

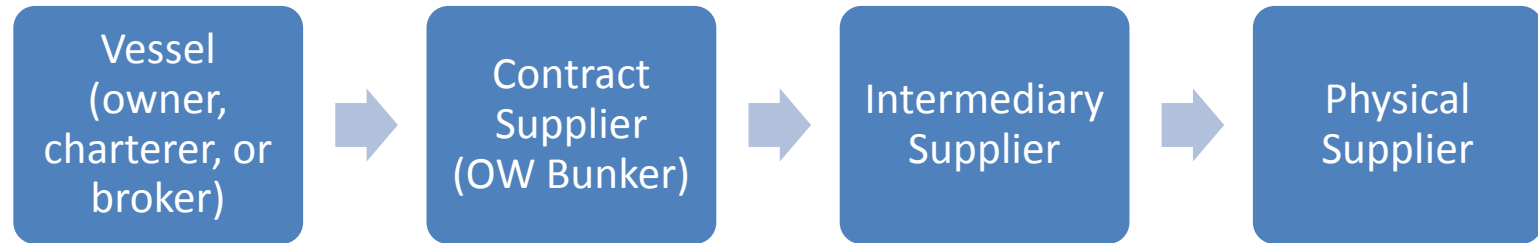
Bunkering in the US: liens, emissions, and contamination

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Maritime Liens & OW Bunker

- Typical transaction:



- Who has a maritime lien?
 - Contract supplier?
 - Assignee?
 - Physical supplier?
- Commercial Instruments & Maritime Lien Act
 - (1) provide necessaries;
 - (2) to a vessel; and
 - (3) on the order of the owner or a person authorized by the owner

Maritime Liens & OW Bunker

- (3) “On the order of the owner or a person authorized by the owner”
 - *Ken Lucky*: unbroken chain of agency
 - *Lake Charles Stevedores*: “control” over selection of sub-contractors

Maritime Liens & OW Bunker

- Appellate courts are unanimous
 - OW Bunker has maritime liens because it acted on the order of owners, authorized charterers, or authorized brokers
 - Physical suppliers do not have maritime liens because they acted on the order of (unauthorized) independent traders like OW Bunker
- Remand
 - Was the assignment to ING Bank valid?
- The end is in sight
 - OW USA already liquidated about 75% of its receivables
 - OW North America already liquidated 98% of its receivables

Emissions & Enforcement

- 2020 global sulfur cap
 - How will vessel comply?
 - Low-sulfur fuel
 - LNG
 - Scrubbers
 - What are consequences of non-compliance?
 - Voluntary disclosures (FONAR's)

Emissions & Enforcement

APPENDIX 2. Penalty Worksheet

- Civil penalties:

	STEP	AMOUNT
1	Calculate Economic Benefit using Penalty Policy Section II.A (cost of ECA fuel - cost of non-ECA fuel X amount of fuel = Economic Benefit)	
2	Calculate Gravity using Penalty Policy Section II.B.i and ii (fuel sulfur content violation + record keeping violation = Gravity)	
3	First Preliminary Penalty Amount (line 1 + line 2)	
4	Adjust Gravity using Penalty Policy Section III.A, B and C	
	A. Degree of Willfulness or Negligence (0 to 20% X line 2)	
	B. Degree of Cooperation: Aggravating gravity: (0% to 10%) X line 2 Mitigating gravity: (-10% to 0%) X line 2	
	C. History of Noncompliance (0 to 70% X line 2)	
	D. Total Gravity after adjustments (line 2+ 4.A + line 4.B + line 4.C)	
5	Second Preliminary Penalty Amount (line 1 + line 4.D)	
6	Adjust for Litigation Risk reduction using Penalty Policy Section III.D, if applicable (0 to 10% X 4.D)	
7	Adjust for Ability to Pay reduction using Penalty Policy Section III.E, if applicable (attach calculation consistent with ability to pay guidance)	
8	Adjust for SEP using Penalty Policy Section III.F, if applicable (attach calculation consistent with SEP policy)	
9	Third Preliminary Penalty Amount (line 5 – lines 6, 7 and 8)	
10	Calculate Statutory Maximum Penalty (if final penalty exceeds statutory maximum reduce penalty to statutory maximum) (\$25,000 X days of violation X number of violations = statutory maximum)	
11	Final Penalty Amount (line 9 or line 10)	

Emissions & Enforcement

Subpoena Duces Tecum

- Subpoenas:
- Criminal?

1. Provide copies of all [REDACTED] corporate policies and procedures containing [REDACTED] environmental protection policies related to compliance with Annex VI of the MARPOL Treaty, as they relate to the North American Emissions Control Area (ECA). Include all revisions to such policies, and the date such original documents and revisions were distributed to relevant staff, including crews of [REDACTED] vessels. Include and highlight relevant sections that enable [REDACTED] and vessel crew to implement effectively the environmental protection policy and procedures for compliance with or pertaining to MARPOL Annex VI.
2. Provide relevant excerpts from the Safety Management System for each vessel listed in Appendix C. Identify all provisions related to compliance with requirements in any ECA.
3. Provide a copy of the International Air Pollution Prevention (IAPP) Certificate and all supplements to IAPP certificates issued by the Flag Administration for each vessel listed in Appendix C for the time period in question.
4. For each filed Fuel Oil Non-Availability Report (FONAR), as listed in Exhibit C:
 - a. List each bunker supplier that does business at the port of call the vessel visited prior to entering the North American ECA, as well as at each port the vessel visited since receiving orders to proceed to a destination in the North American ECA (U.S. or Canada);
 - b. Provide copies of all correspondence with each bunker supplier you listed in response to a. above, beginning with the date that the vessel received orders to proceed to a destination in the North American ECA (U.S. or Canada); and
 - c. If the fuel purchase was a contractual function of another party, provide copies of all contracts covering the period as stated above.
5. Submit copies of [REDACTED] fuel procurement policies and contracts as they relate to any vessel for which [REDACTED] filed a FONAR.
6. Provide an electronic spreadsheet with the following information for each FONAR that [REDACTED] filed. Make sure to provide any missing information required by EPA's FONAR guidance,¹ but previously not submitted.
 - a. Report Date;
 - b. Report Form ID;
 - c. Ship Operator Name;
 - d. Vessel Name;
 - e. Flag Country;

¹ <http://www2.epa.gov/sites/production/files/documents/finalfuelavailabilityguidance-0626.pdf>

Contamination

- 2018: more than 200 vessels reportedly affected in US Gulf
 - Minor equipment troubles and major engine shutdowns
- 2020: more blending low-sulfur fuel ... more contamination

Contamination

- Warranties
 - ISO 8217: “The fuel shall be free from any material at a concentration that causes the fuel to be unacceptable for use”
- Disclaimers

EXCEPT AS OTHERWISE SET OUT IN THIS SECTION 5, ALL BUNKERS ARE SOLD “AS IS” AND ANY AND ALL WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF FITNESS FOR PURPOSE, SATISFACTORY QUALITY, MERCHANTABILITY, WORKMANLIKE PERFORMANCE, DESCRIPTION OR OTHERWISE, ARE HEREBY EXPRESSLY EXCLUDED AND DISCLAIMED BY THE SELLER AND THE SELLER’S AGENTS MAKE NO WARRANTIES WHICH EXTEND BEYOND THE EXPLICIT DESCRIPTION CONTAINED IN THIS AGREEMENT.

- Specific express warranties (like product descriptions) control over general disclaimers of implied warranties (like merchantability and fitness)

Contamination

- Notice of claim

Always without prejudice to Section 8.13 herein, any and all claims concerning the quality of the Bunkers delivered or time consumed for the entire operation, shall be submitted to the Seller in writing within thirty (30) days after delivery with a clear statement as to the nature or the claim(s) along with appropriate supporting documentation, failing which any rights to complain or claim compensation of whatever nature shall be deemed to have been waived and absolutely barred for all purposes. Furthermore, and notwithstanding any other Section of these GTC, Seller shall not be responsible for any claim whatsoever arising in circumstances where there is or has been commingling of Bunkers delivered by Seller with other fuel aboard the Vessel or Buyer's Delivery Vessel. Any such claim shall be submitted in accordance with the Notice requirements set forth in Section 19.

- Time bar

Jurisdiction other than the United States of America. No action or other proceedings shall be brought by the BUYER for any alleged breach of this Agreement more than one (1) year after the accrual of the cause of action therefore; provided, however, that nothing in

- Generally enforceable unless ...

- Unconscionable, frustrate essential purpose of contract, or against public policy
- Product of fraud, willful misconduct, or gross negligence

Contamination

- Limitation of remedies & waivers of consequential damages

(a) Notwithstanding anything in this Contract to the contrary, (i) Seller's obligations or liabilities hereunder shall not include any consequential or indirect damages, including without limitation, deviation costs, demurrage, damage to any Vessels or Buyer's Delivery Vessels or to their engines or tanks, and any actual or prospective loss of profits, and (ii) other than provided in Section 7(f) or in the event of personal injury or death, Seller's maximum liability under this Contract shall not exceed the lesser of the price charged to the Buyer for the Marine Fuels supplied under this Contract or the sum of USD Three Hundred Thousand (US\$300,000.00). Buyer agrees that no claim of USD Two Thousand (US\$2,000.00) or less shall be made under this Contract.

- Generally enforceable unless ...

- Unconscionable, frustrate essential purpose of contract, or against public policy
- Product of fraud, willful misconduct, or gross negligence

Contamination

- Law and jurisdiction
 - Frequently disputed because bunker sales contracts (*i.e.*, purchase orders, sales confirmations, standard terms and conditions, and “side” agreements) are inconsistent

Contamination

- US litigation
 - *Rule B*: security for charter party claims pending in foreign jurisdictions
 - *Trans-Tec*:
 - Initiated by contract supplier
 - Against vessel: failure to cooperate
 - Against physical supplier: breach of contract, negligence, and indemnity
 - Issues: time bar, waivers of damages, and law and jurisdiction
 - Class actions?
 - “Test” cases?

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