BETWEEN:

PANTHER SHIPPING INC

Claimant / Owners

- and -

OMEGA CHARTERING LIMITED

Respondent / Charterers

M/V “THANOS QUEST”

Charter Party dated 18.03.2016

TEAM

KASHYAB VENKATESH • KRITANJALI SARDA • LIKITH REDDY • SHILPA SAI • YESHWANTH

MEMORANDUM ON BEHALF OF THE CLAIMANT/ OWNERS

MEMORANDUM ON BEHALF OF CLAIMANT
MEMORANDUM ON BEHALF OF CLAIMANT

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QUESTIONS PRESENTED

I. Whether the Owners are entitled to the cost of underwater hull cleaning as claimed under First Hire Statement?

II. Whether the period of detention is to be treated as on-hire?

III. Whether the Owners can claim damages on late redelivery of vessel?

IV. Whether the Owners are liable for the cargo damages caused?
STATEMENT OF FACTS

THE PARTIES AND THE CONTRACT OF CARRIAGE

Omega Chartering Limited (“The Charterers”) by a C/P dated 18.03.2016 agreed to charter the Vessel “M/V Thanos Quest” (“The Vessel”) from Panther Shipping Co. (“The Owners”) by way of an amended NYPE 2015 standard form C/P. The C/P included additional rider clauses and incorporated Standard terms of business of both parties. The C/P provided that the Vessel was to arrive at West Coast, Challaland (“The Loading Port”) on the 29th of March; from where it would carry a cargo of 8,600 (1720 x 5mt bags) Metric Tons of English Breakfast Tea in big bags to Wahanda, Bao Kingdom (“The Discharge Port”). The laycan for the Vessel was agreed from the 25th to the 30th of March 2016.

THE HULL CLEANING CLAUSE

On 7th of May 2016, the Vessel reached Wahanda but was unable to berth immediately and instead waited at anchorage. Noting that the vessel would spend more than 30 days at the port of Wahanda, the Owners sent an e-mail to the Charterers, requesting them to confirm arrangements for cleaning the Vessel’s hull in accordance with Clause 83 of the C/P. On the same day the Charterers responded to the email stating that the hull cleaning cannot be performed at Wahanda.

DETENTION BY WAHANDA PORT STATE CONTROL:

The vessel after arriving at the discharge port was not allowed to proceed immediately to berth and instead waited at anchorage for Port State Control to attend the vessel on-board. On 11th May 2016, the Wahanda Port State Control finally attended vessel on-board. Subsequently, they detained the vessel for a minimum 28 days, possibly longer, for suspecting Ebola virus among its
crew members. The Charterers from their mail dated 7th May, 2016 onwards state that duration of detention should not be calculated for hire. The Ship owners contended otherwise

THE LATE REDELCIVERY

On 15th of June 2016, the owners entered into a C/P with Champion Chartering Corp for which the Delivery of the Vessel to them was to be DLOSP Wahanda with a laycan of 22nd to 28th June 2016 (“Next Fixture”). On 28th June 2016, Champion Chartering Corp cancelled the Next Fixture as per Cl. 3 of C/P. The charterers re-delivered the Vessel to the Owners on 30th June 2016. On 4th July 2016, the Owners entered Replacement Fixture with Fairwind International.

THE NOTICE OF ARBITRATION AND THE ARBITRATION PROCEEDINGS

On the 16th of October 2018, the Owners (“Claimants”) gave the Charterers (“Respondents”) an official notice of the arbitration.

The arbitration proceedings commenced on 9th of November 2018, against the Charterers as per the arbitration clause in the charter, for settlement of disputes arising out of the C/P.

THE CLAIMS

The Owners contend that the Charterers are in breach of the C/P due to their failure to:

i. perform hull cleaning prior to re-delivery and

ii. to re-deliver he Vessel prior to the expiry of the maximum period of the C/P.

The Charterers contend that the Owners are responsible for the cargo damage which was caused due negligence on the part of the crew and hence are responsible for compensating for the same.
ARGUMENTS ADVANCED

I. THE RESPONDENT IS LIABLE TO PAY THE COST INCURRED BY THE CLAIMANT FOR THE PERFORMANCE OF UNDERWATER CLEANING

For clause 83 to come into operation, the following essentials needs to be satisfied:

i. The vessel remains at or shifts/ sails within a place, anchorage or berth or port(s)

ii. For an aggregate period exceeding: a. 25 days in a tropical zone; b. 30 days outside such zone

The ship having arrived at Wahanda at charterers’ order on 7th May, 2016 and remained at Wahanda port till 29th June, 2016. The period having exceeded 30 days, the clause is thereby effective.

A plain reading of Clause 83(c) provides that the charter shall perform the underwater cleaning and attributes the risk and liability on the charterers’ cost, expense and time for conducting under water inspection and under water cleaning, and for the period which all the performance warranty is suspended.

The claimant with reference to the above mentioned clause, humbly submits the following claim:

a. The Respondent has a duty to perform the bottom cleaning which he had failed.

b. The Respondent is bound to pay all the expenses claimed by the claimant for the failure to perform his duty.

A. The Respondent has a duty to perform the hull cleaning and has failed to do so

The BIMCO’s Hull Fouling Clause for Time Charter Parties has been developed to transfer hull cleaning obligations to charterers where, as a result of their trading requirements and

MEMORANDUM ON BEHALF OF CLAIMANT
employment orders, a vessel is subject to a prolonged period of idling in port or at anchorage that results in fouling of the hull and underwater parts to an extent that may affect vessel performance.¹

The Hull Fouling Clause comprehensively sets out the circumstances and point in time when responsibility for cleaning hull fouling passes from the owners to the charterers. ² As evident, is established that the hull cleaning clause is operable in the present case and there lies an obligation on the charterers to perform hull cleaning having satisfied the conditions laid down in Clause 83. The charterers, however, have claimed the exception that they were prevented from performing the hull cleaning and hence called for payment of lump sum payment under clause 83(d). The reference is made to the email dated 9 June 2016 communicates that it the Wahanda government does not allow underwater cleaning jobs due to dirty water.³

The Claimant humbly submits that the Respondent was not prevented from performing hull cleaning, hence cannot invoke clause 83(d) causing lump sum payment. It is submitted that to assimilate the way in which any document to be interpreted is to attribute the common sense principles by which any serious utterance would be interpreted in ordinary life.⁴ The meaning of words is a matter of dictionaries and grammars.⁵ The rule is that natural and ordinary meanings of words are to be attributed.⁶ In addition, it must be that the word must be construed not only in the context of the contract, but against the background of the ‘Matrix of fact’ and subject to the requirement that it should have been reasonably available to both the parties at the time of

¹ BIMCO Special Circular No.3, 24th June 2013.
² Id.
³ Moot compromis, Pg 33.
⁴ Investors’ Compensation Scheme Ltd v. West Bromwich Building Society, [1998] 1 All ER 98.
⁵ Id.

MEMORANDUM ON BEHALF OF CLAIMANT
contracting. It is urged that the Arbitrator must place himself in thought in the same factual matrix as that in which the parties were. The matrix of fact includes ‘evidence of the “genesis” and objectively of the “aim” of the transition’, it does not include subsequent conduct.

Thus while interpreting clause 83 of the C/P, it should be construed using the rules above mentioned. Further, looking into the “factual matrix”, the objective aim of this clause is very clear so as to make the Charterers liable for the task of hull cleaning. Stating so, it is very clear that the duty of the Charterers is very strict in nature and is mandated to perform the duty of hull cleaning imposed on him by the C/P, failing to do so would be a breach of the contract.

It is the further submission of the Claimant, that the Charterers proving that they have a mandatory duty imposed on them to clean the hull on construction of Clause 83(d). The hull fouling clause averts litigation over the allocation of responsibility for de-fouling on redelivery by providing that the vessel’s hull should always be cleaned by the Charterers before she is returned to her Owners. No doubt this is a clause which favours Owners’ interests, as it explicitly places the risk, cost and time of such cleaning on Charterers. The term ‘always’ should be given its natural meaning – that is to say, ‘at all times’. Further, it is also evident very clearly that the Charterers were ready to perform the hull cleaning outside the Wahanda Port.

The Charterers actions clearly indicate that they were ready to perform their duty at the North Port. The Charterers however, invoked the exception under Clause 83(d) to permissively evade the duty imposed on them gaining an unjust enrichment. One cannot benefit out of their

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7 Id at 114; Barclays Bank plc v. Weeks, Legg & Dean, [1999] QB 309.
11 Supra note 4.
12 NYPE Clause 83(d).
14 Moot Compromis, pp 39.
misdeed. The contract cannot be interpreted to suit once own misdeed. The Charterers hence cannot refuse to perform the hull cleaning, or to optionally perform it if and only if the Claimant abided by their terms and conditions leading to an unjust enrichment by the Charterers.

Further, the Clause 83(d) very explicitly mentions that both the partied need to agree for the lump sum payment. Which in the present case has not occurred. A unilateral statement by the Charterers does not amount to acceptance by the Claimant. It is thus, the humble submission of the Claimant that the Charterers have an absolute mandated duty owed, which cannot be waived off by claiming a defence of a farfetched interpretation of the exemption provided under Clause 83(d).

B. **The Respondent is bound to pay all the expenses claimed by the claimant for the failure to perform his duty**

Arguendo assuming that the Claimants agree to the action of re-delivery of the vessel without hull cleaning which is a primitive duty of the Charterers, it is duty-bound prayed by the Claimant that the Charterers are liable to pay all the resultant cost incurred by the Claimant in lieu of the hull cleaning.

The intention of clause 83(d) is that, where required in accordance with the clause, cleaning should be undertaken before redelivery to the owners. However, if this cannot be done the parties should, before or at the latest on redelivery, **agree a lump sum to cover the owners’ costs and ancillary expenses in respect of cleaning**. The phrase “cost and expenses arising as a result of or in connection with the need for cleaning” is wide enough to include any additional costs incurred by the Claimant in pursuance of the hull cleaning performed at South Port. In addition, arguendo, if deemed that Clause 83(d) does only cover the cost of cleaning and not any other...
additional claims, the right of the Claimant still exist over the additional claim made in the FHS with respect of the hull cleaning by having a conjoint reading of Clause 1(d) read with Clause 4(c) of the C/P wherein Clause 1(d) it provides that “the Charterers shall indemnify the Owners for any loss, damage, costs, expenses or loss of time..........., caused as a consequence of the vessel lying aground at the Charterers’ request” and further Clause 4(c) states that “Acceptance of redelivery of the Vessel by the Owners shall NOT prejudice their rights against the Charterers under this C/P”. Thus, the Charterers are thereby liable to pay all and any cost which the Claimants have incurred in respect of the hull cleaning performed by them as reflected in the FHS.

II. THE CHARTERERS ARE LIABLE TO PAY FOR THE PERIOD OF DETENTION AS IT IS ON HIRE
The claimant submits that under a time charter there is an obligation to pay hire continuously to the owner of the vessel. Off hire clauses further operate as exceptions which cut down the owner’s right to hire under a time C/P, it is therefore for the Charterers to show that those circumstances have arisen. The off hire clause for reasons stated above the meaning of which is uncertain then the words must be read in favour of the owner as held in Royal Greek Government v Minister of Transport, The Ilissos.17

A. The detention of the vessel by the port state authority does not fall within the ambit of clause 17 of the C/P Agreement ( Off Hire clause)

The claimants submit that the full working of the ship was not prevented due to deficiency of either the crew of the vessel or the vessel as a whole. The claimants contend that the detention was due to an extraneous cause which cannot be attributed to the owners.

17Royal Greek Government v Minister of Transport, The Ilissos , 1948 82 L1 L Rep 196, p 199.
The vessel if affected by conditions not mentioned under the off hire clause of the C/P and are not preventable by the actions of both parties then such a cause hindering the functioning of the vessel as expected of it under the C/P is said to be an extraneous cause. In the case of Court Line Ltd v Dant And Russel INC\textsuperscript{18} the court held that the boom even though caused a delay in time is an extraneous cause may prevent the use, but it cannot properly impact the full working of the ship. And the court thus held the said period of delay caused due to such an extraneous cause as on hire.

The claimant submits that Lord Justice Griffith in the case of Aquacharm\textsuperscript{19} held that the vessel at all times remained fully efficient in all respects. She could not pass through the canal because the canal authorities decided she was carrying too much cargo, but that decision in no way reflected upon the Aquacharm’s efficiency and therefore the said period was held to be on hire.

It is therefore submitted that the crew as well as the vessel was seaworthy and was not deficient at the time of loading as well as during the period of voyage to the discharge port and said period of detention by the port state authorities was an extraneous cause beyond the control of the parties to the agreement and further the said vessel was not detained for any lack of deficiency or for unseaworthiness which would have been the liability and responsibility of the owners, but was instead detained by the sovereign authorities on an assumption that the crew in the said vessel could be carrying the ebola virus from the port of loading, this in no way would affect the full functioning of the vessel as well as the efficiency of the vessel as it was equipped and capable of performing its obligation under the C/P and therefore the said period from 07.05.2016 to 27.06.2016 which was the period of detention of the vessel must be held on hire. It is further submitted that once the port state control issued a pratique the vessel discharged the

\textsuperscript{18}Court Line Ltd v Dant And Russel INC , 1939 Lloyd’s L rep 212

\textsuperscript{19}Actis Co. Ltd. v. The Sanko Steamship Co. Ltd. (The Aquacharm), 1982 Lloyd’s rep 7
cargo at the port of delivery as specified under the C/P agreement therefore it is safe to conclude that the functioning capacity of the vessel as well as its crew were not impacted and was in full working condition. Since the detention was not caused due to any inherent vice of the vessel or its crew, the said detention period does not fall under the off hire clause of the C/P and the vessel thus continues to remain on hire.

**B. The last link in the chain of causation shall be attributed to the Charterers**

The Claimant submits that the primary obligation of the Charterers with regard to the safety of the port to which they order the vessel to at the time of loading arises when the Charterers decide the port of loading according to the C/P agreement. A safe port has been defined by Sellers L.J in the case of Leeds Shipping v SocieteFrancaise Bunge (the Eastern city)20 His Lordship held that a “A port will not be safe unless, in the relevant period of time, a particular ship can reach it, use it and return from it without, in the absence any abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and steamship.” Further Justice Teare in the Ocean Victory 21 stated that “while the focus is usually on the ship, it is suggested that risks to her crew can render a port unsafe even where there is no risk of damage to the ship herself”. The obligation arises as well once the port becomes unsafe after nomination by the Charterers. The Charterers are now under an obligation to cancel the original order which would take the vessel to the unsafe port and if they wish to continue they must issue fresh orders to a port which is at that point prospectively safe.22

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20 Leeds Shipping v SocieteFrancaise Bunge (the Eastern city), 1958 2 Lloyd’s rep 127.
The claimant submits that the test of reasonableness and foreseeability must be applied in determining the obligation of the Charterers which arose when the port of loading turned unsafe. In the case of Uni Ocean Lines PTE LTD v. C - Trade S.A. the Charterers ordered the discharge of cargo at a port which at the time of the said order was a safe port however at the time of discharge the port turned unsafe. The learned justices in this case questioned whether there was a foreseeable risk that the vessel might get trapped or was the trapping of the vessel too remote a consequence flowing from the Charterers breach. The Court however held this to be an unsafe port and dismissed the appeal of the Charterers. The Court in this case laid down that the Charterers had an obligation to ensure the safety of the vessel as well as the crew the orders so given by the Charterers must be in consonance with the safety and security of the vessel, they must be reasonable and foreseeable the risks of the orders they issue to the master of the ship.

The Claimant submits that in the present facts of the case, the port of loading turned unsafe on 18.04.2016 due to the outbreak of ebola virus in the region. The Charterers at this point in time had an obligation to order the vessel to a safe port on receiving the news of such an outbreak as it has turned the port unsafe. The Charterers however continued to load the cargo onto the vessel even after having the knowledge that the port of loading had turned unsafe. This delay in issuing fresh orders and keeping the vessel in an ebola effected unsafe port exposed the vessel as well as its crew to the outbreak of this epidemic in the unsafe port. The vessel left the unsafe port only after the completion of loading the cargo and this period of 48 hours was sufficient cause of a suspicion that certain crew members could possibly be carrying the disease of ebola. The detention by the port state authority at the port of discharge was on reasonable suspicion that a vessel arriving from an unsafe port effected by the ebola epidemic could be carrying the disease on to their port. Had the Charterers issued fresh orders immediately on having knowledge of the

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23 Uni Ocean Lines PTE LTD v. C - Trade S.A, 1984 2 Lloyd’s Rep 244
outbreak of the epidemic the vessel would not have been detained. Thus, it was the obligation of the charters to issue orders, as according to the C/P and their failure in complying with their obligation of ensuring safety and security of the ship has resulted in the said detention period. The Claimant therefore respectfully contends that, the detention must be attributed to the failure in obligation of the Charterers and must hence hold the period of detention as on hire.

III. THE RESPONDENT IS LIABLE TO PAY FOR THE DAMAGES ARISING OUT OF LATE RE DELIVERY

The Claimant submits that the Charterers are bound to pay for any loss, damage, costs, expenses or loss of time arising from such delay in re-delivery of the Vessel. Further it is submitted that the damages to be paid for such Late Redelivery is at the rate in which the Owners have entered next fixture with the Champion Chartering, not at the difference in rate between market rate and C/P rate as claimed by the Charterers in their defence.

In Robophone Facilities Ltd v. Blank24, the Court laid down the factors as to when the Defendant is liable to pay the cost or damages to the Claimant:

a. The defendant should have special knowledge regarding such fixture; and

b. That he should have acquired this knowledge from the plaintiff, or at least that he should know that the plaintiff knew that he was possessed of it at the time the contract was entered into and so could reasonably foresee at that time that an enhanced loss was liable to result from a breach. The question of whether or not a loss was too remote was one of mixed fact and law.25

24Robophone Facilities Ltd v Blank, [1966] 1 WLR 1428.
A. **Charterer has a special knowledge of Next Fixture with Olympic which was communicated by the Claimant**

It is submitted by the Claimants that there is special knowledge for Charterers of the vessel’s Next Fixture. In the mail dated 26.06.2016 the owners have mentioned that ‘The vessel has already been fixed for her next voyage to load East Coast range’. In spite of knowledge, the Charterers continued with the voyage, this implies responsibility on the Charterers. So, it is apparent that the Charterers had a duty to redeliver the vessel by appropriate redelivery date, so that the vessel could proceed on its subsequent voyage. They breached causing losses at a higher rate than the current market rate. The Claimant further contends that the special knowledge of the Next Fixture implies assumption of liability in case of breach.

B. **The Respondent is liable to indemnify the Claimant against any loss under the C/P**

Further, there exists an arrangement entered by the parties in the form of indemnity under Clause 1(d), whereby it states:

“…The Charterers shall indemnify the Owners for any loss, damage, costs, expenses or loss of time, including any underwater inspection required by class, caused as a consequence of the Vessel lying aground at the Charterers’ request.”

The Charterers must ensure that the end of the ship’s final voyage under the charter must coincide with the end of the charter period. The Vessel was lying safely aground in Wahanda port exceeded the period of 50-55 days, making the Charterers’ order illegitimate. Thus, any damages the Claimant incurred due to such non-contractual orders of staying afloat in the port

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26 Moot Compromis, pp. 34.
27 Robophone Facilities Ltd v Blank, [1966] 1 WLR 1428.
shall be claimed against the Clause 1(d) of NYPE. The right to indemnity is often a right to recover “all loss suffered which is attributable to a specified cause, whether or not it was in the reasonable contemplation of the Parties\textsuperscript{30}. Since, Charterers’ ordered to stay afloat in the Wahanda port, has caused the late redelivery, and subsequently led to cancellation of the next fixture of the vessel. The Owners are entitled for losses which is at the rate of next fixture\textsuperscript{31}.

C. **The Respondent is liable to pay even when no special knowledge can be attributed to them**

*Arguendo* that there can be no special knowledge attributed to the Charterers, the Claimant submits that it is not a mandate that such knowledge to be imputed to the Respondent to bring such an action as it was a result of natural consequence to the breach.

The Claimant, by applying first limb principle of the Hadely v. Baxendale\textsuperscript{32}, contends that a reasonable person in the position of the defendant would be taken to have assumed responsibility for a loss of this nature which flows naturally from the breach\textsuperscript{33} and that it is to be not treated as a special circumstance.\textsuperscript{34} It is not an imputed knowledge since the Charterers as a reasonable person is taken to know ‘ordinary course of things\textsuperscript{35}’ being in the relevant market\textsuperscript{36}. Entering subsequent fixture is ordinary course of things and it results from the Charterers’s breach in


\textsuperscript{32} Hadely v. Baxendale[1854] EWHC J70

\textsuperscript{33} Hadely v. Baxendale, [1854] 9 Exch 341

\textsuperscript{34} Victoria Laundary (Windsor) Ltd v. Newman Industries Ltd [CA] [1949] 2 KB 528

\textsuperscript{35} Czarnikow (C) Ltd v. Koufos [The Heron II][HL][1967] 2 Lloyd’s Rep. 457; [1969] 1 AC 350

\textsuperscript{36} Satef-HuttenesAlbertusSpA v. Paloma Tercera Shipping Co SA, [The Pegase], [1981] 1 Lloyd’s Rep 175
failing to redeliver the vessel by the Contractual delivery date which the Respondent is liable to pay. This observation was noted by Lord Mustill in The Gregos [1995] 1 Lloyd’s Rep 1:

“A cargo ship is expensive to finance and expensive to run. The shipowner must keep it earning with the minimum of gaps between employments. Time is also important for the Charterers, because arrangements have to be made for the shipment and receipt of the cargo, or for the performance of obligations under sub-contracts. These demands encourage the planning and performance of voyages to the tightest of margins. . . .”

The only point of contention is whether there was assumption of responsibility while entering the C/P?

In principle the contention against overrun period measure would be with respect to undesirable and uncommercial nature of it. In the words of Ward LJ:

"It is undesirable, because it puts the owners too much at the mercy of their charterers .... It is uncommercial, because, if it is demanded that the charterers need to know more than they already do in the ordinary course of events, when they already know that a new fixture, in all probability fixed at or around the time of redelivery, will follow on their own charter, then the demand is for something that cannot be provided......."

The House of Lords, however in appeal, set a limitation to the extent of assumption of responsibility. But, the Court has laid down as to when such responsibility can be assumed — paragraph 36 Lord Hope has stated cases when this assumption can be presumed (ordinary

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38 Transfield Shipping Inc. v. Mercator Shipping Inc(The "Achilleas"). [CA] [2007] 2 Lloyd’s Rep.557
circumstances – in great multitude of cases)\(^{39}\). The House of Lords in \textit{Achilleas} did not lay down any new law and the application is restricted to only unusual claims\(^{40}\). In present facts and circumstances, the claims are not unusual unlike in ‘The Achilleas’\(^{41}\) where it was regarding the extremely volatile market conditions in which Next Fixture rate was calculated which was an unusual occurrence\(^{42}\). Submitting the same, thus, the Owners are entitled to damages according to the next fixture and not based on Overrun measure.

**D. The maximum period of 4 years should be considered for damages calculation and not minimum period of 2 years**

The Claimants contends that their damages for 4 years is not uncertain or speculated.\(^{43}\) The claim is based on prior market earnings\(^{44}\) of the Owners and the vessel\(^{45}\). Also, such profit would have accrued if the contract had proceeded to completion.\(^{46}\) Hence, Claimants are entitled for damages for maximum period of 4 years and not minimum period of 2 years.

**E. Credits cannot be given for hire received from the Replacement Fixture**

The hire received from Replacement fixture does not amount to mitigation\(^{47}\) and can’t be credited for damages payable for late-redelivery by the Charterers in the present dispute. The hire earned through Subsequent fixture is ‘independent collateral benefit’\(^{48}\) and not ‘arising out

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\(^{39}\)Transfield Shipping Inc. v. Mercator Shipping Inc(The "Achilleas"), [HL] [2008] 2 Lloyd’s Rep. 275

\(^{40}\)ASM Shipping Ltd of India v TTMI Ltd of England, (the "Amer Energy"), [2009] 1 Lloyd’s Rep. 293

\(^{41}\)The “Sylvia”, [2010] 2 Lloyd’s Rep. 81

\(^{42}\)Supershield Ltd v Siemens Building Technologies FE Ltd, [2010] EWCA Civ 7

\(^{43}\)Fink v Fink (1946) 74 CLR 127; SPP v. Arab Republic of Egypt, ICSID award of 20 May 1992, Yearbook XIX (1994) 84

\(^{44}\)Metalclad Corp v The United Mexican States, ICSID Case No. ARB (AF)/97/1, Award of August 2000, 16(1) ICSID Rev. - Foreign Inv. L.J. 168

\(^{45}\)Moot compromise, pp. 5

\(^{46}\)Levitt v Islamic Republic of Iran, 14 Iran-U.S. Cl. Trib. Rep. 191 (1987)

\(^{47}\)Lowick Rose LLP v. Swyson Ltd, [2017] UKSC 32

\(^{48}\)Globalia Business Travel SAU v. Fulton Shipping Inc. [2017] UKSC 43
of the transaction". 49 Also, there is no duty upon Claimants to mitigate in the sense of an obligation to do so. 50 Also, taking into consideration the Queen’s Bench Division case of The "Elena D’Amico", the court held on similar fact that:

"the decision not to take advantage of the available market is the independent decision of the innocent party, independent of the wrongdoing which has taken place. It takes place in the context of a pre-existing wrong but it does not, to use Viscount Haldane's expression, "arise out of the transaction".

So, it is humble submission of the Claimants that the hire earned through the Replacement fixture neither has its close link causation with the defendant’s breach of contract by Late Redelivery or by successful act of mitigation. Furthermore, the decision to let the vessel on hire is independent speculation 51 of the owners and not as a result of Charterers’ breach 52. The collateral benefit cannot be credited to the Charterers.

IV. THE INFORMATION IN THE NOTICE SUBMITTED BY THE RESPONDENT IN PURSUANCE OF CLAUSE 6 OF THE INTER- CLUB AGREEMENT (ICA) IS NOT SUFFICIENT

The Claimant submits that clause 6 mandates the Respondent to provide a claim notification to the Ship Owners in light of the damages claimed. However, it is the humble submission that the Respondent have not satisfied the requirement as laid down under this clause. It is the contention of the Claimant that the information provided by the Respondent is not adequate enough to be regarded as a notice on two grounds:

50 Darbishire v. Warran, [1963] 1 W.L.R. 1067
A. Construction of “Shall” if possible in Clause 6 of Inter Club Agreement

The use of word ‘Shall’ raises a presumption that the particular provision is imperative. It is indeed true to state that a literal construction may not to be taken in all cases and the intention of the legislation needs to be considered. However, the need of such legislative interpretation does not arise. The question whether a requirement is mandatory or directory does not arise when the consequence of such breach is spelt out in the statute. Thus, where a requirement is imposed by the statute, the court is then only charged with the task of enforcing what consequence intended should follow from failure to implement the requirement. Thus, when the Clause 6 provides that the details “shall if possible” include …… can be reasonably and legally be construed to mean that the person claiming for the apportionment of cargo damage must provide for the details of carriage of carriage, the nature of claim and the amount if he is in possession of such knowledge. The wordings “if possible” should be interpreted in the light of the mandatory direction and not merely at the discretion of the Respondent. Since, in the present case, the Respondent have not submitted the details even when possible, have not met with the requirement of this Clause. Thus, the only duty of the Tribunal is to enforce the intended consequence. A consequence which is barring of the claim under ICA.

B. The Respondent is impliedly bound by the custom of trade and thus, has committed a breach.

Although there is no strict prescribed form as to what a notification is to contain, it is a common trade practice the report must contain the following information (to the extent possible), bill of lading, the terms of reference, cargo history, vessel description, breakdown of the amount and

56 Id.
other cargo related information. This is the basic requirement that most of the P&I Clubs mandate for when a claim is made. Hence, it is the duty of Respondents to have provided with the same kind of information in their notification as Clause 6 also prescribes for it. This is a common trade practice, followed in the maritime sector.

According to English law, every usage must be notorious, certain and reasonable, and it must not offend against the intention of any legislative enactment. Notoriety does not mean it must be known to the world, but that it must be well known at the place to which it applies, and be capable of ready ascertainment by any person who proposes to enter into a contract of which that usage would form a part. A usage, which is founded on the general convenience of all the parties engaged in a particular department of business can never be said to be unreasonable, and where a usage has been sufficiently proved, there will be very few cases in which it will be held that the usage is unreasonable; for the fact that the usage is established and followed, tends to show that it is convenient. Thus, when established, the custom is a part of a contract, and must be interpreted in the same way as the written part of a contract.

The Claimant submits that, in the present case, the common trade practice under maritime law which is followed widely across the world as prescribed by the International Group of P&I Clubs (recognized by the Inter Club Agreement) is to divulge the basic information with respect to the bill of lading, amount claimed, nature of claim, etc., are a bare minimum requirement in order for the opposite party to ascertain the amount they would have had to pay, in case the claim succeeded.

58 Moul v. Halliday (1898) 1 QB 25.
The Claimant submits that the main aim of a notification is to give as much information as possible with respect to the cargo loss/damage at the first instance, which didn’t happen in the present case. The idea of the notification under Clause 6 of the ICA was to give the receiving party the possibility to investigate the claim in hand and prepare his strategy of defence.\(^6\) No information with respect to the Bill of Lading, description of the vessel, or amount of cargo claim was mentioned, hence rendering the notification “insufficient” for the purposes of the cargo claim.

**V. THE CLAIMANTS CANNOT BE MADE RESPONSIBLE FOR THE LOSS OF CARGO OF THE RESPONDENT**

Though the fact remains that there is damage to the cargo, however, such a damage cannot be attributed to the Claimants due to the following factors:

**A. The ‘cargo claim’ cannot be apportioned under the ICA since it does not satisfy the precondition laid down under Clause 4(c) of the ICA**

Clause 4 provides for three preconditions to be satisfied for the apportionment of cargo claims under the ICA. Clause (4)(c) states that the original cargo claim has been “properly settled or compromised and paid”. Thus, the claim must not only have been properly settled or compromised but must actually have been “paid” and not merely incurred or ascertained.\(^6\)\(^1\) In *The “Cargo Explorer”*,\(^6\)\(^2\) it was held that the Inter-Club Agreement only comes into operation after the cargo claim has been settled, and that the obligation to indemnify only arises once the underlying claims have been met. The judge held that:

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\(^6\)\(^1\) Steven J. Hazelwood & David Semark, P. & I. Clubs Law and Practice, 4\(^{th}\) ed. 2010.

\(^6\)\(^2\) Primegates Maritime Company Limited v. The Bunker on Board the MV Cargo Explorer, 1995 CLD 640 (D).
“I am in agreement with Kerr, LJ [in The “Strathnewton”63] that it is only after there has been payment or settlement of a cargo claim that the Inter-Club Agreement comes into operation…….” Further, Hobhouse, J in the “Holstencruiser”64 stated that “liability is postponed until the claim has been properly disposed of accords with the general principles of indemnity namely that the obligation to indemnify only arises once the underlying claims have been met.”

This reasoning was followed in The “Gallant II”65, where the judge relied further on an American case Seguros Banavenez SA v The “Oliver Drescher”66. In the “Gallant II”, the court held that even any claim for security from the Charterers was premature without any prior establishment of the liabilities for the cargo damage.

In Sonito Shipping Company, Inc. v. Sun United Maritime Ltd.67, the Court relying on Strathnewton wherein the Court of Appeal laid down that the “condition precedent” for apportionment and indemnification under the ICA was that the cargo claims had been paid. “Condition precedent” is a term of art in the law; ordinarily, such a condition must be satisfied before an obligation arises or a cause of action accrues.68 This works no unfair hardship upon Sonito in this case. Sonito was not required to agree to the incorporation of the ICA in the C/P, but having done so is bound by it.69 For these reasons, I conclude that Sonito has not carried its burden of showing that at the time of the attachment it had a valid maritime claim against Sun United.” In the present case, the quantum of Receivers’ claim in respect of which the Respondent seeks an indemnity, alternatively damages, has been agreed to amount to 2,000 mt

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65 Wajllam Exports (Singapore) Pte Ltd v Transpacific Eternity SA (The Gallant II), Case no: A39/2002 Durban & Coast Local Division.
66 SegurosBanavenez SA v The “Oliver Drescher,761 F.2d 855, 1985 AMC 2168 (2d Cir. 1985).
68 Id.
69 Id.
of cargo at a value of US$ 50 per kg. However, a mere agreement is a promise of future performance and cannot be construed to be paid which is an essential pre-condition to be satisfied in order to apportion the cargo claim under the ICA. Thus, this cargo claim cannot be apportioned under the ICA since the claim has not been paid to the Receiver by the Charterers.

B. **The claimants are not responsible for 100\% of the claim, as it was not caused by unseaworthiness or error or fault of navigation or management of the vessel**

The Claimants deny that the cargo claim would fall to be apportioned under clause 8(a) of the ICA, since the claim was not caused by unseaworthiness and/or error or fault of navigation or management of the vessel. The claimants submit that, in the present case, there was no unseaworthiness of the vessel.

The classic definition of “seaworthiness” which was approved by Scrutton, L.J., in *F.C. Bradley & Sons v. Federal Steam Navigation*\(^70\) is, “The ship must have that degree of fitness which an ordinary careful Owners would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. Would a prudent Owners have required that it should be made good before sending his ship to sea, had he known of it?”

Furthermore, Griffiths, L.J., in The Aquacharm\(^71\), said “there are two aspects of seaworthiness. The first requires that the ship, her crew and her equipment shall be in all respects sound and able to encounter and withstand the ordinary perils of the sea during the contemplated voyage. The second requires that the ship shall be suitable to carry the contract cargo.”


\(^71\) The Aquacharm, [1982] 1 Lloyd’s Rep. 7 (a voyage charter case) at page 11
The claimant submits that, the vessel was fit to encounter and withstand the ordinary perils of the sea in all respects, as the vessel was inspected and checked before the start of the voyage for any inherent or evident defects, the crew was well trained and was consequently cleared fit, for the voyage.

The claimant further submits that, the cargo holds of the vessel were in a perfect condition and capacity to transport Tea Bags. Hence, being suitable to carry cargo.

Additionally, Webster, J., in The Arianna held that “a ship is unseaworthy if there is something about it which endangers the safety of the vessel or its cargo or which might cause significant damage to its cargo or which renders it legally or practically impossible for the vessel to go to sea or to load or unload its cargo. . .”

The claimant further submits that, no aspect of the vessel would’ve jeopardized the safety of the vessel or its cargo or which would’ve rendered it legally or practically impossible for the vessel to go to sea or to load or unload its cargo. All the inspections carried out before the voyage state the same.

The seaworthiness of the vessel implies and proves that it was fit for carrying the cargo, i.e., the cargo-worthiness of the vessel is implied by the seaworthiness of the vessel. In Maori King v. Hughes it was held that “Seaworthiness entails that the ship is cargoworthy. That is, its cargo spaces must be fit for the reception of cargo and any machinery used for preserving the cargo must be fit for that purpose.”

In the present case, the vessel (according to the definitions and conditions as held in various cases) was completely seaworthy and cargoworthy as the vessel has no latent or patent defects.

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72 The Arianna, [1987] 2 Lloyd’s Rep. 376 at page 389
73 Maori King v. Hughes, [1895] 2 Q.B. 550

MEMORANDUM ON BEHALF OF CLAIMANT
Also, relying on the Preliminary Survey Report by Mekon Surveyors Inc. it was reported that the ballasting system was found to be in order. There were no issues or problems faced by the vessel during the course of the voyage and hence, proving it to be seaworthy and cargoworthy.

However, McNair, J., in M.D.C. v. Zeevaart Maatschappij held that “The test in a case of this kind, of course, is not absolute: you do not test it by absolute perfection or by absolute guarantee of successful carriage. It has to be looked at realistically. . .” The fact that some minor or routine damage to cargo may result during the carriage does not necessarily render the ship unseaworthy.

This clearly proves that the vessel was indeed seaworthy and a minor mishap during ballasting cannot render the vessel unseaworthy. The Preliminary report also states that it was a ready vessel to depart, post discharge of cargo.

C. The Claimant are not liable to pay 50% of the damages claimed under Clause 8(b) in the present case

The Claimants submit that, Clause 8(b) is not applicable in the present case.

The following words, “loading”, “stowage”, “discharge”, “storage”, “lashing” and “handling of cargo” have not been explicitly defined by the ICA.

In the case of, Fothergill v. Monarch Airlines, the House of Lords, per curiam, said that “there was no reason why a judge should not use his own knowledge of the language nor why he should not consult a dictionary.”

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75 Time Charters, 7th ed., Informa Law from Routledge, LLOYD’S SHIPPING LAW LIBRARY, Series editors Andrew W. Baker and Hatty Sumption
76 Fothergill v. Monarch Airlines, [1980] 2 All ER 57
In, Madla v. Dowell-Lee\textsuperscript{77}, House of Lords used a Dictionary to ascertain the meaning of “ethnicity” and now binds the lower courts in relation to what it means.

In, R v. Peters\textsuperscript{78}, the Court held that, it is permissible to refer to dictionaries to find out the general sense in which that word is understood in common parlance.

Therefore, the claimants rely on the dictionary meanings of these terms in order to ascertain what they mean.

As per Cambridge Dictionary\textsuperscript{79}, the meaning of:

\begin{itemize}
\item[a)] Loading - the action of putting goods onto a vehicle so they can be transported
\item[b)] Stowage – space for storing things on a boat or a plane
\item[c)] Discharge – to take goods off a ship or plane or to allow passengers to get off
\item[d)] Storage – the act of putting things in a special place for use in future, or the place where you put the things
\item[e)] Handling of cargo – the activity of moving goods on and off ships, planes, truck, etc.
\item[f)] Lashing\textsuperscript{80} – this is the operation executed by the ship’s personnel or by the pelletes, so that cargo is tied and secured according to navigational techniques.
\end{itemize}

In the present scenario, as the facts and the Preliminary Survey Report, clearly state that the cargo damage arose due to a mishap while ballasting.

\textsuperscript{77} Madla v. Dowell-Lee, [1983] 2 AC 548
\textsuperscript{78} R v. Peters, [1886] 16 QBD 636, p. 641 (Lord Coleridge)
\textsuperscript{79} These meanings have been derived from Cambridge Online Dictionary which gives the meaning of words in different contexts. We have referred to the ones in context of “transport” to fit our Moot Scenario better. Available at: https://dictionary.cambridge.org/
\textsuperscript{80} Dictionary of International Trade, Global Negotiator, (21\textsuperscript{st} April 2019, 11:01 PM), available at https://www.globalnegotiator.com/international-trade/dictionary/lashing/
Additionally, by going by these definitions and meanings of the nautical terminology, it is clear that the claim cannot be attributed to any of the above-mentioned conditions as mentioned in Clause 8(b) of ICA.

The clause clearly states that the “…claims in fact arising out loading… or other handling of cargo”. Thus, since the claim did not arise out of these conditions, this clause is not applicable for apportionment of the cargo claims to the claimants, and additionally, the claimants are not liable to pay.
PRAYER

In the light of above submissions, the Owners request the tribunal to declare that:

1. The Charterers had a duty to perform hull cleaning and has failed to do it.
2. The Charterers is liable to pay all the cost incurred in respect of underwater hull cleaning in South Port.
3. The vessel was not off-hire from period 07.05.2016 to 27.06.2016
4. The Charterers is liable to pay damages for late redelivery at the rate of the subsequent charter party.
5. The Charterers is liable to pay damages for the loss incurred due to cancellation of the next fixture.
6. The Owners cannot be made liable for the damage to the cargo.

And therefore, the following reliefs are prayed for:

1. USD 15, 426, 567. 42 as damage caused due to late delivery (loss of hire under the Next Fixture, calculated as 4 years at USD10,500 per day ) and cost incurred for hull cleaning and other incidental cost in connection with hull cleaning;
2. Compound or alternatively simple interest under S. 49 of the Arbitration Act at such rests and at such rates at which the tribunal deems fit;
3. Costs with compound or alternatively simple interest on costs under S. 61 (2) of the Arbitration Act;
4. Further or other reliefs.

MEMORANDUM ON BEHALF OF CLAIMANT