



SHIPPING 2019



OFF-SPEC FUEL OIL EPIDEMIC PREPARING FOR BEYOND 2020

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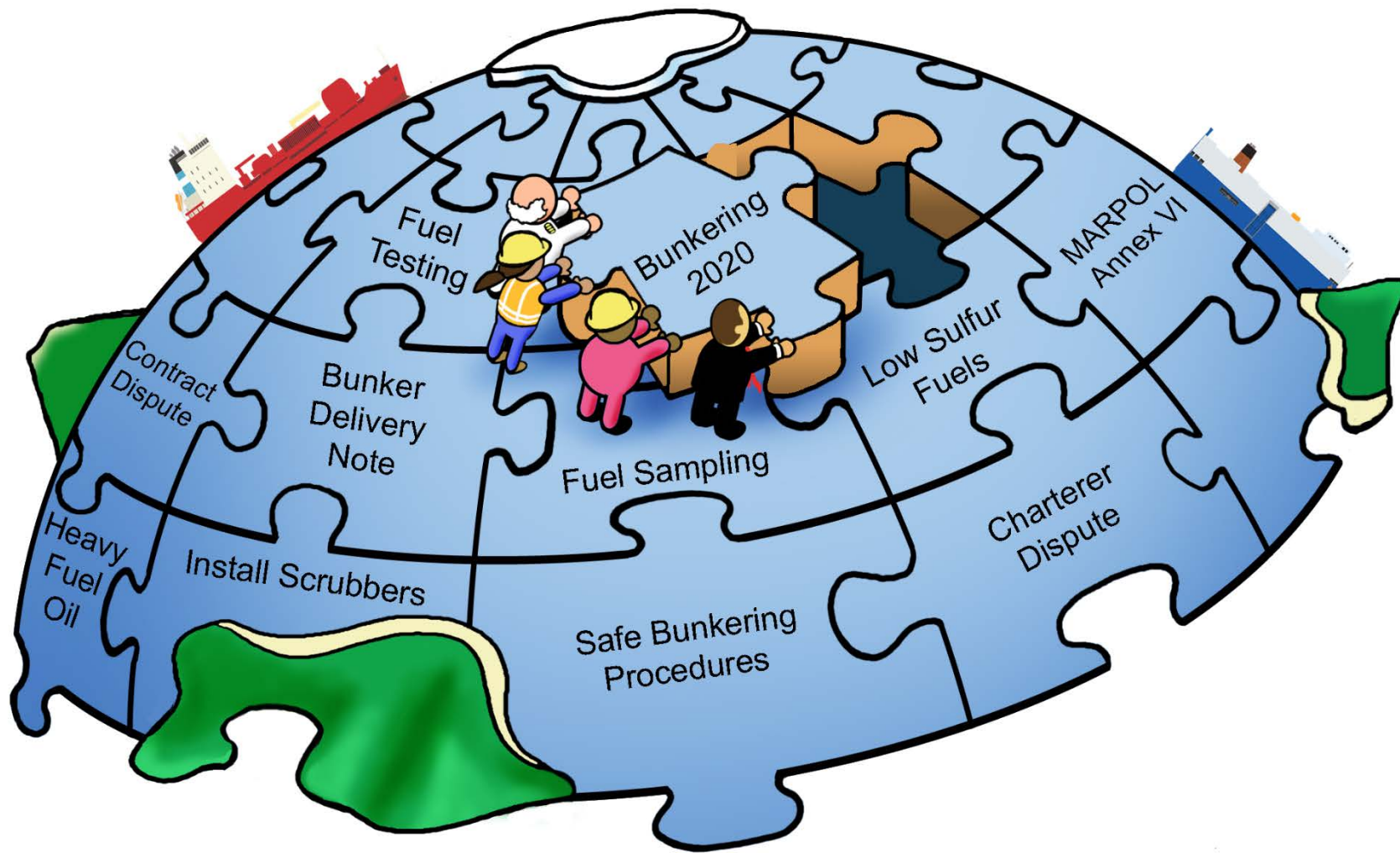
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Contaminated Fuel-Oil Epidemic- “The Houston Problem”

- Spiked in 2018 and quickly became widespread.
- Houston, Panama, Singapore, Caribbean, Malaysia, Hong Kong.
- >200 vessels affected.
- Numerous different bunker suppliers were involved.
- Bad batches of fuel oil could not be isolated. Different contaminants have been found in different areas.
- The standard fuel oil test methods (ISO 8217) insufficient to detect particular contaminants involved.
- Contaminants identified by advanced analytical techniques, i.e. gas chromatography, combined with mass spectrometry (GC-MS).

Contaminated Fuel-Oil Epidemic- “The Houston Problem” (Cont.)

- Off-Spec fuel caused a range of technical problems.
- Common problem: sticking and seizure of fuel-injection system components and the blocking of fuel filters due to bad bunkers.
- Damage to the engine and the cost of repair are only the beginning.
- Complete loss of main engine power can cause serious incidents such as black outs, collisions and groundings.
- *Location* can be critical: high risk to the environment, life of the crew and other vessels in the vicinity.





Claims Resulting From Contaminated Bunkers

- Damage to vessel's hull/machinery
- Cost of repairs to the vessel's engines/auxiliaries
- Loss of time and expenses incurred to de-bunker or deviate to port of refuge or to stem fresh bunkers
- Salvage costs/General average
- Claim for late cargo delivery or deterioration of perishable cargo due to delay

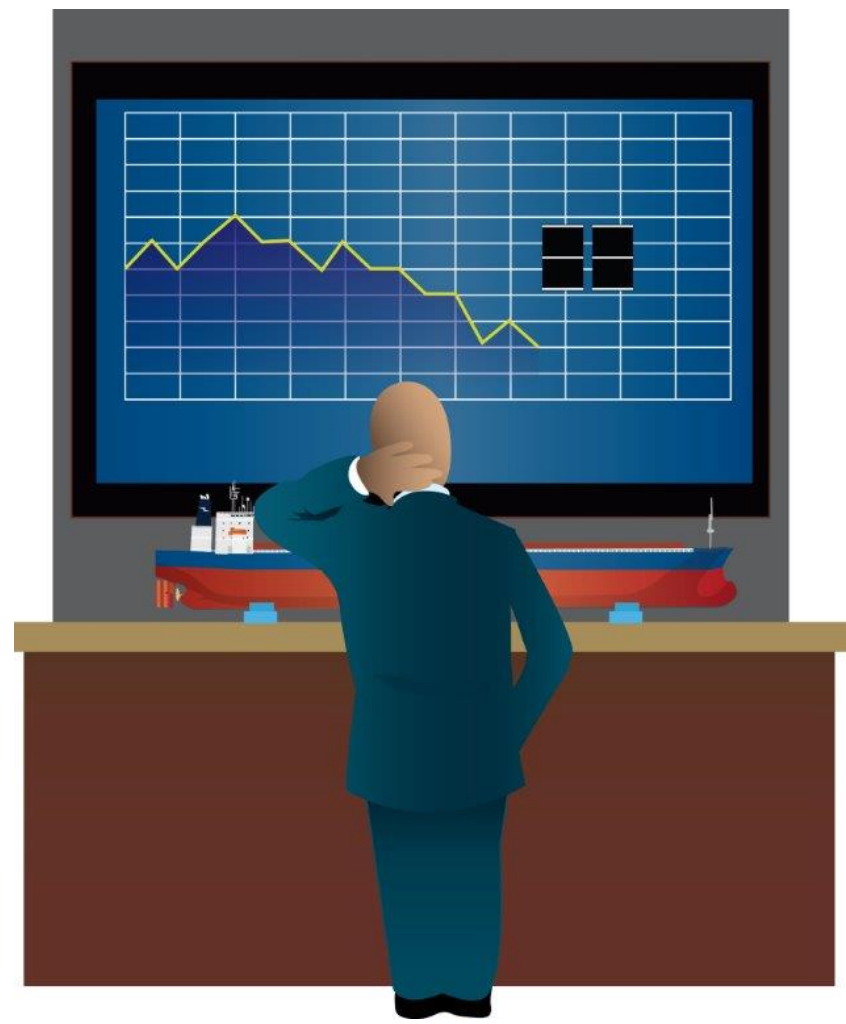


Stemmed Contaminated Bunkers - Now What to Do?

- Post incident actions to take:
 - Immediately notify P&I Club, H&M (if physical damage to machinery had/may have been caused)
 - Provide details: relevant C/P and bunker supply contract, the results of any routine analysis undertaken, the problems being experienced, if there is cargo onboard, if deviating vessel is intended.
 - Also notify all relevant parties, classification society and, depending on the problem, local authorities
 - Initiate early dialogue with the charterer and supplier to prove the off-spec nature of the fuel and the damage, and to compel a prompt de-bunkering.



Duty to Mitigate Damages upon Contaminated Bunker's Stem



- A shipowner, who suffers losses/damages as a result of time charterer's or bunker supplier's breach of contract, has the legal obligation to exercise reasonable efforts in order to minimize the losses and avoid taking unreasonable steps that would increase his/her losses.

- Failure to mitigate precludes the recovery of damages.



Duty to Mitigate Damages upon Contaminated Bunker's Stem (Cont.)

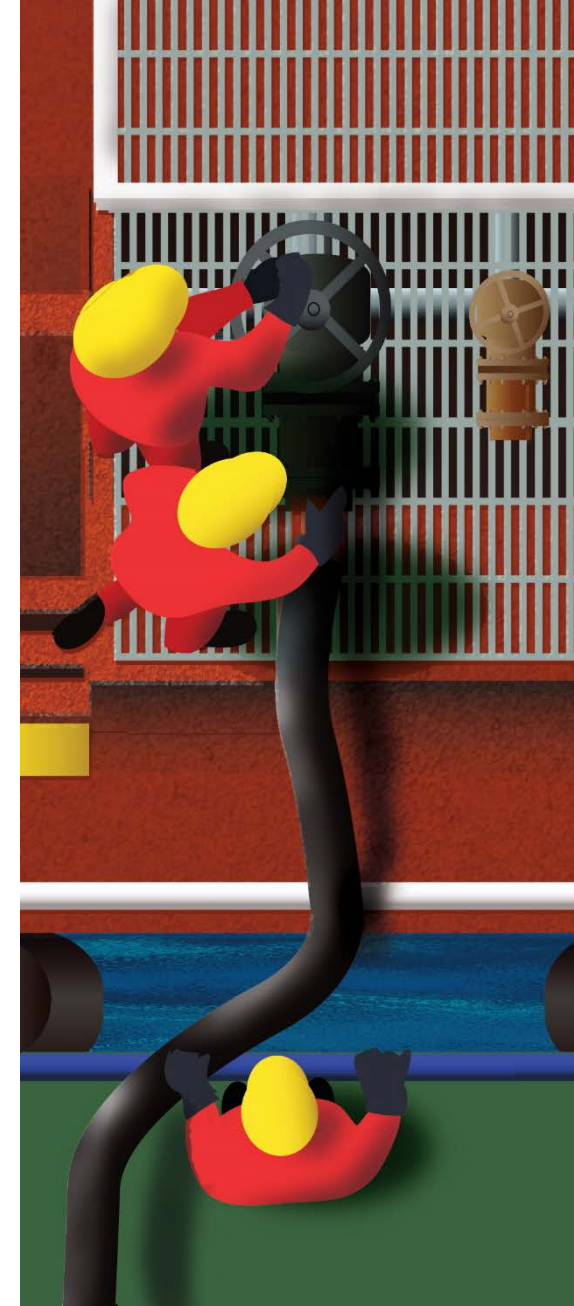
- Prompt de-bunkering, if contaminated bunkers cannot be blended and used.
- Owner remains responsible for maintaining the vessel and ensuring that vessel is seaworthy under contract of carriage for cargo on board or charter party.
- If the time charterer and/or bunker supplier deny liability and refuse to cooperate, Owner to deal with off-spec bunkers and consider paying the de-bunkering cost.



Burning off-spec bunkers may break the chain of causation and cause further damage to the engine.

Post-Incident Claims Handling - Evidence is Key!

- Bunker quality claims require detailed consideration of the relevant contractual, technical and evidential issues. These claims are often difficult and expensive to pursue.
- The ability to properly pursue or defend bunker quality claims depend on the quality of the evidence:
 - Good record keeping is essential.
 - Maintain detailed records, log book entries, samples
 - Conduct investigation, take crew's statements timely
 - Promptly appoint right experts.





Post-Incident Claims Handling - Evidence is Key! (Cont.)

- Find root cause of the problem: off-spec bunkers.
- Establish chain of causation, that the loss/damage suffered was caused by the off-spec bunkers supplied.
- The claim will fail if such link is not proven.





Post-Incident Claims Handling - P&I Club's Role

- Club promptly appoints right technical and legal experts.
- Club is actively involved in evidence gathering, claims handling and setting legal strategy.
 - Whether and what remedies are available under contract or torts law.
- Club ensures Member's interests are protected and monitors the costs exposure.





Anticipate Receiving Defenses from Charterers or Bunker Suppliers

- The engine/machinery problems arose due to poor maintenance of the vessel;
- Vessel's equipment itself was not in good order and therefore unable to process the bunkers properly.
- The engine/machinery problems were caused by bunkers supplied under a previous charter;
- The loss/damage would have been avoided had preventative measures been taken, such as blending the fuel and/or incorporating additives into the off-spec fuel.

Contractual Considerations

- Protect yourself with a good contract.
- There is no one contractual solution.
- Negotiate clauses carefully.
- Examine supply terms in advance.





Contractual Considerations (Cont.)

- Time C/P: bunker supply = charterer's responsibility.
- Absolute obligation to provide bunkers of a reasonable quality which are suitable for the ship in question.
- Express requirements on type and grade of bunkers, must be complied with.
- Bunkers must be "fit for purpose."
- Include any and all unusual characteristics of the engine prior to the supply.
- Voyage C/P: bunkers = owners responsibility.
- Supply contracts weigh in favor of supplier.

Contractual Considerations (Cont.)

BIMCO has a set of standard clauses:

- BIMCO's Bunker Operations and Sampling Clause
- BIMCO's Bunker Quality Control Clause for Time Chartering
- BIMCO Bunker Terms 2018 *as amended*

New BIMCO clauses for 2020:

- BIMCO 2020 Marine Sulphur Content Clause for Time Charter Parties
- BIMCO 2020 Fuel Transition Clause for Time Charter Parties



BEWARE: Pitfalls of Bunker Supply Contracts' Standard Terms

- *Short time limits* for a notification of a quality claim or commencement of proceedings against supplier (i.e., 7 days).
- The claim notice must comply with the express terms of the contract, which usually *requires a fully documented claim*.
- *Barge samples are binding and conclusive* (not the sample drawn by the vessel).
- *Waiver of all claims* if vessel commingles, fails to permit the supplier's survey, or fails to preserve damaged parts.
- The supplier can *limit liability* to the purchase price (value of the bunkers) or less.
- *Excludes liability* for consequential losses (loss of hire, loss of use, etc.).



BIMCO Bunker Terms 2018

- Replaced BIMCO's Standard Bunker Contract 2015;
- Can be used as a template, parties are free to tailor it considering particular commercial and legal factors;
- New liability cap at the invoice value or USD500,000 (negotiable between parties), whichever is higher;
- Comprehensive provisions regarding claims management for quantity, quality and delay claims (i.e., 30 DAYS given to make a quality claim);
- Sampling is to be carried out in the presence of both parties and a mutually agreed point;
- 5 samples should be drawn: 2 for supplier, 2 for buyer (kept on receiving vessel), 1 for MARPOL (kept on receiving vessel).



Fuel Sampling/Testing - Preparing contract in advance of a claim

Sampling and testing should be agreed upon in advance and set out in the charter party or bunker supply contract.

Most charter parties do not provide for how sampling or testing of bunkers should be carried out in the event of a bunker quality dispute.

There are no provisions for:

- Joint testing in the event that the owners allege that the bunkers are off-specification;
- Which party will bear the costs of testing the bunkers; and
- What tests are to be conducted.

Fuel Sampling/Testing - Preparing contract in advance of a claim (cont.)

Agree to a suitable testing lab (qualified, accredited, independent).

- BIMCO's Bunker Quality Control Clause for Time Chartering, para. 4: parties are to insert in the contract the name of the jointly agreed fuels analyst.
- BIMCO's Bunker Terms 2018, clause 9(b)(ii): *"In the event a claim is raised [re. quality or specification] the Parties hereto shall have the quality of the Marine Fuels analyzed by a mutually agreed, qualified and independent laboratory."*

Parties' experts should agree on the testing protocol to avoid later arguments as to the method of testing.



Forecasting Post 1 January 2020 - Will bunker quality/contamination disputes increase?

- Will the global shift to max. 0.50% (as per MARPOL Annex VI) sulfur content create a troublesome vicious cycle?
- Common fear: A spike in demand for new low sulfur blends from 1 January 2020 will greatly increase the risk of contamination as *blending will increase significantly* in order to meet the anticipated high demand for low sulfur fuel.
- BIMCO clauses dealing with bunker quality can be used before and after 1 January 2020 and be adopted as standard.





Claims Resulting from Non-Compliance with New 0.5% Sulphur Cap

Disputes expected to arise due to non-compliance:

- Claims of unseaworthiness
- Vessel has not been properly fitted for service
- Claims for the costs of deviation required to take on compliant fuel
- Off-spec bunker claims / contamination claims
- Disputes over responsibility for managing and segregating different fuels on board
- Claims for delay occasioned by engine failure
- Detention of vessels under local regulations
- Disputes over payment of financial penalties from ports and states



Renegotiate/Negotiate C/P Terms to Reduce Disputes

- Focus on the clear allocation of risk and cost liability;
- Reduce exposure to liability arising from non-compliance;
- Review all clauses concerning fuel and bunkering, to ensure that those clauses are Annex VI-compliant;
- Clarify which party is to remove the non-compliant fuel;
- Include express sampling procedures, to ensure that bunkering operations are Annex VI-compliant;
- Specify “low-sulfur fuel” by stating the exact sulfur limit 0.5%.



Renegotiate/Negotiate C/P Terms to Reduce Disputes (Cont.)

- Specify pricing of fuel on delivery and redelivery, when negotiating longer-term fixtures that will span the transitional period;
- Review dry-docking and off-hire clauses (in the context of time C/P), and laytime and demurrage clauses (in the context of voyage C/P);
- For vessels both able to burn LSFO and also retrofitted with a scrubber: to which extent charterers may use scrubbers & to what extent charterers should bear the additional energy consumption costs incurred as a result;
- Amend speed and performance warranty;
- Voyage C/P: Include liberty to deviate to stem <0.5% low sulphur bunkers with allocation of cost for so doing.



BIMCO 2020 Marine Sulphur Content Clause for Time Charter Parties

- Replaces the BIMCO's Fuel Sulphur Content Clause 2005;
- Deals with the parties' respective obligations in relation to compliance with the low-sulphur requirements after 1 January 2020;
- Sets out **balanced obligations** for both charterers and owners. So, parties share obligations arising from the new regulations;
- Can immediately be incorporated in C/P as it refers to MARPOL standards "*as amended from time it time*", meaning it will also apply without further amendment post-2020.





BIMCO 2020 Fuel Transition Clause for Time Charter Parties

- Designed for Time C/P that will span January 1st, 2020;
- Deals with “transitional period” issues, covering the move from high sulphur to low sulphur fuel;
- Fair allocation of responsibilities and liabilities between owners and charterers in managing remaining non-compliant fuel;
- Charterers to (1) ensure tanks are “*free of liquid and pumpable fuel*” by March 1st, 2020; (2) supply compliant fuel to the vessel before January 1st, 2020 (so that as of January 1st, 2020 “*the vessel shall have sufficient compliant fuel to reach the nearest port where compliant fuel is available*”);
- Owners to ensure tanks are fit to receive compliant fuel; therefore, they need to clean the tanks from residues that are not “*liquid or pumpable*”.



INTERTANKO Bunker Compliance Clause for Time Charter Parties

- Broad clause in comparison to most others;
- Ready for immediate use by parties ahead of the implementation of the 0.5% global sulphur cap on January 1st, 2020;
- Charterers warrant that the bunkers are suitable for burning, Owners warrant that the vessel is able to consume the compliant fuels;
- Makes a reference to speed and performance warranties;
- Charterers are expressly required to prepare the bunker tanks, including cleaning, flushing, *to the Owners' satisfaction*, before January 1st, 2020. But if the tank cleaning is required in order to receive the compliant bunkers, that would be at Owners' cost and time vessel will be off-hire.



Scrubbers Clause?

BIMCO "standard scrubber clause" is due to be published soon and:

- likely to address possible installation cost sharing between owners and charterers, with formulas potentially reflecting the life of the scrubber or the remaining duration of the charter party.
- might also deal with scrubber breakdown, and impose requirements for the carriage of a reserve of LSFO to avoid off-hire.

Plan Ahead - Prepare!

- There is no one-stop contractual solution.
- Assess your particular trade/vessel situation.
- Carefully choose your supplier.
- Evaluate modifications to standard clauses.
- For 2020: have a plan in place.
- Consult your club/seek guidance.
- American Club's experienced claims team can assist.



*Thank
You!*

