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# BUNKERSPOT

## SURVIVAL OF THE FITTEST

### BUNKERING IN A TIME OF TRANSITION

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# Terms of engagement

## The collapse of OW Bunker is proving to be a game-changing and salutary lesson for the marine fuels industry. With a nod to another Danish tragedy, Steve Simms looks at sales terms – notably, retention of title

**The scene is Shakespeare's *Hamlet*, Act I, Scene IV. The setting is in winter (the season of the OW Bunker tragedy) at Elsinore Castle, Denmark (but a few hours from the OW Bunker 'castle' (headquarters) and insolvency court in Aalborg).**

In this scene, after the exit of Hamlet and the ghost of Hamlet's father, Hamlet's friends comment on the state of affairs:

> HORATIO: He [Hamlet] waxes desperate with imagination.
>
> MARCELLUS: Let's follow; 'tis not fit thus to obey him.
>
> HORATIO: Have after. To what issue will this come?
>
> MARCELLUS: Something is [ROT-ten] in the state of Denmark.

Shakespeare's *Hamlet* is, of course, a tragedy and, indeed, for many bunker suppliers, brokers and traders the OW collapse was also a tragic turn of events. The ghost in *Hamlet* challenged his son to revenge his death. Those suppliers, brokers and traders who are 'ROT-ten' in Denmark and elsewhere in their sales to OW may still 'make a ghost' of those try-ING to take their entitlement to recovery. Those who are not ROT-ten, however, should learn the tragedy's lessons so as to avoid becoming ghosts the next time.

**POLONIUS: Though this be madness, yet there is method in't.** *(Hamlet, Act II, Scene II)*

A reservation of title (ROT) clause is a 'contractual agreement according to which the seller retains title to the goods in question until the price has been paid in full'. (1 Directive on Combating Late Payment in Commercial Transactions Art 2 (3), 2011/7/EU).

The sales terms and conditions of some marine fuel suppliers, brokers and traders who did business with OW, have ROT-ten clauses. In the OW insolvency and others (in other words, just about any situation for a marine fuel seller), ROT actually is good, not just in Denmark but world-wide.

So who gets paid when a bunker buyer becomes insolvent? Will it be the bank claiming assignment or a general security interest, other creditors, or the marine fuel supplier, broker or trader holding the ultimate risk of non-payment?

Properly drafted and communicated ROT sales terms greatly increase suppliers', brokers' and traders' leverage to be paid when buyers become insolvent. In the OW situation and others, ROT clauses may be the primary means for payment.

The author of this feature (especially since the OW collapse) has reviewed many sales terms and conditions of OW's supplier customers. Remarkably, many are rotten, because they lack ROT. There seems to be no reason for this other than failure to know and keep current those sales terms. An example of the most basic 'state of the art' terms is the Baltic and International Maritime Council's (BIMCO) Standard Bunker Contract, published in 2015. While marine fuel suppliers, brokers and traders can and should have at least this, they actually can and should have more ROT than the BIMCO terms. There is a method to the madness.

**HAMLET: That it should come to this!** *(Hamlet, Act I, Scene II)*

ROT isn't new but it is important, particularly in most countries (like the United Kingdom) which have no system otherwise for retaining title and rights to recover if a buyer fails to pay.

About 40 years ago, an English High Court case called *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676; [1976] 2 All ER 552 gave rise to much of the ROT-ten world. *Romalpa* involved aluminum ingots transformed into foil, which was sold. The aluminum seller had a ROT clause, allowing it to retain title, reclaim unpaid aluminum and trace the value of the aluminum it had sold to the sales proceeds. The High Court enforced the ROT clause, including returning the sales proceeds to the seller. The debtor's banks, who wanted to take all the money and inventory from the suppliers, were... foiled.

ROT terms after this case are frequently called 'Romalpa Clauses' (and give indigestion to banks and suppliers' competing creditors). In 2000, the High Court of Australia (in *Associated Alloys Pty Ltd v ACN* 001 452 106 Pty Ltd [The Associated Alloys Case] [2000] HCA 25) assessed *Romalpa's* impact as follows:

> When the *Romalpa* case was decided, much of the legal commentary upon it was overcome by admiration for the perceived ingenuity of the device upheld in the decision and ecstatic about its potential to afford protection from the rigours of insolvency law to well-advised parties. It was predicted that the decision in *Romalpa* would 'have a greater impact on commercial law than almost any other case decided this century'. Those words appeared to reflect popular commercial sentiment at the time. However, as more cases were decided about retention of title clauses, and more analysis came to be written about the decisions, the 'fundamental flaw' of such clauses in the context of statutory priorities governing insolvency came to be recognised.

The world-wide importance of *Romalpa* remains – particularly in the world of marine fuel sales – even though courts and legislatures have developed exceptions to it. Well-drafted, updated and communicated ROT clauses allow marine fuel sellers to retain title, reclaim unpaid supplies and, in some cases, proceed against vessel owners for conversion of unpaid-for fuel. In parallel, are registration regimes, such as those in the United States, Australia, and New Zealand, which consider title retention to be granting of security interests which require registration.

Marine fuel sellers generally sell across many jurisdictions, and if they have to recover for unpaid sales, must consider recovery action in many more, depending on where the vessel they have sold to is trading. The challenge to marine fuel sellers is to draft, maintain (including through required security interest registration filings) and communicate to vessel owners and managers ROT sales terms and conditions, which, along with their other sales terms and conditions (such as those providing for maritime liens and vessel arrest), give sellers the greatest possibility for recovery in the most jurisdictions.

**CLAUDIUS: Words without thoughts never to heaven go.** *(Hamlet, Act III, Scene III)*

Properly-drafted (and well-thought) ROT sales terms and conditions work well in several situations.

Where a vessel owner takes unpaid-for marine fuel subject to a ROT clause, the owner can be liable to the fuel seller for converting the bunkers (basically, theft). In *Forsythe International (UK) Ltd v Silver Shipping Co Ltd and others; The Saetta (Queens Bench Division – Admiralty Court)*, [1994] 1 WLR 1334, [1993] 2 Lloyd's Rep 268, [1994] 1 All ER 851, for example, the marine fuel seller's terms and conditions had a ROT clause.

The charterer/customer defaulted on the charter, and so the vessel owner took the vessel back, including the bunkers. The court observed that because the owners took the bunkers involuntarily there was no sale to owners. "[T]here was no delivery by the charterers of the bunkers to the owners as contemplated by the section. It follows that the owners are liable to the plaintiffs for damages for conversion."

ROT is most certain in situations such as that of *Forsythe*, where there is no sale but instead an involuntary taking of the marine fuel subject to ROT. Next most certain is where there remains on the vessel, the same fuel which the supplier has provided the vessel subject to a ROT.

More difficult is where the vessel has consumed the fuel, co-mingled it with other fuel, or combined the fuel to make a different product. Even for those situations, however, there is no reason not to anticipate them with well-drafted sales terms and conditions. Sellers must keep in mind that where some jurisdictions (like vessel arrests on maritime liens) may honour the ROT, others may not; it may be a matter of tracking the vessel and choosing the jurisdiction in which it is most favourable to proceed.

**POLONIUS: Neither a borrower nor a lender be; For loan oft loses both itself and friend, and borrowing dulls the edge of husbandry.** *(Hamlet, Act I, Scene III)*

Minding the exhortations of Polonius and Claudius, examples of ROT terms useful to marine fuel sellers, and the thoughts for each, follow. Selling on terms is coextensive with lending, but good ROT terms will keep suppliers from losing recoveries and being forced to borrow.

Remember Claudius' caution with these, however: '[w]ords without thoughts never to heaven go.' There is no cut and paste to ROT or other marine fuel suppliers', brokers' or traders' sales terms and conditions. Those who simply import words to their sales terms and conditions and do not assure that it not only follows their operations, but is up-to-date and understood, rarely benefit from the words. It is important that every marine fuel supplier, broker or trader understand their sales terms and conditions and have competent counsel advise them on regular reviews and revisions. That said, we recommend that every marine fuel supplier's, broker's, and trader's sales terms and conditions should include (but not be limited to) terms such as the following:

1. *Title in and to the Fuel shall not pass to the Buyer until all amounts owing by the Buyer to the Seller on any account whatsoever (including the purchase price of the Fuel, together with all interest, costs and expenses which may have accrued) (herein, 'Amounts Owing') has been paid to the Seller.*

This is the basic title retention clause. It retains title until the buyer (which your sales terms and conditions should define broadly) pays everything the buyer owes the seller, including interest and contractual costs (including attorneys' fees) which may not otherwise be included in the amount of a maritime lien against the vessel supplied.

2. *Without limiting the meaning of Amounts*

'If this article provokes nothing else, it should move every physical supplier issuing BDRs to state on and incorporate into them, its ROT and maritime lien terms, and links to the supplier's sales terms and conditions'

*Owing, if the Buyer makes a payment to the Company at any time, whether in connection with these Terms and Conditions of Sale or otherwise, the Seller may apply that payment as it sees fit.*

This keeps the buyer from designating a pay-off of a supply involving a vessel in an opportune arrest location, and ignoring other amounts due.

3. *Buyer acknowledges that until title in and to the Fuel passes to the Buyer in accordance with paragraph 1, Buyer holds the Fuel as trustee, agent and bailee of the Seller and that a fiduciary relationship exists between the Buyer and the Seller.*

This protects the fuel from attachment and may establish conversion for involuntary taking of the fuel. Note, however, that some jurisdictions (for example, the United States in In re *Millenium Seacarriers, Inc*., 2003 WL 22939112, 2004 A.M.C. 538 (S.D.N.Y. 2003), *aff'd*, 419 F.3d 83 (2d Cir. 2005) have held that there is no bailment where the parties intended the bunkers to be consumed.

4. *Until title in and to the Fuel passes to the Buyer in accordance with paragraph 1, the Buyer shall store the Fuel separately from other fuel held by the Buyer and in such a manner so it is identifiable as the property of the Seller. The Buyer agrees that the products will be dealt with at all times by the Buyer on a first in, first out basis.*

This also confirms that the fuel is to be identified to the seller, so that the seller can recover it as needed and, that fuel existing on the vessel if commingled with the seller's new fuel, is considered consumed before seller's fuel. Rarely, of course. will a vessel have the capacity to hold new fuel separate from existing fuel, until paid for.

5. *Until title in and to the Fuel passes to the Buyer in accordance with paragraph 1, if the Fuel becomes part of another product through processing or becoming commingled (herein the 'Commingled Fuel'), the Seller shall have a security interest in the amount of the purchase price of the Fuel which continues in that Commingled Fuel.*

Case law sometimes holds that fuel may be so commingled as to be considered a separate product. This gives the seller a security interest (claim) continuing into that product. Note, however, that for registration jurisdictions this will have to be registered to have priority, as discussed below).

6. *The Buyer acknowledges that if it sells or otherwise deals with the Fuel or Commingled Fuel before title in and to the Fuel has passed to the Buyer in accordance with paragraph 1:*

*(a) it does so as trustee and agent for the Seller;*

*(b) it must hold the proceeds of the sale or such dealing as trustee and agent for the Seller;*

*(c) it must be able to separately and clearly identify such proceeds once deposited into the Buyer's account as the property of the Seller.*

This allows the seller to trace – and reclaim – the cash from the sale of its fuel. Again, however, there must be registration of this security interest in such jurisdictions requiring that, and other jurisdictions may require deposit into a separate account in order to recover. Buyers (particularly insolvent ones) rarely have such accounts (instead they are usually their financing banks' accounts). Sellers thus must check and insist on separate deposit accounts.

7. *Despite paragraph 6, the Buyer must not represent to any third parties that it is acting as agent of the Seller and the Seller will not be bound by any contracts with third parties to which the Buyer is a party.*

Seller, of course, does not want its customers binding seller to any contracts.

8. *Buyer acknowledges that the Seller has a security interest in the Fuel and any proceeds described in paragraph 6 until the title in and to the Fuel passes to the Buyer in accordance with paragraph 1. This security interest secures all moneys owing by the Buyer to the Seller (including the Purchase price of the Fuel) any contract or otherwise.*

This security interest again will have to be timely and properly registered, in registration jurisdictions, in order to have priority.

9. *The Buyer agrees that it will not assign or grant a security interest in respect of any accounts owed to Seller in relation to the Fuel without the Seller's prior written consent. The Seller has a security interest in all such accounts to secure the Amounts Owing.*

This attempts to assure that the customer does not pledge accounts owing to the seller. Again, though, an insolvent buyer is likely to violate this term.

10. *Buyer consents to the Seller effecting a registration on any register (in any manner the Seller considers appropriate) in relation to any security interest contemplated by these Terms and Conditions of Sale. Buyer grants Seller a limited power of attorney for Buyer to supply any required signatures for Buyer, to such registration, and Buyer also agrees to provide all assistance required to facilitate registration.*

This gives the seller the right to register its security interest, in those jurisdictions where retaining title is a security interest. Such jurisdictions provide the advantage that the seller has a continuing security interest in the sales proceeds of their product.

11. *In addition to any rights the Seller may have under law, the Seller shall be entitled at any time until the title in and to the Fuel passes to the Buyer in accordance with paragraph 1:*

*(a) to demand the return of the Fuel, upon which the Buyer must immediately return to the Seller the Fuel;*

*(b) to the extent permitted by law, to board or enter (or have its representative enter) any vessel or premises controlled, operated, leased or otherwise used by the Buyer in order to search for and remove the Fuel without notice to the Buyer and without liability to the Buyer (including liability in relation to negligence). The Buyer and its representatives shall provide all reasonable assistance to the Seller and its representatives for this purpose; and*

*(c) to retain, sell or otherwise dispose of*

'Choice of law should provide for United States' maritime law to govern the formation and retention of maritime liens, but English law to govern ROT'

'It similarly is critical that marine fuel sales terms and conditions, to have a proper ROT, exclude application of the UN Convention for the International Sale of Goods'

*the Fuel on any terms and In any manner Seller sees fit and apply the proceeds to repay any debt owed to it by the Buyer.*

Of course, the seller must be able to take back its fuel if not paid for. This term provides for that.

12. *Buyer shall indemnify, defend and hold Seller harmless against any claim (including negligence and any alleged or proved negligence of the Seller) in respect of any damage or alleged damage to the vessel, property, premises, or surrounding area (including water) to which paragraph 13(b) refers, including loss or claim of any kind arising out of the search for and removal of the Fuel in accordance with paragraph 11.*

This term protects the seller when it reclaims the fuel. Again, however, if the buyer is insolvent it will be unable to pay indemnity; on the other hand, the term is a defence which may be raised if there is any claim by the trustee or estate of an insolvent buyer.

13. *In order to secure and in consideration for Seller's extension of credit to Buyer, Buyer assigns to Seller all rights, title and interest to any right Buyer may have to recover and/or collect from any entity receiving or benefitting from the marine fuel sold, including any right Buyer may have to arrest any vessel or to attach or garnish any asset in connection with the sale or provision of the marine fuel.*

Maritime liens and claims are fully assignable, as are accounts receivable. This term is essential, particularly for physical suppliers which may not be considered to have directly 'provided' fuel to a vessel and therefore be considered to lack a maritime lien (and/or arrest) claim against the vessel, or to have a direct claim for recovery against the ultimate fuel purchaser. This term should allow the seller to arrest a vessel owned or chartered by an 'upstream' supplier or broker (as OW was to many suppliers) and to directly pursue the customers of that 'upstream supplier or broker.

For example, in a Malta case (in the TNT insolvency, *Dr Ann Fenech noe v Vessel MV D Ladybug*, Civil Court (First Hall), Application 741/2014, delivered on October 8 2014 by Justice Mark Chetcuti), the mortgaging bank paid the marine fuel suppliers to the vessel. The suppliers sold their fuel subject to ROT. The bank insisted that by buying the bunkers it also took the title, so the bunkers' title was separable from the vessel and bunkers not sold with the vessel. When it came time for the Marshal to sell the vessel, the court on that basis excluded the bunkers for sale and allowed the bank, as assignee of the ROT, to sell or offload the bunkers.

14. *In the event that Buyer is not the entity which provides the marine fuel to a vessel, but instead sells or purports to transfer control over the marine fuel to a further entity, buyer, and any other entities shall for the purpose of providing fuel to the vessel to which the fuel ultimately is provided, agree that Buyer and such entities act as agent for Seller, and that through their actions as agent they are providing the marine fuel directly to the vessel provided, on behalf of the Seller.*

This is the reverse of Term 13. It is to address statutory and case law stating that only the entity engaging directly with the vessel charterer or owner (or any entity directly ordering fuel for a vessel) holds a maritime lien against the vessel. The term makes the engagement direct to the seller (including physical supplier) through the intermediate buyer as agent for the seller.

15. *Nothing in these sales terms and conditions prejudices or affects Seller's right to arrest/attach any vessel and/or sister ship and/or any sister or associate ship and/or other assets of the Buyer (or the Owner of the Vessel or any other party liable), wherever situated in the world, without prior notice.*

This term confirms that the seller's ROT rights are coextensive with its vessel arrest rights, for example, on any maritime lien. Otherwise, a vessel owner might claim that by retaining title or taking assignment or rights the seller does not have arrest rights, because the seller has not relied on the vessel's credit to secure payment (but instead has relied only on retained title or assigned rights).

16. *Where, notwithstanding these terms, title in and to the marine fuel delivered has passed to the Buyer and/or any third party before full payment has been made to the Seller, the Buyer shall grant a pledge and security interest over such marine fuel to the Seller. The Buyer shall furthermore grant a pledge and security interest over any other marine fuel present in the respective Vessel, including any mixtures of the delivered Bunkers and other bunkers. Such pledge will be deemed to have been given for any and all claims, of whatever origin and of whatever nature that the Seller may have against the Buyer.*

This term gives the seller a blanket security interest over all marine fuel on the vessel supplied, which again may require registration in the United States or similar jurisdiction to be effective over other registered security interests.

17. *Buyer's rights to use and possession of the marine fuel immediately shall cease if: (a) Seller at any time determines that it is insecure about payment; (b) Buyer has not paid for the marine fuel in full by the expiration of any credit period allowed by agreement with the Seller; (c) Buyer is insolvent or otherwise declared insolvent or makes any proposal to his creditors for a reorganisation or other voluntary arrangement; or (c) a receiver, liquidator or administrator is appointed in respect of Buyer's business.*

It is essential that the seller immediately may recover its product if for any reason it believes it may not be paid. There should be no sales term (including invoice term, providing on its own a firm number of days in which to make payment) restricting the seller's right to take whatever immediate action it determines – on its sole judgment – to be needed.

Marine fuel sellers must be able to act quickly to protect their interests and must not be tied to payment terms which, where sellers take action before the terms expire, may subject the sellers to claims for wrongful

vessel arrest or marine fuel attachment.

**HAMLET: To be, or not to be: that is the question.** *(Hamlet, Act III, Scene I)*

Inclusion of ROT terms such as the above, however, is not enough. To have ROT 'be' effective rather than 'not to be', marine fuel sellers must also be proactive, including in the following ways.

## ROT must be communicated to vessel owners, managers and all upstream buyers/suppliers

In *Angara Maritime Ltd v OceanConnect UK Ltd*, [2011] 1 Lloyd's Rep 61], [2010] EWHC 619 (QB), Oceanconnect (the bunker supplier) tried to rely on its ROT to claim that the vessel owners had converted bunkers the charterers didn't pay for.

The charter party provided that, at the charter's conclusion, the charterer would sell the bunkers to owners to satisfy any unpaid charter hire. The court held that the owners took the bunkers as a good faith purchase, because they didn't know of the ROT.

Sellers thus must make vessel owners, managers, and all 'upstream' brokers and traders to which sellers sell aware of the ROT.

An obvious way to do this is to fax or email each such entity, prior to the time of each supply. Short of that, sellers should reference their ROT on any bunker delivery receipt (BDR) that they use. The vessel's Chief Engineer or Master (in a bareboat charter usually the owners' employee) signs and acknowledges the BDR.

Case law frequently confirms that the Chief Engineer or Master acts for the vessel owner. Explicit reference of the ROT in the BDR (and the BDR also should reference maritime lien rights and state a link to the seller's sales terms and conditions) arguably puts the vessel's owners and managers on notice of the ROT. In any subsequent court case, this limits any argument that they took the bunkers in good faith and not knowing of the ROT terms.

Remarkably few BDRs – which are signed and acknowledged directly by owners' and managers' employees and agents (the vessel Chief Engineer or Master) – incorporate any notice to owners/ managers, ROT and maritime lien terms or refer to sales terms and conditions. If this article provokes nothing else, it should move every physical supplier issuing BDRs to state on and incorporate into them, its ROT and maritime lien terms, and links (all sales terms and conditions should be posted on the supplier's/broker's/trader's web site) to the supplier's sales terms and conditions.

## ROT – not risk

With title retention, sellers also should make clear that the buyers take all risk of loss, of any kind, with the fuels sales.

Out of concern for liability, some marine fuel suppliers, brokers or traders do not use ROT terms, concerned that holding title also means that one holds risk. A review of world-wide court opinions considering ROT terms, however, does not show this concern to be well-founded. There is a far greater chance that a seller will have a loss without ROT, than with it. Sellers certainly should assure that their insurance coverage provides for defence, however, if they sell subject to retention of title.

## Assure that security interests are timely and properly registered

For those jurisdictions requiring security interest registration or notice filing, there will be a limited time to file before, if there is an insolvency, the security interest claim might be set aside as a preferential transfer. Do not hesitate to file or notice security interests, where they must be filed or noticed to be effective.

## Law choice is critical

Many marine fuel sellers' terms and conditions specify United States' maritime law to govern all of the terms. This is good for claiming *in rem* maritime liens, but problematic when claiming priority to marine fuel under a ROT term if the seller has not filed the required security interest document (known as a Financing Statement, form 'UCC-1'). Consequently, choice of law should provide for United States' maritime law to govern the formation and retention of maritime liens, but English law to govern ROT. Sales terms and conditions must clearly make the distinction about which law applies to which terms. Terms and conditions seeking to support maritime lien claims should never have an English (or similar law) choice associated with a claim for *in rem* maritime liens.

Courts recognising the freedom of contract and primacy of parties' law choice in international contracts should honour this law choice. This being said, sellers with sales in a jurisdiction requiring registration of security interests, although England does not provide for such registration, should still register their security interests.

It similarly is critical that marine fuel sales terms and conditions, to have a proper ROT, exclude application of the UN Convention for the International Sale of Goods (CISG). The CISG otherwise will apply in many countries (including the United States) because it has been adopted, as a treaty with the force of national law.

An effective CISG opt-out clause is the following: 'The Uniform Law on the Formation of Contracts for the Sale of Goods, based upon the United Nations Convention on Contracts for the International Sale of Goods, shall not be applicable.' (*Hull 753 Corp. v. Elbe Flugzeugwerke GmbH*, 58 F. Supp. 2d 925, 927 (N.D. Ill. 1999). The reason for the CISG opt-out is that CISG Article 30 states that the 'seller must deliver the goods, hand over documents relating to them and transfer the property in the goods as required by the contract and [the] Convention.' This arguably interferes with a ROT term.

So the ultimate question is, what does a marine fuels seller achieve for itself through effective ROT terms such as those above?

Under US and similar (Panama) procedures, the unpaid seller may arrest the unpaid-for, existing marine fuel in the United States using Supplemental Admiralty and Maritime Rule D (to try claims for title to maritime property). The seller may also reclaim (replevin) the fuel, including any fuel substituted for it. The seller further may pursue a security interest superior to other creditors, in proceeds from the seller's fuel.

In England, Singapore or other Commonwealth jurisdictions, recovery of unconsumed marine fuel is more difficult. In these jurisdictions, arrest of bunkers, including based on ROT, is not a maritime claim. Injunctions to prevent consumption of the bunkers, or to reclaim them, are difficult and expensive to obtain. Nevertheless, ROT gives marine fuel sellers leverage where owners have taken vessels back from insolvent charterers, where there is an attempt to attach unpaid-for marine fuel, or with notice to owners or others claiming that they have purchased the marine fuel, that they did so free of ROT.

Well-drafted ROT terms, properly administered, noticed and suited to the business of the marine fuels seller, are no guarantee in the current OW insolvency situation – or any other – that a marine fuels supplier, broker or trader will prevail against other creditors. Certainly, the OW insolvency will further test those terms. At worst, however, there is little, if any, detriment to having well-drafted ROT terms as part of a well thought out set of marine fuels sales terms and conditions.

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