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# BUNKERSPOT

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# Clause and effect

Under Regulation 18.2.2 of MARPOL Annex VI, a ship is not required to deviate from its planned route or substantially delay its voyage to achieve regulatory compliance. In the light of this stipulation, **Nicholas Woo** and **Lisa Wortley** from Birketts' Shipping and International Trade Team consider how IMO 2020 could affect contractual relationships between shipowners and charterers

There is no shortage of commentary on the technical challenges presented by the new MARPOL Annex VI regulations, due to come into force on 1 January 2020. However, their impact on the contractual relationships between shipowners and charterers has received less attention. As the deadline approaches, those involved in time chartering vessels (as owners or charterers) will need to give serious thought to how the new responsibilities are to be allocated and governed in the charterparty terms.

In particular, owners and charterers will need to consider how to manage the transition period for charterparties which will span the period from late 2019 to early 2020 and, if the vessel is not fitted with a scrubber, how to ensure compliance with the ban on carrying non-compliant fuel which will come into force on 1 March 2020. This further regulatory change will mean that Port State Control will have to show only that a vessel has non-compliant bunkers on board and not that the vessel has actually burnt them in breach of the regulations.

The complex new set of obligations gives rise to a number of issues in drafting charterparty terms. If a vessel is found not to comply with the regulations, it may not only face fines, but could be detained by State authorities until it is compliant, including forcing the vessel to discharge and dispose of the non-compliant fuel. The resulting delays, which could be lengthy, might lead to missed laycans for follow-on fixtures, or potentially cause damage to perishable cargo arising from the delays.

Against this background, while owners are responsible for ensuring that a vessel complies with the new rules, it is important to remember that under a time charter, charterers are usually responsible for supplying the fuel. This is a recipe for expensive disputes unless the charterparty terms are clear and robust.

BIMCO has prepared two well-drafted clauses to assist owners and charterers. However, like any pro-forma clauses, these must be considered carefully to ensure that they deal with all potential circumstances and that they work within the context of the charterparty as a whole.

The '2020 Fuel Transition Clause for Time Charterparties' aims to deal with the complex problems of how to allocate responsibilities for the period leading up to the prohibition on carriage of non-compliant fuels.

The '2020 Marine Fuel Sulphur Content Clause' is intended to replace the 'Fuel Sulphur Content Clause 2005'. It not only updates the regulatory requirements for fuel to be supplied, but redefines the scope of the clause's application, the indemnity given by charterers and the warranty given by owners.

Part (a) of the new clause defines the new 'Sulphur Content Requirements' in terms of MARPOL Annex VI and the requirements of 'any other applicable lawful authority'. Part (b) sets out charterers' obligations, which include 'to supply fuels to permit the Vessel, at all times, to comply with any applicable Sulphur Content Requirements'.

It is easy to believe that including the BIMCO clauses in a charterparty is a

simple panacea to all the potential problems arising from the IMO 2020 regulations. However, one important area which is not dealt with in the BIMCO clauses is the effect of Regulation 18.2.2 of MARPOL Annex VI.

## REGULATION 18.2

Regulation 18.2 of MARPOL Annex VI reads as follows:

*2.1 If a ship is found by a Party not to be in compliance with the standards for compliant fuel oils set forth in this Annex, the competent authority of the Party is entitled to require the ship to:*

- .1 present a record of the actions taken to attempt to achieve compliance; and*
- .2 provide evidence that it attempted to purchase compliant fuel oil in accordance with its voyage plan and, if it was not made available where planned, that attempts were made to locate alternative sources for such fuel oil and that despite best*

*efforts to obtain compliant fuel oil, no such fuel oil was made available for purchase.*

*2.2 The ship should not be required to deviate from its intended voyage or to delay unduly the voyage in order to achieve compliance.[our emphasis]*

*2.3 If a ship provides the information set forth in subparagraph 2.1 of this paragraph, a Party shall take into account all relevant circumstances and the evidence presented to determine the appropriate action to take, including not taking control measures.*

## WHAT IF?

Regulation 18.2.2. says that a vessel is not required to deviate or unduly delay its voyage to comply with the Regulations. Consider the following scenario.

On 20 December 2019, a charterer orders the vessel to proceed to Port A to stem compliant bunkers. Charterers are assured by their bunker supplier that there are sufficient compliant bunkers at Port A. However, when the vessel arrives at Port A on 30 December 2019, compliant bunkers have run out. If the vessel arrives at Port B burning only non-compliant bunkers, it will be in breach of the Regulations and subject to possible fines and detention by Port State Control authorities. The charterer orders the vessel to proceed to Port B anyway on the grounds of Regulation 18.2.2.

This scenario opens a Pandora's box of uncertainties:

- (a) Can the owners demand that the charterers deviate the vessel to Port C to stem compliant bunkers to avoid problems with Port State Control?
- (b) Can charterers argue that they are not obliged to deviate or unduly delay the vessel's voyage pursuant to Regulation 18.2.2? Or is it only owners who are entitled to rely on this?
- (c) Given the provisions of Regulation 18.2.2, is the duty of the charterers under clause (b) of the BIMCO Sulphur Content Clause an absolute one?
- (d) Alternatively, can charterers argue that pursuant to clause (a) of the BIMCO clause they have complied with the 'sulphur content... requirements as stipulated in MARPOL Annex VI', given that Regulation 18.2.2 is found in MARPOL Annex VI?
- (e) If Port State Control authorities take action against the vessel as a result of the vessel's non-compliance, are the owners entitled to say that their charterers made best efforts to stem compliant fuel but were unable to do so?
- (f) Will the Port State Control authorities

expect the owners to show that they made their own enquiries as to whether compliant fuel was available?

Singapore has been reported to have taken steps to ensure that it is well prepared to have sufficient supplies of compliant fuel from 1 January 2020. Given that more than 50% of bunkers are stemmed in Singapore, this should mean that in the majority of cases, the above problem should not happen. However, other ports may not be so well prepared.

## THE PAPER TRAIL

Regulation 18.2 is designed to give owners an excuse to Port State Control authorities in the event that compliant bunkers are not available. It says that owners can provide evidence that they tried to purchase compliant fuel.

Regulation 18.1.2 gives the Port State Control authorities the power to ask owners to provide information in respect of the steps they took to comply with the Regulations. Owners will have to file a 'Fuel Oil Non Availability Report' (or FONAR) with the Port State Control authorities at the next port of call after the bunkering port. At the time of writing this article, we understand that the International Maritime Organization (IMO) has yet to publish a proforma of the FONAR.

The International Chamber of Shipping (ICS) has published a possible form which is available on the Internet. The form requires owners to provide a great deal of detail, including the name of the suppliers, their contact details and date of contact; operational constraints preventing the availability of compliant fuel oil; specific steps owners have taken to resolve these operational constraints; description of the availability of compliant fuel oil at the bunker port; a list of the lowest sulphur content fuel oil available and, if the available compliant fuel oil does not meet the requirements, then the methods used for testing.

Assuming that this form or something similar is adopted, it is clear that if owners wish to seek an exemption from Port State Control pursuant to Regulation 18.2, they will require extensive information about the processes leading up to the non-compliant bunker supply.

As the IMO is not concerned with commercial matters, it is not surprising that Regulation 18.2 fails to take into consideration the commercial reality that under time charters, the charterers are normally responsible for arranging the purchase and subsequent stemming of bunkers. It is charterers who make arrangements with bunker brokers and who will have the paper trail required to fill in a FONAR. Owners would normally have little (if any) knowledge of the steps taken

by charterers to purchase compliant fuel, so if they need to rely on regulation 18.2, they may need to obtain a lot of information from charterers before they can fill in the FONAR.


Charterparty terms will have to be drafted to ensure that charterers are obliged to provide this information. While there seems to be no reason why a charterer would not provide it, this cannot be assumed. As existing charterparty terms do not require charterers to provide this information, it will be unclear which party should bear the cost of any time lost as a result of delay caused by waiting for the information to fill in the FONAR. Also, it may be necessary for the charterers' obligations to provide the information to continue beyond the end of the charter period, if the vessel is to be redelivered immediately following a bunker stem.

To add to the uncertainty, even if owners are given full co-operation by their charterers, the question remains of whether owners would still be obliged under Regulation 18.2 to make their own enquiries about compliant supply, even though they are not the party required to supply bunkers under the charterparty. This could vary from one Port State Control authority to another. Owners might want to ensure that the charterparty includes an indemnity from charterers if Port State Control does not accept the FONAR.

## CONCLUSION

It is worth repeating that the BIMCO clauses, like any standard clauses, must always be considered in the light of the commercial needs and realities of each fixture and that the full terms of any charter should be reviewed to ensure that they do not conflict with each other. This article illustrates just one of the possible problems that can arise if this painful exercise is not carried out. There are many others.

This article is not meant to be regarded as legal advice in any way whatsoever and should not be relied on as such. Specific legal advice should always be sought. Birketts' Shipping and International Trade Team would be happy to assist owners and charterers in drafting specific clauses for their chartering requirements.

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