



**SHIPOWNERS**

## ► An overview of the legal position across jurisdictions following the collapse of OW Bunkers

**The collapse of OW Bunkers led to numerous law suits and arrests across the globe as owners faced competing claims from both the physical bunker suppliers and ING as the liquidator for OW Bunkers.**



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In the immediate aftermath the legal position varied greatly from jurisdiction to jurisdiction. However, now the dust has settled, following the *Res Cognitans* Supreme Court decision of 11 May 2016, we reflect on the UK's position and that of many other maritime jurisdictions.

The leading English case is *PST Energy 7 Shipping LLC and Product Shipping & Trading S.A. v OW Bunker Malta Ltd and ING Bank N.V.* (the 'Res Cognitans'). This was a test case, brought to resolve the question of "who an owner should pay" in situations where both OW Bunkers and the physical supplier were out of pocket. In this case, the bunkers were supplied to *Res Cognitans* by OW Bunker Malta Ltd in Tuapse, Russia. OW Bunker Malta Ltd had obtained the bunkers from OW Bunker Trading A/S who had obtained them from Rosneft Marine (UK) Ltd and who, in turn, had obtained them from RN-Bunker Ltd (the physical supplier who made the actual delivery in Russia). At the time of OW Bunkers becoming insolvent the physical suppliers had not yet been paid.

The Supreme Court held:

- i) that the Owners' contract with OW Bunkers was not a sale within Section 2 of the Sales of Goods Act 1979, so the Owners had no defence to OW/ING's claim for the price under Section 49 SGA 1979. In reaching this decision the Court focused on the fact that the OW/Owners contract gave the Owners liberty to consume the bunkers without acquiring property in or having paid for them.
- ii) there is no implied term in the OW/Owners contract that OW Bunkers must promptly pay their physical supplier. The only obligation on OW Bunkers was to have a legal entitlement to give permission for use of the bunkers prior to payment.
- iii) even if the contract had been one of sale and not *sui generis* (i.e. not a contract with features which made it distinct/unique from standard sales contracts), on the facts, Section 49 SGA 1979 would not have prevented OW/ING's claim for the price succeeding.

As a result, Owners will have to treat any claim from ING/OW Bunkers akin to a debt claim, to be paid on presentation.

We recommend Owners review their existing contract wordings to make clear that should their direct counterpart become insolvent, in the bunker supply context or otherwise, that payment to the party down the chain (e.g. the physical supplier) shall be permitted and discharge the debt to the insolvent party.

This is particularly pertinent in light of the information that follows which demonstrates that a payment to the insolvent contracting party may not – in all jurisdictions - protect Owners against claims from the physical supplier.

The following pages provide an overview of the legal position of a number of maritime jurisdictions in relation to the *Res Cognitans* Supreme Court decision.

## Australia

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**Leading case**

*Reiter Petroleum Inc v The Ship "Sam Hawk"*[2015] FCA 1005;

*The Ship "Sam Hawk" v Reiter Petroleum Inc*[2016] FCAFC 26.

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**Summary of legal position**

Australia is an 'arrest-friendly' jurisdiction, where ships can be arrested quickly and efficiently. It is widely accepted, however, that the Admiralty Act does not, as a matter of Australian law, permit the arrest of bunkers separately from the ship on which they are loaded.

A claim in respect of bunkers supplied to a ship would fall within the definition of 'general maritime claim' under the Admiralty Act, because it would constitute "*a claim in respect of goods, materials or services supplied to a ship for its operation or maintenance*". However, it would be necessary for a claimant to establish a cause of action directly against the shipowner (rather than against a time charterer) in order to proceed *in rem* against the ship concerned. Ordinarily, therefore, it would be difficult for a physical supplier to establish a direct cause of action sufficient to arrest the ship, in circumstances where bunkers have been supplied to the account of a party other than the shipowner (e.g. a time charterer).

In its 2015 decision in the "Sam Hawk", the Australian Federal Court held at first instance that a claimant may establish such a cause of action, and therefore arrest a ship in Australia, based on a maritime lien that exists under applicable foreign law but which does not exist under Australian law. For instance, US law recognises the supply of "necessaries", including bunkers, to a ship as giving rise to a maritime lien (which is not the case under Australian law).

This decision was reversed on appeal in the September 2016 judgment of the Full Court of the Federal Court. The Australian law position on the enforceability of maritime liens arising by operation of foreign law therefore remains in line with the decision of the Privy Council in the "Halcyon Isle". That is, a foreign law maritime lien will not, in principle, be enforceable in Australia where the same circumstances would not give rise to a maritime lien under Australian law.

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**Practicalities**

HFW has recently published a briefing note on the Full Court's appeal decision in the "Sam Hawk" and the practical implications arising from that decision. Please refer to:

<http://www.hfw.com/Arrest-of-the-SAM-HAWK-October-2016>

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## France

<b>Leading case</b>	In the context of ship arrests, the French Courts of Appeal have rendered conflicting decisions (relating to OW Bunkers/other bunker suppliers). The Supreme Court is yet to rule.
<b>Summary of legal position</b>	<p>The two main issues are:</p> <p>(i) whether both the physical suppliers and OW Bunkers/ING bank can arrest a vessel.</p> <p>(ii) whether a ship can be arrested to secure a maritime claim against a former charterer/sub charterer, when the claimant has no lien on the vessel.</p> <p>Both issues were answered both positively<sup>1</sup> and negatively<sup>2</sup> by the different courts seized.</p>
<b>Practicalities</b>	<p>Some French jurisdictions/Courts have protected Owners' interests whereas others have proved favourable to bunker suppliers.</p> <p>Some Courts held that, to have the arrest lifted, Owners had to provide the claimant with a guarantee payable against presentation of a Court decision ordering the former charterer to pay the claimant, or even against a mere declaration of the claimant's claim in the former charterer's insolvency procedure.</p> <p>This can result in Owners paying the debts of a former charterer (or sub charterer), without any possible recourse against the real debtor (if the charterer is insolvent, or if Owners' claim under the charter party is time barred, e.g. under a charter governed by French law, subject to a one year time bar).</p>
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<sup>1</sup> (i) Court of Le Havre (1<sup>st</sup> instance) answered yes on 8 July 2015 in the "Calisto"; (ii) Rennes Court of Appeal answered yes in the "ATLANTIC PIONEER" on 25 September 2012

<sup>2</sup> (i) Pau Court of Appeal answered no in the "HC Nadja Maria" on 15 September 2015 (ii) Court of Appeal of Saint Denis de la reunion answered no in the "Komodo" on 9 August 2012

## Greece

<b>Leading Case</b>	765/2015; 2127/2015; 33/2016; 517/2016; 1558/2016 and 1559/2016
<b>Summary of legal position</b>	<p>The Greek Courts have issued contradicting decisions regarding the liability of the Owners to compensate Greek-based physical suppliers for unpaid bunkers ordered by companies of the OWB Group. In summary, the Greek Courts have adopted the following conflicting positions:</p> <ul style="list-style-type: none"><li>i) Owners are liable to pay to the physical supplier the value of the bunkers ordered by OWB, because such liability is established directly by the law (Art. 106 of the Greek Private Maritime Code).</li><li>ii) Owners are not liable to pay the physical supplier, because there is no contractual relationship between these parties (it could not be shown OW acted as an agent for the physical supplier).</li><li>iii) Owners are liable to pay the physical supplier, because the chief engineer, when signing the bunker delivery receipt without reservation, guaranteed on Owners' behalf payment of the physical suppliers' invoice.</li><li>iv) The Greek Courts do not have jurisdiction to hear claims of a physical supplier against Owners having their place of business abroad, notwithstanding the fact that the chief engineer signed the bunker delivery receipt, containing a clause that the Greek Courts would be competent to hear the claims of the physical supplier.</li></ul> <p>Although no judgment has yet been given by the Piraeus Court of Appeal, we expect them to rule shortly on whether Owners have any liability towards the physical suppliers for these claims.</p>
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## Hong Kong

<b>Leading case</b>	<i>NewOcean Petroleum Co Ltd v. OW Bunker China Ltd and Cosco Petroleum Ltd</i> (11 July 2016, Court of Appeal).
<b>Summary of legal position</b>	<p>In relation to an application to challenge jurisdiction brought by Cosco, the Court of Appeal held that NewOcean as the physical bunker supplier, made out an arguable case of a claim in conversion.</p> <p>This case is distinguished from the <i>Res Cogitans</i> because, under NewOcean's terms, NewOcean retained title in the bunkers until it was paid the price in full and it did not grant permission for anyone to consume the bunkers prior to payment.</p> <p>In permitting the Owner of the vessels to consume the bunkers immediately prior to payment, and by impliedly undertaking that it had a right to grant such permission, Cosco asserted a right inconsistent with the NewOcean's rights as the owner of the bunkers which gives rise to a claim for conversion by NewOcean.</p>
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# Singapore

<b>Leading case</b>	<ol style="list-style-type: none"><li>1. <i>Precious Shipping Public Co Ltd and others v OW Bunker Far East (Singapore) Pte Ltd and others and other matters</i> [2015] SGHC 187 (“<i>Precious</i>”)</li><li>2. <i>The “Xin Chang Shu”</i> [2015] SGHC 308 (“<i>XCS</i>”)</li></ol>
<b>Summary of legal position</b>	<p>The <i>Precious</i> case arose from a breakdown of a chain of bunker supply contracts following the collapse of OW Bunker &amp; Trading A/S. 13 end-buyers (“Buyers”) of bunkers in Singapore faced claims from various physical suppliers (“Suppliers”) and ING Bank (“ING”) as assignees of receivables of OW entities (“OW”) who were the intermediary sellers (“Sellers”) of the bunkers. The Buyers applied for interpleader relief to determine who payment should be made to.</p> <p>The Buyers needed to satisfy the Court that:</p> <ol style="list-style-type: none"><li>1. they were under a liability for a debt, money, goods or chattel;</li><li>2. they expected to face at least two competing <i>prima facie</i> claims; and</li><li>3. those claims were adverse.</li></ol> <p>The Court dismissed the Buyers’ application as the 2<sup>nd</sup> and 3<sup>rd</sup> requirements were not satisfied.</p> <p>The Court held that the arguments in support of granting relief, namely that:</p> <ol style="list-style-type: none"><li>(i) the Buyers were fiduciary agents or bailees of the bunkers this was because retention of title clauses were present in the Suppliers’ contracts with OW which were incorporated into the contracts between the Buyers and OW,</li><li>(ii) the Buyers had converted the bunkers as the title remained with the Suppliers,</li><li>(iii) the Suppliers had a collateral contract with the Buyers and could therefore bring a direct claim against them,</li><li>(iv) the Suppliers were entitled to relief for the Buyers’ unjust enrichment, and</li><li>(v) the Suppliers could invoke a maritime lien against the Buyers’ vessels in other jurisdictions, were factually and legally unsustainable.</li></ol> <p>The Court also found that the competing claims were not adverse as, unlike those of OW/ING, none of the Suppliers’ claims were based on a contractual right to be paid for the bunkers, and the extinction of either set of claims would not have any impact on the other.</p> <p>In <i>XCS</i>, a Supplier arrested a Buyer’s vessel to secure a claim for the price of bunkers supplied to OW Singapore (“OWS”), arguing that OWS acted as the Buyer’s agent. However, no agency relationship existed as the Buyer had contracted for the bunkers with a separate Seller who had then contracted with OWS. The arrest was set aside and found to be wrongful.</p>
<b>Practicalities</b>	<p>Interpleader relief does not appear to be available to Buyers facing claims from Suppliers and intermediary sellers.</p> <p>Though the Court did not determine the merits of the Suppliers’ claims in <i>Precious</i>, from its assessment of the possible causes of action argued and the case of <i>XCS</i>, it appears Suppliers will find it difficult to succeed in claiming against Buyers where they have no contract with the Buyer.</p>
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## United Arab Emirates (UAE)

<b>Leading case</b>	Cases are not reported in the UAE
<b>Summary of legal position</b>	<p>A substantial number of claims have been brought by physical suppliers against ship owners as a result of OW Bunkers' ("OWB") failure to pay.</p> <p>UAE Maritime Law gives the physical supplier the right to arrest the ship for unpaid bunkers. This is regardless, whether the supply contract was entered with the owners, charterers or another trading or contractual supplier. Accordingly, physical suppliers have used this right under the Maritime Code to arrest vessels for outstanding amounts on OWB across the UAE. However, Courts within the 7 Emirates have taken different views as to whether the ship owner is liable for OWB's outstanding debt due to the physical supplier.</p> <p><b>Dubai:</b> the Court of Appeal recently concluded that the ship owner was not liable to the physical supplier on the basis that there was no contract between the supplier and the ship owners. The case was rejected against the owners of the vessel.</p> <p>However, the court confirmed the physical supplier's right to arrest the supplied ship and its right to enforce against her or against any other security placed in court to release her for the outstanding amount of OWB. In practice, this effectively means that though the ship owner "wins the case", the ship herself or any security placed to release her will respond to discharge the obligation of OWB towards the supply contract entered with the physical supplier.</p> <p><b>Ras al-Khaimah:</b> takes the same approach as the Dubai Courts.</p> <p><b>Fujairah:</b> the Court has taken a different approach, finding the shipowner was directly liable to the physical supplier. The courts relied on the standard delivery receipt usually signed by the Master of the vessel to establish a direct contractual relation between the shipowner and the physical supplier.</p> <p>HFW Middle East was successful in counter proceedings brought on behalf of a shipowner (in the same proceedings filed by the physical supplier) against OWB relieving the shipowner from any obligations towards OWB under the supply contract (this can be contrasted with the English law position).</p>
<b>Practicalities</b>	<p>The shipowner should be able to defend any claim by the physical supplier in Dubai or Ras al-Khaimah on the basis that the shipowner is not a party to the contract between OWB and the physical supplier. However, these claims will normally be filed against the shipowner and the OWB jointly. If the physical supplier was able to arrest the vessel in the UAE, such security/arrest may respond to any judgment issued against OWB. Accordingly, the shipowner would win the case but lose the security.</p> <p>It is to be noted that a number of the above jurisdictions currently have conflicting case precedents, and/or cases pending for appeal. In some cases, the Foreign Court is waiting for guidance from the English Supreme Court, in light of which it will be interesting to see whether the 'Res Cogitans' COGITANS" ruling is now applied beyond the seas or whether those Courts will chart a divergent course.</p>

## United States

**Leading case** *Lake Charles Stevedores, Inc. v. PROFESSOR VLADIMIR POPOV MV*, 199 F.3d 220 (5th Cir. 1999)

**Summary of legal position** The bankruptcies of O.W. Bunker & Trading A/S and Bunker International led to numerous interpleader actions being filed, in particular before the US Court of Appeals for the Fifth Circuit (Texas and Louisiana) and the US Court of Appeals for the Second Circuit (New York).

The common issue among these cases is whether a maritime lien may be asserted by a physical supplier of necessities (i.e. bunkers) to a vessel.

The Commercial Instrument and Maritime Liens Act (the 'CIMLA') states that a person who provides necessities; (1) to a vessel; (2) on the order of the owner, or a person authorized by the owner, has a maritime lien against the vessel. 46 U.S.C. § 31342(a).

The Fifth Circuit in *Lake Charles Stevedores, Inc. v. PROFESSOR VLADIMIR POPOV MV*, 199 F.3d 220 (5th Cir. 1999) formulated the following test, which has been generally accepted by multiple federal courts, to determine whether a physical supplier may assert a maritime lien where there is no direct contract, but a chain of contracts.

To determine whether a party was authorized to procure necessities on behalf of a vessel, courts look to: (1) the "general contractor/subcontractor" line of cases; and (2) the "middleman" line of cases.

- (1) The general contractor (the bunker supplier) is entitled to a maritime lien against the vessel even if it does not actually deliver the necessities, provided, they can demonstrate that "an entity authorized to bind the ship controlled the selection of the subcontractor or its performance."
- (2) The ultimate deliverer of necessities may be able to obtain a maritime lien. The test is not whether an intermediary can be expected to supply the necessities itself that distinguishes instances in which the actual suppliers have liens, but it is rather the nature of the relationship between each pair of entities that are involved in the transaction at issue (e.g., agent v. independent contractor)."

Whether a claim falls within either the "general contractor/subcontractor" or the "middleman" line of cases is often a difficult fact-intensive enquiry.

*Valero Mktg. & Supply Co. v. M/V Almi Sun, IMO No. 9579535*, Civ. A. No. 14-2712, 2016 WL 475905 (E.D. La. Feb. 8, 2016) addressing the *Lake Charles* issues, is now on appeal to the Fifth Circuit. Due to the numerous O.W. Bunker filings, the *Valero Marketing* case has garnered significant interest, which includes the filing of several *amicus* briefs and presents an opportunity for the Fifth Circuit to either reaffirm the *Lake Charles* decision or to provide substantive changes to the law governing a physical supplier's right to assert a maritime lien.

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