IN THE MATTER OF THE ARBITRATION ACT 1996 AND IN THE MATTER OF AN ARBITRATION

GOVERNMENT LAW COLLEGE, MUMBAI

MEMORANDUM FOR RESPONDENT

CLAIMANT
PANTHER SHIPPING INC.
80 BROAD STREET, MONROVIA, LIBERIA

V.

RESPONDENT
OMEGA CHARTERING CORP.
LICHTENSTEIN

TEAM 23

COUNSEL
PRIYANSHI VAKHARIA | KANIKA KULKARNI | MISHA MATLANI | ADITYA DESHINGKAR
TABLE OF CONTENTS

LIST OF ABBREVIATIONS .................................................................................................................. iv

STATEMENT OF AUTHORITIES ........................................................................................................ vi

SUMMARY OF FACTS .......................................................................................................................... 1

ARGUMENTS ADVANCED .................................................................................................................... 3

SUBMISSIONS ON JURISDICTION OF LEARNED TRIBUNAL

I. THE TRIBUNAL CAN DECIDE DISPUTES ARISING UNDER THE CHARTERPARTY ................................................................. 3

II. THE DISPUTES IN THE PRESENT CASE ARISE OUT OF OR IN CONNECTION WITH THE CURRENT CHARTERPARTY ................................................................. 3

SUBMISSIONS ON RESPONDENTS’ BREACH OF CHARTERPARTY

I. THE RESPONDENTS ARE DISPENSED WITH THE RESPONSIBILITY TO PERFORM HULL CLEANING AFTER THE REDELIVERY PERIOD ELAPSES ................................................................................................................................. 5

A. Per the Charterparty the port of redelivery is in the Respondents’ option ................................................................................................................................. 5

B. The 1-day redelivery notice has been tendered ............................................................................. 6

II. THE OWNERS HAVING REJECTED THE RESPONDENTS’ PROPOSAL TO PERFORM HULL CLEANING OF THE VESSEL AT NORTH TITAN PORT
CANNOT HOLD THEM LIABLE FOR NOT PERFORMING THE SAME.....7

A. The Respondents are entitled to travel to and perform hull cleaning at North Titan Port.................................................................7

B. The journey to South Island Port for the purposes of hull cleaning is not contractual........................................................................7

III. THE CLAIMANTS REJECTED MULTIPLE OFFERS OF LUMP SUM AMOUNT .................................................................................9

A. The Respondents were prevented from carrying out hull cleaning at Wahanda Port due to instructions of the Wahanda Port Services ...9

B. The Respondents could not carry out the inspection asked for at the Wahanda Port. ........................................................................10

IV. THE RESPONDENTS ARE NOT LIABLE FOR DAMAGES ARISING FROM LOSS OF NEXT FIXTURE .........................................................10

SUBMISSIONS ON LOSS AND DAMAGES CLAIMED UNDER BREACH OF THE CHARTERPARTY

I. THE CLAIMANTS CANNOT CLAIM MORE THAN USD 33,000.00 AS THE COSTS OF THE HULL CLEANING ............................................12

II. THE RESPONDENTS ARE NOT LIABLE TO BEAR THE COST OF THE VOYAGE TO SOUTH ISLAND FOR HULL CLEANING AMOUNTING TO USD 55,567.42..............................................................................13

III. THE CLAIMANTS CANNOT CLAIM FULL AMOUNT OF USD 15,330,000.00 FOR CANCELLATION OF THE NEXT FIXTURE ..........14
SUBMISSIONS ON COUNTERCLAIMS ISSUE

I. THE RESPONDENTS ARE LIABLE TO BE INDEMNIFIED AGAINST

CARGO CLAIMS ................................................................. 16

A. The Cargo Claim is not time barred under Clause 6 of the ICA… 16

B. The Claimants are liable to bear 100% of the Cargo Claim pursuant
to clause 8(a) of the ICA ....................................................... 17

C. In the alternative, Respondents are to be paid damages under
   Clauses 27 and 53 .............................................................. 18

D. In the further alternative, the Claimants are liable for 50% of the
cargo claim pursuant to clause 8(b) of the ICA.......................... 18

II. THE RESPONDENTS CLAIM FOR RESTITUTION OF OVERPAID SUM OFF
   HIRE… ......................................................................................... 19

PRAYER FOR RELIEF .................................................................................. 22
# LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vessel</td>
<td>M/V Thanos Quest</td>
</tr>
<tr>
<td>EWHC</td>
<td>High Court of Justice in England and Wales</td>
</tr>
<tr>
<td>EWCA</td>
<td>Court of Appeal of England and Wales</td>
</tr>
<tr>
<td>HL</td>
<td>House of Lords</td>
</tr>
<tr>
<td>UKHL</td>
<td>United Kingdom, House of Lords</td>
</tr>
<tr>
<td>CoA</td>
<td>Court of Appeals</td>
</tr>
<tr>
<td>Ch. D.</td>
<td>Chancery Division</td>
</tr>
<tr>
<td>QB</td>
<td>Queen’s Bench</td>
</tr>
<tr>
<td>KB</td>
<td>King’s Bench</td>
</tr>
<tr>
<td>J.</td>
<td>Judge</td>
</tr>
<tr>
<td>Lord J.</td>
<td>Lord Justice</td>
</tr>
<tr>
<td>et. al.</td>
<td>et alia (and others)</td>
</tr>
<tr>
<td>Next Fixture</td>
<td>Charter offered by Champion Chartering Corp.</td>
</tr>
<tr>
<td>NYPE 2015</td>
<td>New York Produce Exchange Form 2015</td>
</tr>
<tr>
<td>ICA</td>
<td>Inter-Club Agreement</td>
</tr>
<tr>
<td>BIMCO</td>
<td>Baltic and International Maritime Council</td>
</tr>
<tr>
<td>SOLAS</td>
<td>Safety of Life at Sea Act</td>
</tr>
<tr>
<td>IMO</td>
<td>International Maritime Organization</td>
</tr>
<tr>
<td>LMAA</td>
<td>London Maritime Arbitrators’ Association</td>
</tr>
<tr>
<td>Moot Scenario</td>
<td>20th International Maritime Law Arbitration Moot 2019 ‘Moot Scenario’</td>
</tr>
<tr>
<td>Art.</td>
<td>Article</td>
</tr>
<tr>
<td>p.</td>
<td>Page Number</td>
</tr>
<tr>
<td>cl.</td>
<td>Clause</td>
</tr>
<tr>
<td>v.</td>
<td>Versus</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Rep.</td>
<td>Report</td>
</tr>
<tr>
<td>Edn.</td>
<td>Edition</td>
</tr>
<tr>
<td>Civ.</td>
<td>Civil</td>
</tr>
<tr>
<td>Ltd.</td>
<td>Limited</td>
</tr>
<tr>
<td>WLR</td>
<td>Weekly Law Report</td>
</tr>
<tr>
<td>QLR</td>
<td>Quarterly Law Report</td>
</tr>
<tr>
<td>LQLR</td>
<td>Lloyd’s Quarterly Law Report</td>
</tr>
<tr>
<td>LQR</td>
<td>Lloyd’s Quarterly Report</td>
</tr>
<tr>
<td>Comm.</td>
<td>Commercial</td>
</tr>
<tr>
<td>Co.</td>
<td>Company</td>
</tr>
<tr>
<td>S.A.</td>
<td>Société anonyme (Public Limited Company)</td>
</tr>
<tr>
<td>S.p.A</td>
<td>Società per azioni (Public Limited Company)</td>
</tr>
<tr>
<td>B. V.</td>
<td>Besloten Vennootschap (Private Limited Company)</td>
</tr>
<tr>
<td>GmbH</td>
<td>Gesellschaft mit beschränkter Haftung (Company with limited liability)</td>
</tr>
</tbody>
</table>
STATEMENT OF AUTHORITIES

A. Books


B. Cases

*AB Marintrans v Comet Shipping Co Ltd (The Shinjitsu Maru No 5)* [1985] 1 Lloyd's Rep 568 (Leggatt J)

*Andre & CIE SA v Orient Shipping (Rotterdam) BV (The Laconian Confidence)* [1997] 1 Lloyd's Rep 139

*Demand Shipping Co Ltd v Ministry of Food, Government of The People’s Republic of Bangladesh (The Lendoudis Evangelos II)* [2001] EWHC Commercial 403.

*Dunkirk Colliery Co v Lever* (1878) 9 Ch D 20


*Government of Gibraltar v Kenney* [1956] LR 2 QB 410, 421


*HE Daniel Ltd v Carmel Exporters & Importers Ltd* [1953] 2 Lloyd’s Rep 103.

Maestro Bulk Ltd v Cosco Bulk Carrier Co Ltd (The Great Creation) [2015] 1 Lloyd's Rep 318 [18].

MH Progress Lines SA v Orient Shipping Rotterdam BV (Genius Star I) [2011] EWHC 3083 (Comm).

Minerva Navigation Inc v Oceana Shipping AG (The Athena) [2013] EWCA Civ 1723

Owners of the Hamtun v Owners of the St John (The Hamtun and the St John) [1999]

Payzu v Saunders [1919] 2 KB 581

Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty) [1994] 1 Lloyd’s Rep 365 (HL) 368 (Lord Goff).

SBT Star Bulk & Tankers (Germany) GMBH & Co Kg v Cosmotrade SA (The Wehr Trave) [2016] 2 Lloyd's Rep 175 [13].

Sidermar SPA v Apollo Corporation (The Apollo) [1978] 1 Lloyd’s Rep 200 [61].

Sotiros Shipping Inc v Sameiet Solholt [1983] 1 Lloyd’s Rep 605


The Alma Shipping Corporation of Monrovia v Mantovani (The Dione) [1975] 1 Lloyd's Rep 115

The Labrador 1998 (2) Lloyd’s Rep 387 (Coleman J)

The Benlawers [1989] 2 Lloyd’s Rep 51 (Hobhouse J)

Transfield Shipping v Mercator Shipping (The Achilleas) [2008] 2 Lloyd’s Rep 275


Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony) [2001] 1 Lloyd’s Rep 147.
C. Legislations

Arbitration Act, 1996 (UK)

Administrative Measures for Entry and Exit Inspection and Quarantine on Ships of International Sails

International Convention for the Safety of Life at Sea (SOLAS), 1974

London Maritime Arbitrators’ Association Rules

Carriage of Goods by Sea Act, 1984

Hague-Visby Rules

D. Other Sources

Dr Theodora Nikaki and Barış Soyer, ‘Enhancing standardisation and legal certainty through standard charterparty contracts: The NYPE 2015 experience’ in Baris Soyer and Andrew Tetterborn (eds), Charterparties: Law, Practice and Emerging Legal Issues (1st edn, Informa Law from Routledge 2017).

SUMMARY OF FACTS

Background

1. Pursuant to a Fixture Recap dated 18 March 2016 along with additional Rider Clauses therein (collectively termed “Charterparty”) Panther Shipping Inc. (“Claimants”) let the vessel M/V Thanos Quest (“Vessel”) on a time charter trip of about 50-55 days from Challalond, West Coast to Bao Kingdom, Wahanda, to Omega Chartering (“Respondents”). Pursuant to the Charterparty, the Vessel was delivered to the Respondents on 29 March 2016, and departed on its voyage having been loaded on 20 April 2016. The Vessel was carrying a cargo of loose leaf English Breakfast tea.

Hull cleaning and Re-delivery:

2. The vessel arrived at the Wahanda anchorage on 7 May 2016 but was prevented from berthing due to a suspicion of Ebola among its crew. After an inspection by the port authorities on 11 May 2016 the vessel was quarantined until 26 June 2016, only when it was granted free pratique by the Port Authorities. The date of discharge of cargo was changed due to the vessel being quarantined by the Port Authorities, which was beyond the Respondents’ control.

3. After consulting with Port authorities, it was recognized that no hull cleaning can take place at Wahanda, as the water was muddy. The Respondents alternatively offered a lumpsum of USD 15,000 for the same function, as stipulated under the BIMCO Hull Fouling Clause for Time Charterparties, incorporated as Clause 83 of the Charterparty.

4. By an email dated 27 June 2016 the Respondents offered to clean the hull at North Titan Port or alternatively offered a sum of USD 20,000. The Claimants rejected both alternatives and instead suggested sailing to South Island Port for hull cleaning, which was not contractual.
5. Vide email dated 29 June 2016, the Respondents tendered a definite 1-day redelivery notice to the Claimants, and offered them a lumpsum of USD 30,000 as full and final settlement of Claimants cost and expenses to perform hull cleaning.

6. The Claimants accepted redelivery with a fouled hull and carried out hull cleaning at South Island Port from 1 July 2016 to 3 July 2016. The costs incurred by Claimants for the voyage to South Island and hull cleaning carried out are being claimed from the Respondents.

Alleged Recovery of Loss of Next Fixture:

7. The Claimants vide their email dated 15 June 2016, chartered the Vessel to Champion Chartering Corp. (“Champion”) for a fixed period of 2 years, extendable by 2 years at Champion’s option (“Next Fixture”).

8. The Claimants only informed the Respondents about the Next Fixture vide email dated 26 June 2016, which was right in the middle of the laycan period of the Next Fixture. The Next Fixture was cancelled and losses for the same are being claimed from the Respondents.

Claimants’ Liability for Damage to Cargo:

9. The Respondents vide their email dated 27 June 2016 informed the Claimants of severe water damage to the cargo in Lower Cargo Hold No. 2 due to the crew’s negligence. The Respondents held the Claimants fully liable for their crew’s negligence. The Claimants acknowledged the notice and communicated the same to their P & I Club.

10. A preliminary survey conducted by Mekon Surveyors Inc. found that the cargo was severely damaged due to the crew’s negligence in pumping seawater into the Lower Cargo Hold No. 2 instead of the ballast tanks, in the course of the ballasting operation.
I. THE TRIBUNAL CAN DECIDE DISPUTES ARISING UNDER THE CHARTERPARTY.

It is submitted before the Learned Tribunal that the Respondents agree that the Learned Tribunal has competence to decide on its own jurisdiction. It is submitted that according to the principle of ‘competence-competence’ an arbitral tribunal has the authority to decide issues relating to its own jurisdiction.1 This principle is a basic principle in international commercial arbitration.2 Under the LMAA rules which govern the procedural conduct of this arbitration,3 Article 12 provides that unless otherwise decided, the jurisdiction of the Learned Tribunal shall extend to disputes arising under or in connection with the transaction of the subject of the reference.4 In the present case, such transaction of the subject of the reference is the Charterparty between the Claimants and the Respondents, comprising the Fixture Recap and the Rider Clauses. Section 30(1)(c) of the Arbitration Act 1996, to which the Charterparty is subject, empowers the Tribunal to rule on its own jurisdiction regarding which matters submitted to arbitration are in accordance with the arbitration agreement.5

II. THE DISPUTES IN THE PRESENT CASE ARISE OUT OF OR IN CONNECTION WITH THE CURRENT CHARTERPARTY.

It is submitted that in a case where parties have contractually agreed to refer any dispute that arises out of the contract to arbitration such agreement between parties must be construed

---


3 New York Produce Exchange 2015, cl 54(b).


5 Arbitration Act 1996, s 30(1)(c).
broadly. The expression ‘arising out of’ can be interpreted to include non-contractual claims that are closely linked with the contract or are incidental to such contract. This expression reflects that disputes that arise not only out of contractual obligations and rights, but also out of practical considerations in the performance of the contract fall under the ambit of ‘arising out of’ the contract. The use of words ‘arising out of’ covers all disputes except a dispute as to the existence of the contract. In the present case, Clause 54(b) of the NYPE 2015 uses the expression ‘arising out of or in connection with this Charter Party’. Hence the use of this expression demands a broad interpretation such that it covers all disputes in the present case.

---

10 New York Produce Exchange 2015, cl 54(b).
SUBMISSIONS ON RESPONDENTS’ BREACH OF CHARTERPARTY

I. THE RESPONDENTS ARE DISPENSED WITH THE RESPONSIBILITY TO PERFORM HULL CLEANING AFTER THE REDELIvery PERIOD ELAPSES.

It is submitted that the Respondents were prevented from performing hull cleaning at the Wahanda Port due to issues of current and charge, and due to the presence of muddy water at the anchorage triggering an order of the Wahanda Port Services.\(^\text{11}\) Under Clause 83(d) of the Rider Clauses, the Respondents commenced negotiations with the Claimants regarding the lump sum amount at a time sufficiently prior to the Vessel’s redelivery.\(^\text{12}\) However, no sum was agreed upon prior to redelivery and consequently, the Respondents were compelled to serve their 1 day redelivery notice.\(^\text{13}\) Thereafter, the Respondents redelivered the Vessel on 30 June 2016. It is submitted that even if the Respondents have been prevented from performing hull cleaning of the Vessel, the Claimants are obliged to accept redelivery of the Vessel in good order and condition with a fouled hull because: (A) Per the Charterparty the port of redelivery is in the Respondents’ option; and (B) The 1 day redelivery notice has been tendered.

A. Per the Charterparty the port of redelivery is in the Respondents’ option.

The Charterparty states that although the Vessel is to be redelivered at DLOSP 1SP Wahanda range; the port is to be at the Respondents’ option and redelivery is to take place at any time day/night, Sundays and holidays included.\(^\text{14}\) Thus, the Respondents are well within their obligations under the Charterparty, mutually agreed to by both parties, to give redelivery of the Vessel. The Vessel is redelivered when the Respondents’ use of it comes to an end and the vessel is once again at the disposal of the Claimants.\(^\text{15}\) The

\(^{11}\) Moot Scenario, p 26.
\(^{12}\) Second mail of 8 June 2016, Moot Scenario, p 29.
\(^{13}\) First mail of 29 June 2016, Moot Scenario, p 44.
\(^{14}\) Moot Scenario, see p 4.
\(^{15}\) Terence Cooghin and others, Time Charter, (7th edn Informa Law from Routledge 2014) para 15.1.
Respondents cannot be precluded from their right to redeliver the Vessel merely because they were unable to perform hull cleaning at the Wahanda Port.

**B. The 1-day redelivery notice has been tendered.**

Under the NYPE as incorporated in the Charterparty, the Respondents are obliged to keep Claimants informed of the Vessel’s itinerary; and prior to the arrival of the Vessel at the redelivery port or place, to serve notices of redelivery within the agreed timescale.\(^{16}\) The Respondents have scrupulously kept the Claimants informed of the former. However, no periods of days have been mutually decided under Clause 4 of the NYPE for tendering notices of redelivery. Despite this, the Respondents have still, in accordance with this clause, tendered their 1 day redelivery notice specifying that the vessel will be redelivered to DLOSP Wahanda on 30 June 2016.\(^{17}\)

Once such notice has been tendered, the Claimants cannot compel the Respondents to perform hull cleaning and preclude them from their right to redeliver the vessel. It is pertinent to note that the giving of valid redelivery notices is not a condition precedent to an effective redelivery.\(^{18}\) There is simply an obligation to give such notices at the time appropriate for proper performance of the contract.\(^{19}\) The Respondents have fulfilled said obligation by tendering their 1 day notice of redelivery, and the Claimants are obliged to accept the same. The redelivery notice imposes on the Respondents an implied duty to use reasonable diligence to redeliver the ship by the date stated in the redelivery notice. In the alternative, even if there was a complete failure to serve the required redelivery notices, which is not the present case, the Respondents are not prevented from

---

\(^{16}\) Dr Theodora Nikaki and Barış Soyer, ‘Enhancing standardisation and legal certainty through standard charterparty contracts: The NYPE 2015 experience’ in Baris Soyer and Andrew Tetterborn (eds), *Charterparties: Law, Practice and Emerging Legal Issues* (1st edn, Informa Law from Routledge 2017).

\(^{17}\) First email of 29 June 2016, Moot Scenario, p 44.

\(^{18}\) *Maestro Bulk Ltd v Cosco Bulk Carrier Co Ltd (The Great Creation)* [2015] 1 Lloyd's Rep 318 [18].

\(^{19}\) *Maestro Bulk Ltd v Cosco Bulk Carrier Co Ltd (The Great Creation)* [2015] 1 Lloyd's Rep 329 [84].
redelivering the Vessel. The Claimants cannot question redelivery of the vessel on the sole ground that the Respondents have been unable to perform hull cleaning of the vessel.

II. THE OWNERS HAVING REJECTED THE RESPONDENTS’ PROPOSAL TO PERFORM HULL CLEANING OF THE VESSEL AT NORTH TITAN PORT CANNOT HOLD THEM LIABLE FOR NOT PERFORMING THE SAME.

It is submitted that the Respondents offered to arrange hull cleaning of the vessel at the North Titan Port which was about half a day sailing from Wahanda. The Claimants failed to respond to this offer, and instead held the Respondents liable for the hull cleaning of the Vessel performed at the South Island Port, undertaken entirely by the Claimants. In this regard the Respondents submit that: (A) They are entitled to travel to and perform hull cleaning at North Titan Port; and (B) The journey to South Island Port for the purposes of hull cleaning is not contractual.

A. The Respondents are entitled to travel to and perform hull cleaning at North Titan Port.

The Respondents are fully entitled to give such an order to proceed to North Titan Port for the purposes of performing hull cleaning. The defining characteristic in a time charter trip such as this, is that the vessel is under the directions and orders of the Respondents as regards her employment for the charter period. Orders to proceed to or remain at a certain port, or orders as to the general route to be taken are orders regarding employment. The Respondents order to proceed to North Titan

---

22 SBT Star Bulk & Tankers (Germany) GMBH & Co Kg v Cosmotrade SA (The Wehr Trave) [2016] 2 Lloyd's Rep 175 [13].
Port would qualify as an order regarding employment and would thus be valid.

**B. The journey to South Island Port for the purposes of hull cleaning is not contractual.**

It is submitted that the journey to South Island for the purposes of hull cleaning is not contractual because the Claimants cannot insist on continuance of the Charterparty after the Vessel has been redelivered. The Claimants first suggested the journey to South Island Port\(^{24}\) subsequent to the Respondents’ mail dated the same day containing their 1 day redelivery notice\(^{25}\). Once the Vessel has been redelivered, the Respondents’ use of it comes to an end and the Vessel is once again at the disposal of the Claimants\(^{26}\).

The legitimacy of Respondents’ orders as to employment of the vessel must be judged not at the time the order is given but at the time for performance\(^{27}\). In the present case, had the Respondents presumably undertaken the journey to South Island after serving their notice of redelivery, the impossibility of such voyage was clear at the time of giving the order as well as at the time of performance\(^{28}\). If the Respondents had undertaken such journey, they would have stood in breach of their 1 day redelivery notice. In this respect, the Respondents cannot perform the journey to South Island as they could not reasonably have expected the vessel to complete such journey before the date of redelivery on 30 June 2016\(^{29}\).

Furthermore, the Respondents have been prevented from performing hull cleaning of

---

\(^{24}\) First mail of 29 June 2016, Moot Scenario, p 44.
\(^{25}\) Second mail of 29 June 2016, Moot Scenario, p 43.
the Vessel due to the directions of the Wahanda Port Services.\textsuperscript{30} They have attempted to negotiate a lump sum amount with the Claimants multiple times. Having disregarded this, the Claimants cannot compel the Respondents to perform hull cleaning at another port, after the notice of redelivery has been served.

III. THE CLAIMANTS REJECTED MULTIPLE OFFERS OF LUMP SUM AMOUNT.

It is submitted that, without prejudice to the forgoing, the Respondents in order to amicably resolve the dispute proposed to pay to Claimants’ a lump sum amount if they were prevented from performing hull cleaning of the Vessel. The Claimants rejected the multiple offers of a lump sum amount made by the Respondents despite the fact that: (A) The Respondents were prevented from carrying out hull cleaning at Wahanda Port due to instructions of the Government of Wahanda; and (B) The inspection asked for could not be carried out by the Respondents at the Wahanda Port.

A. The Respondents were prevented from carrying out hull cleaning at Wahanda Port due to instructions of the Wahanda Port Servies.

The Respondents were informed by the Wahanda Port Services’ emails that hull cleaning could not be performed at the Wahanda Port due to issues with current and charge and due to muddy water at the anchorage.\textsuperscript{31} As a result, the Respondents were prevented from cleaning underwater parts in any form at the Wahanda Port. The Respondents’ informed the Claimants of the same via various emails.\textsuperscript{32} It is common practice, that a ship voluntarily in a port subjects itself to the jurisdiction of the port State.\textsuperscript{33} The

\textsuperscript{30} Moot Scenario p 26-27.
\textsuperscript{31} Emails dated 25 June 2016, Moot Scenario, p 26.
\textsuperscript{32} Second email of dated 8 June 2016, Moot Scenario, p 29; Second email of dated 9 June 2016, Moot scenario p 28; Third mail of 27 June 201, p 39.
\textsuperscript{33} Owners of the Hamtun v Owners of the St John (The Hamtun and the St John) [1999] 1 Lloyd’s Rep 883, see Andrew Serdy, ‘Chapter 8: Public International Law Aspects of Shipping’, Yvonne Baatz, Maritime Law (3rd edn, Informa Law from Routledge 2014) 313.
Respondents were liable to obey the order of the Wahanda Port Services. The Respondents are not concerned with the reason of the vessel’s detention at the behest of a foreign port authority—the vessel will be considered off hire if the delay caused is due to the Respondents obedience to the orders of a foreign port authority. The Respondents submit that despite having attempted to perform hull cleaning, they were prevented from doing so by the order of the Wahanda Port Services.

B. The Respondents could not carry out the inspection asked for at Wahanda Port.

Clause 83(b) of the Rider Clauses states that “…either party may call for an inspection which shall be arranged jointly…” The Claimants have even acknowledged that the Respondents found it impossible to carry out joint inspection of the hull fouling due to the water conditions at the redelivery port. Furthermore, the Claimants themselves had offered to carry out the inspection and the cleaning of the Vessel at the Respondents cost and expense; to which the Respondents agreed. The Claimants also did not respond to the Respondent’s offer to sail to North Titan Port where the necessary inspection could have taken place. Despite the inability of the Claimants to contribute to a joint inspection, the Respondents procured a quotation of hull cleaning costs at North Titan Port for a sum of USD 33,000 for the Claimants benefit.

IV. THE RESPONDENTS ARE NOT LIABLE FOR DAMAGES ARISING FROM LOSS OF NEXT FIXTURE.

The Respondents are not liable to bear the damages arising from cancellation of the Next Fixture, due to late redelivery. In the present case, when the Charterparty allows for a time

34 Andre & CIE SA v Orient Shipping (Rotterdam) BV (The Laconian Confidence) [1997] 1 Lloyd's Rep 139.
35 Omega Chartering Rider Clauses, cl 83(b), Moot Scenario p 11.
36 Email dated 9 June 2016, Moot Scenario, p 28.
37 Email dated 23 June 2016, Moot Scenario, p 35.
charter trip about 50-55 days without guarantee, the Respondents is only under an obligation to consider an estimate of the duration of the trip in good faith and not on a reasonable basis. Thus the Charterparty allows for a degree of flexibility in redelivering the vessel. It is submitted that in light of the cancellation of the Next Fixture the Claimants’ claim for damages is limited to the normal measure of the loss and that they cannot recover the full cost of the Next Fixture. The Respondents cannot be said to have assumed responsibility for any loss arising from the cancellation of the Next Fixture, at the time of formation of the Charterparty. The Respondents could not have had any control over, or even knowledge of, the terms of such a charter, nor would they have been able to quantify the liability they were assuming. In the present case, since there is no express clause by which the Respondents assumes responsibility for certain kinds of losses, such a term is implied. That is to say that the Respondents assumes responsibility for losses which can reasonably be foreseen at the time of contract to be be not unlikely to result, at the time the Charterparty is formed.

---

38 Moot Scenario, p 4.
39 Demand Shipping Co Ltd v Ministry of Food, Government of The People’s Republic of Bangladesh (The Lendoudis Evangelos II) [2001] EWHC Commercial 403.
40 Transfield Shipping v Mercator Shipping (The Achilleas) [2008] 2 Lloyd’s Rep 275, see Terence Coghlin, and others, Time Charter (7th edn, Informa Law from Routledge 2014) 103.
41 Transfield Shipping v Mercator Shipping (The Achilleas) [2008] 2 Lloyd’s Rep 275, see Terence Coghlin, and others, Time Charter (7th edn, Informa Law from Routledge 2014) para 4.58.
SUBMISSIONS ON LOSS AND DAMAGES CLAIMED UNDER BREACH OF THE

CHARTERPARTY

I. THE CLAIMANTS CANNOT CLAIM MORE THAN USD 33,000.00 AS THE COSTS OF THE HULL CLEANING.

The Respondents submit that Claimants’ claim of USD 41,000.00 is unreasonable and that the cost of hull cleaning should be no more than USD 33,000.00 according to the quotation by North Titan Shipbuilders. When the Respondents are liable for damage caused to the ship during the pendency of the Charterparty, the Claimants are normally entitled to recover only the reasonable cost of repair.44

Following the principle of mitigation of damages, the party suffering any loss from a breach of contract, must take any reasonable steps available to mitigate the extent of the damage caused by the breach.45 It has been observed that a claimant may even be required to accept a reasonable offer from the defendant which would make good the loss or part of it.46 In the present case, the Respondents made multiple offers of lumpsum which the Claimants unreasonably rejected. Similarly, the Owners rejected the Respondents offer to travel to North Titan Port to perform hull cleaning despite the fact that this was a reasonable offer in the ordinary course of business.47 Thus, despite being given multiple opportunities to mitigate their loss, the Claimants did not.

As a result, the Claimants suffered further losses when they had to accept redelivery of the Vessel with a heavily fouled hull. It is observed that when the Claimants’ loss has been caused partly by the Respondents’ breach of contract and partly by the Claimants’ own blameworthy

conduct, the damages are not reduced unless the Claimants’ conduct constitutes a failure in the Claimants’ duty to mitigate its loss. In the present case, the Owners would not have had to undertake hull fouling at their expense, if they had, prior to redelivery of the Vessel, accepted either the Respondents’ offer to negotiate a lump sum price or the Respondents’ offer to perform hull cleaning at North Titan Port. The Claimants’ conduct in unreasonably rejecting all of the Respondents’ offers amounts to a failure in their duty to mitigate their losses, and as such the Claimants’ conduct should disallow them from recovering the unreasonable claim of USD 41,000.00.

II. THE RESPONDENTS ARE NOT LIABLE TO BEAR THE COST OF THE VOYAGE TO SOUTH ISLAND FOR HULL CLEANING AMOUNTING TO USD 55,567.42.

The Claimant is bound to take reasonable steps to mitigate the extent of the damage caused by breach of the contract, under the principle of mitigation of damages. The Claimants cannot take unreasonable steps and then hold the Respondents liable for losses which are subsequently suffered. The Claimants undertook the journey to South Island Port to perform hull cleaning at their own cost, after rejecting all of the Respondents’ offers to mitigate their loss. It is submitted that this is an unreasonable step and the Respondents cannot be expected to bear the additional cost of the voyage to South Island Port. The question of reasonableness here is a question of fact. The Respondents humbly submit that the Claimants have acted unreasonably in undertaking the voyage to South Island Port after rejecting the Respondents’ offers of negotiating lump sum and of cleaning the hull at North Titan Port. The Respondents are thus, not liable to pay the costs of voyage to South Island Port.

The Respondents are entitled to perform hull cleaning at North Titan Port, since the Vessel is under the directions and orders of the Respondents as regards her employment for the charter period. Where the Respondents have a choice between two methods of performance the damages are to be assessed on the basis of the minimum legal obligation, i.e. the Charterparty would have been performed by the method least onerous to the Respondents and least beneficial to the Claimants. The method least onerous to the Respondents and least beneficial to the Claimants would have been the payment of the lump sum. However, the Charterers were still willing to sail to North Island Port to perform hull cleaning. The Claimants did not accept either offer and thereafter chose to undertake hull cleaning at South Island Port of their own volition, which was more expensive. The Respondents are thus not liable to pay for the costs of the voyage to South Island Port.

III. THE CLAIMANTS CANNOT CLAIM FULL AMOUNT OF USD 15,330,000.00 FOR CANCELLATION OF THE NEXT FIXTURE.

The Respondents are only liable to pay the difference between the Charterparty rate of hire and the market rate of hire for the period overrun, and not the full amount of USD 15,330,000 claimed by the Claimants. The Claimants’ damages will at best be restricted to such normal measure of damages, i.e. the difference between the charter and market rates for the period of the overrun. The period of overrun is the period from the latest time at which the ship could lawfully have been redelivered, up to the date on which she was in fact redelivered.

---

50 SB Star Bulk & Tankers (Germany) GMBH & Co Kg v Cosmotrade SA (The Wehr Trave) [2016] 2 Lloyd’s Rep 175.
52 South Island Port Agency Ltd Invoice, Moot Scenario, p 50-51.
54 Terence Cooghin and others, Time Charter, (7th edn Informa Law from Routledge 2014) para 4.54.
The Respondents submit that the Claimants cannot claim the loss arising from the cancellation of the Next Fixture. At the time of entering into the Charterparty the Respondents have not assumed responsibility for the loss of subsequent fixtures. The Claimants cannot hold the Respondents liable for risks which would not reasonably be considered to have been undertaken in their particular market at the time of entering into the Charterparty. The Respondents cannot be expected to know at what point in the currency of their Charterparty with the Claimants, would the latter enter into a subsequent fixture, with whom, for what length or what its other terms would be.

It is submitted that without prejudice to the foregoing, the calculation of damages for the cancellation of the Next Fixture is based on the fixed period of two years, not the extendable period of four years. The Respondents submit that damages for the whole period of the Next Fixture are remote, because the Respondents cannot have been said to accept liability or responsibility for such loss. Hence the Claimants can only claim damages for the minimum two-year period.

57 Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [23] [34] (Lord Hope).
SUBMISSIONS ON COUNTERCLAIMS ISSUE

I. THE RESPONDENTS ARE LIABLE TO BE INDEMNIFIED AGAINST CARGO CLAIMS.

The Respondents are liable to be indemnified by the Claimants because: (A) The Cargo Claim is not time barred under Clause 6 of the ICA; (B) The Claimants are liable for 100% of the Cargo Claim pursuant to clause 8(a) of the ICA; (C) In the alternative, Respondents are to be paid damages for the Claimant’s breach of Clauses 27 and 53 of the Charterparty; and (D) In the further alternative, the Claimants are liable for 50% of the Cargo Claim pursuant to clause 8(b) of the ICA.

A. The Cargo Claim is not time barred under Clause 6 of the ICA.

The Respondents submit that the Cargo Claim furthered by them is not time barred under Clause 6 of the ICA. It has been observed that Clause 6 requires written notice of claim, not the commencement of legal proceedings which is an additional requirement to any statutory or contractual time bar. Furthermore, Clause 6 of the ICA states that the Respondents are to include if possible details of the contract of carriage, the nature of the claim and the amount claimed. The Respondents issued a formal notice of claim against the Claimants on the basis of a preliminary damage report by their surveyors, and referencing a previous mail in which they had set out nature of the claim. They further disclaimed that they would revert once the details of the Merchant’s claim against them were made clear.

Prior to serving the formal notice of claim the Respondents had informed the

59 MH Progress Lines SA v Orient Shipping Rotterdam BV (Genius Star 1) [2011] EWHC 3083 (Comm).
60 Second email of 7 July 2016, Moot Scenario, p 45.
Claimants that they would be held fully liable for the cargo damage, which the
Claimants subsequently acknowledged by informing their P & I Club.\(^1\) Thus, the
Respondents provided as many details as they were able to regarding the Cargo
Claim, and the Claimants cannot contend that such claim is time barred.

B. The Claimants are liable to bear 100% of the Cargo Claim pursuant to clause
8(a) of the ICA.

Under Clause 8(a) of the ICA, the Claimants are liable for claims arising out of
unseaworthiness and/or error or fault in the navigation and management of the
vessel.\(^2\)

The Respondents submit that the ingress of seawater into the cargo holds which
resulted in the damage to the cargo, was due to the negligence of the crew and as
such, arises out of error in the management of the vessel. The crew by negligently
pumping seawater into the cargo hold instead of into the ballasting tanks endangered
the safety of the vessel.\(^3\) The ingress of seawater into the cargo holds which
damaged the cargo, posed a risk to the safety of the vessel, constituting an error in
management of the vessel. The ballasting operation, in the course of which said
negligent act of the crew occurred, is undertaken to maintain the stability and
structural integrity of the ship.

Furthermore, under Clause 64 of the Rider Clauses, the Claimants have guaranteed
that the vessel will always be maintained in a safe condition during ballast
operations.\(^4\) Any negligence arising from the process thereof which endangers the

---

\(^1\) Second Email of 27 June 2016, Moot Scenario, p 38.

\(^2\) Inter-Club New York Produce Exchange Agreement, cl 8(a), Moot Scenario, p 71.

\(^3\) International Packers London Ltd v Ocean Steamship Co. Ltd [1955] 2 Lloyd’s Rep 218 (QB), see Simon

\(^4\) Omega Chartering Rider Clauses, cl 64, Moot Scenario, p 12.
safety of the ship, is an error in management of the vessel, for which the cargo claims arising are to be 100% apportioned to the Claimants account.

Given that Clause 8(a) and 8(b) apportion liability for cargo claims, the ICA on its proper construction, is brought into play not by reference to the way cargo interests form their claim, but by reference to what on the evidence is the true cause of the cargo damage. Under the ICA, the dispute is decided ultimately upon the evidence to decide what the cause of the cargo damage is. Thus, as evidenced by the facts, the negligence of the crew in pumping the seawater into the cargo holds instead of the ballasting tanks was the proximate cause of damage to the cargo. As a result, the Claimants are to be 100% liable for cargo claim and must indemnify the Respondents against the same.

C. In the alternative, Respondents are to be paid damages under Clauses 27 and 53.

Clause 27 of the NYPE 2015, and Clause 53 of the Rider Clauses, both of which constitute the Charterparty between the Claimants and the Respondents provide that any cargo claims as between the Claimants and the Respondents shall be settled in accordance with the ICA. Under Clause 2 of the ICA, the general provision is that the terms of the ICA “shall apply notwithstanding anything to the contrary in any other provision of the charterparty”. Where the parties have incorporated the ICA, such as in the present case, via clauses 27 and 53, cargo claims for which it provides an apportionment must be dealt with between Claimants and Respondents on such

---

D. In the further alternative, the Claimants are liable for 50% of the cargo claim pursuant to clause 8(b) of the ICA.

In the further alternative it is submitted that if the Learned Tribunal does not find the Claimants wholly responsible for indemnifying the Respondents against the cargo claims under Clause 8(a) of the ICA, the cargo claims are to be apportioned to 50% of the Claimants account, following the phrase ‘…supervision and responsibility of the Master’ in Clause 8(a) of the NYPE 2015. Given that the Charterparty provides for the addition of the words ‘and responsibility’ to said Clause 8(a) of the NYPE, the Claimants are entitled to bear such damages arising from the cargo claim.

The addition of ‘and responsibility’ has been held to effect a prima facie transfer from the Respondents back to the Claimants of liability for negligence in loading, stowing, trimming or discharging the cargo, unless it can be shown that the Respondents have intervened and in so doing have caused the relevant loss or damage. Such amendment places the primary duty on the Claimants and, in the absence of actual intervention by the Respondents; the Claimants are responsible for all cargo operations whether or not ‘within the master’s province’.

II. THE RESPONDENTS CLAIM FOR RESTITUTION OF OVERPAID SUM OFF HIRE.

The Respondents claim restitution of the overpaid hire amount or alternatively seek damages for the same as the vessel was off hire from 7 May 2016 to 26 June 2016 pursuant to Clause 17 of the Charterparty. The vessel was off hire in accordance with the orders of the Wahanda Port

---

State Authority, and not at the responsibility of the Respondents. The overpaid hire to the tune of USD 375,000 is based on the accumulation of the daily rate of hire for a period of 20 days.

Under Clause 17 of the Charterparty, the vessel is considered to be off hire by detention by Port State Control or other competent authority for vessel deficiencies or by any similar cause which prevents the full working of the vessel.\textsuperscript{70} It has been observed that obtaining free pratique is no mere formality, and the quarantine of a vessel by Port Authorities does prevent the full working of the vessel, which triggers the off-hire clause.\textsuperscript{71} In the present case, free pratique was denied to the Respondents by the Wahanda Port Authority on 11 May 2016, and granted only on 26 June 2016.

Per the Administrative Measures for Entry and Exit Inspection and Quarantine on Ships of International Sails,\textsuperscript{72} as well as the International Convention for the Safety of Life at Sea 1974,\textsuperscript{73} port authorities can quarantine vessels coming in from areas where a quarantinable infectious disease is epidemic. The Respondents were liable to comply with the orders of the Wahanda Port Authorities under the terms of the Charterparty.\textsuperscript{74} Thus, the quarantining of the vessel by the Wahanda Port Authorities in the present case, due to a suspected outbreak of Ebola amongst the crew triggers the off-hire clause during which period, per Clause 17, the payment of hire and overtime, if any, shall cease for the time thereby lost.

Such a net clause is concerned with the service immediately required of the vessel, and not with the chartered service as a whole or the entire maritime adventure.\textsuperscript{75} Even if the immediate service required was the discharge of cargo, such service could not be performed due to the quarantine the vessel was placed under. Thus, the vessel was off hire between the period of 7

\textsuperscript{70} New York Produce Exchange 2015, cl 17.
\textsuperscript{71} Sidermar SPA v Apollo Corporation (The Apollo) [1978] 1 Lloyd’s Rep 200 [61].
\textsuperscript{72} Administrative Measures for Entry and Exit Inspection and Quarantine on Ships of International Sails, art 9.
\textsuperscript{73} International Convention for the Safety of Life at Sea (SOLAS), 1974.
\textsuperscript{74} Moot Scenario, p 4.
May 2016 to 26 June 2016, and the Respondents were liable to be restituted in light of the overpaid hire. Since the vessel has been off hire during a period for which the Respondents have already paid hire in advance, they are entitled to be paid an adjustment of hire, in respect of the hire that the ship has not earned.\textsuperscript{76}

Clause 17 of the NYPE 2015 expressly provides that the Respondents is entitled to be paid an adjustment of hire.\textsuperscript{77} Even in the absence of an express clause, such right is implied.\textsuperscript{78} There exists a contractual debt, even in the absence of an express clause to such effect, payable by the ship Claimants to the Respondents—advance hire which has already been paid in a period during which the ship was rendered off hire under a term of the contract must ordinarily be repaid.\textsuperscript{79} Under such a contractual regime which legislates for the recovery of overpaid hire, the Respondents are liable to recover the over paid hire of USD 375,000. As a result, the Respondents claim restitution of the overpaid hire amount or alternatively seek damages for the same as the Vessel was off hire from 7 May 2016 to 26 June 2016 pursuant to clause 17 of the Charterparty.

\textsuperscript{76} Terence Cooghin and others, \textit{Time Charter}, (7th edn Informa Law from Routledge 2014) 280.
\textsuperscript{77} New York Produce Exchange 2015, cl 17.
\textsuperscript{78} \textit{Pan Ocean Shipping Co Ltd v Creditcorp Ltd} (The Trident Beauty) [1994] 1 Lloyd’s Rep 365 (HL) 368 (Lord Goff).
\textsuperscript{79} \textit{Pan Ocean Shipping Co Ltd v Creditcorp Ltd} (The Trident Beauty) [1994] 1 Lloyd’s Rep 365 (HL) 368 (Lord Goff).
PRAYER FOR RELIEF

For the reasons set out above, Respondent requests that the Tribunal:

a) **FIND** that the Respondent is liable to pay only the reasonable costs of hull cleaning, which is no more than USD 33,000.

b) **FIND** that the Respondents are not liable to pay for the voyage to South Island.

c) **FIND** that the Respondents are not liable to pay for loss of Next Fixture.

d) **FIND** that the Claimants are liable to an indemnity of 100% of the cargo claims or damages in the same amount.

e) **AWARD** USD 375,000.00 as restitution for overpaid hire or as damages in the same amount.

f) **AWARD** costs and interest in favour of the Respondent.