The Future Now After OW: Assuring "Anni Mirabilis" With Lessons from "Anni Horribilis"

by J. Stephen Simms and Marios J. Monopolis, Simms Showers LLP

Tuesday February 21, 2017

In 1992, **England**'s **Queen Elizabeth** gave a speech marking her 40th year as Queen. Her speech is better remembered, however, as her expression of how difficult that 40th year had been. There had been failed or failing family marriages and even a fire at **Windsor Castle** in **London**. She called the year, a "horrible year" - "not a year on which I shall look back with undiluted pleasure," the Queen said. "In the words of one of my more sympathetic correspondents, it has turned out to be an 'Annus Horribilis.' I suspect that I am not alone in thinking it so."

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Spiked by **OW Bunkers**' collapse, the bunkers industry has since the end of 2014, and into 2015 and 2016, has had not just one "annus horribilis," but "anni horribilis," horrible years. Collapsing along with OW was the world-wide petroleum market. Prices dropped and do did profits, as the maritime industry generally contracted and so bunker demand also decreased.

The 2014 OW collapse causes now are well known. After accruing hundreds of millions of dollars in liabilities for bunkers OW had "purchased" from physical suppliers, and after OW's financial bulwark – **ING** – pulled OW's credit line, OW went bust. Following OW's collapse, a litigation bonanza ensued, involving bankruptcy proceedings, interpleader cases, arbitration proceedings in London, and vessel arrests and attachments. At last count, there were more than 830 legal actions pending throughout the world.

Into 2016 traders and physical suppliers which had sold to OW, experienced compounded losses as court after court throughout the world refused to recognize their claims. Instead, courts with few exceptions (the **Canada** Federal Court's decision in **Canpotex**, for example) held against traders and physical suppliers and for an entity led by ING Bank claiming to have rights to all OW receivables. Every **U.S.** court in 2015 and 2016 faced with competing maritime lien

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Petition Filed Requesting a Rehearing of Key OW Bunker Payment Case

Earlier this month a US Court of Appeals partially reversed an earlier decision in a case involving bunkers delivered to M/V Temara by physical supplier CEPSA.

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claims over the provision of bunkers involving OW Bunker concluded, without exception, that the physical suppliers did not meet the statutory requirements of U.S. maritime law and did not have maritime liens against the vessels to which they had provided bunkers.

A number of U.S. courts went a step further, finding that OW Bunker's purported assignee – ING Bank – had met the statutory requirements and therefore held maritime liens in rem against individual vessels. This was despite the fact that ING had taken assignment under a document incorporating U.K law (the courts overlooking that U.K. law does not recognize in rem maritime liens for bunker provision).

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The fact patterns present in the OW Bunker cases are, for all intents and purposes, identical. Each case involved a series of transactions between (a) a vessel owner or charterer, (b) one or more OW entities, (c) sometimes, a series of "downstream" traders, and then (d) a physical bunker supplier. Each transaction was purportedly concluded at arms-length and involved an independent sale-and-purchase of the subject bunkers, through which the final OW entity ultimately "sold" bunkers to vessels for which physical suppliers had never been paid.

In the United States, physical suppliers with U.S. choice of law clauses in their terms and conditions proceeded either to arrest the vessels to which they had provided bunkers, or intervening in arrests that ING made, asserting maritime liens under the Commercial Instruments and Maritime Lien Act, 46 U.S.C. § 31342, et seq. ("CIMLA"). Asserting that it was the assignee of OW's receivables, ING joined those actions (or initiated its own) and declared that it held maritime liens against the vessels. Many of the U.S. actions were subsequently converted to interpleader actions when the vessel owners deposited funds into the courts' registries sufficient to pay for the value of the bunkers that had been provided to the vessels.

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Prior U.S. cases do not provide a definitive answer to this question. Some courts have concluded that the absence of contractual privity between the physical supplier and the entity ordering bunkers for the vessel is determinative in that physical suppliers did not provide the bunkers on the order of an authorized person. Other courts have found that, under certain fact patterns typically involving a great deal of communication and coordination between the physical supplier and the authorized person, a physical supplier has satisfied the requirements of the CIMLA and therefore has a maritime lien.

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bunkers on Saturday.

Jun 27

Singapore: Exxon to Increase LS Bunker Fuel Output

With expansion of Jurong refinery.

Jun 25

IMO 2020: Supply Uncertainty Means MGO is Tramp Trader's Only Compliance Choice for Now

But 0.5% will definitely be an option in the future.

Jun 26

Singapore: Landing of Bunker Samples Delayed After Customs Policy Change

Bunker surveyors warned of severe disruptions to bunker fuel testing services in Singapore if samples could not be landed.

Jun 26

GHG Savings of Only 6% Makes LNG Bunkers a "$22bn Distraction" for EU Shipping, New Study Insists

"LNG is not a bridge fuel, it's an expensive distraction that will make it harder for the EU to achieve its shipping climate goals," says T&E's Faig Abbasov.

Jun 28

Weekly Vessel Scrapping Report: 2018 Week 26

Have you sold bunkers to a recently scrapped vessel? Check here with VesselsValue's demolition sales from June 21 – June 27, 2018.

Against this factual and legal background, a number of cases were teed up on motions for summary judgment (without trial) across a series of U.S. jurisdictions. Considering these motions, every U.S. district court denied any recovery to physical suppliers. Courts in **Louisiana**, **Washington**, **Texas**, and **New York** were unpersuaded by physical suppliers' arguments and concluded that the physical suppliers did not provide bunkers on the order of an authorized person, as required by the CIMLA. In related cases, courts in **Alabama**, New York, and Texas also concluded that ING – standing in OW's shoes as an assignee – did "provide" bunkers on the order of an authorized person and therefore held a maritime lien.

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2017 is shaping up to be a better year, however. All of the unfavorable U.S. District Court now are on appeal to their respective Courts of Appeal (Second, Fifth, and Ninth Circuits), with briefing either already concluded or very soon to be. Decisions from the appellate courts should start issuing in the first half of the year, with the balance in by year end 2017.

Further, one of the two U.S. OW Bunker cases to proceed to a full trial (the prior cases were decided on motions for summary judgment) now has bucked the growing trend of decisions unfavorable to physical suppliers. Instead, this court – holding in favor of physical supplier **Martin Energy** against ING - instead concluded that both statutory U.S. maritime law and basic equitable principles, require that each party to the bunkering transaction receive what it agred to receive. So, the Court held, the physical supplier must be paid for its supply, and ING receive, as assignee, the commission that OW otherwise was to receive.

In Martin Energy Services, LLC v. M/V BRAVANTE IX, et al., No. 14-cv-322, decided at the end of January, 2017, **Judge Hinkle** correctly concluded that the physical supplier had indeed provided the bunkers on the order of an authorized person.

Four important points shaped Judge Hinkle's view of the facts, and ultimately his analysis and opinion. First, equity – both maritime law and interpleader proceedings are fundamentally concerned with principles of equity. Indeed, the codification of a statutory maritime lien was founded on the idea that it would be manifestly unjust to suppliers of maritime necessaries if there were no substantive means of recovering after a vessel departed port. Similarly, interpleader proceedings are used to protect a party from being forced to pay multiple times for the same liability. With equity in mind, Judge Hinkle fashioned a solution that achieved the result all parties had intended and which would have otherwise occurred but for the collapse of OW Bunker.

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Second, contract principles. Notwithstanding the fact that multiple OW Bunker entities stood between the physical supplier and the vessel owner, Judge Hinkle concluded that there was a contract between the physical supplier and the vessel owner:

I find as a fact that Martin and Boldini did enter into a contract at that time. The terms were these: Martin would provide the previously agreed amount and type of fuel on board the Bravante VIII. Boldini would pay Martin's price if the intermediary who was primarily liable did not do so, but Martin's only recourse against Boldini would be against the ship.

These terms square precisely with the contemporaneous written documentation. The ship's engineer, acting within the course and scope of his authority for Boldini, signed a certificate acknowledging "the vessel's ultimate responsibility and liability for the debt incurred through this transaction." Martin's Ex. 8. The engineer could properly bind the ship and its owner. See Atl. & Gulf Stevedores, Inc. v. M/V Grand Loyalty, 608 F.2d 197, 200 (5th Cir. 1979). ING's assertion that Boldini had no contract with Martin and no liability for this debt cannot be squared with this certificate.

Here the external signals were set out in the bunkering certificate in terms that could bear only one meaning: the ship bore ultimate liability for the debt arising from Martin's delivery of the fuel.

ING notes, though, that under Florida law, a contract arises only when there is an offer and acceptance—a meeting of the minds on the contract's essential terms. See, e.g., Perkins v. Simmons, 15 So. 2d 289, 290, 153 Fla. 595, 599 (1943). When Martin showed up with fuel and tendered the certificate, that was an offer to deliver the fuel on the terms stated in the certificate. When Boldini, through its captain and engineer, accepted the fuel, Boldini accepted Martin's terms. When the engineer signed the certificate, he confirmed acceptance of the terms.

*There was also the requisite "meeting of the minds." The test is of course objective, not subjective; what is required is an agreement on a set of external signals, not the same subjective understanding of those signals. See, e.g., Macky Bluffs Dev. Corp. v. Advance Const. Servs., Inc., No. 3:06cv397/MCR/EMT, 2008 WL 4525018, *8 n.19 (N.D. Fla. Sept. 26, 2008) ("[C]ourts look not to 'the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing but on their having said the same thing.' " (quoting Leopold v. Kimball Hill Homes Fla., Inc., 842 So. 2d 133, 136 (Fla. 2d DCA 2003))). Here the external signals were set out in the bunkering certificate in terms that could bear only one meaning: the ship bore ultimate liability for the debt arising from Martin's delivery of the fuel. That the amount of the debt was not specified did not matter; it was a set amount that could readily be determined by reference to Martin's prior contract with the intermediary, if necessary.*

Third, and most critically for bunker suppliers, the plain statutory text of the Commercial Instruments and Maritime Lien Act ("CIMLA"), 46 U.S.C. § 31341-43. The relevant portion of the statute confers a maritime lien on "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner." 46 U.S.C. § 31341(a). Applying standard rules of construction in analyzing the statutory text, Judge Hinkle looked to the "plain meaning of the statute" to "construe the statute to mean what it

had indeed provided necessaries on the order of the vessel's owner.

Here there are no facts that alter the statutory presumption one way or the other. The captain, the engineer, and Hirth, as Boldini's agent at the port, all had authority to procure necessaries for the Bravante VIII.

All of these—the captain, the engineer, and Hirth—dealt directly with Martin (through its agents) on the logistics for delivery of the fuel. Before delivery began, Martin provided the bunkering certificate that an official would be required to sign. The bunkering certificate made clear that Martin claimed a maritime lien. After delivery of the fuel, the engineer signed the certificate.

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As a matter of ordinary English, it is difficult to assert that Martin did not deliver the fuel "on the order of" the captain and the engineer, if not also Hirth. Martin delivered the fuel when, where, and how the captain and engineer directed.

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Fourth and finally, quantum meruit, which is another legal theory based on in equity. Unlike maritime and interpleader law which arises under federal statute, however, quantum meruit calls for application of state law (though the elements of a quantum meruit claim are generally identical across the United States.

Under Florida law, to prevail on a quantum-meruit claim, a plaintiff must show that (1) it conferred a benefit on the defendant; (2) the defendant had knowledge of the benefit; (3) the defendant accepted or retained the benefit; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying its fair value. Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co., Inc., 695 So. 2d 383, 386 (Fla. 4th DCA 1997) (en banc).

Martin has satisfied each of these elements in spades. Martin conferred a benefit: 300 tons of fuel. Boldini knew of, accepted, and retained the benefit; indeed, Boldini signed a certificate acknowledging the fuel's delivery. It would be inequitable for Boldini to retain the benefit without paying for it. Boldini has not sought to do so.

The legal implications for bunker suppliers arising out of the OW Bunker cases continue to unfold in a fluid manner. In the aftermath of 2016's string of unfavorable decisions, bunker suppliers have been moved to re-examine their assumptions about payment and security. It now matters whether there are intermediate entities involved in the contracting chain between physical suppliers and vessel charterers. Extending credit to traders is no longer an automatic assumption. Terms and conditions

are being updated, particularly with respect to the most advantageous choice of law, on issue of title retention and maritime liens.

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What can bunker traders and suppliers expect, then, from the OW Bunker decisions that should issue in 2017? Later this year, decisions from the various appellate courts considering the OW Bunker cases will begin to issue. If the appellate courts affirm the district courts' rulings, bunker suppliers will have to think long and hard about whether present business practices can be maintained. Credit insurers will either raise premiums, place significant restrictions on the types of transactions they will cover, or some combination of both. It will become ever more critical to conduct substantive credit checks of every entity involved in the bunker transaction. Physical bunker suppliers that can afford to be discerning in choosing which entities to do business with will demand stronger assurances of payment, particularly where intermediary traders and brokers may have pledged all of their receivables to secured lenders.

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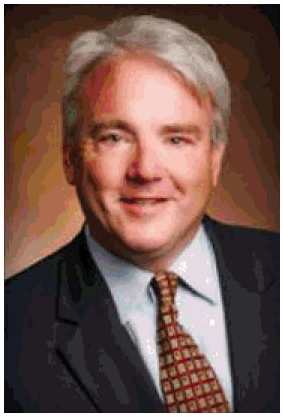
Even if the appellate courts reverse the district courts' decisions, those decisions give a call now for physical suppliers, and any traders "downstream" of the ultimate seller to their customer, to examine their sales terms and conditions. Physical suppliers and downstream traders simply assumed that they would be paid and that they could arrest if they weren't paid. But, the district court decisions simply recognized what had been a long-existing requirement under U.S. maritime law. That is, unless one provides bunkers directly to a vessel on the order of someone in charge of the vessel, there is no maritime lien right. More is needed for a maritime lien, for example, direct contact between the downstream trader or supplier and the entity in charge of the vessel, or, an explicit assignment by the ultimate trader of its maritime lien right (for the value of the supply) to the physical supplier or "downstream" trader.

As 2017 begins, it seems that demand for bunkers may be increasing, and petroleum prices rising somewhat. Although U.S. and other courts around the world continue to consider whether (as the court did correctly for supplier Martin Energy) the parties' original agreements should be honored, physical suppliers and those traders engaging in "downstream" transactions, with ultimate sellers, must apply the lessons now from, and not forget the lessons of the 2014-2016 "anni horribilis."

Some scholars comment that the Queen drew the term "annus horribilis" from a 1667 poem titled "Annus Mirabilis" by then-famous English poet John Dryden. Basically, England had in 1667 miraculously survived a series of great challenges. So Dryden marked the year poetically celebrating the "Annus Mirabilis," meaning "a year of miracles" (or marvels, or wonders) in Latin. Certainly OW's collapse, decreased world trade, and low petroleum prices of 2014-2016 will not be the bunker industry's last challenge. But, putting in place now responses to the "annui horribilis," physical bunker suppliers and others trading "downstream" can make their next "anni" relatively more "mirabilis."

About J.Stephen Simms



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Simms Showers is one of the most active United States firms working in the area of vessel arrest, maritime attachment, and related maritime remedies for creditors. The Firm has to date recovered over U.S. $200 million for its clients as the result of successful vessel arrest and maritime attachment proceedings throughout the world.

Simms Showers or its principals have been involved in every major United States and international maritime bankruptcy since 1985, including Hanjin, Cho Yang, Korea Lines, OSG, Genmar, Eastwind (Probulk), and Trailer Bridge.

Mr. Simms served as a prosecutor in the Honor Law Graduates program of the United States Department of Justice before entering private practice. He is a graduate of the Northwestern University School of Law (Chicago) where he served as Editor-in-Chief of the Northwestern Journal of International Law and Business. He holds an M.A. in International Studies from The Johns Hopkins University School of Advanced International Studies, and a B.A. in International Studies from The Johns Hopkins University.

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Mr. Simms serves as member of the Board of the International Bunker Industry Association (IBIA) is the Husband of his wife of 27 years, Denise, and Dad of daughter Alison, an Epidemiologist at Johns Hopkins Hospital and of son John attending Middlebury College, and of West Highland White Terrier Barrett, who enjoys chasing squirrels with the same enthusiasm that Mr. Simms has for chasing ships.

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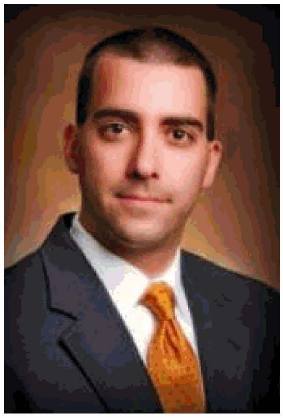

Marios Monopolis is a Senior Associate of the Firm. Marios' practice includes admiralty and maritime litigation, business and civil matters, employment matters, intellectual property litigation, and False Claims Act ("Qui Tam") litigation. Prior to joining the Firm, Marios worked in the U.S. House of Representatives and at the Johns Hopkins University. In 2012, Marios was seconded to St eamship Mutual and Holman Fenwick Willan in London.

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