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Mealey's International Arbitration Report

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Introduction

The Oil Companies International Marine Forum (“OCIMF”) is an association of oil companies that formed in response to growing concerns about marine pollution. The OCIMF is recognized as the “voice of the oil industry” with respect to the safe transportation of oils at sea and on land. Its 96-company membership includes all of the Oil Majors, i.e., BP, Chevron, ExxonMobile, etc.

The OCIMF’s Ship Inspection Report (“SIRE”) program was launched in 1993. The SIRE database is accessible by registered companies, such as tanker charterers, vessel owners, and government authorities. The database contains vessel particulars, questionnaires, and inspection reports which allow registered companies and government authorities to assess a vessel’s safety risk.

Over the course of several years, Falcon Carrier Shipping, Ltd. (“Owner”) and ST Shipping and Transport Pte. Lte. (“Charterer”) entered into a series of time and voyage charters for the use of the tanker vessel FALCON CARRIER. Over the course of several years, the parties entered into a two-year time charter party, on a Shelltime (1984) 4 form, for the continued use of the FALCON CARRIER.

On May 15, 2008, the parties entered into a two-year time charter party, on a Shelltime (1984) 4 form, for the continued use of the FALCON CARRIER. Just over ten days later, and prior to the Charterer taking delivery, the vessel was inspected by a BP SIRE inspector and rejected as unacceptable for use by the BP Group. On May 28, 2008, Charterer gave the Owner a notice to cancel pursuant to charter party contract Clause 48. The Owner agreed on the condition that the Charterer's re-delivery notice pursuant to Clause 48 was withdrawn or ignored. Charterer requested that the charter party contract be continued. Owner agreed on the condition that the Charterer's re-delivery notice pursuant to Clause 48 was withdrawn and ignored. Eleven days later, Charterer agreed that the re-delivery notices could be considered withdrawn, but insisted that the May 28, 2008 cancellation notice remained in force.

Dispute

Over the course of several years, the vessel continued to trade based on Charterer’s orders and underwent two additional SIRE inspections on June 20, 2008 and September 5, 2008, respectively. These inspections were favorable. Charterer also recognized that oil companies approve subject to the vessel’s trading pattern, Charterers early notice of discharge ports and oil company vetting inspectors availability. If during the rectification period allowed under Clause 48, oil companies withdraw or expire. Owners shall take necessary steps to rectify the faults and/or maintain acceptance. Charterer disputed the results of these inspections.

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Over time, the SIRE program "gained industry-wide acceptance as a benchmark of vessel inspections and standards." Within the last 12 months alone, there have been over 22,500 SIRE reports on over 8,000 vessels. Accordingly, the SIRE program and database are extensively used in the context of tanker charter party contracts, so that charterers can determine if the vessel can be gainfully employed in advance of "fixing" a charter party contract.

The subject arbitration award involves a dispute between long-term business partners over the use of a vessel in the wake of the 2008 world financial crisis. In the end, the panel took a modern view of a classic "approvals" clause.

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After a third SIRE inspection was conducted on December 5, 2008, the vessel completed 5 additional voyages under the charter party contract before Charterer issued its second notice of cancellation and redelivery under Clause 48 on February 17, 2009. The vessel was finally re-delivered on March 3, 2009.

At issue in this arbitration is whether Charterer's cancellation under the Approvals Clause (i.e., Clause 48) and redelivery of the vessel on March 3, 2009 were wrongful.

Pursuant to the charter party's Arbitration Clause, the dispute was submitted to arbitration in New York, before the Society of Maritime Arbitrators, and U.S. law was applied.26

Liability

The arbitration panel considered three issues: (1) whether Charterer's Clause 48 notice on May 28, 2008 was effectively withdrawn; (2) whether the Owner was in breach of the approvals requirement when Charterer gave its second notice of redelivery; and (3) whether the second redelivery notice was proper.27

1. The Effective Withdrawal Of The May 28, 2008 Clause 48 Notice

After Charterer issued the first cancellation notice on May 28, 2008, Charterer continued to make use of the vessel under the charter party contract.28 Specifically, Charterer sub-chartered the vessel to carry crude oil on a voyage from Tampico, Mexico to Mobile, Alabama, and gave the Owner corresponding orders for the vessel to sail for Tampico.29

The arbitration panel determined that Charterer's continued performance under the charter party contract implied to the Owner that the May 28th Clause 48 notice was withdrawn.30 Moreover, the Owner agreed to perform the Tampico to Mobile voyage on the condition that Charterer's prior notices of cancellation and redelivery were withdrawn.31 Since the Charterer waited 11 days to contest Owner's condition of waiver, the Owner's right to refuse the voyage instructions and retain commercial control of the vessel was "severely prejudiced."32 Under these circumstances, the arbitration panel held that the May 28, 2008 Clause 48 notice was effectively withdrawn.33

2. Owner Was Not In Breach Of The Approvals Requirement At The Time Of The Second Redelivery Notice

Prior to certain high-profile oil pollution incidents in early 2000, Oil Majors inspected tankers, reported the results through the SIRE database, and also "issued pre-fixture blanket approval letters generally effective for six to twelve months."34 However, after those incidents, the Oil Majors "refused to grant pre-fixture blanket approvals and now merely acknowledge on the SIRE database that the vessel had been inspected."35

This change in industry custom had a significant impact on the effect and meaning of the standard Approvals Clause found in tanker vessel charter party contracts. According to Owner, to comply with the Approvals Clause, "approval" meant having an oil major conduct a SIRE inspection, the resulting SIRE inspection report being posted in the OCALL website along with Owner's comments, and the oil major having no further questions.36 In contrast, Charterer contended that Owner must prove that three oil majors actually approved the vessel for specific voyages.37

Despite the fact that Clause 48 requires the vessel to be "approved" by at least three Oil Majors at all times, the parties agreed that Oil Majors no longer issues such approvals.38 The arbitration panel acknowledged that a strong argument could be made to consider Clause 48 null and void because it created a condition that was due to current industry practices was impossible to meet.39 However, as the acceptance of a vessel to carry cargo significantly impacts its ability to be marketable, the arbitration panel opted to provide a reasonable construction of the clause in light of industry practice.40

First, the arbitration panel noted that the terms of the Approvals Clause allows Owner an opportunity to rectify the faults before the vessel can be redelivered by the Charterer.41 Second, the Approvals Clause does not mention actual acceptance of the vessel for a specific voyage.42 Third, Charterer's interpretation of the Approvals Clause places too heavy a burden on Owner since Charterer controls the vessel's employment and tendering of the vessel to an oil major for the performance of a specific voyage.43

As to the facts of this case, during the rectification period, two Oil Majors posted inspection reports on the SIRE database, to which Owner responded, and in each case the respective Oil Majors advised that no further information was required.44 In fact, each Oil Major commented that, in the absence of any changes to the vessel, no further SIRE inspections would be required for six months.45 This, reasoned the arbitration panel, was sufficient evidence that the two Oil Majors found the vessel generally acceptable.46

Nonetheless, the arbitration panel noted that, even with successful SIRE inspections, vessels might still be rejected by Oil Majors for specific voyages.47 For example, an Oil Major might reject a vessel for a specific voyage, despite a successful SIRE inspection, because the voyage would require the vessel to sail within an environmentally sensitive area where higher safety standards apply.48 Such an occurrence would not necessarily mean that Owner was in breach of the Approvals Clause. In order to show that Owner was in breach of the Approvals Clause, Charterer would have to show that the oil majors would not accept the vessel for "any" voyage without an additional SIRE inspection.49

Given the successful SIRE inspections during the rectification period, the arbitration panel found that Owner did not breach the Approvals Clause.50

3. The Second Notice Of Redelivery In February 2009 Was Improper

The arbitration panel acknowledged that, since Oil Majors no longer issue approvals, one of the triggering elements in Clause 48 could not occur.51 Regardless, this issue was rendered moot because the arbitration panel found that Owner did not breach the Approvals Clause.52 Therefore, even under a modern view of the vetting process, the FALCON CARRIER was acceptable to at least three Oil Majors, so the Charterer's second notice of redelivery was improper.

The arbitration panel went on to clarify that even assuming, arguendo, that the vessel has only two approvals at the time, "the time for giving the notice of redelivery would be measured from the time the vessel either failed a SIRE inspection or an approval lapsed because of the passage of time from the date of the relevant SIRE inspection."53

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Endnotes

8. Id.
12. Id.
13. Id.
14. Id.
15. Id. at *2.
16. Id. at *1.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
22. Id. at *1-2.
23. Id.
24. Id. at *2.
25. Id.
26. Id.
27. Id. at *6.
28. Id. at *1-2, 6.
29. Id. at *6.
30. Id.
31. Id.
32. Id.
33. Id. at *6-7.
34. Id. at *5.
35. Id.
36. Id. at *7.
37. Id.
38. Id. at *6.
39. Id. at *8.
40. Id.
41. Id. at *7-9.
42. Id.
43. Id.
44. Id. at *7.
45. Id.
46. Id.
47. Id.
48. Id. at *8.
49. Id. at *8-9.
50. Id. at *9.
51. Id.
52. Id.
53. Id. at *10.
54. Id.
55. Id.
56. Id. at *10-11.
57. Id. at *11-13.