SHIPPING & TRANSPORT - DENMARK

Parties facilitating financing in shipping industry must consider law of transferor's domicile

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Two Danish OW Bunker companies gave a foreign bank security against the companies' ordinary claims. The companies subsequently became subject to insolvency proceedings. The insolvent estates' ability to extinguish the security was governed by Danish law, as the foreign bank had derived its right from the Danish companies as transferors.

Facts

A Dutch bank (A), together with a group of other banks, provided financing through an international credit agreement to two Danish OW Bunker companies (C) and (D). As part of the credit agreement, A was given security against the companies' outstanding (and future) accounts generated from the sale of bunker stems. The security was established by two agreements: the English Omnibus Security Agreement and the Security Agreement Pledge of a Certain Bank Account.

C and D subsequently became subject to insolvency proceedings. The insolvent estates (E) purported to extinguish or avoid the collateral security. In relation to avoidance, A and E agreed on Danish law governing the matter. However, the parties disagreed on the governing law in regard of E's ability to extinguish the collateral security given to A.

As a result, E brought proceedings before the Maritime and Commercial Court against A, claiming that Danish law governed:

- whether the outstanding accounts were to be seen as collateral security or a transfer of title; and
- the matter of extinguishment.

A claimed that:

- whether the outstanding accounts were to be seen as collateral security or as a transfer of title should be decided in accordance with the English Omnibus Security Agreement; and
- E's ability to extinguish the collateral security should be decided in accordance with English law.

Decision

The Maritime and Commercial Court ruled in favour of E. The court called attention to the fact that the insolvent estates were a distinct legal person and an independent third party. Thus, the insolvent estates were not to be seen as contracting parties to the international credit agreement.

The court stressed the property law aspects of the case and noted that the Rome Convention on the Law Applicable to Contractual Obligations does not govern the choice of applicable property law and was thus found to be inapplicable. The court concluded that the choice of law should be decided in

accordance with Danish international civil law and underlined that A's rights derived from C and D, both of which were companies domiciled in Denmark.

Danish law was therefore to be applied when determining:

- E's ability to extinguish A's rights; and
- whether the outstanding accounts were to be seen as collateral security or a transfer of title.

Comment

According to the judgment, OW Bunker's insolvent estate should be seen as a distinct legal person and an independent third party from the OW Bunker companies. In contractual relations therefore, including finance contracts, it is not possible to agree on a choice of law with prejudice to the insolvent estate and an insolvent estate should not be seen as a party to agreements entered into prior to insolvency proceedings. Therefore, an insolvent estate is not bound by the contracting parties' choice of law with regard to questions of extinction.

The judgment stressed that parties facilitating financing in the shipping industry must consider the law of the transferor's domicile and undertake due diligence in accordance with this law in order to protect their interests in the event of the transferor's insolvency.

For further information on this topic please contact Jesper Windahl at Windahl Sandroos & Co by telephone (+45 3525 3800) or email (jw@wsco.dk). The Windahl Sandroos & Co website can be accessed at www.wsco.dk.

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