

# A comparative analysis of national responses to the OW Bunker collapse

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## 1. Introduction

OW Bunker & Trading A/S was founded in Denmark in 1980. It had become the world's largest bunker supplier at the time of its collapse on November 7<sup>th</sup>, 2014. At its peak, it had operations in 29 countries and claimed to control about 7% of worldwide bunker trade.<sup>1</sup> Its demise was swift, amid allegations of fraud and improper dealing. It filed for bankruptcy less than 48 hours after a fraud scandal worth \$125 million was uncovered at its Singapore-based subsidiary Dynamic Oil Trading.<sup>2</sup>

The sudden disappearance of OW Bunker has led to litigation all over the world, much of which is still continuing at the time of writing.<sup>3</sup> The basic structure of the business operation was simple, but it has led to profoundly difficult legal questions. Ship operators (sometimes owners, more often time charterers) would order bunkers for their ships from an OW Bunker entity, which would then engage another company to make the physical supply of bunkers to the ship, usually requiring the ship's master or chief engineer to sign a bunker delivery note after

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<sup>1</sup> "OW Bunker: How one of the world's largest marine fuel providers went from IPO to bankruptcy", *Ship and Bunker* (January 7, 2015), available at <https://shipandbunker.com/news/features/industry-insight/649431-ow-bunker-how-one-of-the-worlds-largest-marine-fuel-traders-went-from-ipo-to-bankruptcy-part-1-founding-to-ipo>.

<sup>2</sup> "OW Bunker files for bankruptcy", *gCaptain* (November 7, 2014), available at <http://gcaptain.com/ow-bunker-files-bankruptcy/>.

<sup>3</sup> August 2017.

delivery was completed. The physical bunker supplier would typically provide the bunkers on credit, secure (or so it thought) in the belief that it would be paid by OW Bunker, or could ultimately seek redress from the ship operator who bought the bunkers. When the intermediary OW Bunker disappeared, a legal conundrum appeared in its place. Who was to be paid for the bunkers supplied on credit? Was it the physical supplier, or was it OW Bunker, which assigned its receivables to ING Bank after its demise? Whom should the ship operator pay? Hundreds of millions of dollars have turned on those basic questions, which have been litigated all around the world since 2014. This short paper is an attempt to give a comparative overview of the various legal responses that countries have made.

## **2. *The contracts: sale, agency, or something else entirely?***

One of the key questions that courts around the world have had to consider is the nature of the contract between OW Bunker (or one of its subsidiaries) and the physical supplier of the bunkers. Another is the nature of the contractual relationship between OW Bunker and those operating the ship that bought the bunkers. The 2013 edition of the OW Bunker Group Terms and Conditions is attached to this paper as a resource for readers to make up their own minds about the second question, as these were the contractual terms upon which OW Bunker dealt with the ships to which it arranged for bunkers to be supplied.

For the most part, the OW Bunker standard terms and conditions seem unquestionably to be evidence of a contract for the sale of bunkers from OW Bunker to the ship-side purchaser. The contract describes OW Bunker as the “Seller” and those operating the ship (its owners or charterers) as the “Buyer”. Although reference is made to the “Supplier” as being the person who will “supply or deliver the Bunkers” to the ship, the basic terms of the contract, with one small but possibly important exception, make it look like a sale of bunkers by OW Bunker to its counterparty, the ship operator. The contract acknowledges that OW Bunker will have to find the bunkers from a physical supplier, but that is *res inter alios acta* so far as the contract between

OW Bunker and the ship operator is concerned. It appears to be a simple sale from OW Bunker to the ship operator, complete with a retention of title clause (cl. H), reserving to OW Bunker title to the bunkers until payment by the ship-operator/buyer has been made in full.

The contractual position is complicated considerably, however, by the fact that the physical suppliers of the bunkers generally dealt with OW Bunker on the basis of their own terms and conditions, which obviously vary considerably, but which tend to try to give the impression that the ultimate ship-side buyer is “the party or parties obligated to buy [bunkers] under the agreement”, and which usually make explicit that any sale of bunkers is made on the credit of the ship to which the bunkers are supplied, as well as any person acting on behalf of the ultimate buyer. A copy of the Terms and Conditions of Sale of a Houston-based physical bunker supplier, NuStar Energy Services, Inc., is also attached to paper as an example of the terms on which physical bunker suppliers dealt with OW.<sup>4</sup>

Thus, when OW suddenly disappeared from the picture, one of the key legal questions – perhaps *the* centrally important legal question – became: what was the nature of the contractual relationship, if any, between the physical supplier and the ship operator? Was there any privity of contract between the two? If so, that can only have occurred because OW Bunker was acting as agent for one or other of the parties when dealing with the other. If OW Bunker was acting as principal, buying from one party and selling to the other, then there was no direct contractual nexus between the supplier and the ship, and thus no contractual basis for the former to sue the latter.

In several of the countries that have considered this OW-related question, the courts have concluded that there was no contractual relationship between the bunker supplier and the ship

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<sup>4</sup> I should point out that although I have given advice on several cases brought by NuStar, I am not here disclosing confidential information. As the header of the attached document shows, it was filed in the U.S. District Court for the Southern District of Texas, and so is part of the public record. The NuStar Terms and Conditions are also freely available at <http://www.merlinpetroleum.com/terms/NUSTARUSA2009.pdf>.

operator because OW Bunker acted as principal, rather than as agent for the ship, when it purchased bunkers from the physical supplier. That has been the conclusion of courts in the United States (repeatedly, although many of the decisions are currently under appeal),<sup>5</sup> Singapore,<sup>6</sup> Hong Kong (where the agency argument was actually abandoned by the bunker supplier after the court had refused to strike it out),<sup>7</sup> Italy,<sup>8</sup> and France.<sup>9</sup> Indeed, the High Court of Singapore thought that the absence of a contractual nexus between bunker supplier and ship was so obvious that it awarded damages for wrongful arrest of the ship by the bunker supplier,<sup>10</sup> although it should be noted that that aspect of the case is presently on appeal to the Singapore Court of Appeal.<sup>11</sup>

One aspect of the OW Bunker General Terms and Conditions that has attracted attention in some, but not all, of these cases is clause L.4(a), which provides:

“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

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<sup>5</sup> *Valero Marketing and Supply Co. v. MV Almi Sun*, 2015 WL 9459971 (E.D.La. 2015); 160 F.Supp.3d 973, 2016 AMC 632 (E.D.La. 2016)(*Valero II*); *O'Rourke Marine Servs, L.P. v. MV Cosco Haifa*, 179 F.Supp.3d 333 (S.D.N.Y. 2016); *ING Bank, N.V. v. MV Temara*, 203 F.Supp.3d 355, 2016 AMC 2387 (S.D.N.Y. 2016); *Bunker Holdings Ltd. v. M/V YM Success*, 2016 AMC 1723 (W.D. Wash. 2016); *Barcliff, L.L.C. v. M/V Deep Blue*, 2016 AMC 2901 (S.D. Ala., 2016); *NuStar Energy Services, Inc. v. M/V Cosco Auckland*, 2017 AMC 1184 (S.D.Tex., 2016).

<sup>6</sup> *The Xin Chang Shu* [2016] 1 SLR 1096.

<sup>7</sup> *Newocean Petroleum Co. Ltd v. OW Bunker China Ltd* [2016] HKEC 2798 (HKCA).

<sup>8</sup> Tribunal of Venice, March 24, 2015.

<sup>9</sup> Cour d'Appel de Pau, September 15, 2015.

<sup>10</sup> *The Xin Chang Shu* [2016] 1 SLR 1096.

<sup>11</sup> Again, in the interests of full disclosure, I should point out that I acted as expert witness for the bunker supplier in the appeal to the Singapore Court of Appeal, which was still pending at the time of writing.

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.”

This provision has provided the basis for some bunker suppliers to argue that there is contractual privity between them and the ultimate ship-side buyer (called “the Buyer” in the OW Bunker terms and conditions), because it indicates that the relevant OW Bunker entity was acting as agent to bind the ultimate buyer to the bunker supplier’s contractual terms and conditions. Such an argument has failed in the United States,<sup>12</sup> was raised but not finally decided in an interpleader case<sup>13</sup> in the Canadian Federal Court of Appeal,<sup>14</sup> and is still pending in the Singapore Court of Appeal.<sup>15</sup>

In one case in the United States,<sup>16</sup> the court held that there was contractual privity between the physical bunker supplier and the ultimate ship-side buyer simply because the ship’s Chief Engineer signed the supplier’s bunker delivery note when the bunkers were pumped into the ship. So far, this decision has proven to be a lone outlier – indeed, other US decisions have come to the opposite conclusion<sup>17</sup> – but it should be noted that it has been cited in another US decision as a reason for allowing an interpleader proceeding to continue.<sup>18</sup>

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<sup>12</sup> *ING Bank, N.V. v. MV Temara*, 203 F.Supp.3d 355, 2016 AMC 2387 (S.D.N.Y. 2016).

<sup>13</sup> Interpleader proceedings are considered below, in Section 3.

<sup>14</sup> *ING Bank, N.V. v. Canpotex Shipping Services Ltd* [2017] FCA 47. This case is presently on appeal to the Supreme Court of Canada.

<sup>15</sup> *The Xin Chang Shu* [2016] 1 SLR 1096.

<sup>16</sup> *Martin Energy Services, L.L.C. v. MV Bravante IX*, 233 F.Supp.3d 1269 (N.D.Fla. 2017).

<sup>17</sup> *Clearlake Shipping Pte Ltd v. OW Bunker (Switzerland), S.A.*, --- F.Supp.3d ---, 2017 AMC 627 (S.D.N.Y. 2017).

<sup>18</sup> *ING Bank, N.V. v. MV African Swan*, 2017 WL 1080078 (S.D.N.Y. 2017).

Although most courts around the world have taken the position that the relevant legal choice is between sale and agency – did the supplier sell to OW Bunker, or to the ultimate buyer through OW Bunker’s agency? – the Supreme Court of the United Kingdom<sup>19</sup> and the Hong Kong Court of Final Appeal<sup>20</sup> have approached the question in a very different manner. The case in the Supreme Court of the United Kingdom turned on the question of whether the bunker supply contract was one for the sale of goods. It focused on the retention of title provision in the bunker supplier’s terms and conditions, which purported to reserve title in the bunkers to the physical supplier until it had been paid in full (a fairly typical provision). The shipowner argued unsuccessfully that it was entitled to resist OW Bunker’s claim (meaning, in truth, ING Bank’s claim) for payment of the price for the bunkers because there had been a total failure of consideration under the contract between OW Bunker and the shipowner, as OW Bunker had failed to provide the shipowner with title to the bunkers, which had been retained by the physical supplier. The Supreme Court held that the contract between OW Bunker and the shipowner was not a contract for sale of goods, but a “complex *sui generis* transaction”, by which OW Bunker did not agree to transfer property in the bunkers in return for the price, but rather gave the shipowner a licence to use them (i.e., to burn them for the ship’s propulsion), while title remained in whichever entity up the chain of contracts had retained title. The Hong Kong Court of Final Appeal later followed the Supreme Court’s decision, distinguishing interpleader cases in the United States and Singapore as being not relevant, because they turned on an analysis of the chain of contracts as being one for successive sales of goods.<sup>21</sup>

The cases in the UK and Hong Kong differ from those from other countries considered earlier in this section in the fact that they were concerned with claims brought by the relevant

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<sup>19</sup> *PST Energy 7 Shipping, L.L.C. v. OW Bunker Malta Ltd (The Res Cogitans)* [2016] AC 1034 (UKSC).

<sup>20</sup> *Newocean Petroleum Co. Ltd v. OW Bunker China Ltd* [2016] HKLRD 892; [2016] HKEC 1507. (**NB:** This is not the same *Newocean* decision as that cited above in n. 7).

<sup>21</sup> *Id.* at [23], per Kwan JA.

OW Bunker entity (or, rather, its successor in title, ING Bank) against the ship operator, rather than claims for payment brought by the physical bunker suppliers. The most recent decisions in the United States have held that OW/ING itself does not have a claim against the ship,<sup>22</sup> for reasons that will be explained in more detail below,<sup>23</sup> although at least one court in India has expressly allowed a ship arrest to proceed on the basis of a claim for unpaid bunkers brought by OW/ING.<sup>24</sup> The very fact that both OW/ING and the physical bunker suppliers have tried to recover from the ultimate buyers, the ship operators, leads now to a consideration of the law relating to interpleader, which is designed to deal with the situation of competing claims against the same defendant.

### **3. Interpleader, a.k.a. no double jeopardy**

*Double Jeopardy* (1999, directed by Bruce Beresford; not the classic 1955 version directed by R.G. Springsteen, starring Rod Cameron, Allison Hayes and Gale Robbins)

*Nick Parsons (played by Bruce Greenwood): They're tough in Louisiana, Libby. You shoot me, they'll give you the gas chamber.*

*Libby Parsons (played by Ashley Judd): No they won't. It's called double jeopardy. I learned a few things in prison, Nick. I could shoot you in the middle of Mardi Gras and they can't touch me.*

*Travis Lehman (played by Tommy Lee Jones): As an ex-law professor, I can assure you she is right.*

Many jurisdictions have a version of the interpleader procedure, although the technical requirements vary quite widely from jurisdiction to jurisdiction. Because there is little international uniformity in interpleader procedures, what follows is necessarily cast in general

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<sup>22</sup> *ING Bank N.V. v. MV Temara*, 2016 AMC 2946 (S.D.N.Y. 2016). (**NB:** This is not the same *Temara* decision as that cited above in nn. 5 and 12).

<sup>23</sup> Section 4.

<sup>24</sup> *ING Bank, N.V. v. MV Naias* (Gujarat High Court, February 22, 2016), available at <https://indiankanoon.org/doc/195647945/>.

terms. The basic idea of interpleader procedure is, however, to avoid the possibility of double jeopardy. A person who fears that he or she (or it) may be held liable to two or more competing claimants in relation to the same liability asks the court, as applicant, to determine which of the possible claimants is entitled to succeed. The person seeking interpleader relief is typically required either to pay the contested amount of money into court, to be paid to whichever of the competing claimants proves to be successful, or to give some secure undertaking that it will pay the successful competing claimant after the court has made its interpleader determination. The simple idea is that the debtor wants to pay its debt only once, and wants to leave it to the court to determine which of the possible creditors is entitled to the debt. In order for interpleader to be appropriate, the court must decide whether the competing claims are claims of the same kind, so that satisfaction of one will extinguish the possibility of the other succeeding.

Versions of the basic interpleader proceeding have been invoked in several different countries in the aftermath of the OW Bunker failure. Shipowners and operators who had not yet paid for the bunkers purchased either from or through the medium of an OW Bunker entity acknowledged that they were obliged to pay for the bunkers they had used, but said that they were not sure whom they should pay, OW/ING or the physical bunker supplier.<sup>25</sup> In most interpleader cases, that question became one of whether the claims of OW/ING and the physical bunker supplier were sufficiently closely related to one another in legal terms to satisfy the requirements of the particular jurisdiction's interpleader procedure.

In the United States, most of the interpleader claims in the various federal district courts in the country were transferred to the US District Court for the Southern District of New York,

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<sup>25</sup> See, e.g., *Precious Shipping Public Co. Ltd v. OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [3], per Steven Chong J (“The purchasers accept that payments for the bunkers are due and owing but claim that they are unable to decide which party to pay. Under these circumstances, the purchasers decided that it would be prudent to seek interpleader relief from the court.”)

which decided that interpleader relief should be granted,<sup>26</sup> a decision that was then appealed to the US Court of Appeals for the Second Circuit. As explained in further detail below,<sup>27</sup> the physical bunker suppliers were asserting a statutory claim for a maritime lien over the ships in question by virtue of the Commercial Instruments and Maritime Liens Act (CIMLA).<sup>28</sup> In contrast, OW/ING had contractual claims for payment from the ship operators under the bunker supply contracts with OW Bunker. Although these were claims of different kinds, the US Court of Appeals for the Second Circuit ultimately decided that interpleader relief should be granted because the claims of the physical bunker suppliers and OW/ING were “inextricably interrelated”, despite their different legal origins.<sup>29</sup> As noted above, the very possibility that the physical bunker supplier might have a valid claim for relief, no matter what its basis, has been regarded (at least in some courts) as a sufficient reason to grant interpleader relief in the United States.<sup>30</sup>

In contrast, in similar proceedings, the High Court of Singapore refused to grant interpleader relief according to the rules of that jurisdiction.<sup>31</sup> The High Court of Singapore said (emphasis in the original):<sup>32</sup>

The question is *not* whether the applicant has a genuine *subjective* apprehension (however acutely felt) that competing claims will be brought against him; rather, the question is whether the competing claims have an *objective* basis in law and fact.

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<sup>26</sup> *UPT Pool Ltd v. Dynamic Oil Trading (Singapore) Pte Ltd*, 2015 AMC 2070 (S.D.N.Y. 2015).

<sup>27</sup> Section 4.

<sup>28</sup> 46 U.S.C. §§ 31301-43.

<sup>29</sup> *Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading, L.L.C.*, 814 F.3d 146, 152, 2016 AMC 305, 314 (2d Cir. 2016).

<sup>30</sup> See above, n. 18.

<sup>31</sup> *Precious Shipping Public Co. Ltd v. OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229.

<sup>32</sup> *Id.*, at [33], per Steven Chong J.

Because the claims of the physical bunker suppliers were not claims to recover a contractual debt, they were not of the same kind as those advanced by OW/ING, and so the requirement of “symmetry” for interpleader relief was not available.<sup>33</sup> Thus, “inextricable interrelat[ion]” was not sufficient for purposes of Singapore law, as it was found to be under US law.

An OW Bunker interpleader claim in the Federal Court of Canada is presently on appeal before the Supreme Court of Canada. The Federal Court of Appeal refused to grant interpleader relief on grounds that seem to steer a middle path between the US view and the Singaporean view, albeit for reasons that ultimately rest (as all such claims do) on the terms of the relevant interpleader procedure.<sup>34</sup> The Federal Court of Appeal held that interpleader relief should be refused because the OW Bunker entity’s contractual claim for recovery of the cost of the bunkers arose from the contract between OW Bunker and the time charterer of the ship, which had ordered and contracted for the bunkers, whereas the physical bunker supplier’s claim, if any, was a claim for a maritime lien against the ship itself *in rem*, rather than a claim against the time charterer – or, indeed, anyone else – *in personam*.<sup>35</sup>

The careful and precise distinction between *in personam* and *in rem* claims made by the Canadian Federal Court of Appeal leads on to a consideration of the unique US legislation that was intended to give physical bunker suppliers (and other necessities suppliers) a maritime lien over the vessels to which they supply bunkers, and the effect it has had on the OW litigation in the United States.

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<sup>33</sup> *Id.*, at [83], per Steven Chong J.

<sup>34</sup> *ING Bank, N.V. v. Canpotex Shipping Services Ltd* [2017] FCA 47.

<sup>35</sup> *Id.*, at [60], per M. Nadon, J.A.

#### 4. US law on maritime liens

The Commercial Instruments and Maritime Liens Act (CIMLA) confers a maritime lien on any person who supplies necessaries to a vessel “on the order of the owner or a person authorized by the owner”.<sup>36</sup> The necessaries provider is given a statutory right to proceed against the vessel itself *in rem*, without regard to the *in personam* liability of the person who ordered the bunkers.<sup>37</sup> Thus, the contractual arrangements between the parties are not of primary concern, as the necessaries provider’s right to proceed against the ship *in rem* is a statutory one, not a contractual one.

Nevertheless, much of the OW Bunker litigation in the United States has ended up turning on the contractual role of OW Bunker, not because CIMLA requires contractual privity between supplier and ship but because the order for the bunkers to the physical supplier must come from “a person authorized by the owner” for a maritime lien to arise. Despite the existence of earlier authority indicating that it was sufficient that the order originally emanated from someone such as a time charterer, thus making the exact role of any intermediaries irrelevant,<sup>38</sup> US courts in OW Bunker litigation have uniformly held that the relevant OW Bunker entities acted as principal when dealing with the bunker suppliers, not as agent for the owner or charterer of the ship when buying the bunkers.<sup>39</sup> The consequence has been that the physical bunker

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<sup>36</sup> 46 U.S.C. § 31342(a).

<sup>37</sup> 46 U.S.C. § 31342(a)(1),(2).

<sup>38</sup> *Marine Fuel Supply & Towing, Inc. v. M/V Ken Lucky*, 869 F.2d 473 (9<sup>th</sup> Cir. 1988).

<sup>39</sup> *Valero Marketing and Supply Co. v. MV Almi Sun*, 2015 WL 9459971 (E.D.La. 2015); 160 F.Supp.3d 973, 2016 AMC 632 (E.D.La. 2016)(*Valero II*); *O’Rourke Marine Servs, L.P. v. MV Cosco Haifa*, 179 F.Supp.3d 333 (S.D.N.Y. 2016); *ING Bank, N.V. v. MV Temara*, 203 F.Supp.3d 355, 2016 AMC 2387 (S.D.N.Y. 2016); *Bunker Holdings Ltd. v. M/V YM Success*, 2016 AMC 1723 (W.D. Wash. 2016); *Barcliff*,

suppliers have been held not to have maritime liens under US law, despite the explicit intention of CIMLA to protect US necessities suppliers.

Although previous cases had held that a supplier could “provid[e] necessities to a vessel” for purposes of the legislation, even if it sub-contracted the task to someone else,<sup>40</sup> the US District Court for the Southern District of New York recently held that OW Bunker itself did not have a maritime lien for bunkers supplied to a ship by a sub-contracting physical supplier, because it (OW Bunker) had not put itself at financial or other risk in relation to the provision of the bunkers.<sup>41</sup> The court did not shy away from the conclusion that this meant that no-one had a maritime lien for the supply of the bunkers in OW Bunker cases: the physical suppliers did not have a maritime lien because the order that they satisfied did not come from “a person authorized by the owner”, and OW Bunker itself did not have a maritime lien because it did not “provide” the bunkers to the ship itself.<sup>42</sup>

These decisions are significant not only for necessities providers in the United States, but also for bunker suppliers in other parts of the world, who often include a choice of law clause in their contracts choosing American law, whether or not the supply of bunkers has anything to do

*L.L.C. v. M/V Deep Blue*, 2016 AMC 2901 (S.D. Ala., 2016); *NuStar Energy Services, Inc. v. M/V Cosco Auckland*, 2017 AMC 1184 (S.D.Tex., 2016).

<sup>40</sup> *Galehead, Inc. v. MV Anglia*, 183 F.3d 1242, 1245 (11<sup>th</sup> Cir. 1999)(“A contracts to deliver to B coal of a specified kind and quality. A delegates the performance of this duty to C, who tenders to B coal of the specified kind and quality. The tender has the effect of a tender by A.”) See also *The Golden Gate*, 54 F.2d 397 (9<sup>th</sup> Cir. 1931).

<sup>41</sup> *ING Bank N.V. v. MV Temara*, 2016 AMC 2946 (S.D.N.Y. 2016). (**NB:** This is not the same *Temara* decision as that cited above in nn. 5 and 12).

<sup>42</sup> *Id.* at 2959 (“The question naturally arises whether some entity will always have a maritime lien if necessities are provided to a vessel. The answer is no.”)

with the USA.<sup>43</sup> Clauses of this kind have been held in the United States to give the bunker supplier a US maritime lien, whether or not the physical supply of the bunkers has anything to do with the United States,<sup>44</sup> although courts in Australia<sup>45</sup> and India<sup>46</sup> have recently refused to apply US law to maritime lien claims in those countries, notwithstanding a US choice of law clause. The latter view will also be followed by courts in any countries that follow the decision of the Privy Council in *The Halcyon Isle*,<sup>47</sup> which holds that the availability of a maritime lien is a matter of procedural law to be determined by the law of the forum, rather than the substantive law of the contract.

## 5. **Cross-border insolvency and antisuit injunctions**

The interaction between the UNCITRAL Model Law on Cross-Border Insolvency and maritime claims has attracted much attention in recent years, but it has not played a significant part in the legal proceedings following the OW Bunker collapse. The UNCITRAL Model Law provides

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<sup>43</sup> The OW Bunker General Terms and Conditions were themselves an example of this: see cl. P.5.

<sup>44</sup> *Trans-Tec Asia v. M/V Harmony Container*, 518 F.3d 1120, 2008 AMC 684 (9<sup>th</sup> Cir. 2008); *Triton Marine Fuels Ltd, S.A. v. MV Pacific Chukotka*, 575 F.3d 409, 2009 AMC 1885 (4<sup>th</sup> Cir. 2009); *World Fuel Services Trading, D.M.C.C. v. Hebei Prince Shipping Co. Ltd*, 783 F.3d 507, 2015 AMC 929 (4<sup>th</sup> Cir. 2015); *World Fuel Services Singapore Pte Ltd v. Bulk Juliana MV*, 822 F.3d 766, 2016 AMC 2722 (5<sup>th</sup> Cir. 2016). For a diametrically opposed point of view in a different circuit, see *A/S Dan-Bunkering Ltd v. MV Centrans Demeter*, 633 Fed. Appx. 755, 2016 AMC 1117 (11<sup>th</sup> Cir. 2015).

<sup>45</sup> *Ship Sam Hawk v. Reiter Petroleum, Inc.* (2016) 246 FCR 337; 335 ALR 578.

<sup>46</sup> *MV Flag Mersinidi v. MV Flag Mersinidi on 16 April 2014* (Bombay High Court, April 16, 2014), available at <https://indiankanoon.org/doc/107420148/>.

<sup>47</sup> *Bankers Trust International Ltd v. Todd Shipyards Corp. (The Halcyon Isle)* [1981] AC 221.

that if suit is brought in an enacting country<sup>48</sup> against a person or company that has opened insolvency proceedings in its centre of main interests (COMI), then the proceedings brought in the enacting country must be stayed and the claimants sent to participate in the insolvency proceedings in the COMI, which are known as a foreign main proceeding (FMP).<sup>49</sup> Although OW Bunker entities opened insolvency proceedings in several different countries, the existence of those insolvency proceedings had little impact on the litigation that followed the OW Bunker collapse. As we have already seen, physical bunker suppliers mostly tried to skirt around the insolvent OW Bunker entity with which they had dealt, to bring a claim directly against the ultimate buyer, the ship operator or the ship itself. ING Bank sued to recover debts owing to the insolvent OW Bunker entities in various parts of the world, but in that posture it was plaintiff, not defendant, thus making the jurisdictional shield provided by the UNCITRAL Model Law irrelevant. Hence, the insolvency of the OW Bunker entities generally had no effect on claims for non-payment brought in other parts of the world.

One of the many US cases in the wake of the OW Bunker collapse serves as an example of why the UNCITRAL Model Law on Cross-Border Insolvency has played a relatively small part in the worldwide OW Bunker litigation. An interpleader action was brought in the US District Court for the Southern District of New York by vessel owners and charterers seeking interpleader relief in relation to claims for unpaid bunkers that had been bought through the medium of OW Bunker Germany, G.m.b.H.<sup>50</sup> After OW Bunker Germany opened insolvency proceedings in Germany, its COMI, it applied to the US Bankruptcy Court for the Southern District of New York asking for recognition of the insolvency proceedings as a foreign main

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<sup>48</sup> The Model Law is not an international convention; it takes effect only in those countries that have chosen to enact it as part of their domestic legislation. At the time of writing (August 2017), there were 45 such countries: see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html).

<sup>49</sup> UNCITRAL Model Law on Cross-Border Insolvency, Art. 20.

<sup>50</sup> The procedure in interpleader proceedings is described in Section 3 above.

proceeding (FMP) under Chapter 15 of the Bankruptcy Code, the US enactment of the UNCITRAL Model Law on Cross-Border Insolvency.<sup>51</sup> The Bankruptcy Court issued an order recognizing the German insolvency proceedings as an FMP, but then lifted the automatic stay “for cause” to allow the interpleader proceedings in the District Court to continue.<sup>52</sup> OW Bunker Germany then sought to have the interpleader actions referred from the District Court to the Bankruptcy Court, presumably as a prelude to renewing its attempt to have them stayed under Chapter 15. The District Court both retained jurisdiction over the interpleader actions and transferred the Chapter 15 bankruptcy proceedings to itself, holding that there were “interesting and apparently novel questions regarding the interplay among the United States bankruptcy law, maritime law, and federal interpleader statutes”, which demanded consideration by the District Court.<sup>53</sup> Thus, the proceedings in New York were allowed to continue in parallel to the German insolvency proceedings.

One of the key underlying principles of the UNCITRAL Model Law on Cross-Border Insolvency is that all proceedings in relation to the liabilities of an insolvent debtor should be brought in one country, rather than having parallel proceedings in different jurisdictions around the world. If the automatic stay procedure created by the Model Law does not produce that result (as it has not in the OW Bunker cases, for the reasons just explained), the only other legal mechanism for forcing parallel proceedings in other countries to come to an end is the anti-suit injunction, a device familiar in common law countries and generally regarded as anathema in civil law countries.

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<sup>51</sup> 11 U.S.C. §§ 1501-32.

<sup>52</sup> *In re OW Germany, G.m.b.H.*, No. Civ. 15-13018 (Bkrcty. S.D.N.Y. 2016).

<sup>53</sup> *Bonny Gas Transport Ltd v. OW Bunker Germany, G.m.b.H.*, 2016 AMC 1560, 1564 (S.D.N.Y. 2016). Technically, the District Court granted OW Bunker Germany’s motion for referral of the interpleader actions to the Bankruptcy Court, then withdrew the entire case from the Bankruptcy Court’s jurisdiction pursuant to 28 U.S.C. § 157(d).

In some federal circuits of the United States,<sup>54</sup> an antisuit injunction is granted only with “great restraint”, in acknowledgment of the fact that although the order is directed at the litigant, rather than the foreign court, it effectively interferes with the jurisdiction of the court of a foreign sovereign by precluding the litigant from initiating or continuing legal action there.<sup>55</sup> Even under the “great restraint” standard, one US court has granted an antisuit injunction to restrain physical bunker suppliers who were participating in OW Bunker interpleader proceedings in New York from proceeding in other countries to arrest ships owned or operated by the ultimate buyer of the bunkers.<sup>56</sup> The alternative would be to expose the ship operator to the possibility of double or even triple liability for a single obligation if there were to be inconsistent judgments in different countries.<sup>57</sup>

## **6. Conclusion**

Much of the OW Bunker litigation around the world has come down to a battle between an unpaid physical bunker supplier and ING Bank, the successor to OW Bunker, with each of them laying claim to payment in full from the ultimate buyer, the ship operator, whose main concern is to pay for the bunkers only once, not twice or possibly three times. If the physical bunker supplier wins, then it is finally paid for the bunkers it supplied, but OW/ING gets nothing. If

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<sup>54</sup> Other federal circuits take a more liberal approach to the grant of antisuit injunctions: see, e.g., *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5<sup>th</sup> Cir. 1996); *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*, 10 F.3d 425 (7<sup>th</sup> Cir. 1993); *Seattle Totems Hockey Club v. National Hockey League*, 652 F.2d 852 (9<sup>th</sup> Cir. 1981).

<sup>55</sup> *China Trade and Development Corp. v. MV Choong Yong*, 837 F.2d 33, 35, 1988 AMC 880 (2d Cir. 1987).

<sup>56</sup> *Hapag-Lloyd, A.G. v. US Oil Trading, L.L.C.*, 2016 AMC 1590 (S.D.N.Y. 2016).

<sup>57</sup> *Id.* at 1596.

OW/ING wins, the physical bunker supplier still has a contractual claim against it for payment, but is likely to recover only cents in the dollar from an insolvent debtor.

If the relevant transactions had gone ahead as planned, the physical bunker suppliers would have been paid, and OW Bunker or its subsidiary would have received its profit margin reflecting the difference between what it charged the ultimate buyer and what it paid the bunker supplier. That would seem to be the most sensible and desirable outcome even after the collapse of OW Bunker but, ironically, none of the many legal devices and arguments considered in this short paper has seemed able to achieve that result, as each leads to an all-or-nothing outcome. Many physical bunker suppliers have gone unpaid and ING Bank has then netted more per transaction than OW Bunker would have done. In those cases where the physical bunker supplier has succeeded, it would seem that OW Bunker's legitimate profit margin has simply evaporated, because the bunker supplier's bill should be paid at the rate that it charged for the physical supply, not the rate charged to the ultimate buyer by OW Bunker. In other words, all the legal ingenuity poured into this debacle around the world does not seem to have been able to produce what seems obviously to be the fair outcome. *C'est la vie, c'est la loi.*<sup>58</sup>

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<sup>58</sup> This phrase appears in the song "La Roue Ternera" by the Panamanian/Colombian singer Miguel Bosé. It seems surprising that it has not been used more often. Perhaps it has and I am simply too ignorant of Francophone culture. If so, *pardonnez-moi*.