

RODYK & DAVIDSON LLP

BUNKER ASIA 2011 COUNTERPARTY DISPUTES IN THE SUPPLY OF BUNKERS

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SCOPE OF COUNTER PARTY DISPUTES

- > Disputes may arise between owners and charterers on the one hand and bunker suppliers on the other over:-
 - > issues of quality (off spec) and quantity (short supply)
 - > best avoided by prevention and measures taken to ensure correct quantities and quality are supplied
 - > payment default by owner/charterer
 - > recourse to ship arrest, but a good understanding of the intricacies of arrest under different jurisdictions is required

COMMERCIAL CONSIDERATIONS

- > A well-regulated market (eg Singapore) attracts many suppliers resulting in fierce competition with the potential for price under-cutting
- > Additionally, suppliers may find it harder to procure/provide on-spec fuel:-
 - > increasing onshore demand for premium oil;
 - > failure by routine analysis to pick up contaminants;
 - > ships with lighter and higher performing engines; and
 - > specifications extended to include environmental laws curbing emissions

QUANTITY ISSUES

- > Suppliers should be aware of industry malpractices and avoid:-
 - > inaccurate/false/incorrect measuring devices, tank tables, densities or temperatures; and
 - > contaminants (water and air frothing)
- > In the event of a dispute over quantity, settlement will favour the party which:-
 - > has quality supporting evidence (well kept records and contemporary documents); and
 - > responds speedily

BUNKER QUALITY

- > Suppliers must match the desired ISO grade in the requisition:-
 - > in Singapore, prior to the release of ISO 8217:2010, the Maritime and Port Authority's SSO 600:2008 Code of Practice required bunkers to meet the same standard as (or a better standard than) the latest ISO (which was then ISO 8217:2005); and
 - > with the latest ISO 8217:2010 now released, suppliers in Singapore have until June 2012 to meet the higher ISO 8217:2010 standard
- > Shipowners/charterers have in place a system for bunker testing and suppliers should take these protective measures:-
 - > confirm the samples taken are representative and that the integrity of the sampling is not compromised;
 - > for example testing of retained samples under the MPA's custody transfer sampling enables the supplier to prove its integrity; and
 - > obtain copies of any test results

ARBITRATING BUNKER DISPUTES I

- > The Singapore Chamber of Maritime Arbitration has an expedited procedure to resolve of bunker disputes:-
 - > model of arbitration tailored for the maritime community with rules following the London Maritime Arbitrators Association providing a high degree of party autonomy; and
 - > SCMA is not involved in the management of the arbitration, but is available to facilitate the process upon the party's request:-
 - > no management costs charged; and
 - > no mandatory scale of arbitrator's fees so that parties are free to agree on the rates with the arbitrator

ARBITRATING BUNKER DISPUTES II

- > The SCMA provides for 2 alternatives:-
 - > Summary Procedure:-
 - > simplified, expedited and inexpensive procedure for small claims or claims involving only a single issue
 - > Full procedure
 - > claims > S\$100,000 or with complex issues

RISK OF PAYMENT DEFAULT

- > It is current market practice for bunker supply contracts to allow all or part of the purchase price to be paid some time after delivery of the bunker
- > In times of economic uncertainty and increasing liner, owner and charterer insolvencies, generous credit terms expose suppliers to greater risk of default
- > Suppliers who can may wish to stipulate full or substantial payment upfront (cash in advance) or extract a guarantee from the purchaser

SHIP ARREST

- > The arrest, or the threat of ship arrest, is the primary recourse against non-payment:-
 - > the creditor can seize a debtor's working asset;
 - > considerable pressure is exerted on the debtor to settle the claim:-
 - > business is disrupted;
 - > inconvenience and cost of processing the ship arrest and applying for release;
 - > arrest or threat of arrest usually encourages speedy resolution:-
 - > the parties settle the underlying dispute without proceeding to trial;
 - > the ship owner may put up a bank guarantee or some other security (eg P&I club undertaking)

SHIP ARREST JURISDICTIONS

- > If the party ordering the bunker is the ship owner, the ship is property that can be arrested or attached as security for the unpaid supplier's claim
- > In some jurisdictions, ships belonging to a common / group ownership may also be exposed to arrest / attachment
- > In other jurisdictions, even though the ship owner is not the party ordering the bunker, the ship is nonetheless property that can be arrested / attached as security for the claim, based on the concept of maritime lien

SINGAPORE ARREST PROCEDURE

- > Court issues warrant of arrest
- > Claimant's lawyers authorised by Sherriff to serve notice and warrant on ship
- > Sherriff takes care and custody of ship
- > To avoid arrest-associated costs from eating into recovery, claimant usually immediately proceeds to judicial sale if owner still refuses to pay
 - > Total time; 3-4 days to arrest ship, up to 10 weeks for bidder to pay full purchase price

COMMON / GROUP OWNERSHIP

- > Some jurisdictions have significantly expanded the class of ships that can be arrested:-
 - > ships to be deemed to be owned by the same person if the majority shares, voting rights, or value of the shares are owned by the same person;
 - > the associated ship at the time of arrest must be owned by a person who controlled the company which owned the guilty ship when the claim arose; and
 - > the associated ship must at the time of arrest be owned by a company which is now controlled by a person who then owned the guilty ship or controlled the company which owned the guilty ship at the time the claim arose

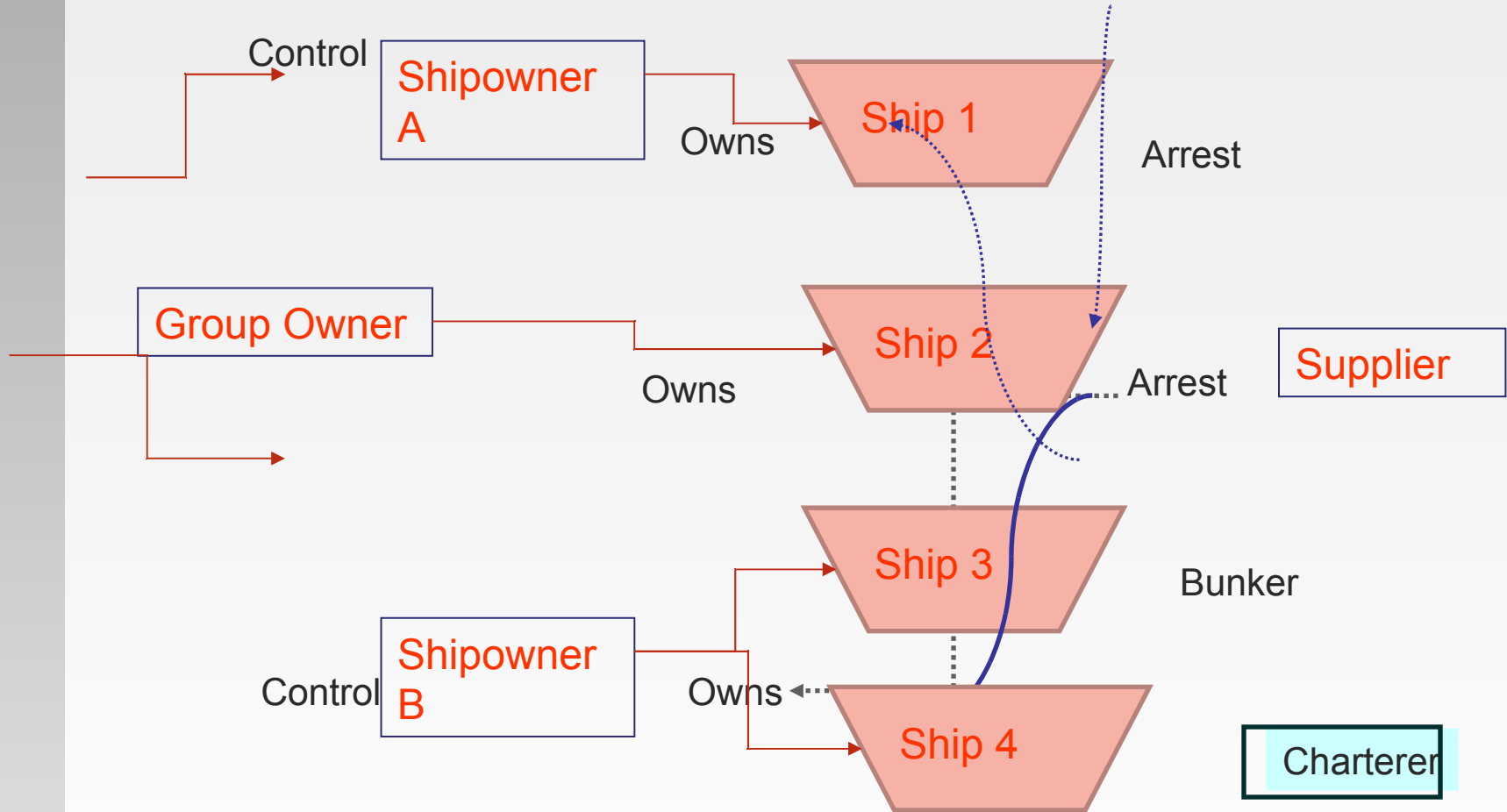
MARITIME LIEN CONCEPT

- > In some jurisdictions, bunkers are considered necessities supplied to a vessel and are protected by a maritime lien:-
 - > maritime liens “personify” the ship;
 - > an unpaid bunker supplier can sue the ship itself:-
 - > even where the bunker supplier did not contract with the owner; and
 - > any judgment obtained can be enforced directly against the vessel

ATTACHMENT

- > Maritime liens only apply to the “guilty” ship and the claimant cannot proceed against surrogate or sister ships of the same fleet
- > However, in some jurisdictions, a claimant can attach a debtor’s tangible or intangible personal property:-
 - > the property attached does not need to have a direct connection to the claim but cannot exceed the amount claimed; and
 - > all the debtor’s tangible or intangible personal property (including sister ships) can be attached

ASSOCIATED SHIP ARREST



COUNTERPARTY DISPUTES IN THE SUPPLY OF BUNKERS

THANK YOU

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