

Time Charters and Bunkers

Legal and Practical Issues

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Focus:

Liability to pay for bunkers

Generally speaking, time charterers arrange and pay for bunkers

NYPE 93

7. *The Charterers, while the Vessel is on hire, shall provide and pay for all the bunkers except as otherwise agreed ...*

9. *The Charterers on delivery, and the Owners on redelivery, shall take over and pay for all fuel and diesel oil remaining on board the Vessel as hereunder.*

SHELLTIME 4

7(a) *Charterers shall provide and pay for all fuel ...*

15. *Charterers shall accept and pay for all bunkers at the time of delivery, and Owners shall on redelivery (whether it occurs at the end of the charter or on the earlier termination of this charter) accept and pay for all bunkers remaining on board, at the price actually paid, on a "first-in-first-out" basis. Such prices are to be supported by paid invoices.*

Vessel to be delivered and redelivered from the charter with, at least, a quantity of bunkers on board sufficient to reach the nearest main bunkering port.

Notwithstanding anything contained in this charter all bunkers on board the vessel shall, throughout the duration of this charter, remain the property of Charterers and can only be purchased on the terms specified in the charter at the end of the charter period or, if earlier, at the termination of the charter.

SUPPLYTIME 89

8(a) *While the Vessel is on hire the Charterers shall provide and pay for all fuel ...*

9. *Unless otherwise agreed, the Vessel shall be delivered with bunkers and lubricants as on board and redelivered with sufficient bunkers to reach the next bunkering state en route to her next port of call. **The Charterers upon delivery and the Owners upon redelivery shall take over and pay for the bunkers and lubricants on board at the prices prevailing at the times and ports of delivery and redelivery.***

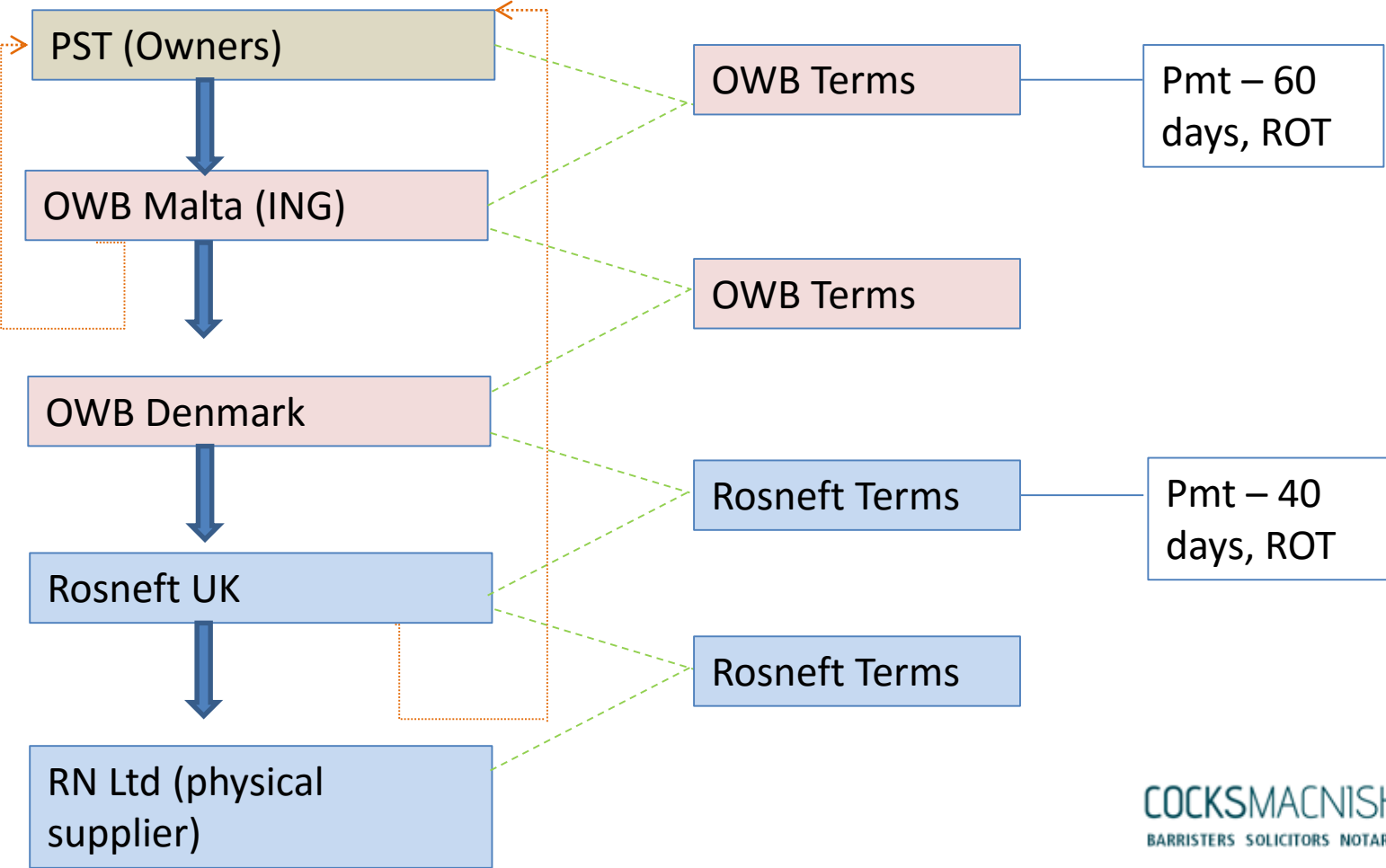
Risk for time charterers

- Double payment
 - Difficulty with regards to seeking interpleader relief - uncertainty

(Relevant to any party that arranges for the bunkers and enters into contractual obligations for that purpose)

Double payment

PST Energy 7 Shipping & anor v OW Bunker Malta Limited & anor “Res Cogitans” [2015] EWHC 2022



Double payment

Difficulty with interpleader relief

Precious Shipping Public Company Ltd & ors v OW Bunker Far East (Singapore) Pte Ltd & ors [2015] SGHC 187 (Steven Chong J)

- Competing claims are not adverse to each other

Double payment

Res Cogitans

Owner's arguments:

- i. The contract was a contract for the sale of goods to which the SOGA applied.
- ii. ING's claim is an action for the price, which can only be maintained if the conditions relating to title in s 49 of SOGA are satisfied, namely that (1) property in the goods has passed to the buyer or (2) the price is payable on a day certain irrespective of delivery
- iii. Neither condition was satisfied
- iv. Because Rosneft was not paid, title never passed to OWBM
- v. This was a breach of s 12 SOGA, that the seller had a right to sell the goods
- vi. Therefore Owner did not have to pay OWBM

Double payment

Res Cogitans (cont'd)

For SOGA to apply:

Section 1 – The **Act applies to ‘contracts of sale’**

Section 2 – contract of sale of goods

(1) A contract of sale of goods is a contract by which the seller transfers or agrees to transfer property in goods to the buyer for money consideration, called the price.

...

(5) Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell.

Section 61 – A contract of sale **includes an agreement to sell.**

Double payment

Res Cogitans (cont'd)

Findings:

- i. ROT clauses + expectation that bunkers would be consumed before the payment would have been due
- ii. Parties could not have intended for property in the bunkers to pass to Owners
- iii. OWBM did not undertake obligation to transfer property to Owners
- iv. This is not a 'contract of sale' therefore SOGA does not apply

Double payment

Res Cogitans (cont'd)

What were owners paying for?

The right to consume the bunkers – This is a BUNKER SUPPLY CONTRACT

Was there a total failure of consideration, ie did they get the right to consume the bunkers?

Yes:

- Rosneft knew that OWBAS was a trader and not end user,
- Therefore Rosneft knew or ought to have known that OWBAS would contract directly or indirectly with owners of the vessel to which the bunkers would be delivered and that the owners would be authorised to consumer the bunkers
- Owners will not be liable in conversion because Rosneft knew that the bunkers would be consumed before payment was due

Outcome

ING's claim enforceable as a debt

Implications for owners if the person ordering the bunkers was the time charterer? (assuming UK/Australian law applies to the CP)

Owner has authority to consume the bunkers during the charter

- possibly on sub-bailment on terms: *The Fesco Angara* [2011] 2 Ll L Rep 61

At the end of the charterparty:

- if owner takes possession of the bunkers in good faith and without notice of the ROT clause, then owner acquires good title
 - SOGA will likely apply as between owner and time charterer: *The Fesco Angara* [2011] 2 Ll L Rep 61
- if owner withdraws the vessel, then the owner may be liable in conversion for bunkers remaining on board if the property remained with the supplier
 - this would depend on the terms of the CP: *The Saetta* [1993] 2 Ll Rep 268
- if breach by owner, then property in the bunkers on board remain vested in the charterer
 - *The Eurostar* [1993] 1 Ll Rep 106

Risk for owners

- Liability on a maritime lien

Where?

1. Jurisdictions in which a maritime lien is afforded in respect of bunker claims – example, US and Canada
2. Other jurisdictions which recognise foreign maritime liens – now including Australia?

Liability on a maritime lien

Jurisdictions in which a maritime lien is afforded in respect of bunker claims –
example, USA

Commercial Instruments and Maritime Liens Act, 46 U.S.C Ch 313 (US)

§ 31342

- (a) ... a **person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—**
- (1) **has a maritime lien on the vessel;**
 - (2) may bring a civil action in rem to enforce the lien; and
 - (3) is not required to allege or prove in the action that credit was given to the vessel.

§ 31341

- (a) The following persons are presumed to have authority to procure necessaries for a vessel:
- (1) the owner;
 - (2) the master;
 - (3) a person entrusted with the management of the vessel at the port of supply; or
 - (4) **an officer or agent appointed by—** (A) the owner; ... (B) a **charterer**

Liability on a maritime lien

Jurisdictions in which a foreign maritime lien is recognised – now including Australia?

Reiter Petroleum Inc v The Ship Sam Hawk [2015] FCA 1005

- Time charterer arranged for bunkers with a trader
- Trader's terms and conditions were subject to Canadian law, and they provided for US law to apply to the question of maritime liens
- Bunkers supplied in Istanbul
- Time charterer did not pay for bunkers
- Suppliers asserted a maritime lien over the vessel arising under either US or Canadian law
- Suppliers arrested the ship in Australia on a maritime lien under s 15 of the *Admiralty Act 1988* (Cth) and on a general maritime claim under ss 4(3)(m) and 17.

Defendant ship challenged jurisdiction – *Halcyon Isle*

Court – *Halcyon Isle* should no longer be followed in Australia – minority reasoning should be followed and on that basis, court has jurisdiction

Liability on a maritime lien

Jurisdictions in which a foreign maritime lien is recognised – now including Australia?

Implications of the *Sam Hawk*:

- Marks a significant departure from English law position
- Remains to be seen if others in the supply chain could similarly claim, for eg, the physical supplier
- Probably only limited to ‘maritime liens’ characterised by the foreign law as being substantive
- Ability to arrest under s 15 on non-owner’s liabilities, including charterers and agents
- Difficult for owners to protect themselves against arrest/claim – BIMCO no lien clause ineffective if charterer is insolvent (particularly relevant in relation to US law)
- Priority given to foreign maritime lien claimants (for eg, foreign suppliers of bunkers subject to US law) over domestic claimants in respect of similar claims

Thank you