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## **Payment of ransom**

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The call to the owner, frequently at night, from the agent reports that the company's ship has been hijacked by pirates in the Indian Ocean. The crew is apparently unharmed, but has been forced to sail the ship to an anchorage off the coast of Somalia. The favorite pirate strongholds have been located near communities such as Harardhere, Hobyo, and Eyl in northern Somalia. There are several pirate groups and a few independent operators, but they all have similar patterns. Once control of the vessel has been obtained, the master is forced to sail to the Somali coast. The master is also required to notify the agent or owner of the hijacking. Negotiations for payment of the ransom for release of the vessel, its crew, and its cargo commence shortly thereafter. In typical cases, negotiations take six to ten weeks. Negotiations can take longer in some cases, as when the vessel is carrying a valuable or unusual cargo (such as when a VLCC loaded with crude oil or a cargo ship loaded with military weapons has been seized). Occasionally, the pirates decide to retain the vessel for a while to use as a mothership from which to launch further assaults. Eventually, though, the vessel runs low on bunkers and thus loses its usefulness.

The owner is then faced with a demand from the pirates for payment of ransom. As the parties haggle over an amount, the owner is confronted by moral and legal dilemmas. Morally, is it right to pay monies to criminals? The answer clearly is "no", but it is also clearly the lesser of two evils, since the pirates will continue to hold the vessel, its crew, and its cargo until ransom is paid.

The more difficult question relates to the law: Is it legal to pay monies to the pirates? The answer to the legal question is "It depends."

If there was any doubt as to where British law stood on this issue, that was resolved by a recent decision of the UK Court of Appeal. The chemical tanker Bunga Melati Dua, while on a voyage from Malaysia to Rotterdam, was hijacked by pirates in the Gulf of Aden on August 19, 2008. Plaintiff had a cargo of biodiesel on the tanker when it was hijacked. On September 18, 2008, plaintiff cargo owner served a notice of abandonment on defendant insurers. The notice was promptly rejected. The tanker, its crew, and its cargo were released by the pirates on September 29, 2008 upon payment of a ransom of \$2 million by the tanker owner. The tanker resumed its voyage, reaching Rotterdam on October 26, 2008. Unfortunately, the market for

biodiesel fuel is seasonal. The cargo had an insured value of \$13,326,481.75 (including freight). Plaintiff claimed a loss of \$7,608,845.30, following the delayed sale of the biodiesel. Defendant insurer denied the claim and litigation ensued.

Plaintiff asserted that it suffered an actual total loss (ATL) of the cargo when the hijacking occurred and that the law should not take account of the payment of ransom by the tanker owner as a relevant, legitimate reason for calculating the possibilities of recovery. Defendant insurer asserted that the cargo was not irretrievably lost as there was a good chance of negotiations for payment of ransom bearing fruit. Most importantly, defendant asserted that payment of ransom was neither illegal nor against public policy and therefore the prospects of recovery should be taken into account for purposes of applying the test of irretrievable deprivation. Plaintiff responded that payment of ransom, which amounted to submission to extortion, was so undesirable from the point of view of the public interest and universal principles of morality, that it could be no part of an insured's duty to preserve its property from loss by succumbing to a ransom demand. Thus, the property in this case should be considered irretrievably lost, physically and legally, where the only means of recovering it was to do something that an insured could not reasonably be expected or required to do.

The court stated that piratical seizure in the circumstances of this case, where there was not only a change, but a strong likelihood, that payment of a ransom of a comparatively small sum, relative to the value of the vessel and its cargo, would secure the delivery of both, was not an ATL. It was not an irretrievable deprivation of property, but a "wait and see" situation. Capture or seizure is not automatically an ATL situation. Rather, it is fact specific.

After discussing the British law relating to recovery for ATL of marine cargo and the circumstances surrounding modern-day Somali piracy, as compared to the previous experience with traditional piracy and capture, the court squarely addressed the issue of the legality of the payment of ransom.

The court noted that there is no British legislation against the payment of ransoms. In fact, a ransom payment is subject to recovery as a 'sue and labor' expense under British insurance law. While pirates, the enemies of mankind, may not enforce an agreement to pay a ransom, there is no universal morality against the payment of ransom, the act not of the aggressor but of the victim of piratical threats, performed in order to save the property and the liberty or life of hostages. There is no evidence of such payments being illegal anywhere in the world. This is despite the realization that the payment of ransom, whatever it might achieve in terms of the rescue of hostages and property, itself encourages the incidence of piracy for the purpose of extracting more ransoms. As an aside, the court opined that its position might be different if the perpetrators were shown to be terrorists rather than typical pirates.

Ultimately, the court concluded that there is no universally recognized principal of morality, no clearly identified public policy, and no substantially incontestable public interest which could lead the courts to state that the payment of ransom to the Somali pirates should be regarded as a matter that stands beyond the pale, without any legitimate recognition. There are

only elements of conflicting public interests, which push and pull in different directions, and have yet to be resolved in any legal enactments or international consensus.

The UK House of Lords has also examined the problems posed by Somali piracy. Its report on the matter included testimony from Mr. Gavin Simmons, head of international policy at the UK Chamber of Shipping, who explained his view that a “fragile status quo” had been achieved that was “delivering our people and ships back”, the safe return of whom was the priority. Mr. Jan Kopernicki, co-chair of the UK Shipping Defence Advisory Committee, testified:

At first sight, paying ransoms is an anathema . . . and we are very familiar with the argument that it might fuel further activity, but . . . the priority is around the safety of seafarers. . . There is . . . a conversation emanating from Washington about suggestions to make payment of ransoms in some way illegal, [but] there is a very good international discussion perhaps not to support the American move. . . We do have a concern that if a view were taken that paying ransoms was illegal, the process would go underground, and that would be far, far worse. None of this is good but this is an extremely difficult situation and at the moment, thankfully, we have had very little loss of life.

Lord Malloch-Brown, minister of state at the UK Foreign and Commonwealth Office (FCO), testified: “We are very clear that while we recognize this practice goes on, we will not be a party to it. We do not endorse or condone it, we do not participate in it, but it is a reality of this situation.”

The House of Lords Report concluded, in pertinent part: “We support the status quo whereby the payment of ransom to pirates is not a criminal offence under United Kingdom law. We recommend that the Government continue to monitor the potential risks of monies reaching terrorists.”

The situation in the United States is unclear and unsettling.

As of the date of writing this article, no US ship has been hijacked and held for ransom by Somali pirates (although there was one instance in 2008 where a US-owned foreign-flag ship was hijacked and held for ransom, which was paid). One US ship – the *Maersk Alabama* – was boarded by pirates on April 8, 2009. The pirates departed in the ship’s lifeboat, taking the master, Captain Richard Phillips, with them. A US Navy warship, the *USS Bainbridge* (DDG 96) arrived on scene shortly thereafter. One pirate transferred to the warship for medical care. The other three pirates were killed by Navy Seals several days later and Captain Phillips was freed. No ransom was ever demanded or paid.

Research has failed to find any reported US court decisions on legal issues relating to payment of ransom to pirates for return a hijacked vessel.

There has been, though, a significant development on the political side. On April 13, 2010, President Obama issued an Executive Order finding that the deterioration of the security situation and the persistence of violence in Somalia and acts of piracy and armed robbery at sea off the coast of Somalia constitute an unusual and extraordinary threat to the national security and foreign policy of the United States. Acting under the authority of International Economic Powers Act and the National Emergencies Act, he declared a national emergency to deal with the Somali threat. The effect of the Executive Order has been to threaten persons subject to the jurisdiction of the United States with prison and/or fines for, among other things, any provision of funds for the benefit of any person whose interests are blocked pursuant to the Executive Order. The Office of Foreign Assets Control (OFAC) has since issued information regarding specially designated nationals (SDNs) identified in the Annex to the Executive Order, several of whom are alleged to have ties to piracy in waters off Somalia. OFAC expects persons who might be subject to US law, including banks and insurance companies, to check with it prior to paying ransom to Somali pirates in an effort to ensure that monies are not for the benefit of a SDN. The process is largely opaque and it is unclear how OFAC determines where any ransom monies eventually go. To date, though, OFAC has not blocked payment of any ransoms to Somali pirates for release of hijacked ships, their crews, or their cargoes.

The position of the UK Government seems to be that, while it does not support the payment of ransom to Somali pirates, it will not stand in the way, unless possibly there was clear evidence that the ransom monies were going to terrorists. The position of the US seems to be that it presumes that ransom monies are going to terrorists and demands the right to examine each proposed transaction (payment of ransom to Somali pirates) so as to be reasonably sure that is not the case. While the two different approaches have ended up with the same result to date (ransom payments have invariably been made), the impact is different. The UK Government basically turns a blind eye and retains a modicum of plausible deniability. The US Government, on the other hand, in addition to introducing delay into the negotiation process, has made itself complicit in the payment of ransom to the Somali pirates. Obviously, each of the two governments believes that their handling of this very difficult issue is the preferred one. Other nations have been less forthcoming regarding their policy regarding payment of ransom to pirates.

The world continues to hope that the piracy problem in the Indian Ocean will be resolved soon. Until that day, the Somali pirate will continue to hijack ships and the owners of those ships will continue to pay ransoms. Very sad, but very true.