



MITIGATING LEGAL RISKS

LESSONS LEARNT AFTER THE OW BUNKER INSOLVENCY

By

Jeremy M Joseph

Introduction

- Bankruptcy of intermediaries
- OW Bunker & Trading OS declared financial insolvency about 18 months ago
- Shipowners and charterers can deduce from this that there are inherent dangers in the use of intermediaries to supply bunkers

Introduction

- The intermediaries on the one hand, while acting as the suppliers in the contract, provides an invoice and is meant to receive payment for the bunkers
- In certain jurisdictions however, physical suppliers have an unrestrained privilege to lay claim to the vessel for bunkers which payment are yet to be made

Introduction

- Consequently, there lies an ingrained danger for parallel claims against vessels to the degree the intermediaries declines make remittance to the physical supplier

Recent court decisions since the OWB collapse

- PST Energy 7 Shipping LLC and Anor v OW Bunker Malta Limited and Others – “The “Res Cogitans” [2016] UKSC 23 (11 May 2016) - **UK**
- Precious Shipping Public Company Limited and Others v O.W. Bunker Far East (Singapore) Pte Ltd and Others [2015] SGHC 187 - **Singapore**

Recent court decisions since the OWB collapse

- Canpotex Shipping Services Limited and Others v Marine Petrobulk Ltd, OW Supply & Trading A/S, OW Bunkers (UK) Ltd, ING Bank NV and Others [2015] FC 1108 (Canada)
- ING Bank NV and OW Bunker Middle East DMCC v Owners of the Vessel “Malik Al Ashtar” (Malaysia) [2016] Unreported

Defaulting Charterers

- During charter contracts, charterers are the ones who handle the payment and supply of bunkers. The right of a bunker supplier to keep possession of the bunkers, should the charterer fail to pay is dependent on the terms of the contract.

Defaulting Charterers

- In most law jurisdictions, including Malaysian law, contracts involving supply of bunkers expectedly allows the bunker supplier to exercise this right. However, if the supplier cannot prove that the owners consented to the contract; such claim will fail.

Defaulting Charterers

- In the United States for example, certain things have to be done if owners are to be shielded from the presupposition that time charterers can statutorily constrain a vessel for bunker purchase. In jurisdictions where time charterers are seen to have implicit powers to constrain owners, suppliers can be assisted with considerate procedure for the settlement of the claim hence, bunker suppliers are able to arrest the vessel.

Mitigating Your Risks

What can owners and charterers do ?

- The Bunker Non-Lien clause is intended to make provision for a pre-emptive mechanism to shield owners by mandating time charterers to notify the seller at the beginning that the vessel requested are being made available to their accounts hence the vessel cannot be arrested

What can owners and charterers do ?

- This allowance might not deter those interested in a seller chain from making efforts to arrest the vessel (usually in a cautiously selected jurisdiction) as guarantee should the charterer fail in paying.

What can owners and charterers do ?

- Yet, the clause and as suitable a copy of the time charterers' communication to sellers, could be cited as proof by owners in such occurrence or utilized in any subsequent adjudication or court proceedings to ascertain the merits of the bunker sellers' claim.

What can owners and charterers do ?

- One controversial area of law and practice is contracts involving the supply and commitment to pay for bunkers. However, the new requirement is an indication of the willingness to institute a system to shield the interest of guiltless parties.

What can owners and charterers do ?

- This might not be effective in every jurisdiction or event but it is intended to stimulate charterers to live up to their responsibility. Failure to admit this into a contract could arouse suspicions about the party's financial status and dependability.

What can owners and charterers do ?

- It may be important for the owners and charterers to make decisions to ensure intelligibility of the terms of contract of the supply of bunkers, as well as lessen the danger of rivalling claims:

What can owners and charterers do ?

- **Insert BIMCOs Non-Lien Clause in the charterparty.**
- **Before placing orders for bunkers, the supplier should be furnished with the following notice (this is linked to the above non-lien clause):**

Sample Wording

- To: Bunker Sellers (Name, address and contact details)
- Take note that we, (Charterers: Name, address and contact details) are today (date) ordering (specification of) bunkers for supply at (port or place) on or about (date) on our account and our credit to MV/MT..... on charter to us and that the bunkers to be supplied to the Vessel are solely for our account as Charterers and that neither the Vessel, the Owners nor the Master is a party to the bunker supply contract and no lien, encumbrance or any rights shall arise on the Vessel.
- Yours faithfully
- Charterers of MV/MT.....

What can owners and charterers do ?

- **Circumvent any reference on the Bunker Delivery Receipt to the physical supplier's own Terms and Conditions in order to avoid creating a direct contract between the vessel owner and the supplier.**

What can owners and charterers do ?

- **Stamp and sign the Bunker Delivery Receipt with the following wording:**

Sample Wording

- Vessel.....

This bunker supply is for account of vessel's time charterers, Messrs.....
I herewith declare that neither owners / bareboat charterers nor the vessel are responsible for payment of this supply and no lien or other claim against the vessel can therefore arise.

- Date:

Master / Chief Engineer

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- (Full wording can be obtained from the BIMCO Bunker Non-Lien Clause for Time Charter Parties)

What can bunker suppliers do?

- In the US and other jurisdictions, physical suppliers are at liberty to refuse any signing of document after agreeing to terms of the contract because their laws acknowledge the possession of a defaulter's vessel for the supply of bunkers.

What can bunker suppliers do?

- Take advantage of possibilities to take out insurance to protect against the danger of charterer (or bunker intermediary) insolvency

Other options

- As stated earlier, employing the use of third parties will involve high level risk vis-à-vis supply of bunkers.
- Owners may, at their discretion, decide to only relate with physical bunker suppliers straight and if this is to be, this should be accommodated in the charterparty.
- If, however, an intermediary is used, caution should be exercised in these aspects:

Other options

- **Ensure that the intermediaries have the relevant credit insurance.**

Other options

- Endeavour to agree to pay the intermediary the profit element only by way of paying the physical supplier separately, or by way of making one payment to the intermediaries which is split into two; the intermediaries receives the profit element as principal and the substantive sum as agent for the physical supplier. At least the first alternative needs to be stated in the contract with the intermediaries.

Other options

- **Ensure that the ultimate buyer has the longest credit period in the contractual chain by way of a term in the contract with the intermediaries that the intermediary has to first pay their supplier in full for the bunkers before the ultimate buyer is obliged to pay them.**

Easier said than done but we can try

- Lastly, here is something to be cautious about. Circumstances and parties involved in issues relating to supply of bunkers are different, hence there is no perfect answer which for all the legal dangers inherent in it.

Easier said than done but we can try

- Despite this, what has been shared above gives owners and charterers ideas on what can be done to lessen those dangers and reduce them to the barest minimum, in suitable situations. It must be admitted however, that these could be difficult to practice in reality.

THANK YOU

Jeremy M Joseph

+6012 3955 594

Email : jeremy@jnplaw.my