness

brought by charterers on the basis that the ISPS code was imperfectly operating on the subject ship? Obviously, the failure in the shipboard organisation would have to have caused the damage, in the sense that the failure allowed a successful terrorist attack that might otherwise have been thwarted if the systems had been operating correctly.

Such claims, should they occur, would involve difficult questions of evidence, causation and public policy. It is very difficult to prevent a determined terrorist attack. Should a shipowner therefore be found liable for failing to prevent a terrorist act simply because the ISPS security precautions have been made compulsory?

Routine delay

Regarding more routine matters, delay will no doubt become an increasing problem under the code and, save in the most efficient ports, add to the general congestion. Local authorities will have wide powers to delay vessels whilst background security checks are undertaken. Customs clearances will be slower and port state control more onerous. Local authorities will be much less willing to leave checks of the vessel and its compliance with the ISPS code until the vessel is in the port.

Therefore, port state control inspections will be done before the ship is allowed in. In such cases, where will the risk and cost of delay fall as between the owner and the charterer? Unless clauses are added to deal with such delay, they will be dealt with under force majeure or "restraint of princes" clauses and the loss will fall on the shipowner.

Where the threat state at the port increases to "State 2" or even "State 1", ports may bar vessels from entering the port or even anchoring in the usual waiting areas until the threat has receded or the ship checked and searched. Such action might give rise to disputes about whether the ship is an "arrived ship" unless its definition is changed.

The threat of terrorism

A definition

How is the actual threat of terrorism likely to affect the day-to-day operation of ships?

The UK Terrorism Act 2000 defines terrorism as "the use or threat of action where:

- it involves serious violence against a person, or it involves serious damage to property, or it endangers a person's life, other than that of the person committing the action, or it creates a serious risk to the health or safety of the public or a section of the public, or it is designed seriously to interfere with or seriously to disrupt an electronic system, and
- the use or threat is designed to influence (any) government or to intimidate the public or a section of the public, and
- the use or threat is made for the purpose of advancing a political, religious or ideological cause.

To fall within this definition, the terrorist must be associated with a proscribed organisation, the list of which is regularly updated by Statutory Instrument.

The definition of terrorism would encompass most if not all of the types of terrorist attack being made today. It is clear that an attack by, say, an armed gang of pirates intent merely on stealing property would not be an act of terrorism. The UK definition of terrorism refers to a list of proscribed organisations, which is set out in a current Statutory Instrument. There might be an argument that, because a terrorist group committing the act of terrorism was not on the list of proscribed organisations, such act falls outside the UK definition. However, if the terrorist act clearly falls within the definition quoted above, it is likely that the court will take a common-sense approach and find that the act was in fact an act of terrorism even though the terrorists did not appear on the proscribed list. Indeed, it is difficult to see what other conclusion a court could reach in such circumstances.

Current charterparty clauses

In many current editions of commonly used charterparties, there is now explicit reference to terrorism. For instance, BPVoy 4 Clause 39 states that war risks shall include "...acts of terrorists....by any person, body, terrorist or political group.... which in the reasonable judgement of the Master and/or Owners may be dangerous or are likely to become dangerous to the Vessel, her cargo, crew or other persons onboard." The clause goes on to give the Master/Owners the right to refuse to load/discharge if the Master, exercising reasonable judgement, believes that performance of the contract of carriage will expose the vessel to war risks including terrorism. Owners have the option to cancel or only perform part of the voyage or require the charterers to nominate an alternative port. It is essential that all charterparties signed by shipowners have such a clause allowing the shipowner the flexibility to deal with such situations.

Where the charterparty includes such a clause, what event would be required for a master to refuse to conduct the agreed contract of carriage? For instance, would a master have been entitled to refuse to enter into New York on 11 September 2001. The answer is probably "yes", not only because the port was closed by the authorities but because of the events of that day in New York. The day after the Bali bomb, would a master or owner have been entitled to decline to sail into Jakarta? The answer is almost certainly "no", as the threat to commercial shipping remained unchanged at that port. The Bali bomb was against a "soft" tourist target in a different part of the country and there was no intelligence that a general terrorist campaign throughout Indonesia was about to be mounted.

Refusal to visit a port

Where there is a threat of terrorism at the intended port of loading or discharge at the time the contract of carriage was agreed, it would not be possible for the master/owners then to decline to visit that port owing to the continuing terrorist threat. The threat would be unchanged and the owners would have implicitly agreed to accept that level of threat. Only where the threat was manifestly greater than that at the time of agreeing the contract would the master/owners be able to decline to visit that port. Furthermore, the level of risk to the vessel itself posed by the threat must be considered. The master of a vessel flying the flag of the USA, UK, France, Italy, Canada, Germany, Australia or Israel might have more to fear than say the master of a Greek, Argentinian or South African flagged ship. The charterer may have chosen a ship specifically because of its flag to reduce the risk of an attack. However, if the terrorists are targeting a port or civilian population, then they may not care about the flag of the ship, so that the threat to all ships whatever their flag would become high.

Increased security alerts

Where port authorities are in possession of good intelligence and have taken steps to deal with the threat by increasing security (and after the introduction of the ISPS code, by changing the security state to "State 2 or even "State1"), then the master may have grounds to decline to enter that port. However, the courts will require very strong evidence of the threat against shipping generally and that ship in particular such that it made the port unsafe to enter. The court assumes a high degree of fortitude on the part of seafarers as many of the judgments regarding war risks illustrate. Mere threats of violence, or attacks on other aspects of society such as tourism or civilian populations, are unlikely to satisfy the court in the absence of a clear threat against shipping. The court will not wish to encourage the refusal of shipping to enter ports where only vague threats exist - such behaviour would interrupt trade and hand a partial victory to the terrorists. Public policy would be against this. Only if such attacks reached a level that required additional war risk

premium to be paid making the area a "war zone" would there be any change in this approach.

Unsafe ports

Once in the port, damage by an act of terrorism to the vessel, her crew and cargo may well fall to be decided under the usual rules of "unsafe port". Where a charterer orders a vessel to an unsafe port in breach of the express warranty only to order the vessel to safe ports and berths and as a result of the unsafety of the port, the vessel is damaged, then the charterer will be liable to the owner in damages.

The test to be applied is that the port will not be safe unless the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship. Would a terrorist attack be regarded as an abnormal occurrence? Clearly the test was decided with navigational or meteorological factors in mind such as silting, ice or insufficient depth of water. However, political risks have been found to be relevant in deciding whether a port is safe and the outbreak of hostilities or blockade of a port has been found to make a port unsafe. The question the court will ask is whether the incident was an isolated occurrence which was unexpected and out of the ordinary, or whether, by the frequency of terrorist attack, such risk has become a characteristic of the port and is therefore prospectively unsafe.

Whilst terrorist attacks on shipping are still relatively rare, such is the diversity of the present terrorist threat that almost any port in North American, Europe, the Middle East and Asia could potentially be an unsafe port. However, the test is for a "particular ship" and, even where a ship is damaged by terrorist action at a particular port, such incident would not necessarily make the port unsafe for other ships that used the port without interference.

The ramifications of recent developments in this area are widespread and considerable thought will have to be given when negotiating charterparties, both as to the division of risk between owners and charterers for delay and the consequences of ports being closed and entry refused. This area may give rise to much litigation unless shipowners and charterers effectively consider the new risks and negotiate clauses that remove the uncertainty where delay and extra cost is incurred as a result of the operation of the code and the effects of terrorism.

Norton Rose is an international law firm offering clients service from offices in Athens, Bahrain, Bangkok, Beijing, Brussels, Cologne, Frankfurt, London, Milan, Moscow, Munich, Paris, Piraeus, Singapore, Warsaw, and associate offices in Jakarta and Prague. The firm has over 200 partners, 1000 fee-earners and more than 1900 staff. Detailed information on the Norton Rose shipping group is available on the firm's website at: www.nortonrose.com.