Bunker supply contracts – key considerations for the buyer

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Regardless of whether a buyer purchases fuel directly from physical suppliers or via brokers or traders and whether sale is under a global framework agreement or ad hoc on a port by port basis, a common feature is that the seller's terms generally prevail.

On 1 January 2020, the lower sulphur limit imposed pursuant to IMO 2020 regulations came into effect. The new regulations have been written about extensively by Gard and others in the shipping and insurance industries. However, the terms upon which bunkers are purchased is perhaps not given the consideration it deserves

Sellers' terms often incorporate fixed (often low) limits on sellers' liability, exclusions for certain types of loss (e.g. loss of time, profit, indirect or consequential loss), short time bars for buyers' claims, and evidential and law and jurisdiction clauses in sellers' favour. There have been moves to try and work towards standard bunker purchase contracts with BIMCO introducing BIMCO Bunker Purchase Terms in 2015, which were updated in 2018. These contracts are more balanced than typical sellers' standard terms, and representatives from owners, charterers and bunker companies were all involved in the drafting process.

From a commercial bargaining perspective, it may be easier to negotiate more balanced terms if they are agreed in advance as part of a worldwide framework agreement to buy bunkers from a single or small number of sellers.

Taking the BIMCO Terms as a starting point, buyers may try to negotiate on some of the following checklist key items:

Bunker supply contracts – key issues checklist

- **Due diligence with respect to the seller:** considermarket reputation and financial standing of sellers, in terms of financial standing and insurance position (see below) and involvement in previous supply issues . Are they also a physical supplier or only an intermediary? How do they verify the quality of the fuel supplied? What are their supply chain quality management procedures?
- **Due diligence with respect to the fuel:** consider what information you need about the fuel and its origin. Are there any special parameters regarding storage, handling, treatment and use of the fuel on board? Do you require specific information in the Certificate of Quality?Helpful Joint Industry Guidance is available on the supply and use of 0.50 per cent-sulphur fuel: (https://www.concawe.eu/wp-content/uploads/joint-Industry-Guidance-on-the-supply-and-use-of-0.50-sulphur-marine-fuel.pdf).
- **Fuel specification:** the contract should identify the correct specification of the fuel - for example by expressly stating the relevant ISO specification. For residual fuels, the most widely used specification is ISO 8217 Table 2. The Table 2 specification for sulphur content is stated as per "statutory requirements" and, since 1 January 2020, the global MARPOL sulphur limit is 0.50 per cent with lower limits set for SECAs. ISO 8217 is periodically revised and the industry guidance recommends the most recent version, ISO 8217 2017. Check whether the fuel specified in your bunker supply terms complies with IMO 2020 and that this also accords with charterparty requirements, so it is back-to-back. A further point to consider adding is an express term that the fuel is free of contaminants, is fit for purpose and complies with MARPOL.
- **Sampling and quality testing:** the contract should specify the agreed sampling and quality testing regime, including for sulphur content. Ideally, a sample from each of the bunker supplier and the vessel should be analysed, as opposed to only the supplier's sample. Again, insofar as possible, sampling and testing requirements need to match the charterparty so the buyer is not exposed to different test standards. Ideally, the sampling process should be set out in detail in the contract, together with the agreed analysis regime that is to be used. Consideration should also be given as to whether preferred accredited labs for testing should be identified in the contract. In the event there is a dispute about the quality or characteristic of the particular stem, inability to agree to a lab for testing may complicate and delay resolution.
- **Quality claims time bar:** the contract should ideally include a quality claim time bar that allows sufficient time for quality testing to be performed, taking into consideration that testing might need to take place at an accredited lab located at a place other than the place of supply. In our experience, bunker contract time bars are normally far too short, especially given that bunkers may not be immediately used

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(for example bunker test results may be required under the charter before the bunkers are in fact used) and even when used promptly problems may not manifest themselves immediately. We have seen cases where the bunker recourse claim against the supplier is time barred before the bunkers have been used. It is recommended to link any time bar to 14 days after use of the bunkers or alternatively to have a much longer time bar period, for example 45 days.

- Li**mitation of liability:** standard bunker supply contracts usually include a low mutual limitation of liability figure (usually one, or at most two times the invoiced value of the fuel). Consider negotiating increased limitation of liability sums to reflect the fact that losses arising from loading or consumption of off-specification fuel can be very high in value. It is suggested that at least twice the value of the fuel or more should be targeted where possible. An alternative option is to include reference to both a specific amount and at least twice the value of the fuel provision, with the highest of the two applying. Lastly, make sure that any limitation agreed applies mutually to both parties (rather than just the sellers).
- **The "OW Bunkers" issue:** if buying direct from a physical supplier there is less risk, but if purchasing via a broker or trader, there is a risk they may not have paid their counterpart for the bunkers, which could, in the event of their insolvency, lead to competing payment demands and the risk for the buyer of having to pay twice. (http://www.gard.no/web/updates/contents/21081199/gard-alert-ow-bunker-english-supreme-court-upholds-previous-decisions-that-ing-can-recover-payment-from-shipowners). It is sensible to include provisions under which the sellers warrant they have paid for the bunkers and the buyer has a right to request evidence from the sellers that they have paid any third parties for the bunkers, before the buyer is required to pay the sellers' invoice, such that if no evidence is provided the buyer may withhold payment/hold sellers in breach.

It is further prudent to include a term that in the event of bankruptcy of the sellers, the buyer will be entitled to withhold payment for the fuel until the relevant court/tribunal determines whether sellers or the physical suppliers or any third parties have a claim directly against the buyer/vessel. If there is such a determination, the contract can also provide that payment to a party other than sellers for the fuel, as determined by the relevant court/tribunal, shall be deemed to subordinate the claim to the rightful party in order to safeguard the buyer from having to pay more than one party (and more than once!) for the fuel.

Consider also making the contract subject to the Sale of Goods Act 1979, so as to make the contract a contract of sale (thus bringing in the Act's protection so far as fitness for purpose and quality are concerned, and the requirement that the Sellers also have good title to the fuel at the time of sale to the buyer).

Insurance: sellers should ideally have insurance in place and should be required to produce evidence of this. Such insurance may for example include credit, professional indemnity and product liability insurance.

Local rules and regulations: most standard term contracts incorporate local rules and regulations into the bunker supply contracts. Local rules and regulations can bring about surprises that the parties to the contract might not be aware of at the time of contracting. Consideration is accordingly recommended to be given to the exclusion of local rules and regulations, either in their entirety or to limit their applicability to fuel sampling only.

Uniform bunker supply terms: ideally the same supply terms should be used across the board with all suppliers, so as to have certainty over the risk allocation and to avoid the use of ad hoc supplier friendly terms. In effect, have a framework agreement/standard terms agreed with major suppliers.

Lien: try and avoid provisions that give the sellers a lien over the vessel or any rights of action against third parties (e.g. the owner if the charterer is the buyer) as this can cause serious issues under the charterparty. A further point to consider, is to add an express provision that the sellers must hold the buyer harmless and indemnify the buyer in the event that a third party asserts a lien or encumbrance on the vessel in relation to the fuel purchased from the sellers. Similarly, a clause can also be included by which the sellers warrant that no third party has any right to claim against the buyer in relation to the fuel, or exercise any right of lien, charge, encumbrance or arrest over the vessel or any sister vessels in respect of the fuel. Lastly, consider including a provision that if such a claim nevertheless arises, the sellers shall co-operate to allow interpleader proceedings. See also our comments on the OW Bunkers issue above.

Exclusions: consider whether you wish to exclude indirect or consequential loss (as this could extend to loss of time). Be careful of broad term exclusions that are usually found in bespoke sellers' contracts. Make sure that any exclusions apply mutually to both contractual parties if they are agreed.

Law and jurisdiction: avoid the application of US law (due to maritime lien rights) and agree on a neutral law/jurisdiction that is not necessarily the sellers' choice.

These suggestions come from our experience in disputes and litigation involving bunker quality. It is important for buyers to understand the consequences of accepting sellers' terms and well worth the effort to attempt to negotiate a more balanced contract. Even when the terms are not negotiable, risks can be mitigated by exercising due diligence before selecting the seller.

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