Revised Piracy - FAQs

1. Do clubs cover risks arising from acts of piracy and armed robbery at sea?

International Group (IG) club rules contain no definition of, or exclusions for, piracy or armed robbery at sea. The usual third-party liabilities insured by the clubs therefore remain covered when arising out of such incidents.

These liabilities may 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, wreck removal, and potentially cargo liabilities/General Average (GA) in the case of a shipowner'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 club 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 shipowner'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.

While these FAQs are focused on piracy in the High-Risk Area in the Indian Ocean, they also apply to armed robbery at sea in the Gulf of Guinea and other similarly affected areas.

The publication of industry guidance in 2018 included, "Global Counter Piracy Guidance for Companies, Masters and Seafarers", revisions to the "Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea (BMP5)", and "Guidelines for Owners, Operators and Masters for protection against piracy and armed robbery in the Gulf of Guinea region", provide comprehensive risk assessment and mitigation guidance to companies and seafarers. These documents can be accessed by clicking here and the shipping industry's dedicated Maritime Global Security Website https://www.maritimeglobalsecurity.org

The clubs recommend that shipowners take all lawful, prudent and appropriate measures to harden ships against attack as outlined in these most recent versions of industry approved guidance documents.

However, the following general principles apply equally in all regions where there is a risk of piracy or armed robbery at sea:

- Conduct a voyage-specific risk assessment in accordance with company security management protocols and/or the industry guidance;
- Exercise due diligence in the selection of a private maritime security company (PMSC) (if their engagement is deemed necessary, based on the risk assessment and geographical region); and

- Enter into contractual arrangements for the performance of security functions by a PMSC/privately contracted armed security personnel (PCASP) that do not prejudice club cover.

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

"Weapons of war" are identified as being mines, torpedoes, bombs, rockets, shells and explosives. While club 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 attackers engaged in piracy and armed robbery include hand guns, rifles automatic weapons and RPGs and these weapons are treated by IG clubs as not triggering the exclusion. However, the increased use of PMSCs on ships could result in attackers resorting to 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 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 cover piracy as a specific named peril.

4. Should shipowners carry guards on board?

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 to engage a PMSC is an operational one for shipowners, 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 23 May 2011. Circular 1405 was subsequently revised in September 2011 and May 2012.

The IG clubs also recommend that shipowners obtain positive confirmation of the steps being taken by the PMSC to secure compliance with the International Standard for PMSCs, ISO/PAS 28007[1] 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".

[1] ISO/PAS 28007 can be accessed at the following link http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=42146

Consideration should also be given to the appropriate number of guards deployed. BIMCO GUARDCON provides for a minimum team of four persons, but the minimum number is best determined by CSOs and through voyage-specific threat and risk assessments that take into consideration the relevant characteristics of the vessel (speed, freeboard, hull length, any areas vulnerable to boarding, etc.) as well as local factors in the sea area/s to be transited or visited. Whilst a failure to use a prescribed or recommended minimum number of guards will not automatically prejudice cover, this could, however, depending upon specific circumstances and causation, result in cover restrictions or prejudice cover altogether.

The deployment of armed or unarmed security personnel should not be a substitute for, but in appropriate cases, a supplement to effective compliance with the latest versions of industry maritime security guidance in FAQ1.

A key part of applying such guidance includes effective and timely liaison with naval forces, who can provide valuable intelligence information and, in some cases, physical help to ships whose owners have followed the guidance and reporting requirements by notifying e.g. Maritime Security Centre Horn of Africa (MSCHOA) and the UK Maritime Trade Office Dubai (UKMTO) before entering areas of known risk. Voyage reporting details can be accessed via the Global Counter Piracy Guidance, BMP5 and Gulf of Guinea guidance.

5. Should guards be armed?

The deployment of PCASP remains an option in the toolbox of mitigation measures that companies, and shipowners may use to mitigate attacks against ships in sea areas where there is a risk of piracy. The deployment of PCASP is an additional measure that may mitigate the risk of attackers boarding a ship.

Flag, coastal and port State regulations, 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 a PMSC can 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.

Shipowners 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. Shipowners can mitigate this risk by obtaining evidence from their PMSCs that they do not use unlicensed floating armouries.

Where armed guards are used, if there is a choice between vessel protection detachments comprising serving members of a State's military forces, or PCASP, the former should be preferred.

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.

Shipowners 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 are 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 shipowners 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

Since its inception, BIMCO GUARDCON has provided contractual certainty for shipowners and PMSCs/PCASP, and it continues to serve as the benchmark contract for shipowners and IG clubs.

As a minimum, all IG clubs will expect shipowners to contract for the employment of security guards on terms that are no less favourable to the shipowner 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 concerns the master's responsibility and authority in relation to the use of arms by a PCASP. Contracts should recognise the master's responsibility for the overall safety of the vessel under SOLAS and other applicable maritime Conventions, but shipowners should not voluntarily contract on terms where decisions on the discharge of live rounds are referred to the master. These issues concerning Rules for the Use of Force should be set out in advance of a voyage in a framework for actions to be taken in the event of a piracy attack.

Several Flag States have issued guidance on these matters. The rules and regulations of the Flag State should be carefully consulted to ensure the deployment of PCASP does not offend that State's law. Consideration should also be given to the applicable rules of the coastal State if PCASP are on board during transits of a coastal State's jurisdiction. 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), owners are encouraged to use "GUARDCON West Africa" which is a form of the GUARDCON contract specifically adapted for use in this region.

Shipowners 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, shipowners 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/subcontracted 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 shipowners find best guidance to avoid being attacked?

Clubs have made available to shipowners the latest industry maritime security guidance referred to in these FAQs.

Other organisations which provide invaluable assistance and information specific to the Gulf of Aden are the MSCHOA, UKMTO, the EU Naval Task Force (EUNAVFOR), and the International Maritime Bureau (IMB). Gulf of Guinea (MDAT GOG) provide assistance and information specific to the GOG region. Their contact details and reporting advice appear in the new and revised guidance documents.

Horn of Africa

The NATO Shipping Centre (NSC) website[2] provides 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 BMP5) are strongly encouraged to comply fully with all the recommended BMP planning, voyage and reporting procedures. Shipowners should pay particular attention to the latest iteration of maritime security charts which contain safety-critical information to assist bridge crews in the planning of safe passages through high risk areas.

The importance of fully applying the industry guidance, 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 to the relevant reporting authority e.g. UKMTO https://www.ukmto.org/indian-ocean/reporting-formats and MSCHOA https://on-shore.mschoa.org/

In the case of a successful attack and hijack, a causative failure to comply with BMP could prejudice a shipowner'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 apply protective measures 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 attacks in the Gulf of Guinea, the industry has revised the guidelines to shipowners, operators and masters which complement the Global Guidance and BMP5. The Maritime Domain Awareness Trade - Gulf of Guinea website provides further guidance and instructions on how to report https://gog-mdat.org/home

10 Who do shipowners/masters turn to for guidance if their vessel is attacked?

Shipowners/masters should follow the procedures set out in the relevant industry guidance and coordinate with the prescribed, relevant reporting authority e.g. UKMTO, MSCHOA, MDAT-GoG and the IMB, as requested by those bodies. They

[2] http://www.shipping.nato.int/Pages/default.aspx

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.

11 If shipowners pay a ransom for the release of a ship's captured crew, who can they ask to contribute?

Although details are kept confidential, ransom payments are likely to be 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 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 it is not recoverable under any other insurance and cannot be recovered from other sources.

13 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 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 shipowners are entitled to recover contributions.

Contributors in GA will include those with a financial interest in the voyage, typically the shipowner, 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 shipowner's breach of the contract of carriage, provided the breach does not also affect club cover.

14 Are shipowners obliged under their charterparty to transit high risk piracy areas or can they refuse the charterer's orders to do so?

Shipowners' 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 shipowner'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 shipowner 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?

Shipowners remain legally responsible for armed guards on their vessel even if provided by the charterer. Shipowners 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 "owners" box in Part I along with the vessel's owners' details or the contract should be signed "for and on behalf of owners"[3].

The International Group supports this position.

[3] See explanatory notes to GUARDCON at the following link https://www.bimco.org/Chartering/Documents/Security/~/media/Chartering/Document_Samples/Sundry_Other_Forms/Explanatory_Notes_GUARDCON.ashx