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Bunkering - Take care ! Many legal risks and pitfalls

FDD based out Shanghai again brings you a very practical write up. Many law firms, or Clubs produces tons of write up, but what Andrew Liu Clients need is a practical write-up and please find this time an article that is suitable for owners and Operators on legal risks associated with supply of bunkers.

Take a usual scenario in shipping is that a ship owner has time chartered the vessel and the charterer have ordered the bunkers. In this scenario there are multiple risks such as:

Risks under Scenario 1

Charterers has not paid the bunker supplier and in many jurisdictions, the person who supplied the bunkers has a maritime lien, such as in US and that supplier will try to arrest the vessel to obtain his money.

How can you protect?

Advice - the ship crew to sign the Bunker Delivery Receipt (BDR) on behalf of the charterer and also write the details of charter party, such as the date, when signing the Bunker Delivery Receipt. Also add 'Charterers (name) remain solely liable for payment of bunkers'. It is not full proof solution in all jurisdictions, but it will protect you to large extent.

Risks under Scenario 2

Bunker supplier has become bankrupt, and their administrator is after a party responsible for payment. The Physical bunker supplier, which actually supplied the bunkers, is also after the payment. If you pay now pursuant to the invoice to one party, then you are not sure whether you will still liable to pay to another party.

How can you protect?

The situation is not clear-cut and Supreme Court had granted leave to the Owners of the "RES COGITANS" to appeal the Court of Appeal judgement. The Supreme Court has now expedited the appeal process and hearing took place on 22 March 2016. While writing the article, judgement has come on 11 May 2016 and Supreme Court has dismissed the appeal of the Owners. Owners will be liable to pay the amount to the administrators of OW Bunker pursuant to the fact that invoice is an ordinary debt and arguments whether the clear title was passed as per the Sales of Goods Act is not relevant. Physical supplier can also seek payment for bunkers. What will the effect of this judgment in other jurisdictions such as Singapore, US, our view is that it is too early, since the judgment came just 2 days previously. However, please check the Terms and conditions of the contracts and if US jurisdiction clause is involved, it's better to pay the money in US court to buy time before things are clearer.

Risks under Scenario 3

Many of bunker supply companies are just traders. They do not supply the bunkers themselves and are just intermediary. In a very tricky manner, they include a following clause that is very complicated in any jurisdiction. For example:

“We hereby give notice that we have assigned to [Bank X] all amounts due to us from you under the contract to which this invoice relates...We therefore authorise and instruct you to pay the amounts due under this invoice to [Bank X’s account] without further obligation to us.”

This clause is very risky for owners/operators. Major risks are whether the Owner/operator is liable for payment to the bunker trader with whom the owner/operator had contracted, or are they liable for payment to the bank who has been assigned the payment by that bunker trader due to the above clause, or to the physical supplier who can also demand the payment in future.

How can you protect?

FDD department advice to the clients of Andrew Liu is to avoid such contracts completely and instead find another bunker supplier. If for some reason you like this bunker supplier who has provided you with this unusual clause multiplying your risks, then in that scenario contact the bank to enquire as to whom you are liable to pay amount pursuant to the invoice. Also, under different governing law of the contract, risks arising from the clause can be even more. Its best to avoid contracts having such clause.

Many of the Andrew Liu clients have managed to resolve their disputes with their bunker supplier with the help of FDD department of Andrew Liu.

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