



*HFW*

SHIPPING

# 2020 SULPHUR CAP

WEST OF ENGLAND PRESENTATION

**RORY BUTLER**

Partner

T +44 20 7264 8310

E [rory.butler@hfw.com](mailto:rory.butler@hfw.com)

**ALESSIO SBRAGA**

Senior Associate

T +44 20 7264 8768

E [alessio.sbraga@hfw.com](mailto:alessio.sbraga@hfw.com)



## What is HFW doing at the moment in relation to 2020 – some examples

- Drafted BIMCO 2020 clauses
  - Produced a variety of Owner and Charterer focussed clauses for time charters, voyage charters and COA contracts (e.g. compliance, transition, scrubber clauses)
  - Advised Owners and Charterers on scrubber purchase contracts
  - Advice on financing scrubber purchases
  - Advice on several projects to retrofit scrubbers to existing and new time charter tonnage, with scrubbers being paid for by Owners and/or Charterers
  - Advice LNG fuel/retrofit
-



## What this talk will cover?

- MARPOL Annex VI - Regulation and Enforcement
- Compliance with the 2020 Sulphur Cap
  - What are the issues?
  - BIMCO 2020 Marine Fuel Sulphur Content Clause for Time Charterparties [**"BIMCO Compliance Clause"**]
  - Additional considerations/provisions to promote discussion
- Transition from high sulphur to (compliant) low sulphur fuel oil / Carriage Ban
  - What are the issues?
  - BIMCO 2020 Fuel Transition Clause for Time Charterparties [**"BIMCO Fuel Transition Clause"**]
  - Additional consideration / provisions
- Scrubbers
  - Scrubber Types and Bans
  - Concerns
  - Example charter clause
  - Agreements to fit scrubbers

n.b. now no BIMCO clause attended to address scrubbers

---



## Marpol Annex VI – key provisions

- Regulation 14.1: "*General Requirement*"  
"Sulphur content of any fuel oil used on ships shall not exceed 0.50% m/m wef 01.01.20" ("**2020 Sulphur Cap**")
  - What is a "Ship"?  
"a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms."  
(Article 2(4) MARPOL)
  - What is "Fuel Oil"?  
"Fuel Oil means any fuel delivered to and intended for combustion purposes for propulsion or operation on board a ship, including distillate and residual fuels."  
(Regulation 2.9)
  - Compliant Fuel = "*alternative fuel oils*" provided they are  
"....at least as effective in terms of emissions reductions...."  
(Regulation 4.1)
-

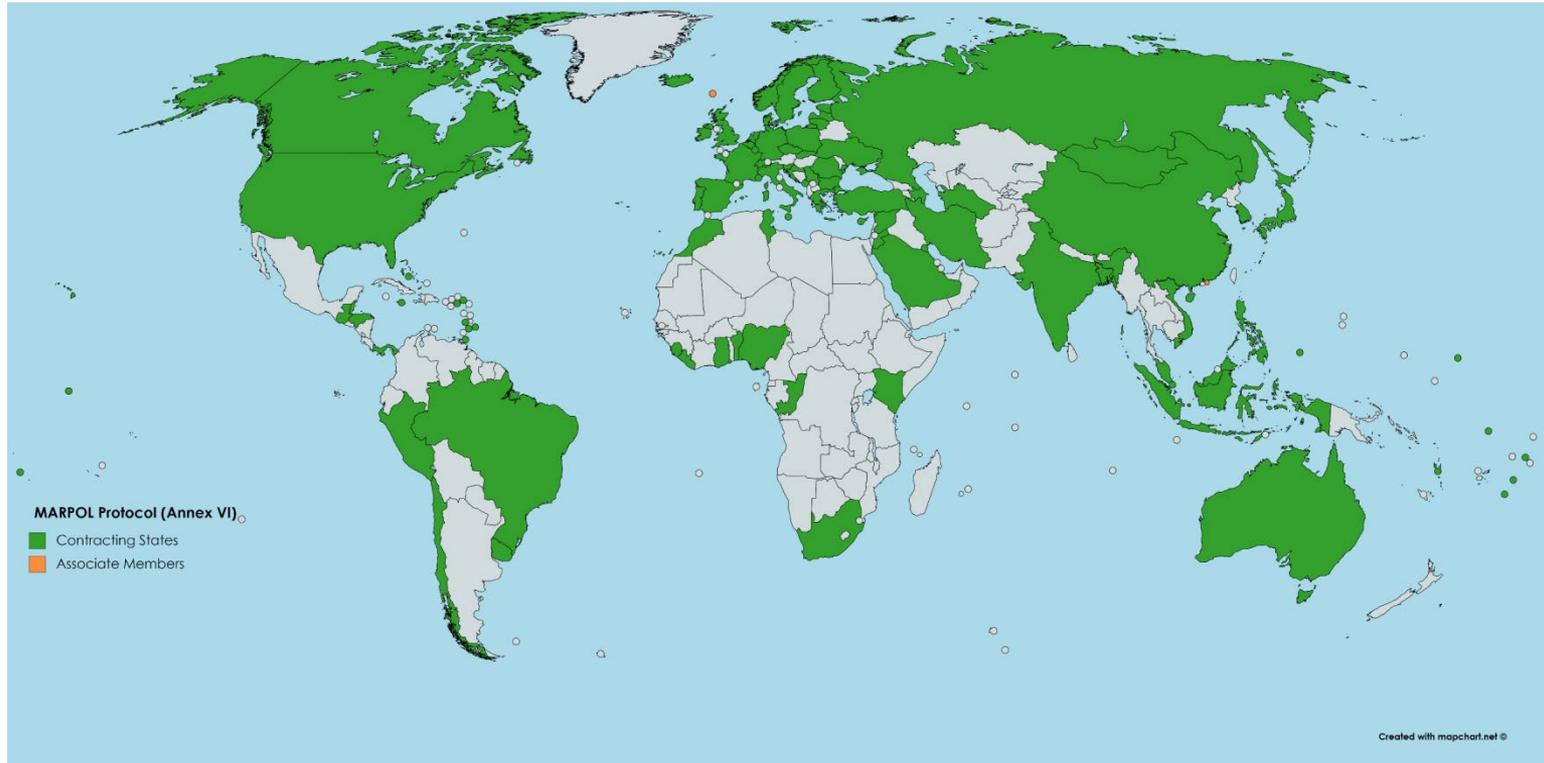
## Marpol Annex VI – methods of compliance

- Types of (compliant) fuel oils
    - (a) Distillate fuels
      - MGO (DMA)
      - MDO (DMB)
    - (b) Hybrid or blended fuels
      - Blends – between heavy distillate and light residual
      - New residuals – HFO from sweet crudes or HFO that has undergone desulphurisation
    - (c) LNG
    - (d) Methanol, bio fuels, LPG, hydrogen fuel cells
  
  - Alternative abatement technology
    - Exhaust Gas Cleaning Systems (i.e. scrubbers)
    - provided "*...at least as effective in terms of emissions reductions....*" (Regulation 4.1)
    - approved by Administration (flag state Government)
-



## Annex VI – Application

- Annex VI (including the 2020 Sulphur Cap) applies to:
    - (a) Any trades which involve ships calling at MARPOL convention state; and
    - (b) Any ships which fly the flag of a MARPOL convention state
  - Hence, reference to the "**global cap**"
  - As can be seen from the map on the next slide there will be some “gaps” where cabotage/local trades may mean that ships do not need to comply with Annex VI – subject to:
    - at least to registering with a flag state that does not require compliance or relying on PSC/local inspectors to turn a “blind eye”; and
    - not calling at ports which are subject to other sulphur content emission regimes
-





## Annex VI – Responsibility for compliance

- Primary responsibility always rests with shipowners
  - Normally reflected in charterparty provisions
  - However, possible to allocate cost and risk of compliance under contract
-

## Annex VI - Additional requirements

- Fuel Oil Availability (Regulation 18.1-18.2)
    - if vessel found to be non-compliant (eg compliant fuel not available), the vessel is obliged to provide:
      - (1) a record of actions taken to achieve compliance;
      - (2) evidence that “best efforts” to purchase compliant fuel were made, but it was not possible
    - obligation on shipowners
    - vessel should not be required to deviate from voyage to achieve compliance (query though if Vessels may chose to do so in practice)
    - risk as consequences unclear – up to PSC and flag state
  - Fuel Oil Quality (Regulation 18.3)
    - compliant fuel oil:
      - “shall not include any added substance or chemical waste which.....jeopardizes the safety of ships or adversely affects the performance of the machinery.”* (Regulation 18.3.1.1.3.1)
-

## Annex VI - Additional important considerations

- Carriage Ban (MEPC 73)
  - Prohibition on carriage of fuel oil of > 0.50 % sulphur content for use in fuel tanks wef 01.03.20
  - unless scrubber installed and (de facto) operational
- Covers more than the 2020 Sulphur Cap
  - ECAs i.e. fuel oil of no more than 0.10 % sulphur content (Regulation 14.3-14.6)
- Outside Annex VI - other areas where sulphur content is regulated
  - US, EU, China, Hong Kong, Antarctic / Arctic and more

(Now also necessary to consider where scrubbers are banned, we return to this later)

---

## Annex VI – Policing / Enforcement

- Straightforward to identify a vessel in *de facto* in breach due to the carriage ban (bunker delivery notes and vessel documents or tank sampling)
  - Wide application of MARPOL
    - can be enforced by either contracting flag state ("Administration") or Port Authority of contracting state ("Party")
  - Fines/Enforcement
    - depend on individual contracting state – fines will need to be sufficiently large to deter (see US magic pipe case example)
  - "*Experience building phase*"
    - rejected at MEPC 73, but information is being gathered
  - MEPC Circular - written ship implementation plans
    - approved at MEPC 73, but precise content / format not yet clear
  - Paris and Tokyo MOUs
    - 'letter of warning' about importance of compliance come 01.01.20 being distributed to ships
  - At present, the position is *unclear*.....
-

## Annex VI – Policing / Enforcement – Enforcement and Insurance Cover?

- If there is a significant price difference between high and (compliant) low sulphur fuel Owners may be tempted to risk breaching the new rules, either by flouting the rules and taking a risk on being caught and fined if the consequences are not that great or having hidden tanks/fake records/sampling etc.
- Tech has a role to play here, e.g. tamper proof monitoring systems on ships, drones or airborne monitoring as does the bunker industry (ship's fitted with scrubbers will have monitoring of emissions)
- Early enforcement and penalties will “set the tone”
- Crew may “whistleblow” in the hope of rewards, see the US “magic pipe” example
- Vessel and Managers may end up on PSC “hit lists” or be subject to special measures/inspections

### Insurers:

- New issue for Insurers
  - Likely to refuse any cover where Members have intentionally breached the rules – potentially significant exposure to fines
  - May be more sympathetic if there is an accidental or “no fault” breach, especially if early on, e.g. crew error re late changeover or bunkers not matching bunker test results (off spec for sulphur content)
-



## **COMPLIANCE WITH THE 2020 SULPHUR CAP**

---



## Compliance with the 2020 Sulphur Cap – and Who Pays?

- Raises a number of significant issues/challenges likely to impact the entire physical shipping chain. Very likely to result in increased risk, responsibility and cost for all parties.
  - Existing Charterparty provisions do not adequately cover these.
  - Who Pays, Time Charters, Voyage Charters/COA?
    - Normal position in existing time charters is that Charterers will have to provide pay for and supply low sulphur fuel and that Owners are not obliged to pay for scrubbers/LNG conversion etc – there may be exceptions if a time charter provides that Charterers are only to supply very specific fuel quality
    - Long term COA – may be more akin to a time charter in some respects - can be difficult as Owner supplies bunkers and is often reimbursed by a freight adjustment or bunker adjustment clause, sometimes set by reference to a particular fuel standard - potential for very significant claims
  - Prudent parties are agreeing additional clauses NOW! However not everyone will agree and litigation will occur in 2019/2020 on this topic.
-

## Significant issues / challenges arising out of the 2020 Sulphur Cap

- Compliance with MARPOL Annex VI – by which method? By whom?
  - Which party is responsible for ensuring the Vessel is supplied with fuel of the required sulphur content and Who Pays the Extra Cost?
  - Owners' seaworthiness / fitness obligations under the charter – are Owners required to install scrubbers?
  - What type of (compliant) fuel should be used?
  - Is the Vessel in a position to receive, store and burn compliant fuel? Fuel tank space, ability segregate, to burn new fuels, effect on vessel performance etc.
  - Availability of compliant (low sulphur) fuel come 2020?
  - Importance of complying with sulphur content requirements of other regimes
-

**BIMCO 2020 Marine Fuel Sulphur Content Clause for Time Charter Parties**

(a) For the purpose of this Clause, "Sulphur Content Requirements" shall mean any sulphur content and related requirements as stipulated in MARPOL Annex VI (as amended from time to time) and/or by any other applicable lawful authority.

(b) The Charterers shall supply fuels to permit the Vessel, at all times, to comply with any applicable Sulphur Content Requirements. All such fuels shall meet the specifications and grades set out in this Charter Party.

The Charterers also warrant that any bunker suppliers, bunker craft operators and bunker surveyors used by the Charterers shall comply with the Sulphur Content Requirements.

The Charterers shall indemnify, protect, defend and hold harmless the Owners from any and against all losses, damages, liabilities, delays, deviations, claims, fines, costs, expenses, actions, proceedings, suits, demands arising out of the Charterers' failure to comply with this subclause (b), and the Vessel shall remain on hire throughout.

(c) The Owners warrant that the Vessel shall comply with the Sulphur Content Requirements.

Subject to the Charterers having supplied the Vessel with fuels in accordance with subclause (b), the Charterers shall not otherwise be liable for any losses, damages, liabilities, delays, deviations, claims, fines, costs, expenses, actions, proceedings, suits, demands arising out of the Owners' failure to comply with this subclause (c).

---



## Scope

- Replaces BIMCO Fuel Sulphur Content Clause 2005
- Similar provisions, but important amendments
- Adapted to meet requirements of new MARPOL global regime, as well as existing / additional regimes
- General compliance clause – clearly identifying the obligations of each party to meet the "*Sulphur Content Requirements*"

## Application

- Capable of application to time charterparties as of today, as well as from 2020 onwards
  - It is not intended to address:
    - the one-off event (transition period) or the Carriage Ban – separate clause
    - issues of fuel compatibility – separate issue and already dealt with under existing BIMCO bunker clauses
  - Does not apply to:
    - voyage charterparties / COAs
    - vessels fitted with scrubbers
    - time charter trips (where Charterers are not to supply fuel)
  - However, for time charters that will stretch into 2020 – importance of incorporating both BIMCO clauses
-

## Sub-clause (a)

- Definition - "*Sulphur Content Requirements*"
- Shift of focus
  - Away from "zones" / geographical areas to "*Sulphur Content Requirements*"
- Sulphur Content Requirements

Broad definition to cover:

(1) actual "*sulphur content*" limits:

- (a) imposed by MARPOL – Regulation 14
- (b) required by other lawful authorities

(2) "*Related requirements*" – includes documentation required by MARPOL (in Regulations 14 and 18) and applicable regimes

- Regulation 14.5: "*sulphur content of fuel.....shall be documented by its supplier in accordance with Regulation 18*"
  - e.g. covers provision of a bunker delivery note (Regulation 18.5 and Appendix V)
  - e.g. Charterers to assist in collection of evidence required in event of unavailability of compliant fuel (Regulation 18.2)
  - but arguably also covers minimum fuel oil quality requirements (Regulations 14.1)
-



## Sub-clause (b)

- Charterers' obligation to supply compliant (low sulphur) fuel
    - Reinforces general charterparty obligation
    - Type of fuel – not specified
    - All fuels are to "*meet the specifications and grades set out in the Charterparty*"
    - Obligation to supply fuels to enable compliance "*at all times*"
  - Charterers' warranty that bunker suppliers / bunker barge operators used will comply with "*Sulphur Content Requirements*"
  - Indemnity for Owners
    - Expanded wording – reflecting additional risk created by 2020 Sulphur Cap
    - Addition of word "*deviation*"
    - to "*remain on hire throughout*"
-



## Sub-clause (c)

- Owners' warranty to comply with Annex VI
    - not dependent on Charterers supplying fuel of the required sulphur content
    - restatement of regulatory compliance
  - Owners remain responsible for fuel management
  - No warranty that the "*Vessel shall be able to consume fuels of the required sulphur content*"
  - Exclusion of liability - provided Charterers comply with their obligations under Sub-clause (b), they are not responsible for Owners' failure to comply with Annex VI
  - No reciprocal indemnity wording for Charterers
-



## Additional considerations/provisions

- Not suitable for COA or Voyage Charters
  - Problem that parties may think this clause deals with all issues/parties don't incorporate other BIMCO fuel clauses into the charter
  - New issues/problems may crop up – BIMCO clause is arguably a very good starting point – need to be kept under review
  - Once a ISO low sulphur standard is produced the parties may wish to include this in their low sulphur clause – some charters we have advised on provide for an option to incorporate once available
  - BIMCO clause is not a general air pollution clause – it only addresses sulphur whereas emission control areas can address SOX, NOX and particulate matter. Query if entering into a long term charter is a more widely defined clause would be beneficial
  - It is not “future proof” – if negotiating a long term new time charter then a general change in regulations clause or Compulsory Modifications regime is recommended from an Owners' perspective
  - Does not address Vessel's fitted with scrubbers – Voyage Charters/COA or Time Trip Charters may require a clause that can address Vessel's fitted with or without scrubbers.
  - Does not specifically address blended fuel/if Owners are required to burn the same or Vessel performance issues
  - Ideally clause would interact with other bunker clauses in the charter, e.g. bunker sampling and testing clauses
  - Consider adding indemnity provision
-

## Additional considerations/provisions – some example clauses provisions:

- A wider definition (using concept of a defined term “emission control zones”) and a general air pollution clause:

This could cover zones and/or areas as stipulated in MARPOL Annex VI, zones and/or areas (applying at sea or in port) regulated by local, regional and/or national authorities (e.g. US Environmental Protection Agency, the Chinese Ministry of Transport and AMSA etc) and regulatory requirements/laws

Should the definition cover regulations/laws imposed at the date of this Charter Party or introduced during the Charter Party?

Should it apply to fuel, sulphur content, NOX and other air pollution requirements?

- From an Owners perspective consider:

*“Charterers shall supply fuel which is suitable for burning in the Vessel's main engine and auxiliaries as fitted and without requiring any modifications thereto and without causing any damage or excessive wear and tear whatsoever”;*

Also - Include an obligation on Charterers not to supply hybrid or blended fuel without Owners consent?

This may be opposed by Charterers as low sulphur fuel may well be blended

- From a Charterers perspective consider:

*“the Vessel shall be able to consume fuels of the required sulphur content when ordered by the Charterers to trade within any such zone;”*

---

Especially for a new charter Charterers will not want to face any arguments that low sulphur fuel has damaged the engine/is their responsibility



## Additional considerations/provisions – some example clauses provisions:

- Effect on Performance

*“...to the extent that the fuel supplied by Charterers in order to comply with this sub clause (a) negatively impacts Vessel performance warranties when compared with performance using high sulphur fuel oil Charterers acknowledge that Owners will not be responsible for any shortfall caused by the fuel supplied and the same shall not be a breach of charter; and...”*

Owners may also want to check performance warranty clause and update this.

- Option for new ISO standard:

*“...where an agreed ISO Standard is introduced for low sulphur fuel in the future which is compliant with MARPOL Annex VI, the Parties agree they will, only if they both agree this in writing, incorporate this into this Charter Party as the normal fuel supply standard for such fuel but such agreement will remain subject to the obligation on Charterers to supply fuel that complies with clause [ ] above as this may require a different fuel specification;”*

- Alternatively one party could be given the option to include this or it could be agreed to automatically apply. The potential concern is that the ISO standard may differ from regulatory requirements
-



## Additional considerations/provisions – some example clauses provisions:

- Other Misc Provisions:

*“Charterers acknowledge that the Vessel is entered into a fuel testing program and Owners shall not be obliged to burn any fuel until it has been tested and found to be compliant with this clause.”*

- A Charterer friendly addition is to provide Charterers have no liability under the clause if Owners burn the bunkers before results are available

*“they keep each stem of fuel segregated into separate tanks to the extent this is possible. Owners shall not be responsible for any reduction in bunker capacity that results”*

- A Charterer friendly version would be to require Owners to keep stem's separate and to indemnify Charterers if they do not do so and keep tanks and lines segregated.

*“This sub clause (a) shall not apply to bunkers already onboard the Vessel on delivery into the Charter Party.”*

Why? Because Charterers should not be liable for issues caused by bunkers they did not stem

- **Generally well worth updating your charter not just with BIMCO clause and additions (or another suitable clause) but checking all the other bunker fuel clauses are fit for purpose and up to date – for consistency, to avoid gaps and to mitigate against future claims**
-



2020 SULPHUR CAP

**KEY ISSUES ARISING OUT OF TRANSITION AND CARRIAGE BAN**

**TRANSITION FROM HSFO TO LSFO AND CARRIAGE BAN**

---



## Key issues arising out of transition

### Operational / technical

- Preparation of fuel system - tanks and pipeline cleaning
- Fuel management:
  - storage / handling
  - quantities of residual (high sulphur) and compliant (low sulphur) fuel
  - type of compliant fuel to be used?
- Tank capacity restrictions?
- Segregation of new blends of compliant (low sulphur) fuel – quality of fuel

### Carriage Ban - Disposal of high sulphur fuel by latest 01.03.20

- How / when / where to dispose?
  - Limited in a geographical sense? Sufficient facilities ashore?
  - Local port regulations?
  - Value of high sulphur fuel oil? Secondary market for scrubbers?
  - Property / title to fuel if being disposed of?
  - Large number of shipowners seeking to dispose of such fuel at the same time (i.e. 2 months is not long)?
-



## Key issues arising out of transition

### Commercial

- Price and availability of compliant fuel
  - What type of compliant fuel
  - Employment/trading of the vessel – potential disruption / limit on trade caused by technical or commercial reasons
-





### How can these issues be addressed?

- Not all issues aligned with each other
- Wide variety of scenarios to cater for
- Important to strike the right balance
- As existing charterparty provisions do not deal with this, it is important to have:
  - 1) a robust contractual framework;
  - 2) cooperation between Owners and Charterers to meet their specific circumstances

**KEY ISSUES ARISING OUT OF TRANSITION AND CARRIAGE BAN**

Cooperation between Owners and Charterers





## KEY ISSUES ARISING OUT OF TRANSITION AND CARRIAGE BAN

### Cooperation between Owners and Charterers

- Why?
- Competing interests:
  - Not simply a question of supplying compliant (low sulphur) fuel on the deadline
  - Require (at least) a minimum amount of compliant (low sulphur) fuel on board before 01.01.20 deadline
  - In existing charters, no express obligation on Charterers to stem compliant (low sulphur) fuel before deadline
  - Expected price differential between fuels – Charterers seek to delay supply until as late as possible?

Result? Knock on effect on planning and preparation (notably, tank cleaning, to the extent required)

- Role to be played by both parties:
    - (a) **Charterers** - responsible for putting fuel on board and employment / trading of the Vessel
    - (b) **Owners** - responsible for:
      - (1) fuel management; and
      - (2) ensuring Vessel's tanks are capable of receiving, storing and burning compliant fuel
-



## KEY ISSUES ARISING OUT OF TRANSITION AND CARRIAGE BAN

### Cooperation between Owners and Charterers

- Planning / agreement *essential* in order to:
    - Prepare Vessel for receipt, storage and use of compliant (low sulphur) fuel depending on ship type, age and trade
    - Manage fuel supplies on board and to have compliant fuel stemmed in advance of 01.01.20
    - If possible, gain experience of handling and burning new hybrid / blends of compliant (low sulphur) fuel prior to 01.01.20  
(unless proposed compliance method is MGO)
  - Direct dialogue in advance *essential*
-

## KEY ISSUES ARISING OUT OF TRANSITION AND CARRIAGE BAN

### (a) Definitions

For the purpose of this Clause:

“Carriage Ban Date” means 1 March 2020.

“Carriage Ban” means the prohibition of the carriage for use of Non-Compliant Fuel as of the Carriage Ban Date.

“Compliant Fuel” means any fuel that meets the Sulphur Content Requirements with effect from the Effective Date.

“Effective Date” means 1 January 2020.

“Non-Compliant Fuel” means any fuel with a sulphur content of more than 0.50%.

“Sulphur Content Requirements” means any sulphur content and related requirements as stipulated in MARPOL Annex VI (as amended from time to time) and/or by any other applicable lawful authority.

### (b) Requirements

(i) Before the Effective Date, the Charterers shall have supplied the Vessel with fuel so that on the Effective Date the Vessel shall have sufficient Compliant Fuel to reach the nearest bunkering port where Compliant Fuel is available.

(ii) No later than the Carriage Ban Date there shall be no Non-Compliant Fuel carried for use by the Vessel.

Together the “Requirements”.

Notwithstanding the Carriage Ban, Owners and Charterers shall cooperate and use reasonable endeavours so that no later than the Effective Date there shall be no Non-Compliant Fuel carried

---



## KEY ISSUES ARISING OUT OF TRANSITION AND CARRIAGE BAN

- (c) (i) In order to meet the Requirements, the Charterers shall at their risk, time and cost ensure that any Non-Compliant Fuel remaining on board after the Effective Date shall be discharged from the Vessel's bunker tanks until such tanks are free of liquid and pumpable fuel latest by the Carriage Ban Date or the redelivery date of the Vessel, whichever occurs first; and
- (ii) in respect of the bunker tanks that are free of liquid and pumpable fuels, Owners shall at their risk, time and cost ensure that such tanks are fit to receive Compliant Fuel, taking into account the type of Compliant Fuel that will be loaded into such bunker tanks.
- Compliant Fuel shall not be loaded into a Vessel's bunker tanks until the steps described above in subclauses (c)(i) and (c)(ii) have been carried out in respect of such bunker tanks.
- Once bunker tanks are fit in accordance with subclause (c)(ii), no Non-Compliant Fuel shall be loaded into such bunker tanks.
- (d) **Disposal of Non-Compliant Fuel** - In respect of Non-Compliant Fuel, if any, which needs to be discharged from the Vessel in accordance with subclause (c)(i), Charterers shall dispose of such fuel in accordance with any applicable local regulations at Charterers' risk, time and cost.
- (e) **Segregation** - Unless otherwise agreed between Owners and Charterers, each supply of Compliant Fuel shall be bunkered into empty tanks within the Vessel's natural segregation.
-



## BIMCO Fuel Transition Clause

- Application and purpose
    - long term time charterparties stretching into 01.01.20
    - one-off event (transitional period)
    - separate from the BIMCO Compliance Clause, but to be used in conjunction
    - not drafted for charterparties where vessels are to be redelivered prior to 01.01.20 **or** vessels with scrubbers fitted
  - Key aims
    - wide application irrespective of vessel type and trade
    - a reasonable and fair allocation of risk and responsibility
    - not prescriptive: flexibility for parties to coordinate and decide on timing / operational matters
  - Practical implications
    - highlights need for early planning
    - physical steps need to be taken in Q4/2019, if not before
  - Key components
-



## KEY ISSUES ARISING OUT OF TRANSITION AND CARRIAGE BAN

### Key Components

- Overarching framework:
    - **Minimum threshold obligations** imposed on each party to ensure compliance with **Annex VI mandatory provisions**
    - Providing parties with sufficient flexibility to determine / cooperate on essential operational / timing issues
  - Annex VI mandatory provisions:
    - (1) Meet the 2020 Sulphur Cap
      - ensure sufficient compliant (low sulphur) fuel on board come 01.01.20
    - (2) Meet the Carriage Ban
      - ensure all "*Non-Compliant Fuel*" (i.e. residual (high sulphur) fuel) is removed from the Vessel by 01.03.20
  - Minimum threshold obligations / responsibilities
-



## KEY ISSUES ARISING OUT OF TRANSITION AND CARRIAGE BAN

### Minimum threshold obligations / responsibilities

Three main areas:

- 1) Requirements
  - 2) Charterers' obligations / responsibilities
  - 3) Owners' obligations / responsibilities
-



## KEY ISSUES ARISING OUT OF TRANSITION AND CARRIAGE BAN

### Requirements

#### Sub-clause (b) – the "Requirements"

- a) Charterers shall supply sufficient compliant (low sulphur) fuel on board to reach nearest bunkering port by 01.01.20  
**(Sub-clause (b)(i));**
  
  - a) All residual (high sulphur) fuel to be completely removed from the vessel by 01.03.20  
**(Sub-clause (b)(ii));**
  
  - a) Parties to "*cooperate and use reasonable endeavours*" to have no residual (high sulphur) fuel on board by 01.01.20
-



## KEY ISSUES ARISING OUT OF TRANSITION AND CARRIAGE BAN

### Charterers' obligations / responsibilities

#### Supply of compliant (low sulphur) fuel – when and how

- No obligation to only have compliant (low sulphur) fuel on board by 01.01.20
    - too onerous given likely fuel price / not mandatory under Annex VI
  - Parties to use "*reasonable endeavours*" to consume all residual (high sulphur) fuel by 01.01.20
    - recommended because otherwise parties will only have 2 months to dispose and this is likely to be very challenging
    - however, not a strict obligation
  - Charterers' obligation to provide sufficient compliant (low sulphur) fuel (**Sub-clause (b)(i)**)
    - strict positive obligation on Charterers to have sufficient amount to reach nearest bunkering port where compliant (low sulphur) fuel is also available
    - in practice, this will require:
      - 1) Charterers burning / running down residual (high sulphur) fuel in at least one bunker tank; so that
      - 2) the bunker tanks can be made "*fit*" (as necessary) to receive, store and burn compliant (low sulphur) fuel (**Sub-clause (c)(ii)**)
      - 3) Charterers can then supply sufficient compliant (low sulphur) fuel
-

## KEY ISSUES ARISING OUT OF TRANSITION AND CARRIAGE BAN

### Charterers' obligations / responsibilities

#### Residual (high sulphur) fuel – use and / or disposal

- Wef 01.01.20, any ROB (high sulphur) fuel in bunker tanks shall be removed by Charterers (**Sub-clauses (c)(i) and (d)**)
  - By when?
    - a) by latest 01.03.20, or
    - b) by the redelivery date whichever occurs first (**Sub-clause (c)(i)**)
  - Presumption is that the parties will be using "*reasonable endeavours*" to run down residual (high sulphur) fuel by 01.01.20 anyway (**Sub-clause (b)**)
  - Scope of Charterers' obligation - bunker tankers to be "*free from liquid and pumpable fuel*"
  - Importance of the words "*whichever occurs first*"
    - Avoiding redelivery problems between 01.01.20 and 01.03.20
  - Emphasises importance of Charterers planning the bunkering route and identifying ports in advance that can:
    - a) supply compliant (low sulphur) fuel; and
    - b) receive residual (high sulphur) fuel
-



## KEY ISSUES ARISING OUT OF TRANSITION AND CARRIAGE BAN

### Owners' obligations / responsibilities

#### Bunker tank cleaning (if required) (Sub-clause (c)(ii))

- Bunker tank cleaning:
    - a) Operational activity best carried out by Owners
    - b) Trade off with Charterers' obligations to (1) supply compliant (low sulphur) fuel before the deadline; (2) remove all high sulphur fuel
  - Not prescriptive
    - does not dictate how, where, when to achieve this / parties to decide what suits the vessel and her trade
  - *"Fit.....taking into account the type of Compliant Fuel that will be loaded into such bunker tanks"*
    - determined on a case by case basis (i.e. vessel type, age, tank system, type of Compliant Fuel to be used)
  - Unpumpable materials
    - Owners will be responsible for removing unpumpable materials if any / to the extent necessary (see **Sub-clause (e)**)
  - Once tank has been cleaned, residual (high sulphur) fuel cannot be re-stemmed in that tank
  - Highlights the importance of early planning and being clear on appropriate method of cleaning  
i.e. how, where, when and extent of cleaning required
-

## KEY ISSUES ARISING OUT OF TRANSITION AND CARRIAGE BAN

### Owners' obligations / responsibilities

#### Compliant (low sulphur) fuel to be bunkered into empty tanks (Sub-clause (e))

- To minimise risk of incompatibility between stems: bunkering into empty tanks within Vessel's natural segregation
    - Concern over compatibility issues with new type of fuel (hybrids / blends)
    - Oil companies reluctant to assure compatibility between stems they produce
  - "*Unless otherwise agreed*"
    - Envisages that it may not be necessary to have empty tanks
    - Depending on the type of compliant (low sulphur) fuel – operational issue and Owners to determine this in accordance with fuel management responsibilities
    - Not enough compliant fuels on the market at this point in time to say any more
  - Unknowns:
    - Element of co-mingling inevitable – fuel management is Owners' responsibility, but have little experience of dealing with new fuels.
    - Guidance from ISO awaited: Publically Available Specification ('PAS') awaited
-

## KEY ISSUES ARISING OUT OF TRANSITION AND CARRIAGE BAN

### BIMCO clauses

- provide robust contractual building blocks to achieve MARPOL compliance by key dates
  - but not the complete answer (i.e. not one clause fits all)
  - further agreement(s) still required between the parties, as specifically envisaged by the BIMCO Fuel Transition Clause (eg decisions on operational / timing of transition to compliant fuel which need to take place before 01.01.20)
  - Likely determining factors:
    - (a) the chosen method of compliance
    - (b) the Vessel type and age
    - (c) the Vessel's trade and employment
  - reasonable and fair allocation of risk and responsibility may not reflect commercial aim / bargaining power of parties
  - does not apply to all types of contracts / scenarios
  - also additional issues / considerations which are not covered
-

## What is not covered? Potential additions?

- Detailed plan / arrangements for de facto transition
    - Clause does not detail how the transition is to be effected. Will the changeover be done in one go (perhaps more suitable for bulkers/tankers) or tank by tank over a period which we have seen some container clients adopt
    - It is prudent to agree a detailed plan – if Owners are going to carry out the cleaning will a cap/fixed sum be agreed?
    - The Charterers will want to minimise the amount of fuel that is de-bunkered and if this does need to occur may have a preferred port
  - Different commercial terms?
    - The Parties may want to propose alternative commercial terms to the BIMCO clause  
eg we have seen clauses where Charterers wish to shift at least part of the cost onto Owners or propose a 50/50 split or where Charterers have agreed to pay for the time and cost of tank cleaning
    - It may be prudent to specify a longstop before which all non-compliant high sulphur fuel must be removed
-



## Extract from Charterer friendly transition clause for time charter:

*“Owners to arrange and pay for all necessary cleaning of all fuel tanks/lines/and any required modifications for the Vessel to use Compliant Fuel and for the Vessel's fuel system to comply with the 2020 Regs same as if/when trading for Owners' own account. Owners' cleaning programme in readiness for the 2020 Regs shall include but not be limited to sludge clearance and cleaning of settling and storage tanks, cleaning of day tanks, lines, pumps and purifiers (collectively "Necessary Cleaning"). The parties agree that the Necessary Cleaning should be carried out prior to January 2020, namely in [Q4/2019], and shall cause the minimum disruption to Charterers' service..... and*

*.....Necessary Cleaning: Charterers will enter into a written transitional bunkering and fuel system plan with Owners for [Q4/2019] as the parties shall more precisely set out therein but to include a plan for segregating the tanks, pumps and lines to be cleaned in stages, retaining other tanks and lines for storage and use of non-Compliant Fuel until such non-Compliant Fuel is used up. For the avoidance of doubt cleaning, including sludge removal, always to be carried out at Owners' cost [and time/alternatively" but in Charterers' time"].”*

---



## KEY ISSUES ARISING OUT OF TRANSITION AND CARRIAGE BAN

### Additional provisions / issues

- Delivery / Redelivery: fuel quantity and prices
  - Modifications to the vessel / performance warranties
  - Suitability / compatibility between fuels
  - BIMCO bunker clauses
  - Restriction on tank capacity when planning / preparing for compliance during Q4/2019
-

### Scrubber Types

- Closed loop (disposal of waste issue)
- Open loop – most popular
- Hybrid – open loop but can be converted to closed loop
- “Scrubber Ready”
- Most commonly adopted method compliance new regs aside purchase of low sulphur fuel

### Scrubber – bans on discharges open loop scrubbers

- Singapore
- China – inland water transport
- US Ports – California
- Belgium

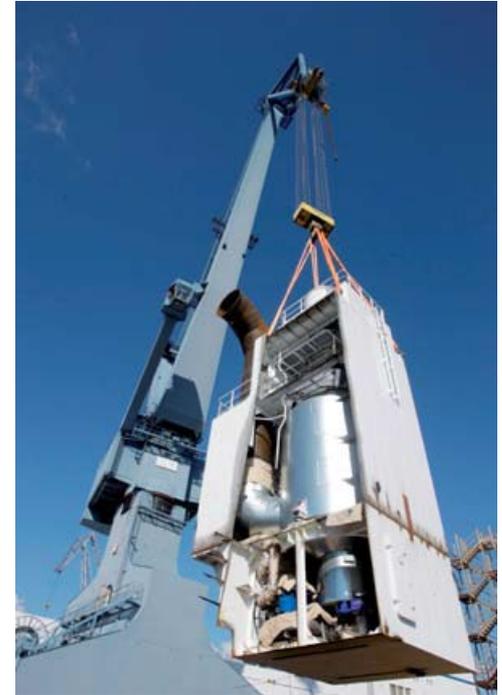


©Alfa Laval

## Scrubbers Concerns:

Potentially strong economic case but....

- Regulatory Uncertainty – especially open loop
- Public Perception – discharge of “pollution into the sea”
- Takes up considerable deck and engine room space
- Uncertainty re availability of high sulphur fuel oil post 2020
- Uncertainty re pricing bunkers post 2020
- Lack of Availability
- Time out of Service to fit scrubbers
- Limited service life?
- Reliability?
- How to finance USD 2 million plus cost?
- Insurance /effect on any Charterers’ Vessel purchase options





## Scrubbers – example time charter clause additions:

Charterer friendly – the below is a fairly simple clause and we have seen/drafted more complex examples, interplay with other charter clauses is also very important so a clause cannot just be “dropped in”

*“.....Owners shall in any event be responsible for ensuring that the vessel's EGCS, if installed, is: on delivery and for the duration of the Charter Party:*

- (i) Class approved (where relevant) and meeting all regulatory and certification requirements including new regulations introduced after the date of this Charter Party; fully operational; and operating at maximum efficiency.*
- (ii) Owners bear all risk, liability, expense and loss arising from any breakdown, deficiency, or non-compliance of the EGCS, including loss, delay, fines, costs or expenses arising or resulting from the Vessel's failure to comply with Marpol Annex VI, or the requirements of any emission control zone.*

*Charterers shall have the right to place the vessel off hire if the EGCS is not fully operational and/or there is a breach of clause [ ] above and should the EGCS be estimated to be, or in fact be out of service or not fully operational for more than [30] days (save for maintenance when the Vessel is scheduled to be out of service which time shall not count) the Charterers shall have the option to cancel the Charter Party immediately if the Vessel is in ballast or at the completion of discharge if the Vessel is laden or to require Owners to provide a replacement vessel – in Charterers' option....”*

If a closed loop system is used then charter clauses will also need to address disposal of waste/residues and capacity for storage/costs in this regard

From an Owners' side different points may arise – Owners may also wish to negotiate annual maintenance allowance

## Scrubbers – reserve fuel

- Scrubber bans mean it will be necessary/prudent to carry reserve low sulphur fuel onboard. It would be risky to source this only when required as it may require deviation for bunkering
  - Who sources and pays for this in a time charter? Logically this should be the Charterers but there may be a dispute about the specification/suitability such that Owners prefer to do this and invoice Charterers
  - How much reserve fuel is needed – best to specify a minimum quantity to be maintained at all times
  - What is the specification, no ISO standard yet? See earlier comments on this
  - What if problems arise re availability – should obligations be subject to an availability caveat?
  - We have seen clauses that require Owners/Charterers to arrange this – so not definite market practice
-

## Scrubbers – Owners/Charterers agreeing to pay for and fit Scrubbers on existing charters

- Three example deals we have seen for existing longer term charters:
    - (i) Owners ordering and agreeing to pay for and fit scrubbers with Charterers agreeing to pay for the same via a lump sum and/or an increased daily hire rate or additional “scrubber” payment – process mainly at Owners’ risk
    - (ii) As per (i) but Charterers order the scrubbers and then assign the contracts and guarantees to Owners. Process at Charterers’ risk until scrubbers fitted and signed off
    - (iii) Owners ordering and agreeing to pay for scrubbers with an effective profit share on the price differential between low and high sulphur fuel being shared between Owners and Charterers – both sides taking commercial risk, Owners taking technical/regulatory risk
  - Potential also for same approach with LNG conversions
  - Current issue/problem is can Charterers also finance the project/is lease finance possible – problem existing mortgages/leasing house not owning the scrubber etc - assignment of earnings under charter that may already be assigned to existing bank etc
-

## Scrubbers – Owners/Charterers agreeing to pay for Scrubbers - issues to consider

Note – high value financial transaction – specific advice needed:

- Who orders scrubber?
  - status guarantees supplier – can they be assigned if scrubber ordered by charterers?
  - IP/Software rights – again can they be assigned?
  - Who takes risk of delay/time spent out of service whilst scrubber fitted and who pays?
  - Availability of spare parts and maintenance into the future
  - What is the EGCS spec – what fuel can the scrubber cope with/will Owners give a performance warranty?
  - Who pays for scrubber and how? Lump sum and/or hire or both? Spread over vessel life or just the charter period?
  - Is additional sum still paid when scrubber cannot be used due to regulatory risk?
  - Title scrubber – finance/leasing issues
  - Insurance
  - Security – if financed by third party – need inter creditor arrangement, second mortgage etc
-

## Scrubbers – Owners/Charterers agreeing to pay for Scrubbers - issues to consider cont..

- Termination – what happens to future hire payments/sums already paid (from Charterers point of view gradual payment via hire is better)
  - Effect on Purchase Options – price adjustment?
  - Does the charter need to be extended to spread out cost?
  - Who takes regulatory risk of future changes/bans?
  - Right to terminate if scrubber inoperable
  - What is maintenance and repairing obligation? Can Charterers also claim damages in addition to off hire. Should their right to claim damages be restricted or capped as damages could be very large if there is a big bunker price differential
  - Who pays fines if scrubber inoperable?
  - Problems associated with having to maintain separate tanks and lines with low and high sulphur fuel onboard, recommended that Charterers are obliged to stem a minimum quantity of low sulphur fuel and to co-operate with Owners to keep this separate
  - Who pays for tank cleaning where you have to switch between fuels because you have a scrubber
  - Reserve Fuel issue – already discussed
-



## ALESSIO SBRAGA, HFW



T: +44 (0)20 7264 8768  
M: +44 (0)7917 192598  
Alessio.sbraga@hfw.com

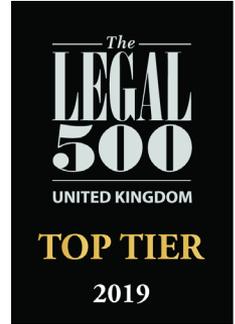
Alessio is a Senior Associate at the London office of International law firm, HFW. He specialises in international commercial dispute resolution in the marine and offshore sectors, and has over 12 years experience of advising in respect of charterparties, bills of lading, sale contracts, shipbuilding, MOA, grounding, unsafe port, off-shore (FSO, FPSO, rig, floating accommodation units), bunker and cargo disputes.

Alessio has an international practice, which involves him advising and representing the main stakeholders in the physical shipping and off-shore chains across the globe. This includes shipowners, charterers, freight forwarders, shippers, bunker suppliers, P&I clubs and underwriters, as well as cargo owners, banks and traders. He handles large, complex and multi-jurisdictional disputes, and litigation in both the English High Court and in arbitration.

Alessio is a member of the BIMCO Sub-Committee responsible for drafting standard Charterparty clauses relating to 2020 MARPOL Revised Annex VI sulphur regulations, and is currently advising clients on the legal and commercial implications arising out of this key development in the shipping sector.

Since joining HFW, Alessio has also benefited from a secondment to the commodities department at a major London based bank.

Alessio is qualified in England and Wales, and speaks fluent Italian.



UN Security Council

S/RES/2383 (2017)



T: +44 (0)20 7264 8310  
M: +44 (0)7766 247848  
[rory.butler@hfw.com](mailto:rory.butler@hfw.com)

Rory specialises in shipping, including dispute resolution arising from charterparties, bills of lading, shipbuilding, fire and explosion, piracy, collisions, groundings, general average, salvage, limitation and total loss. His expertise encompasses both dry and admiralty matters which is especially beneficial when handling major casualties with a multi jurisdictional focus. Rory has acted for owners, charterers and cargo interests and their insurers on a wide variety of cases. He has developed a reputation for successfully handling major containership casualties involving dangerous goods as well as particular expertise relating to multipurpose and heavy lift vessels.

On the advisory side Rory has assisted clients on contract terms including charterparties, COA, bills of lading, pool agreements, shipmanagement agreements, sale and purchase agreements and shipbuilding contracts. Rory has also built up experience in the LNG sector with regard to shipbuilding contracts and long term charters.

Rory edits a regular case update presentation to P&I Clubs and other clients which covers recent developments in English law. He has also spent time on secondment in the industry at a P&I Club and shipbroker.

Rory has been named in the world's top ten shipping lawyers in 2018 by leading trade publication Lloyds List. One of the barristers surveyed by Lloyd's List for the report said that Rory gets *"top billing among shipping lawyers and is virtually ubiquitous at the moment"*.

Rory is also listed as a notable practitioner in both the Legal 500 and Chambers (Band 2).

Chambers 2019 notes: *"Clients describe him as a brilliant litigator and strategic thinker" adding "You can be sure the dispute will be resolved on the best possible terms"*.

Chambers 2018 notes *"He is sensible and very commercial, and good to deal with"*.

Chambers 2017 states Rory is *"highly experienced in both wet and dry matters, with regular work on shipbuilding and multi-jurisdictional casualty matters. He "is very available and clearly a specialist who knows the dynamics of the market," reports a client"*.

Rory is qualified in England and Wales.

## RORY BUTLER, HFW

