WEST

Defence Guides

Hull Fouling in a nutshell

Hull fouling is a well-known problem affecting vessels trading in warm water ports and is the result of marine growth on the hull. It can lead to diminished vessel performance as well as additional costs and time lost cleaning the hull.

Commonly, there will be protective clauses in the charter to deal with this situation. However such clauses are sometimes omitted or may be insufficient to encompass the specific scenario. English law has addressed these issues and the most often used charter party forms are considered here.

1) Owners' obligation to maintain:

Clause 1 of the NYPE 1946 form (clause 6 of the 1993 form) sets out owners' overriding duty to maintain the ship. The costs of cleaning fouling from the hull, repairing paint work usually fall to owners as part of the maintenance obligation. It is also worth noting clause 21 of the NYPE 1946 form which (while often deleted) expressly provides for the vessel to be dry-docked at least every six months for bottom cleaning and painting.

2) Owners' claims that can arise:

a) Can owners claim damages and/or an indemnity against charterers for following charterers' orders?

This depends on whether charterers' order was lawful or unlawful. In other words, did charterers order the vessel to trade to a safe port, anchorage, berth or place within the permitted trading limits?

- **Hull fouling as a result of an unlawful order:**

  Where the fouling is shown to be a direct result of obeying charterers' orders which involve, for example, the vessel trading outside the charter party trading limits, charterers will be in breach of the charter party and are likely to be liable for the cost of cleaning the hull and the time taken for the cleaning operation. Owners must still show a causal link between the breach and the hull fouling. Conversely, charterers would need to show that their unlawful order did not cause the hull fouling.

  Even if charterers give an unlawful order, it may be that charterers can argue that owners agreed to follow charterers' illegitimate order and that owners have thereby waived their right to damages. As a general rule, however, obeying charterers' unlawful orders will not amount to a waiver by owners of their right to claim for damage or losses arising. As a matter of prudence, owners should clearly put charterers on notice that owners are not waiving their right to claim against charterers for charterers' unlawful order (The Kanchenjunga [1990]).

- **Hull fouling as a result of a lawful order:**

  The NYPE form does not contain an express indemnity from charterers to owners (unlike the Baltime form).

  Furthermore, 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. For example, the cost of cleaning the fouling from the hull and repairing the paint work falls to owners as a risk which they consented to bear on fixing the charter party. Such fouling is considered foreseeable at the time of fixing the vessel and falls within owners' obligation to maintain the vessel, especially where the vessel is permitted under the terms of the charter to trade in warm waters.

  In some limited circumstances, however, an indemnity for hull fouling may be implied. Such an indemnity will generally be implied against unforeseen liabilities, losses or costs incurred by owners as a direct consequence of complying with charterers' orders (The Island Archon [1994]), further or alternatively, when fouling is fortuitous or unforeseen events occur.

  It is unlikely that an indemnity will be implied in owners' favour where: time spent at a warm water port was usual and expected for the particular port (see The Kitsa [2005]); the marine growth in the water was usual and expected at that place for that time of year; or if either of the parties had been aware of the environmental factors prevailing at that place before the vessel traded there.

  As a matter of good practice, it is better to have a comprehensive clause in the charter party agreed in advance rather than rely on implied indemnities which are less certain.

DEFENCE

b) Can owners make a claim against charterers for failure to redeliver the ship "in like good order and condition"?

Charterers' duty is to redeliver the ship fully discharged, clean, and free of previous cargoes. Owners cannot however claim that charterers are in breach of their redelivery obligation because of growth on the ship's hull where, for the particular trade for which the ship is chartered, such growth on the hull is "ordinary wear and tear"for which charterers cannot be held liable (The Pamphilos [2002]).

To summarise, owners have a duty to maintain the ship and will not be entitled to claim in respect of losses arising during the charter party or for charterers' failure to redeliver "in like good order and condition" if:

- The damage arises from obeying legitimate and ordinary employment orders; and/or
- The loss/damage was foreseeable at the time of fixing the vessel.

c) Can owners claim damages from charterer for an underperformance claim in a follow on charter?

This will depend on the terms of the Charterparty. However, if a charter contains a hull fouling clause whereby, hull cleaning has to be performed at charterers' time, risk and expense but charterers do not clean the hull before redelivery, then owners may be able to claim for the cost of hull cleaning and the follow-on underperformance deduction. This is however subject to the vessel not having had sufficient time to carry out thorough cleaning before delivery under the follow-on charter (London Arbitration 25/17).

3) Charterers' claims that can arise:

a) Can charterers make an off-hire and/or under-performance claim?

If the ship's performance is affected due to the hull being fouled on or before delivery, then charterers will be able to put the ship off hire for any time lost (The "Ioanna" [1985]).

If the hull is fouled during the currency of the charter party, charterers may argue that the ship is off-hire by claiming that the hull fouling was a: "... cause preventing the full working of the vessel" and/or "defect in the hull" (clause 15 NYPE). However, where a vessel under-performs and time is lost due to hull fouling and that fouling arose as a natural consequence of the service under the charter party, then the vessel cannot be considered to be off-hire in accordance with clause 15.

Similarly, unless the speed and consumption of the ship are warranties that apply during the charter party (and not just on delivery under the charter), charterers will also not be able to make an under-performance claim as the warranties are only given on delivery whereas the fouling occurred as a result of a natural consequence of the service of the ship during the charter party.

Charterers might be able to make a claim under owners' maintenance clause if charterers can show that owners breached the obligation to maintain the vessel by failing to adhere to an appropriate anti-fouling programme during the course of the charter or to clean the hull within reasonable time. However, if charterers' trading of the vessel does not give owners the opportunity to clean the hull, charterers cannot complain about breach of owners' maintenance clause and/or under-performance.

b) Can charterers claim for time lost cleaning the hull?

While owners bear the cost of cleaning the hull, time spent cleaning the hull during the charter will usually be for charterers' account as the vessel will not be off-hire under clause 15. As a matter of prudence, however, charterers' agreement should be obtained as to the time and place of cleaning.

If the charter party contains a deviation clause, this usually permits the vessel to be placed off-hire for the period when owners deviate the vessel from a voyage for owners' own purposes, such as for cleaning the hull. When the vessel is laden, deviating to undertake cleaning may also constitute a "deviation" under the Hague/Hague-Visby Rules which in turn could compromise Club cover. The Club should be contacted in such circumstances.

To summarise:

- The vessel will not be off-hire for time lost (for example, due to slow steaming) as a direct result of hull fouling which arose as a natural consequence of the service under the charter party;
- Owners have an obligation to maintain the vessel and should clean the hull within a reasonable time if it has become apparent that there is fouling;
- The vessel may be off-hire whilst owners carry out maintenance/ cleaning of the vessel's hull during the charter party

4) Protective clauses

In order to avoid the risk of delays in tropical waters it is common for time charter parties to include protective clauses. These clauses are however not always adequately drafted and frequently do not offer the protection which owners had hoped for.

During negotiations, owners and charterers may devise their own wording. The clause can sometimes give rise to unintended consequences. Owners should be careful with the following points (this is not intended to be an exhaustive list):

- Where does the clause apply? Does it apply when the ship is at berth, port, anchorage, drifting outside port limits but waiting to load/ unload or at any other place at which the vessel is ordered to wait for charterers' business?

- For what period does the clause apply (for example, "the vessel being at anchor or in port for more than twenty five (25) days")? What if the vessel waits, for instance, 10 days at anchorage and 15 days in port, or if the vessel is ordered to leave the berth for a period to give room to a priority vessel?
- After how many days does the clause take effect? It may be wise for the clause to differentiate between tropical and non-tropical waters. (Fouling may rapidly occur in warm and shallow water)
- What is meant by "tropical waters"? It may be wise to define a geographical area or range of latitudes and temperatures within which the clause is to apply
- What if the delay is not all suffered on consecutive days? What if the vessel shifts between berths and so the delay is interrupted by steaming a few hours to bunker (e.g. "The stay shall not be interrupted by the Vessel shifting between waiting places and/or berths, nor by sea passage(s) of less than [12] hours")? It is common for charterers to order a vessel to take a short local passage to break the waiting period and thereby prevent the delay from being all on consecutive days
- Is there a strict obligation on charterers to clean the hull (for example, "Charterers to clean Vessel at their time and expense, otherwise owner's representation of Vessel's speed/consumption to be non-operative…")?What if this is a time charter trip? The above clause does not impose an obligation to clean as it only states that charterers will be unable to make a claim for underperformance. What if this is the final voyage and the hull is fouled at the redelivery port?
- Although the cost of cleaning is for charterers' account, who is responsible for cleaning? Is it better for owners or charterers to undertake the cleaning?
- Evidence: from owners' perspective, it is best to have a clause which simply provides for charterers to clean the hull following a stay at a tropical port, without adding the requirement for owners to prove any such hull fouling. However, practically, charterers may not agree to such terms. In that event, do owners have to provide evidence? Is it up to charterers to reverse the burden of proof and show that the fouling occurred prior to the vessel's prolonged stay in warm waters? From owners' perspective it is best for the clause to put the burden on charterers to show that the growth was not caused by the prolonged stay in a port but, rather, by the lack of maintenance by owners

To summarise:

- If a clause turns out to be ineffective then parties will rely on the case law as discussed above;
- Owners still need to prove that the prolonged stay caused the fouling

5) Evidence

Where there is dispute about whether the prolonged stay caused the hull to be fouled (whether or not a prolonged stay clause is incorporated in the charter), the outcome is likely to turn on the quality of the available evidence. A claim for hull fouling can be hampered by a lack of reliable evidence that the fouling arose as a result of a particular delay and was not pre-existing. It is important to have evidence indicating where and when a particular fouling took place (for example, with photos and samples of the hull fouling). Charterers will attempt to allege pre-existing fouling or that the hull was fouled to a greater extent than it ought to have to by arguing that owners had not applied adequate anti-fouling paint or that the paint's efficacy was reduced due to passage of time and that the vessel needed to be repainted as part of planned dry-docking.

Tips for owners:

- Where it can reasonably be anticipated that there might be delays and fouling, take pictures of the hull on arrival at the port. Good contemporaneous evidence of the condition of the ship's hull before a voyage will be better rather than relying on an after-the-fact reconstruction;
- Keep good records of the vessel's cleaning and painting history;
- It is important to have good evidence of the nature and extent of the fouling before cleaning, ideally by a good quality underwater survey;
- It may be possible to have an expert extrapolate from the available evidence, once fouling has been discovered, to determine how long the fouling is likely to have been present. It is therefore worth asking the underwater surveyor to take samples

December 2017

This article was written by Julien Rabeux in the Club's Hong Kong office with additional input from Smyth & Co in Hong Kong.

WEST

The West of England Ship Owners Mutual Insurance Association (Luxembourg)
UK office One Creechurch Place, Creechurch Lane, London EC3A 5AF
Tel +44 20 7716 6000 **Email** mail@westpandi.com **www.westpandi.com**