



# Soundings

Sulphur Series: Countdown to 2020

## Charterparty checklist: are you contractually ready for 2020?

**As the clock counts down ever closer to 2020, when ships will need to comply with the reduced bunker sulphur content cap of 0.5%, Members are advised to give careful thought to their charterparty provisions with a view to minimising scope for contractual disputes.**

Where charterparties have not been drafted with the 2020 requirements in mind, certain key clauses may not be compatible with the post-2020 requirements. Taking steps at this stage to identify any areas of ambiguity and agree on a mutual approach with ones counterparty could help to reduce the scope for dispute in due course. For new charterparties, on the other hand, there are a number of provisions that parties can include to protect and clarify their respective positions.

We have put together a **checklist** of points to consider both in the context of existing and new charterparties:

### ✓ Compliance

#### *Existing charterparties*

Under most standard time charterparties, broadly speaking, it will be the time charterer's duty to supply fuel and the owner's duty to ensure the ship is capable of using it safely.

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In the absence of an express provision, it may be implied that the charterer should supply MARPOL compliant fuel, though it would be prudent for the parties to clarify this to avoid scope for debate in due course.

Some existing charterparties may already incorporate the BIMCO bunker fuel sulphur content clause 2015. However, this only requires charterers to supply low sulphur fuel to comply with requirements in the “emission control areas” set up under MARPOL Annex VI. Although there may be scope for different interpretations, on the face of it the clause does not require charterers to comply with sulphur requirements outside emission control areas.

### *New charterparties*

BIMCO and INTERTANKO have both produced standard compliance clauses setting out the owner’s and charterer’s respective responsibilities. These are recommended for use as a starting point, though there is scope for expanding the wording for more protection and tailoring it to the parties’ needs.

### ✓ Fuel Specifications

#### *Existing charters*

Where charterparties contain detailed provisions as to fuel specifications, these should be reviewed to ensure that they make sense in the context of low sulphur fuel usage. It is in both parties’ interests to agree on the type and specification of fuel that should be supplied to the ship to ensure that it can operate safely and legally.

Where the existing fuel specifications require charterers to supply a high sulphur grade of fuel, it is suggested that these may be overridden by an implied duty on charterers not to supply fuel that will place the ship in breach of applicable regulations. However, this may depend on how the contract is worded and there is certainly scope for debate here. It would be prudent for parties to discuss commercially and agree appropriate revised fuel specifications in advance of 2020.

### *New charterparties*

Given the technical complexities surrounding low sulphur fuels it is wise to ensure that new charterparties contain fuel specifications that are as detailed as possible, rather than falling back on the general and commonly used provision that fuel be simply “suitable for burning in the ship’s engines”. In particular, charterers should be required to supply bunkers of the latest ISO standard, including any subsequent amendments. The 2005 ISO8217 standard requires sulphur limits of 3.5% only whilst more recent versions refer more broadly to “statutory requirements”, the latter is clearly preferable in the context of the 2020 provisions. Technical advice should be sought, if in doubt.

### ✓ Bunker adjustment clauses

In the context of voyage charters, these provisions are designed to mitigate the effect on the owner of bunker price fluctuations by adjusting the freight rate in line with any changes in the bunker price.

### *Existing charterparties*

Where these clauses address HFO prices only, it may be debatable as to whether they will continue to be applicable in the context of low sulphur fuel usage. It is advisable for parties to address and clarify any such inconsistencies.

### *New charterparties*

Owners should ensure that any new clauses are relevant to the new types of fuel that will be used after 2020. There are also a number of other considerations in relation to the drafting of bunker escalation and bunker adjustment factor clauses which are discussed in our [March, 2019 Soundings](#).

### ✓ Costs of modifications

#### *Existing charterparties*

In some cases, it may be necessary for certain modifications to be carried out on the ship in order to burn low sulphur fuel safely and efficiently. In most standard charterparties, where such modifications are necessary, owners may have to carry them out at their own cost based



on principles laid down in “The Elli & the Frixos” (2007). However, there may not be a legal basis for a charterer to require an owner to take steps above and beyond the minimum requirements, for example installing scrubbers.

#### ✓ Tank preparation

Parties will need to plan well in advance to ensure tanks are cleaned and non-compliant fuel discharged in time for the respective deadlines. If tanks are not cleaned adequately, new fuel may be contaminated, resulting in an unanticipated MARPOL breach. The main methods being adopted are either to clean tanks out manually at a lay-by berth, which involves downtime and associated costs; or to flush the tanks clean with additives or low sulphur fuel, which avoids taking the ship out of service but requires long-term planning.

#### *Existing charterparties*

In the absence of bespoke clauses, broadly speaking, owners will be responsible for tank cleaning, as part of their maintenance duty. Beyond this, parties would be wise to try and reach a mutual agreement to avoid the potential for dispute.

For example, where tanks will need to be cleaned in advance of 1st January, 2020, whether due to lay-by berth availability or to fit around the ship’s schedule, parties may need to discuss who will bear the cost of stemming low sulphur fuel before it becomes compulsory to do so. Similarly, where parties choose to flush the tanks clean, there may be some discussion as to who should pay for the chemicals or low sulphur fuel used for flushing purposes. Either way, owners and charterers will need to cooperate to ensure tank cleanliness can be achieved in conjunction with the charterer’s commercial schedule and the owners’ Ship Implementation Plan.

#### *Future charterparties*

It is advisable to include bespoke provisions catering for the planned cleaning procedure. BIMCO and Intertanko have both produced standard wordings specifically dealing with

tank preparation. They broadly divide responsibility between the charterer, for disposing of non-compliant fuel, and the owner, for cleaning the tanks ready for compliant fuel to be stemmed. These clauses may form a starting point only and in many cases will need to be tailored to requirements. They do not, for example, address the points raised above in relation to existing charterparties.

This issue is discussed in more detail in our [February 2019 Soundings](#).

#### ✓ Speed and performance warranties

##### *Existing charterparties*

Performance warranties may need to be reviewed in light of new fuel specifications. Depending on how warranties are drafted, they may no longer be applicable to post-2020 fuel usage. In some cases, warranties may become redundant, leaving charterers without a clear basis for recourse in respect of underperformance. In others, owners may be bound to comply with performance warranties which are not realistic when the ship is operating on low sulphur fuel. Owners should review their warranties and, where necessary, seek the charterer’s agreement to logical amendments.

##### *New charterparties*

New charterparties should contain speed and performance warranties which cater for the use of low sulphur fuels during ocean passages.

#### ✓ Bunkers on delivery/redelivery

##### *Existing charterparties*

It is common for charterparties to provide that the ship be redelivered with the same quantity of fuel as on delivery. This is, of course, not going to be practical, or even legal, for charterparties that span the transition into 2020 because the ship will have been delivered with a quantity of high sulphur fuel but will have to be redelivered with only low sulphur fuel on board. Strictly speaking, charterers may not be able redeliver the ship without being either in breach of charter or in breach of MARPOL. Clearly, it would be

appropriate, in such cases, for the parties to agree an alternative arrangement that allows the charterer to redeliver with a suitable quantity of compliant fuel. Prices will also need to be agreed in line with any new arrangements.

#### *New charterparties*

Again, for new charters that will span the transition into 2020, the standard provision that bunkers are to be the same on redelivery as on delivery will not be appropriate. Alternative clauses might, for example, provide for ships to be redelivered with sufficient fuel to reach the next bunkering port where compliant fuel is available, factoring in a safety margin.

The price at which fuel is taken over on redelivery should also be considered. Given the potential for bunker price fluctuations, whether the parties agree to apply the price actually paid by charterers or the market price at the port of redelivery, for example, could make quite a financial difference.

#### ✓ Fuel quality

Low sulphur fuels tend to be highly refined and blended in innovative ways as refineries seek to produce lower priced fuels. This raises concerns in terms of the unknown characteristics of new fuels on the market and the potential for quality problems, such as the presence of catalytic fines, stability and compatibility issues, low flash point and low viscosity. In the worst cases, such fuels may cause serious engine damage and at the very least there may be time loss and de-bunkering costs in cases where off spec bunkers have to be replaced. The use of tight bunker quality and dispute resolution clauses in charterparties will be even more important than ever.

#### *Existing charterparties*

Many charterparties already incorporate standard bunker sampling and testing clauses. These should be followed closely in the event of any dispute. Where there are no such, or minimal provisions, parties should be careful to obtain as much evidence as possible of bunker quality in case any dispute should arise.

#### *New charterparties*

It is recommended that parties incorporate comprehensive, tried and tested clauses such as the BIMCO Bunker Quality Control Clause for Time Chartering and the Bunker Quality and Liability Clause into all new charterparties.

#### ✓ Off hire

There is certainly potential for delays to arise in the context of the 2020 regulations, for example, if a ship is detained by PSC for non-compliance (or suspected non-compliance), if a ship has to deviate to obtain fuel due

to non-availability in certain ports, or if it is necessary to carry out maintenance due to engine damage.

#### *Existing charterparties*

As a basic principle, a charterer can only place a ship off hire if they can bring themselves squarely within an off hire clause. Standard off hire clauses may not respond to some of the delays arising in the context of 2020. For example, clause 15 of the NYPE 1946 form would only operate if there is a listed off hire event and the "full working of the vessel" is prevented, but it may be debatable whether that is the case in the above situations.

#### *New charterparties*

Parties may wish to give thought to bespoke off hire clauses which cater specifically for anticipated delays.

#### ✓ Scrubbers

Where scrubbers have been installed, most of the points raised above will not apply. However, the use of scrubbers in itself provokes a number of specific issues that parties should address.

#### *Existing charterparties*

It is unlikely that existing charterparties will deal with many of the issues germane to the use of scrubbers. So it is highly recommended that parties enter into bespoke addenda or side agreements when scrubbers are used.

#### *New charterparties*

Parties should negotiate and agree on express terms or agreements dealing with matters such as responsibility for the time and cost of installation; liability for the costs of waste disposal; responsibility for the time and costs of maintenance and repairs; and liability in the event of a scrubber failure leading to a breach. Where relevant, parties should make provision for the fact that many ports have banned the use of open-loop scrubbers.

Scrubbers are considered in more detail in our [January 2019 Soundings](#).

#### ✓ Concluding comments

The above list is not exhaustive and there will no doubt be other clauses requiring attention, but these are good starting points. With a little forethought and timely commercial discussions with commercial counterparts, we hope that Members will be able to minimise the scope for contractual disputes surrounding 2020.

**As always, please contact the Managers for any information on the issues covered above.**

#### **The UK Defence Club**

Thomas Miller Defence Ltd, 90 Fenchurch Street, London, EC3M 4ST  
tel: +44 207 283 4646 fax: +44 207 204 2131  
email: [tmdefence@thomasml.com](mailto:tmdefence@thomasml.com) web: [ukdefence.com](http://ukdefence.com)