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Ordering Chaos at Sea: Preparing for Somali Pirate Attacks Through Pragmatic Insurance Policies

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ORDERING CHAOS AT SEA: PREPARING FOR SOMALI PIRATE ATTACKS THROUGH PRAGMATIC INSURANCE POLICIES

INTRODUCTION

Abduwali Abdukhadir Muse, a young Somali man, made headlines in the United States in April 2009 when he and three co-conspirators held Captain Richard Phillips of the American-flagged Maersk Alabama hostage for nearly four days.¹ Of four attackers, Muse is the only surviving pirate.² The Navy brought Muse to the United States to stand trial.³ On May 19, 2009, a grand jury indicted Muse for conspiracy to violently seize a ship, conspiracy to hold a hostage, aiding and abetting a plot to hold a hostage, and unlawfully discharging a firearm.⁴ The United States has the legal authority to try individuals for piracy on the high seas.⁵

The attack on the Maersk Alabama was the first Somali pirate attack to attract real media attention in the United States, possibly because compared to other shipping nations, the number of American-controlled ships that have been attacked by Somali pirates is relatively small.⁶ Arguably the most interesting aspect of the Maersk Alabama incident was that it was an anomaly among the modern piracy that occurs daily in the Gulf of Aden: The Navy intervened (rather daringly), and no one paid ransom.⁷ In many piracies in the area, insurers (and sometimes governments) negotiate with the pirates and pay

1. Robert D. McFadden & Scott Shane, *Navy Rescues Captain, Killing Three Pirate Captors, Navy Kills 3 Pirates*, N.Y. TIMES, Apr. 13, 2009, at A1.

2. Benjamin Weiser, *A Young Somali in Manhattan, To Face U.S. Charges of Piracy*, N.Y. TIMES, Apr. 22, 2009, at A1.

3. *Id.* See United Nations Convention on the Law of the Sea art. 100, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

4. The charges were brought under 18 U.S.C. § 1651 (life sentence for piracy), § 2280 (committing violence against a ship), § 924 (unlawfully discharging a firearm), and § 1203 (hostage taking). Indictment at 1–2, 4, 6–7, United States v. Muse, No. 09-cr-512 (S.D.N.Y. May 19, 2009), available at http://www.investigativeproject.org/documents/case_docs/1160.pdf.

5. U.S. CONST. art. I, § 8, cl. 10 (Congress may “punish Piracies and Felonies committed upon the high Seas, and Offences against the Law of Nations.”).

6. See ICC INT’L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS ANNUAL REPORT: 1 JANUARY–31 DECEMBER 2009 16–17 (2010) [hereinafter ICC ANNUAL REPORT] (noting that in 2009, the United States had four ships attacked out of a total of 406 attacks).

7. McFadden & Shane, *supra* note 1.

ransoms.⁸ While it is expensive to pay ransom, it is cheaper than changing shipping routes.⁹ Insurers and shipping interests therefore seem willing to take the risk of encountering pirates for expediency's sake, emboldening the pirates with a sense of success. In 2009, 217 of the 406 reported pirate attacks worldwide were attributed to Somali pirates, compared with only 51 Somali-attributed attacks in 2007.¹⁰

Additionally, this is a new incarnation of piracy, an ancient crime, and marine insurance and domestic and international law have yet to evolve accordingly. Traditionally, piracy was a violent attack on a ship aimed at procuring the vessel or the cargo onboard.¹¹ Somali pirates have taken on a new strategy somewhere between terrorism (defined as violence undertaken for political ends¹²) and traditional piracy (violent armed robberies¹³).¹⁴

Somali piracy has become an attractive career choice for young Somali men. Twelve percent of the world's daily oil supply moves through the Gulf of Aden.¹⁵ After years of war without a functioning central government, lawlessness is rampant.¹⁶ Piracy is now so lucrative that the bandits set up an investment exchange where people can invest in particular attacks without

8. See Alan Cowell, *Pirates Attack Maersk Alabama Again*, NYTIMES.COM (Nov. 18, 2009), http://www.nytimes.com/2009/11/19/world/africa/19pirates.html?_r=1&emc=eta1 (noting that there were rumors of the Spanish government paying a \$3.5 million ransom for the release of a Spanish crew); see also RAWLE O. KING, CONG. RESEARCH SERV., OCEAN PIRACY AND ITS IMPACT ON INSURANCE 3 (2009) (noting that London based shipping firms are willing to pay ransom because their hull insurance policies cover piracy and will reimburse them).

9. James W. Carbin, *Pirates: Hostis Humanis Generis*, FED. LAW., Sept. 2009, at 50, 53.

10. ICC ANNUAL REPORT, *supra* note 6, at 5–6, 21. The International Criminal Court (ICC) notes that the Somali pirates were responsible for attacks in Somalia, the Gulf of Aden, the Red Sea, the Arabian Sea, the Indian Ocean, and Oman. *Id.* at 21.

11. Phillip A. Buhler, *New Struggle with and Old Menace: Towards a Revised Definition of Maritime Piracy*, CURRENTS: INT'L. TRADE L.J., Winter 1999, at 61, 64.

12. Leticia M. Diaz & Barry Hart Dubner, *An Examination of the Evolution of Crimes at Sea and the Emergence of the Many Legal Regimes in Their Wake*, 34 N.C. J. INT'L. L. & COM. REG. 521, 539–40 (2009).

13. *Id.*

14. One author argues that this new hijack-for-ransom strategy results from the pirates' inability to maneuver large cargo vessels or to sell large amounts of stolen goods. Carbin, *supra* note 9, at 55. *But see Somalia: Pirates Attack Oil Tanker*, N.Y. TIMES, Nov. 10, 2009, at A10 (intimating that Somali pirates are becoming increasingly sophisticated, at least with regard to weaponry).

15. James Kraska & Brian Wilson, *Piracy Repression, Partnering and the Law*, 40 J. MAR. L. & COM. 43, 43 (2009).

16. Gwen Thompkins, *Morning Edition: Battling Piracy Around the World: In Somalia, Piracy is an Attractive Career Option* (NPR radio broadcast May 6, 2009), transcript available at <http://www.npr.org/templates/story/story.php?storyId=103815312&sc=emaf>. The Transitional Federal Government (TFG) of Somalia, elected in early 2009, consented to the United Nations recommendation that member nation ships freely traverse its territorial waters to police them. See S.C. Res. 1816, ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008).

directly participating in the violence, taking a percentage of the money earned if the attack is successful.¹⁷ International law is evolving to protect seafaring vessels and their crews, but these legal frameworks evolve slowly, and frequently are riddled with reservations by individual nations who wish to apply their domestic laws in lieu of certain compact provisions.¹⁸ The United States is cooperating with other nations to patrol the area and arrest pirates where possible.¹⁹ Additionally, the Maritime Safety Commission (Horn of Africa) (MSCHOA) established a recommended travel corridor that is patrolled continually by the participating nations.²⁰ Despite these precautions, attacks have still occurred in the patrolled area.²¹ The Gulf is very large, and the pirates have been moving further and further offshore.²²

While the United Nations and its Member States work out the best way to control and punish pirates, insurers continue to pay ransoms.²³ Insurers have passed these costs on to ship owners: premiums for voyages through the Gulf of Aden have increased tenfold since 2005.²⁴ Logically, then, these increases are likely passed on to manufacturers in the form of increased shipping costs and general average expenses, and finally to the end purchasers of the cargo. It is reasonable that the costs of this danger will be spread among those who undertake the risk. However, insurers could accomplish this risk and cost spreading more efficiently with better tailored, more specific policies. Though paying ransom undoubtedly perpetuates the cycle of piracy-for-ransom, there is an understandable serious concern for human life. Insurers should pay these demands only in very specific instances to incentivize training and preventive measures, and marine insurance policies should be tailored to this end. This would be a helpful stopgap while the international community learns to thwart the marauders effectively.

This Comment will outline the international response thus far to the situation off the coast of Somalia. After a brief history of marine insurance, exposing the complicated underlying policy and economic issues implicated in

17. Mohamed Ahmed, *Somali Sea Gangs Lure Investors at Pirate Lair*, REUTERS (Dec. 1, 2009, 2:44 PM), <http://www.reuters.com/article/idUSTRE5B01Z920091201?rpc=60>.

18. See Patrick J.S. Griggs, *Uniformity of Maritime Law—An International Perspective*, 73 TUL. L. REV. 1551, 1562 (1999) (discussing difficulties in writing effective conventions in light of each individual country's needs).

19. S.C. Res. 1846, ¶ 6, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

20. *Piracy Prone Areas and Warnings*, ICC COMMERCIAL CRIME SERVS., http://www.icc-ccs.org/index.php?option=com_content&view=article&id=70&Itemid=58 (last visited June 20, 2011).

21. *Id.*

22. *Somalia: Pirates Attack Oil Tanker*, *supra* note 14 (describing an attempt to attack an oil tanker approximately 1000 nautical miles from the Somali shore).

23. See Carbin, *supra* note 9, at 54.

24. Michael H. Passman, *Interpreting Sea Piracy Clauses in Marine Insurance Contracts*, 40 J. MAR. L. & COM. 59, 59 (2009).

insuring modern voyages, this Comment will examine some other major crises that affected marine insurance and how insurers dealt with those situations. Finally, the author will recommend ways insurers (using the American system) can best protect their clients'—and their own—interests when contracting for voyages around the Horn of Africa.

I. THE INTERNATIONAL RESPONSE TO SOMALI PIRACY

A. *In General*

Though piracy has plagued the seas for millennia,²⁵ incidents in the mid- to late-twentieth century were so rare that some United Nations delegates thought pirates no longer deserved the description *hostis humani generis* (the enemy of all).²⁶ Even during this time, piracy still occurred to a lesser degree in Southeast Asia and some South American ports.²⁷ Piracy in Somalia began in the early 1990s in the form of hostage-taking for ransom in Somali territorial waters,²⁸ allegedly to protect the coastal waters from illegal dumping and overfishing that had devastated the local fisheries.²⁹ The pirate activity in the area continued at low levels during the next fifteen years, but increased substantially in 2006.³⁰ In 2009, there were 217 attempted attacks and 47 successful attacks in Somali waters, the Gulf of Aden, the Red Sea, the Indian Ocean, the Arabian Sea, and Oman, all perpetuated by Somali pirates, resulting in 867 hostages taken in 2009.³¹ The resurgence has been attributed to the poor economy and lack of effective government in the country.³² Despite the danger, major shipping companies have continued to use the route from the Suez Canal to the Middle East: Approximately 50,000 ships and 12% of the world's daily oil moves through this treacherous area.³³ However, some companies, including Maersk and Odfjell, are considering altering their

25. Homer mentions pirates in the *Iliad*. HOMER, THE ILIAD (H.F. Cary, A.M. ed., Alexander Pope trans., George Routledge and Sons 1872); see also Carbin, *supra* note 9, at 51.

26. Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EUR. J. INT'L. L. 399, 399–400 (2009).

27. See I.R. Hyslop, *Contemporary Piracy*, in PIRACY AT SEA 3, 16–18 (Eric Ellen ed., 1989).

28. Per UNCLOS, a nation's territorial waters extend up to twelve nautical miles from the coastline. UNCLOS, *supra* note 3, art. 3. An additional twelve miles are considered contiguous zones, where states may patrol to enforce certain laws (immigration, customs, sanitation, and fiscal). *Id.* art. 33. Other nations may freely enter the twelve-mile contiguous zone, but not the twelve-mile territorial waters. See *id.* arts. 25, 111. Piracies committed in territorial waters are subject to domestic laws. *Id.* art. 25.

29. Treves, *supra* note 26, at 400.

30. *Id.* at 399–400.

31. ICC ANNUAL REPORT, *supra* note 6, at 12–13, 25.

32. See Thompkins, *supra* note 16; Treves, *supra* note 26, at 400.

33. Kraska & Wilson, *supra* note 15, at 43.

shipping routes, possibly foregoing the Suez Canal for significantly longer trips around the Cape of Good Hope at a higher cost.³⁴ One author noted:

As the shipping industry confronts volatile fuel costs, plummeting freight rates, container ship surpluses and dramatically increased insurance premiums, protecting their ships, crew and cargo remains a paramount concern. Determining the most effective way forward, while challenging, has brought unprecedented partnering. Industry representatives such as the Baltic and International Maritime Council (BIMCO) suggest that naval powers are responsible for keeping the sea lanes free, and maritime states should begin to work more closely to accomplish the counter-piracy mission.³⁵

B. United Nations and Other Public Bodies

As noted above, under the United Nations Convention on the Law of the Sea (UNCLOS), territorial waters extend twelve nautical miles from a sovereign state's coastline.³⁶ For any nation to prosecute individuals for piracy, the act of depredation must have occurred on the "high seas"—outside the territorial waters of any nation.³⁷ In the early escalation of attacks, Somali pirates sometimes escaped capture by towing or running hijacked vessels into Somali territorial waters, evading international interveners and thus, prosecution under international law.³⁸ United Nations Security Council Resolution 1816, approved June 2, 2008, allows certain states to enter Somali territorial waters to repress piracy or armed robbery at sea, using any method allowed under UNCLOS.³⁹ This essentially eliminates the "high seas" hurdle to international prosecution for piracy offenses. The Security Council has promulgated further resolutions, including Resolution 1851 on December 16, 2008.⁴⁰ In this resolution, the Security Council reaffirms its disapproval of the piracy; recognizes the sovereignty of the Somali Transitional Federal Government (TFG); encourages states to cooperate with the TFG in suppressing piracy; and encourages nations to prosecute pirates.⁴¹ Additionally, this resolution notes that "lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture, has hindered more robust international action against the pirates off the coast of Somalia and in some cases led to pirates being released without facing justice."⁴² The resolution also "[n]otes with concern the findings . . . of the Monitoring Group

34. *Id.* at 46.

35. *Id.*

36. UNCLOS, *supra* note 3, art. 3.

37. *Id.* arts. 100–01.

38. Treves, *supra* note 26, at 403–04.

39. S.C. Res. 1816, *supra* note 16, ¶ 7.

40. S.C. Res. 1851, pmb., U.N. Doc. S/RES/1851 (Dec. 16, 2008).

41. *Id.*

42. *Id.*

on Somalia that escalating ransom payments are fuelling the growth of piracy in waters off the coast of Somalia.”⁴³ The International Maritime Organization (IMO), a United Nations specialized agency focusing on international shipping, called a conference in Djibouti in January 2009, which resulted in a Code of Conduct to guide member states in coordinating efforts against the pirates, though their plans for implementation are still in the infant stage.⁴⁴ The IMO also published recommendations for ships’ masters in order to avoid piracy, encouraging evasive maneuvering, using long-range acoustic devices, and installing netting or electric fences.⁴⁵

In the United States, the National Security Council promulgated guidelines entitled “Countering Piracy Off the Horn of Africa: Partnership & Action Plan” in December 2008 to build upon the United States Piracy Policy President George W. Bush signed in mid-2007.⁴⁶ This plan

seeks to . . . establish and maintain a contact group; strengthen and encourage the use of the maritime security patrol area (MSPA) in the Gulf of Aden; support and contribute to a regionally based counter-piracy coordination center[.];⁴⁷ disrupt and dismantle pirate bases ashore[.] and conclude agreements and arrangements to formalize custody and prosecution arrangement.⁴⁸

The United States Coast Guard announced additional precautions: All vessels sailing under United States flag through the Horn of Africa must have an approved anti-piracy security plan on file and must post guards on the ship.⁴⁹ In addition to requiring flagged ships to register anti-piracy plans, the Department of State has been investigating the possibility of arming ships or of allowing private security firms to escort ships.⁵⁰

43. *Id.* ¶ 9.

44. Press Release, Int’l Mar. Org., High-Level Meeting in Djibouti Adopts a Code of Conduct to Repress Acts of Piracy and Armed Robbery Against Ships (Jan. 30, 2009), available at http://www.imo.org/Newsroom/mainframe.asp?topic_id=1773&doc_id=10933.

45. IMO, *Guidance to Shipowners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships*, at 12, MSC.1/Circ. 1334 (June 23, 2009).

46. Kraska & Wilson, *supra* note 15, at 52; see also NAT’L SEC. COUNCIL, COUNTERING PIRACY OFF THE HORN OF AFRICA: PARTNERSHIP & ACTION PLAN (2008); Press Release, Memorandum on the Maritime Security (Piracy) Policy (June 14, 2007), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/06/20070614-3.html>.

47. This parallels the ReCAAP, the agreement between Southeast Asian nations including heavy patrolling and monitoring that is credited for greatly reducing the number of piracy incidents in the Straits of Malacca, the most dangerous waterways in the world from the 1980s until the late 1990s. See generally ZOU Keyuan, *New Developments in the International Law of Piracy*, 8 CHINESE J. INT’L L. 323 (2009).

48. Kraska & Wilson, *supra* note 15, at 52 (citing NAT’L SEC. COUNCIL, *supra* note 46).

49. Carbin, *supra* note 9, at 54.

50. *Id.* at 53–54.

Other international industry groups are also working to help ships avoid attack. The MSCCHOA established a heavily-patrolled Internationally Recommended Marine Corridor where all ships should travel.⁵¹ Additionally, the International Marine Bureau's Piracy Reporting Centre (PRC) maintains a live piracy report, posting details, photos, and coordinates of recent attacks and suspected pirate ships.⁵² The PRC links to international recommendations and highlights trouble spots worldwide, as well as encourages all ships to report any attempted attack immediately.⁵³ The Philippines announced that in 2010, it would require all citizen sailors to complete an anti-piracy course; over 470 Filipino sailors have been held hostage over the last five years.⁵⁴

C. *The Need for Modernized Private Practices*

Despite the intergovernmental and nongovernmental actions outlined above, the number of attacks in 2009 (406) is substantially higher than the number of attacks during the same period in 2008 (293).⁵⁵ Though the number of attacks for January through June 2010 is lower in the Gulf of Aden, the attacks have moved farther offshore.⁵⁶ According to the PRC's live piracy report on November 15, 2009, there were ten attempted attacks in the Gulf of Aden or off the coast of Somalia in the previous ten days, two of which resulted in hostage situations.⁵⁷ Only eleven attacks were reported across the world during this time period.⁵⁸ As of December 31, 2009, Somali pirates held approximately 263 crewmembers hostage.⁵⁹

As is clear from the persistence and increasing sophistication of attacks, the end, or even minimization, of piracy in Somalia is not yet in sight. The area is geographically vast, and pirates use small craft.⁶⁰ Private entities must coordinate as soon as possible: Waiting for an international compact or even

51. *Piracy Prone Areas and Warnings*, *supra* note 20.

52. See *IMB Piracy Reporting Centre*, ICC COMMERCIAL CRIME SERVS., http://www.icc-ccs.org/index.php?option=com_content&view=article&id=30&Itemid=12 (last visited June 20, 2011).

53. *Id.*

54. *Philippines Orders Sailors To Take Anti-Piracy Classes*, BBC NEWS (Jan. 4, 2010, 11:58 PM), <http://news.bbc.co.uk/2/hi/8439198.stm>.

55. ICC ANNUAL REPORT, *supra* note 6, at 25.

56. See ICC INT'L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS: REPORT FOR THE PERIOD 1 JANUARY–30 JUNE 2010 5–6 (2010) [hereinafter ICC QUARTERLY REPORT] (showing a decrease in the amount of attacks in the Gulf of Aden and an increase in the attacks in other offshore areas, including the Red Sea).

57. *Live Piracy Report*, ICC COMMERCIAL CRIME SERVS. (citing data as reported Nov. 15, 2009) (on file with author).

58. *Id.*

59. ICC ANNUAL REPORT, *supra* note 6, at 21.

60. See Cowell, *supra* note 8 (describing a pirate attack in which the pirates used a skiff 600 miles off the coast of Somalia).

military suppression could take several more years at least, if the crackdown on piracy in the Straits of Malacca is indicative.⁶¹ Currently, just as there is no one-plan-fits-all solution for insuring a voyage, there is no set solution regarding who pays for what if a hostage situation arises.⁶² Insurers should incentivize preventive behaviors and clearly state when ransom will be covered and by whom.

II. HISTORY OF MARINE INSURANCE

A. *Marine Insurance in General*⁶³

1. Development of Coverage

Marine insurance has existed almost as long as humans have been using the waters to ship goods. Research shows that ancient Chinese merchants split their cargoes between several vessels, thereby spreading the risk of loss among merchants.⁶⁴ The Code of Hammurabi, dating from 2300 B.C., contained “bottomry” provisions.⁶⁵ Under bottomry, if there was a mortgage on the ship, the owner would be indemnified in case of a total loss; if the ship arrived safely, however, the owner would pay over a substantial portion of his profits to the insurer.⁶⁶ This practice was incorporated into Roman law as early as 50 B.C.⁶⁷ Justinian limited insurance rates on this “foenus nauticum” to 12% in A.D. 533.⁶⁸ There is evidence that the Lombards and the Hanseatic League practiced a form of marine insurance in their shipping businesses in the thirteenth and fourteenth centuries.⁶⁹ Codification and standardization began in the Middle Ages: The Barcelona Ordinance of 1435 standardized continental policies.⁷⁰ The modern English policies evolved from the

61. The Straits of Malacca were formerly the most dangerous waterways in the world, but thanks to strong multinational cooperation in Southeast Asia, only two attacks occurred in 2009. ICC QUARTERLY REPORT, *supra* note 56, at 5.

62. Evidence of ransom payments is difficult to obtain. *See infra* Part V.

63. For a more detailed history of the evolution of marine insurance, see generally VICTOR DOVER, A HANDBOOK TO MARINE INSURANCE: BEING A GUIDE TO THE HISTORY, LAW AND PRACTICE OF AN INTEGRAL PART OF COMMERCE, FOR THE BUSINESS MAN AND THE STUDENT (2d ed. 1924); D. McKellar, *Marine Insurance—An Ancient Art that Meets Modern Demands*, 16 VICTORIA U. WELLINGTON L. REV. 161 (1986).

64. CHRISTOPHER HILL ET AL., INTRODUCTION TO P & I 1 (2d ed. 1996) (describing the ancient predecessors to the P & I Club).

65. D. McKellar, *supra* note 63, at 161.

66. *Id.*

67. *Id.*

68. DOVER, *supra* note 63, at 16.

69. *Id.* at 19–21.

70. *Id.* at 22.

Ordinance of Florence, authored in 1523.⁷¹ This is the wording that the early English underwriters adopted.⁷² The Royal Exchange was founded in London in 1570,⁷³ which became the main center for marine insurance brokerage in England after the powerful Hanseatic League was expelled from Great Britain in 1597.⁷⁴

2. The English System and Lloyd's

By the mid-1600s, English underwriting occurred mostly at coffee shops near ports.⁷⁵ The most famous of these was Edward Lloyd's shop, established in 1687.⁷⁶ The Lloyd's system began informally, with merchants writing their names under the description of a particular voyage as a sign of their agreement to indemnify a portion of the voyage in exchange for a premium.⁷⁷ Parliament officially incorporated Lloyd's in an 1871 act.⁷⁸ Additionally, the company "oversees and regulates the competition for underwriting business . . . [and] has statutory powers . . . to regulate the affairs of the international insurance market in London" under the Lloyd's Acts of 1871 and 1982.⁷⁹

The Lloyd's system is unique and complex. "Names," individuals who pool their resources to underwrite marine risks, deposit funds with Lloyd's.⁸⁰ This amount determines the amount of risk that a Name is allowed to underwrite.⁸¹ A member's agent acts as a fiduciary for the Name, helping it to join a syndicate or underwriting agency.⁸² A Name normally underwrites in 40 to 100 different syndicates.⁸³ Agents of the syndicates maintain booths on the floor at Lloyd's.⁸⁴ Ship owners hire a certified Lloyd's broker to represent their risks to the syndicates on the Lloyd's floor.⁸⁵ The broker presents a broker's slip summarizing the risk to a particular syndicate.⁸⁶ The first

71. D. McKellar, *supra* note 63, at 162.

72. *Id.*

73. *Id.*

74. DOVER, *supra* note 63, at 21.

75. D. McKellar, *supra* note 63, at 162.

76. *Id.*

77. Jeremy A. Herschaft, *Not Your Average Coffee Shop: Lloyd's of London—A Twenty-First-Century Primer on the History, Structure, and Future of the Backbone of Marine Insurance*, 29 TUL. MAR. L.J. 169, 174 (2005).

78. Lloyd's Act, 1871, 34 Vict., c. 21 (Eng.).

79. Herschaft, *supra* note 77, at 174 (quoting *Lipcon v. Underwriters at Lloyd's London*, 148 F.3d 1285, 1288 (11th Cir. 1998)).

80. *Id.* at 175–76.

81. *Id.* at 176.

82. *Id.* at 176.

83. *Id.* at 177.

84. Herschaft, *supra* note 77, at 177.

85. *Id.*

86. *Id.*

syndicate to sign on is the “lead underwriter.”⁸⁷ Subsequent underwriters may adhere to the same terms, or request different ones if there is no “full-follow” clause requiring all underwriters to adhere to the same terms.⁸⁸ Once 100% of the risk is allocated, the risk is considered insured, even before the final contract is drawn up.⁸⁹ This complex system of risk-spreading underscores the difficulties inherent in insuring a major commercial venture.

3. The Development of General Average and P & I Clubs

General average is a concept that developed independently of, but parallel to, contractual marine insurance agreements.⁹⁰ Historians estimate that this system originated between 900 and 700 B.C. and was incorporated in the law of Rhodes in A.D. 200: “Let that which has been jettisoned on behalf of all be restored by the contribution of all.”⁹¹ The York-Antwerp Rules, revised several times over, still govern the principles of general average.⁹² Rule A defines a “general average act” as one where “any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the *property* involved in a common maritime adventure.”⁹³ General average was traditionally linked to property or commerce, but courts have implied that an expenditure to save human life should qualify in some limited cases as a general average act, allowing contribution.⁹⁴ General average is now instituted by clauses in bills of lading that incorporate the York-Antwerp Rules.⁹⁵ Formerly, “substituted” expenses (expenses incurred to prevent the necessity of jettisoning cargo, for

87. *Id.* at 178.

88. *Id.* at 179.

89. Herschaft, *supra* note 77, at 178.

90. DOVER, *supra* note 63, at 17. An “average” is a loss of some kind. F.D. ROSE, GENERAL AVERAGE: LAW AND PRACTICE 2 (1997). A particular average is one that is attributable to a particular party (e.g., the first mate for poor steering, the installer for a faulty part, etc.). *Id.* A general average, however, is a loss that is undertaken for the safety of the voyage. *Id.* Traditionally, this meant jettison of cargo (as in throwing cargo overboard to avoid sinking) or cutting down a ship’s mast to avoid imminent peril. *Id.*

91. DOVER, *supra* note 63, at 17.

92. ROSE, *supra* note 90, at 2.

93. 2004 YORK-ANTWERP RULES, § A, ¶ 1 (emphasis added), available at <http://www.comitemaritime.org/Uploads/YAR%202004%20english.doc>. A very similar definition is found in the British Marine Insurance Act: “There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in a time of peril for the purpose of preserving the property imperiled in the common adventure.” Marine Insurance Act, 1906, 6 Edw. 7, c. 41, § 66(2) (Eng.) (discussed *infra*).

94. ROSE, *supra* note 90, at 15 (citing *Montgomery & Co. v. Indem. Mut. Marine Ins. Co.*, [1902] 1 KB 734, 740).

95. *Id.* at 10.

example) could not be claimed through general average at common law.⁹⁶ York-Antwerp Rule F changed this exclusion, encouraging ships' masters to take preventive action where appropriate.⁹⁷ All parties that could potentially be required to contribute to general average expenses routinely procure insurance for such expenses.⁹⁸ If general average is invoked, an independent adjuster calculates the proportional loss and contribution of each party, which sometimes takes years; then the parties must sort out disputes in arbitration and the courts.⁹⁹

Protection and indemnity clubs, now known as P & I Clubs, are essentially mutual assurance groups of insurers.¹⁰⁰ Their predecessors date back to ancient China and India, as well as the medieval guilds.¹⁰¹ The hull club, the direct predecessor of the P & I Club, grew out of ship owners' dissatisfaction with the available marine insurance: many of these clubs specialized in a particular risk that was considered too expensive or risky to be covered by normal marine insurance.¹⁰² These clubs also allowed the owners to insure voyages for more than the value of their vessel; they were normally limited to the ship's appraised value by the Marine Insurance Act of 1745.¹⁰³ If a collision or similar occurred, causing damage greater than the appraised value of the ship itself, the ship owner would have a resource for the additional liability from loss of cargo or personal injury.¹⁰⁴ Today's P & I Clubs function as corporations, funded by premiums and calls, where members vote to approve or deny claims.¹⁰⁵

B. *The American System of Marine Insurance*

1. An English Example

The American system of marine insurance is derived from the English example. The earliest recorded instance of marine insurance originating in the United States dates to 1721, when a Mr. John Copson of Philadelphia advertised a marine underwriting operation at his home because American settlers had "been obliged to send to London for such Assurance, which has

96. *Id.* at 59.

97. *Id.* at 60 (citing 1994 YORK-ANTWERP RULES, § F).

98. WILLIAM TETLEY, INTERNATIONAL MARITIME AND ADMIRALTY LAW 391 (2002).

99. ROSE, *supra* note 90, at 12.

100. HILL ET AL., *supra* note 64, at 1.

101. *Id.* at 1–2.

102. *Id.* at 2–4.

103. *Id.* at 6.

104. *Id.* at 7.

105. HILL ET AL., *supra* note 64, at 9–10.

not only been tedious and troublesome, but even very precarious.”¹⁰⁶ The first official company, the Insurance Company of North America, was established in 1792.¹⁰⁷ One author estimates that by 1845, there were seventy-five or more American marine insurance companies.¹⁰⁸ This growth in the field has “kept pace with the tremendous development of the resources of the world’s richest continent” since then.¹⁰⁹

2. Admiralty Law and the Common Law

In the United States, federal courts have original jurisdiction over admiralty and maritime matters.¹¹⁰ The Judiciary Act of 1789 gave federal district courts jurisdiction over admiralty or maritime claims, whether they are private civil matters or criminal matters.¹¹¹ The British Parliament passed the Marine Insurance Act, 1906, which codified the British common law of marine insurance.¹¹² This statute was considered so well-written that it was “copied almost *verbatim* in most of the countries of the Commonwealth.”¹¹³ Similar statutes codifying marine laws exist in European countries, including France, Italy, Spain, and Germany.¹¹⁴ The European Union, South Africa, Australia, and China all have legislation in effect governing marine insurance.¹¹⁵ The United States is somewhat unique, then, among modern industrial nations in that marine insurance is not governed by federal statute, even though federal courts have jurisdiction over admiralty matters.¹¹⁶ Instead, United States courts rely on the general maritime law, an American version of the *lex mercatoria* as existed in civilian Europe.¹¹⁷ The 1906 English Act has been very persuasive in United States court decisions.¹¹⁸

106. LESLIE J. BUGLASS, MARINE INSURANCE CLAIMS: AMERICAN LAW AND PRACTICE 1 (2d ed. 1972).

107. *Id.*

108. *Id.*

109. *Id.*

110. U.S. CONST. art. III, § 2.

111. Act of Sept. 24, 1789, ch. 20, 1 Stat. 76–77 (1789) (establishing the judicial courts of the United States).

112. Marine Insurance Act, 1906, 6 Edw. 7, c. 41, § 66(2) (Eng.); *see also* TETLEY, *supra* note 98, at 583.

113. TETLEY, *supra* note 98, at 583.

114. *Id.* at 584 & n.26.

115. *Id.* at 584, 587–88.

116. *Id.* at 585.

117. *Id.*

118. TETLEY, *supra* note 98, at 585–86.

3. The *Wilburn Boat* Doctrine

The Wilburn brothers and their houseboat-turned-ferry caused an upheaval in marine insurance practice in the United States in 1955. The brothers had been using their houseboat to transport commercial passengers across Lake Texoma when the boat was destroyed by fire.¹¹⁹ The brothers tried to recover, but their claim was denied because the boat was insured for personal use only.¹²⁰ In *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, the Supreme Court held that there was no federally-established admiralty rule governing marine insurance contracts, and therefore state insurance law should govern these contracts.¹²¹ This was contrary to prior Supreme Court and English admiralty decisions.¹²² Justice Frankfurter concurred in the result on the grounds that the matter of a small boat on an inland lake was local rather than national in character.¹²³ This decision caused American law governing marine insurance to diverge somewhat from its English cousin,¹²⁴ as well as to become a bit unpredictable for underwriters.¹²⁵ One author observes that lower courts have avoided this undesirable rule by:

[R]outine application of state law; appearing to find, without discussion, a well-developed admiralty rule in the American decisions; finding such a rule with the aid of English decisions; and finding that the state law does not differ substantially from the "maritime law" . . . and that the state has no substantial interest in the application of its law. Finally, the court may simply ignore *Wilburn*.¹²⁶

4. The American Institute of Marine Underwriters

The American Institute of Marine Underwriters (AIMU) attempts to help American underwriters navigate the complex system of risk allocation and United States case law by developing form contracts and lobbying on the industry's behalf.¹²⁷ Somali piracy is currently one of the hot issues that AIMU is tracking, hoping to help its members develop appropriate coverage

119. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 311 (1955).

120. *Id.*

121. *Id.* at 316, 321.

122. Graydon S. Staring, *Admiralty and Maritime Law: Selected Topics*, 26 TORT & INS. L.J. 538, 543 (1991).

123. *Wilburn*, 348 U.S. at 321–22.

124. TETLEY, *supra* note 98, at 586.

125. Staring, *supra* note 122, at 545.

126. *Id.* at 544 (footnotes omitted).

127. AM. INST. OF MARINE UNDERWRITERS (AIMU), <http://www.aimu.org/> (last visited June 7, 2010).

for this new risk.¹²⁸ The AIMU policies have become the new American standard for marine insurance contracts, as outlined below.

III. MODERN AMERICAN MARINE POLICIES: LANGUAGE AND COVERAGE

Piracy is arguably as old as shipping by sea, mentioned in the Justinian Digest of A.D. 529,¹²⁹ which also discussed marine insurance.¹³⁰ The bandits were historically labeled *hostis humanis generis* (the enemy of all mankind) and Ishmaelites (persons without a country).¹³¹ Shippers have been insuring against the risk of pirates for almost as long as they have been insuring, developing a group of form clauses that can be pieced together to protect against various threats inherent in different voyages.¹³² Several approaches to allocating the risk of piracy have emerged through practice over the years, as outlined below.¹³³

A. Hull Policies and “Perils” Clauses

The American Institute Hull Clauses include a standard “perils” clause:

Touching the Adventures and Perils which the Underwriters are contented to bear and take upon themselves, they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the Vessel, or any part thereof, excepting, however, such of the foregoing perils as may be excluded by provisions elsewhere in the Policy or by endorsement thereon.¹³⁴

128. AIMU, AIMU ISSUES BOOK *1–2 (2009). In addition, the group is tracking legislation relating to marine insurance and terrorism, a subject that may be highly relevant to protecting ships from Somali piracy. *Id.* at *4–5.

129. ZOU, *supra* note 47, at 323.

130. DOVER, *supra* note 63, at 16.

131. Carbin, *supra* note 9, at 51.

132. Raymond P. Hayden & Sanford E. Balick, *Marine Insurance: Varieties, Combinations, and Coverages*, 66 TUL. L. REV. 311, 315 n.5 (1991) (“It is questionable whether any policy is so straightforward and without alteration as to be truly ‘typical.’ There are, for instance, several hull forms available in the marine market. In practice, these policies become a patchwork of standard clauses drawn from various sources and customized to reflect the intentions of the parties to the particular contract.”) (citation omitted).

133. See generally Eric Danoff, *Marine Insurance for Loss or Damage Caused by Terrorism or Political Violence*, 16 U.S.F. MAR. L.J. 61, 62–73 (2003–2004) (providing an overview of marine insurance coverage terms).

134. AIMU, AMERICAN INSTITUTE HULL CLAUSES II. 70–74 (1977), available at <http://www.aimu.org/aimuforms/7.pdf>.

This section appears to include the risks of piracy, and for many years was interpreted as such.¹³⁵ However, this same form policy later excludes threats from piracy under the War Strikes and Related Exclusions Clause:

The following conditions shall be paramount and shall supersede and nullify any contrary provisions of the Policy.

This Policy does not cover any loss, damage or expense caused by, resulting from, or incurred as a consequence of:

- (a) Capture, seizure, arrest, restraint or detainment, or any attempt thereat; or
- (b) Any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; or
- (c) Any mine, bomb or torpedo not carried as cargo on board the Vessel; or
- (d) Any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter; or
- (e) Civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy; or
- (f) Strikes, lockouts, political or labor disturbances, civil commotions, riots, martial law, military or usurped power; or
- (g) Malicious acts or vandalism, unless committed by the Master or Mariners and not excluded elsewhere under this War Strikes and Related Exclusions clause; or
- (h) Hostilities or warlike operations (whether there be a declaration of war or not) but this subparagraph (h) not to exclude collision or contact with aircraft, rockets or similar missiles, or with any fixed or floating object, or stranding, heavy weather, fire or explosion unless caused directly by a hostile act by or against a belligerent power which act is independent of the nature of the voyage or service which the Vessel concerned or, in the case of a collision, any other vessel involved therein, is performing. As used herein, "power" includes any authority maintaining, naval, military or air forces in association with a power.

If war risks or other risks excluded by this clause are hereafter insured by endorsement on this Policy, such endorsement shall supersede the above conditions only to the extent that the terms of such endorsement are inconsistent therewith and only while such endorsement remains in force.¹³⁶

Clearly, this provision exempts from coverage the acts of piracy allegedly covered by the earlier perils clause. Even if the form hull policy is not used, these above-mentioned risks are normally excluded through the use of the Free of Capture and Seizure Clause (F.C. & S.),¹³⁷ which contains substantially similar language to the War Strikes and Related Exclusions Clause excerpted

135. Passman, *supra* note 24, at 60–61.

136. AIMU, *supra* note 134, ll. 239–55.

137. Danoff, *supra* note 133, at 63–64.

above, and also expressly exempts coverage of piracy.¹³⁸ It is important to note that the general hull policy contains insurance for general average losses the policyholder might incur.¹³⁹ These exempted risks are insurable, but ship owners must purchase a separate War Risks policy to obtain coverage. This policy is essentially the opposite wording of the above, with some additions. The essential portion is the first clause, a basic statement of coverage:

This insurance is only against the risks of capture, seizure, destruction or damage by men-of-war, piracy, takings at sea, arrests, restraints, detainments and other warlike operations and acts of kings, princes and peoples in prosecution of hostilities or in the application of sanctions under international agreements, whether before or after declaration of war and whether by a belligerent or otherwise, including factions engaged in civil war, revolution, rebellion or insurrection, or civil strife arising therefrom; the imposition of martial law, military or usurped power, and including the risks of aerial bombardment, floating or stationary mines and stray or derelict torpedoes, and weapons of war employing atomic or nuclear fission and/or fusion or other reaction or radioactive force or matter but excluding loss, damage or expense arising out of the hostile use of any such weapon and warranted not to abandon (on any ground other than physical damage to ship or cargo) until after condemnation of the property insured.¹⁴⁰

Exempting war risks from general hull coverage makes sense in terms of allocating risk: Those vessels that are traveling a safer route, or who choose to take on the risk of piracy do not have to pay the additional premium for this coverage. The costs of the acts of piracy are spread among those who choose to travel more perilous routes or who wish to have this added peace of mind.

However, the costs of War Risks policies for the Gulf of Aden have increased tenfold since mid-2008.¹⁴¹ One recent attack was 1000 nautical miles off the coast of Somalia, a distance far greater than previous attacks.¹⁴² Statistics gathered by the International Chamber of Commerce/International Maritime Bureau's Piracy Reporting Center (PRC) indicate that attacks in the area during 2009 kept pace with those in 2008, and are spreading farther from the coast and northward into the Red Sea.¹⁴³ Some ships traveling this distance

138. See AIMU, F.C. & S. CLAUSE (HULLS) (1959), available at <http://www.aimu.org/aimuforms/87B-59.pdf>.

139. For more discussion of General Average, see *supra* Part III.A.3. It will be interesting to see if any cases arise where the victims of a pirate attack who do not carry a separate war risks policy would be able to file a claim for general average, or if the court would read this to be precluded by the War Strikes Clause.

140. AIMU, WAR RISK ONLY OPEN POLICY (CARGO) ¶ 1 (1981), available at <http://www.aimu.org/formsmenunumber.html>.

141. AIMU ISSUES BOOK, *supra* note 128, at 1–2.

142. *Somalia: Pirates Attack Oil Tanker*, *supra* note 14.

143. ICC ANNUAL REPORT, *supra* note 6, at 5–6, 21.

from the shoreline might have chosen to take the remote risk of a pirate attack and forego the high cost of a War Risks policy. Alternatively, they might all purchase the policy because the premium is still cheaper than diverting shipments around the Cape of Good Hope.¹⁴⁴ Arguably, then, the separation of liability for piracy is spread between the appropriate parties, but the costs to insurers may soon be too great to continue insuring these risky voyages.

*B. A Clear Definition of Piracy*¹⁴⁵

Another layer in the already complex debate about how to solve the problems piracy poses for international shipping is settling on a definition of piracy. Hull risks and general average were originally formulated to cover risks to vessel and cargo,¹⁴⁶ and piracy involved acts of “robbery and depredation” on the high seas against that property.¹⁴⁷ American statutes incorporate the UNCLOS definition, which includes any act of violence or depredation done on the high seas for personal gain against the crew of a ship.¹⁴⁸ Alternatively, the International Maritime Bureau defines piracy as “[a]n act of boarding any vessel with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act.”¹⁴⁹ In the United States, case law indicates that “piracy” as defined in a marine insurance contract may consist of

- (1) an act of depredation (not limited to robbery),
- (2) by persons not recognized as belligerents by the political branches of the government or by foreign governments,
- (3) on the “high seas” (as that term is popularly used),
- (4) for private ends, and
- (5) in the spirit of general or universal aggression against all.¹⁵⁰

Though the term “piracy” has traditionally been broadly construed by marine insurers, covering a number of different types of attacks on a ship,¹⁵¹ there is a risk of equivocation on the point if the term is not defined in the contract. Somali pirates, unlike traditional pirates, do not wish to steal the cargo or the vessel: Instead, they threaten violence against human lives and costs in the form of ransom and delay of delivery of goods, essentially

144. See Carbin, *supra* note 9, at 53 (indicating that the easiest tactic to repel pirate attacks is to avoid that area of the sea, but that such a strategy has increased costs).

145. For an in-depth discussion of how the definition of piracy affects international law, see generally Buhler, *supra* note 11.

146. ROSE, *supra* note 90, at 5–6.

147. Buhler, *supra* note 11, at 63 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 72 (9th ed. 1783)).

148. 18 U.S.C. § 2280(a) (2006); UNCLOS, *supra* note 3, art. 101.

149. ICC ANNUAL REPORT, *supra* note 6, at 3.

150. Passman, *supra* note 24, at 84–85 (footnotes omitted).

151. *Id.* at 67–68.

extorting a toll to pass through their waters safely.¹⁵² Considering this new incarnation of crime at sea, defining the term in an insurance contract might provide better protection for insureds, as well as insurers—but it could also provide a technicality upon which an insurer could deny coverage.¹⁵³ It is easy to imagine such a coverage dispute arising if insurers begin experiencing an even higher number of claims for hostage-for-ransom situations without defining “piracy” in their policies.

C. Modern General Average and P & I Club Coverage

As noted above, general average is usually insured against by all parties to a “common adventure.”¹⁵⁴ The clause included in AIMU cargo and hull risks policies states:

General Average and Salvage shall be payable as provided in the contract of affreightment, or failing such provision or there be no contract of affreightment, payable at the Assured’s election either in accordance with York-Antwerp Rules 1950 or 1974 or with the Laws and Usages of the Port of New York. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid accordingly.

....

When the contributory value of the Vessel is greater than the Agreed Value herein, the liability of the Underwriters for General Average contribution (except in respect to amounts made good to the Vessel), or Salvage, shall not exceed that proportion of the total contribution due from the Vessel which the amount insured hereunder bears to the contributory value, and if, because of damage for which the Underwriters are liable as Particular Average, the value of the Vessel has been reduced for the purpose of contribution, the amount of such Particular Average damage recoverable under this Policy shall first be deducted from the amount insured hereunder, and the Underwriters shall then be liable only for the proportion which such net amount bears to the contributory value.¹⁵⁵

General average rules have not changed much, but their application that has changed over the years, with parties to common adventures insuring against general average losses.¹⁵⁶ The lengthy determination of who is at fault and for how much, however, remains an administrative hurdle to sharing losses.¹⁵⁷

152. *Id.* at 87–88.

153. *Contra id.* at 88 (arguing that defining such terms would help insurers price risk, benefitting both parties to an insurance contract).

154. *See supra* Part III.A.3.

155. AIMU, *supra* note 134, ll. 120–23, 128–33.

156. ROSE, *supra* note 90, at 8–9.

157. *See id.* at 12 (describing the role of an average adjuster).

Thus it seems insurers of general average expenses—who are also insurers of voyages—have an incentive to clearly define who will cover ransom expenses incurred in modern piracy incidents. Otherwise, their total risk on a particular voyage remains unpredictable.

P & I Clubs sometimes include a clause in their rules that allow the directors to pay a claim that may not be specifically covered elsewhere in their rules.¹⁵⁸ For example, the American Club's "omnibus" provision allows such discretion: "Liability for costs and expenses not expressly excluded elsewhere in these Rules, incidental to the business of owning, operating or managing ships which the Directors, in their sole discretion, shall consider to fall within the scope of the insurance protection afforded by the Association under these Rules."¹⁵⁹ These policies only cover those amounts which hull policies would not cover.¹⁶⁰ Additionally, this policy only provides coverage for the war risks of piracy and barratry.¹⁶¹ Some P & I Club rules now expressly exclude coverage for terrorism.¹⁶² Even though piracy has always been a risk at sea, the new system of hijacking-for-ransom via small craft and a few heavily-armed individuals is in some ways more akin to modern terrorism at sea than to traditional piracy. One can imagine that P & I Clubs might eventually be forced to exclude coverage for ransoms due to the repeated high costs potentially incurred by members.

D. Kidnap and Ransom Insurance

There is some limited evidence that kidnap and ransom policies insuring the crew of a ship against such threats are taking hold. The AIMU has not yet developed or endorsed such a policy, though some syndicates at Lloyd's offer them.¹⁶³ According to advertisements, the policy may include negotiation experts.¹⁶⁴ Some companies now offer a "comprehensive package," which sounds like a good idea in the face of complicated piecemeal policies covering every separate aspect of a major commercial sea voyage.¹⁶⁵ Corporations have used similar policies to protect their employees that go abroad to dangerous

158. Danoff, *supra* note 133, at 71.

159. THE AMERICAN CLUB, 2011/2012 BY-LAWS, RULES & LIST OF CORRESPONDENTS 55 (2011), available at <http://www.american-club.com/rulebooks/1112.pdf>.

160. *Id.* at 59–60.

161. *Id.* at 56.

162. Danoff, *supra* note 133, at 71.

163. *Maritime Kidnap and Ransom Insurance Growing*, INT'L EXEC. SEC. MONITOR (Oct. 7, 2009), <http://kidnapandransom.net/2009/10/maritime-kidnap-and-ransom-insurance-growing/>.

164. *Unique & Related Coverages: Kidnap and Ransom Insurance*, MERCATOR RISK SERVS., INC., http://www.mercatorpro.com/products/unique_amp_related_coverages/kidnap_and_ransom_insurance.html (last visited June 20, 2011).

165. See, e.g., *SCR and MUSC Launch Vessel Shield to Solve Piracy Coverage Dilemma*, INS. SERVS. NETWORK (Mar. 4, 2009), <http://www.isn-inc.com/news/news.aspx?nid=1084&cid=4>.

regions for work.¹⁶⁶ Undisputedly, paying ransoms legitimizes the actions of the pirates.¹⁶⁷ Encouraging the purchase of such coverage would, extended ad absurdum, lead to consumers paying lawless individuals for the privilege of buying goods which passed through international waters, making ransom part of the cost of doing business. This would certainly conflict with the stated goals of the United Nations Security Council—and hopefully meet with widespread public protestation. However, some payments may not be avoidable at this early stage of the fight against Somali pirates.

IV. THE ETHICAL DILEMMA OF PAYING RANSOMS

It is very difficult to obtain accurate data on ransom payments, possibly because some ship owners may not be reporting payments if they have the cash resources to allow them to deal off the grid. Hostage situations create significant concern for American-flagged ships, as their crews and cargoes are in imminent danger.¹⁶⁸ Those who pay ransoms now do so in direct contravention of the wishes of the United Nations Security Council, of which the United States is a permanent member.¹⁶⁹

One attorney posits several propositions about ransom payments, but fails to cite the sources for his numbers or theories. James W. Carbin states that in September 2009 the total amount paid in ransom for hostages held by Somali pirates was projected to reach \$50 million soon.¹⁷⁰ The anecdotal reports of individual, per-craft payments show ransoms are normally in the single-digit millions of dollars.¹⁷¹ Carbin suggests that ransoms are being paid in two ways: by voluntary contribution of the parties to a voyage or by advancement of funds by particular interests who then invoke general average.¹⁷² Carbin argues that, in the first case, the insurance policy which covers the risk of piracy (in United States policies, the War Risks policy) voluntarily contributes to the ransom, as does, potentially, P & I Clubs and Hijack and Ransom insurance.¹⁷³ In the second instance, a general average adjuster would be appointed after the doctrine is invoked to discern the values of each party's

166. See Nicholas Schmidle, *The Hostage Business*, N.Y. TIMES MAG., Dec. 6, 2009, at 44.

167. A market for kidnapping oil workers is still thriving in Nigeria, allegedly due partially to the lucrative nature of payments from insurance companies. *Id.*

168. The United States Foreign Corrupt Practices Act only bans payments to foreign government officials or other parties who negotiate business with said foreign governments. Carbin, *supra* note 9, at 55 (discussing 15 U.S.C. § 78(dd) (2006)). Thus, paying ransom to the pirates does not run afoul of this provision. *Id.*

169. S.C. Res. 1851, *supra* note 40, ¶ 9.

170. Carbin, *supra* note 9, at 54.

171. *Id.* at 55.

172. *Id.* at 54.

173. *Id.* Carbin also notes here that it is not yet certain whether the P & I and hijack and ransom insurers will seek subrogation from the other insurers of the adventure. *Id.*

interest in the venture.¹⁷⁴ This value, interestingly, does not include a valuation of the lives of the crew, assessing only property values.¹⁷⁵ It seems smart general average insurers will soon find a way around funding ransom, which is a substitute expenditure.¹⁷⁶ Though Carbin argues that United States courts have approved the use of general average funds to pay ransom by positively citing a British case in an 1894 decision (*Ralli v. Troop*, 157 U.S. 386 (1894)),¹⁷⁷ it seems unlikely (or at least unwise) that a court would condone paying ransoms not explicitly provided for in the policy, contrary to the express U.S. public policy condemning such payments.

V. LEARNING FROM THE PAST: MARINE INDUSTRY RESPONSES TO PREVIOUS CATASTROPHIC DISTURBANCES

A. *The Exxon-Valdez and Changes at Lloyd's*

As shipping is one of the world's oldest industries, the insurance markets have experience responding to major disturbances in the market that appear from time to time throughout the centuries. One example is the major structural change undertaken by Lloyd's in the aftermath of the *Exxon-Valdez* incident.¹⁷⁸ This loss, along with several others in the late 1980s and early 1990s, forced the stately insurer to post major losses averaging \$461,000 per member.¹⁷⁹ These losses, along with the fact that members were continually exposed to potentially unlimited personal liability in the future, led to a mass exodus of members.¹⁸⁰ Lloyd's quickly changed its rules, allowing corporations to become members for the first time; since directors and shareholders in corporations are protected against unlimited personal liability by the very nature of the corporate entity, this change eliminated the unattractive exposure to personal liability that formerly accompanied membership at Lloyd's.¹⁸¹ Over the years, corporate membership increased, and individual membership decreased.¹⁸² There are now several types of

174. See ROSE, *supra* note 90, at 12 (describing the role of an average adjuster in determining claims).

175. Carbin, *supra* note 9, at 54.

176. Substitute expenditures are those that are used to *avoid* potential damage or delay to the ship, and traditionally were not covered by general average without prior approval. This was altered by York-Antwerp Rule F. ROSE, *supra* note 90, at 59–60; *see also* 1994 YORK-ANTWERP RULES, § F.

177. Carbin, *supra* note 9, at 55.

178. Herschaft, *supra* note 77, at 183.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* Individual members are still subject to unlimited personal liability in the event of a loss.

corporate memberships, making membership an attractive investment opportunity for a variety of types of companies.¹⁸³ This fundamental change in who absorbs the losses adds another layer of protection for investors and insurers.

B. New Form Clauses Specific to Certain Geographic Locations

Prior to aggressive cooperation efforts between Southeast Asian governments, the waterways around Thailand, Malaysia, Indonesia, and the Philippines were pirate-riddled.¹⁸⁴ Though the incidents in the Gulf of Aden now far outnumber the attacks in these areas, the International Maritime Bureau's Piracy Reporting Centre still warns of a strong potential for attack.¹⁸⁵ Attacks on docked ships are still relatively common in the Philippines, as well as throughout South America.¹⁸⁶ In response to these recurring problems, the AIMU promulgated a Philippine Shipment Clause and a South American Shipment Clause, insuring the cargoes of ships for a period of time once the ship has arrived at its destination port but the voyage has technically ended.¹⁸⁷ However, these clauses do not provide additional protection for *crew members* who may be faced with these sudden attacks, usually at night, while docked.¹⁸⁸ This may be because in those areas, the pirates are primarily trying to rob the ship rather than extort money from the ship owners by ransoming the crew. The very fact that the organization was willing to promulgate site-specific form clauses evinces a need and a desire to specifically tailor coverage for individual routes beyond the normal patchwork of general coverage shippers obtain, allowing the shipper to account for additional risks and the insurer to pass those costs of loss directly to those who take the risk of sailing that area. Formulating a similar "Gulf of Aden" clause could be one option for reforming the current approach to covering incidents in that area, as will be discussed in further detail below.

183. Herschaft, *supra* note 77, at 183.

184. ZOU, *supra* note 47, at 338, 343.

185. *Piracy Prone Areas and Warnings*, *supra* note 20.

186. *Id.* Buhler, *supra* note 11, at 61 (noting a rash of attacks on Brazilian ports in the late 1990s).

187. AIMU, PHILIPPINE SHIPMENT CLAUSE, available at <http://www.aimu.org/aimuforms/SP-18.pdf>; AIMU, SOUTH AMERICAN SHIPMENT CLAUSE, available at <http://www.aimu.org/aimuforms/SP-10A.pdf>.

188. *See, e.g.*, Buhler, *supra* note 11, at 61 (describing a midnight attack where the crew of a vessel was held at knifepoint and gunpoint for money).

C. Reinsurance and Terrorism

Marine reinsurance, the practice of insurers procuring indemnity insurance from larger insurers, is likely as old as marine insurance itself.¹⁸⁹ The first recorded policy may have been written for a portion of an ancient trip from Genoa to Sluys: The insurer retained the Mediterranean risk, but reinsured the dangerous part of the route from Cadiz to Sluys.¹⁹⁰ This further spreads the risks of loss among players in the industry. Reinsurers normally cover both marine and non-marine policies, are lightly regulated, and depend on familiar principles to function (utmost good faith, stringent disclosure rules, and similar warranties as in marine policies).¹⁹¹ Reinsurance of Gulf of Aden voyages is likely already happening, but no formal statistics are available regarding what routes or dollar proportion of policies insurers are reinsuring. One author points out that when insurers are considering changes to policy language, they must consider whether those changes will coalesce with reinsurance practices since the insurers often depend on the reinsurers for particularly risky ventures.¹⁹² Thus, when considering a comprehensive solution to insuring ships in the Gulf of Aden, insurers must be mindful of their supporters in reinsurance.

Marine terrorist attacks have been on the radar since the *Achilles Lauro* incident in the early 1980s.¹⁹³ Terrorism, like piracy, is a term of art in marine insurance, defined as a politically motivated act of violence against a ship.¹⁹⁴ In light of this definition, the hybrid nature of Somali piracy becomes clear: while the Somalis' actions are not politically motivated per se, they are acts of violence directed against the people of the ship in order to extort money rather than the traditional seizure of goods.¹⁹⁵ Like modern piracy, acts of terrorism are excluded from the AIMU Hull Policy, and there is continuing controversy about how to cover such acts.¹⁹⁶ The 2001 terrorist attacks in New York caused a massive number of claims against numerous lines of insurance (property-casualty, business interruption, life, health, etc.).¹⁹⁷ The "shocking

189. GRAYDON S. STARING, *LAW OF REINSURANCE* 6 (2011).

190. *Id.*

191. Graydon S. Staring, *Insurance and Reinsurance of Marine Interests in the New Age of Terrorism*, 77 TUL. L. REV. 1371, 1376 (2003).

192. *Id.* at 1377.

193. See Diaz & Dubner, *supra* note 12, at 540. This infamous incident where terrorists from a smaller boat boarded the Italian-flagged ship in the Greek isles and pushed a paralyzed man overboard in his wheelchair shocked the international community. See Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 269 (1988).

194. See Diaz & Dubner, *supra* note 12, at 540.

195. *Id.*

196. AIMU, *supra* note 134, ll. 239–53; Staring, *supra* note 191, at 1386.

197. Staring, *supra* note 191, at 1377.

amounts of loss and their unforeseeability . . . led many to doubt the market's capacity for unlimited risks of terrorism in the future."¹⁹⁸ This doubt led insurers to refuse or limit coverage of the risk of terrorism, which the General Accounting Office found had a chilling effect on development and construction projects that need such coverage to obtain financing.¹⁹⁹

In order to reassure these insurers and businesses, the federal government passed a stopgap measure, the Terrorism Risk Insurance Act, to strengthen the market.²⁰⁰ In effect, the act (which was renewed through 2014) is set up like a reinsurance program: in the event of a catastrophic terrorist incident where losses exceed \$100 million,²⁰¹ the Secretary of the Treasury, with concurrence from the Secretary of State and the Attorney General, can activate the coverage, and direct insurers can recover from the government or from another reinsurer (not both).²⁰² In exchange, insurers must cover damage caused by terrorist attacks, and offer coverage for such acts similar to other coverage available at the particular premium rate.²⁰³ Hence, businesses and insurers are urged to continue in their normal productive patterns without worrying about potential catastrophic losses from something so unpredictable as terrorism.

VI. AN INSURER'S APPROACH TO FIGHTING SOMALI PIRACY

A. *Revising the Applicable Clauses*

1. Defining and Redefining Piracy

There are several steps insurers could take to revise marine policy clauses to make coverage clearer without losing the convenience of the form contract. Since each venture poses a unique set of risks, it is important from a practical standpoint that insurers are able to cobble together coverage by picking and choosing from existing language. First, piracy should be redefined in

198. *Id.* at 1378.

199. *Id.* at 1378–79.

200. Terrorism and Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (codified at 15 U.S.C. § 6701 (2006)); *see also* Staring, *supra* note 191, at 1395. The measure was initially set to expire in 2005, but was renewed by Congress through 2014 in 2007. Terrorism Risk Insurance Program Reauthorization Act of 2007, Pub. L. No. 110-160, § 3(a), 121 Stat. 1839, 1839 (codified at 15 U.S.C. § 6701 (Supp. 2008)).

201. 15 U.S.C. § 6701 (2006). In the 2002 version, the losses needed only to be \$5 million. Terrorism Risk Insurance Act of 2002 § 102(1)(B)(ii), 116 Stat. at 2324 (codified at 15 U.S.C. § 6701 (2006)). The amount was increased to \$50 million in 2005, then to \$100 million in 2007. Terrorism Risk Insurance Program Reauthorization Act of 2007 § 4, 121 Stat. at 1840 (codified at 15 U.S.C. § 6701 (Supp. 2008)).

202. Terrorism Risk Insurance Act of 2002 § 103, 116 Stat. at 2327–332 (codified at 15 U.S.C. § 6701 (2006)). Insurers must also increase all subscribers' premiums by 3% to attempt to recover some of the money if claimed. *Id.* § 103(e)(8), 116 Stat. at 2330–231.

203. *Id.*

international law to include hostile acts against the ship or her crew for the purpose of extorting money, not just hostile acts against the ship to procure the goods onboard. Much like denials of coverage that began after the terrorist attacks of 9/11,²⁰⁴ it is not unimaginable that insurers might change their broader conception of “piracy” to match the narrower one embodied in United States law if they must continually reimburse for Somali pirate attacks. If the definition is consistent throughout law and business, denying coverage on such a technicality becomes much more difficult. Additionally, defining “piracy” in the policy would help ship owners determine whether or not a particular incident is covered under that portion of the policy.

2. *The “Gulf of Aden” Clause*

In addition, or alternatively, insurers may want to consider a “Gulf of Aden” clause, passing the costs on to those who desire to use the convenient waterway despite the additional risks (and costs) of doing so. This clause could be formulated to provide special coverage for kidnappings in this area. Though paying ransoms is controversial as it undoubtedly rewards the bad acts of the pirates,²⁰⁵ the reality is that someone is paying.²⁰⁶ Creating a separate clause for this type of coverage would be a good way to efficiently distribute costs of this risk: Once shippers feel the area is politically stable and risks of kidnapping are minimal, they no longer will pay for the coverage. This gives governments and international actors time to solve the problem, and also gives the marine insurance industry an easy way to revert to standard practices once the problem is under control.

Additionally, offering such a clause will avoid the confusion and delay of determining who will pay how much and when, as happens when general average is invoked. The pay now, figure it out later strategy, due to its complexity, should be saved for true one-off instances: The risks of travelling the Gulf of Aden are now infamous. Further, insurers will no longer have to perform slight-of-hand to pay ransoms while still appearing to be in compliance with United Nations Security Council mandates. Kidnapping and Ransom insurers often contract negotiations with the criminals out to a third party in order to maintain clean hands; the same could be done here. But insurers would no longer have to pretend that they would not cover these losses that devastate their lifeblood industry.

204. See *infra* Part VII.B.

205. See Schmidle, *supra* note 166.

206. See Andrés Cala & Alan Cowell, *After 6 Weeks, Somali Pirates Free Crew of Spanish Vessel*, N.Y. TIMES, Nov. 18, 2009, at A10.

B. *Temporary Program of Government Reinsurance*

As previously mentioned, portions of the Terrorist Risk Insurance Act were extended in 2007 through December 2014.²⁰⁷ This act covers marine insurance policies, but only on the “terrorism” front, which still requires that the violent action be politically (rather than financially) motivated.²⁰⁸ The United States would likely be reluctant to sponsor coverage for ransoms, considering the United Nations Security Council condemns paying ransoms.²⁰⁹ There is likely a loophole way that costs could be covered while not condoning or reimbursing for ransom expenses directly. Perhaps some sort of consequential damages fund could be established to help pay claims resulting from the delays in transit. This would offer reinsurance to P & I Clubs who might be considering dropping coverage, and also keep seafaring vessels moving through the quickest route for trade. The insurance industry and shippers, however, would likely benefit more from upfront definition of what is and is not covered, and offering the option of a Gulf of Aden clause to parties choosing to travel the dangerous route.

C. *Worst-Case Scenario: To Pay or Not to Pay?*

Paying ransom should be considered the last resort in a worst-case scenario, even when the theoretical “Gulf of Aden” clause is purchased. There is certainly moral grey area here. In fact, there is ample anecdotal evidence that paying ransoms in this type of situation does perpetuate the crimes.²¹⁰ However, the constant threat to human life makes paying ransoms difficult to resist.²¹¹ Insurers should require certain behaviors or procedures as antecedents to negotiating with pirates to incentivize preparation and competence among their clients.

Insurers ought to require ship management to take anti-piracy courses.²¹² This is similar to giving people a discount on their automobile insurance

207. *See supra* note 201 and accompanying text.

208. 15 U.S.C. § 1607 (2006).

209. S.C. Res. 1851, *supra* note 40, ¶ 9.

210. Kidnapping in Nigeria was similarly big business. The kidnapers are accustomed to negotiating with certain crisis management groups insurers employ. *See* Schmidle, *supra* note 166.

211. After being held hostage for a month, and Spanish sailors pleading with their families to beg the government to give the pirates what they wanted, the ship was eventually freed. *See* Cowell, *supra* note 8 (explaining that the Spanish prime minister, José Luis Rodríguez Zapatero, declined to comment on reports that a ransom of nearly \$3.5 million had been paid for the Alakrana and its crew. “The government did what it had to do,” he said).

212. The Philippines recently mandated that all of its citizens who sail on commercial ships take an anti-piracy course before being allowed to sail in 2010 because 470 of its citizens have been held for ransom in the past several years. *See Philippines Orders Sailors To Take Anti-Piracy Classes*, *supra* note 54.

premium for taking a driver's education course: The risks of insuring such people are theoretically lessened if they have the skills to help protect themselves and their vehicle. So too with sailors and their ship. The IMO's "Recommendations to Shipowners" recommends training sailors to use fire hoses, fences, or sonic devices to repel pirates at the first attempt to board.²¹³ Even prior to employing those deterrent measures, they recommend employing evasive maneuvering and reporting all attempted attacks to the International Maritime Bureau's Piracy Reporting Centre.²¹⁴ In addition to merely training the sailors in these measures, ship captains should be required to show that they employed these techniques and followed their anti-piracy plan in order to avoid capture in every way possible.²¹⁵

Additionally, ships should be required to show that they were travelling in the MSCHOA Internationally Recommended Transit Corridor where coalition forces patrol. This area has still been the site of attacks, but the risks should be diminished if ships stay within this patrolled area. Travelling within this corridor, as well as following IMO's recommended procedures, should be requirements for covering ransom.

CONCLUSION

Piracy and insurance against piracy are nearly as old as shipping. The Somali pirates have managed to turn the industry on its head by employing new techniques: combining hostage-for-ransom with attacking ships passing by. Initially unsophisticated, the pirates are growing bolder, employing mother ships and creating an investment exchange. Yes, paying ransoms validates their bad behavior, but as the Spanish Prime Minister said, sometimes you do what you have to do.

Since this is a new incarnation of an old crime, no one is quite sure where or how it is covered in the hodgepodge marine insurance policies that cover individual voyages. The insurers largely seem to be crossing their fingers and sending their clients on their way, hoping for the best. Anticipating the worst, however, would be far more beneficial than scrambling when a ship is attacked. Including a definition of piracy, and potentially a Gulf of Aden clause, could aid both sides (and courts) in the event of a disagreement. Such language could help determine who is to pay what, when. In addition, though

213. IMO, *supra* note 45, ¶¶ 56–57.

214. *Id.* ¶¶ 11, 55.

215. Some have argued that we should arm the ships, issuing temporary Letters of Marque that authorize them as a merchant marine. This idea is not feasible, however, as it would require uniform treatment of armed foreign ships in all foreign ports, and could lead to further liability for shippers rather than reduced. See D. Joshua Staub, *Letters of Marque: A Short-Term Solution to an Age Old Problem*, 40 J. MAR. L. & COM. 261, 266–69 (2009).

the United States cannot condone paying ransom,²¹⁶ some sort of temporary government fund could help alleviate the high cost of insuring against such attacks, keeping sea traffic moving through the shortest travel routes. Finally, before paying any ransom claim, insureds should have to prove that they were following IMO recommendations and travelling in the MSCHOA corridor.

The United Nations, its member states, Somalia's neighbors, and the transitional government of Somalia are working diligently to police the area and develop a long-term solution. However, this takes time and experimentation. In the meantime, insurers can assist by requiring training, preparation, and strategy of their clients—and of themselves.

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216. S.C. Res 1851, *supra* note 40, ¶ 9.

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