

July 2018

Defence class cover

Hull fouling

What is it?

Hull fouling is the accumulation of marine growth on a ship's hull and is a well-known issue affecting ships trading in warm waters. It can be a significant problem which can cause costly disputes to arise between an owner and charterer relating to who is responsible for the cost of cleaning the hull, and the resulting off-hire issues and underperformance claims.

Cleaning of the ship's hull

In *The Island Archon*¹ the English courts held that, under the standard NYPE form, an owner is entitled to an indemnity, express or implied, from a charterer against unforeseeable losses that are directly caused by complying with that charterer's legitimate employment orders. We have seen many owners try to recover the cost of hull cleaning using such an implied indemnity. However, in the absence of an express provision specially negotiated between an owner and charterer, the implied indemnity does not protect an owner against losses arising from hull fouling that was caused as a consequence of legitimate and ordinary voyage instructions.

Therefore, where a charterer has provided instructions that are legitimate under the terms of the subject charterparty (in other words, the ship is permitted to trade in warm waters) and the ship suffers hull fouling in the ordinary and expected course of such trading, an owner will be responsible for the costs of cleaning the fouling from the hull and repairing the paintwork. Such fouling will be considered foreseeable and will fall within an owner's overriding obligation to maintain the ship.

Guidance was given by the English courts as to what is considered ordinary and expected hull fouling in *The Kitsa*². *The Kitsa* was delayed for 22 days at Visakhapatnam, India, due to extended operations at the port. The ship was gearless and required the use of shore cranes to carry out cargo

operations. The charterparty did not contain any specific terms regarding hull fouling or the responsibility for the losses arising from the same, but it did allow for trading into Visak. It was found that the characteristics of the port and the characteristics of the ship meant that delays such as those experienced were not unforeseeable and were within the scope of ordinary trading under the terms of the charterparty. The owner was aware of the intended trade and, therefore, was deemed to have accepted the risk of hull fouling and its consequences when entering into the subject fixture.

Absent an express clause to the contrary in a charterparty, it is generally difficult for an owner to recover the costs of hull defouling from a charterer by way of an implied indemnity. Only in rare circumstances will such a recovery be possible. One such circumstance might be where there is an unforeseen increase in congestion at the warm water port in question, between the date of the charter and the date of the charterer's order for the ship to proceed there.

Off-hire

Conversely, as to the time spent defouling the ship, the general rule is that where marine growth is the natural consequence of complying with a charterer's order, the ship is not off-hire. In *The Rijn*³ it was held that fouling caused during the charter period was not a 'defect' in the hull for the purposes of clause 15 of the NYPE form and, as a result, the ship was not off-hire during the time spent defouling the hull. To express it a different way, in the ordinary course of events, there would be no fortuity in the hull fouling. Instead, there is simply compliance with a charterer's order and, thus, there is no off-hire event under a standard off-hire clause such as Clause 15 of the NYPE form. Caution should be exercised, however, if the charterparty contains a deviation off-hire clause, which can suspend time when a ship deviates for 'owner's purposes' – such as for defouling.



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Underperformance

Where the charterparty does not include a continuous speed and performance warranty, the ship is required to be capable of fulfilling the speed warranted only at the commencement of the charterparty. Therefore, any time lost due to hull fouling after the commencement of the charterparty may not be recoverable from an owner.

In the case of *The Pamphilos*⁴ the court also suggested that, if there was a continuing performance warranty, hull fouling as a result of compliance with a charterer's order would be a defence to any ensuing underperformance claim. However, an owner will almost certainly also be under an obligation under the time charter to maintain the efficiency of the ship (see clause 1 of the NYPE form for example). An owner will be in breach of this obligation if defouling operations are unreasonably delayed, notwithstanding that the accumulation of growth is the result of complying with a charterer's employment order.

BIMCO 2013 Hull Fouling Clause

To overcome the uncertainty of the above positions, BIMCO has published its Hull Fouling Clause 2013 for time charterparties, which aims to strike a balance between an owner's and charterer's responsibilities in respect of hull fouling. The aim of the clause is to expressly state in what circumstances and at what point the responsibility for hull cleaning and liability for losses arising therefrom shift from an owner to a charterer.

- The BIMCO clause at sub-clause (a) allows for the parties to agree a specific period, or number of days, during which the ship can remain in tropical waters without the charterer becoming liable for hull cleaning or for losses arising therefrom. The clause provides that a period of 15 days will apply in default. Pursuant to sub-clause (a), the ship's performance warranties are suspended once the agreed/default number of days have elapsed pending underwater inspection of the ship.

- Sub-clause (b) provides that, after the agreed/default number of days have elapsed, either party may call for a hull inspection, which shall be arranged jointly and undertaken at charterer's risk, time and expense.
- Sub-clause (c) provides that where either party calls for cleaning to be carried out as a result of the inspection, such cleaning is for the charterer's time, risk and expense, and should be undertaken in consultation with the owner, under the master's supervision.
- Sub-clause (d) provides that the hull cleaning must take place before redelivery of the ship. However, if a charterer is prevented from carrying out such cleaning, the parties shall agree a lump sum payment to cover the costs of cleaning.
- Sub-clause (e) provides that, to the extent that the charterer demonstrates that the ship's performance remains as warranted despite the agreed trading days/the 15-day default position being exceeded, the performance warranties will be reinstated and the charterer's obligations in respect of inspection/cleaning will no longer apply.

The club endorses the use of this BIMCO clause because it should prevent the ambiguity and uncertainty that can lead to disputes. However, as with all pro forma clauses, the parties should consider carefully whether it requires amendment to address the particular factual circumstances of their subject charterparty contract.

Defence cover is, by its very nature, discretionary in that the club must be satisfied as to the merits and quantum of the claim in question and the likelihood of achieving a successful outcome, if it is to lend support.

Members requiring further information on this topic should direct their enquiries to their usual contact at the club.

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1. *Triad Shipping Co. v Stellar Chartering & Brokerage Inc.* ('The Island Archon') [1994] 2 Lloyd's Rep 227.
2. *Action Navigation Inc v Bottigliere di Navigazione S.p.A* ('The Kitsa') [2005] EWHC 177 (Comm).
3. *Santa Martha Baay Scheepvaart and Handelsmaatschappij N.V v Scanbulk A/S* ('The Rijn') [1981] 2 Lloyd's Rep 267.
4. *The Pamphilos* [2002] 2 Lloyd's Rep 681 (QB).

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