



Soundings

Sulphur Series: Countdown to 2020

Fuel availability concerns: considering the FONAR

In response to industry-wide concerns as to whether there will be sufficient supplies of low sulphur fuel available after 2020, the IMO has made provisions in MARPOL. In the event of non-availability, ships are not required to deviate to find compliant fuel and may submit a fuel oil non-availability report, or “FONAR”. In this article we consider the extent of the protection afforded by these provisions and related contractual issues.

Unsurprisingly, most projections show that demand for low sulphur fuel will increase sharply towards the end of 2019 in anticipation of the new MARPOL requirements. Although refineries around the world are responding to the anticipated increase in demand, the situation is still somewhat uncertain and there are doubts as to whether there will be a sufficient supply, particularly outside the large bunkering ports such as Singapore, Fujairah or Rotterdam.

There was a foreshadowing of this shift in demand when the IMO amended MARPOL in 2015 to create Emission Control Areas (“ECAs”) that were subject to a limit of 0.1% sulphur content, which produced a shift in fuel usage representing about 300,000 barrels per day. The impact of the further amendments coming into play in 2020 is

likely to be significantly greater, with the majority of ships now having to carry out a major switch from HFO to VLSFO as their dominant fuel.

For those owners who have chosen to go down the route of installing a “scrubber” there may also be issues of undersupply of heavy fuel oil (HFO). It is reported that higher sulphur fuel will continue to be available in certain quantities at major ports, but it is unlikely to be commercially viable for minor bunkering ports to maintain stocks of HFO, together with dedicated shore tanks and lines, given the foreseeable dip in demand from the relatively low number of ships that have installed scrubbers. There will also be limited numbers of bunkering barges prepared to carry HFO,

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which then precludes them from carrying LSFO before intensive cleaning is carried out. Bunker traders are monitoring the situation and providing updates to the market when available.

FONAR

The IMO has sought to address these on-going concerns by way of appropriate provisions in MARPOL. Regulation 18.2 of Annex VI provides that, while owners are required to exercise best efforts to secure compliant fuel, ships should not be required to deviate or unduly delay their voyage in order to do so. Where, despite best efforts, compliant fuel is not available, the ship may submit a FONAR and use non-compliant fuel on a temporary basis.

The FONAR is, essentially, a declaration that a breach of the rules is about to occur. It will be taken into account by the relevant local port state authorities when considering whether to impose any penalty.

Guidelines

The 2019 Guidelines for Consistent Implementation of the 0.50% Sulphur Limit under MARPOL Annex VI (passed by the IMO at MEPC 74 in May 2019) attempt to give further detail and substance to the FONAR scheme and to introduce a degree of harmonisation. FONARs are already used in the North American ECAs and guidelines issued by the US Environmental Protection Agency may also be helpful in providing practical guidance as to best practice. Nevertheless, the interpretation of and response to FONARs is likely to vary from state to state.

Appendix 1 to the 2019 Guidelines sets out the required format of a FONAR, which must be submitted as soon as it is known that it will not be possible to procure compliant fuel. The pro forma FONAR includes sections on the ship's voyage plan, evidence of attempts to purchase compliant fuel (including location, suppliers and copies of relevant

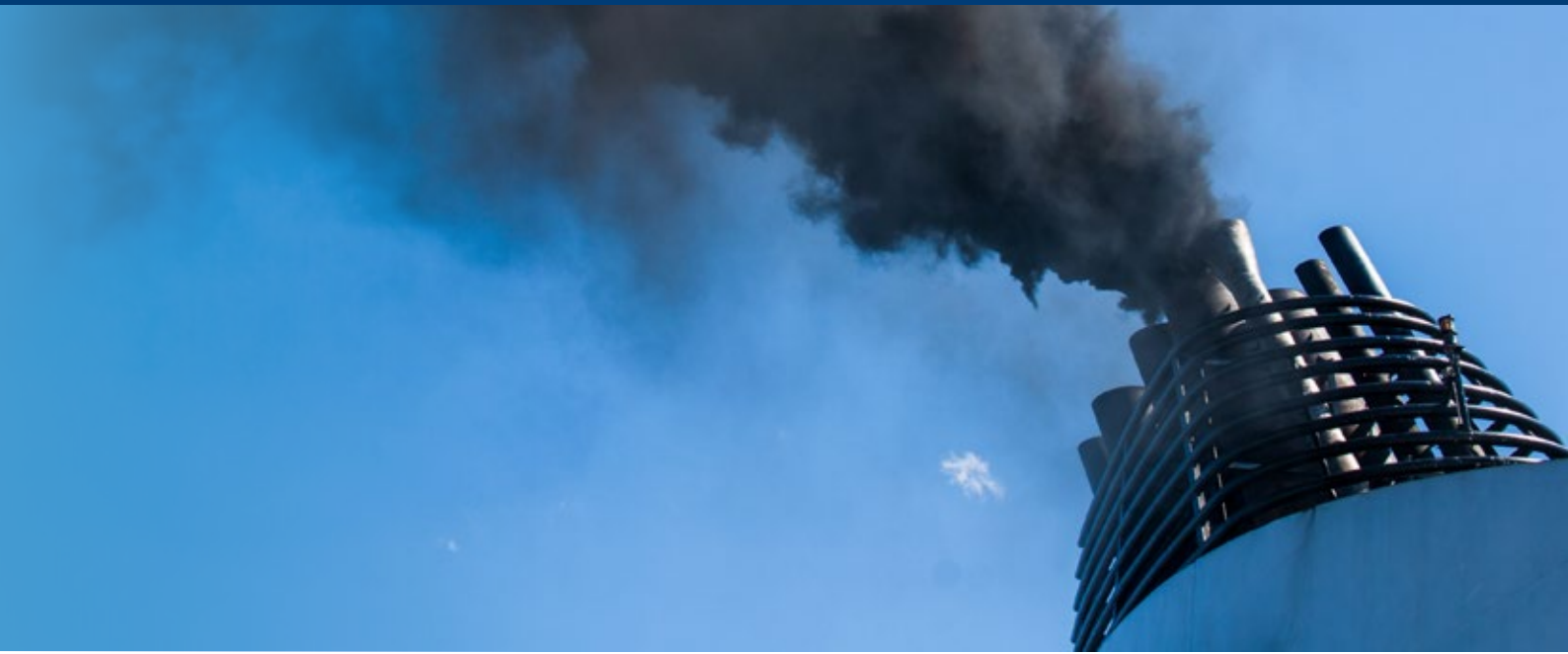
communications), any operational constraints that might prevent the ship from using compliant fuel, the planning undertaken to secure compliant fuel and details of all FONARs submitted in the last 12 months.

FONAR not an exemption

However, it should be noted that the FONAR is only a reporting mechanism and is not intended to provide a watertight exemption. The Guidelines mandate that member states should scrutinise and investigate FONARs, requesting further information from owners where necessary, rather than simply taking them at face value. This element of scrutiny is seen as an important element in discharging a member state's obligation to promote the availability of a consistent supply of fuel oil, as well as deterring abuse of the system.

Member states are also required to notify MARPOL of the submission of any FONAR, by uploading details onto the central GISIS platform. It is clear that the FONAR is not merely an exercise in box-ticking. It must be supported by detailed evidence of planning for, and attempts to obtain, compliant fuel, including attempts to locate alternative sources of fuel.

Member states may adopt differing detailed evidential requirements, and the degree of stringency is likely to vary from port to port. However, where the evidence fails to establish proper plans for the stemming of compliant fuel, it seems likely that a port state authority would impose a penalty. Other situations may be more difficult to predict. For example, one grey area is whether port state authorities will permit an owner to escape penalties where it is shown that the use of compliant fuel will result in damage to the ship. Similarly, where a ship's scrubber breaks down, it is not entirely clear whether a FONAR is required to be submitted and, if so, whether penalties would be imposed on the owner.



In practice, it is likely that the imposition of penalties will be fact-specific and depend on a number of factors, including whether the breach of the rules is the result of poor planning or preparation, whether the ship has a history of breaches and whether sufficient attempts to obtain compliant fuel from alternative sources were made.

Contractual considerations

As is reasonably clear from the above discussion, the contractual effect of submitting a FONAR is somewhat uncertain and is likely to remain so for some time to come. For example, although submitting a FONAR may protect an owner from being subjected to penalties for breach of the MARPOL scheme, that does not necessarily mean that responsibility or liability (eg for delays or extra costs) will be excluded under a charterparty. The position under time charters, where charterers are responsible for the provision of fuel but owners are responsible for compliance with regulatory constraints, is likely to be particularly complex. With these concerns in mind, parties may wish to consider adjusting provisions governing liability for deviation, delays or other losses in the event of fuel unavailability.

Does tendering a FONAR discharge a charterer's duty under the charterparty?

From January, 2020, most time charterparties will contain express provisions requiring charterers to supply compliant fuel. The BIMCO 2020 sulphur content clause provides one example of such a clause. However, depending on how the clause is drafted or amended, there may be issues as to whether the supply of non-compliant fuels coupled with the service of a FONAR is sufficient to discharge a charterer's contractual obligations. A charterer might argue, for example, that submission of a FONAR means that there has been no "non-compliance" with the requirements of MARPOL, because the FONAR should protect against the imposition of penalties. Such an argument may be questioned, however, at least where

the clause requires the charterer to ensure that the fuel complies with the MARPOL requirements.

Submission of a FONAR does not establish an exception to the requirements of Annex VI, but is merely a piece of evidence to be taken into account by local port authorities when deciding whether to impose a penalty for non-compliance. A failure to supply compliant fuel is, prima facie, a breach of a contractual obligation to supply such fuel, though of course if no penalty is imposed or there is no time lost, that breach may not cause any loss. Nevertheless, owners may wish to put the matter beyond doubt by stipulating that their charterer's obligation to supply compliant fuel is absolute and that the submission of a FONAR will not discharge that obligation.

Are charterers required to deviate to find compliant fuel?

More difficult is the question of whether an owner can require a ship to deviate to a port where compliant bunkers can be stemmed, in order to avoid any possible breach of MARPOL. Under MARPOL rule 18.2.2 ships are not required to deviate to stem compliant fuel. However, the position may be different as a matter of contract. A charterer might argue that its contractual obligation to supply fuel under the charterparty must be interpreted by reference to rule 18.2.2 such that it is therefore not required under the charterparty to deviate.

Whether such an interpretation of a charterer's obligations is tenable would depend on the precise words used, but where the clause imposes an obligation to secure "compliant fuel" (rather than a broader obligation to comply with MARPOL Annex VI) it would be difficult to argue that the obligation was anything other than absolute.

It may be preferable to put the matter beyond doubt by expressly stating that the charterer's obligation is absolute and may require deviation in order to stem compliant fuel.



A further issue that parties may wish to address in their charterparties relates to the evidential requirements of the FONAR regime.

Who has access to the evidence needed to satisfy FONAR requirements?

A further issue that parties may wish to address in their charterparties relates to the evidential requirements of the FONAR regime. In a time charter situation, the charterer will conduct the negotiations and discussions with bunker suppliers and will, therefore, be in possession of the evidence relating to the efforts to secure compliant bunkers. An owner may, therefore, wish to negotiate for terms expressly requiring the charterer to preserve and disclose to the owner all evidence relating to its efforts to secure compliant bunkers.

Conversely, a charterer, particularly an intermediate one, may not have sufficient information to complete a FONAR adequately, and may therefore wish to include terms in the charterparty requiring the owner's co-operation in providing such information in a timely manner.

Can owners delegate their MARPOL obligations?

It is unclear whether the MARPOL obligation to exercise best efforts to secure compliant fuel is delegable to charterers. Can an owner, faced with potential penalties, rely on steps taken by its charterer to secure compliant fuel? Or must the owner show that they have themselves also attempted to source compliant fuel? The position is unclear.

Owners may, therefore, wish to protect themselves – first by imposing express and absolute obligations on charterers to supply compliant fuel, but also by seeking an express indemnity where they are exposed to liability. The BIMCO Sulphur Content Clause contains an indemnity, though the wording could perhaps be broadened to offer more protection for owners.

Who is liable for lost time and costs incurred in waiting or deviating for compliant fuel?

In some cases, time may be lost and costs incurred in waiting for compliant fuel to become available or sailing

to a port where compliant bunkers are available. Time charter clauses governing off hire and deviation and voyage charter clauses governing deviation and, possibly, laytime and demurrage, may need to be adjusted to address these specific situations. It will also generally be advisable for owners under voyage charters to seek to negotiate an express liberty to deviate for the purpose of stemming compliant bunkers. Any such liberty should also be incorporated into the applicable bill, or bills, of lading.

Who will be liable if a FONAR fails to prevent a fine?

As mentioned, a FONAR does not offer guaranteed protection. The relevant rules place responsibility for submission of a FONAR on the ship or operator. If an owner submits a FONAR in reliance on its charterer's attempts to find compliant bunkers which nevertheless results in a penalty being imposed on the ship, will the loss lie where it falls, or can the owner argue that the liability is a result of compliance with the charterer's orders? For avoidance of doubt, owners may wish to protect themselves by including express terms allowing them to recover such losses from their charterers.

Concluding remarks

FONARs are not a "get out of jail free" card. Their use is likely to be carefully scrutinised by port state authorities. The circumstances in which submission of a FONAR will avoid the imposition of a penalty are, as yet, unclear and are likely to vary from port to port. Against that background, parties may wish to include express terms allocating responsibility for issues relating to fuel availability in their charterparties.

Please contact the Managers for further advice in relation to any of the issues discussed above.

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