

## **Piracy - FAQs**

### **1. Do clubs cover piracy?**

The usual liabilities insured by the clubs remain covered when arising out of incidents of piracy. These liabilities are potentially most likely to involve loss of life/personal injury/illness, trauma/stress treatment and counseling, crew substitution and repatriation, and crew/passenger loss of effects. Liabilities could also extend to pollution, possible wreck removal, and potentially cargo liabilities/GA (General Average) in the case of a shipowners contributory fault or negligence. In relation to strict liability claims under International Conventions, the “intentional act” defence may provide some protection where/if applicable.

Such liabilities are however excluded from cover if caused by the use/engagement of certain “weapons of war” specifically named in the club rules or “other similar weapons of war” to those specifically named. Also, where primary War Risk P & I underwriters include piracy as a specific named peril, there may be overlap between P & I liabilities arising from piracy covered by the War Risk P&I underwriters and those covered by the Group Clubs.

### **2. What does “similar weapons of war” mean?**

There is no definition in the Pooling Agreement or in club rules but the wording used in the war risks exclusion “or other similar weapons of war” indicates that such other weapons should be of a similar nature to those previously identified. The specifically identified weapons of war are mines, torpedoes, bombs, rockets, shells and explosives and show an intention that something more than guns/rifles/conventional ammunition would be needed to trigger the operation of the exclusion.

The arms typically used by pirates to date (hand guns, rifles, AK47s, and RPGs) have generally been treated by Group Clubs as not triggering the exclusion. However, the increased use of armed guards on ships could result in pirates resorting to heavier weapons of a type that triggers the exclusion. In this event, the liabilities will usually be covered by the owner’s War Risks P&I policy.

### 3. How does piracy differ from terrorism?

- **Definitions of Piracy**

**(i) UNCLOS Article 101: Definition**

In the **United Nations Convention on the Law of the Sea (UNCLOS)** of 1982, "maritime piracy" consists of:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

**(ii) The International Maritime Bureau (IMB) defines piracy as:**

“the act of boarding any vessel with an intent to commit theft or any other crime, and with an intent or capacity to use force in furtherance of that act”.

**(iii) Republic of Bolivia v Indemnity Mutual Mar Ass Co Ltd (1909)**

As defined in *Republic of Bolivia v Indemnity Mutual Mar Ass Co Ltd (1909)*, a pirate is “a man who is plundering indiscriminately for his own ends, and not a man who is simply operating against the property of a particular state for a public end, the end of establishing a government, although that act may be illegal and even criminal, and although he may not be acting on behalf of a society which is politically organised.”

**(iv) Athens Maritime Enterprises Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd [1983] - *The Andreas Lemos***

In public international law, piracy consists of acts of violence done on the high seas without the recognised authority and outside the jurisdiction of any State. In the context of an insurance policy, piracy is not limited to acts outside territorial waters.

(v) **The IG Pooling Agreement** contains no definition or exclusion of piracy. Club rules follow the Pooling Agreement.

- **Definition of Terrorism**

There are various definitions of terrorism which include violence or the threat of violence, bombing, kidnapping and assassination carried out for political purposes.

The key distinctions between terrorism and piracy appear to be the differing motivations and objectives, in the former the political motivation and intention to cause death/injury/damage and in the latter the forcible seizure of property/persons to secure private/personal financial gain.

#### **4. Why does the difference matter?**

For the purposes of club coverage, the distinction is fundamental since P&I liabilities arising from acts of piracy are not an excluded risk whereas those arising from terrorism are an excluded risk (and would fall under war risk cover).

#### **5. What do hull underwriters cover and what do war risk underwriters cover?**

Depending on shipowners' particular insurance arrangements, hull and machinery underwriters and war risk underwriters will between them provide property cover (H&M/GA/Salvage etc.) and war risk P&I cover. If a Piracy incident triggers the club war exclusion (by virtue of the weapons of war provision), the consequent liabilities are likely to be covered by war risk underwriters. Also, as stated in FAQ 1 above, some primary P & I War Risk underwriters also cover piracy as a specific named peril.

#### **6. Should shipowners carry guards?**

There is no cover restriction or prohibition per se on the deployment of convoy escort protection or on-board security personnel and appropriately trained and competent personnel may well assist in enhancing on board security procedures and response.

In each case, it is an operational decision for shipowners, which should be based on specific voyage risk assessment, whether to carry guards, unarmed or armed. If on-board security is deployed, proper care and diligence should be exercised in relation to the selection of the appointed security company.

There are some private and State sponsored initiatives to develop systems for accreditation of private security providers which initiatives are being monitored and, to the extent appropriate, supported by the industry, including the Group. However, as far as the Group is aware, no such initiative is yet sufficiently developed for accreditation to be of much help to shipowners in the task of choosing competent, safe and professional security providers.

The deployment of armed or unarmed security should not be a substitute for, but in appropriate cases, a supplement to effective compliance with the latest version of the joint industry Best Management Practices (BMPs).

A key part of compliance with the BMPs is the liaison with naval forces, who can provide valuable intelligence and in some cases physical help to ships whose owners have followed the BMP procedures to make contact with MSCHOA (Maritime Security Centre Horn of Africa) and with UKMTO (UK Maritime Trade Office Dubai) before entering the High Risk Area. Contact details are easy to find in the BMPs and where armed guards are to be carried shipowners should make this known to MSCHOA.

## **7. Should guards be armed?**

It remains the firm view of states and industry associations that crew should not be armed. However, the previous strong opposition of industry associations to the use of armed guards has softened in the light of increasing levels of piracy activity in areas distant from naval protection and against a background of increasing aggression against crews. There has been a shift from general opposition to more neutrality, and in high risk cases, positive support for the deployment of armed personnel.

The underlying reasons against arming security personnel remain the risks inherent in use of arms by untrained/improperly trained persons, the enhanced risk of loss of life/injury through armed engagement, and the risk of encouraging the escalation of armed engagement and the use of more potent and warlike weaponry.

Flag State and Port State restrictions, and licensing requirements or prohibitions on placing and transporting security personnel and arms on board vessels, must also be carefully considered in any decision relating to the deployment of armed personnel on board vessels. The Group is advised that the International Chamber of Shipping (ICS) is maintaining a table of “Flag State Rules and Requirements on arms and private armed guards on board vessels” which may be considered helpful in this regard.

Where armed guards are used, if there is a choice between Vessel Protection Detachments (VPDs) made up of serving members of a military force, or privately contracted armed security personnel (PCASPs), the former should be preferred other things being equal.

A thorough voyage risk assessment should be carried out in deciding whether to deploy armed security personnel on board. In the event that the decision is to deploy armed security personnel, shipowners should have regard to the IMO's "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", which was based upon industry guidelines and was issued by IMO as Circular 1405 on 23 May 2011.

#### **8. Is cover prejudiced by the use of guards armed or otherwise?**

The extent of any prejudice to cover is likely to be dependent on loss/causation on a case-by-case basis. It is unlikely that cover would be prejudiced by the use/actions of unarmed guards, but intervention by armed guards could result in prejudice to cover if their use is in breach of Flag State, Port State or other applicable legal prohibition.

Shipowners should also ensure that the embarkation of additional security personnel does not place them in breach of SOLAS safety equipment and certificate requirements.

#### **9. Are there any contractual/insurance issues with the use of security companies?**

There are a variety of different forms of contractual arrangements in use by on-board security providers and by states which may provide naval or military personnel on board. These arrangements may contain assumptions of responsibility to indemnify/hold harmless in respect of consequential losses and damages. The consequential liabilities assumed by shipowners may not be fully covered by their clubs and may be excluded if they would not have arisen but for the terms agreed where these are not permissible in accordance with the principles in the Pooling Agreement relating to contracts and indemnities. As a minimum there would be an expectation that the terms would contain reciprocal indemnities (and if limitation amounts are included, reciprocal limitation amounts) for liabilities arising from negligence or would be no less favourable to the shipowner than knock for knock. Contracts should also require the security provider to have public and employers liability insurance cover for itself and its personnel/subcontracted personnel.

Another potentially important contractual issue is the treatment of the Master's responsibility and authority in relation to the use of arms. Contracts should recognize the Master's responsibility for the overall safety of the vessel, but shipowners are strongly advised against contracting on terms where every decision as to the use of live rounds is referred to the Master whose experience and training may not have prepared him for combat decisions. These issues can be addressed by agreed Rules for the Use of Force, setting out in advance a framework for actions that may be necessary when no consultation is possible. A number of Flag States have prepared detailed guidance on what such rules might reasonably include.

Shipowners are encouraged to consult fully with their clubs before entering into such contracts, so that contractual shortcomings can be remedied. Since in the event that the “weapons of war” exclusion is triggered there would be no P&I cover, shipowners should also clarify the position of their war risk underwriters in relation to the terms of security company contracts which they may be considering entering into.

## **10. Where can shipowners find best guidance to avoid being attacked?**

Clubs have made available to shipowners the BMPs developed by the industry and first published in February 2009 (now in version 4) in response to the Somalia/Gulf of Aden situation. The BMPs document is kept under continuing review and the newly released Version 4 reflects practical lessons learned by the industry and by the military as to effective methods to deter and defend against piracy. Industry associations such as OCIMF, ICS, BIMCO and Intertanko have also published general piracy guidance for shipowners which is available. Club websites as well as the Group’s website also provide useful information/updates/links.

Other organizations which are providing invaluable assistance and information specific to the Somalia/Gulf of Aden situation are the MSCHOA, UKMTO, the EU Naval Task Force (EUNAVFOR) and the International Maritime Bureau (IMB). Their contact details appear in the BMPs.

The new, improved NATO Shipping Centre (NSC) website is now live providing more comprehensive and timely information about pirate activity around the Horn of Africa for the shipping community.

Shipowners with vessels transiting the High Risk Area (as defined in the BMPs) are strongly encouraged to comply fully with all the recommended BMPs planning, voyage and reporting procedures. Shipowners should pay particular attention to the defined limits of the High Risk Area which has greatly expanded since the problem first began.

EUNAVFOR has reported that in many cases shipowners were only partially complying with the recommended procedures, resulting in successful attacks which could otherwise have been avoided. The critical importance of fully complying with the BMPs, the implementation of which has been shown to be effective in protecting vessels and crews, cannot be understated.

For vessels which have security personnel on board, unarmed or armed, confirmation of this should be provided with the usual reporting information prescribed under the BMPs to UKMTO and to MSCHOA.

In the case of a successful hijack, a causative failure to comply with the BMPs could prejudice a shipowner’s right of recovery particularly in cases where cover is provided on a discretionary basis. Cover could also be potentially affected by failure to comply with

the BMPs in the case of a small minority of Flag States that have made compliance with the BMPs mandatory.

#### **11. Who do shipowners/Masters turn to help if their vessel is attacked?**

Shipowners/Masters should follow the procedures set out in the BMPs and should coordinate with UKMTO, MSCHOA and IMB as directed therein. They should also follow any designated Flag State procedures. An up-to-date list of contacts and company/ship specific procedures should be readily available, particularly on the Bridge, radio station, command centre and/or citadel as appropriate.

#### **12. What types of help do Shipowners/Masters need?**

Shipowners/Masters should be provided with, and ensure compliance with, the BMPs in advance of entering into and during passage through piracy risk areas.

If a vessel is attacked the Master and the crew should follow the recommended notification and response procedures. Prompt notification will assist in early coordination of naval support to a vessel under attack.

#### **13. If shipowners have to pay a ransom, who can they ask to contribute?**

Although details are kept confidential, currently it appears that ransom payments are being funded by K&R (Kidnap and Ransom) insurers where engaged and by war or property insurers (H&M/Cargo).

#### **14. Are ransom payments covered by the clubs?**

As stated in FAQ 1 above, the usual P&I liabilities arising out of incidents of piracy will, provided the “weapons of war” exclusion is not triggered, be covered by clubs. Ransom is not a risk which is expressly covered and one club has an express exclusion of liability for ransom payments.

It is possible that ransom might be recoverable from clubs at the discretion of boards under sue and labour or omnibus provisions if this is not recoverable under any other insurance and cannot be recovered from other sources.

**15. If there is an attack, can shipowners declare GA?**

Shipowners can declare GA in response to the common peril to ship and cargo interests for the purposes of recovering contributions towards expenditure incurred. It has been traditionally accepted adjusting practice and upheld by the English courts that a ransom payment made to obtain the release of a hijacked vessel/cargo is a GA expense for which shipowners are entitled to recover contributions.

Contributors in GA will include those with a financial interest in the adventure, typically shipowners, cargo owners and potentially charterers. P&I insurers may become liable to cover cargo's contribution in GA where this is irrecoverable due to the shipowners' breach of the contract of carriage.

**16. Are shipowners obliged under their charterparty to transit the Gulf of Aden or can they refuse the charterer's orders to do so?**

Shipowners' rights and obligations in relation to charterers' orders to transit the Gulf of Aden/HoA region will depend upon the nature of the Charter party (voyage charter or timecharter) and the relevant charterparty terms. Intertanko and BIMCO have developed piracy clause wordings which seek to preserve owner's rights to either refuse orders to proceed to piracy risk areas or to seek alternative orders in appropriate cases. In each case it will be necessary to examine the relevant contract(s) to determine the extent of the shipowners' rights and obligations and to negotiate an agreed allocation of risk between shipowners and charterers.

**17. What if the charterer pays the war risks AP?**

Most of the piracy clauses expressly stipulate for charterers to pay additional insurances (amongst other expenses) resulting from charterers directing the vessel to proceed to an area of piracy risk, though this obligation to pay for additional insurance does not derogate from contractual rights. The shipowner may have to refuse orders or seek alternative orders. Issues may arise regarding the recoverability of additional insurance (and other) costs if the vessel does not proceed into a piracy risk area.