IN THE MATTER OF AN ARBITRATION HELD IN MELBOURNE

Claimant
Western Tankers Inc

Respondent
Less Dependable Traders Pte

MEMORANDUM FOR THE RESPONDENT

TEAM NO. 2

Emily Bell
Rebecca Cain
Kala Campbell
Zia Van Aswegen
CONTENTS

List of Authorities: Books and Journals ...................................................................................... i

List of Authorities: Cases & Arbitral Awards ................................................................................. iii

List of Authorities: Legislation ....................................................................................................... viii

List of Authorities: Other .............................................................................................................. viii

List of Abbreviations .................................................................................................................... ix

Statement of Facts ........................................................................................................................ 1

Part One: Jurisdiction .................................................................................................................. 3

   I. The Arbitration Agreement is invalid due to unilateral mistake .............................................. 3

   II. The seat of the arbitration is in Singapore .............................................................................. 4

   III. The tort of deceit is to be decided according to Singaporean law ....................................... 5

Part Two: Contractual Liability ................................................................................................... 6

   I. The Charterparty was not in force for the entire charter period ............................................. 6

   II. The loss did not arise as a result of the Master’s compliance with the Respondent’s
       instructions ............................................................................................................................... 8

       A. The Claimant followed instructions from a third party .................................................... 8

       B. The instructions were not an effective cause of the Claimant’s loss ............................... 10

       C. The loss was too remote .................................................................................................. 11

       D. The Respondent is not required to indemnify the Claimant under the BIMCO STS
           Clause ............................................................................................................................... 11

   III. The Respondent is not liable to pay hire under clause 8 of the Charterparty because the
        Respondent is entitled to claim equitable set-off .................................................................. 12
A. The Claimant’s hire claim and the Respondent’s equitable set-off counterclaim arise from the same contract ................................................................. 13

B. The Claimant has breached the contract by failing to provide a seaworthy Vessel ........ 13

C. The Claimant’s breach is directly connected to the payment of hire............................ 17

D. It would be manifestly unjust if the Claimant’s hire could be asserted without reference to the Respondent’s equitable set-off claim ...................................................... 18

Part Three: Counterclaim ........................................................................................... 19

I. The Claimant is liable for its failure to properly and carefully care for the Cargo .......... 19

A. The Claimant breached its duty to care for the Cargo ............................................. 19

B. The Claimant cannot rely on an exemption under art IV r 2 of the Hague-Visby Rules 20

II. The Claimant has breached its duties in bailment .................................................... 20

A. The Claimant failed to take reasonable care of the Cargo...................................... 21

B. The Claimant converted the Cargo ...................................................................... 22

PRAYER FOR RELIEF .................................................................................................. 23
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D

G

H

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B

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[1980] 2 Lloyd’s Rep 267.................................................................................................................. 12, 13, 17, 18
Bank Line Ltd v Arthur Capel and Company [1919] AC 435............................................................. 7
Berezovsky v Michaels [2000] 1 WLR 1004...................................................................................... 5
Blackburn, Low & Co v Vigors (1887) 12 App Cas 531................................................................. 3
Boursot v Savage (1866) LR 2 Eq 134............................................................................................... 3
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British Road Services Ltd v Arthur V Crutchley & Co Ltd [1968] 1 Lloyd’s Rep 271 .............. 21

C

Caltex Refining Co Pty Ltd v BHP Transport Ltd (The Iron Gippsland) [1994] 1 Lloyd’s Rep 335
.......................................................................................................................................................... 19
Caxton Publishing Co Ltd v Sutherland Publishing Co Ltd [1939] AC 178 ...................................... 22
Century Textiles and Industry Ltd v Tomoe Shipping Co (Singapore) Pte Ltd (The Aditya
Vaibhav) [1991] 1 Lloyd’s Rep 573 ................................................................................................. 12, 13, 17, 18
Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer
Holzwirtschaftsbetriebe Registrierte GmbH [1954] 1 QB 8 ............................................................ 3
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Compania Sud Americana De Vapores v Shipmair BV (The Teno) [1976] 2 Lloyd’s Rep 289 ... 12,
............................................................................................................................................................ 18
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Lloyd’s Rep 91 ...................................................................................................................................... 5

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Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696 ....................................... 7
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E

East West Corporation v DKBS AF 1912 A/S [2003] QB 1509 ..................................................20, 21, 22
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Salvage & Towage) Ltd (The Sea Angel) [2007] 2 Lloyd’s Rep 517 ...........................................7
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..................................................................................................................................................15

G

G H Trading Renton & Co Ltd v Palmyra Trading Corporation of Panama [1957] AC 149 ...... 19
Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd [1994] 1 Lloyd’s Rep 213 ...... 21
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Bungo Seroja) (1998) 196 CLR 161 ..........................................................................................19

H

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I

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R

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S

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<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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| Arbitration Agreement | Clause 46 BIMCO  
*Shelltime 4* (December 2003)                                         |
| ASA                | Atlantic Services Agency                                                   |
| ASA2               | Atlantic Services Agency (ASA Angola Ltd)                                  |
| BMP4               | Best Management Practices for Protection Against Somalia Based Piracy (Version 4) |
| Cargo              | 30,000 mt jet fuel and 70,000 mt +/- 10% gasoil                             |
| Charterparty       | BIMCO *Shelltime 4* (December 2003)                                        |
| Claimant           | Western Tankers Inc                                                        |
| Loadport           | Singapore PB Terminal                                                      |
| Protection Measures| Razor wire, fixing clips, handheld flashlights and batteries               |
| Respondent         | Less Dependable Traders Pte                                                |
| Rider Clauses      | LDTP Rider Clauses                                                         |
| Vessel             | *Western Dawn*                                                             |
| Voyage Orders      | Voyage Orders *M/T Western Dawn*                                           |
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). The Respondent was to deliver the Cargo to Angola Energy Imports in Luanda.

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 27 May 2014 the Respondent received a provisional credit line of USD650,000 from Equator Bunkers. The Respondent used this credit line to supply the Vessel with 950 mt of bunkers (Bunkers).

4. On 4 June 2014 the Vessel arrived at Singapore’s PB Terminal (Loadport). Between 7 and 8 June 2014 the Vessel was loaded with the Cargo and 950 mt of bunkers. On 8 June 2014 the Vessel left the Loadport.

5. On 3 June 2014 the Respondent informed the Claimant that additional bunkers would be provided during the voyage. On 28 June 2014 the Respondent confirmed that STS Area 1 was the bunker supply area. William from Atlantic Services Agency (ASA) was cc’ed into this email. The Voyage Orders for M/T Western Dawn (Voyage Orders) stated that William was the disport agent.

THE PIRATE ATTACK

6. On 28 June 2014 Captain Anya of Atlantic STS Agency Ltd (ASA Angola Ltd) (ASA2) emailed the Master claiming to be the ship-to-ship coordinator. He directed the Vessel towards coordinates 06°00’S, 08°10’E which he claimed was STS Area 1. This conflicted with the
Master’s information. However the Master followed Captain Anya’s instructions without question.

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

8. 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**

9. 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.

10. On 4 July 2014 the Respondent informed the Claimant that it would not be paying for its second hire period due to no contact with the Vessel.

**Arbitral Proceedings**

11. During negotiation of the Charterparty the Respondent informed the broker that it did not want arbitration to take place in London. Despite this, the final arbitration clause contained in Clause 46 of the Charterparty stated that all disputes arising out of the Charterparty would be referred to London arbitration in accordance with the *Arbitration Act 1996 (UK)* (*Arbitration Agreement*).

12. On 1 November 2014 the Claimant referred the dispute to arbitration.

13. On 29 November 2014 the Respondent served its Statement of Defence on the Claimant. The Respondent objected to the arbitral seat and stated that the proper arbitral seat was Singapore.
PART ONE: JURISDICTION

1. An arbitral tribunal has the power to rule on its own jurisdiction. The Respondent argues that this Tribunal does not have jurisdiction to hear the merits of the dispute because: (I) the Arbitration Agreement is invalid due to unilateral mistake; and (II) the seat of the arbitration is in Singapore. Further, the Respondent argues that English law cannot be used to determine a claim for the tort of deceit because: (III) the tort of deceit is to be determined according to Singaporean law.

I. THE ARBITRATION AGREEMENT IS INVALID DUE TO UNILATERAL MISTAKE

2. An arbitration agreement can be challenged on general contract law principles including mistake. Unilateral mistake occurs when one party is mistaken about the terms of a contract and the other party is aware of the mistake. A party is deemed to have knowledge of a mistake where they have actual or constructive knowledge of the mistake.

3. A principal is deemed to have the same knowledge as its agents when that knowledge relates to, and was acquired during, the agency relationship. A shipbroker is an agent for the purposes of making a charter. The agency relationship can be determined by examining the source of the shipbroker’s commission.
4. The Claimant was responsible for paying the broker’s commission.\textsuperscript{8} On 23 May 2014 the Respondent informed the broker that it did not want arbitration to take place in London.\textsuperscript{9} However Clause 46 of the Charterparty provided for arbitration in London.\textsuperscript{10} The Respondent argues that the broker is the Claimant’s agent and therefore the Claimant had constructive knowledge of the Respondent’s intention. Therefore the inclusion of ‘London arbitration’ in Clause 46 was a unilateral mistake.

II. THE SEAT OF THE ARBITRATION IS IN SINGAPORE

5. An arbitral tribunal may select the arbitral seat if the parties have not agreed on an arbitral seat.\textsuperscript{11} The tribunal must have regard to the contract and all the relevant circumstances.\textsuperscript{12} The relevant circumstances include: any connections that the parties have with a particular country, the proposed procedures in the arbitration including the location of any hearings, the parties and witnesses and the place of performance of the contract.\textsuperscript{13}

6. The parties did not agree on an arbitral seat because of unilateral mistake.\textsuperscript{14} Therefore the Respondent argues that this Tribunal has the power to designate the arbitral seat. The Respondent argues that this Tribunal should select Singapore because it is the most appropriate seat. The Claimant and its staff were located in Singapore.\textsuperscript{15} The Vessel was anchored in Singapore\textsuperscript{16} and the Cargo was loaded in Singapore.\textsuperscript{17} The Bills of Lading were issued in

\begin{footnotesize}
\textsuperscript{8} New Zealand Maritime Law Journal 29, 29. See also Navig8 Inc v South Vigour Shipping Inc [2015] EWHC 32 (Comm).
\textsuperscript{9} Les Affréteurs v Leopold Walford (London) Ltd [1919] AC 801, 812 (Lord Atkinson); Ingersoll Milling Machine Co v M/V Bodena, 829 F 2d 293 (2nd Cir, 1987), [15]-[16] (Pierce J); Watts and Reynolds, above n 5, 56-7; Anderson, above n 6, 94.
\textsuperscript{10} Moot Problem, 2, 6.
\textsuperscript{11} Ibid 2.
\textsuperscript{12} BIMCO, Shelltime 4 (December 2003) cl 46.
\textsuperscript{14} See Paragraphs [2]-[4].
\textsuperscript{15} Moot Problem, 13, 14.
\textsuperscript{16} Ibid 4.
\textsuperscript{17} Ibid 1.
\end{footnotesize}
Singapore. The officers and crew were Australian, Filipino and Malay nationals. Therefore the Respondent argues that Singapore would be the most appropriate seat for the arbitration due to its close connection to the parties, the contract and any witnesses.

III. THE TORT OF DECEIT IS TO BE DECIDED ACCORDING TO SINGAPOREAN LAW

7. Parties to an arbitration agreement may choose the law applicable to the underlying contract. The parties have agreed that English law should govern the underlying contract. However, the Private International Law (Miscellaneous Provisions) Act 1995 (UK) provides that the applicable law when determining a tort is the law of the country in which the tort occurs. The tort of deceit occurs when one party relies, to their detriment, on the false representation of another party who knew that the representation was untrue. Where the elements of the tort of deceit occur in different countries the general rule is that the law of the country in which the most significant components of those elements occurred will apply. Significance means the significance of the element in relation to the tort in question.

8. The Claimant has made three allegations of deceit. First, that the Respondent fraudulently represented that bunkers would be provided in Durban; second, that the Respondent and ASA2, on behalf of the Respondent, fraudulently represented that there would be a sufficient

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18 Ibid 43, 44.
19 Ibid 51.
21 BIMCO, Shelltime 4 (December 2003) cl 46(a).
26 Moot Problem, 63.
supply of bunkers available at STS Area 1; and third, that ASA2 fraudulently represented that the Cargo would be discharged at a nominated STS location.  

9. The Respondent argues that the most significant element of the tort of deceit is that of intentional false representation. Therefore the critical factor is where the parties were located when these alleged representations were made. The first allegation relates to an email the Respondent sent at 17:21 UTC+8 on 3 June 2014. The second allegation relates to two emails, one sent by the Respondent at 18:43 UTC+8 on 28 June 2014 and one sent by Captain Anya at 18:02 UTC+1 on 28 June 2014. The third allegation relates to the same email sent by Captain Anya on 28 June 2014. Captain Anya is not the Respondent’s agent and therefore the Respondent cannot be held liable for his actions. The use of UTC+8 time indicates that the Respondent was located at its offices in Singapore at the time of these alleged representations. Therefore Singaporean law applies to the tort of deceit.

PART TWO: CONTRACTUAL LIABILITY

10. The Respondent argues that it is not liable to indemnify the Claimant for any loss arising from the pirate attack because: (I) the Charterparty was not in force for the entire charter period; and (II) the loss did not arise as a result of the Master’s compliance with the Respondent’s instructions. Further the Respondent argues that it is not liable to pay hire under Clause 8 of the Charterparty because: (III) it is entitled to claim equitable set-off.

I. THE CHARTERPARTY WAS NOT IN FORCE FOR THE ENTIRE CHARTER PERIOD

11. The Respondent argues that it is not liable to pay the Claimant damages for breach of contract because the Charterparty was not in force for the entire charter period. The Charterparty was

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27 Ibid.
28 Ibid.
30 Ibid 34.
31 Ibid 35.
32 Ibid.
33 See Paragraphs [19]-[20].
not in force for the entire charter period because the Charterparty was frustrated as a result of the pirate attack.

12. The doctrine of frustration applies to time charterparties. A contract is frustrated when a supervening event makes performance of the contract radically different to that originally 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. If the foundation of the contract is destroyed then the contract will be frustrated, regardless of any express provisions.

13. Whether performance has been rendered radically different is determined by reference to the facts. The original obligation must have become incapable of being performed and it must be ‘positively unjust’ to enforce the new obligation against the parties.

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14. The Respondent hired the Vessel to deliver 72,199.127 mt of gasoil and 30,000 mt of jet fuel to Angola Energy Imports.\textsuperscript{44} Pirates attacked the Vessel between 4 and 17 July 2014.\textsuperscript{45} The pirates stole 28,190 mt of gasoil from the Vessel.\textsuperscript{46} Therefore the Respondent was unable to fulfil its contractual obligations to Angola Energy Imports under their contract of sale.\textsuperscript{47} The Respondent argues that the pirate attack rendered performance of its contractual obligations radically different by leaving the Respondent unable to fulfil the purpose of the Charterparty. Therefore the Charterparty was frustrated and is no longer in force.

II. THE LOSS DID NOT ARISE AS A RESULT OF THE MASTER’S COMPLIANCE WITH THE RESPONDENT’S INSTRUCTIONS

15. Clause 13 of the Charterparty requires the Master to obey the Respondent’s instructions.\textsuperscript{48} The Respondent must only indemnify the Claimant for losses that arise from the Master’s compliance with its instructions.\textsuperscript{49}

16. The Respondent argues that it is not liable to indemnify the Claimant for any loss arising from the pirate attack because the loss did not arise as a result of the Master’s compliance with the Respondent’s instructions. The loss did not arise as a result of the Master’s compliance with the Respondent’s instructions because: (A) the Claimant followed instructions from a third party. In any event: (B) the instructions were not an effective cause of the Claimant’s loss; and (C) the loss was too remote. Further: (D) the Respondent is not required to indemnify the Claimant under the BIMCO STS Clause.

A. The Claimant followed instructions from a third party

17. A master must follow a charterer’s orders without question.\textsuperscript{50} A master does not need to obey the charterer’s orders immediately and may seek further clarification about the validity of those orders.\textsuperscript{51}

\textsuperscript{44} Moot Problem, 5, 29, 43-4.
\textsuperscript{45} Ibid 41-2.
\textsuperscript{46} Ibid 42.
\textsuperscript{47} Ibid 30.
\textsuperscript{48} BIMCO, Shelltime 4 (December 2003) cl 13(a).
\textsuperscript{49} Ibid cl 13(a)(i).
18. The Voyage Orders instructed the Master to refer any voyage related instructions received from third parties to the Respondent. On 28 June 2014 the Master received an email from Captain Anya advising the Master that ASA2 was the Vessel’s ship-to-ship transfer coordinator. Captain Anya advised the Master that the ship-to-ship transfer coordinates were 06°00’S, 08°10’E. This conflicted with the Master’s information. The Master had the coordinates 09°00’S, 11°30’E listed as the location of Outer Port Limits Area 1. There is a difference of approximately 268 nautical miles between these two sets of coordinates.

19. The Claimant should not have coordinated the ship-to-ship transfer with Captain Anya of ASA2. The Voyage Orders listed ASA as the disport agent. The Respondent cc’ed ASA into emails with the Claimant on 2 occasions. The Claimant cc’ed ASA into emails to the Respondent on 7 occasions. Captain Anya claimed to represent a different company, with a different email domain. Captain Anya also purported to represent the Antelope, but there is no known relationship between ASA and the Antelope. The Master did not advise the Respondent that it had begun communicating with ASA2. On 28 June 2014 the Vessel proceeded towards the coordinates supplied by Captain Anya.

20. The Respondent argues that ASA2 is a third party because ASA2 was neither the Respondent nor its agent. ASA2 directed the Claimant to a location contrary to the instructions of the

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52 Moot Problem, 13.
53 Ibid 35.
54 Ibid.
55 Ibid 34.
56 Ibid.
57 Ibid 14.
58 Ibid 33, 34.
59 Ibid 30-4.
60 Ibid 35; Procedural Order No 2, [21].
61 Moot Problem, 35; Procedural Order No 2, [12].
62 Procedural Order No 2, [13].
63 Moot Problem, 35-41.
64 Ibid 35.
Respondent. The Claimant did not refer these instructions to the Respondent for handling. Therefore the Claimant followed instructions from a third party.

B. The instructions were not an effective cause of the Claimant’s loss

21. The employment orders must be the effective or real cause of the loss. The employment orders do not need to be the only or dominant cause of the loss.

22. Both parties were aware that the Vessel would be travelling to areas of known piracy. The Vessel should have been protected against piracy. The Claimant was required to comply with the BMP4. Piracy precautions significantly reduce the chances of a successful pirate attack. However the Claimant failed to equip the Vessel with adequate protection measures. Further, the discharge of cargo is in the normal course of a voyage. The ship-to-ship transfer was necessary to discharge the Cargo. The Respondent argues that it does not make commercial sense for a ship-to-ship transfer to be determined as an effective cause of a pirate attack.

23. The Respondent argues that the Claimant’s actions were an effective cause of the loss. Therefore the Respondent should not be liable to indemnify the Claimant.


66 Northern Shipping Co v Deutsche Seereederei GmbH (The Kapitan Sakhavov) [2000] 2 Lloyd’s Rep 255, 268 (Auld LJ); ENE Kos 1 Ltd v Petroleo Brasileiro SA (No 2) [2012] 2 AC 164, 174 (Lord Sumption), 189 (Lord Clarke).

67 Moot Problem, 8-9, 11-2, 16, 22.

68 Ibid 8-9, 11-2, 16.

69 Ibid 8-9, 16.


71 Moot Problem, 27.


73 Moot Problem, 32-3.
C. The loss was too remote

24. A loss will be too remote when it is not a foreseeable consequence of the charterer’s instructions.74 Only the damage itself must be foreseeable.75 The extent or scale of the damage does not need to be foreseeable.76

25. The Respondent’s instructions related to the ship-to-ship transfer. This transfer was necessary for the Vessel to complete the Voyage.77 The Respondent believed that the Vessel was equipped with piracy precaution measures.78 If the proper piracy precautions are implemented it is substantially less likely that a pirate attack will occur.79 The Respondent argues that a pirate attack is not a foreseeable consequence of its orders to conduct a ship-to-ship transfer. Therefore the loss was too remote.

D. The Respondent is not required to indemnify the Claimant under the BIMCO STS Clause

26. The Respondent argues that it is not required to indemnify the Claimant under the BIMCO STS Clause because the intended ship-to-ship transfer did not occur.

27. The BIMCO STS Clause provides that all such ship-to-ship transfers shall be at the Respondent’s risk, cost, expense and time.80 It also requires the Respondent to indemnify the Claimant against any and all consequences arising out of the ship-to-ship operations.81

28. The Respondent intended that the Vessel travel to STS Area 1 for the purpose of conducting a ship-to-ship transfer to discharge the Cargo and receive bunkers.82 However the Master

77 Moot Problem, 32-3.
78 Ibid 8, 16.
79 Shane and Magnuson, above n 70, 13-7; Psarros, above n 70, 317; Bryant, Townsley and Leclerc, above n 70, 77-8; Duda and Wardin, above n 70, 199.
80 Moot Problem, 10.
81 Ibid 11.
82 Ibid 33-4.
followed the instructions of Captain Anya who diverted the Vessel to a different location. The intended ship-to-ship transfer did not occur. Instead the Vessel was attacked by pirates who stole approximately 28,190 mt of gasoil via multiple ship-to-ship transfers. These ship-to-ship transfers are not the one contemplated in the BIMCO STS Clause.

29. The BIMCO STS Clause does not contemplate the effects of a pirate attack. It only contemplates the possibility of damage arising from the conduct of the ship-to-ship transfer, for example damage arising from other alongside vessels.

30. The Respondent argues that the ship-to-ship transfers were a result of piracy and do not fall within the scope of the BIMCO STS Clause. Therefore the Respondent is not required to indemnify the Claimant.

III. THE RESPONDENT IS NOT LIABLE TO PAY HIRE UNDER CLAUSE 8 OF THE CHARTERPARTY BECAUSE THE RESPONDENT IS ENTITLED TO CLAIM EQUITABLE SET-OFF

31. Equitable set-off applies to time charterparties and claims for hire. Equitable set-off will enable the charterer to deduct capital from its hire payments to compensate for loss caused by the shipowner. This loss must be directly connected to the hire payment.

32. The Respondent argues that it is not liable to pay hire under Clause 9 of the Charterparty because it is entitled to claim equitable set-off. The Respondent is entitled to claim equitable set-off because: (A) the Claimant’s hire claim and the Respondent’s equitable set-off counterclaim arise from the same contract; (B) the Claimant has breached the contract by

83 Ibid 35-41.
84 Ibid 41-2.
85 Ibid.
86 Ibid 10-1.
87 Ibid.
88 Ibid 11.
90 Santiren Shipping Ltd v Unimarine SA (The Chrysovalandou Dyo) [1981] 1 Lloyd’s Rep 159, 163 (Mocatta J); The Nanfri, Benfri, Lorfri [1978] 2 Lloyd’s Rep 132, 147 (Goff LJ).
failing to provide a seaworthy Vessel; (C) this breach is directly connected to the payment of hire; and (D) it would be manifestly unjust if the Claimant’s hire could be asserted without reference to the Respondent’s equitable set-off claim.

A. The Claimant’s hire claim and the Respondent’s equitable set-off counterclaim arise from the same contract

33. The owner’s hire claim and the charterer’s equitable set-off counterclaim must arise from the same contract.\(^9\) Clause 8 of the Charterparty requires the Respondent pay hire at a rate of USD19,950 per day pro rata. All hire payments were due and payable monthly and in advance for the duration of the charter.\(^9\) The charter period begins when the vessel is delivered.\(^9\) The Respondent’s claim for equitable set-off arises because the Claimant breached the seaworthiness obligation contained in art III r 1(a) of the Hague-Visby Rules.\(^9\) The contract of carriage incorporates the Bills of Lading which are subject to the Hague-Visby Rules.\(^9\) Therefore the Respondent argues that the Claimant’s hire claim and the Respondent’s equitable set-off counterclaim both arise from the same contract.

B. The Claimant has breached the contract by failing to provide a seaworthy Vessel

34. Seaworthiness is governed by art III r 1(a) of the Hague-Visby Rules\(^9\) which are incorporated into the contract of carriage.\(^9\) The carrier is obligated to provide a seaworthy vessel.\(^9\) The Respondent argues that the Claimant breached the contract of carriage because: (a) the Claimant is the carrier; (b) the Claimant breached art III r1 of the Hague-Visby Rules; (c) Claimant’s breach was an effective cause of the Respondent’s loss; and (d) Claimant failed to exercise due diligence before and at the beginning of the voyage.

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\(^9\) Ibid cl 4(a). See also Wilford, Coghlin and Kimball, above n 50, 129.

\(^9\) See Paragraphs [36]-[46].


\(^9\) BIMCO, *Shelltime 4* (December 2003) cl 38(1); Moot Problem, 43-4.

a. The Claimant is the carrier

35. A carrier must exercise due diligence before and at the beginning of the voyage to ensure that the vessel is seaworthy. Under the Hague-Visby Rules the carrier may be either the shipowner or the charterer. Article I r 1(a) of the Hague-Visby Rules provides a definition of a carrier. This states that a ‘carrier includes the owner or the charterer who enters into a contract of carriage with a shipper.’ The Respondent is the charterer and shipper. If the carrier was found to be the charterer then the Respondent would have entered into a contract of carriage with itself. Therefore the only logical interpretation is that the Claimant is the carrier.

36. English law recognises that the identity of the carrier is a question of fact that depends on the circumstances of each case. The shipowner will generally be the carrier if the bills of lading are signed by the master. Under a time charter the shipowner is responsible for the ship’s maintenance. This is because under a time charter the charterer does not control of the physical operation and maintenance of the vessel, merely its navigation.

37. The Master signed the Bills of Lading. The identification of the Respondent as the carrier under the Hague-Visby Rules is impractical because the Respondent did not have physical control over the Vessel. Therefore the Respondent argues that the Claimant is the carrier for the purpose of the Hague-Visby Rules.

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100 Ibid art III r 1(a); The Kapitan Sakharov [2000] 2 Lloyd’s Rep 255, 266 (Auld LJ); Fyffes Groups Ltd v Reefer Express Lines Pty Ltd (The Kriti Rex) [1996] 2 Lloyd’s Rep 171, 185 (Moore-Bick J); Eridania SpA v Rudolf A Oetker (The Fjord Wind) [2000] 2 Lloyd’s Rep 191, 199 (Clarke J).
102 Ibid art I r 1(a).
103 Ibid.
104 Moot Problem, 43-4.
106 Ibid.
107 Ibid 384.
108 Ibid 381.
109 Moot Problem, 43-4.
b. The Claimant breached Article III r 1 of the Hague-Visby Rules

38. Article III r 1 of the Hague-Visby Rules requires the carrier to exercise due diligence to make a ship seaworthy before and at the beginning of the voyage.\(^{110}\) 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.’\(^{111}\) 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.\(^{112}\) ‘Before and at the beginning of the voyage’ is the ‘period from at least the beginning of loading until the vessel starts on her voyage.’\(^{113}\)

39. The Claimant argues that the parties foresaw the risk of piracy during the Voyage. The contract for carriage included specific provisions regarding piracy.\(^{114}\) The Voyage Orders required the Vessel to carry the latest edition of the Best Management Practices for Protection Against Somalia Based Piracy (BMP4).\(^{115}\) On 27 May 2014 the Claimant expressly acknowledged that the Vessel would be travelling into areas of known security and piracy threat.\(^{116}\) Despite this the Claimant failed to install any anti-piracy measures on the Vessel.\(^{117}\) Therefore the Respondent argues that the Claimant failed to make the Vessel seaworthy.

c. The Claimant’s breach was an effective cause of the Respondent’s loss

40. Article III r 1 of the Hague-Visby Rules provide that the carrier’s failure to exercise due diligence to ensure that the vessel is seaworthy must be an effective cause of the charterer’s

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\(^{114}\) Moot Problem, 8-9, 11-2.

\(^{115}\) Ibid 16.

\(^{116}\) Ibid 22.

\(^{117}\) Ibid 27, 36.
loss. The carrier’s failure to exercise due diligence does not need to be the only or dominant cause of the loss merely an effective cause.

41. Anti-piracy protection measures substantially decrease successful pirate attacks. The BMP4 has been recognised as the minimal ship protection measures that are likely to be effective in a pirate attack. The BMP4 has been produced and supported by numerous international authorities and shipping associations including the IMB, OCIMF and BIMCO. The BMP4 recommended anti-piracy protection measures include evasive maneuvering, increased speed, anti-piracy watch, increased lighting and use of razor/electric wire.

42. A vessel is at a greater risk of being attacked by pirates if it is not moving at full speed, is anchored or drifting. The majority of West African pirate attacks occurred whilst the vessel was not moving at full speed.

43. The Claimant failed to implement the necessary anti-piracy protection measures such as razor wire and increased lighting. There is also no evidence to suggest that the Master and crew undertook any active anti-piracy measures such as watch-keeping, enhanced vigilance and evasive maneuvering. The Respondent argues that the Claimant’s failure to implement anti-piracy protection measures left the Vessel vulnerable to a pirate attack. Between 4 and 17 July

120 Shane and Magnuson, above n 70, 13-7; Psarros et al, above n 70, 317; Bryant, Townsley and Leclerc, above n 70, 77-8; Duda and Wardin, above n 70, 199.
123 Ibid 35.
124 Ibid 7, 35.
125 Ibid 3-4.
126 Ibid 36.
128 Shane and Magnuson, above n 70, 13-4; Psarros et al, above n 70, 329; Pristom et al, above n 121, 682.
129 Psarros et al, above n 70, 314; Pristom et al, above n 121, 682.
130 Moot Problem, 27, 36.
131 Ibid 36.
2014 pirates attacked the Vessel and stole 28,190 mt of gasoil. The Respondent argues that the Claimant’s failure to abide by the BMP4 and ensure the Vessel was seaworthy was an effective cause of this loss.

d. The Claimant failed to exercise due diligence before and at the beginning of the voyage

44. 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 relevant act or omission. The shipowner will not be liable for any unseaworthiness provided he satisfies this test.

45. The Claimant knew by 27 May 2014 that the Vessel would be travelling into areas of known piracy. The Charterparty required the Claimant to adhere to the BMP4. However the Claimant failed to install the relevant piracy precautions. The Respondent argues that a reasonably prudent shipowner would have followed the BMP4 and installed, at the very minimum, passive anti-piracy precautions, such as razor-wire, on board the Vessel.

C. The Claimant’s breach is directly connected to the payment of hire

46. The shipowner’s breach must be directly connected to the payment of hire. The shipowner’s breach will be directly connected to the charterer’s obligation to pay hire when the shipowner’s

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132 Ibid 41-2.
135 Ibid.
137 Robin Hood Flour Mills Ltd v NM Paterson & Sons Ltd (The Farrandoc) [1967] 2 Lloyd’s Rep 276, 278 (Thurlow J); Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd [1959] AC 589, 602 (Lord Somervell); McFadden v Blue Star Line [1905] 1 KB 697, 707 (Channell J).
138 Moot Problem, 22.
139 Ibid 8.
140 Ibid 36.
breach resulted in the charterer having less than the full use of the vessel. The charterer may deduct payments by way of equitable set-off if the shipowner fails to render the services he has agreed to provide. When a charterer charters a ship they expect to receive a vessel that is seaworthy, secure and equip for the voyage.

47. The Respondent argues that its obligation to pay hire under Clause 9 of the Charterparty is directly connected to the Claimant’s failure to provide a seaworthy Vessel. The Vessel must be seaworthy in order for the Respondent to exploit the capacity of the Vessel to carry the Cargo. The Claimant’s failure to ensure that the Vessel was seaworthy was an effective cause of the pirate attack. This left the Respondent with less than full use of the Vessel.

**D. It would be manifestly unjust if the Claimant’s hire could be asserted without reference to the Respondent’s equitable set-off claim**

48. To claim equitable set-off the counterclaim must be so closely connected with the shipowner’s demand for hire that it would be manifestly unjust to allow the shipowner to enforce payment without regard to the cross claim. It is manifestly unjust to allow a shipowner to recover hire for a period during which he had, in breach of contract, provided less than the full use of the vessel.

49. The Respondent was paying hire for the full use of the Vessel. The Respondent argues that the Claimant breached the contract by providing an unseaworthy vessel. This was an effective cause of the pirate attack. The pirate attack left the Respondent with less than the

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144 BIMCO *Shelltime 4* December 2003 cl 1(c).

145 See Paragraphs [40]-[43].


148 BIMCO *Shelltime 4* December 2003 cls 8, 9.

149 See Paragraphs [38]-[39].

150 See Paragraphs [40]-[43].
full use of the Vessel. The Respondent argues that it would be manifestly unjust to allow the Claimant to recover hire for the period after the pirate attack without considering the Respondent’s claim for equitable set-off.

**PART THREE: COUNTERCLAIM**

50. The Respondent argues that it is entitled to damages because: (I) the Claimant is liable for its failure to properly and carefully care for the Cargo; and (II) the Claimant breached its duties in bailment.

I. **THE CLAIMANT IS LIABLE FOR ITS FAILURE TO PROPERLY AND CAREFULLY CARE FOR THE CARGO**

51. 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.

52. The Respondent argues that the Claimant is liable for damages under art III r 2 because: (A) the Claimant breached its duty to care for the Cargo; and (B) the Claimant cannot rely on an exemption under art IV r 2 of the Hague-Visby Rules.

A. **The Claimant breached its duty to care for the Cargo**

53. 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. ‘Properly’ is an obligation to adopt a sound system considering all the knowledge the carrier has or ought to have about the nature of the goods. This depends on the conditions that the cargo will meet. Voyage orders contain specific information about the nature of the cargo that allows the carrier to adopt a sound system for carriage of particular goods.

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151 Moot Problem, 42.
153 Id.
155 The Bunga Seroja (1998) 196 CLR 161, 175 (Gaudron, Gummow and Hayne JJ).
54. The Claimant knew the Vessel was travelling into areas of piracy.\textsuperscript{157} Vessels carrying oil cargoes are key targets for West African pirates.\textsuperscript{158} The Vessel was carrying 72,199 mt of gasoil.\textsuperscript{159} The Voyage Orders required the Vessel to carry and implement the BMP4.\textsuperscript{160} The Claimant failed to install any protection measures on the Vessel.\textsuperscript{161}

55. The Respondent argues that a sound system for an oil tanker bound for West Africa would have included the BMP4 protection measures to protect the Cargo from the risk of piracy. The Claimant has failed to install protection measures on the Vessel. Therefore the Claimant has breached its duty to properly care for the Cargo.

\textbf{B. The Claimant cannot rely on an exemption under art IV r 2 of the Hague-Visby Rules}

56. A carrier will not be able to rely on the exemptions under art IV r 2 of the Hague-Visby Rules if they have breached their overriding obligation to exercise due diligence to provide a seaworthy vessel.\textsuperscript{162} The Respondent argues that the Claimant failed to exercise due diligence to provide a seaworthy vessel.\textsuperscript{163} Therefore the Claimant is unable to rely on the exemptions under art IV r 2 of the Hague-Visby Rules.

\textbf{II. THE CLAIMANT HAS BREACHED ITS DUTIES IN BAILMENT}

57. A bailment occurs when one person (the bailee) voluntarily takes possession of the goods of another (the bailor).\textsuperscript{164} The Claimant agreed to take voluntary possession of the Cargo when it

\begin{footnotes}
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\item[157] Moot Problem, 22.
\item[159] Moot Problem, 29, 44.
\item[160] Ibid 16.
\item[161] Ibid 27, 32.
\item[163] See Paragraphs [38]-[39].
\item[164] \textit{East West Corporation v DKBS AF 1912 A/S} [2003] QB 1509, 1529 (Mance LJ); \textit{The Pioneer Container} [1994] 2 AC 324, 342 (Lord Goff); \textit{Homburg Hautimport BV v Agrosin Private Ltd} [2004] 1 AC 715, 772 (Lord Hobhouse); 20
\end{footnotes}
agreed to ship the Cargo on its vessel to Luanda.\textsuperscript{165} The Respondent had title to the Cargo.\textsuperscript{166}

The Claimant took possession of the Respondent’s Cargo on 7 June 2014 when the Cargo was loaded onto the Vessel.\textsuperscript{167}

58. The primary duties of a bailee are to take reasonable care of the bailed goods and avoid converting the goods.\textsuperscript{168} The Respondent argues that the Claimant breached its duties in bailment because: (A) the Claimant failed to take reasonable care of the Cargo; and (B) the Claimant converted the Cargo.

A. The Claimant failed to take reasonable care of the Cargo

59. A bailee must take reasonable care of the bailed goods and redeliver the goods in accordance with the bailor’s instructions.\textsuperscript{169} Reasonable care is judged on all the circumstances of the particular case.\textsuperscript{170} The degree of care will vary depending on how and why the goods were delivered.\textsuperscript{171} This requires that the bailee take active steps to protect the bailed goods from foreseeable hazards, including theft.\textsuperscript{172}

60. The Claimant knew the Vessel would be travelling through areas of known piracy.\textsuperscript{173} The Claimant was required to adhere to the BMP4.\textsuperscript{174} The Claimant failed to install any protection measures on the Vessel.\textsuperscript{175} Between 4 and 17 July 2014 the Vessel was attacked by pirates who


\textsuperscript{166} Ibid 30; Procedural Order No 2, [22].

\textsuperscript{167} Moot Problem, 29.

\textsuperscript{168} 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, 1529 (Mance LJ); Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd [1994] 1 Lloyd’s Rep 213, 231 (Handley JA); Palmer, above n 164, 48.

\textsuperscript{169} Houghland v RR Low (Luxury Coaches) Ltd [1962] 1 QB 694, 698 (Ormerod LJ); British Road Services Ltd v Arthur V Crutchley & Co Ltd [1968] 1 Lloyd’s Rep 271, 276 (Lord Pearson, Danckwerts and Sachs LLJ); Morris v CW Martin & Sons Ltd [1996] 1 QB 716, 731 (Diplock LJ).

\textsuperscript{170} Houghland v RR Low (Luxury Coaches) Ltd [1962] 1 QB 694, 698 (Ormerod LJ); British Road Services Ltd v Arthur V Crutchley & Co Ltd [1968] 1 Lloyd’s Rep 271, 282 (Lord Pearson, Danckwerts and Sachs LLJ).

\textsuperscript{171} 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 164, 1108.

\textsuperscript{172} Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd [2004] 2 Lloyd’s Rep 251, 264 (Gross LJ); Palmer, above n 164, 1108. See also Matrix Europe Ltd v Uniserve Holding Ltd [2009] EWHC 919 (Comm).

\textsuperscript{173} Moot Problem, 8-9, 11-2, 16, 22.

\textsuperscript{174} Ibid 8.

\textsuperscript{175} Ibid 27, 36.
stole approximately 28,190 mt of gasoil. The Respondent argues that the Claimant failed to take reasonable care of the Cargo because the Claimant did not protect the Cargo from piracy, despite knowing that the Vessel would be a high risk target.

B. The Claimant converted the Cargo

61. A bailee must not convert the bailed goods. 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. A bailee must take reasonable care to protect the bailed goods from foreseeable hazards, including theft.

62. The Claimant was required to protect the Cargo from piracy. The Vessel was travelling through areas of known piracy and was a high risk target. The Claimant failed to install any protection measures on the Vessel. A failure to include protection measures substantially increases the likelihood of a successful pirate attack. The Vessel was attacked by pirates. The pirates stole approximately 28,190 mt of gasoil. This was contrary to the Respondent’s proprietary rights to the Cargo. The Respondent argues that the Claimant’s failure to take reasonable care of the Cargo caused the Respondent to be excluded from the use and possession of the Cargo. Therefore the Respondent argues that the Claimant is liable for the conversion of the Cargo.

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176 Ibid 41-2.
178 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] AC 833, 906-7 (Lord Nicholls).
179 Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd [2004] 2 Lloyd’s Rep 251, 264 (Gross LJ); Palmer, above n 164, 1108. See also Matrix Europe Ltd v Uniserve Holding Ltd [2009] EWHC 919 (Comm).
180 Moot Problem, 8-9, 11-2.
181 Ibid 22; Procedural Order No 2, [8]. See Paragraph [54].
182 Moot Problem, 27, 36.
183 Shane and Magnuson, above n 70, 13-7 Psarros et al, above n 70, 317; Bryant, Townsley and Leclerc, above n 70, 77-8; Duda and Wardin, above n 70, 199.
184 Moot Problem, 41-2.
185 Ibid 42.
PRAYER FOR RELIEF

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

(I) DECLARE that this Tribunal does not have jurisdiction to hear the merits of this dispute;  
(II) DECLARE that the seat of the arbitration is Singapore;  
(III) FIND that the Respondent is not liable for any additional hire payments; and  
(IV) AWARD damages to the Respondent and interest on the amounts claimed.