



DECEMBER 23, 2011

CIRCULAR NO. 40/11

TO MEMBERS OF THE ASSOCIATION

Dear Member:

REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA (PRC) ON THE PREVENTION AND CONTROL OF MARINE POLLUTION FROM SHIPS - UPDATE

Members are referred to Circular No. 36/11 of December 8, 2011.

Matters have developed significantly and rapidly in the PRC over the past two weeks. The International Group (IG) has liaised further with the China MSA, various ship pollution response organizations (SPROs), shipowners and other interested parties in order to clarify a number of issues and to work toward ensuring, so far as possible, that there are suitable contractual arrangements in place to permit Members to be able to comply with the Regulations as easily and efficiently as possible.

The China MSA issued a Notice on December 22, 2011 outlining further requirements relating to the Regulations. The China MSA has indicated that there will be no deferral of the implementation date of the Regulations of January 1, 2012 in ports that have approved SPROs. However, if an operator is unable to finalize a contract with a SPRO in these ports before arrival of a vessel, the local MSA may permit entry of that vessel subject to operators providing an explanation to the local MSA in advance of arrival as to why it has not been able to conclude a contract to the MSA. If a vessel is permitted entry in these circumstances a contract will have to be concluded before the vessel departs the port.

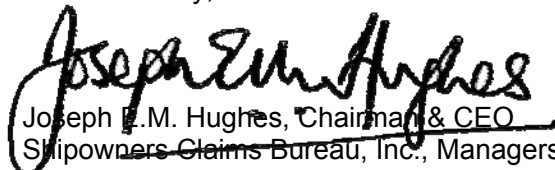
A set of Frequently Asked Questions (FAQs) have been developed by the IG and are attached to this Circular. The FAQs incorporate recent developments and the requirements of the China MSA Notice of December 22, 2011. These FAQs will be updated as appropriate with further developments when known. While the FAQs deal with the issues in some detail, the most significant issues of concern to Members are:

- Umbrella SPROs/alliances/consortia and agents signing contracts on behalf of operators will need to file relevant documentation with the MSA in order to be approved. A list of approved agents and umbrella SPROs/alliances/consortia will be published on the China MSA website: <http://msa.gov.cn>
- Overseas operators without a branch company or office or representative in China can choose to sign a clean up contract directly with an approved SPRO or appoint an agent to sign the contract on their behalf.

The above points are a summary of the main issues for Members arising from the recent China MSA Notice. Members are referred to the attached FAQs for more detailed information.

The IG will continue to maintain contact with the China MSA, SPROs and other key parties and further updates will be provided as appropriate.

Yours faithfully,


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

REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA (PRC) ON THE PREVENTION AND CONTROL OF MARINE POLLUTION FROM SHIPS

China SPRO FAQs

Compliance date – 1 January 2012

The above Regulations require owners/operators of (a) any ship carrying polluting and hazardous cargoes in bulk or (b) any other vessel above 10,000 gt enter into a pollution clean up contract with a Maritime Safety Agency (MSA) approved Ship Pollution Response Organisation before the vessel enters a PRC port.

The requirements do not apply to Hong Kong or Macau.

These FAQs reflect guidance given by the MSA and are believed to be correct as at 23 December 2011, but further updates may be necessary as the situation develops.

Ship Pollution Response Organisations (SPROs)

Approval of SPROs

1. Has the China MSA postponed the 1 January 2012 compliance date of the contract requirements?

Only in those ports where the MSA has not approved any SPROs and alternate measures have not been taken. Where this is the case the requirements have been postponed until 1 March 2012. Otherwise, where a ship cannot conclude a contract before entry into a Chinese port after 1 January 2012, then they must explain the reasons why to the relevant local MSA, who *may* permit the ship entry into port. In such cases, a contract will still need to be concluded before the ship leaves port.

From 1 March 2012, there will be full enforcement of the contract requirements.

2. What is an approved SPRO?

It is the clean up organisation approved by the MSA and found to meet the requirements listed in the guidelines for Capacity Evaluations of SPROs. This means that such SPROs are approved to contract with the owner/operator for pollution response for either Level 1, level 2, level 3 or level 4. (For an explanation of "levels" see section on "levels for SPROs" below)

3. Will a "certificate" be issued by the MSA showing evidence that a SPRO has been approved?

A SPRO will receive a certificate showing that it has been approved by the MSA for clean up response. This is called a Ship Pollution Response Unit Qualification Certificate (Article 10 of the Detailed Rules of the MSA of the PRC on the implementation of the Administration Regime of Agreement for Ship Pollution Response). Such certificate is normally valid for 3 years.

4. Will a "certificate" be issued by MSA to owners/operators that the owners/operators have satisfied the requirement to contract with a SPRO?

No.

5. How will we as the owner/operator know that a SPRO has been approved?

A list of MSA approved SPROs is published on the following websites in Chinese:

<http://msa.gov.cn/Notice/NotList/00000000-0000-0000-0300-040000000008>

http://www.osp.cn/new/Index_news_disp.asp?nid=1097&Title=国内动态

It is anticipated that in due course the list will also be published in English on the website.

The SPRO must be domiciled in mainland China.

6. We, as the overseas owner/operator already contract with an approved contractor for sludge removal. Do we need to enter into another contract for clean up response?

Yes. The requirements for sludge removal are completely separate from clean up response. There is a separate approval procedure for sludge contractors and for clean up contractors.

Signatories to the Clean Up Agreement

Who should sign the clean up agreement between the owner/operator and the SPRO?

7. We, as the owner/operator are based in China, can we sign the contract directly with SPROs? Who in our company can sign such a contract?

If you are domiciled in China then you must contract directly with a SPRO. The Legal Representative in that office must sign the clean up Agreement.

8. We, as the overseas owner/operator have a branch office in China, can we sign the contract directly with SPROs? Who in our company can sign such a contract?

If you have a branch company or office or representative in China then you can either contract directly with a SPRO or through an agent.

Where the contract is signed directly, without an agent, then the Legal Representative in that office must sign the clean up Agreement. Where this is the case then the branch office must file the certificate of incorporation (business certificate) and letter of authorisation to the China MSA (see section below on letter of authorisation). If the contract covers multiple port entries the documents must be filed with China MSA, Beijing. However, if the branch office is signing only where the ship calls at a fixed port, then the documents can be filed with the local MSA of the region in which that port is located.

9. We are an overseas operator and do not have a branch company or office or representative in China, will we need an agent to sign on our behalf?

No, it is not necessary. An overseas operator may choose to sign a clean up contract directly with an approved SPRO or appoint an agent to sign the contract on their behalf.

In addition the master of the ship may sign a contract direct with the SPRO provided he is authorised to do so by the overseas operator (see below). It is recommended that the master only signs the contract with the SPRO in cases of emergency.

10. Are there additional requirements if we are an overseas owner/operator?

If contract is signed through the master of a vessel, a ship's chop or stamp shall be stamped on the contract.

11. We are an overseas operator with a branch office in China but the branch office does not have the resources to conclude contracts with SPROs directly, can we use an agent to sign the contract with SPROs on our behalf? If we can, who in the company should appoint the agent, the overseas head office or the branch office in China?

Yes. If the branch office only deals with a particular segment of the trade, e.g. container ships, for that segment of the trade the branch office should sign or confirm the contract with the SPRO. However, the head office may make all the arrangements with the SPRO, or appoint an agent to do so. In such a case the branch office must confirm or endorse the contract by affixing the company chop on the contract already signed by the agent (as provided in Article 18 of the Detailed Rules).

12. Who, in the Head office or branch office of the overseas operator, should sign the contract with the SPRO?

The Legal Representative in the relevant office or other person legally authorised to do so. In exceptional circumstances the master may sign the contract on behalf of the owner/operator but see below under LOA.

13. Who should sign the contract on behalf of the SPRO?

The Legal Representative or another person legally authorised to do so by the SPRO.

It is recommended that the SPRO should also put a company stamp on the contract in addition to the signature because company stamps are more important in China than signatures. All the company chops/stamp are filed with local police in China.

14. Should a charterer sign the contract with an approved SPRO?

No. Although the definition of “operator” included in the Detailed Rules refers to the owner, manager or actual operator of a ship, which might conceivably include the charterer, it is the owner or manager of the ship (and his Club) who should have control of the clean-up operation in the event of a spill and it is therefore they who should be contracting with a SPRO, not the charterer.

Letter of authorisation (LOA)

15. If, as an overseas operator without a branch company, office or representative in China, we choose to employ an agent to sign the contract with the SPRO, do we also need to sign a contract with the agent?

You will need to sign a LOA authorising the agent to sign on your behalf. It is recommended that you also sign a contract with the agent. Some agents (CMS and Huatai) are requiring that contracts are signed with them.

16. We, as the overseas owner/operator need to put into a port in China in an emergency. We understand we need to conclude a clean up contract with a SPRO, and that the master can sign the clean up contract on our behalf. Do we need to provide an LOA to the master?

Yes. You will need to provide authority by means of an LOA to the master. It is recommended that the LOA merely provides that “the master of xxxxx ship” has authority to sign and does not name the actual master, since it is possible that the master may change. See also Q.10 and the need for the company chop.

17. We are an overseas operator with a branch office in China do we need to provide special authority to our branch office to sign the contract with the SPRO? If so should this be in the form of a LOA?

MSA requires the branch office must file the certificate of incorporation (business certificate) and letter of authorisation to the China MSA.

Is there a proforma letter of authorisation for such a purpose?

The International Group has prepared a proforma letter of authorisation as contained in the most recent International Group circular on the Regulations. It has the footer IG LoA dated 6 December 2011. It is recommended that this form be used.

18. Who in our company can sign the Letter of Authorisation?

The Legal Representative of the company or other person authorised to sign on behalf of the company

19. Do we, as owner/operator need to sign a separate LOA to a person to sign each individual SPRO contract or can the LOA be sufficiently broad to include several ports.

The operator only needs to send and sign one authorisation letter i.e. the same letter can be addressed to and name different agents that have been authorised to perform specific functions (if this is the case), or it can be addressed to one agent who may be authorised to sign contracts with different SPROs in different ports for different vessels. This depends on which, and how many, agents the owner/operator is going to authorise depending on the nature of the operator's operations and trade to China.

The agent in China

20. Can we appoint any person to be our agent?

There are various companies that offer the service of agent for the purposes of contracting with SPRO's, two of which are CMS and Huatai. If you wish to employ either of these companies it will be necessary to sign a service contract with them. These contracts contain details of the nature of the services and fees charged. Other traditional ship agents such as Penavico also offer the service of agent but no details of the exact fees they will charge or the services they offer are known.

The agent must be domiciled in mainland China and must meet certain requirements laid down in the Notice issued by the China MSA dated 22 December 2011. A list of agents that have met such requirements will be published by the China MSA on the China MSA website: <http://msa.gov.cn>

Electronic documents and signatures

21. Can the contract with the SPRO and the Letter of Authorisation with the agent or other party be signed in electronic form (pdf format) and then sent via email to the appropriate persons or authorities?

Yes. China MSA has confirmed that this acceptable.

22. To where should the Letter of Authorisation (LOA) be sent?

China MSA will announce a special e mail address to which to send the LOA. The LOA should be filed by the agent. Until such address is published the LOA should be sent by post/mail to MSA Beijing, c/o the

Department of Ship Safety Pollution Prevention Department, for the attention of Mr Xu Shiming or Mr E Hailing.

23. To where should the contract with SPROs be sent?

This should be sent to the local MSA by the SPRO, see Article 10 of the IG recommended Sample Agreement issued by the Club and annexed to the most recent International Group circular.

24. Are there any special requirements with regard to electronic signatures on the documentation?

No.

Legal Representative

25. Who is the Legal Representative of the owner/operator?

The "legal representative" means the Owners'/Operators' statutorily designated representative pursuant to their Articles of Association, or similar. This person should sign the authorisation letter for appointing an agent and should also sign the contract. This is the same legal representative that will be named in the contract. See page 5 of the contract with footer IG Sample Agreement dated 6 December 2011.

26. Who is the Legal Representative of the SPRO?

The "legal representative" means the SPRO's statutorily designated representative pursuant to their Articles of Association. Under Chinese law, the legal representative may delegate this power to one particular person within the company or to more persons if there are more, such as directors of the board, who may be authorised to sign legal documents in the articles of association. If this is the case those directors can also sign the contract. The Legal Representative of a SPRO will be named in the MSA approved list of SPROs. A Legal Representative of the SPRO must be named in the clean up and must sign it.

27. Should the person signing the SPRO contract on behalf of the SPRO be the representative listed in the approved list of SPROs? And should that person be listed as the Legal Representative in the list at the front of the contract?

The same person may be named in the MSA approved SPROs' list and also sign the contract on behalf of the SPRO. However, it is possible that different persons may be authorised to sign.

The contract

28. Is there a particular format for the contract?

On 1 June 2011 the MSA published a model contract entitled "Sample Agreement" to be used when the owner/operator concludes a clean up contract with a SPRO.

29. Can any of these articles in the contract be changed?

The articles relating to the rights and obligations of the parties to this contract are mandatory and therefore cannot be changed.

Additional clauses may be added in an Annex to the Agreement. **Recommended additional clauses have been developed by the International Group and included in a recommended IG Sample contract which is contained in the most recent International Group circular issued by the Club on China.**

It should be noted that an option chosen in Article 8 of the recommend IG Sample contract should be indicated by a “v” in the box or filling in a blank, a decision to delete an option should be shown by an “x”.

30. Can we see from the contract which the relevant local MSA is?

Yes. The first two numbers of the header will show which MSA is involved. The Key to the MSAs is shown on page 4 of the Sample Agreement.

31. If we, as the owner/operator are contracting with an umbrella SPRO who is contracting on behalf of several other SPROs, which number will be inserted ?

The number of the lead SPRO. Please note that the lead SPRO is required to discuss the nature and structure of the “umbrella” (consortium) with MSA and will need to meet the requirements laid down in the Notice issued by the China MSA dated 22 December 2012. The China MSA will publish the list of approved consortia on the China MSA website: <http://msa.gov.cn>.

32. The agreement refers to Party A and Party B. Where are these terms defined?

The parties are named on page 5 of the Sample Agreement. Party A is the owner/operator. Party B is the SPRO.

33. What are the additional clauses recommended in the IG sample contract?

The International Group has recommended some additional clauses principally in relation to termination and insurance.

The International Group recommends that the owner/operator ensures that a Level 1 SPRO has at least RMB 2 million to cover its liabilities under the contract (principally Article 7 of the IG sample contract), Level 2: RMB 1.5 million, Level 3 RMB 1 million and Level 4 RMB 500,000. (Article 6)

It is recommended that the Agreement include a clause permitting the parties to terminate during a response to an incident after discussion with MSA. (Article 6)

It is recommended that in Article 8 the parties choose the courts of China to resolve disputes.

It should be noted that “ ” should be used instead of “x” in Art. 8 of the recommend IG Sample contract because the former means the two parties has made the choice and the latter means the parties choose to delete it in according with Para. 4 of the opening introduction of MSA model contract.

34. If we are in doubt on the contract terms, or we receive a contract which is different to the recommended IG sample agreement, what should we do?

Contact your Club.

35. The SPRO is “MSA approved” but does not accept the insurance provision of the supplemental clauses, what should we do?

Contact your Club. If there is a possibility of contracting with a SPRO in a particular port which has insurance and whose contract conforms, the member should opt for the SPRO with insurance. When it is necessary to contract with a SPRO on an urgent basis and none are available in the area with insurance, then it would seem reasonable to suggest that the contract should just be for that voyage and not the annual contract.

36. The SPRO is “MSA approved” but does not accept the termination provision of the supplemental clauses, what should we do?

Contact your Club. Again, if this has to be accepted in the case of an emergency it is suggested that the contract be entered into on a voyage basis.

37. Are we, the owner/operator free to contract with any SPRO approved by the MSA?

Yes, depending on whether the SPRO has the appropriate level of qualification, see Annex IV attached to the most recent circular issued by the International Group of P&I Clubs. SPROs may be qualified for different levels. Level 1 is the highest level of qualification. The criteria for determining the level of SPRO are shown in the guidelines for the capacity evaluations of ship pollution clean units published on 1 June 2011.

Level 1 approval is carried out by China (Beijing) MSA, approval of other levels is carried out by local MSAs.

38. How do we, the owner/operator determine if the cargo that my ship is carrying means that it falls within the scope of the contract requirements?

The MSA issued a Notice in February 2011 with an accompanying “catalogue of cargoes Apt to Cause Pollution during Ocean Carriage” for the purposes of the Regulations of concern and the MSA contract. In terms of those cargoes not listed, the Notice states that “*Cargoes that are not listed in the Catalog but are suspected of apt to cause pollution and cargoes with uncertainty whether apt to cause pollution shall be submitted to an appraisal agency recognized by the Maritime Safety Administration for test and assessment.*” The catalogue lists all those cargoes which fall with the term “liquid hazardous cargo other than oil in bulk. The Catalogue in Chinese can be found on the following website:

<http://msa.gov.cn/Notice/NotList/00000000-0000-0000-0300-040000000006>

The MSA has confirmed that semi-submersibles and MODUs must meet the requirements.

39. Annex IV refers to Classes 1 – 4. Are these the same as Levels?

Yes.

40. Should we, the owner/operator sign the contract on a voyage basis or yearly basis or otherwise?

This will depend on the trading pattern of the ship and is left to the discretion of the individual member. However if a member due to an emergency is forced to sign a contract which does not conform with the guidelines, or for which the response tariff is unreasonably high, it is recommended that this is done on a voyage basis to allow an opportunity for further negotiation for any subsequent calls. The contract will be valid for the period of time agreed between the operator and the SPRO. The contract contains a clause that allows for it to be agreed for a fixed term of years or months, or on a per voyage basis.

41. The area we are trading to does not have any SPRO with which our vessels are required to contract, what should we do?

The MSA may permit a contract with an approved SPRO from a nearby port to be used.

42. Can we, as owner/operator enter into one contract with a specific SPRO but for a number of different vessels calling at the port where the SPRO has been approved?

Yes, the contract allows for this, see Appendix 1 of the recommended IG Sample contract.

43. We, the owner/operator understand that the requirements do not apply to ports on the Yangtze River. Is this true?

It is understood that the requirements will only apply to Nantong Port on the Yangtze River.

44. We, the owner/operator, are taking delivery of a new vessel in a Chinese port. Will we need to ensure that a contract is in place with an approved SPRO for that vessel for the purposes of its maiden voyage even if it is not calling at a Chinese port in the following year?

Yes.

One stop service/ umbrella SPROs/ alliances/ consortia

In accordance with clause 4 of the Supplementary Notice on Relevant Issues Concerning the Implementation of the Regime of Agreement for Ship Pollution Response, a SPRO may, acting on behalf of its branches or interlocking units, provide a one stop service. This SPRO shall provide China MSA with materials describing its service.

The MSA requires the umbrella/alliances/consortia to report all relevant documents to the China MSA for review as laid down in the Notice issued by the China MSA dated 22 December 2011. Therefore, before signing a contract with an umbrella SPROs/alliances/consortia, operators should check that they have been approved by the China MSA. The China MSA will publish the list of approved umbrella SPROs/alliances/consortia on the China MSA website: <http://msa.gov.cn>.

45. Can we, as the owner/operator, enter into a contract under the umbrella of one SPRO that has been approved in different ports?

Yes, but separate contracts may be needed with the SPRO in each of the different ports. In any event the parties under the agreement are the owner/operator and the SPRO in the relevant port.

46. Do we have the names of those "umbrella" alliances?

The following SPROs are reported to be forming alliances:

Jufeng

Longshan

Qianhe

Shanghai Resolve Shengmin

In addition OSRO China (based in Hong Kong) offers a service to facilitate an alliance of SPROs in China.

It would seem that these SPROs intend to charge the same fees and response tariff for all the SPROs in their individual umbrella. However, the fees vary from consortia to consortia.

47. Does a copy of the contract need to be kept on board?

Yes it does. Article 1.2 requires Party A (owner/operator) to keep a copy of the Agreement on board all the ships listed in the Agreement and to make sure that the crew are familiar with the Agreement.

48. Does the Agreement require the Party A to keep any other documents on board?

Yes. Article 1.2 of the Sample Agreement also requires Party A to keep on board a copy of the Pollution Response Operation Plan formulated by Party B.

49. What is a Pollution Response Operation Plan (PROP)?

A Pollution Response Operation Plan or PROP is a contingency plan prepared by the SPRO for implementation in the case of a spill. It is reviewed by MSA as part of the SPRO assessment for approval. The PROP must be filed by the SPRO with the local MSA. Before signing the contract the owner should ask the SPRO for a copy, since under Article 1.2 of the clean-up Agreement the PROP should be kept on board and provided to the owner in English and Chinese, and the ship's crew should be familiar with its contents.

Retainer fees

The retainer fees to be charged by the SPRO will be listed in Appendix II.1 of the Sample Agreement. The law states that such fees should be reasonable (Article 20 of the Detailed Rules) The China Association of Communication Enterprise Management (CACEM) published a guidance document on fees to be charged by way of retainer, including a recently published revised set of reduced retainer fees, although the reduction is not significant and their retainer fees are still considered to be unreasonably high.

50. Are retainer fees covered by the Club?

No. This is an operational expense.

51. At which point on the ship's arrival would it be reasonable to expect the SPRO to charge a retainer fee?

Since the SPRO should be on standby from the point at which the ship enters the service zone it would be reasonable to charge the retainer fee from this point. However, there is no law which governs how and when the SPRO can charge retainer fees. This is a matter for individual negotiation.

Response tariffs

Appendix II.2 of the Sample Agreement sets out the response tariff, i.e. the costs which will be charged in the case of a spill.

52. How do we determine if the response tariffs are reasonable?

Members should ensure that response tariffs are incorporated into the contracts and should contact their Club if the response tariff has not previously been considered by the International Group.

53. If the agent becomes bankrupt, or disappears, will the contract with the SPRO become invalid?

Whilst the law is not explicit on this point, it is considered likely that if the agent becomes bankrupt or disappears, the contract between the owner/operator and the SPRO will remain valid. However, the contract between the owner/operator and the agent will no longer be valid.

54. Is there an International Group recommended charter party clause to describe the division of responsibilities between owner and charterer for compliance with the new regulations?

No.

55. Are there any penalties if I do not conclude a contract with a SPRO?

Yes. Article 68 of the Regulations states that failure to conclude a clean up contract can result in a fine of between RMB 10,000 and RMB 50,000. Article 58 provides that if a ship does not comply with the regulations, the MSA can order rectification of the omission and if this fails they can prevent the ship from entry to or departure from a port.

56. In addition, can a SPRO have representatives in various Chinese ports that will be included in one contract for these ports or must each operator contract with different SPROs depending on the port?

There is provision for one SPRO to form an alliance with SPROs in other ports, and we know that some of them are doing this (see 43 above). However, the regulation requires nonetheless that each SPRO file a signed contract with local MSA. Any SPRO alliance should be reported to the MSA. As these alliances develop, it is possible that a way of streamlining the procedure will evolve.

57. We, as owner/operator are calling at Chinese ports in January but the vessels which will be calling only require Level 2, 3 or 4 SPROs. If there are no Levels 2, 3 and 4 SPROs approved by that date, what do we do?

The local MSA should be consulted. If there is a Level 1 SPRO approved by MSA in a particular area, even if there are no Levels 2, 3 and 4 SPROs in the area, the contract should be made with the Level 1 SPRO.