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BUNKERSPOT

CREDIT CONTROL

MANAGING RISK IN UNCERTAIN TIMES

INSIDE:

MARINE LUBRICANTS
AMMONIA BUNKERING
CYBER SECURITY
DELIVERING DIVERSITY

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Credit where credit's due

In this detailed discussion of bunker credit issues, **Steve Simms** of Simms Showers offers a useful checklist for bunker suppliers when tasked with making sound credit decisions

Back, back to the end of 2019. 0. 50% sulphur content bunkers would be the worldwide standard. Futures prices of very low sulphur fuel oil (VLSFO) were rising. Predictions were that only the deeply capitalised traders would survive and traders less so, would fail or be absorbed. But then, 2020, COVID-19, and the expected credit situation of 2019 hasn't come to pass – yet.

Now, as we look back to 2019, dream back a few more years – or about 900 – to the 12th century, way before bunkers (and in the last age of carbon neutral propulsion, sail).

There is the first recorded source of maritime law, the Rôles of Oléron. These were both court judgments and agreed principles, regulating the wine trade between Flanders, England and Aquitaine. Important to be sure, that wine kept flowing. The Rôles of Oléron (and wine) still influence world maritime credit (and maritime law) to this day. The very first part of them addresses maritime credit:

> *Here follows the Rôles of Oléron which are for the sea. Here begin the judgments of the sea, of ships, of seaman, merchant and of all their being.*
>
> *Article 1. First, one man is named master of the ship. The ship belongs to several partners. The ship leaves its home country and goes to Bordeaux or elsewhere and then freights to foreign lands. The master may not sell the ship but if he does not have the authorisation of the owners or their mandate, but if he requires money for the expenses of the ship, he may pledge the ship's equipment upon the advice of the crew. This is the judgment in this case.*[1]

The maritime world, and things necessary to enable vessels to sail, always has run on credit – essentially, risk. Investors came together not only to pool resources to build, launch and equip ships to sail to distant places, delivering goods sold at a premium and receiving them to be delivered at a premium, but also to employ mariners who would, probably, use their best judgment to enable the ships to do this. The maritime industry depended on credit and does so today.

Astute credit management will be essential to bunker traders of any size as the market reawakens from what was expected at the end of 2019 – and moves through 2021 and beyond.

Another challenge in the credit decision-making process is the rapid introduction of new fuels, including dual-fuelled vessels using LNG or other fuels. Should trad-

ers take the risk of offering credit for sale of multiple fuels? Or will credit extension become more complicated with new fuels, as owners are able to choose between multiple fuel sources, where some offer more 'liberal' credit, for example, for an LNG fuelling than conventional bunker sellers might offer?

But again (and 900 years of history makes a hard argument against it), credit is central to vessel operation, and fuel. Making sound credit decisions, in terms of what is a good voyage and vessel operator to invest in, is what makes money for bunker providers. Successful bunker selling is what makes money both for sellers and customers. It also is what makes sellers, bigger sellers and, paradoxically, able to take more risks and weather more decisions which may sometimes turn out to be unprofitable.

The purpose of this article is to help bunker sellers make more profitable bunker credit decisions.

The English term 'credit' comes from the first part of the 16th century, drawn (probably over a few glasses of Bordeaux) from the Middle French words for 'belief, trust, reputation, esteem, money lent or borrowed'. This was an inheritance from the old Italian term, 'credito', meaning a 'financial transaction with payment deferred', and then back to the Latin, *creditum*, for 'loan, debt'. Follow through to the verb and we get to 'credere', meaning 'to believe, confide, entrust, give credit'.

In other words, when in the maritime credit world, do as the Romans did: believe, confide, etc., but also, as US President Ronald Reagan said (not too long after the Romans), 'trust, but verify'.

The basics of credit – for anyone selling bunkers – is the confidence that the seller has that the buyer will pay timely, or at least eventually, with an acceptable and hopefully profitable return which is worth the risk of losing the credit extended. Credit in the bunker industry always involves providing bunkers without requiring immediate payment; there is rarely much made on a cash in advance transaction, except, perhaps, for places where the bunker availability of the required quality is rare. Bunker industry credit usually involves negotiation over terms, including those requiring interest payment after terms are exceeded.

So, if a customer has developed a reputation for regular payment and honesty when payments are missed, the customer has good credit, and the opposite when the customer does not. But, of course, such customers may be more few and far between than bunker sellers would want – and particularly those less-capitalised sellers in the market.

So in 2021 and beyond, as prices may rise and customers look to greater extension of credit as part of their decisions of who to buy from, how can bunker sellers better their 'odds' that they will profit from extending the credit that, as a matter of competition, their customers (or potential customers) want?

Now is the time again, to brush up on 800 years (plus) of maritime credit history – as we in the bunker industry move into the credit challenges delayed from 2019 and potentially facing us in 2021 and beyond.

First, as you consider an existing customer, or potential customer wanting credit, assess your leverage. There are many things to consider.

Where is the customer still trading? Where and when are its vessels (or the vessels you supplied, if off charter) calling? How many vessels does it have active? Is it a voyage charterer, time charterer (and if so how long) or bareboat charterer (usually for on a lease-purchase basis). How will the jurisdictions where your customer's (or potential customer's) vessels call address any claim you might have to make for legal action to arrest the vessel, its bunkers, its freight, or all three. If the vessel is calling the Arabian Gulf or the Indian Ocean region, your legal options will be limited.

How often has the vessel changed name, flag or owner? If the bunker provider knows of changes to name, flag or owner, it can anticipate the defences that the owner (or 'new' owner) may attempt to make on an arrest. 'New' ownership, for example, may prevent a vessel arrest (on an in personam claim against the owner or charter) in many jurisdictions.

Who are your customer's customers? Does your customer in turn depend on several major customers or many? What are the geographical locations of its customers? Do freight forwarders book an appreciable amount of its business? Where are those freight forwarders located? Where does the defaulting customer keep its bank accounts?

Similarly, it is much easier for a bunker provider to learn of the customer's assets, including its customers, while the customer is working with the bunker provider and relations are relatively good, rather than after the customer disappears and the bunker provider is clamouring along with others to recoup its losses. Before extending credit – or as a condition of extending greater credit – bunker providers always should try (hopefully, with success) to obtain a list of major account references and make note of customer names (which in the case of ships, will be apparent on bills of lading, or, in US Customs entry records; these also are available on several Internet databases).

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to recover on maritime liens and claims, based on your provision to the customer's vessels?

Tracking the vessels is not difficult. Usually, with a vessel's IMO number, you can access any of a number of free Internet sites, following the vessel's AIS (transponder) readings.

Sometimes the customer will instruct its crews to turn off the transponder. Vessels can still be found relatively easily using Lloyds MIU or other tracking services, and on now rare occasions if that doesn't work, with a few telephone calls to harbour pilots or port authorities.

Following where the vessel will go after it deals with the bunker provider for the last time will say much about a) the quality of one's remedies, including the opportunity for arrest, and b) the interest (and ability) that the debtor and owners have in payment. Tracking vessels as soon as a debt is owed rather than catching up with them later is the most effective and cost-efficient approach.

If the customer's vessel is scheduled to come through the Panama Canal, or to a US, Canadian, French or Netherlands port, those legal systems may give you a strong basis

What documents do you have relating to the customer's assets? Bunker providers should make copies of cheques from customers (to locate bank accounts) and note the sources of wire-transferred funds. All of these sources, if located within the reach of US jurisdiction and prejudgment attachment requirements (discussed below), could be the source of recovery.

Knowing how your customer is paid, who owes money to the customer, and where the entities owing money to the defaulting customer are located, also will tell how strong your position is against the customer if you have to

recover – and thus how advisable it is to extend credit and for how long. Again, if the entities owing money are reachable by process from a US, Canadian or French court, you may have a strong recovery right. Elsewhere, probably not.

Does the customer operate a liner service with regular calls, or does it operate voyage charters? The location of its calls will be a further lead to information about who and where its customers are. Knowing the identity of the voyage charterer, if some part of the charter is payable on cargo delivery, also may provide a recovery basis.

Is the customer a vessel charterer, or an owner (directly or indirectly owning the vessels)?

What's the nature of the charters – voyage or time charters? If either, are they true charters or lease-purchase charters?

Few customers will directly own their vessels, but some might be operating the vessels under a lease-purchase through which they are the true owners of the vessels. Owned vessels are an obvious asset to look toward for a recovery. Again, whether the vessel is available for recovery depends on the legal system where the vessel is located.

Related to this, too, is that shipowners don't like their vessels being arrested for charterers' debts. The relationship between the shipowner and charterer may be such that a demand to the shipowner could prompt payment from your customer-charterer. Make sure you pay close attention to the documents you receive when you are negotiating a bunkering transaction. If any have words to the effect, 'charterer's account only', that means that if you're not paid by your customer, who is only a charterer, you may not be paid by the charterer which has nothing but the paper (or electrons) of its charter. Be aware too of names which may be familiar but which in fact have no assets; the well-known 'XYZ Shipping' of London, for example, is quite a bit different from its apparent affiliate, 'XYZ Shipping BVI'.

Is the vessel you've supplied – or will potentially supply – mortgaged? If it's mortgaged, is there likely to be any equity in the vessel after payment of the mortgage? Generally, the mortgage holder will have priority of payment over a bunker provider, except where there is a US law-based maritime lien, enforced by an arrest in the United States or Canada, and the mortgage is not a US preferred ship's mortgage (which would only be against the relatively rare, US-flagged vessel).

Related to this is whether the customer you have supplied has pledged or factored its receivables. Has the customer financed its operations by giving security interests to others? If so, even if you attach the customer's assets, including receivables, your attachment may not give you priority to them over and above the security interest.

When making the decision about how long to extend payments, it's important to consider that, if you have to contend with other creditors, how old will your claim be? Generally, the older the claim the less priority that it will have over other competing claimants. The longer your claim has been outstanding, the more likely that there are other competing claimants. Different jurisdictions have different claims priorities. Where is your customer operating – and in those places where you might have to press (and even arrest a vessel) to recover, where will your claim rank in priority over other providers (not just bunkers, but of other unpaid claimants)?

> 'What is the universe of claimants against the defaulting customer? Are there other claimants before you – which have already attached your customer's assets or arrested its vessels?'

What is the vessel you're considering providing – or have provided to – worth? Depending on the market cycle you're operating in the answer may be, 'not much' if, for example, it's a smaller container carrier or an older tanker or bulk vessel. If you arrest or attach you will be responsible for paying the arrest costs, including keeping the vessel and repatriating the crew. In some places, those costs are extreme, and if the vessel's only value is for scrap the arrest location may be so far from Pakistan, Bangladesh or other vessel scrapping locations that you and other claimants may have a vessel that ends up costing you money rather than being a source of recovery of money.

Should you have any guarantors for the defaulting customer's debt? Does the defaulting customer have any parents, affiliates or financing sources which might be willing to guarantee all or part of the payment?

What also is the universe of claimants against the defaulting customer? Are there other claimants before you – which have already attached your customer's assets or arrested its vessels? Should you intervene in the arrest (if it's in the US) or file a caveat (if it's in a British Commonwealth jurisdiction)? Is there any pending attachment proceeding, public or non-public, that might catch the defaulting customer's payment to you, and divert it to another competing creditor?

Is the customer owed by a government? This may limit your actions against the customer in certain countries (the US and UK, for example) but not in others (Netherlands).

Has your potential or existing customer filed or been the threatened with an insolvency proceeding? If it has, does that proceeding prevent you from attaching or arresting the customer's assets, or current or former vessels, in or outside of the insolvency proceeding jurisdiction? Have there been ancillary proceedings filed in other jurisdictions to assist the initial insolvency proceeding? Would making a claim in the insolvency proceeding strengthen your position (by giving you a say in that proceeding and right to any asset recovery) or weaken it (by your submitting to an unfavorable jurisdiction, where there could be counterclaims or restraint that could prevent you from proceeding elsewhere)?

If there is or likely will be an insolvency proceeding, have you been paid recently? Was that to satisfy an *in rem* maritime lien or, instead, might you have to return the payment as a voidable preference? Did the defaulting customer receive a 'fair exchange for value' in exchange for the payments it made? If you do catch the defaulting customer's assets in a non-insolvency proceeding jurisdiction, might you have to return what you catch as 'property of the estate'? As you consider credit, what insolvency laws may apply to the customer? What do you need to make sure – to the extent you can – that you do not have to return any payments you've received from the defaulting customer?

If you will have to arrest or attach the customer's assets or the vessel you've provided to, what law will apply? Just because you find the asset in one place, doesn't mean that the court there will apply that place's law to decide whether you get the asset. What is the flag of the vessel you've sold to? What is the nationality of your company, and of your customer? Where did the physical provision take place? Which nation has the greatest interest in the transaction? This question of 'choice of law' is complicated but essential.

And if you were to decide to proceed in court, might the customer (or vessel owner) have any potential counterclaims? What, for example, happens if there is a quality or quantity dis-

pute? If so, how would the jurisdiction where you will arrest or attach treat the counterclaim? Would it require you to arbitrate it? Would you have to post counter-security (and if so, what counter-security does the court accept)?

Even if the jurisdiction seems to be favourable, what are the costs of proceeding there?

How have you or other bunker providers fared in the past? What are the requirements for proceeding, in terms of powers of attorney, certified copies and apostilles, deposits? What are the typical lengths of a proceeding once it goes forward and requirements of proof (in-person testimony, for example)? What is the difference between what the jurisdiction's law says are your rights, and how the jurisdiction will enforce that law in practice?

Finally, what do your sales terms and conditions say? When did you provide the customer with the terms and conditions? Are they up on your website (and were they up when you sold to the customer)? What remedies to your terms and conditions provide? What law do they choose? Do they provide that you retain title to the product, until paid? Do they provide for recovery of attorneys' fees and costs? Strong terms and conditions also are essential, and we also discuss this further, below.

Sound credit decisions now – as they always have – turn on how much information you have about the customer's assets and the strength of your potential recovery, or if you don't have the information, how you can get it. This turns on what information you had to make your credit decision in the first place and your relationship with the customer. And, if you haven't invested the time to collect the information before making the credit decision, you have to backtrack and that may take more time than you have, as the defaulting customer's assets dwindle.

Once the customer goes out of terms, or you have any ground for believing there may be a problem with payment, it may be too late to start assessing your leverage. But your sales terms and conditions should always give you rights to obtain more information from the customer about its assets, and to get you additional security for payment, as discussed below.

Good maritime credit policy – and successful recovery – always depends on bunker providers from the outset knowing their security, that is, the nature of their security and remedies, the nature of the maritime debtors and property involved, the locations of the vessels against which there are maritime liens (for arrest and attachment), the nature of their ownership, the identity of shippers and others who owe the debtor funds (for attachment), and the location of maritime property of the creditor's that the debtor holds (for possessory actions).

So, here is the centrepiece of bunker providers' credit decisions: not only good sales terms and conditions, but, knowing what your terms and conditions actually say.

The 'bottom line' is that sales terms and conditions will get you paid – and paid before other suppliers with poor and out of date sales terms and conditions. Ineffective and poorly drafted ones may be worse than having none at all.

Have you looked recently at your sales documentation – including your incorporated terms and conditions? Where would you find your company's sales terms and conditions, if you had to find them quickly? How would you be able to confirm exactly what version of your sales terms and conditions applied to any particular sales transaction? How would you ever be able to confirm whether your defaulting customer ever received your terms and conditions?

paid to forming the sales contract. This is the thankless (until there must be recovery) job of the bunker provider's credit manager: making certain that every one of the company's transactions incorporates the company's sales terms and conditions, making sure those terms and conditions are current and favourable to the bunker provider, and making sure that if the terms and conditions are a needed ground for recovery, the provider can reliably and promptly confirm exactly which version of the terms and conditions control the sale to the defaulting customer.

If at all possible, what every bunker provider wants to be able to claim is a maritime lien *in rem* (*rem* meaning essentially, 'the thing alone') against the vessel to which it provides bunkers. This is a claim against the vessel only, which does not depend on who is chartering or owning the vessel at the time

> 'Sound credit decisions now – as they always have – turn on how much information you have about the customer's assets and the strength of your potential recovery, or if you don't have the information, how you can get it'

A relatively recent trend has been for customers to demand their own sales terms, or to demand use of the 2018 BIMCO Bunker Terms. There are many good aspects of the BIMCO 2018 Bunker Terms, but others which are problematic, at least, if not used thoughtfully. Unfortunately, some making bunker sales quotes simply refer to the '2018 BIMCO Terms' without making any of the choices of law or language that those Terms require to make them effective. The result of that lack of care is a loss of recovery or at least giving a defaulting customer a great discount when recovery becomes difficult. The bottom line is that bunkers providers using the 2018 BIMCO Bunker Terms must use them consciously and carefully. The author's article on the 2018 BIMCO Terms referenced here, deals with that in detail.[2]

The best course, however, is for a bunker provider to have sales terms that are suitable to its own way of doing business and credit decisions. The typical bunkers sale, of course, starts with a request for a quote. Then, a quote including price, quantity, and delivery and sales terms. Then, a confirmation, and, finally, the bunkers provision, generally done through a physical supplier.

On many occasions a good credit decision is extinguished by a lack of attention

of arrest. It is a lien which arises through the application of United States, French, Polish, Panamanian and Liberian (with some restrictions) or (oddly enough) British Columbia law, but which does not arise under other countries' law (for example, UK, Singapore, Greek, Spanish or South African law does not recognise the concept of maritime liens *in rem*).

When making a credit decision it is critical to know whether, if there has to be a ship arrest, that arrest will be based on an *in rem* maritime lien or one which is in essence, simply an *in personam* claim against the vessel owner or charterer with the vessel available as security (what US law calls an 'attachment', and most other countries' law considers an 'arrest').

But the bottom line is that a terms and conditions choice of law clause providing for an *in rem* maritime lien is the strongest ground for recovery by a bunker provider. Every bunker provider's terms and conditions must have such a choice of law clause. It may give your company a right of recovery against a vessel you have provided long after there is nothing to recover from your defaulting customer, and long after there is no other 'arrest' right under non-*in rem* jurisdictions' maritime law. It may also give your company priority over a vessel mortgagor or non-*in rem* claimants.

If your terms and conditions have something other than a choice of law clause providing for an *in rem* maritime lien, change them now! It is remarkable how many major bunker providers incorporate English, Singapore or other law which does not allow for an *in rem* maritime lien. Such law incorporation is effectively useless when it comes to the need to arrest a vessel. Customers who are looking to 'stretch' their credit know this inherently.

What is remarkable is that despite years of decisions, many bunker providers retain law choices in their terms and conditions which, at best, give little or no assistance to the bunkers provider, and at worst defeat the provider's *in rem* claim. UK (English) and Greek law, for example, have no *in rem* maritime liens. Liberian maritime lien law is an old version of US maritime lien law, which prohibits maritime liens if a charter party (whether the provider knows it or not) contains a maritime lien prohibition clause. The author has even seen a bunker provider's law choice providing for a Liechtenstein choice of law. The court considering this law choice quickly recognised that as an entirely landlocked country, Liechtenstein lacked any maritime lien law and so consequently the bunkers provider never had any expectation (despite its attempt at an *in rem* arrest, in the US claiming a maritime lien) of a maritime lien.

In many situations of vessel arrest, the existence of an *in rem* maritime lien (usually based on US law, which many countries, including the US, will recognise) has made the difference between getting paid, and losing everything.

Even if the bunkers provision was in an *in rem* jurisdiction, such as Panama, the US or France, courts which have considered the issue (mostly US and Panamanian) will immediately dismiss a claim of *in rem* arrest where the underlying terms and conditions incorporates law which does not allow for an *in rem* maritime lien against the arrested vessel. This is because (as discussed below) the underpinning of such a maritime lien is relying on the credit of the vessel to secure payment for the bunkers provision. There is no such reliance if the controlling law does not provide for an *in rem* maritime lien.

Consequently, your own terms and conditions law choice may defeat your claim. Again, review your company's terms and conditions now, and if they contain a law choice other than US maritime law, change that law choice or decide (and it is unclear why any bunker provider would want to do this) that your company wants to give up the security of a maritime lien.

The author is unaware of any downside risk of making such a change, even if your transactions rarely have anything to do with the United States. At the worst, a court viewing such terms may decide that they do not apply and in that case you are no worse off than if your company had no law choice terms. In that event, the court would apply a choice of law analysis (discussed below) to determine which country's law applied to the transaction. But if the court does recognise your US law choice terms, then your company may have a much greater recovery chance from what frequently is the only remaining asset available for recovery: the vessel to which you provided your unpaid-for bunkers.

Ideally, as well, after the buyer communicates acceptance of your offer, your company's confirmation should restate that your company takes a maritime lien on provision, and all of the other terms of your initial offer.

Note, of course, that if the customer's acceptance varies your offer, including the maritime lien and United States law claim, then that will not be a term of the contract unless the customer withdraws its variation. Consequently, if documentation has such a variation, that will mean that you have much less of a position against the customer.

'A customer which varies terms which the provider may not consider to be as material as the price (such as law choice terms) is sophisticated enough to choose between paying its suppliers which hold maritime liens, and not paying the suppliers which don't'

If your terms and conditions have the right choice of law clause, then you may have a greater range of action, including *in rem* arrest. On the other hand, if you finally pull out your company's terms and conditions and only read what you thought was the most obscure and arcane part of them, their law choice, finding that it makes an ineffective choice, then your range of recovery options may be significantly limited.

It is also critically important to incorporate effectively your company's terms and conditions into your sales transaction. Bunker sales, of course, are usually very quick and completed with a minimum of documentation. Your company's offer of bunkers (stem) must incorporate your company's terms and conditions and it must be clear with your offer that the buyer accepts the terms and conditions along with its acceptance of the basic price, quality and delivery terms.

Consequently, every one of your company's offers must contain language to the effect that 'the terms of this offer include the Company's Sales Terms and Conditions'. It also is best for your offers to state (even though your terms and conditions also state this) that with the provision of bunkers to the vessel being sold to, the provider takes a maritime lien against the vessel, and that United States law controls the transaction. The offer should also state that the placing of stamps or disclaimers on any document including the bunker delivery receipt shall be of no effect. Bunker providers always should examine the customer's acceptance to make sure that the customer hasn't attempted to vary the provider's terms, and if there is a variation, strongly consider not making the sale even though the price (and profit) alone may be enticing. In bunker sales, as with most everything else, what seems to be too good to be true, often turns out to be exactly that. A customer which varies terms which the provider may not consider to be as material as the price (such as law choice terms) is sophisticated enough to choose between paying its suppliers which hold maritime liens, and not paying the suppliers which don't.

Ideally for all transactions, but certainly for those in which the customer's credit is questionable, the bunker provider should also send the customer directly a copy of the terms and conditions. If the customer is a charterer, the bunker provider should send its terms and conditions to the vessel owners and managers, as well. Usually, the owners or managers will not respond at all, but if they do respond (stating, for example, that any sales are to the charterer's/customer's 'own account' or that there are 'no liens' to arise against the vessel), then the provider should strongly consider not supplying the vessel (because, as set out below, there may be no maritime lien against the vessel, in the provider's favour). If the bunker provider must arrest the vessel the provider has sold to, then if the owner/manager has had a copy of the terms

and conditions there will be a much weakened defence put up by the owner/manager against the provider's maritime lien claim.

Your company website is the ideal place to post terms and conditions. The initial bunker offer (stem) and confirmation should list a link to those posted terms and conditions. Ideally as well, your bunker stem and confirmation should also attach a copy of the terms and conditions. Retain the electronic copy and attachment in your system (and back it up, of course) and this will be a straightforward and quick way to confirm exactly the terms and conditions version which controls any given sale. You should also keep a log of any website changes you make to your posted terms and conditions, including the dates of effectiveness of each version. The law will change so your terms and conditions must be an active document, but you also must be able to prove as needed which version applies to the transaction on which you are pursing recovery.

Other important sales terms include those for attorneys' fees and adequate assurance of performance. It is important to remember that under United States maritime law, as well as US (and state) law generally, the successful claimant cannot recover its attorneys' fees. The exception to this is that courts will award attorneys' fees in an action based on breach of contract or a similar action, if the parties have agreed to them in a written contract. Consequently, written contract terms should always contain an attorneys' fees provision, which typically is that the debtor will pay 15% of the total amount due as an attorneys' fee, if it is necessary for the creditor to proceed against the debtor to recover the debt. Attorneys' fees will not become part of the maritime lien amount, but they are recoverable from the debtor's assets in a maritime attachment (as well as a direct) action.

In addition to attorneys' fees provided for contractually, whether or not the contract addresses interest, US courts customarily award prejudgment interest in maritime cases.

Suppose also you learn that before the terms of your sale to the customer run (e.g., 30-day terms), your customer has had an unexpected financial downturn. Your terms and conditions should allow you to demand from the customer adequate assurance of performance. If your terms and conditions incorporate United States law, the Uniform Commercial Code (UCC) will apply to the sale, including UCC § 2-609, 'Right to Adequate Assurance of Performance'.

Article 72 of the United Nations Convention for the International Sale of Goods (1980) has a similar adequate assurance provision. Even 40-plus years after its 1980 drafting, however, it is still unclear in many international commercial transactions how and when the UN-CISG applies. UN-CISG Article 6, however, explicitly allows the parties to a contract to 'exclude the application of this Convention'. Whether under the UCC or UN-CISG, however, bunkers are considered to be a 'good'. When as usual, the sale is between merchants (e.g., the bunker provider and the standard commercial customer), in order to avoid confusion about which adequate assurance provision applies, bunker providers explicitly should in their terms and conditions exclude application of the UN-CISG. It is important, however, that the bunker provider's right to demand adequate assurance be clear, so that the provider is not tied to taking action for recovery once it becomes insecure about being paid.

Terms and conditions should also provide that it is the bunker provider, and not the customer, which decides which invoices will be paid by payments received from the customer. Customers also know which provisions have the best chance of being enforced with a maritime lien claim and will try to assign payments to invoices for those provisions. Bunker providers also should be able to assign payments to amounts due which may not constitute maritime liens (for example, contractual penalties, contractual interest and attorneys' fees), leaving maritime lien amounts remaining to collect against arrested vessels.

Should terms have a title retention clause? This is a larger consideration than it might seem – and it relates to choice of law. Under US law, title retention is only effective if there is a filed 'security interest' using a 'form UCC-1'. Retention of title clauses (called, ROT or *Romalpa* clauses) are effective in many other jurisdictions, including under English law (as affirmed relatively recently under the UK Supreme Court *Res Cogitans* decision).[3] Effective bunker providers' terms can state that US law controls determination of maritime liens, while English law controls title retention. It is usually always acceptable to state different law, which controls different terms.

Another clause that bunker providers often are surprised – or glad – to see is an arbitration clause. Should arbitration be a part of bunker providers' sales terms?

Often the arbitration clause requires binding London arbitration according to the rules of the London Maritime Arbitrators Association (LMAA). This is good and bad news. The good news is that because London has been a maritime arbitration centre for so many years, there are relatively more experienced maritime arbitrators available. Further, most of the world's nations have entered into the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which provides that once a binding arbitral decision is entered in one jurisdiction party to the Convention (which includes, the UK), then any other party to the Convention must give the arbitral decision full effect.

The bad news is that London maritime arbitration (although the LMAA is trying to change this) frequently is expensive and sometimes slower than desirable. Many arbitral decisions are not appealable and if a party loses any part of the arbitration, including procedural decisions, the party must pay the other side's 'costs' (which, unlike in the US, includes all attorneys' fees, and also includes arbitrators' fees). At the end of the day, even if a bunker provider has obtained an arbitral award through the LMAA, that award may have come too late to then enforce to recover anything; all of the defaulting creditor's assets may be gone and all the provider may have is the 'costs' of the arbitration.

'Even if a bunker provider has obtained an arbitral award through the LMAA, that award may have come too late to then enforce to recover anything; all of the defaulting creditor's assets may be gone and all the provider may have is "the costs" of the arbitration'

Arbitration still may be desirable because it allows the avoidance of court systems which may not be reliable, or which may be even slower than the arbitration. For arbitration locations and rules, however, there are alternatives to London and to the LMAA. Best is that the provider's terms and conditions state that arbitration shall proceed at the option of

the provider, but not as the provider's exclusive remedy (although that all claims by the customer against the provider, including quality and quantity claims, must be arbitrated). The terms and conditions should choose an arbitration situs which is most convenient to the provider, where a favourable party arbitrator can be retained by the provider at a reasonable cost. For example, the arbitration clause could choose Baltimore, or Miami, and specify that the arbitration take place according to the Rules of Arbitration of the International Chamber of Commerce. There is no need for any arbitration to be administered by any formal arbitral body; in fact, that tends to add expense and delay (although there must be rules chosen to determine how the arbitration will proceed).

One important reason to have an optional arbitration clause is to take full advantage of the ability to attach a defaulting customer's assets, under United States Supplemental Rule of Admiralty Procedure B, and have the court enter judgment to recover on the attached asset rather than having to wait on an arbitration and then present the arbitral award to the court, after attachment, for recovery.

One of the conditions of a US attachment action is that the debtor not be 'found' in the US federal court district of the attachment. Terms and conditions can provide that the customer does not have an agent for the purpose of service of process in the United States. They also should provide for ease of service of process after attachment or on a direct suit (for example, that it may be done by facsimile effective when sent, and that process does not have to be translated into a language other than English or transmitted in any way other than directly from the creditor to the debtor).

Is the sale to be to a state-owned entity? Terms and conditions also should contain waivers of sovereign immunity, namely that if the customer is owned by or is a sovereign (government) entity, it will not claim exemption from attachment, arrest or garnishment under the US Foreign Sovereign Immunities Act (US-FSIA), or any other law. Note that such a clause always should appear with any general US choice of law clause, since the US law choice clause arguably will incorporate the US-FSIA (which excepts foreign sovereign entity property from prejudgment attachment or arrest). It is unclear whether in all cases such a waiver ultimately would be given effect, but certainly the US-FSIA would be applied without an express waiver. The FSIA waiver is discussed further below.

Providers should also include in their terms and conditions a clause that the customer waives any right that it may have to prejudgment attach any asset of the bunker provider (in case of a counterclaim or otherwise) or to demand counter-security. Customers sometimes will attempt to preempt a provider's action by suing and attaching a provider's assets before judgment (using 'Rule B', for example), or will raise a counterclaim after providing security for release of an arrested vessel (which, under US court procedure, generally requires the bunker provider doing the arrest to also post counter-security against the counterclaim). These terms will decrease the customer's perceived leverage to lower or escape payment to the bunker provider.

Customers often – and particularly with the increased use of blends to achieve 0.50% very low sulphur fuel oil (VLSFO) standards – raise real or imagined dispute over bunker quality. Although they do not relate directly to the monetary recovery on deals that have gone wrong, they do frequently determine whether and how the customer must pay, including what sort of offset the customer might claim and how the customer must claim it. Because these must also be inherent parts of every bunker provider's terms and conditions, we also mention it here. Your recovery ability will turn directly on how your company's incorporated terms and conditions address these problems and resolving them.

Strong and effective terms and conditions, which keep up with the current maritime law throughout your trading area, are (even though perhaps boring at the time) absolutely essential to effective recovery (and, as set out above, even can thwart recovery). You must regularly review and understand your company's terms and conditions.

'One size' – whether that is BIMCO 2018 or some other set of terms – does not 'fit all' for every provider; instead, it is important to understand your customer base and the risks of that base, including how the jurisdictions in which you are providing bunkers, and in which you may have to seize assets or arrest vessels, will treat your terms and conditions.

It may even be appropriate to have varied terms and conditions, depending on the customer involved.

Especially in this area, working with experienced legal counsel who regularly review your terms and conditions of sale is essential and one of your best investments. Without that, your recovery and loss expenses may prove to be much more than you would ever invest on the 'front end' to have strong and regularly up-to-date terms and conditions and credit terms.

Credit always has been and will continue to be essential in the maritime industry generally, and in the bunkering industry particularly. Good credit decisions will be more challenging as the industry considers new fuels, and less-capitalised traders seek to compete by taking greater but hopefully more educated credit risks.

So, the last year or so may have been somewhat of a pause but now particularly is the time for bunker sellers who want to do well to take consideration of making sound credit decisions and having the sales terms supporting them, to keep the wine (VLSFO, HFO, LNG, and the fuels that develop) flowing.

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1 *History and Definition of Maritime Liens, The Rôles of Oléron*, W. Tetley, Maritime Liens and Claims 2d Ed. 1998, at 17.

2 *Required Reading, Bunkerspot*, Vol. 15 No. 4, August-September 2018 at 40, copy available from *Bunkerspot* and at www.simmsshowers.com/news/2020/5/18/bimco-bunker-terms-2018.

3 *See* the author's article on the *Res Cogitans* decision, *Due Payment*, *Bunkerspot* Vol 13, No. 3, June/ July 2016, available from *Bunkerspot* and at www.simmsshowers.com/news/res-cogitans-impact.

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The opinions and recommendations of this article are his and not necessarily also those of IBIA or SEA/LNG, except if identified specifically as such.

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