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# Pick and choose from two menus?

**Alsuwaidi & Company LLC provides a comparative analysis in bunker litigation under the Laws of England and Wales and the United Arab Emirates**

A ship arrest in the United Arab Emirates (hereinafter as the ‘UAE’) is a preservatory remedy to obtain security, in favour of a claim in the merits whether to be commenced through court litigation or arbitration. For this purpose, the UAE adopted a ‘closed-list’ approach for the definition of a ‘maritime claim’, where a list consists of limited numbers of maritime debts are defined and based on which only a ship could be arrested. These are reduced to 15 classes of maritime claims listed in article 115(2) of the UAE Federal Law of No. 26 of 1981, as amended by Federal Law No. 11 of 1988, concerning the commercial maritime law (hereinafter as the ‘CML’). A bunkering claim is listed in paragraph (i) of article 115(2) of the CML, which classifies it as: ‘Supplies of products or equipment necessary for the utilisation or maintenance of the vessel, in whichever place the supply is made.’

## The concept of priority debts in the UAE

Under the UAE laws, bunkering is not only classified as a ‘maritime claim’ but also a ‘priority debt’, which takes precedence over some other maritime debts such as ship mortgage, demurrages, and insurance premium. Indeed, although the provisions of the CML on priorities were seemingly imported from the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages of 1967, the concept of ‘maritime lien’ as applicable internationally is not recognised in the UAE. Rather, the concept termed ‘priority debts’ is in place and one of these priority debts is bunkering as stated forth in article 84 (e) of the CML. Article 84 (e) of the CML classifies bunkering debt as follows: ‘Debts arising out of contracts made by the master, and operations carried out by him outside the port of registration of the vessel within the scope of his lawful powers for an actual requirement dictated by the maintenance of the vessel or the continuance of its voyage, whether or not the master is also the owner of the vessel, or whether the debt

is due to him, or to persons undertaking supply, or lenders, persons who have repaired the vessel, or other contractors.’

Pursuant to article 86 of the CML, a right derived from priority debts shall attach to the vessel and to the freight of the voyage during which the debt arises, and to the appurtenances of both the vessel and the freight earned since the commencement of the voyage. Priority debts shall be ranked and dealt with in accordance with the sequence set out in article 84 of the CML. It is also stipulated that priority debts shall follow the vessel in the hands of whoever it may be. In this regard, the change of ownership does not

affect a right attached to the vessel that is derived from a priority debt.

Following the above, we may notice that the legal position of a bunker supplier before the UAE courts and applying the UAE laws is comparatively stronger than one coming before the admiralty jurisdiction of the English Court, knowing that under English laws, there are two categories of maritime claims giving rise to the right to arrest a ship.

While a claim for unpaid bunker is given an automatic right to arrest for being a “maritime debt” in the UAE, to qualify for a right to arrest the same claim is subject to further conditions to be fulfilled under the English law.

## The English equivalent of the UAE’s priority debts and maritime debts: maritime liens and statutory maritime claims

The first category contains ‘maritime liens’, which are equivalent to ‘priority debts’ in the UAE. These are enforceable by a claim *in rem* which enables the creditor to arrest the ship. They include claims related to collision and salvage claims, crew and master’s wages, master’s disbursements, bottomry and respondentia. The second category of claims are ‘statutory maritime claims’, which are equivalent to ‘maritime debts’ in the UAE. These include, amongst others, claims related to bunker supply and are enforceable by a claim *in personam* which may enable the creditor to arrest the ship subject to the satisfaction of certain conditions before an action *in rem* can arise.

As a result, any ‘maritime debt’ in the UAE, like unpaid bunker, would give rise to a right to arrest a ship within the UAE waters regardless of her ownership as stated forth in articles 84 and 115 of the CML. The same bunker supplier, however, would face hurdles before the English admiralty court as they must satisfy additional conditions set out in section 21(4) of the English Senior Courts Act 1981 in order to arrest the concerned vessel.

The position is similar in some other common law jurisdictions such as Singapore. Indeed, in *Precious Shipping Public Company et als. v O.W. Bunker Far East (Singapore) Pte Ltd and others* [2015] SGHC 187, it was stated that under Singaporean laws, no lien arose from the supply of bunkers nor could a lien be created by contract. Therefore, when it comes to arresting a ship within the UAE waters for unpaid bunker, it is important to rely on UAE laws.

#### However, why is it important to rely on any incorporated clause showing the application of English law when it comes to claims in the merits?

Under the UAE laws, claims for unpaid bunker are considered ‘priority debts’ which would be time-barred within six months as stated forth in article 93 of the CML. In comparison and as explained above, claims for unpaid bunker are not considered as a shipping nor a maritime claim under English laws. This is confirmed in the English case

*PST Energy 7 Shipping LLC v O.W. Bunker Malta Ltd* [2015] EWCA Civ 1058 (*‘Bunkers’*). It is noteworthy that despite deciding that claims for unpaid bunker shall not be considered as a shipping nor a maritime claim, the arbitrators, the first instance judge and the Court of Appeal subsequently held that the price of the supplied bunker was due as a matter of debt. In this regard, the supplier’s claim is a straightforward claim in debt and as such is subject to section 5 of the Limitation Act 1980 of English laws, which states: ‘Time limit for actions founded on simple contract: “An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.”’

#### Two menus, which should you choose?

To conclude, whenever the terms and conditions of the bunker suppliers apply English laws to their supply contracts and whenever the suppliers wish to arrest a ship within UAE territorial waters, they are advised to ‘pick and choose’ from the UAE menu the right given to them by article 115 of CML to enforce their debt by a claim *in rem* which enables them to arrest the ship as opposed to the English menu, and ‘pick and choose’ from the English menu the right to an extended statutory time limit stated forth by section 5 of the Limitation Act 1980 instead of article 93 of the CML.



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