

SULPHUR CAP IN MARINE BUNKERS – A FRENCH PERSPECTIVE

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Entry into force on 1 January 2020 of the new sulphur cap for marine bunkers provided for by Annex VI of the Marpol Convention: a new challenge for the maritime industry

Human health and the environment are affected by emissions of sulphur oxide (SOx). The consumption of bunkers containing sulphur by ships constitutes one of the sources of these emissions. This is the reason why public authorities have targeted the maritime sector in their fight against air pollution. The new 0.5% sulphur cap in marine bunkers, as fixed by Annex VI of the MARPOL convention, arises in this context.

THE CURRENT AND FUTURE LEGISLATION

Annex VI of the MARPOL Convention 73/78 was adopted in 1997, entered into force in 2005, and was subsequently revised. It aims at limiting and monitoring progressively air pollution, and more specifically air pollution resulting from SOx emissions (Rule 14 of Annex VI)¹. Its provisions were integrated into European law by directive 199/32/CE as amended by directive 2012/33/EU (now codified by directive 2016/802/EU relating to a reduction in the sulphur content of certain liquid fuels). This directive was belatedly transposed by France under order No. 2015-1736 of 24 December 2015 which amended and supplemented article L.218-1 and following of the Code of the Environment.

Initially fixed at a maximum of 4.5% subsequently reduced to 3.5% as from 2012, Annex VI now provides for a 0.5% sulphur cap in marine bunkers for all vessels and the entire world after 1 January 2020 (as per an amendment of 2008, which came into force in 2010). According to the text, in case of averred unavailability of very low sulphur fuel by 2020, the deadline for the applicability of the new sulphur cap could be postponed until after 2025. However, in October 2016, the Marine Environment Protection Committee (MEPC) of the IMO, with the support of France, amongst others, decided to maintain 1 January 2020 as the date of entry into force of the new sulphur cap of 0.5%. It now for the maritime industry to be prepared for this new requirement.

Other measures aiming at the reduction of the emission of SOx by vessels have also been recently enacted. However, their applicability was limited to certain areas or types of vessels.

Indeed, the MARPOL convention allows the creation of Sulphur Emission Control Areas (SECA) in which the sulphur emissions are capped at 0.1%. Since 2015, the Channel and the Northern Sea belong to a SECA and the French State is currently supporting the creation of a new SECA in the Mediterranean Sea.

Directive 2012/33/EU (amending directive 1999/32/EC) also banned, as from 1st January 2015, the use of marine bunkers with more than 1.5% sulphur by passenger vessels calling in the European Union, as well as the use of marine bunkers with more than 0.1% sulphur by vessels berthed for more than 2 hours in a port of the European Union.

The table below recapitulates the current and future legislation.

SULPHUR CAP	CURRENTLY	AS FROM 1 JANUARY 2020
General	3.5%	0.5%
SECA	0.1%	0.1%
Passenger vessels in Europe	1.5%	0.5%
All vessels berthed in Europe (+ 2 hs)	0.1%	0.1%

The new sulphur cap of 0.5% therefore affects globally the entire maritime sector and raises questions and uncertainties.

¹ Rule 13 of Annex VI of the MARPOL convention also limits the emission of nitrous oxide (NOx). The legislation concerning the emissions of this gas are not considered in this article.

TECHNICAL AND FINANCIAL UNCERTAINTIES

3 main options are open to shipowners:

1. To use bunkers with a sulphur level does that does not exceed 0.5% (MDO² or ULSFO³). This option does not require major technical changes. However, the main and auxiliary engines will need to be adapted to the new type of fuel. This option however implies a significant increase of the fuel budget (the current difference between HFO⁴ at 3.5% and ULSFO at 0.5% would be approximately USD 250 per metric tonne). It could be more difficult for shipowners to charter their vessels, by reason of the increase of the price of the bunkers to be borne by the time charterer or to be passed on to the voyage charterers / cargo interests by way of freight increase, and, the unavailability of adequate bunkers in certain ports. The profitability of the vessel and/or of certain lines is to be considered further.
2. To install a scrubber⁵ subject to the approval of the equipment by the administration of the flag of the vessel. Recognised as compliant under the MARPOL convention, this option requires an immediate and significant investment, without any certainty as to its future profitability in the medium term, since it will depend in fact on the evolution of the price difference between HFO at 3.5% and ULSFO at 0.5% which currently remains unknown. Oil suppliers have indicated they have already started reducing their HFO volume, which suggests that the supply of ULSFO products should increase, and as a result the price difference could decrease. Conversely, a number of charterers have already indicated they would accept higher freight rates for vessels equipped with scrubbers, which suggests they consider there will remain a non-negligible price difference between the 2 types of products.
3. To install LNG⁶ propulsion which releases very limited or even no SOx emissions. However, such a modification can be extremely complicated or impossible for most existing vessels⁷. New shipbuilding with LNG propulsion implies a more expensive construction and LNG supply is currently available only in a limited number of ports.

Decisions as to compliance with these new regulations are not easy to take and give rise to a number of discussions⁸, while the availabilities of shipyards to install scrubbers by 1 January 2020 are shrinking.

LEGAL UNCERTAINTIES

In addition to the technical and financial questions, legal issues also arise.

Waste generated by scrubbers

Scrubbers generate waste that can be harmful to the marine environment. Certain categories of scrubbers will discharge this waste at sea⁹. If the IMO has not yet prohibited such a discharge, certain European ports have already done so. It is likely that this trend will continue and that this discharge of waste at sea will eventually be prohibited by the IMO¹⁰.

Oil fuel quality

The decision to use ULSFO to comply with the new requirements is likely to generate more litigation on fuel quality, in relation to the sulphur level, but also in relation to possible instabilities of the oil mixtures made by oil producers to reduce the sulphur level (clogging of filters, propeller breakdowns, etc.).

Construction

If the SOx emissions are beyond the legal requirements in spite of the installation of scrubbers, it is likely owners will be willing to pursue shipyards that may not have complied with the expected performance. Contractual terms with shipyards should therefore be carefully scrutinised.

2 Marine Diesel Oil.

3 Ultra Low Sulphur Oil. This covers in principle fuel the sulphur level of which does not exceed 0.1%. LSFO (Low Sulphur Oil) contains a maximum level of 1% sulphur. There is currently no agreed intermediary term. ULSFO in this article should be considered as reference to fuel which does not exceed 0.5% sulphur.

4 Heavy Fuel Oil.

5 Pollution control devices that use liquid to wash unwanted pollutants (e.g. SOx) from a gas stream.

6 Liquefied Natural Gas.

7 This option may be available for vessels requiring a limited volume of fuel (and therefore a relatively small LNG tank).

8 For instance CMA CGM chose LNG propulsion for its new containerhips, the Compagnie du Ponant will have its vessels supplied with MDO or GNL for its icebreaker, Maersk will use ULSFO, while Frontline, DHT, Star Bulk and Spliethoff are equipping their vessels with scrubbers.

9 The "open loop" devices with discharge at sea are less complicated and expensive than the "closed loop" system.

10 Certain scrubber manufacturers have stated the scrubbers can be easily adapted if this was to be the case.

Time charter

Issues concerning the respective liability of the parties could arise, and in particular:

- (i) As to the time and costs incurred for the maintenance of the scrubbers and/or the handling of the waste they generate;
- (ii) In case of clogging / damage to propellers / breakdowns resulting from the fuel supplied (ULSFO);
- (iii) In case of non-compliance of the fuel supplied with the sulphur cap (including ship detention, guarantee to be provided, delays and commercial losses, removing non-compliant bunkers, criminal fines, etc.);

It is therefore recommended to (re)negotiate very carefully charterparties to ensure that the risks/costs have in such situations have been clearly allocated between the parties (we consider that the risk should be borne by the time charterer, unless the vessel is not adapted to the new sulphur regulations).

Voyage charter

Given the uncertainties as to the availability of ULSFO fuel, it may be opportune to insert a clause in the charterparty providing for the possibility and consequences of a deviation (and/or a delay) to obtain compliant oil.

Insurance

The failure to comply with MARPOL new requirements could lead underwriters to consider the vessel is not seaworthy, and therefore not covered.

THE SANCTIONS IN CASE OF FAILURE TO COMPLY

The sanctions to be applied in case of non-compliant bunkers are determined by States.

As far as France is concerned, the relevant legislation has been enacted to sanction the breach of the regulations concerning sulphur emissions by vessels.

Article L218-15 provides for a maximum penalty of one year of imprisonment and/or a fine of Euros 200,000 against a master who has violated the rules of Annex VI of the MARPOL convention as set out at L218-2.1 or the other European regulations regarding sulphur emissions. This sanction is expressly applicable in relation to the 0.5% sulphur cap to be imposed as from 1 January 2020.

The owner or the operator of the vessel may also be liable for the fine if it was at the origin of the offence or did not take the necessary measures to avoid it (article L.218-20). French criminal case law considers that the charterer, or even the manager, can fall within this definition.

Additionally, if the offenders are not physical parties, the fine may be multiplied by 5 (article 131-38 of the Criminal Code). The fine can therefore reach an amount of Euros 1,000,000, in addition to the possible costs linked to the vessel detention by the French authorities which are to be borne by the owners. Article L.218-30 indeed provides that the authorities may detain the vessel and condition its release on the remittance of a guarantee.

It shall be a defence to prove that no compliant fuel was available, and the master gave notice to the flag administration and the port of destination, and despite best efforts it was not possible to obtain compliant fuel unless the vessel deviates from its intended voyage or the voyage is unduly delayed in order to achieve compliance.

AN EXPECTED FRENCH REPRESSIVE RESPONSE

The above sanctions are far from being theoretical.

The Paris MOU has already stated that Port State Control inspections shall be extremely strict as early as 1 January 2020 and the vessels may be detained in case of failure to comply with the new sulphur cap. The vessels will have to disclose their IAPP certificate (International Air Pollution Prevention), the bunker delivery receipts (BDR) and the oil record book. Analysis of oil samples taken on board will be conducted. In this respect, a specific « Concentrated Inspection Campaign » (CIC) conducted by several MOU (including Paris MOU) will focus on sulphur contents of marine bunkers from 1 September to 30 November 2018.

Various signals also lead us to believe the French state intends to adopt a firm repressive policy as far as violation of sulphur cap legislation is concerned.

In this regard, last spring, the Public Prosecutor of Marseilles commenced criminal proceedings against the master and the owner of the cruise vessel AZURA of the company P&O Cruises. They are pursued for allegedly having used marine fuel exceeding the 1.5% sulphur cap fixed for passenger vessels calling in France (according to our information, the level of sulphur alleged was 1.68%). After having been adjourned the case was eventually pleaded on 8 October 2018 before the criminal court of Marseille. The Public Prosecutor requested the court to hold the master liable for a fine of Euros 100,000, of which Euros 80,000 to be borne by the owners. He insisted on the fact the owners *“had wanted to save money in disregard of everyone’s health, in a context of major air pollution caused partly by cruises”*, while the master was well aware the fuel was beyond the applicable 1% sulphur cap. The owners and master argued that the 1.5% was not applicable because this rule was only applicable to passenger ships operating on regular services to or from European Union ports and the AZURA did not fall within this definition (they alleged it was not on a regular service). Several environmental societies, as civil parties, also presented claims against the defendants for damage to the environment.

The decision is due to be rendered on 26 November 2018.

The outcome of the case could give an idea as to the future trend so far as repression in France is concerned.

Another strong signal given by the government in its fight against air pollution is the release of a technical note on 21 March 2017 which defines and details the procedure to be followed in case of air pollution detected by drones. It relates to the use of drones equipped with sensors allowing them to detect emissions of vessels exceeding the authorised level of sulphur. In case it is exceeded, the public authorities are informed and immediately proceed to the taking of fuel oil samples on board the relevant vessel. A programme for the development of such “sniffer drones” is currently in progress.

It is therefore very likely that the new requirements will also fuel criminal litigation, unless the entire maritime industry is fully prepared to meet the deadline of 1 January 2020.