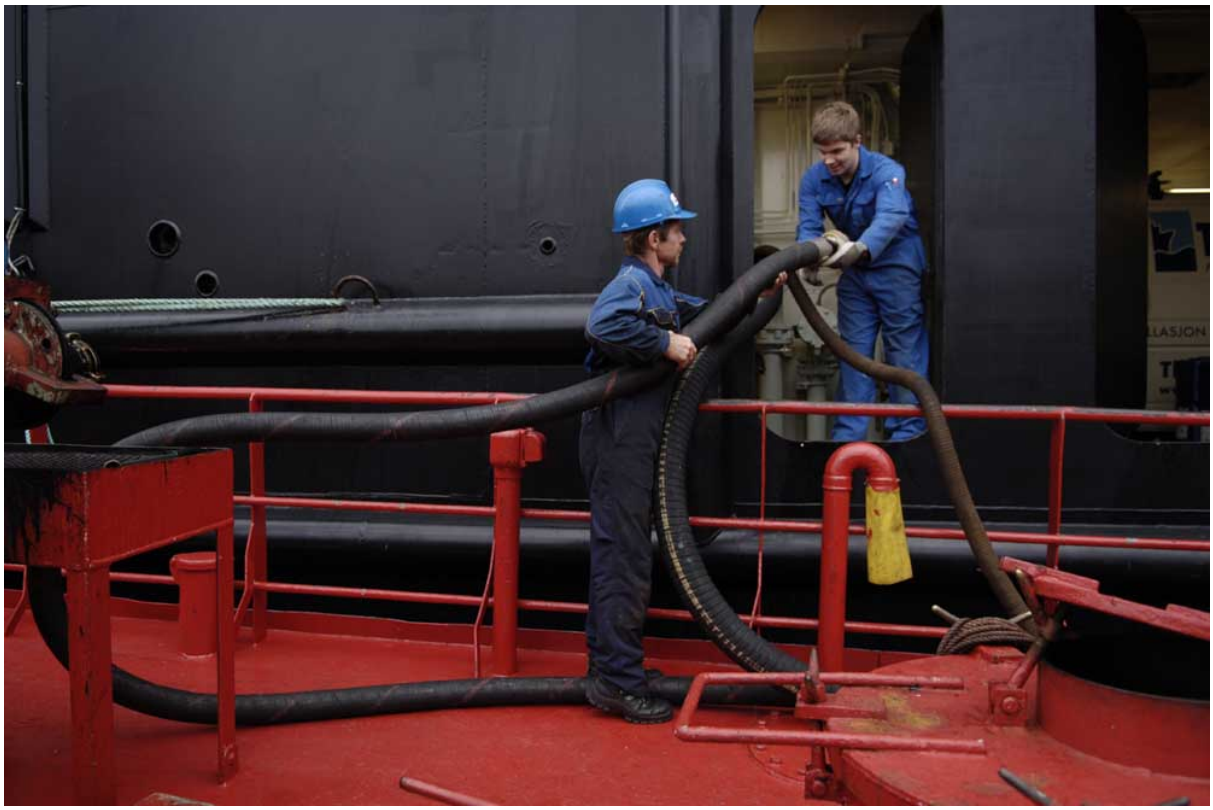

Gard Alert: OW Bunker – Court of Appeal also rejects vessel owners' arguments

The key concern of owners remains the uncertainty that bunkers consumed are not clearly free from third party proprietary or lien rights.

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It is important to underline the case only deals with the English law position on whether the bunker contract was intended to transfer property and title in bunkers. The appeal court decided it was not - it was a supply agreement, granting owners the *licence* to consume the bunkers supplied. The court was unwilling to state whether such a licence automatically prevents third party claims, but doubted whether such term operates by implication.

Background

The owners had sought a declaration in arbitration against OW Bunker Malta Ltd (OWBM) and ING (as OWBM's security assignee) that they were not liable to make payment to ING as OWBM were incapable of transferring ownership in the bunkers. OWBM had sub-contracted the supply to its Danish holding company, OW Bunker & Trading AS (OWBAS), which in turn sub-contracted the supply to Rosneft Marine (UK) Limited (RMUK), which then itself sub-contracted the supply to the physical supplier RN-Bunker Ltd. RN-Bunker Ltd was later paid by RMUK, but RMUK had not been paid by OWBAS, and OWBAS had not been paid by OWBM.

The London arbitration resulted in a successful outcome for OW Bunkers/ING. The owners appealed to High Court, which upheld the award. Owners then took their case to the appeal court where RMUK was permitted to make written submissions explaining why such an important decision should not be made without it having the opportunity to argue its case.

The findings

ING argued that the bunkers had been supplied on credit and for immediate consumption by the vessel. It argued that all parties in the bunker trading chain assumed this was going to occur, so that the simple obligation of owners was to pay OWBM upon expiration of the 60 day credit period. The arbitration tribunal agreed.

The High Court took the view that a bunker supply contract containing a retention of title clause combined with a permit to consume the bunkers supplied was not one of sale of goods. It decided OWBM had agreed to arrange for the delivery of the bunkers to the owners' vessel, and this conclusion was supported by the appeal court.

The agreed assumed facts put forward to the arbitrators stated RMUK were taken to know that OWBM and OWBAS were traders and supplying on the standard OW terms permitting the owners to consume the bunkers before they were paid for. The appeal court declined to decide the point whether it was an agreed term of the OWBM bunker supply that an effective licence or consent to consume had indeed been obtained from RMUK.

A decision on whether to appeal the outcome of the latest development to the Supreme Court is under consideration.

Comments

Owners and time charterers who contracted directly with the OW Bunker Group on similar terms now face the decision whether to pay ING or fight on. The key concern of owners remains the uncertainty that bunkers consumed are not clearly free from third party proprietary or lien rights. The owners' argument, that ING as a security assignee of OWBM's right, cannot demand to be paid if it never acquired nor passed on ownership of bunkers, again failed.

Further, the judgment fails to answer questions whether vessels may yet be arrested by physical suppliers who, whilst they may lodge claims in the OW Bunker insolvency, have no realistic prospect of receiving any dividend payment out.

A number of interpleader actions remain pending in the English courts. It is noteworthy that whilst a Singapore court has refused applications by owners and charterers to deposit funds in court to allow the court to determine priority interests directly between ING and the physical suppliers, a Canadian court has concluded a physical supplier should be paid, with OW Bunker/ING entitled only to receive the *margin* on the financial transaction. Physical suppliers in the US (who have maritime liens) have also been criticised by the courts in New York for selling on credit terms to OW Bunker companies, but seeking to enforce against the vessel rather than lodge claims in the OW Bunker insolvency.

Finally, the mechanisms adopted by the US and Canadian courts has been to bring together the main players - owners, operators, physical suppliers, OW Bunker and ING - into the same forum to seek a measured response to the fallout from the OW Bunker collapse. This has shown far greater flexibility and ingenuity in attempting to find a resolution to the problem than so far demonstrated by the piecemeal approach of the English and Singapore courts.