BUNKER LITIGATION: The Teaching of OW Bunker's Demise[1]

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This paper proposes to review the recent decisions rendered in Common law jurisdictions in the wake of the bankruptcy of OW Bunker group of companies. [3]

UK

PST Energy 7 Shipping LLC et als. v. O.W. Bunker Malta Limited et als. ("RES COGITANS") [2015] EWHC 2022; Aff'd [2015] EWCA Civ 1058; Aff'd [2016] UKSC 23

The *Res Cogitans* is said to be a test case for the resolution of several similar disputes between the owners or operators of vessels and ING regarding the amounts due for bunkers delivered by third-party physical suppliers and consumed by the vessels to which they were delivered.

The dispute was between the owners and operators of the *Res Cogitans* (the **Owners**) and ING, as assignee of OW Bunker Malta Ltd (**OWBM**), the contractual supplier of bunkers delivered following an order placed by the Owners and confirmed by OWBM's Sale Order Confirmation. The Sale Order Confirmation incorporated by reference O.W. Bunker Group's 2013 Terms and Condition of sale for Marine Bunkers (the **OWBG TC**).

The Sale Order Confirmation made the agreed price payable within 60 days from delivery.

The OWBG TC contained a title retention clause stipulating that title in the bunkers remained vested with the Seller until full payment was received by the Seller. Until such payment was made, the Buyer was a bailee for the seller, not entitled to use the bunkers other than for the propulsion of the vessel.

OWMB ordered the bunkers from its parent company, OW Bunkers & Trading A/S (**OWBAS**) which contracted, in turn with Rosneft Marine (UK) Ltd (**RMUK**). The latter placed an order with an associate company, RN-Bunker Ltd (**RNB**) which delivered the bunkers to the vessel in a Russian port on November 4, 2014, two days before OWBAS applied to the court for restructuring. Shortly thereafter, ING, as assignee of OWBM's receivables, asserted a right to claim from the Owners the amount due to OWBM.

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[3] Unfortunately, at the time of writing, Australia, with a reported nine arrests linked to OW Bunkers ("*9th OW Bunker Related Arrest in Australia"*, Ship & Bunker, April 18, 2016), had not yet produced substantial judgments, at least, none that had been reported so far. *9th OW Bunker Related Arrest in Australia*, Ship & Bunker, April 18, 2016

On November 18, RMUK paid RNB for the bunkers. The day before, it sent a demand for payment to the Owners for the amount it had invoiced OWBAS.

The Owners refused to pay the value of the bunkers delivered to the Vessel on the ground that the agreement between them and OWMB was a contract of sale of goods subject to the *Sale of Goods Act 1979* (**SOGA**) and that, accordingly, a claim for the price could only be maintained if one of the conditions set out in section 49 SOGA was met, namely (i) property in the goods has passed to the buyer or (ii) the price was payable on a day certain, irrespective of delivery. Based on the term of the agreement between Owners and OWMB, neither of these conditions had been met.

In early December 2014, the dispute was referred to arbitration, as per the arbitration clause contained in the OWBG TC and proceeded on the basis of agreed facts. The panel unanimously found that the contract between the Owners and OWBM was not a contract of sale to which SOGA applied and that, accordingly, section 49 SOGA did not apply. Furthermore, the panel found that since OWMB had met all of its obligations under the agreement with the Owners, ING was entitled to the agreed consideration. The panel also found that had the contract been one to which SOGA applied, ING could not have maintained its claim since none of the conditions set out in section 49 SOGA had been met.

The finding of the panel was upheld by the High Court (Males J). The Court first reasoned that consumption of the bunkers by the Owners had the effect of extinguishing any property in them. Since the goods had ceased to exist prior to the payment became due, it followed that no title could pass to the Owners at the time of making the agreed payment.

Looking at the agreement, and in spite of the numerous references to it being a 'contract of sale' between a 'seller' and a 'buyer', Males J held that the agreement between owners and OWMB was not a contract of sale as per the meaning of SOGA, namely, "*a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration*" since, at the time the payment became due, the property no longer existed. The Court insisted that in order to qualify as a contract of sale under SOGA, four conditions needed to be met: (i) the subject-matter of the agreement had to be 'goods'; (ii) the seller must undertake to transfer property in the goods; (iii) there must be a monetary consideration payable by the buyer; and (iv) there must be a link between the transfer of title and the monetary consideration "such that the consideration for the payment is the transfer of title to the buyer as distinct from some other benefit (…)".

In the judge's opinion, the combined effect of (1) the retention of title, (2) the term of credit, (3) the permission to consume the bunkers and (4) the fact that most of the bunkers were likely to be consumed prior to their price becoming due meant that the payment of the said price was not in consideration of the transfer of title. Rather, it was the making of the bunkers available for immediate and lawful consumption upon delivery that was the consideration for the agreed payment. In this respect, the Court further noted that what OWMB had to do was to ensure that the title holder, the physical supplier, had given such permission or licence. On the basis of the assumed facts submitted to the panel, it appears that the physical supplier was aware that the bunkers were purchased for resale at a profit and that the contract between OWMB and the vessel owners would allow for immediate consumption and might be wholly consumed by the

time the agreed price became due by OWMB. Therefore, in the Court's opinion, under English law the Owners would be under no liability to the physical supplier in the tort of conversion. Either the physical supplier, as head bailor, was bound, expressly or implicitly, by the terms of the contract between its bailee and sub-bailee *Morris v. C.W. Martin & Sons Ltd.* ([1966] 1 Q.B. 716) or he was deemed to have given permission by the simple fact of delivering the bunkers knowing that they would or might be consumed straight away.

Males J further rejected an alternative argument by the Owners that terms equivalent to those contained in section 12 SOGA should be implied, namely that the seller will have title in the goods at the time when property is to pass, reiterating that under the proper construction of the agreement, OWMB had not undertaken to transfer title at any given time.

Males J further indicated that, had it been necessary to consider the issue, he would have agreed with the panel and held that ING could not claim for the payment of the price, pursuant to section 49 SOGA.

In appeal, Moore-Bick V-P, with whom Longmore and McCombe LJJ agreed, summarized the issue as follows:

> The question is simply whether the characterisation by the parties of the contract as one of sale adequately reflects the substance of the obligations to which it gives rise.

Essentially, the Court of Appeal adopted the reasoning of the first judge.

On the issue of implied terms, Moore-Bick V-P noted that the Owners' argument had evolved over time. To the extent that a term similar to section 12 SOGA was to be implied, the Lord Justice agreed with the reasoning of Males J. He further dismissed the proposition that one was to imply that OWMB was to have title in the bunkers at the time of delivery, since "*it is common knowledge in the industry that bunkers are normally sold on 30 day's credit and no one would have expected OWBM to pay its owns supplier on or before delivery*". Moore-Bick V-P finally rejected the proposition that it was an implied condition of the contract that OWBM would comply with its obligations to the party above in the chain, in particular by paying for the goods when due. In the Vice-President's opinion, there was no need to imply a term of that kind, which did not reflect the essential nature of the contract.

> Under a contract of this kind, the owners bargain for the right to consume the goods before property has passed to them and if they obtain an effective licence to do so binding on the various parties in the supply chain, an implied condition of the kind postulated by the owner is both unnecessary and inappropriate.

The Owners obtained leave to appeal before the Supreme Court. The appeal was dismissed by a unanimous panel of five Law Lords, Lord Mance writing the judgment on behalf of the Court.

On the characterization of the nature of the contract, the Supreme Court approved the finding of the arbitral panel. The agreement was a 'sui generis transaction', not a contract of sale, with the main aspect being "*to permit consumption prior to any payment and (…) without any property ever passing in the bunkers consumed*."

On the issue of the implied term, the Supreme Court agreed with the Court of Appeal's conclusion that there was no basis or need for any implied duty as suggested by the Owners. In Lord Mance's view, OWBM's only implied undertaking as regards the bunkers which it permitted to be used and which were used by the Owners in propulsion prior to payment was that OWBM had the legal entitlement to give such permission. In order to be so entitled, OWBM did not need to have or acquire title to the bunkers. It merely needed to have acquired the right to authorise such use under the chain of contracts by virtue of which it had obtained the bunkers.

As surprising as it may have originally sounded, the conclusion regarding the true nature of the contract for the provision of bunkers appears wholly sound, once the retention of title clause and the licence to consume the bunkers is given due consideration. Less satisfactory, however, is the conclusion of the absence of an implied term as to OWBM's title in the bunkers delivered or as to some other undertaking that, ultimately, the Owners would not be facing competing claims.

As mentioned, the Supreme Court adopted the view of the Court of Appeal that implying a condition of the kind was both "unnecessary and inappropriate".

To support his point, Moore-Bick V-P said that it was common knowledge in the industry that bunkers were normally sold on 30 day's credit term. Yet, on the facts of the case under review, the credit term in the supply chain varied from 60 days, in the OWBG TC, to 30 days in the RBUK TC , to 14 days in the RNB TC. But more tellingly, pursuant to the retention of title provision, title was said to *remain* with OWBM until payment. How can one say that it was not the expectation of the parties, or at least of the Owners, that OWBM had title at the time of delivery?

The judges who considered the issue do not seem to have been concerned with the possibility that the Owners could be sued or the ship arrested in some other jurisdiction. What concerned the first judge was whether the Owners could be sued for conversion under English law. Once this possibility was excluded, no particular concern was expressed regarding the possibility of claims being made under another system of law:

> As already indicated, I cannot exclude the possibility that the Owners may have a liability to Rosneft under some system of law other than English law and, if so, that the vessel may be exposed to arrest in some jurisdictions. However, in circumstances where the bunkers were delivered on board the vessel pursuant to an English law contract between Rosneft and OWBAS which by necessary implication authorised the consumption of the bunkers prior to payment, and which contemplated another English law contract between OWBM and Owners which expressly authorised such consumption, I see no reason why the possibility of such a claim should affect the decision in this case. Exposure to claims with the possibility of arrests is one of the risks which shipowners run.

The Court of Appeal offered no comment on this issue, while Lord Mance, for the Supreme Court, seemed content that the possibility was not real in this case:

> The issues before the court do not involve any claim (…) that the Owners are or may be exposed to any risk of double exposure, either by reason of RMUK's claim (never so far as appears formally pursued) or on any other basis. On the presently assumed facts, therefore the Owners are simply liable for the price, albeit under a contract sui generis which is not one of sale.

Singapore

Precious Shipping Public Company et als. v. O.W. Bunker Far East (Singapore) Pte Ltd and others [2015] SGHC 187

This is a judgment on consolidated applications for interpleaders made by several entities (mostly charterers) who had all contracted for the purchase of bunkers with one of the OW Bunker companies and who had received the bunkers via a third-party physical supplier.

The applications were dismissed on the basis that the condition for interpleader proceedings were not met.

The application judge first noted that, in all cases, the purchasers acknowledged that the price was due to the OW Bunker entity and not to the physical suppliers. He also noted that in spite of their threats, none of the physical suppliers had actually commenced legal proceedings against the purchasers. Finally, the judge observed that the claims by the OW Bunker entity and the physical supplier were for different amounts. The judge then put the issues as follow:

> Is interpleader necessary or even appropriate when the applicant appears to know exactly to whom he is liable? Is the mere assertion of "adverse claims", however remote or fanciful, sufficient? Can claims be adverse when they related to different sums referable to different contracts?

In Singapore, the power of the Court to grant interpleader relief is expressly conferred by s. 18(2) of the Supreme Court of Judicature Act (**SCJA**) read with para. 4 of the First Schedule which reads:

> (…) where the person seeking relief is under liability for any debt, money or goods or chatters, for or in respect of which he has been or expects to be sued by 2 or more parties making adverse claims thereon;

The application judge stressed that since the power of the court was statutorily conferred, the court was without power to grant relief outside the parameters set out in the statute:

> The powers of the court in this area have been delimited by Parliament and these limits demand scrupulous adherence.

The judge then proceeded to determine whether the three conditions (liability of the claimant, suit or expectation to be sued by 2 or more parties and adverse claims made such parties) were present.

The parties did not dispute that the first condition was met, since the purchasers all had a contractual obligation towards the O.W. Bunker entity (unlike in the *Res Cogitans*, the purchaser could not deny being under liability to the OW Bunker entity).

Regarding the second condition, the judge relied on a long line of authority (authorities??) and held that in order to establish a genuine expectation of being sued, the purchasers had to show that the physical suppliers had a "prima facie" case against them.

In order to determine whether the purchasers met this condition, the judge proceeded to review the arguments made by the physical suppliers in support of their claims. Five arguments were submitted as a basis for a claim by the physical supplier:

(a) Due to the retention of title clause contained in the physical supplier's general terms and conditions, the OW Bunker entity was a fiduciary agent or bailee of the bunkers and, as such, now held the sale proceeds in trust for the physical supplier;
(b) The purchasers were liable for the tort of conversion (since title had remained with the physical supplier);
(c) There was a collateral contract between the purchasers and the physical suppliers allowing a direct claim by the latter against the former;
(d) The physical suppliers are entitled to restitutionary claims against the purchasers on account of unjust enrichment;
(e) A maritime lien could be invoked in some other jurisdiction.

The judge dismissed all of these arguments as "factually and legally unsustainable".

(a) Fiduciary/bailee argument

Regarding the retention of title argument, the judge cited *Benjamin's Sale of Goods* that "*a mere retention of title will not, of itself, impose upon the buyer an obligation to account to the seller for the proceeds of sale of the goods in which property is retained.*"

As for the OW Bunker entity holding the proceeds of sale in trust, there were simply no proceeds paid to them to be held in trust as yet. Furthermore, the judge thought that the provision in the physical supplier contract making the OW Bunker entity a trustee was insufficient to create such relationship without further provisions such as a requirement to keep the sale proceeds separate.

The judge also rejected the suggestion that the OW Bunker entity was a bailee since it never had possession of the bunkers. In fact, only the purchasers who were actual shipowners could be deemed bailee and, in any event, a breach of a bailee's obligation gives rise to a claim in damages, not for the proceeds of the sale.

(b) Conversion

The application judge rejected this argument for the same reasons as Males J in the *Res Cogitans* case, i.e.: the physical supplier had authorized the consumption of the bunkers before title passed.

(c) Collateral Contract

This argument was flatly rejected by reason of lack of any particulars as to *when* the offer would have been made, the *terms* upon which the offer was made, *when the offer was accepted* and on *what terms.*

(d) Unjust Enrichment

After enumerating the four requirements (benefit received by the defendant, at the expense of the plaintiff, unjust to allow the defendant to retain the enrichment and no defences available), the court observed that since the purchasers admitted owing the purchase price and intended to pay to the party entitled to it, there would be no enrichment on the part of the purchasers to begin with.

(e) Maritime Lien

The application judge noted that this argument was only valid for one purchaser who also owned a ship and was premised on the existence of a lien clause in the physical supplier contract.

The judge first observed that under Singapore law, no lien arose from the supply of bunkers and no lien could be created by contract.

But even assuming that the lien could be enforced in some other jurisdiction against the vessel, the judge failed to see how this could be deemed a competing claim for the purpose of interpleader proceedings since, in Singapore, where the entitlement to the purchase price would be determined, this was not recognized as a valid claim.

With respect to the third condition - the presence of adverse claims - the judge determined, after reviewing general common law principles of interpleaders, that in order to be adverse, the claims needed to be made in respect of the same subject matter, namely *the same legal obligation to which the applicant has admitted*. This was the symmetry requirement. Also, the claims needed to be mutually exclusive: the resolution of the interpleader must result in the extinction of the unsuccessful competing claims. Finally, there must be an actual disagreement as to whom should be paid.

Comparing the claim made by the OW Bunker entity and the possible claims argued on behalf of the physical suppliers, the application judge concluded that none of these possible claims met the symmetry requirement as none were based on the contract between the purchaser and the OW Bunker entity. It was also doubtful that these claims were mutually exclusive, especially the claim based on a maritime lien which arose irrespective of the *in personam* liability of the owner. Consequently, they were not 'adverse' within the meaning of the Rules of the Court.

Accordingly, the judge dismissed the interpleader applications.

Finally, the judge also dismissed a request on behalf of the OW Bunker entity to "summarily determine and dismiss the physical suppliers" claims on the merits, and then order "payment out" in its favour.

To the extent that this decision is based on the interpleader criteria set out by statute, there is little to be said about this decision. On the application judge's analysis of the existence prima facie of a claim by the physical suppliers and his rejection of these claims, we also believe that there is little to add and that in this respect, the decision is well founded.

The "Xin Chang Shu" [2015] SGHC 308

In this case, the physical supplier arrested a ship to which bunkers had been delivered. There were two OW Bunker entities between the shipowner and the physical supplier. In support of its application for the arrest, the physical supplier alleged that the OW Bunker entity that had contracted with him had done so as agent for the shipowner who therefore was the debtor under the physical supplier's terms and conditions.

The arrest was set aside and the application judge ordered damages for wrongful arrest on the basis that the claim was devoid of merits and lacked in "*colour*" or "*foundation*".

In particular, regarding the provision contained in the physical supplier's terms and conditions to the effect that the contracting OW Bunker entity was acting as agent for the shipowner, the judge held that such 'self-authorizing' provisions were without effect.The court further noted that there was no assertion by the physical supplier that the shipowner had held out the contracting OW Bunker entity as having authority to bind it as principal. Accordingly, the Court held that there was no serious ground to assert a claim against the shipowner based on agency.

The "Star Quest" et als [2016] SGHC 100

This was an application for summary judgment by a physical supplier from Singapore who had sold several parcels of bunkers to OW Bunker entities and who sought to recover the value of the parcels from the owners of the bunkering barges and ships that had delivered the bunkers to the OW Bunker's clients.

The claims were based on the bills of lading that had been issued and retained by the physical supplier.

The question was whether these bills of lading were true bills of lading or mere receipts. The court dismissed the application.

After noting that the bill of lading did not call for any particular place of delivery but merely to "OCEAN GOING VESSELS", without further detail, the court found that the fact that it was contemplated that the bunkers covered by a single bill of lading would be delivered to multiple vessels was fatal for the proposition that the bills of lading were to act as documents of title and, therefore, needed to be presented by the receiver at time of delivery. Indeed, since one bill of lading covered the delivery of multiple parcels, it was "*unworkable to expect delivery of each sub-parcels to be accomplished only against its production*".

The court found further support when considering, as extrinsic evidence, the underlying contract of sale between the physical supplier and the OW Bunker entities which provided for a 30-day term of credit. This again showed that the bills of lading could not be intended to act as documents of title.

The court also rejected the alternative claim based on bailment and conversion by reason of the fact that, pursuant to the physical supplier's contract of sale, risk and title passed on to the OW Bunker entity when bunkers were loaded on the delivering vessel. Accordingly, the physical supplier had no possessory interest in the bunkers thereafter.

Other arguments made by the shipowners based on estoppel and custom of the local bunker industry were also considered by the court.

United States

Valero Marketing and Supply Co. v. M/V "Almi Sun", No. 14-cv-2712 (ED La February 8, 2016)

In this case, Valero, a physical supplier, had been contracted by OW Bunker USA to deliver bunkers to a vessel whose owners had contracted with another OW Bunker entity. A receipt for the bunkers (which receipt contained a lien clause) had been signed by the chief-engineer at the time

of delivery and sampling had been conducted between the supplier and the ship personal. After having caused the ship to be arrested, it moved for summary judgment which was denied. The owners then moved for summary judgment to find that Valero had no maritime lien against the vessel under the *Commercial Instruments and Maritime Liens Act* (**CIMLA**). The motion was granted.

The question before the court was whether Valero had provided the necessaries "on the order of the owner or a person authorized by the owner".

The court held that it did not. The court insisted on the fact that the mere expectation by the owner or even the knowledge of the identity of the sub-contractor was not enough to establish the required relationship. The owner (or a person authorized to bind the owner) ought to have been involved in the selection of the sub-contractor which was not the case here.

O'Rourke Marine Services L.P., L.L.P. v. M/V "COSCO Haifa", No.15 Civ. 2992 (S.D.N.Y. April 8, 2016)

This was a motion for summary judgment by the physical supplier (O'Rourke) arguing it had a maritime lien against two vessels to which it had delivered bunkers at the request of an OW Bunker entity. Like most other cases wehave seen, there were at least two OW Bunker entities between the shipowners and the physical supplier. The evidence showed that the owners had not been involved in the selection of O'Rourke and the latter had dealt exclusively with OW Bunker. Bunker receipts containing a lien clause in favour of O'Rourke had also been signed by the ships' Chief Engineers. The initial question for answer by the court was the same as in the *Valero* case: did O'Rourke provide the necessaries "on the order of the owner or a person authorized by the owner"? Furthermore, the court looked at whether ING held a lien (as assignee of the rights of the contracting supplier, the OW Bunker entity).

The court considered the issue through two principles acknowledged by the case law: the contractor/sub-contractor line of cases, and the principal/agent or middleman line of cases.

In the first line of cases, a sub-contractor is generally not entitled to claim a lien unless a person entitled to bind the shipowner selected the sub-contractor.

In the middleman line of cases, a sub-contractor can claim a maritime lien if he can establish that the intermediaries above him were in an agency relationship with the shipowner (for instance, if they refused to be responsible for the action of the physical supplier or if the latter can be held directly liable to the shipowner for failure to deliver the bunkers).

Based on the contractual chain of contracts, the court held that there was no agency relationship between the shipowners and the contracting suppliers who acted truly as contractor.

The court also found that the shipowners had not been involved in the selection or nomination of O'Rourke as sub-contractor. Accordingly, O'Rourke could not establish that it had supplied necessaries at the request of the owners or a person authorised to bind the owners.

Turning to the contracting OW Bunker entity, the court held that it, on the other hand, had contracted with the owner or some authorized to bind the owner and, accordingly it was entitled to claim a maritime lien, even though it had not physically provided the necessaries.

The next round is likely to take place in ***Clearlake Shipping Pte v. O.W. Bunker (Switzerland) SA et al.*** N.Y.S.D. (Judge Valerie E. Caproni), where a motion by ING for summary judgment is currently pending and will likely be heard in the coming months.

Canada

Canpotex Shipping Services Limited v. Marine Petrobulk Ltd. et als. 2015 FC 1108

Canpotex was a time charterer who had a fixed price agreement with one OW Bunker entity, O.W. Supply & Trading A/S (**OW Trading**).

On two occasions, it placed orders for bunkers with another OW Bunker entity, OW Bunkers (UK) Ltd. (**OW UK**). On each occasion, the sales order confirmations were issued by OW UK showing Marine Petrobulk Ltd (**MP**) as the physical supplier. MP invoiced OW UK and OW UK invoiced Canpotex.

After receiving a demand for payment from MP, who claimed a maritime lien, Canpotex initiated interpleading proceedings. A Prothonotary of Federal Court granted Canpotex' s motion and authorized it to pay in court the amounts due under the OW UK invoices. Thereafter, the three parties filed motions to determine the rights of ING, as assignee of OW UK and MP, over the fund.

Two questions were before the Court: Which supplier was entitled to the money and would the payment made by Canpotex extinguish all of the Plaintiff's liability arising out of the marine bunkers supplied to the Vessels?

Before addressing the right of the respective suppliers, the Court had to deal with an argument made by ING that this was not a case for interpleader, invoking, essentially, the arguments made before the Singapore High Court in *Precious Shipping* (lack of symmetry, no exclusivity). ING also challenged that the Court could not decide, in the context of interpleader proceedings initiated by a time charterer, whether a physical supplier has a maritime lien on the vessel.

The Court denied the right of ING to raise this issue, as the matter had already been dealt with before the prothonotary and ING had failed to appeal its decision. In *obiter,* the Court opined that this was a suitable case for interpleader. The Court formed this opinion on the conclusion it had reached that the terms and conditions of the MP contract had been incorporated in the Canpotex/OW agreement, thereby making both Canpotex and OW jointly liable. Accordingly, if MP's claim was valid, it followed that a portion of the fund owed under the OW contract was meant to be paid to MP. Accordingly, by discharging OW's obligation, Canpotex would be entitled to set off against the amount it owed the latter. In other words, both ING and MP were after the same amount that represented the payment of the bunker prices delivered by MP. The court further opined that conflicting claims could arise from different causes of action (citing the BC case of *Savage v. First Canadian Financial Corp* (1996), 27 BCLR (3d) 21).

The Court then turned to the question of which agreement applied to the relationship between Canpotex and ING. After reviewing the evidence, it held that it was the terms of the fixed based agreement that governed, with the consequence that the terms and conditions of MP, as physical supplier, were incorporated and varied the agreement between Canpotex and OW UK.

As a result, the Court found that MP had a direct right to claim from Canpotex who was jointly and severally liable with OW UK for the price of the bunker delivered by MP.

As a result, the Court made no finding as to the existence of an agency relationship between Canpotex and OW UK.

Since MP's claim could be fully satisfied out of the fund, the Court felt it was not necessary to determine whether the necessary lien of s. 139 of the Marine Liability Act extended to the funds.

Conclusion

The case law originating from the UK and the US has provided, so far, coherent decisions that have benefited the contractual suppliers (and their assignees) as opposed to the subcontractor, the physical supplier, bringing a welcome legal certainty to an otherwise very messy situation.

The Canadian decision in *Canpotex*, insofar as it is based on some contractual incorporation of the contract with the physical supplier, can be distinguished and arguably would not be an obstacle to a *Res Cogitans*-type solution in a future case, should the contractual terms be right.

Canpotex, however, poses a bigger problem to the extent that it purports to recognize that physical suppliers have a statutory lien pursuant to s. 139 *Marine Liability Act* against ships to which bunkers have been delivered, irrespective of whom the physical supplier has contracted with. The premise to enacting s. 139 was to level the playing field with American suppliers. If the interpretation of s. 139 in Canpotex stands, one will have to acknowledge that the playing field is no longer levelled. More importantly, it creates an impossible situation in which a ship could be arrested in the US by the contracting supplier (like in *O'Rourke*), yet it could arguably be arrested again by the physical supplier, once in Canada.

This is a real issue and one that needs to be carefully considered when the case is next heard by the Federal Court of Appeal. It cannot be dismissed as lightly as suggested by Males J (*Exposure to claims with the possibility of arrests is one of the risks which shipowners run*). Shipowners do not accept risks of having their ship arrested for a contractual claim when they have no contract with either the physical supplier or even the contractual supplier (as in *Canpotex*). Such a result, if maintained by the Court of Appeal, would likely place Canada at odds with its maritime trading partners.

Beyond the Canadian exception, the OW litigation cases show that the time is probably right, for traders and purchasers, to have a closer look at the forms they have been using in order to minimize, as much as possible, uncertainty and risk of double jeopardy in the future.