INTERNATIONAL MARITIME LAW
ARBITRATION MOOT 2007

No. AR30/06
IN THE MATTER OF AN ARBITRATION HELD AT ARCHLAND

BETWEEN

TITAN LINES BV
Of 58 Starboard Drive,
Horizon City, Ganosa.

GULLIVER OIL TANKER INC
Of 37-51 Laridae Street,
Harbour-Town, Archland

CLAIMANT
RESPONDENT

MEMORANDUM
FOR THE
CLAIMANT

TEAM NUMBER 17
MARA UNIVERSITY OF TECHNOLOGY

COUNSELS
Nur Ashikeen bt. Khamis
Mazuin bt Hashim
Mohd Azinuddin b. Abdul Karim
Zaznuriah bt. Mohd Zahir
TEAM NUMBER: 17
TEAM NUMBER: 17
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2. *County & District Properties Ltd v C Jenner & Son Ltd And Others* [1976] 2 Lloyd's Rep 728
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15. *Sonatrach Petroleum Corp v Ferrell International Ltd* QBD (Commercial Court) (Transcript) 4th October 2001
16. *Star Shipping As V China National Foreign Trade Transportation*
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17. Steel v Stateline Steamship Co (1877) 3 App Case 72

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STATUTES

1. Limitation Act 1980
STATEMENT OF FACTS

PARTIES TO THE DISPUTE

The Claimant, Titan Lines BV [Titan Lines], is a time Charterer of the vessel, Olympic Star. It is a company that is incorporated under the laws of the United Kingdom.

The Respondent, Gulliver Oil Tankers Inc [Gulliver Oil], is a company situated in Archland. Archland gained it’s independence from the United Kingdom colony in 1970’s and since then adopted the UK legislation in most areas. The Respondent is also the owner of the Vessel in question, Olympic Star which is being chartered to the Claimant for shipping oil subject to the Time Charterparty Agreement.

BACKGROUND TO THE DISPUTE

The Claimant and the Respondent entered into a time charterparty [Time Charterparty Agreement], which was made and concluded on 10 September 2004. In the Time Charterparty Agreement, the Respondent agreed to charter its vessel, the Olympic Star to the Claimant from 30 September 2004 for a period of 24 months, one month more or less at the Claimant’s option at the rate of USD$ 39,000 per day.
Pursuant to the charter, the Claimant entered into contract with Britannic Shipping Pty Ltd [BSPL] to sublet the Olympic Star to ship dirty petroleum product or superior quality crude oil from Port Horizon, Genosa to Aslan Port, Archland. BSPL is the consignor of the oil product which will be shipped to Oil Futures Limited [OFL] who is the consignee of the shipment.

**TITAN LINES’ CLAIMS AGAINST GULLIVER OIL**

- **Events Leading to the Cargo Claim**

  One of the terms of the Time Charter; which concluded on 10 September 2004 between the Claimant and the Respondent was that the Claimant, being the Charterer, could sublet the Vessel within the time covered. The Claimant, upon subletting the Vessel, will hold the responsible for the fulfillment of every conditions of the Time Charterparty Agreement.

  On 29 March 2006, the Claimant entered into a Voyage Charterparty with Britannic Shipping Pty. Ltd. (BSPL) to charter the vessel to BSPL for the purpose of transporting of 80,000 metric tonnes of dirty petroleum product +/-5% from Genosa to Archland. BSPL is the consignor of the dirty petroleum product, and the party to inform is Oil Futures Limited (OFL). The Voyage Charterparty is in ASBATANKVOY form. The Claimant had informed BSPL that Clause 18 is removed from the Asbatankvoy prior to the signing of both parties.
On 30 April 2006, BSPL informed the Claimant that there has been a last minute change of cargo from dirty petroleum product to superior quality crude oil. After being informed about the change of cargo by the Claimant, the Master of the Vessel had performed the visual inspection of tank one and tank two of the Vessel as requested by BSPL and reported that there had been a slight discolouration in tank two.

Based on the Survey Report 193/2006 made by a surveyor from the Atlas Marine Consultants (AMC), it was found that tank two of the Vessel was contaminated with vapours of dirty petroleum product which was confirmed by the Master to have come from the cargo of the previous voyage. According to Clause 9 of the Time Charter between the Claimant and the Respondent, the Master shall at all times use due diligence to keep the tanks of the Vessel clean for the cargo specified and the Master alone can decide whether the tanks are properly cleaned.

The re-refinement of the oil in tank two of the Vessel, that being 13 673 tonnes was at the Consignee’s expense at a cost of USD$555 059. Later, upon the claim made by the Consignee on 7 June 2006, for the failure of the Master to fulfill his obligations, on 5 July 2006, the Claimant paid USD$555 059. The Claimant then claimed for the same amount from the Respondent on the grounds of Clause 5 and Clause 24 of the Time Charter.
• Events Leading to the Claim for the Repayment of Hire

On 12 May 2006, the Claimant was informed by the Master about the overheating of the engine on the Vessel and on the recommendation of the chief engineer, the revs of the engines were reduced. The engine problems were solved on 19 May 2006. Clause 15 of the Time Charter provides that the vessel will be off hire if time, greater than three hours, is lost due to causes that are laid down in the said clause. In addition, in the case where the Vessel fails to proceed at the agreed speed and if such a failure arises from any of the causes set out in such clause, the Vessel will be off hire. The Claimant claims that the Respondent is responsible for the repayment of the hire, in pursuance of the said clause, for the five-day delay.

On 23 May 2006, the Vessel was already berthed in Port Aslan and was in the process of discharging the cargo which contained of superior quality crude oil when the Claimant notified by the Master about Aslan’s confirmed cases of bird flu illness. On the next day, at 1100 hours, the discharging of the cargo was completed. However, the Vessel was not able to depart on time because an order of the closing of the port was made by the Port Authority on 1117 hours on the same day due to the bird flu outbreak. No vessel was permitted to enter or depart from the port. As a result, the Vessel was being detained for 99 days, 4 hours and 43 minutes. The Claimant, by applying Clause 15(a) (iii) of the Time Charter, claims that the Respondent is also responsible for the repayment of hire for the four-month delay.
• Conclusion

The Claimant contends that the Respondent holds the responsibility to repay the cargo claim amounting to USD$555,059 for the expense of re-refining the contaminated oil in tank two of the Vessel. Additionally, for the claims on the repayment of hire, the Claimant also contends that the Respondent is to repay to the Claimant for the hire paid for the five-day delay due to engine problems and for 4 months that the Vessel being detained due to the quarantine requirements at Aslan Port.

Since the matters are being brought to the Tribunal, the Claimant also contends that the Respondent pay for the interest that is to be assessed by the Tribunal and all costs.

INITIATION OF ARBITRATION PROCEEDINGS

• The Claimant’s initiation of Arbitration Proceedings in Archland

On 19th July 2006, the Claimant gave notice to the Respondent that it wished to initiate arbitration proceedings in Archland in accordance with London Maritime Arbitrators’ Association (LMAA) Terms current at the time when the arbitration proceedings were commenced, pursuant to the arbitration agreement in Clause 26 under the Time Charter.
The Respondent dispute over the Claimant’s right for proceeding due to time barred

Pursuant to Clause 25 of the Time Charter, all disputes must be brought to arbitration within 3/6* months of the cause of action arising. The symbol * is noted to mean to ‘strike out inapplicable’. Both the Claimant and the Respondent did not strike out any of the month mentioned. Pursuant to the Time Charter, the Claimant seeks to enforce their rights for proceedings. However, the Respondent is denying the Claimant’s rights as it was submitted to be time barred.
QUESTION PRESENTED

Preliminary Issues

1. Whether the Claimant is time-barred from making claims against the Respondent?

Claim

1. Whether the Respondent has breached a contractual obligation owed to the Claimant to maintain the Vessel?
2. Whether the Claimant can rely on Clause 24 of the Time Charterparty Agreement to be indemnified by the Respondent?

Counter-Claim

1. Whether the Claimant has breached the safe port obligation under the Time Charterparty Agreement?
2. Whether the vessel was off-hire during the detention period of 4 months at Port Aslan?
3. Whether Oil Future Ltd is the right party to claim for cargo damage?
ARGUMENTS AND AUTHORITIES

I. THE CLAIMANT IS NOT TIME BARRED FROM MAKING CLAIMS AGAINST THE RESPONDENT

A. Time limit for arbitration clause is void for uncertainty

1. Clause 25 void for uncertainty

Clause 25 of the Time Charter Party is void for reasons of uncertainty.¹

The said arbitration clause must be able to be identified with certainty and must not be ambiguous so as to be able to be interpreted or construed in more ways than which it was intended to. The language of the clause evidently provides that there is a requirement for a clear and unequivocal acceptance of clause 25 to be observed.

The clause requires the parties to agree between 3 or 6 months to bring the dispute to arbitration from the date in which the cause of action accrues and to strike out the inapplicable time limit.² The requirement for the inapplicable time limit to be struck out was not observed by both parties.

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¹ Time Charterparty Agreement, p 37 of the Bundle of Correspondence.
² ibid
Therefore, there was no conclusive agreement so as to which of the time limit stipulated was to be relied on in bringing the matter to arbitration. In such a situation where there is no certainty as to which time limit is to be relied upon, it is thus submitted that clause 25 is rendered void for reasons of uncertainty.

The principle that a clause is to be construed as uncertain can be seen in the case of **Lovelock (EJR) Ltd v Exportles**\(^3\) where the arbitration clause provided both that "any dispute" should be referred to arbitration in London and that "any other dispute" should be referred to arbitration in Moscow. It was held that such a provision could not give rise to the possibility that a definite place in which the arbitral proceeding is to take place can be ascertained as the construction of the clause was such that it provides no certainty as what would categorized as ‘any disputes’ and ‘any other disputes’.

A similar principle was undertaken in the case of **Sonatrach Petroleum Corp v Ferrell International Ltd**\(^4\) where conflicting provisions under clause 46 which refers to "any dispute (which) arises concerning this Charter between the parties is to be determined accordance with the law of Japan” and clause 78 in which "cases where the dispute may arise between Disponent Owner and Charterer is to be determined in accordance with the law of England had resulted in the inability to ascertain the precise scope of the rights and obligations of the parties.

\(^3\) [1968] 1 Lloyd's Rep 163
\(^4\) Para 9 and 10
Therefore, it is submitted that due to the fact that the inapplicable time limit option was not struck out as required and had subsequently left the clause to be open to interpretation of either 3 or 6 months for commencement of arbitral proceeding, clause 25 of the Time Charterparty Agreement should be declared as null and void.

1. **Effect of nullity**

The effect of clause 25 being declared as null and void is that the said clause would be inapplicable. The principle that a null and void clause would be inapplicable was illustrated again in *Lovelock (EJR) Ltd v Exportles*\(^5\) where it was held that such a provision cannot be given effect because the parties had failed to agree to the means of identifying which disputes were to be arbitrated at the different venues.

The nature of the uncertainty in which the courts are concerned in such cases goes to the applicability of the arbitration clause. An arbitration clause will be held inapplicable when the extent of uncertainty of such clause makes it impossible for the court to determine the venue of the arbitration.\(^6\)

Therefore it is submitted that clause 25 of the Time Charterparty Agreement should be inapplicable and cannot be relied upon in determining the

\(^5\) Supra, n 4  
\(^6\) [1968] 1 Lloyd's Rep 163
time limit for commencement of arbitral proceedings as the clause is void for uncertainty.

However, this does not mean that the agreement to arbitrate under clause 26 of the Time Charterparty Agreement is rendered void although the time limit to arbitration under clause 25 is rendered void. It is a clear principle in the case of “The Star Texas”\(^7\) that uncertainty as to the procedures of arbitration will not invalidate the arbitration clause as long as there is a clear indication that parties to the dispute agreed that disputes must be resolved through arbitration.

Thus, since clause 26 clearly provides for dispute settlement between the claimant and the respondent being subject to arbitration tribunal, the effect of uncertainty of clause 25 will not in anyway render clause 26 to be inapplicable.

\(\text{B. Application of other statutory provisions}\)

\(^7\) Star Shipping AS v China National Foreign Trade Transportation Corporation The “Star Texas”[1993] 2 Lloyd's Rep 445
Due to the fact that the relevant provision conferring the time limit within the Time Charterparty Agreement is rendered void for uncertainty, therefore the general provision of the Arbitration Act 1996 applies whereby s 13 of the Act provides for the Limitation Act 1980 to be applicable to arbitral proceedings as it applies to legal proceedings. By s 34 of the Limitation Act 1980, the Act applies to arbitrations as it applies to actions in the High Court. 8

An action founded on a simple contract shall not be brought after the expiration of 6 years from the date on which the cause of action accrued. 9 It was held by Hobhouse J in “The World Era” 10 that the character of the time limit is the same in arbitration as it is in an action, where it provides a procedural bar to the remedy which must be raised as a defence in the action. It does not go to the jurisdiction of the Court or the arbitral tribunal.

The provisions of the Limitation Act was relied on by a numerous cases in determining whether the claim was to be time barred, as in the case of Bosma v Larsen, 11 where the action was held not to be time barred as it was within the prescribed time limit for a simple contract, which is 6 years. The principle can also be found in the case of “The Island Archon”, 12 “The World Era”, 13 and “The UB Tiger”. 14

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8 Limitation Act 1980, s34
9 Ibid., s5
11 [1966] 1 Lloyd's Rep 22
14 P&O Nedlloyd BV v Arab Metals Co and Others [2005] 1 Lloyd’s Rep 111
Therefore it is our contention that due to the inapplicability of the time limit in the Time Charterparty Agreement, the general provisions of the law in relation to limitation period of a contract shall apply to the present case, which is as codified under the Limitation Act, is to be 6 years from the cause of action.¹⁵

C. **Cause of action accrues at the time of the cargo claims.**

The time for the commencement of arbitration proceedings begins when one party serves on the other party or parties notice in writing requiring him/them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.¹⁶ Under s 34 (3) of the Limitation Act 1980, arbitration shall be treated as having been commenced when the appropriate steps to appoint or require the appointment of an arbitrator have been carried out.¹⁷

In the present case it is thus contended that the commencement of the arbitral proceeding starts on the date of appointment of the arbitrator by the Claimant.¹⁸

**Mr Justice Swanwick in County & District Properties Ltd v C Jenner & Son Ltd** And Others, held that the time that cause of action first accrued must

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¹⁵ Supra, n 10
¹⁶ s14 (4) Arbitration Act 1996
¹⁷ s34 (3) Limitation Act 1980
¹⁸ Letter dated 8th November, p 62 of the Bundle of Correspondence
be the date when there arose "...A factual situation, the existence of which entitles one person to obtain from the Court a remedy against another person . . ." and that this stage would be reached when the defendants were indemnified. 19 He further added that an indemnity against a breach, or an act, or an omission, can only be an indemnity against the harmful consequences that may flow from it, and that the indemnity does not give rise to a cause of action until those consequences are ascertained.20

The general principle in determining indemnity as laid down in the case of “The Caroline P”21 was that the party has no cause of action until the liability of the person to be indemnified was ascertained or established.22 It is submitted therefore that the cause of action only arises after the claimant had incurred a loss as a result of the breach, which is the payment to re-refine the cargo to Oil Futures Limited as a result of the contamination of tank 2 of the Olympic Star.

With reference to clause 24 of the Time Charterparty Agreement, in the event of loss suffered as a result of an act or omission by one of the parties to the Charterparty Agreement, the other party is to indemnify the aggrieved party to the extent of the loss incurred. 23

19 [1976] 2 Lloyd's Rep 728
20 ibid
21 Telfair Shipping Corporation v Inersea Carriers SA [1984] 2 Lloyd's Rep 466; [1985] 1 WLR 553, ibid
22 ibid
23 Time Charterparty Agreement, p 13 of the Bundle of Correspondence.
Therefore it is the contention of the claimant that the time in which the cause of action begins was the moment the claimant had to pay the reimbursement to Oil Futures Limited, which took place on the 5\textsuperscript{th} of July 2006.

II. THE RESPONDENT HAS BREACHED A CONTRACTUAL OBLIGATION OWED TO THE CLAIMANT TO MAINTAIN THE VESSEL.

A. The Respondent has breached the terms in Clause 2, 8 and 9 of the Time Charter Agreement.

1. The Respondent failed to provide a seaworthy vessel.
   a. The vessel was uncargoworthy

   It is submitted that Clause 2 of the Time Charter Agreement \textsuperscript{24} provides that the Respondent is under an obligation to provide a seaworthy vessel; which covers four different aspects of seaworthiness which are the physical condition of the vessel, documentation provided on board, the efficiency of the crew and equipment and the cargoworthiness of the vessel.

   The Respondent is under a duty to provide a seaworthy vessel. This includes the duty to provide a cargoworthy vessel. It is in fact that a vessel must be fit to carry the cargo. This is said in \textit{Tattersall v The National Steamship}

\textsuperscript{24} Refer to clause 2, pg 1 of the Time Charter Agreement
Company, Limited, where it states that in respect of the undertaking of seaworthiness further extends to the question of cargoworthiness of the vessel, in which the ship owner is under a primary obligation to ensure that the ship is in fit state to receive the contractual cargo. Therefore, the Respondent has undertaken the duty to provide a cargoworthy vessel and such duty is ‘not merely that they should do their best to make the ship fit, but that they should really be fit.’

The Vessel was unfit to receive the cargo upon its delivery and thus rendered it to be uncargoworthy. Based on the Survey Report (hereinafter the Report) dated May, 27th 2006 by a surveyor from Atlas Marine Consultants, the contaminating substance was found to be vapours of dirty petroleum product. Also, it was stated in item 9 of the report that on May 23rd 2006, a conversation between the Master and the surveyor had confirmed that the Vessel had carried a cargo of dirty petroleum product on the voyage immediately prior to this voyage. In item 19 of the Report, the surveyor suggested that the vapours of dirty petroleum were derived from the previous cargo as it was not fully removed during the cleaning process of the Vessel’s tank.

This proves our contention that upon the Vessel being delivered to the Claimant, she was unfit to carry the cargo of superior quality crude oil due to the failure of the Master to clean the tank. As a result, the vapours of dirty petroleum

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25 (1884) 12 QBD 297
26 Ibid at pg 302
27 Lord Blackburn in Steel v Stateline Steamship Co (1877) 3 App Case 72 at p 86
28 Pg 51-54 of Bundle of Correspondence
product from the previous shipment were not fully removed during the cleaning process. Therefore, the Vessel’s uncargoworthiness, cause contamination of the cargo. The Respondent had therefore breached Clause 2 of the Time Charter Agreement.

b. Failure of the duty of providing a seaworthy vessel arises within the period of ‘before and at the commencement of the voyage.’

It is submitted that under Clause 8 of the Time Charter Agreement 29 that the Respondent shall exercise their duty in providing a seaworthy ship from the period of before and until the commencement of any laden voyage.

In *Maxine Footwear Co Ltd and Another v Canadian Government Merchant Marine Ltd* 30, the duration “before and at the beginning of the voyage” in Article III rule 1 of the Hague-Visby Rules (hereinafter ‘the Rules’) which deals with the duration of a carrier’s responsibility means the period from at least the beginning of the loading until the vessel starts on her voyage. This includes the whole of the loading process. 31

Thus, it is submitted that Clause 8 of the Time Charter Agreement shall be interpreted in light of the Rules and as propounded in the case of in

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29 Refer to Clause 8, pg 2 of the Time Charter Agreement
30 [1959] AC 589
31 Pyrene Co Ltd v Scindia Navigation Co Ltd [1954] 2 QB 402 at pg 11
It is our contention that even at the beginning of loading the cargo; the Vessel had appeared to be unseaworthy. As reported by the Report, the contamination happened in tank 2 of the Vessel was due to the substance from the previous cargo. It was further reported that the substance that makes the cargo uncargoworthy exist even before the cargo was loaded into the Vessel. Thus, Respondent’s claim that the damage to the consignment did not occur while the cargo was on board the vessel is highly irrelevant.

Evidently, the failure of such duty to provide a seaworthy cargo does exist within the stipulated period ‘before and at the commencement of any laden voyage.’ Therefore, the Respondent had indeed breach Clause 8 of the Time Charter Party Agreement.

c. The Respondent failed to exercise due diligence

It is our contention that cleaning process is a prior step that needs to be taken by the Respondent in providing the Vessel to be cargoworthy in which making the vessel to be seaworhty.

Clause 8 of the Time Charter Agreement clearly states that the Respondent has the responsibility to exercise due diligence in ensuring the Vessel to be
seaworthy from the time of loading the cargo until the beginning of the voyage. Further, Clause 9 of the Time Charter Agreement provides the scope of duty of exercising such duty of due diligence.

In *Paterson Steamships Ltd. v. Robin Hood Mills Ltd* 33, the scope of due diligence was dealt as “The condition” – that is of the exercise of due diligence to make a vessel seaworthy – “is not fulfilled merely because the ship owner is personally diligent. The condition requires that diligence shall in fact have been exercised by the ship owner or by those whom he employs for the purpose”. 34

Therefore, by virtue of Clause 5 of the Time Charter Agreement, the master is an employee of the Respondents and thus has the responsibility to exercise due diligence for the cleanliness of the tank in order to make it seaworthy for the voyage.

In *The Ionian Pioneer* 35 the standard of due diligence was described in the following wordings:

“Where the standard of due diligence is applicable, it comprehends inspection and investigation, where prudent, to determine the existence of deficiencies before they become critical and the failure to discover defects which

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33 (1937) 58 L.I.L.Rep. 33  
34 Ibid at page 40  
35 Ionian Steamship Company of Athens v United Distillers of America [1956] 2 A.M.C. 1750
examination would necessarily have disclosed is the very absence of due
diligence.”

The master then is under a duty to inspect and investigate Vessel and
determine the deficiency of the vessel in exercising his duty to make the ship
seaworthy before cargo is loaded.

From the facts of the case, even though there was short notice of change of
cargo, the Master was silent or did not give active response in acknowledging that
the Vessel has not gone through the complete process of cleaning or that the
Vessel is not ready for the cargo. With such act, the Master is giving the
impression that the cargo is fit for the cargo of superior crude oil at the ERL time
which is May 1\textsuperscript{st} 2006.

As the substance of the contamination which are vapours of dirty
petroleum from the previous cargo were found to be not fully removed during the
cleaning process; and thus rendered the Vessel to be unfit to carry the cargo of
superior crude oil, this proves that the Respondent has failed to exercise its due
diligence to clean the tank; which means the Master has failed in exercising his
duty of due diligence in clause 9 of the Time Charter Party.

The Respondent has breach Clause 8 and Clause 9 of the Time Charter
Agreement.

\footnote{Ibid pg 1758}
B. The Respondent may not rely on the exception of liability provided under clause 17 (a) of the Time Charter Party.

Clause 17 (a) excludes the liability of the Respondent for “any loss or damage…arising or resulting from any act, neglect or default of the master, ... in the navigation or management of the vessel…”

We shall look into the interpretation of the clause on management of the ship incorporated in clause 17 (a) to determine whether it falls under the exception of liability or not to be excluded from the liability over the contamination of the cargo in Tank 2.

Greer LJ in Gosse Millerd v Canadian Government Merchant Marine 37 expressed the distinction as:

“If the cause of the damage is solely, or even primarily a neglect to take reasonable care of the cargo, the ship is liable, but if the cause of the damage is a neglect to take reasonable care of the ship or some part of it, as distinct from the cargo, the ship is relieved from liability; for if the negligence is not negligence towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved.” 38

37 (1927) 29 LILR 190
38 Ibid, at p 200
Based on this distinction, *prima facie* the Respondent is able to rely on the exception whereby it will be excluded from liability for the failure to provide a seaworthy vessel.

However, it is submitted that the preferred view is found in *Maxine Footwear Co Ltd and Another v Canadian Government Merchant Marine Ltd*\(^{39}\). The House of Lords held that:

“Article III rule 1 of the Rules; which deals with the responsibilities and liabilities of the ship owner or making the vessel seaworthy, is an **overriding obligation**. If it is not fulfilled and the **non-fulfillment** causes the damage, the **immunities of article IV cannot be relied on**. This is the natural construction apart from the opening words of Article III, rule 2. The fact that, that rule is made subject to the provisions of Article IV and rule 1 is not so conditioned makes the point clear beyond argument.”

Therefore, it is our contention that the duty of providing a seaworthy ship under Clause 2, 8 and 9 of the Time Charter Agreement is an overriding obligation of such immunity in Clause 17 (a) of the Time Charter Agreement. As it has been submitted above, it has been established that the Respondent failed to satisfy its duty of providing a seaworthy vessel. Thus, due to the Respondent’s non-fulfillment of the obligation of providing a seaworthy ship, the Respondent cannot rely on the immunity provided in Clause 17 (a) of the Time Charter Agreement.

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\(^{39}\) [1959] AC 589
III. THE CLAIMANT IS ENTITLED TO BE INDEMNIFIED BY THE RESPONDENT.

A. **The claimant is relying on Clause 24**

Clause 24 of the Time Charterparty Agreement provides that both parties, the Claimant or the Respondent is entitled to be indemnified by the other parties in respect of a cargo claim. The claims settlement must be made against either the Respondent or the Claimant under the bill of lading due to the extent of the other parties act or omission. This unique yet operational indemnity clause work both ways between the Claimant and the Respondent thus creating rights for both parties.

From the construction of Clause 24, the Claimant invokes the right to be indemnified by the Respondent against the settlement of the cargo claims made against the Claimant by the consignee of the cargo.

The duty to maintain the cleanliness of the vessel and to endure that it is fit to carry cargo to carry cargo was the duty of the Respondent under the Time Charterparty Agreement.\(^\text{40}\) The Respondent has breach their contractual duties, and as a direct consequence of that, the Claimant had to pay for the settlement of

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\(^{40}\) Clause 2, Clause 6, Clause 8, Time Charterparty Agreement, p 10 of *Bundle of Correspondence*.  

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the settlement for the cargo claims made against them by the consignee of the cargo.

It is evidentially clear from the surveyor report\(^{41}\) that contaminating substance was dirty petroleum vapours. It caused the contamination to the cargo of the vessel. A sample for examination and testing was also taken prior to discharge of the cargo at Port Aslan, thus eliminating the possibility that the cargo was contaminated whilst undergoing the process of discharge. From the investigation, the master had reaffirm that the vessel was carrying dirty petroleum products on the voyage immediately before the voyage to Aslan Port.

Case law authorities suggest that in order for an indemnity clause to be invoked and relied upon, there has to be link of causation, from the event that had occurred leading to the cause that triggered the indemnity clause itself. In the case of *The Island Archon*\(^{42}\) the judge take a close look at the causation link between event that led to the loss, which although there was no breach that had occurred, the owner was still held to be entitled to invoke the indemnity clause in the contract due to pure adherence to the charterer’s order which lead to the loss.

Therefore it is submitted that the breach of the contractual duty to maintain the cleanliness of the vessel by the Master resulted to the contamination. This has led to the cargo claims being made by the consignee of the cargo against

\(^{41}\) Item 19, Atlas Marine Consultant report, p 53 o thef Bundle of Correspondence..

\(^{42}\) Triad Shipping Co v Stellar Chartering and Brokerage Inc [1995] 1 All ER 595
the Claimant. The indemnity clause, Clause 24, was then triggered since payment for settlement of the cargo claims was made by the claimant. There is indeed a clear causal link between the breach, the cargo claims and the promise for and indemnity under the Time Charterparty Agreement.

The second requirement to support entitlement to invoke the indemnity clause under a contract is that the loss must be within contemplation of the parties.\textsuperscript{43} Test of foreseeability of the loss is applied by the court to determine whether or not a loss is within contemplation of the parties.

It is indeed foreseeable that the failure of the Respondent to honour their duty to maintain the vessel would expose the cargo to contaminate and would lead to cargo claims being made by the consignee of the cargo against the claimant. Therefore loss suffered by the Claimant in settling the cargo claim was indeed within contemplation of the parties to the contract.

\section*{B. Attempt to unilaterally vary the term of the Time Charterparty Agreement by the Respondent.}

The letter on 12 September 2004\textsuperscript{44} amounted only to a unilateral attempt to vary the term by the Respondent in the Time Charterparty Agreement that they have entered with the Claimant.

\textsuperscript{43} \textit{The Eurus} [1998] 1 Lloyd’s Rep 351
\textsuperscript{44} Letter dated 12 Sept. 2004, p 21 of the Bundle of Correspondence
The letter attempt to imposed extra (1) exclusion provision for liability of the Respondent in respect of the cleanliness of the vessel and, (2) a narrower indemnity clauses that promises the Respondent to be indemnified by the Claimant against a cargo claims in the even of contamination.

The agreement was concluded on the 10th September 2004 when both parties has signed the agreement respectively and agreed with all the term contain here in it. Both the Claimant and the Respondent without prejudice then is only subjected to the term of the agreement that they have mutually agreed upon at that time.

The new term on the letter cannot then be applicable in the charter since it was introduced after the agreement was concluded. Therefore it is clear here that it was not the intention of the parties to actually incorporate those terms to the Time Charterparty Agreement. This is supported by the fact that the Time Charterparty Agreement itself contains the specific provision to cover the term and situation stipulated in the letter. There was no need for variation of term as the exclusion of liability and indemnity clauses contain in the charter was clear enough illustrating the intention of the parties.

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45 Letter dated 10 Sept. 2004, p 20 of the Bundle of Correspondence.
46 Olley v. Marlborough Court Ltd [1949] 1 All ER 127
47 Clause 17, Clause 24 of Time Charterparty Agreement, p 19 of the Bundle of Correspondence
Alternatively even if the term introduced in the letter was to be applicable to the charter, it cannot be incorporated to the charter due to the fact that there was no sufficient notice of it’s existence in the charter to the Claimant. This introduction of a new term was subject to the normal rule of sufficient notice\textsuperscript{48} and the person against the new term was introduced must actually consented to the term.

There was only evidence from the surrounding of the case; that the letter was sent by the Respondent to inform the Claimant of the new term that they wish to apply. However there was no further correspondence from the Claimant that actually consented to the new term which the Respondent suggested. In cases such as this, opportunity for the Claimant should be given to actually accept those terms if they agreed upon it or to reject the term if they didn’t find it appropriate. Clearly this opportunity was not given in this case.

The Respondent didn’t insist for a reply to the 12 September letter neither that they make further enquiry on acceptance of the new term that they attempt to introduce from the Claimant. The Respondent then let the time charter to be operational and proceed with their obligation under the contract. Mere silents here on the part of the Claimant cannot in anyway amounted to acceptance of the new modified term of the charter.

\textsuperscript{48} Olley v. Marlborough Court Ltd [1949] 1 All ER 127
Furthermore it is submitted that the only exclusion of liabilities and indemnities clauses that can be applicable to the charter could only be found in the Time Charterparty Agreement itself and the attempt to unilaterally vary the term of the charter by the Respondent through their letter\(^{49}\) send to the Claimant was not successful. There was no extra exclusion or a narrow indemnity clause that could be incorporated to the charter.

The parties are bound to the term in the Time Charterparty Agreement as what they have agreed on 10\(^{th}\) September 2004 when the agreement was signed and concluded. The 4 corners of the agreement shall bind the term to both parties.

The Claimant therefore is entitled to be indemnified by the Respondent for the settlement of the cargo claims that was a result of the Respondent breach of duty under the Time Charterparty Agreement as provided under Clause 24.

C. **Oil Future Ltd. was the right party to claim over the cargo damage.**

Oil Future Ltd. (OFL) Is not a party to contract between the Claimant and the Respondent. The only document that relates OFL to the vessel is the bill of lading issued pursuance to the voyage charter agreement entered between Britannic Shipping Pty Ltd and the Claimant.\(^{50}\) The term of the agreement is base

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\(^{49}\) Letter dated 12 Sept. 2004, p 21 of the Bundle of Correspondence

\(^{50}\) 29\(^{th}\) March 2006, p 31 of the Bundle of Correspondence.
on a modified ASBATANKVOY form which OFL was name as the party to be notified on the bill of lading.\textsuperscript{51}

In the preliminary submission of the Respondent, they have concede item no 7 of the Claimant preliminary submission\textsuperscript{52}. This means that they understood and agreed on the fact that during the course of the voyage, the bill of lading was transferred to OFL.

From the fact of the case, it is a safe inference to make that the damage to the cargo occurred sometime between process of loading to the time prior to discharge at Aslan Port. At all material time of the voyage, OFL has physical possession over the bill of lading.

Since OFL is the ‘lawful holder’ of the bill of lading, section 2(1)(a) of Carriage of Goods by Sea Act 1992 (COGSA) give him right to suit under the contract of carriage as if he had been a party to that contract. OFL then has a statutory right to suit the Claimant for the damage of the cargo.

OFL is a ‘lawful holder’ of the bill of lading by actual physical possession of the bill that was effected in pursuance of the arrangement made with BSPL as the original shipper. This is the meaning of a ‘lawful holder’ within Section 5(2)(b) of COGSA.

\textsuperscript{51} Bill of lading no /001 , p 41 of the Bundle of Correspondence.
\textsuperscript{52} Item no 2, Preliminary Submission of The Claimant , p 73 of the Bundle of Correspondence.
In the classic landmark case of Leduc v Ward, a third party indeed has the right to take action based on the term on the bill of lading issued pursuant to a contract of carriage.

Therefore it is submitted that OFL as a ‘lawful holder’ of the Bill of Lading no /001 is the right party to claim over the damage of the cargo and has obtained statutory right to sue under the provision of Carriage of Goods by Seat Act 1992.

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53 (1888) 20 QBD 475, CA.
IV. THE CLAIMANT IS NOT LIABLE FOR THE DETENTION OF THE VESSEL AND HAS DISCHARGED HIS SAFE PORT OBLIGATION.

A. The Claimant has discharged its primary duty to nominate safe port at the time of nomination and therefore not liable for the delay in Port Aslan, Archland.

Under a time charterparty, the Claimant is under a primary duty to nominate a prospectively safe port.\(^{54}\) If the Claimant fails to nominate such a port, the Respondent is entitled to reject the nomination and request for a fresh nomination.

Since the Respondent did not request for any re-nomination of the port nominated earlier,\(^^{55}\) it is evidently clear that the Respondent had waived their right by agreeing to sail to Aslan Port.

There was also no admissible evidence to support that Aslan Port was unsafe at the time of nomination. There is only a rumour from the local newspaper of what appears to be a disease outbreak at Aslan.\(^{56}\) However, there was no confirmation on the level of the threat cause by the outbreak by the Port Authority. The Aslan Health Authority also advised


\(^{55}\) Email dated 30\(^{th}\) April 2006, p 37 of the Bundle of Correspondence.

\(^{56}\) Email dated 12th May 2006, p 43 of the Bundle of Correspondence.
that the disease could easily be avoided by taking basic health precautions.\textsuperscript{57}

Therefore, it is submitted that the Claimant did not breach its primary safe port obligation under the charter since Aslan Port was still safe at the time of the nomination.\textsuperscript{58}

The Claimant also did not breach the secondary safe port obligation to order the vessel out from Port Aslan.\textsuperscript{59} This is because the vessel was ready to leave Aslan Port, when the detention order by the port authority was issued.\textsuperscript{60} Due to unavoidable circumstances, the vessel could leave Aslan Port right after the discharge of the cargo. This is supported by the fact that, the detention order was made 17 minutes just after the vessel was ready to leave.\textsuperscript{61} Hence, by the time the vessel was detained, the Claimant doesn’t have ample time to exercise his secondary duty and thus cannot be liable under the safe port obligation of the Time Charterparty Agreement.

\textsuperscript{57} Email dated 20\textsuperscript{th} May 2006, p 43 of the Bundle of Correspondence.
\textsuperscript{58} \textit{Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India} (The "Kanchenjunga") [1990] 1 Lloyd's Rep 391
\textsuperscript{59} \textit{Ibid}
\textsuperscript{60} 23\textsuperscript{rd} May 2006, page 48 of the Bundle of Correspondence.
\textsuperscript{61} Page 49 & 50 of the Bundle of Correspondence.
The Claimant would only be in breach of its duty, if there was an opportunity to order the vessel out of the port and the Claimant failed to act upon it.

Therefore, it is submitted that the Claimant had discharged his safe port obligation under the Time Charterparty Agreement and is not liable for breach of duty or for the detention of the vessel at Aslan Port.

B. The Claimant is entitled to claim from the Respondent for the repayment of hire paid for the 4 month the detention of the vessel at Port Aslan.

In order for a charterer to claim for off-hire repayment, it must be proven that the situation that had occurred is within the one stipulated in the charter. In other word, the charterer must bring himself to the off-hire
clause in a charter, and then only he is entitle to claim that the vessel was indeed off-hire.  

Under Clause 15 (iv)\textsuperscript{63} of Time Charterparty agreed between the Claimant and the Respondent state that:

“The vessel will be off-hire if time, greater than three hours, is lost:

(iv) due to detention of the vessel by authorities at home or abroad attributed to legal action against or breach of regulations of the vessel by the vessel or the owners, unless brought about by the negligence of the Charterers.”

It is submitted that the wording “legal action against the vessel” from the Clause 15(iv) above would include legal action by way of detention taken against the vessel for the purposed of health investigation.

The case of “The Jalagouri” illustrated that in a compromise contractual agreement such as this, the term of the off-hire clause inside the agreement must interpreted to reflect the intention of the parties at the time they entered into such agreement.\textsuperscript{64}

\textsuperscript{62} Hyundai Merchant Marine Co Ltd v Furnace Withy (Australia) Pty; The Doric Pride, [2006] EWCA Civ 599, [2006] 2 All ER (Comm) 188, [2006] 2 Lloyd's Rep 175.

\textsuperscript{63} Clause 15 of the Time Charterparty Agreement

\textsuperscript{64} Nippon Yusen Kaisha Ltd. V Scindia Steam Navigation Co Ltd. [2000] 1 Lloyd’s Rep 515
Definition of “legal action” should not be subjected nor restricted only to bring to the meaning of court’s legal action. This is because if the parties were in the intention to restrict the meaning of Clause 15(iv) only covers legal action taken by way of court’s order; they would have expressly state in the clause.

It is also further submitted that the detention by Aslan Port Authority for the purposed of health investigation was definitely not by negligence on the part of the charterer, to exclude its right to invoked Clause 15.

Therefore it is submitted that the detention of the vessel at Aslan Port for health investigation purpose by the Harbour Authority falls within Clause 15 (iv) and the Claimant is entitle for off-hire repayment.
PRAYER FOR RELIEF

For the reasons submitted, the Claimant respectfully requests this Arbitral Tribunal to:

I. ADJUDGE that the Respondent has breach a contractual obligation owed to the
   Claimant to maintain the vessel.

II. ADJUDGE that the Claimant can rely on Clause 24 and is entitled to be
    indemnified by the Respondent.

III. ADJUDGE that Claimant has discharged its duty to nominate a safe port and
     subsequently the vessel was off-hire for 4 months.

And therefore

IV. AWARD the Claimant:

   A. I ) An indemnity for US$555059.00 in damages paid to the cargo
      claimaint.

   II) Repayment of off-hire:

      i. For 5 days delay in arriving at Aslan Port

      ii. For the Vessel’s 4 months of detention of vessel due to the
          quarantine at Aslan Port.
B. Interest;
C. Costs.