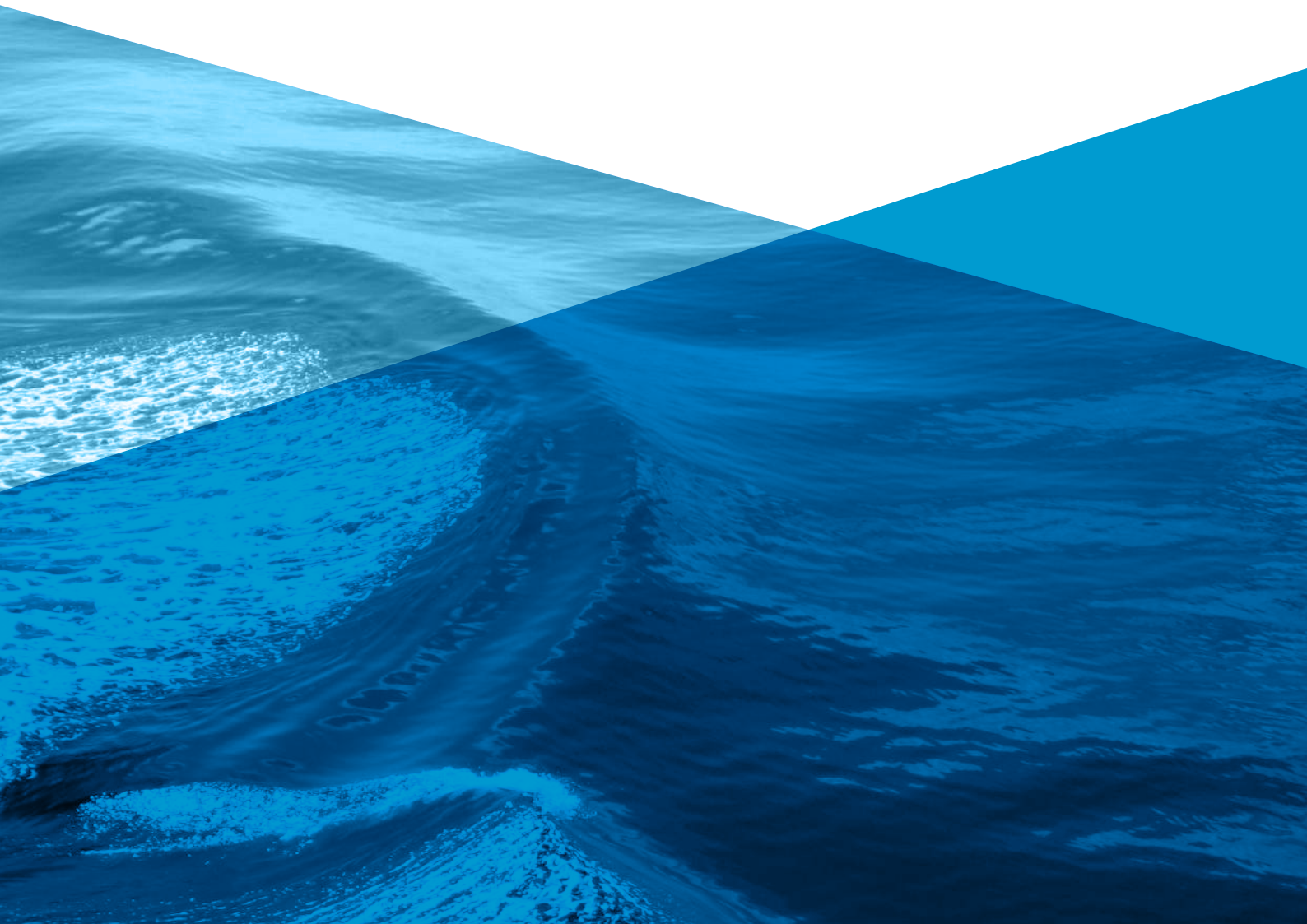


# **BIMCO AND INTERTANKO JOINT GUIDANCE: CONTRACTUAL ISSUES FOR SCRUBBER-FITTED SHIPS**

23 May 2019



## BIMCO AND INTERTANKO JOINT GUIDANCE

### CONTRACTUAL ISSUES FOR SCRUBBER-FITTED SHIPS

#### OVERVIEW

These Q&As have been produced jointly by INTERTANKO and BIMCO with the assistance of the North of England P&I Club. They focus on the potential contractual issues that parties should be aware of when chartering scrubber-fitted ships. The objective is to highlight and address the relevant clauses and concepts charterers and owners should take into consideration during their negotiations.

Much has been written about the introduction of the 'Global Sulphur Cap' of 0.50% m/m (mass for mass) for fuel oil under MARPOL Annex VI which comes into force on 1 January 2020; also the 0.10% m/m sulphur limit within emission control areas. Many owners have also already chosen their route to MARPOL Annex VI Regulations 14.1, 14.3 and 18 compliance which can be achieved in one of two ways:

1. By using fuel oil with a sulphur content that does not exceed 0.50% m/m, or 0.10% m/m while the ship is operating (**'low sulphur fuel oil'**).
2. By using *'equivalents'* which are alternative methods that are at least as effective in terms of emission reductions as using low sulphur fuel oil. 'Equivalents' includes the installation of **exhaust gas cleaning systems, or 'scrubber(s)'**. See MARPOL Annex VI Regulation 4 and the 2015 Guidelines for exhaust gas cleaning systems, adopted by resolution MEPC.259(68) (currently under review). Fuel oil cleaned by scrubbers will have a sulphur content above 0.50% m/m (**'high sulphur fuel oil'**).

Both BIMCO and INTERTANKO are neutral as to which option should be chosen. It is up to each individual owner to decide which option is best for their ship's operation after conducting a proper assessment of the pros and cons of each option including safety and operational issues, price differentials between low and high sulphur fuel oil, fuel availability, capital investment, payback time, trading patterns and charter rates. International, regional and national regulatory requirements may also play a part in this decision.

However, both Associations have been faced with a series of questions from Members who have fitted or are contemplating fitting scrubbers concerning how the use of a scrubber may impact on their contractual arrangements. These questions on both time and voyage chartering issues form the basis of the Q&A section below. They do not address questions relating to the technical and operational impact of installing a scrubber. Such information is available from numerous online sources.

Both Associations have decided, for the time being at least, not to develop a "standard" scrubber clause for time or voyage charter parties. The decision to install and operate a scrubber is seen primarily as a matter of commercial negotiation between owners and charterers relating to the division of costs and benefits. The need for a clause will, however, be kept under regular review.

We suggest that you consider the recommendations in this document to assess the need for a bespoke scrubber clause and/or any amendments to existing charter party terms. You may need to seek independent legal advice on a case-by-case basis to suit your particular chartering arrangements and trading patterns.

This document will be updated to include any new Q&As which will affect the contractual issues for scrubber-fitted ships.

BIMCO and INTERTANKO – 23<sup>rd</sup> May 2019

Contents

<b>1. TIME CHARTER ISSUES</b> .....	4
<b>General Recommendations</b> .....	4
<b>1.1. Additional clauses</b> .....	5
<b>1.1.1. How do I address MARPOL Annex VI Regulations 14.1, 14.3 and 18 compliance in my time charter?</b> .....	5
<b>1.1.2. Should I still use the BIMCO Bunker Fuel Sulphur Content Clause for Time Charter Parties 2005?</b> .....	5
<b>1.1.3. Why do I need the BIMCO 2020 Marine Fuel Sulphur Content Clause for Time Charter Parties?</b> .....	6
<b>1.1.4. Do I need to add the BIMCO 2020 Fuel Transition Clause for Time Charter Parties ?</b> ...	6
<b>1.1.5. Why do I need the INTERTANKO Bunker Compliance Clause for Time Charterparties?</b>	6
<b>1.2. Bunker provisions</b> .....	6
<b>1.2.1. Do I have to specify anything new about bunker requirements if I have a scrubber?</b> ..	6
<b>1.2.2. What if there is no contractual sulphur cap in the charter party?</b> .....	7
<b>1.3. Which existing time charter clauses should be reviewed?</b> .....	7
<b>1.3.1. Description of scrubber system</b> .....	7
<b>1.3.1.1. What types of scrubbers are there?</b> .....	7
<b>1.3.1.2. What should I say about the scrubber system installed?</b> .....	8
<b>1.3.2. Indemnity</b> .....	8
<b>1.3.3. Breakdown/malfunction</b> .....	8
<b>1.3.4. Maintenance &amp; Repairs</b> .....	9
<b>1.3.4.1. What if the scrubber requires periodic maintenance?</b> .....	9
<b>1.3.4.2. Will the ship be off-hire if the scrubber breaks down/malfunctions?</b> .....	9
<b>1.3.5. Drydocking</b> .....	9
<b>1.4. Is there an impact on the performance warranties?</b> .....	9
<b>1.5. Who is responsible for supply of scrubbing agents and scrubber waste removal?</b> .....	10
<b>1.6. What are the consequences of non-compliance with MARPOL Annex VI Regulations 14 and/or 18?</b> .....	10
<b>2. VOYAGE CHARTER ISSUES</b> .....	11
<b>General Recommendations</b> .....	11
<b>2.1. Which clauses should be reviewed for ships using a scrubber?</b> .....	11
<b>2.2. What happens if the required fuel oil is not available at the intended bunkering port?</b> ...	11

2.3. What will be the consequences of non-compliance with MARPOL Annex VI Regulations 14 and/or 18? .....	11
2.4. Will Worldscale distinguish between a ship using a scrubber and one using compliant fuel oil?.....	12
<b>3. GENERAL CONTRACTUAL ISSUES .....</b>	<b>13</b>
3.1. Can owners ask charterers to pay towards the cost of installation of a scrubber? .....	13
3.2. Can charterers force an owner to install a scrubber?.....	13
3.3. Can charterers exercise a lien on a scrubber?.....	13
3.4. What about bunker supply contracts? .....	13
3.5. Who is responsible for enforcing compliance with MARPOL Annex VI Regulations 14 and/or 18? .....	14
3.6. What are the consequences of non-compliance with MARPOL Annex VI Regulations 14 and/or 18? .....	14
3.7. In which ports are open-loop scrubbers prohibited? .....	14
3.8. Where do I discharge scrubber waste? .....	15
3.9. What happens between 1 January 2020 and the entry into force of the amendments to MARPOL Annex VI on 1 March 2020 (the “Carriage Ban”)? .....	15

## 1. TIME CHARTER ISSUES

### General Recommendations

We recommend that if you are time chartering a ship fitted with a scrubber, you incorporate, as a minimum, the following:

- A clause that provides for compliance with MARPOL Annex VI Regulation 14.1, 14.3 and 18, such as the INTERTANKO Bunker Compliance Clause for Time Charterparties – General Provisions; or the BIMCO 2020 Marine Fuel Sulphur Content Clause for Time Charter Parties; ([see 1.1](#)) and
- In the description of the fuel oil to be provided by charterers, add that the maximum sulphur content should not exceed the maximum sulphur content warranted by the scrubber manufacturer (likely 3.50% m/m). ([see 1.2](#))

In addition, we recommend that parties consider and/or review the following contractual issues ([see 1.3](#)):

- Description of scrubber system including the warranted maximum sulphur limit for fuel oil used and the sulphur content emission level to be achieved (see [1.3.1](#));

- Indemnity provisions for losses and delays arising from issues such as (1) off-spec fuel and/or non-compliance with MARPOL Annex VI Regulations 14 and 18, (2) fines, (3) detentions, (4) delays, (5) removal of fuel oil and (6) any guarantees which have been put up ([see 1.3.2.](#));
- Malfunctioning/breakdown of scrubber ([see 1.3.3.](#));
- Maintenance clause allocating responsibility for maintenance if the cost of the scrubber has been shared ([1.3.4.1.](#));
- Off-hire clause ([see 1.3.4.2.](#));
- If the scrubber is going to be installed during a dry dock under the charter party, review the Dry Docking Clause ([see 1.3.5.](#));
- Performance warranties addressing the impact on ship performance when operating the scrubber ([see 1.4.](#)); and
- Allocation of responsibility (including loss of time) for disposal of waste from a closed-loop or hybrid scrubber ([see 1.5.](#)).

## **1.1. Additional clauses**

### **1.1.1. How do I address MARPOL Annex VI Regulations 14.1, 14.3 and 18 compliance in my time charter?**

Both BIMCO and INTERTANKO have produced Bunker 2020 Clauses that deal with MARPOL Annex VI Regulations 14.1, 14.3 and 18 compliance. These 2020 Clauses will also be relevant, as set out below, even where a scrubber is fitted, because both are based on meeting the Regulation 14 requirements of MARPOL Annex VI which can be achieved by using a scrubber. If the scrubber malfunctions then the ship may need to burn low sulphur fuel oil to comply with the 2020 limits.

Both clauses are equally valid and ready for use in time charters being negotiated now. Each has a different approach with the [BIMCO 2020 Marine Fuel Sulphur Content Clause for Time Charter Parties](#) addressing sulphur requirements as part of [BIMCO's Suite of Bunker Clauses for Time Charter Parties](#) and the [INTERTANKO Bunker Compliance Clause for Time Charterparties](#) taking a more comprehensive 'all in one' approach.

### **1.1.2. Should I still use the BIMCO Bunker Fuel Sulphur Content Clause for Time Charter Parties 2005?**

No. The BIMCO Fuel Sulphur Content Clause 2005 was developed in response to the introduction of Emission Control Areas (ECAs). The BIMCO 2020 Fuel Sulphur Content Clause replaces the BIMCO Fuel Sulphur Content Clause 2005. This new version of the clause addresses the global 0.50% m/m sulphur content regime that takes effect on 1 January 2020. The new version also covers operating in ECAs as well as in the current 3.50% m/m maximum fuel sulphur content regime. BIMCO

recommends that you replace the BIMCO Fuel Sulphur Content Clause 2005 with the BIMCO 2020 Marine Fuel Sulphur Content Clause in all new charters.

### **1.1.3. Why do I need the BIMCO 2020 Marine Fuel Sulphur Content Clause for Time Charter Parties?**

The BIMCO 2020 Marine Fuel Sulphur Content Clause is written as a simple, short and all-encompassing compliance provision covering the sulphur content requirements of MARPOL Annex VI. It also allocates responsibility for providing appropriate fuel under a time charter and contractual consequences of non-compliance. Although designed primarily for compliance with 0.50% m/m sulphur content marine fuels, the clause also provides for compliance when operating in ECAs and can help avoid disputes about who provides low sulphur fuel oil in the event of a scrubber breakdown or the non-availability of low sulphur fuel oil.

The BIMCO 2020 Marine Fuel Sulphur Content Clause for Time Charter Parties is designed to work together with existing time charter bunker clauses that already cover issues relating to the specifications, grades and quality/suitability of the fuel provided by charterers.

### **1.1.4. Do I need to add the BIMCO 2020 Fuel Transition Clause for Time Charter Parties?**

No. It is not applicable to scrubber-fitted ships and does not need to be added to your time charter party. [The Fuel Transition Clause](#) is designed specifically for ships that are not fitted with scrubbers but are required to switch to 0.50% m/m sulphur content fuel oil latest by 1 January 2020.

### **1.1.5. Why do I need the INTERTANKO Bunker Compliance Clause for Time Charterparties?**

INTERTANKO also has a clause available that covers compliance - the INTERTANKO Bunker Compliance Clause for Time Charterparties. It takes a broader approach to MARPOL Annex VI and other requirements and includes references to quality issues and industry best practice. It also covers speed and performance issues and fuel changeover, both of which are relevant to the use of 0.50% m/m sulphur content fuel oil as well as scrubbers. This has been produced as one clause because INTERTANKO does not have the equivalent to BIMCO's suite of bunker clauses that addresses other key bunkering issues.

## **1.2. Bunker provisions**

### **1.2.1. Do I have to specify anything new about bunker requirements if I have a scrubber?**

In the description of the grade and specification of fuel to be provided by charterers, we recommend that owners clearly state the maximum sulphur content of the required fuel to be delivered in order to allow the scrubber to operate in compliance with MARPOL Annex VI. Note that if the scrubber will not be used to (or cannot) scrub down to 0.10% m/m, in order to comply with the ECA requirements of MARPOL Annex VI Regulation 14.3-4, the bunker requirements in the charter party will need also to provide for the supply by charterers of 0.10% m/m sulphur fuel oil for use in ECAs.

The grade and specification of the fuel oil to be supplied will depend on the individual scrubber system installed on the ship. Owners may consider imposing a limit of 3.50% m/m sulphur content

in the charter party given that this has been the maximum permitted sulphur limit under MARPOL Annex VI Regulation 14.1 since January 2012. After 1 January 2020 the 3.50% m/m cap falls away and in the absence of such a cap the sulphur content of any high sulphur fuel oil available may increase.

As only a relatively small percentage of the world fleet is fitted with scrubbers, the demand for high sulphur fuel oil will drop significantly. The sulphur content of high sulphur fuel oil produced and available may in fact rise after 2020 as demand drops and refiners can make savings in the production phase by exceeding 3.50% m/m. Manufacturers' warranties for scrubber systems should therefore be checked to see if the installed scrubber is warranted to be capable of cleaning the exhaust gas to the required level when burning fuels with sulphur content in excess of 3.50% m/m. Owners may wish to consider specifying a sulphur limit in the charter party in accordance with the capability of the installed scrubber.

### **1.2.2. What if there is no contractual sulphur cap in the charter party?**

If there is no sulphur cap in the charter party, charterers will be permitted under the terms of the charter party to supply fuel oil with any sulphur content. So it is essential that the charter party fuel oil specification is tied in with the capabilities/warranties of the scrubber system installed. Even if the scrubber can achieve compliance with MARPOL Annex VI when fuel oil with above 3.50% m/m sulphur is used, this may impact on the ship's speed and performance warranted elsewhere in the charter party.

The output of sulphur emissions from the main engine at full speed needs to match the rated capability of the scrubber, otherwise a reduction in exhaust gas flow (emissions) and thus more power may be required. This needs to be reflected in the charter party.

Bunker clauses should also cover issues such as quality, liability, testing and sampling. This is however neither new nor scrubber specific.

### **1.3. Which existing time charter clauses should be reviewed?**

#### **1.3.1. Description of scrubber system**

##### **1.3.1.1. What types of scrubbers are there?**

A scrubber system is likely to be one of the following:

- Open loop (requiring untreated seawater)
- Closed loop (requiring fresh water and additives such as caustic soda or magnesium oxide)
- Hybrid (open loop at sea/closed loop in port or as required)

A scrubber system will use a variety of substances including seawater, fresh water or dry substances e.g. caustic soda, to remove most of the sulphur oxides from exhaust gases.



All scrubber systems will create waste from the substance used for cleaning plus the sulphur oxides and particulate matter removed from the exhaust gases.

#### **1.3.1.2. What should I say about the scrubber system installed?**

The charter party should include a full description of the scrubber system fitted (or to be fitted) as described by the manufacturer.

This should include the % of sulphur content the system can handle to achieve the equivalent of 0.50% m/m or 0.10% m/m (in line with the scrubber manufacturer's warranties).

#### **1.3.2. Indemnity**

In most time charter parties a general compliance clause establishes that the owners must comply with the relevant and applicable national and international laws and regulations, which includes MARPOL Annex VI. As the supply of bunkers under a time charter party is charterers' obligation, care should be taken to avoid disputes by contractually allocating responsibility and liability for compliance with MARPOL Annex VI. Owners may face sanctions, fines, delay, detention or other losses but the fault may lie with charterers. In extreme cases, the fuel supplied by charterers may need to be removed.

You should consider including specific indemnity provisions to address situations where owners are in breach of MARPOL Annex VI, but the fault lies with charterers. To address these issues, we recommend incorporating the BIMCO 2020 Marine Fuel Sulphur Content Clause for Time Charter Parties or the INTERTANKO Bunker Compliance Clause for Time Charterparties – General Provisions. Both clauses allocate responsibilities and contain indemnity provisions for the scenarios mentioned above.

Although not specific to scrubbers, the parties might want to consider circumstances when the fuel oil supplied by charterers complies with MARPOL Annex VI requirements and is on specification for ISO 8217, but causes damage to the engine for other reasons. Depending on the terms of the charter party, the fuel oil can comply with the bunker description but nevertheless not be suitable for burning in the ship's engines or auxiliaries, i.e. it is not *'fit for purpose'*. This was the case with the recent spate of quality issues with bunkers emanating from the US Gulf and elsewhere. This issue is covered in the INTERTANKO Bunker Compliance Clause for Time Charterparties (see subclause 1.1(c)) and the BIMCO Bunker Quality and Liability Clause.

#### **1.3.3. Breakdown/malfunction**

It is important to consider what might happen if the scrubber breaks down or malfunctions and the ship needs to burn low sulphur fuel oil to continue the voyage. Does the charter party make it clear which party is to provide low sulphur fuel oil and who pays for it? If charterers are only obliged to provide high sulphur fuel oil there may be a dispute over the difference in cost for providing low sulphur fuel oil during the breakdown period.

#### **1.3.4. Maintenance & repairs**

You should review the maintenance and off-hire clauses to allocate responsibility for any costs and loss of time if the scrubber needs periodic maintenance or breaks down/malfunctions and needs repair.

##### **1.3.4.1. What if the scrubber requires periodic maintenance?**

The scrubber is essentially a piece of equipment on the ship which owners are obliged to maintain. It has no greater status than any other item of equipment on board. Where owners and charterers have shared the cost of installation (see [3.1.](#) below), they may therefore consider reviewing or including maintenance provisions or extending any existing grace period for maintenance of equipment for which no deduction from hire takes place.

##### **1.3.4.2. Will the ship be off-hire if the scrubber breaks down/malfunctions?**

A defective scrubber would be captured by standard off-hire clauses in NYPE 46 or Shelltime 4. How the off-hire is calculated will depend on the particular clause. Under so-called 'net loss of time' off-hire clauses, charterers may invoke the clause only if they have suffered a loss of time as a result of the scrubber becoming defective. For a 'period' loss of time, i.e. from one event to another, the ship may be off-hire for the time of repairs and the duration of the breakdown. As with maintenance, owners may therefore negotiate a pre-agreed period of time for scrubber repair for which no deduction from hire takes place.

The breakdown or malfunction of a scrubber does not detract from the obligation to comply with MARPOL Annex VI. This will involve the immediate use of low sulphur fuel oil, if on board, which will carry with it a price differential for owner's account unless otherwise specified. If there is no low sulphur fuel oil on board this will carry certain regulatory consequences (see [1.6](#) below).

#### **1.3.5. Drydocking**

When a scrubber is installed during the charter period, the potential loss of time may be covered under the existing dry-docking clause. If you are negotiating a time charter party for a ship on which a scrubber will be installed, you may want to consider allocating any costs and loss of time resulting from the installation.

#### **1.4. Is there an impact on the performance warranties?**

The use of a scrubber might have an impact on the fuel consumption of the ship because additional fuel is required to power the scrubber. The impact on the engine could result in the ship not being able to sail at the full speed warranted by owners. If a ship cannot sail at the warranted full speed, owners might be in breach of the performance warranties under the charter party and/or any 'utmost dispatch' provision under the bill of lading contract. This in turn could expose owners to a claim for damages from charterers and/or third-party bill of lading holders.

As a consequence, owners should therefore not only state the maximum sulphur content of the fuel oil required but also amend the performance warranties so that they will not apply if charterers supply fuel oil with a sulphur content that exceeds the limit specified in the charter party.

If the ship needs to switch to low sulphur fuel oil to comply with local regulations e.g. where use of open-loop scrubbers is restricted or prohibited, the parties might want to consider whether the time required to changeover fuels should be excluded from the speed and performance evaluation. However, it should be noted that the procedure for changeover is in principle the same as has been applied for many years when entering and leaving an ECA. Under the INTERTANKO Bunker Compliance Clause for Time Charterparties (subclause 3), fuel changeover periods are excluded from speed and performance evaluations.

### **1.5. Who is responsible for supply of scrubbing agents and scrubber waste removal?**

Hybrid or closed-loop scrubbers will require scrubbing agents and will create waste. Therefore, you should allocate responsibility for arranging and paying for the supply of the scrubbing agents and waste removal. In the absence of an agreement, owners will be responsible for costs and loss of time for this supply and the removal of scrubber waste. Open-loop scrubbers do not use chemical agents but can produce waste – again, you should allocate responsibility for arranging and paying for the disposal of this waste.

### **1.6. What are the consequences of non-compliance with MARPOL Annex VI Regulations 14 and/or 18?**

Whether or not owners are in breach of the charter party for failing to comply with MARPOL Annex VI Regulations 14 and/or 18 will depend on the terms of the charter. Under a time charter party where it is charterers' obligation to provide the fuel oil, it needs to be established who is at fault, i.e. is the MARPOL Annex VI non-compliance caused by the ship or the fuel oil? Where the MARPOL Annex VI non-compliance is caused by the ship, for example by a malfunction of the scrubber, and this constitutes a breach of the charter party, charterers may be entitled to damages and compensation for loss of time or delay to cargo.

If the scrubber breaks down, and there is not enough low sulphur fuel oil on board to complete the voyage, the ship will be in breach of MARPOL Annex VI. Even if the crew has followed all recommended procedures and notified all required parties (including port of departure, next port of arrival, flag, class, etc.), but the port State imposes sanctions such as fines or detentions for MARPOL Annex VI non-compliance on the ship, owners will be ultimately liable for the fines and consequences of the detention, unless the charter party provides otherwise.

Therefore, it is recommended to include provisions into your charter party that clearly allocate risks and liabilities - such as the INTERTANKO or BIMCO compliance clauses.

## 2. VOYAGE CHARTER ISSUES

### General Recommendations

We recommend that if you are voyage chartering a ship fitted with a scrubber, you consider and/or review the following contractual issues:

- Indemnity provisions for MARPOL Annex VI Regulations 14 and/or 18 non-compliance covering loss of time, fines, penalties, and damages resulting from the non-compliance ([see 1.3.2.](#));
- The liberty and deviation clause in the charter party on (1) whether it gives owners the right to deviate in the event of non-availability of the required fuel oil at the intended bunker port/allocation of responsibility, expenses, costs and loss of time and (2) to obtain confirmation from your P&I insurers that the insurance cover remains in place ([see 2.2.](#)); and
- If part of a COA, a review of the Bunker Adjustment Factor Clause.

### 2.1. Which clauses should be reviewed for ships using a scrubber?

You should review the laytime, demurrage and force majeure provisions in the context of a breakdown or malfunction of the scrubber.

### 2.2. What happens if the required fuel oil is not available at the intended bunkering port?

It is likely that supplies of high sulphur fuel oil will decrease after 1 January 2020 in response to reduced demand and may not be available at every bunker port. MARPOL Annex VI Regulation 18.2 states that ships are not required to deviate from their intended voyage or delay unduly in order to achieve MARPOL Annex VI compliance.

If owners cannot source high sulphur fuel oil for use with the scrubber, they will need to stem low sulphur fuel oil at their cost.

Owners should review the deviation provisions in their charter parties and check with their P&I insurers that this deviation will not prejudice their P&I cover.

### 2.3. What will be the consequences of non-compliance with MARPOL Annex VI Regulations 14 and/or 18?

In the event of non-compliance with MARPOL Annex VI due to malfunctioning of the scrubber, the fault will lie with owners who own the scrubber and provide the fuel oil. The contractual consequences will depend on the terms of the voyage charter party but generally, unless the charter party terms state otherwise, any delays will be for owners' account.

Other potential consequences of non-compliance with MARPOL Annex VI are (1) whether the ship has met the laycan; can give a valid notice of readiness at the loadport or work cargo there, (2)

whether it is obliged to deviate to take on board low sulphur fuel oil during the voyage and consequently is in breach of any obligation to proceed with utmost dispatch, (3) whether it can enter the discharge port, can give a valid Notice of Readiness there or work cargo, and (4) whether laytime or demurrage runs at the load or discharge ports.

If a ship cannot sail at the warranted full speed, owners might be in breach of their obligation to sail with 'utmost dispatch' to the discharge port under the voyage charter party and/or any bill of lading contract. This in turn could expose owners to a claim for damages from charterers and/or third-party bill of lading holders.

#### **2.4. Will Worldscale distinguish between a ship using a scrubber and one using compliant fuel oil?**

At present, the consensus from Worldscale is no. They are currently awaiting prices for low sulphur fuel oil and will use best practice to ensure that prices used for Worldscale are relevant for 2020.

This will mean that for those ships using scrubbers and burning high sulphur fuel oil, the flat price will be based on a low sulphur fuel oil under the Worldscale nominal scale, which may be more expensive until bunker grade prices align. Owners may consider specific clauses to address this.

### **3. GENERAL CONTRACTUAL ISSUES**

#### **3.1. Can owners ask charterers to pay towards the cost of installation of a scrubber?**

In general, if owners decide to install a scrubber, installation will be at their cost. We are aware of some owners who have negotiated a commercial allocation of the cost of installation of a scrubber for a long-term fixture between themselves and charterers, given that charterers will benefit from fuel cost savings.

#### **3.2. Can charterers force an owner to install a scrubber?**

The answer to this question will depend in each case on the provisions of the charter party. However, in general, it seems unlikely that charterers would be able to compel an owner to install a scrubber in order to comply with the new global sulphur limit. This is because the new sulphur limit can be met either by using low sulphur fuel oil or by installing a scrubber.

One possible scenario where charterers could try to force an owner to install a scrubber would be under a long-term time charter (concluded before 1 January 2020 and ending after that date) in which owners warrant that the ship can trade worldwide and charterers are to supply a specified grade of fuel oil with a sulphur content of max 3.50% m/m. Charterers may seek to argue (following the rationale of the English Court in The Elli and The Frixos dealing with the requirement that tankers be double-hulled) that owners are obliged to fit a scrubber in order for the ship to meet the worldwide trading warranty whilst charterers are supplying fuel oil with a sulphur content of max 3.50% m/m.

However, the probable legal outcome is that charterers (or owners) would be obliged to supply low sulphur fuel oil and charterers would be compensated for (or owners will need to bear) the difference between the cost of the low sulphur fuel oil actually supplied and the notional cost of the charter party grade of high sulphur fuel oil.

This issue is unlikely to arise under charter parties concluded after 1 January 2020 when the full impact of the new global sulphur limit is known and no doubt owners and charterers will expressly deal with the issues of compliance, the fitting of scrubbers and cost-sharing.

#### **3.3. Can charterers exercise a lien on a scrubber?**

Charterers who have contributed to the cost of installation of a scrubber cannot exercise a lien under English law on the scrubber unless there is a specific contractual provision in the charter party or separate agreement.

#### **3.4. What about bunker supply contracts?**

The BIMCO 2020 Marine Fuel Sulphur Content Clause stipulates that charterers should select bunker suppliers and barge operators who are also obliged to comply with MARPOL Annex VI. The [BIMCO Bunker Terms 2018](#) not only provide a fair and harmonised set of terms and conditions for buying bunkers but also offer a 30-day time bar on quality claims (unlike the much shorter time bars in supplier's own terms which could cause problems when the new fuels start to be used).

The INTERTANKO Bunker Compliance Clause likewise provides that bunker suppliers shall comply with MARPOL Annex VI. Parties may also consider inserting appropriate indemnity provisions into their bunker supply contract. The [INTERTANKO MARPOL ANNEX VI Clause for Bunker Supply Contracts](#) may be added to any bunker supply terms that do not already refer to MARPOL Annex VI requirements. This clause requires bunker suppliers to warrant they comply with MARPOL Annex VI, including the provisions relating to bunker delivery notes and sampling.

### **3.5. Who is responsible for enforcing compliance with MARPOL Annex VI regulations 14 and/or 18?**

The IMO is a specialised agency of the United Nations and has no authority to enforce the regulations of the MARPOL annexes. The primary responsibility for ensuring compliance with MARPOL Regulations lies with the flag State administration. If non-compliance is identified, the flag State will evaluate what action or enforcement response is required.

The MARPOL Convention furthermore authorises port State authorities to perform port State control inspections and to investigate and/or consider enforcement actions for pollution incidents in their territorial waters. The port State has no authority to sanction any non-compliance with MARPOL Annex VI outside its territorial waters. The port State can only report to the ship's flag State where it believes it has detected non-compliance. The port State can sanction the violation of its local environmental and criminal laws within its jurisdiction which usually correspond with a violation of the MARPOL Annex VI.

### **3.6. What are the consequences of non-compliance with MARPOL Annex VI Regulations 14 and/or 18?**

Sanctions against ships for breach of MARPOL Annex VI are determined by the port States which have enacted the regulations into local law. Depending on local law, fines, which vary from State to State, can be imposed against owners or the Master. There may be both civil and criminal penalties for MARPOL Annex VI violations, including imprisonment.

If a port State imposes fines for non-compliance on the ship, owners would be responsible for paying those fines. Depending on the terms of the charter party, they might be entitled to an indemnity from charterers. While the fines will vary from jurisdiction to jurisdiction the wording of the MARPOL Convention requires that these be *'adequate in severity to discourage violations ... irrespective where the violations occur'*.

### **3.7. In which ports are open-loop scrubbers prohibited?**

While use of an open-loop scrubber is permitted under MARPOL Annex VI, an increasing number of ports are placing more stringent restrictions on their use including prohibition of the discharge of washwater in port or territorial waters, or only allowing it under certain conditions. For a ship with an open-loop scrubber, this then means that the ship will have to use low sulphur fuel oil.

It is expected that more States will prohibit the discharge of washwater from open-loop scrubbers into their territorial seas and/or inland waterways. Owners who have open-loop scrubbers are

advised to check with local agents for up-to-date requirements when conducting their voyage planning. Check also with your P&I Club as many are compiling lists.

### **3.8. Where do I discharge scrubber waste?**

There may be logistical difficulties in arranging scrubber waste disposal from all types of scrubbers where reception facilities on the ship's trading route are unavailable or inadequate. IMO maintains a database of reception facilities as part of its Global Integrated Shipping Information System (GISIS).

Owners may ask their flag State to access this database in case of any doubt as to the availability of such facilities and/or check with local agents.

### **3.9. What happens between 1 January 2020 and the entry into force of the amendments to MARPOL Annex VI on 1 March 2020 (the "Carriage Ban")?**

MARPOL Annex VI Regulation 14.1 stipulates that the fuel oil used on board ships may not have a sulphur content of more than 0.50% m/m as of 1 January 2020.

All ships may still carry fuel oil with a sulphur content above 0.50% m/m up until 1 March 2020 (the "Carriage Ban Date").

The carriage of high sulphur fuel oil on board ships after 1 March 2020, is prohibited, unless the ships are fitted with a scrubber and/or the fuel oil is being carried as cargo.

BIMCO and INTERTANKO – 23<sup>rd</sup> May 2019