Withholding vessel STS approval rejected

A recent decision by the Court of Appeal will provide reassurance to the tanker transhipment trade.

The Court of Appeal ([2014] EWCA Civ 713) considered the issue of whether owners had acted unreasonably in withholding their consent for the use of two nominated VLCCs in a ship to ship (STS) transfer of crude oil from another VLCC at the port of Pasir Gudang.

At first instance ([2013] EWHC 3678 (COMM)), the judge had found in favour of the charterers, Arcadia Energy Pte Ltd (represented by Clyde & Co), ruling that the owners, Falkonera Shipping Co, had acted unreasonably in withholding their approval.

The owners obtained permission to appeal this judgment, the hearing of which took place on 27th and 28th January, this year. Judgment was handed down on 5th June, 2014 in which the Court of Appeal upheld the High Court decision in favour of charterers.

The facts behind this case were that Falkonera Shipping had chartered the 1991-built VLCC *Falkonera* and the VLCC storage vessels to Arcadia Energy to perform a voyage, carrying crude oil from Yemen to the Far East. Charterers nominated two VLCC storage vessels to receive the cargo at the discharge port by way of STS transfer.

Owners withheld their approval of the proposed VLCCs and the cargo therefore had to be discharged into smaller vessels, which shuttled between the *Falkonera* and the VLCC storage vessels, causing delay. The owners brought a claim for demurrage. However, the charterers denied liability for demurrage and counter claimed for additional expenses incurred.

The charterparty contained a specific clause covering STS transfers: "if charterers require a ship-to-ship transfer operation.... then all tankers and/or lightering barges to be used in the transhipment/lightening shall be subject to the prior approval of owners, which not to be unreasonably withheld...all ship-to-ship transfer operations shall be conducted in accordance with the recommendations set out in the latest edition of the ICS/OCIMF ship-to-ship transfer guide (petroleum)."

The charter also contained the standard clause 8.1 of BPVoy4: “Charterers shall have the option of transferring the whole or part of the cargo... to or from any other vessel including, but not limited to, an ocean-going vessel, barge and/or lighter... All transfers of cargo to or from transfer vessels shall be carried out in accordance with the recommendations set out in the latest edition of the ICS/OCIMF Ship to Ship Transfer Guide (Petroleum).”

Appeal

The owners submitted at first instance that discharging a VLCC cargo by STS transfer into another VLCC of materially identical size is not a routine or standard operation and that it therefore was not unreasonable for them to refuse approval of the vessels nominated by charterers, on the basis that they had concerns about the STS operation itself.

The judge, however, found that their withholding of approval was unreasonable. The owners argued on appeal that their submission was well founded and that the judge had been wrong to reject it. The owners also appealed on the grounds that the judge had misconstrued the STS Lightering clause by constraining owners' freedom beyond the simple requirement that they should not behave unreasonably.

The Court of Appeal agreed with the judge's findings, in particular holding that:

- While there might be some force in the proposition that a VLCC/VLCC transfer was in a sense 'non-standard', it did not follow that the owners had acted reasonably in withholding their approval of the VLCCs. Rather, it was necessary to consider what particular reasons, if any, there might be for owners to withhold their approval.
- The right to transfer was a right to transfer to any vessel, including a VLCC. The fact that the proposed transfer could be regarded as non-standard was not of itself a reasonable ground for refusal. If that were so, the charterers' right to perform such an operation would be illusory. The owners must be taken to have contractually accepted such risks as are inevitably attendant on any VLCC/VLCC transfer.
- What owners were required to approve was the vessel and not the STS operation itself. However, owners were not required to consider the nominated vessel's characteristics in a vacuum, but in the context of the operation contemplated.
- The judge had been right to dismiss owners' submission at first instance that the OCIMF Guide, in its then form, made no mention of VLCC/VLCC transfers, and that such operations were therefore not permitted by that publication. The owners had (as the judge had found) "a settled policy or at the lowest had reached a clear position that they simply would not allow such a transfer," supporting the inference that owners' refusal was based on their aversion to VLCC/VLCC transfers in principle rather than any particular characteristics of the transferee vessel.
- The judge was also right to find that the owners would not be justified in withholding approval of the vessels simply because there was uncertainty as to whether a suitable plan of operation could be devised, or indeed whether there was

sufficient time in which to plan any STS operation. The required approval, as stated above, related to the vessel and it was not the function of the STS Lightering clause to allow owners to vet the plans for the transfer operation before deciding whether to approve that vessel.

- The owners' specific criticisms of the mooring plan did not make a withholding of approval reasonable. The judge had found that the proposed arrangement was safe in principle and that the absence of head lines and stern lines was not something which gave any reason for concern. Further, owners' concerns regarding the vertical aspect of the mooring lines were found to be without foundation.

The appeal was therefore dismissed. The owners have indicated that they will be applying to the Supreme Court for permission to appeal.

Comment

It is worth noting that about a year after the first instance trial, on 22nd November, 2013 a new edition of the OCIMF Guide was published containing a section dealing with ship-to-ship transfers involving vessels of a similar length. The Court of Appeal decided not to admit the new edition in evidence, but it was noted in a postscript to the judgment that the Court of Appeal regarded it as underscoring the judge's decision that the previous version upon which owners had relied, did not intend to outlaw VLCC/VLCC transfers.

The following comment from the Clyde & Co legal update of July 2013 following the first instance decision remains applicable following the Court of Appeal judgment:

'The Court construed owners' reasonableness by reference to both the charter terms and the specific facts of the case. Although each case will be fact-dependant, this decision provides useful guidance as to how the Court is likely to construe similar contentions made by owners in the future. For example, an argument that there is insufficient time to plan the STS transfer as a basis for refusal to permit a STS transfer is unlikely to succeed as this is a factor relevant to the operation itself rather than being relevant to owners' right to approve the nominated vessel.'

Owners should be aware that if they do not act reasonably when considering charterers' requests to perform STS transfers, they risk finding themselves in breach of charter. This case will give comfort to charterers that the industry practice of VLCC to VLCC STS transfers is not to be regarded as inherently suspect, but must be properly considered by owners on a case by case basis.

It also gives some guidance to owners about the basis upon which they can and cannot exercise their right to withhold approval. It may, therefore, have wider implications for other situations involving the requirement that owners act reasonably in relation to their right to withhold approval for operations that are apparently permitted (subject only to such approval) by the charterparty. TO

**A referewnce to this article apeared in a recent issue of Maritime Advocate and it also available on Clyde & Co's website. It was written by the law firm's Hatty Sumption and Peter Ward.*