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All About Freedom of Contract? Bunker Supply Arrangements Post-Res Cogitans in Global Context

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This article considers the repercussions brought by the ratio decidendi of the Res Cogitans in the realm of international sales of bunkers under English law. It considers the judicial findings from the conflicts of law perspective and argues that under the relevant lex rei sitae the result should be different. The intermediate seller could not claim for the price of bunkers neither on contract nor in bailment, because he did not confer a direct benefit (ownership in the fuel) to the shipowner. On the other hand, the latter obtained title from the physical supplier based on possession at the moment of delivery to the ship. This title should be opposable to any third party, including the intermediate provider.

I
INTRODUCTION

It was a welcome surprise to see the Supreme Court of the United Kingdom pay tribute to the French philosopher Descartes in the introductory part of its decision in the *Res Cogitans*[1] case, a dispute which started with arbitration proceedings in November 2014 to terminate only after 18 months with a judgement from the

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[1]PST Energy 7 Shipping LLC v. OW Bunker Malta Ltd (The Res Cogitans) [2016] UKSC 23; [2016] Lloyd's Rep. 589.

UK's highest court in May 2016.[2] However, it is worth examining whether the argumentation of their Lordships achieved the depth it had promised, especially because the outcome caused shockwaves, which were felt in other legal systems as well.

II
FACTUAL BACKGROUND

The facts of the case were considered straightforward in the eyes of those engaged in the bunker industry. Equally, the judges found the contractual terms typical.[3] There was a chain of contracts, involving the Owners/Managers of the *Res Cogitans* (Owners) and various bunker suppliers, but there was no direct nexus between the Owners and the actual physical supplier.[4] As is usual in these cases, the first contracting supplier, OWB Malta (hereafter "OWBM"), in cooperation with its parent company, OW Bunker & Trading AS (hereafter "OWBAS"), thoughtfully secured an adequate flow of bunkers. They did this by virtue of a distinct contractual agreement with another provider in the chain, Rosneft Marine (UK) Ltd (hereafter "RMUK"), which, in its turn, had contracted with its Russian associate-subsidiary company, RN-Bunker Ltd. (hereafter

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[2]It should be borne in mind that this dispute was merely one of many arising out of the collapse of OW. At the same time, the litigation path from physical suppliers against shipowners was replicated in many other jurisdictions (for example, the Netherlands, Italy, France, Canada, Singapore, Hong-Kong, the U.S. and Greece). There was also the threat of litigation from intermediate suppliers, who did not want to find that their only claim was against the insolvent OW Group. Hence, the lack of litigation involving the insolvency proceedings against the OW Group.

[3]" . . . It involves the supply of bunkers to a vessel on terms which are typical of hundreds or thousands of such transactions carried out every year" ([2015] 2 Lloyd's Rep. 563, [1]).

[4]In some jurisdictions, the physical supplier could establish an "artificial" contractual link with the shipowner by virtue of the Bunker Delivery Note. Alternatively, the claim could be based on unjust enrichment, tort or, even, a maritime lien. In the last case, the claim could be pursued against the *res* (i.e. the ship), even in the hands of a *bona fide* purchaser (The Bold Buccleugh (1851) 7 Moo.P.C. 267). The possibility of an alternative remedy was well noted by the English court: "As already indicated, I cannot exclude the possibility that the owners may have a liability to Rosneft under some system of law other than the English . . . " ([2015] 2 Lloyd's Rep. 563, [47] and [53]).

"RN-Bunker"), to provide and physically deliver the bunkers to the ship in the port of Tuapse, Russia. It is worth noting that, according to the agreement between OWBAS and RMUK, the latter would be the physical supplier. However, the actual supply was performed by RN-Bunker, which had physical possession[5] of the bunkers actually delivered to the ship.

III
THE TERMS OF THE AGREEMENTS

There were inconsistencies, if not conflicting terms, in the chain of contracts.[6] The crucial terms, which were contained in the contract between the Owners and OWBM (the main contract),[7] were reviewed by the arbitrators, the High Court,[8] the Court of Appeal[9] and the Supreme Court,[10] and could not be characterised as "reinventing the wheel." The first thing to note is the choice of English law and English arbitration,[11] which are considered

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[5]Remarkably there is no passage in any of the judgments relating to the issue of who was the legal owner of the bunkers delivered to the ship. A possible reason was that it was more than obvious that it was owned by the company that had its base on Russian soil.

[6]Although we have not seen the full terms of the whole contractual network, it appears from the judgments that there were conflicting arrangements on some matters.

[7]The agreement was subject to OW Bunker Group's 2013 Terms & Conditions of Sale for Marine Bunkers. The supply was to be obtained by a chain of contracts, each with a retention of title clause in favour of the contracting provider, to be paid after a fixed period of time from delivery, and coupled with a permission for consumption by the ordering ship, even before payment became due.

[8][2015] EWHC 2022 (Comm); [2015] 2 Lloyd's Rep. 563 (Males J).

[9][2015] EWCA Civ 1058; [2016] Lloyd's Rep. 228 (Moore-Bick, Longmore and McCombe LJJ).

[10][2016] UKSC 23; [2016] Lloyd's Rep. 589 (Lords Neuberger, Mance, Clarke, Hughes and Toulson).

[11]Legal certainty and dynamic distribution of justice are two significant elements that make the English *forum* most attractive for dispute resolution. See, The Atlantic Star [1972] 2 Lloyd's Rep. 446, 451 "You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for quality of goods and the speed of service." The statement was disapproved by Lord Reid, when the case was appealed to the House of Lords ("There have been many recent criticisms of 'forum shopping' and I regard it as undesirable." [1973] 2 Lloyd's Rep. 197, 200).

common practice in the industry. Second, the agreement was regulated by "Terms and Conditions of sale for Marine Bunkers,"[12] which made sporadic reference to "sale"[13] and "purchase" between a "Seller"[14] and a "Buyer"[15] for a "price."[16] Third, the bunker order was confirmed by OWBM's Sales Order Confirmation, which named OWBM as "Seller." Fourth, OWBM would retain[17] all title and property rights in the bunkers until full payment was received within 60 days of the invoice date. Additionally, the Buyers would receive the bunkers as bailees with licence to consume them.

At the same time, OWBAS and RMUK concluded the other important contractual matrix (supporting contract)[18] that influenced[19] the main contract. English law would again apply. Back to back, there was reservation of title in favour of the provider,[20] albeit without explicit licence for consumption or resale. The period of credit was 30 days. The contract was concluded with

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[12]"The sale and delivery of the marine fuels described above are subject to the OW Bunker Group's Terms and Conditions of sale(s) for Marine Bunkers. The acceptance of the marine bunkers by the vessel named above shall be deemed to constitute an acceptance of the said general terms applicable to you as the 'Buyer' and to O.W. Bunker Malta Limited as 'Seller.'"

[13]"This is a statement of the Terms and Conditions according to which [OWB] will sell marine bunkers."

[14]"Payment shall be made in full, without any set-off, counterclaim, deduction and/or discount free of bank charges to the bank account indicated by the Seller on the respective invoice(s)."

[15]"'Seller' means OWB . . . 'Buyer' means . . ."

[16]"It is agreed and acknowledged that the sale of the Bunkers to the Buyer and/or their acceptance on the Vessel create a maritime lien over the Vessel for the Price of the Bunkers . . . "

[17]Clause H.1 provided "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."

[18]This agreement was subject to Rosneft's 2012 Marine Fuels Sales General Terms & Conditions, which presumably applied also in the supply contact between RMUK and RN-Bunker.

[19]According to clause B.1 "Supplier means any party instructed by or on behalf of the Seller to supply or deliver the Bunkers."

[20]Clause 10 provided " . . . 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 . . . "

OWBAS acting as principal and not as agent of the ultimate buyer of the fuel.

For the sake of completeness, there were two more contracts, which played a secondary role; one between OWBM and OWBAS and the other between RMUK and RN-Bunker. Possibly for the reason that they were intra-group agreements, their influence on the clauses of the main and supporting contracts was trivial, at least in the eyes of the judges, who did not review them, nor comment on their impact.

The abovementioned agreements formed a contractual network in which mutual duties were undertaken. It has been observed[21] that the structure was based on the standard terms and clauses that the bunker supply industry has adopted for at least 15 years, most of them devised by BIMCO. This has particular significance because it shows that the choice of English law, as well as the exclusion of certain of its provisions, was deliberate and not incidental.

IV
JUDICIAL APPROACH OF THE BUNKER SUPPLY ARRANGEMENT

It should be remembered at this point that the claim was introduced by virtue of pre-emptive arbitration proceedings brought by the Owners in fear of having to pay twice[22] for the same claim; that is, to ING Bank, as assignee of OWBM, which in the

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[21]Coghlin S., *The Res Cogitans*, UCL Commercial Maritime Law Conference, 2016, par. 15.

[22]"The essential problem arises from the insolvency of OW Bunker Group and the concerns of the vessel owners that they may be exposed in paying twice over, once to the immediate bunker supply group now insolvent, and again to the ultimate source of the bunkers who may claim rights under a reservation of title or maritime lien." Lloyd's Rep. [2016] Lloyd's Rep. 589, 591 per Lord Mance.

meantime fell with the collapse of OW Group,[23] and to RMUK,[24] which paid the physical supplier in full.[25]

After reading the judgments, it is clear that the crux of the matter lay in the classification of the main contract. The arbitrators relied on the principle of freedom of contract and held that the agreement showed features of, but was not, a contract of sale.[26] Therefore, the Sale of Goods Act 1979 (hereafter "SGA") could not apply. In reality, they did not classify the contract, at least within the typical categories.

Males J approved the arbitrators' finding that the contract resembled a contract of sale but that the terms did not rely on a fundamental "ingredient" of the contract of sale, which is the transfer of title.[27] He accepted that it was the combination of the retention of title clause with the permission for consumption of the bunkers, even before the expiry of the credit period, which made the applicability of the Sale of Goods Act questionable. The judge concluded that, in such case, it must be taken that the parties had understood that it was likely that the title would never be transferred to the Owners. So, the latter agreed to pay OWBM for the consumption of bunkers, which OWBM would secure only by obtaining permission for consumption from RMUK.

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[23]OW Bunker AS applied for restructuring on November 6, 2014 before the Court of Aalborg (Denmark), which caused an event of default to occur in the financing agreement between OW and ING. As a result, ING asserted all OW's rights as assignee.

[24]RMUK confined itself to a simple demand of the price without entertainment of court proceedings. Not surprisingly, in the arbitration proceedings between the Owners and OWBM, RMUK contended that the price was not owed to OWBM by the Owners but to RMUK, according to the written submissions served by RMUK pursuant to the order of Vos LJ ([2015] Lloyd's Rep. 228, [15]).

[25]" . . . RMUK on the other hand paid RNB in accordance with its contract with RNB on 18 November 2014." ([2016] Lloyd's Rep. 589, [9]).

[26]The contract was characterised as *sui generis* (see par. 46 of the arbitration award " . . . (although we would prefer to describe it – and no doubt others like it – as sui generis) . . . ")

[27]"I agree, therefore, with the essential and commendably succinct reasoning of the arbitrators on this issue which is encapsulated in the following paragraph of their award: '51 . . . Such an agreement does quite obviously resemble in some respects a contract of sale, but in its terms and their performance do not to any extent rely on property or title in their transfer.'" ([2015] 2 Lloyd's Rep. 563, [55]).

The Court of Appeal was more careful about noting that the agreement was couched in language redolent of a contract of sale,[28] but that the true nature of the parties' bargain was for delivery of bunkers with entitlement for immediate use in exchange for a money consideration.[29] The only exception was those bunkers not consumed on the payment date, which did involve a genuine agreement to sell,[30] and to which the SGA would apply.[31] And although the failure to transfer title to that quantity would amount to a contractual breach, it would not entitle the Owners to treat the whole contract discharged, save for the case that the unconsumed quantity was so large as to amount to a total failure of consideration.[32]

After careful consideration and thorough analysis of the legal issues, the Supreme Court concluded that it was a *sui generis*[33] transaction in the sense that it was not a straightforward agreement to transfer title in the bunkers for a price. More specifically, the court held[34] that it was not a contract of sale but an agreement comprising two elements: permission for consumption prior to the payment date, and transfer of property in any bunkers remaining unconsumed at that date. However, the agreed price referred to all bunkers, consumed and unconsumed at the payment date. Nevertheless, that second element of the agreement was not

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[28][2016] Lloyd's Rep. 228, [14].

[29]Hence the finding of the court that a right to sue in debt for the price could lie in favour of OWBM.

[30]"It is a contract under which goods are to be delivered to the owners as bailees with a licence to consume them for the propulsion of the vessel, coupled with an agreement to sell any quantity remaining at the date of payment, in return for a money consideration which in commercial terms can properly be described as the price." ([2016] Lloyd's Rep. 228, [33]).

[31]"Since the contract provided for the transfer to the owners of property in any part of the bunkers remaining at the time of payment, it was to that extent a contract for the sale of goods to which the Act, including the implied condition in section 12, applied." ([2016] Lloyd's Rep. 228, [33]).

[32]Ibid.

[33][2016] Lloyd's Rep. 589, [34].

[34]Ibid, [28].

sufficient to turn the whole agreement into a contract of sale.[35] It followed that the transaction was not a sale, but was analogous to a sale, a finding which led to the acceptance of a number of implied terms,[36] similar to those in a conventional sale.[37] Alternatively, even if the contract would be analysed as one for sale, it would still be subject to a resolutive condition subsequent, whereby it would cease to be a contract of sale from the moment the Owners exercised the contractual right to use the bunkers until complete consumption of the full quantity.[38]

V
JUDICIAL FINDINGS AND BUSINESS COMMON SENSE

At this point, it is considered appropriate to examine the court's findings in the context of commercial reality.

First, the Owners had no express permission from RMUK to use the bunkers for the purpose of propulsion.[39] However, the court deduced from the wording of various clauses that RMUK had implicitly consented to the burning of the bunkers by any ship that OWBM supplied, even before payment became due to RMUK. To be more precise, Males J concluded that RMUK must have contemplated that the bunkers would be resold by OWBAS to another supplier, who would resell them to a shipowner for

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[35]"The obligation on the part of OWBM to be able to pass the property in respect of any bunkers not so consumed against the payment of the price for all the bunkers cannot make the agreement as a whole a contract of sale." ([2016] Lloyd's Rep. 589, [34]).

[36]Can this finding be right? Suppose that most of the sold bunkers were not consumed until the 59th day from delivery and only on that day the Owners discovered that the quality did not match the agreed specification, leading to the rejection of the whole consignment. Would OWBM be able to recover the price agreed? What would OWBM's counterargument be to the Owners' argument that they were given licence to consume the fuel until the payment date and OWBM should be obliged to accept the return of the unconsumed bunkers, as no right had been transferred to the Owners, including ownership, which would have been transferred on the 60th day with payment?

[37][2016] Lloyd's Rep. 589, [31].

[38]Ibid, [36].

[39][2015] Lloyd's Rep. 228, [2].

immediate consumption.[40] Therefore, there was no need for an explicit licence for consumption to be given to OWBM in order for OWBM to rightfully supply the bunkers to the Owners. This finding cannot be reconciled with the retention of title clause in favour of RMUK. An act of further disposal of the bunkers by OWBAS/OWBM for immediate use would destroy the effect of the clause, which had been inserted precisely for the event of the buyer's bankruptcy.[41] Alternatively, the court failed to examine whether RMUK, also by implication, had accepted that it would be paid exclusively by its contracting party, i.e. OWBAS, and not by the ultimate user of the bunkers.[42] In such case, no remedy would exist against the Owners. Conversely, the court favoured the position that the shipowner was exposed to double recovery, one to OWBM and one to RMUK/RN-Bunker. But, could it be realistically accepted that this was the intention of the contracting parties, when the main contract is read against the supporting contract? To be more specific, could it ever be possible that the Owners gave consent to OWBM to expose them to an additional remedy for the recovery of the price by RMUK?[43] Further, what would it take for the shipowner to challenge such a reading? Would it be required from the master of the ship, when the physical supplier arrived for delivery, to protest in the form: "*Who are you?*

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[40][2015] 2 Lloyd's Rep. 563, [17] and [50].

[41]It should be remembered that OWBM had explicitly prohibited the resale of the bunkers by the buyer to a third party as per Clause H.2: "Until full payment of the full amount due to the Seller has been made . . . the Buyer . . . shall not be entitled to use the bunkers other than for the propulsion of the Vessel, nor mix, blend, sell . . . the Bunkers to any third party or other Vessel."

[42]Clause 10 of the supporting contract reads: "Until such 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." Had the court focused on that clause, it should have reached the opposite conclusion. That is, if OWBAS would make due payment within the 30 day credit period, such act would also benefit the ship. Therefore, OWBAS could not undertake an obligation towards RMUK to make any other buyer, except itself. Obviously, no remedy would lie against the ship.

[43]Further, how "reasonable" would such a term be, to be accepted by implication, according to the doctrine of sub-bailment on terms as elaborated in The Pioneer Container? (see infra, Section VI).

Shipowner has contracted with OWBM. I do not recognise you as a contracting party for this bunker supply . . . "

Second, the court found no contractual breach in respect of title to the bunkers, because, according to the construction of the relevant terms, there was no sale, which would allow the implication of a term for transfer of ownership. However, doesn't the inclusion of a retention clause in an agreement, regardless of how the parties have labelled it (sale or else), signify that at some point, in our case, full payment of price, full title[44] would pass to the transferee? Otherwise the parties would eliminate the possibility that transfer of ownership would occur with explicit wording from the start. Also, doesn't the "supply"[45] for consumption of something contain the right to "exhaust" its substance, which would require ownership to be transferred to the "consumer?"

Further, a knock-out point was dealt with surprisingly briefly by the court.[46] The two, back-to-back, reservations of title clauses were incompatible with the right to consume the bunkers. That would be so because RMUK, upon payment by OWBAS/OWBM, would transfer title to non-existent goods in respect of the consumed quantity. Further, that would mean that OWBM's reservation of title clause *vis-à-vis* the Owners was meaningless because one cannot transmit or retain something that he never had (i.e. ownership in non-existent bunkers). The conclusion would still be the same, even if RMUK had implicitly consented to the resale of the bunkers by OWBM. Because, even if it did, the existence of the retention clause would prove fatal because it would obstruct the activation of the resale right until full payment of RMUK. This would be so because the resale of a perishable good without transfer of its retained ownership would make no sense. Equally, resale of the "use" of a good that will become non-existent by consumption,

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[44]See the arguments by Tettenborn A., Case Note [2015] LMCLQ 24, 26–28.

[45]"It is unnecessary to attach a label to the contract, although, if a label is sought, the label 'bunker supply contract' seems to me to be perfectly adequate." ([2015] 2 Lloyd's Rep. 563, [56] per Males J).

[46]Tettenborn, Case Note [2015] LMCLQ 24, 26–27.

does not make legal sense. So, again, the retention clause is totally meaningless.[47]

Third, the court refused to accept that the agreement was a straightforward sale of bunkers. As a result, it never fell within the ambit of the SGA. In holding so, the court paid limited attention to the characterisation of the agreement as a sale by the parties themselves. It interpreted the contract against[48] the explicit contractual intention – which was for a sale – by focusing on the obligations stipulated in the contractual clauses, which resulted in the categorisation of the supply agreement outside any of the typical categories. So, while the court abstained from giving the contract a meaning that its language could not properly bear,[49] it may be doubted whether the interpretation moved in the right direction. More specifically, on what basis could it be justified that the parties erred in the adoption of the term "sale" and it was not the setting out of the obligations that was done erroneously and needed "rectification," so as to make business common sense[50] within the category of sale?

Fourth, an alternative reading of the terms of the main contract, accepting the existence of a sale, was rejected on the basis that there was a resolutive condition subsequent. But the resolutive condition subsequent would need to be set out on very clear terms and nothing in the OWBM terms could suggest such a reading. On the

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[47]This has been rightly supported by Gullifer L., *The Interpretation of Retention of Title Clauses: Some Difficulties*, [2016] LMCLQ 564, 580 in fn. 91 "The usefulness of ROT clauses is limited in some contexts, such as where goods are perishable or are for immediate attachment to land." This applies even more where the right of consumption has been granted in conjunction with the retention of title.

[48]This, despite the promise of the court for the opposite: "... save to the extent that they are inconsistent with the parties' agreement." ([2016] Lloyd's Rep. 228, [33]).

[49]"Just as it is no part of the court's function to remake the parties' contract in the guise of interpretation, so it is no part of the court's function to shoehorn their contract into a category to which it does not properly belong in order to impose on them consequences which they did not intend." ([2016] Lloyd's Rep. 228, [18]).

[50]Rainy Sky SA v. Kookmin Bank [2012] Lloyd's Rep. 34. On the other hand, if the parties' arrangement would lead to an absurd result, the court could intervene by disregarding the ordinary meaning of used terms (Antaios Compania Naviera SA v. Salen Rederiena AB (The Antaios) [1985] AC 191), even if it would take a substantial correction (Chartbook Ltd v. Persimmon Homes Ltd [2009] AC 1101).

contrary, the main contract was unconditional[51] except for the reservation of title, which has the opposite effect. That is, that transfer of title would occur upon fulfilment of the payment obligation by the Owners. Equally, the agreement could not be characterised based on subsequent events, as it is hardly conceivable that the parties contemplated that title to bunkers would have to be transferred only in the event that the bunkers would remain unconsumed on the 60th day from delivery. More importantly, subject to a very strict exception, post-contractual conduct cannot be invoked for the interpretation of a contract.[52]

Fifth, there were some crucial contractual provisions which were hard to reconcile with each other. As stated earlier, the court impliedly accepted that the back-to-back retention of title clause was consistent with the explicit right of consumption granted to the Owners by OWBM and the implied right granted to OWBAS/OWBM by RMUK. At the same time, OWBAS/OWBM secured right of repossession[53] of the bunkers in case of non-payment. However, neither RMUK nor OWBAS/OWBM ever obtained title or possession in the bunkers. Finally, no supplier in the chain acted as agent of its provider so as to give rise to a right in the proceeds of sale. Could such an arrangement be based on business common sense and realistically work? It seems that this was the principal reason that led the court to find resort to a metaphysical and legally unsound argument that the bunker provider intended to retain title[54] or repossess an object that would

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[51]By virtue of clauses G.11 and H.2, delivery of the bunkers and physical possession (albeit solely for propulsion) were unconditionally transferred to the Owners by the physical supplier.

[52]James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd [1970] AC 583.

[53]Clause H.3 provided "In case of non or short payment for the Bunkers by the Buyer, the Seller is entitled (but not obliged) to repossess the Bunkers without prior judicial intervention, without prejudice to all other rights or remedies available to the Seller."

[54]In order for a person to retain title in a transaction, it means, either that he already has one or that he will acquire one at an agreed point of time. More importantly, that he will convey this title to the other contracting party. In the present case, was there any prospect that OWBM would receive title in the bunkers, in order to retain it? If not, then

be freely consumed to smoke by the ship. Thus, when OWBM provided licence for consumption of the bunkers, it offered nothing substantial to the Owners.[55] Rather it caused RN-Bunker's submittal to the Owners' will for supply of bunkers.

VI
PRIVATE INTERNATIONAL LAW APPROACH OF THE BUNKER SUPPLY ARRANGEMENT

It was implicit in all judgments that the process of classification of the main contract could properly be carried out under English law. Was that assumption right? It is beyond doubt that the dispute had foreign elements,[56] which could connect the case with many legal systems, the laws of which could assert application. Nevertheless, the arbitrators and judges found in favour of English law, apparently due to the existence of the applicable law clause in the main contract, which, as an obligatory agreement, could validly lead to the classification under English law. Can this be right?

The mechanism of characterisation[57] is fundamental for the finding of the proper law of an agreement. However, prior to the ascertainment of the governing law, the judge must determine the nature of the relationship under examination, in order to classify it in the proper legal category. According to the prevailing view,[58] the judge accomplishes this task with the assistance of *lex fori*.

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the security clause is, to say at least, redundant. Or was it inserted to "heal" the defect, that OWBM would never validly pass it to the Owners?

[55]This resembles the hypothetical case in which, in exchange for money, I promise someone a licence to enjoy a glass of brandy on the terrace of the Eiffel Tower. The fact that no policeman happened to enforce the law during the tippling does not mean that this was a valid agreement, because I "sold" nothing to the person who paid the bill.

[56]Indicatively, the seat of incorporation of the litigants, the flag of the ship, the place of delivery of the bunkers etc.

[57]Collins (ed.) DICEY/MORRIS/COLLINS ON THE CONFLICT OF LAWS, 15th ed. (Sweet & Maxwell, London, 2015) (hereafter "Dicey/Morris/Collins"), Vol. I, par. 2–001 et seq.

[58]Macmillan Inc. v. Bishopsgate Investment Trust Plc. (No.3) [1996] W.L.R. 387, 407.

In the present case, the outcome seemed straightforward because all contracts could easily fall in the realm of the law of obligations, but not in every respect. It must be stressed that the main contract as well as the supporting contract – and probably the agreement for the physical delivery – also dealt with interests in property. According to the relevant terms,[59] title in the bunkers would remain vested in the sellers (RMUK and OWBM, back-to-back) as security (retention of title). At the same time, buyers (OWBM and Owners, back-to-back) would obtain possession but only as bailees with licence to consume the bunkers.[60] So, even if we accept that the *sui generis* contract intended no transfer of ownership, one could not challenge the effect of delivery in the bunkers together with the right to use them in light of the reservation of title. Both acts produce an effect on the proprietary interests in the bunkers. This is so on two grounds. First, because delivery signifies transfer of physical possession, a legal right, which in many jurisdictions has a proprietary or quasi-proprietary nature,[61] and second, because the license to use the bunkers causes the extinction of ownership in them. Indeed, as mentioned above, the exercise of this power destroys any proprietary effect that the reservation of title might have intended to bring.

It is for these reasons that the clauses that purported to prescribe the effect of delivery and consumption of the bunkers were dealing, in reality, with proprietary interests.[62] Therefore, from the conflicts of law perspective, they could not properly fall under the law of obligations. Based on the above analysis, it is right to assume that the *sui generis* main contract – and back-to-back the supply

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[59]See clause H.1 of the main contract and clause 10 of the supply contract.

[60]Clause H.2 provided "Until full payment of the full amount due to the Seller has been made and subject to Article G.14 hereof, the Buyer agreed 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 propulsion of the Vessel, nor mix, blend, sell, encumber, pledge, alienate, or surrender the Bunkers to any third party or other Vessel."

[61]It is for this reason that in the conflict of laws possession in chattel is referred to the law of property. The same applies as regards acts which inflict upon the integrity of chattel.

[62]Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association [1966] W.L.R. 287 at 330 per Diplock LJ.

contract – dealt also with proprietary interests in chattel,[63] which are traditionally governed by the *lex rei sitae*.[64] That would mean that the single *sui generis* agreement, in reality, was comprised of two distinct contracts: one dealing with the obligatory/contractual rights, and another dealing with the proprietary rights. Further, the classification of each contract could properly be done under the *lex fori* (i.e. English law) but each contract should fall into a different category. As a result, the obligatory should be governed by *lex contractus* while the proprietary by the *lex rei sitae*. Moreover, there was another clause which pointed to the direction of examination of proprietary rights. The back-to-back provisions for reservation of title indisputably regulated proprietary rights[65] in the bunkers. Therefore, they should have been examined according to the relevant conflict rule.[66] However, neither the courts nor the arbitrators found it appropriate[67] to examine those issues, as such, from the private international law point of view.[68]

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[63]Cammell v. Sewell (1858) 3 H & N 617.

[64]Re Hoyles [1911] 1 Ch. 179 (CA); Glencore International AG v. Metro Trading International Inc [2001] Lloyd's Rep. 284.

[65]"Although the [retention of title] clause is contained in a contract between buyer and seller, it purports to give the seller proprietary rights which suggests a proprietary, rather than a contractual, characterization" (BENJAMIN'S SALE OF GOODS, 9th ed. 2014, par. 26–155).

[66]Since the retention of title clause deals with proprietary rights, it should be classified as a proprietary matter. The validity of the clause should be examined according to the *lex rei sitae* of the movable at the time of the conclusion of the contract, which contains the clause (Dicey/Morris/Collins, Vol. 2, par. 33–029). The same law should regulate the validity of the transfer of title (asset transfer), which may or may not refer the matter to the applicable law of the contract. Also, the proprietary effect of a sub-sale, if it had occurred during the effective period of the agreement.

[67]It is a well-established common law rule, that, unless the parties plead and prove foreign law, the law of all jurisdictions is presumed to be the same as that of England. It is argued that retention of title clauses present complex private international law problems, which have not been considered by the English courts in reported cases. According to Dicey/Morris/Collins, Vol 2, par. 33–029 "This may be because potentially relevant foreign law is not pleaded . . . , or, correctly or incorrectly, thought not to be different from English law." However, in the present case, the issue that some clauses regulated proprietary rights in the bunkers was not even spotted.

[68]This dimension was touched lightly by the High Court judge "Therefore the question whether OWBM fulfilled its promise [to grant permission for use of the bunkers] is a question arising between OWBM and the owners under English law, not a

If the above line of thinking is correct, then the proprietary contract, comprising of the clauses dealing with delivery and right of consumption in light of the retention clause, should have properly been referred to the law of the place where the bunkers were delivered,[69] i.e., Russian law. The intended legal consequences of these acts should have been examined under the law of the place of delivery because they were aiming at regulating proprietary interests in chattel. In other words, the validity and effect of the security clause,[70] as influenced by the effect of delivery and consumption of the bunkers, should have been examined under Russian law,[71] regardless of any stipulations to the contrary in the clauses comprising the obligatory contract.[72] That would be so because, in respect of those matters, there is really no room for contractual freedom.[73]

It is worth delving now into the continental law approach, which differs from that of common law only in respect of mechanics.[74] Any transaction that involves performance is divided into two contracts:[75] the obligatory, where the duties undertaken by the

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question to be analyzed under some other system of law or in proceedings elsewhere." ([2015] 2 Lloyd's Rep. 563, [47]).

[69]Clause G.12 provided "Delivery . . . shall pass to the Buyer from the time the Bunkers reach the flange/connecting pipe line(s)/delivery hoses provided by the Seller on the barge/tank/shore tank."

[70]Dicey/Morris/Collins, par. 33-029.

[71]See Rule 133 in Dicey/Morris/Collins, par. 24R-001 especially 24–007.

[72]Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association [1966] Lloyd's Rep. 197, 236 per Lord Diplock.

[73]Giuliano M./Lagarde P., REPORT ON THE CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS, C-282/2 at p. 10.

[74]From the private international law perspective, the two systems do not differ fundamentally. Indeed, common law recognises that the passing of property in moveables is governed by *lex rei sitae*. That is to say, that the validity of the transfer as well as the effect on the proprietary rights of the parties is governed by the law of the country, where the tangible moveable is at the time of the transfer (Glencore International AG v. Metro Trading International Inc [2001] Lloyd's Rep. 284, 294 [28]). The difference with the continental law approach is that common law does not recognise that the transfer of the moveable is executed by a distinct contract. It is for this reason, however, that the SGA is rendered ineffective in respect of the transfer of proprietary rights on goods lying outside England.

[75]See Larenz K./Wolf M., ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS, 8th ed. (Verlag C.H. Beck, 1997), § 23 par. 32–58. Flume W., ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS, Vol. 2 – Das Rechtsgeschäft, 4th ed. (Springer Verlag, 1992) § 11, 140–141.

contracting parties are set out, and the divestitive, by virtue of which asset transfer is executed. In the first, party autonomy prevails, while in the second, no contractual freedom is tolerated. To provide an example, in a donation (gift), the donor agrees to transfer to the donee an object (chattel or immovable), without consideration (money or other valuable). This is merely the promise, which is the ground (*causa*) for a complementary act. Indeed, in order for the intended effect to be realised, there is a need for asset transfer. Accordingly, the donor shall free himself from his promise only if he transfers the ownership and delivers the object that he promised. With that act, which is a contract because the donee must also agree to perform, the donor divests himself of ownership and delivers possession in the object. The legal significance of this division is obvious. If the contractual promise is not valid for any reason (e.g. incapacity), this defect penetrates the second contract. So even if title to the object was transferred, it can be re-vested in the donor. More importantly, if the object was delivered, it can be repossessed according to the provisions of unjust enrichment due to lack of valid *causa*. On the other hand, if the donor refuses to execute the valid promise, then the donee has two options, either to request from court *in natura* performance, or to file for damages.

From the private international law perspective, the obligatory part is usually determined by the *lex contractus*, whereas the divestitive part is invariably determined by the *lex rei sitae,* which cannot be derogated from. So, the parties can freely stipulate the terms of performance; but when it comes to the execution of the performance, if it involves asset transfer, this must be done according to the *lex rei sitae*. Furthermore, even if the asset transfer is concealed under the guise of a contractual promise, its execution will obey the mandatory provisions relating to the transfer of proprietary rights in the place of performance (*lex rei sitae*). Accordingly, it will be of no avail to characterise a contracting party as owner or possessor if no ownership or possession is vested in him under the *lex rei sitae*.

In the present case, it is extremely doubtful that Russian law would recognise the intended effect of the *sui generis* agreement. OWBM, OWBAS and RMUK had no title in the bunkers, save for RN-Bunker, which physically delivered the bunkers. Such position

would be reinforced by the existence of the retention of title clause in favour of RN-Bunker. And even if the governing law of the clause was validly subjected to party autonomy, the fate of the absolute right of ownership would be mandatorily regulated by the *lex rei sitae* (i.e. Russian law).

More interesting is the "path" of possession in the bunkers. Possession does not necessarily follow the fate of ownership, albeit there is a link between them. This is so because possession is a legal right (*jus*) and a real situation (*factum*), which is protected by law. At first, the parties agreed that possession as a *jus* would be transferred from RN-Bunker/RMUK to OWBAS/OWBM and from OWBM to the Owners.[76] At the same time, OWBM had undertaken towards the Owners the obligation to provide them with the right of use, but OWBM never obtained real possession in the bunkers, nor did OWBAS or RMUK. It was RN-Bunker that fulfilled the obligation of OWBM by delivering to the ship the bunkers, in which it had possession as a *factum*. This obligation was executed, despite the lack of contractual nexus with the Owners. However, RN-Bunker/RMUK had transferred possession to OWBAS/OWBM as a *jus*. Did that have any legal significance? It is submitted that it did. According to a *presumptio juris*[77] of Roman Law, which is still embedded in many continental law[78] countries, "*The person who exercises possession of a tangible moveable is presumed to be the legal owner of that.*"[79a] Since the *presumptio* is included in a substantive rule and it deals with an absolute right, it is the *lex situs* of the tangible moveable which will prescribe its application. According to the relevant rule, the right is opposable *erga omnes* with the exception of the real owner. Based on the above, even if possession as a *jus* was transferred down the chain, ownership and possession as *factum* remained vested in RN-

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[76]See clause H.2 of the main contract and clause 10 of the supporting contract.

[77]As regards the notion, Trayner J., LATIN PHRASES AND MAXIMS (Edinburgh 1861), 257.

[78]See art. 2276 French Civil Code, §1006 German Civil Code, art. 1141–1143 Italian Civil Code, §§930–932 Swiss Civil Code and art. 1110–1111 Greek Civil Code.

[79a]Interestingly the *presumptio* appears also in the English dictum Lickbarrow v. Mason (1790) 126 E.R. 209, 211 "Possession of goods is prima facie evidence of title" per Lord Loughborough.

Bunker. So, RN-Bunker did not lose its capacity as legal owner and possessor of the bunkers until the moment the agreed quantity was validly delivered to the ship, delivery in the form of transfer of possession as *factum*.

More importantly, it is this acquisition by the Owners of the *Res Cogitans* that made them legal owners of the bunkers by virtue of the *presumptio*. Moreover, this ownership was opposable to RMUK, OWBAS/OWBM and to any third party. And that was a knock out for both the retention of title as well as the repossession[79] clauses. Indeed, the Owners obtained legal ownership in the bunkers opposable to OWBM regardless of non-payment of the price. Equally, the Owners could lawfully consume the bunkers because the right of use was transferred to them with possession by RN-Bunker, regardless of the payment of the price agreed with OWMB. Inevitably, no repossession could ever be invoked from OWBM because the Owners had become lawful holders of the bunkers with possession as *factum*.

So, did OWBM have a *locus standi* for the price? The answer is negative if one looks at the two contracts as a whole.[80] The obligatory contract of the *sui generis* agreement stipulated for the supply of bunkers from a non-owner that did not come into possession at any point in time. But what was the object of performance (i.e. asset transfer), in exchange of which the Owners would be obliged to pay the consideration to OWBM? The contractual nexus conferred no direct benefit from OWBM to the Owners. Could the benefit be the performance by RN-Bunker? If yes, would the Owners have a valid claim against RN-Bunker for performance? Even if the benefit was validly offered by RN-Bunker, the answer would still be negative. The ship would have no direct contractual claim against the local physical supplier for the bunkers. That would be so regardless of whether the agreement was characterised as sale, *sui generis* or else. So, it turns out that

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[79]Clause H.3 of the main contract provided "In case of non or short payment for the Bunkers by the Buyer, the Seller is entitled (but not obliged) to repossess the Bunkers without prior judicial intervention, without prejudice to all other rights or remedies available to the Seller."

[80]One might oppose this line of thinking on the basis that it would jeopardise the validity of many similar contractual arrangements which have been submitted to English law. However, such risk in no way justifies its acceptance on legal terms.

OWBM conferred no direct benefit to the Owners, while the bunker supply (i.e. the asset transfer) was performed by a third party, as OWBM never obtained physical possession in the bunkers. In fact, OWBM committed a breach of its contractual obligations towards RMUK because the transfer of the right of use of the bunkers to the ship destroyed the effect of the reservation of title clause. That would be so even if RMUK had implicitly accepted the use of the bunkers. Further, OWBM had no involvement in the performance of the proprietary contract, which reflected the divestitive part of the agreement. This was carried out by RN-Bunker and it was exclusively governed by the *lex situs* (i.e. Russian law).

Under normal circumstances, the asset transfer by RN-Bunker would release OWBM from its duties, which were assumed with the obligatory contract towards the ship. But there was an insuperable obstacle. OWBM had neither title nor possession in the bunkers, so as to render performance (i.e. transfer of "use") and ask for the price. Even if we accepted for a moment the finding of the court that OWBM secured "use" of the bunkers in exchange for the price, that still could not justify the claim because the effect of the retention of title in favour of RMUK in conjunction with the lack of possession as a *factum*, in reality, frustrated any substantial performance by OWBM. That is to say, that the obligatory contract could not justify the action for the price due to absence of substantial performance in the form of asset transfer by OWBM. Moreover, the Owners obtained title in the bunkers because, according to the *lex rei sitae,* the voluntary transfer of possession (i.e. delivery) by RN-Bunker automatically triggered ownership to be vested in them by virtue of the above-mentioned *presumptio juris*. Finally, the delivery for free "use" destroyed any effect that the reservation of title clauses might have intended to bring because the *lex rei sitae* displaced the obligatory undertakings relating to the fate of the proprietary rights in the bunkers.

VII
BAILMENT RELATIONSHIPS

The analysis will focus now on the consequences deriving from the bailment relationships. Now, even if we accepted for a moment that English law could validly regulate the transfer of possession in

the bunkers, crucial points were not addressed by the courts nor by the arbitrators.

Prima facie, the *sui generis* agreement between OWBM and the Owners should give rise to a non-gratuitous bailment.[81] However, as shown earlier, neither RMUK nor OWBAS/OWBM ever obtained real possession in the bunkers. But it was stipulated in the contracts (back-to-back) that the buyer would be in possession as bailee for the seller. So, contractually, if the physical supplier (RN-Bunker) was the principal bailor of the bunkers, then RMUK would be the head bailee,[82] OWBAS/OWBM the sub-bailee,[83] and the Owners the sub-sub-bailee. The first striking point is the compatibility of the capacity of the latter with the consumption of the very object, the possession of which was entrusted to him. Indeed, the primary duty of a bailee is to protect and redeliver the object entrusted to him,[84] subject to additional contractual duties. In the present case, the right of consumption would displace the primary duty, as it would frustrate any prospect of redelivery of the burnt fuel. The second is the consistency of the various terms in the chain of contracts for the provision of the bunkers. If possession of an object is entrusted by a bailor to a party, is it possible that the latter would have been entrusted with possession of the same object by virtue of another agreement and on different terms? In the present case, if the principal bailor (RN-Bunker) delivered bunkers directly to the sub-sub-bailee (the Owners) with knowledge that the bunkers would be consumed by the ship, could the head-bailee (RMUK) or the sub-bailee (OWBAS/OWBM) have validly agreed to transfer possession to the Owners, even if they never received possession themselves? And if they did, on what terms would the

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[81]Palmer N.E., BAILMENT, 3d ed. (Sweet & Maxwell, London, 2009), 37–40.

[82]However, Males J accepted that RMUK was the head bailor and not the head bailee ([2015] 2 Lloyd's Rep. 563, 573 " . . . Roseneft is bound by the permission in clause H.2 of the OWB terms because a head bailor is bound by the terms in a contract between his bailee and a sub-bailee if he has expressly or impliedly consented to those terms . . . "). But RMUK was never in physical possession of the bunkers, even as an intermediary. Also, there is no mention in the judgments of the exact terms between RMUK and its subsidiary, RN-Bunker.

[83]Alternatively, OWBAS could be the sub-bailee and OWBM the sub-sub-bailee.

[84]Morris v. C.W. Martin & Sons Ltd [1965] Ll.L.R. 63, 73–74 per Diplock LJ.

bunkers be consumed if the terms in the bailment and sub-bailment were different or even irreconcilable?

This problematic situation came for decision before the English courts, albeit in a different context.[85] The Privy Council held that once the principal bailor had consented, even impliedly, that the head bailee would further transfer possession of the object to another bailee, then the principal bailor would be bound by those terms, unless they were unusual or unreasonable.[86] In our case, the principal bailor might have contractually consented to further bailments but no real possession was ever transferred to the bailees down the chain, except for the sub-sub-bailee (i.e. the Owner), who was simultaneously the bailee of the physical supplier when he received real possession for consumption. As a result, the consumption, from the proprietary respect, was regulated by the terms of the bailment between RN-Bunker and Owners and not by those of the sub-sub-bailment, as the court left it to be understood.

At the same time, the proprietary nature of possession, which is the necessary element for the triggering of the bailment relationship,[87] would dictate that the determination of the applicable law of the transfer should fall outside[88] the law of obligations, including Rome I and II.[89] Especially because possession is linked to ownership according to the above analysis, *ergo* the *lex situs* is the most appropriate law to govern proprietary rights on the tangible moveable. That would be so independent of the contractual stipulations purporting to regulate the terms of bailment between the parties. When it comes to the rights of third

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[85]The Pioneer Container [1994] Lloyd's Rep. 593, which involved carriage of goods by sea. Males J. mentioned the case in *obiter* ([2015] 2 Lloyd's Rep, 563, 570 [30]), from which he concluded that the supply contract was a sub-bailment on terms, which provided consent to the shipowner for consumption of the bunkers in accordance with the active charterparty.

[86]See supra fn. 86 [1994] Lloyd's Rep. 593, 605 per Goff LJ.

[87]See supra fn. 86 [1994] Lloyd's Rep. 593, 598–599 per Goff LJ.

[88]Sir Aikens R., *Which Way to Rome for Cargo Claims in Bailment When Goods are Carried by Sea?*, [2011] LMCLQ 482.

[89]Regulation (EC) No. 593/2008 of 17 June 2008 (Rome I) and Regulation (EC) No. 864/2007 of 11 July 2007 (Rome II).

parties[90] situated in another jurisdiction, the *lex rei sitae* should prevail. So, the retention of title clause, when read in conjunction with the bailment arrangement for commingling,[91] should be looked at according to the *lex contractus,* but its effect should be determined[92] by the *lex situs* (i.e. place of delivery of the bunkers).

VIII
EPILOGUE – A MORE PRAGMATIC APPROACH

We now come to the final point. Even if the Supreme Court sensed that by not upholding the validity of the main contract, bunker providers would feel disrepute for English law because they would be left with no *locus standi* to claim for the price of their services, that could in no way justify the "legal levitation" brought by the judgment. It is true that the English SGA knows of no distinction between the obligatory and the proprietary effect of the contract. This is the reason why, in respect of the transfer, the legislation applies only to goods situated in England.[93] However, the present case calls for this distinction to be identified and tackled properly. If the matter is pursued further on additional grounds before the English courts, then it may be expected that a more pragmatic approach could be adopted. Leaving hundreds of shipowners in uncertainty of whom to pay[94] in order to ensure that

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[90]For example, it will be the *lex situs* exclusively, which will regulate the effect of a contractual repossession of bunkers exercised by OWBM against the Owners, who received the bunkers physically from RN-Bunker.

[91]Clause 10 of the supporting contract reads: " . . . If, prior to payment, the Seller's Marine Fuels are commingled with other Marine Fuels on board the Vessel, title to Marine Fuels should remain with the Seller corresponding to the quantity of the Marine Fuels delivered."

[92]Glencore International AG v. Metro Trading International Inc [2001] Lloyd's Rep. 284.

[93]Dicey/Morris/Collins, par. 24R-001 especially 33–027.

[94]This quote from Precious Shipping Public Co. Ltd v. OW Bunker Far East (Singapore) Pte Ltd [2015] 4 SLR 1229 [3] per Chong J. is indicative of the uncertainty: "The purchasers accept that payments for the bunkers are due and owing but claim that they are unable to decide which party to pay. Under these circumstances, the purchasers decided that it would be prudent to seek interpleader relief from the court."

they will only do it once, is an unwelcome surprise for all those who rely on English justice by choice. At the same time, the interpleader relief does not seem to have provided a satisfactory alternative, as many courts have rejected the argument that the claims involved were "inextricably interrelated."[95] Indeed, it is doubtful whether the contractual claim for recovery of the price for bunkers ordered by the time charterer is in "symmetry"[96] with the physical supplier's *in rem* claim against the ship.[97]

The *sui generis* agreement, despite the fact that it provided in the obligatory contract for positive performance in exchange for the price, in respect of the execution of the proprietary contract no asset transfer (i.e. ownership or possession in the bunkers) was ever realised, as no real benefit shifted from the side of OWBM to the Owners. Rather it was a "supply" of promise based on another "supply" of promise, which was based on a promise by the physical supplier to appear at the right port in the agreed time for bunker delivery. As a result, it was the physical supplier who "tabled" the tangible moveable. By parity of reasoning, no substantial performance by OWBM should lead to no action for the price.[98] But OWBM claimed the full price and nothing less (e.g. profit). So, according to the rationale of the case before the Supreme Court, the Owners were potentially exposed to a double recovery for the full price: from the *sui generis* agreement in favour of OWBM and

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[95]Precious Shipping Public Co Ltd v. OW Bunker Far East (Singapore) Pte Ltd [2015] 4 SLR 1229.

[96]Davies M., *A Comparative Analysis of National Responses to the OW Bunker Collapse*, Paper submitted to CMI, Genoa, 2017, 10.

[97]ING Bank NV v. Canpotex Shipping Services Ltd [2017] FCA 47.

[98]The reasoning adopted by the U.S. District Court for the Southern District of New York in rejecting OW Bunker's claim on provision of necessaries to the ship is remarkable. The court held that " . . . OW Bunker (Denmark) did not take on any risk (financially or in goods provided) with regard to the provision of bunkers to the TEMARA. That is, it never assumed title or possession of the bunkers, it never obligated itself to pay the actual physical supplier, and it never supplied the bunkers. At most, O.W. Bunker's risk was a theoretical risk of a failure to deliver on its contract to the charterer; no exposure from this risk ever materialized." (ING Bank NV v. M/V Temara, 2016 AMC 2946 (S.D.N.Y. 2016)).

from the delivery performance in favour of RN-Bunker.[99] In the first case, the price should correspond to the right of "use," and in the second, the price should correspond to the ownership for any use. But the two prices could be claimed in full, subject to a difference in the profit margin. Further, the physical supplier's claim could be founded, either *in rem* by virtue of the Bunker Delivery Orders[100] – with maritime lien[101] or without[102] – or in tort for conversion, but not on agency.[103] Another option would be to found the claim on restitution for unjust enrichment of the shipowner.

As it has been correctly observed,[104] due to the diverse nature of the available remedies in the various countries and the structure of the contractual arrangement for the bunker supply, we have come

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[99]The situation was slightly different, since RN-Bunker, which might have secured its claim by a maritime lien against the ship, was out of the picture, as it had been paid in full by its parent company RMUK. This fact seems to have influenced the Supreme Court's decision in finding in favour of OWBM.

[100]Martin Energy Services LLC v. MV Bravante IX, 233 F. Supp. 3d 1269 (N.D. Fla. 2017). However, see, Clearlake Shipping Pte Ltd v. OW Bunker (Switzerland) SA, 2017 AMC 627 (S.D.N.Y. 2017), which favoured the opposite view.

[101]Under U.S. law, see 46 U.S.C. §§31301–43 (Commercial Instruments & Maritime Liens Act); Marine Fuel Supply & Towing Inc. v. M/V Ken Lucky, 869 F. 2d 473 (9th Cir. 1988).

[102]Valero Marketing & Supply Co. v. M/V Almi Sun, 160 F. Supp. 3d 973 (E.D. La. 2016).

[103]Clause B.1 of the main contract provided for the definition of "Supplier," which seemed to be an acknowledgment by the Buyer that OWBM could validly perform through a third party. Also, clause L.4(a) stipulated that "These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions. In such circumstances, these Terms and Conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party." However, that in no way amounted to furnishing authority for the conclusion of a separate contract on the Buyer's behalf. Further, no contractual remedy could lie in favour of the physical supplier against the Buyer based on the nexus between OWBM-Supplier, as it would be a *res inter alia acta* for the Buyer. That would be so, even if the terms of that contract purported to make the ship ultimately responsible for payment of the bunkers. Remarkably, lack of privity of contract between the physical supplier and the ship was the position favoured by the U.S., Singapore, Hong-Kong, Italian and French courts (see Davies M., supra fn. 96, 3–4 and footnotes 5–9).

[104]Davies M., supra fn. 96, 17.

to an unfortunate "all-or-nothing" outcome. One illation could be safely extracted: the bunker providers will need to rewrite their agreements in order to be in a position to validly claim the proper consideration. This rewriting would have to take away all the non-pragmatic stipulations, such as transfer of possession by a non-possessor, retention of title with simultaneous right of consumption, right of repossession of consumed fuel, and pledge without physical delivery to the pledgee.[105] Only then should the courts be willing to give pragmatic legal recognition to these bargains.[106]

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[105]Clause H.6 provided "Where, notwithstanding these conditions, title in and to the Bunkers delivered has passed to the Buyer and/or any third party before full payment has been made to the Seller, the Buyer shall grant a pledge over such Bunkers to the Seller . . . "

[106]The words of one of the most influential judges in the sphere of commercial law are trenchant but apposite: " . . . Our only desire is to give sensible commercial effect to the transaction. We are here to help businessmen, not to hinder them: we are there to give effect to their transactions, not to frustrate them: we are there to oil the wheels of commerce, not to spanner in the works, or even in the oil . . . In commercial transactions, the duty of the court is simply to give effect to the contract, not to dictate to the parties what the court thinks they ought to have agreed, or what a person (reasonable or otherwise) might have agreed if he had read the contract and addressed his mind to the problem which, in the outcome, has arisen" (Rt.Hon. Sir R. Goff, Commercial Transactions and the Commercial Court [1984] LMCLQ 382, 391).