KYLLINGSTAD KLEVELAND

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OW Bunker and Bergen Bunkers Bankruptcy

Various clients of our firm have recently received a 'Notice of Dispute' or a 'Notice of Arbitration' subsequent to the bankruptcies of OW Bunker and Bergen Bunkers back in 2014. We have assisted our clients both in the initial phase but also later on with adjacent matters.

In recent weeks, we have seen a significant rise in activity related to 'demand for payment' and claims in connection with the bankruptcies. This newsletter from Kyllingstad Kleveland Advokatfirma is therefore meant to serve as a 'cautionary note' describing possible pitfalls important to pay attention to in the event you find yourself served with a Notice of Arbitration/Notice of dispute, or other threatening demand letters related to the OW Bunker and Bergen Bunkers bankruptcies.

It should be observed that we are also familiar with several Norwegian companies having received 'Notice of Dispute', or similar notices (inter alia, notice of arbitration, etc.) from ING Bank for the unpaid bunkers. ING Bank allege to hold a right to the receivables due and owing to the bunker supplier by assignment under a Facility Agreement.

Due to the complexity of the legal issues related to the bankruptcies we would as a general advice recommend to seek legal assistance prior to executing any payment regardless whether the 'demand for payment' or any 'Notice of Disputes' is served by any of the bankruptcy estates, ING Bank or other parties claiming the debt due and owing.

Based on the recent developments we have outlined a few key points to look into should you be served with a Notice of Dispute/Arbitration or in some way be involved in the current matter.

GOVERNING JURISDICTION AND LEGAL VENUE

We have experienced the Notice of Dispute/Arbitration to contain a reference to the contract entered into by a client and Bergen Bunkers, incorrectly referring to English law as governing law and arbitration as the agreed legal venue.

In order to avoid a 'notice of objection' to be entangled in the foreign courts or arbitration institutes the executed agreement with Bergen Bunkers must be examined closely to determine the agreed governing jurisdiction If the premise of the legal jurisdiction in the 'Notice of Dispute' proves to be incorrect, it is important to respond in a manner tailored to meet the particulars under any given authority in order to refute the assertion successfully . A non-conformity of this sort will often result in a cumbersome and costly process for a debtor.

In terms of legal venues, it should be observed that albeit arbitration is often seen as an advantageous form of dispute handling, national courts may under certain circumstances very well prove beneficial. It is therefore important to carefully consider each notice on a case-to case basis.

BATTLE OF FORMS

In order to assess your legal position under claims raised in the aftermath of the OW Bunker and Bergen Bunkers bankruptcies, it is paramount that you assess the terms and conditions contemplated by the various agreements, in particular the governing agreement for the purchase of bunkers.
It is commonly seen in commercial contracts for each contracting party to include reference to its "own" set of standard terms and conditions. To illustrate we have recorded Bergen Bunkers to refer to one's "Terms and Conditions for sale of Marine Bunkers", and the purchaser on the other hand to refer to his standard purchase conditions.

More often than not, our experience is that the sets of terms and conditions is contradictive on material areas, inter alia payment terms, transfer of ownership of the goods, dispute mechanism or legal venue for disputes. The parties are then left to argue which of the two sets to be the governing document, if any at all, by a 'Battle of Forms'.

When a battle of the forms arises, you must first and foremost seek to clarify whether the respective terms and conditions have been validly included under your contractual scheme. For instance, the terms and conditions may be included by fine print or by vague reference to the terms and conditions on a website, and issues are raised as to whether they can be seen as a part of the contract or not.
Provided that the terms and conditions are validly included, Battle of Forms may however be addressed differently under various jurisdictions, but in general the battle is often won by the party who fired the "last shot"; meaning the last party to put forward terms and conditions that were not explicitly rejected by the other.

The Last Shot Rule may result in a "ping-pong" situation, and to assess your legal position, correspondence and documentation in relation to the period of time when i) the offer was made, ii) the negotiations was held and iii) the agreement was formed, is essential. It is therefore advised to take due care where competing sets of terms and conditions are known to exist and to carefully assess your legal position and associated risk exposure.

STATUTE OF LIMITATIONS

The OW Bunker and Bergen Bunkers bankruptcies occurred autumn 2014 and the associated claims were raised shortly thereafter. We would recommend investigating whether the claims are still valid or considered time barred under the statute of limitations.

Point to note is that the statute of limitations in an international context will differ. It is therefore important to investigate and seek clarity on the governing statues of limitations under the jurisdiction in hand, at all times. In the event you are able to rebut a claim by statute of limitations, you must reject the claim and treat any allegations or assertions as such to avoid to have effectively forfeited your defense.

THE OW BUNKER BANKRUPTCY UNDER ENGLISH LAW

Background and key issue

Our co-operating law firm under English law in relation to the OW Bunker and Bergen Bunkers bankruptcies, Ince & Co LLP, has been involved in numerous claims and cases flowing from the collapse of the OW Bunker group back in 2014 and continues to assist clients on related matters in the UK and throughout its network of international offices. The OW Bunker group collapse raises a wide range of insolvency, contractual, jurisdictional and other legal issues. Under English law one key question has been whether shipowners and charterers risked having to pay twice for bunkers supplied to them to both contracting suppliers, such as OW, and to physical suppliers. Many owners and charterers had already paid to or faced claims from the

contracting supplier, but the physical supplier had not been paid by the contracting supplier as a result of the contracting supplier being insolvent and unable to pay the physical supplier.

The Supreme Court Case

Ince & Co LLP represented PST Energy 7 Shipping LLC in their claim against OW Bunker Malta Ltd ("OWBM") and another (known as the Res Cogitans) in which the English Supreme Court confirmed that bunker suppliers who were unable to transfer property in bunkers supplied to a ship were nonetheless entitled to the price of the bunkers from the ship-owners ("Owners").

The bunker supply contract in question provided for a credit period and incorporated a retention of title ("ROT") clause. The Supreme Court concluded that it was not a contract of sale within the scope of the Sale of Goods Act 1979 ("SOGA"). Therefore, the implied term under s. 12(1) SOGA, which provides that it is an implied condition of a contract for the sale of goods that the seller has the right to sell the goods or will have such right at the time when property is to pass, did not apply. Further s.49(1) SOGA, which requires the property in the goods to have passed to the buyer if the seller is to maintain a claim for the price, also did not apply.

In relation to the nature of the bunker supply contract, the Supreme Court held that while the bunker supply contract was similar to a sale contract and would contain similar implied terms as to description, quality and fitness for purpose to those implied in any conventional sale, its essential nature was such that it could not be regarded as a straightforward agreement to transfer the property in the bunkers to the Owners for a price. The contract was in substance an agreement with two aspects: (i) to permit consumption of the bunkers prior to any payment and without any property ever passing in the bunkers consumed; and (ii) but only if and so far as bunkers remained unconsumed, to transfer the property in the remaining bunkers to the Owners in return for the Owners paying the price for all the bunkers, whether consumed before or remaining at the time of payment. The Supreme Court further found that the bunker supplier's obligation to pass the property in respect of any bunkers not consumed against payment of the price for all the bunkers could not make the agreement as a whole a contract of sale.

As to whether there was a need for an implied term that OWBM had a duty to pay its supplier timeously so that it could pass title to the Owners, the Supreme Court held that there was not. The only implied undertaking that was required in this case was that OWBM were legally entitled to permit the Owners to use the bunkers for the vessel's propulsion prior to payment. OWBM did not need to have title to the bunkers for this and there was no claim before the Court that OWBM did not have the right to permit such use.

Conclusion and lessons learned

The Supreme Court's decision was disappointing for the maritime industry and one that has had an unwelcome outcome for those regularly entering into bunker supply contracts. Prior to the Res Cogitans litigation, most ship-owners and charterers buying bunkers believed they were entering into a contract for the sale and purchase of goods under which ownership of the bunkers was intended to pass from the seller to the buyer. The fact that the Supreme Court has taken a different view came as a surprise to the industry.

Many standard bunker industry forms will now have to be revised to make it clear that the permitted consumption of bunkers during the permitted credit period is not intended to take the transaction outside the scope of SOGA or to provide that the seller is not entitled to payment until the other suppliers in the chain have been paid. However, this decision has far-reaching consequences, beyond the maritime sector and bunker supply contracts, for a number of other industries that may also need to amend their standard terms and conditions as a result.

ROBUST DEFENCE

As pointed out, a broad specter of complex legal issues are raised in relation to the OW Bunker and Bergen Bunkers bankruptcies, which in turn requires in-depth legal expertise both within Norwegian law but also various other jurisdictions. In order to prepare a robust defence against any claims and allegations we recommend you to seek legal counseling which holds the relevant expertise and sufficient capability to assess the issues timely within and beyond Norwegian jurisdiction.

Following our involvement and assistance in the OW Bunker and Bergen Bunkers bankruptcies, Kyllingstad Kleveland has teamed-up with legal expertise in relevant jurisdictions, and also engaged in a cooperation with the leading firm in Norway on insolvency and bankruptcy; Ro Sommernes Advokatfirma DA
Kyllingstad Kleveland's team mobilized for the claims and disputes within the OW Bunker and Bergen Bunkers bankruptcies is staffed with high qualified experts equipped to handle any OW Bunker and Bergen Bunkers bankruptcy related matters going forward, both in Norway and internationally.

If any legal assistance proves required, our team is available and ready to act and respond to any queries you might have.

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Ro Sommernes is ranked by Legal 500 as the leading firm in Norway within insolvency, bankruptcy and restructuring law. Ro Sommernes provides broad assistance within various areas of business law such as transactions and corporate, real estate and construction law, litigation, family law and inheritance, employment law, information technology and media.

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