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SOUNDINGS

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The construction of an "oil majors approval" clause - The "FALCON CARRIER" " and The "ROWAN"

The interpretation of "oil major approvals" clauses in charterparties is often difficult and can give rise to significant disputes.

Typically tanker charterparties require owners to maintain a number of approvals from oil majors. However construction of such clauses can lead to difficulties.
A recent decision of a New York arbitration tribunal has considered the construction of an "oil major approvals" clause when oil majors no longer pre-approve ships. This decision is causing considerable interest among the shipping community as it gives guidance as to how such clauses should now be construed. It follows earlier decisions of the English High Court ([2011] 2 Lloyd's Rep. 331) and Court of Appeal [2012] 1 Lloyd's Rep. 564) in The "ROWAN".

Following the EXXON VALDEZ incident a number of large oil companies introduced vetting systems to ensure that the ships carrying their cargoes were of a requisite standard. The vetting systems varied between oil companies. Initially, oil majors would pre-approve ships. Prospective charterers wanted to ensure that they would be able to sub-charter or otherwise fix the ship to the "oil majors". Therefore, it has become usual for tanker time charterparties to include a clause that requires an owner to have and maintain a certain number of "oil major" approvals. "Oil major approval" clauses were developed in different forms. In addition to the need to have and maintain a specified number of approvals (typically three out of a list of six), sanctions were attached if approvals were not obtained or were lost. For example, the ship would go off-hire until an approval was restored. The absence of a requisite approval may also entitle a charterer to cancel a charterparty. Such clauses often require a charterer to give notice to the owner identifying the default and giving it a period of time to rectify it before the charterer can terminate the charterparty.

The approach of the "oil majors" developed over time. They continued to inspect ships but stopped issuing pre-approvals. .An "oil major's" inspection might reveal issues with the ship which could be listed on the OCIMF website for other subscribers to see. An owner could then address those issues and, if the "oil major" was satisfied with the response, typically it would advise that it had no further questions. There would be no formal "approval" as such that would last for a specified period of time. Often the "oil major" would recommend that the ship undergo a further inspection in about six or twelve months' time. The "oil major" or other subscriber would decide on the basis of the reports listed on the website, and other available information, as to whether a particular ship was suitable for a particular voyage.

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The FALCON CARRIER

An owner Member of the Association fixed the FALCON CARRIER on a two-year time charterparty. A clause was included requiring the Member to hold and maintain at least three approvals out of a list of six "oil majors". If any approval was withdrawn or expired, the charterer could seek to cancel the fixture but was required to give notice of this default. The Member would then have forty-five days or three discharge ports to rectify the problem. If not rectified, the charterer could redeliver the ship.

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continued

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Issues arose at the outset of the charterparty as to whether the ship was "approved" by a particular "oil major". The Member sought to address these issues but the charterer purported to give subsequent notices of redelivery. However on each occasion the charterer continued to trade the ship. Eventually the charterer did redeliver the ship, with ten days notice, with over a year of the charterparty period remaining, leaving the Member to mitigate its losses in less favourable market conditions.

Award

The tribunal rejected the charterer's argument that the Member was required to have three pre-approvals before each voyage and construed the relevant clause in the light of new vetting practices. The tribunal was satisfied that if a ship had been inspected by an "oil major", any issues had been addressed by the Member and the "oil major" had replied that it had no further questions, the ship could be considered "approved" within the meaning of the clause. This was also the view expressed by the judge at first instance in The "ROWAN". This particular point was not in issue in the Court of Appeal, but the judge there queried (but did not decide) whether a letter which expressly stated that it was not a "blanket" approval could really be an "approval" within the meaning of such clauses.

The tribunal noted that the ship had two "approvals" following actual inspections. It also held that the ship would be deemed to have the third requisite "approval" because the charterer had represented to a sub-charterer that the ship was "acceptable" to two additional "oil majors". As the charterer was marketing the ship in this way, the tribunal believed that the charterer could not argue against the Member that the ship was not acceptable.

The tribunal also held that the charterer had only given ten days notice rather than the required forty-five day notice shortly before redelivery. It rejected the charterer's alternative argument that it could rely on an earlier redelivery notice and held that, by continuing to trade the ship, the charterer had waived its reliance on that earlier notice.

Having found that the charterer had wrongfully redelivered the ship, the tribunal awarded the Member a total of $6.75 million by way of damages.

Costs

In an unusual award of costs for a New York Arbitration, the tribunal awarded the Member 100% of its attorney costs as claimed, when it would be more usual for a successful party to recover between 66% and 75% of such costs. It further ordered the charterer to pay all of the tribunal's costs, when the usual order is for the parties to share those costs regardless of the result. This highlights what appears to be a developing practice in New York arbitrations of a successful party being awarded a significant proportion, and occasionally all, of its legal costs.

Conclusion

Oil major approval clauses continue to be widely used in the tanker trade, but their construction can cause problems when disputes arise as to whether or not a ship has been "approved" in circumstances where "oil majors" no longer provide blanket pre-approvals. Members are recommended to examine such clauses during their charter negotiations to ensure that they are unambiguous and consideration could be given to using clauses which refer to ships being "acceptable to", or "not unacceptable to" "oil majors".

If Members have any questions concerning "oil major approvals" clauses please contact your usual contact at your local Managers' office.

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