MEMBER ALERT

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OW BUNKER GROUP COLLAPSE: US APPELLATE COURTS' RULINGS REJECTING PHYSICAL BUNKER SUPPLIERS' MARITIME LIEN CLAIMS

The litigation in the United States related to competing maritime lien claims against vessels whose charterers contracted with OW Bunker & Trading A/S or its affiliates (OW Bunker) in October-November 2014 has continued over the past year, primarily at the appellate level. Your Managers attach a brief review of recent US Appellate Courts' decisions on this subject.

Members are reminded that there is a dedicated space on the Club's website which contains a range of information on the OW Bunker collapse, including answers to frequently asked questions on the subject, general guidance, and various updates. It also provides links regarding the OW Bunker bankruptcy; and can be accessed at:

http://www.american-club.com/page/OW_bankruptcy.

Members are encouraged to refer to this section of the Club's website or to contact the Managers directly should they have questions about this matter.

Your Managers would like to thank Mr. James Power and Ms. Marie Larsen of Holland & Knight LLP for their kind assistance in making contributions to, and reviewing, this document.

ATTACHMENT TO MEMBER ALERT OF AUGUST 1, 2018

OW BUNKER: US APPELLATE COURTS' RULINGS REJECTING PHYSICAL BUNKER SUPPLIERS' MARITIME LIEN CLAIMS IN THE US

THE UNDERLYING DISTRICT COURT RULINGS

As previously reported, last year litigants in the OW Bunker interpleader and vessel arrest cases received slightly differing rulings from District Judges Valerie Caproni and Katherine Forrest.

A. The Arrest Actions

The matters before Judge Forrest arose from ING Bank N.V.'s (ING) arrest of vessels seeking to enforce a maritime lien for the supply of bunkers by OW Bunker. In many of the cases, the physical suppliers then intervened and also filed maritime lien claims against the arrested vessels. The arrests were made in various US jurisdictions but then transferred to the Southern District and assigned to Judge Forrest. ING and the physical suppliers thereafter filed cross motions for summary judgment on the validity of their maritime liens and OW Bunker's purported assignment of its maritime lien to ING.

Under the Commercial Instruments and Maritime Lien Act (CIMLA, or the Lien Act), a provider of necessaries may obtain a maritime lien against the supplied vessel under certain circumstances, if such provision was made on the order of the vessel or a person authorized by the owner (i.e., a charterer). 46 U.S.C. §31341, *et seq.*

In *ING Bank N.V. v. M/V Temara*, 2016 WL 6156320 (S.D.N.Y. Oct. 21, 2016) (*Temara II*), Judge Forrest held that the physical supplier was not entitled to a maritime lien, because it failed to meet the requirements of the Lien Act, because it did not act on the authority of someone authorized to bind the vessel. Instead, it acted on the instruction of OW Bunker, who was not an agent of the vessel.

Judge Forrest noted that it is possible that neither entity possesses a lien where neither meets the statutory requirements.

Judge Forrest found that OW Bunker never acquired a maritime lien under the Lien Act because it did not "provide" necessaries to the vessels where it did not pay the underlying physical supplier, or extend credit in any way relating to the transaction. Judge Forrest discussed the purposes of the lien act to protect good faith necessaries suppliers, but not to award a windfall to claimants like ING who failed to pay the underling physical supplier. Given her decision on the lien issue, Judge Forrest did not reach a decision on whether any maritime lien held by OW Bunker had been validly assigned to ING based on the English law assignment.

ING and the physical suppliers filed cross-appeals and oral argument was held on March 15, 2018.

B. The Interpleader Actions

In the interpleader actions Judge Caproni ruled consistently with Judge Forrest, and the other decisions from around the country that the physical suppliers do not hold maritime liens against the vessels with respect to the fuel deliveries. *Clearlake Shipping Pte Ltd. v. O.W. Bunker (Switz.) SA*, 239 F. Supp. 3d 674 (S.D.N.Y. 2017). Judge Caproni performed a careful review of the fuel delivery transactions, and noted that the physical suppliers did not provide the fuel "on the order of" the vessel interests or any other entity authorized to bind the vessels to a maritime lien. Importantly, Judge Caproni noted that the physical suppliers merely acted as subcontractors at the instruction of OW Bunker, with no contractual privity with the vessels, their owners or agents. Additionally, Judge Caproni rejected that any of the acts taken by the vessel interests upon delivery, such as the signing of the bunker delivery note, or the mere knowledge as to the identity of the physical supplier, was enough to ratify the supplier relationship or to bind the vessel to a maritime lien.

Judge Caproni did however find that the contracting OW Bunker entity possesses a maritime lien for the fuel deliveries. Judge Caproni found it significant that OW Bunker, as a party to the sales contract with the vessels, bore a financial risk, and that if the physical supplier had not performed then OW Bunker would have been responsible for finding a substitute supplier, or alternatively liable for damages. Judge Caproni noted that this analysis is not inconsistent with Judge Forrest's earlier ruling against OW Bunker, because Judge Forrest noted the lack of record in the arrest cases as to the financial risk borne by OW Bunker, whereas in the interpleader cases Judge Caproni found that the extensive factual background of the transactions supported her finding. Judge Caproni emphasized that while there may have been equitable defenses available against OW Bunker's lien, that the physical suppliers did not plead or support any allegations of fraud or bad faith by OW Bunker in entering into the contracts and failing to pay their suppliers.

The physical suppliers appealed Judge Caproni's ruling to the Second Circuit, and oral argument was held on April 19, 2018.

US APPELLATE COURTS' RULINGS: FAILURE OF THE SUPPLIERS' LIEN CLAIMS

On June 13, 2018, the US Court of Appeals for the Second Circuit issued an opinion, reversing in part, affirming in part and remanding the case back to the District Court to determine further issues. *ING Bank N.V. v. M/V Temara*, No. 16-3923, (2d Cir. June 13, 2018). In a victory for vessel owners and charterers, the Court of Appeals agreed with the District Court that CEPSA as physical supplier did not meet the requirements of the Lien Act because it provided bunkers at the direction of OW Bunker, rather than on the authority of the vessel or charterer. The Court also rejected that clause L.4 of the OW Bunker General Terms and Conditions, which purports to substitute the physical supplier's terms in the contract between OW Bunker and the customer, served to create a contract or agency relationship between CEPSA and the customer that gives rise to a maritime lien.

The Court of Appeals did find that OW Bunker met the requirements of the Lien Act and disagreed with Judge Forrest that some "financial risk" at the time of arrest or contracting was required in order to obtain a maritime lien. However, the Second Circuit left wide open the issue of whether a factual finding that OW Bunker provided the fuel in bad faith (i.e., contracting while insolvent on the eve of bankruptcy, knowing that it could not and would not pay the physical

supplier) would negate any such lien. The issues of alleged bad faith and fraud of OW Bunker was not before the Second Circuit and will be fully ligated on remand provided that the Bank can overcome the threshold issue of whether it was assigned a US maritime lien claim from OW Bunker. The Second Circuit also found that the District Court erred in its initial grant of summary judgment in favor of the vessels without providing OW Bunker an opportunity to submit additional evidence that OW Bunker had paid its downstream affiliate in the contract chain with the ultimate physical supplier.

The Second Circuit has remanded the case back to the District Court for further proceedings after full discovery into the alleged bad faith and fraud of OW Bunker. As such, the renewed District Court proceedings will likely address any additional defenses or exceptions to the lien, such as "bad faith" or fraud, as significant developments and disclosures concerning OW Bunker's activities have come to light since Judge Forrest's original decision. Additionally, the Court of Appeal's finding that OW Bunker meets the requirements of the Lien Act still leaves open the question of whether a maritime lien was validly assigned by OW Bunker to the Bank (the assignment being governed by English law, which does not give rise to a US maritime lien).

While the Second Circuit has not yet ruled in the interpleader appeals, the Court has since been joined by the US Court of Appeals for the Fifth Circuit in finding against the physical suppliers. *Valero Marketing & Supply Co. v. M/V Almi Sun*, No. 16-30194 (5th Cir. June 19, 2018). The Eleventh Circuit has also so ruled in *Barcliff, LLC v. M/V Deep Blue*, 867 F.3d 1063 (11th Cir. 2017). In summary, named Appeal Courts held that a **physical supplier of bunkers does <u>not</u> have a maritime lien under the Lien Act against the vessel where the vessel ordered the bunkers from a bunker trader.** The Appeal Courts made it clear that the liens can be created only by law, not by contract. Therefore, the physical supplier's argument that OW Bunker's bunkering supply terms and conditions confer a lien on the physical supplier failed.

LESSONS LEARNED

Although the OW Bunker saga is not over, the havoc caused by the OW Bunker collapse in the maritime industry has illustrated the need for owners to take every step possible to avoid allowing any lien for bunkers to attach to their vessels. Countless owners and vessels have been targeted because of the all-too-common failure of a charterer to pay for bunkers. Moreover, failure by the bunker seller to pay a physical supplier for the fuel it purchased on credit often leads to multiple claims against a vessel by both the seller and the physical supplier. Liens for unpaid bunkers against a vessel are the largest threat to an owner's bottom line and yet can be entirely avoided with good practices.

It is no coincidence that most bunker sales contracts incorporate US law with respect to the existence of a lien against the vessel for unpaid bunkers. US law is by far the most generous in terms of allowing a lien against the vessel in favor of the seller for unpaid bunkers.

The recent OW Bunker cases have highlighted the need for owners to take proactive steps to protect themselves, both from physical supplier claims as well as those from contract sellers. the Lien Act was drafted to protect suppliers that faced the risk of going unpaid by a vessel whose creditworthiness could not be evaluated by the supplier. But this principle is outdated in an industry where suppliers are entering into sophisticated contracts with brokers, contract suppliers and charterers, including the extension of significant lines of credit and 30 days (or longer) credit terms.

The Lien Act itself provides a rebuttable presumption that a charterer is authorized, on behalf of an owner, to bind the vessel to a maritime lien for the provision of necessaries to a vessel. 46 U.S.C. § 31341. Despite the recent increase in maritime lien cases in the United States, the presumption that an owner has authorized the charterer to bind the vessel to a lien is simply that – a rebuttable presumption for the owner to overcome. An owner must therefore in the eyes of US law take proactive measures in order to avoid being held responsible for a charterers' debts.

Many charters include a "no lien clause" which states that the charterer is not authorized to bind the vessel to a maritime lien. It could be argued these "no lien clauses" are standard in many form contracts and an owner, or a broker acting on its behalf, should take steps to negotiate that a "no lien clause" is contained within the charter. But, typically, where the fuel supplier does not receive a copy of the contract and has no notice of such a provision, this clause cannot be relied upon by an owner when defending a maritime lien claim from the supplier. A supplier must have "actual knowledge" of the relevant clause.

Additionally, even if the charterer is under a contractual obligation to communicate the "no lien clause" to the supplier, which the new Baltic and International Maritime Council (BIMCO) clause purports to require, it is difficult to police this in practice, and a charterer's failure to do so may result only in a breach of contract claim, which the owner must then pursue against a likely defunct charterer. Thus, the new BIMCO lien clause is insufficient to protect an owner against a lien for unpaid bunkers under US law and caution should be exercised by any owner who is advised that a BIMCO lien clause is all that is needed.

Additionally, courts have consistently held that the addition of a "no lien stamp" to a bunker delivery note, which is affixed following the transfer of fuel, does not provide sufficient notice to the supplier.

In a recent case, *Bomin Greece S.A. v. M/V Genco Success*, 2017 A.M.C. 1716 (May 30, 2017), the Northern District of New York provided useful guidance for owners attempting to avoid a maritime lien. In that case, the Court agreed with relevant precedent that the burden of showing that the supplier has actual knowledge of the charterer's lack of authority rest squarely on the owner of the vessel to overcome the supplier's statutory presumption under the Lien Act. Where the chief engineer of the vessel, on behalf of the owner, made affirmative representations to the captain of the bunker supply barge in a pre-bunkering meeting, such communications were sufficient to overcome the presumption. In that case, the pre-bunkering notice of the no-lien provision of the charter party and lack of authority of the charterer to bind the vessel was also documented contemporaneously with a letter of protest.