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Legal and practical concerns of maritime defense

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The threats to private shipping from pirates have given rise to an industry of armed guards aboard private ships—which in turn give rise to legal considerations and controversy among shipping organizations regarding whether to use armed force in the first place. This article touches on a few of the legal considerations by attempting to address, in part, a checklist of legal concerns published by the Swedish Club which is a marine mutual insurer, headquartered in Göteborg, Sweden. Piracy & armed guards: General overview (Member Alert, 21 April 2011) http://www.swedishclub.com/upload/Loss_Prev_Docs/Piracy/PIRACY_and_USE_OF_ARMED_GUARDS_-_General_overview.pdf, hereinafter cited as “Swedish Club Article.”

Other sources for this article and cited herein or referenced in acronyms are: Christian W. J. Cartner, John A. C. Cartner, and Richard P. Fiske, *Defending Against Pirates: The International Law of Small Arms, Armed Guards and Privateers*. (“Defending Against Pirates”), the International Convention for Safety of Life at Sea (SOLAS), the United Nations Convention for Law of the Sea (UNCLOS), and the International Maritime Organization’s (IMO) MSC.1/Circ.1405/Rev.1/Annex 16 September 2011 (“MSC Annex”).

At the outset, it is important to note that we

are neither discussing a sovereign warship and its crew nor a land-based contractor working for the United States within a sovereign nation. An armed guard aboard does not enjoy the protections of sovereign immunity. A private ship is *res* (or extraterritorial property), with a license from a flag state where the ship is registered. Even with contemplated changes to flag state statutes or SOLAS, the armed guards will not be treated legally with the protections afforded military personnel. Additionally, law, regulation, and conventions vary during steps of the voyage as the armed guards embark from, pass through, and disembark at different “jurisdictions.” Accordingly, as we turn to the Swedish Club’s checklist, we consult laws of flag states, the laws of the armed guards’ employer (for purposes of this article, the United States), port and coastal states, and UNCLOS and SOLAS, among other authorities.

Is it legal for there to be armed guards aboard the vessel?

It depends on the laws of the flag state, the law of the nation where the ship owner is located, and the location of the ship during its voyage. “Flag states appear to be becoming more open to the deployment of armed security guards on board vessels, although in as

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regulated a manner as possible.” Swedish Club Article at 1-2. Similarly, whether and what types of firearms may be carried on board depends on analysis of the particular law in question. Some legal regimes are more stringent or regulate use of armed guards without specifically prohibiting or permitting the use. *Id* at 2. The answer also depends on the “law of the state where the vessel’s Owners and/or Managers are incorporated or have their seat of commercial operations.” *Id* at 2-3.

During the voyage, “the law of the coastal states and/or ports where the vessel will call apply. Article 17 of UNCLOS entitles a merchant vessel to innocent passage through the territorial waters of a coastal state” and “gives coastal states the authority to exercise criminal jurisdiction over a foreign flagged vessel in certain exceptional circumstances. These include where the consequences of a criminal act extend to the state in question, and where the criminal act disturbs either the peace of the country or the good order of the territorial sea. Some coastal states may well consider the death of a pirate as a result of defensive action taken by a merchant ship to fall within one or both of these categories.” *Id* at 3.

The laws of the relevant coastal state will also regulate the types of weapons which may be carried on board a vessel calling at a particular port, what weapons are banned, need to be declared, or are subject to strict storage requirements. Swedish Article at 3. Among other legally protective acts, therefore, the Master and security team should document the carriage and management of firearms and ammunition from embarkation to disembarkation. IMC Annex at 3.4.

Are all concerned parties aware of the licenses required?

The weapons carried on board must comply with the regulations and licensing requirements of (a) the flag state; (b) the port of embarkation; (c) all areas of transit; (d) any ports at which the vessel will moor; and (e) the port of disembarkation. Swedish Club at 3. And in contrast to some military operations, the process should

be transparent. The armed guard documentation should include licensures and proof of compliance with the relevant flag, coastal and port State legislation and relationships. IMC Annex at 3.4.2.

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Additional considerations for a United States security company include, but are not limited to the following: International Trafficking in Arms regulations (ITARs), Department of State Directorate of Defense Trade Controls (DDTC) for export of weapons and defense services.² A U.S. citizen and company also must comply with the Foreign Corrupt Practices Act and consider its exceptions for permits, licenses, or other official documents or to facilitate or expedite performance of a “routine governmental action.” 15 U.S.C. § 78dd-2.(b) Other U.S. agencies and law apply to licensure for export of weapons and other issues related to maritime defense.

In the event of pirate attack, what are the rules of engagement and use of force?

Rules of engagement and use of force depend on the flag state, the law of the state where the vessel’s owners and/or managers are incorporated or have their seat of commercial operations, and coastal and port states. Swedish Club Article at 4-5. A complete understanding of the rules for the use of force should be agreed among the ship owner, private security company, and master to prevent boarding using the minimal necessary force. E.g., MSC Annex at 3.5 (Rules for the Use of

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Force). It is important to document full compliance with these rules, and such documentation should include recording instances of use of force. *Id.* at 3.6 (Reporting and Record Keeping.)

Will the presence of armed guards adversely affect insurance coverage?

“Whether a particular policy is affected by the presence of armed guards will depend to a large extent on the specific [insurance] policy terms. Further, the International Group of P&I Clubs has said, in its ‘Piracy FAQs’ issued on 2 June 2009, that whether any cover is prejudiced will depend on an analysis of the loss and causation on a case by case basis.” Swedish Club Article at 5. If the use of armed guards breaches law or regulation, or fails to comply with SOLAS Regulations and the International Ship and Port Facility Security Code (ISPS Code), insurance coverage may be prejudiced. Swedish Club Article at 5.

Other considerations both for insurance coverage and best management practices include vetting the private security management company and the armed guards. Documentary evidence may include security company maritime experience, written procedures, understanding of flag state, port state and coastal state requirements with respect to carriage and usage of firearms. Other needed documentary evidence is that firearms are procured, transported, embarked and disembarked legally and a documented understanding of best management practices, ship protection measures, and access to legal advice (e.g. in-house counsel/external legal advisers) on a 24/7 basis. Other evidence may be the backgrounds of armed guards and their vetting process.

Have all concerned parties been informed of the decision to use armed guards?

The Swedish Club suggests that owners “inform Charterers, cargo interests and their own insurers about any decision to deploy armed guards.” Swedish Article at 6.

Conclusion

The Swedish Club writes:

“As mentioned at the beginning of this Alert, the issue of whether to deploy armed guards as a way of combating piracy is a controversial one. This does not, however, mean that it should be dismissed by Owners. Rather, a careful consideration of the key questions set out in this memo, together with an analysis of any contract to be entered into for the provision of security services, will enable an Owner to take such a decision in as prudent a manner as possible.”

Swedish Club Article at 6.

Prudence is also the best legal practice. The law varies by jurisdiction and practice. The master, not the armed guard, is the ultimate authority aboard a ship, and he will place safety before security. A change in standard contracts from this concept of master authority in favor of security could lose insurance coverage. And a change from best practices and full compliance with the varying laws could lose an armed guard’s freedom to criminal charges or lose a ship owners property to civil liability.

Endnotes

1. Treaties and statutes should be consulted for any in depth discussion. Additionally, the positions of different countries, shipping organizations, and the statutes of flag states are changing weekly. This article, indeed, will be outdated by the time it is published. For example, recognizing the urgent need for change, IMO has recommended Governments, particularly coastal and port States bordering high risk areas, have in place policies and procedures which facilitate the movement of armed guards and their equipment. MSC.1/Circ.1408 16 September 2011. If the Governments follow these recommendations, then it may ease carriage of armed guards and for them to embark and disembark at those ports.

2. DTTT rules about defense services will change. April 13, 2011, DDTT published a proposed rule (76 Fed. Reg. 20590-20593) to amend the ITARs regarding defense services and to clarify the scope of activities that are considered a “defense service.”