INTERNATIONAL MARITIME LAW ARBITRATION MOOT

2015

THE UNIVERSITY OF HONG KONG

TEAM 1

MEMORANDUM FOR THE OWNERS

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TIFANY TSZ SHAN TAM
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I. **SUMMARY OF ARGUMENT**

1. It is the Owners’ case that: (1) This Tribunal has jurisdiction to consider the claims. (2) The Charterers are liable for breach of the Charterparty and deceit. ASA2 was the Charterers’ agent and the Discharge Instruction was given in breach of the Charterparty. Further, the Charterers failed to pay hire. (3) The Owners are not liable for the Charterers’ counterclaims.

II. **SUMMARY OF FACTS**

2. By a charterparty entered into between Western Tankers Inc (‘Owners’) and LDT PTE (‘Charterers’) on 26 May 2014, the Owners agreed to let and the Charterers agreed to hire the ‘Western Dawn’ (‘Vessel’) for a period of three months, plus or minus 30 days (‘Charterparty’). The Charterparty was in the form of Shelltime 4 with amendments and additional rider clauses found in the Recap dated 26 May 2014 (‘Recap’).

3. The Charterparty was for a time charter trip, from Singapore to OPL Luanda, West Africa, via the Cape of Good Hope with re-delivery of the Vessel in the Mediterranean area.

4. On 27 May 2014, the Charterers sent a voyage order (‘Voyage Order’) to Captain Stelios Smith, master of the Vessel (‘Master’). The Master acknowledged receipt of the Voyage Order on the same day and requested for 1,500 mt bunkers.

5. The Charterers confirmed the supply of 950 mt of bunkers on 30 May 2014, and further suggested that alternative bunker supply may be made available at Durban or Cape Town on 3 June 2014. The Charterers and Master exchanged email correspondence on the same day regarding the provision of bunker.

6. The Master issued a Notice of Readiness upon the Vessel’s arrival in Singapore on 4 June 2014. The Vessel was then loaded with 30,000.559 mt of Jet A1 aviation fuel and 72,199.127 mt of gasoil. Upon completion of loading on 8 June 2014 and issuance of Bills of Lading, the Vessel left Singapore on the same day for OPL Luanda.
7. The Charterers issued a 45-day redelivery notice on 20 June 2014, stipulating redelivery of the Vessel on or about 4 August 2014 about Gibraltar.

8. By an email dated 25 June 2014, the Master protested against the Charterers’ advice not to supply fuel at Durban and reduced the speed of the Vessel to 12 knots for conservation of fuel. The Charterers responded on 28 June 2014, stipulating that ‘Next bunker supply now on arrival STS Area 1’ and further designating the Bonny Offshore Terminal as the next load port and the Mediterranean Sea, not East of but including Greece, as the destination.

9. By an email dated 28 June 2014, Captain William Edward Anya (‘Captain Anya’), General Manager of ASA (Angola) Ltd (‘ASA2’), informed the Master that ASA2 would act as the agent for the Charterers and gave detailed instructions regarding a ship-to-ship transfer (‘STS Transfer’) with the vessel Antelope (‘Antelope’) at an alternative discharge place in international waters off the Angolan coast (‘Alternative Discharge Location’).

10. On 3 July 2014, the Owners advised the Charterers by email that payment for the second hire period had fallen due. In a separate email from the Master to the Charterers on the same day, the Master stated that the Vessel would arrive at ‘the new OPL discharge R/V tomorrow at 0530. You have advised AGW 3 day discharge to 2 STS, with bunkers on arrival supply from STS v/l ANTELOPE before cargo transfer’.

11. The Charterers issued a 30-day redelivery notice on 4 July 2014, and further asked the Master to ‘continue to liaise with your STS coordinator’. Bonny was confirmed as the next bunker supply location.

12. Upon the Vessel’s arrival at the Alternative Discharge Location specified by Captain Anya on 4 July 2014, the Master issued a Notice of Readiness to Captain Anya and the Charterers. The Vessel was later arrested.
13. By an email dated 4 July 2014, the Charterers informed the Owners that they considered ‘Vessel as offhire due no contact with receiver/ chrtr [and] payment for second hire period not due until vessel back on-hire’.

14. By an email dated 17 July 2014, the Master gave notice to the Charterers and the Owners that the Vessel was back under his command after a pirate attack and cargo diversion (‘Pirate Attack’). The Charterers and the Owners were informed of loss of cargo, specifically the loss of 28,190 mt of gasoil, in multiple ship-to-ship transfer operations and damage to the Vessel. The Vessel proceeded to Cape Town for assistance due to the absence of further instructions from the Charterers and insufficient bunker supply.

15. The Vessel was unable to meet her discharge target date at OPL Luanda, or to discharge the cargo aboard in accordance with the voyage instructions and Bills of Lading. Further, hire for the second hire period under the Charterparty remains outstanding.

III. **THIS TRIBUNAL HAS JURISDICTION TO CONSIDER THE CLAIMS**

A. **This Tribunal Is Competent to Rule on Its Own Jurisdiction**

16. Since there is no contrary agreement, it is submitted that this tribunal is competent to rule on its own substantive jurisdiction by virtue of section 30(1) of the Arbitration Act 1996, which codified the principle of Kompetenz-Kompetenz.

B. **There Is a Valid Arbitration Agreement**

17. Shelltime 4 is used as the basis of the Charterparty.\(^1\) Clause 46(a) (‘Choice of Law Clause’) and Clause 46(b) (‘Arbitration Clause’) provide, respectively, that English law is the governing law and that ‘All disputes arising out of this charter shall be referred to Arbitration in London accordance with the Arbitration Act 1996’.

18. It is submitted that the Arbitration Clause satisfies the formality requirement imposed by sections 5 and 6 of the Arbitration Act 1996. Therefore, it is a valid arbitration agreement.

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\(^1\) Moot Problem p 5.

19. The Arbitration Clause provides that disputes should be resolved by arbitration. According to section 3 of the Arbitration Act 1996, London is the proper seat of the arbitration.

20. Albeit that the Charterers were ‘really not keen on London arbitration’, such views were never communicated to the Owners. In any event, the Charterers did not take the opportunity to object to the Arbitration Clause when the recap of the Charterparty was sent to the Charterers on 26 May 2014.

21. Absent reference to other jurisdictions in the Charterparty, any agreement as to the venue of arbitration is presumed to be an agreement as to seat. The Choice of Law Clause also reinforces the proposition that London is the proper seat.

D. The Arbitration Clause covers both Contractual and Tortious Claims

22. In this dispute, the phrase ‘all disputes arising out of this charter’ was used in the Arbitration Clause. This phrase has a wide compass and catches any matter having some relation to the Charterparty.

23. In *The Angelic Grace*, the arbitration clause provided that ‘All disputes from time to time arising out of this contract shall ... be referred to the arbitrament of two Arbitrators’. The issue was whether a tortious claim regarding a collision fell within the arbitration clause. The Court of Appeal affirmed the decision of Rix J that the collision claim fell within the arbitration clause. Citing an earlier decision in *The Playa Larga*, Leggett LJ restated the legal principle that a tortious claim is considered as ‘arising out of’ a contract if there is a sufficiently close connection between the tortious claim and a claim under the contract. To

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2 ibid p 2.
3 ibid p 5.
4 *Shashoua v Sharma* [2008] EWHC 957 (Comm).
8 *The Angelic Grace* (n6) 89 col 2 (Rix J).
establish such a connection, the claimant must show that either the resolution of the contractual issue is necessary for a decision on the tortious claim, or that the contractual and tortious disputes are so closely knitted together on the facts that an arbitration agreement can be properly construed as covering the tortious claim.\(^9\)

24. In this case, the claim based on tort of fraud relates to the Charterer’s contractual obligation to provide bunker. The claims for fraudulent representations and for hire arose from the same incident, i.e. the Pirate Attack. This Tribunal will be investigating into the same set of facts to determine the responsibilities of the Charterers in relation to the Pirate Attack.

25. In addition, the Court of Appeal also based its decision on the presumption of one-stop adjudication,\(^{10}\) which was subsequently endorsed by the House of Lords in *Fiona Trust*.\(^{11}\) The parties, being rational businessmen, are likely to have intended any dispute arising out of the Charterparty to be decided by the same tribunal.\(^{12}\) This presumption will only be rebutted by clear language that certain disputes should be excluded from the jurisdiction of this Tribunal.\(^{13}\) Given the simplicity of the wording contained in the Arbitration Clause,\(^{14}\) there is no reason why the Owner should suffer the detriment of a ‘forensic nightmare’ if the tortious claim must be brought in a separate action in possibly a different jurisdiction.\(^{15}\)

26. Furthermore, this Tribunal should refrain from over-scrutinising the semantics of the Arbitration Clause for two policy reasons. First, Shelltime 4 is a well-known standard charterparty which enables contracts to be entered into quickly and efficiently.\(^{16}\) The parties are unlikely to linger over the words used in the Arbitration Clause given that the overall purpose is clear.\(^{17}\) Second, the exclusion of tortious claim from arbitration leads to the

\(^9\) ibid.
\(^{10}\) ibid 91 col 1 (Rix J).
\(^{11}\) *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951.
\(^{12}\) ibid [13] (Lord Hoffmann).
\(^{13}\) ibid.
\(^{14}\) ibid [27] (Lord Hope).
\(^{15}\) *The Angelic Grace* (n6) 90 col 1 (Rix J).
\(^{16}\) *Fiona Trust* (n11) [25] (Lord Hope).
\(^{17}\) ibid.
uncertainty of forum with regards to such claim. As Lord Hope said, ‘If the parties have confidence in their chosen jurisdiction for one purpose, why should they not have confidence in it for the other?’\textsuperscript{18}

27. Given that the current dispute only involves a civil claim of fraud, such dispute is clearly arbitrable.\textsuperscript{19} Therefore, in the interests of saving the costs and time of both parties, this Tribunal should be cautious to attribute to the parties an intention that there would be two sets of proceedings regarding the current dispute.

IV. ASA2 Was the Charterers’ Agent

A. Captain Anya Had Apparent Authority in Giving Instructions for the Vessel to Proceed to the Alternative Discharge Location (‘Discharge Instructions’)

28. It is the Owners’ submission that the Captain Anya had apparent authority in giving voyage instructions on behalf of the Owner. The test is whether (i) the principal made a representation that another person had authority to act on his behalf,\textsuperscript{20} and (ii) the third party reasonably relied on such representation.\textsuperscript{21}

29. The Master was instructed by Captain Anya, who purported to act with authority of the Charterers, to proceed to an Alternative Discharge Location on 28 June 2014.\textsuperscript{22} The Master communicated those instructions, including the fact that there was a ‘new OPL discharge R/V’, the name of the designated vessel for the STS Transfer, and the provision of bunker upon arrival at the Alternative Discharge Location, to the Charterers on 3 July 2014.\textsuperscript{23} The Charterers did not dispute the instructions in their reply on 4 July 2014 and simply urged the Master to ‘continue to liaise with your STS coordinator’.\textsuperscript{24}

\textsuperscript{18} ibid [28] (Lord Hope).
\textsuperscript{20} Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] QB 480, 505.
\textsuperscript{21} Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd (The Raffaella) [1985] 2 Lloyd’s Rep 36, 41; Pourzand v Telstra Corp Ltd [2014] WASCA 14 [83].
\textsuperscript{22} Email dated 28 June 2014 18:02 (UTC+1): Moot Problem p 35.
\textsuperscript{23} Email dated 3 July 2014 16:28 (UTC+1): ibid p 38.
\textsuperscript{24} Email dated 4 July 2014 09:52 (UTC+8): ibid p 40.
instructions, the Master proceeded to the Alternative Discharge Location in accordance with the original coordinates given by ASA2.

30. The Owners therefore submit that (i) the Charterers’ reply on 4 July 2014 amounted to a representation that ASA2 had authority to act on their behalf, and (ii) the Owners reasonably relied on such representation by reason of the Charterers’ failure to object to the Discharge Instructions as relayed by the Master. By virtue of the foregoing, ASA2 gave the Discharge Instructions with apparent authority from the Charterers.

B. The Charterers Are Estopped from Denying the Authority of Captain Anya

31. Further or alternatively, it is the Owners’ submission that the Charterers are estopped from denying the authority of Anya in acting on behalf of the Charterers.

32. It is trite law that a principal may be bound by acts of an agent even if the latter does not have actual authority.\(^{25}\) In circumstances where ‘a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs which another has taken to be settled or correct’,\(^{26}\) the doctrine of estoppel can operate provided that there is some manifest representation made by the principal either by action or inaction, on which the other party relies.\(^{27}\) The applicability of this principle in giving rise to an agency relationship is affirmed in *Bowstead & Reynolds*,\(^{28}\) and *The Isabelle*.\(^{29}\)

33. In submitting that the Charterers are estopped by their conduct from denying the authority of ASA2, the Owners rely on the grounds that:

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28 P Watts (ed) (n25) paras 2-099-2-103.
29 *Cosmar Compania Naviera SA v Total Transport Corporation (The Isabelle)* [1982] 2 Lloyd’s Rep 81, 87.
a) The BIMCO Ship to Ship Transfer Clause for Time Charter Parties, which was incorporated into the Charterparty,\(^{30}\) imposes an obligation on the Charterers to ‘direct the Vessel to a safe area for the conduct of...ship to ship operations’;\(^ {31}\)

b) The Charterers and/or their agent failed to reply to the request of the Master sent on 20 June 2014 requesting confirmation of ‘STS Coordinates’;\(^ {32}\)

c) Atlantic Services Agency, being the disport agent appointed by the Charterers under the Voyage Order,\(^ {33}\) failed to contact the Master to arrange for discharge of cargoes at any time before the Pirate Attack, and the Charterers further failed to procure such arrangements to be made;

d) The Charterers failed to draw to the attention of the Owners and/or the Master that the Discharge Instructions, which were relayed to them by the Master on 3 July 2014 as set out in paragraph 29 above, were inaccurate in any aspect;\(^ {34}\)

e) The fact that the Charterers were aware of there being ‘no contact with receiver’,\(^ {35}\) indicates that the Charterers had always been in a position where it could ascertain if the Master communicated with the right agent regarding the discharge location; and

f) The Charterers failed to provide the Owners or the Master with the full style contact details of their agents as required under Clause 45(b)(i) of Shelltime 4. The only information relating to the disport agent that the Charterers provided under the Voyage Orders was the name Atlantic Services Agency as well as the email of the person in charge named ‘William’.\(^ {36}\)

\(^{30}\) Moot Problem pp 10-11.
\(^{31}\) Sub-clause (b) of the BIMCO Ship to Ship Transfer Clause for Time Charter Parties.
\(^{32}\) Email dated 20 June 2014 11:02 (UTC+4): Moot Problem p 31.
\(^{33}\) Attachment to email dated 27 May 2014 09:27 (UTC+8): ibid pp 14-15.
\(^{34}\) P Watts (ed) (n 25) paras 2-099, 2-106.
\(^{35}\) Email dated 4 July 2014 12:24 (UTC+8): Moot Problem p 41.
\(^{36}\) Attachment to email dated 27 May 2014 09:27 (UTC+8): Moot Problem p 15.
34. In reliance of the Charterers’ acquiescence, the Master acted in accordance with the Discharge Instructions and directed the vessel to the Alternative Discharge Location, as a result of which loss was suffered.

35. Accordingly, ASA2 acted with apparent authority from the Charterers or, alternatively, the Charterers are estopped from denying that ASA2 was the Charterers’ agent.

V. **THE CHARTERERS INSTRUCTED THE VESSEL TO DISCHARGE CARGOES AT THE ALTERNATIVE DISCHARGE LOCATION IN BREACH OF THE CHARTERPARTY**

A. **The Discharge Instructions for the Discharge of Cargoes Were Given by the Charterers and/or Their Agent**

36. The Owners acknowledge that the Discharge Instructions were first given by Captain Anya.\(^37\)

For the reasons submitted in paragraphs 31 to 35, the Owners submit that the Charterers are estopped from denying the authority of Captain Anya in acting on behalf of the Charterers.

37. Further or alternatively, even if Captain Anya was not the Charterers’ agent, the Owners submit that it was in fact the Charterers’ orders for the Vessel to proceed to the Alternative Discharge Location for the STS Transfer as instructed by Captain Anya.

38. An issue in *The Erechthion* was whether instructions given by the harbour authority on the discharging location were those of the charterers.\(^38\) The court held that the charterers’ orders for the vessel to proceed to a particular port for discharge, properly construed, were orders for the vessel to proceed to the location designated by the harbour authority upon arrival at that port.\(^39\) This was because the charterers left it to the harbour authority of the designated port to direct the vessel on where exactly it should discharge, which was in practice within the control and power of the harbour authority. The Owners submit that the Charterers, in failing to give alternative directions themselves or through their disport agent and further asking the Master to ‘continue to liaise with your STS coordinator’ after being informed of Captain Anya’s

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\(^37\) Email dated 28 June 2014 18:02 (UTC+1): Moot Problem p 35.


\(^39\) ibid.
instructions, endorsed the Discharge Instructions such that it was the Charterers’ orders that the Vessel was to proceed to the Alternative Discharge Location as directed by Captain Anya.

B. The Discharge Instructions Were Given Without the Authorisation of the Owners and in Breach of the Charterparty

39. Further, the Charterers were not entitled to give the Discharge Instructions without first obtaining approval from the Owners.

40. Generally, ‘the charterer has neither the right nor the obligation to change’ his nomination of a discharging port in the absence of an express provision. This principle is confined in the context of time charters under which the charterer is entitled to direct the vessel to any port within the specified trading limits.

41. The issue is whether a voyage to the Alternative Discharge Location is within the trading limits under the Charterparty (‘Trading Limits’), which expressly excludes Angola from the trading limits. It is first submitted that, as construed in its factual context, international waters off the coast of Angola is also excluded as the risk of piracy therein would likely be the same if not more due to the lack of policing.

42. The Owners further submit that (i) the Charterparty was not varied to provide for the said voyage, and (ii) the Owners have not waived their right to refuse compliance with the Discharge Instructions.

43. The Master’s compliance with the voyage instructions to OPL Lunada is irrelevant in determining whether a charterparty was amended given his lack of authority in this regard.

As it is the obligation of the Charterers, rather than the Owners, to direct the Vessel within the

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40 Email dated 04 July 2014 09:52 (UTC+8): Moot Problem p 40.
42 Segovia Compania Naviera SA of Panama v R Pagnan & FLLI of Padova (The Aragon) [1975] 1 Lloyd’s Rep 628, 633 col 1; Ispat Industries Ltd v Western Bulk Pte Ltd [2011] EWHC 93 (Comm) [35].
43 Moot Problem p 6.
44 T Coghlin and others, Time Charters (7th edn, Routledge 2014) para 5.9.
Trading Limits,\textsuperscript{45} any failure on the Owners’ part to object to instructions for the Vessel to proceed to OPL Luanda, without more, does not amount to variation of the Charterparty to permit a voyage to Angola or the Discharge Instructions.

44. Further or alternatively, mere compliance with the instructions to proceed to Angola is insufficient to constitute waiver of the Owners’ right to refuse compliance with the Discharge Instructions.\textsuperscript{46} The issue is whether the Owners communicated unequivocally their acceptance of the transgression of the Trading Limits. In \textit{The Kanchenjunga},\textsuperscript{47} the court found that the owners had waived their right to object to the safety of the port nominated by the charterers because of their unequivocal acceptance by way of, \textit{inter alia}, the issuance of a notice of readiness. This is distinguished from the present case, in which the Owners had not acted in any way beyond merely allowing the Vessel to proceed to OPL Luanda.

45. Based on the foregoing, the Owners submit that the Charterers were in breach of the Charterparty in instructing the Vessel to the Alternative Discharge Location without authorisation of the Owners.

VI. \textbf{The Charterers Were in Breach of the Charterparty in Failing to Pay Hire}

46. The general rule is that ‘\textit{hire is payable continuously unless the charterers can bring themselves within an exception’}.\textsuperscript{48} Pursuant to Clause 9 of Shelltime 4, payment of hire is due ‘\textit{per calendar month in advance}’. The Owners submit that the Charterers’ refusal to pay hire for the ‘\textit{second hire period}’, namely the second month of the hire period (4 July 2014 to 3 August 2014) is unjustified.

\textsuperscript{45}bid para 5.14.
\textsuperscript{46} \textit{Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)} [1990] 1 Lloyd's Rep 391 (HL) 397-398.
\textsuperscript{47} Ibid.
\textsuperscript{48} \textit{Osmium Shipping Corporation v Cargill International SA (The Captain Stefanos)} [2012] EWHC 571 (Comm) [7].
A. The Charterparty Was not Frustrated by 4 July 2014 by the Pirate Attack

i. The doctrine of frustration does not apply

47. The doctrine of frustration is inapplicable where the contract contains express provisions addressing the alleged frustrating event.49 Given the inclusion of contractual provisions specifically dealing with pirate attacks,50 the Charterers’ contention that the Charterparty was frustrated by the Pirate Attack is untenable.

ii. Even if the doctrine of frustration applies, the Pirate Attack does not amount to a frustrating event

48. Even if the inclusion of contractual provisions addressing pirate attacks does not preclude the operation of the doctrine of frustration, the issue is whether the Pirate Attack amounts to a frustrating event for ‘so significantly chang[ing] the nature (not merely the expense or onerousness) of the out-standing contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution’.51

49. The incorporation of rider clauses dealing with piracy in the Recap indicates that the capture of the Vessel by pirates was foreseeable. As such, the Pirate Attack cannot be said to have changed the nature of the parties’ obligations as contemplated at the time of execution of the Charterparty.

50. Secondly, any change in the nature of the parties’ obligations is not radical. A ‘critical factor’ is the likely duration of the interruption relative to the remaining balance of the hire period,52 to be assessed without the benefit of hindsight under the test of ‘what estimate would a reasonable man of business take of the probable length of the withdrawal of the vessel from service’.53 In the case of a typical pirate attack involving theft of cargo, as in the present case,

49 Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd [1942] AC 154, 163.
50 Moot Problem pp 8-9, 11-12.
52 T Coghlin and others (n 44) para 26.43.
53 ibid para 26.47.
‘vessels are hijacked for several days and cargo is transferred to a smaller vessel’. The Charterparty was for a period of three months, plus or minus 30 days. Given that the Pirate Attack only lasted for 13 days, and occurred a month into the hire period, the detention of the Vessel does not suffice in frustrating the Charterparty.

iii. The Vessel remained on-hire from 4 July 2014 despite the Pirate Attack

51. The Charterparty incorporates two clauses on acts of piracy, specifically the Piracy Clause, and the BIMCO Piracy Clause for Time Charter Parties 2013 (‘BIMCO Piracy Clause’). Sub-clause (4) of the Piracy Clause provides that hire would remain ‘payable at 100% for duration of hire’ where its capture by pirates is ‘not caused by a lack of due diligence on the part of the Owners’ and where the Charterers have requested the Owners to purchase off-hire insurance. The BIMCO Piracy Clause, on the other hand, provides that (i) the Vessel shall remain on hire if it is attacked, or seized by pirates, and (ii) hire shall remain payable until the 91st day after seizure of the Vessel.

52. The issue is how the two clauses should be reconciled to determine whether the Vessel was off-hire by reason of piracy. In The Captain Stefanos, the court drew a distinction between provisions dealing with rights and obligations of parties when a vessel was off-hire and those defining off-hire events, and held that the latter governed the issue of whether an off-hire event has occurred.

53. It is submitted that the Piracy Clause merely sets out the obligations of the Charterers with regard to payment of hire where the Vessel is off-hire. This is contrasted from the BIMCO Piracy Clause, which plainly stipulates that attacks or seizure of the Vessel by pirates do not

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55 Moot Problem pp 8-9.
56 ibid pp 11-12.
57 Clause (e) of the BIMCO Piracy Clause: Moot Problem p 12.
58 Clause (f) of the BIMCO Piracy Clause: Moot Problem p 12.
59 ibid.
60 The Captain Stefanos (n48) [11].
amount to an off-hire event. Applying the distinction drawn in *The Captain Stefanos*, the latter clause should be upheld, such that the Vessel was not off-hire by reason of its capture regardless of whether the Owners exercised due diligence.

54. Further or alternatively, full payment of hire notwithstanding any piracy attack is specifically provided for under Sub-clause (4) of the Piracy Clause and Clause (f) of the BIMCO Piracy Clause.  

iv. The Vessel was not off-hire from 4 July 2014 by reason of breach of orders and/or neglect of duty on the part of the Master

55. The Owners further submit that the Vessel was not off-hire under Clause 21(a)(ii) of Shelltime 4 by reason of any breach of order or neglect of duty on the part of the Master. Even if the Master did fail to comply with the Best Management Practices for Protection against Somalia Based Piracy Version 4 (‘BMP4’) or the BIMCO Guidelines for Owners, Operators and Masters for Protection against Piracy in the Gulf of Guinea Region (‘Gulf of Guinea Region Guidelines’) in taking precautionary measures, the Pirate Attack was an extraneous event such that time loss as a result thereof was not due to any breach of duty of the Master.

56. In *The Saldanha*, an issue arose as to whether the vessel was off-hire by reason of a piracy attack under a charterparty on the NYPE form, whereby ‘payment of hire shall cease’ for ‘loss of time from default and/or deficiency of men ... detention by average accidents to ship or cargo ... or by any other cause preventing the full working of the vessel’. The court held that (i) ‘default of men’ in this context was confined to the refusal to perform duties as opposed to the negligent performance thereof, and (ii) acts of piracy did not in any event fall within the sweeping clause covering ‘other cause[s] preventing the full working of the vessel’ as piracy attacks are ‘totally extraneous cause’ which ‘did not arise out of the condition or efficiency of

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61 Sub-clause (4) of the Piracy Clause: Moot Problem p 8; Clause (f) of the BIMCO Piracy Clause: Moot Problem p 12.  
64 *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The M/V ‘Saldanha’)*[2010] EWHC 1340 (Comm).
the vessel, or the crew, or the cargo, or the trading history, or any reasonable perception of such matters by outside bodies’.

57. While Clause 21(a)(ii) of Shelltime 4 is more widely drafted than the relevant clause in The Saldanha to cover time lost ‘due to ... breach of orders or neglect of duty on the part of the master’, it has no application in the present case given the absence of causation between the Pirate Attack and the Master’s actions.

58. In light of the foregoing, the Charterers are in breach of the Charterparty for failing to pay hire for the second month of the hire period.

VII. THE CHARTERERS COMMITTED THE TORT OF DECEIT

A. The Charterers Had Made Three Distinct Fraudulent Misrepresentations to the Owners

59. The Owners submits that the Charterers had committed the tort of deceit by making false representations to the Owners dishonestly. In order to establish the tort of deceit, the Owners have to establish the following four ingredients for each representation:

a) a statement of present intention;

b) the representation was untrue to the Charterers’ knowledge or that the Charterers were reckless as to its untruthfulness;

c) the representation was intended to be acted on by the Owners;

d) the Owners had been influenced by the misrepresentation.

60. The Charterers and/ or its agent ASA2 acting on their behalf had made the following three representations to the Owners:

65 ibid.
66 Clydesdale Bank Ltd v Paton [1896] AC 381, 394.
67 Derry v Peek (1889) 14 App Cas 337, 376; AIC Ltd v ITS Testing Services (UK) Ltd [2006] EWCA Civ 1601; [2007] 1 All ER (Comm) 667 [256]-[259] (Rix LJ).
68 Peek v Gurney (1873) LR 6 HL 377, 411-413 (Lord Cairns).
a) The Charterers represented on 3 June 2014 that a sufficient supply of bunkers would be ‘available passing Durban or Cape Town’\(^70\) (‘First Representation’);

b) The Charterers represented twice on 28 June 2014 that a sufficient supply of bunkers would be available ‘on arrival STS Area 1’\(^71\) (‘Second Representation’);

c) ASA2, on behalf of the Charterers instructed the Vessel on 28 June 2014 that she was under the ‘control’ of ASA2 as the Charterers’ ‘agent’ and ‘local instruction’ and that she would ‘discharge 72,000 mts gasoil/ balance of cargo TBN’ at the Alternative Discharge Location while receiving ‘300 mt IFO bunkers’\(^72\) with the vessel Antelope (‘Third Representation’).

B. The First and Second Representations Were Fraudulent Misrepresentations

i. The First and Second Representations were statements of present intention

61. Under Clause 7 of Shelltime 4, the Charterers were to provide and pay for all fuel. In the Hill Harmony,\(^73\) the court held that the provision of bunkers was the charterers’ responsibility and the charterers had the right to select the ports at which a time-chartered ship was to take on bunkers.

62. The First and Second Representations were made by the Charterers after the Master repeatedly protested for insufficient bunkers on 3 June\(^74\) and 25 June 2014\(^75\) respectively. They would thereby be reasonably construed as the Charterers’ representations that arrangements for

\(^70\) Email dated 3 June 2014 17:21 (UTC+8): Moot Problem p 26.
\(^71\) Email dated 28 June 2014 16:27 (UTC+8): ibid p 33; Email dated 28 June 2014 18:43 (UTC+8): ibid p 34.
\(^72\) Email dated 28 June 2014 18:02 (UTC+1): ibid p 35.
\(^73\) [2001] 1 Lloyd’s Rep 147, 157.
\(^74\) Email dated 3 June 2014 12:17 (UTC+8): Moot Problem p 25; Email dated 3 June 2014 20:02 (UTC+8): Moot Problem p 28.
\(^75\) Email dated 25 June 2014 11:02 (UTC+3): ibid p 32.
confirmed bunkers had already been made in order to ease the Master’s concern as well as to fulfill their obligation and to exercise their right to advise on bunkers.66

63. Accordingly, the First and Second Representations constituted statements of present intention made within the special knowledge of the Charterers who were in possession of the information regarding available bunkering ports.77

64. Furthermore, given that the Charterers were the only party who was in possession of information regarding available bunkers, the First and Second Representations would carry with them a further implication of fact, that the Charterers believed there existed facts which reasonably justified the representations.

ii. The First and Second Representations were untrue to the Charterers’ knowledge or that the Charterers were reckless as to their untruthfulness

65. The First Representation was untrue as no bunkers were provided by the Charterers at Durban or Cape Town. Despite the protest from the Master on 25 June 2014 complaining that no bunker was supplied at Durban, the Charterers never responded to the protest or provided instructions for bunkering at Cape Town. The Charterers had no intention of providing bunkers passing Durban or Cape Town.

66. The Second Representation was also untrue as no bunkers were provided to the Vessel by the Charterers at STS Area 1. The Charterers had no intention of providing bunkers at STS Area 1 as ASA2, on behalf of the Charterers, subsequently directed the Vessel to the Alternative Discharge Location78 without first allowing the Vessel to take bunkers at STS Area 1.

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66 Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm), [2011] 1 CLC 701 [215] (‘In order to determine whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee’ (Hamblen J)).


78 Email dated 28 June 2014 18:02 (UTC+1): Moot Problem p 35.
67. Alternatively, even if the First and Second Representations were in fact true when they were made, they were rendered untrue by later events which happened before the representations were acted upon by the Owners. Therefore, the Charterers were bound to communicate the truth to the Owners when they knew of such events. Since the Charterers never communicated their subsequent knowledge of the falsity of the statements, they are still liable in deceit for failing to correct the untrue representations.79

iii. The First and Second Representations were intended to be acted on by the Owners
68. The First Representation on 3 June 2014 was made after the Master expressed his disappointment towards the insufficiency of bunkers supplied and was therefore intended to be believed by the Master in order to ease his concern.

69. In the correspondence from the Master to the Charterers on 3 June80 and 20 June 201481 respectively, the Master urged the Charterers to confirm the details of bunkering at Durban, and as such, the Charterers should have appreciated that in the absence of other unforeseen intervention and alternative instructions the Master would have acted on the Charterers’ First Representation to prepare for bunkering at Durban.82 Nevertheless, the Charterers never got back to the Master regarding bunker supply at Durban despite their promise to revert on 3 June 2014.83 Such constitutes sufficient intent on the part of the Charterers to deceive the Owners.

70. Meanwhile, the Second Representation was made after the Master protested against the Charterers for their failure to supply bunkers at Durban by reducing speed in order to conserve

79 Incledon v Watson (1862) 2 F&F 841; With v O’Flanagan [1936] Ch 575, 584; Bradford Third Benefit Building Society v Borders [1941] 2 All ER 205, 220 (Lord Wright); R. Bigwood, ‘Pre-Contractual Misrepresentation and the Limits of the Principle in With v O’Flanagan’ [2005] CLJ 94.
80 Email dated 3 June 2014 20:02 (UTC+8): Moot Problem p 28.
81 Email dated 20 June 2014 11:02 (UTC+4): ibid p 31.
82 Shinhan Bank Ltd v Sea Containers Ltd [2000] 2 Lloyd’s Rep 406, 414 [26].
83 Email dated 3 June 2014 20:15 (UTC+8): Moot Problem p 28.
bunkers\textsuperscript{84} and was therefore intended, again, to be believed by the Master in order to ease his concern over bunkers.

iv. The Owners had been influenced by the First and Second Representations

71. In reliance of and influenced by the Charterers’ First Representation, the Owners had arranged internally on 3 June 2014 for security equipment against piracy threat to be delivered at Durban.\textsuperscript{85}

72. It is submitted that the influence of the First Representation as made by the Charterers need not be the sole cause for the Owners to proceed to Durban. It suffices for the purpose of showing inducement to act that the First Representation substantially contributed to deceiving the Owners.\textsuperscript{86} It does not assist the Charterers to claim that the Owners would have proceeded to Durban anyway given their backup plan to reschedule the delivery of the security equipment in Singapore to Durban in case of late delivery.\textsuperscript{87}

73. Meanwhile, in reliance on and influenced by the Charterers’ Second Representation, the Master sought to proceed to STS Area 1 by enquiring with the Charterers for the coordinates of ‘Area 1’\textsuperscript{88} and provided in its daily estimated time of arrival (‘ETA’) message dated the same day the ETA at STS Area 1 at the reduced speed.\textsuperscript{89}

C. The Third Representation Was a Fraudulent Misrepresentation

i. ASA2 acted as an agent of the Charterers in making the Third Representation

74. The Owners rely on the above submission at paragraphs 31 to 35 to establish that ASA2 made the representation on behalf of the Charterers as agent.

\textsuperscript{84} Email dated 25 June 2014 11:02 (UTC+3): ibid p 32.
\textsuperscript{85} Email dated 3 June 2014 12:01 (UTC+1): ibid p 27.
\textsuperscript{87} Email dated 3 June 2014 12:01 (UTC+1): ibid p 27.
\textsuperscript{88} Email dated 28 June 2014 11:42 (UTC+2): Moot Problem p 34.
\textsuperscript{89} Email dated 28 June 2014 12:29 (UTC+2): ibid.
ii. The Third Representation was untrue to ASA2’s knowledge or that ASA2 was reckless as to its untruthfulness

75. The Third Representation was untrue as Antelope was not available at the Alternative Discharge Location to perform STS Transfer$^{90}$, nor were there bunkers provided there. ASA2 never responded to the Master’s repeated requests for confirmation of hose connections and fender supply as well as discharge rotation.$^{91}$ It is submitted that ASA2, as the Charterers’ agent, had no intention to perform the STS Transfer or to provide bunkers.

iii. The Third Representation was intended to be acted on by the Owners

76. The Third Representation was made in order to induce the Master to proceed to the Alternative Discharge Location, again in response to the Master’s repeated concern over bunkers.

iv. The Owners had been influenced by the Third Representation

77. The Owners acted in reliance on the Third Misrepresentation as the Master followed the instructions of ASA2 and proceeded to the Alternative Discharge Location.

78. Furthermore, prior to the Vessel’s arrival at the Alternative Discharge Location in international waters off the Angolan coast, the Master repeatedly confirmed, on 28 and 29 June and 1, 2 and 3 July 2014, that the Vessel would be ‘taking bunkers on arrival’.$^{92}$

v. The Charterers are primarily liable for the deceit committed by ASA2

79. It is submitted that the Charterers were aware that the Third Representation was false when the Master communicated it to him on 3 July 2014.$^{93}$ They however intended the Owners to be misled or were indifferent as to whether the Owners would be misled.$^{94}$ As such, they are liable together with ASA2 as joint tortfeasors.

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$^{90}$ Email dated 4 July 2014 05:20 (UTC+1): ibid p 40; Email dated 4 July 2014 05:22 (UTC+1): ibid p 41.
$^{91}$ Emails dated between 28 June 2014 and 3 July 2014: ibid pp 35-38.
$^{92}$ Emails dated 28 June to 3 July 2014: Moot Problem pp 35-38.
$^{93}$ Email dated 3 July 2014 16:28 (UTC+1): ibid p 38.
$^{94}$ *Cornfoot v Fowke* (1840) 6 M&W 358, 370 (Rolfe B): ‘The claimant must “bring home fraud to the principal”’. 
vi. Further or alternatively, the Charterers are vicariously liable for the deceit committed by ASA2

80. ASA2, acting in its capacity as the Charterers’ disport agent, made the Third Representation dishonestly.\(^95\) Meanwhile, the giving of STS coordinates as well as the Discharge Instructions to the Master fell squarely within the apparent authority of ASA2.\(^96\) As such, the Charterers would be vicariously liable for the Third Representation made by ASA2 regardless of his own innocence.\(^97\)

vii. The carelessness (if any) of the Master in not discovering the untruthfulness is no defence to the tort of deceit

81. The Owners deny any allegation of carelessness or negligence on the part of the Master in discovering the untruthfulness of the Third Representation.

82. In any event, it is no answer to the action for fraudulent misrepresentation for the Charterers to allege that the Master should have discovered the falsity of the Third Misrepresentation by the exercise of ordinary care.\(^98\) Even if the Master might have been able to discover the falsity of the Third Representation by confirming the new coordinates with the Charterers, this would not negate the Charterers’ tortious liabilities for the Third Misrepresentation.

VIII. **The Owners’ Defence to the Charterers’ Counterclaims**

A. The Vessel Was Fit for Service

83. The contractual obligations to provide a vessel that is fit for service are provided under Clauses 1(c) and 2(a)(i) of Shelltime 4. The test for ‘fitness for service’ is for the owners to provide a ship that is suitable for the particular service which the ship is to perform.\(^99\)

\(^{95}\) *Crédit Lyonnais Nederland NV v Export Credits Guarantee Department* [2000] 1 AC 486.

\(^{96}\) *Lloyd v Grace, Smith & Co* [1912] AC 716, 736 (Lord Macnaghten); *Armagas Ltd v Mundogas SA* [1986] AC 717.

\(^{97}\) *Briess v Woolley* [1954] AC 333.

\(^{98}\) ‘It does not lie in the mouth of a liar to argue that the claimant was foolish to take him at his word’ as per Lord Chelmsford in *Venezuela Central Ry v Kisch* (1857) LR 2 HL 99, 120; Nor is the Law Reform (Contributory Negligence) Act 1945 available here to reduce the damages.

84. As mentioned in paragraphs 29 to 30 above, the Master followed the Discharge Instructions because he was under the belief that ASA2 was the Charterers’ agent. Accordingly, it is submitted that Clause 2(a)(i) was not breached and the Master was competent.

85. With regard to the Master’s failure to deploy razor wire in accordance with BMP4, it must first be emphasized that BMP4 only requires ship protection measures to be installed ‘prior to transiting the High Risk Area’. In other words, it is not a requirement for such equipment to be loaded in Singapore and remained deployed throughout the entire voyage.

86. The Owners further submit that their decision to delay the supply of razor wires was made under reasonable contemplation that:

a) The Vessel was bound to be bunkered prior to arriving at the original discharge port named under the Voyage, i.e. Luanda, under the intention of both parties.

b) The potential locations of alternative bunker supply that lie on the pre-determined route, i.e. Cape of Good Hope, do not fall within the ambit of high-risk areas in West Africa, namely, Gulf of Guinea.

c) Therefore, it was reasonable to expect that razor wires would be supplied before the Vessel set sail to Luanda.

87. Moreover, it is common ground that the Charterers are responsible for directing the voyage route and providing bunkers pursuant to Shelltime 4 Clauses 4(a) and 7(a) respectively. The reasonable implication of these two clauses is that it is incumbent upon the Charterers to give confirmations on alternative bunker supply locations. Indeed, the Charterers promised to ‘revert’ on alternative bunker supply location. However, such promise never materialised in time before the Vessel passed through Durban and Cape Town.

100 UK Maritime Trade Operations (UKMTO) Office and others (n62) p 15.
88. Therefore, the fact that the Vessel did not stop at Durban is not a fault attributable to the Owners.

89. Furthermore, the Owners submit that they are not bound by the Gulf of Guinea Region Guidelines as it was published in October 2014, which was after the expiry of the Charterparty.

90. For the foregoing reasons, it is submitted that the Vessel was fit for service. Accordingly, the Owners did not breach Clauses 1(c) and 2(a)(i) of Shelltime 4. Should the Tribunal make a finding to the contrary, it is submitted that liability for such breaches, which are equivalent to breach of article III, rule 1 of the Hague-Visby rules, should be exempted by Article IV, rule 2(a), since the ultimate issue before the Tribunal is to determine whether the Owners are liable for cargo loss, which will be discussed in paragraphs 91 to 99 below.

B. The Owners Are Exempted from Liability Arising from Loss of Cargo

91. The Owners do not dispute that there was a loss of approximately 28,190 mt of gasoil.

92. Should the Owners be found to be in breach of article III, rule 2 of the Hague-Visby rules, it is the Owners’ submission that they are protected by the exemption clause under article IV, rule 2(a), which reads,

‘Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship’.

93. Accordingly, the Owners would benefit from the exemption if the breach took place either in the ‘navigation’ or ‘management’ of the ship. It is submitted that ‘management’ best suits the facts of the present case.
94. In *Gosse Millerd v Canadian Government Merchant Marine Ltd*,\(^{102}\) the English House of Lords gave the definition of ‘management’ by citing Bankes LJ in *Hourani v T & J Harrison*,\(^{103}\) in which he held that a distinction exists as between ‘damage resulting from some act relating to the ship herself and only incidentally damaging the cargo, and an act dealing ... solely with the goods and not directly or indirectly with the ship herself’, whereby the former reflects the true meaning of ‘management’.\(^{104}\) It is submitted that it is the Owners’ mismanagement of the Vessel (i.e. prima facie breach) which incidentally led to the loss of cargo.

95. Having satisfied that the Owners’ breach fall within the scope of article IV, rule 2(a), it is necessary to ascertain whether the Owners can discharge the burden of proof to claim for exemption.

96. In *The Tasman Pioneer*,\(^{105}\) the Supreme Court of New Zealand came to the view that article IV, rule 2(a) exempts the Owners ‘from liability for the actions of masters and crew unless the damage is intentional or the consequence of subjective recklessness’.\(^{106}\) The words ‘acts, neglect or default’ were considered to be ‘sufficiently wide to encompass all acts or omissions of master or crew’.\(^{107}\) Comments from Sir Guenter Treitel and Professor Reynolds were also cited to lend support to the court’s view, which read, ‘it seems that the exception extends even to a wilful or reckless act of any person within the list, i.e. master... for the words of Art 4.2(a) do not refer to negligence, but to “act, neglect or default”’\(^{108}\).

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\(^{102}\) [1929] AC 223.

\(^{103}\) [1927] 28 Ll L Rep 120.

\(^{104}\) ibid 123 col 2; *Gosse Millerd* (n102) [233].


\(^{106}\) ibid 18 col 1.

\(^{107}\) ibid 18 col 2.

97. *The Quo Vadis* was accepted by *The Tasman Pioneer* as an illustration of the wide scope of application of article IV, rule 2(a).\(^{109}\) In *The Quo Vadis*,\(^{110}\) the master’s failure to ensure that the air inlet to the engine room was closed despite a storm warning was found to be a ‘*serious error*’ but could not be characterised as ‘*reckless and with knowledge that damage will probably result*’.\(^{111}\) Similarly, the master in *The Tasman Pioneer* itself who lied to cover up his wrongdoings was not held to be reckless or have had the intention of causing cargo damage.\(^{112}\)

98. The foregoing discussion illustrates that article IV, rule 2(a) imposes a low threshold. It is the Owners’ submission that the burden of proof to negate fault can be discharged. First, although the Master had knowledge that the navigation route was prone to pirate attacks, failure to take sufficient anti-piracy precautions (if successfully proved by the Charterers), would not disqualify the application of article IV, rule 2(a), since by reference to *The Quo Vadis* and *The Tasman Pioneer*, the alleged default should not be characterised as one of recklessness. Second, with regard to razor wire deployment, it should be emphasized that the Owners did intend to put them in use before passing through the high-risk area, as discussed in paragraph 85 above.

99. For the reasons above, it is submitted that the Owners are exempted from liability arising from loss of cargo.

**IX. CONCLUSION**

100. In light of the aforesaid submissions, the Charterers are liable for breach of the Charterparty and deceit. The Charterers’ counterclaims should be dismissed.

\(^{109}\) ibid 18 col 1.

\(^{110}\) *Quo Vadis* Schip en Schade 2002, No 82 (13 March 2001) (The Court of Appeal of The Hague, the Netherlands).

\(^{111}\) ibid.

\(^{112}\) ibid 19 col 1.