

OW BUNKER –update following the *Res Cogitans* decision
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Background

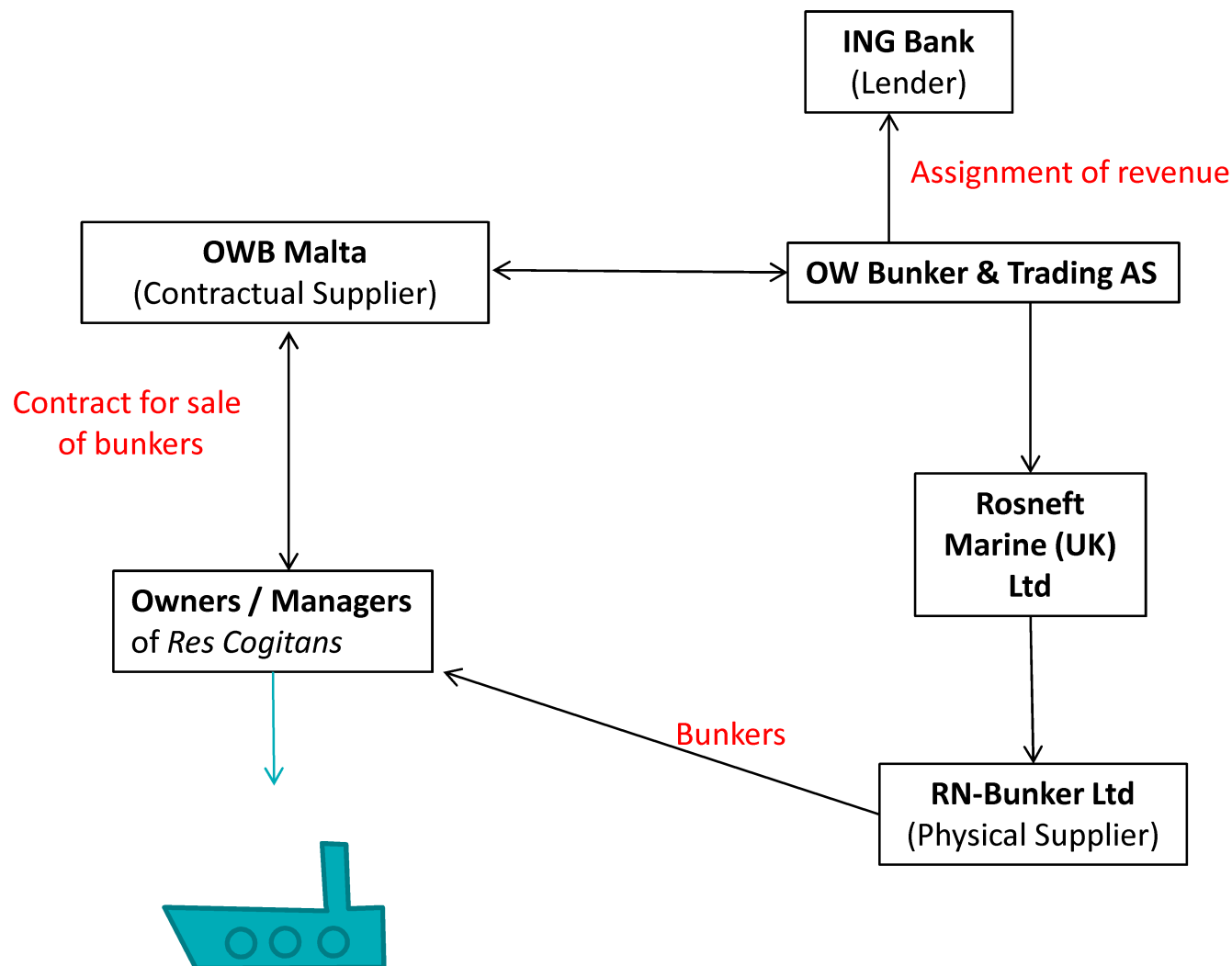
- OW Bunkers – worlds largest bunker supplier.
- 6 Nov 2014 – OW Bunkers apply to Danish Court for restructuring;
- OW Bunkers not always the physical supplier – often the contractual supplier only;
- Shipowners and Charterers exposed to demands for payment by competing parties for the same bunker supplies;
- proceedings in various jurisdictions including the test case *Res Cogitans* in the English Courts.

Summary

Res Cogitans proceedings:-

- **Arbitration** – 22 April 2015
- **Commercial Court** – 14 July 2015
- **Court of Appeal** – 22 October 2015
- **Supreme Court** – 11 May 2016

Factual background



Legal Background (1)

Sale of Goods Act (SOGA)

Section 2(1) of SOGA defines a contract for the sale of goods as:-

*"a contract by which the seller transfers or agrees to transfer the **property** in goods to the buyer for a money consideration, called the price".*

Section 12 of SOGA provides:

*"... there is an implied term on the part of the seller that in the case of a sale he has a **right to sell** the goods, and in the case of an agreement to sell he **will have such a right at the time property is to pass**".*

Legal Background (2)

Sale of Goods Act (SOGA)

Section 49 of SOGA provides:-

- (1) Where, under a contract of sale, **the property in the goods has passed to the buyer** and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.
- (2) Where, under a contract of sale, the **price is payable on a day certain irrespective of delivery** and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract.

Contractual Background(1)

Contract between OW and Rosneft

Terms of contract with Rosneft :-

- London arbitration, English law
- Payment term: 30 days
- ***"Title to the Marine Fuels shall pass to the Buyer upon payment for the value of the Marine Fuels delivered, pursuant to the terms of Clause 8 hereof. Until such time as payment is made, on behalf of themselves and the Vessel, the Buyer agrees that they are in possession of the Marine Fuels solely as Bailee for the Seller. If, prior to payment, the Seller's Marine Fuels are commingled with other Marine Fuels on board the Vessel, title to the Marine Fuels shall remain with the Seller corresponding to the quantity of the Marine Fuels delivered."***

Contractual Background(2)

Contract between OW and Owner

- London arbitration, English law

- Payment term: 60 days

- H.1 - Retention of title clause

Title in and to the Bunkers delivered and/or **property rights in and to such Bunkers shall remain vested in the Seller until full payment has been received by the Seller** of all amounts due in connection with the respective delivery.

- H.2 - Licence to use

Until full payment of the full amount due to the Seller has been made ..., the Buyer agrees that it is in possession of the Bunkers solely as Bailee for the Seller, and **shall not be entitled to use the Bunkers other than for the propulsion of the Vessel**, nor mix, blend, sell, encumber, pledge, alienate, or surrender the Bunkers to any third party or other Vessel.

Supreme Court Decision (1)

- The Contract between the Owners and OW was not a contract of sale to which SOGA would apply but was a 'sui generis ' (i.e. one-off) contract;
- The contract was subject only to an implied promise that OW had acquired the right to authorise the Owners' use of the bunkers before payment; and
- Even if SOGA applied, section 49 was not mandatory and would not be a bar to a claim by OW for payment of the agreed price.

Supreme Court Decision (2)

- Application to other contracts with similar terms
- Possibility that Physical Suppliers might also be entitled to payment
- ING entitled to whole price and margin, not just margin
- Each case to be viewed on its own facts – terms may vary

Decisions of other jurisdictions

Interpleader procedures

- **USA**

interpleader actions allowed

suppliers do not have a lien on ships if they have no contract with vessel interests

- **Canada**

Canpotex decision : obligation of the Owner to pay the bunker price to the physical supplier and to pay the margin to OWB

- **Singapore**

Interpleader action dismissed

No claim for bunker suppliers

Thank you

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