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Recovery Actions for Unpaid Bunker Claims

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High bunker prices and tight economic circumstances have resulted in a perfect storm, leaving unpaid bunker suppliers in its wake.

The position of bunker suppliers is made precarious for three reasons.

First, bunker fuel is one of the largest expenses in shipping operations. In these tight economic times bunkers are one of the costs that are the hardest for shipping operators to meet. As a result, bunker suppliers are faced with significant delays in payment and non-payment.

Second, shipping operators often expect credit terms for the payment of bunkers. Most bunker suppliers purchase their stock from oil majors on tight credit terms. Bunker suppliers try and reflect these in their credit terms with shipping operators. Any delay in payment by shipping operators leaves bunker suppliers in a position where they have to pay their suppliers regardless.

Third, shipping operators and their vessels are often only in the jurisdiction of the bunker suppliers temporarily. This is particularly the case in geographically remote places like Australia. This means that a supplied vessel will often leave the jurisdiction before the credit terms expire and before payment is due – thereby removing the only asset of the shipping operator from the jurisdiction.

What then is a bunker supplier to do?

The starting point is to conduct a risk assessment for each supply. Any new customer, shipping operator with bad credit history or shipping operator that does not have a repeat presence in the jurisdiction might be identified as a potential credit risk. It might be appropriate to require upfront payment or at least a substantial deposit for any such supplies.

For any supplies where credit terms are to be granted (and in practice, this is most supplies), the next most important thing is to establish a solid legal foundation for the supply. This means ensuring that the bunker supplier has an appropriate, comprehensive and up-to-date

set of terms and conditions for supply. The terms and conditions will provide the legal foundation for many rights of enforcement that a bunker supplier might not otherwise have under general law.

For example, the terms and conditions might provide for enforcement rights as against additional parties. Where a vessel Owner orders a supply there is generally no issue that the Owner is liable to pay and action can be taken against the vessel in the event of non-payment (see below). However, under a time charter it is usually the time charterer that is responsible for bunkers. Where a time charterer orders a supply the supply contract will be between the bunker supplier and the time charter, not the Owner. The time charterer will therefore be responsible for payment and the bunker supplier may not be able to take any action against the Owner or the vessel.

Bunker supply terms and conditions often try to address this problem by saying that any supply is made jointly to the person ordering the supply and the Owner/vessel and that enforcement action can be taken against any or all of them. However, a contract between a charterer and bunker supplier cannot automatically make Owners jointly liable just by saying so. It is necessary to give Owners notice of the proposed supply and terms and conditions and obtain their express or implied agreement to be bound before the contract is concluded.

Another example is for terms and conditions to provide for a retention of ownership of bunkers by the bunker supplier until it is paid in full. Ordinarily, ownership of goods transfers to a buyer upon delivery. Under a retention of ownership clause, the bunker supplier remains the owner of the goods until it is paid. If a payment default occurs, the bunker supplier is entitled to exercise its rights in respect of the bunkers.

First, the bunker supplier could demand that unconsumed bunkers be redelivered to it, whether at the next port of call or elsewhere. However, in practice this might not always be possible. Not all ports are equipped to discharge and store bunkers. Further, the price obtained upon resale at an intermediate port might not be attractive.

Second, the bunker supplier can demand that its bunkers are not further consumed. Any person with notice of the bunker supplier's retention of ownership who then consumes the bunkers will be guilty of conversion, which is similar to theft.

However, where bunkers are ordered by a time charterer a further complication arises. Where a time charterer fails to pay for bunkers, they often also default under the charterparty and redeliver the vessel and bunkers remaining on board to the Owners. Charterparty terms typically provide that Owners will pay the charterer for the bunkers remaining on board upon redelivery. Where Owners take over and pay for the bunkers without prior notice of the bunker supplier's retention of ownership, the law says that they take the bunkers with 'clear title'. That is, clean and free and not subject to any retention of ownership.

In order to establish a right to pursue Owners for conversion, bunker suppliers need to ensure that Owners are on notice of the retention of ownership before they take over and pay for any bunkers remaining on board. This is best achieved by giving Owners notice of the retention of ownership at the time of supplying the fuel to the vessel (if Owners have not otherwise already been provided with notice of the terms and conditions and/or made party to the bunker supply contract). This is best done by communicating direct with Owners. A fall-back, although not as effective, is to include a notice of retention of ownership in the bunker delivery receipt signed by the Master/Chief Engineer on behalf of Owners when the supply is made. This provides an additional cause of action and an additional person against whom to seek recovery.

Terms and conditions will not do any good if they are kept in a desk drawer or on a hard drive. Terms and conditions must be incorporated into the contract for bunker supply in order to be effective. They must be incorporated before the supply contract is finalised. Once the supply contract is finalised, it is too late to try and incorporate terms and conditions – the deal is already done.

Incorporation is best done by getting the customer to sign a copy of the terms and conditions. Next best is to send the customer a full copy of the terms and conditions when negotiating the supply. Following that, the next best course is to include a notice referring to and incorporating the terms and conditions in the booking request/confirmation forming the supply contract.

Bunker suppliers should also consider insisting that payment for the supply is guaranteed by another entity, such as a group parent or holding company. Of course, a guarantee is only as good as the financial standing of the guarantor. A guarantee provided by a company with no assets or cash flow is as good as no guarantee. The financial standing of the guarantor must therefore be considered.

A further issue that must be considered in relation to guarantees is the authority of the person signing the guarantee. In order to be valid, a corporate guarantee must be signed by a person who is authorised to give the guarantee. An unauthorised guarantee signed by the mailroom clerk will not bind the guarantor. Under Australian law, a guarantee signed by two directors of the guarantor should be upheld. The law of the place which governs the guarantee should be considered in this respect. If the person signing does so pursuant to a power of attorney, the power of attorney should be called for and reviewed to ensure that the giving of corporate guarantees falls within the person's scope of authority. It is also a good idea to include a clause in which the person signing warrants that they have full authority to give the guarantee. If the guarantor is later able to avoid the guarantee as being unauthorised, the person signing can be sued personally for breach of their warranty of authority.

In the event that payment default occurs despite the above measures, what are the enforcement options open to bunker suppliers?

The most effective weapon in an unpaid bunker supplier's armoury is to arrest the supplied vessel in order to secure its claim. Only vessels owned by the person liable for the bunker supply can be arrested. For supplies made to Owners, arrest is likely to be unproblematic. For supplies made to time charterers, the above considerations as to whether or not Owners are also made jointly liable under the bunker supply contract will apply. An Owner is required to put up security for the claim in order to have the vessel released, failing which the Court will sell the vessel and any successful judgment will be paid from the sale proceeds. Even the threat of arrest, where it can be followed through, is often enough to get many claims paid.

In certain circumstances, sister vessels in the same ownership can also be arrested. This becomes a very valuable right if the supplied vessel has been sold, sunk, scrapped or is not located in a jurisdiction where arrest is convenient.

In some jurisdictions it might be possible to arrest the relevant bunkers themselves in order to secure them, even if a right to arrest the vessel does not otherwise exist. However, this is unfortunately not the case under Australian or English law.

Similarly, in some jurisdictions, namely the United States, the supply of bunkers to a vessel gives rise to a maritime lien which permits the arrest of the vessel regardless of whether or

not the Owner ordered and/or is liable for the supply. A maritime lien is a special class of maritime claim which is said to 'travel with' the vessel and ranks in priority over other claims, regardless of whether the Owner is liable and/or any subsequent transfer of ownership of the vessel. However, Australian law does not recognise a maritime lien for the supply of bunkers.

Some bunker suppliers try to obtain the benefit of the maritime lien recognised under United States law by making United States law the law of the bunker supply contract and/or providing for a contractual lien in the bunker supply contract. However, only maritime liens recognised under Australian law will be given effect by Australian Courts. Maritime liens which only exist under foreign law or contract will not be recognised in Australia. The position may be different in a very limited number of jurisdictions.

Accordingly, the maritime lien for the supply of bunkers that is recognised by United States law will only be able to be enforced by arrest action in the United States or in one of the few jurisdictions which recognise foreign maritime liens, such as Canada.

United States law also provides a further interesting enforcement mechanism – the Rule B attachment. Rule B of the Supplemental Rules for Federal Admiralty and Maritime Claims permits a person with a maritime claim to attach property (such as bank deposits) of the defendant that is located within the jurisdiction, up to the value of the claim. Once attached, the property is held as security for the claimant's claim.

The introduction of Rule B attachment resulted in a tsunami of Rule B claims in the United States courts. Maritime claimants successfully attached any payments into or out of the defendant's United States bank accounts. Maritime claimants also successfully attached payments which were merely in transit and routed through the United States banking system due to the currency of payment being United States dollars.

This continued until the United States Court of Appeals, Second Circuit, issued a decision which put an end to the frenzy. The Court held that payments in transit were not property of the defendant and could not be attached until they landed in the defendant's account. For in transit payments, the defendant's account would not be in the United States. Payments which were merely routed through the United States banking system became virtually untouchable. However, it is still possible to attach deposits within or payments coming out of a defendant's United States bank account.

A further limitation on Rule B attachment is that it is only available where the defendant 'cannot be found' within the relevant United States District. That is, where the defendant is not registered to conduct business in the relevant District. Rule B was designed to provide maritime claimants with a means to secure their claim and force non-resident defendants to appear. However, if a defendant is found within the jurisdiction, there is no need for a Rule B attachment as a claimant can simply sue the defendant in person.

Whilst the feast that was Rule B attachments is now more of a modest meal, Rule B attachment is still a valuable means for maritime claimants to secure their claims, providing that the thresholds for attachment can be met.

The nature of the bunker supply business places bunker suppliers in a precarious position in relation to payment. However, a well structured supply contract can help avoid some problems and provide additional remedies in the event of default. If default occurs, bunker suppliers have a range of potential enforcement mechanisms available to them across the globe. Not all of them will always be available, but it pays to consider all of the options in order to recover a significant debt.

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