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Newsletter

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Bunker samples

Everybody involved in the bunker industry knows that fuel oil samples are taken at various points in the bunker supply chain. This is done in order to check the quality of the oil and to ensure that samples are retained in case of a dispute.

In this article we will focus on the delivery of fuel oil to a sea-going vessel. In the Netherlands, discussions are going on about creating more transparency earlier in the supply chain, in particular about the quality of the blending products that are used. There has been a great deal of media interest in the risks of hazardous waste admixtures in marine fuel oils.

Those interested in an initial investigation into the bunker market may be interested in the report 'Blending and Bunkering', a study initiated by the Dutch government and carried out by CE Delft in 2011. You can find the report (no. 1193) on their website; there is a Dutch and an English version available.

The vessel's Owners - wanting to ensure that the engines are functioning reliably - have contracts with marine

fuel testing services and laboratories that test and analyze the supplied fuel oil prior to departure. That is why the vessel's engineers take samples at the ship's manifold. But isn't it an upside down world, really, when ship owners have to invest time and money to check if the fuel oil supplied meets the required quality standards every time the ship is taking bunkers?

The vessel, as a rule, will take four samples: 1) for the vessel itself; 2) for the suppliers; 3) for the laboratory and 4) one Marpol sample.

Although the Charterers will purchase the bunkers most of the time, they are seldom involved in the sampling and testing procedures. However, there is a growing tendency among them to appoint a surveyor to check the quantities on board the bunker barge and/or sea-going vessel.

The bunker barge's crew will take their own samples and are basically not very interested in the samples taken by the vessel. The reason for this lies in the Suppliers' general delivery conditions, which - in the Dutch situation anyway - give undue preference to the Suppliers' own positions. Article 7.3 of the General Conditions of the Dutch Association of Independent Bunker Suppliers NOVE says that in case of a dispute, the suppliers' samples shall be conclusive and binding. You can download these conditions from their website. Maybe you would also like to watch their latest promotion film.

Note that article 7.3 starts with: ´*Unless quality shall compulsorily be determined at the receiving vessel's manifold*……..', and guess what: there is no such compulsory rule in the Netherlands at the moment!

Marpol 73/78 Annex VI, regulation 18, which came into force in 2005, says that the Bunker Delivery Note (BND) is a statutory document. Since then the fuel oil quality has become regulated by law and is therefore no longer only a matter between the Owners/Managers/Charterers and the Suppliers.

In spite of Marpol, there are still disputes between owners and suppliers about the quality of the fuel, and these disputes are often time-consuming and sometimes even emotional. One of the reasons is the fact that both the Owner and the Supplier will only recognize their own samples as legitimate: they do not trust each other's samples.

If the analysis results of the Owner's samples turn out to be different from that of the Suppliers', matters become more complicated. Not surprisingly in these cases, the Suppliers´ sample will often be within, while the Owner's sample will be outside specification limits mentioned in the ISO 8217 standard. We often recommend having a "fingerprint" made of both samples, so that at least it can be ascertained that the samples originate from the same batch.

The Charterers - with Charter Party clause in one hand and Suppliers' delivery conditions in the other hand - often find themselves between the devil and the deep blue sea.
The differences in the results of the analysis could be attributed to various reasons, such as deviating parameters, different sampling methods or false samples.

In accordance with Marpol 73/78 Annex VI, regulation 18, fuel oil samples should be taken by the continuous drip sampling method at the receiving ship's bunker manifold during the entire bunker delivery period. See also Resolution EPC.182(59) - 2009 Guidelines for the sampling of fuel oil for determination of compliance with the revised MARPOL Annex VI

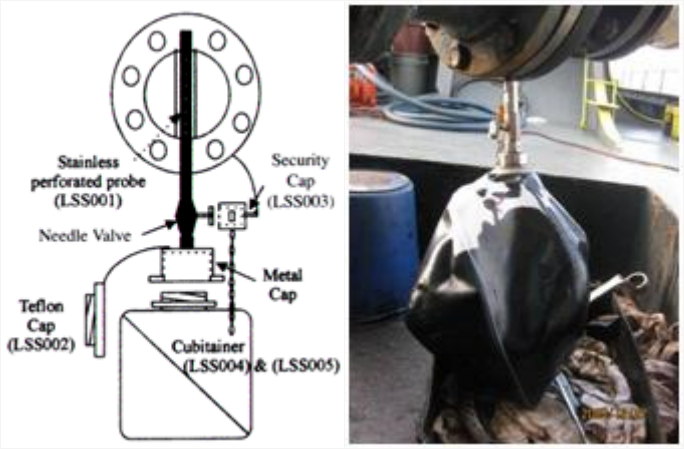

image: Continuous drip sampling device with plastic container

Not all bunker barges are fitted with drip sampling devices, but on those barges fitted with this device, we have experienced that the crew do not always use it, or do not use it correctly. As per standard procedure, the sea-going vessel is normally invited to witness the tank measurements, as well as the sampling.

We have investigated several cases of dispute and often learned that the sampling had not been witnessed by the sea-going vessel's representative. When we discussed this with the vessel's representative, however, we were often led to believe that an invitation to witness the sampling on the barge had never been received, even though the Chief Engineer's signature was often found on the label of the Suppliers' sample!

It frequently happens - in Dutch ports at least - that in order to avoid discussions afterwards, the Chief Engineer is requested to sign in advance the labels of the Suppliers' samples together with other documents and the mandatory bunker check list. See for instance the website of the Port of Rotterdam.

Most Chief Engineers sign these labels without protest and that is strange, because at that moment they do not yet know when, where or on what bottles these labels will be fixed and they haven´t even witnessed the sampling yet.

In some cases, the samples of the barge were continuous drip samples, in many other cases they were so-called line or spot samples. Spot samples are taken by simply and quickly filling the sample bottle from a drain on the discharge line. Such a sample - one litre - does obviously not represent the fuel oil from all bunker tanks at all levels. Over the years, we have come across situations where samples had already been prepared prior to bunkering. On other occasions the signed label for the Supplier's retained sample had simply been "filed" in combination with its seal number, but without any bottle attached to it. There were evidently wrong practices in the past, but in recent years we have not seen any and it is not necessary to generalize, because improvements are visible. Most Suppliers and barge Owners have good fuel quality systems in place; procedures are properly implemented and crews well trained.

On board sea-going vessels things sometimes go wrong as well. The sampling on board is not always in line with company rules; the collected fuel oil in the container - the drip sampler - is sometimes not properly distributed over the different sample bottles. In one case, for instance, we noted that the fuel oil had been collected in a dirty bucket. As the sea-going vessel is subject to ISM requirements, check lists for bunker activities must be included and adhered to.

Considering the above examples, the question could be raised whether it would not be better if the Dutch Authorities - and preferably the EU - were to take an example from the Singapore Standard Code of Practice for Bunkering - SS 600. See the website.

Be that as it may, there are other important issues about samples and sampling, which have not been discussed yet, but need to be considered as well. In short, at the laboratory we usually inspect the samples prior to analysis in order to witness the breaking of the seals and to inspect the information on the labels. For here is where things can go wrong as well. For example, incorrect or insufficient information on the labels or even worse: improperly fitted seals. When preparing the samples on board after bunkering, tamper-proof security seals with a unique identity number should be fitted in the presence of a representative of the other party.

And last but not least, when Owners and Charterers finally agree to take samples from the vessel's bunker tanks, the question arises as to how to get representative samples. This crucial question can be very difficult to answer and sometimes even impossible to solve.

The following advice can be given to Ship owners and Managers:

1. Remember that it is of paramount importance to get a representative sample. Remember also that this will require full awareness and accuracy of the personnel involved.
2. It is essential to check, witness or supervise if sampling is carried out in the correct way - on board the sea-going vessel, as well as on board the bunker barge.
3. The only accurate method is the continuous drip sampling method; it must be carried out according to correct procedures with the proper instruments during the entire bunker delivery period.
4. Never sign labels beforehand! Labels must only be signed after proper sampling has been carried out. If sampling has been carried out incorrectly, a Letter of Protest should be issued.
5. Labels must contain all necessary information. Seals must be properly fitted and documented.

For your own good: do not let this advice get lost in the pile of papers on your desk, but implement it in your organization.

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Time charter

The consequences of a single non-payment of hire

In a recent case following an Arbitration Award, a Commercial Court Judge decided that a single failure to pay hire amounts to a breach of condition** of charter, entitling the Ship Owners to terminate the charter and seek damages.

***A "condition" is a term of a contract which is so fundamental that any breach of it will entitle the innocent party to consider the whole contract terminated. Fundamental terms of a contract contrast with "intermediate or innominate terms" and "warranties". A breach of the former allows the innocent party to terminate the contract, but only if the breach is so serious as to deprive him of substantially the whole benefit of the contract as intended; a breach of the latter entitles the innocent party to damages only.*

The Judge's decision appears to go against the generally held view that the obligation to punctual and regular payment of hire is not a condition. Until now, Owners were only able to recover future losses following a termination if the charter had come to an end as a result of a repudiatory breach.

Failure of punctual and regular payment of hire, means that there should have been a series of consecutive hire payment defaults before Owners can terminate the charter on the grounds of repudiatory breach.

Furthermore, the Judge also considered whether a clause in an addendum to the charter party - which stipulated that the Owners would be entitled to recover future losses if the time charter was terminated - constituted a penalty clause. (If it did, such a clause would be unenforceable under English law).

The background to the case:

The vessel was chartered under a NYPE Charter Party for a period of 5 years.

Under clause 5 of the NYPE, Charterers are obliged to pay hire in advance and "failing the punctual and regular payment of hire….the Owner shall be at liberty to withdraw the vessel…."

The Charter also contained a so-called anti-technicality clause which required the Owners to give Charterers two banking days' notice if the hire had not been received on the due date.

This Charter was concluded in 2008, a time during which the Shipping Market was in decline.

After the vessel was delivered, the market continued to decline and the charterers found that they had chartered the vessel too expensively.

They tried to re-negotiate the time charter rate on various occasions, and threatened that if the Owners would not agree, they (the Charterers) would liquidate their company.

By mid-2009, the Owners agreed to a reduced rate for one year and an addendum was drawn up accordingly. This addendum also contained the clause referred to above, which stipulated that Owners would be entitled to

future loss of earnings if the charter were to be terminated by reason of any breach by or failure of the Charterers to perform their obligations.

After this addendum had been agreed, Charterers insisted that they required further reductions in hire and when Charterers failed the punctual and regular payment of hire due in August 2010, the Owners withdrew the vessel from Charterers' service and terminated the Charter.

The Owners then claimed future loss of earnings, arguing that:

1. Charterers were in breach of condition by not paying hire on time; and
2. Charterers' conduct was a repudiatory breach of charter.

The Arbitrators held:

That with regard to the first argument, they were not convinced that under the current state of the law, failure to pay hire constitutes a breach of condition.

That, on the second argument, Charterers' conduct showed an intention to be no longer bound by the charter party and that Charterers had repudiated the Charter.
The late payments as such were not evidence of repudiatory conduct but the repeated threats by Charterers that they would declare bankruptcy unless the Owners agreed to reduced rates, as well as Charterers' failure to honor the terms of the 2009 addendum, could be interpreted as repudiatory.

The Appeal:

The Charterers were allowed to appeal on two questions:

1. Whether Charterers' conduct, i.e. showing an intention to perform a contract in a manner which is inconsistent with its terms, but which does not deprive the innocent party of substantially the whole benefit of the contract, was tantamount to repudiatory conduct; and
2. Whether the "compensation clause" in the addendum was actually a penalty clause.

The Owners were allowed to lodge an appeal against the Arbitrators' findings that a failure to pay hire did not amount to a breach of a condition, entitling the Owners to end the charter and claim damages.

The Commercial Court, Mr. Justice Flaux:

Of these questions, the most significant one to be answered by the Court was the Owners' contention that failing to pay hire was a breach of condition.
Based upon earlier authority, it has been pointed out that failing to pay hire is a breach of an innominate term

rather than a breach of condition. ,.
Mr. Justice Flaux, however, found that a NYPE clause 5 is a condition, a breach of which would entitle the Owners to terminate and claim damages.
The following noticeable points emerge from the judgment:

1. The Owners disputed the fact that, since their charter party contained an anti-technicality clause, their case differed from an earlier case; whereas Flaux J. held that even without an anti-technicality clause, clause 5 was a condition of charter.
2. Before withdrawing the vessel and terminating the charter party, an Owner must always allow the anti-technicality grace period to expire.
3. The status of the judgment may be open to debate as it conflicts with a previous judgment from a higher Court on a similar issue.
4. Mr. Justice Flaux's finding that Clause 5 is a condition, may be viewed as obiter, since he
5. had already decided that Owners would succeed on the grounds of charterers having repudiated the charter.
6. The Court dismissed Charterers' argument that the "compensation clause" was a penalty clause and thus unenforceable. The reference to "any breach" in that clause should be read to mean a "repudiatory breach" or a "breach of condition". So, as a matter of fact, the clause entitled the Owners to damages that - following a repudiation of charter in a falling market - they would in any case have been entitled to.

In view of the above, until or unless Flaux J.'s conclusion is overturned by a higher Court, it would seem clear that if charterers are in breach of clause 5 by their failure of punctual and regular payment of hire, the Owners will be entitled to withdraw the vessel, terminate the charter and claim damages without the need for having to show a repudiatory breach on the part of the Charterers.

This certainly makes the Owner's position stronger, which is particularly relevant in a falling market.

Their position, however, does not make the decision to withdraw and terminate the charter any easier, particularly when the vessel has cargo on board for which Owner's Bills of Lading have been issued. But that is a different story…..

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Incident Bulk carrier - Tug

On 15 July 1998, two tugboats assisted a capesize bulk carrier with a cargo of coal while mooring in the port of IJmuiden in the Netherlands. One of the tugs assisted at the stern of the vessel. The tug's line was attached to a bit on the poop deck of the bulk carrier. After the vessel had moored, the tug's line had to be cast off. When the tug's line was cast off, an accident occurred whereby an able-bodied seaman (AB) of the vessel's crew was severely injured.

As for the facts of the accident the following was established:

Once the vessel had moored with the help of the tugs, the tug that assisted at the stern had to manoeuvre into a different position. This meant that the tug's line - the link between the tug and the vessel - had to be cast off.

The eye at the end of the tug's line was lifted from the bit and placed on the deck by AB and several of his

colleagues. Then, even before the rope stopper had been removed, the tug began winching in the tug's line. The pressure on the rope stopper became so high that it broke, transferring the tension to the messenger line, which was slack at that moment. The messenger line was loosely connected to the bulk carrier's winch and ran via a capstan between the two posts of the bit. The messenger line was pulled from the winch and then hit the bit from which AB had just removed the eye of the tug's line. AB fell down and got trapped between the taut messenger line and the bit.

As a result of this AB suffered very serious bodily injuries and was in danger of losing his life. AB managed to recover, however, and after having spent more than nine months in hospital, his physical condition allowed him to be repatriated to his home in India. AB, aged 48, had become permanently disabled.

After having discussed the accident with the Master of the bulk carrier and AB's colleagues, it became obvious that the tug crew had misinterpreted the situation on the bulk carrier's poop deck. The tug crew had prematurely started winching in the tug's line.

In principle, assuming the tug crew to have been at fault, AB had two options to gain compensation. Firstly, towards his employer he could exercise his rights under his employment contract; and secondly, towards the Tug Owner he could claim full compensation in respect of any and all damage and loss suffered.

There were a number of legal issues. One issue was the applicability of standard general T's and C's. Another related issue was the fact that in respect of AB's bodily injury, AB's employer - being the ship's management company - was under various financial commitments towards AB, pursuant to the employment contract.

Towards its contract partner or partners, i.e. the ship's management company, the Tug Owner could invoke the Netherlands Towage Conditions 1951. These conditions apply to almost every towage contract under which a tug operator commits itself to render tug assistance to a sea-going vessel by way of a customary stipulation. So AB's employer wishing to take recourse against the Tug Owner would in all probability face these Towage Conditions. Under these conditions, a Tug Owner's liability is drastically limited.

There is another point of view. Seen from AB's perspective he had not entered into any agreement with the Tug Owner and the Tug Owner would not be able to rely on the Towage Conditions.

It is, however, not possible to claim the same loss twice, so a careful course of action had to be chosen.

Of course it was nobody's intention that AB would waive the rights he possessed under his employment contract. And since the item 'medical costs', especially, was substantial, it was agreed between AB, his employer and their insurers that for the time being all amounts that AB could claim under his employment contract would be advanced by his employer. This was done under the condition that AB would try to seek recourse against the Tug Owner, and that he would refund his employer part of the compensation - if any.

In order to better assess AB's position towards the Tug Owners, a provisional examination of witnesses was initiated.

The first engineer of the tugboat gave the following witness statement:

"From the bridge, I could see that the crew of the sea vessel had started to cast off the tug's line. I could see part of the deck of the vessel. I saw the top of the first post of the bit and a tiny bit of the second one. I could see the people on the poop deck down to their knees. (...) I clearly saw two crew members of the … remove the eye of the tug's line from the bit. (...) There was another man standing a bit behind those two men. (...) If I remember correctly, that man gave a non-specific sign, from which I gathered that everything was clear. The three men then walked away, I could no longer see them. (...) That was when I slowly started to winch in the rope. (...) I never start winching until the tug's line has been cast off, which I know is the case when I can no longer see anyone near the bit and the hawse hole. In an ideal world, you get a sign from the vessel, but that does not always happen, and in such a situation, I act on what I can see. (...) Easing off and winching the tug's line is my responsibility. On 15 July 1998, I did not see any reason to liaise with the captain."

AB gave the following witness statement:

"There were (...) five of us working on the poop deck. The winch was operated by the cadet. (…) The second officer was in charge. We had been instructed to lift the tug's line from the bit. The first step that is required is to lessen the tension on the tug's line. To that end, the crew winched in the messenger line, which allowed us to attach the stopper to the tug's line again. After that, the messenger line, which was connected to the winch, was slackened, so that the tension was transferred to the rope stopper, and the tug's line can be lifted from the bit. Then, the messenger line is again pulled taut with the winch, so that the rope stopper can be loosened again. (…) I held the messenger line (...) in my hands to lift the eye of the tug's line from the bit. I made a step forward, so that I stood between the two posts of the bit, on the raised part of the poop deck (...), and I wanted to lift the

eye of the tug's line from the post of the bit by means of pulling the messenger line. At that moment, the rope stopper snapped (...). Both my thighs were trapped under the messenger line."

AB started legal proceedings. AB's claim in tort was based on the fact that the accident was the consequence of mistakes made by the tug's crew when casting off the tug's line. After all, either the crew of the tug had started winching in the tug's line before a sign had been given from someone on the vessel; or the crew of the tug had not sufficiently checked if the progress in the casting-off procedure was such that the tug's line could be winched in without causing any danger. Either fact had resulted in winching in the tug's line before the rope stopper had been loosened. Subsequently, the rope stopper snapped, pulling the messenger line taut, which caused the injuries to AB.

In the first instance, the District Court of Amsterdam dismissed AB's claim. The Court of Appeal, however, considered it a matter of record that the first engineer of the tugboat had not waited for the sign from the vessel that they could start winching in the tug's line. The first engineer was therefore not in a position to assume that they could start winching in the tug's line. As the first engineer's actions resulted in a situation of potential danger, his actions must be regarded as negligent towards AB, not at least in the light of the nature of the first engineer's mistake and the nature of the damage, i.e. bodily injury. This meant that it was in principle a fact that the Tug Owner was liable for the mistake made by its crew, the Court of Appeal decided.

One of the defences put forward by the Tug Owner was that carelessness on the poop deck resulted in the accident. The Tug Owner inter alia blamed AB for using a rope stopper instead of a wire stopper.

The fact that the accident would not have happened if the correct procedure had been followed and the first engineer had waited until he had been given the required 'All Clear' signal was considered of paramount importance by the Court of Appeal. The fact that a rope stopper rather than a wire stopper had been used did not imply that the first engineer could not be blamed for his mistake. The Court of Appeal ruled that the use of a wire stopper did not remove the causal link between the first engineer's action and the accident.

The Tug Owner was not willing to give up after the Court of Appeal's decision. The case was presented to the Supreme Court. All objections against the Court of Appeal's decision raised by the Tug Owner were dismissed.

It can be concluded that AB's employer and his P&I Club have gone to great lengths in order to fully recover AB's damage and loss in the first place; and their own loss items in the second place. At the end of the story, AB received much more compensation than his employment contract provided for. His employer's P&I Club, which had advanced all medical, legal and other costs, achieved a positive net result as well. Due to all costs, the P&I Club's loss items were only partly reimbursed.

PS
After having read this story, one could wonder why the Tug Owner did not ask the ship's management company for an indemnity. Actually, the Tug Owner did ask, but for several reasons failed in that action. From AB's and especially from his employer's perspective this was indeed a risk which was foreseen right from the beginning; a risk which luckily did not materialize.

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COLOPHON
With this quarterly newsletter we'd like to keep you informed on all developments within Dutch P&I.
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