

► Piracy FAQs - Updated

Circular 13 – 2013
13th September 2013
To All Members,

Further to recent discussions the International Group clubs have updated their guidance to Members on the issue of piracy. The latest advice is presented below with some additional comments from this Club. If Members do have any questions on the subject which are not covered by the FAQs, please let us know and we will be able to advise further.

1. Do clubs cover piracy?

International Group (IG) club rules contain no definition of (or exclusion for) piracy. The third-party 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 counselling, crew substitution and repatriation, and crew/passenger loss of effects. Liabilities could also extend to pollution, wreck removal, and potentially cargo liabilities/General Average (GA) in the case of a vessel owner's 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 Association Rules or 'other similar weapons of war' to those specifically named. Also, while P&I liabilities arising from acts of piracy are not an excluded risk, those arising from terrorism are excluded (and would fall under the vessel owner's war risk cover). Furthermore, 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 IG clubs.

These FAQs are focused on piracy in the High Risk Area in the Indian Ocean. However, the following general principles apply equally in the Gulf of Guinea:

- Conducting a voyage-specific risk assessment
- Exercising due diligence in the selection of a private maritime security company (PMSC) (if their engagement is deemed necessary, based on the risk assessment) and
- Entering into contractual arrangements for the performance of security functions by a PMSC/private contracted armed security personnel (PCASP) that do not prejudice Association cover.

The clubs also recommend that vessel owners take all lawful, prudent and appropriate measures to harden ships against attack as outlined in the most recent version of the Best Management Practices (BMP) (now in version 4 published in August 2011).

2. What does 'similar weapons of war' mean?

'Weapons of war' are identified as being mines, torpedoes, bombs, rockets, shells and explosives. While Association Rules have no definition of 'similar weapons of war', the specifically identified weapons of war indicate 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) are treated by IG clubs as not triggering the exclusion. However, the increased use of PMSCs on ships could result in pirates resorting to heavier weapons of a type that triggers the exclusion. In this event, the liabilities would usually be covered by the shipowner's war risk P&I policy.

3. What do hull underwriters cover and what do war risk underwriters cover?

Depending on the shipowner's particular insurance arrangements, hull and machinery (H&M) 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 Association 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 cover piracy as a specific named peril.

4. Should vessel owners carry guards?

There is no cover restriction or prohibition per se on the engagement of PMSCs or the use of convoy escort protection, and appropriately trained and competent PCASP may well assist in enhancing on board security procedures and the response to a piracy incident.

In each case, the decision as to whether or not to engage a PMSC is an operational one for vessel owners, which should be based on a voyage-specific risk assessment.

The IG clubs expect their Members to exercise due diligence in the selection of a PMSC, including following the latest version of 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 the IMO as Circular 1405 on 23rd May 2011. Circular 1405 was subsequently revised in September 2011 and May 2012.

The IG clubs also recommend that vessel owners obtain positive confirmation of the steps being taken by the PMSC to secure compliance with the new International Standard for PMSCs, ISO/PAS 28007 and that the PMSC complies with the IMO's 'Interim Guidance to Private Maritime Security Companies providing Privately Contracted Armed Security Personnel on board ships in the High Risk Area'.

It is expected that PMSCs will be able to seek to be accredited against ISO/PAS 28007 in late 2013, following a pilot scheme that is currently under space way.

There are some private and State sponsored initiatives to develop systems for accreditation of PMSCs which initiatives are being monitored and, to the extent appropriate, supported by the industry, including the IG clubs. However, as far as the IG clubs are aware, no such initiative is yet sufficiently developed so as to be of much help to vessel owners in choosing a competent, safe and professional PMSC. Development of industry standards will assist but not replace a vessel owner's obligation to conduct appropriate due diligence in respect of individual PMSCs.

Consideration should also be given to the appropriate number of guards deployed. BIMCO GUARDCON provides for a minimum team of four persons. This is thought to be a good starting point for most vessels but the minimum number is best determined through a voyage-specific risk assessment that takes into account the relevant characteristics of the vessel (speed, freeboard, hull length, any areas vulnerable to boarding, etc.) as well as local factors in the High Risk Area to be transited (history of recent attacks, reports of suspicious vessels, anticipated weather conditions, etc.) Whilst a failure to use a prescribed or recommended minimum number of guards will not automatically result in any restriction on cover, this could, depending upon specific circumstances and causation, potentially impact on cover.

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 BMP.

A key part of compliance with BMP 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 the Maritime Security Centre Horn of Africa (MSCHOA) and with the UK Maritime Trade Office Dubai (UKMTO) before entering the High Risk Area. Contact details are set out in BMP and where PCASP are to be carried, vessel owners should make this known to MSCHOA and UKMTO.

5. Should guards be armed?

The previous strong opposition of industry associations to guards being armed 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 neutrality, and in high risk cases, positive support for the deployment of PCASP.

The underlying reasons against arming security personnel remain the risks inherent in the 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 and Port State restrictions and licensing requirements or prohibitions on carrying PCASP (and their weapons) on board vessels must also be carefully considered in any decision relating to the deployment of PCASP. It is important to ensure that the PMSC is able to demonstrate that its weapons have been purchased, stored, exported and transferred in accordance with all applicable laws, including by providing appropriate supporting documentation, clearly identifying the relevant issuing authority. The IG is advised that the International Chamber of Shipping (ICS) is maintaining a comparison of Flag State laws applicable to PMSCs and PCASP which may be considered helpful in this regard.

Floating armouries are frequently used by armed guards, but the legality of their use is the subject of debate. Vessel owners should be aware that the use of illegally sourced weapons (whether hired-in or owned) may potentially give rise to uninsured civil and criminal liabilities. Vessel owners can mitigate this risk by obtaining evidence from their PMSCs that they do not use unlicensed floating armouries.

As of August 2013, the UK government has announced that it will make available licences for floating armouries on a case by case basis, as appropriate.

Where armed guards are used, if there is a choice between vessel protection detachments made up of serving members of a military force, or PCASP, the former should be preferred, all things being equal.

A thorough voyage-specific risk assessment should be carried out in deciding whether to deploy PCASP. In the event that the decision is to deploy PCASP, vessel owners should follow 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'.

It remains the firm view of the IG clubs, States and industry associations that crew should not be armed.

6. Is cover prejudiced by the use of unarmed/armed guards?

Subject to the guidance contained in these FAQs, the use of guards - armed or unarmed - will not of itself prejudice a shipowner's P&I cover.

Vessel owners should, however, ensure that the embarkation of additional personnel does not place them in breach of SOLAS safety equipment and certificate requirements.

7. Are there any contractual issues with the use of security companies?

There is a variety of different contractual arrangements in use by PMSCs/PCASP and by States which may provide naval or military personnel. These arrangements may contain assumptions of responsibility to indemnify/hold harmless in respect of loss and damage. Liabilities assumed by vessel owners may not be covered by their clubs if they would not have arisen but for the terms agreed and the club had not approved those terms in advance.

The IG clubs strongly recommend the use of BIMCO GUARDCON. Its use has considerably improved the terms upon which providers of maritime security have been engaged and it has simplified the process of approval of contracts by vessel owners and their clubs. It has also ensured minimum levels of insurance cover for providers of maritime security.

As a minimum, the IG clubs' expectation is that contractual terms for the employment of security guards on vessels be no less favourable to the vessel owner than knock for knock and contain reciprocal indemnities for assumed liabilities. If limitation amounts are included, there should be reciprocal limits of liability. The contractual arrangements, liabilities and indemnities outlined in BIMCO GUARDCON Part II, Section 7, Clause 15 are considered acceptable by the IG clubs and fulfill these minimum requirements provided they are unamended.

Another important contractual issue is the treatment of the Master's responsibility and authority in relation to the use of arms. Contracts should recognise the Master's responsibility for the overall safety of the vessel, but vessel owners should not voluntarily contract on terms where decisions as to the discharge of live rounds are 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 to be taken in the event of a piracy incident. A number

of Flag States have prepared detailed guidance in relation to what such rules might reasonably include and guidance can also be downloaded from BIMCO's website.

If BIMCO GUARDCON is to be used in the context of the Gulf of Guinea (where the deployment of PCASP is prohibited in the territorial waters of Nigeria, Togo and Benin), armed and unarmed guards provided by the local military forces should be included in the 'Contractors' Group' for the purposes of Part II, Section 7, Clause 15 (Liabilities and Indemnities) and the PMSC's insurance should cover not only its own personnel but also the guards provided by the local military forces. Such cover is currently available in the market.

The IG clubs are currently working with BIMCO to draft a series of recommended amendments to BIMCO GUARDCON to facilitate its use in the context of the Gulf of Guinea. The recommended amendments are expected to reflect the differences between East and West African piracy but not fundamentally affect the liability and insurance provisions that lie at the heart of BIMCO GUARDCON.

Vessel owners are encouraged to consult fully with their clubs before entering into contracts with PMSCs, so that any contractual shortcomings which may prejudice P&I cover can be remedied.

Given the risk of the 'weapons of war' exclusion being triggered (in which case there would then be no primary P&I cover), vessel owners should also consult their war risk underwriters on the proposed terms of contracts with PMSCs.

8. Should PMSCs have insurance?

It is essential that a PMSC has in place insurance that complies with the requirements of BIMCO GUARDCON Part II, Section 6, Clause 12, which includes contractual indemnity cover to support its obligations and possible exposure, as well as public and employers' liability insurance cover for itself and its personnel/sub contracted personnel.

The above also applies to the situation in the Gulf of Guinea, where a PMSC's insurance should cover not only its own personnel but also armed and unarmed guards provided by the local military forces. Such cover is currently available in the market.

9. Where can vessel owners find best guidance to avoid being attacked?

Clubs have made available to vessel owners the BMP developed by the industry and first published in February 2009 (now in version 4, published in August 2011) in response to the Somalia/Gulf of Aden situation. The BMP are kept under review and version 4 reflects practical lessons learned by the industry and by the military as to effective methods to deter and defend against piracy. Club websites as well as the IG's website also provide useful information/updates/links.

Other organisations which provide 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 BMP.

The NATO Shipping Centre (NSC) website provides comprehensive and timely information about pirate activity around the Horn of Africa for the shipping community.

Vessel owners with vessels transiting the High Risk Area (as defined in BMP) are strongly encouraged to comply fully with all the recommended BMP planning, voyage and reporting procedures. Vessel owners 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 vessel owners 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 BMP, 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 BMP to UKMTO and to MSCHOA.

In the case of a successful hijack, a causative failure to comply with BMP could prejudice a vessel owner's right of recovery, particularly in cases where cover is provided on a discretionary basis. Cover could also potentially be affected by a failure to comply with BMP if and to the extent that such failure relates to any provision that has been made mandatory by a Flag State.

West Africa

In response to the growing number of piracy attacks in the Gulf of Guinea, the industry developed region-specific guidelines to vessel owners, operators and Masters which complement BMP and are supported by the IG clubs .

10. Who do vessel owners/Masters turn to for guidance if their vessel is attacked?

Vessel owners/Masters should follow the procedures set out in BMP and coordinate with UKMTO, MSCHOA and the IMB, as requested by those bodies. 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.

Vessel owners/Masters operating in the Gulf of Guinea region should follow the procedures set out in the industry developed region-specific Interim Guidelines for Owners, Operators and Masters to be read in conjunction with BMP.

11. If vessel owners 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 kidnap and ransom insurers (where this cover is in place) and by war or property insurers (H&M/cargo).

12. Are ransom payments covered by the clubs?

As stated in FAQ 1 above, the third-party P&I liabilities arising out of incidents of piracy will, provided the 'weapons of war' or terrorism exclusions are not triggered, be covered by IG clubs. Ransom is not a risk which is expressly covered by any IG Club and the Shipowners' Club Rules contain an express exclusion in respect of ransom demands. In IG clubs where there is no such express exclusion it is possible that ransom payments might be recoverable at the discretion of individual club boards under sue and labour or omnibus provisions so long as the costs are not covered elsewhere or by insurance.

13. If there is an attack, can vessel owners declare GA?

Vessel owners can declare GA in response to the common peril to ship and cargo interests for the purpose of recovering contributions towards expenditure incurred. It has been traditionally accepted adjusting practice 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 vessel owners are entitled to recover contributions.

Contributors in GA will include those with a financial interest in the voyage, typically the vessel owner, cargo owners and potentially charterers. P&I insurers may become liable to cover cargo's contribution in GA where this is irrecoverable due to a vessel owner's breach of the contract of carriage, provided the breach does not also affect club cover.

14. Are vessel owners obliged under their charterparty to transit the Gulf of Aden or can they refuse the charterer's orders to do so?

Vessel owners' rights and obligations in relation to charterers' orders to transit high risk piracy areas including the Gulf of Aden/Horn of Africa region will depend upon the nature of the charterparty (voyage charter or time charter) and the relevant charterparty terms. Intertanko and BIMCO have developed piracy clause wordings which seek to preserve a vessel owner's right 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 charterparty and bill(s) of lading to determine the parties' rights and obligations.

15. What if the charterer pays the war risks additional premium?

Most charterparty piracy clauses expressly provide for charterers to pay additional insurances (amongst other expenses) resulting from charterers directing the vessel to proceed to an area of piracy risk, though the obligation to pay for additional insurance does not derogate from contractual rights. The vessel owner may still have the right 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.

16. What if the charterer provides the PMSC?

Vessel owners remain legally responsible for armed guards on their vessel even if provided by the charterer. Vessel owners are advised to avoid contracting with charterers on terms which would compromise their ability to exercise due diligence over the selection of PMSCs.

BIMCO state that 'GUARDCON is designed to be a contract between the owners of the vessel and the security contractors and that the liability, insurance and other important provisions are constructed on this basis. While we acknowledge that in some cases it may be the charterers who arrange and pay for the security guards, it is essential that the owners are identified as the contracting party. If the contract is entered into by charterers or ship managers then the names and details of these parties should be added to the owner's box in Part I along with the vessel's owner's details or the contract should be signed 'for and on behalf of owners' '. The IG clubs support this position.