Charterparty piracy clauses and maritime insurances

As the volume and violence of pirate attacks continues to escalate\(^1\), our Marine specialists have prepared this technical paper to help vessel charterers and cargo-owners better understand the multiple maritime insurances available for this complex risk issue and better assess the value propositions presented to them by the vessel operators.

Certainty of coverage should a vessel be subjected to piracy attack is essential to ensuring peace of mind for charterers, cargo-owners and all concerned in maritime trade. While the strength and reach of laws concerning ‘piracy’ are currently under debate, the extent of cover provided by standard marine and war risk hull policies is historically more certain, but variable according to circumstance and the exposure to charterers or cargo-owners to expense is not readily understood.

\(^1\) According to the International Maritime Bureau, acts of piracy during the first quarter of 2009 have almost doubled over the corresponding period last year, and also risen 20 percent over the final quarter of 2008. (Piracy and Armed robbery Against Ships - 1 January to 31 March 2009, IMB)
Executive summary

In brief, unless bespoke provisions allocate risk atypically, in voyage and time charters (not ‘bareboat’/for demise) the charterer is responsible for the nomination of safe berths/ports (and their approaches) while the shipowner is responsible for safely prosecuting the voyage(s) with dispatch, but is not responsible for fortuitous delays.

Attack by pirates (or any violent theft attempt) is likely to be covered by the ship’s war insurers, both in relation to any hull damage and to crew injury/death, while payments to avoid both (ransoms) will be typically addressed as if a general average sacrifice. Only in the event of a general average being agreed would charterers or cargo owners have any obligation to contribute to such a ransom demand (unless the risk is atypically allocated to them).

In the event that the crew or master is specifically held hostage (the ship then not being ‘in peril’), historically the shipowner’s Protection and Indemnity (P&I) Club, or other crew liability insurer, would treat the ransom as a ‘sue and labour’ expense, but high ransoms may not be protected by this treatment.

In any event where swift resolution is achieved, the charterer and cargo owner will ‘benefit’ by lack of delay in delivery of the cargo (significantly, since such delay is typically not the responsibility of the owner).

Where a charterer pays insurance premiums by reimbursing the actual costs, there might be an implication that it is a beneficiary (as an undisclosed principal) of the insurance and thus safe from subrogation.

Where a ship-owner procures specific marine kidnap insurance, any ransom is insured with an arguably higher degree of certainty than historically might have been the case. It operates as a negotiation and settlement service, giving immediate expert help. Also, the charterer is then able to procure a specific loss of hire protection from the same insurers, if required.

Accordingly, although the specification of costs is arguably more onerous in both the standard Conwartime 2004 and the BIMCO Piracy clause 09.03.09, funding these costs arguably provides more certainty and the balance is for commercial assessment by both ship-owner and charterer.

However, the inclusion of a reimbursement of “any claims from holders of bills of lading or third parties caused by such orders” in the BIMCO Piracy clause 09.03.09, is probably an extension of the expectable responsibilities and as such must be specifically agreed by the charterers’ liability insurer as being protected by their coverage.
Discussion

There are two popular formal additional charter clauses for time charters relevant to piracy, ‘Conwartime 2004’ and the ‘Piracy Clause for Time Charter Parties’ (dated 09.03.09) both from BIMCO (an independent international shipping association), as well as a host of informal versions of various vintage. Other time charterparty forms have substantially equivalent provisions, while voyage charters have BIMCO’s equivalent Voywar 2004, or similar. BIMCO are additionally drafting a piracy clause for voyage charter parties used in contracts of affreightment (COA).

The essential message of these clauses is to allocate the expense of additional insurance to charterers. However, the 09.03.09 clause also says “and the Charterers shall indemnify the Owners for any claims from holders of bills of lading or third parties caused by such orders [from underwriters, or from Flag or any other authority or the UN]”.

Conwartime 2004 defines ‘war risks’ to include ‘acts of piracy’, but otherwise is a wide litany of war and associated risks. Conversely, the 09.03.09 clause is specifically with regard to the “…risk of piracy…” and by implication is to be added to charters which already have a ‘War Risks’ definition but which does not include piracy specifically...

In common for all voyage and time charters (not ‘bareboat’/for demise) the provisions are essentially about allocating expenses between ship-owner and charterer (by showing which party is ‘to provide’ services or features) and not primarily for allocating/transferring risk. In these charters the primary responsibility of the owner is to perform the voyage(s) successfully, so the owner has the primary choice of route and is responsible for all navigational aspects and risks of the voyage. Although the owner must prosecute the voyage ‘with despatch’ it is typically not responsible to the charterer for fortuitous delays. Swift resolution of delays will, of course, benefit both the charterer and cargo owner.

Typically, all these charters treat the ‘owner’ as the whole ownership chain and management pyramid, both implicitly and specifically. Similarly, the ‘charterer’ is treated as the whole sub-charter chain of carriers but, significantly, not as the owner of cargo to be carried.

Meanwhile the charterer is primarily responsible for naming safe ports (and berths) and for ‘providing’ the cargo, but in time charters the charterer also provides bunkers and other propulsion consumables (which it is likely to own). However, there is rarely a ‘plain’ voyage or time charter and most template forms have bespoke additional provisions. It is not unknown for these bespoke clauses to amend the basic allocations of risk, but both owner and charterer may find themselves without full insurance protection if they allow these amendments without careful individual assessment.

In the absence of an atypical allocation of risk, the owner ‘provides’ the ship as seaworthy (‘providing’ and implicitly paying for all necessary crew) and as cargoworthy and acts as a bailee of cargo and is responsible for most damage to it through the voyage, but not all risks. The international
conventions known as ‘Hague-Visby’ (or the later but unpopular ‘Hamburg’)
provisions have been translated into ‘Carriage of Goods by Sea’ (COGSA)
laws and typically each time charter will stipulate that the bills of lading
should contain the Hague-Visby Rules, which particularly exclude any
responsibility for perils of the sea, acts of war or of public enemies or arrest
or restraint or any other cause without the fault or privity of the carrier.
Alternatively, many charters stipulate that the owner will only be liable for
‘delay... and for loss or damage to goods onboard, if such delay or loss has
been caused by want of due diligence on the part of the owners or their
manager in making the vessel seaworthy and fitted for the voyage or any
other personal act or omission or default of the owners or their Manager.’
(BALTIME 39/2001).

Similarly, in the absence of an atypical allocation of risk, the owner should
procure full marine and war risks insurances and full P&I insurance ‘for
their own account’, that is to say, unless specified elsewhere, the charter
hire (or freight, for voyage charters) covers all owner’s costs, including
insurance premiums. However, typically the template charter forms will
include a provision for owners to be able to claim reimbursement for some
insurance premiums:

■ voyage charters will typically provide for charterers to reimburse any
increase in premiums or additional premiums between the date of
fixture and the ship’s arrival at an ‘area of enhanced risk’ where war
underwriters demand additional premium;

■ time charters will typically provide for charterers to reimburse the entire
cost of additional premiums.

Time and voyage charters are typically silent on insurances which the
charterer is to ‘provide’, leaving it to the prudence of individual charterers
to insure (or retain) whatever responsibility they have for hull damage
(through ‘unsafe’ berths/ports) or vicarious liability to third-parties. This
paper assumes that charterers will insure ‘charterers liability’ (to third-
parties and separately, or also, for hull damage) separately, perhaps as a
 corporate protection, for both marine and war risks.

Frequently, nowadays, time charter forms include in their ‘war clause’
(provisions enabling the owner/master to decline to enter war areas or to
enter only with liberty to navigate under local orders, or drop the cargo
short of destination, without breaching the charter) obligations on the
charterer to pay for ‘any crew bonus or additional wages’ (BALTIME 1939/
2001, incorporating the 1993 Conwartime) or similar. Both Conwartime
2004 and the Piracy Clause 09.03.09 provide that charterers should pay ‘the
actual bonus or additional wages’ paid by owners under the crew contracts
for each area of war risk/piracy risk respectively.

Historically, London insurers specified ‘piracy’ as a ‘marine’ peril, but in
the last few years it has been progressively transferred to ‘war’ insurance,
where it now resides for the majority of fleet placings. Insurers in the U.S.
and elsewhere have historically treated piracy as a war peril. Meanwhile,
P&I clubs continue to treat piracy as a marine risk. This is potentially
confusing, but not always disadvantageous to charterers.
In recent months, ships have been hi-jacked and a ransom demanded without any pretence at a political or terrorist motive (for which ransom payments are typically illegal), but with an implied or specific threat of damage to the ship and cargo and/or injury or death of the crew. Where this hijack is during a loaded voyage, the ship is under active peril, so that any expenditure which successfully saves the adventure is a ‘general average expense’. Thus, ransom money paid (and expenses involved in the negotiation and payment) are typically reimbursed on a general average approach. However, where the ship is safely anchored and some crew members are disembarked and held prisoner separately then, depending upon circumstances, the ransom could be in respect of crew kidnap only and not a general average (since it could be argued that the ship and cargo is safe throughout). Since this paper is only considering ships under charter it will not comment on those off charter except to say that perhaps there is no ‘common’ interest to share the expense as general average, so ransom for hijack may be a so-called ‘sue and labour’ expense.

General average expenses are split between interested parties as their respective ‘arrived values’ bear to the total to be split. What expenses are allowable in general average form another set of internationally agreed ‘rules’, the York-Antwerp Rules. The latest set generally used is the 1994 rules (although a set of 2004 rules exists, it is considered to be imbalanced and not generally accepted). These rules describe both the expenses allowed to count and the methods of valuation and adjustment. Where the time charterer has provided bunkers, these form one of the ‘arrived values’ (and typically part of the sacrifice in other events). The cargo owner will have another ‘arrived value’ (and also may be form part of the sacrifice in other events).

Typically the cargo insurance is ‘all risks’ (probably combined marine and war risks), including cargo’s general average contribution. But, in the absence of actual damage to the cargo, neither the cargo-owner nor the insurance will be involved directly in piracy events. Accordingly, cargo insurances typically do not (as yet) charge additional premiums for specific sea areas.

Meanwhile, the ship-owner’s marine and war risks insurances should ideally reflect one another, differing only as to perils covered (albeit war policies are commonly without deductible and cancellable at seven days notice). Thus both will cover general average, so that the claim will fall on whichever covers the active peril. For general efficacy, since P&I insurers habitually exclude war risks, war insurers have accepted P&I risks on their hull policies. Many (but not all) insurers will agree (within their policy) to accommodate claims for general average expenses in full without the need to demand contribution from cargo or charterers.

Typically, charterers choose commercially whether to request that the owner names them as co-assured (jointly insured) under the marine and war risks policies, but conversely are forced by insurers to insure charterers’ liability (to third-parties) separately. Their charterers’ liability insurer is sometimes also able to agree to cover their liability for damage to hull (as a result of an unsafe berth/port). Typically, however, having bunkers onboard, it is more efficient to name the charterer as insured on
the owner’s marine and war insurances so that a total loss settlement will cover both ship and bunkers; thus any general average contribution of charterers will be recoverable from the marine or war insurers alongside that of the ship-owner. However, it is typical for a cargo-owner to insure the cargo (and any general average) separately, even if it is also the charterer.

At the same time, the ship-owner’s P&I cover (its legal liability insurance) will respond for its liability to crew, so that expenses to save the crew which is not allowable as general average have historically been considered by the P&I insurers as ‘sue and labour’ expenses and included in their coverage. In the last few years out-sourcing of crew procurement has led to separation of ‘liability to crew’ insurance from the owner’s P&I, but for simplicity this paper will assume it has not separated.

However, although the P&I Clubs in particular have a long history of trying to accommodate unusual claims (under their ‘omnibus’ rule, whereby club directors (owners) approve payment) the concept of ‘sue and labour’ is of expenses to save a full loss, so clubs and their boards have refused to comply with ransom amounts far above the equivalent figure (calculated by a multiple of annual wages) which might be payable to the crewmember’s dependants in a total loss disaster. This has led to the recent emergence of marine kidnap coverage, to pay solely for crew ransom, or where an illegal seizure extension is agreed, for crew or ship/cargo ransom.

Marine kidnap insurance is offered as standalone coverage by kidnap and ransom specialist insurers, which for many years have offered corporate clients such coverage (on a confidential basis) for their directors and senior staff. These ‘K&R’ forms have extension endorsements relating illegal seizure of property and separately with regard to business interruption (loss of income). Many of these insurers have historically agreed to cover sea-staff, but the enquiries were rare. Now, marine kidnap forms follow the non-marine forms in being focussed on personnel, with endorsements to include illegal seizure of property (and, separately, for loss of charter hire). They typically include immediate incident response services by pre-nominated teams of experienced negotiators.

Because the ship-owner’s marine, war and P&I insurances are contracts of indemnity, the owner would typically have to choose between claiming expenditure under marine/war or P&I, or under another kidnap coverage. However, in practice, the marine kidnap policy operates as a negotiation and settlement service, giving immediate expert help on-scene. So the ‘choice’ is made immediately upon the event, not once the ransom is settled and the ship and crew are safe.

As mentioned, available as an extension of marine kidnap insurance (with illegal seizure endorsement) is loss of hire insurance. This is offered as protection of the hire which a time charterer is obliged to pay throughout the period of detention. Thus for most of these loss of hire policies, the charterer is the sole insured party.
In addition to this background, it must be borne in mind that at English Law (and similarly under Norwegian and possibly elsewhere too) funding an insurance premium may imply that the coverage will be beneficial to the funder which might therefore be considered an 'undisclosed principal' of the insurance and protected from subrogation (cf Mark Rowlands Ltd v Bernie Inns Ltd and others, Court of Appeal Dec 1985). The charter piracy clauses considered here ('Conwartime 2004' and the 'Piracy Clause for Time Charter Parties' dated 09.03.09) and others similar, imply that the presence of the ship in dangerous waters is a result of charterer's instructions. Even if not accurate in the particular circumstances of any venture (in that charterers will rarely if ever stipulate a detailed voyage routing) nevertheless, such comments as ‘via Suez Canal’ or ‘via Singapore Straits’ on the confirmatory messages will imply that both parties know in general of what options may be available to the master for safe routing. Similarly the charterer’s obligation to nominate a safe port extends beyond the port to its approaches, but arguably not beyond a reasonably close distance (case law exists for demurrage and other subjects of dispute).

The corollary of this is that charterers might be expected (by a court of law) to take comfort from the extent of insurance and other protections and indeed will probably have questioned the estimated extra costs and the need for their expenditure. While it may be prudent to establish in those exchanges either joint coverage or a categorical waiver of subrogation, where there is only contingent exposure, or only a consequential commercial benefit, this might be impossible. Nevertheless, the fact of the ‘pass-through’ of costs implies that a benefit to the charterer is intended.

Specifically, where the nature of the voyage difficulties are actively discussed in pre-fixture or port nomination discussions, the cash costs will be detailed and an opportunity should then arise for the charterer to discover all the pertinent insurance arrangements. In its assessment of these arrangements and their costs, the charterer can then consider the implicit scope of protection from contribution or from subrogation and suggest appropriate amendments. One of these suggestions might be that the shipowner procures in the name of the charterer the K&R loss of hire extension.

However, any attempt to pass specifically to the charterer any legal liability incurred during the navigation of the ship, whether perceived as ‘normal’ or ‘under orders’ should be carefully evaluated by the charterer and by their liability insurers.