

22 October 2012

TO ALL MEMBERS

Dear Sirs

Australian pollution law – Oil pollution indemnity clause for penalties and fines

The Australian Government introduced increased penalties for pollution from ships and damage to the marine environment by way of new legislation – the Maritime Legislation Amendment Act, 2011 – that came into effect on 4 December 2011. The Act amends the Australian Navigation Act 1912 and the Protection of the Sea (Prevention of Pollution from Ships) Act, 1983.

As a result of these recent amendments, longstanding criminal liability imposed on owners and masters for oil discharge or threat of discharge in Australian waters has been extended to charterers. Charterers, owners and masters are now severally liable with offences punishable by fines.

The maximum penalty for this criminal offence is increased from 500 penalty units to 20,000 penalty units (AUD2.2 million (USD2.3 million)) for an individual. This may be multiplied by a further factor of five for a corporation, taking the maximum penalty to AUD11 million (USD11.5 million).

In order to address concerns raised by both owners and charterers in respect of the new law, the International Group has drafted, in consultation with BIMCO, a recommended clause for inclusion in charterparties. The wording of the clause is not country specific and capable of broader application. The clause addresses the specific situation of criminal fines and civil penalties.

The International Group is aware that pending publication of this clause some charterers have sought to use pollution indemnity clauses that do not preserve an owner's right to limit and have other provisions that render the clause uninsurable by Clubs. Members are therefore strongly urged to use this new clause in their charterparties.

The text of the clause and explanatory notes are attached.

Should Members have any questions regarding this clause or its application they should contact the Managers in the normal way.

Yours faithfully
A BILBROUGH & CO LTD
(MANAGERS)

All Clubs in the International Group of P&I Clubs have issued similar circulars.

5:458

ANNEX

Oil Pollution Indemnity Clause for penalties and fines

- (a) Subject to the terms of this Charterparty, as between Owners and Charterers, in the event of an oil pollution incident involving any discharge or threat of discharge of oil, oily mixture, or oily residue from the Vessel (the "Pollution Incident"), Owners shall have sole responsibility for responding to the Pollution Incident as may be required of the vessel interests by applicable law or regulation.
- (b) Without prejudice to the above, as between the parties it is hereby agreed that:
- i. Owners shall indemnify, defend and hold Charterers harmless in respect of any liability for criminal fine or civil penalty arising out of or in connection with a Pollution Incident, to the extent that such Pollution Incident results from a negligent act or omission, or breach of this Charterparty by Owners, their servants or agents,
 - ii. Charterers shall indemnify, defend and hold Owners harmless in respect of any liability for criminal fine or civil penalty arising out of or in connection with a Pollution Incident, to the extent that such Pollution Incident results from a negligent act or omission, or breach of this Charterparty by Charterers, their servants or agents,
- provided always that such fine or penalty has not been imposed by reason wholly or partly of any fault of the party seeking the indemnity and that the law governing the charterparty does not prohibit recovery of such fines.
- (c) Nothing in this clause shall prejudice any right of recourse of either party, or any defences or right to limit liability under any applicable law.
- (d) Charterers shall procure that this Clause be incorporated into all sub-charters and contracts of carriage issued pursuant to this Charterparty.

Explanatory Notes

It is understood that under the revised Australian law, charterers can be strictly liable for penalties and fines imposed on them, as a result of a pollution or threat of pollution caused by the act or negligence of the owner (e.g. navigational error). Conversely owners can be strictly liable for penalties and fines imposed on them, as a result of a pollution or threat of pollution caused by the act or negligence of the charterer (e.g. unsafe berth). As this involves circumstances beyond owners' and charterers' control, a charterparty clause is recommended to achieve the effect that whoever causes the Pollution Incident should bear the criminal fines or penalties through indemnification.

Under the clause owners have overall responsibility for responding to a discharge or threat of discharge of oil, oily mixture or oily residue (subparagraph (a)). This is in line with the Australian legislation and with the international compensation regime.

Further, the indemnity in subparagraph (b) is designed to protect owners and charterers by incorporating an equal indemnity by the party whose negligent act or omission, or breach of the charterparty, causes pollution or threat of pollution. Where the pollution or threat of pollution is entirely caused by a third party's act, without involving any act of the owner or of the charterer, but the owner or charterer still incurs the penalty/fine under the new Australian law, the indemnity in this clause will not respond to such a situation.

The clause only addresses the specific situation of criminal fines and civil penalties, not civil liability which is within the sphere of the Conventions.

Any right of recourse of either party, defences or right to limit is preserved under subparagraph (c).

Subparagraph (d) is designed to ensure that the same recovery and indemnity provisions apply where there is a charterparty chain.