

VAN STEENDEREN MAINPORTLAWYERS

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This year's topic of the London International Maritime Law Seminar is "Recent Developments in Maritime Law: A Multi-Jurisdictional Perspective". During this half-day seminar, speakers from fourteen jurisdictions will be addressing recent developments in maritime law within their respective jurisdictions.

DE-BUNKERING IN THE NETHERLANDS

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1. Introduction

1.1 I will focus on "*De-bunkering in the Netherlands*", since this recently has become a topic of interest in the Netherlands. For the last couple of years, the Dutch authorities are focusing heavily on bunker fuel operations following a series of incidents involving admixture of hazardous waste to bunker fuel. More specifically, the Dutch authorities are "increasingly concerned" about de-bunkering procedures and the de-bunkering of "off-spec" fuel in Dutch waters due to the perceived risk that the fuel could contain hazardous waste.

1.2 The past few years have seen an increase of problems with the environmental authorities in the Netherlands as well as in other EU countries when vessels had to be de-bunkered. De-bunkering is the removal of fuel from a vessel that was meant to be used for sailing. In some cases this bunker fuel must be classified as waste, while in others it can be regarded as a product. The specific situation determines whether and, if so, where in the supplier / transporter / shipowner / user chain it is regarded as waste matter or a product. This, in turn, determines which regulations apply to the

bunker fuel. The Dutch Human Environment and Transport Inspectorate (“*Inspectie Leefomgeving en Transport*” (ILT)), monitors compliance with these regulations. In this presentation I will explain how the Inspectorate assesses a de-bunkering situation.

- 1.3 In line with their concern, in a significant number of cases the Dutch authorities have required de-bunkered fuel to be “treated, handled and disposed of as waste” unless there has been proof to the contrary.
- 1.4 Situations in which the Inspectorate categorizes bunker fuel as waste are any of the following:
 - waste matter;
 - banned substances, such as PCBs or PCB-containing oil, freons or brominated flame retardants (POPs regulation);
 - higher than permitted levels of organic halogens ((Organic Halogen Content of Fuels Decree);
 - substances not permitted under the MARPOL Convention, e.g. non-petroleum derivatives such as coal tar, lignite tar and creosote oil.
- 1.5 Accordingly, Dutch authorities have been actively launching criminal investigations into the course of events with regard to de-bunkering procedures they deem to be suspicious. In many cases this leads to criminal prosecution. The National Police and Customs are the Agency’s law enforcement partners.

2. Background information: the bunker fuel market

- 2.1 Worldwide, the bulk of bunker fuel trading is in four ports: Fujairah, Houston, Rotterdam and Singapore. In the Netherlands, Rotterdam is by far the major trading location, the source of around 88% of all bunker fuel. All in all, over 22,000 vessels are bunkered in the Netherlands annually, together taking in around 13 million metric tons of fuel. To a large extent the constituents of this fuel derive from imported materials. In recent years this import volume has risen significantly, particularly from Russia and the Baltic states, and now stands at 26.8 MT (2011). At the same time, there are very substantial exports of 21.5 MT (2011), particularly to Singapore.

2.2 The main links in the bunker fuel supply chain are trading (trade, storage and transit, including blending) and supply (physical delivery of bunker fuel). Some companies are active on all fronts.

2.3 The main market players in North-Western Europe are:

- (i) the independent oil traders (particularly Vitol, Glencore, Gunvor, Chemoil, Koch, Trafigura and Litasco),
- (ii) the oil companies (Shell, BP, Exxon Mobil, Total and others),
- (iii) the independent tank storage and transit companies (Vopak, ETT, Argos, STR and others) and
- (iv) the suppliers (Argos Ceebunkers, OW Bunkers, Wiljo/NIOC, Verbeke and others).

2.4 Trading is carried out by the big oil companies (the ‘majors’) as well as by independent oil traders. These are companies with serious financial clout. The annual turnover of oil trader Vitol is almost EUR 200 billion (2011), for example. Storage and transit takes place at a limited number of storage terminals, most of which are owned by independent storage and transit companies. The remainder are owned by traders and majors. The market is not very transparent and highly dynamic, involving an ever-changing array of players, regular take-overs and intense price competition.¹

2.5 The IMO has laid down standards for bunker fuel in MARPOL 73/78 Annex VI - Regulations for the Prevention of Air Pollution from Ships.

MARPOL Annex VI, first adopted in 1997, limits the main air pollutants contained in ships exhaust gasses, including sulphur oxides (SO_x) and nitrous oxides (NO_x), and prohibits deliberate emissions of ozone depleting substances. MARPOL Annex VI also regulates shipboard incineration, and the emissions of volatile organic compounds from tankers.

Following entry into force of MARPOL Annex VI on 19 May 2005, Marine Environment Protection Committee (MEPC), at its 53rd session (July 2005),

¹ The foregoing information is derived from the CE Delft publication “*Blending and Bunkering*”, spring 2011.

agreed to revise MARPOL Annex VI with the aim of significantly strengthening the emission limits in light of technological improvements and implementation experience. As a result of three years examination, MEPC 58 (October 2008) adopted the revised MARPOL Annex VI and the associated NOx Technical Code 2008, which entered into force on 1 July 2010.

The main changes to MARPOL Annex VI are a progressive reduction globally in emissions of SO_x, NO_x and particulate matter and the introduction of emission control areas (ECAs) to reduce emissions of those air pollutants further in designated sea areas.

Under the revised MARPOL Annex VI, the global sulphur cap is reduced initially to 3.50% (from the current 4.50%), effective from 1 January 2012; then progressively to 0.50 %, effective from 1 January 2020, subject to a feasibility review to be completed no later than 2018. The limits applicable in ECAs for SO_x and particulate matter were reduced to 1.00%, beginning on 1 July 2010 (from the original 1.50%); being further reduced to 0.10 %, effective from 1 January 2015.

The revised measures are expected to have a significant beneficial impact on the atmospheric environment and on human health, particularly for those people living in port cities and coastal communities.²

- 2.6 The MARPOL standards are in force across the world and set maximum limits on fuel sulphur content (45,000 ppm in the open seas and, from 2012 onwards, 35,000 ppm). The standard is to be tightened further in 2020 to 5,000 ppm (or possibly in 2025, pending the outcome of a review in 2018).
- 2.7 On a voluntary basis the market has also adopted the ISO 8217 product standard for marine fuel oil specification, which sets criteria for bunker fuel geared mainly to guaranteeing proper functioning of ship's engines. With a view to protecting crew health, limits on H₂S (hydrogen sulphide) content were recently added to this standard.

The widely used ISO 8217:2005 standard was replaced on 1 July 2010 by a revised edition (ISO 8217: 2010) to meet higher international requirements for air quality, ship safety, engine performance and crew health. The revised edition has, compared to the former standard, stricter

² See for more (background) information on MARPOL 73/78 Annex VI - Regulations for the Prevention of Air Pollution from Ships:
<http://www.imo.org/OurWork/Environment/PollutionPrevention/AirPollution/Pages/Air-Pollution.aspx>

requirements which will lead to the harmonisation of marine fuel categories and increase quality.

The process of reviewing the former standard has involved representatives from all parts of the bunker industry. The new standard will hopefully lead to greater confidence and transparency between buyers and suppliers in the global market for marine fuels.

The main changes compared to the previous standard (ISO 8217:2005) are that the limits of some of the parameters have become stricter in addition to the introduction of new parameters. Important changes include distillate and residual category rationalization and new fuel characteristics.

On August 15, 2012, the ISO published an even newer edition of the standard for marine fuel, the 8217:2012 edition. However, according to a report by Platts, the new global bunker fuel specifications released by the International Organization for Standardization (ISO) are unlikely to be taken up by the industry for “a few years”, since the existing specification (ISO 8217:2010) the 2012 edition supersedes is still facing problems and is rarely used by the bunker industry.

ISO 8217:2012, the fifth edition of the standard, differs from ISO 8217:2010 only in that it adds test method IP 570 for hydrogen sulfide (H₂S), and while an H₂S upper limit of 2 mg/kg effective July 1, 2012 was already part of the previous standard, no test method had been specified.³

3. De-bunkering in the Netherlands

Introduction

- 3.1 As stated before the Inspectorate has been delegated by the Dutch government to monitor and encourage compliance with both national and European legislation and regulations in favour of a safe and sustainable transport. In that capacity, the Inspectorate also monitors compliance with the rules and regulations with regard to bunkering and de-bunkering of vessels in the Dutch territorial waters.

³ See for more (background) information on the ISO 8217 standard: <http://shipandbunker.com/news/world/337419-singapore-traders-iso-82172012-wont-be-adopted-for-years>, <http://www.platts.com/latest-news/shipping/singapore/bunker-industry-unlikely-to-adopt-new-iso-2012-8678823>, www.bunkerworld.com and www.intertek.com.

3.2 The Inspectorate describes de-bunkering as the removal of fuel from a vessel that was meant to be used for sailing. According to the Inspectorate, in some cases this bunker fuel must be classified as waste, while in others it can be regarded as a product. The specific situation determines whether and, if so, where in the supplier / transporter / shipowner / user chain it is regarded as waste matter or a product. This, in turn, determines which regulations apply to the bunker fuel.

3.3 In the following situations, the Inspectorate categorises de-bunkering as the return of a product:

- A bunker supplier has delivered bunker fuel to a vessel in the Netherlands, but has delivered a larger volume of fuel than agreed on. The vessel's owner does not want or is unable to pay for the extra volume. A part of the fuel supplied is offloaded.
- A vessel is chartered for use within EU waters, but the charter period expires. The owner of the vessel does not want to take back the vessel with the fuel oil present in the fuel tanks. This fuel oil must therefore be pumped out of the chartered vessel, and offloaded and sold separately.
- A product is delivered that does not meet the desired specifications, e.g. high-sulphur fuel oil instead of low-sulphur fuel oil. The high-sulphur fuel oil is therefore offloaded.
- A vessel comes from outside the EU and has come to the end of its charter period. The owners want the vessel to be delivered without bunker fuel.
- A sea-going vessel needs to be sent to the shipyard because repairs have to be carried out, e.g. to the fuel tanks. The fuel (not fuel residues) must be pumped out.
- A vessel arrives from outside the EU with high-sulphur fuel oil. Once it arrives in the Netherlands, it receives new orders: it is to remain temporarily in EU waters. The high-sulphur fuel oil must be removed because of the regulations applicable in the EU. Instead, the tanks must be filled with low-sulphur fuel oil which meets SECA requirements.

- A sea-going vessel is running on bunker fuel that is not suitable for use in colder waters. The vessel is now bound for a port in, for example, Northern Europe. The bunker fuel with a high pour point (summer grade) is replaced by bunker fuel with a low pour point (winter grade).
- 3.4 Please note that in all these cases, the category of ‘return of product’ only applies if no irregularities are detected in the bunker fuel.
- 3.5 Below is a list of situations in which the Inspectorate categorises bunker fuel as waste. This is the case if the bunker fuel contains any of the following:
- waste matter.
 - banned substances, such as PCBs or PCB-containing oil, freons or brominated flame retardants (POPs regulation).
 - higher than permitted levels of organic halogens (Organic Halogen Content of Fuels Decree).
 - substances not permitted under the MARPOL Convention, e.g. non-petroleum derivatives such as coal tar, lignite tar and creosote oil.
- 3.6 Even if none of these substances are present, the fuel may still be classified as waste. This is the case if any of the following situations applies to the supplied bunker fuel:
- it could endanger the safety of the vessel
 - it could have a negative impact on the machinery
 - it could be harmful for the crew
 - it could cause additional air pollution

Relevant legislation

- 3.7 The following legislation is of relevance to de-bunkering cases:
- Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste (“Waste Framework Directive / EC Directive”) sets the basic concepts and definitions related to waste management, such as definitions of waste, recycling, recovery. It explains when waste ceases to be waste and becomes a secondary

raw material (so called end-of-waste criteria), and how to distinguish between waste and by-products. The Directive lays down some basic waste management principles: it requires that waste be managed without endangering human health and harming the environment, and in particular without risk to water, air, soil, plants or animals, without causing a nuisance through noise or odours, and without adversely affecting the countryside or places of special interest. Waste legislation and policy of the EU Member States shall apply as a priority order the following waste management hierarchy:



In Article 3 paragraph 1 of the EC Directive, “waste” is defined as follows: *“any substance or object which the holder discards or intends or is required to discard.”*

And in Article 3 paragraph 2 of the EC Directive, “hazardous waste” is defined as follows: *“waste which displays one or more of the hazardous properties listed in Annex III.”*

- 3.8 The Directive introduces the “polluter pays principle” and the “extended producer responsibility”. It incorporates provisions on hazardous waste and waste oils (old Directives on hazardous waste and waste oils being repealed with the effect from 12 December 2010), and includes two new recycling and recovery targets to be achieved by 2020: 50% preparing for re-use and recycling of certain waste materials from households and other origins similar to households, and 70% preparing for re-use, recycling and other recovery of construction and demolition waste. The Directive requires that Member States adopt waste management plans and waste prevention programs.

Article 29(5) of Directive 2008/98/EC on waste calls upon the Commission to create a system for sharing information on best practice regarding waste prevention and to develop guidelines in order to assist the Member States in the preparation of their waste prevention programs. In order to address this requirement, the Commission has set up a website devoted to waste prevention activities.

- The Dutch Environmental Management Act (“*Wet Milieubeheer*”).

The Environmental Management Act came into force on 13 June 1979. In Article 1.1. of the Act, “industrial waste” is defined as follows: “*waste substances that are not household waste or hazardous waste*”.

“Hazardous waste” is defined as follows: “*waste substances designated as such by ministerial order, in accordance with relevant treaties and decisions of international organisations which are binding upon the Netherlands.*”

3.9 In the event the authorities assume that the bunkers on board a vessel are “off-spec” and therefore presumably qualify as waste then discharge of this waste will fall under the scope of the Dutch Environmental Management Act. This prohibits the transfer of industrial or hazardous waste to a party which is not authorized to receive hazardous waste. In such case Article 10.37 of the Environmental Management Act may become applicable.

Article 10.37 of the Environmental Management Act reads as follows:

“1. Discarding industrial or hazardous waste by transferring it to another person shall be prohibited.

2. This prohibition shall not apply if industrial or hazardous waste is transferred to a person who,

a. is authorized to collect the waste substances in question pursuant to Article 10.45 or 10.48;

(...)”

Other relevant Articles of the Environmental Management Act with regard to the de-bunkering cases are Article 10.45 paragraph 1, Article 10.48 and Article 10.55.

Article 10.45 of the Environmental Management Act reads as follows:

“1. It shall be prohibited to collect industrial or hazardous waste:
a. without having been placed on a list of collectors, or
b. without a license from Our Minister, if the waste substances belong to the categories designated pursuant to Article 10.48.
(...)”

Article 10.48 of the Environmental Management Act reads as follows:

“1. In the interests of the efficient management of industrial or hazardous waste, it may be provided by order in council that a licence from Our Minister shall be required for the collection of categories of such waste designated therein.
2. Articles 8.5 to 8.25 shall apply mutatis mutandis to the issue, refusal, amendment and withdrawal of a licence as referred to in paragraph 1, with the proviso that, for the purposes of the said Articles, the interests of protecting the environment shall be limited to the interests of efficient waste management.
3. Article 8.36f, paragraph 2 shall apply mutatis mutandis to holders of licences as referred to in paragraph 1.”

Article 10.55 of the Environmental Management Act reads as follows:

“1. It shall be prohibited to:
a. transport industrial or hazardous waste for other persons in exchange for payment;
b. trade in industrial or hazardous waste;
c. act as an intermediary on behalf of other persons in the management of industrial or hazardous waste, without having been placed on the list of transporters, traders or intermediaries as a transporter, trader or intermediary respectively.
2. The prohibition referred to in paragraph 1 (a) shall not apply to persons who are authorized to collect industrial or hazardous waste pursuant to Article 10.45.
3. Our Minister shall designate an agency to place, on his behalf, transporters, traders and intermediaries on the list referred to in paragraph 1.
4. Our Minister shall lay down further rules on the placing of transporters, traders and intermediaries on the list referred to in paragraph 1, these

rules shall in any event include criteria for placing persons on and removing them from the list.

5. With regard to the activities referred to in paragraph 1, a transporter, trader or intermediary shall record the following information:

a. the name and address of the person;

1. from whom the waste substances originate;

2. to whom the waste substances are to be transferred;

b. the usual nomenclature and the quantity of the waste substances.

6. Article 10.38, paragraph 2 shall apply mutatis mutandis.”

- 3.10 The EU Directive on Port Reception Facilities, which implements the MARPOL Convention, requires member states to ensure the availability of adequate Port Reception Facilities, which should be capable of receiving types and quantities of ship-generated waste and cargo residues from ships normally using that port.

The interpretation by the Dutch authorities

- 3.11 Fact is that the definition in Article 3 paragraph 1 of the EC Directive, which states that “*waste means any substance or object which the holder discards or intends or is required to discard*”, is rather vague. The terms ‘substance’ and ‘object’ are not to be understood in the sense of EU chemicals legislation, but as autonomous terms of waste legislation which are to be read broadly. Any substance or object is either waste or non-waste. The definition of waste itself has not been modified compared to the previous Waste Framework Directive (2006/12/EC). The European Court of Justice has been required to clarify and interpret the concept of waste on several occasions, having regard to the definition of waste under the previous directives. In two key areas, however, the legislator has tightened up the concept of waste by incorporating concepts of by-products and of end-of-waste criteria. Both the concepts ‘by-product’ and ‘end-of-waste’ introduce a distinction between waste and non-waste.
- 3.12 The key term of the waste definition is ‘discard’, used in three alternatives (‘any substance or object (1) which the holder discards or (2) intends or (3) is required to discard’), without providing definitions or clarification on the exact meaning of these. However, the first alternative is describing an action

or activity of the holder of the substance or the object, the second describes an intention of the holder, and the third a legal obligation. These three alternatives are not always easy to distinguish. Regarding the second alternative (intention to discard), note that the European Court of Justice has recognised that the holder's intention is to be inferred from his/her actions in the light of the aims of the Directive and having regard to factors provided by the Court, and is thus an objective test.

3.13 For a number of every-day situations, the allocation of a holder's actions and activities to one of the three 'discarding' alternatives and thus the classification of a substance or object as a waste is an easy task. For example, an item thrown in a dustbin is discarded, and is thus considered waste. On the other hand, for a number of cases and in a very wide range of circumstances, there remains uncertainty. The question whether a holder of an object or substance has the intention to discard it has to be answered on the basis of all relevant facts and circumstances and can lead to extensive debates about the interpretation of his/her intention. The European Court of Justice has recognised a need for flexibility in adopting a case-by-case approach as well as a need to consider all the specific factual circumstances involved. Furthermore, the Court has held that in view of the aims and objectives pursued by the Directive, the concept of waste cannot be interpreted restrictively.

Joined cases C-418/97 and C-419/97 ARCO (2000), paras 36 et seqq; Case C-252/05 Thames Water (2007) para 28; Case C-188/07 Commune de Mesquer (2008), para 39, 44.

The following non-exhaustive clarifications regarding the concept of discarding were provided by the European Court of Justice:

- discard applies to both recovery and disposal of waste. However, it should be noted that this does not mean that any substance which undergoes a recovery/disposal operation as listed in the Directive's Annexes is waste per se, but it might be regarded as evidence for being waste;

Joined cases C-418/97 and C-419/97 ARCO (2000), para 51; Case C-9/00 Palin Granit Oy (2002), para 27.

- discard can involve a positive, neutral, or negative commercial value. No distinction is made based on whether the substance/object is marketable or not;

Joined cases C-206/88 and C-207/88 Vessoso and Zanetti (1990), para 9 (judgment prior to Directive 91/156/EEC).

- discard can be intentional/deliberate on the part of the holder or unintentional / involuntary / accidental;

Case C-252/05 Thames Water (2007) para 28

- or even can occur with or without the knowledge of the holder;

Case C-1/03 van de Walle (2004) paras 46 et seqq.

- the storage location of a material does not influence whether it is a waste or not;

It must be noted that no single factor or indicator is conclusive. It is always necessary to consider all the circumstances. Hence, none of the examples provided above are intended to take precedence over real-life cases, since the circumstances of those cases may lead to other results.

- 3.14 The Dutch authorities adopt a very strict policy. In line with their concerns, the Dutch authorities have required de-bunkered, off-specification fuel to be treated, handled and disposed as waste, unless there has been proof to the contrary.

Although the Dutch authorities have yet to provide clear guidelines as to when off-specification bunker fuel is to be considered as “waste”, the Dutch authorities have explained that bunker fuel should be handled and disposed of as “waste” if the bunker fuel is found not suitable for use on board a particular vessel due to which the Captain of that vessel takes the decision to debunker for that reason. It should be noted that fuel may be unsuitable for a particular vessel but may even without upgrading still be used by another vessel due to differences in the engine requirements. Whether in such a case, the fuel is to be considered waste is still uncertain.

Consequently, the unusable fuel oil may only be handed over to a licensed waste collector with the intention of a controlled recycling, recovery or disposal of the fuel oil pursuant to the waste regulations. The de-bunkered fuel should be waste-labelled and must be accompanied by required waste disposal documents in accordance to European and Dutch legislation.

- 3.15 The Dutch authorities immediately bring any infringement of the waste regulations to the attention of the public prosecutor who will then decide on bringing criminal cases against the holders and receivers of the de-bunkered fuel oil. The fines which can be imposed for such offences can be quite high, whereas an offence – if committed wilfully – can even be punished by imprisonment. Needless to say, any waste label attached to a consignment of fuel oil will rapidly decrease its value from USD 600 per MT to a salvage sale value or even to a negative value.
- 3.16 The lack of clear guidelines has led to discussions in the Netherlands. When interviewed by the Dutch Financial Times (*Financieele Dagblad*) on the topic of blending and bunkering, engineer Peter Meeusen of Inspectorate, subsidiary of Bureau Veritas, has stated that the problem is that there are no clear rules on what blend components can and what blend components cannot be used in the blending of bunker fuel.
- The Dutch authorities have only set maximum parameters which cannot be exceeded and they are of the opinion that bunker fuel that exceeds the maximum parameters is considered to be hazardous waste and that it is therefore prohibited to discard that kind of bunker fuel, whilst it could well be the case that the chemical substances in the bunker fuel as such can be used in a different manner.
- Mr Meeusen and other experts involved have suggested the authorities to provide the market with a “black list” of prohibited substances and blend components, so that it is clear from the outset what rules and requirements have to be followed.
- 3.17 The judgment of the Middelburg District Court (Criminal Chambers) dated 17 October 2011, known as the “*Marjatta*” case, is in line with the strict policy adopted by the Dutch authorities and has triggered more concern

from the Dutch bunker industry and in particular of the Association of Bunker Suppliers in the Netherlands (“NOVE”).

The “Marjatta” case

- 3.18 On 7 October 2011 officers of the Dutch National Police KLPD, Section Harbour Police, discovered de-bunkering of approx. 100 mt of heavy oil from the seagoing vessel “Marjatta” into the inland barge “Chopin”. They interviewed the Chief Engineer and Master of the “Marjatta” who stated that they had encountered difficulties with the heavy fuel they had taken on board in Gdansk on 16 September 2011. This heavy oil was described by the Polish sellers as “RMG IFO380”. During the voyage the vessel had only been able to burn approx. 30 mt during a voyage, and the vessel had suffered repeated clogging of separators. Even blending with another quantity of bunkers supplied in Finland did not assist very much and therefore the Owners decided to return the bunkers to the original Polish supplier in a Dutch port.
- 3.19 According to an analysis report of samples taken on board of “Chopin” describing the fuel as RMG IFO380, the findings were that the fuel had a Total Sediment Potential of 0.91 per cent (m/m) and Ash of 0.039 per cent (m/m). This is not in conformity with ISO 8217 where TSP should be maximum 0.10 per cent (m/m). In the event the TSP exceeds 0.2 per cent this generally will lead to main engine problems.
- 3.20 The District Court held that the heavy fuel de-bunkered in the Netherlands was not fit to be used for the purpose of using it as bunkers on board of a seagoing vessel. The analysis certificate in conjunction with the Data Sheet from Shell MFO380 qualified the heavy fuel as a hazardous substance (waste). Under Article 10.37 of the Environmental Management Act discarding industrial or hazardous waste by transferring it to another person is prohibited. Under Article 10.45 it shall be prohibited to collect industrial or hazardous waste without having been placed on a list of collectors, or without a license from the Minister if the waste substances belong to the categories designated pursuant to Article 10.48. A dispensation may be granted from the prohibition referred to above by or pursuant to order in

council for categories of cases indicated therein, if this does not conflict with the interests of protecting the environment.

- 3.21 In the case of the “Marjatta” both persons indicted (the Owner of the vessel and the Dutch bunker trader taking the off-spec bunkers from the “Marjatta”) were not listed as official collectors of hazardous waste.
- 3.22 The Middelburg District Court ruled that de-bunkering is an illegal manner of disposing of (hazardous) waste. Since the decision in the “*Marjatta*”-case, shipowners and /or time charters and / or bareboat charters are withheld permission to de-bunker, unless the de-bunkering operation is executed by an authorised waste disposal company.
- 3.23 However, there is light at the end of the tunnel for all parties involved in the bunker industry, as the European Court of Justice and the Dutch Council of State have recently rendered two judgments which have shed a more than welcome light on the essential question whether a substance is to be deemed waste or not. I will discuss these rulings next.

“Shell Nederland Verkoopmaatschappij B.V. and Belgian Shell N.V. / the Netherlands Government”, European Court of Justice 12 December 2013, joint cases C-241/12 and C-242/12

- 3.24 On 12 December 2013 the European Court of Justice has rendered a preliminary ruling about de-bunkered contaminated diesel. Under the circumstances described in the ruling the de-bunkering of diesel will not fall within the scope of illicit trade in waste.
- 3.25 The facts of these joint cases were as follows. On 3 September 2006 Shell in the Netherlands loaded Ultra Light Sulphur Diesel (“diesel”) on to a barge for delivery to a client established in Belgium. When the consignment was delivered in Belgium it was discovered that, at the time of loading, the tanks of the barge had not been completely emptied, which resulted in the diesel being mixed with MTBE. Since the flashpoint of the resulting diesel mix was too low for it to be resold as fuel for diesel engines in accordance with the contractual purpose contemplated by the Belgian client and since the client was precluded from storing the diesel mixture at his premises having regard

to its environmental permit, the consignee returned the off-spec diesel to Shell, which shipped the consignment back to the Netherlands.

- 3.26 In a criminal case before the Rotterdam District Court the Public Prosecutor stated that, at the time of shipment from Belgium to the Netherlands, the product in question constituted waste and by having failed to adhere to the notification procedure laid down in Article 15 of Regulation no 259/93, Shell was guilty of illegal traffic, within the meaning of Article 26 (1) of that Regulation. Shell argued, however, that the consignment at hand could not be categorized as waste.
- 3.27 The Rotterdam District Court asked the European Court of Justice for a ruling whether a consignment of off-spec diesel at the time of its loading into a barge must be categorized as waste where, after delivery to the purchaser, it was discovered that the consignment did not meet the contractual specifications or the safety requirements, because of its low flashpoint, and whether, because of its new composition, it could not be stored by the purchaser having regard to its environmental permit nor sold by it as diesel fuel as was intended, so that it was, at the purchaser's request, returned to the seller which intends to resell it after having blended it with another product.
- 3.28 The European Court of Justice reminded of the fact that, in accordance with settled case-law the concept of "waste" must not be understood as excluding substances and objects which have commercial value and which are capable of economic reutilization (*Palin Granit Oy/Vehmassalon, C-9/00*). The fact that Shell took back the consignment at hand with the intention of blending it and placing it back on the market was considered to be of decisive importance in the present case. It was established during the proceedings that the consignment at issue could be sold on the market without being processed, in the condition in which it was when it was taken back by Shell and, secondly, the commercial value of the contaminated diesel corresponded largely to that of a product which meets the agreed specifications.

- 3.29 The European Court of Justice held that it would not be justified at all to make goods, substances or products which the holder intends to exploit or market on economically advantageous terms in a subsequent recovery process subject to the provisions of Directive 2006/12, which seeks to ensure that recovery and disposal operations will be carried out without endangering human health and without using processes or methods which could harm the environment. Having regard to the requirement to interpret the concept of “waste” widely, the reasoning should be confined to situations in which the re-use of the goods or substance in question is not a mere possibility but a certainty, which it is for the referring Court to ascertain, without the necessity of using any of the waste recovery processes referred to in Annex II B to Directive 2006/12 (*note: the Directive preceding 2008/98/EC*) prior to re-use. Consequently a consignment of diesel accidentally contaminated with another substance is not covered by the concept of “waste”, provided that the holder of that consignment does actually intend to place that consignment, mixed with another product, back on the market, which is for the referring Court to ascertain.
- 3.30 The case was then referred back to the Rotterdam District Court which still has to decide whether the cargo of fuel oil in the case at hand concerned waste or not.
- 3.31 According to the ruling of 12 December 2013 the focus in every case must be on whether the holder of a substance “intends to or is required to discard” it. The fact that Shell as buyer of the contaminated product discarded it by rejection could not be determinative of Shell’s position. Shell was not legally bound to dispose of the mixed product, and the fact that it had commercial value and could be re-sold on the market in its contaminated state, pointed to a low risk of its disposal in a harmful manner. The additional fact that transactions in off-spec petroleum products were not generally regarded by the industry as a trade in waste was additional evidence to suggest that the consignment was not waste. If the substance at question is not waste within Article 1 (a), the fact that it may be subjected to an alteration that would be a recovery operation if it were waste, cannot bring it within the definition of waste. The re-use argument is to be seen in the light of the principle also applied by the European Court of

Justice, that is that re-use of the material had to be a “certainty”. The question of sufficient certainty is one of fact for the national courts to decide.

“Stena Weco AS / the Secretary of State of the Netherlands of the Infrastructure and Environment Department (“Freja Crux” case), Dutch Council of State 2 April 2014 (201301179/1/A41)

- 3.32 Since the 12 December judgment of the European Court of Justice, we have seen a judgment dated 2 April 2014 in a case between Stena Weco AS and the Secretary of State of the Netherlands of the Infrastructure and Environment Department, the so-called “Freja Crux” case.
- 3.33 Stena Weco, the time charterer of the Lauritzen owned m.v. “Freja Crux”, had purchased a quantity of HSFO, which was supplied on board on 14 November 2012 in Rotterdam. A few days later, this quantity of HSFO was de-bunkered in the port of Amsterdam.
- 3.34 The reason for this de-bunkering was that according to an analysis of the HSFO it had a content of 1150 mg/kg of DCPD and a content of 163 mg/kg of Styrene. DCPD and Styrene are so called ‘cutter stocks’. They have been present in nearly all consignments of HSFO bunkered in the ARA range during the last 30 years. The trading norms ISO 8217:2010 and 2005 do not provide for specs in respect of the presence of DCPD and Styrene.
- 3.35 The owner of “Freja Crux” was nevertheless of the opinion that the bunkers did not meet their quality standards for the particular ship and he therefore informed the time charterer that the HSFO was unsuitable for the planned transatlantic voyage and had to be removed as quickly as possible.
- 3.36 In order not to lose time, the time charterer discussed and negotiated with the bunker supplier that the supplier would take back the HSFO for the sound market price and agreed with the de-bunkering requested by the owner. The Dutch environmental authorities have been notified about the de-bunkering beforehand and they notified the owner and time charterer of “Freja Crux” that the bunkers had to be deemed waste and the authorities

threatened pressing criminal charges if the time charterer would redeliver the bunkers to the bunker supplier or if the vessel would depart with the fuel still on board (to be de-bunkered elsewhere) without an EVOA permit.

3.37 In line with the European Court of Justice decision of 12 December 2013, the Dutch Council of State ruled that the time charterer could not be considered to have had the intention to discard the HSFO within the meaning of the definition of waste.

3.38 An important aspect of the “Freja Crux” decision was that the de-bunkered fuel was redelivered to the original bunker supplier against a refund of the full purchase price. Such redelivery is not considered to constitute a discarding of waste.

4. Conclusion

4.1 The recent decisions in the Shell and “Freja Crux” cases are applauded by the bunker suppliers and all other parties involved in a de-bunkering procedure. The cases reverse the very strict interpretation which the Dutch authorities have placed on off-spec bunkers. The Dutch authorities were of the opinion that if a consignment of fuel oil could not be used for its immediate intended purpose, i.e. the burning on board of the vessel in question, the de-bunkering was to be interpreted as an act of discarding and, as a consequence, the consignment of fuel oil to be de-bunkered had to be deemed a waste product. By insisting they were classed as waste they invoked all sorts of domestic and EU Regulations for their handling which imposed disastrous and totally unnecessary costs on the bunker industry.

4.2 We expect that the rulings will have a major impact in the key North Europe bunker hub of Rotterdam where the Dutch authorities had interpreted the EU Regulation which describes “waste” as “*any substance or object which the holder discards or intends or is required to discard*” literally with respect to off-spec bunkers. In the Shell cases the European Court of Justice has ruled that such literal interpretation is wrong. The European Court of Justice has ruled that, in determining whether a substance is waste, one should take

into account whether that substance is still of use to the holder. In this case, the parcel could easily be reconditioned and resold for a considerable value.

A crucial aspect of the “Freja Crux” case was that the consignment of fuel oil was to be returned to the original bunker supplier against repayment of the full purchase price. Such redelivery is not deemed to be an act of discarding. It remains to be seen, however, if this principle formulated by the Dutch Council of State can also be relied upon if such a redelivery to the supplier is not made against repayment of the full purchase price. We are of the opinion that there are compelling arguments in favour of that view.