

# BUNKERSPOT



## TURNING UP THE HEAT

NO ESCAPE FROM  
THE 2020 CHALLENGE

### INSIDE:

BIMCO BUNKER TERMS  
2020 FUELS  
BUNKER SURCHARGES  
FUEL QUALITY



# Required reading

In this close and extensive analysis of the newly-published BIMCO Terms 2018, **Steve Simms** of Simms Showers finds much to applaud – but, he cautions, some of the changes have generated further questions or, at the very least, require careful consideration

**O**n 2 May 2018, the BIMCO Documentary Committee approved the BIMCO Bunker Terms 2018.<sup>1</sup> BIMCO's 2018 Terms drafting committee, including shipowner, P&I, and bunker trader representatives,<sup>2</sup> had formally begun work in July 2016. The Committee's chair, Claus Kesting of shipowner J. Lauritzen (who had also worked on the BIMCO Terms 2015 – Standard Bunkering Contract (the '2015 Terms')) commented at the time:

*The OW Bunker collapse has sharply focussed the industry's mind on how essential it is to have a solid contract in place. Encouraging the industry to support and use uniform terms and conditions for bunker sales is the best way to reduce the contractual uncertainty that we currently have. . . .With the backing of several major physical suppliers and traders, we can work together to find a global*

*contractual solution acceptable to sellers, suppliers and purchasers.*<sup>3</sup>

Few, before reading this article, might also be aware that the development of the 2018 BIMCO Bunker Terms, microwave ovens, Post-It Notes, and Play-Doh have similar origins with unexpected outcomes.

The date 7 November 2014 is central to the origin of the 2018 Terms. This was, by cosmic coincidence, the same day that OW Bunker filed its Denmark insolvency proceedings and that the BIMCO Documentary Committee met and approved the 2015 Terms for publication.<sup>4</sup>

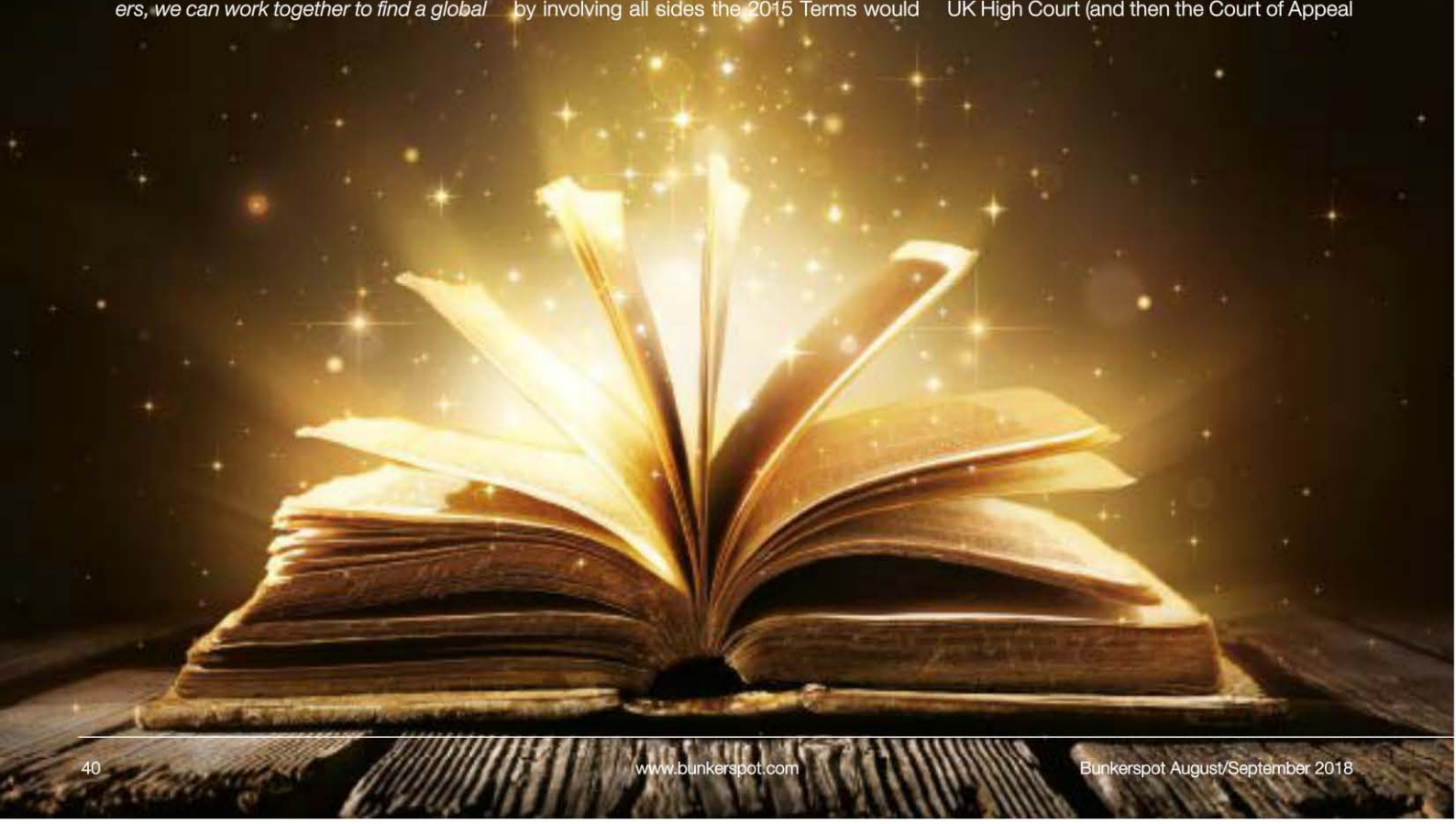
BIMCO's 2015 Terms drafting committee had worked to balance the interests of shipowners, charterers, bunker traders and suppliers. A perception that BIMCO's 1995 Fuelcon and 2002 Standard Bunker Contract overly favoured one side or the other led to neither much being used. The hope was that by involving all sides the 2015 Terms would

introduce a consistent and globally-acceptable set of bunker sales terms and conditions.

7 November 2014 suddenly changed the focus. ING Bank claimed assignment of OW's accounts and began arresting ships. Shipowners worried about paying twice and bunker suppliers worried whether they would be paid at all. Shipowners, bunker suppliers, and traders quickly could agree on one thing: neither the 2015 Terms or any sales terms they had agreed to, or had been using, answered the 'OW Problem' of potential double payment, or no payment at all. The first question in the market became, 'have you paid the physical supplier'?

Continuing the focus change was the first *Res Cogitans* decision, in the first half of 2015.<sup>5</sup>

Shipowners had hoped that the UK *Sale of Goods Act* would stop double payment when sales terms did not. They urged that they shouldn't have to pay for bunkers (goods) that OW itself never paid for. Judgment by the UK High Court (and then the Court of Appeal





and Supreme Court) took that defence away, too. It held that sales under a title retention clause (where title did not pass to bunkers until payment) was not a UK Act 'sale of goods'.

Responding with best intentions, in February 2016 BIMCO added a line to the 2015 Terms saying that '[t]he United Kingdom Sale of Goods Act shall apply to this Contract'; in other words, despite title retention, a sale under the Terms was in fact a Sale of Goods Act sale.<sup>6</sup> This addition was much like saying that a dog is a cat. Consequently, as well balanced as they were, because of the 'OW Problem' the 2015 Terms together also have not extensively been used.

Thus the revision of the 2015 Terms to become the 2018 Terms really began not in July 2016 but on 7 November 2014, the day the 2015 Terms were approved (and before their public issue in January, 2015).

The primary goal for what is now the 2018 Terms was to create terms answering the 'OW Problem' of double payment, or no payment, when a trader became insolvent and did not pay physical and other 'downstream' suppliers. The second goal was to continue the 'interest balancing' of the 2005 Terms.

This is where microwave ovens, Post-It Notes, and Play-Doh come in.

Percy Spencer was an electrical engineering genius. In 1945, he was working with a magnetron, hoping to discover how to improve radio transmissions. The magnetron emitted microwaves. He had a chocolate bar in his pocket which began to melt. Even though he had intended to improve radio, what he unintentionally discovered was the microwave oven. Those who need to make quick ramen noodles are forever grateful to Percy Spencer!

Dr Spencer Silver was a scientist for the 3M Company. He wanted to develop a super-strong adhesive. Instead, what he made was a re-usable adhesive that could be stuck, and removed from a surface multiple times. For a while no one could think of a use for the invention. Then, another colleague realised that there was a demand for small adhesive pieces of paper to be used to highlight text or images in books and documents. The 3M Company made hundreds of millions of dollars on the 'Post-It Note', which few students, law offices and concept meetings now can do without.

Play-Doh began as a product for cleaning wallpaper. However, consumers weren't interested in it for cleaning and its manufacturer nearly went out of business. Someone working for the manufacturer then noticed that children used the product for craft projects. The company added colour and a better scent. Now, not only is Play-Doh sold around the world – but, on 15 May, 2018, the US Patent and

Trademark Office registered a 'scent mark' for it (akin to a trademark, with a distinctive smell).<sup>7</sup>

Ultimately, the 2018 Terms' drafting committee decided that the 2018 Terms couldn't meet its first priority, to create bunker sales terms which responded to the 'OW Problem'. It decided that no terms satisfactory to all interested in a bunker transaction would solve the 'Problem'. So, from that standpoint, the 2018 Terms did not meet primary intentions.<sup>8</sup>

Just like the origins of microwave ovens, Post-It Notes and Play-Doh, however, the 2018 Terms present, in many ways, more useful (although at least initially unintended) results that were not their drafters' first intention.

Following on from the 2015 Terms, the 2018 Terms continue to pursue a balance between the interests of shipowners, charterers, bunker traders and suppliers. They also introduce new and important terms focusing on ethical and legal compliance in bunkering transactions, clarify the procedures for payment and recovery, for resolving bunker quality and quantity disputes, and further define liability limitations.

### THE 2018 TERMS - BY THEMSELVES - ARE NOT A CONTRACT: THE CONFIRMATION NOTE CONTROLS

The 2018 Terms clarify from the 2015 Terms that they are not a 'contract'. This is an important (although perhaps otherwise obscure) point to first keep in mind when, and if, using any (or all) of the 2018 Terms.

Instead the defined 'Contract' means [the 2018 Terms] as amended and supplemented by the Confirmation Note, and the Election Sheet (if applicable). The 2018 Terms end with new language (para. 26(d) – 'Entire Agreement' from the 2015 Terms, and adding 'and Priority of Terms'):

*(d) In the event of a conflict between any of the provisions of these General Terms and Conditions and the Election Sheet, the provisions of the Election Sheet shall prevail over the provisions of these Terms and Conditions. If there is a conflict between any of the provisions of these General Terms and Conditions, the Election Sheet and the Confirmation Note respectively, the provisions of the Confirmation Note shall prevail over these General Terms and Conditions and the Election Sheet to the extent of such conflict, but no further.*

Keeping the 2015 Terms language, the 'Confirmation Note' is the 'Seller's' written

confirmation and defines 'Sellers' as the 'Party contracting to sell and arrange delivery of the Marine Fuels'. The 2018 Terms add to this, defining 'Sellers' with the words 'stated in the Confirmation Note'.

The 'Election Sheet', addressed in more detail below, is a new addition with the 2018 Terms, providing for users to easily make certain customisations with each bunkering transaction. In some ways, this is a benefit, but, as addressed below, in some ways it is not.

What this all means is that with the 2018 Terms, it is the 'Confirmation Note' (and what the 'Sellers' have written in it) that ultimately controls. Consequently, 'Sellers' (and the Confirmation Note is to define exactly who the 'Sellers' are; that could even include both a trader and its supplier) using the 2018 Terms must be careful with what they write in their Confirmation Note.

That is to say, also, that the Confirmation Note expressly might incorporate all of the 2018 Terms, or some of them, depending on what the 'Sellers' write in the note. Although 'Sellers' might not use all of the 2018 Terms, some which 'Sellers' especially should consider incorporating are outlined below. Through use of the Confirmation Note, the 2018 Terms allow 'Sellers' to determine exactly which of the Terms (including the 'Election Sheet') will be part of the sales 'Contract'.

### NEW TERMS FOR ETHICAL AND LEGAL COMPLIANCE

The 2018 Terms' Anti-Corruption Clause (para. 13) is entirely new. In another coincidence (importantly, although less 'cosmic' than that of 7 November 2014), this clause coincides with the International Bunker Industry Association's (IBIA) present, parallel initiative to develop an industry-wide code of ethics.<sup>9</sup>

IBIA polled delegates at its November 2017 Annual Convention in Singapore. To the question, 'In your opinion how common or widespread is unethical behaviour in the bunker industry?', 50% responded, 'it happens quite often', and 26% responded that 'it happens on a daily basis'. A total of 79% 'strongly agreed' that '[t]he bunker industry would benefit from a global code of ethics'.<sup>10</sup>

The 2018 Terms thus introduce this 'Anti-corruption Clause', which the industry (at least represented in IBIA) is ready to adopt, and proposes to do that as a mandatory matter of contract.

The Clause (Terms para. 13) requires parties to 'agree that in connection with the performance of any [bunker provision] Contract they shall'... 'comply at all times with all applicable anti-corruption legislation', keep accurate ►



books and records, and cooperate to reject and report bribes (defined as illegal 'demand[s] for payment, goods or any other thing of value').

It further adds 'teeth' to non-compliance. It requires the party 'fail[ing] to comply with any applicable anti-corruption legislation' to indemnify the other party. It also allows the non-breaching party to terminate the bunker provision contract whether the other party has breached. It further requires each contracting party to 'represent [ ] and warrant [ ] that in connection with the negotiation of any Contract neither it nor any member of its organisation has committed any breach of applicable anti-corruption legislation,' giving the innocent party further right to terminate the contract without liability to a breaching party.

Consequently, the 2018 Terms' Anti-Corruption Clause (para. 13), when utilised in a bunker sale contract (again, starting with the Confirmation Note), enforces contractually the compliance, and as part of that, ethical responsibilities that each party to the transaction should be following.

This might even more effectively introduce industry-wide compliance and ethical standards, than IBIA's eventual Code of Ethics, in that noncompliance would mean at a minimum a loss of profits, and likely a customer. IBIA's poll suggests

that the bunker industry should welcome the 2018 Terms' Anti-Corruption Clause.

### REVISED LIABILITY TERMS

The 2018 Terms also re-work the 2015 Terms' limits of liability.

The 2015 Terms had, as part of their 'Claims' paragraph (9, (d) Exclusions), a statement that there would be no liability other than defined quality, quantity or delay claims, for lost profit or production or for any 'consequential loss or damage'.

The 2018 Terms move this language to a separate paragraph ('15. Liability'), adding that:

*(b) Notwithstanding any other provision in the Contract, the liability of either Party, whatsoever or howsoever caused, shall (unless otherwise agreed in the Election Sheet) not exceed the invoice value of the Marine Fuels or USD 500,000, whichever is the higher figure, subject to anything stated in the Election Sheet or otherwise agreed by the Parties.*

An open question: what if the Confirmation Note provides for different liability terms? This apparently is the only 2018 Term overriding that ('[n]otwithstanding any other provision in

the Contract...'). What this new limitation does then is in all circumstances limit liability to USD 500,000, which is a relatively small amount compared to the cost, for example, of refitting an engine damaged by non-conforming fuel.

Given the speculation that 2020 will bring more blends and more fuel quality problems, the use of this Term could be particularly important for 2020. Its use also might lower bunker providers' insurance premiums, since, damages (and insurable loss) arising from the fuel sold would be limited (unless there is other agreement) to an outside USD 500,000 or, what is usually, the lower 'invoice value' of the fuel.

### TERMS FURTHER BENEFITTING 'SELLERS': PAYMENT

Although the 2018 Terms adopt most of the 2015 Terms' 'Payment' clause, they add further benefits for 'Sellers' who are unpaid or at risk of not being paid.

A new line (e) – to what is paragraph 8 – Payment – in both Terms) states that '[p]ayment for delivery under the Contract shall satisfy sums owed to the Seller in the following order: (1) interest; (2) legal and enforcement costs; and (3) invoices from oldest to newest.' This thwarts non-paying 'Buyers' from attempting to pay only charges



# Oil Marketing & Trading International

## MARINE FUELS in UAE

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for which there easily might be arrest (in the United States, for example, for maritime liens *in rem*, basically only for the price of bunkers themselves, delivery, and non-contractual interest) and requires payment first of what are sometimes more difficult-to-recover charges.

Then, a new section (h) provides that amounts owed immediately are due where there is 'bankruptcy, liquidation or suspension of payment' or similar situation of the 'Buyers'. Then, in 'any other situation, which in the reasonable discretion of the 'Sellers' is deemed to affect adversely the financial position of the 'Buyers', the 'Sellers' shall have the option to:

1. demand that the Buyers comply with their obligations under the Contract; and/or
2. demand adequate security; and/or
3. suspend any pending deliveries; and/or
4. withdraw permission to consume the Marine Fuels for the propulsion of the Vessel; and/or
5. terminate the Contract.

This latter section of the 2018 Terms is particularly helpful where a Seller has just sold to what emerges, within what otherwise are the Seller's payment terms (30 days under both 2015 and 2018 Terms) as a troubled Buyer. Without this (or incorporated legal provision, such as the U.S. Uniform Commercial Code ('UCC') § 2-609 'Right to Adequate Assurance of Performance'), a Seller otherwise must wait as the Buyer's figurative (and sometimes literal) ship sinks before the payment term has run. This section thus enables a central principle of recovery of payment: to secure as much as you can, as soon as you can, if you believe that your buyer might not pay.

## TACKLING THE DEMURRAGE PROBLEM

A final major addition of the 2018 Terms tackles the problem of demurrage, sometimes arising from a lack of clarity over when a receiving vessel is to take on fuel, and when the 'Sellers' are to be ready to provide it.

The 2018 Terms retain the first part of 2015 Terms' paragraph 15(b) ('Delivery'):

*The Buyers, or their agents at the port or place of delivery, shall give the Sellers or their representatives at the port or place of delivery, seventy-two (72) and forty-eight (48) hours approximate and twenty-four (24) hours definite notice of the Vessel's arrival and the location and time at which...*

Adding, 'delivery of the Marine Fuels is requested'. Then, the 2018 Terms 'Delivery' paragraph continues that:

*If the Sellers agree to commence the delivery of the Marine Fuels at the time specified in the Buyers' 24 hours' notice, or the Parties agree to another time, the Sellers shall confirm this in writing to the Buyers (the 'Confirmed Delivery Time').*

- (c) *Providing that the time of Actual Readiness is within 6 hours\* of the Confirmed Delivery Time, the Sellers shall commence delivery of the Marine Fuels within 6 hours\* of either: (i) the Confirmed Delivery Time; or (ii) the time of Actual Readiness, whichever is later.*
- (d) *Where the time of Actual Readiness is not within 6 hours\* of the Confirmed Delivery Time, the Sellers shall commence delivery within 12 hours\* of either: (i) the Confirmed Delivery Time; or (ii) the time of Actual Readiness, whichever is later.*
- (e) *Where no Confirmed Delivery Time has been agreed, the Sellers shall commence delivery within 12 hours\* of the Buyers' time of Actual Readiness.*

*\*or such number of hours as otherwise specified in the Election Sheet.*

This is another situation in which those using the 2018 Terms must remember that what is in the Confirmation Note controls. Sometimes, however, delivery and readiness times are left unclear in bunker sales contracts. These 2018 Terms, again if incorporated through the Confirmation Note, provide specific times for which Sellers must provide fuel, and Buyers must receive it.

## POINTS FOR FURTHER DEVELOPMENT IN THE 2018 TERMS

Like the first microwave oven, Post-It Notes or Play-Doh, the unintended positive innovation should not, however, be the final development of bunker sales terms.

**The Election Sheet:** The Election Sheet is one idea offering both positive but potentially difficult application. The 2018 Terms' drafters intended the Election Sheet to enable 'Buyers' and 'Sellers' quickly to negotiate changes to sales terms, for specific transactions or for transactions generally between specific sets of 'Buyer' and 'Seller' counterparties.

So, using the 2018 Terms' 'Election Sheet' – headed 'Customisation of Provisions in the BIMCO Bunker Terms 2018', after filling in specific names of the 'Sellers' and 'Buyers' and also the specific 'Effective Date' of the Contract, the 'Election Sheet' provides blanks for the parties to specify a range of things like

delivery dates, claims deadlines, specific laboratories which will do testing, choice of law and arbitration (US, Singapore or English), and 'additional clauses'. 'Sellers' and 'Buyers' then are each to sign and give an 'Effective Date' to the completed 'Election Sheet'.

A first question is, which comes first, the Confirmation Note or the Election Sheet?

**'A larger question is, do bunker traders and suppliers want to invite customisation of sales terms and conditions? If they use the Election Sheet with the 2018 Terms, what training would be needed to enable their personnel to accurately - and in the right order to make a binding contract (under the 2018 Terms) - complete the Election Sheet?'**

Apparently, the Confirmation Note must follow the completed, signed Election Sheet (because, without the Confirmation Note, there is no contract and thus no Effective Date). So, filling in the 'Effective Date' on the Election Sheet, must presume that the Confirmation Note will be issued as of that date and also incorporate the Election Sheet, which in turn, incorporates the 'elected' 2018 Terms.

A larger question is, do bunker traders and suppliers want to invite customisation of sales terms and conditions? If they use the Election Sheet with the 2018 Terms, what training would be needed to enable their personnel to accurately - and in the right order to make a binding contract (under the 2018 Terms) - complete the Election Sheet? Does the standard bunker transaction occur in time sufficient to essentially negotiate new sales terms for each sale? ►



Bunker 'Sellers' thus may want to consider whether, although 'Buyers' may request use of it, the Election Sheet works to their advantage, particularly across many sales.

**Title Retention:** The 2018 Terms also (paragraph 10, 'Risk/Title', also in the 2015 Terms) attempt to address what was, in part, the *Res Cogitans* problem of whether a sale, with a title retention, is in fact a sale under UK law. That is, parties considering the Terms can decide that '[r]isk and title in the Marine Fuels shall pass to the Buyers once the Marine Fuels have passed the Sellers' flange connected to the Vessel's bunker manifold.'

Alternatively, the parties can decide that risk passes when the 'Marine Fuels' pass the Seller's flange, but that title doesn't pass until Sellers are paid, and that, until then, Buyers only hold the fuel as bailee and 'title to the Marine Fuels shall remain with the Sellers corresponding to the quantity of the Marine Fuels delivered'.

If there is no election (on the 'Election Sheet'), the latter, bailment applies. Here's the problem for Sellers, though. Electing US law, a Seller has little protection from title retention, which US law considers to be a security interest which must be perfected by registration (using a form 'UCC-1'). Electing English law, Buyers aren't protected where the supplier hasn't been paid (because there is no Sale of Goods Act 'sale'; US law doesn't protect them either), but Sellers are (English law recognises continuing title in bailed and replacement bunkers, without requirement of registration).

Effective title retention clauses are valuable security for Sellers. So, Sellers should be able to elect English law for title retention, but US law otherwise (for assertion of maritime liens *in rem* – enabling them to arrest vessels generally regardless of ownership or charterer change). The 2018 Terms (unless perhaps there is a carefully crafted further term written in on the Election Sheet) don't provide for this dual-controlling law election.

**Maritime lien *in rem*, or not – and required arbitration:** On election of remedies, the 2018 Terms also continue as the 2015 Terms did to provide for election of US, Singapore or English law, but only for arbitration.

First, for 'Sellers', choice of Singapore or English law, through the 2018 Terms or otherwise, prevents them from exercising a maritime lien *in rem*. If a customer is no longer the charterer to which the fuel was sold, Sellers can't arrest the ship, even if it arrives in the United States. (US courts consider election of English or Singapore law, a waiver of US maritime lien *in rem* rights).

Second, for all disputes, the 2018 Terms provide only for arbitration, not

court proceedings (after, perhaps, an initial arrest to secure the arbitration award, if the chosen law allows for that). Arbitration is not always desirable. Depending on the available court, where a vessel is arrested, arbitration often is slower and much more expensive than court proceedings.

Third, the 2018 Terms provide that where the parties don't elect the law and arbitration to control (using the 'Election Sheet'), English law controls. This again presents 'Sellers' with the challenge that if they are not paying attention and using the 'Election Sheet' to choose otherwise, with the 2018 Terms English law and London arbitration automatically will be binding. Yes, the Seller may enforce its bailment over unpaid-for bunkers, but it might also be without a maritime lien *in rem* necessary to secure its arbitration award (including, the award for London arbitrator and counsel costs).

**What about the new, effective 1 January 2019 BDN requirements?** Effective 1 January 2019, all bunker delivery notes (BDNs) must be in a new format, with 'tick boxes' on which the supplier (or its delivery person) confirms that the vessel provided the fuel, can consume it compliantly. There are significant details to this new requirement; these are addressed in the author's recent *Bunkerspot* article.<sup>11</sup>

All suppliers, and traders working with them, must be aware of these new BDN requirements, now.

Clause 2(a) ('Specifications/Grades/Quality') is unchanged from 2015 in the 2018 Terms, stating that '[t]he Buyers shall have the sole responsibility for the nomination of the specifications and grades of Marine Fuels fit for use by the Vessel.'

Question: will this be sufficient for the purposes of the 1 January 2019 'tick box' BDN? Under US regulations, for example, a BDN is considered to be a report directly to the United States government, subject to prosecution for a false report. May the bunker supplier (or its barge crew), or trader communicating with the supplier, simply look to the Terms' Clause 2(a) for assurance that the vessel can consume compliantly, the fuel the 'Buyers' nominate? Will the 'sole responsibility' that the clause specifies, be enough for a confident tick of the new BDN box certifying MARPOL compliance? Unlikely, in an obvious example, where the 'Buyers' order high sulphur fuel for a vessel without a scrubber (or functioning one).

Also, the fuel may be 'fit' for the vessel's use in that it may run well in the vessel, but still not be MARPOL compliant. Consequently, bunker suppliers and traders, and those others 'ticking' the new 1 January 2019 BDN boxes indicating MARPOL compliance, must incorporate further terms (again, in the Confirmation

Note, or the Election Sheet) where the 'Buyers' certify that the fuel they have ordered is MARPOL-compliant for the vessel. Even with that, those 'ticking' the BDN boxes should still independently verify, and document, that the fuel sold can be consumed compliantly.

**Is it really confidential?:** Finally, the 2018 Terms substantially carry over the 2015 Terms' 'confidentiality' provisions (now 2018 Terms' paragraph 20) requiring that:

*[n]either Party shall disclose to third parties any confidential information relating to pre-contractual discussions and/or the terms and conditions of the Contract, except with the prior written consent of the other Party, which shall not be unreasonably withheld, or to the extent required by law, or by a request of a government or its agency thereof.*

What exactly is the 'confidential information' protected? Neither the 2015 and now 2018 Terms require either party to specify, in advance, what information it considers to be 'confidential'.

'Confidential' information might be most anything which 'relates' to the 'terms and conditions of the Contract', which is, essentially, everything having to do with the sale. What if, for example, a Buyer discovers non-compliant conduct of the Seller, and makes that public? The Seller might certainly want that information to be 'confidential'. At minimum, then, there should be a definition of what information is 'Confidential' if the 2018 Terms are used, on the Election Sheet, or this term omitted entirely (using the Election Sheet, or better, the Confirmation Note).

**What about the copyright?:** Those considering use of the BIMCO 2018 Terms also must remember that BIMCO continues to hold the copyright over the Terms, and that (as each page states) '[a]ny unauthorised copying, duplication, reproduction or distribution of this document will constitute an infringement of BIMCO's copyright.' The 2018 Terms document can be used, though, with copyright licence from BIMCO by accessing the BIMCO website<sup>12</sup> and then paying BIMCO (if not a member) a €150 start-up fee and then €6 (at presently quoted rates on the IDEA system, and comparable rates on the new SMARTCON system) for each form used. If one uses the Election Form for each sale, then presumably the entire form must be paid for each time.

**What about the 'OW Problem?':** So, even with the useful and initially unintended improvements of the 2018 Terms, the 'OW Problem' remains. Can it be solved using sales terms and conditions?

The short answer is, 'yes', where ►



sales terms are carefully crafted to make sure that suppliers retain title, and receive rights to arrest vessels *in rem*, until traders (or the ultimate counterparty) pays them.

The longer answer is the subject of a number of more detailed articles by the author.<sup>13</sup>

But, such carefully crafted terms, necessarily favour traders, and suppliers, and not their 'Buyer' counterparties. The question, particularly as 2020 approaches with the expected significant rise in compliant distillate prices, however, is, whether bunker traders and suppliers should offer terms that are 'balanced', at least as far as their credit security is concerned?

Bunker traders and suppliers, particularly as 2020 draws closer, should remember that because they will be holding the increased credit risk, they should assure now that the sales terms they use give them the most security. Using the 2018 Terms alone does not provide that security, although a number of the terms discussed above (particularly those permitting termination and other remedies when payment is insecure) move closer to that. **So, should bunker traders and suppliers use (and agree to their counterparties' requests for) all of the 2018 Terms?** Considering the comments above, bunker traders and suppliers should be very cautious about choosing 2018 Terms outright, or without significant attention, before agreeing to their counterparties' requests for them.

First and foremost, the 2018 Terms (admittedly) never could do what BIMCO set out for them to do (and which made the 2015 Terms needing change from the start): namely, both answer the 'OW Problem' and maintain balance between counterparties. They require the changes (although that would be unbalancing) by bunker suppliers and traders, detailed above.

Second, although the 2018 Terms have brought with them some very good results, a number of which this article addresses, they, like the first microwave, Post-It Notes and Play-Doh, still offer opportunities for further development. That further development will come as 2020 approaches, with its certain changes of fuel type sales, very likely re-focus on the importance of credit management and security, and probably, the next 'OW'-type, or even new, problem.

The 2018 Terms present solid ground for (as Drafting Committee Chair Claus Kesting said in July 2016, beginning the project), 'a global contractual solution acceptable to sellers, suppliers and purchasers.'

Now, bunker traders and suppliers in the short time until 2020 should do one of two things.

First, they should purchase a licensed

copy of the 2018 Terms accessing BIMCO's system, and use them after making careful edits through the Terms' Election Sheet and their own Confirmation Note.

Alternatively, bunker traders and suppliers should consider the Terms' helpful ideas (particularly those addressing insecure payment, and compliance/ethics) and (without copyright violation, of course) modify their own sales terms and conditions.

The 2018 Terms successfully advance the industry-wide debate that BIMCO's 1995 Fuelcon began. It is essential now to continue the debate, particularly during the short time until 2020.

The author is grateful to Grant Hunter, Head of BIMCO's Contracts and Clauses Section, and the members of the BIMCO Bunker Terms 2018 (BBT2018) subcommittee (collectively the Drafting Committee) for their collective comments to the author, on this article. The Drafting Committee urges that the 2018 Terms be used as a whole and that it intentionally developed all of the Terms with the continued goal of reaching a balanced document that both 'Sellers' and 'Buyers' can readily accept. The author agrees that the 'OW Problem' presented the impetus to develop new Terms beneficial to the industry. In the words of Joseph Jobert (French moralist and essayist (1754-1824) '[i]t is better to debate a question without settling it than to settle a question without debating it.' Although the author and the Drafting Committee are not agreed about the effect and application of the Terms, the author intends that this article encourages continued debate, including education about the Terms and how best to utilise them.

1. A copy of the BIMCO Bunker Terms 2018 (copyright ©BIMCO 2018), along with Explanatory Notes, is available from BIMCO at [www.bimco.org/contracts-and-clauses/bimco-contracts/bimco-bunker-terms-2018](http://www.bimco.org/contracts-and-clauses/bimco-contracts/bimco-bunker-terms-2018), to BIMCO members or by registration for a free BIMCO account at [www.bimco.org/authentication/register](http://www.bimco.org/authentication/register).

2. Drafting committee members were Messrs. Claus Kesting, (J. Lauritzen, Chairperson), Klaus Stamp (Norden), Henrik Zederkof (Dan-Bunkering and IBIA Board member), Rob Crees (World Fuel Services), Zain Hudda (Peninsula Petroleum), Michael Hope (North of England P&I) and James Kennedy (Clyde & Co).

3. *Standard Bunker Contract Under Industry Spotlight*, *Bunkerspot*, 8 July, 2018, at [www.bunkerspot.com/news-archive?view=article&id=42219:global-standard-bunker-contract-under-industry-spotlight&catid=14](http://www.bunkerspot.com/news-archive?view=article&id=42219:global-standard-bunker-contract-under-industry-spotlight&catid=14).

4. For an analysis of the 2015 Terms and its predecessors, see the Author's article in the August-September 2015 edition of *Bunkerspot*, *Common Purpose*, pp. 35-39, available on line at [www.simmsshowers.com/news/let-the-discussion-](http://www.simmsshowers.com/news/let-the-discussion-)

[continue-the-bimco-terms-2015-standard-bunker-contract-addressing-consistent-inconsistency](http://www.simmsshowers.com/news/let-the-discussion-continue-the-bimco-terms-2015-standard-bunker-contract-addressing-consistent-inconsistency).

5. *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd (the Res Cogitans)*, [2015] EWHC 2022 (Comm). The Court of Appeals decision affirming is at [2015] EWCA Civ 1058; the U.K Supreme Court's decision further affirming is at [2016] UKSC 23.

6. Grant Hunter, Recommended Amendments to Bunker Contracts, BIMCO Guidance, 29 February, 2016, at [www.bimco.org/news/contracts-and-clauses/20160226\\_recommended\\_amendment\\_for\\_bunker\\_purchase\\_contracts](http://www.bimco.org/news/contracts-and-clauses/20160226_recommended_amendment_for_bunker_purchase_contracts).

7. <http://tsdr.uspto.gov/documentviewer?caselid=sn87335817&docid=RFA20170217125306&docindex=0&page=1>.

8. See the article by Clyde & Co. Senior Associate James Kennedy, a member of the BIMCO 2018 Terms Committee, 3d May 2018, at [www.clydeco.com/insight/article/bimco-releases-new-bunker-terms-2018](http://www.clydeco.com/insight/article/bimco-releases-new-bunker-terms-2018):

*After wide consultation and a thorough examination of possible solutions, it was concluded that there is no legally and commercially workable OW Bunker type protective clause that would be widely accepted by the industry. Instead, the Bunker Terms 2018 will be accompanied by advice and guidance to better protect parties against double payment, by helping the industry to focus on better risk management, understanding of contractual terms, and know-your-counterparty due diligence before entering into a contract.*


9. See *Ethical Bunkering: a fairy tale or reality*, 16 October, 2017 by IBIA's CEO Justin Murphy, at <https://ibia.net/ethical-bunkering-a-fairy-tale-or-reality>.

10. IBIA addresses ethics in bunker industry, 3 January 2018, <https://safety4sea.com/ibia-addresses-ethics-in-bunker-industry>.

11. J. Stephen Simms, *Thinking Outside the Box*, *Bunkerspot*, February-March 2018, at 42-47.

12. [www.bimco.org/contracts-and-clauses/create-a-contract/idea/payment-options](http://www.bimco.org/contracts-and-clauses/create-a-contract/idea/payment-options).

13. See, for example, J. Stephen Simms, *Due Payment*, *Bunkerspot* June-July 2016, at 21-24.

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Simms Showers continues to be active representing major clients in the OW Bunker, Hanjin, and other maritime insolvencies and advises bunker suppliers and traders on credit security, recovery, sales terms and conditions and MARPOL-related issues, including those imminent for 2019, 2020 and beyond.

Steve Simms serves as Chair of the Legal Committee and is an immediate past Board member of the International Bunker Industry Association (IBIA). The opinions and recommendations of this article are not necessarily those of IBIA, except where identified specifically as such.

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