

Practical Issues arising from the BIMCO 2020 Fuel Transition Clause for Time Charter Parties

Speed Read

Although the new IMO 2020 low-sulphur fuel regulation does not come into effect until 1 January, we are already seeing a large number of enquiries during the run-up to its implementation, particularly for vessels on time charters that will expire close to 1 January, in which the BIMCO 2020 Fuel Transition Clause for Time Charter Parties has been incorporated. This short article describes the issues of which shipowners and charterers need to be aware.

Introduction

With the pending entry into force of the IMO 2020 sulphur cap, BIMCO has introduced a standard clause which is now frequently being incorporated into time charters that could extend beyond 1 January 2020.

Without the incorporation of this type of clause, a Charterer's obligation is ordinarily limited to supply of compliant fuel during the charter period and the entire burden of compliance with the regulation rests with Owners. The new clause seems to shift a large portion of the burden of compliance onto the Charterer.

In summary, the clause provides as follows:-

- Prior to 1 January 2020 (which is the Effective Date, the date on which the 0.5% sulphur limit comes into effect), Charterers shall supply the Vessel with sufficient compliant fuel to reach the nearest bunkering port where compliant fuel is available.
- Prior to 1 March 2020 (being the Carriage Ban Date, the date on which it becomes illegal for vessels to carry non-compliant fuel), there shall be no non-compliant fuel carried for use by the Vessel.
- Owners and Charterers shall cooperate and use reasonable endeavours so that, no later than the Effective Date, there shall be no non-compliant fuel carried for use by the Vessel.
- Charterers shall, at their time and cost, ensure that any non-compliant fuel remaining on board after the Effective Date shall be discharged from the Vessel until the tanks are free of liquid and pumpable fuel, prior to the date of redelivery or the Carriage Ban Date (whichever occurs first).
- Owners shall at their time and cost ensure that tanks emptied by Charterers are fit to receive compliant fuel.

The clause is drafted to set out the parties' respective obligations for time charters that extend beyond the Effective Date. However, the clause has important practical and financial implications for both owners and time charter operators for vessels that are due to be redelivered in the days not only following, but also preceding, 1 January 2020.

Bunkering plans are an essential aspect of voyage planning and an effective bunkering plan can, by itself, determine whether a particular voyage or charter is profitable or not. Let us consider two extreme scenarios:-

- Redelivery takes place on 31 December 2019
- Redelivery takes place on 2 January 2020

Redelivery on 31 December 2019

If the vessel is on its final voyage prior to redelivery, it is likely to only have non-compliant fuel onboard and there may or may not be clean tanks that can receive ultra low sulphur fuel oil (“ULSFO”). The BIMCO Clause does not expressly deal with charter parties ending prior to the Effective Date so, on a strict reading, it could be argued that the operation of the clause is only triggered if redelivery is to occur after the Effective Date.

Whilst there is an obligation on both parties to exercise reasonable endeavours to ensure that there is no non-compliant fuel on board after 1 January, whether a Charterer who is going to redeliver on 31 December must supply ULSFO sufficient to reach the next bunkering port is not at all clear. Also, what effect does the BIMCO clause have on other terms of the charter party?

This lack of clarity raises a number of potential problems.

For an Owner:-

- He may be required to pay for High Sulphur Fuel Oil (“HSFO”) on redelivery at the agreed price, only to have to discharge that fuel the day after (at a much lower price), in his time.
- He may be left with his vessel full of HSFO, which the next charterer will not accept until it is replaced with ULSFO.
- Should he refuse the final stem of HSFO prior to redelivery if it will result in a large quantity of HSFO on redelivery?
- If an Owner has prepared one or more tanks for receiving ULSFO prior to the Effective Date, will he be liable for the Charterer being unable to utilise the full bunkering capacity in accordance with the initial HSFO bunkering plan?

It is important to note that these are problems that any owner would face, even without this specific clause.

For a Charterer:-

- Is he required to supply any ULSFO if he plans to redeliver prior to the Effective Date? If so, must he do so even if he is redelivering on 20 December? Or on 10 December?
- If he does supply ULSFO prior to redelivery, he may only receive payment in accordance with the lower charter party HSFO price, having paid a substantial premium for ULSFO.
- If he cooperates with the Owner to reduce the quantity of HSFO prior redelivery, is he still liable for a shortage of bunkers on redelivery? If so, can the Owner charge him for replacement fuel, at ULSFO prices?

- If an owner refuses to permit HSFO to be stemmed prior to redelivery, who is liable for the extra cost of ULSFO?

In contrast to the Owner's position, these are potential problems created by the clause itself.

Redelivery on 2 January 2020

If a time charter unexpectedly runs over by a few days, the obligations of a Charterer immediately increase substantially, as the obligations under the BIMCO clause are triggered. An Owner obtains the protections of the clause, so his burdens are not compounded beyond what he would have borne without the clause, but instead shifts some of that burden to the Charterer.

For example:-

- Is the Owner required to pay for HSFO on redelivery after the Effective Date in circumstances where it is unusable (i.e. it is not "marine" fuel, as it is not permitted to be consumed)?
- If redelivery takes place a day late, a Charterer will be in breach in failing to ensure that sufficient ULSFO is on board and therefore will be liable in damages, both in terms of time and cost of replacement ULSFO.
- A Charterer is required to remove all of the HSFO prior to redelivery at his own time and costs (whereas a day earlier he would not have had to).
- If ULSFO was supplied prior to the Effective Date, does the Owner get the benefit of ULSFO at lower charter party prices?

Conclusion

These questions are not ones that the drafting committee may have had in mind when drafting the BIMCO clause. As with many new standard clauses, it is difficult to predict all the practical issues that may arise in the chartering market.

There are no easy answers, but the questions are important to bear in mind for all owners and charterers who are likely to have vessels that are due to be redelivered in December 2019 or January 2020.

Owners may want to consider letting their ship on a charter that requires redelivery after the Effective Date, so that their burden is lessened. Charterers may want to think carefully about their choice of final voyage (or option as to duration of the charter) if it means potentially running past the Effective Date and incurring significant costs that might outweigh the profit to be earned on that voyage.

Asad Naqvi and Kevin Cooper are partners at MFB Solicitors specialising in shipping law. They welcome any questions arising from this article.

Contact us: anaqvi@m-f-b.co.uk

kcooper@m-f-b.co.uk