

## Claims Guides

# Bunker Quality Disputes Part 2: Legal and Claims Handling Considerations

The consequences of burning off-specification bunkers can be severe, possibly leading to the breakdown of the vessel's machinery. Even where off-specification bunkers do not result in a breakdown, the loss of time and expenses incurred if it is necessary to de-bunker or deviate to stem fresh bunkers can be significant.

Off-specification bunkers can potentially give rise to claims under an owner's hull and machinery insurance as well as under Club cover, whether by way of an FD&D claim against time charterers or bunker suppliers and/or by way of a P&I claim, such as for delay in delivery of cargo or if that delay causes the cargo to deteriorate. There may also be a charterer's liability to owners for providing off-specification bunkers.

In this pair of publications, "Bunker Quality Disputes Part 1: Practical and Technical Measures" deals with the practical measures that should be considered in order to avoid off-specification bunker disputes and Part 2 (below), sets out the legal and claims handling steps that should be taken in the event of an off-specification bunker claim arising.

## Part 2: Legal and Claims Handling Considerations

### 1) Contractual obligations under a time charter party:

#### a) Time charterers' general obligations

Under English law, where the charter party is on the usual time charter terms, e.g. NYPE, Shelltime 4 or Balttime, it is generally accepted that there is an absolute duty to provide bunkers that comply with the charter party bunker specification, that are of reasonable quality and that are suitable for the vessel's engine and machinery. However, charterers will not be obliged to meet any unusual requirements of the engine beyond those to be expected of the type of engine as specified in the charter party unless this is drawn to charterer's attention by owners. Under English law, the issue of whether the obligation is absolute has not been finally decided by the courts. However, it is generally accepted that it is an 'absolute' obligation. Such an 'absolute' duty means that it would not be sufficient merely to use reliable suppliers (who then go on to provide off-specification bunkers). The Charterers have to provide bunkers of suitable quality.

#### b) Recommended time charter clauses

If, despite precautionary measures being in place, it is found that off-specification bunkers have been ordered or delivered, owners will have a better chance of successfully claiming against the bunker supplier or charterers by having certain provisions incorporated into their contracts. BIMCO's suite of bunkering clauses contains such provisions and it is recommended that owners and charterers fix on these terms where possible. For example:



## **BIMCO's Bunker Operations and Sampling Clause:**

- (a) The Chief Engineer shall cooperate with the Charterer's bunkering agents and fuel suppliers during bunkering. Such cooperation shall include connecting/disconnecting hoses to the vessel's bunker manifold, attending sampling, reading gauges or meters or taking soundings, before, during and/or after delivery of fuels.
- (b) During bunkering a primary sample of each grade of fuels shall be drawn in accordance with IMO Resolution MEPC.182(59) Guidelines for the Sampling of Fuel Oil for Determination of Compliance with the Revised MARPOL 73/78 Annex VI or any subsequent amendments thereof. Each primary sample shall be divided into no fewer than seven (7) samples; one sample of each grade of fuel shall be retained onboard for MARPOL purposes and the remaining samples of each grade distributed between the Owners, the Charterers and the bunker suppliers.
- (c) The Charterers warrant that any bunker suppliers used by them to bunker the Vessel shall comply with the provisions of Sub-clause (b) above.
- (d) Bunkers of different grades, specifications and/or suppliers shall be segregated into separate tanks within the Vessel's natural segregation. The Owners shall not be held liable for any restriction in bunker capacity as a result of segregating bunkers as aforementioned.

## **BIMCO's Bunker Quality Control Clause for Time Chartering**

- (1) The Charterers shall supply bunkers of a quality suitable for burning in the Vessel's engines and auxiliaries and which conform to the specification(s) mutually agreed under this Charter.
- (2) At the time of delivery of the Vessel the Owners shall place at the disposal of the Charterers, the bunker delivery note(s) and any samples relating to the fuels existing onboard.

- (3) During the currency of the Charter the Charterers shall ensure that bunker delivery notes are presented to the Vessel on the delivery of fuel(s) and that during bunkering representative samples of the fuel(s) supplied shall be taken at the Vessel's bunkering manifold and sealed in the presence of competent representatives of the Charterers and the Vessel.
- (4) The fuel samples shall be retained by the Vessel for 90 (ninety) days after the date of delivery or for whatever period necessary in the case of a prior dispute and any dispute as to whether the bunker fuels conform to the agreed specification(s) shall be settled by analysis of the sample(s) by (NB: parties must insert the name of the jointly agreed fuels analyst here) or by another mutually agreed fuels analyst whose findings shall be conclusive evidence as to conformity or otherwise with the bunker fuels specification(s).
- (5) The Owners reserve their right to make a claim against the Charterers for any damage to the main engines or the auxiliaries caused by the use of unsuitable fuels or fuels not complying with the agreed specification(s). Additionally, if bunker fuels supplied do not conform with the mutually agreed specification(s) or otherwise prove unsuitable for burning in the ship's engines or auxiliaries the Owners shall not be held responsible for any reduction in the Vessel's speed performance and/or increased bunker consumption nor for any time lost and any other consequences.

**For further details please see BIMCO's Bunker clauses for time charter parties.**

### **c) The terms of the bunker supply contract**

The supply contract should specify:

- That the vessel's nomination as to bunker product quality should meet the engine manufacturer's recommendations and at the very least comply with the required ISO 8217 standard.

- How the samples are to be drawn and how these will be allocated to interested parties. For example, continuous sampling throughout the bunkering period for each grade of bunkers supplied with two authenticated, sealed and tamper-proof representative samples of bunkers to be given to each party and retained for a specified period of time for later testing if necessary.
- That prior to delivery the bunker supplier should present a signed document which rigorously documents the quality parameters of the fuel and confirms that the fuel is as per the vessel's required specification.
- That post-delivery bunker delivery receipts should be presented by the bunker supplier showing the viscosity, density, sulphur content, flash point and delivery temperature of the fuel and, if possible, vanadium, ash, water and pour point. The delivery receipt should then be signed by the vessel's representative as an acknowledgement of receipt only (not agreement as to the figures provided). The Bunker Delivery Note (BDN) and the delivery receipt may be two separate documents or a single one. In the latter case the receipt should comply with MARPOL requirements regarding the information to be shown on a BDN.

**BIMCO's Standard Bunker Contract** encompasses all of the above points and its use is recommended. A copy of BIMCO's Standard Bunker Contract 2015 can be found in the Annex to this Claims Guide.

It is recognised, however, that the terms of the bunker supply contract, including the law and jurisdiction clause, will usually be on the bunker supplier's standard terms. Such standard terms often favour the bunker supplier, with, for example, very short time limits in which to claim against the bunker supplier, possibly as little as seven days, or less, whereas under BIMCO's Standard Bunker Contract, which is more generous to bunker purchasers, the time limit for claims is thirty days from the date the bunkers were supplied.

In the event that bunker suppliers are in breach of the contract, their standard contracts usually exclude liability for any indirect or consequential loss and/or damage. However, if the bunker supply contract is subject to English law, such an exclusion of liability will be interpreted against the beneficiary of the exclusion clause (ie against the bunker supplier) if the exclusion clause is unclear or not wide enough to cover the loss or damage claimed.

## 2) Handling off spec bunker claims:

### a) Steps for owners to follow if bunkers are suspected to be off-specification:

If problems are being experienced by Members (whether owners or charterers) with bunkers supplied under a charter party and legal advice is needed or a dispute is anticipated, the Club's Managers should be contacted. Details should be provided regarding the relevant charter party and bunker supply contract, the results of any routine analysis undertaken, the problems being experienced, whether there is cargo on board and if there is an intention to deviate the vessel.

If physical damage to machinery has or may have been caused, owner Members should also contact their hull and machinery insurers and the vessel's Classification society. Depending on the nature of the problem it may also be necessary to notify the local authorities, particularly if the safety of the vessel could be affected.

### b) Evidence: documentation

Under English law, the burden lies on the claimant to prove his claim. Therefore, accurate and complete documentation for the claim is essential.

The following documents should be retained, not only for the period when the off-specification bunkers were being burned but also for the periods before and after the stem since these should help to show that the vessel's engine and machinery were operating normally before the stem and after the vessel stopped burning the off-specification bunkers:

- Log books (deck, engine, and rough)
- Engine room alarm logs
- Oil Record Book(s)
- Planned Maintenance System (PMS) records
- Pre-arrival checklists
- Pre-departure checklists
- Bunker tank soundings and measurements
- Consumption records
- BDNs and bunker receipts
- Third party fuel oil analysis for previous stems
- Engine lubricating oil analysis results
- Photographs of physical damage (any damaged parts removed or replaced should be preserved)
- Survey reports

### c) Evidence: attendance by surveyors and analysis of samples

A surveyor should promptly be appointed to attend the vessel, conduct an investigation into the circumstances of the case and submit a report. Charterers and/or the bunker supplier (as relevant) should also be invited to attend the survey and witness any sampling and analysis. If possible, and taking into account any agreement already reached in Cl 4 of the BIMCO Bunker Quality Control

Clause (if used), the parties should agree to the type of analysis to be carried out on one or more agreed samples by the same laboratory.

An ISO 17025 certified laboratory may also be instructed to carry out further bunker tests, with charterers and/or the bunker supplier invited to witness a joint analysis using agreed methodologies to ascertain whether or not the sample is off-specification. Further testing, including gas chromatography or gas chromatography mass spectrometry may be required to establish why a sample is off-specification by determining the cause or source of the contamination and where responsibility consequently lies. Particular care should be taken by the laboratory to ensure that the sample's unique seal numbers are written on the label as well as on the plastic seal of the sample so that the numbers can be recorded on the analysis report. No questions can then arise as to the validity of the samples. In some cases joint sampling of bunkers on board followed by joint testing thereafter may be required if there is a possibility that the contamination occurred or the specification of the fuel changed after delivery. Sampling from bunker tanks requires specialist equipment and the correct procedures for using such equipment should be followed to ensure that the samples are fully representative of the fuel and do not become contaminated when drawn.

Routine third party analysis may reveal a fuel to be off-specification. However, the problem may not necessarily be significant. Such apparent off-specification issues may be due to the contamination of samples caused by dirty sampling equipment or bottles or



due to laboratories using different test methods or the interpretation of test method tolerances.

## d) “Reproducibility” of analyses carried out

With regard to test method tolerances, a fuel sample may be found to be apparently off-specification at the laboratory during routine analysis for owners. However, the results may also fall within permissible limits if the sample is tested by other laboratories using the same test methodology. This allowable difference is known as the “reproducibility” and is specified in fuel testing standard ISO 8217. Consequently a stem may appear to be off-specification in certain respects but it may still comply with the supply contract details. An additional test may show the fuel to be on-specification if the new results are found to be within the limits permitted by reproducibility.

Sulphur content can be a particular problem in this regard. If fuel oil is found to contain sulphur slightly in excess of a mandatory MARPOL threshold, it may still fall within the limits for reproducibility permitted by ISO 8754 “Petroleum products – Determination of sulphur content” in association with ISO 4259 “Petroleum products – Determination and application of precision data”. Therefore the fuel may meet contractual standards, but may not comply with a mandatory sulphur limit and use of the fuel could contravene MARPOL requirements.

## 3) Common allegations and defences to off-specification bunker claims:

### a) From claimants’ perspective

**Where owners are claiming against charterers or where owners or charterers are claiming against bunker suppliers:**

Under English law, the burden lies with the claimant to prove his claim. Therefore, for claimants to succeed in their claim against charterers and/or bunker suppliers, claimants must prove, on a balance of probabilities, that the loss/damage suffered was caused by the off-specification bunkers supplied. Conversely, defendant

charterers or bunker suppliers need only prove one or more defences, again on a balance of probabilities, in order to defeat the claim.

Experience has shown that it can be difficult to succeed in proving that bunkers did not meet the contractual specification, particularly where a contaminant cannot be identified. Also, if the laboratory analysing the bunkers did not keep proper records, the defendant charterers or bunker suppliers may succeed in throwing sufficient doubt upon the analysis results to the extent that claimants are unable to fulfil their burden of proof.

### b) From defendants’ perspective

Where charterers are defending a claim by owners or where bunker suppliers are defending a claim by owners or charterers:

**If claimants can prove that the bunkers were off-specification, defendant charterers or bunkers suppliers may also argue that:**

- The engine/machinery problems arose due to poor maintenance of the vessel;
- The engine/machinery problems were caused by bunkers supplied under a previous charter;
- The loss/damage would have been avoided had more rigorous fuel management procedures been employed on board, such as isolating and analysing the bunkers before they were burned. However, in a scenario such as this, defendant charterers/bunker suppliers would prima facie still be liable for the delay, costs and any liability that would have been incurred, for example, by deviating to take on fresh bunkers and, in some cases, having to de-bunker the vessel;
- The loss/damage would have been avoided had preventative measures been taken such as blending the fuel and/or incorporating additives into the off-specification fuel.

### c) Claiming against the bunker supplier:

Charterers may find themselves in a position of having to defend a claim by owners for main engine damage caused by off-specification bunkers and to pursue an indemnity against their bunker supplier. Alternatively, where the vessel is not time-chartered out, owners may seek to claim against bunker suppliers directly.

As noted above, bunker supply contracts will often contain very short time bars and, even if a claim is brought within time, the bunker supply contract may also exclude liability for consequential losses. The supply contracts may also be subject to law and jurisdiction provisions which are very different from the charter party (if any). The terms of the limitations/exclusions of liability under the supply contract are also usually very onerous. This makes it very difficult if not impossible to claim anything more than modest damages against bunker suppliers and usually nowhere near the full extent of the loss which owners or charterers may have suffered.

A further consideration is that bunker supply contracts may specify a particular sample which is to be analysed in the case of a dispute and for that analysis to be binding. If possible, all parties should agree to the analysis of the same sample by the same laboratory. Agreement also needs to be reached on the scope of the analysis.

Any samples, in spite of their possible flaws, will again be vital as evidence to either of these proceedings. Note that if the charter party contains the BIMCO’s Bunker Operations and Sampling Clause (see above) charterers should have a bunker sample. Otherwise, it may be that a bunker supplier is confident in the quality of the bunkers supplied and willingly co-operates and allows access to the supply terminal and for a statement to be taken from the master of the bunker vessel. However, if the bunker supplier is reluctant to assist, charterers should note that if seeking to obtain samples from the supplier, it is rarely possible to join them into the same legal proceedings with owners, usually because the supply contract

and the charter party are governed by different laws and jurisdictions. Accordingly, if charterers do not have bunker samples, charterers could make enquiries about other vessels that may have bunkered from the same supplying vessel immediately prior to or after the vessel in question and the owners of such vessels may then be approached for samples.

#### d) Mitigation -owners' duties if off-specification bunkers are supplied:

If owners can successfully prove that off-specification bunkers were provided to the vessel causing breakdown of the vessel's machinery or delay, in order to recover against the bunker supplier or charterers, owners must also discharge their obligation to mitigate their losses even if that means incurring expenses. The chain of causation may also be broken for example, if the crew continue to burn the bunkers which then cause or amplify any engine damage.

Owners will also remain responsible for maintaining the vessel and ensuring that it is seaworthy under any contract of carriage for cargo on board or charter party. Therefore if owners cannot persuade charterers or bunker suppliers to take steps to deal with the off-specification bunkers, owners will remain responsible for taking such action themselves.

**If bunkers supplied to the vessel are determined to be off-specification, there are several methods of dealing with the situation. Such measures will depend on the circumstances of the case:**

- Use the fuel as it is, following the instructions provided by the third party laboratory to ensure safe usage. This is possibly the simplest and most cost effective solution;
- Blend the fuel with another that has the necessary characteristics to produce a fuel that is on-specification. However, this will require more fuel and will take time. Moreover, it may not be physically possible to blend the fuel if the vessel has limited bunker storage capacity. In practice, thorough and effective blending on board cannot be achieved easily;
- Reprocess the fuel on board, for example by using additives, although this may take some time;
- De-bunker the fuel, which may require a deviation involving time and additional costs as well as the need to replace the bunkers, with owners subsequently seeking to recover this loss of time and expenses from charterers

In order to determine the most suitable course of action, expert advice, both technical and legal, will usually be required.

#### e) Dispute resolution:

The charter party or bunker supply contract should contain a law and jurisdiction clause such as English law and London arbitration or the English High Court. Whilst care should be taken to ensure that any time bars are protected, it is recommended that consideration be given to an alternative means of dispute resolution, such as a binding or non-binding adjudication by a jointly appointed fuel analyst (see BIMCO's Bunker Quality Control Clause for Time Chartering above).

#### 4) Conclusion

Bunker quality claims require detailed consideration of the relevant contractual, technical and evidential issues and are often difficult and expensive to pursue. In conjunction with pursuing Members' claim in arbitration or litigation (as appropriate), thought should be given to settlement opportunities and alternative methods of dispute resolution should also be investigated. (The Club has successfully submitted a case to non-binding expert determination which led to a settlement.)

If it is suspected that off-specification bunkers may have been provided, insurers including the Club should be contacted as soon as possible.

Members requiring further guidance should contact the Managers.

#### September 2016

This article was written by Nicola Cox, FDD Deputy Director, with additional input from Alex Macinnes of Tatham Macinnes

This note is intended for general guidance only and should not be relied upon as legal advice. Should you require specific advice on a situation please contact us.





## BIMCO Standard Bunker Contract 2015

### Preamble

These General Terms and Conditions shall apply to all deliveries contracted for unless the Sellers expressly confirm otherwise in the Confirmation Note. Each delivery shall constitute a separate contract.

### 1. Definitions

Throughout this Contract, except where the context otherwise requires, the following definitions shall be applied:

“Banking Day” shall mean a day on which banks are open in the places of business of the Sellers and the Buyers and, where a remittance is in US dollars, in New York or, if other than US dollars, in the country of the price currency.

“BDN” means Bunker Delivery Note or Bunker Delivery Receipt. “Bunker Tanker” means bunker barge or tanker or tank truck supplying Marine Fuels to the Vessel.

“Buyers” means the party contracting to purchase, take delivery and pay for the Marine Fuels.

“Confirmation Note” means the Sellers’ written confirmation.

“Contract” means this contract of sale and delivery of Marine Fuels on the terms hereof as agreed by and between the Parties.

“Day/days” means a calendar day(s), unless otherwise stated.

“Marine Fuels” means products as stated in the Confirmation Note.

“Parties” means the Sellers and Buyers collectively.

“Party” means Sellers or Buyers.

“Sellers” means the Party contracting to sell and arrange delivery of the Marine Fuels.

“Vessel” means the vessel nominated by the Buyers to receive Marine Fuels.

### 2. Specifications/Grades/Quality

- (a) The Buyers shall have the sole responsibility for the nomination of the specifications and grades of Marine Fuels fit for use by the Vessel.
- (b) The Sellers warrant that the Marine Fuels shall be of a homogeneous and stable nature and shall comply with the specifications and grades nominated by the Buyers. Unless otherwise agreed in the Confirmation Note, the Marine Fuels shall in all respects comply with the latest edition of ISO Standard 8217 as per the date of the Confirmation Note.

### 3. Quantities/Measurements

- (a) Subject to the provisions of Sub-clause 6(c) and Clause 9 (Claims) hereunder the quantities of Marine Fuels delivered shall be determined from the official gauge or manual sounding or meter of the Bunker Tanker effecting delivery, or in case of delivery ex-wharf, of the shore-meter or the like equipment.
- (b) The Sellers shall invite the Buyers or their representatives to witness the opening and closing gauge, or manual sounding or meter reading and the taking of bunker temperature of all bunker tanks on the Bunker Tanker and shall be given sufficient information and access to the official gauge or manual soundings or meter of the Bunker Tanker or shore-meter and relevant documentation to verify the volume delivered. (c) The Marine Fuels to be delivered under this Contract shall be measured and calculated in accordance with the ISO-ASTM-API-IP Petroleum Measurement Tables.

### 4. Sampling

- (a) The Sellers shall invite the Buyers or their representatives to witness the sampling of Marine Fuels. During bunkering a primary sample shall be drawn at a point, to be mutually agreed between the Sellers and the Buyers or their respective representatives, closest to the Vessel’s bunker manifold and otherwise in accordance with the procedures set out in IMO Resolution MEPC.182(59) Guidelines for the Sampling of Fuel Oil for Determination of Compliance with MARPOL 73/78 Annex VI or any subsequent amendments thereto. Each sample shall be thoroughly mixed and carefully divided into a minimum of five (5) identical samples and one sample of each grade of Marine Fuels shall be retained on board for MARPOL purposes. The absence of the Buyers or their representatives shall not prejudice the validity of the samples taken. In the event that local bunkering rules and regulations apply mandatorily, these shall take precedence over the provisions of this Sub-clause (a).
- (b) The samples referred to in sub-clause 4(a) shall be securely sealed and provided with labels showing the Vessel’s name, identity of delivery facility, product name, delivery date and place and point of sampling and seal number, authenticated with the Vessel’s stamp and signed by the Sellers’ representative and the Master of the Vessel or the Master’s authorized representative.
- (c) Two (2) samples shall be retained by the Sellers for minimum forty-five (45) days after delivery of the Marine Fuels to the Vessel or, on being requested in writing by the Buyers, for as long as the Buyers

may reasonably require, and the other three (3) samples shall be retained on board the Vessel (one of which shall be for MARPOL purposes).

- (d) If the quantity is delivered by more than one Bunker Tanker, the sampling procedure shall be repeated as outlined in this Clause 4.

## 5. Delivery

- (a) Delivery of the Marine Fuels shall be made day and night, Sundays and holidays included, at the port or place of delivery, subject always to the custom of that port or place.
- (b) The Buyers, or their agents at the port or place of delivery, shall give the Sellers or their representatives at the port or place of delivery, seventy-two (72) and forty-eight (48) hours approximate and twenty-four (24) hours definite notice of the Vessel's arrival and the location and time at which deliveries are required.
- (c) The Sellers shall: (i) be in possession of all permits required to comply with all relevant regulations pertaining to delivery of Marine Fuels at the port or place of delivery, and; (ii) subject to local laws, render all necessary assistance which may be reasonably required to make connections and disconnections between the delivery hose(s) and the Vessel's bunker manifold.
- (d) The Buyers shall be responsible for making all connections and disconnections between the delivery hose(s) and the Vessel's bunker manifold and to ensure that the hose(s) are properly connected to the Vessel's bunker manifold prior to the commencement of delivery.
- (e) The Buyers shall ensure that the Vessel is in possession of all certificates required to comply with all relevant regulations pertaining to delivery of the Marine Fuels at the port or place of delivery and that the Master of the Vessel shall:
  - (i) advise the Sellers in writing, prior to delivery, of the maximum allowable pumping

rate and pressure and agree on communication and emergency shut-down procedures;

- (ii) notify the Sellers in writing prior to delivery, of any special conditions, difficulties, peculiarities, deficiencies or defects in respect of and particular to the Vessel which might adversely affect the delivery of the Marine Fuels, and;
- (iii) provide a free side to receive the Marine Fuels and render all necessary assistance which may reasonably be required to moor or unmoor the Bunker Tanker, as applicable.

## 6. Documentation

- (a) Before commencement of delivery the Sellers shall present for written acknowledgement by the Master of the Vessel or the Master's authorised representative, a bunker pre-delivery form or similar document, duly signed by the Sellers or their representative, which shall contain the quantities to be delivered and all information required in accordance with ISO 13739 or any subsequent amendments thereof, including, in particular, the values for: viscosity; density; sulphur content; flash point; and delivery temperature. In addition, and if available, similar information shall be provided for vanadium, ash content, water content and pour point. In the event that local bunkering rules and regulation apply mandatorily, these shall take precedence over the provisions of this Sub-clause (a).
- (b) Once the delivery is completed and quantities measured, a BDN shall be signed and stamped by the Master of the Vessel or the Master's authorised representative, and returned to the Sellers, or their representative, as acknowledgement of the actual volume and the actual delivery temperature only and a duplicate copy shall be retained by the Master of the Vessel. This receipt shall contain the following minimum information which is warranted by the Sellers: delivered

quantity in volume units; density in kg/m<sup>3</sup> at 15° C as per ISO 3675; delivery temperature; flash point; sulphur content in % m/m as per ISO 8754; and viscosity.

(c) In the event the Master of the Vessel is not satisfied with the sampling, quantity or any other matter concerning the Marine Fuels or their delivery, the Master shall on completion of delivery: (i) make appropriate remarks in the BDN detailing the complaints and/or referring to a separate letter of protest; or (ii) if remarks in the BDN are not permitted, issue a separate letter of protest, receipt of either of which shall be acknowledged in writing by the Sellers' representative.

## 7. Price

- (a) The price of the Marine Fuels shall be in the amount expressed per unit and in the currency stated in the Confirmation Note for each grade of Marine Fuels delivered into the Vessel's tanks free delivered/ex-wharf as applicable and stated in the Confirmation Note. In the event the price is quoted in volume units, conversion to standard volume shall be at sixty (60) degrees Fahrenheit or at fifteen (15) degrees Celsius.
- (b) Any and all additional charges incurred by the Sellers which are for the Buyers' account shall be specified in the Sellers' quotation and in the Confirmation Note and shall include but not be limited to:
  - (i) wharfage charges, barging charges or other similar charges;
  - (ii) mooring charges or port dues, and; (iii) duties, taxes, charges or other costs in the country where delivery takes place.

## 8. Payment

- (a) Payment for the Marine Fuels shall be made by the Buyers within thirty (30) days or, if otherwise agreed, within the number of days stated in the Confirmation Note after the completion of delivery. In the event payment has been made in advance of delivery, such payment shall be adjusted on the basis of the actual quantities of Marine Fuels delivered and additional payment and/or refund shall be made within seven (7) days after the completion of delivery.
- (b) Payment shall be made in full, without set-off, counterclaim, deduction and/or discount, free of bank charges.
- (c) Payment shall be deemed to have been made on the date the payment is credited to the bank account designated by the Sellers.
- (d) If payment falls due on a non-Banking Day, then payment shall be made on or before the last Banking Day before the due date.
- (e) Any delay in payment and/or refund shall entitle either Party to interest at the rate of two (2) per cent per month or any part thereof or as otherwise agreed as per the Confirmation Note.
- (f) In the event of non-payment or non-refund, the non-defaulting Party reserves the right to pursue such legal remedies as may be available to them to recover the amount owed.

## 9. Claims

- (a) Quantity
  - (i) Any dispute as to the quantity delivered must be noted at the time of delivery in accordance with sub-clause 6(c). If no claim for such quantity dispute is presented to the Sellers by the Buyers in writing within fourteen (14) days from the date of delivery, any such claim shall be deemed to be waived and barred.
  - (ii) The Sellers shall have the right to charge the Buyers for all proven additional expenses incurred by the Sellers in connection with the

Buyers' failure to take delivery of the full quantity of the Marine Fuels ordered by the Buyers.

- (iii) The Buyers shall have the right to charge the Sellers for all proven additional expenses incurred by the Buyers in connection with the Sellers' failure to deliver the full quantity of the Marine Fuels agreed as per the Confirmation Note, unless the quantity is amended by the Master in writing.

### (b) Quality/Specification

- (i) Any claim as to the quality or specification of the Marine Fuels must be notified in writing promptly after the circumstances giving rise to such claim have been discovered. If the Buyers do not notify the Sellers of any such claim within thirty (30) days of the date of delivery, such claim shall be deemed to be waived and barred.
- (ii) In the event a claim is raised pursuant to sub-clause 9(b)(i), the Parties hereto shall have the quality of the Marine Fuels analysed by a mutually agreed, qualified and independent laboratory. The Buyers have the option to request a full ISO 8217 analysis. The Sellers shall provide the laboratory with one of the samples retained by them as per sub-clause 4(c). The analysis shall be established by tests in accordance with ISO 8217 and ISO 4259 or any subsequent amendments thereof. Unless otherwise agreed, the expenses of the analysis shall be for the account of the Party whose claim is found wrong by the analysis.

### (c) Delay

#### In the event of any delay resulting from:

- (i) the Buyers' failure to give proper notices and/or to comply with the notices given pursuant to sub-clause 5(b) and/or the Buyers' Vessel failing to receive Marine Fuels at the pumping rate and pressure referred to in sub-clause 5(e)(i), or;
- (ii) the Sellers' failure to commence delivery of the Marine Fuels promptly in accordance with the

Buyers' required delivery time as notified pursuant to sub-clause 5(b) and confirmed by the Seller in writing and/or the Sellers' failure to deliver the Marine Fuels in accordance with the minimum hourly pumping rate and pressure referred to in the Confirmation Note, then the Party suffering such delay shall be entitled to compensation from the other Party for any documented loss suffered as a result of that delay.

### (d) Exclusions

**Other than those mentioned above, neither the Buyers nor the Sellers shall be liable to the other Party for:**

- (i) any loss of profit, loss of use or loss of production whatsoever and whether arising directly or indirectly from the performance or non-performance of this Contract, and whether or not the same is due to negligence or any other fault on the part of either Party, their servants or agents, or
- (ii) any consequential loss or damage for any reason whatsoever, whether or not the same is due to any breach of contract, negligence or any other fault on the part of either Party, their servants or agents.

### (e) Time Bar

In each and every case any/all claims, except those under Sub-clauses 9(a)(i) and 9(b)(i), by the Buyers shall be time barred unless arbitration proceedings have been commenced in accordance with Clause 22 (Dispute Resolution) hereof within twelve (12) months of the date of delivery of the bunkers or the day that delivery should have commenced as per the Confirmation Note.

## 10. Risk/Title

- (a) Risk in the Marine Fuels shall pass to the Buyers once the Marine Fuels have passed the Sellers' flange connected to the Vessel's bunker manifold.
- (b) Title to the Marine Fuels shall pass to the Buyers upon payment for the value of the Marine Fuels delivered, pursuant to the terms of

Clause 8 (Payment) hereof. Until such time as payment is made, on behalf of themselves and the Vessel, the Buyers agree that they are in possession of the Marine Fuels solely as bailee for the Sellers. If, prior to payment, the Sellers' Marine Fuels are commingled with other marine fuels on board the Vessel, title to the Marine Fuels shall remain with the Sellers corresponding to the quantity of the Marine Fuels delivered. The above is without prejudice to such other rights as the Sellers may have under the laws of the governing jurisdiction against the Buyers or the Vessel in the event of non-payment.

## 11. Compliance with Laws and Regulations

The Parties will not do or permit to be done anything which might cause any breach or infringement of the laws and regulations of the Flag State, or of the places where the Vessel trades or takes bunkers.

## 12. Sanctions Compliance Clause

- (a) In this Contract the following provisions shall apply where any sanction, prohibition or restriction is imposed on any specified persons, entities or bodies including the designation of any specified vessels or fleets under United Nations Resolutions or trade or economic sanctions, laws or regulations of the European Union or the United States of America.
- (b) The Buyers and the Sellers each warrant that at the date of entering into this Contract and continuing until delivery of the Marine Fuels and Payment by the Buyers to the Sellers in full:
  - (i) neither Party is subject to any of the sanctions, prohibitions, restrictions or designation referred to in sub-clause (a) which prohibit or render unlawful any performance under this Contract;
  - (ii) the Sellers are selling and the Buyers are purchasing the Marine Fuels as principals and not as agent, trustee or nominee of any person with whom transactions are prohibited or restricted under sub-clause (a);

- (iii) the Buyers further warrant that the Vessel is not a designated vessel and is not and will not be chartered to any entity or transport any cargo contrary to the restrictions or prohibitions in sub-clause (a) above.
- (iv) the Sellers further warrant that the Marine Fuels are not of an origin or have been exported as a product from a place that is subject to any of the sanctions, prohibitions, restrictions or designation referred to in sub-clause (a) above.

- (c) If at any time during the performance of this Contract either Party becomes aware that the other Party is in breach of warranty as aforesaid, the Party not in breach shall comply with the laws and regulations of any Government to which that Party or the Vessel is subject and follow any orders or directions which may be given by any regulatory or administrative body, acting with powers to compel compliance. In the absence of any such orders, directions, laws or regulations, the Party not in breach may terminate this Contract forthwith.
- (d) Notwithstanding anything to the contrary in this Clause, Buyers and Sellers shall not be required to do anything which constitutes a violation of the laws and regulations of any State to which either of them is subject.
- (e) The Buyers and the Sellers shall be liable to indemnify the other Party against any and all claims, including return of any Payment, losses, damage, costs and fines whatsoever suffered by the other Party resulting from any breach of warranty as aforesaid and in accordance with this Contract.

## 13. Indemnity

- (a) Without prejudice to any other claims arising hereunder or in connection herewith and notwithstanding the provisions of sub-clause 9(d), if loss is suffered or a liability is incurred by either Party hereto as a direct result of

compliance with directions given by the other Party, during or for the purposes of the Parties' obligations hereunder, then the injured party is to be indemnified by the other in respect of such loss or liability; unless such loss or liability arises due to a negligent act or omission by the Party incurring the loss or liability.

- (b) Where claims arise under sub-clause 9(c) and sub-clause 13(a), compensation payable in accordance with sub-clause 9(c) shall be taken into account in assessing sums payable under sub-clause 13(a).

## 14. Force Majeure

Neither Party shall be liable for any loss, damage or delay due to any of the following force majeure events and/or conditions at the port of delivery to the extent the Party invoking force majeure is prevented or hindered from performing any or all of their obligations under this Contract, provided they have made all reasonable efforts to avoid, minimize or prevent the effect of such events and/or conditions:

- (a) acts of God;
- (b) any Government requisition, control, intervention, requirement or interference;
- (c) any circumstances arising out of war, threatened act of war or warlike operations, acts of terrorism, sabotage or piracy, or the consequences thereof;
- (d) riots, civil commotion, blockades or embargoes;
- (e) epidemics;
- (f) earthquakes, landslides, floods or other extraordinary weather conditions;
- (g) strikes, lockouts or other industrial action, unless limited to the employees of the Party seeking to invoke force majeure;
- (h) fire, accident, explosion except where caused by negligence of the Party seeking to invoke force majeure;
- (i) any other similar cause beyond the reasonable control of either Party.

The party seeking to invoke force majeure shall notify the other Party in writing within two (2) Days of the occurrence of any such event/condition.

## 15. Termination

Without prejudice to accrued rights hereunder, either Party hereto shall be entitled to terminate this Contract in the event of:

- (a) any application being made or any proceedings being commenced, or any order or judgment being given by any court, for
  - (i) the winding up, dissolution, liquidation or bankruptcy of either Party (otherwise than for the purpose of reconstruction or amalgamation) or if a receiver or administrator is appointed, or if it suspends payment, ceases to carry on business or makes any special arrangement or composition with its creditors; or
  - (ii) the appointment of a receiver, liquidator, trustee, administrator, administrative receiver or similar functionary of the other Party of all or a substantial part of its assets (otherwise than for the purpose of a reconstruction or amalgamation); or
- (b) any act being done or event occurring which, under the applicable law thereof, has a substantially similar effect to any of the said acts or events described above; or
- (c) either Party is in breach of the provisions of Clause 12 (Sanctions Compliance Clause); or
- (d) if a force majeure event as defined in Clause 14 (Force Majeure) prevents or hinders the performance of the Contract for a period exceeding ten (10) consecutive days from the time at which the impediment begins to prevent performance if notice is given without delay or, if notice is not given without delay, from the time at which notice thereof reaches the other Party.

## 16. Pollution

- (a) In the event of any spillage (which for the purpose of this Clause shall mean any leakage, escape, spillage or overflow of the Marine Fuels) causing or likely to cause pollution occurring at any stage of the bunkering operation, the Buyers and the Sellers shall jointly, and regardless as to whether the Buyers or the Sellers are responsible, immediately take such actions as are reasonably necessary to effect clean up and which shall always be conducted in accordance with such local laws and regulations which may compulsorily apply.
- (b) Where it is a compulsory requirement of the law of the port or place of delivery of the Marine Fuels that the Sellers shall have in place their own oil spill contingency plans, the Sellers shall ensure that they have in place valid oil spill contingency plans.
- (c) The Sellers hereby guarantee payment of and/or agree to indemnify and hold the Buyers harmless for any claims, losses, damages, expenses, penalties or other liabilities incurred by the Buyers under any state, national or international oil pollution legislation, as a result of any spillage occurring whilst the Marine Fuels are being transported directly or indirectly to or from the Vessel's bunker manifold except to the extent that such spillage is caused by any fault on the part of the Buyers. The Buyers shall similarly indemnify the Sellers where any such spillage occurs once risk in the Marine Fuels has passed to the Buyers except to the extent that such spillage is caused by any fault on the part of the Sellers.
- (d) The Sellers shall use their best endeavours to ensure that the owners of the Bunker Tanker are fully insured for oil spill liabilities as required by statutory rules or regulations. If such coverage or insurance is not obtained by the owners of the Bunker Tanker, it shall be the sole responsibility of the Sellers to establish such

coverage for their account. Proof and conditions of such coverage, whether established by the bunker supplying company or by the Sellers shall be made available to the Buyers at their request, as soon as practically possible.

## 17. Drugs and Alcohol Policy

- (a) Each Party shall enforce a company drug and alcohol policy on board the Vessel and the Bunker Tanker and, in the case of the Sellers, also in their facilities.
- (b) Such company drug and alcohol policies shall meet or exceed the standards in the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended.
- (c) The Buyers' personnel shall comply with the Sellers' policy in the Seller's facilities or on board the Bunker Tanker, and the Seller's personnel shall comply with the Buyer's policy when on board the Vessel.
- (d) Both Parties acknowledge and agree that the selling, possession, distribution, use or being under the influence of alcohol or any controlled substance or dangerous drugs other than those medically prescribed is prohibited.

## 18. Confidentiality

- (a) Neither Party shall disclose to third parties any confidential information relating to pre-contractual discussions and/or the terms and conditions of this Contract, except with the prior written consent of the other Party, or to the extent required by law, or by a request of a government or its agency thereof.
- (b) The Parties shall take reasonable precautions to ensure that no unauthorised disclosure of confidential information takes place.
- (c) If a Party is uncertain as to whether information is confidential, the Sellers or the Buyers (as the case may be) shall consult with the other Party.
- (d) Should either Party be required by law to disclose confidential

information, the disclosing Party will notify the other party and shall disclose only the minimum confidential information required to satisfy legal requirements.

- (e) Information is not confidential for the purposes of this Clause if it was in the possession of the Party prior to receipt from the other Party; becomes publicly available other than as a result of a breach of this Contract by one of the Parties; or is lawfully received from a third party.
- (f) This Clause shall survive termination of this Contract.

## 19. Third Party Rights

No third parties may enforce any term of this Contract.

## 20. Assignment

Neither Party shall assign any of their rights under this Contract without the prior written consent of the other Party, such consent not to be unreasonably withheld or delayed.

## 21. Partial Validity

If any provision of this Contract is or becomes or is held to be illegal, invalid or unenforceable in any respect under any law or jurisdiction, the provision shall be deemed to be amended to the extent necessary to avoid such illegality, invalidity or unenforceability, or, if such amendment is not possible, the provision shall be deemed to be deleted from this Contract to the extent of such illegality, invalidity or unenforceability, and the remaining provisions shall continue in full force and effect and shall not in any way be affected or impaired thereby.

## 22. Dispute Resolution Clause 2015

- (a) \*This Contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause. The arbitration shall be

conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced. The reference shall be to three arbitrators. A Party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other Party requiring the other Party to appoint its own arbitrator within fourteen (14) calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other Party appoints its own arbitrator and gives notice that it has done so within the fourteen (14) days specified. If the other Party does not appoint its own arbitrator and give notice that it has done so within the fourteen (14) days specified, the Party referring a dispute to arbitration may, without the requirement of any further prior notice to the other Party, appoint its arbitrator as sole arbitrator and shall advise the other Party accordingly. The award of the sole arbitrator shall be binding on both Parties as if he had been appointed by agreement. Nothing herein shall prevent the Parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator. In cases where neither the claim nor any counterclaim exceeds the sum of USD 100,000 (or such other sum as the Parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

- (b) \*This Contract shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Contract shall be referred to three (3) persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the

purposes of enforcing any award, judgment may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

In cases where neither the claim nor any counterclaim exceeds the sum of USD 100,000 (or such other sum as the parties may agree), the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc.

- (c) \*This Contract shall be governed by and construed in accordance with Singapore\*\*/English\*\* law.

Any dispute arising out of or in connection with this Contract, including any question regarding its existence, validity or termination shall be referred to and finally resolved by arbitration in Singapore in accordance with the Singapore International Arbitration Act (Chapter 143A) and any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The arbitration shall be conducted in accordance with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration (SCMA) current at the time when the arbitration proceedings are commenced.

The reference to arbitration of disputes under this clause shall be to three arbitrators. A Party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other Party requiring the other Party to appoint its own arbitrator and give notice that it has done so within fourteen (14) calendar days of that notice and stating that it will appoint its own arbitrator as sole arbitrator unless the other Party appoints its own arbitrator and gives notice that it has done so within the fourteen (14) days specified. If the other Party does not give notice that it has done so within the fourteen (14) days specified, the Party referring a

dispute to arbitration may, without the requirement of any further prior notice to the other Party, appoint its arbitrator as sole arbitrator and shall advise the other Party accordingly. The award of a sole arbitrator shall be binding on both Parties as if he had been appointed by agreement.

Nothing herein shall prevent the Parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of USD 75,000 (or such other sum as the Parties may agree) the arbitration shall be conducted before a single arbitrator in accordance with the SCMA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

- (d) \*This Contract shall be governed by and construed in accordance with the laws of the place mutually agreed by the Parties and any dispute arising out of or in connection with this Contract shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.
- (e) Notwithstanding (a), (b) (c) or (d) above, the Parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Contract. In the case of a dispute in respect of which arbitration has been commenced under (a), (b), (c) or (d) above, the following shall apply:
- (i) Either Party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other Party of a written notice (the "Mediation Notice") calling on the other Party to agree to mediation.
- (ii) The other Party shall thereupon within fourteen (14) calendar days of receipt of the Mediation Notice confirm that they agree

to mediation, in which case the Parties shall thereafter agree a mediator within a further fourteen (14) calendar days, failing which on the application of either Party a mediator will be appointed promptly by the Arbitration Tribunal ("the Tribunal") or such person as the Tribunal may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the Parties may agree or, in the event of disagreement, as may be set by the mediator.

- (iii) If the other Party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the Parties.
- (iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.
- (v) Either Party may advise the Tribunal that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Tribunal may take the mediation timetable into account when setting the timetable for steps in the arbitration.
- (vi) Unless otherwise agreed or specified in the mediation terms, each Party shall bear its own costs incurred in the mediation and the Parties shall share equally the mediator's costs and expenses.
- (vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Tribunal except to the extent that they are disclosable under the law and procedure governing the arbitration.

(Note: The Parties should be aware that the mediation process may not necessarily interrupt time limits.)

\*Sub-clauses (a), (b), (c) and (d) are alternatives; if this Clause has been incorporated into the Contract without an express choice of law and arbitration forum chosen from sub-clauses (a), (b), (c) and (d), then sub-clause (a) of this Clause shall apply. Sub-clause (e) shall apply in all cases.

\*\* Singapore and English law are alternatives; if Sub-clause (c) agreed also indicate choice of Singapore or English law. If neither or both are indicated, then English law shall apply by default.

## 23. Notices

Any Party giving notice under this Contract shall ensure that it is effectively given and such notice shall be treated as received during the recipients' office hours. If such notice is sent outside the recipients' office hours it shall be treated as received during the recipients' next working day.

## 24. Entire Agreement

- (a) The written terms of this Contract comprise the entire agreement between the Buyers and the Sellers in relation to the sale and purchase of the Marine Fuels and supersede all previous agreements whether oral or written between the Parties in relation thereto.
- (b) Each of the Parties acknowledges that in entering into this Contract it has not relied on and shall have no right or remedy in respect of any statement, representation, assurance or warranty (whether or not made negligently) other than as is expressly set out in this Contract.
- (c) Any terms implied into this Contract by any applicable statute or law are hereby excluded to the extent that such exclusion can legally be made. Nothing in this Clause shall limit or exclude any liability for fraud.

## 25. UK Sale of Goods Act

The United Kingdom Sale of Goods Act 1979 shall apply to this Contract.