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SUBCONTRACTORS AND MARITIME LIENS

By Dean W. Baker

Imagine that you bring your vessel to a yard for an overhaul or refit. You sign a fixed price contract with the yard to make certain upgrades and repairs to your vessel. The yard in turn hires subcontractors to partially perform your contract with the yard. You are aware that the subcontractors are performing work on your vessel and you in fact approve their work. There is, however, no contract between you and the subcontractor. Why would there be; after all you contracted with the yard and agreed to pay the yard to overhaul or refit your vessel. The subcontractors have now completed their work. Before the subs are paid by the yard, the yard files for bankruptcy. Most maritime lawyers believe that the sub will be able to assert a lien against the vessel for the work that it performed. They better be right; because if they are wrong, the sub is left holding the bag with an unsecured claim against a bankrupt entity – the yard. That is in fact the likely result under a growing chorus of cases, at least in the second circuit, that take a dim view of the sub's entitlement to a maritime lien. The following discussion looks at the current state of this issue.

Two recent cases, involving substantially identical facts, reached diametrically opposed conclusions on whether unpaid suppliers of bunkers (i.e. marine fuel) to vessels could assert maritime liens against those vessels. The cases arose out of litigation spawned by the collapse and bankruptcy of O.W. Bunker & Trading A/S, a Danish company and its international subsidiaries (collectively, "O.W. Bunker"). O.W. Bunker was a supplier of bunkers to ocean-going vessels. The vessel owners contracted with O.W. Bunker for supply of the bunkers and O.W. Bunker in turn contacted the petroleum suppliers to deliver bunkers to the vessels. When O.W. Bunker's U.S. subsidiary filed bankruptcy, the vessel owners did not know who to pay. If they paid O.W. Bunker (the entity they were contractually bound to pay), they risked having their vessels arrested by the bunker suppliers who were asserting maritime liens against their vessels. To

resolve the question, vessel owners instituted approximately 30 interpleader actions in various courts. They deposited the price of the bunkers (plus a small premium for interest) with the courts and asked them to determine who was entitled to the funds. If O.W. Bunker was entitled to the funds, the bunker suppliers as unsecured creditors of O.W. Bunker would receive pennies on the dollars, if anything at all. O.W. Bunker's secured creditor was, of course, interested in the proceedings and sided with O.W. Bunker to deny the supplier's maritime lien claims.

The fate of the bunker suppliers depended upon an interpretation of the "necessaries" statute under Section 31342 of the Commercial Instruments and Maritime Liens Act (CIMLA), which provides in relevant part that: "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner - …has a maritime lien on the vessel". The bunker suppliers did not have a direct contractual relationship with the vessel owners and the vessel owners were indifferent to who supplied the bunkers. In other words, the vessel owners did not require O.W. Bunker to hire a particular subcontractor to fulfil the requirements of the contract between the vessel owners and O.W. Bunker.

The eleventh and fifth circuits have construed the "necessaries" statute liberally to conclude that a person in the position of the bunker suppliers may be able to assert a maritime lien depending upon the degree of involvement it had with the owner of the vessel. So, if the owner of the vessel was aware of the subcontractor's performance before and during the performance, that factor together with other factors would militate in favor of awarding the subcontractor a lien. The ninth circuit has always been less forgiving. In the absence of a contractual relationship between the vessel owner and subcontractor or a request to the general contractor (like O.W. Bunker) by the vessel owner to use a particular supplier, the ninth circuit would strictly construe the statute to hold that the supply of bunker fuel by O.W. Bunker's subcontractors is simply not on the order of the owner. Moreover, a person like O.W. Bunker (essentially a general contractor) is not a person authorized by the owner, since another section of CIMLA prescribes the persons who are presumed to have authority to procure necessaries for a vessel. Those persons do not include a general contractor like O.W. Bunker.

Turning to the two recent cases, one is particularly significant since it was decided by a district court in New York. The Second Circuit, to date, has not weighed in on the issue of whether the necessaries statute is applicable to a subcontractor who does not have a contract with the vessel owner. Moreover, law on the issue in the second circuit was scant, except for a lone decision -- Integral Control Sys. Corp. v. Consolidated Edison Co., 990 F.Supp. 295 (S.D.N.Y.1998) – that had essentially adopted the rationale of the ninth circuit and found that subcontractors employed by general contractors, except in limited circumstances, may not assert maritime liens. In a recent decision, Judge Valerie Caproni, adopting the second circuit's strict approach to maritime liens said that:

> "The requirements of CIMLA are interpreted narrowly under the doctrine of *stricti juris.* …… A strict approach is in keeping with the overriding purpose of maritime liens and necessary to prevent a proliferation of liens that might hinder international commerce."

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Judge Caproni found against the petroleum suppliers in a case that will undoubtedly be appealed to the second circuit. See Clearlake Shipping PTE Ltd. V. O.W. Bunker (Switzerland) SA, 2017 WL 894876 (March 3, 2017) (superseding the Court's January 9, 2017 Opinion and Order). Contrast that with a case decided in Florida District Court on the same facts that went the other way and ruled in favor of the bunker suppliers. Martin Energy Services, LLC v. Bravante 2017 WL 373449 (January 26, 2017). The Florida District Court was aware of the Clearlake decision (the January 9 decision which corrected for an error that is not material to9 the matters discussed here). He noted: "*Clearlake* seemingly recognized that its result smacked of inequity—the court said it "sympathize[d] with" the physical suppliers, who believed they held maritime liens, and that the outcome was "unfortunate." ……. But the court said the result was required, in part, by the Second Circuit's rule that maritime liens are "*stricti juris.*"

If the Second Circuit adopts Judge Caproni's view, it is likely that there will be an appeal to the Supreme Court and it seems even more likely that the Supreme Court will take up the case to decide this important issue of maritime law.
In the interim is there anything a sub can do to protect itself from decisions like Clearlake? She suggested at least two solutions to her seemingly inequitable result. The subs/petroleum suppliers could have insisted that the vessel owners become party to their supply contracts or they could have taken assignments of O.W. Bunker's rights against the vessel owners. Those suggestions may be impractical and they do not take into account what O.W. Bunker's secured lender would have said about such arrangements.

CROSS BORDER YACHT PURCHASE & SALE AGREEMENTS / DISTINCT SURVEY AND ACCEPTANCE CLAUSES

By: David M. Bohonnon

Cross border and International Purchase Agreements for yachts have flourished with the advent of technology and the internet in the last decade. Inventory of yachts for sale are widely published and available to prospective owners stimulating this global market place. Fluctuations in currency and favorable exchange rates drive bargains for some, while others may be forced to sell. Thus, cross border and International Yacht Purchase transactions have grown in volume.

Yacht Brokers, Buyers and Sellers of yachts now frequently find they may be in conflict how best to document or memorialize a Purchase and Sale Agreement for a yacht or vessel.

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Different customs, laws, terms and conditions for such transactions widely vary in the form Purchase Agreements developed by associations of yacht brokers domestically and internationally.

For this article, we focus on three different "standard" Purchase Agreements for the following yacht broker's associations: The Mediterranean Yacht Brokers Association (MYBA), Yacht Brokers Association of America (YBAA) and International Yacht Brokers Association (IYBA). Of interest are the differences in the Survey, Acceptance/Rejection of Vessel provisions in each of these agreements.

YBAA

> SURVEY: The BUYER may have the VESSEL surveyed at his expense to verify the condition of the VESSEL and the accuracy of the attached inventory.
>
> ACCEPTANCE OF THE VESSEL: The BUYER shall notify the SELLING BROKER of his ACCEPTANCE of the VESSEL and its inventory in writing. If said notice has not been received by the ACCEPTANCE DATE, the BUYER shall be deemed to have rejected the VESSEL and its inventory, subject to the terms, if any, of Paragraph 8. *IT IS THE BUYER'S RESPONSIBILITY TO OBTAIN ANY ASSURANCES HE REQUIRES REGARDING THE AVAILABILITY OF SATISFACTORY FINANCING AND INSURANCE PRIOR TO ACCEPTANCE DATE*.
>
> TERMINATION OF AGREEMENT: If the BUYER gives notice of his intention to reject the VESSEL under the terms of AGREEMENT, such notice shall constitute termination of the BUYER'S obligation to purchase and the SELLER'S obligation to sell, and the BUYER and the SELLER both authorize the SELLING BROKER to return the deposit to the BUYER, after deducting any fees and charges incurred against the VESSEL by the BUYER, or by the BROKERS on behalf of the BUYER, including the cost of the survey and related expenses.

From the above extracted provisions of the YBAA Vessel Purchase and Sale Agreement we can conclude a Buyer has the right to only survey the Vessel. It is important to note the absence of any right to sea trial the Vessel. Under the terms above the Buyer must notify the Selling Broker in writing of their acceptance of the Vessel by the Acceptance date prescribed in the Agreement, or else the Vessel is deemed rejected. ("Default Rejection") Written rejection or Default constitutes a termination of the Purchase Agreement and a return of deposit to Buyer. It is important to note that a Conditional Acceptance of the Vessel constitutes a counter offer to the Purchase Agreement, which terms need to be accepted in writing by the Seller or the default and termination provisions above control.

IYBA

> "Survey Option; Acceptance of Vessel; Conditions of Survey. Buyer's obligation to purchase the Vessel is subject to Buyer's satisfaction, in Buyer's sole discretion, with a trial run and survey of the Vessel, if Buyer elects to have the Vessel inspected…. and (e) Buyer must deliver written notice of rejection or acceptance of the Vessel to Seller or the Listing Broker on or before the Accept/Reject Date set forth above.
>
> *Whether or not Buyer has inspected the Vessel, Buyer will be deemed to have rejected the Vessel if he fails to give timely written notice of its acceptance*. Upon Buyer's acceptance of the Vessel, Seller will not make any use of the Vessel pending Closing except to move the Vessel to the Delivery Location. If Buyer rejects or is deemed to reject the Vessel, after all expenses incurred on Buyer's behalf have been paid, (i) the Selling Broker shall return the Deposit to Buyer, (ii) this Agreement will terminate, and (iii) the parties and the Brokers will be released from any further liability hereunder. The Brokers will not be responsible for the cost to correct any defects or deficiencies noted during the trial run and survey".

From the provisions in the current IYBA Purchase and Sale Agreement for Brokerage Vessel we find similar provisions to the YBAA Agreement in terms of written acceptance or Default Rejection of the Vessel. Distinguished from the YBAA Agreement, the IYBA contract language conditions the return of the deposit to the Buyer "after all expenses on Buyer's behalf have been paid. This is important to understand, as such expenses might otherwise constitute maritime claims of lien attaching to the Vessel in rem. Simply if these expenses remain unpaid they become a Seller's issue attaching to the Vessel. Additionally, it is important to note the right to a "trail run" or sea trial of the Vessel in this agreement as opposed to the YBAA Agreement.

The IYBA Agreement protects its brokers with the following additional clause:

> "Brokers will not be responsible for the cost to correct any defects or deficiencies noted during the trial run and survey."

What we can ascertain here more fully is neither Broker nor Seller shall be responsible for cost to correct any defects or deficiencies noted during the trial run and survey unless there is some form of amendment or counter offer to the Purchase Agreement. Again, as in the case of the YBAA Agreement it is important to note that a Conditional Acceptance of the Vessel pursuant to the IYBA Agreement constitutes a counter offer to the Purchase Agreement, which terms need to be accepted in writing by the Seller or the default and termination provisions above control.

MYBA

> (26) Sea Trial
>
> Prior to the date at Clause (9) and prior to the Vessel being placed ashore for the Condition Survey, the Seller at his/its own expense

is to make the Vessel available to the Buyer for a Sea Trial of a maximum of four hours' duration at a time to be mutually agreed between the parties hereto. It is at the Buyer's discretion to take advantage of this facility. In the event that the Buyer or his/its nominee does not attend such Sea Trial or otherwise take advantage of this facility then the Buyer shall be deemed to have accepted the Vessel subject to Clause (27). Notwithstanding what is contained elsewhere in this Agreement, if for any reason whatsoever and in his/its discretion the Buyer considers that the Vessel has not performed to his/its satisfaction on the Sea Trial and he/it does not therefore wish to proceed with the purchase, he/it shall give written notice of his/its rejection of the vessel to the Seller or the Broker within twenty-fours of completion of the Sea Trial or prior to placing of the Vessel ashore for the Condition Survey as mentioned in Clause (27) hereof whichever shall be the sooner. In the event that notice of rejection is given by the Buyer, all expenses incurred by the Buyer, if any, in relation to such Sea Trial shall be payable and shall be paid from the Deposit and the balance of the deposit shall be returned to the Buyer forthwith and this Agreement shall thereafter be deemed null and void. If such notice of rejection is not given, the Sea Trial shall be deemed to have been to the Buyer's satisfaction.

(27) Condition Survey

The Buyer may at his/its own cost place ashore and/or open up the Vessel and her machinery for the purpose of completing a Condition Survey no later than the date shown as Clause (9) herein, time being of the essence in this respect.

(a) If on completion of the Condition Survey any defects in the Vessel or her machinery have been found other than those disclosed to the Buyer in writing prior to the date of this Agreement and thereby accepted by the Buyer, the Buyer may within seven days of completion of the Condition Survey give to the Seller or the Broker(s) either:

(i) Written notice requiring the Seller forthwith either to make good any or all of the defect(s) and/or alternatively to make reasonable and sufficient reduction in the Sales Price to enable the Buyer after completion of the Sale to make good the same. An agreed item of work shall be completed by the Seller without undue delay in all the circumstances and shall be carried out so as to satisfy the expressly specified requirements of the Buyer's Surveyor in respect of the defect(s) mentioned in the Surveyor's Report and notified to the Seller, in which case the Completion Date shall be extended by such period as the Seller and the Buyer may agree to allow the remedial works to be completed; or

(ii) Written notice of his/its rejection of the Vessel identifying and specifying in that notice the defect(s). If the Buyer shall service written notice under Clause (27(a)

(ii)) then this Agreement shall be deemed terminated and the terms and conditions of Clause (29) shall apply.

(b) If the Buyer shall serve written notice under Clause (27(a)(i)) above and if after seven days of service of such notice one or a relevant combination of the following circumstances applies:

(i) The Seller has not agreed in writing to make good without delay any defect(s) specified in such notice; or

(ii) The Buyer and Seller have not agreed in writing as to the amount by which the Sales Price is to be reduced; or

(iii) The Seller and the Buyer do not agree the period within which the remedial works are to be completed.

then this Agreement shall be deemed terminated and the terms and conditions of Clause (29) herein shall apply.

A defect shall be regarded as a defect for the purposes of this Clause (27) if an officially appointed Marine Surveyor (to be defined as a Marine Surveyor whose day to day business is occupied with the surveying of vessels of a similar quality to and value of the Vessel) shall have certified in writing that the defect(s) affect(s) the operational integrity of the Vessel or her machinery or her systems or renders the Vessel unseaworthy. For the purposes of any time limits herein the survey shall be deemed to be completed immediately following the completion of the physical inspection by the Surveyor.

For the avoidance of doubt, the period of the Condition Survey and the completion thereof shall not depend on the production of provision of any written report by the Surveyor to the Buyer.

The Broker(s) is/are not responsible for the engagement of the Surveyor selected by the Buyer.

The terms and conditions of the MYBA Sea Trial and Condition survey provisions for Vessel are much more technical and distinct from the previous two contract examples.

The MYBA contract provides for up to a 4 hours' sea trail for the Vessel. In the event, however that Buyer or his/its nominee does not attend such Sea Trial then the Buyer shall be deemed to have accepted the Vessel subject to the terms of Condition Survey clause.

Rejection of the Vessel after Sea Trail is limited to Buyer issuing written notice of rejection within twenty-fours of completion of the Sea Trial or prior to placing of the Vessel ashore for the Condition Survey as mentioned in Clause (27) hereof whichever shall be the sooner.

Obviously close attention must be paid to these deadlines and terms failing an unsuspecting Buyer acceptance of the Vessel.

Like the IYBA agreement, the deposit may be utilized to extinguish Buyer's expenses incurred against the Vessel for Sea Trial prior to refund and termination of the Agreement.

The MYBA contract Condition Survey provisions present a midfield of limitation and potential disaster for the Buyer.

Time being of the essence is inserted in this clause which makes all deadlines and dates exacting. The Buyer has seven days to respond to the Seller Post Condition Survey as to "present one or a relevant combination of the following circumstances:"

> a. A written presentation of Buyer noted defect(s) which Seller agrees to cure/fix at their expense;
>
> b. A Buyer and Seller written agreement as to the amount by which the Sales Price is to be reduced based on disclosed defects; or
>
> c. The Seller and the Buyer do not agree the period within which the remedial works are to be completed, resulting in a termination of the Agreement.

Adding a layer of complexity to this clause the measure of a "defect" as defined in the MYBA Agreement is as follows:

> A defect shall be regarded as a defect for the purposes of this Clause (27) if an officially appointed Marine Surveyor (to be defined as a Marine Surveyor whose day to day business is occupied with the surveying of vessels of a similar quality to and value of the Vessel) shall have certified in writing that the defect(s) affect(s) the operational integrity of the Vessel or her machinery or her systems or renders the Vessel unseaworthy. For the purposes of any time limits herein the survey shall be deemed to be completed immediately following the completion of the physical inspection by the Surveyor.

Simply, shopping for a yacht has no longer become geographically restricted for many in the industry. An isolated sampling of a small but important section of each of the industries' "standard" form Purchase Agreements presents different conditions and customs for survey, sea trial and acceptance terms for the vessel. Both Buyer and Seller are well served to receive advice and counsel on these terms unless they are well versed in the mechanics and meaning of this language.

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BIG BOX BROKERAGE: ARE YOU REALLY GETTING THE BEST DEAL?

By Steven A. Clark

You are looking to buy your next boat. Spring is here and the window to purchase for the upcoming summer is getting smaller and smaller. Looking…looking…looking…scouring the internet for your next perfect boat. And you find it! It looks great in the pictures and the price seems too good to be true. You glance at a brokerage house controlling the listing…you've obviously heard of them from your dock-mates. It is a big box yacht brokerage firm and they have the lowest priced comparable model on the market. But I beg you to ask yourself: are you really getting the best deal?

Recently, in handling and closing yacht transactions with big box brokerage houses, I was left with the lingering feeling that my clients didn't get the best deal. I am not referring to price but to the fact that they may not be representing your best interests. Having represented buyers in these transactions, my points of note herein will largely be based from a buyer's perspective. Notably, however, in my transactions, the big box brokerage also represented the seller; this situation (i.e. where the same brokerage represents both the seller and buyer) presents the complex scenario of dual agency, which carries with it the poignant legal considerations of fiduciary obligations and disclosures. Without going into the potential pitfalls of dual agency, I will focus on the considerations a buyer should make when purchasing from a big box brokerage.

1. The Contract: Big box brokerage houses do not allow revisions to their contracts. There is generally a small section for contingencies in which they will consider minor revisions. It is essential that a buyer clearly state the contingency conditions under which it is entering into the agreement. These conditions will likely be the only mechanism (save seller default and acts of God) by which a buyer can back out of the contract. Such conditions must be carefully drafted.

2. The Jurisdiction of the Big Box Brokerage: A buyer must be cognizant of the jurisdiction of the big box brokerage with which he/she is dealing. By way of example, in a recent transaction, a subject vessel was located in and was to be delivered in the same jurisdiction. Unbeknownst to the parties, the big box brokerage was operating out of a different jurisdiction and readily asserted that sales tax would be levied in the state of the big box brokerage. Such an assertion was entirely incorrect and could have resulted in a substantial tax liability for the buyer. Therefore, a buyer must carefully consider the jurisdiction of the brokerage house and be wary of any assertions that sales tax will be collected in a jurisdiction contrary to the delivery location.

3. Documentation Agent: In a customary yacht transaction, a buyer is free to choose its own documentation agent (i.e. the person/agency that processes the documentation/registration of the vessel) and the buyer pays for such service. Unfortunately, such freedom to choose within the documentation agent marketplace may not be available with a big box

brokerage house. In fact, in my last big box brokerage transactions, buyers were forced, under the threat of losing their deals, into using the documentation agent selected by the big box brokerage…and come to find out that their chosen documentation agency is wholly owned by the big box brokerage company. In this scenario, amazingly, not only is a buyer's right to free trade restricted but the big box brokerage garners additional profits. A buyer must be mindful of such a potential restriction.

4. Control: Based on my experiences, the goal of the big box brokerages is to gain complete control over a yacht transaction, and preferably over both the buyer and seller. Complete control dictates the contractual language and the closing conditions, all of which are geared toward earning a commission and, on top of that, documentation fees. Such control, in my opinion, limits the ability and effectiveness of a fiduciary (especially in a dual agent capacity) to represent and best protect the interests of their client (both for buyers and sellers). Such control should be carefully weighed against the value garnered by "getting a deal".

As you can see, when it comes to that seemingly great deal on the yacht of your dreams from a big box brokerage house, there are more considerations to be made prior to signing the offer.

Thank you for reading our firm's Spring 2017 Newsletter. If you have any questions or concerns, please contact our office, and we would be happy to speak with you.

Enjoy your 2017 Cruising Season!

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