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BUNKERSPOT

THE FINAL COUNTDOWN

WILL SHIPPING PLAY BY THE RULES?

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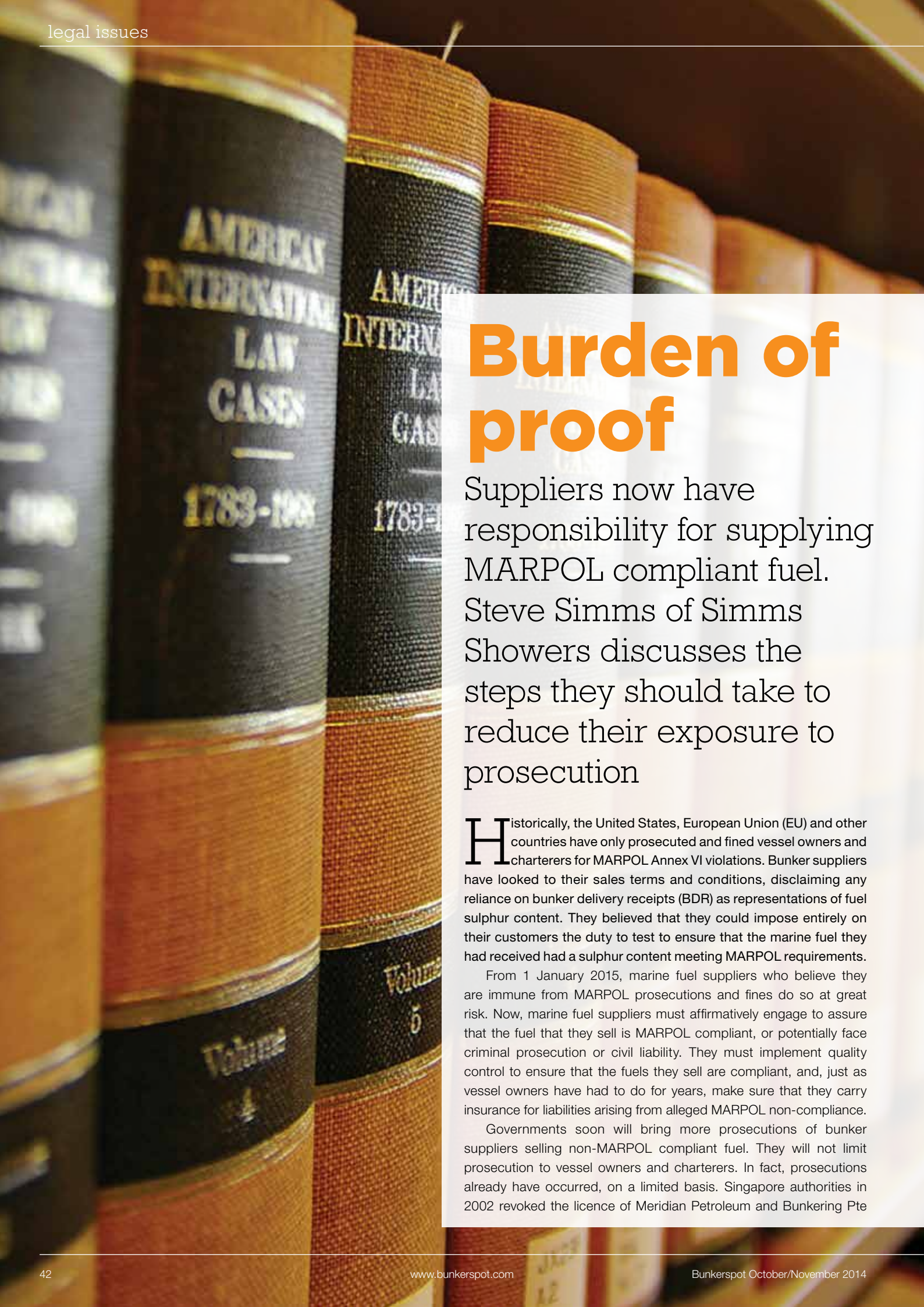

Burden of proof

Suppliers now have responsibility for supplying MARPOL compliant fuel. Steve Simms of Simms Showers discusses the steps they should take to reduce their exposure to prosecution

Historically, the United States, European Union (EU) and other countries have only prosecuted and fined vessel owners and charterers for MARPOL Annex VI violations. Bunker suppliers have looked to their sales terms and conditions, disclaiming any reliance on bunker delivery receipts (BDR) as representations of fuel sulphur content. They believed that they could impose entirely on their customers the duty to test to ensure that the marine fuel they had received had a sulphur content meeting MARPOL requirements.

From 1 January 2015, marine fuel suppliers who believe they are immune from MARPOL prosecutions and fines do so at great risk. Now, marine fuel suppliers must affirmatively engage to assure that the fuel that they sell is MARPOL compliant, or potentially face criminal prosecution or civil liability. They must implement quality control to ensure that the fuels they sell are compliant, and, just as vessel owners have had to do for years, make sure that they carry insurance for liabilities arising from alleged MARPOL non-compliance.

Governments soon will bring more prosecutions of bunker suppliers selling non-MARPOL compliant fuel. They will not limit prosecution to vessel owners and charterers. In fact, prosecutions already have occurred, on a limited basis. Singapore authorities in 2002 revoked the licence of Meridian Petroleum and Bunkering Pte

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Ltd, and suspended the licences for two months of Elf Trading, Tramp Oil and Bomin Bunker, after investigation showing sales of MARPOL non-compliant fuel. Significantly, some licences affected were those of physical suppliers, but others were of the traders which sold through the physical suppliers.

In November 2012, the European Parliament approved its Directive 2012/33/EU, 'amending Council Directive 1999/32/EC as regards the sulphur content of marine fuels,' that:

6. Member States shall, in accordance with regulation 18 of Annex VI to MARPOL:

(a) *maintain a publicly available register of local suppliers of marine fuel;*

(b) *ensure that the sulphur content of all marine fuels sold in their territory is documented by the supplier on a bunker delivery note, accompanied by a sealed sample signed by the representative of the receiving ship;*

(c) *take action against marine fuel suppliers that have been found to deliver fuel that does not comply with the specification stated on the bunker delivery note;*

(d) *ensure that remedial action is taken to bring any non-compliant marine fuel discovered into compliance.*

Along with this, MARPOL VI Annex Regulation 18, ratified by many nations, calls for regulation and enforcement actions against bunker suppliers. Clearly, both the European Parliament Directive, and MARPOL regulations adopted by many countries, contemplate direct action against bunker suppliers for MARPOL violations.

There is no reason for bunker suppliers to believe that such actions are not imminent.

From 1 January 2015, vessel charterers, owners and operators operating in emission control areas (ECA) will be required to use marine fuel with only 0.10% sulphur content. In California, state regulations already require ocean vessels sailing to and from California, within 24 nautical miles (nm) of its shores, to use fuel with 0.10% sulphur content.

Many ports lack ready availability of low sulphur fuel. Responding to the difficulty of obtaining even 1.0% sulphur fuel, the US Environmental Protection Agency (EPA) on 26 June 2012 issued its *Interim Guidance on the Non-Availability of Compliant Fuel Oil for the North American Emissions Control Area*, providing for vessel owners and charters to file a 'Fuel Oil Non-Ability Report' (FONAR) voluntarily disclosing incidents where their vessels cannot obtain MARPOL-compliant bunkers. If the vessel cannot obtain compliant fuel, it must file a FONAR, containing details of the quality of fuel that the vessel owner did obtain. The EPA's FONAR Guidance also states, however, that:

The United States government also expects that vessel operators are vigorously preparing for the 0.10% m/m (1,000 ppm) MARPOL Annex VI ECA fuel oil sulphur standard that will become effective January 1, 2015, and that will likely necessitate the use of distillate fuel oil. We expect that vessel operators will be prepared to operate their vessels using fuel oil that meets the 0.10% m/m (1,000 ppm) sulphur standard as soon as that standard takes effect.

According to the FONAR Guidance, any FONAR must contain:

A description of the actions taken to attempt to achieve compliance prior to entering the North American ECA, including a description of all attempts that were made to locate alternative sources of compliant fuel oil, and a description of the reason why compliant fuel oil was not available (e.g., compliant fuel oil was not available at ports on 'intended voyage'; fuel oil supply disruptions at port; etc). As mentioned above, the United States government does not consider the cost of compliant fuel oil to be a valid basis for claiming the non-availability of compliant fuel oil). Include names and addresses of the fuel oil suppliers contacted and the dates on which the contact was made ...

Significantly, the ability to file FONARs in the United States does not decrease any demand for MARPOL-compliant fuel, because, as the FONAR Guidance states:

The filing of a Fuel Oil Non-Availability Report does not mean your ship is deemed to be in compliance with MARPOL Annex VI. However, the United States government will take into account the information provided in your Fuel Oil Non-Availability Report, as well as all relevant circumstances, to determine the appropriate action to take, if any, in response to the MARPOL Annex VI fuel oil sulphur standard violation.

Consequently, the availability of FONARs gives small comfort to those buying marine fuel for use in ECAs and does little to lessen the demand for MARPOL-compliant fuels for operation in ECAs. The use of FONARs themselves raises liability, because if the fuel quality is not correctly reported in the FONAR, the vessel operator also can be liable in damages for a false statement to the United States government.

To meet the great demand for fuel with the 0.10% content requirement, bunker suppliers have limited options. They can buy low sulphur crude stocks at a premium price. They can invest in similarly expensive de-sulphurisation units. Finally, they can attempt to blend a low sulphur fuel which uses a blend of cutter stocks, non-marine low sulphur fuel, and low sulphur crude. This blended fuel, however, often is unstable, has low lubricity and is subject to microbial contamination.

Before a vessel arrives in port, it must have low sulphur fuel onboard and change over to that fuel before arrival. The risk of reaction and instability increases during the changeover process. One result may be that the fuel consumed may have a higher sulphur content than MARPOL, or national or California regulation permits. The 0.10% (that is, one hundredth of one part) sulphur requirement is a very precise figure. Fuel supplied can often exceed MARPOL-permitted sulphur content.

What was not a concern under earlier standards, therefore, or what at least was a lesser concern of bunker suppliers because of a greater margin for error, now must become so.

The US law implementing MARPOL, the International Convention for the Prevention of Pollution from Ships, and its Annex VI, is the

Act for Prevention of Pollution by Ships (*APPS*).

APPS defines violations involving pollution, including air pollution, discharges by ships of 'harmful substance[s]' and 'incident[s]' in 'navigable waters' including the territorial sea of the United States and United States internal waters. Those prosecuted include 'operator[s], defined to include 'any other person', in addition to a demise charter, 'who is responsible for the… supplying of the vessel [.]. This includes bunker suppliers.

The EPA, with the assistance of the US Coast Guard (USCG), has the duty to enforce APPS. The Act provides that vessels, and their marine fuel tanks, may be inspected at any port or terminal within US jurisdiction or anywhere, after the secretary has come to a reasonable belief that an APPS violation has occurred.

There can be severe penalties for violations, including criminal penalties and civil fines and penalties. Civil penalties can be up to $25,000 for each violation and up to $5,000 for each false statement or representation.

Under APPS, vessels violating the MARPOL protocol, Annex IV, as enacted in APPS, may be liable *in rem* and subject to arrest for the amount of any criminal fine or administrative penalty. They may be arrested in the United States District Court of any district 'in which the ship may be found'.

APPS prosecutions can include bunker suppliers. Any person or entity violating APPS can be criminally prosecuted or face civil fines. Under APPS, the term 'person' means an 'individual, public or private corporation, partnership, association…' There are similar provisions concerning civil penalties, also for the prosecution of 'a person' violating the MARPOL protocol, Annex IV.

In the third quarter of 2014, the EPA, cooperating with USCG, began a new enforcement initiative. The USCG began to board vessels to collect bunker samples, testing them to confirm that the vessel bunkers meet the present 1.00% sulphur limit which applies within the North American ECA. The EPA has also conducted, with the USCG, aerial surveillance of vessel smokestacks to measure whether plumes show violation of applicable sulphur limits. The EPA issued subpoenas to ship operating companies operating ships within the North American ECA.

Although the EPA/USCG focus has been on ships and steamship lines, of course it is bunker suppliers which provide the fuel in the first place. APPS readily provides for US enforcement efforts to turn to bunker suppliers whose fuel exceeds the 0.10% MARPOL sulpur content limit. US law and regulation also already impose requirements on bunker suppliers, implementing the like requirements of MARPOL, require bunker suppliers to issue and keep BDR (see The United States Code of Federal Regulations, implementing APPS (40 C.F.R. § 1043.80, Recordkeeping and reporting requirements for fuel suppliers).

If, despite what a BDR represents about MARPOL compliant fuel, a vessel is found to violate APPS, the USCG may detain the vessel. Upon violation, the United States may refuse or revoke clearance for a vessel to proceed from the US port. This significantly damages the vessel owner and charterer, and the owner or charterer may then attempt to recover those damages from the bunker supplier.

Bunker suppliers may attempt to limit their liability to the shipowner through contractual clauses disclaiming warranty that their fuel is MARPOL compliant. Bunkers suppliers' sales terms and conditions now certainly should contain such terms, which include at least the following:

'Seek competent legal counsel to conduct an audit of your operations, to help assure that you are and will continue to be MARPOL-compliant'

Quality: Unless otherwise specified in the Contract, Products and/or Services shall be of the quality offered by Seller to its customers at the time and place of the delivery. SELLER EXPRESSLY EXCLUDES FROM THE CONTRACT AND DISCLAIMS ANY IMPLIED OR EXPRESS CONDITIONS AND WARRANTIES, INCLUDING THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. Buyer, having greater knowledge than Seller of its own requirements, shall have the sole responsibility for the prior selection of the particular grade(s) of Products and/or Services and acceptance thereof.

MARPOL Sample: By request of Buyer, a fourth MARPOL 73/78 Annex VI sample (the 'MARPOL sample') may be taken if Supplier is in agreement and per Supplier's policy. The MARPOL sample may only be used for purposes of confirming the sulphur content of the Products and such other matters as are specifically set forth in MARPOL Annex VI, Regulation 18. In instances where MARPOL Annex VI applies to the supply affected, the sample accompanying the delivery note pursuant to Regulation 18(6) of MARPOL Annex VI should, where reasonably practical, be drawn in accordance with Resolution MEPC.96 (47).

No Guarantee of MARPOL Compliance: Seller does not warrant or guarantee that any Supplier is compliant with MARPOL 73/78 Annex VI, Regulations 14 and 18, as they apply to marine fuel deliveries, nor will Seller be responsible for any costs, charges, or damages incurred by Buyer from lack or non-compliance of Marpol 73/78 Annex VI by either Supplier, Buyer, or the Vessel's' personnel or agents. Should Supplier provide a certificate pursuant to Marpol Annex 73/78 Annex VI, such certificate does not constitute a general warranty of merchantability or fitness for a particular purpose of the Products.

Environmental Compliance is Buyer's Responsibility: It shall be the sole responsibility of Buyer to comply, and advise its personnel, agents and/or customers to comply, both during and after delivery, with all health and safety requirements and all environmental regulations and legislation, both national and international, applicable to the Products and/or Services supplied. Seller accepts no responsibility for any consequences arising from Buyer's failure to comply with such health and safety requirements or environmental regulations and legislation. Buyer acknowledges familiarity with the hazards inherent in the nature of any Products, and shall protect, indemnify and hold Seller and Supplier harmless against any claims or liability incurred as a result of any allegation of a failure to comply with the relevant health and safety requirements or environmental regulations and legislation, regardless of whether that allegation resulted from or related to, or is claimed to have resulted from or relate to, Seller's or Supplier's own negligence.

Such terms and conditions, however, do not insulate bunker suppliers from claims directly by the US government, where the suppliers violate APPS by selling non-compliant fuel. If the USCG detains a vessel because of MARPOL non-compliance, the owner may contend

that, unknown to it, its bunker supplier provided it with non-compliant fuel. This could be a substantial defence to the shipowner, especially if there is an effort by the shipowner to test the fuel on its own prior to loading.

The bunker supplier, however, will have supplied the fuel, despite its disclaimers in terms and conditions, in response to an order from the shipowner or charter for MARPOL sulphur content-compliant fuel. APPS allows the United States to prosecute the bunker supplier directly – and the bunker supplier may be prosecuted directly under other countries' laws implementing MARPOL. The bunker supplier arguably should have a degree of knowledge higher than the ordering charterer or owner because the bunker supplier purportedly selected the fuel based on the customer's specific order for compliant fuel.

No sales term or condition will protect a bunker supplier from direct government prosecution. In fact, if a government prosecutes a shipowner or charterer for a MARPOL violation, there is no reason why the government should not also prosecute the supplier which provided the offending fuel for MARPOL violation.

In the United States, 'whistleblower' awards available under APPS make the possibility of detection of non-compliant fuel and reporting more likely. APPS whistleblowers may receive, at the courts or administrative discretion, up to 50% of the total award. Most APPS awards to date (and there have been many), have been to seamen who have reported the use of 'magic pipes' to discharge oily wastes in violation of MARPOL/APPS. The rewards have been substantial, often running into hundreds of thousands of dollars, merely for the report of information of a violation and documentation of that violation.

It is conceivable that an engineer or an oiler onboard a vessel may find that fuel represented to be MARPOL compliant is not. He or she may report this non-compliance to US government authorities. The incentive for such a report is significant, because a reward for reporting under APPS may be a considerable multiple of average seamens' wages.

Of course, bunker suppliers know that it is often difficult to provide compliant fuel in any waters, including those of the United States. This knowledge is a double-edged sword, however. That is, the demand and price that a bunker supplier may receive for MARPOL-compliant fuel may be so significant that the supplier may not be as diligent in assuring that the fuel supplied is certainly MARPOL compliant.

Although US procedure does accept shipowner/charterer reporting where MARPOL-compliant fuel may not have been available, US law also does not eliminate liability for burning, and supplying, non-compliant marine fuel.

The question for bunker suppliers under APPS and MARPOL is, 'what diligence has the bunker supplier exercised to assure that the fuel is MARPOL compliant and thus not burned in violation of APPS?'

In order to deter claims directly from customers which contend that they have liabilities from non-compliant marine fuel, bunker suppliers accordingly should assure first that their sales terms and conditions include disclaimers that any warranty that the fuel they sell is sulphur content-required compliant. The shipowner prosecuted for APPS violations because of non-compliant fuel may suffer damages not only in fines and penalties, but also for the detention of its vessel.

Bunker suppliers' sales terms and conditions should make clear that the supplier is not liable for any such damages, fines or penalties. The terms and conditions should require that customers test the fuel for compliance before it is put on the vessels, and that the customers are accepting the fuel in reliance on that testing.

Nevertheless, a shipowner may attempt to recover in indemnity such fines and penalties and damages. MARPOL does require accurate reporting of fuel specifications, on BDRs, and arguably, despite sales terms and conditions, a customer may be entitled to rely on these. In fact, recklessly reported fuel specifications on a BDR could be a false statement to a government, which has required pursuant to MARPOL, an accurate BDR statement.

A court may hold that any bunker supplier's attempt to escape its own liability for providing non-compliant fuel violates public policy. The shipowner could argue that its non-compliance was innocent, but that the bunker supplier knew or should have known that the sulphur content of the fuel supplied violated MARPOL. Bunker suppliers must assure that they have insurance against the possibility that they will inadvertently supply fuel which is MARPOL noncompliant and be subject to civil or criminal prosecution.

Even if the bunker supplier's sales terms and conditions effectively turn back the suit of a customer, which has been prosecuted or fined for APPS / MARPOL violations, it is unlikely that the supplier will do business again with the customer.

So, what should the bunker supplier do? We advise at least the following:

- Review all sales terms and conditions to assure that, in all jurisdictions of sale, the supplier has maximum protection against customers' claims for compensation resulting from MARPOL violations. This should include stated times to assert claims, requirements for testing before loading, and limitation of liability;
- Be aware of the national regulatory and legal regimes governing bunkering and MARPOL compliance;
- For physical suppliers, regularly test, before taking on any load for supply, fuel content, for MARPOL compliance, and for brokers, make sure that your physical supplier does that testing reliably, with and through a competent and reliable testing lab;
- Make sure that your barge operators, or others who issue and sign BDRs, are fully trained to accurately record fuel quality. Make sure that you scrutinise – and then safely and reliably store – each BDR, to assure that it is accurate and then properly and safely stored;
- Keep and control the bunkering samples taken for each delivery so they can be provided if there is any question about MARPOL compliance; and
- For brokers, assure that all of your physical suppliers are providing MARPOL-compliant fuels, including sending independent bunker surveyors to ensure this. Make sure that your suppliers cut no corners about supply, including providing supposedly compliant fuel for a higher price, providing supposedly non-compliant fuel for a lower price; and
- Seek competent legal counsel to conduct an audit of your operations, to help assure that you are and will continue to be MARPOL-compliant. If you receive notice of prosecution, connect immediately with counsel who understand the bunkering industry generally and operation of MARPOL/APPS in particular.

In general, bunker suppliers (including brokers) which exercise diligence and good faith should avoid prosecution. But, at the same time, bunker suppliers and brokers should not think that they can escape prosecution. They must be proactive and create a corporate culture which is always diligent about MARPOL compliance.

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