TWENTIETH ANNUAL INTERNATIONAL MARITIME LAW
ARBITRATION MOOT COMPETITION

TEAM NO. 32
UNIVERSIDAD CARLOS III DE MADRID
IN THE MATTER OF AN ARBITRATION HELD IN ROTTERDAM

CLAIMANT                      RESPONDENT
PANTHER SHIPPING INC          v.                  OMEGA CHARTERING LIMITED

MEMORANDUM FOR RESPONDENT
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♦ BIMCO, 2015: “Commentary on Hull Fouling Clause for Time Charter Parties”.


♦ Clifford, P. and Browne, O. 2018: “Appointment of arbitrators (Insight)”. Thomson Reuters.


B. Cases

- Amec Civil Eng’g Ltd. v. Secretary of State for Transp. [2005] English Court of Appeal.
- Dallah Real Estate & Tourism holding Co v Pakistan [2010] UKSC 46.
- Gow v Gans S.S. Line, 174 F. 215 [2d Cir. 1909].
- Hadley v Baxendale [1854] EWHC J70.
- Italian State Railways v Mavrogordatos [1919] 2 K.B. 305.
- Mulvenna v Royal Bank of Scotland Plc. EWCA Civ 1409, 4 All ER 484.
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II. **STATEMENT OF FACTS**

1. The Claimant is Panther Shipping Inc, a Liberian company and the Owner of the Vessel. The Respondent is a Liechtensteiner company, Omega Chartering Ltd. Respondent’s, and first charterer of the Vessel. Respondent’s broker is Clark Kent & Sons whilst Claimant’s manager is Hulk Hulls. The Vessel is M/V “Thanos Quest”, whose flag is from Antigua and Barbuda (the “Vessel”).

2. On the 18 March 2016, Respondent entered into a Time Charterparty (“TCP”) for a period of 50-55 days, in order to carry bulk products from West Coast to Wahanda. The Vessel was delivered on the 29 March 2016 in West Coast, although the cargo was not completely loaded until 20 April 2016, whereupon she sailed for Wahanda. On 18 April 2016 the West Coast Daily Echo published that Ebola had been reported in the city of West Coast. No member of the crew informed the Charterer of the Ebola outbreak.

3. On 7 May 2016, the Vessel arrived at Wahanda anchorage, but it was prevented to proceed to berth by the Port State Control due to suspicion that some crew members could be infected. On 11 May 2016, the authorities quarantined the Vessel up to 26 June 2016, when the free-pratique was issued. From 7 May 2016 to 26 June 2016 the Vessel remained off-hire.

4. On 15 June 2016, while the Vessel was still in quarantine, Claimant entered into another Time Charterparty (“Next Fixture”) with Champion Chartering Corp (“Champion”) for a
period of two years plus a further two years in Charterers’ option. Notwithstanding this, on the 28 June 2016 it was cancelled by Champion.

5. Because of the quarantine, the Vessel remained idle for a long period and therefore the hull was fouled. On 8 June 2016, Respondent informed the Claimant that cleaning was not allowed at Wahanda’s port. Respondent offered several alternatives to the cleaning in Wahanda: the payment of a lumpsum, the payment against original invoice or carrying on the cleaning at North Titan. Claimant refused all offers presented.

6. On the 27 June 2016 discharge operations started. It was discovered that part of the cargo — stowed in lower hold no.2 — was severely damaged due to the crew’s negligence while ballasting operation. Hence, 2000 mt. of loose English tea whose production was experience a production shortage, was ruined.

7. On 29 June 2016, Respondent gave Claimant the one-day redelivery notice. Finally, the discharge operations ended, and the Vessel was redelivered on 30 June 2016.

8. On 30 June 2016, after the Vessel redelivery, Claimant order the Vessel to sail to South Island. South Island port was the port of delivery of the 50-55 days’ Time Charterparty (“Replacement Fixture”) that Claimant signed with Fairwind International at a daily hire rate of USD 11,000.

9. On 2 July 2016, prior to the delivery of the Vessel to Fairwind, the Claimant performed the hull cleaning in South Island Port. The costs of the cleaning amounted to USD 30,000.

III. SUMMARY OF THE ISSUES

A) Whether the Tribunal has been validly constituted and whether it has the power to hear Claimant’s claims regarding hull cleaning costs and costs of voyage.

B) Whether the Tribunal considers Respondent liable for hull cleaning costs.

C) Whether the Tribunal considers Respondent liable for late re-delivery.

D) Whether the Tribunal considers Claimant liable for the loss of the cargo and the overhire paid.
IV. THE TRIBUNAL LACKS POWER TO HEAR CLAIMANT'S CLAIMS AS IT HAS NOT BEEN VALIDLY CONSTITUTED

10. The Tribunal has no jurisdiction since it shall be constituted with three members. In the case at hand, (A) RESPONDENT has not appointed its arbitrator and (B) the third member of the Arbitral Tribunal has not been appointed.

A. RESPONDENT has not appointed its arbitrator

11. Since the Parties chose London, United Kingdom, as their seat of arbitration, the lex arbitri is the Arbitration Act 1996. In the arbitration clause,¹ there is no agreement on the procedure for appointing the arbitrators. However, for an appointment to be valid, the three criteria listed by Lord Denning in Tradax Export SA v Volkswagenwerk AG² must be completely fulfilled: (a) the nominee must be informed; (b) the nominee must agree to act; and (c) the other party to the arbitration must be informed. In the present case, Cap. Eric Masterson ("Captain") has not been informed as there is no reference to his appointment as arbitrator on behalf of the RESPONDENT in the communication served on 26 October 2018.³ The intention of the RESPONDENT never was appointing him as arbitrator just asking for help⁴. Thus, as the intention of the RESPONDENT was different, there was no appointment on its behalf.

12. In this regard, it must be noted that, in accordance with the principle of equal treatment of the parties, if one party is prevented from appointing an arbitrator on its behalf, the award rendered may be not enforceable⁵. The principle of equal treatment of the parties—due to its widely recognized value—has been considered to be rule of international

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¹ Moot scenario, p. 17.
² [1970] 1 Lloyd’s Rep. 62
³ Moot scenario, p. 64.
⁴ Ibid.
procedure public policy. Thus, an award that does not comply with this principle in regard to the composition of an Arbitral Tribunal may be set aside pursuant to art. V(2)(b) of the New York Convention (hereinafter, NYC). Furthermore, there is a duty for arbitrators to ensure, as much as possible in their capacity as such, that the award rendered is enforceable.

13. Even if the Tribunal finds that there is a valid arbitrators’ appointment on behalf of Respondent—which is denied—Captain should be removed from the Tribunal due to his lack of impartiality. Impartiality is the watchdog of all Tribunals, including arbitration. The arbitrator’s duty of impartiality prevents him from giving advice to the parties. The ask for help of Respondent to Captain prior to the constitution of the Tribunal violates that duty and points to a close personal friendship between the Captain and the party. In accordance to the International Bar Association Guidelines (hereinafter, IBA Guidelines) a close friendship relation is an orange situation and Captain has a duty to disclosure. This may also cause the refusal of enforcement pursuant to V(1)(d) NYC. An unenforceable award, as noted by Derains and Schwartz, goes against the raison d’etre of the arbitration process. When the parties agree on arbitration as a method of resolving their dispute, they have in mind an award which they can enforce.

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9 AMEC Civil Engineering Ltd v. Secretary of State for Transport [2005] EWCA Civ 291.
10 IBA Guidelines on Conflict of Interest in International Arbitration, point 3.3.6.
11 IBA Guidelines on Conflict of Interest in International Arbitration, Part II, point 3.
13 Ibid.
B. The third member of the Arbitral Tribunal has not been appointed

14. In their arbitration clause, the parties explicitly agreed that the Tribunal shall be constituted with three arbitrators. Notwithstanding this, even if the Tribunal considers that the Respondent has appointed an arbitrator—which is denied—the third member has not been appointed.

15. Despite that Claimant’s possible allegation that the Arbitration Act 1996 allows a Tribunal to have only two members, it does not mandate any set number of arbitrators. To this regard, the Arbitral Tribunal must note that, pursuant to the general principle of *pacta sunt servanda*, the parties may decide how the arbitration will be carried out. Therefore, the will of the parties shall prevail. This procedural flexibility is precisely one of the major benefits of arbitration.

16. The parties have also agreed that the third member shall be a Chairman, which is also in line with the Arbitration Act 1996. This figure—unless otherwise agreed by the parties—shall be present in all the decisions, orders and awards rendered by the Tribunal, so she/he has to be involved in decision-making process from the beginning. Furthermore, the parties have agreed explicitly that the third member shall act as

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14 Moot scenario, p. 17.
15 Procedure Order no.1, p. 79.
16 S.16 (4) of the Arbitration Act 1996.
17 Ibid.
19 S.1 (c) of the Arbitration Act 1996.
21 Procedure Order no.1, p. 79.
22 S. 15(2) of the Arbitration Act 1996.
23 Neither in clause 80 nor in Procedure Order no.1 there is any provision in relation to the functions of the Chairman.
24 S. 20(3) of the Arbitration Act 1996.
Chairman,\textsuperscript{26} not as an umpire,\textsuperscript{27} thus, according to the Arbitration Act 1996, the two members of the Tribunal shall forthwith appoint a Chairman.\textsuperscript{28} Thereupon, all the decisions\textsuperscript{29} and orders\textsuperscript{30} adopted by this Tribunal without a Chairman are null and void.  

17. Thus, the Tribunal must note that an award rendered without a third member appointed as Chairman, may well lead to an annulment by the English Tribunals,\textsuperscript{31} or refusal of enforcement under art. V(1)(d) NYC on the basis that the award was rendered by an improperly constituted Tribunal.\textsuperscript{32} An unenforceable award — as noted in §§ 12 and 13— goes against the ultimate goal of arbitration and the duty of arbitrators.  

\section*{V. IF THE TRIBUNAL CONSIDERS IT HAS BEEN ADEQUATELY CONSTITUTED, IT STILL DOES NOT HAVE THE POWER TO DECIDE ON THE HULL CLEANING COSTS AND COSTS OF VOYAGE}

18. According to that clause 102\textsuperscript{33} of the TCP, both parties agreed on submitting claims which do not exceed the sum of USD 100,000.00 to the Small Claims Procedure 2012 of the LMAA. It is far beyond doubt that the intention of the parties when including clause 102 TCP was no other than making the procedure faster and cost-effectiveness, which complies with Article 3 of LMAA.  

19. The fact they decided to submit the hull cleaning and voyage costs claims to a specific procedure rather than to the general arbitration\textsuperscript{34} shall be considered by this Arbitral Tribunal as it reflects parties’ intention. The Arbitral Tribunal cannot turn a blind eye to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{26} Procedure Order no.1, p. 79.
\item \textsuperscript{27} The procedure of the appointment of an umpire, s. 16(6) of the Arbitration Act 1996, is different from the position of the appointment of a Chairman, s. 16(5) of the Arbitration Act 1996.
\item \textsuperscript{28} S.16(5) of the Arbitration Act 1996.
\item \textsuperscript{29} The decision of the acceptance of the time extension for defence submissions was rendered without Chairman, Moot scenario, p.66.
\item \textsuperscript{30} There are two procedure orders (no 1 and no.2) rendered without Chairman.
\item \textsuperscript{31} S. 67(1) (a) of the Arbitration Act 1996.
\item \textsuperscript{33} Moot scenario, p. 64.
\item \textsuperscript{34} S. 1(b) of the Arbitration Act 1996.
\end{itemize}
\end{footnotesize}
that agreed by the parties. The principle of party autonomy must be complied with by the Arbitral Tribunal, that being that the parties to influence different aspects of arbitration by their agreement and thus, they may choose the rules of procedure to be applied.\textsuperscript{35}

20. Furthermore, the TCP has been drafted by experienced commercial men which set out in clear terms the parties’ agreement. Thus, the wording of the Article leaves no room for a different interpretation of clause 102 of the Charterparty.\textsuperscript{36}

21. In relation to the stated costs, hull cleaning costs amount to USD 30,000.00\textsuperscript{37} and costs of voyage amount to USD 66,567.42, which entitles to a sum of USD 96,567.42. Thus, pursuant clause 102 TCP, this quantity cannot be claimed in the current proceeding. Although the Tribunal has the right to rule on its own competence according to the doctrine \textit{kompetenz-kompetenz}, in so doing it does not have the power to disregard parties’ instructions.\textsuperscript{38}

22. In this regard, in the event the Tribunal ignores clause 102 TCP and considers it has the power to solve the above-mentioned claims, the award would be unenforceable due to an excess of power exercised by the Tribunal. This will render the award not enforceable and thus, null and void as there are strong grounds to set it aside according to the NYC and the Arbitration Act 1996.

23. First, Art. V(d) of NYC\textsuperscript{39} determines that the recognition and enforcement of an award may be refused in case the arbitral procedure was not in accordance with the agreement of the parties. In addition to this, Art. 68 (2)(c) of the Arbitration Act 1996 states that the

\textsuperscript{35} Moot scenario, p. 15.
\textsuperscript{36} The 9th Circuit Court of Appeals referred to existing case-law which had made this distinction and argued that those judgments had already existed when the parties entered into their agreement: "There is no reason to believe that the experienced lawyers representing both parties intended that the language they chose would be interpreted differently than it had been in those cases." Cape Flattery Ltd v. Titan Maritime, LLC U.S. Court of Appeals, 9th Circuit [2011].
\textsuperscript{37} Moot scenario, p. 52.
\textsuperscript{39} According to the Art V (1)(d) of the NY Convention "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement was not in accordance with the law of the country where the arbitration took place".
parties might challenge the award in case some serious irregularity is committed, such as the failure by the Tribunal to conduct the proceeding in accordance with the proceeding agreed by the parties.

24. In conclusion, it is more than clear that the parties expressly agreed on a specific proceeding to be carried out in case of less complex disputes which cannot be ignored.

**SUBMISSIONS ON THE MERITS**

**VI. RESPONDENT HAD NO OBLIGATION TO REDELIVER THE HULL CLEANED**

25. **RESPONDENT** had no obligation whatsoever to redeliver the Vessel cleaned as (A) according to the TCP, there is no duty to redeliver the hull cleaned and; (B) Alternatively, if the Tribunal considers otherwise, **RESPONDENT** would only be liable for USD 30,000.

A. **According to the TCP, there is no duty to redeliver the hull cleaned**

26. According to clause 83 of the TCP, the **RESPONDENT** obligation to redeliver the Vessel with cleaned hull has two prerequisites: (a) the time the Vessel remains idle must be under **RESPONDENT**’s orders; and (b) the idle time shall exceed 30 days.\(^{40}\) Therefore, clause 83 is only triggered if both conditions are met.\(^{41}\)

27. When the Vessel arrived at Wahanda Port on 7 May 2016\(^ {42}\), she was held at anchorage by Port Authorities.\(^ {43}\) On 11 May 2016, the Port Authorities quarantined the Vessel\(^ {44}\) until 26 June 2016, when the Vessel obtained the free-pratique.\(^ {45}\) During those 50 days, the Vessel was not under **RESPONDENT** orders — if any, it was under Port Authorities’ orders— thus, the prerequisite (a) is not met and clause 83 cannot be applied.

\(^{40}\) The idle time must exceed 25 days in tropical zones and 30 days outside such zones (Clause 83 of the Charterparty). As West Coast is not a tropical zone (Procedure Order no.2), the period relevant for these purposes is the second one.
\(^{41}\) BIMCO commentary on Hull Fouling Clause for Time Charterparties, 2015.
\(^{42}\) Moot scenario, p. 24.
\(^{43}\) Moot scenario, p. 25.
\(^{44}\) Moot scenario, p. 24.
\(^{45}\) Moot scenario, p. 72 and Procedure order no.2, p. 81.
28. Additionally, the Vessel could not be under Respondent’s orders as during those 50 days she was off-hire. Pursuant to clause 44 of the TCP the Vessel would be off-hire if the crew has not obtained the written consent of Respondent to communicate with an infected area. The crew knew that West Coast Port was infected on 18 April 2016 and remained in communication with that port until 20 April 2016 without the consent of the Respondent. Thus, under the mentioned provision, the Vessel was off-hire during quarantine.

29. Moreover, clause 17 NYPE declares several off-hire situations, some of which are met in the present case: one is the deficiency of officers and ratings; and other is the absence of free-pratique.

30. Regarding the first one, the deficiency of officers and ratings — known as deficiency of men — will put a ship off-hire due to the incapacity of a full complement of crew to work (actual deficiency). However, deficiency of men may also be constructive: even though there are enough members of the crew to allow the full working of the Vessel (actual deficiency), they are unable to do it. In Tweedie Trading Co. v George D. Emery Co., the Tribunal declared that from the arrival at quarantine: a deficiency of men prevented the working of the Vessel within the meaning of the off-hire clause. Namely, while sickness did not affect the full crew, there was a constructive deficiency of men resulting from their inability to work because of the quarantine.

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46 Moot scenario, p. 22.
47 Procedure Order no.2, p. 81.
48 Clause 44 of the TCP.
49 The NYPE was incorporated to the Charterparty in the fixture, Moot scenario, p. 4.
50 There has been an evolution of the language in the NYPE. The off-hire clause initially referred to the officers and ratings as men.
52 Respondent stated that a few crew members were infected. The Claimant stated that there were only two: the cook and one of the motormen, Moot scenario, p. 24. In any case, it could be deduced that the infection not affected the whole crew.
53 Gow v Gans S.S. Line [1909] and Noyes v Munson S.S. Line [1909].
31. The second off-hire cause pursuant to clause 17 NYPE is the absence of free-pratique, which prevented to Vessel from berthing until 26 June 2016.\(^{55}\) The free pratique is the licence given to a ship to enter a port on the assurance that she is free from contagious diseases.\(^{56}\) Although absence of this licence is not explicitly stated in the wording of NYPE off-hire clause, it is understood to be contained in the sweep-up provision of clause 17 NYPE.\(^{57}\) In *The Laconian Confidence,* Judge Rix considered that the causes included in clause 17 NYPE could be classified in physical or efficiency conditions of either Vessel — crew included — or the cargo. Thus, it is sustained that the absence of free-pratique is a similar cause to those explicitly stated at the mentioned clause as it affects the efficiency of the Vessel, preventing it from full working — as it cannot enter to the port —. In the context of illness of the crew, the absence of free-pratique cannot be seen as a mere formality so it brings the off-hire clause into play.\(^{59}\)

32. In conclusion, clause 83 of the TCP cannot be applied as within the 50 days which the Vessel remained idle it was off-hire and thus was not under RESPONDENT orders. Hence, RESPONDENT had no duty to redeliver the Vessel with the hull cleaned.

**B. Alternatively, if the Tribunal considers otherwise, RESPONDENT would only be liable for USD 30,000**

33. RESPONDENT performed its obligation to redeliver the Vessel in good order and conditions with due diligence. RESPONDENT contacted with the Wahanda Port Services in order to perform the cleaning there.\(^{60}\) When the port services communicated that the anchorage

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\(^{55}\) Moot scenario, p. 72 and p. 81.


\(^{57}\) The sweep-up provision of Clause 17 NYPE states that: "any other similar cause preventing the full working of the Vessel".

\(^{58}\) *Andre et Cie SA v Orient Shipping (Rotterdam) BV (The Laconian Confidence)* [1997] 1 Lloyd’s Rep. 139, at 144 (Rix J).


\(^{60}\) Moot scenario, p. 27.
was not suitable for hull cleaning, RESPONDENT showed a cooperative attitude\(^{61}\) to solve the unexpected problem.

34. Since CLAIMANT did not look for any solution, RESPONDENT proposed several alternatives: (i) the payment of the cleaning against original invoice,\(^{62}\) (ii) the performance of the cleaning in the nearest port (North Titan); and (iii) as mandated by clause 83(d), the payment of several lump sums: USD 15,000,\(^{63}\) USD 20,000\(^{64}\) and USD 30,000.\(^{65}\) All the offers were rejected.

35. Despite RESPONDENT's numerous efforts to cooperate with CLAIMANT, RESPONDENT has seen itself involved in a shameful situation due to CLAIMANT's unreasonable denial of every offer. As a way of example, it is worth mentioning that, like with the rest of the offers, Claimant's denial to the performance of the cleaning in the nearest port (North Titan) is totally unreasonable. It was the most convenient port — only half day sailing — in which the hull cleaning could be performed\(^{67}\). The other available facility, South Island Port, was at two sailing days from Wahanda.\(^{68}\) Moreover, pursuant to the TCP, RESPONDENT could had redelivered the Vessel in North Titan.\(^{69}\) In this situation, RESPONDENT was prevented to perform the cleaning as, pursuant to clause 83(c) of the TCP, the cleaning shall be undertaken in consultation with the CLAIMANT.

36. In this non-cooperative scenario created by CLAIMANT, in which there was no chance to come to an agreement, the allocation of the cleaning costs shall be made under clause 83(d) of the TCP.

\(^{61}\) They asked the CLAIMANT to advise them the method to solve the problem, Moot scenario, p. 29.
\(^{62}\) Moot scenario, p. 22.
\(^{63}\) Moot scenario, p. 29.
\(^{64}\) Moot scenario, p. 39.
\(^{65}\) Moot scenario, p. 43.
\(^{66}\) Moot scenario, p. 39.
\(^{67}\) Procedure Order no.2.
\(^{68}\) Moot scenario, p. 53.
\(^{69}\) Moot scenario, p. 4.
37. In accordance with BIMCO, the entity which drafted clause 83 of the TCP, there are two alternative scenarios when the Charterers are prevented from carrying out the cleaning: the agreement of a lump sum — which was not possible — or the payment against invoices for actual costs of subsequent cleaning.\(^70\) The actual cost of the cleaning includes the invoice of the cleaning (USD 30,000)\(^71\) but does not extend to the other on-hire related costs (bunkers, port facilities and the hire).\(^72\) All those costs are payable only when the Vessel is on hire.\(^73\) However, as the Vessel was properly redelivered\(^74\) on 30 June 2016, on-hire payments produced from 30 June to 4 July 2016 are not due.

38. In fact, the Arbitral Tribunal must not be fouled. What the CLAIMANT is trying when it asks for these costs is to reposition the Vessel in South Island for their own commercial advantage — their next fixture started there — at the expense of the RESPONDENT. CLAIMANT cannot take advantage of an unlawful situation.

VII. RESPONDENT CANNOT BE HELD LIABLE FOR THE ALLEGED DAMAGE

39. RESPONDENT denies any liability whatsoever\(^76\) regarding the redelivery of the Vessel since (A) she was not redelivered late according to the TCP. Alternatively, (B) in case this Tribunal considers the Vessel was not proper and timely redelivered the damages to which CLAIMANT is entitled has to be determined.

A. The Vessel was not late redelivered according to the TCP

40. According to the fixture recap of the TCP, the Vessel was hired for a period of 55 days.\(^77\) The Vessel sailed 20 April 2016 from West Coast to Wahanda\(^78\) and arrived at the port on 7 May 2016 within the time agreed, because at the latest, she had to be redelivered and,

\(^71\) Moot scenario, p. 50.
\(^72\) Those costs amount a sum of USD 67,133, FHS, Moot scenario, p. 54.
\(^73\) Clause 4 NYPE.
\(^74\) Moot scenario, p. 44.
\(^75\) Moot scenario, p. 54.
\(^76\) Moot scenario, p. 52.
\(^77\) Moot scenario, p. 4.
\(^78\) Moot scenario, p. 81.
thus, put at the Claimant’s disposal on 23 May 2016. On 7 May 2016, she was detained by the Port State Control since some crew members could have been carrying the Ebola virus. As per clause 44 of the TCP, and the other causes listed in §§ 30 and 31, detention by Port State Authorities falls into the scope of quarantine, so it should be considered the Vessel to be off-hire and under Claimant’s liability.

41. If it is sustained by Claimant that the Vessel was redelivered on 30 of June, from 7 May 2016 to 26 June 2016, day in which the detention came to an end, the days cannot be counted. Having stated this, the amount the Vessel was on hire do not reach 55 days by 30 of June and thus, Respondent has not redelivered the Vessel late. What is more, Respondent had 12 days left to redeliver the Vessel in a proper condition and on time before the end of the stipulated period.

B. Alternatively, if the Tribunal considers the Vessel not properly and timely redelivered

42. If this Tribunal finds that Respondent has breached the contract, (1) Claimant has not suffered any damage since Respondent paid the equivalent amount to 91 days of hire. If Claimant has suffered damages (2), those were not foreseeable and, what it is more, (3) any alleged economical losses are due to Claimant’s breach of his duty to mitigate. In any event, it must be noted that if the Tribunal considered the damages as foreseeable, (4) the best way to determine damages in the shipping market is not always foreseeability. Lastly (5) The parties never agreed for Respondent to bare the risk of those damages.

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80 Moot scenario p. 9.
81 See above VII (A).
82 Moot scenario, p. 68.
83 Until 12 July 2016.
1. **Claimant has not suffered any damage**

43. According to the FHS, Claimant has charged Respondent the hire corresponding to 91,1285 days of hire during the following dates: from 29 March 2016 to 30 June 2016. Consecutively, the Vessel was cleaned between 1 July 2016 and 3 July 2016 at South Island Port,86 due to Claimant’s choice and afterwards, on 4 July 2016, the Vessel was time-chartered to Fairwind87 for 50-55 days at a daily rate of USD 11,000. According to these facts, the Vessel has not been detained and Claimant is not entitled to damages as he has not suffered any loss.88

2. **Any alleged economical losses are due to Claimant’s breach of his duty to mitigate**

44. In the event it is considered by the Arbitral Tribunal that there has been a breach of contract and, as a result, Claimant has lost the TCP with Champion, it is sustained there were no damages caused to Claimant as there was no time lost in between time charter parties but, what is more, due to Claimant’s duty to mitigate damages.

45. Mitigation concerns “the avoiding of the consequences of a wrong, whether tort or breach of contract”.89 The first rule of mitigation states that Claimant “must take all reasonable steps to mitigate the loss to him consequent upon the defendant’s wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid”.90

46. Therefore, in the scenario of damages, Claimant has mitigated the loss of contract with a subsequent one and there is no hindrance to continue to arrange subsequent contracts with Charterers after the 55 days’ time Charterparty with Fairwind ends.

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84 Moot scenario, p. 52.
85 Amount: USD 25,627.92, daily price: USD 7,500.
86 Moot scenario, p. 43.
87 Moot scenario, p. 53.
88 Moot scenario, Defence and counterclaim submissions 11.3. (a) p. 73.
89 Part three, Ch. 9, Section I. Sub-section 1.
90 Ibid.
47. Indeed, the daily hire in the contract with Champion was 10,500$,\textsuperscript{91} while the one with “replacement fixture” with Fairwind was 11,000$.\textsuperscript{92} Thus, not only Claimant has not suffered any damage, but has made a profit.

3. **If Claimant has suffered damages, those were not foreseeable**

48. A claim for damages is a remedy to which injured parties most commonly resorts and these damages can be defined as “an award in money for a civil wrong”.\textsuperscript{93} As a matter of fact, the breaching party is not obliged to compensate for every damage, but only to those which arises "naturally, ie according to the usual course of things, from such breach of contract itself".\textsuperscript{94}

49. The existence of a subsequent next fixture of extraordinary length cannot be considered as part of the ordinary knowledge of Respondent. Therefore, the full amount of the 4 years’ fixture can only be considered as compensable when the special circumstances were communicated by the Claimants to the defendants and, thus, known to both parties.

50. Respondent did not receive any information from Claimant in terms of its next contractual obligations, neither when the contract was signed, nor during the performance of the Charterparty, therefore it cannot be considered that Respondent was aware of the special circumstances about the extension that surrounded the following fixture.

51. Moreover, even in the hypothetical case of some fortuitous knowledge of Respondent of the circumstances, this fact does not automatically means that he has to assume the liability, since the risk for those “special circumstances” was not in any case accepted by Respondent, whose acceptance is required in order to make him responsible for the damages which can arise out of them.\textsuperscript{95}

\textsuperscript{91} Moot scenario, p. 32.
\textsuperscript{92} Moot scenario, p. 55.
\textsuperscript{94} First rule in *Hadley v Baxendale* (1854) EWHC J70.
\textsuperscript{95} Mulvenna v. Royal Bank of Scotland PLC, Court of appeal - Civil division, [2003] EWCA CIV 1112.
4. Foreseeability is not always the best way to determine damages in the shipping market

i. The shipping market custom has limited the liability to the loss of opportunity to take advantage of the market rate during the period of overrun

52. Firstly, on the assumption that the possible consequence of a late redelivery was the loss of a subsequent fixture, the general understanding in the shipping market is that liability is restricted to the difference between the market rate and the charter rate for the overrun period\(^\text{96}\) and that “any departure from this rule is likely to give rise to a real risk of serious commercial uncertainty which the industry, as a whole, would regard as undesirable”.\(^\text{97}\)

53. The overrun is the period from the latest time at which the ship could lawfully have been redelivered, up to the date on which she was in fact redelivered\(^\text{98}\). In this connection, in *The Achilleas*, the House of Lords held that “a time charter who re-delivered the chartered Vessel 9 days late was not liable for the whole of the ship owner’s loss of a long-term follow-on charter concluded when the market was materially higher than at the date of the redelivery and which was cancelled because of the redelivery (even tough arbitrators had made a finding of fact that such loss was to be contemplated when the charter was concluded)”. Namely, it is crystal clear that the “award in money” to which Claimant is entitled corresponds to the difference between rates of the Charterers, as the quantity reasonably in contemplation of the parties at the time they made the contract, as the probable result of the breach of it.\(^\text{99}\)


\(^{97}\) Transfield Shipping Inc v Mercator Shipping Inc [2008] UKHL 48.


\(^{99}\) *Hadley v Baxendale* [1854] EWHC J70.
ii. The parties never agreed for RESPONDENT to bare the risk of those damages

54. If this Tribunal understanding is that the damage caused was foreseeable - which RESPONDENT denies -, it is sustained the insufficiency of the foreseeability to determine the damages due, even thought, the orthodox approach may remain the general test applicable in the great majority of cases. 100

55. However, in the present case the surrounding circumstances are extraordinary and the damage claimed does not follow the general understanding in the shipping market. Therefore, it is sustained that a further analysis of whether there has been an assumption of responsibility is needed. According to Lord Hoffman: 101 “In real life, the single concept of foreseeability is an inadequate instrument for explaining all the cases”, inasmuch as in some cases 102 the damage is foreseeable, but not compensable; 103 and in others it was not foreseeable but it has been considered as a damage. 104

56. Namely, in the event this Tribunal understand that due to a late redelivery, CLAIMANT suffered a loss of a next contract and that RESPONDENT should have regarded it as “not unlikely”, it has to be considered that RESPONDENT did not assume liability for such a loss. In fact, when the contract was signed, there was no provision in which RESPONDENT assumed any type of liability in case of a breach of contract. According to this, it should be, in principle, wrong to hold someone liable for some risk for which other operators of that same particular market would not reasonably considered to have undertaken. In fact, RESPONDENT would probably not have contracted with CLAIMANT if it meant that Charterers were assuming such responsibility for the consequences of that breach.

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100 Transfield Shipping Inc v Mercator Shipping Inc [2008] UKHL 48 (9 July 2008).
102 Gregoraci, B. Daños indemnizables en el derecho contractual inglés, ADC, tomo LXIV, 2011, fase 1 p.144.
57. This Tribunal may consider that a fair allocation of risks should be carried out due to the lack of express will of the parties in regard with the damages. Consequently, it has to be point out the absence of culpable infringement or of an express contractual clause, the disproportion between the damage and the benefit CLAIMANT would have in case the full amount of the time charter party is recognized as damages and the shipping market understandings, previously mentioned. These criteria developed by Robertson\textsuperscript{105} should be deemed in a fair allocation of risks.

58. To conclude, as it was stated in \textit{The Achilleas}: "The normal approach to damages for late redelivery was being based on the difference between charter and market rate for the duration of the period of lateness". As a matter of fact, as it was the case then and it is now, "the Charterers did not assume liability for the loss of the value of the entire follow-on fixture and were not liable for it".

59. Orthodox principles of remoteness should not be applicable as they will only produce unquantifiable, unpredictable, uncontrollable or disproportionate liability and such liability would be contrary to market understandings and expectations.

\textbf{SUBMISSIONS ON THE MERITS OF THE COUNTERCLAIM}

\textbf{VIII. RESPONDENT IS ENTITLED TO CLAIM DAMAGES IN THE CARGO, OVERPAID HIRE AND INTEREST}

\textbf{A. The subject-matter of the dispute falls under the arbitration clause}

60. Parties agreed on clause 80 of the TCP\textsuperscript{106} that any dispute between Owners and Charterers shall be referred to an Arbitral Tribunal. In that connection, the damage of the cargo falls within the scope of the arbitration agreement since it complies with the requirements to be considered a subject-matter of the arbitration clause as the latter

\textsuperscript{105} Robertson, \textit{The basis of remoteness rule in contract}, [2008] Legal studies, p. 192.
\textsuperscript{106} Moot scenario, p. 15.
involves the expression “any dispute”. That means, the dispute at stake shall be referred to the substantive contract in which it is embedded. Thus, the ICA clause\textsuperscript{107} determines that \textsc{claimant} agrees that the liability for cargo claims shall be conducted according to the ICA and hence, the subject dispute is expressly contained in the contract which gives rise to the arbitration clause contained therein.

61. As the matter of damage of the cargo was considered when drafting the Charterparty by introducing clause 53, the Tribunal shall have competence to render an award as the liability for loss of the cargo is expressly contained in the TCP. Thus, it might be a dispute which may arise between \textsc{claimant} and \textsc{respondent} because it is expressly provided in the Contract.

B. \textsc{Respondent} is entitled to claim damages in lieu of the loss of the cargo as the Receiver is seeking compensation

62. \textsc{Claimant}’s claims are not just groundless, but the Tribunal must grant \textsc{respondent} damages caused by \textsc{claimant}. Not only is \textsc{respondent} entitled to be indemnified for the cargo damages due to \textsc{claimant}’s actions, but also \textsc{respondent} must receive the overpaid hire; all sums with the correspondent interests. Further, arbitration costs shall be borne by \textsc{claimant}.

1. The cargo claim under the ICA is valid; regardless the cargo has not been paid by \textsc{respondent} yet

63. According to clause 4(c) in the ICA, the claim shall have been properly settled or compromised and paid before the ICA can be used to apportion the claim. The pre-payment has not taken place yet, but because \textsc{respondent} is seeking to claim the loss of the cargo on its own name. To this regard, the cargo has been lost and it became uselessness. Thus, \textsc{respondent} has the obligation to pay the loss of the cargo sooner or later because as the cargo has been destroyed, it is impossible to be delivered. This

\textsuperscript{107}Moot scenario, p. 12.
scenario involves a quantifiable current loss to RESPONDENT which match with its interest and thus, untie this cargo claim as opposed to the one did by the Receiver against RESPONDENT.

64. In addition to this, although the ICA states that the payment shall be made before apportioning liabilities concerning the loss of the cargo, (i) there is a valid cargo claim against RESPONDENT and (ii) RESPONDENT’ recourse claim falls under the arbitration agreement. Thus, there is no reason whatsoever for demanding RESPONDENT to make a prepayment in order to give commence to a different arbitration. That solution would be inefficient in terms of costs and time and hence, the loss of the cargo may be addressed in this proceeding.

2. CLAIMANT accepted the Receiver cargo claim made to RESPONDENT

65. As it was stated above, the ICA remains applicable as they were expressly introduced by the parties within the TCP. In that regard, clause 4 (a) of the ICA includes a condition precedent which states that “the claim was made under a contract of carriage”. That means, the ICA only applies to the cargo claims made by a third party. That condition has been satisfied as the Receiver made a valid counterclaim within the time extensions granted to them by RESPONDENT. In addition to this, it has been proven that CLAIMANT does not dispute that the RESPONDENT informed it of the cargo claim in 2016 and thus, there is no doubt as to the cargo claim made by RESPONDENT as a result of the one did by the Receiver.

3. The cargo had been severely water damaged during transportation

66. According to the Survey Report, a significant proportion of the cargo was damaged due to water ingress in lower hold nº 2 during ballasting operations. clause 64 of the TCP

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108 Moot scenario, p. 10.
109 Moot scenario, Procedural Order no.2, Clarification no.10, p. 82.
110 Moot scenario, p. 46.
states that “all ballasting shall be at discretion of Master having due regard to stability and seaworthiness of the Vessel”.\textsuperscript{111} Since Master and the crew are representing\textsuperscript{112} the Owner, \textit{Claimant} had to guarantee that the Vessel “will always be maintained in safe condition during ballast operations”.\textsuperscript{113} Notwithstanding this obligation also stated in clause 8 (1)(a) of the ICA, \textit{Claimant} breached its duty of care when ballasting. The negligent\textsuperscript{114} performance was carried out by a member of the crew when opening the wrong valve so that “\textit{water was pumped into the hold, rather than into the ballast tanks}”.\textsuperscript{115} As a result of this negligent action, it has been agreed that 2,000 mt of loose leaf English Breakfast were damaged.\textsuperscript{116} If it had not been for the error made by the crew, the cargo would have been in perfect conditions and \textit{Respondent} would have not suffered any cargo damage.

\textbf{67.} \textit{Respondent} thus seeks compensation for each bag of tea damaged according to the market price in the territory of Bao Kingdom. In order to determine the amount in lieu of the above-mentioned damages, several factors shall be considered. First, the reduction in the production of loose tea\textsuperscript{117} will lead to a considerable rise in its price since all other factor that may influence the price of tea did not vary, such as the demand. Furthermore, since Challaland happens to be one of the main producers of Tea, such a reduction in the tea supply might have a great global impact on its principal markets. Hence, the price is very likely to go upwards following the law of supply and demand. Secondly, the Procedural Order no.2 estimates that the actual market price within the territory of Bao Kingdom is US 50 per kilo.

\textsuperscript{111} Moot scenario, p. 12.
\textsuperscript{112} The crew is employed by the shipowner under a time-charter and thus, it is responsible for the nautical operation and maintenance of the Vessel and the supervision of the cargo – at least from a seaworthiness point of view. Falkanger, T., Bull, H.J. and Brautasel, L., 2011. Scandinavian Maritime Law: The Norwegian Perspective. 3rd edn, p. 393.
\textsuperscript{113} Moot scenario p. 12.
\textsuperscript{114} The definition of negligence involves three manifestations: 1. duty of care; 2. breach of the duty of care and 3. that breach is the one causing \textit{Respondent} de economic loss, meaning the damage.
\textsuperscript{115} Moot scenario, p. 46.
\textsuperscript{116} Procedural Order no.2.
\textsuperscript{117} Moot scenario p. 21.
In order to compensate Respondent for the cargo damage, Claimant must put Respondent in the position he would have been in, had not Claimant acted negligently. Hence, since the 2,000 mt of tea have been damaged, which accounts to 2,000,000 kilos; and each kilo is valued USD 50, Claimant shall indemnify Respondent USD 100 million.

Alternatively, in case the Tribunal does not considered the full indemnity in lieu of the cargo damaged by mismanagement of the Vessel, clause 8(b) of the ICA remains applicable and hence, Claimant is 50% responsible for damages in the cargo while performing discharging operations. Pursuant to clause 8(b), claims arising out of the discharge shall be held by the Charterer. However, the Fixture Recap amended the NYPE clause 2015 by adding the words “and responsibility”. That means, the responsibility is held 50% by Respondent and 50% by Claimant. As regards to the compensation, the indemnity shall cover half of the damages resulting in a total amount of USD 50 million.

4. Claimant had expressly recognized cargo damages

All the above-mentioned cargo damages have been expressly recognized by Claimant and thus, there is no controversy regarding their existence. It has been proven that Claimant accepted that it undertook its own investigations into the incident which confirmed the findings of the Preliminary Survey Report in relation to the cause of the damage suffered to the cargo. That means, Claimant is absolutely concerned about the further cargo damages and whether they exist or not shall not be at stake in this proceeding as it is a disputed fact.

5. Respondent’s right to claim damages is not time-barred

Time requirements in order to submit cargo claims may be sought in the ICA, as both parties agreed on them by introducing clause 53 of the TCP. The Respondent and the Receiver included a General Paramount clause in their B/L which determined Hague

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118 Procedural Order no.2.
119 Moot scenario, p. 48.
Rules as applicable to cargo claims. Therefore, the controversy lies in determining whether the one-year limit bar in the Hague Rules or the two-year bar in the ICA shall apply. To this regard, the Hague Rules has not been incorporated in the TCP but only in the B/L. That means, they are mandatory in relation to the relationship existing between cargo-owner and carrier in case the contract of carriage is a bill of lading. However, they do not remain applicable when Charterer and Shipowner are parties to a TCP.

72. Thus, CLAIMANT and RESPONDENT are facing the second scenario, since both included the ICA through clause 53 of their TCP. In that connection, Lord Justice Kerr ruled\(^\text{120}\) that “the Inter-Club Agreement had the effect of cutting across the balance of claims and defenses under the Hague Rules by means of a rough and ready apportionment of financial liability as between Owners and Charterers”. Therefore, there is no justification to apply to time bar contained in Art. III (6) of the Hague Rules\(^\text{121}\). As a result, the ICA contained in a TCP operates regardless of other Charter Terms, including the Hague Rules, when the latter are not included in the TCP and thus, they do not remain mandatory.

73. Once the two-year bar contained in the ICA had been confirmed, RESPONDENT complies with all-time requirements stated in Art. VI of the ICA and thus, it is entitled to seek compensation by CLAIMANT’s loss of the cargo. That Article determines that recovery shall be deemed absolutely barred unless written notification of the cargo Claims has been given to the other party within 24 months of the date of delivery of the cargo. It adds that the date starts to run from the date on which the delivery took place. To this regard, the date of delivery of the cargo was on 30 June 2016,\(^\text{122}\)

74. Following the deadline to submit RESPONDENT’s claims for cargo damages consisting on 24 months, the 30 of June 2016 the action of recovery would had become time-barred.

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\(^\text{120}\) The Strathnewton [1983] 1 Lloyd’s Rep 296, p.228.
\(^\text{121}\) Ibid.
\(^\text{122}\) Moot scenario, p. 45.
However, email chains between Claimant and Respondent granting time extensions in relation to claim for cargo damage shall be considered by this Tribunal.

75. The first extension was asked by Respondent on 23 May 2017\textsuperscript{123} and there was a tacit acceptance on 29 May 2017\textsuperscript{124} as Claimant says that they were preparing with their Club a 3-month extension. Thus, the cut-off date to submit the recovery action had shifted from the 30 June 2018 to the 30 September 2018.

76. The second extension was asked by Respondent on 27 August 2017\textsuperscript{125} and there was a second tacit acceptance on 28 August 2017\textsuperscript{126} as Claimant says that they were preparing to grant a further 3-month time extension. Thus, the cut-off date to submit the recovery action had shifted from the 30 September 2018 to 30 December 2018.

77. As the counterclaim was filed on 17th December 2018, the action brought by Respondent as regards to recovery cargo damages is within the time period contained in Art. VI of the ICA.

C. **Claimant shall return the amount of USD 375,000.00 to Respondent in lieu of overpaid hire**

78. As argued in the defence,\textsuperscript{127} the Vessel remained off-hire from 7 May 2016 until 26.\textsuperscript{128} Since both clause 17 of the NYPE and clause 44 of the TCP determine that during the period of the Vessel remains off hire, the payment of hire and overtime shall have ceased. As it did not happen, Respondent claims the overpaid hire to the Claimant, resulting in a total amount of USD 375,000.00. This amount is a result of the daily inclot hire (USD 7,500.00) multiplied for a total of 50 days.

\textsuperscript{123} Moot scenario, p. 60.
\textsuperscript{124} Moot scenario, p. 60.
\textsuperscript{125} Moot scenario, p. 59.
\textsuperscript{126} Ibid.
\textsuperscript{127} See supra VI (A).
\textsuperscript{128} According to Clause 44 TCP and Clause 17 NYPE off hire operate in the following scenario: “in the event of loss of time from detention by Port State control or other competent authority for Vessel deficiencies, the payment of hire and overtime if any, shall cease for the time thereby lost.”
D. **CLAIMANT shall also satisfy interest on all sums due according to Section 49 of the Arbitration Act 1996, adding to the costs of the arbitration**

79. All the sums due by the CLAIMANT concerning both (A) the damage of the cargo and (B) the overpaid hire is subject to compound interest rates according to Section 49 of the Arbitration Act 1996. Hence, the Tribunal will establish the compound interest rates as “it considers meets justice of the case”.¹²⁹

80. In addition to this, according to the Section 59 of the LAA, costs of the arbitration include the arbitrators’ fees and expenses; the fees and expenses of any Tribunal institution concerned, and; the legal or other costs of the parties.¹³⁰ Pursuant to clause 62 (2) of the Arbitration Act 1996, the general principle that “costs follow the event” shall apply. Therefore, RESPONDENT estimates that costs shall be held by the CLAIMANT.

81. Alternatively, RESPONDENT requests the Tribunal to depart from the above-mentioned rule by adjusting the parties’ entitlements and liabilities in relation to costs and thus, this party seeks to apply a broad-brush approach to costs.¹³¹

**IX. PRAYER FOR RELIEF**

82. For the reasons set out above, RESPONDENT requests that the Tribunal; (A) Declare that the Tribunal has not been validly constituted, (B) Declare that it does not have jurisdiction to hear CLAIMANT’s claims in relation to hull cleaning costs and costs of voyage, (C) Declare that RESPONDENT have no obligation to redeliver hull cleaned, (D) Declare that CLAIMANT is not entitled to seek damages for late re-delivery, and (E) Declare that RESPONDENT shall be compensated in relation to the loss of the cargo and the overpaid hire, while interests and costs of arbitration are satisfied.

   Dated on 29 April 2019, in Rotterdam.

   Solicitors for the RESPONDENT

   *Knight & Protector Solicitors*

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¹²⁹ S. (49) (3) of the Arbitration Act 1996.