



中国船东互保协会
CHINA SHIPOWNERS MUTUAL ASSURANCE ASSOCIATION

地址: 中国 北京市朝阳区五里桥一街一号院 12 号楼 邮编: 100024

Add: Building No. 12, Courtyard No. 1, Wuliqiao No. 1 Street, Chaoyang District, Beijing, P. R. China. PC: 100024

Tel: 0086 10 59223500 Fax: 010 59621611 (Claims) 59621612 (U/W)

Circular No. 17E/2014/Claims

TO THE MEMBERS

26th December 2014

OW Bunker Bankruptcy

Dear Sirs,

OW Bunker ("OW") is one of the world's biggest bunker suppliers (with a reported 7% share of the marine fuel supply market). 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. Its bankruptcy has the potential for adverse consequences – ship owners and charterers around the world currently face a number of problems such as who to pay and threat of arrest. We have compiled the following FAQ relating to OW Bunkers to assist Members.

The situation

As of today's date, the Association is aware of OW companies declaring bankruptcy or taking steps in that regard in Denmark, Germany, Singapore and the USA.

Among these are the parent OW Bunker A/S, OW Bunker & Trading, OW Bunker Supply & Trading as well as OW Bunker Far East.

At present the situation with respect to Dynamic Oil Trading is not sufficiently clear to make a firm statement, but there are likely to be developments in the near future.

The Association is aware of there being possibly up to 40 OW Bunker and related offices around the world and a number of different trading names. As such it is likely that further news and developments will occur in a number of jurisdiction in the near future and members are advised to follow these closely to see how they may be affected.

Affected parties

As a result of this situation a number of different parties have been directly affected.

In the shipping context that includes:

- Shipowners that have bunkers on board supplied by or through OW or an affiliated company
- Time charterers that ordered or received on a chartered vessel such bunkers
- Bunker brokers and traders involved in the arrangement of the supply
- Actual performing suppliers of fuel
- Bunker barge owners and charterers involved in a supply or supply contract related to OW or an affiliated company

As such a significant number of companies may be directly or indirectly affected by this still developing situation.

Bankruptcy effect

While the main parent company, and certain affiliates / subsidiaries have gone in to bankruptcy, it must be understood that:

- the bankruptcy of one company does not immediately mean the bankruptcy of another
- bankruptcies of separate legal entities in separate legal jurisdictions will be handled according to the local law and practice - there is no "global" bankruptcy - but cross border recognition may be granted by some jurisdictions of another's proceedings
- it is possible to be a creditor in one set of bankruptcy proceedings and a debtor in another
- a company's bankruptcy does not immediately or necessarily mean it's contractual positions are closed off, terminated or that it is in any form of repudiatory breach
- bankruptcy puts a stay on legal action for that entity in that particular jurisdiction

There are many other issues to consider and members will be well advised to ensure they seek specific advice for specific jurisdictions from local subject matter practitioners in law. There is likely to be no "one size fits all" legal advice or solution to this situation.

Possible claims against members

Owners and charterers that have received fuel through or by OW Bunker A/S, affiliates and subsidiaries will need to check whether there was a separate performing supplier involved and whether that company has in fact been paid.

It is likely that unpaid physical / actual suppliers may consider to take action against vessels which received fuel through / via OW Bunker or affiliates and which did not see the performing supplier get paid.

This brings with it the risk that if the supply has not been paid for at all, that

competing claims are made by possibly:

- a. performing supplier
- b. the oil trader
- c. receivers / trustees in bankruptcy of OW
- d. any assignee of OW (the Association is aware that OW has assigned rights to payments to at least one bank)

The basis for these claims could be on a variety of legal grounds, and these would in part depend on the specific law and practice of both the supply contract as well as the jurisdiction in which legal action is contemplated.

Double claims

At present there is a potential risk of more than one demand for payment being made for the same stem of fuel.

That would even be the case where the member has already paid OW, but then OW failed to pay the performing supplier.

Whether the risk of a double payment will ultimately be borne out will depend on a number of factors including the law of the supply contract, the jurisdiction in which any legal action takes places, the jurisdiction in which the relevant OW entity may be undergoing bankruptcy and the possibility of multi-party negotiations to find a commonly acceptable solution.

Indeed the Association would encourage members affected to seek to start an early dialogue with possible counterparties, claimants and receivers / trustees in bankruptcy as the alternative of multi-party / multi-jurisdictional legal action is likely to be an unsatisfactory experience for all concerned.

What to do for open contractual positions

As stated earlier, the mere bankruptcy of a company does not necessarily mean its contractual positions are automatically terminated. It will be a matter for both the general law of that contract, as well as the decisions made by the trustee in bankruptcy, which could see contracts survive or come to an end.

It can be legally dangerous to "jump the gun" and prematurely consider a contract repudiated, and thus risk committing a repudiatory breach of one's own. Careful legal analysis is required before taking any step in this regard.

Clearly if fuel was to be supplied by or through OW, an affiliate or a subsidiary then an urgent review needs to be made of that position and whether any third party was going to be involved.

It may be possible to somewhat salvage such positions, but again careful legal analysis will be a pre-condition.

Checks to undertake

There are a number of possible claim scenarios where someone may either owe

money to OW (or an affiliate) or be owed money by them. These scenarios may involve competing demands from multiple claimants as discussed above.

Anyone who has done business with OW or its subsidiaries or affiliates will be well advised to carefully review their position in order to establish the potential exposure.

Things to watch out for are:

- check to identify the precise OW entity and its home jurisdiction for each and every contractual position
- review which positions are open and which are recently closed (perhaps going back at least four weeks and perhaps more)
- identify whether you are a debtor or creditor in any situation
- check whether the specific OW entities under consideration have already filed for bankruptcy
- consult with legal advisors for each specific jurisdictional situation
- check which invoices have already been paid
- seek to find out if any third party was involved to any transaction or position
- make early contact with that third party, establish whether they were paid or not
- if that third party believes it has a claim for an unpaid supply then seek to start a dialogue now rather than wait for possible legal action (which could follow without warning)

Further developments

It is likely that further developments will happen with respect to both companies already in bankruptcy and others which will follow.

These events may be hard to predict as to their exact timing and nature, which means members affected or potentially affected by this situation will need to closely follow these events.

FAQ

1. What OW entities are affected?

Current information is that the two OW companies that have filed for liquidation are OW Bunker and Trading AS and OW Supply and Trading AS. However, in light of the \$125m fraud in Singapore and \$150m risk management loss which have led to this situation, it seems likely that the rest of the OW Group may follow.

2. Do OW act as physical suppliers and intermediaries?

Yes. In some instances OW are the physical suppliers of stems of fuel. In other cases fuel is supplied by third party suppliers but with OW remaining as the contractual supplier.

3. Will third party suppliers have a lien over the fuel and/or the ship?

This will depend on the local law where the lien is said to apply and the terms of the relevant supply contract with the Member. A bunker supplier may have a lien for the supply of necessities even if they had no direct contract with the shipowner. If threats are made against the ship Members should contact the Managers and provide copies of all relevant papers including bunker supply contracts, invoices, charterparty and correspondence.

4. Stems from OW are being provided shortly. Should we change the on-board procedures?

No. Existing procedures in relation to sampling and segregation should be followed. OW's financial difficulties may mean that any recourse claim against them may be difficult, for example for damages for engine damage, de-bunkering costs, cleaning fees, loss of time etc. Prevention of any contaminants entering the ship's fuel system will be far better than the cure.

5. We have contracts with OW for the future supply of fuel. What should we do?

Contractual obligations, of course, will turn on the terms of the contract and the legal standing of the contractual counterparty; not all OW entities are in liquidation at this stage. The interpretation of the contract will be subject to the relevant law and jurisdiction clause. Local advice may be needed as to whether any contract with an OW entity is frustrated or can be terminated.

6. OW has sub-contracted with a third party supplier which is now demanding direct payment to them. We now face competing demands for payment by OW and the physical supplier. What should we do?

In the event that payment is made to OW then there is a considerable risk of an arrest of the ship (or a sister or an associated ship) by the physical supplier on the basis either that they have supplied necessities (giving rise to a lien, perhaps a maritime lien) enforceable in a number of jurisdictions or on the basis that the physical supplier will say that they own the bunkers by way of a retention of title clause and thus the shipowner is converting their property. This is a risk which already exists in relation to bunkers previously supplied under contracts with OW where the physical supplier has not been paid. If competing demands are made for payment then the Member should consider:

1. discussions with OW and the physical supplier so that an agreement can hopefully be reached between them as to the party to whom payment is to be made. This may not be easy at the moment given the uncertainties surrounding OW but an attempt should be made.
2. an offer to pay the funds into an escrow account pending resolution of the

“dispute” between OW and the physical supplier.

3. payment of the funds into court (by way of what is known as an “Interpleader” in England) whereby the court will recognise the difficulties of the shipowner by virtue of the competing claims and will decide the party entitled to the funds. It may be that Interpleader exists in other jurisdictions, for example New York. This can be a complex and expensive option so payment into escrow may be more practical.

If Members are under extreme pressure to pay a third party supplier in the face of an imminent threat to arrest the ship it may be that the most practical step would be to pay the supplier (in return for a full receipt and settlement agreement) and then defend or refute any claim from OW interests at a later date.

6.1 As per FAQ 6 above but OW seem to agree to such direct payment in e mail correspondence. Can we agree to the direct payment?

The contract terms should be carefully examined to identify if possible the OW entity and its sub-contractors. Assurances from one OW entity that third party suppliers can be paid directly may not bind other OW entities or non-OW contractual suppliers in what could be a bunker contracts chain. Any agreement by the relevant OW entity must be clear and explicit that a payment to the third party supplier will extinguish all claims by OW interests in relation to the relevant stem.

6.2 How much should be paid to the third party supplier?

If the price agreed with OW is the same price as that agreed between OW and its supplier then clearly that is the amount that can be paid. It seems likely that OW’s price will be higher than their supplier’s price. If a payment is made to the physical supplier then any difference, between the supplier’s price and OW’s price should be payable to OW. If not OW (or its liquidator) may have a residual claim for the price difference being the amount they would have expected to make on the bunker trade as an intermediary.

7. What approach should shipowners take when faced by a threat of arrest by physical supplier?

Many physical suppliers aggressively pursue claims for payment for bunkers even where they have contracted with the time charterer. In certain jurisdictions whether an arrest can be made will depend upon the law of the contract. That may be English law (albeit that the shipowners will not be a party to that contract) and one response to a threat of arrest is to offer security which responds to a London arbitration award or High Court judgment. As a matter of English law (in relation to privity of contract) the physical supplier ought not to be able to obtain an award or judgment against the shipowner in circumstances where they have no contract

with them. However, questions may arise as to whether the shipowners had, or should have had, notice of any retention of title clause in the physical supply contract.

If faced with competing demands for payment (by OW and the physical supplier) shipowners might consider sending the following message to OW and the physical supplier:

Owners have received competing demands for payment for the supply of [] metric tonnes of [] at [] to the vessel [].

You will both appreciate that this puts the Owners in a position where they cannot pay one party or the other without risking a claim for payment by the other party. Owners therefore ask that OW and [] enter into an immediate discussion so as to reach an agreement as to the party to whom payment is to be made by Owners. In the event that no agreement can be reached, Owners reserve the right either to pay the funds into escrow or to interplead before a relevant Court in order for the Court to decide as to the proper recipient of the monies due.

8. What terms and conditions apply to my contract with OW?

This will depend on what terms have been legally incorporated into the contract. In some cases terms and conditions have only been referred to after the contract has been concluded or performed (for example when an invoice has been raised). Under English law it is possible to argue that such incorporation is too late and that those terms do not apply to the contract. In some cases the terms of OW's contract permit variation to match the terms of OW's sub-contract with their supplier. Similar considerations apply in relation to the validity of the incorporation of these terms into the Member's contract with OW. If the physical supplier's terms are incorporated into the Member's contract with OW that does not act as a novation of the Member's contract with OW to the physical supplier. As a matter of English law, the Member's rights and obligations will still be with OW. The supplier is unlikely to become the Member's contracting party, although this may turn on local law. However, in all cases the terms and conditions should be closely examined so that the law, jurisdiction and any applicable time limits are identified.

9. The ship's time charterer plans to load bunkers supplied by OW. Can the shipowner refuse?

Under the time charter, of course, the shipowner is bound to accept the time charterer's lawful employment orders. The time charterer is responsible for payment for bunkers. How it chooses to make those arrangements (i.e. direct with a physical supplier or through another party) is a matter for that charterer. The mere fact that the shipowner apprehends that the supply of bunkers to the ship may give rise to an arrest or threat of an arrest later by the physical supplier does not of itself entitle the shipowner to refuse the order to load the bunkers in question. If the ship were subsequently to be arrested then the shipowners would

be entitled to look to their time charterer for re-imbusement of any liability on the basis that the charterers had the obligation to pay for the bunkers supplied to the ship and it would not matter if they had in fact paid OW. The practical difficulty for the shipowners is that unless charterers are prepared to provide security to lift the arrest it would be necessary for the shipowners to provide security and then seek to pursue claims against the charterers under the charterparty. The financial standing of the charterers will obviously be important in this context.

10. In the event that shipowners are on notice of a supply of bunkers ordered by a time charterer from OW can any preventative steps be taken?

In some jurisdictions a notice given to the bunker suppliers may protect the shipowner against a subsequent arrest in the event of non-payment by OW. Some shipowners already use clauses for this purpose though it must be recognised that they are not binding in some jurisdictions and must, in any event, be given before the physical supply is made. Wording can be used such as:

We hereby put you on notice that the bunkers to be supplied to the vessel [] at [] are supplied under a contract between the vessel's Time Charterers [] and [], a contract to which Owners are not a party. These bunkers are not supplied on the faith and credit of the Owners, their servants, agents or subcontractors, or the vessel, none of whom will have any responsibility for payment for them. No lien or other encumbrance whatsoever will be created by the supply of bunkers to the vessel [].

11. The ship's charterer has failed to pay OW and suppliers are now demanding payment. What are the consequences?

It is possible that such conduct by the charterer will put them in breach of charter and an appropriate notice could be sent to them in order to hold them to their contractual obligations. The parties' respective rights and obligations will turn on the terms of the relevant charter. It may be the case that the physical supplier will have the right to exercise a lien over the ship, notwithstanding that the shipowner may not have been privy to any bunkering contract. This will turn on local law. The fact that a charterer has failed to pay a supplier is unlikely to afford an owner with a defence in these circumstances.

Yours Faithfully,

China Shipowners Mutual Assurance Association