



ENERGY & MARINE

Executive Order 13536

Blocking Property of Certain Persons Contributing to the Conflict in Somalia

Overview

Piracy, never the most straightforward of subjects, remains a focus of attention for navies, governments, insurers and shipping industry bodies who continue to address the numerous legal, political and insurance issues that have arisen. That said, the overriding concern of individual ship owners and operators naturally remains how best to prevent an attack, and how to protect against the financial consequences of a successful hijacking.

This entire issue became more convoluted when on 12th April 2010, the President of the United States issued Executive Order 13536 entitled “Blocking Property of Certain Persons Contributing to the Conflict in Somalia”*. This paper is not specific to piracy, but is rather a measure that has been taken against entities and individuals involved in activities that constitute threats to the peace, security and stability of Somalia. Piracy and armed robbery at sea are deemed to be included in this definition, although the term “ransom” is not specifically mentioned. Notwithstanding this, the wording of the Order, leaves little doubt that the action of responding to a demand for ransom money in order to secure the release of a hijacked vessel, its cargo and crew, could contravene the Order, and leave the victim at risk of being in breach of US Government sanctions.

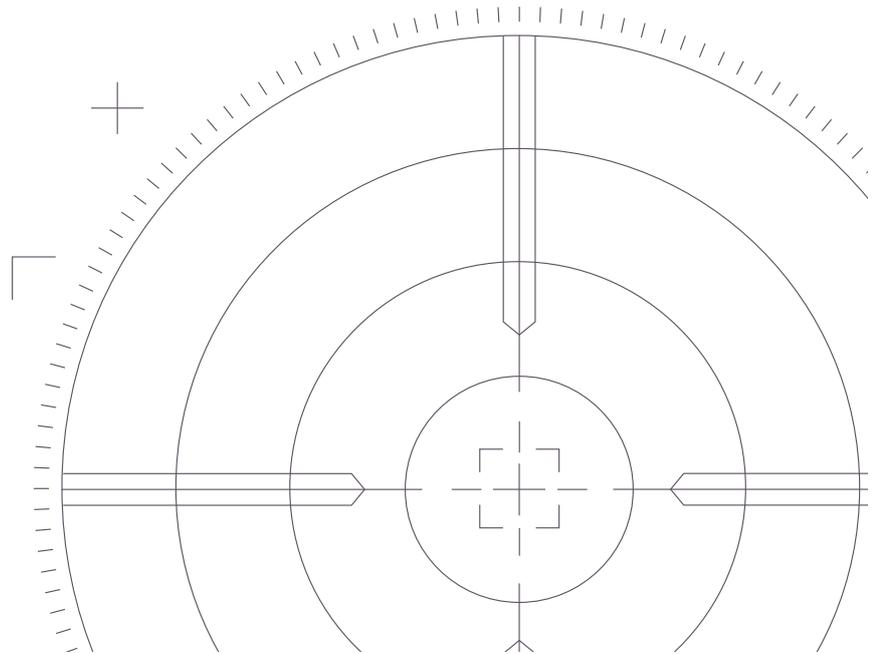
This paper provides a brief background to the Somali piracy crisis; the Order itself and its intent and answers some of the more pressing questions that shipowners and their insurers have raised. This is not intended to be a fully comprehensive document; indeed many issues remain unclear and subject to further interpretation. Nevertheless, it is hoped it will be of assistance to those who are concerned that they might become involved, in one way or another, with a piracy incident.

*www.ustreas.gov/offices/enforcement/ofac/legal/eo/13536.pdf

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Background and Growth of Piracy

As is widely known, Somalia has not had an official government since 1991 despite attempts by the United Nations in 1993 to install one. Since that time, chaos and anarchy has reigned in the country, with various tribal groups taking control in running their respective territories. The situation is however fluid, with opposing forces, both political and religious, continually trying to impose themselves and assume power thereby establishing themselves as the leading authority within the country.

This situation, abject poverty, and lack of resources have made the majority of Somalis prepared to take desperate measures to provide food for their families and themselves. The life expectancy of a Somali man is 36 years, which inevitably means that they generally have a “live for today” mentality. Piracy came about as a result of disruption of their key activity, fishing, on which survival depended. Territorial and traditional fishing rights off the Somali coast were being threatened by foreign fishing fleets. Local fishermen defended their livelihood with force, which over time morphed into piracy.

Over the last few years, this problem has continued to grow, both in the number of reported piracy incidents, and their theatre of operations, with attacks now taking place along the length of the East Coast of Somalia through to the Gulf of Aden almost to the Indian Coast. That said, in the first quarter of this year, a reversal in the general escalation trend was recorded. ICC International Maritime Bureau, who monitor piracy activity worldwide have reported that a total of 34 Somali pirate incidents took place in Q1, compared with 61 during the same period last year. This they attribute to the ongoing presence of navies who have successfully destroyed a number of “mother” vessels, and the extended NE monsoon season, which only started to dissipate at the end of February/ beginning of March. Time will tell which has contributed most to the downturn, and whether it can be maintained.



The Scope and Intention of the Executive Order

In its broadest terms, the Executive Order is designed to address the deteriorating security situation in Somalia, and the persistence of violence, acts of piracy and armed robbery that continue to take place at sea off its coast. The methodology the Order adopts is to prohibit monetary payment transactions by “US persons” to entities and private individuals identified by the US Treasury as having contributed to the Somali crisis. These entities and individuals are referred to, in the Order, as Specially Designated Nationals and Blocked Person (SDNs).

The consternation that the Order caused in the days following its publication was considerable. This was driven by the lack of definition as to who exactly would be liable to prosecution; whether payment of a ransom to secure the release of a vessel, is embraced by the term “transaction” referred to in the Order; how far the term “property in the US” could extend; and what steps shipowners or their insurers could take to ensure that they are acting in compliance with the Order.

Maritime lawyers in both the US and the UK have subjected the Executive Order to intense scrutiny and analysis, as have numerous bodies representing the shipping and insurance industries. Representations have also been made to both the US Treasury and the Office of Foreign Assets Control (OFAC) the body designated by the US Government as responsible for the implementation of the Order. Although OFAC have endeavoured to provide clarification on the meaning and intent of the Order, a strict definition of terminology has, in the main, not been possible, given the deliberately vague wording of the Order itself. A further element of concern has been the potential that the legality of ransom payments as defined in English Law might be at odds with the legality, as defined by the Executive Order, in US law.

Through ongoing discussions between the various entities representing the Insurance and Shipping Industries, with different departments of the US Government, a general consensus view has been reached on various aspects of the Order.

The following is a summary of what we understand to be the common understandings reached between the various departments of the US Government and representatives of the Shipping and Insurance industry.

- It is of paramount importance that any owner whose vessel is taken by pirates should firstly establish if they are subject to the order by being a US person or entity. If they consider that they are subject to the order then contact should be made with OFAC for approval prior to any payments being made. This is equally the case for underwriters, cargo interests, charterers, brokers and lawyers. Each interested party must determine if they are subject to the order. In the event of any uncertainty then they should seek authority from OFAC.
- It is clearly in the Owners interest to demonstrate their willingness to cooperate with OFAC, establish any requirements they may have, and minimise the risk of delay in obtaining their licence to settle the ransom. OFAC has a hotline in the United States 800-540-6322, and can also be reached by email on www.ustreas.gov/offices/enforcement/ofac/hotline.shtml
- The Order specifies that piracy and armed robbery at sea are included as “activities that constitute threats to the peace, security and stability of Somalia”.
- There is a breach of the Executive Order, however, only if payments (including ransom monies) are paid to an SDN, or are 50 per cent or more to the ultimate benefit of an SDN. Currently the list of SDNs consists of eleven individuals and one entity, but is subject to update.
- Only “US persons” are subject to the provisions of the Order. This term includes US nationals, permanent aliens, or others in the United States. It also includes US companies, or foreign branches of US companies. A foreign entity that has operations or offices in the US does not become a “US person” although Officers and employees of that organisation could be.
- It is incumbent on the shipowner, insurer or other party to exercise due diligence to ensure that the payee of any ransom is not classified as an SDN. Ignorance is not a defence. The provisions of the Order are subject to a strict liability regime. In other words, unwitting payment to an SDN, even if steps have been taken to determine their SDN status, are no defence under the Order.
- The same “US person” benchmark applies to insurers. In other words, payment by an insurer whose company is domiciled in the US, even if through a branch office overseas would be subject to the Order. Similarly any involvement by a US domiciled bank or its overseas branches would be subject to the Order.
- In the event of a perceived need to make a payment to an identified SDN a licence from OFAC is essential.



Conclusions

It is apparent that at a fundamental level, the Executive Order's provisions only apply to "US persons" who will be in breach of the Order if they or their representatives make payment, wittingly or otherwise, to an SDN.

However, numerous scenarios can and have been envisaged which may have the potential of varying the Order's scope (part cargo owned by US interests, for example) and these are the subject of further and ongoing discussions with US authorities.

It bears repeating that both the Foreign Office and OFAC, strongly recommend an ongoing dialogue with OFAC be maintained throughout the negotiation process.

Whilst this makes basic sense, it will inevitably place an additional burden on the shipowner and/or his insurers who naturally are anxious to secure the release of his crew and vessel in the shortest possible time.

From a purely practical point of view, it remains to be seen how the often delicate and time sensitive negotiations with pirates, will be affected by attempts to identify the recipient(s) and end beneficiaries of ransom monies and whether obtaining the approval of OFAC will result in delays which put the negotiation at risk.

Early indications are encouraging. We have been given to understand by those involved in recent negotiations, that OFAC have been timely in their responses and that their requirements have not negatively impacted on negotiations.

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