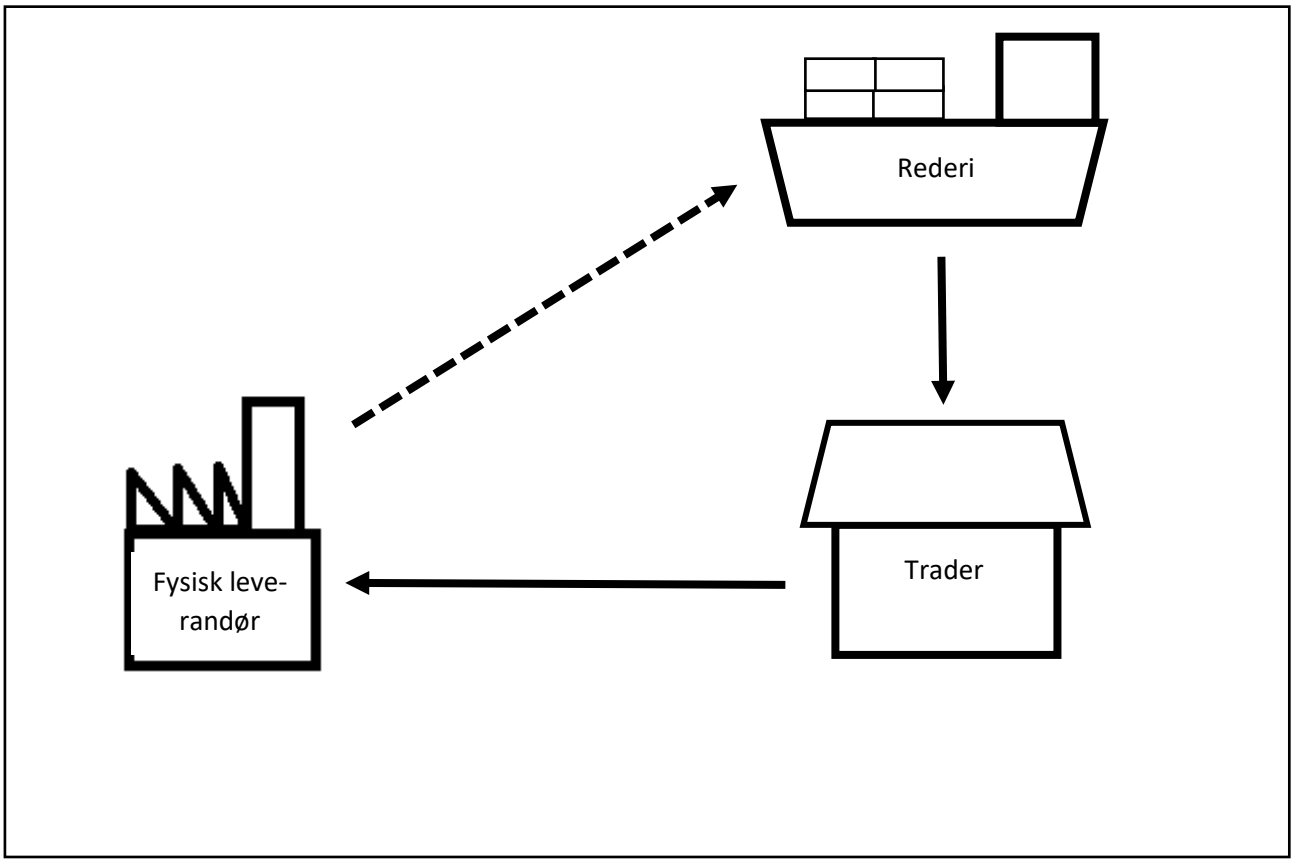
En komparativ analyse af gyldigheden af ejendomsforbehold i bunkerolie-branchen under henholdsvis dansk og engelsk ret

A Comparative Analysis of the Validity of Retention of Title Clauses in the Bunker Oil Industry under Danish and English Law Respectively



af RIKKE ROBSAHM HANSEN

Specialet undersøger hvordan ejendomsforbehold bliver brugt i bunkerolie-branchen både i forholdet mellem fysisk leverandør og trader og i forholdet mellem rederi/charter og trader ved at tage udgangspunkt i konkrete T&C og praksis, med det formål at se om praksis overholder lovens krav under henholdsvis dansk og engelsk ret. Dansk ret er generelt mere restriktiv end engelsk ret, hvilket gør at ejendomsforbehold i bunkerolie-branchen, der ofte tillader bunkerolien forbrugt før betaling og sammenblandet med andre bunkeroliерester, vil være svære at opretholde under dansk ret. Engelsk ret er mere lempelig, hvorfor det er mere sandsynligt at ejendomsforbeholdene vil blive opretholdt og dermed udgøre en aktuel sikkerhed i bunkerolie-branchen, en sikkerhed der er svær at opnå på anden vis. Specialet foreslår derfor at de danske regler bliver modificeres således at ejendomsforbehold også kan udgøre en aktuel sikkerhed i brancher der handler med genus varer i bulk under dansk ret.

Indhold

Engelsk resumé

Retention of title clauses are commonly used in bunker oil purchace contacts as it is industry practice to sell the bunker oil on 30 days' credit based solely on the security provided by a retention of title clause. At the same time the ship owner as buyer is allowed to consume the bunker oil before payment has been made.
A retention of title clause is a clause whereby the seller retains title to the bunker oil until he has received full payment notwithstanding that possession of the oil has passed to the buyer.
Under both Danish and English law, a retention of title clause will terminate as soon as the bunker oil is burned or resold. It is therefore only as long as the bunker oil is still in existence that seller has security for payment.
Under both Danish and English law the retention of title clause is only valid provided it has been agreed between the parties in accordance with the contract law of the respective jurisdiction and the bunker oil must be specified to enable an identification of the bunker oil. Specified under Danish law means that the bunker oil cannot be mixed with any other product but under English law the bunker oil just has to keep its physical characteristics.
Further under Danish law, there are requirements of settlement in accordance with consumption, control with the consumption and separate accounting of the consumption.
The rules are generally more relaxed under English law, why the retention of title clause is more likely to be upheld under English law, and thereby becoming an actual security in the bunker oil industry. It is therefore suggested that Danish law be modified along similar lines.

1. Indledning

OW Bunker A/S (OW Bunker) efterlod bunkerolie-branchen med mange spørgsmål og ubetalte regninger efter deres konkurs tilbage i efteråret 2014. OW Bunker var en af verdens største forhandlere af bunkerolie og ifølge IBIA – the International Bunker Industry Association – sad OW

Bunker på 9 % af verdensmarkedet[1], hvorfor konkursen kom som et chok for hele branchen og fik sat advokater på overarbejde.

Skibe blev arresteret som aldrig før, redere frygtede, og kom til, at skulle betale to gange for samme leverance[2] og branchens terms and conditions (T&C) blev sat på prøve.[3] Der blev anlagt retssager i hele verden, men særligt en retssag har vist sig at være af særlig interesse – *PST Energy 7 Shipping LLC and another (Appellants) v O W Bunker Malta Limited and another (Respondents) [2016] UKSC 23*, herefter kaldet *PST Energy*[4]. En sag der nåede hele vejen til den engelske Supreme Court[5], hvor rederen påberåbte sig den engelske købelov, the Sale of Good Act 1979 (SOGA), art. 2(1) og 49, for at undgå at betale deres kontraktpart, en underafdeling til OW Bunker[6], da reder også var blevet mødt med krav om betaling fra den fysiske leverandør af bunkerolien. Domstole og advokater verden over afventede denne afgørelse for at få en ide om hvordan bunkerolie-branchen skulle forholde sig til alle sagerne i kølvandet af konkursen, men også fremadrettet ved kontraktindgåelse i bunkerolie-branchen.

Rederen, der blev mødt med krav om betaling fra både den fysiske leverandør[7] og OW Bunker for den samme bunkerolie, anførte i sagen mod OW Bunker, at de ikke, jf. SOGA, skulle betale for bunkerolien, medmindre ejendomsretten til bunkerolien overgik til dem og det kunne den ikke, da OW Bunker ikke selv havde ejendomsret til bunkerolien. Imidlertid fastslog såvel voldgiftsretten, hvor sagen startede, som både Court of Appeal og Supreme Court, at salget ikke var omfattet af SOGA men var en aftale sui generis [læs: aftale af sin egen art], der gav reder ret til at bruge bunkerolien inden denne var betalt og derfor skulle reder betale til OW Bunker, for den bunkerolie som var forbrugt, uden at der kunne stilles krav om ejendomsrettens overgang.
Supreme Court udtalte obiter dictum at havde SOGA fundet anvendelse ville rederen formentlig stadig være forpligtet til at betale.

Spørgsmålet er om resultatet ville have været anderledes, såfremt rederen havde anlagt sagen anderledes. Dette åbner Supreme Court op for i præmis 39 linje 22-27, hvor det anføres"*the issues before the court do not involve any claim that OWBM had no right to permit such use* [læs: brugen af bunkerolien før ejendomsrettens overgang], *or that the Owners are or may be exposed to any risk of double exposure, either by reason of RMUK's claim* [læs: fysiske leverandørs krav direkte mod reder] *(never so far as appears formally pursued) or on any other basis. On the presently assumed facts, therefore the Owners are simply liable for the price, […]"*

[1] Finans 2014
[2] ShippingWatch 2017
[3] Hellenic Shipping News Worldwide 2015
[4] se bilag 4
[5] The Supreme Court er den højeste ret i det engelske retssystem
[6] Den faktiske modpart er OW Bunker Malta Ltd og den anden indstævnte er ING Bank NV, der før konkursen havde fået overdraget fordringer i OW Bunker Group. I denne opgave vil de samlet gå under OW Bunker.
[7] Krav fra fysiske leverandør kan følge af reglerne om ejendomsrettens overgang, reglerne om søpant og reglerne om arrest.

Ejendomsforbeholdet spiller en central rolle i dommen, da det er med til at udelukke, at SOGA finder anvendelse. Havde sagen været anlagt for en dansk domstol eller anderledes for de engelske domstole, kunne ejendomsforbeholdet muligvis have haft lige så central rolle men muligvis til fordel for rederen. Rederen kunne muligvis have påberåbt sig delvis vanhjemmel[8] overfor OW Bunker, da den fysiske leverandør i visse jurisdiktioner vil have søpant[9] og dermed ret til at arrestere reders skib som sikkerhed for deres krav mod OW Bunker.
Alt afgørende bliver dog om den relevante domstol vil anerkende ejendomsforbeholdet, altså om det er gyldigt. Det er dette spørgsmål der skal være hovedgenstand for dette speciale, da et gyldigt ejendomsforbehold muligvis vil kunne medføre et andet udfald i en tilsvarende sag, hvis brugt anderledes og i øvrigt bruges ejendomsforbehold sædvanemæssigt i bunkerolie-branchen til sikring af ganske store leverandørkreditter, som det vil fremgå af det følgende, hvorfor det alene af den grund er relevant at undersøge.

1.2. Problemformulering

Er ejendomsforbehold i bunkerolie-branchen gyldige under henholdsvis dansk og engelsk ret, herunder hvilke krav stiller de to respektive jurisdiktioner til ejendomsforbeholdets gyldighed, og har det betydning om bunkerolien er helt eller delvist forbrugt før ejendomsrettens overgang?

1.3. Emne afgrænsning

Ejendomsforbeholdsklausuler kan være formuleret forskelligt fra virksomhed til virksomhed. I dette speciale vil der blive taget udgangspunkt i OW Bunkers T&C fra 2013[10], som fandt anvendelse i *PST Energy*, hvor lovvalget er engelsk og A/S Dan-Bunkering Ltds[11] (Dan-Bunkering) T&C fra 2010, hvor lovvalget er dansk, da Dan-Bunkering i dag er en af verdens førende virksomheder indenfor bunkerleverancer.

OW Bunker og Dan-Bunkering er begge mellemhandlere af bunkerolie, og kun i begrænset omfang fysiske leverandører. De vil derfor oftest indgå aftale med en fysisk leverandør om den faktiske levering, og den fysiske leverandør vil have sit eget sæt T&C. I dette speciale vil der blive taget udgangspunkt i Bomin Internationl Group of Companies'[12] (Bomin) T&C.
Nærmere forklaring af parterne og deres interne forhold, samt bunkerolie-branchen, findes i afsnit 2.

Ejendomsforbeholdet vil alene blive set på fra et erhvervsretligt synspunkt, da kreditkøbsaftaler vedrørende bunkerolie som udgangspunkt vil være imellem erhvervsdrivende. Eventuelle særregler der gælder for forbrugere vil derfor ikke blive omtalt.

I indledningen blev det nævnt, at et gyldigt ejendomsforbehold muligvis vil kunne medføre et andet udfald i en lignende sag som *PST Energy* men hvad domstolene vil og bør komme frem til

[8] Se afsnit 4.3.2.2.
[9] Falkanger s. 130
[10] Se Bilag 2
[11] Se Bilag 3
[12] Se Bilag 1

vil ikke være genstand for dette speciale, ligesom retsvirkningerne af ejendomsforbeholds gyldighed eller ugyldighed ikke vil blive behandlet i dybden.

1.4. Metode og opbygning

Der foretages en retsdogmatisk analyse af gyldighedsbetingelserne for ejendomsforbehold under dansk og engelsk ret. Dette sker på baggrund af relevante love, retspraksis og juridisk litteratur i de respektive jurisdiktioner. Målet er at beskrive gældende ret og analysere denne ud fra konkret praksis i bunkerolie-branchen, samt lave en komparativ analyse.

Først vil parternes forhold og bunkerolie-branchen blive beskrevet (afsnit 2).
Efter en kort bemærkning om lovvalg og værneting (afsnit 3) følger en generel introduktion til ejendomsforbehold, herunder forklaring af begrebet, formålet og dets retsvirkninger (afsnit 4). Herefter vil dansk ret blive beskrevet og analyseret (afsnit 5), først ud fra forholdet mellem fysisk leverandør og trader (afsnit 5.2) og herefter ud fra forholdet mellem trader og reder (afsnit 5.3), afsluttet med en konklusion af ejendomsforbeholdets gyldighed under dansk ret (afsnit 5.4).
Herefter beskrives og analyseres engelsk ret på samme måde (afsnit 6). Først forholdet mellem fysiske leverandør og trader (afsnit 6.2), herefter forholdet mellem trader og reder (afsnit 6.3) og til sidst afsluttet med en konklusion af gyldigheden af ejendomsforbehold under engelsk ret (afsnit 6.4).

Specialet afsluttes med en konklusion indeholdende en komparativ analyse af gyldigheden af ejendomsforbehold i de to jurisdiktioner (afsnit 7.1) og en de lege ferenda betragtning (afsnit 7.2).

2. Parternes forhold og bunkerolie-branchen

Skibene, uanset om det er et fiskefartøj, fragtskib, passagerskib eller et fjerde type skib med motor, har brug for brændstof, også kaldet bunkerolie, for at sejle.
Om det er rederiet eller en tidsbefragter der bestiller bunkerolien, og dermed i forholdet mellem reder og tidsbefragter er ansvarlig for betalingen til leverandøren, afhænger af tidsbefragtningsaftalens ordlyd, men skibet behøver ikke at være tidsbefragtet og i så fald er rederiet ansvarlig for betalingen til leverandøren.
For dette speciale er det som udgangspunkt ikke afgørende om det er rederi eller tidsbefragter der har foretaget bestillingen af bunkerolie, så medmindre andet fremgår vil ”reder” både omfatte rederiet og tidsbefragteren.

Trader er mellemhandler af bunkerolie, dvs. han køber og sælger bunkerolie, men han hverken producerer eller bruger bunkerolie.

Fysisk leverandør er en virksomhed der ejer bunkerolie og sælger det til mellemhandlere eller redere, som en del af sin virksomhed.

Jeg har kontaktet Rune Pejtersen, tidligere OW Bunker medarbejder, for at få en gennemgang af hvordan bunkeroliekøb normalt finder sted.

Det varierer i forhold til om det er trader eller reder der tager første skridt for at få en aftale i stand. Nogle redere vil være på løbende kontrakt med trader-virksomheden og leverancerne vil derfor til en vis grad følge direkte af kontrakten. For så vidt angår spotkontrakter med tidligere- eller faste kunder vil det være en vekslen mellem om det er trader eller reder der tager kontakt for at få en aftale i stand, og samme gør sig gældende for helt nye kunder.

Før trader afgiver tilbud til reder vil trader som udgangspunkt kontakte en eller flere fysiske leverandører i det pågældende område, hvor reder ønsker at leverancen skal finde sted, for at høre hvad en leverance af den pågældende størrelse skal koste. Trader vil hos den fysiske leverandør bede om en fast pris, og denne pris vil den fysiske leverandør ofte kræve skal accepteres inden for en forholdsvis kort tidsfrist, da oliepriserne svinger meget.

Trader vender nu tilbage til reder med et tilbud, som reder kan takke ja eller nej til. Takker reder ja bliver der indgået en aftale om den pågældende leverance til den pågældende pris.
Denne aftale vil nogen gange være af formel karakter, hvor der i forbindelse med tilbuddets afgivelse henvises til traders T&C, samt udarbejdes en skriftlig aftale, og andre gange mere uformelt, hvor det hele følger af en tråd på online medier og slutteligt fremsendes en ordrebekræftelse, hvor på en henvisning til T&C er trykt. Sidst nævnte tilfælde vil være den primære måde at indgå aftaler om køb af bunkerolie på.
Reklamerer reder ikke mod ordrebekræftelsen og dennes henvisning til T&C antager trader, at reder har accepteret vilkårene. Rune Pejtersen pointerer, at det dog er meget sjældent, at der reklameres direkte eller i form af fremsendelse af modstridende T&C.

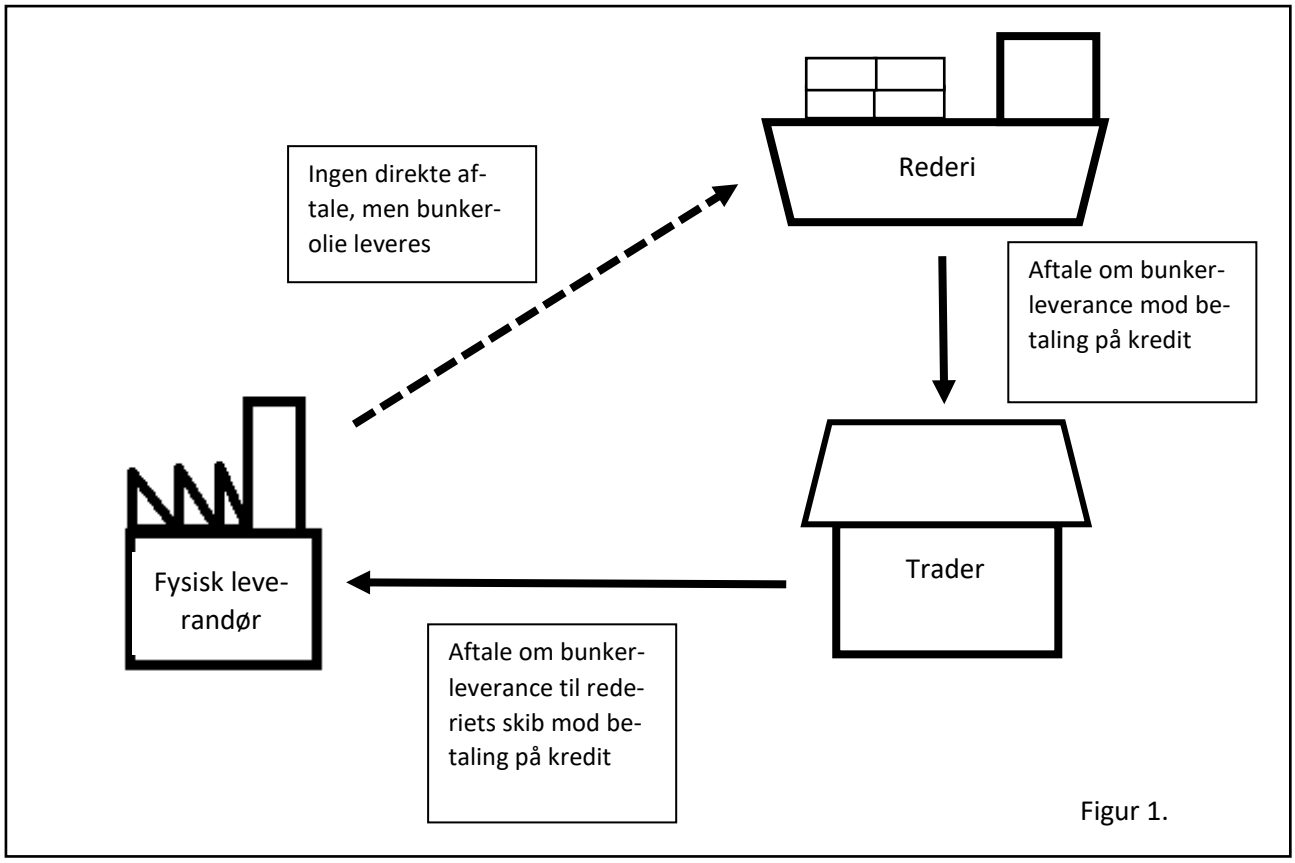
Aftalen vil oftest være en kreditaftale, dvs. betaling først skal finde sted på et senere tidspunkt – ofte 30 dage fra levering.

Så snart reder har takket ja, vender trader tilbage til den fysiske leverandør for at bekræfte tilbuddet om levering af den angivne mængde bunkerolie til reders skib i den angivne periode. Denne handel vil typisk være omfattet af den fysiske leverandørs T&C og vil være en kreditaftale på enten 14 eller 30 dages kredit.

Både traders T&C og den fysiske leverandørs T&C vil som regel indeholde en klausul om ejendomsforbehold, dvs. at ejendomsretten ikke overgår til køber før denne har betalt købesummen. Fysiske leverandør/trader giver imidlertid tilladelse til, at bunkerolien bliver brugt til driften af reders skib før betaling har fundet sted, og fysiske leverandør vil ligeledes have tilladt videresalg.

Som det fremgår, involverer en leverance af bunkerolie ofte 3 parter[13], indeholder to kreditkøbsaftaler og den ene part vil aldrig være i besiddelse af bunkerolien, men alene være en mellemhandler. Dette er illustreret på figur 1 nedenfor.

[13] Det er ikke sjældent, at der er flere mellemhandlere involveret og dermed endnu flere led. Det var tilfældet i *PST Energy*, hvor OW Bunker havde handlet med egen underafdeling og det sammen havde RMUK. Problematikken for de enkelte kontrakter er den samme, som ved de to kontrakter illustreret i figur 1.



Figur 1.

3. Lovvalg og værneting

Kontrakter i bunkerolie-branchen er næsten altid af international karakter – i *PST Energy* sidder reder ét sted, trader på Malta, fysiske leverandør i England og leverancen sker i Rusland – hvorfor spørgsmålet bliver hvor en evt. tvist skal løses og under hvilket lands retsregler.

Dette afhænger af de enkelte landes internationale procesretlige regler(IPCR) og internationale privatretlige regler(IPR).[14]

IPCR regulerer hvilke(n) domstole der har kompetence til at afgøre sagen og IPR vedrører hvilke materielle regler der finder anvendelse i sagen.

Under IPR[15] skal der ske en kvalificering af retsforholdet. En tvist mellem kontraktens parter vil som udgangspunkt være reguleret af kontraktstatuttet og tingsretlige tvister vedrørende bunkerolien, såfremt de ikke vedrører forholdet mellem de kontraherende parter, vil være omfattet af tingsstatuttet i Danmark[16] og reglerne om property i England[17].

[14] Fogt s. 475
[15] Der er reelt set allerede sket en klassificering når det er konstateret at forholdet er inden for IPR, dvs. privatretten, modsat fx strafferet eller forvaltningsret.
[16] Fogt s. 544
[17] Briggs s. 298 ff

Lovvalg er i sig selv et tungt emne som kunne være grundlag for et speciale og vil derfor ikke blive behandlet nærmere her. Det er dog et spørgsmål der er vigtig at have for øje, når man har med internationale sager at gøre.

4. Introduktion til ejendomsforbehold i erhvervsforhold

Ejendomsforbeholdsklausuler er internationalt kendt under betegnelsen "retention of title clauses" og defineres i et EU-directive,[18] på følgende måde; *"'retention of title' means the contractual agreement according to which the seller retains title to the goods in question until the price has been paid in full"* og anerkendes umiddelbart i det meste af verden[19].
Et ejendomsforbehold er et vilkår i en kreditkøbsaftale, som skal sikre, at ejendomsretten til det solgte ikke overgår til køber før sælger har modtaget købesummen. Sagt anderledes, køberen har ikke fuld retlig rådighed over det købte før købesummen er betalt, trods det at køber har modtaget salgsgenstanden.

4.1. Alene råderettens overgang

Ejendomsforbehold er en fravigelse af udgangspunktet i både dansk og engelsk køberet om, at ejendomsretten overgår ved endelig aftaleindgåelse hvad angår individualiserede varer og tidspunktet for individualisering ved genus varer[20].
I køb med ejendomsforbehold er det alene råderetten der overgår til køber ved aftaleindgåelsen, om end en begrænset råderet, mens ejendomsretten følger betingelserne i kontrakten, hvilket typisk vil være salgsgenstandens fulde betaling.

Den råderet køber får ved levering er begrænset i den forstand, at køber skal overholde aftalevilkårene og derudover må køber ikke foretage dispositioner der fratager sælger nogen ret over det solgte til fordel for køberens aftaleerhververe og øvrige kreditorer. Det medfører for eksempel, at køberen kan pantsætte det solgte, så længe panthaver respekterer sælgers ejendomsforbehold[21].

4.2 Ejendomsforbeholds formål

Sælgerens formål med at indsætte et vilkår om ejendomsforbehold er at sikre købesummens betaling når der gives kredit til køber. Ejendomsforbehold anses altså for en sikkerhedsret.
Sikkerheden består i sælgerens adgang til at tilbagetage det solgte hvis køberen tilsidesætter sine forpligtelser. Havde der ikke været aftalt ejendomsforbehold ville sælger umiddelbart[22] ikke have adgang til at tilbagetage det solgte[23].
Derudover medfører ejendomsforbeholdet fortrinsret i forbindelse med købers konkurs. Går køber konkurs før ejendomsretten er overgået til køber vil sælger være separatist i købers konkursbo og

[18] DCLP Art. 2(9)
[19] The British Exporters Association 2005
[20] Gomard s. 68-69, SOGA art. 18
[21] Thomsen 2012 s. 201
[22] Det kan følge af særlovgivning, at sælger alligevel har en sådan ret; fx ifølge reglerne om søpant, jf. Falkanger s. 130
[23] KBL § 28, stk. 2

dermed være bedre stillet end købers øvrige kreditorer. I Danmark følger dette direkte af Konkursloven (KL) § 82 og i England af Insolvency Act 1986 (INA) section 251.

4.3 Retsvirkning af ejendomsforbehold

4.3.1. Begrænset retlig råderet

Som nævnt giver et gyldigt ejendomsforbehold sælgeren ret til at tilbagetage det solgte hvis køberen tilsidesætter sine forpligtelser og sælger bliver separatist i købers konkursbo.

Som følge af den begrænsede retlige råderet skal sælger ikke respektere panthavers rettigheder hvis køber pantsætter genstanden, hvori der er taget ejendomsforbehold, eller andre retsforfølgende kreditorer hvis de forsøger at gøre udlæg i genstanden. Sælger vil kunne anse det som misligholdelse fra købers side og derfor tage det solgte tilbage.
Skulle der ved pantsætningen eller udlægget være skabt en friværdi i salgsgenstanden må pant/udlæg dog anses for konverteret til friværdien[24] og dermed opnår sælger ikke nogen uberettiget vinding.

4.3.2. Vindikation eller ekstinktion

Ejendomsforbehold er ikke udelukkende af relevans inter partes, men vil også kunne have retsvirkninger for tredjemand.
Købers råderet er som nævnt retligt begrænset og køber må ikke foretage dispositioner til fordel for sine øvrige kreditorer eller aftaleerhververe i strid med sælgers ret. Overdrager køber fx genstanden videre til tredjemand før der er sket betaling til den oprindelige sælger, bliver spørgsmålet om den oprindelige sælger kan vindicere salgsgenstandens fra tredjemand eller om tredjemand ekstinkverer sælgers ret. Hvorvidt der sker vindikation eller ekstinktion afhænger af den relevante jurisdiktions retsregler. Har den oprindelige sælger ikke adgang til at vindicere det solgte mistes ejendomsforbeholdets sikkerhedsvirkning.

4.3.2.1. Ejendomsforbehold taget over for en mellemhandler

I både Danmark og England vindicerer sælger salgsgenstanden fra tredjemand, og dette er uanset om tredjemand var i god tro. Dette udgangspunkt gælder dog ikke i de tilfælde hvor sælger vidste eller burde vide, at køber havde til hensigt at sælge genstanden videre til tredjemand, jf. forhandlergrundsætningen i Danmark[25] og SOGA art. 25 i England. I dette tilfælde vil tredjemand ekstinkvere sælgers ret, medmindre tredjemand er i ond tro.

4.3.2.2. Vanhjemmel

Over for en godtroende aftaleerhverver kan regler om vindikation være forholdsvis byrdefulde, men som modstykke til dette vil købers aftaleerhverver som udgangspunkt kunne påberåbe sig hel eller delvis vanhjemmel og dermed hæve aftalen eller kræve erstatning fra dennes sælger.

[24] Thomsen 2012 s. 238
[25] Elmer s. 177, Thomsen 2012 s. 248

Vanhjemmel er betegnelsen for det forhold, at *"køberen på grund af tredjemands ret ikke opnår den ret over salgsgenstanden, som var aftalt med sælgeren, eller som køberen havde ret til at forudsætte"*[26].

5. Dansk ret

5.1. Retsgrundlag

Ejendomsforbehold har været anerkendt længe i Danmark, og der blev allerede fremsat forslag om lov om afdragshandel i 1895, men først i 1917 blev kreditaftaler og ejendomsforbehold reguleret ved lov[27].

I dag er gyldigheden af ejendomsforbehold som udgangspunkt reguleret i Kreditaftaleloven (KAL). KAL er beskyttelsespræceptiv hvad angår kreditkøb med ejendomsforbehold, jf. KAL § 7, stk. 2, hvorfor aftaler der falder inden for lovens anvendelsesområde ikke kan fraviges til skade for køber.

KAL § 4, nr. 16 definerer et ejendomsforbehold som *"et kreditkøb, hvor det er aftalt, at sælgeren kan tage det solgte tilbage, hvis køberen ikke opfylder sine forpligtelser."*

KAL § 4, nr. 15 definerer et kreditkøb og heraf fremgår, at det kun er kreditkøb af løsøre der er omfattet af loven. Loven definerer ikke løsøre, hvorfor det må være den generelle juridiske forståelse af løsøre der må lægges til grund.

Løsøre er herefter først og fremmest rørlige, fysiske og overgivelige ting, men også elektricitet, vand, gas, varme og lignende anses for løsøre[28].

Bunkerolie er ud fra denne definition løsøre og dermed omfattet af KAL. Se hertil U 2003.701 SH der vedrørte mangler ved bunkerolie og ansås for omfattet af KBL og dennes løsørebegreb[29].

Lovens kapitel 11 finder anvendelse på kreditkøb i handelskøb, jf. KAL § 2, stk. 1. Dette gælder dog ikke såfremt det er et kreditkøb med videresalg for øje eller af materialer, til brug for virksomhedens produktion, jf. stk. 2.

Da de anvendelige regler er afhængige af parternes forhold og det konkrete kreditkøb, må der sondres imellem kreditkøbet hos fysiske leverandør/trader og kreditkøbet hos trader/reder.

5.2. Forholdet mellem fysiske leverandør og trader

Som omtalt i afsnit 2 er trader alene mellemhandler af bunkerolie og vil som udgangspunkt aldrig have bunkerolien i sin varetægt. Trader køber bunkerolien fra en fysisk leverandør for at videresælge den til en reder. Kreditkøbet vil derfor som udgangspunkt aldrig være omfattet af KAL, jf. § 2, stk. 2.

Kreditkøb med tilladelse til videresalg har ikke sjældent været genstand for behandling og disse tilfælde har fået betegnelsen konsignationsforhold.

[26] Kristensen s. 149, linje 34-36.
[27] Thomsen 2012 s. 17
[28] Thomsen 2012 s. 57
[29] Anvendt i note til KBL i Karnov vedrørende § 43

5.2.1. Introduktion til konsignation

Konsignanten (sælgeren) opretholder ejendomsretten til salgsgenstanden indtil konsignataren (mellemhandleren) videresælger genstanden til slutkøber[30]. Ejendomsforbeholdet ophører i det øjeblik salgsgenstanden bliver videresolgt. Derved bliver der tale om en ophørende sikkerhedsret og der bliver ikke tale om at kunne vindicere fra slutkøber.
Ophørende sikkerhedsret vil sige, at ejendomsforbeholdet ophører før købesummen er betalt.

Konsignationsforhold er almindelig forekommende i erhvervslivet, men er til dato ikke lovreguleret. Praksis har imidlertid igennem tiden opstillet nogle betingelser der skal være opfyldt før konsignationsforbehold kan opretholdes.

5.2.1.1. Formål med konsignationsbetingelserne

Hovedformålet med betingelserne er at sikre, at ejendomsforbeholdet ikke blot er et aftalt konkursprivilegium, altså separatiststatus i købers konkursbo. Formålet med ejendomsforbeholdet skal være den sikkerhedsret som er defineret i KAL § 4, nr. 16, dvs. retten til at tage det solgte tilbage såfremt køber tilsidesætter sine forpligtelser.

5.2.1.2. Betingelser for konsignation

Først og fremmest skal de generelle betingelser[31] der gælder for almindelige ejendomsforbehold være opfyldt. Det betyder ejendomsforbeholdet skal være aftalt seneste ved bunkeroliens overgivelse, aftalen skal være klar og udtrykkelig, genstanden skal være specificeret så den altid kan identificeres, det samlede beløb skal overstige 2000 kr. og der skal være tale om et fast lånebeløb. For det andet skal de i praksis opstillede betingelser for konsignationsforbehold være opfyldt, dvs. der skal ske afregning i takt med videresalget, der skal føres en hvis kontrol til at sikre, at afregningen sker i takt med videresalget og der skal som udgangspunkt føres særskilt konsignationsregnskab[32].

5.2.2 Konklusion på forholdet mellem fysiske leverandør og trader

Disse betingelser vil imidlertid være uden praktisk relevans i forholdet mellem fysiske leverandør og trader, da bunkerolien, som gennemgået i afsnit 2, altid vil være videresolgt før levering. Ejendomsforbeholdet vil derfor være ophørt før det overhovedet er kommet til eksistens.

Den fysiske leverandør skal levere direkte til reder, hvem han ikke har kontraheret med, hvilket skyldes, at der er indført en mellemhandler (trader). Trader vil altid have videresolgt bunkerolien, og hvis ikke dette var tilfældet, ville fysiske leverandør ikke have nogen at levere til.
Grundet konsignationsforholdets ophørende karakter, vil ejendomsforbehold taget af den fysiske leverandør aldrig kunne få praktisk betydning i bunkerolie-branchen under dansk ret.

[30] Thomsen 2012 s. 291
[31] Generelle betingelser er betingelserne opstillet i KAL kap. 11
[32] Thomsen 2012 s. 292

5.3. Forholdet mellem trader og reder

Reder skal bruge bunkerolie til driften af sit skib og har som udgangspunkt ikke til hensigt at videresælge bunkerolien. Der er derfor ikke tale om et kreditkøb med videresalg for øje og der er altså ikke tale om et konsignationsforhold, som i kreditkøbet mellem fysiske leverandør og trader. Rederen bruger imidlertid bunkerolien i driften af sin virksomhed og spørgsmålet er om det falder ind under "kreditkøb af materialer, til virksomhedens produktion", og dermed falder udenfor KAL, jf. § 2, stk. 2.
Produktion opfattes traditionelt set som fremstilling af varer ved brug af andre varer, hvor varer forstås som et fysisk produkt. Denne definition kan formentlig ikke finde anvendelse i dag med virksomheder af så forskellig artet karakter, hvorfor produktion må forstås mere bredt. Rederivirksomhed består i at transportere varer fra A til B, altså stedforandrende virksomhed, og produktet må anses for selve transporten[33]. Bunkerolien anvendes til at fremskaffe produktet og må derfor anses for at indgå i produktionen.
Kreditkøbsaftaler om levering af bunkerolie falder derfor uden for lovens anvendelsesområde, jf. KAL § 2, stk. 2.

Da KAL ikke finder anvendelse, og der heller ikke er tale om konsignationsforhold, bliver spørgsmålet hvilke regler der så regulerer ejendomsforbeholdets gyldighed i forholdet mellem trader og reder.

5.3.1. Tilladt forbrug

Som gennemgået i afsnit 2 er der som udgangspunkt tale om et kreditkøb med tilladelse til forbrug før ejendomsrettens overgang. Det er formentlig ikke afgørende om tilladelsen til forbrug er udtrykkelig aftalt eller ej. Det afgørende bliver om sælger vidste eller burde vide at et sådant forbrug ville finde sted[34].

Praksis har fastslået, at ejendomsforbehold med tilladelse til forbrug minder om konsignationsforhold, da der ligeledes er tale om en ophørende sikkerhedsret[35].
Ejendomsforbehold i varer, hvor forbrug er tilladt før ejendomsrettens overgang, vil automatisk ophøre så snart forbruget sker. Spørgsmålet er om ejendomsforbeholdet kan opretholdes indtil varen er forbrugt og om det er af betydning om den er hel eller delvist forbrugt.
Praksis viser[36] at betingelserne opsat for konsignation også finder anvendelse på ejendomsforbehold med tilladelse til forbrug, jf. U 1931.231[37], hvorfor de generelle betingelser for almindelige ejendomsforbehold skal være opfyldt og derudover skal de særlige betingelser for konsignationsforbehold være opfyldt.

[33] Den Store Danske, Gyldendal
[34]Thomsen 2012 s. 248, 291
[35] Carstensen 1984 s. 103
[36] Carstensen 1984 s. 87-107, Illum s. 268
[37] dommen er nævnt i afsnit 5.3.3.1

Om betingelserne er opfyldt i forholdet mellem trader og reder må afhænge af de konkrete forhold. I det følgende vil der blive taget udgangspunkt i Dan-Bunkerings og OW Bunkers T&C og deres praksis for aftaleindgåelse, som er blevet ridset op af Rune Pejtersen.

5.3.2. Generelle betingelser

5.3.2.1. Aftaleindgåelsen

5.3.2.1.1. Aftalt senest ved overgivelsen

Ejendomsforbeholdet skal være gyldigt aftalt senest ved overgivelsen. Dette er en direkte konsekvens af KBL § 28, stk. 2 der bestemmer, at sælger ikke kan hæve købet når varen er overgivet til køber, medmindre sælger har taget forbehold i så henseende.
Dette udgangspunkt fraviges imidlertid i de tilfælde hvor endelig aftale ikke anses for indgået før efter tidspunktet for levering, jf. U 1979.430 V, hvor ejendomsforbeholdet ansås for rettidig aftalt selvom det først blev vedtaget efter levering af kreaturerne i midt december, da aftalen først blev indgået slut december efter at køber havde valgt hvilke af kreaturerne aftalen skulle omfatte.
Ejendomsforbehold skal derfor aftales inden det seneste af disse to tidspunkter, hvilket oftest vil være leveringstidspunktet.
Det bliver derfor relevant at se på hvornår bunkerolie anses for overgivet til reder og hvornår parterne sædvanligvis indgår aftale om ejendomsforbehold.

Overgivelsestidspunkt

Konkret må overgivelsen anses for at ske i det øjeblik bunkerolien passerer bunkermanifolden på det respektive skib, som er det sted hvor lasteslangen fastgøres til det modtagende skibs rørsystem, i overensstemmelse med kreditkøbsaftalen[38].

Aftaletidspunkt

Ofte vil det første tidspunkt trader nævner ejendomsforbeholdet være i ordrebekræftelsen. Ordrebekræftelsen bliver fremsendt umiddelbart efter aftaleindgåelsen eller som en del af aftaleindgåelsen og dermed inden leveringen og vil derfor leve op til det tidsmæssige krav. Hvorvidt ejendomsforbehold taget i ordrebekræftelsen er gyldige henvises til afsnittet om klar og udtrykkelig aftale nedenfor.

Ofte vil der være henvist til T&C i forbindelse med tilbuddets afgivelse, og igen i ordrebekræftelsen. Henvisning i forbindelse med tilbuddets afgivelse er både før levering og endelig aftaleindgåelse, hvorfor T&C, herunder ejendomsforbehold, som udgangspunkt vil være vedtaget i disse situationer.

Skulle det ske, at ejendomsforbeholdet først bliver nævnt for køber i faktura eller leveringskvittering der fremkommer til køber i forbindelse med levering af bunkerolien, vil det ikke være indgået før overgivelsen. Derudover vil et sådant ejendomsforbehold som udgangspunkt anses for at være taget ensidigt fra sælgers side, hvilket ikke vil være gyldigt. Det er som udgangspunkt uden betydning om køber reklamerer, da ejendomsforbeholdet er taget for sent og ensidigt.

[38] OW Bunker T&C clause G. 12, Dan-Bunkering T&C clause 6.1 og BIMCO T&C clause 10 (a)

5.3.2.1.2. Klar og udtrykkelig aftale
Ejendomsforbeholdet skal være vedtaget ved klar og udtrykkelig aftale for at køber har mulighed for at forstå, at ejendomsretten først overgår når særlige betingelser er opfyldt. Det er et objektivt, og ikke et subjektivt krav, hvorfor aftalen skal være udtrykkelig og klar for den almindelige køber og ikke nødvendigvis den konkrete køber[39].
Der gælder ikke særlige regler for aftalens klarhed og udtrykkelige vedtagelse, hvorfor der må henledes til de almindelige aftaleretlige regler og retspraksis på området.

Ejendomsforbehold skal ikke aftales skriftligt for at være gyldige inter partes, men ejendomsforbehold kan kun gøres gældende ved fogedretten på baggrund af en skriftlig aftale[40], hvorfor ejendomsforbehold bør være aftalt skriftligt. Derudover vil skriftlighed også lette bevisbyrden for at der er aftalt ejendomsforbehold.

Udtrykkelighedskravet medfører, at ejendomsforbehold som udgangspunkt ikke kan følge af sædvane, branche-kutyme eller handelsbrug. Skulle ejendomsforbeholdet alene følge af disse kilder har parterne netop ikke indgået en udtrykkelig aftale[41].
Sædvane, branche-kutyme og handelsbrug kan imidlertid indgå i fortolkningen af parternes konkrete aftale og kan i særlige tilfælde medføre, at ejendomsforbeholdet er gyldigt vedtaget ved stiltiende aftale.[42] Dette var tilfældet i U 2000.1618 V, hvor ejendomsforbeholdet var taget i ordrebekræftelsen, hvilket som udgangspunkt ikke var tilstrækkeligt. Domstolene fandt dog, at ordrebekræftelsen sammenholdt med parternes tidligere samhandel, hvor sælger sædvanligvis tog ejendomsforbehold, var tilstrækkelig når køber ikke havde reageret på ejendomsforbeholdet i ordrebekræftelsen. Købers passivitet over for henvisningen kunne altså anses for en stiltiende accept.

Underskrift på aftaledokumenter vil generelt være af stor værdi ved vurdering af om ejendomsforbehold i almindelige salgs- og leveringsbetingelser er gyldigt vedtaget. Praksis tyder på at vigtige/byrdefulde vilkår skal fremgå oven for underskriften for at være vedtaget.
I U 1978.373 V var salgs- og leveringsbetingelser trykt på bagsiden, men underskrevet på forsiden, hvilket ikke var tilstrækkeligt. Mens salg- og leveringsbetingelser, herunder ejendomsforbeholdet, var vedtaget i U 2003.1392 V, hvor der var henvist til salgs- og leveringsbetingelser, som indeholdte ejendomsforbehold, på forsiden, og forsiden var underskrevet af parterne.
Forskellen på de to domme er at henvisning til salgs- og leveringsbetingelser i den ene dom er efter underskriften og i den anden dom før underskriften. Henvisning skal være før underskriften, da man objektivt set har accepteret betingelserne oven for underskriften.

Henvisning til T&C

[39] Thomsen 2012 s. 211
[40] Thomsen 2012 s. 209 f
[41] Illum s. 244
[42] Thomsen 2012 s. 209

I bunkerolie-branchen vil ejendomsforbeholdet som udgangspunkt være en del af traders T&C, og disse vil der blive henvist til i ordrebekræftelsen. Spørgsmålet er om en sådan generel henvisning til T&C er tilstrækkelig.

Umiddelbart er en sådan generel henvisning i ordrebekræftelsen ikke tilstrækkelig vedtagelse, da køberen dermed ikke nødvendigvis kender til vilkåret.[43] En generel henvisning kan dog være udtryk for hvad der udtrykkeligt eller stiltiende er aftalt mellem parterne, hvorfor der må kigges på aftaleindgåelse og parternes samhandel som en helhed.

I U 1983.311 H var parterne i fast samhandelsforhold og sælger havde altid henvist til T&C i ordrebekræftelsen, men T&C havde umiddelbart aldrig været til drøftelse mellem parterne. Køber havde aldrig gjort indsigelser mod T&C og herunder ejendomsforbeholdet, trods de mange henvisninger igennem tiden, hvorfor ejendomsforbeholdet ansås for vedtaget i den pågældende sag. Ejendomsforbeholdet blev dog ikke opretholdt grundet en fast kredittid på 3 måneder, nærmere om fast kredittid nedenfor i afsnit 5.3.3.1.
Til sammenligning fandt mindretallet i U 1990.485 V, hvor parterne ikke var i fast samhandelsforhold, at ejendomsforbeholdet var gyldigt vedtaget i ordrebekræftelsen, da forhandlingerne om finansiering ikke var afsluttet og køber ikke havde gjort indsigelse mod ejendomsforbeholdet. Flertallet, og dermed sagens afgørelse, sagde at ejendomsforbeholdet ikke var vedtaget i ordrebekræftelsen grundet sagens særlige omstændigheder. Ordrebekræftelsen foreskrev, at den skulle underskrives og returneres, hvilket ikke var sket og derfor kunne sælger ikke forvente at køber havde accepteret ejendomsforbeholdet.
I U 1961.148 H var ejendomsforbeholdet taget ved en henvisning til sælgers almindelige salgs- og leveringsbetingelser i ordrebekræftelsen, samt igen i fakturaerne. Domstolen fandt det betænkeligt at antage, at ejendomsforbeholdet var gyldigt vedtaget på denne måde. Ejendomsforbeholdet blev dog ikke tilsidesat alene i dette forhold, men sammen med en henvisning til en fast kredittid på 90 dage.

Disse domme tyder på, at såfremt der ikke foreligger særlige omstændigheder, som fx fast samhandelsforhold med fast praksis for aftaleindgåelse, vil en generel henvisning til T&C ikke være tilstrækkelig, medmindre ordrebekræftelsen er underskrevet af køber.
Hvorvidt henvisningen i bunkerolie-branchen til T&C er tilstrækkelig må derfor afhænge af parterne indbyrdes forhold og de konkrete omstændigheder.

5.3.2.2. Specifikationskravet

Genstanden, hvori der tages ejendomsforbehold, skal være specificeret således, at man altid kan identificere genstanden blandt købers andre aktiver. Dette er ikke kun af hensyn til sælger og købers interne forhold, men lige såvel af hensyn til tredjemand. Et gyldigt ejendomsforbehold har forrang over andre sikkerhedsrettigheder og køber har kun begrænset råderet, hvorfor det er vigtig for tredjemand at kunne identificere aktiver under ejendomsforbehold. Det er særlig i forhold til købers øvrige kreditorer i forbindelse med konkurs, at kravet er vigtigt og bliver aktuelt i praksis.

[43] Thomsen 2012 s. 210

Hvorvidt genstanden er tilstrækkelig specificeret afhænger af de givne forhold og omstændigheder på tidspunktet for ejendomsforbeholdets påberåbelse, jf. U 1969.620 SH, hvor specifikationskravet ved aftaleindgåelsen umiddelbart var overholdt, da inventaret, hvori der var taget ejendomsforbehold, var detaljeret nedskrevet i forbindelse med skifteregistrering. Køber fik imidlertid nyt inventar, hvilket kunne forveksles med det oprindelige inventar, hvorfor ejendomsforbeholdet ikke kunne opretholdes. Denne dom illustrerer, at praksis primært ser konkret på om der kan ske identifikation når ejendomsforbeholdet påberåbes/anfægtes og ikke så meget på specifikationen i selve købsaftalen[44]. Specifikationskravet har derfor primært betydning for tilbagetagelsesforretningen.
Dette støttes yderligere af U 1975.914 SH vedrørende ejendomsforbehold i blysats, hvor blysatsen ikke var identificeret i aftalen, men principielt kunne lade sig identificere på tidspunktet for ejendomsforbeholdets påberåbelse og U 1979.430 V, hvor kreaturer var tilstrækkelig identificeret, da der ikke befandt sig andre kreaturer de kunne forveksles med, trods det, at kontrakten ikke specificerede kreaturerne tilstrækkeligt.

Parterne må være omhyggelige i deres aftaleindgåelse og efterfølgende handlinger for at sikre sig identifikationsbevis, og ikke blot lade det være op til omstændighederne på tidspunktet for ejendomsforbeholdets påberåbelse. Købsaftalen, samt andre dokumenter, vil være af betydning for den konkrete identifikation, da en meget detaljeret beskrivelse af varen i købsaftalen vil kunne hjælpe til identifikationen på tilbagetagelsestidspunktet. En generel beskrivelse vil modsat ikke hjælpe noget særligt til identifikationen[45]. Foruden beskrivelse af varen i købsaftalen bør sælger sikre sig, at der konkret kan ske identifikation, hvilket kan gøres ved mærkning eller ved på anden måde at holde varen adskilt fra køberens andre varer[46].

5.3.2.2.1. Specifikation særligt vedrørende bunkerolie
Bunkerolie er en genus vare, hvilket betyder en vare bestemt efter sin art.[47] Den fysiske leverandør kan derfor selv vælge hvilke konkrete ton bunkerolie der bliver leveret og bunkerolien hjælper ikke i sig selv til specifikationen. Beskrivelsen af bunkerolien i købsaftalen vil formentlig ikke kunne opfylde et rent materielt identifikationskrav, da man aldrig vil kunne adskille det ene ton fra det andet, jf. bunkerolies fungible karakter. Der må derfor skulle ske en fysisk adskillelse af bunkerolien fra anden bunkerolie for at sikre den bevismæssige identifikation.
Bunkerolie kan af praktiske årsager ikke leveres med seriemærke eller i mærkede bokse, som mange andre varer. Afgørende bliver om bunkerolien kan holdes adskilt fra anden bunkerolie ombord på reders respektive skib og om det kan fastslås, hvilken bunkerolieleverance der er i skibets forskellige tanke[48].

Umiddelbart kan bunkerolie alene blive identificeret ved at blive pumpet ind i særskilte tanke, således at man kan sige at bunkerolien i eksempelvis tank 1 og 2 på det konkrete skib tilhører

[44] Carstensen 1984 s. 108
[45] Thomsen 2012 s. 212
[46]Heidmann
[47] KBL § 3
[48] Se gennemgangen af specifikationskravet i afsnit 5.3.2.2

trader indtil betaling. Identifikation af denne art vil formentlig blive anerkendt af domstolene, jf. U 1987.629 H, hvor grise var blevet adskilt fra købers andre grise ved at være inddelt i nummererede båse. Det var dog kun mindretallet der fandt det tilstrækkeligt, men dette har formentlig sammenhæng med, at der i kontrakten var foreskrevet, at sælger ville få dyrene øremærket, hvilket ikke var sket og sælger ikke havde ført nogen kontrol med dyrene. Nærmere om denne dom og kontrolkravet længere nede i dette afsnit.
For at ejendomsforbehold kan håndhæves må der ikke være anden bunkerolie i tankene på leveringstidspunktet, men der må heller ikke efterfølgende blandes ny bunkerolie i tankene, for så vil det ikke længere være muligt at identificere den enkelte leverandørs bunkerolie, jf. U 1969.620 SH.

Der vil ofte ligge bundrester i tankene som ikke kan pumpes ud på normalvis, men kræver en fuldstændig rengøring af tankene for at blive fjernet. Spørgsmålet er om en sammenblanding med bundrester gør at den leverede bunkerolie anses for blandet med et andet produkt og dermed ikke længere kan specificeres. Hertil bliver det et spørgsmål om der kan kræves fuldstændig rengøring for at ejendomsforbeholdet kan opretholdes.
Bundresterne kan ikke pumpes på normalvis og kan derfor ikke bruges til forbrænding, og dermed har det antageligvis ikke økonomiskværdi for rederen eller dennes kreditorer, hvorfor hensynet til disse ikke tilsidesættes ved at acceptere, at der sker en sammenblanding med bunkerolierester. Derudover må økonomiske- og driftsmæssige hensyn tale for, at der ikke kan kræves en fuldstændig rengøring før hver bunkerleverance. Det vil kræve at skibene skal ligge i havn i længere tid i forbindelse med at bunkerolien leveres, hvilket vil forsinke sejladsen, og skabe uforholdsmæssige store ekstra omkostninger.
Det må derfor antages, at bunkerolien er holdt tilstrækkelig adskilt til at være identificerbar hvis indført i separate tanke selvom tankene indeholder bundrester.

Der kræves imidlertid en hvis kontrol fra traderens side for at han kan påberåbe sig ejendomsforbeholdet, sml. U 1987.629 H, hvor sælger i kontrakten havde skrevet at varen skulle mærkes, hvilket ikke skete. Ejendomsforbeholdet kunne derfor ikke opretholdes, da specifikationen alene hvilede på sælgers oplysninger, navnlig selve købsaftalen, som sælger ikke havde sikret sig blev overholdt. Det forhold, at køber rent faktisk havde ført en hvis kontrol med grisene på sin ejendom medførte ikke at specifikationskravet var overholdt, da købers oversigt over grisene var af hensyn til ham selv og ikke af hensyn til sælger. Dissensen fandt, at grisene kunne identificeres og ejendomsforbeholdet derfor var gyldigt, uanset hvem der sørgede for at holde grisene specificeret.
Hvorvidt traderne fører tilstrækkelig kontrol henvises til afsnittet 5.3.2.2.2, hvor konkrete T&C inddrages.

Anderledes bliver resultatet såfremt trader kan fremkomme med oplysninger om, at skibet ikke har haft anden bunkerolie ombord på skibet i den relevante periode. Kan trader fremkomme med sådanne oplysninger lempes specifikations kravet, jf. U 1979.430 V, hvor der ikke var sket specifikation i købsaftalen, men ejendomsforbeholdet blev opretholdt fordi sælger tilvejebragte tilstrækkelige oplysninger om, at der ikke havde været andre dyr på ejendommen i den relevante periode.

5.3.2.2.2. Konkrete T&C

OW Bunker

OW Bunkers T&C[49] klausul H.2 foreskriver*"until full payment of the full amount due to the Seller has been made […] Buyer […] shall not be entittled to use the Bunkers other than for the propulsion of the Vessel, nor mix, blend[…]".*

Rederen må altså ikke blande bunkerolien med andre produkter, men afgørende må være om det rent faktisk sker og om OW Bunker følger op på, at der ikke sker en sammenblanding, smh. U 1987.629 H nævnt ovenfor. Det bliver derfor et spørgsmål om hvad der kan kræves til en sådan kontrol.

Skibene vil sejle over hele kloden og det vil derfor ikke være muligt at mønstre skibene for at sikre sig, at der ikke sker en sammenblanding med anden bunkerolie eller andre produkter ombord. Man kan diskutere om en bekræftelse fra skibet om, at tankene var tomme ved levering og der ikke vil ske sammenblanding, vil være tilstrækkelig kontrol.

Denne bekræftelse ville kunne bestå i fremsendelse af kopi af den bunkeroliejournal der føres ombord på skibet. Skibet fører en bunkeroliejournal over hvortil bunkerolien fra forskellige leverandører bliver leveret og hvorfra bunkerolien forbruges.

Kontrollen vil alene bero på skibets bunkeroliejournal, men ved at kræve at denne bliver fremsendt, for eksempel ugentlig, udøver traderen en vis form for kontrol, og derved vil det ikke alene bero på reders ord på tidspunktet for ejendomsforbeholdet påberåbelse som tilfældet var i U 1987.629 H.

OW Bunker T&C bestemmer i samme klausul, at *"in the event that the Bunkers have been mixed with other bunkers on board the Vessel, the Sellers hall have the right to trace its proprietary interest in the Bunkers into the mixed bunkers[…]".*[50]

Denne ordlyd anerkender at bunkerolien risikerer at blive sammenblandet med anden bunkerolie ombord på skibet og OW Bunker forsøger derfor at udvide ejendomsforbeholdet til det sammenblandede produkt. Afgørende må dog være om bunkerolien på tidspunktet for ejendomsforbeholdets påberåbelse de facto er blevet blandet med anden bunkerolie eller ej og ikke selve ordlyden af aftalen, jf. afsnit 5.3.2.2. og hvorvidt OW Bunker har ført kontrol med adskillelsen, jf. U 1987.629 H. Reglerne om specifikation medfører, at hvis der de facto sker en sammenblanding kan ejendomsforbeholdet ikke opretholdes, hvorimod det må kunne opretholdes, hvis der ikke er sket sammenblanding og det er dokumenteret ved bunkeroliejournalen.

Dan-Bunkering

Dan-Bunkerings T&C[51] klausul 4.3 pålægger ligeledes reder at holde bunkerolien adskilt fra anden bunkerolie;*"The Buyer shall be responsible to keep the delivered Bunker Oil segregated from any Bunker Oil(s) onboard the Vessel or from a different delivery to the Vessel […]."*

Denne bestemmelse vil formentlig have samme betydning som beskrevet under OW Bunkers T&C lige ovenfor.

[49] Se bilag 2
[50] Klausul H.4
[51] Se bilag 3

Forskellen er dog, at ordlyden om bunkeroliens adskillelse i OW Bunkers T&C står i klausulen vedrørende ejendomsforbehold, mens ordlyden om adskillelse i Dan-Bunkerings T&C står i klausulen om risikoen for bunkeroliens kvalitet, og umiddelbart ikke har sammenhæng med klausulen om ejendomsforbehold.
Dette må imidlertid være uden betydning såfremt bunkerolien faktisk er holdt adskilt fra anden bunkerolie og andre produkter ombord på skibet, og Dan-Bunkering har ført en vis kontrol, fx ved modtagelse af kopi af bunkeroliejournalen, som beskrevet ovenfor.

5.3.2.3. Beløbsbetingelse
Det følger af KAL § 34, stk. 1, nr. 2, jf. KAL § 50, at sælger kun kan forbeholde sig ejendomsretten til varen såfremt det samlede beløb overstiger 2000 kr. Da KAL kap. 11 anses for at udgøre de generelle betingelser for gyldigt ejendomsforbehold i ikke-forbruger kreditkøb, må dette krav også skulle være overholdt for at ejendomsforbehold i bunkerolie-branchen kan anses for gyldige.
Mængderne af bunkerolie der leveres er så store, at prisen som udgangspunkt altid vil overstige 2000 kr. Dette krav vil derfor ikke blive behandlet nærmere.

5.3.2.4. Fast lånebeløb
Krav om fast lånebeløb følger også af KAL kap. 11, jf. KAL § 34, stk. 1, nr. 3, jf. KAL § 50. Dette krav har dog ingen relevans i bunkerolie-branchen, da det utvivlsomt altid vil være opfyldt idet kreditten vedrører konkrete fakturaer for konkrete leverancer og dermed udgør et fast beløb.

5.3.3. Konsignationsbetingelser
5.3.3.1. Krav om afregning i takt med forbrug og krav om kontrol
Afregning og kontrol har stor sammenhæng og praksis viser også en tendens til at behandle afregning og kontrol under ét. Kontrollen skal sikre, at afregningen faktisk sker i takt med forbruget.[52]
Der kan ikke opstilles generelle krav til hvor ofte der skal ske kontrol, da det må afhænge af de konkrete omstændigheder og branche-kutyme.
I dette afsnit vil der være hovedfokus på selve afregningskravet, men med inddragelse af kravet om kontrol undervejs.

Ideelt set skal der ske afregning i takt med at bunkerolien forbruges, men fuldstændig sammenfald vil være urealistisk i praksis. I praksis kræves blot en vis sammenhæng mellem afregning og forbrug, og i hvert fald må de to ting ikke være uafhængige af hinanden.
I både U 1983.311 H og U 1961.148 H blev ejendomsforbeholdet ikke opretholdt fordi der var aftalt en fast kredittid uafhængig af forbrugstakten. Domstolene udtalte, at der kræves afregning i takt med henholdsvis videresalget og forbruget, hvilket en fast kredittid ikke overholder, og dertil var der ikke ført nogen form for kontrol fra sælgers side.

I bunkerolie-branchen sælges bunkerolien typisk på 30 dages kredit beregnet fra levering, jf. afsnit 2. Dette har umiddelbart karakter af en fast kredittid, hvilket ikke overholder kravet om afregning

[52] Illum s. 258 ff, Carstensen 1984 s. 87 ff, Thomsen 2012 s. 292

i takt med forbruget. Det må imidlertid blive afgørende om de fastsatte kredittider har en vis sammenhæng med forbruget og om der føres en form for kontrol med forbruget.
I U 1931.231 blev fødevarer solgt under ejendomsforbehold med tilladelse til at forbruge fødevarerne og der var aftalt månedlig afregning. Her blev ejendomsforbeholdet opretholdt over for konkursboet, da de månedlige afregninger fandtes at overholde afregningskravet når der samtidig blev ført tilstrækkelig kontrol.
I dommen var der tale om en forbrugsvare der bliver tilladt forbrugt før betaling på samme vis som i bunkeroliekontrakter. Denne dom tyder på at en fast kredittid på 30 dage kan være tilstrækkelig når blot der føres kontrol. Forskellen er dog, at i U 1931.231 er alle varerne ikke forbrugt ved udgangen af første måned, og afregningen sker kun for den del der er forbrugt. Derved bliver den månedlige afregning periodisk, hvilket anerkendes i praksis som tilstrækkelig afregning[53].
I bunkerolie-branchen er det hele beløbet der forfalder efter de 30 dage på hvilket tidspunkt alt bunkerolien oftest er forbrugt, og der er altså ikke yderligere udestående, hvorfor der ikke bliver tale om periodiske afregninger og det er derfor usikkert om denne dom kan give støtte for, at en fast kredittid på 30 dage i bunkerolie-branchen kan opfylde kravet om afregning i takt med forbruget.

Ligeledes i U 1980.597 SH, hvor der var tale om konsignationsforhold, hvilket fremgik af parternes aftale. Konsignationsaftalen indeholdt bestemmelser der foreskrev afregning i takt med videresalg, og ligeledes henviste til en liste med fortegnelse over varer leveret til køber på kredit. Varelageret blev gjort op ved udgangen af hver måned og forbruget skulle afregnes med 6 måneders veksel. Ejendomsforbeholdet blev dog ikke opretholdt, fordi sælger havde forlænget vekslerne af flere omgange, hvorfor det fik karakter af gældsstiftelse.
Dommen viser at en fast kredittid er acceptabel så længe kredittiden har sammenhæng med forbruget, dog må denne kredittid ikke forlænges.
Trader må ikke forlænge reders kredit, da det vil medføre, at ejendomsforbeholdet ikke kan opretholdes, da det vil få karakter af gældsstiftelse.

I U 2001.2400 V, omhandlende leverance af stålplader til brug for købers produktion, var der aftalt en kredittid på løbende måned plus 30 dage. Det viste sig, at afregning faktisk fulgte forbruget, men da det ikke var aftalt, at afregning skulle følge forbruget og der ikke blev ført kontrol, var den faktiske sammenhæng uden betydning. Sælger fremførte i sagen, at den pågældende måde at tage ejendomsforbehold på var fast praksis i branchen og virksomheden havde en produktionscyklus på 11-12 uger, men af dommen fremgik det at, *"Da S ikke havde godtgjort eksistensen af en eventuel branchemæssig kutyme, der skulle kunne føre til en anden vurdering, kunne S ikke gøre ejendomsforbeholdet gældende over for K's konkursbo."*[54]
Landsretten åbner umiddelbart op for, at branche-kutyme kan medføre, at en umiddelbar fast kredittid kan være tilstrækkelig afregning, såfremt der også føres kontrol med denne afregning.

[53] Ørgaard 2003 s. 72
[54] U 2001.2400 V, hovedresume linje 24-26

BIMCO Terms[55] er et sæt standard salgs- og leverings betingelser for bunkeroliekontrakter, udarbejdet af BIMCO, som er redernes internationale interesseorganisation, sammen med repræsentanter for bunkerolie-branchen, med det formål at lave en afbalanceret standard kontrakt til brug for bunkerolie-branchen. BIMCO Terms 2015 indeholder ejendomsforbehold i klausul 10 og opererer med en kredittid på 30 dage, jf. klausul 8. Spørgsmålet er om denne kredittid har baggrund i den gennemsnitlige tid det tager at forbruge en bunkerolieleverance og/eller den tid det tager før der sker betaling af fragten som bunkerolien har "produceret" ved at skibet har kunne sejle fra havn A til havn B, og dermed have udviklet sig til en branche-kutyme der kan berettige en fast kredittid, eller blot er en tilfældig fastsat kredittid.

For at finde ud af baggrunden for de 30 dages kredit, har jeg været i kontakt med Pernille Kærvad Jacobsen der er ansat hos BIMCO og har været med til at udvikle BIMCO Terms siden 2010. Hun skriver, at *"de 30 dages kredit i BIMCO Terms 2015 reflekterer branche praksis og det har været sådan længe før vores kontrakt blev publiceret. Det er vores kontrakt som reflekterer praksis og ikke omvendt."* Der er således en dokumenterbar branche-kutyme for 30 dages kredit, dog mener Pernille Kærvad Jacobsen ikke at kredittiden på 30 dage har sammenhæng med bunkeroliens forbrug, da *"disse bliver brugt kontinuerligt og skibet tager bunkers om bord løbende, afhængigt af hvilke havne det besøger og hvor det passer bedst tidsmæssigt at tage bunkers ombord."*
De 30 dages kredit, som er en dokumenterbar branche-kutyme, som BIMCO har taget til sig, må antageligvis være opstået på baggrund af et behov for netop 30 dages kredit i bunkerolie-branchen. Det kan argumenteres, at kredittiden har sammenhæng med den tid det tager at gennemføre en rejse og dermed den tid der går før reder modtager betaling for fragten, som skal bruges til betaling af bunkerolien.
Bunkerolieleverancer koster store summer og udgør ofte skibenes største driftsudgift og denne kan rederne ofte ikke låne sig til i banken[56], hvorfor reder er afhængig af fragten for at kunne betale for den leverede bunkerolie. Trader-virksomhederne yder derfor en nødvendig driftskredit til rederne. Det vil være uhensigtsmæssigt, at trader og reder i forbindelse med hver leverance skal diskutere sejladsens konkrete længde, hvilket kan tyde på, at 30 dage er et udtryk for den gennemsnitlige tid det tager at gennemføre en rejse og dermed optjene fragt.

Dette tyder på, at der ikke sker afregning i takt med forbruget af bunkerolie, men i takt med at den enkelte rejse bliver gennemført. Der er således tale om en kredit der ikke udstrækkes længere end til tidspunktet, hvor fragten ud fra en gennemsnitsbetragtning er optjent. Der bliver således ikke tale om gældsstiftelse, e.c. U 1980.597 SH, men alene en driftskredit.

Konsignationsbetingelserne er opsat for at fastholde den afbalancerede afvejning af hensynet til de handelsmæssige fordele ved ejendomsforbehold overfor beskyttelseshensynet til tredjemand i almindelige ejendomsforbehold[57]. Betingelserne skaber en modvægt til den forholdsvis frie rådighed mellemhandleren har, og uden en sådan modvægt ville ejendomsforbeholdet ikke have nogen realitet og forholdet ville alene have karakter af almindelig kreditgivning.

[55] Standard Bunker Contract with Explanatory Notes by BIMCO (Baltic and International Maritime Council)
[56] Udtalelse fra Finn Hansen, tidligere Head of Legal hos Bunker Holding A/S
[57] Carstensen 1984 s. 40

Formålet er at adskille de acceptable tilfælde, hvor ejendomsforbeholdet bruges til almindelig kredithjælp til driften af købers virksomhed, og de uacceptable tilfælde, hvor ejendomsforbeholdet bruges til oppustning af købers likviditet. Ejendomsforbeholdet må ikke blot være et aftalt konkursprivilegium og omgåelse af pantereglerne[58].

Da reder, som beskrevet ovenfor, ofte er afhængig af optjening af fragten for at kunne betale bunkerolieregningerne, er reder ofte afhængig af den tilladte kredit og der bliver derfor tale om kredithjælp. Så længe trader ikke forlænger kreditterne og foretager ekstra leverancer på kredit uden at sikre sig betaling ved udløbet af kreditperioden, vil der formentlig ikke være tale om oppustning af likviditeten.
Det bliver derfor umiddelbart ikke betænkeligt med en fast kredittid på 30 dage, da denne kredittid er en driftskredit nødvendig i shipping og bunkerolie-branchen.

Det vil dog være op til domstolene at afgøre om en sådan argumentation kan medføre ejendomsforbeholdets opretholdelse, da det fraviger det normale krav om afregning i takt med forbruget, idet kravet om afregningen er udvidet til at være i takt med fragtens optjening.

5.3.3.2. Særskilt regnskab
For at en konsignationsaftale kan anses for gyldig skal der som udgangspunkt føres særskilt regnskab.[59] Dette er for at have overblik over hvilke varer der er solgt og hvilke der stadig er i behold, og dermed vide hvilke fakturaer der er forfaldne til betaling. Dette krav har dermed stor sammenhæng med kravet om afregning og kontrol.

Praksis har fraveget kravet om særskilt regnskab når der er tale om enkelt genstande overgivet til videresalg, således at der ikke er et varelager hos forhandleren[60]. I disse situationer vil det være urealistisk at kræve særskilt regnskab, da der som sådan ikke er noget at føre særskilt regnskab over. Det afgørende i disse tilfælde må være om der sker afregning i takt med forbruget, samt føres kontrol hermed.

Leverance af bunkerolie kan på den ene side anses for én genstand, så længe der kun er foretaget én leverance. Bunkerolie er fungibel og man kan ikke skelne det ene ton fra det andet. På den anden side kan bunkerolie prismæssigt godt opdeles, fx i ton, men så bliver spørgsmålet hvordan det skal opdeles.
Dette har formentlig ikke afgørende betydning for ejendomsforbeholdet gyldighed, såfremt der er sket afregning i takt med forbruget og ført kontrol, som gennemgået ovenfor. Regnskabet vil blot være et element i denne vurdering.

Handler parterne ofte med hinanden må det antages at kravet skal være overholdt, da der er mulighed for at reder stadig har bunkerolie leveret fra den pågældende trader på tidspunktet for senere

[58] Carstensen 1984 s. 87 ff.
[59] Thomsen 2012 s. 292, Illum s. 265
[60] Carstensen 1984 side 97-98, Illum s. 266

leverancer og derved får det karakter af et varelager. Handles der knapt så ofte og der derfor ikke kan blive tale om "varelager" vil kravet ikke være særlig relevant.

5.3.4. Konklusion på forholdet mellem trader og reder

I de bunkeroliehandler hvor der bliver fremsendt eller henvist til traders T&C, og dermed til det der i indeholdte ejendomsforbehold, i forbindelse med tilbudsgivelse, uden at der gøres indsigelse herimod, vil ejendomsforbeholdet som udgangspunkt være gyldigt vedtaget. Det er imidlertid sværere at sige noget generelt om de sædvanlige aftaleindgåelser, hvor T&C først bliver henvist til i ordrebekræftelsen. Her vil det være et krav at parterne tidligere har handlet sammen og der tidligere har været henvist til T&C, og dermed bliver henvisningen i ordrebekræftelsen et udtryk for hvad der stiltiende er aftalt mellem parterne.

Om Dan-Bunkerings eller OW Bunkers T&C, og dermed ejendomsforbehold, er gyldigt vedtaget afhænger af deres tidligere samhandel med reder, men har der ikke været tidligere samhandel vil et sådan ejendomsforbehold ikke være gyldigt vedtaget ved henvisning i ordrebekræftelsen, medmindre denne bliver underskrevet af reder.

Antages det af ejendomsforbeholdet er gyldigt vedtaget skal bunkerolien være specificeret og der skal være sket afregning i takt med reders forbrug af bunkerolien, samt ført kontrol hermed, for at ejendomsforbeholdet kan opretholdes.

Skibet vil, og har pligt til, at føre en bunkeroliejournal med optegnelse over hvilken tank bunkerolien er leveret til og hvorfra bunkerolien bliver forbrugt. Så længe det af bunkeroliejournalen fremgår at der ikke var anden bunkerolie i tanken ved levering og der efterfølgende ikke er hældt anden bunkerolie oveni vil dette formentlig være tilstrækkelig dokumentation for bunkeroliens identifikation. Trader vil dog skulle holde en vis kontrol med denne adskillelse, således at identifikationen ikke alene beror på reders udtalelser på tidspunktet for ejendomsforbeholdets påberåbelse. Dette vil umiddelbart kunne opfyldes hvis trader ugentlig indhenter kopi af bunkeroliejournalen.

Bunkerolien leveres på 30 dages kredit og da bunkerolien bliver forbrugt kontinuerligt vil der sjældent være sammenhæng med afregning og forbrug. Imidlertid antages det, at de 30 dage svarer til en gennemsnitlig sejlads og dermed tidspunktet for betaling af fragt. Der er derfor driftsmæssig sammenhæng, hvilket gør at hensynene til kravet om afregning i takt med forbruget umiddelbart er tilgodeset.

Med de anførte forbehold må det antages at ejendomsforbeholdet kan opretholdes i den bunkerolie der stadig er i behold.

5.4. Konklusion dansk ret

Dansk ret opererer både med lovregulerede og ikke-lovregulerede ejendomsforbehold, og da reglerne i KAL er beskyttelsespræceptive er det vigtigt at have sig for øje hvilke ejendomsforbehold der hører under lovens anvendelsesområde.

Kreditkøbsaftaler hvori der er taget ejendomsforbehold i bunkerolie-branchen vil som udgangspunkt tillade at bunkerolien blive forbrugt før der sker betaling, og fysiske leverandør vil tillige tillade videresalg, hvorfor ejendomsforbehold i bunkerolie-branchen som udgangspunkt ikke vil være omfattet af KAL og alene blive reguleret af praksis.
Praksis har imidlertid fastslået at de generelle betingelser fastsat i KAL kap. 11 også skal være opfyldt uden for lovens anvendelsesområde, hvorfor KAL indirekte får betydning for kreditkøbsaftalerne i bunkerolie-branchen. Praksis har dog skærpet betingelserne uden for lovens anvendelsesområde således der er yderligere betingelser der skal være opfyldt for at ejendomsforbehold kan opretholdes når der tillades videresalg og/eller forbrug. Dette er betingelserne om afregning i takt med forbrug og kontrol hermed, samt særskilt regnskab.

Ejendomsforbehold uden for lovens anvendelsesområde er altid en ophørende sikkerhedsret, hvilket vil sige at ejendomsforbeholdet i bunkerolien ophører så snart bunkerolien er videresolgt eller forbrugt. Det er således alene i den bunkerolie der er i behold når ejendomsforbeholdet gøres gældende at ejendomsforbeholdet kan opretholdes.
Ejendomsforbehold den fysiske leverandør tager i sin kreditkøbsaftale med trader vil derfor aldrig være af praktisk relevans, da bunkerolien er videresolgt, og ejendomsforbeholdet dermed ophørt, inden ejendomsforbeholdet overhovedet kommer til eksistens.
Det er derfor alene traderens ejendomsforbehold der vil have praktiske relevans under dansk ret, og kun i det omfang bunkerolie stadig er i behold.

Traderen vil ofte, men ikke altid, have taget gyldigt ejendomsforbehold ved at henvise til dette i sine T&C i forbindelse med tilbudsgivelse eller ved i løbende samhandelsforhold at henvise til sine T&C i ordrebekræftelsen. I de tilfælde hvor der alene sker henvisning i ordrebekræftelsen og der ikke foreligger samhandelsforhold vil ejendomsforbeholdet ikke være gyldigt vedtaget.
Der er tillige krav om minimums beløb på 2000 kr. og fast lånebeløb, men disse krav vil formentlig altid være opfyldt i bunkerolie-branchen.

Antages det, at ejendomsforbeholdet er gyldigt vedtaget, skal bunkerolien holdes adskilt fra anden bunkerolie ombord på skibet og dette skal trader så vidt mulig holde kontrol med. Dette sker umiddelbart ikke i dag, men vil formentlig kunne ske ved at trader indhenter kopi af skibets bunkeroliejournal ugentlig.
Da der som sagt er tale om en kreditkøbsaftale udenfor KAL, skal der tillige ske afregning i takt med forbruget, samt føres kontrol hermed. Der er umiddelbart ikke sammenhæng med forbruget, men derimod med sejladsen og fragtens optjening, hvorfor de 30 dages kreditpraksis alene er en kredit relateret til den konkrete leverance og dennes forbrug og dermed respekterer formålet med konsignationsbetingelserne.

Sammenfattende må det derfor antages at såfremt ovenfor nævnte afregning og kontrol iagttages vil et gyldigt vedtaget ejendomsforbehold kunne gøres gældende i den del af en bunkerolie leverance der fortsat er i behold på tidspunktet hvor ejendomsforbeholdet gøres gældende.

6. Engelsk ret

6.1 Retsgrundlag

Under engelsk ret kaldes ejendomsforbehold retention of title eller Romalpa clause[61], men i det følgende vil betegnelsen RoT blive brugt.
RoT bliver anvendt i vid udstrækning i England, men en undersøgelse viser at kun i 15 % af de RoT-sager der kommer for domstolene bliver ejendomsforbeholdet opretholdt.[62] I dette afsnit vil der blive set på, hvilke regler der regulerer RoT under engelsk ret, herunder hvilke almindelige gyldighedsbetingelser der gælder og om de kan anses for opfyldt i bunkerolie-branchen.

England er et common law-land, hvorfor engelsk ret primært bygger på retspraksis og ikke så meget på skreven lov. Den engelske købelov, SOGA, regulerer visse aspekter af ejendomsretten og har fundet anvendelse i flere afgørelser vedrørende bunkeroliekontrakter, bl.a. i *Forsythe International* og *Oceanconnect UK*.
Den engelske litteratur vedrørende ejendomsforbehold tager udgangspunkt i SOGA og gør SOGA til omdrejningspunkt for gennemgangen af ejendomsforbehold i den engelske litteratur.
I denne analyse vil der blive taget udgangspunkt i SOGA med henblik på at finde frem til gyldighedsbetingelserne for ejendomsforbehold.

6.1.1. SOGA 1979

SOGA art. 17 bestemmer at ejendomsretten til det købte overgår på tidspunktet parterne har haft til hensigt. Parternes har altså aftalefrihed og kan vælge at ejendomsretten ikke overgår før der er sket betaling, eller at andre betingelser er opfyldt. Derudover åbner art. 19 direkte op for muligheden for RoT ved at bestemme, at sælger kan forbeholde sig retten til at tilbagetage det solgte indtil der er sket betaling eller andre krav er opfyldt.
Det skal dog pointeres, at sælger kun kan kræve betaling af købesummen såfremt ejendomsretten er overgået eller der skal betales på en specifik dato uafhængig af leveringstidspunktet, jf. SOGA art. 49[63].
I *Caterpillar* var art. 49 genstand for behandling. Sælger ville påberåbe sig RoT, men køber havde allerede videresolgt varerne, hvorfor der ikke kunne ske tilbagetagelse. Sælger forsøgte i stedet at sagsøge køber for købesummens betaling. Domstolen fandt, at når der var aftalt RoT og varen ikke var betalt før videresalget, overgik ejendomsretten aldrig til køber og sælger kunne derfor ikke kræve betaling, jf. art. 49[64].

Derudover skal kort nævnes art. 25, der beskytter slutkøber mod oprindelige sælgers rettigheder, herunder sælgers ejendomsforbehold. Er slutkøber i god tro om rettigheden til varen, vil han vinde ret til varen.

[61] Som forkortelse af *Aluminium Industrie Vaassen B.V. v Romalpa Aluminium* [1976] 1 W.L.R. 676, som anses for den vigtigste dom i engelsk ret angående ejendomsforbehold
[62] Johnson s. 105
[63] The British Exporters Association s. 12
[64] *PST Energy* præmis 42, Poole Casebook s. 407

6.1.1.1. Gælder SOGA på bunkeroliekontrakter i dag

Selvom litteraturen tager udgangspunkt i SOGA betyder det ikke, at ejendomsforbehold ikke har sin berettigelse i aftaler uden for SOGA. Dette bekræftede Supreme Court i *PST Energy*.

I *PST Energy* antog reder, at forholdet faldt ind under SOGA og påstod, at trader ikke kunne kræve betaling, jf. art 49 og *Caterpillar*, da ejendomsretten til bunkerolien aldrig overgik, jf. ejendomsforbeholdet i traders T&C. Ligeledes mente reder, at consideration for købesummen bestod i ejendomsrettens overgang, og når ejendomsretten aldrig overgik var det grundlæggende princip om consideration tilsidesat[65].

Imidlertid ved at påberåbe sig at ejendomsretten ikke var overgået selvom reder havde forbrugt den leverede bunkerolie blev det aktuelt at se på lovens anvendelsesområde. SOGAs anvendelsesområde kommer til udtryk i art. 2, der lyder *"A contract of sale of goods is a contract by which the seller transfer or agree to transfer the property in goods to the buyer for a money consideration, called the price"*.

Det kommer til udtryk i *PST* Energy[66], at bunkeroliekontrakters særegne karakter, der tillader forbrug før der er sket betaling af købesummen, medfører at der reelt set ikke er noget at få ejendomsret i på tidspunktet for betaling, hvorfor ejendomsretten aldrig vil overgå. Da ejendomsrettens ikke overgår, vil der ikke kunne blive tale om en kontrakt inden for SOGAs anvendelsesområde, jf. art. 2.

Problemet, som også blev diskuteret i *PST Energy*, er at bunkerolien ikke altid vil være forbrugt på tidspunktet for betaling, og dermed kan ejendomsretten godt overgå hvad angår den stadig eksisterende bunkerolie. Der er imidlertid tale om én kontrakt angående betaling af én pris for alt bunkerolie leveret, uanset om bunkerolien er forbrugt eller ej, hvorfor man ikke kan dele forholdet op alt efter om bunkerolien er forbrugt eller ej.[67] Hovedformålet med kontrakten er som Supreme Court anfører i præmis 27 linje 14-16; *"the liberty to use the bunkers for propulsion prior to payment is a vital and essential feature of the bunker supply business"*. Supreme Court kom derfor til, at der var tale om en kontrakt sui generis og ikke en købsaftale under SOGA, jf. præmis 59, og derfor blev reder dømt til at betale til traderen selvom ejendomsretten ikke var overgået til reder.

I præmis 35 henvises til *Borden (U.K.)* og *Armour and Another*, begge vedrørende påberåbelsen af ejendomsforbehold, der er blevet behandlet under SOGA og i forlængelse her af udtalte Supreme Court"*[…] even if on analysis these two cases could and should have been analysed as sui generis, like the present, it is difficult to think that could have had any effect on their outcome."*[68].

I *Borden (U.K.)* var der tale om salg af harpiks, der som fast praksis blev forbrugt i produktionen af spånplader i løbet af to dage fra levering, hvorfor ejendomsretten aldrig ville kunne overgå, men blev dog behandlet under SOGA. Det følger indirekte her af, at RoT skal behandles på samme måde i sui generis kontrakter og i købekontrakter under SOGA.

[65] *PST Energy* præmis 23, se nærmer om consideration i afsnit 6.2.1.1.1
[66] Præmis 22 ff
[67] *PST Energy* præmis 29
[68] Linje 14-16

Dette var også House of Lords konklusion i *Alexander Knox McEntire*, hvor de kom til, at RoT blot var en illustration af kontraktfriheden og at der hverken var regler eller juridiske principper der forhindrede parterne i at aftale, at ejendomsretten ikke skulle overgå til køber.[69]

Da aftaleindgåelsen, herunder vedtagelsen af ejendomsforbehold, i *PST Energy* er meget typisk for aftaleindgåelse i bunkerolie-branchen, tyder det på, at bunkeroliekontrakter aldrig vil være omfattet af SOGA, og RoT derfor udelukkende vil blive reguleret af retspraksis.
Retspraksis vedrørende RoT vil ofte vedrøre købekontrakter under SOGA, da det primært er i disse type aftaler, at parterne aftaler RoT. Denne retspraksis vil stadig være af betydning for RoT i bunkerolie-branchen, selvom de ikke er omfattet af SOGA, når det drejer sig om krav til gyldighed og opretholdelse af RoT, da disse krav er opstillet i retspraksis og ikke er reguleret i SOGA.

6.1.2. Charges

Som nævnt i indledningen til engelsk ret er det en overraskende lille procentdel af RoT der bliver opretholdt af domstolene. Dette hænger sammen med reglerne om "charges"[70], som, modsat RoT, er en sikkerhedsret der kræver registrering [læs: security interest]. En sikkerhedsret der kræver registrering opstår når skyldner giver kreditor rettigheder i et aktiv, som skyldner ejer[71]. I salg under RoT er ejendomsretten netop ikke overgået til køber, hvorfor der ikke bliver tale om en sikkerhedsret der kræver registrering.
I største delen af de sager, hvor RoT ikke bliver opretholdt, skyldes det, at ejendomsforbeholdet får karakter af en sådan charge, og det har med tiden skabt nogle kategorier af RoT klausuler, hvoraf nogle er mere tilbøjelige til at blive anset for charges end andre.
Det er følgende typer af RoT klausuler; Simple RoT, hvor ejendomsretten overgår når varen hvori der er taget RoT er endelig betalt, enlarged RoT, hvor varen er tilladt blandet med andre varer og RoT udvides til også at gælde det nye produkt, extended RoT, hvor RoT udvides til også at omfatte købesummen fra videresalg eller krav mod tredjemand og All-monies clauses, hvor sælger tager RoT i alle leverede varer indtil alle udestående mellem parterne er betalt, uanset at der er tale om flere kontrakter. De tre sidst nævnte får ofte karakter af en charge og kræver dermed registrering, men er ikke prima facie ugyldige, mens simple RoT generelt findes gyldig[72].

Ved behandlingen af disse forskellige typer af RoT, har retspraksis udviklet nogle generelle betingelser der skal være opfyldt for at ejendomsforbehold kan opretholdes. Formålet med betingelserne er at sikre, at vedtagelsen af RoT ikke blot bliver en omgåelse af reglerne om charges og dermed giver sælger en bedre retsstilling i forbindelse med købers konkurs end købers øvrige kreditorer.

[69] Davies 2006 s. 3, Diamond s. 517
[70] Se COA
[71] Johnson s. 106
[72] Johnson s. 103ff, Davies 1999 s. 129

Det er betingelser vedrørende aftaleindgåelse, specifikation og konneksitet. Derudover er der formentlig et krav om, at der skal foreligge "fiduciary relationship[73]" for at extened RoT kan opretholdes. Dette er altså ikke et generelt krav, hvorfor ikke alle RoT skal overholde dette krav. Kravet om "fiduciary relationship" vil derfor kun blive inddraget i det omfang det er relevant.
Nedenfor vil de generelle betingelser blive gennemgået i forbindelse med gennemgangen af henholdsvis aftaleforholdet mellem fysiske leverandør og trader og aftaleforholdet mellem trader og reder.

6.2. Forholdet mellem den fysiske leverandør og trader

Som omtalt i afsnit 2 er trader mellemhandler af bunkerolie og vil som udgangspunkt aldrig have bunkerolien i sin varetægt, da traderen vil have videresolgt bunkerolien inden der indgås en aftale med den fysiske leverandør som forestår levering direkte til reders skib.

I *Re Highway Foods* fremgår det at hvis køber ifølge sin aftale med sælger har ret til at videresælge varen til tredjemand, vil tredjemand få overdraget ejendomsretten, uanset om han er i god- eller ond tro. Dette betyder indirekte at sælgers RoT ophører i forbindelse med videresalget – ligesom tilfældet er under dansk ret.

Det betyder som udgangspunkt at fysiske leverandørs RoT klausul aldrig vil blive relevant i praksis.

Imidlertid fastslår *Re Highway Foods* også, at er der gyldigt aftalt ejendomsforbehold i begge kontrakter, altså både mellem sælger og køber og køber og tredjemand, vil sælger forblive ejer af varen indtil der sker betaling.
I *Re Highway Foods* havde Harris solgt kød til Highway, som videresolgte det til Kingfry. Highways virksomhed bestod bl.a. i at sælge kød, og det var derfor kendt for parterne at han var forhandler. I aftalen mellem Harris og Highway var det derfor aftalt, at Highway måtte videresælge kødet. Begge kontrakter indeholdte RoT og derfor var det Harris der var den egentlige ejer af kødet indtil der var sket betaling. Harris kunne derfor gøre RoT gældende overfor Kingfry.
Denne adgang er uafhængig af princippet om at godtroende aftaleerhverver ekstinkverer sælgers ret når sælger ved at han sælger til en forhandler[74]. Dette hænger sammen med, at Kingfry ved, at han ikke har ejendomsret til kødet, som følge af RoT klausulen i hans aftale med Highway.
Havde Kingfry betalt til Highway inden RoT blev gjort gældende ville Harris derimod ikke have adgang til at gøre RoT gældende overfor Kingfry.

Det var også tilfældet i *Forsythe International*, hvor domstolene udtalte, med henvisning til RoT i begge kontrakter, at fysiske leverandør forblev ejer af bunkerolien indtil trader betalte for bunkerolien den 27. december, selvom den var solgt videre til reder den 19. november.

[73] Krav om, at der skal foreligge et særligt tillidsforhold. Køber passer på varerne for sælger og køber sælger varerne på vegne af sælger. (sammenligneligt med kommisionsforhold under dansk ret)
[74] Princippet der kommer til udtryk i SOGA art. 25

Dette betyder, at fysiske leverandørs RoT klausul, vil være relevant i bunkerolie-branchen, da trader oftest indsætter RoT klausul i sin aftale med reder, jf. afsnit 2. Såfremt begge ejendomsforbehold er gyldigt vedtaget vil den fysiske leverandør kunne gøre RoT gældende indtil enten han er blevet betalt af trader eller reder er blevet ejer af bunkerolien ved at have betalt trader.

Der må derfor kigges nærmere på om fysiske leverandørs RoT klausul er gyldigt vedtaget og om den kan opretholdes i de tilfælde hvor hverken trader eller reder har betalt for bunkerolien.

6.2.1. Betingelser

Betingelserne er som nævnt ovenfor udledt af praksis og vedrører aftaleindgåelse, specifikation og konneksitet.

6.2.1.1. Aftaleindgåelse

Som beskrevet i afsnit 2 vil selve aftaleindgåelsen bestå i en dialog mellem parterne, enten via telefon, mail eller lignende der afsluttes med en ordrebekræftelse [læs: order confirmation], og der udformes oftest ikke en underskrevet kontrakt.
Aftalen vil derfor ofte kunne være delvist mundtlig og delvist skriftlig eller bestå i en længere skriftlig korrespondance, og spørgsmålet bliver hvad der er del af aftalen, herunder særlig om RoT er del af aftalen. Til at afgøre dette henledes der til de almindelige aftaleretlige regler udviklet i praksis.

Herefter kan RoT være inkorporeret i aftalen ved underskrift, rimelig underretning, på baggrund af tidligere samhandel eller fælles forståelse[75].
Med henvisning til måden aftalerne i bunkerolie-branchen indgås vil det primært være spørgsmålet om rimelig underretning og samhandel der vil være af interesse for denne gennemgang. Først skal dog nævnes tidspunktet for aftaleindgåelsen.

6.2.1.1.1.Tidspunktet for aftaleindgåelsen

Hovedreglen er, at ejendomsforbehold skal være taget inden endelig aftaleindgåelse og dette har stor sammenhæng med princippet om consideration[76].
Consideration er et af hovedprincipperne i engelsk aftaleret og betyder, at der altid skal gives en modydelse, dvs. noget for noget, for at en aftale er gyldig.
Aftaler parterne først at der skal gælde en RoT klausul efter at der er givet endelig accept får sælger lov til at beholde ejendomsretten indtil købesummen er betalt men giver ikke noget for denne ret. Der vil altså mangle consideration og RoT vil derfor ikke være gyldig aftalt.

Battle of forms

I tilknytning til at RoT som udgangspunkt skal være aftalt inden der afgives endelig accept skal nævnes problematikken vedrørende battle of forms. Battle of forms er de situationer hvor begge parter henviser til eller fremsender deres egne T&C.

[75] Poole Casebook s. 206
[76] Poole Casebook chp. 4.

Hvis sælger fremsender et tilbud inklusiv dennes T&C og køber accepterer dog med fremsendelse af dennes T&C, som viser sig at fravige sælgers T&C, kan man argumentere, at købers accept ikke er i overensstemmelse med sælgers tilbud, hvorfor der ikke vil være indgået en aftale.[77]
De engelske domstole har fastslået, at sådanne uoverensstemmelser i T&C ikke medfører uoverensstemmende accept med den virkning at der ikke er indgået en aftale. De har derimod fastslået, at der som udgangspunkt gælder et princip om "last shot", jf. *Butler Machine,* hvilket betyder at det sidste sæt T&C der bliver fremsendt uden at der gøres indsigelse vil være gældende, medmindre den ene part tidligere i forløbet udtrykkeligt har sagt at de ikke vil handle på den anden parts T&C.

Battle of forms og princippet om "last shot" er kun aktuelt i de tilfælde, hvor T&C har været nævnt i forbindelse med tilbudsgivelsen, dvs. før der er givet endelig accept.

6.2.1.1.2. Rimelig underretning
Rimelig underretning om ejendomsforbehold kræver for det første, at underretningen sker i et dokument der ud fra en objektiv vurdering kan forventes at indeholde aftalevilkår og for det andet, at underretningen sker senest samtidig med endelig aftaleindgåelse.
Tidspunktet hænger sammen med reglerne om tilbud og accept, samt consideration som nævnt ovenfor, hvorefter RoT-vilkåret skal være underrettet køber inden denne accepterer købet.

I *Grogan v Robin* fremhævede retten forskellen mellem dokumenter der udgør kontrakten og dokumenter der indgår i udførelsen af kontrakten, som fx tidsplaner, fakturaer og opgørelser.
Fremgår RoT først af fakturaen vil RoT som udgangspunkt være forsøgt indgået for sent, medmindre aftalen endnu ikke anses for accepteret[78].

Som nævnt i afsnit 2 vil der af og til være henvist til fysiske leverandørs T&C i forbindelse med tilbudsgivelsen, og i så fald vil en sådan henvisning være rettidig.
Ofte vil der dog først blive henvist til fysiske leverandørs T&C i ordrebekræftelsen.
Ordrebekræftelser må man forvente kan indehold aftalevilkår, jf. *L'Estrange* men spørgsmålet bliver om ordrebekræftelsen fremsendes før eller efter aftaleindgåelse og om en reference til T&C, der indeholder RoT klausul, er tilstrækkelig vedtagelse.

Henvisning til T&C
Det er almindeligt accepteret at reference til andre dokumenter kan være tilstrækkelig inkorporering af T&C, og det samme gør sig gældende hvis der, som i fx Dan-Bunkerings ordrebekræftelser står, "copy available on request", jf. *Rooney v CSE, "or on our homepage: www.dan-bunkering.com"*, jf. *Impala Warehousing.*
Ifølge *P4 Limited* skal referencen til andre dokumenter, når det drejer sig om inkorporering af RoT, dog fremgå af forsiden af det pågældende dokument.

[77] Poole Casebook s. 55
[78] Poole Casebook s. 209

Kravet om henvisning på forsiden, jf. *P4 Limited*, gælder imidlertid kun hvis RoT ikke anses for et almindeligt og ikke-byrdefulde vilkår[79]. RoT er så hyppigt forekommende i bunkerolie-branchen, at det ikke kan anses for ualmindeligt og byrdefuldt. Denne antagelse understøttes af clause 10 (b) i BIMCO Terms 2015, der indeholder bestemmelse om ejendomsforbehold, og når en stor international organisation indsætter ejendomsforbehold som standard i en afbalanceret kontrakt, må RoT tages som udtryk for et almindeligt og ikke-byrdefuldt vilkår i branchen.

Tidspunkt for fremsendelse af ordrebekræftelse
Som det fremgår af afsnit 2, bliver ordrebekræftelsen ofte først fremsendt efter at tilbudsprisen er accepteret, hvorfor dette umiddelbart er for sent til at inkorporere T&C, herunder RoT.
Resultatet kan imidlertid være anderledes, hvis parterne ofte har handlet sammen. Nærmere om dette straks nedenfor.

6.2.1.1.3. Samhandel
Parternes samhandel over længere tid kan medføre at fysiske leverandørs T&C kan anses for gældende i senere aftaler.
Den der vil påberåbe sig samhandel som grundlag for at T&C skal gælde har bevisbyrden for, at der foreligger en tilstrækkelig ens samhandel[80].

I *Circle Freight* havde parterne alene indgået mundtlige aftaler over telefonen uden drøftelse af handelsvilkår. Først ved udstedelse af faktura, hvilket skete i forbindelse med leveringen, var der henvist til IFFs[81] handelsvilkår. Domstolene fandt, at inkorporering som følge af samhandel ikke kræver, at vilkårene tidligere har været del af kontraktdokumenter mellem parterne og en henvisning til hvor vilkårene kan findes er tilstrækkelig, når der er tale om almindelige og ikke-byrdefulde vilkår. Da indstævnte ikke havde gjort indsigelser mod henvisningen til vilkårene i de tidligere 11 fakturaer, og den respektive handel fulgte almindelig praksis mellem parterne, var IFFs handelsvilkår gældende.
I *Circle Freight* er det i fakturaerne der henvises til handelsvilkår, hvorfor fast henvisning i ordrebekræftelse forventeligt må kunne føre til samme resultat, da disse bliver fremsendt til køber tidligere end fakturaen.
Afgørende bliver dog om der er tale om fast samhandel. I *Capes (Hatherden)* udtalte domstolen, at samhandlen i den pågældende sag måtte udgøre en grænse for hvornår samhandlen er tilstrækkelig for at vilkårene er inkorporeret. I sagen var der tale om 4 mundtlige kontrakter i løbet af et år, vedrørende en slags afgrøder, mens den pågældende kontrakt var for en anden slags afgrøder, dog var alle 5 kontrakter indgået på stort set samme måde ved henvisning til T&C i ordrebekræftelsen. Domstolene fandt, at der ikke var tale om inkorporering som følge af samhandel, men udtalte, at havde der været lidt klarerer bevis for at det var typiske vilkår for branchen eller sagsøgte var bekendt med, at det pågældende type vilkår ofte blev brugt i branchen, ville udfaldet have været anderledes.

[79] Poole Casebook s. 210ff
[80] Poole Casebook s. 214
[81] Institute of Freight Forwarders

Der kan ikke siges noget generelt om hvorvidt T&C er inkorporeret som følge af samhandel, men det må afhænge af hvor ofte der er handlet og om der fast har været henvist til T&C uden at der er gjort indsigelse herimod.
Ud fra domstolenes argumentation i *Capes (Hatherden)* må man se på om køber har eller bør have kendskab til brugen af RoT i den pågældende samhandel eller branche, og såfremt det kan godtgøres, at køber bør være klar over RoTs normale forekomst i bunkerolie-branchen, vil 4 handler på et år være tilstrækkeligt til at statuere inkorporering ved samhandel, sml. *Balmoral Group,* hvor 5 kontrakter vedrørende forskellige varer i løbet af 13 måneder statuerede samhandel.
Vigtig er det, at handlerne er indgået på samme måde så der kan blive tale om fast praksis mellem parterne, jf. *Circle Freight*.

Har sælger første gang parterne handler sammen fremsendt T&C som en del af kontrakten og dermed givet underretning i overensstemmelse med beskrivelsen i afsnit 6.2.1.1.2, men i efterfølgende handler alene henvist til T&C i ordrebekræftelsen, vil T&C allerede anses for vedtaget ved anden handel mellem parterne, jf. *Forsythe International*.

6.2.1.2. Specifikationskrav
Kravet om specifikation er, ligesom under dansk ret, ikke en gyldighedsbetingelse for RoTs vedtagelse, men en betingelse for at sælger kan tilbagetage det solgte. Dette kom til udtryk i *Borden (U.K.)*[82] der vedrørte leverance af harpiks til en køber der producerede spånplader. Her fandt domstolen, at når harpiksen var inkorporeret i det nye produkt – spånpladerne – kunne harpiksen ikke længere identificeres og RoT ikke opretholdes. RoT havde derfor kun virkning indtil harpiksen blev anvendt i produktionen[83].

Identifikationskravet har stor sammenhæng med reglerne om charges. Praksis viser, at hvis varen mister sin identitet og ikke kan adskilles fra købers øvrige varer vil varen blive købers ejendom, jf. *Clough Mill,* hvor den ene dommer udtalte; *"Now it is no doubt true that, where A's material is lawfully used by B to create new goods, whether or not B incorporated other material of his own, property in the new goods will generally rest in B, at least where the goods are not reductiable to the original materials."*[84] Når varen anses for købers ejendom og der gives sikkerhed vil det, som nævnt i indledningen til engelsk ret, udgøre en sikkerhedsret der kræver registrering[85].
Hertil kan igen nævnes *Borden (U.K.),* hvor sælger forsøgte at udvide RoT til også at gælde spånpladerne, men domstolen fandt at en sådan udvidelse vil statuere en charge og kræve registrering, og RoT vil kun gælde så længe harpiksen kan identificeres.
I *Aluminium Industrie*, vedrørende salg af sølvpapir, opretholdte domstolene en extended RoT, og udvidede RoT til også at gælde købesummen fra videresalget, men det var bl.a. fordi beløbet henstod på særskilt konto, og derved kunne identificeres.

[82] Se også *International Banking,* hvor retten udtalte at "the doctrine of specification" medfører at sælgers ejendomsret vil ophøre når varen er omdannet til et nyt produkt
[83] The British Exporters Association s. 11
[84] Præmis 119
[85] Johnson s. 112

Litteraturen opfordrer til at varen specificeres i købsaftalen, samt at RoT klausulen kræver separat opbevaring eller en form for mærkning af varen så der altid kan ske identifikation[86]. Hvorvidt specifikationskravet er overholdt afhænger af en samlet vurdering af aftalens indhold, de konkrete forhold og omstændigheder, samt hvilken praktisk betydning opretholdelse af RoT vil have.[87]

I afsnit 5.3.2.2.1 om specifikationskravet under dansk ret blev det diskuteret hvordan bunkerolien bør opbevares i særskilte tanke for at være adskilt fra anden bunkerolie eller andre produkter og dermed mulig at identificere.
Engelsk praksis har haft mere fokus på de tilfælde hvor varen er blevet omdannet til et andet produkt og dermed ikke kan identificeres, end tilfælde hvor produktet blandes med et andet tilsvarende produkt.
Der er dog domme der tyder på, at såfremt varen ikke mister sin oprindelige fysiske egenskab kan RoT opretholdes i en del af varen svarende til det leverede[88]. Sælgerne af de produkter der bliver blandet vil blot eje det blandede produkt i sameje.
I *Forsythe International* var sammenblandingen af bunkerolie, hvor i der var taget RoT, med anden bunkerolie, ikke genstand for dybdegående behandling. Domstolene konstaterede blot, at sammenblandingen, der var sket som normal praksis, ikke ændrede ved sælgers ejendomsret. *Indian Oil* vedrørte ikke RoT, men spørgsmålet om ansvar under konnossement. Dommen skal dog nævnes, da hovedfokusset var sammenblanding af crude oil, der også bruges som bunkerolie. Der var sket sammen blanding af crude oil fra 3 forskellige lande og dermed var der teoretisk tale om et nyt produkt. Det blev dog ikke anset for et nyt produkt, da de sammenblandede produkter var væsentlig ens og derved bevarede crude oilen sin fysiske egenskab, hvorfor sammenblandingen var uden betydning.
Dette gives der også støtte for i *Borden (U.K.)*, hvor der sondres mellem homogene og heterogene varer. Sammenblanding af homogene varer vil ikke blive påvirket af sammenblandingen, og sælger vil stadig kunne tilbagetage sin andel.

6.2.1.3. Konneksitet

Det kan diskuteres om der gælder et krav om sammenhæng mellem det solgte, den påberåbte ejendomsret og udeståendet – altså et krav om konneksitet. Litteraturen slutter modsætningsvist fra All-monies clauses, at der må gælde et krav om konneksitet[89].
All-monies clauses er RoT-klausuler der bestemmer at ejendomsretten skal forblive hos sælger indtil alle udestående mellem parterne er betalt, og dermed udvider RoT til at omfatte gæld der ikke vedrører den konkrete leverance.
Når RoT vedrører alle udeståender på tidspunktet hvor RoT forsøges håndhævet, forsøger man altså at omgå kravet om konneksitet, og derved anerkender man indirekte, at der gælder et konneksitetskrav.

[86] Davies 1999 s. 119
[87] *Compaq Computer*
[88] Davies 1999 s. 117, The In-House Lawyer
[89] Johnson s. 104-105, Guildhall Chambers s. 8

Hvorvidt All-monies clauses vil blive opretholdt i praksis er uklart, da det ikke har været hovedspørgsmålet for domstolene, selvom de bliver anvendt i vid udstrækning[90].
I den skotske dom *Armour and Another* opretholdte domstolene imidlertid en All-monies clause, hvilket må tages til udtryk for at der er plads til sådanne klausuler og dermed tilsidesættelse af kravet om konneksitet. Domstolens begrundelse for opretholdelsen var parternes aftalefrihed, hvorfor parternes hensigt måtte anerkendes.
Denne opfattelse deles af nogle engelske professorer[91], mens andre er mere skeptiske omkring All-monie clauses opretholdelse. Blandt andet argumenteres det, at hvis der sker delvis betaling og ejendomsretten ikke overgår for denne del af det leverede, vil det være tilsidesættelse af det grundlæggende princip om consideration[92].
Dette argument kan formentlig ikke stå alene, da samme problematik kan opstå under en simple RoT klausul, hvis der sker en stor delbetaling, hvorefter sælger gør brug af RoT og tilbagetager alle solgte varer[93].

Derimod vil hensynet til købers øvrige kreditorer tale for at All-monies clauses ikke skal opretholdes. Også hensyn til reglerne om charges tilsiger at all monies clauses ikke skal opretholdes. Er der sket fuld betaling af én faktura, vil reglerne om konneksitet medføre, at ejendomsretten til varen under den konkrete faktura er overgået til køber. Udvider man til, at sige at alle udestående skal være betalt og derved fraviger kravet om konneksitet, vil det kunne argumenteres, at køber nu giver sikkerhed i noget denne ejer, og derved tilsidesætter reglerne om charges.

På denne baggrund må det antages, at der gælder et krav om konneksitet når der er tale om simple RoT, men er der aftalt All-monies clause vil kravet kunne fraviges såfremt de resterende betingelser for RoTs gyldighed er overholdt.
Da praksis på området ikke er helt klar bør en sælger umiddelbart holde styr på hvilke krav der bliver betalt, således at han kan overholde konneksitetskravet skulle All-monies clausen blive tilsidesat, og man dermed falder tilbage på den del af RoT-klausulen der kan opretholdes, hvilket typisk vil være den simple RoT.

6.2.1.4. Konkrete T&C

6.2.1.4.1. Bomins T&C[94]

Bomins T&C klausul 17.1 indeholder en simple RoT:
"*The products shall remain the Seller's property until Buyer has paid for them in full. Until that time, Buyer shall hold them as bailee, store them in such a way that they can be identified as Seller's property, and keep them separate from Buyer's own property and the property of any other person […]"*
Klausulen foreskriver, at køber skal holde bunkerolien adskilt fra anden bunkerolie ombord på skibet således at den leverede bunkerolie kan identificeres. Bomin gør imidlertid ikke umiddelbart

[90] Johnson s. 115 ff
[91] Professor Hicks and Goode, jf. R. Johnson s. 117
[92] Davies 1999 s. 107
[93] Johnson s. 117
[94] Se bilag 1

noget for at kontrollere, at dette krav overholdes. Det må derfor være omstændighederne på tidspunktet for RoT klausulens påberåbelse der må være afgørende for om der kan ske identifikation. Imidlertid må det anses for uden betydning når blot bunkerolien bevarer sine fysiske egenskaber[95].

Skibet vil, som beskrevet under dansk ret, føre en bunkeroliejournal og denne vil formentlig kunne bruges som dokumentation for bunkeroliens adskillelse, samt som dokumentation for hvilken konkret bunkerolie der tilhører den fysiske leverandør og dermed hvilken bunkerolie der er i behold.

6.2.2. Konklusion på forholdet mellem fysiske leverandør og trader

Aftalen mellem fysisk leverandør og trader vil sædvanligvis være indgået på fysiske leverandørs T&C[96], som typisk indeholder RoT klausul. Såfremt der er givet underretning om T&C i forbindelse med tilbudsgivelsen vil RoT være gyldigt vedtaget, da RoT anses for et almindeligt og ikke-byrdefuldt vilkår.

Det er imidlertid mere kompliceret, hvad angår de mere typiske tilfælde, hvor der først er henvist til T&C, herunder RoT, i ordrebekræftelsen. Her bliver parternes samhandel afgørende og har de handlet mindst 4 gange inden for det senest år, må RoT anses som gyldigt vedtaget, jf. gennemgangen i afsnit 6.2.1.1.3.

Hvis det antages at RoT er gyldigt vedtaget skal betingelserne om specifikation og konneksitet være overholdt for at sælger kan opretholde RoT.

Bunkerolien skal alene beholde sine fysiske egenskaber for at kunne overholde specifikationskravet, hvilket bunkerolien ofte vil kunne selv om den bliver blandet med anden bunkerolie. Afgørende bliver de sammenblandede produkters kvalitet. Er det ene produkt af betydelig ringere kvalitet vil bunkerolien ikke beholde sine fysiske egenskaber og specifikationskravet vil således ikke være overholdt.

Ofte vil bunkerolien imidlertid være holdt adskilt på skibet og bunkeroliejournalen vil kunne bruges som dokumentation for hvilken bunkerolie der er i hvilke tanke, hvorfor simple RoT som udgangspunkt vil kunne blive opretholdt, så længe bunkerolien er i behold.

Dog er den fysiske leverandørs mulighed for at opretholde RoT ikke alene afhængig af hans eget kontraktforhold, men også af traders aftale med reder, jf. *Re Highway Foods.* Har trader og reder ikke indgået en gyldig aftale – se afsnit 6.2.1.1 om aftaleindgåelse – vil den fysiske leverandørs RoT klausul være uden betydning, da ejendomsretten vil overgå til reder på tidspunktet for videresalg. Omvendt vil en gyldig aftale medføre at fysiske leverandør forbliver ejer af bunkerolien indtil enten reder eller trader har betalt deres kontraktpart for bunkerolien.

6.3. Forholdet mellem trader og reder

Reder skal bruge bunkerolie til driften af sit skib og har som udgangspunkt ikke til hensigt at videresælge bunkerolien. Reder forbruger imidlertid bunkerolien således at den ofte hører op med at eksistere inden købesummen er betalt.

[95] Se afsnit 6.2.1.2
[96] Jf. Rune Pejtersen

Trader vil som udgangspunkt have taget RoT i den leverede bunkerolie, således at han har sikkerhed for købesummens betaling så længe bunkerolien er i behold. Spørgsmålet er om RoT klausulen er gyldigt vedtaget i trader og reders aftaleforhold, og om betingelserne for opretholdelse er overholdt.

Det har ikke været muligt at finde engelske domme, hvor det solgte bliver forbrugt og ophører med at eksistere inden købesummen er betalt. *PST Energy* vedrørte RoT hvor bunkerolie blev forbrugt, men RoTs gyldighed var ikke hovedspørgsmålet for dommen, hvorfor den ikke umiddelbart kan bruges som støtte for gældende praksis på området.

Forholdet må dog kunne sammenlignes med de tilfælde hvor varen bliver forbrugt i købers produktion for at skabe et nyt produkt eller varen videresælges. I disse tilfælde ophører simple RoT og sælger har ikke længere sikkerhed for købesummens betaling når varen indgår i det nye produkt eller bliver videresolgt. RoT klausulen kan kun gøres gældende hvis varen er i behold, hvilket også må gælde når varen ophører med at eksistere fordi den forbruges.
Bunkerolie der er forbrugt kan derfor hverken efter reglerne eller i sin natur tilbagetages. Bunkerolie der stadig er i behold må derimod kunne tilbagetages på baggrund af en gyldig RoT klausul, jf. *Borden (U.K.)*, hvor harpiksen der endnu ikke var forbrugt blev tilladt tilbagetaget når det kunne specificeres.

Der gælder umiddelbart ikke nogen særlige betingelser for RoT hvor der er tilladt forbrug, hvorfor det alene er de almindelige betingelser gennemgået ovenfor i afsnit 6.2.1 om forholdet mellem fysiske leverandør og trader der skal være opfyldt.

6.3.1. Betingelser

Betingelserne for at RoT er gyldig vedtaget og kan opretholdes mellem trader og reder er de samme som gælder i forholdet mellem fysiske leverandør og trader, og vedrører aftaleindgåelse, specifikation og konneksitet.

Måden hvor på aftalen indgås mellem trader og reder er meget lig måden aftalen indgås mellem fysisk leverandør og trader, hvorfor der henvises til gennemgangen ovenfor i afsnit 6.2.1.1, hvorefter RoT kan være gyldigt vedtaget mellem trader og reder.

Hvorvidt specifikationskravet og konneksitetskravet er overholdt og dermed tillader RoTs opretholdelse, er identisk med forholdet mellem den fysiske leverandør og trader, da det er den samme bunkerolie det drejer sig om. Det vil derfor være den samme bunkeroliejournal der vil blive taget udgangspunkt i når det skal vurderes om bunkerolien er forbrugt eller ej, og om bunkerolien er blandet med anden bunkerolie eller andre produkter.

Betingelsernes overholdelse vil ikke blive gennemgået nærmere her, da de svarer til hvad der er anført i afsnit 6.2.1, men nedenfor vil konkrete T&C i forholdet mellem trader og reder blive set nærmere på.

6.3.1.1. Konkrete T&C

6.3.1.1.1 Dan-Bunkerings T&C[97]

Klausul 8 hedder "Title" og lyder som følger:

"The Seller retains title to the Bunker Oil delivered to the Vessel until the Invoice has been paid in full in so far as the Seller has this right according to the law of the place of delivery or according to the law of the Vessel's flag state or according to the law at the location where the Vessel is found."

Dan-Bunkerings RoT klausul er meget kort og siger at ejendomsretten ikke overgår før der er sket fuld betaling for den respektive faktura. Dette er et klassisk eksempel på en simple RoT og vil som udgangspunkt være gyldig under engelsk ret når de generelle betingelser behandlet ovenfor er overholdt.

Klausul 4.3 foreskriver, at køber skal holde bunkerolien adskilt fra anden bunkerolie ombord på skibet ved levering og anden bunkerolie der efterfølgende måtte blive leveret fra andre. Dan-Bunkering kræver, at bunkerolie holdes adskilt og dermed kan identificeres. De gør imidlertid ikke umiddelbart noget for at kontrollere, at dette krav overholdes. Det må derfor være omstændighederne på tidspunktet for RoTs påberåbelse der må være afgørende for om der kan ske identifikation.

Til at vurdere om bunkerolien er holdt adskilt, eller i hvert fald har samme fysiske egenskaber, må bunkeroliejournalen kunne bruges som bevismateriale.

Skulle reder argumentere, at bunkerolien ikke længere har samme fysiske egenskab fordi bunkerolien er blevet blandet med anden bunkerolie, vil man umiddelbart kunne henlede til de bunkerolieprøver der bliver taget ved levering[98]. Er prøverne på bunkerolien i den respektive tank af samme kvalitet, må bunkerolien antageligvis have samme fysiske egenskab.

6.3.1.1.2 OW Bunkers T&C[99]

OW Bunkers T&C klausul H har overskriften "Title" og indeholder ejendomsforbehold indtil udestående er betalt, jf. H. 1, tillader forbrug før betaling, jf. H. 2, kræver bunkerolien adskilt fra anden bunkerolie ombord på skibet, jf. G. 14, jf. H. 2, men skulle bunkerolien blive blandet udvides RoT til også at gælde det nye product, jf. H. 4, og H. 6 vedrører de tilfælde, hvor ejendomsretten er overgået trods RoT.

H.1 er i sig selv en simple RoT og stod den alene ville den være gyldig og have virkning på samme måde som Dan-Bunkerings RoT, se ovenfor. H.1 bliver imidlertid suppleret af H.2 til H.7.

H.2 henviser til klausul G.14 der bestemmer at bunkerolie skal opbevares i særskilte tanke, egnet til bunkerolie. OW Bunker har derved, ligesom Dan-Bunkering, forsøgt at sikre sig, at bunkerolien kan identificeres og dermed overholde specifikationskravet, hvilket dog er uden betydning når blot bunkerolien bevarer sine fysiske egenskaber[100].

[97] Bilag 3
[98] Klausul 10
[99] Se bilag 2
[100] Se afsnit 6.2.1.2

I det tilfælde at bunkerolien ikke skulle beholde sine fysiske egenskaber ved sammenblanding med anden bunkerolie, forsøger OW Bunker, at udvide RoT til også at omfatte det sammenblandede produkt, jf. H. 4. En sådan bestemmelse har karakter af enlarged RoT og spørgsmålet bliver om den vil blive opretholdt som gyldig når bunkerolien har mistet sin oprindelige fysiske egenskab.

Det skal første og fremmest pointeres, at enlarged RoT endnu ikke er blevet opretholdt af de engelske domstole, men er prima facie ikke ugyldige.[101]
I *Clough Mill*, som er citeret ovenfor i afsnit 6.2.1.2 hvad angår specifikationskravet, finder domstolen at udgangspunktet er, at RoT ophører når produktet blandes med andre produkter, medmindre parterne udtrykkeligt har aftalt, at RoT skal udvides til det nye produkt. I så fald vil parterne have indgået aftalen inden køber har fået ejendomsret til det nye produkt, og derfor er det ikke nødvendigvis omgåelse af reglerne om charges. Hvorvidt dette er gældende ret er uklart, da andre domme[102] tyder på at uanset at der er indgået udtrykkelig aftale vil udvidelse af RoT til nye produkter altid have karakter af en charge og dermed være ugyldig, medmindre registreret.
En tilladelse til at udvide RoT til det nye produkt vil kunne begunstige sælger uberettiget, hvis for eksempel der er tilført produktet værdi ved sammenblandingen[103].
Såfremt det nye produkt også består af tredjemands produkter vil RoT aldrig kunne udvides, uanset hvor tydelig ordlyden af den pågældende RoT er, da køber ikke har ret til at disponere over tredjemands ejendom.[104]

H. 4. siger udtrykkeligt at RoT skal udvides til den blandede bunkerolie, hvorfor det kan argumenteres, at såfremt produktet der bliver sammenblandet med traders bunkerolie er ejet af reder, vil klausulen kunne opretholdes, såfremt bunkerolien ikke stiger i værdi ved sammenblandingen. Hvorimod, det ikke er tilfældet såfremt bunkerolie blandes med bunkerolie ejet af tredjemand, typisk en anden fysiske leverandør/trader.

H. 6 regulerer de tilfælde hvor ejendomsretten er overgået til køber eller tredjemand før der er sket betaling og sikkerhedsretten ifølge simple RoT skulle være ophørt. Dette er ikke en udvidelse af den pågældende RoT, men etablering af en ny form for sikkerhed – pledge - i den leverede bunkerolie. Hvorvidt en sådan sikkerhedsret kan tages ensidigt og alene ved henvisning til T&C er tvivlsomt med henvisning til afsnit 6.2.1.1.2, hvoraf fremgår, at ualmindelige og byrdefulde vilkår ikke kan tages ved henvisning til T&C. De generelle regler for gyldig vedtagelse af pledge under engelsk ret skal dog ikke behandles nærmere her.

[101] Johnson s. 113
[102] Se fx *In Re Peachdart* og *Borden (U.K.)*
[103] Johnson s. 115
[104] Davies 1999 s. 117

6.3.2. Konklusion på forholdet mellem trader og reder

Aftalen mellem trader og reder vil sædvanligvis være indgået på traders T&C[105], som typisk indeholde RoT klausul, og såfremt der er givet underretning om T&C i forbindelse med tilbudsgivelsen, vil RoT klausulen være gyldigt vedtaget, da RoT anses for et almindeligt og ikke-byrdefuldt vilkår i bunkerolie-branchen.

Det er imidlertid mere kompliceret, hvad angår de mere typiske tilfælde, hvor der først er henvist til T&C, herunder RoT, i ordrebekræftelsen. Her bliver parternes samhandel afgørende og har de handlet mindst 4 gange inden for det senest år, må RoT anses som gyldigt vedtaget, jf. gennemgangen i afsnit 6.2.1.1.3.

Bevarer bunkerolien sine fysiske egenskaber må den anses for at overholde specifikationskravet.

Holdes bunkerolien ikke adskilt fra anden bunkerolie og andre produkter så den dermed ikke bevarer sin fysiske egenskab vil ejendomsforbeholdet være ophørt. Det gælder imidlertid ikke såfremt det antages at enlarged RoT er gyldigt vedtaget og ikke er en tilsidesættelse af reglerne om charges.

Bunkeroliejournalen vil kunne bruges som dokumentation for om bunkerolien stadig er i behold, eller om den er delvist eller helt forbrugt, og kun i det omfang den er i hel eller delvis behold vil trader kunne gøre brug af RoT.

6.4. Konklusion på engelsk ret

I England er RoT almindeligt anerkendt og anvendes både i købsaftaler under SOGA og i andre type aftaler. Gyldighedsbetingelserne for ejendomsforbeholdets vedtagelse og opretholdelse er imidlertid de samme uanset hvilken type aftale der er tale om, og disse betingelser er fastslået i retspraksis.

RoT i bunkerolie-branchen, uanset om det er i kreditkøbsaftalen mellem den fysiske leverandør og trader eller kreditkøbsaftalen mellem trader og reder, skal være vedtaget senest ved endelig aftaleindgåelse, medmindre parterne fast handler sammen og RoT er fast praksis i dette samhandelsforhold. Henvisning i ordrebekræftelsen vil således godt kunne være gyldig vedtagelse af RoT når parterne fast har handlet sammen.

I aftalerne i bunkerolie-branchen vil der som sagt være tilladt videresalg og/eller forbrug, hvorfor RoT kun vil kunne opretholdes indtil videresalget eller forbruget sker. RoT kan altså kun opretholdes i den bunkerolie der stadig er i behold. Yderligere kan den fysiske leverandør kun gøre sin RoT klausul gældende såfremt der hverken er sket betaling til ham selv eller trader.

Er RoT ikke gyldigt vedtaget mellem trader og reder, vil den fysiske leverandør ikke kunne opretholde sin RoT klausul selvom den er gyldigt vedtaget, da reder vil få ejendomsret til bunkerolien som følge af traders tilladelse til videresalg iht. aftalen med den fysiske leverandør, jf. princippet i SOGA art. 25.

[105] Jf. Rune Pejtersen

Antages det, at RoT er gyldigt vedtaget i begge aftaleforhold kan RoT kun opretholdes så længe bunkerolien bevarer sin fysiske egenskab og der er konneksitet mellem bunkerolien og betalingskravet. Disse krav vil ofte være opfyldt, men det afhænger af en konkret vurdering, hvor bunkeroliejournalen ført på skibet vil være af stor bevismæssig værdi.

7. Konklusion

Kreditkøbsaftaler og de hermed forbundene ejendomsforbehold er en helt essentiel del af bunkerolie- og shippingbranchen. Rederne er afhængige af at kunne få leveret bunkerolie på kredit, da de ofte er afhængige af fragtens optjening før de kan betale deres bunkerolieregninger.[106]
Fysisk leverandørs og traders eneste indkomstgrundlag er fortjenesten på bunkerleverancerne, hvorfor de er afhængige af købesummens betaling. De forsøger derfor at sikre sig betaling ved at tage ejendomsforbehold i den leverede bunkerolie.
Da fysiske leverandør og trader ved, at reder er afhængig af at kunne bruge bunkerolien så snart den er leveret, dvs. før købesummens betaling, tillader de i deres T&C at bunkerolien forbruges før ejendomsrettens overgang. Fysiske leverandør tillader tillige at bunkerolien videresælges idet de ved at traderens virksomhed består i at videresælge bunkerolie.

Udgangspunktet i både dansk og engelsk ret, for så vidt angår simple RoT, er at et gyldigt ejendomsforbehold med tilladelse til videresalg eller forbrug ophører så snart der sker videresalg/forbrug, således at ejendomsforbeholdet kun gælder i den bunkerolie der stadig er i behold på tidspunktet for ejendomsforbeholdets påberåbelse.
Under engelsk ret har fysiske leverandør imidlertid en udvidet adgang til opretholdelse af ejendomsforbeholdet såfremt traders ejendomsforbehold i aftalen med reder er gyldigt vedtaget, da reder ikke kan forvente at få ejendomsretten grundet ejendomsforbeholdet i traders aftale med reder. Fysiske leverandør forbliver derfor ejer af bunkerolien under engelsk ret, indtil enten reder eller trader har betalt deres kontraktpart[107].

7.1. Sammenligning af betingelserne for vedtagelse og opretholdelse under dansk og engelsk ret

Betingelserne for at ejendomsforbehold anses for gyldigt vedtaget ligner hinanden under henholdsvis dansk og engelsk ret. I begge jurisdiktioner kan ejendomsforbehold være gyldigt vedtaget ved henvisning til T&C i ordrebekræftelsen, såfremt parterne tidligere har handlet sammen og det i samhandlen har været fast praksis at henvise til T&C uden at der er gjort indsigelse fra modparten. Handler parterne ikke normalt eller plejer der ikke at blive henvist til T&C, vil henvisning til T&C i ordrebekræftelsen ikke være tilstrækkelig, da der som udgangspunkt kræves udtrykkelig aftale under dansk ret og rimelig underretning under engelsk ret.
Under dansk ret har parterne dog mulighed for at indføre en klausul om ejendomsforbehold efter endelig aftaleindgåelse ved at få køber til at underskrive at dette skal gælde, hvilket som udgangspunkt ikke er muligt under engelsk ret, jf. princippet om consideration.

[106] Se hertil *PST Energy* præmis 27
[107] Jf. *Re Highway Foods*

Antages det at klausulerne om ejendomsforbehold er gyldig vedtaget er der særlige betingelser for ejendomsforbeholdets opretholdelse.

Begge lande operer med et krav om, at bunkerolien skal kunne specificeres for at kunne opretholdes, men indholdet af dette specifikationskrav er ikke ens under de to jurisdiktioner.
Specifikationskravet er forholdsvist strengt under dansk ret. Bunkerolien skal holdes adskilt fra anden bunkerolie, såvel som andre produkter hos køber, og sælger skal kunne bevise, at den pågældende bunkerolie faktisk er den bunkerolie der er blevet leveret.

I England er specifikationskravet mere lempeligt, da der alene kræves, at bunkerolien bevarer sin fysiske egenskab. Bunkerolien må derfor godt blandes med anden bunkerolie af samme kvalitet.
Parterne bør dog være forsigtige med at blande bunkerolien, for skulle det ene produkt være af en dårligere/bedre kvalitet må det kunne argumenteres, at det ikke bevarer sin fysiske egenskab[108].

Risikoen for dårlig kvalitet gør at reder også har interesse i at holde bunkerolien adskilt, da problemer med brændstof vil kunne betyde problemer med motoren og dermed stor risiko for forsinkelse og ekstra omkostninger.
Bunkerolien vil derfor blive forsøgt adskilt i forskellige tanke, men dette vil ikke altid være muligt, særligt ikke ved mindre skibe. Derudover tager skibene, som nævnt i afsnit 5.3.2.2.1, bunkers ombord løbende alt afhængig af hvilke havne de anløber og hvornår det passer bedst tidsmæssigt, hvorfor der muligvis ikke er tomme tanke ombord og sammenblanding derfor ikke kan undgås.
Muligheden for at holde bunkerolien adskilt i praksis afhænger altså af skibets størrelse, herunder antal brændstoftanke, samt skibets sejlrute.

Hvorvidt specifikationskravet er overholdt kan derfor være forholdsvis tilfældigt, men man må formode at såfremt det er muligt vil alle parter have interesse i at holde bunkerolien adskilt og i så fald vil specifikationskravet være overholdt.
Sandsynligheden for at specifikationskravet er opretholdt under engelsk ret er dog betragtelig større end under dansk ret, da sammenblanding her er tilladt såfremt bunkerolien beholder sin fysiske egenskab.
Derudover kræver dansk ret at sælger skal have ført kontrol med adskillelsen, således at specifikationskravets overholdelse ikke alene beror på købers oplysninger på tidspunktet for ejendomsforbeholdets påberåbelse, jf. U 1987.629 H.
Sælger vil således kunne støtte sig til bunkeroliejournalen på tidspunktet for påberåbelse uden tidligere at have haft kendskab til dennes indhold under engelsk ret, hvor sælger under dansk ret løbende skal have ført kontrol.

Den væsentligste forskel på kravene under dansk og engelsk ret til opretholdelsen af ejendomsforbehold i bunkerolie-branchen er de specielle betingelser dansk ret stiller til ejendomsforbehold i varer der skal videresælges eller forbruges før der er sket betaling.

[108] Se hertil *Indian Oil*

Under engelsk ret skal varen blot være i behold og have bevaret sin fysiske egenskab for at et gyldigt vedtaget ejendomsforbehold kan opretholdes[109].
Under dansk ret, udover at være i behold og være specificeret, skal der ske afregning i takt med forbruget/videresalget, samt føres kontrol og føres særskilt regnskab over forbrug/videresalg. Overholdes disse krav ikke, vil ejendomsforbeholdet ikke kunne opretholdes uanset om der er sket forbrug/videresalg eller ej.
Der sker ikke afregning i takt med forbruget i bunkerolie-branchen, men efter en fast aftalt kredittid, hvorfor det er usikkert om ejendomsforbehold under dansk ret kan opretholdes.

V. Carstensen[110] skriver dog at det nærmere krav til afregning- og kontrolkravet må afhænge af handelssædvane og særlig branche-kutyme[111], hvilket kan tale for, at kravene kan anses for opfyldt i bunkerolie-branchen gennem branche-kutyme på 30 dages fast kredittid.

Til sidst skal blot nævnes, at dansk ret yderligere indeholder krav om minimums beløb på 2000 kr. og et krav om fast låne beløb. Disse krav vil som udgangspunkt altid være overholdt i bunkerolie-branchen, og vil derfor ikke være det der skiller gyldigheden af ejendomsforbehold under dansk og engelsk ret.
Heller ikke det engelsk krav om konneksitet, da et sådan krav følger indirekte af det danske strenge specifikationskrav.

7.2. De lege ferenda betragtninger

Uanset om betingelserne for vedtagelse og opretholdelse af ejendomsforbehold er overholdt eller ej, vil ejendomsforbeholdet have en begrænset rækkevidde, da bunkerolien bliver forbrugt kontinuerligt og derfor ofte vil være forbrugt på betalingsdatoen.
Det vil derfor alene være i de situationer hvor køber kommer i betalingsvanskeligheder umiddelbart eller kort efter levering, at ejendomsforbeholdet vil blive aktualiseret.

Det kan derfor undre, at sælger ikke kræver kontantbetaling, men kreditterne er en integreret del af shipping- og bunkeroliebranchen, og reder vil ofte ikke være i stand til at betale leverancen før han har optjent sin fragt[112].
De særlige forhold i bunkerolie-branchen, herunder behovet for at tillade at bunkerolien forbruges, begrænser muligheden for andre former for sikkerhed og derfor bliver ejendomsforbeholdet relevant selvom det kun kan opretholdes i begrænsede tilfælde.

Dette er formentlig medårsag til, at engelske advokater forsøger at udvide ejendomsforbeholdet til også at gælde blandede produkter, krav fra tredjemand og andre udeståender mellem parterne i bunkerolie-branchen.

[109] I. Davies s. 106 og *Borden (U.K.)*
[110] Juridisk professor
[111] V. Carstensen s. 97
[112] Se hertil *PST Energy* præmis 27

Praksis viser dog, at disse specielle RoT har meget begrænset rækkevidde, da de så godt som aldrig bliver opretholdt af domstolene. Et at de få eksempler på opretholdelse af de specielle RoT er den berømte *Aluminium Industrie-dom,* som kort er nævnt i afsnit 6.2.1.2.

Sådanne udvidelser af ejendomsforbehold ses som udgangspunkt ikke i dansk ret, hvilket formentlig skyldes de noget mere strenge og klare regler for ejendomsforbehold, såvel som for andre sikkerhedsrettigheder. I U 1926.751 SH var en sådan udvidet ordlyd dog forsøgt opretholdt. Der var tale om en sælger der havde forsøgt at udvide ejendomsforbeholdets ordlyd til at gælde alle udestående mellem parterne i alle varer leveret – svarende til All monies clauses – men det udvidede ejendomsforbehold kunne ikke opretholdes, da pantereglerne ikke var overholdt.

K. Illum[113] skrev i 1976, at ejendomsforbehold med tilladelse til forbrug og forarbejdning ikke har nogen fremtrædende betydning indenfor dansk erhverv.[114] Dette må siges ikke at være tilfældet i dag, hvor ejendomsforbeholdet som gennemgået er meget anvendt i bunkerolie-branchen. Men man må også forvente, at det kan have central rolle i andre brancher der ligeledes arbejder med genus varer i bulk. Det kan for eksempel være salg af kornprodukter eller kul. Der kan i begge tilfælde være tale om leverandørkredit af betragtelig størrelse.

Dansk praksis og teori bør derfor anerkende, at kravet om afregning i takt med forbrug bør kunne modificeres så ejendomsforbehold også er en reel sikkerhedsmulighed og kan realiseres i praksis i bunkerolie-branchen, samt andre brancher der arbejder med genus varer i bulk. Afgørende bør være at balancen mellem de handelsmæssige og kreditmæssige hensyn og hensynet til tredjemand opretholdes[115]og der ikke bliver tale om oppustning af købers likviditet.[116]

Denne modificering kunne bestå i dels at anerkende en slækkelse af specifikationskravet på linje med hvad der gælder i eksempelvis England og dels at anerkende en slækkelse af afregnings- og kontrolkravet, således at en branche fastsat kredittid som 30 dage, der relaterer sig til en gennemsnitlig rejseafviklingsperiode, kan accepteres. Dette kan som nævnt ske ved købers fremførelse af skibets bunkeroliejournal og afregning i takt med optjening af fragt, da dette er tilstrækkelig sikring af, at der alene er tale om en driftskredit og ikke aftalt konkursprivilegium[117]. En anden mulighed for opfyldelse af afregningskravet vil, som foreslået af A. Ørgaard[118], være at tillade transport i reders fragtkrav.

[113] Juridisk professor ved Aarhus Universitet 1942-1969
[114] Illum s. 267
[115] Carstensen 1984 s. 40
[116] Carstensen 1984 s. 87 ff
[117] Se afsnit 5.3.3.1
[118] Juridisk professor. Ørgaard 2003 s. 72 linje 6-8: *"Sker videresalget på kredit, kan afregningskravet opfyldes ved transport på konsignatarens købesumskrav, sikret på sædvanlig måde ved meddelelse herom til køberen."*

Forkortelser

Love, m.m.:

CISG	Bekendtgørelse af international købelov fra 21. november 2014, nr. 1224.
COA	Companies Act 2006
DCLP	Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions
INA	Insolvency Act 1986
KAL	Bekendtgørelse af lov om kreditaftaler fra 26. november 2015, nr. 1336.
KBL	Bekendtgørelse af lov om køb fra 17. februar 2014, nr. 140.
KL	Bekendtgørelse af konkursloven fra 6. januar 2014, nr. 11.
SOGA	Sale of Goods Act 1979

Andre forkortelser:

BIMCO	Baltic and International Maritime Council
IPCR	International procesret
IPR	International privatret
RoT	Retention of Title
T&C	Terms and conditions

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Bilag 1 – BOMINs T&C

1. Definitions

1.1 "Seller" shall mean any of the BOMIN International Group of Companies, including its servants, agents, brokers, designated representatives, subsidiaries or affiliates wherever applicable.

1.2 "Buyer" shall mean the party and/or parties contracting to buy products and/or services as set out in the Seller's Confirmation of Order for Products and/or Services, including its servants, agents, brokers, designated representatives, subsidiaries or affiliates wherever applicable.

1.3 "Products" shall mean the Fuels, Oils, Lubricants, goods, items, equipment and materials of whatever type and description as specified in the Seller's Confirmation of Order.

1.4 "Services" shall mean agency services, or similar attendance to Buyer's needs.

1.5 "Contract" shall mean an agreement between Seller and Buyer, subject to these conditions.

1.6 "Vessel" shall mean the vessel to which the "Products", and/or "Services" are to be delivered by Seller to Buyer.

1.7 "Conditions" shall mean Seller's General Conditions of Sale and Delivery.

1.8 "Supplier" shall mean the party physically supplying the Products and/or Services to the Vessel, together with his servants, agents, successors, sub-contractors and assigns.

2. Validity and Scope of Terms

2.1 These Conditions constitute an integral part of any offer and/or Contract made for Products and/ or Services provided by Seller to Buyer, and override any terms and conditions incorporated or referred to by the Buyer whether in its order or elsewhere.

2.2 The supply by Seller of Products and/or Services and every quotation, pro-forma invoice, order confirmation, price list or other similar documents is made or issued solely subject to these Conditions and no representation or warranty, collateral or otherwise shall bind Seller and no statement made by any representative by or on behalf of Seller shall vary these conditions unless such representation, warranty or statement shall be made in writing and signed by an Officer of Seller and shall be stated to be made specifically in pursuance of this clause 2.2.

2.3 Any variance to these Conditions shall not prejudice or limit in any way the validity of the remaining Conditions of any Contract between Seller and Buyer. Failure by either party at any time to enforce any of these Conditions shall not be considered as a waiver by such party of such provisions or in any way affect the validity of these Conditions. If any provision of the Contract is invalid, void, or unenforceable, it will not affect the validity, legality, or enforceability of any other provision of the Contract.

2.4 Subject to the provisions of Clauses 2.2 and 2.6, and insofar as these clauses apply, these Conditions embody all the terms and conditions and cancel in all respects any previous Conditions, agreements and/or undertakings, whether given in writing or orally.

2.5 No statements made outside the Contract, or in any brochures, catalogues or sales literature, as well as in any correspondence or orally during negotiations, are intended to have any contractual effect.

2.6 Without prejudice to the provisions of Clause 2.2 herein, Seller reserves the right to include, at its discretion, any additional or substitute terms and Conditions. Any additional or substitute terms shall be advised to Buyer prior to the time of concluding the Contract.

3. Terms of Offers and Contracts

3.1 Seller's offers and estimates of costs are to be understood as being conditional and subject to availability and alteration and shall include only such services as are expressly

specified.
3.2 The Contract shall be deemed to have commenced effective from the time that Seller provides to the Buyer (or its agent, broker or designated representative) notice of confirmation. Any subsequent amendments to the Contract are to take effect as though they had been made as at the date the Seller provided to the Buyer (or its agent, broker or designated representative) notice of confirmation.
3.3 Save where otherwise expressly provided for in the Contract specifications, all particulars notified to Buyer (e.g. analytical data) and all documents to which access has been given regarding the characteristics of the Products at any delivery location, shall not be construed as specifications of the Products to be delivered hereunder, but only as indications of the characteristics of the Products available at that location from time to time, and shall not constitute undertakings. Seller reserves the right to make alterations to such particulars or documents or to the Products. That same provision shall apply to the quality of the Products.
3.4 Referenced commercial terms shall be deemed to have the meaning contained in the most recent edition of Incoterms.
3.5 In the case of imported goods the Contract shall be deemed to be concluded subject to the provision that Seller is granted any export or import licenses which may be necessary. Without prejudice to clause 4.1 below, Buyer shall indemnify Seller for any such expenses incurred in connection with the securing or delay in securing of the aforementioned licenses.
3.6 Seller is entitled to recover from Buyer all direct and indirect losses, costs and expenses incurred as a consequence of cancellation of the Contract by Buyer, for whatever reason.

4. Prices
4.1 Unless otherwise specified, prices shall be deemed to be in US dollars, ex-wharf, and shall represent only the purchase price of the Products. Buyer shall pay any additional expenses or costs such as barging, surcharges, overtime, demurrage, wharfage, dockage, port/harbor fees, dues, duties, taxes, levies and other costs, including those imposed by governments and local authorities. If the price is quoted as "Delivered", the price includes transportation to Buyer's Vessel, but does not include demurrage or any other expenses or costs as indicated above.
4.2 Seller's confirmation to Buyer includes the earliest estimated time of Vessel's arrival (ETA) as advised by Buyer to Seller at the time of nomination. Unless the ETA date range agreed under the Contract is wider than four calendar days, Buyer's Vessel shall begin to take delivery of the Products within the 4-day range of three calendar days after the earliest estimated ETA. The Contract price shall be valid only for deliveries begun within such period.
4.3 If, after Seller's confirmation of the Contract, Buyer begins to take delivery, or requests delivery to begin outside the 4 calendar-day range referred to in clause 4.2 above, Seller shall be entitled to amend its quoted price under the Contract. This entitlement is without prejudice to any claim Seller may have against Buyer for failing to take delivery within the 4 calendar-day range referred to in clause 4.2 above.
4.4 If price controls are imposed, Seller shall not be required to deliver if the maximum price is below that previously established with the Buyer.
4.5 Buyer shall be liable for all costs, expenses and/or charges incurred by the Seller on account of Buyer's failure, breach and/or non-compliance with its obligations under Clause 10 herein.
4.6 Notwithstanding anything else herein, should the Vessel not arrive within the determined time range, the Contract shall be considered null and void unless Seller elects to accept the new arrival date of the Vessel as the basis of a new contract for

which a new price can be agreed upon with the Buyer.
5. Quality
5.1 Unless otherwise specified in the Contract, Products shall be of the quality generally offered by Seller to its customers at the time and place of the delivery. ANY IMPLIED CONDITIONS AND WARRANTIES, INCLUDING THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ARE EXPRESSLY EXCLUDED AND DISCLAIMED. Buyer, having greater knowledge than Seller of his own requirements, shall have the sole responsibility for the prior selection of the particular grade(s) and acceptance thereof.
5.2 Products delivered under the Contract shall be segregated from Product(s) already on board the receiving Vessel. Any consequences arising from commingling Products aboard the Vessel shall remain the joint and several responsibility of the receiving Vessel and the Buyer. In any event, the Seller shall not be responsible for any on-board safety or storage failure that may affect the delivery as requested and shall have the right to recover from Buyer any loss, damage or expenses incurred as a result of such failures.
5.3 The Seller can in no circumstances be held responsible for any consequences of the misuse or defective application of the Products if caused by lack of information or misinformation given by the Buyer on the use or application of the Products.
5.4 In order to determine the quality of the Product delivered, Seller shall be entitled to draw or cause to be drawn, samples of each delivery from Supplier's designated facilities, and to have them sealed. Where reasonably practical, the samples shall be taken in accordance with ISO-8217, but shall otherwise be taken from a point and in a manner chosen by Seller or its representative. At least one of the samples will be handed to the master of the Vessel which has received the delivery. Any remaining samples will be retained by Seller. In the event of a quality complaint, Seller shall seek to agree with Buyer upon the appointment of an independent inspector to undertake an analysis of one of the retained samples. Method ISO- 4259, which covers the use of precision data in the interpretation of test results, shall be used in all cases of dispute. In instances where MARPOL Annex VI applies to the supply effected, the sample accompanying the Bunker Delivery Note pursuant to Regulation 18(6) of MARPOL Annex VI should, where reasonably practical, be drawn in accordance with Resolution MEPC.96(47).
5.5 If, after 21 calendar days from the date that Buyer registers a quality complaint to Seller, no agreement has been reached between the two parties, Seller reserves the right to have one of its retained sealed samples independently analyzed and for the results to be final and binding upon both parties. The cost of any analysis shall be borne by Buyer, unless the complaint as to the quality is shown to be justified.
5.6 Unless otherwise agreed to in writing by Seller, only samples provided by Seller to Buyer at the time of delivery shall be deemed representative of the Product delivered.
5.7 In any event, the Seller's obligation hereunder shall not exceed the direct expenses incurred for the removal and replacement of the Products, and shall not include any consequential or indirect damages, including, without limitation, demurrage claims, loss of opportunity or loss of profit. Should the Buyer remove the Products without the prior consent of the Seller, all such costs incurred in doing so shall be for Buyer's account.

6. Quantity
6.1 All quantities referred to in the Contract are understood to be approximate with a margin of 10 per cent more or less at Seller's option.
6.2 Except where government regulations or local authorities determine otherwise, the quantity of Product shall be determined from the official gauge/sounding of the delivering barge, road wagon, or rail tank car, delivery note for drum deliveries, or by gauging in Supplier's shore tank or by Supplier's flow meter, at Seller's election. Adjustment in volume owing to difference in temperature shall be made in accordance

with API/ASTM+IP petroleum measurement standards for generalized Products (table 6B, 24B, or 54B depending on port location). In the measurement of marine fuel, Seller shall make allowances for all water and non-petroleum sediment in excess of one percent (1%), or any other percentage mutually agreed to between Buyer and Seller. Buyer may be present or represented by a properly accredited agent when such measurements are taken. If Buyer is not present or represented, then Seller's determination of quantities shall be deemed to be correct and conclusive.

7. Deliveries and Risk

7.1 Vessels shall be supplied as promptly as circumstances permit. Any supply date within the Contract is not guaranteed, and time shall not be of the essence in respect thereof. Seller shall not be liable for demurrage or for any losses due to congestion at Supplier's storage or delivery facilities or due to any prior commitment of available transportation.

7.2 The Seller's obligation to make any delivery hereunder is subject to the availability to the Seller at the port at which delivery is requested of the particular grade of Products requested by the Buyer. If, as a result of any events, matters or things referred to in Clause 15 hereof, or any, other foreseeable or unforeseeable event, including contractual changes relating to the supply of crude oil and/or petroleum products from which the Products of the type to be sold hereunder are derived, supplies of the Products are curtailed, or are available to the Seller only under conditions which, in Seller's sole judgment are deemed unacceptable, the Seller may allocate, on any fair and reasonable basis according to its own discretion, its available supplies of Products to meet its own requirements and those of its subsidiaries and affiliated companies and other customers. The Seller shall not be required to increase supplies from some other source or supply, or to purchase Products to replace the supplies so curtailed, or to make up deliveries omitted during the period of disruption, nor will the term of the Contract be extended due to any event occurring under this Clause of Clause 15 herein.

7.3 If Buyer causes delays to Supplier's delivery facilities in the receiving of Products, Buyer shall be liable to reimburse Seller for any and all costs incurred.

7.4 Seller shall not be required to deliver Products into any vessel's tanks which are not normally used for such Product.

7.5 If any government or local port license or permit is required for deliveries hereunder, each party must comply as applicable. In case of Buyer's failure to comply, Seller shall not be required to deliver, and will be entitled to recover all costs and consequences related thereto from Buyer.

7.6 Delivery shall be made either from a shore terminal or by barge or by any other accredited methods of delivery, where such deliveries are available from time to time. In the case of more than one method of delivery being available, Seller shall at its sole discretion select one, providing that it does not breach any other conditions of the Contract.

7.7 Buyer shall provide free of cost a clear safe berth, position or anchorage alongside the vessel receiving lines. Seller shall be under no obligation to make deliveries when in its sole opinion a clear and safe berth, position or anchorage is not available. Buyer shall indemnify Seller against all claims and expenses for any loss, damage, demurrage or delay caused to Seller's delivery equipment, irrespective of whether the circumstance causing the loss, damage, demurrage or delay was within the control of Buyer or his local representative.

7.8 The Buyer shall make all connections and disconnections between pipelines or delivery hoses and Vessel's intake lines and shall render all other necessary assistance and provide sufficient tankage and equipment to receive promptly all deliveries hereunder. In no case shall the Seller be liable for any damage or delay resulting from causes beyond its control or avoidable by care on the part of the Buyer or the Vessel.

7.9 Delivery shall be deemed to have been completed and risk transferred as the Product passes the flange connecting the pipelines or delivery hoses with the intake lines of the Vessel at which point Seller's responsibility shall cease. Products supplied by other methods shall be considered to be delivered when passing the Vessel's rail. Buyer shall assume all risks including loss, damage, deterioration, depreciation, evaporation, shrinkage as to the Products so delivered.
7.10 Upon completion of the delivery to the Vessel, the master, or authorized representative of Buyer shall confirm the delivery by signing a receipt, provided by Seller or his contractor at that time. Seller shall not be deemed to have any constructive knowledge of the authority or lack of authority of any purported local representative of Buyer and shall be under no duty to verify authority of such purported representative. The acceptance of the aforesaid signed receipt in good faith by Seller shall bind Buyer.
7.11 If Buyer fails to take delivery of the product or any part thereof within a reasonable time from the agreed supply time, Seller shall be entitled at Buyer's risk and expense,

either to transport the product back to storage or to sell in a downgraded form at a market price without prejudice to Seller's other rights under this Contract for damages. Seller shall at its sole discretion determine what constitutes a reasonable time to terminate the delivery.
7.12 Delivery shall be made during normal working hours. Unless otherwise agreed deliveries outside normal working hours shall be subject to additional costs which shall be borne by Buyer.
7.13 Seller may elect to discontinue operations at any delivery location for any reason without obligation to Buyer.
7.14 Products and Services delivered under a Contract shall be made not only on the account of Buyer but also on the account of the receiving Vessel. The Buyer warrants that the Vessel's owner has given the Buyer express authority to purchase the Products. The Buyer further warrants that the Seller has the right to assert and enforce a lien in accordance with Clause 18.1 herein against the receiving Vessel or any sister or associated Vessel for the amount of the Products and Services provided, plus without limitation, contractual interest pursuant to Clause 9.4 herein and any other expenses related to enforcement of the lien. The Buyer expressly warrants that he has the authority of the Vessel's owner to pledge the Vessel's credit as aforesaid. The Vessel is ultimately responsible for the debt incurred through the Contract. The Supplier's right to apply and enforce a maritime lien will not be altered, waived or impaired by the application to the Bunker Delivery Note of any disclaimer stamp.

8. Claims
8.1 Any claims made by Buyer regarding shortages in quantity must be made in writing to Seller at the time and place of delivery. Seller has the option to leave delivery equipment connected to the vessel at Buyer's expense until a quantity dispute has been resolved to Seller's satisfaction.
8.2 Any claims made by Buyer with regard to quality must be made in writing to Seller immediately upon detection of the alleged defect, and in any event no later than within fourteen (14) calendar days from receipt of the Product. The foregoing preliminary notice shall be followed by a formal written notice of claim, within thirty (30) calendar days from receipt of the product, to Seller containing all details necessary to allow evaluation of the claim.
8.3 In any event, should Buyer fail to present a claim in writing to the Seller as to quantity or quality within thirty (30) calendar days of the date of receipt of the Product, any

such claim by the Buyer shall be deemed to be waived and absolutely time-barred. The Buyer's submission of any claim hereunder does not relieve it of the responsibility to make payment in full for the Products supplied by the Seller. This provision shall survive a termination of the Contract.

9. Payment

9.1 Irrevocable payment shall be made by Buyer in full, as directed by Seller, within the time specified in the Contract. Timely payment is of the essence. Seller shall be absolutely entitled to the payment in full without discount, reduction, counterclaim or set off (whether legal or equitable) and free of bank charges, which shall be made to Seller's bank account. Should the due date for payment fall on a Saturday, Sunday or Public Holiday, then payment should be received by the previous working day.

9.2 When paying, Buyer shall not be entitled without Seller's consent in writing, to offset any amounts for claims against seller, whether or not these claims are connected, and whether or not they arise out of the contract.

9.3 Unless otherwise agreed, payment shall be made by irrevocable telegraphic transfer. Delivery documents shall be provided to Buyer, wherever possible, however payment shall not be conditional upon receipt of such documents, unless specifically agreed at the time of concluding the Contract.

9.4 Overdue payments shall be subject to an interest charge of 2% per thirty (30) calendar day period compounded, or the maximum rate permitted under applicable law, running from the due date of payment.

9.5 All payments received by the Seller from the Buyer, notwithstanding any specific request to the contrary, shall be applied in the following order in diminution or extinction of:

a) Contractual interest

b) Financial charges incurred by Seller as a result of Buyer's late payment (if any)

c) The principal sum in respect of Products/Services supplied by Seller to the Buyer

9.6 Should Products and/or Services be ordered by a broker or agent then such broker or agent as well as Buyer shall be bound to and be liable for all obligations as fully and as completely as if it were itself a Buyer whether such principal be disclosed or undisclosed and whether or not such broker or agent purports to contract as brokers or agents only, but in all such cases the said broker or agent shall not have any rights against Seller.

9.7 If Buyer is in default of the full payment, or if its financial condition, or that of a subsidiary, parent, associate or affiliate, in Seller's sole opinion becomes impaired, or if proceedings in bankruptcy or insolvency are instituted by and/or against Buyer, its subsidiary, parent, associate, related or affiliate company of the Buyer, or in the case of liquidation or dissolution of Buyer, or of a subsidiary, parent, associate, related or affiliate company of the Buyer, or any other reason at Seller's sole discretion, any and all postponed or deferred payments including interest thereon, shall become immediately due and payable and Seller reserves the right to offset the same against any debts due to Buyer or its parent or its subsidiary companies, affiliates, associated or related companies. Exercise of any such rights shall be without prejudice to Seller's right to recover damages or losses sustained and resulting from any default by Buyer, and Seller shall have the right to suspend/and to cancel deliveries hereunder.

10. Notice

10.1 Buyer shall give Seller directly, or through Buyer's agent at least 72 hours notice (Saturday, Sunday and local holidays excluded) of vessel's readiness to receive delivery and exact quantity required to enable Seller to make necessary arrangements for the delivery.

10.2 Buyer shall give Seller final notice of requirement directly or through Buyer's agent at

least 48 hours (Saturday, Sunday and local holidays excluded) before loading marine fuels into barge or other accredited methods of transportation.

11. The Vessel and The Environment

11.1 It shall be the sole responsibility of Buyer to comply, and advise its personnel, agents and/or customers to comply, both during and after delivery, with all health and safety requirements and all environmental regulations and legislation, both national and international, applicable to the Products supplied. Seller accepts no responsibility for any consequences arising from failure to comply with such health and safety requirements or environmental regulations and legislation.. Buyer acknowledges familiarity with the hazards inherent in the nature of any petroleum Products, and shall protect, indemnify and hold Seller harmless against any claims or liability incurred as a result of Buyer, or any user of the Products, or its customers, failing to comply with the relevant health and safety requirements or environmental regulations and legislation

11.2 Without prejudice to Clause 7.9 herein, in the event of any leakage, spillage, overflow of Product causing or likely to cause pollution occurring at any stage, Buyer shall, regardless as to whether Buyer or Seller is responsible, immediately take such action as is necessary to remove the Product and mitigate the effects of such leakage, spillage or overflow.Failing such prompt action, the Buyer (who hereby warrants that they have been authorized by the Vessel's owners) authorizes Seller to take whatever measures Seller deems fit to effect clean-up at the Buyer's expense and on the Buyer's behalf and the Buyer shall cooperate fully with the Seller and lend all assistance required in the cleanup operation. The Buyer shall indemnify and hold Seller and/or Supplier harmless against any claims or liability, expenses, damages, costs, fines and penalties arising out of or in connection with any leakage, spillage or overflow unless such leakage, spillage or overflow shall be proven to be wholly caused by Seller's gross negligence. The Buyer shall also give, or cause to be given, to the Seller all such documents and other information concerning any leakage, spillage or overflow, or any program for the prevention thereof, or which are requested by the Seller, or required by law or regulation applicable at the time and place where delivery of the Products to the Vessel takes place.

11.3 Buyer warrants that the vessel at all material times will be in compliance with all national and international regulations. Buyer also warrants that the Vessel, her main engine, her auxiliary engines and all other parts, equipment, and machinery, are being operated in accordance with the manufacturer's specifications, instructions and guidelines. The Buyer further warrants that the Product to be supplied to the Vessel is suitable for the Vessel, her parts, her equipment and machinery as set out in the manufacturer's specifications, instructions and guidelines. It shall be the responsibility of the Master of the Vessel to notify Seller of any special conditions, difficulties, peculiarities, deficiencies or defects with respect to the Vessel or any part thereof, which might adversely affect the delivery of Product. Seller has the right to refuse to deliver the product to the Vessel if it is deemed probable in Seller's sole discretion that such delivery will result in adverse consequences of any kind whatsoever.

12. Assignments

12.1 Seller may assign/transfer any/all all of its right and obligations under the Contract. Buyer shall not assign/transfer any/all of its right under the Contract, without written consent of the Seller.

13. Indemnity

13.1 Without prejudice to Clauses 3.6, 11.1 and 11.2 herein, the Buyer shall defend, indemnify

and hold Seller harmless with respect to any and all liability, loss, claims, expenses, or damage whatsoever that the Seller may suffer or incur by reason of, or in any way connected with, the fault or default of Buyer, its employees, servants, officers, or crew of the Vessel, agents and representatives in the purchase of, receipt, use, storage, handling or transportation of the Products.

14. Liability and Consequential Damages

14.1 The Seller and/or Supplier shall not be liable for any special, indirect, consequential, punitive or exemplary damage of any kind including but not limited to loss of prospective profits, anticipated cost savings, contracts or financial or economic loss, claims in tort including negligence of the Seller and/or Supplier, its agents, servants or sub-contractors, arising out of, or in connection with, the performance or nonperformance under the Contract. In any event, the liability of the Seller and/or Supplier shall be limited to the price of the Products supplied under the Contract.

15. Force Majeure

15.1 Neither Buyer nor Seller shall be responsible for damages caused by delays, failure to perform in whole or in part any obligation hereunder (other than the payment of money), or non-compliance with any of the terms hereof when such delay, failure or non-compliance is due to or results from causes beyond the reasonable control of the affected party, including without limitation acts of God, fires, flood, adverse weather, perils of the sea, war (declared or undeclared), terrorist actions (threatened or actual), embargoes, accidents, strikes, labor disputes, failure of, or shortage of vessels, or barge services normally available to Seller, breakdown of or damage to, or shortage in facilities used for production, refining or transportation of Products, acts in compliance with requests of any government authority or person purporting to act on behalf thereof, or any similar causes. Notwithstanding the provisions of this clause, the Buyer shall not be relieved of any obligation to make payments for all sums due hereunder.

16. Breach

16.1 Seller may terminate the Contract in whole or in part, at its own discretion upon the breach of any provision hereof by Buyer.
16.2 Seller reserves the right to recover from Buyer all damages and costs (including but not limited to loss of profit) resulting from any breach of the Contract.

17. Title

17.1 The products shall remain the Seller's property until Buyer has paid for them in full. Until that time, Buyer shall hold them as bailee, store them in such a way that they can be identified as Seller's property, and keep them separate from Buyer's own property and the property of any other person. Although the Products remain the Seller's property until paid for, they shall be at Buyer's risk from the time of delivery and Buyer shall insure them against loss or damage accordingly and in the event of such loss or damage it shall hold the proceeds of such insurance on behalf of Seller as trustee of Seller.
17.2 Buyer's rights to possession of the Products shall cease if:
a) Buyer has not paid for the Products in full by the expiry of any credit period allowed by the Contract; or
b) Buyer is declared bankrupt or makes any proposal to his creditors for a reorganization or other voluntary arrangement; or
c) A receiver, liquidator or administrator is appointed in respect of Buyer's business.
17.3 Upon cessation of Buyer's right to possession of the Products in accordance with clause 17.2, the Buyer shall at his own expense make the Products available to the Seller and

allow Seller to repossess them.
17.4 Buyer hereby grants Seller, his agents and employees an irrevocable license to enter any premises where the Products are stored in order to repossess them at any time.

18. Governing Law
18.1 This Agreement is subject to General Maritime Law of the United States of America, place of jurisdiction the United States of America, or any other law and jurisdiction as specified in the Contract. However, nothing in this clause shall preclude Seller, in event of a breach of this Agreement by the Buyer, from taking any such action or actions as it shall in its absolute discretion consider necessary to enforce, safeguard or secure its rights under this Agreement in any court or tribunal of any state or country, including, but not limited to the action to enforce its rights of lien against ships, the existence and procedure of enforcement of such right of lien being determined by the local law of the place where enforcement is sought, or to otherwise obtain security by seizure, attachment or arrest of assets for any amount(s) owed to Seller.

Bilag 2 – OW Bunkers T&C

OW BUNKER GROUP

Terms and Conditions of sale for Marine Bunkers
Edition 2013

A. GENERAL INTRODUCTION

A.1 This is a statement of the terms and conditions according to which the International O.W. Bunker Group (hereinafter called "OWB") will sell marine bunkers.
A.2 These conditions apply to all offers, quotations, orders, agreements, services and all subsequent contracts of whatever nature, except where otherwise is expressly agreed in writing by OWB.
A.3 General trading conditions of another party will not apply, unless expressly accepted in writing by OWB.
A.4 In the case that, for whatever reason, one or more of the (sub)clauses of these general conditions are invalid, the other (sub)clauses hereof shall remain valid and be binding upon the parties.

B. DEFINITIONS

B.1 Throughout this document the following definitions shall apply:
"Seller" means OWB; any office, branch office, affiliate or associate of the OWB Group; being the legal entity within the OWB Group, whose name is included in the Order Confirmation, sent to the Buyer.
"Buyer" means the vessel supplied and jointly and severally her Master, Owners, Managers/Operators, Disponent Owners, Time Charterers, Bareboat Charterers and Charterers or any party requesting offers or quotations for or ordering Bunkers and/or Services and any party on whose behalf the said offers, quotations, orders and subsequent agreements or contracts have been made;
"Bunkers" means the commercial grades of bunker oils as generally offered to the Seller's customers for similar use at the time and place of delivery and/or services connected thereto;
"Owner" means the registered Owner, Manager or Bareboat Charterer of the vessel;
"Vessel" means the Buyer's Vessel, Ship, Barge or Off-Shore Unit that receives the supply/bunkers; either as end-user or as transfer unit to a third party;
''Nomination'' means the written request/requirement by the Buyer to the Seller, for the supply of the Bunkers;
''Order Confirmation'' means the written confirmation as issued by the Seller and forwarded to the Buyer to conclude the conclusion of the negotiated sale/purchase of the Bunkers. In case of conflict between the Nomination and the Order Confirmation, unless the Seller otherwise agrees in writing, the wording and content of the Order Confirmation is deemed contain the prevailing terms of the Agreement;
''Agreement'' means the concluded terms for the sale/purchase of the Bunkers;
''Supplier'' means any party instructed by or on behalf of the Seller to supply or deliver the Bunkers;
''GTC'' means these General Terms and Conditions which shall govern the contractual regulations between the Seller and the Buyer
''BDR'' means the Bunker Delivery Receipt, being the document(s) which is/are signed by the Buyer's representative(s) at the place of the supply of the Bunkers to the Vessel, evidencing the quality and quantity of the Bunkers supplied to and received by the Vessel.

C. OFFERS, QUOTATIONS AND PRICES

C.1 An Agreement shall only be concluded and binding on the Seller when the Seller sends the Order Confirmation to the Buyer. Each Order Confirmation shall incorporate these GTC by reference so that the GTC are considered a part of the Confirmation.

C.2 Agreements entered into via brokers, or any other authorised representative on behalf of the Seller, shall only bind the Seller upon the Sellers' broker or other authorised representative sending the Order Confirmation to the Buyer or the Buyer's broker as the case may be.
C.3 The Seller's offer is based on the applicable taxes, duties, costs, charges and price level of components for Bunkers existing at the time of the conclusion of the Agreement. Any later or additional tax, assessment, duty or other charge of whatever nature and however named, or any increase of components for Bunkers or any additional costs borne by the Seller whatsoever caused by any change in the Seller's contemplated source of supply or otherwise, coming into existence after the Agreement has been concluded, shall be added to the agreed purchase price, provided that the Seller shall give the Buyer prior notice of this effect within a reasonable (under the prevailing circumstances) time after the Seller becoming aware of the relevant circumstances.
C.4 All prices and/or tariffs are exclusive VAT, unless specifically stated otherwise. Any VAT or other charge and/or tax applicable and whenever imposed, shall be promptly paid by the Buyer, and unless otherwise agreed in writing all supplies are quoted and invoiced based on quantity calculated quantity in metric tons in vacuum.
C.5 If the party requesting Bunkers is not the Owner of the Vessel, the Seller shall have the right (but will not be obliged) to insist as a precondition of sale that a payment guarantee is provided by the Owner. The Seller shall have the right (but will not be obliged) to cancel any agreement with the Buyer at any time, if such payment guarantee is not received upon request thereof from the Seller to the Owner. The Seller's decision to forego obtaining a payment guarantee under this Clause C.5 shall have no effect on Seller's right to a lien on the Vessel for any Bunkers supplied under this Agreement.
C.6 The Buyer warrants that it is authorized as agent to order Bunkers for the Vessel, and that the Seller has a lien on the Vessel for any Bunkers supplied under this Agreement. If the party requesting Bunkers is not the Owner of the Vessel, Buyer assumes the sole responsibility for communicating the terms and conditions of this Agreement to the Owner of the Vessel prior to the date of delivery.
C.7 If at any time before the delivery the financial standing of the Buyer appears to the Seller (in its absolute discretion) to have become impaired or unsatisfactory, the Seller may require cash payment or security to be provided by the Buyer prior to delivery, failing which the Seller may cancel the delivery without any liability on the part of the latter or its subcontractors.

D. SPECIFICATIONS (QUALITY – QUANTITY)

D.1 The Buyer assumes the sole responsibility for the choice of nominating the quantity and quality of Bunkers and determine (if applicable) potential compatibility with any Bunkers already on board the Vessel. The Buyer also assumes sole responsibility for the selection and fitness of its choice of Bunkers for any particular use or purpose, and the Seller shall assume no responsibility whatsoever for the compliance or fitness of the Bunkers for a specific type of engine or equipment which the Buyer may or may not have agreed upon in any C/P (Charterparty) term or otherwise. This includes but is not limited to the quality, sulphur content and any other specific characteristics of the Bunkers whatsoever. Any and all warranties regarding the satisfactory quality, merchantability, fitness for purpose, description or otherwise, are hereby excluded and disclaimed.
Where specifications designate a maximum value, no minimum value is guaranteed unless expressly stated in the Order Confirmation, and conversely where minimum values are provided in a specification, no maximum values are guaranteed unless expressly stated in the Order Confirmation.
D.2 The quality and quantity shall be as agreed between the Seller and the Buyer and shall correspond to the Seller's Order Confirmation. Unless otherwise agreed in writing the Bunkers are delivered and sold based on metric tons in vacuum.
D.3 Where standard specifications are being given or referred to, tolerances in accordance with ISO 4259 in respect of Reproducibility/Repeatability in quality are to be accepted without compensation or other consequences whatsoever.
D.4 In respect of the quantity agreed upon the Seller shall be at liberty to provide, and the Buyer shall accept a variation of 5% from the agreed quantity, with no other consequence than a similar variation to the corresponding invoice from the Seller.

D.5 Information regarding the typical characteristics of the Bunkers at any delivery location shall only be indicative of the Bunkers that have been made available at that location and shall not form a part of the specification of the Bunkers to be delivered. All grades of produce may contain petroleum industry allowed bio-derived components.

E. MEASUREMENTS – NON CLAUSING OF THE BDR(S)

E.1 The quantities of bunkers shall be determined only from the official gauge or meter of the bunkering barge, tank truck or of the shore tank in case of delivery ex wharf.
E.2 The Buyer's representative shall together with the Seller's representative measure and verify the quantities of Bunkers delivered from the tank(s) from which the delivery is made. When supplied by bunkering barge/tanker the particular barge/tanker will present its tank calibration and ullage sounding records, which are agreed to be the sole valid and binding document(s) to determine the quantity or quantities supplied. Quantities calculated from the Receiving Vessel's soundings shall not be considered.
E.3 Should the Buyer's representative fail or decline to verify the quantities, the measurements of quantities made by the Seller or the Supplier shall be final, conclusive and binding and the Buyer shall be deemed to have waived any and all claims in regard to any variance.
E.4 The Buyer expressly undertakes not to make any endorsement, complaint/ comment (including but without limitation any ''No-lien'' clausing) on the BDR when presented for signature by the Buyer's representative(s), any such insertion shall be invalid and of no effect whatsoever.
E.5 In the event of complaint/comment on the quantity of Bunkers delivered, the Buyer or the Master of the Vessel shall give to the Seller/Supplier a letter of protest separately, followed by a complaint in detail to the Seller, setting out the exact quantity(ies) claimed shortsupplied, and with full supporting vouchers, in writing within 7 (seven) days thereof, failing which, any such claim by the Buyer shall be extinguished as non existent, and the Buyer shall be deemed to have expressly waived any such claim against the Seller/Supplier, the relevant claim being time barred, and the Seller/Supplier's weight and measurements shall be conclusive evidence of the quantity of Bunkers delivered.

F. SAMPLING

F.1 The Supplier shall arrange for four (4) representative samples of each grade of Bunkers to be drawn throughout the entire bunkering operation. The Buyer's representative has the responsibility to witness that such samples are drawn correctly and shall confirm his witnessing thereof and also confirm the proper and correct sealing by signing the labels of the sample bottles.
F.2 In case that dripsampling is not available onboard the barge, tanktruck or shore tank, samples shall be taken as a composite of each tank from which supplies are made, onboard the barge (respectively at the shore tank or tanktruck), divided with 1/3 from each the top, mid and bottom of the tanks.
F.3 The samples shall be securely sealed and provided with labels showing the Vessel's name, identity of delivery facility, product name, delivery date and place and seal number, authenticated with the Vessel's stamp and signed by the Seller's representative and the Master of the Vessel or his representative. The seal numbers shall be inserted into the BDR/Bunker Delivery Receipts, and by signing the BDR both parties agrees to the fact that the samples referred to therein are deemed valid and taken in accordance with the requirements as specified in this Chapter F.
F.4 Two (2) samples shall be retained by the Seller for ninety (90) days after delivery of the Bunkers, or if requested by the Buyer in writing, for as long as the Buyer reasonably required. The other two (2) samples shall be retained by the receiving Vessel, one of which being dedicated as the MARPOL sample.
F.5 In the event of a dispute in regard to the quality of the Bunkers delivered, the samples drawn pursuant to this Chapter F, shall be conclusive and final evidence of the quality of the Bunkers delivered. One, and only one, of the samples retained by the Sellers shall be forwarded to an independent laboratory to perform a set of tests, the result of which is to be made available to both parties. Those test results shall be final and binding upon both Buyer and Seller as to the parameters tested. The parties are to use best endeavours to agree the independent laboratory to perform the tests. If, however, no agreement can be reached on the choice of laboratory

within 3 days of the Buyer being advised of the Seller opting to have the sample tested, the Seller is at liberty to send the sample to a reputable and independent laboratory of its choice for the tests to be conducted, and those test result will be final and binding upon Buyer and Seller as set out above.
F.6 The seal must be breached only in presence of both parties unless one/both in writing have declared that they will not be present, or fails to be present at the appropriate time and place; and both parties shall have the right to appoint independent person(s) or surveyor(s) to witness the seal breaking.
F.7 No samples subsequently taken shall be allowed as (additional) evidence. If any of the seals have been removed or tampered with by an unauthorised person, such sample(s) shall be deemed to have no value as evidence.
F.8 Any eventual samples drawn by Buyer's personnel either during bunkering or at any later date after bunkering shall not be valid as indicator of the quality supplied. The fact that such samples may eventually bear the signature of personnel on board the barge or tank truck or other delivery conveyance shall have no legal significance as such local personnel have no authority to bind Seller to different contractual terms. Seller shall have no liability for claims arising in circumstances where Buyer may have commingled the products on board the Vessel with other fuels.

G. DELIVERY

G.1 The time of delivery, as given by the Seller, has been given as an approximate time, unless it has been otherwise specifically agreed in writing between the parties.
G.2 The time of delivery will only be binding upon the Seller when all information necessary for the Seller to comply with its obligations hereunder, have been properly delivered to the Seller in reasonable time before the delivery. In the event the Nomination addresses a spread of dates for delivery, the Seller has the sole discretion to commence the delivery within any time, day/night/sshinc of these dates, always subject to the circumstances set out below in Clause G.3.
G.3 The Vessel shall under all circumstances be bunkered as promptly as the prevailing circumstances permit, having regard to congestion affecting the delivery facilities of Seller, its Suppliers or Agents and to prior commitments of barges or other delivery means. The Seller and/or the Supplier shall not be liable for any consequences or any time lost due to the Vessel having to wait for berth for bunkering or for completion of bunkering, and unless otherwise agreed in writing, the Seller shall not be obligated to deliver prior to the nominated date or spread of dates. The Seller is not responsible for delays caused by local customs, pilots, port- or other authorities.
G.4 In any case the Buyer, unless otherwise agreed in writing, must give not less than 72 (seventy two) hours approximate notice of readiness of the Vessel for delivery, which is to be followed by 48 (forty eight) hours and 24 (twenty four) hours such notices, where the last notice must also specify the exact place of delivery. All these notices must be given to the Sellers and the Seller's representatives/agents in writing.
G.5 The Seller shall be entitled to deliver the Bunkers by separate part deliveries, in which case each part delivery shall be construed as a separate delivery.
G.6 The Seller shall not be required to deliver any Bunkers if any customs and/or other government permit required for such purpose has not been obtained in due time before the delivery.
G.7 If the Seller at any time for any reason believes that there may be a shortage of supply at any place and that as a result thereof it may be unable to meet the demands of all its customers, the Seller may allocate its available and anticipated quantity/ies of Bunkers among its customers in such a manner as it may determine appropriate in its sole discretion.
G.8 The Vessel shall be accessible at all times to Seller and Supplier and shall be bunkered as promptly as the circumstances permit. The Seller and/or the Supplier shall not be liable for any demurrage paid or incurred by the Buyer or for any loss, damage or delay of the Vessel (consequential and/or liquidating damages included) of any nature whatsoever due to congestion at the loading terminal, prior commitments of available barges or tank trucks or any other reason.
G.9 The Buyer shall ensure that the Vessel provides a free, safe and always afloat and accessible side for the delivery of bunkers and that all necessary assistance as required by the Seller or the Seller's representative is rendered in connection with the delivery. If in the Supplier's opinion clear

and safe berth is unavailable, delivery might be delayed or, in Seller's option, cancelled and all costs related to above will be on account of the Buyer.
G.10 The Vessel shall moor, unmoor, hoist and lower bunkering hose(s) from the barge(s) whenever required by the Seller, Seller's representative or Supplier, free of expenses and in any way as may be requested to assist the barge equipment to a smooth supply. The Buyer shall make and be responsible for all connections and disconnections between the delivery hose(s) and the Vessel's bunker intake manifold/pipe and ensure that the hose(s) are properly secured to the Vessel's manifold prior to commencement of delivery.
During bunkering the Vessel's scuppers must be safely blocked, which blocking must be made by the Vessel's own crew. Furthermore the Vessel must ensure that all pipes and manifolds and receiving tanks are properly checked and ready to receive the bunkers, including but not limited to ensuring proper opening/closing of relevant valves, without any risk for spillages, etc, during the bunkering.
Local further special requirements for receiving bunkers must be followed strictly by the Vessel, whether advised or not by the Seller or the Seller's representative, as it is always the Vessel and the Buyer who remains solely responsible for the knowledge and awareness of such eventual additional requirements for safety reasons.
G.11 In the event that the Vessel is not able to receive the delivery promptly, the Buyer is thereby in default and shall pay damages and/or any reasonable demurrage claim to the barging/supplying facilities and shall indemnify the Seller in each and every respect as a result thereof.
G.12 Delivery shall be deemed completed and all risk and liabilities, including loss, damage, deterioration, depreciation, contamination, evaporation or shrinkage to the Bunkers delivered and responsibility for loss, damage and harm caused by pollution or in any other manner to third parties 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 truck/shore tank.
G.13 If the Buyer for whatever reason is unable or refuses to receive the full quantity ordered, the Seller shall have the right to invoice the Buyer for the loss incurred by having to transport the undelivered Bunkers back to the storage or by having to sell the Bunkers in a degraded form or at a lower price. The Seller may exercise this right without prejudice to the Seller's other rights for damages or otherwise pursuant to these conditions.
G.14 The Vessel shall provide and have appropriate and segregated tanks to receive the contracted quantity of Bunkers; and the Vessel shall always be able to perform its own blending on board if any blending is deemed to be required by the Buyer. The Vessel shall upon delivery test the Bunkers supplied by running her engines or auxiliaries or equipment, for which the Bunkers are supplied, for a minimum of 1 (one) hour to determine that the Bunkers are satisfactory. In the event the Bunkers are not considered satisfactory, the Seller and Supplier are to be notified in writing immediately after such test period has expired. Otherwise, it shall be deemed that the Bunkers were satisfactory and that in any event the Buyer has waived any right to claim in this regard.
G.15 If delivery is required outside normal business hours or on local weekends, Saturday, Sunday, national religious or public holidays the extra expenses incidental to such delivery shall be reimbursed by the Buyer as additional costs.
G.16 In the event the Bunker delivery is made by vessel or barge as a ship-to-ship transfer, any damage caused by contact and/or collision and/or swell and/or other weather or sea related condition or incident, is to be dealt with by the Owners directly with the owners of the units involved, and Seller/Supplier shall not be held nor be responsible for any such damages. If, however, any of the involved units choose to pursue Seller and/or Supplier, Buyer will fully indemnify and hold Seller harmless in relation thereto.
G.17 For safety reasons it is agreed that it is solely the Master of the bunkering barge that determines whether mooring alongside is safe, taking weather, swell and forecasts into consideration. Supplier/Seller not to be held responsible for any delays, demurrages, liquidating damages or similar whatsoever as a result of any eventual delays caused by any decision by the Master of the barge in this connection. Supplies being always performed weather permitting.
G.18 Without prejudice to any other article(s) herein, any and all supply/ies will be based on as per best endeavours only if the receiving Vessel arrives outside the originally agreed time split as per the Order Confirmation forwarded.

H. TITLE

H.1 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. The provisions in this section are without prejudice to such other rights as the Seller may have under the laws of the governing jurisdiction against the Buyer or the Vessel in the event of non-payment.
H.2 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 the propulsion of the Vessel, nor mix, blend, sell, encumber, pledge, alienate, or surrender the Bunkers to any third party or other Vessel.
H.3 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 juridical intervention, without prejudice to all other rights or remedies available to the Seller.
H.4 In the event that the Bunkers have been mixed with other bunkers on board the Vessel, the Seller shall have the right to trace its proprietary interest in the Bunkers into the mixed bunkers and/or a right of lien to such part of the mixed bunkers as corresponds to the quantity or net value of the Bunkers delivered.
H.5 The provisions of this Chapter H do not prejudice or in any way limit the Seller's right to arrest/attach the Vessel and/or sister ship and/or any sister or associate ship and/or other assets of the Buyer (or the Owner of the Vessel or any other party liable), wherever situated in the world, without prior notice.
H.6 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. The Buyer shall furthermore grant a pledge over any other Bunkers present in the respective Vessel, including any mixtures of the delivered Bunkers and other bunkers. Such pledge will be deemed to have been given for any and all claims, of whatever origin and of whatever nature that the Seller may have against the Buyer.
H.7 For the avoidance of doubt, where a mortgagee bank enforces any rights against the Vessel and becomes a mortgagee in possession of the Bunkers then as bailee the mortgage bank is liable to the Seller for fulfilment of the Agreement.

I. PAYMENT – MARITIME LIEN

I.1 Payment for the Bunkers and/or the relevant services and/or charges shall be made by the Buyer as directed by the Seller within the period agreed in writing.
I.2 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).
I.3 (i) If at any time after delivery but before the due date the financial standing of the Buyer appears to the Seller (in its sole discretion) to have become impaired or unsatisfying, the Seller may require immediate full payment of all its invoices due and/or those not yet due, or such security as it shall deem to be satisfactory.
(ii) In the event that the Buyer shall default in making any payment due, the Seller may suspend deliveries of Bunkers until such payment has been made in full (together with default/delay compensation and costs), or the Seller may, in its discretion, elect to treat such default as a serious breach of the Agreement and thereupon terminate the Agreement on whole or in part without prejudice to any claim against the Buyer for damages, including cancellation charges. Such termination or suspension shall not relieve the Buyer of any obligation undertaken by virtue of an Agreement so terminated.
(iii) Where the Seller has extended any kind of credit facility to a group of companies or associated companies, default by any one relevant Buyer in respect to any invoice of the Seller shall give the right to the Seller to cancel all credit arrangements of the entire group or of all the associates, whereupon sub-clauses I.3.(i) and I.3.(ii) shall apply as appropriate.
(iv) Where the Buyer fails to pay timely, the Seller has the right to (without prejudice to its rights to receive default/delay compensation) take all appropriate steps to secure and enforce its claim;

the Seller may also unilaterally cancel any credit arrangements agreed with/extended to the Buyer.
(v) All judicial and extrajudicial costs and expenses, including pre-action costs, fees, expenses and disbursements of the Seller's lawyers/attorneys-at-law, incurred in connection with non payment or delayed payment or by any other breach by the Buyer of these conditions, shall be for the Buyer's account, immediately payable by the latter to the Seller. In case of litigation, the Buyers shall also pay all the relevant expenses to the Seller, including but without limitation all his reasonable attorneys/lawyers' fees, costs and disbursements.
I.4 Payment shall be deemed to have been made on the date of which the Seller has received the full payment and such is available to the Seller. If payment falls due on a non-business day, the payment shall be made on or before the business day nearest to the due date. If the preceding and the succeeding business days are equally near to the due date, then payment shall be made on or before the preceding business day.
I.5 Any delay in payment of the full sum due shall entitle the Seller to interest at, the rate of 3 (three) per cent per month (compounded monthly for each month [or part thereof] of non payment) without prejudice to any rights or remedies available to the Seller. Furthermore the Seller is entitled to charge a delayed payment administration fee of USD 1.50 per mton supplied, or the equivalent thereof in local currency, with a minimum administration fee of USD 350.00 for each delivery made. All reasonable attorneys' fees incurred by Seller in connection with the collection of overdue payments shall be for the sole account of the Buyer.
I.6 Payments made by the Buyer in respect of a supply of Bunkers shall at all times be credited in the following order: (1) costs of any kind or nature, including but not limited to legal costs and attorneys' fees, (2) interest and administrational fee, and (3) invoices in their order of age, also if not yet due, or in Seller's sole discretion to specify a payment to any such invoice Seller considers relevant.
I.7 All costs borne by the Seller in connection with the collection of overdue payments, including those of the Seller's own legal and credit department and, including but not limited to, reasonable attorneys' fees, whether made in or out of court and in general all costs in connection with breach of any agreement by the Buyer, including but not limited to reasonable attorneys' fees, shall be for the sole account of the Buyer.
I.8 The Seller shall at all times, in its absolute discretion, be entitled to require the Buyer to provide the Seller what the Seller deems to be proper security for the performance of all of Buyer's obligations under the Agreement. Failing the immediate provision of such security upon Seller's demand, the Seller shall be entitled to stop any further execution of any agreement(s) between the parties until such time as the Buyer has provided the required security.
I.9 Where Bunkers are supplied to a Vessel, in addition to any other security, the Agreement is entered into and the Goods are supplied upon the faith and credit of the Vessel. It is agreed and acknowledged that the sale of Bunkers to the Buyer and/or their acceptance on the Vessel create a maritime lien over the Vessel for the price of the Bunkers (and all interest and costs payable in respect thereof; including but not limited to the reasonable attorney's fees), such maritime lien afforded to the Seller over the Vessel. In any event any applicable Law shall not prejudice the right of the maritime lien of the Seller afforded hereunder or by any other applicable Law, be it of the place of delivery, or the flag of the Vessel, or the place of jurisdiction and/or an arrest of the Vessel, or otherwise howsoever.
I.10 It is mutually agreed that the Bunkers provided by the Seller to the Buyer under the terms of this Agreement have been ordered by the Buyer in the ordinary course of business between Seller and Buyer. All payments from Buyer to Seller for Bunkers supplied under this Agreement are deemed to have been made in the ordinary course of business between Seller and Buyer, according to these ordinary business terms agreed between them.

J. CLAIMS

J.1 In addition to the obligations referred to in Article E.4 and E.5 herein, any claim in connection with the quantity of the Bunkers delivered must be notified by the Buyer, or the Master of the Vessel, to the Seller or Supplier immediately after completion of delivery in the form of a letter of protest. If the Buyer or the Vessel's Master fails to present such immediate notice of protest to the

Seller or Supplier, such claim shall be deemed to have been waived and shall be absolutely barred for all purposes.
J.2 Always without prejudice to Article G.14 herein, any and all claims concerning the quality of the Bunkers delivered or time consumed for the entire operation, shall be submitted to the Seller in writing within 15 (fifteen) days after delivery with a clear statement as to the nature or the claim(s) along with appropriate supporting documentation, failing which any rights to complain or claim compensation of whatever nature shall be deemed to have been waived and absolutely barred for all purposes.
J.3 The Buyer shall be obliged to make payment in full and fulfil all other obligations in accordance with the terms of the Agreement and these conditions, whether or not it has any claims or complaints. If Buyer submits a claim against Seller with respect to the quality or quantity of the products supplied, the Seller or the Seller's nominated representative shall be entitled to board the Vessel and investigate the Vessel's records, log books, engine logs, etc, and to make copies of any such document the Seller or the Seller's nominated representative may consider necessary for its investigations connected to the case. The Buyer shall allow this, or where Buyer has chartered the Vessel then the Buyer shall obtain authorization from Owner to allow the herein stated steps and to provide full assistance and support by the Vessel's officers and crew in any such manner the Seller or Seller's nominated representative may require. Failure to allow boarding and/or produce required copies of documents and/or lack of full cooperation by the Vessel's officers and crew shall constitute a waiver of the Buyer's claim.
J.4 The Seller shall be allowed, and the Buyer, Owner, Officers and Crew onboard the receiving Vessel shall agree and in any way support and cooperate with Seller's representative, to draw samples from the Vessel's storage tanks, settling tanks and service tank and/or from before and after the Vessel's centrifuges to have extra tests carried out for such samples at independent laboratory.
J.5 In each and every case, any and all claims of the Buyer shall be timebarred unless arbitration/legal proceedings have been commenced/issued at the competent tribunal/court set forth in Chapter P hereof and served within 12 (twelve) months from the date of delivery of the Bunkers, or the date that delivery should have commenced pursuant to the Order Confirmation from the Seller.

K. LIABILITY – LIMIT TO SELLER'S LIABILITY

K.1 The Seller and/or Supplier shall not be liable for damages of whatever nature, including physical injury, nor for delay of delivery of Bunkers or services, no matter whether such damages or delay have been caused by fault or negligence on the side of the Seller. The Seller shall furthermore not be liable for damages or delay as described above when such damages or delay have been caused by the fault or negligence of its personnel, representatives, Supplier or (sub)contractors.
K.2 Liabilities of the Seller for consequential and/or liquidated damages including but not limited to loss of time, loss of cargo or charter cancelling date, loss of income or profit/earnings, are excluded. In any event and notwithstanding anything to the contrary herein, liability of the Seller shall under no circumstances exceed the invoice value of the Bunkers supplied under the relevant agreement to the relevant Vessel.
K.3 The Buyer shall be liable towards the Seller and herewith undertakes to indemnify the Seller for any and all damages and/or costs suffered or otherwise incurred on the Seller due to a breach of contract and/or fault or neglect of the Buyers, its Supplier, agents, Servants, (sub)contractors, representatives, employees and the officers, crews and/or other people whether or not on board of the Vessel(s). The Buyer furthermore undertakes to hold the Seller harmless in case of any third party institutes a claim of whatever kind against the Seller whether direct or indirect relation to any agreement regulated by these terms and conditions. Third party shall mean any other (physical or legal) person/company than the Buyer.
K.4 No servant, supplier or agent of the Seller/Supplier (including independent (sub)contractors from time to time employed by the Seller/Supplier) shall be liable to the Buyer for loss, damage or delay, while acting in the course of or in connection with its employment and/or agency for the Seller. Without prejudice to the above every exemption, limitation, condition and liberty herein

contained, and every right, exemption from or limit to liability, defence or immunity of whatever nature applicable to the Seller or to which it is entitled hereunder shall also be available and shall extend to protect every such servant, representative or agent of the Seller and/or the Supplier acting as aforesaid.

L. EXEMPTIONS AND FORCE MAJEURE

L.1 Neither the Seller nor the Seller's Supplier shall be liable for any loss, claim, damage, delay or demurrage due to any delay or failure in their performance under this Agreement (a) by reason of compliance with any order or request of any government authority, or person purporting to act therefore, or (b) when supply of the Bunkers or any facility of production, manufacture, storage, transportation, distribution or delivery contemplated by the Seller or Supplier is interrupted, delayed by congestion or other event (also see Article G.3 above), or by unavailability of product and/or barge equipment or by inadequate resource for any cause whatsoever which interruption, delay, unavailability or inadequate resources is not within the immediate control of the Seller or the Supplier, including (without limitation) if such is caused wholly or partly by labour disputes, strikes, stoppages, lock-out, governmental intervention, wars, civil commotion, riot, quarantine, fire flood, earthquake, accident, storm, swell, ice, adverse weather or any act of God. Neither the Seller nor the Supplier shall be required to remove any such cause or replace any affected source or supply or facility if doing so shall involve additional expense or a deviation from the Seller's or the Supplier's normal practices. Neither the Seller, nor the Supplier shall be required to make any deliveries which fail in whole or in part as a result of the causes set out in this Article at any later time.
L.2 If the Buyer exercises reasonable diligence, the Buyer shall not be liable for failure to receive any particular delivery if prevented therefrom by force majeure. The Buyer shall indemnify the Seller or the Seller's supplier for any damage caused by the Buyer, the Buyer's agent or employees in connection with deliveries hereunder.
L.3 Declaration of Force Majeure shall be given without unduly delay once such event(s) have come to the knowledge of the respective party declaring same. However, under no circumstances and for no reason whatsoever, can Force Majeure entitle the Buyer not to pay promptly any invoice of the Seller.
L.3 In the event that the Seller, as a result of force majeure, can only deliver a superior grade of bunkers, the Seller is entitled to offer the said grade, and the Buyer must accept delivery thereof and pay the applicable price.
L.4 (a) 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.
(b) Without prejudice or limitation to the generality of the foregoing, in the event that the third party terms include:
(i) A shorter time limit for the doing of any act, or the making of any claim, then such shorter time limit shall be incorporated into these terms and conditions.
(ii) Any additional exclusion of liability clause, then same shall be incorporated mutatis mutandis into these.
(ii) A different law and/or forum selection for disputes to be determined, then such law selection and/or forum shall be incorporated into these terms and conditions. (c) It is acknowledged and agreed that the buyer shall not have any rights against the Seller which are greater or more extensive than the rights of the supplier against the aforesaid Third Party.

M. BREACH/CANCELLATION

M.1 Without prejudice to any other remedies and rights, the Seller shall have the option immediately to cancel the Agreement in full or in part, or to store or procure the storage of the Bunkers, in whole or in part, for the account and risk of the Buyer and to charge the Buyer the expenses thereby incurred, or to hold the Buyer fully to the agreement, or take any other measures which

the Seller deems appropriate, without prejudice to its rights of indemnification, without any liability on the side of the Seller, in any one of (but not limited to) the following cases:
a) when the Buyer, for whatever reason, fails to accept the Bunkers
in part or in full at the place and time designated for delivery;
b) when the Buyer fails in part or in full to comply with its obligations to pay any amount due to the Seller and/or provide security as set out in these GTC;
c) when, before the date of delivery, it is apparent in the opinion of the Seller that the financial position of the Buyer entails a risk to the Seller;
d) when, in case of force majeure, the Seller is of the opinion that the execution of the agreement should be cancelled.
M.2 The Seller may terminate any Agreement with the Buyer in whole or in part, in
its full discretion, upon the breach of any provisions hereof by the Buyer or in the event that the Buyer fails to make or suspends payment, ceases to carry on business, makes an arrangement with its creditors or undergoes any form of bankruptcy, administration, re-organisation or asset rearrangement.
M.3 The Seller has the option to immediately cancel the Agreement for the account and risk of the Buyer if at any time the Seller, in its sole discretion, has reasonable grounds to believe that:
a) The Vessel; or
b) The Charterer of the Vessel; or
c) The fully or partly Owner(s) of the Vessel; or
d) Any officers of the Vessel; or
e) The Operator and/or Manager of the Vessel; or
f) Any other person or entity in any way related to the Agreement or delivery is/are
1) Iranian(s); or
2) Related in any way to Iran or Iranians; or
3) Listed on the US OFAC Specially Designated Nationals List; or
4) Covered by any US, UN- and/or EU sanctions; or
5) Covered by any sanctions of any other jurisdiction and/or administration.

Under no circumstances can the Seller be held liable for any loss, delays, claims or damages of whatever kind suffered by the Buyer due to a cancellation under this Article.
The Buyer must inform the Seller immediately the Buyer becomes aware of or has reasons to believe that any of the above items a) to f) in combination with any of the above items 1) to 5) are fulfilled/apply.
Should the Buyer breach its obligation to inform the Seller, the Buyer shall fully indemnify and keep the Seller harmless for any damage or loss caused by such breach, including consequential or liquidated damages.
M.4 The Buyer acknowledges that any agreements with the Seller and any actions related to such agreements as well as any interaction with third parties related to such agreements are covered by certain anticorruption laws and regulations which can include any anticorruption law, including but not limited to the U.S. Foreign Corrupt Practices Act ("FCPA"), and the UK Bribery Act. Therefore, the Buyer declare to comply with all applicable anticorruption laws and regulations and agrees that the Buyer has not, and will not, offer, promise, pay, or authorize the payment of any money or anything of value, or take any action in furtherance of such a payment, whether by direct or indirect means, to any public official or private individual to influence the decision of such person in the performance of his duties to a government or to his company. Any breach of this clause will void the related Agreement and in the sole discretion of the Buyer any other Agreement between the parties, making any claims for payment, delivery or any other obligation of the Seller under this Agreement void. The Buyer is liable for all and any costs or losses incurred by the Seller due to such breach and/or an Agreement becoming void as a consequence.

N. SPILLAGE, ENVIRONMENTAL PROTECTION

N.1 If a spill occurs while the Bunkers are being delivered, the Buyer shall promptly take such action as is necessary to remove the spilled Bunkers and mitigate the effects of such spill. Without prejudice to the generality of the foregoing the Seller is hereby authorised by the Buyer in the absolute discretion

of the Seller, but at the expense of the Buyer, to take such measures and incur such expenses (whether by employing its own resources or by contraction with others) as are necessary in the judgment of the Seller to remove the spilled Bunkers and mitigate the effects of such spill. The Buyer shall cooperate and render such assistance as is required by the Seller in the course of the action. All expenses, claims, costs, losses, damages, liability and penalties arising from spills shall be borne by the party that caused the spill by a negligent act or omission. If both parties have acted negligently, all expenses, claims, losses, damages, liability and penalties, shall be divided between the parties in accordance with the respective degree of negligence. The burden of proof to show the Seller's negligence shall be on the Buyer. The Buyer shall give the Seller all documents and other information concerning any spill or any programme for the prevention thereof that is required by the Seller, or is required by law or regulation applicable at the time and place of delivery.

O. DELAYS AND CANCELLATIONS

O.1 Notwithstanding anything else to the contrary herein, and without prejudice to any rights or remedies otherwise available to the Seller, the Buyer, by its acceptance of these conditions, expressly agrees that Seller has the sole discretion to cancel or to adjust prices in the event the Vessel is suffering a delay exceeding 24 hours from the (last) nomination date.

O.2 If the Buyer for whatever reason (including circumstances entirely outside Buyer's control) cancels the Agreement, where Order Confirmation has been sent by Seller, the Buyer shall be liable for any and all losses suffered and liabilities incurred by the Seller and/or the Supplier as a result of such cancellation, including, but not limited to, barge costs, re-storing of the Bunkers, and hedging costs, and also in Seller's sole option any difference between the contract price of the undelivered product and the amount received by the Seller upon resale to another party or, if another buyer cannot be found, any market diminution in the value of the product as reasonably determined from available market indexes. These losses and liabilities shall be indemnified by a minimum amount of USD 4,000 by way of agreed minimum liquidated damages, and shall be indemnified in full if they in total exceed USD 4,000.

P. LAW AND JURISDICTION

P.1 This Agreement shall be governed and construed in accordance with English law.

The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) shall not apply.

Except for circumstance referred to in Clause P.5 below all disputes arising in connection with this Agreement or any agreement relating hereto, save where the Seller decides otherwise in its sole discretion, shall be finally settled by arbitration in London, England in accordance with the Arbitration Act 1996 (or any subsequent amendment).

P.2 In the event that the Seller determines to refer any dispute to arbitration it shall be referred to a tribunal of three arbitrators consisting of one arbitrator to be appointed by the Seller, one by the Buyer, and one by the two arbitrators already appointed. Each member of the tribunal shall be a full member of The London Maritime Arbitrators Association (the ''LLMA''). Either party may call for Arbitration by service of written notice, specifying the name and address of the arbitrator appointed and a brief description of the dispute(s) or difference(s) to be the subject or the Arbitration. If the other party does not within 14 days serve notice of appointment of an arbitrator to arbitrate the dispute(s) or difference(s), then the first moving party shall have the right without further notice to appoint its own arbitrator as sole arbitrator and shall subsequently advise the other party accordingly. The award of the sole arbitrator shall be binding on both parties as if he had been appointed by agreement. Provided each party appointed their own arbitrator then these two arbitrators shall jointly appoint the third arbitrator. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either party may apply to the English courts for the appointment of a third arbitrator.

Any disputes to be referred to Arbitration are to be determined in accordance with the current LMAA terms unless the parties agree otherwise.

P.3 Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

P.4 In cases where neither the claim nor any counterclaim exceeds the amount of USD 100,000 (or such other sum as the parties may agree) the Arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

P.5 The General Maritime Law of the United States shall always apply with respect to the existence of a maritime lien, regardless of the country in which Seller takes legal action. Seller shall be entitled to assert its rights of lien or attachment or other rights, whether in law, in equity or otherwise, in any jurisdiction where the Vessel may be found.

Without prejudice to any other Clause herein any disputes and/or claims arising in connection with these conditions and/or any Agreement governed by them, any dispute and/or claim arisen in connection with a Vessel detained by Seller at any port, place or anchorage within the United States shall be submitted to the United States District Court for the Southern District of New York.

P.6 If any procedure of any nature whatsoever is instituted under Clause P.5 above, in connection with any controversy arising out of this Agreement or to interpret or enforce any rights under this Agreement, the prevailing party shall have the right to recover from the losing party its reasonable costs and attorneys' fees incurred in such proceeding.

Q. VALIDITY

Q.1 These terms and conditions shall be valid and binding for all offers, quotations, prices and deliveries made by the O.W. Bunker Group, any associated company, representative or agent as of September 1, 2013, or at any later date.

Q.2 These terms and conditions are available at the website www.owbunker.com, on which site as well the Sellers may notify amendments, alterations, changes or verifications to same. Such amendments, alterations, changes or verifications are deemed to be a part of the entire terms once same have been advised on the website.

Bilag 3 – Dan-Bunkerings T&C

GENERAL TERMS AND CONDITIONS FOR THE SALE AND DELIVERY OF BUNKER OIL FROM A/S DAN-BUNKERING LTD.

March 2010

List of offices:
Strandvejen 5 · 5500 Middelfart, Denmark · P +45 6441 5401 · F +45 6441 5301 · middelfart@dan-bunkering.com
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2G, Universitetskaya St., Office 402, 403 · 236040 Kaliningrad, Russia · P +7 4012 51 9009 · F +7 4012 51 9008 · kaliningrad@dan-bunkering.com

1. General Terms and Conditions

1.1 These general terms and conditions shall apply to the sale and purchase of marine bunker oil and related products of whatever type or grade by A/S Dan-Bunkering Ltd. to any buyer as defined below.

2. Definitions

2.1 In this document the following terms shall have the following meanings:
Bunker Confirmation means a confirmation in writing from the Seller to the Buyer setting forth the particular terms of each sale of Bunker Oil
Bunker Contract means the Bunker Confirmation and the General Terms
Bunker Oil means marine bunker oil and related products of whatever type or grade delivered by the Seller
Buyer means the Buyer under each Bunker Contract, including the entity or entities named in the Bunker Confirmation, together with the Vessel, her master, owners, operators, charterers, any party benefitting from consuming the Bunker Oil, and any other party ordering the Bunker Oil, all of whom shall be jointly and severally liable as Buyer under each Bunker Contract
General Terms means these terms and conditions in force as of March 2010
Seller means A/S Dan-Bunkering Ltd., with Danish company registration (VAT No. DK-67226917) and registered address at Strandvejen 5, 5500 Middelfart, Denmark acting through any of its offices as indicated on the front page of these General Terms
Vessel means the Vessel to which a delivery of Bunker Oil is made and/or onboard which it is consumed, which shall include any on-shore tank, train, rig, helicopter, aircraft or other unit or installation supplied by the Seller.

3. Bunker Transactions

3.1 Each sale of Bunker Oil shall be confirmed by a Bunker Confirmation. The Bunker Confirmation shall incorporate the General Terms by reference and the Bunker Confirmation and the General Terms together constitute the complete Bunker Contract. The Bunker Contract shall supersede any conflicting terms of other contracts which the Buyer may seek to enforce against the Seller. In particular, any terms not directly aimed at bunker sales transactions may not be enforced against the Seller to the effect they contravene the Bunker Contract.
3.2 If a purchase of Bunker Oil is contracted for by a broker, an agent or a manager for a principal, each such broker, agent or manager shall be bound by and be fully liable for the obligations of the Buyer. Furthermore, delivery shall always take place for the account of the registered owners and for the account of the current charterers all of whom shall be jointly and severally liable for the payment of the delivery as Buyers. The Buyer warrants that it is authorized as agent to order the Bunker Oil for delivery to the Vessel, and that the Seller has a lien in the Vessel for its claim.
3.3 Any notice or any stamp in the Bunker Delivery Receipt or similar cannot waive the Seller's maritime lien on the Vessel.

4. Bunker Oil Grade and Quality

4.1 The Buyer alone shall be responsible for and bear the risk of the grade of Bunker Oil ordered from the Seller, and the Seller shall not be under any obligation to check whether the grade of Bunker Oil is suitable for the Vessel. The Bunker Oil shall be of the same quality generally offered for sale at the time and place of delivery, for the grade of Bunker Oil ordered by the Buyer.

4.2 DISCLAIMER. Any implied warranties, including the warranties of merchantability and fitness for a particular purpose that the Seller may be deemed to have made, are expressly excluded and disclaimed.
4.3 The Buyer shall be responsible to keep the delivered Bunker Oil segregated from any Bunker Oil(s) onboard the Vessel or from a different delivery to the Vessel. In no event shall the Seller be responsible for the quality and compatibility of the Bunker Oil delivered if the Seller's product is mixed or comingled with any other product(s) onboard the receiving Vessel. The Buyer shall be solely responsible for any losses caused by mixing or comingling the Bunker Oil with any other oil, including any damage the Bunker Oil may cause on other products on board the receiving vessel.
4.4 If the Bunker Oil deviates from specifications, the Buyer shall use all reasonable endeavours to mitigate the consequences hereof and shall burn the Bunker Oil if possible even if this requires employment of purification tools or other similar measures. The Seller shall cover reasonable costs related hereto provided that the Seller is given opportunity to assist and suggest methods of handling the Bunker Oil.

5. Delivery

5.1 Unless otherwise requested by the Seller, the Buyer and/or its representatives shall give the Seller and/or Seller's nominated representatives at the place of delivery 48 (forty-eight) hours written notice of arrival of the Vessel at the place of delivery.
5.2 The Buyer shall be responsible for all connections and disconnections of the delivery hose(s) to the Vessel, and shall ensure that the Bunker Oil is received by the Vessel at the time for delivery. In the event the delivery is requested outside normal working hours or normal working days and is permitted by local port regulations to be so delivered, the Buyer shall pay all overtime and additional expenses incurred in connection therewith.
5.3 The Buyer shall be responsible for any and all demurrage, detention or additional expenses incurred by the Seller if the Buyer or the Vessel fails to receive the Bunker Oil at the time for delivery. In addition, if the Vessel fails to take delivery of the Bunker Oil or any part thereof, the Buyer shall compensate the Seller for any loss or damage which the Seller may suffer as a result of such failure, including but not limited to any loss of profit on any resale of the Bunker Oil, and the Buyer shall bear the risk of the return transport, storage or selling of the Bunker Oil.
5.4 In case of delay or failure to deliver the Bunker Oil the Seller shall not be liable to the Buyer or any other entity for any claim, loss or damage unless such delay or failure to deliver is caused by the Seller's negligence.

6. Risk of Loss

6.1 Risk in the Bunker Oil, including loss, damage, deterioration, evaporation, or any other condition or incident related thereto shall pass to the Buyer at the time the Bunker Oil passes the fixed bunker connections of the delivering Vessel. The Buyer warrants that representatives from the Vessel shall be responsible for ensuring that the Bunker Oil is received in a safe way.

7. Payment

7.1 The Buyer shall pay for the Bunker Oil at the price agreed in the Confirmation as set forth in Seller's invoice(s) (hereinafter the "Invoice"). In addition, the Buyer shall pay the costs of the delivery irrespective of whether the delivery takes place from a terminal facility, barge, lorry, or other method of delivery. The delivery costs shall be set forth in the Confirmation and/or in the invoice. Unless otherwise agreed, the final volume stated in Seller's or its representative's delivery documentation is to be considered final in respect of the quantity to be invoiced.
7.2 All prices are excluding VAT and/or taxes. The Seller is entitled, at any time, to charge additional VAT and/or taxes.
7.3 If not otherwise specifically agreed between Buyer and Seller at time of ordering, the confirmed costs including possible additional extra costs are only valid for delivery performed to the Vessel on the agreed and confirmed delivery date(s). Should the date(s) of delivery for any reason change, the Seller is entitled to change the price.
7.4 Payment shall be made in full, free of bank charges, without discount or deduction, and without set-off for any claim or counterclaim of any nature whatsoever. Should the Buyer nevertheless set-off any amount; the Seller's claim will be increased by 20 (twenty) percent as a penalty.
7.5 Payment shall be made to the Seller by bank transfer, according to the payment instructions contained in the Seller's Invoice or any copy hereof forwarded by fax, e-mail or by any other means. The Seller shall be under no obligation to provide any accompanying documents with the Invoice such as a bunker delivery

receipt or other documents.
7.6 If the Buyer fails to pay any Invoice at the time of maturity set forth in the Invoice, the Buyer shall pay interest at the rate stated in the Invoice. In the absence of an indication in the invoice the Seller shall be entitled to 3 (three) percent monthly interest. The interest rate will be charged monthly from the date of maturity, without prejudice to any other right or claim of the Seller. Interest will be added to the principal as it falls due.
7.7 In the event that any Invoice is not paid in due time, the Seller shall be entitled, at its sole discretion, to specify any particular Invoice or part thereof to which any subsequent payment(s) shall be applied, including, but not limited to, payment covering interest charges, legal fees and other charges. Moreover, the Buyer shall indemnify the Seller against any loss which is caused by adverse currency fluctuations between the Invoice currency and the value of the Danish Kroner from the latest due date of the Invoice until the date on which payment is made.
7.8 Notwithstanding any agreement to the contrary, payment will be due immediately and the Seller shall be entitled to cancel all outstanding stems and/or withhold future deliveries in case of (i) bankruptcy, liquidation or suspension of payment or comparable situation of the Buyer, (ii) arrest of assets of the Buyer, (iii) if the Buyer fails to pay any invoice to the Seller at the time of maturity set forth in such invoice, (iv) if the Buyer fails to comply with any other obligation pursuant to the Bunker Contract, including, but not limited to, the Buyer's failure to take delivery of Bunker Oil in full or in part, or (v) in case of any other situation, which in the sole discretion of the Seller is deemed to adversely affect the financial position of the Buyer. In any of the foregoing situations the Seller shall have the option to either (a) cancel the Bunker Contract, (b) to store the Bunker Oil in full or in part for the Buyer's account and risk, (c) to demand that the Buyer complies with its obligations pursuant to the Bunker Contract or (d) to make use of any other remedy available under the law.

8. Title

8.1 The Seller retains title to the Bunker Oil delivered to the Vessel until the Invoice has been paid in full in so far as the Seller has this right according to the law of the place of delivery or according to the law of the Vessel's flag state or according to the law at the location where the Vessel is found.

9. Arrest of Vessel

9.1 The Bunker Oil supplied to the Vessel is sold and delivered on the credit of the Vessel, as well as on the promise of the Buyer to pay therefore, and the Buyer agrees and warrants that the Seller shall have and may assert a maritime lien against the Vessel and may take such other action or procedure against the Vessel and any other vessel or asset beneficially owned or controlled by the Buyer, for the amount due for the Bunker Oil and the delivery thereof. The Seller is entitled to rely on any provisions of law of the flag state of the Vessel, the place of delivery or where the Vessel is found and shall, among other things, enjoy full benefit of local rules granting the Seller maritime lien in the Vessel and/or providing for the right to arrest the Vessel. Nothing in this Bunker Contract shall be construed to limit the rights or legal remedies that the Seller may enjoy against the Vessel or the Buyer in any jurisdiction.

10. Sampling

10.1 The Seller or its representatives shall arrange for samples to be drawn at the time of delivery of the Bunker Oil. Unless otherwise agreed between the Seller and Buyer prior to entering into the Bunker Contract, the samples shall be drawn from a point and in a manner chosen by the Seller or its representatives in accordance with the customary sampling procedures at the port or place of delivery of the Bunker Oil.
10.2 The sampling mentioned in paragraph 10.1 shall be performed in the presence of the Seller or its representatives and the Buyer or its representatives, but the absence of the Buyer or its representatives during all or any part of the sampling process shall not prejudice the validity of the samples.
10.3 On completion of sampling, all samples drawn by the Seller or its representatives are to be sealed, labelled and signed by both Seller or its representatives and Buyer or its representatives. One sample shall be retained by the Buyer or its representatives. The remaining samples shall be retained by the Seller or its representatives.
10.4 In the event of a dispute concerning the quality of the Bunker Oil, the results of analysis of the Seller's or its representative's drawn samples performed by an independent laboratory mutually appointed by the Buyer and Seller shall be conclusive to determine the quality of the Bunker Oil supplied. Analysis results of the Seller's or its representative's drawn samples will be the sole binding evidence for the quality of the Bunker Oil supplied to the Vessel.
10.5 If the Seller and the Buyer cannot agree on an independent laboratory to perform mutual analysis or if the

Buyer fails to reply to the Seller's notice hereof within 7 (seven) days from receipt of such notice, the Seller can at its sole discretion decide which laboratory to perform the analysis, which shall be final and binding for all parties involved.

11. Claims

11.1 If not otherwise agreed, the final supplied volume is to be determined by the Seller's or its representative's measurements. Any claim regarding the quantity of the Bunker Oil delivered shall be notified verbally as well as in writing by the Buyer or the master of the Vessel to the Seller immediately during delivery of the Bunker Oil. In the event immediate verbal as well as written notice is not made, such claim shall be deemed to be waived and barred. A notification inserted in the Bunker Delivery Receipt or in a separate protest handed to the physical supplier of the Bunker Oil shall not qualify as notice under this section 11.1 and the Seller shall under no circumstances be deemed to have accepted such notice or protest handed to the physical supplier.
11.2 Any claim regarding the quality of the Bunker Oil delivered shall be presented in writing to the Seller as soon as an alleged problem has occurred or the Buyer is notified of any alleged problem and in any event no later than within 14 (fourteen) days from the date of delivery to the Vessel. Should the Buyer fail to make timely notification of any claim regarding the quality of the Bunker Oil the claim shall be deemed waived and barred.
11.3 In the event of any claim presented in accordance with Section 11.1 and 11.2, the Buyer shall:
• Cooperate with the Seller and make all necessary arrangements for the Seller or its representatives to investigate such claim, including but not limited to the boarding and inspection of the Vessel, the interviewing of crew, and the review and copying of Vessel documents. Failure to provide boarding and inspection and copying shall constitute a waiver and bar of any such claim.
• Take all reasonable steps and actions to mitigate any damages, losses, costs and expenses related to any claim of alleged off-specification or defective Bunker Oil.
11.4 The Seller shall not be liable to pay damages if the Buyer has failed to safeguard the Seller's recourse against the physical supplier of the Bunker Oil or any other wrongdoer, or has failed to ensure the existence of the necessary evidence.
11.5 Any claims against the Seller in respect of this contract shall be brought before the relevant court or arbitral tribunal in accordance with Section 16 within 1 (one) year of the date of delivery of the Bunker Oil, failing which such claims shall be time barred.

12. Liability

12.1 The Seller's liability for any damage whatsoever arising under this contract whether caused by negligence or not, whether based in tort or contract and whether falling on the Buyer or third party shall be limited to a maximum of the aggregate of 3 (three) days of time charter equivalent in the charter agreement in which the Vessel is employed. For the avoidance of doubt the foregoing shall include product liability claims.
12.2 The Seller shall under no circumstances be held liable for any consequential losses whatsoever, including, without limitation, delay, detention, demurrage, charter hire, crew wages, pilotage, towage, port charges, lost profits or increased cost or expenses for obtaining replacement fuel.
12.3 Any liability for damages to the Vessel shall in any event be reduced by 20 (twenty) percent of the invoice value of spare parts for each year or fraction thereof in which the replaced part has been in use.
12.4 The Buyer undertakes to indemnify the Seller against any claims, losses or costs of whatever kind related to the Bunker Contract instituted by third parties against the Seller to the extent such claims exceeds the Seller's liability towards the Buyer according to this Clause 12.

13. Force Majeure

13.1 The Seller shall not be liable for any loss or damage of whatever nature resulting from any delay or failure in performance under the Bunker Contract (i) caused by any circumstance beyond the Seller's direct control, or (ii) if the supply or source of the Bunker Oil from any facility of production, distribution, storage, transportation or delivery contemplated or intended by the Seller's supplier is disrupted, unavailable or inadequate due to war or war-like situations, riots, strikes, congestion, governmental order or intervention, unavailability of barges or other means of transport or stem, weather, act of God, changed market conditions, or similar situations.
13.2 In the event of a failure of performance as provided in Section 13.1, the Seller may, but is under no obligation, to source, procure or obtain alternative Bunker Oil or product, and in such case the Seller shall be entitled to receive from the Buyer payment of any additional costs of performance.

13.3 The Buyer shall have no right of cancellation of the Bunker Contract.

14. Safety and Environmental Protection

14.1 It shall be the sole responsibility of the Buyer to ensure that the Vessel, its crew and those responsible for its operation and management observe and comply with all health, safety and environmental laws and regulations with regard to the receipt, handling and use of the Bunker Oil. The Buyer warrants that the Vessel is in compliance with all national and international trading and pollution regulations.
14.2 In the event of a spill or discharge occurring before, during or after the delivery of the Bunker Oil, the Buyer shall, in addition to any other obligations imposed by law, immediately notify the appropriate governmental authorities and take or arrange whatever action is necessary to respond and clean-up such spill or discharge, and shall pay all costs and expenses in connection therewith. If the Buyer fails to take such prompt action, the Buyer authorizes the Seller, the supplier, and others appointed by the Seller, to take such action on behalf of the Buyer, at the Buyer's risk and expense, and the Buyer shall indemnify and hold the Seller, the supplier, and others harmless against any damages, expenses, claims, or liabilities, of whatever nature, unless such spill or discharge is proven to be solely caused by the Seller's negligence.

15. Collection and Indemnity

15.1 The Buyer agrees to pay any and all expenses, legal fees and court costs incurred by the Seller (i) to collect and obtain payment of any amount due to the Seller, including but not limited to legal fees and court costs associated with enforcing a maritime lien, attachment, right of arrest, or other available remedy in law, equity or otherwise; and (ii) to recover any damages or losses suffered by the Seller as a result of any Breach by the Buyer of any provision of the Bunker Contract.

16. Law and Jurisdiction

16.1 The Bunker Contract shall be governed by the laws of Denmark. However, the choice of law is for the sole benefit of the Seller and the Seller may apply and benefit from any law granting a maritime lien and/or right to arrest the Vessel in any country as stipulated in Section 9 hereof.
16.2 Any dispute between the Seller and a Buyer domiciled in the European Union, Norway, Switzerland, Lichtenstein or Iceland arising out of or in connection with any Bunker Contract shall be determined by the Maritime and Commercial Court in Copenhagen, Denmark.
16.3 Any dispute between the Seller and a Buyer domiciled outside the European Union, Norway, Switzerland, Lichtenstein or Iceland arising out of or in connection with any Bunker Contract, including any disputes regarding the existence, validity or termination, shall be settled by arbitration in Copenhagen arranged by Danish Arbitration in accordance with the rules of arbitration procedure adopted by Danish Arbitration and in force at the time when such proceedings are commenced.
16.4 Section 16.2 and 16.3 above shall be for the sole benefit of the Seller and the Seller shall have the right to take any legal action before the courts in any country either to (a) pursue the merits of a claim against a Buyer before such courts or (b) as an interim measure of protection in order to securing payment of any amount due from the Buyer.

17. Section Headings

17.1 The headings of each section herein are descriptive only, and are provided for organisational purposes.

18. Entry into Force

18.1 These terms and conditions shall be effective as of March 15th 2010 at 00:01 hours central European time and shall apply to any contracts concluded after this time.

Bilag 4 – *PST Energy*

Easter Term
[2016] UKSC 23
On appeal from: [2015] EWCA Civ 1058

JUDGMENT
PST Energy 7 Shipping LLC and another (Appellants) v O W Bunker Malta Limited and another (Respondents)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON 11 May 2016

Heard on 22 and 23 March 2016

Appellants
Jonathan Crow QC
Stephen Cogley QC
Julian Kenny QC
Liisa Lahti
Marcus Mander
(Instructed by Ince & Co LLP)

Respondent
Robert Bright QC
Marcus Mander
Clara Benn
(Instructed by Allen & Overy LLP)

LORD MANCE: (with whom Lord Neuberger, Lord Clarke, Lord Hughes and Lord Toulson agree)

Introduction

1. Despite the significance of her name in Cartesian philosophy, the vessel "Res Cogitans" depends on bunkers. The parties' submissions have in compensation lent a degree of metaphysical complexity to commonplace facts. We are told that many similar cases worldwide await our decision with interest.

2. The essential problem arises from the insolvency of the OW Bunker Group and the concerns of vessel owners that they may be exposed to paying twice over, once to their 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. The concerns stem from what are understood to be fairly typical conditions on which bunkers are supplied worldwide.

3. The bunkers in this case were supplied to the vessel in the Russian port of Tuapse in the Black Sea on 4 November 2014. They were ordered on 31 October 2014 by the appellants, who are respectively owners and managers of the vessel and can be treated as one and referred to simply as the Owners. The immediate bunker supplier was the first respondent, OW Bunker Malta Ltd ("OWBM"), which obtained the bunkers under a contract with its parent company, OW Bunker & Trading A/S ("OWBAS"), another member of the OW Bunker Group, which was at the time the world's largest bunker supplier and is now insolvent. OWBAS in turn obtained them from Rosneft Marine (UK) Ltd ("RMUK"), which itself obtained them from an associate,

RN-Bunker Ltd ("RNB"), which had facilities in Tuapse and made the actual delivery. On 6 November 2014, OWBAS announced that it was applying to the court in Aalborg for restructuring. The second respondent, ING Bank NV ("ING") financed the OW Bunker Group and claims as assignees of any claim which OWBM has against the Owners.

OWBM's contract with the Owners

4. OWBM's supply contract with the Owners described itself as being for sale and delivery ex barge of 110 mt of gasoil at a price of USD 848 per mt and 1000 mt of fueloil at a price of USD 359 per mt (a total of USD 443,800), with "Payment within 60 days from date of delivery upon presentation of invoice". But it was expressly subject to the OW Bunker Group's general terms (said in OWBM's printed Sales Order Confirmation to be "well known to you" and to be published on OWBM's website).

5. The general terms start with the following "General Introduction":

"A.1 This is a statement of the terms and conditions according to which the International OW Bunker Group (hereinafter called 'OWB') will sell marine bunkers.

A.2 These conditions apply to all offers, quotations, orders, agreements, services and all subsequent contracts of whatever nature, except where otherwise is expressly agreed in writing by OWB."

Clause P.1 provides for the agreement to be governed by English law and for arbitration in London of all disputes arising in connection with it.

6. Clause G.12 under the heading Delivery provides:

"Delivery shall be deemed completed and all risk and liabilities, including loss, damage, deterioration, depreciation, contamination, evaporation or shrinkage to the Bunkers delivered and responsibility for loss, damage and harm caused by pollution or in any other manner to third parties 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 truck/shore tank."

Clauses H.1 and H.2 provide in summary that "until full payment" of all amounts due to OWBM, title and property rights were reserved to OWBM and "the Buyer" was in possession of the bunkers "solely as Bailee for the Seller, and shall not be entitled to use the Bunkers other than for the propulsion of the Vessel". The full wording of clauses H.1 and H.2 is as follows:

"H.1 Title in and to the Bunkers delivered and/or property rights in and to such Bunkers shall remain vested in the Seller until full payment has been received by the Seller of all amounts due in connection with the respective delivery. …

H.2 Until full payment of the full amount due to the Seller has been made and subject to article G.14 hereof, the Buyer agreed [sic] that it is in possession of the Bunkers solely as Bailee for the Seller, and shall not be entitled to use the Bunkers other than for the propulsion of the Vessel, nor mix, blend, sell, encumber, pledge, alienate, or surrender the Bunkers to any third party or other Vessel."

The "Vessel" is defined by clause B.1 of the terms as meaning

"the Buyer's Vessel, Ship, Barge or Off-shore Unit that receives the supply/bunkers; either as end-user or as transfer unit to a third party."

7. It is unnecessary to consider whether the recognition in clause B.1 that the vessel might serve as a "transfer unit to a third party" fits with the prohibition in clause H.2 of sale, alienation or surrender of the bunkers to any third party or other vessel. That situation is not in question here. What is clear is that the Owners accepted that, until full payment to OWBM, they would not acquire title or property rights in the bunkers, but would hold them as bailees for OWBM, subject only to a right to use them for the propulsion of the vessel "Res Cogitans" herself.

RMUK's contract with OWBAS

8. OWBAS's purchase from RMUK priced the gasoil and fueloil at respectively USD 333 per mt and USD 830 per mt (a total of USD 416,000), and required "payment within 30 days from date of delivery against hard copy of invoice". The purchase was subject to RMUK's terms and conditions, clause 10 of which provided, inter alia:

"Until such time as payment is made, on behalf of themselves and the Vessel, the Buyer agrees that they are in possession of the Marine Fuels solely as Bailee for the Seller. If, prior to payment, the Seller's Marine Fuels are commingled with other Marine Fuels on board the Vessel, title to the Marine Fuels shall remain with the Seller corresponding to the quantity of the Marine Fuels delivered."

There was no express provision regarding consumption, but on the facts being assumed for the purposes of this case, RMUK was aware that the bunkers were being purchased for resale at a profit, that the OW Bunker Group's terms would be likely to include provisions to like effect to clauses H.1 and H.2 set out in para 6 above and that the bunkers were being purchased for immediate use and might be wholly or partly consumed within both the 30-day credit period allowed by RMUK and the 60-day credit period allowed by OWBM. Having contracted to supply the bunkers to OWBAS, RMUK then entered into a contract with RNB, under which RNB agreed to sell the bunkers to RMUK for delivery in accordance with the contract between RMUK and OWBAS.

The assumed facts

9. On the assumed facts, the Owners availed themselves of the right to consume the bunkers in the vessel's propulsion - and did so both within and, quite probably after, the 30 and 60-day periods allowed for payment under the contracts between respectively RMUK and OWBAS and OWBM and the Owners. The bunkers were in the event totally consumed without any payment ever being made by OWBM or OWBAS to RMUK. RMUK on the other hand paid RNB in accordance with its contract with RNB on 18 November 2014. On the day before doing so, RMUK, having become aware that it might not receive payment from OWBAS, sent a "Demand of Payment" to the Owners, asserting that it remained the owner of the bunkers and requesting immediate payment from the Owners of USD 416,000, the amount which it had invoiced to OWBAS. The Supreme Court was given no indication that RMUK has since then taken any formal steps to pursue this claim against the Owners.

The proceedings to date

10. By the end of November 2014, the Owners had commenced arbitration proceedings claiming a declaration that they had no liability to pay OWBM and/or ING for the bunkers. The parties agreed to submit a raft of detailed preliminary issues to the arbitrators (David Farrington, Ian Kinnell QC and Bruce Harris), and for the purposes of such issues agreed a series of assumed facts. The arbitrators, after a four-day hearing, wrote an admirably analytical award dated 16 April 2015, giving their reasons for answers to each of such issues set out in its appendix 1 and holding inter alia that, on the assumed facts, OWBM/ING would be entitled to payment.

11. The parties having agreed that this award on preliminary issues should be the subject of appeals on both sides without leave pursuant to section 69(2)(a) of the Arbitration Act 1996, Flaux J gave directions accordingly on 8 May 2015, and the matter came on 7 to 9 July 2015 before Males J, who with notable speed produced his judgment on 14 July 2015. He dismissed the Owners' appeal, but went on, obiter, to express his opinion on an appeal by OWBM/ING, which would only have arisen for decision had the Owners' appeal succeeded. Males J then gave the Owners permission to appeal to the Court of Appeal, while refusing OWBM/ING permission to go to the Court of Appeal on their cross-appeal. The Court of Appeal (Moore-Bick V-P, Longmore and McCombe LJJ) on 22 October 2015 dismissed the Owners' appeal. The Supreme Court granted permission to appeal on 11 February 2016.

The issues and the award in more detail

12. The arbitrators were evidently invited to treat the assumed facts as accepting that all the bunkers were used within the 60-day credit period allowed by OWBM to the Owners (see para 42 and footnote 18 to their award). But their reasoning was wide enough to cover what the Supreme Court has been told may be the actual position, which is that at most that part of the bunkers were so used, with any remainder being used later. Addressing OWBM's cross-claim for the price, the arbitrators noted that section 2(1) of the Sale of Goods Act 1979 provides that:

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

Further, section 49 provides that:

"(1) Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

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

The arbitrators noted in footnote 7 to para 31 of their award that, if the contract was one of sale, then, according to authority binding on them, section 49(1) precluded recovery of the price of goods in circumstances where the property in goods had not passed to the buyer.

13. The authority to which they were referring is F G Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd (often referred to as "Caterpillar") [2014] 1 WLR 2365. This is an authority the correctness of which OWBM/ING would, if necessary, wish to challenge in the Supreme Court on this appeal. It is in dispute whether it is open to them to do so, in the light of the issues as addressed to and answered by the arbitrators as well as in the light of Males J's refusal of permission to OWBM/ING to cross-appeal from his judgment to the Court of Appeal. Because of this dispute, it will be necessary to give an account of the arbitrators' reasoning, award and answers to the preliminary issues which is fuller than it would otherwise have been.

14. Having rejected section 49(1) as a basis for recovery of the price, the arbitrators considered and rejected three other ways in which OWBM suggested that it could recover the price of the bunkers if treated as sold within the Sale of Goods Act: (i) under section 49(2), as being "payable on a day certain irrespective of delivery"; (ii) under section 50, as damages for non-acceptance; and (iii) on the basis that property passed for or in a nanosecond, as and when the bunkers went up in smoke. These being points raised by OWBM's cross-claim, for which permission to appeal was refused by Males J, none of them is before the Supreme Court.

15. Taking stock, the arbitrators considered that they could now answer certain of the agreed preliminary issues. They could answer issues 1, 2 and 3 to the effect that, on the assumed facts, OWBM never had property in the bunkers at any material time, and that the retention of title clause in its terms (in any event) prevented property passing to the Owners. On that basis, issue 4 then required the arbitrators to determine

"what is the consequence in respect of any claim that OWBM may seek to assert:

(a) for the price under section 49 or section 50 of SOGA 1979; or

(b) otherwise under the Contract; or

(c) in bailment; or

(d) in restitution; or

(e) in tort?"

They held that they could answer issue 4(a) to the effect that "No such claim could succeed", and issue 8, asking whether section 49(2) applied, with a simple "No".

16. On that basis, the arbitrators said (para 45) that it was now convenient to turn attention to issue 4(b). This, they said,

"concerns the possibility that [OWBM/ING] have a contractual claim falling outside constraints of [the Sale of Goods Act], and involves looking again at the contractual relationships between the parties, and in particular at that between OWBM and the Owners."

In answering this issue, the arbitrators said (para 46):

"If, as we believe we must, we accept that section 49 of SOGA rules out the possibility of a claim against the Owners for the price of the bunkers supplied to the Vessel, and, as seems more obviously the case, that section 50 offers no alternative, does this also rule out the possibility of there being some other contractual remedy against the Owners arising out of their failure to pay OWBM's invoice? The Owners have suggested that the answer to this question is 'Yes'. We do not agree. Whether or not one chooses to describe the contract between these two parties as a 'hybrid contract' is, we consider, probably neither here nor there (although we would prefer to describe it - and no doubt others like it - as sui generis), but to suggest that the remedies that may follow from the failure to comply with its terms are solely and irrevocably those within the gift of SOGA appears to us to be unacceptable and quite unreal."

17. In the next para (para 47), they continued:

"If all had gone in accordance with the parties' expectations (and, of course, the Owners had had previous dealings with OWB Group companies), the Owners would have paid OWBM's invoice within the 60-days credit period. We are quite confident, that, when they did so, it would not have crossed anyone's mind to enquire what bunkers had been consumed meanwhile in order to determine whether the invoice was being paid wholly or in part under a contract of sale (in respect of unconsumed bunkers), or otherwise (in respect of consumed bunkers). Regardless of the situation on board the Vessel, both parties would in our opinion understand that payment was being made simply in accordance with the express terms of the contract, which would have been the case. There is in our view no challenge to the provisions of SOGA or their effect in reaching the conclusion that we have unhesitatingly reached that, on the assumed facts, once the 60-days period of credit had elapsed the Owners were in breach of contract, the remedy for which was a claim in

debt. We have seen nothing in the authorities to suggest that this simple and straightforward conclusion is incorrect."

18. The arbitrators concluded that this reasoning enabled them to answer issues 4(b) and 6(a). Issue 6(a) was whether "to the extent not resolved by the determination of issue 4" OWBM/ING had a claim under the contract. However, they added "we have to say that we find the relationship (if any) between issues 4 and 6 somewhat unclear" (para 48). They went on to say that "we believe that we can at this point also tackle issue 9". Before doing so they addressed issue 5, rejecting OWBM's case that their supply to the Owners contained various implied terms, now no longer relied on. Turning to issue 9, this asks:

"Did [the Sale of Goods Act] apply to the Contract between the Owners/OWBM in any event and if not what is the effect on the parties' respective claims?"

The arbitrators gave the straightforward answer: "No, and none".

19. In the light of this answer, the arbitrators concluded that they could deal shortly with issues 10 to 13, saying (para 53):

"As to Issue 10, OWBM was not required to own or to have property in the bunkers at the time of delivery because the contract between OWBM and the Owners did not require this. There was no 'modification' of the requirements of SOGA because SOGA did not apply and its terms were not engaged. As to Issue 11, there was no such requirement. As to Issue 12, no terms were implied into the contract by virtue of section 12 of SOGA. And, finally, as to Issue 13, in so far as there were no such implied terms as suggested, there were none to be breached. It is unclear what, if any, other breaches of contract by OWBM are alleged, but none appears to have been established."

20. Issues 10 to 13 and the answers given read as follows:

"10. Do the OWBM T&Cs, on a true and proper construction, modify the requirements of section 12 of SOGA 1979 such that OWBM was required to own or have property in the Bunkers at the point of delivery?

ANSWER: The OWBM T&Cs did not modify section 12 of SOGA 1979, but, under the Contract between the Owners and OWBM, OWBM was not required to own or have property in the Bunkers at the point of delivery, and section 12 did not apply.

11. If not, what is the requirement imposed by the Contract, on a true and proper construction, regarding the title OWBM is required to pass to the Owners?

ANSWER: There was no such requirement.

12. What terms were implied into the Contract by virtue of section 12 SOGA?

ANSWER: None, because section 12 did not apply.

13. Is OWBM in breach of Contract, and in particular the implied terms referred to at Issue 12 above (or any of them) and if so in what way?

ANSWER: As there were no terms implied into the Contract by virtue of section 12 SOGA, there were none to be breached. No other breaches were specified, and on the basis of the Assumed Facts, none appears to have been established."

The proceedings in court in more detail

21. Males J in dismissing the Owners' appeal held that OWBM's contract to supply bunkers to the Owners was not a contract to which the Sale of Goods Act applied, but was a contract containing a condition whereby OWBM undertook that the Owners would have the lawful right to use any bunkers which they in fact used pursuant to the liberty they were given by its terms (paras 48 and 52). He held that it was not subject to any further condition as regards the passing of property in any bunkers used. OWBM/ING's cross-appeal, to recover the price under section 49 of an equivalent sum by way of damages, did not on this basis arise, but Males J nonetheless expressed some views on it, obiter. He thought (paras 66 and 74) that if the Act applied, that could only be because OWBM undertook, in the terms of section 2(1), "to transfer the property in goods to the buyer", that it had failed to do so and was therefore (subject to two now immaterial arguments) in breach of the implied term contained in section 12(1), and that that would represent a total failure of consideration which, applying Rowland v Divall [1923] 2 KB 500, would provide the Owners with a defence to a claim for the price. Apart from this problem, he said that he would, however, have disagreed with the arbitrators on one point relating to the cross-claim, in that in his view the credit terms would have satisfied the language of section 49(2). Having expressed these views, he refused permission, as already stated, in respect of the Owners' cross-appeal.

22. The issues argued before the Court of Appeal were thus effectively limited to two: (1) Was the contract a contract of sale within the meaning of section 2(1) of the Sale of Goods Act? (2) If not, was it subject to any implied term that OWBM would perform or had performed its obligations to its supplier, in particular by paying for the bunkers timeously? Like the judge, the Court of Appeal was bound by the Caterpillar decision, so that it could have done no more than hold that section 49 of the Sale of Goods Act barred any claim to the price by OWBM if the contract was subject to the Act, even if that point was open and had arisen, for consideration.

23. The Court of Appeal agreed substantially with the judge in answering the two main questions before it in OWBM/ING's favour. However, as appears from the following key passage in its reasoning, it also contemplated that the contract would or might be a contract of sale pro tanto to the extent that payment was made at a time when any part of the bunkers remained unconsumed. Moore-Bick V-P, giving the main judgment, with which the other members of the court agreed, said:

"33. … Whatever label one attaches to the contract (and I see nothing incongruous in describing it in commercial terms as a contract for the sale of goods), its essential nature is in my view reasonably clear. 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. That may not satisfy the definition of a contract of sale of goods in section 2(1) of the 1979 Act, but there is no reason why the incidents of a contract of sale of goods for which the Act provides should not apply equally to such a contract at common law, save to the extent that they are inconsistent with the parties' agreement. The difficulties in the present case stem entirely from the owners' attempt to establish that the consideration for the payment of the price was the transfer of property in the whole of the goods to which the contract related, despite the fact that that does not correspond to the express terms of the contract relating to the use of the goods and the passing of title. The commercial background and the terms of the contract make it clear that what the owners contracted for was not the transfer of property in the whole of the bunkers, but the delivery of a quantity of bunkers which they had an immediate right to use but for which they would not have to pay until the period of credit expired. From the suppliers' point of view the retention of title clause provided an ever diminishing degree of security for the payment of what was due to them. 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. A failure to pass title to any residue remaining at the time of payment would therefore involve a breach of contract, but it would not be one which entitled the owners to treat the contract as a whole as discharged, unless (contrary to all expectations) it represented such a large proportion of the quantity originally delivered that there could be said to have been a total failure of consideration.

34. For these reasons I agree with the judge that the transfer of property in the bunkers from OWBM to the owners was not the essential subject matter of the contract and that a failure to transfer property in the bunkers, all of which had been consumed when the period of credit expired, did not relieve the owners of the obligation to pay for them."

The issues before the Supreme Court

24. The issues on the Owners' appeal to the Supreme Court remain as argued before the Court of Appeal and set out in para 22 above. But, in seeking to uphold the decisions of the courts below, Mr Robert Bright QC for OWBM/ING submits that it is open to OWBM/ING to rely on a point which was not open to his clients in those courts. That is that the decision of the Court of Appeal in the Caterpillar case, mentioned in para 13 above, was wrong and should be overruled. The correct position is, he submits, that, even though a contract is categorised as one of sale within the Sale of Goods Act, section 49 should not be read as excluding all possibility of claims to the price of goods sold, if the contract so provides, even though the circumstances cannot be brought within either of subsections (1) and (2). Whether this submission is open to OWBM/ING is, as I have stated in para 13 above, in dispute.

25. For the Owners, Mr Jonathan Crow QC makes five basic, though over-lapping, submissions about the nature of the contract. This, he submits, is a matter of substance, not form. Second, it must be determined at the date when the contract is made. Third, it depends on what the parties then agreed, not what happened subsequently or what they expected they might do subsequently. Fourth, the question must be answered once and for all, and fifthly it must be answered by reference to the statutory test set out in section 2(1) of the Act, not by "reverse engineering", by which Mr Crow meant: not because the consequences of recognising the contract as one of sale within the statutory definition might seem unpalatable.

Analysis of the nature of the contract

26. Mr Crow's first proposition is well-established and needs no great elaboration: see eg Stoneleigh Finance Ltd v Phillips [1965] 2 QB 537 (CA). An agreement may also be in substance a contract of sale, even though it has ancillary aspects, eg for after-sales services, which do not involve the passing of property and are not by themselves sale. Here, Mr Crow is able to point out that the basic form and language of the contract is that of sale. That is true, as far as it goes. But clauses A.1 and A.2 make clear that sale may here be used in an expanded sense, since the general terms are to apply to all agreements and services and all subsequent contracts "of whatever nature", and "Buyer" is under clause B.1 a defined term which includes "any party requesting offers or quotations for or ordering Bunkers and/or Services" (emphasis added). Even apart from that, however, clauses H.1 and H.2 make clear that the contract has special features. First, they expressly provide not only for retention of title pending payment, but also expressly that, until such payment, the "Buyer" is to be in possession of the bunkers "solely as Bailee for the Seller". After going on to provide that the Buyer "shall not be entitled to use the bunkers", the terms introduce the qualification "other than for the propulsion of the Vessel".

27. The qualification clearly reflects a reality. Bunker suppliers know that bunkers are for use. If they grant relatively long credit periods combined with a reservation of title pending payment in full, it is unsurprising that they do so combined with an express qualification authorising use in propulsion, since standard terms prohibiting any use would be uncommercial or in practice, no doubt, simply ignored. Mr Crow vigorously resisted the introduction of any such considerations, on the basis that they are speculative and that the nature of a contract cannot change according to the level of certainty with which parties are to be taken to have expected that bunkers supplied might or might not be used in propulsion before payment for them was made. But OWBM's (and RMUK's) contractual terms and the assumed facts (particularly paras 13, 20 and 30) - together with an admissible modicum of commercial awareness on the court's part about how ships operate (and in particular how owners strive to keep them operating) and about the value of credit and the likelihood that full advantage of it will be taken - all point in one direction. They demonstrate that the liberty to use the bunkers for propulsion prior to payment is a vital and essential feature of the bunker supply business.

28. In these circumstances, OWBM's contract with the Owners cannot be regarded as a straightforward agreement to transfer the property in the bunkers to the Owners for a price. It was in substance an agreement with two aspects: first, to permit consumption prior to any payment and (once the theory of a nanosecond transfer of property is, rightly, rejected) without any property ever passing in the bunkers consumed; and, second, but only if and so far as bunkers remained unconsumed, to transfer the property in the bunkers so remaining to the Owners in return for the Owners paying the price. But in this latter connection it is to be noted that the price does not here refer to the price of the bunkers in respect of which property was passing, it refers to the price payable for all the bunkers, whether consumed before or remaining at the time of its payment.

29. A contract of sale may under section 2(3) of the Act be either absolute or conditional; and under section 2(6) "An agreement to sell becomes a sale when … the conditions are fulfilled subject to which the property in the goods is to be transferred". Mr Crow submits on this basis that the contract can be regarded as an agreement to transfer property, conditional on the bunkers remaining unburned when payment is made. The difficulties with this submission are that:

i) it categorises the whole agreement by reference to only one possibility relating to only one part of the bunkers covered by the agreement, namely the possibility of at least some bunkers surviving unused, after 60 days or whenever payment is made. Sections 2(3) and (6) can readily be applied where there is a condition regarding the passing of property to which all the goods covered by an agreement are subject, but that is not the case here;

ii) it ignores the fact that there is no condition governing the transfer of property in the bunkers used before payment - the property in bunkers consumed never passes and is never agreed to be passed; and

iii) it focuses on the agreement to pass property in the bunkers surviving at the time of payment, when the agreement was a single contract to pay a single "price" for all the bunkers sold not later than 60 days after delivery, whatever had happened to such bunkers in the meantime; the agreement is a single agreement which cannot sensibly be treated as divisible. As the arbitrators said, aptly, in para 47 of their award quoted in para 17 above, in the ordinary course when Owners paid OWBM's invoice after 60 days:

"it would not have crossed anyone's mind to enquire what bunkers had been consumed meanwhile in order to determine whether the invoice was being paid wholly or in part under a of sale (in respect of unconsumed bunkers), or otherwise (in respect of consumed bunkers)."

30. Mr Crow sought to avoid some of these difficulties by submitting at one point that the agreement could be analysed as one of sale, under which OWBM undertook that at the date of payment they would transfer property in any bunkers then remaining and that they could and would also have transferred property in any bunkers already consumed, had they not been consumed. That submission certainly has a metaphysical aspect. But it makes in my view neither legal nor commercial sense. All that mattered for the Owners was that they should have and had the right to consume the bunkers in the vessel's propulsion as and when they did so prior to payment, and that upon payment they would acquire the property in, and thereby an absolute right to dispose of or use as they wished, any remaining bunkers.

31. For similar reasons to those given in the preceding three paragraphs, I would also reject the Court of Appeal's suggestion in para 33 of its judgment, quoted in para 23 above, that the contract can be analysed as a contract of sale to the extent that it provided for the transfer of property in any part of the bunkers remaining at the time of payment. That is again to divide up a single agreement covering the supply of all the bunkers (gasoil and fueloil) at a single price for each, irrespective of what had happened to them. However, I fully accept that, viewing in isolation the position of any bunkers remaining at the time of payment, the transaction relating to them is closely analogous to a sale. I also accept that, both as regards bunkers consumed and as regards any bunkers remaining at the time of payment, the contract, although not one of sale, would contain similar implied terms as to description, quality, etc to those implied in any conventional sale.

32. The above analysis is consistent with the approach taken by the Court of Appeal in the somewhat complicated case of Harry & Garry Ltd v Jariwalla [1988] WL 1608652. The English buyers, Harry & Garry, had under contracts of sale received a quantity of sarees which they found defective and in respect of which they had not yet accepted the relevant bills of exchange, by reference to which, it appeared, the Indian sellers, the Jariwallas, had however already succeeded in raising some monies in India. In these circumstances, Harry & Garry agreed to accept the bills, so acquiring property in the sarees, while the Jariwallas agreed either to arrange the cancellation of the bills or to take back and pay for the sarees. Under this agreement, 2,494 sarees were then selected as sarees which the Jariwallas would, as they did, take back physically, and it was agreed that the Jariwallas would pay £46,763.45 for such sarees, with property being retained by Harry & Garry until this full amount was paid. Through a Mr Shah, the Jariwallas sold some 411 of these sarees, evidently with the consent of Harry & Garry despite the reservation of title. Harry & Garry sued for the full £46,763.45 agreed to be paid.

33. In the court below, Judge Harris had seen the contract as being one of sale, and on that basis held that, since the circumstances did not fall within section 49(2), a claim for the price was precluded. In the Court of Appeal, Harry & Garry's appeal was allowed. Kerr LJ, giving the main judgment, noted that section 49(1) was in terms inapplicable, because of the reservation of title. But he went on to say of the judge's approach that:

"It would be ironical if that were the correct analysis. One would be driven to the conclusion that although these goods had been delivered and had been accepted, the only remedy open to the plaintiffs, if indeed they were sellers of these goods, would apparently have been a claim for damages for non-acceptance under section 50, there being no other provision of the Act which would have given the plaintiffs any remedy. With all due respect to the judge, no doubt influenced as he was by the complexity of this case and the arguments which were addressed to him, I cannot agree with that analysis for two reasons. First, in my view this was not a contract for the sale of goods within the terms of the 1979 Act. It was not, to quote section 2(1) of the Act, 'a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price'. Like many other contracts in complex situations, this was a sui generis transaction. In effect, what the Jariwallas agreed was that if the bills of exchange were accepted, which was

their great concern, they would either have them cancelled or they would take the goods back and pay for them.

When it then came to the specific agreement about the 2,494 selected sarees, I think the nature of the agreement was that in consideration of the plaintiffs' allowing them to take that consignment away and seeking to dispose of it as agents for the plaintiffs, who remained the owners of it, they agreed again either to perform the first part of the option, to have the bills of exchange cancelled at any rate to the extent of the value of those selected goods, or to pay the sum of £46,763.45p. That was the nature of the agreement. Taking it on its own or taking it, as I think one should, as part of the agreement made on 23 December, I do not think it was a contract for the sale of goods to which the Act applied."

34. As with the buy back contract in Harry & Garry, so here, in my opinion, the relevant agreement is, in Kerr LJ's words, "Like many other contracts in complex situations, … a sui generis transaction", not a contract of sale. As I have already indicated, that does not mean that its terms, as regards undertakings as to description and quality, would not be modelled on those applying in the sale of goods. But, in its essential nature, it offered a feature quite different from a contract of sale of goods - the liberty to consume all or any part of the bunkers supplied without acquiring property in them or having paid for them. The obligation on the part of OWBM to be able to pass the property in respect of any bunkers not so consumed against payment of the price for all the bunkers cannot make the agreement as a whole a contract of sale.

35. Mr Crow drew our attention to first instance cases where the relationship between the suppliers of bunkers and charterer customers under a reservation of title was assumed to fall within the Sale of Goods Act, for the purposes of analysing whether, on the termination of the charter, the vessel's owners had acquired title under section 25(1) of that Act: Forsythe International (UK) Ltd v Silver Shipping Co Ltd [1994] 1 WLR 1334, Angara Maritime Ltd v Oceanconnect UK Ltd [2010] EWHC 619 (QB); [2011] 1 Lloyd's Rep 61. In neither case was the nature of the contract or the present issue questioned or directly addressed. Similarly, it was simply assumed that the transaction was one of sale within the Act in the appellate authorities of Borden (UK) Ltd v Scottish Timber Products Ltd [1981] Ch 25 (CA) and Armour v Thyssen Edelstahlwerke AG [1991] 2 AC 339 - the former case concerning an unsuccessful attempt to trace title reserved in resin into chipboard manufactured using it, the latter concerning a successful attempt to reclaim steel supplied subject to a reservation of title. I add that, even if on analysis these two cases could and should have been analysed as sui generis, like the present, it is difficult to think that could have had any effect on their outcome. None of these cases therefore really assists the resolution of the present appeal.

36. I also add (with further reference to the Court of Appeal's suggestion mentioned in para 31 above) that, even if the contract were (contrary to my above analysis) to be analysed as a contract of sale when made in that it contemplated the transfer of property in any bunkers unused at the date of payment, I do not see how this could assist the Owners. OWBM could not owe any obligation to transfer property in bunkers consumed before payment. The contract would be subject to a resolutive condition subsequent whereby it would cease to be a contract of sale as and to the extent that the Owners exercised their contractual right to consume the bunkers in the vessel's propulsion, and would cease entirely to be a contract of sale if and when all such bunkers were consumed before payment.

37. For the reasons I have given, the arbitrators were correct, in my opinion, in concluding that the contract was not one of sale within section 2 of the Sale of Goods Act, with the result that the Owners could have no possible defence under section 49 to the claim for the price.

The Owners' alternative ground of appeal

38. I turn in this light to the Owners' alternative ground of appeal, which is that there must, as a matter of obviousness and necessity, have been an implied term of the contract relating to performance of obligations in the contractual chain above OWBM, by virtue of which OWBM obtained the bunkers it supplied to the Owners. In the Court of Appeal at least initially and in the written case, this is put extremely briefly as an implied duty on OWBM to perform its obligations by making timeous payment to its supplier. The real reason why OWBM could not have passed any title to the Owners appears, however, to have been that OWBAS became insolvent and never paid RMUK. The Owners' formulation of an implied term in their case would not address this. Not surprisingly, the matter was therefore put differently and more widely in the Court of Appeal, which was however left in the end in understandable uncertainty about the precise content of the alleged implied duty. For similar reasons to those given by Moore-Bick LJ in para 36, I share the Court of Appeal's conclusion that there is no basis or need for any such implied duty, however it is put.

39. In short, the essential nature of the bargain is as I have stated in para 28 of this judgment. As a result, OWBM's only implied undertaking as regards the bunkers which it permitted to be used and which were used by the Owners in propulsion prior to payment was that OWBM had the legal entitlement to give such permission. In order to be so entitled, OWBM did not need to have or acquire title to the bunkers. It merely needed to have acquired the right to authorise such use under the chain of contracts by virtue of which it had obtained the bunkers. As regards bunkers in existence at the time of any payment, OWBM would of course have to have had or at least be able to pass title. Had they been unable to do so, then, maybe, the Owners could have treated OWBM as in breach of condition and terminated the contract, though they would at the same time have had to refrain from further use of the bunkers. OWBM would then have been unable to maintain a claim for the whole price, and would have had to assert either a contractual or a restitutionary claim (it is unnecessary to consider which) to pro rata payment for the bunkers consumed. But none of this is relevant, and for that reason it was not explored in submissions. What happened was quite different. No payment was ever tendered by the Owners. The Owners simply continued to use the bunkers under the contractual liberty until they were all consumed. So far as material, no basis appears for treating the contractual liberty as ending with the 60-day period for payment, if payment was not then made; so long as the contract remained in force, the liberty would continue on its face until payment or complete consumption of all the bunkers supplied. The issues before the court do not involve any claim that OWBM had no right to permit such use, or that the Owners are or may be exposed to any risk of double exposure, either by reason of RMUK's claim (never so far as appears formally pursued) or on any other basis. On the presently assumed facts, therefore the Owners are simply liable for the price, albeit under a contract sui generis, which is not one of sale.

The position if the contract had been one of sale

40. In view of the above conclusions, the position if the contract had been classified as a contract of sale within section 2 of the Sale of Goods Act cannot and does not arise. The Owners' case was that, if the contract was one of sale, then section 49 would preclude any claim by OWBM/ING for the price of the bunkers used. OWBM/ING challenge this analysis and the Court of Appeal decision in Caterpillar which currently supports it. Since the point was fully argued and has general significance, I propose to say something on it.

41. First, however, I should briefly address the preliminary question, very specific to this particular case, whether it would, if necessary, even have been open to OWBM to challenge the correctness of the Court of Appeal's decision in Caterpillar. Not without some doubt, I conclude that it would have been. This is because of the way in which the arbitrators addressed issue 4(b), as set out in paras 16-18 above. They answered it in their reasons before and on the face of it independently of their conclusion under issue 9 that the Sale of Goods Act did not apply to the contract. Further, their reasons appear to postulate that the Sale of Goods

Act could apply but that a contractual claim for payment (albeit not for a "price") could still be maintained - otherwise why the references to section 49 ruling out a claim for the price, to section 50 offering no alternative, and to their conclusion presenting no challenge to the Sale of Goods Act?

42. On that basis, was the Court of Appeal correct in Caterpillar to conclude that, where goods are delivered under a contract of sale, but title is reserved pending payment of the price, the seller cannot enforce payment of the price by an action? In Caterpillar the goods had been agreed to be sold and were delivered by F G Wilson to John Holt & Co (Liverpool) Ltd ("Holt Liverpool") which it was known would on-deliver them to its subsidiary, John Holt plc ("Holt Nigeria"), a Nigerian company. The majority (Patten and Floyd LJJ) held that, under the relevant terms, Holt Liverpool (not having paid the price to F G Wilson) had delivered the goods to Holt Nigeria as fiduciary agents for F G Wilson, and that property had in this situation continued in law to reside in Holt Liverpool until such delivery, whereupon it had passed directly from F G Wilson to Holt Nigeria without Holt Liverpool ever acquiring it. Longmore LJ, although he had dissented on the passing of property, gave the principal reasoned judgment on the question which arose from the majority's conclusion that property had not passed. This was whether F G Wilson could sue Holt Liverpool for the price. He concluded, after reviewing the authorities, that section 49 constituted a code, which precluded any action for the price outside its terms.

43. The authorities included what Longmore LJ saw as two inconsistent previous Court of Appeal decisions, one Otis Vehicle Rentals Ltd v Cicely Commercials Ltd [2002] EWCA Civ 1064, the other the case of Harry & Garry, discussed above on another aspect and which Longmore LJ's judgment records was unearthed by the industry of counsel appearing in Caterpillar.

44. Section 49(1) enables an action for the price where the seller has transferred property, with or without delivery, and the buyer has failed to pay the price due. Conversely, the authorities cited by Longmore LJ establish that, where property has not passed, a seller cannot sue for the price of goods, delivery of which the buyer has refused to accept either physically (Atkinson v Bell (1828) 8 B & C 277; Otis Vehicle Rentals, cited above) or by refusing to take up the shipping documents (Stein Forbes & Co v County Tailoring Co (1916) 115 LT 215; Muller, Maclean & Co v Leslie & Anderson (1921) 8 Lloyd's List Law Rep 328; Plaimar Ltd v Waters Trading Co Ltd (1945) 72 CLR 304) or by failing or refusing to make the necessary shipping arrangements (Colley v Overseas Exporters [1921] 3 KB 302).

45. An established common law exception (see Dunlop v Grote (1845) 2 C & K 153) now reflected in section 49(2) of the Act exists where the price is payable on a day certain, in which case the seller may enforce its payment, provided that he is ready and able at the same time to deliver to the buyer the goods and property in them: Otis Vehicle Rentals, para 16 per Potter LJ. In Caterpillar, Longmore LJ expressed the view that a "price payable on a day certain" would embrace a situation where the price was expressed to be payable within 30 days of the date of the invoice. If so, it would embrace the situation under RMUK's contract with OWBAS or OWBM's contract with the Owners, whereby the price was payable within respectively 30 or 60 days of delivery. This was also Males J's view, differing on the point from the arbitrators.

46. Leaving section 49(2) aside, the question of principle is whether section 49 excludes any claim to recovery of a price outside its express terms. The majority of the High Court of Australia in Minister for Supply and Development v Servicemen's Co-operative Joinery Manufacturers Ltd (1951) 82 CLR 621 can be read as accepting that similar statutory language did not exclude all such claims. However, whilst Latham CJ, one of the majority, made no express reference to section 49(2), he did refer to Dunlop v Grote, cited above, and to Benjamin on Sale, 7th ed (1931), p 861, which both deal with a price payable on a day certain. It is not clear that he necessarily intended to go further.

47. In Colley v Overseas Exporters, cited above, McCardie J undertook a detailed examination of the pre-1893 Sale of Goods Act position at common law, concluding that there had been only two established counts available for recovery of the price of goods sold, both dependant on property passing and so falling within what became section 49(1). Section 49(2) was a limited exception. Support for this can be found in the illuminating discussion and judgments in Laird v Pim (1841) 7 M & W 474, to which McCardie J also referred. In that case, the defendant, having contracted to purchase and having been given possession of a plot of land, had refused to complete a conveyance or pay for it. During the proceedings, the analogy with the non-acceptance of goods was drawn, and at one point Parke B pointed out that, since the land was still the plaintiff's at law, the plaintiff might bring ejectment. The plaintiff made clear however that it was not claiming the price of the whole purchase money, but "only for the damages sustained by the non-performance of the contract" (p 479). To this counsel for the defendant responded (p 483) that "Unless the defendants are bound to pay the purchase-money, no damages can be recovered for the non-payment of it: the plaintiff, therefore, must shew not only that the defendants did not pay, but also that they were bound to pay". But this argument failed. Parke B said (p 485) that the plaintiff was

"substantially in the same situation, for the purpose of recovering the money, as if all had been done on his part which he engaged to do. It does not follow that he shall recover the whole purchase-money, but he is in the same situation for the purpose of recovering damages for the non-payment of the price, as if all had been done by him."

48. That approach, if adopted, at least answers the problem which Longmore LJ found in paras 55-56 in Caterpillar about accepting a claim for damages for non-payment of money or seeing any remedy whatever open to the seller. I add three observations. First, it would seem to me that the non-performance in a case like Laird v Pim could just as well be described in terms of failure to accept a transfer of the title to property, as failure to pay its price. Second, if described as a claim for failure to pay the price, the judgments in Sempra Metals Ltd v Inland Revenue Comrs [2008] AC 561 mean, I believe, that a claim for damages for non-payment of money could quite readily be accommodated in the modern law. Third, in Laird v Pim, the damages might have had to be reduced to take account of the prospect of recovery of the property - the law report does not address their measure more precisely than I have already indicated. In the present case, bearing in mind the complete consumption of the bunkers, there would be no difference between the agreed price and the damages for non-payment of the price that would follow on the approach taken in Laird v Pim.

49. Nonetheless, there is artificiality about treating the seller's claim as being for damages, after delivery was made albeit under retention of title, and particularly so where the buyer is authorised to consume the goods as here. Part of the thinking behind the rule in section 49(1) is no doubt, as Longmore LJ observed (para 43), that "It would have been thought unfair to a buyer if, before delivery had occurred, the goods had perished or been damaged and yet the price was payable, unless the goods were actually his property, see Simmons v Swift (1826) 5 B & C 857. It would also be odd if a seller's creditors on bankruptcy could both seize goods still on his premises and sue the buyer for the price."

However, it will be noted that both these rationales focus on situations where delivery has not been made, and, as appears from the judgments in Simmons v Swift, the real significance attached by the court to the fact that property had not passed in Simmons v Swift was that it meant that the goods were still at the risk of the sellers. The oddity mentioned by Longmore LJ would not have existed, if the goods had been at the buyer's risk.

50. Section 49(2) relaxes only partially the strictness of section 49(1), and it depends on the price being "payable on a day certain". These are words which can no doubt be construed liberally, as Longmore LJ was

minded to, but are not of indefinite expansion. Further, the main focus of section 49(2) may well have been on cases where delivery has not been made - hence the phrase "irrespective of delivery". Section 49 does not focus on the position existing where delivery is made, title is reserved but the price is agreed to be paid, albeit not on a particular "day certain". Even less does it focus on the position where all these features are present and the buyer is permitted to dispose of or consume the goods or they are at the buyer's risk and are destroyed or damaged. The question is whether in all these cases an action for the price is excluded, and the seller is forced to look around for other means of redress.

51. The Court of Appeal, in an alternative reason for its judgment in Harry & Garry, did not think so. Kerr LJ, now approaching the case on the hypothesis that the buy back contract was subject to the Sale of Goods Act, said this:

"In any event, however - and this is the second reason why I differ from the judge - it is clear from the authorities to which we were referred that even in the realm of contracts for the sale of goods there can be situations in which a seller may be entitled, under the particular terms of the contract, to claim a sum which is in effect the price of the goods, even though he cannot bring himself within the terms of section 49.

In that connection we were helpfully referred by Mr Bartlett to another section of the Act and a number of authorities. I can deal with them quite shortly. First, section 55 of the Act makes it clear that the provisions of the Act are not exhaustive, but that the parties may enter into agreements which negative or vary the rights, duties or liabilities which would otherwise arise under a contract of sale by virtue of the Act. Secondly, Mr Bartlett referred to a part of the speech of Lord Diplock in Ashington Piggeries Ltd v Christopher Hill Ltd [1972] AC 441, 501, in which he points out that the Sale of Goods Act is not an exhaustive code within which every transaction of the nature of a sale of goods must necessarily be brought, but that it is open to parties, if they have done so by the terms of their agreement, to create situations which, while being contracts for the sale of goods, are not governed exclusively by the terms of the Act.

It is true that in Colley v Overseas Exporters [1921] 3 KB 302, 310, McCardie J expressed the obiter view that section 49(2) was an exhaustive statement (together with subsection (1)) of situations in which a seller is entitled to sue for the price. But that was clearly not the view of Wright J as expressed in Shell-Mex Ltd v Elton Cop Dyeing Co Ltd (1928) 34 Commercial Cases at p 39, where he referred to what is now section 55 of the 1979 Act and the particular terms of the contract. He concluded that on its true construction the sellers were not entitled to recover the price, but without regard to the fact that on no view could the case have been brought within section 49."

Kerr LJ went on to state that that had been the view of the majority of the High Court of Australia, in Minister for Supply and Development v Servicemen's Co-operative Joinery Manufacturers Ltd, before concluding:

"If, contrary to the primary view which I have expressed, this transaction recorded in the form of the document of 31 December 1982 was indeed a sale by the plaintiffs to the Jariwallas, then in my view, having regard to the agreement as a whole which the judge has found, it would still be open to the plaintiffs to sue for the £46,000-odd once a reasonable time had elapsed and it had become clear - all of which has now happened - that they were not going to be relieved from the bills of exchange. Accordingly, I would allow this appeal to the extent of judgment for the plaintiffs for £46,763.45p, with the appropriate interest."

52. Like Longmore LJ in Caterpillar (para 53), I am unconvinced that the solution to the present problems is found in section 55 or in Lord Diplock's dicta in Ashington Piggeries. Both concern the negativing or variation of any "right, duty or liability [which] would arise under a contract of sale of goods by implication of law", into which category it is difficult to fit the statutory provisions of section 49. I am also unconvinced that

Wright J's judgment in Shell-Mex is of present assistance, and I have already questioned whether both members of the majority in the High Court of Australia in the Minister of Supply case were necessarily speaking of situations outside section 49(2).

53. Nevertheless, the 1893 Act was rooted in and intended to reflect common law authority, developed in an era when freedom of contract and trade were axiomatically accepted as beneficial. Certainly, a court could not now recognise a claim for the price in a case falling squarely within section 50, and it should be cautious about recognising claims to the price of goods in cases not falling within section 49. But I consider that this leaves at least some room for claims for the price in other circumstances than those covered by section 49.

54. Harry & Garry is on its facts such a case. Title being reserved to Harry & Garry, the Jariwallas were nonetheless permitted to take possession under the buy back contract, and to dispose of some of the sarees of which possession was taken back. It seems entirely natural and appropriate that Harry & Garry should be entitled to recover for the price of all the sarees so taken back, on condition of course that they were ready and willing to transfer title in the remaining sarees to the Jariwallas in return.

55. Another case covered by authority is that where the goods are at the buyer's risk, but property has not passed. This situation was addressed in two successive cases in 1872: Castle v Playford (1872) LR 7 Ex 98 and Martineau v Kitching (1872) LR 7 QB 436. In the former, the contract for the sale of ice was for cash on delivery at the rate of 20s a ton as weighed on arrival and delivery in the United Kingdom, but it was agreed that the buyer should "take upon himself all risks and dangers of the seas". The vessel was lost. The court (Cockburn CJ, Willes, Blackburn, Mellor, Brett and Grove JJ) found it unnecessary to decide whether property had passed. Whether or not it had, the true construction of the contract was from the buyer's viewpoint, in Cockburn CJ's words, at p 99:

"I will engage, when it arrives, to pay you according to what may be its value; and if, in the meantime, while it is upon the seas, it shall perish through the perils of the seas, I will undertake to pay you for it according to what may be estimated to have been its fair value at the time of going down."

Blackburn J giving the other reasoned judgment said, at p 100:

"Now here, the ship and cargo have gone to the bottom of the sea; but in the cases of Alexander v Gardner (1835) 1 Bing NC 671, and Fragano v Long (1825) 4 B & C 219, it was held, that if the property did perish before the time for payment came, the time being dependent upon delivery, and if the delivery was prevented by the destruction of the property, the purchaser was to pay an equivalent sum. In the present case, when the ship went down there would be so much ice on board, and, in all probability, upon an ordinary voyage so much would have melted; and what the defendant has taken upon himself to pay is the amount which, in all probability, would have been payable for the ice."

The two judgments define the sum payable in very slightly different ways, but both treat it as a sum payable for the goods under the contract terms.

56. Three months later the second case came before Cockburn CJ, Blackburn, Lush and Quain JJ in the Queen's Bench Division. Sugar was agreed to be sold, with the price payable "Prompt at one month; goods at seller's risk for two months", to be kept at the seller's premises and drawn down by the buyers as wanted. After two months and after only some of the sugar had been drawn down by the buyers, a fire destroyed the rest. The buyer having disputed his liability to pay for the undelivered sugar which had been burned in the fire, the seller brought an action "to recover the price of [the] sugars sold" and the question was whether the sellers were so entitled (see pp 436, 441, para 21; and p 445). The court held that they were. Cockburn CJ did so on the basis that property had passed. But Blackburn, Lush and Quain JJ found it unnecessary to decide this, and

they all decided the case on the basis that after two months the risk had passed. Blackburn J put the matter thus, at p 455:

"[A]ssume that [property] had not passed. If the agreement between the parties was, 'I contract that when you pay the price I will deliver the goods to you, but the property shall not be yours, they shall still be my property so that I may have dominion over them; but though they shall not be yours, I stipulate and agree that if I keep them beyond the month the risk shall be upon you;' and then the goods perish; to say that the buyer could then set up this defence and say, 'Although I stipulated that the risk should be mine, yet, inasmuch as an accident has happened which has destroyed them, I will have no part of that risk, but will throw it entirely upon you because the property did not pass to me,' is a proposition which, stated in that way, appears to be absolutely a reductio ad absurdum; and that is really what the argument amounts to. If the parties have stipulated that, if after the two months the goods remain in the sellers' warehouse, they shall, nevertheless, remain there at the buyer's risk, it would be a manifest absurdity to say that he is not to pay for them; and I think the case of Castle v Playford is a clear authority of the Court of Exchequer Chamber, that where the parties have stipulated that the risk shall be on one side, it matters not whether the property had passed or not. The parties here have by their express stipulation impliedly said, after the two months the goods shall be at the risk of the buyer, consequently it is the buyer who must bear the loss."

57. The price may therefore be recovered in respect of goods undelivered which remain the seller's property but are at the buyer's risk and are destroyed by perils of the seas or by fire. The present situation is in my opinion a fortiori. The price of bunkers, which remain the seller's property but which are both (i) at the buyer's risk as regards damage or destruction (clause G.12) and (ii) also permitted by the express terms of the contract to be destroyed by use for the Owners' commercial benefit, must be equally recoverable. I add that I do not suggest that this is the limit of the circumstances outside section 49 in which the price may be recoverable. The decision in Harry & Garry itself was that the price was recoverable for all the 2,494 sarees agreed to be bought back, although only 411 of them had been disposed of by the buyers with the seller's permission. The precise limits of such circumstances - and the significance which may in particular attach to the use of retention of title clauses in combination with physical delivery of the goods and the transfer of risk - must be left for determination on some future occasion. I would only add that, when that occasion arises, much benefit will be obtained (as I have done in writing this judgment) from the perceptive discussion by Professor Louise Gullifer in her article The interpretation of retention of title clauses: some difficulties (2014) LMCLQ 564. She also addresses some critical remarks to the other issue in the Caterpillar case, that is the interpretation of Holt Liverpool's role as one of agency on behalf of F G Wilson in parting with the goods to Holt Nigeria. That issue does not arise here, but may well merit further consideration in another case in this court.

58. It follows from what I have said that, had the contract been one of sale, I would have held, over-ruling the Caterpillar case on this point, that section 49 is not a complete code of situations in which the price may be recoverable under a contract of sale, and that, in the present case, the price was recoverable by virtue of its express terms in the event which has occurred, namely the complete consumption of the bunkers supplied.

Conclusion

59. In the result, I conclude that, on the assumed facts:

(i) the contract between OWBM and the Owners was not one of sale, but sui generis;

(ii) that it was not subject to any such implied term or terms, regarding performance by OWBM (or OWBAS) of any supply contract higher up the chain, as the Owners have alleged - though it was no doubt subject to an implied promise by OWBM that OWBM was entitled (in consequence of whatever were the arrangements under which the bunkers had been obtained directly or indirectly from whoever was interested in them) to supply them to the Owners on terms permitting their use for the propulsion of the vessel before payment; and

(iii) that the Owners have no defence to OWBM's claim to the agreed price.

60. Had I concluded on the other hand that the contract was one of sale, I would, again on the assumed facts, have held that section 49 of the Sale of Goods Act was also no bar to a claim by OWBM to payment of the agreed price.