

THE CHARTERER

THE CHARTERERS P&I CLUB NEWSLETTER

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BUNKER CLAIMS – A CHARTERER’S DILEMMA REVISITED

This article aims further to develop the areas highlighted in the January 2006 issue of “The Charterer” dealing with charterers liability in relation to the supply of bunkers. In particular, the purpose of this article is to look more closely at the legal regime which potentially places liability upon a charterer for the supply of off spec bunkers which leads to vessel damage. We aim to examine the evidential burden upon both owner and charterer, the issue of causation and finally, potential solutions which can be implemented to improve a charterers position.

It is without doubt that the number of incidents involving quality of bunker disputes has increased and that, with the possible exception of Japan and Korea, (where for some inexplicable reason bunkers appear to be of superior quality as compared with other countries) no geographical area is free from the risk of the supply of off spec bunkers. Advances in engineering technology, sophistication of machinery and financial pressures on both bunker suppliers and their customers have all led to a heightened risk platform. What steps can a charterer take to protect their interests and what is the true summary of the legal position in which they find themselves?

CONTRACTUAL LIABILITY

All major time charter forms, including the NYPE and Baltime, place a requirement upon charterers to provide and pay for all required fuel, save as otherwise agreed. English law has interpreted this contractual obligation to

amount to an absolute obligation on a charterer to provide bunkers of a sufficiently reliable quality to be used by a vessel without causing harm or interruption to service. Bunkers thus paid for and provided by charterers will be their property and effectively their responsibility. Clause 9(b) of

the 1993 form of the NYPE charterparty goes a stage further by requiring charterers to supply bunkers of a quality suitable for the ship’s engines and auxiliaries and conforming to agreed specifications. This more onerous requirement is simply a reflection of the fact that, generally, time charters include in their additional terms and conditions supplementary provisions relating to the quality of bunkers to be supplied and their suitability for the

particular vessel in question.

Such requirements, which provide detailed specifications for supply, can be a two-edged sword. While on the one hand a detailed bunker requirement clause will set out exactly the quality of bunkers that the charterer is obliged to supply (potentially creating scope for a claim where the requirements of the clause are not adhered to), such a clause may give scope for a charterer to avoid a bunker damage claim where they are able to show that the bunkers contracted for were generally within the specification required by a particular clause and that the damage in question has actually been caused by some unusual requirement of the particular machinery in question which could not have been known to charterers and was not identified by the particular provision in question.



JULIAN CLARK

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Clearly, a charterer will be obliged to supply bunkers which are of "good quality" and fit for their purpose. However there remains in relation to any quality of bunker dispute an overriding obligation to establish the actual cause of the damage and whether the incident was truly due to some defect or lack of quality in the bunkers, or, some other extraneous cause such as a specific requirement of the particular vessel's engines unknown to charterers, some other defect of the vessel itself, (whether that be an inherent or patent defect) a defect which has developed due to improper maintenance by the engine room staff or indeed any other reason. The burden of proof on the owner to establish causation is a high one, and arbitrators on both sides of the Atlantic have found in a charterers favour when an owner has been unable to meet this burden. Having said that a charterer must aim to comply with the particular requirements of any clause within a charter and should wherever possible take steps to confirm in advance of fixture that the suppliers with whom they generally contract on the routes envisaged by the charter are able to supply and meet the specification required.

LEGAL POSITION

Although there are a surprisingly limited number of cases before the English courts which have directly considered the issue of quality of bunkers (there are far more reported arbitration decisions, particularly in the US, in relation to this issue) it is clear that a charterer is faced with a number of difficulties in relation to the purchase and supply of bunkers. For example the bunker supplier with whom a charterer contracts is often merely undertaking to supply fuel in accordance with industry standards, either due to their own terms and conditions or the limited requirements communicated to a charterer by an owner. Another example of the legal disadvantage faced by a charterer is that the terms of the sale contract will generally be favourable to the supplier (limitation provisions, general exclusions and time limits for claims) with the charterer having limited scope to re-negotiate what often amounts to a "take it or leave it" deal.

Where the odds are stacked against a charterer and a claim arises the issue of causation is particularly relevant in quality of bunker claims. When an engine breakdown occurs, the question is whether this breakdown has been caused by the quality of fuel supplied, some inherent defect or fault in the machinery, a lack of maintenance or some other cause or a combination of various causes.

There may also be issues relating to a "break in the chain of causation" where the vessels own engineering staff should have been aware of a problem but have failed to take immediate steps to avoid potential serious damage by, for example, continuing to use a fuel having been aware of the potential off spec nature and risk of vessel damage. In any quality of bunker case an owner will be under a duty of mitigation to limit the extent of damage by, amongst other measures, transferring subject bunkers to storage tanks and utilising other "on spec" fuel where possible.

The potential problems do not however stop there and issues in relation to risk and legal ownership of bunkers, where there is a time charter chain, shut out cargo due to carriage of alleged off spec bunkers in storage spaces, trading capacity due to limited fuel, off loading and resultant storage and environmental issues, all have to be considered.

EVIDENTIAL REQUIREMENTS

Perhaps more than in any other area the immediate preservation of evidence is extremely important in quality of bunker disputes in order to ascertain the cause of any incident. Far too frequently the contemporaneous evidence retained consists of merely advance supply samples and samples taken following the incident. It is however extremely important to obtain as much evidence as possible. The evidential list is exhaustive but should include as a minimum samples of fuel and sludge from all accessible, tanks, lines and machinery spaces; all documentary evidence including, but not limited to, invoices, bunker receipts, stem documents, engine and deck logs, as well as the retention and preservation of any damaged parts, filters and debris. It is also very

important to note that evidence as to causation may not be found in the most obvious place. Experts in the field can advise as to what samples, and other physical evidence should be obtained and retained. It may often be the case that residues in slop tanks and sludge samples in fairly inaccessible places can prove to be worth more than their weight in gold when a charterer faces a serious financial claim from an owner alleging not only interruption to service but excessive and expensive vessel damage.

PRACTICAL SOLUTIONS

Two important statements should serve as guidelines in avoiding loss in relation to such claims.

First of all, "prevention is better than cure", secondly, "if you face an exposure make sure that you can pass it on".

On the prevention side, wherever possible charterers should liaise as closely as possible with owners to ensure that their standard bunker suppliers are able to meet the requirements for the vessel in question. It may be sensible to investigate with the owners operations department whether they have any prior history of both good and poor bunker suppliers highlighting any incidences where they have experienced claims or difficulties following the supply from a particular jurisdiction or supplier. Clearly, such suppliers and jurisdictions should, wherever possible, be avoided.

While often commercially difficult, charterers should also try to ensure that any requirements in relation to their obligations under a time charter concerning the supply of bunkers are back to back with their bunker supply contract.

Charterers would also be advised, wherever possible, to make arrangements together with owners and their bunker suppliers for a standard and agreed process to be followed on a supply, for example storage in separate tanks and agreed analysis of samples prior to use. Consideration may be given to agreeing a survey/analysis procedure with both owners, sub charterers and suppliers. Once again such arrangements should be "back to back" in all applicable contracts.

Charterers should take care to ensure, wherever possible, they are able to comply with the often severe time limits in bunker supply contracts and attempt to obtain likewise limitation protection in relation to any claim from an owner, although it is accepted that commercially this is often extremely difficult.

Notwithstanding whatever quality checks, performance histories and relationships charterers have it is unfortunately likely that, at some point, a charterer will face a bunker contamination claim. In such circumstances, a charterer needs to obtain the best evidence available as quickly as possible. It would therefore be sensible for charterers to include within their standard charterparty additional terms, a clause which obliges the owner to give immediate access to all evidence and records whenever there is a potential quality of bunker claim. Access to such records should extend to all maintenance records and engine manufacturers reports and not be limited to a particular voyage, as the problem (and more importantly evidence of it) could well pre-date charterers involvement with the ship in question.

Charterers should also, where possible, include a provision in their charterparties allowing their experts to have full and uninterrupted access (together with owners experts and representatives), to all contemporaneous evidence, including interviews with engine room personnel and the right to attend on board the vessel and collect samples, not only immediate fuel samples, but samples of sludge and other physical evidence from all tanks and machinery spaces as deemed relevant by charterers appointed expert/superintendent.

Finally, one potential practical solution for all parties would be to agree at the time of contract (be that the bunker supply, head or sub charter) that such disputes are to be resolved by three-way mediation attempting to tie-in the owner, bunker supplier and charterer (and/or sub charterer) with an agreement that in respect of quality of bunker disputes, rather than engaging in what can often be extremely lengthy and costly litigation, the parties immediately agree to move into a mediation phase, where there can be a swift identification of the actual problem and the resolution of the dispute. There is clearly a benefit for all parties

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concerned in adopting such a process as quality providers (suppliers, charterers and owners) should be aiming to resolve quality of bunker issues so as to improve the business relationship between them allowing them to

concentrate on the real business of shipping and not the legal shipping business.

Julian Clark is a Partner at the International Law firm of Holman Fenwick & Willan.

CHARTERERS CONFERENCE PROVES POPULAR

We are pleased to announce that the conference hosted by The Charterers P&I Club and The Baltic Exchange held on 9th November proved to be very popular, with over one hundred and thirty people attending. Many of the delegates had travelled from as far away as Hong Kong, US, Dubai, Sweden, Holland and many more from throughout Europe.

The capacity audience comprising Members, other major charterers, academics in maritime law and professionals from all areas of the industry gathered at Trinity House London to hear four presentations given by leading experts in their field on a wide number of subjects highlighting issues directly affecting charterers.

Papers were given by Julian Clark, Partner at the law firm Holman Fenwick and Willan entitled (*Charterers Rights to Limitation of Liability*), Tim Eyre, Legal Counsel for Noble Group Hong Kong (*Managing Counter Party Risk*), Dr Nikos Nomikos, of Cass Business School (*Shipping Risk Management*) and Alex Gray, Managing Director Clarksons Securities (FFAs – A tool for the Charterer).



TIM EYRE

The Chairman of the meeting and the panel discussion was John Garthwaite, Head of Marine Reinsurance and Products at Price Forbes. In his summing up Mr Garthwaite praised the high quality of the presentations and for the organisation of the conference.



CHRISTOPHER ELSE

He also thanked Noble Group, Holman Fenwick and Willan and Charterers P&I Club for hosting the cocktail party at The Swiss Re Building ("The Gherkin") the night before.

Closing the meeting Christopher Else, Managing Director of Michael Else and Company Limited, Underwriting Agents of The Charterers P&I Club said, he was delighted with the response to the conference (which was over subscribed) and that the demand had clearly indicated that there was a keen interest in a forum dealing exclusively with charterers' problems and it was an initiative on which to build in the future.

Feedback and details of the conference can be found at www.else.co.uk

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