

# OW Bunker bankruptcy



**Jamie Wallace, Partner**  
**Bentleys, Stokes and Lowless**  
+44 20 7782 0990  
jwallace@bentleys.co.uk



**Olivia Furmston**  
**Legal Director**  
+44 20 3320 8858  
olivia.furmston@ctplc.com

This article intends to provide only general guidance on the above issues, arising as a matter of English law. It is not intended to provide legal advice in relation to any specific query. Instead, its aim is to assist the club's members in identifying the issues requiring consideration and in deciding on what further enquiries and advice should be sought from its club or preferred lawyers before acting.

Although the OW Bunker group (OWB) only had a reported 7% share in the marine fuel supply market, OWB's filing for bankruptcy on 7 November 2014, followed a week later by three US subsidiaries, is having an unforeseen and very immediate impact on the wider shipowning community. Indeed, we have received a high number of queries from our members as a result of this recent financial collapse.

Different types of cases are emerging from OWB's difficulties, including claims where OWB is the cargo owner and/or charterer. However, the most common cases we are seeing, and which are focused on in this brief article, stem from circumstances where a vessel owner/operator (or time charterer) has contracted with OWB but the physical supply of bunkers is handled by a third-party.

The risk to members particularly arises where the physical supplier remains unpaid under its supply contract with OWB or one of its bankrupt subsidiaries. In such circumstances, physical suppliers are looking to the owner of the supplied vessel for payment irrespective of the contractual position.

Owners and time charterers ordering bunkers from OWB may correctly point out that their primary payment obligations are owed to OWB or a bankrupt subsidiary under the supply contract (or perhaps ING Bank following its recent intervention). However, in certain jurisdictions, such as the USA, Holland and Belgium, a bunker supplier may have a lien against a vessel (and hence the right to arrest) even if it has no direct contract with the owner. Even if, for example, OWB's supply contract was with the time charterer, the bunkers may be deemed supplied 'on the credit of the vessel'.

Whilst the supply of bunkers can give rise to a direct claim against the vessel in certain jurisdictions, a supplier will not always be able to arrest for non-payment. For example, most common law jurisdictions, such as England, South Africa and Singapore (and those jurisdictions which interpret the 1952 Arrest Convention in a similar way) will not assist third-party bunker suppliers. A vessel cannot generally be arrested where there is no direct contractual link between the vessel's owner and third-party supplier.

If a member is confronted by the threat of arrest, or even a claim in contract from OWB, it faces a difficult choice, namely whether to:

- (i) pay OWB or the physical supplier, but risk double payment and/or arrest; or
- (ii) withhold payment and risk arrest.

The concern arising from (i) is that payments made under a supply contract to OWB are unlikely to result in the physical supplier being reimbursed at the same time or at all. That, in turn, potentially gives the latter a direct claim against the vessel (perhaps by virtue of a lien). On the other hand, payment to the physical supplier may well leave an owner exposed to contractual claims from OWB's liquidator, whose lawyers are reported to have confirmed that the liquidators will take legal action to

enforce payment pursuant to invoices. The position is further complicated by ING Bank's reported demand that owners and time charterers pay sums due to OWB direct to the bank.

The alternative course of withholding payment as per option (ii) above will, however, also expose an owner to risk of arrest, unless carefully managed.

In addition to arrest, a further remedy that a supplier may seek is a court order for delivery up of bunkers. In short, a supplier may rely on a retention of title clause in its supply contract to argue that it owns the bunkers on board a vessel and is entitled to take back possession. If the bunkers have already been burnt, then the supplier may have a claim in 'conversion'. Further discussion of these claims is beyond the scope of this article, and in any event, such claims often require detailed factual and legal investigation.

It is important to note that each case will turn on its own facts, not least because OWB contracted on different terms, which variously included English or Danish law clauses. In addition, different jurisdictions have diverse approaches to claims regarding non-payment of bunkers, the right of arrest and other remedies.

#### **Practical steps**

If bunkers have already been supplied, the broad message is for owners and time charterers to think very carefully before making any payments in relation to OWB bunkers, and certainly not before consulting with the club or lawyers. Payments to OWB are likely to be retained by the duly appointed liquidators rather than passed on to the physical supplier (hence the vessel may still be vulnerable to arrest), while payment to the physical supplier or, say, ING Bank rather than OWB is likely to expose an owner or time charterer to contractual claims for non-payment.



#### Documents to be gathered include:

- (i) details of the bunker operations, including the date and place of delivery, name of the supplying company (and chain of suppliers if relevant) and delivery vehicle (barge, truck, pipe);
- (ii) copies of all documents received and given by the vessel before, at and after the bunker operation, including the bunker delivery note;
- (iii) copies of relevant vessel log entries;
- (iv) correspondence with OWB and/or the physical supplier on actual delivery; and
- (v) bunker contracts – with OWB and, if possible, supply contract(s) between OWB and the physical supplier – plus invoices.

The prudent course is to contact the club before any payments are made. Further, information should be obtained to enable an assessment of the available options and applicable jurisdictions. Examples of the types of documents to be gathered can be seen in the box opposite.

In some cases, a solution may be found by writing to OWB/the liquidators and the physical bunker supplier, plus any other known claimant(s) such as ING Bank, seeking written confirmation of payment instructions and/or proof of payment to the supplier. If payment is due imminently, the owner/time charterer may add that payment to OWB will be postponed until the agreed payment instructions are received, while at the same time making it clear that the owner or time charterer is willing and able to pay. At the very least, meaningful without prejudice discussions may then start, which could avert an immediate threat of arrest and may lead to settlement.

However, if there is no agreement between OWB and the physical supplier or other claimant(s) regarding payment or one or all remain silent, then the owner may be able to pay the money into escrow pending resolution of the dispute between OWB, the physical supplier and other claimant(s). Alternatively, the owner may pay the monies into court and 'interplead'. The latter is a procedure in England and Wales where a claimant starts proceedings to compel competing parties to litigate a common dispute. Similar procedures are found in other jurisdictions including, we believe, in the USA and South Africa. Again, the club strongly advises members to seek advice before attempting to make payments into escrow or court.

Subject to local advice, there may be other court procedures that can assist to head off an immediate threat of arrest, for example, filing a caveat against arrest, though this typically requires security to be put up quickly. If an owner knows that its vessel is at risk of arrest but does not know where, then to minimise the risk of detention and subsequent delays, it may wish to take pre-emptive steps to have adequate security ready at short notice.

Other options may, of course, arise on a case-by-case basis such as payment to the physical supplier in return for an express indemnity to defend and hold the owner harmless from any attempt by OWB or other interested party to seek payment. Of course, any such arrangement is only as good as the terms on which it is written and also depends on the financial standing of the physical supplier. Bear in mind also the jurisdiction where the supplier is located in case subsequent enforcement is required.

Furthermore, an owner may have an indemnity claim against its time charterer in the event of a claim emerging for non-payment (see, for example, clause 18 of the NYPE form).

Members should be aware that likely arrest jurisdictions include not only the country where the bunkers were supplied but also the USA, Holland, Belgium, Panama, Nigeria, Chile, Venezuela, Argentina and possibly certain parts of India. China is also possible, if the supplier is a national company, and we are aware of attempted arrests relating to OWB claims in Singapore and South Africa.

**Example of notice to suppliers confirming that the charterer does not have authority to pledge credit of the vessel**

'We hereby put you on notice that the bunkers to be supplied to the vessel [•] at [•] are supplied under a contract between the vessel's time charterers [•] and [•], a contract to which the owners are not a party. These bunkers are not supplied on the faith and/or credit of the owners, their servants, managers, agents or subcontractors, or the vessel, none of whom will have any responsibility for payment for them. No lien or other encumbrance whatsoever will be created by the supply of bunkers to the vessel [•].'

While discussions above have concentrated on difficulties where bunkers have already been supplied, issues will undoubtedly also arise if bunkers have been ordered from OWB but have yet to be delivered. If so, then the first point to check is the status of the seller as not all OWB companies have filed for bankruptcy. Again, the imperative is to gather relevant contracts and information, and speak to the club before problems arise. If the supply does proceed and it has been ordered by the time charterer, then notice should be given to both OWB and the physical suppliers confirming that the charterer does not have authority to order bunkers for the credit of the vessel or the owner and that the bunkers are for the charterer's sole account.

The last point, and the collapse of OWB generally, serve as a timely reminder of the steps that an owner can take to minimise the risk of arrest in the event

of a time charterer's non-payment of bunkers. Details of these steps are again beyond the scope of this article, but broadly include (i) a time charter provision expressly prohibiting the charterer from procuring supplies and services on the credit of the vessel and, as indicated above, (ii) giving notice to suppliers confirming that the charterer does not have authority to pledge the credit of the vessel or the owner. An example of such a notice is shown in the box on the left.

Whilst there is no guarantee such a notice will be effective to protect a vessel in all jurisdictions, it is certainly better than nothing when it comes to accepting future liftings.

In case of any doubt, the member should not hesitate to contact the authors or their usual club contact. The law is not static and we are always on hand to assist.

