

**To the Members**

**November 1997**

Dear Sirs,

**UNITED STATES OIL POLLUTION  
VESSEL RESPONSE PLAN - CONTRACTS FOR SERVICES**

This circular is addressed to all shipowner Members including owners of dry cargo vessels and tankers.

Previous advice to Members on the terms of contract which are required under the federal regulations on vessel response plans in the United States has concentrated on four issues which are of importance to the Club, as well as to the Member. These are the scope of indemnities contained in these contracts, provisions for control of the contractor's operations by the owner, provisions for funding of the contractor's invoices and warranties by the contractor that he is competent to perform the contracted service.

In the course of preparation of Members' vessel response plans (VRPs) during 1993, a large number of contracts for various services, particularly of companies acting as "qualified individual" (QI) and oil spill response organisations (OSROs) were reviewed by the Managers of the Clubs in the International Group either at the request of individual Members or the contractors themselves. In many cases this review process included a discussion with the contractor concerned on modification of the originally proposed contract terms so as to conform with the general guidelines suggested by the Managers. These guidelines are attached as Appendix 1 to this circular.

As a result of this review process many contracts were confirmed (a) to contain an indemnity which could be covered by the Association and (b) generally, in respect of other provisions in the contract, not to conflict with the guidelines suggested by the Managers. It is inevitable that this confirmation has been regarded by contractors and Members alike as "approval by the International Group of P&I Clubs".

The present position is that many contractors have made amendments to their contracts and the following comments may be helpful to clarify the significance of "approval" by the International Group of P&I Clubs in this context.

**1. Indemnity provisions**

"Approval" of the wording of an indemnity provision in the contract is an affirmative statement that the owner's liability to indemnify the contractor pursuant to that clause is covered by the Club under the rule covering liabilities under certain contracts and indemnities, subject, as always, to the owner not being in breach of the Rules or his terms of entry.

Conversely, the absence of confirmation from the Managers that the terms of an indemnity have been "approved" means that Club cover does not fully extend to the liabilities that may be incurred under the indemnity. Such liabilities must either be separately insured or, if not, cover is at the sole discretion of the Directors in the event of the owner becoming liable for a claim under the indemnity.

Any Member being requested to sign a variation of a contract submitted to and "approved" by the Club is advised where appropriate to check with the Managers to ensure that such variations do not cause the initial "approval" to become invalid.

**2. Control of the contractor's operations**

The Managers continue to suggest that it is important for such contracts clearly to give the owner the right to control the operations of the contractor (rather than allowing the contractor to proceed with the contracted operations at his own discretion and to charge the owner accordingly). Contracts which have been "approved" by the Managers contain provisions which are considered adequate to give such control to the owner. However, Members should note that some contractors offer more than one service. Members are therefore recommended to ensure that the entities appointed by them to perform the various services named in the VRP remain independent of each other, e.g. that persons performing the roles of QI/Spill Managers are genuinely independent from OSROs.

The extent to which control can actually be exercised over a contractor may depend upon the circumstances of a particular incident. To the extent that a Member fails in practice to exercise adequate control over a contractor, the Member may still be liable for the costs that are incurred under the contract but will be at risk of failing to make a complete recovery from the Club in respect of those costs to the extent that adequate control has not been exercised.

### **3. Funding of contractors' services**

Certain contractors have requirements concerning proof of financial viability to be given either on signing the contract or prior to the contractor performing services. Reliance should not be placed on the Club to provide any form of financial guarantee or evidence of insurance, other than the normal Certificate of Entry for the ship. In particular, some of the contracts which have been "approved" contain a provision that enables the contractor to request that payment for his services is secured by means of a deposit or a Club letter of guarantee as a condition of continuing to perform. "Approval" of a contract containing such a term does not constitute a commitment by the Club to provide such a letter of undertaking on behalf of the Member. As in all cases, the provision of security is in the discretion of the Club and agreement to provide such a letter of undertaking and the terms on which it is to be provided can only be determined in the light of all the circumstances of the incident. In addition to the usual pre-conditions of agreement to provide security, the Club will also need to be satisfied that the Member is exercising sufficient control over the operations of the contractor so that the costs incurred can form a proper claim on the Club.

### **4. Contractors' warranties**

In general terms, contracts which have been "approved" do contain some form of warranty on the part of the contractor that he is legally and professionally competent to perform the contracted service.

However, the Managers have not been able to verify the legal or technical qualifications of any contractor and "approval" of the contract in no way constitutes a recommendation that a particular contractor or contract should be used by the Member concerned. In the event that the contractor fails to perform the contracted service, "approval" of the contract does not constitute a commitment by the Club to cover the Member against the potential consequences of his contractor's failure.

It should also be noted that, although a number of contracts do contain schedules or appendices of rates to be charged by the contractor for his services, the Managers' "approval" of the contract does not extend to agreement that all rates quoted are reasonable.

Whilst under federal law vessel response plans are only required from tanker owners, under State law such plans are sometimes required from owners of other vessels. A list of VRP requirements for individual States is attached as Appendix 2\*. States which are not mentioned on the list do not have separate requirements.

Attached as Appendix 3\* is a schedule of those contractors whose contracts have been "approved" within the terms of the circular. Appendix 4\* lists contractors whose contracts have been considered by the International Group but have not been "approved".

Yours faithfully,

**The American Steamship Owners' Mutual Protection and Indemnity Association, Inc.  
Assuranceforeningen Gard (Gjensidig)  
Assuranceforeningen Skuld (Gjensidig)  
The Britannia Steam Ship Insurance Association Limited  
The Japan Ship Owners' Mutual Protection and Indemnity Association  
Liverpool and London Steamship Protection and Indemnity Association Limited  
The London Steam-Ship Owners' Mutual Insurance Association Limited  
The Newcastle Protection and Indemnity Association  
The North of England Protecting and Indemnity Association Limited  
The Shipowners' Mutual Protection and Indemnity Association (Luxembourg)  
Skuld Mutual Protection and Indemnity Association (Bermuda) Limited  
The Standard Steamship Owners' Protection and Indemnity Association Limited  
The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Limited  
The Standard Steamship Owners' Protection and Indemnity Association (Europe) Limited  
The Steamship Mutual Underwriting Association Limited  
The Steamship Mutual Underwriting Association (Bermuda) Limited  
The Steamship Mutual Underwriting Association (Europe) Limited  
Sveriges Angfartygs Assurans Forening (The Swedish Club)  
The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited  
The West of England Ship Owners' Mutual Insurance Association (Luxembourg)**

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\* Members requiring up to date details of the information given in appendices 2, 3 and 4 should contact the Managers' London representatives.

## Appendix 1

### **INTERNATIONAL GROUP GUIDELINES ON VRP CONTRACTS**

#### **Control**

It should be clear in the contract that the ultimate control of the clean-up operation remains with the owner.

#### **Funding (particularly important for contracts with OSROs)**

The Association will not provide advance funding guarantees. It may be possible in the appropriate cases to guarantee payment by the Member of invoices relating to the services provided under the contract in accordance with the contract terms within a reasonable time after the incident. Such a guarantee will be subject to the following provisos:

- A fixed US dollar amount.
- A fixed time limit for the services, i.e. the letter would guarantee expenses incurred in providing response services up to a fixed period of time as appropriate (e.g. seven days from the incident date) subject to extension by written agreement of the Association; and
- A haul-off clause which provides for the Association's liability to be terminated upon 24 hours' notice.

### **Insurance and Indemnity**

The Association will not agree to provide co-assurance for OSROs or to warrant the owners' cover directly to the contractor.

It will agree to provide cover for limited indemnities to QIs and OSROs in the following form:

- Contractor indemnifies owner/operator for liabilities arising from gross negligence or wilful misconduct of contractor or a breach of the contract, or breach of applicable law or regulation by the contractor.
- Owner/operator indemnifies the contractor against liabilities arising from gross negligence or wilful misconduct or a breach of the contract, or breach of the applicable law or regulation by the owner/operator.
- Owner/operator indemnifies the contractor against liabilities for removal costs and damages arising out of a discharge of oil from the vessel, except to the extent that:
  - responder immunity applies under Federal or State law;
  - the liabilities arise from the gross negligence or wilful misconduct of the contractor;
  - owner/operator would not have been liable if sued direct;
  - owner/operator would have been able to limit his liability; and
  - the liability arises in respect of death or personal injury.

It is advisable that the contracts include a limit so that the total aggregate of all liabilities incurred cannot exceed the limit of club cover.

### **Warranties**

Contracts should contain warranties that the contractors (particularly for removal actions) will have and maintain all necessary Federal and State approvals/licences/classifications.

### **Classification**

The OSRO contract should contain a warranty that the OSRO maintains classification under Federal and State law (if applicable).

### **Insurance**

Care should be taken to ensure that the contractor maintains adequate insurance.

### **Law and jurisdiction**

With regard to choice of law and jurisdiction it is preferable to name the State of New York.