



GUARDCON

Standard Contract for the Employment of Security Guards on Vessels

BIMCO has developed GUARDCON to assist the industry, and in particular shipowners and their P&I Clubs, by providing a clearly worded and comprehensive standard contract on which they can conclude agreements for security services. The employment of security guards on ships is something that shipowners, unfortunately, have recently become all too familiar with due to the continuing threat of piracy to shipping in the Indian Ocean and other areas around the world.

In response to ship owners' increasing demand for security services, an ever growing number of private maritime security companies have entered the market to meet that demand. A recent count of such companies stood at more than 200 – each with their own set of terms and conditions of employment. There is presently very little regulation governing the activities of these companies and no formal recognised accreditation system to ensure minimum standards. While there are a number of well-established, professional and highly reputable maritime security firms in operation, there are also many that are less well-founded and who may be operating with inadequate insurance cover and without the necessary permits and licences.

The use of GUARDCON is not in any way intended to be a substitute for the proper exercise of due diligence by ship owners as part of the pre-contractual process when selecting a security company to provide unarmed or armed guards for a ship. While there is no substitute for due diligence, GUARDCON aims to raise the bar in terms of the standards to which security companies must reach in terms of insurance cover for their risks, and permits and licences to allow them to lawfully transport and carry weapons. The insurance requirements alone are set at such a level as will potentially exclude smaller companies from being able to offer their services using GUARDCON if they lack the necessary financial resources. This is deliberate and is intended, along with the permits and licences provisions, to weed out operators who may potentially place shipowners and their crews at risk.

Of equal importance is that ship owners employ security guards as a supplement to existing anti-piracy and BMP measures and not as an alternative. In this respect, GUARDCON emphasises that ship owners should not seek to reduce costs by employing less than the number of guards recommended. Risk analysis has shown that in the majority of cases the recommended minimum number will be four guards. This number has been proven to give the best protection against attack because all quarters of the ship can be covered and a proper round the clock watch system can be maintained.

At the November 2011 meeting of the Documentary Committee in Copenhagen, it was agreed that the development of a standard contract for the employment of security guards on vessels should be given the highest priority. A Sub-committee was chosen immediately after the November DC meeting to undertake the drafting work. The selected group brought expertise drawn from ship owners, underwriters, P&I Clubs and lawyers. The first meeting of the Sub-committee took place in December 2011 with the concluding meeting to finalise the draft taking place on 16 March.

The speed at which GUARDCON has been drafted, in just a little over 3 months, is a considerable credit to the Sub-committee members who devoted many long hours free of charge to the project. BIMCO is indebted to the Sub-committee for all their hard work. The members of the GUARDCON Sub-committee are as follows:

- Mr Tor Langrud, Wilhelmsen, Norway (Owner) (Chairman)
- Mr Daniel Carr, Stolt-Nielsen, USA (Owner)
- Mr Chris South, West of England P&I Club, UK
- Mr Andrew Moulton, Ascot Underwriters, UK
- Mr Stephen Askins, Ince & Co, UK
- Ms Elinor Dautlich, Holman Fenwick Willan, UK

We must also thank those who took part in the consultation process during the drafting. A number of reputable international private maritime security companies, including Drum-Cussac, PVI Ltd, MAST and Salama Fakira were invited to submit comments on the draft. The feedback we received from the security firms was positive and constructive. We also benefited from the useful advice of a number of leading marine underwriters including Ascot Underwriters (who were represented on the Sub-committee), Hiscox, Canopus and Aegis as well as valuable input provided by the Piracy Sub-committee of the International Group of P&I Clubs. Lastly, but not least, we thank the members of BIMCO's Documentary Committee for their constructive feedback and useful suggestions on the draft during development and for their agreement to fast-track the approval of GUARDCON for publication.

In parallel with the development of GUARDCON, BIMCO has also prepared Guidance on the Rules for the Use of Force. It is outside of BIMCO's remit to draft a set of standard Rules for the Use of Force as such because, ultimately, the content of such Rules is a matter of national law. While the BIMCO Guidance on RUF will undoubtedly be of great assistance to owners and private maritime security companies when drawing up and agreeing RUF for their own purposes, the Guidance itself does not form part of the GUARDCON contract.

Explanatory Notes

The following notes are intended to provide some of the thinking behind the provisions of GUARDCON.

Nature of the Contract

GUARDCON is intended to be a multi-functional agreement which can be used for single transits or as a framework agreement for multiple transits. Although it is geared towards the employment of private armed guards on board ships, it may equally also be used for the employment of unarmed guards. It does not cover the use of security escort vessels as different principles apply which, if incorporated, would create an unduly complex contract.

The liabilities and indemnities provisions of GUARDCON are based on knock for knock principles. In drafting GUARDCON the Sub-committee has drawn upon examples of clauses commonly found in existing contracts agreed between shipowners and reputable international private maritime security firms.

The contract follows the usual BIMCO pattern of a Part I box layout where the parties will enter the variable information of the agreement; a Part II terms and conditions; plus several annexes covering matters such as instruction notices, security equipment, rules for the use of force and individual waiver.

The provisions of GUARDCON are not cast in stone; they are designed to provide a well thought through and solid contractual platform on which the parties can base their agreements. It is expected that ship owners and security companies may wish to negotiate and subsequently amend some of the more commercial terms, such as those relating to payments and fees. However, we strongly recommend against any amendments to the key clauses – namely those dealing with insurance, liabilities, Master's authority, and permits and licences. Any changes to these provisions may result in a ship owners' P&I Club cover being prejudiced and so should be avoided.

SECTION 1 – Basis of the Contract

1. Definitions

In common with other BIMCO contracts, a list of definitions is provided of terms used throughout the Contract.

It should be noted that GUARDCON is designed to be a contract between the owners of the vessel and the security contractors and that the liability, insurance and other important provisions are constructed on this basis. While we acknowledge that in some cases it may be the charterers who arrange and pay for the security guards, it is essential that the owners be clearly identified. If the charterers or the managers on behalf of the owners enter into the contract, then the names and details of these parties should be added to the "owners" box in Part I along with the actual owners details and the contract should be signed "for and on behalf of owners".

2. Commencement, Appointment and Duration

GUARDCON is an “evergreen” contract when used as a framework agreement and will continue beyond the initial 12 month contract period until terminated by one of the parties giving 30 days’ notice. For single transit purposes, the contract ends when the security guards disembark the vessel at the end of the transit.

Sub-clause (c) emphasises that when GUARDCON is used as a framework agreement it does not oblige the owners to use the contractors’ services exclusively during the contract period or require them to guarantee a minimum number of transits. Owners require a degree of flexibility in providing security guards for their vessels to ensure that services are available when needed. As smaller security companies may not always have the personnel resources available to provide guards as and when needed by the owners, the contract allows the owners to obtain services elsewhere to meet their vessel scheduling requirements.

SECTION 2 – Security Services

3. Security Services

The contractors are to provide a security team of at least four members, one of whom must be an appropriately experienced leader. Four is considered to be the minimum number of guards necessary to operate an efficient round-the-clock watch on board a vessel during a transit and providing the required level of protection. Certain circumstances, such as a lack of accommodation on board, may preclude a four man team being deployed; however, accepting any less than four guards should be agreed carefully on a case by case basis between owners and contractors and should follow from a proper risk analysis.

The opening sentence of sub-clause (b) is lifted from BIMCO’s Piracy Clause which means that the contract will also encompass seaborne armed robbery that takes place in inshore or territorial waters, such as in the Gulf of Guinea (which would not usually come under the definition of “piracy”).

4. Engagement of Security Services

If GUARDCON is used for multiple transits, the owners must notify the contractors on each occasion and at least 72 hours in advance by issuing an Instruction Notice (as per Annex C) setting out their requirements and intended transit dates. The use of the contract is not limited to the current High Risk Area, but can be used within any defined geographical area agreed between the owners and contractors.

5. Change of Specification of Security Services

New legal and regulatory requirements may dictate a change to the specification of the security services supplied by the contractors. While such requirements are to be implemented, this clause ensures that any changes to the specification do not include a reduction in the number of guards or an increase in fees.

SECTION 3 – Obligations and Responsibilities

6. Contractors' Obligations and Responsibilities

There is no established “best industry practice” in the maritime security sector as yet. Consequently, the contract requires the contractors to use “all reasonable skill and care” as the benchmark for providing the agreed security services.

Sub-clause (a)(ii) requires the contractors to advise on and/or help the owners implementing security measures on board the vessel (hardening) but makes it clear that such hardening is based on the owners’ instructions. This has been done to avoid situations where the contractors might attempt to claim that the level of hardening does not meet their requirements and use that as an excuse to not board their team. However, it should be noted that the employment of private security guards on ships is not a substitute for other security measures – it is simply another layer on top of existing security. Reference is made to BMP in this respect, but BMP will only apply where the transit is through the High Risk Area and not to other areas such as the Gulf of Guinea (this also applies to the provisions of sub-clause 6(a)(v)).

Sub-clause (a)(iv) relates to advice provided by the security team to the Master in respect of routing. The clause makes it clear that such advice is strictly limited to security related matters concerning the routing of the vessel and does not undermine the Master’s overall authority in respect of the navigation of the vessel.

Sub-clause (a)(ix) requires the contractors to have sufficient shore based resources to provide operational and administrative backup to the security team during the transit. It is essential that security firms are adequately resourced to be able to manage and advise their guards during deployment and for the owners to have a round-the-clock point of contact for the contractors.

Sub-clause (a)(x) deals with the contractors’ responsibility for their sick or injured personnel. Deviating to a place where the sick or injured personnel can be taken ashore for medical attention and repatriation is the owners’ responsibility under Clause 7 (Owners Obligations and Responsibilities) - sub-clause 7(i) - and will be covered by their P&I Club; however, arranging for the transportation of the injured personnel to shore and then home is a cost to be met by the contractors and they will need to be appropriately insured to cover this cost (see Clause 12 (Insurances)).

Sub-clause (b) sets out the qualifications, training and experience required of the security guards. Sub-clause (b)(i)(2) refers to STCW training – this is intended to cover basic shipboard fire-fighting skills, personal safety and survival craft proficiency. It is not intended that the security guards should be STCW qualified or certified. The sub-clause also refers to BMP training – but it should be noted that this will only apply where the owners require security guards for transits through the High Risk Area.

Sub-clause (b)(i)(6) relates to the background experience of the guards – it does not limit the guards to only ex-military personnel but recognises that ex-law enforcement personnel and also those from other relevant backgrounds may be equally suited to the task. It is not

intended that the reference to “or other service acceptable to the Owners” is a back-door to allowing security contractors to provide personnel ill-suited to the task; GUARDCON is not a substitute for the exercise of due diligence by ship owners to ensure that the security contractors are able to provide personnel that are appropriately qualified and experienced.

Sub-clause (b)(i)(8) covers working languages. It is important that the guards are able to communicate effectively with the Master of the vessel and, of course, among each other.

Sub-clause (b)(ii) requires that the team leader has some prior experience of providing shipboard security services and that at least one of the guards has had advanced first aid training (which in military terms would be the ability to provide first aid to victims of gunshot and other similar life-threatening wounds).

Sub-clause (c) emphasises one of the key principles of the contract – that the contractors must have and maintain adequate insurance.

The contractors’ do not have an automatic right to sub-contract. Owners will have carried out due diligence on the company that they have contracted with to provide security services. Sub-clause (d) reflects that it would be unreasonable to allow contractors under these circumstances to farm out the contract to another company that the owners have not checked.

Sub-clause (d)(ii), however, addresses the fact that it is common practice in the security industry for individual guards to be sub-contracted by security companies rather than being directly employed. In some cases, for tax reasons, individual guards will set themselves up as a “company” (where they are the sole shareholder/employee). This provision allows sub-contracting in these specific circumstances and does not require the owners’ approval.

7. Owners’ Obligations and Responsibilities

The nature of the GUARDCON contract dictates that the owners’ obligations will be a shorter list than those of the contractor – however, the Sub-committee has done its best to “balance” the obligations of the parties.

The key obligation is the payment of all sums due to the contractors. Other notable obligations include the notification of all relevant parties that the vessel will be carrying armed/unarmed security guards; the provision of a secure location for the storage of firearms, if carried (It is common practice for the bridge of the ship to be used for this purpose where the locked firearms containers used by the guards to transport their weapons can be stored); and the entering of the guards on the crew manifest as supernumeraries and giving them shipboard familiarisation training. Listing the guards as supernumeraries on board the vessel is done to avoid issues in certain ports as to the status of non-crew on the ship – if not listed as supernumeraries they could be considered as passengers that might create difficulties in terms of their employment on board and the carriage of their security equipment.

SECTION 4 – Master’s Authority, Division of Responsibilities and Hijacking

8. Master’s Authority and Division of Responsibilities

Clause 8 is undoubtedly one of the most important provisions in GUARDCON and the one which has perhaps been most discussed during the drafting process.

The concept of providing for the use of force, including lethal force, in a commercial contract is unique in the maritime field. It is worth remembering that the police in most countries are subject to robust and onerous regulations and procedures before weapons are used with each step assessed and recorded in a Decision Log. Transparency and accountability is fundamental. At the moment the maritime security industry does not have anything like the same level of scrutiny.

As a “test” for the GUARDCON regime the Sub-committee discussed the issue with the UK Crown Prosecution Service (CPS) who looked at the draft GUARDCON and the Guidance for the Rules for the Use of Force. Although the CPS will not at this stage be providing a formal response or issuing their own guidelines, they have confirmed that the approach in GUARDCON is right at least as a matter of English Law where force used to prevent a potential hijacking must be proportionate and necessary. The CPS cautioned against allowing the Master to be involved in the decision to open fire in case he should fall foul of the rules on "joint enterprise" and be tainted by the actions of the security personnel.

The CPS have also advised that there should be a point in time when it is clear that a decision has been made to the effect that the use of force MAY be used to deal with an escalating or existing threat and that the Rules for the Use of Force are invoked.

The most fundamental aspect of carrying armed civilian guards on board a merchant vessel is that under no circumstances should there be a derogation of the Master’s authority – he retains at all times full command of and responsibility for the vessel. This is a SOLAS requirement and is expressly stated in the contract.

However, GUARDCON also acknowledges that the Master of a merchant vessel does not have the necessary expertise to command a team of armed guards in the use of firearms or necessarily to decide upon situations where a graduated response by the guards is appropriate. Clause 8 does not require the Master to invoke the Rules for the Use of Force (RUF), which is consistent with the advice given by the CPS above to avoid the risk of “joint enterprise”. If the Master was to invoke the RUF and the guards, acting on his orders, unlawfully fatally injure a third party, the Master could be exposed to criminal liability.

It is important to note that the RUF are invoked only in response to a specific threat – they are therefore not necessarily in effect for the whole duration of a transit. Could the RUF be made effective at the time the guards embark the vessel until the end of the transit, thus avoiding any decision making process about who invokes them and when? In BIMCO’s view the concept of effectively giving weapons control to the security guards while the vessel is within the territorial waters of a Coastal State would create many more legal and practical issues than it resolved.

Sub-clause 8(b) deals with the assessment by the security team leader of threats to the vessel. If, in the team leader's professional opinion, the threat warrants a graduated response from the security guards, he has to advise the Master or, in the Master's absence, the officer of the watch, that he intends to invoke the RUF. During the development of GUARDCON, the Sub-committee discussed various scenarios that might impact on the obligation of the team leader to advise the Master – in particular in the case of a surprise attack where there might not be time to advise the bridge team. However, experience of Somali piracy attacks indicate that with vigilant bridge and security teams there is always forewarning of an attack and therefore there should always be time for the guards to make the bridge team aware of their intentions.

It is very important to note that invoking the RUF does not necessarily mean the use of lethal force or indeed force of any kind by the security guards. A properly drafted and agreed RUF provides a means of graduated response to a threat which must be proportionate to that threat. It may well be that the highly visible presence of security guards on deck is sufficient to deter a threat without further action being taken.

In terms of the actual use of force, Sub-clause 8(c) clearly allocates the decision to each of the security guards alone. This means that the Master cannot order a guard to shoot – each guard must act in accordance with the RUF and national law in deciding upon the appropriate use of force and will be held liable for the consequences. In this way the Master is unlikely to be exposed to any criminal action at a later date.

Sub-clause 8(d) echoes the sentiment of Sub-clause (a) in terms of emphasising the Master's absolute authority at all times as conferred by the SOLAS Convention. Although the Master does not invoke the RUF or order the use of force by the security guards, he retains the right under all circumstances to order the guards to stop firing.

However, it should be noted that the Master's right to order the guards to stop firing is set against the individual right of each guard to exercise self-defence. Simply put, an individual has the right to take whatever appropriate action he feels is necessary and proportionate to defend himself (in accordance with national law). If a guard thinks that to stop shooting would lead directly to him being killed or injured, then he can take the sole decision to continue firing regardless of orders to the contrary.

9. Hijacking

The preamble to Clause 9 makes the clear statement that the contractors cannot and do not guarantee that the security services they provide will prevent the vessel from being attacked. The wording is intended to convey that if the vessel is hijacked despite the best efforts of the guards, then it does not mean that all liabilities and losses pass to the contractors.

The Clause goes on to deal with what happens if the vessel is hijacked by pirates. Although the owners will normally appoint a team of specialists to manage the hijack, the contractors and the families of the captured security guards will understandably also want to be kept advised of what's happening. Sub-clause (a) provides for the owners to arrange for the contractors to receive weekly situation reports.

Sub-clause (b) is intended to avoid situations where the contractors and the captured security guards may place the crew of the vessel at risk by attempting to communicate with each other in order to escape from their captors.

For the purposes of negotiating with and paying ransom to the pirates, Sub-clause (c) sets out that the security guards on the seized vessel are to be considered as crew members. As such, the contractors are not obliged to contribute to any ransom payment by the owners to secure the release of the vessel and crew. Cargo does not contribute to ransoms as they rely on general average (GA) and similarly crew are not expected to contribute to their proportion in GA.

SECTION 5 – Permits and Licences, Investigations and Claims

10. Permits and Licences

There is concern in the industry that an apparent sizable number private maritime security firms are operating without the necessary permits and licences to transport and carry weapons. The consequences of contractors failing to have the required permits and licences effectively makes the carriage of weapons illegal, the consequences of which could result in significant delays to the vessel. In response to this concern, GUARDCON contains a comprehensive clause dealing with permits and licences which place a strict obligation on the contractors to ensure that they meet all such requirements. This is an important clause and parties should take careful note of its provisions.

IMPORTANT NOTE: Verifying End User Certificates (EUCs)

A small minority of private maritime security companies are known to be using weapons “rented” or “borrowed” from other security companies. This is being done to save operating costs and undercut legitimately operated PMSCs. This is an illegal practice if the weapons are not legitimately licenced to the end user. Owners are strongly advised as part of their due diligence process to verify the legitimacy of all permits and licences provided by the contractors. This is particularly important for the firearms End User Certificate (EUC) issued by the importing country which, in accordance with a number of relevant conventions¹, needs to be officially approved by a government agency from the exporting country. Ideally, the ship’s flag state should as a matter of routine sight EUCs and verify their authenticity prior to issuing letters of authority (to allow the ship to have the weapons on board). The consequences for owners of unauthenticated firearms EUCs could mean significant delays to the ship or even detention.

¹ United Nations, General Assembly, ‘Programme of action to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects’, A/CONF.192/15, July 2001, section II, para. 12; OSCE, Forum for Security Co-operation, ‘Standard elements of end-user certificates and verification procedures for SALW exports’, Decision no. 5/04, document FSC/DEC/5/04, 17 Nov. 2004; Council of the European Union, User’s Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, document 9241/09, Brussels, 29 Apr. 2009; Wassenaar Arrangement, ‘End-user assurances commonly used: consolidated indicative list’, adopted in 1999, revised in 2005.

Clause 10, however, is not one-sided as it recognises that the owners also have obligations in respects of various permissions that need to be obtained in order to carry armed guards on board. It places a mutual obligation on the owners and the contractors to obtain all necessary permits and to maintain them during the transit and provide copies to the other party on request. Each party is also obliged to indemnify the other against the consequences of failing to obtain the required permits. Permit has been defined for the purposes of the Clause to mean, in addition to permits, certificates, licences, authorisations, consents, permissions, approvals and visas.

This is an extremely important clause and parties should take very careful note of its provisions.

11. Investigations and Claims

If there is an incident on board the vessel involving firearms, this will generally result in an enquiry by the vessel's Flag State or, at the very least, by the vessel's owners. In such cases the contractors are obliged to assist in the enquiry – which may entail the submission of written reports from the Master, team leader and other members of the security team/crew.

If there is a third party claim against the contractors or the owners as a consequence of the security services (for example, a claim by a fisherman for damage to his boat resulting from security measures), Sub-clause (c) provides for the parties to assist each other in defending claims.

SECTION 6 – Insurance, Fees and Taxes

12. Insurance Policies

One of the key features of GUARDCON is the all-important Insurance Policies Clause. It is highly recommended that parties carefully read the provisions of Clause 12 to make sure that they fully understand their obligations.

Sub-clause 12(a) sets out the minimum insurance cover that the contractors must maintain to cover their liabilities during the contract period. The policy limits for the contractors' insurances set out in the Clause reflect a level which should be considered the industry accepted norm. BIMCO acknowledges that the insurance requirements in GUARDCON will "raise the bar" on insurance cover for many security contractors. The result may be that the widespread adoption of GUARDCON will weed out some of the less well-resourced companies who are unable or unwilling to meet the insurance requirements. However, given the fundamental importance of ensuring that security contractors are adequately insured to cover their risks, BIMCO feels that GUARDCON has an essential role to play in regulating this aspect of the commercial arrangement between owners and contractors.

The Insurance Policies Clause has been drafted in consultation with the underwriter representative on the GUARDCON Sub-committee, Mr Andrew Moulton of Ascot Underwriters, with additional input provided by a number of other leading marine insurance underwriters including Hiscox, Canopus and Aegis. It has been a fundamental part of the

development of GUARDCON to ensure that underwriters are comfortable with the contract and prepared to write appropriate cover for it. We are aware of at least one prominent insurance broker that has been working with a leading underwriter to produce a tailored “GUARDCON insurance package” for security contractors and we are confident that similar packages will be developed to coincide with GUARDCON’s publication.

Sub-clause (b) deals with policy limits which are set at \$5 million (or other higher figure as may be agreed by the parties). While the application of deductibles to help reduce premiums is a perfectly acceptable practice, the contract provides that to avoid contractors agreeing deductibles that in the event of a claim they may not have the financial resources to meet, such deductibles have to reflect market practice. The contractors are obliged to provide the owners with evidence of insurance with copies of cover notes if the owners so require.

Owners should also be adequately insured and have appropriate P&I cover – this is dealt with in Sub-clause (c).

Sub-clause (d) deals with kidnap and ransom insurance. As is common with this type of insurance, if you have it you cannot say you have it because it may be invalidated as a result. However, K&R policies normally extend to every person on board a vessel including supernumeraries and so if the owners have K&R cover the security guards will be embraced by that policy while they are on board the vessel. Should the vessel be hijacked and the security guards removed from the vessel then the Clause addresses the fact that once off the ship, the guards are no longer covered by the owners’ kidnap and ransom policy and therefore the contractors will need to make alternative arrangements or at least be aware that the owners’ insurance may not respond.

13. Fees and Expenses

The fees and expenses provisions of the contract encompass two main methods of employing security guards – namely a daily rate or a lump sum agreement. BIMCO acknowledges that the security industry operates with a number of permutations in respect of fees and expenses – in some cases combining the two. However, to avoid GUARDCON becoming overly complex, only daily rate and lump sum are contemplated. If the commercial parties wish to negotiate and agree upon alternative fee structures and payment methods they are free to amend the contract accordingly to suit their needs.

The parties should not only agree the amount of the fees but also clearly state the currency to apply. This is done by filling in Box 13.

Sub-clause (b) deals with mobilisation fees, if any have been agreed. Again, the amount and currency should be stated in the appropriate box in Part I.

Invoicing is on the basis of latest 30 days after the security guards have disembarked the vessel is provided in Sub-clause (c). The owners have 21 days in which to settle invoices issued by the contractors. If the owners fail to pay within 21 days then Sub-clause (d) provides the contractors with various sanctions against the owners.

If the owners decide that they require additional services to those originally agreed, then Sub-clause (g) provides for agreement to be reached in writing setting out what the additional services are and what extra fees the owners have to pay for the additional services.

Sub-clause (i) deals with rescheduling of the transit by the owners where the date of embarkation of the guards is delayed. If the owners are unable or fail to give more than 48 hours' notice of the delay then the contractors will be entitled to be paid as of the original agreed date of embarkation.

If the vessel is hijacked then according to Sub-clause (k) no further daily rate payments will be made by the owners to the contractors until the vessel is released and if/when security services are resumed – so even though the contractors assume no liability for the seizure of the vessel the consequence is that all payments are suspended for the duration of the hijack.

14. Taxes

This is a comprehensive mutual clause dealing with taxes payable by the owners and the contractors and also covering sales tax for security related items purchased by the contractors on the owners' behalf. Additionally, in Sub-clause (d) provision is made for withholding taxes which the owners are obliged to pay on behalf of the contractors to relevant tax authorities.

SECTION 7 – Legal and Liabilities

15. Liabilities and Indemnities

Along with the Clauses covering insurances and permits & licences, the liabilities and indemnities provisions are at the very heart of GUARDCON. The contract applies “knock for knock” mutual allocation of risk principles whereby each party is responsible for loss of/damage to and/or death of/injury to any of its own property and/or personnel or that of the entities within its defined “group”; responsibility is without recourse to the other party; and each party, in respect of the losses, damages or other liabilities it has assumed responsibility for, indemnifies the other party.

It should be noted that Sub-clause 15(b) is not an exclusion of liability. It is a contractual arrangement whereby two parties agree to hold each other harmless and indemnify each other for this liability (up to the contractual cap). It does not exclude liability to an injured/dead person (such as a fisherman killed by a security guard), who would still claim in the normal way against whichever of the contracting party is the party at fault (who may then be able to take the benefit of this indemnity to recover from the other contracting party).

Sub-clause (c) concerns third party liability. To be consistent with Sub-clause (b), the provision is reciprocal with each party indemnifying the other against claims by third parties with the exception of claims from third parties arising out of the owners' or contractors'

own negligence. The reference to “unlawful” act is intended to cover scenarios such as a fisherman being killed by a security guard using unlawful force.

Sub-clause (c)(iii) addresses the issue of third party claims (including claims from the crew) in the event of a liability caused as a result of a firearm being accidentally or negligently fired by a security guard. This sort of accident could be the result, for example, of a guard tripping while carrying a loaded firearm. It is an exception to the knock for knock principle; the owners agree not to pursue individual security personnel but can still claim against the contractors under this indemnity.

The handling of claims is dealt with under Sub-clause (c)(iv) – the clause provides that the parties have the option to take over the handling of specific claims from the other party for which they would otherwise have to provide an indemnity.

Sub-clause (d) places a contractual cap on the liabilities under the contract as between the owners and the contractors of a minimum of US\$5 million while recognising that although the owners may have rights of limitation under international conventions and national law, the contractors will not have any such rights.

Sub-clause (e) is the consequential damages provision that has been lifted from TOWCON 2008.

16. Security Personnel Liability

Clause 16 is basically a “Himalaya” provision tailored to the requirements of the security personnel provided by the contractors which extend the contractual protections afforded the contractors to their employees.

17. Security Personnel – Waiver

The security guards are required to sign a waiver before embarking the vessel – a standard form of waiver has been drafted specifically addressing the terms of GUARDCON and attached as per Annex D. A number of security companies have reviewed the text of the waiver and seem satisfied that it fits the bill as currently worded.

18. Delay

Given the legal, logistical and regulatory difficulties that the contractors may face transporting weapons and personnel through and to various countries, Sub-clause (a) provides a grace period to the contractors to absorb the first twenty-four hours of any delay in embarking the security team and their equipment. It does not, however, absolve the contractors of their responsibility to do their utmost get their personnel and equipment on board as and when required.

Sub-clause (b) deals with delays due to weather which prevent the security team from disembarking the vessel as scheduled. In such cases the full daily rate continues to be payable until the guards finally disembark.

19. Cancellation and Termination

Sub-clause (a) deals with cancellation of an individual transit in advance of embarkation. If the contractors are unable to get their security team and equipment on board the vessel within the twenty-four hour grace period provided for in Clause 18, the owners have the right to cancel the agreed transit and no compensation is payable to the contractors.

Under other circumstances the owner may also wish to cancel a scheduled transit, perhaps due to a change of employment orders for the vessel. Sub-clauses (a)(i) to (iii) provide a compensation mechanism for the benefit of the contractors on a sliding scale depending on how close to the embarkation date notice of cancellation is given.

Termination for cause is dealt with under Sub-clause (b) and with the exception of (b)(i), dealing with flag state authorisation for the carriage of armed guards, is based on standard wording found in other BIMCO contracts.

When GUARDCON is used as a framework agreement it is an “evergreen” contract, so if the parties wish to bring it to an end for reasons other than fault, they are required to give the other party 30 days’ notice in accordance with Clause 2 (Commencement, Appointment and Duration). The minimum contract period is 12 months.

20. Compliance with Laws and Regulations

This is a standard BIMCO wording taken from the SHIPMAN Standard Ship Management Agreement.

21. Health, Safety and Environmental Regulations

Although it may perhaps seem a little strange to link the employment of armed guards with health and safety in the workplace requirements, this is a provision commonly found in current security guard contracts and is protective of owners (for example, the guards must follow smoking prohibitions on board).

22. Drug and Alcohol Policy

This is a self-evident but nevertheless very important provision. The ban on drugs extends to prescription drugs if used or abused for purposes other than those for which they were medically prescribed.

23. No Salvage

Bearing in mind that it might be as a result of the actions of the security team in defending the vessel that results in the vessel requiring salvaging, this Clause excludes claims for salvage awards and life salvage by the contractors and their security team.

24. Dispute Resolution

This is the current version of the BIMCO Dispute Resolution Clause offering the parties three options on arbitration: London (which applies by default if no other venue is agreed as it currently handles by far and away the largest proportion of international maritime arbitrations); New York; and, finally, a free choice of venue as may be agreed between the parties. The mediation provision applies in all circumstances. It is very important that the

parties agree which jurisdiction and arbitration venue is to apply to their contract and that they clearly indicate their choice in Box 19.

SECTION 8 – General

25. Assignment

A standard wording other than the fact that the words “or delayed” have been incorporated as a useful addition.

26. Notices

This is a general notice provision dealing with how contractual notices should be given and when they should be treated as received.

27. Confidentiality

Confidentiality is a matter of particular concern to both parties in this type of contract where security is of chief importance and so a comprehensive mutual provision has been drafted.

28. Third Party Rights

The purpose of this Clause is to clarify that only third parties expressly identified in the Contract can benefit from it.

29. Partial Validity

The Partial Validity Clause is designed to avoid a potential situation where the entire contract is held to be invalid simply because a particular provision is deemed by an arbitrator or other competent authority to be illegal, unenforceable or invalid. If the offending clause cannot be interpreted or amended in such a way as to make it valid, then this Clause provides for it to be considered deleted but for the rest of the contract to be unaffected.

30. Entire Contract

This is a standard wording found in a number of other BIMCO contracts. The purpose of the Clause is to limit the rights of the parties to the written terms of the contract. As such it is intended to exclude representations, written and oral, not intended to be part of the final concluded contract.

ANNEXES

Annex A (Security Equipment)

This Annex is designed for the parties to attach a list of firearms, ammunition and other equipment (including non-lethal weapons) that will be provided by the contractors. It is intended to be a generic descriptive list and therefore not include actual serial numbers (these will be required, however, for the issue of permits and licences to the contractors).

Annex B (Rules for the Use of Force)

This is a blank Annex to which the parties need to attach their agreed RUF to form part of the contract. BIMCO has developed Guidance on the Rules for the Use of Force to which the parties may refer as a useful source of inspiration when drafting and agreeing their own RUF.

Annex C (Instruction Notice)

When the contract is used as a framework agreement for multiple transits, the owners are required to issue an instruction notice detailing their requirements for each transit. This Annex provides a pro forma Instruction Notice which can be used for this purpose.

Annex D (Individual Waiver)

As mentioned in the notes above on Clause 17 (Security Personnel – Waiver), the members of the security team are required to sign individual waivers before boarding the vessel. This Annex provides a standard wording for the waiver that specifically refers to the terms of the contract.

Annex E (Schedule of Charges)

This Annex covers mobilisation fees at various named ports and allows for charges for other ports to be added as agreed by the parties.

Annex F (Standard Operating Procedures)

Many maritime security companies have their own standard operating procedures covering the provision of security services on board ships. If such procedures exist, they should be attached to this Annex.

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