The OW BUNKER'S debacle in Spain

The collapse of the marine fuel trader OW Bunker and its affiliates has resulted in a flurry of legal disputes all around the world involving complex issues.

Said collapse took place in November 2014 and the shipping industry has already heard of notable decisions as the one recently issued in July by the English High Court in the “RES COGITANS” matter, or the opposite ones of the courts in New York and Singapore on the validity of the interpleader applications, to mention some of them.

Spain is not an exception in the flurry of litigation arising from the OW's bankruptcy and the related complex legal issues.

I will only deal in this occasion with the typical situation of the cases of the suppliers who sold the marine fuel to OW Bunker or its affiliates and also physically supplied it to the vessel.

Before dealing with said typical situation, I would like to mention that under Spanish law there are not interpleader proceedings as those of other jurisdictions.

We all know that these proceedings are to protect a party facing multiple claims in respect of a simple obligation, by asking the court to determine the entitlement of competing claimants and in the interim, granting equitable relief by making a form of anti-suit injunction to restrain the competing claimants from proceeding elsewhere.

On the other hand, I would also like to mention that the very interesting conclusion of the English High Court on the nature of the supply contract in the RES COGITANS would not be the one in Spain, where a contract for the supply of bunkers is a contract for the sale of goods.

Coming to the typical situation of a supplier selling the marine fuel to OWB or its affiliates and at the same time physically supplying it to the vessel, it is understandable that said suppliers, given the bankruptcy of said companies, had pondered to jump the queue of OWB creditors by proceeding directly against the vessel and her owners to collect the amounts owed for the fuel.

Are the suppliers entitled to do so under Spanish law?

The issue is rather a difficult one since under the 1993 Convention on Maritime Liens and Mortgages, to which Spain is party, a claim for suppliers is not a maritime lien.

The difficulty could be in principle overcome if the law of the flag of the vessel considers a marine supply to be a maritime lien since said law would be then relevant in Spain given that article 10,5 of the Spanish Civil Code provides that rights established on vessels are subject to the law of her flag.

A maritime lien arises in favour of a creditor by operation of law as security for a claim. After it has attached to a vessel a maritime lien goes with the vessel everywhere and the supplier, holding such a lien, would be able to pursue the vessel and her owner to collect the amounts owed for the fuel.

And when the supply is not deemed a lien under the applicable law, would the supplier be able to proceed against the shipowner?

As always, it would depend on the circumstances surrounding each case but I would say in general that suppliers who had sold to OWB or its affiliates and had physically supplied the marine fuel to the vessel could have arguments favouring such course of action, not without difficulties.

In practice, it was clear in most of the cases that the supplier sold the marine fuel to OWB or its affiliates, who acted as an intermediary and it was the supplier who physically supplied the product to the vessel who, in turn, signed in its own name and behalf a bunker receipt issued by the supplier.

This bunker receipt
would be a key document.

There is a usual Bunker Receipt in the sale contracts between the Spanish suppliers and OWB or its affiliates that we have been able to examine:

“Once the supply is completed and the measurement of the grantity supplied performed and samples taken, THE SELLER shall present the ship a receipt that must be signed by the Ship’s Master supplied or the agent and it will bear the ship’s seal, confirming satisfactory receipt of the marine fuel on board the ship”

The bunker receipt, as mentioned, is the key document:

- It is the evidence of the delivery of the product (fulfilment of its obligations by the supplier) to the vessel/owners, and
- It is the evidence of the acceptance from these of the delivery of the product (quantity and quality) by a company which in fact was not the seller under the (second) sale agreement between OWB or its affiliate and the vessel's owners or charterers

In said circumstances,
there are arguments under
Spanish law to maintain:

1. That the supplied vessel/owner should be considered as a third party in favor of whom the bunker sale contract was executed between the supplier and OWB, who as intermediary, was never the party who would physically receive the product,

2. That the bunker receipt, by which the final buyer of the bunkers/supplied vessel (“third party”) approved the product quantity and quality, should be consider as an (express) agreement to the sale contract between the supplier and OWB, and

3. That, accordingly, the suppliers CT&C bind the third party (vessel/owners) in favor of whom the (first) bunker sale contract between the said supplier and OWB was executed including the usual invoicing and payment clause:

“the bunkered vessel, the buyer, the shipowner company, the management company, the charterer and any parent company or majority shareholder, if any, shall be joint and severally liable for payment of the price of the Marine Fuel supplied:
The seller may enforce his credit, in the manner and within the legal limits foreseen on the ship bunkered and on the chartered goods accrued thereon”

Retention of title clause in favor the supplier would also help sometimes the supplier, having this finally the supplier an additional relevant tool in practical terms.

This tool is the possibility of arresting the supplied vessel alleging a maritime claim pursuant to the 1999 Geneva International Convention on the Arrest of Ships and the Spanish Shipping law 14/2014.

Later, if agreement is not reached or guarantee is deposited before the arresting court, the supplier would have arguments to obtain a judgment in respect of the claim against the shipowner that can be enforced against the supplied vessel by a judicial or forced sale.

After all, the vessel's navigation and her operation have been benefited with the supplied fuel.

Don´t you think that in case of poor quality of the bunkers the vessel owners would sue the supplier?

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