

Circular Ref: 2017/0013**Date: 28 September 2017**

Hull Fouling - Charterers' Beware

In the recent arbitration (2017) 986 LMLN 3, London Arbitration 25/17, the subject vessel was chartered on an amended NYPE 1946 form for a time charter trip from Sual in the Philippines to Singapore/Malaysia with a cargo of coal in bulk. The vessel sailed from Sual on 16 June 2014 and arrived at Lumut, Malaysia, on 1 July 2014, thereby waiting for the berth until 31 July 2014, when discharge began. The discharging was completed on 5 August 2014.

On 22 July 2014, three weeks after arrival, the master reported signs of marine growth, particularly around the waterline. On 29 July 2014 the charterers ordered the vessel to proceed to sea for a short period, but the vessel did not do so because the master queried the effectiveness of such, and when he did so the charterers failed to confirm their instructions.

The vessel was then chartered under a follow-on fixture by a different charterer. On completion of that fixture, the follow-on charterers submitted a performance claim. The owners settled that claim for US\$41,303.83. After completion of the follow-on fixture the vessel underwent hull cleaning in China, concurrently with loading operations.

The owners brought arbitration proceedings against the charterers claiming that the vessel's hull had become fouled at Lumut and that the charterers were in breach of clauses 4 and 43 of the charter in not redelivering the vessel in "like good order and condition and/or in, the same condition (including vessels hull/bottom) as she was on delivery". Clause 43 provided:

If the vessel, whilst under Charterers orders, is idle or remains stationary at a port or anchorage or at any other place for a period of more than 30 days leading to marine growth at vessel's hull, the Master to report same immediately to Charterers when same has been discovered. Owners will not be responsible for reduction of speed/over consumption from such fouling. However if requested by Charterers, Owners will endeavor to carry out hull/bottom cleaning at a mutually agreed convenient port/place where proper facilities are available, at Charterers time risk and expense. In any case, Charterers to redeliver the vessel in, the same condition (including vessels hull/bottom) as she was on delivery.

The owners claimed damages comprising: (a) US\$41,303.83 paid in settlement of the performance claim under the follow-on fixture; (b) hull cleaning costs of US\$29,500; and (c) bank charges of US\$305.84. The owners gave credit for a part payment of US\$25,000, so that their net claim was for US\$46,169.67. The charterers' counter arguments were: (1) the vessel's hull was probably fouled at the time of delivery into the subject charter; (2) the master should have complied with the charterers' instructions on 29 July 2014 to proceed to sea for a short period; (3) any fouling constituted "ordinary wear and tear" so that the charterers were not in breach of charter; and (4) the performance claim presented by the follow-on

charterers was not related to events at Lumut.

The arbitrators held they have been persuaded by expert evidence that fouling did take place at Lamut and charterers' failure to confirm the instructions to sail to sea. The arbitrators further held that Clause 43 made it very clear that redelivery in a fouled condition was not protected by the fair wear and tear exception as argued by the Charterers. Further the arbitrators found on evidence that follow-on fixture underperformance was related to this breach.

FDD department based in Shanghai advice to the clients of Andrew Liu is as follows:

- (a) Keep all the correspondence from charterers and in such arbitration they can be the deciding factor.
- (b) Keep all certificates of all paints, especially anti-fouling paints
- (c) FDD department has assisted clients of Andrew liu to successfully argue with the charterers in similar cases.

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