Between

Panther Shipping Inc

... Claimant

and

Omega Chartering Ltd

... Respondent

TEAM 6
CLAIMANT’S MEMORANDUM

Fabian Chiang Mun Chun | Marcus Chiang Mun Leong | Shawn Lim Zi Xuan
Juliana Ho Shing Chian | Tan Zhi Rui

20th ANNUAL INTERNATIONAL MARITIME LAW ARBITRATION MOOT 2019
In the matter of an Arbitration under the LMAA Arbitration Rules
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I. BACKGROUND FACTS

A. The Parties

1. The Claimant is Panther Shipping Inc, registered in Liberia. The Respondent is Omega Chartering Ltd, registered in Liechtenstein. The Claimant is the registered shipowner of the *MV Thanos Quest*, a multi-purpose vessel flagged in Antigua and Barbuda (the “Vessel”).

B. The Charterparty

2. By way of a trip time charterparty, the Vessel was fixed for the carriage of a cargo of bulk harmless products from West Coast to ports in the Wahanda range, for a duration of about 50 to 55 days (the “Charterparty”).

3. The relevant terms of the Charterparty are contained in three separate documents, in descending order of precedence: - (a) the fixture recap set out in the email dated 18.03.2016 (“the “Fixture Recap”); (b) the Charterer’s rider clauses (the “Omega Rider Clauses”); and (c) the NYPE 2015. The relevant clauses are set out below: -

   (i) The redelivery clause in the Fixture Recap which states “REDEL DLOSP ISP WAHANDA RANGE, PORT IN CHTRRS OPTION, ATDNSHINC”.

   (ii) Clause 44 of the Omega Rider Clauses which puts the vessel off-hire for “any delay in quarantine arising from the Master, Officers, or crew having communication with the shore or any infected area without the written consent of Charterers or their Agents”.

   (iii) Clause 53 of the Omega Rider Clauses which provides that liability for cargo-claims “shall be apportioned as specified by the Inter-Club New York Produce Exchange Agreement ... as amended”.

   (iv) Clause 83 of the Omega Rider Clauses which incorporates the BIMCO Hull Fouling Clause for Time-Charter Parties.
(v) Clause 17 of the NYPE 2015 which allows the Respondent to treat the vessel as off-hire for any loss of time from *inter alia*, “detention by Port State control or other competent authority for Vessel deficiencies” or “any other similar cause preventing the full working of the Vessel”.

C. **Performance of the Charterparty**

4. The Vessel was delivered on 29.03.2016 at West Coast, where on the Respondent’s orders the Vessel loaded a cargo of 1720 bags English breakfast tea of 5mt each. Loading was completed on 20.04.2016, whereupon the Vessel sailed for Wahanda.

5. The Vessel arrived at Wahanda on 07.05.2016, but was ordered to wait at the anchorage as the authorities suspected that the crew may be carrying Ebola. Thus, the vessel was only permitted to berth on 26.06.2016. Discharge was completed on 30.06.2016, whereupon the Respondent redelivered the Vessel.

6. As a result of the Respondent’s late redelivery, the Claimant lost its next fixture to Champion Chartering Corp (the “**Champion Fixture**”) fixed on 15.06.2016, which had a laycan from 22.06.2016 to 28.06.2016 for delivery at Wahanda and a daily hire rate of USD 10,500. This fixture was for two years, with an additional two years charterer’s option. To mitigate its losses, the Claimant entered into a replacement fixture with Fairwind International on 04.07.2016 (the “**Fairwind Fixture**”), which had a laycan from 04.07.2016 to 06.07.2016 for delivery at South Island at a daily hire rate of USD 11,000. This fixture was a trip of 50 to 55 days.

7. Further, due to the detention, the Vessel’s hull also became fouled. As the Wahanda Port Services purportedly did not allow for underwater cleaning at Wahanda, the Respondent asked the Claimant through their brokers on 09.06.2016 to arrange for hull-cleaning themselves and that the Respondent will pay a lump sum in return. However, the Claimant replied on the same day that they were unable to agree to a lump sum as there has been no underwater inspection to determine the extent of the fouling. As the fouling worsened, further email correspondence between the parties ensued, whereby the Respondent first offered to clean at North Titan or to pay a USD 20,000 lump sum (27.06.2016), which later increased to
USD 30,000 (30.06.2016). The Claimant instead suggested, on 29.06.2016, for cleaning at South Island, or for the Claimant to arrange for cleaning themselves at the Respondent’s expense. After discharge was completed at Wahanda on 30.06.2016, the Vessel sailed to South Island where the Vessel’s hull was cleaned from 02.07.2016 to 03.07.2016. In its Final Hire Statement, the Claimant billed the Respondent *inter alia* for hull cleaning costs (USD 41,000) and costs of the voyage to South Island in order to perform hull cleaning (USD 55,567.42), amounting to USD 96,567.42.

8. Meanwhile, on discharge at Wahanda on 27.06.2016, it was discovered that the cargo suffered wet damaged during ballasting operations during loading. As such, the cargo-receivers (“the Receivers”) made a claim against the Respondent. However, at the preliminary hearing on 07.03.2019, that claim still has not been settled or paid.

II. SUMMARY OF THE ISSUES

9. The issues before the Tribunal are as follows: -

   (i) Whether the Respondent is obliged to compensate the Claimant for USD 96,567.42 in relation to hull-cleaning.

   (ii) Whether the Claimant is entitled to USD 15,330,000 for the Respondent’s late redelivery of the Vessel, representing the loss of hire under the Champion Fixture calculated as 4 years at USD 10,500 per day.

   (iii) Whether the Vessel was off-hire during the period of the quarantine.

   (iv) Whether pursuant to the Inter-Club Agreement as amended in September 2011 (the “ICA”), the Claimant is liable to indemnify the Respondent for 100% of the claim brought against them by the Receivers (the “Cargo Claim”).
III. THE RESPONDENT MUST COMPENSATE THE CLAIMANT FOR LOSS AND DAMAGE FOR HULL-FOULING.

10. The Respondent is liable for loss and damage suffered by the Claimant for both (1) hull cleaning costs incurred of USD41,000.00 and (2) costs of the voyage from Wahanda to South Island in order to perform hull cleaning amounting to USD55,567.42.

IV. THE RESPONDENT HAS AN OBLIGATION TO CLEAN THE VESSEL AT ITS OWN COST, EXPENSE AND TIME UNDER CLAUSE 83, SINCE THE REQUIREMENTS UNDER CLAUSE 83 HAVE BEEN COMPLIED WITH.

A. Clause 83(a) is triggered.

11. Clause 83(a) of the Omega Rider Clauses states: “If, in accordance with Charterers’ orders, the Vessel remains at or shifts/sails within a place, anchorage and/or berth and/or port(s) for an aggregated period exceeding: A period of 30 days outside such zones”.

12. Clause 83(a) is triggered because the Vessel has remained at a non-tropical zone port, Wahanda\(^1\), for more than 30 days\(^2\) upon the Charterer’s orders.

B. The Respondent has an obligation to clean the vessel at its own cost, expense and time under Clause 83(c) because the condition precedent in Clause 83(c) is deemed to be fulfilled.

1. Clause 83(c) contains a condition precedent to the Charterer’s cleaning obligations.

13. A condition precedent is a specified event which is not certain to occur, and upon which the obligations of the parties to a contract are dependent on\(^3\).

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\(^1\) Procedural Order, para 2.
\(^2\) It arrived at Wahanda on 7\(^{th}\) May and left on 1\(^{st}\) July.
Clause 83(c) reads: “If, as a result of the inspection either party calls for cleaning of any of the underwater parts, such cleaning shall be undertaken by the Charterers.” On a true construction of Clause 83(c), the Respondent has an obligation to clean the vessel if a party calls for cleaning as a result of a Clause 83(b) inspection (the underlined phrase shall be referred to as the ‘Condition Precedent’).

2. **The Condition Precedent is fulfilled because the Respondent has prevented its occurrence, and it will thus be deemed to be fulfilled.**

The House of Lords in *Mackay v Dick*\(^4\) held that when one party prevents a condition precedent from occurring, the condition precedent will be deemed to be fulfilled. There, Lord Blackburn stated that:

"It would follow in point of law that ... by his own default he can now never be in a position to call upon the pursuers to take back the machine, on the ground that the test had not been satisfied, he must, as far as regards that, keep, and consequently pay for it."\(^5\)

Lord Watson\(^6\) agreed, holding that when a party has:

“been thwarted in the attempt to fulfil that condition by the neglect or refusal of the Appellant to furnish the means of applying the stipulated test; and their failure being due to his fault, ... they must be taken to have fulfilled the condition.”

The proposition in *Mackay v Dick* was considered and accepted by the English High Court in *Colley v Overseas Exporters*.\(^7\) The court agreed that it was evident from common sense that if the performance of a condition precedent by the plaintiff had been rendered impossible by the neglect or default of the defendant “it is equal to performance”\(^8\).

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\(^4\) *Mackay v Dick and another* (1881) 6 App Cas 251 (HL).
\(^5\) ibid 264 (Lord Blackburn).
\(^6\) ibid 270 (Lord Watson).
\(^7\) *Colley v Overseas Exporters* [1921] 3 KB 302.
\(^8\) Agreeing with *Hotham v The East India Co* (1787) 1 TR 638, 99 ER 1925.
18. On the facts, the Respondent has prevented or rendered impossible the Condition Precedent from being fulfilled because it refused to jointly arrange an inspection with the Claimant as required under Clause 83(b), in circumstances where it had no basis for refusing to do so.

19. The Respondent’s conduct constituted a failure to jointly-arrange an inspection. On 26 June⁹, the Claimant requested the Respondent to advise their intention regarding underwater inspection. The Respondent’s replied that pursuant to Clause 83(d), they were entitled to pay a lump sum in full and final settlement since they were prevented from cleaning by the Wahanda Port Authorities.¹⁰ As a result, the Respondent did not consent to an inspection, and the inspection could not possibly have been jointly-arranged.

20. The Respondent’s conduct constituted prevention of the Condition Precedent from occurring as they had no basis in insisting at the time that they could pay a lump sum in lieu of an inspection under Clause 83(b). This is due to the manner in which Clause 83 is structured – The right to pay a lump sum in lieu of cleaning under Clause 83(d) is only triggered if an inspection has been carried out in the first place under Clause 83(b). Since an inspection had yet to be carried out at the time of the Respondent’s insistence on paying a lump sum, the Respondent cannot therefore have relied on such a right in full and final settlement of its Clause 83 obligations.

21. The Respondent had therefore prevented the occurrence of the Condition Precedent. Applying the proposition from Mackay v Dick, the Condition Precedent will be deemed to be fulfilled. Thus, pursuant to Clause 83(c), the Respondent is obliged to undertake cleaning at its own cost, expense and time.

3. The Respondent failed to carry out cleaning under Clause 83(c).

22. Since the Respondent is obliged to undertake cleaning, and it has not at any point during performance of the Charterparty done so, it has breached Clause 83(c).

⁹ Moot Scenario, p 34.
¹⁰ Moot Scenario, p 43.
4. **The Respondent is liable for damages for breach of Clause 83(c).**

23. The Respondent is liable for damages as may fairly and reasonably be considered either arising naturally, and according to the usual course of things, from this breach of contract.\(^1\) The measure of damages is what will put an innocent party in the position as if the contract was performed.\(^2\) In the present case, that measure will be the costs and expenses incurred in cleaning since the Respondent is fully liable for these expenses.

C. **Alternatively, the Respondent is liable for the same amount in damages for breach of an implied term not to prevent the fulfilment of the Condition Precedent.**

1. **There is an implied term that neither party will wrongfully prevent the fulfilment of the Condition Precedent.**

24. The Tribunal should imply a term that neither party can rely on its own acts in defeating or preventing the fulfilment of the Condition Precedent (the underlined portion shall be referred to as the ‘Term’).

25. Such a term will be implied where it is necessary for business efficacy\(^3\) or where implication fulfils the officious bystander test\(^4\). The Term will also be implied where the prevention of the fulfilment of the contract constitutes a breach of duty owed to the plaintiff or is wrongful\(^5\).

a) It is necessary for business efficacy to imply the Term

26. Such a term is necessary for the working of Clause 83, otherwise the Respondent could altogether avoid its obligations under Clause 83(c) by indefinitely forestalling on jointly arranging an inspection. This

\(^{11}\) Hadley v Baxendale (1854) 9 Ex 341, 354-5 (Adelson B).

\(^{12}\) Robinson v Harman (1848) 1 Ex 850, 855 (Parke B); C. Czarnikow Ltd v Koufos (The “Heron II”) [1967] UKHL 4, [1969] 1 AC 350, 385-386 (Lord Reid).

\(^{13}\) Luxor (Eastbourne) Ltd (in liquidation) and others v Cooper [1941] 1 All ER 33 (HL) 52-53 (Lord Wright).

\(^{14}\) Bournemouth and Boscombe Athletic Football Club and Co Ltd v Manchester United Football Club Ltd [1980] Lexis Citation 1529.

\(^{15}\) Thompson v ASDA-MFI Group plc [1988] 2 All ER 722 (Ch) 741 (Scott J).
would deprive Clause 83 of any commercial effect. BIMCO further recognizes that under “Sub-clause b) … both parties should cooperate in arranging the inspection”.\(^{16}\) Necessity therefore demands that the Term be implied, to ensure neither party undermines the workability of Clause 83.

b) The Term fulfils the officious bystander test

27. Similarly, a bystander standing behind the shoulders of the parties at the time of contracting, while they were considering whether there was an implied term to this effect, would have remarked that this must certainly be the case.\(^{17}\) Without the Term, the obligations under Clause 83 will be rendered pointless.

2. The Respondent has breached the Term.

28. The Respondent has breached the implied term that neither party is to defeat the occurrence of the Condition Precedent. This is due to the Respondent’s conduct in refusing to jointly arrange an inspection under Clause 83(b) despite the Claimant’s calls to do so.

29. The Respondent has repeatedly asserted that it was entitled to pay a lump sum payment in full and final settlement of any liabilities as per Clause 83(d). As submitted above in section B.2, the Respondent could not have relied on Clause 83(d) as relieving it of jointly arranging an inspection, since rights under Clause 83(d) are predicated on Clause 83(b) being fulfilled.

30. Therefore, the Respondent has prevented the Condition Precedent from being fulfilled and breached the Term.\(^{18}\)


\(^{17}\) Bournemouth (n 14).

\(^{18}\) Thompson (n 15) 741 (Scott J).
3. **Breach of the Term sounds in damages.**

31. According to Viscount Simon LC in *Luxor (Eastbourne) Ltd v Cooper*\(^{19}\), the plaintiff’s normal remedy for breach of the implied term not to prevent fulfilment of a condition precedent would be damages\(^{20}\).

4. **The amount of damages is the cleaning costs and expenses incurred by the Claimant**

32. In awarding damages for breach of the Term, the English courts will examine various matters, such as the possibility that the condition might not have occurred, even if there had been no such breach.\(^{21}\) The Courts have awarded damages of an equivalent amount to the amount owed had the condition precedent been fulfilled.\(^{22}\)

33. The Tribunal should follow the English courts and award damages equivalent to the costs and expenses in cleaning the Vessel since this would be the amount the Respondent would have been liable for had the Condition Precedent been fulfilled. Had the Respondent co-operated in jointly arranging an inspection, cleaning of the Vessel would have occurred. The Claimant was at all times willing to inspect the vessel and would have consented to a joint inspection. Following such an inspection, the Claimant would in all likelihood have called for cleaning pursuant to Clause 83(c) given the heavy state of fouling of the Vessel. The photos taken showed that the vessel was heavily fouled both above and below the water line\(^{23}\) and the extent of the fouling is not disputed.\(^{24}\)

34. The Tribunal therefore should not make any discount on the full measure of damages to account for the possibility that the Condition Precedent may not have been fulfilled despite the Respondent’s co-operation. The Claimant is thus entitled to the full measure of costs and expenses it incurred in cleaning the Vessel.

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\(^{19}\) *Luxor* (n 13) 44 (Viscount Simon LC).

\(^{20}\) *Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd* [1949] 2 All ER 1014 (KB) 1017 (Devlin J).

\(^{21}\) *Treitel* (n 3) para 2.110; *Bournemouth* (n 14).

\(^{22}\) *George Moundreas & Co SA v Navimpex Centrala Navala* [1985] 2 Lloyd’s Rep 515 (Comm) 517 (Saville J).

\(^{23}\) Moot Scenario, p 43.

\(^{24}\) Procedural Order, para 5.
V. THE TRIBUNAL SHOULD AWARD DAMAGES FOR LOSS OF THE CHAMPION FIXTURE DUE TO LATE REDELIVERY.

35. The Tribunal should find that the Respondent is liable to pay the Claimant USD 15,330,000 for the loss of hire under the Champion Fixture, calculated as 4 years at USD 10,500 per day. The Respondent is liable for this loss because they failed to re-deliver the Vessel on time. This has been admitted\(^{25}\) by the Respondents. As a result, the Vessel missed the cancellation date of the Champion Fixture, causing Champion to cancel.\(^{26}\)

36. Moreover, the Claimant’s claim for the loss of the Champion Fixture is not too remote. First, such damages arise naturally from late redelivery. Alternatively, the Respondent possessed actual knowledge of special circumstances.

A. The Claimant should be put in the same position as if the Vessel had been redelivered on time.

37. Pursuant to the compensatory principle which underpins the assessment of contractual damages, a claimant should be put in as good a position as if the contract had been performed.\(^{27}\) In the present case, had the Charterparty been performed, the Claimant would not have lost the Champion Fixture. The Champion Fixture was cancelled because the Vessel was not at the port of delivery before the expiry of the laycan period. The Vessel could not reach the port of delivery under the Champion Fixture as the Respondent had re-delivered the Vessel late under the Charterparty. In the circumstances, the Respondent is liable to compensate the Claimant for the loss of hire from the cancelled Champion Fixture.

\(^{25}\) Moot Scenario, p 72.
\(^{26}\) Moot Scenario, p 67.
\(^{27}\) Robinson v Harman (n 12); The Heron II (n 12).
B. Damages stemming from the loss of the Champion Fixture are not too remote to be claimed.

1. The loss of the Champion Fixture can be claimed under the first limb of the Hadley v Baxendale rule

   a) The orthodox Hadley v Baxendale rule should be applied

   38. The Claimant’s claim is not too remote. Pursuant to the first limb of the rule in Hadley v Baxendale, losses which naturally flow from the breach in the ordinary course of events are recoverable as damages. In this regard, a contracting party will be liable for losses however unforeseeably large as long as loss of that type falls within one of the rules in Hadley v Baxendale. Accordingly, if the losses claimed fall within the first limb of Hadley v Baxendale, it is immaterial that the quantum of loss was much higher than could have been expected. The type of loss suffered in the present case is the loss that shipowners suffer when a subsequent fixture is cancelled due to late redelivery. It has been observed in The Achilleas that the loss on a subsequent fixture was a "not unlikely" result of late redelivery. This is a type of loss which the charterer ought to have realised when he made the contract was not unlikely to result from a late redelivery. In a market where owners expect to keep their ships constantly on hire, late delivery would generally result in missing the laycan period of a subsequent fixture.

   b) The Achilleas is distinguishable

   39. The Tribunal should not apply The Achilleas as a general proposition that damages from the loss of a following fixture cannot be claimed. In fact, the present case can be distinguished from The Achilleas. The court in The Achilleas disallowed the shipowner’s claim for the loss of profit under a subsequent fixture due to late redelivery for two reasons which can be distinguished from the present case. First, the court considered that such loss was too remote because the charterers did not assume liability for the

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28 Hadley v Baxendale (n 11), 354-5 (Adelson B); The Heron II (n 12) 385-6 (Lord Reid).
31 ibid, [30] (Lord Hope).
particular loss. On a close reading of the case, this assumption of responsibility test applies only in "unusual cases". Second, the Court disallowed the claim under the first limb of *Hadley v Baxendale* on the basis that such losses were not a type of loss which would result in the ordinary course of late redelivery due to volatile market activity.

a. *The assumption of responsibility test is only applied in unusual cases.*

40. The assumption of responsibility element introduced in *The Achilleas* with regard to the first limb of *Hadley v Baxendale* should not be applied in the current case because it is not an unusual case. The Court in *The Achilleas* reasoned that it was an unusual case because there was a general understanding of the shipping market on recoverable losses and because the loss of a subsequent fixture was completely unquantifiable at the time of contracting. The two circumstances in *The Achilleas* which pushed the Court to characterize it as an unusual case can be distinguished.

41. First, it was stated in *The Achilleas* that the new test should be applied in unusual cases involving "particular types of contracts arising out of general expectations in certain markets". In *The Achilleas*, the tribunal found a general expectation in the shipping industry that liability for late redelivery was restricted to the difference between the market rate and the charter rate for the overrun period. Hence, the court relied upon this finding to characterize the case unusual. It is open for this Tribunal to find that this general market understanding does not apply in the current case as recognised in *The Sylvia*. First, as highlighted by the Singapore Court of Appeal in *MFM Restaurants* the finding in *The Achilleas* was based on evidence from the shipping industry and their lawyers "as it existed at that particular point in time". Second, the opinion and expectations of shipping lawyers would likely not have been unanimous.

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32 *ibid*, [9] (Lord Hoffmann).
33 *ibid*, [97] (Lord Hoffmann).
on this issue. Third, the finding of general market expectations by the arbitrators in *The Achilleas* appears arguably to be based on "no more than" the absence of any authority for claims of loss of subsequent fixture. However as highlighted by Baroness Hale in *The Achilleas* the fact that no one has made such a claim before "does not mean that it is unfounded".

Second, the assumption of responsibility test should not apply in the current case because the loss is not unquantifiable. The court in *The Achilleas* considered that it would be appropriate to apply an assumption of responsibility requirement because the charterers would be unaware of the length and terms of subsequent fixtures. This unusual circumstance is absent here. The facts here are more akin to *The Sylvia*, where the Court allowed a claim for the loss of a sub-fixture. A sub-fixture was of a more defined length since it "can never be for a longer period than the time charter itself." In the present case, the Claimant clearly advertised on its Chatter Account that it wished "to fix [its vessel] for 3-5 years". This illustrates a quantifiable charterparty length that the Claimant intended to charter its vessel as of 1 March 2016, a fact which the Respondent were aware of. Since an advertisement is a clear invitation to treat, the advertisement is reflective of the Claimant's intentions regarding the period of time it would be willing to charter the Vessel out for.

Moreover, subsequent cases have construed *The Achilleas* narrowly by stating that the Court had no intention of laying down a completely new remoteness test. The overall approach by courts following *The Achilleas* is that of confining the assumption of responsibility test to unusual cases. In fact, there appears to be no subsequent cases where damages have been cut down or out by applying the assumption of responsibility test. Significantly, in *The Sylvia*, one of the only subsequent time charterparty cases

37 Foxton (n 36) 476.
38 Achilleas (n 30), [90] (Baroness Hale).
41 McGregor (n 40) 200.
concerning loss of subsequent fixtures, it was held that the *Hadley v Baxendale* “orthodox approach” remains the "standard rule" regarding remoteness, even in shipping cases. This was also recognized in *The Achilleas* itself by the leading proponent of the assumption of responsibility test, Lord Hoffmann, who acknowledged that "in the great majority of cases" the orthodox approach from *Hadley v Baxendale* applies.

**b. The loss in the current case did not stem from volatile market conditions**

44. The court in *The Achilleas* also reached its decision on the basis of the orthodox *Hadley v Baxendale* test by relying on the unusual market volatility in that case. There is no such unusual market volatility here. Baroness Hale held that it "was only because of the unusual volatility of the market" that the subsequent charterparty had to be renegotiated at a lower rate, a view echoed by Lord Rodgers who stated that the loss stemmed from the "unusual occurrence" of the market's volatility. Neither party would reasonably contemplate that in the ordinary course of things, a late redelivery of nine days would cause the owners the loss but for the extremely volatile market conditions.

45. In *The Achilleas*, the market rate when parties first negotiated the subsequent fixture had doubled since the start of the ongoing charterparty, from $16,750 to $39,500 per day. However, during the nine-day overrun period, it plunged to $31,500 per day. Neither party would reasonably contemplate that in the ordinary course of things, a late redelivery of nine days would cause the owners such loss. By contrast, there is no indication that there exists a similar volatility in the market in the current case. Hence the loss of the profits from the Champion Fixture is not too remote to be recovered.

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42 *Sylvia* (n 34) [48] (Hamblen J).
43 *Achilleas* (n 30) [90] (Baroness Hale).
44 *ibid*, [53] (Lord Rodger); *MFM* (n 35) [84] (Phang JA).
45 *Custom and Practice or Foreseeability* (n 29) 50.
2. The loss of the Champion Fixture can be claimed under the second limb of the Hadley v Baxendale rule

46. Alternatively, even if this Tribunal does not allow the claim for loss of subsequent fixture under the first limb of Hadley v Baxendale, it should be allowed under the second limb because the Respondent possesses special knowledge. The special circumstances under which the charterparty was originally made had been communicated to the Respondent. This consists of the knowledge that the Claimant had intended from the onset to hire its newly acquired vessel for the next three to five years in the time charterparty market.

47. Thereafter, if the contracting parties do not make express provision in their contract for what is to happen in the event of a breach resulting in extraordinary damages, the contract breaker is taken to be liable for such damage. Since the charterparty does not contain any limitation on this particular type of loss, the Claimant’s claim should be allowed.

C. THE RELEVANT PERIOD OF THE CHAMPION FIXTURE FOR DAMAGE CALCULATION IS 4 YEARS

48. The Tribunal should find that the Claimant suffered a loss of a chance for the additional two years due to the Respondent’s late redelivery since there was a real chance that Champion would have exercised its option to extend the Champion Fixture. A claimant can recover damages for a loss of chance dependent on the hypothetical conduct of a third party by demonstrating that there was a “real” or “substantial” chance the relevant actions would have happened as opposed to a speculative one.

49. There is a real chance that Champion would have exercised its option. This is because the Claimant’s Chatter advertisements clearly highlight its intention to charter the Vessel for three to five years, a fact known by Champion as the Claimant’s social media posts “were publicly available and widely read”. The

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46 Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528 (CA) 539 (Asquith LJ).
48 ibid, Chatter Account post dated 1 March 2016.
49 Jackson (n 29), [36]-[37] (Lord Hope).
50 Allied Maples Group Ltd v Simmons & Simmons [1995] EWCA Civ 17, [1995] 1 WLR 1602, 1614 (Stuart-Smith LJ); McGregor (n 40), para 10.059.
Claimant would likely not have entered into Champion Next Fixture if it knew from the outset there was not a real chance but only a speculative one that the Champion Fixture would be extended.

VI. THE VESSEL REMAINED ON-HIRE DURING THE ENTIRE PERIOD OF THE CHARTERPARTY AND THE CHARTERERS HAVE THUS NOT OVERPAID HIRE.

A. Save for certain limited circumstances, there is an absolute obligation on the charterer to make full payment of hire when it falls due.

50. Under a time charterparty, a charterer’s duty to pay hire is generally absolute. It may only withhold hire (i) for previously accrued off-hire; (ii) under an express right to deduct from hire; or (iii) if there is right of equitable set-off under a separate cross-claim for breach of charter by the shipowner. 51

51. On the facts, none of the three exceptions apply. First, there is no express right to deduct hire, nor was it pleaded. Second, none of the off-hire provisions are engaged. Third, the Respondent’s counterclaim has no basis, discounting any possibility of equitable set-off. As such, the Respondent is not absolved from their absolute obligation to pay hire and have thus not overpaid hire.

B. Since written consent was given, Clause 44 does not operate to put the Vessel off-hire.

52. Clause 44 does not operate to put the vessel off-hire since the Respondent gave written consent for the Vessel to establish communication with an infected area. This has been given in the form of an employment order to load cargo at West Coast during an ongoing Ebola outbreak.

53. An employment order given by the Respondent should suffice for “written consent”. It is the “cardinal rule” 52 that off-hire clauses must be strictly construed since it operates as a clause of defeasance that provides an exception to the shipowner’s prima facie absolute right to hire. 53 Any ambiguity will thus be resolved in favour of the shipowner. 54 This is also consistent with the general principle that exception

51 Howard Bennett, Carver on Charterparties (Sweet & Maxwell 2017) para 7.468-7.469.
52 Royal Greek Government v Minister of Transport (The Ilissos) [1949] 1 KB 525 (CA) 529 (Bucknill LJ).
53 Carver (n 51), para 7.606.
clauses are to be construed strictly. With this cardinal rule in mind, the “written consent” should be proviso construed generously in favour of the Claimant. An employment order, like “an order to load a particular cargo”, should be sufficient.

54. It should be immaterial, for the purposes of “written consent”, whether the Respondent actually knew that an order to load would result in communication with an infected area. In *The Greek Fighter*\(^{57}\), the charterers ordered the vessel to load Iraqi oil subject to UN sanctions, and was thus detained by the UAE Coast Guard. Colman J held that the charterers could not treat the vessel as off-hire for the period of detention since it was “brought about by the act or neglect of the charterers” within the meaning of the off-hire clause there. The court found it immaterial that the charterers were unaware of the illegality.\(^{58}\) Likewise, the “written consent” requirement should be satisfied irrespective of whether the Respondent knew that their order would trigger the off-hire event.

55. On the facts, pursuant to Clause 8(a) of the NYPE 2015, an order to load cargo is an employment order for the Respondent to give. If such an order requires the Vessel to come into communication with an infected area, this should amount to “written consent”. The Respondent did in fact gave an order to load a cargo of tea at West Coast, which was only completed on 20 April 2016.\(^{59}\) This was after the newspaper report dated 18 April (p 22) which reported at the material time over 100 cases of Ebola in West Coast, including amongst stevedores at the port. It can be reasonably inferred that at the time the Vessel began loading, West Coast was already “infected” with Ebola. Yet, the Respondent gave the order to load, knowing that contact with West Coast would be inevitable. This amounts to “written consent” within the meaning of Cl 44, and hence the Vessel is not off-hire.

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\(^{56}\) *Royal Greek Government v Minister of Transport* (1949) 83 L L Rep 228, 235 (Devlin J).


\(^{58}\) *ibid.*, [368] (Colman J).

\(^{59}\) Moot Scenario, p 66, p 72.
C. The Respondent is not entitled to rely on Clause 17 of the NYPE 2015 since Clause 44 of the Omega Rider Clauses prevails over it.

56. Having failed to establish that the vessel is off-hire pursuant to Clause 44, the Respondent is not entitled to a second bite at the cherry under Clause 17.

57. Where there is a conflict between printed clauses and rider clauses, the rider clauses take precedence. Thus, where the parties have gone to the trouble of including a specific off-hire clause to regulate a specific risk, the general clause should be disregarded. In *The Bunga Saga Lima*, in addition to the NYPE off-hire clause (clause 15), a rider clause (clause 13) provided for the vessel to be off-hire for time lost caused by hold cleaning at the first loadport. The charterers accepted the vessel without reservation at the first loadport even though the holds had coal residues, as their first cargo was of iron. However, at the second loadport, the charterers had to clean the holds for their second cargo of rapeseed. The court rejected the charterer’s reliance on the catch-all (“any other cause”) provision in clause 15 to put the vessel off-hire. The inclusion of clause 13 made it clear that the parties only intended for the off-hire to extend to the first loadport, which prevailed over clause 15. Otherwise, clause 15 would be rendered redundant.

58. On the facts, this general common law principle has been reinforced in the Fixture Recap, which states that the Omega Rider Clauses are to take precedence over the NYPE 2015 clauses. Applying this principle to Clauses 17 and 44, Clause 44 should take precedence for loss of time caused by quarantine. While Clause 17 of the NYPE deals with “detention by Port State control” broadly, Clause 44 deals with one specific form of detention — quarantine — and contains a proviso absent in Clause 17. Allowing the Respondent to rely on Clause 17 for quarantine would render the proviso specifically inserted by the parties in Clause 44 nugatory.

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60 *Robertson v French* (1803) 4 East 130, 136 (Lord Ellenborough); *Homburg Houtimport BV and Others v Agrosin Private Ltd and another (The Starsin)* [2004] 1 AC 715 (UKHL), [12] (Lord Bingham).


63 *ibid.*, [15] (Gloster J).

64 Moot Scenario, p 4.
VII. THE CLAIMANT SHOULD NOT BE LIABLE FOR 100% OF THE CARGO CLAIM.

59. The Tribunal should find that the Respondent’s Cargo Claim is time-barred for failure to give written notification as per Clause 6 of the ICA. Even if the it is not time-barred, it is prematurely brought as Clause 4(c) of the ICA is not satisfied. Finally, even if the Cargo Claim has been validly brought against the Claimant, losses arising out of the Cargo Claim should be apportioned pursuant to Clause 8(b) instead of Clause 8(a) of the ICA, such that the Owners should only be liable for 50% of the Cargo Claim.

A. The Cargo Claim is time-barred under Clause 6 of the ICA.

60. Pursuant to Clause 53 of the Omega Rider Clauses, liability for cargo claims is to be apportioned pursuant to the ICA. Clause 6 of the ICA reads: “Recovery under this Agreement... shall be deemed to be waived and absolutely barred unless written notification of the Cargo Claim has been given to the other party to the charterparty within 24 months of the date of delivery of the cargo... Such notification shall if possible, include details of the contract of carriage, the nature of the claim and the amount claimed.”

61. On the facts, delivery was completed at the latest on 30 June 2016. Including a further 6 months’ time extension granted by the Claimant on a without prejudice basis, written notification of the Cargo Claim should have been given to the Claimant by latest 30 December 2018. To date, no valid written notification had been given by the Respondent to the Claimant. The Cargo Claim should accordingly be time barred.

1. The Charterers’ E-mails between 27 June and 7 July 2016 did not constitute valid notice.

62. Communications from 27 June to 7 July 2016 did not constitute valid notice as they failed to provide the Claimant with clear notice of the Cargo Claim, including details of the relevant contract of carriage, quantum and nature of the claim, as required under Clause 6. In London Arbitration 16/02, the Tribunal

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65 *ibid*, pg 10.
66 Moot Scenario, p 42, p 68. 30 June 2016 was when cargo discharge was completed and vessel was re-delivered by Charterers. See also p 72.
67 Moot Scenario, p 57-58.
(considering the notice requirement under Clause 1(iv) of the 1984 ICA69 (an earlier version of Clause 6)) interpreted “should” as meaning “shall” (not “ought to”) and observed that this was consistent with the current wording in Clause 6. It decided that messages simply reporting on the condition of the cargo were insufficient to satisfy the notice requirement. The notice must provide clear notice of the likely claim, specifically identifying the relevant bills of lading, the amounts claimed and the nature of the claims.

63. Here, the e-mails between 27-29 June 2016 concerning the cargo70 were merely advice on the condition of the cargo and is insufficient. The Respondent’s email on 7 July 2016, that simply attached a Preliminary Survey Report (“PSR”) regarding the cargo and stated “treat this message as formal notice of claim…”,71 is also insufficient to amount to notice. It was silent as to details of the contract of carriage even though it was clearly possible to provide these details. Further, any estimations of the quantum of damage in the PSR were made without the benefit of the relevant bill of lading72 and were ambiguous at best.73 Accordingly, there has not been written notification of the claim as required under Clause 6 of the ICA.

2. **Respondent’s Defence and Counterclaim is not valid notice.**

64. After 7 July, there was no further mention of the present Cargo Claim until 17 December 201874, when the Defence and Counterclaim Submissions (“Counterclaim”) were served.75 This did not amount to written notice as required under Clause 6 of the ICA. The Counterclaim did not provide details on the contract of carriage and quantum of the claim, falling short of the requirements in Clause 6. Thus, the Respondent have failed to give the Claimant written notification of the Cargo Claim before 30 December 2018. Recovery under the ICA should accordingly be “deemed to be waived and absolutely barred”.76

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69 This stated that the notification “should record bill of lading details and the nature and amount of the claim”.
70 Moot Scenario, p 38, p 44.
71 Moot Scenario, p 45.
72 Procedural Order, para 8.
73 Moot Scenario, pg 46.
74 ibid, p 74.
75 ibid, p 70-74.
76 Clause 6 of the ICA.
B. The Cargo Claim is prematurely brought as Clause 4(c) of the ICA is not satisfied

Even if not time-barred, the Cargo Claim should be dismissed for being brought prematurely. Clause 4(c) of the ICA is a condition precedent for the ICA to apply. It provides that apportionment under the ICA “shall only be applied to Cargo Claims where... the claim has been properly settled or compromised and paid”. Kerr LJ in *The Strathnewton* stated that the ICA only operates after there is payment or settlement of a cargo claim. Similarly, *The Lazos* (applying English law), decided that Clause 4(c) was a condition precedent for apportionment and indemnification under the ICA, noting that two South African decisions on the ICA have also held that there is no obligation to indemnify unless the underlying claims have been met. These cases suggest that the Cargo Claim must be paid before a cause of action to be indemnified is accrued. On the facts, the Respondent has not adduced any evidence to prove that the Cargo Claim has been settled or compromised and paid. Hence, the Respondent’s counter-claim should be dismissed for failure to satisfy Clause 4(c) of the ICA.

C. The Cargo Claim should not be apportioned pursuant to Clause 8(a) of the ICA.

Clause 8(a) of the ICA covers claims “arising out of unseaworthiness and/or error or fault in... management of the vessel”; these claims are prima facie “100% Owners”. Clause 8(b) covers claims “arising out of the loading... or other handling of cargo”, i.e. concerning management of cargo. If the claim is apportioned pursuant to Clause 8(b), and where (as in the present case) Clause 8 of NYPE 2015 is amended to include “and responsibility” after “under the supervision”, the cargo claim is to be apportioned as: “50% Charterers 50% Owners”, unless “the Charterer proves that the failure properly to... handle the cargo was caused by the unseaworthiness of the vessel in which case: 100% Owners”.

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79 Moot Scenario, p 5.
1. Even if the Cargo Claim has been validly brought, it should be apportioned pursuant to Clause 8(b) as the acts complained of arise out of cargo handling.

67. In *The Yangtze Xing Hua*\(^80\), it was stated that the “critical factual question under Clause 8 is that of causation” – whether the claim ‘in fact’ [arises] out of the act, operation or state of affairs described”.\(^81\) Here, the Tribunal should find that the damage arose from an act done in the management of the cargo, in which case the claim should be apportioned pursuant to Clause 8(b) instead of Clause 8(a).

68. *The Privocean*\(^82\) and *The Germanic*\(^83\), on the interpretation of “management of the ship” in Art IV r 2(a) of the Hague Rules (“HR”) or Hague-Visby Rules (“HVR”), provide guidance on whether an act is to be regarded as “handling of cargo” or “management of the vessel” (Clause 8 of ICA). To determine this, the court should consider the primary purpose of the acts which caused the damage. In *The Germanic*, the US Supreme Court reasoned that an act concerns the management of the vessel if the primary purpose is to affect the ballast of the ship.\(^84\) However, where the primary purpose is to get the cargo ashore, the fact that the vessel’s trim is also affected does not detract from it being cargo management.\(^85\) The court should consider “the primary nature and object” of the acts, and ask whether they were part of care of cargo or “part of the running of the ship not specifically related to the cargo.”\(^86\) The fact-sensitive nature of such cases was emphasised in *The Privocean*,\(^87\) where *The Germanic* was distinguished on its facts. In *The Germanic*, discharge operations were in progress and stability arose out of issues looking to discharge;\(^88\) the acts there concerned cargo management.\(^89\) In contrast, the acts complained of in *The Privocean* occurred even before the act of loading\(^90\) and their primary purpose was ship management.

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81 ibid, 953 (Hamblen LJ).
84 ibid, 597-598 (Holmes J).
85 ibid.
86 Privocean (n 83) [61] (Cockerill J).
87 ibid, [63], [68] (Cockerill J).
88 ibid, [71]-[73] (Cockerill J).
89 Germanic (n 84) 597-598 (Homes J).
90 ibid.
On the facts, even if the damage occurred due to negligence in ballasting prior to leaving berth at West Coast,⁹¹ where the vessel had been loading cargo,⁹² the alleged negligence in ballasting was an act concerning cargo management. The present case is analogous to *The Germanic*, where the vessel lost stability during cargo operations. Here, ballasting would have occurred as a necessary part or consequence of the loading operation. The concern for stability arose from the loading process, to accommodate the loading of cargo. Hence, the damage “[arose] out of the loading... of cargo”, and the Cargo Claim should be apportioned pursuant to Clause 8(b) instead of Clause 8(a).

2. **The Cargo Claim should be apportioned “50% Charterers 50% Owners” as the vessel was not unseaworthy.**

70. The Cargo Claim should not be apportioned pursuant to Clause 8(a) of the ICA because the claim does not arise out of unseaworthiness. Similarly, under Clause 8(b), it should be apportioned “50% Charterers 50% Owners” as the cargo damage was not caused by unseaworthiness and a seaworthy vessel was provided. In *The Benlawers*⁹³, “unseaworthiness” in ICA 1984 was interpreted in its “natural and broader sense” – in line with its ordinary commercial meaning and cargo liability arising from a bill of lading incorporating the HR or HVR.⁹⁴ Thus, “seaworthiness” under the ICA entails that the vessel – with her master and crew – is fit to encounter the perils of the voyage and carry the cargo safely on that voyage.⁹⁵ The shipowner’s obligation to provide a seaworthy vessel is one of due diligence, and not absolute.⁹⁶

71. The vessel in this case was seaworthy. According to the PSR, the ballasting system was “standard... and found... to be in order”.⁹⁷ The vessel’s ability to receive and carry the cargo is not challenged. Neither is it alleged that there had been insufficient crew or that the master and/or crew had been inexperienced,

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⁹¹ Moot Scenario, p 72.
⁹² ibid, p 47.
⁹⁴ ibid, 59-60 (Hobhouse J).
⁹⁷ Moot Scenario, p 46.
unfit or unqualified.\textsuperscript{98} The only allegation is that the crew had been negligent.\textsuperscript{99} Since Art IV r 2(a) of the HR/HVR provides an exemption for crew’s negligence, the mere fact that the crew had been negligent does not amount to a breach of a shipowner’s obligation to provide a seaworthy vessel. Thus, the cargo damage was not caused by unseaworthiness since a seaworthy vessel has been provided.

\textbf{VIII. PRAYER FOR RELIEF}

72. For the reasons set out above, the Claimant seeks the following orders and declarations:

(i) An order that the Respondent pay the Claimant damages in the amount of USD 15,426,567.42 comprising:
   
   a. USD 41,000 for the costs of hull cleaning;
   
   b. USD 55,567.42 for the costs of the voyage to South Island;
   
   c. USD 15,330,000 for loss of hire under the Champion Fixture;

(ii) A declaration that the Respondent has not overpaid hire; and

(iii) A declaration that the Respondent is not entitled to be indemnified under the ICA.

\textsuperscript{98} Northern Commercial Co v Lindblom 162 F. 250 (1908) (9th Cir).
\textsuperscript{99} Moot Scenario, p 72.