

# The insurability of ransom

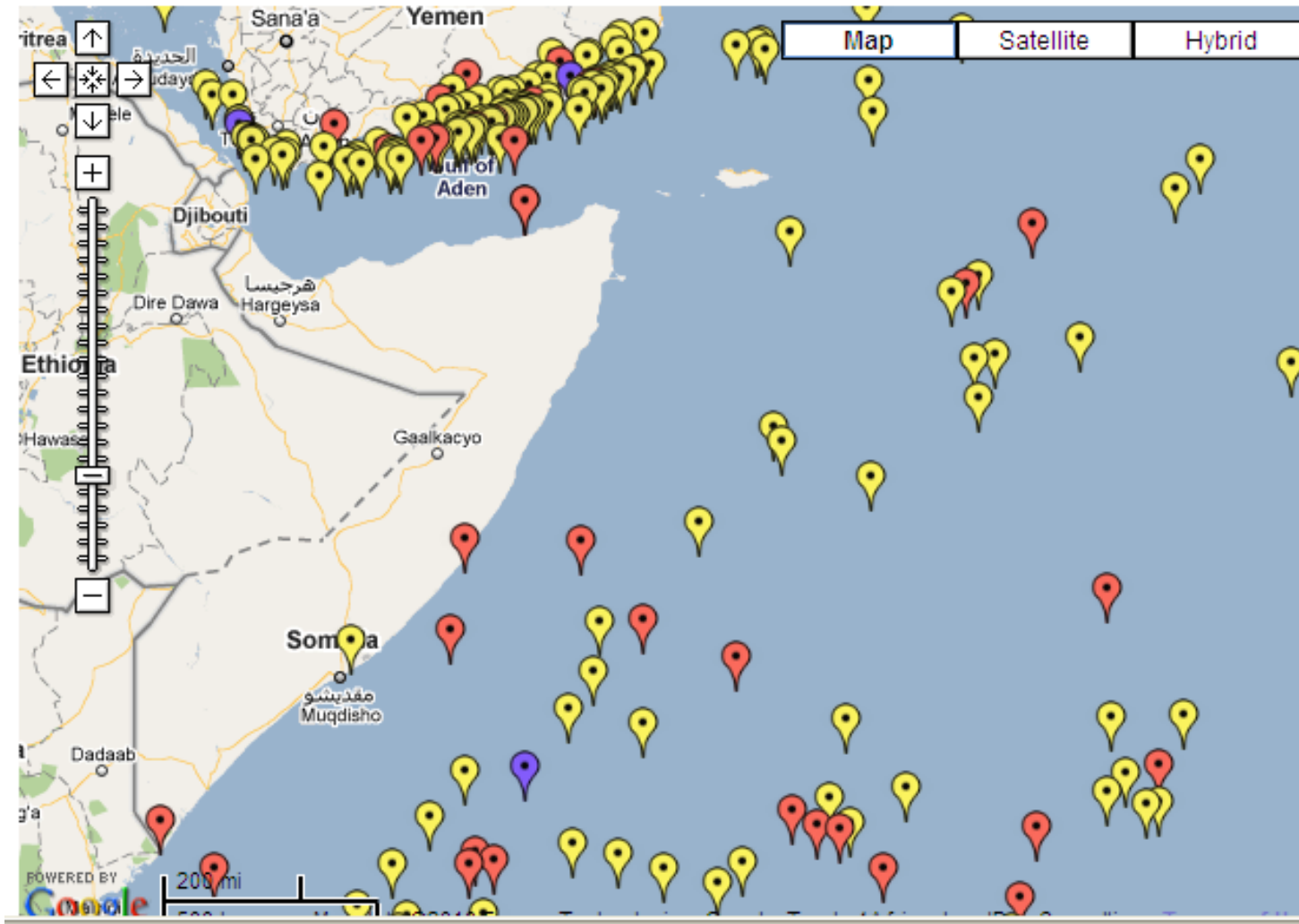
Kate Lewins



**MURDOCH**  
**UNIVERSITY**  
PERTH, WESTERN AUSTRALIA

# Introduction

- History of piracy (in 20 words or less)
- Somali piracy; the ‘ransom’ model (as opposed to traditional ‘capture’ model).



## IMB piracy map 2009 - Somalia

[http://www.icc-ccs.org/index.php?option=com\\_fabrik&view=visualization&controller=visualization.googlemap&Itemid=261](http://www.icc-ccs.org/index.php?option=com_fabrik&view=visualization&controller=visualization.googlemap&Itemid=261)

# *Masefield AG v Amlin Corporate Member Ltd*

[2010] 1 Lloyd's Law Reports 509 (Steel J.)

*Bunga Malati Dua (MISC)* carrying cargo of biofuel,  
Malaysia ⇒ Rotterdam

- Insured on Institute Cargo Clauses (A) terms
- Seized on 19 August 2008
- Pirates and shipowner in contact within days
- Insured's notice of abandonment served 18 Sept/rejected
- 10 days later ransom paid, ship released.
- Cargo delivered Rotterdam 26 October 2008

# Cargo insured's arguments

1. Actual total loss: Cargo had been lost upon capture by pirates.

*MIA (UK) S57 (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.*

*(2) In the case of an actual total loss no notice of abandonment need be given.*

*Dean v Hornby (1854) 3 E & B 179*

# Arguments (cont)

## 2. Cargo was CTL at date of notice of abandonment

*MIA (UK) s60.(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.....*

*(operation of s60(2) modified by policy)*

# Justice Steel's judgment

- Dismissed the claims for ATL and CTL. Overwhelming evidence that Somali pirates operate to release vessels on payment of ransom. As at 18 Sept, prospects of release were good.
- Insured couldn't establish irretrievable deprivation of goods as required to constitute an ATL. Recovery was not impossible.

# What about CTL?

- CTL in this context had basis in capture cases (*Dean v Hornby*).
- Ability to call a CTL ‘heavily dependent on facts’.
- In a ransom situation a ‘wait and see’ approach is justified (contrast capture cases)
- Cargo owners had filed the notice of abandonment but had not actually ‘abandoned hope of recovery’ (or intent to secure recovery).



# Should payment of ransom even be considered? Insured's arguments

Court ought not take the effect of paying ransom into account in determining if cargo is 'lost' because:

- Payment of bribes is contrary to public policy
- The insured was under no duty to pay ransom, even as sue and labour expense.

# Steel J.

- ‘wholly unpersuaded’ that bribes were contrary to public policy.
- No legislation rendering payments illegal
- ‘Not a place for courts to stray’
- Payments can be recovered as a sue and labour expense *Royal Boskalis Westminster NV v Mountain* [1999] QB 674
- Kidnap and ransom insurance is available in market

# Bad day at the office?

- ‘In the result the fact that shipowners paid a ransom [and the property was returned] inevitably defeats the claimant’s claim’ (*my added words in brackets*).
- Appeal listed to be heard this week.

# Insuring against pirate attacks- comments on Masefield

- Insured's claim that cargo lost has whiff of 'Emperor's new clothes'?

But consider:

- Caselaw re CTL: validity of notice/claim assessed at that date. Effect of *Dean v Hornby*
- Cargo owner had no control over negotiations
- Goods were undamaged, but had lost value of US\$7M due to market downturn.

# Why couldn't insured recover?

Didn't argue partial loss claim: why not?

Piracy is an insured peril – CL 6 ICC(A)

6. In no case shall this insurance cover loss damage or expense caused by

6.1 war, civil war, revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power

6.2 capture seizure arrest restraint or detainment (piracy excepted), and the consequences thereof or any attempt thereat

- The type of ‘loss’ is critical because ICC clauses cover only ‘loss of or damage to’ the cargo. (not ‘loss and damage’)
- Insured had suffered a loss directly a result of the seizure by pirates but cargo had not come to any physical harm.
- But facts will not always be as clear cut as in this case....

# If cargo contributed to ransom, could it be claimed from insurers?

Could be:

- a request from shipowner to 'top up' ransom payment (direct payment)
- as a result of shipowner declaring GA event.

What is the effect of *Masefield* here?

# Direct contribution to ransom recoverable as sue and labour expense?

## *'Duty of Assured Clause'*

16 It is the duty of the Assured and their servants and agents in respect of loss recoverable hereunder

16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss...

and Underwriters will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties. (*my emphasis*)



- Steel J accepted ransom payment not illegal and can be sue and labour expense.
- Has to be ‘reasonable’: bearing in mind value of goods.
- Could cargo be in breach of sue and labour by not offering to contribute?

# Shipowner declaring GA event?

(Steel J has removed any defence by cargo that the payment is illegal.)

- If cargo required to chip in, then policy would seem to respond.
- Policy covers GA payment ‘incurred to avoid or in connection with the avoidance of loss from any cause whatsoever apart from those excluded in clauses 4, 5,6..’

# Position in USA

Bigger picture of consequences of Somali piracy.  
Anecdotally, it is feared that 70% of ransom funds go to support terrorism.

13/4/10: President Obama's Executive Order forbidding payment of ransom to Somali pirates in certain circumstances:

<http://www.whitehouse.gov/the-press-office/executive-order-concerning-somalia>

# Conclusion

- If the cargo in this case had suffered physical loss/damage during detention, would have - arguably - been recoverable.
- If insured had contributed to ransom, via S&L or GA, that too would be recoverable in English law.
- If an insured wants cover for economic consequences of detention, then needs different cover (war clauses will not assist).