The Swedish Club

The RES COGITANS (ultimately decided by the UK Supreme Court [2016] UKSC 23)

In late October 2014, the owner of the RES COGITANS contracted with OW Bunkers for the supply of US$443,800-worth of bunkers to the vessel. In turn OW Bunkers purchased the bunkers from Rosneft Ltd.

The vessel owners had received competing claims from ING Bank and Rosnneft Ltd. Owners challenged ING Bank's claim on the basis that only Rosneft Ltd. could claim payment because, according to the UK Sale of Goods Act, ING Bank had never had title to the bunkers since they never had paid Rosneft Ltd. The arbitration tribunal found the Sale of Goods Act did not apply and hence that ING Bank had a straightforward claim under the contract with the owners.

The decision whether the Sale of Goods Act applied was appealed as a preliminary point to High Court, which endorsed the decision. In November 2015, the Court of Appeal essentially confirmed the decision, as a preliminary point, (although with the caveat that the bunker contract was a hybrid and the Sale of Goods Act applied to any bunkers not consumed after the end of the credit period). This decision was appealed to the Supreme Court which did not only confirm that the Sale of Goods Act did not apply, but also held that, had the Act applied, Owners would still have been obliged to pay ING Bank due to express terms in the contract. The case was subsequently referred back to the Tribunal for resolution.

As a matter of reflection, it is easy to solely blame OW Bunker and ING Bank for all the problems caused to owners and charterers receiving duplicate claims. However, from the perspective of the innocent owner or charterer, the problem actually manifests itself when a different party not being the contractual counterparty – the physical supplier – pursues a claim against the vessel despite the fact that the contractual supplier has been paid.

Admittedly, the ancient right for a bunker supplier to have a lien in the vessel for unpaid bunkers may not sit very well with an arrangement involving an intermediary since, as the courts suggested, owners' obligation to pay the intermediary is absolute.

After all, the physical supplier has contracted with OW Bunker, and has agreed to receive payment form OW Bunker. If the contractual chain was to be honoured, which would seem reasonable, the physical supplier should submit a claim against OW Bunker's bankrupt estate to the extent the bunkers are not paid.

Be that as it may, the Res Cogitans decision illustrates that there is a fundamental risk for owners and charterers when purchasing bunkers through an intermediary since the purchaser stand the entire credit risk of that intermediary.