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COMPETITIVE EDGE

BUNKER PLAYERS SHAPE UP FOR THE FUTURE

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All in the detail

As courts debate competing claims in the case of OW Bunker, Steve Simms of Simms Showers says careful and informed choices should be made over terms and conditions and the choice of legal jurisdiction

For a Roman Emperor, Marcus Aurelis (121-180 AD) did pretty well. He stuck around for a long time (about 60 years), and he survived attempted invasions of 'barbarians' as well as wild economic fluctuations.

Facing all of this, Marcus (or his speech writers) every now and then thought great thoughts, including: '[n]ever let the future disturb you. You will meet it, if you have to, with the same weapons of reason which today arm you against the present.

Marcus' trouble was that he – or at least his successors – didn't take his advice. They didn't learn from their 'present' experience. The barbarians were pretty good fighters. The Romans looked great, they could think great thoughts, but they rarely learned anything from their battles with opponents and eventually were overrun.

Don't be like Marcus. Marine fuel suppliers, brokers and traders should seize the opportunity to learn now from the OW Bunker situation of last year. And this experience could be only the start of more severe situations if our industry does not choose to change.

The collapse of OW last November surprised many, as is now evidenced by world wide vessel arrests, interpleader and other (expensive) related legal actions. The 'legion' of legal actions today most frequently involve OW's lead bank and lender, ING, which claims to be assigned various maritime rights by the range of OW companies.

It will be many years before the OW situation somehow resolves itself, but the legal actions to date should serve as notice to marine fuel physical suppliers, brokers and traders to examine their trading practices now, including their sales terms and conditions, so as to anticipate more situations like the OW collapse.

It was just a little over a year ago, in June, 2014, that just about everyone in the marine fuel industry was living pretty large. Oil sold at an average of $106 per barrel. But, in the first part of October, 2014 that had fallen to about $82/barrel. Among the causes of OW's collapse was the further price fall by the first part of November, 2014. The price fall continued up to 27 November, OPEC meeting, marking a $78/barrel price (a 27% price drop from June, 2014) which has continued steadily to today's approximate $45/barrel price (58% less than June, 2014).

Current projections are that by the end of 2015, prices will 'stabilise' at $51/barrel.

For bunker suppliers, traders and brokers, this supposed 'stability' is none at all because profit margins on sales and trading have stayed the same. Most readers of this article will appreciate this painfully. For those others, imagine that you have been living on a $50,000 per year income. You are living relatively comfortably, but a year and a half later, you find yourself living on $24,000. That is an extraordinary difference.

Projections are that oil prices will stay 'stable' for some (unspecified) time, but what does this mean for the marine fuel industry? In the months since the OW collapse the industry has experienced other suppliers, brokers and traders exit the market – many involuntarily – unable to sustain the low returns that they can obtain on low prices.

Since the OW insolvency, there have been hundreds of vessel arrests and related court actions around the world. Although the legal and related contractual and business lessons from these are still incomplete, there are some emerging principles that suppliers, brokers and traders should make sure they adopt now – before another OW-type collapse.

Well-incorporated and thought out sales terms and conditions are, once again, proving to be critical as various entities along the line of supply contend over who should be paid.

Fundamentally, of course, the entity actually supplying the fuel, the physical supplier, should be paid first, and then the 'downstream' entities be paid what they agreed to be paid, that is, a price which mostly is the price of the physical supplier and an additional amount commercially agreed with the 'upstream' customer.

In the OW situation, physical suppliers and others 'downstream' from the ultimate entity dealing with the vessel owner or charterer (typically, an OW entity) have struggled with claiming that they have vessel arrest rights, or otherwise primary rights to funds (which have increasingly been deposited with various courts through 'interpleader' actions) which vessel owners or charterers have paid to avoid vessel arrests.

Significantly, OW's own standard terms and conditions (there are two, one incorporating US, the second UK law, but both have this term) contain the following, and physical suppliers might say, prescient (for them) language (Clause "L.4"):

(a) These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions. In such circumstances, these Terms and Conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party.

(b) Without prejudice or limitation to the generality of the foregoing, in the event that the third party terms include:

(i) A shorter time limit for the doing of any act, or the making of any claim, then such shorter time limit shall be incorporated into these terms and conditions.

(ii) Any additional exclusion of liability clause, then same shall be incorporated mutatis mutandis into these.

(iii) A different law and/or forum selection for disputes to be determined, then such law selection and/or forum shall be incorporated into these terms and conditions.

(c) It is acknowledged and agreed that the buyer shall not have any rights against the Seller which are greater or more extensive than the rights of the supplier against the aforesaid Third Party.

The 'bottom line' of these OW terms and conditions is that the physical supplier's sales terms are incorporated in all OW sales.

This recently has proved difficult to OW's lender, ING, attempting to claim OW's rights to arrest a vessel or otherwise receive payment, where OW never paid its physical supplier.

In other words, the Summer 2015 UK High Court decision in *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd* (the *Res Cogitans*), [2015] EWHC 2022 (Comm) – which OW's UK receivers (really, ING) have trumpeted recently as the last word against physical suppliers and others in favour of ING – is hardly the last word at all.

The Canada Federal Court's recent *Canpotex Shipping Services, Limited, et al. v. Marine Petrobulk, Ltd. et al.* (Federal Court of Canada, 2015 FC 1108, 23 September, 2015) decision considered the claims of Canadian-based physical supplier Marine Petrobulk Ltd. (MP), competing with those of ING, asserting OW's claimed rights, as assignee under ING's loan agreement. Canpotex, the charterer, deposited over $600,000 into the Federal Court, the amount plus interest and costs Canpotex agreed was due for the marine fuel supply to two vessels it had chartered.

Canpotex (responsible to the vessel owners from which it had chartered), like the range of vessel owners across the present 'OW World', made the deposit (attempting, ultimately, successfully, an interpleader action) and asking the court to restrict the competing entities (which here, as in many situations across the world now, include the physical supplier and ING asserting one or more OW interests). The Canada Federal Court agreed with the physical supplier, MP: the physical supplier had first claim to the funds deposited.

The reason for this was both OW's, and the physical supplier's (MP's) sales terms and conditions, and operation of Canada law. The Federal Court of Canada first observed (at 59) as follows:

It is also clear from Schedule 3 of the General Terms and Conditions between Canpotex and OW UK that Canpotex and OW UK understood and agreed that their contractual arrangements would be varied where the physical supply of the fuel was undertaken by a third party such as MP, and that the buyer was deemed to have read and accepted the terms and conditions imposed by the third party. Consequently, I conclude that both Canpotex and OW UK were bound by MP's General Terms and Conditions for the supply of the marine bunkers to the Vessels that are the subject of this dispute.

MP had sales terms and conditions which gave it arrest rights for unpaid provisions. OW's terms and conditions – those quoted above – incorporated MP's.

This, therefore, is an important lesson for physical suppliers, brokers and traders: make sure, that the 'upstream' entity you are selling to also has sales terms and conditions incorporating your effective sales terms and conditions.

The Court then continued that:

It is, of course, understandable why ING would now want that to be the case, but ING cannot assert greater rights against Canpotex and/or MP than were enjoyed by OW UK, and the record is clear that OW UK accepted that the marine bunkers would be supplied to the Vessels on MP's Standard Terms and Conditions. ING is looking for a technical way out of the consequences of this agreement between MP and OW UK but, in my view, ING cannot assert contractual rights or equities that OW UK did not have.

In Canada, as the Canpotex court emphasised (opinion at 17), the established law is that 'an intermediary who has not paid an actual physical supplier of goods or services to a vessel is not entitled to make an *in rem* claim against the vessel where the goods and services were supplied: *Balcan Ehf v Atlas (The*), 2001 FCT 1328 [*Balcan*].'

This also is where terms and conditions are critical – focusing on the retention of title to marine fuel provided in close relationship to the choice of law, in sales terms and conditions. The physical supplier in the Canpotex case (MP) had chosen Canada law to control its sales terms and conditions. This choice was critical.

In the UK High Court's *Res Cogitans* decision, however, the law involved was UK law, which worked to give rights of recovery only to the OW entity involved, and therefore that right assigned to ING. If under UK law, said the *Res Cogitans* court, there had been a sale (immediate passage of both possession and title to the fuel provided), then ING (through OW) would have had no rights, having not paid for the fuel. Because title had not passed (OW having not paid the physical supplier, which had a title retention clause), however, the *Res Cogitans* court decided there was no sale, and so the UK *Sale of Goods Act* did not apply. The *Sale of Goods Act*, if it applied, wrote the court, would have given ING (through OW) no rights for goods (the fuel) not paid for.

Instead, said the court, the transaction was not for a sale of goods, but of a transmission of entrusted (bailed) goods (the fuel), for which OW (and thus ING) had a right of recovery.

Marine fuel suppliers, brokers and traders should not read *Res Cogitans* to say that sales terms and conditions, title retention clauses are bad. They benefit the seller, instead, when they also incorporate the right law – in the case of Canpotex, Canadian law.

US law also can be beneficial from this standpoint of determining who actually has 'provided' fuel to a vessel, and thus who actually holds the maritime lien *in rem* (against the vessel directly, regardless of ownership of the vessel).

As I have outlined in previous articles in *Bunkerspot*, the US law addressing marine fuel suppliers' vessel arrest rights, for maritime liens *in rem*, is the Commercial Instruments and Maritime Liens Act ('CIMLA').

In the Canpotex case, the physical supplier – its terms and conditions linked to the supply through OW's sales terms and conditions – had a direct claim through to Canpotex, the OW customer and to the vessel. The Federal Court of Canada therefore wrote further as follows (at 60-62):

> *[135] On the record before me, the evidence shows that on or about October 22, 2014 Canpotex, as charterer, ordered the marine bunkers from OW UK to be delivered to the Vessels, and that on October 22, 2014, MP was contracted by OW UK to provide the marine bunkers to the Vessels. MP provided confirmation to OW UK on the same day. Paragraph 2 of MP's Standard Terms and Conditions provides as follows:*
>
> > … If the Marine Fuel is ordered by an agent, manager or broker then such agent, manager or broker, as well as the principal, shall be bound by, and liable for, all obligations as fully and as completely as if the agent were itself such principal, whether such principal is disclosed or undisclosed, and whether or not such agent, manager or broker purports to contract as agent, manager or broker only.
>
> *[136] In my view, the agreement is clear that Canpotex and OW UK were jointly and severally liable to pay MP the full purchase price for the marine bunkers delivered to the Vessels. This is so even though MP initially invoiced OW UK for the purchase price. In my view, this liability arises irrespective of whether OW UK acted as agent, broker or manager for this supply of the bunkers. The definition of 'Customer' under s 1 of the MP's Standard Terms and Conditions captures both Canpotex and OW UK as Customers, and s 2 also deems any principal, agent, manager or broker to be a Customer, 'all of whom shall be jointly and severally liable as Customer under each Agreement.' Read in the context of the whole clause and agreement, these words, in my view, cannot possibly mean that joint and several liability only arises if there is a principal/agent, broker or manager relationship. The clause simply brings such parties within the meaning of 'Customer' if there is such a relationship, and it is all customers who are jointly and severally liable 'under each Agreement.' On the facts before me, this means that joint and several liability extends to MP and OW UK because they both meet the definition of 'Customer' either under s 1, or under s 2 if there is an agency manager or broker relationship. The Court does not have to decide if a principal/agent relationship exists in this case between Canpotex and OW UK. In the normal course, Canpotex would be responsible for the full purchase price and OW UK would be entitled to its mark-up. In the event of OW UK's bankruptcy and failure to pay the purchase price for the marine bunkers to MP, the Standard Terms and Conditions make it clear that MP can look to Canpotex and compel payment of the full amount. In the event that Canpotex does pay the full amount then it is not contractually obliged to also pay OW UK the purchase price because OW UK has breached its obligations to pay for the bunkers. The reality is that, if Canpotex pays MP for the bunkers the full purchase price will have been paid directly by Canpotex rather than indirectly though OW UK. Canpotex's direct payment will fall within the terms of MP's Standard Terms and Conditions by which Canpotex, OW UK and MP are bound. These terms and conditions are deemed (paragraph 16) to supersede all prior negotiations and agreements. There is no residual contractual obligation that requires Canpotex to also pay the purchase price to OW UK after it has paid MP, and it would be bizarre and unconscionable if there were. In my view, MP's Standard Terms and Conditions clearly contemplate a situation such as the present where, if OW UK goes bankrupt and cannot pay the full purchase price for the bunkers, then MP can look to Canpotex for payment on the basis of joint and several liability.*

MP's sales terms and conditions include the following language:

> …Customer acknowledges and agrees that Marine Petrobulk has and can assert a maritime lien on the Vessel or Customer's delivery vessel, and may take such other action or procedure against the Vessel, Customer's delivery vessel and any other vessel or asset beneficially owned or controlled by Customer, for all sums owed to Marine Petrobulk by Customer. Marine Petrobulk shall not be bound by any attempt by any person to restrict, limit or prohibit its lien attaching to the Vessel and, in particular, no wording placed on the bunker delivery receipt or any similar document by anyone shall negate the lien hereby granted…

Based on this, the Court decided that '[i]t is clear... that MP has a lien against the Vessels in this dispute' and (at 64)

> *ING has no lien or security interest against the Vessels or any asset beneficially owned by Canpotex, including the Funds, so that once Canpotex pays MP the purchase price for the bunkers supplied to the Vessels from the Funds, ING has no claims against Canpotex or any asset Canpotex or the other Plaintiffs own or control.*

Consequently, because of a difference in the choice of law, and the wording of sales terms and conditions, the physical supplier in the Canpotex situation has (subject to present, potential appeal) been paid – while those in the *Res Cogitans* case (again subject to present appeal) have not.

The lesson again for this is, carefully, with the benefit of the OW experience, employ the right terms and conditions language and choice of law.

Recently in a situation similar to that of OW, asserting the interests of an unpaid physical supplier which an insolvent broker had not paid, the author succeeded in assisting recovering entirely for the physical supplier, in a vessel arrest. The terms and conditions language which the physical supplier had embraced, after consultation with the author (and with the benefit of the OW situation, particularly in regard to unpaid physical suppliers) was the following.

First, the physical supplier prominently stated on its bunker delivery receipt (BDR) the following language:

> Signing acknowledges that you received a copy of our General Terms and Conditions. ANY OFFER TO SELL TO CUSTOMER IS SUBJECT TO AND INCORPORATES BY REFERENCE ALL OF [named physical

supplier] CURRENT GENERAL TERMS AND CONDITIONS A COPY OF WHICH IS APPENDED HERETO OR AVAILABLE AT [web site of physical supplier, where terms and conditions are posted and easily accessible].

Printed as a part of the BDR are the physical supplier's GENERAL TERMS AND CONDITIONS OF SALE' – with a space for signature on each page – including the following:

SIGNATURE AND INITIALS BELOW AND ON EACH PAGE OF OUR GENERAL TERMS AND CONDITIONS OF SALE (GTS) ACKNOWLEDGES THAT YOU HAVE RECEIVED A COPY OF OUR GENERAL TERMS AND CONDITIONS OF SALE AND ON BEHALF OF YOUR PRINCIPALS, DEFINED AS BUYERS IN THE GTC, BUYERS AGREE TO THE GTC. BUYER BY YOUR SIGNATURE AND INITIALS ACKNOWLEGE THAT SELLER EXPRESSLY HAS RELIED ON YOUR ACKNOWLEDGEMENT OF AGREEMENT TO THE GTC AS A CONDITION OF PROVISION OF MARINE FUEL AND VALUE OF THAT MARINE FUEL AND AVANCEMENT OF CREDIT. YOU AGREE THAT YOU PROVIDE THIS AGREEMENT INDEPENDENT OF ANY OTHER LEGAL OBLIGATION TO SIGN THIS BUNKER DELIVERY NOTE.

The physical supplier's 'GTS' also included the following terms:

In consideration of Seller's extension of credit to Buyer, Buyer irrevocably assigns to buyer all right, title and interest to all claims and security interests, including but not limited to maritime liens *in rem* (herein, the 'Assigned Liens') which Buyer may have arising out of any transaction or provision involving any Receiving Vessel (as defined by the GTCs), including but not limited to any claim for a maritime lien *in rem* which the Buyer may have against such Receiving Vessel, until Seller is fully satisfied, including but not limited to the principal amount of Seller's sale to or in connection with the Vessel, all interest, attorneys' fees and court costs. Seller shall hold exclusive title to and have the exclusive right to exercise and enforce its rights to such Assigned Liens until Seller is fully satisfied for all amounts which the Assigned Liens secure. Seller may proceed anywhere in the world, including in the name of Buyer, to assert and recover on its Assigned Liens, including but not limited to in arrest of the Receiving Vessel and/or for recovery from creditor of Buyer. Buyer agrees in turn that it will require any further entity to which it sells the Marine Fuels, to assign to Seller all of such further entity's Assigned Liens. Buyer further agrees that it will within one (1) day of Seller's request provide Seller with the identity including email and facsimile address, of any further entity to which Buyer sells the Marine Fuels.

Buyer grants Seller a limited power of attorney to execute on Buyer's behalf, such documents including filings under the Uniform Commercial Code of any United States state, or similar government body under any law providing for registration of any security interest, any filing which Seller may consider helpful to perfect any security interest under these General Terms and Conditions of Sale (GTS).

Neither this nor any other terms and conditions statement can give 100% certainty that in a bankruptcy or insolvency situation there will be a 100% recovery – but the above certainly assisted the physical supplier significantly to recover where it otherwise might have faced no recovery or at 'best' an interpleader proceeding.

Incorporated sales terms and conditions, however, are not the 'last word' for improving the position for recoveries by marine fuel suppliers, traders and brokers. It also is possible – and desirable if the customer will do this – to enter into an explicit, separate agreement with the customer (just as a bank might do with a borrower providing security) with full signature, negotiated terms and filed security agreements (in the United States, called 'UCC' (Uniform Commercial Code") '1's'.

This, of course, is much more involved than a normal supplier-broker-trader-customer transaction in the marine fuel industry. But, given the changes in the market such agreements now may be particularly desirable, and attractive, for lenders to finance.

Lenders understanding the better security that strong sales terms and conditions provide, however, also should be willing to provide financing to marine fuel suppliers, traders or brokers, where those lenders otherwise, particularly in the present market, otherwise might not be willing.

Vessel charterers and owners – who agree that they owe someone payment for unpaid marine fuel supplies – understandably resist payment to one claimant in the chain of supply, where they fear that others unpaid may arrest their vessel.

The OW insolvency has introduced a new 'interpleader' phenomenon in marine fuel supply. That is, before, if a marine fuel supplier was unpaid, it simply would arrest the vessel and (of course it's not always 'simply') after a direct proceeding against the vessel, there would be a result. OW introduced the situation of frequently unpaid 'downstream' suppliers, brokers and traders – who, depending on where they catch a vessel around the world, might arrest the vessel.

Thus, instead of paying the money they agree they owe, directly to the providers they agree should be paid (the physical suppliers of the marine fuel, and then, commissions to the 'upstream' brokers and traders), the owners and charterers have paid the money that they admit they owe for the fuel – to someone – to the courts. Then, the various parties (including ING, as the financing bank) fight over it, expensively for all concerned.

The OW situation in courts around the world (Canada, the United Kingdom, and the United States, for example) has led to decisions which have established (for OW and situations thereafter) the right of vessel owners and charterers to bring 'interpleader' actions (funds paid into court, for claimants to fight over) to avoid vessel arrests.

At the same time courts (in the United States, Singapore, and India, so far) have rejected interpleader attempts, where the court has concluded that there is no real dispute over the funds involved.

'Interpleader', where there is any interest along the chain of marine fuel supply that is unpaid, is certain in the future. Marine fuel suppliers, brokers and traders can 'interpleader-proof' their arrests, however, by using sales terms and conditions along with effective law choice clauses.

These, as ultimately they did for the physical supplier in Canpotex, and in the author's experience, make clear that the sole recovery rights are with the unpaid physical supplier, broker or trader. Not only can such terms ultimately defeat an interpleader effort (and obtain payment) but they also can give the confidence that an educated financial institution needs to approve or continue to support financing of a marine fuel supplier, trader or broker.

The OW situation presents the opportunity (unlike Marcus Aurelius and his Romans, who would not learn from experience) to incorporate lessons that will take the marine fuel industry forward into a more stable future.

Steve Simms is a Principal of Simms Showers LLP.

Email: jssimms@simmsshowers.com
Tel: +1 410 783 5795