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## The future of KG funds

**T**HERE has been considerable speculation about the future of German KG funds as a source of finance for shipping investments following the financial crisis and the meltdown in the container market in 2009.

The famous German dentists are keeping their money in their pockets or investing it elsewhere.

KG investors, seeing their returns disappear as vessel earnings crashed, are understandably reluctant to put any money into further shipping projects, though many were persuaded to pump more of their

hard-earned euros into existing funds that needed restructuring.

From a peak in 2007 when KGs raised some €3.2bn (\$4.4bn), last year KG fundraising only reached €711m. Investors stumped up an additional €286m to restructure existing funds but only a handful failed completely.

Despite the collapse in new fundraising there is still an estimated about €21bn invested in more than 1,200 active KG funds. Fundraisers have turned their attention away from containerships towards bulk carriers and specialist tonnage. Even then, some funds got their fingers burnt from the failure of Korea Line, which chartered KG financed bulk carriers.

On Monday, a KG fund confirmed it is to finance a pair of 3,800 teu ships to be built in China for owner FA Vinnen to the tune of about €4.6m each. This is the first newbuilding containership project to be funded through KG structures since the financial crisis. This development might generate hopes that KG finance for boxships is set to make a comeback, especially as the container markets are showing signs of recovery.

However, there is no sign of any rapid return of traditional KG finance in the container markets to its

former heights. The banks learnt their lesson and will no longer guarantee finance before KG funding is in place. Most KG funds are producing a positive return for investors but their caution seems set to last for some time. Reports of the death of KG finance are exaggerated. They have not gone away, but any return to levels of finance raised in the heady days of 2007 remains a distant prospect. Owners must continue seeking alternative sources to bridge that gap.

## Antitrust anomaly

**T**HERE is no conceivable way that the European Union is ever going to rescind its ruling on the block exemption from competition regulations that the container line industry used to enjoy.

It is not a decision that can be overturned; as American judge Oliver Wendell-Jones once remarked, a mind stretched by a new idea can never go back to its original dimensions.

So a significant portion of the liner industry now has work without competing companies being able to

discuss market conditions. Has this, as OOCL chairman CC Tung claims, been the cause of the extreme rate volatility seen on the Asia-Europe trade since late 2008?

It is an almost impossible question to answer given that it came at the same time as the maelstrom of the recession, although it is indicative that the transpacific trade was not subject to the same sudden swings.

However, his remarks on the inability of carriers simply to talk have echoes. In the air freight industry, currently subject to a series of price-fixing cases, executives from one airline who have any kind of conversation with those from another have to recount the exact content of the conversation to company lawyers afterwards.

It is an absurd situation, but a goldrush for lawyers — and it is difficult sometimes not to jump to the conclusion that, far from being for the greater good of mankind, antitrust legislation has actually been a massive conspiracy on the part of the legal profession to provide itself with endless, recyclable piles of work. ■

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### Industry Viewpoint



JOHN AC CARTNER

# Do armed guards have a licence to kill?

**Private security options may be gaining popularity among shipowners but the ramifications of an armed guard killing a pirate open up a can of legal worms**

**T**HE question arises: "May a guard contracted to an owner kill a pirate?" The short but accurate answer is "of course".

The consequences of the act are not short — it may stop the parade for the killer and those around him.

The master holds the warrant of the sovereign to enforce its laws on the vessel. He or she is the only person holding a warrant unlimited in scope within the laws of the flag state. Other persons — officers — hold warrants, but their warrants are limited by the laws of the state.

The owner registers his ship with the flag state, which requires a master on board acceptable to it and its laws. No master means no sailing.

The master may delegate his duties but not his responsibilities. Delegation may be to a person competent to accept the delegation. He delegates to the chief engineer the running of the engine department and to the chief mate the running of the deck department when each is hired.

The master may not delegate to a person incompetent legally to accept the delegation. Thus, he or she may not delegate to those not certificated.

Seafarers, cooks, firemen and so forth are hired by the master in one way or another to assist in prosecuting the voyage by providing skilled labour. However, these people may not accept delegation of duties of the master because they are not certificated to do so.

Similarly, passengers, riding crew contractors, stowaways, workaways and the like may not accept the delegation of duties and the master may not delegate to them.

Where does this leave an armed guard?

He or she is not certified and no matter what his or her status as a non-certified person, he or she is incompetent to accept the delegation. A corporation may not accept the delegation for other than a personal services contract, putting the servant in the same position as any other non-delegable person.

The master provides in his or her night orders the statement to the watch officer:



Weapons warning: owners must tread carefully when employing armed contractors. Shutterstock

"If people in funny pirate suits are sighted, call me immediately and call the first officer and advise each of us the situation."

Suspected pirates are sighted by the third officer. He or she follows his orders exactly. The master and the mate appear on the bridge and access the situation. The master then calls the party chief of the armed guards to the bridge and gives a brief on the situation and of the master's intentions.

The master specifically orders the chief officer to advise the contractor that any death occasioned by the contractor is not the company's responsibility or the vessel's responsibility — in writing. The inevitable happens. The suspected pirates get close and a contracted armed guard kills one. What now?

The agreement between the armed guard contractor and the vessel owner cannot contract away a crime. The guard has committed a crime under flag state law.

**"Piracy is a crime of universal jurisdiction; however, the civilised steps of due process, while irksome, prevail"**

The master must enforce the laws of the flag state. As they all have a law against unlawful killing — it is a criminal offence.

The master may neither delegate an unlawful act nor may he delegate to the uncertified guard. There may be defences against the crime such as self-defence and the like.

Further, piracy is a crime of universal jurisdiction; however, the civilised steps of due process, while irksome, prevail.

Nevertheless, a crime has been committed unless there is immunity provided by the state. No prosecutor worth his salt would turn a blind eye to that.

If I were an owner, I would be concerned about this situation. If I were an armed guard I would probably not be for long. At any rate, I would not make a move without a legal opinion and making a record in detail of every decision and its justification. I would do the same thing as master to keep the odour of things at arms length.

The promise of a state not to prosecute a crime before a crime is committed is not immunity from commission of the crime. Hence, the wink-and-nod approach by the trusty prosecutor will not work.

It would seem that simple ways for the scheme to be viable would be either the flag state hiring the contractor and providing immunity where the owner reimburses the state or the state issuing a limited letter of marque. However, a letter of marque usually puts things in prize

court so it may not be the acceptable way to do things. The contractor and its people are not immune from prosecution without cover by the flag state of some sort.

In summary, then, an armed guard contractor has no immunity under contract in a violation of flag state law unless given such by the flag state itself as a sovereign. If the contractor or its employees commit a crime, the crime cannot be merely contracted away as a civil matter. Indeed, for a contract to be valid, it must not be an agreement to commit a crime.

Hence, if any armed guard company proposes killing pirates, it would appear that the contract would be invalid as to both the owner and the contractor.

Further, because no immunity attaches to the person killing, he or she would most likely be prosecuted under flag state law.

In addition, the killer may be prosecuted in his or her state of citizenship. Being on an extra-territorial chattel and killing is still killing. There may be a warrant for arrest at the airport on returning home.

The home state of the contractor has given no licence to kill — the high seas are no excuse either. The killing occurred on the ship under the master's dominion and domain.

Armed guards on board vessels is a can of legal worms, which will not be sorted out in the near future. Contractors should step quite warily.

Owners should be equally aware of the criminal risks that may be involved as accessory to a killing. Those who would wish to kill pirates for sport should be aware of their nakedness to charge of a crime under flag state law.

Where do we go from here? ■  
John AC Cartner practises maritime law in Washington DC. He is also a solicitor in England and Wales and is a certificated and unrestricted master mariner. He is the principal author of *The International Law of the Shipmaster* (2009) Informa [www.shipmasterlaw.com](http://www.shipmasterlaw.com) and is a co-author of *The International Law of the Carriage of Small Arms and Armed Guards for the Defence against Pirates, Intershipmaster Press*

## No extension to high-risk piracy zone

From Tim Springett

SIR, in your story on piracy, you state that the Chamber of Shipping and Nautilus International agreed to extend the existing high-risk zone, which covers the Gulf of Aden, into the Indian Ocean ('High-risk agreement extended to cover whole Indian Ocean', Lloyd's List online Friday March 4, 2011).

This is not accurate. When it met last week, the Warlike Operations Area Committee agreed to leave the high-risk zone unchanged and to designate an area of the Indian Ocean, equivalent to the MTO

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voluntary reporting area, as an "at risk" zone.

The difference in designation is intended to make clear that, while seafarers transiting the high-risk zone in the Gulf of Aden should receive special payments equivalent to 100% of basic pay in respect of the time they are in the zone, this does not apply when transiting the "at risk" zone.

However, as you rightly state, seafarers

will have the right to decline to serve on ships transiting the "at risk" zone if their ships are not observing the industry best management practices to deter piracy.

This represents a welcome endorsement for the best management practices and the role that they play in deterring attacks. ■

Tim Springett  
Head of Employment  
Chamber of Shipping

## NGO Platform proposals on pre-cleaning 'unworkable'

From John Stawpert

SIR, We were nonplussed by the remarks of the NGO Ship Breaking Platform 'Time to come clean on shipbreaking', Lloyd's List, March 4, 2011, which were seemingly reproduced from their response to ICS during the debate at last week's ship recycling forum in Dubai.

The shipping industry, as represented by ICS, does not refuse to accept that clean, green ship recycling is practical, but reasonably contends that the proposals of

the NGO Platform on pre-cleaning are unworkable. If there is any doubt about our commitment to safe and environmentally sound ship disposal then please see the Guidelines for Transitional Measures for Ship Recycling ([www.marsec.org/recycling.htm](http://www.marsec.org/recycling.htm)), which have been prepared for the entry into force of the IMO Ship Recycling Convention. ■

John Stawpert  
Senior Adviser  
International Chamber of Shipping