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SULPHUR CAP – HOW IT AFFECTED CHARTERERS



From the 1st of January 2020 all ships are obliged to comply with the MARPOL Annex VI Sulphur content requirements and to burn fuel with a Sulphur content of no more than 0.5 % (previous limit was 3.5%) unless they are fitted with an exhaust gas emissions cleaner (the so-called scrubbers that are systems that “clean” the emissions before they are released into the atmosphere). The existing 0.1% limit for emission control areas remains unaffected.

The 2020 cap applies to all ships flying the flag of a state that has ratified the MARPOL Annex VI and/or calling at a port or passing through the waters of a state that has ratified the Convention. According to estimates of the Association the Sulphur Cap applied to about 95-98% of the total world’s fleet. Therefore, nearly all the Charterers in some way were affected by the regulation.

How it affected Time Charterers

Usually under a time charter the responsibility for bunker supply lies on the Charterers. Therefore, Charterers were very anxious about availability of bunkers with a Sulphur content of no more than 0.5 % since all the time lost due to unavailability of the required bunkers to be for Charterers’ account. I.e. the vessel to remain on hire during the time lost.

It appeared that all Charterers’ apprehensions did not prove to be correct - there were no shortages in main bunkering hubs.

Some Charterers obtained guarantees from their bunker suppliers that the required fuel would be available and that the supplier would be MARPOL compliant. At the same time, some Charterers made relevant corrections in their bunker purchase contracts. Particular attention should be paid to the time limits within which to notify the supplier of a quality dispute (often limited to 7 days which is quite short) and/or to present a claim as well as the limits of the suppliers’ liability (often, the bunker suppliers try to exclude their liability or to limit it to extremely low levels not sufficient to cover Charterers’ losses which could be significant in some cases).

Because low Sulphur fuels cannot be mixed with high Sulphur fuels, Charterers need to discuss with Owners well in advance the possibility to segregate the two type of fuels in tanks that can receive the compliant fuel (the tanks may have to be cleaned first) or if the vessel is chartered after 01st January, ensure that the C/P will contain specific provisions by which Owners will undertake to have tanks ready to receive Charterers' compliant bunkers.

Time charters usually contain performance warranties (in respect of speed and consumptions) for specific fuels. A warranty given for a specific fuel will probably no longer apply so Charterers will have to ensure that the vessel's description clause and performance warranties will be amended to take into consideration the new compliant fuel. In that respect, we feel it necessary to remind Charterers that they should not accept that the vessel's description and performance warranties are given "without guarantee" since these words mean that the Owners are in fact not giving any guarantee in respect of vessel's performance...

Despite considerable time passed since 1st of January 2020, the impact that the new type of fuel have on the engine is still not known to the Charterers and Owners. Under English Law, where compliant fuel is supplied but it still causes damage to the engine, the Charterers will nevertheless be responsible for the damage but of course, the parties can agree different terms in their contracts so Charterers should consider inserting a clause that will clearly provide that Charterers' obligations and responsibility will be limited to providing bunkers that are within the specifications stipulated by the Owners, for instance.

BIMCO has published two 2020 sulphur clauses (available on the BIMCO's web site):

- BIMCO 2020 Marine Sulphur Content clause for Time Charter Parties (which is meant to replace the BIMCO Fuel Sulphur Content Clause 2005). The clause is short and provides that Charterers shall supply fuels to permit the vessel to comply with any applicable Sulphur content requirements at any time and that the fuel shall meet the specifications and grades set out in the Charter Party. The Charterers also warrant that any bunker suppliers, bunker craft operator and bunker surveyors shall comply with the Sulphur content requirements. The clause also contains an indemnity which provides that Charterers will indemnify, protect, defend and hold harmless the Owners from any and against all losses, damages, liabilities, delays, deviation, claims fines, costs, expenses, actions, proceedings, suits, demands arising out of the Charterers' failure to comply with the clause and that the vessel should remain on hire throughout. The clause is therefore very wide and protective of Owners' interests. The parties are of course free to amend the clause if they wish.
- BIMCO 2020 Fuel Transition Clause for Time Charter Parties which deals with the one-off event of switching from 3.50% Sulphur content fuel to 0.50% Sulphur content. The approach taken by the BIMCO is that the Charterers should pay to offload and dispose of any non-compliant fuel on board and Owners should ensure that the ship is fit to receive compliant fuel.

While these two clauses are helpful, they do not, in our view, cover all the aspects of the new regulation as mentioned above and they also do not deal with issues relating to the specifications,

grades, quality and suitability of the fuels supplied (which are often dealt with by specific rider clauses in the Charter Parties). The parties will therefore need to review their Charter Parties and ensure that they fit their needs.

The consequences for not complying with the new regulation are also not clear and will vary from jurisdiction to jurisdiction and it will be left to each port state to determine the level of fines imposed, whether or not exemptions will be granted and if the vessel will be detained. Charterers should however keep in mind that if they are found in breach of the regulation, the vessel is likely to be considered as on-hire for all the time lost and the Owners will probably have a claim against Charterers for any fine paid and/or other losses suffered.

Voyage-charters

The impact of the new regulation on voyage Charterers are limited but some Owners try to insert clauses in the Charter Parties to allow them to deviate to a convenient bunkering port during the voyage or try to limit their liabilities in case the vessel is detained due to a breach of the new regulation. Charterers should also consider inserting in their contracts a clause that provides that laytime and time on demurrage will not count in case the vessel is detained and/or time is lost. Similarly, voyage-Charterers of vessels equipped with scrubbers should consider inserting a clause that will make the Owners responsible in case the scrubber system fails and that laytime/time on demurrage should not count in such circumstances.