



Insolvencies in the charterparty chain

C L I F F O R D
C H A N C E

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Insolvency in the shipping industry

- ❑ Shipping = inherently international.
- ❑ Increased globalisation has led to increase in cross-border insolvency regulation; insolvencies not limited by geographic borders.
- ❑ Difficulties arise in cross-border insolvencies - assets and creditors located in different jurisdictions. Which country's laws apply? Which court can control and sell assets?
- ❑ Different legal systems have differing perceptions about fairness and risk allocation.
- ❑ Last 20 years has seen progress in harmonising cross-border insolvency laws – but still a long way to go to international harmonisation.

“Admiralty law is only an arcane or obscure branch of the law to those whose legal thinking is informed exclusively by land-based human activity...”

Justice Allsop 'Admiralty Jurisdiction - Some Basic Considerations and Some Recent Australian Cases' (FCA) [2007] FedJSchol 5

Maritime law v Insolvency law

Maritime law -v- insolvency law. Different in nature and often competing objectives. Major challenge to market participants.

Maritime law:

- international
- focuses on enforcement of an individual creditor's rights

Insolvency law:

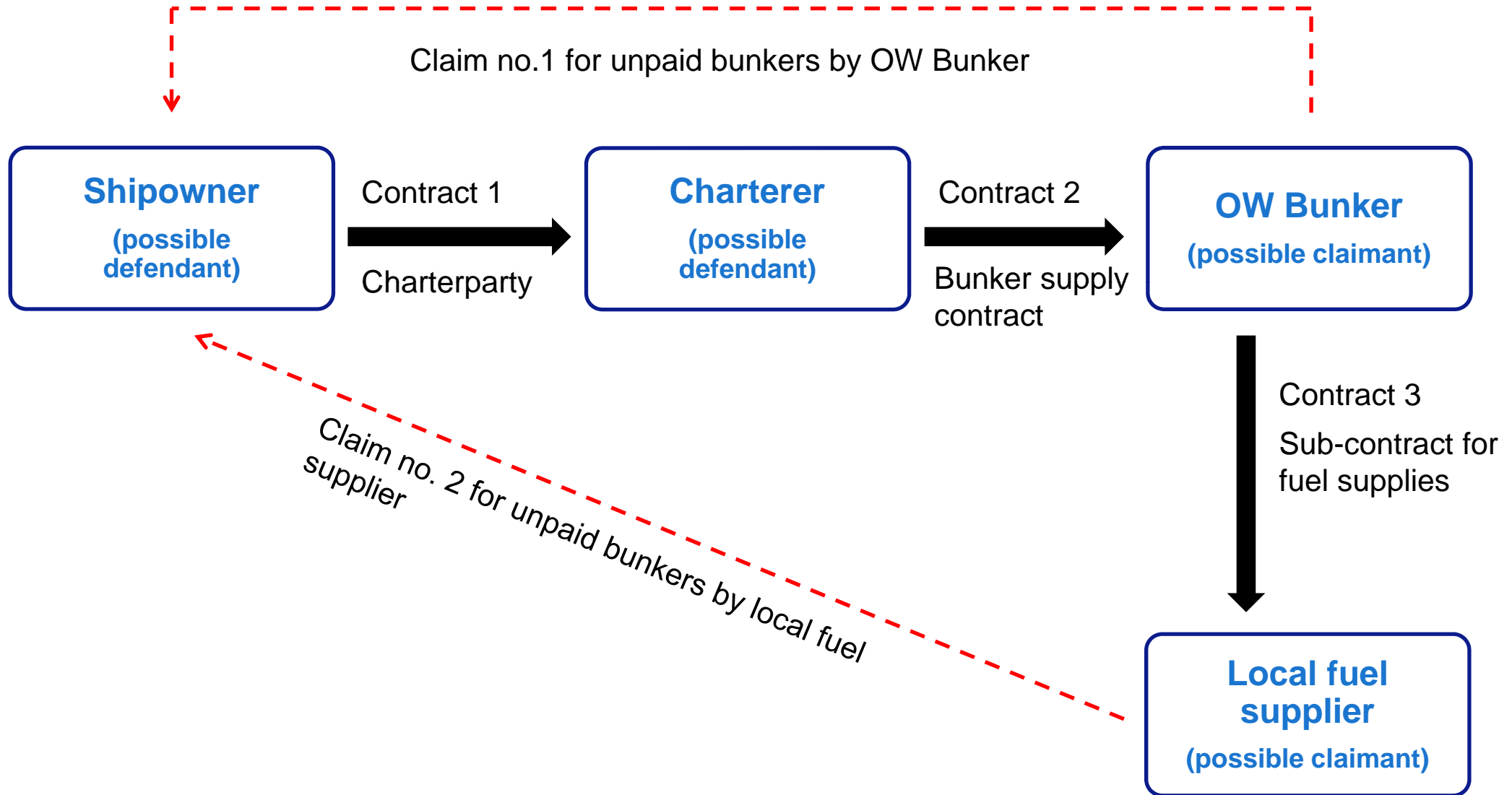
- domestic
- objective - universal enforcement & equal treatment of creditors, subject to secured claims

Conflicts arise - claimant's right to arrest ship/other property -v- company's ability to provide security for claims against it when company enters into administration/winding-up.

Ship arrest can undermine principle inherent in insolvency regimes of protecting debtor & treating all creditors of same class equally.

Charterparties and bunker supply chains

* No contract between local fuel supplier and ship



Fallout from OW Bunker's bankruptcy

- ❑ Q. Who has right to claim payment for costs of bunkers?
 - OW Bunker/ING;
 - local fuel supplier; or
 - no-one; shipowners/charterers relieved of obligation to pay for the bunkers.

- ❑ Q. what is basis of OWB and local suppliers' claims?

- ❑ These questions = classic illustration of conflict between maritime -v- insolvency law. Can local fuel supplier circumvent insolvency proceedings (which treats creditors equally) through an action *in rem* which allows arrest of the ship to gain security for claim?

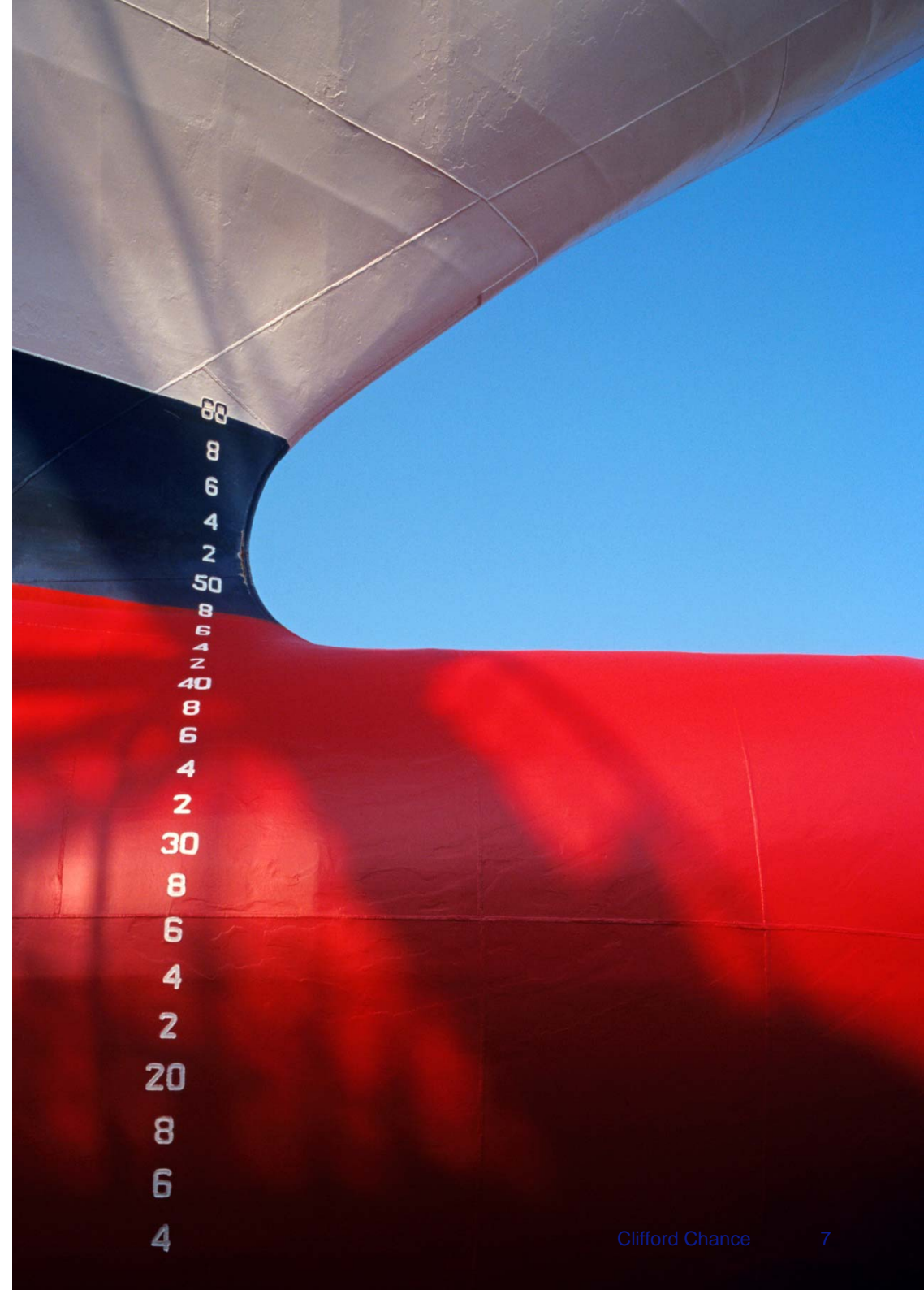
OW Bunker – collecting unpaid bunkers

❑ Local fuel suppliers' claims for payment on multiple basis:

- Maritime lien (in some jurisdictions)
- Retention of title clauses
- Conversion

❑ OW Bunker (and banks) insist on payment in full & reject physical suppliers' claims for payment.

❑ Shipowners/charterers face conflicting demands for payment of same debt. They seek assistance of courts to decide who is the rightful recipient of price of bunkers.





Bunkers and barometers: what may be arrested?

- Q. Are bunkers capable of arrest separate from ship in Australia?
- A. No, they are an integral part of ship.
- In *Scandinavian Bunkering AS v Bunkers on Board the Ship FV "Taruman"* (2006) 151 FCR 126, the *Taruman* was seized by AFMA for breaches of the *Fisheries Management Act 1991* (Cth). Unable to arrest vessel, claimant commenced *in rem* proceedings against vessel's bunkers. Court held "*ship*" in *Admiralty Act* includes ship's bunkers, as such bunkers can be sold in judicial sale of vessel after arrest. Bunkers are not capable to separate arrest and sale.
- Why? Sufficient connection between bunkers and ship, such that bunkers = integral part of ship.

Claims by unpaid local fuel suppliers

- ❑ Depending on contract terms, local bunker suppliers can retain title to bunkers until they are paid.
- ❑ If OW Bunker has not paid its local suppliers, suppliers may pursue shipowners/charterers directly for debt.
- ❑ Supplier may either try to enforce retention of title clause, OR bring action for conversion (unlawful interference with title of another in goods – dealing with goods in a manner inconsistent with (and denies) that title).
- ❑ Risk that suppliers may try to arrest vessel to obtain security for its claims.

IMPORTANT CLAUSES IN BUNKER SUPPLY CONTRACT

- 1. Permission for shipowners/charterer to consume bunkers before payment i.e. during credit term.**
- 2. Retention of title clauses**
 - ❑ Retention of title clause = contractual agreement where seller retains title to goods until price as been paid in full.
 - ❑ These clauses are common.
- 3. Credit terms**

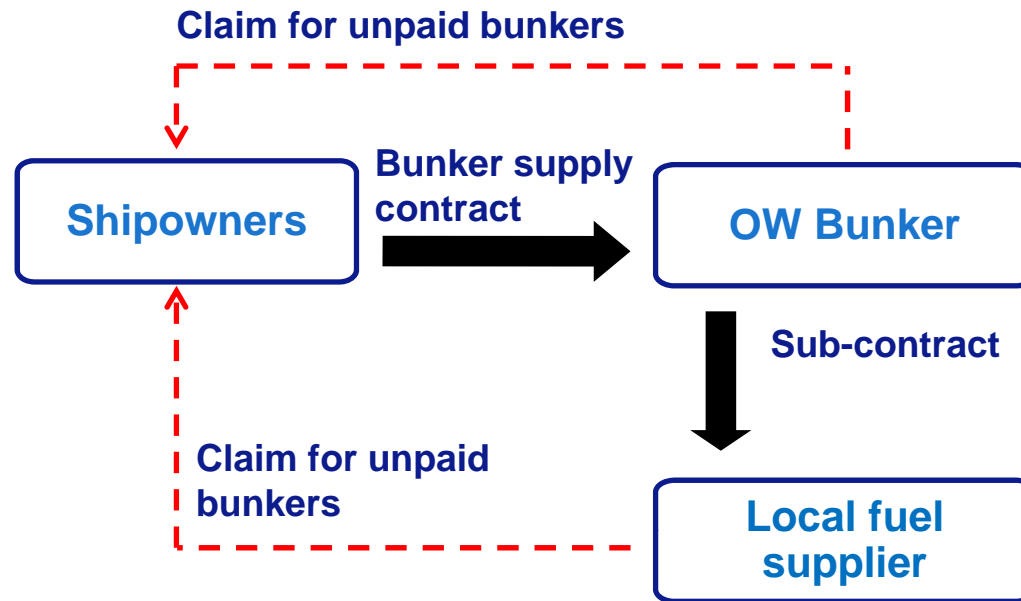


Supply of bunkers

- ❑ Chain of contracts between shipowner/charterer who contract with supplier e.g. OW Bunker, who then contracts out the obligation to supply the bunkers. No contractual relationship between shipowner/charterer and physical bunker supplier at end of chain.
- ❑ Contracts between parties in the chain are on similar terms, including retention of title clause, credit terms and permission for shipowner/charterer to consume the bunkers prior to payment.
- ❑ Should shipowners/charterers pay their contractual counterparty or pay physical supplier of the bunkers or neither?

Res Cogitans - UK 'test' case

*PST Energy 7 Shipping
LLC & Anor v OW
Bunker Malta Ltd & Anor
(The "Res Cogitans")
[2016] UKSC 23*



- ❑ Critical OWB/shipowners contract terms: 1. 60 day credit term and 2. retention of title.
- ❑ OWB/local supplier contract – permission to consume bunkers before payment.
- ❑ Vessel consumed bunkers, without payment being made when OWB applied for insolvency.
- ❑ Were shipowners liable to pay for bunkers, and if so to whom - OWB or local fuel supplier? Alternative claim for damages by shipowner for breach of contract in OWB failing to pass title in the bunkers.

Res Cogitans - UK 'test' case...cont

❑ Shipowners denied liability for cost of bunkers – bunker supply contract = contract of sale under UK Sale of Goods Act, but OWB could not claim price because the conditions of the Act were not satisfied – OWB did not have title to bunkers and could not pass title to shipowners.

Issues for determination

Three questions were put to the UKSC –

Q1. Was the bunker supply contract a contract of sale under UK Sale of Goods Act, such that the shipowners could maintain their objection to payment?

- No, UKSC held that bunker supply contract was not a contract of sale under the Act; it was not a contract to transfer title in bunkers for a price. Court held it was an agreement belonging to a unique class of transactions, which offered shipowners the liberty to consume the bunkers prior to payment.
- OWB's obligation to pass title in unused bunkers did not convert the agreement into a contract of sale.
- UKSC held that shipowners didn't have defence under the UK Sale of Goods Act.

Res Cogitans - UK 'test' case...cont

Q2. Was there an implied term that OWB would timeously pass title to bunker to shipowners?

- No, UKSC held OWB impliedly undertook that it had legal entitlement to give shipowners permission to use bunkers prior to payment. To grant that permission, OWB did not require title to bunkers – needed only right to authorise such under the chain of contracts.
- OWB obliged to pass title to shipowners at time of payment. Had OWB been unable to do so, OWB could not maintain claim for whole price, but could assert claim for pro-rata payment for bunkers actually used.

Q3. Is UK Sale of Goods Act a complete code for recovery by vendors?

- No, UK Sale of Goods Act is not complete code of situations in which a price may be recoverable under a contract of sale.
- UKSC held price was recoverable under express terms of contract if shipowners had completely consumed the bunkers.

Res Cogitans - UK 'test' case..cont

Q. Comments on outcome?

- ❑ Criticism of priority given to OWB over local bunker supplier – generally, OWB does not contract with shipowners, but with time charterers even though bunkers intended to be supplied to vessel.
- ❑ Under typical charterparty, shipowner & charterer agree to sell & repurchase bunkers remaining on board vessel (**ROB**). If OWB never had title to pass to shipowner because OWB never acquired title from local bunker supplier, then shipowners and charterers could never be in a position to buy and sell bunkers ROB.

Competing claims in competing jurisdictions – Summary of comparative analysis

| Singapore | US | Canada | Hong Kong |
|---|--|---|---|
| <ul style="list-style-type: none"> ▪ Local bunker suppliers did not have claim against shipowners. ▪ Retention of title clause did not give supplier a contractual right to be paid under OWB/shipowner contract. ▪ No claim for conversion; parties intended that bunkers would be consumed before payment. | <ul style="list-style-type: none"> ▪ Local bunker suppliers do not have US maritime law lien against vessels arising out of bunker supply chain. ▪ OWB/ING does have enforceable maritime lien against vessel. ▪ Need to show direct contractual relationship or agency relationship. | <ul style="list-style-type: none"> ▪ Standard T&C's provided that local supplier can compel charterer to pay, if OWB failed to pay. ▪ Charterer liable to pay local supplier, however relieved of liability to pay OWB. | <ul style="list-style-type: none"> ▪ No express/implied term which authorised bunkers to be consumed before payment. ▪ By virtue of retention of title clause, local supplier has arguable case for conversion – as bunkers consumed without payment. |

Singapore: Competing claims

Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd [2015] SGHC 187

- ❑ 13 interpleader actions - shipowners sought permission to pay funds into court, and for court to decide who should be paid.
- ❑ Purchasers accepted that payment was now due and owing.
- ❑ Same fact pattern as “*Res Cogitans*” case.
- ❑ Good news for shipowners and operators, court dismissed local suppliers’ claims. Under Singaporean law, local suppliers don’t have a maritime lien.
- ❑ Court held local suppliers did not have contractual right to be paid under contract between OWB and shipowners (no privity of contract between shipowners and local suppliers).
- ❑ Despite failing to obtain interpleader relief, shipowners appear to be better off - local suppliers unable to establish legitimate basis for claim.



United States: Competing claims

Interpleader relief

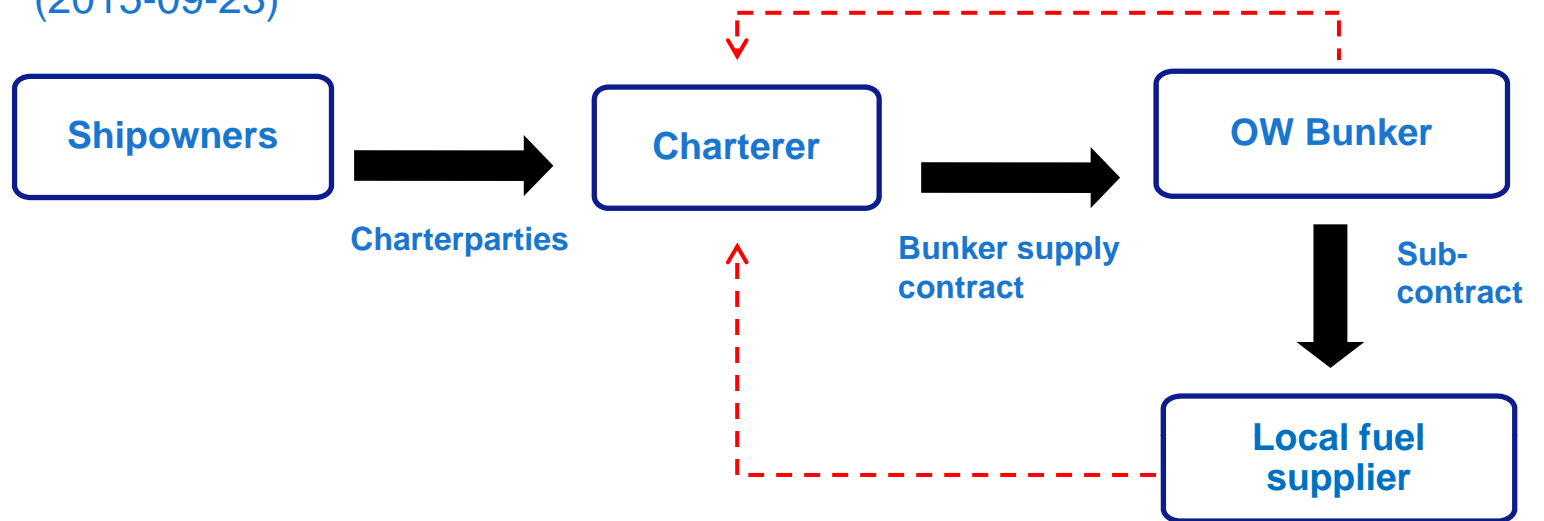
- ❑ Shipowners & charterers successfully filed interpleader lawsuit in New York & obtained injunctions against bunker suppliers and OWB preventing arrest of vessel or from pursuing claims against shipowners and charterers elsewhere.
- ❑ This decision has been appealed.

US maritime liens

- ❑ Louisiana court held that local supplier did not have enforceable law maritime lien against a vessel under US law: *Valero Marketing and Supply Co. V M/V ALMI SUN*, No. 14 Civ.2712 (NJB) (E.D. La. decided Dec. 28, 2015 and Feb. 8, 2016).
- ❑ New York Court held that ING Bank (OWB's assignee) had enforceable maritime liens against vessels: *O'Rourke Marine Services L.P., L.L.P. v M/V COSCO HAIFA*, No. 15 Civ. 2992 (SAS) (S.D.N.Y. decided Apr. 8, 2016).
 - Local supplier did not have maritime lien – no direct contractual relationship with shipowners.
 - OWB/ING had an enforceable maritime lien - OWB took orders for bunkers from shipowners – irrelevant that OW Bunker did not physically deliver bunkers.

Canada: Competing claims

Canpotex Shipping Services Limited v. Marine Petrobulk Ltd., 2015 FC 1108
(2015-09-23)



- Plaintiff sought declaration that payment of funds into court extinguished its liabilities and any *in rem* claims.
- Court held:
 - if OWB failed to pay local supplier, the standard T&Cs provided that local supplier could compel plaintiff to pay for bunkers. Hence, plaintiff directly liable to local supplier.
 - no residual obligation requiring plaintiff to also pay OWB after it paid local supplier - would otherwise be unfair.

Canada: Competing claims...cont

Maritime liens

- ❑ Maritime lien did flow to local supplier - it met all statutory requirements under Canadian law. However, funds put up by charterers would prevent arrest of vessels.
- ❑ OWB/ING did not have lien/security interest against vessels. Once charterers paid local supplier from funds deposited, OWB/ING had no claims against charterer or its assets.

4. Hong Kong: Competing claims

Newocean Petroleum Co Ltd v OW Bunker China Ltd (in provisional liquidation) & Anor (The "Cosco Felixstowe") [2016] HKCFI 492

- ❑ Local bunker supplier brought claim of conversion against OWB.
- ❑ OWB contracted with ship owner for bunkers; OWB then contracted with the bunker supplier.
- ❑ Contract terms between OWB and bunker supplier materially different from those in *Res Cogitans* case; no express or implied authorisation to consume bunkers during credit period.
- ❑ Hong Kong court held local bunker supplier had arguable claim of conversion - use of bunkers was inconsistent with bunker supplier's proprietary rights.



Tips & traps

- ❑ Some measures shipowners & charterers can take to protect themselves from exposure to claims for supply of bunkers:
 - obtain waiver of claims from contracting party + bunker supplier, or at least, obtain waiver from bunker supplier - minimise exposure to multiple claims
 - incorporate BIMCO "bunker non-lien clause" in time charterparties to protect from claims in relation to bunkers used by defaulting charterers + pass on "bunker non-lien clause" to bunker supplier before stemming i.e. when ordered.
 - ship owners and charterers should be cautious where conditions of bunker supply contract are provided to them – this may enable bunker supplier to seek enforcement against shipowners/vessel direct.
 - obtain advice from lawyer practicing in relevant jurisdiction. Case-by-case.



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