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**WHAT A SHIPOWERNER NEEDS TO KNOW WHEN CONSIDERING
THE USE OF ARMED SECURITY GUARDS**

PIRAEUS
JUNE 9, 2011

History

- Piracy is an age old problem
- Barbary Coast pirates preyed upon shipping in the Mediterranean Sea from 16th through 19th centuries
- 800,000 Europeans captured and sold as slaves
- Annual tribute and ransoms paid by England, U.S., and other maritime nations
- 1796 - U.S. paid \$1 million tribute / ransom to Algiers to free dozens of enslaved American merchant seamen
- U.S. Navy waged two wars against Barbary Coast pirates in 1801 -1805 and 1815 to eliminate payment of tribute and open trade for U.S. shipping in Mediterranean
- Royal Navy bombarded Algiers in 1816 & 1824
- France conquered Algeria in 1830 to end Barbary Coast piracy



Somalia: An international problem

2010

- 219 attacks off Somalia
- 49 vessels were hijacked
- 1,016 people taken hostage
- Average ransom was \$5.4 million per ship in 2010 (compared with \$150,000 in 2005)
- Estimated annual cost of piracy was \$5 - \$8 billion
- Individual Somali pirate's earnings were anywhere from \$33,000 to \$79,000

2011

- No sign of any let up
- Some 33 vessels already hijacked this year and 26 currently held
- 758 hostages taken and 522 at present
- 7 murders committed by Somali pirates - 3 crew on board the *Beluga Nomination* and 4 killed on yacht *Quest*
- Ransoms increasing – \$9 million for SAMHO DREAM
- Average hijacking duration reached 214 days
- Anticipated costs to shipowners for having 3 – 5 armed guards on each ship could reach \$100 million

Sources: IMO, ICS, ICC & Seamen's Church Institute



Armed guards - Introductory considerations

- Presence of armed guards on board the vessel does not prejudice P&I cover, but certain risks may fall outside the scope of cover based on the terms of the contract entered into with Private Security Company (PSC)
- Operational decision to enter into such an agreement with PSC after making a thorough risk assessment
- Please leave sufficient advance time for security services contract to be negotiated (10 days)
- Consult with Flag State authority
- Best Management Practices 3 - still very important
- Consult a lawyer to assist with contract negotiations and to assess potential liabilities and exposures
- Advise charterer and cargo interests to ensure that any existing contractual relationships are not prejudiced
- Vet contract with your insurers



Good starting points

- IMO Guidance to shipowners on use of privately contracted armed security personnel when transiting high risk areas – issued on May 23, 2011- See American Club Circular No. 18/11 dated June 3, 2011
- Flag State Guidance
 - Recent IMO recommendations to Flag States regarding use of armed guards (also dated May 23, 2011)
 - Liberian Bureau of Maritime Affairs previously issued detailed guidance on use of PSCs



Armed guards & flag state considerations

Ask Flag State:

- Whether it is legally permissible for it to allow armed guards on their vessels
- Whether the Flag State requires any licenses or permits for the carriage and/or use of weapons
- Whether it has any Rules of Engagement / Rules on the Use of Force guidance
- Provide your P&I Club with Flag State's written response



P&I cover & flag state considerations

- American Club Rule Book, Class I, Rule 1, Section 4(14)(v) provides:

“The Member must comply or procure compliance with all statutory requirements of the State of the insured vessel’s flag...”

- Prerequisite to P&I Cover
- No Flag State approval means no P&I cover
- May also prejudice shipowner’s other insurances



Flag state laws & armed guards

Yes - States that allow use of armed guards

U.S.A., Norway, Hong Kong, India

No - States that prohibit use of armed guards

France, Greece, Germany, Japan, U.K.

The Neutrals – not recommended nor prohibited

Panama, Bahamas, Liberia, Marshall Islands, Denmark

SOURCES: ICS & Lloyd's List

Flag state considerations rules of engagement / use of force

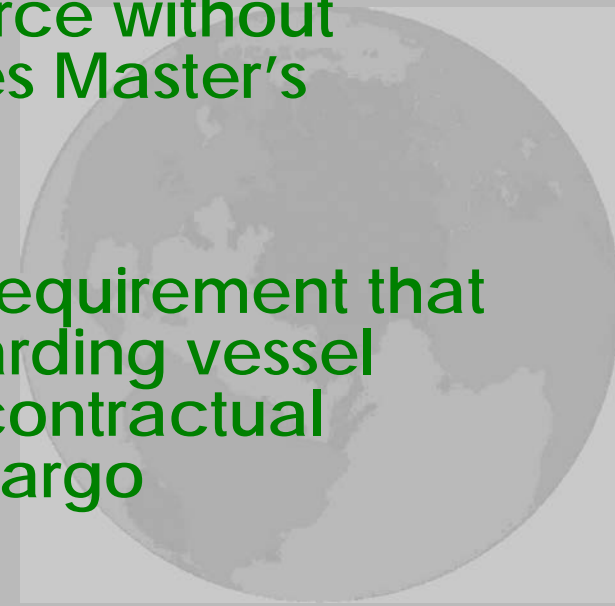
33 U.S.C. §383 (1819) U.S. anti-piracy statute provides: "The commander and crew of any merchant vessel of the United States ... may oppose and defend against any aggression, search, restrain, depredation, or seizure, which shall be attempted upon such vessel ..."

U.S. Coast Guard Authorization Act of 2010 – Section 912 removes liability for monetary damages for injury or death caused by the use of force to defend a U.S. flagged vessel against an act of piracy – use of force rules must be followed for this immunity to apply

U.S. and U.K. law - Deadly force may be used only when one has a reasonable belief of imminent danger of death or great bodily harm

Who is in charge?

- Who ultimately authorizes the use of force on a vessel?
- PSCs may try to insert a contractual clause that authorizes security team to use force without Master's prior approval – displaces Master's authority
- Contractual clause may impose requirement that Master obey PSC instructions regarding vessel course – may prejudice owner's contractual obligations to charterers and/or cargo



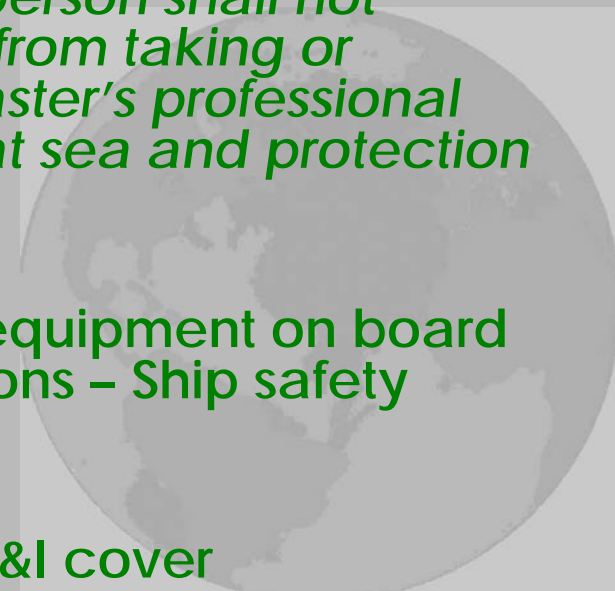
Who is in charge? – SOLAS considerations

Who is in charge during a piracy attack?

- SOLAS Regulation 34-1:

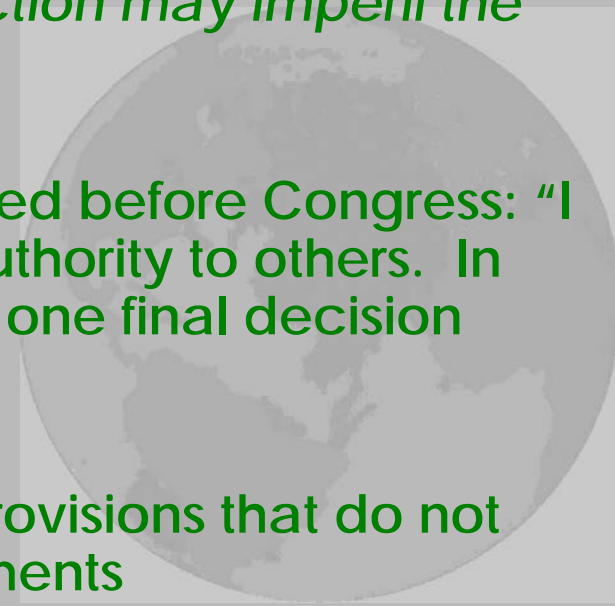
The owner, the charterer, the company operating the ship as defined in regulation IX/1, or any other person shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master's professional judgment, is necessary for safety of life at sea and protection of the marine environment.

- Make sure the number of men and / or equipment on board the vessel do not breach SOLAS regulations – Ship safety certificate
- Infringement of SOLAS could prejudice P&I cover



Who is in charge? – ISPS code

- ISPS code, section 4.10: *“At all times the Master of a ship has the ultimate responsibility for the safety and security of the ship. Even at security level 3 a Master may seek clarification or amendment of instructions issued by those responding to a security incident, or threat thereof, if there are reasons to believe that compliance with any instruction may imperil the safety of the ship.”*
- Capt. Phillips of MAERSK ALABAMA testified before Congress: *“I am not comfortable giving command authority to others. In the heat of an attack, there can be only one final decision maker.”*
- P&I Club will not authorize contractual provisions that do not comply with ISPS / SOLAS / Flag requirements



Compliance with BMP3

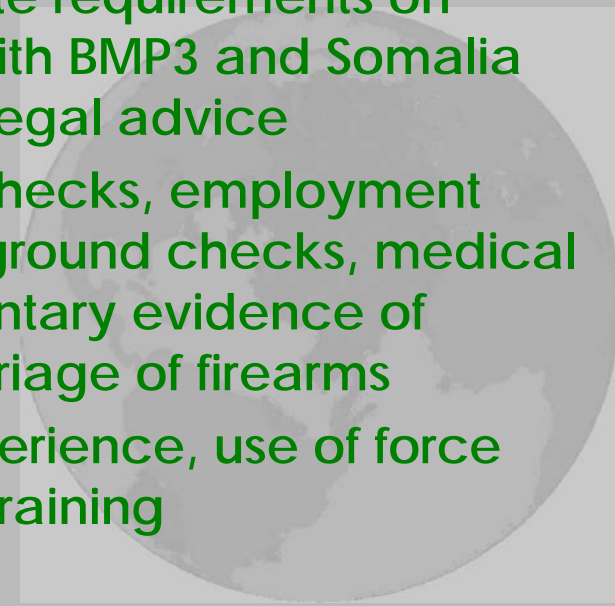
- Armed guards are not a substitute for following BMP3, proper crew training, or contingency planning
- Owners should ensure that PSC is trained / intimately familiar with BMP3
- Owners should coordinate effective training between Master, crew, and security company personnel – SOPs for PSC and crew, designation of roles and responsibilities, engagement protocols, records and reporting
- Failure to comply with BMP3 can have serious consequences may prejudice P&I cover if vessel is captured
- Cargo or other interests may argue that vessel was unseaworthy - undermines efforts to obtain contribution from cargo towards ransom or general average



Criteria for selecting security company

PSC selection criteria – see IMO guidance to shipowners

- *General* – company structure, financial position, extent of insurance cover, senior management experience, ISO accreditation
- *Background Information* – maritime experience, written procedures, understanding of Flag State and coastal State requirements on licensing / carriage of firearms, familiarity with BMP3 and Somalia based piracy threat, references, access to legal advice
- *Selection / Vetting* – criminal background checks, employment history, military and law enforcement background checks, medical / physical / mental fitness records, documentary evidence of certification and experience to use and carriage of firearms
- *Training* – records of training, shipboard experience, use of force training, specific firearms training, medical training

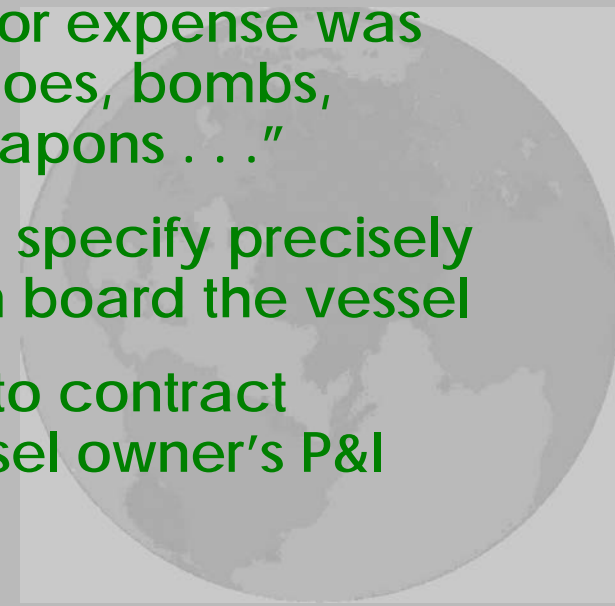


Weapons to be used by PSC - P&I policy exclusions

American Club 2011-2012 Rule Book, Class I, Rule 3, Section 1 provides:

“There shall be no right of recovery from the Association in respect of any liabilities, costs or expenses ... when the incident giving rise to the liability, cost or expense was caused by the following: Mines, torpedoes, bombs, rockets, shells, explosives or similar weapons”

- Request the security company to specify precisely what weapons will be brought on board the vessel
- Failure to address this issue prior to contract execution might prejudice a vessel owner's P&I cover



Weapons to be used by PSC

Pistols, rifles, automatic weapons (lower caliber)

OK

RPGs, grenades, rockets, shells (large caliber)

Not OK



Weapons : licensing issues

- Owner's obligation to make sure any weapons carried on board are properly licensed
- Port of embarkation of guards, transit (canal authorities), coastal states, anchorage / mooring, port of disembarkation
- National laws of the country where the security company is based
- Many of the top recipient ports for U.S. food aid – Djibouti, Port Sudan, Dar Es Salaam and Mombasa – have vessel firearms prohibitions which effectively preclude use of PSCs
- Failure to properly license can subject Master / crew to civil and/or criminal penalties - likely not covered by P&I cover
- American Club Member Alert issued regarding recent developments in South Africa



Weapons : licensing issues

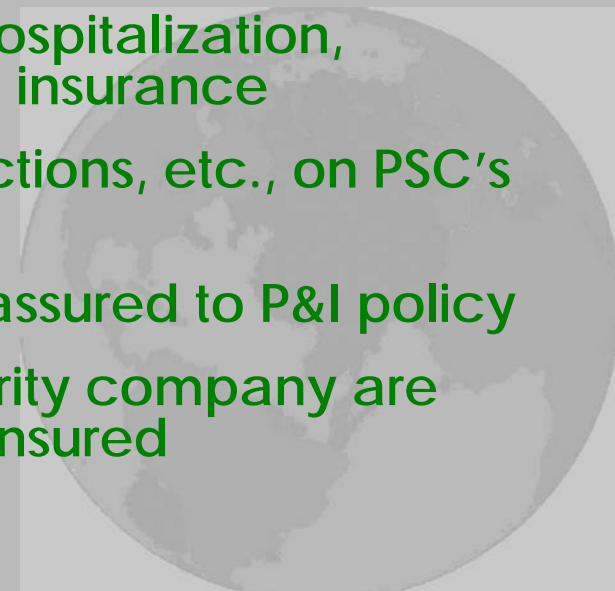
Recommendations:

- Include a clause in contract that requires security company to take the lead to obtain all required licenses at all relevant ports / jurisdictions
- Require continuing obligation for such compliance
- Request proof of such licensing compliance from security company



PSC's insurance cover

- Request PSC's Insurance Cover Note
- General third party, public, professional liability insurance to an appropriate level
- Maritime employers liability / workers compensation
- Personal accident, medical expenses, hospitalization, emergency evacuation and repatriation insurance
- Make sure there are no limitations, restrictions, etc., on PSC's cover
- PSC should not be added as additional assured to P&I policy
- Contractual indemnities offered by security company are worthless if company is not adequately insured



Contractual provisions that might prejudice P&I cover

- “Knock for Knock” clauses - each party agrees to be responsible for loss / damage to its own property, and injury / death to its employees
- Indemnity provisions - broad-sweeping indemnities can be disguised as Knock for knock – read them carefully!
- Avoid clauses containing exceptions for “reckless” or “grossly negligent” conduct
- Waivers of rights of recourse or subrogation
- Additional assureds

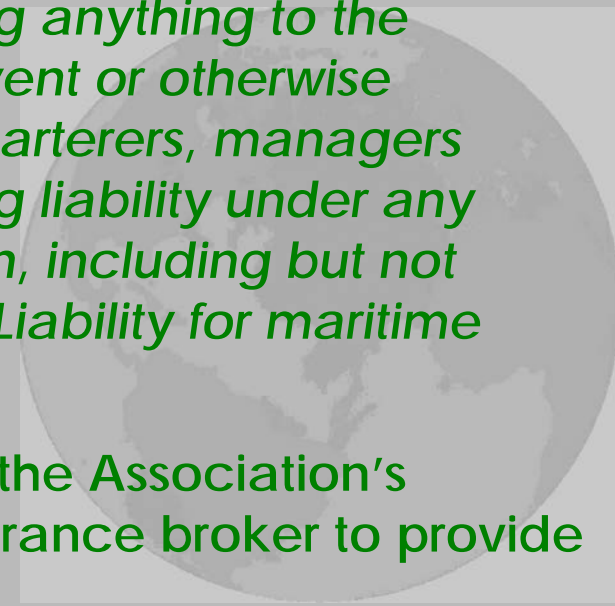


Contractual indemnities

- American Club 2011-2012 Rule Book, Class I, Rule 3, Section 2(8) excludes cover for: “There shall be no right of recovery from the Association in respect of . . . liabilities, costs and expenses which would not have arisen but for the terms of a contract or indemnity entered into by a Member, unless those terms have been expressly approved in writing by the Managers.”
- Poolability of major incidents is prejudiced under the IG Pooling Agreement which excludes liabilities, costs or expenses stemming from:
 - Contractual indemnities where owner assumes responsibility for liability that it would not otherwise be liable
 - “Knock for Knock” provisions are acceptable so long as vessel owner’s rights to limit liability have not been waived
- Efforts have been made with PSC community to agree on a standardized services contract but this is still in draft form – MARSEC 2011 form contract being reviewed by IG Maritime Security Subcommittee

Shipowner's right to limit liability

- Include language that specifically reserves this right
- Indemnity or “knock for knock” provisions may be deemed to act as a waiver of this fundamental right
- To be on the safe side, request the following provision to be included in PSC contract: *“Notwithstanding anything to the contrary herein, nothing shall restrict, prevent or otherwise prejudice the rights of owners, insurers, charterers, managers and/or operators of the vessel from limiting liability under any applicable law or international convention, including but not limited to the Convention on Limitation of Liability for maritime Claims, 1976 (London).”*
- If forced to agree onerous terms, contact the Association's Underwriting Department and/or your insurance broker to provide additional cover to plug any gaps



Overkill?



Is this due diligence?



Just right?



Are unarmed guards the better option?



Arguments for the use of armed guards

- Complementary solution to multinational naval coalition
- Creates a “harder” target for pirates
- ICS press release acknowledged benefit of using PSCs
- Shipowners should retain all options to deter piracy attacks, defend its crews and vessel
- Armed security is preventive measure to avoid high costs associated with post-hijacking efforts (negotiators, ransom, rescue attempts, etc.) and the need to transit longer routes and saves costs (Cape of Good Hope)
- Many armed guards are highly trained former military personnel
- No vessel with armed guards has ever been hijacked
- MAERSK ALABAMA targeted again by pirates on March 9, 2011 but warning shots fired by armed guards foiled the attack



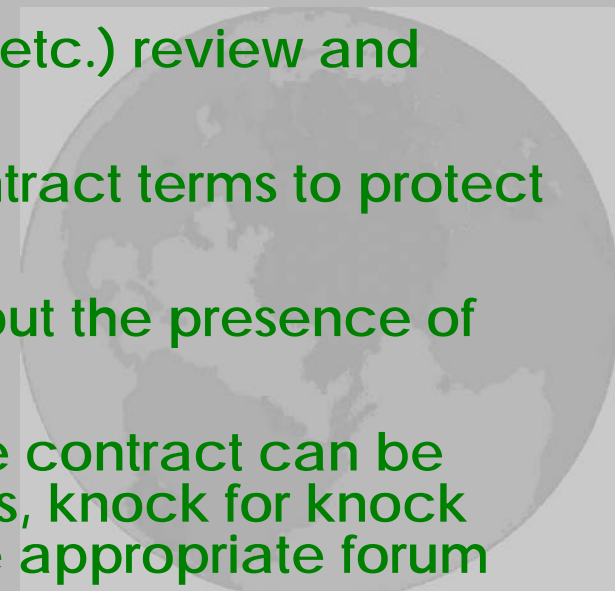
Arguments against the use of armed guards

- Inability to ensure qualities or standards of PSCs (rent-a-cops)
- Not enough qualified guards to go around
- Unregulated industry
- IMO, IG, BIMCO and Intertanko do not recommend use of weapons
- Private contracts make it easier for PSCs to evade compliance with applicable laws leaving shipowners to be ultimately responsible
- Uncertainty about rules on the use of force and potential criminal liability of PSCs and shipowners
- Will escalate violence and prompt pirates to be more aggressive in future attacks and treatment of existing hostages
- Quagmire of various countries' laws regarding possession or licensing of weapons carried on board vessel
- Complicates shipowner's existing insurance coverages



Conclusion

- Perform a thorough risk assessment on whether armed guards are needed
- Contact your Flag State authority
- Use due diligence when selecting a PSC
- Provide draft PSC services agreement to your P&I Club (at least 10 days before execution)
- Have your other insurers (H&M, War Risks, etc.) review and approve the agreement
- Get independent legal advice on the contract terms to protect your interests
- Advise charterers and cargo interests about the presence of armed guards
- Check whether some of the clauses of the contract can be improved to avoid ambiguous indemnities, knock for knock clauses, preserve right to limit liability, use appropriate forum selection and choice of law clauses



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