GUARDCON waiver jurisdiction clause

A study of formal and substantive validity of the GUARDCON jurisdiction clause.

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## List of abbreviations

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<th>Full Form</th>
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<tr>
<td>BIMCO</td>
<td>Baltic and International Maritime Council</td>
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<td>BMP</td>
<td>Best Management Practices</td>
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<td>CJEU</td>
<td>Court of Justice of European Union</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>EG/EC</td>
<td>European Community</td>
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<td>EU</td>
<td>European Union</td>
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<td>GUARDCON</td>
<td>Contract for the Employment of Security Guards on Vessels</td>
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<td>HRA</td>
<td>High Risk Areas</td>
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<td>IMO</td>
<td>International Maritime Organization</td>
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<td>ISM-code</td>
<td>International Safety Management Code</td>
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<td>ISPS-code</td>
<td>International Ship and Port Facility Security Code</td>
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<td>MLC</td>
<td>Maritime Labour Convention</td>
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<td>NIS-registry</td>
<td>Norwegian International Ship Register</td>
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<td>NMC</td>
<td>Norwegian Maritime Code</td>
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<td>NOR-registry</td>
<td>Norwegian Ship Register (domestic)</td>
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<td>NOU</td>
<td>Norges Offentlige Uttredninger (Norwegian travaux préparatoires)</td>
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<td>PECL</td>
<td>Principles of European Contract Law</td>
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<td>P&amp;I-club</td>
<td>Protection and Indemnity club</td>
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<td>PCASP</td>
<td>Privately Contracted Armed Security Personnel</td>
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<td>PMSC</td>
<td>Private military and security company</td>
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<td>SSA</td>
<td>Ship Employment Act</td>
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<td>SSA</td>
<td>Norwegian Ship Safety and Security Act</td>
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<td>SOLAS</td>
<td>International Convention for the Safety of Life at Sea</td>
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<td>SOU</td>
<td>Sveriges Offentliga Utredningar (Swedish travaux préparatoires)</td>
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<td>Acronym</td>
<td>Description</td>
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<tr>
<td>STCW</td>
<td>The International Convention on Standards of Training, Certification and</td>
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<td></td>
<td>Watchkeeping for Seafarers</td>
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<td>UKMTO</td>
<td>United Kingdom Marine Trade Operations</td>
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<tr>
<td>UNIDROIT</td>
<td>International Institute for the Unification of Private Law</td>
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<td>UPICC</td>
<td>UNIDROIT Principles of International Commercial Contracts</td>
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1 Introduction

1.1 Background

This thesis is about an ancillary document to GUARDCON, Contract for the Employment of Security Guards on Vessels, which contains a waiver which all guard sign prior to embarkation. GUARDCON is a standard contract designed for the contractual relationship between the PMSC, Private Maritime Security Company, and the owner or operator of a merchant vessel, i.e. a ship owner. Normally armed guards are employed by a company, a PMSC, which in turn is employed by a ship owner. The ship owner enters into a contract with the PMSC which places the armed guards on board.\(^1\) GUARDCON, has become the industry standard-contract used in this contractual relationship since first developed in 2012.\(^2\) It is now widely used and recommended as an integral part of the recommended due diligence processes on the employment of armed guards and the regulative framework surrounding counter piracy measures.\(^3\)

The introduction of armed guards on board raises concerns for potential liability arising out of the use of firearms on board. Another concern is the potential liability for armed guards suffering injury during the potentially lethal counter piracy operations on board. For this reason, the GUARDCON main contract contains a knock for knock clause and one of the GUARDCON ancillary documents, the waiver, contains a waiver of liability clause.

The knock for knock principle is clear cut in the relationship between the contracting parties, each party limits the right of the other party to claim damages and waives the right to claim damages from the other party. Freedom of contract is limited to the damages each party to the contract may suffer such as the damage to property or loss of income. The relationship to third parties, such as employees of the opposite party, are regulated by tort law. The knock for knock principle is extended with indemnity and subrogation clauses which will apply in a potential tort situation where for example a crew member suffers damage which has been caused by an armed guard. This will have the effect of the ship owner standing the costs for anyone on his side of the contractual relationship. Hence, the knock for knock principles is a combination of liability, subrogation and indemnity clauses.\(^4\) These clauses are then supplemented by clauses stipulating duties to arrange for insurance that covers such contractual commitments in order to ensure that the parties are capable of living up to their

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\(^1\) Pigeon, ”Introduction to Private Maritime Security Companies (PMSCs)”.  
\(^2\) Swedish Club. ”Circular and contract for the use of maritime security on ships off West Africa”.  
\(^3\) BIMCO, GUARDCON explanatory notes, 1.  
\(^4\) Wilhelmsoen, ”Liability and insurance clauses in contracts for vessel services in the Norwegian offshore sector - the knock for knock principle,” 83-84.
commitments to indemnify and subrogate claims.\(^5\) This is an especially important issue when considering hiring a PMSC since a PMSC is a service company which can operate without investing in large assets and which is not particularly bound to a certain country by way of mandatory rules securing national interests.\(^6\)

The waiver also contains a choice of law clause and a prorogation, or jurisdiction clause. Pursuant to the standard contract the interpretation of the waiver is subjected to English law exclusively and the exclusive jurisdiction of the English High Court.\(^7\) In this part the GUARDCON waiver provides:

This undertaking, and any non-contractual obligation arising out of this undertaking (including, without limitation, questions of the Owner's liability), is governed by English law. Any dispute arising out of this undertaking is to be decided by the English High Court to the exclusion of the courts or tribunals of any other jurisdiction.

Subjecting potential claims between ship owners and the individual guards to English law and the English High Court may be to prevent the scenario where ship owners are dragged to court all over the world but also to subject the waiver to the law under which the terms of such a waiver are most likely to be enforced.

The GUARDCON waiver is an agreement between the guard and the Master on behalf of the ship owner, signed by the guard. The liability regime provided in the terms of GUARDCON is based on a knock for knock principle.\(^8\) The desired effect of the waiver is to establish a contractual relationship between the ship owner and the individual armed guard and give effect to the knock for knock principle in the relationship between the individual guard and the ship owner.

Since GUARDCON is a standard contract, and the terms of the waiver are pre-printed, the ship owner will be reluctant to change any of the terms. The ship owners are strongly recommended not to change any of the terms of the contract dealing with, amongst other,

\(^5\) Wilhelmsen, "Liability and insurance clauses in contracts for vessel services in the Norwegian offshore sector - the knock for knock principle," 94-96.

\(^6\) This concern is reflected in IMO-recommendations to ship owners for employment of armed guards, which are further described below, through the recommendation to ensure that the PMSC has relevant insurance cover and to investigate financial status of the PMSC see International Maritime Organization, \textit{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}, section 4.1.4.

\(^7\) GUARDCON Annex D, clause 1.

\(^8\) The waiver clause is found in Part II of the contract clause 17: "The Contractors undertake to procure from each member of the Security Personnel, prior to their boarding the Vessel, individual waivers in substantively the form attached to this Contract in Annex D (Individual Waiver)."
liability since this may prejudice P&I-cover. Although the jurisdiction clause is not a liability clause *per se* it is contained in the waiver which is created for the purpose of contracting out of liability. A ship owner would probably hesitate to change the jurisdiction clause if asked by the PMSC to do so.

GUARDCON is an international standard contract which means it is drafted in a style normally used when the contracting parties are from different countries. The style and legal language in such contracts are suited for interpretation under the common-law tradition. This is a result of widely spread common law models used in contract drafting. However, the application of international private law rules may lead to courts applying another *lex causae* than that of a common-law tradition. The parties to a contract may for instance choose another law with which they are more familiar or there may be mandatory rules of law which affects the interpretation of the contract. The effect of parties choosing the governing law of a civil law tradition may be that the mandatory rules of the chosen law take precedence over the stated will of the parties or that the will of the parties are interpreted in a different manner than expected. The effect of subjecting the contract to the jurisdiction of a civil law tradition allows the judges to apply overriding mandatory rules of their own law. Even if the parties chose English law and English High Court to have jurisdiction, which is the case in the GUARDCON waiver, the party bringing a claim to court may choose to disregard the contract jurisdiction clause and the bring the claim to another court than the assigned. The interpretation of the jurisdiction clause will then become subject to private international law rules of *lex fori*.

In interpreting private international law rules the forum court may also bring civil law aspects into interpretation. This means that the plan of the negotiating parties to a standard contract on how the clauses of the specific contract are meant to operate may not come into full effect to the detriment of foreseeability. The purpose of this thesis is to discover these potential unforeseeable effects. Since ship owners are bound by mandatory rules and regulations securing financial capacity and a certain level of connection to the flag state there is a risk that claims relating to ship owner’s liability are subjected to other jurisdictions than the jurisdiction clause in the waiver, i.e. the English High Court.

1.2 Research question scenario

An armed guard, a Norwegian citizen domiciled in Norway, is employed by a PMSC registered in Saudi Arabia which undertakes to supply armed guards to a Norwegian flagged vessel for transit through a High Risk Area. The parties agree upon terms under

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9 BIMCO, *GUARDCON explanatory notes*, 3.
GUARDCON. The guard is placed on board but is severely injured during a piracy attack as a result of pirates shooting towards the ship. He is handicapped for life. Subsequent investigations reveal that the Master had given order to travel a route closer to the shore line than recommended for the relevant area. Moreover, there was a man shortage. The look outs were not in accordance with the security plan under the ISPS-code since one man from the crew fell ill and the guards took watch hours exceeding the watch hours prescribed under the ISM-code.

Subsequently it turns out the PMSC is bankrupt and the insurance company refuses cover due to fraudulent behaviour by the PMSC when negotiating and entering into the insurance contract. The armed guard turns to the ship owner and claims for compensation for the injury and loss of income.

It is presupposed under this thesis that the pirates, who are the primary responsible source of harm cannot be held liable due to practical obstacles.

1.2.1 Research question

Would the clause giving exclusive jurisdiction to the English High Court be adjusted by Norwegian Courts when the guard brings his claim to a Norwegian court?

1.2.2 Method and disposition

The validity of jurisdiction clauses under Lugano Convention can be separated into two sub-requirements: formal and substantial validity. The formal requirement is clearly governed by the Lugano Convention and is dealt with in chapter 2. Substantial validity of the jurisdiction clause will be considered in the chapter 3.

Chapter 3 presents further elaborations on tools for contract adjustment under Norwegian statutes. The legal basis for a Norwegian court to set aside provisions of the waiver under Norwegian contract law, the Contracts Act section 36, will here be presented.

Reflections upon presented material follows each subsection.

Lastly conclusions on studied aspects will be drawn under chapter 5. Arguments pointing towards Norwegian courts deciding they have jurisdiction are based on findings of chapters 2-4. Arguments showing such jurisdiction may prove hard to claim is also presented. Conclusions on mandatory rules of international law is based on chapters 2-4.

1.3 Relevance of research question

Private international law are rules in the own legal system of a State to which a case is brought. First a court decides whether or not it has jurisdiction. Once decided that the court is competent to rule on the matter the court will apply the private international law of the State
to which the case is brought, *lex fori*, in order to decide which substantial law, *lex causae*, to apply on the merits of the case.\textsuperscript{12} Before a Norwegian court can even consider the legal remedies of substantial law it must establish firstly that it has jurisdiction to rule on the matter, and secondly which substantive law is applicable. If the court finds it lacks jurisdiction it is irrelevant what the effect the law of the court would have had on the merits of the case.

In this respect, the Lugano Convention will be of predominant interest. Norway, as well as the EU-states, is a signatory state to the Lugano Convention\textsuperscript{13} and has implemented the Convention in the Act on Mediation and Procedure in Civil Dispute, the Civil Claims Act, ”as is” through reference to the Convention in said act section 4-8. The Lugano Convention takes precedence over Norwegian national law with status as *lex specialis*.\textsuperscript{14} The prerequisites of international character of the dispute and habitual residence of respondent is subject to interpretation in several court cases and is not entirely uncomplicated.\textsuperscript{15} Focus will nevertheless be on the Lugano Convention with the presumption that it is applicable.

The scenario presented involves a ship registered in Norway since the primary rule under the Convention is that a claim against a person domiciled in a Convention state shall be brought to the court where that person is domiciled.\textsuperscript{16} If the respondent is one of many, the claim may be brought to a court in a place where any of the respondents are domiciled provided that it is necessary to try the case coherently.\textsuperscript{17}

A jurisdiction clause may confer jurisdiction upon a Convention state through appointing a Convention state jurisdiction. If one of the parties, respondent or claimant, is domiciled in a Convention state and the court of a Convention state is appointed jurisdiction this jurisdiction is presumed to be exclusive.\textsuperscript{18} This is the case in the scenario where an armed guard domiciled in Norway has signed a contract containing the waiver where English High Court is appointed jurisdiction.

\textsuperscript{13} Convention on jurisdiction and the enforcement of judgements in civil and commercial matters 2007 (Lugano Convention or Lugano II).
\textsuperscript{14} Ot.prp.nr.89 (2008-2009) Om lov om endringer i tvisteloven m.m. og om samtykke til ratifisjon av Luganokonvensjonen 2007 om domsmyndighet og om anerkjennelse og fullbyrdelse av dommer i sivile og kommersielle saker, 12.
\textsuperscript{16} Pålsson, *Bryssel I-förordningen*, 91.
\textsuperscript{17} Lugano II, article 6.
\textsuperscript{18} Lugano Convention 2007 article 23.
The domicile of a company, such as a ship owning entity, is where the company has its statutory seat, central administration or principal place of business.\textsuperscript{19} The assessment of domicile is decided according to the national law of that state.\textsuperscript{20} The NMC section 1 paragraph 1 and Norwegian International Ship Registry Act contains detailed requirements which to a certain extent ensures domicile of ship owning companies in Norway when flying Norwegian flag.\textsuperscript{21} This is in accordance with flag state control as provided in article 94 of the United Nations Convention of the Law of the Sea.\textsuperscript{22} Hence, the outlook, pursuant to the research question, will place Norway as fall back jurisdiction if the jurisdiction clause is in valid since it is the flag state. The link between flag state control and jurisdiction is created through Norwegian requirements on ships to be registered in the NIS-registry or NOR-registry.

The interest for Norwegian courts to potentially exercise jurisdiction over the legal relationship between the ship owner and the individual guard is motivated by the legal uncertainties surrounding waivers from liability under Nordic legal tradition. When interpreting the jurisdiction clause, law of the lex fori, may influence the interpretation and it is possible that Norwegian court decides it has jurisdiction to rule on the matter. The interpretation of the content of the waiver may still remain under the English law, lex causae, but contract clauses, i.e. the effect of the waiver from liability, will potentially be subject to overriding mandatory rules of their own law which the court decides they must apply in a particular case. In such scenario, they may decide to apply overriding mandatory rules of the lex fori with the effect of changing the dispositions between the parties.

The overriding mandatory rules are those that are considered so important that the choice of law, to a certain extent, must be disregarded. Examples of such rules are rules protecting the interests of an inferior or weaker contracting party.\textsuperscript{23} It has been suggested that the law rules protecting the principle of good faith and fair dealing may have an overriding character.\textsuperscript{24} One particular law rule which may have such character, which exists in the Norwegian as well as Swedish Contracts Act is section 36 which provides the court with a tool for adjusting the content of a contract.\textsuperscript{25} In the scenario, the Norwegian guard brings a claim to the Norwegian

\textsuperscript{19} Lugano II, article 60.
\textsuperscript{20} Pålsson, Bryssel I-förordningen, 101-102.
\textsuperscript{21} Norwegian International Ship Registry Act 1987-06-12-48 and Norwegian Maritime Code
\textsuperscript{22} UNCLOS article 94 provides: "Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."
\textsuperscript{23} Cordero-Moss, "Lovvalg i kontraktsforhold," 141.
\textsuperscript{24} Cordero-Moss, Internasjonal privatrett, 198.
\textsuperscript{25} In Government preposition 1997/98:14, 28 Swedish law makers mentioned section 36 of the Swedish Contracts Act, which is basically identical with the Norwegian version, as an example of potential overriding
court hit is for this reason of great relevance whether the private international law rules to
determine if the court should rule on the matter or not.

1.4 Legal sources

The scenario places Norwegian private international law rules in the centre of the study. For
this reason, Norwegian law is one of the primary sources of law under this thesis. Nordic
countries, and particularly Norway and Sweden, have great similarities which also allows for
supporting arguments to be sought in legal sources of other Nordic countries.26

Studying GUARDCON is a given when considering the terms of employment of armed
guards on board vessels. Due to the elevated and significant role that GUARDCON plays in
mapping out unchartered contract territory it is the only source providing standardised terms
regulating obligations, mutual requirements, important details and liability. The fact that it is
the only standard contract signals that this contract has great impact on industry practice and
general idea of the mutual rights and duties under a maritime security contract in general.

The presumption that the Lugano Convention is applicable in our scenario is due to contracts
related to maritime affairs often having international character. This Convention is also an
important source of law since it is of great importance in Europe today. EU-members are
bound by the Brussels-I regulation27 inter se whilst EU members are bound by Lugano II in
relation to Lugano II signatory parties since EU signed the Lugano II Convention on behalf of
all the EU-member states.28 These instruments are the continuation of an initiative of the EG
as far back as the 1960s when the Brussels Convention was adopted in order to erase the
national impediments to recognition and enforcement of judgments within the EG and
promote the "free movement of judgements" or "the common market for judgements".29
Referrals to the Lugano Convention are used synonymously with Brussels-I regulation thus
citation from books discussing Brussels-I is equated with the Lugano Convention. This
method can be used since the Lugano Convention and Brussels-I regulation is practically
identical with a few exceptions which will not be relevant under this thesis.30 Interpretation of
the regulation is under the competence31 of the CJEU (EU-domstolen).32 In turn, the Lugano

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26 For example one of the main sources of law under this thesis, section 36 of the Norwegian Contracts Act is
identical to corresponding article in the Swedish Contracts Act.
27 Brussels-I could be issued following the transfer of EU-cooperation in civil legal matters from the third to the
first pillar actualizing the freedom of movement etc. in civil legal matters.
29 Ibid, 21.
31 This follows from the EG-treaty which applies to all EU-legal acts.
32 Pålsson, Bryssel I-förordningen, 44.
II Convention, having the status of EU-law, can be rendered subject to the interpretation of CJEU through request of EU-member states. Furthermore, Lugano II is, according to ancillary protocols, to be interpreted as autonomous as possible and in accordance with corresponding articles of the Brussels-convention/Brussels-I regulation.\textsuperscript{33} States bound by any of these synonymous instruments will be referred to as Convention states and this concept will then include all EU-states bound by the Brussels-I regulation as well. The differences of interpreting the Convention autonomously or being bound by the Brussels-I regulation under EU-law will be left aside. Focus will be on the autonomous interpretation under the Lugano Convention in accordance with the interpretational impositions just explained.

1.5 Delimitation

The research question, with a certain provided scenario, excludes several potential questions regarding liability between the contracting parties and tort victims. This is a deliberate choice intended to narrow the subject and allow for a focused presentation.

A precondition for applicability of the Lugano Convention is that the respondent is domiciled in a Convention state. This rule comes with certain exceptions however. These exceptions are dealt with when relevant.\textsuperscript{34}

The applicability of the Lugano Convention is presumed for the purposes of delimitation under this thesis to the effect of excluding further investigation regarding these subsidiary private international law rules in Norwegian legislation. The validity of the jurisdiction clause is the primary object of this thesis. Another presumption regards the jurisdiction of Norwegian courts in absence of a jurisdiction clause to the contrary. Several articles of Lugano II would lead to the potential jurisdiction of Norwegian court in a scenario such as that above. The preconditions of registering a ship under NIS-registry in Norway are design in a manner which connects domicile in Norway with the flag state but further investigations into the possibilities for a NIS-flagged vessel to fall outside of the domicile requirement in the Lugano Convention is excluded from this study.

It could be debated whether the form of the waiver, whereby the guard signs a piece of paper prior to embarkation, amounts to a proper contract under national law. Unless the Lugano Convention and section 36 of the Contracts Act prevents validity of the waiver it will be considered a legally binding document.

The Convention article on jurisdiction provides that jurisdiction is awarded to the Convention state if the parties to an agreement has decided that this state has jurisdiction over disputes arising in connection with a particular legal relationship. EU-case law and doctrine has dealt

\textsuperscript{33} Ibid, 44.

\textsuperscript{34} Pålsson, Bryssel I-förordningen, 92.
with this requirement to a limited extent. An agreement which concerns any future claims between two parties generally is not specific enough. A jurisdiction clause in a contract regulating disputes arising from the contract is the clearest example of a particular legal relationship. A jurisdiction clause contained in the articles of association concerning disputes between the company and its shareholders has been considered a particular legal relationship.\textsuperscript{35} The waiver is meant to create a legal relationship between the ship owner, or the Master, or the Master on behalf of the ship owner, and the individual guard. The waiver jurisdiction clause refers to “this undertaking” which must refer to the undertaking to defend the ship from pirates but possibly also in the broader sense, the undertaking of entering on board a ship with potential dangers this entails. The legal relationship itself appears to be clear enough but between which parties the relationship exists appears may be more indefinite. It’s not a issue whether a particular legal relationship exists but it would have to be decided in reliance of the facts of the case whether this relationship is in fact between the ship owner and armed guard or between the Master and the armed guard. The effects of this is outside the scope of the thesis.

Norwegian private international law rules relating to \textit{lex causae}, i.e. which substantive law to apply when assessing whether the guard is entitled to compensation from the ship owner, will also be excluded. Although the Norwegian court decides that the part of the waiver appointing jurisdiction to the English High Court is not valid, there may be other rules regarding the choice of law clause giving proper effect to that part of the waiver even if it is close at hand to presume that this would go hand in hand. Whether this is the case will not be explored. This thesis is based upon the idea that jurisdiction is the major issue at hand and choice of law is of minor importance. The importance here is where the case is tried.

\textsuperscript{35} Pålsson, \textit{Bryssel I-förordningen}, 212.
2 Lugano Convention formal validity of jurisdiction clauses

Article 23 of said Convention provides that the subrogation clause must be in writing.\textsuperscript{36} The formal requirements of a jurisdiction clause were dealt with in a substantial number of cases before the CJEU pertaining to the Brussels Convention\textsuperscript{37}. Since the Lugano Convention contains certain specific rules protecting employees and consumers case law is primarily concerned with issues that normally would arise between professionals. The Brussels Convention offered no alternative to the written requirement, hence the discussion is made with reservation for the potential applicability of these alternative requirements when drawing parallels to case law pertaining to the former Convention. However, emphasis on the jurisdiction agreement as an exception to the general jurisdiction rule to be interpreted restrictively remains relevant. Through restrictive interpretation of the rule, the CJEU attaches importance to whether the agreement is a result of consensus, a meeting of the minds, which must be expressed in a clear manner. A jurisdiction clause expressed in a language, for instance, which one of the parties doesn't understand may be cause for lack of consent.\textsuperscript{38} Case law concerning the formal requirements primarily addresses the situations when the jurisdiction clause is printed on standard delivery or contract forms.

2.1 Written agreement, or oral agreement evidenced in writing

In \textit{Estasis Salotti} a jurisdiction clause stated in standard print on the flip side of a purchase contract which contained no reference to the flip side standard printing, was not sufficient to prove consent in the eyes of the CJEU. This points to certain caution regarding preprinted terms, such as those on the waiver.\textsuperscript{39}

On the GUARDCON waiver the following can be noted. It consists of two pages. The first page contains all the clauses relevant and the second page is completely blank except for indications of what to write such as name, address and signature. It is possible that the guards never even look at the waiver itself and merely sees the information and signature as part of a procedure prior to embarkation, certainly name and address are relevant for the listing as supernumeraries on board. The difference between the forms used in the \textit{Estasis Salotti} case and the waiver is that all relevant clauses are printed on the same side as opposed to some

\textsuperscript{36} Lugano Convention 2007 article 23 (b). Case law NJA 2003 s. 379 Swedish decision

\textsuperscript{37} which, has relevance to the interpretation of the Brussels-I regulation and the Lugano II Convention.

\textsuperscript{38} Pålsson, \textit{Bryssel I-förorordningen}, 215.

\textsuperscript{39} Pålsson, \textit{Bryssel I-förorordningen}, 217.

being printed and agreed upon on one side of the paper and some found on the flip side. However, in a situation where one of the parties is already obliged to perform a service and the agreement is ancillary to that service the person signing a blank piece of paper may not beware, nor pay attention to, that he or she is actually signing a contract at all.

In said case the seller argued that the written requirement was fulfilled since the contract text referred to an earlier offer which contained such explicit reference to the general conditions containing a jurisdiction clause on the flip side of the paper. According to CJEU the reference to the earlier offer could fulfil the written requirement provided that the reference was clear and could be controlled by a person paying normal attention and that the general sales terms containing the jurisdiction clause was actually available together with the offer.\(^{40}\) The CJEU thus takes into account what had been available to the offeree and factors such as what is detected by a person paying ”normal attention”. The earlier offer lived up to the written requirement and the subsequent offer which was accepted referred to the earlier offer. Arguably the reference to the former offer is relevant since the party then had actual knowledge of the general conditions before signing the contract.

Parallels can be drawn although the situations are not quite the same. The first offer containing an explicit reference to the clauses on the reverse side can be compared to a situation where the individual guards are given heads up by their employer or co-workers that the waiver will be presented to them when reaching the vessel. The employment contract may even contain a clause concerning the waiver. The waiver would then probably have to be presented to them in that context. In *Estasis Salotti* the general sales terms containing the jurisdiction clause had to actually available together with the offer. The waiver clauses are presented in a context before entering on board. Arguably, anything which is not previously known to the armed guard would not be binding when signing before embarkation since this is often in the middle of the ocean after a long journey to foreign countries. If an actual understanding of the waiver is relevant, the signature on the waiver can be binding pursuant to the written requirement of Lugano II provided that it was previously discussed and that the document was actually presented to the armed guard in a safe environment prior to the employment.

Actual knowledge of what they are signing however, would not be facilitated by negotiations with ship owners but with their employee, the PMSC. It is a question of fact whether they

\(^{40}\) Pálsson, *Bryssel I-förrordningen*, 217.

knew that they are signing a waiver and if they had access to relevant material. It may very well be that signing the waiver is a given, which is mentioned without further discussion, by the PMSC.

The idea of a person paying normal attention mentioned in *Estasis Salotti* is a difficult concept which potentially can have different meanings under different legal traditions. Who is the person paying normal attention? Is it anyone, the average guard or the actual guard bringing a case to Norwegian court? What is normal attention? Should attention be considered in the context where it is presented which is possibly in the middle of the ocean, or in a vacuum of external influences?

Arguably an individual guard paying normal attention would ask further questions regarding a waiver mentioned during employment negotiations with the PMSC. However, the language in which the waiver is mentioned will also create differences between native English speakers and others in this regard. A “waiver” is a word with neutral ring to it in the ears of a non-native speaker whilst the native English speaker may be alarmed by this word and ask further questions. If the mentioning of the waiver simply slips by in the mix of events leading up to an employment contract the guard may not be so thorough when signing the waiver either, it is just seen as part of a routine. Language barriers is also mentioned as a relevant factor in the strict interpretation of the rule in case law as mentioned above.

Considering the possibility that the waiver jurisdiction clause is an oral contract evidenced in writing, it is submitted that there is no prior contract between the individual guard and the owner or the Master on board the vessel. The undertaking to sign the waiver is rather an obligation to the employee, the PMSC. It is not until the signature is on the paper that an obligation to the ship owner or Master exists.

**2.2 A form which accords with practices established between parties**

Lugano II also opens up for jurisdiction agreements to be ”in a form which accords with practices which the parties have established between themselves”.41 In *Tilly Russ*42 the formal requirement of the Brussels Convention which allowed an oral contract to be evidenced in writing was interpreted. A prior oral agreement between shipper and carrier expressly relating to a jurisdiction agreement is evidenced in writing in the bill of lading. It was not necessary for the shipper to have signed the bill of lading for the carrier to invoke the jurisdiction clause.43 The judges referred to *Galeries Segoura v Bonakdaria*44 whereby there is an oral

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41 Lugano Convention 2007 article 23 (b).
43 *Tilly Russ* at paragraph 18.
agreement and one party sends over general conditions containing a jurisdiction clause. In that case it was found that the requirement “evidenced in writing” was not fulfilled even if the party receiving such conditions fail to raise any objections, unless within the framework of a continuing business relationship.

The guard, as opposed to the shipper in *Tilly Russ*, has signed a document containing a jurisdiction clause but it was submitted that it is difficult to find supporting arguments that this is an oral contract evidenced in writing. However, guard which has worked for several years may have worked on board a certain ship, or on ships owned by a certain ship owner many times. At some point the guard would discover the content of the waiver and realise it’s content. Even if the signature itself on the waiver does not bind the parties, reoccurring employment on board vessels owned by one and the same ship owner could be considered the framework of a continuous business relationship. The issue remaining regards within which relationship such form is developed. Is it between the guards and the Master or between the guards and the owner? In this regard it should be mentioned that it will not be the same Master on board every time the individual guard embarks. It could be argued that the legal relationship in question is one between the ship owner and individual guard since the Master is an agent for the owner.

2.3 **A form which accords with a usage in trade or commerce**

A third possibility exists for Lugano II to recognize validity of a jurisdiction clause, that is if the clause is ”[…] in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.”45 Consent is still a requirement but it is presumed.46 The consent requirement remains ”[…]so as to protect the weaker party to the contract by avoiding jurisdiction clauses, incorporated in a contract by one party, going unnoticed.”47

In the case of *Castelletti v Trumpy*48 the CJEU found that the jurisdiction clause on the flip side of the bill of lading is ”[…] in international trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been

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45 Lugano Convention 2007 article 23 (c).
This was held in Case C-106/95 *Mainschifffahrts-Genossenschaft eG* (MSG) v *Les Gravières Rhénanes* SARL [1997] ECR I-911.
48 *Castelletti v Trumpy*
The bill of lading was a contract forming part of international trade or commerce and in relation to a branch of trade or commerce which is the yardstick, and not international trade or commerce in general. Awareness of such usage, the requirement that the parties ought to have been aware of the usage can be proven if it concerns a “[...] course of conduct in question is generally and regularly followed by operators in the branch of international trade in which the parties to the contract operate.” Publicity of such conduct is not necessary, but may help prove that it is common practice in a particular branch and if operators in a country which are dominant in that particular trade this will also show proof of common practice. However, that parties are not from a country where such practice is regularly followed is not relevant. Although the written requirement is not fulfilled when a signature is placed on the bill of lading containing a jurisdiction clause on the flip side of the paper as established in *Estasis Salotti* the formal requirement was fulfilled since this was in accordance with practices of a particular branch of trade or commerce.

Since the waiver which always contains the jurisdiction clause choosing the English High Court to govern the relationship is part of a publicised standard contract which is presumably well known in the security industry. For this reason, there is potential for building a strong case that jurisdiction agreements on a waiver between the individual guards and the Master, as agent for the ship owner serving to protect everyone on the ship owners side from liability claims anywhere else than in England, is in a form which accords with practices in that trade or commerce.

One prerequisite is that the contract regulates trade or commerce which may be questionable since there are no direct transactions between the ship owner or Master and the armed guard. The obligation to perform a service is in relation to the employee, the PMSC. The waiver itself regulates liability issues exclusively. If seen from a broader perspective, however, it forms part of a contractual relationship relating to trade or commerce but this contractual relationship is a relationship between the ship owner and the PMSC and not the individual guard. The issue of what the parties ought to have been aware of is not thoroughly dealt with by the CJEU in *Castelletti v Trumpy*. It may be noted that what parties ought to have been aware of again raises the issue of which yardstick to measure against. Is it the individual guard, taking into account amount of time engaged in the security work on board vessels? Or is it any guard? These issues relates to divergences in legal traditions.

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49 The Brussel Convention wording differed from the corresponding wording of the Lugano Convention.
2.4 Succession of rights and obligations, including a jurisdiction clause

The position of a third-party holder of a bill of lading is also clarified in case law. In Tilly Russ the consent proven between the parties by way of an oral contract evidence in writing meant that also the third party holder was bound by the clause.\textsuperscript{50} It should be mentioned that the United Kingdom strongly advocated the jurisdiction clause to be considered binding in relation to a third party holder in Tilly Russ.\textsuperscript{51} In Castelletti v Trumpy positions of third parties were also clarified. In the context where awareness of a usage can be established, and thus consent may be presumed between the original parties to the contract, the holder of a bill of lading will be bound by the jurisdiction clause. The principle, that the jurisdiction clause can be pleaded against the third party holder of a bill of lading thus applied also in cases where consent between the original parties was presumed.\textsuperscript{52} Thus, if under relevant national law, the holder of the bill of lading succeeds to the shipper's rights and obligations the jurisdiction clause will bind the third-party holder also in the situation where consent was presumed pursuant to practices in that trade or commerce of which the parties are or ought to have been aware.

If it could be established that an agreement to ensure that guards pursue the ship owner in England - would the individual guard be bound by this agreement? A bill of lading is a negotiable document evidencing a contract of carriage. The third-party holder succeeds to the rights and obligations of a shipper against the carrier. The same cannot be said about the waiver. Surely the main contract of GUARDCON contains a clause similar to a Himalaya clause\textsuperscript{53} which allows the individual guard to invoke the knock for knock clause to his advantage. However, this contract remains a contractual obligation between the ship owner and the PMSC and is not mentioned in the waiver. Neither does the individual guard succeed to any rights of payment or obligations to deliver a service as agreed upon in the main contract. It is submitted that it is not possible to draw any conclusions regarding validity of the jurisdiction clause pursuant to the succession of rights and obligations similar to the succession of rights and obligations pursuant to a bill of lading for these reasons.

\textsuperscript{50} Tilly Russ, at paragraph 18.
\textsuperscript{51} Tilly Russ, 2424.
\textsuperscript{52} Castelletti v Trumpy, at paragraphs 19-21 and 41-43.
\textsuperscript{53} GUARDCON part II, section 7 clause 16 provides: “[..] every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Contractors or to which the Contractors are entitled hereunder shall also be available and shall extend to protect each of the Security Personnel.”
One option is to consider the possibility of an agreement between the ship owner and the PMSC to ensure that the individual guards undertake not to pursue the owner anywhere else than in England.⁵⁴ One could play with the thought that the PMSC has the power of attorney. The main contract does refer to the waiver and the PMSC undertakes to ensure the waiver is signed by the guards. The main contract does not mention jurisdiction. However, the annexes are available online to each and everyone and furthermore it is common practice to have a jurisdiction clause inserted in the waiver since GUARDCON is the only contract available and widely used. Arguably the PMSC, and also the individual guards even if this is not relevant here, either are, or ought to have been aware of this practice.

3 Lugano Convention substantive validity of jurisdiction clauses

Under chapter 2 the discussions on formal validity of jurisdiction clauses have revealed that the knowledge and understanding of the waiver does in fact have relevance when assessing if the written requirement is fulfilled. The written requirement thus contains certain subjective elements which in national laws are solved pursuant to a catalogue of legal instruments. Arguably, fulfilment of the formal validity tangents the substantial validity issues. What is a “person paying normal attention”? Such considerations does arguably tangent substantive validity considerations. When discussing substantive validity one can imagine a scale. On the left end, there is a case where a person is not bound by a jurisdiction clause if contained in general conditions sent subsequent to an oral contract unless the clause was not specifically discussed. Passivity does not amount to consent. On the right end of the scale there are situations such as contracting made under duress. How far on the left hand side of the scale is considerations of substantive validity allowed to go without undermining the purpose of the written requirement?

The waiver contains the following on the very bottom of the standard printed clauses:

The undersigned further represents and warrants to have read and understood in full the above and have willingly and under no duress agreed to its terms.

This is what Cordero-Moss refers to as a boot-strapping clause. Just as you may try lifting your own bodyweight through pulling the straps of your own boots, a person may warrant all they want but if the warranty is made under gun threat it is still not valid.⁵⁵ Whether there is duress is a question of facts and can’t be remedied through a clause in the contract.

⁵⁴ GUARDCON part II, section 7 clause 17 provides: “The Contractors undertake to procure from each member of the Security Personnel, prior to their boarding the Vessel, individual waivers in substantively the form attached to this Contract in Annex D (Individual Waiver).”

⁵⁵ Cordero-Moss, International Commercial Contracts, 12.
3.1 Substantive validity and good faith, an international standard?

The Lugano Convention does not provide the solution on how to deal with issues such as duress or misrepresentation. These are issues that influence the formation of consent to contract which are not solved by the formal requirements under article 23. It has been argued that the autonomous interpretation of consent by the ECJ merely constitutes prima facie evidence of consent and that the law of national courts must be used to solve the issue of substantive validity if questioned during proceedings. Others argue that the principle of good faith can solve the issue of consent without resort to national law. This presupposes the existence of a general principle of good faith in EU. Cordero-Moss presents strong arguments in her book, International Commercial Contracts, where she shows how common law jurisdictions and civil law jurisdictions differ when it comes to the interpretation of good faith and fair dealing requirements. Good faith in common law tradition has other implications than good faith under civil law jurisdictions. The principle of fairness is intertwined into legal acts, jurisprudence of national law which does not allow these principles to be easily separated from the rest of the body of law.

European Union law has failed to work out a doctrine on the substantive validity of arbitration clauses in 30 years. This indicates a lack of political will. The initiatives on harmonising civil law in Europe through transnational legal instruments such as the UNIDROIT Principles of International Commercial Contracts (UPICC) and Principles of European Contract Law (PECL) but these instruments lack the details and comprehensiveness required to replace national law. Transnational sources tend to refer to good faith which again has no self-evident meaning. Surely, the Council could decide to adopt a doctrine with the features based on English law but that would cause civil law jurisdictions to protest, and vice versa.

The autonomous interpretation of the instruments could be guided either by some, undefined, European standard but also possibly with assistance from the substantial rules on validity of a contract in national law. Pålsson dismisses this as an issue and argues that this is more a question of evidencing the requirement of consent. However, which law deals with issues on lack of legal capacity, capacity of a legal representative or coercion for example will necessarily be appointed by international private law rules of the court.

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56 Ratković and Rotar, "Choice-of-Court Agreements under the Brussels I Regulation (Recast),” 253-354.
57 Ibid, 254.
58 Cordero-Moss, International Commercial Contracts, 45.
59 Hov, Avtalerett, 71.
60 Cordero-Moss, International Commercial Contracts, 86.
61 Ratković and Rotar, "Choice-of-Court Agreements under the Brussels I Regulation (Recast),” 254.
62 Cordero-Moss, International Commercial Contracts, 45.
63 Pålsson, Bryssel I-förordningen, 225-226.
Clearly there is no universal rule in the EU helping deciding upon the substantive validity of a jurisdiction clause. Good faith is not a universal concept. The idea that the formal requirement is a mere prima facie rule, is neither quite helpful when understanding to what extent the formal requirement blocks considerations which are relevant when considering validity under national law. The idea of evidencing the requirement of consent, as Pålsson argues, requires a definition of consent to exist. So, what is consent under the Lugano Convention, and is it possible to define without reference to national law principles which are elaborated in order to ensure consent?

3.1.1 Which law decides upon substantive validity?

Since there is no universal concept of unfairness this is an issue which much be resolved under national law. Which law governs substantial validity of the jurisdiction clause is a rather unclear issue but as seen, the legal traditions differ in their approach when assessing validity. There have been divergent practices in different countries regarding which law to apply when assessing the validity of a jurisdiction clause. Some countries will apply lex causae, the chose law under the contract, and others lex fori, the law of the chosen court. The Brussels-I Regulation Recast article 25, has addressed the issue of which countries substantial law to apply when assessing substantial validity. The court is instructed to apply the law of the Member State which is awarded jurisdiction in order to decide upon substantive validity of the jurisdiction clause. The validity of waiver jurisdiction clause would then have to be interpreted according to English law. The parties to the Lugano II Convention are bound by autonomous interpretation of the Brussels-I regulation. It remains to be seen how Norwegian courts interpret the commitment to autonomous interpretation.

Validity of a jurisdiction clause was subject to interpretation in the Norwegian Supreme Court in the case Baronie Chocolates Belgium NV v Nidar AS. In the Court of Appeal the issue of which law to apply when deciding upon substantial validity was brought up. The claimant, Baronie, invoked that the employee of the buyer with which the email conversation was carried out, lacked position proxy. On this issue the Court states:

The question of which country's law should be applied, is to be decided by Norwegian conflict rules, with referral to the principle of lex fori. Neither Lugano Convention itself or other internal or international legal sources provides the Court of Appeal with any solution on the applicable law.

He also mentions that the Rome Convention isn't applicable on jurisdiction agreements.


64 Ratković and Rotar, "Choice-of-Court Agreements under the Brussels I Regulation (Recast)," 256.

The Court continues, to conclude that the selected country's law should, as a starting point be applied to most contract law issues, including questions of interpretation, breach of contract and effects of the agreement's invalidity. The rationale is that all aspects of a legal controversy should be decided by the same national law in accordance with the principle of the contract unity. The Court decides that the substantive validity, i.e. the legal capacity of the employee to bind her employer, must also be decided according to Norwegian law on the basis that one of the standard contracts contains a choice-of-law clause favouring Norwegian law. The issue of invalidity due to lack of authority is solved with referral to a general assumption that one must fall back on the applicable national law to assess these matters.\textsuperscript{66}

This stance goes both for and against the stance of the Brussel-I Recast. The Court partly based jurisdiction on the \textit{lex fori} principle, not so much contained in the contract, but the \textit{lex fori} as in where the claim was brought. Then goes on to take guidance from a choice-of-law clause contained in the contract when choosing which country’s law should be applicable when assessing the validity of the contract itself. This is more in line with the principle in the Brussel-I Recast where the \textit{lex fori} of the court stated in the contract shall determine substantive validity. The Supreme Court does not further address the issue of substantive validity, only the formal validity, since this part of the judgement was not appealed by the claimant.

3.1.2 Setting aside jurisdiction clauses with reference to section 36 of the Norwegian Contracts Act

It was concluded that Norway may very well decide that Norwegian law is applicable to the assessment of substantive validity of a subrogation clause. It was also mentioned that assessment of substantial validity may be subject to Norwegian law pursuant to \textit{lex fori}, if Norway shouldn’t decide to follow the new principle under the Brussels-I Recast. In such a case the substantial validity can become subject to interpretation under section 36 of the Norwegian Contracts Act.

3.1.3 National laws and consent

Formal validity of jurisdiction clauses under Lugano II can be contrasted to elaborate rules in national laws regulating contracts. Formal and substantive validity is under national laws intertwined together in a complicated legal system. Norwegian contract law is based upon the fundamental principles of freedom of contract, freedom of form and \textit{pacta sunt servanda}. Consent are evidenced by offer and acceptance. These principles are then, as well known, subject to restrictions and limitations such as if the contract or parts of the contract is contrary

\textsuperscript{66} \textit{Baronie v Nidar}
to the law, general moral, is illegal under penal legislation for example.\textsuperscript{67} The principles on offer and acceptance are used as guidance by courts when assessing if the written requirement is fulfilled. This was shown in Baronie Chocolates Belgium NV v Nidar AS mentioned further below.\textsuperscript{68}

The procedure of offer and acceptance, with fine tuning rules on when and where the promise is considered binding can be contrasted to English law of contract where certain further elements are involved. English law entails certain peculiarities regarding the elements required in order for a contract to come into existence. Three elements are particularly identified: consideration, intention and form.\textsuperscript{69} The doctrine of consideration under common law requires that there must be a mutual exchange of value or at least a promise of such, consideration, in order for an agreement to classify as a contract.\textsuperscript{70} The doctrine of consideration and how it operates illustrates one of the major differences between English contract law and the legal tradition in the rest of the European Union and Norway etc.

The GUARDCON waiver clause consideration element reads as follows:

\begin{quote}
\textit{In consideration} [emphasis added] of (i) the sum of USD10 (the receipt and adequacy of which I hereby acknowledge) and (ii) your allowing me to form part of the Security Personnel on board [...] and to make the Transit [...] made on the BIMCO GUARDCON form [...] Owners and my employers as Contractors, I undertake to the Owners as follows [...] 
\end{quote}

Hence, 10 USD and the right to form part of the Security Personnel on board is the consideration obtained for the promise made by the guard to waive rights of direct recourse against the ship owner in accordance with the waiver clauses. The intention here is to point out that, under English law, 10 USD could, and would probably, amount to consideration as intended in the contract and how this differs from Norwegian or Nordic law tradition.\textsuperscript{71} Per English contract law the consideration doesn't need to be adequate, but it must be sufficient, which means that it must amount to some sort of benefit and/or detriment for the promise to be enforceable. From this follows that the 10 USD could likely be sufficient consideration. In

\begin{flushright}
\textsuperscript{67} Hov, Avtalerett, 54-55, 71-75.
\textsuperscript{68} Baronie v Nidar.
\textsuperscript{69} Poole, Textbook on Contract Law, 2 and 3.
\textsuperscript{70} Ibid, 116.
\textsuperscript{71} Further analysis of whether 10 USD and the right to perform the task which the guard is most likely obliged to perform under the employment contract with the Contractor is outside the scope in question in this work, although rather interesting. Could “being allowed onboard” which is a duty under the employment contract with Contractors amount to consideration for the promise not to hold the Owner liable the way a shipper was deemed to have obtained consideration for the undertaking not to pursuit carrier or anyone employed by the carrier when stevedores performed tasks they were already obliged to perform under the contract with their employee, the carrier, in New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd, The Eurymedon [1975] AC 154.
\end{flushright}
the famous case *Thomas v Thomas* 72 1£ plus undertaking of maintenance of a property was sufficient as consideration for the right of a widow to take possession of a house. 73

This shows how the waiver is constructed for the purpose of being interpreted under English contract law. Rules on substantial validity and formal validity are not easily separated in various national law systems which is demonstrated by requirements such as that contained in the doctrine of consideration, raises the question of how to decide upon substantial validity of a jurisdiction clause pursuant to the Lugano Convention. Section 36 of the Contracts Act, which will be discussed below, is another example of national law which are complex and not easily separated from the requirements of formal validity under Lugano II.

3.1.4 Consent under English law

Under English law consent to contract is evidenced by the contract, parole evidence rule, and extrinsic evidence such as what a person actually understood in a particular case is irrelevant. There are several exceptions to this rule but the ground rule is of importance when understanding English legal tradition. A court must ask how a reasonable person would interpret the written word of a document with regard to all relevant circumstances, without, of course taking into account prior negotiations which are not included in the written contract. The meaning of words are understood from their context and should not be contrary to a common sense viewpoint. 74 Certainly a contract may be deemed void due to circumstances such as duress or misrepresentation but the wording of the contract is not changed. The yardstick is a *reasonable person*. Actual consent to all the clauses and if or how the individual person actually interpreted the clauses is irrelevant.

The common-law tradition in contract drafting, which is commonly used in commercial contracts for historical reasons rather than practical, is one of complete exhaustion of all thinkable terms, they follow the principle of *caveat emptor*. The idea is to leave very little to the interpretation and discretion of the judges in contrast to the civil law tradition where mentioned default rules as well as the principle of good faith can be read into the contract and influence the judge’s interpretation of the contract. 75 A party with knowledge of these differences may be more attentive when signing a contract than a party from a civil law tradition.

It should also be mentioned that the legal traditions differ as to the tendency of employing lawyers. The common law tradition is based on the legal relationship between professionals to a greater extent than civil law tradition. Under common law contracts are drawn up by

72 *Thomas v Thomas* (1842) 2 QB 851.
lawyers and each clause carefully considered whereby each parties’ intention will be manifested in the contract.\footnote{Ibid, 11.} To an individual from a civil law perspective looking to do their job as an armed guard on board a ship, hiring a lawyer may not be the first thing that comes to mind. At least, an individual familiar to the English legal system would perhaps be more attentive to contract drafting and specifically what has been agreed whilst an individual from a civil law system can be expected to trust that the principles of good faith and fair dealing will secure a fair outcome. This could arguably be a factor when understanding the purpose of the Lugano Convention formal requirements, which is to ensure consent between parties.

3.1.5 Norwegian law, consent and fairness

Under Norwegian contract law each contract type can be subject to supplementary principles of law, filling in the gaps and adjusting the contract depending on which type of contract is at hand.\footnote{Hov, \textit{Avtalerett}, 71.}

Of interest here is the tool available to Norwegian judges when assessing validity of contract clauses is the Norwegian Contracts Act section 36 which reads as follows:

\begin{quote}
“An agreement may be wholly or partially set aside or amended if it would be unreasonable or conflict with generally accepted business practice to invoke it. The same applies to a unilaterally binding disposition.

In the assessment, account will be taken not only of the contents of the agreement, the position of the parties and the circumstances prevailing at the time of conclusion of the agreement, but also of subsequent events and circumstances in general.”\footnote{Wilhelmsen, “Liability and insurance clauses in contracts for vessel services in the Norwegian offshore sector - the knock for knock principle” 106-107.}
\end{quote}

Section 36 provides the judges with the possibility of setting a contract aside wholly or partly. Previously the general invalidity rules available were based upon issues relating to the preconditions leading up to the creation of a contract. The rules influencing contract formation pursuant to the Norwegian Contracts Act under the articles 28 to 35 deals with contract formation based on threat of violence, fraud, duress, frivolousness, inexperience etc. are limited to the time leading up to conclusion of a contract. Section 36, however, permits in addition to consideration for the preconditions leading up to the creation of a contract, adjustments based on issues regarding the content of the contract.\footnote{Woxholth, “Utviklingen i rettspraksis vedrørende anvendelsen av avtaleloven § 36,” 260.} However, preconditions influencing the conclusion of a contract remains an element in a total evaluation which may permit adjustment pursuant to section 36.\footnote{Ibid, 261.} If the contract entails an unreasonable allocation
of rights and duties between the parties in some way it may be deemed an unreasonably large imbalance in the benefits each party are afforded under the contract.\textsuperscript{81} Adjustments may also be made based on circumstances occurring subsequent to the time of contract.\textsuperscript{82}

These three elements are the grounds for adjustment and should be considered in a total evaluation which provides the judges with a more flexible law rule than those on invalidity based on for example duress. Furthermore, it allows for a more flexible remedy. The contract can be set aside partly or wholly.\textsuperscript{83} The rule comes into effect only if there is “[…] a significant difference between the effects of the contract clauses and the solution which would be considered a reasonable in the legal relationship between the parties.”\textsuperscript{84}

The effect of the jurisdiction clause for a Norwegian guard would probably be practical impossibility of bringing a claim before the English High Court. He would have to employ translators; he would have to understand the procedural rules of common law and he would have to go to England to pursue his claim. A person which is handicapped for life will be weakened for years to come and deal with ordeals of such circumstances. He is awarded 10 USD when signing the waiver, is this the benefit he affords under the contract? Or perhaps the benefit should be measured in relation to the salary and benefits he is entitled to from his employer?

The evaluation of what qualifies as a significant difference is a concrete standard of unreasonableness which means that the reasonability of a specific clause or contract, in a specific scenario, is subject to the evaluation. A consequence from this is that the standard, whether or not allowing the clauses to operate in full is considered unreasonable or not, will be relative depending on specific factors in a specific contract relationship. If one party is a consumer without any specialist knowledge about the subjects regulated under the contract and the other contracting party is a professional trader the threshold for what may considered an unreasonable term of contract is lower than in a contract relationship between two professional traders.\textsuperscript{85} However, it is not a precondition for the rule to come into effect that the parties are imbalanced in terms of power.\textsuperscript{86}

The statute wording, preparatory documents, jurisprudence and legal literature has provided guidance on which factors are of relevance to how high the threshold should be. The list of

\textsuperscript{81} Ibid, 276.
\textsuperscript{82} Ibid, 261.
\textsuperscript{83} Ibid, 260.
\textsuperscript{84} Ibid, 268.
\textsuperscript{85} Woxholth, ”Utviklingen i rettspraksis vedrørende anvendelsen av avtaleloven § 36,” 268.
\textsuperscript{86} NOU 1979:32, 59.
factors is an open ended list. The type of contract in question may also be a relevant factor. In certain contracts, such as employment contracts, the protection needs of employees can influence the threshold when evaluating what should be considered a result unreasonable enough to render section 36 in effect. Well established and widely used contract terms in a certain trade will seldom be adjusted per section 36, this follows from the wording of section 36 that a contract can be wholly or partly set aside if it would be contrary to good business practice to give it full effect per its terms. GUARDCON is a standard contract which speaks against the application of section 36. The negotiations leading up to the formation of the standard contract may however be questioned, as mentioned previously. The circumstances surrounding the signing of the waiver also speaks to the advantage of setting aside the jurisdiction clause, which is a circumstance which is of interest under the formal requirement discussed in previous chapter.

Some observations are necessary here. It is clear that the purpose of the formal requirements in article 23 of the Lugano Convention is to establish consent between the contracting parties regarding a jurisdiction clause. The presentation of section 36 of the Contracts Act does not focus so much on consent as a fair result. Lack of consent is rather inferred from the situation by way of fictively deciding that the person could not have consented to a contract with such an outcome. Actual consent is a factor which can be shown in factors of relevance such as prior negotiations, but not decisive. Subsequent events, such as information about loss of insurance cover due to fraud, places the jurisdiction clause in a different light. Had he known of subsequent events such as those he may not have consented, even if he in fact consented at the time of the contract. In the Lugano Convention consent to the jurisdiction clause of the waiver can be understood in several ways however. It may either be understood as knowing about a jurisdiction clause without further understanding of what this actually means. It could also be a thorough understanding of all the ordeals the jurisdiction clause would entail if the individual guard lost his insurance cover and had to pursue the owner in England.

CJEU has clearly stated in Castelletti that “the fact that the substantive provisions applicable before the chosen court tend to reduce that party's liability may affect the validity of the jurisdiction clause” does not affect formal validity. Hence, considerations of a more severe effect of liability clauses when interpreted under English law, since English lawyers are more likely to enforcing a contract limiting liability, cannot influence the substantial validity. Obviously, this could be a factor of relevance when interpreting substantial validity under Norwegian law, i.e. the Contracts Act section 36. The statement of the court bars one of the

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87 Woxholth, "Utviklingen i rettspraksis vedrørende anvendelsen av avtaleloven § 36,” 266-267.
88 Ibid, 278.
89 Hagstrøm, "Urimelige avtalsvilkår,” 157.
90 Castelletti v Trumpy, at paragraphs 46-47.
factors of relevance when assessing Where is the limit for factors of relevance to substantial validity. Should it be limited to the common law defenses against performance such as duress and fraud etc.?

Regarding the formal requirement, the CJEU stated the following in the case of Castelletti v Trumpy:\footnote{Castelletti v Trumpy.}

“[..] it is in keeping with the spirit of certainty, which constitutes one of the aims of the Convention, that the national court seised should be able readily to decide whether it has jurisdiction on the basis of the rules of the Convention, without having to consider the substance of the case.”

3.1.5.1 Imbalance of power between parties, lowering the threshold of unfairness

To clarify the presentation of the subsection above, the total evaluation of whether a contract clause or contract should be adjusted or considered invalid contains the three elements: deficiencies during conclusion of contract, deficiencies in the content of a contract and subsequent events. The threshold on what is considered an unreasonable outcome from enforcing the contract in full will be higher or lower depending on factors mentioned such as the inferiority of one of the contracting parties.\footnote{Woxholth, “Utviklingen i rettspraksis vedrørende anvendelsen av avtaleloven § 36,” 267.} CJEU however has barred any considerations which concerns the substance of the case, such as the more severe effect of a waiver containing a jurisdiction clause being interpreted by the law of the court chosen.

The Norwegian author, Einar Mo, discussed interpretation of jurisdiction clauses in employment contracts pursuant to Norwegian law. He discusses Norwegian statute (other than Lugano), which also presents a formal written requirement in international jurisdiction contracts where Norwegian courts would otherwise be competent to rule on the matter. Norwegian law poses a formal requirement but no specific protective rules of employees such as discussed articles 18-21 Lugano.\footnote{Mo, “Grunnris av den norske internasjonale arbeidsretten,” 929-923.} Hence, the Norwegian decisions on jurisdiction in employment contracts, falling outside the application of the Lugano Convention, are not affected by mandatory rules other than the mere written requirement. This allows for parallels to be drawn between findings of the court in cases concerning jurisdiction clauses in employment contracts and the specific conditions of the armed guards in relation to the ship owner. This is possible because the employee definition becomes irrelevant and instead the evaluation is based on the facts of the case where an employee-employer relationship is a factor.
He stresses the fact that in individual agreements, as opposed to collective agreements, the employer is most often the stronger party in the contractual relationship. They are often entered into without prior negotiations and it is more likely, when taking into account specific circumstances that are unfavourable to the employee, that the jurisdiction clause becomes subject to alterations pursuant to section 36 of the Norwegian Contracts Act. Such circumstances may be for instance that the jurisdiction is so far away that it becomes practically and economically unaffordable for an employee to bring their claim in the agreed jurisdiction.\(^9\)

The GUARDCON sub-committee of BIMCO consisting of two ship owners, one representative from a Protection & Indemnity-club and two representatives from international commercial law firms drafted the contract. Subsequently a number of PMSCs were invited to submit comments on the draft.\(^5\) This shows that PMSCs took a back seat in the drafting process which may have had the effect that important aspects of such a contract was not properly considered. The individual guards cannot be considered to have been represented in those negotiations to a great extent.

In Swedish case law, predating the Lugano Convention, jurisdiction clauses have been disregarded when an employment contract entered into in Sweden with a Swiss company to carry out work in Sweden contained a clause awarding Switzerland exclusive jurisdiction. The Swedish Employment High Court found that Sweden had jurisdiction since employment had loose connection with Switzerland, stronger connection with Sweden and that the application of Swiss courts of mandatory rules relating protecting employees would not protect the employee to a satisfactory extent.\(^6\) Such considerations are then not relevant under Lugano II since this would take into account the substance of the case as seen above. Lugano II contains protective rules for employees which are meant to mitigate such problems as the Swedish case.

The imbalance in negotiating power between an employee and an employer lowers the threshold on what would be considered a significant difference between the effects of the contract clauses and the solution which would be considered reasonable in the legal relationship between the parties. This relates to the yardstick against which contract should be interpreted. Under chapter 2 it was noted that the CJEU considered what “a person paying normal attention” would discover in general conditions of sale sent to them. Would a person, which is an individual guard, be required to pay the same level of attention as the CEO of the

\(^9\) Ibid, 929-931.
\(^5\) BIMCO, GUARDCON explanatory notes, 2.
\(^6\) Ibid, 929-923.
AD 1976 number 101.
PMSC when hearing about some waiver he is supposed to sign? Under Norwegian law the answer is clearly no. The same issue can be brought up if it is argued that guards are bound pursuant to usage in trade or commerce. Ought they (the individual guards) have known this is usage? Under Norwegian law this would be a question of fact. One would have to consider the education, knowledge, language proficiency etc. of the guard bringing the claim to court. Is this the case under Lugano II? Since Lugano II is taking care of concerns for weaker parties such as consumers and employees in articles which are specifically reserved for those categories, article 23 is perhaps not constructed in a way which allows the considerations of weaker contracting parties.

The balance in power between the individual guard and the ship owner, and/or the Master, can vary depending on the situation. In many situations, however it can probably be assumed that the individual guard is an inferior party which would then, under Norwegian law, lower the threshold regarding a situation which is considered so unfair as to amount to a significant difference between the effects of the contract clauses and the solution which would be considered a reasonable in the legal relationship between the parties pursuant to section 36 of the Contracts Act. A smaller PMSC would probably consist of no more than a post box and it is the individual guards who are the PMSC.

It is submitted that no clear answer on the relevance of all three of the elements and the factors influencing the threshold for an outcome which would be considered unreasonable exists. Interpreting substantive validity of jurisdiction clauses does appear to require some precaution keeping the consent requirement in centre, but there is no clear answer which type of consent should be sought.

Without clear answers on posed question there is a possibility that certain factors influencing the threshold of unfairness pursuant to section 36 of the Contracts Act are admissible in the assessment of the substantial validity of a jurisdiction clause under Lugano II. Following subsection will look further into the employee concept under Norwegian law and understand the factors influencing the considerations of imbalance of power between parties which motivates the relevance of the employee concept.

3.1.5.2 The employee concept

Under this subsection the similarities with the employee concept and tasks performed on board by individual guards will be presented depicting the power balance between the parties.

The Lugano Convention does not provide a definition to the concept of an employee. If the guards were to be considered employees of the ship owner under National law the protection

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Shenavai v Kreisher, Case 266/85 [1987] page 239 (61985J0266).
rules provided for under the articles 18-20 of the Lugano Convention would probably allow the guard to bring a claim in Norway. If not, the factors influencing the considerations of imbalance of power between parties which motivates the relevance of the employee concept is still of interest.

In Norwegian case law and theory, the distinction between employees and independent contractors can be found in different laws. Generally, the definition is subject to a relatively broad assessment with special emphasis on the employer's right to manage, direct and control the work. The definition of being an employee is central to several mandatory state laws regulating worker's rights in Norway. An employee working on board a Norwegian ship is protected by the mandatory rules in the Norwegian Work Injuries Insurance Act obliging the employer to maintain insurance and subduing the employer to strict liability for work related injuries. The term employee in the Ship Employment Act of 2013 is meant to align with the traditional definition of employee. The traditional concept of employee found in general employment law, the Norwegian Working Environment act, includes the idea of a legal relationship stemming from an employment contract i.e. personal and continuous commitment in exchange for payment with an element of organizational subordination. Preparatory works to said act also provides: "[...] if the association with an employer in reality has the nature of an employment relationship." For the purpose of determining who is an employee an overall assessment of all the circumstances of the contractual relationship must be carried out. The Norwegian author Einar Mo quotes the CJEU in its statement regarding the issue: “[...] employment contracts, like other contracts for non-independent work, unlike other agreements and including agreements of services is of a special nature since the employee with a special lasting bond is linked to the relevant company or employer's business organization.”

The preparatory works of the Norwegian Work Environment Act presents a list of factors determined in Norwegian case law when defining the legal relationship employer-employee

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98 Lugano Convention 2007 article 21 (2) and (3).
100 LOV-1989-06-16-65 om Yrkesskadeforsikring sections 1 to 3.
101 LOV-2013-06-21-102 om stillingsvern mv. for arbeidstakere på skip
102 NOU 2012:18 Rett om bord - ny skipsarbeidslov 7.4.4.
Shenavai v Kreisher, Case 266/85 [1987] page 239 (61985J0266).
Estatis Salotti.
some of which are in common with the relationship between armed guards and ship owners.

- an obligation to make their own personal labour force at disposal of the employer and may not subcontract to another helper
- an obligation to subordinate themselves to the employer's direction and control of the work
- the employer provides working space, machines, equipment, tools, materials or other aids necessary for the execution of the work
- the employer bears the risk of the work result
- the employee receives compensation in one form or another
- the relationship between the parties has a fairly stable character and is terminable with specific deadlines
- work is performed mainly for one employer

The employee-concept found in the Ship Employment Act is meant to follow such terminology, where independent contractors would fall outside the scope of the act. Nevertheless, the requirement of a fully satisfactory and safe working environment will include everyone performing work which is affiliated with the employer’s business. The *lex specialis* of the Ship Employment Act and Ship Safety and Security Act constitutes in Norwegian legislature, is intended to align with this principle as well:

106 The law committee emphasizes that although certain groups of workers as a starting point falls outside ships Labour Code, these will still have the safety and working environment safety imposed by the Maritime Safety Act, since this law is directed against any persons working on board.

The statutes of named act pertaining to personal safety are applicable” [to] each an everyone working on board the ship, regardless of whether the person is an employee, independent contractor or perform their work based on another legal basis than contract, and regardless of affiliation to the ship's operation.” Also, certain specific statutes of the Ship Employment Act

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105 NOU 2012:18 Rett om bord - ny skipsarbeidsloven 7.4.4.
7.4.1. […] anvendelse av sjømannsloven som hovedregel betinget av at personen som arbeider på skipet, er arbeidstaker. Det er klargjort gjennom virkeområdeforskriften at sjømann skal likestilles med arbeidstaker. Utgangspunktet er følgelig at sjømannsloven kun regulerer de arbeidsavtaleene som etablerer et løpende underordningsforhold, og at selvstendige oppdragstakere faller utenfor. Virkeområdeforskriften nyanserer dette. Etter forskriften § 3 får enkelte av lovens bestemmelser anvendelse for personer som arbeider om bord som selvstendig næringsdrivende.
7.4.4."Utvalget vil videreføre vilkåren om at personen som arbeider på skipet må være arbeidstaker for at skipsarbeidsloven skal komme til anvendelse.”
106 NOU 2012:18 Rett om bord - ny skipsarbeidsloven 7.4.5.
includes everyone working on board.\textsuperscript{107} The requirements of the SSA and chapters 8 and 10 of the Ship Employment Act were deemed sufficient for the purpose of providing a safe working environment for those who are employed by another party.\textsuperscript{108} Being protected under the general rules of safety and security on board a vessel would not necessarily change the status of independent contractors on board but it helps understand the context in which the guards operate.

The contractual commitments can vary from one relationship to another whereby one contract is a one-time deal whilst some ship owners employ mainly one PMSC which places the guard team where it has previous experience. In more long lasting contractual relationships features such as stable character of the relationship and a relationship with specific deadlines are more likely to develop. If the PMSC primarily is a company post box where the PMSC actually in practice consists of the team of persons continually working together this suggests an even more employee-like relationship since the PMSC may not sub-contract without written consent of the ship owner.\textsuperscript{109} GUARDCON does not provide a requirement of naming the specific individuals which are intended to carry out the operation on board but in practice, it is not unlikely that such unwritten rules may emerge in a commercial relationship.

One important factor of relevance concerns the organisation and authority of the work. If the employee is obliged to subordinate themselves to the employer's direction and control of the work this is a factor of relevance to the assessment. To understand how this factor plays out in the legal relationship treated in this thesis it is necessary to establish further familiarity with the legal framework surrounding security operations on board.

3.1.5.3 Maritime Security, the organisation of work on board

It was explained previously how the Norwegian ship owners are subject to state control through ownership requirements on NIS-flag.\textsuperscript{110} Under this subsection flag state control mechanisms providing for organisational requirements on ship owners will be presented in relation to some of the GUARDCON provisions of interest. The purpose is to provide a nuanced explanation of how security work is organised, who is responsible and who has control over it.

SOLAS and following amendments such as the ISPS-code and ISM-code have been enacted in Norwegian legislation primarily through the Norwegian Ship Safety and Security Act,

\textsuperscript{107} Ibid, 7.4.4.
\textsuperscript{108} Preposition 115 L (2012-2013) Law on Employment Protection etc. for employees on ships (Prop.115 L (2012-2013) Lov om stillingsvern mv. for arbeidstakere på skip) 8.3.2.
\textsuperscript{109} GUARDCON Part II, section 3, article 6 (d)(i).
\textsuperscript{110} The Norwegian Maritime Code section 1 to section 3.
SSA. The ISM-code the ship owner, is the entity appointed responsible operator of the ship on the ISM-certificate, the Company. The Company nominated in the ship safety certificate, the operating company which may or may not be the owner, has the role of responsible party under the act. The International Maritime Organization, hereunder the IMO, has issued recommendations assisting flag states in creating order and control over the employment of armed guards. The regime is laid down through several recommendations directed to the flag State, guard company, ship owner and port State respectively. Flag States are recommended to implement a process for authorizing ship owners on the one side to employ PMSCs as well as the armed guards, referred to under these instruments as Privately Contracted Armed Security Personal, PCASP. The flag states are also recommended that they should ensure PMSCs employing the individual guards hold valid accredited certification to ISO 28007-1:2015.

The recommendations are to a certain extent incorporated into Norwegian legislature in the Security Regulations and procreates the requirement of ship owners to present the PMSCs documentation on recruitment procedures and procedures for the handling of guns and ammunition to the flag State before armed guards may be employed. The base of security regulations, the fundamental requirements of the International Code for the Security of Ships and of Port Facilities, the ISPS-code, such as carrying out a Ship Security Assessment, SSA and the establishment of an Ship Security Plan, SSP, are also enacted through the Security Regulations. A function similar to those of Classification Societies is performed by the Recognized Security Organizations, RSOs, which are entitled to carry out inspections regarding compliance with the ISPS-code on behalf of the flag State in countries where legislation so allows. The Security Regulations allows for such delegation to RSOs. The Security regulation also presents a general reference to the IMO-recommendations to ship owners in choosing a suitable PMSC. The general reference to the IMO ship owner-recommendations incorporates inquiries and investigation, due diligence, regarding amongst

112 Implementation of the ISM-code is discussed in Ot.prp.nr.87 (2005-2006) 9.1to 9.4 and 13.1to13.4.
113 The Regulations enacting the ISPS-code, the Security Regulations, also refers to the Safety Management Certificate as well as the SOLAS Convention chapter XI-2 rule 1, 1.1.7. for the purpose of defining the responsible shipowner. Some confusion may arise due to the fact that these are two separate certificates.
116 Norwegian Ship Security Regulation §§ 7-16.
117 Norwegian Ship Security Regulation § 10.
118 Norwegian Ship Security Regulation § 20 (3).
other financial status and extent of insurance cover held by the PMSC.\textsuperscript{119} This allows for information access of the ship owner into the PMSC status.

It is the ship owner’s duty to ensure that the numerous tasks presented as a result of SOLAS and further elaborated under annexes to the Conventions as well as following IMO-resolutions pursuant to tacit amendments to SOLAS enacted in the Ship and Safety Security Act are followed. These duties rests, regardless of delegation of those responsibilities, always with nominated ship owner on the certificate.\textsuperscript{120} The numerous duties imposed upon ship owners via mentioned act are itemized under various regulations which specifies the otherwise frame-like legislation. The Regulation on Security, Piracy- and Terrorism Contingency and Use of Force On board Ships and Movable Drilling rigs, hereunder the Security Regulations, is a further specification on the very specific rules on ship security.\textsuperscript{121} Measures pursuant to the ISPS-code are prescribed under the Security Regulation.\textsuperscript{122}

Pursuant to article 20 of the Security Regulations the ship owner must motivate why industry practice preventive measures are insufficient in order to protect the ship from attack and the ship owner is obliged to carry out a specific risk analysis on carrying PCASP. This is a courtesy to the industry recommendations Best Management Practices for the protection of Somalia Based Piracy, BMP, which provides ship owners with non-violent alternatives to avoid hijacking: “If armed Private Maritime Security Contractors are to be used they must be as an additional layer of protection and not as an alternative to BMP.”\textsuperscript{123} The preventive measures are for example enhanced bridge protection, following advice from UKMTO regarding appropriate routes and watch keeping.\textsuperscript{124} The idea of armed protection is for it to function as an outer layer of protection. The core of security on board are the preventive measures such as those mentioned.

Regarding the scenario with an injured guard certain remarks can be made. The overarching responsibility and control rests with the ship owner. It is the ship owner who is in the centre of all parties coming on board and the ship owner is ultimately responsible for the implementation of SOLAS. There are several aspects of safety and security on board of relevance to the well being of the individual guards and which may influence the outcome of

\begin{itemize}
\item \textsuperscript{119} International Maritime Organization, 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, section 4.1.4.
\item \textsuperscript{120} Falkanger, Bull, Sjørett, 56.
\item \textsuperscript{121} FOR-2004-06-22-972
\item \textsuperscript{122} The Security Regulation, sections 8 to 16.
\item \textsuperscript{123} UKMTO etc., Best Management Practices for the protection of Somalia Based Piracy version 4 (BMP4), 3.1 to 3.5 and 8.5.
\item \textsuperscript{124} See and compare with Norwegian Ship Security Regulation § 20 (b).
\end{itemize}
the work on board of which the armed guards are unaware, and may never become aware. These aspects are solely under the control of the ship owner unless the ship owner, or the crew on behalf of the owner, invites the security company to improve the ship hardening and make an oversight of safety issues of relevance to security. In employing a PMSC the ship owner has access to far more information about the PMSC than the individual guard can be expected to take part of and the ship owner owns the control over the security work which is outside of the PMSC sphere. There is a mismatch in the access to information. In this respect the Recognised Security Organisations, RSOs, are certainly of importance since they are experts in security and validate proper organisational work onboard but the RSO as such cannot have the perspective of the individual guard. The guard will be in the hands of the knowledge of others. Where system requirements have failed to detect fatal attitudes of a Master, such as the Master in our scenario, it will appear even more unfair to uphold the effects of a jurisdiction clause where the guard has to go to a foreign country and plead his case against a Norwegian ship owner. The fact that there is a mismatch in information, and that the individual guards are excluded from the employee concept but supposedly are protected by the framework regulations on board is of little comfort to the individual guard if it turns out regulations are inadequately followed or the regulations themselves are not following the speed of events. Whilst employee protection rules establish strict liability for physical injury, the armed guards undertake to deal with such claims in a foreign country. Furthermore, armed guards are subject to other types of risks than the rest of the crew, reference to general safety and security measures are not spot on when it comes to their protection in work related injuries. Pursuant to section 36 of the Contracts Act, the disproportion of information access and the circumstances leading up to signature on the waiver would influence the assessment of validity of the jurisdiction clause.

The mentioning that the ship owner must motivate why industry practice preventive measures are insufficient to protect the ship from attack can be related to the level playing field on agreed terms of engagement about the ship hardening and preventive measures. In the outset, it was explained that GUARDCON was drafted by the GUARDCON sub-committee of BIMCO which consisted of two ship owners, one representative from a Protection & Indemnity-club and two representatives from international commercial law firms. Subsequently a number of PMSCs were invited to submit comments on the draft. The outcome of this constellation appears to be a somewhat one-sided take on the potential problems and risks in a shared adventure. For example, the possibilities of armed guards

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125 It may also be mentioned that the RSO is prohibited from approving, certifying or verifying processes and procedures that it has wholly or partially developed. IMO, Guidance on the role of the Recognised Security Organisation in relation to the employment of armed guards and the installation of citadels on board ships threatened by piracy in the Indian Ocean, No 124 of May 2012.

126 BIMCO, GUARDCON explanatory notes, 2.
tripping and firing their guns by accident, shooting innocent fishermen by malice or damaging third party property by negligence are all mentioned by way of example to enlighten the reader as to the logic behind GUARDCON provisions. Another example of concerns relates to the ship-hardening tasks, the guard company is under an obligation to assist in preparations of the ship itself to better withstand piracy attacks. However, in the GUARDCON explanatory notes it is pointed out that ship hardening is under the Owner’s instructions so that guards wont refuse to embark because the ship hardening isn't satisfactory in their opinion. Although such concern is justifiable it is also quite possible to argue that guards, with an expert role on security, and who places their lives in the hands of the ship owners’ due diligence of preparing the ship adequately for firearms to be an effective deterrent, have a keen interest in deciding how well prepared the ship is for the adventure.

The ship owner is highly dependent upon the armed guard-team committing to their contractual obligations. The losses could be massive if the guards refuse embarkation right in the middle of the ocean, with cargo owners waiting in the harbour for example. The question however remains, who should stand the risks of contractual malfunctions in such a case. Should the guards be feel the pressure of a potential contract breach if prior to embarkation they discover major systematic flaws in the security systems on board? Or should the ship owner stand the risk of employing an unserious contractor that for some reason demands backs out of their commitment and blames security issues? The ship owner can employ another PMSC next time, and consult other ship owners regarding the reputation of a PMSC. The guards can become injured for life, perhaps killed. The drafting method chosen in GUARDCON lacks such further contemplation when based on a simple knock-for-knock model which is created in for another scenario. One may make in respond make the reservation that armed guards can influence their employee, the PMSC, in this regard and demand the changes necessary for them to carry out their tasks in a better environment. The obvious flaw in such an argument however is, if that was the case, would a clause to this effect not be inserted in GUARDCON already?

In this context it should be mentioned that the category on board which are included in the definition of employees are afforded a right to resign from a voyage if the ship does not live up to the requirements established pursuant to the SSA and ancillary regulation. Certainly, the PMSC could negotiate such terms. However, as discussed, GUARDCON was introduced in a somewhat one-sided manner and GUARDCON is condoned by the ship owners’ insurers. The stated word of the contract has become norm and it is not likely that a PMSC, and even

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127 Ibid, 5-6, 10, 11.
128 Ibid, 4.
less so, an individual guard, are in a position to challenge this and still keep their daily income.

3.1.5.4 Master’s authority

The Master’s authority on board is also important for organisation of the employment of armed guards on board. Pursuant to GUARDCON the security team advises the Master that they are intending to invoke the Rules of Force, placing such actions under their initiative. The individual guard “[…] shall always have the sole responsibility for any decision taken by him for the use of any force.” Pursuant to the same sections GUARDCON clarifies that the Master has ultimate responsibility for the safe navigation and overall command of the vessel.

Any decisions made by the Master shall be binding and the Contractors undertake to instruct the Security Personnel accordingly.

These sections also provide that no provisions of GUARDCON shall be construed as a derogation of the Master’s authority under SOLAS. It is also stated that the Master has authority to order cease fire. However, it is further stated that the provisions should still not prevent the guards from their right to exercise self-defence in accordance with applicable law. Such exercise can naturally be carried out through the firing of weapons. Aside from the contradictory sections of this section the greatest flaw of this section, with the purpose of avoiding that the Master is held responsible for the actions of individual guards, is how it exclusively deals with a situation where the ship is already under attack.

There is arguably an embedded conflict of interest between security and the need to keep costs low and meet the commercial expectations. Surely, the armed guards have an important and specialized roll and are to be expected a high level of control in the exercise of force on board but it is quite clear that the armed guards are quite surrendered to the decisions of the Master. One of the clauses on Obligations and Responsibilities, section 3 of GUARDCON, identifies assisting in ship hardening procedures as part of the tasks the PMSC undertakes to perform. However, the armed guards do not have authority on board and if the Master decides to prioritise commercial considerations before security risks by way of, as in the scenario of this thesis, choosing an inappropriate route, the armed guards will probably not have any prospects of succeeding in going against the Master. The armed guards are guests on board a foreign vessel, each vessel being unique in regards such as the culture on board, language used, where equipment is stored and particularly the obedience of safety rules and measures. Not seldom do they embark shortly before entering piracy waters. In their role it is rather unlikely that the guards will start negotiations, questioning the waiver and pointing out errors in security management in the middle of the ocean prior to embarkation.

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130 GUARDCON part II section 4, 8 (a-c).
Security work is intertwined with the safety and security systems on board in a rather abstract manner. As opposed to a welder coming on board to weld a particular isolated part of the ship, the armed guards become part of the manning on board which is responsible for the safe and secure propulsion of the vessel through piracy waters. The crew and the security team are fused together to a higher degree than the welder. The welder arrives to the ship and may perhaps feel obliged to start working even if he is unsure as to whether he agrees with the safety standards on board in order not to become liable to the ship owner for breach of contract. To that extent the guards and a welder would be in the same situation. However, the welder leaves after conducting his tasks, whilst the armed guards form part of the venture which arguably leaves them more in the hands of occurrences and preconditions which materialises only first when there is no turning back. One such latent precondition may be the attitude of the Master towards sailing close to shore contrary to recommendations. It may also be that the Master decides to conduct maintenance work during transit through piracy waters since he considers the armed protection sufficient to fend off intruders.131

4 Concluding remarks
4.1 Formal validity

No clear conclusion can be drawn regarding the written requirement. In *Estasis Salotti* some of the terms were on the reverse side of the paper of a bill of lading. The waiver contains all terms on one side and the signature is placed on the other. This may become an obstacle to the written prerequisite.

No prior oral agreement exists between the parties to the waiver. If possible to consider proof of understanding of the contract the PMSC would have had to present the waiver to the guard so that they can read it. An employment contract containing a clause expressly referring to the waiver, and presented to the guard together with the waiver, may help mitigate the question-marks concerning the written requirement. When the waiver later is presented to the guard it is known to the guard. However, the contractual context is not identical to the case discussed. The employment contract is in relation to the PMSC and the waiver is in relation to the Master.

The formal requirement of a form which accords with practices between parties raises the problem of which parties have developed this form. A guard may operate on board several different vessels and for several different ship owners. Is it between a certain ship owner or and the guard or between a master and the guard? A long lasting relationship between a

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131 BMP4 recommends that UKMTO recommendations are followed concerning routes and that no maintenance work should be conducted during transit. See BMP4 page 19.
smaller PMSC and a ship owner may entail recurring visits by one and the same individual guard on board the vessel of that specific owner.

Provided that the waiver is considered a contract in trade or commerce there is likelihood that the waiver jurisdiction clause is considered to be in a form which accords with usage in trade or commerce of the maritime security branch. This can be concluded since GUARDCON is a standard contract, and also the only standard contract, in the sector. The annexes are available online to each and everyone and furthermore it is common practice to have a jurisdiction clause inserted in the waiver since the GUARDCON waiver contains such a clause and GUARDCON is the only contract available and widely used. As to the issue of what a person ought to have known was usage in a particular business it is submitted that this concept is unclear and can be interpreted differently under different national laws. The court has touched upon these issues when mentioning language as a factor of relevance.

4.2 Substantive validity

No EU-principle concerning substantive validity of contracts exists. The courts must apply national law when deciding substantive validity issues. There are divergent practices and Norwegian court, in the lower instance, has in one case decided that the law applicable when deciding if a person legal competence to bind the employee was the law of the court to which the claim was brought, i.e. Norwegian law. However, the court secured their take on the matter with the argument that the chosen law in the contract was also Norwegian law. It is not possible to draw conclusions from this. The introduction of the recast to the Brussel I Regulation does not change the situation for Norway since the autonomous interpretation does not include future instruments.

A civil law jurisdiction such as Norway deciding upon substantial validity of a jurisdiction clause may apply section 36 of the Contracts Act. Consent under national legal systems are imbedded in principles and a thorough system of rules where fulfilment of a formal requirement is a factor but not conclusive to the outcome of assessing validity. Under the Lugano Convention the purpose of foreseeability in jurisdictional matters are at the heart of the matter. The absence of rules on substantive validity in the Lugano Convention and EU-law causes difficulties since it is difficult to determine which rules causing a jurisdiction clause to be considered void or invalid are admissible.

Consent under English law the interpretation of what was consented to is solely based on the contextual meaning of the words presented therein. In Norwegian law this is not the case. Prior negotiations and subjective understanding of the contract may influence the interpretation of a contract. The rules for contract adjustment such as section 36 of the Contracts Act may allow adjustments without specific concern for consent. Several factors of the assessment pursuant to said section is related to concerns for consent, without necessarily fitting the description of the more extreme situations such as duress. English contract law
leans more towards the requirement that a more severe consensual issue exists in order to question consent when there is a signature on a written contract. The signature is proven consent to the contextual meaning of the words contained therein. If the written requirement should be interpreted in this way it is clear that English law of contract has played an important role when constructing the Lugano Convention.

Considering the posture of the CJEU that considerations of substantive law under chosen jurisdiction is irrelevant there are potentially aspects of Norwegian contract adjustment tools which are inadmissible when assessing substantive validity.

It is submitted that pursuant to section 36 there is a significant difference between the effects of the contract clause and the solution which would be considered a reasonable in the legal relationship between the parties when an average Norwegian, which is employed as an armed guard has to go to England to claim compensation for bodily injury. There exists an imbalance of power between parties the threshold for what is considered a significant difference is lowered. The reasons for this such as organisation of the work on board and other factors influencing the relationship were mentioned. There are several factors in the Norwegian employment definition which overlap with the legal relationship between the armed guards and the ship owner. Such factors influence the assessment of section 36. The ship owner has the overarching understanding and control over the organisation of work on board. The Master is highest in command and the guards cannot influence factors outside their own responsibilities if the Master refuses to take their advice. Taking into consideration the facts of a specific case and the legal implications influencing the organisation of the work on board great similarities with an employee contract between a ship owner and an armed guard can be detected, entirely depending on the actual scenario. It can be argued that the individual guards are in fact just a part of a greater context over which the ship owner has ultimate control.

Considerations concerning the legal right of employees of a ship owner not to embark on a voyage if the ship is not seaworthy adds to the unfairness since the individual guards are not only falling outside the circle of persons afforded such rights but also inclined to waive their right to claim damages and subduing their legal relationship to the ship owner to a foreign law and jurisdiction. Since everyone is in need of income, and thus employment, for their living a jurisdiction clause will not necessarily be consented to. The same cannot be said when trade unions have negotiated the contract. For the individual guards a practice, which has been decided by a club representing ship owners, and then subject to subsequent commenting by a few PMSCs will not necessarily align with the principle of trade union negotiations.

Arguably the guards should primarily take their complaints to their employee. In the scenario presented the PMSC is based in Saudi. The PMSC may not necessarily based there due to actual connections to Saudi but rather of convenience. The employee cannot make use of the
protection rules in the Lugano II if wishing to pursue the employer since Saudi is not a Convention state. Furthermore in the scenario the employee is bankrupt. Subsequent events are of relevance in Norwegian contract law but may not be relevant pursuant to the Convention. The fact that a ship owner also has insight into the financial status of the PMSC can however be considered another factor which places the individual guard in an inferior position to the ship owner and further adds to the unfairness of being bound by a jurisdiction clause when the PMSC has committed fraud. The ship owner had the possibility to discover such circumstances, the individual guard is less likely to have access to such information. Content of the contract which are relevant under Norwegian contract law, such as the liability waiver for bodily injury or death and comparisons to employees in the same situation, would perhaps have to be disregarded. This pursuant to the stance of the CJEU concerning the matter.

The limit between formal validity and substantive validity appears somewhat fluent. Aspects of relevance to substantive validity appears to have some bearing to the CJEU assessments of formal validity. There is some leeway for national courts to assess jurisdiction clause formal validity in the light of national contract laws relating to consent. Taking into account the admissible factors above it is still not unlikely that Norwegian courts would find that consent would have to be declared in a clearer manner for the written requirement to be fulfilled, or that it could not be presumed pursuant to the trade usage prerequisite because it is not a usage of which individual guards ought to have been aware.

However, if the formal validity was clearly considered valid pursuant to the written requirement which would be the case if the signature was placed on the same page as the jurisdiction clause, it would be more difficult to question the jurisdiction clause.
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