UK DEFENCE CLUB

Soundings

New Zealand biofouling regulations: practical and contractual considerations

Following the introduction in 2018 of new biofouling regulations for ships visiting New Zealand, Intertanko have now issued practical guidance to owners which addresses and clarifies some of the issues relating to the new requirements. As these relatively stringent new regulations present a number of technical, commercial and practical implications for owners and charterers, Members are recommended to take note of all available guidance and take protective measures to minimise disruption under charterparties.

The foundation for the new regulations is New Zealand's Biosecurity Act, 1993. It provides that the Director-General may regulate in order to effectively manage risks that are associated with the entry of ships into New Zealand territory. New rules came into force on 15th May, 2018 and now apply compulsorily to any ships entering New Zealand waters.

Requirements for ships visiting New Zealand

Under these rules, ships must arrive in New Zealand with a "clean hull", meaning a hull which has no biofouling of live organisms present other than those within stated thresholds.

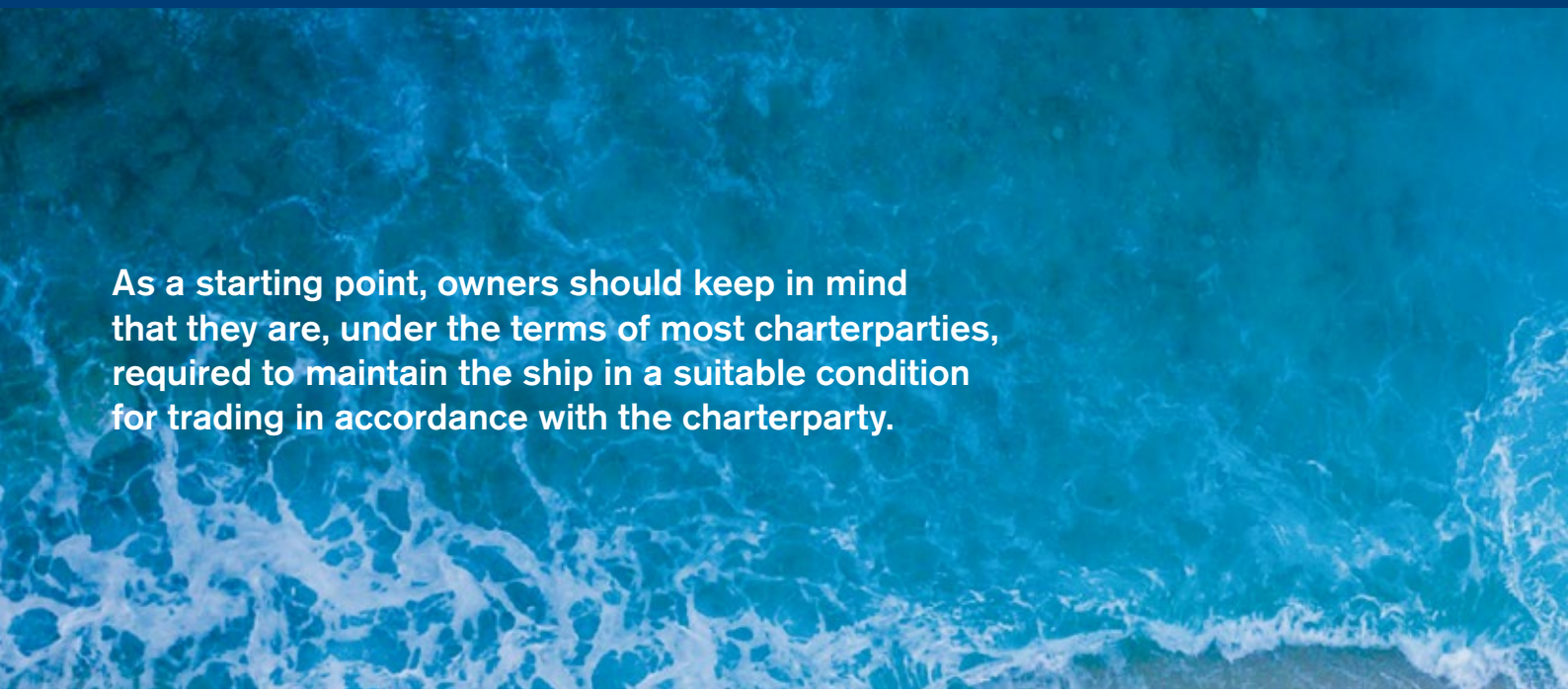
The rules provide for three methods to meet the clean hull requirement, namely:

i) cleaning to be carried out 30 days prior to a visit to New Zealand, or within 24 hours upon arrival at an approved facility in New Zealand;

ii) continual maintenance using best practice, including antifoul coatings, marine growth prevention systems, in-water inspections and hull cleaning, following the IMO Biofouling Guidelines; or

iii) application of "approved treatments" under specific further regulations.

continued overleaf



As a starting point, owners should keep in mind that they are, under the terms of most charterparties, required to maintain the ship in a suitable condition for trading in accordance with the charterparty.

Ships are divided into two categories: short-stay (less than 21 days) and long-stay. Short-stay ships must arrive with a "clean hull", meaning no biofouling of live organisms being present other than that within the permitted threshold. It is understood that the "short-stay" ships are expected to meet the new standards by continual maintenance. Cleaning facilities are limited in New Zealand. There are no in-water cleaning facilities and haul-out/dry-docking facilities are only available for smaller ships. Ships are therefore encouraged to practice proactive biofouling management, which includes actions such as applying an anti-fouling coating to the hulls and treating pipework and other areas with a marine growth preventative system, cleaning the slime layer when necessary and performing in-water inspections and cleaning when performance begins to decline. As to the third option listed above, it is understood that there are as yet no "approved treatments" apart from hauling-out/dry-docking at an approved facility.

Proof of compliance with one of the three measures will have to be provided to New Zealand's Ministry of Primary Industries ("MPI"). In order to demonstrate the requisite level of maintenance, owners should prepare and keep on board a Biofouling Management Plan and Biofouling Record Book, as recommended by the IMO Biofouling Guidelines. The record book is crucial in terms of compliance as it will detail all of the biofouling management actions undertaken by the ship, including any cleaning, inspection, treatment, dry-docking, antifouling, etc.

Notification requirements

There are also strict notification requirements for owners prior to arrival in New Zealand. In short, the ship must send an advanced notice, 48 hours prior to arrival, including details such as the intended length of stay, whether the ship has spent any extended periods stationary in a single location and which measures will be used to comply with the new rules.

In some cases it will be appropriate to produce a Craft Risk Management Plan outlining how the owners intend to meet the biofouling requirements.

Compliance will be assessed based on the evidence provided. If ships are unable to prove compliance initially, it may be necessary for a physical inspection of the hull to be carried out.

If a ship is found to be non-compliant, the owner may be required to carry out steps to reduce the risk, such as further cleaning. In severe cases ships may be directed to leave New Zealand territorial waters. Given the lack of cleaning facilities in New Zealand, it is advisable to adopt continual maintenance practices in order to avoid the need to clean on arrival.

More detailed practical guidance from Intertanko can be found at: https://safety4sea.com/wp-content/uploads/2019/02/Intertanko-Guide-to-New-Zealands-Biofouling-and-Ballast-Water-Requirements-2019_02.pdf.

Liability under existing charterparties

There are obvious adverse consequences for both owners and charterers potentially arising from non-compliance, not least in terms of delay and interruption to commercial operations as well as additional cleaning costs on top of the general costs and time associated with compliance.

Who is liable for the associated costs?

As a starting point, owners should keep in mind that they are, under the terms of most time charterparties, required to maintain the ship in a suitable condition for trading in accordance with the charterparty. So, absent any express provision, it is likely that owners will be obliged to ensure that the ship complies with the requirements of the new regulations at their time and expense.

Owners could seek to recover any costs from time charterers under the usual express or implied indemnity for following charterers' orders (see The Island Archon [1994] 2 Lloyd's Rep 227). The scope of that indemnity is very likely to depend on the terms of the charter and whether New Zealand falls within a broad trading range or whether the ship is ordered to a specific port in New Zealand. The possibility of an indemnity is much reduced in the latter context. However, in any event, the indemnity does not protect an owner against risks or costs which they have expressly or implicitly agreed to bear under the terms of the charter or which are ordinarily incidental to the service. As such, it is in most cases unlikely that owners would be able to recover merely for the costs of complying with the new rules, since costs of marine fouling are likely to be considered an ordinary trading expense incidental to the service (see The Kitsa [2005] 1 Lloyd's Rep 432 and The Kos [2012] 2 Lloyd's Rep 292).

However, it may be arguable that certain costs that are incurred in order to meet the unusual nature of the New Zealand regulations (for example, in-water cleaning prior to entry into New Zealand) may be regarded as a risk which is not accepted by owners. The question has yet to be tested and much will depend on the facts of the case and the terms of the particular charter.

Where does the risk of lost time fall?

In the case of a time charter, as a general principle, the ship will be on hire unless charterers can bring themselves clearly within the terms of the off-hire clause. The courts have confirmed that ordinary marine growth on a ship is not a fortuitous event triggering off-hire within the words "damages to hull, machinery or equipment" in the NYPE form off-hire clause (see The Rijn [1981] 2 Lloyd's Rep 267, at 272 and The Kitsa [2005] 1 Lloyd's Rep 432). Therefore, under many charter forms, it seems unlikely that any time lost in complying with the directions of the local authority (for example, for off-shore hull cleaning) would put the ship off-hire.

Charterers might be able to argue that interference with the ship's operation by the port authorities may fall within the omnibus provision in the NYPE form off-hire clause ("any other cause preventing the full working of the ship"), particularly where the word "whatsoever" has been added (see The Laconian Confidence [1997] 1 Lloyd's Rep 139). However, this argument is not certain and much will turn on the facts and the terms of the off-hire clause in question.

If the ship is required to deviate out of New Zealand territorial waters for hull cleaning, it may be that the ship can be put off-hire under a deviation clause. However, this type of clause is not contained in many standard forms of charterparties and so the rider clauses expressly agreed by the parties would need to be reviewed to see if the situation falls within any of them as an off-hire event.

In the case of a voyage charter, owners will bear the risk of lost time unless they are able to recover demurrage or damages for detention from charterers. This will often turn on whether the ship is an arrived ship and has tendered a notice of readiness when her operations are affected. Anecdotal experience suggests that in some cases the local authority may not intervene until after the ship has already commenced cargo operations. In such cases, in principle, laytime would continue to run in the absence of any applicable exception clause and demurrage may become payable by charterers for any period of delay. However, owners are generally not entitled to recover demurrage or detention damages if a ship is unable to load or discharge due to the owner's own default (see The Dora [1925] 2 KB 172). Therefore, charterers may argue that any delay caused by a failure to comply

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with the new rules resulting in intervention by the local authority would be an owner's default such that demurrage or detention damages should not be recoverable.

Future charterparties

When negotiating future charters, particularly ones which contemplate trading to New Zealand, it is recommended that Members keep in mind the requirements under the new rules. Parties are advised to review maintenance, off-hire and deviation clauses to ensure that the allocation of risk and responsibility for compliance with the new regulations is clear. In appropriate cases where regular trade to New Zealand is involved, parties may consider drafting bespoke clauses which deal with issues such as which party is to be responsible for the cost and time required for additional advance cleaning.

Conclusion

Owners are responsible for ensuring compliance with the mandatory provisions. Failure to do so could result in lengthy delays, costs and logistical difficulties. It is already clear that the local authorities are taking a strict approach to the application of the regulations and a number of ships have already had additional cleaning requirements imposed, with consequent interruption to their operations. Members should familiarise themselves with the requirements, both in terms of technical maintenance and documentary compliance, and ensure they are met prior to entering any New Zealand ports and, where applicable, on an on-going basis. It is also recommended that owners and charterers ensure that appropriate provisions are included in future charterparties to minimise the scope for disputes.

Members should contact the Managers directly for any further advice and guidance.

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