"Known unknowns" – the sulphur cap is here

The sulphur cap is finally here, but what do we actually know? asks **Nick Austin**, of Reed Smith

And so, 1 January 2020 has come and gone. The sulphur cap is with us and the sea air is, rightly, cleaner for it. After so much has been said about the new MARPOL Annex VI sulphur cap it might be thought that there is nothing much left to talk about. Theory is now reality and all we can do is sit back and see whether the predictions of disrupted supplies, uncertain quality and unpredictable enforcement come true.

Firms such as Reed Smith are answering practical questions every day about the cap, including reports from across the world of higher than expected sulphur content in apparently "compliant" fuel. Now that it has legal force, getting to grips with this and the other uncertainties of the cap is more important than ever if the industry is to manage the risks inherent in living with the limit.

Perhaps nothing captures the mood better than Donald Rumsfeld's famous quote as US Secretary of Defense before the 2003 war in Iraq: "There are things we know that we know. There are known unknowns. That is to say there are things that we know we don't know. But there are also unknown unknowns. There are things we don't know we don't know". While most doubts about the sulphur cap may not be "unknown unknowns", few qualify as ones "we know that we know".

Take, for example, the potential vagaries of enforcement. We know there is no permissible tolerance in the maximum sulphur content of 0.5 per cent and that fuel delivered with a sulphur content even fractionally above that level will be legally non-compliant with MARPOL. We also know that commercial and MARPOL "delivered" samples taken at the manifold may well differ, that ISO 4259 recognises a higher sulphur content of 0.53 per cent (0.11 pe cent in emission control areas) and that IMO guidance (MEPC.321(74)) requires flag state and local authorities, probably port state control, to be notified without delay if fuel is found to contain more than 0.5 per cent sulphur.

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What we do not know is what those authorities and agencies will do about it in each case, especially if the discrepancy is so small as to be within ISO 4259 tolerances. They may not react in the same way or agree with each other as to the appropriate solution. Some may be quick to take action while others turn a blind eye. Local variations will be pronounced.

Perhaps more concerning is the expectation under different IMO guidance (MEPC.1/Circ.881) that port state control, flag state and the ship must work together to agree on a suitable solution, be that re-testing samples, invoking pre-agreed steps in the ship implementation plan, managing non-compliant fuel in some mutually acceptable fashion, or de-bunkering entirely.

Differing commercial and MARPOL samples, at least if taken in the same manner, creates the separate and additional risk of a bunker supplier or time charterer being in breach of MARPOL but not of the bunker supply contract or charter under which the

fuel was supplied. The practical consequences of this divergence of risk remain to be seen post-implementation.

Several outcomes are possible depending on the circumstances of each case, a phrase lawyers will be familiar with as the pre-cursor to a dispute. And for anyone involved in the time-sensitive business of carrying goods by sea, attuned to the commercial and legal imperative to meet laycans, berthing slots and charterparty obligations, all of this is likely to create delays which someone, ultimately, has to pay for. So far, so unknown.

The position is little better when it comes to buying compliant very low-sulphur fuel oil (VLSFO) for use by vessels not fitted with scrubbers. Although this new generation of marine fuels is still emerging, they are bound to become more popular when the price comes down. But we know that the characteristics of VLSFOs are not widely understood in the industry and are less familiar to those handling them. And we know that parameters such as density, stability and cat fines can vary dramatically depending on the source, creating an additional level of risk for ship, charterer and cargo interests.

While bunker quality claims are hardly new, and the old wisdom about collecting documentary evidence still applies, the prospect of problems through using VLSFO must be greater than with fuels the industry has been burning for decades. What we do not yet know is how often these problems will arise, how serious they will be and what solutions will be found.

Distillates are better understood and require only minor engine adjustments and easier transition arrangements. But the availability of reputable supplies remains a concern and the price differential between HSFO and both distillates and VLSFO has surged, more than doubling since October 2019. Time will tell whether this is a mere spike in the immediate aftermath of 1 January 2020 or the start of a longer-term trend.

All this assumes a ship without a scrubber has managed to find compliant fuel in the first place. We know that the usual bunkering hubs should have a ready and reputable supply of all fuel types, whatever their characteristics. Other places are bound to be less prepared for the new demand. Again, any time lost as a result of not being able to bunker within the law, including deviating to a port where compliant fuels can be supplied, will have to be paid for.

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We know also that the dreaded FONAR is a legal requirement where the ship has determined it cannot obtain compliant fuel. What we do not know is at precisely what point the FONAR becomes a strict obligation and what the risk is of filing too many FONARs when the authorities come to consider enforcement. A ship with a particular trading pattern may justifiably submit several FONARs in a short period but how will the authorities decide if "best efforts" were actually made in each case? Where will they draw the line? And will it be drawn consistently in different locations?

No feature on maritime risk following a change as significant as the sulphur cap would be complete without mentioning the potential impact on charterparties, the contractual lifeblood of the shipping industry. We know that the implications of the cap need to be clearly addressed in appropriate clauses in fixtures and that, where there is disagreement, owners and charterers will generally be held to the terms of their charterparty on the basis of the written words they have used.

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We do not yet know whether appropriate clauses and amendments have been introduced properly and thoroughly. We do not know how many owners and charterers have failed to cater for the change in their contracts despite the promotion of standard clauses by BIMCO, Intertanko and others intended to ease the legal impact of the transition. There may even be risks to owners and charterers arising out of the practical application of the cap which have not been foreseen, whose legal and commercial ramifications are as yet unclear. A true "unknown unknown".

Now that we are in the brave new world of the sulphur cap, uncertainty will surely continue while the industry gets to grips with its practical effects, and as actions and solutions to the more common problems start to emerge. Some say the arrival of the sulphur cap is just a taste of things to come as shipping enters the 2020s and heads towards the 2030 target of a 40 per cent reduction in carbon emissions compared to 2008 levels. That, and the nature of the challenges presented by ever greater environmental regulation in the years to come, is something we simply cannot know.

We at least know that. ***MRI***

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