SAMI Security Association for the Maritime Industry
www.seasecurity.org

PMSCs and GERMAN GOVERNMENT LEGISLATION

SAMI MEMBER UPDATE: December 2012

Hamburg based Lawyer Michael Karschau of Grimme & Partner law firm in Germany has kindly issued SAMI with a briefing paper on the forthcoming German regulation of maritime security companies providing services on board German-flagged vessels.

Despite some complications, it is anticipated the Bill will be passed as stakeholders with different interests are exerting influence for a fast solution, foremost German ship-owners. However, it should be noted that sudden changes may happen in the legislative procedure due to unexpected events or political reasons not connected with the matter itself.

Further, in the draft papers of the Bill and of an assisting by-law several – sometimes crucial - points have been left open and are subject to further amendments.

According to Grimme & Partner most or all of those points are still in discussion between the different governmental and parliamentary bodies which are affected for reasons of competence. Something which Karschau considers quite normal in the legislative procedure.

The briefing paper is therefore based upon the latest currently available information. Please note that this paper does not constitute a legal advice but is intended as an overview only.

SAMI members are also reminded this law firm is regularly and intensively monitoring the legislative development and can be followed on Twitter (@M_Karschau) or members may contact Michael directly on m.karschau@grimme-partner.com or see www.grimme-partner.com.

Current regulation, goal and time-frame of the new regulation

Current regulation

At the moment, MarSec-companies do not need to be certified. Only the guards themselves need to be admitted to provide guarding services. In case a weapon is necessary for their service, they need a weapon permit.

Those current rules are relatively low standard and apply to any duty ranging from patrolling malls and subways to doorman and security personal for armoured car services, and they will also apply to guards on vessels. Needless to say that to my knowledge all of those people guarding German-flagged vessels adhere to much higher standards than they are obliged to by the current law. But it is the law of which I am to report here.

Goal of the new regulation

These comparatively lower legal standards and at the same time, international movements for higher standards for maritime guards (such as the relevant IMO Guidance, GUARDCON, drafting of ISO PAS 28007, etc.) are the reasons why Germany decided to regulate these guarding duties more thoroughly.

The German approach is now to certify a company directly rather than certify the individual guards. The companies will have to prove that they and their guards meet the requirements by documentary evidence only. From a legal point of view, this is a new and really innovative approach which bears more resemblance with certificates / accreditations known from air-cargo security (e. g. the “known consignor”) than with the current regulation of the guarding industry. It is a mixture between regulatory mechanisms already known from other German regulated industries and a kind of quality management known from DIN/ISO standards.

In my understanding the German approach surpasses other international and national accreditation procedures / legislative attempts insofar as it will be more detailed and broader while setting a high quality standard for the company itself and for their personnel. It will allow the guarding of any German-flagged vessel. Furthermore, it will not be limited to duty in the HRA and insofar, as I understand, has a much wider scope than e.g. the OGTL.

Time-frame & transmission period

After the Bill will have been passed hopefully this year, the decisive date for companies and owners alike will be 1st August 2013. From this day on, MarSec-companies will only be able to guard German-flagged vessels if they are certified.

As soon as the law will have been passed it will already be possible to apply for such a certificate. This period between end of this / beginning of the next year and August next year is meant as a transmission period.

It is planned that letting a company doing duty without certificate would constitute, for owners, a criminal offense. For companies, violating certain parts of the regulation would constitute a regulatory offense which could be quite costly and could result in either losing the certificate or being legally hindered to receive one in the first instance.

This transmission period is necessary. Otherwise, those companies now guarding the vessels would effectively be out of business from one day to another until they would have received the certificate.

During the transmission period, competences between the participating agencies will have to be clarified, frictions may show. This is, after all, a totally new proceeding which is to be installed. For companies already doing services on board German vessels, or planning to offer services from 1st August on, time may be an issue.

Procedure, costs and applicants

Procedure

There are several governmental agencies involved in the admission: The BAFA (Federal Office of Economics and Export Control, www.bafa.de) issues the certificates while the Bundespolizei (Federal Police, www.bundespolizei.de) peruses parts of the documents and the Waffenbehörde Hamburg (Hamburg Weapon Authority, no central website available yet) issues the weapon permits; some other agencies participate in (minor) questions.

BAFA inter alia plans to set up a dedicated website with information (I anticipate in German as well as in English language) in this matter after the Bill has been passed. In most of the agencies structures already exist which may used to handle the applications.

A MarSec-company has to file an application to the BAFA to obtain the certificate, together with several documents. I will highlight some of the necessary contents of those documents in detail below. For now, these are mainly documents dealing with

- 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 personnel
- Equipment, weapons and permits
- Documentary evidencing before, during and after deployment
- Insurance

It has been made clear already that most of the requirements on those documents will be modelled on the IMO-Guidance(s) and GUARDCON. So, for those of you who already have passed (several) GUARDCON-audits most of those documents shall already be available.

Costs

The explanatory statements to the Bill expect BAFA to raise administrative fees for issuing the certificate in the amount of ca. Euros 8,000.00 to Euros 16,000.00 for the first application. More costs will accrue for training personal not meeting the requirements, inner- and outer company resources working on the admission, and eventually for translation of the necessary documents.

As the certificate will be valid for two years, at least part of these costs will be bi-annually. Whether there will be a reduction for the renewal of this certificate is not clear yet.

Who can apply?

National and foreign companies alike can apply.

It is worthwhile to mention that if a foreign company has already been accredited to or certified by a member state of the European Union, it is planned to be entitled to receive the German accreditation – as long as the member state's requirements for accreditation are comparable to the German regulation. The comparability will be verified by BAFA together with the other agencies.

A foreign company accredited to or certified by a non-European country may receive the German accreditation for the same reasons, but without the legal entitlement.

Details of the German regulation

The main requirements under the regulation are two-folded. First, the company will have to prove that several internal mechanisms are in place. Second, the management and the guards will have to meet certain requirements.

Company organization

The company will have to prove the existence of a functioning procedure in place concerning

- A concept of guarding vessels, including aspects of planning a service as well as structuring and supervising of teams
- SOPs and RUF, eventually recurring to ICoC
- Guaranteeing the master's authority as per SOLAS
- Communications and decision-making
- Documentation
- Securing of weapons and other restricted equipment
- Methods of making the above obligatory for the personnel
- Choice and training of personnel to guarantee their compliance with the personnel requirements below.

At the latest when the guards are about to board a vessel, the company will have to provide several other documentation such as weapon permits, details of the guards and their insurances (e. g. health care and accident), travel permits etc.

The company will have to provide the guards with "adequate and functionable equipment", though what that exactly means remains unclear.
A so-called "leading employee" must be named by the company. This is the person being in charge and responsible for the aforementioned procedures as well as the deployments.

Management's personal requirements

There are different personal requirements for the CEO and/or the management of the company or its (German) subsidiary and for the "leading employee". Both will have to be "zuverlässig und geeignet", a common used legal term of the meaning of "credible" or "reliable" and "able". This basically means that they should have no criminal record, no record of alcohol or drug abuse, no psychic defects, no record or hints for irresponsibility in handling weapons or ammunition, and no political extremist background. Further they will have to be a least 18 years old.

Guard's personal requirements

The guards will also have to be credible and able as per the definition above. Additionally, they will have to be "competent" ("Sachkunde"). They will need knowledge of and / or skills and abilities in

- German public, civil and criminal laws relevant to public security including width and limits of the right of self-defence (basic)
- Crisis handling and de-escalation techniques
- ISPS and ISM-code
- Nautical and/or sea-farer's trade (basic)
- Ship and equipment
- Secure handling of weapon and equipment
- Weapon law and foreign trade law of Germany and of the relevant harbour and coastal states as regards purchase, taking on- and off board, securing, carrying and use of weapons, ammunition and other restricted equipment
- First aid at sea
- Details of potential threats in the area of deployment and of the relevant groups therein, military operations in the area, best managements practices (e.g. BMP4)
- The company's SOP and RUF
- Tactics at sea

The leading employee is required to meet any of these additional requirements of the guards except having a seafarer's book or comparable.

I understand that a further regulatory order is planned which I assume will elaborate on details of those knowledge, skills and abilities, and eventually on details about the documents with which such knowledge, skills and abilities and may be proved.

Information & documentary issues

The deployment and the service will have to be documented and should be ready for submission at request by BAFA. The guarding contract will have to be sent to BAFA for documentary purposes. It appears that the fees may be blanketed.

All the other requirements above will have to be documented, archived and held ready for inspection. This includes proof of the meeting of the personal requirements by the individuals mentioned above.

Insurance

A liability insurance is a necessity. Until now, the range and minimum cover is not clear. We assume the minimum cover to be at least the 5 Million Euros as stated in GUARDCON.

The guards need health-care and accident insurance, proof of which will have to be provided at the beginning of a deployment the latest.

Subcontractors

The use of subcontractors is an issue under the Bill. Or rather, it is no issue whatsoever in the wordings and the reasoning and exactly that could pose a problem.

The Bill seems not to take into account that the use of subcontractors is more or less common practice in the industry, either by hiring them directly or using a "manning" agency in-between. Using subcontractors is not explicitly forbidden; the Bill simply does not acknowledge the existence of subcontractors.

Moreover, the wording of the Bill is so wide that until now even those single-person companies/freelancers fall under it ("offering guarding services outside German waterways...").

Under the first draft this even would have resulted in a potential criminal offense committed by an accredited MarSec company if they used a non-accredited subcontractor.

The criminal offense no longer exists. However, according to the wording, the use of non-certified subcontractors may still lead to considerable fines up to Euros 10,000.00 or even more.

It appears that until now it would not be advisable to use subcontractors. It is unclear whether this would also apply if a foreign-accredited company applied for the German accreditation. Here is still need for discussion.

We have been criticising this issue from the beginning, and we will continue to do so.

Weapons

The certificate will grant the possibility for applying for company-granted weapon permits. It will be also possible to take those weapons from German territorial waters to international waters and back. It will not be an export license insofar as it is no permit to sell these weapons abroad.

As the company will hold the permit, pooling solutions with other companies should not be possible at the moment.

The German government made clear that full-automatic rifles will not be allowed, nor will be heavy weapons.

The guards will need to have a German weapon-license. Again, whether foreign weapon-licenses may be admitted is unclear yet.

Concluding summary

The new German regulation will be detailed and surpass most standards and regulations currently in the market. Companies will have to comply with thorough organisational and documentary requirements. The accreditation would be proof of a functioning quality-management system. Guards and the “leading employee” alike will have to meet a high, but defined standard.

This would not be cheap. The total costs for the accreditation procedure may well exceed the costs for an accreditation in other European countries. Although most of the personal requirements base on IMO-Guidance(s), some are specific German and may require additional and constant training of personnel. The issue of subcontractors may form a market-barrier.

Several issues remain to be clarified. A new procedure will be installed, which may lead to loss-of-time in the accreditation-process. Time, though, may be essential especially for those companies already active under the German flag.

A total of 465 vessels flew the German flag in October 2012. Those vessels belong to the second-largest merchant fleet of the world with 3,602 vessels in the same month. According to the German ship-owners association, 933 German-flagged vessels made the transit through the HRA in 2011, while an estimated c. 1,700 transits were made by German vessels in total. According to a survey by PWC in 2012, ca. 60% to 80% of German owners hire guards for the transit. This regulation does bear relevance for the industry.

Grimme & Partner
Rechtsanwälte

For further information please contact:

Michael Karschau
m.karschau@grimme-partner.com
Twitter (@M_Karschau)
www.grimme-partner.com