



## **THE COLLAPSE OF OW BUNKER GROUP**

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**and the International Tail of Maritime Litigation Regarding the  
Supply of Bunkers**

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**OCTOBER, 2015**

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## Background

As is now well known throughout the shipping industry, on November 7, 2014, O.W. Bunker A/S, the parent company of a global network of traders and physical suppliers of bunkers (“OW” or “the OW Bunker Group”), filed for bankruptcy protection in Denmark upon the discovery of a massive fraud and unsupervised trading which resulted in losses of about US\$275 million. At the time of its collapse, the OW Bunker Group maintained operations in 29 countries and possessed a market share of roughly seven (7) percent of the worldwide bunker trade. OW had subsidiaries in numerous countries throughout the world, including United States, Singapore, Germany, China, and the United Arab Emirates. Nearly all of the subsidiaries of OW also filed for bankruptcy protection in their respective countries of incorporation throughout the world. Shortly thereafter, a co-operation agreement was made between the OW Bunker Group and ING Bank NV (“ING”) as the assignee of a number of debts due to OW.

These bankruptcy filings created a ripple effect throughout jurisdictions worldwide which saw a rash of bunker supply disputes involving bunker suppliers, ING, and vessel owners and charterers alike.

### Background: Bunker supply transactions with OW

The majority of the bunker supply transactions involving OW Bunker entities transpired in a similar fashion. First, a vessel interest such as the owner or charterer contracted with an OW entity for the supply of bunkers to the vessel. Thereafter, that OW entity frequently subcontracted the order with a different OW entity, which was often the OW Bunker entity located closest to the intended port of supply. For example, most bunker supply contracts entered into by vessel interests with European-based OW entities for the supply of bunkers in a port in the United States would at some point be subcontracted to OW USA. After receiving the bunker supply order from their OW Bunker Group counterpart, the second OW entity would then further subcontract the order with either an independent physical supplier, or, depending upon the location of the port of supply, another OW entity to perform the physical supply of the bunkers. In the ordinary course of business, the physical supplier of the bunkers invoiced and was subsequently paid by the OW entity that acted as its contractual counterparty with respect to the supply. Likewise, the vessel interests were invoiced by and would subsequently proceed to pay the OW entity that acted as its direct contractual party with respect to the supply.

OW’s terms and conditions, which are industry standard, generally provided for:

- Sale on credit terms;
- Permission to use the bunkers before payment is made; and
- A retention of title by OW even if the bunkers are mixed with fuel from other suppliers in the vessel’s tanks.

## Complications subsequent to OW's fallout

After the financial collapse of the OW Bunker Group, numerous physical suppliers faced the risk of not being paid as their contractual counterparty was now in bankruptcy. Accordingly, countless physical suppliers have sought to obtain payment by arresting or threatening to arrest the vessels that were supplied. To make matters even more complicated, ING, acting as assignee of various OW entities, has demanded that all sums due under outstanding invoices from OW Bunker entities be remitted directly to ING, pursuant to the contracts with the OW entities. ING also started to arrest or threaten arresting vessels, asserting that the OW entities (not the physical suppliers), and hence ING as assignee, have a lien on the vessels.

The end result is that vessel owners/operators are facing threats of arrest and demands for direct payment by different entities, including the physical supplier, perhaps the OW entity that acted as the direct contractual supplier, and ING for the same single bunker supply. Additionally, because the claims by some of these entities are subject to arbitration, vessel owners/operators run the risk of having to defend the claims for payment in different forums, and consequently, vessel owners/operators face the risk of having to pay more than once for the bunkers, i.e., to the physical supplier pursuant to the lien in any arrest proceedings and/or to ING or OW pursuant to the contractual obligation. This risk exists even if the vessel owner/operator has already paid either ING, OW or the physical supplier.

### Bunker claim as a maritime lien:

A “maritime lien” is a special maritime claim against a particular vessel and it remains valid despite changes in ownership of the vessel. The sale or supply of bunkers to a vessel may give rise to a maritime lien depending on the law applicable to the transaction in question.

#### English law:

English law does not recognize the concept of a maritime lien for necessities (charges for goods and services rendered to the vessel). Maritime liens under English law are strictly limited to a short list of particular claims (such as, crew wages, salvage claims, and damages caused by the ship to a person or property). Bunker suppliers or traders will not have a maritime lien.

Under English law, a vessel can be arrested only if the vessel owner (or demise charterer) is liable *in personam* to the bunker supplier. In the case of bunkers supplied with OW as an intermediary, the vessel owner has no contractual link to the physical supplier and therefore no *in personam* liability to the physical supplier. In such a scenario, there would not be a right to arrest in England.

The law and practice relating to arrest of ships in Hong Kong and Singapore is very similar to that in England and other common law jurisdictions.

## U.S. Law:

The position in the USA is different from English law.

U.S. Federal Maritime Lien Act provides that an unpaid bunker supplier or trader will have a maritime lien against the vessel where the bunker was ordered by “a person authorized by the owner”. This Act states that an officer or agent appointed by the charterer is “presumed to have authority to procure necessaries (bunkers) for the vessel”. In order to obtain the benefit of maritime lien recognized under the U.S. law some bunker traders state in their terms and conditions that U.S. law will apply to the contract.

It is possible to rebut the presumption that the charterers had authority to order the bunkers for the vessel. Where there is proof that the bunker supplier knew that the charterer had no authority to bind the vessel and the vessel owner expressly precluded the charterer from creating any liens against the vessel, the US Federal Maritime Lien Act’s presumption can be overcome<sup>1</sup>.

While a vessel’s presence in the U.S. may expose it to the risk of arrest seizure by fuel suppliers, the vessel’s presence does not necessarily mean that a court will ultimately apply U.S. law to the underlying transaction. Several U.S. federal appellate circuit courts have applied a fact-intensive choice-of-law analysis to determine whether to apply US law or another nation’s laws to the transaction giving rise to the alleged lien.

## Relief by Interpleader

This is a procedure found in common law jurisdictions under which a debtor who (1) has not paid a claim but is faced with competing claims brings proceedings to join the creditors and (2) pays the money into court leaving the creditors to contest between themselves entitlement to the money without involving the debtor.

While this sounds like a neat solution, it is complex:

- It will not work if the competing claims are not the same.
- Where the relevant contracts contain an arbitration clause, generally, courts do not have jurisdiction.
- Under English law, according to the decision in *Cool Carriers AB v. HSBC Bank* [2001] 2 Lloyd’s Rep 22, claims for interpleader relief cannot be served out of the jurisdiction. Therefore, if the two claimants are not in England the debtor would not be able to serve the proceedings on them.

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<sup>1</sup> For a discussion of maritime lien in the context of bunker supply situations and the effect of a “no liens” clause under U.S. law, please see “Protecting the Owner”, CURRENTS Issue No. 17, November 2003 at pages 3-4 (available at [http://www.american-club.com/files/files/currents\\_17.pdf](http://www.american-club.com/files/files/currents_17.pdf))

Unfortunately, therefore, interpleader relief has limited value. The procedure has been tested in two jurisdictions, New York and Singapore, which are discussed as below.

### **United States - New York: Use of Interpleader Relief is Available**

Faced with the competing claims and the risk of double payment, many vessel interests sought the protection of the U.S. federal court system. More specifically, numerous vessel interests with ships calling in the U.S. filed interpleader actions in the Southern District of New York, paid the amount due under the OW invoices into the registry of the court or posted security for that obligation, and obtained an injunction against the actual suppliers and the OW affiliates/ING from arresting the vessels or pursuing their claims elsewhere. At present, some 25 interpleader actions are marked as related cases before District Judge Caproni in New York.<sup>2</sup>

In the interpleader cases, the physical suppliers, OW entities involved in the chain, and ING have all been named as potential claimants to the payment obligation at issue. For the most part, the physical suppliers and ING, as well as some of the OW entities, have retained counsel and appeared in the New York interpleader actions. As the New York interpleader cases primarily involve U.S.-based physical suppliers and situations in which the bunkers were supplied in the U.S., ultimately, none of the parties challenged the court's exercise of personal jurisdiction over them. Thus, all relevant parties are before the New York court.

Earlier this year, two of the physical suppliers with significant claims challenged the district court's exercise of interpleader jurisdiction, arguing that interpleader relief is not appropriate as their claims are allegedly separate and distinct from the contractual claims of ING and the OW entities. On July 1, 2015, Judge Caproni denied their challenge. Judge Caproni ruled that subject matter jurisdiction exists and determined that the commencement of the interpleader actions was appropriate. This ruling, for now, preserves the status quo as to the parties to the interpleader actions in New York. There may be some additional procedural issues to be addressed by the court as well as, of course, the substantive issue as to which party has a lien and/or is entitled to be paid. It remains to be seen exactly the relief that will be granted in New York on a substantive basis, but at least for now, the vessel owners/operators have obtained some relief from the threats of arrest in those cases and have before the court all parties involved in the bunker supply transaction.

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<sup>2</sup> In addition to these interpleader cases filed in New York, several physical suppliers commenced vessel arrest actions in other courts within the U.S., including in Texas, California and Washington. In response to those efforts, many vessel owners/operators have instituted interpleader proceedings in those cases through the filing of a counterclaim and third-party claim. While these interpleader actions stand in a different procedural posture than the cases that were commenced in New York as interpleader proceedings, the issues presented in those cases and the parties involved are similar to the New York cases. As a result, some of those judges in those cases have agreed to transfer those cases to New York to be administered along with the cases before Judge Caproni.

## Potential Impact of Ruling in New York

While Judge Caproni's ruling as to the propriety of the interpleader filings is not binding on other courts, it can serve as persuasive authority for other U.S.-based courts faced with efforts by vessel owners/operators to bring before the court all parties potentially claiming the right to be paid and to obtain a declaration as to whom payment should be made. It is thus hoped that Judge Caproni's ruling will assist those vessel owners/operators that are defending vessel arrest actions in other districts in the U.S., as they may be able to rely on the interpleader remedy as a means to have all relevant parties in a single forum.

The ruling does not, however, necessarily open the door for all vessel owners/operators facing competing claims arising out of the OW collapse. As mentioned, the New York interpleader cases primarily involve U.S.-based bunker suppliers and supplies and none of the parties has challenged the court's exercise of personal jurisdiction. The situation will likely be different in situations involving a foreign supply or supplier. In such cases, an analysis would need to be undertaken to determine whether there is a sufficient "jurisdictional hook" to hale the physical suppliers and other parties into the U.S. court. Such "hooks" may exist depending on the standard terms of the physical suppliers and its contacts otherwise with the U.S. Similarly, if a party seeks to arrest a vessel in the U.S., that party, even if it is foreign-based, will be deemed to have consented to U.S. jurisdiction at least in relation to the supply transaction at issue in the arrest proceedings.

A vessel owner/operator faced with competing claims, or compelled to defend an arrest action in the U.S., should not immediately discount the ability to utilize the U.S. interpleader relief.

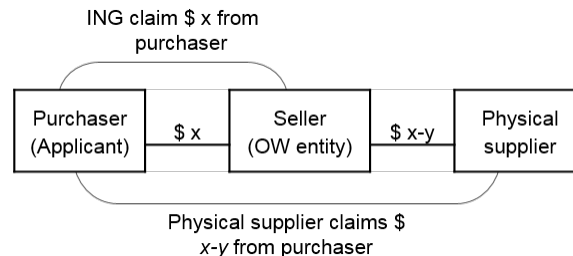
## Singapore: Interpleader Relief Denied

A recent case before the Singapore High Court, *Precious Shipping and others v. O.W. Bunker and others* [2015] SGHC 187, represented an unsuccessful attempt by end purchasers in 13 interpleader applications to obtain an order for interpleader proceedings involving the OW Bunker entities and the physical suppliers.

In this case (and similar to many other cases worldwide), the general *modus operandi* of the OW entities was (1) to enter into contracts with the end-users ("the purchasers") for the supply of bunkers to vessels, (2) separately contract with bunker traders ("the physical suppliers") at a lower price, and (3) to have them deliver the requisite bunkers, making a small margin in the process. The bunkers were stemmed and were eventually consumed but, in light of the liquidation, the physical suppliers have not received payment from the OW entities. The purchasers have also not paid the OW entities for the bunkers because some of the physical suppliers have written to the purchasers seeking to recover the price of the bunkers directly from them as they have not received any payment from the OW entities. The purchasers accepted that payments for the bunkers were due and owing but

claimed that they were unable to decide which party to pay. Under these circumstances, the purchasers decided that it would be prudent to seek interpleader relief from the court. This led the purchasers to file multiple interpleader summonses.

The main features of this case were illustrated by the Court as per the following diagram:



The Singapore Court did not consider that interpleader relief was available because ING's claim under the sale contract and the physical suppliers' claims<sup>3</sup> were not the same. The court also considered that, objectively, the purchasers (some of whom had denied the physical suppliers' claims) were not faced with conflicting claims looking at the matter objectively.

The Singapore Court reasoned that because the claims of ING and the physical suppliers were in different amounts interpleader relief was not appropriate.

To the purchaser's (also vessel owners/operators') benefit, the Singapore Court also noted that under Singapore law the physical suppliers did not have a lien even though in other jurisdictions (for example the United States) they would. The Court deliberated further that even if the physical suppliers are entitled to the bunker payments because they possess the requisite title under the Retention of Title Clause (and ahead of all other creditors), they would not have contractual right to be paid the price of bunkers under the contract between the purchasers and the OW entities.

Despite failing to obtain interpleader relief, the bunker purchasers' position appears to have improved by reason that the physical suppliers were unable to establish a *prima facie claim* that they are entitled to recover the price of the bunkers directly from the purchaser. The rejection of a lien on the part of the physical suppliers by the Singapore court is most helpful to the ship owners/operators.

This case was fully argued by the legal representatives of the numerous parties and the decision will certainly be persuasive in other jurisdictions.

<sup>3</sup> The physical suppliers claims were that the purchasers (a) were fiduciary agents or bailees; (b) had converted the physical suppliers' property; (c) were liable under a collateral contract; (d) had been unjustly enriched; or (e) there was a maritime lien in favor of the physical suppliers.



## United Kingdom: Recent Legal Developments

A different issue arose in proceedings in London in *Res Cogitans* [2015] EWHC 2022 (Comm). This is the first case arising out of the collapse of the OW Bunker Group to reach the English Commercial Court. The decision, which was handed down on the July 14, 2015 was an appeal from an arbitration award made on April 16, 2015.

The facts of the case are synonymous with the situation many shipowners are facing in the wake of the sudden demise of OW. In *Res Cogitans*, both OW's assignee, ING, and the physical supplier (Rosneft Marine UK) claimed payment from the owners of their unpaid invoices. Owners did not object to paying for the bunkers, but did not want to pay twice.

In *Res Cogitans* the owners argued that the contract with OW was a contract of sale governed by the Sale of Goods Act of 1979. Under the Retention of Title clause, property and the goods had not passed to the shipowner before the fuel was consumed. As the goods had ceased to exist before time for payment arose there was nothing to be transferred. Therefore ING could not claim the price of the goods.

ING argued that the contract between OW was not a contract within the terms of the Sale of Goods Act of 1979 and that it had an action in debt.

The court held that ING was correct. Even though the OW contract gave every appearance of being a "sale" contract it was not a contract for the sale of goods. The Judge agreed with the arbitrators that ING had an action for the debt. Hence, the High Court decided that the owners were obliged to pay ING.

The High Court has ruled that owners are obliged to pay OW entities under OW's standard terms. If owners have already paid the physical supplier for bunkers (or have a liability to do so in another jurisdiction), they may in fact be liable for paying two invoices for the same fuel stem.

A Court of Appeal ruling on the issue is awaited with great interest. An update on the outcome will be provided in due course.

### What to do once claim is received for unpaid bunkers

Considering the foregoing, if a vessel owner/operator receives a demand for payment in relation to an OW bunker transaction, whether from ING/OW or from a physical supplier, it should evaluate the situation and act with caution before making any such payment.

There is a risk that another party may soon emerge claiming payment for that same supply, and if the vessel calls at the U.S., there is a likelihood that the vessel will be arrested whether by the physical supplier and/or ING or OW. Should that occur, or if the vessel owner/operator

wants to be proactive by trying to prevent an arrest from occurring, the owner/operator should consult with legal counsel, as well as its FD&D carrier, about the potential for commencing an interpleader proceeding.

If the bunker supply transaction was U.S.-based, then the situation should be similar enough to the situations presented in the New York interpleader cases, suggesting that interpleader relief may be appropriate. If, however, the bunker transaction is not U.S.-based, an additional analysis will need to be undertaken to determine the appropriateness of interpleader relief.

Upon receipt of a payment demand (or threat of vessel arrest) from the physical bunker supplier, it is recommended to first enter into without prejudice dialogue, if possible, with both the physical suppliers and OW's (or their assignee ING) representatives to explore possible amicable settlement between all parties as to which party to pay who. If an amicable settlement is achieved, a receipt and release and hold harmless shall be obtained in exchange of an executed settlement agreement. If an amicable agreement cannot be reached, vessel owner/operator may offer security pending resolution of the pending dispute between OW/ING and the physical supplier.

In any case, upon receipt of a payment demand for bunkers stemmed under OW contract, legal advice may need to be obtained under the governing law of the contract. Members are recommended to obtain legal advice from the jurisdiction where the vessel is threatened with arrest to establish whether a lien may be recognized and the vessel arrested locally.

## Loss Prevention

### How to protect against unnecessary exposures associated with the supply of bunkers to vessels:

- The most effective way in which an owner can protect himself from similar claims is to ensure that when paying for bunkers he obtains a receipt and waiver of claims from the contracting party and the physical supplier, alternatively the owner should obtain a waiver from the physical supplier.
- Owners are also recommended to ensure that the BIMCO “bunker non-lien clause” is incorporated in the time charterparties to protect them from claims in relation to bunkers stemmed by defaulting charterers. Such clause is available at [https://www.bimco.org/en/Chartering/Clauses\\_and\\_Documents/Clauses/Bunker Non-Lien Clause for Time Charter Parties.aspx](https://www.bimco.org/en/Chartering/Clauses_and_Documents/Clauses/Bunker_Non-Lien_Clause_for_Time_Charter_Parties.aspx)

“Non-Lien Clause” shall be given to the bunker supplier in advance of stemming of bunkers, preferably when bunkers were ordered. Caution: “Non-Lien” stamp on the Bunker Delivery Note after the delivery of bunkers may not be enforceable against the supplier.

- Additionally, Owners may safeguard against potential claims by including the following words in the bunker receipt itself:

*“Goods/services ordered solely for the account of [ ] Charterers of m/v [ ] and not for the account of said vessel or her owners...”*

- “SUGGESTED FORM OF WORDS” by BIMCO

***Bunker Pre-order Non-Lien Notice***

*To: Bunker Sellers (Name, address and contact details)*

*Take note that we, (Charterers: Name, address and contact details) are today (date) ordering (specification of) bunkers for supply at (port or place) on or about (date) on our account and our credit to MV/MT..... on charter to us and that the bunkers to be supplied to the Vessel are solely for our account as Charterers and that neither the Vessel, the Owners nor the Master is a party to the bunker supply contract and no lien, encumbrance or any rights shall arise on the Vessel.*

*Yours faithfully*

*Charterers of MV/MT.....*

- Owners shall be wary when notice of the terms and conditions of the bunker supply contract is given to them. Bunker supply terms and conditions often provide the bunker trader with the legal bases for rights of enforcement against the vessel/owner. The terms and conditions of the contract can include retention of title (the bunkers remain the property of the supplier until paid) and the enforcement of rights against additional parties. Bunker supply terms and conditions commonly say that any supply is made jointly to the person ordering the supply and to the owner/vessel and that enforcement action can be taken against any or all of them. The lack of privity between the owner and the bunker trader may be overcome if notice of the terms and conditions of the supply contract is given to the owner.
- If Owners are threatened with an arrest, then they should take advice from legal counsel practicing in the jurisdiction without delay in order to minimize losses. Each case shall be handled based on the relevant facts and contractual provisions involved; therefore, upon receipt of a claim for unpaid bunkers Members are strongly recommended to contact the Managers’ FD&D Department, which is available at all global offices, for assistance.

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