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Fighting Piracy With Private Security Measures: When Contract Law Should Tell Parties to Walk the Plank

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Fighting Piracy With Private Security Measures: When Contract Law Should Tell Parties to Walk the Plank

Abstract

This Article addresses the following question: when should contract law permit parties to discontinue performance under a private security contract aimed to combat piracy? Piracy has been 'on the rise' off Somalia and in East Asia, with serious attacks escalating. Some shipping companies have responded by drafting 'best management practices', hiring security companies to advise on countering the threat and hiring armed or unarmed security protection. After presenting representative factual situations involving pirate attacks, the Article describes the traditional approach to defining the obligations of parties and the performance issues that arise during contractual performance. This approach takes into account interpretation through reasonable expectations, trade usage and public policy and would deny a party the right to excuse the failure of performance in instances where the particular risk might be categorized as foreseeable or is expressly or impliedly allocated to the contracting party. An excuse approach does not necessarily give the parties guidance as to when security forces onboard a ship attacked by pirates should not attempt to fulfill contractual obligations, perhaps because performance may escalate the risk to employees of both parties due to the particular acts of the pirates. This uncertainty of obligation may lead to escalation of the dangers of piracy necessitating increased use of force or depriving a contracting party of a needed contractual out, leaving the non-performing security provider in breach. After describing and critiquing efforts to combat piracy, the Article provides a contractual analysis of the relationship between the private parties, shipper and security company. It then proposes a approach to the problem of performance that anticipates use of force - one that would hold parties to the security contracts in most circumstances where the response to piracy is likely to be effective, but would allow and perhaps encourage cessation of performance in situations that require a governmental response such that private ordering for use of force is less appropriate, could result in escalation with the pirates or could increase risk to employees or non-pirate third parties. Employing a comparison to domestic robbery, an interpretative approach that favors non resistance when pirates actually board should be not only permitted but encouraged where the risk associated with combating piracy requires a more governmental response and, therefore, responsibility should remain with the Government or international community as a whole. The Article concludes with a discussion of the specific balancing of contractual obligations and public policy and public interest where civilians contract for the use of force implicating the international community's need to maintain peace.

Keywords

Security, Pirates, Piracy, High Seas, International, Contract, Trade Usage, Interpretation, Public Policy, Excuse, Impracticability, Force, Civilians, Maritime

FIGHTING PIRACY WITH PRIVATE SECURITY MEASURES: WHEN CONTRACT LAW SHOULD TELL PARTIES TO WALK THE PLANK

JENNIFER S. MARTIN*

*I'm dishonest, and a dishonest man you can always trust to be dishonest.
Honestly. It's the honest ones you want to watch out for, because you can
never predict when they're going to do something incredibly . . . stupid.*

—Jack Sparrow¹

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1. PIRATES OF THE CARIBBEAN: CURSE OF THE BLACK PEARL (Disney 2003).

INTRODUCTION

On April 8, 2009, Somali pirates² attacked the *Maersk Alabama*, an American cargo ship ferrying food aid to East Africa (the “*Maersk Alabama* Attack”).³ The pirates boarded the ship with grappling hooks and ropes from their skiff.⁴ After one of the crew members stabbed the pirate leader’s hand with an ice pick, the crew convinced the pirates to leave the ship on a lifeboat.⁵ As part of the deal, the pirates took the *Maersk Alabama*’s Captain, Richard Phillips, as a hostage until the crew released one of the pirates it held as a hostage.⁶ When the crew released the pirate hostage, however, the pirates, not surprisingly, did not release Captain Phillips.⁷ Instead, the pirates insisted that the crew of the *Maersk Alabama* follow the pirates in the lifeboat to Somalia.⁸ The conflict led to the arrival of the USS *Bainbridge*, which engaged in negotiations with the pirates for the release of Captain Phillips, and finally, to the shooting of the pirates once the officers on the *Bainbridge* believed that the pirates had decided to kill Captain Phillips.⁹

Similar stories can be told of the other 217 pirate attacks that occurred off the Horn of Africa in 2009, as recorded by the Piracy Reporting Centre of the International Chamber of Commerce’s

2. Article 101 of the Law of the Sea Convention defines piracy to include:

[A]ny illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.

United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; see also BARRY DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY 1–11 (1980) (suggesting that the 1958 articles fail to account for modern aspects of piracy). Pirate ships are those which the persons in control intend to use for the purposes of piracy. UNCLOS, *supra*, art. 103.

3. Sarah Childress & Peter Spiegel, *Snipers Kill Pirates, Save Captain*, WALL ST. J., Apr. 13, 2009, at A1, A10. See generally LAUREN PLOCH ET AL., CONG. RESEARCH SERV., PIRACY OFF THE HORN OF AFRICA 14–15 (2009), available at http://assets.opencrs.com/rpts/R40528_20090928.pdf (describing the attack and response of the M/V *Maersk Alabama*); Mark Mazzetti & Sharon Otterman, *U.S. Captain is Hostage of Pirates*, N.Y. TIMES, Apr. 9, 2009, at A6, A10 (comparing the attack to an attack from a Robert Louis Stevenson novel); Robert McFadden & Scott Shane, *Navy Rescues Captain, Killing 3 Pirate Captors*, N.Y. TIMES, Apr. 13, 2009, at A1, A8 (providing an account of the rescue of Captain Richard Phillips).

4. Childress & Spiegel, *supra* note 3, at A10.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. See *id.* at A1, A10 (reporting that Navy snipers noticed that a pirate had aimed an AK-47 machine gun at Captain Phillips’s back and, thus, concluded that the Captain was in “imminent danger”).

International Maritime Bureau (IMB).¹⁰ In fact, pirates attacked the *Maersk Alabama* again in November 2009, but were unsuccessful after the onboard “security team” responded with small arms fire, evasive maneuvers, and long-range acoustical devices designed to be painful to the ear.¹¹ Vice Admiral Bill Gortney, Commander of the United States General Command, observed: “Due to Maersk Alabama following maritime industry’s best-practices such as embarking security teams, the ship was able to prevent being successfully attacked by pirates. This is a great example of how merchant mariners can take pro-active action to prevent being attacked.”¹²

In another incident, pirates seized the M/V *Theresa*, an attack that resulted in the death of the North Korean captain of the ship, who the pirates shot and killed after he fired a flare gun.¹³ Pirates also launched an attack on the Ukrainian M/V *Juliet* that was unsuccessful after the European Union Naval Force (EU NAVFOR)¹⁴ “Vessel Protection Detachment” that was onboard the ship returned fire.¹⁵ When pirates seized the Spanish fishing ship *Alakrana*, the Spanish government reportedly paid a ransom of more than \$3.5 million.¹⁶

10. ICC Commercial Crime Services, 2009 Worldwide Piracy Figures Surpass 400 (Jan. 14, 2010), http://www.icc-ccs.org/index.php?option=com_content&view=article&id=385:2009-worldwide-piracy-figures-surpass-400&catid=60:news&Itemid=51.

11. See Alan Cowell, *Somalia: Second Attack on U.S. Ship*, N.Y. TIMES, Nov. 19, 2009, at A12 (reporting that four men in a skiff came within 300 yards of the ship); Press Release, Nathan Schaeffer, Naval Forces Central Command, M/V Maersk-Alabama Repels Suspected Pirate Attack (Nov. 18, 2009), <http://www.cusnc.navy.mil/articles/2009/195.html> (providing a synopsis of the attack and noting that this was the second incident involving the *Maersk Alabama* in 2009).

12. Schaeffer, *supra* note 11.

13. See Alan Cowell, *Pirates Attack Maersk Alabama Again*, N.Y. TIMES, Nov. 19, 2009, <http://www.nytimes.com/2009/11/19/world/Africa/19pirates.html> (comparing the *Theresa* attack with the second attack on the *Maersk Alabama*); *Pirates Seize N Korea Tanker Crew*, BBC NEWS, Nov. 17, 2009, <http://news.bbc.co.uk/2/hi/8363922.stm> (noting that Somali pirates began operating in an area off the Seychelles in order to evade naval forces).

14. The European Union Naval Force Somalia is a European Union military mission to protect humanitarian vessels from acts of piracy and sea robbery off the coast of Somalia. See EU NAVFOR Somalia, *About Us: Mission*, <http://www.eunavfor.eu/about-us/mission/> (last visited Feb. 10, 2010) (describing the aim, mandate, operational parameters, and funding of the European Union’s military operation against piracy).

15. *Pirates Seize N Korea Tanker Crew*, *supra* note 13; see also Press Release, EU NAVFOR Somalia, Attempted Hijacking of Ukrainian Ship MV Lady Juliet (Nov. 17, 2009), <http://www.eunavfor.eu/2009/11/attempted-hijacking-of-ukrainian-ship-mv-lady-juliet/> (asserting that the pirates did not realize prior to the attempted attack that a Vessel Protection Detachment was onboard).

16. Cowell, *supra* note 13; see also *Somali Pirates Free Spanish Boat*, BBC NEWS, Nov. 17, 2009, <http://news.bbc.co.uk/2/hi/8364530.stm> (reporting Spanish Prime Minister Jose Luis Rodriguez Zapatero’s statement that the “government did what it had to do”).

Pirates even seized a private yacht, the *Lynn Rival*, with a retired British couple onboard, who are still in captivity.¹⁷

The United Nations Security Council has aided nations in fighting piracy by passing five different resolutions aimed at authorizing nations to patrol the waters off the Somali coast and to pursue pirates, whether on the high seas or in Somali territorial waters.¹⁸ Despite the general utility of these resolutions in permitting nations to police the waters, the nearest patrol vessel was 300 nautical miles away from the *Maersk Alabama* when pirates attacked and captured the vessel.¹⁹ Pirate attacks now occur over an area in excess of one million square miles of ocean.²⁰ Accordingly, patrolling ships will often be too late to help ward off an attack, as vessels under attack typically have less than fifteen to thirty minutes from the first pirate sighting to the time the pirates take the vessel.²¹ Even when military force is used, death of crewmembers or escalation of violence can still

17. See Mohamed Olad Hassan & Jill Lawless, *Pirates Take British Couple to Base, Empty Yacht Found By British Navy*, HUFFINGTON POST, Oct. 29, 2009, http://www.huffingtonpost.com/2009/10/29/british-couple-possibly-k_n_338121.html (stating that the pirates boarded the sailboat at night while the couple was asleep); *Kidnapped British Yacht Couple 'Need Urgent Help'*, BBC NEWS, Jan. 31, 2010, http://news.bbc.co.uk/2/hi/uk_news/england/kent/8489958.stm (reporting that a doctor had visited the captured retirees and that they were being kept in separate locations).

18. See S.C. Res. 1851, ¶ 4, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (calling on states to join together to fight piracy generally); S.C. Res. 1846, ¶ 9, U.N. Doc. S/RES/1846 (Dec. 2, 2008) (encouraging states to address piracy off the coast of Somalia to help food supplies in Somalia); S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008) (advising states to freeze funds to Somalia partly due to pirate activity); S.C. Res. 1838, ¶¶ 2, 6, U.N. Doc. S/RES/1838 (Oct. 7, 2008) (urging states to protect themselves and fight piracy off the coast of Somalia); S.C. Res. 1816, ¶ 2, U.N. Doc. S/RES/1816 (June 2, 2008) (encouraging the intensification of efforts off the coast of Somalia to combat the effects of piracy); see also James Baker, *UN Pledges to Take Fight Against Pirates on to Land; Security Council Passes US-Drafted Resolution to Toughen Stance in Gulf of Aden*, LLOYD'S LIST, Dec. 18, 2008, at 5 (explaining that prior to the passage of Security Council Resolution 1851, states had only a "limited mandate to prosecute pirates"); *RP Deploying Naval Liaison Officers to Work with US Fleet in Rescuing RP Seamen Held Hostage by Pirates*, PHILIPPINES NEWS AGENCY, Apr. 18, 2009, available at <http://www.lexisnexis.com/us/lnacademic> (search for "Deploying Naval Liaison Officers to Work" in Philippines News Agency) (recounting Filipino President Gloria Arroyo's response to pirate attacks on Filipino seamen); Dominic Wabala, *Russia Seeks Go-Ahead With Attack*, DAILY NATION (U.K.), Oct. 23, 2008, <http://www.nation.co.ke/News/-/1056/483372/-/tlh0sq/-/index.html> (discussing Russia's attempts to undertake measures sanctioned by the U.N. Security Council to improve the maritime situation in the Gulf of Aden); Press Release, Security Council, Security Council Decides States, Regional Organizations May Use 'All Necessary Means' to Fight Piracy Off Somalia Coast for 12-Month Period, U.N. Doc. SC/9514 (Dec. 2, 2008); Press Release, Security Council, Piracy Off Somali Coast Not Only Criminal, But Very Successful, Security Council Hears, Cautioned There Could Be No Peace At Sea Without Stability on Land, U.N. Doc. SC/9793 (Nov. 18, 2009).

19. Mazzetti & Otterman, *supra* note 3, at A10.

20. *Id.*

21. PLOCH ET AL., *supra* note 3, at 10.

occur.²² Moreover, while piracy might traditionally have been perceived as attacks focused on taking a vessel and its contents, crews have heightened concerns about modern piracy, including the possibility that pirates will take hostages for ransom.

In addition to the human and military costs of piracy, there are economic costs that affect global trade, including: payments of ransom, damages to ships and cargoes, delays in deliveries, increases in insurance premiums, and measures to secure ships from attack, including private security teams.²³ Recent events suggest that shipowners are either arming or at least considering arming their vessels to thwart pirate attacks.²⁴ Yet, historically, contracts between merchant vessel owners and the security forces hired to combat pirate attacks have contained no absolute guideposts regarding engagement with pirates.

Several maritime organizations have published their own guides for these contracts, but there is no certainty that these standards prevail as a matter of trade usage binding on contracting parties.²⁵ For example, various industry groups banded together to publish best management practices for deterring piracy in the Gulf of Aden and off the coast of Somalia ("Best Management Practices").²⁶ The IMB

22. For example, a French naval attack to free a hostage on a small sailboat resulted in the death of a French citizen during the exchange of fire. *Id.* at 10. Additionally, after the U.S. Navy killed three pirates in order to save Captain Phillips of the *Maersk Alabama*, the pirate leaders vowed to attack and kill Americans in the future. *Id.* at 11.

23. PLOCH ET AL., *supra* note 3, at 12; see also Lawrence J. Kahn, *Pirates, Rovers, and Thieves: New Problems with an Old Enemy*, 20 TUL. MAR. L.J. 293, 316–17 (1996) (discussing the economic effects that pirate attacks have on shipowners). For a discussion of the impact of piracy on maritime insurance and the options that the U.S. Congress might consider to address the situation, see RAWLE O. KING, CONG. RESEARCH SERV., OCEAN PIRACY AND ITS IMPACT ON INSURANCE 1–10 (2009), http://assets.opencrs.com/rpts/R40081_20090206.pdf.

24. See Keith Bradsher, *Rescue Revives Debate Over Arming Crews*, N.Y. TIMES, Apr. 13, 2009, at A8 (considering the role that firearms played in the *Maersk Alabama*'s first attack); *Private Security Firms Join Battle Against Somali Pirates*, FOXNEWS.COM, Oct. 26, 2008, <http://www.foxnews.com/story/0,2933,444103,00.html> (reporting that some maritime organizations have expressed concern about the presence of armed guards on private vessels); David Isenberg, *Yaargh, Here Be Contractors*, CATO INST., (Oct. 24, 2008), available at http://www.cato.org/pub_display.php?pub_id=9748 (asserting that private security contractors "have been working the maritime beat for many years now"). Private security companies like Hollowpoint Protective Services offer both armed and unarmed guards to assist with combating piracy. Hollowpoint Protective Services Homepage, <http://www.hollowpointprotection.com/Maritime.php> (last visited Mar. 29, 2010).

25. See *Anti-Pirate Attack Guidelines Being Ignored, UN Says*, BBC NEWS, Jan. 29, 2010, <http://news.bbc.co.uk/2/hi/africa/8487837.stm> (reporting estimates that up to twenty percent of vessels passing through the Gulf of Aden were ignoring safety advice).

26. See CHAMBERS OF SHIPPING OF AMERICA, BEST MANAGEMENT PRACTICES TO DETER PIRACY IN THE GULF OF ADEN AND OFF THE COAST OF SOMALIA 1 (2009),

published its “Advice to Masters” (“IMB Advice”).²⁷ The International Maritime Organization (“IMO”) published its “Guidance to Shipowners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships (“IMO Guidance”).²⁸ These guides illustrate that maritime organizations consider the ability of private security firms to deescalate violence when pirates successfully board their vessels to be a critical concern. But without clear, uniform standards guiding performance by security contractors, it is doubtful that private security firms will respond uniformly to pirate attacks.

The purpose of this Article is to analyze the potential of using contract law to provide guidance to private security firms engaged in combating piracy. This Article examines how the intersection between international law, maritime law, and contract law presents particular challenges for shipping companies attempting to protect vessels from pirate attacks in the vast area of the seas. Taking the *Maersk Alabama* Attack as a representation of the challenges that face shipowners, private security firms, and the government, this Article employs a typical approach to contractual analysis by interpreting the parties’ agreement in light of trade usage, public policy, and the excuse doctrine.

I conclude that while the existing analyses regarding interpretation may ultimately be helpful in forming an acceptable outcome for security providers and shipowners alike, the traditional excuse doctrine may prove unsatisfactory because it primarily focuses on whether certain risks are foreseeable to the parties and does not readily adapt to situations presenting extreme personal hazards

<http://www.knowships.org/images/Roundtable-Anti-Piracy-Best-Management-Practices.pdf> [hereinafter BEST MANAGEMENT PRACTICES] (naming the following organizations as industry representatives that support these best management practices: the International Association of Independent Tanker Owners, the International Chamber of Shipping, the Oil Companies International Marine Forum, the Baltic and International Maritime Council, the Society of International Gas Tanker and Terminal Operators, the International Association of Dry Cargo Ship Owners, the International Group of Protection and Indemnity Clubs, the Cruise Lines International Association, the International Union of Marine Insurers, the Joint War Committee & Joint Hull Committee, the International Maritime Bureau, and the International Transport Workers Federation).

27. See International Maritime Bureau, ICC Commercial Crime Services, Advice to Masters,

http://www.iccccs.org/index.php?option=com_content&view=article&id=309&Itemid=97 (last visited Mar. 29, 2010) [hereinafter IMB Advice].

28. See INTERNATIONAL MARITIME ORGANIZATION, GUIDANCE TO SHIPOWNERS, COMPANIES, SHIP OPERATORS, SHIPMASTERS AND CREWS ON PREVENTING AND SUPPRESSING ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS 1 (June 23, 2009), http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25976/1334.pdf [hereinafter IMO REVISED GUIDANCE].

to the crew, security forces, and third parties. Moreover, while the excuse doctrine forms a helpful backup for unexpected contingencies, it fails to inform parties about performance standards at the earliest point in performance—where parties require more guidance.

After discussing the importance of balancing the needs to protect the crew and cargo, this Article proposes an analysis that would evaluate the demarcation between functions assumed by private security actors and those functions retained by governments. Such an evaluation requires a contractual interpretation that takes into account developing trade usage concerning the proper role of security personnel. This approach is informed by analogy to the common practices of employees and security personnel hired to protect against armed bank robbery. This analysis is based on an interpretation of risks associated with government functions that are retained by the government in such cases, rather than assumed by private actors. My proposed approach to security contracts involves a novel method of applying contract interpretation doctrine—novel, although it builds on existing doctrine regarding the reasonable expectations of contracting parties and the role of trade usage, as well as government functions retained even where contractors also provide protections. Yet, this approach attempts to remain committed to the ideal that parties will be bound by their agreements. I argue that, using the proposed approach, a conceptually sound application of contract interpretation doctrine can be obtained from existing law that holds private security companies to their bargains in most circumstances, but encourages parties to stand down when the risks associated with responding to a pirate attack are too great.

I. THE PROBLEM OF CONTRACTING FOR THE USE OF FORCE TO COMBAT PIRACY

A. *Crews and Contractors Ready to Defend*

Shipowners and private security contractors are faced with the challenge of protecting ships from pirate attacks under changing circumstances that present risk of personal injury or death to crew and security contractors, as well as the loss of the ship and its cargo. The *Maersk Alabama* Attack is representative of one possible outcome that may occur where a ship's crew successfully fights against pirates after the pirates board the ship. The use of force employed by the *Maersk Alabama* crew led to the taking of Captain Phillips, a standoff

with U.S. Naval forces, and the killing by snipers of the pirates on the lifeboat with Captain Phillips. But the crew's response might have led to a less positive outcome. Protecting themselves and the cargo after the pirate attack exposed the *Maersk Alabama* crew and all others onboard to personal hazard.

Alternative responses and outcomes are presented in other recent pirate attacks. For instance, private security onboard the *Maersk Alabama* thwarted a second pirate attack.²⁹ The owners of the *Lynne Rival* had no onboard security, did not put up resistance, and have been hostages ever since.³⁰ An Italian cruise ship's Israeli security officers repelled a pirate attack by returning fire.³¹ Some crew members have not survived clashes with pirates. As mentioned earlier, pirates killed the captain of the M/V *Theresa* in response to his attempt to send off distress flares.³² The Chief Engineer of the oil tanker *Cancale Star* died and other crew members were injured as the crew successfully fought off pirates.³³ Other freight ships have simply hired security forces that are proactively ready to shoot across the bow or employ non-lethal measures in the event pirates attack.³⁴

B. Combining International, Maritime, and Contract Law and Policy

The framing of a response by shipowners to the threat of piracy depends greatly on, first, the extent to which international law enables nations to successfully battle pirates; second, whether general maritime law allows shippers to engage in self-help to protect crews and cargos; and third, the terms of any agreement made with crew and security teams to protect the ship, cargo, and crew. The threat of

29. See Schaeffer, *supra* note 11; see also Ryan Smith, *Maersk Alabama Attacked by Pirates Again! Private Security to the Rescue, Repels Somali Bandits*, CBSNEWS.COM, Nov. 18, 2009, <http://www.cbsnews.com/blogs/2009/11/18/crimesider/entry5695715.shtml> ("Somali pirates took on the *Maersk Alabama* again Tuesday, but they were met by a private security force which repelled the assault with gunfire and a high-decibel noise device.").

30. See sources cited *supra* note 17 (describing the capture of the British couple who owned the yacht).

31. See *Italian Cruise Ship Fights off Pirate Attack*, L.A. TIMES, Apr. 27, 2009, at A17 (reporting that this incident was one of the first armed exchanges between pirates and a nonmilitary ship).

32. See Cowell, *supra* note 13 (describing the violent attack on the M/V *Theresa*).

33. See *Pirates Kill Sailor in Attack on Oil Tanker off Benin*, BBC NEWS, Nov. 24, 2009, <http://news.bbc.co.uk/2/hi/8376715.stm> (reporting that the pirates who attacked the *Cancale Star* were thought to be from Nigeria).

34. See John Miller, *Loaded: Freighters Ready to Shoot Across Pirate Bow*, WALL ST. J., Jan. 5, 2010, at A18 available at <http://online.wsj.com/article/SB126265833983415885.html> (explaining that, in the past, shipping companies and fishing vessels hesitated to employ armed protection due to fears about liability for damage to freight and vessels).

force and presence of patrols by the U.S. Naval forces, EU NAVFOR, and others has been grounded in the authority granted under several resolutions passed by the U.N. Security Council.³⁵ In particular, the resolutions, since renewed, not only permitted nations an initial twelve-month period to patrol the waters of the Indian Ocean off the Somali coast, but also included provisions aimed at bringing pirates using the territory of Somalia as a base to justice by permitting pursuit of pirates into the territory of Somalia.³⁶ Moreover, the authority included approval of measures targeted at suppressing piracy in Somali waters for a period of six months.³⁷

These U.N. resolutions, though, only pertain to actions taken by nations, rather than actions taken by private parties. With patrols often hundreds of miles away, shippers must also depend on the parameters of statutes and maritime custom and law to determine a course of action. For U.S. flagged ships, the rules of federal maritime law govern shipping contracts—such as those involving charter parties,³⁸ salvage, and insurance—that are not addressed by statutes.³⁹

35. See resolutions cited *supra* note 18. In November 2009, the Security Council restated the challenges involved in dealing with piracy, and renewed and extended for an additional year the authority to enter Somali territorial waters in Resolutions 1846 and 1851. S.C. Res. 1897, ¶ 1, U.N. Doc. S/RES/1897 (Nov. 30, 2009); see also Press Release, Security Council, Security Council Renews for 12 Months Authorization for States Combating Piracy Off Somalia's Coast, Unanimously Adopting Resolution 1897, U.N. Doc. SC/9799 (Nov. 30, 2009), available at <http://www.un.org/News/Press/docs/2009/sc9799.doc.htm> (last visited Feb. 16, 2010) (announcing the Security Council's decision to renew previous authorizations for States and regional organizations cooperating with the Somali Transitional Federal Government to enter Somalia's territorial waters and fight piracy and armed robbery). Commentators have discussed how international law might function to combat modern sea piracy. See Milena Sterio, *Fighting Piracy in Somalia (and Elsewhere): Why More Is Needed*, 33 FORDHAM INT'L L.J. (forthcoming 2010) (urging world powers to confront Somali pirates because "the legal tools needed to capture and prosecute these pirates already are in place"). Compare Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory For Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1 (2007) (arguing that extant international law is sufficient to counter the reemergence of piracy and piratical terrorism), with Ethan Stiles, Note, *Reforming Current International Law to Combat Modern Sea Piracy*, 27 SUFFOLK TRANSNAT'L L. REV. 299 (2004) (concluding that extant international law does not adequately address the modern threat of piracy).

36. See S.C. Res. 1851, ¶ 6, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (stating that states and regional organizations "may undertake all necessary measures that are appropriate in Somalia" for the purpose of combating piracy).

37. S.C. Res. 1816, ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008).

38. See THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 670 (4th ed. 2004) (defining a charter party as "the principal document of the tramp shipping industry"). A charter contract, for instance, effectuates the hire of an entire ship. *Id.* The party chartering the ship is commonly referred to as the charterer or shipper and the party supplying the ship is the carrier or shipowner. *Id.* Different types of charters exist, including time charters, voyage charters, and bareboat charters where the charterer takes control of the ship and mans it with its own crew. *Id.*

Maritime contracts, though, are private agreements, so the parties are generally free to allocate risks by express contract provisions or by trade practices in the shipping industry.⁴⁰ Accordingly, federal maritime law typically embraces the general principles of common law contract.⁴¹

Among the charter clauses that give insight into the obligations of crew and captain are the exclusions for “war risks,” which typically include acts of piracy.⁴² A standard charter clause commonly allows the master of the ship to discharge the cargo even when at sea, if the crew, master, ship, or cargo is subjected to war risks.⁴³ Yet, one important principle accepted under maritime and international law is the recognition of the right of self-defense against piracy.⁴⁴ Piracy is taken so seriously that warships actually have an affirmative duty to suppress piracy.⁴⁵ Private ships also have an affirmative duty to render

39. *Id.* at 108; *see also* *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961) (holding that contracts for hire of ships and sailors are maritime contracts subject to admiralty jurisdiction); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 411 (1866) (holding that a contract of transport on a vessel is a maritime contract within the jurisdiction of admiralty); *Morewood v. Enequist (The Gothland)*, 64 U.S. (23 How.) 491, 492 (1859) (holding that charter parties and contracts for shipping are maritime contracts).

40. *See* SCHOENBAUM, *supra* note 38, at 672 (indicating that, in practice, highly standardized forms are frequently used).

41. *Id.* at 673; *see also, e.g.*, *Navieros Oceanikos v. S.T. Mobil Trader*, 554 F.2d 43, 47 (2d Cir. 1977) (applying contract principle of interpretation against the draftsman); *N.H. Ins. Co. v. Diller*, No. 07-cv-1131, 2009 WL 5171866, at *7 (D.N.J. Dec. 23, 2009) (noting that, although federal maritime rules apply, state law often provides the applicable rule); *Maersk, Inc. v. Neewra, Inc.*, No. 05 Civ. 4356(CM), 2009 WL 5102754, at *19 (S.D.N.Y. Dec. 17, 2009) (finding that admiralty contracts are generally construed like any other contract); *T & O Shipping, Ltd. v. Lydia Mar Shipping Co.*, 415 F. Supp. 2d 310, 314 (S.D.N.Y. 2006) (applying contract law to determine whether a forum selection clause was effective).

42. *See, e.g.*, 2B BENEDICT ON ADMIRALTY Form No. 4-4A ¶ 14(b) (John C. Koster ed., LexisNexis 2009). The standard bareboat charter form includes in the following definition of war risks:

[A]ny war (whether actual or threatened), act of war, civil war, hostilities, revolution, rebellion, civil commotion, warlike operations, the laying of mines (whether actual or reported), acts of piracy, acts of terrorists, acts of hostility or malicious damage, blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the Government of any state whatsoever, which may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the Vessel.

2B *Id.* at ¶ 26.

43. 2B *Id.* ¶ 14(d).

44. The editor's comment to the U.N. Security Council Resolution 1846 observed that “forcible self-defense against pirate attacks is universally permitted under conventional international law.” 6D BENEDICT ON ADMIRALTY Doc. No. 13-14A (Frank L. Wiswall, Jr. ed., LexisNexis 2008).

45. BURDICK H. BRITTIN, INTERNATIONAL LAW FOR SEAGOING OFFICERS 116 (5th ed. 1986).

assistance to other ships in distress, which would surely include helping ships being attacked by pirates.⁴⁶

Pirates are enemies of the human race—*hostes humani generis*—posing a long recognized threat to shipping and commerce.⁴⁷ While international law universally permits forcible self-defense against piracy by private parties,⁴⁸ shipowners, shippers, masters, crew, and security companies must reach consensus about when and to what extent forcible self-defense may be employed. The IMO Guidance, the IMB Advice, and the Best Management Practices not only represent important guides to those planning security and crew responses to piracy, but may eventually support the establishment of some industry trade usage regarding precautions against and the appropriate reaction to piracy at different stages of an attack.

The IMO Guidance addresses the issues raised for shipowners, operators, masters, crews, and security providers by Somali pirates by focusing on prevention.⁴⁹ The IMB Advice mirrors this focus by directly advising vessels to follow the IMO Guidance and to “avoid physical confrontation.”⁵⁰ While the IMO Guidance provides that the decision to follow its guide can only be made by the owners and masters of the vessel, it does make specific recommendations regarding engagement with pirates, weapons, and safety.⁵¹ Specifically, the IMO Guidance approves the use of passive and non-lethal resistance, such as water hoses, netting, long range acoustical devices, wire, and electrical fences.⁵² Regarding firearms and direct engagement, the IMO Guidance is less supportive, warning of the

46. UNCLOS, *supra* note 2, art. 98. For an analysis of international humanitarian conventions that provide legal protection to pirates, see Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1 (2008).

47. E.D. BROWN, *THE INTERNATIONAL LAW OF THE SEA* 299 (1994).

48. 6D BENEDICT ON ADMIRALTY, *supra* note 44; *see also* 33 U.S.C. § 383 (2006) (giving merchant ships of the United States license to oppose and defend aggression); UNCLOS, *supra* note 2, art. 87 (allowing freedom of the seas for purposes of navigation); *Harmony v. United States*, 43 U.S. (2 How.) 210, 236 (1844) (“But every hostile attack in a time of peace is not necessarily piratical. It may be by mistake or in necessary self-defense, or to repel a supposed meditated attack by pirates.”). The U.S. Coast Guard requires U.S. flagged vessels sailing off the Horn of Africa to have an approved security plan. Press Release, United States Coast Guard, Coast Guard Issues Maritime Security Directive 104-6 (May 17, 2009), <https://www.piersystem.com/go/doc/786/271953/>.

49. *See* IMO REVISED GUIDANCE, *supra* note 28, at Annex ¶ 2 (“It is important to bear in mind that shipowners, companies, ship operators, masters and crews can and should take measures to protect themselves and their ships from pirates and armed robbers.”).

50. IMB Advice, *supra* note 27.

51. IMO REVISED GUIDANCE, *supra* note 28, at Annex ¶ 10.

52. *Id.* at Annex ¶ 56–57.

dangers of firearms—both in terms of flammability of cargoes as well as conflict with port rules banning their use—and outright discourages the carrying of firearms for purposes of personal and ship protection.⁵³ The IMO Guidance is open to unarmed security personnel, noting the potential for security advice and enhanced lookout capability, but is more cautious with privately contracted armed security, noting that the presence of such security increases the potential for escalation of violence and other risks.⁵⁴ The IMO guidance advises that if pirates succeed in entering the ship, the crew and master's focus should be on crew safety and maintaining control of navigation.⁵⁵ Moreover, while crew counter-attacks of the type mounted by the crew of the *Maersk Alabama* may at times be somewhat successful, crews should not engage where there is any risk to the crew or where the pirates are armed with weapons.⁵⁶

The Best Management Practices, supported by the vast majority of shipowners and operators, takes a similar approach, reporting that careful planning and passive counter-measures have enjoyed success against pirate attacks.⁵⁷ Recognizing that there is no one approach for all ships and that the master must ultimately decide which measures to employ, the Best Management Practices advise that the use of unarmed guards “is at the discretion of the company but the use of armed guards is not recommended.”⁵⁸ The Best Management Practices encourages the use of passive measures in response to an attack, and in the event that the ship is boarded, recommends offering no resistance, as resistance presents greater risk of violence and harm to the crew.⁵⁹

While this general backdrop of law, policy, and practice begins to sketch the decision-making process that crew and security forces might undertake to counter the personal hazards presented by a pirate attack, traditional contract excuse doctrine demonstrates that failures by crew and security forces to engage pirates should not be considered contractual breaches in some circumstances.

C. *Excusing Security Forces Under Traditional Contract Doctrine*

In the event that a contract dispute over performance arises between a shipper or owner and a security provider after a pirate

53. *Id.* at Annex ¶ 59–61.

54. *Id.* at Annex ¶ 62–63.

55. *Id.* at Annex ¶ 71.

56. *Id.* at Annex ¶ 74.

57. BEST MANAGEMENT PRACTICES, *supra* note 26, at 3.

58. *Id.* at 5.

59. *Id.* at 12.

attack, the shipper or owner could claim breach of contract for the security contractor's unsuccessful defense of the ship. A seemingly obvious breach occurs when a security contractor simply abandons ship at the sight of pirates. In comparison, a performing security contractor who defends but stands down after pirates board the ship might defend a claim of contractual breach by arguing that the contract did not require the use of force in all situations. Alternatively, the performing security contractor who stands down after boarding might defend against the claim of breach under the common law doctrine of excuse such that the shipowner or ship operator is not entitled to damages because the problem was caused by piracy (a traditional war risk).

Specifically, the security contractor will argue that it was ready and otherwise able to perform the contract but that the actual boarding of the ship by pirates created a contingency whereby engaging the pirates with force "could lead to unnecessary violence and harm to the crew."⁶⁰ The security contractor would also take the position that the changing nature of hazards raised by pirates is not allocated to security contractors merely by engaging in security contracts and is not allocated to security contractors by trade usage (or alternatively that the risk of piracy is allocated to shipowners, ship operators, and their insurers).⁶¹ The security contractor would also assert that, at the point pirates board a ship, performance is made impracticable because the cost of overcoming the pirates would include not only increased financial costs of an unknown magnitude, but also loss of life or serious injury to crew and security personnel.⁶² The security contractor will argue further that because performance of the contract became commercially impracticable, he did not breach the

60. *Id.* For the elements of a claim of excuse based on impracticability, see RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981). See also *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315–16 (D.C. Cir. 1966) (providing that the three elements of commercial impracticability are: (1) that a contingency occurred, (2) that risk of unexpected occurrence had not been allocated, and (3) that occurrence of contingency rendered performance commercially impracticable). For a discussion of the application of the impracticability doctrine to civilian-military contractors, see Jennifer S. Martin, *Adapting U.C.C. § 2-615 Excuse for Civilian-Military Contractors in Wartime*, 61 FLA. L. REV. 99, 108–09 (2009).

61. See *Transatlantic Fin. Corp.*, 363 F.2d at 316–18 (noting that although the allocation of risk may be expressed or implied in the agreement, the surrounding circumstances should also be considered).

62. See *id.* at 315 (weighing the interest in enforcing contracts with the consequences of requiring performance); see also *Chevron U.S.A., Inc.*, 90-1 B.C.A. (CCH) ¶ 22,602, at 113,427 (A.S.B.C.A. Dec. 29, 1989) (finding no commercial impossibility or impracticability where the cost increase resulted from a change of port due to the threat of hostilities in the Persian Gulf and where the contract did not require loading at a particular port).

security contract because his performance was excused. Therefore, the security contractor will assert that the shipowner or ship operator is not entitled to resort to the normal contractual remedies for breach of contract because there was no breach. Moreover, the security contractor will argue that it is entitled to payment for services provided under the contract.⁶³

If a security contractor decides to stand down when pirates board a ship, the contractor would have a good chance of succeeding in a claim for excuse with the argument that non-boarding by pirates was the basic assumption of the contract (i.e., a contract for planning and prevention).⁶⁴ Of course, parties can include a contractual clause addressing the conduct of security contractors in the event of boarding,⁶⁵ or they can simply include performance directives of the type anticipated by the IMO Guidelines, which envision that crew and security contractors will not engage pirates in hostilities where there is risk to the crew.⁶⁶ Where parties have not included such a clause or the contract is not clear, a security contractor would have a strong case that performance has become impracticable due to excessive and unreasonable risk of personal injury or death to the crew and security contractors (perhaps in addition to increased financial costs) when pirates actually board a ship,⁶⁷ though factual issues would have to be resolved.⁶⁸

On the other hand, shipowners and ship operators could argue that security contracts are not subject to excuse based on impracticability because the risks of piracy are always foreseeable to

63. See RESTATEMENT (SECOND) OF CONTRACTS § 272 (1981) (providing the requirements for the relief of restitution); see also *Transatlantic Fin. Corp.*, 363 F.2d at 320 (“If the performance rendered has value, recovery in *quantum meruit* for the entire performance is proper.”).

64. See RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. b (1981) (noting that, even if an event is foreseeable, foreseeability does not necessarily compel the conclusion that non-occurrence was not a basic assumption on which both parties made the contract).

65. See *id.* § 261 cmt. c (explaining that parties may insert provisions into a contract that would require performance where the notion of “impracticability” would otherwise justify non-performance).

66. See IMO REVISED GUIDANCE, *supra* note 28, at Annex ¶ 74 (“The possibility of a sortie by a well-organized crew has, in the past, successfully persuaded attackers to leave a ship but the use of this tactic is only appropriate if it can be undertaken at no risk to the crew.”).

67. See RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (1981) (“Performance may be impracticable because extreme and unreasonable difficulty, expense, *injury*, or loss to one of the parties will be involved.”) (emphasis added).

68. Factual issues might include whether the non-occurrence of the pirates’ boarding was a “basic assumption” and whether the contract allocated the risk. See *id.* § 261 cmts. b, c (providing examples of factors used to determine whether a party bears the risk or is discharged of a duty).

parties entering into contracts for security in waters where there are known and active pirates.⁶⁹ Yet, foreseeability itself does not always indicate that the event of pirates boarding the vessel was a basic assumption of the parties.⁷⁰ Shipowners and ship operators might argue further that the risk of loss was allocated to the security contractors if pirates boarding the ship was a basic assumption. Both of these arguments—which together comprise what I will term the “traditional analysis” of impracticability—deserve further consideration.

Shipowners and ship operators could argue that they did not assume the risks relative to boarding by pirates; rather, by hiring the security contractors, they effectively shifted the risk to the security contractors.⁷¹ In other words, a security contractor’s act of contracting for the provision of security services to protect against piracy cuts off the contractor’s ability to later claim excuse when pirates board the ship, and any non-performing security contractor must be held accountable to shipowners and ship operators if they fail to protect the ship when it is boarded by pirates. The Restatement (Second) of Contracts describes such a scenario, where the parties’ expertise results in the owner allocating some risk to a contractor, thereby precluding the contractor from claiming excuse:

A, who has had many years of experience in the field of salvage, contracts to raise and float B’s boat, which has run aground. The contract, prepared by A, contains no clause limiting A’s duty in the case of unfavorable weather, unforeseen circumstances, or otherwise. The boat then slips into deep water and fills with mud, making it impracticable for A to raise it. If the court concludes, on the basis of such circumstances as A’s experience and the absence of any limitation in the contract that A prepared, that A assumed an absolute duty, it will decide that A’s duty to raise and float the boat is not discharged and that A is liable to B for breach of contract.⁷²

69. See *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 318 (D.C. Cir. 1966) (noting that foreseeability may support, but is not sufficient to prove, allocation of risk).

70. See RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. b (1981) (providing that foreseeability does not automatically result in the allocation of risk).

71. See *id.* § 261 cmt. c (stating that the court may determine under certain circumstances that a party impliedly assumed greater obligations); see also *Bethlehem Steel Corp.*, 72-1 B.C.A. (CCH) ¶ 9186, at 42,589 (A.S.B.C.A. Nov. 19, 1971) (stating that the court will construe and interpret specification provisions fairly and reasonably); *Aerosonic Instrument Corp.*, 59-1 B.C.A. (CCH) ¶ 2115, at 9,098 (A.S.B.C.A. Mar. 12, 1959) (finding that the appellant contracted to provide research beyond the state of the art and that it therefore assumed the obvious risks).

72. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. c, illus. 5 (1981).

Because the security contractor made no promises concerning the safety and security of the ship in waters known to inhabit pirates, shipowners and ship operators could argue that the security contractor contracting for protection against pirates is always obliged to engage with force to meet its contractual obligations even when pirates board the vessel.⁷³ In short, shipowners and ship operators could argue that they never promised (contractually) that protection from pirates could be carried out safely and that the security contractors at least impliedly understood and assumed this risk.

Upon paying the high prices charged by security contractors, shipowners and ship operators could claim that they are entitled to demand their services in all instances, such that the nature of the relationship does not fit the traditional notions of excuse. As Judge Skelly Wright observed in the well-known *Transatlantic Financing Corp. v. United States*⁷⁴ case relative to the closure of the Suez Canal:

Parties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes because they cannot agree, often simply because they are too busy. Moreover, that some abnormal risk was contemplated is probative but does not necessarily establish an allocation of the risk of the contingency which actually occurs. In this case, for example, nationalization by Egypt of the Canal Corporation and formation of the Suez Users Group did not necessarily indicate that the Canal would be blocked even if a confrontation resulted. The surrounding circumstances do indicate, however, a willingness by Transatlantic to assume abnormal risks, and this fact should legitimately cause us to judge the impracticability of performance by an alternative route in stricter terms than we would were the contingency unforeseen.⁷⁵

Despite the arguments that shipowners and ship operators could make under the traditional analysis, there are strong counterarguments that security contractors may claim excuse when

73. See 14 JAMES P. NEHF, CORBIN ON CONTRACTS § 74.8, at 54 (Joseph M. Perillo ed., rev. ed. LexisNexis 2001) (allowing parties to assume obligations that may be discharged or formulate their own clauses); see also *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 992 (5th Cir. 1976) (interpreting the contract language to cover foreseeable contingencies); *Roy v. Stephen Pontiac-Cadillac, Inc.*, 543 A.2d 775, 778–79 (Conn. App. Ct. 1988) (holding that the seller assumed the risk of contingency where the seller knew of facts that made performance impracticable); *Swift Textiles, Inc. v. Lawson*, 219 S.E.2d 167, 171 (Ga. Ct. App. 1975) (holding that the seller assumed the risk of price increases in contracting to deliver goods to the buyer and therefore was not excused from performance). But see *Alimenta (U.S.A.), Inc. v. Gibbs Nathaniel (Can.) Ltd.*, 802 F.2d 1362, 1366 (11th Cir. 1986) (upholding the jury's determination that the seller did not assume risk of drought that prevented peanut deliveries).

74. 363 F.2d 312 (D.C. Cir. 1966).

75. *Id.* at 318–19.

pirates actually board a vessel, perhaps even where the parties include provisions for pirate-boarding procedures in the contract.

True, security contractors are hired for the very purpose of thwarting pirate attacks, which implies a degree of danger and anticipates the potential for pirate boarding. Yet, recognition that performance might be dangerous does not mean that security contractors assume the risk of any and all dangers that pirates present. One might observe that even those persons who perform dangerous contracts do not necessarily agree to perform under all types of dangers that might arise (i.e., one does not expect bank employees to prevent all bank robberies).⁷⁶ As such, one would expect that performance by security contractors who are recognized as civilians—as opposed to government forces—would have some natural limitations.

The risk that security contractors combating piracy with force assume, if envisioned through contract, may well be interpreted to be limited to tasks performed prior to pirate boarding. Additionally, contractual “outs” excusing performance which ship operators and others provide for in “war risk” clauses are recognized for acts of piracy committed on the high seas. Moreover, maritime insurance contracts obtained by merchant shippers typically contain coverage for piracy, indicating that this type of contingency is assumed by shipowners and ship operators, at least if pirates board the vessel.⁷⁷ But if the particular risks of engaging pirates who actually board the ship are not assumed by security contractors and if the other traditional elements of excuse are met (e.g., failure of a basic assumption), a security contractor that does not engage pirates who board a vessel with force could probably claim excuse and not be liable for breach.⁷⁸ Assuming that the particular uncertainties and risks raised by pirates who actually board a ship are not assumed by security contractors, excuse would likely be available.

76. See discussion *infra* Part II.B.

77. See KING, *supra* note 23, at 4–5 (describing various forms of marine insurance); see also Michael H. Passman, *Interpreting Sea Piracy Clauses in Marine Insurance Contracts*, 40 J. MAR. L. & COM. 59, 84–85 (2009) (listing factors courts consider when determining whether an act constitutes “piracy” for purposes of insurance contract interpretation).

78. If the security contracts were not entered into particularly to combat piracy, but perhaps just for general purposes, the issue of allocation of risk for third-party interference by pirates would not be as likely to come up in contract performance. The risk would most likely be one not assumed by either of the parties nor one necessarily in their contemplation. In such cases, availability of excuse is seemingly permitted without much difficulty.

Alternatively, an attempt by shipowners and ship operators to disclaim the applicability of the excuse doctrine by including in the contract provisions which delineate when excuse is available or require performance in all cases (e.g., engagement with pirates using force) might be ineffective. This would be the case if, for example, the contractual provisions do not completely foreclose the availability of the traditional excuse doctrine,⁷⁹ or if the contract did not properly outline which acts of piracy result in excuse or where security contractors should stand down versus engage with force, or if the shipowners or operators simply did not act in good faith.⁸⁰ Boarding of a vessel by pirates in such cases would seem to render performance “impracticable,” and grounds for excuse would exist under the traditional impracticability doctrine. On the facts of the *Maersk Alabama* Attack described above, it would seem that, had security contractors been onboard the vessel, they would have likely had a good contract defense had they stood down and refrained from engaging the pirates instead of using force as was ultimately the case.

Ultimately, granting security contractors a contractual out under the doctrine of excuse in the event that they decide to stand down if pirates board a vessel may be an incomplete approach. Consideration of whether security contractors (and crew) should stand down if pirates board a vessel is more valuable as it addresses the boundaries of contractual obligation at an earlier period during their performance of the contract. Concepts of contract interpretation sometimes provide a route to allow (and perhaps encourage) parties to cease performance under a contract. Contract law, for example, allows parties in many cases to explain or supplement contract terms with course of dealing,⁸¹ usage of trade,⁸² course of performance,⁸³ and by evidence of consistent additional

79. See U.C.C. § 2-615 cmt. 8 (2009) (stating that force majeure clauses are considered under U.C.C. § 2-615 in light of “mercantile sense and reason”).

80. See *First Nationwide Bank v. Fla. Software Servs., Inc.*, 770 F. Supp. 1537, 1542 (M.D. Fla. 1991) (providing that good faith is an implied condition); 8 CATHERINE M.A. MCCAULIFF, CORBIN ON CONTRACTS § 33.4, at 172 (Joseph M. Perillo ed., rev. ed. Lexis 1999) (discussing good faith as a restraint on contract performance). See generally Robert S. Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 199 (1968) (discussing good faith as applied in contract law).

81. See U.C.C. § 1-303 (2009); RESTATEMENT (SECOND) OF CONTRACTS § 223 (1981).

82. See RESTATEMENT (SECOND) OF CONTRACTS § 222 (1981).

83. See U.C.C. § 1-303 (2009).

terms⁸⁴ which anticipate the inclusion of the concept of “commercial context” when interpreting a contract’s language.⁸⁵

Although security contracts require performance in international waters where pirates may attack, the commercial context might call for a response of non-resistance if pirates board. The next Section of this Article will explore the role of interpretation and commercial context when security contractors are part of the response to combat piracy.

II. USING CONTRACT LAW TO INFORM COMPANIES AND SECURITY PROVIDERS

A. *Employing a Reasonable Interpretation Approach*

Recall that there are two common arguments against permitting a party to claim excuse due to piracy (and thus avoid damages for breach of contract) under common law. The first argument, related to the sanctity of the contract made by parties, is that most contracts either expressly or impliedly place the risk that pirates will successfully board on the security contractor. The second argument is that even if the risk were not placed on the security contractor by the contract, the contingency that arises is foreseeable so that the security contractor cannot claim excuse when the contingency later materializes, even if the parties did not mention the risk in the contract. Several cases that examine claims of excuse ultimately express their conclusions in terms of risk allocations, either by interpreting the express language of the contract or by finding that the contingency was foreseeable and that the risk resided with the party claiming the excuse.⁸⁶

Despite these arguments, some commentators have argued that in certain categories of cases, excuse is (or should be) available to parties.⁸⁷ Although the commentaries help by analogy to establish

84. See *id.* § 2-202; RESTATEMENT (SECOND) OF CONTRACTS § 216 (1981).

85. See U.C.C. § 1-303 cmts. 1, 8 (2009) (rejecting both the “lay-dictionary” and the “conveyancer’s” reading of a commercial agreement and permitting commercial practices and dominant pattern to be incorporated into an agreement). See generally JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS § 3.9, at 149–50 (5th ed. 2003) (discussing questions of meaning commonly considered when interpreting an agreement).

86. See cases cited *supra* note 73.

87. See Mark B. Baker, “A Hard Rain’s A-Gonna Fall”—Terrorism and Excused Contractual Performance in a Post September 11th World, 17 TRANSNAT’L LAW. 1, 4 (2004) (post-9/11 terrorism cases); Suzen M. Grieshop Corrada, *The Best Laid Plans: Force Majeure Clauses in Travel and Event Contracts*, 31 NOVA L. REV. 409, 421 (2007) (same); Patrick J. O’Connor, *Allocating Risks of Terrorism and Pandemic Pestilence: Force Majeure for an Unfriendly World*, 23 CONSTR. LAW. 5, 10–11 (2003) (same); Jennifer Sniffen, *In*

some recourse for parties through excuse, none of the commentaries establish a proper basis for either excuse or contractual interpretation in the area of security contracting to combat piracy.

Part I of this Article provided an evaluation of the contract law doctrine of excuse. What is needed to complete this analysis is a look at how a commercial context might provide a standard for risk allocation among security contractors, shipowners, and ship operators prior to recourse to the excuse doctrine while remaining consistent with the basic contract principles of context and reasonable interpretation.⁸⁸ That is, the examination of security contracts must take into account the “social matrix that includes custom, trade usage, prior dealings of the parties, recognition of their social and economic roles, notions of decent behavior, basic assumptions shared, but unspoken by the parties, and other factors, most especially including rules of law, in the context in which [the parties] find themselves.”⁸⁹ After surveying banking—a comparable industry in terms of security contracts—and its response to criminal activity, this Article will evaluate the role of trade usage, public policy, and public interest as general guides setting the parameters of contractual obligations under security contracts combating piracy.

B. Traditional Response to Bank Robbers as a Guide

Jim Nicholson was working as a teller at a Seattle branch of Key Bank when a would-be bank robber entered and demanded money.⁹⁰ Nicholson ignored the robber’s demands, lunged at the robber, chased him for several blocks, and pinned him to the ground until police arrived.⁹¹ Nicholson’s reward: Key Bank fired him for violating a company policy that prohibited cooperating with bank robbers and offering resistance and stated that “[o]ur policies and procedures [to not attack robbers] are in the best interests of public

the Wake of the Storm: Nonperformance of Contract Obligations Resulting from a Natural Disaster, 31 NOVA L. REV. 551, 553–54 (2007) (natural disasters).

88. See RESTATEMENT (SECOND) OF CONTRACTS § 212 (1981) (emphasizing that the interpretation of an integrated agreement is directed at meaning of the terms in light of the circumstances).

89. 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1.3, at 10 (Joseph M. Perillo ed., rev. ed. West 1993). For a discussion of why courts should favor the inclusion of trade usage to help define parties’ obligations, see Juliet P. Kostritsky, *Judicial Incorporation of Trade Usages: A Functional Solution to the Opportunism Problem*, 39 CONN. L. REV. 451 (2006).

90. See Joshua Rhett Miller, *Seattle Bank Teller Loses Job After Thwarting Heist*, FOXNEWS.COM, Aug. 4, 2009, <http://www.foxnews.com/story/0,2933,536361,00.html>; Jennifer Sullivan, *Bank Teller Foils Holdup, Nabs Suspect—Loses Job*, SEATTLE TIMES, Aug. 1, 2009, at A1, A8.

91. Sullivan, *supra* note 90, at A1.

safety and are consistent with industry standards.”⁹² The prohibition is in effect regardless of whether the person is a bank employee or even an off-duty police officer.⁹³ The basic message to bank employees and patrons is that money is insured, but lives cannot be replaced.

The crime of robbery involves the taking of (or attempt to take) something of value from another person by force, threat of force, violence, or by putting the victim in fear.⁹⁴ The Bank Protection Act of 1968⁹⁵ requires banks to have a security plan in place to deter robberies.⁹⁶ The regulations under the Bank Protection Act provide for a “security program” aimed at “identifying persons committing crimes” and training employees to conduct themselves properly in the event that the bank is robbed.⁹⁷ Similar to the regulations promulgated by the United States, the New Zealand Department of Labour’s advice on armed robbery recommends that bank employees: (1) keep calm; (2) do what the offender demands; (3) memorize details about the offender; and (4) note the method of escape.⁹⁸ Moreover, not only is having armed guards at banks not required, but not having them at all might actually be the exercise of sound judgment designed to protect human life.⁹⁹ Engaging the

92. Miller, *supra* note 90.

93. *Id.*

94. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: 2002 UNIFORM CRIME REPORTS 303 (2002).

95. Pub. L. 90-389, 82 Stat. 294 (current version at 12 U.S.C. §§ 1881–84).

96. 12 U.S.C. § 1882 (2006); 12 C.F.R. § 208.61(b) (2009) (requiring that member banks “designate a security officer who shall have the authority . . . to develop . . . and to administer a written security program for each banking office”). For general information about bank robbery in the United States, see FEDERAL BUREAU OF INVESTIGATION, *supra* note 94, at 303.

97. 12 C.F.R. § 208.61(c).

98. NEW ZEALAND DEP’T OF LABOUR, DEALING WITH THE THREAT OF ARMED ROBBERY: ADVICE FOR EMPLOYEES (1998), <http://www.osh.dol.govt.nz/order/catalogue/pdf/armdro-p.pdf>; see also Webcast: Robbery: Prepare to Survive (Dodgen & Associates), <http://www.dodgenandassociates.com/preview.asp> (last visited Apr. 4, 2010) (emphasizing that being prepared and staying calm are vital to employee safety).

99. See, e.g., *Nigido v. First Nat’l Bank*, 288 A.2d 127, 129 (Md. 1972) (“If it is the rationale of the bank that armed guards might provoke gun-play and that it is better to lose cash than lives, then the total absence of guards would seem to be justified.”); *Genovay v. Fox*, 143 A.2d 229, 239–40 (N.J. Super. Ct. App. Div. 1958) (“The value of human life and of the interest of the individual in freedom from serious bodily injury weigh sufficiently heavily in the judicial scales to preclude a determination as a matter of law that they may be disregarded simply because the defendant’s activity serves to frustrate the successful accomplishment of a felonious act and to save his property from loss.”), *rev’d on other grounds*, 149 A.2d 212 (N.J. 1959). But see *Berdeaux v. City Nat’l Bank*, 424 So. 2d 594, 595 (Ala. 1982) (declining to hold the bank liable when the customer was shot after the teller failed to do as the robber ordered); *Noll v. Marian*, 32 A.2d 18, 19 (Pa. 1943) (same).

robber with force is not recommended and is actually considered to increase the risk of harm to all persons at the bank.¹⁰⁰

The practices of the banking industry relative to armed robbery focus on preparation and avoidance, followed by a calm response and compliance when robbed. The problem of armed bank robbery presents some parallels with—and distinctions from—piracy that might help inform the practices that could govern contracts to combat piracy using security contractors. First, the object of both piracy and robbery is the taking of something of value. In fact, most pirates and robbers are motivated by the potential to make money, although some might act solely to perpetrate an act of terrorism.¹⁰¹ Second, both crimes are commonly perpetrated by criminals who often travel in groups.¹⁰² Third, both robbers and pirates use the threat of violence and carry weapons, most often guns.¹⁰³ Finally, while both crimes can result in significant loss to an individual victim, the total loss is only a small amount within each industry as a whole.¹⁰⁴

Several distinctions suggest that the dangers associated with piracy create a more volatile situation than the dangers associated with a bank robbery. Whereas bank robbery has an almost sixty percent rate of arrest,¹⁰⁵ piracy occurs in international waters and, thus, catching

100. See *Nigido*, 288 A.2d at 129 (noting that “not providing armed guards might very well reflect the exercise of sound judgment rather than negligence”); Tony Brissette, *10 Potentially Catastrophic Mistakes During Bank Robberies*, BANKERSONLINE.COM, Mar. 2003, <http://www.bankersonline.com/articles/bhv12n12/bhv12n12a3.html> (stating that when “bank security guards, branch managers and other employees have physically confronted bank robbers” it “increases the level of danger to all employees and customers in the bank”).

101. See PLOCH ET AL., *supra* note 3, at 6–7 (asserting that piracy has “become an attractive pursuit for young men”); see also DUBNER, *supra* note 2, at 7 (offering the argument that attacks imbued with a political nature could be considered acts of war, rather than acts of piracy). While most piracy appears to be linked to profitability, the attack on the U.S.-flagged M/V *Liberty Sun* may have been in retaliation for the killing of pirates during the *Maersk Alabama* Attack. PLOCH ET AL., *supra* note 3, at 9.

102. See PLOCH ET AL., *supra* note 3, at 6–7 (detailing the territorial pirate groups operating in Somali waters); Brissette, *supra* note 100 (noting that while eighty percent of bank robberies involve a single robber, takeover robberies with a group of robbers has become more commonplace).

103. See PLOCH ET AL., *supra* note 3, at 9 (stating that the typical Somali team of pirates is equipped with AK-47 rifles and rocket propelled grenade launchers); Brissette, *supra* note 100 (noting that a lone robber may or may not display a weapon, though takeover groups typically come in the bank with guns drawn).

104. See FEDERAL BUREAU OF INVESTIGATION, *supra* note 94, at 305 (estimating that bank robbers take approximately \$70 million per year, with an average of \$8000 per incident); PLOCH ET AL., *supra* note 3, at 12 (acknowledging that the total economic costs of piracy equal only a small fraction of the total value of worldwide ship-borne commerce).

105. See FEDERAL BUREAU OF INVESTIGATION, *supra* note 94, at 303 (highlighting the 57.7 percent clearance rate for bank robberies in 2001).

and prosecuting pirates requires international cooperation.¹⁰⁶ Another important distinction is the prevalence of hostage-taking by modern pirates. Pirates take hostages and engage in what are often lengthy negotiations in order to secure a ransom, whereas many bank robbers simply take their money and leave.¹⁰⁷ While the banking industry is sensitive to the issue of robbery at particular locations, the strategic location off the Horn of Africa affects a key transit area used by a large number of merchant vessels.¹⁰⁸ Finally, while bank robbers may violate local law when committing the crime, piracy is a universally condemned act, and pirates are the “enemies of all nations and of the human race” who commit crimes punishable by any nation.¹⁰⁹

While the analogy to armed bank robbery suggests that the same type of cautionary approach might be applied to security contracts for those combating piracy, it does not consider the differing trade usages between banks and marine shipping.¹¹⁰ Determining the expectation of the contracting parties requires consideration of context, making trade usage and the particular response by banks helpful in deducing the obligations of the parties.¹¹¹ Essentially, business norms form part of the basis of the agreement governing particular contingencies. Trade usage normally connotes some type of supplementation or qualification of the parties’ obligations.¹¹² Yet, the norms of one industry do not always apply to another industry, depending on how parties define the industry or the geographic area subject to the practice.¹¹³

106. Cf. PLOCH ET AL., *supra* note 3, at 22 (describing the IMO’s efforts to improve antipiracy cooperation amongst nations).

107. See *id.* at 10 (finding that hostage taking is unique to the Somali pirates, who seek payment of a ransom for the victims, rather than outright harming them); FEDERAL BUREAU OF INVESTIGATION, *supra* note 94, at 312 (stating that violence and injury during bank robbery is infrequent).

108. See PLOCH ET AL., *supra* note 3, at 11–12 (reporting, for example, that “as many as 3.3 million barrels of oil” transit the Bab el Mandeb strait every day).

109. H.B. JACOBINI, INTERNATIONAL LAW: A TEXT 118 (rev. ed. 1968).

110. See RESTATEMENT (SECOND) OF CONTRACTS § 222 (1981) (listing the considerations that a court makes when determining the existence and scope of usage of trade).

111. See CORBIN, *supra* note 89, at 9–10 (noting that many factors help courts determine the total legal obligation formed through a contract).

112. See RESTATEMENT (SECOND) OF CONTRACTS § 222 (1981) (permitting usage of trade that the parties know can supplement their agreement); 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.14, at 127–28 (Joseph M. Perillo ed., rev. ed. Lexis 1998) (stating that supplementary terms help fill gaps in an express contract).

113. See KNIFFIN, *supra* note 112, § 24.13, at 111 (noting, for example, that an “original condition” may have different meanings in the aircraft and refrigerator industries).

Thus, while the armed bank robbery analogy is helpful in predicting a trade usage that might develop regarding security contracts, the difference in industry could limit its persuasiveness. Moreover, the usage prevalent in response to armed bank-robbery in the United States could be less persuasive in light of international considerations of jurisdiction, standards, and policies that are present in the case of piracy off the coast of Africa. Further, the armed bank-robbery analysis does not consider the impact that hostage-taking might have on the response of security contractors, suggesting that the best response to pirates boarding a ship could differ depending on whether hostages are taken. Despite these possible limitations, the analogy to armed bank-robbery provides useful instruction that, along with other evidence, helps develop the context that qualifies party obligations under contracts between shipowners and security teams.

Once it is recognized that the qualification of party obligations depends on the principles of commercial acceptance and regular observance in a designated industry, the need for standards governing particular industries and contingencies, like piracy and security contracts, is apparent. While parties generally should be held to their contracts, the armed bank-robbery analogy provides a convincing framework that warrants an understanding that crew and security contractors, like bank employees, are not expected by the law of contract (which would otherwise make them liable for breach) to use force if pirates successfully board a vessel despite their efforts to prevent the attack. As this Article shows below, any limitations on applying this analysis to security contractors are mitigated by examining how the maritime industry and the international community may be moving toward a trade usage that is parallel to the analogy of armed bank robbery.

*C. Using Maritime and Industry Guides to
Determine and Supplement Party Intent*

Some cases that discuss whether to incorporate trade usage into a contract find that it is unnecessary to prove that the contract is ambiguous before taking usage into consideration.¹¹⁴ That is, the

114. See, e.g., *L.K. Comstock & Co. v. United Eng'rs & Constructors*, 880 F.2d 219, 223 (9th Cir. 1989) (affirming the district court's conclusion that trade usage can be used to determine whether a contract is ambiguous). But see *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 332–33 (5th Cir. 1981) (citing *Hicks v. Ocean Drilling & Exploration Co.*, 512 F.2d 817, 825 (5th Cir. 1975) (holding that a court may not look beyond the written language of the document to determine the intent of the parties unless the disputed contract provision is ambiguous)).

inclusion of express contractual provisions regarding the use of force by security contractors against pirates is not necessarily a bar to incorporating trade usage into a contract.¹¹⁵ It is necessary, though, to establish that there is actually a usage involved in the industry,¹¹⁶ which the bank-robbery analogy fails to accomplish by itself. It is easier to find a trade usage where there is a regularity of observance making it reasonable to expect that parties know the usage is binding.¹¹⁷ The presence of form contracts, different sizes of ships, different cargoes carried by ships, and different nationalities of shippers makes it difficult to clearly establish uniform maritime industry practice in some cases.

To understand this point, one can look at the decision of the United States Court of Appeals for the Second Circuit in *Encyclopaedia Britannica, Inc. v. SS Hong Kong Producer*,¹¹⁸ where the court found no trade usage regarding on-deck storage relative to a particular class of vessels.¹¹⁹ The case involved a claim by Encyclopaedia Britannica, the shipper, that 1300 cartons of encyclopedias were damaged by breakage and seawater during a voyage from New York to Japan.¹²⁰ The short-form bill of lading contract did not address whether the books would be stored on-deck or below, but incorporated by reference the carrier's regular bill of lading, which provided that the goods could be stored under or on-deck, unless the shipper notified the carrier that it needed below-deck storage.¹²¹ Encyclopaedia

115. Cf. *L.K. Comstock & Co.*, 880 F.2d at 223 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 222(3) (1981)).

116. See *Simon Wrecking Co. v. AIU Ins. Co.*, 530 F. Supp. 2d 706, 715–16 (E.D. Pa. 2008) (explaining that the term “sudden and accidental” in the pollution exclusion contained in insurance policies did not have a trade usage in the insurance industry, so a court would not vary from the apparent meaning of the language); *F.W.F., Inc. v. Detroit Diesel Corp.*, 494 F. Supp. 2d 1342, 1369 (S.D. Fla. 2007), *aff'd* 308 F. App'x 389 (11th Cir. 2009) (stating that plaintiff yacht owners failed to establish trade usage “that a yacht engine manufacturer assumes the responsibility to do whatever is necessary to ensure the engines and vessel pass a sea trial when they agree to perform an engine repair or repower” where the parties’ settlement agreement did not so specify and the yacht owner failed to show that the words used by the parties “have acquired by usage of trade a peculiar and different meaning with reference to the general dealing of the trade or profession, and that they were so used”) (citation and internal quotation marks omitted).

117. See U.C.C. § 1-303(c) (2001) (defining a “usage of trade” as “a usage having such regularity of observance . . . as to justify an expectation that it will be observed with respect to a particular agreement”).

118. 422 F.2d 7 (2d Cir. 1969).

119. *Id.* at 18. But see *English Elec. Valve Co. v. M/V Hoegh Mallard*, 637 F. Supp. 1448, 1460 (S.D.N.Y. 1986), *rev'd* 814 F.2d 84 (2d Cir. 1987) (finding that above-deck storage was an industry custom, at least with respect to container ships, where shipper had some knowledge of custom).

120. *Encyclopaedia Britannica, Inc.*, 422 F.2d at 9.

121. *Id.* at 9–10.

Britannica claimed that the carrier issued what appeared to be a bill of lading for below-deck storage, but then deviated by storing the books on-deck.¹²²

The lower court viewed the case as a simple contract dispute between two freely negotiating parties and concluded that Encyclopaedia Britannica simply failed to provide the proper notice, or, alternatively, that industry custom permitted the storage of containerized cargo on-deck.¹²³ The Court of Appeals disagreed, finding that the matter was complicated by the policy set forth in the federal Carriage of Goods by Sea Act (COGSA),¹²⁴ which limits carriers' ability to disclaim liability.¹²⁵ The court explained that the practice of requiring shippers to find a copy of the carrier's regular bill of lading "to discover a clause which in effect authorizes a serious deviation from the standard provisions and which can only be prevented by the shipper's assuming the burden of giving notice to the carrier before delivery that below-deck storage is required," is no more than a device around the general protections anticipated under COGSA.¹²⁶ The court also found that no trade usage regarding on-deck storage existed to supplement the bill of lading.¹²⁷ The court found through testimony that the practice of some carriers of storing items on-deck amounted to no more than habit contrary to the desires of shippers.¹²⁸ The court also rejected other testimony regarding on-deck storage, finding that it was restricted to "small ships designed for island trade" and that it would have "no bearing on any custom of stowing containers on the decks of general ocean-going cargo vessels in international trade."¹²⁹ Finally, the court noted that any practice in one port might not indicate a practice applicable to other ports.¹³⁰

The *Encyclopaedia Britannica* decision exemplifies the challenges that exist in establishing trade usages in the maritime industry.

122. *Id.* at 11.

123. *Id.* at 11, 17.

124. 46 U.S.C. §§ 1301–15.

125. See *Encyclopaedia Britannica, Inc.*, 422 F.2d at 11–12 (specifying that the purpose behind COGSA was to fairly balance the competing interests of carriers and shippers).

126. *Id.* at 13.

127. *Id.* at 17–18.

128. See *id.* at 18 ("A party cannot claim to have proved a valid custom merely by showing that it is the habit of some carriers to stow goods on deck contrary to the wishes or knowledge of shippers.").

129. *Id.*

130. See *id.* (recounting the testimony of the carrier's witness who testified that incoming vessels from foreign ports would not show custom in the Port of New York).

Challenges certainly exist with attempting to establish a trade usage regarding crew and security contractor responses to piracy, particularly with respect to the use of force. First, as the Second Circuit noted in *Encyclopaedia Britannica*, maritime industry practices vary widely depending on where a ship is flagged, what country a port is located in, and which nation's policies are implicated. These variables can present obstacles to the establishment of uniform, recognized trade usage, though the promulgation of a number of international and industry guidelines on the response to piracy may help to clear this hurdle.¹³¹ Second, the different types of ships involved, the size of the crew, and the cargo carried can each heavily influence the particular response to piracy that may be appropriate for any one vessel. For example, a ship carrying flammable cargo may be largely precluded from using certain weapons and types of force in the response to piracy. Third, actions taken by some security team personnel in response to piracy may not amount to a usage of contract, but rather, actions beyond the law of contract and contractual obligation (e.g., personal attempts to avoid becoming a hostage) that are analogous to the "habit" precluding a finding of trade usage in *Encyclopaedia Britannica*.¹³² Fourth, the basis for establishing trade usage is the uniformity of practice over a period of time such that the practice is seen as part of the contractual obligation.¹³³ While piracy has been a problem for merchants for hundreds of years, a problem that has led them to arm their vessels at certain points in history, our current initiatives regarding piracy are directed primarily at piracy off the Horn of Africa, a more recent phenomenon. A usage does not need to be "ancient," but there is an expectation of "commercial acceptance by regular observance"¹³⁴ that can be more difficult to document with emerging rules.

Despite the limitations associated with recognizing a trade usage that would affect contracts with security contractors to combat piracy, there are indications that a uniform approach—one highly consistent with the approach to domestic armed bank-robbery—is emerging (or, arguably, could already be in place). This developing trade

131. See RESTATEMENT (SECOND) OF CONTRACTS § 222 cmt. c (1981) ("Where usages vary from place to place, there may be a problem in deciding which usage is applicable.").

132. See 422 F.2d at 18 ("The mere habit of a carrier to stow cargoes anywhere it chooses, even if it is in breach of its contract, cannot be said to establish a custom.").

133. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 222(1) (1981) ("A usage of trade . . . may include a system of rules regularly observed even though particular rules are changed from time to time.").

134. RESTATEMENT (SECOND) OF CONTRACTS § 222 cmt. b (1981).

usage is evidenced by three different written recommendations: the IMO Guidelines, the IMB Advice and the Best Management Practices (collectively, the “Recommendations”).¹³⁵ The emerging trade usage focuses on preparation and avoidance rather than use of force, a focus that is consistent with the general policy goals of the standard response to armed bank-robbery. To the extent that trade usage is emerging, it could become part of the obligations of parties to security contracts, whether stated in express contract language or not, so long as one considers the trade usage included by other contract language or as supplementation to the contract in general.¹³⁶ A trade usage regarding the use of force in response to piracy could become so pervasive that it would be unnecessary to inquire about the actual intentions of the parties because the usage would be understood to be part of the deal.¹³⁷

The emerging usage documented in the Recommendations regarding the response to piracy takes up the issue of force in a number of ways. First, parties are generally cautioned against having firearms on the vessel, as such weapons could pose problems with local regulations and could be dangerous depending on the cargo that the vessel is carrying.¹³⁸ Second, the Recommendations discourage arming the crew for personal protection.¹³⁹ Third, the Recommendations recognize that companies may hire either unarmed or armed security contractors, but emphasize that the presence of armed personnel carries additional risks, including the escalation of violence.¹⁴⁰ Fourth, the Recommendations suggest the use of measures such as evasive maneuvers and hoses.¹⁴¹ Once the pirates board the vessel, the Recommendations shift their focus from

135. See *supra* Part I.B.

136. See RESTATEMENT (SECOND) OF CONTRACTS §§ 220, 221 (1981) (describing usage relevant to interpretation and usage supplementing an agreement).

137. See RESTATEMENT (SECOND) OF CONTRACTS § 221 cmt. a (1981) (“But if there is a reasonable usage which supplies an omitted term and the parties know or have reason to know of the usage, it is a surer guide than the court’s own judgment of what is reasonable.”).

138. IMO REVISED GUIDANCE, *supra* note 28, at Annex ¶ 59.

139. *Id.* at Annex ¶ 60.

140. *Id.* at Annex ¶ 63 (“If armed security personnel are allowed on board, the master, shipowner, operator and company should take into account the possible escalation of violence and other risks.”); BEST MANAGEMENT PRACTICES, *supra* note 26, at 5 (“The use of additional private security guards is at the discretion of the company but the use of armed guards is not recommended.”).

141. See IMO REVISED GUIDANCE, *supra* note 28, at Annex ¶ 65 (“Appropriate passive and active measures, such as evasive manoeuvres and hoses should be vigorously employed as detailed in the preparation phase or in the ship’s security plan.”); BEST MANAGEMENT PRACTICES, *supra* note 26, at 12 (listing methods that can be employed to make it difficult for pirates to board the ship).

active avoidance measures to securing the safety of the crew and trying to remain in control of the ship's navigation; they recommend an organized confrontation with the pirates only if the pirates do not have lethal weapons and only if the confrontation can be accomplished without risk.¹⁴² If the pirates take control of the vessel, the Recommendations stress the importance of remaining calm, moving into a negotiating posture, and complying with the attackers' demands as obstruction can be "futile and dangerous."¹⁴³ Finally, the recommendations provide that there are no strict guidelines for kidnapping situations, but that "survival" is the goal.¹⁴⁴

While there are some impediments to recognizing a firm trade usage with respect to the appropriate response of security contractors to piracy, there are arguments favoring the establishment of such a usage. Although the Recommendations are not "ancient," trade usage can be based on change within the maritime industry, even if there has not been time for regular observance.¹⁴⁵ The Recommendations indicate a sense of universality, as the guidance comes from disparate organizations: a highly influential international body, the International Maritime Organization; a highly respected commercial organization, the International Chamber of Commerce's International Maritime Bureau; and fifteen different maritime industry groups representing a wide variety of shippers, from tank owners to cruise lines and even a transport workers' group. Moreover, a universality of observance in the maritime industry is not required to show evidence of party intent regarding security contractors, to the extent that the usage is "sufficiently general so that the parties could be said to have contracted with reference to it."¹⁴⁶ The Recommendations are very flexible and general on some points, leaving discretion to the ship master where needed, but they give specific directions on important points, like standing down if pirates succeed in taking control of the vessel.¹⁴⁷ This flexibility allows the

142. See IMO REVISED GUIDANCE, *supra* note 28, at Annex ¶ 71–74 (noting that the options available to the master and crew depend on the extent to which the attackers have secured control of the ship).

143. IMO REVISED GUIDANCE, *supra* note 28, at Annex ¶ 76; BEST MANAGEMENT PRACTICES, *supra* note 26, at 12 ("Offer no resistance; this could lead to unnecessary violence and harm to the crew.").

144. IMO REVISED GUIDANCE, *supra* note 28, at Appendix 4. The Best Management Practices does not provide guidance in the event that the pirates take hostages.

145. RESTATEMENT (SECOND) OF CONTRACTS § 222 cmt. b (1981).

146. *Threadgill v. Peabody Coal Co.*, 526 P.2d 676, 678 (Colo. App. 1974).

147. See IMO REVISED GUIDANCE, *supra* note 28, at Annex ¶ 76 ("There will be many circumstances when compliance with the attackers' demands will be the only safe alternative and resistance or obstruction of any kind could be both futile and dangerous.").

usage to address some of the specific deficiencies presented in the *Encyclopaedia Britannica* case concerning different ships, cargos, and local rules.¹⁴⁸

For purposes of security contracts, the most important aspect of this usage would involve use of force in the event that pirates board the vessel. If such usage were to exist, then security contractors would not need to rely on the excuse doctrine to relieve them of their contractual obligations. The usage would become part of the parties' contractual obligations.¹⁴⁹ Instead, security contractors could be comfortable with the practices that would be in effect both prior to pirate boarding and after, whether or not expressed outright in the contract. Thus, non-engagement with boarding pirates would not be a breach of contract. Of course, in the event that the contract expressly directs non-engagement upon boarding and a security contractor responds with force, the case for breach would seem stronger, more analogous to the situation of the Seattle bank teller fired by Key Bank for failing to follow bank protocol of no resistance.¹⁵⁰ In the end, the preference for no resistance due to the increased risk of violence and harm to employees makes the preferred response by security contractors much like the response to domestic armed bank-robbery.

While trade usage presents an alternative to relieving security contractors of performance obligations involving the use of force when pirates board a vessel, another alternative arrives at the same result. Even though there is a strong policy toward parties performing contractual obligations, particularly where lives are at risk, both excuse doctrine and trade usage may require refinement in application to settle on a practice that protects crew and security contractors. Limitations on the security contractors' contractual obligation to use force would also seem to be supported by policy favoring the allocation to governments of the risks of armed engagements. Such a policy—one that can be squared with the Recommendations and good contract theory—can be obtained by looking further into the larger context of the international community's response to piracy. This Article now turns to the role

148. See *Encyclopaedia Britannica, Inc. v. SS Hong Kong Producer*, 422 F.2d 7, 18 (2d Cir. 1969) (examining testimony and concluding that the carrier did not present sufficient evidence to establish that a custom existed).

149. See RESTATEMENT (SECOND) OF CONTRACTS § 222(3) (1981) ("Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.").

150. See discussion *supra* Part II.B.

that public policy and overall context might play in supporting non-performance by security contractors in this situation.

D. Considerations of Context and Public Policy

The Second Circuit in *Encyclopaedia Britannica* noted that some arrangements are not simple matters of contract law, for instance, where certain practices of maritime history and the government's response through COGSA and other acts effectuated a policy governing the relationships of shippers and carriers in the maritime industry.¹⁵¹ This approach is certainly consistent with contract law, which recognizes that contract terms may be unenforceable or limited on grounds of public policy.¹⁵² Moreover, public policy would certainly form part of the "relevant evidence of the situation and relation of the parties" forming the context for supplementing the agreement.¹⁵³ To the extent that public policy calls for a limitation on the use of force in piracy security contracts, such a construction is entirely consistent with contract theory.¹⁵⁴

Public policy and context are particularly important with respect to security contracts to combat piracy in the international waters off the coast of Africa. With several U.N. Security Council resolutions in place and a number of military vessels patrolling the waters off the coast of Africa, these policies might guide our view of contractual obligations affecting the use of force by private parties to combat piracy.¹⁵⁵ That is, the allocation of responsibility between governments and civilian parties may also have a part to play in terms of policy affecting contractual obligations involving the use of force by private parties to combat piracy. One might say that some use-of-force decisions are best made by governments, rather than by contractual obligation. Of course, the vast territory of waters subject

151. *Encyclopaedia Britannica, Inc.*, 422 F.2d at 11–12.

152. See RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 179, 183, 185 (1981).

153. RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. b (1981).

154. See *id.* § 207 ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred."); see, e.g., *Herrera v. Katz Commc'ns, Inc.*, 532 F. Supp. 2d 644, 647 (S.D.N.Y. 2008) (applying the principle that a meaning which serves the public interest, such as awarding of attorneys' fees in civil rights cases, will be preferred over meanings which do not serve the public interest); *Prouty v. Gores Tech. Group*, 18 Cal. Rptr. 3d 178, 186 (Cal. Ct. App. 2004) (concluding that public interest is served by interpreting a company acquisition agreement to preclude early termination of employees). But see *State Farm Mut. Auto. Ins. Co. v. Wilson*, 782 P.2d 727, 728, 732–33 (Ariz. 1989) (holding that the public policy of ensuring that victims of drunk drivers have access to insurance did not demand that victim's own insurance company should pay punitive damages, which are generally focused on deterring wrongful conduct).

155. See resolutions cited *supra* note 18 and accompanying discussion in Part I.B.

to pirate attacks indicates that some private measures are appropriate and necessary, making the role of private parties key in the effort to combat piracy.

Security contracts to combat piracy present obvious differences that distinguish them from routine maritime shipping contracts. Determinations of risk allocation and interpretation are to be made with reference to the “circumstances surrounding the contracting.”¹⁵⁶ Extending this analysis to piracy, the nature of the response by the international community, the contractors’ civilian status, and the particular circumstances of security contracting to combat piracy off the Horn of Africa should factor into any recommendations for a framework that would determine contractual obligations in this context and what aspects of these contracts may be beyond the general law of contract. Due to the measures taken by naval forces, and due to the interest of the international community in securing the high seas, it is not surprising that after pirates attacked the *Maersk Alabama* a second time, Vice Admiral Bill Gortney applauded the “maritime industry’s best-practices,” which focused on “pro-active” measures aimed at preventing a ship from being taken.¹⁵⁷ Thus, private contracts have a role to play.

The civilian status of the crews and security contractors is important in defining their role by reference to the public interest favoring non-resistance when pirates succeed in boarding vessels. While merchant ships throughout history maintained arms onboard, the practice fell out of favor due to concerns about liability and safety of the crew and others.¹⁵⁸ Because of the particular practices involved in current pirate attacks, the public interest would arguably favor an interpretation of contracts that protects human life, recognizing that crew and security contractors could be killed—rather than merely held for ransom—if they respond with force and fail to prevail over the pirates.¹⁵⁹ Moreover, the objectives of the international

156. U.C.C. § 2-615 cmt. 8 (2001).

157. Schaeffer, *supra* note 11.

158. See generally Bradsher, *supra* note 24, at A8 (considering safety considerations and international law in the debate over arming crews).

159. See PLOCH ET AL., *supra* note 3, at 31 (noting that a failed attempt to defend a ship may, in turn, make the pirates more likely to kill crew members); *Pirates Seize N Korea Tanker Crew*, *supra* note 13 (detailing the hijacking of a North Korean tanker in the waters off Somalia and discussing a Spanish trawler and other ships and crews that were held for ransom); *Pirates Kill Sailor in Attack on Oil Tanker Off Benin*, *supra* note 33 (reporting the death of a chief engineer during a pirate attack off the coast of Benin). The Supreme Court of Washington has observed that “[s]ociety places the highest priority on the protection of human life.” *Gardner v. Loomis Armored Inc.*, 913 P.2d 377, 383 (Wash. 1996) (holding that an employer wrongfully

community might be compromised if the arms carried onboard vessels become the targets of attack by those seeking to secure additional weapons, or if the presence of the weapons encourages an arms race between vessels and pirates.¹⁶⁰

Alternatively, government policy is also implicated if an armed vessel creates its own security or terrorism risks while visiting a nation's ports.¹⁶¹ Essentially, important limitations should be placed on the means used by security contractors to perform their contracts to combat piracy due to their status as civilians. For instance, in one recent attack, private security forces, as opposed to international naval forces answerable to the United Nations, killed at least one pirate in an attack on a vessel.¹⁶² For these reasons, any rule that would expect security contractors to use force when pirates board a vessel, or else be liable for breach in all circumstances, would necessarily fail to take into consideration the policy and public interest underpinnings involved in armed conflicts with pirates in open waters.

For these public policy reasons, any argument favoring an absolute rule encouraging contractual performance—particularly one that anticipates the use of force answerable by an action for breach for the failure so to act—even when pirates board a vessel, should not succeed. The argument that security contractors have a contractual obligation to use force in such cases does not take into account the circumstances surrounding efforts to combat piracy. Appropriate reasons for expecting contractual performance should not center solely on the act of contracting for the provision of security, but must take into account the limitations placed on security contractors due to the risks of using force and their civilian status, rather than government actors, in the fight against piracy. In short, the same policies driving government authorities regarding armed bank-robbery—to secure the safety of persons over property, recognizing

terminated an armored car driver who left vehicle to save a woman from a life-threatening hostage situation).

160. Bradsher, *supra* note 24, at A8 (reporting that the U.S. Coast Guard fears that weapons onboard vessels could be used for terrorist attacks); PLOCH ET AL., *supra* note 3, at 31 (conveying the concerns of U.S. government officials that merchant ships carrying weapons could pose security or terrorism risks to U.S. ports).

161. PLOCH ET AL., *supra* note 3, at 31.

162. See Alan Cowell, *In First, Private Guards Kill Somali Pirate*, N.Y. TIMES, Mar. 24, 2010, at A11 (reporting that pirates twice attacked a Spanish frigate, which responded with gunfire by private security forces who killed one of the pirates raising issues of responsibility and accountability). Naval forces released the pirates the next day because the ship's captain was unable to assist in the legal prosecution against the pirates. Alan Cowell, *Pirate Suspects Are Released by Naval Forces*, N.Y. TIMES, Mar. 26, 2010, at A8.

that civilians are safest when they are calm and compliant—apply to the protection of civilians on vessels attacked by pirates.

The proposed practice of encouraging non-performance by security contractors where the use of force might be required after pirates have boarded the vessel should be limited to security contracts where the use of force becomes a risk factor greater than offering no resistance. Where parties to maritime contracts claim excuse or that trade usage supports their position, common law principles will often apply without special considerations. Thus, such a party would not likely need the protections of the proposed practice as there is general precedent for many other cases of non-performance. The proposed procedure for excusing security contractors from using force once pirates board the vessel is based on existing contract-law doctrines. The logical development of this procedure from the established doctrines has been described above.¹⁶³ The suggested applications of each are based on sound public policy from which a court could conclude that certain contingencies presented by pirates should not be met by security contractors driven by contractual obligations to use force. Rather, the practice of standing down is arguably more in line with trade usage and the public interest.

CONCLUSION

A security contractor facing many of the perils of piracy will, in most cases, be held to performance or will otherwise face a claim for breach. The simple reason is that shipowners and ship operators may perceive that the heightened risks associated with sailing off the Horn of Africa create a special need to protect lives and cargo, a need which favors holding the parties to the terms of their bargain. That said, a security contractor on a vessel boarded by pirates experiences a contingency involving a substantial risk of death or personal injury to the crew and contractor personnel and should be able to claim that any obligation to use force under the contract is excused. Theories to the contrary that either bar the application of the excuse doctrine or favor excuse for all acts of a public enemy (here, pirates) are not consistent with contract theory. For instance, any theory that would prevent recourse to excuse would be contrary to contract doctrine that surely contains such a contractual out. There is little basis in law or policy regarding civilians acting as security contractors to take on the particular demands that the hostility of a pirate attack in international waters present. Thus, the shipowner or ship

163. See discussion *supra* Part II.A.

operator should not be able to recover damages based on such breach because the defense of excuse should be available to the contractor.

Some cases and commentaries regarding the impracticability doctrine unduly limit the application of excuse or lead to contractual uncertainty, leaving recourse to contractual theories such as interpretation to allocate performance obligations helpful to parties at the time of performance. Allocation of performance obligations customary for the response to armed bank-robbery, in particular, provides a framework for the establishment of an approach to interpretation through trade usage that is analogous to what should be our expected response to pirate attacks. As with the response of bank security guards to an armed robbery, an interpretation of contractual obligations that focuses on preservation of life and allocates to government actors the responsibility for crime-fighting is compelling if such an interpretation can be obtained through trade usage, public policy, or considerations of public interest. As a result, guidance to security contractors should include methodology designed to interpret contractual relations in the context of the particular nature of using private security contractors in the battle against piracy.

This Article proposes that we interpret security contracts in a way that considers the emerging trade usage that favors non-resistance to pirates who successfully board a vessel. This proposed view of the obligations of the parties to a security contract recognizes that there are some cases where a security contractor should not face a claim of damages for breach of contract if the security contractor does not respond to a pirate attack with use of force, having considered the risk to crew that could result if such resistance fails to deter the pirates. Contract law already considers trade usage as part of the process of interpreting contractual obligations where the usage is sufficiently universal to become part of the bargain. Thus, this proposed view of these contracts is firmly grounded in general contract theory.

The focus of this proposed solution is identifying and understanding—at the earliest stage of contract performance—the parties' expectations in the event of a pirate attack that is successful in taking the vessel, so that the courts and the parties will know when the use of force is not contractually obligated and when failure to use force is not a breach. Because contract law already recognizes that trade usage forms an important part of the allocation of responsibility between parties and expectations in general—either expressly or

impliedly—this proposed view does not require any change in the law. Thus, while contract law would require performance generally, the contract theory of trade usage would find that performance does not include the use of force when pirates board a vessel on the basis of emerging trade usage, as expressed in the Recommendations.

This approach to contractual obligations under security contracts is also supported by contractual reference to public policy and the public interest generally. Unlike the application of the classic excuse doctrine or trade usage theory, however, public policy and the public interest takes into account the interest of the national and international actors who are also combating piracy through diplomatic channels and military actions, including patrols of the Indian Ocean and the Gulf of Aden. These policies would favor contractual interpretations that limit the use of force by civilians against pirates where there are also government actors involved and such force has the potential of not only harm to the crew and security contractors, but also the risks of setting off arms races, terrorism, and security problems in ports. As a result, security contractors would be justified in declining to use force if pirates successfully take a vessel because of the risk to the crew and contractors and the need for a more international response to the piracy.

In short, while the traditional excuse doctrine offers less clarity and consistency when applied to the responses of security contractors to piracy, interpreting contracts for onboard security forces in light of the applicable trade usage does not always require scrupulous performance in all cases. The emerging trade usage and existing public policy allows the parties to gain a better understanding of their obligations, including the understanding that the security team's decision to not use force when pirates board does not breach the contract. Instead, it could be that an international or military response is proper, or that the risks accompanying the use of force outweigh the potential benefits. Excusing the performance of security contracts to combat piracy in some cases is solidly grounded in existing methods of contractual interpretation; excuse gives effect to the unique context in which these contracts are formed and the developing trade usage, which disfavors active resistance when pirates successfully board a vessel.