



The collapse of OW Bunker Group – problems for shipowners



Overview

- OW Bunker A/S and collapse
- Complications due to fallout
- Maritime lien
- Interpleader
- Claims & loss prevention



OW Bunker A/S and collapse



- OW Bunker A/S parent company of global network of bunker traders and physical suppliers
- Filed for bankruptcy in Denmark in November 2014
- Fraud and unsupervised trading losses of US\$ 275m
- Operated in 29 countries with market share of 7% of worldwide bunker trade (China, US, Singapore, Germany, UAE, etc.)
- Various OW Bunker entities entered into cooperative agreement with ING Bank NV as assignee of OW Bunker's debts

Bunker supply transactions



- Owner/charterer contracted with OW Bunker entity
- OW Bunker entity subcontracted with another OW Bunker entity—generally located closest to location of supply
- Sub-contracted OW Bunker entity would further sub-contract with a physical supplier – independent or another OW Bunker entity
- Ordinarily, physical supplier of bunkers invoiced and was paid by OW Bunker entity acting as contractual counterparty with respect to supply

Terms & conditions



- Standard terms and conditions were normally applied as follows:
 - ✓ sale of bunker on credit terms
 - ✓ permission to use bunkers before payment is made
 - ✓ retention of title by OW Bunkers even in the event it is mixed with other fuels in the vessel's tanks

Complications due to fallout



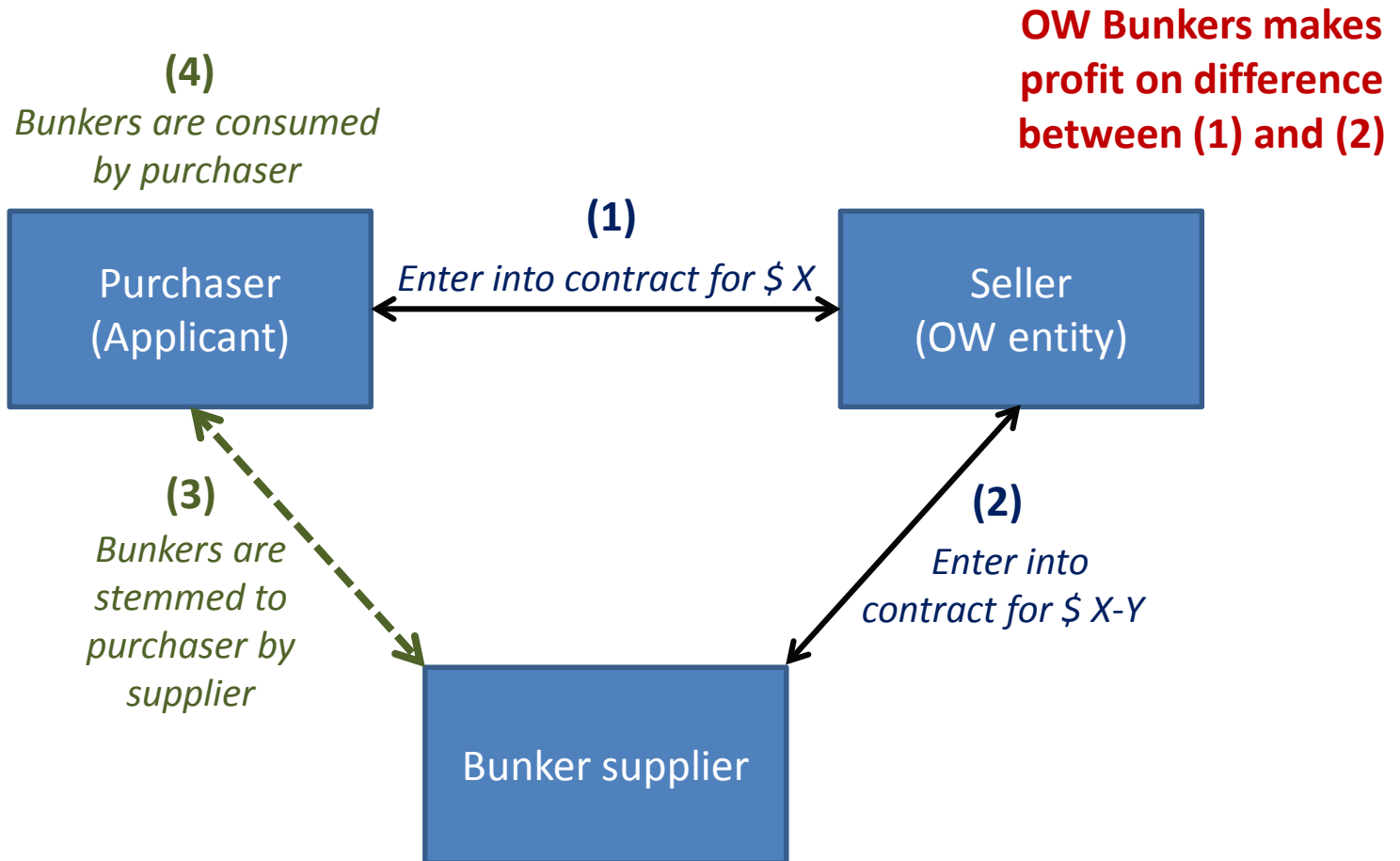
- Physical suppliers faced risk due to non-payment from contractual counterparty
- Sought to arrest vessels supplied with bunkers
- ING, acting as assignee, also demanded payments to be remitted directly to them
- ING began arresting vessels asserting they had lien on vessel – not the suppliers
- ING and physical supplier both asserting liens against vessel for same payments

Interpleader

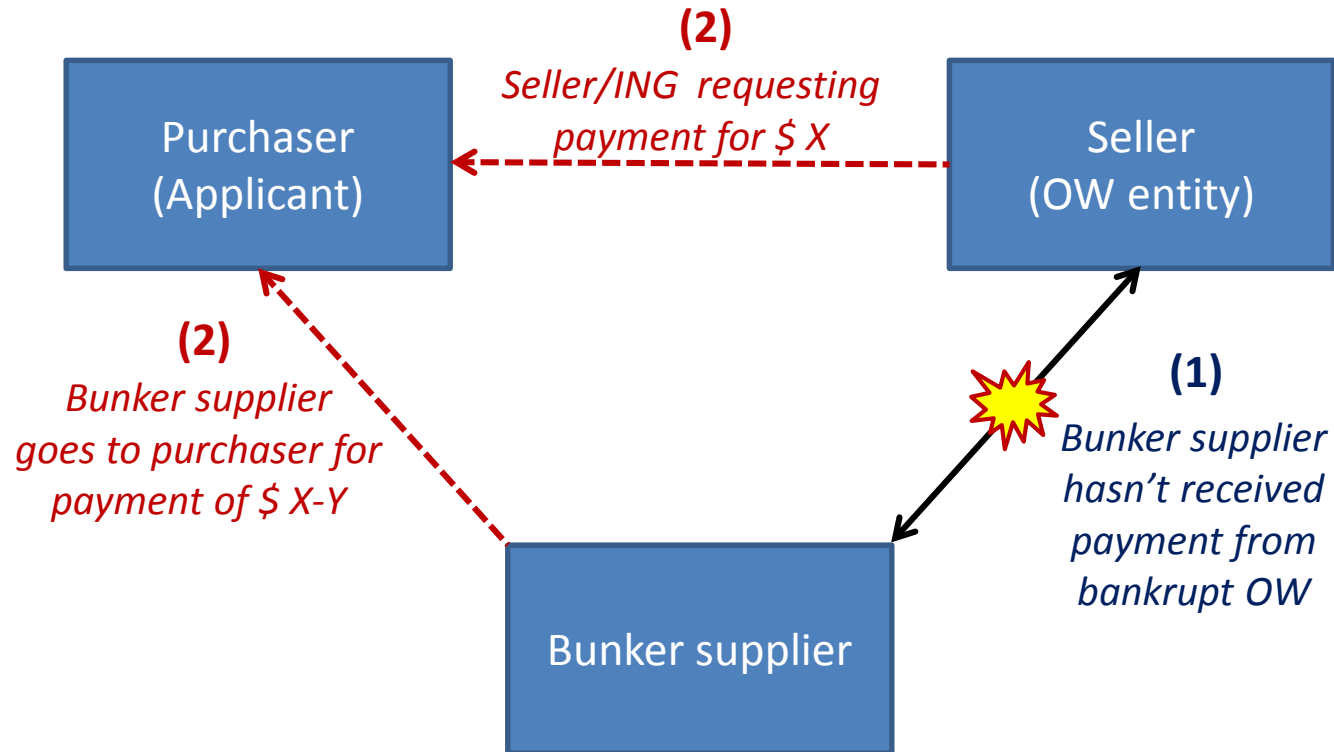
- Procedure in common law jurisdictions whereby debtor pays into court leaving creditors to legal fight between themselves
- The problem...
 - ✓ Will not work if competing claims are not the same
 - ✓ If contract has arbitration clause, courts don't have jurisdiction
 - ✓ Interpleader relief cannot be served outside of a common jurisdiction
Cool Carriers AB v. HSBC Bank [2001]



Modus operandi...



The problem under the bankruptcy...



Owner wants to pay... but who???

Maritime lien

- Special claim against vessel remaining valid despite change in ownership
- Different under US and English law



English law



- ✓ Does not recognize maritime lien for “necessities”, i.e. charges for goods and services to vessel, including bunkers
- ✓ Vessel can be arrested only if the shipowner (or demise charterer) is liable in person to the bunker supplier
- ✓ No direct contractual link between ship owner and bunker supplier– no right to arrest in England

Maritime lien

US law



- ✓ US Maritime Lien Act provides unpaid bunker applies if ordered by person “authorized by the owner”
- ✓ Officer/agent appointed by charterer is presumed to have authority to get bunkers for the vessel
- ✓ How to rebut presumption that charterers had authority to order bunkers? – With proof that bunker supplier was aware charterer had no authority to bind vessel and owner expressly precluded charterer from creating lien, then US Maritime Lien Act is overcome
- ✓ Vessel’s arrest in US does not necessarily mean US law applies. US courts will determine whether to apply U.S. law or another nation’s law to the transaction giving rise to the alleged lien



Interpleader tested



- Singapore high court case, *Precious Shipping and others v. O.W. Bunker and others* [2015] SGHC 187
 - ✓ Unsuccessful attempt by end purchasers in 13 interpleader applications to obtain order for interpleading proceedings between OW Bunker entities and physical suppliers
 - ✓ Ruled ING's and supplier's claims were not the same, different amounts, an interpleader relief would not be appropriate
 - ✓ Also ruled that under Singapore law, suppliers would not have a lien
 - ✓ Purchasers position improved as suppliers were unable to establish *prima facie* claim entitling them to recovery from the purchasers

Interpleader tested



- Many owners sought protection in US due to concerns over double payment risks
- Numerous vessel interests with ships calling US filed interpleader actions in New York
- OW invoices were paid into the registry of the court or security was posted for the obligation
- Owners obtained injunction against suppliers, OW affiliates and ING from arresting their vessels
- Currently 25 cases before judge in New York Federal Court
- Some suppliers commencing arrests outside of NY (TX, CA and WA) – interpleader actions are similar to those in NY and being transferred there

Interpleader tested (cont.)



- Two suppliers challenged the court's exercise of interpleader jurisdiction outside NY jurisdiction
- Challenge was denied and it is currently status quo
- Hopefully the NY ruling will assist other owners in other districts to rely on interpleader remedy having all parties in a single forum
- This ruling is primarily for US based bunker suppliers where jurisdiction is clearer and where US law recognizes maritime lien for unpaid bunkers
- The issue may become more complicated if foreign suppliers take action in US jurisdiction



Interpleader tested



- In the UK, proceedings in London in *Res Cogitans* [2015] EWHC 2022 (Comm)
- ING and supplier (Rosneft Marine UK) claimed payment from owners for unpaid invoices
- Owner had no objection to payment, but not twice and argued that the contract was with OW Bunkers and governed by Sales of Goods Act 1979
- Under Retention of Title clause, property and goods had not passed to shipowner before fuel was consumed
- Goods ceased to exist before time for payment arose, there was nothing to transfer so ING could not claim price of goods
- ING won argument stating that Sales of Goods Act 1979 did not apply to the OW and it had an action for the debt
- If owners had paid suppliers, they may still be liable to pay OW/ING!

Claims and loss prevention

What to do once a claim is received for unpaid bunker

- Check your time charter party wording
- Risk of who to pay if invoices are received from ING/OW Bunker entity or supplier
- Caution should be taken before any payment is made as another party may soon emerge requesting payment and threatening lien/arrest of the vessel
- Owners should consult legal counsel on the matter before payments are made and consider their options/potential in commencing interpleader proceedings
- Contact your FD&D carrier and legal counsel without delay if notified of a threat of vessel arrest
- If bunker transaction occurred in USA, an interpleader relief may be appropriate
- If outside the USA, further considerations with legal counsel would be appropriate
- Open dialogue with both supplier and OW/ING to explore amicable settlement



Claims and loss prevention (cont.)

What to do once a claim is received for unpaid bunker (cont.)

- Offering security until dispute is settled may be considered as option to prevent vessel arrest
- Most effective protection is ensure when paying bunkers, receipt and waiver from claims from contracting party and supplier
- Alternatively waiver should be obtained from physical supplier



Claims and loss prevention (cont.)

How to avoid maritime lien and unpaid bunker supplier

- Vessel owners should review time C/P wording and consider incorporating “BIMCO Non-Lien Clause” into C/P
- “No Lien Clause” shall be given to the bunker supplier **BEFORE** stemming of bunkers and preferably when ordered
- **Beware!** “No-Lien” stamp on the Bunker Delivery Note after the delivery of bunkers may not be enforceable against the supplier.
- **Further beware!** Bunker supply terms/conditions often state any supply is made jointly to person ordering (i.e. charterer) to the owner/vessel, both then can be responsible. A lack of privity between owner and supplier may be overcome if the supply contract’s terms/conditions are given to owner



Club can assist to guide Members accordingly!

謝謝

