**PROTECTING THE WAGES OF SEAFARERS HELD HOSTAGE BY PIRATES: THE NEED TO REFORM THE LAW**

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**Abstract**

In this paper it is argued that seafarers held hostage by pirates do not have a right to the continued payment of their wages under international conventions. Under English law it is contended that the entitlement to wages exists in some limited circumstances, but in many other circumstances is uncertain, inadequate or non-existent. The need to protect the wages of seafarers and to reform the law is therefore argued. Taking into account the spread of piracy and the fast evolving `business models’ of piracy, draft legislation that is already being considered in one state is proposed as a possible legislative guide for other states.

**1. INTRODUCTION**

The Security Council of the United Nations (‘the SC’) is concerned that piracy off Somalia is ‘a threat to international peace and security in the region’.[[2]](#footnote-2) It has expressed ‘serious concern at the inhuman conditions hostages face in captivity, recognizing the adverse impact on their families’.[[3]](#footnote-3) Although passing a commendably wide range of far reaching resolutions, no mention is made of the need to ensure the continued payment[[4]](#footnote-4) of the wages of seafarers, once they are held hostage.[[5]](#footnote-5) The payment of those wages is the subject of this paper.

While the total economic cost of piracy in 2011 is estimated at between $6.6 and $6.9 billion,[[6]](#footnote-6) the total human cost of piracy is not amenable to such calculation. In a study sponsored by the One Earth Future Foundation, it was found that:

‘In 2010, thousands of seafarers in the Indian Ocean and Gulf of Aden were subjected to assaults with automatic gunfire and RPGs, beatings, and extended confinement as hostages. In some cases, hostages were used as human shields to protect pirates from navy vessels or were forced to crew “motherships” that were then used to lure and attack other merchant traffic. Some captive seafarers also were abused, both physically and psychologically. There is a genuine fear that abuse and even torture will be used with increasing frequency to provide additional leverage during ransom negotiations’.

In the ‘Good Practice Guide for Shipping Companies and Manning Agents for the Humanitarian Support of Seafarers and their Families’ (‘the Guide’)[[7]](#footnote-7), it is observed that:

‘in recent years nearly 5000 seafarers have been hijacked and detained for months often in appalling conditions, while thousands of others have been the victims of a pirate attack. Every day of the year more than 100,000 seafarers experience anxiety while sailing in, or towards, piracy infested waters. Their families share these worries, often with a feeling of helplessness’.

‘Some things’, it is said in the Guide, ‘that help reassure seafarers … are: … Knowledge of the commitment from the Company that wages/remittances will continue to be paid in accordance with the seafarer’s contract’. The law provides no such reassurance; and, while a higher rate of pay for seafarers venturing into the high risk area would appear to provide some compensation for the risk of being taken hostage[[8]](#footnote-8), that compensation can be rendered illusory by the invocation of early termination clauses in employment agreements, so that seafarers may not be paid at all when held hostage. The longer seafarers are held hostage, the greater the risk of the termination of their employment agreements. That is a real risk, which is clear from the statistics.

When the first case of piracy from Somalia came before the Court of Appeal in October 2010,[[9]](#footnote-9) the *modus operandi* of the pirates was then described as a ‘pattern’: negotiations lasted between six to eight weeks, and at that time there was no known case where ship, crew and cargo had not been released. But that has all changed. In 2011, 1,118 seafarers were held hostage by Somali pirates.[[10]](#footnote-10) As compared to 2010, ransom negotiations took much longer (about six months), and a growing number of ships and seafarers have been or are at the time of writing being held for more than a year. The *Iceberg I,* for example, was captured in March 2010; but her crew were held hostage until freed by force by a Puntland Marine force on December 2012, some two years and nine months later. One crewmember remains captive. The *Asphalt Venture,* taken in September 2010, was released in April 2011; but some of her Indian crew are still hostage in apparent retaliation for the arrest by India of suspected Somali pirates.[[11]](#footnote-11) Some of the crew of *Choizil,* captured in October 2010, were released in June 2012 after negotiations with Somali pirates. Seven Bangladeshis have spent nearly two years in captivity since the *Albedo* was seized in November 2012, with 15 seafarers released in July 2012. The *Gemini* was captured in April 2011. Seven months later, the vessel and 21 crew members were freed, four remaining crewmembers being released some later, after some 19 months.

**2. LEGAL DILEMMAS POSED BY PIRACY**

Cases such as these raise a range of novel questions and dilemmas, difficult to answer and resolve concerning the status of the right of seafarers to their wages. Does it, for example, make any difference if the seafarers are held hostage aboard their ship and are capable of rendering service to their ship; or are held ashore and incapable of rendering service to their ship; or the ship is ransomed and released, but the seafarers remain held hostage ashore; or the shipowner, being unsuccessful in ransom negotiations, abandons his ship and the seafarers remain held hostage; or the employment agreements of the seafarers are discontinued either by contractual termination or by frustration? Assume the right to wages continues throughout any period of captivity no matter the circumstances, how is the right to be secured, enforced and preferred if the ransomed ship is released and sold to a third party; or the ship, being owned by a one-ship company, is abandoned in Somali waters; or the shipowners persuade the seafarers to agree to less than full payment?

This paper would appear to be the first attempt to identify and answer such questions, most legal research hitherto being concerned with privateering, letters of marque, definitions, interdiction, jurisdiction, insurance, and charterparty issues.[[12]](#footnote-12) Nor do the leading textbooks treat the payment of wages within the context of contemporary piracy.[[13]](#footnote-13) To attempt to answer the questions involves the identification and analysis of a remarkably wide and diverse range of apparently unconnected international legal instruments. Ultimately no adequate answer is to be unearthed, which leaves national laws to be considered. It is beyond the scope of this paper to canvass all national laws; instead, English law, being of much international influence, is selected for analysis. Although inherently more flexible, adoptable and adaptable that the prevailing international law in relation to the circumstances of contemporary piracy, English law too cannot provide certain, comprehensive and adequate answers. And, it is an ironic that when the circumstances of the seafarers are most desolate and desperate, that they are finally failed by the law.

The analysis of the law presented in the first part of this paper lays the foundation for the need to the reform of law. In the second part of this paper, draft legislative reform is proposed for adoption by maritime states, while legislation already drafted for one African stated is discussed as a possible model for other such states. It is convenient to begin the analysis of the law by first turning to the international legal instruments.

**3. IF A SEAFARER IS HELD HOSTAGE DOES THE MARITIME LABOUR CONVENTION PROVIDE FOR WAGES?**

The Maritime Labour Convention 2006 (‘the MLC’), which is the work of the International Labour Organization of the United Nations (‘the ILO’), will come into force 12 months after the ratification by at least 30 member states with a total share of at least 33 per cent of the world tonnage of ships. The gross tonnage requirement was achieved in 2009. On 20 August 2012, the Philippines became the 30th member state to ratify the MLC. The ratification by the Philippines will therefore ensure that the MLC will come into effect as binding international law on 20 August 2013 by virtue of article VIII(3).

Such is the high reputation of the MLC that it is commonly referred to as a ‘bill of rights’ for seafarers. It is designed to ensure that minimum international labour and social standards for seafarers are made as effective as the international regulatory regime to providing for ship safety, security and protection of the marine environment from ship-source pollution. Consideration of the MLC is therefore inescapable.[[14]](#footnote-14) Wages (also referred to as ‘basic pay’[[15]](#footnote-15)) are covered by Regulation 2.2, the avowed purpose of which is to ‘ensure that seafarers are paid for their services’.

However, that purpose is not, it is argued, served where seafarers are held hostage ashore and their employment agreements are terminated. This is because no express or implied provision is made for the payment of wages if seafarers are held hostage ashore. In article II(f), ‘seafarer’ is defined to mean ‘any person who is employed or engaged or works in any capacity *on board a ship* to which the Convention applies’. Working on board is a requirement reiterated in Standard A2.2(1), which obliges each member state to require that ‘payments due to seafarers *working on ships* that fly its flag are made at no greater than monthly intervals’. In Guideline B2.2 (1)(a), wages are defined to mean pay ‘for normal hours of work,’ which in turn is defined in Guideline B2.2(1)(d) to mean ‘time during which seafarers are required to do *work on account of the ship’*. Furthermore, Guideline B2.2.2(1)(a) stipulates that ‘for the purpose of calculating wages, the normal hours of work *at sea and in port* should not exceed eight hours per day’. While working ‘at sea’ necessarily implies working on board, working ‘in port’ most probably also implies working on board the ship in a port; and, in any event, a ship held captive by pirates off the coast of Somalia cannot sensibly be said to be in ‘port’ insofar as that noun imports a safe haven for ships under the lawful control of a port authority.

Furthermore, the MLC does not preclude the termination of employment agreements by the shipowner in the event of the capture of the ship. In *Standard A2.1(4),* it is stipulated that member states shall adopt laws specifying:

‘(g) the termination of the agreement and the conditions thereof, including: (i) if the agreement has been made for an indefinite period, the conditions entitling either party to terminate it, as well as the required notice period, which shall not be less for the shipowner than for the seafarer; (ii) if the agreement has been made for a definite period, the date fixed for its expiry; and (iii) if the agreement has been made for a voyage, the port of destination and the time which has to expire after arrival before the seafarer should be discharged’.

Under clause (i), even though an employment agreement is for an indefinite period, the termination of the agreement after notice when seafarers are held hostage by pirates is not expressly precluded by force of law, provided it is agreed by the parties to be a condition entitling the shipowner to terminate the employment agreement. (Such agreement means that freedom of contact and market forces will prevail, since the matter is left for negotiation between shipowners and seafarers at the time of entry into the employment agreements). Termination of an agreement by virtue of clause (ii) after the definite period of time stipulated in the agreement - even if it occurs after capture by pirates - is also not expressly precluded. Only where the agreement provides for its termination at the port of destination pursuant to clause (iii) would termination of the agreement by virtue of the piratical capture of the ship be precluded by implication. If the ship is released - but not the seafarers - and she arrives at her stated port of destination, the employment agreements could be terminated, since termination is made dependent on the completion of the ship’s ‘voyage’ and arrival at the ‘port of destination’. Therefore, little or no protection from termination is guaranteed by the MLC in the event of capture by pirates.

In Guideline B2.2.2(4)(d) it is stated that on ‘termination of engagement all remuneration due should be paid without undue delay; [and] (e) adequate penalties or other appropriate remedies should be imposed by the competent authority where shipowners unduly delay, or fail to make, payment of all remuneration due’. Therefore, when employment agreements are terminated after seafarers are held hostage, national legislation enacting the MLC 2006 need only ensure entitlement to payment without undue delay for past - but not on-going - wages. Guideline B2.2.2(4)(l) states that ‘to the extent that seafarers’ claims for wages and other sums due in respect of their employment are not secured in accordance with the provisions of the International Convention on Maritime Liens and Mortgages, 1993, such claims should be protected in accordance with the Protection of Workers’ Claims (Employer’s Insolvency) Convention, 1992 (No. 173)’ (‘the 1992 Convention’). However, the 1992 Convention does not refer to piracy, doing nothing more than securing an entitlement to wages and a maritime lien, *provided they already exist*.

Since the MLC will not, when it comes into force, provide for entitlement to wages in many contemporary circumstances of captivity by pirates, the case for its amendment is compelling. But, no amendment can be attempted until the MLC has entered into force; and, in the meantime, seafarers are without any international legal instrument upon which a claim for wages can be based.

**4. IF A SEAFARER IS HELD HOSTAGE DOES ANY CONVENTION SECURE AND PREFER A RIGHT WAGES?**

On 2 June 1931, the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926 (‘the 1926 Convention’) entered into force. Twenty eight states are bound by the 1926 Convention. The International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967 is not in force. Given that so far only six states are party to the 1967 Convention, the high probability is that the Convention will never enter into effect. It therefore merits no further mention. The International Convention on Maritime Liens and Mortgages 1993 (‘the 1993 Convention’) entered into force on 5 September 2004 and 13 states are bound by its provisions.

In the 1926 Convention and the 1993 Convention seafarers’ wages cover somewhat different claims. According to the 1926 Convention, there is a maritime lien:

‘on a vessel, on the freight for the voyage during which the claim giving rise to the lien arises, and on the accessories of the vessel and freight accrued since the commencement of the voyage: … [for] … claims arising out of the contract of engagement of the master, crew, and other persons hired on board’.[[16]](#footnote-16)

Under the 1993 Convention, a claim against:

‘the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel: [for] (a) claims for wages and other sums due to the master, officers and other members of the vessel’s complement in respect of their employment in the vessel, including costs of repatriation and social insurance contributions payable on their behalf’.[[17]](#footnote-17)

Since no explicit provision is made for a maritime lien securing and preferring wages accrued while seafarers are held hostage by pirates, can the Conventions be so construed by necessary implication? If seafarers are held hostage on board their ship for, say, a month or two with valid employment agreements - remaining ready, willing and able to resume service to their ship - their claim for wages should, it is contended, be secured and preferred by a maritime lien under either Convention.

But if seafarers are held hostage for years - ashore and after the termination or frustration of their employment agreements - their entitlement to wages (assuming it to exist) would not, it is argued, be secured and preferred by a maritime lien. The reasons are twofold. First, the 1926 Convention stipulates that the seafarers must be ‘hired on board’, while the 1993 Convention similarly enjoins ‘employment in the vessel’. Second, the 1926 Convention requires an existing ‘contract of engagement’ (which must mean an employment agreement), and the 1993 Convention similarly stipulates that there be ‘employment’ (which implies, though probably not inescapably, an employment agreement) for the maritime lien to arise. It follows that where a ship is ransomed and released, but sold to a third party, the entitlement to wages cannot be enforced by an action *in rem* against that ship for lack of a maritime lien.

In effect, therefore, the contemporary circumstances of capture of seafarers by pirates are not comprehensively covered in either the 1926 Convention or the 1993 Convention (the author participated in the negotiations leading to 1993 Convention and at that time the circumstances of contemporary piracy were not foreseeable), by virtue of the stipulated - and unduly restricted prerequisites - for the creation of a maritime lien. Since the lack of a maritime lien would in many instances render nugatory any entitlement to wages, amendment of the Conventions to keep them current with contemporary circumstances is crucial to the protection of seafarers.

**5.** **IF A SEAFARER IS HELD HOSTAGE DOES ANY CONVENTION SECURE REPATRIATION COSTS?**

Adopted on 9 October 1987, the Repatriation of Seafarers Convention 1987[[18]](#footnote-18) (‘the 1987 Convention’), which revises the Repatriation of Seafarers Convention 1926[[19]](#footnote-19), does not mention the repatriation of seafarers held hostage by pirates. Seafarers are, however, entitled to repatriation:

‘(a) if an engagement for a specific period or for a specific voyage expires abroad; (b) upon the expiry of the period of notice given in accordance with the provisions of the articles of agreement or the seafarer's contract of employment; (c) in the event of illness or injury or other medical condition which requires his or her repatriation when found medically fit to travel; …’.

While any, or all, of these prerequisites[[20]](#footnote-20) to the right to repatriation may pertain to seafarers held hostage by pirates, repatriation is, of course, premised on the release of the seafarers by the pirates. Furthermore, the right to repatriation in the 1987 Convention does not expressly include or necessarily imply a right to unpaid wages. It is therefore argued that the 1987 Convention is of no avail to seafarers being held hostage who seek an entitlement to unpaid wages during their captivity.

**6. IF A SEAFARER IS HELD HOSTAGE DOES ANY CONVENTION COVER THE ARREST OF THE SHIP FOR WAGES?**

Two conventions provide for the arrest of ships in respect of certain maritime claims: the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships, 1952 (‘the 1952 Convention’), which entered into force on 24 February 1956, with 77 states parties to the Convention; and the International Convention on the Arrest of Ships 1999 (‘the 1999 Convention’), which entered into force on 14 September 2011, when Albania became the tenth state to accede to the Convention.

Neither the 1952 Convention nor the 1999 Convention defines a ‘maritime claim’ in relation to piracy.[[21]](#footnote-21) Instead, in the 1952 Convention a maritime claim is stated to mean a claim ‘arising out of’, *inter alia*, ‘wages, of masters, officers, or crew’[[22]](#footnote-22), while the 1999 Convention defines a ‘maritime claim’ as ‘arising out of, *inter alia*, ‘wages and other sums due to the master, officers and other members of the ship’s complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf’.[[23]](#footnote-23) It is argued that, if seafarers are held hostage ashore, their claims for wages are not maritime claims under the 1999 Convention, since their wages do not arise ‘in respect of their employment on the ship.’

But ‘employment on the ship’ is not a requirement for a maritime claim for wages under the 1952 Convention and therefore the arrest of a ship for wages accrued while the seafarers were held ashore is not precluded. Nor is such a requirement to be found in the national legislation of some states that are parties to the Convention or states having legislation comparable to the Convention.[[24]](#footnote-24) But the right to arrest a ship in an action *in rem* for unpaid wages is, however, of little utility where, as argued above, there is no maritime lien. And so, in the absence of clear rights for seafarers under international law, the enquiry turns to English law.

**7. IF A SHIP IS CAPTURED BY PIRATES DOES THE ENGLISH MERCHANT SHIPPING ACT 1995 PROVIDE FOR THE PAYMENT OF WAGES?**

In 1819, the wreck of a ship, resulting in her total loss, brought about the termination of the seafarers employment agreement and a total loss of wages.[[25]](#footnote-25) In 1824, Lord Stowell explained thatthat the ‘natural and legal parents of wages are the mariner's contract and the performance of the service covenanted therein; they in fact generate the title to wages.’ [[26]](#footnote-26) So, at common law, if a ship was lost, even without the fault of the seafarer, he could recover nothing.[[27]](#footnote-27) The manifest hardship and injustice to the seafarer was remedied to some extent by s. 158 of the Merchant Shipping Act 1894. [[28]](#footnote-28) Today, s. 38 of the Merchant Shipping Act 1995 provides that:

E+W+S+N.I. ‘(1) Where a United Kingdom ship is wrecked or lost a seaman whose employment in the ship is thereby terminated before the date contemplated in the agreement under which he is so employed shall, subject to the following provisions of this section, be entitled to wages at the rate payable under the agreement at the date of the wreck or loss for every day on which he is unemployed in the two months following that date’.

It is argued that s. 38 leaves piracy out of consideration. Under s. 158 of the Merchant Shipping Act 1894[[29]](#footnote-29) (a precursor to s. 38 of the 1995 Act), the ‘loss’ of the ship was held in *Sivewright v Allen* not to mean ‘mere capture of a ship by an enemy or a seizure by pirates’ unless - in addition - there was ‘physical destruction of the ship’[[30]](#footnote-30). Similarly, in *Horlock v Beal[[31]](#footnote-31)* the House of Lords held that ‘loss’ was confined to ‘physical loss’.[[32]](#footnote-32) The capture and safekeeping of a ship by pirates could not, therefore, be equated with the loss of the ship.

‘Wreck’ (or ‘wrack’), in relation to a ship (and not goods) and whether used as noun or a verb, is of indefinite meaning. Does, for example, an actual total wreck (‘*naufragium’*), include a constructive total wreck as well as a ‘*semi-naufragium,’* that is a half-wreck or partial wreck? Does ‘wreck’ mean something different from ‘loss’? Or, does the collocation of ‘wreck or loss’ in s. 38 imply *any other kind* of loss? Does ‘wreck’ invariable import physical damage or injury? In *The Olympic*[[33]](#footnote-33)the ship was bound from Southampton to New York. Although seriously damaged in the hull in a collision, the ship was navigated back to Southampton and could not proceed to New York until she was fully repaired, after nine weeks. The majority of the Court of Appeal held that the ship was a wreck within the context of s. 158 of the 1894 Act. Buckley LJ said: ‘the wreck of the ship in this context, I think, is *anything happening to the ship* (emphasis added) which renders her incapable of carrying out the maritime adventure in respect of which the seamen’s contract was entered into’.[[34]](#footnote-34) Without any expression of approval or disapproval in *Horlock v Beale*, this majority decision was upheld in the House of Lords in *Barras v Aberdeen Steam Trawling and Fishing Co.*[[35]](#footnote-35) *‘*Anything happening to the ship’ connotes something less than actual or constructive total loss; and would, on a literal reading, include capture by pirates where the ship (as is almost invariably the case) is not physically injured or damaged. While the use of this phrase suggests the partiality traditionally shown by the courts towards seafarers, it is inconsistent with the facts of the case and a reading as a whole of the majority judgments, which refer elsewhere to injury and repair. It is therefore argued that wreck cannot include capture, without damage, by pirates.

In the result, s. 158 of the 1894 Act has been held (correctly it is submitted), to have left out of consideration capture of a ship by pirates that transferred possession and custody of the ship to the pirates, though not, of course, ownership. [[36]](#footnote-36) Similarly, the words ‘wreck’ and ‘loss’ in s. 38 leave piracy out of consideration.

But even if s. 38 is applicable - on highly exceptional facts - to the capture and the total or partial actual wreck of the ship by pirates, the entitlement to wages for two months is clearly inadequate to do justice to seafarers typically being held hostage for years - a circumstance, it has to be fairly said, that could not have been contemplated when the section was drafted and also limited to United Kingdom ships. Can the English common law, then, offer any comfort to seafarers?

**E+W+S+N.I.**

**8. IS A SEAFARER HELD HOSTAGE ENTITLED UNDER ENGLISH COMMON LAW TO WAGES?**

The Admiralty Court has traditionally been ‘peculiarly tender and benevolent’[[37]](#footnote-37) towards seafarers since they are perceived to be in need of protection, even against themselves.[[38]](#footnote-38) Adopting a partial attitude towards seafarers,[[39]](#footnote-39) the Admiralty Court gives seafarers the benefit of the doubt[[40]](#footnote-40) in the construction of their employment agreements, doing ‘what is fair and just in order to secure to the seaman what he has earned by service to and in the ship’[[41]](#footnote-41), while also keeping ‘up to date’ and having regard to ‘the changed and changing conditions of seamen’s employment.’[[42]](#footnote-42) In *The Halcyon Skies[[43]](#footnote-43)* Brandon J said that wages cannot be confined to a ‘bare’ sum of money. And, later, in *The Ever Success[[44]](#footnote-44)* it was held that ‘it was never appropriate for the Court to evaluate the services of each seaman on a *quantum meruit* basis; the proper approach was to ask whether in the relevant period the claimant was rendering a service to the ship as a member of the crew’. The ‘immemorial custom’ of the Admiralty Court is ‘to look to the service done as the ground of the claim against the ship.’ [[45]](#footnote-45) In 1931, wages was described ‘term of art in maritime law.’[[46]](#footnote-46) Can that term of art include wages while held hostage? The maritime lien for wages has been widely - but not endlessly - extended to cover claims by seafarers. It has been held that ‘wages’ includes: ‘emoluments,’[[47]](#footnote-47) which are not regular payments that cover bonuses or gratuities obtained in the course of service;[[48]](#footnote-48) deductions for health insurance;[[49]](#footnote-49) notice of termination of service, paid leave, sick leave;[[50]](#footnote-50) social benefits in the nature of national health insurance contributions;[[51]](#footnote-51) a seafarer’s pension and provident fund contributions, a shipowner’s pension fund contributions, income tax deductions, stamp duties, and trade union dues[[52]](#footnote-52); damages for wrongful dismissal;[[53]](#footnote-53) and repatriation costs.[[54]](#footnote-54)

However, not every payment made by the shipowner to a seafarer under the seafarer’s employment agreement is necessarily a payment of ‘wages,’ secured and preferred by a maritime lien. The maritime lien most probably does not extend to wages for study leave ashore, whether before or after the seafarers service on the ship, or to wages for previous service in a ship in different ownership managed by the same manager as the ship in question, or for service while in a group pool of officers.[[55]](#footnote-55) Nor does the maritime lien extend to severance pay (which is a lump sum payable to a seafarer who is surplus to the requirements of the shipowner), since it is said not to be paid as extra remuneration, or as deferred remuneration, or as remuneration for the services of seafarers to the ship. Instead, it is regarded as compensation for the loss of employment or termination of service in relation to the employer, albeit in relation to the aggregate length of service the seafarer renders to the companies which own the ships to which the seafarer renders his services.[[56]](#footnote-56) There would, therefore, appear therefore to be no precedent for wages and a co-existing maritime lien for seafarers held hostage by pirates. So, can doctrine be adopted and adapted to contemporary circumstances?

**9. IS A SEAFARER HELD HOSTAGE ABOARD ENTITLED TO WAGES?**

Since service to the ship is a prerequisite for the maritime lien, can it be said that seafarers render service to the ship while being held hostage? At least three situations arise, which for convenience are considered separately, though one situation may develop and flow into another.

The first situation is where the ship captured and the seafarers are forced to navigate, operate and maintain their ship as a ‘mother ship’ for the purpose of piratical predations. Here, the mother ship is receiving service from the seafarers and, it is argued, there is no apparent reason in doctrine to deny to the seafarers their right to wages, secured and preferred by a maritime lien. Navigating, operating and maintaining the ship; assisting in negotiations for the release of the ship; and being ready, willing and able to resume service to the ship as soon as the ship is ransomed and released are all, it is argued, services to the ship, earning wages.

The second situation occurs when the pirated ship (not being deployed as a mother ship), is navigated by the seafarers to Somali waters under threat of violence by the pirates. During this voyage, the seafarers in navigating, operating and maintaining the ship would, it is similarly argued, provide service to the ship.

The argument in respect of both these situations is analogously supported by several cases where seafarers were unlawfully forced, though not by pirates, to render services to their ships. In *The Ferret*[[57]](#footnote-57) seafarers, navigating their ship under the unlawful control of the mate (who tried to steal the ship), were awarded their wages; in *The Edwin[[58]](#footnote-58)* the master, appointed by the fraudulent possessor of the ship, was held entitled to his wages and a maritime lien given his service to the ship; and in *The Justitia[[59]](#footnote-59)* seafarers, having been obliged by armed insurgents to navigate and operate their ship as an armed cruiser, were in an action *in personam* against the shipowners and master (who employed them), adjudged their wages.

The third situation arises where seafarers are held captive aboard their ship, which is moored in Somali waters. Here, the pirates would have possession and control of the ship, and the seafarers (no longer taking instructions from their master), would almost certainly be incarcerated within their ship. Still service may occur. Anchoring the ship; assisting in negotiations for the release of the ship; maintaining the ship; and being ready, willing and able to resume service to the ship once it is ransomed and released are, it is argued, examples of service. But the adoption and adaption of doctrine has its limits, especially when the seafarers are held hostage ashore.

**10. IS A SEAFARER HELD HOSTAGE ASHORE ENTITLED TO WAGES?**

Since service to the ship is a prerequisite for the action *in rem* (both explaining and justifying wages and the maritime lien), is service severed if the seafarer is held hostage ashore? Does this negate any legal notion of service to the ship? And, if the ship is released, but the seafarers are held hostage ashore, can seafarers still render service to the ship?

Although service to the ship may appear to imply service on board the ship, this is not necessarily an invariable implication. Even at the time when service ‘on board’ was a statutory requirement[[60]](#footnote-60) (until it was removed in 1956),[[61]](#footnote-61) a strictly literal construction was not placed upon the phrase, so obvious was the detriment to seafarers. In *The Chieftain[[62]](#footnote-62)* Dr Lushington held that, although s. 10 of the Admiralty Court Act 1861[[63]](#footnote-63) provided the High Court of Admiralty with jurisdiction ‘over any claim by a seaman of any ship for wages earned by him *on board the ship’*, a master would still have a claim for wages even if he did not live on board and ‘did not sleep on board, and although his duty required him on many occasions to be absent from the ship, more especially for the purpose of going into the city, and there accelerating matters for the ship's voyage’. Seafarers earn wages while, for example, on shore leave, sick leave, or vacation.[[64]](#footnote-64) So, not all service needs to be rendered in, on, or to the ship.[[65]](#footnote-65) In *The Ever Success[[66]](#footnote-66)* Clarke J (as he then was) explained that:

‘the authorities show that a master or a seaman is entitled to wages and thus to a co-extensive maritime lien if he renders the service appropriate to his rank. That is as, say, master, chief engineer or seaman. He must be part of the crew of the ship, but need not necessarily render the service on board the ship or live on board the ship, but the service must be in a real sense referrable to the ship and the service must be rendered during a period when the particular claimant can fairly be said to be part of the crew of the ship. So, for example, where a shipowner recruits a person as master and sends him to the port where the ship is in order to take over from the existing master, he can fairly be regarded as employed as master of the ship before the actual moment of handover. Moreover, if he had to wait for a few days at a hotel while perhaps the vessel waited outside the port because of bad weather or ... because of an embargo, he would be entitled to both wages and a maritime lien[[67]](#footnote-67) … It appears to me that, consistent with the cases and the general principles outlined above, it can be fairly said that the crew were rendering a service to the vessel when they proceeded to Varna, so as to be able to join her there as the crew, and for a few days thereafter. *But after at most a week* [emphasis added] I do not think that that could any longer fairly be said”. [[68]](#footnote-68)

This line of authority would not therefore appear to extend to cover seafarers held hostage ashore for years. Instead, a different line of cases, not considered in *The Ever Success,[[69]](#footnote-69)* require consideration. In *Beale v Thompson*[[70]](#footnote-70) the captain and the crew had been taken out of their ship in a Russian port by a Russian guard, marched inland and imprisoned. After six months, the master and crew were marched back to their ship and returned on board. At that time, the ancient doctrine was that freight was ‘the mother of wages’[[71]](#footnote-71) since a shipowner and a seafarer were regarded as co-adventurers in earning the freight from which the wages of the seafarer would have been paid (described by Earl Loreburn as a ‘cruel exception,’[[72]](#footnote-72) although the doctrine was not invariably applicable,[[73]](#footnote-73) to the tender benevolence shown by the Admiralty Court to seafarers). The House of Lords, taking into consideration three facts (that the seafarers were received back into service; that freight was earned; and that the seafarers performed their service properly), held in favour of wages until completion of the return voyage to London, which therefore included the period of imprisonment. In effect, the return of the seafarer to the ship and the resumption of the voyage operated as a waiver by the shipowner of any objection to the continued existence of the seafarer’s employment agreement. The decision in *Delamainer v Winteringham,[[74]](#footnote-74)* on almost identical facts, is to the same effect. Lord Ellenborough said:

‘I will presume that the embargo was of such a nature as not to put an end to the contract between the master and owner of the ship, and the mariners. The plaintiff's return to the ship and the completion of the voyage, appear to me to remove all difficulty. Then, if the plaintiff is entitled to recover at all, it must be for work and labour. The action is maintainable on the ground that there was no severance of his services; and therefore, in contemplation of law, he was working and labouring for the defendant, from the commencement to the conclusion of the voyage’.

The reconciliation of this decision with a later decision of the House of Lords in *Horlock v Beal[[75]](#footnote-75)* is, however, not readily apparent. Here, a British ship entered a German port on 2 August 1914 and was detained on 4 August 1914 when war broke out. The seafarers were removed to a lodging ship at Hamburg and were later interned near Berlin. At the time of the proceedings, it was uncertain whether the ship would be destroyed, confiscated or returned.[[76]](#footnote-76) In a single dissenting judgment, Lord Parmoor (being expressly unable to find a material distinction with *Beale v Thompson*[[77]](#footnote-77) since there was in both cases hostile seizure of the ship and removal of the seafarers from their ship), found that there was no severance of service under the employment agreement and that the claim of the allottee was, therefore, good. But the majority denied the claim. Lord Shaw of Dunfermline said:

‘The ship cannot be navigated, no orders in that regard by the master could be obeyed, and the crew, unhappily, is prevented by hostile force from rendering the ship any service whatsoever. In such circumstances I do not see my way to hold the seaman to be entitled in law to wages which, through no fault of the owners, he is entirely unable to earn by service.’ [[78]](#footnote-78)

The reconciliation of the decisions lies, it is argued, in a crucial distinction: in *Beale v Thompson*[[79]](#footnote-79) the seafarers had been returned to their ship and - with the approval of the shipowner - completed the voyage; whereas in *Horlock v Beal[[80]](#footnote-80)* the fate of the ship and her seafarers was at the time of the legal proceedings a matter of ‘overwhelming uncertainty.’[[81]](#footnote-81)

Assume a ship is captured by pirates (without the fault of the seafarers), who are held hostage, but released by the pirates, so that - with the approval of their employer - they complete the voyage. *Beale v Thompson* and *Delamainer v Winteringham* which would suggest that the seafarers are entitled to their wages until the completion of the voyage, including the period they were held hostage. But if seafarers are no longer ready, willing or able to complete the voyage (as is most likely due to injury, illness and/or psychological trauma after being held hostage for years), the shipowner may well contend that service to the ship is entirely severed. Any arguments by way of analogy with *Beale v Thompson* and *Delamainer v Winteringham* would therefore be negated. If however the seafarers are still ready, willing and able to resume service to the ship, but the ship herself is no longer navigable (as often happens if a ship is held captive for years without maintenance), there could be no reliance on in *Beal v Thompson* or *Delamainer v Winteringham* for as Earl Loreburn observed, ‘There is no distinct authority for the proposition that if a seaman is willing to fulfil his contract he is still entitled to wages, though the performance of it has been made impracticable on both sides by a prolonged captivity.’ But, assume, the seafarers are ready, willing and able to resume service and the ship is seaworthy. Would the justice of paying wages for years when the employment agreement is discontinued be accepted by the shipowners?

**11. IF AN EMPLOYMENT AGREEMENT IS DISCONTINUED IS THE SEAFARER ENTITLED TO WAGES?**

The employment agreement of a seafarer may be discontinued by virtue of contractual termination or frustration. An analysis of the occurrence of such discontinuance and its effect on the right of a seafarer to wages during captivity reveals that law is uncertain, and that right would most probably be successfully contested in certain circumstances.

Contractual termination would probably occur after about nine months, since nowadays this is the average contracted period of employment of seafarers.[[82]](#footnote-82) Although most ships are released after six months, for those unfortunate seafarers held hostage for years the probability of contractual termination is very high. There is common law that would appear, by analogy, to allow for early termination of a seafarer’s employment agreement where the seafarer held hostage by pirates can provide no service to captured ship. In *The Elizabeth[[83]](#footnote-83)* the ship was damaged, without fault, when she ran onto a reef of rocks. She could not return to London until she had been repaired. But the repairs could not be done before the winter, when the homeward voyage to London would be blocked by ice. So, the master terminated the employment agreements, justifying his decision on the basis that discharge was necessary to avoid the expense of maintaining the seafarers in idleness for the whole winter. Sir Walter Scott held that the master had the right to discharge the seafarers:

‘Is it clear law that the master, acting for his owners, could not, in such circumstances, dismiss the mariners on any terms whatever? If so, then he was bound to keep this crew in an unemployed state, living on shore, and keeping holiday all winter, at the expense of his owners, who were to continue all that time to pay, *pro opere et labore* , by virtue of the contract, though no work or labour could be performed; and thus the price of industry was to be regularly paid to unoccupied idleness! I know and feel the partiality which the maritime law entertains for this class of men, but it must not overrule all consideration of justice to other classes, particularly to merchants, their employers; for what is oppressive to the merchant cannot but be injurious to the mariner. The seaman cannot be ultimately benefited by that which, as far as it operates, must operate to the discouragement of navigation’.

If applied to the capture of a ship by pirates the dictum would imply that the shipowner could terminate the employment agreements if and when the continued payment of wages is considered by the court to be unjust and oppressive. It could be argued that the applicability of the dictum may be contested as a strained and artificial analogy: ‘keeping holiday,’ in ‘unoccupied idleness’ ashore is no analogy for being held hostage by pirates in a Somali stronghold. Nonetheless, where no service has been and can be rendered by seafarer held ashore for years (with no reasonably foreseeable prospects of release), the shipowner could well argue that continued payment for an indefinite and probably lengthy period would be oppressive.

Turning to the frustration of the employment agreement, it is argued, that difficulties abound. Although frustration would, of course, only apply to a seafarer’s employment agreement in the absence of a ‘force majeure’ clause covering capture by pirates, what construction would be placed on a clause providing higher wages for voyaging in a high risk area? Since frustration must not be self-induced, due to ‘the act or election of the party seeking to rely on it,’[[84]](#footnote-84) would it be sufficient for the shipowner to have followed BMP4 as recommended[[85]](#footnote-85) by the IMO? Should ships in a high risk area additionally carry privately contracted armed guards (which is neither condemned nor commended by the IMO,[[86]](#footnote-86) being left to the laws and practice of flag states)? Since frustration aims to meet the ‘dictates of justice’[[87]](#footnote-87) or the ‘demands of justice,’[[88]](#footnote-88) to achieve ‘a just and reasonable result,’ and to do what is ‘reasonable and fair,’[[89]](#footnote-89) in precisely what circumstances will this ‘ultimate rationale of the doctrine’[[90]](#footnote-90) be apparent? In the House of Lords, it has been held that ‘a seaman's contract is not lightly dissolved either on his side or on that of the owner.’[[91]](#footnote-91) In the Court of Appeal in New Zealand in *AO Karelrybflot v Arthur Udivenko[[92]](#footnote-92)* the shipowner argued that, since the ships were forfeited to the Crown for fisheries offences committed by the charterer, the employment agreements of the seafarers were frustrated. Accepting the applicability of the doctrine for frustration to employment agreements, Blanchard J said however that,

‘In view of the nature of a contract of employment, the doctrine will not easily be able to be invoked by an employer because of the drastic effect which it would have on the rights of vulnerable employees – the present respondents being an example.’

Capture it is therefore argued would not at once lead to frustration. And, insofar as negotiations with reasonable prospects of success are underway, the agreements would most probable not be frustrated. Wait and see would be the watchwords, at least for a reasonable period in relation to the term of the employment agreement. Here, the words of Lord Roskill in [*The Nema[[93]](#footnote-93)* are apposite:](http://www.lawandsea.net/List_of_Cases/P/Pioneer_Shipping_v_BTP_The_Nema_1982_AC724.html)

‘where the effect of that event is to cause delay in performance of contractual obligations, *it is often necessary to wait upon events* [emphasis added] in order to see whether the delay already suffered and the prospects of further delay from that cause, will make any ultimate performance of the relevant contractual obligations "radically different," … from that which was undertaken by the contract’.

But, his Lordship added:

‘business men must not be required to await events too long. They are entitled to know where they stand. Whether or not the delay is such as to bring about frustration must be a question to be determined by an informed judgment based upon all the evidence of what has occurred and what is likely thereafter to occur. Often it will be a question of degree.’[[94]](#footnote-94)

Assume, then, that the seafarers are contractually employed for, say, nine months; but held hostage for more than two years, without reasonable prospects of release. First, the shipowners would be entitled to know where they stand; and, second, could argue that the continued payment of wages is no longer just, fair and reasonable and that the agreements are accordingly frustrated.

Assume, then, frustration. Wages already paid would not be returned; henceforth however the loss of wages would lie where it falls, the employment agreements terminating without liability or any claim for damages.[[95]](#footnote-95) As a consequence of frustration, no action *in personam* for service to the ship would, it is argued, lie against the shipowner under English law, since there would be no person liable on the claim, which would also exclude an action *in rem*[[96]](#footnote-96) against a sister ship within the jurisdiction of the English Admiralty Court.

However, an important advantage of the maritime lien for wages is that, even without employment agreements, the right to enforce claims for wages arises, since the maritime lien springs into existence independently of the personal liability of the employer.[[97]](#footnote-97) In *The Ever Success[[98]](#footnote-98)* it was held that:

‘Despite the judicial tendency on occasions to associate the wages lien loosely with the contract it is not the case that the maritime lien arises out of the contract. The lien is established by reference solely to the maritime law and its existence is not wholly dependent upon an express or implied contractual term.’

So, if there is service to the captive ship - even after frustration - there would be a maritime lien. But the enforcement of that lien in an action *in rem* against the ship lying captive or abandoned in the waters Somalia would be impossible given the absence of any properly functioning legal system in Somalia.

**12. NEED FOR LAW REFORM**

International law as enshrined in the conventions does not either explicitly or implicitly deal with the payment of the wages of seafarers held hostage, while English law would, in limited circumstances, protect the seafarer’s right to wages; in many other cases that law is most uncertain; and in some instances it seems most unlikely that seafarers would have an enforceable right to wages. The position may be summarised as follows. If seafarers - who are held hostage aboard their ship for no more than a few months with existing employment agreements - complete their voyage they would, it is argued, be entitled to wages, secured and preferred by a maritime lien, and enforceable by an action *in rem.* However, if seafarers are held ashore for years, unable to render service, without existing employment agreements, and with the ship abandoned by her owners in Somali waters there would most probably be no entitlement to wages. Nor could the entitlement, if it did exist, be enforced by an action *in rem* (secured and preferred by a maritime lien)*,* or an action *in rem* against a sister ship, or an action *in personam* against the shipowner. So, neither international law nor English law provide comprehensively and adequately for the changing circumstances of contemporary piracy.

Although successful pirate attacks off the coast of Somalia have recently declined, piracy is evolving tactically and geographically, growing fast elsewhere in the world, especially off the coast of west-Africa.[[99]](#footnote-99) Since the risk of piracy has evaded elimination, it is best regarded as an evolving and enduring threat. Parties to employment agreements can - and should - provide for the allocation the risk, which of course is routinely done within the context of charterparties.[[100]](#footnote-100) But the view that shipowners and seafarers themselves will - within the context of employment agreements – comprehensively, adequately and fairly allocate the risk is not persuasive. The need for reform would therefore appear to be compelling.

**13. INTERNATIONAL ATTEMPTS AT REFORM**

The nature and scope of the required law reforms should first be assessed within the context of the work of the IMO. In orchestrating responses to piracy, the wide ranging and far reaching endeavours of that organization are impressive and commendable. The IMO has, for example, engaged at the political level with the Security Council of the United Nations; strengthened the protection of seafarers, fishers and passengers, ships and cargoes; preserved the integrity of strategic shipping lanes; ensured that ships’ crews were aware of how to access naval protection and to implement the preventive, evasive and defensive measures recommended by IMO and the industry; addressed in guidelines the carriage of privately contracted armed security personnel aboard ships, involving flag, port and coastal States; promoted co-ordination among navies, and co-operation between states, regions and organizations; developed regional initiatives, such as the IMO-led Djibouti Code of Conduct; and helped to build the capacity of states to deter, interdict and bring to justice those who commit acts of piracy and armed robbery. And, the IMO has not only expressed its deep sympathy for the loss of seafarers in captivity and for their plight while held hostage in appalling conditions, but also appealed for the immediate release of captured seafarers. More specifically, a resolution of the Assembly of the IMO has urged governments to ‘keep substantially interested States informed, as appropriate, about welfare measures for seafarers in captivity on ships entitled to fly their flag, measures being taken for the early release of such seafarers and the status of payment of their wages.’[[101]](#footnote-101)

Although some member states have argued on the basis of this resolution that the IMO should work to ensure the payment of wages, the majority of member states have thus far not regarded the payment of wages as within the remit of the IMO. But the majority has, it argued, overlooked the consideration that just as the International Convention on Maritime Liens and Mortgages 1993 was done under the auspices of the ‘United Nations/International Maritime Organization Conference of Plenipotentiaries’ so too can the 1993 Convention be amended by the United Nations/IMO. Reform of international law would at the very least require that the MLC and the conventions on maritime liens be amended, with the ILO and IMO working in collaboration. But international law reform would be a protracted process, and is the subject of another paper.

**14. WHAT ARE THE LEGISATIVE OPTIONS?**

Pending the reform of international law, states should consider national legislation. The drafting of such legislation could be a taxing task, especially when considered in the light of the following considerations. First, entitlement to wages in the context of capture by pirates is highly fact sensitive. How are the facts to be comprehensively contemplated by a draftsman? Second, the circumstances of future hostage situation are unpredictable as the piracy ‘business model’ off the coast of Somalia has rapidly evolved. Third, the spread of piracy to other areas of the world, especially off the coast of west- Africa - is quickening. The business model employed in this region is often more ruthless and deadly than that employed elsewhere, and currently it poses the most serious challenge to the international community. Fourth, the capture of ships and the taking of seafarers in the territorial sea (common off the coast of west-Africa), is by definition not piracy.[[102]](#footnote-102) Fifth, the right to wages when there is no longer an employment agreement, when the seafarer has rendered no service to the ship for years, and when the ship has long since been ransomed and released would most probably be contested, notwithstanding the hardship that the seafarer suffers. To foresee every situation and to provide for the comprehensive, adequate, fair and equitable allocation of rights and obligations in each and every such situation by way of detailed legislative provisions would not therefore be reasonably possible, since it would require an extraordinary degree of precise prescience.

A better legislative approach, it is argued, is to allocate the risk to the shipowner or the seafarer in simple and general terms, thereby giving certainty to the law. Certainty would better serve the interests of both shipowners and seafarers, since they could accordingly adjust their actions, particularly when employment agreements are being negotiated. To whom, then, should the risk be allocated?

Shipowners can dictate the routes of their ships; they know the freeboard of their ships; they can dictate the speed of their ships; they are responsible for ensuring that their ships adhere to BMP4 in the high risk areas; they may decide, if the law of the flag permits, that their ships will carry privately contracted armed guards; they may decide, consistent with the law of the flag, to enlist and pay for the protection of military detachments on their ships; and they may take the precaution of arranging insurance, particularly kidnap and ransom insurance. Seafarers, it may be countered, knowingly and freely choose to voyage on the particular ship; they may decide to accept a bonus to venture through the high risk areas; and they are also responsible for preventing their own capture.

The balancing these considerations would strongly suggest that shipowners are better placed as compared to seafarers to contemplate, anticipate, remove, reduce and manage the risks. And to legislate accordingly would be in broad accord with existing policy objectives of protecting the interest of seafarers. The rights of seafarers to salvage and the right to have their wage claims are, for example, already legislatively secured and preferred by maritime liens, which are not capable of renouncement by agreement between the seafarer and the shipowner.[[103]](#footnote-103)

Draft legislation could, it is argued, provide that wages:

‘shall, regardless of any law or agreement to the contrary, continue to be payable to a seafarer during any period he or she may have been captured from his or her ship and held captive or hostage in any circumstances by pirates or any other persons’.

This provision would have several advantages. First, it is simple, clear and generalised, answering the questions considered in this paper, providing shipowners and seafarers alike with legal certainty. Wages would be payable regardless of the duration of the captivity, whether the seafarer is held aboard or ashore, whether the employment agreement is contractually discontinued or frustrated, and whether the ship and/or her cargo are released or not. This allocation of the risk could then be factored into, for example, individual employment agreements (including collective employment agreements), insurance contracts, and freight and hire rates. Second, the provision is sufficiently broad to be applied to whatever evolutions the piracy ‘business model’ may undergo, anywhere in the world. The location of the ship, the means of her capture, and the motivation for her capture (although essential to the definition of piracy), would be irrelevant to the right to wages, since the right is not restricted to capture by pirates as defined by international law or indeed any other persons. So, it would not be necessary to define the captors as either pirates or terrorists; in either event, the right wages would still be payable. Third, the entitlement to wages would however not extend to the situation where a seafarer is captured ashore. Various considerations inform the allocation of this particular risk. While the shipowner’s duty of care to provide a safe working environment for seafarers features most prominently when they are aboard their ship and thereby subject to the direct protection and control by the master and/or shipowner, the duty would also exist where, for example, the seafarers are working ashore alongside the ship and under the orders of the master. But if seafarers are enjoying shore leave and engaged on a frolic of their own they may, it is argued, fairly be said to be responsible for their own safety. And, as a general rule, seafarers who are ashore are more likely enjoying their leave rather than performing their duties. So, when seafarers are captured ashore, the allocation of the risk of capture falls, it is argued, more fairly on the seafarer than on the shipowner.

**15. CONCLUSION**

Africa is at the epicenter of piracy. The legislation discussed above has been drafted by the author for Namibia; and, if passed, will protect the continued payment of wages of captured seafarers. Other African states may pass similar legislation.

The notion of legislative reform to ensure the payment of the wages of captured seafarers is not new. Nearly a hundred years ago*,* Lord Shaw of Dunfermline, when driven by the law to deny wages to seafarers prevented by hostile force from rendering service to their ship, exclaimed that, ‘Such cases, no doubt, will take their rank among the many desolating circumstances which demand remedial attention at the hand of Parliament or the Executive power.’[[104]](#footnote-104) For the major maritime states of the world the time for remedial action is now at hand.

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2. S/RES/1816 (2008). [↑](#footnote-ref-2)
3. S/RES/1976 (2011); S/RES/2015 (2011); S/RES/2020 (2011). [↑](#footnote-ref-3)
4. Payment is usually made directly to the accounts of seafarers held hostage or payment may be allotted to persons nominated by the seafarers. [↑](#footnote-ref-4)
5. S/RES/1816 (2008); S/RES/1838 (2008); S/RES/1846 (2008); S/RES/1851 (2008); S/RES/1897 (2009); S/RES/1918 (2010); and S/RES/1950 (2010). For Resolutions relating to piracy in the Gulf of Guinea see: S/RES/2018 (2011); and S/RES/2039 (2012). [↑](#footnote-ref-5)
6. One Earth Future Foundation's report: ‘The Economic Cost of Somali Piracy, 2011’, 8. [↑](#footnote-ref-6)
7. A copy of this document may be downloaded at www.mphrg.org [↑](#footnote-ref-7)
8. See, for example, the agreement between the International Transport Federation and shipowners providing that: ‘During the period of transit of the area designated as the IBF [International Bargaining Forum] High Risk Area seafarers shall be entitled to compensation amounting to 100% of the basic wage and a doubled compensation payable in case of death and disability’ as well as the requirement of the Philippine Government that all contracts with Filipino seafarers include hazard pay in the form of 200% of wages when transiting the high risk area in One Earth Future Foundation's report: ‘The Economic Cost of Somali Piracy, 2011’, 21. For other examples of bonus pay see: *Osmium Shipping v Cargill International* [2012] 1 CLC 535, 540 and *Taokas Navigation SA and Komrowski Bulk Shipping KG (GmbH & Co) and Kent Line International Ltd and Solym Carriers Ltd* [2012] EWHC 1888 (Comm). [↑](#footnote-ref-8)
9. *Masefield AG v Amlin Corporate Member Ltd* [2011] 1 WlR 2012. [↑](#footnote-ref-9)
10. One Earth Future Foundation's report: ‘The Economic Cost of Somali Piracy, 2011’, 21. [↑](#footnote-ref-10)
11. One Earth Future Foundation's report: ‘The Economic Cost of Somali Piracy, 2011’, 13. [↑](#footnote-ref-11)
12. See, for example: A.T. Whately ‘Historical Sketch of the Law of Piracy’ (1874) 3 *The Law Magazine and Review* 536; Peter Earle *The Pirate Wars* (Meuthuen, 2003); Douglas Guilfoyle *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) 64-72; James Kraska and Brian Wilson ‘Maritime Diplomacy and Piracy in the Horn of Africa’ [2008] 161 *Maritime Studies* 13; Omer Elagab ‘Somali Piracy and International Law: Some Aspects’ (2010) 24 *Australian and New Zealand Maritime Law Journal* 59; Douglas Guilfoyle ‘The Laws of War and the Fight against Somali Piracy: Combatants or Criminals’ (2010) 11 *Melbourne Journal of International Law* 141; Joel H. Samuels ‘How Piracy has Shaped the Relationship between American Law and International Law’ (2010) 59 *American University Law Review* 1231; Milena Sterio ‘The Somali Piracy Problem: A Global Puzzle Necessitating a Global Solution’ (2010) 59 *American University Law Review* 1449; Barry Hart Dubner ‘On the Definition of the Crime of Sea Piracy Revisited: Customary vs. Treaty Law and the Jurisdictional Implications Thereof’ (2011) 42 *Journal of Maritime Law and Commerce* 71;

Ademun Ademun-Odeke ‘Jurisdiction By Agreement Over Foreign Pirates In Domestic Courts:*In Re Mohamud Mohamed Dashi & 8 Others’* (2011-2012) 24 *University of San Francisco Maritime Law Journal* 35; Sandra L Hodgkinson *et al* ‘Piracy: New Efforts In Addressing This Enduring Problem’ *Tulane Maritime Law Journal* 36 (2011) 65; D.R.T. ‘Somali Piracy – Report of UK Foreign Affairs Committee’ (2011) 17 *Journal of International Maritime Law* 411; Theodore M. Cooperstein ‘Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering’ (2009) 40 *Journal of Maritime Law and Commerce* 221; D. Joshua Staub ‘Letter of Marque: A Short-Term Solution to an Age Old Problem’ (2009) 40 *Journal of Maritime Law and Commerce* 261. The most recent text books on the law of the sea which also deal with piracy do not however cover wages: see, for example, Donald R Rothwell and Tim Stephens *The International Law of the Sea* Hart Publishing 2010) at 162-164; and Yoshifumi Tanaka *The International Law of the Sea* (Cambridge University Press 2012) at 354 -361. As to the leading work on piracy and charterparties see Paul Todd *Maritime Fraud and Piracy* (Lloyd’s List 2010); see also Aleka Mandaraka Sheppard ‘When is a serious risk of piracy serious enough for the law?’ (2011) 17 *Journal of International Maritime Law* 430; and Paul Todd ‘Ransom, piracy and time charterparties ‘ (2012) 18 *Journal of International Maritime Law* 193. As to piracy and marine insurance see, for example, Kate Lewins and Robert Merkin ‘Masefield AG v Amlin Corporate Member Ltd; The Bunga Melati Dua Piracy, Ransom and Marine Insurance’ [2011] 35 *Melbourne University Law Review* 717; and Paul Todd ‘Ransom, piracy and time charterparties ‘ (2012) 18 *Journal of International Maritime Law* 193. [↑](#footnote-ref-12)
13. See, for example, the following writers who deal with the wages of seafarers and/or the maritime lien for wages: Griffith Price *The Law of Maritime Liens* (Sweet & Maxwell 1940); D. R. Thomas *Maritime Liens* (Stevens & Sons 1980); William Tetley *Maritime Liens and Claims* (International Shipping Publications, 2 ed 1998); F. N. Hopkins *Business and Law for the Shipmaster* (Brown, Son & Ferguson Ltd 1998); Jonathan S. Kitchen *The Employment of Merchant Seamen* (Croom Helm 1980) at 433 where it is simply said that by the early eighteenth century a seaman was liable to lose or forfeit all or most of his wages in a wide range of circumstances, including capture by pirates; Susan Hodges and Christopher Hill *Principles of Maritime Law* (Informa Professional 2001); D.C. Jackson *Enforcement of Maritime Claims* (LLP 2005 4ed); Nigel Meeson and John A. Kimbell *Admiralty Jurisdiction and Practice* (Informa 2011 4ed). Nor does the subject appear to have yet been considered under the law of the USA: see the preeminent work on seafarers by Robert Force (formerly Martin J.Norris) *The Law of Seamen (Thomson West) vols 1-3 2003* at 12:1 – 12:40 where wages are treated with great authority. For a consideration of wages under the law of the UK and the USA, see John A.C. Cartner, Richard P. Fiske and Tara L. Leiter *The International Law of the Shipmaster* (Informa Law 2009). As to the law of New Zealand, see, for example, Michael Ng ‘The protection of seafarers wages in Admiralty: a critical analysis in the context of modern shipping’ [2008] 22 *Australian and New Zealand Maritime Law Journal* 133. [↑](#footnote-ref-13)
14. At 4. For commentary on the provisions of the MLC dealing with wages see: Moira L. McConnell, Dominick Devlin, Cleopatra Doumbia-Henry *The Maritime Labour Convention, 2006* (Martinus Nijhoff Publishers) 2011, 277, 291, 294-301. For commentary on Wages, Hours of Work and Manning (Sea) Convention (Revised) 1968 (ILO C109), see Deirdre Fitzpatrick & Michael Anderson *Seafarers’ Rights* (Oxford University Press) 2005, 72. Neither of these commentaries touches on the entitlement to wages of seafarers held hostage by pirates. [↑](#footnote-ref-14)
15. Guideline B2.2.1(b) which states that: ‘(b) *basic pay or wages* means the pay, however composed, for normal hours of work; it does not include payments for overtime worked, bonuses, allowances, paid leave or any other additional remuneration’. As to how the MLC might be implemented through national laws or regulations, through collective bargaining agreements or through other measures or in practice see International Labour Office *Handbook: Guidance on Implementing the Maritime Labour Convention, 2006 - Model National Provisions* (International Labour Organization Geneva)2012, 22, 23. [↑](#footnote-ref-15)
16. International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926, article 8 [↑](#footnote-ref-16)
17. International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967. [↑](#footnote-ref-17)
18. Thirteen states have ratified the 1987 Convention. [↑](#footnote-ref-18)
19. In terms of article 13 of the 1987 Convention. [↑](#footnote-ref-19)
20. The other prerequisites in article 2 (the shipwreck of the vessel, the inability of the shipowner to fulfil his contractual obligations due to bankruptcy, the ship being in a warzone, or the termination or interruption of the contract due to industrial award or collective agreement) do appear to be relevant. [↑](#footnote-ref-20)
21. In the South African Admiralty Jurisdiction Regulation Act 105 of 1983 a maritime claim is defined to include ‘any claim for, arising out of or relating to’, *inter alia*, ‘piracy, sabotage or terrorism relating to property mentioned in section 3(5), or to persons on any ship’: s1(1)(cc). There is, for example, no such reference to piracy in the Maritime Law Admiralty Act 1973 of New Zealand, the High Court Ordinance Chapter 4 of Hong Kong, the Federal Courts Act of Canada, the Admiralty Act No. 34 of 1988 of Australia, the Senior Courts Act 1981 of the United Kingdom, and the High Court (Admiralty Jurisdiction) Act of Singapore. [↑](#footnote-ref-21)
22. Article 1(1)(m). [↑](#footnote-ref-22)
23. Article 1 (1)((o). [↑](#footnote-ref-23)
24. There is, for example, no requirement that wages must be earned on board a ship in the Maritime Law Admiralty Act 1973 of New Zealand, the High Court Ordinance Chapter 4 of Hong Kong, the Federal Courts Act of Canada, the Admiralty Act No. 34 of 1988 of Australia, the Senior Courts Act 1981 of the United Kingdom, and the High Court (Admiralty Jurisdiction) Act of Singapore. [↑](#footnote-ref-24)
25. *The Elizabeth* (1819) 2 Dodson 403 ,408 [↑](#footnote-ref-25)
26. *The Neptune* (1824) 1 Hagg. Adm. 227, 232 [↑](#footnote-ref-26)
27. *Ellerman Lines Ltd v Murray, White Star Line & Co Ltd v Comerford* [1931] AC 126 (HL) 126, 130, 144. [↑](#footnote-ref-27)
28. See also the Merchant Shipping (International Labour Conventions) Act 1925 which was repealed by the Merchant Shipping Act 1970, s 100(3), Sch 5. [↑](#footnote-ref-28)
29. Section 158 provided that: ‘Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship, or of his being left on shore at any place abroad under a certificate granted as provided by this Act of his unfitness or inability to proceed on the voyage, he shall be entitled to wages up to the time of such termination, but not for any longer period’. This provision was substantially the same as s. 185 of the Merchant Shipping Act 1854. [↑](#footnote-ref-29)
30. *Per* Ridley J in *Sivewright v Allen* [1906] 2 KB 81 and see also the judgment of Lord Alerstone, but compare Darling J who said that the actual destruction of the ship was not necessary and that the loss of a ship to pirates - without its actual destruction - would constitute ‘loss’. [↑](#footnote-ref-30)
31. [1916] AC 486 at 490, 524. [↑](#footnote-ref-31)
32. *Horlock v Beal* [1916] AC 486 at 490, 524. [↑](#footnote-ref-32)
33. [1913] P 92. [↑](#footnote-ref-33)
34. *The Olympic* [1913] P 92, 107. [↑](#footnote-ref-34)
35. [1933] 402. [↑](#footnote-ref-35)
36. *Horlock v Beal* [1916] AC 486, 499. [↑](#footnote-ref-36)
37. *Horlock v Beal* [1916] 1 AC 486, 492. [↑](#footnote-ref-37)
38. Lord Stowell in *The Minerva* (1825) 1 Hag 347, 355 described seafarers as a: ‘set of men, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument that may be proposed to them; and on all accounts requiring protection, even against themselves.’ [↑](#footnote-ref-38)
39. In the *Juliana (1822) 2 Dods. 503* Lord Stowell stated that: ‘This Court … will as far as it can, protect these illiterate and inexperienced persons against their own ignorance and imprudence’. As to the favoured status of seafarers see H. Staniland ‘Should a Seaman Sue for this Wages as a Favoured Litigant?’ (1986) *Industrial Law Journal* vol. 7 part 3, 451. [↑](#footnote-ref-39)
40. In *The Nonpareil* (1864) Br & L 355 it was held that: ‘In the construction of the seamen’s contract in cases of doubt it will give the benefit of such doubt to the seaman,’ which was approved in *The Arosa Star* [1959] 2 Lloyd’s Rep 396 at 400 and also *The Westport No 4.* [1968] 2 Lloyd’s Rep. 559, 561. [↑](#footnote-ref-40)
41. *The Tacoma City* [1991] 1 Lloyd’s Rep 330, 344. [↑](#footnote-ref-41)
42. *The Arosa Star* [1959] 2 Lloyd’s Rep 396. [↑](#footnote-ref-42)
43. [1976] 1 Lloyd’s Rep. 559. [↑](#footnote-ref-43)
44. [1999] 1 Lloyd’s Rep 824. [↑](#footnote-ref-44)
45. *Per* Dr Lushington in *The Edwin* (1864) 167 ER 365, 367. [↑](#footnote-ref-45)
46. *Ellerman Lines Ltd v Murray, White Star Line & Co Ltd v Comerford* [1931] AC 126 (HL) 126, 134. [↑](#footnote-ref-46)
47. In *The West Port No. 4* [1968] 2 Lloyds Rep 559, 562 Karminski J defined ‘emoluments’ as ‘something which is received by a member of a ship's company from which he receives a *benefit* as recompense for the execution of his duty’. [↑](#footnote-ref-47)
48. *The Elmville No. 2* [1904] P 422 cited with approval in *The Tacoma City* [1991] 1 Lloyd’s Rep 330, 334, 335, 345. [↑](#footnote-ref-48)
49. *The Arosa Kulm No.2* [1960] 1 Lloyd’s Rep 97. [↑](#footnote-ref-49)
50. *The Arosa Star* [1959] 2 Lloyd’s Rep. 396, 402. [↑](#footnote-ref-50)
51. *The Arosa Kulm No. 2* [1960] 1 Lloyd’s Rep 97. [↑](#footnote-ref-51)
52. *The Westport No. 4* [1968] 2 Lloyd’s Rep 559. [↑](#footnote-ref-52)
53. In *The Blessing* (1877) 3 P D 35 it was held that s 3(2) of the County Court Admiralty Jurisdiction Act 1968 included a claim for damages for the wrongful dismissal of the master, who was prevented from boarding the vessel, during the continuance of his contract of employment when he was ready, willing and able to work on the vessel. See also: *The Arosa Star* [1959] 2 Lloyd’s Rep 396 (Supreme Court of Bermuda); *The Arosa Kulm No 2* [1960] 1 Lloyd’s Rep 97; *The Fairport* [1965] 2 Lloyd’s Rep 183; *The British Trade* (1924) 18 Ll. L. Rep. 65; and *The Halcyon Isle* [1976] 1 Lloyd’s Rep 46 where Brandon J said that: ‘in my judgment … the admiralty jurisdiction in wages has long extended … to claims founded in damages as well as debt’, the judgment being cited with approval in *The Tacoma City* [1991] 1 Lloyd’s Rep 330, 334, 347. [↑](#footnote-ref-53)
54. *The Tacoma City* [1991] 1 Lloyd’s Rep 330, 344; *The West Port No. 4* [1968] 2 Lloyds Rep 559, 562. [↑](#footnote-ref-54)
55. *The Tacoma City* [1991] 1 Lloyd’s Rep 330, 347. [↑](#footnote-ref-55)
56. *The Tacoma City* [1991] 1 Lloyd’s Rep 330, 346, 348; *The Chieftain* (1863) Br. & L. 167 E.R. 316; *The Ruby No. 2* [1898] P. 59. As to severance pay under South African law, see Hilton Staniland ‘Severance Pay for Seamen’ [1992] 13 *Industrial Law Journal* 1107. [↑](#footnote-ref-56)
57. *Joseph Phillips and Others v The Highland Railway Company The “Ferret.”* (1882-83) L.R. 8 App. Cas. 329. [↑](#footnote-ref-57)
58. (1864) 167 E R 365. [↑](#footnote-ref-58)
59. (1887) 12 PD 145. [↑](#footnote-ref-59)
60. The Admiralty Court Act, 1861 (24 Vict. c. 10, s. 10) : ‘ The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise ; and also over any claim by the master of any ship for wages earned by

him on board the ship, and for disbursements made by him on account of the ship.’ [↑](#footnote-ref-60)
61. See s. 1(1) (*o*) of the Administration of Justice Act 1956. [↑](#footnote-ref-61)
62. (1863) 167 E.R. 316, 320. [↑](#footnote-ref-62)
63. 24 Vict. c. 10. [↑](#footnote-ref-63)
64. *The Tacoma City* [1991] 1 Lloyd’s Rep 330. [↑](#footnote-ref-64)
65. *The Halcyon Skies* [1977] Q B 14. [↑](#footnote-ref-65)
66. [1991] 1 Lloyd’s Rep 824. [↑](#footnote-ref-66)
67. *The Ever Success* [1999] 1 Lloyd's Rep 824, 832. [↑](#footnote-ref-67)
68. *The Ever Success* [1999] 1 Lloyd's Rep 824, 834. [↑](#footnote-ref-68)
69. [1991] 1 Lloyd’s Rep 824. [↑](#footnote-ref-69)
70. 102 ER 940. [↑](#footnote-ref-70)
71. As to the justification of this rule see, for example, [*Harris v Watson* (1791) Peake NP 72](http://www.lawandsea.net/List_of_Cases/H/Harris_v_Watson_1791_Peake_72.html), 73 where Lord Kenyon said: ‘If this action was to be supported, it would materially affect the navigation of this kingdom. It has been long since determined, that when the freight is lost, the wages are also lost. This rule was founded on a principle of policy, for if sailors were in all events to have their wages, and in times of danger entitled to insist on an extra charge on such a [promise](http://www.caselawquotes.net/P/Promise.html) as this, they would in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to make.’ [↑](#footnote-ref-71)
72. *Horlock v Beal* [1916] 1 AC 486. The doctrine was abolished by statute: s. 183 of the Merchant Shipping Act 1854; and s. 157 of the Merchant Shipping Act 1894. [↑](#footnote-ref-72)
73. *Cutter v Powell* (1795) 4 East 43 where reference was made to the exceptions where the ship was lost through the fault of the owners, or if the ship was seized for the debt of the owners or on account of having contraband goods on board. [↑](#footnote-ref-73)
74. (1815) 4 Camp 186. When at a Russian port, the seafarer and the rest of the crew were taken out of the ship, marched into the country, afterwards released and returned to the ship. They continued and concluded the voyage, so that freight was earned. [↑](#footnote-ref-74)
75. [1916] AC 486, 490, 524 [↑](#footnote-ref-75)
76. *Horlock v Beal* [1916] AC 486, 510. [↑](#footnote-ref-76)
77. 102 ER 940. [↑](#footnote-ref-77)
78. *Horlock v Beal* [1916] AC 486, 514. [↑](#footnote-ref-78)
79. 102 ER 940. [↑](#footnote-ref-79)
80. [1916] AC 486, 490, 524 [↑](#footnote-ref-80)
81. *Per* Lord Shaw of Dunfermline in *Horlock v Beal* [1916] AC 486, 510. [↑](#footnote-ref-81)
82. See, for example, Maragtas S.V. Amante (Mols Sorenson Postdoctoral Research Fellow at Seafarers International Research Centre, Cardiff University, March 2002- Feb 2004) *Philippine Global Seafarers: A Profile* at 8. [↑](#footnote-ref-82)
83. (1819) 2 Dodson 403. [↑](#footnote-ref-83)
84. *Per* Lord Justice Bingham in *The Super Servant Two* [1990] 1 Lloyd’s Rep 1, 8. [↑](#footnote-ref-84)
85. See, for example, the resolution of the Maritime Safety Committee of the IMO MSC.324(89); and Circular letter No.3164. [↑](#footnote-ref-85)
86. See, for example, the resolution of the Assembly of the IMO (A. 1044 (27)) and the circulars of the Maritime Safety Committee: MSC.1/Circs. 1405 and 1406. [↑](#footnote-ref-86)
87. *The Sea Angel* [2007] 2 All ER 634, 670. [↑](#footnote-ref-87)
88. In [*National Carriers Ltd v Panalpina (Northern),* Ltd [1981] 1 All ER 161](http://www.lawandsea.net/List_of_Cases/N/National_Carriers_v_Panalpina_1981_1_AllER161.html), 184 Lord Roskill said that the doctrine ‘has been described as a 'device' for doing [justice](http://www.caselawquotes.net/J/Justice.html) between the parties when they themselves have failed either wholly or sufficiently to provide for the particular event or events which have happened.’ [↑](#footnote-ref-88)
89. Per Lord Justice Bingham in *The Super Servant Two* [1990] 1 Lloyd’s Rep 1, 8. [↑](#footnote-ref-89)
90. *The Sea Angel* [2007] 2 All ER 634, 670. [↑](#footnote-ref-90)
91. *Barras Appellant; v Aberdeen Steam Trawling and Fishing Company, Limited Respondents* [1933] AC 402, 426. [↑](#footnote-ref-91)
92. [2000] 2 NZLR 24. [↑](#footnote-ref-92)
93. [*The Nema* [1982] AC 724](http://www.lawandsea.net/List_of_Cases/P/Pioneer_Shipping_v_BTP_The_Nema_1982_AC724.html), 752. [↑](#footnote-ref-93)
94. [*The Nema* [1982] AC 724](http://www.lawandsea.net/List_of_Cases/P/Pioneer_Shipping_v_BTP_The_Nema_1982_AC724.html), 752. [↑](#footnote-ref-94)
95. The entitlement to wages would not appear to be affected by the Law Reform (Frustrated Contracts) Act 1943. [↑](#footnote-ref-95)
96. As required by s. 21 of the Senior Courts Act 1981. [↑](#footnote-ref-96)
97. *The Tacoma City* [1991] 1 Lloyd’s Rep 330, 346, 348. In *The Castlegate* [1893] AC 38 Lord Watson held that: ‘in the case of lien for wages of master and crew the Legislature recognised the rule that it attaches to ships independently of any personal obligation of the owner’. [↑](#footnote-ref-97)
98. [1991] 1 Lloyd’s Rep 824, 829. [↑](#footnote-ref-98)
99. See the latest statistics by the [International Maritime Bureau Piracy Reporting Centre.](http://www.google.co.uk/url?sa=t&rct=j&q=international%20chamber%20of%20commerce%20piracy%20reporting%20centre&source=web&cd=1&cad=rja&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.icc-ccs.org%2Fpiracy-reporting-centre&ei=0TU_ULSTB6O10QWzr4HgCg&usg=AFQjCNGIJien3AiscDsGmAlXYOc9xN19xQ)  [↑](#footnote-ref-99)
100. See, for example: *Osmium Shipping v Cargill International* [2012] 1 CLC 535. For commentary on some recent cases on piracy within the context of chaterparties see, for example, Dr Aleka Mandaraka Sheppard ‘When is a serious risk of piracy serious enough for the law?’ (2011) 17 *Journal of International Maritime Law* 430; and Paul Todd ‘Ransom, piracy and time charterparties’ (2012) 18 *Journal of International Maritime Law* 193. [↑](#footnote-ref-100)
101. See Assembly resolution A 27/Res.1044 para 8(l). [↑](#footnote-ref-101)
102. In terms of article 101of the 1982 Law of the Sea Convention; and see the discussions of the definition cited in footnote 12. [↑](#footnote-ref-102)
103. Section 39 of the UK Merchant Shipping Act 1995 provides: ‘(1) A seaman's lien, his remedies for the recovery of his wages, his right to wages in case of the wreck or loss of his ship, and any right he may have or obtain in the nature of salvage shall not be capable of being renounced by any agreement. (2) Subsection (1) above does not affect such of the terms of any agreement made with the seaman belonging to a ship which, in accordance with the agreement, is to be employed on salvage service, as provide for the remuneration to be paid to them for salvage services rendered by that ship. [↑](#footnote-ref-103)
104. *Horlock v Beal* [1916] AC 486, 514. [↑](#footnote-ref-104)