20/20 VISION FOR THE 2020 GLOBAL LOW SULFUR REQUIREMENT FOR THE SHIPPING INDUSTRY

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By: Barry M. Hartman, George K. Kontakis

In our July 9, 2018, alert entitled "*Do You Clearly See What's Coming? Having 20/20 Vision For the New 2020 Global Low Sulfur Requirement for Low Sulfur Fuel for the Shipping Industry*," we reported on an upcoming International Maritime Organization Working Group meeting taking place in London among flag and port state representatives, along with other industry stakeholders/observers, for the purpose of considering and developing recommended measures that promote consistent and effective implementation of the low sulfur fuel (0.5%) requirements coming into effect globally in January 2020. Meeting participants were to consider and develop a report to the Marine Environment Protection Committee ("MEPC") that recommends measures that promote consistent and effective implementation of the 2020 requirements globally, and to address industry concerns regarding enforcement of these requirements in the context of whether sufficient fuel will be available. This meeting was driven by significant concerns regarding whether sufficient safe and compatible low sulfur fuel will be available, and if not, how port and flag states would address this from an enforcement perspective.

From July 9 to 13, 2018, representatives from over sixty nations and organizations met to discuss and attempt to reach consensus on these questions. Few issues were actually resolved at the meetings, but the issues, themselves, became clearer and more crystalized. As we have emphasized previously and the results of the July meetings confirm, companies potentially impacted by these changes should engage as soon as possible in order to better understand the impacts and put appropriate measures in place to maximize compliance efforts.

Below are some of the key takeaways from the meetings based on the issues that were on the agenda:

1. Preparatory and transitional issues that may arise with a shift from the 3.50% sulfur limit to the new 0.50% limit.

While there was general consensus that vessel owners and operators must undertake some level of planning (i.e., "responsible planning") before January 2020 so that they are in a position to be in compliance on that date, the scope and nature of what they must do—called the "Ship Implementation Plan"—was misunderstood by some and not agreed to by others. It was ultimately left for further discussion at the MEPC meeting this fall. It is clear there is there is not going to be any "one-size-fits-all" prescriptive Ship Implementation Plan. There are, however, fundamental and common-sense principles that "responsible planning" will be expected to embody. It is possible (at least in the United States) that the de facto "bar" for these plans will be set based on the most detailed plans developed and carried out by particular companies, and these may well be the key to ensuring a level playing field among competitors. Those principles are embodied in the many proposals made by various interest groups and International Maritime Organization ("IMO") member states. Vessel owners and operators should consider analyzing those proposals now and developing plans of their own using common elements and adjusting them as is appropriate for their operations. Bunker suppliers, brokers, charterers, refiners, though perhaps not technically

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subject to the law themselves, may want to consider how they should plan in light of what parties who do fall within the scope of the law will be required to do.

In addition, the issue of the availability of de-bunkering facilities was almost as important as the issue of availability of compliant fuel. What happens, for example, when a vessel is compelled to take non-compliant fuel from Port A (where compliant fuel is unavailable) and can then get compliant fuel at Port B? What if Port B lacks a de-bunkering facility or suitable cleaning capacity? The answer is not clear from the discussions that took place. Operators, charterers, bunker suppliers, brokers, and ports should consider this and related scenarios. The problem of cleaning fuel tanks in order to prepare for low sulfur fuel before January 2020 and then potentially having to use the tanks for noncompliant fuel for a short period, thus resulting in contamination and potential non-compliance, was a subject of significant discussion.

2. The impact on fuel and machinery systems that may result from the use of fuel oils with a 0.50% sulfur limit.

The concern over how the many variations in blends of residual fuels (as opposed to distillates) might be used to meet the 0.50% requirement may be more significant than many people previously thought, although there were distinctly different views on this issue. While some participants claimed that until those blends are made, there is no basis to assume there might be a safety or operational problem (a view held by many IMO member states), other participants believed that until those blends are proven safe, compatible, and useful, one must assume that there could be a problem with profound impacts on vessels' operations (a view held by many industrial observers). The question of how these issues will impact "fuel availability" remains unanswered.

3. Verification issues, control mechanisms, and actions necessary to ensure compliance and consistent implementation.

On-board compliance testing of fuel remains a major issue. At the meetings, the U.S. delegation took the position that fuel will only be deemed compliant if it tests at levels at least 10% below the 0.50% standard. How this more stringent standard would be enforced was not discussed. As noted below, it also appears that some amendment to MARPOL Annex VI may be needed to adopt certain testing and verification procedures.

4. Draft standard format (a standardized system) for reporting fuel oil nonavailability that may be used to provide evidence if a ship is unable to obtain compliant fuel oil.

There is unlikely to be an agreement on the uniform content for any sort of Fuel Oil Non-Availability Report (FONAR). In fact, the issue will not be further considered until February 2019. Regardless of the form, it is the substance—what a responsible party has done to prepare for compliance—that may be the major factor in whether a claim of fuel nonavailability will be accepted by the relevant coastal/port state authority.

5. Developing guidance that may assist IMO member states and stakeholders in assessing the sulfur content of fuel oil delivered for use on board vessels.

Testing protocols may not be agreed to and put in effect until 2021. There was some debate at the meetings over what circumstances would justify a coastal/port state authority conducting an investigation beyond reviewing "bunker notes" that otherwise indicate compliance with the low sulfur regulations. As noted, the U.S. delegation suggested that, if the sulfur content for the compliant fuel is not at least 10% below the 0.50% sulfur content limit, then that might justify investigating beyond a review of the bunker notes. It was also noted that remote sensing

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and portable fuel oil sulfur measurement devices might be used during port state inspections, but that the measurements taken by such devices "should not be regarded as the evidence of noncompliance."

6. Requesting International Organization for Standardization ("ISO") to consider the framework of the ISO 8217:2017 standard for fuels supplied on a worldwide basis for consumption on-board vessels, with a view toward keeping consistency between the relevant ISO standards on marine fuels and the implementation of regulation 14.1.3 of MARPOL Annex VI.

There was support at the meetings for use of IS0 8217:2017 specifications for marine fuel as a framework for compliant 0.50% sulfur fuels, though there is disparity between these ISO criteria and the relevant fuel specifications in relevant commercial contracts. There also was some dispute regarding how the standard would or could be applied to residual low sulfur fuels. An ISO representative said that the ISO 8217 Committee is working on drafting specifications that more clearly account for the new, compliant fuel.

7. Any consequential regulatory amendments and/or guidelines necessary to address issues raised or otherwise considered necessary to ensure consistent implementation of regulation 14.1.3 of MARPOL Annex VI.

Several draft guidelines were proposed by IMO member states and subsequently adopted with some revisions. The member States agreed to develop a draft definition of "sulphur content." The member states also agreed to develop draft amendments with respect to testing and verification for in-use fuel samples.

8. Allocation of responsibility between charterers and vessel owners/operators.

This issue remains largely unresolved. Few participants realized or appreciated the "mismatch" between the ***regulatory*** *liability for compliant fuel, which is placed on the owners and operators, and the* ***commercial*** *liability, for which responsibility of obtaining compliant fuel can be allocated among contractual parties. Again, planning by vessel owners and operators, as well as by charterers, is now crucial.*

Some of these issues will be addressed at the MEPC meeting in October, but whether they will be resolved in a manner that will provide concrete direction to regulated entities remains an open question.

Notes:

[1] Recent reports regarding off-spec bunkers from Houston being off-loaded in Singapore and allegedly getting into the Singapore bunker supply chain demonstrates this concern even before the 2020 standards become effective. *See* http://www.bunkerworld.com/news/Vessels-forced-to-de-bunker-after-receiving-off-spec-bunker-fuel-in-Singapore-150050; https://www.spglobal.com/platts/en/market-insights/latest-news/shipping/081518-feature-off-spec-houston-bunker-fuel-leads-buyers-to-adjust-buying-decisions. After the effective date, this situation would create even more significant commercial and regulatory legal issues for owners, operators, charterers, and bunker suppliers.

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KEY CONTACTS



BARRY M. HARTMAN
PARTNER

WASHINGTON, DC
+1.202.778.9338
BARRY.HARTMAN@KLGATES.COM



GEORGE K. KONTAKIS
PARTNER

NEW YORK
+1.212.536.4021
GEORGE.KONTAKIS@KLGATES.COM

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