

There are limited defences available, but deploying these would likely necessitate overcoming high threshold tests.

No doubt the Australian government will hope that these changes will act as a general and serious deterrent against pollution.

NAVIGATION ACT 1912

The Navigation Act 1912 was amended:

1. To create an offence if the master of a ship negligently or recklessly operates a ship in a manner that causes pollution or damage to the marine environment or negligently or recklessly fails to prevent such pollution or damage. The court is empowered to take into account certain factors when considering liability, including but not limited to, the characteristics of the ship, type of cargo, state of visibility and presence of other ships.
2. To extend liability whereby, in certain cases, a person can be penalised as an accessory to a breach of these new obligations. This includes a person who has been '*directly or indirectly, knowingly concerned in, or party to, a contravention*'. This might include charterers.
3. Such that the maximum applicable penalties for breach are now A\$660,000 for individuals and A\$3.3m for corporations. The penalty is said to increase where there is an aggravated breach, namely a breach involving serious harm to the environment, or for being an accessory to an aggravated breach.

CONCLUSION

The impact of these new rule changes has not been tested. Members, especially those chartering ships operating in Australian waters, are advised to mitigate their effect by:

- Actively reviewing risk management practices and SMS procedures.
- Consider seeking indemnities from their trading partners.
- Reviewing their insurance arrangements.

GUARDCON GATHERS MOMENTUM – SOME ISSUES TO CONSIDER



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INTRODUCTION

The demand for armed and unarmed guards to protect crew, ships and cargo transiting high-risk areas has created a unique maritime security industry and has led to a surge in the number of providers marketing their 'specialist' teams to owners, operators and their insurers. There is presently very little regulation governing the activities of these companies. While there are a number of well-established, professional and highly reputable maritime security firms in operation, there are also many in their infancy which do not apply the same high standards.

Until recently, security providers have been contracting with owners on their own standard terms, which have given rise to a number of issues.

GUARDCON IS BORN

Responding to industry demand for a clearly worded and comprehensive standard contract, on 26 March, BIMCO published GUARDCON, a standardised contract for the employment of security guards on ships, with the aim of raising the bar in terms of the minimum standards that security companies must meet. In what is one of the first contracts of its kind, it envisages (albeit in the last resort) the use of lethal force to ensure the success of a commercial venture rather than a military operation. A necessary but controversial part of GUARDCON are the rules for the use of that force and these terms need to be agreed in advance between owners and their security provider in conjunction with flag states and other interested parties.

Although GUARDCON runs to 16 pages with six annexes, this should not present difficulties to reputable security providers. If problems do arise members should question whether an alternative provider should be engaged. An intended consequence of the introduction of this contract is either to encourage providers to raise their standards to meet the demands of the market that they seek to operate in or that they fall away.

This article highlights a few of the issues that members should be aware of when contemplating the use of GUARDCON.

THE CONCEPT OF THE CONTRACT

Members will be familiar with the concept of a 'knock-for-knock' allocation of risk, i.e. each party bearing responsibility for damage to their own property and personnel. GUARDCON embraces this concept, and to ensure the division of risk is maintained in practice, the security provider is required to obtain insurance cover of a minimum of \$5m and to ensure that guards are also required to sign a 'waiver' in respect of any rights they may have against the ship and/or owner.



COMMERCIAL ASPECTS

Naturally, members have contractual freedom to negotiate price-sensitive clauses and to decide whether a lump sum or daily rate contract would best suit their needs. However, delays at the port of embarkation are common when engaging this type of service, and members should be aware that the security provider has a grace period for the first 24 hours of delay. After that, members may cancel the contract. However, members may also wish to keep the contract alive, if for instance, there is no acceptable alternative security provider in the area or they have secured what they consider to be the best rate for those services. In such a situation, members can continue, but they should be aware that the contract does not specify what the measure of damages would be for the continuing delay. Members would therefore need to consider the usual rules for damages claims, and therefore, it may be simpler to cancel the contract and renegotiate on revised terms. In any event and in conjunction with GUARDCON, members should continue to include an appropriately worded piracy clause in their charters to ensure that the ship remains on-hire during delays of this nature.

If on the other hand, members wish to cancel the contract due to, for example, a change in charterers' orders or the availability of a convoy negating the perceived need for armed guards, then the contract contains a sliding scale of fees to be paid to the security provider, leading up to a 50% cancellation fee if cancellation is within 24 hours. In the unfortunate event that a hijacking occurs, owners should not be liable for the payment of the guards' wages during the period of detention, but likewise, a security provider will not be obliged to contribute to any ransom payment.

In negotiating any contract, confidentiality of terms is often a key issue. However, experience has shown that when an incident occurs, for example between an armed guard and a third party, this contract will be one of the first documents requested by the investigating authorities in order to determine responsibility. Members should therefore be aware that the contents could end up in the public domain via the courts, in a very short time.

NON-COMMERCIAL CONSIDERATIONS

Annex B to GUARDCON is intended to attach the 'Rules for the Use of Force' as agreed between owners and security providers. That, along with the division of responsibility and obligations of the master as distinct from the armed guards, requires special mention here.

With extended time, the BIMCO working group may have formed a view as to what would be acceptable rules for the use of force to the majority of flag states, rather than leaving Annex B blank. However, the club anticipates that the sections on self-defence, the chain of command and the graduated response as set out in the guidance notes, will form an acceptable basis for Annex B to be negotiated and approved by flag states and other interested parties. Nevertheless, this is a new and untested area, and members should be aware that whatever is inserted into the Annex by the security provider needs to be communicated to, understood by and be capable of being put into practice by the guards. In this regard, short, clear instructions will be the most effective.

One of the purposes of GUARDCON is to clearly set out what the division of roles is between the master and the guards in the event of an attack, so that it is clear to the parties involved and those looking at it externally. As members will expect, in line with SOLAS, the master retains overall responsibility for the safe navigation and command of the ship, while the guards take on the protection of life and property. However, in the event of an attack, if the master considers that the guards should cease firing, he can order it and the guards, subject to their personal right of self-defence, must follow this order.

In the aftermath of an attack in which guards open fire, a master can therefore expect to be questioned on why he did or did not order the guards to stop firing. This is an unenviable position to be in, but in all likelihood, the ability to make such a decision may be limited if the master and crew group together in the citadel; from that location, it will be difficult for the master to make a qualitative judgement on whether or not to order a cease fire, albeit it may be a location with a greater degree of protection for the crew.

Ultimately, when an incident happens at sea, it will be difficult for a master to avoid the understanding that he retains overall control of the ship, whether or not this is specifically set out in a contract.

CONCLUSION

The good news is that the industry has recognised that GUARDCON is a well thought through and solid contractual platform upon which parties can have this risk allocation between owners and security companies.

An agreement to provide the provision of guards is a contract for services to the ship. For liabilities under such an agreement to be covered and to be poolable, members are obliged to use best endeavours to ensure that the security contract provides, as a minimum, reciprocal indemnities for liabilities arising from negligence or is on terms no less favourable to the shipowner than knock-for-knock. An unamended GUARDCON conforms with these requirements and is poolable. Where an alternative contract is used or the GUARDCON is amended, our advice has been, and continues to be, that the member should still forward the contract to their usual club contact in order to ensure there is no prejudice to club cover.

An unintentional consequence of simplifying the procurement of armed guard services could mean the proliferation and normalisation of their use in shipping. It is hoped that this will not be the case, but in the meantime, where members feel that armed guard services are an essential part of their operations, the club recommends that GUARDCON becomes their contract of choice. GUARDCON and the guidance notes can be downloaded from the BIMCO website, www.bimco.org.

