

# Legal perspectives: Re-shaping legal strategy for IMO 2020

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# IMO 2020: KEY FACTS & DATES

- Sulphur content limit of 3.50% **reduced to 0.50%**;
- Limit for **Emission Control Areas** remains at **0.10%**
- Implementation by **1 January 2020**;
- Non-compliance is **NOT** an option
- **Carriage ban** of non-compliant fuel from **1 March 2020**
  
- Two main options for compliance:
  - (1) Compliant fuel (LSFO/MGO's, LNG)
  - (2) Approved equivalent methods, scrubbers

- NEWS BULLETIN -

THERE WILL BE NO GRACE PERIOD

# CONTRACTUAL CONSIDERATIONS\_T/C & V/C

## In re-drafting contracts:

- ✓ Are existing terms still legal?
- ✓ Are new terms contradictory with existing terms?

## Review charterparties and how clauses work together in respect of:

- ✓ Compliance
- ✓ fuel specification – segregation, co-mingling / compatibility, monitoring
- ✓ Fuel quality
- ✓ speed and performance
- ✓ scrubbers use
- ✓ fuel tank preparation/cleaning
- ✓ Bunker adjustment clauses
- ✓ bunkers (and cost) on delivery and redelivery
- ✓ Cost of modifications
- ✓ Speed & performance warranty clauses
- ✓ Off-hire clauses

# CONTRACTUAL CONSIDERATIONS

## ✓ Charterer's responsibility:

**Compliant Fuel Supply or supply under Bunker Delivery Notice (BDN)**

## ✓ Owner's responsibility:

**Vessel's seaworthiness (guarantee safe operation with provided fuel)**

➤ **Existing Charterparties:** BIMCO bunker fuel sulphur content 2015 clause, does not guarantee that the Charterer is obliged to comply with new sulphur requirements outside the emission control areas.

## ➤ **Future Charterparties add:**

- BIMCO 2020 Fuel Transition Clause – for ships not fitted with scrubbers
- BIMCO 2020 Marine Fuel Sulphur Content Clause for Time Charterparties
- INTERTANKO Bunker Compliance Clause for Time Charterparties (where vessel is scrubber fitted)

**IMPORTANT NOTE:** it is advised that when drafting such clauses, they should be expanded in order to accommodate both parties' needs and safeguard them.

# Fuel specifications:

**Existing Charterparties:** Re-determining the type and specification of fuel that needs to be supplied

**Future Charterparties:** incorporate a detailed fuel specification clause. Charterers' might be required to supply bunkers with the latest ISO standard – including any future amendments, which reflects statutory requirements.

✓ Add comprehensive clauses on **provision of compliant fuel**

✓ Clause on **bunker delivery note**. It provides for bunker suppliers, if asked to provide fuel exceeding the sulphur limit, to do so only on the basis of receiving a notification from the buyer that the fuel is intended to be used compliantly. **There is no requirement on the supplier to check if this is the case – only to obtain a 'notification'. Further steps must be added clearly in contract clauses.**

✓ **Bunker claims time frames** on:

- applicable law/jurisdiction
- rights and obligations
- Other possible issues if caught in the middle of the contractual chain

# Fuel quality

**Existing Charterparties:** When a dispute arises, standard bunker sampling and testing clauses in already existing charterparties should be followed. In the absence of such clauses, parties should obtain evidence relating to bunker quality.

**Future Charterparties:** incorporate tight bunker quality and dispute resolution clauses more than ever. Include tried and tested clauses as for example the BIMCO Bunker Quality Control Clause for Time Chartering and the Bunker Quality and Liability Clause.



# Scrubbers

**Existing Charterparties:** it is recommended that parties enter into addenda or side agreements.

**Future Charterparties:** agree on express terms, such as time and cost of installation, liabilities that may arise for the costs of waste disposal, liabilities concerning the maintenance and repair and/or scrubber failure.

Additionally, it is essential to take into account the ports that have banned open-loop scrubber waste disposal and reconsider options, planning more carefully.

# Tank preparation

**Existing Charterparties:** Both parties have to ensure that their charterparty entails tank preparation provisions relating to tank's cleanliness either by a lay-by berth; or flash the tanks clean with additives, or, low sulphur fuel.

Nevertheless, in the absence of such provisions, owners will be responsible for the cleanliness of the tank. It is essential that both owners and charterers work together, to reach mutual agreement.

**Future Charterparties:** Both BIMCO and INTERTANKO have created tank preparation clauses, allocating the responsibilities of the owner and charterer in relation to the cleanliness of the tanks ensuring that such clauses are compatible with the new fuel types and for the disposal of non-compliant fuel.

# Bunker adjustment factor clauses:

**Existing Charterparties:** Any adjustment clauses referring to Heavy Fuel Oil (HFO) should be reviewed, as post-2020 they may be illegal.

**Future Charterparties:** ensure that such clauses are in conformity with the new types of fuel that will be supplied and used. Add **bunker adjustment factor clauses** (BAF clauses)

- BAF clauses help carriers hedge against the risk of bunker price volatility.
- When bunker prices significantly fluctuate, a carrier's ability to offer its customers a stable base freight rate is reduced.
- An issue here is that BAF clauses typically track against prices fixed on a passed date (the bill of lading date in the clause above). They will not track the present pricing reality at the time the bunkers are purchased or stemmed.
- If parties wish to track actual bunker costs during the voyage more closely, they should consider incorporating **Bunker Escalation and De-Escalation clauses**.

# Bunkers on delivery/redelivery

**Existing Charterparties:** It is almost customary that charterers should redeliver the vessel with the same quantity of fuel as on delivery. However, this practice will most likely result in the violation of the IMO's 2020 legal requirements. Thus, both parties have to agree to a different arrangement, where the charterer will have to redeliver the vessel with an appropriate quantity of fuel and at the same time, be compliant with the legal requirements.

**Future Charterparties:** Similar as above, new charterparties, will have to pursue an alternative arrangement when it comes to bunkers delivery/redelivery clauses. Such alternative arrangement could be for the **vessel to be redelivered with sufficient fuel to reach to the next bunkering port** where compliant fuel will be available.

It is important that parties when agreeing to such clauses, have to consider the **price** at which fuel is taken over on redelivery and be in compliance with the post-2020 requirements.

# Cost of modifications

**Existing and Future Charterparties:** In order to burn low sulphur fuel safely and efficiently, modifications on the ships might be necessary. The cost of such modifications will most likely be borne by the shipowner.

However, the shipowner will not be legally obliged by the charterer to modify its vessel to an extent greater than what is expected (i.e. installation of scrubbers).

# Speed and performance warranties

**Existing Charterparties:** Due to the new fuel specifications, performance warranties need to be reviewed as some of them may not be applicable to the low sulphur fuel usage requirement.

There can be two scenarios: firstly, if the performance warranties become **redundant**, it will most likely create an ambiguity in the context of underperformance. Secondly, from the point of view of the owners, when their vessels will be operating on low sulphur fuel, they might be required to comply with **unrealistic warranties**.

Therefore, it is advised that both parties to the agreement work together and amend where necessary the performance warranties.

**Future Charterparties:** speed and performance warranties, should be carefully drafted.

# Off-hire

**Existing Charterparties:** delays resulting by the detention of the vessel due to non-compliance or the deviation from her route to obtain fuel, will most likely not be covered in the bespoke clauses.

A solution to that could be to incorporate the **clause 15 of the NYPE '46**, but only if there is a listed off-hire event and the 'full working of the vessel' is prevented.

**Future Charterparties:** The drafting of off-hire clauses in new charterparties should be drafted carefully.

In this respect clauses should be developed in such a way where they anticipate any possible delay that can reasonably occur as a result of the low sulphur fuel usage, such as possible engine break downs due to incompatible fuel blends.

# THE EFFECT OF NON-COMPLIANCE

- **Fines** – which are undetermined
- **Detention** of the vessel
- Ship owner will have to prove what **compliance/mitigation measures** were implemented
- Whether any cost is recoverable depends on **contract** such as charter parties or supply contracts, and cause of non-compliance
- **Insurers** only cover fines where there has been accidental breach (non-negligent) and proof that all reasonable mitigation measures have been taken
- **Reputational damage**



# THE STRATEGY:



# KEY CONSIDERATIONS OVERVIEW & ACTIONS

## ➤ SHIP SPECIFIC IMPLEMENTATION PLAN

- Risk assessment and mitigation plan (impact of new fuel)
- Fuel oil systems modification and tank cleaning (if applicable)
- Fuel oil capacity and segregation capability
- Procurement compliant fuel
- Fuel oil changeover plan
- Documentation and reporting
- Contractual updates in T/C's and V/C's as presented earlier

## ➤ CREW TRAINING:

- maintain appropriate record-keeping on board (MARPOL/Flag state)
- Knowledge on fuel characteristics as loaded & ability to respond to storage requirements, handling and use of these fuels on board.
- ahead of arrival at a port, be fully aware of the quantities and qualities of fuel in each tank as well as in the transfer pipework.
- trained in the start-up, operation and shut-down procedures with the new fuel, as well as in any maintenance routines that are, or might be, required

# KEY CONSIDERATIONS OVERVIEW & ACTIONS cont'd

## ➤ FUEL NON AVAILABILITY REPORT (FONAR) [MARPOL VI, Regulation 18]

- the ship's **name, flag, and IMO number**
- a copy of the ship's **voyage plan** in place the date
- **time and location of the ship** when it first received notice of the proposed voyage
- **actions taken to attempt to achieve compliance** with sulphur regulations
- **description of why compliant fuel oil was not available**
- in cases of fuel oil supply disruption, **the name of the port at which the ship was scheduled to receive compliant fuel oil and the name of the fuel oil supplier that is now reporting the non-availability of compliant fuel oil**
- Where applicable, **describe any operational constraints that prevented the ship from using available compliant fuel oil - steps the ship has taken, or is taking, to resolve these operational constraints**
- **Key contact information** for the master, ship operator, ship agent and ship owner. Further, the designation of a corporate official authorized to answer additional questions in the event of investigations by the relevant authorities.

**Don't wait for the Christmas miracle: Take action now!**



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thank  
you



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