

# BUNKERSPOT

## **MARKET VOLATILITY** **CHANGING DYNAMICS WITHIN THE** **GLOBAL BUNKER INDUSTRY**

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# An equitable share

The contentious issue of competing claims for payment continues to be vigorously debated as the OW Bunker bankruptcy process makes slow progress. Steve Simms of Simms Showers suggests such arguments could be avoided if parties to a bunker transaction work with, rather than against, each other

The folk tale of stone soup is one known in various versions around the world. Common to those versions is a hungry traveller who carries an empty pot into a village. The traveller convinces the village people – who are also hungry – that he can make soup with water and one common stone. As the people watch the traveller bring the stone to a boil, they are fascinated and so the traveller convinces them to flavour the soup by bringing out their hidden meat and vegetables. Soon there is a hearty soup that all then eat from the same pot – and the people then save the stone for the next soup.

With low bunker prices (not yet quite the price of water, but closer than a short time ago) there is currently hunger in the 'bunkering village'. In one version of the stone soup tale, the famine has resulted from war, and while the OW Bunker collapse is (thankfully) far from war it has proved to be a catastrophe for many. Vessel owners and charterers are now wary about dealing with brokers and traders, who they believe might not pay physical suppliers who could then arrest their vessels.

Some are now seeking to buy directly from physical suppliers, but with the shortcoming that the physical suppliers may not be able or willing to offer the coverage or credit that the brokers and traders offered. Physical suppliers must develop credit facilities and analysis that they may not have had before.

Some brokers and traders – particularly those serving smaller markets – are finding it more difficult to obtain physical supplier and bank credit. Vessel owners and charterers, and physical suppliers, are wary of brokers and traders who may have been relying on bank credit. Banks which had extended and profited

on that credit are withdrawing from extending it, out of concern that the security they thought they had in receivables is instead subject to physical suppliers' and others' claims.

However, all the 'bunker villagers' do still have meat and vegetables – perhaps now held back because of OW – to contribute to the common pot. There's no reason for anyone in the 'village' to starve because, all together, they have the ingredients needed for a 'good soup' recipe.

From the OW insolvency experience and its litigation and arbitration so far, this is the 'hunger' of the respective 'villagers':

- Banks must know that they have security for their credit lines, unimpaired by other creditors' claims, particularly creditors like physical suppliers who may claim maritime liens against the vessels which the banks' customers sell to;
- Vessel owners and charterers must know that they won't face competing claims for payment, from the banks and physical suppliers (so that they won't have to pay twice, or more);
- Vessel owners and charterers also need reliable, flexible and price- and credit-competitive sources from which to buy their bunkers rather than having to negotiate with a physical supplier at each place they must refuel;
- Brokers and traders need bank credit and also credit from physical suppliers, and need vessel owners and charters to sell to;
- Physical suppliers need a range of customers, not just vessel owners and charterers directly but also brokers and traders who will at least in part assess and bear credit risk and bring business to the physical suppliers so that the physical

suppliers can focus on what they do best (collecting and delivering physical supply) rather than dealing with successive new, direct customers.

It is a paradox that the relatively challenged economy of the bunker industry presents the greatest opportunity for 'good soup'. Yet, perhaps this isn't really a paradox. What is the real paradox is that there is much less cooperation when economics are less challenging. The 'villagers' then see less need to cooperate and believe they will do better going it on their own.

Reality hits, however, when situations such as OW occur and when all realise that their relative prosperity has only served to postpone addressing the underlying issue – the need for cooperation.

It is also a paradox that OW may have put the first vegetable in the soup. Readers of my articles and our clients know that I am (and all those competently advising bunker brokers, traders and suppliers should be) fanatic that strong, well-incorporated, clear and legally enforceable sales terms and conditions are essential to every bunker transaction, from physical supplier through broker, trader and agent.

Why is that? Because they are like the soup ingredients. When every ingredient that each 'villager' brings contributes to the 'soup', then all eat well.

The interesting and unique 'ingredient' that OW brought to the 'soup' is this clause in its sales terms and conditions which provides as follows:

- (a) These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party which insists



that the Buyer is also bound by its own terms and conditions. In such circumstances, these Terms and Conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party.

(b) Without prejudice or limitation to the generality of the foregoing, in the event that the third party terms include:

- i. A shorter time limit for the doing of any act, or the making of any claim, then such shorter time limit shall be incorporated into these terms and conditions.
- ii. Any additional exclusion of liability clause, then same shall be incorporated mutatis mutandis [legalese for 'the necessary changes having been made'] into these.
- iii. A different law and/or forum selection for disputes to be determined, then such law selection and/or forum shall be incorporated into these terms and conditions.

(c) It is acknowledged and agreed that the buyer shall not have any rights against the Seller which are greater or more extensive than the rights of the supplier against the aforesaid Third Party.

So, why is this a really meaty addition to the soup?

What OW's sales terms do is recognise its physical suppliers' rights through its sales terms and extend those to its contracts with its customers. So, for example, where OW's physical suppliers (the 'third parties') have sales terms providing that they have maritime liens against the vessels supplied, then the OW terms extend those 'third party' physical supplier terms, to the vessels supplied, making those terms part of the contract with the direct customer ordering the bunkers. The terms also extend a direct contractual right for the physical supplier to be paid, if the broker/trader (OW) doesn't pay the physical supplier.

Whatever one may say of OW, the author of its sales terms still has this 'meat' to add to the soup: sales terms which extend the physical supplier's rights to arrest vessels and collect directly from the trader/broker's customers, if the physical supplier is unpaid.

Physical suppliers rightly should look for such a term in the sales terms of the brokers and traders they sell through. With such a term, the brokers and traders become a recovery agent for the physical supplier, and, once they pay the physical supplier claim, take assignment of the entire receivable from the

broker/trader's ultimate customer. At the same time, a well drafted 'third party' sales term leaves no room for misunderstanding that the receivable (and lien) belongs to the physical supplier, until the physical supplier is paid.

With this, the physical supplier 'adds to the pot' its willingness to sell its supply on credit to the broker/trader, supported by sales terms which confirm the physical supplier's rights to – and assignment to – all rights to recover against the ultimate buyer (and vessel supplied) if the physical supplier is not paid.

A concern of a broker/trader may be that the ultimate customer does not know how much the broker/trader pays the physical supplier (and thus the broker/trader's margin). With this approach, the ultimate customer doesn't know or particularly care because it receives a well-flavoured transaction: it knows that it is less likely that it will have to pay twice.

If the broker/trader (or its bank) were to arrest a vessel (and even further, the vessel owner start an interpleader proceeding), the rights to the money would be clear: the broker/trader would get its margin, and the physical supplier the value of its provision. Only then, but not before, would the ultimate customer know the value of the physical supply and of the margin, and again, it would know that it would be unlikely to pay twice because there would not be supposedly concurrent claims to the same amount.

In fact, there is nothing to say that for a single bunker supply, there cannot be claims which add to a total amount, rather than a 'zero sum' of claims. Properly drafted physical supplier's, and broker/trader sales terms, allow for claims for the broker/trader's margin, and at the same time the physical supplier's bunker value. It makes no sense that the important values that each provide, should be exclusive. The vessel owner/charterer has benefitted from both: including the broker/trader's credit and marketing expertise and international supply network, and the physical supplier's product. There is no reason that each should not enjoy from the same pot of soup what each agreed to eat in the first place.

The same is true of the financing banks. They bring the meat and vegetables of allowing brokers and traders to buy on credit from physical suppliers and sell to vessel

owners and charterers. But the soup that the banks enjoy properly is the margin which their broker/trader customers make selling the physical supplier's product. Thus, any financing agreement must make plain that it claims security only against the unencumbered receivables of the broker/trader – and the banks (and brokers/traders financed) should be prepared to disclose the 'meat' of such agreement to any vessel owner or charterer, or physical supplier who asks.

The shipowners and charterers bring the last meat and vegetables to the soup. They are the buyers who pledge their and their vessels' credit, in exchange for voyage profits to pay for the bunkers. Clear divisions of security rights should readily encourage shipowners and charterers to make their essential contribution so that all enjoy a good meal.

Now, if after reading this you are thinking that you need to join hands at the next industry meeting to sing 'We are the World' or something similar, that is not what this discussion is about. What it is about is opportunity and focusing on concurrent self interest and common interest. Looking at self interest, good soup isn't a bad thing – and it certainly is a marketing advantage (not only to customers who will have less concern about paying twice and multiple vessel arrests if there is a payment problem, but also to physical suppliers who may more readily extend credit and prefer brokers/traders providing for those suppliers' security).

Everyone in each step of a bunker transaction must be adequately assured that each will be paid, and that if each must exercise their rights to security, they may do that with a minimum of cost and maximum likelihood of recovery.

So, from that standpoint everyone in the bunker 'village' eats, and can eat well, from the same pot with thoughtful cooperation, and (yes, even lawyers have a carrot to contribute) competent and trusted advisors can bring that about.

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