16TH ANNUAL INTERNATIONAL MARITIME LAW ARBITRATION MOOT COMPETITION 2015

IN THE MATTER OF AN ARBITRATION HELD IN LONDON

CLAIMANT’S MEMORANDUM

Claimant: Western Tankers Inc.  
Respondent: LDT Pte Ltd.

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LIST OF AUTHORITIES

A. CASES

Afovos Shipping Co SA v R Pagnan & Fratelli (The Afovos) [1983] 1 WLR 195 (HL)

Aughton Ltd v MF Kent Services Ltd (1991) 57 BLR 1 (CA)

Bradford Third Equitable Benefit Building Society v Borders [1941] 2 All ER 205 (HL)

Coldman v Hill [1919] 1 KB 443 (CA)

Davis Contractors v Fareham Urban District Council [1956] AC 696 (HL)

Derry v Peek (1889) LR 14 App Cas 337 (HL)

Downs v Chappell [1997] 1 WLR 426 (CA)

Fiona Trust & Holding Corp v Privalov [2007] EWCA Civ 20, [2007] 1 All ER (Comm) 891

Fiona Trust & Holding Corp v Privalov [2007] UKHL 40, [2007] 4 All ER 951

Freeman & Lockyer v Buckhurst Park Properties Ltd [1964] 2 QB 480 (CA)

Ioanna, The [1978] 1 Lloyd’s Rep 238 (CA)

Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5) [2002] 2 AC 883 (HL)

Lloyd v Grace, Smith & Co [1912] AC 716 (HL)

McFadden v Blue Star Line [1905] 1 KB 697 (KBD)

McIver v Tate [1903] 1 KB 362 (CA)

Morris v CW Martin & Sons Ltd [1966] 1 QB 716 (CA)

Oakley v Lyster [1931] 1 KB 148 (CA)

Ocean Tramp Tankers Corporation v V/O Sovfracht (The Eugenia) [1964] 2 QB 226 (CA)

Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd [1979] AC 580 (PC)

Smith v Chadwick (1884) 9 App Cas 187 (HL)

Smith New Court Securities v Scrimgeour Vickers Ltd and another [1997] AC 254 (HL)

Verity Shipping SA v NV Norexa [2008] 1 Lloyd’s Rep 652 (QBD)

Westacre Inv v Jugoimport-SPDR Holding Co [1999] 2 Lloyd’s Rep 65 (CA)

Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony) [2001] 1 AC 638 (HL)

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Coghlin, Time Charters (7th edn Informa, London 2014)
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1. ASA2 made a false representation of fact that the ANTELOPE had been instructed to supply the Vessel with bunkers at STS Area 1. This was made with knowledge of its falsity.

2. ASA2 made this representation with the intention to induce the Master to rely on it.

3. The Claimant was induced by the representation to waive its right to refuse ASA2’s order and proceed to STS Area 1.
   a) The Master had a right to refuse ASA2’s order to proceed to STS Area 1.
   b) The Master waived his right to refuse ASA2’s order because the Vessel was in need of bunkers.

4. The Claimant suffered damage as a result of ASA2’s representation.

VI. THE CLAIMANT’S DEFENCE TO THE RESPONDENT’S COUNTERCLAIMS.

A. THE CLAIMANT FULFILLED ITS OBLIGATION OF SEAWORTHINESS AS REQUIRED BY THE CHARTERPARTY.

1. The Vessel met the standard of seaworthiness required by the ordinary prudent shipowner.

2. The Master was not incompetent in following the instructions given by the Respondent’s agent ASA2.

B. THE CLAIMANT IS NOT LIABLE IN BAILMENT.

C. THE CLAIMANT IS NOT LIABLE IN CONVERSION BECAUSE IT DID NOT DEAL WITH THE GOODS IN A MANNER INCONSISTENT WITH THE RIGHTS OF THE RESPONDENT AT ANY POINT OF TIME.

VII. PRAYER FOR RELIEF.
CLAIMANT’S CASE

I. STATEMENT OF FACTS

A. THE PARTIES

1. The Claimant is Western Tankers Inc, a long established and reliable company incorporated in the BVI. The Claimant owns a fleet of tankers, one of which is the “Western Dawn” (the “Vessel”). The Respondent is LDT Pte Ltd, a company incorporated in Singapore.

B. THE CHARTERPARTY

2. On or about 26 May 2014, the Claimant as “Owners” and the Respondent as “Charterers” entered into an agreement for the hire of the Vessel for a period of three months, plus or minus 30 days (the “Charterparty”). The Charterparty was evidenced by a “fully fixed fixture recap” set out in an email dated 26 May 2014 (“Fixture Recap”).

3. The Charterparty terms are based the Shelltime 4 charterparty form (“Shelltime 4”) as amended by the parties in the Fixture Recap and the Respondent’s rider clauses which were incorporated into the Charterparty.

4. The Charterparty contains an arbitration clause, i.e. clause 46 of Shelltime 4, which provides, that all disputes “arising out of this charter shall be referred to Arbitration in London in accordance with the Arbitration Act 1996”.

C. PERFORMANCE OF THE CHARTERPARTY

5. The Charterparty provides for a voyage from Singapore to OPL Luanda.

6. On 27 May 2014, the Respondent issued VOYAGE ORDER LDTP/WD01 for the Vessel to load “30, 000mt MIN/MAX Jet A1 PLUS 70,000 +/-10% MOLOO GASOIL” (the “Cargo”) in Singapore for discharge at OPL Luanda.
7. On or about 4 June, the Vessel arrived at Singapore in accordance with the Voyage Order. On the same day, the Master tendered a Notice of Readiness (“NOR”). On 7 June 2014, the Vessel commenced loading and completed loading the next day. The Vessel loaded approximately 30,000 MT of the Cargo. After completion of loading, the Vessel sailed for OPL Luanda.

8. Pursuant to clause 7(a) of Shelltime 4, the Respondent was obliged to provide the Vessel with bunkers for her voyage. While the Vessel was at Singapore, the Master required 1,500 MT of bunkers to be supplied at Singapore on the basis of the planned trading route of the Vessel, i.e. Singapore – Cape of Good Hope – OPL Luanda – Gibraltar. However, the Respondent only procured a supply of 950 MT of bunkers. This quantity of bunkers was barely sufficient for the Vessel to reach “OPL Luanda plus the bad weather reserve”. On 20 June 2014 and 25 June 2014, the Master repeatedly chased the Respondent to provide more bunkers. In response to this, the Respondent informed the Master that they would supply additional bunkers at various locations during the voyage to OPL Luanda.

9. On 28 June, the Respondent informed the Master that it will provide additional bunkers at “STS Area 1”. At about the same time, the Respondent changed the voyage instruction – instead of discharging at OPL Luanda, the Vessel was to discharge the Cargo at STS Area 1.

10. The Master was not aware of a location by the name of STS Area 1. As far as the Master was concerned, there was only a location called OPL Area 1. Accordingly, the Master requested the Respondent to provide the co-ordinates for STS Area 1. The Respondent did not do so.

11. Subsequently, also on 28 June, the Respondent’s agent, Atlantic STS Agency (“ASA2”), contacted the Master and provided the specific co-ordinates of STS Area 1 where the Vessel was to discharge the Cargo and receive bunkers. STS Area 1 is in the international waters off
the Angolan Coast\(^1\). ASA2 also advised the Master that 300 MT of bunkers would be supplied and the Vessel was to discharge the Cargo onto a vessel called “ANTELOPE”.

12. On or about 3 July, while the Vessel was *en route* to STS Area 1, the hire for July - August fell due. On the same day, the Claimant reminded the Respondent that hire was due. The Respondent did not pay.

13. On 4 July, the Vessel arrived at STS Area 1. Contrary to the Respondent’s representations, the Respondent did not arrange for another vessel to load the Cargo or supply bunkers at STS Area 1.

14. While the Vessel was at STS Area 1, the Vessel was attacked by pirates. The pirates hijacked the Vessel and siphoned off approximately 28,190 MT of the Cargo via multiple STS operations. During the hijacking, the Vessel lost communications with the Respondent.

15. On 17 July 2014, after about 2 weeks of captivity, the crew managed to repel the pirates and regained control of the Vessel. Thereafter, the crew inspected the Vessel and discovered that the pirates had damaged the Vessel’s navigational and radio equipment in the wheelhouse.

II. SUMMARY OF THE ISSUES

16. The following issues arise for determination by the Tribunal:

   a. Whether this tribunal has jurisdiction to determine the substantive merits of the parties’ claims, given that the Charterparty contains an express arbitration clause providing for London arbitration.

   b. Whether the Respondent is liable for outstanding hire for the period between July – August 2014 under the Charterparty.

\(^1\) 06 Degrees 00 minutes South: 08 Degrees 10 minutes East.
c. Whether the Respondent is liable for damage to the Vessel under the tort of fraud for the fraudulent representations of ASA2.

d. Whether the Claimant is liable to the Respondent for loss of Cargo under the following grounds:

i. For the breach of the obligation of seaworthiness;

ii. For the breach of duties as bailee of the Cargo; and

iii. Under the tort of conversion.

III. PRELIMINARY ISSUE OF JURISDICTION

A. ON A TRUE CONSTRUCTION OF THE CHARTERPARTY, THIS TRIBUNAL HAS JURISDICTION TO HEAR THE MATTER.

17. Pursuant to s 30 of the English Arbitration Act (c.23) (“the Arbitration Act 1996”), which encapsulates the Kompetenz-Kompetenz principle, this Tribunal is entitled to rule on its substantive jurisdiction to hear the merits of these claims.

I. The parties have expressly agreed for London to be the seat and forum of arbitration.

a) The Fixture Recap incorporates clause 46 of Shelltime 4.

18. A general reference in a contract to a printed set of standard clauses which contains an arbitration clause is sufficient to incorporate that arbitration clause into the contract.²

19. In London Arbitration 14/14, the fixture recap provided, “Attached [charterer’s] rider clauses with owner’s amendments to apply”. In that case, the Tribunal found that the

² Aughton Ltd v MF Kent Services Ltd (1991) 57 BLR 1 (CA).
charterer’s rider clauses including the arbitration clause were incorporated into the charterparty.

20. In the present case, the Fixture Recap clearly provides that Shelltime 4 was the “basis proforma” and then goes on to make specific amendments to the standard clauses in Shelltime 4. In other words, the parties adopted the standard clauses in Shelltime 4 subject to the specific amendments which they had agreed on. Clause 46 of Shelltime 4 is a London arbitration clause. The parties did not make any amendment to clause 46. Accordingly, clause 46 was properly incorporated in the Charterparty, as part of the standard clauses in Shelltime 4.

b) Clause 46 clearly states that London is the proper seat and forum of arbitration.

21. Clause 46 provides that all disputes have to be “referred to Arbitration in London in accordance with the Arbitration Act 1996”. This means that the arbitration hearing is to take place in London and London is the seat of the arbitration. English law has regarded such clauses providing for “arbitration in London” as clearly stipulating that London is to be the seat and forum of the arbitration.

22. In the present case, the wording of clause 46 is clear and binds parties to an agreement to arbitrate in London. Accordingly, this Tribunal, being properly constituted, has jurisdiction to determine the parties’ disputes.

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2. There is nothing to indicate that the Parties have agreed for Singapore to be the proper seat and forum of arbitration.

23. As set out in Paragraph 3 of the Respondents’ Statement of Defence, it is contended that on a true construction of the Charterparty, and in accordance with the intention of the parties as set out in the Fixture Recap and correspondence (in particular that of 23 May 2014), the proper seat and forum in which this dispute is to be determined is Singapore and Singapore arbitration.

24. The Respondent has not elaborated on the basis of their contention. Nonetheless, it is clear that the Respondent’s contention cannot be correct. First, neither the Fixture Recap nor the correspondences between the parties have indicated an intention to arbitrate elsewhere but London. In fact, the word “Singapore” does not even appear in the Charterparty. On the other hand, clause 46, as explained above, clearly stipulated London as the seat of the arbitration.

25. The Respondent purports to rely on an email dated 23 May 2014 which states that the Respondent was “really not keen on London arbitration.” This is part of the parties’ pre-contractual negotiation, and therefore not relevant. In any event, as clearly evidenced by the Fixture Recap, the parties ultimately agreed to incorporate clause 46 without any amendment.

26. The fact that the heading “Law and Litigation” appears in the Fixture Recap also does not assist the Respondent. Although reference was made in the Fixture Recap to “Law and Litigation” (i.e. the heading of clause 46 in Shelltime 4), the fact that no changes were made to clause 46 further reinforces the fact that the parties had intended to specifically adopt clause 46 as it stands in Shelltime 4, i.e. arbitration in London.

   a. In the Fixture Recap, the required field under “LAW AND LITIGATION” was left blank. This is insufficient to support a contention that Singapore is the appropriate
forum and seat of arbitration. If the Respondents intended for an arbitration clause that provided for something other than London arbitration, they should have done so utilising clear and unambiguous language. Furthermore, there is no reference at any part of the Charterparty to Singapore as a seat of arbitration.

b. The correspondence between the Claimant, Respondent and their Broker does not reveal any intention to arbitrate in Singapore. Any purported intention to do so was couched in ambiguous terms. For example, the email dated on 23 May 2014 from the Respondent to the Broker merely stated that the former was “really not keen on London arbitration.”

27. This Tribunal should thus place greater weight on the terms reflected in clause 46 of Shelltime 4.

B. THIS TRIBUNAL HAS JURISDICTION TO HEAR THE CLAIMANT’S SUBSTANTIVE CLAIM OF FRAUD.

1. Fraud claims are admissible in arbitration.

28. The Respondent contends at Paragraph 4 of their defence that the Claimant’s claim in fraud is “inadmissible” in arbitration. Presumably, it means it is not “arbitrable”. This contention is without merit. The claim relating to fraud is admissible in arbitration.

29. This “inadmissibility” argument can be shortly disposed of. The English Court of Appeal in Fiona Trust & Holding Corp v Privalov ("Fiona Trust") has held that arbitral tribunals may consider and resolve claims of corruption, bribery and related illegality because “if arbitrators can decide that a contract is void for initial illegality, there is no reason why they

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should not decide whether a contract has been procured by bribery”.

Although Fiona Trust specifically concerned an allegation of bribery which tainted the underlying contract, there is little substantive difference, if any, between bribery and fraud. There cannot be any sensible distinction between the two. This was confirmed in Fiona Trust itself, where the Court of Appeal specifically noted that “bribery cannot be any different from fraud”.

Therefore if an allegation of bribery is arbitrable, it follows that a fraud claim is arbitrable as well.

30. The Court of Appeal’s decision was later affirmed by the House of Lords. In the House of Lords, the judges reiterated that there was no substantive difference between fraud and bribery insofar as “admissibility” of claims is concerned. Their Lordships held that the “language of [the then-equivalent of] Shelltime 4 contains nothing to exclude disputes about the validity of the contract, whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else”.

Likewise, the Charterparty in this case (and the underlying Shelltime 4 form) does not contain anything to exclude the arbitrability of claims relating to fraud.

31. This is consistent with Article II(1) of the New York Convention, which provides for recognition of agreements to arbitrate disputes “whether contractual or not” and therefore encompasses disputes involving claims of fraud.

32. Accordingly, issues relating to fraud, like issues relating to corruption, bribery and related illegality, are “arbitrable” and admissible in these proceedings. Therefore, this Tribunal should hold that it has jurisdiction to hear the substantive allegation of fraud.

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5 [2007] EWCA Civ 20, [2007] 1 All ER (Comm) 891 at [29].
6 ibid at [25].
7 Fiona Trust & Holding Corp v Privalov [2007] UKHL 40, [2007] 4 All ER 951 at [15].
2. The phrase “all disputes arising out of this charter” is wide enough to encompass a claim under the tort of fraud.

33. Since there is no objection in principle to the arbitrability of claims relating to fraud, the next issue is whether the actual wording of clause 46 contemplates parties submitting such claims to the tribunal. The operative phrase in clause 46 is “all disputes arising out of this charter”. The word “all disputes” should be liberally construed – “all disputes” must include a fraud claim. There is no room for any exclusion. Further, the presumption is also consistent with the principle enunciated in Fiona Trust that parties as rational businessmen would intend for all disputes arising out of the parties’ relationship to be decided by the same tribunal unless the language clearly excludes certain subject matter from the arbitrator’s jurisdiction.\(^8\)

34. In the present case, the terms of the Charterparty does not exclude any subject matter from the arbitrator’s jurisdiction. Therefore, it follows that by reason of the words “all disputes” in clause 46, the Claimant and Respondent must have intended that “all disputes arising out of this charter” should be brought before this Tribunal. This Tribunal should find that the phrase “arising out of” is wide enough to allow it to hear a claim relating to fraud. The parties have agreed to refer the present dispute which includes claims relating to fraud to arbitration before this Tribunal.

IV. CLAIM FOR OUTSTANDING HIRE

35. The Respondent is liable for the outstanding hire due on 3 July 2014 for the period of July to August 2014.

\(^8\) ibid at [13], [15].
A. THE RESPONDENT IS LIABLE TO PAY OUTSTANDING HIRE UNDER CLAUSE 9 OF SHELLTIME 4.

36. Pursuant to clause 9 of Shelltime 4, payment of hire has to be made a “calendar month” in advance. This means hire is due before performance and may be made on or before the due date. The Respondent is therefore in default if it does not make payment before midnight of the last day available for payment.9

37. In time charters, hire runs from the time the Master tenders a NOR. On the facts, NOR was tendered on 4 June 2014 at 00:01 (UTC + 8). Pursuant to clause 9 of Shelltime 4, the first hire fell due a “calendar month” thereafter on the 3 July 2014. In breach of this clause 9, the Respondents failed to pay hire before 3 July 2014 expired.

B. THE PIRATE ATTACK DID NOT FRUSTRATE THE CHARTERPARTY.

38. The first defence which the Respondent relies on in response to the claim for outstanding hire is that the Charterparty was frustrated by reason of the piracy attack. In order to invoke “frustration” a situation must arise which renders the performance of the contract “a thing radically different from that which was undertaken by the contract”.10 The court must first construe the contract to determine if the parties provided for the event that has arisen. Where the contract provides for the event, the contract takes precedence and there is no frustration.11

39. In the present case, clause (e) of the BIMCO Piracy Clause provides that the Vessel is to remain on hire in the event of a pirate attack. In order words, the parties have contemplated the possibility of a pirate attack and have expressly agreed that the BIMCO piracy clause (e) would govern such an event. In light of BIMCO Piracy clause (e), there is no room for the application of the doctrine of “frustration”.

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9 Afovos Shipping Co SA v R Pagnan & Fratelli (The Afovos) [1983] 1 WLR 195 (HL) at 201.
10 Davis Contractors v Fareham Urban District Council [1956] AC 696 (HL) at 729.
11 Ocean Tramp Tankers Corporation v V/O Sovfracht (The Eugenia) [1964] 2 QB 226 (CA).

40. The Respondent also contends that the Vessel was off-hire. The Vessel may be put off-hire pursuant to clause 21(a)(ii) of Shelltime 4 where there is a “breach of orders or neglect of duty on the part of the master, officers or crew”. In this case, the Master, in complying with the orders of ASA2, was in fact complying with the Respondent’s orders (see Part A of Claimant’s Contentions, below). The Master was, at material times, performing his duties. Therefore, clause 21(a)(ii) does not apply and the Vessel was on hire throughout the voyage.

V. CLAIMS FOR DAMAGES TO THE VESSEL

41. The claim against the Respondent for damages to the Vessel is premised on the tort of fraud. The Respondent's agent, ASA2, made fraudulent representations to the Claimant that bunkers were available at STS Area 1. In reliance on these representations, the Claimant duly proceeded to STS Area 1 where they were attacked by pirates. The Respondent's defence is a bare denial that ASA2 is its agent. It will be shown that ASA2 is, in fact, the Respondent’s agent.

A. ASA2 WAS THE RESPONDENT’S AGENT.

1. ASA2 had actual authority to act on the Respondent's behalf.

42. There is strong circumstantial evidence showing that there is an agency relationship between ASA2 and the Respondent.

a. First, the nature of how ASA2’s instructions corresponded closely with that of the Respondent’s is strong evidence that the Respondent had employed ASA2 as its agent. ASA2 was privy to information that only an entity employed by the Respondent would have had. On 28 June, the Master had been instructed by the
Respondent to proceed to STS Area 1 for bunker supplies and discharge of cargo. However, in so doing, the Respondent failed to specify the location of STS Area 1. Approximately 6 hours later, ASA2 sent an e-mail to the Master nominating the precise coordinates of the STS location where the Vessel was to discharge bunkers and receive bunkers from the vessel “ANTELOPE”. The fact that ASA2’s e-mail was timely and corresponded perfectly with the Respondent’s last email must go towards showing that there is an agency relationship between the Respondent and ASA2.

b. Secondly, the fact that the Respondent neither protested nor sent enquiries after the Master ceased sending noon reports is highly indicative that the Master was corresponding with the Respondent’s agent. After ASA2 had contacted the Master, the Master ceased its daily practice of sending noon reports to the Respondent. Instead, it diverted the noon reports to ASA2. The failure of the Respondent to protest or enquire about this change of procedure indicates that the Master was liaising with the Respondent’s agent and the Respondent had waived the Master’s obligation to send noon reports.

c. Lastly, the fact that ASA2 was an appointed agent of the Respondent was confirmed by the series of correspondence between the Respondent and Claimant from 3 to 4 July. On 3 July, the Master informed the Respondent of the precise instructions given by ASA2, namely that it was meeting the vessel “ANTELOPE” to discharge the Cargo in 2 STS operations and receive 300 MT of bunkers. The Master attributed these instructions to the Respondent by using the words “[y]ou have advised…” In response to this email, the Respondent instructed the Master to “continue to liaise with your STS coordinator”, thus confirming that the ASA2 was indeed acting for the Respondent.
2.  *Alternatively, ASA2 had apparent authority to act on the Respondent’s behalf.*

43. Even if ASA2 does not have actual authority, the Respondent is still bound by the acts of ASA2 because the Respondent had conferred apparent authority on ASA2 to do those acts. Apparent authority was created when the Respondent represented to the Master that ASA2 had authority as STS coordinators to give instructions to the Master on behalf of the Respondent. In reliance on these representations as to ASA2’s authority, the Master followed ASA2’s instructions and duly proceeded to the STS location nominated by ASA2. Thus, the Respondent is liable for the acts of ASA2.\(^\text{12}\)

44. The Respondent had, over a period of time, represented by conduct that ASA2 had the authority to act on its behalf. The Respondent made this representation by permitting ASA2 to act on its behalf and subsequently affirming the actions of ASA2. This amounts to a representation that ASA2 had the authority to act on the Respondent’s behalf.\(^\text{13}\)

   a. First, the Respondent made a representation by conduct that ASA2 had permission to act on its behalf. This is evidenced by the fact that the Respondent was put on notice as to the actions of ASA2 but failed to act on it. As mentioned above, after ASA2’s email, the Master ceased sending noon reports to the Respondent and instead sent them to ASA2. The abrupt departure from the customary practice of sending noon reports to the Respondent should have put the Respondent on notice. Yet the Respondent never enquired or emailed the Master about it.

   b. Subsequently, the Respondent conclusively affirmed ASA2’s authority to act as its agents in its email dated 4 July. On 3 July, the Master provided the Respondent with

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\(^\text{12}\) Freeman & Lockyer v Buckhurst Park Properties Ltd [1964] 2 QB 480 (CA).

\(^\text{13}\) ibid.
specific details of the instructions given by ASA2, namely, that they would be receiving 300 MT of bunkers via STS transfer from a vessel “ANTELOPE”. The Master even attributed the instructions to the Respondent, with the words “[y]ou have advised...” On 4 July, the Respondent affirmed ASA2’s authority by replying “[p]lease continue to liaise with your STS coordinator”.

B. THE RESPONDENT IS LIABLE UNDER THE TORT OF FRAUD FOR ASA2’S FRAUDULENT REPRESENTATIONS THAT BUNKERS WOULD BE PROVIDED AT STS AREA 1.

45. Since it has been established that ASA2 is the Respondent’s agent, the fraudulent acts of ASA2 are binding on the Respondent. The act of an agent within the scope of his authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests.\textsuperscript{14}

46. The Respondents had committed actionable fraud because:

a. The Respondent made a false representation of fact that bunkers would be supplied at STS Area 1. This representation was made with knowledge of its falsity;

b. The Respondent made this representation with the intention to induce the Claimant to rely on it;

c. The Claimant was induced by this representation to waive its right to refuse the order to proceed to STS Area 1; and

d. In acting upon this representation by proceeding to STS Area 1, the Claimant suffered a pirate attack that resulted in damage to the Vessel.\textsuperscript{15}

\textsuperscript{14} Lloyd v Grace, Smith & Co [1912] AC 716 (HL).

\textsuperscript{15} Bradford Third Equitable Benefit Building Society v Borders [1941] 2 All ER 205 (HL) at 211.
1. **ASA2 made a false representation of fact that the ANTELOPE had been instructed to supply the Vessel with bunkers at STS Area 1. This was made with knowledge of its falsity.**

47. On 28 June, ASA2 made a representation of fact that the vessel “ANTELOPE [had been] instructed to supply [the Claimant] with 300MT IFO bunkers on [their] arrival/ before cargo transfer”. This was false because the ANTELOPE had never been instructed by ASA2 to supply the Vessel with bunkers. On the facts, the ANTELOPE was not present at STS Area 1 on either 4 July or at any time thereafter. There was also no indication that the ANTELOPE ever contacted the Vessel. Furthermore, there is no evidence that the bunkers, which the ANTELOPE was supposed to supply the Vessel with, had ever been purchased.

48. The representation was that ASA2 had already given instructions to ANTELOPE. Since ASA2 did not in fact give the vessel ANTELOPE any such instructions, it goes without saying that ASA2 had made the representation fraudulently with knowledge of its falsity.  

2. **ASA2 made this representation with the intention to induce the Master to rely on it.**

49. The representor is presumed to have intended to induce the representee when the representations made are material. A representation is material when its natural and probable result is to induce the representee to act on the faith of it in the manner in which he had in fact acted.

50. ASA2’s representation that the ANTELOPE had been instructed to supply 300 MT bunkers at the STS Area 1 was material to the Master. As the Vessel was insufficiently bunkered for its passage to Bonny Offshore Terminal at the time the representation was made, it was natural

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16 *Derry v Peek* (1889) LR 14 App Cas 337 (HL).
17 *Smith v Chadwick* (1884) 9 App Cas 187 (HL) at 196.
18 *Downs v Chappell* [1997] 1 WLR 426 (CA), at 433.
and probable for the Master to be induced by the representation. This is because the Master is required, under the obligation of seaworthiness, to ensure the Vessel is sufficiently bunkered. Accordingly, ASA2’s intention to induce the Master may be presumed from the materiality of the representation.

3. **The Claimant was induced by the representation to waive its right to refuse ASA2’s order and proceed to STS Area 1.**

51. The Master was induced by the false representation to voluntarily alter his position by proceeding to STS Area 1. The Master had the right to refuse ASA2’s order to proceed to STS Area 1 because of the dangers involved in proceeding to a known piracy threat area with inadequate bunkers. However, the Master was induced to waive the right to refuse ASA2’s order because ASA2 represented that ANTELOPE was instructed to supply bunkers to the Vessel and the Vessel was in need of those bunkers. Had the representation as to bunkers not been made, the Master would not have proceeded to STS Area 1 for the sole reason of performing a Cargo discharge.

   a) **The Master had a right to refuse ASA2’s order to proceed to STS Area 1.**

52. Under clause 13 of Shelltime 4, the Master is “under the order and direction of the [Respondent]”, and thus obliged to “follow [the Respondent's] instructions without undue question”. However, the Master is not obliged to obey orders that impinge on his responsibility for matters of navigation and seamanship, particularly where the safety or security of the vessel, her crew and her cargo is involved.  

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19 McIver v Tate [1903] 1 KB 362 (CA).
20 Smith v Chadwick (1884), 9 App Cas 187 at 190.
21 Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony) [2001] 1 AC 638 (HL).
53. The Master was entitled to refuse ASA2’s order to proceed to STS Area 1 and ask for fresh orders. Proceeding to STS Area 1 would have jeopardised the safety of the Vessel and Cargo by making her vulnerable in an area that has gained increasing notoriety as a piracy threat area. ASA2’s order was to conduct 2 STS operations over 3 days. This is dangerous, as the Vessel would have to be positioned alongside an STS vessel without being able to promptly disengage from the STS vessel in the event of a pirate attack. Given the danger involved, the Master was entitled to refuse ASA2’s order to proceed to STS Area 1.

b) The Master waived his right to refuse ASA2’s order because the Vessel was in need of bunkers.

54. In reliance on ASA2’s representation that bunkers would be supplied at STS Area 1, the Master voluntarily altered his position and proceeded to STS Area 1. This was because the Vessel was in need of bunkers for its next voyage to Bonny Offshore Terminal. This is evidenced by the fact that the Vessel only had sufficient bunkers to proceed to “discharge area plus bad weather reserve”. Thus, had the representation as to bunkers not been made, the Master would not have proceeded to STS Area 1 purely for Cargo discharge.

4. The Claimant suffered damage as a result of ASA2’s representation.

55. ASA2’s fraudulent representation was a “substantial factor” which led to the damage suffered by the Vessel as a result of the pirate attack. The Vessel proceeded to the piracy-infested waters off the Angolan coast due to reliance on the fraudulent representations. The Vessel was left idle in international waters, with insufficient bunkers, awaiting the arrival of the ANTELOPE. This rendered the Vessel vulnerable and exposed to a potential pirate attack. The subsequent onslaught of a pirate attack was thus a consequence of the Master following ASA2’s orders.

VI. THE CLAIMANT’S DEFENCE TO THE RESPONDENT’S COUNTERCLAIMS

56. The Respondent makes a counterclaim for loss of Cargo on the following bases:

   a. The Claimant had breached its obligation of seaworthiness as required the Charterparty;

   b. The Claimant is liable to the Respondent in bailment; or

   c. The Claimant is liable to the Respondent under the tort of conversion.

57. As will be shown, the Claimant is not liable under any of these bases.

   A. THE CLAIMANT FULFILLED ITS OBLIGATION OF SEAWORTHINESS AS REQUIRED BY THE CHARTERPARTY.

58. Seaworthiness of a vessel entails the fitness of both the physical vessel as well as the competency of the Master and crew.

   1. The Vessel met the standard of seaworthiness required by the ordinary prudent shipowner.

59. Under clause 1(c) of Shelltime 4, the Vessel is required to be “tight, staunch, strong, in good order and condition, and in every way fit for the service, with her machinery, boilers, hull and other equipment... in a good and efficient state”. This corresponds to the obligation of absolute warranty of seaworthiness required at common law.23 The standard required is not that of absolute perfection24; the mere existence of a minor defect is not sufficient to render

23 McFadden v Blue Star Line [1905] 1 KB 697 (KBD) at 700.
24 Coghlin, Time Charters (7th edn Informa, London 2014) at [8.20].
the vessel unfit for service. The seaworthy obligation is met so long as the Vessel possessed all that an ordinary prudent shipowner would require of his vessel for a particular voyage.

60. Sub-clause (1) of the Piracy Clause requires the shipowner to “adhere to the latest version of Best Management Practices”. The latest Best Management Practices is “Best Management Practices 4” (“BMP4”). The Respondent alleges that the Claimant had to fully comply with BMP4 in order to fulfil its seaworthy obligation. This is not the law. The ordinary prudent shipowner would not require total compliance with BMP4 because only compliance to the extent necessary for the Vessel's voyage to OPL Luanda is required. This accords with the nature of BMP4 as a list of recommended, but not mandatory practices that shipowners may deploy according to the particular requirements of the voyage.

61. The Vessel complied with the standard of seaworthiness required by the ordinary prudent shipowner by complying substantially with the recommendations under BMP4. This is evident on the facts. Before the Vessel was delivered to the Respondent, the Claimant’s Chief Security Officer, Captain Rich Evasion, and the Master jointly conducted a review of the Vessel to ensure that the recommendations listed in BMP4 were met. Subsequently, on 3 June 2014, Captain Rich Evasion informed the Claimant's “Purchasing” department that the Vessel only lacked two items, namely the coiled razor wire and flashlights, which were to be supplied in Singapore.

62. The Respondent contends that the mere absence of coiled razor wire and flashlights was sufficient to render the Vessel unseaworthy. This may be disposed of shortly. The absence of these items did not result in the Claimant’s breach of its seaworthiness obligation because the Vessel had alternative measures in place to deal with the threat of piracy.

26 Moot Scenario (5 December 2014) at 22, 26-27.
a. The purpose of the coiled razor wire was to make it more difficult for the pirates to board the Vessel. The same result could be reached by utilising the Vessel’s ballast pumps to create a water barrier over the Vessel’s side that prevents pirates from climbing aboard the Vessel.\(^{27}\)

b. Flashlights were also unnecessary. They serve the purpose of detecting approaching pirate vessels. There are ready alternatives that can serve the same purpose, such as the Vessel’s deck lights. Moreover, the Vessel’s radar would also serve as an equally effective warning to detect the presence of approaching pirate vessels.

2. **The Master was not incompetent in following the instructions given by the Respondent’s agent ASA2.**

63. The Respondent also contends that the Master was incompetent in following the instructions of ASA2. As established above, ASA2 was in fact the agent of the Respondent. Therefore, the Master was competent in following ASA2’s instructions to proceed to STS Area 1.

B. **THE CLAIMANT IS NOT LIABLE IN BAILMENT.**

64. There was a bailment of the goods from the Respondent to the Claimant. The Claimant had voluntarily assumed custody of the Cargo.\(^{28}\) The Respondent contends that Claimant is liable in bailment for the loss of the Cargo due to the Claimant’s failure to exercise reasonable care in relation to the Cargo. As will be shown, the loss of the Cargo was not caused by any want on the part of the Claimant to exercise reasonable care.\(^{29}\)

65. The Claimant, as bailee, was required to exercise reasonable care in relation to the Cargo by adopting a system of protection which minimized the risk of loss of goods as a result of

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\(^{27}\) BMP4 at 32.

\(^{28}\) *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 (CA) at 728.

\(^{29}\) *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580 (PC) at 590.
piracy. The standard of reasonable care required from the bailee in relation to the bailed goods varies according to the circumstances of the case and in light of the function which the bailee has to perform in relation to the goods.

66. In the present case, the Claimant, in carrying the cargo from Singapore to Luanda, a piracy threat area, was required to adopt an adequate system of protection in the form of substantial compliance with BMP4. This is because BMP4 is the recognised industry practice in relation to carriage of goods through known piracy threat areas.

67. The Claimant had adopted an adequate system of protection by adhering to BMP4. Since BMP4 is a list of suggested deterrent measures, the Claimant need not comply with all the deterrent measures as long as the Vessel is adequately equipped to minimise the threat of piracy. Accordingly, the mere fact that the Vessel was not equipped with coiled razor wire and flashlights did not result in the Claimant breaching its duty to take reasonable care in relation to the bailed Cargo. As mentioned earlier, the failure to equip the Vessel with coiled razor wire and flashlights did not impair the Vessel’s ability to deter any threat of piracy; alternative measures could be deployed utilising equipment already on board.

68. In light of the preceding, the Claimant had adopted an adequate system of protection by adhering to BMP4. The Claimant cannot be made liable in bailment to the Respondent for the loss of the Cargo because the Claimant had discharged its duty to exercise reasonable care in relation to the bailed Cargo.

30 Coldman v Hill [1919] 1 KB 443 (CA) at 454.
32 See above at [62].
C. THE CLAIMANT IS NOT LIABLE IN CONVERSION BECAUSE IT DID NOT DEAL WITH THE GOODS IN A MANNER INCONSISTENT WITH THE RIGHTS OF THE RESPONDENT AT ANY POINT OF TIME.

69. To be liable in conversion, the Claimant must have intentionally dealt with the Cargo in a manner that is inconsistent with the rights of the Respondent.\(^{33}\) To show that the Claimant's conduct was inconsistent with the Respondent's rights to the Cargo, the conduct in question must amount to such an extensive encroachment on the Respondent's rights that it excluded the Respondent from use and possession of the goods.\(^{34}\)

70. The Respondent’s allegation of conversion is untenable. The Claimant had at all material times acted consistently with the rights of the Respondent when dealing with its Cargo. Throughout the Charterparty, the Claimant dealt with the Cargo according to the orders given by the Respondent and its agent ASA2. The Claimant cannot be said to have denied the Respondent from its use and possession of the Cargo. Therefore, the claim under the tort of conversion must fail.

VII. PRAYER FOR RELIEF

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

**FIND** that this Tribunal has jurisdiction to hear the substantive claim of fraud.

**FIND** that the Claimant is entitled to the sum of US$618,450.00 by way of hire or damages in the same amount, and interest on the said amount.

**FIND** that the Claimant is entitled to damages for all consequential losses resulting from the Respondent’s fraud, including the cost of effecting repairs to the Vessel.

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\(^{33}\) Oakley v Lyster [1931] 1 KB 148 (CA) at 153.

\(^{34}\) Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] 2 AC 883 (HL).
DECLARE that the Claimant is not liable for the Respondent’s counter-claims.

AWARD interests & costs in favour of the Claimant.

Dated this 22\textsuperscript{nd} day of April 2015 by Top Solicitors LLP, of 1 Verity Lane, London, Solicitors for the Claimant.