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Interpreting Sea Piracy Clauses in Marine Insurance Contracts

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I
INTRODUCTION

Piracy at sea has plagued maritime commerce throughout the history of human civilization.[1] There have been a substantial number of pirate attacks in the last several years.[2] The rise of modern piracy has had important implications for both merchant shippers and insurance underwriters.[3] For example, in the Gulf of Aden insurance premiums have increased tenfold because of rampant piracy off the Somali coast.[4] Despite the effect piracy has on security and trade, the words "piracy" and "pirates" have no consistent definitions when used as legal terminology.[5] Those words have been particular-

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[1]See, e.g., LAURENCE BERGREEN, MARCO POLO: FROM VENICE TO XANADU 284-287, 289 (Alfred A. Knopf 2007) (describing piracy off the coast of India in the late 13th century); PETER EARLE, THE PIRATE WARS *passim* (Thomas Dunne Books 2003) (describing piracy during the so-called Golden Age of Piracy); David Braund, *Piracy under the Principate and the Ideology of Imperial Eradication*, *in* WAR AND SOCIETY IN THE ROMAN WORLD 195-212 (John Rich & Graham Shipley, ed., Routledge 1993) (discussing piracy during the early Roman Empire).

[2]INT'L MAR. BUREAU, INT'L CHAMBER OF COMMERCE, 2007 PIRACY AND ARMED ROBBERY AGAINST SHIPS ANNUAL REPORT 5-6 (2008) [hereinafter 2007 ANNUAL REPORT ON PIRACY] (note that the ICC IMB uses its own definition of piracy as discussed below).

[3]ROGER MIDDLETON, PIRACY IN SOMALIA *passim* (Chatham House 2008) (reporting that piracy off the coast of Somalia has more than doubled in 2008 and has significantly increased insurance premiums in some areas).

[4]Miles Costello, *Shipping Insurance Cost Soars with Piracy Surge Off Somalia*, THE TIMES, Sep. 11, 2008, *available at* http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article4727372.ece.

[5]See generally ALFRED P. RUBIN, THE LAW OF PIRACY 1, 313, 394-395 (Transnational Publishers, Inc. 1998) (1988).

ly hard to define in the commercial realm of marine insurance.[6] Consistently interpreting piracy clauses in insurance contracts is necessary to determine whether there is insurance coverage for attacks at sea.[7]

Several recent commentators have addressed the interpretation of piracy clauses in insurance contracts under British law.[8] However, a number of courts in the United States have also interpreted piracy clauses in insurance contracts and it is likely that they will continue to do so with more frequency.

This article primarily examines the decisions of American courts that have interpreted piracy clauses in insurance contracts. A survey of the case law shows that (1) the interpretations of piracy clauses in insurance contracts are not always consistent with criminal law or international law definitions of piracy; and (2) American law on this issue is sometimes divergent from British law.

American courts interpreting piracy clauses should not blindly apply definitions of piracy originating in international or criminal law. Instead, courts should determine whether an act constitutes piracy based on factors employed by prior American cases, while taking into account the reasonable expectations of the parties. Where there is no American precedent on point, courts should look to British law. This analysis may be of use for American merchants and insurers, as well as for British merchants and insurers whose insurance contracts may be interpreted in American courts.

II
PIRACY CLAUSES IN MARINE INSURANCE CONTRACTS

Since marine insurance began, loss caused by piracy has either been specifically covered or excluded.[9] In some older marine insurance agree-

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[6]MICHAEL D. MILLER, MARINE WAR RISKS 213 (3d ed., T&F Informa UK Ltd. 2005); Peter Rogan, *Insuring the Risk of Terrorist Damage and Other Hostile Deliberate Damage to Property Involved in the Marine Adventure: An English Law Perspective*, 77 TUL. L. REV. 1295, 1317 (2003).

[7]See Lawrence J. Kahn, *Pirates, Rovers, and Thieves: New Problems with an Old Enemy*, 20 TUL. MAR. L.J. 293, 296 (1996).

[8]See, e.g., HOWARD BENNETT, THE LAW OF MARINE INSURANCE 360-361 (Oxford University Press 2006); MICHAEL D. MILLER, MARINE WAR RISKS 207-221 (3d ed., T&F Informa UK Ltd. 2005); F.D. ROSE, MARINE INSURANCE: LAW AND PRACTICE 279-281 (Gerard McMeel & Stephen Watterson asst., Informa Professional 2004); Aleka Mandaraka-Sheppard, *Hull, Time and Voyage Clauses: Marine Perils in Perspective*, in THE MODERN LAW OF MARINE INSURANCE 75-76 (D. Rhidian Thomas ed., LLP Limited 1996); Peter Rogan, *Insuring the Risk of Terrorist Damage and Other Hostile Deliberate Damage to Property Involved in the Marine Adventure: An English Law Perspective*, 77 TUL. L. REV. 1295, 1317-1321 (2003).

[9]LEE R. RUSS IN CONSULTATION WITH THOMAS F. SEGALLA, COUCH ON INSURANCE § 137.83 (3d ed., West 2007); Peter Rogan, *Insuring the Risk of Terrorist Damage and Other Hostile Deliberate Damage to Property Involved in the Marine Adventure: An English Law Perspective*, 77 TUL. L. REV. 1295, 1317 (2003).

ments, piracy was considered simply part of the "perils of the sea" and covered even if "piracy" was not specifically mentioned.[10] However, loss caused by pirates was traditionally covered as a separate named peril in the standard hull policy.[11]

While loss caused by pirates often remains a named peril,[12] some insurers now exclude piracy from coverage through various exclusions.[13] Additionally, because of the ongoing worldwide rise in piracy, some insurers have recently removed piracy from the named perils in the hull clauses.[14] Under these new clauses, coverage for piracy is included only by purchasing a separate war risk policy, paying an additional premium, and submitting to additional reporting requirements.[15]

III
DEFINING "PIRACY" AND "PIRATES" IN MARINE INSURANCE

The term "piracy" transcends easy labeling.[16] Piracy has one meaning in the insurance industry, another in the international shipping industry, another in international law, another in criminal law, and yet another in the "common law." Therefore, there are no less than five reasonable interpretations of

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[10]Theophilus Parsons, A Treatise on the Law of Marine Insurance 566 FN2 (vol. 1, Little, Brown, and Company 1859) (1868); *cf.* Addison Gage v. Minot Tirrell, 91 Mass. 299, 310 (Mass. 1864) (suggesting, in a case involving the interpretation of bills of lading, that piracy is a peril of the sea under the terms of a commercial document); but see Florence Edler de Roover, *Early Examples of Marine Insurance*, 5 The Journal of Economic History 172, 174 (1945) (distinguishing between the *risicum gentium*, including piracy, and the *risicum maris*, the perils of the sea).

[11]Lawrence J. Kahn, *Pirates, Rovers, and Thieves: New Problems with an Old Enemy*, 20 TUL. MAR. L.J. 293, 307 (1996); Andrew J. Nocas, *Are You Covered When We're At War?*, 20-SUM BRIEF 10, 41 (1991).

[12]Robert T. Lemon II, *Allocation of Maritime Risks: An Overview of the Marine Insurance Package*, 81 TUL. L. REV. 1467, 1470 (2007).

[13]Robert T. Lemon II, *Allocation of Maritime Risks: An Overview of the Marine Insurance Package*, 81 TUL. L. REV. 1467, 1470 (2007); Jean E. Knudsen, *The Hull Policy Today: Thoughts from the Claims World*, 75 TUL. L. REV. 1597, 1617 (2001).

[14]Christine Seib, *Lloyd's to Overhaul Piracy Policies*, THE TIMES (Nov. 12, 2005), available at http://business.timesonline.co.uk/tol/business/industry_sectors/transport/article589231.ece.

[15]Christine Seib, *Lloyd's to Overhaul Piracy Policies*, THE TIMES (Nov. 12, 2005), available at http://business.timesonline.co.uk/tol/business/industry_sectors/transport/article589231.ece.

[16]MICHAEL D. MILLER, MARINE WAR RISKS 207 (3d ed., T&F Informa UK Ltd. 2005).

the word "piracy"[17] and the context of the word may determine its meaning.[18] In order to properly define piracy when interpreting an insurance agreement, courts must consider the rules of insurance contract interpretation alongside the various competing definitions.

A. Principals of Insurance Contract Interpretation

In both the United States and the United Kingdom, marine insurance agreements, like all insurance agreements,[19] are contracts.[20] Marine insurance agreements are generally interpreted using the same rules of construction as other contracts.[21] However, courts take the unequal bargaining power between the insurer and insured into consideration when interpreting insurance contracts.[22] Interpreting the meaning of "pirates" or "piracy" in a

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[17]See, e.g., MICHAEL D. MILLER, MARINE WAR RISKS 207 (3d ed., T&F Informa UK Ltd. 2005) (suggesting five different meanings); ALFRED P. RUBIN, THE LAW OF PIRACY 1 (Transnational Publishers, Inc. 1998) (1988) (suggesting at least six different meanings); Lawrence J. Kahn, *Pirates, Rovers, and Thieves: New Problems with an Old Enemy*, 20 TUL. MAR. L.J. 293, 295-296 (1996) (suggesting six different meanings).

[18]MICHAEL D. MILLER, MARINE WAR RISKS 207 (3d ed., T&F Informa UK Ltd. 2005); *cf.* HOWARD BENNETT, THE LAW OF MARINE INSURANCE 268 (Oxford University Press 2006) (explaining that the definitions of terms with a specialized meaning in, for example, the criminal law do not necessarily correspond to the concerns of the reasonable person taking out a policy of marine insurance).

[19] EORGE RICHARDS, A TREATISE ON THE LAW OF INSURANCE 110 (2d ed., The Banks Law Publ'g Co. 1909) ("At the very outset it must be noted that insurance is essentially a contract of indemnity); see TOM BAKER, INSURANCE LAW AND POLICY: CASES, MATERIALS, AND PROBLEMS 25 (2003) (noting that "...the relationship between insurers and policy holders remains largely the province of contract law); Joseph F. Cunningham with James N. Markels, *Attorneys' Fees Incurred in Defending Insurance Policy Non-Covered Claims: Who Pays?*, 2 BROOK. J. CORP. FIN. & COM. L. 69, 70 (2007) (noting that "the basic premise of an insurance policy is a contract whose particular language alone governs the duties and benefits conferred on both parties) (citing BAKER, supra this note).

[20]Marine Insurance Act, 1906, Edw. 7, c. 41, § 1 (United Kingdom) ("A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to the marine adventure"); THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW 912-913 (4th ed., West 2004); F.D. ROSE, MARINE INSURANCE: LAW AND PRACTICE 6 (Gerard McMeel & Stephen Watterson asst., Informa Professional 2004); D. Rhidian Thomas, *Perspectives on the Contact of Marine Insurance*, in THE MODERN LAW OF MARINE INSURANCE 1 (D. Rhidian Thomas ed., LLP Limited 1996); 1 ARTHUR L. FLITNER & ARTHUR E. BRUNCK, OCEAN MARINE INSURANCE 28 (2d ed., Insurance Institute of America 1992).

[21]ALEX PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 112 (vol. 1, Cornell Maritime Press 1987).

[22]SAMUEL WILLISTON, 7 WILLISTON ON CONTRACTS § 900 (3d ed. 1963):

> . . . Few persons solicited to take policies understand the subject of insurance or the rules of law governing the negotiations, and they have no voice in dictating the terms of what is called the contract. They are clear upon two or three points which the agent promises to protect, and for everything else they must sign ready-made applications and accept ready-made policies carefully concocted to conserve the interest of the company . . . . The subject, therefore, is sui generis, and the rules of a legal system devised to govern the formation of ordinary contracts between man and man cannot be mechanically applied to it.

marine insurance contract implicates three important contract doctrines: (1) reasonable expectations; (2) usage of trade; and (3) *contra proferentem*.

1. Reasonable Expectations

The law of contracts seeks to enforce the reasonable expectations of the parties.[23] This doctrine applies in the context of insurance contracts,[24] including marine insurance contracts.[25] Both American and British courts have endorsed the reasonable expectations doctrine for interpreting piracy claus-

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[23]ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1.1, at 2 (Joseph M. Perillo ed., West Publ'g Co. 1993) (1963) ("The Main Purpose of Contract Law Is the Realization of Reasonable Expectations Induced by Promises"); see HOWARD BENNETT, THE LAW OF MARINE INSURANCE 262 (Oxford University Press 2006):

> In construing a contract, the court seeks to give effect to the bargain concluded by the parties. The modern approach to interpretation is to reject any impediment to determining and implementing the intention of the parties in concluding the contract they did in fact conclude, while remaining vigilant not to rewrite the contract. In particular, a commercial contact will be construed through the eyes of reasonable commercial parties and not via the application of abstract, technical rules.

See also Restatement (Second) of Contracts § 347 (1979) (setting out expectation interest of damages); E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.9, 212 (3d ed., Aspen Publishers 2004) (stating that the general value of expectation damages equals the "loss in value + other loss – cost avoided – loss avoided) (emphasis omitted); Lawrence Kalevitch, *Contract, Will & Social Practice*, 3 J.L. & POL'y 379, 380 (1995) ("A liberal theory of contract aims at meeting party expectations"); Menachem Mautner, *Contract, Culture Compulsion, or: What Is So Problematic in the Application of Objective Standards in Contract Law?*, 3 THEORETICAL INQUIRES IN THE LAW 545, 559 (2002) ("[I]t is no wonder that rules directed at the protection of reasonable expectations arose within the realm of contract law doctrine"); Matthew O. Tobriner & Joseph R. Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CAL. L. REV. 1247, 1273 (1967) ("The concept that a contract is to be interpreted in the light of the parties' reasonable expectations lies deep in contract law").

[24]*Rodman v. State Farm Mut. Aut. Ins. Co.*, 208 N.W.2d 903, 906 (Iowa 1973) ("The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations"); Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 961 (1970) ("...the reasonable expectations of applicants and intended beneficiaries will be honored"); *see* Robert H. Jerry, II, *Insurance, Contract, and the Doctrine of Reasonable Expectations*, 5 CONN. INS. L.J. 21, *passim* (1998); Péter Cserne, *Policy considerations in contract interpretation: the contra proferentem rule from a comparative law and economics perspective*, at 16 (Hungarian Association for Law and Economics working papers 2007), available at http://works.bepress.com/peter_cserne/28 (suggesting that in the second half of the 20th century, U.S. courts applied the contra proferentem rule broadly reasoning that "an ambiguous insurance policy disappoints the reasonable expectations of the insured and is difficult to understand"); see also Restatement (Second) of Contracts § 237 cmt. f (1979) ("Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation"); but see Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 828 (1990) (suggesting the doctrine of reasonable expectations is limited to a minority of American states in insurance cases).

[25]ALEX PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 135-137 (vol. 1, Cornell Maritime Press 1987.

es in insurance contracts.[26] Under the doctrine of reasonable expectations, courts interpret marine insurance contracts to provide the coverage that the insured "reasonably assumed they had purchased."[27] Applying this doctrine where the insured is commercially sophisticated, represented by counsel, and fully understands the coverage purchased is improper.[28] When interpreting the meaning of the terms "piracy" and "pirate" in an insurance policy, courts should look to what the parties reasonably expect the terms mean while appropriately considering the relative sophistication of the parties.[29]

2. Usage of Trade

In both the United States and the United Kingdom, contract law permits courts to interpret an uncertain term consistent with its popular meaning in the industry in which the term is used.[30] The usage of trade doctrine has historically played a significant role in interpreting marine insurance contracts[31] and is often used to explain the meaning of technical words or phrases.[32]

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[26]Republic of Bolivia v. Indem. Mut. Mar. Assur. Co., Ltd., [1909] 1 K.B. 785:

> One has to look at what is the natural and clear meaning of the word "pirate" in a document used by business men for business purposes; and I think that, looking at it in that way, one must attach to it a more popular meaning, the meaning that would be given to it by ordinary persons, rather than the meaning to which it may be extended by writers on international law.

Id. (Pickford J.); accord Charles E. Dole v. Merchants' Mut. Mar. Ins., 51 Me. 465, 1863 WL 1315 at *2 (1863).

[27]*Lewis v. Aetna Ins. Co.*, 505 P.2d 914, 919 (Or. 1972); see ALEX PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 136-137 (vol. 1, Cornell Maritime Press 1987 (citing *Lewis*).

[28]*Eagle Leasing v. Hartford Fire*, 540 F.2d 1257, 1261 (5th Cir. 1978); see ALEX PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 136-137 (vol. 1, Cornell Maritime Press 1987 (citing *Eagle Leasing*).

[29]See SIR FREDERICK POLLOCK, PRINCIPALS OF CONTRACT AT LAW AND IN EQUITY 308-309 (Gustavus H. Wald & Samuel Williston ed., Baker, Voorhis & Company 1906):

> In order to ascertain what the promisee had a right to expect, we do not look merely to the words used. We must look to the state of things as known to and affecting the parties at the time of the promise, including their information and competence with regard to the matter at hand, and then see what expectation the promisor's words, as uttered in that state of things, would have created in the mind of a reasonable man in the promisee's place and with the same means of judgment.

[30]HOWARD BENNETT, THE LAW OF MARINE INSURANCE 268 (Oxford University Press 2006); ALEX PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 117, 119-122 (vol. 1, Cornell Maritime Press 1987); GEORGE RICHARDS, A TREATISE ON THE LAW OF INSURANCE 108-109 (2d ed., The Banks Law Publ'g Co. 1909).

[31]Brough v. Whitmore, 100 Eng. Rep. 976, 978 (K.B. 1791) (Buller, J.) (marine insurance "has at all times been considered in Courts of Law as an absurd and incoherent instrument; but it is founded on usage, and must be governed and construed by usage"); ALEX PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 123 (vol. 1, Cornell Maritime Press 1987); GEORGE RICHARDS, A TREATISE ON THE LAW OF INSURANCE 110 (2d ed., The Banks Law Publ'g Co. 1909).

[32]ALEX PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 118 (vol. 1, Cornell Maritime Press 1987); GEORGE RICHARDS, A TREATISE ON THE LAW OF INSURANCE 109 (2d ed., The Banks Law Publ'g Co. 1909).

When applying the trade usage doctrine to the interpretation of piracy clauses in marine insurance contracts, a key issue is whether to look to the insurance industry or the shipping industry for the proper usage of trade.[33]

3. Contra Proferentem

Courts in both the United States and the United Kingdom generally hold that an ambiguous term in an insurance contract is construed against the insurer.[34] One commentator has noted that this rule carries more weight in the United States than the United Kingdom.[35] Interpreting ambiguous terms against the insurer is a specialized application of the traditional doctrine of contract interpretation *verba chartarum forties accipiuntur contra proferentem*:[36] an ambiguous term in a contract is construed against the drafter of the contract.[37]

The doctrine assumes that insurers generally have a much more powerful bargaining position than the insureds. If the insurer wanted a term to have a more specific meaning, it had an opportunity to specify the meaning at the

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[33]Many insureds who know much about shipping but little about insurance may believe that their own industry's terminology has been incorporated into insurance. Courts should not allow technical contract analysis to override business commonsense. *See* HOWARD BENNETT, THE LAW OF MARINE INSURANCE 273 (Oxford University Press 2006). Similarly, Lloyd's of London is a major insurance market that has its own specialized customs different from the general London insurance market. British courts have refrained from holding assureds bound by Lloyd's customs that are prejudicial to their interests unless it could be shown that the insured knew of the custom and contracted with reference to it. HOWARD BENNETT, THE LAW OF MARINE INSURANCE 268 (Oxford University Press 2006).

[34]ALEX PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 122-123 (vol. 1, Cornell Maritime Press 1987); see Péter Cserne, *Policy considerations in contract interpretation: the contra proferentem rule from a comparative law and economics perspective*, at 16 (Hungarian Association for Law and Economics working papers 2007), available at http://works.bepress.com/peter_cserne/28; but see HOWARD BENNETT, THE LAW OF MARINE INSURANCE 285-286 (Oxford University Press 2006) (citing British case law and arguing against automatically interpreting an ambiguous term against the insurer and suggesting situations where an ambiguous term should be interpreted against the insured).

[35]ALEX PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 123 (vol. 1, Cornell Maritime Press 1987).

[36]Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 602 (2d Cir. 1947); ALEX PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 122 (vol. 1, Cornell Maritime Press 1987); Péter Cserne, *Policy considerations in contract interpretation: the contra proferentem rule from a comparative law and economics perspective*, at 16 (Hungarian Association for Law and Economics working papers 2007), available at http://works.bepress.com/peter_cserne/28.

[37]ALEX PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 122 (vol. 1, Cornell Maritime Press 1987); see Péter Cserne, *Policy considerations in contract interpretation: the contra proferentem rule from a comparative law and economics perspective*, at 5 (Hungarian Association for Law and Economics working papers 2007), available at http://works.bepress.com/peter_cserne/28 ("The doctrine says, shortly, that ambiguities in the language of a written contract should be construed against the drafter of the unclear contract clause").

time the contract was drafted.[38] In some cases where the insured and insurer have equal bargaining power or the insured itself suggests a term, *contra proferentem* should not be applied against the insurer.[39] However, courts have historically applied *contra proferentem* more rigorously to insurance contracts than other contracts.[40] The *contra proferentem* rule often has the effect of putting the burden on the insurer to prove lack of coverage – "the insurer must at its peril make its policy exclusions and exceptions clear and unmistakable."[41]

B. The Competing Definitions of Piracy

The existence of multiple definitions of piracy invites confusion when interpreting insurance contracts.

1. British Insurance Definition of Piracy

Admiralty courts in both the United States and United Kingdom have been heavily influenced by the United Kingdom Marine Insurance Act of 1906. The term "pirates," but not "piracy," is mentioned in the Marine Insurance Act: "The term 'pirates' includes passengers who mutiny and riot-

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[38]Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 601 (2d Cir. 1947); see Péter Cserne, *Policy considerations in contract interpretation: the contra proferentem rule from a comparative law and economics perspective*, at 11-12 (Hungarian Association for Law and Economics working papers 2007), available at http://works.bepress.com/peter_cserne/28 (presenting a number of rationales for the contra proferentem). However, the process by which marine insurance agreements are often formed in the United Kingdom presents a special problem for applying *contra proferentem* because it is not always clear which party truly is the *proferens*. See HOWARD BENNETT, THE LAW OF MARINE INSURANCE 286-287 (Oxford University Press 2006) (noting that marine insurance contracts in the U.K. are often made up of standard market documents assembled by a broker, who is the agent of the insured, and presented to the insurers); see also THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW 915-917, 924-925 (4th ed., West 2004).

[39]HOWARD BENNETT, THE LAW OF MARINE INSURANCE 285 (Oxford University Press 2006) (citing British case law and suggesting that an ambiguous term should be interpreted against whichever party inserted the ambiguous term even if that results in an interpretation against the insured); ALEX PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 123 (vol. 1, Cornell Maritime Press 1987); *see* Péter Cserne, *Policy considerations in contract interpretation: the contra proferentem rule from a comparative law and economics perspective*, at 17 (Hungarian Association for Law and Economics working papers 2007), available at http://works.bepress.com/peter_cserne/28 (discussing the so-called "sophisticated policyholder defense").

[40]Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 602 (2d Cir. 1947); see Péter Cserne, *Policy considerations in contract interpretation: the contra proferentem rule from a comparative law and economics perspective*, at 16 (Hungarian Association for Law and Economics working papers 2007), available at http://works.bepress.com/peter_cserne/28 ("Insurance law is probably the legal area where the contra proferentem rule has been most frequently invoked").

[41]ALEX PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 124 (vol. 1, Cornell Maritime Press 1987).

ers who attack the ship from the shore."[42] The Marine Insurance Act codifies British marine insurance case law through 1906.[43] Marine insurance contracts subject to British law are interpreted according to the terms of the statute.[44] The Marine Insurance Act remains highly persuasive in the United States.[45]

British courts recognize that the international or criminal law definitions of piracy are not always on point when interpreting an insurance contract.[46] Instead, British courts use the popular and business meaning of piracy.[47] Together with the Marine Insurance Act of 1906, British case law suggests the following insurance definition of piracy: a maritime[48] act of depredation,[49] mutiny included,[50] for private ends[51] accomplished through force or the threat of force.[52]

2. *International Shipping Industry Definition of Piracy*

The International Chamber of Commerce International Maritime Bureau (hereinafter "IMB") is a nonprofit organization dedicated to fighting maritime crime, malpractice, and fraud.[53] The IMB's Piracy Reporting Centre publishes free reports on piracy.[54] The purpose of the piracy reports is to

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[42]Marine Insurance Act, 1906, 6 Edw. 7, c 41, s. 8, sched. 1 (U.K.).

[43]ALEX PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 18 (vol. 1, Cornell Maritime Press 1987).

[44]ARTHUR L. FLITNER & ARTHUR E. BRUNCK, Ocean Marine Insurance 29 (2d ed., vol. 1, Insurance Institute of America 1992).

[45]ALEX PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 18 (vol. 1, Cornell Maritime Press 1987); see LEE R. RUSS IN CONSULTATION WITH THOMAS F. SEGALLA, COUCH ON INSURANCE § 137.83 (3d ed., West 2007); ARTHUR L. FLITNER & ARTHUR E. BRUNCK, OCEAN MARINE INSURANCE 29 (2d ed., vol. 1, Insurance Institute of America 1992).

[46]See F.D. ROSE, MARINE INSURANCE: LAW AND PRACTICE 279 (Gerard McMeel & Stephen Watterson asst., Informa Professional 2004).

[47]HOWARD BENNETT, THE LAW OF MARINE INSURANCE 360 (Oxford University Press 2006).

[48]Athens Mar. Enters. Corp. v. Hellenic Mut. War Risks Ass'n (Bermuda) Ltd., [1983] Q.B. 647, 658; Republic of Bolivia v. Indem. Mut. Mar. Assurance Co. Ltd., [1909] 1 K.B. 785, 789-790, 798-799 (various opinions agreeing that an act must be able to be characterized as a "maritime offense" to constitute piracy as that term is used in an insurance contract, but not agreeing on whether the act in that case was maritime).

[49]Athens Mar. Enters. Corp. v. Hellenic Mut. War Risks Ass'n (Bermuda) Ltd., [1983] Q.B. 647, 65-661.

[50]Marine Insurance Act, 1906, 6 Edw. 7, c 41, s. 8, sched. 1 (U.K.); see Naylor v. Palmer, [1853] 8 Ex. 738, 750.

[51]Republic of Bolivia v. Indem. Mut. Mar. Assurance Co. Ltd., [1909] 1 K.B. 785, 791 (Pickford J).

[52]Athens Mar. Enters. Corp. v. Hellenic Mut. War Risks Ass'n (Bermuda) Ltd., [1983] Q.B. 647, 661; Shell International Petroleum Co. Ltd. v. Gibbs, [1982] Q.B. 946, 986 (Lord Denning M.R.).

[53]International Maritime Bureau, available at http://www.icc-ccs.org/index.php?option=com_content&view=article&id=27&Itemid=16.

[54]IMB Piracy Reporting Centre, available at http://www.icc-ccs.org/index.php?option=com_content&view=article&id=30&Itemid=12.

raise awareness of piracy throughout the shipping industry, including insurance companies.[55] The IMB has traditionally used a non-legal definition of piracy for statistical purposes: "An act of boarding or attempting to board any ship with the apparent intent to commit theft of any other crime and with the apparent intent or capability to use force in the furtherance of that act."[56]

The IMB's piracy definition is useful for statistical purposes because it includes attacks against ships that take place within territorial waters while piracy as defined under international law does not include those attacks.[57] However, while the IMB is continuing the use of their own non-legal definition for statistical purposes,[58] that definition is not based in any legal precedent.

3. International Law Definition of Piracy

Under international law, any state may capture pirates on the high seas or outside the territory of any state.[59] Though the authority to capture pirates is grounded in international law,[60] pirates are punished under the criminal law of whatever nation places them on trial.[61]

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[55]Id.

[56]INT'L MAR. BUREAU, INT'L CHAMBER OF COMMERCE, 2007 PIRACY AND ARMED ROBBERY AGAINST SHIPS ANNUAL REPORT 3 (2008) [hereinafter 2007 ANNUAL REPORT ON PIRACY].

[57]Id.

[58]See Id.; INTERNATIONAL MARITIME BUREAU, INTERNATIONAL CHAMBER OF COMMERCE, 2008 PIRACY AND ARMED ROBBERY AGAINST SHIPS 1ST QUARTER REPORT 4 (2008) [hereinafter 2008 1st QUARTER REPORT ON PIRACY].

[59]RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987); LORI FISLER DAMROSCH, LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW 405 (4th ed. 2001) ("Under the universal principal of jurisdiction. . . international law permits any state to apply its national law to punish piracy even when the accused is not a national of the state and the act of piracy was not committed in that state's territorial waters or against one of its vessels."); CHARLES MOLLOY, DE JURE MARITIMO ET NAVALI 75 (9th ed. 1744) (1676); see HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 200 (A. C. Campbell, trans., M. Walter Dunne 1901) (1625) ("Sovereign Princes and States are answerable for their neglect, if they use not all the proper means within their power for suppressing piracy and robbery").

[60]United Nations Convention on the Law of the Sea, art. 100, Dec. 10, 1982, 1833 U.N.T.S. 3 ("All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State").

[61]United Nations Convention on the Law of the Sea, art. 105, Dec. 10, 1982, 1833 U.N.T.S. 3 ("The courts of the State which carried out the seizure [of a pirate ship] may decide upon the penalties to be imposed . . . ."); GREEN HAYWOOD HACKWORTH, 2 DIGEST OF INTERNATIONAL LAW 681 (U.S. Govt. Print. Off. 1940-1944) (noting that pirates "may be punished by any nation that may apprehend or capture them").

Piracy under international law is defined by the United Nations Convention on the Law of the Sea:[62]

> Piracy consists of any of the following acts:
> a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate-ship or aircraft;
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).[63]

Under the main piracy definition in part (a) above, piracy is defined as illegal acts of violence, detention, or depredation[64] (including but not limited to robbery),[65] carried out for non-public and non-political ends[66] against

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[62]Jon D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 NAVAL L. REV. 73, 91-93 (2008); José Luis Jesus, *Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT'L J. MARINE & COASTAL L. 363, 375 (2003) (arguing that UNCLOS is now customary international law and has ended the discretion of individual states to define piracy under international law); Jon B. Jordan *Universal Jurisdiction in a Dangerous World: A Weapon for all Nations against International Crime*, 9 MSU-DCL J. INT'L L. 1, 11 (2000); *but see* ALFRED P. RUBIN, THE LAW OF PIRACY 393 (Transnational Publishers, Inc. 1998) (1988) (suggesting that there may be no international law defining piracy and arguing that the UNCLOS definition does not reflect any widely accepted definition or consensus because the rules were not discussed during the drafting process and are incomprehensible); Samuel Pyeatt Menefee, *Yo Heave Ho!: Updating America's Piracy Laws*, 21 CAL. W. INT'L L.J. 151, 161-63 (1990-1991) (questioning whether UNCLOS is actually a full definition of piracy under international law).

[63]United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 3.

[64]The questions of (1) who determines that an act is "illegal" and (2) which law determines illegality are left unresolved. ALFRED P. RUBIN, THE LAW OF PIRACY 367 (Transnational Publishers, Inc. 1998) (1988).

[65]José Luis Jesus, *Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT'L J. MARINE & COASTAL L. 363, 377 (2003) ("'Private ends' does not necessarily mean stealing.").

[66]Jon D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 NAVAL L. REV. 73, 91-93 (2008); José Luis Jesus, *Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT'L J. MARINE & COASTAL L. 363, 376-79 (2003); Jacob W. F. Sundberg, *Piracy: Air and Sea*, 20 DEPAUL L. REV. 337, 384 (1971) (commenting on the definition of "piracy" in the 1958 Geneva Convention on the High Seas); but see Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 26-37 (2007) (arguing that terrorism on the high seas can be piracy).

persons other than the ship's crew,[67] committed using a private ship[68] on the high seas[69] or in a place outside the jurisdiction of any state.[70] Such a technical and highly specific definition of piracy is not useful in the insurance context where courts seek to enforce the reasonable expectations of the parties.[71]

4. Criminal Law Definition of Piracy

There is widespread scholarly debate over the status of piracy as a "crime" under international law.[72] Whether or not piracy is an international

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[67]JAMES LESLIE BRIERLY, THE LAW OF NATIONS 313 (Humphrey Waldock ed., Oxford: Clarendon Press 6th ed. 1963); Jacob W. F. Sundberg, *Piracy: Air and Sea*, 20 DEPAUL L. REV. 337, 384 (1971) (commenting on the definition of "piracy" in the 1958 Geneva Convention on the High Seas). But see Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 38-40 (2007) (arguing against the two ship requirement). This is known as the "two ship requirement." José Luis Jesus, *Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT'L J. MARINE & COASTAL L. 363, 376-377 (2003).

[68]José Luis Jesus, *Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT'L J. MARINE & COASTAL L. 363, 376 (2003); Jacob W. F. Sundberg, *Piracy: Air and Sea*, 20 DEPAUL L. REV. 337, 384 (1971) (commenting on the definition of "piracy" in the 1958 Geneva Convention on the High Seas).

[69]The term "high seas" has a technical meaning in this context. The high seas are "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State." United Nations Convention on the Law of the Sea, art. 86, Dec. 10, 1982, 1833 U.N.T.S. 3.

[70]José Luis Jesus, *Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT'L J. MARINE & COASTAL L. 363, 379-80 (2003); Jacob W. F. Sundberg, *Piracy: Air and Sea*, 20 DEPAUL L. REV. 337 (1971) (commenting on the definition of "piracy" in the 1958 Geneva Convention on the High Seas).

[71]See Charles E. Dole v. Merchants' Mut. Mar. Ins., 51 Me. 465, 1863 WL 1315 at *2 (1863).

[72]Compare United States v. Smith, 18 U.S. 153, 160-62 (1820) (Story, J.) ("The common law, too, recognizes and punishes piracy as an offense, not against its own municipal code, but as an offense against the law of nations . . . as an offence against the universal law of society, a pirate being deemed an enemy of the human race."), and WILLIAM BLACKSTONE, 4 COMMENTARIES *68 (classifying piracy along with violation of safe-conducts and infringement of the rights of ambassadors as one of the principal violations against the law of nations), and Douglas R. Burgess, Jr. *Piracy is Terrorism*, N.Y. Times, Dec. 5, 2008, at A33 (arguing that piracy should be recognized as an international crime), *and* Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 6 (2007) (suggesting piracy is an international crime), *and* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hallow Foundation*, HARV. INT'L L.J. 183, 191 (2004) (suggesting piracy is an international crime), and Bruce D. Landrum, *The Globalization of Justice: The Rome Statute of the International Criminal Court*, ARMY LAW., Sept. 2002, at 2 ("As early as the sixteenth century, piracy was recognized as an international crime with universal jurisdiction."); and Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MSU-DCL J. INT'L L. 1, 9 (2000) (suggesting that piracy is an international crime), *and* Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 5 n.12 (1996) ("The clearest instances of customary international crimes are piracy and war crimes."), and 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, 272 (1988) (suggesting that piracy is an international crime), with José Luis Jesus,

crime, many maritime states criminalize piracy under their own municipal laws.[73] Some nations define the crime of piracy consistent with the international law definition. For example, the United States criminal statute looks to international law to define piracy:[74] "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."[75] The United Kingdom's piracy statute appears to be in accord with the American statute,[76] specifying that, "For the avoidance of doubt it is hereby declared that for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, the provisions of the United Nations Convention on the Law of the Sea 1982 . . . shall be treated as constituting part of the law of nations."[77] Kenya, a nation that has taken a leading role in

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Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects, 18 INT'L J. MARINE & COASTAL L. 363, 374 (2003), *and* Harvard Res. in Int'l Law, Draft Conventions on Piracy, 26 AM. J. INT'L L. 738, 760 (Spec. Supp. 1932) ("[P]iracy is not a crime by the law of nations. It is the basis of an extraordinary jurisdiction in every state to seize and prosecute and punish persons. . . .")). For further discussion of this dispute, see ALFRED P. RUBIN, THE LAW OF PIRACY 313, 394-95 (Transnational Publishers, Inc. 1998) (1988) (discussing some of the debate and confusion surrounding whether or not piracy is a crime under international law); Thomas A. Clingan Jr., *The Law of Piracy*, in PIRACY AT SEA 168, 169 (Eric Ellen ed., 1989) (noting the debate over whether piracy is an international crime); BARRY HART DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY 42-44 (1980) (discussing the Harvard Research scholars' determination that piracy is not a crime against the law of nations and noting that the traditional view was that piracy is a crime or offense against the law of nations); JAMES LESLIE BRIERLY, THE LAW OF NATIONS 311-14 (Humphrey Waldock ed., 6th ed. 1963) (noting confusion between noncriminal piracy defined by international law and criminal piracy defined by municipal laws); Kenneth Randall, Universal Jurisdiction Under International Law, 66 TEX. L. REV. 785, 796 (1988) (noting the debate over whether piracy is an international crime).

[73]See generally Jacob W.F. Sundberg, *Piracy: Air and Sea*, 20 DEPAUL L. REV. 337, 341-46 (1971) (tracing the history of municipal piracy statutes in the United Kingdom, France, Italy, Spain, the Scandinavian states, and the United States).

[74]JAMES KENT, 1 COMMENTARIES *186 (citing U.S. v. Smith, 18 U.S. 153 (1820)). The international law definition of piracy as Kent understood it in his time was slightly different from the modern definition set forth in the United Nations Convention on the Law of the Sea. *See* JAMES KENT, 1 COMMENTARIES *184 ("Piracy is robbery, or a forcible depredation on the high seas, without lawful authority, and done *animo furandi*, and in the spirit and intention of universal hostility. It is the same offense at sea with robbery on land; and all the writers on the law of nations, and on the maritime law of Europe, agree in this definition of piracy") (italics original and citations omitted). Nevertheless, the principal that the U.S. statute incorporates the international law definition of piracy remains the same.

[75]18 U.S.C. § 1651 (2000).

[76]*See* WILLIAM BLACKSTONE, 4 COMMENTARIES *72 (suggesting that English piracy statutes historically intended to aid and enforce the law of nations).

[77]Merchant Shipping and Maritime Security Act, 1997, ch. 28, § 26 (U.K.). See also Piracy Act, 1837, 7 Will. 4 & 1 Vict., c. 88, § 2 (U.K.) ("[W]hosoever, with Intent to commit or at the Time of or immediately before or immediately after committing the Crime of Piracy in respect of any Ship or Vessel, shall assault, with Intent to murder, any Person being on board of or belonging to such Ship or Vessel, or shall stab, cut, or wound any such Person, or unlawfully do any Act by which the Life of such Person may be endangered, shall be guilty of Felony . . . .").

the ongoing fight against Somali piracy by placing captured pirates on trial,[78] also looks to international law to define the crime of piracy: "Any person who, in territorial waters or upon the high seas, commits any act of piracy jure gentium is guilty of the offence of piracy."[79]

On the other hand, the Philippines, an archipelagic nation that experiences pirate attacks,[80] has its own definition of criminal piracy independent from the international law definition: "Any attack upon or seizure of any vessel, or the taking away of the whole or part thereof . . . by means of violence against or intimidation . . . *committed by any person, including a passenger or member of the complement of said vessel, in Philippine waters*, shall be considered as piracy."[81]

The most obvious problem with using a criminal law definition to define piracy in an insurance context is that it is difficult to determine which nation's definition applies.[82] For example, an insurance agreement may be entered into in one nation for a vessel flagged in another nation while the loss occurs either in the territorial waters of a third nation or on the high seas. A choice-of-law provision in the insurance agreement may remove this problem.[83] Nonetheless, using a criminal law definition of piracy is imprudent in the insurance context because it violates the contract principal of "reasonable expectations." It is unlikely that a party's reasonable expectations will be met by the application of a foreign criminal statute. Even a sophisticated insured may not know the criminal statutes of foreign nations.

5. Common Law Definition of Piracy

The common law defined piracy as those acts of depredation and robbery committed on the high seas which, if committed on land, would have amounted to a felony.[84] Subsequent statutes expanded and changed the crim-

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[78]Jane Nyambune, *Kenya Convicts Somali Pirates for 7 Years*, KENYA BROADCASTING CORPORATION, Nov. 1, 2006, http://www.kbc.co.ke/story.asp?ID=39235.

[79]Penal Code (1967) Cap. 63 § 69 (Kenya).

[80]INT'L MAR. BUREAU, INT'L CHAMBER OF COMMERCE, 2007 PIRACY AND ARMED ROBBERY AGAINST SHIPS ANNUAL REPORT 5 (2008) [hereinafter 2007 ANNUAL REPORT ON PIRACY] (note that the ICC IMB uses its own definition of piracy as discussed above).

[81]Pres. Dec. No. 532 (Phil.) (emphasis added where definition differs from international law definition).

[82]See THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW 951 (4th ed., West 2004) (suggesting that international choice-of-law issues arise in maritime contract and marine insurance cases).

[83]Cf. Id. at 952 (suggesting that courts often uphold choice-of-law provisions in marine insurance contracts).

[84]LEE R. RUSS IN CONSULTATION WITH THOMAS F. SEGALLA, COUCH ON INSURANCE § 137.83 (3d ed., West 2007); WILLIAM BLACKSTONE, 4 COMMENTARIES *72.

inal law definition of piracy in England.[85] Nevertheless, this definition has retained popularity in common usage and the case law, including marine insurance cases interpreting piracy clauses.[86]

Recent editions of Black's Law Dictionary use a substantially similar definition.[87] Although courts regularly look to dictionaries to define terms in an insurance agreement, courts should be wary that the dictionary definition of piracy may be based on obsolete common law now overruled by statute and international convention.

C. The Effect of Many Potential Definitions of Piracy in an Insurance Context

It is unfortunate that insurers have generally left "piracy" undefined in an insurance contract. As described in the next section, courts have attempted to define piracy in marine insurance contracts without perfect success. The inconsistent and confusing decisions by various American and British courts have created uncertainty for both insurer and insured.

IV
UNITED STATES CASES INTEPRETING PIRACY CLAUSES

United States courts have never dealt comprehensively with the definition of piracy in a marine insurance contract. However, during and immediately after the American Civil War insurers battled over the definition of piracy in several state and federal courts. These cases addressed the taking of merchant ships by Confederate warships. These cases are particularly instructive for interpreting modern insurance contracts in the context of Somali piracy because they address the taking of merchant ships by an unrecognized power.

A. Pre-Civil War Litigation Interpreting Piracy Clauses in Insurance Contracts

In the 1845 case *Thomas McCargo v. The New Orleans Insurance Company*, the Supreme Court of Louisiana held that revolting slaves were

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[85]WILLIAM BLACKSTONE, 4 COMMENTARIES *72 (explaining how various statutes have expanded and changed the criminal definition of piracy in England).

[86]Charles E. Dole v. Merchants' Mut. Mar. Ins., 51 Me. 465, 1863 WL 1315 at *4 (1863) (citing CHARLES MOLLOY, DE JURE MARITIMO ET NAVALI 75 (9th ed. 1744) (1676)).

[87]BLACK'S LAW DICTIONARY 1186 (Bryan A. Garner ed., West 8th ed. 1999) (defining piracy in the first definition as "Robbery, kidnapping, or other criminal violence committed at sea").

not pirates as that term was used in an insurance contract.[88] *McCargo* concerned a mutiny by slaves on the open ocean during a voyage from Norfolk to New Orleans.[89] The mutineer slaves sailed the ship to Nassau where the British authorities emancipated them.[90] The slaves were insured under a policy that included, among other perils, coverage for loss by pirates.[91]

The insured argued that the slaves were pirates and the loss was covered.[92] The court first noted that piracy implies *animus furandi*, the intention to steal,[93] while the slaves were motivated by freedom rather than plunder.[94] More importantly, the court looked at the reasonable expectations of the parties. It concluded that the parties intended for the policy to cover loss from external attack by pirates rather than violence committed by the insured property itself.[95]

Two justices dissented.[96] They would have held that the slave mutiny was piracy.[97] They cited the English and American common and criminal law in support.[98]

McCargo has little value as a precedent. Its holding really has nothing to do with whether or not mutiny is piracy. Instead, the court focused on the fact that the insured property itself could not be pirates.[99] Slavery is now illegal.[100] But *McCargo* remains important for its early recognition that piracy clauses in insurance contacts should be interpreted based on the reasonable expectations of the parties.

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[88]Thomas McCargo v. The New Orleans Insurance Company, 10 Rob. (LA) 202, 145 WL 1466 at *38 (La. 1845).

[89]Id. 145 WL 1466 at *1 (La. 1845).

[90]Id. 145 WL 1466 at *1 (La. 1845).

[91]Id. 145 WL 1466 at *1 (La. 1845).

[92]Id. 145 WL 1466 at *38 (La. 1845).

[93]BLACK'S LAW DICTIONARY 97 (Bryan A. Garner ed., West 8th ed. 1999).

[94]Thomas McCargo v. The New Orleans Insurance Company, 10 Rob. (LA) 202, 145 WL 1466 at *38 (La. 1845).

[95]Id. 145 WL 1466 at *38 (La. 1845).

[96]Id. 145 WL 1466 at *45 (La. 1845).

[97]Id. 145 WL 1466 at *54 (La. 1845).

[98]Id. 145 WL 1466 at *54 (La. 1845).

[99]Id. 145 WL 1466 at *38 (La. 1845).

[100]See, e.g., U.S. CONST. amend XIII; An Act for the Abolition of the Slave Trade, 1807, 47 Geo. 3, ch. 36 (U.K.).

B. Civil War Era Litigation Interpreting Piracy Clauses in Insurance Contracts

In each of the Civil War era insurance cases interpreting piracy clauses, pirates were an insured peril[101] but the policies contained a warranty that specifically excluded the insurer's liability for "capture," "seizure," or "detention."[102] The decisions reached by the several courts that confronted this issue were not uniform. In one case, the court used a definition of piracy based primarily in the common law and criminal law. In the other cases, the court focused on international law and the difference between belligerency[103] and piracy.[104]

1. The Golden Rocket *Litigation*

The first Civil War era cases to reach the courts arose from the taking of the *Golden Rocket*, an American merchant ship, by the *CSS Sumter*, a Confederate cruiser, in July of 1861.[105] The *Golden Rocket* was captured between Cuba and the Isle of Pines.[106] The record is unclear whether the taking occurred on the "high seas" in the legal sense of that phrase,[107] but one source uses that term in the popular sense.[108] Three cases arose from this capture. The courts disagreed on the proper interpretation of piracy clauses.[109]

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[101]Mauran v. Ins. Co., 73 U.S. 1, 1 (1867); Dole v. New England Mut. Mar. Ins. Co., 7 F.Cas. 837, 839 (C.C.Mass. 1864) (plaintiff's brief); Charles E. Dole v. Merchants' Mut. Mar. Ins., 51 Me. 465, 1863 WL 1315 at *2 (1863).

[102]Id. 1863 WL 1315 at *6 (1863).

[103]Belligerency is "The status assumed by a nation that wages war against another." BLACK'S LAW DICTIONARY 164 (Bryan A. Garner ed., West 8th ed. 1999).

[104]See United States v. The Ambrose Light, 24 F. 408, 430-431 (SDNY 1885) (discussing Civil War era cases interpreting piracy clauses in insurance policies).

[105]See Id.

[106]DAVID D. PORTER, THE NAVAL HISTORY OF THE CIVIL WAR 606 (Dover Publications 1998) (1886).

[107]Various sources fail to give the exact location of the capture or whether it occurred sufficiently distant from Cuba and the Isle of Pines to be considered the a capture on the "high seas." See Dole v. New England Mut. Mar. Ins. Co., 7 F.Cas. 837, 837 (C.C.Mass. 1864) (stating the capture took place "off the Isle of Pines"); JOHN M. TAYLOR, SEMMES: REBEL RAIDER 27 (Potomac Books Inc. 2003) (suggesting that the *Sumter* captain "planned to sweep across the Cuban coast" before the capture); WARREN F. SPENCER, RAPHAEL SEMMES: THE PHILOSOPHICAL MARINER 112 (University of Alabama Press 1997) (stating that the capture "took place just off Cuba").

[108]COLYER MERIWETHER, RAPHAEL SEMMES 128 (George W. Jacob & Co. 1913) ("The master [of the *Golden Rocket*] was almost too astonished to make any complaint as he never dreamed of seeing a Confederate flag on the high seas").

[109]United States v. The Ambrose Light, 24 F. 408, 430 (SDNY 1885).

a. *The* Golden Rocket *Litigation in Maine State Court*

In the 1863 case *Charles E. Dole v. Merchants' Mutual Marine Insurance*, the Supreme Judicial Court of Maine held that the taking of an American merchant ship by a Confederate vessel was not only piracy but also capture.[110] Therefore, the insurers were not liable.[111] The court considered both American and British law.[112] The court refused to be restricted to the international law definition of piracy.[113] Instead, the court suggested that that the term had a special meaning in a contract relating to risk.[114] It concentrated its analysis on the definitions of piracy found in the common law and criminal law of England and the United States.[115] The court specifically looked to what it thought the parties understood "piracy" meant,[116] suggesting it used the reasonable expectations doctrine.

The court proposed a definition of piracy with only two elements: (1) robbery (2) on the high seas.[117] The insurers argued that because the *Sumter* was carrying on hostilities against the United States,[118] the taking could not be piratical because pirates attack indiscriminately regardless of national character.[119] The court rejected this argument by explaining that piracy was simply robbery: "No one has ever contented that a man could not be convicted of *robbery*, unless he had a general purpose to rob everybody. Such a rule is no more applicable to robbery on the seas, than on the land."[120]

The court also rejected the insurer's argument that the *Sumter*'s crew lacked piratical intent because they were not motivated by private gain.[121] Instead, the court found that the only intent necessary for piracy is felonious

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[110]Charles E. Dole v. Merchants' Mut. Mar. Ins., 51 Me. 465, 1863 WL 1315 at *10 (1863); *see* United States v. The Ambrose Light, 24 F. 408, 430-431 (SDNY 1885) (discussing Civil War era cases interpreting piracy clauses in insurance policies).

[111]Charles E. Dole v. Merchants' Mut. Mar. Ins., 51 Me. 465, 1863 WL 1315 at *10 (1863).

[112]Id., 1863 WL 1315 *passim* (1863).

[113]Id., 1863 WL 1315 at *2 (1863).

[114]Id., 1863 WL 1315 at *2 (1863).

[115]Id., 1863 WL 1315 at *2-4 (1863).

[116]Id., 1863 WL 1315 at *2 (1863).

> The parties to the contract must be presumed to have understood the laws, at least of this country; and so far as any kind of *piracy*, whether by the statutes or by the law of nations, could affect marine risk, it must be considered as embraced in that term when used in contracts relating to such risks, unless there is some limitation or exception.

Id. (emphasis original).

[117]Charles E. Dole v. Merchants' Mut. Mar. Ins., 51 Me. 465, 1863 WL 1315 at *3 (1863).

[118]Id., 1863 WL 1315 at *2 (1863).

[119]Id., 1863 WL 1315 at *3 (1863).

[120]Id., 1863 WL 1315 at *3 (1863) (emphasis original).

[121]Id., 1863 WL 1315 at *4 (1863).

intent.[122] In the court's eyes, rebels were both criminals and enemies, and their conduct was simultaneously piracy and an act of war.[123]

Four justices concurred, concluding that the taking was a capture and therefore excluded from insurance coverage whether or not it was piratical.[124] Two justices dissented, concluding that the taking was piratical but not a capture, seizure, or detention.[125]

b. *The* Golden Rocket *Litigation in Massachusetts State Court*

The Supreme Judicial Court of Massachusetts also saw *Golden Rocket* litigation in 1863. In *Charles E. Dole v. The New England Mutual Marine Insurance Company*, the court held that the taking of an American ship by a Confederate vessel fell under the capture exclusion in the policy.[126] The court interpreted "capture" in a broad sense,[127] including a taking by pirates.[128] The court equivocated on whether the taking was piracy. The court held that the taking was not piracy under international law or the law of maritime contracts[129] but noted that the Confederate sailors were criminally liable for piracy.[130] Nevertheless, the Confederate sailors did not commit "ordinary piracy."[131] The court was influenced by the fact that the Confederacy was a *de facto* government with recognized belligerent rights.[132]

b. *The* Golden Rocket *Litigation in Federal Court*

In 1864, the federal Circuit Court for the District of Massachusetts came to a similar result in *Dole v. New England Mutual Marine Insurance Company*. The circuit court held that the taking of an American merchant ship by a Confederate vessel was not piracy.[133] In a detailed opinion, the circuit court considered both criminal and international law.[134] Like the Maine Supreme Judicial Court, the circuit court concluded that the interpretation of a term in an insurance policy was governed by the rules of commercial

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[122]Id., 1863 WL 1315 at *4 (1863).

[123]Id., 1863 WL 1315 at *4-5 (1863).

[124]Id., 1863 WL 1315 at *10 (1863).

[125]Id., 1863 WL 1315 at *10 (1863).

[126]Charles E. Dole v. The New England Mutual Marine Insurance Company, 6 Allen 373, 395, 88 Mass. 373, 395 (Mass. 1863).

[127]Charles E. Dole v. The New England Mutual Marine Insurance Company, 6 Allen 373, 386-391, 88 Mass. 373, 386-391 (Mass. 1863).

[128]Id., 6 Allen 373, 390-391, 88 Mass. 373, 390-391 (Mass. 1863) (opining that "we believe that the accuracy of the expression 'capture by a pirate' has never been called in question").

[129]Id., 6 Allen 373, 392, 88 Mass. 373, 392 (Mass. 1863).

[130]Id.

[131]Id.

[132]Id.

[133]Dole v. New England Mut. Mar. Ins. Co., 7 F.Cas. 837, 849 (C.C.Mass. 1864).

[134]Supra, 7 F.Cas. 837, 846-848 (C.C.Mass. 1864).

law.[135] However, the circuit court held that maritime commercial law draws more heavily from the law of nations than from the criminal law of any particular country.[136] The court used the usage of trade doctrine to explain its decision to rely on international law rather than criminal law: "maritime law... pervades everywhere the institutions of that vast combination of civilized nations, which constitute one community for commercial purpose and social intercourse."[137]

The circuit court noted that the Civil War was of such a great size it was as if a foreign nation had invaded.[138] The court also noted that a state in revolt could be a belligerent under the law of nations without any international acknowledgment of its independence.[139] The court was mindful of England's proclamation of neutrality, recognizing hostilities between the United States and the Confederate States, and the United States' own proclamation of blockade.[140] The court found these considerations of international diplomacy and historical fact "utterly irreconcilable" with the insured's argument that an act of piracy occurred.[141]

2. The John Welsh *Litigation*

The Supreme Court of Pennsylvania interpreted a piracy clause in the 1864 case *Fifield v. The Insurance Company of the State of Pennsylvania*. The court held that the capture of the *John Welsh* by a confederate brig the *Jeff Davis*[142] was not piracy.[143] The taking took place on the high seas on July 6, 1861.[144] The opinion of the court focused on the distinction between privateering and piracy The former was "for the benefit of a political power organized as a government *de jure* or *de facto*." The later was "mere robbery

[135]Supra, 7 F.Cas. 837, 847 (C.C.Mass. 1864).

[136]Supra, 7 F.Cas. 837, 847-848 (C.C.Mass. 1864).

[137]Supra, 7 F.Cas. 837, 847 (C.C.Mass. 1864) (citing JAMES KENT, 3 COMMENTARIES *342-343).

[138]Id.

[139]Id.

[140]Id.

[141]Id.

[142]The court notes that the crew of the Confederate brig referred to it by many names, but tends to use the name *Jeff Davis* throughout the opinion. Fifield v. The Ins. Co. of the State of Penn., 47 Pa. 166, 1864 WL 4665 at *1 (1864).

[143]Fifield, supra, 1864 WL 4665 at *6 (1864).

[144]The capture occurred at latitude 38° 45, longitude 65° 23. W.L. Hudson, *Memorandum from Captain Fifield, of the brig John Welsh, in* RICHARD RUSH AND ROBERT H. WOODS, OFFICIAL RECORDS OF THE UNION AND CONFEDERATE NAVIES IN THE WAR OF THE REBELLION 42 (vol. 1, Government Printing Office 1894). The court describes this position as "about two hundred and fifty miles from the Nantucket shoals." Fifield, supra, 1864 WL 4665 at *2 (1864).

on the high seas committed from motives of personal gain."[145] The court discussed the status of the Confederacy and acknowledged that its belligerent rights had been recognized by the European powers.[146]

The court was far from unanimous.[147] The opinion of the court, per Chief Justice Woodward, was accompanied by four concurring opinions.[148] One justice, Justice Thompson, simply concurred with the reasoning set forth in the opinion of the court.[149] Two justices, Justices Strong and Agnew, found that the *Jeff Davis*' acts were piracy but also capture.[150] Justice Agnew's specifically noted that his decision was influenced by the fact that *Fifield* was an insurance coverage case.[151] He reasoned that marine insurance contracts must have a consistent meaning throughout the world.[152]

The remaining justice, Justice Reed, agreed with the court that the taking was not piracy[153] but protested that the opinion of the court cited authorities relating to intercourse between foreign nations.[154] Justice Reed argued that the case properly addressed rebellious citizens rather than independent nations.[155] Therefore, the relevant source of law was general commercial law.[156] Justice Reed explicitly invoked the usage of trade doctrine: "the word pirates is used in the sense known to the commercial world."[157]

3. The Marshall *Litigation*

Two cases arose out of the capture of the *Marshall* by the Confederate steamer *Music* on May 17, 1861.[158] The *Marshall* was seized "two or three miles inside the bar at the mouth of the Mississippi River, on her way up to

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[145]Fifield, supra, 1864 WL 4665 at *3 (1864) (emphasis original).

[146]Fifield, supra, 1864 WL 4665 at *3-4 (1864).

[147]*See* United States v. The Ambrose Light, 24 F. 408, 430 (SDNY 1885) (noting that "the view of the different judges were quite diverse").

[148]Fifield, supra, 1864 WL 4665 at *6-18 (1864).

[149]Fifield, supra, 1864 WL 4665 at *6 (1864) (Thompson J., concurring).

[150]Fifield, supra, 1864 WL 4665 at *9, 16-17 (1864) (Strong and Agnew JJ., concurring).

[151]Fifield v. The Ins. Co. of the State of Penn., 47 Pa. 166, 1864 WL 4665 at *18 (1864) (Agnew J., concurring).

[152]Fifield v. The Ins. Co. of the State of Penn., 47 Pa. 166, 1864 WL 4665 at *18 (1864) (Agnew J., concurring).

[153]Fifield, supra, 1864 WL 4665 at *11 (1864) (Reed J., concurring).

[154]Fifield, supra, 1864 WL 4665 at *10 (1864) (Reed J., concurring).

[155]Fifield, supra, 1864 WL 4665 at *10-11 (1864) (Reed J., concurring).

[156]Fifield, supra, 1864 WL 4665 at *11 (1864) (Reed J., concurring).

[157]Fifield, supra, 1864 WL 4665 at *11 (1864) (Reed J., concurring).

[158]Mauran v. Ins. Co., 73 U.S. 1, 2 (1867).

New Orleans."[159] The capture did not occur on the "high seas" as that term is used in modern international law.[160]

a. *The* Marshall *Litigation in Massachusetts State Court*

The Supreme Judicial Court of Massachusetts heard Suchet Mauran 2d v. The Alliance Insurance Company at the same time it heard Charles E. Dole v. The New England Mutual Marine Insurance Company.[161] The policy in Suchet Mauran 2d contained similar insured perils and exclusions as the policy in Charles E. Dole v. The New England Mutual Marine Insurance Company.[162] The court adopted its own decision in Charles E. Dole v. The New England Mutual Marine Insurance Company that the loss was excluded by the capture exclusion.[163] The court declined to determine the exact legal status of the Confederate sailors.[164]

b. *The* Marshall *Litigation in Federal Court*

The United States Supreme Court finally addressed the interpretation of piracy in an insurance contract in 1867. In *Mauran v. Ins. Co.*, the Court endorsed the use of international law and historical fact for interpreting an insurance contract's piracy clause.[165] The insurance policy in *Mauran* was slightly different from those in the other cases described in this section: the policy insured against pirates,[166] excluded coverage for capture,[167] and then excepted "ordinary piracy" from the exclusion.[168] Therefore, "if the loss was on account of a capture or seizure by pirates, the insured would have been entitled to recover."[169]

The Court concluded that the insurers were not liable because the taking of an American merchant ship by a confederate vessel was a capture under the policy.[170] The Court did not find the taking within the "ordinary piracy" exception because the taking was "under the authority of a *quasi* govern-

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[159]Id.

[160]See United Nations Convention on the Law of the Sea, art. 86, Dec. 10, 1982, 1833 U.N.T.S. 3 (the high seas are "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State").

[161]Charles E. Dole v. The New England Mutual Marine Insurance Company, 6 Allen 373, 384 FN1, 88 Mass. 373, 384 FN1 (Mass. 1863).

[162]Suchet Mauran 2d v. The Alliance Insurance Company, 6 Allen 384, 1863 WL 3424 at *1 (1863).

[163]Id.

[164]Id.

[165]Mauran v. Ins. Co., 73 U.S. 1 (1867), See United States v. The Ambrose Light, 24 F. 408, 430-431 (SDNY 1885) (discussing Civil War era cases interpreting piracy clauses in insurance policies).

[166]Mauran v. Ins. Co., 73 U.S. 1, 1 (1867).

[167]Id.

[168]Mauran v. Ins. Co., 73 U.S. 1, 15 (1867).

[169]Id.

[170]Mauran v. Ins. Co., 73 U.S. 1, 14 (1867).

ment, or government in act (the ruling power of the country at that time)."[171] Two justices dissented.[172]

4. Finding a Common Thread Among the Civil War Era Cases

The Civil War era courts only agree on the point that piratical acts include acts of depredation other than robbery.[173] In all the cases, except *Charles E. Dole v. Merchants' Mutual Marine Insurance*,[174] the courts adopted the private ends requirement of the international law definition of piracy.[175] Those cases also held that a recognized belligerent cannot commit piracy.[176] The courts deferred to the political branches of government to determine who was a belligerent.[177] In all of the cases the attackers used force, but only the court *Charles E. Dole v. Merchants' Mutual Marine Insurance*, relying in large part on the common law definition of piracy as robbery at sea,[178] implied that there is any force requirement in the insurance law definition of piracy.[179] Finally, only the court in *Charles E. Dole v. Merchants' Mutual*

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[171]Mauran v. Ins. Co., 73 U.S. 1, 15 (1867) (emphasis original).

[172]Mauran v. Ins. Co., 73 U.S. 1, 5 (1867). The grounds for dissent are not recorded.

[173]See, e.g.,Dole v. New England Mut. Mar. Ins. Co., 7 F.Cas. 837, 846 (C.C.Mass. 1864); Fifield v. The Ins. Co. of the State of Penn., 47 Pa. 166, 1864 WL 4665 at *9 (1864) (Strong J., concurring); Charles E. Dole v. Merchants' Mut. Mar. Ins., 51 Me. 465, 1863 WL 1315 at *2-3 (1863).

[174]Charles E. Dole, supra, 1863 WL 1315 at *3 (1863).

[175]Mauran v. Ins. Co., 73 U.S. 1, 15 (1867); Charles E. Dole v. The New England Mutual Marine Insurance Company, 6 Allen 373, 392, 88 Mass. 373, 392 (Mass. 1863); Dole v. New England Mut. Mar. Ins. Co., 7 F. Cas. 837, 849-851 (C.C.Mass. 1864); Fifield v. The Ins. Co. of the State of Penn., 47 Pa. 166, 1864 WL 4665 at *6 (1864).

[176]Mauran v. Ins. Co., 73 U.S. 1, 15 (1867); Charles E. Dole v. The New England Mutual Marine Insurance Company, 6 Allen 373, 392, 88 Mass. 373, 392 (Mass. 1863); Dole v. New England Mut. Mar. Ins. Co., 7 F.Cas. 837, 849 (C.C.Mass. 1864); Fifield v. The Ins. Co. of the State of Penn., 47 Pa. 166, 1864 WL 4665 at *6 (1864); *Insurance-Marine Insurance-Meaning of "Piracy" in Policy*, 22 HARV. L. REV. 454, 454 (1909); *cf.* Samuel A. Swinnerton v. The Columbian Ins. Co., 37 N.Y. 174, 1867 WL 5783 at *10 (N.Y. 1867) (holding that whether the sinking of an American ship by a Confederate mob fell under the "capture, seizure, or detention" exclusion was a jury question); Addison Gage v. Minot Tirrell, 91 Mass. 299, 310 (Mass. 1864) (suggesting, in a case involving the interpretation of bills of lading, that if the Confederacy was considered a *de facto* government, then the taking of an American ship by a Confederate vessel was not piracy).

[177]Fifield v. The Ins. Co. of the State of Penn., 47 Pa. 166, 1864 WL 4665 at *5-6 (1864); see Mauran v. Ins. Co., 73 U.S. 1, 14 (1867) (recounting both political and judicial recognition of the Confederacy's belligerent rights); Dole v. New England Mut. Mar. Ins. Co., 7 F. Cas. 837, 849 (C.C.Mass. 1864) ("the proclamation of blockade [by the President] was of itself conclusive evidence that a state of war existed...").

[178]Charles E. Dole v. Merchants' Mut. Mar. Ins., 51 Me. 465, 1863 WL 1315 at *3 (1863).

[179]The crime of robbery generally includes the elements of force or threat of force. BLACK'S LAW DICTIONARY 1354 (Bryan A. Garner ed., West 8th ed. 1999) (defining robbery as "The illegal taking of property from the person of another, or in the person's presence, by violence or intimidation").

Marine Insurance seemed to care whether an attack took place on the high seas.[180]

The courts generally acknowledged that piracy clauses in insurance contracts must be interpreted as commercial documents governed by a body of law distinct from criminal or international law.[181] The court in *Charles E. Dole v. The New England Mutual Marine Insurance Company* went furthest, mentioning three possible definitions of piracy: one definition under international law, a second criminal law, and a third independent definition under the commercial law of insurance.[182] This does not mean that the common, criminal, or international law definitions of piracy cannot also be the insurance law definition. In fact, the court in *Charles E. Dole v. The New England Mutual Marine Insurance Company* seemed to consider the international law and commercial law definitions identical.[183] But these traditional definitions can only be the insurance law definition of piracy if they best represent the parties' expectations and trade usage.

C. 20th Century Litigation Interpreting Piracy Clauses in Insurance Contracts

The Civil War era cases had produced a number of conflicting opinions without much consistency. The 20th century produced two more opinions just as unclear but lacking the detailed explanation and abundant citation to earlier sources that marked the Civil War era cases.

1. The New York Harbor Tug Litigation

In the 1930 case *Britannia Shipping Corporation v. Globe & Rutgers Fire Insurance Company*, the Supreme Court of New York[184] held that the term piracy in an insurance contract includes only acts that occur on the "high

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[180]Charles E. Dole v. Merchants' Mut. Mar. Ins., 51 Me. 465, 1863 WL 1315 at *3 (1863). The taking of the *Marshall* in *Mauran* did not take place on the high seas, but the court does not justify its holding on these grounds. See Mauran v. Ins. Co., 73 U.S. 1, 2 (1867).

[181]Dole v. New England Mut. Mar. Ins. Co., 7 F. Cas. 837, 847 (C.C.Mass. 1864) (citing JAMES KENT, 3 COMMENTARIES *342-343); Charles E. Dole v. Merchants' Mut. Mar. Ins., 51 Me. 465, 1863 WL 1315 at *2 (1863); Charles E. Dole v. The New England Mutual Marine Insurance Company, 6 Allen 373, 392, 88 Mass. 373, 392 (Mass. 1863); Fifield v. The Ins. Co. of the State of Penn., 47 Pa. 166, 1864 WL 4665 at *11 (1864) (Reed J., concurring).

[182]Charles E. Dole v. The New England Mutual Marine Insurance Company, 6 Allen 373, 392, 88 Mass. 373, 392 (Mass. 1863).

[183]Id.

[184]The Supreme Court of New York is the trial court of general jurisdiction in that state. New York State Unified Court System, Court Structure, http://www.courts.state.ny.us/courts/structure.shtml.

seas."[185] *Britannia Shipping Corporation* involved a tug boat that was stolen from New York Harbor.[186] The owner sought to recover from an insurance policy that expressly covered loss by piracy.[187] The court cited statutes and cases that did not pertain to insurance law.[188] From this survey of irrelevant authority, the court concluded that piracy cannot occur except on the high seas as that term is used in its popular sense.[189] The court defined high seas as open waters rather than ports, havens, and basins.[190] The court did not reach the issue of whether there was any requirement that piracy occur by force.[191]

2. *The* Miss Sondra Leigh *Litigation*

In the 1970 case *S. Felicione & Sons Fish Company v. Citizens Casualty Company of New York*, the U.S. Court of Appeals for the Fifth Circuit heard an appeal involving the drunken rampage of a shipping captain.[192] Captain Frank Paprocki, captain of the *Esto Fleet*, boarded the *Miss Sondra Leigh*, killed its captain and another on board, attempted to kill a third person, capsized the ship, rammed her three times, and then was never heard from again.[193] The *Miss Sondra Leigh* was covered by an insurance policy that covered loss by assailing thieves[194] but specifically excluded loss by piracy.[195]

On the trial court level, the federal District Court for the Middle District of Florida held that Captain Paprocki was an assailing thief but not a pirate.[196] Therefore, the loss was covered by insurance.[197] The District Court used a definition of piracy that included an element of general aggression

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[185]Britannia Shipping Corp. v. Globe & Rutgers Fire Ins. Co., 138 Misc. 38, 40-41, 244 N.Y.S. 720, 722-724 (Sup. Ct. 1930).

[186]Id., 244 N.Y.S. 720, 721 (Sup. Ct. 1930).

[187]Id., 244 N.Y.S. 720, 722 (Sup. Ct. 1930).

[188]Id., 244 N.Y.S. 720, 722-724 (Sup. Ct. 1930).

[189]Id., 244 N.Y.S. 720, 723-724 (Sup. Ct. 1930).

[190]Id., 244 N.Y.S. 720, 723 (Sup. Ct. 1930).

[191]Id., 244 N.Y.S. 720, 723-724 (Sup. Ct. 1930).

[192]S. Felicone & Sons Fish Co. v. Citizens Cas. Co. of N.Y., 430 F.2d 136, 136 (5th Cir. 1970).

[193]S. Felicone & Sons Fish Co. v. Citizens Cas. Co. of N.Y., 430 F.2d 136, 136-137 (5th Cir. 1970).

[194]"Assailing thieves" is somewhat similar to piracy yet is a distinct peril in marine insurance contracts. For detailed explanations of the assailing thieves peril and the difference between piracy and assailing thieves, see Peter Rogan, *Insuring the Risk of Terrorist Damage and Other Hostile Deliberate Damage to Property Involved in the Marine Adventure: An English Law Perspective*, 77 TUL. L. REV. 1295, 1318-1321 (2003); Lawrence J. Kahn, *Pirates, Rovers, and Thieves: New Problems with an Old Enemy*, 20 TUL. MAR. L.J. 293, 307-14 (1996); see generally Lawrence Delay, *Yacht Theft: Loss by Pirates or Assailing Thieves?*, 4 MAR. LAW. 277 (1979).

[195]S. Felicone & Sons Fish Co. v. Citizens Cas. Co. of N.Y., 430 F.2d 136, 137-138 (5th Cir. 1970).

[196]S. Felicone & Sons Fish Co. v. Citizens Cas. Co. of N.Y., 430 F.2d 136, 138 (5th Cir. 1970).

[197]Id.

against all: "robbery, murder, or forceable [*sic*] depredation on the high seas, without lawful authority, in the spirit and intention of universal hostility."[198] Paprocki's crimes against certain individuals did not rise to the level of general aggression against all humankind required of piracy.[199] On appeal, the Fifth Circuit did not determine whether Paprocki's acts were piracy[200] because the court found that he was not an assailing thief.[201]

V
PIRACY CLAUSES IN INSURANCE CONTRACTS TODAY

When the American cases are looked at as a whole, a framework for interpreting piracy clauses in insurance contracts emerges.

A. Indicia of Piracy

The following factors are indicia of piracy as that term is used in an insurance contract: (1) an act of depredation (not limited to robbery),[202] (2) by persons not recognized as belligerents by the political branches of the government or by foreign governments,[203] (3) on the "high seas" (as that term is

[198]Id. (quoting the District Court).

[199]Id.

[200]Id.

[201]Id., 430 F.2d 136, 138-140 (5th Cir. 1970).

[202]See, e.g., S. Felicone & Sons Fish Co. v. Citizens Cas. Co. of N.Y., 430 F.2d 136, 138 (5th Cir. 1970) (quoting the District Court); Dole v. New England Mut. Mar. Ins. Co., 7 F.Cas. 837, 846 (C.C.Mass. 1864); Fifield v. The Ins. Co. of the State of Penn., 47 Pa. 166, 1864 WL 4665 at *9 (1864) (Strong J., concurring); Charles E. Dole v. Merchants' Mut. Mar. Ins., 51 Me. 465, 1863 WL 1315 at *2-3 (1863).

[203]Mauran v. Ins. Co., 73 U.S. 1, 15 (1867); Charles E. Dole v. The New England Mutual Marine Insurance Company, 6 Allen 373, 392, 88 Mass. 373, 392 (Mass. 1863); Dole v. New England Mut. Mar. Ins. Co., 7 F.Cas. 837, 849 (C.C.Mass. 1864); Fifield v. The Ins. Co. of the State of Penn., 47 Pa. 166, 1864 WL 4665 at *6 (1864); *Insurance-Marine Insurance-Meaning of "Piracy" in Policy*, 22 HARV. L. REV. 454, 454 (1909); *cf.* Samuel A. Swinnerton v. The Columbian Ins. Co., 37 N.Y. 174, 1867 WL 5783 at *10 (N.Y. 1867) (holding that whether the sinking of an American ship by a Confederate mob fell under the "capture, seizure, or detention" exclusion was a jury question); Addison Gage v. Minot Tirrell, 91 Mass. 299, 310 (Mass. 1864) (suggesting, in a case involving the interpretation of bills of lading, that if the Confederacy was considered a *de facto* government, then the taking of an American ship by a Confederate vessel was not piracy).

popularly used),[204] (4) for private ends,[205] and (5) in the spirit of general or universal aggression against all.[206] These are not strict elements in the sense of a criminal statute because the case law is somewhat conflicting and incomplete. Instead, acts consisting of a majority of these factors are likely to be piracy; while acts consisting of fewer of these factors are less likely to be piracy. These factors should be considered together with the reasonable expectations of the parties.

Some of the indicia listed above may conflict with British law. For example, British law does not require general or universal aggression against all for an act to constitute piracy in an insurance contract.[207] Likewise, British law has not definitively decided the exact point at which an act of depredation is too close to the shore to be piracy as that term is used in an insurance contract.[208] This is all the more reason to regard these indicia as factors rather than strict elements. Wherever possible, terms used in marine insurance contracts should be interpreted consistent with the way the international marine insurance community uses those terms.[209]

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[204]Britannia Shipping Corp. v. Globe & Rutgers Fire Ins. Co., 138 Misc. 38, 40-41, 244 N.Y.S. 720, 722-724 (Sup. Ct. 1930); Charles E. Dole v. Merchants' Mut. Mar. Ins., 51 Me. 465, 1863 WL 1315 at *3 (1863).

[205]Mauran v. Ins. Co., 73 U.S. 1, 15 (1867); Charles E. Dole v. The New England Mutual Marine Insurance Company, 6 Allen 373, 392, 88 Mass. 373, 392 (Mass. 1863); Dole v. New England Mut. Mar. Ins. Co., 7 F.Cas. 837, 849-851 (C.C.Mass. 1864); Fifield v. The Ins. Co. of the State of Penn., 47 Pa. 166, 1864 WL 4665 at *6 (1864); see also Eric Danoff, *Marine Insurance for Loss or Damage Caused by Terrorism or Political Violence* 16 U.S.F. Mar. L.J. 61, 69 (2003-2004). British law is in accord. HOWARD BENNETT, THE LAW OF MARINE INSURANCE 360 (Oxford University Press 2006) (citing Republic of Bolivia v. Indem. Mut. Mar. Assurance Co. Ltd., [1909] 1 K.B. 785); F.D. ROSE, MARINE INSURANCE: LAW AND PRACTICE 281 (Gerard McMeel & Stephen Watterson asst., Informa Professional 2004) (citing the same); Peter Rogan, *Insuring the Risk of Terrorist Damage and Other Hostile Deliberate Damage to Property Involved in the Marine Adventure: An English Law Perspective*, 77 TUL. L. REV. 1295, 1318-1319 (2003) (citing the same).

[206]S. Felicone & Sons Fish Co. v. Citizens Cas. Co. of N.Y., 430 F.2d 136, 138 (5th Cir. 1970) (quoting the District Court).

[207]MICHAEL D. MILLER, MARINE WAR RISKS 213 (3d ed., T&F Informa UK Ltd. 2005).

[208]F.D. ROSE, MARINE INSURANCE: LAW AND PRACTICE 279-280 (Gerard McMeel & Stephen Watterson asst., Informa Professional 2004); Aleka Mandaraka-Sheppard, *Hull, Time and Voyage Clauses: Marine Perils in Perspective*, *in* THE MODERN LAW OF MARINE INSURANCE 75-76 (D. Rhidian Thomas ed., LLP Limited 1996); Peter Rogan, *Insuring the Risk of Terrorist Damage and Other Hostile Deliberate Damage to Property Involved in the Marine Adventure: An English Law Perspective*, 77 TUL. L. REV. 1295, 1320 (2003). For a comparison of American and British law on this point, see Lawrence J. Kahn, *Pirates, Rovers, and Thieves: New Problems with an Old Enemy*, 20 TUL. MAR. L.J. 293, 310 (1996).

[209]Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 493 (1924) ("[t]here are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business"); *see* Dole v. New England Mut. Mar. Ins. Co., 7 F.Cas. 837, 847-848 (C.C.Mass. 1864); *cf.* THE FEDERALIST No. 80 (Alexander Hamilton) (stating that maritime cases "so generally depend on the laws of nations, and so commonly affect the rights of foreigners...").

B. Loose Ends under American Law

There are two potential indicia of piracy that remain unclear in American law: (1) use of force and (2) mutiny. In the absence of American precedent, American courts should apply British law in keeping with the international and commercial nature of marine insurance contracts.

1. Use of Force

As stated above, the Civil War era case *Charles E. Dole v. Merchants' Mutual Marine Insurance* implied that there might be a force requirement for piracy.[210] However, in the more recent case *Britannia Shipping Corporation*, the court expressly declined to comment on whether any use of force is necessary for piracy as that term is used in an insurance contract.[211]

Under British law, piracy as that term is used in an insurance contract includes an element of force or threat of force.[212] In *Athens Maritime Enterprises Corporation v. Hellenic Mutual War Risks Association (Bermuda) Ltd.*, the Queen's Bench, per Judge Staughton, stated that "The very notion of piracy is inconsistent with clandestine theft... piracy is not committed by stealth."[213]

2. Mutiny

As stated above, the court in *McCargo* did not truly reach the issue of whether mutiny can be piracy as that term is used in an insurance contact.[214] Nevertheless, at least one British commentator has asserted that existing American case law suggests that mutiny by a crew cannot be piracy,[215] citing *Greene v. Pacific Mutual Life Insurance Co.*[216] and *Republic of China v.*

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[210]Charles E. Dole v. Merchants' Mut. Mar. Ins., 51 Me. 465, 1863 WL 1315 at *3 (1863).

[211]Britannia Shipping Corp. v. Globe & Rutgers Fire Ins. Co., 138 Misc. 38, 41, 244 N.Y.S. 720, 723-724 (Sup. Ct. 1930).

[212]Shell International Petroleum Co. Ltd. v. Gibbs, [1982] Q.B. 946, 986 (Lord Denning M.R.) ("There were no 'pirates' here because there was no forcible robbery"); HOWARD BENNETT, THE LAW OF MARINE INSURANCE 361 (Oxford University Press 2006); MICHAEL D. MILLER, MARINE WAR RISKS 218 (3d ed., T&F Informa UK Ltd. 2005); Aleka Mandaraka-Sheppard, *Hull, Time and Voyage Clauses: Marine Perils in Perspective*, in THE MODERN LAW OF MARINE INSURANCE 76 (D. Rhidian Thomas ed., LLP Limited 1996).

[213]Athens Mar. Enters. Corp. v. Hellenic Mut. War Risks Ass'n (Bermuda) Ltd., [1983] Q.B. 647, 661.

[214]Thomas McCargo v. The New Orleans Insurance Company, 10 Rob. (LA) 202, 145 WL 1466 at *38 (La. 1845).

[215]MICHAEL D. MILLER, MARINE WAR RISKS 220 (3d ed., T&F Informa UK Ltd. 2005).

[216]Green v. Pacific Mut. Life Ins. Co., 9 Allen 217, 91 Mass 217 (Mass. 1864).

National Union Fire Insurance Co. of Pittsburg, Pennsylvania.[217] Those cases are simply not on point. The court in *Greene* was interpreting the term "capture."[218] The court in *Republic of China* was interpreting the terms "barratry" (acts committed by the vessel's master or crew in disobedience to the owner's instructions or for their own purposes)[219] and "seizure."[220] Both courts address conduct that might arguably be piracy under some definition of that word, but neither interprets the terms "piracy" or "pirates."

Under British insurance law, piracy includes mutiny by the crew.[221] This rule is expressly stated in the United Kingdom Marine Insurance Act of 1906[222] and should be followed by American courts in the absence of precedent to the contrary.

C. Applying the Indicia of Piracy to Modern Day Piracy

One of the main areas afflicted by modern piracy is the coast of Somalia.[223] Applying the indicia listed above to modern day pirates, most Somali pirates are "pirates" as that term is used in insurance contracts. Somali pirates commit various acts of depredation, including robbery, battery, kidnapping, and murder.[224] Somali pirates are very unlikely to be lawful belligerents under the law of war.[225] Somali pirate attacks occur at sea (sometimes hundreds of miles from the coast).[226] They keep the majority of

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[217]Republic of China v. Nat. Union Fire Ins. Co. of Pittsburg, PA, 151 F.Supp. 211 (D.Md. 1957).

[218]Green v. Pacific Mut. Life Ins. Co., 9 Allen 217, passim, 91 Mass 217, passim (Mass. 1864).

[219]LEE R. RUSS IN CONSULTATION WITH THOMAS F. SEGALLA, COUCH ON INSURANCE § 137.3 (3d ed., West 2007).

[220]Republic of China v. Nat. Union Fire Ins. Co. of Pittsburg, PA, 151 F.Supp. 211, *passim* (D.Md. 1957). The court, in dicta, mentions piracy only once, stating that the seizure was not for the benefit of the crew so was not piracy. This comment has nothing to do with whether mutiny can be piracy.

[221]HOWARD BENNETT, THE LAW OF MARINE INSURANCE 360-361 (Oxford University Press 2006) (citing Naylor v. Palmer, [1853] 8 Ex. 738, 750); MICHAEL D. MILLER, MARINE WAR RISKS 220 (3d ed., T&F Informa UK Ltd. 2005); F.D. ROSE, MARINE INSURANCE: LAW AND PRACTICE 281 (Gerard McMeel & Stephen Watterson asst., Informa Professional 2004).

[222]Marine Insurance Act, 1906, 6 Edw. 7, c 41, s. 8, sched. 1 (U.K.).

[223]ROGER MIDDLETON, PIRACY IN SOMALIA 1 (Chatham House 2008).

[224]ROGER MIDDLETON, PIRACY IN SOMALIA 6 (Chatham House 2008); INT'L MAR. BUREAU, INT'L CHAMBER OF COMMERCE, 2007 PIRACY AND ARMED ROBBERY AGAINST SHIPS ANNUAL REPORT 13 (2008).

[225]*See generally* Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 Tul. Mar. L J. 1 (2008).

[226]ROGER MIDDLETON, PIRACY IN SOMALIA 4 (Chatham House 2008).

money they collect,[227] sometimes supporting lavish lifestyles.[228] Finally, Somali pirates have attacked ships of various nationalities.[229]

This analysis is consistent with the reasonable expectations of the parties. Insurers have publicly commented that they price marine insurance with Somali piracy in mind.[230] Additionally, Somali sea raiders are popularly considered the quintessential pirates of today.[231]

VI
CONCLUSION AND PROPOSAL

The American cases interpreting piracy clauses in insurance contracts are not completely consistent but there are certain factors that the cases generally agree are indicia of piracy. However, there are still several loose ends under American law that the courts have not addressed. Because the British law of marine insurance is more developed in this area and marine insurance contracts are commercial documents used in international trade, American courts should apply British law in those areas where no American precedent exists.

However, the inconsistencies in the case law and the multitude of non-insurance definitions of piracy invite confusion. Therefore, insurers should seriously consider defining "piracy" and "pirates" in their insurance policies using the factors described above. Both the insurer and the insured can better price risk if they fully understand exactly what their insurance contracts cover.

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[227]ROGER MIDDLETON, PIRACY IN SOMALIA 9 (Chatham House 2008).

[228]Jeffrey Gettleman, *Somalia's Pirates Flourish in a Lawless Nation*, N.Y. TIMES, OCT. 31, 2008, at A1, available at http://www.nytimes.com/2008/10/31/world/africa/31pirates.html?_r=1&ei=5070&emc=eta.

[229]See ROGER MIDDLETON, PIRACY IN SOMALIA passim (Chatham House 2008) (mentioning attacks on French, German, Japanese, and United Nations ships).

[230]*See, e.g.*, Miles Costello, *Shipping Insurance Cost Soars with Piracy Surge Off Somalia*, THE TIMES, Sep. 11, 2008, available at http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article4727372.ece.

[231]See ROGER MIDDLETON, PIRACY IN SOMALIA passim (Chatham House 2008).