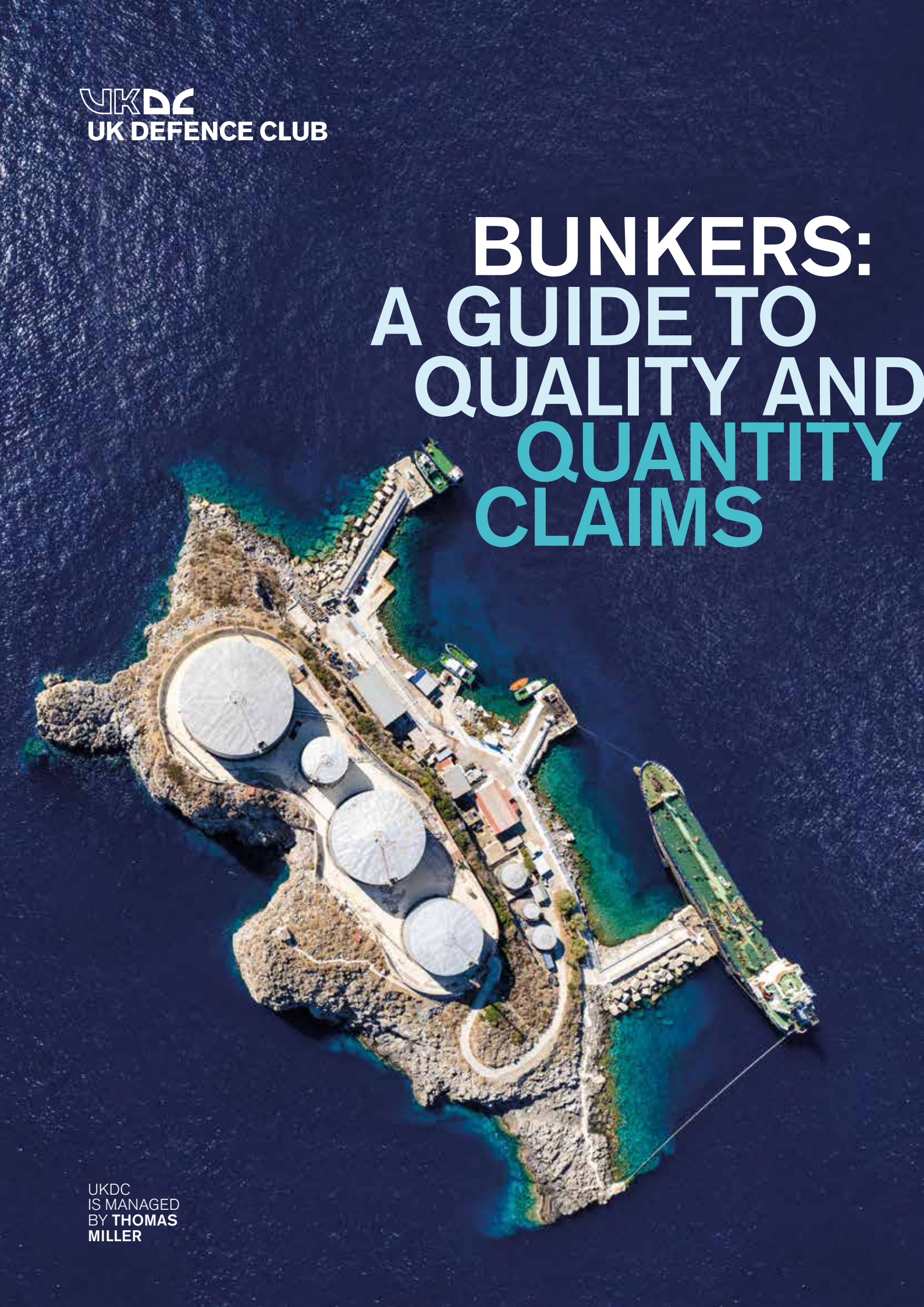
UK DEFENCE CLUB

BUNKERS: A GUIDE TO QUALITY AND QUANTITY CLAIMS



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Front cover image: Bunkering station, Kaloi Limenes, Greece.

INTRODUCTION

The quality of bunker fuel continues to be a source of concern to shipowners and charterers. Over the last 40 years or so, enhanced refining techniques have resulted in a decline in the quality of residual fuel. Unfortunately, some marine fuels have also been used as a dumping ground for waste chemicals and organic substances that are suspected to have caused serious operating problems. Added to this the global switch to low sulphur fuel in 2020 has resulted in heavy blending and quality issues occur all too frequently.

Every year there are isolated incidents of fuel supplied with high levels of catalytic fines, high total sediment and low flash point and the blending of different "renewable" components into fuels appears to be increasing.

There have also been larger-scale contamination incidents, which are often identified when a number of ships suffer similar types of machinery damage as a result of fuel supplied in the same region.

In 2022 fuel containing chlorinated hydrocarbons was supplied in Singapore (although the original source of the contaminant was thought to be the Middle East) which resulted in a large number of ships with machinery damage. In the same year fuel supplied in the ARA region appeared to be contaminated with extracts from cashew nuts.

Claims arising from these problems are typically complicated and often frustrated by inadequate evidence, including representative samples, storage and consumption documentation and fuel analysis reports. The standard ISO 8217 specification for marine fuels can be inadequate in detecting fuels with unusual compositions before problems actually occur in use. In some cases, the fuel quality appears to have met the relevant fuel specification but further extensive testing reveals the presence of unusual contaminants. Linking these to engine damage can prove difficult and it is sometimes necessary to undertake metallurgical examination of worn or damaged components to determine causation. Preservation of damaged parts has become as important as preserving representative fuel samples.

In this publication we set out some important procedures that should be adopted in order to reduce the chances of fuel-related engine damage and ship down-time and provide valuable evidence should a bunker quality claim occur. We also highlight steps that can be taken to minimise the likelihood of bunker quantity claims and review some of the key legal principles relating to the supply of bunkers. On pages 24 to 25 there is a useful checklist summarising some of the key points to consider before, during and after bunkering and in the event of a claim.

This publication was produced with the assistance of Mr Chris Fisher of Brookes Bell.

PURCHASING CONSIDERATIONS

When purchasing bunkers it is important that the correct grade is specified and that the sale and purchase agreement includes the appropriate description of the fuel to be supplied and these should mirror the charterparty specifications. This is best done by reference to the latest available version of the International Standard ISO 8217 and identification of the required grade within this standard e.g. ISO 8217:2017 - RMG 380. Scenarios are often seen where the charterparty requires the latest version of ISO 8217 to be applied, but the buyer accepts fuel that complies with an earlier version of ISO 8217, such as 2005 or 2010. In certain cases, this can result in a charterer being unable to pass a claim on to the supplier. The importance of ensuring that specifications are back-to-back up the contractual chain cannot be stressed highly enough.

A copy of the certificate of quality should also be obtained during the purchase negotiations. If possible, the fuel purchaser should seek to tie the quality stated therein to the contract, so that the supplier will be responsible for any discrepancies in the supplied product.

Buyers need to be fully aware of the terms and conditions of the supplier. These tend to be very much in favour of the supplier, with short time bars and limited liability clauses. They may also refer to the validity of samples and procedures for handling disputes on quality. Often, these do not tally with those contained in the applicable charterparty, which can result in contractual complications for Members who purchase bunkers on terms that are not back-to-back.

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DELIVERY PROCEDURES

Pre–delivery checks

The ship's crew need to be instructed to check the quality of the fuel to be supplied according to the bunker delivery receipt and certificate of quality. In addition, the crew should request a copy of the certificate of quality for the fuel. Although this document does not provide a full analysis of the fuel, it should contain at least the viscosity, density and sulphur content. The Chief Engineer needs to check that these meet with the engine's requirements.

Most suppliers' terms and conditions of sale provide that sampling will be carried out at the barge manifold and that such samples will be used to determine quality in case of dispute. Not all barges are fitted with drip sampling devices and, even where they are fitted, it is important that the ship's crew verify that they are correctly installed and operated throughout the entire delivery. If the barge has no drip sampling device and samples are drawn from the barge's tanks then, where possible, the Chief Engineer should establish that the fuel is supplied from the tanks that the samples are taken from. If the Chief Engineer is not satisfied a note of protest should be issued and an entry made in the engine log book. Photographs of any irregularities would provide useful evidence should a claim arise.

A competent member of the ship's crew should attend on the barge before and after the delivery to measure and record the contents of all the barge tanks. This involves sounding or ullaging the tanks, taking temperatures, establishing the barge trim and using the calibration tables to determine volumes. If possible the sounding should include the use of water-finding paste to establish the amount of free water at the bottom of the tank.

The density of the fuel provided on the bunker receipt may be used to find the correct conversions for volume at standard temperature and weight. If this process is carried out correctly there should be no dispute on the quantity of fuel discharged from the barge. If the Chief Engineer has any concerns that the barge calibration tables are not correct or that the barge may have tanks that have not been possible to measure a letter of protest should be issued at the time and, if necessary, an independent surveyor should examine the barge.

If the Chief Engineer is not satisfied a note of protest should be issued and an entry made in the engine log book.

Procedures during the delivery

The barge crew should be invited in writing to witness this sampling and be offered a part of this sample on completion of the bunkering. If the supplier refuses to witness this sampling or to receive a sample the Chief Engineer should again issue a letter of protest and make an appropriate record in the log book.

An owner should, whenever possible, avoid mixing fuels from different sources. New bunkers should be loaded into empty tanks. If this is not possible then an owner should try to avoid 50/50 mixing of old fuel with new as this can be the worst combination if the fuels are not compatible. Segregation will prevent pre-existing fuel becoming contaminated with an off-specification new fuel. Prior to loading, the Chief Engineer needs to measure and record the contents of all bunker tanks and, at the end of the delivery operation, repeat this process.

Continuous drip sampling throughout the bunkering operation should be used for all samples and should be carried out at a single, mutually agreeable and monitored location. Most issues with sampling arise due to the availability of two locations for sampling - one at the receiving ship's manifold and the other at the bunker barge's manifold.

In many bunkering ports the Chief Engineer is provided with samples drawn on-board the bunker barge. This is often the agreed sampling procedure under the bunker supply contract and these samples are consequently often considered as the representative and binding samples for any potential dispute with the supplier. If this is the case, it is important that a senior representative from the ship's crew attends on the barge to ensure that proper sampling procedures are taking place at all times.

On the other hand, charterparties often specify that samples taken at the ship's manifold shall be representative, in which case, samples will need to be taken in both locations. In such cases, there is a risk that results from the different sets of samples may not tally and disputes may therefore not be back-to-back up the contractual chain.

The International Convention for the Prevention of Pollution from Ships ("Marpol") clearly identifies the bunker manifold of the receiving ship as the appropriate location for sampling. This is echoed in the 2020 version of ISO 13739, which provides guidance on commercial sampling.

DELIVERY PROCEDURES continued

Whilst previous versions of ISO 13739 allowed representative samples to be taken from either end of the bunker hose, the latest version limits representative samples to those taken at the receiving ship's manifold. This may minimise the scope for dispute arising due to multiple sampling points, although commercial practices of sampling at the barge manifold may continue to cause issues. Parties may seek to incorporate the ISO 13739 standard into bunker supply contracts and charterparties to reinforce the single sampling location requirement.

Masters should be encouraged to seek guidance from the owner about sampling procedures and requirements well before bunkering takes place. The crew should know which sampling location is binding and should comply with any requirements as to the sampling method.

Throughout the delivery, the sampling on the barge and the ship should be constantly monitored. It may be necessary to adjust the drip sampling to ensure that about 5 litres of bulk sample is collected by the end of the bunkering operation. Frequent checks of the loading rate and receiving tank contents need to be made to avoid spillage.

It is not unknown for a barge to deliver a slug of contaminated fuel in the hope that this will not be picked up by the drip sample. The Chief Engineer should note any stops/starts and pay particular attention to the fuel delivered in that period.

The sampling container should be securely sealed in the presence of the Chief Engineer. The seal should provide security against tampering and contamination during the entire bunkering process. Each sample must be allocated a sample number and the bottle label should contain the ship name, barge or installation name, type of fuel, date of loading/date of sample, signature of supplier's representative, signature of receiver's representative, sampling method and seal number. The seal numbers of all samples taken during bunkering should be recorded in the respective bunker delivery note.

The Chief Engineer should refuse to sign sample labels submitted prior to the completion of bunkering and if the bunker supplier offers another sample, which the ship has not witnessed, then this should only be accepted by the Chief Engineer with the written qualification "for receipt only, source unknown".

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Post-delivery procedures

All the barge's tanks and ship's tanks need to be re-measured after delivery to verify the quantity of fuel stemmed. Both the quantity discharged by the barge and that received by the ship should be calculated and recorded.

The barge outturn figure should be recorded on the bunker delivery receipt (in mt) as this will provide the information for the invoice. If the Chief Engineer does not agree with this figure, a letter of protest must be issued and an entry made in the log book or the oil record book. The oil record book should also state the contents of all the ship's bunker tanks before and after the delivery.

All owners are advised to participate in a fuel analysis scheme and follow any recommendations made under that scheme. Members should use the services of a reputable bunker testing company to verify fuel quality. One representative sample should be despatched immediately to the testing company. It is important that an owner carries out tests on a representative sample to verify the quality of the bunkers as quickly as possible after stemming them bearing in mind that many supply contracts have short time periods for notifying the supplier of any quality claim. It is important to keep a careful record of who is given custody of samples sent ashore for testing, where they are stored and how they are transported. The supplier has a duty to provide the ship with a Marpol sample and the seal number of this must be recorded on the bunker delivery receipt along with the seal numbers of any other samples issued by the supplier. Some owners take their own Marpol sample but under the Marpol regulations the official Marpol sample is that issued to the ship by the supplier. If the Chief Engineer is not satisfied that the Marpol sample was taken properly, a letter of protest should be issued.

All the samples and documentation from the bunkering operation must be kept in a safe location on-board as they may be needed by a Port State Control officer and would provide valuable evidence in case of a dispute on quality.

COMPLIANCE WITH MARPOL ANNEX VI AND OTHER REGIONAL RESTRICTIONS

On 1st January, 2020, the implementation of amendments to Annex VI of Marpol brought into play a global cap on sulphur content of 0.50%. Owners and charterers need to ensure that fuels supplied and consumed comply with Marpol and other regional regulations concerning sulphur content. Non-compliance with such regulations can result in detention and/or fines.

Port State Control officers may board ships in port and ask to see documentation showing that ships are compliant. This would include bunker delivery receipts, records of Marpol samples and log books showing when compliant fuels were put into use. In some ports, officers have obtained samples from ships' bunker tanks and tested these for sulphur content and compliance.

The current situation is set out below:

- Maximum sulphur content of fuels used outside restricted areas (global cap): 0.50%

- Maximum sulphur content in restricted emission control areas ("ECA"s): 0.10% in designated ports in Europe, Baltic Sea, North Sea and English Channel, North American area, and United States Caribbean Sea area.

In addition, there are many regional ECA areas and variances in requirements at berth or anchorage. For example, in China, as of 1st January, 2020 ships operating in the inland ECAs (Yangtze and Xijiang River) must use fuel with a sulphur content not exceeding 0.10% sulphur. The same will apply within the Hainan Coastal ECA from 1st January, 2022. The European Union Sulphur Directive also stipulates a maximum of 0.10% sulphur content for ships in EU ports. It remains to be seen whether the UK will opt out of the EU Directive post Brexit, in which case there may be some ports within the UK which will not be subject to the 0.10% cap as they are neither designated as an ECA under Marpol nor subject to the European Directive.

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Use of Scrubbers

Since the introduction of the 0.50% global sulphur cap, some ships have installed exhaust gas cleaning systems, also known as ‘scrubbers'. These allow the ship to continue burning higher sulphur fuel, which is cleaned via the scrubber system to render it compliant.

When using an ‘open-loop' scrubber, as opposed to a 'closed-loop' scrubber, wash-water is generated which may have harmful effects on local waters. This has led to many ports introducing regulations restricting the use of open-loop scrubbers or imposing additional requirements relating to the discharge of wash-water from such systems. To assist operators, the Exhaust Gas Cleaning System Association (EGCSA), has launched a free to access Global Marine SOx Emissions Regulation map on their website (egcsa.com), which provides links to verified information on local regulations.

THE PRESERVATION OF EVIDENCE

The ability to properly pursue or defend bunker quality or quantity claims depends on the quality of the evidence. Good record keeping is essential. If the ship maintains detailed records, log book entries and samples and the Member involves the Club in good time to allow statements to be taken, and a proper investigation conducted, then the Member will be in the best position. The prompt appointment of the right expert is particularly important and the Club can assist with this. There is a risk that vital evidence will not be secured if appropriate action is not taken promptly.

Typical documentation in a bunker dispute would include ship's log books (deck, engine and scrap log books), oil record books, maintenance records, pre-arrival checklists, bunker start-up and completion times, bunker tank content records, consumption records (which fuel used and when), bunker delivery notes and invoices, historic sample results, photographs of damaged parts and excessive sludge, survey reports, class records, statements of engineers, invoices for spare parts and other costs and relevant correspondence.

Sample evidence

Most bunker quality disputes will centre on the samples taken during and after delivery. In regard to sample evidence, the importance of correct witnessing, sampling and labelling of bunker samples cannot be overstated. Without correct labelling and an ability to trace samples and analysis reports, fighting a bunker dispute can be very difficult. If sampling and recording is not done properly then it is always open to an opponent to challenge the authenticity of any test results.

Letters of protest

If there are aspects of the delivery that are unsatisfactory, a letter of protest must be issued to the barge master. The letter of protest should give details of the problem and a copy should be retained on-board for reference and submission to the bunker supplier.

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Damaged components must be retained on-board and photographic/video evidence taken of any blocked filters and separators.

Evidence if problems arise

A situation may arise where fuel has to be used before the analysis results have been received, or perhaps no analysis has been carried out. The crew may experience problems treating and/or burning the fuel and engine damage may occur. In this case, it is important to document everything, with dates and times of occurrences, including when the fuel was first used, for how long it was used, how it was handled and treated, which tanks were used and when problems first occurred.

Damaged components must be retained on-board and photographic/video evidence taken of any blocked filters and separators. Samples should be taken from the fuel system at various locations including before and after the separators, at the inlet to the main engine and after the transfer pump. Samples of any sludge or sediment from filters and separators, as well as exhaust valve and turbo charger deposits, should also be taken and sent for analysis.

The quality of the evidence and the decisions taken at the time a bunker problem arises will be crucial to a party's success in prosecuting or defending a claim at a later stage.

It is recommended, where possible, that the ship does not burn any fuel without receiving the analysis results first.

LEGAL ISSUES: CHARTERPARTIES

Under most time charterparties, the supply of bunkers is the responsibility of the charterer. The relevant provisions of the NYPE (both the 1946 and 1993 versions) and Shelltime 4 charterparties are very similar and provide that the charterer shall "provide and pay for all fuel".

Property in the bunkers

In most cases, any bunkers on-board become the property of the charterer upon delivery of the ship. During the currency of the charterparty, the owner simply has the possession of the bunkers as bailee until they are purchased back by the owner upon re-delivery, which transfers ownership back to the owner.

Quantity of bunkers

On delivery, if the ship has less bunkers on-board than the minimum quantity required under the charterparty this will not entitle the charterer to refuse delivery. This is provided it does not make the ship unfit for service and that it has sufficient bunkers to sail safely to the next bunkering location. When the charterparty term qualifies the quantity of bunkers on-board on delivery with the word "about", a margin of 0.5% is generally permitted. It is the owner's obligation to provide an honest estimate based on reasonable grounds.

With regard to the quantity of bunkers the charterer should supply, the owner is under a general duty to co-operate and to provide the charterer with all relevant information. This should include details of the previous and current consumption and any particular characteristics of the ship in order to allow the charterer to supply the required bunkers.

On re-delivery, if the ship does not have the required quantity of bunkers on-board, as agreed in the charterparty, the owner cannot refuse to accept the ship for re-delivery, but may have a claim in damages. If the charterparty is silent as to re-delivery quantities, the charterer will generally not be allowed to order quantities which are not required for the performance of the chartered service in order, for example, to make a trading profit on bunker prices on re-delivery.

When the charterparty makes no provision for the bunker prices to be paid on delivery or re-delivery, the market price will generally apply without regard to the price actually paid, although certain charterparty forms either specify the price or provide a mechanism for establishing the price. By way of example, the Shelltime 4 form (line 290) provides that: "Such prices are to be supported by paid invoices."

The charterer has the right to select the port at which the ship is to stem bunkers. If the charterer directs the ship to an unsafe bunkering place either directly or indirectly through its agent (including the bunker supplier) and this results in damage to the ship, the charterer is likely to be held liable for the losses.

Quality of bunkers

In terms of quality, it is generally accepted that the charterer is under an absolute obligation to provide bunkers of a reasonable quality which are suitable for the ship in question. If the charterparty includes express requirements regarding the type and grade of bunkers, the charterer will have to comply.

Clause 9 (b) of the NYPE 1993 form, for example, expressly requires the charterer to supply bunkers of a quality suitable for the ship's engines and auxiliaries and conforming to agreed specifications. Should the charterer fail to comply with the charterparty terms it may be responsible for any damage to the main engine directly caused by the use of such bunkers.

On delivery, if the ship has less bunkers on-board than the minimum quantity required under the charterparty this will not entitle the charterer to refuse delivery.

LEGAL ISSUES: CHARTERPARTIES continued

Fit for purpose

It is also important to note that under English law, the fact the bunkers may comply with the basic contractual specifications is not enough. Under the Sale of Goods Act 1979 as amended by the Sale and Supply of Goods Act 1994 (SOGA), the bunkers must be 'fit for purpose'.

So what does 'fit for purpose' mean? This question arose in an unreported arbitration decision in 2004, concerning a case in which bunkers had been found to be within specification by DNV, but had poor ignition qualities due to the fines content. The tribunal found that in addition to an express term in the charterparty there was also an implied term that the bunkers had to be fit for the purpose intended and that the poor ignition qualities in the fuel caused the damage to the engine and so the fuel could not have been fit for purpose. The tribunal accordingly found the charterer in breach and liable for the engine damage.

In that case, the engine was not unusual, in that it had no particular characteristics or requirements. However, where the engine is unusual or has particular requirements 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 should be noted that, as a result of a recent English court decision, bunker supply contracts may not amount to a contract for a sale of goods under the SOGA, with the consequent effect that the provisions in the SOGA may not apply to the bunker supply contract. Therefore, the fit for purpose rule may only apply to bunker disputes under a charterparty and not a supply contract.

So what does 'fit for purpose' mean? This question arose in an unreported arbitration decision in 2004.

LEGAL ISSUES: CHARTERPARTIES continued

Causation

In bunker disputes, it must be established whether the damage to the ship was caused by the poor quality of bunkers or some other extraneous cause. The burden of proof is on the owner to establish causation and that there is a link between the bunker quality and the damage sustained to the engine. It is a high burden which, if not met, is likely to mean that an owner's claim will fail.

If an owner burns bunkers in the knowledge that they are not suitable for burning, then an owner may break the chain of causation such that the charterer is not liable for any consequent damage. An owner will also be responsible for any damage that is caused by its treatment or handling of the bunkers or poor maintenance of the engine, rather than the quality of the bunkers themselves. The question of causation is often key to such disputes.

Mitigation

Even if bunkers are off-specification and may have caused, or may be capable of causing, damage to the ship's engine, questions of mitigation are likely to arise.

There is no "duty" as such on the innocent party to mitigate; instead a party will not be able to recover as damages losses which have been unreasonably incurred i.e. losses which were reasonably avoidable. The rule is not intended to impose an onerous obligation on the party who has suffered loss. It is only where it would be unreasonable not to act in a particular way, and yet such action is not taken, that the doctrine operates to reduce the level of damages.

Steps which may be said to be taken in mitigation may include de-bunkering any contaminated bunkers or taking steps to treat or manage the bunkers in some way so that they can be safely burnt. Where bunkers have been supplied by the charterer, the owner will invariably seek to have the charterer arrange and pay for the de-bunkering operation. However, if the charterer denies liability and refuses, the owner should in mitigation consider arranging de-bunkering itself and claiming the cost from the charterer at a later date. This is especially important where the ship may be delayed waiting for the charterer to reach a decision on de-bunkering. It may be possible to mitigate losses by selling the fuel, possibly as slops for refining. However, an owner will need to bear in mind that the bunkers are the property of the charterer.

Even if bunkers are off-specification and may have caused damage to the engine, the ship's crew will be under a duty to mitigate any loss.

In some cases, it may be possible to burn the fuel if it is treated or managed in a certain way. The costs of de-bunkering may thereby be avoided. Indeed, it is not unusual for a charterer to accept that the bunkers supplied are not within the charterparty specification or requirements (or to reserve their position on that issue) but to suggest to the owner means by which the bunkers can be treated or managed so as to make them usable. In such cases, expert advice should be sought as to any treatment or management of the fuel in order to assess whether such treatment or management might cause damage to the ship or be an undue additional burden on the ship's engineers. The owner should not be required to take any genuine risks in order to mitigate the consequences of the breach, though under English law there is scope to try to recover the costs of taking reasonable action to mitigate loss.

In the case of bunkers that are found to be in excess of the applicable sulphur limit, blending might be proposed as a solution to potentially lower the sulphur level. However, an owner should be wary of such action. Aside from the practical difficulties of ensuring that the resulting blend is compliant, there are documentary difficulties arising out of the fact that the bunker delivery note no longer represents the fuel on-board. In order to still be in compliance with Marpol after blending, it may be necessary to obtain an equivalence to regulation 18.5 of MARPOL Annex VI in accordance with regulation 4.1 of MARPOL Annex VI from the ship's flag state. Blending should therefore not be performed without appropriate technical and legal guidance.

LEGAL ISSUES: SUPPLY CONTRACTS

Where the ship is employed under a voyage charterparty, the owner remains responsible for the provision of bunkers and will therefore enter into a direct contract with a bunker supplier. Where a time charterer purchases bunkers, it will enter into the supply contract and should seek, where possible, to ensure that terms are back-to-back with terms under the charterparty so that any liability incurred to the owner for provision of off-specification bunkers can be passed to the supplier. However, supply contracts are often based on non-negotiable standard terms and may be subject to local law and jurisdiction, which might be favourable for the supplier.

There are nearly as many different forms of terms and conditions as there are suppliers in the market place but a common thread is that the terms and conditions are heavily weighted in favour of the supplier.

Prevailing figures and binding samples

In terms of quantity, a typical bunker contract will try to make the quantity recorded by the supplier prevail, meaning that the supplier's figures are conclusive.

With regard to quality, a supplier's conditions may try to exclude any implied terms or warranties. As for samples, as has been already mentioned, supply contracts frequently seek to make the supplier's samples binding and conclusive.

Be wary of supply contract time bars

The supplier's terms may also seek to impose strict terms as regards the notification of claims and may have very short time bars (sometimes only 7 days from delivery) for notification or the commencement of proceedings. Suppliers may also attempt to limit their liability to the value of the bunkers and exclude any other consequential losses. Where possible an owner should obtain the supplier's terms and conditions in advance in order to be aware of any restrictive clauses.

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Retention of title

Whether the bunkers are ordered by the owner under a voyage charter or by the time charterer, the ship may be exposed to an arrest by the bunker supplier if the bunkers have not been paid for. The bunker contract will invariably contain a lien clause or a Romalpa/retention of title clause. The legal position may vary depending on the jurisdiction.

In the case of *The Saetta* [1993] 2 Lloyds Rep 268, the charterparty provided that the charterer would pay for all bunkers on-board at the time of delivery and the owner would, on re-delivery, accept and pay for all bunkers remaining on-board. The charterer ordered bunkers, which were supplied, but did not pay for them. The bunker supply contract contained a retention of title clause, whereby property in the bunkers was not to pass to the buyer until the fuel had been paid for. The ship was subsequently withdrawn from the charterer's service for non-payment of hire.

The bunker supplier sued the owner for the price of the bunkers. The owner sought to defend the claim on the basis that it had acquired title in the bunkers when the ship was withdrawn pursuant to the terms of the SOGA. However, the court rejected the owner's position, since the charterer had not transferred the bunkers to the owner "voluntarily" when the ship was unilaterally withdrawn from its service. The owner was therefore liable to the supplier for damages, for conversion of the bunkers.

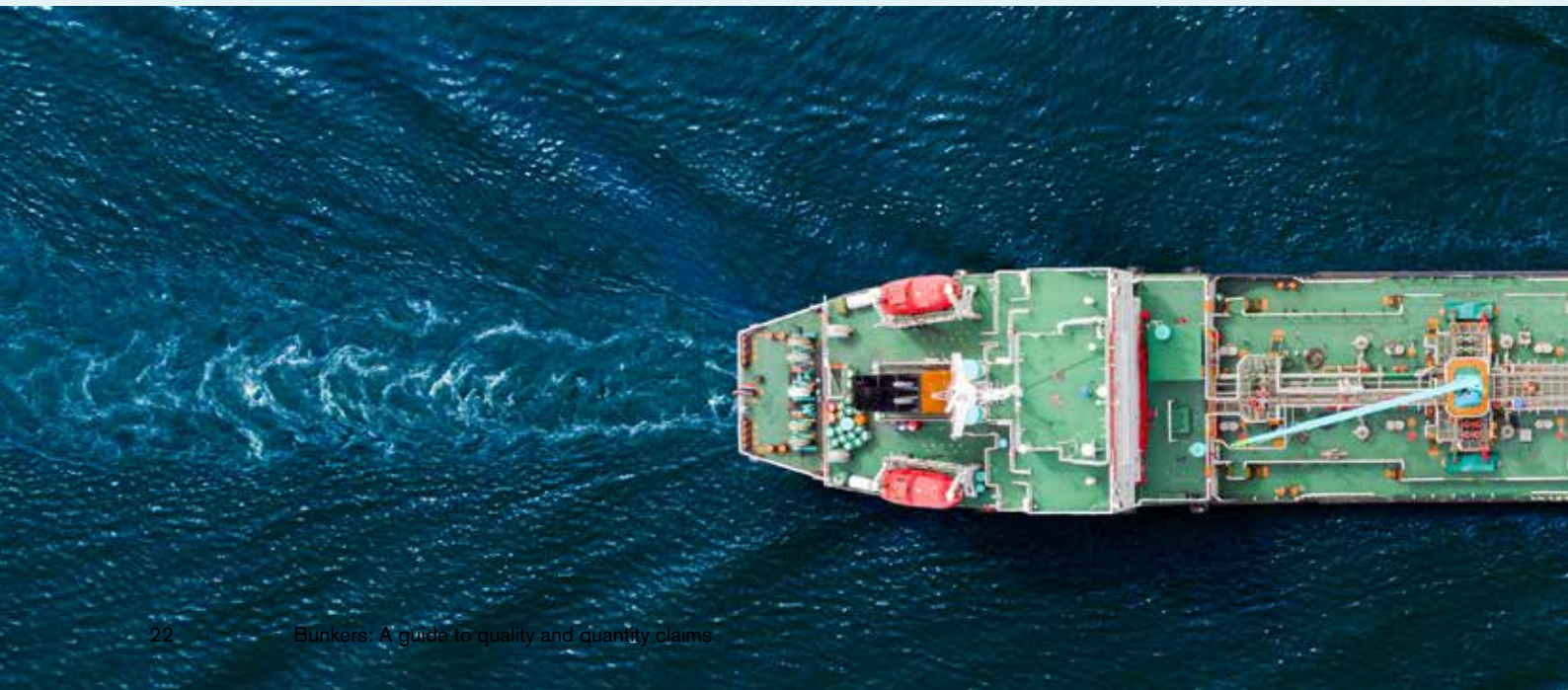
This can be contrasted with the more recent case of *The Fesco Angara* [2010] EWHC 619 (QB), where the supplier sued the owner for the price of bunkers which had not been paid for by the time charterer. In this case, the charterparty had been terminated by mutual agreement and the owner had offset the unpaid hire against the value of the bunkers remaining on-board. The court held that title in the bunkers transferred to the owner upon re-delivery by reason of the offset notwithstanding the retention of title clause in the bunker supply contract. The bunker supplier was unable to obtain payment from the owner.

LEGAL ISSUES: SUPPLY CONTRACTS continued

However, this decision was based on the fact that the owner had no knowledge of the lien clause in the bunker contract or that the bunkers had not been paid for and that the agreed delivery of the bunkers to the owner was a voluntary transfer of possession by the charterer under the SOGA.

The Club supported a test case through to the English Supreme Court, *PST Energy 7 Shipping LLC v. OW Bunker Malta Ltd* (*"Res Cogitans"*) [2016] UKSC 23, concerning the insolvency of the bunker trader OW Bunkers (OWB), which resulted in hundreds of ship operators being exposed to the risk of having to pay for the same fuel twice. Where a purchaser had already paid OWB for the fuel, but OWB had not passed the payment on to the physical supplier due to its insolvency, in many cases the purchaser was also obliged to pay the physical supplier where the latter had a right to lien the ship for non-payment of necessaries.

The claimant sought a declaration that the owner Member was not obliged to pay OWB, or its financiers, for the bunkers because, among other things, OWB was in breach of contract for failing to give good title to the bunkers under the SOGA. However, the English Supreme Court held that the SOGA did not apply to the bunker contract and that the parties had contracted on a different basis, under which technical points about title to the bunkers were irrelevant. As a result, the owner was obliged to pay OWB and/or its lenders for the bunkers whilst also remaining exposed to the physical bunker suppliers claiming entitlement to maritime liens. Members are referred to the Club's May, 2016 Soundings for more detail on this case and recommendations on how to avoid the issue in future, including a suggested protective wording.



In the BIMCO Bunker Terms 2018 an attempt has been made to strike a fair balance between the interests of buyers and sellers.

An owner can seek to protect itself from such a situation by incorporating provisions into their charterparties such as the BIMCO Bunker Non-Lien Clause 2014. Protective wording can also be incorporated into supply contracts, subject to negotiation. Where possible, a purchaser may seek to remove any retention of title provisions and/or include a requirement that the supplier must, as a condition precedent to any obligation or liability on the buyer's part, obtain the right to transfer title to any.

If the Master is asked to acknowledge receipt for bunkers on the charterer's behalf then wherever possible invoices should be stamped:

"The goods and/or services being hereby acknowledged, receipted for, and/ or ordered are being accepts and/or ordered solely for the account of the charterers [insert name] and not for account of said ship or her owners. Accordingly no lien or other claim against said ship can arise therefrom."

Standard Terms

In the BIMCO Bunker Terms 2018 an attempt has been made to strike a fair balance between the interests of the buyer and seller. For example, the sampling is to be carried out in the presence of both parties and at a mutually agreed point. Under this contract, the Master is also allowed to make reservations on the bunker receipt or in a letter of protest regarding quantity or quality. Furthermore, it sets a more generous time limit of 30 days from the date of delivery for any claim.

BUNKER CHECKLIST*

(some key points to consider)

1. Charterparty clauses

i) Detailed fuel specification requirements should be set out in charterparties including:
- Recognised fuel standard, eg latest version of ISO 8217
- Sulphur requirements – bunkers to comply with Marpol Annex VI, EU Sulphur Regulations and applicable regional legislation

ii) Bunkers to be suitable for ship's engines/auxiliaries

iii) Bunker quality, escalation, sulphur content clause:
- Bunker quality and dispute resolution clauses (e.g. BIMCO Bunker Quality Clause for Time Charters)
- Sulphur content provisions (e.g. Intertanko or BIMCO Sulphur Content Clause for Time Charters)

2. Bunker supply contracts

i) Check terms of contract – are there onerous time bars, limitations and exclusions and do seller's supply figures prevail?

ii) When does title in bunkers pass?

3. Lien avoidance

i) Incorporate the BIMCO Bunker Non-Lien Clause 2014, or a similar provision, into charterparties

ii) Supply contracts to include, where possible, a warranty that the seller has title to the bunkers

iii) If the Master is asked to acknowledge receipt for bunkers on the charterer's behalf then wherever possible invoices should be marked as being for charterer's account only:

"The goods and/or services being hereby acknowledged, receipted for, and/or ordered are being accepts and/or ordered solely for the account of the charterers [insert name] and not for account of said ship or her owners. Accordingly no lien or other claim against said ship can arise therefrom."

* This is only a summary guide and is not an exhaustive analysis of all issues that need to be considered.

4. Sampling

i) Drip samples to be taken throughout bunkering process at ship's manifold and in compliance with applicable contractual provisions

ii) Sample containers to be sealed in presence of Chief Engineer. Seal numbers of all samples should be recorded in the respective sample labels and bunker delivery notes

iii) Samples (including Marpol sample) to be retained in a safe place on-board

iv) One representative sample to be despatched to testing company promptly

v) Bunkers to be tested by a recognised fuel analysis scheme

5. Claims

i) Place charterer, supplier, and/or underwriters (hull, charterer's liability) on notice

ii) Letter of protest to be issued

iii) Sampling to take place by independent testing company and in accordance with any dispute resolution terms in the applicable contract

iv) Off-specification bunkers to be discharged (by charterer or supplier) if necessary

v) Damaged engine parts to be retained, photographic and written records to be taken

vi) Promptly check and comply with any short time bars

CONCLUSION

Damage caused to ship's engines from poor quality bunkers can be very costly, not only in terms of repair costs, but also de-bunkering costs and the loss of time incurred in dealing with the problem.

There are a number of practical steps which can be taken, as highlighted above, to try to minimise the problems that can arise.

Bunker claims tend to involve either claims made by suppliers for unpaid bunkers or claims brought under a charterparty or a supply contract for engine damage and other expenses or loss of time caused by the provision of off-specification bunkers. In addition, under-performance claims can arise. These types of claims generally fall within the scope of the Club's cover.

In the event that a bunker claim arises, the early involvement of the Club is crucial. This is in order that an appropriate expert can be appointed to preserve all available evidence, so that any short time bars can be complied with and so that the Member can benefit from the considerable experience and expertise that the Club has to offer in dealing with bunker related claims.

In the event that a bunker claim arises, the early involvement of the Club is crucial.

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