



THE BOSPHORUS ONLINE

Newsletter of Ülgener Legal Consultants / Law Office

SPECIAL EDITION

2020 REGULATION ON SULPHUR CONTENT OF MARINE FUELS (INCLUDING TURKISH STANDPOINT)

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1. Introduction

As it is known, the following changes shall take place next year regarding marine fuels:

- a. As per MARPOL¹ 14.1.3 (Annex VI), sulphur content of marine fuels (except for ECAs [Emission Control Areas] requiring a sulphur content of 0.10%) shall be maximum 0.50% m/m as of 1.1.20. (While this value used to be 4.5% before 2012, it was later dropped to 3.5%; and in 2016, the IMO "Marine Environment Protection Committee" decided on a content of 0.5% for the year 2020.)
- b. As per MARPOL 14.1.3 (annex VI), it shall be prohibited, as of 1.3.20, to carry on board any fuel with sulphur content higher than the value specified above.

2. Alternatives

From the specified day forward, shipowners will have only two alternatives without changing the main engine:

- a. Installation of a scrubber: This system disposes of unwanted chemicals by introducing alkaline water into the exhaust gas of the vessel (it is available in three types; which are open-loop, closed-loop, and hybrid). The vessels equipped with such system will not be affected from the changes mentioned above. In other words, such vessels will be able to continue using fuels with a sulphur content exceeding 0.5%. The downside of this alternative is that the scrubber costs 2-3 million USD (although it is claimed that it allows the shipowner to profit in the long haul). Considering not all shipowners can make such an investment and taking into account the vessels that do not have a long life ahead, we believe the other alternatives mentioned below have greater value.

First of all, the cost of a scrubber varies depending on the system in use. Even though the open-loop scrubber system that pumps the water used for cleaning the sulphur back into the sea is the cheapest among its alternatives, it is banned by many ports as it causes marine pollution. On the other hand, the closed-loop systems that store the contaminated water in the special tanks located on board are acceptable alternatives; however, they cost more than the former. Also, there is another system called hybrid scrubber, which stores the contaminated water in tanks at the port and pumps it out on the high seas. This system is high in price, though.

¹ International Convention for the Prevention of Pollution from Ships (MARPOL)
Annex I Regulations for the Prevention of Pollution by Oil (entered into force 2.10.83)
Annex II Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk (entered into force 2.10.83)
Annex III Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form (entered into force 1.7.92)
Annex IV Prevention of Pollution by Sewage from Ships (entered into force 27.9.03)
Annex V Prevention of Pollution by Garbage from Ships (entered into force 31.12.88)
Annex VI Prevention of Air Pollution from Ships (entered into force 19.5.05)

- b. The second alternative that a shipowner might choose is to start using compliant fuel. Here, there are two types of fuel available:
 - a. Using fuel with a sulphur content of 0.5%
 - b. Using gasoil with a sulphur content of 0.1% ("*ultra-low sulphur*") (which is the fuel that is used in the ECAs; therefore, it is a type of fuel available on the market)

Abovementioned fuels would naturally result in increased costs. As also indicated above, it is claimed that the cost of a scrubber would be more favourable in the long run than not getting it installed and using pricy fuels.

As it is seen, both options come with a cost increase for the shipowner, who can either get through the times ahead by reflecting such increased costs onto the freight rates as much as possible, or face major financial issues.

3. Non-availability of compliant fuel

It is highly likely that the fuel with the properties specified will not be available at almost all ports as of January 2020. Taking this into account, the IMO has devised a mechanism to clear shipowners from responsibility for using high-sulphur fuel even for a certain period of time provided they meet its requirements.

Accordingly, in the event of inability to procure the compliant fuel despite using reasonable endeavours, the master or the shipowner shall draw up a report that can evidence the reasonable endeavours used to find the compliant fuel required for the voyage where the vessel is located and at other ports that may be alternatives to such location, and immediately send such report to the authorities of the Port State and the Flag State at the destination.

In this context, the term "*reasonable endeavour to be used*" includes searching for availability of other fuel types that may be an alternative to the compliant fuel. In practice, this report is called "*FONAR*" ("*Fuel Oil Non-Availability Report*").

It is crucial to note that it is not a valid reason that the price of the compliant fuel is higher, and it is not possible to claim that the fuel could not be found based on such an invalid reason.

In the event of non-availability of the compliant fuel, provided that FONAR is drawn up and sent to competent authorities, vessels are allowed to navigate to the next port using non-compliant fuels. In this sense, vessels are not required to deviate from their routes in order to find the compliant fuel.

It is important to note that FONAR is not a certificate of exemption; it is rather one of the documents to be taken into consideration by the party states in the event of a potential sanction that may be imposed on a vessel that does not comply with the regulation.

In accordance with the guidelines for implementation of MARPOL:

- FONAR is not a certificate of exemption; and the competent authority who will examine it must be satisfied that the content of the report is true so that the report can be valid.
- In the event the report is unsatisfactory or FONAR documents are submitted repeatedly, the competent authority may require additional documents and evidence that support the claims of non-availability of the fuel. Furthermore, the vessel / or its employer may be subject to more detailed examinations.
- The vessel / or its employer is required to use reasonable endeavours in order to find and use the compliant fuel. Such requirement includes being able to use a combination of fuels with different viscosity and sulphur content, heating it when necessary, or subjecting it to other processes.

4. Violation and Sanction

The regulation regarding the examination leaves it with the state parties to the convention how the regulation violations will be punished. From a general point of view, however, it is possible to summarize the sanctions as follows:

- Fines (it is expected that high amounts will be established to ensure deterrence)
- Detention of the vessel
- PSC bans (port entry bans)

Inspection of vessels and imposition of the sanctions above, if necessary, will normally take place within the boundaries of ports; effective and continuous inspection on the high seas, however, has its challenges. To tackle this, the IMO has banned carriage of such fuels on board in order to prevent use of non-compliant fuels outside ports. In this respect, if the port state discovers non-compliant fuel on board during its inspection, the vessel and its employer will face above mentioned sanctions.

Besides, vessels using fuels that violate the regulation will be tried to be detected via the "sniffer" inspections to be conducted using the sensors installed at port entries and on bridges or the drones in order to perform the emission checks at various stages. During the inspections on board, authorities shall have the authority to examine any documents and evidence regarding use of compliant fuel.

5. Liability Insurance / P and I

As explained above, this is a subject that has an exposure to certain fines and sanctions. Therefore, one cannot help but think about liability insurances. Will these companies that protect individuals against the liabilities they might come across in business life pay such fines?

It must be noted right now that, even though IG member clubs use certain expressions that are supportive of shipowners, our impression is that it is not easy to give an answer to the question above as there are still no strict rules regarding this matter, which is left up to the discretion of the club. This is also evidently revealed by the classification below:

- What is evident is that the fines and sanctions to be imposed for violation of the new regulation are not covered by the liability insurance.
- Moreover, the fines arising from inadvertently using or carrying non-compliant fuel (including breakdown of the scrubber system) may be covered by the insurance subject to certain conditions and at the discretion of the board of directors of the insurance company.

6. Issues in the Charter Party and BIMCO Clauses

Changing the properties of the fuel to be used in merchant vessels and the resulting change in the costs necessarily reflect on the time charter parties. As is known, fuel is an item that is borne by the time charterer (unlike the voyage charter agreements); and the shipowner places at the disposal of a time charterer the sections of their vessel that are suitable for carrying cargo for a certain period of time, charging a freight² that is calculated based on time; therefore, the fuel to be consumed by the vessel during such period will be collected from the time charterer. Taking this particular into account in parallel with the subject matter we have put under the scope, we come across the following challenges:

- All of the particulars explained above applies to time charterers, as well; if the vessel has no scrubber system, the time charterer will use the fuel with the properties described during the term of the contract, or draw up a FONAR if they are unable to find the fuel, and submit the report to relevant authorities. Otherwise, the sanctions mentioned above may be imposed. The real issue comes into play right at this point as some of the sanctions directly target the vessel. For example, if the vessel is banned from a certain port for a certain period of time, this will automatically affect the next business of the vessel after the charter party. As such, the only way for the shipowner to avoid the risks described is to know and be able to trust the party with whom they sign the charter party; otherwise, it will not be possible to avert this risk just like some other issues in said charter.
- On the other hand, it is recommended to add a clause to the time charter party since the issue of fuel is critical for the charter. In practice, there are some examples of standard clauses regarding the subject. The one that stands well with us is the clause³ devised by BIMCO as it is simple and will be accepted by everybody in general.

² We are of the opinion that the legal nature of the payment collected by the shipowner under a time charter party is freight. The term "hire" used in this context is wrong. For detailed information on this matter, please see Ülgener, Charter Parties Vol. 1.

³ **BIMCO 2020 Marine Fuel Sulphur Content Clause for Time Charter Parties**

a. *For the purpose of this Clause, "Sulphur Content Requirements" means any sulphur content and related requirements as stipulated in MARPOL Annex VI (as amended from time to time) and/or by any other applicable lawful authority.*

In this clause, the charterers warrant, on behalf of both themselves and their helpers (including the bunker supplier and bunker surveyor), that they shall comply with the relevant rules and shall indemnify the shipowners against the damages they will incur and any adverse outcomes that may arise. In the last subclause of the clause, the shipowners warrant that the Vessel they placed at the disposal of the charterers complies with the fuel regulation, and that the charterers will be released from liability for any damages and adverse outcome that may arise in relation to this matter if the charterers have performed the obligation they have undertaken above.

- Another subject that must be particularly emphasized is what will happen during the transition phase. What will become of the fuel with high sulphur content carried by a vessel placed at the disposal of a charterer in December 2019 for a 6-month period? Who will handle the cleaning of the bunker tanks? This transition phase brings about these problems among others. If shipowners will enter into time charter parties for a period covering the end of 2019 and the months of 2020, they should absolutely make special adjustments to the contract. To that end, the clause devised by BIMCO specifically for the transition stage includes the following solutions: ⁴
 - If the vessel is delivered to the charterer before 1.1.20, the vessel shall be supplied with sufficient compliant fuel to allow it to reach a port where compliant fuel is available at the effective date.
 - After 1.3.20, there shall be no non-compliant fuel on board for use by the vessel.
 - The Charterers shall, at their risk, time and cost, have any non-compliant fuel on board discharged and have the bunker tanks cleaned and readied for supply of compliant fuel at the date of the redelivery of the vessel to the shipowner or on 1.3.20, whichever occurs first.
 - The shipowners shall, at their risk, time and cost, have the empty bunker tanks cleaned and readied for supply of compliant fuel.

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- b. *The Charterers shall supply fuels to permit the Vessel, at all times, to comply with any applicable Sulphur Content Requirements. All such fuels shall meet the specifications and grades set out in this Charter Party. The Charterers also warrant that any bunker suppliers, bunker craft operators and bunker surveyors used by the Charterers shall comply with the Sulphur Content Requirements. The Charterers shall indemnify, protect, defend and hold harmless the Owners from any and against all losses, damages, liabilities, delays, deviations, claims, fines, costs, expenses, actions, proceedings, suits, demands arising out of the Charterers' failure to comply with this subclause (b), and the Vessel shall remain on hire throughout.*
 - c. *The Owners warrant that the Vessel shall comply with the Sulphur Content Requirements. Subject to the Charterers having supplied the Vessel with fuels in accordance with subclause (b), the Charterers shall not otherwise be liable for any losses, damages, liabilities, delays, deviations, claims, fines, costs, expenses, actions, proceedings, suits, demands arising out of the Owners' failure to comply with this subclause (c).*

⁴ **BIMCO 2020 Fuel Transition Clause for Time Charter Parties**

(a) Definitions

For the purpose of this Clause:

"Carriage Ban Date" means 1 March 2020.

"Carriage Ban" means the prohibition of the carriage for use of Non-Compliant Fuel as of the Carriage Ban Date.

"Compliant Fuel" means any fuel that meets the Sulphur Content Requirements with effect from the Effective Date.

"Effective Date" means 1 January 2020.

"Non-Compliant Fuel" means any fuel with a sulphur content of more than 0.50%.

"Sulphur Content Requirements" means any sulphur content and related requirements as stipulated in MARPOL Annex VI (as amended from time to time) and/or by any other applicable lawful authority.

(b) Requirements

(i) Before the Effective Date, the Charterers shall have supplied the Vessel with fuel so that on the Effective Date the Vessel shall have sufficient Compliant Fuel to reach the nearest bunkering port where Compliant Fuel is available.

(ii) No later than the Carriage Ban Date there shall be no Non-Compliant Fuel carried for use by the Vessel.

Together subclauses (b)(i) and (ii) are the "Requirements".

Notwithstanding the Carriage Ban, 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.

(c) (i) In order to meet the Requirements, the Charterers shall at their risk, time and cost ensure that any Non-Compliant Fuel remaining on board after the Effective Date shall be discharged from the Vessel's bunker tanks until such tanks are free of liquid and pumpable fuel latest by the Carriage Ban Date or the redelivery date of the Vessel, whichever occurs first; and

(ii) in respect of the bunker tanks that are free of liquid and pumpable fuels, Owners shall at their risk, time and cost ensure that such tanks are fit to receive Compliant Fuel, taking into account the type of Compliant Fuel that will be loaded into such bunker tanks.

Compliant Fuel shall not be loaded into a Vessel's bunker tanks until the steps described above in subclauses (c)(i) and (c)(ii) have been carried out in respect of such bunker tanks.

Once bunker tanks are fit in accordance with subclause (c)(ii), no Non-Compliant Fuel shall be loaded into such bunker tanks.

(d) **Disposal of Non-Compliant Fuel** - In respect of Non-Compliant Fuel, if any, which needs to be discharged from the Vessel in accordance with subclause (c)(i), Charterers shall dispose of such fuel in accordance with any applicable local regulations at Charterers' risk, time and cost.

(e) **Segregation** - Unless otherwise agreed between Owners and Charterers, each supply of Compliant Fuel shall be bunkered into empty tanks within the Vessel's natural segregation.

7. Conclusion / The Status in Turkish Practice

The Republic of Turkey is a party to the conventions indicated in this review; therefore, the particulars mentioned above shall necessarily come into effect as of 1.1.2020 on Turkish waters.

It is possible to talk about the following in general:

- Today, even though separate inspections are not conducted regarding sulphur content of fuels on board, the bunker delivery note on board is also checked during the inspections conducted on board by the port state. In the event of discovering any violation, the amount of the fine to be imposed is determined as per the Environment Law no. 2872.⁵ It is believed the same principle shall continue to be in effect also after 1.1.2020.
- It has been determined that it is not very likely for the new compliant fuel to be available at the Turkish ports (considering that the refineries in Turkey will not be able to manufacture such fuel -at least in the short term-) (as in the case of other ports). As such, shipowners have the options (as also explained above) to have a scrubber installed on their vessels, provided it is commercially feasible, or to use gasoil. It must be immediately noted that we do not believe the new fuel will be cheaper than gasoil even if it can be procured.
- Therefore, we think that, in the future, new ships will be built and shipowners will have scrubbers installed on their vessels as long as they can balance the books; otherwise, they will use gasoil for now. Due to the problems that may be encountered burning both gasoil and the new compliant fuel with the same engine and technical setup, it is clear this is how things are going to be until said fuel is unproblematically available on the market. In the long run, even, it seems not unlikely for the new compliant fuel to become a rather unfavorable marine fuel due to the reasons mentioned above unless the new compliant fuel will be much cheaper than gasoil.

⁵ We believe the following are included in the regulations that will be put into practice:

1. Environmental Law no. 2872 ("*Law on Principles of Emergency Response and Compensation of Losses in case of Contamination of Marine Environment with Petroleum and Other Hazardous Substances*")
2. **Law on Reducing Sulphur Content of Certain Types of Fuel Oil**
 - This Regulation was prepared (a) based on Additional Article 6 of the Environmental Law no. 2872 dated 9/8/1983 and Articles 1, 2 and 9 of the Law no. 4856 dated 1/5/2003 on Organisation and Functions of the Ministry of Environment and Forestry, and (b) in parallel with the Directives 96/62/EC, 99/30/EC, 2000/69/EC, 2002/3/EC and 2004/107/EC of the European Union.
 - Relevant provisions of the Environmental Law no. 2872 dated 9/8/1983 shall apply in the event of violation of the provisions of this Regulation.
 - ARTICLE 1-** (1) The purpose of this Regulation is to define the procedures and principles related to reduction of sulphur dioxide emissions resulting from burning certain types of fuel oil in order to protect humans and the environment from harmful effects.
 - ARTICLE 2-** (1) This Regulation involves limitation of sulphur content of certain types of fuel oil or reduction of sulphur dioxide emissions in the maritime jurisdictions or designated contamination control areas in the territories of the Republic of Turkey, as well as inspection, sampling and reporting of certain types of fuel oil.
 - (2) Limitations to the sulphur content of certain types of petroleum-based fuel oil specified in this Regulation:
 - k) SO_x emission control areas: the sea area defined by the International Maritime Organisation (IMO) in "the MARPOL Convention Annex VI",**
 - ARTICLE 6-** (1) Any measures necessary are taken in order prevent use of marine fuels with sulphur content higher than 1.5% by mass in the SO_x Emission Control Areas within the maritime jurisdictions or contamination control areas of the Republic of Turkey. This provision applies to any vessels regardless of their flags, including those that begin their voyage outside the maritime jurisdictions of the Republic of Turkey.
 - (2) No Turkish flagged ship navigating within the SO_x Emission Control Areas defined in the "MARPOL Convention Annex VI" by the International Maritime Organisation may use marine fuels with sulphur content higher than 1.5% by mass.
 - (3) No passenger ship going on regular scheduled cruises may use marine fuels with sulphur content higher than 1.5% by mass when navigating within the maritime jurisdictions and designated contamination control areas in our country. This provision applies to any vessels regardless of their flags, including those that begin their voyage outside the maritime jurisdictions of the Republic of Turkey.
 - ARTICLE 7-** ("*Maximum sulphur content of marine fuels used by vessels at inland waters and at berth*") (1) (Amended first sentence: 11/12/2009-2009/15667 K.) Marine fuels with sulphur content higher than 0.1% by mass may not be used by the vessels listed below.
3. **Regulation On Administrative Fines to be Imposed as per the Environmental Law No 2872:** Article 20 of the Environmental Law no. 2872 dated 9/8/1983 sets out the administrative fines to be imposed in the event of violation of the law.



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Ulgener LC/LO, based in Istanbul, with its office right in the Shipping Center, where the most major Turkish ship holding groups have their headquarters, is a law firm dedicated mainly to shipping matters, with a wide scope including all kind of related issues, such as: P&I matters, such as cargo claims - disputes arising from bills of lading, crew claims, pollution, liens on vessels; as well as accidents, such as collisions, salvage, wreck removal and general average matters, etc. FD&D matters, such as disputes arising from voyage and time charterparties, i.e. forced freight & demurrage collection, liens on cargoes, etc. H&M, war and strike clauses and cargo insurance matters, such as salvage, general average adjustment, etc., also representing underwriters and providing legal advice regarding local and international law, collection of outstanding premiums on behalf of P&I Associations, Ship Finance - Sale & Purchase, as well as assisting foreign banks and other financial institutions, covering also mortgages and disputes arising out of mortgages, Enforcement of foreign arbitration and court awards, Advising shipowners and P&I Clubs regarding issues arising from Turkish as well as International maritime law, (legal correspondent of a P&I Club within International Pool) Also assisting owners for protection of their interests and avoiding conflicts on drafting charterparties, bills of lading, MOA's and other documentation, advising leading Turkish steel manufacturers for shipping related issues, Serving as legal advisers to Turkish Chamber of Shipping, also representing the Chamber at the Bimco Documentary Committee.

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