BUNKER

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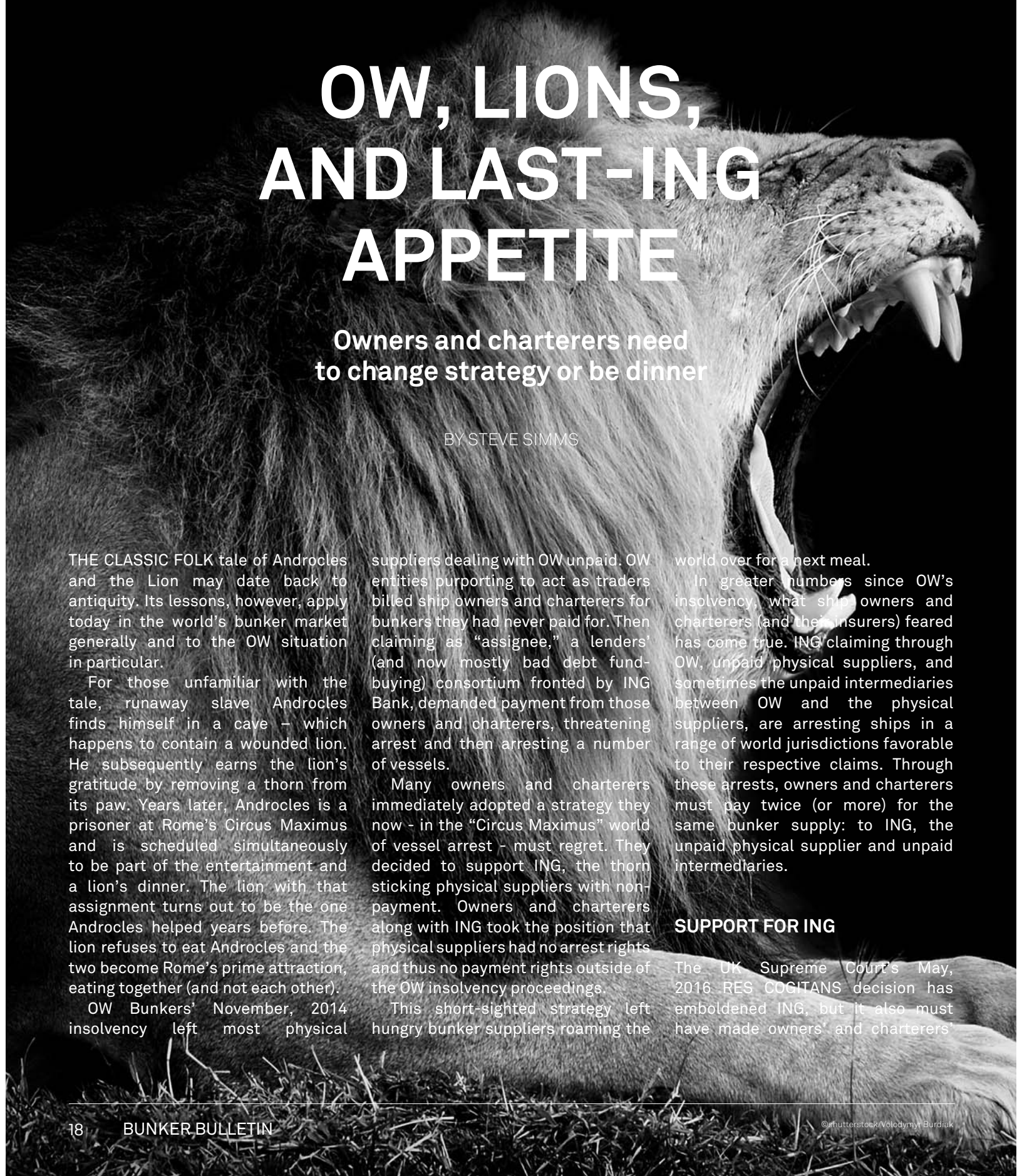


OW, LIONS, AND LAST-ING APPETITE

Owners and charterers need to change strategy or be dinner

BY STEVE SIMMS

THE CLASSIC FOLK tale of Androcles and the Lion may date back to antiquity. Its lessons, however, apply today in the world's bunker market generally and to the OW situation in particular.

For those unfamiliar with the tale, runaway slave Androcles finds himself in a cave – which happens to contain a wounded lion. He subsequently earns the lion's gratitude by removing a thorn from its paw. Years later, Androcles is a prisoner at Rome's Circus Maximus and is scheduled simultaneously to be part of the entertainment and a lion's dinner. The lion with that assignment turns out to be the one Androcles helped years before. The lion refuses to eat Androcles and the two become Rome's prime attraction, eating together (and not each other).

OW Bunkers' November, 2014 insolvency left most physical suppliers dealing with OW unpaid. OW entities purporting to act as traders billed ship owners and charterers for bunkers they had never paid for. Then claiming as "assignee," a lenders' (and now mostly bad debt fund-buying) consortium fronted by ING Bank, demanded payment from those owners and charterers, threatening arrest and then arresting a number of vessels.

Many owners and charterers immediately adopted a strategy they now - in the "Circus Maximus" world of vessel arrest - must regret. They decided to support ING, the thorn sticking physical suppliers with non-payment. Owners and charterers along with ING took the position that physical suppliers had no arrest rights and thus no payment rights outside of the OW insolvency proceedings.

This short-sighted strategy left hungry bunker suppliers roaming the world over for a next meal.

In greater numbers since OW's insolvency, what ship owners and charterers (and their insurers) feared has come true. ING claiming through OW, unpaid physical suppliers, and sometimes the unpaid intermediaries between OW and the physical suppliers, are arresting ships in a range of world jurisdictions favorable to their respective claims. Through these arrests, owners and charterers must pay twice (or more) for the same bunker supply: to ING, the unpaid physical supplier and unpaid intermediaries.

SUPPORT FOR ING

The UK Supreme Court's May, 2016 RES COGITANS decision has emboldened ING, but it also must have made owners' and charterers'

strategy obviously regrettable. The Court's opinion opens observing:

"The essential problem arises from the insolvency of the OW Bunker Group and the concerns of vessel owners that they may be exposed to paying twice over, once to their immediate bunker supply group now insolvent, and again to the ultimate source of the bunkers who may claim rights under a reservation of title or maritime lien. The concerns stem from what are understood to be fairly typical conditions on which bunkers are supplied worldwide."

PST Energy 7 Shipping LLC and another (Appellants) v O W Bunker Malta Limited and another (Respondents) [2016] UKSC 23, May 11, 2016.

"Fairly typical"? Yes, perhaps considering the provision of bunkers, but, is it "typical" to pay twice for the same thing?

The UK Supreme Court was just a step up from the High Court observation about ten months' before, where the High Court judge (Mr. Justice Males) had observed the following:

"53. As already indicated, I cannot exclude the possibility that the Owners may have a liability to [the trader, Rosneft, which paid the physical supplier for the bunkers, but never was paid] 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 [the OW entity involved] which by necessary implication authorized the consumption of the bunkers prior to payment, and which contemplated another English law contract between [OW] and Owners which expressly authorized 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."

PST Energy 7 Shipping LLC and another (Appellants) v O W Bunker Malta Limited and another (Respondents), [2015] EWHC 2022 (14th July, 2015).

MOUNTING EXPOSURE

We could supplement the High Court's observation - which the UK Supreme Court affirmed - to read: "...exposure to claims with the possibility of arrests *[piracy, shipwreck, mutiny, and multiple claims for different entities providing exactly the same thing making shipowners pay multiple times for the same thing]* is one of the risks which shipowners run."

This is true, but are these necessary - and avoidable - risks?

One can't blame the physical supplier, who provided the fuel which was sold in the first place. Essential to the OW sales terms and conditions ING has relied on to claim everything it and the debt buying companies it stands in for is paragraph "L.4" which says:

"These Terms and Conditions are subject to variation in circumstances ***where the physical supply of the Bunkers is being undertaken by a third party*** [herein Macoil] which insists that the Buyer [which OW's terms also defines as the Vessel's Owners/Charterers] 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" .***

However, few OW entities ever undertook actual physical supply. OW instead "undertook" most all of its physical supplies to vessels through third party physical suppliers.

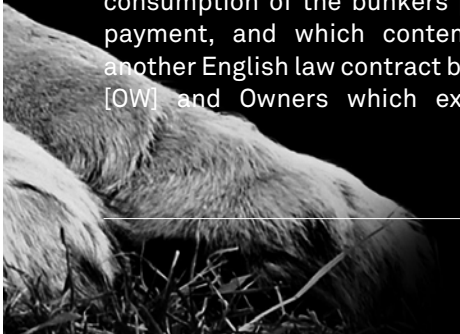
The third party physical supplier terms invariably insist that they be paid directly by the vessels' owners and charterers and that they have a maritime lien *in rem* against the vessels which the physical supplier, has supplied. They also insist that their direct contractual relationships be paid from the owners/charterers and others directly contracting for the supply.

SPEAKING PLAINLY

What in plain language does this mean? OW's own language, which ING insists on (and which it must insist on in order to attempt to recover anything) means that physical suppliers - which have given most of the value (the actual bunkers) to the vessel owners/charterers - have the right to recover not only by arresting the vessels supplied, but also directly against the entities ordering the suppliers' bunkers.

What OW's own "L.4" requires of ING is its mark-up or commission over and above the price of the physical suppliers' bunkers. It also establishes ING, as trustee and fiduciary, as having the responsibility to receive and then pay to the physical supplier the value of the physical supplier's bunkers. But, clearly, OW terms' clause "L.4" does not turn the value of the physical supplier into something that ING ever owns or could be assigned.

This makes complete sense; it makes no sense that anyone claiming payment who has paid nothing for the



underlying supplies, should receive anything.

What owners and charterers (and their insurers) are now seeing is the natural result of their less-informed, initial decisions following the relatively unprecedented situation. Before, owners and charterers could be content. They imagined that they only owed money to bunker traders, who took complete title to the bunkers those owners/charterers bought. But that's not true or right.

Nearing two years out from OW's collapse and as a result of their misguided strategy of penalizing to physical suppliers and intermediaries, owners/charterers and their insurers are seeing what should have been the expected consequence of their short-sighted decision.

ING arrests in one place favorable to them, and suppliers/intermediaries arrest in another as much or more favorable to them. ING opposes the suppliers'/intermediaries' participation in an arrest, insisting on independent London arbitration or otherwise. The suppliers/intermediaries (also encouraged by no less than the UK Supreme Court) forge ahead in court (not bound by arbitration) insisting that they should independently be paid.

This all goes back to the owners'/charterers' fundamental decision about who should suffer from the ING thorning.

KEY QUESTION

The dominant question post OW-insolvency for bunker traders is have you paid the physical supplier? Many owners and charterers have not, as they didn't want to pay twice.

However, the strategy of ignoring the thorn and hoping the lion would forget, was not a well thought out one. Our lions – the unpaid physical suppliers – may have long memories, especially when they are informed by empty stomachs.

What, then is the answer going forward? Owners/charterers and their insurers, and physical suppliers and intermediaries in the chain behind any ultimate OW entity (through which ING claims) together now must insist that the physical suppliers, and intermediate entities, are paid what all originally agreed to be paid.

The Canada Federal Court *Canpotex* decision, at the time of writing on appeal to the Canada Federal Appeals Court, sensibly reaches this result. In consideration of OW Group's sales terms clause L.4, this would seem to be the right result: everyone receives what they agreed on at the beginning. This would even include ING, which would receive the mark-up, over and above what the OW entities were to pay the physical supplier.

Presently and perhaps emboldened by the Supreme Court's *RES COGITANS* decision, ING is, now nearing two years after OW's insolvency, insisting even more vehemently that physical suppliers and intermediary traders not be paid. If owners and charterers fail to resist this, their vessels (and insurers) will have to pay twice for the same bunkers - a bad experience all owners/charterers/insurers would agree.

But there is another way: beginning with OW's terms' clause L.4, owners/charterers/insurers should insist that there should only be one payment for one bunkers provision, and that each in the transaction should receive what each agreed to receive. The bunker supplier and the intermediary to the OW entity should each receive the original, agreed payment without duplicates.

So, back to Androcles and the Lion, where we started. The physical suppliers - aka our lion – may find it hard to forget that ING thorn and the pain it caused. Owners/charterers and their insurers, need to make sure that there is reliable means to assure this particular lion - provider of the very means to propel their vessels and which extends credit – is appeased.

Post-OW insolvency their first question in a bunkers transaction should be, "how can I make sure the physical supplier is paid?" The OW L.4 clause may be the yet unsung responder to this question. Owners/charterers must insist in their transactions that traders (and their thorny financers) have no more rights to recover - by arrest or directly - anything more than they have paid for their physical supply. They also should, now in OW/ING situations and going forward, recognize physical suppliers' recovery rights for the supply only those suppliers have provided.

Years from now or probably sooner, owners/charterers and their insurers will be face-to-face in the Circus Maximus with the lions they either have chosen to help or stick. At that point, the physical suppliers will choose whether to dine with or on those who made the earlier choice of not paying, by which point ING will be but a distant memory.

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