The Guardcon contract, knock-for-knock clauses, DCFR and unfair terms (Part I)

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This article examines the Guardcon standard contract form utilised when contracting private maritime security services on board vessels. The main focus of analysis is directed to the Guardcon knock-for-knock clause and several related contractual provisions that, to a serious extent, limit or exclude the liability of contractual parties. Part I examines the nature of private maritime security services and the level of commitment required from the contractors. It questions whether the Towcon 2008 standard towage contract form as the contractual template was the best choice, given that the fundamental obligation in the Guardcon contract closely resembles the obligation of means in the standard salvage contract forms. Part II (to be published in the next issue of this journal) examines the impact of knock-for-knock and related provisions on the core and auxiliary contractors' obligations, and endeavours to determine whether the aftermath of assessment steers towards a possible application of the unfair terms regulation, both with regard to business to business and business to consumer contracts.

1 Introduction

The aim of this article is to examine the contractual relationship between the owner of vessel and the provider of private maritime security services (ie the contractor).[1] The focus of analysis is placed on the issue of exemption/exclusion clauses with regard to contractual inter-party responsibility and liability. Such clauses are commonly referred to as the 'knock-for-knock' clauses,[2] and their primary purpose is to limit or completely exclude the liability in connection to the other party's damage, often irrespective of the type of injury or damage being caused and irrespective of the type of (non-)performance causing such injury or damage. Thus, each party remains responsible for his own loss and bears the risk of potential injury or damage and the subsequent liability to compensate such injury or damage. Although knock-for-knock clauses often do not directly refer to the term 'exclusion' or 'exemption' of liability, the right of indemnification between the parties, as a practical consequence, serves to that effect. In other words, if one party has to bear the costs of a particular (third party) claim, the knock-for-knock provision will enable the right of indemnification from the other party.

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[1] The relevant literature uses the following terms which are to be considered as synonyms: (private) contractors, armed guards on board vessels, privately contracted armed security personnel (PCASP), security personnel and similar. Stephen Askins utilises the term 'maritime private security companies' (MPSCs). See S Askins 'BIMCO publishes GUARDCON standard contract for the employment of security guards on vessels' (28 March 2012) http://incelaw.com.

[2] Also commonly referred to as the indemnity clauses, hold harmless clauses and knock-for-knock indemnities (KK indemnities).

The fundamental obligation of the contractor, as stipulated in a private maritime security services contract, is to provide the security services to the owner (with respect to the specified vessel and the crew on board that vessel), adhering to a certain level of skill and care while rendering security services. However, in accordance with the knock-for-knock principle, should a contractor fail to fulfil this fundamental obligation, even if the breach of contract has resulted from a failure to exhibit the expected level of skill and care, in principle no liability on the part of the contractor will arise.

If a private maritime security services contract is entered into through the auspices of a standard contract form, the knock-for-knock clause may be inserted into the standard contract form as a non-negotiable term, disabling any individual negotiations with regard to the incorporation and contents of such a clause. Section 17 ('Legal and liabilities'), clause 15 ('Liabilities and indemnities') and paragraph (b) ('Knock-for-knock') of the Guardcon Standard Contract for the Employment of Security Guards on Vessels (Guardcon)[3] embodies the knock-for-knock principle, being inserted both as a term not individually negotiated and (preferably[4]) a non-negotiable term and forms, in the words of the authors, '. . . the very heart of Guardcon'.[5]

Under certain conditions the non-negotiable standard terms clauses may place a party which did not offer the standard contract form (for acceptance) or did not refer to (or 'placed forward') such a clause (in order for example to escape liability) into an inequitable position, potentially classifying such a clause as an unfair term. The analysis of the European contractual and non-contractual legal framework conducted through the Draft Common Frame of Reference (DCFR) project indicates, if not a unified, then a symmetrical approach to the issue of unfair terms, specifying certain conditions and criteria necessary to be assessed in order to nominate a specific term or a clause as an unfair term. This is especially true for the so-called 'business to consumer' contracts, where the strict European law statutory provisions (as incorporated and enforced through the various European Union Member States' legislation), provided that the specified criteria are met, will invalidate the knock-for-knock clauses falling under the unfair terms category, especially if such clauses exclude or exempt liability with regard to personal injury or death.

The analysis below will examine the knock-for-knock framework, with a particular focus on the offshore standard contract forms where such clauses are (usually) present. This is an indispensable requirement owing to the fact that the Guardcon contract relies heavily on the Towcon 2008 International Ocean Towage Agreement (Towcon 2008)[6] standard form contract, especially with respect to the knock-for-knock regime. The analysis will also examine the nature of service contracts and assess whether the fundamental obligation present in the Guardcon contract corresponds better to the typical contract of towage, such as the Towcon 2008, or different kinds of maritime services, such as the contract of salvage. This categorisation is important because contracts of towage, in principle, recognise knock-for-knock clauses as an indispensable ingredient of each contract form, whereas the standard salvage contract forms, in principle, do not utilise the knock-for-knock clauses owing to their lack of conformity with the relevant mandatory provisions of international and domestic law.

Further examination will tackle the issue of unfair terms from the perspective of both the European law regulation and the relevant jurisdictions' case practice. Even in the case of contracts of towage, the growing European legislation as well as the general non-contractual (tort) rules on due care towards others (*neminem laedere*) may be of influence when assessing whether a particular knock-for-knock clause in a particular set of circumstances corresponds to the notion of an unfair contractual term.

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[3] Baltic and International Maritime Council (BIMCO) *The Guardcon Standard Contract for the Employment of Security Guards on Vessels (Guardcon)* (2012).

[4] ibid point 5.1.

[5] ibid 10 www.bimco.org.

[6] BIMCO *The TOWCON 2008 International Ocean Towage Agreement (TOWCON 2008)* (2008).

Finally, the relevant Guardcon contract provisions will be scrutinised in order to assess whether certain terms contained in that contract, under certain conditions, potentially fall under the premises of unfair terms categorisation.

2 Bottom-up law-making and security services industry

2.1 From mercenaries to professional service providers

In order properly to assess the core legal and functional elements of any private maritime security services contract (eg the Guardcon), it is necessary to revert back briefly to the political and legal development background preceding the formation of the private security services industry's sub-branch specialising in the provision of maritime security services. Following the end of the Cold War, the use of private military and security companies reached unprecedented levels, perhaps best characterised by the scope of employment as visible in the Iraq and Afghanistan war(s) (from the beginning of those conflicts to date). The relatively sudden rise in private security services' contracting and the engagement of private military and security companies' personnel exposed such companies to difficult tasks and endeavours, at the same time enhancing the possibility of various incidents occurring. After several disturbing incidents reached the global media, the word 'mercenary' overshadowed the whole industry, reminding the general public of the notorious private military (and security) companies operating in the 1980s and 1990s, especially with regard to their activities in Africa.[7]

The industry was unhappy with this public label and constantly sought ways of promoting a professional private security service.[8] One of those was cooperation with the (interested) governments and non-governmental organisations with an aim of creating proper regulation and private security services performance standardisation. Owing to the variety of legal (and political) issues surrounding the use of private security services, the lack of regulation was tackled not through direct legislation, but through a bottom-up law-making process, where the soft-law guidelines, recommendations and standards paved the way for, if not an international treaty, at least domestic law regulation.

The first important instance of soft-law regulation is the Montreux Document,[9] drafted and adopted by the interested states, providing a compilation of good practices and standards to be adhered to by the home states (where the private military and security companies are registered), contracting states (where the services are contracted) and the territory states (where the services are executed) during an armed conflict. The Montreux Document dedicates special care to the protection of human rights and international humanitarian law, requiring a set of conditions to be observed by the private military and security companies in order to be qualified to perform professional security services. A number of private military and security companies present during the Montreux drafting discussions inquired about the possibility of becoming signatories to the Montreux Document, although that was not possible as the Montreux Document was intended for states and not private entities.

These companies nevertheless pursued the possibility further, and adopted the International Code of Conduct for Private Security Service Providers (ICoC), a first legally non-binding document drafted by the private security services industry, specifying the standards of quality and performance expected from those signing the code. In the industry's opinion, the existence of the ICoC and the ICoC Association signifies a professionalisation of the private security services, as opposed to the operations of mercenaries as occurred in the past.[10]

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[7] See A Axelrod *Mercenaries: A Guide to Private Armies and Private Military Companies* (Sage 2014) 161 ff.

[8] See for example House Oversight Committee 'Private security contractors in Iraq and Afghanistan: Erik Prince testimony – legal issues' (United States House of Representatives 2007).

[9] For more information see International Committee of the Red Cross *The Montreux Document: On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict* (Swiss Confederation Federal Department of Foreign Affairs 2009) and B S Buckland, A M Burdzy *Progress and Opportunities, Five Years On: Challenges and Recommendations for Montreux Document Endorsing States* (DCAF: A Centre for Security, Development and the Rule of Law 2013).

[10] http://www.icoc-psp.org.

2.2 Private maritime security companies

With the emergence of pirate attacks in the Gulf of Aden and along the Somali coast, a number of private security and military companies, primarily registered in the United Kingdom (UK) and the United States of America (US), many of which had signed the ICoC, endeavoured to offer private security services in the maritime field. The term 'private maritime security companies' (PMSCs[11]) was immediately coined. Having in mind the public relations difficulties faced by the rest of the industry (ie the so-called *Nisour Square* case[12]), the PMSCs sought to set a good public relations image from the start of their activities, seeking to distinguish themselves (in professional terms) and differentiate themselves from the rest of the industry (in misconduct terms). So began the process of (soft-law) 'institutional harmonization on the industry' at the sub-branch level (maritime security services), followed by the domestic law regulation of the maritime security services[13] (both through the guidelines and bye-laws), particularly after the International Maritime Organization (IMO) changed its official stance with regard to the use of armed guards on board vessels.[14]

This relatively quick and efficient process is an excellent example of how soft law can influence hard law, especially owing to the fact that the majority of domestic law provisions closely followed the IMO guidelines and relevant standards, and it is often the case that domestic law bye-laws by implication refer to the American National Standards Institute (ANSI), the American Society for Industrial Security (ASIS) and the International Organization for Standardization's (ISO) relevant standards or other similar standards as a requisite for obtaining and maintaining a licence to provide security services on specific flag state vessels.

2.3 Professional service

In order for the private maritime security industry successfully to assert the claims of being a professional industry, it is required to demonstrate four basic characteristics of a professional service.[15] First, the industry needs to demonstrate through practice that it is capable of offering skilled and specialised marine security protection services. Secondly, high moral principles and a high standard of service are required when performing services. Thirdly, a professional association must be formed. Finally, the industry ought to secure a specially recognised status in the community, if not through a statutory classification, then through common consent.

The outcome of these processes presently point to the existence of a group of persons or companies professing to possess a certain level of skill and knowledge when performing private maritime security services as contractors. They form various industry associations, as is also the case with the International Association of Maritime Security Professionals (IAMSP) and the Security Association for the Maritime Industry (SAMI). They conform to the standards of conduct with separate vetting and auditing procedures, such as the 'ANSI/ASIS PSC 4 Quality Assurance and Security Management for

[11] It is to be noted that the abbreviation PMSCs, as utilised by the majority of available literature on the private security services industry, stands for the term 'private military and security companies'. However, the literature focused on the provision of maritime security services utilises the same term to abbreviate the term 'private maritime security companies'. This article adopts the latter classification.

[12] See Global Research – Centre for Research on Globalization *Blackwater Mercenaries Convicted for Role in 2007 Iraq Massacre* http://www.globalresearch.ca/blackwater-mercenaries-convicted-for-role-in-2007-iraq-massacre/5409494. For a different account of events, and the general consideration of the (aggressive) media treatment from the providers of private military and security services perspective, especially with regard to the (former) *Blackwater* company see E Prince *Civilian Warriors: The Inside Story of Blackwater and the Unsung Heroes of the War on Terror* (Penguin Harmondsworth 2013).

[13] See C Berube, P Cullen *Maritime Private Security: Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century* (Routledge Abingdon 2012) 3 ff. For a detailed report see 'Responses received from port and coastal state requirements related to privately contracted armed security personnel (PCASP) – MSC-FAL.1/Circ.2 'Questionnaire on information on port and coastal state requirements related to privately contracted armed security personnel on board ships' (International Maritime Organization 2011).

[14] For more general background see M Mudrić 'Armed guards on vessels: insurance and liability' (2011) 50 *Comparative Maritime Law* 165.

[15] Cf R P Jackson, J L Powell *Jackson & Powell on Professional Negligence* (Sweet & Maxwell London 2002) 1–2.

Private Security Companies Operating at Sea Guidance' or the 'ISO/PAS 28007:2012 – Guidelines for Private Maritime Security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships (and pro forma contract)'. They, often by implication, adhere to the principles and guidelines set by the Montreux Document (with regard to the respect of human rights and international humanitarian law) and the ICoC. They formally conform to the domestic law obligations with regard to the licensing, vetting, monitoring and the accountability procedure. Finally, they are frequently utilised in practice.

At present, the PMSCs claim that their regulation has reached satisfactory levels and a number of related industry associations, such as the International Chamber of Shipping,[16] support that notion. Simultaneously, the PMSCs argue that they represent a serious, professional industry, with high standards of conduct and professional efficiency, providing effective and productive security services to their clients. The professional security protection of the vessel and crew on board, therefore, represents the core element of a private maritime security service contract.

Breach of this fundamental duty should, accordingly, represent a cornerstone of distinction between those in the industry who actually strive successfully to fulfil this determination as opposed to those who refer to such notions as pure rhetoric. The extent to which the knock-for-knock principle adheres to the noted segmentation is an issue requiring further examination. This cornerstone differentiation should serve not only to protect the consumers (irrespective of whether they are business or private entities) but the private maritime security services industry as well, owing to the fact that the sanctions available promote the professional industry by means of allowing the method of rooting out the so-called 'bad apples'.

2.4 Pending legal issues

Irrespective of the industry's stance with regard to legal regulation, it could be argued that the legal scrutiny of the existing and yet to be drafted regulation has hardly begun. Many legal issues still warrant serious consideration and drafting. A number of incidents related to PMSCs occurred in connection with a lack of proper licences, in some cases leading to the arrest of vessels and detention of both the vessel's crew and the contractors.[17] Although the vetting of personnel was hardly an issue during the height of the pirate menace, good rates of pay attracted professional (ex-)soldiers with solid military backgrounds and the current drop in market forces now means that more and more companies must employ third-party nationals without the possibility of a proper vetting procedure.[18] Whereas the provision of armed guards on board vessels is regulated, at least to a reasonable extent, no relevant provisions exist at all with regard to so-called floating armouries[19] or so-called escort vessels.[20]

The latter offer protection to vessels by means of armoured speedboats that follow a vessel through High Risk Areas, engaging potential threats, whereas the former remain anchored at the edge of High Risk Areas, offering to buy and sell weapons to be utilised by the contractors.[21] Furthermore, there are no cases in practice that would, under the application of domestic laws, provide monitoring and

[16] See K Khosla *Piracy and Legal Issues Arising from the Use of Armed Guards – An Overview* (Comité Maritime International Yearbook 2014) 312 ff.

[17] For example see the AdvantFort's *Seamen Guard Ohio* case http://gcaptain.com/india-seizes-advanfort-security-vessel.

[18] For example see http://www.independent.co.uk/news/world/exclusive-antipirate-security-staff-all-at-sea-after-major-firm-suddenly-goes-bust-9636217.html and http://www.marsecreview.com/tag/gulf-of-aden-group-transits.

[19] The latest development is noted with regard to the 'MNG Maritime' company, that, in accordance with the SAMI *theBridge* newsletter, became the first and only floating armoury operator to be certified with the ISO/PAS 28007:2012 (with respect to the armed guards protecting their vessel) and the ISO 28000 (with respect to the service provided). For more information see SAMI *theBridge* (January 2015) Issue 7 at 14. For more information with regard to the UK practice in connection to the floating armouries see L McMahon 'UK gives go ahead for floating armouries' (8 August 2013) Lloyd's List.

[20] For more information see J J J R Pitney, J-C Levin *Private Anti-Piracy Navies: How Warships for Hire are Changing Maritime Security* (Lexington Books 2013).

[21] For more information, see Omega Research Foundation *Floating Armouries: Implications and Risks* (Remote Control Project 2014).

surveillance, due process and, most importantly, accountability of the contractors,[22] which is also true for the various associations. However, the use of force at sea (with regard to the provision of private security services) is still legally unclear, although the pending *Enrica Lexie* case before the Indian courts may shed some light on that issue.[23]

Finally, the Guardcon contract requires legal consideration in order to assess whether its provisions have relied too extensively on the offshore standard contract forms that are related to different kinds of services, different kinds of industry, different sets of clients and different obligations and expectations altogether.

3 Fundamental obligations and knock-for-knock

3.1 Nature of the Guardcon service

The drafting of the Guardcon contract has relied heavily on the provisions of the Towcon 2008 contract, incorporating, amongst other provisions, the relevant exclusion clauses.[24] It is, therefore, necessary to ascertain whether the nature of the Guardcon and Towcon 2008 contracts presupposes the same sort of obligations and expectations. The main tug owner's obligation under a typical contract of towage consists of a specific service or a specific result (ie to tow, to aid in construction, to supply etc).[25] Some typical standard towage contract forms, such as the UK Standard Conditions for Towage and Other Services, are said to be of a 'draconian' quality, placing tug owners in a privileged position with regard to the exclusion of liability.[26] Other contract forms, such as the Towcon 2008, offer a uniform and reciprocal exclusion system between the tug and the tow.[27] Having been tested in practice and scrutinised by the courts, these contract forms offer widely accepted and well respected systems of liability division. Even in the most extreme cases, as in the *Piper Alpha* disaster,[28] the courts have readily accepted the reality and practicability of indemnity clauses, even when these concern the issues of personal injury or death.

Like the Towcon 2008 contract, the Guardcon contract contains such an exclusion, stipulating that the contractor will not be held liable for the personal injury or death of crew members. As is also the case with the Towcon 2008 contract, the Guardcon contract often utilises the reciprocal exclusions on the part of the owner as well, thereby allowing the owner the same knock-for-knock protection.[29] However, whereas under a typical towage contract personal injury or death may be considered an unwelcome and regrettable but incidental occurrence, and one that is incompatible with the main tug's obligation (and the tow's expectation), the prevention of personal injury or death forms the core obligation under the Guardcon contract. Unlike a number of maritime-related professional service-providing industries, including the salvage industry, a contractor operating under the terms of the Guardcon contract will not, in accordance with the knock-for-knock regime, suffer sanctions resulting from his negligent performance of security services.

As set out in clause 6(a), the Guardcon contract requires PMSCs to provide security services to the vessel (and the crew) and, whilst doing so, to execute 'all reasonable skill and care'. This fundamental obligation on the part of the contractor indicates that the private maritime security services contract is a contract for services, whereby the contractor cannot promise a specific result,

[22] As acknowledged to this author by the relevant source from one relevant association. Also see J Huggins, M Walje *The Challenges of Maritime Private Security Oversight* (December 2012) Private Security Monitor https://www.globalpolicy.org.

[23] See for example M Tondini 'Some Legal and Non-Legal Reflections on the Use of Armed Protection Teams on Board Merchant Vessels: An Introduction to the Topic' (2012) 51(7) *Military Law and the Law of War Review* 7.

[24] As examined further below.

[25] S Rainey *The Law of Tug and Tow and Offshore Contracts* (Informa Law from Routledge Abingdon 2013) 1.12.

[26] ibid 1.34.

[27] It should be noted that the US Supreme Court has, in *Bisso v Inland Waterways Corp.*, 349 U.S. 85, 94, 1955 AMC 899, rendered an exemption clause in favour of the tug owner invalid due to, as the Supreme Court reasoned, among other factors, ensuring that the tow is not placed at a disadvantage by the superior bargaining position of the tug owner.

[28] See *Caledonia North Sea Ltd v British Telecommunications plc* [2002] 1 Lloyd's Rep 553.

[29] The present examination concentrates on the position of the contractor.

namely to escort the vessel and crew safely from point A to point B; instead, it promises to provide the best possible security service while the vessel and the crew are in transit in a specified area.

Such an obligation is usually described as the obligation of means.[30] This is further supported by clause 9 of the Guardcon contract form ('Hijacking'), whereby it is stated that the contractor does not guarantee the safety of both vessel and crew when performing the security services. Thus, breach of the promise to act carefully will not result from the fact that the vessel and the crew have been (un)successfully attacked during the transit, and have, as a result, suffered property damage or bodily harm, but from the fact that the contractor failed to exhibit skill and care during such an attack.[31]

Unlike the majority of the Baltic and International Maritime Council's (BIMCO) standard contract forms, which are developed under a thorough and a detailed process that can often take two or three years to finalise,[32] the Guardcon contract has been developed in a relatively short time period, encompassing a smaller-than-usual drafting committee, heavily influenced by a focused interest group.[33] Because the choice of template has rested on the Towcon 2008 standard form contract, the discrepancy between the choice of template and the nature of private maritime security services is clear. In accordance with the DCFR (IV.C: 2:106), the obligation of result presupposes the client's reasonable expectation of a specific result as stipulated in a contract.[34] This is a typical obligation readily present in typical towage contracts, such as in the Towcon 2008. However, because the main contractor's obligation falls into the obligation of means category, it would appear that the choice of template might have taken into consideration other types of contracts, such as the standard salvage contract forms.[35] This would, however, require a recognition – bearing in mind the core issue of this article – of the major difference between the two types of contracts: one fully endorsing the knock-for-knock regime, and the other operating on very different provisions.

3.2 Performance with skill and care

The DCFR's general rule with regard to the obligation of skill and care (ie the obligation of means, IV.C: 2:105) requires the service provider to perform with a certain level of skill and care reasonably expected from a reasonable or professional service provider under the same or similar circumstances, this being understood as the fundamental obligation on the part of the service provider.[36] If the service provider professes to possess a higher standard of care, often claiming to be a part of a professional body of service providers, the service provider is expected to act in accordance with a higher level of skill and care, as required by the stipulated group of professionals. In addition, the service provider is expected to take reasonable precautions during the performance of services in order to prevent the occurrence of damage arising out of that service. These efforts need to be conducted with respect to the overall performance expectation of the other contracting party, as stipulated in the contract for services.

This classification is readily accepted by the European Union Member States' legislation and jurisprudence. German law recognises a special position of a person claiming to be a part of a specialist group, requiring such a person to perform with higher skill and knowledge.[37] French law requires

[30] G H Jones, P Schlechtreim 'Breach of contract (deficiencies in a party's performance)' in A T von Mehren (ed) *International Encyclopedia of Comparative Law, Vol. XVII, Contracts in General, Part 2* (Martinus Nijhoff Publishers The Hague 2008) 3147. For more on the obligation of means concept see F Terré, P Simler and Y Lequette *Droit civil: Les obligations* (Dalloz Paris 2009) 729 ff.

[31] BIMCO (n 5) 7.

[32] Rainey (n 25) 1.37.

[33] The drafting procedure took three months, encompassing six drafters from the relevant industries; see C Hasche 'The latest legal updates that affect your security and operations' (24 April 2012) FleetHamburg. For specifics see BIMCO (n 5) 2.

[34] C von Bar, E Clive (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frames of Reference (DCFR)* (Sellier Munich 2009) IV.C: 2:106 'Obligation to achieve results' 1652–53.

[35] See eg Council of Lloyd's *Lloyd's Standard Form of Salvage Agreement 2011* (2011).

[36] DCFR (n 34) IV.C: 2:105: 'Obligation of skill and care' 1645, 1649. For the inter-relation between this fundamental obligation and the principle of good faith, as incorporated in various national jurisdictions, see DCFR ibid 1650 ff.

[37] C Grüneberg *Verantwortlichkeit des Schuldners* in *Palandt Bürgerliches Gesetzbuch* (Beck Munich 2013) 361 ff.

specialist skills from persons claiming to possess certain skills.[38] Under English law, the so-called *Bolam* test[39] recognises the standard of conduct as fit for a particular profession. Similarly, in US jurisprudence, the so-called *Hand* test[40] establishes a cost-benefit analysis of the level of performance necessary to avoid harm, aiding in the assessment of whether the person professing to be a part of a professional group acted in accordance with the standards of that particular group.[41] A failure to adhere to the elevated standard of care – a breach of contract – may therefore result in liability for damage so caused.

3.3 Knock-for-knock principle

In accordance with the general professional liability standards (as noted above), negligent performance or non-performance of a professional service leads to responsibility and liability for damage. This is true even with regard to the services provided by private entities such as, for example, the salvage industry, but also with regard to the services provided by public entities, such as the police, fire department or hospital.[42] Even in the common law systems where the duty to adhere to the contractual obligations is strict,[43] where the case at hand concerns professional performance the case law has recognised an exception whereby it is necessary to prove the lack of such performance in order to establish the breach of contract.[44]

The main issue in connection with the knock-for-knock regime is whether the professional liability for negligently conducted or omitted provisions of service – this being the fundamental obligation of a contract for services – can be limited by an exclusion of liability clause, an exemption from liability clause or an indemnity clause and, if so, to what extent.

The effect of a contractual knock-for-knock scheme is to reverse the commonly accepted principle whereby the party at fault is liable for the ensuing damage.[45] Parties to a contract that includes a knock-for-knock clause are said to agree to exclude the liability towards each other for the damage or injury sustained. Owing to the sensitive nature of such an arrangement, the court and arbitration practice demonstrates a diligent approach to assessing whether the wording of such a clause was intended and fully understood by the contracting parties. In cases where it cannot, with certainty, be established that, at the time of signing the contract, the clause conformed to the interests and understanding of both parties, the clause may be interpreted in accordance with the interest of the weaker party to the contract, usually a consumer or a business that had to accept a clause that was part of a standard contract form offered by the other party. This is especially true in instances where it can be established that such a clause was non-negotiable.

The use of such clauses in standard contract forms is, nevertheless, frequent, being especially visible within the maritime law domain in various types of charterparties and offshore contracts.[46] The rationale behind such standard practice can easily be explained when considering the extent to which incorporation of such a term limits the parties' exposure to liability. Instead of a full range of (professional) liability insurance, including both contractual and non-contractual exposure to liability, the parties can significantly lower the insurance premium costs by narrowing the risk

[38] Jones and Schlechtreim (n 30) 147.

[39] *Bolam v Friern Hospital Management Company* [1957] 1 WLR 582. The applicability of the *Bolam* test to all professions was confirmed in *Adams v Rhymney Valley District Council* [2000] Lloyd's Rep 777.

[40] *United States v Carroll Towing Co.*, 159 F.2d 169 (2nd Cir. 1947).

[41] Cf American Law Institute *Restatement of the Law Third: Torts – Liability for Physical and Emotional Harm* (American Law Institute Publications 2010) § 12 'Knowledge and skills' 141.

[42] For examples see n 48 below.

[43] Cf E McKendrick *Contract Law: Text, Cases and Materials* (Oxford University Press Oxford 2012) 754–55.

[44] See N Andrews *Contractual Duties: Performance, Breach, Termination and Remedies* (Sweet & Maxwell London 2011) 87–88. See also *Platform Funding Ltd v Bank of Scotland plc* [2008] EWCA Civ 930, [2009] 2 WLR 1016.

[45] See R W Williams 'Knock-for-knock clauses in offshore contracts: the fundamental principles' in B Soyer, A Tettenborn (eds) *Offshore Contracts and Liabilities* (Informa Law London 2015) 53, 58.

[46] See eg *Caledonia North Sea Ltd v London Bridge Engineering Ltd and Others (The Piper Alpha)* [2002] UKHL 4; [2002] 1 Lloyd's Rep 553 (HL).

assumption and allocation towards each other (bearing in mind that the knock-for-knock regime is frequently employed in commercial operations involving a potentially large number of participants and affected parties[47]). The latter is especially true, also bearing in mind that the effect of such a clause is usually widened to include all sub-contracting activities.

Whereas knock-for-knock clauses are generally derived from private interests, it is nevertheless useful to point out that similar 'partial immunity' regimes have been developed by public bodies as well, usually through the courts' established public policies offering tightened evaluation procedures or certain categories of circumstances offering the right to be exempted from liability. To a certain extent, the knock-for-knock regime can be compared with the public policy of leniency towards professional rescuers or the so-called doctrine of professional rescuers' immunity from liability, whereby a distinction is made between a professional rescuer who fails to prevent harm and that when a professional rescuer creates harm.[48]

In the context of the provision of private maritime security services, such a distinction would correspond to the distinction between occasions where the contractor fails completely to negate the negative consequences of a pirate attack to that when the contractor causes damage to property or bodily harm to the owner, irrespective of a pirate attack. In the law of salvage context, this distinction is readily employed under the doctrine of affirmative damages, recognising the US-developed concept of 'distinguishable damages' whereby a (professional) salvor may be sanctioned beyond the forfeiture of a salvage award in case the damage suffered by the salvee did not originate from the original peril but from the (lack of proper) conduct on the part of the salvor.[49]

3.4 Level of commitment

3.4.1 Best endeavours

The exact wording of the fundamental obligation ('all reasonable skill and care') used in the Guardcon contract, as noted previously, creates a certain amount of confusion, especially because the same contract uses a similar but different term, 'reasonable endeavours', in two other clauses[50] and the term 'best endeavours' in another clause.[51] These differences in terminology may indicate that the level of commitment (or standard of care) expected for each specific obligation under each specific clause differs.[52] This, in turn, may produce a considerable difference in the level of performance expectation.

The quality of service (or standard of care) required from a professional person is regulated either (and/or) through contractual stipulations, statutory duty or a non-contractual obligation of *neminem laedere*.[53] An example of a typical statutory duty, as found in the French Civil Code (Articles 1135 and 1137), requires a service provider to act in accordance with the standards and customs of a particular profession.[54] German law equally requires the *lege artis* approach when complying with a sum of standards and measures of performance available through the auspices of particular professional associations.[55] In accordance with English case practice, the term 'best endeavours'

[47] Williams (n 45) 53.

[48] M Simpson (ed) *Professional Negligence and Liability* (LLP London 2004) 1–29. See *Capital and Counties v Hants CC* [1997] QB 1004, [1997] WLR 331, [1997] 2 All ER 865. See also *Watson v British Boxing Board* [2001] 2 WLR 1256; *Miller v United States*, 614 F. Supp. 948 (D. Me. 1985); *Hoff v. Pacific Northern Environmental Corp. et al.,* WL 3043111 (D. Or., 2006).

[49] For more on this issue see M Mudrić *The Professional Salvor's Liability in the Law of Negligence and the Doctrine of Affirmative Damages* (LIT Verlag Münster 2013).

[50] Guardcon cll 7(d), 12(e).

[51] ibid cl 18(a).

[52] For more information see K Lewison *The Interpretation of Contracts* (Sweet & Maxwell London 2011) 739–41.

[53] Jackson and Powell (n 15) 6 and 63 ff. Cf P J Zepos, P Christodoulou 'Professional liability' in A Tunc (ed) *International Encyclopedia of Comparative Law, Vol. XI, Torts, Part I* (Martinus Nijhoff Publishers The Hague 1983) 3, vol XI, ch 6 at 4–5.

[54] See A Montas *Le quasi-contrat d'assistance: essai sur le droit maritime comme source de droit* (Librairie Générale de Droit et de Jurisprudence Paris 2007) 227.

[55] Cf R Herber *Seehandelsrecht: Systematische Darstellung* (de Gruyter Berlin 1999) 394.

usually indicates an obligation to undertake all possible (or all reasonable) actions that can be undertaken under the given circumstances,[56] as compared with the behaviour of a person professing to possess the same skills and knowledge as the actor in the particular case, acting under the same or similar circumstances.[57]

The reasonable boundaries to such performance are evaluated by the courts or arbitration tribunals, often based on the standards of conduct available through the auspices of related professional associations. This standard of care is usually classified as the most stringent one, applying to such person willing to express the utmost professionalism on its behalf and, therefore, fits perfectly into the overall effort on the part of the private maritime security industry when striving to declare its profession a professional one. The BIMCO drafting committee decided to insert this term into clause 18 of the Guardcon contract, whereby the contractor is under the obligation to use best endeavours in order to avoid delays in (dis)embarkation, with a noted exemption if the delay in both cases separately does not exceed 24 hours.

3.4.2 All reasonable skill and care

However, the above term did not find its place in the description of the contractor's main obligation and the term 'all reasonable skill and care' was inserted instead. The drafting committee opted for such an expression, stating that there is no '. . . established "best industry practice" in the maritime security sector as yet'.[58] It could be argued that the drafting committee wanted to emphasise the difference in the level of standard of care when compared to the term 'best endeavours', not being ready to force the PMSCs to adhere to the most stringent standard of care, until the practice develops to the point when the necessary experience and know-how allows for such an elevation of the required standard of conduct. Comparing such a stance with the experience of a similar professional industry – the salvage industry – it should be noted that one of the first standard salvage contract forms, the Lloyd's Standard Form of Salvage Agreement (Lloyd's Open Form, LOF), in its first edition (the LOF 1908) incorporated the duty of best endeavours when rendering salvage services.[59]

Well over 100 years ago, from the very commencement of their professional services, a related industry was ready to commit to the most stringent obligation in order fully to support its determination to position itself as a professional industry service provider. It is, furthermore, strange to find in the amended Guardcon West Africa contract, issued by the International Group of P&I Clubs (and not the BIMCO),[60] that the revised section 2 on security services, bearing in mind the necessity of employing local security personnel to offer protection in the territorial waters of a number of coastal states in West Africa,[61] states that the contractors are under an obligation (clause 3(d) of the Guardcon West Africa contract) to use 'best endeavours' to ensure, among other things, that the 'local security personnel' provide the security services with 'reasonable skill and care'.[62]

It should be noted that the term used here is 'reasonable skill and care', and not 'all reasonable skill and care'. It should also be noted that, unlike the BIMCO drafting committee, the International Group seems to be of the opinion that there is, in fact, an 'established best industry practice' with regard to the contractor's supervision over the work of local security personnel, owing to the fact that

[56] See *IBM United Kingdom v Rockware Glass Limited* [1980] FSR 335 and a US case *Bloor v Falstaff Brewing Corp.*, 601 F.2d 609 (2nd Cir. 1979).

[57] Cf C von Bar, E M Clive and H Schulte-Nölke (eds) *Principles, Definitions and Model Rules of European Private Law* (Sellier Munich 2009) 1650 and 3408 ff.

[58] BIMCO (n 5) 4.

[59] The LOF 1908 was obtained through the courtesy of Mr Mike Lacey, Secretary General of the International Salvage Union (e-mail correspondence of 17 August 2012).

[60] International Group of P&I Clubs *Guardcon West Africa* http://www.igpandi.org. The recommended amendments are based on the recommendations issued by BIMCO in BIMCO 'Guidelines for the use of Guardcon when engaging PMSCs as intermediaries to employ local security guards within territorial waters' Special Circular No 1 (20 February 2014).

[61] See http://www.intermanager.org/2014/06/nigerian-navy-preventing-use-of-armed-guards.

[62] This not being a mandatory obligation; in fact, under the same provision, the contractors do not guarantee that this will, in fact, be the case.

the International Group proposed the term 'best endeavours' with regard to that particular obligation. However, when pointing to the actual provision of security services by the local security personnel, the International Group points to an even lower standard of conduct (by the omission of the word 'all', as noted above) than required from the contractors under the very same contract (as stipulated in clause 6(a) of the Guardcon West Africa contract). The same distinction is present in the amended clause 6(d)(iii) of the Guardcon West Africa contract, which also uses the term 'best endeavours' when committing the contractor to procure individual waivers from the local security personnel (clause 17). It would appear that the International Group is of the opinion that the industry has developed enough practice and experience in that particular activity in order to perform with the most stringent standard of performance.

If, however, the term 'skill and care' is to be understood as a term identical to the term 'endeavours', it could be argued that there is no substantial difference between the terms 'best endeavours' and 'all reasonable skill and care',[63] although it nevertheless remains unclear why both terms would be used in the same contract if they were to mean exactly the same type of obligation.

The Guardcon contract also uses the term 'reasonable endeavours', which, in accordance with English case practice, is understood as an obligation to use at least one reasonable action.[64] This standard of care corresponds to the owner's duty to ensure the contractor's access to the vessel (clause 7(d) of the Guardcon contract), and to both parties when stipulating their obligation to try to persuade their insurers not to utilise their right of subrogation against the other party (clause 12(e) of the Guardcon contract).[65]

3.4.3 Professional service provider

It is submitted that, bearing in mind the professional liability standards discussed above, the standard stated in clause 6(a) of the Guardcon contract should, nevertheless, be understood (especially before the courts and arbitration tribunals) as the best endeavours standard. In accordance with the national legal systems examined in the DCFR, if the service provider professes a higher standard of skill and care – which is certainly the case with the PMSCs and the primary reason why such services cost the money they do – the service providers should exercise precisely that skill and care. In addition, if the PMSCs claim to be a member of a group of professional service providers, as is the case of PMSCs' related associations, they must follow the rules and standards of those associations.[66]

The relevant standards and guidelines promote the necessity of ensuring a professionally rendered service. The ISO/PAS 28007:2012 Ships and marine technology – Guidelines for Private Maritime Security Companies (PMSC)[67] stipulates in clause 4.1.6 that the contractors must ensure the necessary skills (clause 5.2.2 emphasizes the specialist skills), experience and professional competence to carry out the security services with regard to the protection of persons on-board and vessel are available. The Quality Assurance and Security Management for Private Security Companies Operating at Sea – Guidance ANSI/ASIS PSC 4 – 2013,[68] emphasizes[69] the contractors' obligation to act with due diligence and 'remedy the consequences of incidents' in order to demonstrate their professional capacity.[70] The other relevant standards, guidelines and recommendations, as well as

[63] See *Trecom Bus. Sys., Inc. v Prasad*, 980 F. Supp. 770 (D.N.J. 1997).

[64] *Rhodia International Holdings Limited v Huntsman International LLC* [2007] EWHC 292; *Yewbelle Limited v London Green Developments Limited* [2007] EWCA Civ 475; and *LTV Aerospace and Defense Co. v Thomson (In re Chateaugay)* 186 B.R. 561 (S.D.N.Y., 1995).

[65] See BIMCO *The Guardcon Standard Contract* (n 3) point 4.7.1: 'Waiver'.

[66] ibid point 2.3: 'Professional service'.

[67] International Organization for Standardization *The ISO/PAS 28007:2012 Ships and marine technology - Guidelines for Private Maritime Security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships (and pro forma contract)* (2012). The 'pro forma contract' mentioned in the title refers to the Guardcon contract.

[68] American National Standards Institute (ANSI), ASIS International *Quality Assurance and Security Management for Private Security Companies Operating at Sea – Guidance* ANSI/ASIS PSC 4–2013.

[69] ibid 12.

[70] ibid 14.

national acts/statutes and connected regulation, rely heavily on the Interim Guidance and the Revised Interim Guidance issued by the IMO in 2012; for the professional services, the Interim Guidance[71] requires the contractors to pay due attention (clause 3.6) to the impact of their services with regard to the owners' property and liability insurance coverage, whereas the Revised Interim Guidance[72] indicates the difficulty that the owners face when attempting to identify truly professional contractors. The contractors who are willing to demonstrate their professionalism, *inter alia*, through accepting the accountability, responsibility and liability for damage arising out of poor (non-) performance, would most certainly ease the owners' burden.

Irrespective of the nature of the standard of care, the existence of knock-for-knock and related clauses puts into question the overall scope of contractors' (and owners') responsibility and liability. In order to assess this issue more thoroughly, it is necessary to focus on the exact wording of the Guardcon knock-for-knock provisions. This will be examined in Part II of this article, to follow in the next issue of the *Journal of International Maritime Law*.

[71] IMO *Interim Guidance to private maritime security companies providing contracted armed security personnel on board ships in the High Risk Area* (2012) MSC.1/Circ 1443.

[72] IMO *Revised Interim Guidance to shipowners, ship operators and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area* (2012) MSC.1/Circ 1405/Rev 2 4.