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## Hull Fouling - Charterparty Issues

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Hull fouling is a well-known problem affecting vessels trading in warm water ports. It can lead to loss of time from diminished vessel performance and lost time and costs associated with hull cleaning.

Resulting claims include Charterers' claims for underperformance and that the vessel is off-hire for the period of hull cleaning. Owners' claims include damage to the vessel due to fouling and claims for indemnity from Charterers for hull cleaning costs.

Determining factors include whether:

- » The port was within the trading limits as provided within the charter.
- » Time spent at the warm water port was usual and expected for that time of year and for that vessel.
- » The marine growth in the water was usual and expected at that place for that time of year.
- » Either of the parties had been aware of the environmental factors prevailing at that place before the vessel traded there.

The issues which typically arise in such cases were helpfully revised in a recent High Court decision in which the Club's members were successful against owners in a defence coordinated by charterers and sub-charterers: *Action Navigation Inc v. Bottiglieri Navigation Spa (The "Kitsa")* [2005] EWHC 177. In this case, the vessel sat for 21 days at Visag under Charterers' order. The Court was asked to determine two questions. (1) Whether a time charterparty permitting the vessel to be traded within the Institute Warranty Limits necessarily carried with it an assumption by the shipowner of all risks ordinarily incident at each port within those limits; if so, the implied indemnity against the consequences of obeying the Charterers' lawful orders would not extend to the materialisation of risks peculiar to the particular port or class of ports. (2) Whether time spent removing marine growth which had attached itself to the hull of the vessel in the course of service under the relevant charterparty amounted to time lost within the meaning of clause 15 of the charterparty. In *The "Kitsa"*, the answer to both these questions was held to be "no". The charterparty was on amended NYPE form of which the preamble<sup>1</sup>, clauses 1<sup>2</sup>, 4<sup>3</sup>, 8<sup>4</sup> and additional clauses concerning the vessel's description and trading limits were considered relevant to the dispute.

Liability for fouling can be analysed on a basis of (1) causation or (2) apportionment of risk under the charterparty. Only liability for risks foreseeable at the commencement of the charterparty can be apportioned under the charterparty. Liability for unforeseeable risks will generally be determined on the basis of causation<sup>5</sup>.

The issues to be considered are as follows:

### Lawful Or Unlawful Order as to Employment?

Did the Charterers order the vessel to trade to a safe port, anchorage, berth or place within the permitted trading limits? Where a lawful order has been given, risk apportionment under the charterparty should be considered in the first instance.

However, the Master may obey unlawful orders from Charterers without such conduct amounting to a waiver by Owners of Charterers' breach of charterparty and without prejudicing Owners' right to claim for damage or losses arising<sup>6</sup>. In such circumstances Charterers would need to show that their unlawful order was not causative of the hull fouling. Otherwise, where the fouling is shown to be a direct result of obeying Charterers' orders to trade at a port outside the charterparty permitted trading limits, Charterers are likely to be held liable for the cost of cleaning the hull and the time taken for the cleaning operation, representing damages arising from Charterers' breach of charterparty.

Did fouling arise due to Charterers' orders as opposed to while Charterers' orders are being carried out?<sup>7</sup> For instance, if all warm water ports had been excluded from the charterparty permitted trading range and Charterers ordered the vessel to such a port, then Charterers will be liable for the fouling. However, if the charterparty permitted trading range included warm water or weather ports, but the port to which Charterers ordered the vessel fell outside the permitted trading range due to other logistical issues, then Charterers may not, automatically, be held liable for the fouling of the vessel.

### Can Owners Claim an Indemnity from Charterers?

The NYPE form does not contain an express indemnity from Charterers to Owners (unlike the Baltime form). An indemnity for hull fouling and associated losses can be implied depending on the facts of the incident.

Owners will not be entitled to claim from Charterers under an implied indemnity where losses and expenses are incurred as a consequence of complying with Charterers' legitimate and ordinary employment orders<sup>8</sup>. Therefore, where lawful orders have been provided by charterers and the vessel incurs hull fouling in the course of ordinary trading, the costs of cleaning the fouling from the hull, repairing the paint work and time for such works fall to Owners as a risk which they consented to bear on fixing the charterparty. Such fouling is considered foreseeable at the time of fixing the vessel, especially where the vessel is permitted to trade in warm waters, and falls within Owners' obligation to maintain the vessel.

An indemnity will generally be implied against unforeseen liability, losses or costs incurred by Owners as a direct consequence of complying with Charterers' orders<sup>9</sup>. Such implied indemnity would arise when Charterers give unlawful orders and fouling is fortuitous. Unforeseen or fortuitous fouling occurring despite Charterers' orders being lawful would also be a potent factor for deciding that the loss or expense falls within the scope of the implied indemnity.<sup>10</sup>

### Off-Hire

Fouling of a hull gives rise to two incidents of lost time that Charterers would seek to deduct from hire (1) time lost due to the underperformance of the vessel, and (2) time lost due to cleaning of the hull. Charterers may deduct from hire if either of these incidents can be shown to fall within either clause 15 of the NYPE charterparty form or the deviation clause.

### Under-Performance

For a vessel to be off-hire under clause 15, the cause of the off-hire must be fortuitous (i.e. not the natural result of complying with Charterers' orders). Clause 15 contains two possible provisions to bring hull fouling within the off-hire provision, (1) "... any other cause preventing the full working of the vessel, and (2) "defect in the hull". Where a vessel underperforms and time is lost as a direct result of hull fouling and that fouling arose as a natural consequence of the service under the charterparty, then the vessel cannot be considered to be off-hire in accordance with 15<sup>11</sup>. For such fouling to fall within clause 15, Charterers would have to show that the Owners breached the obligation to maintain the vessel by failing to adhere to an appropriate anti-fouling programme during the course of the charter.

If the fouling was unforeseen and arose due to Charterers giving an unlawful order as to employment, then Charterers would not have a right to claim deductions for underperformance under clause 15 because it was the Charterers' breach of charterparty which caused the loss of time.

#### Time Lost Cleaning Hull

The deviation clause usually permits for the vessel to be placed off-hire for the period when Owners deviate the vessel from a voyage for Owners' own purposes. Where Owners clean the hull as part of their obligation to maintain the vessel, then the vessel may be placed off-hire for the period for which the vessel is unavailable to Charterers, as was held in *The "Kitsa"*.

#### Summary

In *The "Kitsa"*, it was held that the Charterers had given legitimate orders to the vessel and, therefore, that the port of call was within the permitted trading limits of the charterparty. It was also found that the risk of fouling at that port had been foreseeable by Owners and Charterers on fixing the charterparty and that the fouling was not fortuitous as, particularly, the vessel had not sat at that port for a period longer than was usual for that type of vessel trading at that port. Therefore, the risk of fouling was considered to be an operational risk which Owners had consented to bear when fixing the charterparty and there were no grounds on which Owners could claim an indemnity from Charterers for the cost of cleaning the hull. Charterers were not permitted to make deductions from hire due to underperformance arising from fouling, but Charterers were permitted to deduct from hire for the period of deviation for Owners to clean the hull.

1. "This Charter Party, made and concluded in ... between ... Owners of the good ... Motorship NAME ... with hull, machinery and equipment in a thoroughly efficient state, ... and capable of steaming fully laden under good weather conditions about (See specification) ... and Charterers ... the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, for a Timecharter period of minimum ... months to about ... months ... always via safe port(s), safe berth(s), safe anchorage(s), always afloat, always within Institute Warranty Limits ... within below mentioned trading limits ... Vessel on her delivery or on her arrival at the first load port to be ready to receive in all respects any permissible Charterers' intended cargo ... and tight staunch, strong and in every way fitted for the intended cargoes, service, ..."

2. "That the Owners shall ... keep the vessel in a thoroughly efficient state in hull, machinery and equipment ... for and during the service."

3. "... hire to continue until the hour of the day of her redelivery in like good order and condition, ordinary wear and tear excepted, to the Owners ..."

4. "That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and equipment boats. The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, secure and discharge and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts."

5. *The White Rose* [1969] 2 Lloyd's Rep 52.

6. *Temple Steamship v. V/O Sovfracht* (1945) 79 LI L Rep 1.

7. *Larrinaga Steamship v. The Crown* (1944) 78 LI L Rep 167.

8. *The Island Archon* [1994] 2 Lloyd's Rep 227.

9. *The Georges Christos Lemos* [1991] 2 Lloyd's Rep 107; *The Athanasia Comminos* [1990] 1 Lloyd's Rep 227; *The Island Archon* [1994] 2 Lloyd's Rep 227 (CA).

10. *The Island Archon* at 236 and 238. "The loss must be one which on a fair reading of the Charterparty a shipowner cannot be taken to have accepted" per Sir Donald Nicholls VC.

11. *Santa Martha Baay Scheepvaart and Handelsmaatschappij NV v. Scanbulk A/S (The "Rijn")* [1981] 2 Lloyd's Rep 267 at 271-2.