

GUARDCON

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All industry participants will be well aware of the difficulties caused by the recent flourishing of piracy in the western Indian Ocean and elsewhere. A whole vessel security industry continues to grow, particularly in Dubai, as a result. In recent times, minds have turned to consider the liabilities and consequent legal and insurance issues arising out of the employment – or otherwise – of security personnel on board vessels. Recent incidents involving the “*FairChem Bogey*” (taken from a waiting anchorage at Salalah) and “*Enrica Lexie*” (Indian fishermen allegedly killed by security personnel) have served to concentrate industry minds further.

BIMCO has been admirably quick in responding to industry concerns. On 28th March, after a gestation period of a little over three months, GUARDCON has been published as an industry standard Contract for the Employment of Security Guards on Vessels. The document represents a valiant attempt to regulate the relationship, and in particular, the apportionment of liabilities, as between Owners and Security Companies, Master and Guards. If widely adopted, it will also relieve P & I Clubs of the burden of reviewing the myriad forms of contract presented to shipowners today. Further, the consequence that Security Companies will be obliged to maintain insurance cover for their own liabilities, the extent of which, at least between Shipowner and Security Company, is much more clearly defined by the new form, will comfort both owners and their insurers. Security Guards must be appropriately qualified and trained. The duties of the Security Company are also set out, requiring it to assist in the training of crew and “hardening” of Vessels for transit in addition to providing guidance to the Master and protecting the Vessel. That said and while admittedly dealing with a wide variety of complex legal issues, the document descends too readily into legal jargon and in some respects bears the hallmarks of the speed with which it has been produced. Nevertheless, the principles that it establishes are almost certainly those which the industry would expect, while the form sets a standard which can reasonably be expected of all its serious participants.

In format, GUARDCON conforms to other recent BIMCO documents in having a box format Part I and a Part II which forms the body of the agreement. However, Part II runs to 548 lines, which makes Guardcon probably one of the longest documents yet produced by BIMCO, and also

provides for Annexes A through F, giving a total of 23 pages of relatively small print. There are also guidance notes running to 14 pages and a further five pages of Guidance on Rules for the use of Force, all of which are very useful. It is a long and complex document to deal with complex issues but, it has to be said, not one which resonates with the plain English of, say, Norwegian Sale Form or Shipman. It may not resonate with shipowners for that reason.

The document deals logically and fairly successfully with four principal areas of uncertainty:

1. **The relationship between the Vessel's Master and Security Personnel on board.**

Clearly, there are whole minefields for both Master and Owner in terms of the Master's responsibility for engaging pirates, actual or perceived, with lethal weapons and the liabilities arising therefrom. Accordingly, and subject to the overall umbrella of the Rules for the Use of Force (RUF) discussed below, decisions as to whether or not to invoke RUF is left with the Security Personnel Team Leader, but the Master retains the right to order cease firing. GUARDCON specifically states that this right should not compromise any Security Personnel's right of self defence, which seems logical but also introduces a grey area where difficulties as to apportionment of liability could arise in the future.

2. **The apportionment of liabilities between the parties.** This is dealt with on a very strict "knock for knock" basis, in that the Owner, on the one hand, and the Security Company on the other, bear the losses that each of them incurs regardless of the responsibility of either party. Similarly, while the Owner is liable to bring any injured Security Personnel to a safe port, the Security Company is responsible for their transportation thereafter. This is backed up by a requirement that the Security Company carries insurances (specified in Clause 12) covering it and its security personnel against costs and liabilities arising. The limit of this insurance is \$5,000,000, which may be sufficient in the western Indian Ocean, but may not be in other parts of the world. A number of London market brokers, including those involved in the drafting of GUARDCON, are offering this insurance, which will require a degree of investment (and thus financial standing) on the part of security companies. An unfortunate side effect, however, is the need for each member of the Security Team to sign a waiver of all claims against the Owner arising out of any incident. This comprises slightly more than a page of legal small print which at best could only be described as not very user-friendly.

3. **The number of security personnel on board.** This is set at four, and the accompanying guidance notes counsel against economising by using fewer numbers. This seems a very

sensible approach, enabling observation from all four quarters and a 360 degree arc of fire should this prove necessary.

4. **The concept of Rules for the Use of Force (RUF).** These are intended to set out what the military would call “Rules of Engagement”. As already mentioned, BIMCO provides guidance as to what RUF should contain, rather than setting them in stone. This is understandable, since different RUF will be acceptable to different flag states and different security companies. However, the omission leaves the (presumably) relatively inexperienced Owner on his own. BIMCO could probably do little more than produce guidance notes pointing Owners at areas of concern. As a result, some effort on the part of the Owner will be required to make sure that the RUF are practical, legitimate and sufficient to protect both Owner and Security company from civil and/or criminal liability.

There are a couple of minor technical issues arising out of the document, both in clause 13. Lines 271 and 272 provide that if the owner gives less than 48 hours’ notice of a change in the time for embarkation of security personnel, fees payable to the security company will nevertheless be calculated from the original embarkation time. This presupposes that embarkation is delayed: what happens if embarkation is brought forward? Second, lines 276 and 277 provide that if the Vessel should be hijacked, then the Owner ceases to be liable to pay fees to the Security Company. This seems harsh on the Security Company, which will presumably nevertheless be required to pay its personnel for the period that they remain onboard during the hijacking, and may make a successful insurance claim for pay less likely.

These are, however, minor quibbles. BIMCO has stepped into the breach by providing the industry with a much-needed standard form which tackles many of the issues which have been the subject of doubt and debate amongst shipowners, security companies and others involved in the maritime industry. Clearly, and as the Guidance Notes state, the Owners must be able to choose a reputable and responsible Security Company and agree Rules for the Use of Force which are both practical and able to withstand inquiry should an incident occur. In that sense, BIMCO has not done owners’ work for them, but it has made a significant start.

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