



**BIMCO**

## **SPECIAL CIRCULAR**

No. 1 – 20 February 2014

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### **Guidelines for the use of GUARDCON when engaging PMSCs as intermediaries to employ local security guards within territorial waters**

GUARDCON was published in March 2012 with the specific aim of addressing industry demand for a set of harmonised terms and conditions for the employment of armed or unarmed security guards on board merchant vessels passing through the High Risk Area in the Indian Ocean.

It has been very widely and rapidly adopted by the industry as the standard for contracting for maritime security services for vessel transits through the Indian Ocean. In view of the widespread use of GUARDCON and the very positive response from the industry since its inception, BIMCO has no plans to revise the contract in the near future. Evidence suggests that it currently serves the industry very well for the purpose which it was designed and that parties have no problems in getting the contract agreed and approved by their insurers.

However, BIMCO is fully aware that the industry has recently become more focused on the risk of pirate attacks taking place in the Gulf of Guinea. The type of pirate attacks taking place in this region are very different in character to those of Somalian pirate attacks in the Indian Ocean and require a different approach. The chief difference is that unlike the Somalian pirate attacks in the Indian Ocean on vessels in transit on the high seas, the attacks in areas such as the Gulf of Guinea often take place on vessels entering or leaving ports, or at anchor within the territorial waters of a littoral state. National law in the affected countries dictates that foreign security guards are not permitted to carry firearms on board merchant vessels within their territorial waters. Shipowners who want armed security personnel to protect their ships in these areas must rely on local security or law enforcement forces (commonly marine police or naval personnel). It is also understood that in Nigeria, for example, the Navy will provide small patrol craft to protect shipping.

To employ local military/police personnel as on board security guards a shipowner has two main options. Firstly, the owner can use a local agent with direct links to the military/police in that country to employ local security guards. Secondly, the owner can engage the services of a PMSC to act as an intermediary to employ local guards and to provide additional logistical and administrative support.

GUARDCON is worded to provide a framework agreement for the provision of on board security teams for vessel transits on the high seas through areas at risk of piracy. It is geared towards the use of foreign armed guards simply to reflect the free choice of service providers that an owner has when engaging security services for high seas transits. When a vessel leaves the high seas to enter

a port or loading/discharging location with territorial waters, different rules and regulations prevail concerning the deployment of armed guards.

If an owner wishes to have or continue to have armed support on board his vessel then any non-local armed guards must disembark the vessel and be replaced with local security personnel. An owner who has relied on the services of a PMSC for providing armed security for his vessel on the high seas may wish to continue to rely on that expertise to arrange security within territorial waters. This arrangement can be achieved using GUARDCON but it does require that the contract be amended to reflect that the PMSC will only be acting as an intermediary in engaging local security guards on the owners' behalf. This is a very important distinction that owners should be fully aware of before entering into any agreements. Local military personnel placed on board merchant vessels in areas such as the Gulf of Guinea will operate under their own national rules of engagement, be subject to local law and jurisdiction, and accountable under the terms of their employment as security or law enforcement personnel. The ability of a PMSC through their on board representative ("Team Leader") to effectively control local security guards will therefore be limited in scope. It is also important to ensure that any Team Leader employed in territorial waters complies with local visa regulations.

The purpose of this Special Circular is twofold. Firstly, it is to provide a "health warning" to anyone contemplating using GUARDCON for purposes other than the high seas security services for which it was designed. It should not be used to engage local security personnel through a local agent. It is simply the wrong type of contract for that purpose. If a PMSC is to be used as an intermediary to engage local security personnel, GUARDCON cannot be used without special adaptations. This is because GUARDCON contains provisions for liabilities, responsibilities and insurances that contemplate the direct employment and control of security personnel by the PMSC. The fact that only local security guards can be used changes the game, requiring careful consideration of the contract.

**BIMCO would like to make it very clear that GUARDCON is designed exclusively for contractual arrangements between PMSCs and shipowners. If GUARDCON is to be used in any other circumstances then shipowners are strongly encouraged to check with their underwriters and P&I Club beforehand. The P&I Clubs that belong to the International Group have reviewed these Guidelines and prepared a Circular to their members indicating approval of amendments, where necessary, based on these Guidelines. Please refer to the Club Circular before contacting your P&I Club.**

BIMCO will not issue any form of amended GUARDCON or any "special edition" of the contract for use in areas such as the Gulf of Guinea. However, the secondary purpose of this Special Circular is to provide some guidance as to the type of adaptations that owners and PMSCs may wish to consider when drawing up a GUARDCON agreement to provide additional security services within territorial waters. Owners should also check with their Flag state about any regulations concerning the use of local armed guards on board vessels in territorial waters.

### **Clause 1 (Definitions)**

A number of the definitions found in GUARDCON are specific to Indian Ocean piracy and are therefore not relevant when using the contract outside this area. For the sake of clarity you might wish to consider deleting the definitions of "MSCHOA" and "UKMTO".

A number of shipping associations have jointly developed a set of Interim Guidelines to address piracy in the Gulf of Guinea and it is recommended that these Guidelines be read in conjunction with Best Management Practices (BMP). A suggested definition of the Interim Guidelines is as follows:

**“Interim Guidelines”** means Interim Guidelines for Owners, Operators and Masters for protection against piracy in the Gulf of Guinea region or such updated version as may have been introduced at the date of the Instruction Notice.

It is important to make a clear distinction between any security personnel provided and employed by the PMSC and local security personnel. It is possible for the contract to cover both, as part of the “transit” may occur on the high seas where the PMSC can use their own personnel before switching to local guards once the vessel enters territorial waters. A suggested definition of local security personnel is as follows:

**“Local Security Personnel”** means serving members of national security forces of littoral states provided by the Contractors for the performance of the Security Services on board the Vessel.

Local security guards will have use of their own weapons on board the vessel. Unlike the cached firearms used by the PMSCs own personnel, the local militia will have their own standard issue personal firearms and ammunition that they will carry when boarding the vessel. A definition to distinguish between firearms is suggested:

**“LSP Firearms”** means the firearms and ammunition carried by Local Security Personnel

Simply for the sake of clarity, it is suggested that a clear distinction is made between the PMSCs own personnel and the local security personnel – perhaps through a minor amendment to the definition of “Security Personnel” as follows:

**“Security Personnel”** means the personnel directly engaged or employed by the Contractors for the performance of the Security Services on board the Vessel, for avoidance of doubt excluding Local Security Personnel.

#### **Additional references to “Local Security Personnel”**

There are a number of places in GUARDCON where it will be necessary to refer to “Local Security Personnel” as defined, as well as Security Personnel. For example, in the definitions of “Disembarkation Point” and “Embarkation Point” these should refer after “Security Personnel” to “Local Security Personnel” as the provision applies to both.

We suggest that similar amendments are made after “Security Personnel” in the following Clauses: Sub-clause 6(c)(ii); Sub-clause 7(g); Sub-clause 7(i); Sub-clause 8(a); Sub-clause 8(c); Sub-clause 8(d); Sub-clause 9(c); Sub-clause 10(a); Sub-clause 13(a); Sub-clause 13(j); Sub-clause 15(a)(ii); Clause 16; Sub-clause 18(a); Sub-clause 19(a); Sub-clause 19(b)(iv)(2); Clause 21; Clause 22; and Clause 23.

#### **Clause 2 (Commencement, Appointment and Duration)**

In Sub-clause (b) where there are references to “Security Personnel” embarking and disembarking there should also be a reference to “Local Security Personnel”.

#### **Clause 3 (Security Services)**

The basic manning level for the security team under GUARDCON is a Team Leader plus at least three other security guards. When using local security teams it will not usually be possible to specify the number of guards as this will be determined by their own commanders and is not generally negotiable. Feedback from shipowners suggests that at least four guards will be assigned to each ship, sometimes more. The PMSC should of course retain a Team Leader to act as a liaison officer on board. To distinguish between manning levels for PMSC guards and local guards you may wish

to add wording to the preamble of this clause to the effect that “...or, where Local Security Personnel are to be provided, one Team Leader and four (4) or more Local Security Personnel”.

In Sub-clause 3(b) there is a reference to the use of Security Equipment to protect and defend the vessel. As the local security guards will use their own firearms you should consider adding a reference to “LSP Firearms” as these are distinct from the defined “Security Equipment” belonging to the PMSC. This should also be applied in Sub-clause 11(a) (Investigations and Claims).

### **Clause 6 (Contractor’s Obligations and Responsibilities)**

In Sub-clause 6(a)(v) there are references to “UKMTO” and “MSCHOA” which are not relevant to operations outside the Indian Ocean. It would be appropriate to delete these references and refer instead just to “local authorities”. This wording also occurs in Sub-clause 7(f) where a similar amendment would be helpful for the sake of consistency.

BMP is written with Indian Ocean piracy in mind. However there are still measures and practices contained in the BMP that have application in areas such as the Gulf of Guinea. We would suggest that in this context the reference to BMP in Sub-clause 6(a)(v) is supplemented by “...in conjunction with the Interim Guidelines”. These additional words should also be considered for Sub-clause 7(f).

In Sub-clause 6(a)(vii) the crew should not be permitted to handle any firearms and so an additional reference to the “LSP Firearms” would add clarity.

In Sub-clause 6(d)(i) – Contractors’ Right to Sub-contract – the PMSC needs to retain the right to sub-contract solely for the purposes of engaging local security guards on behalf of the owners. It would be helpful to clarify this exception in the clause by adding wording to the effect of “other than the provision of Local Security Personnel”.

Sub-clause 6(d)(ii) deals with security personnel sub-contracted by the PMSC. Local security guards are not sub-contractors of the PMSC, they are employed by the local military. For the sake of clarity it would be helpful to add “(excluding Local Security Personnel)” after the reference to those not in the direct employment of the Contractors.

A very important consideration when using GUARDCON with a PMSC acting as an intermediary is what the PMSC can reasonably be expected to warrant in terms of providing local guards and the level of control that they can exercise over them. Owners should be fully aware that it is difficult if not impossible for a PMSC to bind local security guards to the provisions of GUARDCON, Rules for the Use of Force and the PMSC’s own operating procedures. However, the PMSC should exercise due diligence in the provision of local guards and, at the very least, make them aware of the scope of the services and most importantly, the authority of the Master. Some helpful wording to form a new Sub-clause 6(d)(iii) might be “The Contractors shall use all reasonable skill and care in the provision of Local Security Personnel including making them aware of the scope of the Security Services, Rules for the Use of Force and the authority of the Master.”

### **Clause 12 (Insurance Policies)**

The insurance provisions of GUARDCON are an essential feature of the contract as they establish a clear benchmark for minimum insurance levels under the agreement. Particular care should be taken before considering any amendment of Clause 12. It may well be possible for a PMSC to extend insurance cover for their own personnel so that the \$250,000 per person personal accident insurance is also available to the local security guards. All insurance related matters should be checked with insurance providers before including any references to local security guards in this clause.

However, one important suggested change is to include a reference “Local Security Personnel, LSP Firearms” in the final sentence of Sub-clause 12(a) to ensure that the use of local militia with their own weapons on board does not invalidate the PMSC’s insurances.

**Clause 15 (Liabilities and Indemnities)**

Similar to Clause 12 (Insurance Policies) BIMCO would not recommend making any significant changes to this important clause in case they inadvertently alter the careful balance of liabilities and indemnities written into the contract. GUARDCON incorporates a “knock for knock” liability regime and in order to maintain the balance of the regime, responsibility for the local security guards should be allocated. In BIMCO’s view, the responsibility for the local security guards should fall within the “Contractors’ Group” and so a reference to the local guards should be added to Sub-clause 15(a)(ii).

In terms of third party liability, you may wish to include a reference to “LSP Firearms by Local Security Personnel” in Sub-clause 15(c)(iii) in relation to the indemnity provided by the Contractors to the Owners’ Group in respect of any negligent or accidental discharge of firearms by security personnel.

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The suggested changes to GUARDCON set out above are provided purely for guidance to owners wishing to use PMSCs as intermediaries to employ local security guards for operations within territorial waters. It is not intended to be an exhaustive list and the parties may well wish to agree further more extensive amendments or additional clauses to suit their particular circumstances. In all cases BIMCO strongly recommends that owners consult closely with their P&I Clubs before agreeing any amendments – particularly those which may have a bearing on the owners’ level of risk (which is likely to be higher when engaging PMSCs as intermediaries).

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20 February 2014  
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