

PIRACY & USE OF ARMED GUARDS - Part 1: General overview

31 July 2012

GUARDCON was published by BIMCO on 28 March 2012. BIMCO states that its aim is to provide “a clearly worded and comprehensive standard contract” by which Owners and their P&I Clubs can conclude contracts for security services.

The contract itself is substantial, and contains detailed provisions dealing with all aspects of the employment of armed guards. It is by no means mandatory for contracts to follow GUARDCON. However, if GUARDCON is to be used then the Club recommends that it be used as drafted and that no amendments are made. As long as GUARDCON remains unamended, Members may proceed to contract on those terms and do not require any further approval from the Club.

The purpose of this Alert is to supplement the commentary already published by BIMCO, and to inform Members as to their position should they decide to contract with a security company using GUARDCON. Should Members have any specific queries in respect of GUARDCON, they should get in touch with their usual contact at the Club.

Part I

As with all standard BIMCO contracts, Part I consists of various boxes into which the parties will insert certain key information. Each of the boxes refers specifically to one or more clauses in Part II of the contract. Members must ensure that they check the provisions of the relevant clauses prior to deciding on exactly what information will be entered into each box.

Members should also note that, by way of Part I, the contents of Annexes A to E to GUARDCON are incorporated into the contract. These Annexes will contain:

- Annex A: A list of the firearms, ammunition, non-lethal weapons and other security equipment which will be provided by the security company.
- Annex B: Rules for the Use of Force. Members should note that these must be agreed with the security company, although it is likely that a reputable security company will have a standard form of such Rules.
- Annex C: A standard instruction notice from Owners to the security company requesting specific security services.
- Annex D: A standard form of individual waiver to be signed by the security personnel prior to boarding the vessel.
- Annex E: A schedule of port embarkation and disembarkation charges.

Part II

Security Services (Clause 3)

It is essential that the security services to be provided are defined, so that the security company knows what it must provide and Owners know what they are entitled to expect.

As regards the number of security personnel to be deployed on board the vessel this will depend on various factors, for example the level of risk likely to be encountered and the type and size of vessel. As part of the decision-making process before entering into the contract, Members should consider carefully how many security personnel they think will be required. GUARDCON provides for a minimum of 4 personnel, on the basis that this is considered the minimum number required for an efficient round-the-clock watch, and to provide a sufficient level of protection.

Members should also familiarise themselves with exactly what services will be provided by the security company pursuant to this clause. This could be discussed with the security company and clarification sought where necessary. This will ensure that the execution of the services to be provided proceeds as smoothly as possible.

Contractor's Obligations and Responsibilities (Clause 6)

This clause goes into a great deal of detail as to exactly what the security company must do and provide pursuant to the terms of the agreement. Members should familiarise themselves with this clause, so that they fully aware of the services to be provided.

There are certain aspects of this clause which will require some thought and input on the part of the vessel owners. In particular, they will need to consider how they want to harden the vessel. Pursuant to clause 6(a)(ii) it is for Owners to provide the security company with instructions on this. The security company will not take the initiative, although it is required to provide advice where necessary.

Owners' Obligations and Responsibilities (Clause 7)

Members must, of course, make sure that they are aware of all of their obligations and responsibilities under the contract. Clause 7 is detailed in this regard, but some sub-clauses require further comment, in particular:

- Clause 7(d). Members should liaise with the security company in order to determine exactly what their requirements will be.
- Clause 7(e). Members should consider which “interested parties” will need to be informed of the arrangement to deploy armed guards on board the vessel. As well as those parties listed in the clause, Members should inform cargo interests, and request that they in turn inform their insurers.
- Clause 7(f). Members should consider exactly what will need to be done in order to liaise with UKMTO and MSCHOA, what information they will require and when such information should be sent.
- Clause 7(h). Members should give consideration to where firearms will be stored on board the vessel, and whether such storage is adequately secure. This may require discussions with the security company.

Master's Authority and Division of Responsibilities (Clause 8)

Where 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.”

In light of these requirements, it is essential that nothing in a contract between Owners and a security company compromises the Master’s authority. This provides the basis for clause 8 of GUARDCON. Members should ensure that the Master is aware of this provision, and also that he is familiar with the relevant Rules for the Use of Force. The Club suggests that Members encourage the Master to work closely with the security team, so that all parties are aware of their rights and responsibilities in the event of a piracy incident.

For further detailed commentary on this clause, see the BIMCO Explanatory Notes to GUARDCON.

Permits and Licences (Clause 10)

As set out in Part 1, it is essential that all appropriate licences and permits are obtained and maintained for the carriage of both the armed guards and their weapons. The purpose of this clause is to ensure that both Owners and the security company are aware of exactly what licences and permits they will be responsible for obtaining.

Members should familiarise themselves with their responsibilities under this clause. It is for Members to obtain any permits relating to the carriage of the guards, the performance of the security services and the use of firearms and other equipment on board the vessel. Members should determine in good time exactly what permits will be required.

It should be noted that this clause contains a mutual indemnity provision in respect of any losses suffered by one party as a result of the other not having obtained the required permits.

Insurance Policies (Clause 12)

Members must ensure that they have in place the insurances required by this clause, and should also be aware of their right to request evidence of the insurances which the security company has in place.

Clause 12(e) provides that each party will use reasonable endeavours to ensure that its underwriters waive their rights of subrogation. From Owners’ perspective, this will mean that an insurance company will not be able to step into the security company’s shoes, after having paid out under the relevant policy, and bring an action against Owners. This is a “reasonable endeavours” obligation only: there is no absolute requirement that these rights be waived.

Liabilities and Indemnities (Clause 15)

This clause is central to the contract, as it makes provision for the circumstances in which each party will have legal recourse against the other in the event that something goes wrong. The provisions of this clause are based on the “knock for knock” principle, i.e. that losses will lie where they fall and that neither party will have recourse against the other except in specified circumstances. This provides some certainty to the parties in respect of their potential liabilities and assists in the risk analyses which both parties will need to carry out.

Under clause 15(b), Owners will bear any loss and damage sustained to their property (including the vessel), or in respect of personal injury, illness or death, “arising out of or in any way connected with” the performance of the contract. Further, they are required to hold harmless and indemnify the security company from “any and all claims”. It should be noted that this includes any loss or damage suffered as a result of neglect or default on the part of the security company.

Clause 15(c) deals with third party liability. It provides that each party shall hold harmless and indemnify the other from all claims and liabilities brought by any third party arising out of any unlawful or negligent act or omission on the part of the party providing the indemnity. The exception to this is where the claim or liability in question is a result of the negligence of the party who would otherwise be indemnified.

Clause 15(c)(iii) provides an exception to the “knock for knock” regime. The security company will indemnify Owners for all liabilities, including liabilities to crew members and third parties, arising out of accidental and/or negligent discharge of firearms by the security personnel.

The effect of clause 15 is that Owners’ rights of recourse against the security company are very limited, and will essentially be confined to any situation which can be brought within clause 15(c)(iii). The clause does, of course, provide a similar advantage to Owners, in that the security company’s rights of recourse are similarly limited. Indeed, they do not have the advantage of the exception in clause 15(c)(iii).

Security Personnel Liability (Clause 16)

This clause specifically extends all rights and exemptions which apply to the security company to the security personnel who will be deployed on the vessel. This means that Owners will have no right of recourse against those security personnel.

Cancellation and Termination (Clause 19)

Members should be aware of the specific circumstances in which both they and the security company can cancel the contract. In particular, Members should note that certain clauses will survive termination (as set out in clause 19(c)), including clause 15 (Liabilities and Indemnities). This means that even after cancellation or termination of the agreement, each party’s right of recourse against the other will be limited as provided in clause 15.

Conclusions on GUARDCON

GUARDCON is not a universally agreed and approved form of contract, but it is very close to being so. It takes a balanced approach to the respective rights and responsibilities of Owners and the security company. Neither party’s obligations are more onerous than the other’s.

The Club reiterates that Members may proceed to contract on GUARDCON terms without any further input from the Club provided that those terms remain unamended.

Should Members wish to contract on terms other than GUARDCON, they should review Part 2B of this Alert.

Disclaimer: This Member Alert is intended to provide only general guidance and information pertaining to the issues identified and commented upon herein. The content of this Alert is not intended to be, and should not be treated as being final and binding legal advice. If Members consider they are likely to or in fact have encountered problems or difficulties as discussed in this Alert, they are asked to contact the Club and obtain further legal advice relevant to their specific circumstances.