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Summary (by far) of the test case "Res Cogitans"

The first test case "Res Cogitans" after the OW Bunker's bankruptcy was first arbitrated and the tribunal found in favour of OW/ING. Vessel owners appealed the award but the English Commercial Court upheld the tribunal's findings. Owners then appealed to the English Court of Appeal, however, the Court has upheld the Commercial Court decision of 14 July 2015.

The case

The case involved the direct supply by an OWB subsidiary to the vessel owners just before the OW bankruptcy was announced. No payment was made by owners pending clarification of the party rightfully entitled to be paid for the bunker supply. OW Bunkers did not pay the physical supplier.

Under the contract, OWB's subsidiary (in this case Malta) had agreed to arrange for delivery of the bunkers to the owners' vessel and to ensure that the true owner of the bunkers (the physical supplier) consented to the consumption of bunkers during the period of credit. Therefore, under English law the physical supplier could not have a claim against the owners in conversion, nor were owners contractually obliged to make payment to the physical supplier. Once the credit period had expired, the debt was owed by the vessel owners to OW Bunkers/ING.

The Law

Owners of "Res Cogitans" lose in three tribunals in a row. The Court of Appeal has upheld the Commercial Court decision that, a contract for the sale of goods, where there is a credit period and a retention of title (ROT) clause, coupled with an express (or even implied) right to consume the goods during the credit period, is not a contract of sale within the scope of the Sale of Goods Act 1979, at least so far as bunkers are consumed during the credit period.

Implications and current status of the case

The decision, if finalized, has significant implications. ROT clauses will need to be reassessed. Buyers may need to seek contractual promises as to quantity, quality, and fitness for purpose to the extent that the goods are consumed prior to payment.

In the bunker industry, this may lead to:

- A reduced use of bunker intermediaries by bunker suppliers.
- The re-wording of bunker suppliers' standard terms, bearing in mind that ROT clauses merely provide a diminishing security for payment no longer fit for purpose.
- A possible return to requests for up-front cash payments by bunker suppliers.

Owners of "Res Cogitans" have applied for leave to appeal to the English Supreme Court and it is expected that Owners will know whether they can further appeal early next year. We will continue to watch the developments and will issue further circular wherever appropriate.

Source of Information: Andrew Liu & Co., Ltd www.andrewliu.com.hk