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THE O.W. BANKRUPTCY AND THE RESULTING LEGAL ISSUES

Ifigeneia Xanthopoulou

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I. INTRODUCTION

In the shipping industry, a single transaction is often facilitated through a chain of intermediaries. While such multiparty dealings are advantageous and profitable for the actors involved, in the event that one of the parties defaults, the remaining parties struggle to protect their financial interests. The O.W. Bunker & Trading A/S bankruptcy, which raised a number of novel and complex legal questions, is an example of such a default. This article seeks to examine the various approaches taken in legal systems internationally and reach conclusions as to how parties can best protect their interests in the future.

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O.W. Bunker, established in Denmark in 1980, was a leading global independent marine fuel (bunker) company with operations in twenty-nine countries.[1] The company acted primarily as a physical distributor and reseller of marine fuel.[2] Additionally, it provided risk management services and operated a fleet of approximately thirty bunker vessels.[3] In December 2013, O.W. Bunker entered into an omnibus security agreement with ING Bank N.V., pursuant to which ING acted as an agent for a syndicate of lenders to the O.W. Bunker group.[4] All rights, title, and interest in the company's receivables, both current and future, were assigned to ING.[5] In March 2014, O.W. Bunker completed an initial public offering and went public for the first time.[6] Only eight months later, on November 7, 2014, it filed for bankruptcy in the Danish court.[7] A number of its local and foreign subsidiaries followed.[8]

O.W. Bunker often acted as an intermediary between owners or charterers and physical suppliers, facilitating the purchase of bunkers.[9] In the ordinary course of dealing, the vessel interests contracted with O.W. Bunker to supply their ships with bunkers. O.W. Bunker subcontracted with local suppliers, which fulfilled the order, supplied the bunkers to the vessel, and obtained a receipt signed by the master.

With O.W. Bunker in bankruptcy, a number of competing claims arose against vessel owners. The contractual supplier (O.W. Bunker) possessed a debt claim flowing from the supply contract between it and the

1. Alessandro Mauro, *OW Bunker: How One of the World's Largest Marine Fuel Traders Went from IPO to Bankruptcy—Part 1, Founding to IPO*, SHIP & BUNKER, Jan. 7, 2015, http://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.

2. OW Bunker A/S, *Offering Circular*, at 25, http://hugin.info/160189/R/1769393/601748.pdf.

3. *Id.*

4. *ING brings in PwC for scandal-hit OW Bunker Group*, SINGAPORE BUS., Nov. 24, 2014; *O.W. Bunker & Trading A/S*, PWC, http://www.pwc.co.uk/services/business-recovery/administrations/owbunker.html.

5. *Id.*

6. Christian Wienberg, *OW Jumps After Selling Second Biggest Danish IPO Since 2010*, BLOOMBERG, Mar. 28, 2014, 3:47 AM, http://www.bloomberg.com/news/articles/2014-03-28/ow-bunker-s-980-million-ipo-denmark-s-second-biggest-since-2010.

7. *Danish ship fuel supplier OW Bunker goes bankrupt*, BBC NEWS, Nov. 7, 2014, http://www.bbc.com/news/business-29961566. O.W. Bunker filed for Chapter 11 protection less than a week later. Tim Corrigan, *O.W. Bunker's U.S. Units File for Bankruptcy Protection Shipping Fuel Supplier Says It Uncovered $125 Million Fraud at Its Singapore Unit*, Nov. 13, 2014 2:43 PM, http://www.wsj.com/articles/o-w-bunkers-u-s-units-file-for-bankruptcy-protection-1415907784.

8. *In Re* OW Bunker USA, Inc., No. 5:15-BK-51722 (Bankr. D. Conn., filed Nov. 13, 2014).

9. *Offering Circular*, supra note 2, at 75.

owners.[10] The physical supplier, which ordinarily obtained payment from O.W. Bunker, demanded payment from vessels and their owners; merely standing in line with O.W. Bunker's unsecured creditors was a far less attractive option.[11] To complicate matters further, ING asserted that it was the assignee of several bankrupt O.W. Bunker entities and asked for payment.[12] Both the contractual and the physical suppliers could seek to secure their claims by arresting the vessel.

Thus, shipowners find themselves in an untenable position. Which supplier should they pay—the contractual or the physical? If the wrong claimant is paid, the vessel remains subject to arrest, pursuant to *in rem* jurisdiction.[13] The same danger exists if shipowners withhold payment altogether.

This uncertainty resulted in a frenzy of litigation around the world. As different legal systems have addressed the issues according to their own rules and procedures, many cases are pending and the law remains unsettled. The two leading jurisdictions on the matter are the United States and the United Kingdom, while case law from Singapore, Canada, and Israel also contributes to the discussion.

II. UNITED STATES

A. *Maritime Lien Law*

Under U.S. law, a creditor may be entitled to a maritime lien[14] as security for a debt or claim. A maritime lien is "a special property right in a vessel given to a creditor by law as security for a debt or claim arising from some service rendered to the ship to facilitate her use in navigation or from an injury caused by the vessel in navigable waters."[15]

Specifically, those that provide necessary services or supplies enjoy protection under the American maritime lien law.[16] The Commercial In-

10. Wakim & Assocs., *OW Bunker's bankruptcy: will you have to pay your bunker debts twice?*, July 13, 2016, http://www.lexology.com/library/detail.aspx?g=d2586260-badf-4940-8d3c-7f653eb7ec55.

11. *Id.*

12. *Update: ING Sells Its OW Bunker Debt, Could Prompt Physical Supplier Claims Surge*, SHIP & BUNKER, Nov. 17, 2015, http://shipandbunker.com/news/world/325044-update-ing-sells-its-ow-bunker-debt-could-prompt-physical-supplier-claims-surge.

13. *OW Bunker creditor arrests 15 vessels*, SHIPPING WATCH, Oct. 25, 2016, http://shippingwatch.com/suppliers/article7199681.ece.

14. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 586 (2d ed. 1979).

15. ROBERT FORCE, A.N. YIANNOPOULOS & MARTIN DAVIES, 2 ADMIRALTY AND MARITIME LAW 262 (2d ed. 2012).

16. *Id.* at 3; The Stjerneborg, 106 F.2d 896, 898 (9th Cir. 1939), *aff'd sub nom.* Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of Cal., 310 U.S. 268 (1940).

struments and Maritime Liens Act (CIMLA)[17] states that "a person providing necessaries to a vessel on the order of the owner or person authorized by the owner . . . has a maritime lien on the vessel . . . [and] may bring a civil action *in rem* to enforce the lien . . ."[18] CIMLA defines necessaries as including "repairs supplies, towage and the use of a dry dock or marine railway."[19] Supply of bunkers to a vessel falls within the ambit of the CIMLA[20]; "any service that is 'convenient, useful and at times necessary' may qualify as a lien."[21]

B. *Who Has the Maritime Lien?*

To successfully assert a maritime lien on a vessel, a supplier must prove that (1) it furnished necessaries (2) to a vessel (3) upon the order of a shipowner or a person authorized by the owner.[22] This last prerequisite becomes relevant to the O.W. Bunker cases because "the party that supplies the necessaries and the party who receives orders from an agent of the vessel are two different entities."[23] Hence, there is inherent uncertainty whether the contractual or the physical supplier (or both) may assert a lien to secure payment for its services. More specifically, while O.W. Bunker enjoyed privity of contract with the shipowner or charterer, could it be considered an entity that *actually* supplied the bunkers? On the other hand, while the physical supplier delivered the bunkers to the vessel, did it receive an order from someone with authority to bind the vessel?

As a general rule, U.S. courts favor the contractual supplier as opposed to the physical supplier, which lacks privity of contract with the owner. In *Lake Charles Stevedores, Inc. v. Professor Vladimir Popov M/V*,[24] the Fifth Circuit held that "the general contractor supplying necessaries on the order of an entity with authority to bind the vessel has a maritime lien."[25] On the other hand, courts find that "a subcontractor generally cannot assert a maritime lien on its own behalf under CIMLA, because it provides its services on the order of the contractor, rather than on the order of a person with statutory or other authority to procure necessaries."[26] An analysis of courts' interpretation of the CIMLA's acting "on

17. 46 U.S.C. § 31301–31343 (2006).
18. 46 U.S.C. § 31342.
19. 46 U.S.C. § 31301.
20. Gulf Oil Trading Co. v. M/V Caribe Mar, 757 F.2d 743 (5th Cir. 1985).
21. GILMORE & BLACK, *supra* note 14, at 543.
22. 46 U.S.C. § 31342 (2006).
23. Blair Brogan, *The Supplier Strikes Back: Under What Circumstances Can a Subcontracting Necessaries Supplier Assert a Maritime Lien?*, 34 TUL. MAR. L. J. 279, 282 (2009).
24. 199 F.3d 220 (5th Cir. 1999).
25. *Id.* at 229.
26. Ceres Marine Terminals, Inc. v. M/V Harmen Oldendorff, 913 F. Supp. 919, 923 (D. Md. 1995).

the order of the owner or a person authorized by the owner"[27] sheds some light on who possess the right to lien.

The Fifth Circuit distinguishes between general contractor and middleman cases.[28] A general contractor is hired by the agent of the ship to complete a particular task and then solicits subcontractor(s) to assist. Under this line of case law, in order for subcontractors to obtain a lien, they must prove that "an entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance."[29] The court in *Lake Charles Stevedores* listed a number of factors[30] to be considered in such cases: the shipowner's directions to the general contractor, whether the general contractor engaged a particular subcontractor, and the degree of supervision over the subcontractor's work. The owner's mere awareness of a third party's involvement in the supply is insufficient to award the third party with a maritime lien.[31]

Unlike a general contractor, which is itself responsible for the completion of the task, a middleman is hired by the owner to procure the necessaries supplier. In middleman cases,[32] courts examine "the nature of the relationship between each pair of entities that are involved in the transaction at issue."[33] In middleman cases, subcontractors have good chances of successfully asserting a lien.[34]

The U.S. District Court for the Eastern District of Louisiana discussed this jurisprudential distinction specifically in the context of the O.W. Bunker saga. In a recent decision,[35] Judge Brown held that the transaction at issue qualified as a general contractor rather than a middleman case. The physical supplier filed for a motion for summary judgment regarding the existence of a maritime lien in its favor, basing its argument in the middleman line of jurisprudence. However, the motion was denied because the physical supplier failed to demonstrate "that the Vessel's owners directed the selection of [the physical supplier] or otherwise retained sufficient control over the subcontractor's performance. . . ."[36] Relying on the analysis in *Lake Charles Stevedores*, the court held that a maritime

27. 46 U.S.C. § 31341 (2006).
28. *Lake Charles Stevedores*, 199 F.3d at 228–29.
29. *Id.* at 229.
30. *Id.* at 230–31.
31. *Id.* at 232.
32. *See, e.g.*, *Belcher Co. of Ala., Inc. v. M/V Martha Mariner*, 724 F.2d 1161 (5th Cir. 1984).
33. *Lake Charles Stevedores*, 199 F.3d at 230.
34. Crescent City Marine, Inc. v. M/V Nunki, 20 F.3d 665 (5th Cir. 1994).
35. Valero Mktg. & Supply Co. v. M/V ALMI SUN, No. 14-2712, 2015 WL 9459971 (E.D. La. Dec. 2, 2015), *reconsideration denied*, No. CV 14-2712, 2016 WL 475905 (E.D. La. Feb. 8, 2016).
36. *Id.* at 12.

lien was not created.[37] The court's decision has been appealed to the Fifth Circuit[38] and it remains to be seen if this ruling will be upheld.

Case law from other appellate courts is equivocal. The Ninth Circuit has held that a subcontractor generally may not assert a lien unless the general contractor is the agent of the owner or has been directed by the owner to hire that particular subcontractor.[39] Nonetheless, the court has found that the fuel supplier may have a maritime lien in light of implied authority granted by the shipowner when the owner's agent has requested the services rendered by the subcontractor.[40]

In determining the lien priority issue, the Eleventh Circuit considers the degree of involvement between the owner and the subcontractor(s).[41] Was the involvement "significant and ongoing"[42] or "minimal or nonexistent?"[43] To determine the issue, the Eleventh Circuit examines a number of criteria pertaining to the degree of the owner's knowledge about the subcontractor as well as the control exercised on it.[44]

In sum, although each circuit has a separate approach to the question whether a subcontractor may assert a maritime lien, the analysis is generally focused on the degree of interaction between the parties on the two sides of the chain.[45] From a public policy point of view, the courts must reach a conclusion as to which one of two innocent parties should be protected. Neither the owner nor the physical supplier engaged in wrongful conduct. Yet, with O.W. Bunker's default, both have competing interests that must be balanced.

Importantly, the inclusion of a "no lien" clause in the charter party may further complicate the issue. As explained above, CIMLA states that necessaries may be provided "on the order of a person listed in section 31314 . . . or a person authorized by the owner."[46] CIMLA includes a statutory presumption[47] that the persons listed in Section 31314 ("a person entrusted with the management of the vessel at the port of supply; or an officer or agent appointed by a charterer") have authority to procure necessaries. In

37. *Id.* at 9.
38. No. 16-30194 (5th Cir. filed Mar. 7, 2016).
39. Port of Portland v. M/V Paralla, 829 F.2d 825, 828 (9th Cir. 1989).
40. *See* Marine Fuel Supply & Towing, Inc., v. M/V Ken Lucky, 859 F.2d 473, 478 (9th Cir. 1988).
41. Galehead, Inc. v. M/V Anglia, 183 F.3d 1242 (11th Cir. 1999).
42. *Id.* at 1245.
43. *Id.* at 1246.
44. Marine Coatings of Ala., Inc. v. United States, 932 F.2d 1370, 1376 (11th Cir. 1991).
45. Brogan, *supra* note 10, at 298–302.
46. 46 U.S.C. § 31341 (2006).
47. Robert Force, Admiralty and Maritime Law 180 (2d ed. 2013).

other words, under CIMLA, a supplier of necessaries has no duty to inquire whether the charterer had the power to grant a lien over the vessel.

What happens, however, when a charter party includes a "no lien" clause, prohibiting the creation of a lien in favor of the supplier? Courts have held that the supplier's lien may only be defeated if it had "actual knowledge" of the "no lien" clause; constructive knowledge will not suffice.[48] In an attempt to show such actual knowledge of the supplier, owners have principally relied on a "no liens" stamp on the bunker delivery receipt. Nonetheless, in a recent decision of the O.W. Bunker line of cases, the court held that a "no lien" stamp placed by the chief engineer on the delivery receipts did not limit the supplier's lien.[49]

C. *Are Interpleader Actions the Solution?*

In an effort to handle the competing claims against them in the wake of the O.W. Bunker bankruptcy, shipowners have brought interpleader actions in U.S. courts. Under the Interpleader Act,[50] a party threatened with multiple claims to a single and limited fund or obligation may initiate court proceedings to settle the controversy. If an action is properly brought, the stakeholder is relieved from liability and the claimants are left to resolve their claims to the stake. Importantly, the court may issue an injunction, restraining all claimants "from instituting or prosecuting any proceeding in any state or United States court affecting the property, instrument, or obligation involved in the interpleader action until further order of the court."[51]

More than twenty-five interpleader actions have been brought in the U.S. District Court for the Southern District of New York as a result of the O.W. Bunker bankruptcy. In the words of the court, "the Interpleader Actions present interesting and apparently novel questions regarding the interplay among United States bankruptcy law, maritime law, and the federal interpleader statutes."[52] The court in most cases granted owners leave to deposit security with the court and issued the in-

48. Belcher Oil Co. v. M/V Gardenia, 766 F.2d 1508 (11th Cir. 1985).

49. O.W. Bunker Malta Ltd. v. MV TROGIR, 602 F. App'x 673–76 (9th Cir. 2015).

50. 28 U.S.C.A. § 1335 (West). The federal interpleader statute confers original jurisdiction on federal district courts where "[t]wo or more adverse claimants [of at least minimally] diverse citizenship" may or do claim entitlement to "money or property of the value of $500 or more," or any benefit arising from an "instrument of value or amount of $500 or more," or "an obligation written or unwritten to the amount of $500 or more," provided that the plaintiff "has deposited such money or property" into registry of the court or "has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper."

51. 28 U.S.C.A. § 2361 (West).

52. UPT Pool Ltd. v. Dynamic Oil Trading (Singapore) PTE. Ltd., 2015 AMC 2070, 2072 (S.D.N.Y. July 1, 2015).

junctions they requested.[53] In light of such issue novelty, the parties were directed to submit briefs with their argumentation on the following two main issues.

First, did the court have subject matter jurisdiction over the interpleader actions? The "objecting claimants" (namely, the O.W. Bunker entities, the physical suppliers, and ING) argued that the court lacked subject matter jurisdiction to restrain the *in rem* claims because the security deposited with the court by the owners differs from the subject of the suppliers' claims, namely, the vessels themselves. The court held that this argument is without merit[54] since both the *in rem* and the *in personam* claims at hand "spring from a single event": the provision of fuel pursuant to the contract.[55] Thus, any *in personam* claims are "merely alternative procedural devices to obtain the same relief;"[56] for purposes of subject matter jurisdiction, the deposit of security with the court up to the amount of the *in personam* liability of the owners suffices to satisfy the vessel's *in rem* obligations.[57]

Second, what is the proper scope of the injunction? The objective claimants underlined the domestic character of the interpleader statute as well as the fact that the vessel at hand had not arrived or was not scheduled to immediately arrive at a port in the district.[58] For this reason, they argued that the court might not grant an international injunction. The court rejected the argument, holding that "the statutory basis for interpleader is 'remedial and to be liberally construed.'"[59] Citing Supreme Court jurisprudence,[60] the court stated that the relief sought by the owners fell squarely within the protective ambit of the Interpleader Act and that "the *in rem* nature of the Objective Claimants' maritime liens [did] not undermine the Court's authority."[61]

Importantly, while the district court granted an international injunction in *UPT Pool Ltd.*, the Second Circuit recently remanded a similar decision to the district court to determine the proper scope of the injunctive relief.[62] The reason for this result was that the court in *China Trade &*

53. SHV Gas Supply & Risk Mgmt. SAS v. O.W. Bunker USA, Inc., 14-CV-9720 (S.D.N.Y. Dec. 11, 2014) (order granting preliminary injunction).
54. *UPT Pool Ltd.*, 2015 AMC at 2079.
55. *Id.* at 2078.
56. *Id.*
57. *Id.* at 2081.
58. Id. at 2074.
59. *Id.* at 2076 (quoting State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 533 (1967)).
60. Cont'l Grain Co. v. The FBL-585, 364 U.S. 19, 26 (1960).
61. UPT Pool Ltd. v. Dynamic Oil Trading (Singapore) PTE. Ltd., 2015 AMC 2070, 2086 (S.D.N.Y. July 1, 2015).
62. Hapag–Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC, 814 F.3d 146 (2d Cir. 2016).

Development Corp. v. M.V. Choong Yong[63] adopted a test to properly decide whether an extraterritorial injunction may be warranted, which the district court failed to employ.[64] Thus, the Second Circuit thought it "more prudent to order a limited remand,"[65] giving the opportunity to the district court to make determinations pursuant to the *China Trade* test and either eliminate or retain the foreign scope of the injunction. Notably, the Second Circuit affirmed in part the district court's decision as to the matter of subject matter jurisdiction, confirming that the plaintiffs properly asserted rights under the Interpleader Act.[66]

As the pending interpleader cases are being resolved, the law will become clearer as to the existence and scope of injunctive relief for owners and charterers in the O.W. Bunker cases.

III. UNITED KINGDOM

In addition to the United States, the other jurisdiction leading developments in the O.W. Bunker saga is the United Kingdom. The juxtaposition of the law in the two countries exposes two significant differences.

First, unlike in the United States, the interpleader method is not available under English law. Second, "any claim in respect of goods or materials supplied to a ship for her operation or maintenance,"[67] which would include the furnishing of bunkers, confers a statutory maritime lien. Nonetheless, the law prescribes certain restrictions that must be satisfied before an action *in rem* can arise, creating a right to arrest the vessel. Indeed, such action may be brought only if "(a) the claim arises in connection with a ship; and (b) the person who would be liable on the claim in an action in personam . . . was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship."[68] In other words, the vessel may be arrested via an action *in rem* only if the owner or demise charterer is liable *in personam* to the physical supplier.

63. 837 F.2d 33 (2d Cir. 1987).
64. *Id.* at 35–36. The *China Trade* test was summarized by the court as follows:

> First, an anti-foreign-suit injunction may be imposed only if the parties are the same and resolution of the case before the enjoining court is dispositive of the action to be enjoined; if this threshold is met, the District Court must then examine five factors: (1) frustration of a policy in the enjoining forum; (2) the foreign action would be vexatious; (3) a threat to the issuing court's in rem or quasi in rem jurisdiction; (4) the proceedings in the other forum prejudice other equitable considerations; and (5) adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment.

65. *Hapag–Lloyd*, 814 F.3d at 155.
66. *Id.* at 156.
67. Senior Courts Act, 1981, 53, § 20(2)(m) (Eng.).
68. *Id.* § 21(4)(i).

The leading case in this jurisdiction is the *Res Cogitans*,[69] handed down by the English Court of Appeals on October 22, 2015. Pursuant to a contract with O.W. Bunker Malta Ltd, the *Res Cogitans* was supplied with bunkers in November 2014. The contract incorporated the standard O.W. Bunker terms and conditions and, importantly, included a retention of title clause (ROT clause) as well as an express right to use the bunkers for propulsion from the moment of delivery. The last link in the chain of intermediaries was RN-bunker, the physical supplier. Before payment was rendered, the O.W. Bunker group filed for bankruptcy.

The central issue is this case was the nature of the bunker supply contract as a matter of law. Both the arbitrators and the High Court found that the Sale of Goods Act 1979 (SOGA) did not apply to the bunker supply contract. The Court of Appeal upheld this finding. In light of the fact that the owners had the right to use the bunkers for propulsion immediately upon delivery, the Court concluded that the owners had in fact contracted for the *delivery* of bunkers and *not* for the transfer of property. Such immediate consumption of the bunkers, coupled with the ROT clause in the contract, meant that the property of title in the bunkers could not and did not pass to the vessel owners. Hence, the claim at bar was a straightforward debt claim; O.W. Bunker was the only entity entitled to payment, even though it was never in a position to transfer title to the bunkers supplied.

In sum, the current position under English law is as follows. If the physical supplier has impliedly or expressly authorized the owner to consume the bunkers before rendering payment, the physical supplier's security provided by the ROT clause is diminished, preventing it from asserting a claim *in rem*. This way, the risk of multiple claims against the owner was resolved in favor of O.W. Bunker as a debt created by their contractual relationship. This decision has been appealed to the Supreme Court, which heard the case on March 22, 2016.

IV. OTHER JURISDICTIONS

A. *Singapore*

The Singapore High Court has contributed with yet another piece to the O.W. Bunker bankruptcy puzzle.[70] The case derived from thirteen consolidated proceedings for interpleader relief[71] brought by vessel owners in an effort to protect themselves from competing claims.

69. PST Energy Shipping 7 LLC v. O.W. Bunker Malta Ltd. (The RES COGITANS) [2015] EWCA Civ. 1058.

70. Precious Shipping Public Company Ltd and Others v. O.W. Bunker Far East (Singapore) Pre Ltd and others [2015] SGHC 187.

71. Supreme Court of Judicature Act, First Schedule, § 4 (2007).

The court set out the three pre-conditions for the grant of interpleader relief:

> (a) the applicant seeking interpleader relief must be "under a liability for any debt, money, goods or chattels," (b) there must be "an expectation that he [i.e., the applicant] would be sued by at least two persons," and (c) there must be "adverse claims for the debt, moneys, goods or chattels" from the persons whom the applicant expects will bring suit.[72]

The physical suppliers argued that the owners, in consuming the bunkers before rendering payment, interfered with the suppliers' possessory rights and were thus liable to them in the tort of conversion. The High Court rejected this argument, citing the terms and conditions of the O.W. standard contract binding the parties, "which permitted the bunkers to be used in the propulsion of the vessel even before payment."[73]

What is more, the court held that the *UPT* case[74] was "of little relevance"[75] since Singapore law, unlike American law, does not recognize the existence of maritime liens for the provision of "necessaries." The judge also commented that "[t]he fact that the OW entities are now insolvent does not extinguish the physical suppliers' contractual claims since their debts may still be provable in insolvency."[76]

To sum up, under Singaporean law, physical suppliers will stand in line with the rest of the O.W. Bunker creditors. The court concluded that "interpleader relief cannot be granted because the competing claims raised do not disclose any *prima facie* case for relief."[77]

B. *Canada*

The Federal Court of Canada reached a decision that differs substantially from judicial findings regarding the O.W. bankruptcy in other jurisdictions.[78] Indeed, in *Canpotex Shipping Services Ltd. v. Marine Petrobulk, Ltd.*, the time charterers that had ordered bunkers from O.W. Bunker were discharged from the obligation to pay O.W. Bunker by paying the physical suppliers.

Before the case was brought before the court, the Prothonotary had issued an order accepting the charterer's (Canpotex) interpleader applica-

72. *Precious Shipping*, [2015] SGHC 187 § 27 (citing Tay Yok Swee v United Overseas Bank Ltd and others [1994] 2 SLR(R) 36).
73. *Id.* § 42.
74. UPT Pool Ltd. v. Dynamic Oil Trading (Singapore) PTE. Ltd., 2015 AMC 2070 (S.D.N.Y. July 1, 2015).
75. *See Precious Shipping*, [2015] SGHC 187 § 53.
76. *Id.* § 45.
77. *Id.* § 55.
78. Canpotex Shipping Servs. Ltd. v. Marine Petrobulk, Ltd., [2015] F.C. 1108 (Can.).

tion, pursuant to Rule 108 of the Federal Courts Rules.[79] Thus, the court was asked to decide the allocation of the funds deposited by Canpotex between ING as O.W. Bunker's assignee and the physical suppliers (Marine Petrobulk).

The court applied the physical supplier's standard terms and conditions for the supply of the marine bunkers to the vessels.[80] In interpreting those terms, it found that Canpotex and O.W. Bunker U.K. were jointly and severally liable to pay Marine Petrobulk the full purchase price of the marine bunkers.[81] The terms also provided that, in the event O.W. defaulted and failed to pay the purchase price, Marine Petrobulk could compel payment of the full amount from Canpotex. At the same time, upon such payment, Canpotex would not be obliged to pay O.W. Bunker or ING the purchase price.[82]

In sum, unlike in other countries, the Canadian approach is currently very friendly towards the physical supplier, which holds both a contractual and a maritime lien claim until it receives full payment for the bunkers delivered.[83]

C. *Israel*

Israel also contributed to the international O.W. Bunker debate with a recent decision of the Admiralty Court.[84] Israeli maritime law provides for the creation of a maritime lien for the furnishing of bunkers, which are considered necessities.

In the dispute at bar, a line of subcontractors was involved in the supply of bunkers to the vessel, M/V Emmanuel Tomasos.[85] The central issue before the court was which of the parties had the maritime lien. The court ruled that the legislative intent was to grant a maritime lien only in favor of the party that directly contracted with the vessel interests. Hence, O.W. Bunker Malta Ltd. was unsuccessful in claiming payment for bunkers; the owners had contracted only with another company in the chain of supply. As a result, payment to the party that enjoyed privity of contract with the owners discharged them from any obligation to pay O.W. Bunker.

79. *Id.* at para. 93.
80. *Id.* at para. 132.
81. *Id.* at para. 136.
82. *Id.* at para. 137.
83. *Id.* at para. 138.
84. MC 45897-02-12 O.W. Bunker Malta Limited v. M/V Emmanuel Tomasos.
85. *See* Felipe Arizon, *The Identification of the "Fuel Supplier" Entitled to Claim a Maritime Lien in an In Rem Claim*, 11 ARREST NEWS 1 (Oct. 2015), http://shiparrested.com/wp-content/uploads/2016/02/The-Arrest-News-11th-issue.pdf.

In this ruling, the court demonstrated little tolerance for claims by entities that merely served as intermediaries in the supply chain.[86] If an owner has rendered payment to its contractual counterparty, this will effectively protect its vessel from being arrested by any of the subcontractors involved. O.W. Bunker has appealed this decision to the Israeli Supreme Court.

V. CONCLUSION

While litigation continues in jurisdictions around the world, the pieces of the O.W. Bunker bankruptcy puzzle are gradually falling into place. Nonetheless, there is no uniform solution. As demonstrated in this article, there is the considerable divergence in the law of different jurisdictions, which is further complicated by the varying developments of the supply chains in the cases.

Albeit not fully resolved yet, the O.W. Bunker collapse may function as a cautionary tale for the parties involved. Vessel owners have been facing a difficult choice between paying excessive amounts to multiple claimants and having their vessels arrested. Taking into consideration the current status of the law, the following measures could prove effective in providing owners with some guidance.

First, with respect to the United States, owners should note that courts have been entertaining and granting interpleader actions in their favor. However, depending on the outcome of the *Hapag-Lloyd* case on remand, the injunctive relief may not be granted an extraterritorial scope. What is more, case outcomes could vary depending on the circuit in which suit is brought. One general rule has developed in the U.S.: in multiple party dealings, the less control the owners exercise over the selection and role of the physical supplier, the more likely courts will find that the supplier may not demand payment from the vessel interests.

Second, the law in the United Kingdom, based upon the leading case of *Res Cogitans*, suggests that shipowners are required to pay the contractual supplier, namely O.W. Bunker, for the marine fuel bunkers supplied. If this finding is upheld by the Supreme Court, it seems that owners can safely discharge their obligation by rendering payment to O.W. Bunker, as opposed to the physical supplier.

Third, some general precautionary measures could prove useful for the vessel interests in future dealings. To begin with, owners are advised to bring the maximum amount of contractual clarity in relation to bunker supply transactions. Important examples are the incorporation of a "no lien" clause in the charter party, coupled with pertinent notice to the

86. *See* JAMES GOSLING & REBECCA WARDER, THE SHIPPING LAW REVIEW 262 (2014).

physical supplier, explicitly informing it of the "no lien" clause. The judicial approach vis-à-vis the effectiveness of prohibition of lien clauses demonstrates that the owners should establish the supplier's "actual knowledge;" a mere "no lien" stamp on the bunker delivery receipt would likely fall short of meeting this threshold. Furthermore, owners may maximize their protection by including an indemnification clause in the charter party; this will give them the right to be reimbursed by the charterer in the event the vessel is subjected to a lien.

Another matter that could be resolved contractually in advance is the method of payment. Indeed, owners may schedule to pay the contractual supplier separately from the physical supplier or pay only the physical supplier, but designate which amount of the sum is to be set aside as the contractual supplier–principal's profit. Additionally, the contract could provide that the owner will render payment to the contractual supplier only if it presents a receipt of its payment to the physical supplier. Of course, the likelihood that the counterparties will agree to such terms will largely depend on the vessel owner's bargaining power.

In addition, before entering in multiparty dealings, owners could explore the option of taking out insurance to protect their interests against the risk of the intermediary's insolvency or seek to verify that the intermediaries themselves enjoy the benefits of such insurance.

In any event, dealing directly with the physical supplier may prove advantageous for the shipowner. Elimination of other intermediaries in the supply chain, utmost due diligence in the selection of the supplier, and risk assessment in advance may go a long way in safeguarding the interests of vessel owners.

Setting aside such suggestive precautionary measures, however, what is the optimal solution to be adopted by the courts? The divergent results both within the confines of the United States and internationally offer some food for thought as to the role of the judiciary.

First, which U.S. circuit seems to be offering the most equitable solution to the problem? So far, the Fifth Circuit has interpreted the *Lake Charles Stevedores* jurisprudence to rule against the physical supplier for failure to demonstrate the needed nexus between it and the owner. The Second Circuit found that an interpleader claim is a proper means of asserting rights in O.W. Bunker cases, but questioned the scope of the injunctive relief granted in favor of the owner.

Second, do findings of international courts contribute to a fair result? The United Kingdom judiciary has focused on the nature of the bunker supply contract, depriving the physical supplier of a claim *in rem*. On the contrary, O.W. Bunker enjoyed a debt claim, flowing from its contractual relationship with the owner. Singapore also disfavors physical suppliers, sending them in line with the rest of O.W. Bunker's creditors.

Israel's approach is similar; only the contractual supplier enjoys privity with the owner and is thus entitled to a maritime lien. On the other hand, Canada is the only jurisdiction that has awarded a physical supplier with a lien for its claim.

The optimal solution would strike a balance between the rights of all the parties involved. The Fifth Circuit's approach, analogous to findings in the United Kingdom, Singapore, and Israel, seems to leave the physical supplier unprotected. While it is true that the degree of interaction between the physical supplier and the owner (as interpreted by the different circuits) may not always be present or sufficient, it is also undeniable that the physical supplier, in providing bunkers to the vessels, shouldered the biggest part of the financial burden in the transaction. In other words, absent O.W. Bunker's bankruptcy, the physical supplier would have been entitled to the largest portion of the payment, i.e., the full price, minus only O.W. Bunker's commission for middleman services.

On the other hand, the owners should be protected from pressing competing claims; the interpleader mechanism seems to be an appropriate first step. It remains to be seen whether the court in *Hapag-Lloyd* will confirm the injunction's extraterritorial application. Absent such international scope of the injunction, owners would remain exposed to litigation, a fact that would significantly undermine the protective power of interpleader relief.

Nevertheless, the question remains whether the contractual or the physical supplier will be granted priority in its claims. In this regard, neither the O.W. Bunker–friendly approach (United Kingdom, Singapore, and Israel) nor the physical supplier–friendly solution (Canada) seems to equitably resolve the dilemma. Perhaps the optimal solution could be found somewhere in the middle: after securing the payment at hand via an interpleader proceeding, the court could divide the sum and award the bunker price to the physical supplier and the commission to the contractual supplier. This way, both parties would receive the sum that they would have ended up with, absent O.W. Bunker's collapse.

In the aftermath of the O.W. Bunker bankruptcy, one thing seems certain: the challenging problems facing the parties involved are far from resolved. In light of the complex nature of the bunker supply business and absent a clear underlying legal framework, the solutions suggested in this article may only go so far. Hence, as considerable uncertainty lingers, we are anticipating more decisions from the highest courts internationally. One can only hope that the novel questions presented will be resolved in a manner most equitable and beneficial to the interests of all entities across the supply chain.