



## Shipping and Insurance Update Piracy

**July 2011**

The recent surge in piracy around the world has compelled the U.S. and the International community to clarify the legality of the use of force in any defense against piracy, in particular due to the increasing use of privately contracted security teams embarked onboard vessels transiting high-risk areas. This results from the fact that while there have been broad international efforts to curb piracy by providing naval patrols to high risk areas, these efforts have been largely ineffectual, as the number of successful piracy attacks has risen steadily.

### **What is the U.S. position on use of force against piracy?**

#### **(a) Original Legislation**

The United States has long recognized the legitimacy of the use of force by U.S. owned vessels in deterring or repelling unlawful attacks. In fact, in 1819, Congress enacted a statute entitled "Resistance of Pirates by Merchant Vessels" (33 U.S.C. § 383), which remains in effect today and which provides that the master and crew "of any merchant vessel of the United States, owned wholly, or in part, by a citizen thereof" have authority to "oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel." This statute, and the right of self-defense and defense of others to ward off any attack continue to be the underlying standard for the use of force in the defense of U.S. vessels from unlawful seizure.

#### **(b) Port Security Advisory of June 18, 2009 (3-09)**

More recently, on June 18, 2009, the United States Coast Guard (USCG) and the Department of Homeland Security (DHS) issued The Port Security Advisory (3-09) "Guidance on Self-Defense or Defense of Others by U.S. Flagged Commercial Vessels Operating in High Risk Waters." This advisory provides guidelines and contains standard rules for defense against piracy. The advisory states that the captain and crew should take into consideration the means, opportunity, and actions of the attacker(s) when determining the necessary use of force.

When considering the use of force, important factors include, but are not limited to, the pirates' use or possession of weapons and the seriousness of the physical threat. The use of deadly force is allowable in cases of self-defense or defense of others where there is reason to believe that there is imminent danger of death or great bodily harm. The use of non-deadly force is allowable in the defense of the vessel or property. Retreat to a "safe room" is a possible alternative to the use of force. A "warning shot" is allowable as a way to signal a vessel to stop, but (somewhat surprisingly) the advisory states expressly that it is not an acceptable way to signal the imminent use of force. The need for and authority for the use of force is to be determined by the vessel's master, and only force that is reasonably necessary under the circumstances should be used. The advisory states that it provides

guidance, and does not prescribe rules of engagement or mandate specific actions. The advisory only applies to U.S. flagged commercial vessels not entitled to sovereign immunity. The advisory does not establish new standards or duties with respect to the right of self-defense or defense of others.

### **(c) Coast Guard Authorization Act of 2010**

Subsequent to the issuance of PSA 3-09, in 2010, H.R. 3619 the "Coast Guard Authorization Act of 2010" (46 U.S.C § 8107) was signed into law. Section 912 of this law provides that those defending by force "a vessel of the United States against an act of piracy shall not be liable for monetary damages...if such force was in accordance with standard rules of the use of force." Subsequent to the passage of the Act, pursuant to subsection (c) of section 912, the USCG and DHS sought comment from representatives of industry and labor to determine whether the 2009 advisory (PSA 3-09) provided an adequate framework for standard rules for the use of force for self-defense of vessels of the United States. In a Notice of Policy issued on July 6, 2011, the USCG and DHS confirmed that the advisory provided adequate guidance on conduct relating to section 912 of the H.R. 3619 and 33 U.S.C § 383 "Resistance of Pirates by Merchant Vessels." Thus the vessel, crew and contracted security personnel using force which is in compliance with the guidelines set forth in PSA 3-09 will have immunity from awards of monetary damages in claims arising from the use of such force.

### **Does the U.S. recognize the Use of Contract Security Personnel?**

The United States does recognize the use of contract security personnel, and has specific requirements for their use. Security personnel are referenced in Port Security Advisory (PSA) 3-09. The advisory holds that they have the same rights to use force against piracy in self-defense or defense of others as any other crewmembers, but must act, like the crew, under the direction and the authority of the master of the vessel. The U.S. Coast Guard released a further PSA (5-09) on July 24, 2009, which laid out the basic guidelines for the hiring and use of contract security personnel. Security personnel are expected to possess a Transportation Worker Identification Credential (TWIC), the issuance of which is dependant upon meeting the immigration and nationality requirements prescribed in 49 C.F.R. § 1572.105. The advisory holds that the security personnel shall have the sole intent to protect the vessel and crew against attack and boarding, and shall have no other duties that would conflict with this purpose. The advisory also requires that security personnel be fluent in English and capable of properly communicating with crew and authorities. Security personnel should be appropriately licensed and bonded, and have undergone some form of security training or equivalent experience to properly perform their duties, as directed in 33 C.F.R. 104.220. When considering the hire and use of security personnel, the owners and operators of the vessel should refer to the Marine Security Directive 104-6, which requires the creation of a piracy specific Vessel Security Plan, dictating additional security measures to be employed in high risk areas, and which could include embarked security personnel. More detailed information on the use of security personnel can be found in PSA 5-09, 33 CFR part 104, and MARSEC Directive 104-6.

### **What is the U.S. position on the Use of Firearms aboard U.S. Flagged Vessels?**

U.S. operators or persons carrying, possessing, or transporting firearms aboard U.S.-flagged vessels in any location must comply with all applicable laws, including state laws, the Gun Control Act, the National Firearms Act, and International Traffic in Arms Regulations (ITAR) found in 22 C.F.R parts 120-130. On September 3, 2010 the U.S. Coast Guard released Port Security Advisory 4-09. The advisory outlines relevant U.S. laws on the matter and discusses ITAR. The advisory states that for US flagged vessels, "the most flexible ITAR solution would be for the vessel operator to obtain a DSP-73 temporary export

## Further information

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license, which would allow the vessel to import and export the listed firearms into and out of the United States over a four year period." The temporary license would not allow the weapons to be transported to other vessels, and would not apply to weapons purchased overseas. Another option, is the "personal use exemption" under 22 C.F.R § 123.17, this allows U.S. persons to export up to three non-automatic firearms and one thousand rounds of ammunition, not greater than .50 calibre, for personal use. Security personnel using firearms must be trained and licensed to use their firearms: U.S. citizens must meet the standards of 18 U.S.C § 922 (g) and foreign citizens must meet equivalent standards. When operating a vessel with firearms onboard, the owners and operators must be aware of and comply with all local laws that apply to different ports, as U.S. law may not offer protection abroad.

## Summary

- Although the Port Security Advisories issued by the U.S. Coast Guard and the Department of Homeland Security do not include any directive or requirement for the use of outside contracted security forces, the advisories do contemplate that U.S. owned and flagged ships can and will use such services.
- Contracted security personnel and the crew may, under circumstances or pursuant to guidelines directed by the Vessel's master, use force, including deadly force, in the defense of the ship and the lives of those onboard. Provided such force complies with the standard rules for the use of force, those using force shall not be liable for monetary damages in any suit brought in the United States.
- Contracted security personnel shall be properly trained and in all respects comply with U.S. regulations (such as those found in 33 C.F.R. 104) and other directives, and must at all times be in compliance with U.S. firearms laws.

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