

MEMBER ALERT



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PIRACY – FREQUENTLY ASKED QUESTIONS (FAQs)

The attached document replicates a paper very recently issued by the International Group of P&I Clubs – and which has also been posted on the Group’s website – dealing with frequently asked questions concerning piracy.

Bearing in mind the current importance of this subject, and the wide discussion it is generating throughout the shipping and insurance industries, it was felt that Members would appreciate having a document of this kind to provide answers to such frequently asked questions.

It is therefore hoped that the attached document is illuminating. If there is any further information which individual Members may require, the Managers will, of course, be pleased to reply to them.

PIRACY – FREQUENTLY ASKED QUESTIONS (FAQs)

1. 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 recognized 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.

2. 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, crew substitution and repatriation, and crew/passenger loss of effects.

Liabilities could also extend to pollution, possible wreck removal, and potentially cargo liabilities/general average (GA) in the case of a shipowners contributory fault or negligence. In relation to strict liability claims under International Conventions, the “intentional act” defense may provide some protection where/if applicable.

Such liabilities may however become excluded from cover if arising from a piracy incident which involves the use/engagement of “weapons of war”. Also, some primary P & I War Risk underwriters include piracy as a specific named peril in which case P & I liabilities arising are covered by them and not by the clubs.

3. What does “similar weapons of war” mean?

There is no definition in the Pooling Agreement or in club rules but the wording used “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.

4. How does piracy differ from 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.

5. 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 terrorism is an excluded risk (and would fall under war risk cover).

6. What do hull underwriters cover and what do war risks 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 2 above, some primary P & I War Risk underwriters also cover piracy as a specific named peril.

7. Should shipowners carry guards?

There is no cover restriction or prohibition per se on the deployment of on-board security personnel and appropriately trained and competent personnel may well assist in enhancing on board security procedures and response. Proper care and diligence should be exercised in relation to the selection of the appointed security company.

8. Should guards be armed?

The current view of most states and industry including the Group clubs is that crew/on-board security personnel should not be armed. The underlying reasons include 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, licensing requirements or prohibitions on arms on board vessels also need to be considered (the prohibiting and licensing provisions of the UK Firearms legislation for example are extended to UK Flag vessels).

There is however increasing pressure from some states to positively support the use of armed on board security. The most recent indications from the US are that it is heading in this direction in relation to US flag vessels.

9. 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 certificate requirements.

10. 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. There may also be obligations to provide insurance cover. 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 governing 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 for liabilities arising from negligence or would be no less favorable to the shipowner than knock for knock.

In the event that the “weapons of war” exclusion is triggered, there would be no P&I cover and shipowners would need to clarify the position of their war risks underwriters in relation to the terms of the security company contract.

Shipowners are encouraged to consult fully with their clubs/war risks insurers before entering into such arrangements so that they are aware of any potential gaps in or restrictions on cover.

11. Where can shipowners find best guidance to avoid being attacked?

Clubs have made available to shipowners the Best Management Practices (BMP) developed by industry (February 2009) in response to the Somalia/Gulf of Aden situation which are being kept under continuing review. Industry associations such as OCIMF, ICS, BIMCO and Intertanko have also published general piracy guidance for shipowners which is available. Club web sites 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 Maritime Security Centre Horn of Africa (MSCHOA), the UK Maritime Trade Operations centre in Dubai (UKMTO), the EU Naval Task Force (EUNAVFOR) and the International Maritime Bureau. Their contact details appear in the BMP.

Shipowners with vessels transiting the Somalia/Gulf of Aden region are strongly encouraged to follow the recommended BMP planning, voyage and reporting procedures which have been shown to be effective. In particular, it is essential to ensure that the recommended two stage registration process described in the BMP is followed.

12. Who do shipowners/Masters turn to help if their vessel is attacked?

Shipowners should follow the procedures set out in the BMP and should coordinate with UKMTO, MSCHOA and IMB as directed therein. They should also follow any designated Flag State procedures.

13. What types of help do shipowners/Masters need?

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

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

14. 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).

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 general average 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 ransom payments covered by the clubs?

As stated in paragraph 2 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 labor or omnibus provisions if this is not recoverable under any other insurance and cannot be recovered from other sources.

17. 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 charterparty (voyage charter or timecharter) and the relevant charterparty terms. There are recently developed piracy clauses in use 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.

18. What if the charterer pays the war risks additional premium (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.