

To the Members:

The Risk of Ship Arrest for unpaid Bunkers arising from the OW Bunker group collapse

Members' attention is drawn to the risk to ship owners of bunker suppliers attempting to arrest ships to recover sums due for bunkers supplied to vessels.

This arises out of the collapse of the OW Bunker group of companies, some of which are in insolvency proceedings and some of which are not (yet) (each of the OW Bunker entities being referred to generally as **OW Bunker** in this Club Circular). As a result of the OW Bunker group collapse, there are a significant number of physical bunker suppliers that have not been paid by the relevant OW Bunker entity with which they contracted and so may seek to arrest vessels to which they supplied fuel.

The analysis that follows is based on the assumption that ship owners did not contract directly with the third party suppliers. Owners or charterers contracted with various OW Bunker entities, who then contracted with the physical suppliers. There are however occasions where the master or chief engineer has signed a "bunker receipt" from the physical supplier, most of which do not however appear to incorporate any of the physical supplier's terms and conditions.

A number of vessel owners are facing claims for payment directly from the physical suppliers who have not been paid by OW Bunker either on the basis that the Owner is directly liable (whether because of the signing of the receipt or arising out of agency arguments) or on the basis that the supplier had a retention of title provision in its terms and conditions.

This Club Circular will address whether it is possible to arrest a vessel in these circumstances in the following jurisdictions: England and Wales, Hong Kong, Singapore, US, Japan, China, Australia, South Africa and Italy.

1 England

- 1.1 The admiralty jurisdiction of the English Court is set out in section 20 of the Senior Courts Act 1981. It provides the High Court with jurisdiction to hear and determine all the claims which are described as "maritime claims" in the 1952 Brussels Arrest Convention.
- 1.2 There are two classes of maritime claims giving rise to the right to arrest. The first is a maritime lien, which includes damage done by a ship; salvage; seaman's and master's lien for wages; and Master's disbursements. The second class of claims are statutory maritime claims set out in section 20(2) paragraphs (a) to (s). It includes at sub-paragraph (l) "any claim in respect of goods or materials supplied to a ship for her operation or maintenance" which would include the supply of bunkers.
- 1.3 However, while a maritime lien gives rise to a right to arrest that ship regardless of ownership, as the supply of bunkers is a statutory right of arrest, there are further restrictions set out in section 21(4) which must be satisfied before an action *in rem* can arise (which entitles a party to arrest a ship). This provides that only where:
 - (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* ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

- (c) an action *in rem* may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against -
 - (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
 - (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it."
- 1.4 While this means that a sister ship (ie within the same direct ownership) can be arrested for a maritime claim, it also means that only if the ship owner or demise charterer is liable *in personam* to the bunker supplier, can any of its ships be arrested.
- 1.5 In the case of bunkers supplied with OW Bunker as an intermediary, the ship owner has no contractual link to the physical supplier and therefore no *in personam* liability to the physical supplier. If that is the case, there is not right to arrest in England.
- 1.6 While some physical suppliers have argued that the contractual relationship is established by the signing of the bunker receipt, this, on its own, is unlikely to give rise to a contractual relationship without clear wording, a course of dealing or other evidence to establish an intended contractual relationship.
- 1.7 It is not possible to arrest bunkers themselves in England and where the supplier asserts its claim on the basis of a retention of title, this does not give rise to a right to arrest as it is not a maritime claim under the Senior Courts Act. As with other common law jurisdictions, the physical supplier would have to argue that title to the bunkers had not passed. However, retention of title clauses in contracts are often difficult to enforce and are unlikely to be enforced where the bunkers have already been used or have been mixed with others. Even if such a claim could be effective, it would require an injunction to detain the vessel until the bunkers were returned which would almost certainly give rise to insurmountable practical as well as legal difficulties.

2 Hong Kong

- 2.1 The law and practice relating to arrest of ships in Hong Kong is very similar to that in England, Singapore and other common law jurisdictions.
- 2.2 The High Court Ordinance (Section 12A(2)) lists eighteen classes of claims in respect of which the court can exercise its Admiralty jurisdiction. These claims generate a statutory right of arrest, and include "any claim in respect of goods and materials supplied to a ship for her operation or maintenance," which covers a claim for the supply of bunkers, subject to the conditions mentioned below.
- 2.3 As this type of claim does not enjoy the status of maritime lien in Hong Kong the condition specified in Section 12B(4) must be satisfied. This section provides that an action *in rem* (that is against the vessel or fund created by the judicial sale of the vessel) may only be brought against a vessel which at the time the cause of action arose was owned, chartered, or in the possession or control of the person who would be liable in an action *in personam* and further that that person must be the beneficial owner of the vessel named in the writ (whether the same vessel or a sister-ship) or the demise charterer of the same vessel, at the time the writ is issued.
- 2.4 The ordinance allows sister ship arrests where the claim arises in connection with a ship and the person who would be liable on the claim in an action *in personam* ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship; then an action *in rem may* (whether or not the claim gives rise to a maritime lien on that ship) be brought against that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

- 2.5 Where the contract for the supply of bunkers is with a third party, such as one of the OW Bunker companies, *in personam* liability will not be made out and no right of arrest will exist. The claimant supplier will have to demonstrate contractual liability in order to arrest. One possibility is for him to show that the third party was acting as agent for the owner. This will depend on the intention of the parties as evidenced by the facts and particularly the contract of supply and any other documents and any prior course of dealing between the parties. Receipts signed by the chief officer or mate may exist but in the absence of other documents, will usually be treated merely as evidence of physical receipt of bunkers rather than contractual relations.
- 2.6 Claimant suppliers will sometimes assert ownership of bunkers based on a retention of title provision in the contract, but this will not give them a statutory right of arrest or a maritime lien. If the provision is effective (and sometimes it is not effective on the facts), the claimant supplier may be justified in saying it has retained ownership of the bunkers and in demanding that the bunkers be returned. Failure to comply with such a demand constitutes a denial of the right to possession and a trespass to goods which continues while the bunkers and vessel on which they are being consumed remain in local waters. In this way jurisdiction can be made out in the Hong Kong courts and may form the basis for an injunction order for the delivery up of the bunkers and possibly also payment of damages for bunkers consumed following receipt of the demand.
- 2.7 However applications of this nature must satisfy stringent conditions and are costly to mount. A successful claimant may also have difficulty in pumping off and storing bunkers in Hong Kong.

3 Singapore

- 3.1 The position in Singapore is similar to the position in England and other common law jurisdictions. A claim in respect of goods or materials supplied to a ship for her operation or maintenance (which would include the supply of bunkers), does in principle come under the admiralty jurisdiction of the High Court in Singapore pursuant to section 3 of Singapore's High Court (Admiralty Jurisdiction) Act.
- 3.2 However, section 4(4) of the High Court (Admiralty Jurisdiction) Act deals with the *in rem* jurisdiction, setting out the requirements necessary for the right to arrest for such a claim to arise. It states:
- (a) In the case of any such claim as is mentioned in section 3(1)(d) to (q) [which includes the right to arrest for the supply of bunkers], where:-
 - (i) the claim arises in connection with a ship; and
 - (ii) the person who would be liable on the claim in an action *in personam* (referred to in this subsection as the relevant person) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,
 - (b) an action *in rem* may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against:-
 - (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of that ship under a charter by demise; or
 - (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.
- 3.3 In other words, the right to arrest a ship, or a sister ship, for such a claim would only arise if the party that is contractually liable to the supplier is the "owner or charterer of, or in possession or in control of, the ship". The word "owner" in section 4(4)(b) has been interpreted to include beneficial ownership.
- 3.4 The phrase "beneficial owner" in s 4(4)(b)(i) has been interpreted to mean such ownership of a ship as is vested in a person who has the right to sell, dispose of or alienate all the shares in that ship.
- 3.5 However, where the contract between the bunker supplier is with the intermediary (in this case one of the OW Bunker entities), there is no right to arrest the ship or its sister ship. The bunker supplier would

need to find some way to establish contractual liability with the shipowner or charterer before a right of arrest would arise. Receipts signed by the chief officer or mate may exist but in the absence of other documents, will usually be treated merely as evidence of physical receipt of bunkers rather than contractual relations.

- 3.6 In the event that the supplier argues that it does have a contractual link arising as a result of an agency relationship, the case of *The AA V* [1999] SGHC 274 is useful authority on this issue relating to the sale of gas oil through a third party. The Singapore High Court held that the court did not have admiralty jurisdiction under s 4(4) and awarded damages for wrongful arrest. There was clear evidence the defendant was not a party to the contract it was sued on – the plaintiff had made a contract for the sale of gas oil with a third party, rather than with the defendant, and the third party was not the agent of the defendant.
- 3.7 Where the supplier asserts its claim on the basis of a retention of title, this does not give rise to a right to arrest as it is not a maritime claim under the Singapore’s High Court (Admiralty Jurisdiction) Act. At best, the third party supplier would have to argue that title to the bunkers had not passed and assert the continuing tort of trespass to goods, which is a denial of the right to possession of goods. Even if they were able to establish this, they would need to apply to the Singapore Court for an injunction, requiring delivery up of their bunkers. There are however legal difficulties (it is much more difficult and costly to obtain an injunction than to arrest for a maritime claim, leaving aside the fact that the bunkers over which they claim title have almost certainly been consumed by this time).

4 USA

- 4.1 Under U.S. maritime law, unlike the law of many other jurisdictions, the act of supplying bunkers or other “necessaries” to a vessel on the order of the owner (or an authorized agent of the owner, including potentially a charterer of the vessel) often results in the creation of a maritime lien against the vessel to which these necessaries were supplied. A fuel supplier that has not been paid for the fuel it provided to a vessel may, through court action, seek to arrest the vessel that received the fuel. If the arresting party proves to the court that it possesses a legitimate, unsatisfied maritime lien, it may eventually seek to have the court sell the vessel to pay the outstanding debt secured by lien. Unless a court dismisses the lien claim action and vacates the arrest, the vessel may only be released upon payment or by way of the posting of substitute security, typically in the form of a bond or Letter of Undertaking.
- 4.2 The entity that directly supplied bunkers to a vessel may not possess a maritime lien if the vessel owner or charterer dealt exclusively with a bunkering agent rather than the contracted bunkerer’s subcontracted supplier. Although statutory language makes clear that suppliers of necessaries enjoy a maritime lien, several U.S. federal circuit courts require a subcontracted supplier to show that it was approved or selected by the vessel owner or charterer in order for the subcontractor to itself possess a lien on the vessel. A fuel supplier may also have waived its right to enforce a maritime lien if it deliberately intended to waive its right, which may be expressed in writing or proven by clear testimonial evidence.
- 4.3 Additionally, while a vessel’s presence in the U.S. may expose it to the risk of seizure by fuel suppliers, the vessel’s presence does not necessarily mean that a court will ultimately apply U.S. law to the underlying transaction. Several U.S. federal appellate circuit courts have applied a fact-intensive choice-of-law analysis to determine whether to apply U.S. law or another nation’s laws to the transaction giving rise to the alleged lien.
- 4.4 Nevertheless, all defences to the enforcement of a fuel supplier’s maritime lien will depend on a factual analysis that may be applied differently among the U.S. courts, depending on the location of the arrest within the geographic confines of a particular U.S. federal circuit. In most instances, it can be expected that a fuel supplier subcontractor will attempt to assert a lien against the vessel if it has not been paid by its principal, claiming that it as the direct provider is the party which holds a valid maritime lien under U.S. law against the provisioned vessel.

5 Japan

- 5.1 It is possible to arrest a ship in Japan for unpaid bunkers supplied to the ship. Article 842 (6) of Japanese Commercial Law provides that any party furnishing necessaries to make a ship continue her voyage shall have a maritime lien on the ship. The claim of the bunker supplier falls within such necessaries claim.
- 5.2 The position is unsettled as to whether or not it is possible to do so even if the contract to supply bunkers was entered into between the physical supplier and an intermediary such as OW Bunker (and or a time charterer) and not with the Owner (i.e. there is no *in personam* claim against the Owner for the bunkers). However it is unlikely that the physical bunker supplier who entered into the contract with the intermediary can have a maritime lien on the ship under Japanese commercial law.
- 5.3 Without protection of a maritime lien any bunker supplier may not give the Master any credit and the Master cannot continue his voyage. The intention of the Article 842 (6) of Japanese Commercial Law is to protect the Master to continue his voyage (by encouraging a bunker supplier to supply bunker when the ship is on voyage). It is unlikely that the intention of this law is to protect the physical bunker supplier who entered into the contract with the intermediary.
- 5.4 However, if for example (a) the bunkers were supplied to a ship in the USA; (b) that the ship was flying a Panamanian flag; (c) that the bunker supply contract between the physical supplier and an intermediary is governed by USA law; and (d) that the bunker supplier sought to arrest the ship in Japan, it is not settled what law shall be the basis of arrest of the ship in Japanese court. This is a matter of conflict of laws. This is a matter of what law shall recognize a maritime lien in case of arrest of the ship.
- 5.5 Some courts say that if Japanese law recognises a maritime lien on the ship the supplier can arrest the ship in Japan. Some courts say that not only must the law of the flag of the ship but also the governing law of the contract recognize a maritime lien in order for the bunker supplier to arrest the ship in Japan. Some courts say that not only the governing law of the contract but also the law of the place of the supply of the bunker must recognise a maritime lien in order for the bunker supplier to be able to arrest the ship in Japan. The important cases on this issue would be (1) Nagasaki Spirit, (2) Asia Star (3) Hao Guo, (4) Hao Fu (5) Fairwind 308 and (6) Eastern Frontier. Each court has split views.
- 5.6 In summary, there are several split cases on this issue of the governing law of the maritime lien when arresting a ship in Japan and there is no settled law. Therefore it might be possible for the bunker supplier to arrest the ship depending on the approach of the Japanese court regarding the governing law to recognize a maritime lien.
- 5.7 In relation to the fact that the master had signed a receipt, in principal mere signature of the master does not create any contractual relation between the physical bunker supplier and the Owners. It however depends on what kind of receipt the Master signed. In other words it is a matter of fact finding of the court. In a recent ship arrest case by a bunker supplier in the Okayama District Court, the bunker supplier argued that the contract was created by the signature of the receipt of the bunker by the master (although the case was settled without a court decision).
- 5.8 In relation to sistership arrests, the bunker supplier would arrest the ship based on a maritime lien assuming that there is no *in personam* claim against the Owner for the bunkers. The maritime lien is on the particular ship. Therefore it is impossible for the bunker supplier to arrest other ships (as the supplier has no maritime lien on other ships).
- 5.9 Finally, in response to the retention of title arguments that are being run by some bunker suppliers, unlike Panama and USA, in Japan it is extremely difficult to attach the bunkers (which results in detention of the ship) even if the bunker supplier has title to the bunkers on board the ship. This results from some procedural laws in Japan.

6 China

- 6.1 Ship arrest in China is a procedural remedy to obtain security, in favor of the substantive proceedings (litigation or arbitration commenced or to be commenced in China or foreign countries), and the arrest order can be obtained on the ex-parte application, when the requirements for ship arrest (the *prima facie* evidence and the satisfactory counter security) are satisfied.
- 6.2 It is practically difficult for the Chinese court to look at the merits at the stage of ship arrest, which will have to be dealt with in the substantive proceedings. Usually, when it appears to be an arguable case and there is a risk for the arrest to be wrongful, the Chinese court may impose a relatively strict requirement in respect of the counter security, so as to secure any potential claims for the wrongful arrest.
- 6.3 If being dissatisfied with the arrest order, the respondent (usually the named owners and/or the bareboat charterers) are entitled to apply for reconsideration/review of the arrest order within 5 days after the arrest order is served. However, as the Chinese court may not be able to consider the merits of the claim at this stage (especially when the substantive proceedings are subject to the foreign law and jurisdiction), it is usually difficult for the arrested vessel to rely upon any arguments on merits, to convince the Chinese court to set aside the arrest order and to release the vessel, especially when the sufficient counter security has been in place to secure any potential wrongful arrest.
- 6.4 The counter security is usually equal to some 30-day loss of the vessel. When the period of ship arrest is more than 30 days and/or when the arrested vessel is to be auctioned, it is likely for the Chinese court to demand additional counter security from the arresting party. The counter security is usually a burden for the arresting party to take the arrest in China, which may not be released until the final determination of the substantive underlying claims or the final determination of the wrongful arrest claim or the elapse of the two-year time limitation for the wrongful arrest claim.
- 6.5 It is clear law in China (Article 21 (12) of the Maritime Procedure Law of PRC) that the ship can be arrested for the claim/dispute over supplies or services in respect of the ship operation, management, maintenance or repair. Further, it is allowed to arrest the sister ship (the vessel to be owned by the same liable party), but not the associated ship.

Potential Risk

- 6.6 With the bankruptcy of OW Bunker, the physical supplier, who has the contract with and has not been paid by OW Bunker, is looking at the vessel/owners for payment.
- 6.7 Although there was no direct contractual relation with the owners (the bunker is usually purchased/ordered by the time charterers and some others), the bunker would have been actually supplied by the physical supplier to the vessel, which can be evidenced by the bunker delivery note (signed by the master and/or chief engineer of the vessel).
- 6.8 The terms and conditions of the sales contract (such as the broad definition of the buyer, to include the owners), the signed bunker delivery note and the invoice (issued to the master/owner and etc.) may be important. The bunker delivery note may, for example, state that "*The vessel is ultimately responsible for the debt incurred through this transaction*". All these points can be relied upon by the physical supplier with attempt to showing a *prima facie* claim as against the owners.
- 6.9 All that being said, it is procedurally possible for the physical supplier to take the arrest action against the vessel in China, even if there was no direct bunker supply contract.
- 6.10 As to the merits of such claim against the owners/vessel in the absence of the contractual link, it will depend upon the governing law and jurisdiction for the substantive claim. It is questionable from the perspective of the Chinese law whether the physical supplier can succeed in such claim against the owners if the substantive claim was issued in China (depending of course on the fact and circumstance of each particular case), but it is very likely for the physical supplier (the arresting party) to choose a friendly jurisdiction and to commence the substantive proceedings outside of China or to apply the foreign law for their claim.
- 6.11 In the event that the physical supplier can obtain a successful judgment or award as against the owners on merits, the arrest in China may not be wrongful and they could then try to call on the

security obtained from the ship arrest. Of course, when the substantive proceedings are commenced outside of China, a further issue (whether the future judgment/award can be recognized and enforced in China) will arise.

Retention of Title

- 6.12 The title to the bunkers will of itself be a complicated issue to be determined, in view of the fact that there are different contracts with different governing law involved (at least the supply contract between the supplier and OW, that between OW and the time charterers, the c/p between the charterers and owners) and whether a *bona fide* third party can obtain the title. However, this can be a further point to be taken by the physical supplier for purpose of the arrest, in addition to the fact that the bunker was supplied to the vessel.

Summary

- 6.13 To summarize, from the perspective of Chinese law and practice, it is procedurally possible (and there may be a real risk) for the physical supplier to take the arrest action against the vessel for the unpaid bunker in China to obtain security, and it may not be easy for such arrest to be successfully challenged (so that the vessel can be released without giving security). However, it will depend upon the result of the substantive claims whether the owners can be finally held liable for the claim and/or whether such arrest is wrongful.

7 Australia

- 7.1 It is possible under Australian law to arrest a ship for unpaid bunkers under the *Admiralty Act 1988* (Cth) (Australian Act). A person must have a recognised “general maritime claim” prior to arresting a ship based either on “owner’s liabilities” under s 17, or on “demise charterer’s liabilities” under s 18 of the Australian Act.
- 7.2 Under Australian law, bunkers are not capable of arrest separately from a ship. This was clearly decided by the Federal Court of Australia in *Scandinavian Bunkering AS v The Bunkers on Board the Ship FV Taruman* (2006) 151 FCR 126.
- 7.3 To arrest for owner’s liabilities and demise charterer’s liabilities, the plaintiff will need to prove the following:
- (i) There is a claim which is a general maritime claim, specified under s 4(3) of the Australian Act. A claim for unpaid bunkers falls under a general maritime claim as defined under s 4(3)(m) – being a claim in respect of “goods, materials or services ...supplied ... to a ship for its operation or maintenance”;
 - (ii) The ship is the subject of the claim;
 - (iii) The “*relevant person*” as defined in s 3(1) of the Australian Act is a person who would be liable on the claim *in personam* (on the assumption that the claim is successful); and
 - (iv) Owner’s liabilities (section 17)/Demise Charterer’s liabilities (section 18)
 - (v) when the cause of action arose, the relevant person was the owner or charterer of, or in possession and control of, the ship; and
 - (vi) when the proceeding is commenced, the relevant person is the owner / demise charterer of the ship.
- 7.4 Therefore the putative arresting party will need to establish, on a prima facie basis, that it is entitled to success against the shipowner/demise charterer for the outstanding payment of bunkers supplied.
- 7.5 If that contractual link can be established, the Australian Act also gives a right to arrest a “surrogate ship”. Section 19 of the Act is the provision relating to surrogate ship arrest.
- 7.6 A plaintiff will need to prove the following:

- (a) That there is a claim which is a general maritime claim (defined in s 4(3) of the Australian Act as above);
- (b) The first ship (the wrong doing ship - the ship that received the unpaid bunkers) is the subject of the general maritime claim; and
- (c) The “relevant person” (ie, the person who would be liable on the claim *in personam* if the claim is successful)
 - (i) was when the cause(s) of action arose the owner or charterer of, or in possession or control of the first-mentioned ship; and
 - (ii) when the proceeding is commenced, the relevant person is the owner of the second-mentioned ship.

7.7 The Australian courts have recognised that the concept of ownership in the context of surrogate ship arrest is not limited to “registered owner” and encompasses beneficial owner (*Malaysia Shipyard v Iron Shortland as Surrogate for the Ship Newcastle Pride* (1995) 59 FCR 535). However, in a number of decisions, the courts have declined to further broaden the scope of “beneficial ownership” and therefore it does not encompass ultimate parent companies or major shareholders of the ship owning entity.

8 South Africa

- 8.1 In South Africa claims can be enforced in admiralty if the claims are maritime claims.
- 8.2 The Admiralty Jurisdiction Regulation Act (No 105 of 1983) includes in its definition of maritime claims, any claim for, arising out of or relating to the supplying of goods for the employment and maintenance of the ship [Section 1(1)(m)]. This would include the provision of bunkers to a ship.
- 8.3 Bunkers are almost always supplied to a vessel in accordance with the terms and conditions of a contract. The shipowner, or demise charterer, is likely to have contracted with OW Bunker, presumably on terms that do not make the shipowner or demise charterer liable to the third party supplier. If the shipowner or demise charterer is **not** a party to the contract with the third party supplier, then the owner or demise charterer cannot be liable to that third party supplier *in personam*.
- 8.4 A ship can only be arrested (by an action *in rem*) if the claimant has a claim *in personam* against the owner (or demise charterer - assuming that they still charter the ship, but not any other kind of charterer) of the ship to be arrested **and** the ship is property against or in respect of which the claim lies. So, by way of example, if OW Bunker supplied bunkers to the owners of Vessel A, then OW Bunker could arrest that vessel in order to enforce its claim in South Africa in the event that it was not paid. But if OW Bunker had a contract to supply bunkers to Company B, the operational managers of a fleet of ships, then there may be no ship “*against or in respect of which the claims lies*”.
- 8.5 The only other way in which a maritime claim can be enforced by an action *in rem* is if the claimant has a maritime lien over the ship to be arrested. South African law does not recognise foreign maritime liens and only recognises the liens accorded that status by English law - namely, bottomry and respondentia bonds, salvage, damage done by a ship, seaman's wages, master's wages and disbursements. So the third party supplier of bunkers has no claim based on a maritime lien.
- 8.6 It follows that absent any unusual terms and conditions in the agreement between the shipowner/demise charterer and OW Bunker, the third party supplier cannot arrest the ship to which the bunkers were supplied. Whilst it is true that some third party suppliers require the Chief Engineer or the Master to acknowledge receipt of the bunkers by signing documents that purport to make the shipowner liable, an arrest brought on the basis of such a document is usually unsustainable in circumstances show that the C/E or the Master only signed the document confirming receipt of the stem.
- 8.7 If the facts are such that a claim can be enforced by the arrest of the ship against or in respect of which the claim lies, but that ship is not within an arrest friendly jurisdiction, then that maritime claim

may be enforced by the arrest of a ship other than the ship against or in respect of which the claim arose - ie, against a sister or an associated ship (being ships owned or controlled by a common entity at the relevant times).

- 8.8 In theory it is possible to arrest bunkers. But you cannot arrest your own bunkers in order to vindicate them (essentially, to get them back).
- 8.9 But bunkers can be attached to found and confirm the jurisdiction of a South African court if the claimant can show that the bunkers are owned by the party that owes the claimant money.
- 8.10 Bunkers can also be the subject of the so-called security arrest for proceedings instituted or to be instituted out of another jurisdiction - again, the claimant must show who owns the bunkers and that it has a claim against that owner.

9 Italy

- 9.1 The position under Italian law is that a bunker supplier without any base in Italy can arrest a ship.
- 9.2 The possibility of a vessel arrest depends upon whether the arrest is lawful under Art. 3.4 of the 1952 Brussels Arrest Convention (the **Arrest Convention**). Article 3.4 is considered in Italy to be a sufficient basis for arrest where the arrest concerns the particular ship to which the supply was made. There is also case law which provides that the claim should be based on a statutory lien under the law of the flag state, but this has not always been upheld (it could be used as a ground for challenging the arrest depending upon the position of maritime liens under the laws of the flag state).
- 9.3 However, the ability to arrest should not be confused with the merits' proceedings for the claim itself. If the arrest is confirmed then the arrestor, under the Italian Civil Procedure Code, should commence the merits' proceedings within sixty days and it is only the party with the contractual link to the shipowner, or the physical supplier who have a valid claim. Any other intermediary will have no title to sue. As such, even though the ship can be arrested and security will have to be posted to release the ship, it may be possible for the arrest to be challenged on the basis that there is no merit to the claim behind the arrest.
- 9.4 If the arrestor has no valid claim on the merits, it should not be possible to arrest. However, regardless as to whether an arrest is upheld or not by the Italian court, because of the likelihood that the first instance court will take a literal approach to Article 3.4 of the Arrest Convention and allow arrest, the shipowner is likely to have to provide security if it is to avoid the vessel being out of service until the Italian court proceedings have concluded.

10 Belgium

- 10.1 In Belgium, it is possible for the contractual supplier or unpaid physical supplier to arrest a vessel for unpaid bunkers.
- 10.2 However, in a recent decision by the Antwerp Court, arrest of a vessel by the unpaid physical supplier was lifted on the basis that the owner had paid their contracting party (in this case, an OW Bunker's entity). This meant that the unpaid physical supplier was no longer entitled to proceed against the vessel.
- 10.3 Under Belgian law, an unpaid intermediary (i.e. a party that has not contracted directly with the vessel owner and is not the physical supplier) will not be entitled to arrest the vessel supplied, and an unpaid physical supplier will lose the right to arrest the supplied vessel if the owner can demonstrate that it has paid the contractual supplier for the bunkers supplied.