STS transfers- a risky business

The number of STS transfers has increased dramatically over the last decade, particularly in UK waters where there has been a boom in operations taking place off Southwold, Suffolk.*

STS transfers are, however, more risky than port-based operations. The need to co-ordinate two moving vessels requires specialist assistance and, because such transfers usually take place at sea, they can be more susceptible to difficulties and delay.

Despite the increased frequency, the law in this area remains relatively undeveloped. Although standard clauses do exist, the few reported decisions on STS transfers make it clear that a tanker operator needs to give careful thought to the specific operations envisaged under a charterparty when negotiating such clauses.

Charterparties often require the owners to approve the second vessel in advance of an STS operation. The wording of such provisions varies, but a clause of this type was considered by the Court of Appeal in The *Falkonera* last year, in relation to a VLCC.

The charterers had the option of transferring cargo to "any other vessel including, but not limited to, an ocean-going vessel" and wanted to conduct an operation with another VLCC. The charterparty also provided that:

"(i) if charterers require a ship-to-ship transfer operation or lightening… then all tankers and/or lightering barges to be used in the transhipment/lightening shall be subject to prior approval of owners, which not to be unreasonably withheld….

(ii) 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 charterers asked the owners to approve the transfer to another VLCC. The owners refused to permit the transfer, citing safety concerns because the vessels were the same size and, also, because such a transfer was not envisaged by the version of the ICS/OCIMF Guide current at that time.

The Court of Appeal decided that the owners had been unreasonable in refusing the charterers' request and found that, because the charterparty provided a clear right to transfer to another ocean-going vessel, to refuse a request reasonably there would need to have been "some characteristic of the [second] vessel which would mean that the proposed operation could not be carried out safely."

Even though a VLCC-to-VLCC transfer required more planning than a normal STS transfer, in this instance there had been time for such planning and there was nothing inherently unsafe in a VLCC-to-VLCC transfer, if such planning had been undertaken.

The *Falkonera* judgment makes it clear that, if an owner wants an unfettered right to vet transferring or receiving vessels, then robust wording will be needed. Such wording would need to give the owner the right to refuse the other vessel based on its own discretion. Charterers should be wary of such amendments, however, because a broadly drafted right to refuse an STS transfer (or to delay while deciding whether to refuse) could cause a charterer to incur substantial costs, especially where there are two vessels involved and often an ancillary web of sales contracts.

Double banking

Many timecharters contain a 'double banking' clause, which seeks to place the risks associated with STS transfers onto the charterer and, frequently, also provide an indemnity from the charterers for any damage that might result. The wording of such clauses varies, with some applying only to cargo operations (such as the current BIMCO "Ship to Ship Transfer Clause") while others extend to off-shore bunkering operations as well.

An earlier BIMCO clause was considered in London Arbitration 2/99 in relation to lightering a bulk carrier. The Arbitration concerned damage by stevedores at three locations in the Pipavav Roads, India. The lightering operations took place shortly before the monsoon, amidst "a prevailing swell and tidal streams" with "numerous interruptions to loading due to bad weather."

There was also some confusion about the correct location for loading, and it was found that the Master had moored in the first location against the charterers' advice and without the benefit of local charts (referred to in the voyage instructions). The second and third locations were specified by charterers, however, and the vessel's hull sustained damage in all three locations.

The double banking clause provided that the charterers would "indemnify the owners for any costs, damage and liabilities resulting from such operations". The charterers were also required to re-deliver the vessel in "like good order and condition as on her delivery, but with ordinary wear and tear excepted."

The owners claimed for the cost of repairing the damage to the vessel's hull, which they said had been caused by the charterers ordering the vessel to go to a place which was "adverse, hazardous and unsafe for loading heavy cargoes using grabs and barges with inadequate fendering". The charterers claimed that the damage had been caused by the owners' own actions and argued that the Master had not tried to suspend the operation, which he could "if in his reasonable opinion it [was] not safe."

The Tribunal decided that, because the owners had specifically agreed to load at a named anchorage in the weeks before the onset of the monsoon, they were deemed to have reasonably anticipated the conditions. Also, because the vessel had only been fixed the day before the operation there was not time to purchase local charts and "the Master was entitled to anchor where he did, and had acted reasonably in anchoring the vessel in those places."

Nevertheless, the exception for "ordinary wear and tear" had "to be considered in the light of the trade for which both parties had contracted". On this basis, the owners were entitled to an indemnity for the damage

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suffered in the second and third locations (to which the vessel had been specifically directed by the charterers) but not for the damage suffered in the first. This could have been avoided if the Master had followed the charterers' advice and such damage was also "to be expected when loading off-shore on the West Coast of India from shore lighters."

London Arbitration 2/99 makes it clear that an owner cannot guarantee being able to rely on a double banking clause indemnity for all consequences of an STS operation. The "ordinary wear and tear" that might arise from an STS in heavy weather in an unsheltered location could be substantial. In addition, the fact that damage arising from owners' own actions might not be covered, even where those actions were apparently reasonable and not negligent, could have a significant impact on the extent of the indemnity. This is particularly important where, during an STS operation, decisions might have to be made quickly and without time to liaise with the charterers.

A prudent owner will want to obtain an indemnity from a charterer that extends to all loss and damage incurred in an STS operation, whether "ordinary wear and tear" or not. In addition an owner will want to ensure that all actions that a Master might take are covered

by the indemnity. A charterer should, however, be very careful about the extent of any amendments here because some P&I Clubs are known not to cover losses arising from indemnities that cover Master's negligence during STS operations.

When a vessel arrives to perform a loading or discharging operation it tenders a notice of readiness (NOR), which in turn starts time running under the relevant voyage charter (and sale contract). To tender a valid NOR, the vessel needs to be legally (and physically) ready to undertake the operation in question.

Approval issues

Issues have arisen regarding the need for MCA approval before undertaking an STS operation off Southwold. Although local STS operators are known to obtain such approval as a matter of course, the Merchant Shipping (Ship-to-Ship Transfers) Regulations 2010 only apply within "United Kingdom waters", where approval from the MCA is required before an STS operation can take place. Outside territorial waters (where many transfers take place) the requirements are different and "notification", along with a ship transfer operations plan approved by the vessel's flag state, are required instead of a "permit".

This creates uncertainty where operations often take place under way and can, sometimes, start inside territorial waters but finish outside. Disputes have arisen over whether a vessel can be legally ready to start an operation (and so capable of tendering a valid NOR) before such approval, or notification, has been arranged. Local operators may want to obtain "approval" even for operations taking place in international waters and, even where such approval is actually needed, there can be delays while it is obtained.

These are issues that can be managed using an appropriate rider clause, which clarifies the situation and apportions liability for any delay while approval is obtained, or notification given. An owner will, in particular, want to ensure there are no questions over when NOR can be validly tendered to avoid disputes later over when time actually started running for the purposes of demurrage.

As these three issues make clear, when negotiating a charterparty in which STS transfer is envisaged it is important that careful thought is given to how liability for such an operation is apportioned.

Although clarity is, of course, the main aim for both parties, an owner may want to vet a possible second vessel if they have any concerns (of whatever nature) and to ensure the Master can proceed without having to worry about the extent of the indemnity in the charterparty.

An owner will also want clarity about when an NOR can be tendered and perhaps to try and make any delays in obtaining approval for STS transfer something for the charterer's account. These are all things which are better clarified within appropriate rider clauses, rather than being decided after the event in costly arbitration or litigation. TO

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