

CLAIMS FOR UNPAID BUNKER DUES

Bunker fuel is technically any type of fuel oil used aboard ships. It gets its name from the containers on ships and in ports that it is stored in, called bunkers. Unpaid dues of Bunker Suppliers are secured by a maritime claim and/or a right to arrest the vessel in rem to which the bunkers were supplied or her sister ship

Bunker fuel oil is used mainly in powering ships. Bunker fuel is also known by other names: heavy oil, #6 oil, resid, Bunker C, blended fuel oil, furnace oil and other often locally used names.

A common feature of bunker supply contracts is that bunker suppliers frequently allow all or part of the purchase price to fall due some time after delivery of the bunkers. One reason why a bunker supplier may be willing to grant such credit is that the amount owing may be secured by a maritime claim and/or a right to arrest the vessel in rem to which the bunkers were supplied or her sister ship.

Owners trading vessels in the spot market will purchase bunkers on their own account. In such circumstances, fulfilment of the payment obligations under the bunker supply contract will be within owners control. If, however, the vessel is chartered out on a time or bareboat charter, bunkers will normally be purchased by the charterer. In such cases, owners have no control over the purchasers fulfilment (or not) of the payment obligations under the bunker supply contract. And if the purchaser defaults, this may lead to actions against the vessel by the bunker supplier.

In many other jurisdictions, while the bunker suppliers claim will not be secured by a maritime lien, it may qualify as a maritime claim, which may entitle the bunker supplier to arrest the vessel to which the bunkers were supplied (in some cases also sister vessels).

A large number of countries have ratified the 1952 Arrest Convention, which defines claims related to bunker supplies as maritime claims.

Although the Brussel convention has not been adopted by legislation, the principles incorporated in the International Convention relating to the Arrest of Seagoing Ships, Brussels, 10 May 1952 are part of the common law of India and applicable for the enforcement of maritime claims against foreign ships as is held in *m.v Elisabeth-v- Harwan Investment & Trading Pvt Ltd., Goa*.

The Supreme Court of India in the matter of *m.v. Sea Success I* has also held that the principles underlying the 1999 Geneva Arrest Convention were applicable for ship arrest in India.

Countries that have ratified the 1952 Arrest Convention, such as the Scandinavian countries, an arrest by a bunker supplier will only be accepted if the debtor for the unpaid claim is also the owner of the vessel. In time- and bareboat-charter situations this will not normally be the case and the bunker supplier will not be entitled to arrest the vessel.

Certain countries, such as Holland, India as well as at least some court districts in France, apply a less strict interpretation of the Arrest Convention and allow arrest even in cases where the debtor is not the owner of the vessel.

Owners should be aware that if charterers start defaulting under the charterparty, they are also likely to be defaulting on payments to suppliers of bunkers and other services, exposing the vessel to enforcement actions as a result.

Appeal Court of the Bombay High Court in Chemoil Adani Pvt Ltd versus m.v. Hansa Sonderburg & Ors confirmed the order of arrest of the vessel 'Hansa Sonderburg' where the bunker supply was requisitioned by time charterer of the vessel and supply of bunker oil was made by the bunker supplier on the vessel although there was no privity of contract with the vessel owner and bunker supplier. In this case the bunkers requisition was signed by time charterer and it was delivered on the vessel and the vessel acknowledged receipt of the supply.

Section 4 (1) (l) of the Admiralty Act (2017) deals with the above subject maritime claims, goods, materials, perishable or non-perishable provisions, bunker fuel, equipment (including containers), supplied or services rendered to the vessel for its operation, management, preservation or maintenance including any fee payable or leviable.

Bunker supplies are necessities for a ship or necessities for its voyage.

The arrest procedure in India is not difficult to instigate and pursue. Applications for arrest of a ship can be made to the Admiralty judge of the High Court having Admiralty jurisdiction where the vessel is to be arrested. It is necessary that the ship should be in Indian waters for filing of an Admiralty Suit but it is not necessary that the vessel should take berth, the vessel can be anywhere in the Indian territorial waters.

Bunker oil supplied to the ship for sale to other ships could not be conceived as goods supplied for her operation. The phrase 'operation of the ship' should not be equated with the business activities of the shipowner and the section as enacted could not cover goods which are loaded onto two ship only to be unloaded or disposed of soon thereafter by sale.

Division Bench of the Bombay High Court allowed the appeal filed by bunker supplier, Chemoil Adani Pvt Ltd for unpaid bunker dues, the order of arrest of the vessel m.v. Hansa Sonderburg was upheld, the order passed by

the single judge vacating the order of arrest of the vessel was reversed in appeal on April 27, 2010 confirming the order of arrest of the vessel as prima-facie case was made out and the arrest was justified.

Although the appeal court was of the view that the appellant bunker supplier cannot be shut out at prima facie stage and the single judge vacating the order of arrest proceeded to analyse the case and rendering conclusive findings at the interim stage was not permissible at an interlocutory stage.

Chemoil Adani Pvt Ltd filed an admiralty suit in the Bombay High Court against the vessel m.v. Hansa Sonderburg, the owner of the vessel Hansa Sonderburg Shipping Corp and the time charterer of the vessel Hull & Hatch Logistics LLC. The suit was filed for unpaid bunker dues. Bunkers were supplied at the request of the master of the vessel m.v. Hansa Sondersburg, further, the supply was made in terms of the agreement between the bunker supplier and the time charterer of the said vessel.

During the charter, the vessel was in need of bunker.

Time Charterer of the vessel enquired from the bunker supplier as to whether they are ready to supply bunkers. After negotiation, the terms of supply were agreed in an exchange of emails between the bunker supplier and time charterer, the terms were agreed on June 26, 2009. The master of the said vessel had made a request to the bunker supplier on July 5, 2009 for supply of 800MT of bunker to the vessel for the purpose of its onward journey to Eden.

The bunker came to be supplied under a bunker delivery note dated July 5, 2009. The bunker receipts were duly acknowledged by the master of the vessel on the bunker delivery note and also by a landing certificate dated July 5, 2009 thereafter a detailed invoice dated July 5, 2009 was delivered. There was a default in payment; suit was filed on October 19, 2009 and an exparte order of arrest of the vessel was passed by the single judge.

The vessel owner made an application for vacating the order of arrest before the single judge on the ground that the bunker requisition was made at the behest of the time charterer and it is the responsibility of the time charterer to arrange and pay for the bunkers. The ship owner urged that the bunker supplier has no privity of contract with the vessel and the owner of the vessel. The contract of the bunker is only with the time charterer and in the absence of any privity of contract the bunker supplier cannot have any right to proceed against the vessel in rem and the owner of the vessel in personam. The order of arrest was accordingly vacated by the single judge and vessel was ordered to be released but the order of release of the vessel was reversed in appeal.

The bunker supplier the appellant in appeal urged that whether the terms and conditions of the contract between the bunker supplier and time charterer would bind the ship and the ship owner or not, what are the legal repercussions of the stipulations in the bunkers delivery note and what is the legal consequence of the acknowledgment of the supplies by signing bunkers delivery note are matters which cannot be decided at an interlocutory stage. Bunker supplier further urged in appeal that at this interlocutory stage, they need not prove that supply was on the credit of the vessel. In any event, the documentary evidence was produced which would demonstrate that the bunkers were supplied against the Master's requisition for the benefit of the vessel and the supply of bunkers to the vessel is acknowledged and evidenced by the bunker delivery note also signed by Master/Chief Engineer of the vessel. As to whether the Master's signature was necessary and whether the Chief Engineer had the authority to sign the same or not are matters which cannot be gone into and decided at an interlocutory stage. The appellant bunker supplier's case was clear. The requisition was made by the Master but the acknowledgment /delivery note was signed by the Master/Chief Engineer. In such circumstances, whose signature binds the vessel is something which the learned Judge could not have conclusively decided at interlocutory stage.

In *m.v.Eco* matter Mr. Justice Chayya ordered that the Plaintiff, the bunker supplier, when supply was made at the behest of the time charterer has made a prima facie case that it has a maritime lien over the defendant vessel and therefore, even if the test as provided in Order 38 as well as Order 39 of the Code of Civil Procedure is applied, the plaintiff has a prima facie case and the balance of convenience is also in favour of the plaintiff and therefore, there is no consideration for vacating of the order of arrest that too without any proper security is made out by the defendant. Plaintiff, the bunker supplier has a reasonably arguable case on merits and therefore, the suit cannot be dismissed at the threshold. In prima facie opinion of this Court, in view of the claim raised by the plaintiff and contradicted by the defendant, such an issue is a triable and arguable issue. It is not the case that of the defendant that the bunkers were not supplied to the defendant vessel and that the Master/Chief Engineer has not accepted the supply. It is also not the case of the defendant that the bunkers supplied were not utilized by the defendant vessel. The material on record prima facie shows that the charterer of the defendant vessel, had agreed to the terms and conditions, which also binds the charterer. The question whether the same was binding on defendant vessel cannot be decided at this stage. It was rightly contended by the learned counsel for the plaintiff that a private arrangement between the owner and the charterer cannot deprive the bunker supplier from taking action in rem for supply of goods which were received and consumed by the vessel for its operation which constitute maritime claim and which was duly acknowledged by the Master/Chief Engineer. Therefore, the contention raised that the Master had not specifically confirmed the liability to pay for the bunkers on behalf of the owners would not take the case of the defendant any further.

A change in approach by the Western Australia Federal Court has opened up the possibility for claimants including unpaid bunker suppliers having a maritime lien under foreign law to arrest ships in Australia. In Australia, it has

been unclear whether foreign maritime liens are enforceable through ship arrest, when the underlying claim would not give rise to a maritime lien under Australian substantive law. On 11 September 2015, the Western Australia Federal Court (the FCA) made a groundbreaking decision in the *SAM HAWK* [2015] FCA 1005 allowing the vessel to be arrested for a claim for unpaid bunkers. In the given case, the vessel was time-chartered to Egyptian Bulk Carriers (EBC), which was required to provide bunkers to the vessel. EBC was not authorised to contract for necessities on behalf of the owners nor to bind the vessel with a maritime lien for necessities. EBC contracted with Reiter Petroleum (RP) for bunkers to be stemmed at Istanbul. RP arranged with KPI Bridge Oil for Socar Marine to supply the bunkers. The supply contract was subject to Canadian law and provided that RP was entitled to a lien wherever it finds the vessel and US law to determine the existence of a maritime lien. The vessel owners were not involved in the negotiations for the supply and delivery of bunkers and were not aware of RP's role. They had advised Socar Marine that neither they nor the vessel accepted any liability to pay for bunkers and EBC were responsible. On 5 November 2014, RP filed an in rem claim for unpaid bunkers and arrested the vessel in Albany, Western Australia. The owners applied for the writ to be set aside for lack of jurisdiction on the ground that the supply of bunkers was not a recognisable maritime lien under Australian law. They relied on the (controversial) majority decision set out in the Privy Council case of the *Halycon Isle* [1981] AC 221, which held that the existence of a maritime lien was a matter of procedure and therefore subject to the domestic law of the place of arrest. RP argued that under the contract with EBC, RP had a maritime lien under Canadian or US law, which was sufficient to constitute a proceeding on a maritime lien. The FCA rejected the *Halycon Isle* case, finding that a lien will operate independently of the fortuitous choice of venue in which a ship is arrested. The court followed the reasoning in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 (Pfeiffer), where the High Court of Australia found that matters affecting the existence, extent or enforceability of

the rights or duties of the parties are substantive not procedural issues. It remains to be seen whether courts in other common law jurisdictions will adopt the Sam Hawk approach.

Why it matters:

Bunker supplier's legal position is unclear as regards their claims under admiralty law when supplies are made at the behest of time charterer while legal position is different when supplies are requisitioned by master of the vessel or by the vessel owner.

Certain countries, such as Holland, India as well as at least some court districts in France, apply a less strict interpretation of the Arrest Convention and allow arrest even in cases where the debtor is not the owner of the vessel. English law does not recognise the concept of a maritime lien for necessaries (charges for goods and services rendered to the vessel). Therefore, an unpaid bunker supplier would not enjoy a maritime lien as a matter of English law. However, under US maritime law, such a bunker supplier does have a maritime lien.

Ship owners should be aware that if charterers start defaulting under the charterparty, they are also likely to be defaulting on payments to suppliers of bunkers and other services, exposing the vessel to enforcement actions as a result. Bunker suppliers have experienced the impact of defaulting charterers but the tide has turned in some jurisdiction.

Unpaid bunker dues requisitioned by master of a ship that is time chartered, is a maritime claim and can be arrested as the master is first and foremost the ship owner's representative, he has more or less the same authorities as a ship owner himself but he is obliged to contact the ship owner if possible before making a major decision.

It is the master's responsibility to make the vessel ready for sailing before the commencement of a voyage. This for example means that sufficient supplies of adequate food and water are brought onboard, the master is also responsible for the seaworthiness of the vessel when the voyage commences and that the vessel continues to be seaworthy during the voyage. Whether the vessel is seaworthy or not is decided by the master. The duty of the master to supervise the seaworthiness of the vessel also means that he is obligated to refuse to carry out the orders of the charterer or shipowner, in case their assessment of the seaworthiness is not compatible with his. If the charterer or the shipowner does not respect this it is possible to prosecute each of them as an instigator or accessory.

The master also shall supervise the loading and the discharging of the vessel. (The actual supervision is often carried out by the first officer.) It is also his responsibility to make sure the voyage is performed as swiftly as possible without time loss. The charterer can have a great influence on the circumstances surrounding the voyage but the master is the person who is primarily responsible for the performance of the voyage.

The Master need not obey orders given by Charterers of his vessel if it is, or at the material time he reasonably believes that it is, unsafe for him to obey them; or they call upon him to perpetrate or to facilitate a fraud upon, or commit a tort in relation to, or break a contract with, a third party; or they are manifestly inconsistent with the express or implied terms of the charterparty. The master has got several assignments on board. He is principally responsible for the seaworthiness of the vessel, both at the time of the departure and during the voyage. The master has got the legal right to refuse to obey orders that will jeopardize the seaworthiness and sometimes he is even obligated to refuse to obey such orders.

The master is responsible for the day-to-day operation of the vessel while the shipping company has the ultimate responsibility.

Section 4 of the ISM-Code “Designated Person(s)” reads as:

To ensure the safe operation of each ship and to provide a link between the company and those on board, every company, as appropriate, should designate a person or persons ashore having direct access to the highest level of management. The responsibility and authority of the designated person or persons should include monitoring the safety and pollution prevention aspects of the operation of each ship and to ensure that adequate resources and shore based support are applied, as required"

Bunker oil is ‘necessary’ goods and supplies for ship. If it is conclusively shown that necessities supplied or services rendered to any ship are prima facie 'necessaries' and are within the section 4 (1) (l) of the Admiralty Act (2017), proving supply and services rendered admiralty action will lie. The concept of "necessaries" goods and materials supplied or services rendered to a ship for her operation and maintenance. The operation of the ship would necessarily include operation of ship ‘necessary’ for voyage and sea worthy necessarily include necessities including bunkers, for the vessel to be seaworthy from commencement and continues to be seaworthy during the voyage. Bunker fuel oil is used mainly in powering ships.

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