

Circular Ref: 2016/0015

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**If hull is fouled due to long stay at port,
then Owners are responsible for underperformance!**

In a new case of *Imperator I Maritime Company v. Bunge SA (Coral Seas)* [2016] EWHC 1506 (Comm), a longstanding belief that a ship owner could argue hull fouling due to long stay as a defence in the context of continuous performance warranty was discarded by High Court.

In this case, a newly built vessel, The Coral Seas ('the vessel') was time chartered on an amended NYPE to a big charterer Bunge S.A. ('Charterers'). There were no underperformance claims for one year, but after one year during the charter service, the Charterers ordered the vessel to proceed to the warm water port of Guaiba Island, Brazil. The vessel remained at the port for a month and was waiting to load the instructed cargo in that port. The Charterers deducted USD 389,379.51 from hire arguing underperformance, and further asserted that the Owners have breached the ongoing performance warranty as provided in below set-out rider Clause 29(b) ongoing performance warranty.

The arbitrators found that hull growth was due to the long stay at the Brazilian port, and such hull growth was not unusual. Accordingly the arbitrators decided to rule in favour of the Charterers. The Owners appealed the Award to the High Court of London against the award.

The charterparty contained following express clauses:

Clause 8

The captain...shall be under the orders and directions of the charterers as regards employment and agency...

Rider Clause 29(a) to the charterparty provided:

Speed/consumption (expected as a new building) ... All details given in good faith as per shipbuilders' plans and as a new building vessel can be described...

Rider Clause 29(a) to the charterparty provided:

Throughout the currency of this charter, owners warrant that the vessel shall be capable of *maintaining and shall maintain* on all sea passages, from sea buoy to sea buoy, an average speed and consumption as stipulated in clause 29(a) above, under fair weather condition not exceeding Beaufort force four and Douglas sea state three and not against adverse current.

The Commercial Court did not allow the appeal, and maintained the decision of the arbitrators. The judgment clarified that the continuous speed and performance warranty provided in the charterparty applies to all the sea voyages, irrespective of the fact this underperformance could be due to hull fouling that is a normal wear or tear. If such hull fouling was *ordinary and not extraordinary*, then it is no defence

for the owners to argue as hull fouling as defence to the speed and performance claim.

The FDD division's advice to the clients of Andrew Liu is as follows:

- a) BIMCO Hull Fouling clause for Time Charterparties should be included in the rider clause. If it was included in the charterparty, then the owners would not have faced such a situation as in this case, not to mention the legal costs. (see the attached Annex 1 containing the Bimco Hull Fouling Clause).
- b) FDD division has resolved a few cases through arbitration for the clients and argued circumstances surrounding the long stay in the port to put more pressure on the Charterers.

Source of Information: Andrew Liu & Co., Ltd www.andrewliu.com.hk