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Dealing with innovative bunker suppliers by Johannes Grove Nielsen, Bech-Bruun, Denmark

The increasing global economic crisis and in particular the downturn in the shipping markets have led to ship owners and charterers going out of business or even bankrupt. This has made the creditors more innovative and in some cases more aggressive in their ways of getting paid for the services rendered.

Bunker suppliers who have contracted with charterers for bunker supplies to their time chartered vessels are often left unpaid and in their search for payment they have turned their attention to the owners of the chartered vessels – an option that is possible in some jurisdictions and in others not.

It is normally the obligation of the time charterer to provide and pay for fuel according to the time charter party. However, even if the charterer goes bankrupt or disappears, the vessels will still be there and this has led several bunker suppliers to cast their eyes on the vessels in order to obtain payment of the debt outstanding by arresting or otherwise detaining the vessels even if they are not owned by or connected to the charterer, the debtor whom the bunker supplier had contracted with.

The interest in obtaining payment from the vessels' owners has resulted in creative initiatives providing comfort to the bunker suppliers in relation to their view that the ship owners' obligation to pay the charterers' debts is fair and reasonable and often justifiable. A view shared by few but the bunker suppliers.

When the manager of a charterer places an order for bunker and lube oil supplies, the bunker suppliers often reply by confirming the order "for account of (vessel's name) and/or master and/or owners and/or charterers and/or managers and/or operators and/or charterers (by name)". Some bunker suppliers have added to their standard terms and conditions that all orders are considered made by the different parties.

The evidential value of an order confirmation is of course substantial, in particular, if the owners do not object to the description therein. However, it is hard for the owner to object if they did not know that they had been included in the group of debtors relating to the bunker supply – the bunker suppliers most often will not send a copy to the owner. The bunker suppliers will

often also refer to the bunker receipts often signed by the captain and which refers to the order and sometimes the order confirmation.

Owners and charterers often try to keep the bunker suppliers at a distance by including a provision in their charter parties prohibiting charterers from creating, or allowing to be created, any lien over the vessel.

The NYPE form contains the provision that "the charterers shall provide and pay for all fuel and diesel fuel" and the additional clauses often contain individual clauses that "charterers not stem bunkers basis to "the order of owners and/or masters and/or owners and/or managers". Charterers to stem bunkers "for and to the order of (charterer's name)".

However, the existence of such clauses in a charter party is not in itself sufficient to provide the owners with a defence against the arrest or lien imposed by the bunker supplier on the vessel. It may be advisable to make potential bunker suppliers aware of such clauses in the charter party and that they will not have any right to a lien on the vessel. This may be effected by filing registered letters or other notifications of official nature on the bunker suppliers.

A further initiative to protect the vessels has been taken by some ship owners by instructing their officers on board the vessels to stamp any receipts or other documents given after the receipt of bunkers to the effect that the goods and/or the services have been received "solely for the account of the charterers and not for the account of the vessel or the vessel's owner".

This initiative has the weakness that at the time of the presentation of the receipts or other delivery documents, the bunkers have already been pumped into the vessel which is then already subject to lien or arrest.

A recent decision by the Danish Supreme Court shows how far the bunker suppliers can go in order to force payment of bunkers.

The case concerned an Indian ship owner and a Danish bunker supplier. The owner had chartered its vessel to an English charterer which according to the charter party was to arrange and pay for bunkers for the ship. In relation to the owner the charterer had undertaken not to order any bunkers in the name of the ship or the ship owner.

The charterers concluded an agreement with a Danish bunker supplier for the delivery of bunkers in accordance with the general terms of delivery of bunkers according to which the ship owner was liable for the delivery of bunkers and subject to a contractual lien in the ship in respect of the claim for bunkers.

Order confirmation for the deliveries was sent to the charterers only and after delivery of the bunkers and before payment was effected, the charterer went bankrupt.

Under Danish law, a bunker supplier who has entered into a contract for the supply of bunkers with a charterer cannot arrest the chartered vessel, as it is a requirement for arrest that the execution of the claim can be levied against the owner. Only if the arrestor has a claim against the owner or has a statutory maritime lien can the claim be levied against the owner. As a statutory lien is not granted to claims for the supply of bunkers and as the contract has been entered into with the charterer, arrest, under Danish law, could not be carried out in the vessel.

This, of course, did not discourage the bunker supplier who immediately pointed at the owners and requested payment as the bunker supplier would otherwise take steps to have the vessel arrested at the ship's next port of call, Riga, Latvia.

Latvian law, as Danish law, did not allow arrest of the vessel, but the bunker supplier did not show any interest in the underlying legal issues and maintained their threat of arrest.

The Indian ship owner had suffered financially from the English charterer's bankruptcy and had finally been able to find a new charterer. If the vessel was arrested in Riga, the owner would lose the new charter which could, potentially, led to the bankruptcy of the owner.

Faced with the threat of having their vessel arrested and consequences that would follow, the owners signed an agreement on their obligation to pay for the bunkers, adding the notation "signed under duress". This was not acceptable to the bunker suppliers who proceeded to prepare for the unlawful arrest. The phrase was then deleted.

During the subsequent proceedings in Denmark the owners submitted that they had entered into the agreement with the bunker supplier under duress and that the bunker supplier had taken benefit of such duress knowing about the extreme consequences an arrest would have for the owner.

It was submitted that it does not seem right or fair that the owners have to bear the risk for the bunker suppliers' deliveries on credit without the owners having had the possibility to decide whether to accept the debtor (without security) or not. It was submitted that it was not clear why the bunker supplier enjoyed such preferential status over the charterers' other creditors.

The Supreme Court denied all the owner's arguments.

The Supreme Court ruled that albeit the Danish bunker supplier had threatened with an unlawful arrest and this threat had resulted in owners signing the agreement under duress this did not make the agreement unenforceable as, if the remedy turned out to be unlawful, the ship owner could simply claim compensation for his losses afterwards.

The case shows both the extreme measures taken by the bunker suppliers and how far they are protected by the courts.

Although most countries provide strict liability for unlawful arrest, it is often, as in this case, not a practical option for the owner to simply let the vessel be arrested and take the legal battle afterwards. The bunker suppliers know this and take advantage of it when forcing swift settlement on favourable terms.

But are the owners left completely without any right of justice?

In some jurisdictions providing, for instance, statutory liens for the delivery of bunkers - probably yes. In others not completely, but levelling the playing field require owners to approach the battle with the same kind of innovativeness and fearlessness as the bunker suppliers.

Under Danish law, owners are not part of the contract for supply of bunkers entered into between the bunker supplier and the charterer.

Consequently, although the bunker supplier clearly sees the claim as a contract claim, if the matter is turned upside down and viewed from the owners' side, the claim is out of contract which renders two options open for the owner no matter what jurisdiction clause is contained in the general terms and conditions of the bunker supplier: It can let the vessel be arrested in whatever jurisdiction it is in and take the battle there, or it can go on the offence and file a suit against the Danish bunker supplier in Denmark immediately when it hears about the threat of arrest.

Denmark would often have jurisdiction as it is the domicile of many of the world's biggest bunker suppliers.

Recent cases show a huge commercial advantage to the owners by adopting this approach and by claiming that the bunker supplier should admit that the owner is not the right debtor for the claim.

This has the dual effect that the merits of the actual claim given cause to the (potential) arrest be decided in Denmark where the owner is not liable for the claim and also, it puts tremendous pressure on the bunker supplier as if it does not reach an amicable settlement, a legal precedence that owners are not liable for charterers bunker debt may be established – a precedence that could forever ruin the bunker suppliers' well known tactic of threatening unlawful arrests in order to force payment from owners.