



Claims Guide

A Case for 20/20 Vision? IMO's Low Sulphur Fuel Limit Under Marpol Annex VI which comes into force on 1st January 2020

The implementation of the global 0.5% sulphur cap for bunker fuel under MARPOL Annex VI in just under 18 months' time has been well publicised. Concerns about the cost of complying with this low sulphur cap and whether there will be sufficient availability of low sulphur fuel oil (LSFO) have also been well publicised.

In this article we focus on some of the compliance and practical considerations, as well as legal issues that may arise, together with indications as to the charter party issues that both ship owners and charterers will need to consider.

Options for compliance and practical considerations

There are, broadly speaking, two main options available for compliance: burning compliant fuel or utilising so-called "approved equivalent methods". The choices available in order to comply with the latter can be further narrowed down with each option carrying respective advantages and disadvantages. Some of these methods of compliance are briefly explored below:

Burning compliant fuel

Marine Gas Oil (MGO) / distillate fuel

However, issues arise concerning:
Fuel treatment plant's ability to effectively deal with lighter / less viscous fuel
Lower lubricity / acidity
Engine lubricating oil choice

Low sulphur compliant blended hybrid fuels (ECA hybrid fuels)

However, issues arise concerning:
Engine lubrication
Limited experience
Availability worldwide
Quality related issues*

**The International Organization for Standardization (ISO) released the statement on the ISO 8217:2017 standard reassuring that the characteristics included into the ISO standard cover 0.50% sulphur fuels. 2020 Sulphur cap guidelines on how to manage distillate fuels and fuel oil blends are being developed by IMO in preparation for approval by IMO MEPC 74 in May, 2019. Additionally, OCIMF and IPIECA in cooperation with CIMAC, the Energy Institute and ISO are working on an industry guidance that will assist crews and ship operators to prepare for the potential impact on fuel and machinery systems. The document dealing with new fuel blends or fuel types will include guidance on the handling, storage and use of such fuels.*

Liquefied Natural Gas (LNG)

Using LNG bunkers has the benefit of being less susceptible to future environmental regulation (for example, the inevitable regulations that will be implemented to achieve the IMO's target of reducing greenhouse gas emissions by 50% by 2050). However, re-fitting the vessel will present physical and practical challenges, such as a decrease in cargo carrying capacity and the need to ensure that crew are adequately trained to operate the vessel safely. The global availability of LNG is also uncertain.

Alternative fuels

A number of other alternative fuel sources have been mooted including methanol, biofuels, liquefied petroleum gas (LPG) and hydrogen fuel cells. However, these are, at present, underdeveloped technologies which have been less well researched than other options.

Onboard desulphurisation

Onboard desulphurisation of fuel may be available (see Ultrasonic Catalysis; Filtering), although these systems are less developed/less researched in comparison with other options.

Approved equivalent methods - Exhaust Gas Cleaning System (EGCS or “Scrubbers”)

An alternative is for owners to install a scrubber system. These are systems designed to clean the emissions before they are released into the atmosphere and consist of broadly two types: an open-loop scrubber and a closed-loop scrubber. The former involves spraying the exhaust gas with sea water which, through its natural alkalinity, cleans the emissions and the sea water is discharged back into the sea in line with all applicable environmental legislation; the latter uses a combination of fresh water and chemicals to similar effect but with the option of retaining the recycled water and by-products on board.

This option will require capital outlay by owners, as well as time spent in dry-dock and, potentially, a reduction in cargo carrying capacity. The EGCS will also require regular maintenance, together with suitably trained crew, and provision will need to be made for disposal of the waste by-products (such as scrubber sludge).

Legal Issues

Cost

Compliance with the new sulphur cap will bring with it unavoidable cost consequences, the extent of which will depend upon both the method of compliance that owners elect to adopt (i.e. compliant fuel or “approved equivalent methods” – see above) and the contractual apportionment of liability that each party has adopted under the terms of individual charter parties.

By way of example, the installation of an exhaust gas cleaning system (or “scrubber”) will require a more significant up-front cost for a ship owner but may also attract an increased rate of hire from charterers on the basis that charterers will be able to make use of cheaper HSFO.

Furthermore, with the higher price of low sulphur fuel or alternatives such as LNG, there is likely to be more focus on a vessel’s performance and the parties should have clear charter party clauses to govern how the vessel’s performance and fuel consumption is to be assessed.

Quantity and quality of bunkers

Bunker specification clauses will be of paramount importance in minimising the scope for potential disputes, particularly in the context of liability for non-compliance with MARPOL Annex VI, and these should therefore not only require that bunkers comply with MARPOL Annex VI but also detail the exact maximum sulphur content permitted for any bunkers stemmed during the charter party. It also worth noting that existing standard form clauses, such as the BIMCO Bunker Quality and Liability Clause, may not be suitable in their current format.

Note that a BIMCO sub-committee is due to meet on 19 September 2018, the aim being, after consultation with the shipping industry, to publish a BIMCO low sulphur clause. It is hoped this will be available by the end of 2018.





Liability

There has been discussion within the industry as to whether there will be adequate global availability of low sulphur fuel. If there are availability issues and time is lost waiting for bunkers or the vessel loses time during a time charter in order to bunker low sulphur fuel, the charter party should clarify who is liable to pay for the time lost and expenses/bunkers burned (usually time charterers).

If the vessel is delayed reaching her laycan under a voyage charter, owners should bear in mind that they may be liable in damages to charterers for a failure to reach the laycan with “reasonable despatch” if the delay is caused by owners not having sufficient compliant bunkers on board when the charter party was fixed.

Also, where cargo on board is damaged due to delays in the voyage or other consequences of the vessel deviating or waiting for bunkers where the vessel had insufficient compliant bunkers at the commencement of the voyage, this may constitute a deviation under the contract of carriage which could, depending on the circumstances, give rise to liabilities which fall outside Club cover.

Where the vessel is detained by Port State Control (PSC) for a suspected breach of MARPOL Annex VI Regulations, owners and charterers should clarify in the charter party whether any fines imposed and time lost are owners’ or charterers’ responsibility. Often it may be unclear which party (the owner or the time charterer) is liable for the time lost and this will depend upon the reason for the PSC’s detention and the outcome of the PSC’s investigation. It is also recommended to insert a charter

party clause that hire is payable during any PSC detention and investigation, with hire repayable to charterers depending upon the outcome of the PSC investigation.

EGCS or “scrubbers”

In circumstances where owners have elected to install a scrubber a number of additional considerations may arise. Owners should ensure that the particular characteristics of the scrubber are detailed in the charter party and be aware that this will likely attract an additional performance warranty, the breach of which may permit charterers to bring a claim in damages.

Owners should also note the additional costs associated with maintaining the scrubber and the likelihood that the vessel will be off-hire in circumstances where the scrubber system breaks down or is defective. This will likely be covered by existing provisions such as the maintenance, off-hire and dry-docking clauses within a charterparty.

Additional clauses may also need to be included in the charter party in order to apportion liability for the time and cost for removing any by-products produced by the EGCS.

Long term charter parties

Particular questions can arise under long term charter parties that have already been fixed and which are due to span the 1 January 2020 MARPOL Annex VI implementation date.

In several respects these issues are likely to be similar to those that arose in pre-existing charter parties with the implementation of the MARPOL requirement for double hulled tankers, although the issues arising from the low sulphur fuel regulations are more nuanced since there are alternative methods by which to gain compliance. As detailed above, these include the use of low sulphur fuel (likely to be charterers' responsibility), alternatively, "approved equivalent methods" such as installing scrubbers (likely to be owners' responsibility) or making use of alternative fuels.

The quantity of bunkers on delivery and redelivery is also likely to gain more prominence, particularly for those charters that span the 2020 implementation date. At present, many time charter parties stipulate that the vessel should be redelivered with approximately the same quantity of bunkers as on delivery. This could lead to a number of disputes between owners and charterers, not least in circumstances where non-compliant bunkers are retained on board after the implementation date. The parties should therefore make provision for who is liable for the time and cost of removing these or, in circumstances where bunkers on redelivery are worth significantly more (on the basis of the increased cost of LSFO) whether a bunker price adjustment clause should be included.

It is hoped that BIMCO's charter party clause, which is aimed to be published by the end of 2018, and IMO's guidelines, due to be finalised in February 2019, will assist ship operators and bunker suppliers in complying with Annex VI. Approval by MEPC is expected in May 2019. However, these guidelines are unlikely to answer all the issues that may arise, nor will they eliminate the types of dispute that are outlined above.

Please note that the Club has made fixed fee arrangements with some firms of solicitors that are specialists in the area for reviewing and drafting charter party and COA clauses. If Members wish to find out more about these arrangements, please contact Nicola Cox.

This article was written by Nicola Cox, Deputy Director – FD&D and Dmitry Kisil in the Club's loss prevention department in London, with input from Hill Dickinson, London.

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

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