

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

31 July 2012

The purpose of this Members' Alert is to provide general recommendations on and an overview of the use of armed guards to combat piracy. The Club sets out here some general considerations and issues that it suggests should be taken into account by Members, when considering whether to place armed guards on board their vessels.

The use of armed guards in the fight to combat piracy is a controversial issue which has resulted in divided opinion amongst major shipping organisations. BIMCO, for example, initially criticised the rise in the use of armed guards, and questioned the statistics which supported their effectiveness. BIMCO does, however, now recognise that more and more owners are using armed guards on board their vessels, and indeed has recently published (on 28 March 2012) the standard form GUARDCON agreement which attempts to set a standard for the relationship between vessel owners and private security companies. The International Chamber of Shipping also changed its initial position, acknowledging that an individual shipowner's decision to hire armed guards is a possible option in the fight against piracy. Notwithstanding this convergence of views within the industry, the use of armed guards remains, to an extent, controversial. It seems to us that so long as piracy remains an issue for shipowners, then so too will the debate remain about the use of armed guards.

The purpose of this Alert is not to engage in that debate; but rather to proceed on the basis that a notional Owner has decided to deploy guards. That being the case, it seems to the Club that a process of enquiry then becomes necessary so that the Owner can satisfy himself that he has adequately addressed the various legal and procedural issues that fall to be considered. The Club suggests that this exercise might be approached by way of a simple checklist.

Checklist

An Owner considering placing armed guards on one of its vessels should first consider each of the following questions:

- 1. Is it legal for there to be armed guards on board the vessel in the first place?**
- 2. Are all concerned parties aware of the licenses which will need to be obtained?**
- 3. In the event of hostilities involving pirates, how much force are the armed guards allowed to use, and are all concerned parties fully aware of this?**
- 4. Will the presence of armed guards adversely affect any insurance cover currently in place?**
- 5. Prior to the decision being taken to use armed guards, has a thorough risk assessment been carried out?**
- 6. If the decision is made to use armed guards, have all other concerned parties been informed?**
- 7. Has sufficient due diligence been carried out on any security company being considered as a provider of armed guards?**

Each of these points will be dealt with in turn.

1. Is it legal for there to be armed guards on board the vessel in the first place?

It is essential that there be no question of illegality if armed guards are to be present on a vessel. This will involve a consideration of the interests of various legal regimes, and in order for the presence of armed guards to be entirely legitimate, it must be legal under each of them. What, then, are these regimes?

(i) The law of the flag state

This is perhaps the most important law to consider, as it will govern the crucial issue of whether firearms and armed guards can be deployed on a vessel in the first place. The IMO has noted that the use of armed guards is a matter for flag states to legislate on. This follows the provision in article 94(1) of the United Nations Convention on the Law of the Sea (“UNCLOS”) that each state must exercise jurisdiction and control over vessels flying its flag.

Whether or not flag state law governs whether firearms may be carried on board vessels flagged by that state, and if so what types of firearms may be carried, will depend on an analysis of the particular law in question. This may well involve obtaining advice from local lawyers. In any event, an Owner must satisfy himself that he does not fall foul of any legal provision of the vessel’s flag state in having weapons or armed guards present on his vessel. Some legal regimes are likely to be more stringent than others on this point.

Flag states appear in general to be open to the deployment of armed security guards on board vessels, although in as regulated a manner as possible. The IMO has published guidance for Flag States, stating that they should have in place a policy as to whether or not the use of armed guards is authorised. Such a policy should include a process for authorizing armed guards, a process by which Owners may be authorized to use them, specific terms and conditions under which such authorization is granted, and reporting and record-keeping requirements.

As regards the laws of individual flag states, these differ from state to state. Marshall Islands law, for example, does not prohibit the deployment of armed guards, but at the same time does not recommend it, at least without proper risk analysis, co-ordination, control and legal authority. Similarly, the Bahamas Maritime Authority neither prohibits nor recommends the use of armed guards. Liberia has ratified a declaration under which a vessel protection detachment of EU Navfor (the European Union Naval Force) is authorised to embark and protect a Liberian-flagged vessel in the context of Operation Atalanta (the EU military operation intended to repress and deter piracy of the Somali coast).

Set out below are the websites of some of the principle flag state registries, in order to facilitate further research and investigation:

Marshall Islands: <http://www.register-iri.com/index.cfm>

Liberia: <http://www.liscr.com/liscr/>

Panama: <http://www.segumar.com/>

Cayman Islands: <http://www.cishipping.com/>

Bahamas: <http://www.bahamasmaritime.com/>

The full text of the IMO Circular, containing recommendations for Flag States, is available from the IMO website:

www.imo.org/MediaCentre/HotTopics/piracy/Documents/1406-rev-1.pdf

(ii) The law of the state where the vessel's Owners and/or Managers are incorporated or have their seat of commercial operations

While the law of the flag state may permit the presence of armed guards on board its vessels, the law of the state where the Owners' Managers may be incorporated, or where they operate, might be different.

It would be of little comfort to a manager or operator to discover that, although the law of the vessel's flag state allows for the deployment of armed guards, the management company and its officials become either civilly or criminally liable for the presence of those guards or their activities.

Accordingly, an Owner must equally satisfy himself that the presence of weapons and armed guards on board his vessel will not contravene any legal provisions regarding the carriage of firearms in these states.

(iii) The law of the coastal states and/or ports where the vessel will call

Article 17 of UNCLOS entitles a merchant vessel to innocent passage through the territorial waters of a coastal state. Passage is classed as innocent if it is not prejudicial to the peace, good order or security of that state.

Article 27 of UNCLOS gives coastal states the authority to exercise criminal jurisdiction over a foreign flagged vessel in certain exceptional circumstances. These include where the consequences of a criminal act extend to the state in question, and where the criminal act disturbs either the peace of the country or the good order of the territorial sea. Some coastal states may well consider the death of a pirate as a result of defensive action taken by a merchant ship to fall within one or both of these categories. In some states, the vessel may be subject to forfeiture.

The law of the relevant coastal state will also regulate the types of weapon which may be carried on board a vessel calling at a particular port. While certain kinds of weapons may be banned altogether, others may need to be declared to customs or port authorities, or may be subject to strict storage requirements.

The IMO has issued guidance recommending that governments of coastal states, particularly those bordering high risk areas, have in place policies and procedures which will facilitate the movement of armed guards and their equipment. These policies and procedures should be made known to both shipping companies and private security companies. The IMO recommends that, when developing such policies and procedures, governments should take into account (in relation to embarkation and disembarkation of armed guards, and vessels calling at ports):

- (a) requirements regarding notification of the presence of armed guards, firearms and related equipment;
- (b) arrangements and requirements relating to the storage and control of firearms, both on shore and on board the vessel;
- (c) requirements regarding identification of the armed guards; and
- (d) requirements regarding documentation of Flag State authorization.

If the governments of coastal states follow the IMO's recommendations, then it is likely that it will be easier for vessels carrying armed guards to call at ports located in such States, and indeed for the guards to embark and disembark at those ports.

Should armed guards be employed it will be necessary to check well in advance with any particular state or port as to whether and to what extent there are any restrictions or regulations in place. From the IMO recommendations, Members can infer some guidance as to exactly what enquiries should be made of a port. It is suggested that enquiries are made well in advance of a vessel's arrival. This will ensure that any necessary notifications can be given and arrangements made.

If any state at which the vessel regularly calls, or is likely to call, forbids the use of arms and armed guards on board vessels, then Owners are advised not to deploy them.

The full text of the IMO Circular which sets out the recommendations to coastal states is available from the IMO website: www.imo.org/MediaCentre/HotTopics/piracy/Documents/1408.pdf

2. Are all concerned parties (namely the vessel's Owners, Managers and the security company) aware of the licenses which will need to be obtained?

If the deployment of armed guards is legal under all of the regimes detailed above, it is likely that there will still be various licenses to be obtained before the guards can be deployed.

Owners must ensure that all weapons carried on board their vessels meet and comply with the regulations and licensing requirements of the following locations:

- (a) the flag state;
- (b) the port of embarkation;
- (c) all areas of transit;
- (d) any ports at which the vessel will moor;
- (e) the port of disembarkation.

There may also be an obligation for weapons on board or in the possession of the ship to comply with the regulations of the country where the security company supplying the armed guards is based, plus the national laws of the employees both working on board the vessel and employed by the security company.

Some licensing regimes are very strict, for example that in the UK. There are several regulations relating to both import and export of weapons, and as such it is not always an easy task to ensure that they have all been complied with. This Alert does not purport to consider the details of exactly what licenses are required under which regulations, as this is a matter to consider on a case by case basis.

Some security companies may ignore the regulations, with the result that even if approval is given by the flag state and underwriters, the vessel may be carrying unlicensed weapons. It is therefore essential that detailed enquiries are made of any security company which an Owner may intend to engage about the company's proposal to ensure that all weapons held, used and operated by their personnel comply with the licensing regimes identified above.

A further question to consider is which party, Owners or the security company, will be responsible for obtaining the necessary licences. GUARDCON, the standard form contract recently published by BIMCO, divides the responsibility for permits and licences between the two parties, as follows:

- (a) Owners are to obtain and maintain any and all permits/licences which may be required for the vessel to carry the guards on board and/or for the performance of the specified security services on board the vessel, including the carriage and use of firearms and other equipment;

- (b) the security company is to obtain and maintain any and all permits/licences which may be required in order for the security company and its personnel to undertake the specified security services using any firearms and other equipment.

This requirement, and the GUARDCON provisions, are considered in more detail in Part 2 of this Alert (“Specific Contractual Provisions”). The key point at this stage is that the contract should specify which party will be responsible for obtaining the necessary licenses and permits. In any event, it must be remembered that it is ultimately Owners’ responsibility to ensure that all weapons carried on board their vessels are properly licensed.

3. In the event of hostilities involving pirates, how much force are the armed guards allowed to use, and are all concerned parties (namely the vessel’s Owners, Managers, insurers, Master and crew and the security company) fully aware of this?

This question must be considered in relation to each of the relevant legal regimes considered in question 1. It is essential that all parties concerned are aware of exactly how much force armed guards are entitled to use, in order to avoid future legal problems.

It should be noted in relation to this point, that it is crucial that appropriate rules of engagement are attached to any contract entered into for the deployment of armed guards.

(i) The law of the flag state

The law of the flag state may well govern the issue of whether and how much force can be used to defend oneself and one’s property when faced with a criminal act (as piracy is considered in many jurisdictions). An Owner must therefore make himself aware of the law of the flag state, and what this provides as regards the use of appropriate force.

In many common law jurisdictions, for example, if someone’s life is under serious imminent threat then that person is entitled to respond with *potentially* lethal force. The key here is proportionality: the response must be proportionate to the threat posed.

(ii) The law of the state where the vessel’s Owners and/or Managers are incorporated or have their seat of commercial operations

The provisions of this law may be different to that of the flag state. It is first important to determine whether this particular legal regime would assume jurisdiction for events orchestrated outside its territory by an entity connected with it. This is something that Owners must check.

Secondly, if so, it must be determined what legal principles that legal regime would apply to the particular facts. This is of course case specific, and beyond the immediate ambit of this Alert.

(iii) The law of the coastal states and/or ports where the vessel will call

This is, once again, crucial, as some of these states may take a very different approach to all other relevant legal systems. Legal regimes in these states may have little difficulty with the presence of arms and armed guards on board a vessel, but may apply different principles to determine what amounts to justifiable force. Again, Owners must familiarise themselves with the provisions of these regimes to determine exactly what level force used by armed guards will be considered appropriate and justifiable.

4. Will the presence of armed guards affect any insurance cover currently in place?

When considering whether to deploy armed guards, Owners should carefully consider the specific terms of all insurance policies which they have in place. This will include H&M and war risk policies and P&I cover. Whether a particular policy is affected by the presence of armed guards will depend to

a large extent on the specific policy terms. Further, the International Group of P&I Clubs has said, in its “Piracy FAQs” issued on 2 June 2009, that whether any cover is prejudiced will depend on an analysis of the loss and causation on a case by case basis.

If the use of armed guards is in breach of any law or regulation, cover could be prejudiced. Insurance cover may be tainted by illegality in two ways. Firstly, a claim under the policy will not be enforceable where the assured is obliged to rely on an illegal contract. Secondly, a claim will not be allowed where it enables the assured to profit from its own wrongdoing. There is also the issue of whether a criminal or illegal act (such as, for example, the deployment of armed guards in breach of a legal regulation of the vessel’s flag state) will render an insurance policy voidable. There is no general answer to this question, and whether cover will be affected will depend on an analysis of the policy terms in conjunction with the particular facts of the situation.

As well as checking whether the deployment of armed guards itself will create insurance issues, it is important also to check what potential problems could be caused by action taken by those guards. Many P&I policies contain an exclusion relating to the use of “weapons of war”, and cover could be prejudiced in respect of any damage caused by such weapons. However, such a claim could well be covered under a war risks policy.

It should also be noted that any breach of the charterparty or contract of carriage, perhaps resulting from a deviation at the behest of the security company which is found to be unauthorised, may prejudice cover.

SOLAS / ISPS Code

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. Both the SOLAS Regulations and the ISPS Code 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.

If armed guards are deployed, the security company may seek to introduce clauses into a contract which provide that they, rather than the Master, will make the final decision to authorise the use of force. In such a situation, the Master would not have full control over an important area of the vessel’s security. This could result in a breach of the SOLAS Regulations.

Members should note that a breach of the SOLAS Regulations could prejudice P&I cover. This is therefore an important issue to consider, and is dealt with in Part 2 of this advice, in which specific contract terms are considered.

5. Prior to the decision being taken to use armed guards, has a thorough risk assessment been carried out?

The IMO has issued guidance for owners and operators, which states that the decision to use armed guards should only be made after a thorough risk assessment has been carried out. This assessment should include and document the following factors and considerations:

- (a) vessel and crew security, safety and protection;
- (b) whether all practical means of self protection have been effectively implemented in advance;
- (c) the potential misuse of firearms resulting in bodily injury or death;
- (d) the potential for unforeseen accidents;
- (e) liability issues;

- (f) the potential for escalation of the situation at hand; and
- (g) compliance with international and national law.

The Club recommends that, when carrying out such a risk assessment, Members take into account both the IMO guidance and BMP4 (or any subsequent version) to ensure that all relevant issues are covered.

The full text of the IMO Circular containing this guidance is available on the IMO website: www.imo.org/MediaCentre/HotTopics/piracy/Documents/1405-Rev-1.pdf

6. If the decision is made to use armed guards, have all other concerned parties (namely the vessel's Managers, insurers, Charterers and cargo interests) been informed?

Other interested parties may have concerns about the presence of armed guards on board a vessel. It is therefore suggested that Owners inform Charterers, cargo interests and their own insurers about any decision to deploy armed guards.

Insurers should be informed, in order that any issues as to whether the use of armed guards affects cover can be dealt with.

As far as Charterers are concerned, they may seek to raise an argument against Owners that a voyage was not prosecuted with utmost despatch, or that an unauthorised deviation took place, if a security firm seeks to agree a route which is not the quickest or most usual route that the vessel could take. Such arguments could amount to a breach of the charterparty and so Charterers should be kept informed of the decision to deploy armed guards and any subsequent decisions taken as to the route the vessel is due to take. Ideally such a decision should be taken with Charterers' consent.

As regards cargo interests, if any damage arises as a result of the use of armed guards they may seek to argue that the vessel was unseaworthy under the bill of lading contract. This is particularly the case if such use is either negligent or illegal. This highlights the need to ensure that the deployment of armed guards, and any force which they may use, falls well within all relevant legal regimes.

Given the issues that may arise, it is suggested that all parties involved cooperate as regards any deployment of armed guards. Ultimately, however, it is a commercial decision for Owners to make. As mentioned at the beginning of this Alert, the issue of whether to deploy armed guards as a way of combating piracy remains a controversial one. This does not, however, mean that it should be dismissed by Owners. Rather, a careful consideration of the key questions set out in this Alert, together with an analysis of any contract to be entered into for the provision of security services, will enable an Owner to take such a decision in as risk-free a manner as possible.

7. Has sufficient due diligence been carried out on any security company being considered as a provider of armed guards?

Before even reviewing a contract, it is essential that any security company with whom Members may wish to contract is thoroughly investigated. The IMO has provided specific guidance in this regard, in its Interim Guidance to Shipowners, Ship Operators and Shipmasters. Taking into account the IMO guidance, the Club suggests that the following factors in particular are considered.

1. Request references from the company. It may also be worth checking whether any of Owners' contacts are able to provide more informal references (whether good or bad).
2. Check the background, experience and qualifications of the management and senior personnel. Such information may be available on the company's website.

3. Does the company have specific marine experience? Providing security on a vessel is a specialist task, and it is essential that the company has experience in providing such services.
4. On a related issue, does the company have an understanding of Flag State, port State and coastal State requirements with respect to the carriage and use of firearms?
5. Does the company understand the piracy threat, including the military operations in the high risk areas, and do they have the means to maintain up to date information on the threat?
6. Is the company a member of any industry organisation, such as the British Association of Private Security Companies (BAPSC) or the Security Association for the Maritime Industry (SAMI)? If so, then it is more likely to be a reputable company which will provide a high quality service.
7. Has the company signed, or is it willing to follow, the International Code of Conduct for Private Security Companies (IOCC)? If so, then Owners will be more able to expect a higher level of service.
8. Does the company have the ability and resources to provide unarmed guards, training for the vessel's crew, and other assistance as required?
9. What is the extent of the company's insurance cover (particularly as regards third party risks)?

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.