

BRISSET BISHOP S.E.N.C.

BUNKER LITIGATION: The Teaching of OW Bunker's Demise – An update

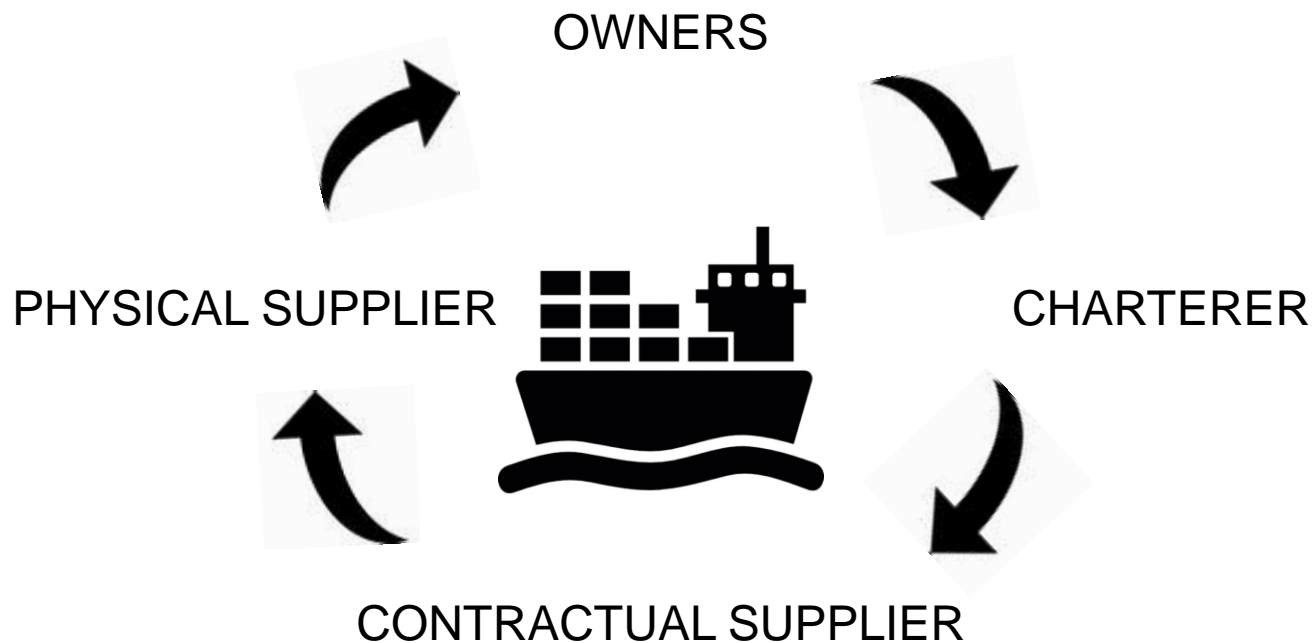


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- An update

LIEN vs. ARREST

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LIEN:

- **A maritime lien is a substantive right peculiar to maritime law.**
- **It is a privilege against property (a ship) which attaches and gains priority without any court action or any deed or any registration.**
- **It passes with the ship when the ship is sold to another owner, who may not know of the existence of the lien.**

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ARREST:

- **A ship arrest is a procedural remedy, the purpose of which is to obtain security for one's maritime claim.**
- **A ship arrest does not, in itself, provide a special status to the creditor.**
- **It is the Common Law or the statute law that determines the status (secured or unsecured) and the ranking (priority) of creditors.**
- **A ship arrest is obtained following the institution of *in rem* proceedings.**

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SECURED vs. UNSECURED

- **Certain maritime claims (maritime liens, mortgages) may provide to the creditor the status of secured creditor (within the meaning of insolvency laws).**
- **Others only grant the creditor a right to institute *in rem* proceedings and arrest a ship.**
- **In the later case, the creditor is, otherwise, an ordinary creditor and the claim ranks after the claims of secured creditors.**
- ***In rem* proceedings may only be commenced when the person who owns the ship at the time of instituting the action is personally liable for the claim.**

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PRIORITIES

- **Possessory lien;**
- **“Traditional” maritime liens;**
- ***Foreign liens;***
- **Statutory liens;**
- **Ship mortgages;**
- **Other claims enforceable by *in rem* proceedings**

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***In rem* proceedings → admiralty court**

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➤ **Section 22 (1) *Federal Courts Acts*:**

The Federal Court has concurrent original jurisdiction (...) in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

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➤ **Section 22 (2)(m) *Federal Courts Acts*:**

Without limiting the generality of subsection (1) (...) the Federal Court has jurisdiction with respect to all of the following:

(m) any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship (...);

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➤ **Section 43 *Federal Courts Acts*:**

(1) Subject to subsection (4), the jurisdiction conferred on the Federal Court by [section 22](#) may in all cases be exercised in personam.

(2) Subject to subsection (3), the jurisdiction conferred on the Federal Court by [section 22](#) may be exercised in rem against the ship, aircraft or other property that is the subject of the action, or against any proceeds from its sale that have been paid into court.

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Danish ship fuel supplier OW Bunker goes bankrupt

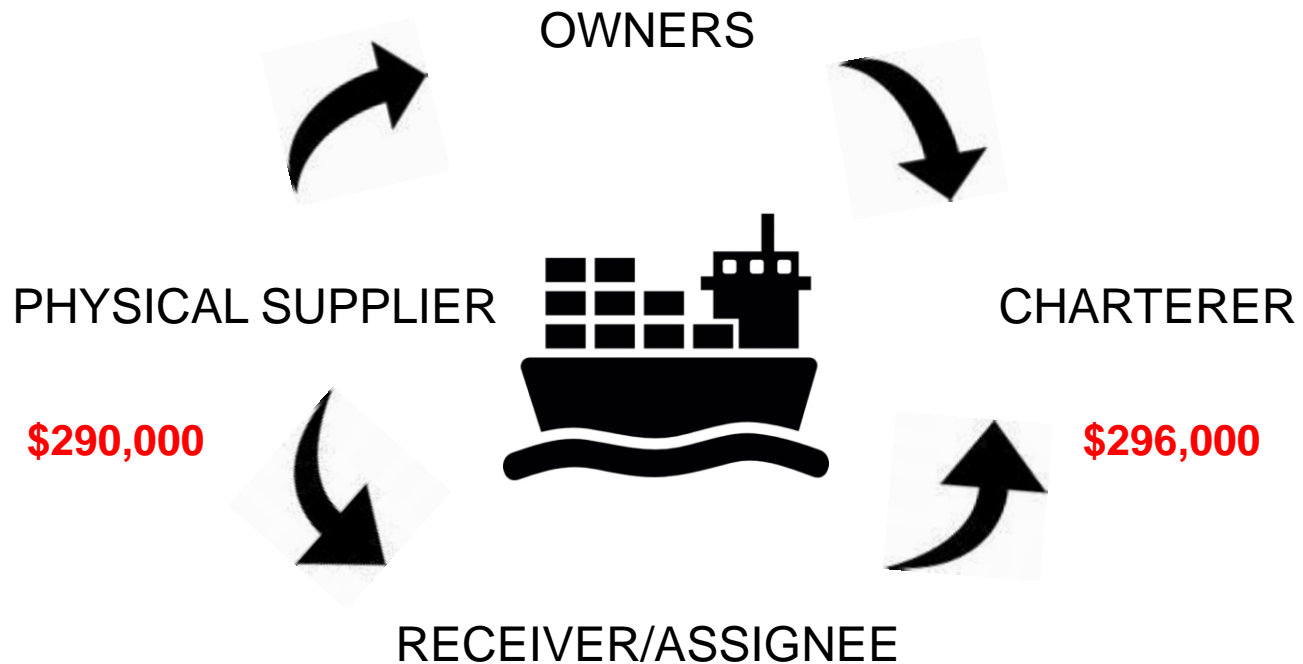
7 November 2014

The world's largest ship fuel supplier, OW Bunker, has filed for bankruptcy after alleged fraud.

The company's troubles came to light earlier this week when it discovered suspected fraud by senior employees in a Singapore-based subsidiary.

[OW Bunker](#) is Denmark's third-largest company and supplies 7% of the world's bunker fuel, used in shipping.

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UK:

THE “*RES COGITANS*”

The “*RES COGITANS*”

OWNERS



OW BUNKER



RN BUNKER

The “*RES COGITANS*”

s. 49 Sale of Goods Act

Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

The “*RES COGITANS*”

H. Title

H1. Title in and to the Bunkers delivered (...) shall remain vested in the Seller until full payment has been received by the Seller (...).

H2. Until full payment (...) has been made (...), the Buyer agreed that it is in possession of the Bunkers solely as Bailee for the Seller, and shall not be entitled to use the Bunkers other than for the propulsion of the Vessel (...).

The “*RES COGITANS*”

s.2 *Sale of Goods Act*

A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

- 1. there must be a link between the transfer of title and the money consideration “such that the consideration for the payment is the transfer of title to the buyer as distinct from some other benefit (...).”**

The “*RES COGITANS*”

“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.”

- 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.”*
- only implied undertaking as regards the bunkers which it permitted to be used by the Owners in propulsion prior to payment was that OWBM had the legal entitlement to give such permission.
- OWBM did not need to have title to the bunkers. It merely needed to have acquired the right to authorize such use under the chain the contracts by virtue of which it had obtained the bunkers.

The “*RES COGITANS*”

- **No implied term as for title**
- **No implied condition that OWBM would comply with its obligations to the party above in the chain, in particular by paying for the goods when due.**

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. (Moore-Bick V-P)

Under English law, the Owners could be under no liability to the physical supplier in the tort of conversion since the latter knew that the bunker would be delivered to an vessel with the likely permission to consume upon delivery. Accordingly, he was deemed to have given permission. (Males J)

The “*RES COGITANS*”

“an implied condition of the kind postulated by the owner is both unnecessary and inappropriate.”

Exposure to claims with the possibility of arrests is one of the risks which shipowners run. (Males J)

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United States:

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Commercial Instruments & Maritime Lien Act (CIMLA), 46 US.C. § 31301

A maritime lien under CIMLA arises in favour of persons who

- (1) provide necessaries;
- (2) to a vessel;
- (3) on the order of the owner or a person authorized by the owner.

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Commercial Instruments & Maritime Lien Act (CIMLA), 46 U.S.C. § 31301

The CIMLA creates a presumption that the following persons are authorized to by the owners to order necessaries:

- (1) the owner;
- (2) the master;
- (3) a person entrusted with the management of the vessel at the port of supply; or
- (4) an officer or agent appointed by –
 - (A) the owner;
 - (B) a charterer;
 - (C) an owner pro hac vice; or
 - (D) an agreed buyer in possession of the vessel.

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- **Some 50 proceedings were reported in the wake of the OW bankruptcy;**
- **About a 12 decisions have been rendered thus far by courts from 5 different districts;**
- **No Courts of Appeal have yet rendered decisions on substantive issues;**

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- **Does the physical supplier have a maritime lien?**
- **Does the contractual supplier lien have a maritime lien?**
- **Does the contractual supplier have a claim *in personam* against the money paid in court?**

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- **Does the physical supplier have a maritime lien?**
- **All judgments but 1 have answered: No.**
- **Third condition not met (*on the order of the owner or a person authorized by the owner*)**

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- **Does the physical supplier have a maritime lien?**
 - **Was the order placed by a person authorized by the Owner?**
 - **Has a direct contractual relationship been created between the Owners and the sub-contractor?**
 - **Are the terms of the bunker receipt or the coordination of the delivery with the ship's personnel relevant?**

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- **Does the physical supplier have a maritime lien?**
 - **One judge from the Northern District of Florida has held that the terms of the bunker receipts and the interaction between the physical supplier and the ship's personnel prior to and during delivery were sufficient to meet the agency requirement of the third condition.**

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- **Does the contractual supplier have a maritime lien?**
 - **Did the contractual supplier *supply* the bunker?**
 - **All but one judge held it had.**
 - **Reasoning of the dissenting judge:**
 - **No tangible financial risk;**
 - ***“Maritime liens are created to provide protection, not to enable an windfall.”***

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- **Does the contractual supplier enforce its claim *in personam* against the money tendered by the vessel interest?**
- **So far, one judge has answered: “Yes”**

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Canada:

Canpotex Shipping v. Marine Petrobulk

Canpotex Shipping v. Marine Petrobulk

➤ **S. 139 (2) *Marine Liability Act*:**

A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise

(a) in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance (...);

Canpotex Shipping v. Marine Petrobulk

- **Did the physical supplier have a claim *in personam* against the charterer?**
- **Will the payment extinguish all of Canpotex's liability arising out of the marine bunker supplied to the Vessels?**
- **Will the payment by Canpotex extinguish *in rem* liability of the vessels?**

Canpotex Shipping v. Marine Petrobulk

- **Direct contract between physical supplier and Canpotex who was jointly liable with OW Bunker.**
- **No need to determine whether there was an agency relationship.**
- **Court was prepared to recognize a maritime lien under s. 139 Marine Liability Act even if the necessaries had not been ordered by the Owner.**
- **But since the claim was fully paid by the payment, the lien would be discharged.**

Canpotex Shipping v. Marine Petrobulk

➤ On Appeal:

- **The Court reversed the finding made by the motions judge regarding the application of a particular set of terms and conditions that formed the basis of his conclusion that there was a direct contract between the physical supplier and Canpotex;**
- **The Court returned the matter to the motions judge for further determination;**
- **The Court also indicated that a payment by Canpotex to the contractual supplier might not discharge the liability of the vessel vis-à-vis the physical supplier.**

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LESSONS:

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- **Be always prepared;**
- **Your protection lies in the contract you enter into;**
- **If there is no implied term, than make it an express term;**
- **Provide for an indemnity.**