

**PIRACY IN SOMALIA AND INSURANCE LAW:
MASEFILED AG V. AMLIN CORPORATE MEMBER LTD
[2010] EWHC 280 (COMM)***

**Somali'deki Deniz Haydutluğu Meselesinin
Sigorta Hukuku Kapsamında İncelenmesi**

Ar. Gör. Alperen Akkaya **

Introduction

Piracy has enormous magnitude in the eye of beholder because not only victims, which are ships companies, insurance companies and ship crew, but also the financial world are affected by piracy. The piracy problem is historically very old and has not been solved since the beginning stages of maritime commerce.¹

In twenty one century, there has been a destructive surge of piracy as a result of Somalia's civil war. Therefore, the Gulf of Aden-or "pirate alley" has turned into the world's most dangerous waterway.² In addition, in respect of Captain Jayand Abhyankar from the Maritime Bureau "Somalia is the most dangerous place these days. The Malacca Straights used to be one of the worst, and the waters of Nigeria and Iraq are currently bad. But Soma-

* Bu çalışma, University Of Wales Swansea University'de, 2009-2010 yılında LLM tezi olarak sunulmuştur.

** Yalova Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı Araştırma Görevlisi (aakkaya86@hotmail.com).

¹ Article by Philip Roche, May 2010, "*Piracy - The legality of ransom payments (Masefield AG and Amlin Corporate Member Ltd)*", Shipping newsletter – Legalseas, see also; <http://www.nortonrose.com/knowledge/publications/2010/pub27624.aspx?page=081121120820&lang=en-gb> 11.08 2010

² Article by by Rene L. Siemens, Joshua J. Pollack and Jessica L. Freiheit ,” *Piracy's Impact on Insurance*” Risk and Insurance Management Society, Inc see also <http://www.rmmagazine.com/Magazine/PrintTemplate.cfm?AID=3959> 11.08.2010

lia's the worst."³

According to the International Maritime Organization, in 2008, totally 135 pirate attacks occurred in that region. Moreover, 101 piracy crimes were committed in the second half of 2008. In addition, 44 vessels were captured by Somali pirates and pirates kidnapped 600 seamen and held them to ransom at gunpoint.⁴ According to the International Maritime Bureau, in 2009 totally 153 ships were boarded, 49 ships were hijacked and some 120 vessels were fired upon.⁵ Among them, some 217 incidents can be pertained to Somali pirates, including 47 ships being hijacked and some 867 crew members taken hostage. When compared to 2008, although the number of attacks has almost doubled, the number of successful hijackings is proportionally less in 2009. But it is clear that when a ship is taken by pirates, a ship owner has both a morally and legally difficulties. After taking a ship by pirates, the most important thing is the safe return of the vessel and its crew.⁶ Despite the all Somalia Pirates case *Masefield v Amlin*⁷ is the first to have considered piracy in the context of the 1906 Marine Insurance Act.⁸

In this project work, I am going to discuss the *Masefield v Amlin. in terms of three aspects*. Firstly I am going to mention about the facts of this case. Secondly, I am going to state the issues. Thirdly, I am going to discuss the decision of court. After discussion, I am going to mention about legality of ransom payments, noticeable comments and finally I am going to give my ideas about this case.

1. *Masefield v Amlin*

1.1. Facts

The claimant, *Masefield AG (Masefield)*, alleged that on the seizure of

³ <http://news.bbc.co.uk/1/hi/world/africa/4584878.stm>, 15.08.2010

⁴ http://www.imo.org/home.asp?topic_id=1178 10.08.2010

⁵ International Maritime Bureau, 2009 Worldwide piracy figures surpass 400 (2010)

⁶ Article by Philip Roche, May 2010, "*Piracy - The legality of ransom payments (Masefield AG and Amlin Corporate Member Ltd)*", Shipping newsletter – Legalseas, see also; <http://www.nortonrose.com/knowledge/publications/2010/pub27624.aspx?page=081121120820&lang=en-gb> 11.08.2010

⁷ *Masefield v Amlin* [2010] EWHC 280 (Comm)

⁸ Article by B.J. Macfarlane. ,19th April 2010, "*Seizure, ransom payments and public policy*", B.J. Macfarlane Co, see also http://www.bjm-co.com/reports/Article_009_Siezure_Ransom_190410_150k.pdf 13.08.2010

the carrying ship by pirates and its removal into Somali waters the cargo became either an actual or constructive total loss. The claimant was the owner of two parcels of bio-diesel shipped on board “*Bunga Melati Dua*”, a chemical/palm oil tanker, which was captured by Somali pirates in the Gulf of Aden during a journey from Malaysia to Rotterdam. “*Bunga Melati Dua*” was taken to Somali waters, together with its crew and cargo. The defendant, *Amlin Corporate Member (Amlin)*, was the insurer of the cargo under an open cover contract which covered loss not only theft but also piracy. Soon after the high jacking, negotiations between the pirates and the owners of the vessel, a state owned Malaysian company, were started for release the vessel, cargo and crew. In the course of those negotiations, about a month later the vessel had been seized, *Masefield* gave a notice of abandonment on *Amlin*. However, *Amlin* declined the notice and the parties agreed that proceedings should be deemed to have commenced on that date. Almost after 10 days a ransom was paid by the ship owner to the pirates and the ship was shortly thereafter released together with the crew. The vessel cruised to Rotterdam where the discharge port was. *Masefield’s* brought a claim to their cargo insurers *Amlin Corporate Member (Amlin)* for recover the damages and expenses.⁹

1.2. Issues and decisions

Masefield’s brought a claim to their cargo insurers *Amlin Corporate Member (Amlin)* alleging that the cargo was not only an actual total loss under section 57 of the Marine Insurance Act 1906 but also a constructive total loss under section 60 of the Act as the ship and the cargo had been *reasonably abandoned on account of its total actual loss appearing to be unavoidable*. “*Masefield submitted that the possibility or even likelihood of an effective ransom payment should be ignored for the purposes of both section 57(1) and section 60(1)*”. *Amlin* indicated that it was clear from very soon after the vessel was high jacked; the vessel, the cargo and crew were likely to be released fairly quickly on payment of a ransom.¹⁰

“*The first issue for the court, and to which the majority of the judgment was directed, was whether at the time of tender of the Notice of Abandonment, it could be said that the claimant had been irretrievably deprived*

⁹ [2010] 1 Lloyd's Rep. 509

¹⁰ Ibid

*of the cargo and, therefore, it had been actually totally lost within the meaning of s57(1) of the 1906 Act. In the alternative, the claimant argued that there had been a constructive total loss under s 60 of the Act, on the basis that the cargo had been reasonably abandoned, due to its actual total loss appearing to be unavoidable”*¹¹

1.2.1. Section 57 (1) of the Marine Insurance Act 1906 (Actual total loss)

Before discussing the court decision I briefly want to mention about Actual Total Loss.

*“(1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.”*¹²

It is clear that subsection 57(1) contemplates three categories of actual total loss.¹³

(a) Destruction

Actual total loss caused by destruction or damage include a loss of charterer.¹⁴ *In Cambridge v Anderton*,¹⁵ the vessel was badly damaged in St. Lawrence and later sold. Abbott C.J. decision was the differentiation of a partial loss and total loss.¹⁶

Abbott C.J. : (p 692)¹⁷ *“If the subject matter of insurance remained a ship, it was not a total loss, but if it were reduced to a mere congeries of planks, the vessel was a mere wreck, the name which you may think to apply to it cannot alter the nature of the thing.”*

¹¹ Article by Andrew Preston, Simon Culhane and Mike Roderick, 7 April 2010,” *Piracy and insurance: the law*”, Clyde & Co, see also; <http://www.ifw-net.com/freightpubs/ifw/article.htm?artid=20017759345&src=rss> 14.08.2010

¹² Section 57 (1) of the Marine Insurance Act 1906

¹³ H. Bennett, (2nd Ed), *“The Law of Marine Insurance”*, (2006, New York, Oxford University Press Inc.), p,643

¹⁴ Ibid.

¹⁵ *Cambridge v Anderton* (1824) 2 B&C 691

¹⁶ S.Hodges (1st Ed) *“ Cases and Materials on Marine Insurance Law”* (1999, London, Cavendish Publishing Ltd) p 602

¹⁷ *Cambridge v Anderton* (1824) 2 B&C 691

In *Bell v Nixon*,¹⁸ the court faced to the problem about the degree of damage required to determine whether the vessel was a total loss. The importance of a notice of abandonment was also appeared.

It was held that, on the slight evidence given, a notice of abandonment was given by the plaintiff therefore; they could recover for a total loss. However, the issue of notice of abandonment and the actual condition of the ship at the time of abandonment were discussed by the court.

Dallas J (p 424)¹⁹: “...*The assured has a right to abandon under certain circumstances; and, in some cases, he may claim a total loss without abandonment. But, if the case doubtful, the assured ought not to take upon himself to determine for underwriters; to break up the ship; and call upon them for a total loss. I think that he should, in the instance, have communicated to the underwriter the state of the vessel. The ship is proved to have been in that condition that it was necessary to have a survey. Examination and judgement were therefore applied to determine what it was expedient to do. The arguments by which this ship is represented to be a wreck proceed upon a fallacy. She was not a wreck. Her timbers were together; she existed as a ship specially, both when she was surveyed, and when she was sold; and it is not because there was no dock at Limerick to receive her and because she is found to contain rotten timber upon breaking up, that she is to be represented as a wreck. If her planks and apparel had been scattered in the sea it would have been another question...but the plaintiffs ultimately had a verdict on two points: (1) that a notice of abandonment had been given to the underwriters, of which fact the plaintiffs gave some light evidence; (2) that the vessel was not unseaworthy.*”

(b) Damage so as to cease to be a thing of the kind of insured

When considering whether insured vessel has not been “to be a thing of the kind insured” any more, the question is whether the insured property has suffered a change of commercial identity.²⁰

In *The Shakir III*²¹ case, a ship, which called The Shakir III, was in-

¹⁸ Bell v Nixon (1816) Holt 423

¹⁹ Ibid

²⁰ H. Bennett, (2nd Ed), “*The Law of Marine Insurance*”, (2006, New York, Oxford University Press Inc.), p,644

²¹ Fraser Shipping Ltd v Colton (The Shakir III) (1997) 1 Lloyd’s Rep 586

sured for a actual total loss only for a voyage under tow from Jebil Ali to both Shanghai and Huang Pu. The underwriters did not receive any information from the plaintiff's brokers about the change of destination. The vessel towed to the Huang Pu because it was driven aground and stranded as a result of typhoon. In addition, the costs of its salvage were thought prohibitive. Owners of the vessel, the plaintiff, claimed that the vessel was an actual total loss in that it was a wreck under their own policy. The question arose whether there was an actual total loss or not. The insurers rejected to indemnify the owners contending, *inter alia*, that the ship was not an actual total loss.²²

Potter LJ²³ stated that "*it is essential components were not so damaged or dissipated that its role and function as a dead ship susceptible of being towed away for scrap had been destroyed.*" After all, insurers were not liable under a policy which covered actual total loss only.²⁴

(c) Irretrievably Deprivation

Section 57 (1) of the Marine Insurance Act 1906 states the last provision of actual total loss, namely, where the assured is "irretrievably deprived" of the subject matter insured.

This provides a recovering right for the assured. This right is that the assured is deprived of his property, although the property still exists in specie. This deprivation may take the form of seizure or appropriation by a third party or the actions of a barratrous crew.²⁵

In addition, H. Bennett stated that there is no requirement about certainty that the property will not be recovered under irretrievably deprivation definition. It is certain that it is not possible to attain unless the property has been destroyed. Under the marine insurance law irretrievably deprivation essentially involves a lower possibility of recovery.²⁶

²² K. Noussia (1st Ed) "*The Principle of Indemnity In Marine Insurance Contracts: A Comparative Approach*" (2007, New York, Springer,) p 92,93

²³ Fraser Shipping Ltd v Colton (The Shakir III) (1997) 1 Lloyd's Rep 586 -591

²⁴ H. Bennett, (2nd Ed), "*The Law of Marine Insurance*", (2006, New York, Oxford University Press Inc.), p,645

²⁵ S.Hodges (1st Ed) "*Cases and Materials on Marine Insurance Law*" (1999, London, Cavendish Publishing Ltd) p 612

²⁶ H. Bennett, (2nd Ed), "*The Law of Marine Insurance*", (2006, New York, Oxford Univer-

In *The Anita*,²⁷ Vietnamese customs authorities seized the insured vessel and afterwards the vessel was confiscated by order of a special military tribunal. On 13 March 1967, underwriters employed the principal intermediary in order to release the vessel in a security way. But, he confronted him that the releasing was not possible. He prepared a survey report which indicated that it was possible to persuade the Vietnamese government to sell the vessel by auction. Therefore if there were no other bidders, the vessel easily could be bought back. On the other hand, bribery of certain officials would be necessary. If there was not a problem in this scenario, it would take several months to come to fruition. As of 2 June, there was not any action about the scenario. On 29 August 1967, the assured alleged that there was an actual total loss because the ship had been detained for 17 months. Eventually, the ship was recovered by auction purchase on 21 May 1968. Mocatta J. mentioned obiter that, despite the very pessimistic scenario for recovery, the test of irretrievable deprivation was not satisfied. The judge indicated that the test “clearly far more severe” than that for unlikelihood of recovery.²⁸

1.2.2 Deprivation under actual total loss

*“The question of actual total loss by deprivation arises where the thing insured is placed, by the perils insured against, in such a position that it is totally out of the assured or the underwriter to procure its arrival. This category of case is not confined to the deprivation perils, such as capture and seizure.”*²⁹

Every efficient deprivation of the *spes recuperandi* means an actual total loss; if the thing insured controls by the stranger, not by the assured; if, by any circumstances over which he has no control, it can never, or within no assignable period be brought its real destination-in such circumstances the fact of its remaining *in specie* at any forced termination of the risk of no importance.³⁰

sity Press Inc.), p,645

²⁷ Panamanian Oriental Steamship Corp v. Wright (The Atina) (1970) 2 Lloyd’s Rep 365

²⁸ Ibid, p 383

²⁹ J. Arnould, J. GILMAN, R. MERKIN and others (7th Ed), “*Arnould’s Law of Marine Insurance and Average*”, (2008, London, Sweet & Maxwell), p 1330

³⁰ Ibid, p 1331

1.2.3. The Court decision under the section 57(1)

It was held that the issue was whether, when notice of abandonment was given on 18 September 2008, *Masefield* had been irretrievably deprived of the cargo and because it had been actually totally lost albeit released at a later date following payment of a ransom by or on behalf of the ship owners.

The existence and nature of piratical attacks of Somalia was famous, since the actual scenario of released of the cargo as on 18 September were good. In any event, the evidence showed that the ship, cargo and crew were likely to be released in short order, on payment of a ransom, as proved to be the case.

So far as actual total loss was concerned, the issue was whether on 18 September 2008 the claimant was “irretrievably deprived” of the cargo. On the evidence, all interested persons including the claimant had fully knowledge about the cargoes were likely to be recovered. The claimant’s submission would been rejected by the Court that high jacking by pirates constituted an actual total loss without more (*Dean v Hornby* (1854) 3 El & Bl 180, *Kuwait Airways v Kuwait Insurance* [1996] 1 Lloyd’s Rep 664 and *Marstrand Fishing Co v Beer* [1937] 1 All ER 158 considered).³¹

In *Marstrand Fishing Co Ltd v Beer*,³² a fishing vessel *Girl Pat* was proceeded by the master to Dover instead of proceeding to North Sea. After six weeks without hearing anything from the ship because of deviation, the ship owners gave the notice of abandonment to the insurer, which they admitted as equivalent to a writ, instead of abandonment. Afterwards it was known that she had put into Channel Islands before sailing via Spain and West Africa to Georgetown in British Guiana, where the ship was arrested. The ship owner brought a claim both an actual and constructive total loss by barratry, which the underwriters continued to contest.

Porter J³³ held that “*First of all, with regard to an actual total loss, it is said that barratry is analogous to capture, and that capture is an actual total loss, though that loss may be redeemed by a recapture. I doubt if this ever was the true question. I think it was always a question of fact whether capture was an actual total loss or merely a possible constructive total loss.*

³¹ Lloyd’s Maritime Law Newsletter 19 Mar. 2010

³² *Marstrand Fishing Co Ltd v Beer* (1937) 1 All ER 158

³³ *Ibid*, p 163

Capture followed by condemnation no doubt was actual total loss, but that was because the vessel had in fact been condemned; the war was supposed to last indefinitely, and, therefore, there was no chance within any reasonable time of the ship being restored. The capture alone I do not think was ever necessarily an actual total loss. It is possible that if the vessel had been carrying contraband and that condemnation was certain, she might be held to be an actual total loss, but I do not think it certain, even then, that that result would follow. Normally, I think that capture is a constructive total loss, and the confusion which has arisen with regard to whether it is an actual or constructive total loss, arose merely because, in the earlier cases, the distinction between those two classes of loss was not kept clear...The class of case I am referring to is Dean v Hornby and Stringer v English and Scottish Marine Insurance Co. However that may be, whether under the old law capture was or was not an actual or constructive total loss, the case is now governed by section 56-60 of the Marine Insurance Act 1906. The Act provides, in section 57, amongst its definitions of "actual total loss", "if the vessel be irretrievably lost". In my view, no one could say here that the vessel was irretrievably lost to her owners. Under the Marine Insurance Act, loss by barratry is necessarily an actual total loss, and in this case I find there was no actual total loss.

In *Dean v Hornby*,³⁴ A vessel was insured under a time policy which was terminated 21st April 1852. In December 1851, during her homeward journey from Valparaiso to Liverpool, she was seized by pirates in the Straits of Magellan and in January 1852 the ship was recaptured by an English war steamer; and a prize master took the control, and brought her to Valparaiso. The owners received information of all these issues at the end of April 1852; and they, on 30th April 1852, gave notice of abandonment to the underwriters, indicating that information had arrived "of the condemnation at Valparaiso" of the ship "as a prize to Her Majesty's steamer." The underwriters refused to accept. The vessel was sent home by the recaptors from Valparaiso, under the control of a prize master, with instructions to proceed to Liverpool, and obtain adjudication in the Court of Admiralty. She suffered a bad weather conditions, and put into Fayal on 19th August 1852, where she was sold by the prize master, being then in a state not justifying the sale. In December 1852, the owners made a claim against the underwriters for a total loss.

³⁴ *Dean v Hornby* (1854) 3 El & Bl 180

It was held that *“they were entitled to recover as for a total loss, there having been a total loss by the piratical capture, in the first instance, and the owners not having afterwards, up to the time of the bringing of the action, had either actual possession or the means of obtaining it: and it being immaterial whether there was or was not a right of detainer against the owners. That the notice of abandonment was early enough, being given in reasonable time after the receipt of the information of the loss. The inaccurate statement of the ship having been condemned as a prize at Valparaiso did not render invalid the notice.”*

Here the Claimant stood upon legal authority from 1854³⁵ which they argued that, in the case of seizure by pirates who wanted to exercise dominion over a vessel or cargo, there was straightaway an actual total loss even though the property was later released. It necessarily followed, in the eyes of the Court that for the purposes of establishing irretrievable deprivation the Claimant must establish that the recovery was not possible. But, when there is a very strong correlation between the payment of a ransom and the return of the vessel and cargo, the Claimant could not be said to have suffered irretrievable deprivation of the cargo, at the time of the claim.³⁶

1.2.4 Section 60 of The Marine Insurance Act (Constructive total loss)

Before discussing the court decision I briefly want to mention about Constructive Total Loss.

“(1)Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2)In particular, there is a constructive total loss—

(i)Where the assured is deprived of the possession of his ship or goods

³⁵ Ibid

³⁶ Article by Philip Roche, May 2010, *“Piracy - The legality of ransom payments (Masfield AG and Amlin Corporate Member Ltd)”*, Shipping newsletter see also <http://www.nortonrose.com/knowledge/publications/2010/pub27624.aspx?page=081121120820&lang=en-gb> 11.08.2010

by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or

*(iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.”*³⁷

To understanding the reasons why notice of abandonment required in the circumstances of constructive total loss, we must understand what exactly means “constructive total loss”, a term which appears to be peculiar to marine insurance. According to the section 60 (1) of the Marine Insurance Act 1906 contains the above definitions.³⁸ Also Section 60, subsection (1) can be explained with an example where a vessel has ground on rocks and is being permanently pounded by wind and waves in circumstances where nothing can be done to recover the vessel. There is the idea of competent authorities (Salvage Association) that, unless the circumstances changes soon, the vessel will break up because of wind and waves and become a complete wreck; thereby qualifying for an Actual Total Loss claim under the hull policy. It is unnecessary to wait for the Actual Total Loss to occur for the assured who can abandon the wreck to the underwriter and claim Constructive Total Loss under the hull policy.”³⁹

According to the Arnold,⁴⁰ *”A constructive total loss in Insurance Law*

³⁷ Section 60 of The Marine Insurance Act

³⁸ J.K. Goodacre, (3rd Ed), *“Marine Insurance Claims”*, (1996, London, Witherby & Co. Ltd), p 966

³⁹ R.H. Brown, (2nd Ed), *“Introduction to Marine Insurance Training Notes for Brokers”*, (1995, London, Witherby & Co. Ltd), section 11 p 7

⁴⁰ J. Arnould, J. GILMAN, R. MERKIN and others (7th Ed), *“Arnould’s Law of Marine Insurance and Average”*, (2008, London, Sweet & Maxwell), p 1353

is that which entitles the assured the whole amount of the insurance, on giving due notice of abandonment.” For better understanding the constructive total loss, it can be compared with the actual total loss. “The latter is a total loss in law in fact; the former in a total loss in law but not in fact, and must be converted, by a properly notified abandonment, into a total loss in fact, to entitle the assured to claim a total loss against his insurers.”⁴¹ If the subject matter insured is not in fact totally lost, but it is likely become so, from improbability, impracticability or expense of repair or recover, there will be a constructive total loss. Doctrine is unique to marine insurance⁴²; there could be a constructive total loss for some purposes even though there has been no insurance, but the expression has no other definition that that which is given to it by the law of marine insurance.⁴³

In addition according to the Arnold,⁴⁴ The doctrine appears to have originated in cases of seizure, to decrease the great hardship that would be suffered by an assured whose ship was captured, if he should wait the chance of her being recaptured before he could bring an action on his policy.⁴⁵ It was, however, soon extended to damages of other kinds.

1.2.5. Some important cases which are related with capture under the section 60

- *Polurrian Steamship Co Ltd v Young*⁴⁶

Polurrian, which was a neutral steamship, was owned by the plaintiffs and insured against the risk of capture seizure and detention by the defendants. In 1912, at the time of Greece- Turkey war the ship was carrying Welsh coal for Constantinople (Istanbul), however, she was captured and detained by a Greek warship for carrying contraband. The plaintiffs made a claim for a constructive total loss: the defendants accepted detainment, but not capture. The decision of the trial judge was upheld by the Court of Appeal and they ruled that, the recovery of the ship was uncertain, however, it

⁴¹ See also *Stewart v Greenock Mar. Ins. Co.* (1848) 2 H.L.C. 159 at 185

⁴² See also *Assicurazioni Generali v Bessie Morris Co.* (1892) 2 Q.B.652.

⁴³ See also, *Manchester Ship Canal Co. B Horlock* (1914) 2 Ch. 199

⁴⁴ J. Arnould, J. GILMAN, R. MERKIN and others (7th Ed), “*Arnould’s Law of Marine Insurance and Average*”, (2008, London, Sweet & Maxwell), p 1353

⁴⁵ See also, per Lord Atkinson in *Moore v Evans* (1918) A.C. 185 at 193-194

⁴⁶ *Polurrian Steamship Co Ltd v Young* (1915) 1 KB 922, CA

was not unlikely.⁴⁷ In addition in the case, after 6 months of capture the ship was realised because the captain did not know the state of the war.⁴⁸

Warrington⁴⁹ held that “*I do not feel myself justified in holding that the balance probabilities has been proved to me so clearly against her recovery that I can say that such recovery was ‘unlikely’. This being so, the plaintiffs have failed to make out their case, and this appeal must be dismissed.*”

- Marstrand Fishing Co Ltd v Beer⁵⁰

The fishing vessel *Girl Pat* was owned by the owner who claimed for constructive total loss when the master and crew of the ship absconded with her for their own purposes. Although, the owners had been effectively deprived of possession of the ship, the question before the court was whether this deprivation amounted to a constructive total loss.

It was ruled by the court that there was not a constructive total loss, and, in so ruling, analysed in depth the term of the ‘unlikely to be recovered’ as well as referring to the *Pollurian* case for authority.⁵¹ Porter J⁵² held that the test of ‘unlikely to be recovered’ must be objective, at the time when the objective test should be made was the time when the writ ,enforcing the abandonment, was made.

- Kuwait Airways Corporation v Kuwait Insurance Co SAK⁵³

At the time of the invasion of Kuwait by Iraq, Kuwait Airways’ aircraft and spares were plundered by the invading forces and the airline made a immediate claim upon their war risk insurers. One of the issues before the court was whether all the losses arose out of one circumstance and Rix J

⁴⁷ S.Hodges (1st Ed) “*Cases and Materials on Marine Insurance Law*” (1999, London, Cavendish Publishing Ltd) p 638

⁴⁸ M.D. Chalmers, E.R.H. Ivamy, (6th Ed) “*Chalmers’ Marine Insurance Act, 1906*” (1966, London, Butterworths), p 85

⁴⁹ *Pollurian Steamship Co Ltd v Young* (1915) 1 KB 922, CA, p 937

⁵⁰ *Marstrand Fishing Co Ltd v Beer* (1937) 1 All ER 158

⁵¹ S.Hodges (1st Ed) “*Cases and Materials on Marine Insurance Law*” (1999, London, Cavendish Publishing Ltd) p 640

⁵² *Marstrand Fishing Co Ltd v Beer* (1937) 1 All ER 158, p 164

⁵³ *Kuwait Airways Corporation v Kuwait Insurance Co SAK* (1996) 1 Lloyd’s Rep 664

reflected upon the objective test in marine insurance for constructive total loss in order to made the point clear.⁵⁴

According to Rix J⁵⁵, “... *the matter must be scrutinised from the point of view of an informed observer placed in the position of the insured. I would suggest that as in the case of analysing a situation for the purpose of deciding whether a constructive total loss has accoutred, the scrutiny must be performed on the basis the true facts as at that time and not simply on the facts as they may appeared at that time: and that, as in the case of frustration, the probabilities as to true facts as at that time may be tested by reference to subsequent events.*”

- *Stringer v English and Scottish Marine Insurance Co*⁵⁶

The prudent uninsured owner criterion was applied by the court in order to support their decision that the assured were not at fault in not preventing the sale of the cargo. The seizure, which on the end led to enforce the sale, was held to have occasioned the total loss of the goods.⁵⁷ According to the Blackburn J⁵⁸, “...*They might have prevented the sale by giving security, and generally, we think that it would be reasonable thing to give security rather than allow the goods to be sold. But, in this case, from the peculiar nature of the American currency at the time, those who became sureties must have bound themselves in the event of the condemnation to pay the value of the goods estimated in paper dollars at a time when gold was at from 150 to 180 premium; and it was not improbable that they might be called upon to pay when gold was at par, thus being liable to pay from 150 to 180 % more than the value of the goods.*”

Also it was added that,⁵⁹ “*We come, therefore, to the conclusion of fact, that the assured could not by any means, which they could reasonably*

⁵⁴ S.Hodges (1st Ed) “ *Cases and Materials on Marine Insurance Law*” (1999, London, Cavendish Publishing Ltd) p 641

⁵⁵ Kuwait Airways Corporation v Kuwait Insurance Co SAK (1996) 1 Lloyd’s Rep 664, p 686

⁵⁶ Stringer v English and Scottish Marine Insurance Co (1869) LR 4 QB: 1870 5 QB 599

⁵⁷ S.Hodges (1st Ed) “ *Cases and Materials on Marine Insurance Law*” (1999, London, Cavendish Publishing Ltd) p 644

⁵⁸ Stringer v English and Scottish Marine Insurance Co (1869) LR 4 QB: 1870 5 QB 599, p 691

⁵⁹ Ibid, p 692

be called on to adopt, have prevented the sale by the American Prize Court, which at once put an end to all possibility of having the goods restored in specie, and consequently entitled to assured to come upon their insurers for a total loss."

1.2.6. Constructive total loss of ship by deprivation of possession

*"The assured on the ship has a right to give notice of abandonment immediately he hears that his ship has been forcibly taken out of his possession and control by capture, for from the moment of capture he is deprived of the free disposal of his vessel- at all events for a time, and perhaps forever."*⁶⁰

In addition although, notice of abandonment had not been previously given, yet the assured might at that moment have abandoned, he may recover as for a total loss, notwithstanding existing of here mere hull. This recovery will only happen, if the vessel after the recapture comes to the disposal of the owner, and remains at the time of bringing the action in such a state.⁶¹

If the owner of the ship is deprived of the free use and disposal of his vessel, even though the master and crew of the ship remain on board, he will be said to be "deprived of possession"⁶²

1.2.7. The Court decision under the section 60

In *Masefield v Amlin*, the claimant also argued that according to the section 60(1) of the Act there had been a Constructive Total Loss on the basis that the cargo had been reasonably abandoned because its actual total loss appearing to be unavoidable.⁶³ In addition, unluckily for *Masefield*, section 60 (2) of the Act, which states that where an assured is deprived of possession by a covered peril with little prospect of recovery, was expressly ex-

⁶⁰ J. Arnould, J. GILMAN, R. MERKIN and others (7th Ed), "*Arnould's Law of Marine Insurance and Average*", (2008, London, Sweet & Maxwell), p 1368

⁶¹ Ibid

⁶² Section 60(2) of Marine Insurance Act 1906, see also J. Arnould, J. GILMAN, R. MERKIN and others (7th Ed), "*Arnould's Law of Marine Insurance and Average*", (2008, London, Sweet & Maxwell), p 1372

⁶³ Article by Andrew Preston, Simon Culhane and Mike Roderick, 7 April 2010," *Piracy and insurance: the law*", Clyde & Co, see also http://www.clydeco.co.uk/attachments/published/8827/Shipping%20Insurance%20update_Piracy_March2010.pdf 15.08.2010

cluded by the policy. Therefore, Masfield tried to convince the court that they gave the Notice of Abandonment since an actual total loss appeared unavoidable.⁶⁴ According to the *Philip Roche*⁶⁵, “As regards the Claimant’s submission that the cargo had become a constructive total loss, it was necessary for the Claimant to establish that the cargo must be abandoned, and that an actual total loss appeared unavoidable.”⁹ In finding for the Defendant, the Court found that these criteria had not been met at the time the Claimant submitted to underwriters its notice of abandonment. In the court’s opinion, what is required is not a notice of abandonment in the sense of sections 61, 62 and 63 of the Act, but rather the abandonment of any hope of recovery. On the facts, and to be contrary, the court found that the ship owners and the cargo owners had every intention of recovering their property and were fully hopeful of doing so and, therefore, there was no reasonable basis for regarding an actual total loss unavoidable.”

2. Legality of the ransom payment

Ransom payments to Somali pirates are not illegal under English law, a partner at a blue-chip law firm has said. “I can confirm that payment of a ransom illegal as a matter of English law. This follows the repeal of the Ransom Act (1782)” Argument has mounted that there are legal reflection from the payment of ransom owing to the Terrorism Act (2000). The UK is an significant jurisdiction about piracy, owing to the presence of underwriters who pay ransom via British law firms. Payments that are known, or reasonably suspected, to be used for ‘terrorist purposes’ are not legal under English law. ‘Terrorism’ is identified as the use or threat of action indented to intimidate the state or the public for the purpose of progressive a political, religious or ideological cause. To ransom payments paid to Somali pirates is not in this category so far. Mainly, piracy is an illegal act of violence committed for private ends on the overseas against a vessel. The term of ‘private ends’ is important. Entirely piracy cases in which we have been discussed, there has been no credible idea whatsoever that the pirates are related to ter-

⁶⁴ Article by B.J. Macfarlane, 19th April 2010, “Seizure, ransom payments and public policy”, B.J. Macfarlane Co, see also http://www.bjm-co.com/reports/Article_009_Siezure_Ransom_190410_150k.pdf 13.08.2010

⁶⁵ Article by Philip Roche, May 2010, “Piracy - The legality of ransom payments (Masfield AG and Amlin Corporate Member Ltd)”, Shipping newsletter <http://www.nortonrose.com/knowledge/publications/2010/pub27624.aspx?page=081121120820&lang=en-gb> 11.08.2010

rorists or terrorism as defined by English law.”⁶⁶

The claimants had a further discussion, which was that the release of the *Bunga Melati Dua* and its cargo by the payment of a ransom must be ignored, since the payment of the ransom, although legal under English law, was, in the claimants’ submission, contrary to public policy. This, they alleged, had a bearing on whether the vessel and cargo must be treated as “ir-retrievable” in practice.⁶⁷

On this issue, Steel J followed the decision in *Fender v. St John Mildmay*⁶⁸, where Lord Atkin had stated:

“The doctrine [of public policy] should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds.”

Steel J focused on three reasons why payment of a ransom must not be categorised as contrary to public policy. Firstly, the payment of ransom was submitted by the claimant as not being illegal as a matter of English law. *“Secondly, where legislative action has intervened to make such payments illegal, for example the Ransom Act of 1782 (now repealed), the courts should refrain from entering into the same field. He might have noted here that the Ransom Act was actually a war measure, directed to stop British merchantmen paying ransoms to the French, with no hint that Parliament thought ransoms to be objectionable in general”*. Thirdly, even though it is true that ransom payments encourage repetition of pirate activity – the number of incidents reported last year shows that out –no sufficient alternative has been identified to secure return crews of seized vessels to safety until now. Diplomatic or military intervention cannot usually be successful and may even put other crews in a risky position. He also stated that kidnap and ransom cover is a long-standing insurance market product. *“While that is a long way from finding that the courts should not render unenforceable a*

⁶⁶ http://www.fairplay.co.uk/login.aspx?reason=denied_empty&script_name=/secure/displayMagArticles.aspx&path_info=/secure/displayMagArticles.aspx&articlename=fpnw20081023011nw 17.08.2010

⁶⁷ *Masefield v Amlin* [2010] EWHC 280 (Comm): see also <http://www.idaratmaritime.com/wordpress/?p=246> 19.08.2010

⁶⁸ *Fender v. St John Mildmay* [1938] AC 1

*type of policy just because it is written in the market, this reflects”.*⁶⁹

*“The ever-present threat of the employment of violence is, therefore, reasonably averted by the payment of a ransom. It is not surprising that Mr Justice Steel was “wholly un persuaded” by the argument that the payment of a ransom was contrary to public policy to the extent of being “substantially incontestable”.*⁷⁰

The Court also considered that the payment of a ransom can be recoverable as a sue and labour expense, that is, expenses paid by the assured when taking such measures as may be reasonable for the purpose of preventing or minimising a loss which would be recoverable under the assureds’ policy.⁷¹

Where the assured is deprived of possession or control of the insured property by using force, there is no difference whether those who deprive him of it are acting legally or illegally, as the perils contained by standard policies are in most circumstances not subject to any limitation in this respect.⁷²

On the other hand, there are some problems under the suing labouring clause. In *Royal Boskalis Westminster NV v Mountain*⁷³, the assured made a claim to recover the values of its waived claims as sue and labour claims but this claim failed on the ground that there was no effective loss, because the waiver could not have been enforced as a consequence of illegality or duress affecting the validity of the “finalisation agreement under which the claims were waived. The claim was not related with illegality, the *ex turpi causa maxim* did not apply, the claim failed as a result of absence of loss. The suggestion that a payment which is not legally made cannot be recovered as sue and labour did not therefore directly arise, but was accepted by Phill L.J.

⁶⁹ <http://www.incelaw.com/documents/pdf/Strands/Insurance-and-Reinsurance/Incisive-Risk/Masefield-AG-v-Amlin-Corporate-Member.pdf> 18.08.2010

⁷⁰ <http://www.wecoxclaimsgroup.com/index.asp?ContentName=index> 01.09.2010

⁷¹ Article by Philip Roche, May 2010, “*Piracy - The legality of ransom payments (Masefield AG and Amlin Corporate Member Ltd)*”, Shipping newsletter – Legalseas see also; <http://nortonrose.co.uk/knowledge/publications/2010/pub27624.aspx?page=081121120820&lang=de-de> 11.08.2010

⁷² J. Arnould, J. GILMAN, R. MERKIN and others (7th Ed), “*Arnould’s Law of Marine Insurance and Average*”, (2008, London, Sweet & Maxwell), p 1172

⁷³ *Royal Boskalis Westminster NV v Mountain* (1197) L.R.L.R. 523

mentioned that he wanted to leave open for future idea whether a sue and labour clause covers payment made under treat or of loss, from whatever source,” *which are totally repugnant to English law nations of legality*’, in other saying, “*Is the payment of a type the Law should recognise as entitling the payer to claim as sue and labour, given the public interest in the issue if extortion of money from ship owners in circumstances of duress and illegality*”.⁷⁴

No question arises where the ransom payment is not legal under the proper law of the policy. In such cases, it is clear that the assured cannot recover expenses under the suing and labouring clause.⁷⁵ There arises to be a doubt that where a payment which is legal under any relevant law is made to secure the release of property, this can be recovered though the persons demanding the payment are acting unlawfully in so doing.⁷⁶

3. Comments

The case shows welcome clarification on some of the legal problems raised by the many recent incidents of piracy off Somalia. Although primarily focused on insurance coverage issues, and in particular the rejection of the claimant’s primary argument that where a ship is seized by pirates there is an actual total loss immediately, regardless of later recovery (the *Dean v Hornby* point), the judgment gives helpful guidance on other related issues of interest to the wider shipping community.

The rejection of the Masfield’s claim that ransom payments are contrary to public policy is particularly interesting because it led the judge to reflect upon both the legality of such payments and whether they can be recoverable as a sue and labour expense. . In the case, the claimant chose not to contend that the payment of ransom was illegal under English law. In the case, the judge mentioned that “*the payment of ransom is not illegal as a matter of English law*”, and also focused that in other circumstances, Parliament had intervened to make ransom payments not legal, but had not done so in this context.

⁷⁴ J. Arnould, J. GILMAN, R. MERKIN and others (7th Ed), “*Arnould’s Law of Marine Insurance and Average*”, (2008, London, Sweet & Maxwell), p 1173

⁷⁵ Ibid, the decision confirms the assumption made in successive editions of Arnould that the payment of ransom to recover captured property, when not illegal, is within the scope of a sue and labour clause.

⁷⁶ Ibid

Therefore, the fact that payment of a ransom is not illegal was relied on by the judge as one of the reasons for refusing the idea that these kinds of payments are contrary to public policy.

With regard to sue and labour, the judge referred to, and relied upon, the majority idea given by the Court of Appeal in *Royal Boskalis v Mountain [1999]* that "*the assumption of the editors of Arnould that payment of a ransom, if not itself illegal, is recoverable as an expense of suing and labouring is well founded*". During the judge's finding reflects commercial understanding of the legality position with respect to Somali pirates, it should be noted that legality was not fully discussed, due to the concession by the claimant in this case.⁷⁷

*"There is little doubt that the taking of a vessel by piracy leaves vessel owners and other interested parties in a difficult position. Often, as has and continues to be the case in Somalia and elsewhere, the payment of a ransom is the only cost effective means of securing the timely release of the vessel, its cargo and crew. Whilst the repeal of the Ransom Act 1782 was long thought to provide the necessary measure of protection against an allegation that such payments are illegal, the recent decision in Masefield Ag v Amlin Corporate Member Ltd nonetheless cloaks owners with a degree of moral and legal comfort in that their actions in meeting pirate demands will not be deemed illegal by the courts."*⁷⁸

This decision clarifies the law of marine insurance, piracy and total losses and the treatment of ransom payments as a matter of English law.

When we want to discuss the actual total loss, under the Marine Insurance Act, we have to consider that the test of "*irretrievably deprived*" is an objective one and should be assessed on the facts. If there is any way to recover property – even though it is through disproportionate effort or expense, there is no irretrievable deprivation.

In addition, the payment of a ransom to pirates is not contrary to Eng-

⁷⁷ Article by Andrew Preston, Simon Culhane and Mike Roderick, 7 April 2010, "Piracy and insurance: the law", Clyde & Co, see also <http://www.ifw-net.com/freightpubs/ifw/article.htm?artid=20017759345&src=rss>; 14.08.2010

⁷⁸ Article by Philip Roche, May 2010, "*Piracy - The legality of ransom payments (Masefield AG and Amlin Corporate Member Ltd)*", Shipping newsletter – Legalseas see also; <http://www.nortonrose.com/knowledge/publications/2010/pub27624.aspx?page=081121120820&lang=en-gb> 11.08.2010

lish public policy. This kind of payment is not illegal but may on occasion be seen as the only option⁷⁹

If the cargo owners had successfully showed that they were irretrievably deprived of the cargo they could have claimed for the entire cargo value under the policy and afterwards give credit to underwriters for the sale proceeds leaving a net claim of about \$6m. There was no claim for loss of cargo under the policy if they were not irretrievably deprived of the cargo. According to the relevant clause in the policy and judge idea which was “*Somali pirates would demand a ransom and would release the vessel, cargo and crew upon payment. It was also likely that the ransom would be paid and that the vessel, cargo and crew would be released.*” about the Somalia Pirates, the claim for Actual Total Loss failed.

Of perhaps more general interest are the comments made by the judge regarding on the ransom payments. The judge rejected claimants’ argument which was the payment of the ransom was contrary to public policy, stating “*In these circumstances with no clear and urgent reason for categorising the activity as contrary to public policy the court should resist any temptation to enter the field in the manner suggested by the claimant.*”

The judge also interpreted that to make the ransom payments contrary to public policy would cause kidnap & ransom cover to be unenforceable. He also mentioned that the ransom payments are recoverable as sue and labour expenses.⁸⁰

Nicola Kneizeh⁸¹ made a very sufficient comment about piracy and ransom payments. “*Even though piracy is an insured peril, the onus to prove the act of piracy for successful recovery remains with the assured, in particular to establish that the act occurred was piracy and not terrorism,*

⁷⁹ Article by A.Symons, K.Houston, 04 May 2010, “*Marine insurance: recovery under cargo policy where ransom paid*” CMS Cameron McKenna see also <http://www.law-now.com/lawnow/2010/marineinsurmar10.htm?cmckreg=true> 02.09.2010

⁸⁰ Article by J.Sharma, 24February 2010,” *Piracy – ransom payments not contrary to public policy/recoverable as sue & labour under English Law* “Dolphin Maritime & Aviation Services Ltd see also; <http://ahliasuransi.com/2010/02/24/piracy-%E2%80%93-ransom-payments-not-contrary-to-public-policyrecoverable-as-sue-labour-under-english-law/> 02.09.2010

⁸¹ Article by Nicola Kneizeh, 19 July, 2010,”*Piracy Under Marine Insurance Policy*”, Fichte & Co see also; http://www.fichtelegal.com/en/news_article.php?news_id=71 02.09.2010

i.e. that the persons committing the act did so exclusively for their own material benefit, rather than pursuing a political, ideological or religious scope.

Important principle to be kept into consideration while claiming from the insurance is the duty under which the ship-owner has to mitigate its own losses. He must in fact demonstrate that he has performed his best endeavours to avoid harsher and further consequences of his losses. In this sense a payment of ransom by the insured to recover the vessel might be considered as an attempt to mitigate the loss, and when the assured successfully mitigates his loss by paying a ransom, the same could be simply recovered under the sue and labour expenses clauses contained in the insurance policy.

Although the shipping market has welcomed the inclusion of acts of piracy within the catalogue of insured perils, both common law and civil law jurisdictions have been reluctant to allow for an all too easy recovery of such claims. On the other hand piracy shall be an insurable peril, as otherwise its consequences would be catastrophic on world trade”.

My comments as a conclusion

I agree the other comments, which I have mentioned above, about why the claimant made a claim on the ground that Sections 57 (1) and 60 of the Marine Insurance Act 1906. Because for an actual total loss claim (*ir-retrievably deprived*) there should be no way to recover the property⁸² but in this case it is obvious that when the ransom was paid to pirates, subsequently the ship and her crew would be released. Also, the section 60(2) was expressly excluded by the policy and under the section 60 (1) the negotiations between pirates and claimant, begun immediately upon high jacking and in keeping with piratical activity in the Somalia, indicated that release was likely, and therefore the goods were not abandoned.⁸³

The claimant does not need the proof about the actions of Somalia Pirates because the media and the other sources have already certified the is-

⁸² Article by A.Symons, K.Houston, 04 May 2010, “*Marine insurance: recovery under cargo policy where ransom paid*” CMS Cameron McKenna see also <http://www.law-now.com/law-now/2010/marineinsurmar10.htm?cmckreg=true> 02.09.2010

⁸³ Article by B.J. Macfarlane, 19th April 2010, “*Seizure, ransom payments and public policy*”, B.J. Macfarlane Co, http://www.bjm-co.com/reports/Article_009_Siezure_Ransom_190410_150k.pdf 13.08.2010

sue. During the claimants' discussing about payment of ransom contrary to public policy, I think overlooked about legality of ransom payments under English law. Payment of ransom is not illegal under English law; therefore it is a recoverable expense under the suing and labouring clause.⁸⁴

In addition, I agree with Christopher Dunn⁸⁵ who stated that *"It may be that pirates may be properly considered to be the "enemies of mankind" and, as acknowledged by the expert evidence given in this case, that paying ransoms to them encourages further hostage taking. However, in our view, the payment of a ransom to secure the safety and release of the crew and the preservation of property is not morally objectionable. Rightly therefore, in our opinion, the Courts should be wary of intervening in such matters on the basis of English Public Policy (involving the payment of a ransom by a Malaysian entity to Somali pirates in connection with a Malaysian owned vessel and cargoes owned by Swiss traders)."*

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