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London Arbitration 28/22: (Maritime) Lien on Me?

An interesting (anonymised but legally incorrect) London arbitration final award highlights the risks of foregoing legal advice at an early stage of a dispute.

The facts of the case are straightforward, and a common scenario seen every day when vessels stem bunkers.

The vessel was on time charter and the time charterers arranged a stem of bunkers on their own account with bunker suppliers. The time charter included a no-lien clause, as did the demise (bareboat) charter. However, as is quite typical, the bunker sale contract purported to be made with not only the time charterers but also the owners and the vessel, amongst other supposed counterparties. Furthermore, it was subject to English law but applied United States federal maritime law for the purpose of purportedly creating a US statutory maritime lien against the vessel for the bunkers supplied.

The time charterers failed to pay the invoice, and the bunker suppliers purported to commence arbitration not only against the time charterers but also the demise owners. With both parties having failed to respond to the arbitration notice, the bunker suppliers' arbitrator became sole arbitrator by default.

Only later did the demise owners become involved and then only alleged that the bunker suppliers had admitted in correspondence that the time charterers were the ones liable to pay.

The sole arbitrator held that the correspondence in question was fraudulent – created by a hacker thought to be acting on behalf of the time charterers – and went on to determine there was a US maritime lien on the vessel and the demise owners were liable to pay.

However, as a matter of English law, the time charterers could not agree to the bunker sale contract on behalf of the demise owners (or the vessel) without their express authority (and such authority had been expressly excluded by the no-lien clause in the time charter).

Further, the bunker suppliers and the time charterers alone could not contract on a basis that artificially created a US maritime lien (which arises by US statute) on the vessel, which was a third party to the contract. This follows from the English Admiralty Court judgment in *The "Yuta Bondarovskaya"* [1988]

1 Lloyd's Rep. 357. This keeps in mind that English law alone would determine if a contract was formed and who the parties to that contract were, because US federal maritime law only applied for another purpose.

As a result, the demise owners made two key mistakes. First, they could have remained silent, which would have preserved their right to challenge the final award on enforcement on the basis that the sole arbitrator lacked substantive jurisdiction to have made the final award. Second, and with proactivity in mind, they should have challenged the sole arbitrator as to his or her substantive jurisdiction to resolve the supposed claim against them, because they (and the vessel) were not counterparties to the bunker sale contract or any London arbitration agreement found therein.

The value of FD&D cover

Had the demise owners (who later became registered owners) of the vessel held North FD&D cover, instead of engaging with the purported arbitration without legal representation, this could have avoided a potentially enforceable final award being made against them in the first place.

Further, this would have spared them the substantial costs now being incurred in seeking to obtain leave to appeal against the final award from the English High Court or (if this cannot be corrected because the application is out of time and time is not extended or the appeal itself is not granted or if heard is dismissed) having to contest enforcement proceedings, if there are any good grounds to do so.

Source of Information: The North P&I Club