Germany to **tighten rules** on security firms

Michael Karschau, of Grimme & Partner, reports on a new German law on armed guards used to protect against piracy

Germany passed a new law regulating the use of private maritime security companies (PMSCs) on 13 December 2012. From 1 December 2013 PMSCs or maritime security companies (MarSec companies) will have to be accredited to German government if they intend to guard German-flagged vessels. Several issues remain unclear.

A total of around 440 vessels flew the German flag in December 2012, while approximately 3550 belonged to German shipowners in the same month. For economical reasons these figures are constantly decreasing; those vessels, nevertheless, still belong to the third-largest merchant fleet of the world. According to the German shipowners, association VDR, 933 German-flagged vessels made the transit through the high risk area at the Gulf of Aden in 2011, while an estimated 1700 transits were made by German vessels in total. According to a survey by PriceWaterhouseCoopers (2012), up to 80% of German owners hire armed guards. For German owners, the threat of piracy and the use of armed guards is a fact they deal with on a daily basis.

Former legislation

Under the current German legislation of article 34 (a) of the German Trade Law (Gewerbeordnung), there is no need for a maritime security company to be certified by the German government. Instead, only the guards themselves need to be admitted to provide guarding services and they need a weapon permit. German MarSec companies could provide security services on board German vessels as long as their guards met certain requirements. Those were relatively low standard, drafted for duties ranging from patrolling malls and subways to escorted car services. The former regulation dated back decades and did not envisage security services under fire on board a vessel.

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The new regulation

Germany decided to impose a much higher legal framework for the use of armed guards. The new law relies partly on MSC.1/Circ 1443 and MSC.1/Circ 1405/Rev.2 as well as on Guardcon. A new article 31 was inserted in the Gewerbeordnung dealing with the accreditation of maritime security companies. This article is accompanied by a new article 28 (a) of the Weapons Act (Waffengesetz) dealing with all matters involving weapons. The exact details of the accreditation procedure are still not clear and are subject to a forthcoming regulatory order.

The decisive date for companies and owners alike will be 1 December 2013. From this day on, MarSec companies will need to be accredited for providing guarding services on board German-flagged vessels.

Procedure

Several government agencies will be involved in the accreditation. While the procedure will be under the aegis of the Federal Office of Economics and Export Control (BAFA) which will issue the certificates, the federal police (Bundespolizei) will peruse parts of the documents and the weapons authority Hamburg will issue weapon permits.

The certificate will be valid for two years and will cost – government charges only – between €8,000 and €16,000. A company will have to file an application with BAFA to obtain the certificate by submitting several documents. It will be a document only procedure. Some of those documents should already be available within those companies which have been audited several times or which have applied for other approvals, such as the UK Open General Trade Control Licence (Maritime anti-piracy) (OGTCL). Those documents shall address:

- organisation of the company;
- compliance with legal rules;
- operational concept and handbook (SOP);
- rules on the use of force (RUF);
- training, choice and abilities of personal;
- equipment, weapons and permits;
- documentary evidencing; and
- insurance.

National and foreign companies alike can apply. Foreign accreditations from outside of the European Union may be acknowledged by BAFA – as long as they are comparable to German requirements. One of the crucial points will be the guards' training standards. In the draft regulatory order, this comprises of knowledge of and skills in:

- relevant German public, civil and criminal laws, including width and limits of right of self-defence;
- crisis handling, de-escalation techniques;
- ISPS and ISM code;
- nautical and/or sea-farer's trade;
- ship and equipment;

- secure handling of weapon and equipment;
- weapons law and foreign trade law of Germany and of the relevant harbour and coastal states;
- first aid at sea;
- threats in the area of deployment, the relevant groups therein, military operations in the area, best management practices (eg BMP4);
- the company's SOP and RUF; and
- tactics at sea.

Weapons

The German government has made it clear that it will not allow fully automatic rifles. Semi-automatic weapons will be possible under certain circumstances. The accreditation and the license from weapon authority Hamburg will form an export-license for weapons and regulated equipment for anti-piracy purposes. In much, the German accreditation is comparable to the UK OGTCL, however it is broader in a geographical sense. Where the OGTCL is limited to the high risk area around the Gulf of Aden, the German accreditation has no such limits.

Pooling solutions of weapons and the use of floating armouries were not addressed in the legislative history. It is doubtful if one or both will be permissible.

Insurance

An indemnity insurance is a necessity under the law. The draft order calls for a minimum cover of €5m. This has recently been criticised by German GDV, central organisation of German insurers. They insist on limiting the cover especially for financial losses to €500,000 and further demand that the indemnity insurance should be subsidiary to those damages covered under other policies, for example the owners' P&I, hull & machinery, kidnap & ransom or war risk.

If GDV succeeds, German indemnity policies would be inadequate for services under Guardcon. Clause 12 Guardcon demands the security company "to maintain insurance to cover their liabilities and contractual indemnities, including this in Clause 15" with a limit of US$5m. In clause 15 (c) (i) Guardcon, the company agrees to "hold [owners] harmless, defend, indemnify … from and against any and all claims …" by third parties if the reason for the claim lies in the sphere of the security company. This liability could be limited to $5m according to clause 15 (d), but not to €500,000 as suggested by GDV. Moreover, as Guardcon's insurance clause is deemed by the international clubs as indispensable such a discrepancy in cover could also invalidate owners' war risk cover. It seems German insurers are not interested in entering this market.

Subcontractors

The legislative history did not address the use of subcontractors. It is more or less common practice in the industry to hire subcontractors, often single entrepreneurs, either directly or through a "manning" agency in-between. It is a matter of cutting costs, compared to long-term employees. According to the new article 144 subs 2 Nr 2 Gewerbeordnung, "offering guarding services outside German waterways" without an accreditation will be fined. Needless to say those individuals almost never will be able to fulfil the organisational or financial requirements for the accreditation.

Time

Time posed a real problem until very recently. Originally companies had to be accredited by 1 August 2013. As the details of the procedure were still not clear and applications were not possible, the government very quietly pushed the deadline back to 1 December 2013. Parliament made that decision on 28 February 2013. Otherwise, companies would not have been able to fulfil their long-term contracts with owners and the training of guards in inter alia specific knowledge of German legal provisions would have been impossible.

Companies which have already been granted permission under the current legislation for the use of weapons for maritime security services may apply for a transmission period until 31 December 2013, article 28 subs 6 of the new Waffengesetz.

Publicity

One issue of the German accreditation which should not be disregarded is publicity. The accreditation will certify German authorities' approval of the security company. The German accreditation will have much more demanding requirements and will be much harder to receive. Panama and Cyprus accreditation are already used in the market as quality features. We estimate that nearly all companies receiving the German accreditation will use this as a unique selling point ("approved by the German government").

Closing remarks

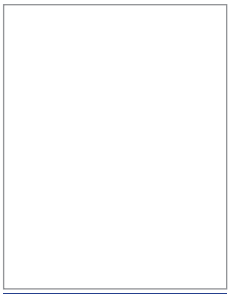
With the accreditation, Germany made a move to provide the international community with a potent tool to assess the quality of maritime security companies. But this alone will not suffice to fight piracy.

During the last months, IMB's live piracy map saw a drop in piracy to only one reported incident in 2013. On the other hand, seven incidents were reported at the Gulf of Guinea at West-Africa (mostly robberies of crude oil carriers) and eight incidents at the waterways around the Straits of Malacca.

The decline in successful attacks at the high risk area was only possible due to a combination of owners following the advices of the Best Management Practice 4, considerable naval forces, hardened vessels and – yes – armed guards.

Diligence paid out. It would be dangerous if due to dropping incident figures owners would became complacent and disregarded this diligence now for reasons of costs. ***MRI***

• *Parts of this article are based on "PMSCs and German Government Legislation, SAMI Member Update: December 2012", a briefing paper written by the author for SAMI on 4 December 2012.*



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