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# P&I perspective: IMO 2020 & punitive damages

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# IMO 2020 – a P&I perspective

As of 1st Jan 2020, MARPOL Annexe 6 comes into effect, and with it a 0.5% cap on the sulphur content of ship fuel emissions. Following a 90-day grace period, vessels will be prohibited from carrying non-compliant fuels on board, regardless of their intended use. With just five months until the regulation comes into force, the pressure is on for the shipping community to prepare for this sea change.

Despite the time restraints, there is still much uncertainty surrounding the transition. A shipowner must decide between installing scrubbers, switching to low sulphur fuels (LSF), or using alternatives such as LNG or MGO. Each solution comes with its own set of challenges and shipowners will have to react quickly and appropriately to avoid both casualties and recriminations. The next couple of years will be a steep learning curve for everyone in the industry.

# P&I perspective: fines and enforcement

Administration shortfalls are likely to be the most frequent cause of repercussions under the new MARPOL regulation. Advice from across the industry has been consistent: record-keeping is key. Shipowners must ensure they have correct and complete documentation on board such as (but not limited to) Oil Transfer Procedure (OTP), IAPP Certificate, Engine Test reports and Bunker Delivery Notes. These will be essential to prove that the shipowner has tried to comply with the regulation throughout the entirety of the journey - from the purchase of bunkers to arrival at port. Shipowners could be fined for missing/incomplete documentation even if they have not broken the sulphur limit in practice.

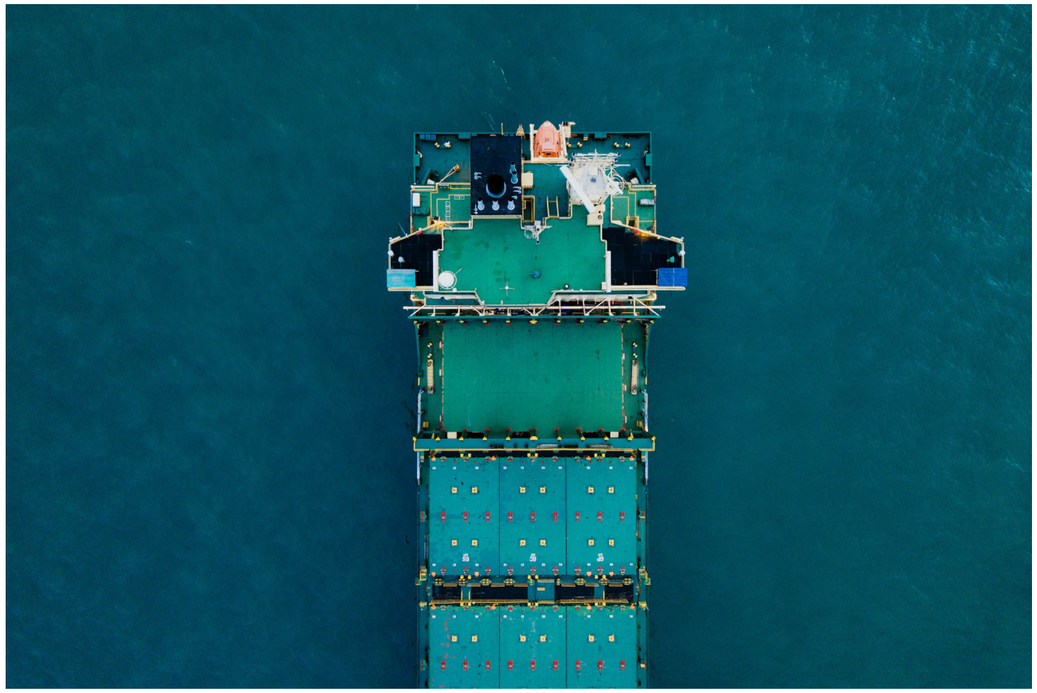
Furthermore, the IMO does not dictate how to enforce the regulation; this is for individual states to decide and implement. Shipowners transiting internationally will need to be aware of the protocol in each state and what methods are used to check vessel emissions. Certain countries are already using technology such as sniffer drones to detect emissions from ships offshore. Crew training will be essential; shipowners/managers need to ensure understanding and discipline are maintained at all levels of the company.

When breaches occur, the shipowner may find themselves facing a fine from the port authorities, and potentially detention of the ship. Cover for fines under P&I Club rules is discretionary; whether the Club will pay a fine for breaching legislation will depend on how far the shipowner appears to have adhered to the new regulations. The key point is that fines are more likely to be covered when the Club feels the member has taken adequate steps to ensure that emissions are within compliant levels and correct documentation has been maintained.

# P&I perspective: charterparty disputes

Owners and charterers must agree on how vessels will become compliant in time for the transition. The Clubs are already witnessing disputes arising between owners and charterers over how to manage this issue. Tank cleaning must be completed in advance of 1st Jan if the vessel is to be ready to use a new fuel type. New blends may not run as efficiently, which could be a problem for the charterer if they are the supplier of fuel. There are no standard clauses for retrofitting scrubbers; both parties must agree who pays to fit the scrubber and who owns it. Long-term charterparties may no longer work and new clauses will need to be agreed. However, the IMO 2020 BIMCO clauses are not one-size-fits-all; they will need to be changed or developed to work for both parties.

The Clubs have teams of experienced claims handlers, often trained lawyers, to assist their members with contractual issues. They review thousands of contracts each year, giving them a depth of experience with contract wordings. Their insight into how the clauses are being adapted to work through the transition is a useful resource for shipowners and charterers to utilise.



# P&I perspective: engine failure and marine casualties

The introduction of new fuels may affect vessel operation and the industry could see a rise in incidents as a result. The chemical structure of low sulphur fuels varies. Certain products can be high in catalytic fines, which are erosive to machinery. Comingling can create sludge, which affects engine operation. Pour-point consistencies can cause solidification and reduce fuel flow. It can be difficult to test how new fuels will react in existing engines, making it hard to pre-empt and avoid negative by-products.

In the event of engine malfunction, loss of power could cause the vessel to drift, resulting in collisions or grounding. In a worst-case scenario, a vessel might become a wreck and/or threaten the lives of people on board. Depending on the circumstances of the incident (location, nationality of crew/passengers, environmental regulations etc), these claims can become very expensive for Club and member alike.

# Going forward

Every shipowner/charterer faces different challenges when preparing their ships for the introduction of the next emissions cap. There is an expectation that port authorities will be more lenient in the first year to help shipowners adjust to the new regulation. However, states and shipowners must work together through the transition to create safe and sustainable systems that will meet the requirements. From a P&I perspective, sharing information and experience will be of mutual benefit to both Club and the membership alike. Taking a pro-active approach in pre-empting the consequences of the transition will help to mitigate the risk of claims and prepare those involved to respond when incidents arise.

To see the latest bulletin from the International Group please see the link below.

https://www.igpandi.org/article/international-group-circular-2020-global-sulphur-cap-pi-cover

# *Dutra Group v. Batterton:* punitive damages

On 24th June 2019, the US Supreme Court issued its decision in the *Dutra Group v. Batterton* case ruling that punitive damages are not an available remedy to seamen in unseaworthiness claims. This decision overrules the Ninth Circuit and resolves the split in decisions of the lower courts, which should allow greater predictability in such cases moving forward. Please see an outline of the case and ruling below, kindly provided by Keesal, Young & Logan Maritime Law Group:

On Monday, the US Supreme Court ruled in *Dutra Group v. Batterton* that a seaman may not recover punitive damages on an unseaworthiness claim, overruling the Ninth Circuit and resolving a split between the Fifth and Ninth Circuits.

Plaintiff Christopher Batterton was working as a deckhand on a vessel owned by defendant Dutra Group when a hatch blew open injuring his hand. Batterton sued Dutra asserting an unseaworthiness claim and seeking general and punitive damages. Dutra moved to dismiss the claim for punitive damages, arguing that they are not available under unseaworthiness claims.

The district court denied Dura's motion and the Ninth Circuit affirmed. That decision created a split between circuits because the Fifth Circuit in 2014 held that punitive damages are not available in unseaworthiness cases.

In a 6-3 decision, the Supreme Court reversed the Ninth Circuity ruling. Writing for the majority, Justice Alito explained that "the overwhelming historical evidence suggests that punitive damages are not available" on an unseaworthiness claim. The majority distinguished the Supreme Court's prior ruling in *Atlantic Sounding Co. v. Townsend,* which established that punitive damages are recoverable under "maintenance and cure" claims. Justice Alito pointed out that the Court in Townsend relied on an established historical record of punitive damages in maintenance and cure cases, and he noted that there is no similar historical record in unseaworthiness cases.

The majority opinion emphasized that remedies available for a personal injury claim under general maritime law should be consistent with those available under the Jones Act, which regulates maritime commerce. Since federal courts have uniformly held that punitive damages are not available in a Jones Act negligence action, the majority concluded that it could not allow more expansive remedies for Batterton's common law unseaworthiness claim.

Finally, Justice Alito noted that adopting the Ninth Circuit view would put the American shipping industry at a competitive disadvantage because other nations generally do not impose punitive damages for unseaworthiness claims.

Keesal, Young & Logan Maritime Law Group

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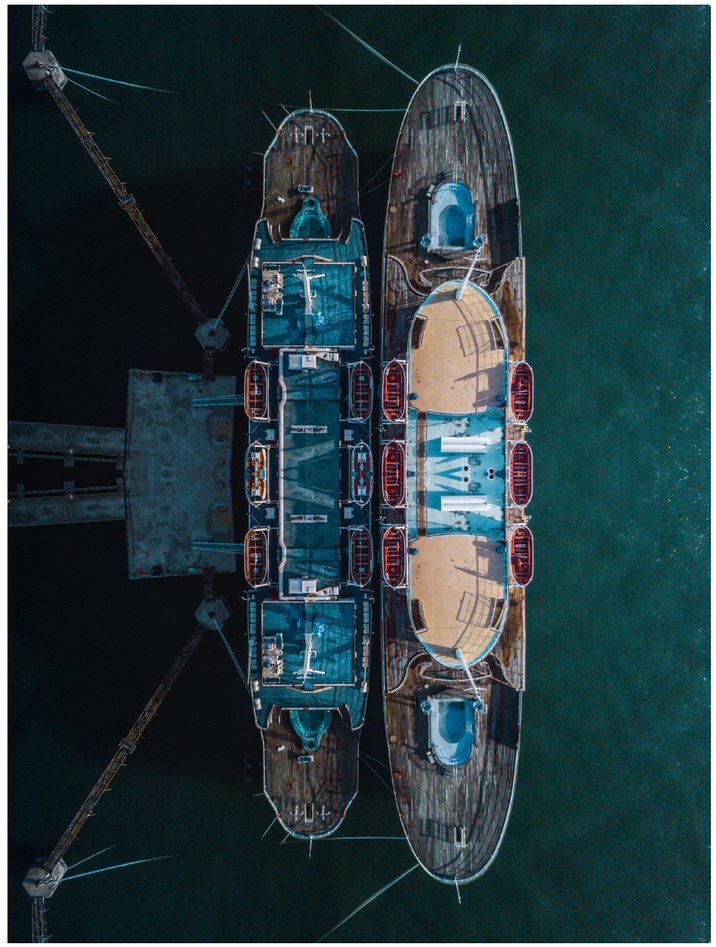

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