Commercial Aspects of Shipping – Bunkers III

Jagmeet Makkar
FICS, FRINA, FIMarE (I), ACIArb

From the previous month ……it is also advisable, where practically possible, to avoid using the newly bunkered oil till the time a fuel oil analysis report has been received and is found to be satisfactory. Taking this topic further, we will touch upon a few more practical aspects in the next article.

Planning bunkers is one of the most important acts of the shipboard staff. This should be done not only to take into account the spillage angle but also ensuring that the new bunkers are taken in empty tank(s). The reason to do so is obvious but at times this most important aspect is either ignored or onboard transfer not done to empty the tanks for various reasons. Let us look at a case where the oil was supplied apparently in compliance with the specifications but was received in a tank, which already had previous oil. To make the matters worse, the Chief Engineer did not take routine samples of the new oil while bunkering. After about five days of sailing, vessel started to use the oil and experienced serious problems and owners decided to divert the vessel, notifying charterers of the matter and holding them responsible for the time and cost, which of course was refuted by the charterers on the pretest that the oil in the tank was not representative of the bunkers supplied. The oil in the tank was analyzed and found in compliance with the specifications and so was the bunker supplier's sample. To make the matters still worse, the owners had not advised the P&I club or give it a notice of deviation. For those who are familiar with Hague Visby rules governing the contract of carriage as evidenced by the bill of lading would know that a deviation that is proven to be unreasonable could result in owners' right to limit liability. It is thus of utmost importance that the matter of deviation is taken most seriously and P&I club consulted prior taking such a course of action. In this particular case, apart from appointing a consulting engineer to help find the cause of problem (which in his opinion was due to incompatibility of the old and new oil resulting in serious sludge formation), the club refused to extend any more support in pursuing the claim against the charterer and the owners eventually withdrew their claim. Important lessons from such a case are:

1. Plan the bunkering process well (including requirements), taking into account onboard consumption planning to empty the tank(s) for receiving the new oil and considering not to start using the new oil until analysis report is available and oil is suitable for use.

2. Sampling process – this is a crucial act and can make or break a case. Not taking samples at the manifold, following an accepted procedure would mean relying on bunker suppliers' samples, in the event of a dispute! Going a bit further, in case of a doubt that the sampling process is being tempered with, Chief Engineer must take a strict stand and make his views known to his owners in addition to putting a remark on the bunker receipt, as guided by the owners. At times, the bunker barges will not accept any remark and the dispute can delay the vessel. However, it is essential to take a well considered stand to protect owners as well as charterers' interest against an unscrupulous bunker supplier. Later in the article, we will briefly look at a case with this matter at its heart.

3. Deviation – in case the bunkers are not suitable and a prudent owner must decide to deviate the vessel to offload the bunkers and seek replacement, it must be done keeping the P&I club closely notified. Taking a ship out of its planned route is a breach of the contract unless the cause for such deviation is considered reasonable. P&I club is in the best position to guide an owner in this respect and thus helping owner to keep his liability limits intact. In the case above, it was because of the

The views expressed here are solely those of the author, and do not necessarily reflect the views of the organization he represents.

poor bunker management and sampling practices onboard, the P&I club did not feel it could confirm cover for the liabilities arising out of the "unreasonable" deviation in addition to the fact that club was not notified before the deviation.

4. Record keeping – again an essential element to come out winner in any dispute. Following proper procedure and documenting it is important and needs to be followed in any event. In case of any inkling that a dispute might be taking birth, it becomes all the more critical that the evidence collection in chronological order is put in place. This can include written statements, formal and informal (diary/notebooks) documents/forms, photographs, documents with relevant remarks, putting parties on notice (as and when required) as part of a routine process etc. Being on contractual employment, staff onboard the vessel changes and an efficient system onboard and in the office can provide the much desired continuity.

In another case, the Chief Engineer and the attending bunker surveyor suspected that the samples were being tempered with. Vessel was to receive IFO 180. It appeared that supplier pumped in higher viscosity oil and towards the end supplied MDO to try to reduce the viscosity. Chief Engineer did not protest and the bunker receipts were signed clean. The sample analysis result confirmed the parameters in compliance with the specifications. However due to the doubts created because of tempering with the sampling process, owner decided to have samples drawn from the tanks (oil was received in empty tanks) and analyzed which showed the viscosity to be far above the IFO 180 limit. Owner decided to offload the bunkers and asked charterers to replace the bunkers at its time and cost which charterers refused and by then they had redelivered the vessel back to the owners. Oil was found to be unsuitable for use on the vessel with exhaust temperature running very high in spite of all possible practical actions to solve the problem by the Chief Engineer, who also ensured that proper records were kept and proper evidence and paper trail was gradually constructed. There was no cooperation from the charterers in this case and owners went ahead with the offloading and replacement of the bunkers. Arbitral panel found in favour of owners and they were awarded their claim in full. While Chief Engineer's inserting remarks on the bunker receipts would have helped all, including charterers who could then take the matter up with the bunker supplier, this did not fortunately jeopardize owners' case. Chief Engineer made up for this by taking additional samples and an excellent evidence collection, which finally formed the foundation of the case. In hindsight Charterers could have minimized their losses through close cooperation and bringing the bunker supplier to task under the bunker delivery contract. This case highlights the importance of evidence, good management practices and maintaining records – both formal and informal.

There is an interesting case, where a clerical error in the analysis report caused a prudent owner to take the decision to deviate the vessel, keeping his P&I club duly notified, and with charterers in agreement. However, when

the third sample, kept onboard, was analyzed by an independent analysis company, the oil was found to conform to the specifications and the deviation was unnecessary. Hence in a strict sense, as per what we have discussed above, owners liability limit under Hague Visby rule could be lost. However, since the owner had relied on the information available and the club was fully kept in picture, the deviation could be considered reasonable and the cover was not suspended. Thus such a simple clerical mistake can have far reaching and serious consequences. Here neither the owners nor the charterers could be faulted but the owners had to make good for the time loss to the Charterers who shared the joint survey costs at the port of deviation. The laboratory that carried out the analysis and made the clerical error compensated the owner in turn. Once again, the matter of keeping the club notified prior to deviation is highlighted by this case.

In today's environment with the bunker quality suspected to be deteriorating with every passing day, it is essential to be very careful while carrying out commercial negotiations and agreeing to a charter party clause. Consider the implications to agreeing something like below:

Owners Responsibility

The Charterers shall not be responsible for loss and/or damage sustained by the vessel or for liability for, or the payment of any expenses, cost and damages whatsoever, ***arising through the acts or omissions*** of pilots, tugboats, linesmen, **bunker firms**, who, although they may be engaged by Charterers, shall be deemed to be the servants of the Owners and under their instructions.

In Hindi, there is a phrase "Pairr Par Kulhaadi Maarnaa" (to hit one's own foot with an axe, say while cutting wood). In this case, it is more like "Kulhaadi, tum kahaan ho, muzhe pairr maarnaa hai" (looking around for axe to purposely hurting oneself). On a serious note, accepting such a clause can nullify the effect of any other clause that spells out the bunker specifications and also any other implied warranty. In such a clause, the owner has expressly agreed to accept the liability for the "acts or omissions" of the bunker firms when -

- it is the charterer who has ordered the fuel, selected the bunker supplier, decided on their own with regards to the price and quality.

- owners released the charterers of the absolute obligation to supply bunkers that were reasonability and complying with the specifications.

- owners and crew were "in the hands" of the charterers who decided where the ship was employed and the ports she called at.

In the above arbitration (London arbitration 15/00), the arbitral panel thought that the words "acts or omissions" were clear and wide and should be given effect to. Hence, the lesson from above is to exercise care while agreeing to the CP clauses. While traditionally, the acts of pilots are accepted as owners' responsibility since the master does not relinquish his role of the "commander" of the vessel even when he is assisted by one or more pilots, owners should not seek to take on the responsibility of bunker firms when they have no say in deciding who and where supplies the bunkers.

Contrast above to a simple description in a case (1/88) such as –

"2. That the Charterers shall provide and pay for all fuel except as otherwise agreed……

53. Vessel's description …….

Speed/Consumption ……IF 180 cst"

The owners referred to Time Charters (2nd Edition) by Willford and others, at page 138:

"The bunkers supplied by the charterers must be of reasonable general quality and suitable for the type of engines fitted to the particular ship. They will not be obliged to meet any unusal requirements of the engines, beyond those expected of their type, unless these have been drawn to their attention by the owners in advance. In view of declining quality in bunkers it has become more usual recently for the charter to include express requirements as to the type and grade of the fuel to be supplied: where such a stipulation exists the charterers must comply with it."

It was held by the arbitral panel that the passage in the Willford would be adopted. The case concerned presence of more than a trace of chlor in the bunkers. The charterers were found liable for all the damages resulting from the bunkering oil that was not fit for purpose.

In an older case dated 1984, under a NYPE form, it was held that the words "…. charterers to provide and pay for all the fuel ….." in clause 2 imposed a strict liability on the charterers and the duty on the charterers was found to be an absolute one.

Each case is different with its own peculiarities. What is important is that the parties should try to park the risks with the party that has most effective control to manage the risk. For example, if owners can manage a particular risk better than the charterers, then logically in a fair world, they should take it under their responsibility umbrella and vice versa. However, in a practical commercial world, the condition of the market and the negotiation position of the parties will lead to acceptance and/or rejection of clauses. If a party has accepted something which it should not have, it must be acknowledged and efforts should be made to mitigate the losses by taking proactive actions during the life of the contract.

Next month we will look at the recent changes in the ISO 8217, whether these changes are sufficient and further work that needs to be done in this area.

References:

Text adapted from the Tutorship Material, as necessary, with kind permission from Director General, ICS, UK for promoting Shipping Education and the Institute of Chartered Shipbrokers.