

Soundings

Bunker contamination claims in the US Gulf

US Gulf bad bunkers risk significant engine damage and delays.

Background

There has recently been a significant increase in bunker quality related engine problems following the delivery of fuel supplied in the US Gulf region, particularly in the Houston area. In the most serious cases, this has led to main engine breakdowns, but more commonly, ships have experienced blocked filters and sticking fuel pumps. The Fuel Oil Bunker Analysis and Advisory Service (FOBAS) noted the problem in April 2018. This was followed, in early June, by a marine safety alert from the US Coast Guard (Safety Alert 09-18).

Evidence suggests that the cause of the problems is linked to the inclusion of contaminants in the fuel that are

of non-petroleum refining origin. There appear to be at least two different forms of contamination involved, with industry chemical waste and bio-derived adulterants being noted. These contaminants have not been picked up in standard ISO 8217 tests, as those tests are designed to assess the levels of normal manufacturing and handling impurities, such as catalytic fines and water.

Claims arising under time charters

Under most time charterparty forms, the supply of bunkers is the responsibility of the charterer. It is also generally accepted that the charterer is under an absolute obligation to provide bunkers of a reasonable quality which are suitable

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for the ship in question and many charterparties now specify that bunkers must be compliant with an ISO 8217 standard.

The charterer may argue that if any bunkers supplied pass the applicable ISO 8217 standard test, they are compliant with the charterparty. However, this may not be the case. The ISO 8217 terms contain a caveat, at Clause 5 (General Requirements), whereby:

“... fuel shall not contain any additive at the concentration used in the fuel, or any added substance or chemical waste that... jeopardises the safety of the ship or adversely affects the performance of the machinery...”.

Additionally for charterparties concluded under English law, bunkers will not only need to be of a reasonable quality but also fit for purpose. Fitness for purpose is implied into contracts for the sale and supply of goods and services either by common law or statute by virtue of the Sale of Goods Act 1979 or Sale and Supply of Goods Act 1994.

‘Fit for purpose’ in the context of bunkers was dealt with in an unreported arbitration decision in 2004. In that case, bunkers had been found to be within specification by DNV but were found to have poor ignition qualities due to the presence of catalytic fines. The tribunal found that in addition to an express specification in the charterparty there was also an implied term that the bunkers had to be fit for the purpose intended. In that case, as the poor ignition qualities in the fuel caused the damage to the engine, the tribunal found that the fuel could not have been fit for purpose and the charterer was therefore in breach. However, it should be noted that where an engine is unusual, or has particular requirements, it is likely that the

charterer will only be liable for any damage caused if the charterer has been advised of the unusual characteristics of the engine prior to the supply of the bunkers.

It may be difficult, however, to maintain claims against a charterer if there is evidence of any contamination of the bunkers having occurred on board the ship. Another common defence raised by charterers is that the damage occurred because the ship’s equipment itself was not in good order and therefore unable to process the bunkers properly. It is therefore important that owners keep careful, up-to-date records of engine maintenance and, should damage occur, carry out a survey immediately in order to determine the root cause of the problem.

Claims against bunker suppliers

Any direct claim against bunker suppliers based in the US is likely to be subject to US law either due to the terms of the bunker supply contract, or through the application of US tort law.

Supply contracts often limit liability to the price paid for the bunkers and exclude compensation for any consequential damage caused, including loss of time and profits. Therefore a tortious claim for damage may be preferable, if available.

When bringing a claim under the supply contract the parties should bear in mind that many bunker supply contracts often contain restrictive time limits, for the notification and the commencement of proceedings. It is important to check these at the outset of the claim. In addition, time bars for tortious or other damage to property claims in the US vary greatly and Members should seek prompt local advice.



Time charterers who purchase bunkers are often in the middle of a contractual chain, with the supply contract on one side and the charterparty on the other. In many cases, the applicable clauses are not back-to-back and there may be discrepancies, such as different time bars, bunker specifications and testing methods which can cause problems and potentially leave a charterer unable to pass a claim from its owner on to its bunker supplier. Members are advised to review their contractual clauses with this in mind. The Club recommends the use of the BIMCO wording for bunker quality control in charterparties and BIMCO's recently re-issued bunker supply contract where possible.

Preserving evidence and mitigating losses

No matter whether the claim arises under a time charter, or a bunker supply contract, evidence will be key. It must be established whether the damage complained of by the ship was caused by the poor quality of bunkers or another extraneous cause. Under a charterparty, the burden of proof is on the owner to establish that there is a link between the bunker stem and the damage caused.

Owners will need to ensure that samples of the contaminated fuel are kept, as well as any damaged parts. Additionally, owners will need to ensure that all relevant maintenance records are up to date and assess the evidence of previous bunker supplies to rule out the possibility that poor maintenance or an earlier stem caused the issue.

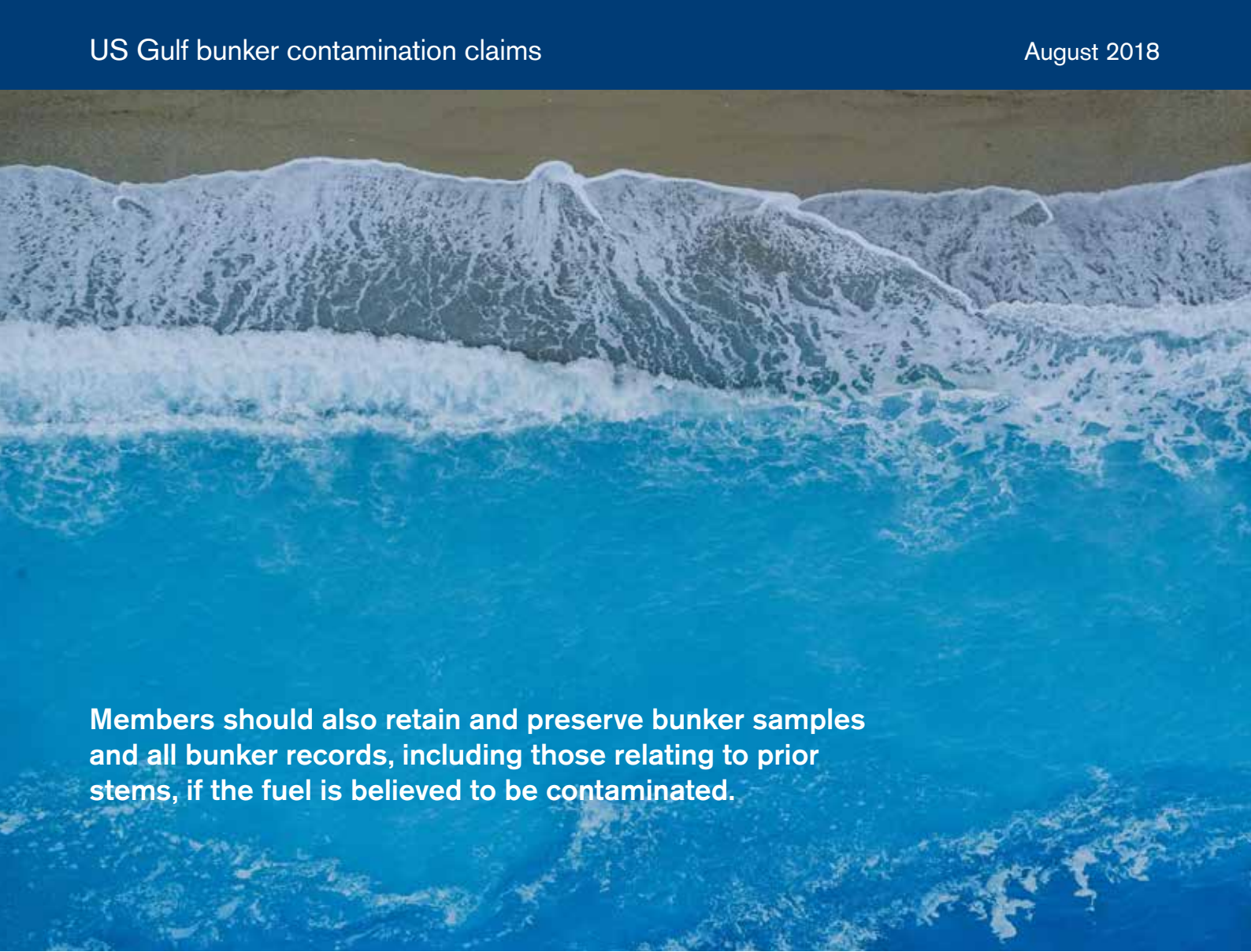
Owners will be under a duty to mitigate their losses, even if the bunkers are off-specification. This may include de-bunkering any contaminated bunkers. An owner is likely to require its charterer to arrange and

pay for the de-bunkering. If the charterer refuses, or the ship is potentially delayed, the owner should consider paying for the de-bunkering costs and claiming them from the charterer at a later date, in line with its duty to mitigate. It is also important that the crew do not continue to burn any bunkers which are suspected to be off-specification, as this may break the chain of causation and cause further damage to the engine.

Testing samples

Testing bunker samples, though not always determinative, will often be key to proving liability. It is important that the parties comply with the terms of any applicable provisions regarding the taking, retention and testing of samples. Clauses often specify the number of samples to be taken, from where (e.g. the ship manifold or the bunker barge manifold), by what method (e.g. continuous drip sample) and how they should be tested (e.g. at a mutually agreed laboratory, in the presence of the parties' representatives). If such provisions have not been complied with to the letter, the owner or charterer, as applicable, may not be able to rely on them as binding evidence as to whether the bunkers stemmed were off-specification.

In relation to the bunkers supplied in the US Gulf region, it is understood that the standard ISO tests may be insufficient to pick up the particular contaminants involved. Additional in-depth tests, such as Gas Chromatography combined with Mass Spectrometry (GC-MS), may be required to provide a more detailed analysis of the fuel and any contaminants therein. However, such tests attract higher charges and, in light of the limited number of facilities that can conduct such tests, the provision of test results may be delayed.



Members should also retain and preserve bunker samples and all bunker records, including those relating to prior stems, if the fuel is believed to be contaminated.

Recommendations

In light of the present risk of contamination, when bunkers are received in the US Gulf region, in addition to conducting standard sampling and testing, Members should also, where possible, consider conducting additional tests before using the bunkers, in order to ensure the absence of contaminants that may not be picked up by standard testing procedures.

If Members are faced with any indication of possible off-specification bunkers, it is recommended that all parties are notified immediately and the suspected contaminated fuel should be segregated as soon as possible in accordance with the ship's bunker supply plan. It should not be used until the results of further testing are received. Members should also retain and preserve bunker samples and all bunker records, including those relating to prior stems, if the fuel is believed to be contaminated.

A prompt joint analysis of the bunkers should be conducted in accordance with any provisions agreed within the charterparty and bunker supply contract respectively.

It is also important to check all relevant contracts for any time bars that may be in place. Given that the standard tests may not be sufficient to identify the particular contaminants involved in the bunkers supplied in the US Gulf region, expert guidance should be sought in relation to appropriate testing parameters and facilities.

The Association is already handling a significant number of claims arising from this situation and indications are that the problem may be spreading geographically. Similar issues have been experienced in relation to bunkers stemmed in Panama, for example, and it is believed that a recent spate of off specification bunkers received in Singapore is also linked to the same source. Members are therefore advised to be extra vigilant when stemming bunkers at this time and seek urgent assistance in the event of any signs that bunkers are off specification.

If Members have any queries relating to bunker claims, please contact the Managers.

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