Arbitration ruling sparks debate over Catch 22 in tanker vetting

The September decision by a US arbitrators' panel, which centred around the vetting of a tanker by BP, has brought the difficult issue of oil-major approvals to the fore

Eric Martin **New York**

Tanker-charter contracts still often require vessels to remain approved by a certain number of oil companies' vetting systems.

However, the oil industry has been unwilling to give vessels prefixture blanket-approval letters since the *Erika* and *Prestige* tanker disasters in 1999 and 2002, respectively.

It is a charter party Catch 22 that took centre stage in a recent seminar hosted by the Society of Maritime Arbitrators (SMA) in the wake of a recent decision that forced a panel of New York's shipping arbitration body to wade into the complicated contract questions.

In the September case, a panel of three arbitrators ruled that ST Shipping & Transport, the shipping arm of trader Glencore, breached the charter of the 68,147-dwt *Falcon Carrier* (built 1992) when it cancelled the deal in 2009 after BP vetting rejected the tanker.

Falcon Carrier Shipping, an affiliate of J Bekkers of Holland, was awarded $7.45m, including $5.76m in cancellation damages.

At the heart of the case was figuring out how to deal with what the arbitration panel called a misnomer in the charter contract. The Shelltime 4 1984 charter party's Clause 48 called for the *Falcon Carrier* to hold and maintain approvals from at least three out of six listed oil majors.

"An approval today is basically the nomination of a vessel for a voyage and acceptance of the charter of that nomination with the qualification that that approval is strictly for that particular voyage," said Jack Berg, a well-respected New York arbitrator who took part in the decision.

"So how does one maintain three approvals at any one time? The answer, of course, is that it is nearly impossible."

The arbitrators noted that after tankers undergo the Oil Companies International Marine Forum (OCIMF)'s Ship Inspection Report (SIRE), the standards for oil-company vetting include factors that may be out of the control of a shipowner, such as geography.

An oil major may reject a vessel as not appropriate for one voyage but accept it for another, and in fact, BP accepted the *Falcon Carrier* just months after the rejection at the heart of the arbitration.

▸**GREY AREA:** Although BP vetting rejected the *Falcon Carrier* tanker in 2009, the oil major accepted the same vessel just months later. **Photo:** BLOOMBERG

The *Falcon Carrier* arbitration panel decided that some oil majors, including BP despite its single-voyage rejection, would have found the ship broadly acceptable based on SIRE reports in the OCIMF database, so it met the requirements of the clause.

At the recent seminar held to coincide with the SMA's 50th anniversary, Paul Stenberg, vice-president of vetting at Nordic American Tankers (NAT), said there is a need to carry out more "quality assurance" of the text of charter parties when fixing vessels in the tanker sector.

He questioned whether vetting should instead require disclosure of a list of oil majors that have rejected a vessel or a statement that none have rejected it, rather than demanding approvals that do not exist.

For charterers such as commodities traders, having maximum flexibility to buy and sell a cargo while, for example, it is still onboard a tanker is a valuable asset, hence their desire for vetting clauses that ensure that numerous oil companies will take the ship.

However, Intertanko chemicals and vetting manager Ajay Gour noted examples of vetting clauses that are skewed toward charterer's advantage but that cause problems for tanker owners. Most of the problem clauses required oil company "approvals" despite the impossibility of that demand.

"They still come up," he told the SMA.

Intertanko, the main tanker owners' and operators' group, developed a model vetting clause in 2009 that changes the charter language to ensure that, rather than being approved, a ship is "not unacceptable" to certain oil companies.

"With the issues and judgements that have happened... I think this has probably come to a stage where this has to be reviewed again," said Gour.

Suspense grows over looming Deepwater Horizon case

Punitive-damages award could send owners to examine safety-management systems, expert says

Eric Martin **Stamford**

The upcoming decision in the *Deepwater Horizon* trial in New Orleans may have a ripple effect for shipping law if the judge slaps oil major BP with a significant punitive-damages bill.

The parties are awaiting a decision from district judge Carl Barbier in the multibillion-dollar lawsuit over the wellhead blowout that triggered the world's biggest oil spill, after the trial ended last month.

The federal judge is poised to decide in the coming weeks whether BP's conduct amounted to gross negligence or wilfull misconduct ahead of the spill. He will also decide whether the UK-headquartered oil major should face punitive damages, an award over and above the actual damages found to have been suffered by plaintiffs in the case.

John Levy, a partner at Philadelphia law firm Montgomery, McCracken, Walker & Rhoads, tells TradeWinds that he believes that an ultimate decision finding gross negligence or awarding punitive damages is unlikely.

Nonetheless, it would lead shipowners to take a careful look at their safety-management systems, a requirement of the International Maritime Organisation (IMO), if the sophisticated systems of a supermajor are deemed inadequate by the court.

"To have a safety-management system in place and then have somebody awarded punitive damages for you being grossly negligent suggests that the safety-management system must have been woefully inadequate, and that would be surprising," Levy said. "That would cause everybody to stop and say, 'Wait a minute, if BP's safety-management system was not adequate, how does ours look?'"

The 2010 oil spill took place when the *Deepwater Horizon* — a drillship owned by Transocean and on contract to BP — suffered a blowout while drilling the Macondo well in the US Gulf of Mexico. The fatal incident led to a months-long gush of oil.

The trial that followed has been conducted in two phases — one on the question of liability and the other to determine the amount of oil spilled. Although months separated the two phases, Barbier has reserved judgement on the first phase until after phase two. Now, he has given parties until 20 December to submit post-trial briefs on phase two.

▸**CARL BARBIER:** The district judge will make his decision in the *Deepwater Horizon* trial in the coming weeks. **Photo:** BLOOMBERG

Lizabeth Burrell, a partner at law firm Curtis, Mallet-Prevost, Colt & Mosle, says the amount that BP is asked to pay will certainly be of interest to maritime lawyers.

However, she does not expect Barbier's ultimate decision on whether to award punitive damages to have a significant impact on maritime law, as the US Supreme Court has already dealt with the standards for punitive damages in the *Exxon Valdez* case.

Although that court sidestepped the question with a split decision, it left a Ninth Circuit Court of Appeals decision on the books allowing for punitive damages. However, the Supreme Court set limits for the amount of punitive damages that will inform Barbier's ultimate decision, Burrell says.

"In terms of having precedential value to guide maritime lawyers for decisions that will be made under maritime law, I don't know that it will be that significant," she said of Barbier's coming decision.

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