

Payment of Ransoms to Pirates – Implications under the Proceeds of Crime Act 2002, Terrorism Act 2000 and US Presidential Executive Order of 13 April 2010

The recent case of *Masefield AG v Amlin Corporate Member*¹ once again threw the legal implications of paying ransoms to pirates into the spotlight. The issue has been further complicated by the very recent publication of a US Presidential Executive Order.

The case focussed on whether such payments are contrary to public policy, which Steel J concluded they are not on the bases that the legislature seems loathe to intervene and that there is at present no viable alternative which will ensure the safe release of vessel and crew. The legality of such payments therefore remains open to debate.

Whilst in some countries the payment of a ransom is illegal, in the United Kingdom² it is not. It has been suggested by the Treasury and the Home Office that to make such payments illegal would risk criminalising families and employers who are already in the position of having to make difficult decisions regarding the fate of hostages³. Furthermore, they suggest that to criminalise such activity would discourage those of whom a ransom demand is made from contacting law enforcement authorities in order to obtain assistance.

The question of whether the law should intervene in making ransom payments illegal has recently been considered by the House of Lords in a 2009 Report entitled *“Money Laundering and the Financing of Terrorism.”*⁴ Although this report concludes that *“We have received no evidence to suggest that the payment of a ransom should be made a criminal offence, and we do not suggest that the law should be changed”*⁵ it raises a number of potential issues and matters of compliance which warrant further consideration.

1. The Proceeds of Crime Act 2002 (“POCA”)

Offences under the POCA which may be relevant to the payment of ransoms are as follows:

- S.327 – transferring criminal property
- S.328 – facilitating the acquisition of criminal property
- S.329 – acquiring, using or possessing criminal property
- S.330 – failing to disclose knowledge or suspicion of money laundering, gained in the course of a business in the regulated sector.

Property is “criminal property” under the POCA if it constitutes (or represents) a person’s benefit from criminal conduct (in whole or part and whether directly or indirectly), and the alleged offender knows or suspects that it constitutes or represents such a benefit.⁶

Clearly therefore, money received by way of ransom payment would fall within the definition of criminal property, it being the pirates benefit from their criminal conduct. However, given that payment of a ransom is of itself not illegal in the UK, it follows that money paid by way of ransom is not “criminal property” until it has left the hands of the paying party and has been received by the pirates.

¹ [2010] EWHC 280 (Comm)

² House of Lords EU Committee Report “Money Laundering and the Financing of Terrorism” (HL Paper 132-I) published 22 July 2009, para 164

³ Ibid

⁴ Ibid

⁵ Ibid

⁶ POCA, s.340 (3)

In preparing their Report, the House of Lords sought advice from Mr McGovern of Lloyds on the manner in which shipowners deal with payments of ransom. His evidence was that: *“As a general principle, [...] insurers do not get involved in negotiating with pirates and do not get involved in making payment. Insurers stand behind the insured and provide, after the event, indemnification for the insured’s loss.[...] the Proceeds of Crime Act and any terrorist financing legislation would not therefore apply to the transaction between the insurer and shipowner because that is a transaction between legitimate parties for a legitimate purpose”*.⁷

However, the House of Lords have expressed concern at this position and state *“in every case of piracy where a ransom has been demanded and the payment is being assembled in the United Kingdom, those involved have in our view a duty to seek consent for the payment of a ransom. Not to do so is likely to result in the commission of a criminal offence”*.⁸ This consent is required in order to provide a defence to the money laundering offence under the POCA.

The Home Office has stated that in the event that consent is not sought, it is unlikely that any prosecution would follow, on the basis that such a prosecution would not be in the public interest. However, the House of Lords do not agree, and state, *“where an offence has been committed, prosecutors retain a discretion not to prosecute where a prosecution is not in the public interest; they do not have a discretion to announce in advance of the commission of a class of offences that no prosecution is likely to be brought if the offence is committed. This is simply encouraging lawbreaking. So long as a failure to obtain consent results in an offence, it must be prosecuted. If prosecution is not thought desirable, then the law must be changed”*.⁹

This suggests that, if a cautious approach is to be taken, the consent of SOCA should be sought under s.338 of POCA where a ransom has been demanded and the payment is being assembled in the UK. *“Not to do so is likely to result in the commission of a criminal offence. We regard it as an abdication of responsibility by the Home Office to suggest otherwise.”*¹⁰

2. Terrorism Act 2000 (“TA”)

Under the TA there are various offences which could be relevant to the payment of ransoms, all of which involve raising or handling funds which are likely to be used for the purposes of terrorism.

- S.15(3) - providing money or other property in the knowledge or with reasonable cause to suspect that it will or may be used for the purposes of terrorism.
- S.17 - entering into or becoming concerned in an arrangement as a result of which money or other property is made available to another, with knowledge or reasonable cause to suspect that it will or may be used for the purposes of terrorism.
- S.62 - there is extra-territorial jurisdiction over these offence so that even if they are committed outside of the UK, a person can still be prosecuted for the offence in a UK Court.

At present the Government view is that, after examining *“intelligence for evidence of links between piracy and terrorism at the highest level. To date we have no evidence that terrorists are using piracy as a means of raising funds”*.¹¹ It seems that this conclusion draws upon a fundamental concept of the present trend in piracy off the coast of Somalia, that being that it is undertaken for personal gain, not for any political or public motivation.

However, this view is not shared by the House of Lords who take the somewhat more realistic view that *“there is a serious risk that a significant proportion of money paid to pirates as a ransom could be used for the financing of terrorism”*.¹²

It has been suggested by the International Maritime Bureau that whilst piracy in most hotspots such as the Malacca Straits and the Gulf of Aden are not linked to terrorism, many if not most attacks off West Africa (in particular Nigeria) are indeed linked to terrorism - and fuelled by terrorist motives. The conclusion of the Home Office is therefore that, to avoid committing such an offence, *“anyone involved in the provision of a ransom payment must satisfy themselves that there is no reasonable cause to suspect that the money or other property will or may be used for the purposes of terrorism”*.¹³

⁷ HL Paper 132-I, Para 165

⁸ Ibid, Para 173

⁹ Ibid, Para 172

¹⁰ Ibid, Para 173

¹¹ The Government reply to the 19th report from the House of Lords European Union Committee Session 2008-2009 HL Paper 132

¹² HL Paper 132-I, Para 166

¹³ Supplementary memorandum (3) by HM Treasury and Home Office, May 2009, Annex A, paragraphs 13-14

The House of Lords are very critical of this approach as, in their conclusion, if anybody should know whether there is a connection between piracy and terrorism, it is the Government, and they are far better placed to decide whether ransom payments are likely to be used to finance terrorist activities or not.

It therefore appears that the cautious approach again would be to obtain consent before making such a payment as the TA provides that an offence is not committed where one is acting with express consent. *"Anyone involved in the provision of a ransom payment must satisfy themselves that there is no reasonable cause to suspect that the money or other property will or may be used for the purposes of terrorism"*.¹⁴

3. US Executive Order dated 13th April 2010 (Copy Attached)

On 13th April 2010 the United States government published an Executive Order which declares a national emergency and states unequivocally that the US has identified a link between piracy off the coast of Somalia and threats to US national security and foreign policy. As such it seems any ransom payments made to Somali pirates are likely to be "prohibited activities" under the Order and could be subject to fines and criminal sanctions in the US.

Conclusion

There is no suggestion that the making of a ransom payment is currently a criminal offence in the UK, and there is no proposal to criminalise it. However, in every case where a ransom payment has been demanded and those involved in assembling the funds are in the UK, consent should be sought before making a payment in order to avoid the possibility of committing an offence under the POCA.

However the US Executive Order of 13th April 2010 highlights a practical issue with wide reaching implications for those involved in making ransom payments to pirates. Under English law there is at present no indication that the Somalian pirates are anything more than criminals. However, under US law those pirates are deemed a threat to US national security and foreign policy and as such providing them with financial support could be subject to fines and criminal sanctions in that jurisdiction.

The US Executive Order and English law do not sit comfortably with each other, and it seems possible that where parties considered to be involved in ransom payments have a link to the US, or where funds pass through US territory, criminal sanctions could be imposed upon them by the US courts.

¹⁴ HL Paper 132-I, Annex A, Para 14

For further details on this article please contact **Nicholas Woo** on 01473 406368 or nicholas-woo@birketts.co.uk

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THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

April 13, 2010

EXECUTIVE ORDER

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BLOCKING PROPERTY OF CERTAIN PERSONS
CONTRIBUTING TO THE CONFLICT IN SOMALIA

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), section 5 of the United Nations Participation Act, as amended (22 U.S.C. 287c) (UNPA), and section 301 of title 3, United States Code,

I, BARACK OBAMA, President of the United States of America, find that the deterioration of the security situation and the persistence of violence in Somalia, and acts of piracy and armed robbery at sea off the coast of Somalia, which have repeatedly been the subject of United Nations Security Council resolutions (including Resolution 1844 of November 20, 2008; Resolution 1846 of December 2, 2008; Resolution 1851 of December 16, 2008; and Resolution 1897 of November 30, 2009), and violations of the arms embargo imposed by the United Nations Security Council in Resolution 733 of January 23, 1992, and elaborated upon and amended by subsequent resolutions (including Resolution 1356 of June 19, 2001; Resolution 1725 of December 6, 2006; Resolution 1744 of February 20, 2007; Resolution 1772 of August 20, 2007; Resolution 1816 of June 2, 2008; and Resolution 1872 of May 26, 2009), constitute an unusual and extraordinary threat to the national security and foreign policy of the United States, and I hereby declare a national emergency to deal with that threat.

I hereby order:

Section 1. (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any overseas branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(i) the persons listed in the Annex to this order;
and

(ii) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

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(A) to have engaged in acts that directly or indirectly threaten the peace, security, or stability of Somalia, including but not limited to:

(1) acts that threaten the Djibouti Agreement of August 18, 2008, or the political process; or

(2) acts that threaten the Transitional Federal Institutions, the African Union Mission in Somalia (AMISOM), or other international peacekeeping operations related to Somalia;

(B) to have obstructed the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia;

(C) to have directly or indirectly supplied, sold, or transferred to Somalia, or to have been the recipient in the territory of Somalia of, arms or any related materiel, or any technical advice, training, or assistance, including financing and financial assistance, related to military activities;

(D) to have materially assisted, sponsored, or provided financial, material, logistical, or technical support for, or goods or services in support of, the activities described in subsections (a)(ii)(A), (a)(ii)(B), or (a)(ii)(C) of this section or any person whose property and interests in property are blocked pursuant to this order; or

(E) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

(b) I hereby determine that, among other threats to the peace, security, or stability of Somalia, acts of piracy or armed robbery at sea off the coast of Somalia threaten the peace, security, or stability of Somalia.

(c) I hereby determine that, to the extent section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) may apply, the making of donations of the type of articles specified in such section by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to subsection (a)

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of this section would seriously impair my ability to deal with the national emergency declared in this order, and I hereby prohibit such donations as provided by subsection (a) of this section.

(d) The prohibitions in subsection (a) of this section include but are not limited to:

(i) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and

(ii) the receipt of any contribution or provision of funds, goods, or services from any such person.

(e) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order.

Sec. 2. (a) Any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

Sec. 3. For the purposes of this order:

(a) the term "person" means an individual or entity;

(b) the term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(c) the term "United States person" means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States;

(d) the term "Transitional Federal Institutions" means the Transitional Federal Charter of the Somali Republic adopted in February 2004 and the Somali federal institutions established pursuant to such charter, and includes their agencies, instrumentalities, and controlled entities; and

(e) the term "African Union Mission in Somalia" means the mission authorized by the United Nations Security Council in Resolution 1744 of February 20, 2007, and reauthorized in subsequent resolutions, and includes its agencies, instrumentalities, and controlled entities.

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(OVER)

Sec. 4. For those persons whose property and interests in property are blocked pursuant to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render those measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to section 1(a) of this order.

Sec. 5. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA and the UNPA, as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the United States Government consistent with applicable law. All agencies of the United States Government are hereby directed to take all appropriate measures within their authority to carry out the provisions of this order.

Sec. 6. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to submit the recurring and final reports to the Congress on the national emergency declared in this order, consistent with section 401(c) of the NEA (50 U.S.C. 1641(c)) and section 204(c) of IEEPA (50 U.S.C. 1703(c)).

Sec. 7. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to determine that circumstances no longer warrant the blocking of the property and interests in property of a person listed in the Annex to this order, and to take necessary action to give effect to that determination.

Sec. 8. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 9. This order is effective at 12:01 a.m. eastern daylight time on April 13, 2010.

BARACK OBAMA

THE WHITE HOUSE,
April 12, 2010.

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THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release

April 13, 2010

ANNEX

Individuals

1. Abshir ABDILLAHI [born circa 1966]
2. Hassan Abdullah Hersi AL-TURKI [born circa 1944]
3. Hassan Dahir AWEYS [born 1935]
4. Ahmed Abdi AW-MOHAMED [born 10 July 1977]
5. Yasin Ali BAYNAH [born circa 1966]
6. Mohamed Abdi GARAAD [born circa 1973]
7. Yemane GHEBREAB [born 21 July 1951]
8. Fuad Mohamed KHALAF [born circa 1965]
9. Bashir Mohamed MAHAMOUD [born circa 1979-1982]
10. Fares Mohammed MANA'A [born 8 February 1965]
11. Mohamed SA'ID [born circa 1966]

Entity

1. al-Shabaab

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