IN THE MATTER OF AN ARBITRATION HELD IN MELBOURNE

Claimant
Western Tankers Inc

Respondent
Less Dependable Traders Pte

MEMORANDUM FOR THE CLAIMANT

TEAM NO. 2

Emily Bell
Rebecca Cain
Kala Campbell
Zia Van Aswegen
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STATEMENT OF FACTS

THE CHARTERPARTY

1. On 26 May 2014 Western Tankers Inc (Claimant) entered into a charterparty (Charterparty) with Less Dependable Traders Pte (Respondent) to transport 30,000 mt jet oil and 70,000 mt +/- 10% gasoil (Cargo) on the Western Dawn (Vessel).

2. The Charterparty comprised of a Shelltime 4 Charterparty including Special Provisions to ST4 Proforma Clauses, the LDTP Rider Clauses and the owner’s additional clause. This formed part of the contract of carriage which also included the Bills of Lading and the Intertanko’s Standard Tanker Chartering Questionnaire 88.

THE VOYAGE

3. On 4 June 2014 the Vessel arrived at Singapore’s PB Terminal (Loadport).

4. Between 7 and 8 June 2014 the Vessel was loaded with the Cargo and 950 mt of bunkers. The Master informed the Respondent that the bunker supply was insufficient for the Voyage.

5. On 3 June 2014, before the Vessel arrived at the Loadport, the Claimant placed an order for razor wire, fixing clips, handheld flashlights and batteries (Protection Measures) to be supplied to the Vessel. The order did not arrive before the Vessel departed from the Loadport.

6. The Respondent advised the Claimant that additional bunkers would be available in Durban. The Claimant organised for the Protection Measures to be supplied at Durban.

7. On 20 June 2014 the Master contacted the Respondent to confirm rebunkering at Durban. The Respondent never replied. On 25 June 2014 the Master protested the Respondent’s failure to supply additional bunkers at Durban. The Vessel proceeded to Luanda via Cape Town.

THE SHIP-TO-SHIP TRANSFER

8. On 28 June 2014 the Respondent advised the Master that bunkers would be supplied and the Cargo would be discharged at STS Area 1 via a ship-to-ship transfer.
9. On the same day Captain Anya of Atlantic STS Agency Ltd (ASA Angola Ltd) (ASA2) advised the Master that ASA2 was the ship-to-ship coordinator. Captain Anya directed the Vessel to STS Area 1 located at 06°00’S, 08°10’E.

10. On 4 July 2014 the Vessel arrived at the coordinates provided by Captain Anya. The Vessel waited for the ship-to-ship transfer vessel, the *Antelope*, to arrive.

THE PIRATE ATTACK

11. Between 4 and 17 July 2014 there was no communication with the Vessel.

12. On 17 July 2014 the Master informed the Respondent that the Vessel was back under his control after a pirate attack. During the pirate attack approximately 28,190 mt of gasoil was stolen. The Vessel also sustained damage to its navigation and radio equipment, main deck hose crane, starboard-side accommodation ladder and bridge equipment. The only operational communication equipment was the GMDSS and VHF radio located in the Vessel’s citadel.

HIRE

13. Clause 8 of the Charterparty requires the Respondent pay hire at a rate of USD19,950 per day pro rata. Hire was payable per calendar month and in advance from the time of the Vessel’s delivery until the time of the Vessel’s redelivery.

14. On 3 July 2014 the Claimant advised the Respondent that payment of the second hire period was due by close of business (London time). This payment was never made.

ARBITRAL PROCEEDINGS

15. Clause 46 of the Charterparty states that the Charterparty is subject to English law and that all disputes arising out of the Charterparty will be referred to London arbitration in accordance with the *Arbitration Act 1996* (UK) (*Arbitration Agreement*).

16. On 1 November 2014 the Claimant referred the dispute to arbitration.
**PART ONE: JURISDICTION**

1. An arbitral tribunal has the power to rule on its own jurisdiction.¹ The Claimant argues that this Tribunal has the jurisdiction to hear the merits of this dispute because: (I) there is a valid arbitration agreement; (II) the Charterparty is subject to English law; and (III) the arbitration agreement covers all the contractual and tortious issues in dispute.

**I. THERE IS A VALID ARBITRATION AGREEMENT**

2. An arbitration agreement must be evidenced in writing² and provide that present or future disputes be submitted to arbitration.³ Evidenced in writing includes email communications.⁴ An arbitration agreement must also conform to general contractual principles.⁵ This includes consent.⁶

3. On 26 May 2014 the broker emailed the Charterparty to the parties.⁷ The Charterparty contained the Arbitration Agreement.⁸ This provided that ‘all disputes arising out of this charter shall be referred to Arbitration in London.’⁹ The Respondent never disputed this clause. On 27 May 2014 the Respondent sent the Voyage Orders to the Master and stated that the charter was ‘now fully fixed’.¹⁰ The Claimant argues that this is evidence that the Respondent

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⁵ Born, vol I, above n 1, 656-7; Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) 113.
⁷ Moot Problem, 5.
⁹ Ibid cl 46(b).
¹⁰ Moot Problem, 13.
consented to the Arbitration Agreement. Therefore the Claimant argues that the Arbitration Agreement is valid.

II. THE CHARTER PARTY IS SUBJECT TO ENGLISH LAW

4. Parties to an arbitration agreement may choose the law applicable to the underlying contract.\(^{11}\) The parties may also choose the procedural law that governs the arbitration.\(^{12}\) Where the parties have not expressly chosen the law applicable to the validity of an arbitration agreement, either the law of the seat or the law applicable to the underlying contract will apply.\(^{13}\)

5. The parties have expressly chosen English law to apply to both the contract\(^{14}\) and the arbitration.\(^{15}\)

III. THE ARBITRATION AGREEMENT COVERS ALL THE CONTRACTUAL AND TORTIOUS ISSUES IN DISPUTE

6. The scope of an arbitration agreement is determined by the wording of the agreement.\(^{16}\) English law embraces a pro-arbitration approach to interpreting arbitration agreements.\(^{17}\) The

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14 BIMCO, Shelltime 4 (December 2003) cl 46(a).

15 Ibid cl 46(b).


words ‘arising out of’ are given a wide interpretation.\(^{18}\) It extends to all disputes that have a sufficiently close connection to the parties’ arguments and dealings.\(^{19}\)

7. The Charterparty states that ‘all disputes arising out of this charter shall be referred to Arbitration in London in accordance with the Arbitration Act 1996’.\(^{20}\) The contractual and tortious issues in dispute are related to the contracted voyage. Therefore the Claimant argues that all contractual and tortious issues in dispute are within the scope of the arbitration.

**PART TWO: ENTITLEMENTS**

8. The Claimant argues that it is entitled to an indemnity for the loss arising from the pirate attack because: (I) the Charterparty was in force for the entire charter period; and (II) the loss arose from the Master’s compliance with the Respondent’s instructions. Further: (III) the Claimant is entitled to hire for the entire charter period.

I. **THE CHARTERPARTY WAS IN FORCE FOR THE ENTIRE CHARTER PERIOD**

9. The Claimant argues that it is entitled to damages for breach of contract because the Charterparty was in force for the entire charter period. The Charterparty was in force because: (A) the pirate attack did not frustrate the Charterparty; and (B) the Claimant’s deviation did not terminate the Charterparty.

A. **The pirate attack did not frustrate the Charterparty**

10. The doctrine of frustration applies to time charterparties.\(^{21}\) A contract is frustrated when a supervening event makes performance of the contract radically different to that originally

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\(^{20}\) BIMCO, *Shelltime 4* (December 2003) cl 46(b).

\(^{21}\) *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, 435 (Lord Finlay LC, Viscount Haldane, Lord Shaw, Lord Sumner and Lord Wrenbury); *National Carriers v Panalpina* [1981] AC 675, 712 (Lord Roskill); *Anglo-Northern Trading Co v Emlyn Jones and Williams* [1918] 1 KB 372, 373 (Sankey J); *Scottish Navigation Company v Souter & Co* [1916] 1 KB 675, 681 (Sankey J).
contracted for. Frustration operates without fault from either party. Frustration will automatically discharge the parties from their contractual obligations. The fact that a supervening event was foreseeable or even foreseen will not exclude the doctrine of frustration.

11. The Claimant argues that the Charterparty was still in force because the pirate attack did not render performance of the contractual obligations radically different.

12. Whether performance has been rendered radically different is determined by reference to the facts. It is not sufficient that performance becomes more onerous or expensive. The original obligation must have become incapable of being performed and it must be ‘positively unjust’ to enforce the new obligation against the parties.

13. Two important considerations are the length of delay that the supervening event causes and its consequences. A significant and abnormal delay is required to frustrate a time charterparty. The delay must destroy the identity of the service.


14. In *The Petro Ranger*[^34] a 2 day voyage was delayed for 31 days.[^35] In *The Sea Angel*[^36] a 20 day voyage was delayed for 110 days.[^37] In *The Eugenia*[^38] a 30 day voyage was delayed for 108 days.[^39] These contracts were not frustrated.[^40]

15. The Voyage was for a maximum of 120 days.[^41] The Vessel was under the pirates’ control for 13 days.[^42] The Claimant argues that a delay of 13 days out of 120 is not significant enough to frustrate the Charterparty. The delay would not have resulted in the Respondent exceeding the charter[^43] and would not have prevented the Respondent from performing the remaining contractual obligations.

16. The pirate attack resulted in damage to the Vessel and the loss of some of the Cargo.[^44] Stolen cargo alone does not result in frustration.[^45] The damage to the Vessel could have been repaired in an off-hire period. The remaining Cargo could have been delivered and the Vessel redelivered. The Claimant argues that performance has not been rendered radically different and therefore the Charterparty has not been frustrated.

**B. The Claimant’s deviation did not terminate the Charterparty**

17. The Claimant argues that its deviation did not terminate the Charterparty because: (a) the deviation was justifiable; and (b) in any event, the Respondent did not repudiate the

[^33]: *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, 458 (Lord Sumner); *F A Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, 407 (Viscount Haldane); *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146, 162 (Diplock J).
[^34]: *The Petro Ranger* [2001] 2 Lloyd’s Rep 348.
[^35]: Ibid.
[^37]: Ibid.
[^38]: *The Eugenia* [1964] 2 QB 226.
[^39]: Ibid.
[^42]: Moot Problem, 43.
[^44]: Moot Problem, 42.
Charterparty. Alternatively: (c) the Respondent is estopped from relying on the deviation to terminate the Charterparty.

a. The deviation was justifiable

18. Deviation is a deliberate and unjustifiable departure from the usual or customary course that a vessel must follow to get from its loading port to its discharge port. A shipowner impliedly undertakes not to deviate from the contracted voyage. Any unjustifiable deviation from the ordinary trade route is a fundamental breach of the contract of carriage.

19. When the contract does not specify a route the vessel must follow the ordinary trade route.

There are two ordinary trade routes from Singapore to Luanda. A vessel could proceed past the Cape of Good Hope or the Suez Canal. The Suez Canal requires voyage through restricted zones. Therefore the Cape of Good Hope is the only applicable ordinary trade route. A vessel does not need to pass through Durban.

20. A deviation will be justifiable where it is reasonably necessary. Deviation to obtain additional bunkers is reasonably necessary because otherwise a vessel would be unable to complete the voyage.

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46 Davis v Garrett (1830) 6 Bing 716, 717 (Tindal CJ); Stag Line Ltd v Foscolo, Mango & Co Ltd [1932] AC 328, 343 (Lord Atkin); Glynn v Margetson & Co [1893] AC 351, 356 (Lord Herschell); Reardon Smith Line Ltd v Black Sea & Baltic General Insurance Co Ltd [1939] AC 562, 571 (Lord Wright); John F Wilson, Carriage of Goods by Sea (Pearson, 7th ed, 2010) 16.


48 Tate & Lyle Ltd v Hain Steamship Company Ltd [1936] 55 Lloyds Rep 159, 173 (Lord Atkin); Joseph Thorley Ltd v Orchis Steamship Company Ltd [1907] 1 KB 660, 667 (Lord Collins MR); Suisse Atlantique Société d’Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 AC 361, 399 (Lord Reid), 425 (Lord Upjohn); Wilson, above n 46, 20.


51 Ibid.

52 Moot Problem, 16.


54 Stag Line Ltd v Foscolo, Mango & Co Ltd [1932] AC 328, 335 (Lord Buckmaster), 339 (Lord Warrington); Reardon Smith Line Ltd v Black Sea & Baltic General Insurance Co Ltd [1939] AC 562.
21. The Vessel was delivered at Singapore’s PB Terminal. The Cargo was to be discharged in Luanda. The Vessel was to be redelivered in the Gibraltar-Trieste Range. The Charterparty is silent as to the route of the Vessel. Therefore the Vessel must proceed along the ordinary trade route through the Cape of Good Hope. The Claimant admits that by proceeding to Durban it did deviate from the ordinary trade route. This deviation was justifiable because it was for the purpose of obtaining additional bunkers necessary to complete the Voyage.

b. In any event, the Respondent did not repudiate the Charterparty

22. Deviation does not immediately terminate a charterparty. The innocent party must elect to terminate the charterparty. If the innocent party does not elect to terminate then the charterparty remains in force. The election must be clear and unequivocal. If the innocent party continues to perform their contractual obligations then they have impliedly affirmed the contract.

23. The Respondent affirmed the contract by continuing to perform its contractual obligations. Therefore the Charterparty is still in force.

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56 Ibid.
57 Ibid 5.
58 BIMCO, Shelltime 4 (December 2003).
59 Ibid 5.
60 Tate & Lyle Ltd v Hain Steamship Company Ltd [1936] 55 Lloyds Rep 159, 182 (Lord Maugham); Edwin Peel, The Law of Contract (Sweet and Maxwell, 13th ed, 2011) 852.
62 Tate & Lyle Ltd v Hain Steamship Company Ltd [1936] 55 Lloyds Rep 159, 178 (Branson J), 182 (Lord Maugham); Wilson, above n 46, 24; McKendrick, above n 61.
63 McKendrick, above n 61, 1540.
64 Ibid 1538.
65 Moot Problem, 33.
c. Alternatively the Respondent is estopped from relying on the deviation to terminate the Charterparty

24. Alternatively the Claimant argues that the Respondent is estopped from relying on the deviation to terminate the Charterparty because the Claimant acted in reliance on the Respondent’s promise to provide bunkers at Durban.

25. Estoppel arises when it is inequitable for the promisor to renege on a clear promise because the promisee has acted in reliance on the promise.\textsuperscript{66} The parties must be in a pre-existing legal relationship.\textsuperscript{67}

26. The Claimant argues that the Respondent should be estopped from relying on the deviation to terminate the Charterparty because: (i) the Respondent made a clear or unequivocal promise to the Claimant that bunkers would be available in Durban; (ii) the Claimant relied on the promise; and (iii) it is inequitable for the Respondent to renege on the promise.

i. The Respondent made a clear or unequivocal promise to the Claimant

27. The promise must be clear and unequivocal.\textsuperscript{68} This is determined objectively.\textsuperscript{69} The promise does not need to be express.\textsuperscript{70} The promise must be reasonably capable of being understood by the promisee.\textsuperscript{71}

28. On 3 June 2014 the Respondent emailed the Claimant and the Master stating ‘we have alternate bunker supply available passing Durban or Cape Town’.\textsuperscript{72} The email was in response to the


\textsuperscript{67} Collier v P & MJ Wright Holdings Ltd [2007] EWCA Civ 1329, [35] (Arden LJ); The Ion [1980] 2 Lloyd’s Rep 245, 250 (Mocatta J); Peel, above n 60, 110.

\textsuperscript{68} Ace Insurance Sa-Nv v Seechurn [2002] EWCA Civ 67, [18] (Ward LJ); Low v Bouverie [1891] 3 Ch 82, 106 (Bowan J); Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1972] AC 741, 755 (Lord Hailsham); Canadian and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd [1947] AC 46, 56 (Lord Wright); G H Treitel, ‘Consideration’ in H G Beale (ed), Chitty on Contracts (Sweet and Maxwell, 30th ed, 2008) vol 1, 305.

\textsuperscript{69} Peel, above n 60, 111; James Edelman, ‘Estoppel’ in John McGhee (ed), Snell’s Equity (Thomson Reuters, 32nd ed, 2010) 372.

\textsuperscript{70} The Ion [1980] 2 Lloyd’s Rep 245, 250 (Mocatta J); Treitel, above n 68, 306.

\textsuperscript{71} Ace Insurance Sa-Nv v Seechurn [2002] EWCA Civ 67, [18] (Ward LJ); Low v Bouverie [1891] 3 Ch 82, 106 (Bowan J); Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1972] AC 741, 755 (Lord Hailsham).

\textsuperscript{72} Moot Problem, 26.
Master’s concern regarding the bunker supply. The Claimant argues that the Respondent’s email is a clear and unequivocal promise to supply additional bunkers.

**ii. The Claimant relied on the promise**

29. The promisee must rely on the promise. The promise must have induced the promisee to alter its position. Reliance may take the form of inaction rather than action. Detriment is not a formal requirement of the doctrine.

30. The Respondent’s email advising that alternative bunkers would be available was sent at 9:21 UTC on 3 June 2014. On the same date, at 11:01 UTC, the Claimant’s purchasing department advised the Claimant that protection measures would be provided in Durban given the Vessel was travelling to Durban to collect bunkers. The Vessel proceeded towards Durban. However because the Respondent did not confirm that bunkers were available the Vessel did not enter Durban. The Claimant argues that these two facts demonstrate that it relied on the Respondent’s promise to provide bunkers at Durban.

**iii. It is inequitable for the Respondent to renego on the promise**

31. It must be inequitable for the promisor to renego on the promise. The Claimant argues that it was inequitable for the Respondent to renego on the promise to supply the Vessel with bunkers.

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73 Ibid 28.
76 *Societe Italo-Belge Pour Commerce Et L’Industrie v Palm and Vegetable Oils (Malaysia) SDN BHD (The Port Chaser)* [1981] 2 Lloyd’s Rep 695, 700 (Goff J).
77 *W J Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, 213 (Lord Denning MR); *The Port Chaser* [1981] 2 Lloyd’s Rep 695, 701 (Goff J); *Peel*, above n 60, 309.
78 Moot Problem, 26.
79 Ibid 27.
80 Ibid 30-2.
81 Ibid.
82 *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439, 448 (Lord Cairns); *Emery v UCB Corporate Services Limited* [2001] EWCA Civ 675, [27] (Gibson LJ); *Collier v P & MJ Wright Holdings Ltd* [2007] EWCA Civ 1329, [3], [35] (Arden LJ); *The Ion* [1980] 2 Lloyd’s Rep 245, 250 (Mocatta J); *The Port Chaser* [1981] 2 Lloyd’s Rep 695, 700 (Goff J); *D & C Builders Ltd v Rees* [1966] 2 QB 617, 624 (Lord Denning MR).
at Durban. The Vessel did not have sufficient bunkers for the Voyage.\textsuperscript{83} The Vessel used additional bunkers to proceed towards Durban.\textsuperscript{84} As a result the Vessel did not have enough bunkers to collect the Protection Measures at Durban and complete the Voyage.\textsuperscript{85} The Vessel had to travel below the guaranteed speed in the Charterparty to conserve fuel.\textsuperscript{86}

\textbf{II. THE LOSS AROSE FROM THE MASTER’S COMPLIANCE WITH THE RESPONDENT’S INSTRUCTIONS}

32. Clause 13 of the Charterparty requires the Master to obey the Respondent’s instructions.\textsuperscript{87} Clause 13 also provides that the Respondent must indemnify the Claimant against all consequences and liabilities that arise as a result of the Master’s compliance with the instructions of the Respondent or its agents.\textsuperscript{88}

33. The Claimant argues that the Respondent must indemnify the Claimant for the loss flowing from the pirate attack because the loss arose from the Master’s compliance with the Respondent’s instructions. The loss arose from the Master’s compliance with the Respondent’s instructions because: (A) the instructions to proceed to STS Area 1 related to employment of the Vessel; (B) no valid exceptions applied; (C) the instructions were an effective cause of the loss; and (D) the loss was not too remote.

\textbf{A. The Respondent’s instructions to proceed to STS Area 1 related to employment of the Vessel}

34. The master must obey the charterer’s instructions regarding the employment of the vessel.\textsuperscript{89}

Employment means ‘employment of the ship to carry out the purposes for which the charterers

\textsuperscript{83} Moot Problem, 25.
\textsuperscript{84} Ibid 31-2.
\textsuperscript{85} Ibid 32.
\textsuperscript{86} Ibid.
\textsuperscript{87} BIMCO, Shelltime 4 (December 2003) cl 13(a).
\textsuperscript{88} Ibid cl 13(a)(i).
\textsuperscript{89} Whistler International Ltd v Kawasaki Kisen Kaisha Ltd [2000] QB 241, 254 (Potter LJ); Newa Line v Erechthion Shipping Co SA (The Erechthion) [1997] 2 Lloyd’s Rep 180, 185 (Staughton J); Kuwait Petroleum Corporation v I & O Oil Carriers Ltd (The Houda) [1994] 2 Lloyd’s Rep 541, 552 (Leggatt LJ); Triad Shipping Co v Stellar Chartering & Brokerage Inc (The Island Archon) [1994] 2 Lloyd’s 227, 236 (Evans LJ).
wish to use her.\textsuperscript{90} Employment is the order to sail from A to B.\textsuperscript{91} It does not include matters of navigation.\textsuperscript{92} Navigation relates to the direction and route the vessel must take when proceeding.\textsuperscript{93} Navigation is also a matter of seamanship.\textsuperscript{94}

35. On 28 June 2014 the Respondent informed the Master that the discharge of the Cargo and supply of bunkers would both take place at the discharge coordinates now given as STS Area 1.\textsuperscript{95} The Master replied to the Respondent and cc’ed ASA to confirm the coordinates for STS Area 1.\textsuperscript{96} On 28 June 2014 Captain Anya responded to the Master, stating that he was the ship-to-ship coordinator.\textsuperscript{97} Captain Anya provided the Master with the coordinates 06°00’S, 08°10’E as the location of STS Area 1.\textsuperscript{98} He confirmed that bunkers would be provided from the Antelope at STS Area 1.\textsuperscript{99} The Master began communicating with Captain Anya to arrange the ship-to-ship transfer.\textsuperscript{100}

36. On 3 July 2014 the Master emailed the Respondent to confirm that discharge would take place at STS and that bunkers would be supplied by the Antelope.\textsuperscript{101} On 4 July 2014 the Respondent replied ‘please continue to liaise with your STS coordinator.’\textsuperscript{102} On 4 July 2014 the Master emailed both the Respondent and Captain Anya, confirming that the Vessel had arrived at STS 06°0’S, 08°10’E.\textsuperscript{103} The Master tendered the notice of readiness but noted that the Antelope had not arrived.\textsuperscript{104} The Respondent did not reply to this email.\textsuperscript{105}


\textsuperscript{91} Larrinaga Steamship Company v The King [1945] AC 246, 261 (Lord Porter); Hamblen and Jones, above n 90, 107.

\textsuperscript{92} Larrinaga Steamship Company v The King [1945] AC 246, 261 (Lord Porter); Hamblen and Jones, above n 90, 107.

\textsuperscript{93} Whistler International Ltd v Kawasaki Kisen Kaisha Ltd [2000] QB 241, 250 (Potter LJ).

\textsuperscript{94} Dockray, above n 47, 294; Hamblen and Jones, above n 90, 111.

\textsuperscript{95} Moot Problem, 33.

\textsuperscript{96} Ibid 34.

\textsuperscript{97} Ibid 35.

\textsuperscript{98} Ibid.

\textsuperscript{99} Ibid.

\textsuperscript{100} Ibid 35-40.

\textsuperscript{101} Ibid 38.

\textsuperscript{102} Ibid 40.

\textsuperscript{103} Ibid 41.

\textsuperscript{104} Ibid.

\textsuperscript{105} Ibid 41-42.
37. Therefore the Claimant argues that the instructions to proceed to STS Area 1 relate to the employment of the vessel and that these instructions were the Respondent’s instructions.

**B. No valid exceptions applied**

38. When the charterer’s instructions relate to the employment of the vessel the master must obey them without question.\(^{106}\) There are some exceptions in certain circumstances.\(^{107}\) The master must only follow the charterer’s instructions within the limits of obviously grave danger.\(^{108}\) This includes instances where the orders are contrary to the terms of the charter.\(^{109}\)

39. The order to proceed to STS Area 1 came from the Respondent.\(^{110}\) The coordinates of STS Area 1 came from Captain Anya.\(^{111}\) The Master believed that the Respondent had passed control of the Vessel to Captain Anya and that Captain Anya was under the Respondent’s authority.\(^{112}\) The Master had no evidence to suggest that the orders to proceed to Captain Anya’s coordinates were outside the limits of obviously grave danger. Therefore the Claimant argues that no valid exceptions apply and it was required to follow the instructions to proceed to STS Area 1.

**C. The instructions were an effective cause of the loss**

40. The orders as to employment of the vessel must be the effective or real cause of the loss.\(^{113}\) The employment orders do not need to be the only or dominant cause of the loss.\(^{114}\)

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\(^{107}\) Michael Collins, ‘Master’s Right to Say “No” to Charterers’ Orders’ (1979) *Scandinavian Institute of Maritime Law Review* 1, 2; Wilford, Coghlin and Kimball, above n 106, 109; Dockray, above n 47, 292; Wilson, above n 46, 109.


\(^{109}\) Wilford, Coghlin and Kimball, above n 106, 316; Collins above n 107, 5; Hamblen and Jones, above n 90, 113.

\(^{110}\) Moot Problem, 34.

\(^{111}\) Ibid 35.

\(^{112}\) Ibid.


41. On 4 July 2014 the Respondent emailed the Master instructing him to ‘continue to liaise with your STS coordinator’.\textsuperscript{115} The Master had been liaising with ASA2 and continued to do so.\textsuperscript{116} ASA2’s subsequent lack of direction resulted in the Vessel being left drifting off the coast of West Africa.\textsuperscript{117} Evidence shows that vessels carrying oil as cargo off the coast of West Africa are highly susceptible to a pirate attack.\textsuperscript{118} Evidence also demonstrates that a stationary or drifting vessel is far more likely to be subject to a pirate attack than a fast moving vessel.\textsuperscript{119}

42. The Claimant argues that the Respondent’s failure to provide instructions left the Vessel drifting, which made the Vessel more vulnerable to pirate attack. Therefore the Respondent’s instructions were an effective cause of the loss sustained as a result of the pirate attack.

D. The loss was not too remote

43. A loss will be too remote when it is not a foreseeable consequence of the charterer’s instructions.\textsuperscript{120} Only the damage itself must be foreseeable.\textsuperscript{121} The extent or scale of the damage does not need to be foreseeable.\textsuperscript{122}

44. The Claimant and Respondent were both aware that the Vessel was travelling into areas of known piracy.\textsuperscript{123} The problems associated with piracy in West Africa are widely known and reported.\textsuperscript{124} It is well documented that oil tankers travelling to West Africa are key targets of

\begin{flushleft}
\textsuperscript{115} Moot Problem, 40.
\textsuperscript{116} Ibid.
\textsuperscript{117} Ibid 41.
\textsuperscript{119} Shane and Magnuson, above n 118, 10-13; Psarros et al, above n 118, 329.
\textsuperscript{120} K/S Penta Shipping A/S v Ethiopian Shipping Lines Corporation (The Saga Cob) [1992] 2 Lloyd’s Rep 545, 548 (Parker LJ); The Sivand [1998] 2 Lloyd’s Rep 97, 102 (Evans LJ).
\textsuperscript{123} Moot Problem, 1.
\textsuperscript{124} Procedural Order No 2, [8].
\end{flushleft}
piracy.\textsuperscript{125} Vessels are particularly vulnerable when they are drifting or stationary.\textsuperscript{126} The Respondent’s instructions left the Vessel in a vulnerable position.\textsuperscript{127} The Claimant argues that the loss of cargo and damage to the Vessel was a foreseeable consequence of the Vessel’s vulnerability. Therefore the loss is not too remote.

45. The Claimant argues that it is entitled to an indemnity for the loss flowing from the pirate attack.

\textbf{III. The Claimant is entitled to hire for the entire charter period}

46. The Claimant argues that the Respondent is not entitled to make deductions from hire because the Respondent must pay hire for the entirety of the charter period. The Respondent must pay hire for the entire charter period because: (A) the Respondent’s hire payments were due and payable monthly and in advance; (B) a pirate attack is not an off-hire event; and (C) the Respondent is not entitled to equitable set-off.

\textbf{A. The Respondent’s hire payments were due and payable monthly and in advance}

47. The Respondent must pay hire in accordance with clause 9 of the Charterparty.\textsuperscript{128} The rate of hire for use of the Claimant’s Vessel was USD19,950 per day pro rata.\textsuperscript{129} All hire payments were due and payable monthly and in advance for the duration of the charter.\textsuperscript{130} The charter period begins when the vessel is delivered.\textsuperscript{131} Payment must be made by midnight on the day that it is due and owing.\textsuperscript{132} This is a strict obligation.\textsuperscript{133}

\begin{footnotes}
\footnote{125 Pristrom et al, above n 118, 682; Shambaugh, Huberts and Zlotnick, above n 118, 28; Shane and Magnuson, above n 118, 10-13.}
\footnote{126 Shane and Magnuson, above n 118, 10-13; Psarros et al, above n 118, 329.}
\footnote{127 Moot Problem, 40.}
\footnote{128 BIMCO, \textit{Shelltime 4} (December 2003) cl 9.}
\footnote{129 Ibid cl 8.}
\footnote{130 Ibid cl 9.}
\footnote{131 Ibid cl 4(a).}
\footnote{133 \textit{Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia} [1977] AC 850, 887 (Lord Russel); \textit{Empresa Cubana de Fletes v Lagonisi Shipping Co Ltd} [1971] 1 QB 488, 493 (Donaldson J); \textit{Afovos Shipping Co SA v R Pagnan and Fratelli} [1983] 1 WLR 195, 201 (Lord Hailsham).}
\end{footnotes}
48. The Vessel was delivered on 4 June 2014 at 0001 hours local time (3 June 2014 at 1701 UTC).\textsuperscript{134} Using local time the Respondent’s hire payment was due and owing on the fourth day of every month. Using UTC hire becomes payable on the third day of every month.

49. On 3 July 2014 at 17:01 hours UTC the Claimant reminded the Respondent that the second hire instalment was due and payable.\textsuperscript{135} The Respondent never made this payment.\textsuperscript{136} The Claimant argues that this breached the Charterparty.

B. A pirate attack is not an off-hire event

50. The Claimant argues that the Respondent must pay hire for the entire charter period because the pirate attack was not an off-hire event. The pirate attack was not an off-hire event because: (a) the BIMCO and ST4 Proforma Piracy Clauses state that the Vessel will remain on-hire in the event of a pirate attack; and (b) in any event, the Vessel was in an efficient working order.

\hspace{1cm} a. The BIMCO and ST4 Proforma Piracy Clauses state that the Vessel will remain on-hire in the event of a pirate attack

51. A pirate attack is the ‘act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act’.\textsuperscript{137}

52. An off-hire clause is an exception to the charterer’s obligation to pay hire.\textsuperscript{138} There may also be additional off-hire clauses within the charterparty.\textsuperscript{139}

53. Clause 21 of the Charterparty is the off-hire clause.\textsuperscript{140} The Charterparty also incorporates the BIMCO Piracy Clause for Time Charter Parties 2013 and the ST4 Proforma Piracy Clause.\textsuperscript{141} Both of these clauses include off-hire provisions stating that if pirates attack the Vessel the
Vessel shall remain on-hire. In the event of a conflict between the BIMCO Piracy Clause and any provision of the Charterparty, this clause shall prevail.\(^{143}\)

54. Between 4 and 17 July 2014 the Vessel was attacked by pirates.\(^{144}\) The pirates stole cargo, injured crew members and damaged the Vessel.\(^{145}\) During this time there was no contact with the Vessel, which sustained damage to its radio equipment.\(^{146}\)

55. On 4 July 2014 the Respondent claimed that the Vessel was off-hire due to no contact with the receiver or charterer.\(^{147}\) The Claimant argues that this lost contact was due to the pirate attack. This does not constitute an off-hire event under the BIMCO Piracy Clause. Therefore the Respondent is liable to pay hire for the entire charter period.

\(b\). In any event, the Vessel was in an efficient working order

56. In any event, the Claimant argues that the Vessel was not off-hire under Clause 21 because the Vessel was in an efficient working order.

57. Off-hire is a period of time when the vessel is not in an efficient working order.\(^{148}\) ‘Efficient working’ relates to the physical condition of the vessel.\(^{149}\) If the vessel is able to render the required service then she will be in an efficient working order.\(^{150}\) For the vessel to be considered off-hire any event which renders the vessel inefficient must be stipulated in the off-hire clause.\(^{151}\)

58. Clause 21 is silent on the effect of piracy. Therefore the Claimant argues that the Vessel cannot be off-hire under Clause 21 and the Respondent is required to pay hire.

\(^{142}\) Ibid.
\(^{143}\) Ibid 12.
\(^{144}\) Ibid 41-2.
\(^{145}\) Ibid.
\(^{146}\) Ibid.
\(^{147}\) Ibid 41.
\(^{148}\) *Mareva Navigation Co Ltd v Canaria Armadora SA (The Mareva AS) [1977] 1 Lloyd’s Rep 368, 382-3 (Kerr J); Actis Co Ltd v Sanko Steamship Co Ltd (The Aquacharm) [1982] 1 WLR 119, 125 (Griffiths LJ); Andre & Cie SA v Orient Shipping (Rotterdam) BV (The Laconian Confidence) [1997] 1 Lloyd’s Rep 139, 149 (Rix J); The Sanko Steamship Co Ltd v Fearnley & Eger AS (The Manhattan Prince) [1985] 1 Lloyd’s Rep 140, 146 (Leggett J).*
\(^{149}\) *The Manhattan Prince [1985] 1 Lloyd’s Rep 140, 146 (Leggatt J); The Laconian Confidence [1977] 1 Lloyd’s Rep 139, 150 (Rix J).*
\(^{150}\) *Thomas Smailes & Son v Evans & Reid Ltd [1917] 2 KB 54, 58 (Bailhache J).*
\(^{151}\) *Cosco Bulk Carrier Co Ltd & Anor v M/V Saldanha C/P [2011] 1 Lloyd’s Rep 187, 194 (Gross J); The Mareva AS [1977] 1 Lloyd’s Rep 368, 381 (Kerr J).*
C. The Respondent is not entitled to equitable set-off

59. The Respondent is entitled to claim equitable set-off if: (1) the Claimant has breached the contract; (2) this breach is directly connected to the payment of hire; and (3) it would be manifestly unjust if the Claimant’s hire could be asserted without reference to the Respondent’s equitable set-off claim.

60. The Claimant argues that the Respondent is not entitled to equitable set-off because the Claimant did not breach of the contract of carriage by providing an unseaworthy vessel. Seaworthiness is governed by art III r 1(a) of the Hague-Visby Rules. The contract of carriage incorporates the Bills of Lading which are subject to the Hague-Visby Rules. The Claimant argues that it is not liable under the Hague-Visby Rules because it acted with due diligence before and at the beginning of the Voyage to make the Vessel seaworthy.

61. A vessel is seaworthy when she is ‘fit to meet and undergo the perils of the sea and other incidental risks which of necessity she must be exposed in the course of the voyage’. This is determined by whether a prudent shipowner would have required a defect be repaired before sending the vessel to sea had he known of it.

62. A shipowner must exercise due diligence before and at the beginning of the voyage to ensure that the vessel is seaworthy. This is equivalent to the exercise of reasonable care and skill. This duty is non-delegable and is judged by reference to the circumstances at the time of the

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153 BIMCO, Shelltime 4 (December 2003) cl 38(1).


158 Ibid.
relevant act or omission and not in hindsight. The shipowner will not be liable for any unseaworthiness provided he satisfies this test.

63. Before the Voyage commenced the Claimant arranged for Protection Measures to be installed in Singapore. The Claimant’s purchasing department advised the Claimant that the Protection Measures would not arrive at Singapore in time due to freighting problems. The Claimant arranged for the Protection Measures to be installed in Durban when the Vessel stopped for additional bunkers. The Respondent failed to provide bunkers at Durban and as a result the Vessel did not enter Durban. Had the Protection Measures been installed at Durban the Vessel would have been adequately protected before it entered any areas of piracy recognised in the Charterparty. By arranging for the Protection Measures to be installed at Durban the Claimant did exercise reasonable care and skill before the commencement of the Voyage to ensure that the Vessel was seaworthy. Therefore the Claimant did exercise due diligence and is not liable for any unseaworthiness under art III r 1.

64. The Claimant has not breached the contract of carriage because it has complied with its seaworthiness obligations under the Hague-Visby Rules. Therefore the Respondent is not entitled to claim equitable set-off.

**PART THREE: LIABILITIES**

65. The Claimant argues that it is not liable to pay the Respondent damages for any failure to care for the Cargo because: (I) it is entitled to rely on the exemptions in art IV r 2 of the Hague-Visby Rules; and (II) it did not breach its duties in bailment.

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161 Moot Problem, 27.
162 Ibid.
163 Ibid.
164 Ibid 32.
165 Ibid 16.
I. **The Claimant is entitled to rely on the exemptions in art IV r 2 of the Hague-Visby Rules**

66. Article III r 2 of the Hague-Visby Rules requires the carrier to properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried on the vessel.\(^{166}\) Pirates stole approximately 28,190 mt of gasoil from the Vessel.\(^{167}\) The Claimant does not accept that it breached art III r 2 when this cargo was stolen by the pirates. However, even if this Tribunal found that the Claimant did breach art III r 2, the Claimant argues that it is entitled to rely on two exemptions under art IV r 2 of the Hague-Visby Rules.

67. The Claimant argues that it is able to rely on two exemptions under art IV r 2 of the Hague-Visby Rules because the loss of or damage to the cargo arose or resulted from: (A) an act of public enemies; or (B) any other cause arising without the actual fault or privity of the carrier.

A. **Act of public enemies**

68. Article IV r 2(f) of the Hague-Visby Rules provides that a carrier will not be liable for loss or damage arising or resulting from the acts of public enemies.\(^{168}\) The definition of public enemy includes pirates.\(^{169}\) In *Trafigura Beheer BV* the Court of Appeal held that a pirate attack fell within the scope of art IV r 2(f).\(^{170}\)

69. Piracy is defined as ‘the act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act’.\(^{171}\)

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\(^{167}\) Moot Problem, 42.

\(^{168}\) *Carriage of Goods by Sea Act 1971* (UK) c 50, sch (The Hague-Visby Rules) art IV r 2(f).


70. Pirates attacked and boarded the Vessel between 4 and 17 July 2014. The pirates stole approximately 28,190 mt of gasoil, injured crew members and damaged the Vessel. The Claimant argues that the loss of this cargo was the result of an act of public enemies and therefore the Claimant is entitled to rely on art IV r 2(f) of the Hague-Visby Rules to exempt its liability.

**B. Any other cause arising without the actual fault or privity of the carrier**

71. Article IV r 2(q) of the Hague-Visby Rules provides that a carrier will not be liable for loss or damage arising or resulting from any other cause that arises without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier. The second ‘or’ should be read as ‘and’. The carrier must show that they and their servants or agents did not contribute to the loss or damage. The carrier will be protected where a theft arises without the actual fault of the carrier, his agents or servants.

72. The Claimant exercised due diligence to ensure that the Vessel was seaworthy. The test for due diligence is equivalent to the test for negligence i.e. whether the party exercised reasonable care and skill to avoid the loss. The Vessel received full safety and security certification. The Claimant took the required reasonable steps to protect the Vessel against piracy.

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172 Moot Problem, 41, 42.
173 Ibid 42.
174 *Carriage of Goods by Sea Act 1971* (UK) c 50, sch (The Hague-Visby Rules), art IV r 2(q); *Goodwin, Ferreira & Co Ltd v Lamport & Holt Ltd* [1929] 34 Lloyd’s Rep 192, 195-6 (Roche J); *Tasman Orient Line CV v New Zealand China Clays (The Tasman Pioneer)* [2009] 2 Lloyd’s Rep 308, 325-6 (Fogarty J); *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd* [1967] 2 QB 250, 251-2 (Sellers LJ).
175 *Hourani v T & J Harrison* [1927] 28 Lloyd’s Rep 120, 125 (Bankes LJ), 126 (Atkin LJ); *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd* [1967] 2 QB 250, 271 (Sellers LJ), 274 (Salmon LJ); *Heyn v Ocean Steamship Company Ltd* [1927] 27 Lloyd’s Rep 334, 336 (MacKinnon J).
177 *The City of Baroda* [1926] 25 KB 437, 439 (Roche J); *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd* [1967] 2 QB 250, 272 (Sellers LJ); *Heyn v Ocean Steam Ship Company Ltd* [1927] 27 Lloyd’s Rep 334, 337 (MacKinnon J); Treitel and Reynolds, above n 169, 512.
178 See Paragraphs [61]-[64].
180 Moot Problem, 49-51.
Therefore the loss of the cargo did not arise due to the Claimant’s actual fault and the Claimant is entitled to rely on art IV r 2(q) of the Hague-Visby Rules to exempt it from liability.

II. THE CLAIMANT DID NOT BREACH ITS DUTIES IN BAILMENT

73. A bailment occurs when one person (the bailee) voluntarily takes possession of the goods of another (the bailor). The Claimant took possession of the Respondent’s cargo on 7 to 8 June 2014 when the Cargo was loaded onto the Vessel. The primary duties of a bailee are to take reasonable care of the bailed goods and avoid converting the goods.

74. The Claimant argues that it did not breach its duties in bailment because: (A) the Claimant took reasonable care of the goods; and (B) the Claimant did not convert the cargo.

A. The Claimant took reasonable care of the goods

75. A bailee must take reasonable care of the bailed goods and redeliver the goods in accordance with the bailor’s instructions. Reasonable care is judged on all the circumstances of the particular case. The degree of care will vary depending on how and why the goods were delivered. This requires that the bailee take active steps to protect the bailed goods from foreseeable hazards, including theft.

76. The Claimant argues that it took reasonable care of the goods by exercising due diligence to ensure the Vessel was seaworthy before and at the commencement of the Voyage. The

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183 Moot Problem, 29.

184 Morris v CW Martin & Sons Ltd [1966] 1 QB 716, 738 (Salmon LJ); East West Corporation v DKBS AF 1912 A/S [2003] QB 1509, 1531 (Mance LJ); Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd [1994] 1 Lloyd’s Rep 213, 231 (Handley JA); Palmer, above n 182, 48.


187 Morris v CW Martin & Sons Ltd [1966] 1 QB 716, 731 (Diplock LJ); East West Corporation v DKBS AF 1912 A/S [2003] QB 1509, 1531 (Mance LJ); Palmer, above n 182, 1108.

188 Palmer, above n 182, 1108. See also Matrix Europe Ltd v Uniserve Holding Ltd [2009] EWHC 919 (Comm); Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd [2004] 2 Lloyd’s Rep 251, 264 (Gross LJ).

189 See Paragraphs [61]-[64].
Claimant was unable to have the Protection Measures installed in Singapore due to freighting problems.\textsuperscript{190} The Claimant arranged for the Protection Measures to be installed in Durban when the Vessel called there to collect additional bunkers.\textsuperscript{191} The Respondent failed to provide additional bunkers at Durban.\textsuperscript{192} This meant the Vessel did not have sufficient bunkers to continue with the Voyage if it stopped at Durban and the Master elected to continue towards Cape Town.\textsuperscript{193} During the Voyage the Claimant took active steps to protect the Cargo from theft. On 29 June 2014 the Master informed the Claimant that the ‘Vessel was doing [its] best to comply with [the] BMP4 in [the] circumstances.’\textsuperscript{194} Therefore the Claimant argues that it fulfilled its duties in bailment to take reasonable care of the Cargo.

B. The Claimant did not convert the Cargo

77. A bailee must not convert the bailed goods.\textsuperscript{195} This means that a bailee must not, through act or omission, allow the bailed goods to be interfered with contrary to the bailor’s proprietary rights.\textsuperscript{196} A bailee must take reasonable care to protect the bailed goods from foreseeable hazards, including theft.\textsuperscript{197}

78. The pirates stole 28,190 mt of gasoil from the Vessel.\textsuperscript{198} The Claimant argues that it is not liable for this conversion because it took reasonable steps to prevent the pirates from converting the Cargo.\textsuperscript{199} The Claimant exercised reasonable care to protect the Cargo from theft.\textsuperscript{200} Therefore the Claimant is not liable in conversion.

\textsuperscript{190} Moot Problem, 27.
\textsuperscript{191} Ibid.
\textsuperscript{192} Ibid 32.
\textsuperscript{193} Ibid.
\textsuperscript{194} Ibid 36.
\textsuperscript{196} Caxton Publishing Co Ltd v Sutherland Publishing Co Ltd [1939] AC 178, 202 (Lord Porter); Morris v CW Martin & Sons Ltd [1966] QB 716, 732 (Diplock LJ); Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19; AC 833, [39]-[42] (Lord Nicholls).
\textsuperscript{197} Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd [2004] 2 Lloyd’s Rep 251, 264 (Gross LJ); Palmer, above n 182, 1108. See also Matrix Europe Ltd v Uniserve Holding Ltd [2009] EWHC 919 (Comm).
\textsuperscript{198} Moot Problem, 41-2.
\textsuperscript{199} See Paragraphs [63]-[64].
\textsuperscript{200} Ibid.
PRAYER FOR RELIEF

For the reasons set out above, the Claimant requests this Tribunal to:

(I) DECLARE that this Tribunal has jurisdiction to hear the merits of this dispute;

(II) FIND that the Respondent is liable to the Claimant for the actions of ASA2;

(III) FIND that the Respondent is liable to the Claimant for hire;

(IV) FIND that the Claimant is not liable for any breach of the Hague-Visby Rules; and therefore

(V) AWARD damages to the Claimant and interest on the amounts claimed.