

Circular From GARD

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Bunker Supply Contracts – Key Considerations For The Buyer

Background

Bunker sales are generally offered on terms prepared by the sellers and should there be a problem with the quality or quantity of the bunkers supplied, the rights of the buyers may well be restricted by the sale contract terms. Our guest authors update their previous [article](#) to point out ways buyers can protect themselves.

Introduction

Purchase of bunkers can generate significant risks/claims and 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 the BIMCO Bunker Purchase Terms in 2015 which were updated in 2018. These contracts are generally 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 instead of making more ad hoc arrangements. This is also sensible in terms of reducing compliance/KYC/sanctions checks and risks by having a reduced number of counterparts.

The [BIMCO Bunker Terms 2018](#) attach an Election Sheet as Appendix A which allows for easy customisation if the Parties as well as a space to add additional clauses or make amendment to the standard BIMCO text.

Bunker supply contracts – key issues checklist

Taking the BIMCO 2018 Terms as a starting point buyers may try to negotiate on some of the following key items:

- **Due diligence with respect to the seller:** consider market 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 and origin of the fuel supplied and how will they evidence this to buyers if required? What are their supply chain quality management procedures?

- **Greater focus on KYC/vetting and who the seller is for sanctions purposes:** this ties into conducting proper compliance checks for general KYC and for sanctions purposes.
- **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?
- **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. 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 up to date IMO and Marpol regulations and any local regulations that apply to the vessel based on the trade conducted and that this also accords with charterparty and main engine maker's requirements. A further point to consider adding is an express contract term that the fuel is free of contaminants, is fit for purpose and complies with MARPOL. If the buyers have a strong bargaining position, then consider also if contractually you can negotiate that sellers will take back proven off specification bunkers.
- **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/barge 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 buyers are 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 (we recommend they are). In the event there is a dispute about the quality or characteristic of the particular stem, an inability to agree to a lab for testing may complicate and delay resolution.
- **Non delivery/delayed delivery of the bunkers:** consider the delivery clauses of your contract and whether they give buyers a right to cancel the contract/bunker supply promptly in the event of a delay. Consider also specifying in the contract what constitutes a delay (by setting out the relevant period) following which a cancellation right in buyers' favour arises. Where charter rates are high buyers may not want to be obliged to "wait" for supply of bunkers if they are not ready to be supplied.
- **Force majeure duration:** consider how long the duration of a force majeure event is reasonable for the trade conducted by the vessel. The BIMCO Bunker Terms 2018 for example provide for a 10 day period. Buyers may wish to opt for a much shorter force majeure period so as to reduce delays to the vessel as much as possible.
- **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 (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 at least 14 days after use of the bunkers (or after test results) or alternatively to have a much longer time bar period, for example 45 days.

- **Limitation 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 (e.g. there may be damage to the Vessel, loss of time and the fuel supplied may have no value and incur de-bunkering tank cleaning and disposal costs). 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). Buyers should be aware that loss of bunker value is not a commonly insured risk under typical insurance policies and with high bunker prices this is therefore a significant uninsured liability. Do remember though if you do raise limits and they are mutual then this applies both ways!
- **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 buyers of having to pay twice. It is sensible to include provisions under which the sellers warrant they have paid for the bunkers and the buyers have a right to request evidence from the sellers that they have paid any third parties for the bunkers before the buyers are required to pay the sellers’ invoice, such that if no evidence is provided the buyers 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 buyers 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 buyers/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 buyers 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 buyers).

- **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 which specifically excludes any additional or alternative terms applying (e.g. the risk of any extra terms referenced in bunker confirmation notes or bunker delivery receipts) unless agreed in writing and signed by both parties.
- **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 are the buyers) as this can cause serious issues under the charterparty. Indeed, ideally agree that they expressly do not have such rights. A further point to consider, is to add an express provision that the sellers must hold the buyers harmless and indemnify the buyers 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 buyers 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 depending on how the clause is drafted). 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.
- **Taxes:** it is recommended that sellers be required to advise of wharfage, barging or additional charges and taxes payable in advance of supply in the bunker confirmation note to avoid unexpected surprise additional costs.
- **Sanctions clause:** the sanctions clause included in the standard BIMCO Bunker Terms 2018 is somewhat outdated now and consideration should be given to updating it in contracts for bunker supplies. We say this from both a buyers and sellers viewpoint. The origin of the fuel (due to sanctions), the person or entity from whom the fuel was purchased by sellers, the position of any bunker supply barge are all key issues to feed into any new sanctions clause. In addition, both parties will want to ensure their counterparts and the owners of any vessel (the vessel being supplied with bunkers or any bunker barge itself) are not subject to sanctions and that they are not owned or controlled directly or indirectly by persons or entities subject to sanctions (in our view this is a gap in the current Bimco sanctions clause). We are seeing updates to previous sanctions clauses to address these risks.
- **Sellers' time bar:** buyers may also wish to consider if they insert a time bar clause for claims by sellers against buyers.
- **Law and Jurisdiction:** avoid the application of US law (due to US maritime lien rights) and agree on a neutral law/jurisdiction that is not necessarily the sellers' choice. Remember that English law can also be used with LMAA Rules and alternative arbitration regimes, e.g. HKMAG, SCMA etc.

These suggestions come from our experience in advising on bunker contracts and litigating bunker disputes. 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 sellers.

It is also important to note that risks can be mitigated by having prudent practices for bunkering, sampling, bunker handling and consumption regardless of bunker supply contract terms. Detailed discussion of such issues is outside the scope of this article but key items are carrying out continuous drip sampling at the Vessel manifold, always bunkering new bunkers into empty tanks whenever possible and never using new bunkers until they have been tested.

Buyers should also ensure they have suitable insurance in place and notify their insurers as soon as any issue is experienced with bunkers supplied.

Alternative Fuels

As a footnote it is understood BIMCO is working on LNG Bunkering Terms which are expected to be published as soon as April 2023. They are expected to be based on a logically updated version of the BIMCO 2018 Terms. It would certainly be helpful for the industry if a "common" bunker contract could be adopted for LNG, methanol, ammonia, biofuels etc with logical changes to reflect the different fuel types. Much of our above "checklist" would equally apply to supply of such alternative fuels.

Source of Information: The Gard P&I Club