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The O.W. Bunker Litigation:

Legal Developments and the Potential Impact on Owners,
Charterers and New York Arbitration

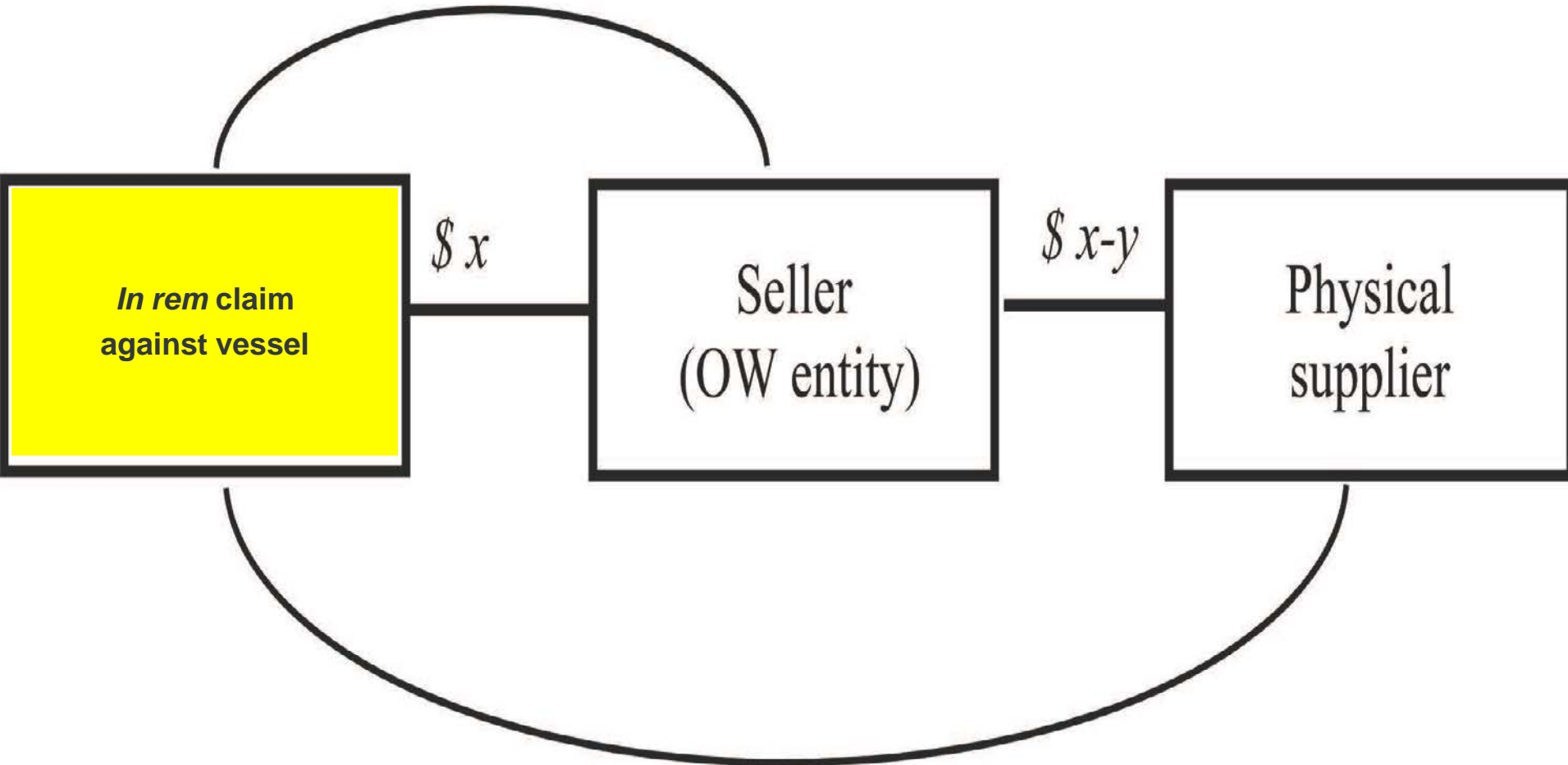
John R. Keough

Background: O.W. Bunker's Collapse

- **Late October and early November 2014 -- O.W. Bunker & Trading A/S and its affiliates collapsed in insolvency.**
- **Vessel Interests stopped paying O.W. Bunker entities and the O.W. Bunker entities failed to pay the physical bunker suppliers.**
- **As a result, physical suppliers, O.W. entities and ING (as alleged assignee of O.W.) all sought to recover unpaid bunker invoices from vessel interests.**



ING claims \$ x from
purchaser



In rem claim
against vessel

\$ x

Seller
(OW entity)

\$ $x-y$

Physical
supplier

Physical supplier claims \$
 $x-y$ from purchaser

Cite: *Precious Shipping Public Co. Ltd. v. O.W. Bunker Far East (Singapore) Pte. Ltd.*, 4 SLR 1229 (2015).

Background: Interpleader Remedy

- **Vessel Interests commenced interpleader actions pursuant to 28 U.S.C. 1335.**
- **The S.D.N.Y. court deemed that the deposited security constituted a substitute *res* for the vessels.**
- **Vessel Interests seek to avoid a “double payment” for each bunker supply.**

Key Issues Addressed by the Second Circuit:

Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC, 814 F.3d 146 (2d Cir. 2016).

- Does the interpleader fund constitute a substitute *res* for the vessels?
 - Determines whether *in rem* jurisdiction exists.
 - If interpleader fund is not a substitute *res* for the vessel, then a question whether maritime liens will extinguish following distribution of fund.



Key Rulings:

- **Security deposited as interpleader fund confers *in rem* jurisdiction over vessel in S.D.N.Y.**
- **Injunction was proper remedy.**
- **Extraterritorial injunction not affirmed but remanded: No further dispute.**

Federal Court Interpleader v. Bankruptcy Court Jurisdiction Under Chapter 15

- *Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC* (S.D.N.Y. Apr. 27, 2016)
- Issue: District Court v. Bankruptcy Court in S.D.N.Y.
- O.W. Bunker Germany sought bankruptcy court adjudication of non-maritime lien issues:
 - Priority and rank of parties' claims
 - Determine which party is ultimately entitled to the interpleader funds
- District court denied the motion and retained case in entirety.
- Mandatory withdrawal required if resolution of proceeding requires consideration of both Title 11 and other laws of United States affecting interstate commerce.
 - See *Hapag-Lloyd* (stating “these cases involve ‘interesting and apparently novel questions regarding the interplay among the United States bankruptcy law, maritime law and the federal interpleader statutes.’”)
- Further, discretionary factors favored the permissive withdrawal of the automatic reference to bankruptcy court.

Effect of Court's Ruling

- **Resolved practical conflict among U.S. maritime law, district court's interpleader authority and jurisdiction of bankruptcy court.**
- **Blocked O.W. entities from pulling the vessel interests and physical suppliers into bankruptcy court to litigate, with increased cost and further delay.**

Federal Court Interpleader v. Arbitration

- *Western Bulk Carriers v. O.W. Bunker & Trading A/S (the M/V LONG LUCKY)*, No. 15-08304(VEC) (S.D.N.Y), and
- *Modion Maritime Management SA et al. v. O.W. Bunker Malta Ltd. et al (the M/V STEFANOS T)*, No. 15-08084(VEC) (S.D.N.Y.)
- **ING motion to stay or to dismiss interpleader proceedings and to compel arbitration.**
 - Approximately 3 months prior to interpleader, ING commenced arbitration proceedings in London pursuant to O.W. Bunker contract provisions.
 - Relies on Section 3 of the Federal Arbitration Act in seeking to stay the interpleader action.
- **The court must further decide whether to stay the entire interpleader or limit any stay to the arbitrable issues.**
 - Not all issues are arbitrable under the O.W. contract.

Maritime Liens - - Valid or Illusory?



Commercial Instruments and Maritime Liens Act ("Lien Act")

46 U.S.C. § 31342. Establishing maritime liens

(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner --

- (1) has a maritime lien on the vessel;
- (2) may bring a civil action in rem to enforce the lien; and
- (3) is not required to allege or prove in the action that credit was given to the vessel.

Congressional Policy Underpinning the Lien Act

The Fifth Circuit summarized the Congressional mandate as follows:

We are of the further opinion that § 971 *et seq.* is not to be viewed through the constricting glass of *stricti juris* We view the legislative history of these sections to mandate a more liberal application than that which existed prior to the 1971 amendments to the Maritime Lien Act. ***Our review leads us inexorably to the conclusion that it was the intent of Congress to make it easier and more certain for stevedores and others to protect their interests by making maritime liens available where traditional services are routinely rendered.***

Atl. & Gulf Stevedores, Inc. v. M/V Grand Loyalty, 608 F.2d 197, 201 (5th Cir. 1979) (emphasis added).

In 1971, reacting to concerns that the difficulty of obtaining a lien was causing crippling losses to stevedoring contractors and others supplying services and goods to vessels, Congress amended section 973 of the Lien Act by deleting the language imposing on the materialman a duty of inquiry. . . . ***Suppliers of necessities are afforded the protection of a lien even when, because of temporal or other limitations, they are unable to ascertain the existence of a prohibition of lien clause or check the credit of the buyer.***

Gulf Oil Trading Co., a Div. of Gulf Oil Co. v. M/V CARIBE MAR, 757 F.2d 743, 749 (5th Cir. 1985) (emphasis added).

Recent Decisions Finding Physical Suppliers of Bunkers do not Hold Valid Maritime Liens

- **Eastern District of Louisiana:**
 - *Valero Marketing & Supply Co. v. M/V ALMI SUN*, 14-CIV-2712(NJB), 2016 WL 475905 (E.D. La. Feb. 8, 2016)(Pending appeal to the 5th Circuit).
- **Southern District of New York:**
 - *O'Rourke Marine Services L.P., L.L.P. v. M/V COSCO Haifa*, 15-CIV-2992(SAS), 2016 WL 1544742 (S.D.N.Y. Apr. 8, 2016).
 - *ING BANK N.V. v. M/V TEMARA*, 16-CIV-95(KBF), 2016 WL 4471901 (S.D.N.Y. Aug. 24, 2016).
 - *Aegean Bunkering (USA) L.L.C. v. M/T AMAZON*, 14-CIV-9447(KBF), 2016 WL 4471895 (S.D.N.Y. Aug. 24, 2016).
- **Southern District of Alabama**
 - *Barcliff, L.L.C. v. M/V DEEP BLUE*, 14-CIV-0590(WEC) (S.D. Ala. Sept. 28, 2016).

Eastern District of Louisiana Decision: *M/V ALMI SUN*

- **Physical supplier did not act “on the order of the owner or person authorized by the owner”.**
- **Signing a bunker delivery receipt did not ratify the physical supplier’s action.**
- **Found no contractual privity.**
- **Did not address whether O.W. entity holds a valid maritime lien.**
- **Appeal pending.**

Southern District of New York Decisions: *M/V COSCO Haifa, M/V TEMARA, M/T AMAZON*

- **Agency:**
 - Found no actual authority.
 - Found no apparent authority.
- **Contractual Privity:**
 - Physical supplier's contractual privity did not extend beyond O.W. entity.
- **District judge in *O'Rourke* found that ING was entitled to a lien by assignment.**
- **On reconsideration a different district court judge vacated that portion of the opinion**
 - *O'Rourke Marine Services L.P., L.L.P. v. M/V COSCO Haifa*, 15-CIV-02992(KBF) (S.D.N.Y. Aug. 24, 2016).

Southern District of Alabama Decision: *M/V DEEP BLUE*

- **Agency:**
 - Found no actual authority.
 - Found no apparent authority.
- **Contractual Privity:**
 - Physical supplier's contractual privity did not extend beyond O.W. entity.
- **ING, as assignee of O.W. Bunker, found to hold a valid maritime lien against the vessel based on trial, not motion.**

Effect of Recent District Court Decisions

- **District court decisions not binding precedent on the other district courts.**
- **These cases each involved maritime lien claims initiated as vessel arrest cases.**
- **Fifth Circuit appeal pending.**
- **Question remains how the S.D.N.Y. court with interpleader jurisdiction will analyze similar, but distinguishable, fact patterns.**

Interpleader Cases Pending

- **Currently 35 interpleader cases remain pending before Judge Caproni in the S.D.N.Y.**
- **Four of those cases have been selected as “test” cases for summary judgment, pending decision.**
 - At issue: whether physical suppliers have a maritime lien?
 - These cases will set a guiding precedent for the remainder of the interpleader cases before Judge Caproni.

CERTIFICATION OF EXPORT. Vessel certifies that it intends to use product delivered to barge at U.S. Oil's terminal for bunkers on a voyage leaving the U.S. Port.

EXEMPTION FROM SALES AND USE TAX & AIR POLLUTION REGULATION: The shipper vessel to which this product is delivered is engaged in operating as a private or common carrier by water in interstate or foreign commerce. The recipient certifies that the product purchased under this receipt is for use in connection with its business of operating as a private or common carrier by water in interstate or foreign commerce; that while the vessel is within the territorial boundaries of the State of Washington, it will not consume the product delivered hereunder; and that the sale is entitled to exemption from the retail sales and use tax of the State of Washington under the provisions of RCW 82.08.0261 and WAC 458-20-175, and exemption from Section 9.07 (d) of PSAPCA Regulation 1.

REMARKS:

DISCLAIMERS: No disclaimer stamp of any type or form will be accepted on this bunker certificate, nor should any such stamp be applied, nor will it alter, change or waive U.S. Oil's Maritime Lien against the vessel or waive the vessel's ultimate responsibility and liability for the debt incurred through this transaction.

MARITIME LIENS: All disputes arising out of this transaction shall be interpreted and enforced in accordance with the general maritime law of the United States of America and all statutes related thereto.

DELIVERY POINT: Title to and the risk of loss of oil passes to customer of delivery point to vessel at the vessel's tank.

Signed as receipt for volume and delivery-temperature only. Specifications subject to verification by analysis of vessel's retained sample.

** ERRORS MADE BY THE BARGEMAN AND CORRECTED BY THE BARGING COMPANY WILL APPEAR AS CORRECTIONS ON THE WHITE COPY ONLY.

PRODUCT DISCHARGED TO VESSEL LISTED ABOVE
A REPRESENTATIVE SAMPLE HAS BEEN DELIVERED TO THE VESSEL REPRESENTATIVE.

SEAL #: M(36757041)S(36833745)B(36833723)

BARGE COMPANY REPRESENTATIVE:

[Signature]
(BARGE CO. REPRESENTATIVE)

29-Oct-14
(DATE)

THE FOREGOING RECEIVED ON BOARD VESSEL (SEE STATEMENT ABOVE)

SEAL #: M(7602808)S(7602814)B(7602804)

MGO

OFFICIAL



OFFICIAL VESSEL OFFICER

[Signature]
Hapag-Lloyd

Captain
(TITLE) (DATE)

Ship Management
gez. Gründel

USU1 000058

Industry Reaction

- **Full impact developing still: intermediaries between contractual seller and physical supplier generally remain.**
- **According to Lloyd's List, some trading majors disallowing extended payment periods and demanding upfront cash transfers. (10/10/16).**
- **Suppliers and vessel owners/operators keeping a close eye on the result of the interpleader actions in the S.D.N.Y.**
- **Frustration over the length and substantial legal costs of litigation and lack of clarity or predictability of the law two years after O.W.'s collapse.**

Changes Considered by Suppliers and Vessel Interests

- **Suppliers:**

- Options considered for removing intermediaries from payment and/or reducing credit risk:
 - Cash on Delivery;
 - Pre-payment;
 - Standby letter of credit.
- Options to address “privity issue”:
 - Physical suppliers requiring direct and written confirmation of bunker order from vessel owners or charterers and express authority to incur lien on vessel.
 - Make explicit that bunkers are “on the order” of the owner or those authorized by the owner to incur liens.

- **Vessel Interests:**

- Notice of “No Lien” clauses to physical suppliers.

Implications for Maritime Arbitration

- **Interpleader used to stay both commencement and continuation of arbitrations.**
- **Arbitration not an option for the physical suppliers who lacked contractual privity with vessel interests whose vessels they supplied.**
- **If U.S. physical suppliers require direct confirmation from vessel interests, suppliers may condition delivery on acceptance of NY arbitration agreement.**
- **If all parties agree to arbitration, then arbitrations concerning same bunker delivery may be consolidated pursuant to the SMA's Consolidation provisions in Section 2 of the Rules.**

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Thank You.

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professionals

3300

Total staff

46

Offices and associated
offices in 18 countries

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