

CAPTURE OF CARGO BY PIRATES – A TOTAL LOSS?



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This article comments on the implications of the 2010 Court of Appeal decision of *Masefield v Amlin* [2011] EWCA CIV 24 (Bunga Melah Dua). The ruling is useful because it confirms the long-held opinion by those in the marine insurance business that where cargo is held temporarily by pirates, the cargo can neither be said to be an actual total loss nor a constructive total loss for the purposes of the Marine Insurance Act. The decision now provides clarity for cargo owners and their insurers on difficult issues surrounding insurance coverage in the event of piracy, and offers guidance for those in the wider shipping community on the legality of ransom payments.

THE CIRCUMSTANCES

The case involved the seizure of the *Bunga Melati Dua* in the Gulf of Aden by Somali pirates on 19 August 2008 during a voyage between Malaysia and Rotterdam. Negotiations for the ship's release appeared to be progressing well, but on 18 September the cargo owner issued a notice of abandonment to their insurer. This notice was rejected by the insurer. Upon payment of a ransom, the ship, cargo and her crew were released on 29 September 2008.

WAS THE CARGO A TOTAL LOSS?

The cargo owner argued that at the time the notice of abandonment was given, cargo was an actual total loss due to capture by the pirates or alternatively it was a constructive total loss. On this basis, they sought to recover the difference between the insured value of the cargo and its resale value. These arguments were rejected in the English Commercial Court and the cargo owner appealed.

It was unanimously agreed by the appeal court judges that the capture of a ship by pirates does not mean that the cargo is an actual total loss for the purposes of insurance coverage. For there to be an actual total loss, the cargo owner would have to show that it is impossible for the cargo to be salvaged physically and/or legally, regardless of cost. The judges said that it was possible that the ship and cargo would be recovered by the payment of a relatively small sum therefore there was no actual total loss. It was accepted that piracy is theft for the purposes of the Theft Act. However, this does not mean that it is impossible to recover the cargo.

ARE RANSOM PAYMENTS ILLEGAL?

The cargo owners also argued that ransom payments should not be a factor in deciding whether it is possible for the cargo to be recovered, because such payments are against public policy and as such constitute bribes.

The judges disagreed. They ruled that ransom payments are legal under English law and morally justified on the basis that the only option in ensuring the effective release of the ship, cargo and crew is often the payment of a ransom.

IMPLICATIONS OF THE DECISION

The *Bunga Melati Dua* is an example of a marine insurance contract that did not clearly define when losses due to piracy could be claimed. Following this decision, it is important for contracts of insurance to deal with all eventualities in the event of pirate attack in order to avoid any uncertainty in their interpretation.

In the absence of express agreement, where the recovery of a ship's cargo remains a possibility, no claims for the total loss of the cargo can be made against the cargo insurer. It is up to the parties in insurance contracts to clearly define the point at which a claim for the full insured value of the cargo will be possible.

From our members' perspective, this decision will provide some comfort as it clearly states that ransom payments are neither against public policy nor illegal. Such payments will continue to be treated as subject to general average and be capable of creating a claim under applicable insurance policies.

