

PIRACY

Questions & Answers

Like all clubs and other insurance providers, Gard has received and continues to receive questions concerning piracy, principally off the coast of Somalia and in the Indian Ocean and the Gulf of Aden, but increasingly in relation to 'piracy' in the Gulf of Guinea and in South-East Asia, from clients and Members. While no two cases are identical and each case must be assessed on its own facts, we set out below some of most frequently asked questions and the answers we have given.

Q1: What is being done to reduce the risk of piracy in the Gulf of Aden and off the coast of Somalia?

A1 Two resolutions passed by the UN Security Council (Resolutions 1816 and 1838) empowered foreign naval and other military forces to suppress piracy in the Gulf of Aden, including within Somali territorial waters. Multi-national navy forces have been allocated to this task. An Internationally Recognised Transit Corridor (IRTC) was established in the Gulf of Aden. This area is patrolled by warships from the coalition of various countries and from other countries, all of whom have sent naval assets to the region. In addition, a number of states have offered the services on board merchant vessels of armed navy personnel. It should be noted that the contractual terms on which such offers have been made are often heavily weighted in favor of the state and against the shipowner. Such terms, principally those offered by the French navy, have been found not to meet the International Group's minimum contractual requirements (see also Q&A 4).

In January 2017, a decision was taken by the EU that the operations of its existing anti-piracy forces (i.e. EU NAVFOR and Operation Atalanta) will be reduced between January 2017 and December 2018, at which time the EU's NAVFOR operation will end. This is despite the EU's assessment (January 2017) that the risk of piracy in/around Somalia and/or the risk of attacks by unidentified parties off the coast of Yemen remains high. Discussions between industry and the EU are continuing. Industry is keen that as much as possible of the existing arrangements should remain in place.

A link to the EU Navfor website is shown below

<http://eunavfor.eu/>

Numerous private security companies have also offered their services to owners and operators. Gard will, upon request, review draft contracts with PCASP (privately contracted armed security personnel) to ensure they comply with any cover(s) afforded by Gard to a client or Member.

However, in spite of these measures, the risk of pirate attacks and hijackings is assessed to remain high, especially in the Indian Ocean. The pirates have shown themselves to be capable of adapting their operations in response to steps taken by naval forces and merchant vessels.

Additionally, the level and method of response to piracy incidents/attacks varies among the international forces.

The Norwegian Shipowners' Association recommends owners to notify the Norwegian Maritime Directorate and the UK Maritime Trade operations before passing through the Gulf of Aden.

Their contact details are:

Norwegian Maritime Directorate
Telephone: +47 52 74 5000
E-mail: security@sjofartsdir.no

UKMTO circulates a weekly update on piracy issues mainly for the Indian Ocean and Somalia regions. They can be contacted for such updates via:

Commander Peter Harriman Royal Navy, Officer-in-Charge,
UKMTO British Embassy Dubai, PO Box 65,
Mil Address – Naval Party 1023, BFPO 490 *
email: dubai-oic@ukmto.org, Office: +971(0)43094268
Mobile: +971(0)505545477, Fax: +971(0)43094254
ftn: 8485 4266.

The Maritime Security Centre, Horn of Africa (MSCHOA) provides valuable information and assistance, as well as being the appropriate registration/reporting location under the BMPs. Their website is

<http://www.mschoa.org/Pages/default.aspx>

NATO issues a Pirate Attack Group (PAG) map. This can be found at:

<http://www.shipping.nato.int/operations/OS/Pages/PAGmap.aspx>

The NATO Shipping Centre (based at Northwood, UK) is able to provide clients and Members with wide-ranging operational information. This information is updated regularly, in some cases, several times a day. Members and clients may contact the Shipping Centre directly for such information at:

Web: www.shipping.nato.int
E-mail: info@shipping.nato.int
Phone: +44 (0)1923 956574
Fax: +44 (0)1923 956575

Incidents of piracy should be reported to the International Maritime Bureau, Kuala Lumpur:
Telephone: +603 2031 0014
E-mail: imbkl@icc-ccs.org

Q2: Where can I find guidelines for owners, operators and Masters for protection against piracy and armed robbery in the Gulf of Guinea region?

A2: The Round Table of International Shipping Associations (BIMCO, ICS, INTERCARGO, INTERTANKO) developed a set of Interim Guidelines for

owners, operators and Masters for protection against piracy and armed robbery in the Gulf of Guinea region. These interim guidelines have been supported and endorsed by the NATO Shipping Centre. The Guidelines were last updated on 2/6/16 and can be found at:

http://www.imo.org/en/OurWork/Security/WestAfrica/Documents/Guidelines_for_protection_against_Piracy_in_the_Gulf_of_Guinea_Region.pdf

Although standalone in nature, the Interim Guidelines should be read in conjunction with the existing industry guidelines that address the Somalia based piracy problem, *Best Management Practices for Protection against Somalia Based Piracy* (BMP4).

Copies of the updated Interim Guidance are available for download from the BIMCO website under 'Piracy'. Alternatively, copies can be obtained from Gard.

It is understood that a Global Best Management Practices for protection against piracy and armed robbery is being drafted by BIMCO, ICS, INTERCARGO, INTERTANKO and OCIMF. The draft is being updated with comments from members of these organisations and from military sources. The final version is expected to be published later in 2017.

Q3: What is the scope of P&I cover for loss, damage or injury caused by pirates?

A3: Piracy may be considered a marine risk or a war risk depending on the terms and conditions of the war risk insurances for the ship. For example, under English conditions (ITC), 'piracy' has traditionally been treated as a marine risk, although more and more insurers now seek to exclude piracy from the standard hull and machinery cover and treat it as a war risk. Under Norwegian (Norwegian Marine Insurance Plan (NMIP)) conditions, however, 'piracy' is treated as a war risk. If it is a war risk, the P&I cover will be subsidiary to the war risk cover. See Gard Rule 71. If it is a marine risk, the standard scope of cover is available under the P&I insurance. For example, cover is available for the shipowner's liability for injury or death to crew members as a consequence of a pirate attack on the ship, as well as for the shipowner's legal liability to cargo owners for loss or damage to cargo. See also comments in the Gard Guidance to the Rules, pages 410 and 411.

It should be kept in mind that the facts of each case are likely to be different. Therefore, Gard will assess the existence and availability of cover on a case by case basis.

Reference should also be made to the International Group's FAQs. These were last revised in August 2013 and can be found at:

<http://www.igpandi.org/article/piracy-faqs-revised-august-2013>

Q4: Can a shipowner refuse to comply with an order from the time charterer to transit a piracy area on account of protecting his ship, crew and/or cargo from pirate attacks?

A4: There is no one answer to this question. The rights and duties of the parties to relevant contracts of carriage or period employment, which will commonly involve time charterparties, voyage charterparties and bills of lading, will depend on the terms and conditions of those contracts, and how they operate together, as well as the level of risk of pirate attacks that is prevalent at the relevant time, which could be when the employment order is given, the fixture date or the time the vessel decides to avoid the relevant area. Gard will help Members with Defence cover to consider rights and remedies in this regard after having reviewed the relevant contractual terms. A shipowner may also have a (different) contractual relationship – under a bill of lading – with cargo owners. This will also have to be taken into account when considering choice of route.

Gard is aware of major shipowners who have taken the decision that, unless contractually obliged to sail, e.g. through the Gulf of Aden, all their vessels will, for the foreseeable future, sail around South Africa. Other major owners are, reportedly, considering taking a similar approach. Gard is also aware of Owners, upon advice from Leading Counsel, have decided to go via the Cape of Good Hope.

Charterparty clauses specifically dealing with the rights and responsibilities of owners and charterers in such a situation have been developed by e.g. BIMCO.

Q5: What is Gard's position if shipowners wish to place armed guards on board their ships as a deterrent against pirate attacks during transits in the Gulf of Aden or the Indian Ocean?

A5: Current public information suggests that, so far, no vessel with armed private security guards on board has been hijacked (although many vessels have been attacked). Insofar as this is correct, it would seem that the use of armed private security guards may, up to now, have prevented pirates getting on board and hijacking such vessels, although whether the continued use of such armed guards will serve to escalate the level of violence and thereby risks to personnel and property, remains to be seen and continues to be debated in the industry. Gard has noted that many shipping industry organisations, such as ICS and a number of Flag States have changed their position from recommending against the use of armed private security guards to being 'neutral'. Gard's position has also been changed to neutral. A relatively small number of States have enacted legislation which expressly permits the employment on board of armed guards.

Ultimately, though, the type and scope of safety precautions is an operational issue that each shipowner must consider and decide, given the type of ship, cargo and trade. Gard remains of the view that having armed private security guards on board does not, by itself, prejudice the owner's insurance cover with Gard, whether P&I, H&M, LOH or War H&M. Members and clients are reminded that they should contact their Flag State to ensure that the employment of private armed guards and/or the use of armed force by such guards against pirates is not prohibited under the Flag State regulations and would not otherwise represent a breach of any statutory provisions of the Flag State. Gard's Rule 8.1.f. may be relevant here. Gard reserves the right to change its view if it is at odds with that of co-insurers, reinsurers or other parties. It should also be noted that the

terms of the contracts offered to shipowners by a number of States with naval assets in the region in exchange for them providing armed service personnel to serve as guards on board ships have previously been found to fall outside standard International Group cover and thus were also outside Club cover. A special cover in relation to this contract has been arranged by Miller Insurance Brokers. Gard's underwriting department can assist in arranging such special cover.

On a practical level, Members and clients should refer to the Industry Guidance on the Selection of Privately Contracted Armed Security Personnel (PCASP), approved by the IMO and updated in May 2012. The revised MSC.1-Circ.1405-Rev.2 dated 25/5/12 and Guidance can be found at:

<http://www.imo.org/OurWork/Security/SecDocs/Documents/Piracy/MSC.1-Circ.1405-Rev2.pdf>

In addition, all clients and Members are strongly recommended to follow the Best Management Practices to deter Piracy in the Gulf of Aden and off the Coast of Somalia. The current version is version 4 (August 2011). This can be found at:

<http://www.marisec.org/piracybmp.htm>

Members should note that the International Group has advised that *"...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."* See paragraph 9 of the Group's FAQs.

Q6: What is Gard's attitude to the employment and presence on board of unarmed security personnel?

A6: In principle, Gard has no objection to the employment and presence on board of unarmed security personnel. Their employment and presence on board will not, by itself, affect the P&I cover and normally, they will be treated as "other persons on board" in accordance with Rule 29 of the Rules. Ideally, such persons should sign an indemnity agreement, the wording of which is available on request, or from the Gard website in the "Forms/Free Pass Agreement" section. More often, they will be employed under a contract. Gard will evaluate all such contracts to ensure they do not impose liabilities on the Member which are considered to be unacceptable and/or outside the scope of the cover.

Again, clients and Members are strongly recommended to follow the Best Management Practices to deter Piracy in the Gulf of Aden and off the Coast of Somalia. The current version is version 4 (August 2011). This can be found at:

<http://www.marisec.org/piracybmp.htm>

Q7: Does Gard recommend or endorse any particular form of contract with private security companies?

A7: In March 2012, BIMCO released the GUARDCON contract. This has become the industry standard contract for the employment of PMSCs in the Gulf of

Aden/Indian Ocean and is used by virtually all PMSCs. However, an unamended GUARDCON is not a suitable contract to use in West Africa/Gulf of Guinea. Therefore, the International Group has developed an amended version of GUARDCON for use in West Africa/Gulf of Guinea, called GUARDCON West Africa. This was published in April 2014. Clients and Members employing (armed) security personnel in this area are recommended to do so only under this contract.

Information received in February 2015 indicated that the Nigerian government has banned the employment by owners/operators of "...any form of security guards (armed or unarmed) on board" when passing through Nigerian waters or calling at a Nigerian port. Clients and Members are recommended to check the current position before entering into any contract for the employment of any security personnel, private or local military. The local club correspondent is usually the best source of information.

Industry organisations have advised as follows:

"The Maritime Trade Information Sharing Centre – Gulf of Guinea (MTISC-GoG, <http://mtisc-gog.org/>) will close before end of June 2016 following the successful conclusion of the Pilot Project, and France and the United Kingdom will commence a new virtual reporting centre, allowing the mission established by the MTISC to continue.

Over the past months, together with key stakeholders, OCIMF has carefully reviewed the outcomes of the MTISC-GoG Pilot Project, with the aim of establishing a sustainable reporting programme. The French and UK authorities, taking into account both their own experience and the role of MTISC-GoG in the region, have decided to offer a new contribution to the maritime information network in the Gulf of Guinea through a virtual reporting centre.

FR/UK Centre – MDAT-GoG

The FR/UK Centre, called Marine Domain Awareness for Trade – Gulf of Guinea (MDAT-GoG), commenced operations at 0800 GMT on 20 June 2016. MDAT-GoG is operated by the navies of France and the United Kingdom from centres in Brest, France, and in Portsmouth, England.

MDAT-GoG contact details:

Email: watchkeepers@mdat-gog.org

Phone : +33 (0) 2 98 22 88 88 (emergency) Phone : +33 (0) 2 98 22 13 02 (exercise). Owners may seek advice before and during the stay of a ship in the concerned region.

The MDAT-GOG is a virtual reporting mechanism managed by French and UK navies supporting the interregional architecture defined by the Yaounde Code of Conduct. The primary output from the MDAT-GoG is to contribute by maintaining coherent maritime situational awareness in the central and western African Maritime Space, with the ability to inform and support industry, contributing to the safety and security of the Mariner in the regional maritime domain.

All vessels are encouraged to report to the MDAT-GoG using the existing reporting formats. The information supplied by vessels will be treated as commercially confidential.

All details can be found on SHOM Chart 8801CSD or UKHO Chart Q6114, 30 June 2016, to allow vessels to report their vessels when transiting the revised Voluntary Reporting Area (VRA), also described on both security charts with the MDAT-GOG, using the email address watchkeepers@mdat-gog.org . Phone number is monitored permanently (+33 298 22 88 88).

MTISC-GoG Maritime Security Guidance (MSG)

MSG is no longer be supported or updated after 20 June 2016 and will be withdrawn from the OCIMF and MTISC-GoG websites.

Whether or not clients and Members should seek anti-piracy protection from the Nigerian (or other State) navy is a matter for them to decide, based on a detailed risk assessment of the situation at the time. Such an assessment is likely to include up-to-date information from the local agent and Gard's local correspondent. It is not currently known if the Nigerian navy is prepared to enter into any contractual agreement for the employment of its personnel and if so, on what terms. Clients and Members are advised that, if possible, they should contract on terms which satisfy the minimum contractual requirements stipulated by the International Group in paragraph 7 of its Piracy FAQs of August 2013.

Clients and Members who are unable to contract on such terms, or on any terms whatsoever, should contact the Association for advice.

Members and clients are reminded that GUARDCON does not represent a recommendation by BIMCO or Gard for, or endorsement of, the use of security guards on board vessels. Nor are security guards a substitute for strict compliance with Best Management Practices. Placing security guards on board a vessel should also only be considered after a risk assessment has been carried out and the Master should be involved in the decision-making process. However, the provisions of GUARDCON have been reviewed by the International Group's Maritime Security sub-committee and conform with club cover and Pooling requirements. The use of the unamended GUARDCON contract, or the GUARDCON West Africa, as applicable, is, therefore, recommended. Further, provided that the provisions of the GUARDCON contract relevant to P&I cover are materially unchanged, it is not necessary for clients and Members to seek prior approval of such a contract from Gard. Clients and Members are reminded that all other draft contracts should be submitted to Gard to ensure they do not prejudice the P&I cover.

Q8: Is a ransom payment covered by Gard?

A8: Under English law, the position is that a ransom payment to pirates (but not to fund or support terrorism) appears to be regarded as not being illegal and to be generally accepted as being a General Average expense, which will be apportioned between the interested parties in accordance with the values at stake. In such circumstances, P&I cover would not respond in respect of the ransom payment itself, but may be involved, pursuant to Rule 41 (a), if cargo interests' proportion of GA is irrecoverable solely by reason of a breach of the contract of carriage. Under certain insurance conditions, notably English conditions, H&M cover

would respond, subject to deductible, in respect of the Ship's proportion of GA. Under certain other conditions, notably the NMIP, piracy is treated as a war risk, not a marine peril, so unless the H&M cover includes war risks, it would not respond. See also Q2 and A2.

Q9: As from 1/4/11, the existing High Risk Area surrounding the coast of Somalia was extended into the Arabian Sea and the North Indian Ocean. This is now called the Extended Risk Zone. Under previously amended CBAs IBF/POEA/Model Agreement, certain crew were entitled to extra benefits (extra wages/bonus, double disability/death compensation) when in transit through the 'High Risk Area'. These crews are now entitled to a bonus equivalent to 100% of basic pay if the vessel on which they are serving is attacked, on a day by day basis. Compensation for death or disability is also doubled while passing through the Extended Risk Zone. To what extent, if any, are such additional costs/exposure covered by Gard?

A9: Extra wages/bonuses are considered to be an operational cost and thus are not coverable. However, P&I cover is available under Gard Rule 27 for double compensation referring particularly to disability/death compensation, provided the incident occurred during the passage through the 'Extended Risk Zone'. Some comments have been made with respect to whether the incident giving rise to the disability/death must be caused by a terrorist action. Whether or not a seafarer is entitled to double compensation for an incident occurring in the 'Extended Risk Zone', irrespective of the cause of any injury or death, will have to be evaluated on the basis on the wording of the relevant Agreement(s).

Q10: To what extent is cover available under Gard's Comprehensive Charterer's Liability Cover (SCC) in respect of a charterer's liability to pay compensation to the owner for liabilities, losses, costs and expenses incurred as a result of the hijacking, capture or other attack by pirates? Does it impact on the scope of cover whether or not piracy is consider a war risk?

A10: Gard's SCC is one of the widest available.

As far as charterers are concerned, piracy is not excluded from Gard's Comprehensive Charterers' Liability Cover and liability that a charterer Member could incur as a result of piracy would be covered as per Rules and terms of entry.

Cover for liability for damage to ships in areas declared as war risks restricted zones by the war risk insurance market would be conditional upon use of approved charter party terms as set out in the Certificate of Entry. Information as to acceptable charterparty terms can be obtained from Gard's underwriting department.

If a ransom payment is recoverable in GA, Gard's Comprehensive Charterers Cover would respond to a charterer's liability to contribute to GA on basis of bunkers and/or freight at risk, if not covered by other insurances.

Q11: Will Gard assist or take the lead in any negotiations with the pirates/hijackers?

A11: No. Gard does not have the experience or the expertise to do so. However, there are a number of crisis consultants and/or London law firms who offer such a service. Gard has no direct experience of such a service and Members and clients considering using such an organisation may wish to seek the views of shipowners/operators who have previously employed such an organisation.

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DISCLAIMER

This note is intended to assist and clarify issues relating to the issue of piracy in/around the Gulf of Aden, in the Indian Ocean and/or the Gulf of Guinea. It is not intended to and should not be taken to provide definitive answers in all situations. Readers should seek specific guidance in specific situations. Everything stated in this note is stated in good faith and to the best of the knowledge and understanding of the contributors to it, but should not be treated as legal advice or as legally binding on Gard in relation to any particular case or matter.