

# Piracy – Armed Security Pitfalls

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# Agenda

- Introduction
- Legal Impediments
- Government Focus
- Current Developments



# Introduction

- *M/V Maersk Alabama*
- *M/V Liberty Sun*
  - Attacked two days after Capt. Phillips rescue
  - Threats to U.S. merchant mariners
  - No boarding – but vessel was shot up



# Legal Impediments – Liability

- No question that there is a legal right for a U.S.-flag merchant vessel to protect itself if attacked.
- Interestingly, the law also provides a financial incentive to U.S. vessels to capture pirate ships as they receive the proceeds from the sale of such ships.
- The U.S. statute dates from 1819 and provides:  
"The commander and crew of any merchant vessel of the United States . . . may oppose and defend against any aggression, search, restrain, deprecation, or seizure, which shall be attempted upon such vessel . . ."

# Legal Impediments – Liability

- The ancient origin of the right of self-defense, combined with the relative absence of modern piracy affecting U.S.-flag ships, results in a lack of precedents or guideposts on tort liability.
- The 1819 statute has not been the subject of judicial interpretation since 1864.
- Measures common in 1819 – such as routinely arming the vessel and the crew with cannon, muskets and edged weapons – have become very uncommon.



# Legal Impediments – Liability

- The international community has also been against fire arms on commercial vessels.
- For example, International Maritime Organization guidelines strongly discourage the carrying and use of fire arms for self-defense.
- The February 2009 collection of best anti-piracy management practices adopted by INTERTANKO, ISC, BIMCO and others indicates that unarmed guards are at the discretion of the owner, "but the use of armed guards is not recommended."
- Therefore, ship owners risk being second guessed in U.S. and foreign courts for self defensive measures that were common in 1819.

# Legal Impediments – ITAR

- Department of State's International Traffic in Arms Regulations (ITAR) generally prohibit the taking out of the United States of virtually all defense articles including fire arms.
- In theory, a ship owner could get a temporary license, but to obtain such a license it was thought to require proving that it was lawful to take the arms to all ports to be visited – which is a daunting task.
- There is also a personal weapons exemption – but that was also thought to be too narrow as it had been interpreted to require personal use and therefore made it difficult to deliver the weapons to a professional security team.

# Legal Impediments – Foreign Laws

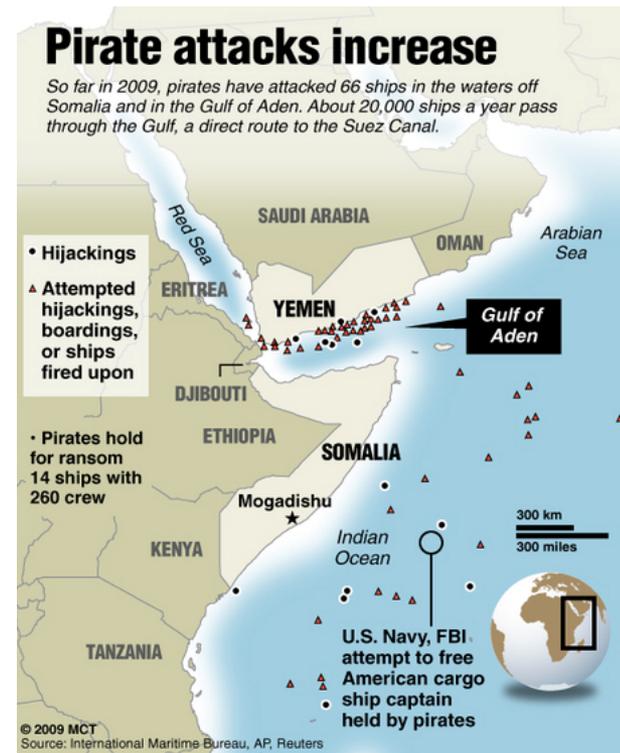
- Although many foreign governments permit fire arms aboard vessels if they are declared and secured, some countries have outright prohibitions or licensure requirements that are onerous.
- Some countries impose fees that make the carriage of fire arms cost prohibitive – especially in east Africa.
- For example, one north east African country has recently adopted a fee of \$15,000 per month for any armed security team transiting their country.
- Undoubtedly, similar fees will spring up as U.S. ship owners request permission to bring fire arms aboard their ships into foreign ports.

# Legal Impediments – Other Issues

- In addition to issues relating to tort liability, arms export controls and foreign government restrictions, there are a number of other issues impinging on arming U.S.-flag vessels.
- For example, it has been suggested that all armed teams have Transportation Worker Identification Credentials (TWIC) cards.
- Although this requirement has receded, it may be replaced with training and certification requirements that impede the use of armed security teams.

# Government Focus

- These and other issues have come into sharp focus since the April 2009 attacks on U.S.-flag ships.
- Several Congressional hearings were held including in the Senate Foreign Relations Committee, the Senate Commerce Committee and the House Transportation & Infrastructure Committee.
- And the Coast Guard, State Department and other agencies have been working to make it easier for U.S.-flag vessels to embark armed security teams when the circumstances warrant.



# Current Developments – Liability

- The liability problem remains a live issue.
- At least one suit has arisen in a U.S.-flag piracy context where a MAERSK ALABAMA crew member sued the vessel owner and operator in June for knowingly sending him into dangerous waters.
- Insurance entities, such as protection and indemnity clubs, have also provided some helpful guidance but left the door open for denying coverage where fire arms are used.
- For example, The American Club indicated on June 2 that "intervention by armed guards could result in prejudice to cover if their use is in breach of Flag State, Port State or other applicable legal prohibition."

# Current Developments – Liability

- Congress has responded to the liability problem with at least two proposals, both introduced by Congressman LoBiondo of New Jersey.
- The first of those bills (H.R. 2984), patterned on the post-9/11 measure permitting airline pilots to be armed, limits the liability of owners, operators and masters when complying with standards (to be written) authorizing force.
- The second bill (H.R. 3376) goes a different direction and grants blanket immunity vis-à-vis pirates (versus the crew or bystanders) to any person "who uses force . . . to defend a vessel of the United States against an act of piracy."
- Congress has not yet acted on either bill.

# Current Developments – ITAR

- One area where progress has been made is with respect to ITAR.
- First, we understand that a temporary license now only requires an affirmation of compliance with local laws and at least one ship owner has obtained a license.
- Second, we further understand that the State Department has confirmed that the personal weapons exemption can be utilized by the vessel owner and the weapons can be employed by a contracted security team.
- Third, the Coast Guard has confirmed that arming U.S.-flag vessels abroad with foreign acquired fire arms is ITAR compliant.

# Current Developments – Foreign Laws

- In recognition of the difficulties U.S. ship owners are facing and of the historic mission of the Navy to protect U.S.-flag ships, Cong. Cummings of Maryland offered an amendment to the DoD Authorization bill which was accepted and which passed the House on June 25.
- The Cummings Amendment requires the Secretary of Defense to provide embarked military security teams to U.S. commercial vessels operating in high risk areas and determined to be at risk of being boarded.
- As there is no companion provision in the Senate passed bill, the Cummings Amendment is the subject of ongoing conference report consideration.

# Current Developments – Foreign Laws

- The Navy opposes the Cummings Amendment arguing that it does not have the resources to provide the needed security teams and that ship owners should provide for their own protection.
- U.S.-flag ship owners have pointed out that only a very few teams are needed as only a very few vessels traverse the dangerous waters.
- U.S.-flag owners have also pointed out that all six of the top recipient ports for U.S. food aid – Djibouti, Port Sudan, Dar Es Salaam, Mombassa and Durban – have vessel fire arms prohibitions which effectively made having private armed security impossible.

# Conclusion



- U.S. flag ship owners continue to face significant hurdles in arming their vessels.
- The fate of the Cummings Amendment hangs in the balance over the next few weeks.
- Questions?