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## Divided we will fall

HERE was a collective sigh of relief in most shipping circles last month when the IMO's Marine Environment Protection Committee adopted the Energy Efficiency Design Index and Ship Energy Efficiency Management Plan as measures to reduce greenhouse gas emissions from ships. It allayed fears that the IMO would go empty-handed to the upcoming UN Framework Convention on Climate Change meeting in Durban in December. Those technical and operational measures are necessary but not sufficient to prevent demands for

further action to curb the industry's carbon dioxide emissions. Discussions about market-based measures are continuing at the IMO. There is still some resistance to any market-based measures in the shipping industry. The prospect of the European Union unilaterally imposing a regional market-based measure on the shipping industry is real.

This fear has prompted strenuous efforts by the International Chamber of Shipping to head off such a move. President Spyros Polemis, writing to European Commissioner Connie Hedegaard, and ICS secretary-general Peter Hinchliffe in a speech in Hamburg, have pressed the commission not to include shipping in the European Union emissions trading scheme.

The ICS has come out clearly in favour of a bunker levy rather than emissions trading as the least worst option. Most other shipping organisations have so far remained on the fence. The commission says that it has not yet made up its mind about what measures it favours for shipping. Political moves for market-based measures are not going to go away and the commission will maintain pressure on the IMO to come up with a consensus position on market-based measures.

No one in shipping wants to see any unilateral

imposition but the ICS effort will not convince the commission to pull back. The ICS view is at least putting forward a positive and not a purely negative position. It might do the industry overall a favour if a few more shipping organisations came out with a positive stance to demonstrate that the industry recognises the reality that it will have to accept some form of market-based measures reflecting its wider climate change responsibilities.

## No excuse

GIVEN the way in which a shortage of containers last year helped push up freight rates it was entirely predictable that whatever direction markets were heading, lines would warn that shortages would feature again this year.

However, this is unlikely to come to pass. Container production was ramped up in 2010, following an almost-complete hiatus the previous year, in reaction to inventory restocking which took carriers, box lessors and box manufacturers by

surprise. But there is a time lag. While it is important to remember that demand for boxes often bears little causal relation to container freight rates, it is also true that the two are correlated.

Freight rates have dropped precipitously because the demand is not there to fill up all the new tonnage that has entered service, while demand for boxes has slipped because overall freight demand has. It is growing, but not at expected levels.

Since the box shortage of last year, lines and lessors have used every tactic to increase box capacity. Large orders have been placed this year with manufacturers, principally by leasing companies; lines and lessors have entered into sale and leaseback deals; and all parties have extended container lifetimes.

Warnings about box shortages will now appear to shippers to be little more than scaremongering. Shippers also understand the need for higher freight rates and increased market stability, and it appears the only way this will be achieved is through reduced capacity. Whatever the prospect of reduced market share, container lines have to consider laying up vessels to return to profitability. ■

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### Industry Viewpoint



JOHN AC CARTNER

**Government response to piracy remains patchy and unconvincing, while the underlying problems remain**

# Two tides are turning

MA YBE two tides are turning. Piracy seems to be declining — depending on the scale one uses for calculating. One would be fatuous to think armed guards are responsible simply because another tide is turning.

Some flag state's policies on armed guards seem to be on a trickling flood. These are no spring tides. Neither the tepid utterances of the International Maritime Organization nor the acts of states flagging most ships are realistic. Without the blessings of good laws the situation with owners has reached the tipping point.

The speed of commerce has exceeded the speed of thought of bureaucrats and legislators.

Estimates vary as to how many vessels are carrying armed guards off East Africa. Some sources place the proportion as great as 40%; others have lesser fractions.

It appears though that either with occasional, quite mild flag-state grudging approvals or ostrich-like hiding, vessels are carrying armed guards. Those which carry them report no hijackings and few incidents.

Why the lack of flag state enthusiasm? There is a pervasive fear that there will be an erosion of the monopoly on violence states enjoy. States exist to control. The situation now is uncertain and therefore difficult to control. Hence, the conservatism, scuttlebutt, rumour and fear-mongering of loosing cowboys, gun-slinging buckaroos and latter-day Rambo's going berserk on our ships.

The matter also has some basis in legal theory. The armed guards remain private and liable. Such laws create a special class of private actors and foster private behaviours which may or may not be under the control of governments and therefore the rule of law.

But the fact of greater import is that governments refuse to place regular military persons aboard private ships to defend them. Those kinds of guards are immune if acting within their scope of duties. Part of the refusal is political and lies in the nature of vessels which are not extraterritorial possessions but extraterritorial private chattel usually owned by those not of the flag state.

States are in the dilemma of protecting property of those not its citizens with public monies or of performing traditional flag state duties of protection. The states' dilemma therefore become the owners' dilemma of great magnitude. It almost dictates self-help.

Neither are the cowboys and buckaroos thoughts unfounded. There have been abuses of the private system and there will continue to be abuses until that endeavour cleans up. However, unless flag states make clear and unambiguous rules of law to regulate armed guards, the invitation for deviate behaviour is open to the aggressive class.

This further means that the order of the armed guards remains with their company managements with little binding government guidance. This is a tricky and untenable proposition which will in the end fail.

In such situations states have a record of tending to overreact and harshly so.



A fraction of ships are carrying armed guards with apparent good effect in the short term. *Nato*

They go against the easy targets — owners, masters and guards whom they can reach. Pirates are hard to reach, especially when dead.

Some commentators have noted that owners are hiring mercenaries. That is not the case for private armed guards. Under the Mercenaries Convention, mercenaries must have the backing of a sovereign and be involved in meddling in the affairs of another sovereign.

Private guards may meddle in state affairs but they are not yet state-backed and therefore not mercenaries.

So states still walk a quite thin and excursive line. Matters are evolving but await real cases to see how things will turn out. I am not hopeful it will be good for either states or armed guards as things stand now.

States have only themselves to blame. Had the rational thing been done — placing state-employed entities on state-flagged vessels to keep the contracts flag states have traditionally had with their merchant ships — the situation would not have evolved as it has.

After getting over the out-of-sight and out-of-mind mentality and setting aside wilful blindness, some states have sent ineffective and extraordinarily expensive naval ships and their accoutrements to keep trade going.

Sovereigns with few exceptions simply cannot afford that today. Further, neither the despatching states nor the underfunded naval forces done a very good job of it. It makes one curious as to the reasons for the Second World War

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knee-jerk response of sending in the heavy guns for a great deal of money when a few good men well-placed for a few pounds could have done the job.

These are the ambiguities of the evolving New World Order one must conclude even though we are still muddling through.

Where does this put us? A fraction of the ships are carrying armed guards with apparent good effect in the short term. However the majority of ships have no flag state policies as to the use of armed guards. The fraction carrying guards under even vague forms of law — most of which rest on after-the-fact concepts of self-defence — are perhaps in a slightly better position for owners and guards than vessels flagged in states having no policies. The problem remains: self-defence is argued in court after charge for an armed guard or master or owner.

A good law would protect these parties against their molestation of putative pirates and preclude charges. Weak laws are as bad in these cases as no law because the new and weak laws are untested. The old laws have been around and have been tested. Some states have put out a path for owners to follow — then strewn it with quicksand.

So the armed guards debate continues. The success in suppressing pirates on individual ships is fairly clear. The success of the current regime of patchwork laws, old laws and wilful blindness will not work in the long run.

Again, where is the IMO? It is putting out bland memoranda from London. The matter of armed guards has not been resolved and this developing part-solution may end up being as bad as no solution. Yet, dum spiro spero. ■ *John AC Cartner practices law in Washington and London. He is the principal author of The International Law of the Shipmaster (Informa) and contributing author to Defending against Pirates: The International Law of Small Arms, Armed Guards and Privateers (Intershipmaster Press: www.Intershipmaster.com)*

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### Maritime Blogspot

## Things must get worse before they get better

CLAY MAITLAND

THE true state of the world economy was shown on August 1, with the release by JP Morgan of a series of indicators making up the global manufacturing purchasing managers' indices.

These, to make a long story short, fell from a level of 52.3 in June to 50.6 in July, their lowest level in two years. In China, the PMI slipped for the fourth month in a row, falling 0.2 percentage points to 50.7.

European results were to the same effect, with the eurozone PMI confirming earlier estimates showing that it fell to its lowest level in two years.

And you say we're not in a recession?

You also say that this has nothing to do with shipping, and that the coast is clear for another ordering spree?

My grandmother had an expression, apparently born of experience in at



Maitland: the global manufacturing purchasing managers' indices have hit their lowest level in two years.

least one World War: "Things must get worse before they get better."

Granted that this is the wisdom of the knowing, why is there so little of it in our industry?

It is very clear that the worst part of shipping's current recession is not yet upon us; it is also apparent that many of us have not taken a close look at the implications.

Given the shortage of capital, and the problems that many companies now face, we can expect a decline in the quality of newbuildings, reflecting narrower margins of quality dictated by a lack of cash.

The implications for marine safety are obvious, and call for our careful attention. The worst of this market is indeed yet to come. ■

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