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JUST AROUND THE CORNER: IMO 2020 – GLOBAL SULPHUR CAP

"IMO 2020, the regulation to cut marine fuel sulphur emissions from 3.5% to 0.5% will set off a tsunami." – Tradewinds, 20 May 2019, IMO 2020.

"The operational challenges will be manifold, and the costs astronomical. S&P Global Platts Analytics estimates the total global impact of this rule on various sectors in the energy space, as well as other industries, will be in excess of $1 trillion over five years." – S&P Global Platts Analytics

THE REGULATIONS

Under the International Convention for the Prevention of Pollution from Ships ("MARPOL") Annex VI, from 1 January 2020, the sulphur content of any fuel oil used on board ships shall not exceed 0.50% m/m. MARPOL Annex VI also prohibits the carriage of fuel oil with sulphur content exceeding 0.50% m/m from 1 March 2020 onwards.

By way of the Section 3 of the Prevention of Pollution of the Sea (Air) Regulations, the MARPOL Annex VI has been adopted in its entirety in Singapore.

THE UNCERTAINTIES

The Regulations have not yet been tested in Court so there is no judicial guidance. However, on a reading of the Regulations, no grace period appears to be provided. Thus, if there is a carriage or use of non-compliant fuel, it is an immediate breach under MARPOL Annex VI.

The International Maritime Organization's philosophy is for equal and strict application of the Regulations to avoid market distortion. However, some Port Authorities or Flag States may not take such a strict approach.

Issues will arise if:

- a ship is unable to obtain low sulphur fuel.
- the fuel is not or becomes non-compliant because of inherent defects/properties.
- the scrubbers break down.
- the breach is due to residual non-compliant fuel in the tanks or pipes.

This leads to two common questions:

(1) Are there any available defences to a compliance breach?

The "Proper Chain" of Documents

Regulation 3 of MARPOL Annex VI states that there will not be any penalties if the (a) emission resulted from damage to the vessel or its equipment, (b) all reasonable precautions were taken after the occurrence of the damage or discovery of emission and (c) the owner/master did not act with intent or recklessly to cause damage. However, it remains to be seen whether said Regulation would cover inherent vice – for instance, if scrubbers fail due to a manufacturing defect or poor maintenance.

Nonetheless, in order to have any chance of availing themselves of the defences and exceptions, Owners must be able to show that they practiced due diligence, e.g.:

(a) When they took on fuel;
(b) In relation to scrubbers; and
(c) If fuel is unavailable.

This involves what we call the “Proper Chain” – proper planning, proper purchase, proper contracts, proper training, proper maintenance, proper operation, proper responses and proper records. A full set of records and documents is going to be the key to any defence.

(2) What approach is the Regulator in Singapore going to take in the case of breach?

Comply or Be Detained

The Regulator in Singapore is the Maritime Port Authority.

Section 9 of the Prevention of Pollution of the Sea (Air) Regulations provides that the owner and master may be liable on conviction to a fine not exceeding $10,000 or to an imprisonment not exceeding 2 years or both.

However, the relatively low level of the fine is unlikely to encourage compliance. Imprisoning a host of owners and masters is also not going to be practical. Rather, we believe that the Regulator’s approach towards enforcement is going to be to require compliance and detain the vessel until then.

The vessel would have to offload non-compliant fuel, clean its tanks and lines and then load compliant fuel. This would inevitably cause significant delays to the vessel’s voyage.

The costs and financial impact to Owners/Charterers by this approach would be considerable and is thus seen as a far better mechanism to deter breach and encourage compliance.

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