PIRACY & USE OF ARMED GUARDS - Part 2B: Specific Contractual Provisions for use in Contracts other than GUARDCON

31 July 2012

In the event that Owners decide to enter into an agreement with a security company for the deployment of armed guards on board one or more of their vessels, it is essential that any contract is first carefully reviewed. In this Member Alert, the Club comments on some of the clauses which Owners should consider.

Members will be aware that the standard form GUARDCON contract was published by BIMCO on 28 March 2012. The Club recommends that if Members wish to contract on GUARDCON terms, then that form should be used as drafted and unamended. This Alert provides recommendations for Members who wish to contract on a form other than GUARDCON.

The Club emphasises that this Member Alert is not a substitute for a detailed review of the proposed contract. Although the Club set out a number of 'pro-forma' clauses for consideration / possible inclusion in any such contract, these clauses are necessarily presented absent any contractual context or supporting factual circumstances. That being the case, Members are advised in all events to contact the Club and/or their lawyers for specific advice before concluding a contract to employ armed guards.

Lawfulness of actions taken by the security company

As set out in Part 1, it is essential that the deployment of armed guards, and any actions that they take, comply with various legal regimes. Any contract entered into should contain a warranty on behalf of the security company that they and their personnel will comply at all times with all laws and regulations which are applicable to the services being provided. This will ensure that Owners have a right of recourse against the security company, should any of the applicable laws or regulations be breached.

Which laws and regulations need to be complied with will, of course, depend on the specific situation and factual circumstances.

Pro-forma Clause

It is essential that a clause addressing the above issue is incorporated into a contract with a security company. The following clause would be suitable for inclusion, as it places a strict burden on that company to comply at all times with all applicable laws and regulations:

"[The security company] warrants and represents that it, its employees and representatives shall comply at all times and in all respects with all laws and regulations which may govern or affect the provision of services under this Agreement."

The following clause would be sufficient, although not ideal, as it does not place such a strict burden on the security company:

"[The security company] will use its best endeavours to ensure that all services provided under this Agreement are in compliance with the laws and regulations which govern the provision of those services."

A clause dealing with these issues may be more acceptable to the security company if it places an identical burden on Owners. In those circumstances, the words *"the security company"* or similar would be replaced with *"each of the Parties"*.

The authority of the Master

If armed guards are deployed on a vessel, and that vessel becomes involved in a piracy incident, an issue may arise as to who is ultimately responsible for the safety of the vessel and its crew: the Master, or the senior representative of the security company. The SOLAS Regulations are clear on the fact that the Master must have the ultimate deciding role when it comes to the safety of the vessel and its crew. Article 34 states:

The Owner, Charterer, the Company operating the ship … or any other person shall not prevent or restrict the Master of the ship from taking or executing any decision which, in the Master's professional judgment, is necessary for the safety of life at sea and protection of the marine environment.

The ISPS Code (implemented through Chapter XI-2 of SOLAS) also states in Article 6 (which is one of the mandatory articles):

The Company shall ensure that the ship security plan contains a clear statement emphasizing the master's authority. The Company shall establish in the ship security plan that the master has the overriding authority and responsibility to make decisions with respect to the safety and security of the ship.

If armed guards are deployed on a vessel, the security company may seek to introduce clauses into any contract which provide that they, rather than the Master, will make the final decision to authorise the use of force. If such a clause were incorporated, the Master would not have full control over an important area of the vessel's security. Further, if the guards were to make any final decision, they may do so without having regard to any contractual obligations which Owners may have. This could therefore result in a breach of the SOLAS Regulations. However, it is necessary to balance this with each individual security guard's right to self defence, which in a particular situation may result in force being used without the Master's prior authorisation. In addition, the security guards must be able to take appropriate action in a given situation without obtaining the Master's authorisation for every action taken. What action it is appropriate to take is likely to be defined by the Rules for the Use of Force.

Pro-forma Clause

A security company may seek to limit the Master's authority and responsibility. This should be strongly resisted, and the Club cannot recommend that Members enter into a contract which contains such limitations. In particular, Members should note that any breach of SOLAS or the ISPS Code could prejudice P&I cover, and this should be specifically checked with the Club.

A clause such as the following would be suitable for inclusion:

"The Master remains ultimately responsible for the safety of the crew and the Vessel at all times and nothing in this Agreement shall derogate from his overall authority onboard the vessel. If an incident occurs, [the security company]'s most senior representative on board the vessel shall seek the prior consent of the Master to assume control of the incident situation."

A security company may seek to incorporate a clause whereby its representative on board the vessel must seek the Master's consent to assume control of a situation, but only if it is "reasonable" or "feasible" to do so. Such a clause still limits the Master's authority, as it leaves it to the judgment of the security team whether or not to obtain his consent. Such a clause might read as follows:

"[The Owner] agrees to follow [the security company]'s instructions in relation to the Services, provided that the Master shall retain overriding authority over the vessel and its crew. If an incident occurs, [the security company]'s most senior representative on board the vessel shall, if feasible, seek the prior consent of the Master to assume control of the incident situation, such consent not to be unreasonably withheld. When, in the reasonable discretion of [the security company]'s representative, the threat from the incident situation has passed, the Master shall reassume the authority temporarily granted to [the security company]."

A clause such as this is not ideal, as a situation may arise where there is a conflict between the Master's judgment and that of the representative of the security company.

There are various terms in these clauses, such as "incident" and "services", which will need to be defined in the contract. The definition of the latter will depend on exactly what the security company is being employed to do. The former could be defined widely to include all incidents of piracy, or more narrowly, depending on the particular factual circumstances. These are also points to which Owners will need to give consideration.

Rules for the Use of Force / Rules of Engagement

As set out in Part 1, the use of force by armed guards on board a vessel could have serious consequences if it is in any way illegal.

As a result, it is essential that appropriate Rules for the Use of Force or Rules of Engagement govern the use of force on board the vessel. These rules govern the circumstances in which weapons can be used. These should be appended to and specifically referred to in the contract with the security company, as well as thoroughly discussed with the Master and crew. Such Rules should also be endorsed by the vessel's flag state, as this is one of the key jurisdictions governing the deployment of armed guards (for which, see Part 1).

Pro-forma Clause

"Rules of Engagement" or "Rules for the Use of Force" should be a defined term in the contract with the security company. The definition could be something similar to:

"the rules under which the Security Company shall act at all times, as set out in Appendix A to this Agreement".

The detailed rules would then be annexed to the contract.

There should also be a provision in the contract by which the security company warrants that it will act in accordance with those rules at all times. Such a clause could read as follows:

"[The security company], its employees and representatives warrant that they will act at all times within the parameters set out in the Rules of Engagement".

If the security company acts outside its Rules of Engagement, the consequences for Owners could be serious, particularly if people are killed or seriously injured. As such, a clause such as the following, which does not place such a strict burden on the security company, would not be ideal:

"[The security company], its employees and representatives will use their best endeavours to act within the parameters set out in the Rules of Engagement".

Best Management Practice

The current piracy problems mean that many Owners are considering deploying armed guards on their vessels, and as a result there are many security companies now offering these services. Owners will want to choose a company who can provide a good level of professional service, and whose employees will work to a high standard of safety.

The armed guards provided should be both aware of and trained in best management practices (for example Best Management Practice 4 ("BMP4"), which has been produced and approved by many of the major shipping organisations, including BIMCO, OCIMF and Intertanko), and this should be specifically provided for in the contract.

Pro-forma Clause

An appropriate provision to deal with this point might read as follows:

"[The security company] agrees that the services to be provided under this agreement will at all times be performed in line with the latest maritime industry best management practices, in particular BMP3 and any subsequent versions which may be published, always subject to the Master's overall authority and responsibility."

This clause not only ensures that the security company will provide its services to a specified standard, but also that the Master's authority is maintained as regards the provision of these services.

The following clause, on the other hand, would not be sufficient:

"The [security company] warrants and represents that … it and the Company are aware of current best practice for transitting the areas in which the Services are to be performed."

A clause such as this is not specific enough. As well as stating that it is aware of the best management practices, the security company should agree to follow them. It would also be helpful to name the specific practices, for example BMP4 or any subsequent versions.

Problems may arise if best management practices are not followed. If the vessel is damaged or captured as a direct result of a failure to follow these practices, P&I cover may be prejudiced. Further, a breach may result in an allegation of unseaworthiness by charterers or cargo interests, and this may be used as a defence to any claim for contribution to, for example, ransom payments or general average.

Training

The Club suggests that a provision is also incorporated into a contract by which the security company undertakes to, or agrees to cooperate in providing on request, coordinated and effective training involving the Master, crew and security company. This will considerably lessen the risk of any problems arising.

Such a clause might read as follows:

"When mutually agreed upon by both [the security company] and [the owner], and subject to the payment of all fees, [the security company] will provide any training requested or required by [the owner] in accordance with [the security company]'s current, published training documentation".

An owner may wish to include more detail in such a clause, for example specifying particular areas in which training may be required.

"Knock for knock" provisions / Indemnity / Waiver

It is important that an Owner wishing to deploy armed guards appreciates that any security company will want to reduce its potential liability to Owners as much as possible. The clauses dealt with in this section are ones which Owners will need to think carefully about since they all operate, potentially, to limit the company's liability. In turn, however, they will also limit Owners' liability to the security company.

"Knock for knock"

Contracts with security companies may contain "knock for knock" provisions. These typically mean that if, for example, a crew member or armed guard is killed or the vessel is damaged, the loss will lie where it falls. In such a provision, each party agrees to hold harmless, indemnify and defend the other from and against certain claims, demands or liabilities connected with the performance of the security services. Essentially, the object of the provision is to ensure that there will be no recourse between the Owner and the security company.

Owners should first consider whether they want to incorporate the clause in the first place, as it is a clause which is particularly favourable to the security company (as it may be their actions which lead to death, personal injury or damage to property).

Further, while Owners may be willing to agree that the loss will fall where it lies, they will need to consider how such a provision will sit with the contracts of employment they have with the vessel's crew members. If a crew member is killed, Owners could find themselves with a liability under the employment contract and no recourse against the security company. Specific legal advice will be required on this point.

It will also be necessary to consider the statutory and mandatory legal provisions of the proper law of the contract. It should be noted that provisions often give rise to significant issues and it is not possible to deal with them in detail here. Further specific advice should be obtained on this aspect if Owners are considering either including or excluding such a clause.

Indemnity

The contract is likely to incorporate a clause by which each party agrees to indemnify the other against certain third party claims, either as part of the "knock for knock" clause or independently. The security company is likely to seek an indemnity from Owners in the widest terms possible. If it is not possible to narrow the clause, Owners should ensure that the indemnities given are mutual, i.e. that the security company agrees to indemnify them in identical circumstances.

The Club recommends that such a clause be drafted along the same lines as clause 15(c) of GUARDCON, as this clause has been carefully drafted to create a balance between the parties' rights and is likely to be acceptable to a security company.

Waiver

Some contracts with security companies may also contain provisions by which Owners waive their right of recourse in certain circumstances, for example should damage be caused to the vessel, or indeed should the vessel be lost. Waivers should at the least be mutual, i.e. both parties to the contract should waive identical rights. Such a clause may still be undesirable from an Owner's perspective, as in reality it is perhaps more likely that Owners will want to bring a claim against the security company.

While such a clause may be undesirable, it may in reality be unavoidable. If so, Owners should ensure that the contract has been approved by their hull and war risks underwriters.

Pro-forma Clause

These three points are often dealt with in a single clause. Owners will need to be alive to the fact that a security company will try to restrict the situations in which claims can be brought against them as much as possible.

A clause such as the following is quite wide-ranging, but would be suitable for inclusion in a contract if it applied equally to both parties:

"[Owners / the security company] shall not be responsible for loss of or damage caused to or sustained by the property of [Owners / the security company] (whether on board the Vessel or not) or incur any liability in respect of personal injury, illness or death of any individual member of [Owners / the security company] (whether on board the Vessel or not) arising out of or in any way connected with the performance of this Agreement, even if such loss, damage, injury or death is caused wholly or partially by (i) the act, neglect or default of [Owners/ the security company] and/or (ii) the unseaworthiness of the Vessel. The [Owners / security company] expressly agree and undertake to hold harmless, defend, indemnify and waive all rights of recourse against the [Owners / security company] from and against any and all claims, demands, liabilities or causes of action of any kind or character, made by or available to any person or party, for injury to, illness or death of any of [Owners / the security company], or for damage to or loss of property (except cargo) owned by or in the possession of [Owners / the security company].

The Club suggests that a clause is also incorporated whereby the security company makes a similar agreement in relation to third party claims, as follows:

"The [security company] expressly agrees to hold harmless, defend, indemnify and waive all rights of recourse against the Owners from and against any and all claims, demands, liabilities, costs or causes of action of any kind, made by or available to any third party arising out of any unlawful and/or negligent act or omission by the [security company] in the performance of this Agreement save to the extent of the Owners' own negligence."

Licenses

As set out in Part 1, it is essential that all appropriate licenses are obtained and maintained for the weapons which will be carried on board the vessel.

The Club suggests that there should be a clause in a contract with a security company stating that the company is obliged to obtain and maintain all requisite licenses (with reasonable assistance to be given by Owners when requested). The company should also be required to prove to Owners that such licenses have been obtained.

Pro-forma Clause

Not all contracts contain provisions relating to the procurement of licenses.

Some satisfactory clauses, which touch on this point, could read as follows:

"Generally, the duties of the security company will include responsibility for obtaining licences and permits at the ports of embarkation and disembarkation…".

"The security company will procure required permits, licenses or similar requirements for the carriage of the weapons and security personnel on board the Vessel."

However, given how important it is that all necessary licenses be obtained and maintained, a clause dealing with this point should be as specific as possible and place more responsibility on the security company, for example:

"The security company undertakes to obtain all required permits, licenses and similar documentation required for the carriage of the security personnel on board the Vessel, and to maintain the validity of this documentation throughout the duration of the provision of the Services as specified in this Agreement. The security company shall, within a reasonable time of the Owner's request, provide evidence to the Owner that all necessary permits and licenses have been obtained and are valid."

It should be noted that if the weapons are not properly licensed, Owners may be held liable under one or more of the laws governing the deployment of armed guards on the vessel (for which, see Part 1). A detailed provision dealing with this point will mean that Owners will have recourse against the security company for breach of contract, should the requisite licenses not be obtained.

Insurance

The contract should contain a clause providing that the security company must have all appropriate insurances in place (as set out below), and stating that they will be maintained for the duration of the contract. This insurance should cover the company's liability to its own employees, as well as liability to third parties and to owners.

A clause such as the following will not, in the Club's view, be sufficient:

"The security company will obtain, and maintain in place for the duration of this Agreement, all appropriate insurances."

This clause is far too general, as parties' views could differ on what exactly the "relevant" insurances are. Rather, the clause should specify exactly which insurance policies the insurance company should take out. A clause such as the following would cover all necessary insurances:

"The [security company] confirms that it has in place, and will maintain in place for the duration of this Agreement, a policy or policies of insurance covering [the security company] and [the security personnel] in relation to:

(i) liability to any third party and/or [the owner] for loss or damage to third party property arising out of the provision of the Services, in the minimum amount of US$5 million;

(ii) liability to any third party and/or [the owner] for injury, sickness or death to third parties arising out of the provision of the Services, in the minimum amount of US$5 million;

(iii) liability for death, injury or sickness of/to any [security personnel] or any other employee of [the security company] sustained as a result of working on behalf of [the security company]; and

(iv) personal accident or sickness suffered by the [security personnel] including medical evacuation and/or repatriation as necessary, in the minimum amount of US$250,000."

The insurances put in place by the security company should also be obtained on the basis that all rights of subrogation are waived. This will mean that the insurance company will not be able to step into the security company's shoes and bring an action against Owners.

The security company is also likely to require a clause by which Owners warrant that the vessel is entered with an International Group P&I Club.

Governing Law and Jurisdiction

Finally, Owners will need to consider the law which will govern the contract with the security company. This will determine the remedies available to Owners should any problems arise. Some particular laws have perceived advantages, and disadvantages.

Under UK law, for example, the following points would be among those to be considered:

(a) it is not possible to exclude liability for death or personal injury caused by negligence. Any such clause incorporated into a contract will not be effective.

(b) A term excluding or limiting liability for negligence (other than where death or personal injury is caused) must be in clear and unambiguous terms. Further, such a term is only enforceable in so far as it is reasonable.

Under US law, there is the perception that claims made are particularly large, and that high damages awards are set by juries.

Owners will need to consider on a case by case basis, both with the Club and their lawyers, which jurisdiction would be most appropriate to govern the contract given the potential issues which may arise.

The above Alert is by no means exhaustive as regards the issues which Owners may want to consider when entering into a contract with a security company. The Club reiterates that each individual contract should be reviewed in the context of the particular situation and the parties involved. Regard must also be had to the applicable factual context.
