

Progress in Establishing International Guidelines that Regulate PMSCs

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Various reasons have determined the vulnerability of a merchant vessel to pirate activity off the coast of Somalia, such as sailing speed, distance from the coastline, the likely difficulty pirates would face in embarking the vessel, the nature and value of cargo being transported, and the size of ransom pirates feel the vessels' owners could be forced to pay out. As stakeholders in the international community activated individual and collective efforts to ensure the freedom of navigation at sea was protected and preserved, ship-owners whose vessels were at risk of hijacking by pirates off the coast of Somalia turned increasingly to Private Maritime Security Contractors (PMSC) for protection. Much of the success achieved in driving down the number of attempted and successful pirate attacks over the past year has been attributed in significant part to the regular use of PMSCs in providing armed security onboard vessels. The record of PMSC speaks for itself: no commercial vessel with armed guards providing protection onboard has ever been hijacked to date.

The growth of the PMSC sector has presented new dilemmas – the sector is not directly regulated by law as there is no single body with clear mandate or legal responsibility to oversee it. Although more and more guidelines and codes of conduct have continued to emerge over the past few years in assisting stakeholders on the appropriate use of PMSCs in terms of legal, financial, moral, and reputational risks, there is still no legal status or governing power behind any code of conduct for PMSC. Most regulations today aim to control the quality of the work of the PMSC rather than setting rules for how they actually act, or setting consequences for incorrect behavior. The lack of direct regulation to date is largely explained by the way that PMSCs emerged in response to market demand when there had been none in the past, out of obscurity and then grew rapidly as they sought to keep up with the dramatic surge in demand for their services by the shipping industry – governments – traditional regulators of such industries –

were however caught out somewhat unprepared but were also constrained by domestic and international law.

Despite government being sympathetic to the security needs of the shipping industry and the inclination of ship-owners to hire armed guards for protection as quick fix solutions, the need to address the growing use of PMSC became imperative due to legal and other important long term implications of the use of PMSC on flagged vessels. Since then, many bodies around the world have recognized the need for a governance framework that ensures PMSCs perform within acceptable limits. So far, the issue of PMSCs has been approached through indirect regulation although efforts have been made in establishing some minimum standards. Also, while the regulation of PMSCs comes from various sources, the greatest influence has come from insurers, protection and indemnity (P&I Clubs) and freight, demurrage and defence insurance (FD&D) to date. This is particularly important because insurers were initially reluctant to provide ship-owners with armed guards on board vessels as the proposition presented many risks that were not easy to resolve. However, as pirate attacks continued mounting to extraordinary levels and high risks areas (HRAs) of pirate activity came to be identified, so the use of PMSCs by ship-owners and their acceptability for insurers grew.

Some insurance companies today refuse to insure vessels until certain conditions are met, such as the use of BIMCO Guardcon (a standard contract for the employment of armed guards on vessels), and meeting minimum criteria in the use of force and interaction with the ship-master and crew. This has in turn encouraged many flag states to set similar standards for PMSCs by refusing to issue approvals wherever compliance to minimum standards is not met. PMSCs frequently include former navy or army personnel who, despite being trained on how to use and control of firearms, are expected to manage weapons in a very different context as armed guards onboard merchant vessels transiting international waters. Significantly, they must operate under circumstances that are ambiguous at best as far as legal protection is concerned. As insurers and flag states have been forced to set due diligence standards, this has helped improve the situation but still does not compensate for the absence of a legal framework.

Industry guidelines and due diligence policies have fallen far short of addressing in meaningful ways questions surrounding the use of lethal force by PMSCs – questions that carry important criminal liability, human rights, and moral implications. In fact, guidelines that have been used

for indirect regulation of PMSCs so far have either avoided the topic of lethal force altogether, using vague language, (such as stating that “reasonable steps” ought to be taken to avoid the use of lethal force), or evading details by leaving it to the “discretion” of the ship-master or ship-owner. The International Code of Conduct (ICoC) has made efforts in this field by completely prohibiting the use of firearms on vessels except in cases of self-defense, thereby helping put forward a more stringent approach for the community. The ICoC is not however a legally binding code and any compliance remains almost entirely voluntary on the part of companies.

The absence thus far of relevant legislation and an international regulatory framework to directly regulate PMSCs hired to provide ship security has continued to create problems. Several well-documented cases of armed guards firing upon innocent fisherman and dhows have emerged over the years. The case of the *Enrica Lexie* was particularly serious, with innocent Indian fishermen shot dead because the Italian PMSC suspected they were pirates. The event escalated to a diplomatic incident between India and Italy. This event is an example of how the absence of PMSCs regulation can actually violate human rights and damage relationships between states as well as between commercial partners.

Vetting standards, auditing, accreditation and accountability all play vital roles in the shipping and PMSC industry. With no single body assigned the mandate and authority to impose regulation on PMSCs, the combined efforts of insurers, flag states, major charterers, PMSC trade bodies and of course ship owners have taken the lead and in effect created a web of indirect and voluntary regulation. Regulation is beginning to emerge from flag states along with accreditation from within the industry. More and more flag states are recognizing the need for regulation and so countries like the United Kingdom, Norway and Greece are enacting legislation and developing regulatory frameworks. The United Kingdom for example has applied legislation to PMSC within their jurisdiction and adopted a strict vetting process for PMSCs, as well as on the licensing and export of weapons by them. These strict rules aim to regulate PMSCs activities and create transparency between government, PMSCs, and their clients.

The main aspects to take into account when dealing with the use of PMSCs on-board are ‘accountability’ and ‘accreditation’. The ISO 28007, designed to set guidelines for PMSCs providing armed guards for vessels, is still being developed in collaboration with industry. Although no PMSC have achieved ISO 28007 accreditation so far, several PMSCs that have

been voluntarily part of the effort to help develop the standard are said to be in the final stages of the process. Until the development of ISO 28007, now in pilot phase, the Security Association for the Maritime Industry (SAMI) represented the mainstay of industry standards. Set up in 2011 as a PMSC peer group, SAMI sought to build credibility through developing a monitoring and compliance mechanism for its members as well as through encouraging self-regulation and transparency. The core mission of SAMI is described as “to effectively vet maritime security companies and the operatives wishing to join SAMI, and then monitor compliance with SAMI standards.” SAMI also provides guidance and advice to accredited companies within the industry although failure to comply with SAMI standards will result in the expulsion of the firm and its operatives from SAMI.

While ISO 28007 sets a higher standard than SAMI, the most stringent of all standards in operation will remain the ‘Exxon audit’. An Exxon audit has to be passed before a PMSC can be allowed on an Exxon chartered vessel. Until the beginning of 2013, Exxon did not allow PMSCs onboard vessels engaged on ExxonMobil affiliate business. Rather than relying on armed guards, Exxon favors limiting the risk of pirate attack and hijackings through rigorous implementation of best management practices, effective management and careful routing. The Exxon audit offers a stringent approach that looks to PMSCs as an absolute final resort – it may represent an approach that can be adopted more widely in the ship-owner community as the long term role of PMSCs in shipping is addressed.

Guidelines from the International Maritime Organisation (IMO), accreditation processes such as the one set by SAMI, the development of ISO 28007, and the willingness of flag states to investigate emergencies and help develop strategies to prevent future attacks are gradually leading to more harmonization in guidelines concerning PMSCs. However, there is still much to be done; in Oman, recent exercises the government initiated, simulating attacks and hijack situations, to prepare and impose some regulation on PMSC, which are common on Omani-owned vessels planning transit through high risk areas (HRA) in the Sea of Oman, found that problems such as the incorrect use of firearms and low standards remain at concerning levels.

Flag states, insurers, charterers, and PMSC trade bodies have created a web of indirect and voluntary regulation – and this has created an expertise and reference base for a consolidated legal framework to be realized at some point in the future. However, addressing the somewhat

controversial need for a proper legal framework would require stronger leadership, especially from the United Nations, than is currently the case.

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