

GUIDELINES CONCERNING COSTS FOR ASSISTANCE AND CLAIMS MANAGEMENT IN THE CONTEXT OF THE BONN AGREEMENT

The annex to this chapter contains an example of a form of contract.

33.1 Introductory considerations

.1 This chapter discusses the arrangements between Contracting Parties to the Bonn Agreement when assistance is required in the case of an incident and costs have to be settled. With regard to these financial arrangements a distinction is made between the costs involved for rendering assistance from one Contracting Party to another and the recovery of costs by the affected Contracting Party.

.2 Costs for assistance would preferably be based on a contract between Contracting Parties, namely the requesting Contracting Party and the assisting Contracting Party. An example contract is provided in Annex 1.

.3 In the unfortunate situation that a Contracting Party is confronted with a maritime incident requiring response measures in the widest sense the polluter will be held liable and responsible for appropriate measures and reimbursement for costs encountered by the affected Contracting Party. "Claims Management" covers all the legal and financial matters to be dealt with in an incident. In 2010 the European Maritime Safety Agency completed a first draft of "EU Guidelines for Claims Management" which can be found in the public domain of the EMSA website: www.emsa.europa.eu.

33.2 The Bonn Agreement

.1 Articles 5 to 12 of the Bonn Agreement describe the communication between Contracting Parties and the aspects for assistance. When the Agreement was founded in 1969 the most important objective was the assistance, the mutual interest between Contracting Parties in combating a pollution.

Article 7 states:

"A Contracting Party requiring assistance to deal with pollution or the prospective presence of pollution at sea or on its coast may call on the help of the other Contracting Parties. Contracting Parties requesting assistance shall specify the kind of assistance they require. The Contracting Parties called upon for help in accordance with this Article shall use their best endeavours to bring such assistance as is within their power taking into account, particularly in the case of pollution by harmful substances other than oil, the technological means available to them."

.2 When a Contracting Party in its zone of jurisdiction has to deal with a maritime incident it is the responsibility of that Contracting Party to take appropriate action. With reference to the POLREP communication system that is applied in the Bonn Agreement, that Contracting Party will inform either the Bonn Agreement Contracting Parties at large or only those that may be affected by the incident.

.3 The POLFAC part of the POLREP system is used to call for assistance. However, in practice direct telephonic communication will be established between a requesting Contracting Party and other Contracting Parties to discuss assets available.

.4 If assistance is agreed, it is recommended to consider detailed paperwork. Any arrangement should be put on paper and signed by both parties. It is considered essential to maintain accurate notes and documents in order to satisfy the Claims Management process.

33.3 Polluter Pays Principle

.1 In environmental law, the polluter pays principle is enacted to make the party responsible for producing pollution responsible for paying for the damage done to the natural environment. It is regarded as a regional custom because of the strong support it has received in most countries in both the Organisation for Economic Co-operation and Development (OECD), and in the European Union (EU). In international environmental law it is mentioned in Principle 16 of the Rio Declaration on Environment and Development.

.2 "Polluter pays" is also known as extended polluter responsibility (EPR). This is a concept that was probably first described by the Swedish Government in 1975. EPR seeks to shift the responsibility for dealing with waste from governments (and thus, taxpayers and society at large) to the entities producing it. In effect, it internalises the cost of waste disposal into the cost of the product, theoretically meaning that the producers will improve the waste profile of their products, thus decreasing waste and increasing possibilities for reuse and recycling.

.3 OECD defines EPR as:

"a concept where manufacturers and importers of products should bear a significant degree of responsibility for the environmental impacts of their products throughout the product life-cycle, including upstream impacts inherent in the selection of materials for the products, impacts from manufacturers' production process itself, and downstream impacts from the use and disposal of the products. Producers accept their responsibility when designing their products to minimise life-cycle environmental impacts, and when accepting legal, physical or socio-economic responsibility for environmental impacts that cannot be eliminated by design."

.4 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD) establishes a framework based on the "polluter pays" principle, according to which the polluter pays when environmental damage occurs. This principle is already set out in the Treaty establishing the European Community (Article 191(2) TFEU). As the ELD deals with the "pure ecological damage", it is based on the powers and duties of public authorities ("administrative approach") as distinct from a civil liability system which is more appropriate for "traditional damage" (damage to property, economic loss, personal injury).

.5 The ELD was already amended twice through Directive 2006/21/EC on the management of waste from extractive industries and through Directive 2009/31/EC on the geological storage of carbon dioxide and amending several directives. Directive 2006/21/EC broadened the scope of strict liability by adding one more dangerous activity ("management of extractive waste") to the list of dangerous occupational activities in Annex III of the ELD. Directive 2009/31/EC adds another dangerous activity ("operation of storage sites pursuant to Directive 2009/31/EC") but includes also genuine responsibility and financial security provisions separate from the ELD.

.6 All Contracting Parties to the Bonn Agreement have implemented the "Polluter Pays Principle" in their Response Organisations. The principle is known and honoured or well respected by shipping as well as offshore industry and all conventions related to compensation for pollution understand the purpose.

33.4 Guidelines

.1 A Contracting Party that is in charge of handling a maritime casualty will define the response measures and also the type of assistance required. Within the Bonn Agreement network (as in other regional agreements) direct contact at personal level may be established to discuss the assistance required and options available.

.2 Assets can be disclosed and made available depending on the requirements defined by the requesting Contracting Party. In the direct communication the availability of equipment can be checked with regard to the actual status of maintenance and readiness.

.3 Although it is the sovereign decision of the assisting Contracting Party what costs will be charged to the requesting Contracting Party it is strongly recommended to provide a detailed overview of all costs involved – up to two decimals – and to avoid offering assistance free of charge. A government to government discount may be used against that assisting Contracting Party in another incident.

.4 In the aftermath of the response operation and on completion of the incident the process starts for reimbursement of costs and it is recommended that all assisting Contracting Parties are compensated by the requesting Contracting Party. The Contracting Party that was in charge of handling the incident will claim all costs from the polluter, unless otherwise agreed between parties.

33.5 Types of assistance

.1 It is not the intention to provide an exhaustive list of types of assistance that can be made available. However, whilst in the early years of the Agreement assistance dealt with equipment only, nowadays management support could also be essential.

.2 Types of assistance to consider are:

- Surveillance aircraft (including crew; downlink equipment)
- Aerial surveillance coordinator
- Dispersant spray aircraft
- Response vessel
- Oil booms
- Oil collection systems (busters)
- Oil pumps
- Powerpacks (in most cases a package is supplied, comprising a powerpack with other components)
- Storage tanks
- Maintenance equipment
- Engineers
- Response staff
- Response coordinator
- Expertise for judging offered equipment
- Expertise for preparing costs recovery

.3 Depending on the type of assistance offered, the contractual documents should clearly state:

- The capacity of the offered system
- The cost per hour in operation, in stand-by
- Cost for cleaning and maintenance (repair)

- Cost per hour for vessels in operation and waiting. Also state extra costs for fuel and lubricants, possible crew change, hotel costs
- Port fees, pilot service if deemed necessary
- In the case of aircraft, state costs per flight hour (including or excluding crew); landing fee; fuel; hotel costs
- Diplomatic clearance
- Transportation costs
- Custom clearance
- In the case of staff and other experts, the costs per hour.
- State the duration of the assistance, even when this indicative
- Define periodical payment. Invoices could be forwarded on a weekly basis
- Define VAT arrangements
(it is experienced that a polluter registered outside the EU could claim reimbursement for VAT)

.4 It is recommended that the requesting Contracting Party clearly describes what they expect the assisting Contracting Party to do and what administrative rules their staff has to comply with. A daily report is a suggested registering method, that may provide essential input for the preparation of the cost overview.

33.6 Evaluation and lessons learned

.1 Contracting Parties are invited to evaluate a maritime incident, for the purpose of this chapter, especially a case where assistance was requested and provided, and that lessons learned are reflected in further improvements of the issues addressed.

{name, address of assisting party}

A contract made on the day of between:

- The government of {country}, represented by:
being agents / owners of the assisting unit :.....{name of the unit}.....
hereinafter referred to as "**owner**" of the assisting unit

and

.....

the assistance requesting authority/party/enterprise

hereinafter referred to as "**requesting party**"

RECOGNIZING the purpose of the assistance as described in: {POLFAC nr} or Fax nr.

HAVE HEREBY AGREED as follows:

- 1 In order to act as aforesaid the requesting party will contact the owners of the required assisting unit by written mail or fax and describe the assistance needed. Upon agreement between the requesting party and the owner both exchange general modalities as there are i.e.
 - .2 Daily and/or hourly costs of the assisting unit, modalities for operations and cleaning,
 - .3 Estimated time of arrival (ETA) at agreed position or port,
 - .4 Necessary preparatory procedures like diplomatic clearance and/or customs clearance,
 - .5 provision of liaison personnel, OSC, communication channels and procedures,
 - .6 Logistics arrangements (crew change, bunkers, spare parts, stores) and crew change frequency (cost estimation).
 - .7 Operational command, aerial surveillance, reporting system, mission orders
 - .8 Application of aerial spraying of dispersants.
- 2 Without prejudice to clause 3 the assisting unit will act as aforesaid under the direction of the head of staff (Supreme on Scene Commander) authorized by the requesting party from the time of its arrival and given notice of readiness to the Supreme on Scene Commander (SOSC) until the unit is relieved from its duties by the SOSC and returned to the orders of the owner.
 - .2 The assisting unit will not act against the orders of the SOSC or his nominee.
 - .3 However, the master of the assisting unit shall at all times have the ultimate decision as to the use and safety of the unit. He is not obliged to follow any orders of the SOSC and/or his nominee that in his opinion could endanger his unit and/or crew. In such case he has to inform the SOSC or his nominee on his decision and the possible consequence.
- 3 The assisting unit is obliged to declare readiness for the requested operation to the SOSC with a functioning recovery system, but not entitled to provide additional skimmers, booms, hoses and lightering systems that do not belong to its standard equipment package.

However the variety of equipment transported with the unit should fulfil the initial request for assistance of the other party.

 - .2 Damage affecting the unit's response equipment during transportation lies within the responsibility of the transport unit.

	Damage affecting the unit's response equipment in operation lies within the responsibility of the master of the assisting unit for reasons of bad practice and negligence in handling the equipment.
.3	If, as result of instructions by the SOSC or his nominee, damage occurs to the response equipment, the SOSC is liable for the damage
4	Upon request by the SOSC and/or considering the filling status of the unit's storage capacity for the recovered pollutant the assisting unit shall approach the selected reception facility arranged for by the SOSC and discharge the recovered pollutant to the reception facility until the unit's storage capacity is empty and safe for further recovery operations. After finalization of the discharge the unit will report its status to the SOSC and request new mission orders.
5	Without prejudice to clause 2 the assisting unit will inform the SOSC or his nominee in case the operational efficiency of the unit declines for different reasons, i.e. when mission tasks given by SOSC do not correspond with the unit's capabilities or when there are no longer recoverable pollutants accessible.
.2	In such cases the SOSC or his nominee shall officially declare to the owner of the assisting unit that at a defined date the assistance activities of the contract will end, or will propose the prolongation of the contract for other purposes within the scope of the relevant marine pollution response activities where the assisting unit could further be effectively utilized.
.3	In case the owner of the assisting unit does not agree to the aforesaid prolongation of the contract, he may end the assistance activities by the unit and prepare for its transfer to home base in line with the contract stipulations
6	Without prejudice to clauses 2 and 4 the owner may request the immediate return of the unit to his orders in case major emergencies involving a significant threat of marine pollutant release effect or threaten to effect the coastal waters for which the unit is built for as a major contingency measure.
7	Any costs incurred by the assisting unit for dues and charges in the area where assistance is provided like (un)berthing, pilots, port dues, lightering charges, agents charges, cleaning material, pre- cleaning of unit and equipment prior to transfer back home are to be paid for by the requesting party.
8	In line with stipulations of clause 7 the owner of the assisting unit is to receive: <ul style="list-style-type: none"> - Remuneration at the rate of per day/hour in operation from the date and time of departure and until date and time of arrival at the point of departure with clearance for the original service. - The following rate is to be calculatedper day/hour of stand- by time. Stand- by time is the time in which the assisting unit is not sailing and operating and not contaminated by pollutants but standing-by in the operation area. - The following rate is to be calculatedper flight hour calculated from blocks off to blocks on.
.2	The costs of the above remuneration includes all running costs of the fully equipped unit including crew wages, insurance, bunkers, lubrication oil, victuals and all regular items and substances needed for the operations. Costs for crew changes are charged additionally.
.3	The final cleaning of the unit and equipment at a place where such an operation can be professionally undertaken at competitive costs and in view of the circumstances that enable the owner to bring it back as soon as possible into the original service is to be chosen by the owner and agreed with the assistance requesting party. With respect to the quality of cleaning, the standard is "ready for paint." * it is strongly advised to clean the units in the area of the response operation in order to avoid oil losses from the hull of recovery vessels in transfer to their home port.
9	Apart from the remuneration according to clauses 7 and 8 owners shall be paid: <ul style="list-style-type: none"> - For all proved damages incurred by the owners by entering into this contract, if owners have indicated before entering into this contract that such damages may be incurred and if so, - The maximum amount of such damages, for all extra payments to master and crew of the unit entitled to such payments by the hazardous and difficult nature of recovery operations under emergency conditions, if owners have indicated the possibility and approximate magnitude of such payments to the assistance requesting prior to concluding the contract.

- 10** No claims for loss, damage or delay arising during the period of this contract shall be made against the assisting unit, master, owner and crew even if caused by negligence except if caused by gross negligence or intention of the aforesaid.
- .2** The requesting party shall indemnify and hold the owners of the assisting unit free from such claims.
- .3** The requesting party shall hold harmless and indemnify the owners, master and crew of the assisting unit against all claims arising by reason of any incident occurring or any act, error or omission committed while operating under command of the SOSOC, even if arising from negligence except if caused by gross negligence or intention of the owners of the assisting unit or their master, crew and other personnel, including claims for loss of life or personal injury of master and crew together with all costs charged and expenses suffered or incurred in connection with any such claims, and against all loss or damage suffered by the owner of the assisting vessel.
- 11** The owner of the assisting unit may at any time replace the unit by any other unit which is suitable for the purpose of this contract and at a time and condition which is acceptable to the assistance requesting party and thereafter the replacement unit shall be subject to all terms of this contract.
- The relieved unit shall then return to its home base under conditions referred to in clauses 7, 8 and 9.
- 12** In case any dispute in the interpretation of the clauses of this contract arises between its parties the(*i.e. District Court Hamburg*) shall determine the remuneration and /or cost compensation in accordance with this agreement and the International Law of the Sea. Such decision is binding for both contractual parties
- 13** The contract is executed in English which language is binding in cases of dispute between the contract parties

For the owner of the assisting unit

{name, date}

For the assistance requesting party

{name, date}