

Zaman Çarteri Esnasında Meydana Gelen Karina Kirlenmesi: Geminin Düşük Performansından Doğan Sorumluluk

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Özet

Zaman çarteri sözleşmesinde, teslimle birlikte donatılmış bir geminin ticari yönetimi belli bir ücret karşılığında çarterere tahsis edilmektedir. Çarterer anlaşılan çarter süresi boyunca gemiyi çarter sözleşmesinde belirtilen coğrafi sınırlar içerisindeki her yere gönderebilir. Bu yüzden, çarter sözleşmesinde bu konuda bir sınır olmadıkça, prensipte çartererin gemiyi tropikal sularda kullanmaya yönelik talimat vermesini engelleyen hiçbir şey yoktur. Çartererin bu tarz bir talimatı meşru bir talimat olarak kabul edilmektedir ve gemi sahibinin bu talimata uyması gerekmektedir. Eğer ki gemi sahibi çartererin bu talimatını haklı bir sebebi olmadan reddedecek olursa, kendisinin bu davranışı fesih hakkı veren (repudiatory) sözleşme ihlali oluşturabilecek ve böylece çarterere sözleşmeyi sonlandırma hakkı verebilecektir. Bu noktada problem şu ki gemi tropikal sularda, uzun süre kaldığı zaman, gemi karinasında kirlenme (hull fouling) çoğunlukla gündeme gelmektedir. Bu doğa olayı deniz organizmalarının geminin karinasında toplanması kümelenmesi olarak tanımlanabilir. Bu durum, geminin performansını etkileyebilecek ve de geminin çarter sözleşmesinde belirtilen hızdan daha düşük bir hızla ve de belirtilen yakıt tüketiminden daha fazla bir tüketimle ilerlemesine sebep olabilecektir. Böyle bir durum söz konusu olduğunda, eğer ki çarter sözleşmesi geminin belli bir hızla ve yakıt tüketimiyle anlaşılan çarter süresi boyunca ilerleyeceğine dair gemi sahibi tarafından verilmiş bir taahhüt içeriyorsa, gemi sahibi, çartererin geminin performansının düşük olduğuna ilişkin olan iddiası ile karşılaşması muhtemeldir.

Bu açıklamalar akabinde, şurası net ki çartererin geminin tropikal sularda uzun süre kullanımına ilişkin talimatı gemi sahibinin çekinmeden uyabileceği türde bir talimat değildir. Çartererin bu talimatı üzerine, gemi sahibi genellikle bir çelişkinin içerisine düşmektedir. Bir tarafta, hukukun kendisine uymayı hükmettiği çartererin talimatı söz konusu iken diğer tarafta kendisinin geminin sözleşmede belirtilen hıza ve yakıt tüketimine sözleşme boyunca uyacağına dair vermiş olduğu bir taahhüt söz konusudur. Bu makalenin amacı; gemi sahibinin, çartererin geminin kullanımına ilişkin olan talimatına uyması sonucunda ortaya çıkan karina kirlenmesinden kaynaklanan geminin düşük performansından dolayı doğacak sorumluluğunun sınırlarını araştırmaktır. Makale ayrıca "BIMCO Hull Fouling for Time Charterparties" klozunun sözleşmeye dahil edilmesi durumunda karina kirlenmesinden kaynaklanan geminin düşük performansıyla ilgili anlaşmazlıkların ne ölçüde azalacağını analiz etmeyi amaçlamaktadır.

Anahtar kelimeler: Karina kirlenmesi, geminin düşük performans göstermesi, BIMCO Hull Fouling Klozu.

Hull Fouling During Time Charter Service: Liability for Deficient Performance of the Ship

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Abstract

Under a time charter, upon delivery commercial exploitation of a ship is placed in the hands of the charterer in exchange for payment of hire. During the agreed charter period, the charterer can send the ship to anywhere within the geographical limits of the charter. There is, therefore, nothing in principle that prevents the charterer from ordering the ship to proceed to tropical waters unless the charter contains a restriction in this regard. Such an order of the charterer is accepted as legitimate employment order and the shipowner is required to comply with it. If the shipowner refuses this order without any good reason, his conduct may constitute a repudiatory breach, so that entitles the charterer to terminate the charter. The problem is that where the ship remains in tropical waters for a long period, hull fouling mostly arises. This natural event can be defined as an accumulation of marine organism such as barnacles and weeds on the ship's hull. It may affect performance of the ship and cause that the ship proceeds at less speed and consumes more fuel than the specified in the charter. In such a case, if the charter contains an undertaking by the shipowner that the ship proceeds at particular speed and consumes particular amount of bunker on that speed during the period of charter, it is likely the shipowner exposes the charterer's claim for underperformance of the ship.

Following these explanations, it is clear that the charterer's order concerning the employment of the ship in tropical waters for a prolonged period is not a kind of order which the shipowner can follow without any concern. Upon the charterer's this order, the shipowner usually confront a dilemma. On the one hand, there is an order which the law requires him to comply with it, but on the other hand his continuous undertaking as to the ship's speed and bunker consumption under the charter. The purpose of this paper is to evaluate the limits of the shipowner's liability for underperformance caused by hull fouling that arises as a result of complying with the charterer's employment order. The paper also aims to analyse to what extent incorporation of BIMCO Hull Fouling Clause for Time Charterparties into the charter reduces underperformance disputes arising from hull fouling.

Keywords: Hull fouling, underperformance of the ship, the BIMCO hull fouling clause.

1. General Considerations as to Time Charter and the Shipowner's Obligation to Provide a Ship that Complies with Charter Description

A time charter is a contract for use of a ship for a particular period of time within agreed trading limits by a charterer in consideration of payment of hire. Under this type of charter, it is common to see a clause that describes the particular features of a ship, such as nationality, cargo capacity, speed and bunker consumption. All these contractual descriptions as to the ship are significant for the charterer since most of the time these are the only considerations which the charterer can rely on while entering

a charter and agreeing to pay a fixed hire for an unknown ship during an agreed charter period. Depending on the layout of charter forms, the details as to the ship's features can be set out either under a separate clause¹ or in the preamble of the charter.² In both cases, existence of descriptions as to the ship's features imposes an obligation on the shipowner to provide a ship that complies with the charter description. Where there is a misdescription as to the features of the ship, the shipowner will be found liable for breach of contract and the charterer will be entitled to damages for the loss he suffered. The answer to the question of whether the charterer can also terminate the charter in such a case depends on the nature of the term which is breached.

Under English law, contractual terms are classified into three groups. These are conditions, warranties and intermediate terms. The word 'condition' is used to classify a term of the contract of major importance for the parties and any breach of it regardless of how minor entitles the party not in default to terminate the charter and sue for damages.³ Definition as to the ship's class can likely be shown by the example of this kind of contractual term.⁴ On the other hand, the 'warranty' emphasises a term which has minor importance for the parties and is not at the heart of the existing contract so it is accepted that breach of it gives rise only to the right to damages.⁵ The third group of contractual terms, intermediate terms, was added to these two later with the Court of Appeal judgment in *The Hongkong Fir*.⁶ In contrast to the other two classes, where an intermediate term is breached, its legal consequence – whether it only gives rise to the right to damages or entitles the party not in default to terminate the contract – is not certain at the beginning. This is determined by considering the factual consequences arising from the breach. In case of breach of an intermediate term, termination of the contract can be an issue only if the breach 'deprive(s) the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract'.⁷ The breach should be so serious to go to the root of the contract. These explanations show that to determine the charterer's remedies where there is a misdescription by the shipowner as to particular features of the ship, it is first necessary to determine the nature of the term.

2. The Shipowner's Description as to Speed and Bunker Consumption of the Ship

When it is compared with other items of the ship's description, it can be said that accuracy of description as to speed and bunker consumption of the ship, in other words, performance warranties, has a particular significance for the charterer since these parameters are in relation to two main costs which the charterer is responsible for under the charter. One of these costs is the payment of fixed hire for the ship during the agreed period of charter. When there is a misdescription by the shipowner as to the ship's speed and the ship proceeds with less speed than promised in the charter, this results in the completion of a particular voyage taking longer than expected. Due to this, fewer voyages will

¹ See *Shelltime 3* cl. 1 and *Shelltime 4* cl. 1.

² See preamble of *NYPE 46*, *NYPE 93*, *NYPE 2015* and *Baltimex 1939* (as revised 2001).

³ *Poussard v Spiers and Pond* (1876) 1 QBD 410.

⁴ *Routh v MacMillan* (1863) 9 LT 541; *Cosmos Bulk Transport Inc. v China National Foreign Trade Transportation Corporation (The Apollonius)* [1978] 1 Lloyd's Rep. 53, p. 61.

⁵ *Bettini v Gye* (1876) QBD 183.

⁶ *Hongkong Fir Shipping Company Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1962] 2 Lloyd's Rep. 478.

⁷ *Hongkong Fir Shipping Company Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1962] 2 Lloyd's Rep. 478, p. 494.

be performed within the agreed charter period than expected by the charterer. In such a case, since the charterer is still required to pay an agreed fixed hire regardless of how many voyages are completed during the agreed period, it could be said that failure of the ship to comply with the described speed will mean a reduction in the profitability of the charter, which is an undesirable result for any charterer. The other cost which the charterer is responsible for is bunker expenses of the ship during the charter period. When parameters given by the shipowner as to consumption of the ship are not accurate and the ship consumes more bunker than promised in the charter, the charterer will find himself in a position of allocating more money for bunker expenses than he is ready to pay under the charter and this adversely affects his expectations as to charter expenditures.

Where the ship fails to perform in accordance with warranted speed and consumption, one of the remedies available to the charterer is damages. Since the general belief is that the description as to performance of the ship has an intermediate term status,⁸ misdescription on the part of the shipowner in this regard may also entitle the charterer to terminate the charter if the charterer can establish that the shipowner's breach goes to the root of the contract.⁹ Imagine that the ship is chartered by a respected logistics company to carry cargo between two designated ports for a period of 10 months. However, due to the ship's continual failure to perform the warranted speed, the company is always delayed in the delivery of the goods to the cargo owners. After a time, this situation may come to affect the standing of the company in a negative way and cargo owners may not want to transport their cargoes via this company. In such a case, the company's assertion that noncompliance of the ship to warranted speed goes to the root of the contract could be considered reasonable which may entitle it to terminate the charter.

In determining when the ship must comply with the described speed and consumption in the charter, the wording of the charter is crucial. The shipowner and the charterer may state the relevant time in this regard to be at the time the charter is made or at the time of delivery of the ship in the charter.¹⁰ Unfortunately, no clear answer has yet been provided as to which point of time will be considered if the charter is silent on this issue.¹¹ If the parties want to avoid uncertainty, it is advised that they make the applicable time of performance warranties clear in the charter. Some charters may go one step further and contain a continuous warranty as to performance of the ship.¹² Under this type of warranty, it is accepted that the shipowner promises that the ship will achieve the warranted performance during the whole period of charter. There is no doubt that this kind of performance warranty by the shipowner is the most advantageous one from the charterer's perspective since all risks which arise during the period of charter and cause failure of the ship to comply with promised speed and consumption, such as hull fouling, fall on the shoulders of the shipowner.

⁸ Such a view is submitted in Coghlin T. and others (2014). *Time Charters*, Informa, Abingdon, p. 75, para. [3.77]; Bennett, H. (ed.) (2017). *Carver on Charterparties*, Sweet & Maxwell, London, p. 784, para. [7-755].

⁹ *Dolphin Hellas Shipping SA v Itemslot Ltd (The Aegean Dolphin)* [1992] 2 Lloyd's Rep. 178.

¹⁰ See *Shelltime 3* cl. 24 and *Bovertime 2004* cl. 2.

¹¹ It was suggested in *Lorentzen v White Shipping Co Ltd* (1942) 74 Ll.L. Rep. 161 that the ship needs to comply with warranted performance at the time when the charter is made. However, *Cosmos Bulk Transport Incorporated v China National Foreign Trade Transportation Co (The Apollonius)* [1978] 1 Lloyd's Rep. 53 made the point that the relevant time in this regard should be at the time of delivery.

¹² See *Shelltime 4* cl. 24.

3. Hull Fouling that Occurs as a Result of the Charterer's Order and its Impact on Performance of the Ship

There is no doubt that one of the common reasons for underperformance of the ship during the charter service is hull fouling. This natural event can be described as an accumulation of a variety of marine organisms on the ship's bottom and sides. It commonly occurs as a result of the ship being at standstill in tropical waters for more than three consecutive weeks. Since hull fouling increases resistance against the ship's propulsion and causes a blockage in the ship's engine cooling intakes, by its nature, this results in a reduction in the ship's speed and increases bunker consumption.¹³ When this occurs, hull fouling becomes a significant problem from the charterer's perspective. It should not be forgotten that under a time charter, the shipowner transfers the earning capacity of the ship to the charterer at the time of delivery in return for payment of hire. As a result of this transfer, the charterer is entitled to give orders to the shipowner as to economic utilisation of the ship, in other words, as to the employment of the ship. The extent of the charterer's power to employ the ship is delimited through trading limits in the charter. For example, most charters contain a limitation as to the kind of cargo that can be carried on board.¹⁴ Similarly, they usually contain trading limits as to geographical employment area of the ship. Such a limitation might have been included to keep the ship away from ice-bound¹⁵ and piracy areas.¹⁶ The risk of war or existence of war may also cause the charterer to be prohibited to send the ship into particular areas.¹⁷ However, except for these indicated geographical limitations, under most time charters the charterer is entitled to use the ship worldwide. This means that the charterer has the freedom to send the ship wherever he wants during the charter. In principle, this also means that the charterer is allowed to employ the ship in tropical waters for a long period of time. Therefore, such an order of the charterer should be treated as a legitimate order unless the charter contains an express restriction in this regard and the shipowner is required to comply with it. Refusal of this order of the charterer by the shipowner without any good reason may result in the shipowner being found guilty of a repudiatory breach of the charter and the charterer will be entitled to terminate the charter.¹⁸

4. The Shipowner's Concern for Employment of the Chartered Ship in Tropical Waters

Most charters require the shipowner to comply with the charterer's order to employ the ship in tropical waters for a prolonged period. However, this is not a kind of order which the shipowner can easily follow without any concern, especially if the charter contains a continuous performance warranty under which the shipowner promises that the ship will achieve the described speed and consumption throughout the period of charter.¹⁹ The shipowner's hesitation is understandable because when he complies with the charterer's order there is a possibility that the ship's hull is fouled and this subsequently causes the ship to proceed at less speed and to consume more bunker than warranted in the charter.

¹³ Grainger, S. (Jun. 2003). Getting to the bottom of it, Maritime Risk International. For more details on how the ship's propulsion components are affected from the hull fouling see Dere, Ç., Kandemir, Ç., Zincir B. and Deniz C. (2016). Hull Fouling Effect on Propulsion System Components, Proceedings of the 2nd Global Conference on Innovation in Marine Technology and the Future of Maritime Transportation, Muğla, Turkey, pp. 142-148.

¹⁴ Both previous NYPE forms and new NYPE form require that cargo on the board must be lawful merchandise. See NYPE 2015 cl. 16, NYPE 93 cl. 4 and NYPE 46 lines 24-25.

¹⁵ See NYPE 93 cl. 33, NYPE 2015 cl. 35 and BPTIME 3 cl. 27.

¹⁶ See NYPE 2015 cl. 39.

¹⁷ See clause NYPE 2015 cl. 34(b) and BPTIME 3 cl. 30.2.

¹⁸ Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star) (No 2) [1993] 1 Lloyd's Rep. 397.

In such a case, the charterer may be tempted to bring a claim against the shipowner for breach of continuous performance warranty even though failure of the ship to comply with warranted speed and consumption during the charter service had resulted from his own employment order. He may even try to terminate the charter by stating that the shipowner's breach as to performance warranty goes to the root of the contract. The question that arises here is whether or not in such a case the shipowner will be found liable for deficient performance of the ship.

It was suggested in *The Pamphilos* that in this situation the shipowner can rely on the fact that underperformance of the ship derives from the charterer's employment order as a defence and he can escape from liability.²⁰ Such an approach clearly sets aside the shipowner's concern about complying with the charterer's order to employ the ship in tropical waters because the shipowner will know from very beginning that he will not be held liable for breach of continuous performance warranty when hull fouling arises upon the performance of the charterer's order and this causes deficient performance of the ship. From the author's point of view, the suggestion made in *The Pamphilos* also seems logical as it employs the principles of factual causation. Since the charterer is the one who provides the order and his order causes deficient performance of the ship, he should be the one held responsible for his own misfortune. However, this approach has very recently been rejected under English law.

In *The Coral Sea* it was held that the fact that hull fouling occurs upon the charterer's legitimate employment order and this causes deficient performance of the ship during the period of charter does not constitute an automatic defence for the shipowner against the charterer's underperformance claims.²¹ It was submitted that to determine whether the shipowner is found liable for underperformance of the ship in such a case, the relevant test is whether or not underperformance was caused by a risk which the shipowner agreed to bear under the charter.²² This test in one sense requires that the attention is given to the issue of whether the hull fouling is a risk which the shipowner contractually accepts. If the answer to this question is in the affirmative, the shipowner will still be found liable for breach of his obligation to provide a vessel that complies with the parameters of continuous performance warranty and is required to compensate the charterer for the loss suffered regardless of the fact that underperformance of the ship derives from an event which occurs as a result of the charterer's employment order.

The problem regarding the suggestion made in *The Coral Sea* is the difficulty to determine when hull fouling is accepted as a risk which the shipowner agrees to bear under the charter in a particular case. No objective criteria have been introduced which the court can consider while evaluating the acceptance of the risk issue. Therefore, during such an evaluation each case will turn on its own facts and the wording of the charter in question will be the primary concern. One of the consequences of this is that, most of the time, the shipowner is not so sure whether he will be held liable for breach of continuous performance warranty when he complies with the charterer's order as to usage of the ship in tropical waters and this causes hull fouling and subsequently underperformance of the ship. Due to this uncertainty, from his perspective the dilemma that he confronts when he receives the charterer's

¹⁹ See *Shelltime 4* cl. 24.

²⁰ *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The Pamphilos)* [2002] 2 Lloyd's Rep. 681, p. 690. For a similar suggestion also see *Coghlin T. and others (2014)*. *Time Charters*, Informa, Abingdon, p. 75, para. [3.75].

²¹ *Bunge SA v C Transport Panamax Ltd (The Coral Seas)* [2016] 2 Lloyd's Rep. 293, p. 299, para. [31].

²² *Ibid.*

order to employ the ship in tropical waters continues. If there is a desire to reduce the uncertainties that may derive from this common law rule, the BIMCO hull fouling clause might be a good option.

5. The BIMCO Hull Fouling Clause for Time Charterparties as a Solution to Set Aside the Shipowner's Concern

The BIMCO hull fouling clause stipulates that:

“ (a) If, in accordance with Charterers' orders, the Vessel remains at or shifts within a place, anchorage and/or berth *for an aggregated period exceeding:*

(i) a period as the parties may agree in writing in a Tropical Zone or Seasonal Tropical Zone*^{*}; or

(ii) a period as the parties may agree in writing outside such Zones*

any warranties concerning speed and consumption shall be suspended pending inspection of the Vessel's underwater parts...

*If no such periods are agreed the default periods shall be 15 days.

(b) In accordance with sub-clause (a), either party may call for inspection which shall be arranged jointly by Owners and Charterers and undertaken at Charterers' risk, cost, expense and time.

(c) If, as a result of the inspection either party calls for cleaning of any of the underwater parts, such cleaning shall be undertaken by the Charterers at their risk, cost, expense and time in consultation with the Owners.

(i) ...

(ii) If, at the port or place of inspection, cleaning as required under this Sub-clause (c) is not permitted or possible, or if Charterers choose to postpone cleaning, *speed and consumption warranties shall remain suspended until such cleaning has been completed.*

(iii) If, despite the availability of suitable facilities and equipment, Owners nevertheless refuse to permit cleaning, *the speed and consumption warranties shall be reinstated from the time of such refusal.*”²³ [emphases added].

It is not the intention of the author to evaluate every aspect of the BIMCO hull fouling clause here. Its relevant parts as to the ship's performance will be in consideration, which is why only those parts are quoted above.²⁴ It appears that the clause ends the uncertainty that derives from the test introduced in *The Coral Sea* and serves the purpose of reducing the shipowner's concern about complying with the charterer's order to employ the vessel in tropical waters. Where the clause is incorporated into the charter, the focus needs to be on whether or not the ship remains in tropical zones more than the duration agreed by the parties.²⁵ It is a straightforward exercise. The duration expressed by the parties in one sense is used as a cut-off point in determining whether the shipowner agrees to bear the risk of hull fouling in a particular case. For example, where the duration during which the ship remains in

²³ The clause was issued through Special Circular, No. 3, 24 June 2013 and is available in the BIMCO's website.

²⁴ Whole clause with a short explanatory note is available in Special Circular, No. 3, 24 June 2013 in the BIMCO's website.

²⁵ See section (a) of the BIMCO hull fouling clause.

tropical zones is determined by the parties as 20 days, if hull fouling arises before the expiry of this duration, it will be treated as a risk accepted by the shipowner. Therefore, even if the hull fouling which arises upon the charterer's order to trade in tropical waters causes the ship's performance to be affected negatively, continuous warranties as to speed and consumption of the ship have not been suspended and the shipowner will be found liable for breach of his obligation to provide a ship that complies with the parameters stated in the warranty. On the other hand, if the hull fouling arises after the ship spends more than 20 days in tropical waters, this risk is treated as one which the shipowner does not agree to bear. Therefore, after the expiry of 20 days, according to section (a) of the clause it is accepted that the shipowner's warranties as to performance of the ship are suspended and the shipowner will not be found liable for underperformance of the ship arising from hull fouling. Such an approach definitively brings about certainty for the parties because they know when the risk of hull fouling and underperformance of the ship upon the charterer's order to proceed in tropical waters is transferred from the shipowner to the charterer taking into account the agreed duration. The clause gives freedom to the parties to choose the length of the duration. However, considering the possibility that this can be disregarded by the parties, 15 days are determined as a default period.

Apart from the stipulation in section (a), section (c) (ii) and (iii) of the BIMCO hull fouling clause also contains a stipulation relevant to the performance of the ship. Section (c) (ii) of the clause makes the point that if the cleaning of the hull is prevented by the charterer, then the shipowner's continuous warranties as to performance of the ship continue to be suspended. This is sensible because in such a case if the charterer was allowed to sue the shipowner for breach of performance warranty, in one sense the charterer would be allowed to get the benefit of his own wrong (this is not allowing the cleaning operation here) and this is not acceptable. In contrast to this, section (c) (iii) of the clause stipulates that where the cleaning is prevented by the shipowner, the performance warranty becomes applicable upon the refusal so that it will be possible for the charterer to bring a claim for underperformance of the ship after that point.

6. Conclusion

Trading of a vessel in tropical waters regularly leads to the problem of hull fouling and this may have a significant effect on the performance of the chartered ship. At this point, if the charter contains a continuous performance warranty, disputes as to performance of the ship will be inevitable. Despite the popularity of the subject, it is indeed surprising that the law has only just been settled through the judgment in *The Coral Sea*. The case sets a clear criterion by stating that while determining the liability of the shipowner for deficient performance of the ship, the attention should be given to the issue of whether the shipowner bears the risk of hull fouling that occurs following the charterer's order to trade the ship in tropical waters. However, as stated above, application of this criterion is not easy and requires further consideration by a court in every case. This brings about uncertainty from the shipowner's perspective. Since he can never be sure under this test whether he will be found liable for deficient performance of the ship when he complies with the charterer's order to proceed in tropical waters and hull fouling subsequently arises, his concern as to complying with the charterer's employment order continues to exist. The BIMCO hull fouling clause is a significant step to set aside the shipowner's concern in this regard because it considers the agreed duration by the parties for the vessel remaining in tropical waters, and so the shipowner knows whether he will be found liable for breach of continuous performance warranty. Therefore, it is believed it will be in the shipowner's best interests to incorporate the clause into the charter. Due to the certainty that comes with the clause, the clause has commonly begun to be preferred in practice.

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