

Piracy

Issues arising from the use of armed guards

March 2010



Despite the flurry of hijackings at the beginning of 2010 pirate activity levels in and around Somalia are down compared to 2009. The real test will come in April and May as the weather improves in the Somali Basin. No one is complacent and the tragic events on the *Win Far 161*, where it is reported that two crew members died during the long hijacking, have reminded everyone that for all the talk of codes of conduct, there is a ruthlessness to the Somali pirates which means that the safety of crews cannot be taken for granted. There is no doubt that the increased vigilance and activity of crews continues to be the best deterrent against hijacking. The latest advisory from the US Maritime Administration (albeit aimed at US vessels) implores ships to “*demonstrate a willingness to defend yourself*” and “*..... not to surrender immediately at the first sign of a threat.*”

With one notable exception (the *Bow Asir* released after 15 days) the benchmark period for capture remains around two months, though some vessels, such as the *Ariane* and the *Win Far 161* were held for over seven and ten months respectively. The published ransoms have hit new heights (the *Pramoni* reported to have paid US\$7.5m), meaning that the reward side of the equation rises inexorably. However, the risk of arrest and prosecution seems to have diminished. Despite dozens of pirates being captured by patrolling naval vessels there appears little political will to see them prosecuted.

By the end of the summer 2009 the success rate for the pirates had fallen. One of the main reasons attributed for this was the ability of the crews involved to evade capture, despite a clear increase in the aggression being shown during attacks. The efforts of the crew of the *Zhen Hua 4* and more recently the *BW Lion* perhaps a template for how crews can defend their vessel against pirates, and they are joined by countless others who through vigilance and good drills have seen off determined attackers. Only some 22% of ships saved from pirate attack relied on naval intervention, although the presence of a number of warships is no doubt acting as a deterrent, particularly in the Gulf of Aden, where the EU Group Transit Scheme is regarded as the best option open to owners. However, the success rate rose dramatically in October/November where just under one in three vessels attacked in the Indian Ocean were hijacked. To be safe there is a argument that the Best Management Practice Guidelines should be adopted in all areas of the Indian Ocean.

The debate on the issue of arming men on board vessels and the role of private security companies is ongoing. The case for armed guards seems to have hardened in recent weeks and months perhaps in part because of the reluctance to arrest and prosecute pirates and the fact that the naval forces are unable to stop the attacks entirely. Gone are the days when the pirates merely shot ahead of the ship or into the hull. Now reports of RPG rounds being fired into accommodation areas are common and there have been several exchanges of fire with armed guards..

The potential escalation of the use of force remains one of the bed rocks of the argument raised against the use of armed guards on ships. By employing armed guards on board a vessel an owner is making a calculated trade-off: a perceived decrease in the risk of the vessel being hijacked and the subsequent exposure to the losses this brings, against a possible increase in the chance of the crew being harmed or the vessel damaged.

The call for armed guards has been supported by military commanders including Admiral Gortney, the US Commander of the Combined Maritime Forces, who suggested that *“shipping companies must take measures to defend their vessels and their crews”*. This message was repeated recently and given new focus through the issuing of a Maritime Security Directive by the US government, forcing US ships to have security teams on board in high risk areas.

The IMO is actively engaged in discussing the issue of armed guards on ships but their official position remains against their use, fearing it will lead to an escalation of violence and loss of life, and instead calling for greater direction from Flag States. The British government has made it clear that they disapprove of armed guards and have said that authorisation would not be given (see MGN 298). However, UK law does allow for ships to have a shotgun or single shot rifle on board where a permit has been given.

The role of the private security contractor is one that has been examined in some detail in Iraq and whilst

accepted by governments and the commercial world, there is no definition of their status in international law. Further, the confusion of how the law of self defence should work in a hijacking scenario also gives rise to uncertainty. There are a number of key issues to consider when contemplating the use of armed guards.

1. Who are armed guards?

The number of companies that offer maritime security has increased dramatically. Many existing companies providing corporate security ashore have moved into the maritime sector. Many more appear to have been established to cope with demand. The boast of years of experience is often at odds with evidence of recent incorporation. The lack of an accreditation system means it is impossible for an owner to take an objective view, although there are private initiatives being made to address this.

The ability of an owner to show that he has exercised due diligence when employing armed guards remains important. The security companies may allow owners to see CVs of those being deployed – this is something that should be insisted on, along with confirmation that the guards being deployed have no criminal records and did not leave their respective “military” services for disciplinary or medical reasons. Such background checks may fall within the owner’s duty to exercise due diligence at the commencement of a voyage. This is particularly important as contracts often call for guards to be regarded as crew for insurance purposes.

2. Who is in charge of the ship?

A fundamental question arises as to who authorises the use of force. Significantly, under the contract between owner and security provider, the master may not have control or the final decision in whether weapons will be deployed and used. That decision may rest with the security team, on terms that the master only need be consulted “if there was time”.

In other words, the master may not be in charge of something which relates to the safety of the crew and the vessel. Indeed there may be a contractual obligation for him to obey “security” instructions from the guards which extend to the routing of the vessel, possibly without regard to any contractual obligations to charterers and/or cargo interests.

The use of armed force on a vessel must relate to the safety of the crew and the protection of the environment and yet owners may be forcing Masters to give up that discretion in breach of SOLAS Regulations. This could lead to issues arising under SOLAS, which at Article 34-1 provides:

“The Owner, Charterer, the Company operating the ship as defined in Regulation 1X/1 or any other person shall not prevent or restrict the Master of the ship from taking or executing any decision which, in the Master’s professional judgment is necessary for the safety of life at sea and protection of the marine environment”.

This message is reinforced in the ISPS Code which states:

“At all times the master of a ship has the ultimate responsibility for the safety and security of the ship....”

This was reinforced graphically after the *Maersk Alabama* case where Captain Phillips before the hearing of the Senate Foreign Relations Committee said:

“I am not comfortable giving command authority to others. In the heat of an attack, there can be only one final decision maker.”

His comments seem to support the belief that masters will not be happy to give up any of their overall authority on board.

3. Armed escort ships

A recent development has been the increased use of private gun boats. Using an armed escort in a high risk area may seem easy in theory, but the practicalities are causing real problems as the status of these companies and therefore their vessels is not defined. Interesting questions have been raised both in terms of responsibility to the master of the ship under escort and under international law as, under Article 107 of UNCLOS, power is given only to military vessels to seize ships involved in piracy. Questions have been raised as to where the legitimacy for these private gun boats come from. Some arguments have even arisen as to whether the armed intervention of a gun boat is in itself piracy.

Article 19 of UNCLOS provides the definition of Innocent Passage, stating:

“Passage of a foreign ship shall be considered prejudicial to the peace, good order or security of the coastal state if in the territorial sea it engages in any of the following activities:any exercise or practice with weapons of any kind.”

The provisions on the rights of transit and the regime of local laws as in middle eastern countries make the use of these vessels difficult and controversial. Providing such a service as an agent of a commercial ship owner should give pause for thought.

4. Can they use lethal force?

Any use of arms must be governed by clear Rules of Engagement, yet these are not always forthcoming from security providers. In our view they should be provided. Furthermore, they should be endorsed by the Flag State, whose laws we would expect to govern the use of force in deterring or preventing what is a criminal act. In the UK for example, lethal force is normally only allowed where there is serious and imminent threat to life.

In the aftermath of an attack, questions would be asked about the imminence of an attack and the proportionality of the response. Distinguishing between fishermen armed to protect themselves and pirates intent on hijacking a vessel should be possible but perhaps only at the last moment. As we have seen recently with the Indian naval attack on a Thai fishing

boat, mistakes can be made. Plainly, if it transpires that lethal force is used improperly or illegally, (and hard questions exist as to under which country’s law legality is to be considered), there are likely to be major problems.

Where the Flag State authorises or directs the presence on board of military personnel, these issues may well be more straightforward.

There is some movement in this area in the United States, where proposals have been made that immunisation against prosecution should be given to those who injure or kill a pirate whilst protecting a ship from attack.

5. Who else needs to know?

i) Insurers

Clearly prudence dictates that the use of armed guards should be discussed and agreed with all underwriters. Although not a question of “disclosure” for existing policies which are not being extended or varied, there are many other possible implications. We can envisage arguments that the practice may affect the validity of a policy, and/or the recoverability of a claim under a valid policy. Arguably, this could be the case even if the security providers were on board with underwriters’ full agreement. Where a voyage through pirate-infested waters requires a variation of a policy (for example because it involves a change of trading limits), then disclosure considerations also apply.

ii) Cargo interests

For the reasons given above, damage arising from or caused by the use of armed forces, particularly if the use of that force was negligent or illegal, may give rise to an argument under the bill of lading contract that the vessel was unseaworthy. Informing cargo interests of the intention to arm the vessel should therefore be considered.

iii) Charterers

The security providers are likely to want to agree a route prior to transit of a high risk area. That route may not be the normal or quickest route and may represent a deviation or a failure to use utmost despatch under the relevant charterparty. An unauthorised deviation may mean a breach of the charter and/or contract of carriage which could then jeopardise the P&I cover. There may also be off-hire implications. Interesting questions could arise, for example, if the vessel was taken by pirates whilst deviating.

6. What happens if someone is killed or the ship/cargo is damaged during a hijack as a result of the actions of the guards?

The security contracts may have a “knock for knock” type provision, which means that in the event that a guard or crew member is killed without negligence occurring, then the loss falls where it lies and there is no recourse between owner and the security company. The security company may have some kind of “Public

Liability Insurance” to cover them in cases where there has been negligence. That may not prevent owners being sued by dependants or cargo interests if they think there is fault or some other breach (such as the duty of care under an employment contract) on the part of owners. Anecdotal evidence suggests that there have been attempts to persuade P&I Clubs to agree to treat guards as supernumeraries and therefore be covered as if they were crew.

7. Citadels

The recent case of the *Ariella* (and before that the *Theoforos P*) highlighted the use of a “Citadel” by the crew when faced with an attack. The Citadel is best described as a designated secure area, such as the steering gear flat, where the crew go in the event of a successful boarding by pirates. Food, water and communications equipment can be placed there to sustain the crew and allow them to talk to naval forces. Their use raises real issues. Despite the publicity surrounding the *Ariella*, this is not a case which somehow vindicates their use. It is not at all clear that

this was a rescue in the true sense and it remains highly improbable that a military operation would be launched if there were pirates on board even if the crew were locked away. There has been at least one documented instance where the pirates have shot through a citadel door, killing a crew member. Various industry sources and the military themselves are advising against their use in a hijacking.

Conclusion

The issue of using armed guards on board vessels will continue to be debated. The key concern for owners is to ensure the safety of their crew and their vessels. In doing so it is vital for owners, charterers and underwriters to review all provisions in their charters and policies and ensure adequate attention is paid to the questions raised. The international law making fraternity is currently dealing with jurisdictional issues, but it will soon need to address more formally the status of private security companies and their role in support of legitimate operations. Other issues may arise out of individual contracts and we would be happy to review these.

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