# BIMCO 2013 HULL-FOULING CLAUSE FOR TIME CHARTER PARTIES

**A time charterparty will usually allow the vessel to trade worldwide, within Institute Warranty Limits (“IWL”). This will permit the charterer to order her to ports in waters that present a risk of hull fouling if the vessel remains idle there for a long time. In several areas, a vessel can be expected to wait for as long as one to two, or sometimes even three, weeks to berth – so fouling of her underwater parts will not be uncommon.**

The owners of such a vessel may well expect the charterers to pay for the hull cleaning and to bear the risk of the vessel's resulting underperformance. In

London Arbitration 24/05

, the Owners recovered the cleaning costs under the NYPE clause 8 implied indemnity in respect of fouling caused by a 14-day stay at three Brazilian ports.

This is not, however, a straightforward area, due to two English Court decisions.

The Kitsa **[2005]**

The Kitsa was on a seven to nine month NYPE charter and was allowed to trade worldwide, within IWL. She sat for 22 days at Visak, India while waiting to discharge coal. Her hull was fouled, causing her to underperform. The Owners claimed the cleaning costs under the clause 8 implied indemnity.

In arbitration proceedings, the Tribunal rejected the Owners' claim. In accordance with

The Island Archon [1993], whilst an expense to the Owners might in a broad sense be a consequence of the Charterers' lawful order, there was no implied indemnity if the expense arose from a risk which the Owners had agreed to bear. The Tribunal held that:

1. The Charterers' order to call at Visak was an ordinary consequence of the charter service, the 22-day wait there was within the reasonable expectation of owners of such vessels, and the consequent risk of fouling was foreseeable and foreseen when the charterparty was entered into.

2. With this in mind, the Owners had cleaned the hull in accordance with their on-going charterparty maintenance obligation and had impliedly agreed to bear the risk and expense (an ordinary trading expense) of such fouling, which precluded an implied indemnity.

3. There were possible exceptions. For example, if the risk of fouling was not known, or the delay which caused the fouling was due to a cargo dispute not concerning the owners, the hull fouling would not be a risk which the owners had agreed to bear - in which case a clause 8 implied indemnity claim would be possible.

On appeal, the Court felt compelled to uphold the Award on the basis that it was for the Tribunal to decide what risks the Owners had impliedly agreed to bear with regard to an implied indemnity claim.

The Pamphilos **[2002]**

The Pamphilos was chartered under the NYPE form for a trip carrying iron ore from Sepetiba, Brazil to Bourgas, Bulgaria.

Her hull had been painted four months previously. Her underwater parts were fouled while waiting for berthing instructions at the Sepetiba anchorage for 21 days and while at the berth for a further three days. The Owners claimed: (1) reimbursement of the Charterers' hire deduction for the underperformance during the charter voyage (on the ground that there was no basis for it given Owners had complied with their charterparty description/maintenance/seaworthiness/fittedness obligations); and (2) the cost of the hull cleaning (on the basis that Charterers had failed to redeliver the vessel "in like goodorder and condition" under clause 4).

In arbitration proceedings, the Tribunal allowed the Owners' claim in (1) on the basis that the underperformance was the consequence of the fouling, but it rejected the Owners' claim in (2).

On appeal, the Court upheld the Tribunal's decision with regard to the Owners' claim in (2) on the basis that the fouling was an occupational hazard for the Owners that qualified as "ordinary wear and tear" under clause 4 (for which the Owners had to pay) unless it resulted from an extraordinary event such as serious fouling resulting from compliance with the Charterers' order immediately or shortly after drydocking.

**BIMCO 2013 Hull Fouling Clause for Time Charter Parties**

In light of this, time charterparties often contain clauses requiring the charterers to clean the hull at their time and expense following a prolonged stay in port. In consultation with representatives from the industry and paint manufacturers, BIMCO has produced its own clause providing that:

1. If the vessel "remains at or shifts within a place, anchorage and/or berth for an aggregated period" exceeding 15 days in tropical or non-tropical waters (or such other period as may be agreed), her performance warranties are discontinued pending an underwater inspection.

2. The underwater inspection can be required by either party and will be arranged jointly - but at charterers' risk, cost and time.

3. After the inspection, if either party requires underwater cleaning, this must be done by charterers at their risk, cost and time - in consultation with owners, under the master's supervision and in accordance with the hull paint manufacturers' guidelines.

4. If the cleaning is not permitted or is not possible where the inspection took place, or if charterers postpone the cleaning, the vessel's performance warranties will remain suspended until the cleaning takes place. If owners refuse to allow the cleaning despite the availability of suitable facilities and equipment, the vessel's performance warranties will be reinstated.

5. The cleaning must take place before redelivery. If, however, charterers are prevented from doing so, the parties will agree a lump sum in respect of the cost to owners of doing so.

6. If charterers show that the vessel is performing as warranted despite the prolonged stay referred to in 1 above, her performance warranties will be reinstated and charterers' inspection/cleaning obligations will no longer apply.

**Comment**

Overall, the BIMCO clause is clear and seems to strike the right balance. Owners will welcome the 15-day default period where it is shorter than the period in their current charterparty clauses, though BIMCO's Circular accompanying the clause urges the parties to agree the period(s) by reference to: (1) the trading areas/climates; (2) the quality/type of the vessel's hull paint and when its manufacturers say that its effectiveness becomes compromised; and (3) the fact that frequent/excessive cleaning reduces the paint's effectiveness.

However, it does not say that it applies to a stay of more than 15 days at two or more different ports. It refers to a stay at "a place" (singular tense) for more than 15 days, and its reference to an "aggregated period" presumably adds time spent at an anchorage in a port to the time spent at the berth and whilst shifting. So if a vessel is at port A for 10 days and at neighbouring port B for six days, the clause apparently does not apply.

Further, if fouling results from a stay of less than 15 days so that the clause does not apply, it should follow that the owner's maintenance obligation then operates - requiring himto clean the hull at the earliest reasonable opportunity (rather than him being liable for underperformance simply because the clause is not triggered). It would, however, have been preferable for the clause to say so.

Finally, similarly to its "Slow Steaming Clause for Time Charter Parties", BIMCO's clause does not address the issue of fouling caused by slow steaming. This may be a problem if the hull paint requires a minimum speed to remain effective.