

CIRCULAR

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TO MEMBERS OF THE ASSOCIATION

Dear Member:

INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS 73/78 (MARPOL): OILY WATER SEPARATORS

The MARPOL regulations contain limits on the amount of oil which vessels can legitimately discharge into the sea. Where discharge from bilge tanks is permitted, it is a requirement that an oil discharge monitoring and control system, together with oil filtering equipment (an Oily Water Separator), be fitted so as to ensure that the oil content of any discharge does not exceed the maximum allowed under MARPOL, being 15 parts per million (ppm).

Any residue or sludge should then either be incinerated or discharged into reception tanks in port. Owners are required to ensure compliance with these regulations by inspection of log books, oil record books, incinerator logs and records of port discharges. There is an irreducible minimum of residue or sludge for which a superintendent should expect to see a proper account.

Port state authorities around the world are taking an increasingly hard line on vessels which have, or are suspected of having, discharged oil at sea in breach of MARPOL. The most vigilant authorities are currently those in Germany, the United States and France. Heavy fines can be imposed for violations.

International Group Clubs obviously do not condone breaches of the MARPOL regulations. Other than in cases of purely accidental discharge, P&I cover for fines resulting from MARPOL violations is only available on a discretionary basis. In such cases, Members will be required to satisfy the Board that they took such steps as appear to the Board to have been reasonable to avoid the offence. In any event, Clubs do not cover any fines or other penalties imposed where an owner knew or ought to have known of the offence and failed to take reasonable measures to prevent it.

This means that fines or penalties imposed under MARPOL relating, *inter alia*, to the misuse of equipment referred to above, or resulting from a failure to comply with record-keeping obligations concerning the disposal and management of engine room and other waste, are not covered by the Clubs, unless the Board in the exercise of its absolute discretion agrees reimbursement. Generally, the Board will only consider whether any reimbursement should be allowed after proceedings are finally concluded.

~~While proceedings are under way, therefore, full counter security in the form of cash or a bank guarantee will be required for any security given on behalf of the owner and, in addition, security will be required for any costs paid by the Club in defending such allegations. The Club can provide the names of law firms and other experts who may be able to assist and advise Members in the defense of such proceedings.~~

It is also the case that, in the United States, the United States Coast Guard (USCG) and the Department of Justice (DoJ) are vigorous in their investigation and prosecution of owners. In many cases, this prosecution may involve extensive use of certain legal powers given to them and there are particular areas in which the USCG and DoJ appear to take a very broad view of their powers.



Criminal investigation of such matters in the United States may be based on one or more of the following allegations:-

- violation of US pollution laws;
- false records (official logs, oil record books ...);
- false statements made to the USCG;
- obstruction of justice (destruction of evidence);
- conspiracy;

and may take one or more of the following forms:

- document subpoena;
- crew interview;
- grand jury subpoena/appearance;
- vessel searches;
- seizure of documents or equipment;
- detention of the crew as material witnesses.

These may lead to criminal or civil charges and fines.

These investigations can be extremely intimidating for the crew, and sometimes the mistake is made of trying to conceal innocent or minor regulatory breaches, thereby inadvertently giving rise to more serious charges involving obstruction of justice. Very often there has been no breach of US pollution laws and DoJ prosecutions have been based on the production of false records.

The legislation most frequently used by the USCG and the DoJ is:

- The False Statement Act: 18 USC 1001;
- Conspiracy: 18 USC 371;
- Witness Tampering: 18 USC 1505;
- Obstruction of Justice: 18 USC 1512;
- Destruction of Evidence: 18 USC 1519.

Although these Acts provide for potentially large penalties, they do not provide for any arrangements concerning security. Therefore the authorities have recently turned to using the US version of MARPOL, being the Act to Prevent Pollution from Ships: 33 USC 1901 (APPS).

APPS only applies to acts committed within US jurisdictional waters (i.e. those within the 12 mile limit) and provides that the US authorities may refer the matter to the flag state concerned or deal with it themselves. If dealt with by the US authorities under APPS, potential fines are a maximum of USD 500,000 per charge or twice the gain obtained (or twice the loss caused) by the offender, whichever is the greater.

As well as being the basis for the requirement of security, APPS also enables the US authorities to offer very substantial rewards to those who report alleged violations – the so-called “whistleblower” legislation, which offers a very real temptation to crewmembers. Security may also be obtained under the provisions of the Clean Water Act, 33 USC 1321, but it also only applies to spills in US waters. US authorities may also invoke the Alternative Fines Act.

It should be noted that APPS will often not apply (because the offences are usually alleged to have occurred outside the US jurisdiction) and that there is no provision in the other Acts for the provision of security. Under APPS, however, security does not have to include undertakings concerning the crew, acceptance of service of documents on behalf of owner, crew or ship by third parties, or authentication of documents.

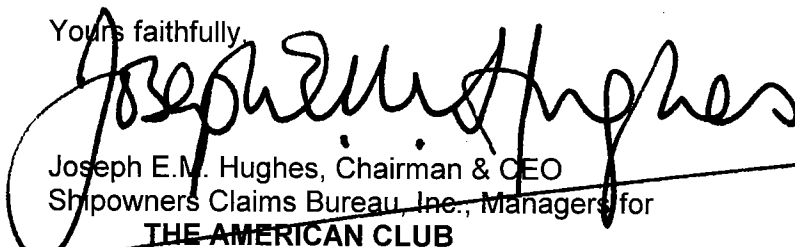


In other words, under APPS the USCG is only entitled to financial security and not to many of the other terms they frequently require before releasing vessels from detention. There may, however, be pressing commercial reasons why Members may prefer to concede some of these points in order to obtain the earliest possible release of the vessel.

So far as P&I cover is concerned, the position is therefore that, while proceedings are under way, Clubs are unable to provide security (except in exchange for counter security in the form of cash or by bank guarantee) for any such alleged offences and if the Club is asked to assist with the funding of costs incurred in defending criminal or civil proceedings, additional security will be required. Generally and with the exception of cases of purely accidental discharge, in relation to the offences discussed in this Circular, cover will only be available as a result of an exercise of discretion by the Board in favor of the Member at the conclusion of the case when all the facts are known.

As is always the case, the Managers will be pleased to respond to any questions Members may have in regard to the above, or generally.

Yours faithfully,



Joseph E.M. Hughes, Chairman & CEO
Shipowners Claims Bureau, Inc., Managers for
THE AMERICAN CLUB

(NB: Similar Circulars are being sent by other Clubs in the International Group.)
