Pirates and Private Law: The Legality of Ransom Payments in the Age of Terrorism

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Abstract:

The current legal framework governing ransom payments by insurers to pirates is pragmatic rather than principled and faces several commercial, moral, and legal dangers. First, efficient ransom payments encourage more piracy, raising costs for all. Second, profound conflicts of interest exist between captives and those paying their ransom as to whether to pay quickly or prolong negotiations in hope of a better final price. Third, conceptual instability of what constitutes 'piracy' in both domestic and international law confuses matters considerably. Finally, current industry practice risks conflict with recent anti-terrorism legislation and anti-money laundering legislation. The essay concludes that expanded use of self-insurance pools, plus a new regulatory framework will bring needed clarity and stability to marine insurance markets, and thereby ensure that England remains a preferred jurisdiction for such matters.

1. Introduction

Piracy may seem like a topic more of interest to historians than to modern lawyers, yet this ancient crime continues to pose important legal questions for English private law. Maritime risk generally is a huge but relatively legal stable legal topic, having been governed by the Marine Insurance Act 1906 (with limited amendments) for more than a century. Recently, *Masefield AG v Amlin Corporate Member Ltd ('The Bunga Melati Dua')*[1] in 2011 and *Mitsui & Co Ltd v Beteiligungsesellschaft LPC Tankerflotte MBH & Co KG* (*'The Longchamp')*[2] in 2017 have developed a seemingly stable approach for dealing with the legal and practical issues of ransom payments to pirates for the return of ships, cargo, and crews. Yet important questions lay poised to disrupt this settled legal picture; the current approach to piracy generally and ransom payments in particular is pragmatic rather than principled and rests on shaky foundations. This essay identifies some of these perils and proposes a possible solution.

Beginning in the late 1990s, maritime piracy and related predations at sea have become a big and surprisingly orderly business. By some estimates, the aggregate cost of additional insurance, 'hardening' of target vessels, and multistate antipiracy efforts ranges from $6-$12 billion dollars annually,[3] notwithstanding the fact that the spate of attacks in the Gulf of Aden beginning in the early 2000s has largely abated. In human

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1 [2011] EWCA Civ 24.

2 [2017] UKSC 68.

3 Jadranka Bendekovic and Dora Vuletic 'Piracy Influence on the Shipowner and Insurance Companies' in *DAAAM International Scientific Book 2003* (Vienna: DAAAM International, 2013), 711, 715.

terms, *Marine Insight* identifies at least 3,639 hostages held captive by pirates between 2018 and 2022.[4] Moreover, despite the recent decline in successful attacks, Lloyd's of London acknowledges that piracy remains substantially under-reported for both security and commercial reasons.[5]

This issue remains of tremendous importance to English law because UK-based insurers and industry risk pools dominate global marine insurance, and both insurers and ship brokers display a strong preference for contracting under English law.[6] While the ramifications of piracy are decidedly international, the extensive use of English law in shipping means the legality of ransom payments to pirates remains an important matter for English private law. Mark Dickinson, General Secretary of the maritime union Nautilus International, observes, 'negotiations on ransom payments are made between pirates and the shipping company affected, and not necessarily the countries of origin of the hostages or the flag state of the ship.'[7] Even with few vessels flying the Red Ensign, English courtrooms continue to hear important cases involving piracy and other violent disruptions at sea.

Modern pirates frequently operate on a hijack-for-ransom model, detaining the vessel and crew until payment is extorted from the shipowner (and, ultimately, the insurer). These situations create complex problems for all involved, and the law must balance competing positions. The shipowner, crew, charterer, cargo interests, and insurers all have different interests in a hostage situation. For crew and cargo interests, expedient release is of the essence. For owners, insurers, and charterers (who often have an 'off-hire' clause which puts charter charges in abeyance during the disruption), the imperative is to negotiate the lowest possible ransom. Matters are further complicated by the different standard clauses various insurers insert into contracts, and by the wide variety of types of policies written and terms they contain.

English private law has adapted in ways that initially appear to manage this complexity well. It has developed its own definition of piracy, distinct from that of both domestic criminal and international law and has created through caselaw a legal framework to handle disputes flowing from maritime predation. In *Masefield*, the Court of Appeal acknowledged that the negotiation of ransom payments was an unfortunate but routine aspect of maritime business in the modern world and affirmed their legality. *The Longchamp* reconfirmed this legality and provided further guidance for apportioning losses flowing from ransom payments. Together, they delineate a private law approach whereby negotiators are expected to agree upon a reasonable ransom reflecting current market conditions, the cost of which is apportioned among insurers and stakeholders by standard approaches to marine risks.

To date, this pragmatic approach has worked well: insurance policies continue to be written, ransoms get paid, and, for the most part, ships eventually continue on their way. Meanwhile, the private law does not

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4 Raunek Kantharia, 'What Are the Causes of Maritime Piracy in Somalia Waters?', *Marine Insight* 3 July 2022.

5 Martin Kelly, 'Where Have All the Pirates Gone?' Lloyd's List Podcast 20 Jan 2023 <https://www.lloydslist.com/LL1143685/The-Lloyds-List-Podcast-Where-have-all-the-pirates-gone#:~:text=The%20latest%20edition%20of%20the%20podcast%20examines%20what%20the%20recent,whether%20it%20really%20has%20disappeared> accessed 8 July 2024); Frankie Youd, 'Here there be pirates: Addressing piracy threats in African waters' *Ship Technology* 15 September 2021.

6 'Maritime Business Services', Maritime UK <https://www.maritimeuk.org/about/our-sector/maritime-business-services/> accessed 8 July 2024.

7 'Nautilus: Outlawing Ransom Payment Jeopardizes Seafarers' *Offshore Energy* 17 December 2014.

bother itself with the theoretical and practical problems just beneath the surface of *Masefield*'s seemingly placid waters. But that desire to avoid larger issues is likely to cause trouble in the future. In particular, the current '*Masefield* approach' is at risk due to:

a) Macroeconomic factors: the efficiency of the piracy-for-ransom market serves to foster more piracy, causing additional problems for shippers and insurers.
b) Industrial complexity: the confusing and highly technical world of marine insurance makes it difficult to manage these risks consistently and logically. Additionally, the secretive, self-governing world of marine underwriting begs for far greater transparency and oversight, which would disrupt the status quo.
c) Conceptual disparities: divergences between private law and other scholarly and legal understandings of piracy undermine the validity and stability of the current private law approach.
d) Divergences between international and domestic law: significant disconnects exist between English private law's approach to piracy and ransom payments and international law's understanding of piracy.
e) Potential conflict between current practice and recent legislation: the implications of new domestic legislation targeting payment to terrorist organizations, especially those found in Terrorism Act 2000 s.17 and 17A and in the Proceeds of Crime Act 2002 s.328.

Before examining these threats to the current approach, however, we must first examine the private law's general conceptualization of piracy and briefly survey how marine insurance currently handles piracy risks in English law (2). We then turn to the *Masefield* approach in more detail (3). Then, after laying out the problems with the current regime (4), I offer what is hopefully a more doctrinally secure but still practical solution (5). The proposed solution first suggests that ransom payments are best handled within existing self-insurance pools within the shipping community. That approach should then be wedded to a new regulatory framework specific to maritime ransoms that can quickly and finally bless individual payments as lawful.

2. Piracy in English Private Law

Surprisingly, much that is traditionally covered by piracy insurance under English law is not, legally speaking, 'piracy.' Legal historian D. Rhidian Thomas explains:

> 'In the modern world the word 'piracy' has come to be used much more freely and loosely as a convenient generic term to embrace not only piracy in its strict sense but also all kinds of criminal and violent acts at sea, so that very generally the word 'piracy' in its contemporary usage refers to any act of criminal maritime violence.'[8]

The United Nations Convention of the Law of the Sea (UNCLOS III) (1982), the most widely accepted international definition, limits maritime piracy to ship-to-ship 'illegal acts of violence or detention' that occur 'in a place outside the jurisdiction of any State', done for 'private ends by the crew or the passengers of a

[8] D. Rhidian Thomas, 'Insuring the risk of maritime piracy', *Journal of International Maritime Law* 10:4 (2004), 355, 357.

private ship…'[9] Because UNCLOS's definition has been imported verbatim into English law,[10] this requirement that the perpetrators have 'private purpose' sits at the heart—and is a potential conceptual weakness—of the current private law approach.

Who may be classified as a 'pirate', what actions constitute 'piracy', and where piracy may occur differ between criminal and private law, as well as between English and international settings. Generally, English law maintains a broad definition of what constitutes piracy in insurance and contractual settings. For example, MIA 1906 affirms that 'The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore.'.[11] Furthermore, *Palmer v Naylor* ruled that clauses insuring against piracy must cover similar ('*ejusdem generis*') events not captured by the stricter criminal definition.[12] *Palmer's* elastic definition has proved essential in modern times. As maritime raiders shifted from seeking to steal vessels and/or cargos to a model of holding vessels, crews, and cargoes for ransom instead, this broad conception has allowed insurance coverage for piracy to adapt to the modern situation. Both *Masefield* and *The Brillante Virtuoso (No.2)* affirm that seeking to extract a ransom constitutes 'piracy' in English law for insurance purposes.[13]

In *Republic of Bolivia v Indemnity Mutual Marine Assurance Company Ltd*,[14] Pickford J articulated a decidedly commercial understanding of piracy in contractual contexts:

> 'One has to look at what is the natural and clear meaning of the word 'pirate' in a document used by businessmen for business purposes…looking at it in that way, one must attach to it a more popular meaning, the meaning that was given to it by ordinary persons, rather than the meaning to which it may be extended by writers on international law.'[15]

This approach has been reconfirmed in later cases, especially *Nishina Trading Co. Ltd. v Chiyoda Fire and Marine Insurance Co. Ltd. ('The Mandarin Star')* where the Court of Appeal found that 'theft' as it appears in a marine insurance contract must be understood in the common meaning rather than the stricter criminal definition.[16]

On balance, this commercially minded approach makes sense. After all, shippers and insurers are interested in apportioning the risk of loss by violence at sea, not delving into international legal complexities. This approach also marks a significant point of divergence between private and criminal definitions of piracy. Whereas the criminal law's understanding of piracy, in both international and English law contexts, is centred on the locus of the act, the perpetrators' intent, and the precise nature of the act, English private law focuses instead on only two main criteria to define an act as piratical for insurance purposes: a) it must be

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9 United Nations Convention of the Law of the Sea III (UNCLOS) 1982 Art.101(a).
10 Merchant Shipping and Maritime Security Act 1997 (MSMSA) s.26(1).
11 Marine Insurance Act 1906 (MIA) sch.1 r.8.
12 (1854) 10 Ex. 382; 156 ER 492.
13 *Masefield*; *Suez Fortune Investments Ltd & Piraeus Bank AE v. Talbot Underwriting Ltd & others ('The Brillante Virtuoso')* [2019] EWHC 2599 (Comm.).
14 [1909] 1 KB 785, p. 585.
15 Ibid.
16 [1969] 2 QB 449. *Mandarin Star* was overturned by *Shell International Petroleum Co Ltd v Gibbs ('The Salem')* [1983] 2 A.C. 375 but only insofar as a policy covering a 'taking at sea' for cargo is not to be read as covering the fraudulent misappropriation of property by the shipowner or crew.

incurred by 'violence or detention' (or threats of violence)[17] against persons[18] and b) it must be for private gain.[19]

Both requirements received modern confirmation in *Athens Maritime Enterprises Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd. ('The Andreas Lemos')*,[20] where armed perpetrators boarded the vessel within Bangladeshi waters but sought to steal from the ship without bracing the crew. Staughton J ruled that the location within Bangladeshi jurisdiction was immaterial for determining if this was an act of 'piracy' as defined by the insurance contract. This seems appropriate, as those incurring the loss from piracy are unlikely to care precisely where disaster struck. Because the insurance contract defines the jurisdiction under which the loss will be addressed, the incident's precise location means little. According to legal scholar Paul Todd, 'the rationales for the act to take place on the high seas and be an attack by one vessel to another have no place in a contractual context.'[21] This 'high seas' requirement in criminal law is jurisdictional, which is moot when parties have contracted to use English law. Even actions deep within another jurisdiction may qualify as piracy for private law purposes. In *Republic of Bolivia*, the Court of Appeal divided over whether to label as 'piracy' actions that took place on a tributary of Amazon River 100+ miles from the ocean, although the case was ultimately decided on other matters.[22]

Likewise, the two-vessel minimum is a mid-twentieth century addition to international (but not English) criminal law[23] to distinguish piracy from cases of mutiny, which remain within the jurisdiction of the vessel's country of registry.[24] Just as with its precise location, injured shipowners care little if it was an attack from another vessel, from an uprising on their own, or from shore, so long as they remain covered for their losses.

Location may not matter (other than that it transpired on the vessel), nor may the number of vessels, but precisely how the loss occurred is, by contrast, essential in an insurance context, because the policies' provisions define what actions are or are not covered. For the *Andreas Lemos*, the contract contained an exclusion for piracy, and so precisely how the loss came about became essential. According to Staunton J, 'It is not necessary that the thieves must raise the pirate flag and fire a shot across the victim's bows before they can be called pirates. But piracy is not committed by stealth.'[25] In other words, absent at minimum a show of force, the theft cannot be piratical, a distinction that has important implications for how such a loss is insured. This distinction makes sense, as the risk of a sneakthief gaining access to the vessel is logically distinct from the risk of the vessel being braced by armed brigands. Mere theft is a persistent risk, which may be perpetrated by crewmembers or those from off the ship, whereas piracy occurs where the ship is menaced directly, often in areas known to harbour pirates, which permits treating (and pricing) it as a

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17 MSMSA 1997 s.26, sch.5.
18 *McKeever v Northern Reef Insurance Co* [2019] 2 Lloyd's Rep. 161.
19 *Banque Monetaca & Carystuiaki v. Motor Union Insurance Co.* (1923) 14 Lloyd's Rep 48.
20 [1982] 2 Lloyd's Rep 483, 661.
21 Paul Todd, 'Piracy for Ransom: Insurance Issues', (2009) 15 (4) *Journal of International Maritime Law*, 307, 313.
22 Because the incident did not qualify as piracy for other reasons, this question remained unaddressed.
23 *In re Piracy Jure Gentium* [1934] AC 586 (1934), 599; See also *Andreas Lemos* (n 20), and *Naylor v Palmer* ((1853) 10 Ex. 382, 389), which both confirm that multiple ships are not required. See also MIA 1906 sch.1 r.8.
24 Todd, (n 21) 312.
25 *Andreas Lemos* (n 20).

separate risk. Similarly, the violence threatened or perpetrated must be directed against persons, not simply property.[26] In *Brilliante Virtuoso*, the Commercial Court distinguished 'sabotage'—even when performed by armed men—from 'piracy' as defined for insurance coverage.[27]

Most problematically, the pirates' purpose is essential to the private law's understanding of piracy. Whereas the Court of Appeal was uncertain about 'piracy' transpiring far up the Amazon, it was univocal in insisting that the putative pirates' goals must be wholly private.[28] As Vaughn Williams LJ's judgment in *Republic of Bolivia* makes clear, 'piracy' as defined for a maritime loss is fundamentally distinct from anything with political or ideological motivations. In his explanation:

> 'The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular State.'[29]

This approach importantly divides maritime attacks into two categories: those which are purely self-serving, and those that are part of some larger purpose or conflict. Thus, political or ideological acts will not constitute piracy for insurance purposes (though they may come under other clauses such as WR). In practice, however, neither insurers nor the courts seem eager to spend time contemplating the complex motives of pirates in modern cases. Absent an explicit political or ideological link, such issues go unexamined, and the prevailing view is that a ransom request creates a strong presumption that the goal is (solely) pecuniary.

Thus, for insurance purposes, so long as there is a) violence (or the threat thereof) and b) a goal of personal gain on the part of perpetrators, it does not matter whether the so-called pirates seek to appropriate the vessel and/or cargo or instead hold it for ransom, even though these are distinct crimes in international law (see 4.4 below). While the requirement of violence poses little problem for the English insurance law, we will see below that the 'personal gain' requirement and the lack of distinction between piracy-cum-theft and piracy involving hostage-taking and ransom is potentially problematic.

The law of what constitutes piracy might seem (at first glance) settled and straightforward, but how parties seek to insurance against such risks remains complex. MIA 1906 remains the bedrock of practice in this sector, but the actual division of specific risks among different policies and clauses adds another layer of complexity. In most instances, maritime risk is divided among three main systems. Although specific contracts and corporate approaches vary, generally, costs associated with piracy are covered either under general maritime insurance (hull and machinery or 'H&M' insurance), which usually covers 75% of the value of the voyage or insured term, or via non-profit, risk pooling associations known as protection and indemnity clubs (P&Is).[30] More recently discrete kidnap and ransom (K&R) policies has arisen to address the specific concerns of ransoms paid to pirates, which, otherwise would be apportioned via 'sue and labour'

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[26] *McKeever* (n 18).
[27] *The Brillante Virtuoso* (n 13).
[28] *Republic of Bolivia* (n 14) 790; confirmed in *Banque Monetaca* (n 19).
[29] *Republic of Bolivia* (n 14) 790.
[30] Peter Chalk *et al*, *Countering Piracy in the Modern Era*, Rand Corporation National Defence Research Institute, 2009, 3.

(S&L) clauses (which require the insured party to take appropriate steps to secure damaged property so as to minimize loss and additional damage)[31] or, where applicable, GA.[32]

Still further complexity stems from the fact that piracy may be covered under different policies or clauses depending on the timing and location of the incident. Insurers and industry groups designate high-risk zones, where additional coverage, adapted from the languages of longstanding war risk (WR) coverage clauses will be required to cover loss from piracy.[33] WR coverage has 'evolved in a convoluted way'[34] and such risks are frequently excluded from H&M policies and covered elsewhere. Unless a voyage takes the insured vessel through an identified hotspot, loss from piracy is often covered under hull insurance. Underwriters will often require a war-risk policy for travel through dangerous waters, however. Such policies were required in Gulf of Aden until six international shipping organizations withdrew the 'high risk' designation (and special insurance requirements and fees) in late 2022.[35]

Moreover, when a loss does occur due to piracy, precisely how to define and apportion that loss remains complex and idiosyncratic to the maritime setting. This idiosyncrasy is particularly significant with respect to the distinction between Actual Total Loss ('ATL')[36] and Constructive Total Loss ('CTL'),[37] and the risk-apportionment scheme known as general average (GA).[38] While these definitions can be subject to contractual modification,[39] the basic rule is that ATL occurs when property is irreparably lost or destroyed, whereas CTL occurs when recovery would not make economic sense (because, for example the cost of repair or recovery is greater than the insured object's value, or the likelihood of timely recovery is small).[40] This latter distinction is significant for ransom cases, because CTL requires the insured to inform the insurer of intention to abandon the insured property with 'reasonable diligence after the receipt of reliable information of the loss',[41] thereby permitting the insurer to take possession of and responsibility for whatever is left of the insured property.[42] The insurer may refuse abandonment if the conditions spelled out, either contractually or in MIA 1906 s.60, are not met. If timely notice is not given, or the insurer prevails in refusing, the loss will be calculated as partial rather than total and the owner retains ownership (and responsibility) for the property.

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31 *Royal Boskalis Westminster BV v Mountain* [1997] LRLR 523.
32 Zach Phillips, 'Marine insurers transfer piracy risks to war cover' *Business Insurance* 29 March 2009; Bennett, *The Law of Marine Insurance* (2nd edn, OUP, 2006), para 24.38.
33 Paul Todd, 'Ransom, piracy and time charterparties,'(2012) 18 (3) *Journal of International Maritime Law*, 193, 207.
34 Keith Michel, *War, Terror and Carriage by Sea* (Informa Law, 2004), §1.12.
35 Harry Dempsey *et al*, 'Shipping industry says piracy off coast of Somalia is no longer a threat', *Financial Times* 22 August 2022.
36 MIA 1906 s.57(1).
37 MIA 1906 s.60.
38 MIA 1906 ss.56, 60, 66, 68, 73.
39 Howard Bennett, 'The Marine Insurance Act 1906: Reflections on a Centenary', *Singapore Academy of Law Journal* 18 (2006), 669, 678.
40 MIA 1906 s.62; *Robertson v Petros M Nomikos Ltd* [1939] AC 371, HL, 382 (Lord Wright), 392 (Lord Porter).
41 MIA 1906 s.62(3).
42 MIA 1906 s.61, 62(2), 63.

Another idiosyncrasy of maritime risk involves the apportionment of exceptional unanticipated loss flowing from an 'extraordinary sacrifice or expenditure…for the common safety' of the vessel.[43] Such unexpected common dangers are apportioned via General Average (GA) which makes all parties to the adventure proportionately responsible for exceptional costs incurred to save the vessel.

GA calculations are often complex, but especially so when human and financial interests are both involved—or at odds. In *The Aid* (1822), Lord Stowell acknowledged that English private law had 'no power of renumerating' 'the mere preservation of life'.[44] The general position in English law remains that 'the value of lives saved is not brought into account' in a GA context[45] but, because courts will often 'take note' of costs incurred by salvors who save lives in calculating salvage awards, this operates '….indirectly, or rather in a disguised manner' as GA.[46] Precisely how ransom payments—and the costs incurred during negotiation with the pirates—are apportioned under GA has been a subject of recent judicial reconsideration discussed below. As *The Longchamp* demonstrates, GA applies problematically in situations of piracy and ransom, both due to competing interests and because GA has difficulty coping with (and pricing) the human toll for those seized by pirates.[47] In cases such as the *Polar*,[48] which involved a 10-month captivity for both crew and vessel, the value of securing the freedom of hostages is hard to calculate against the commercial desire to minimize financial loss for shipowner or insurer.[49]

3. *Masefield* and Private Law's Pragmatic Approach to the Business of Piracy

Pre-twenty-first century pirates usually sought permanently to deprive the owners of their property,[50] but more recent sea raiders tend to focus on holding the vessel temporarily until a ransom is paid to release crew, cargo, and vessel. 'Due to the involvement of insurance companies,' argue criminologists Marelize Schoeman and Benjamin Häefele, 'the negotiation process for the release of vessels and crew has become little more than a business transaction between the owners of the hijacked vessel and the pirates.'[51] This extortionary model has become so commonplace marine insurance has adapted to negotiate and pay ransoms quickly and efficiently. By 2011, this system had become sufficiently routine that English courts presume that capture, ransom, and subsequent release is an unfortunate—but legally unexceptional—part of the maritime trade. *Masefield* clarified two important aspects of ransom-and-release piracy. First, it reaffirmed that the payment of ransoms is lawful. Second, it overturned earlier precedent by stating that, while paying

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43 York-Antwerp Rules 2016, Rule A.
44 (1822) 1 Hagg 83.
45 Sir John Donaldson et al, *Lowndes & Rudolph-The Law of General Average and the York-Antwerp Rules* (1975) §439.
46 Richard Lowndes, *The Law of General Average*, (1863), 84, as cited in Gotthard Mark Gauci, 'Of Piracy and General Average: Contribution in General Average for Ransom Payment Occasioned by Piratical Activity'; (2019) 50(2) *Journal of Maritime Law & Commerce*, 240, 244.
47 Gauci (n 46), 243-244.
48 *Herculito Maritime Ltd v. Gunvor International BV ('The Polar')* [2024] UKSC 2.
49 'Somali Pirates Release *MT Polar*' *Somali Report* 26 August 2011.
50 Todd, (n 21), 308-309.
51 Marelize Schoeman and Benjamin Häefele, 'The Relationship between Piracy and Kidnapping for Ransom' (2013) 5 (2) *Insight on Africa*, 117.

a ransom is not required as part of attempts to mitigate loss, a shipper cannot claim ATL or CTL unless and until it becomes clear that the insured property will likely not be returned.[52]

Prior to *Masefield*, it seemed that a total loss could be triggered at the moment of seizure, unless subsequent events changed matters prior to the settling of a CTL claim. *Cologan v London Assurance* (1816) ruled that '[c]apture operates as a total loss, unless it be redeemed by subsequent events.'[53] *Dean v Hornby* (1857) affirmed this view, ruling that a total loss may be claimed at the instant of capture because, at that moment, no return could be presumed.[54] Following *Dean*, the claimant in *Masefield* argued that piratical seizure automatically triggered ATL, or, alternatively, the owner's lack control of the vessel, with no clear path to its return, was sufficient for them to notice CTL.

Masefield reconsidered this trigger for total loss, however: 'the test is no longer uncertainty of recovery, but unlikelihood of recovery.'[55] While a vessel's seizure by pirates might 'mature into'[56] a presumption of total loss by later events, *Masefield*'s likely recovery was distinguished from the facts of *Dean*, where the owners were unaware of the vessel's whereabouts and condition when the loss was noticed. *Masefield* thus reversed the longstanding precent that seizure by pirates was itself sufficient for the insured give notice of CTL.

Importantly, it remains unclear (on the facts of both *Masefield* and *Dean*) whether a shipowner may give notice of CTL after having been informed of the seizure, but prior to a ransom demand, if a ransom demand was not quickly forthcoming. The implication drawn from *Masefield*, however, is that, given the routine practice of pirates in the Gulf of Aden, failure to wait a reasonable amount of time for such a demand would be unreasonable.

The Longchamp further enshrined the payment of ransoms as a regular part of maritime business under English law. That case involved a dispute between shipowners and cargo interests about expenses incurred during ongoing negotiations with pirates. The cargo owners argued that, because paying the ransom immediately and at the full asking price was unreasonable, costs incurred by taking alternative action would fall outside of their obligation under GA principles under Rule F of the York-Antwerp Rules 1974.

Rule F states that an 'expense incurred in place of another expense which would have been allowable…shall be deemed to general average.'[57] In other words, if the initial expense (in this case, payment of the initially requested, exorbitant ransom) triggered GA, then expenses incurred by alternative action that addressed the same problem (such as those incurred by the delay) will also fall under GA. Here, the cargo interest argued the converse: if the initial request was unreasonable and therefore unapportionable under GA, the costs flowing from the shipowner's attempt to negotiate down the ransom must also fall outside GA.

Lord Mance disagreed and reaffirmed that ransoms are an unfortunate commercial reality, routine enough to fit comfortably with existing maritime risk apportionment structures. It acknowledged that paying the initial,

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52 Kate Lewins and Robert Merkin, '*Masefield AG v Amblin Corporate Member Ltd; The Bunga Melati Dua*: Piracy, Ransom, and Marine Insurance' (2011) 35 *Melbourne University Law Review*, 717, 721.
53 (1816) 105 ER 1114.
54 *Dean v Hornby* (1857) 3 EL & EL 186, 1108-1113.
55 *Masefield* (n 1), [56].
56 Ibid.
57 York-Antwerp Rules 1974. Rule F remains unchanged in the most recent (2016) update.

exorbitant ransom request without negotiating would have been commercially unreasonable,[58] but the ultimate payment of some more reasonable, negotiated ransom was to be expected. This payment was a sufficiently anticipated situation such that negotiation costs qualify as equivalent to (and therefore Rule F replacements of) legitimate GA expenses.

4. Rough (Conceptual) Seas Ahead

At first glance, the current approach to ransom payments to pirates under English law expounded in *Masefield* and *The Longchamp* appears both stable and effective in providing a clear legal approach to the lawfulness of payment and the apportionment of risk for the ransom cost. Beneath that superficial clarity, however, are several conceptual problems that risk upending the status quo. This section briefly delineates some of these concerns that may, inter alia, undermine or problematise the *Masefield* approach.

4.1. Macroeconomic concerns

Despite the recent decline in vessel-taking, many scholars argue that the routinization the piracy-for-ransom business model has several unintended and undesirable consequences. The insurance market's efficient approach has ended up, ironically, encouraging more piracy,[59] ultimately fostering 'a sophisticated business venture that makes use of modern technology' to hunt its prey.[60] 'During the Gulf of Aden piracy crisis, straightforward, timely payments incentivised more crews to turn to piracy, and new crews entered the game as others expanded operations when it became clear that payment had become safe and routine.[61] Moreover, the cost of this expansion is borne by the insured, with rates increasing as much as 1000% in a single year during the height of the crisis, thereby making costs increasingly untenable for shippers. [62]

Even *Masefield* itself acknowledged with regret that the paying of ransoms was likely to encourage more piracy: '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 purposes of exacting more ransoms.'[63] Thus, while Rix LJ concluded that he finds nothing contrary to the legality of ransom payments in English law, he declined to discuss whether such a ban would be preferable because, as a policy issue, it remains a legislative rather than judicial question.[64] What a principled policy on ransoms should be remains itself unclear, warns Todd: 'public policy arguments can work both ways, balancing the lives of the crew on the one hand with discouraging future attacks on the other'.[65]

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58 *Longchamp* (n 2) [67] (Lord Mance).
59 'Report of the Monitoring Group on Somalia Pursuant to SC Resolution 1811' (2008) UN Doc S/2008/769 (10 Dec 2008).
60 Kantharia (n 4).
61 YM Dutton, and John Bellish, 'Refusing to Negotiate: Analyzing the Legality and Practicality of a Piracy Ransom Ban', (Spring 2014) 42 (2) *Cornell International Law Journal*, 299, 313-314.
62 'Aon Reports Kidnap Insurance Costs up 'Tenfold' in Gulf of Aden' *Insurance Journal* 9 April 2009.
63 *Masefield* (n 1) [66] (Rix LJ).
64 Ibid, [62]; citing *Fender v St John-Mildmay* [1938] AC 1 [12] and *Egerton v Brownlow* (1853) 4 HLC 1 [123].
65 Todd, (n 21), 321.

Public outrage toward an industry that calculates market efficiency against the lives and wellbeing of crewmembers could ultimately prompt a policy shift. Business ethicists Paul Lansing and Michael Petersen warn that:

> 'Deeply entrenched in these criminal acts are the ethical costs and dilemmas borne by shipowners in paying hard currency, which …may secure a ship's return and eventual cargo delivery, but also serves to fuel the act and places the lives of their employees…in extreme jeopardy.'[66]

In the long run, they argue, 'the ethical cost of taking the path of least resistance by buying extra insurance and paying off pirates will ultimately prove to be the industry's undoing'.[67] Not only does ransom-paying encourage more piracy, but 'shipping firms must begin to evaluate, from a business perspective, what ethical role they will choose to play in the escalation of violence.'[68] Thus, even accepting that these policy issues are outside the purview of private law's current approach, the increase in piracy fostered by efficient payment, and the ethical problems inherent in payment might encourage Parliament to consider an outright ban, as was seriously contemplated by the Cameron government in 2012.[69]

Another approach taken by shipowners (and encouraged by insurers) is to 'harden' vessels, making them less attractive targets by outfitting vessels with netting, fencing, and/or water-cannons, and running faster (which dramatically increases fuel costs). Some shippers go further, however, contracting mercenaries to protect against pirate attack. This later approach is problematic and likely to bring increased government scrutiny in the long run. According to a Chatham House report on armed deterrence on vessels, '[a] number of legal issues are raised by the hiring of… armed security personnel'[70] including questions of shipboard authority. An attack may put the mercenaries and the captain at odds, thereby violating the International Convention for the Safety of Life at Sea (SOLAS) 1974. Additionally, the presence of armed guards or mercenaries onboard vessels risks running afoul of laws concerning weapon importation and trafficking when the vessel reaches port.[71]

The early 2000s crisis was mainly addressed by multinational naval forces stationed to protect shipping lanes, including the EU's Operation Atlantia and NATO's Operation Ocean Shield. This approach proved effective, but at an unsustainable long-term cost for participating nations.[72] Moreover, as attacks declined in the Gulf of Aden, other hotspots have bloomed in South America, elsewhere in Africa and throughout

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66 Paul Lansing and Michael Petersen, 'Ship-Owners and the Twenty-First Century Somali Pirate; The Business Ethics of Ransom Payment', (2001) 102 *Journal of Business Ethics*, 507, 511.
67 Ibid, 514.
68 Ibid, 507.
69 Dutton and Bellish (n 61), 302.
70 Chatham House, 'Piracy and Legal Issues: Reconciling Public and Private Interests' 2009, 17.
71 Michael G. Scavelli, 'Uncharted Waters: The Private Sector's Fight Against Piracy on the High Seas', (2010) 76 (1) *Brooklyn Law Review*, 343, 358.
72 James M. Bridger, 'Safe Seas at What Price? The Costs, Benefits and Future of NATO's Operation Ocean Shield' *Research Paper* (NATO Defence College) 95 (September 2013), 4.

Southeast Asia.[73] Pirates also appear to be adjusting their tactics, with the outright theft of cargo on the increase, even as hijackings and ransom demands persist.[74] In other words, piracy is adapting, not abating, and hijack-for-ransom incidents remain an expensive reality for maritime interests. Private law must remain flexible enough to adapt with changing events and tactics, while being sufficiently consistent so that shippers and insurers understand their roles and liabilities.

4.2. The complex, shadowy world of marine insurance

It is no surprise that so many cases before the courts begin on the water. Contracts mitigating marine risks are necessarily intricate, with myriad, complex mishaps possible, often at vast distances from the contracting parties. Yet, while some of this complexity and idiosyncrasy unavoidable, much that makes marine insurance different from other insurance situations is due to traditional practices and commercial gatekeeping by Lloyd's of London and the major firms in this space, rather than commercial logic or necessity. Howard Bennett reflected on MIA 1906's centenary by praising the stable base it has provided for 118 years, but also observing that the statute is showing its age. While it has been subject to surprisingly little adjustment over the years, many of the rules it enshrines were longstanding in 1906, have grown outdated and 'no longer serve any useful purpose'.[75] It is rife with 'otiose rules and doctrines' contrary to modern contractual and insurance practice.[76] Although '[d]ifferent types of insurance may raise different issues and concerns,' Bennett argues, 'there is nothing about the maritime subject matter that dictates a difference in legal treatment,'[77] and insists that many divergences between marine and other practices cry out for elimination.[78]

Almost every major aspect of MIA 1906 has required judicial clarification, and the pace of litigation probing its lack of clarity and modern suitability has only increased in recent years.[79] Its complex and dated framework is particularly problematic for the management of piracy risks, where the subject has frequently been shifted between different policies and approaches to coverage.[80] This confusion can make it difficult to assess how well the insurance market copes with piracy generally, which, in turn makes it hard to determine whether the current approach is appropriate.[81]

The evolution of K&R insurance further complicates the picture. K&R policies developed initially in the aftermath of the infamous kidnapping of aviator Charles Lindbergh's son in 1932, but remained a niche insurance product in the US and UK until another famous kidnapping—of heiress Patty Hearst in 1974. Its

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73 Youd (n 5). Among the most up-to-date records of recent attacks is maintained by International Commercial Crime Services (a division of the International Chamber of Commerce), at: <https://icc-ccs.org/index.php/piracy-reporting-centre/live-piracy-map> accesed 8 July 2024.
74 Youd (n 5).
75 Bennett, (n 39), 678.
76 Ibid, 678, 679-692.
77 Ibid.
78 Ibid, 677.
79 Ibid, 687, 691.
80 Susan Hodges, *Law of Marine Insurance* (Cavendish Publishing 1996), 212.
81 Robert Soady, 'A Critical Analysis of Piracy, Hijacking, Ransom Payments, and Whether Modern London Insurance Market Clauses Provide Sufficient Protection for Parties involved in Piracy for Ransom' (2013) 44 (1) *Journal of Maritime Law and Commerce*, 1-26.

use has exploded however, in the context of increased hostage-taking during the early twenty-first century.[82] These specialised policies often include holistic protection services such as professional negotiators and paramilitary extraction teams and can be written to cover marine or terrene scenarios. K&R policies have some advantages over conventional maritime coverage: they can pay quickly, often avoid the need for GA calculations, and can keep the shipowner from resorting to claiming against their hull insurance (which can lead to higher rates in the future).[83] They also offer wider coverage than conventional marine policies, which may cover the ransom itself but not the other expenses of "crisis management" including negotiation and the logistics of payment.[84] said, K&R products are not always well matched to maritime needs. They usually '…come from the non-marine market which undoubtedly has caused problems, as those seeking to sell it have not had an innate understanding of shipping', warns Chatham House.[85] Additionally, these broad services—especially those that provide the use of force—bring up other potential liabilities for both insurer and insured.[86]

Still another pitfall of the current approach to insuring against piracy stems from conflicting interests arising during the negotiation process. Delays brought about by negotiating with captors add expenses and complexity beyond and above the ultimate ransom price By some estimates 'the additional costs associated with the negotiation process typically double the ransom amount.'[87] How these additional costs are apportioned, and how decisions about when to pay and when to continue negotiating represent additional points of tension among stakeholders. Michael G Scavelli warns that 'without a strict regime that regulates the payment and ransoms and ship security measures, the safety of those on board would be left to the business judgement of the ship owner.'[88] Hostages want a quick and safe release, and care little about lowering the ransom amount. By contrast, shipowners usually seek to minimise total loss (ransom plus expenses from delays), and cargo interests' goals depend on what is carried, on what terms, and that particular voyage's contracts for the apportionment of risk. Even as an alarmingly organized market in ransom payments developed, the delays incurred by pirates' increasing demands has slowed the process and increased negotiating costs and complexities 'As ransoms rose, so did the duration of negotiations' notes Anja Shortland.[89] Thus, ransom-payers face both a moral hazard and a business dilemma in deciding how to respond to a ransom demand. Pitting the interests of crewmembers who may be subject to dire conditions on one hand against the business desire to minimise costs and the policy imperative to avoid a spiral of ever-

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82 Michael A Henk, 'Pirates, kidnappings, and ransom: The business of K&R indemnity policies', Milliman, 12 November 2013 <https://www.milliman.com/en/insight/pirates-kidnappings-and-ransom-the-business-of-k-and-r-indemnity-policies#:~:text=K%26R%20insurance%20originated%20following%20the,Charles%20Lindbergh's%20baby%20in%201932> accessed 8 July 2024.

83 Chatham House (n 70), 4.

84 Henk (n 82); see also A.C., 'I'm a client, get me out of here', *The Economist*, 27 June 2013.

85 Chatham House (n 70), 4.

86 See Scavelli (n 71), 360-362 and Anja Shortland, 'Governing criminal markets: The role of private insurers in kidnap for ransom', (2018) 31 (2) *Governance*, 341-358.

87 Lansing and Petersen (n 66), 511.

88 Scavelli, (n 71), 372.

89 Anja Shortland, 'Can We Stop Talking about Somali Piracy Now? A Personal Review of Somali Piracy Studies', (2015) 21 (4) *Peace Economics Peace Science, and Public Policy*, 419, 424.

increasing demands in the wake of higher payments on the other puts those negotiating for the release of ships, cargo, and crews in an unenviable position.

Setting aside the morality of delaying payment whilst trying to drive a harder bargain with the captors, calculating the financial ramifications of how to respond to a ransom demand is in itself challenging. Because shipowners may also be liable for physical and psychological harm suffered by crewmembers whilst awaiting release, it can be hard even to know what approach makes the best business sense, especially because these sorts of liabilities are often calculated within the context of GA.[90] The principle that the cost of a ransom falls within GA has been clear since the sixteenth century[91] and the calculation of the cost sharing for cargo interests is straightforward. If there are not multiple parties, it is recoupable as an S&L expense.[92] But things get far trickier when the situation has competing interests. A firm stance may reduce the pirates' final price, but extend the captivity, with cost implications for those who pay the wages of those held. Delaying payment increases expenses for crew wages, bonuses, and upkeep, as well as cargo spoilage or other penalties for delays.

Previously, the general belief was that such expenses fell outside of GA[93] but *The Longchamp* and *The Polar* both confirm that both ransoms and expenses incurred during negotiation can trigger GA or S&L contributions, depending on the precise contractual terms in operation. While it is clear that the payment of a ransom may constitute a GA event, it is less certain what approach should prevail with respect to negotiations. Moreover, the actual apportionment of GA contributions remains complex and fraught, something *The Polar* acknowledged as a problem.[94] Gauci views the complexities of mapping piracy and ransom payments onto the existing GA framework as so problematic that English law would do better to abandon GA entirely and shift recouping reasonable exceptional expenses to the realm of unjust enrichment.[95]

Finally, much of what actually goes on in the process of calculating premiums and marketing policies takes place within the shadowy world of Lloyd's of London, which even today evades direct legal or statutory scrutiny.[96] Lloyd's opaque structure and secretive practices draw substantial scholarly criticism. Security scholar Luis Lobo-Guerrero argues that Lloyd's acts far outside traditional underwriting principles and 'continuously pushes the limits of insurability by shaping the security environments under which their market risks operate'.[97] He views Lloyd's less as a consortium of underwriters and more as an unaccountable, quasi-state entity framing maritime security to meet its own goals and interests. [98]

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90 Scavelli (n 71), 367. However, under the Merchant Marine Act of 1920 (46 USC s.30204 (2006)) commonly known as the Jones Act, US maritime employers face stricter liability for harm to seafarers for US-flagged vessels than we see at English law.

91 *Hicks v Palington* (1590) Moore 297.

92 MIA 1906 s.78; *Masefield* (n 1) [64].

93 *Masefield* (n 1) [42].

94 *Polar* (n 48).

95 Gauci (n 46), 255.

96 Anja Shortland, 'Governing kidnap for ransom: Lloyd's as a "private regime"', (2017) 30 *Governance,* 283-299.

97 Ibid, 69.

98 Luis Lobo-Guerrero, 'Lloyd's and the Moral Economy of Insuring Against Piracy: Towards a politicisation of marine war risks insurance', (2012) 5 (1) *Journal of Cultural Economy*, 67, 68.

So far, these concerns have yet to prove an insurmountable problem for managing maritime risk. Insurers continue to write policies that price and cover maritime risks (including ransom payments), and only occasionally do disagreements require judicial intervention. Nevertheless, the complex, otiose, and mysterious nature of industry practice may ultimately be its undoing. Marine insurers and their insured would do well to get out ahead of such problems by developing a clearer and more straightforward approach to ransoms, to avoid unwanted regulation or other state intervention, and to maintain the attractiveness of English law for marine insurance generally.

4.3. Conceptual conundrums

Notorious sea-raider Henry Morgan was recalled to England in 1672 to appease Spanish demands that he stand trial for piracy; when he landed in London, the political winds had shifted and Charles II instead knighted Morgan for service to the Crown.[99] Such is the historical difficulty of defining precisely what is 'piracy'. In the modern context, divining the motivations of those who prey on vessels is more problematic than the private law countenances. As journalist Simon Fairlie warns, '[o]ne man's terrorist…is another man's freedom fighter, and the same can be said for pirates.' [100] Indeed, the legal requirement that a pirate must act for personal gain is—at a basic, conceptual level—incongruous with scholarly and historical understandings of piracy, in law and beyond.

Private law is out of step with the historical approach to piracy in a criminal context but this divergence is not, *per se*, a problem. Private law is interested in apportioning and mitigating risk, not addressing the underlying crime. The definition used by 'businessmen for business purposes'[101] makes sense in a commercial context. Problematically, however this commercial definition reflects a faulty understanding of the historical, cultural, economic, and legal conceptualization of piracy, with theoretical implications for commercial law.

Neither statutory definitions nor common law approaches to piracy and related maritime crimes has been historically consistent, but the approach favoured in modern cases requires a definition of piracy that is general and expansive in defining that *actus* of piracy, while restrictive with respect to the wrongdoers' intent. Insurers and shippers do not draw clear distinctions between types of violent predations at sea, but insist on a bright line between acts done for private gain (which will be insured against as 'piracy') and any other motivations.[102] Here, the private law has, since the seventeenth century preferred a narrow definition of piracy as 'only a sea-term for robbery.'[103] To the contrary, a legal approach going back at least as far as Cicero argues that pirates are not merely robbers who got wet but are rather *hostis humani generis*: an existential threat to commerce and legitimate order more generally. This ancient approach was affirmed in the early modern period by Hugo Grotius.[104] Since the seventeenth century, statesmen within and beyond

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99 Dudley Pope, *The Buccaneer King* (Dodd, Mead, 1978), 257-260.
100 Simon Fairlie, 'The West helped create the Somali pirate situation', *Ecologist* 28 December 2009.
101 *Republic of Bolivia* (n 14), 585 (Pickford J).
102 Todd, (n 21), 311.
103 *R v Joseph Dawson et al* (Charles Hedges J); *The Tryals of Joseph Dawson, Edward Forseith, William May, William Bishop, James Lewis, and Joen Sparkes* (John Everingham, 1696), 6.
104 Hugo Grotius, *De Jure Belli ac Pacis*, vol.2 (1625), cap.20, § 40.

England often acknowledge a wider set of motives than personal financial gain.[105] Moreover, historians, anthropologists, and sociologists all view piracy as a crime with profound political underpinnings, whether express or inchoate.[106] For historian Marcus Rediker, pirates represent a profound conceptual challenge to the rise of nation state and capitalism, and pirates often understood themselves as rebels against commercial and systems that exploited them.[107] Economists stress that, even when the surface motivation is private gain, larger political implications lurk beneath the surface.[108] Even in law, the definition of 'private gain' is less secure than recent cases presuppose. These inchoate ideological motivations evade Vaughn Williams' restriction on political motivation in *Republic of Bolivia.* While he acknowledged that a pirate may be 'the enemy of the human race' it was when the pirate furthermore acted as the 'enemy solely of a particular State' that he was no longer a 'pirate' for private law purposes.[109]

These deeper motives can be found in modern piracy just as much as during the 'golden age' of c.1650-1730. As industry expert Martin Kelly explains, 'Piracy isn't a maritime issue. Its root causes are socio-economic.'[110] Indeed, the origins of the piracy crisis of the early 2000s began when local fishermen banded together as '*ad-hoc* coast guards' [111] to fight against illegal fishing in their waters following the collapse of the Somali government.[112] As the predations against their fishing grounds continued, criminal organisations also reportedly capitalised on the lack of national oversight to dump toxic and radioactive waste in Somali waters, further damaging the fishery and polluting the shoreline.[113] According to UN environmental researcher Nick Nuttall, the unpatrolled Somali coastline was exploited as a dumping ground at a tenth the price of more responsible disposal, precipitating an ecological disaster.[114] The origins of modern hijack-and-ransom piracy thus flow from attempts by Somali fishermen to defend against depredations of their economic and national interests. Taking a larger view, the conclusion that these pirates act purely for personal gain becomes less certain.

The historic legal designation of pirates as wholly outside the law has significant implications, even for insurance issues. *Dean* rested not only on the specifics of when the owner lost possession without a clear path to its return (thereby triggering the right to notice CTL), but on the fact that pirates may never 'possess' at all. While terrene thieves may hold a 'thief's title' to their ill-gotten gains, 'pirates are the enemy of mankind, and have no right to the possession.'[115] Thus, Lord Campbell CJ concluded that determining precisely who possessed the vessel could not be a requirement for total loss, because, since pirates may never

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[105] *In re Piracy Jure Gentium* [1934] AC 586 (1934) 49 Lloyd's Rep 411 (PC).
[106] Marcus Rediker, *Villains of All Nations* (Beacon, 2004); Lydelle Joubert, 'Abu Sayyaf: The Chameleon in the World of Terror' *Stable Seas*, 30 April 2020.
[107] Ibid, 6-19, 170-177.
[108] Peter Leeson, *The Invisible Hook* (Princeton, 2009).
[109] *Republic of Bolivia,* (n 14), 790.
[110] Kelly, (n 5).
[111] Lansing and Petersen (n 66), 508.
[112] Ibid; Najad Abdullahi, 'Toxic Waste Behind Somali Piracy' *Al Jazeera.net* (10 October 2008).
[113] Chris Milton, ''Toxic waste' behind Somali piracy', *Ecologist*, 1 March, 2009; Christopher Soloman, 'Is the World Ready to Investigate Somalia's Run-in with the Eco-Mafia?' *Inside Arabia* 24 June 2022.
[114] 'UN: Nuclear Waste Being Released on Somalia's Shores After Tsunami', *Voice of America* 31 October 2009 <https://www.voanews.com/a/a-13-2005-02-23-voa23/309291.html> accessed 8 July 2024.
[115] *Dean* (n 53), 1112 (Campbell CJ).

'possess', 'total loss by [piratical] capture' would be otherwise conceptually impossible.[116] Strikingly, *Masefield* ignores these more existential definitions of piracy and capture posited in *Dean* and *Republic of Bolivia*, and focuses instead on the question of whether there had been "deprivation of possession plus uncertainty of recovery'.[117] In *Masefield* as in *Dean*, the vessel was in the hands of pirates with no certain path to restoration to its owners, but in *Masefield*, Rix LJ believed that ransom demands were sufficiently standard to presume that—at a cost—possession was likely to be restored, so neither ATL nor CTL could be presumed merely on the basis of the seizure. Such is the critical difference between piracy in the 1850s (where the intent was to keep the vessel and cargo, and in the twenty-first century (where the goal is to extort a ransom before returning possession). Perhaps *Masefield* suggests we should shrug off *Dean* and *Republic of Bolivia* as cases from another era, reflecting outmoded definitions of piracy. That older understanding of piracy as something beyond mere robbery remains significant, however, and could undermine the current approach's reliance on 'private gain'.

Situating the actions of an individual band of pirates (be they historical or contemporary) in a larger context reveals far more complex motives. Piracy has been distinguished ideologically from mere 'sea robbery' since before Justinian, and, while neither shippers nor insurers may wish to delve into such historically or geopolitically complex interpretations, the fact that piracy has long been understood as a crime with inherently ideological motives risks undercutting the current legal approach in profound and disastrous ways. If modern jurists are forced to contemplate piracy as a broadly political act, as it has historically been understood, and as scholars argue must be acknowledged in the modern context, it could undermine the core legal conceit upon which all piracy insurance rests. In particular (as is discussed below), a conceptual commingling of the ancient understanding of piracy with the very modern conceptualization of terrorism presents a profound threat to current practice.

4.4. Piracy and Terrorism in International Law

Despite piracy being one of the earliest concerns of public international law, the international law of piracy remains unsettled, made up of 'an array of overlapping and complex rules.'[118] Indeed, between different definitions and different signatories to various agreements, not only what constitutes piracy remains in dispute.[119] Of particular concern for purposes here, international law is more technical than English private law in defining 'piracy' as opposed to other forms of maritime predation (including, importantly for our purposes 'hijacking'). Piracy reemerged as a hot topic in international law when the Palestinian Liberation Front seized the *Achille Lauro* in 1985. This hijacking prompted renewed focus on the meanings of 'piracy' and 'terrorism' in international law.[120] During the ensuing hostage situation, the assailants were described

[116] Ibid.
[117] *Masefield* (n 1), [32] (Rix LJ).
[118] Ryan P. Kelley, 'UNCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy', (2011) 95 (6) *Minnesota Law Review*, 2285, 2286.
[119] Arron N. Honniball, 'The 'Private Ends' of International Piracy: The Necessity of Legal Clarity in Relation to Violent Political Activists', *ICD Brief 13*, October 2015, 4; Douglas R Burgess, *The World for Ransom: Piracy is Terrorism, Terrorism is Piracy* (Prometheus, 2010), 119-169.
[120] Gerald P. McGinley, 'The *Achille Lauro* Affair: Implications for International Law' (1985) 52 (4) *Tennessee Law Review*, 694-706.

by US-president Ronald Reagan as 'pirates',[121] invoking piracy as a crime of universal jurisdiction and calling for greater efforts to confront politically-motivated terrorism nationally and internationally.[122] 'Universal jurisdiction' became a useful model for addressing the similar existential threat of modern terrorism as a form of *hostis humani generis redux.*

The growing international focus on 'terrorism' (itself an ill-defined yet increasingly ubiquitous legal concept) puts international pressure on the pragmatic and non-technical definition of piracy in English private law. Terrorism causes two problems for the *Masefield* approach to ransom payments. First, 'terrorism' is now enshrined in both domestic legislation and international conventions as subject to special restrictions that threaten the legality of the sorts of ransom payments currently commonplace in marine insurance practice. Second, because 'terrorism' itself remains undefined both domestically and internationally, it is hard to predict what will fall within the reach of these new rules.

International Court of Justice jurist Richard Baxter complained a half-century ago that 'we have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all it serves no operational legal purpose.'[123] The years since have yielded little clarification, although definitional vagueness has not stopped the conceptual deployment of 'terrorism' in powerful legal ways. 'As a legal fiction, and a slippery one at that,' argues Jody Greene, terrorism '…is uniquely suited to act as a conduit through which those who hold control over legal interpretation can express and deploy relations of force.'[124] Thus, even though 'terrorism' itself lacks precise definition, it continues to be invoked with frequent and potent legal and political effect. This creates doctrinal uncertainty: how can a private party be certain they are not suborning terrorism via a ransom payment to a pirate if the definition of terrorism itself is unstable?

The most widely accepted international definition of piracy is found in UNCLOS, Art.101(a), which limits piracy to those acting for 'private ends', and therefore fits comfortably with UK's private law's definition. Debate exists in international law circles, however, as to whether or not ideological or politically motivated nonstate violent actors at sea may be understood as acting 'privately' (and can therefore be 'pirates').[125] That said, the ransom scenarios common in modern piracy fit most comfortably under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 ('SUA'), which is silent on the perpetrator's motivation. Todd sees UNCLOS 'losing relevance' in favour of the more aggressive and interventionist approach offered by SUA, which, with its focus on suppression and criminal prosecution, is less interested in dividing pirates from terrorists.[126] The UN in particular tends to link hijacking, ransom demands, and terrorism.[127] The UN's International Convention for the Suppression of the Financing of

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[121] Douglas R. Burgess Jr., 'The Dread Pirate Bin Laden: How Thinking of Terrorists as Pirates can Help Win the War on Terror' *Legal Affairs*, July/Aug 2005.
[122] Malvina Halberstam, 'Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety', (1988) 83 *American Journal of International Law*, 269-310.
[123] Richard R. Baxter, 'A Skeptical Look at the Concept of Terrorism', (1974) 7 (3) *Akron Law Review*, 380.
[124] Jody Greene, '*Hostis Humani Generis*', (2008) 34 (4) *Critical Inquiry*, 683, 694.
[125] Contrast Honniball (n 119).
[126] Todd, (n 21), 312.
[127] Burgess, (n 119), 64.

Terrorism (1999)[128] currently has 188 signatories and provides an international framework for cooperation to disrupt and curtail financial support for terror. Following the attacks on 11 September 2011, the UN Security Council called for all UN member states to 'Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts'.[129] In 2014, UNSC issued a further resolution drawing links between ransom payments and terrorism, and calling on states 'to prevent terrorists from benefiting directly or indirectly from ransom payments'.[130] This later resolution, and its ensuing adoption in UK law, is of particular concern to corporate entities and financial institutions involved in the payment of ransoms. At the height of the Somali crisis, both the US and UK contemplated banning ransom payments outright on policy grounds that included both the risk of encouraging more piracy and ransoms potentially financing terror.[131]

Still more concerning for the private law approach, several international law scholars call for tighter conceptual links between piracy and terrorism[132]—so much so that DR Burgess proposes a single new hybrid concept he dubs 'piratoterrorism'.[133] By contrast, other scholars argue that such links are dubious and 'unlikely'[134], and warn that the 'global security discourse' has been distorted in the 'vulnerable public imaginary' by inaccurate and unhelpful conflations between piracy and terrorism.[135]

Fortunately for the *Masefield* approach, such a tight linkage between terrorism and piracy has yet to gain traction outside of academic circles,[136] but if it should gain primacy, it will have profound implications for the ransom payments. Even without the dramatic reconceptualization proposed by Burgess, however, recent increased focus on terrorism generally and financial support for terrorists specifically in both international and UK law may undermine the current approach in English private law.

4.5. Terrorism and ransom payments in UK law

If the international approach remains an abstract threat to the *Masefield* system, the UK's own antiterrorism statutes are an immediate concern. Because UNCLOS Art.101(a)'s requirement that pirates act 'for private gain' is mirrored in UK statute,[137] the presence of a political goal even in addition to a pecuniary one would render the situation not legally 'piracy' for insurance purposes, which can lead to complex situations with

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[128] International Convention for the Suppression of the Financing of Terrorism (1999, in force 2002); see also United Nations Office on Drugs and Crime, 'Combating Terrorist Financing' <https://www.unodc.org/unodc/en/terrorism/expertise/combating-terrorist-financing.html?testme> accessed 8 July 2024.

[129] S/RES/1373 (2001) s.1(b).

[130] S/RES/2133 (2014) s.3.

[131] Dutton and Bellish (n 61), 312-313.

[132] Sarabjeet Singh Parmar 'Somali Piracy: A Form of Economic Terrorism', Strategic Analysis, 36:2, (2012) 290-303; Donald J Puchala, 'Of Pirates and Terrorists: What Experience and History Teach', (2005) 26 (1) *Contemporary Security Policy*, 1-24.

[133] Burgess, (n 121), 24.

[134] Lydelle Joubert, 'The Extent of Maritime Terrorism and Piracy: A Comparative Analysis', (2013) 41 (1) *Scientia Militaria: South African Journal of Military Studies*, 111.

[135] Currun Singh and Arjun Singh Bedi, 'War on Piracy: The conflation of Somali piracy with terrorism in discourse, tactic, and law', (2016) 47 (5) *Security Dialogue*, 440.

[136] Alexander Spencer, 'Romantic Stories of the Pirate in IARRRH: The Failure of Linking Piracy and Terrorism Narratives in Germany', (2014) 15 *International Studies Perspectives*, 297-312.

[137] MSMSA 1997 s.26; sch.5.

respect to coverage.[138] The piracy-for-ransom model is instead covered by SUA, which enters UK law via Aviation and Maritime Security Act 1990. As such, it creates a confusing situation with respect to what events are covered and, more alarmingly, requires the ransom payor to delve into the motives of the hijacker/pirates to ensure paying the ransom is legal.

The biggest problems for payers of maritime ransoms come from the Terrorism Act 2000 ss.17 and 17A. TA 2000 s.17 makes illegal involvement in any 'arrangement as a result of which money or other property is made available or is to be made available for terrorists'[139] or to know or have 'reasonable cause to suspect that it will or may be used for the purposes of terrorism.'[140] On its face, this provision seems to make payors of ransoms responsible for assessing the destination of the funds they pay out. How, then, are ransom payers to know whether they (lawfully) pay 'piracy syndicates' instead of funding 'maritime-capable terrorist and insurgent groups'?[141] By 2011, English insurers faced increasing scrutiny for ransom payments to Somali pirates that ended up in the hands of Al-Shabaab, a 'terrorist group linked to Al-Quaeda'.[142] Neil Roberts of Lloyd's acknowledged the growing concern about ransom payments' legality, warning 'we would not necessarily be able to indemnify ship owners if they paid a ransom to a terrorist group, if that turns out to be the case'.[143] Todd concurs, noting that neither GA nor S&L recovery will be possible 'if a ransom payment contravenes the Terrorism Act 2000' because 'the assured will…need to rely on his own illegal act.'[144]

Another potential pitfall for ransom-paying insurers can be found in the Proceeds of Crime Act 2002 s.328, which makes it a crime if one '…enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.'[145] Brooke LJ warns that '[t]he language of s.328 has caused great uncertainty within the legal profession', due to the broad definition Parliament has attached to 'criminal conduct' and 'criminal property'.[146] Although the current consensus is that because the ransom itself is not criminal property (until in the hands of the demander), the payor will not run afoul of this provision,[147] but it remains a thorny issue. Moreover, if the ransom payee is listed by the Office of Financial Sanctions Implementation (OFSI) as or linked to such an entity, the payor risks violating sanction rules. Insurers relying on *Masefield* continue to take a head-in-the-sand approach to possible links between maritime pirates and terror groups,[148] or rely on the fact that a ransom payment is not 'proceeds of a crime'[149] until handed over.[150] I believe this

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[138] See *Andreas Lemos* (n 20); *Salem* (n 16); *Polar* (n 48).
[139] TA 2000 s.17(a).
[140] TA 2000 s.17(b).
[141] Justin V. Hastings, 'The Return of Sophisticated Maritime Piracy to Southeast Asia', (2020) 93 (1) *Pacific Affairs*, 5, 8.
[142] 'Lloyd's Faces Piracy Ransom Claims Scrutiny' *Reactions* [UK], June 2011.
[143] Ibid.
[144] Todd, (n 21), 318.
[145] POCA 2002 s.328.
[146] *Bowman v Fels* [2005] EWCA Civ 226, [7].
[147] See 'To pay or not to pay: Criminal law considerations for companies facing ransomware attacks', Eversheds-Sutherland *Insights*, 28 March, 2022 <https://www.eversheds-sutherland.com/en/united-kingdom/insights/to-pay-or-not-to-pay-criminal-law-considerations-for-companies-facing-ransomware-attacks> accessed 8 July 2024.
[148] 'Lloyd's Faces Piracy Ransom Claims Scrutiny'.
[149] POCA 2002.
[150] *R v Loizou* [2005] EWCA Crim 1579; see also Richard Easton, 'Are Payment of Ransoms Illegal? (2014) 178 *Criminal Law & Justice Weekly*, 594.

position is more precarious than other commentators suggest. *R v Lane and Letts*[151] gives worrisome guidance to potential ransom payors on the meaning of the statute's standard that there must not be a 'reasonable cause to suspect'[152] that the money may be used for terrorist purposes, affirming that while the provision does not create strict liability, nevertheless, 'an accused can commit this offence without knowledge or actual suspicion that the money might be used for terrorist purposes.'[153] This decision places a substantial obligation on the payor to have contemplated the evidence at hand. Out of these legislative concerns, payors often go to great lengths to demonstrate that there is no connection or collusion between pirate and payor.[154]

Importantly, K&R policies generally reimburse payments already made by the victim,[155] thereby protecting underwriters, who will refuse payment if legality is suspect, helping them evade 17A's language targeting insurers. Because they are under duress, victims are less likely to be called to account under TA 2000, but the current situation leaves victims uncertain about the viability of purchased coverage.

Helpfully for insurers and ransom-payers, 'Somali pirates have not presented ideological or political motivations for their crimes and have denied affiliation with Islamist groups.'[156] Indeed, most involved in Gulf of Aden piracy are adamantly apolitical, at least when in communication with academics and journalists from the Global North,[157] although this disavowal may demonstrate that they understand the nuances of their trade more than that they genuinely act only for personal gain.[158] Moreover, as pirate attacks have shifted to other areas, potential links between piracy and terrorism only grow more problematic.[159]

Todd notes, 'a consequence of *Republic of Bolivia* is that the activities of neither terrorists nor politically motivated persons are ever likely to overlap with piracy.'[160] On the one hand, this observation suggests that, because politically motivated hijackers do not fall within the legal definition of 'pirates', there is no problem, as no piracy policy need cover payment to terrorists. On the other hand, such distinctions are of little importance to insureds who seek indemnification against risk of seizure under whichever clause applies, whether its motivation be political or piratical. Worryingly, if the perpetrators assert non-pecuniary goals, 'the possibility must be considered that the hijacking falls within no insured peril at all.'[161] This creates a dangerous, unsettled situation for both insurers and the insured, where a single turn of phrase during a ransom demand will convert an insured risk to a wholly uninsurable one, or transform a victim-paid ransom from reimbursable to unrecoverable.

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[151] *R v Lane and Letts* [2018] UKSC 36.
[152] TA 2000 s.17(b).
[153] *Lane and Letts* (n 151), [24] (Lord Hughes).
[154] Jonathan Steer, 'Piracy and General Average', (2009) 23(8) *Maritime Risk International*, 14-15.
[155] 'Spotlight on Kidnap and Ransom' *Canadian Underwriter*, August 2018, 59.
[156] Singh and Bedi (n 135), 449.
[157] Ibid; Karine Hamilton, 'The Piracy and Terrorism Nexus: Real or Imagined?' *Proceedings of the First Australian Counter Terrorism Conference*, Perth: Edith Cowan University, 2010, 28.
[158] Joubert, (n 134), 130.
[159] Samuel A. Smith, 'Financing Terror, Part III: Kidnapping for Ransom in the Philippines' (*Strife*, 26 January 2015); Lydelle Joubert, *The State of Maritime Piracy 2020* (Stable Seas, 2021).
[160] Todd, (n 21), 315.
[161] Ibid, 314.

Because *Republic of Bolivia* affirms that anything other than private ends precludes 'piracy', thus making the action uninsurable under piracy coverage, adapted WR clauses required for particularly dangerous voyages may cover damage flowing from state or political actions but not the payment of ransoms to criminal entities. Moreover, because the malefactors' motives might remain opaque at the moment of seizure or payment, this situation leave both payers and insurers in an unclear legal position.

Nevertheless, TA 2000 s.17 was in place prior to *Masefield* and has not disrupted ransom payments or the expansion of K&R underwriting.[162] This provision places matters on an uncomfortable footing, but the Counterterrorism and Security Act 2015 makes the situation far more uneasy. CTSA 2015 s.42(1) inserts a new provision, s.17A into TA 2000, extending criminal liability to insurers who have 'reasonable cause to suspect' payment may end up in terrorists' hands.[163] This 'unhelpfully vague'[164] new standard puts the *Masefield* approach under much greater strain. While Easton sees the current approach sufficiently compliant with the older s.17,[165] the new statutory language has been met with dismay by lawyers and industry observers.[166] A leading practitioners' text offers tepid reassurance that, so long as the pirates express no political aim, the ransom payer may be acting lawfully, but warns that 'whether situations such as that where the criminal gangs engaging in acts of piracy are having to pay protection money would fall within this wording is questionable.'[167]

Thus, ransom-payers are caught between two contradictory demands: they must act to mitigate loss (and preserve life) by paying ransoms yet may find, post facto, that the payment of the ransom was itself unlawful. Whether this fate befalls an insured party who paid the ransom but is then refused repayment by the insurer due to s.17A, or an insurer, having paid, finds itself in violation of the law, this lack of clarity is troubling. Shippers hoping to manage marine risks may discover that their ability to recover hinges entirely on the stated motives of the pirates—or, worse, a post-facto evaluation of those motivations by the UK or another nation asserting extraterritorial jurisdiction on the grounds of universal jurisdiction of piracy and/or terrorism. Companies with financial exposure to the US should be particularly wary due to that nation's aggressively extraterritorial approach to criminalising financial support of terrorism.[168]

In sum, the situation is less comfortable for all parties than it may appear. Shippers and their underwriters face tough moral and business decisions in cases of piratical extortion and the lack of a precise defined line between pirate and terrorist leaves the current approach subject to policy whims and hazy guidance.

5. A Solution?

Shippers and insurers at English law need a means of addressing the ongoing threat of piracy-for-ransom that maintains the ability to manage risk predictably against a wide variety of marine hazards, including the

[162] Easton (n 150), 594.
[163] TA 2000 s.17A(1)(1)(c).
[164] Richard Neylon, Daniel Martin and Michael Ritter, 'UK Counter-Terrorism and Security Bill: Ransom Payments, November 2014—Part Two', HFW Briefings, November 2014.
[165] Easton (n 150), 594.
[166] Neylon et al. (n 164).
[167] *Arnould: Law of Marine Insurance and Average* 20th ed., (Sweet & Maxwell, 2021), para. 23-3316.
[168] 18 U.S. Code §2339B(d).

necessity of paying ransoms to ensure the release of seafarers and vessels, but will not run afoul of TA 2000. Simply banning the paying of ransoms (proposed by the Cameron government in 2012)[169] remains undesirable because it would undermine England's strong financial position in marine insurance and continues to be opposed by industry groups,[170] and would be ineffective in curtailing piracy.[171] Moreover, as Dutton and Bellish note banning ransom payments is 'inconsistent with the retributive principles of criminal law, since it would punish innocent victims who pay ransoms under duress.'[172]

What then is a practical, doctrinally consistent, and ethical approach going forward? The solution lies in a new regulatory approach to the longstanding practice of P&I clubs. In lieu of covering piracy risks through regular marine insurance, the clubs offer a useful mechanism to handle the legal perils inherent in the payment of ransoms in the marine setting. Club members pay a yearly 'call' for membership rather than taking out a policy on a given vessel or voyage. Therefore, the clubs have a ready pool of funds to handle rapid payment. Also, as a consortium of owners pooling risk, however, they are ethically more akin to the family member who, with a loved one captive, can offer a defence of duress to the claim of paying a ransom. Moreover, P&Is can be structured such that the definition of 'insurance contract' described in TA s.17A(5) will not bite, leaving less troublesome s.17 as the operational provision. Furthermore, because P&I clubs are comprised of peer firms, they are more likely to agree to a general approach to ransom payments than insurers who have different commercial motivations and legal obligations than the insured. P&Is could additionally develop either their own or a shared industry consortium to manage ransom negotiations, which would allow for timely sharing of information about current conditions and pirates' ransom expectations.[173]

Ideally, a new statutory instrument will create a government office as point of contact for P&I clubs. Upon receipt of a demand, the club would present all available information to an official to check against blacklisted individuals and organizations. In the US, the State Department maintains a regularly updated list of 'Foreign Terrorist Organization ('FTOs')[174] and the Treasury Department maintains an extensive list of individuals and entities currently under US financial sanctions so potential transactions can be vetted for legality.[175] Per the Sanctions and Anti-Money Laundering Act 2018, the UK's OFSI also maintains a 'Sanctions List'[176] to combat money laundering, which could serve as the model for building a ransom-specific list.

The quick turnaround offered by such an office will have two benefits: a) time is of the essence for both humanitarian and commercial reasons in cases of maritime piracy, and b) once the decision is made, the state will have indemnified the club against post-facto scrutiny or prosecution. Also, centralising negotiations offers additional financial benefits. Economist Attila Ambrus suggests modern ransom negotiations would

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169 Dutton and Bellish (n 61), 302.
170 Liz McMahon, 'UK MPs' debate to focus on ransom payment' *Lloyd's List* 13 Jun 2012.
171 Dutton and Bellish (n 61), 303
172 Ibid.
173 Attila Ambrus *et al*, 'Pirates of the Mediterranean: An empirical investigation of bargaining with asymmetric information', (2018) 9 *Quantitative Economics*, 243.
174 Dutton and Bellish (n 61), 320.
175 United States Department of the Treasury, OFAC Sanctions List, <https://sanctionssearch.ofac.treas.gov> accessed 8 July 2024.
176 Foreign, Commonwealth and Development Office, 'The UK Sanctions List', <https://www.gov.uk/government/publications/the-uk-sanctions-list> accessed 8 July 2024.

benefit from the kind of centralized approach used during the era of the Barbary Corsairs: 'the historical preference for centralized ransoming organizations suggests that such institutions might aid negotiations with pirates today by both enabling negotiations for multiple cargoes at once and by reducing transaction costs (which, besides saving costs directly, improves the bargaining power of the negotiating team).'[177] Similarly, Lansing and Petersen argue that if 'ship-owners…develop and adhere to united piracy-policies' it will diminish piracy's appeal.[178] Putting matters in the hands of P&I groups, as regulated by statute will help ensure a unified approach, which creates greater transparency for all parties.

This solution does leave other ransom situations outside its purview, however. K&R insurance (terrine and marine) remains within the ambit of s.17A, and its use should be limited, because marine risks are (and should remain) legally distinct.

This solution also does not solve the existing problem of smaller shipping concerns and personal vessels who lack access to P&I membership outside protection[179] although it might be possible to develop a mechanism for them to be permitted to buy into P&I pools as junior members for a small fee to avail themselves of protection. That option would benefit those who currently lack the wherewithal to negotiate, and, given many nations' explicit refusal to pay ransoms on behalf of citizens,[180] it would offer an affordable option to purchase coverage where state help is not forthcoming.

Piracy and pirates' ransom demands will continue to be an important issue in English private law for the foreseeable future. Shippers and insurers operating under English law should remain less concerned about the slippery definition of 'piracy' than they should be about the unclear definition of 'terrorism'. The commercially minded definition of 'piracy' works well in all regards save one: the private purposes requirement. Although the current head-in-the-sand approach offered by *Masefield*, where pirates are simply presumed to be acting for private gain appears to work for the time being, profound cracks threaten that legal edifice. English law will do well to be proactive to address this concern, to support clarity and stability in the marine insurance markets and to help maintain the position of England and Wales as the preferred jurisdiction for marine insurance. These proposed minor adjustments will help ensure smooth (legal) sailing through into the future, even through pirate-infested waters.

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[177] Ambrus (n 173), 243.
[178] Lansing and Petersen (n 66), 513.
[179] Schoeman and Häefele (n 51), 117, 119-121, 125.
[180] The US and UK prohibit state payment of ransoms for the return of citizens, although some other European states have taken a softer view. (Dutton and Bellish (n 61), 309; Foreign, Commonwealth and Development Office, 'Guidance: Kidnappings or Hostages Abroad' <https://www.gov.uk/guidance/kidnappings-or-hostages-abroad> accessed 8 July 2024.)