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OW Bunker - ongoing legal developments in a complicated saga

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It is nearly two years since the bankruptcy of OW Bunker but the complex legal battles drag on impacting transactions in the ship refueling market today.

The continuing saga regarding OW Bunker & Trading and its affiliates was the subject of a lunch hosted by the Society of Maritime Arbitrators (SMA), featuring a discussion by John Keough, a partner in the New York office of lawyers Clyde & Co. The meeting, which focused mainly on the actions in the US Courts, came nearly two years after the collapse of OW, the one-time dominant player in the worldwide bunker fuel markets.

The legal side is complex, with questions about whether payments for bunkers should go to ING Bank, the "assignee", representing a group of lenders, or to the physical suppliers of the fuel, an oil refiner, for example, and the story is still unfolding.

So far, rulings in the Southern District Court of New York (SDNY) have supported the "Interpleader Remedy" approach, which would allow a vessel operator- the buyer of bunkers, to pay a one time security deposit, while the issues between ING and physical suppliers are sorted.

Important questions involve jurisdictional issues, and also the validity of maritime liens. Keough explained that the still murky choices of court jurisdiction (Bankruptcy Court versus District Court) could determine whether the "assignee", ING, or the physical suppliers are entitled to the proceeds of security deposits. He quoted from one court ruling which said: "these cases involve interesting and apparently novel questions regarding the interplay among the United States bankruptcy law, maritime law and the federal interpleader statutes…".

The nature of the bunker supply business, where the fuel buyers deals with OW who, in turn, deals with a physical supplier, also brings about complicated issues with "bunker delivery receipts being a hot piece of evidence."

Rulings so far in various District Courts have pointed to an absence of contractual "privity" between physical fuel suppliers and the vessel operators (buyers of the bunkers), since the dealings occurred through O.W. entities, with uncertainties emerging on the validity of maritime liens. The discussion delved deeply into the important cases now being considered in the various courts, including 35 "interpleader" cases currently in front of the SDNY-with four having been selected as "test cases" for summary judgement. According to the presentation, "…At issue: whether physical suppliers have a maritime lien?"

Keough also mentioned some very practical changes already being experienced in the bunker markets. A tug of war has emerged between physical fuel suppliers, who have sought new ways to establish privity with the owners of ships being supplied, and to require devices such as cash on delivery, pre-payment, or standby letters of credit to guarantee payment.

Meanwhile, the vessel side "has been trying to publicize the 'no lien' clauses in bunkering contracts". At present, as the courts sort through the many cases, the full impacts are still developing. Mr. Keough added: "Suppliers and vessel owners/operators (are) keeping a close eye on the result of the interpleader actions in the SDNY" and that there is still considerable, "Frustration over the length and substantial legal costs of litigation and lack of clarity or predictability of the law two years after OW's collapse."

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