IN THE MATTER OF AN ARBITRATION HELD IN HONG KONG

Claimant
Reliable Tankers Inc
Reliable Holdings Inc

Respondent
Super Charters

MEMORANDUM FOR THE RESPONDENT

TEAM NO. 4

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V. Prayers for Relief.
I. STATEMENT OF FACTS

1. On 10 October, Super Charterers (‘Charterers’) entered into negotiations with Reliable Tankers Inc., (‘Owners’) (collectively ‘the Parties’) for the charter of a VLCC, MT Reliable Butterfly (‘the Vessel’) to carry a cargo of crude oil (‘Cargo’) from BlueLand to IndigoLand.

2. Negotiations culminated, on 17 November, in a Fixture Recap (‘First Recap’), on subjects, on an amended Asbatankvoy Tanker Voyage Charter Party Standard Terms (‘Asbatankvoy C/P’) and Charterers’ Single Voyage Charter Party Rider Clauses (‘Rider Clauses’). The First Recap provided that Owners’ Standard Terms and Charterers’ Standard Terms of Business (‘Charterers’ Standard Terms’) were “fully incorporated as attached”\(^1\). (Collectively the ‘Charter’).

3. The material clauses in the Charter\(^2\) are:
   
a. Cl.24 of the Asbatankvoy C/P provided for disputes to be referred to arbitration in London with English law as the substantive law.

   b. Cl.1 and 2 of Owners’ Standard Terms required Owners to report periodically to Charterers on the Expected Time of Arrival (‘ETA’) and grant Charterers the right of cancellation should it be evident that the Vessel would miss her Laycan and the revised ETA given by Owners was not to Charterers’ satisfaction.

   c. Cl. 4 of Charterers’ Standard Terms imposed a 20- day time bar from “discharge/ re-delivery and/ or when discharge/ re-delivery would have taken place if for whatever reason it did not”\(^3\) (which Owners requested for an extension to 30 days) for claims against Charterers under the Charter.

4. Additionally, Owners acceded to Charterers’ request to delete the phrase “to either party whatsoever” from Cl. 2 of Owners’ Standard Terms\(^4\). By way of an e-mail dated 19 November, Charterers confirmed that all subjects were lifted on the same day at 1700 hrs (‘Recap Email’). However, the said deletion, agreed to by Owners, was not reflected in the subsequent Fixture Recap sent on the same day in response to the Recap Email (‘Second Recap’).

5. On 19 November\(^5\), Owners informed Charterers that the Vessel had proceeded to the bunker port. In response to Charterer’s concerns about the planned refinery shut down, Owners assured Charterers that the Vessel would reach the discharge port and complete discharge by 10 January.

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\(^1\) see the First Recap.
\(^2\) which was subsequently replicated in the Second Recap
\(^3\) which was acknowledged by Owners to be 10 January in an email dated 19 November
\(^4\) which was reflected in the Recap E-mail at Pg. 51, Moot Question
\(^5\) Pg. 89, Moot Question
6. On 22 November, Charterers received information that the Vessel was arrested at the bunker port. However, Owners refused to put up security or seek a Letter of Indemnity (‘LoI’) from their P&I Club to secure the Vessel’s release. Despite requests by Charterers on 23 November for a revised ETA and Laycan, Owners did not do so⁶.

7. On 27 November, Charterers cancelled the Charter, citing Owners’ failure to provide a revised ETA and Laycan as amounting to providing a revised ETA and Laycan for “undetermined” dates⁷.

8. As a result of Owners’ failure to perform, Charterers decided to secure replacement fixtures to transport the cargo, having found that the anticipated costs associated with continuing with the original Charter⁸ and accepting Owners’ offer of a replacement vessel, outweighed the cost of securing replacement fixtures.

9. On 03 January, the Daily reported that Owners had merged with Reliable Holdings Inc (‘RH’) with RH as the “sole surviving party”. This “happened on the low down back in December 2011” with the “people behind Reliable hav[ing] tried to keep it out of the news”⁹.

10. By way of a Notice of Arbitration issued on 28 January (‘First NoA’), Owners purported to commence arbitral proceedings against Charterers in their own name (‘First Reference’). On 12 February, Charterers contended that the First Reference was commenced defectively in the name of a non-existent party. Subsequently, Charterers commenced arbitral proceedings against Owners for:-

   a. a declaration that the freight was not due and owing to Owners; or

   b. damages amounting to freight payable; and

   c. damages, including:-

      i. increases in freight being the difference between the Charter and replacement fixtures; and

      ii. Sums due and payable to the Load Port terminal/ sellers, Dis Port terminal/ sellers pursuant to the respective sale contracts for delayed arrival.

11. On 24 February, RH issued a fresh Notice of Arbitration (‘Second NoA’), purportedly as replacement for the First NoA. (‘Second Reference’).

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⁶ Pg. 95, Moot Question
⁷ Pg. 96, Moot Question
⁸ As enumerated in Pg. 98 of the Moot Question, which included fees at Load Port terminals for delayed lifting, risk of production shutdown and/or additional storage, increased demurrage and loss of goodwill
⁹ Pg. 100, Moot Question
II. PART ONE- PROCEDURE

A. This Tribunal does not have jurisdiction to determine the claims brought by RH and Owners (collectively “the Vessel Interests”) due to (i) incurable deficiencies in their attempts to commence arbitration and (ii) extinguishment of their claims

12. This Tribunal does not have jurisdiction to determine the claims brought by the Vessel Interests in both References. The First NoA was issued in the name of Owners, a non-existent party. The Second NoA was issued after the relevant time period stipulated in Cl. 4 of Charterers’ Standard Terms, which operated as an absolute contractual time bar for claims against Charterers arising out of the Charter. Accordingly, the Vessel Interests’ claims have been extinguished.

1. The first reference commenced in Owners’ name was a nullity as it was commenced in the name of a non-existent party

13. The First NoA was issued in the name of Owners, which at the time of issuance, had already merged with RH; the latter being the sole surviving party. Consequently, under Fruitland law (i.e. the law of the Vessel Interests’ domicile), Owners no longer existed at the time when the First NoA was issued. The First NoA was therefore invalid as Owners (i) did not have the capacity to be party to the arbitral proceedings, by virtue of the supervening merger, and (ii) were no longer vested with the rights and obligations under the Charter, including the right/obligation to refer disputes arising under the Charter to arbitration.

a) English law does not recognise Owners as a/n (i) existing party to the Charter and (ii) separate existing corporate entity.

14. Under English law, the law of the Vessel Interests’ domicile (i.e. Fruitland law), determines the effects of the merger. Fruitland law recognises the concept of universal succession, whereby the constituent companies’ rights and obligations, including those under the Charter are transferred automatically to the surviving entity.

15. English conflict of law rules provide that the effects of a supervening merger (i) between two foreign companies: the first an original party to an arbitration agreement and the second a third party to the said agreement; (ii) which occurred after the entering into the said agreement but before the purported commencement of arbitration, are to be governed by the law of the parties’ domicile. Where the first has merged into the second, the surviving entity will be recognized in the forum to have assumed, as per under the law of the companies’ domicile, the rights and liabilities of the constituent companies,
even though the forum has no similar mechanism of amalgamation of companies (in terms of effect and process to universal succession).

16. In National Bank of Greece\textsuperscript{10}, a Greek statute amalgamated two original banks into a new banking company and enacted that the new company was the 'universal successor' to rights and obligations of the amalgamated companies. An issue before the House of Lords was whether an English court could recognize that transfer of liability without there being a novation (an accepted method of transferring rights and liabilities between companies under English law, unlike universal succession). The Court held that English law regarded all matters relating to the status of the new company as being governed by the law of the company's domicile and, if the law of the domicile clothed the new company with the rights and liabilities of the old company, the same should be recognised by the English court\textsuperscript{11}.

17. In Eurosteel Ltd\textsuperscript{12}, the Commercial Court held that all matters relating to the rights and obligations of a newly merged company were governed by the law of the domicile of the parties to the merger. In that case, B, a German corporation, entered into a charterparty with E Ltd, an English company, as charterers. B and E Ltd subsequently referred a dispute to arbitration in England under English law. After the commencement of the arbitration, B merged with S, another German corporation. The court had to determine whether: (i) the arbitral proceedings lapsed or came to an end upon the merger and; (ii) the arbitration tribunal had any jurisdiction to determine the claim. Longmore J. concluded that the arbitration "did not die immediately" upon the supervening merger and S could "give notice to continue proceedings"\textsuperscript{13}. Longmore J., applying the ratio in National Bank of Greece in the context of rights to refer disputes to arbitration, held that the law of the domicile determines "whether the rights to arbitrate and the liability to pay costs, fees and damages [where awarded] constituted by the [arbitration agreement] are vested in the surviving company"\textsuperscript{14}.

18. In the instant case, Owners have neither the right nor capacity to commence arbitral proceedings. Fruitland law provides for "merger by universal succession", whereby the surviving entity, "automatically without more... becomes the owner, of all the rights and property of the constituent companies and ... becomes subject to all liabilities, obligations and penalties of the constituent companies."\textsuperscript{15} Accordingly, in the present case, the surviving entity, RH, "automatically takes over all

\textsuperscript{10} National Bank of Greece and Athens SA v Metliss [1958] AC 509
\textsuperscript{11} Per Lord Tucker at 529
\textsuperscript{12} Eurosteel Ltd v Stinnes AG [2000] 1 All ER (Comm) 964
\textsuperscript{13} at 963.
\textsuperscript{14} at 964.
\textsuperscript{15} See Pg. 113, Moot Problem.
rights and liabilities” under the Charter, in particular the right to commence arbitral proceedings for claims arising thereunder, to the exclusion of Owners.

19. Longmore J.’s reasoning in Eurosteel Ltd is apposite. The capacity to “appear as a party” before a contractually agreed tribunal avails only to persons “who validly became and remains a party” to the arbitration agreement. English law, in giving effect to the law of the domicile, no longer recognises Owners as party to the arbitration agreement, after the merger. Thus they no longer had the right to “appear as a party” before this Tribunal. It follows that the First NoA issued by Owners in their name is invalid.

20. Further, under Fruitland law, where “two entities merge by universal succession...there is [only] one, single, surviving entity”\(^\text{16}\). The ‘discontinuing corporation’ is for all intents and purposes a non-existing entity. It is a fundamental rule of English law that proceedings cannot be commenced in the name of a non-existent plaintiff\(^\text{17}\). Accordingly, the First NoA, and all proceedings commenced pursuant to it, should be set aside as a nullity.

b) Owner’s decision to commence proceedings in the name of a non-existing party was a deliberate decision; this is not a mere misnomer and should not be rectified

21. Owners’ act of commencing arbitral proceedings in their own name “evinced a fundamental error, an intention to bring the proceedings by a wrong claimant, which was no longer in existence” and was not “merely the use of a wrong name”\(^\text{18}\). Accordingly, the proceedings in the First Reference are “a nullity and the defect cannot be cured by amending to substitute”\(^\text{19}\) RH in place of Owners.

22. The identity of the party intending to be a claimant in an arbitral proceeding is to be “determined objectively [by looking at the notice] in accordance with the ordinary principles for the construction of a contract, by reference to the notice of arbitration and the surrounding circumstances”\(^\text{20}\). In this case, Owners are the intended claimant as determined objectively by (i) reference to parties identified in the Charter (i.e. Charterers and Owners), and (ii) the surreptitious nature of the merger between the

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\(^{16}\) See Pg. 113, Moot Problem.


\(^{19}\) Lazard Brothers v Midland Bank Ltd [1933] A.C. 289 (HL)

\(^{20}\) Unisys International Services Ltd v Eastern Counties Newspapers Ltd [1991] 1 Lloyd’s Rep 538 at 550-551; 558-562 per Ralph Gibson LJ
Vessel’s Interests. A reasonable respondent in the Charterers’ shoes, reading the First NoA, would have presumed that the intended claimant were the Owners instead of RH.

23. Further, the *bona fides* of the applicant and the prejudice to the other party are relevant considerations in the Court’s exercise of its discretion to amend the notice of arbitration. In *Rodriguez*22, Nield J held that court would “only exercise its discretion to grant leave to amend [the notice], if it was satisfied that the mistake sought to be corrected was a genuine mistake, that it was not misleading or such as to cause any reasonable doubt as to the identity of the person intended to be sued and that it would be just to allow the amendment.”23 In that case the intended defendant was identified as the driver of a particular car. It was held that there was a mistake as to name. However, if the plaintiffs had sued the driver of a different car, there would have been a mistake as to identity. The court held that prejudice to the other party arising from the lack of “ample time and opportunity to prepare his case [or him] hav[ing] been misled in any way”24 could possibly militate against the court exercising its discretion to rectify the mistake.

24. In this case, Owners’ attempt to commence proceedings in their own name was disingenuous. But for the announcement in The Daily, Charterers would have been misled as to the identity of the actual party to the arbitration and would have brought a counterclaim against a non-existent party. Since the mistake as to the party commencing the arbitration is both fundamental and could cause prejudice to the respondent25, this Tribunal should not rectify the First NoA so as to allow RH to substitute Owners in the First Reference.

2. The claims brought by RH in the Second Reference are time barred

25. The Second NoA was issued by RH after the time bar in Cl.4 of Charterers’ Standard Terms26, which was incorporated by virtue of the First Recap27.

26. A party may contract to and be bound by a shorter contractual limitation period than it would otherwise be entitled to under the Limitation Act 1980.2829 Further the contractual time limit for commencing

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21 See Newspaper Article at Pg. 100, Moot Question: “this happened on the low down back in December 2011” with the “people behind Reliable hav[ing] tried to keep it out of the news”.
23 Ibid., at 565-566 per Nield J.
24 Ibid., at 566 per Nield J.
25 For example in terms of difficulties in enforcing the resulting judgment
26 As amended see Pg 91, Moot Question
27 See Pgs 8 and 51, Moot Question which provides that “BOTH PARTIES SPECIAL TERMS FULLY INCORPORATED AS ATTACHED”
28 c.28, Note that the scope of the Unfair Contracts Terms Act, which could otherwise cover such limitations clauses, does not extend to Charter Parties by virtue of ss1(2), 2, 3, 4, read together with Para 2 of Schedule 1 to the Act.
29 *Press Automation Technology Pte Ltd v. Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR(R) 712
arbitration operated as an absolute time bar which extinguished the underlying claim\(^{30}\) and consequently bars any remedy whatsoever.

27. Cl. 4 provided that “all claims against Super Charters must be notified to Super Charters within 10 days after ...discharge would have taken place ..., and any ... proceedings must be commenced within [20] days\(^{31}\)”. Further, Cl. 24 of the Asbatankvoy C/P provides that “either party...may call for such arbitration by service upon any officer of the other ... of a written notice specifying the ... arbitrator chosen by the first moving party...” In this case, the Second NoA appointing Mr. Smith as the arbitrator was issued on 24 February. Hence, the Second Reference was deemed to have been commenced on 24 February. Since the Second NoA was only issued on 24 February (more than 30 days after the date when the discharge of the cargo “would have taken place if for whatever reason it did not”\(^{32}\)), RH’s claims against Charterers were already extinguished before the issuance of the Second NoA.

\(\text{a) This Arbitral Tribunal has no power to extend the time limits for commencing of arbitration}\)

28. The power to “extend the time” for commencing arbitral proceedings is solely vested in the ‘court’ by s. 12 of the Arbitration Act 1996. The ‘court’ in s. 12 refers to “the High Court or a county court”\(^{33}\). This is apparent from the language of s. 12\(^{34}\), which confers on the court a wide range of powers and control over the application. This is further supported by s. 12(6) which requires the leave of court for any appeal arising out of its decision exercised pursuant to s. 12. Hence, an application to extend time to commence arbitration is to be made to the courts, and not before this Tribunal.

29. Since the First Reference was commenced invalidly by a non-existent party, and the Second Reference was commenced after the expiration of the time period stipulated in Cl. 4 of SC’s standard terms, the Vessel Interest’s claims are extinguished.

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\(^{30}\) Metalfer Corporation v Pan Ocean Shipping [1997] CLC 1547 at [18]-[20]; Nanjing Tianshun Shipbuilding Co Ltd v Orchard Tankers PTE Ltd, [2011] EWHC 164 at [21]-[22]; Wholecrop Marketing Ltd v Wolds Produce Ltd, [2013] EWHC 2079 (Ch)

\(^{31}\) as extended to 30 days by mutual agreement

\(^{32}\) Cl. 4, Charterers’ Standard Terms

\(^{33}\) s. 105(1) Arbitration Act 1996

\(^{34}\) s. 12(1) provides that “the court shall make an order...”
III. PART TWO- RESPONSE TO CLAIMS BY RELIABLE TANKERS

A. Charterers are not liable to Owners for any advance freight

30. The Charter provides that freight is “computed on intake quantity”\(^{35}\) except where Charterers have loaded onto the Vessel a quantity less than 260,000 MTS, in which case a minimum freight is payable. Since no cargo has been loaded onto the Vessel, no freight is deemed earned and payable.

1. Provision for freight payable on the basis of a minimum intaken quantity only applies where the Vessel has arrived at the Load Port and some cargo has been loaded

31. “FREIGHT PAYABLE BSS MIN 260,000 MTS REGARDLESS OF ACTUAL QUANTITY LOADED” for (“Minimum Freight Provision”) necessarily presumes that the Vessel has arrived at the Load Port ready to receive the cargo for which “freight is computed”.

32. The Minimum Freight Provision is inapplicable here. No cargo has been loaded as a result of Owners’ failure to deliver the Vessel to the Load Port arising from her arrest. The Minimum Freight Provision only applies where (i) the Vessel has arrived timeously at the Load Port, (ii) into which Charterers could subsequently load, albeit (iii) the cargo loaded was less than the minimum amount. As a result of Owners’ failure to deliver the Vessel to the Load Port due to her arrest, Charterers did not load any cargo onto the Vessel.

33. This interpretation of the Minimum Freight Provision reflects the fact that Owners’ and Charterers’ obligations are mutual; Charterers’ corresponding obligation to provide cargo for loading, “on which freight is computed”, is contingent upon Owners fulfilling its prior obligation to bring the Vessel to the Load Port\(^{36}\).

34. Since the Vessel did not arrive at the Load Port, Charterer’s mutual obligation to provide cargo, upon which freight is computed, was not triggered. Since the freight is “computed on intaken quantity”\(^{37}\), no freight was in fact “deemed earned and payable”\(^{38}\) on the lifting of subjects.

35. Owner’s contention that “95% [of Minimum] Freight was deemed earned ... upon lifting of subjects”\(^{39}\) is flawed. Owners’ purported construction of Cl. 4 would unfairly prejudice the Charterers. Charterers would be liable to pay minimum freight, despite Charterers’ readiness to provide a full cargo and Owners’ failure to meet its obligation to deliver the Vessel to the Load Port. The fact that Owners’

\(^{35}\) Cl. 1 Asbatankvoy C/P
\(^{36}\) Cl. 1 and 2 of the Asbatankvoy C/P
\(^{37}\) Cl. 2 Asbatankvoy C/P
\(^{38}\) on Owner’s purported construction of Cl.4 of its Standard Terms, which Charterers specifically deny
\(^{39}\) See para. 14 of Owners’ Claim Submissions at pg. 107, Moot Problem
construction of Cl. 4 “leads to a very unreasonable result must be a relevant consideration”. The “more unreasonable the result [and the greater the consequent prejudice to one party], the more unlikely that parties can have intended it, and if they do intend it the more necessary it is that they should make that intention abundantly clear”40.

B. Alternatively, freight is not payable for a total failure of consideration

36. No freight is due and payable under the Charter because of a total failure of consideration as Owners did not perform any portion of the contracted voyage.

1. The approach voyage from the Bunkering Port to the Load Port will be the commencement of the contracted voyage as contemplated by the parties

37. The point at which the approach voyage commences is the start of the contracted voyage41 as defined in the Charter42. Since Owners’ initial obligation under Cl.1 of the Asbatankvoy C/P is to “proceed to the Load Port”, that point will not normally commence until the vessel is “free of her previous engagements”43 and is proceeding to the Load Port for the purpose of loading the cargo. On the facts, the Charter contemplated the start of the contractual voyage to be the point in time the Vessel departs from the bunker port and proceeds to the Load Port, instead of the date “when the Charter was agreed” (as contended by Owners44). At the time the Charter was agreed, the Vessel was still in the midst of completing her previous charterparty. Cl. 1 of the Asbatankvoy C/P provides for the vessel to “proceed as ordered to Load Ports ...” and Cl. 2 of Charterers’ Standard Terms provides that the ship will “be fully bunkered to perform the contracted voyage”. The former clause contemplates the contracted voyage to commence on the Vessel’s immediate prior voyage to the Load Port. The latter clause expressly re-affirms Owners’ obligation at common law45 to provide a sufficiently-bunkered vessel for the prosecution of the contracted voyage prior to commencement of the contracted voyage. Cl. 2 necessarily contemplates that (i) any voyage to undertake bunkering would be at Owners’ risk and not within the contracted voyage for which any consideration in the form of freight is apportioned; and (ii) the contracted voyage would only commence after completion of bunkering operations.

40 Schuler v. Wickman [1973] 2 W.L.R. 683 at 689 per Lord Reid
42 Re Thornett & Fehr [1921] 1 K.B. 219
43 Thomas v. Clarke (1818) 2 Slack 450.
44 See para. 7 of Owners’ Claim Submissions at pg. 106, Moot Problem
45 Darling v. Raeburn [1906] 1 K.B. 572 per Kennedy J and affirmed by the Court of Appeal [1907] 1 K.B. 846
2. Since the Vessel did not complete any portion of the contracted voyage, this Tribunal should declare that no freight is due and payable to Owners

38. The Vessel did not complete any portion of the contracted voyage for which freight is due and payable. It was arrested at the bunkering port and could not proceed to the Load Port. Subsequently, the Charter was validly cancelled by Charterers on 27 November while the Vessel remained under arrest. Accordingly, this Tribunal should declare that no freight is due and payable for a total failure of consideration and relieve Charterers from the obligation to pay freight under the Charter.

IV. PART THREE- CLAIMS AGAINST RELIABLE HOLDINGS INC

A. Cl.2 does not preclude Charterers’ claims upon cancellation of the Charter

1. Cl. 2 provides for automatic cancellation without either party being required to act further; it does not release either party from further liabilities under the Charter

39. The phrase “without recourse to either party whatsoever” in Cl.2 of Owners’ Standard Terms merely explains the effect of cancelling the Charter pursuant to Cl.2. Cl.2 modifies the Cancelling Clause in Part 1 of the Asbatankvoy C/P by granting the option for Owners to provide a new Laycan, when it becomes evident that the Vessel will miss her Laycan. Charterers in turn can elect to confirm or decline the new Laycan. If Charterers decline, the phrase “without recourse to either party whatsoever” deems the effect of such a choice as similar to terminating the Charter pursuant to the Cancelling Clause. The Cancelling Clause and Cl.2 grant Charterers an express contractual right to terminate the Charter, “although there may have been no breach by the Owners” as long as the Vessel does not reach the Load Port before the Cancelling Date (‘Cancelling Clause’) or Charterers decline the new Laycan (Cl.2). Conversely, cancelling the Charter pursuant to Cl.2 or the Cancelling Clause, without Charterers establishing a subsisting independent breach of the Charter, does not ipso facto grant Charterers the right to claim damages (e.g. for delay). In other words, cancelling the Charter is ‘without recourse to either party whatsoever’.

40. Such an interpretation is consistent with parties’ reasonable commercial expectations. The Cancelling Clause protects both Owners and Charterers in the event that the Vessel’s progress to the Load Port is impeded. Charterers can terminate the charter and find an alternative vessel and Owners do not incur

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46 The Democritos [1976] 2 Lloyd’s Rep. 149, 152 per Lord Denning M.R.
47 Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896
the liability which they would have incurred by promising delivery of the Vessel at a specific time. Cl. 2 reinforces this protection: instead of the parties having to wait for the Cancelling Date to arrive, when Owners are of the view that the Vessel will miss her cancelling date, Owners are entitled to give a new Laycan, which Charterers can accept or decline. This allows both parties to make a decision expeditiously where the Vessel’s progress on the preliminary voyage is slower than expected.

41. In contrast, the interpretation of Cl. 2 as put forth by Owners would defeat the commercial purpose of such a scheme. Where the effect of Charterers declining the new Laycan is to release both parties from further obligations and liabilities, either party would be hesitant to avail themselves to the commercial benefits intended by Cl. 2 as they would not want to give up any potential causes of action or contractual rights which might have arisen.

2. Alternatively, Cl. 2 should be rectified by removing the phrase “without recourse to either party whatsoever” due to a unilateral mistake on Owners’ part.

42. Alternatively, Cl. 2 should be rectified by removing the said phrase as Owners knew of Charterers’ misapprehension of the effect of the removal of the phrase “to either party whatsoever”.

43. Where a party takes “unconscionable advantage of another’s ‘unilateral mistake’ in believing that the document accurately recorded the agreement”\textsuperscript{50}, the party seeking rectification must prove (i) the disparity between his understanding of what the agreement, as intended by both parties, to be and the document, and (ii) the other party’s knowledge of the mistake, whether through its own knowledge or the knowledge of its agents (or lawyers drafting the contract)\textsuperscript{51}. It is “unconscionable for the party tainted with knowledge to resist rectification”\textsuperscript{52}.

44. Unconscionable conduct includes conduct where the party leading the other into a trap “may not actually know, but simply suspects”, that the “entrapment has been successful”\textsuperscript{53}. In Littman\textsuperscript{54}, the Court of Appeal ordered rectification where a party’s lawyer had bungled the drafting of a one-sided clause, but the counterparty’s lawyers understood her game. The agreement was rectified to coincide with the first party’s intention even though the second party would never have agreed to that clause. Jacob L.J. regarded “this attempt to take advantage of an obvious drafting error as inequitable”.

\textsuperscript{48} The Democritos, supra n. 46 at 154 per Bridge L.J.
\textsuperscript{49} See [12] of Owners’ Claim Submissions at pg. 106, Moot Problem
\textsuperscript{50} A Roberts & Co Ltd v Leicestershire County Council [1961] Ch 555, Ch D (Pennycook J)
\textsuperscript{51} Commission for New Towns v Cooper (Great Britain) Ltd [1995] Ch 259, CA at 277 per Stuart-Smith L.J.; George Wimpey UK Ltd v VI Construction Ltd [2005] EWCA Civ 77
\textsuperscript{52} McMeel, [17.39]
\textsuperscript{53} Ibid.,
\textsuperscript{54} Littman v Aspen Oil (Broking) Ltd [2005] EWCA Civ 1579, [24] per Jacob L.J
45. In this case, Owners’ conduct was equally unconscionable, if not more so. Owners were aware of (i) Charterers’ concerns that Owners’ Standard Terms were ‘biased’ towards Owners and (ii) Charterers’ misapprehension that removing the phrase “to either party whatsoever” had the same effect as removing the entire phrase “without recourse to either party whatsoever”, thus allowing recourse by Charterers against Owners in the event of termination. Owners chose to accede to the Charterers’ request simply to entice the latter into entering into the Charter knowing that the removal of the phrase “to either party whatsoever” did not make “any difference”. In the circumstances, it was unconscionable for Owners to subsequently resist the rectification of Cl.2 to accurately reflect Charterers’ understanding.

3. Further in the alternative, Cl. 2 falls to be rectified for common mistake by removing the words “to either party whatsoever” and construed accordingly.

46. Alternatively, Cl. 2 ought to be rectified by removing the words “to either party whatsoever”.

47. This Tribunal should construe Cl.2, after rectification, as providing an automatic cancellation without either party being required to act further but with neither being released from liability.

a) The words “to either party whatsoever” should be removed to rectify the parties’ common mistake.

48. The Second Recap does not reflect the parties’ agreement in the First Recap to delete the phrase “to either party whatsoever” in Cl. 2.

49. The remedy of rectification to correct a common mistake may be granted by the court when what has been agreed by the parties is wrongly recorded in the contractual document without either party being aware of such mistake. The conditions for rectification for common mistake are that: (i) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (ii) there was an outward expression of accord; (iii) the intention continued at the time of the execution of the instrument sought to be rectified; (iv) by mistake, the instrument did not reflect that common intention.

55 per the Internal Memorandum to the Owner’s Management, pg 3, Moot Question
56 Chitty at para. 5-110
57 Chitty at para. 5-115; Chartbrook Ltd v. Persimmon Homes Ltd [2009] UKHL 38 at [48] per Lord Hoffman; Swainland Builders Ltd v. Freehold Properties Ltd [2002] 2 E.G.L.R. 71 at 74, para. 33 per Peter Gibson L.J.
Further, the extent of ratification must be “clearly ascertained and defined by evidence contemporaneous with or anterior to the contract”. Based on the First Recap and correspondence between the parties on 19 November 2011, the conditions for rectification have been met. The First Recap contained the words “save ‘TO EITHER PARTY WHATSOEVER’ is deleted from Reliable Tankers Terms”. Charterers confirmed the Charter on 19 November through their Recap Email, accepting the terms of the First Recap and confirmed that there was a contract “fully fixed with subjects lifted at 1700” and asked for a “drawn up charter for signatures in due course”. However, the Second Recap sent in confirmation of the Charter did not contain the deletion which the Parties had agreed upon. The terms of the Charter are those reflected in the First Recap. The Charter should be rectified to that extent.

4. **On a proper construction of the rectified Cl. 2, neither party is released from liability when the Charter is terminated pursuant to Cl. 2.**

51. The rectified Cl. 2 does not exclude Charterers’ right to claim damages for Owners’ repudiatory breaches and/or renunciation under general law.

52. In the absence of clear words to the contrary, the presumption is that a party does not intend to contractually exclude any remedies or rights of recourse which arise under general law. In *Stocznia Gdanska*, a clause entitled the shipyard to terminate the contract, if the buyers did not make payment on time, and to retain and apply past payments and proceeds from the sale of the vessel to the recovery of its losses. The sellers contended that the contractual termination clause in that case was a self-contained code which superseded all common law remedies. The court disagreed and held that the clause was “not an exhaustive or self-contained code” and thus a resort to it did not exclude the common law action for debt or for damages. In earlier proceedings in the same case, the House of Lords noted that depriving a party of his common law right would result in serious consequences and “clear words are needed” to show that a party intended to “relinquish his rights arising by operation of law”. Thus, a clear wording of terms is needed to rebut “the presumption...that neither party intends

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58 Chitty at para. 5-130; Stait v. Fenner [1912] 2 Ch. 504.
59 See pg 8, Moot Problem.
60 See pg 46, Moot Problem.
62 Ibid., at [72] per Rix LJ
63 *Stocznia Gdanska SA v. Latvian Shipping Co.* [1998] 1 All ER 883
64 Ibid., at 893-895, 899, 905-906 and 911.
to abandon any remedies for its breach arising by operation of law.” In other words, the law presumes that a contracting party did not intend to abandon any remedies for breach of contract arising by operation of law.

53. There are no clear words in Cl. 2 to show that Charterers’ right under general law to recover damages is extinguished when Charterers exercise the right of termination under Cl. 2.

54. Further, Owners’ interpretation of Cl. 2 with the words “without recourse”, effectively transforms Cl. 2 into a release clause which completely excludes the liabilities of both parties. “[S]pecially exacting standards” should be applied to such “release” clauses because of the “inherent improbability that the other party to the contract containing such a clause intended to release the proferens from a liability that would otherwise fall upon him.” This Tribunal ought to apply a similarly strict standard in construing Cl. 2 and find Owners’ interpretation unsustainable. In this case, it is clear from Charterers’ conduct that they did not intend to release Owners from liability altogether. It was Charterers who insisted on the amendment to Cl. 2 by removing the words “to either party whatsoever” as they did not want to be left without recourse should the Charter be terminated pursuant to Cl. 2.

55. Charterers’ right to recover damages under common law remains unaffected as the words “without recourse” are not sufficiently clear to make Cl. 2 the sole scheme for the termination of the Charter, excluding Charterers’ right to damages under general law.

B. Charterers’ Notice of Cancellation was a valid acceptance of Owners’ repudiatory breach and/or renunciation

1. Charterers’ unequivocal conduct is sufficient to constitute valid acceptance; they are not required to specify the ground relied on at the time of cancellation.

56. The Notice of Cancellation issued by Charterers on 27 November constituted a valid acceptance despite the fact that it made no specific mention of the ground relied upon, and was worded as a notice under Cl. 2 of Owners’ Standard Terms. It is established law that an acceptance is valid if it is justifiable by a valid reason unknown or undisclosed at the time of the termination, provided that the reason existed at that time. Thus if the undisclosed ground was a repudiatory breach, the purported termination then became an acceptance of that breach. Consequently, an acceptance of repudiation need not be made with knowledge of or in response to the repudiation. Owners’ numerous breaches (as

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65 Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd [1974] AC 689 (H.L), at 717 per Lord Diplock; Stocznia v. Latvian Shipping [1998] 1 WLR 574, at 585 per Lord Goff of Chieveley

66 Ailsa Craig Fishing Co. Ltd v. Malvern Fishing Ltd. [1983] 1 WLR 964 at 970 per Lord Fraser
enumerated in IV.C. below) individually or collectively constituted a repudiatory breach and/or renunciation which subsisted at the time of notice. Thus, the purported termination under Cl. 2 became a valid acceptance of these breaches. The notice did not preclude Owners from subsequently claiming to have terminated it under common law and sue for damages. On the contrary, the Notice expressly reserved all Charterers’ rights in relation to the Charter, “including... [their] right to claim for losses resulting from [Owners’] breaches of charterparty” and was equivocal as between reliance on Cl. 2 or common law in terminating the contract for breach.

C. Charterers are entitled to terminate at common law for Owners’ Repudiatory Breach and/or Renunciation.

1. Failure to commence the approach voyage and to proceed with reasonable despatch

57. Cl. 1 of the Asbatankvoy C/P\(^67\) requires Owners to prosecute the approach voyage with “convenient dispatch”. It extends the implied common law obligation in which the owner undertakes that his vessel shall be ready to commence the voyage agreed upon, load the agreed cargo and prosecute the voyage with all reasonable despatch.\(^68\)

58. Although the Cancelling Clause does not import an absolute promise by Owners that the Vessel would reach the Load Port at the stipulated date, Owners were under a qualified obligation to commence the approach voyage by such time as the Vessel, proceeding normally, would arrive by the Cancelling Date\(^69\).

59. Based on the parties’ objective intention, as expressed in the Charter\(^70\) and their correspondences, the obligation to proceed with convenient dispatch and to commence the voyage in such time as necessary “[went] to the very root”\(^71\) of the Charter and hence should be treated as a condition. Owners were clearly aware of the time constraints\(^72\) and Charter’s fundamental commercial objective\(^73\) of reaching the Load Port before the refinery shut down.\(^74\)

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\(^{67}\) “The vessel ... shall with all convenient dispatch, proceed ... to the Load Port”

\(^{68}\) Louis Dreyfus & Co. v. Lauro (1938) 60 Ll LR 94, at 97 per Branson J.; Fyffes Group Ltd v. Express Lines Pty Ltd (The Kriti Rex) [1996] 2 Lloyd’s Rep 171, at 191 per Moore-Bick J.

\(^{69}\) The Myrto [1984] 2 Lloyd’s Rep 341

\(^{70}\) Cl. 1 and RECAP

\(^{71}\) Glaholm v Hays (1841) 2 Man. & G. 257 at 266

\(^{72}\) Having noted in their email dated 19 November that “loading is likely to take only a few days, she should sail by 8 December, and with a 30 day voyage time and a few days to discharge, all should be completed early in January, say 10th January. That should make sure she is clear before the planned refinery shutdown which [the Charterers] mentioned from 15 January.” Pg. 89 Moot Question

\(^{73}\) Charterers’ Chartering Manager noted that for the specific cargo to be carried, “only one VLCC (Reliable Butterfly) was available on near dates from a thin tonnage list”, pg. 90 Moot Question. Thus, had Charterers been made aware that the Vessel would not be able to reach the Load Port and disport at the respective agreed dates, they would not have chartered it.

\(^{74}\) See pg. 89, Moot Problem.
60. Since Owners failed to commence the approach voyage at all because the Vessel did not leave the bunkering port to proceed to the Load Port, they were in breach of a condition of the Charter for which Charterers were entitled to terminate.

61. Alternatively, the obligation could be classified as an intermediate term which Charterers can terminate for breach if the requirement for substantial failure is satisfied. Alternatively, the obligation could be classified as an intermediate term which Charterers can terminate for breach if the requirement for substantial failure is satisfied.75

62. In the present case, despite knowing that there was only a five-day grace period between the intended date of discharge (10 January) and the planned refinery shutdown, Owners did not exercise reasonable efforts to secure the release of the Vessel so as to meet the Laycan.76 Owners made a calculated decision to safeguard their own financial position, at the expense of their undertaking to perform the Charter obligations with reasonable despatch. Further, although Owners agreed that the Vessel needed to sail by 25 November, the Vessel, on that day was still under arrest. These breaches, collectively, “deprived [Charterers] of substantially the whole benefit of the contract”77 (which was the provision of carriage of cargo during the scheduled dates), as the Vessel certainly could not reach the Disport, given her arrest at the Bunker Port, and discharge the cargo before the planned refinery shut down. Charterers were thus entitled to terminate the Charter.

2. Owners’ renunciation by declaring that the Vessel was unable to meet the Laycan

63. Alternatively, Owners’ unequivocal declaration of their inability to meet the Laycan constituted a renunciation of the Charter, which entitles Charterers to terminate the Charter.

64. In The Mihalis Angelos78, the Court of Appeal held that the charterers had the right to regard the charterparty as being repudiated by the owners where it was clear that there was no reasonable prospect of the vessel being able to perform the contemplated voyage. This right can arise even before the contractual right to terminate accrues; the contractual right and the common law right to terminate need not arise contemporaneously.

65. In their email dated 25 November 2011, Owners stated unequivocally that they “have not been able to have the RELIABLE BUTTERFLY released from arrest. She will not therefore make her Laycan.”79 Thus, Cl. 2 permitted Owners’ to propose another Laycan, Charterers were not obliged to wait for a

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75 Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 Q.B. 26
76 In their Internal Memorandum dated 23 November, the Owners chose not to approach their P&I Club for a LOI because renewals for club cover were due in February. A LOI from the P&I Club would have secured the release of the Vessel.
77 The Hansa Nord [1975] 2 Lloyd’s Rep 445
79 See pg. 95, Moot Problem.
revised Laycan. Owners were aware of Charterers’ time constraints. As a matter of commercial sense, Charterers could not be expected to wait for a revised Laycan when Owners had already proved themselves unable to reach the Load Port. Thus, Charterers acted reasonably in regarding Owners’ inability to give a revised Laycan as giving a Laycan for indeterminate dates and terminating the Charter accordingly.

D. Cl. 5 does not preclude a claim for consequential damages arising from Owners’ failure to secure the Vessel’s release.

66. Cl. 5 of Owners’ standard terms do not preclude Charterers’ claims for consequential damages. English law does not recognise gross negligence as a separate standard distinct from negligence \textit{simpliciter}. Hence, Charterers simply need to prove negligence \textit{simpliciter} on Owners’ part. In any event, Owners’ failure to secure the Vessel’s release clearly constituted ‘\textit{gross negligence}’ under the circumstances.

\begin{enumerate}
    \item \textit{English law does not recognise a concept of ‘gross negligence’; negligence \textit{simpliciter} suffices for a claim of consequential damages under cl. 5}
\end{enumerate}

67. Cl. 5 only operates to exclude Owners’ liability for consequential damages other than that arising from negligence \textit{simpliciter}. There is no concept of gross negligence in English law. Since ‘\textit{gross negligence}’ is neither defined in the Standard Terms, nor defined by reference to a foreign jurisdiction, it could have no meaning other than mere ordinary negligence.

68. The orthodox English position is that no “\textit{intelligible distinction exists}” between gross negligence and negligence. In \textit{Hinton v Dibber\textsuperscript{80}}, the defendants argued that the trial judge should have directed the jury that the plaintiffs had to prove “\textit{gross or culpable negligence}”, negligence \textit{simpliciter} being insufficient to rule against the defendants. Lord Denman rejected the arguments as there was no difference, under English law, between the two.

69. In special cases where courts have recognised a distinct and separate standard of ‘\textit{gross negligence}’, a (i) foreign definition has been imported through a choice of substantive law of a jurisdiction which recognises a concept of gross negligence, or (ii) that concept has been (a) defined within the contract or a (b) distinction is drawn between the two concepts such that an indication arises by implication as to when the threshold of gross negligence is met.

\textsuperscript{80} (1842) 2 Q.B. 646
70. In *The Hellespont Ardent*[^81], the issue was whether an exclusion clause in the Commercial Advisory Agreement operated to exclude liability by the advisers in making recommendations without proper basis. Cl. 7.9 provided that “the Commercial Advisor ... shall not be liable ... for any losses suffered ... under this Agreement... except Damages resulting from ... gross negligence ...”

71. Both parties accepted that New York law[^82] applied in the interpretation of ‘*gross negligence*’ in Cls. 2 and 7.9. Hence Mance J’s elucidation of a separate standard of “*gross negligence*” in English law by applying “purely English principles of construction” was *obiter.*

72. In *Tradigrain*[^83], Moore-Bick LJ observed that “[t]he term ‘*gross negligence*’, although often found in commercial documents, has never been accepted by English civil law as a concept distinct from simple negligence”; gross negligence is simply “ordinary negligence with a vituperative epithet.”[^84]

73. In *Camarata Property Inc*[^85], Smith J rejected the plaintiff investor’s argument that since there was no concept of gross negligence in English Law, the exclusion clause should be simply read as “*excluding liability for ‘mere’ negligence*”[^86]. Smith J held that “[t]he relevant question is not whether generally gross negligence is a familiar concept in English civil law, but the meaning of the expression in... the Terms and Conditions.” Since the said clause referred to both negligence and ‘*gross negligence*’, the parties must have intended there to be “*some distinction between the two concepts*”[^87]. However, in that case, the Commercial Court did not have to articulate a formulation for ‘*gross negligence*’. It held that, on the facts, Credit Suisse did not fail to “*exercise reasonable skill and care*” and “*a fortiori, [clearly would] not have been grossly negligent.*”[^88] Further, the court observed that the interpretation of ‘*gross negligence*’ was less certain: “*it is not easy to define or even to describe with any precision.*”[^89]

74. The possibility of an operative concept of ‘*gross negligence*’ arises only on the actual wording of the relevant exclusion and on the unique facts. It is of no assistance to Owners since the Charter is governed by English law and the term ‘*gross negligence*’ is not defined anywhere.

[^82]: Mance J cited and used numerous New York authorities, at 581-586
[^84]: Ibid., at [23].
[^85]: *Camarata Property Inc v Credit Suisse Securities (Europe) Ltd. (H.C.)* [2011] 1 CLC 627
[^86]: Ibid., at [160].
[^87]: Ibid., at [161].
[^88]: Ibid., at [161].
[^89]: Ibid., at [161].
2. Owners’ failure to put up security for the Vessel’s release in light of their knowledge, imputed or actual, of the severe consequences that will invariably result to Charterers, is grossly negligent.

75. Alternatively, should this Tribunal find there is a concept of ‘gross negligence’ distinct from negligence simpliciter, Owners’ actions in response to the Vessel’s arrest constituted gross negligence.

76. In The Hellespont Ardent\textsuperscript{90}, Mance J. noted that ‘gross’ negligence could mean “something more fundamental than failure to exercise proper skill and/or care constituting negligence. The concept of “gross negligence” ‘seems... capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk.’\textsuperscript{91}

77. Owners knew of the planned refinery shut-down on 15 January, as evidenced by the email dated 19 November\textsuperscript{92}. Owners must have recognised the importance of meeting the Laycan. The correspondence between the parties dated 22 November and 23 November shows that Owners knew that the Vessel had to be released from arrest and to sail by 25 November if she were to make her Laycan\textsuperscript{93}. Further, Owners were in the business of chartering out oil tankers and must have been familiar with the commercial practices and price volatility of the crude trade, with its corresponding time-sensitivity. Thus, Owners must have been aware of the risk and gravity of the financial consequences to Charterers resulting from a delayed delivery of the cargo.

78. It is also clear from Owners’ Internal Memorandum\textsuperscript{94} that Owners did not have the required funds to put up security but unreasonably chose not to approach their P&I Club for assistance in that respect. This was a calculated decision on Owners’ part with its own self-interest in mind despite a clear appreciation of the financial consequences to Charterers. Further, Owners had to have known that by choosing to negotiate for a lower amount of security instead of acceding to the bunker suppliers’ demands, it was impossible for the arrest to be lifted on time for the Vessel to meet her Laycan.

E. Charterers are entitled to both direct and consequential damages arising from the Owners’ failure to perform the Charter

79. By reason of Owners’ breaches, Charterers have suffered loss and damage and claim the following:

\textsuperscript{90} [1997] 2 Lloyd’s Rep. 547
\textsuperscript{91} Ibid., at 586 col. 2
\textsuperscript{92} See Pg. 89, Moot Question
\textsuperscript{93} dated 23 November, see Pgs. 92 and 94, Moot Question
\textsuperscript{94} See Pg 93, Moot Problem
a. Direct losses: Increase in freight in the amount of US$824,000 being the difference between Charter freight and the amount payable under the replacement fixtures secured by Charterers.

b. Consequential losses: (i) sums due and payable to the Load Port terminals/sellers pursuant to the relevant sale contract for delayed arrival, in the amount of US$100,000; and (ii) sums due and payable to the disport terminal/buyers pursuant to the relevant sale contract for delayed arrival in the amount of US$300,000 in respect of losses suffered from delayed planned maintenance work.

80. Further, Charterers acted reasonably in cancelling the Charter and entering into a replacement fixture. Consequently, Owners failed to prove that Charterers’ want of reasonable mitigation and so Charterers are entitled to claim the aforementioned damages in full.

1. Charterers are entitled to damages which would put them in a position had the Charter been performed

81. Since Owners failed to provide the Vessel and have completely failed to carry the cargo, the normal measure of damages claimable as direct losses is the cost of obtaining substitute transportation less the price under the Charter.\(^95\)

82. Charterers are entitled to a measure of damages that would have put them in a position that they would have been if the Charter had been performed without Owners’ default. The costs incurred in fixing the replacement vessels is a recognised head of direct loss and is computed on the basis of what it will cost the claimants to obtain alternative performance (or completion of performance) of the original contractual undertaking by a third party.\(^96\) Thus, Owners are liable for the cost of the Replacement Fixtures entered into by Charterers less the price that Charterers would have paid under the Charter.

2. Further, Charterers’ are entitled to consequential damages as their claims are not too remote

83. Owners are liable for the consequential losses as they ought to have reasonably contemplated the damages resulting from their breaches.

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\(^95\) *Hinde v. Liddell* (1875) L.R. 10 Q.B. 265 at 268

a) Owners ought to have known that the cargo was carried pursuant to a sale contract and damage to the Charterers under the sale contract resulting from delay was likely

84. The rule in *Hadley* governs the extent of damages that can be recovered for a breach of contract. In order to claim damages under the ‘first limb’ of *Hadley*, Charterers must be able to show that the loss was reasonably foreseeable at the time the Charter was entered into. In this respect, parties are assumed as possessing a certain level of knowledge in the “usual course of things”.

85. The ‘second limb’ in *Hadley* allows the recovery of additional damages based on the parties’ actual knowledge of special circumstances above the usual course of things.

86. This Tribunal ought to find Owners liable for Charterers’ consequential losses because Owners can reasonably be imputed with knowledge of the relevant sale contract under the ‘first’ and/or ‘second limb’ of *Hadley*.

87. It is a “matter of fact”, in any case what degree of knowledge is “found to be, or reasonably treated as, possessed by the party in breach”100. In *The Kriti Rex*101, Moore-Bick J held that a “carrier in a specialised trade” should be “well aware of the general nature of the trade” including the trading patterns of the product being carried. In that case, the plaintiff sub-charterers brought an action against the charterers for breach of volume contracts in failing to tender the vessel for loading. They sought to recover damages based on the projected value of the banana shipment at the Load Port. The charterers sought to recover sufficient damages against the shipowners (2nd defendants) to indemnify themselves against the liabilities they had incurred to their sub-charterers.

88. On the remoteness issue, Moore-Bick J had to consider if the shipowners had a reason to consider that a failure to exercise due diligence to maintain the vessel’s seaworthiness was not unlikely to cause the charterers to incur a liability to the sub-charterer of the kind which was incurred. He held that the losses were not too remote. When a vessel is time chartered for a period of three years for worldwide trading, the owners will “almost inevitably contemplate that it may be sub-chartered for some if not all of the period of the charter” The existence of sub-charter contracts is, therefore, “clearly within the owners’ contemplation”, as is the “likelihood that a breach of charter on their part which renders the vessel

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97 *Hadley v. Baxendale* (1854) 9 Ex. 341
98 *Hadley* at 354-355 per Alderson B
99 *Hadley* at 354-355 per Alderson B
100 *Voyage Charters*, [21.27]
unseaworthy will cause charterers in turn to incur liability to the cargo owners”. The shipowners argued that what rendered the loss too remote in this case was the peculiar nature of the bananas which were cut ahead of the vessel’s arrival and thus could not withstand prolonged delay waiting for alternative transport. However, Moore-Bick J disagreed. The carriage of bananas from tropical ports to Europe “has been going on for many years”. Bananas are “one of the well-established cargoes for refrigerated vessels”. He would “be surprised” if these shipowners were “not aware of the general nature and demands of the trade”. He did not accept that the owners were “unaware of the particular nature of this trade or the “ensuing consequences if the vessel was unable to load the cargo as a result of a breakdown of the kind which occurred.”

89. Similarly, in *The Baleares*¹⁰³, the owners disputed the charterers’ recovery of consequential damages because they had no knowledge of the fixed price contracts between the charterers and third party purchasers of the propane cargo. The Court of Appeal found that such losses were not too remote since a carrier in this specialized trade would “know a considerable amount about the patterns of trading of the product which he was carrying”. Although the owners had “no knowledge of the existence or terms of specific trades or specific contracts” made by the charterers, they “must have realized” that it was “not unlikely that the charterers would have made forward sales at fixed prices”¹⁰⁴.

90. In this case, this Tribunal should allow the full extent of Charterers’ claims for damages. Owners must have realized that it is not unlikely that Charterers were shipping oil pursuant to a sale contract. First, Owners were in the specialized trade of supplying tankers for oil transportation having previously operated under the name “Reliable Tankers”. Furthermore, Owners knew that they were carrying a cargo of crude oil to a refinery, and must have realized that the Charter for carriage of crude oil to a refinery was made pursuant to a contract of sale. In addition, oil is a valuable and highly traded commodity but is price-volatile. Owners, as commercial parties in this specific trade, must be aware that time is of the essence and any delay was likely to result in fluctuations in the value of the oil with serious financial consequences to the Charterers whether loss from subsequent on-sale or damages payable to the consignee/shipper under the relevant contract of affreightment.

91. Further, the planned terminal shutdown was repeatedly brought up in the parties’ correspondence both pre-contract and during performance of the contract itself. Based on Owners’ Internal Memorandum dated 14 November, Owners did have actual knowledge of the planned terminal shutdown and that it

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¹⁰² *The Kritì Rex* at 203
¹⁰⁴ *Ibid.*, at 227
was a concern of the Charterers. Owners had to have known that the losses that Charterers were claiming would be likely to result from a failure to deliver the Vessel at the Load Port timeously. Accordingly, this Tribunal should grant allow Charterers’ claim for consequential damages.

3. Owners are unable to prove that the damages were irrecoverable for want of reasonable mitigation, thus Charterers are entitled to claim these damages in full.

92. Owners failed to discharge its onus of proving Charterers had failed to mitigate. The onus of proof is on the defendant to show that the claimant ought reasonably to have taken certain mitigating steps and could thereby have avoided some of their losses, otherwise the normal measure of damages (i.e. all damages that are taken to have flowed in law from Owners’ breach) will apply.

93. Owners failed to prove that Charterers’ decision to (i) cancel the Charter, (ii) decline Owners’ offer of a replacement vessel and (iii) fix replacement Charters of Suezmax-class vessels was unreasonable.

94. The standard of reasonableness is not a high one and should be tilted in favour of the claimant in view of the fact that the defendant is an “admitted wrongdoer” and “occasioned the difficulty”. The claimant is not obliged to take any steps other than what was necessary in the ordinary course of business and objectively reasonable in his position. The claimant is not “bound to nurse the interest of the defendant”.

95. Charterers’ decision to cancel the Charter was made with due assessment of the consequences of cancelling or proceeding with the Charter. The Charterers concluded that the costs and delayed involved (and now claimed) would be “less than the penalty costs if [they had continued with the Vessel].”

96. Further Charterers’ decision to turn down Owners’ offer of a substitute vessel, which Owners proposed to be in satisfaction of possible claims arising from defective performance of the original Charter, did not constitute a failure to mitigate. In The Golden Breeze, the tribunal held that the owner did not have to accept the charterer’s offer in mitigation of damages when the latter’s past performance gave no basis for confidence it would meet its new obligations. In the instant case, Owners’ repeated

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105 See for example, Owners’ Internal Memorandum (“I think they are worried about being late for the terminal/terminal shutdown etc.” at pg. 3 of Moot Problem) and the email to Charterers dated 19 November ("As we discussed and agreed, loading is likely to take only a few days, she should sail by 8 December and, with a 30 day voyage time and a few days to discharge, all should be completed early in January, say 10 January. That should make sure she is clear before the planned refinery shut down which you mentioned from 15 January.” at pg. 89 of Moot Problem).
107 McGregor, [7-070]; Banco de Portugal v. Materlow [1932] AC 452 at 506 per Lord MacMillan
108 McGregor, [26-080]; Deutsche Bank AG v. Total Global Steel Ltd [2012] EWHC 1201 (Comm) at [159]
109 Harlow and Jones v Panex (International) [1967] 2 Lloyd’s Rep. 509 at 430, per Roskill J
110 Pg. 98, Moot Question
111 SMA 1237 (1978)
breaches of the Charter and negligent actions did not give Charterers assurance that it could complete the journey with its replacement vessel before the planned terminal shutdown.

97. Further, Charterers were not obliged to accept Owners’ offer of a substitute vessel on terms that it would extinguish any possible claims arising from the Owners’ defective performance. In The Liepaya, Rix J held that the shipowners did not fail to mitigate on account of not having accepted additional employment for the vessel from the charterers who were in breach of the time charter by redelivering the vessel prematurely. The owners were entitled to require that any deal should be without prejudice to their claim but the charterers saw their offer as “being in satisfaction of any possible claim”. Rix J there contemplated a possible argument by the owners for “residual claim for damages [which]... could still survive”. In this case, it is clear that the charterers’ seemingly innocuous offer was in extinguishment of any residual claims. At the point of negotiations, the extent of Charterers’ liability under the related sale contracts and to the loadport and disport terminals and subsequently Owners’ corresponding liability for these consequential damages had not crystallised and the quantum of which could not be ascertained. Hence, the possibility, at that time, of residual claims cannot be discounted. Therefore, to require Charterers to enter into negotiations for a substitute charter on basis of extinguishment of all possible claims would prejudice Charterers as its bargaining strength in negotiating for favourable rates and terms is severely undermined. More importantly, Owners did not offer to reduce freight payable, as quid pro quo for the extinguishment of claims but simply offered their replacement vessel on “similar terms”.

98. Finally, the decision to fix a replacement charter of Suezmaxes was justifiable. If a substitute vessel is available on reasonable terms, Charterers ought to mitigate its loss by engaging that vessel. If Charterers cannot get a vessel of the same tonnage as that originally chartered, they were entitled to take the next best reasonable option that was available, which may include chartering a larger vessel or one of a different tonnage even if a failure to do so will cause greater loss to the defaulting party. In this case, the two Suezmaxes were the only “available replacement on dates”. The timely fixing of

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112 See letter from RT to SC at pg 97, Moot Question “provided you are prepared to agree that the rest of this message is correct” including inter alia the correctness of the RT’s contention that they are “relieved of all liability by the terms of the cancellation provision”.


114 See pg 97 Moot Question


116 C. Raoul, Carver’s Carriage by Sea (Stevens & Sons, 13th Ed, 1982) vol 2, [2178]

117 Pg. 98, Moot Question
the replacement of the charter and a compromise as to the carrying efficiency/ capacity\textsuperscript{118} was necessary to avoid any “penalty costs if [Charterers] had stuck with the Vessel”.

99. In the circumstances, Charterers had acted reasonably in arranging for the replacement fixtures and refusing Owners’ offer of new fixture to be performed by a sister VLCC to the Reliable Butterfly.

V. **Prayers for Relief**

100. For the reasons set out above, Charterers requests this Tribunal to:

   a. **DECLARE** that this Tribunal does not have the jurisdiction to hear the merits of the Vessel Interest’s counterclaims;
   
   b. **FIND** that Owners liable for the breaches of the Charter; and
   
   c. **AWARD** damages to Charterers and interest on the amounts claimed.

\textsuperscript{118} Pg. 98, Moot Question