

**Safe Port/Berth  
Charterers Due Diligence Obligation  
April 29, 2020**

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**MLA ARBITRATION AND ADR COMMITTEE MEETING**

1. Since early/mid 2000's, petroleum industry practice to fix on one of three (3) oil major voyage forms:  
  
BPVOY 5 2016  
EXXONMOBILVOY 2012  
SHELLVOY 6 2005
2. ASBATANKVOY 1977 is no longer preferred voyage c/p form. In 2004, ATHOS I fixed on ASBATANKVOY 1977 form with unamended Part II Clause 9 Safe Berthing Shifting terms which constitute warranty not qualified by the Charterer's exercise of "due diligence".
3. EXXONMOBILVOY 2012, Part II, Loading/Discharge Place Clause 16 provides as follows:  
  
(b) **SAFE LOCATION(S).** Charterer shall exercise due diligence to order Vessel to port(s) or place(s) which are safe for Vessel and where it can lie always safely afloat. Notwithstanding anything contained in this or any other Clause in this Charter to the contrary, Charterer shall not be deemed to warrant the safety of any such port(s) or place(s) and shall not be liable for any loss, damage, injury or delay resulting from any unsafe condition at such port(s) or place(s) which could have been avoided by the exercise of reasonable care on the part of the Master or Owner. The term "safe", as used in Part I(C) and (D) shall be construed to be consistent with Charterer's obligation as set forth in this Paragraph (b), (emphasis added).
4. Little or no legal/arbitral authority for what constitutes Charterer's "due diligence" obligation to nominate a safe port. Current edition of *Voyage Charters* defines "due diligence" as Charterer's "desire to promote the safety of the vessel". It is my opinion that due diligence constitutes shipping industry "best practice" and accepted petroleum trade customs.

5. Factors to consider what constitutes “due diligence”:
  - a) As conveyed to the vessel by Charterer representative, Terminal Guidelines with vessel max DWT, LOA, beam and max water depth (fresh, brackish, salt) in private channel and alongside berth.
  - b) Industry problem that Terminal Guidelines typically reference max vessel draft which is exclusively within the control of vessel personnel based on nominated cargo volume, API gravity and Owner’s UKC policy. Guidelines should reference max water depth.
  - c) Proper private channel aids to navigation, i.e., ranges and buoys. Charterer not responsible for public channel.
  - d) Private channel and berth periodically dredged beyond reported water depth in Terminal Guidelines to allow for silting especially in US Gulf ports.
  - e) Terminal reports to local USCG COPT the private channel and berth water depths at MLW or MLLW to be placed on vessel electronic charts (ECDIS) by NOAA. In U.S. Gulf use single beam and U.S. East Coast use double beam sounding.
  - f) Terminal mooring arrangements are suitable for vessel dimensions especially LOA. Current OCIMF vessel mooring recommendation is for total 14 vessel lines, forward and aft breast lines as far forward and aft as possible and perpendicular to vessel. See, OCIMF Mooring Equipment Guidelines (MEG4) 4<sup>th</sup> Ed. 2018. Industry problem for lack of proper terminal jetty mooring fittings for now relatively larger tankers especially for berths in narrow channels subject to passing traffic, i.e., Corpus, Houston Shipchannel, Sabine River and Kill Van Kull, Staten Island/New Jersey. In narrow channels, when on the berth, some larger tankers project into the public channel.
  
6. Pre-nomination Terminal Vetting
  - a) Similar to Charterer pre-fixtured vessel vetting review.
  - b) In 2007, Intertanko and in 2009, OCIMF launched terminal vetting database.
  - c) OCIMF maintains Marine Terminal Information System similar to vessel SIRE system. Currently 4,000 plus terminals in database. See, [www.ocimf.org/media/61941/mtis-brochure-english](http://www.ocimf.org/media/61941/mtis-brochure-english).
  - d) In Mimoso SMA Award No. 4338 (2018), Panel majority rejected Owner’s argument that pre-nomination terminal OCIMF vetting constitutes industry “best practice” for Charterer’s safe berth “due diligence” obligation. Dissent disagreed with majority. It remains my opinion that Charterer has a “due diligence”

obligation to perform pre-nomination electronic terminal vetting especially for cargo operations involving STS and SPM buoy operations. Terminal OCIMF vetting review takes max one (1) hour.

- e) For vessel and terminal OCIMF vetting program, see Tanker and Terminal Vetting Chapter in *Navigating Maritime Arbitration: The Experts Speak, 2019*.

## Chapter 14

# TANKER AND TERMINAL VETTING

James M. Textor\*

Pre-fixture tank vessel vetting programs are very important especially for tanker owners seeking to obtain vessel employment from oil companies as charterers. The physical vessel vetting inspections and owner management vetting compliance reports are voluntary and are not required by flag state, class, local port authorities and/or terminal requirements. However, without suitable vessel inspection results and a management vetting compliance program leading to a favorable oil company review, owners cannot commercially trade their vessels. This chapter discusses the history and current status of tanker inspection and vetting protocols and associated tanker charter party vetting clauses, and the current pre-nomination oil terminal vetting protocols.

### I. TANKER VETTING HISTORY

After the EXXON VALDEZ oil spill incident in 1989, and as oil companies reduced tanker ownership, the Oil Companies International Marine Forum (“OCIMF”) launched the Ship Inspection Report Program (“SIRE”) in 1993 which is a computer database program for tankers to address perceived concerns about substandard tankers and to promote better/higher vessel safety and pollution prevention, and to increase vessel owner management compliance standards within the shipping industry.<sup>1</sup> In 2004, OCIMF expanded the SIRE program to include

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<sup>1</sup> In 1970, in response to the TORREY CANYON incident in 1967, the oil industry formed the Oil Companies International Marine Forum (“OCIMF”) to coordinate vessel anti-pollution initiatives. In 1971, the International Maritime

barges and small vessels. OCIMF does not perform vessel vetting. OCIMF provides data to its members and approved recipients. The OCIMF members and recipients then undertake a vessel assurance process (vetting) using data provided by OCIMF.

For the first several years, the SIRE operated as a repository of existing members inspection forms with no harmonized forms, no comprehensive inspector training qualifications and training program and no screening of sometimes colorful comments by inspectors. In *Falcon Carrier Shipping, Ltd. v. ST Shipping and Transport, Pta. Ltd. and Glencore Ltd.*,<sup>2</sup> the Award noted as follows:

As a result of the EXXON VALDEZ pollution incident in the late 1990's, the Oil Majors formed the Oil Compan[ies] International Marine Forum (OCIMF) and charged it with the responsibility of generating a vessel computer database for the pre-screening of tank vessels prior to their employment by member companies for loading and discharge operations at their terminals. OCIMF is an association of oil companies having an interest in the marine transportation and terminaling of petroleum products and is especially concerned with the prevention of pollution and the safe conduct of these operations.

Vetting is an industry wide best practice pre-fixture risk assessment of the offered tanker. Vetting is applicable to all vessels including bulk carriers, cargoes and trades. However, due to the higher pollution risk associated with the transportation of bulk liquid petroleum cargoes, the OCIMF SIRE program is primarily associated with tankers and oil barges. The focus is on safety requirements and best practices for vessel crew and operator management. There is NO commercial influences content for the OCIMF SIRE programs.

The current OCIMF/SIRE website contains certain information as follows:

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Organization ("IMO") granted OCIMF consultative status to present oil industry views at IMO meetings.

<sup>2</sup> MV FALCON CARRIER, SMA No. 4217 (2013) (Arnold, Berg and Martin, Arbs.).

The SIRE system is a very large database of up-to-date information about tankers and barges. Essentially, SIRE has focused tanker industry awareness on the importance of meeting satisfactory tanker quality and ship safety standards. Since its introduction, the SIRE Program has received industry-wide acceptance and participation by both OCIMF Members, Program recipients and by ship Operators. The expansion of barges and small vessels into SIRE was inaugurated in late 2004.

Since its introduction, more than 180,000 inspection reports have been submitted to SIRE. Currently there are over 22,500 reports on over 8,000 vessels for inspections that have been conducted in the last twelve (12) months. On average, Program Recipients access the SIRE database at a rate of more than 8,000 reports per month.

The SIRE programme requires a uniform inspection protocol that is predicated by the following:

- Vessel Inspection Questionnaire (VIQ)
- Barges Inspection Questionnaire (BIQ)
- Uniform SIRE Inspection Report
- Vessels Particulars Questionnaire (VPQ)
- Barge Particulars Questionnaire (BPQ)

These features have been established to make the program more uniform and user friendly and to provide a level of transparency unique in the marine transportation industry.

SIRE has established itself as a major source of technical and operational information to prospective charterers and other program users. Its increasing use corresponds with oil industry efforts to better ascertain whether vessels are well managed and maintained. OCIMF is in no doubt that better informed vetting decisions are leading to improvements in the quality of ships, accelerating its continuing drive for safer ships and cleaner seas.

Inspection reports are maintained on the index for a period of twelve (12) months from the date of receipt and are maintained

on the database for two (2) years. SIRE access is available, at a nominal cost, to OCIMF members, bulk oil terminal operators, port authorities, canal authorities, oil, power, and industrial or oil trader companies, which charter tankers/barges as a normal part of their business. It is also available, free of charge, to Governmental bodies, which supervise safety and/or pollution prevention in respect of oil tankers/barges (*e.g.*, port state control authorities, MOUs, etc.).<sup>3</sup>

Together with Port State Control vessel inspection and terminal vessel reports for vessel operations, the core documents for oil company pre-fixture vessel vetting review are the VIQ, the VPQ, the Tanker Management and Self-Assessment Version 3 Report (“TMSA 3”) and the vessel Q-88 Report. The VIQ reports are generally accepted by oil major companies for six (6) months and generally the oil companies archive the reports for two (2) years. Therefore, it is industry practice for each tanker to have at least two (2) completed VIQ reports per year. The VIQ reports remain on the OCIMF database for twelve (12) months thereafter the VIQ reports are deleted. For tankers older than fifteen (15) years, the oil companies generally require a VIQ report every four (4) months together with a positive Condition Assessment Program (“CAP”) vessel report.

Generally, it is petroleum industry vetting practice that in the event of a change of vessel ownership/management or a major shipyard vessel repair, previous VIQ reports expire and are no longer valid. Also, each oil company has its own internal and private vetting policy, and individual chartering company vetting results are closely held as company proprietary information not shared with OCIMF or other charterers.

Finally, vessel operators/owners might complain about the lack of uniformity in oil company vetting standards and/or the acceptability criteria programs. However, it is the general consensus of OCIMF members that vetting acceptance represents a business decision taking into account specific oil company risk tolerances, thus establishing one industry wide vetting acceptance standard that could violate anti-trust regulations. Therefore, vetting standards and practices vary among the oil companies.

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<sup>3</sup> See OIL COMPANIES INTERNATIONAL MARINE FORUM, <https://www.ocimf.org> (last visited July 11, 2018).

## II. APPROVED VS. ACCEPTABLE

Prior to the early 2000's, some oil majors would perform vetting review of a tanker and issue pre-fixture blanket vetting approvals good for either six (6) months or a full year.<sup>4</sup> The owners then knew whether or not their vessels were oil company "approved". However, due to the sinkings of the tanker ERICA in 1999 and the tanker PRESTIGE in 2002, which were oil major "approved" at the time of their casualties, the oil majors ceased issuing blanket period vetting approvals. The FALCON CARRIER Award states, as follows:

Prior to the pollution incidents involving the vessels ERICA and PRESTIGE in early 2000, the Oil Majors inspected tankers and recorded the results on the OCIMF SIRE database, and also issued pre-fixture blanket approval letters generally effective for six to twelve months. However, post-ERICA and PRESTIGE, the Oil Majors have refused to grant pre-fixture blanket approvals and now merely acknowledge on the SIRE database that the vessel had been inspected.<sup>5</sup>

Currently, the oil companies only perform vetting review a tanker when needed for charter and/or when nominated to load or discharge at an oil company terminal. This practice has resulted in commercial disputes because the owners do not have ongoing knowledge of the current vetting status of their vessels.

When the oil majors ceased issuing period blanket vessel vetting "approvals", the owners did not know their vessels' vetting status when asked by charter party brokers when negotiating charter party contracts. In an attempt to remedy that problem, in 2007, the International Association of Independent Tanker Owners ("Intertanko") initiated a

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<sup>4</sup> As it existed about twenty (20) years ago, the term "Oil Major" referred to the five (5) or six (6) fully integrated upstream (E&P), midstream (storage/pipelines) and downstream (refining/marketing) companies such as BP, Chevron, ConocoPhillips, Exxon, Shell, Total and possibly integrated national oil companies such as Repsol and Statoil. Due to oil company corporate changes, the term "Oil Major" today is somewhat different, which could include those independent refiners which are significant charterers.

<sup>5</sup> *Supra*, footnote 2.

commercial practice for a vessel's vetting status with an amendment to the vessel's Q-88 vetting status information.<sup>6</sup> As amended, the vessel's Q-88 vetting status disclosure now contains a printed paragraph stating that to the best of owner's knowledge, the vessel is "not unacceptable to" and the owner lists the last SIRE VIQ report by date, inspection location and the oil company which performed the SIRE inspection.<sup>7</sup> "Not unacceptable to" now represents the current vessel owner pre-fixture vetting disclosure where the owner/operator does not know the actual oil company vessel vetting status. The owner might know if the vessel was ever rejected, but not necessarily the reason(s) why. In *Transpetrol Maritime Services Limited v. SJB (MT Marine Energy) BV*,<sup>8</sup> the Court of Appeal accepted the Commercial Court finding based on expert evidence, that in 2007, "approved by" means "acceptable to".

For example, for a particular trade, an oil company freight trader may submit a few potential vessels to vetting personnel for vetting review. A vessel may fail the vetting review and the oil company drops the vessel from further vetting review without the owner/operator ever knowing that its vessel's vetting was rejected. If a major oil company fixed the vessel for employment and/or the vessel loaded and/or discharged at a major oil company terminal, the owner would then know that its vessel is oil major "approved" but for only that moment in time. The "approval" could change, based on any new information or requirement(s). See *Idemitsu Apollo Corp. v. Navig8*,<sup>9</sup> in which the load terminal as the FOB seller vetting approved the FOB buyer's voyage chartered vessel for cargo operations but subsequently the terminal withdrew its vetting approval due to vessel safety and compliances issues, and as the US Coast Guard ("USCG") revoked the vessel's Certificate of Compliance for various vessel violations.

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<sup>6</sup> Q-88 was first released in 1988. To be released in 2018, the fifth edition will be available in five (5) different variants, *i.e.*, oil, chemical, oil/chemical, LPG and LNG. See TANKER OPERATOR, <http://www.tankeroperator.com/news/ocimf-to-upgrade-bvpq/4747.aspx> (last visited July 11, 2018).

<sup>7</sup> See Intertanko Tanker Chartering Questionnaire 88, Version 4, ¶¶ 8.17- 8.19.

<sup>8</sup> [2011] EWHC 3374 (Comm), *rev'd*, [2012] EWCA 198 (Civ).

<sup>9</sup> *M/V ATLANTIC JUPITER*, SMA No. 4257 (2015) (Berg, Lillis and Sheinbaum, Arbs.).

### III. VESSEL INSPECTION QUESTIONNAIRE (“VIQ”)

For the physical onboard SIRE (quality) inspection, the owner and/or the vessel technical manager typically invites one or more oil major companies to perform an onboard vessel inspection at a known discharge port. The first oil company to accept the owner’s invitation appoints an accredited SIRE inspector to conduct the vessel inspection. If the charterer changes the voyage orders including the discharge port, the oil company can cancel the SIRE inspection. For the owner, scheduling a SIRE inspection can be problematic and, at times, beyond the owner’s control if the charterer is a merchant oil trading company which changes the vessel’s destination and/or the vessel is performing relatively short voyages, *i.e.*, cross Caribbean, with insufficient time to schedule the SIRE inspection. Also, scheduling SIRE inspections for VLCC’s trading on long voyages and at relatively inaccessible terminals can be a challenge. Further, the invited oil company can unilaterally cancel the SIRE inspection for no reason. Finally, the SIRE inspection is for the owner’s account and includes the SIRE inspector’s travel charges which can be relatively expensive.

Typically, for relatively larger tankers, the SIRE VIQ physical inspection is about seven (7) to eight (8) hours, plus about three (3) hours for vessel document review. The inspection is performed during daylight hours if possible, and based on well-established industry practice, preferably is conducted during cargo discharge operations so the SIRE inspector can monitor cargo operations and cargo equipment. The inspection can be conducted during loading and/or bunkering operations, but would constitute only a qualified SIRE inspection and generally would be less acceptable to oil companies for a positive vetting result. Therefore, the oil companies will typically not accept an invitation to perform a SIRE inspection during loading operations.

The SIRE inspection cannot interfere with vessel operations, vessel personnel rest time and, most importantly, there can be no other conflicting inspectors (Class) on board, nor can the vessel be conducting major repairs. If Port Safety Control (USCG for example) inspectors are on board, the SIRE inspector would stay out of the way or call a “time out” until the Port Safety Control inspectors had left the vessel.

Prior to the SIRE inspection, it is likely that the SIRE inspector will have reviewed the current VIQ and associated Officer Matrix and will

check if the matrix as posted is accurate. The Officer Matrix is an OCIMF vetting document listing senior and junior deck and engine officers' professional information including nationality, current license and issuing country, years with the current operator, years in rank, years on tankers, years on the current type of tanker and English proficiency. The oil companies have their own individual vetting requirements for acceptable officer experience especially for the First Officer as the cargo officer. Typically, if the matrix is not current, when the vessel is on charter party subjects, the oil company will request a current matrix for the officers presently on the vessel. Finally, for crew changes, the vessel operators will update the matrix as uploaded to the OCIMF website.

The VIQ is a comprehensive inspection of the whole vessel primarily for safety and pollution prevention items. The VIQ is a factual record of vessel condition and operations to allow an oil company review for vetting risk assessment. There are certain core parts of the VIQ inspection, as follows:

- a. documentation and record keeping;
- b. navigation and communication equipment, and bridge procedures;
- c. cargo operations, main deck Cargo Control Room ("CCR") and pump room;
- d. engine room spaces including procedures and operations;
- e. steering gear room; and
- f. accommodation/galley spaces.

As used during the SIRE inspection, the VIQ form is commonly known in the trade as an "open book exam" containing a checklist of about 500 separate standardized questions. The current VIQ dated September 17, 2018, is in its seventh (7th) version, with twelve (12) chapters associated with vessel structure, cargo and ballast operations, vessel documents and record keeping, crew management, navigation, safety management and pollution prevention. The OCIMF SIRE Focus Group which consists of a twelve (12) member oil company team is tasked with managing various aspects of the VIQ inspection program, including to periodically review the VIQ for change and updates as necessary.

Since the core purpose of the SIRE program is to promote vessel safety and pollution prevention, of the twelve (12) VIQ chapters, three (3) chapters are very significant for ultimate charterer vetting review, *i.e.*, navigation, safety management and pollution prevention.

#### **Chapter 4: Navigation**

The preamble states as follows:

Inspection of the bridge will normally take place when the vessel is alongside a terminal therefore the inspector must closely inspect charts, log books and other records to determine that the vessel has been safely navigated and that the bridge at all times be manned. Compliance with the operator's navigation procedures should be evaluated both by observation and by discussion with the Master and officers. The operator's navigation procedures must be supplemented as required by the Master's Standing Orders and the Bridge Order Book. The objective should be to ascertain that such policies are understood and are being complied with.

All navigation equipment should be in an operational condition, regardless as to whether or not it is required by SOLAS. Any bridge equipment which is not functioning must be recorded as an Observation.

This chapter contains eighty-two (82) separate questions focusing on the bridge, including navigation equipment, documents and vessel personnel record keeping.

#### **Chapter 5: Safety Management**

This chapter contains seventy-three (73) separate questions regarding vessel security, accident investigations and close-out reports, safety meetings, fire-fighting, and life-saving equipment, including life boat and fire drills/training. Most importantly, the SIRE inspector will ask questions for an assessment of the vessel's Safety Management System ("SMS") including reported vessel deficiencies and vessel operator

responses to the Master. Typically, the SIRE inspector will review SMS required monthly safety meetings minutes, and near-miss navigation (“non-conformity”) reports.

### **Chapter 6: Pollution Prevention**

This chapter contains forty-one (41) separate questions, focusing on the handling of sludge/bilge water, Oil Record Book entries, MARPOL pollution prevention compliance, a vessel’s ability to deal with small on deck oil spills, oily water separator operation and proper garbage management plan.

## **IV. VESSEL PERSONNEL RESPONSES AND VIQ OBSERVATIONS**

For each VIQ question, the SIRE inspector is required to note one of four (4) responses, *i.e.*, Yes, No, Not Seen, and Not Applicable. Section 3 of the SIRE VIQ states, in relevant part, as follows:

The inspection questionnaires used in the programmed contain a series of questions related to safety and pollution prevention applicable to the type of vessel that is inspected. These questions are consecutively numbered and are logically grouped into separate chapters.

Each chapter contains a series of questions to be answered by the inspector. Questions may be accompanied by guidance, namely:

1. Guidance notes to inspectors;
2. Reference source(s) citing regulation(s) or industry guidelines pertaining to questions; and
3. An indicator to identify issues when an inspector comment is mandatory.

The above-mentioned guidance, regulatory/industry references amplify the questions and these are provided to assist the inspector in answering the questions.

If the guidance and references lead the inspector to conclude that the question should be answered positively the box “**Yes**” in the VIQ computer programmed should be checked. On the other hand, if the guidance and any reference sources indicate to the inspector that the question should be answered negatively the “**No**” box should be checked. Where appropriate, the “**Not Seen**” or “**Not Applicable**” boxes should be checked.

The inspector *must* respond to all the questions appropriate to the type of vessel being inspected. *Failure to do this will mean that the inspection report cannot be transmitted to the SIRE internet site for processing by the principal, who commissioned the inspection.*

When vessel personnel respond to any question where the SIRE inspector marks “No” in the response box, the inspector must insert an Observation. The Observation must specify and explain the reason why the negative response is made. Additionally, where a box is marked “Not Seen”, the reason for the “Not Seen” response must be given in the Observation section accompanying the question. In cases where a “Not Applicable” response is required, the “Not Applicable” response is treated the same way as a “Yes” response and there is no requirement for the reason to be included in the Observations section accompanying the question. However, if in the inspector’s judgment an explanatory comment is necessary, the inspector may make such comment in the “Comments” section accompanying the question provided that the comment assists in understanding a negative “no” answer.

A “No” answer is deemed an “Observation” and the SIRE inspector has two (2) obligations. First, for any Observations that the inspector intends to record in the VIQ, the inspector must point out and discuss these Observations “on site” with the attending vessel staff assigned to the inspection. Second, at the conclusion of the inspection, at what is known as the “close out” meeting, the inspector issues to the Master a written List of Observations. The SIRE inspector cannot give an opinion regarding vessel vetting acceptability or non-acceptance. However, the SIRE inspector can discuss with the Master and vessel staff, the inspector’s findings and receive vessel staff preliminary responses which the inspector can include in his Comments, *e.g.*, correction and/or repair

immediately completed, spare part has been ordered, etc. Also, this is an opportunity for vessel personnel to correct a mistake or misunderstanding especially if there was a language communication issue. The inspector then leaves the vessel, and the Master sends the List of Observations to the person responsible for preparing/submitting the owner's VIQ responses.

Typically, the top performing vessel operators/managers will require the Master when submitting the List of Observations, to include the Master's comments, as follows:

- a. Root cause of Observations;
- b. Short term corrective action; and
- c. Long term measurements to prevent a repeat.

The SIRE inspector then sends to the assigning oil company his draft VIQ with the Observations in italics, and any Comments. The assigning oil company staff reviews the draft VIQ for typos, errors and omissions for coordination with the inspector, and the assigning oil company uploads the completed VIQ to the SIRE website. At this time, the VIQ remains private to the vessel owner and the inspecting oil company. The vessel owner has two (2) weeks to upload the owner's responses to each Observation, and if necessary, the Owner has an additional ten (10) days to submit supplemental responses.

Typically, the owner's VIQ responses are in color and/or italics. The first set of owner replies indicates responses completed and planned. The second set of owner responses gives the owner an opportunity to explain when and how all of the Observations will be addressed at a later date. Generally, oil company vetting personnel see the second set of replies as a positive indicator of management follow-up and competence.

Once the owner has uploaded all of its responses to all Observations to the SIRE website, the subject oil company typically issues an electronic response to the owner that (1) the SIRE inspection process is complete, (2) the owner should schedule another inspection within six (6) months, and (3) no further information is required. The complete VIQ "goes live" and becomes accessible on the SIRE website to all OCIMF members and approved recipients. If the owner does not timely submit its responses within fourteen (14) days, the VIQ report "goes live".

With the response, "no further information required", the owner/operator has no idea of the vetting status of its vessel, except that

the vessel has not been rejected. If there were either serious Observations and/or some excessive number of Observations, the oil company would then issue a rejection notice, but not necessarily explaining the reasons.<sup>10</sup> More, patient charterers *may* enter into an extended dialogue with owners to resolve complex issues until either satisfied or until the vessel is ultimately rejected.

In the FALCON CARRIER Award, which involved a time charter party cancellation dispute for lack of three (3) identified oil major vessel “approvals” in the vetting rider clause, the owner argued that it arranged for required oil major SIRE inspections and received positive responses from the oil majors with the closing “no further information is required” response. Based on fact and vetting expert witness testimony, the Panel ruled as follows:

[The Charterer’s] contention that Owner must prove that the vessel was actually approved for specific voyages by three Oil Majors places too heavy a burden on Owner and is inconsistent with the structure of Clause 48 and the evidence as to how the shipping community and the parties have dealt with the approval question.

Clause 48 provides Owner with the time and opportunity to have additional SIRE inspections performed before the vessel can be re-delivered. It does not mention an actual acceptance of the vessel for a voyage by an Oil Major. Since it is ST Shipping that controls the vessel’s employment and the actual tendering of the vessel to a particular Oil Major, ST Shipping’s construction of Clause 48’s provision of time for additional SIRE inspections provides no protection for Owner, since Owner would have no way to compel ST Shipping to offer the vessel to any Oil Major for a voyage and no way of knowing that the vessel had been rejected by an Oil Major that had previously approved it.

Owner’s argument is supported by the evidence relating to the SIRE inspections by Shell and BP in September and December

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<sup>10</sup> See *Dolphin Tanker Srl. v. Westport Petroleum Inc.* [2011] EWHC 2617 (Comm), an appeal of a London arbitration award, in which the Commercial Court accepted the sole arbitrator’s finding of fact that “oil majors do not normally give reasons for a rejection”.

2008. In each case, the SIRE report was posted, Owner responded to the SIRE comments and Shell and BP advised Owner that no further information was required. In an e-mail dated October 9, 2008, advising Owner that no further information was required, Shell stated advice from OCIMF suggests that reports start to lose their value after six (6) months and were recommend that the vessel be re-inspected by an accredited organization. Colin Ex. 85. Similarly, BP stated we have now received sufficient information for the vessel and we will not normally require re-inspecting the vessel or a period of six months from the date of the inspection report, provided that no change in the ship details takes place. The fact that, in each case, the Oil Major indicated that there was no rejection notice and no need for another inspection for at least six months is convincing evidence that the Oil Major found the vessel acceptable on the basis of the recent SIRE inspection.<sup>11</sup>

Based on the review of expert vetting evidence, the Panel ruled that absent a post SIRE inspection oil company rejection notice, the “owner should be deemed to have the approval of that Oil Major.”

At least in New York arbitration, the meaning of “no further information required” was a matter of first impression and still remains a current arbitration ruling in an owner’s favor.

Each oil company has its own private subjective vessel vetting review program, including vetting with negative results. Generally, after an unacceptable vetting result, the oil companies will not schedule a SIRE inspection for about three (3) months and if the oil company is still interested in the vessel, the oil company may or may not accept another oil company’s VIQ. Depending upon the oil company’s vetting policy, the subject oil company may only accept its own VIQ which is a problem for the vessel owner/operator if that oil company has no interest in the vessel.

OCIMF’s intent is that the VIQ inspection is an objective (not subjective) process and the SIRE inspector provides one of the four (4) mandatory responses to each question. The VIQ inspection is not a pass or fail process but generally forms part of the overall vetting process. However, depending on whether the inspector is an ex-deck or ex-

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<sup>11</sup> *Supra*, footnote 2.

engineering officer and depending on the VIQ question and the vessel personnel response, some in the trade believe that some subjectivity can enter the VIQ inspection process, since the VIQ permits inspector Comments to the Observations. Sometimes, for a vessel inspector's recorded "No" answer resulting in an Observation, the inspector's Comments can be helpful in an oil company vetting review to fully understand the vessel inspector's "No" answer. Section 3 of the VIQ states as follows:

At the end of each chapter there is an **Additional Comments** section. If the inspector has additional comments in respect of subject matter that is not covered by the specific questions in the chapter, the inspector may make such comments in the Additional Comments section.

Finally, about 70% of SIRE inspectors are ex-deck officers and about 30% are ex-engineering officers. Based on a review of the SIRE inspector's Comments, some oil company vetting personnel as examiners, can determine whether the SIRE inspector was an ex-deck or ex-engineering officer, which could result in some interpretation of the subjective influences associated with the SIRE inspector's Comments to the negative answer.

## V. NUMBER OF OBSERVATIONS

Since the SIRE inspection and associated VIQ is not a pass/fail inspection, the number of and type of "No" answers resulting in Observations will certainly affect the oil company vessel vetting review. Since each oil company has its own subjective vetting review policies, there is no hard and fast bright-line number of Observations, which could result in a negative vetting result. Although there is not an equal weighting between VIQ questions, more than twenty (20) Observations would certainly be cause for concern.<sup>12</sup> Four (4) or more Observations involving SIRE VIQ Chapters 4 to 6 would be cause for concern and could result in a negative vetting review. Even one Observation involving suspicion of oily water separator tampering would certainly be cause for concern, resulting in a possible negative/unacceptable vetting review.

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<sup>12</sup> See Transpetrol Maritime Services Limited, *supra* at par. No. 21 and the court's reference to Shell's vetting rejection due to thirty-three (33) VIQ negative comments.

During review of the owner's VIQ replies, an oil company vetting manager looks for evidence that the owner's SMS is implementing the requirements of International Safety Code ("ISM") Section 9, Reports and Analysis of Non-Conformities, Accident and Hazardous Occurrences, with respect to:

- use of non-conformity reports;
- management review of non-conformities; and
- management of change to improve performance.

In conclusion, each oil company and each individual vetting employee in each oil company has his or her own subjective vetting review policies and weightings associated with each Observation and the total number of Observations. Also, the SIRE inspector's Comments associated with each Observation and the vessel owner/operator's response to each Observation, are very important for oil company vetting review.

## **VI. TMSA VERSION 3**

As an integral part of the OCIMF/SIRE vetting program, in 2004 OCIMF introduced the Tanker Management and Self-Assessment ("TMSA") Report, to partly address perceived vessel management and compliance weaknesses, and in theory to lead to tanker industry improvement.

After the PRESTIGE casualty, Exxon initiated an owner management audit program which eventually progressed as an OCIMF vetting program which became the TMSA.

On April 10, 2017, OCIMF issued TMSA Version 3, which became mandatory on December 31, 2017. Together with the VIQ and VPQ, the TMSA 3 is a very important vetting document routinely used by oil companies to evaluate a vessel for employment.

TMSA Version 3 includes thirteen (13) chapters including a new chapter for marine cyber security. It contains at least three hundred (300) separate questions effectively related to the management of vessel operations by shore-side personnel with an emphasis on regulatory compliance, and safety and pollution prevention including implementation

of the vessel SMS for planning and proper procedures to ensure safe cargo, ballast, bunkering, mooring and navigation operations.<sup>13</sup>

The OCIMF TMSA 3, in relevant, part states as follows:

The TMSA programme complements IMO Conventions, Codes and Circulars and is intended to encourage self-regulation and promote continuous improvement to enhance the safety of merchant shipping and achieve incident free operations. Implementation of IMO Conventions, Codes and Circulars is achieved by companies establishing an effective SMS covering both ship and shore management processes. An effective SMS is also required for companies to achieve HSSE excellence.

The TMSA encourages companies to assess their own SMS against set key performance indicators (KPIs) and provides a minimum expectation (level 1) and three further levels of increasing best practice guidance, which a company may wish to apply in their SMS to improve ship management safety performance. Through self-assessment, companies are encouraged to use ship management assessment results to develop phased improvement plans that can be applied across their entire fleet and to share their TMSA self-assessments with potential charterers using the TMSA database.

#### **How the TMSA works**

The TMSA offers a standard framework for assessment of a company's SMS. It sets out 13 elements of management practice that are essential for the effective management and operation of vessels.

Companies can measure their SMS against the KPIs in each element and decide whether they have achieved a particular level in that element and, therefore, provide a clear, objective picture of performance. Importantly, the levels in the TMSA help the

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<sup>13</sup> On January 1, 2021, as per IMO Rules, all vessels must have a marine cyber security program. For tankers, the OCIMF decided not to wait until 2021 for tanker cyber security compliance, in which case, in 2017, OCIMF introduced new TMSA3 chapter 13 for marine cyber security.

company identify gaps in current performance and areas where performance can be enhanced.

Each TMSA 3 chapter has a number of very detailed questions requiring the vessel's management to provide numbered responses from one (1) as the lowest and four (4) as the highest.<sup>14</sup> These are known as Key Performance Indicators (KPI's). Each question states the objective goal against associated best practice guidance along with the operator's numbered KPI response. The TMSA 3 portion for KPI's states, in part, as follows:

In the context of the TMSA, KPIs are measures against which a company can track its effectiveness in meeting its aims and objectives.

**Use of KPIs to measure a management system.**

Companies can use the information contained in this document to assess their management systems and to demonstrate an attainment level, ranked in levels from 1 to 4, for each of the 13 elements.

**Using KPI data.**

Once a self-assessment has been completed, the company will have a clear, objective picture of their safety performance. It should allow them to identify gaps and plan for improvements. The company can decide to use KPI data as a stand-alone decision making tool, or in conjunction with any management tools they currently use for improving their management systems.

Companies should work through the elements and match their SMS to the KPIs within the four levels. The higher the level they match, the closer they are to fully meeting the objective of that element.

Once an initial TMSA has been recorded the company may conduct a review to identify which elements and levels have yet

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<sup>14</sup> Level 1 KPI's address regulatory requirements for minimum expectations for approval.

to be attained, enabling a performance improvement programme to be developed. Companies should decide which elements and levels will improve the performance of their fleet operation and are appropriate to focus on.

Companies are advised to review and update assessments in the TMSA online tool on an annual basis. Additional updates are recommended whenever they have made improvements/changes to their SMS or believe they have attained a higher level in any element rather than wait for planned improvements to be actioned. Significant changes in management structure, SMS or changes to fleet size and composition may also prompt a review.<sup>15</sup>

As with the VIQ, the vessel owner/operator TMSA 3 responses, as uploaded to the OCIMF website for vessel vetting review by interested oil companies, are very important. The submitting company is responsible for updating its own self-assessment results. Finally, the TMSA 3 may be subject to external verification audit review by ISO/ISM and/or a Class approved auditor, including oil company auditors and/or contractors working for oil companies. Generally, TMSA audits are for time charter or long term business.

## VII. VESSEL PARTICULARS QUESTIONNAIRE: VPQ

In its fifth edition as issued on October 1, 2014, the Harmonized Vessel Particular Questionnaire (“HVPQ5”) includes fourteen (14) chapters.<sup>16</sup> “Harmonized” refers to the VPQ having been coordinated with the previously independent Chemical Distribution Institute, which operates another vessel inspection database for the chemical shipping industry.

The fourteen (14) chapters with numerous sub-questions/elements relate to owner/operator contact details and vessel details including builder information, vessel dimensions, class details, vessel certificates,

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<sup>15</sup> OIL COMPANIES INTERNATIONAL MARINE FORUM, TANKER MANAGEMENT AND SELF ASSESSMENT A: BEST-PRACTICE GUIDE 5-6 (Seamanship International Ltd., 3rd ed. 2017).

<sup>16</sup> [www.intertanko.com/Documents/viq-vpq/hvpq5%20Announcement.docx](http://www.intertanko.com/Documents/viq-vpq/hvpq5%20Announcement.docx) (last visited August 8, 2018).

navigation equipment, pollution prevention equipment, and cargo and communication equipment.

Some oil companies will use the VPQ and Q-88 to determine the technical/dimensional “fit” of the vessel when offered for employment. Finally, for fixture, some charterers will incorporate by reference the VPQ into the charter party. The VPQ becomes part of the charter party agreement.

### **VIII. OIL COMPANY VESSEL VETTING SCREENING PROCESS**

Vetting of a vessel against a cargo requirement involves two (2) distinct phases which could be called quantity (berth fit) and quality (safety) vetting.

Quantity vetting assesses whether the offered vessel meets the cargo requirement of the voyage with respect to:

- Size
- Segregations
- Dimensions
  - Draft
  - LOA
  - Beam
  - Air draft
  - Manifold air draft
- Cargo tank coatings
- Last three (3) cargoes
- Speed
- Terminal acceptance

Quantity vetting phase is completed by the cargo interests/charterer (traders, schedulers) prior to submitting the vessel for “quality” compliance vetting review. For quality vetting review, the principal tool is the OCIMF SIRE documents and the vessel’s Q-88.

The subjective assessment of the VIQ by oil company vetting personnel, along with the owner’s responses to the Observations, commences the pre-fixture quality vetting screening process. Although each oil company has its own private vetting process, typically, it is

industry practice for oil company vetting personnel to review and assess certain documents issued by the owner/operator and third party reports not issued by the owner, as follows:

- VIQ
- VPQ
- TMSA 3
- Q-88
- Port Safety Control inspection reports
- Conditions of Class
- VIQ inspection history
- Oil terminal feedback reports;
- CAP reports for older vessels; and
- CDI inspection reports for chemical tankers.

One of the important oil company vetting assessments is the review of the prior VIQ's and the number/type of Observations. Generally, oil company vetting personnel like to see a pattern of vessel improvement with reduced Observations.<sup>17</sup>

Also, although SIRE VIQs are dropped from the active OCIMF database after twelve (12) months, oil major and other charterers may archive downloaded reports for reference for five (5) years or more, or maintain vessel VIQ abstract databases or reference indefinitely. This could become a problem for a new owner and/or for a change of vessel technical management.

Further, vetting review can be affected by the proposed geographic trading range and the specific cargo which are not within the owner's control. As an example, an oil company can reject an offered vessel for loading/discharge in California which has very strict/unique regulations for petroleum cargo operations including cargo vapor recovery. Therefore, for employment in California, a major oil company could reject the vessel,

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<sup>17</sup> See *Dolphin Tanker*, *supra* in which the Commercial Court noted the expert evidence and the arbitrator's finding of fact that oil majors look at the history of SIRE inspection reports as part of the vetting process in order to identify positive and negative trends.

but this does not mean that the vessel is not oil major approved. The subject vessel could be very suitable for employment elsewhere.

In the FALCON CARRIER Award, the Panel stated, as follows:

The parties acknowledge that the post-SIRE inspection vetting review by the Oil Majors is very subjective and varies greatly from one Oil Major to another as well as within the same company. The vetting risk assessment of Oil Majors is based on a number of factors that vary from company to company. The generally applicable vetting standards take into consideration a number of factors that are not within the vessel owner's control or OCIMF's standards, such as geographic scope, vessel's age, specific cargo to be lifted, etc.<sup>18</sup>

For older tankers, the oil companies require a Condition Assessment Program ("CAP") report. CAP is a voluntary vessel condition assessment inspection program. Typically, the CAP inspection is performed by a Class surveyor in dry-dock to allow access to the hull. This inspection service is independent and complementary to Class. The CAP inspection is quite thorough. The main purpose is to thoroughly document vintage/older vessels to allow oil companies to review the vessels based on their current condition rather than their age. CAP reports consist of separate reports for (1) vessel hull, and (2) vessel machinery and cargo.

The Bureau Veritas CAP General Principles Introduction, in part, states, as follows:

The purpose of our CAP services is to assist the ship operator to comply *with* the requirements from charterers, vetting agencies, terminal and port authorities and other third parties, and their specific CAP prerequisites. In addition, BV CAP services are designed to provide the client with a clear and transparent understanding of a vessel's condition through a detailed and illustrated report which if the assessment is planned early enough, may assist in preparing a repair plan prior to entering the repair yard.<sup>19</sup>

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<sup>18</sup> *Supra*, footnote 2.

<sup>19</sup> BUREAU VERITAS, CONDITION ASSESSMENT PROGRAMME (CAP), <https://www.veristar.com/portal/veristarinfo/files/sites/veristarinfo/web%20cont>

The CAP inspection system is based on ratings of one (1) to four (4), as follows:

Rating Level 1: Very Good Condition

Rating Level 2: Good Condition

Rating Level 3: Satisfactory Condition

Rating Level 4: Unsatisfactory Condition

For vetting review of tankers usually older than fifteen (15) years, it is common industry practice that the oil companies will not accept any CAP rating less than Level 2. Generally, for vetting older tankers, a Level 1 rating is preferred by oil companies, and the owners of older tankers usually arrange for CAP inspections when their vessels are in dry-dock for the third special survey.

Also, if an oil company has interest in a vessel and/or while the tanker is on charter party subjects, it is well accepted practice that the oil company vetting personnel will request the owner to provide additional information and documentation. However, it is not accepted practice for the vetting personnel to request a further physical inspection by one of its own appointed inspectors.

Finally, since it is impossible for the oil companies, especially the larger oil majors, to appoint a SIRE inspector for every vessel of interest, it is well accepted tanker industry practice for the oil majors, minors and independents to accept each other's VIQ reports. Oil companies can rely on these reports due to an extensive training examination and performance program scheme that produces a largely uniform VIQ result from one inspector to another.

## **IX. TANKER CHARTER PARTY VETTING CLAUSES**

For a time chartered operator that has no technical control of the chartered vessel, including to scheduling VIQ inspections and handling pre-fixtured vetting issues, a proper vetting rider clause is very important. This vetting rider clause allows trading the vessel in the freight/voyage

market to third-party oil companies, and if the owner is in breach of the vetting rider clause, to allow the time charterer to provide commercial remedies; *i.e.*, off-hire and damages. As is true of most time charter party rider clauses, some vetting clauses are biased in the charterer's favor and others are more balanced.

Before the pre-ERICA and PRESTIGE casualties, typical vetting rider clauses provided, as follows:

Owner warrants that the Vessel is approved by the following companies and will remain so throughout the duration of this charter party. [List of Companies]

Owners warrant that for the duration of this charter the vessel will be kept in a standard acceptable to all major oil producers and all major chemical companies.

Owner will endeavor to maintain all necessary oil company approvals during the course of this charter.

These rider clauses are no longer industry standard. Although the oil companies no longer issue blanket "approvals", some charterers still use the word "approved" in their vetting rider clauses.

An example of a reasonably current but commercially stale time charter party "approvals" vetting rider clause provides, as follows:

#### **Oil Major Approvals**

Owner guarantees that:

- a. The vessel, at the date of delivery under this charter party, is not rejected for chartering of at least (4) Oil Majors at all times ("delivery approvals"), out of the following Oil Companies (ExxonMobil/Shell/Chevtex/Total/Repsol/BP/BHP/Conoco/STATOIL).

Thereafter throughout the term of this agreement, owners are obligated to have at least two satisfactory inspection reports entered into the SIRE system that are less than one year old, one of which must be less than five months old.

- b. Owner shall obtain satisfactory SIRE inspection from other Oil Majors/parties upon Charterers request.
- c. The vessel shall at all times comply with Oil Major crew matrix requirements.
  - (iv) In the event of any disagreement between owners and charterers as to whether the vessel is rejected, owners to immediately provide charterers on their request with all correspondence exchanged with the approving party.
  - (v) Unless Owners are able to provide written proof from an Oil Major to the contrary, the vessel will be considered not to have approval from a Particular Oil Major if:

The party needs to carry out its own physical inspection of the vessel. If an Oil Major has advised that it will refer to the registered valid SIRE report, that advice shall be considered to be evidence that the Oil Major does not need to effect its own physical inspection. However, that advice shall not by itself constitute sufficient evidence to show that the vessel has been approved.
  - (vi) During the duration of this charter party, owners to advise charterers in writing about any oil major rejections/incidents/accidents/casualties/structural problems/fleet holds or any other issues of any kind whatsoever which may affect approvals rejections – failure to do so would be a material breach of charter.
  - (vii) Owners shall advise Charterers immediately, in writing, should the vessel fail an inspection by an Oil Major, or be rejected for chartering because of a vetting failure, or be rejected following SIRE inspection after submission of Owners comments, regardless of the SIRE submitting member(s).
  - (viii) Owners shall simultaneously advise Charterers of their proposed course of action to remedy the defects which cause the failure of such inspection.

- (ix) Charters shall have the option to place the vessel Off Hire from the date and time she is free of cargo and has dropped last outward Sea Pilot after completing discharging, that she fails any vetting inspection by any of the Oil Majors or is rejected for chartering because of a vetting failure (provided that failure leaves the vessel not complying with point a), until the time that the vessel is both re approved by the same organization (complying with a) and in a position no less favorable to Charterers than that at which she went off hire.

This vetting rider clause is commercially stale because (1) it provides for “approvals” not acceptances, and references certain listed oil companies which no longer exist, *i.e.*, Chevtex merged into Chevron and ConocoPhillips split with P66 as the downstream refining/marketing/chartering entity.<sup>20</sup>

In 2009, the International Association of Independent Tanker Owners (“Intertanko”) Documentary and Vetting Committee produced a “balanced” unbiased vetting clause, which provides, as follows:

- a. Owners warrant that at the time of delivery:
  - (i) the Vessel will have a SIRE report available through the OCIMF system which has been issued within the last 6 months.
  - (ii) the Vessel is not unacceptable to [insert companies]
- b. If, during the currency of the charter, the Vessel is found to be unacceptable following a vetting inspection performed under the SIRE system, Owners will take corrective action and will promptly report such actions to the inspecting company concerned and the Charterers will be informed. If required, Owners will have the Vessel inspected again as soon as reasonably practicable. Owners, however, shall not have any obligation to make any changes to the Vessel’s design.

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<sup>20</sup> See David W. Martowski, *Vetting Clauses*, 26 TULANE MAR. L. J. 123 (2001), which contains a discussion of now dated charter party vetting rider clauses and associated SMA NYC arbitration awards.

- c. If the Vessel is found to be unacceptable following a vetting inspection performed under the SIRE system by any of the abovementioned companies that shall not entitle the Charterers to put the Vessel off-hire or to claim damages. However, should the Vessel be found unacceptable on 3 consecutive vetting inspections by any of the abovementioned companies, the Charterers shall have the option to cancel the charter with immediate effect within 7 days of the result of the third inspection becoming known. If, at that time, the Vessel is committed for a voyage such cancellation will take effect from the completion of discharge.<sup>21</sup>

The vetting rider clause recommended by Intertanko includes the “Vessel is not unacceptable to” language as contained in the current Q-88 vetting disclosure paragraphs. The “not unacceptable to” language and the owner/operator not actually knowing the vessel’s vetting status at the time of fixture, is current petroleum industry practice which often is a problem.

For the SHELLTIME 4 form, some time charter party contracts are amended to include an Oil Major Acceptability Rider Clause which states, as follows:

If, at any time during the charter period, the vessel becomes unacceptable to any oil major Charterers shall have the right to terminate the charter.

This is a very biased clause in the charterer’s favor and not necessarily an industry standard.

An example of a more current and unbiased time charter party vetting rider clause provides as follows:

### **Vetting**

The Owners acknowledge that to effectively trade the Vessel acceptance of the Vessel under the SIRE Vessel Inspections

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<sup>21</sup> Intertanko, *Ship Vetting in the Tanker and Chemical Trades*, <https://www.intertanko.com/upload/110254/Ship%20vetting%20in%20the%20chemical%20and%20tanker%20trades.pdf>.

Program by the major oil companies is required. As such, it is a condition of this charter party that on the day of delivery, unless a new build, the Vessel has been inspected under the SIRE Vessel Inspection Program within the last six months and has not been rejected or declined for acceptance by any charterer since such inspection. Charterer recognizes and accepts that Vessel will change ownership, operational management and crew and as such any SIRE inspections as of (two (2) weeks before fixture) will be void. Owner will arrange for full discharge port SIRE inspection at earliest time taking into account the possibility that Vessel may be employed floating storage.

It is a further condition of this charter party that within 3 weeks after the first discharge SIRE, the Vessel has been reviewed and accepted by the major oil companies as required and shall, to best of Owners' knowledge, be acceptable to 3 of the following at all times:

[NAME 6 TO 8 OIL COMPANIES]

If after three (3) weeks after the first discharge SIRE, Owners fail to maintain the minimum required 3 approvals at any time during the currency of the charter party, unless vessel's trading pattern does not allow them to carry any inspections, or unless they can document that required company did not have an available inspector to carry such inspection, Charterers shall have the right to terminate the charter by giving Owners 30 days notice and provided vessel is free of cargo.

This clause references the SIRE program and that VIQ reports are generally valid for six (6) months, recognizes that the VIQ inspections are dependent on the vessel's trading pattern which is controlled by the time charterer, and provides for a charterer remedy of cancellation on thirty (30) days notice.

A further example of a somewhat unbiased time charter party vetting rider clause in the clean petroleum products and chemical trades provides, as follows:

**Vetting**

1. The Owners acknowledge that to effectively trade the Vessel acceptance of the Vessel under the SIRE Vessel Inspections Program by the major oil companies and under the CDI Vessel Inspections Program is required. As such, it is a condition of this charter party that on the day of delivery, unless a newbuild, the Vessel has been inspected under the SIRE and CDI Vessel Inspection Program within the last six months and has not been rejected or declined for acceptance by any charterer since such inspections.
2. It is a further condition of this charter party that on the day of delivery the Vessel has been reviewed and accepted by the major oil and chemical companies as required and shall, to best of Owners' knowledge, remain acceptable to three [3] of the following at all times: [NAME FIVE TO SIX COMPANIES]
3. The inspections referred to in paras 7.1 and 7.2 above are hereinafter referred to separately and together as "Inspection(s)".
4. If the Vessel is a newbuild, then it is a condition of this charter party that the Owners shall arrange such Inspection(s) and obtain at least one CDI and SIRE Report acceptable to the major oil and chemical companies as required within three weeks after delivery.
5. The Owners shall arrange such Inspections to maintain such acceptances for their account. Such Inspections will be coordinated between the Owners, the Charterers and relevant inspectors and, at the minimum, will be carried out within the intervals required in lines 43-44 of the Shelltime 4 form or any lesser intervals as required following inspection, whichever is the lesser period.
6. If a further Inspection is required in order to perform a contemplated voyage or for the Vessel to be eligible for contemplated business, then such Inspection will be arranged by the Owners and coordinated between the Owners, the

Charterers and the relevant inspectors and shall be for the charterers' account and it shall be the Charterers' responsibility to ensure that such Inspection takes place as required by the Charterers.

7. The Owners shall on receipt of an Inspection report promptly make their comments on such report and the report itself available to the Charterers and arrange to have their comments entered into the respective databases.
8. Without prejudice to Charterers' rights under clause 43 of the Shelltime 4 form and in addition to the Charterers' rights to terminate under that clause and in respect of a breach of paragraphs 7.1 - 7.4 above, in the event that the Vessel fails or ceases to be accepted by any oil major (including but not limited to those set out in clause 7. 2) either at all or following any such Inspections, Owners will immediately, upon notice of same, make best endeavors to rectify the situation to make the Vessel acceptable and arrange the Vessel's re-inspection within a maximum of four weeks if this is physically possible, the cost of which shall be for the Owners' account. The Vessel shall be off 'hire from the time of such rejection and/or failure or cessation of acceptance provide it is not physically performing a voyage under charterers instructions until again acceptable In the event the Vessel is not acceptable within that four week period, the Charterers shall have the right to terminate the charter whether or not the Vessel has previously been acceptable to any oil major.

This time charter party vetting rider clause recognizes certain commercial and operational realities, as follows:

- a. For the time charterer to trade the vessel in the freight/voyage market, owner acknowledges that its vessel must be entered in the SIRE system and acceptable to a number of described oil companies.

- b. Depending on the vessel's trading pattern, SIRE inspections are coordinated by owner and charterer which has commercial control of the vessel.
- c. For a particular trade/subcharter, the charterer may need a vetting inspection and vetting review by a particular oil company which inspection is for charterer's account.
- d. The rider clause refers to clause no. 43, which is a separate vetting clause, and the rider clause includes time charterer's commercial remedies for off-hire and cancellation.

Generally, at least in New York maritime arbitration proceedings, the Panels will enforce the vetting rider clauses as agreed, including with the identity and number of agreed oil company's acceptances.

Finally, if the time charterer is using the vessel exclusively in its own program, and the time charterer has no need for oil company approvals, it is very important that the vetting rider clause includes provisions that the charterer will render all necessary assistance to the owner to schedule and facilitate SIRE VIQ inspections of not less than five (5) months.

## X. PRE-NOMINATION TERMINAL VETTING

In 2009, based on an existing informal industry terminal vetting database system, OCIMF launched the Marine Terminal Information System ("MTIS") project to allow petroleum charterers to perform pre-nomination terminal vetting review. In theory, since the OCIMF SIRE program for vessels was successful, the MTIS program would increase marine terminal safety and pollution prevention operations.<sup>22</sup>

Somewhat similar to the OCIMF SIRE system for vessels, the MTIS consists of certain electronic OCIMF documents, as follows:

Marine Terminals Particulars Questionnaire (MTPQ)

Marine Terminal Management Self-Assessment (MTMSA)

Marine Terminal Operator Competency and Training (MTOCT)

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<sup>22</sup> Oil Companies International Marine Forum, *The OCIMF Marine Terminal Information System (MTIS)*, <https://www.ocimf.org/media/61941/mtis-brochure-english.pdf>.

The OCIMF MTIS website states, as follows:

The three core elements at the center of MTIS, MTPQ, MTMSA and the MTOCT, have been constructed to capture a complete overview of a terminal's details in a consistent format. This approach will not only help improve safety aspects of ship-to-shore matching, but also help to improve operational efficiency through applying an improved and accepted global standard for information sharing.<sup>23</sup>

## **XI. MTPQ**

As introduced in November 2009, the MTPQ went live on October 3, 2011.

The OCIMF MTIS MTPQ announcement states, as follows:

The ultimate aim is to compile a comprehensive database of relevant information for all the world's 4,000+ terminals – from the hardware available to berth measurements and transfer rates. The Marine Terminal Particulars Questionnaire (MTPQ) was developed to collect this information in a common format using consistent units of measurement. By comparing the information generated by the MTPQ with SIRE vessel data, vessel programmers, schedulers and operators will be better able to assess the compatibility of ships and terminals and ensure safe operation and environmental protection.<sup>24</sup>

Most currently, the OCIMF website describes the MTPQ as follows:

Marine Terminal Particulars Questionnaire (MTPQ) captures all relevant terminal information, making it easier and simpler for vessel programmers, schedulers and terminal operators to share

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<sup>23</sup> MARINE TERMINAL INFORMATION SYSTEM, [www.ocimf.org/mtis/about-mtis/programmes.aspx](http://www.ocimf.org/mtis/about-mtis/programmes.aspx) (last visited July 11, 2018).

<sup>24</sup> MARINE TERMINAL INFORMATION SYSTEM, <https://www.ocimf.org/mtis/> (last visited August 8, 2018).

information and assess the suitability of the ship/shore interface.<sup>25</sup>

The berth MTPQ contains ten (10) separate chapters with more than one hundred (100) included element questions for certain terminal berth details including mooring equipment, berth and channel water depths including minimum under keel depth, berth beam/LOA restrictions, manifold/chicksan details, and STS and SPM details. It is industry practice for oil terminals which are OCIMF members to upload the berth MTPQ to the OCIMF website.

## **XII. MTMSA**

As introduced in 2012, and somewhat similar to the TMSA 3, the MTMSA is a self-assessment questionnaire of best practice/KPI indicators by terminal operators to assess the effectiveness of terminal management for marine berth operations.<sup>26</sup>

The MTMSA version dated December 2014 includes fifteen (15) separate chapters with about two hundred twenty (220) embedded best practice/KPIs. The chapters focus on safety and pollution prevention including terminal management, operations and procedures, berth mooring equipment, fire-fighting, ship/shore communications and security.<sup>27</sup>

## **XIII. MTOCT**

This document is a guide aimed at allowing marine terminal management to identify/assess key employee competencies and knowledge of loading facility operators against best practices to identify gaps to allow safe cargo operations.

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<sup>25</sup> MARINE TERMINAL INFORMATION SYSTEM, [www.ocimf.org/mtis/about-mtis/programmes.aspx](http://www.ocimf.org/mtis/about-mtis/programmes.aspx) (last visited July 11, 2018).

<sup>26</sup> MARINE TERMINAL INFORMATION SYSTEM, <https://www.ocimf.org/mtis/> (last visited August 8, 2018).

<sup>27</sup> See Oil Companies International Marine Forum, *Marine Terminal Management and Self Assessment*, <https://www.ocimf-mtis.org/Microsite/content/resources/MTMSA%20with%20Additional%20Guidance.pdf>.

Finally, the MTOCT includes recommendations for maintaining terminal personnel training records and verifying that the training program is successful.

*L.R. Mimosa Limited v. Panamax International Shipping Co.*,<sup>28</sup> involved a crude oil spill pollution event due to vessel breakaway from an SPM buoy during cargo discharge operations. The vessel was on a time charter on an amended SHELLTIME 4 form which included terms that the charterer does not warrant the safety of the port/berth and is liable only for an unsafe berth event for “failure to exercise due diligence”. The Panel majority ruled that the proximate cause of the breakaway was imprudent vessel personnel and pilot conduct.

The owner alleged that the time charterer failed to exercise “due diligence” when nominating the SPM buoy as an unsafe berth. The terminal had removed the emergency breakaway couplings from its SPM floating cargo hoses which are required by local regulation and recommended by OCIMF SPM Guidelines. The owner alleged that had the terminal left installed the emergency breakaway couplings in the cargo hoses, there would have been a very minor oil spill if any. Further, based on the time charterer’s documents, the owner alleged that the time charterer had not performed any pre-nomination SPM buoy vetting review, and that the SPM buoy TPQ report did not contain any meaningful information including disclosures relating to the removal of the emergency breakaway couplings. The owner’s vetting expert testified that the forty-eight (48) essentially blank answers of the fifty (50) questions in the SPM buoy TPQ report, was a vetting red flag that violated industry vetting practice. Therefore, the owner alleged that the charterer did not exercise “due diligence” when nominating the SPM buoy. The Panel majority disagreed and ruled that the charterer’s due diligence obligation to nominate a safe port/berth does not extend to performing a pre-nomination OCIMF/MTIS terminal vetting review. In relevant part, the Panel majority ruled as follows:

Captain Dudley’s testimony and the use of the OCIMF MTIS - however desirable the latter may be as a future vetting tool for the tanker industry - are insufficient. In the Panel majority’s view (Mr. Arnold dissenting) to establish a current industry

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<sup>28</sup> M/T L.R. MIMOSA, SMA No. 4338 (2018) (Anderson, Martowski and Arnold, dissenting, Arbs.).

standard of care or “best practices” OCIMF is a purely voluntary organization and no persuasive evidence was presented to demonstrate that the MTIS has achieved industry wide acceptance as a vetting aid. For example, Owner cites a 2014 OCIMF Annual Report which makes it clear that use of the MTIS is not mandatory and in fact was in use by only about 400 terminals out of 3,500 terminals worldwide. No evidence was shown whether the database contained sufficient information concerning the terminals in the MTIS system to form a reliable source of information for charterers accurately to assess the safety of a particular facility. Moreover, Captain Dudley’s testimony did not point to a uniform normative industry vetting standard, but rather an evolving subjective standard that lacks industry consensus and currently varies depending on the particular port or berthing facility.

I think what we are looking for here and grasping, groping toward is trying to figure out where berth vetting due diligence lived in the year 2014, not where it was in 2008 . . . but where it was in 2014 as it is evolving. To the degree that every user of port facilities will have a different subjective point of view on what their due diligence should be it has been very difficult for us to accurately define that. All I have tried to do in this report of mine is indicate that it is an area of steadily increasing concern from 2004, steadily increasing attention, combined with a total absence of regulation. There are no regulations requiring - the IMO has not said anything, the US Coast Guard has not said anything about a standard of pre-terminal vetting that should be applied.

Had it wished to do so, Owner could have insisted on a provision for pre-nomination terminal vetting in the Charter party. Instead Owner now seeks to impose by implication a higher standard of due diligence on charterers than that currently required by law or industry custom and practice. Owner would impose on charterers an onerous duty of inquiry aimed at the discovery of any number

of latent defects in a given facility's premises, systems and equipment in order to fulfill their due diligence obligations.

For the owner's pre-nomination "due diligence" vetting argument, the dissenting arbitrator agreed that current OCIMF/MTIS program for terminals is industry standard and/or represents best practice. The dissent, in part, states as follows:

With regard to this arbitration, the question is whether the OCIMF-MTIS published document should be considered industry standards and/ or best practices. I have carefully reviewed the OCIMF publications in evidence which are based upon worldwide sources for the benefit of its members; *i.e.*, oil companies, including ENAP (terminal) to identify safety and environmental issues facing oil tankers, barges, terminals and offshore marine operations, and develop and publish recommended standards that will serve as technical benchmarks. The report also states that OCIMF membership includes almost all of the world's oil companies.

ENAP's entry into the OCIMF-MTIS program's Berth TPQ for this monobuoy was rather incomplete and should have given rise to questions if it had been consulted.

The majority cites from Captain Dudley's testimony that there are no regulations requiring - the IMO has not said anything, the US Coast Guard has not said anything about a standard of pre-terminal vetting that should be applied. This statement neither supports Owner's nor Charterer's contentions because, if there were regulatory requirements, the argument of industry standards or best practices would be moot.

As stated previously, I considered the OCIMF-MTIS published documents as best practices in an evolving industry.

The MIMOSA Award involved pre-nomination OCIMF/MTIS terminal vetting issues of first impression. Other panels may view a charterer's pre-nomination vetting due diligence obligation differently, *e.g.*, the majority ruling that OCIMF/MTIS terminal vetting is a "higher standard" than required by current industry custom and practice.

#### **XIV. CONCLUSION**

For tankers, pre-fixture vetting is well established industry practice, and arbitration panels will enforce agreed charter party vetting rider clauses based on current industry practices. For oil terminals, pre-nomination vetting could be considered an evolving industry practice but very important to prevent potential vessel oil pollution events and diligent pre-nomination terminal vetting procedures could potentially offer a defense to the charterer for alleged breach of safe port/berth clauses.



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### Education

J.D., Franklin Pierce Law Center,  
Staff Member, *The Journal of New  
Hampshire Law*

B.S., United States Merchant  
Marine Academy

### Bar Admissions

New York  
Pennsylvania

### Background

With nearly 35 years of experience—both in private practice and as corporate counsel for a leading oil trader—Jim Textor is a nationally-recognized admiralty and maritime litigator in state and federal courts at both the trial and appellate levels.

Jim represents maritime clients in shipping and chartering disputes, breach of liquid commodity sales contracts and related commercial arbitrations. He also advises multinational energy companies, financing banks and trading institutions on complex coverage disputes arising from alleged damage to energy-related assets.

His years as maritime counsel provide him with extensive experience in the petroleum and chemical industry, including hedging business risks through derivatives.

Jim is the author of six law review articles on petroleum trading contracts, maritime arbitration, and vessel and barge charter party disputes. As issued by the U.S. Coast Guard, Jim holds an unlimited tonnage ocean Second Mate license.

After graduating from the U.S. Merchant Marine Academy, Jim sailed as deck officer for American Export Lines on dry cargo break-bulk vessels and for Point Shipping and Getty Fleet Corp on U.S. Flag coastwise tankers.

For charter party and sales contract disputes, Jim routinely participates as the Chair in tri-partite Society of Maritime Arbitration proceedings in New York City.

### Experience

- Achieved a favorable arbitration decision on behalf of Astra Oil in connection with payment due for the sale of benzene contracts.
- Achieved favorable arbitration decision on behalf of Falcon Carrier Shipping, Ltd.
- Achieved a favorable pre-award security arbitration decision on behalf of Koch Shipping, Inc.
- Achieved a favorable arbitration decision on behalf of Koch Shipping, Inc.
- Achieved a favorable arbitration decision on behalf of Koch Shipping, Inc.

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- Achieved favorable arbitration decisions on behalf of AOT Ltd.
  - Achieved a favorable decision on behalf of Venfleet, Ltd.
  - Achieved favorable decision on behalf of Astra Oil Co., Inc.

#### Professional Activities

- Member, Maritime Law Association of the U.S., Committee for Alternative Dispute Resolution
- Member, American Bar Association
- Member, New York County Lawyers' Association

#### Articles

- New OCIMF Pre-Fixture Tanker Vetting Cyber Requirement (November 22, 2017)  
Gard
- Oilvoy Clauses—Vessel Late Arrival at Load Port, Recovery of Commercial Damages (Summer 2003)  
*Tulane Maritime Law Journal*, Vol. 27
- Oilvoy Demurrage Clauses—What is a Storm? (August 1985)  
*Lloyd's Maritime and Commercial Law Quarterly*, Vol. 3
- COGSA: Petroleum Shortage Transit Allowance: *Sun Oil Company v. The Mercedes Maria* (1983)  
*Journal of Maritime Law and Commerce*, Vol. 14, No. 2
- Petroleum Shortage Disputes: The Difference between the Legal and Arbitration Approach (1983)  
*Lloyd's Maritime and Commercial Law Quarterly*, Vol. 3
- Oil Shortages Caused by the Inherent Properties of Petroleum Cargos (April 1982)  
*Journal of Maritime Law and Commerce*, Vol. 13, No. 2
- Private Compensation for Oil Discharge Damage (1979)  
*The Journal of Law and Technology*, Vol. 20, No. 2

#### Court Admissions

- U.S. District Court for the Southern District of New York
- U.S. District Court for the Eastern District of New York
- U.S. District Court for the Southern District of Texas
- U.S. Court of Appeals for the Second Circuit
- U.S. Court of Appeals for the Third Circuit