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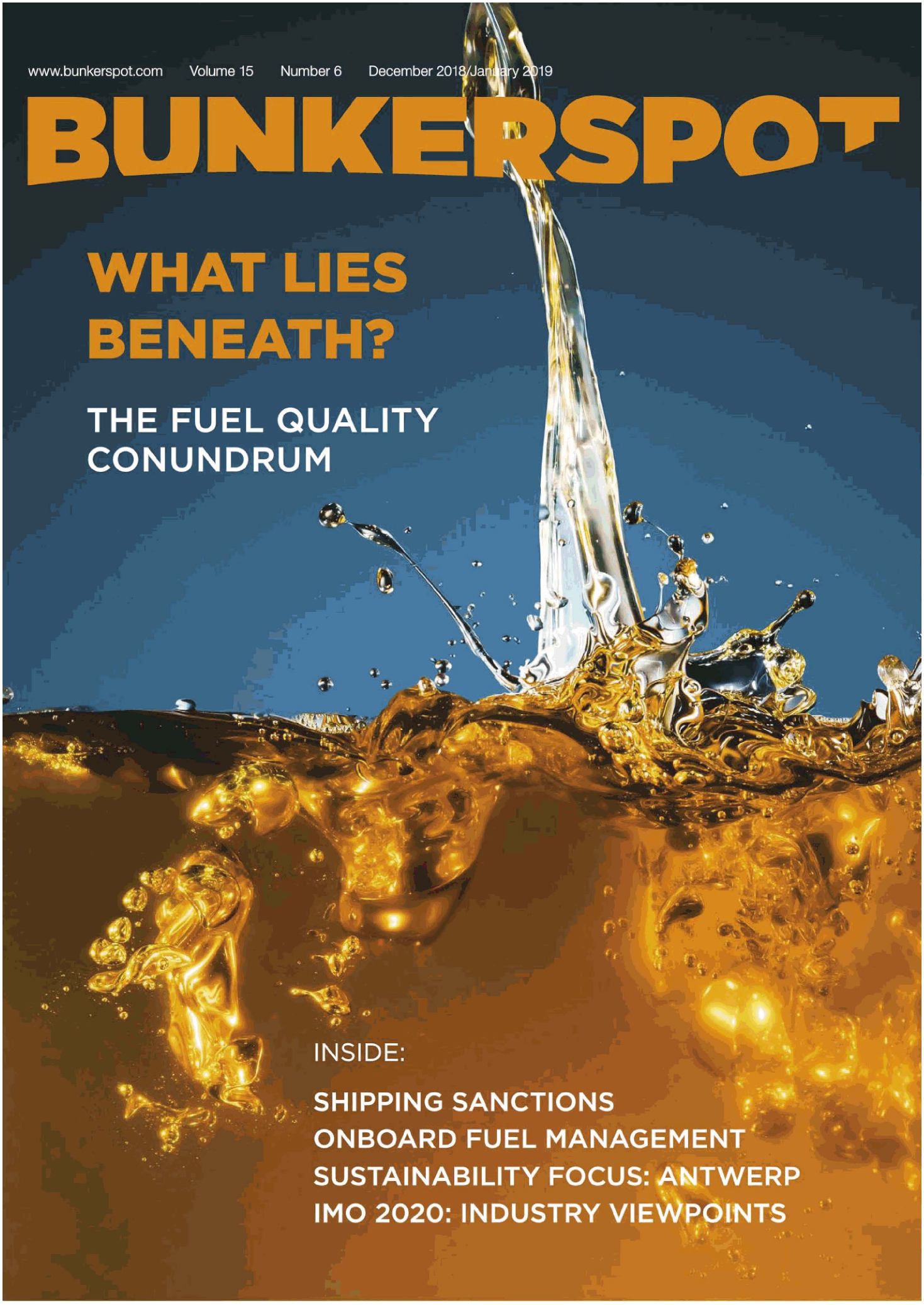

WHAT LIES BENEATH?

THE FUEL QUALITY CONUNDRUM

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IMO 2020: INDUSTRY VIEWPOINTS

Timed out?

Time is on my side, yes it is
Time is on my side, yes it is
Now you always say
That you want to be free
But you'll come running back
(said you would baby)
You'll come running back
(I said so many times before)
You'll come running back to me
Time is on My Side - The Rolling Stones

The recent fuel quality problems encountered at US Gulf ports have brought the issue of quality claims deadlines sharply into focus. **Steve Simms** of Simms Showers offers a close examination of the application of time bars in such bunker disputes

Will 2020 bring more quality disputes? It will bring more blending to meet the global 0.50% sulphur content requirements. Will the blends be compatible and stable? Will the expected high price of compliant fuel bring cheating on quality? The recent, mid-2018 quality disputes at US Gulf ports, Panama and Singapore have affected more than 200 vessels. Are these a harbinger of more quality disputes to come 2020?

Although the mid-2018 quality problems have been substantial, bunker quality disputes are not new. An estimate is that at least one out of every 140 bunker provisions causes vessel machinery damage. There is good debate over whether the mid-2018 disputes predict more quality disputes with 2020. The large number of vessels, suppliers and traders involved in the mid-2018 disputes make it likely, however, that these many disputes will bring new lessons to learn about addressing future bunker quality disputes, whether the number of those increases with 2020 or remains as before.

A central part of the present disputes involves contractual time deadlines to raise quality claims. Surprisingly, there have been no reported court or arbitral decisions directly on this issue. What time limits should apply? Should quality claims deadlines be 30 days, longer, or as short as seven or fewer days? May bunker sellers insist on their contractual claims' deadlines? Will courts or arbitrators enforce the deadlines?

So, with the mid-2018 quality disputes and in anticipation of future ones, for bunker suppliers and traders, is time on your side?

To avoid missing quality claims deadlines, some recommend that buyers transmit a quality dispute notice as soon as they have bought bunkers, even if they know of no dispute. In mid-2018, many vessels were loaded with the same bunkers that caused problems for some vessels, but consumed the bunkers experiencing no problems at all. Can sellers counter this approach of buyers routinely issuing a quality claims notice with each supply, by requiring a detailed notice to be effective? How can buyers be expected to provide detailed notice within times that run before they can obtain test results? Are shorter deadlines unreasonable considering vessel operating standards? What if the tests required to confirm bunker quality are not just 'standard' testing to ISO 8217 Tables 1 and 2, but the more expensive and (presently) slower Gas Chromatography Mass Spectrometry (GCMS) tests? What if the suppliers' sales terms provide that tests only of the suppliers' samples control quality dispute resolution?

How, if at all, does the new MARPOL Annex VI requirement for bunker delivery notes (BDNs) effective from 1 January 2019, change the question of quality dispute notice? From 1 January, suppliers must certify on BDNs that vessels supplied will consume bunkers consistently with MARPOL Annex VI sulphur content limitations. What happens after 1 January 2019 when there is a quality dispute over sulphur content, where the supplier has certified on the BDN that the vessel can burn the bunkers compliantly (but the bunkers turn out to be off-spec and the certification false)? Suppose that the port State authority weeks out from the place of supply fines the vessel for MARPOL Annex VI non-compliance. Is the supplier liable to indemnify the vessel for the fine, or, even be subject to prosecution for false certification? How can the supplier many days after, and far away from the vessel and the prosecuting authority, document an effective defence?

Generally, are shorter quality claims deadlines unfair or unreasonable? Or, might that be the other way around, that longer deadlines for quality claims are unreasonable? The question behind these two is, 'to whom'? Reputable buyers generally might want longer deadlines to accommodate their standard vessel operations and economics. They load bunkers at the most economical ports but do not burn those bunkers until much later. They order tests which presently require several weeks or more for accurate results.

Most predicting the pricing of 2020-compliant product (at least that for vessels without scrubbers) expect that the price of compliant fuel may be significantly higher than the cost of presently-compliant products. This will stretch the credit lines of customers, traders and suppliers alike. Will less reputable, credit-challenged customers raise more quality disputes to attempt to resist or reduce payment for the compliant product? Does the increasing availability of (and owners' demands to charterers for) detailed testing give customers the increased ability to raise quality disputes they might not have raised before? Will credit-challenged suppliers, given the high price of 2020-compliant product, be led to do questionable product blending (as some believe occurred in creating the mid-2018 quality problems)? What, if any, should be the relationship between the time deadline and required details for buyers to report quality claims, and the number of days that sellers extend credit terms?

> 'Terms' explicit choice of US general maritime law and exclusion of other law, at least for quality dispute time limitation clauses, appears presently to be the best choice'

A ongoing quality dispute involves the M/V *Thorco Lineage*. The question of quality reporting time deadlines and details is central to the dispute. It is, like most of the other disputes arising from the mid-2018 disputes, because the seller's' first defence is a claim of late or unspecific reporting of quality claims. The answers will determine who pays for debunkering, machinery repair, demurrage, cargo delivery delay claims, and perhaps penalties that relating authorities impose.

The estimated claims arising from the *Thorco Lineage* dispute now exceed $10 million. Claims amounts for the other mid-2018 quality disputes, and those before, are also significant. Much of the expense for all has involved legal, surveying, testing, and other expenses necessary to determine responsibility for the off-spec bunkers (or whether the bunkers were off-spec at all, or even if so, whether owners/charterers have minimised their damages as required), long in time and distance after the vessels received the bunkers.

According to court filings[1], on 7 June, 2018 physical suppliers at Cristobal bunkered the *Thorco Lineage* with 680 metric tonnes (mt) of RMG 380, specification ISO 8217:2010, 3.5% maximum sulphur content. A trader bought the bunkers from physical suppliers, which in turn bought the bunkers from a third supplier. The physical supplier issued the required bunker delivery note declaring that 'products delivered under this receipt are in conformance with Annex VI of MARPOL 73/78, regulations 14(1) and 18(1).' The trader's customer is the vessel's head time charterer, which also is an affiliate of the vessel owners.

The Cristobal bunkers apparently were loaded into one of the vessel's tanks separate from the tanks with bunkers already on hand. The vessel burned its existing bunkers to sail thousands of miles across the Pacific toward its next call in Australia.

Some 16 days later, on 23 June 2018, the *Thorco Lineage* switched to burning the Cristobal bunkers. The vessel lost power and grounded the next day on an atoll in French Polynesia. The owners gave the trader immediate notice of a quality dispute, and the trader immediately gave notice to the supplier.

Over 1,000 miles away, the French Navy dispatched one of its vessels from Tahiti to assist. Arriving several days later, the French vessel freed the *Thorco Lineage*. Then, pulled by an ocean tug dispatched from even further away, the vessel began a week's long voyage to a South Korean shipyard where it remains at the time of writing. As the vessel moved under tow, the trader and its customer disputed whether the trader could send surveyors to the vessel and have access to vessel records.

The supplier insists that its sales terms – including the following – control any claims against it:

> *Any claims made by Buyer with regard to quality must be made in writing to Seller immediately upon detection of the alleged defect, and in any event no later than within fourteen (14) calendar days from receipt of the Product. The foregoing preliminary notice shall be followed by a formal written notice of claim, within thirty (30) calendar days from receipt of the product, to Seller containing all details necessary to allow evaluation of the claim.*
>
> *In any event, should Buyer fail to present a claim in writing to the Seller as to quantity or quality within thirty (30) calendar days of the date of receipt of the*

Product, any such claim by the Buyer shall be deemed to be waived and absolutely time-barred. The Buyer's submission of any claim hereunder does not relieve it of the responsibility to make payment in full for the Products supplied by the Seller. This provision shall survive a termination of the Contract.

The supplier's sales terms state that they are 'subject to General Maritime Law of the United States of America...' The trader, however, insists that its confirmation includes Florida law, and excluding any other sales terms than in the confirmation, this controls. Further, although the trader's sales terms with the charterer/customer require even shorter notice of quality claims (seven (7) days' notice) the contract that the trader's affiliate has with owners allows thirty (30) days' notice of quality claims.

Consequently, if the supplier's terms control, a quality claims notice at 16 days after supply was two days too late. If the trader's terms control, notice was timely. The liability for tens of millions of dollars of damage may turn on just that.

A first question is whether as a matter of law any particular time deadline for notice (longer or shorter) will be one that courts or arbitrators enforce. The answer to this is twofold: first, whether the contract effectively incorporates the deadline, and with that, what law controls.

In the *Thorco Lineage* dispute, the question of whether the supplier's sales terms are the contract, turns on whether the trader accepted them. The sequence of contracting was a typical one, where the trader obtained quote from the supplier, the supplier quoting that its terms apply in any event, and the trader responding that only its terms apply. The result of this exchange is a clear dispute over which terms apply. Consequently, a first lesson from this is, in order to have your contractual quality time limits clearly apply, assure that the buyer has agreed to those limits. If there is any doubt raised (for example, in a confirmation stating otherwise), clarify the doubt or do not make the sale. Certainly, make sure to read the sale confirmation and do not assume it is just 'standard'. There are no true 'standard' sale confirmations.

Second, the contractual choice of law is important. The United States Uniform Commercial Code (UCC), versions of which are part of the laws of most American states, is not a part of US 'General Maritime Law'. Under the UCC, bunkers are 'goods' and their sale falls under UCC Article 2 ('Sale of Goods') if the UCC applies. UCC Section 2-725 ('Statute of Limitations in Contracts for Sale') states that:

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation **to not less than one year** *but may not extend it.* (Emphasis added.)

So, if purely US state law applies, then time limitations for bringing a suit on a quality claim may not be less than one year. Similarly, under UCC Section 2-602(1) 'Manner and Effect of Rightful Rejection',

Rejection of goods must be ***within a reasonable time*** *after their delivery or tender. It is ineffective unless the buyer* ***seasonably*** *notifies the seller.* (Emphasis added.)

What is a 'reasonable time' and 'seasonably'? That depends on industry custom, practice, the parties' respective understandings and a range of other often expensive-to-gather and present evidence. But, no particular set time on its own (seven days or 30 or more) is, under the UCC, 'reasonable' or 'seasonable', regardless of what the contract terms might otherwise say (although agreed terms are in part evidence of what the parties consider 'reasonable').

With US General Maritime Law controlling, US courts will honour the parties' contractual law choice, but may not if only state law (and the UCC) controls. A question (which apparently continues in the *Thorco Lineage* dispute) is whether when a maritime contract (which a bunker supply contract unquestionably is) by specifying a certain state law, that also includes US General Maritime Law. State law generally also incorporates US General Maritime Law, to assure the uniform application of maritime law across the United States. When the question continues (by not stating controlling US General Maritime Law), however, it also continues to be an expensive question to answer. Consequently, bunker contracts should always specify US General Maritime Law to assure application of their quality claims deadlines, and ideally expressly limit application of state law (at least for the purpose of applying claims deadlines, and for maritime liens *in rem* and other reasons also beyond the scope of this article).

What is 'reasonable time' is also 'a question of fact' (Article 59) under the UK Sale of Goods Act 1979 (the Act otherwise made 'famous' to bunker suppliers with the UK Supreme Court's 2016 *Res Cogitans* opinion). More directly, the UK Act (Article 35) states that '[w]hen the goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them... until he has had a reasonable opportunity of examining them for the purpose... of ascertaining whether they are in conformity with the contract.' The UK Act does not state what a 'reasonable opportunity' for examination is, including whether that relates to time for examination. Apparently, however, if the UK Act applies to a bunker sale, its requirement of 'reasonable opportunity' might override a specific contractual quality dispute reporting period.

Similarly under the UN Convention for the Sale of Goods (which might apply to international contracts, including for bunkers unless their terms explicitly exclude it) Article 39, '[t]he buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.'

Sales terms and conditions' effective law choice consequently is essential to determining whether their specific time limitations, rather than an expensive determination of

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what is 'reasonable opportunity' or 'reasonable time', controls the decision of quality disputes. Terms' explicit choice of US general maritime law and exclusion of other law, at least for quality dispute time limitation clauses, appears presently to be the best choice.

Choice of law rules vary throughout the world, however. That is, some countries will, despite explicit law choice, only apply their own law in their own courts. This possibility also presents a challenge where the standard is what is 'reasonable' rather than what the contract specifies. But this still is no reason for bunker sales terms and conditions to fail to state a deadline for quality dispute reporting or to guess what time (shorter or longer) a court might consider to be 'reasonable' and state that time.

The parties' specific situation will be evidence of what is a 'reasonable' time but so also will be the time that the contract sales terms state. This is particularly so where the parties have done business across a number of transactions utilising the same sales terms (with the same quality dispute reporting time). So, for example, in the *Thorco Lineage* dispute, it will be pertinent how often the supplier and trader have done business subject to the supplier's terms with the supplier's 14-day reporting deadline.

There is, however, no 'industry standard' for the number of days to report a quality dispute. Although the various BIMCO-sponsored bunker terms (1995's FUELCON, 2001-02 'Standard Bunker Contract,' BIMCO Terms 2015 and now 2018) all contain 30-day limitations, the industry never adopted this as standard. In part recognisng this, the 2018 BIMCO Terms repeat the 30-day limitations of the previous versions but also introduce an 'Election Sheet' on which the parties can vary the time for reporting quality disputes:

> *Any claim as to the quality or specification of the Marine Fuels must be notified in writing promptly after the circumstances giving rise to such claim have been discovered. If the Buyers do not notify the Sellers of any such claim within thirty (30) days of the date of delivery (or such number of days as otherwise specified in the Election Sheet), such claim shall be deemed to be waived and barred.*

Current suppliers' and traders' terms range from as short as seven (7) days' (World Fuel Services), to 14 (Bomin) and 15 (Dan-Bunkering, Monjasa), to 21 days' (BP) notice of quality claims; few, if any, extend the notice time to 30 days.

Is there, then, an ideal contractual time limit for reporting quality claims? What should the time limit be? Can and should it be uniform from supply source, to supplier, to trader and all in between? BIMCO's Explanatory Notes to the 2018 Terms state that:

> *[The 30-day time bar for quality claims] is due to the fact that samples will have to be tested by laboratories, which can be a time-consuming process involving shipping samples to a remote location. The parties might prefer to negotiate the number of days on a case by case basis. They can do so and state the different time bar in the Election Sheet. Influencing factors on the suppliers' preferred number of days can be, for example, if they are acting as traders or physical suppliers.*

'The *Thorco Lineage* dispute shows the problem with differing trader and supplier quality dispute reporting deadlines. There, the trader has a 30-day reporting deadline and the supplier a 14-day deadline'

The *Thorco Lineage* dispute shows the problem with differing trader and supplier quality dispute reporting deadlines. There, the trader has a 30-day reporting deadline and the supplier a 14-day deadline. Typically, the supplier will have purchased the supply from a refiner or other intermediary long before the bunkers are loaded on any vessel. That refiner/intermediary will have its own quality claims deadline.

The ultimate customer will (or should) be focused on the quality reporting time in its contract with its counterparty. This may determine when the customer decides to burn (or at least test burn) the bunkers, where to order tests, whether to pay to expedite the tests, what tests to order, and even whether to carry on-board testing equipment. With the trader's 30-day terms, the *Thorco Lineage* operators had no additional incentive to burn or receive back tests of the Cristobal-loaded bunkers, to confirm bunker quality, until after the supplier's 14-day claims period ran. The trader received claims notice within its terms, but depending on a report from its customer for quality claims reporting, did not report the claim to the supplier within the supplier's 14-day deadline. By the time the claim was raised, the vessel was in the middle of the Pacific Ocean, its engines seized and thousands of miles away from surveyors, testing labs, and other relatively more straightforward (and much less expensive) means of determining the actual cause of the problem.

Underlying the 'ideal' choice of quality notice terms is the question of who bears the risk and expense of determining a quality claim. Answering this question turns back to the inherent problem of the standard marine fuels specification, ISO 8217 and the international MARPOL Annex VI marine fuels requirements. ISO 8217 (whether 2010 – 2102 or 2017) – 'Petroleum products – Fuels (class F) – Specifications of marine fuels – 5 General Requirements' states that:

> *5.1 The fuel shall conform to the characters and limits given in Table 1 or Table 2, as appropriate, when tested in accordance with the methods specified.*
>
> * * *
>
> *5.5 The fuel shall not contain any additive at the concentration used in the fuel, or any added substance or chemical waste that* ***jeopardises the safety of the ship or adversely affects the performance of the machinery****; or*

is harmful to personnel; or contributes overall to additional air pollution. (Emphasis added.)

MARPOL Annex VI Regulation 18 mirrors ISO 8217, requiring that:

(b) fuel oil for combustion purposes derived by methods other than petroleum refining shall not:

(i) exceed the sulphur content set forth in regulation 14 of this Annex;

(ii) cause an engine to exceed the NOx emission limits set forth in regulation 13(3)(a) of this Annex;

(iii) contain inorganic acid; and

(iv) (1) ***jeopardise the safety of ships or adversely affect the performance of the machinery,*** *or*

(2) be harmful to personnel, or

(3) contribute overall to additional air pollution. (Emphasis added.)

At least for trade between MARPOL Annex VI signatory states, all marine fuel must comply with MARPOL Annex VI (and Regulation 18), and suppliers must confirm that on the bunker delivery note (BDN). Again, most fuel is sold also specifying the mirrored ISO 8217 standard.

What the supplier confirms on the BDN, and what the trader confirms with its sale to the customer, however, is not 'simply' that the fuel has certain sulphur or other chemical content. They also confirm that the fuel will not adversely affect ship machinery performance or jeopardise ship safety.

Consequently, even if lab tests can be run quickly the standard remains subjective, on a ship-by-ship basis. That is, as was the case with many supplies involved with the mid-2018 quality disputes, many tested within 8217 Table 1 and 2 limits. Some vessels receiving this fuel consumed it with no problems, others with serious ones. On the other hand, some vessels receiving fuels which later tested with GCMS showed chemical quality problems that the standard 8217 tests did not show, still consumed the fuel without problems.

Testing, whatever its timing, does not conclusively determine whether fuel meets the MARPOL Annex VI/ISO 8217 ship-subjective machinery performance and safety standards. That is, whether test results return within 30 days or seven, and whatever detail of tests (basic 8217 test, GCMS or something else) is ordered, the only way to determine ultimately whether a fuel complies with MARPOL Annex VI/ISO 8217 performance and safety standards is for the ship to consume the fuel. Even if tests show that fuel is chemically off-spec, there still is the requirement of mitigation (minimising) damages. That is, can the vessel still – without damaging machinery or jeopardising safety, perhaps with adjustment to the vessel's fuel processing system or with onboard blending or additives – consume the fuel?

With the proliferation of testing labs, competition between them, and on-board chemical testing equipment, there is a good argument that the 30-day time limit that BIMCO first proposed in 1995 (with FUELCON) should be less valid today, even as tests become more detailed. Often obtaining tests results more quickly and with more detail is a matter of price.

'Customers will have to decide whether to modify vessel fuel handling procedures to enable test burns soon after loading, or whether to rely solely on lab test results (which they order on an expedited basis) or onboard testing'

Even if the timing of test lab results may be somewhat outside the control of the ultimate bunker consumers (owners, charterers), however, the timing of when a vessel consumes, or at least test burns, fuel is not. This is almost entirely within the consumer's control – and it is the only way to determine, on the subjective, ship-by ship basis, whether the fuel is MARPOL Annex VI/ISO 8217 compliant. It also is one thing if the vessel consumes, or at least test burns, the fuel within a short time of loading, near the loading place and another thing if the quality problem must be sorted out thousands of miles away in the middle of the Pacific Ocean.

Whether the fuel affects the vessel machinery or safety also is not ultimately in the supplier's (and certainly not the trader's) control. That is, each vessel fuel and engine system is different, particularly where one adds in the further factors of engineering staff expertise, the technical standards of the fuel system, the vessel age and maintenance, and particularly now as 2020 approaches, whether the vessel has a scrubber. Will any given exhaust gas cleaning systems be able to consume over 0.50% sulphur content fuel compliantly, particularly as the ECGS ages after operation in a highly corrosive engine exhaust system?

The bunker supplier or trader has no real way to determine these factors, which all combine, in turn, to determine whether fuel will adversely affect vessel machinery or safety, or MARPOL Annex VI exhaust gas compliance. Yet under the newly-amended MARPOL Appendix V ('Information to be included in the bunker delivery note (Regulation 18(3)'), beginning 1 January 2019, there further must be:

[a] declaration signed and certified by the fuel oil supplier's representative that the fuel supplied is in conformity with regulation 18.3 and that the sulphur content of the fuel oil supplied does not exceed the limit value given by regulation 14.1 or 14.4 of MARPOL Annex VI, or the purchaser's specified sulphur limit value (in % m/m).

This certainly raises the situation that a supplier might provide the 1 January 2019-required declaration, only to be confronted by a customer weeks later who has been cited for violating MARPOL Annex VI sulphur content standards (whether because of fuel content alone, or content which the customer's ECGS could not effectively process). With much time having passed, the supplier will have much more difficulty proving that its declaration and certification was correct.

MARPOL Annex VI/ISO 8217 also requires that fuels be stable and homogenous, but that does not mean stability or homogeneity must be perpetual. That is, fuel will (particularly if provided consistent with ISO 8217:2017, permitting fatty acids (Fame) in marine fuel) degrade over time and also perform differently with climate differences. Quality, then, must be measured as close to loading aboard the vessel as possible. That is, the supplier and trader do not sell fuel with the promise that its quality will be the same for an infinite time after loading. They sell fuel with the promise (and as MARPOL Annex VI / ISO 8217 requires) that the fuel will have certain, compliant characteristics at the time of loading on the vessel.

Again, the only way to confirm these characteristics is for the vessel to test burn the fuel or consume it very soon after loading. The only legal limitation on that consumption is that the vessel may be in an emission control area (ECA) where it may burn only 0.10% sulphur content fuel. At minimum, however, it certainly

is 'reasonable' to require consumption, or a test burn, of fuel as soon as the vessel leaves the ECA. This typically will be a short time after bunkering higher sulphur content fuel.

For suppliers, and traders, to set a shorter quality claims reporting deadline may impose greater costs and risks on their customers. That is, customers will have to decide whether to modify vessel fuel handling procedures to enable test burns soon after loading, or whether to rely solely on lab test results (which they order on an expedited basis) or onboard testing. Customers might also have to invest more in fuel system maintenance and upgrades, regular tank cleaning, and training for engineering personnel. They might further have to consider whether to limit bunker purchases to suppliers known for maintaining consistent quality standards (and pay more for that supply), including working with traders who deal only with such suppliers.

Customers might also specify, for example, that their suppliers conform to the practices set out in the International Bunker Industry Association (IBIA) Best Practice Guidance for Suppliers for Assuring the Quality of Bunkers Delivered to Ships (available at the IBIA website: https://ibia.net/wp-content/uploads/2018/04/IBIA-Guidance-on-best-practice-for-fuel-oil-suppliers.pdf). This, again, does not minimise the subjective, ship-by-ship determination of whether fuel is MARPOL Annex IV/ISO 8217 compliant, but fuel purchased from suppliers following the IBIA Guideline should significantly decrease quality claims, notwithstanding the specifics of each vessel consuming those suppliers' fuel.

This then brings the first ultimate question: what should the time limitation be for reporting quality claims?

Effective quality claims deadlines must turn on both location and time. Sales terms and conditions should require customers to report quality claims either within one day of loading any fuel of 0.10% sulphur content or less, within one day of loading over 0.10% fuel if the vessel is outside of an ECA, and for such fuel within one day of exiting the ECA. Customers then may choose to immediately consume the fuel or burn test some of it, and/or to chemical test the fuel aboard the vessel. Chemical testing which may take longer is important, but again the ship-specific test is within the customer's control and thus can and take place almost immediately after fuel loading.

With this also is the specificity of quality claims reporting, that suppliers and traders should require for a claim to be effective. If the first consideration is, 'can the vessel consume the bunkers safely and without machinery damage,' then specific quality claims reporting can be made essentially at the same time of consumption or burn testing. It simply would be that the fuel damaged the vessel machinery or would not run safely on it, or that the burn testing indicated that it was likely to do so. But suppliers and traders must require quality claims to be specific to be effective, so they promptly can investigate the claim well before the vessel sails from any place of effective investigation. Whatever the claims reporting deadline, it has no effect if a customer can routinely claim a quality problem without specifics, and only months later provide specifics which the supplier or trader cannot easily verify.

This also relates directly to credit. Whether there will be more quality disputes after 2020 or not, it is certain that there will be more payment disputes with the cost of compliant fuel (at least for vessels without ECGS) likely to be multiples of the present price paid for fuel. The availability of detailed lab results can also be the basis of a claim which actually is about a customer's desire to pay less for fuel or inability to pay at all. Effective sales terms and conditions will state that the customer must pay the price regardless of a quality dispute, but also should have a quality dispute reporting deadline well in advance of the time the customer must pay. Ideally, with a short quality dispute reporting deadline, if the report is questionable and apparently a customer's attempt to get a discounted price or avoid payment, the supplier or trader can demand security for payment or even arrest the vessel if there is no security, before the vessel sails away with the fuel and later claims a quality problem to avoid or reduce payment.

What the focus on soon, ship-specific testing does not answer though, is the challenge to suppliers buying from refiners or blenders. That is, there usually is no way for the suppliers to determine as to the refiners or blenders, whether the fuel bought typically months before and stored will affect the machinery or safety when loaded months later on any vessel. Suppliers certainly should have robust testing procedures in place but also attempt to have much longer quality claims deadlines, or even claims deadlines to match those with their customers, with refiners and blenders. That is, suppliers might negotiate contracts providing for chemical quality claims to be reported to their suppliers within a reasonable testing turn-around time (e.g. 15 days) but that mechanical and safety quality claims be reported within one day after the suppliers' own deadlines with their customers.

The problem comes when there is a mismatch, as with the *Thorco Lineage*, between different quality claims reporting deadlines. Fundamentally, each buyer along the purchasing chain, again because of the ship-subjective MARPOL Annex IV/ISO 8217 standards, must be subject to the same quality dispute reporting time deadlines. Otherwise, claims may not be timely received or reported by the entity responsible for the problem. And the deadlines must be close in time to the bunker loading on the specific vessel.

As noted earlier, certain legal systems (US General Maritime Law) will recognise contractually-agreed deadlines, even very short ones. Those systems recognise that commercial parties should be able to decide contractually how each will bear risk. So, as a matter of commercial consideration, a supplier or trader may decide to extend its quality claims reporting deadline to a longer period and thus take on more risk. Certainly, though, that supplier or trader should have the support of its insurers if it does so because the longer the time that passes, the more difficult and expensive for the insurer to defend the claim.

For those legal systems which impose a 'reasonableness' standard, however, is a very short quality claims period (even the one-day period, suggested above) 'reasonable'? When the critical part of quality compliance is subjective to the vessel, how is it 'reasonable' to impose terms which do not incent the soonest vessel-based testing of the fuel? How is it 'reasonable', as in the case of the *Thorco Lineage*, to give rise to a situation where a

vessel sails thousands of miles from prompt assistance and fuel (as argued in the lawsuit) jeopardises its safety, where with prompt vessel-based testing, the safety problem might have been better avoided? Why is it also 'reasonable' to rely on slower and less detailed testing rather than to incent greater spending on more prompt or detailed tests (as well as, to incent further technological developments to speed test results and accuracy)?

As the present mid-2018 bunker quality disputes continue, one common factor has been the bunker quality disputes clauses involved in each dispute. Many of the suppliers and traders involved effectively incorporated relatively short quality disputes terms (seven days or less) into their sales contracts. The customers chose to consume the bunkers long after the terms ran and experienced considerable damages. When they sought to charge those to the suppliers and traders, raising the quality claims bar ended the dispute.

On the other hand, the disputes which have continued and become involved and expensive, are those either involving longer quality claims terms or those where sellers (suppliers and traders) did not effectively incorporate their quality disputes deadlines into their sales contracts. Gathering the documentation, surveying and testing the vessels' fuel and engine systems, taking testimony of engineering staff and crew (and even locating them sometimes months later to do that) continues to be difficult, likely giving rise to litigation or arbitration continuing for years.

Whether 2020 will bring more genuine bunker quality disputes (or manufactured ones to avoid payment), it is likely that through a combination of the 0.50% MARPOL Annex VI standard, greater blending, potential compatibility problems or use of questionable (cheap) blend stock, and challenged credit, that there will be more quality disputes with 2020.

With shorter quality claims reporting deadlines, suppliers and traders should be able to say to their customers (along with the Rolling Stones):

You'll come running back (I won't have to worry no more)
Yes time, time, time is on my side, yes it is ...
Oh, time, time, time is on my side
Yeah, time, time, time is on my side

Suppliers and traders should use the lessons of the mid-2018 quality problems to now re-focus on their sales terms' quality dispute reporting deadlines, to anticipate the coming disputes and better assure that they resolve them both successfully and efficiently.

1 – *Trans-Tec International S.R.L. v. TKK Shipping (PTE) Ltd.*, et al, Case No. 1:18-cv-23199-KMW (U.S. District Court, Southern District of Florida, Miami, filed Aug. 7, 2018)

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