TEAM 32

UNIVERSIDAD CARLOS III DE MADRID

IN THE MATTER OF AN ARBITRATION HELD IN ROTTERDAM

CLAIMANT

PANTHER SHIPPING INC

RESPONDENT

OMEGA CHARTERING LTD

MEMORANDUM FOR CLAIMANT

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<tr>
<td>CLAIMANT / Panther</td>
<td>Panther Shipping Inc</td>
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<td>RESPONDENT / Omega</td>
<td>Omega Chartering Ltd</td>
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<td>TCP</td>
<td>Time Charterparty (between Panther and Omega)</td>
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<tr>
<td>Champion</td>
<td>Champion Chartering Corp - Second charterer -</td>
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<tr>
<td>Fairwind</td>
<td>Fairwind International BVI - Third charterer -</td>
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<td>Replacement fixture</td>
<td>Time charter party (between Panther and Fairwind)</td>
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<td>Vessel</td>
<td>Thanos Quest</td>
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<td>Cargo</td>
<td>English Breakfast tea in bags a720 x 5mt big bags</td>
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♦ *C Czarnikow Ltd v Koufos or The Heron II* [1967] UKHL 4.
♦ *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (the “Saldanha”)* [2010] EWHC 1340.
Jackson v Royal Bank of Scotland [2005] UKHL 3, Transworld Oil Ltd v North Bay Shipping Corp (The Rio Claro) [1987].

Puerto Rico ports authority v M/V Manhattan Prince. et. al. 897 F.2d 1 (1st Cir. 1990).


Robinson v Harman. [1848] 1 Ex Rep 850.


Sylvia Shipping Co Ltd v Progress Bulk Carriers [2010].


C. Legislation


London Court of International Arbitration Rules.

London Maritime Arbitration Association Terms.

Memorandum Of Understanding on Port State Control in the Asia Pacific Region.


The Arbitration Act 1996.
D. Others

- BIMCO, *Hull Fouling clause for Time Charters*.
- Bryan Cave & Leighton Paisner: *Consolidation and joinder of Claims in commercial arbitration*.
- Edward Yang Liu, LLM (Soton), MCIArb, Senior Associate, Reed Smith Richards Butler, *Disputes arising out of hull bottom fouling under time charterparties*.
- Special Circular no.3 - 24 June 2013 of BIMCO.
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I. TIMELINE OF KEY EVENTS

II. STATEMENT OF FACTS

1. CLAIMANT is Panther Shipping Inc, a Liberian company, and RESPONDENT is a Liechtensteiner company, Omega Chartering Ltd. RESPONDENT’s broker is Clark Kent whilst CLAIMANT’s manager is Hulk Hulls. The Vessel is “Thanos Quest” ("Vessel"), whose flag is from Antigua and Barbuda.

2. On 18 March 2016, CLAIMANT time-chartered the Vessel to RESPONDENT for a period of 50-55 days pursuant to a time Charterparty (“TCP”) in order to carry bulk products from West Coast to Wahanda. The Vessel was diligently delivered to RESPONDENT on 29 March 2016, in West Coast, as agreed in the TCP, whereupon the crew started to load the cargo.

3. During the loading, on 18 April 2016, the West Coast Daily Echo published that Ebola had been reported in the city of West Coast. Regardless of this information, RESPONDENT did not flag to the CLAIMANT the existence of a risk of becoming infected by Ebola, being thus CLAIMANT unaware of the possible consequences of this issue. By 20 April 2016, the loading of the cargo was completed, and the Vessel sailed to Wahanda. For CLAIMANT’s surprise, on 21 April 2016, the newspaper published the spreading of the disease with more than 200 new cases.

4. On 7 May 2016, the Vessel arrived at Wahanda, where it was supposed to discharge the cargo. Nevertheless, due to RESPONDENT’s lack of diligence, she was prohibited to berth by the Wahanda’s Port Authorities. The authorities were concerned that several of the crew member had become infected by the Ebola Virus in the loading at West Coast.
5. On May 11 2016, **Respondent** communicated a detention of 28 days at the anchorage by the Port Authority and tried to set off hire the Vessel. However, despite **Respondent**’s intent of twitching that occurred to its benefit, **Respondent** actually acknowledged that the Vessel was on hire. **Respondent** avoids mentioning that it never put up a fight nor bothered answering **Claimant**’s response to its communication clearly noting that the Vessel was on hire.

6. The 55 days charter period ended on 23 May 2016, when the Vessel was supposed to be redelivered, yet **Respondent** failed to meet the deadline.

7. After a long silence from **Respondent**, on 8 June 2016, **Claimant** assiduously contacted **Respondent** to confirm the arrangement of inspection and cleaning pursuant to clause 83 of the TCP. Despite **Claimant**’s insistence to comply with the latter, **Respondent** ignored its obligations under the TCP and merely offered a lump sum of USD 15,000 without a justification. As expected, **Claimant** clearly opposed to the lump sum as an inspection was essential so as to know the exact amount required for the cleaning pursuant the TCP.

8. On 15 June 2016, **Claimant** time-chartered the Vessel to Champion Chartering Corp, a third party, for a period of two years, plus an additional two years at their choice (the “**Next Fixture**”).

9. Due to the **Next Fixture**, **Claimant** needed to have the Vessel ready so as to comply with its other contract with Champion Chartering Corp. Thus, on 18 June 2016, **Claimant** noted that for the event that **Respondent** delivered the Vessel dirty, it reserved its right to claim for the derived losses and costs.

10. Despite the evident need of inspection highlighted by the actual Master in 26 June 2016, **Respondent** failed to fulfill its obligations and offered subsequent below-market sums of 20,000 and 30,000 USD. On 28 June 2016, much to **Claimant**’s despair, **Respondent**’s negligent lack of compliance with its obligations caused Champion Chartering Corp cancellation of the **Next Fixture** as the Vessel was not available, missing the laycan.

11. Despite **Respondent**’s lack of compliance with its obligations, **Claimant** decided to give **Respondent** a final opportunity to arrange the Vessel’s cleaning at South Island and at least comply with the
hull cleaning obligation. This opportunity given by Claimant so as to avoid further conflicts between the parties was surprisingly declined by Respondent on 30 June 2016, by considering any voyage to South Island to be non-contractual.

12. The discharge of the cargo was finally completed on 30 June 2016 and the Vessel was redelivered. The cleaning of the Vessel’s hull was carried out between 1 and 3 July 2016 at South Island at a cost of USD 97,766.64. On 1 August 2016, Claimant presented the Final Hire Statement to Charterer (“FHS”) which included the cleaning of the Vessel’s hull, but Respondent has failed to pay the latter.

III. SUMMARY OF THE ISSUES

This Memorandum will address the following issues:

i. Whether this Tribunal has jurisdiction and power to order a compensation for damages.

ii. Whether the Tribunal should order a compensation for damages from Respondent to Claimant.

iii. Whether Claimant is responsible for cargo damage.

SUBMISSIONS ON THE JURISDICTION

13. The Tribunal has jurisdiction to hear the case at hand as (IV) the parties have consented to solve the disputes at hand through arbitration, and (V) the Tribunal has been validly constituted.

IV. THE PARTIES HAVE CONSENTED TO SOLVE THE DISPUTES AT HAND THROUGH ARBITRATION

14. As agreed by the parties, "any dispute arising under the TCP between them shall be solved through arbitration held in London pursuant to clause 80 of the TCP. The law governing the arbitration agreement in this arbitration is English law, since “arbitration in London” must be read as “English law to apply”.¹

15. Thus, it must be noted that the Tribunal has jurisdiction over the claims because (A) The object of the dispute falls under the scope of the arbitration agreement; and (B) Respondent did not object to the substantive jurisdiction of the Tribunal.

A. THE OBJECT OF THE DISPUTE FALLS UNDER THE SCOPE OF THE ARBITRATION AGREEMENT

16. The intention of the parties when concluding the arbitration clause was to settle any controversy through arbitration\(^2\). The controversies at hand are the lack of hull cleaning and its derived costs, as well as the damages which have arisen from a late-redelivery.

17. Both the hull cleaning and the on-time redelivery are contractual obligations that should have been accomplished by Respondent. However, even if the controversies were non-contractual, they would still be subject to arbitration. Arbitration agreements are treated as covering the entire spectrum of possible disputes arising not only out of the contract, but also out of the commercial transaction.\(^3\)

18. In this vein, English courts follow a general trend of interpreting arbitration agreements broadly to encompass non-contractual as well as contractual disputes. Lord Hoffman held in *Fiona Trust & Holding Corporation v Privalov*,\(^4\) that “A construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction”.

19. Thus, as noted by the majority doctrine, where there is an arbitration clause like in our case at hand, it must be assumed that parties have given broad competence to the arbitrators, including the competence for adaptation.\(^5\) If the parties’ intention was to exclude any matter from arbitrability they would have expressly mentioned it in the TCP. Any intention to define the scope of the arbitration clause must be expressed in clear language and must be found within the contract or in a document incorporated by the contract, which is not the case.

B. SMALL CLAIMS PROCEDURE IS NOT APPLICABLE

\(^2\) Moot Scenario, p. 15.


\(^4\) [2007] 2 Lloyd’s Rep. 267

20. In clause 102 of the TCP, the parties agreed that arbitrations whose amounts in dispute do not exceed the sum of USD 100,000 should be resolved by institutional arbitration by the London Maritime Arbitration Association ("LMAA"). This clause is not applicable since the claim exceeds by far the amount of USD 100,000, reaching the quantity of USD 15,330,000.00. Thus, clause 80 is applicable to the present case.

21. Furthermore, the Small Claims Procedure is a simplified and inexpensive procedure for the resolution of claims. According to the principle of party autonomy, the will of the parties shall prevail. In this vein, the intention of the parties when drafting the Small Claims Agreement was to ensure time and cost-effectiveness in Small Claims proceedings. Provided that there are several disputes at hand, solving them in a unique dispute is more consistent with the intention of the parties than to solve them in separated arbitration proceedings, which will rise the costs arising out of the procedures.

22. Involvement in several claims can also lead to contradictory arbitral awards. Having two different proceedings arising out of the same contract may lead to incompatible awards. There is a narrow link between both claims, they should be solved altogether in order to avoid the impossibility of enforcing the awards.

23. It should be noted by the Tribunal that Small claims procedure is not suitable when there are complex issues, since “the constraints on the arbitrator and the parties imposed by the limited financial remuneration for their services may mean that a particular dispute is not dealt with as the parties envisage”.

V. THE TRIBUNAL HAS BEEN VALIDLY CONSTITUTED

A. THE TRIBUNAL MAY BE VALIDLY FORMED BY TWO ARBITRATORS

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6 Moot Scenario, p. 24.
7 LMAA, Commentary on the Small Claims Procedure (2012).
10 Bryan Cave & Leighton Paisner: Consolidation and joinder of Claims in commercial arbitration.
24. The parties have agreed on a three-member panel to hear this arbitration.\textsuperscript{12} In accordance to this agreement, \textsc{claimant} nominated Ms. Mary Walker as arbitrator,\textsuperscript{13} who confirmed her acceptance to sit as arbitrator in this proceeding.\textsuperscript{14} Equally, \textsc{respondent} named Captain Eric Masterson as the second arbitrator\textsuperscript{15} of the panel. Both arbitrators agreed that, before the hearing took place, they would appoint a third arbitrator.\textsuperscript{16} Thus, the Tribunal has been validly constituted in accordance with the arbitration agreement.

25. Such arbitration agreement does not imply that decisions shall be taken by three the arbitrators. Contrarily, the clause explicitly allows decisions to be taken by only two arbitrators, and that such decisions \textit{shall be final}.\textsuperscript{17} For this reason, although the parties have agreed on an arbitral panel conformed by three arbitrators, the Tribunal may be also formed by two members. This possibility is also contained in the actual Arbitration Act 1996.\textsuperscript{18} Accordingly, Ms. Walker, on behalf of the Tribunal, sent an email to the parties stating the valid constitution of the Tribunal.\textsuperscript{19}

26. In any case, the Tribunal may rule on its own substantive jurisdiction, that is, as to whether the Tribunal is properly constituted.\textsuperscript{20} This rests on the principle of \textit{kompetenz-kompetenz}, which is based on the idea that the Tribunal shall decide over its own competence to hear the disputes, thus preventing the possibility of escaping from the agreed arbitration and resorting to jurisdiction.\textsuperscript{21}

**B. \textsc{respondent}'s arbitrator has been duly appointed**

27. \textsc{respondent} has duly appointed Captain Eric Masterson as the second arbitrator\textsuperscript{22} of the panel, no later than 14 days after service in writing by \textsc{claimant} stating that it had already appointed its own arbitrator,\textsuperscript{23} in accordance to Section 16 (5) of the Arbitration Act 1996.

\textsuperscript{12} Moot scenario, p. 15.
\textsuperscript{13} Moot scenario, p. 59.
\textsuperscript{14} Moot scenario, p. 60.
\textsuperscript{15} Moot scenario, p. 62.
\textsuperscript{16} Moot scenario, p. 79.
\textsuperscript{17} Moot scenario, p. 15.
\textsuperscript{18} S.16(4) of the Arbitration Act.
\textsuperscript{19} Moot scenario, p. 63.
\textsuperscript{20} S. 30(1) of the Arbitration Act.
\textsuperscript{21} As noted by case law, e.g. \textit{Rio Algom Limited} v \textit{Sammi Steel Co.} [1991] ACWSJ 480853.
\textsuperscript{22} Moot scenario, p. 62.
28. Additionally, the arbitrator appointed by Respondent perfectly complies with the requisite that the members of the panel “shall be commercial men conversant with shipping matter”, due to the fact that he “is a chartering man, with many years of commercial experience, as well as arbitration experience”. In The “Myron” (Owners) v Tradax Export S.A., the QDB approached the notion of “commercial men”, by clearly stating that “a person who is actively engaged throughout all available working hours in maritime arbitrations is regarded in practice as being engaged in the shipping trade”. Therefore, such a requirement is met in this case.

C. RESPONDENT HAS ACCEPTED THE JURISDICTION OF THE TRIBUNAL

29. Respondent has not objected to the jurisdiction of the Tribunal in accordance to Section 31 (1) of the Arbitration Act 1996. If it were to do so, such objection should have been raised “not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal’s jurisdiction”. Furthermore, Respondent has had the chance to raise this issue in more than one occasion, such as in the service of Defence Submissions, and afterwards, with its defence and counterclaim submissions. Thus, Respondent’s silence to the jurisdiction of the Tribunal entails its consent.

30. Additionally, not only has Respondent not raised an objection on the Tribunal’s jurisdiction, but it has also claimed damages against Claimant in its Counterclaim. Hence, Respondent has implicitly submitted itself to the jurisdiction of this Tribunal on the understanding that it is competent to hear about its request for damages.

SUBMISSIONS ON THE MERITS

VI. TRIBUNAL SHOULD ORDER RESPONDENT TO PAY COSTS DERIVED FROM THE HULL CLEANING

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23 Moot scenario, p. 61.
24 Moot scenario, p. 15.
25 Moot scenario, p. 62.
27 Section 31 (1) of the Arbitration Act 1996.
28 Moot scenario, p. 64.
29 Moot scenario, p. 72.
30 S. 73 (1) of the Act.
31. Tribunal should grant Claimant the costs derived from the hull cleaning since (A) Respondent failed to fulfill the obligation to perform hull cleaning and (B) Claimant is entitled to receive compensation for all the costs associated with the hull cleaning and the voyage to South Island.

   **A. RESPONDENT BREACHED THE OBLIGATION TO PERFORM HULL CLEANING**

32. Respondent's negligence caused the Vessel to be sitting idle at Wahanda's anchorage for 54 days. As usually occurs in these cases, the Vessel had bottom fouling - the result of accumulation of different marine growth at the bottom of vessels. Fouling increases the mass and hull friction resistance and affects hydrodynamic characteristics, operating speed and maneuverability of the ship.

33. Although it might be true that owners are usually required under a time charter to carry out the maintenance, the Arbitral Tribunal must recall that the party autonomy prevails over statutory, case law or customary principles. In this case, the BIMCO hull fouling clause has been included in article 83 of the TCP. This clause sets the circumstances under which the responsibility for bottom cleaning and liability for losses arising therefrom have shift from the owner (Claimant), to the charterer, the Respondent. According to clause 83, cleaning shall be carried out at Charterer's risk, costs, expense and time, therefore the Arbitral Tribunal should grant not only the cleaning service costs, but also the transportation and fuel consumption costs, the expenses derived from the underperformance of the Vessel due to the fouling and the time incurred in the cleaning.

34. To this regards, the fact that the Vessel was standing for a long period of time at Wahanda activates clause 83(a)(ii) of the TCP, being Respondent responsible, as charterer, for the hull cleaning. Under this clause, after a period of 30 days remaining in any place, anchorage or port,

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31 Moot scenario, p. 29.
32 BIMCO, Hull Fouling clause for Time Charters.
36 Edward Yang Liu, LLM (Soton), MCIArb, Senior Associate, Reed Smith Richards Butler, Disputes arising out of hull bottom fouling under time charterparties.
37 Moot scenario, p. 29.
the warranties concerning speed and consumption will be suspended until the inspection of the
Vessel so as to determine the extent of the fouling and required cleaning.

35. Despite the impossibility to carry out the inspection in Wahanda due to the water conditions, RESPONDENT never doubted the need of cleaning offering lump sums from day one. Also, there were self-explanatory pictures that demonstrated the need for the cleaning.

36. RESPONDENT’s obligation to redeliver the Vessel in the same good order and condition is also clearly established in clause 4 of the NYPE 2015, which parties have agreed to apply in the fixture. The only exception to such an obligation would derive from the “ordinary wear and tear” of the Vessel, that is, the ordinary use of the Vessel. As noted by Evans LJJ in *The Island Anchor* “ordinary wear and tear” must be determined regarding “what risks the shipowner had agreed to bear [which] must depend on the true construction of the charter and the situation when the charter was entered into”. In this case, the TCP had an extension of up to 55 days: the loading of the cargo was completed after 22 days and the voyage to Wahanda was supposed to take 17 days. Thus, at the time of entering into the contract, it could be expected that the Vessel stayed in Wahanda for 15 days. Instead, the Vessel remained at the anchorage for 50 days, plus another 4 days at Wahanda’s port discharging the cargo.

37. Despite RESPONDENT’s obligations, the Vessel was redelivered to CLAIMANT on 30 June with the hull heavily fouled.

**B. CLAIMANT IS ENTITLED TO RECEIVE COMPENSATION FOR ALL THE COSTS ASSOCIATED WITH THE HULL CLEANING**

38. RESPONDENT breached its contractual obligation to perform hull cleaning. As a consequence, CLAIMANT had to face the costs, expenses and time arising out of the cleaning of the Vessel.

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38 Moot scenario, p. 27. After the need of cleaning was recognized by Respondent, several lump sums were offered to Claimant: USD 15,000 (8.6.2016) p. 29, “against original invoice” (9.6.2016) p. 28, cleaning at North Titan Port (23.6.2016) p. 35, USD 30,000 (30.6.2016) p. 43.

39 Moot Scenario, Procedural Order no.2.

40 Moot scenario, p. 5.


42 Moot scenario, Procedural Order no.2.

43 Moot scenario, p. 52.
RESPONDENT has now the obligation to place CLAIMANT in the same position it would have been had Omega not breached its obligation.

39. RESPONDENT offered several lump sums as a substitution to its obligation. These sums were fairly rejected by CLAIMANT, who did not have the contractual obligation to accept them. The obligation of RESPONDENT was to carry out the cleaning in consultation with CLAIMANT, since the cleaning have to be performed in accordance to the paint manufacturers’ recommended guidelines. According to clause 83 (d), cleaning shall be carried out prior to redelivery and if and only “if Charterers are prevented from carrying out the cleaning, the parties shall [...] agree a lump sum payment in full and final settlement of cleaning costs and expenses arising as a result or in connection with the need of cleaning”.

40. RESPONDENT was not prevented from carrying out the cleaning, and even if it is considered that it was not possible due to the detention, RESPONDENT was given free pratique on 26 June 2016 and the Vessel was redelivered on 30 June 2016. Thus, RESPONDENT could have fulfilled its obligation in the remaining four days.

41. For all the above-mentioned reasons, RESPONDENT should be held responsible for the following payments according to clause 83 of the TCP: the hull cleaning cost (USD 41,000.00) and the necessary voyage to South Island (USD 55,567.42) to perform it.

VII. RESPONDENT HAS THE OBLIGATION TO PAY THE COSTS DERIVED FROM LATE REDELIVERY

42. RESPONDENT had the obligation to redeliver the Vessel in time, as this has not happened, CLAIMANT has missed the laycan of his next fixture with Champion Chartering Corp suffering several losses.

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44 Moot scenario, p. 28, 29 and 39.
45 Moot scenario, p. 28.
46 clause 83 TCP.
47 Special Circular no.3 - 24 June 2013 of BIMCO.
48 Moot scenario, p. 16.
43. Thus, Respondent should be held liable for the costs arising out of the late redelivery since (A) Respondent breached its obligation to redelivery in a timely manner. Consequently, (B) Claimant is entitled to damages for the loss of the next TCP.

A. RESPONDENT BREACHED ITS OBLIGATION TO REDELIVERY IN A TIMELY MANNER

45. The Tribunal must deem that Respondent is liable for not complying with its obligation to redeliver the Vessel to the Claimant in a timely manner as (1) Respondent must have avoided remaining in an infected area, (2) Claimant never have its permission to enter infected areas, and (3) alternatively, Zika clause applies since there is an implied term regarding Ebola virus.

1. RESPONDENT must have avoided remaining in an infected area

46. The itinerary of the Vessel as well as the nomination of loading and destination/discharging ports are determined by Respondent as the Charterer in the case at hand. On 18 April 2016, it was published by West Coast Daily Echo that an outbreak of Ebola had been detected in West Coast. An obligation of the Charterer (Respondent) is to leave the port in case of danger, when leaving the port can avoid the danger, whether or not loading is completed. Despite this, Respondent decided to complete loading operations and sailed for Wahanda on 20 April 2016, two days after the Ebola outbreak was announced and widely known.

47. Port State Control authorities worldwide carry out the inspection ships to verify that international regulations and standards are met. In Wahanda, the Tokyo MoU is applicable. In this vein, Decree No. 38 of the General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China clearly notes in its Article 9 (3) that in the event that any ship is carrying people who have or are suspected to have contracted quarantinable infectious diseases, anchorage quarantine shall be implemented by the inspection and quarantine authorities. Thus,

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51 Moot scenario, Procedural Order no.2.
53 Moot Scenario, p. 66.
54 Procedural Order, no.2.
55 International Maritime Organization, Port State Control.
56 Memorandum of Understanding on Port State Control in the Asia Pacific Region.
there was no doubt that the Vessel would be subject to detention in light of Respondent’s decision to sail to Wahanda.

48. The application of this decree should pose no doubt as the detention by the Port State Authority of Wahanda is a matter of Public Policy. Public Policy dispositions are mandatory rules, this is, the autonomy of the parties cannot override them. Conversely, the Law of Hong Kong overrides the TCP and the NYPE.

49. In conclusion, Respondent should have left West Coast as soon as he had notice of the Ebola outbreak. Moreover, Respondent should have known that by sailing from an infected area was going to be an impediment to berth at destination Port, since, as mentioned, inspection and securing the ships arriving to a port is one of the mission of Port State Control. Thus, Respondent is liable for the losses derived from the quarantine imposed over the Vessel.

2. Claimant never gave its permission to enter infected areas

50. Clause 44 of the TCP allocates responsibility to Owner (Claimant) for any delay in quarantine arising from the Master, Officers, or crew having communication with the shore or any infected area without the consent of Charterers or their agents.

51. For clause 44 to be applicable, two requirements have to be met: (a) an area has to be considered infected, and either (b) Master, Officers or crew have to communicate with the shore without permission. In other words, there must be a restriction imposed by the Charterer (Respondent) and either the Master, Officers or crew have to infringe that rule.

52. Such a restriction did not exist when the Vessel sailed to Wahanda on 20 April 2016. The curfew on West Coast was not established until 21 April 2016. Thus, it was impossible for the crew to anticipate that they should have asked the Charterer (Respondent) for permission before that date.

58. Moot scenario, Procedural Order no.2.
59. See §46.
60. International Maritime Organization, Port State Control.
61. Moot scenario, p. 22.
53. Conversely, clause 17 states that in the event of detention by Port State control for Vessel deficiencies or detention by average accidents to the Vessel or cargo or deficiency of men, the Vessel will be off hire. However, it clearly establishes that this will not be the case when detention is caused by events for which the Charterer (RESPONDENT) is responsible, as it is in the present case.62

54. Nonetheless, if the Tribunal considered that RESPONDENT is not responsible, clause 17 is neither applicable since there were no Vessel deficiencies, average accidents, nor deficiency of men.

55. First, regarding Vessel deficiencies, clause 17 is not applicable because efficient working of the Vessel must be understood as physical working derived from the physical conditions of the ship. Since the physical condition of the Vessel was optimum at the time of the detention, this provision is not applicable.63

56. Secondly, an average accident is that which causes a damage and is of fortuitous occurrence.64 As previously mentioned, RESPONDENT knew when sailing to Wahanda that the Port Authorities were likely to detain the Vessel and yet RESPONDENT decided to continue the voyage without taking any preventive measure. Thus, this is not a force majeure or fortuitous occurrence.

57. Thirdly, there was not default nor deficiency of men. A default of men only occurs if the crew refuses to perform their duties or deliberately withhold their services.65 This is not our case as the crew never refused to perform their duties. On the other hand, there is deficiency of men when a full complement of officers and crew are unable to work.66 This may also not be found in our case as only the cook and one of the motormen had a cold.67 The rest of the crew was perfectly available to work.

3. Alternatively, Zika clause applies since there is an implied term regarding Ebola virus

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62 See §§46-49.
63 Puerto Rico ports authority v M/V Manhattan Prince. et. al. 897 F.2d 1 (1st Cir. 1990).
64 Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (the “Saldanha”) [2010] EWHC 1340.
67 Moot scenario, p. 24.
58. As previously noted, the Port State control detained the Vessel on 7 May at the anchorage of Wahanda because the origin port was West Coast Port, an area affected by the Ebola Virus.  

59. According to clause 122 of the TCP, “any direct related costs, risks expenses or liability arising out of the Vessel visiting or having visited an affected area will be at Charterer’s account and the Vessel shall remain on hire throughout”.

60. Clause 122 was added intentionally by the parties to assign responsibility and accountability in the event that the Vessel had any contact with an affected area. There is an implied term in the TCP regarding Ebola, since if the parties had known at the time of signing the TCP that Ebola could outbreak they would have included it in writing. The parties by no means can be expected to include all future unpredictable circumstances. According to the officious bystander test posed by MacKinnon LJ in Southern Foundries: "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'”

61. A comparative chart is attached below to better explain the rationale behind this argument. In 2016, Zika virus outbreaks were common in Asia. Ebola’s outbreak had been, however, two years before, in 2014, and tended to outbreak in equatorial Africa.

62. It must also be noted that they are two different viruses, but with a very similar impact, especially in ports, since they are critical zones for the spread of any disease.

<table>
<thead>
<tr>
<th>COMPARATIVE CHART</th>
<th>ZIKA</th>
<th>EBOLA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Incubation period</strong></td>
<td>3-12 days</td>
<td>2-22 days</td>
</tr>
<tr>
<td><strong>Common Symptoms</strong></td>
<td>Fever</td>
<td>Fever</td>
</tr>
<tr>
<td></td>
<td>Headache</td>
<td>Headache</td>
</tr>
</tbody>
</table>

68 Moot scenario, p. 25.
69 [1940] AC 701.
<table>
<thead>
<tr>
<th>Muscle and joint pain</th>
<th>Muscle and joint pain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fatigue</td>
<td>Fatigue</td>
</tr>
<tr>
<td><strong>Different symptoms</strong></td>
<td><strong>Skin rash</strong></td>
</tr>
<tr>
<td></td>
<td>Abdominal pain, diarrhea</td>
</tr>
</tbody>
</table>

Source: World Health Organization.\(^70\)

63. The World Health Organization ("WHO") has considered Ebola and Zika to pose the same threat level. Thus, given that these viruses and their respective treatments are similar, the consequences of clause 122 of the TCP shall be applicable to them both.

**B. CLAIMANT IS ENTITLED TO DAMAGES FOR THE LOSS OF THE NEXT TCP**

64. Due to **RESPONDENT**’s breach of contract, **CLAIMANT** is entitled to be compensated for the damages since (1) the delay suffered due to the breach does not lay within a reasonable time; (2) the damages were foreseeable, known and contemplated by **RESPONDENT**. Furthermore, (3) even if the Tribunal considered it necessary to carry out the implicit allocation of risks test, **CLAIMANT** is still entitled to damages paid by **RESPONDENT**.

1. **The delay suffered due to the breach does not lay within a reasonable time**

65. **RESPONDENT** should have redelivered the Vessel by 21 May 2016, when the time stipulated in the TCP ended\(^71\). Instead, the Vessel was redelivered the 30 June 2016, uncleaned,\(^72\) due to this, **CLAIMANT** lost the 4 years’ subsequent fixture.

66. In the present case, the charter was made for a fixed period of 50 -55 days, as this period does not qualify by the word “about”, **CLAIMANT** could and, in fact, has required **RESPONDENT** to redeliver the ship on a particular day.\(^73\) As this has not happened, it has incurred in a breach.

67. Although it may be true that charterers are allowed, in some occasions, a reasonable margin in the Vessel’s redelivery, nevertheless, the extent of that tolerance will depend on the circumstances of the case and it is likely to be influenced primarily by the length if the basic charter period. In *The

\(^{70}\) Symptoms as defined by World Health Organization.


\(^{72}\) Moot scenario, p. 68.

Dione,74 the time charter party stipulated a period of 6 months and 20 days and London arbitrators considered that an overlap of 8.4 days was reasonable. However, RESPONDENT’s delay in the Vessels’ redelivery is far beyond a reasonable amount of time since the time stipulated in the TCP was of 50 - 55 days and the delay was of 40 days, a quantity of time which entails 80% over the total amount of hire days.

2. The damages were foreseeable, known and contemplated by RESPONDENT

68. As stated above, RESPONDENT has breached the TCP terms by redelivering the Vessel late and uncleaned and, under English Law, in case of a breach of the contract by one of the parties, the aggrieved party has, among other remedies, a right to damages.75

69. As a matter of fact, the breaching party is not obliged to compensate for every damage, but those foreseeable.

70. To this regard, in the case at hand the damages were foreseeable as, (i) the loss of the next fixture was regarded as a serious possibility; and (ii) RESPONDENT was aware of the special circumstances surrounding the case.

   i. The loss of the next fixture was regarded as a serious possibility

72. CLAIMANT, as the damaged party, is entitled to be placed, so far as it is possible, in the position as if the contract had been correctly performed.76 According to this, the starting point of damages are losses which should have been in contemplation of the parties77 at the time they signed the agreement; either because the losses were “not unlikely to result” according to “the usual course of things” or because the breaching party was aware of the special circumstances.

73. As noted by Burrows: “There is a single contract test of remoteness which lays down that losses are too remote if, at the time the contract was made, the defendant did not contemplate and could not

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76 Robinson v Harman. [1848] 1 Ex Rep 850
reasonably have contemplated that type of loss as a serious possibility”.\(^78\) Thus, CLAIMANT is entitled to the damages which arise from the loss of the next fixture, as they are not too remote to RESPONDENT’s breach. Clearly, RESPONDENT was aware of the consequences of a late redelivery, since any businessman related with the Maritime Industry will agree that the probable loss arising from the late delivery of the Vessel would include missing dates for a subsequent fixture.\(^79\)

74. Moreover, as noted by Lord Reid in *The Heron II*,\(^80\) the loss on the new fixture fell within the first rule in *Hadley v Baxendale* as it arises “naturally, according to the usual course of things, from such breach of contract itself”. This is due to the fact that the damage was "of a kind which the [charterer], when he made the contract, ought to have realized was not unlikely to result from a breach of contract [by delay in redelivery]."

75. RESPONDENT cannot sustain that the lucrative character of the second TCP with Champion makes the loss not recoverable, because even when it is not possible to contemplate the extent of a foreseeable type of loss, this fact does not take it out of the field of recoverable loss.\(^81\)

ii. RESPONDENT was aware of the special circumstances surrounding the case.

76. According to the foreseeability rule established in *Hadley v Baxendale*,\(^82\) RESPONDENT is also liable for the consequential damages when “it is shown specifically that the defendant had reason to know the circumstances responsible for the special damage and foresee the injury”. According to this, if the foreseeability depends on the knowledge of the parties.

77. In the case at hand, there was not only an “ordinary” knowledge of RESPONDENT as it has been stated above, but special knowledge because of the relationship between RESPONDENT, its Broker and the Next Charterer.

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\(^{79}\) Transfield Shipping Inc v Mercator Shipping Inc [2008].

\(^{80}\) C Czarnikow Ltd v Koufos or *The Heron II* [1967] UKHL 4.

\(^{81}\) Jackson v Royal Bank of Scotland [2005] UKHL 3, *Transworld Oil Ltd v North Bay Shipping Corp* (The Rio Claro) [1987].

78. First, it was of public knowledge that when Panther bought the Vessel, they were looking for a fixture of 3 to 5 years.83

79. Secondly, it should be taken into account that Clark Kent, RESPONDENT’s broker, is also the agent of Champion Chartering Corp, and he closed a contract on 15 June 2016 for a period of 4 years84 between Fairwind and CLAIMANT, knowing the Vessel’s situation.

80. Additionally, the fact that RESPONDENT knew about the breach in which they were incurring by not redelivering the Vessel in a proper timely condition, poses no doubt as CLAIMANT brought it to the RESPONDENT’s attention on 18 June. CLAIMANT reserved its right to damages evidencing that “Owners reserve their rights to revert in the due course with their claim for costs/time/expenses... including any underperformance/under consumption claim that may arise from the next time charter due to the Vessel sailing dirty”.85 The lack of answer from RESPONDENT added to the previous knowledge of Clark Kent of the following contract result in the obvious consciousness of RESPONDENT about the existence and extension of the Next Fixture.

81. RESPONDENT was aware of these special circumstances and it should be held responsible for the damages caused to CLAIMANT entirely.

3. CLAIMANT is entitled to damages paid by RESPONDENT even if the implicit allocation of risk test was carried out

82. Since the damage suffered by CLAIMANT was completely foreseeable, in this case it is not necessary to go beyond the facts or the consideration of foreseeability. Thus, a contemplation test of the allocation of risks should not be made.

83. Nevertheless, if this tribunal considers fit to conduct an allocation of risks the same conclusion regarding RESPONDENT’s liability would be reached. To this regard, a further question would have to be answered: Had any of the parties assumed the responsibility of the events?

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83 Moot scenario, p. 1.
84 Moot scenario, p. 33.
85 Moot scenario, p. 34.
84. On the one hand, an implicit allocation of risks would lead us to construe the will of the parties when the contract was made. But, as McGregor states: “How are we to tell what subjectively the contracting parties were thinking about assumption of responsibility? When contracting, assumption of responsibility was probably not in their minds at all”. He continues by stating that an analysis of the facts of the case is a more certain solution and the question of whether that type of loss in question is a difficult and uncertain process which may lead to an unjust decision, since it is a process full of difficulty, uncertainty and impracticality.

85. Nevertheless, in the case that the Tribunal finds that the will of the parties can be construed, Claimant sustains that if the intention of the parties has to be taken into account, they were entirely at liberty to insert an express term excluding consequential loss if they would have wanted to do so. As they did not, Respondent should be held responsible for it.

86. On the other hand, a fair allocation of risk by the Tribunal must also not take place, as the application of this modern remoteness test is very limited. The test was restrictively applied in *The Achilleas*, where due to the special circumstances, as market fluctuations, some of the members of the House of Lords decided to introduce a further analysis of this rule. However, other members of the House of Lords stood by the traditional approach, only analysing the facts and the foreseeability of the damage. In later cases, when the rule of remoteness is enough to determine the damage, it has not been applied.

87. As a conclusion and according to the facts of the case, as it was stated by Chitty: “It is better to have a simple rule that the party in breach is liable for all losses that are sufficiently likely to occur in the usual case, or whose likelihood has been brought home to him when the contract was made, unless he has validly or restricted his liability”.

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89 Lord Hoffman, Lord Hope and Lord Walker.
90 Lord Rodger and Baroness Hale.
91 *Sylvia Shipping Co Ltd v Progress Bulk Carriers* [2010].
88. Therefore, as Respondent’s obligation to redeliver the Vessel timely and in a proper condition has not been accomplished, Claimant has missed the laycan of his next fixture with Champion Chartering Corp, which was a foreseeable damage.

89. Claimant has suffered the loss of a 4 years contract - 1460 days, inclot USD 10,500 per day - and it should be compensated for the full loss of the contract, which reach the quantity of USD 15,330,000.

90. Alternatively, Claimant should be compensated for the difference of the fixed 2 years of contract and the contract Claimant has signed with Fairwind [55 days (USD 11,000/day)] in compliance with his duty to mitigate damages, reaching the quantity of USD 7,611,500.

DEFENSE TO THE COUNTERCLAIM

VII. TRIBUNAL SHOULD NOT CONSIDER THAT THE RESPONDENT IS ENTITLED TO THE CARGO CLAIM

A. THE LOSS OF THE CARGO FALLS BEYOND THE SCOPE OF THE ARBITRATION AGREEMENT

91. Claimant did not agree on submitting claims connected to third parties in the arbitration agreement contained in clause 80 of the TCP. It is clear from the wording of the clause embedded in the TCP that the dispute-matter covers disputes arising between Owner and Charterer. Since the Receiver does not belong to the contractual relationship existing at the time because it has not been included or mentioned in the TCP, disputes included therein are exclusively those that arose between Claimant and Respondent.

92. According to the general international arbitration practice, in order to join a third party to an arbitration agreement, a specific agreement whereby the third party was to be given a right to arbitrate is required. It is clear that the Receiver is not part of the arbitration clause contained in

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92 Moot scenario, p. 17.
93 Pryles. M & Waincymer. J, Multiple Claims in Arbitrations Between the Same Parties.
94 Art. II (1) of the NYC.
the TCP, but still **Respondent** is insisting on seeking damages based on a third contract in which **Claimant** neither participated nor even was aware of its existence. Thus, it seems that **Respondent** seeks to introduce in these arbitral proceedings the figure of joinder in order to support its position regarding the cargo claim brought by the Receiver against it.

93. However, according to the voluntary principle, also known as the need for party consent, the possibility of joining this procedure may not be possible. The basic ground in order to reject the possibility of joining new parties in this arbitration lies in the need of consent of all the Parties involved in the proceeding. Thus, in case the Receiver is added as party, both **Claimant** and **Respondent** shall agree on that and therefore, give their consent. The previous statement is intended to mean that the participation in the arbitration agreement requires universal party consent and not only **Respondent**’s consent.

94. In case the Tribunal considers the Receiver as third party to this arbitral proceeding, there might be a violation of the voluntary principle since the will of the parties when drafting their arbitration clause did not include other parties than **Claimant** and **Respondent**. In addition, the award may not be enforceable under either the NY Convention or national laws as the enforcement can be sought only against a true party. According to Lord Neuberger, this overall chain might be described as “melancholy” and thus, **Respondent** seeks to avoid this fatal scenario by discussing the damage consisting on the loss of the cargo in the relevant forum.

**B. THE ALLEGED CARGO CLAIM MAY BE DISMISSED IN FULL AS THE ICA STATES THE OBLIGATION OF PAYMENT BEFORE APPORTIONING LIABILITIES**

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95 Moot scenario, p. 17.
97 Andrews, N. Arbitration and the expanding circle of consenting parties: joinder of additional parties and consolation of related claims.
98 Moot scenario, p. 17.
99 According to the award on *Dallah Real Estate & Tourism holding Co v Pakistan*, the Supreme Court of the United Kingdom held that a Paris award could not be recognised in England, under the New York Convention (1958), because the French Arbitral Tribunal had incorrectly determined that the Pakistan Government was a party to the relevant arbitration agreement.
100 Lord Neuberger, 2015, *Arbitration and the Rule of Law*
95. A condition that has to be fulfilled for the apportionment to apply is that the cargo claims which have occurred under the TCP have to be “properly settled or compromised and paid” by one or the other of the parties.

96. Both the decision on “Cargo Explorer” and the “Gallant II” support the conclusion that the original underlying cargo claim must be paid and there is no cause of action under the ICA and no right to arrest or attach the other party's Vessel or assets to obtain security before the original claim has been settled or compromised and paid. The conclusion that can be drawn from “Cargo Explorer” is that it is only after there has been payment or settlement of a cargo claim that the ICA comes into operation and that “settlement” as it is written in the clause refers to actual payment or compromise of the claim. This is supported by the fact that ex gratia settlements are excluded from the provisions of the ICA.

97. The argument of liability is postponed until the claim has been properly disposed of, according the general principles of indemnity. The parties that made the ICA in the first place intended that there had to be payment or compromise of the cargo claim before any liability under the ICA arises and this conclusion is strongly supported by the use of the word “properly” in the clause in question which is an indication that the claim has to be finally disposed of before the ICA becomes operational. The effect of this is that no cause of action or right to attach/arrest assets lies under the ICA until the cargo claim has been paid.

98. The conclusions from “Cargo Explorer” were upheld in the “Gallant II” and it was stated that the obligation to indemnify only arises once the underlying claims have been met. Subsequently this means that a party could not claim for indemnity neither for security in that respect until the cargo claim has been settled. This means that the possibility to obtain security in some other property that belongs to the party in order to obtain security for a claim is conditioned by the fact of whether the underlying cargo claim has been paid or compromised in any way by the security-seeking party.
C. ALTERNATIVELY, IN CASE THE TRIBUNAL DOES ESTIMATE THE APPLICATION OF THE ICA DESPITE THE PAYMENT OF THE CARGO HAS NOT TAKEN PLACE, COGSA RULES APPLY TO THIS CARGO CLAIM

1. COGSA Rules 1936 apply as they are incorporated in the Paramount clause of the Bill of Lading

   99. From the General Paramount clause included in the B/L, it is clear that the law applicable is the Hague Rules as enacted in the country of shipment. The country of shipment is Challaland, whose laws resemble to the Laws of United States. Thus, the loss of the cargo shall be held according to the Carriage of Goods by Sea Act 1936 (hereinafter, COGSA Rules 1936).

   100. The provisions of the COGSA Rules 1936 differ from the ICA Rules, particularly COGSA establishes a limitation to damage of the goods and a limitation of actions to one year, whereas under ICA Rules there is no damage limitation and the actions for the apportionment could be bring within two years. As the provisions contained in the COGSA Rules 1963 are mandatory, therefore, RESPONDENT may benefit from the advantages contained therein. If the Tribunal finds that the ICA Rules remain applicable to the relationship existing between CLAIMANT and RESPONDENT, there would be an unfair enrichment held by RESPONDENT.

   101. As a result, mandatory rules of the COGSA Rules 1936 shall apply to both, the relationship existing between CLAIMANT and RESPONDENT, and that existing between the Receiver and RESPONDENT. In case different rules were to apply on the basis of different relationships, CLAIMANT would face some liabilities which are exonerated or at least limited according to the COGSA Rules 1936 provisions.

2. The cargo claim is time barred.

102. Once the application of the COGSA Rules 1936 to the loss of the cargo has been established, its Article 1304 (6) determines that “in the event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the

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101 Moot scenario, p. 48.
goods or the date when the goods should have been delivered”. To this regard, the expression “suit is brought” refers to the commencement of arbitration. However it did not take place until 17 December 2018, when the counterclaim was filed by RESPONDENT. As the Article 1304 (6) establishes, the date giving rise to the one-year time bar starts to run from the date of delivery which is 30 June 2016. As a result, by applying the one-year time bar contained in the COGSA Rules 1936, the action to claim damages had already expired. Particularly, the action shall have been brought before 30 June 2017 and as it did not happen, the claim remains extinguished.

D. IN CASE THE TRIBUNAL DOES NOT CONSIDER CARGO CLAIM AS TIME BARRED, CLAIMANT IS NOT RESPONSIBLE FOR THE LOSS OF THE CARGO

1. Nautical fault exemption shall apply to RESPONDENT in accordance with Article 1304 (2) (a) of the COGSA Rules 1936

103. Taking into account the application of the COGSA Rules 1936, Article 1304 (2) (a) determines that neither the carrier nor the ship are responsible for loss or damage due to acts or omissions of the master and crew during the voyage. Thus, the nautical fault exemption shall apply to the carrier (RESPONDENT) for the loss of the cargo, and RESPONDENT is thus not entitled to claim some liabilities for which it would be exonerated in a potential dispute with the Receiver.

104. Indeed, the cargo is considered to be in the custody of the carrier during all times from the receipt to the delivery of the goods. However, carrier is exculpated from liability due to nautical fault. In the case at hand, the error has been on the master and the crew -meaning any member such as pilot or other person performing work in the ship's service-, and not on the part of the carrier. Therefore, RESPONDENT cannot be held liable since the carrier cannot completely supervise and

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103 Article 1304 (2) (a): “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”.
104 SMC Chapter 13 Section 24.
overlook the navigation and managing of the Vessel. Consequently, CLAIMANT shall not become liable for some damages for which RESPONDENT will not, in any case, answer.

2. **Alternatively, in case the Tribunal does not consider the application of the nautical fault exemption, CLAIMANT shall not answer for the total loss of the cargo**

105. In the unlikely event that this Tribunal does not accept the application of the nautical fault exemption, Article 1304 (5) of the COGSA Rules 1936 determines that the carrier shall not become liable for the loss of the cargo in an amount exceeding USD 500 per package.\(^{106}\)

106. The TCP demonstrates a clear intention between de Receiver and the RESPONDENT to apply limitation under the COGSA Rules 1936. Hence, it is not reasonable that RESPONDENT now claims an amount of damages that it would not be obliged to pay.

107. Particularly, this limitation of liability amounts USD 200,000, which is explained as follows: 2,000 of damaged tonnes, in bags of 5 tonnes, resulting in 400 packages; this 400 packages, with the application of USD 500 of limitation of liability per package, results in USD 200,000.

108. Thus, RESPONDENT is not entitled to claim USD 100 million in lieu of the loss of the cargo due to the fact that, as explained above, CLAIMANT shall not become liable for all the damages, given that RESPONDENT will, in case it is found liable, be limited.

**VIII. PRAYER FOR RELIEF**

For the reasons set out above, CLAIMANT respectfully requests the Tribunal to: a) **DECLARE** that this Tribunal has the power to decide on the contractual issues of this case; b) **FIND** that there is a breach of contract and RESPONDENT is liable for damages caused to CLAIMANT, reaching the quantity of USD 15,426,567.42, and c) **FIND** that the sum requested by RESPONDENT, including the claim damages and the off-hire period, is not payable to RESPONDENT.

Dated on 21 April 2019, in Rotterdam.

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\(^{106}\) Article 1304 (5) of the COGSA Rules 1936: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, (...)"