SHIPPING
PIRACY - ISSUES ARISING FROM THE USE OF ARMED GUARDS
By May 2012 the average duration of the hijacking of the most recent six ships released remained at 250 days. The corresponding average for the amount paid in ransom is difficult to calculate from open sources, but is estimated to be approximately US$6.5 million. The past six months has seen a significant sea change in the industry’s attitude to armed guards; exemplified by the issuing of the new GUARDCON contract by BIMCO and the change to national legislation by countries including the UK, Norway and Greece to allow weapons on board ships.

Despite the best efforts of the limited military resources, pirates remain a threat and, notwithstanding a greater use of citadels, vessels continue to be hijacked. The use of armed guards remains a controversial policy but more owners are compelled to use them as they compete for business in a difficult market. The debate is no longer focused on whether they should be used but instead asks how they can be used safely, with the emphasis on accreditation and accountability.

It has also been recognised that common Rules for the Use of Force (“RUF”) are required. This has been emphasised both by the events surrounding the arrest in India of two Italian marines who were part of a detachment on the Enrica Lexie, and the recent YouTube footage of a team from a PMSC which attracted criticism from some quarters.

Those in favour of the use of weapons were given a significant boost on 15 February 2011 when the International Chamber of Shipping (“ICS”) announced its change of stance on armed guards. The tide turned and UK guidelines dealing with the use of armed guards on UK flagged vessels were issued. The Best Management Practice 4 (BMP4) guidelines recognised that armed guards were being used and the message has been that they should be used but instead asks how they can be used safely, with the emphasis on accreditation and accountability.

The unique selling point for the security companies is that to allow weapons on board ships.

How is the maritime security industry responding?
The attempt by the maritime security industry to regulate itself has continued. The Security Association for the Maritime Industry (SAMI) has seen its membership increase above 150 and it has now introduced an independent auditing process which many members are undertaking. However, at the IMO’s May 2012 meeting on the industry’s regulation it was apparent that the standards to be imposed remain a matter for individual countries. Whilst there is an aspiration to have an international standard overseen, perhaps by the ISO system, there remains a patchwork of regulation and PMSCs must continue to seek recognition in each country.

All members of SAMI are signatories of the International Code of Conduct for Private Security Companies, and although this is primarily aimed at land based security companies, a maritime annex is being drafted. It is likely that companies signing up to the code will find themselves preferred to those who don’t. However, the danger to owners and insurers is that an increase in demand for armed guards will lead to a decrease in quality.

Who is in charge of the ship?
If armed guards are on-board, a fundamental question arises as to who authorises the use of force. Security companies still seek to insert contract clauses which appear to provide that the master may not have overall control or the final decision in whether weapons will be deployed and used. That decision may rest with the security team, on terms that the master only need be consulted “if there is time”. The justification is that, if faced with a lethal threat, the right to self-defence outweighs the master’s overall responsibility to his crew and the environment.

In other words, the master may not have full control of a key area of the vessel’s security, something which impacts directly on the safety of the crew and the vessel itself. Indeed there may be a contractual obligation for him to obey “security” instructions from the guards which extend to the routing of the vessel, possibly without regard to any contractual obligations to charterers and/or cargo interests.

The use of armed force on a vessel must relate to the safety of the crew and the protection of the environment and yet, by employing armed guards, owners may be forcing masters to give up that discretion, in breach of SOLAS Regulations. This could lead to issues arising under SOLAS, which at Article 34-1 provides:

“The Owner, Charterer, the Company operating the ship as defined in Regulation 1X/1 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”.

This message is reinforced in the ISPS Code which states:

“At all times the master of a ship has the ultimate responsibility for the safety and security of the ship...”

This was reinforced graphically after the Maersk Alabama case in 2009, where Captain Phillips before the hearing of the Senate Foreign Relations Committee said:

“I am not comfortable giving command authority to others. In the heat of an attack, there can be only one final decision maker.”

His comments seem to support the belief that masters will not be happy to give up any of their overall authority on board. Owners, charterers and others should therefore give serious thought as to how they would deal with the issue of authority on board the vessel when considering employing armed guards.

This issue was also addressed by GUARDCON, particularly within Clause 8 which deals with the issue of the master’s authority.

There were strong feelings in some quarters that the RUF should be in play from the time of the embarkation of the armed teams; citing the Fairchem Bogey (hijacked three miles from Salalah and in Omani territorial waters) as the basis for such a view. The prevailing view at the time was that the invocation of the RUF should occur when a threat was perceived or had manifested itself. The concern related to distancing the master from the decision to open fire and the balance struck was that it is for the team leader to decide when the threat is such as to allow him to invoke the RUF. This gives him the ability to follow the RUF and defend the vessel without needing approval for each step taken. This is particularly sensible as it is likely that if a threat is real then the master and crew are likely to be in a citadel or secure muster point. In order to emphasise that the master does have overall authority the clause provides a reminder that he has the right to order a cease fire. The individual’s right of self-defence is maintained and the security personnel must take responsibility for their own actions.

During the drafting process, some voiced concerns about the duty of a master in this situation and whether he is under an obligation to intervene if a fire fight was, in his view, threatening the safety of the crew or environment. An analogy was drawn to the duty a master has to intervene in a loading situation where a cargo’s stow compromises the safety of the vessel. The issue here being that if a master did not step in he could somehow face legal liability afterwards. Whilst this has never been tested or really considered this is not a situation which goes to stability or seamanship and one would hope that even at a time when authorities are quick to criminalise crew that they would not criticise a master in these circumstances.

It is an area which IMO has highlighted and further guidance on this is likely to follow.

**Armed escort ships**

Using an armed escort in a high risk area may seem easy in theory. However the practicalities are causing real problems as the status of these companies and therefore their vessels is not defined. Interesting questions have been raised both in terms of responsibility to the master of the ship under escort and under international law as, under Article 107 of UNCLOS, power is given only to military vessels to seize ships involved in piracy.

Questions have been raised as to the legitimacy for these private gun boats. Some arguments have even arisen as to whether the armed intervention of a gun boat is in itself piracy.

Article 19 of UNCLOS provides the definition of Innocent Passage, stating:

“Passage of a foreign ship shall be considered prejudicial to the peace, good order or security of the coastal state if in the territorial sea it engages in any of the following activities: …any exercise or practice with weapons of any kind.”

The provisions on the rights of transit and the regime of local laws in middle eastern countries make the use of these vessels difficult and controversial. Those considering providing such a service as an agent of a commercial ship owner should pause for thought.

Various flag states have now indicated a commitment to flagging vessels wishing to be used as escort vessels and commercial entities are looking at providing a service in the Gulf of Aden.

**Can armed guards or escort boats use lethal force?**

Any use of arms must be governed by clear RUF. There are as many RUF as there are security companies, and many agree that there is merit in trying to develop a uniform system which all companies and operators follow. Again GUARDCON provides guidelines on the graduated response that most countries
require in order to achieve the aim that lethal force is only used as a last resort and is proportionate to the threat.

It had been thought that where the flag state authorises or directs the presence of military personnel on-board, these issues may well be more straightforward. The *Enrica Lexie* incident in February 2012 has shown that this is not the case and that whoever the guards are, that they are subject to the relevant laws on the use of force and self-defence.

There is some movement in this area in the United States, where proposals have been made that immunisation against prosecution should be given to those who injure or kill a pirate whilst protecting a ship from attack.

**Who needs to know?**

**Insurers**

Clearly prudence dictates that the use of armed guards should be discussed and agreed with all underwriters. Although not a question of “disclosure” for existing policies which are not being extended or varied, there are many other possible implications. We can envisage arguments that the practice may affect the validity of a policy, and/or the recoverability of a claim under a valid policy. Arguably, this could be the case even if the security providers were on board with underwriters’ full agreement. Where a voyage through pirate-infested waters requires a variation of a policy (for example because it involves a change of trading limits), then disclosure considerations also apply.

**Cargo interests**

For the reasons given above, damage arising from or caused by the use of armed forces, particularly if the use of that force was negligent or illegal, may give rise to an argument under the bill of lading contract that the vessel was unseaworthy. Informing cargo interests of the intention to arm the vessel should therefore be considered.

**Charterers**

The security providers are likely to want to agree a route prior to transit of a high risk area. That route may not be the normal or quickest route and may represent a deviation or a failure to use utmost despatch under the relevant charter party. An unauthorised deviation may mean a breach of the charter and/or contract of carriage which could then jeopardise the P&I cover. There may also be off-hire implications. Interesting questions could arise, for example, if the vessel was taken by pirates whilst deviating.

**What happens if someone is killed or the ship/cargo is damaged during a hijack as a result of the actions of the guards?**

GUARDCON has a robust knock for knock regime which includes third party claims unless those third party claims are caused by negligence. The minimum insurance required to meet these potential liabilities is US$5 million. The PMSC gives no guarantees about protecting the vessel from attack or hijack and it was not the intention to try and shift the basket of traditional marine insurance that a ship has onto the liability underwriters who are ill equipped to meet those liabilities. One difficult area of consideration was around the costs of deviating to disembark a sick or injured armed guard. GUARDCON provides that the costs of the deviation will be for the ship owner (which is usually a P&I risk), although the MPSC takes responsibility for the disembarkation and subsequent repatriation either under an Employers Liability cover or under the individuals Personal Accident cover both of which are required under GUARDCON. Generally, the parties will bear responsibility for the injury to their own personnel and for the damage and loss to their own equipment, with the exception being where loss arises from the negligent or accidental discharge of a weapon by the armed guard.

**Licensing of weapons**

The licensing regime, particularly in the UK in respect of controlled weapons, casts a wide net and applies to UK companies and nationals (wherever they are) and to foreign companies set up by UK nationals, where the foreign company is set up for the sole purpose of acquiring and moving weapons. Given the identity of the littoral states, the myriad of export and import regulations and the requirement to arrange bonded stores of weapons, it is unsurprising that many grey areas exist. The UK recently issued a new Open General Trade Control License (“OGTCL”) specifically aimed at PMSCs making it far easier to ensure that the movement of weapons is regulated and auditable.

The issue of floating armouries has not yet been resolved. A number of vessels have been chartered to act as floating armouries as a reaction to the increase in regulation and cost of moving weapons in and out of the littoral states. The UK authorities have not authorised any of these as “approved armouries” for the purposes of the OGTCL. In most cases it is suspected that the flag states of the vessels are unaware of the use to which they are being put.

**Conclusion**

There is now general acceptance of armed guards across the industry although for some flagged states they are still not permitted. There is widespread agreement that armed guards are not a substitute for the hardening required under BMP, and certainly in the UK they remain allowed on UK ships only in the High Risk Areas off Somalia in the Indian Ocean. As the situation deteriorates in the Gulf of Guinea it would no doubt be a real concern if there was a call for armed guards there as well. GUARDCON is an important and very real step forward in terms of regulation and ensuring that the use of guards, armed or not, is set against a regime based on clear principles and obligations. There is still much to do as floating armouries are currently being provided on an ad hoc basis with no formal system of approval.

Further there is still a degree of uncertainty as to the regulation and formalities required for bringing weapons into ports in the area, with huge differences in what is required and risks of delays and even arrests if owners inadvertently fall foul of local law.