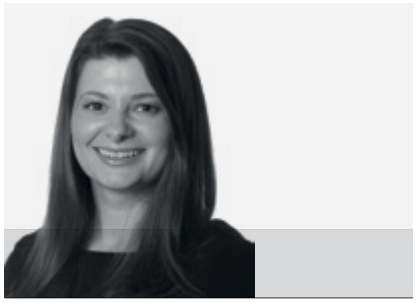
Ship-to-ship transfers and withholding consent – the *Falkonera*



Revecca Vasiliou
Senior Claims Executive, Europe
+44 20 7680 5619
revecca.vasiliou@ctplc.com

When an owner withholds consent for a proposed ship to receive cargo, the refusal must have reasonable grounds, to avoid a claim. Each case will be decided on its individual facts, but this article explores some of the factors that will be taken into account by the courts when deciding if the owner's decision is reasonable or not.

The facts

In November 2010, the VLCC *Falkonera* was chartered by Falkonera Shipping Company (the owner) to Arcadia Energy Pte Ltd (the charterer) to perform a single voyage carrying crude oil from Yemen to '1-2 ports Far East'. The charterer nominated two VLCC storage vessels to receive the cargo by way of ship-to-ship (STS) transfer at Pasir Gudang, Malaysia. The owner withheld its approval of the proposed VLCCs and therefore the cargo was discharged into smaller vessels.

The owner claimed demurrage, but the charterer denied liability for demurrage and instead advanced a counterclaim on the basis that the withholding of consent by the owner was a breach of the charterparty which led to delay and increased costs.

The charterparty terms

Part 2 of the standard BPVOY4 form (clause 8) provided:

'8.1 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 (the "Transfer Vessel")... 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)." Owners undertake that the Vessel and her crew shall comply with such recommendations, and similarly Charterers undertake that the Transfer Vessel and her crew shall comply with such recommendations. Charterers shall provide and pay for all necessary equipment including suitable fenders and cargo hoses. Charterers shall have the right, at their expense, to appoint supervisory personnel to attend on board the Vessel, including a mooring master, to assist in such transfers of cargo.'

By way of specific addition to Part 1, the charterparty contained the following clauses headed 'STS lightering clause':

'If charterers require a ship-to-ship transfer operation or lightering by lightering barges to be performed then all tankers and/or lightering barges to be used in the transhipment/lightering shall be subject to prior approval of owners, which are 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 Commercial Court's decision[1]

The owner argued that, on a true construction of the above clauses, VLCC-to-VLCC transfers were not permitted; therefore, it had acted reasonably in withholding its approval, because VLCC-to-VLCC transfers were non-standard and they had

1 [2012] EWHC 3678 (Comm).

concerns about the STS operation itself. The Commercial Court, however, decided that the owner had withheld its consent unreasonably.

The court decided that the wording in clause 8.1 was wide enough to permit a VLCC-to-VLCC transfer. From past experience, the owner had concerns about VLCC-to-VLCC transfers and, as a company policy, did not allow it. The charterer's expert had, however, been able to demonstrate that the owner's objections were specific to the previous incident and were not sufficient grounds for a reasonable shipowner to decline approval in the present case. The owner's right of approval was limited to the right to review the details of the nominated vessel and to decide whether or not she was suitable for the proposed STS operation rather than approval of the STS operation itself.

The court also held that the absence of a section in the OCIMF Guide (in its then form) dealing with VLCC-to-VLCC transfers did not mean that such operations could not (with advance planning) be conducted in accordance with the Guide.

The Court of Appeal[2]

The owner appealed the Commercial Court's decision, but the Court of Appeal agreed with the previous judge's findings. The Court of Appeal accepted that a VLCC-to-VLCC transfer may not have been a standard operation, but this did not mean that the owner's refusal was reasonable.

The owner was required to approve the vessel and not the STS operation itself. Such an approval was not to be considered in isolation, but in the context of the operation contemplated. However, the above clauses did not allow owners to vet the plans for the STS operation before deciding whether to approve the nominated vessel.

Case comment

Since the first trial, a new edition of the OCIMF Guide has been published dealing with STS transfers involving vessels of a similar length.

What is apparent from this decision is that owners must act reasonably in considering any requests to perform STS transfers. This case will be welcomed by charterers, but each case will be decided on its individual facts. The case gives owners some guidance as to what factors will be taken into account by the courts when deciding if an owner's decision is reasonable or not.

2 [2014] EWCA Civ 713.