

**THOMAS & CO**

LEGAL and MARINE CONSULTANTS Ltd



PIRACY  
OR  
TERRORISM

~ PART TWO ~

Tony Thomas  
December 2011

In Part One of this paper we considered the Masefield decision in detail. One of the reasons that the public policy argument failed in Masefield was that the assured failed to prove any link between the pirates and terrorists. That was the position in September 2008.

The Court was able to treat piracy as a purely commercial problem and the payment of ransoms as a solution, albeit morally questionable, to that problem. There is a porous divide between piracy and terrorism. It is naive to assume that the various gangs of pirates roaming the Somali coast act independently with command at a local level. Somali piracy is at least highly organised crime involving the various Somali warlords that are the defacto government in most of that country.

In the London “Times” of 24<sup>th</sup> February, 2011 an article appeared which was headed “ ‘Pirates’ - Cut Ransom Deal with Terrorists for Safe Port of Call”. In that article it was reported that Somali pirates had reached a multimillion dollar deal with local Islamic militants allowing the militants a cut of future ransom payouts in return for safe anchorage at Harardhere, a port controlled by Al-Shabeeb fighters. In the agreement not only were the pirates offered a safe haven but pirate chiefs who had been imprisoned by Al-Shabeeb were released.

The report then stated that the effect of this was “to threaten to pour insurance money from the shipping industry directly into the terrorist organisation (Al-Shabeeb) that has close links to al-Qaeda”.

The report went on, “The knock on effect of any pirate deal with militants could effectively transform insurance companies into unwitting terrorist bank rollers whose terms of business would be in violation of anti-terrorist legislation across Europe and America.”

If this link or any other link to terrorists is established then the position regarding ransom payments would change at a stroke. What is a “terrorist” as opposed to a “pirate”?

The Institute Cargo Clauses do not cover terrorism but provide a thoughtful definition of what a terrorist is. They say:-

*7 In no case shall this insurance cover loss or damage or expense...*

*7.3 Caused by any act of terrorism being an act of any person acting on behalf, or in connection with any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of any government whether or not legally constituted*

*7.4 caused by any person acting from a political, ideological, or religious motives.*

There are therefore two parts to this provision. Terrorism is excluded (as defined in 7.3) and in addition the exclusion covers persons acting from political or ideological motives.

The definition of “terrorism” in 7.3 is taken from the Reinsurance (Acts of Terrorism) Act 1993 which states in section 2(2):-

*“In this section ‘acts of terrorism’ mean acts of persons acting on behalf of, or in connection with, any organisation which carries out activities directed towards of the overthrowing or influencing by force or by violence of Her Majesty’s Government in the United Kingdom or any other Government ‘de jure’ or ‘de facto’.*

The onus of proof lies with insurers to bring any claim within the exclusion in 7.3 and 7.4.

Acts of terrorism are covered in the Institute Strikes Clauses (Cargo) which provide in Section One:-

*1. This risk covers ....*

*1.2 Any act of terrorism being an act of any person acting on behalf of, or in connection with, any organisation which carries out activities directed toward the overthrowing or influencing, by force or violence, of any government whether or not legally constituted*

*1.3 Any person acting from a political, ideological, or religious motives.*

Accordingly what is excluded under the Marine Risks is covered in the Institute Strikes Clauses.

If a link to terrorists is proved it would, in all probability, become illegal for any insurance company to pay a ransom. It remains to be seen whether such links are established. The Somali pirates who are directed by highly organised criminals must realise that if links to terrorists are established then the ransom payments will stop as any insurance company making such a payment could be open to criminal prosecution.

It may also be naive to assume that terrorists have not been benefitting from a share of the proceeds of ransom payments made by insurers for some time. The point is that for future guidance the public policy argument which failed in *Masefield* could be decided in favour of the assured where evidence is available to suggest that a ransom payment if made would end up, at least partially, in the hands of terrorists. If this occurs then the position changes. Insurers will be unable to fund ransom payments and indeed the insured will similarly be unable to themselves fund any such payment for fear of prosecution. The insured may very quickly be able to claim an ATL as there would be no **legitimate** prospect of recovering the insured property.

The provisions of the Institute Strikes Clauses (Cargo) provide only limited cover. The cover is further restricted in practice by a Joint Cargo Committee Clause JC 56, which limits the duration of the insurance to when the cargo is in transit as defined by the standard transit clause in the Institute Cargo Clauses.

This has the effect that cover is provided for terrorism risks in respect of cargo in transit (whether by land or by sea), but this would exclude cover for cargo stored in port warehouses or towns.

So let us assume that a Court, based on evidence presented to it, considers that a seizure has been made by terrorists rather than pirates. The Court then finds that the terrorists wish to use the ship and cargo for their purposes rather than merely possess it until a ransom had been paid. In these circumstances, the Court might be more prepared at an early stage to hold that an ATL has occurred.

It is perhaps unlikely that terrorists would simply confine their demands to money. It is more than likely that terrorists or people acting from an ideological / political motive would make some other demands, for example, that certain prisoners held by a certain government are freed.

It may well be then that the demands made by the terrorist are immediately taken out of the hands of insurers. If however the demand was limited only to the provision of a ransom payment, then no payment could be made by insurers without the express sanction of the government of the country in which their business is constituted.

Further, what would be the result if two different ships and cargoes were seized on the same day, one by pirates and one by terrorists? In the first case following *Masefield* the payment of a ransom would not contravene public policy and assuming that negotiations took place within a reasonable period no ATL would arise. The second vessel taken by terrorists is more problematical, firstly one would need to discern their motives in taking the vessel and cargo and even if a recovery seemed possible a payment of a ransom may well then become illegal-without the express sanction of government.

So if at some future date the link between the Somali pirates and terrorists is proven then both the public policy and ATL arguments put forward by the assured in *Masefield* might well be re-opened in a future case.

However for the present, the decision of the Court of Appeal in *Masefield v Amlin* is favourable for underwriters as it has held that seizure by pirates does not automatically constitute an ATL or even a CTL but there is a “wait and see” period and this is particularly the case in relation to the Somali piracy which is presently a major problem facing the insurance industry.

Indeed, news reports at the time of writing this paper suggested that the plague of piracy may be spreading from Somalia to the Yemen with Yemenis joining the pirate hoard. The frequency of attacks seems partly dependent on weather and local conditions (seizure numbers are down during the Southwest monsoon season and during religious festivals). However as the Horn of Africa is presently gripped by famine the ability of those countries to eradicate the pirates simply does not exist. Further with many foreign navies having to make cuts in their budgets as a result of the economic downturn, the pressure remains on the marine industry to self help with the provision of armed guards, their training, and regulation being widely promoted and discussed.

As of 21<sup>st</sup> November 2011 Somali pirates were holding 10 large ships and an estimated 243 hostages.

Assistant US Secretary of State, Carson, stated that the problem of Somali piracy could only be resolved by ending the impunity that exists on land – so learning the lesson from history and how the Barbary pirates ( referred to in Part One of this Paper ) were eventually eradicated. Carson said, “It will only be resolved when Somalia has a government with a security force, a police apparatus and Court system and laws that allow it to prevent and prosecute pirates who seek to carry out activities ashore”. To that list I would add the Somali government must have the political will to stop piracy occurring.

In my view, no such will exists and it will be many years before the government measures suggested by Assistant Secretary Carson are implemented and many years before we can *even* hope that Somalia will take ownership of this problem. The international community will have to continue to take whatever measures it can to attempt to control this problem. So, the insurance industry must continue to take centre stage in ensuring that commerce is able to continue in this extremely difficult and dangerous situation.

~~~