

Australian Pollution Law – Oil Pollution Indemnity Clause for Penalties and Fines

Dear Sirs,

In October 2012, an International Group recommended charterparty clause was drafted to address the concerns raised by owners and charterers in respect of the amendments to Australian legislation¹ introducing increased penalties for pollution from ships and damage to the Marine environment. Since the recommended clause was circulated to Members, there have been further developments in relation to the Australian legislation and further consideration of the wording of the recommended clause, which has been updated as attached and further explained below;

Increase in the amount of penalties

On 28 December 2012, a new regulation came into force in Australia escalating the monetary value of financial penalties for Federal offences. The increase in penalty unit valuations is only applicable to offences committed on or after 28 December 2012.

The changes affect fines calculated on penalty units, such as fines imposed under the Protection of the Sea Act 1983, which imposes fines ranging from 500 penalty units to 20,000 penalty units for the offence of discharging oil or oily mixtures into the sea.

Under the previous penalty unit calculation, this resulted in maximum fines of AUD 2.2 million for an individual and AUD 11 million for a corporation. Under the new penalty unit calculation, the applicable maximum fines are now AUD 3.4 million² for an individual and AUD 17 million³ for a corporation.

Amendments to the International Group recommended clause and explanatory notes

- Legal/Defence costs

A new subparagraph (b) iii. has been inserted to address the concerns that prosecution legal costs and/or expenses might be passed onto the defending party. Subparagraph (b) iii. clarifies that the indemnity in the recommended clause extends to the recovery of any reasonable legal costs and/or other expenses incurred by or awarded against either party in respect of any proceedings instituted against them for the imposition of any fine or other penalty, in circumstances set out in subparagraph (b), irrespective of whether any fine or other penalty is actually imposed.

¹ Australian Navigation Act 1912 and the Protection of the Sea Act 1983

² Equivalent to approximately USD 3.5 million, as per the exchange rate on 21st February 2013

³ Equivalent to approximately USD 17.4 million, as per the exchange rate on 21st February 2013

- Indemnity in the event of contributory fault

The proviso to subparagraphs (b) i. and ii. has been amended to specifically address the consequences of liability arising in circumstances where there is contributory fault on the part of the party seeking indemnity. The amendment restricts the amount of the recovery where there is contributory fault, provided this is not prohibited under the law governing the charter party.

The recommended clause and explanatory notes are attached.

This Circular supersedes Member Circular No. 10-12 issued on 23 October 2012.

Should Members have any questions they should contact the Managers in the normal way.

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

Any questions with regard to the above may be addressed to Helenka Leary in Gard (UK) Limited and Arne Sætra in Gard AS.

Yours faithfully,
GARD AS



Claes Isacson
Chief Executive Officer

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 if such fine or penalty has been imposed by reason wholly or partly of any fault of the party seeking the indemnity, the amount of the indemnity shall be limited accordingly and further provided that the law governing the Charterparty does not prohibit recovery of such fines.
- iii. The rights of Owners and Charterers under this clause shall extend to and include an indemnity in respect of any reasonable legal costs and/or other expenses incurred by or awarded against them in respect of any proceedings instituted against them for the imposition of any fine or other penalty in circumstances set out in paragraph (b), irrespective of whether any fine or other penalty is actually imposed.
- (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.

The indemnity in subparagraphs (b) i. and ii. is designed to protect owners and charterers by incorporating an equal indemnity by the party whose negligent act or omission, or breach of charterparty, causes pollution or threat of pollution.

The proviso to subparagraphs (b) (i) and (ii) ensures that club cover is not prejudiced on the grounds that liability has been contractually assumed by virtue of the clause in circumstances where there may not be an underlying legal liability. The proviso restricts the amount of recovery where there is contributory fault. The recovery of fines under the clause is also subject to such recovery not being prohibited under the law governing the charterparty.

The indemnity in this clause extends to the recovery of any reasonable legal costs and/or other expenses incurred by or awarded against either party in respect of any proceedings instituted against them for the imposition of any fine or other penalty in circumstances set out in subparagraph (b,) irrespective of whether any fine or other penalty is actually imposed.

The indemnity in this clause will not respond to the situation 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 where the owner or charterer still incurs the penalty or fine under the new Australian law.

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, defence 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.