OW Bunker Bankruptcy

As has been widely reported OW Bunker A/S, O.W. Bunker & Trading A/S and O.W. Supply & Trading A/S filed for bankruptcy in Denmark on the 7 November, 2014. In the case of OW Bunker A/S a bankruptcy order was issued on the same day whilst it is understood that similar orders have now been issued for both O.W. Bunker & Trading A/S and O.W. Supply & Trading A/S. There are also a large number of other companies in the OW “group”, or trading with the OW name, albeit that their status is currently unclear.

OW Bunker (“OW”) is one of the world’s biggest bunker suppliers and as such its bankruptcy has the potential for adverse consequences for Members – whether Owners or Charterers – not only with respect to claims or disputes directly with OW for payment of bunkers supplied by them, but for (i) claims by sub-contractors of OW that may not have been paid by OW and who claim legal rights with respect to bunkers delivered by them to vessels, and (ii) charterparty disputes arising out of such claims.

Claims by sub-contractors (i.e. the physical suppliers)

Most bunker traders and suppliers contract on terms that purport to retain their legal title in the bunkers until they have been paid in full, together with the right to a maritime lien against the ship, or other legal rights against the vessel or vessel Owner, until they receive payment. Where OW might have subcontracted with another trader or supplier, and not paid their sub-contractor for bunkers supplied to a ship, then that trader or supplier might approach a vessel Owner, threatening legal action and/or to arrest if the vessel Owner does not now pay them directly for bunkers onboard.

The merits of any such claim and the sub-contractors ability to arrest a vessel to secure their claim, will depend on the sub-contractors terms and conditions and whether these terms are “enforceable” against the vessel Owner. This may depend on the exact wording of the bunker receipts or delivery notes and how these have been signed by the vessel, as well as the law of the jurisdiction in which the vessel is threatened with arrest. These issues were discussed in an earlier article published on the Steamship Mutual website in the analogous circumstances of Charterers failing to pay for bunkers.

Any Member that receives a claim from a sub-contractor and/or is threatened with arrest should be aware that if they do agree to pay any such sub-contractor then they may be at risk of paying twice if, notwithstanding that payment, OW (or its trustees in bankruptcy) still has a valid claim to recover the sums invoiced by OW.

Charterparty disputes

Where vessels are on time charter it is normally the Charterers responsibility (a) both to supply and pay for the bunkers consumed when the vessel is on hire, and (b) to ensure no liens or other encumbrances are created that “might have priority over the title and interest of the Owners in the vessel” [NYGCA 1993]. Accordingly, if the vessel is arrested by a sub-contractor of OW because OW has not been paid by the Charterer for bunkers that have been supplied by the sub-contractor during the charter period, it is likely the vessel will remain on hire and the problem is for the Charterer to resolve. An Owner Member that agrees to pay a sub-contractor in these circumstances may have difficulty recovering that sum back from their Charterer. If though the Charterer has paid OW for the supply but OW has not paid their sub-contractor, the issues are less straightforward if the sub-contractor pursues a claim against the vessel.

Although not a means of preventing any such claims or threats of arrest, Owner Members may wish to seek confirmation of the following from their Charterers so that it might be possible to address any potential sub-contractors claims before they are brought:

(i) If any bunkers on-board the vessel have been supplied by or through OW; and
(ii) If so that Charterers, or any sub time Charterers, have paid OW for that supply and whether OW (or their trustees in bankruptcy) has paid any sub-contractors; and
(iii) What arrangements, if any, remain in place with OW for future supplies during the charter period and the payment of any subcontractor that might be involved in any such supplies.

For the reasons discussed above, Charterer Members with outstanding OW invoices also need to exercise caution before paying any sums to OW. In this respect, an added complication is that OW’s invoices may contain a notice of assignment of OW’s right to payment of any invoiced sums to a third party. Whether that third party is entitled to receive any sums due to OW or any such entitlement survives the bankruptcy of OW is unclear.

The issues arising from OW’s bankruptcy, and in particular the possibility that sub-contractors or assignees of OW will pursue claims for unpaid bunker supplies are not straightforward and fact sensitive. Any Members receiving any such claims or threats of arrest should contact the Managers for advice.