

OW BUNKERS: DEVELOPMENTS IN ENGLISH AND US LAW

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- 1. “RES COGITANS” outcome from Supreme Court and practical steps to protect position under English law**

- 2. US position overview**

Demise of OW Bunker Group (OWB) provoked world-wide litigation and arrest of vessels

UKDC members faced competing claims from OWB as contractual supplier and physical supplier due to maritime lien over ship

UKDC – lead case: RES COGITANS

Bunker supply contract was a sale or agreement to sell pursuant to English Sale of Goods Act 1979 (SoGA).

OWB not have good title to claim under SoGA for payment because they had not paid their supplier

SUPPLY



RN-Bunker Ltd (Rosneft company)
Rosneft Marine (UK) Ltd
OW Bunker & Trading
OW Bunker Malta
Owners

PAYMENT



OWB claiming full invoice amount despite only small brokerage percentage being retained in normal trading

Relevant bunker supply contract not a sale of goods within SoGA

- Held**
- licence to consume not requiring OW to transfer property in the fuel**
 - “sui generis” transaction – a unique contract that not a contract of sale**

Has brought some certainty under English law

“ ... in its essential nature, it [the bunker supply contract] offered a feature quite different from a contract of sale of goods – the liberty to consume all or any part of the bunkers supplied without acquiring property in them or having paid for them. The obligation on the part of [OWB] to be able to pass the property in respect of any bunkers not so consumed against payment of the price for all the bunkers cannot make the agreement as a whole a contract of sale.”

Bunker purchasers should consider paying OWB under English law contracts

Risk of paying twice - physical suppliers not paid by OWB may arrest in other jurisdictions (especially if maritime lien is available)

In English law bunker supply contracts, include if possible:

Express term that seller has right to transfer title before it can claim payment.

Not sufficient to simply say that contract one for sale of goods/subject to SoGA.

Has to “do what it says on the tin”

Indemnity from contractual supplier in respect of claim by physical supplier

Right to withhold payment if not already made and to pay physical supplier direct

Provision for purchaser to terminate contract if contractual supplier goes insolvent

Contractual supplier to provide evidence that physical supplier has received payment and has no claim over the ship

(See UKDC suggested bunker supply clause)

Use C/P indemnities - only as good as charterers

**Written confirmation from the physical supplier of payment/
confirmation that has no claim over the ship**

BIMCO Bunker Non-Lien Clause for Time Charterparties

**Designed to protect owners from maritime liens by physical
suppliers. May add some protection**

**Key leverage for owners - Master may refuse to take bunkers
unless non-lien notice provided and hire still accrue**

Members face competing claims in US

OWB

U.S. Oil Trading

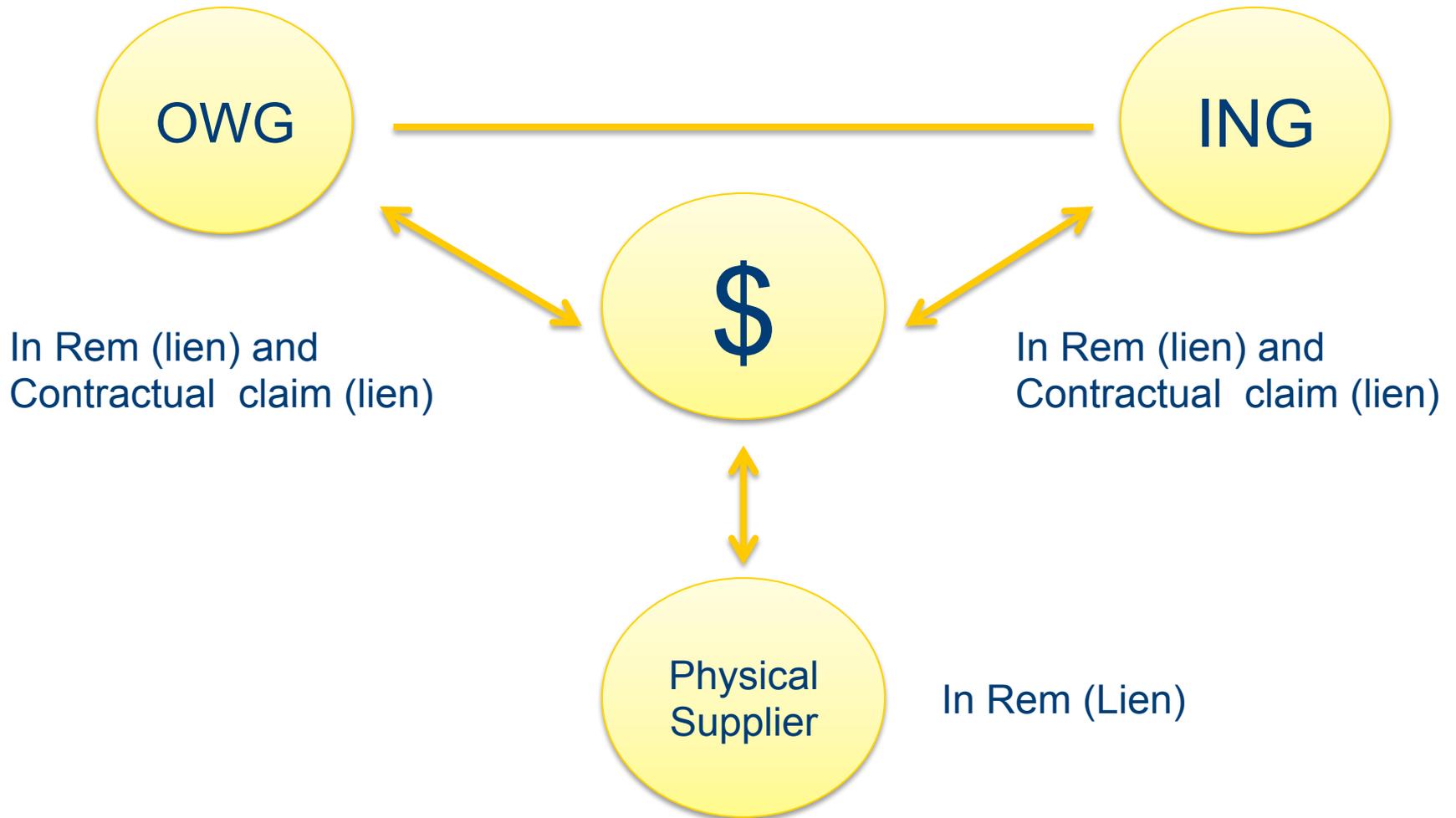
NuStar

OWB/ING asserting contractual and maritime liens

Physical suppliers assert maritime liens

INTERPLEADER ACTIONS commenced in New York and Texas to best protect against the possibility of double payment for the same supply of fuel

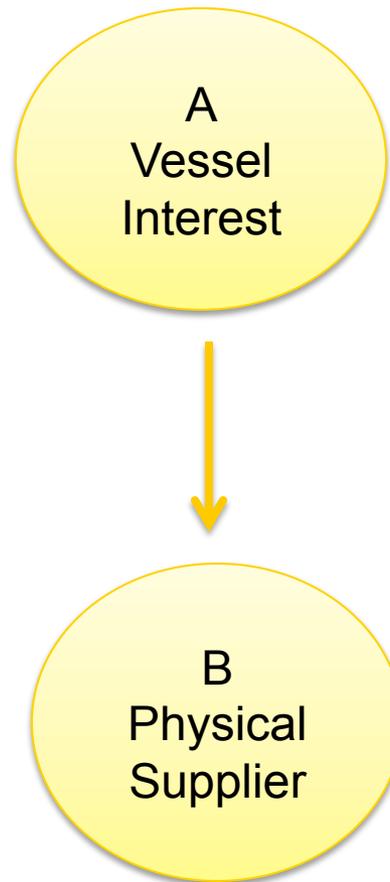
Purpose of the INTERPLEADER is to bring all claimants (contract and maritime lien) into one action thereby permitting the Court to determine which party is entitled to payment. Permits the Court to take into consideration all claims, issues and arguments



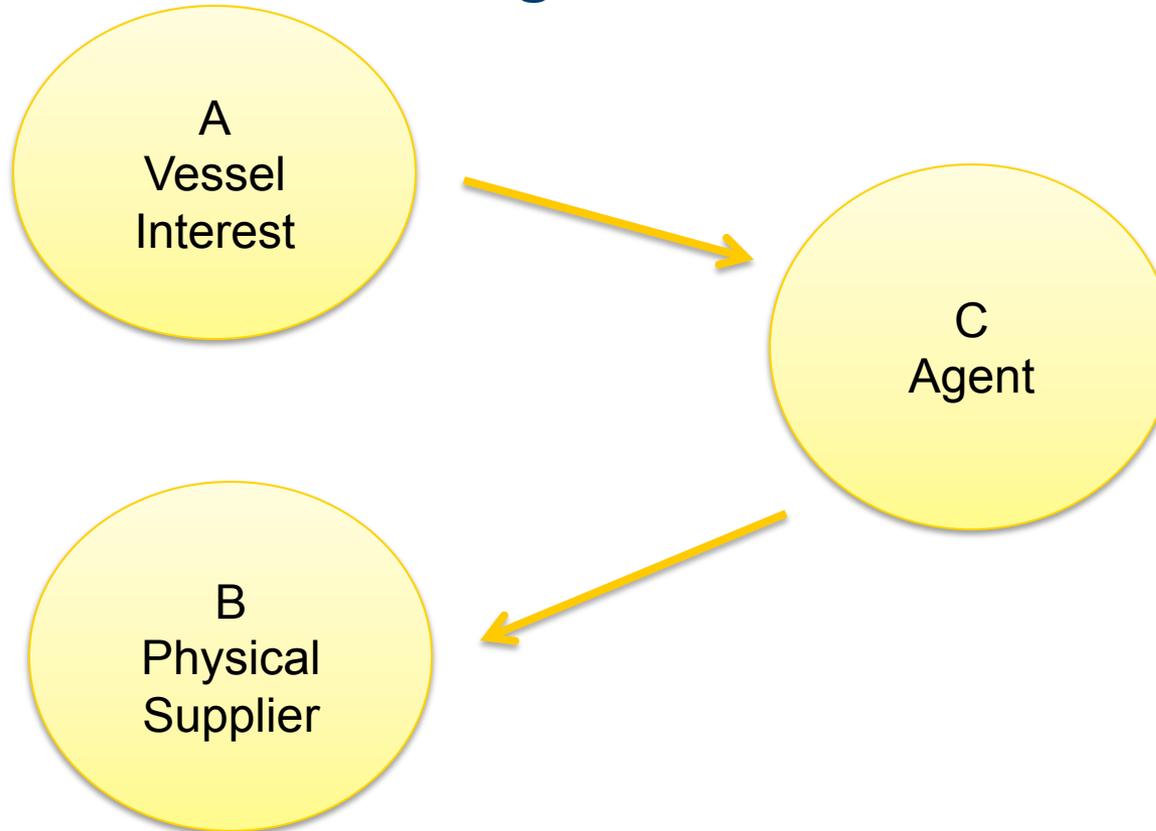
Persons presumed to have authority to procure necessities

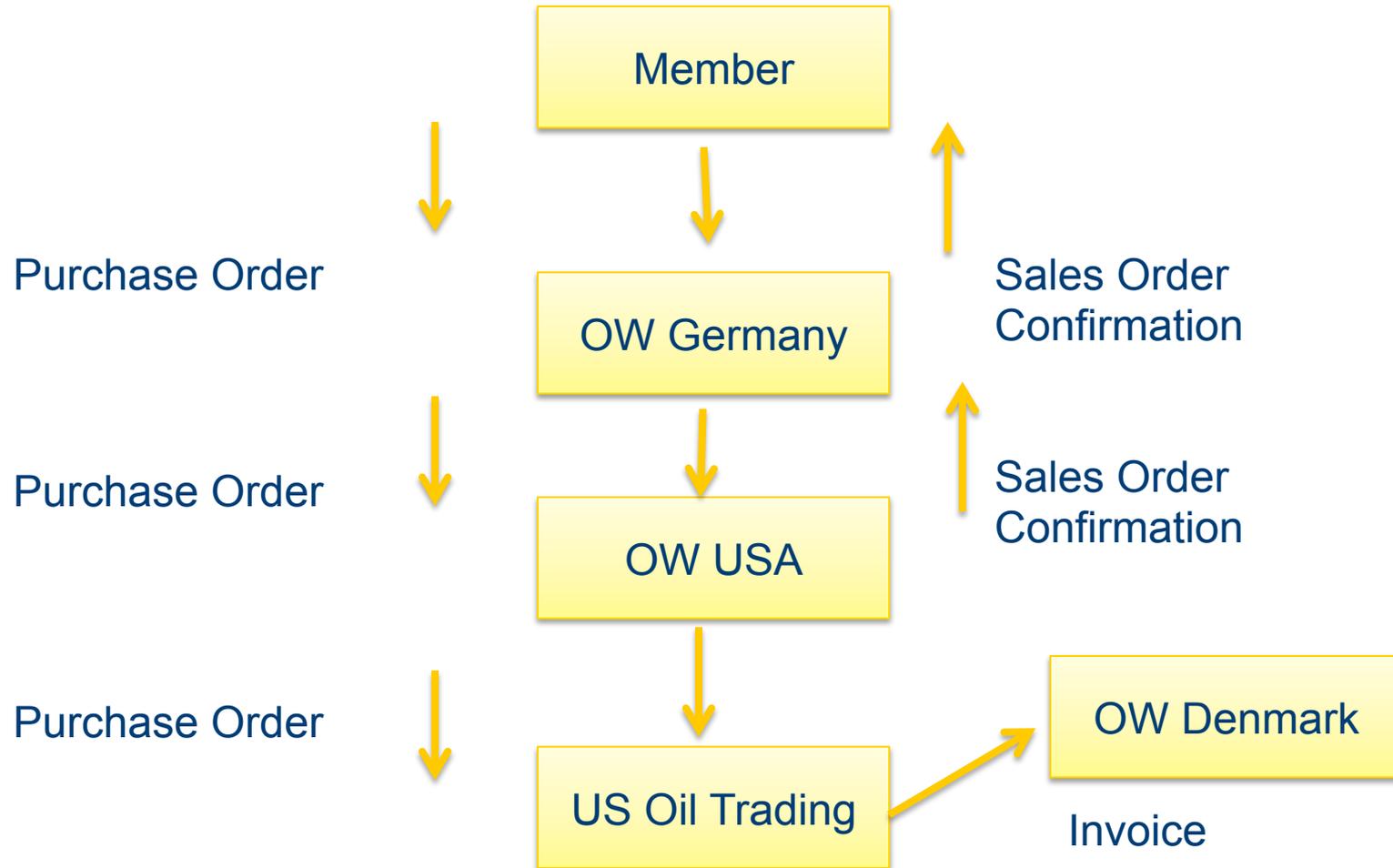
- (a) The following persons are presumed to have authority to procure necessities for a vessel:
 - (1) the owner;
 - (2) the master;
 - (3) a person entrusted with the management of the vessel at the port of supply; or
 - (4) an officer or agent appointed by-
 - (A) the owner;
 - (B) a charterer;
 - (C) an owner pro hac vice
 - (D) an agreed buyer in possession of the vessel

Direct Order = Maritime Lien



Order From Agent = maritime lien





Owners argue: OWB a trader and not agent therefore no maritime lien

Physical supplier appeals to Second Circuit Court of Appeals attempting to:

Undermine Court's jurisdiction over the Interpleader

Limit the claimants and types of claims (contract v. maritime lien) to gain advantage over others

Second Circuit ruled against physical supplier on all issues on appeal.

Court found the various competing claims presented by OWB, ING and U.S. Oil (i.e. contractual and in rem-lien) were proper for purposes of the Interpleader and that the member and other bunker buyers should be shielded from double payment “to the extent the governing law permits”

Attempts to start duplicate proceedings in Bankruptcy Court also denied

Law developing in favour of single payment thanks to interpleader (contrast with English law where interpleader not accepted)

No settled law yet

However, principle of interpleader likely to be maintained, so principle of paying once likely to be upheld

So far, seems more owner friendly jurisdiction for bunker supply contracts

Contrasts with English law position

Thank you for listening!

Any questions?

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