20th Annual International Maritime Law Arbitration Moot 2019

In the matter of an Arbitration under the Arbitration Act 1996 of the United Kingdom

Between

Panther Shipping Inc.
Claimant/Owners

and

Omega Chartering Limited
Respondent/Charterers

_____________________________________________________

Respondent's Memorandum

_____________________________________________________

Educational Institution of ITCA

Team 35

Parmida Assadi
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I. Respondent has respected its obligation of hull cleaning and has therefore discharged this obligation; and in any case, the costs of hull cleaning for Respondent shall not exceed USD 33,000,00.

1. Respondent has taken every measure available to him in order to perform hull cleaning and has therefore discharged its obligation.                      

2. Claimant has waived his right to have hull cleaned by Respondent; or in the alternative receiving a lump sum payment for such cleaning, prior to redelivery. 

3. In any event, the extent of Respondent’s liability for the obligation of hull cleaning does not exceed USD 33,000.00.

II. Claimant is not entitled to damages in the amount of USD 15,330,000.00 for loss of Next Fixture.

1. At the time of entering into Charterparty, Respondent did not have knowledge about the Next Fixture. 

2. The damage to Claimant is not attributable to Respondent or in the alternative it was not caused by Respondent. 

3. Respondent did not assume any liability for the loss of Next Fixture. 

III. Claimant must reimburse Respondent for the overpaid hire in the amount of USD 375,000.00 in accordance with Clause 17 and 40 of the Charterparty.
1. The full working of the Vessel was prevented during the detention by port authorities. 

2. The detention of the Vessel by the port authorities is an off-hire event.

IV. Respondent is entitled to be indemnified by Claimant.

1. The damage caused to the cargo, is attributable to Claimant.

2. 100% of the Cargo Claim is for Claimant’s account pursuant to clause 8(a) of the ICA.

3. Alternatively, 50% of the Cargo Claim is for Claimant’s account.

V. Claimant is not entitled to any interest.

1. The arbitral tribunal has discretion to award an interest in favour of Respondent.

2. Respondent is entitled to interests.

3. The arbitral tribunal should award compounded interest according to borrowing rate of USD.

Prayer for Relief.
Table of Authorities

Statutes and Conventions

International Convention For The Unification Of Certain Rules Of Law Relating To Bills Of Lading (Hague-Visby-Rules)

Cases

Action Navigation Inc v Bottiglieri Di Navigazione SPA (The Kitsa) (2005) 1 Lloyd’s Rep 432, QB (Com Ct)


C Czarnikow LTD v Koufos (The Heron II) (1966) 1 Lloyds Rep 259, 731

Gosse Millard v. Canadian Gov't Merchant Marine (H.L. 1928) All ER Rep 97, 98

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London, Chatham & Dover Railway Co v South Eastern Railway Co (1893) AC 429

Onego Shipping & Chartering BV v JSC Arcadia Shipping (Socol 3) (2010) EWHC 777

Sidermar SA v Apollo Corporation (the Apollo) (1978) 1 Lloyd’s Rep 200

The Glenochil (1896) 73 LTR 416 Adm

Transfield Shipping v Mercator Shipping Inc (The Achilleas) (2007) 1 Lloyds Rep 19

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Triad Shipping Co v Stellar Chartering & Brokerage Inc (The Island Archon) (1994) 2 Lloyd’s Rep 227

Victoria laundry (Windsor) LD v Newman Industries LD (1949) 2 KB 528

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**Journal Articles**


kendall-marsden, Sam, Green, Jamie, ‘A review of off-hire clauses, Part one; the NYPE form’ (June 2018) Standard Club

McCormick, Charles T., ‘Interest As Damages’ (1931) 9 N C L Rev 237 238

Rhidian, Thomas, ‘Commercial Arbitration The vexed issue of interest awards’, Lloyd's Maritime and Commercial Law Quarterly (LMCLQ)


**Other**

*Chartered Institute of Arbitrators, Practice Guidelines 13: Guidelines for Arbitration on how to approach the making of awards on interest* (2011)

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Summary of Facts

The present dispute has arisen between Panther Shipping Inc. (hereafter “Claimant”) and Omega Chartering (hereafter “Respondent”).

Claimant is a ship owner company that has added MV Thanos Quest (hereafter “the Vessel”) to its tween decker vessels to be used in servicing the medium term time charter market.

18 March 2016 The Claimant chartered the Vessel to the Respondent (charterer) for a time charter trip of about 50-55 days from West Coast to Wahanda.

29 March 2016 The vessel was delivered.

18 April 2016 Several cases were reported regarding the outbreak of Ebola virus.

20 April 2016 Loading of cargo was completed and the vessel sailed for Wahanda.

7 May 2016 The Vessel arrived at the discharge port of Wahanda but it was held at anchorage because the Port Authority had suspected crew members were carrying the Ebola virus.

The Respondent insisted the vessel was off-hire at this period pursuant to clause 17 of the charterparty.

8 May 2016 The Claimant iterated that the Vessel was on hire.

24 May 2016 Wahanda port services informed Respondent that hull cleaning could not be performed at the Wahanda anchorage.

15 June 2016 Claimant chartered the Vessel to Champion Chartering Corp (“Champion”) for a period of two years, plus a further two years in charterers’ option (the “Next Fixture”).

The daily rate of hire was USD 10,500.

18 June 2016 Claimant reserved right to claim against Respondent for losses incurred as a result of the Vessel being redelivered without hull cleaning.
23 June 2016  Respondent obtained a quotation from North Titan Shipbuilders for the cleaning of the Vessel’s hull at North Titan port. The total amount was USD 33,000.00.

26 June 2016  The vessel obtained free pratique and was cleared to berth.

28 June 2016  Champion Chartering Corp cancelled the Next Fixture, since the Vessel missed Laycan.

30 June 2016  The Vessel was re-delivered and the discharge of the cargo was completed.
Also, a joint survey was performed by Mekon Surveyors Inc. to determine the extent of damage to the cargo and the preliminary report was obtained.
On the other hand, the receivers of the cargo brought a claim against Charterers (the “Cargo Claim”).

1-3 July 2016  The Vessel’s hull was cleaned by Claimant at South Island at a total cost of USD 41,000.

4 July 2016  Claimant chartered the Vessel to Fairwind International for a time charter trip of about 50-55 days (the “Replacement Fixture”). The daily rate of hire was USD 11,000.

1 August 2016  Claimant presented Final Hire Statement to Respondent (the “FHS”).
The FHS includes costs of USD 97,766.64 in relation to cleaning the Vessel’s hull at South Island after re-delivery of the Vessel.
Respondent has failed to pay the amount of USD 96,567.42 but has otherwise paid the sums due under the FHS.
Summary of Pleadings

I. Respondent has taken every reasonable measure as set out under the BIMCO hull fouling clause in order to have the vessel’s hull cleaned prior to redelivery; therefore, its obligation under this clause has been discharged. Even if Respondent is found liable for costs of hull cleaning, these costs shall not exceed the amount of USD 33,000.00 as originally quoted by North Titan port and offered by Respondent, which Claimant did not agree to.

II. Claimant is not entitled to damages in the amount of USD 15,330,000.00 for loss of Next Fixture. The criteria under the principles of remoteness and causation are not met for the recovery of damages under the Next Fixture. Moreover, Respondent was never aware of any Next Fixture at the time of entering into the Charterparty which is an essential requirement.

III. Claimant must reimburse Respondent for the overpaid hire in the amount of USD 375,000.00 in accordance with Clause 17 and 40 of the Charterparty. Claimant’s failure to ensure that crew will comply with health regulation has led to a detention of Vessel. This duration shall be deemed off-hire because it has prevented the full working of the Vessel.

IV. The cargo owners have filed a valid cargo claim due to the damages caused to the Cargo. Respondent states that it is entitled to be indemnified by Claimant for the damages since the damage is completely attributable to Claimant. Therefore, 100% of the Cargo Claim is for Claimant’s account under clause 8(a) of the ICA because the vessel lacked the adequate seaworthiness and even if not, because of fault / error in management of the vessel. In the further alternative, Claimant is liable for 50% of the cargo damage.

V. Claimant is not entitled for any interest since awarding the interest is based on the alleged damages and there is no damage to the Claimant in the present case. To the contrary, since Respondent has suffered damages as set out below, Respondent is entitled to damages.
Pleadings

I. Respondent has respected its obligation of hull cleaning and has therefore discharged this obligation; and in any case, the costs of hull cleaning for Respondent shall not exceed USD 33,000,00.

According to the BIMCO hull fouling clause amended into the Charterparty, hull cleaning shall be performed by charterer prior to redelivery of the vessel. However, this obligation is not absolute and where cleaning is not possible parties shall agree to a lump sum payment in lieu of cleaning prior to but latest on redelivery.

The risk of Thanos Quest being delayed for more than a month by port authorities was not foreseeable by the parties at the time of conclusion of the Charter Party and therefore, by the same reasoning of previous cases such as *The Aquacharm*¹ and *The Island Archon*², such unforeseeability puts the Respondent in an implied indemnity from having to perform hull cleaning as a result of the decision of the port authority. Given that in the ordinary course of employment of Thanos Quest, the risk of spending the long period of time at anchorage and fouling as a result of following Respondent’s orders was not foreseeable, the conclusion reached by Judge Aikens in *The Kitsa*³ case can be drawn here; that the risk of fouling as a result of the employment of Thanos Quest by Respondent was a risk that the Respondent cannot be taken to have accepted.

Even though Respondent enjoyed an implied indemnity, and It was not due to charterers’ orders that the vessel was held at anchorage which resulted in need for hull cleaning; however Respondent took every measure at its disposal to perform its obligation fully.

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Therefore, Respondent’s obligation of hull cleaning has been discharged (1); Moreover, Claimant has waived its right to have the hull cleaned by Respondent or receiving a lump sum payment for it prior to redelivery (2); in any event and even if Respondent is still found responsible for the costs of hull cleaning, the costs shall not exceed USD 33,000.00 (3).

1. **Respondent has taken every measure available to him in order to perform hull cleaning and has therefore discharged its obligation.**

Pursuant to the BIMCO hull fouling clause, the obligation of hull cleaning arises for the charterers when the vessel has stayed idle for 30 days in a non-tropical zone, such as Wahanda. Due to the delay caused by the port authority of Wahanda, berthing of the vessel was not allowed, which caused fouling of the hull of Thanos Quest. Respondent has ever since taken every reasonable measure to perform its obligation.

There are two measures set out by the BIMCO hull fouling clause in the Charterparty once a vessel has spent more than 30 days outside a tropical zone as per charterers’ orders and the result of the inspection shows that the hull is in fact fouled:

**First;** as specified by sub-clause (c), hull cleaning shall be undertaken at charterers’ risk, cost, expense and time in consultation with the owners, which shall always be carried out prior to re-delivery.

**Second;** as set out in sub-clause (d), if charterers are prevented from carrying out such cleaning, parties shall prior to, but latest on redelivery, agree a sum payment in full and final settlement of owners’ costs and expenses arising as a result of or in connection with the need for cleaning.

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4 Moot scenario, p 16.
Therefore, the first contractual measure is for Respondent to perform cleaning and if that is not permitted, parties must agree to a lump sum payment in lieu of such cleaning.

As soon as it was known to the Respondent that the vessel would have to remain at anchorage for more than 30 days due to the suspicion of Wahanda port authority that some of the crew may be carrying the Ebola virus, even prior to request of hull cleaning from the Claimant, Respondent took every measure possible to uphold its obligations under the BIMCO clause.

On May 1st 2016, Respondent initiated contact with Wahanda port authority in order to arrange for cleaning the hull of Thanos Quest. However, the fact that port authority did not allow underwater hull cleaning for several reasons; namely that there was poor visibility due to the dirty water, was not the Respondent’s fault. Hence, Respondent has been prevented from fulfilling its obligation with regards to the first measure.

However, Respondent did not put an end to his endeavors to perform its contractual obligations and on 8 June 2016, when Claimant requested inspection and cleaning of the hull, Respondent notified him that cleaning was not permitted at Wahanda’s port; and that Respondent was willing to pay a lump sum of USD 15,000.00 as the second measure foreseen within the BIMCO clause which was rejected by Claimant. Respondent further requested an invoice for hull cleaning from Port North Titan, which gave a USD 30,000.00 quotation for full underwater hull and propeller cleaning. Charterer offered a lump sum of USD 20,000.00 to arrange for hull cleaning in North Titan if Owners were sailing north, which was also disregarded by Claimant. Owners refused to settle for a lump sum payment with the Charterers and arranged for cleaning after redelivery which was neither contractual

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5 Moot Scenario, p 26.
6 Moot Scenario, p 26.
7 Moot Scenario, p 28.
8 Moot Scenario, p 39.
nor fair. Charterers tried performing their contractual obligation once again by offering to pay USD 33,000.00 which Owners still did not agree to.\textsuperscript{9}

In this regard, Respondent has taken every measure possible set out by the Charter Party and has therefore discharged all of its contractual obligations.

2. **Claimant has waived his right to have hull cleaned by Respondent; or in the alternative receiving a lump sum payment for such cleaning, prior to redelivery.**

Both of respondent’s obligations of cleaning the hull of Thanos Quest or alternatively paying a lump sum in lieu of cleaning are specifically for the period *prior* to re-delivery. By rejecting all of Respondent’s offers, even though the final offer of USD 33,000.00 was according to an official quotation from North Titan Port, Claimant has waived its rights under this clause.

No other alternatives to hull cleaning or lump sum payments have been established in the BIMCO clause. Therefore, it is completely logical that any costs of journey to another port are non-contractual and only suiting to Claimant’s favors.

The BIMCO clause specifies that, hull cleaning pursuant to this clause must take place prior to redelivery and in the alternative, if charterers are not permitted to clean the hull, owners and charterers must agree to a lump sum payment again prior to redelivery. Respondent has repeatedly made offers of the lump sum payment as mentioned before; and by rejecting all these offers even according to an original invoice, Claimant has implicitly waived its right to having the hull cleaned prior to redelivery or receiving the lump sum payment in its place.

In conclusion, Claimant has waived his rights under the BIMCO clause and cannot demand anything more than the original costs of underwater hull cleaning from Respondent.

\textsuperscript{9} Moot Scenario, p 43.
3. In any event, the extent of Respondent’s liability for the obligation of hull cleaning does not exceed USD 33,000.00.

Even if Respondent is found liable for the costs of post-delivery hull cleaning, his responsibility with regards to its contractual obligations is limited to underwater hull and propeller cleaning and does not include the costs of voyage to South Island.

The quotation given to Charterers by North Titan port was USD 33,000.00 as a total for costs of hull cleaning and vessel disbursements. By referring to the fact that the South Island invoice also specifies USD 30,000.00 as costs of hull cleaning, it is clear that the costs of hull cleaning was never exceeding this amount and Charterers’ offer of this amount was fair and logical.

To conclude, even if Respondent is still held liable for costs of hull cleaning after redelivery of vessel, these costs shall not exceed the amount of USD 33,000.00.
II. Claimant is not entitled to damages in the amount of USD 15,330,000.00 for loss of Next Fixture.

The damages Claimant requests for do not meet the criteria under the rules of causation and remoteness for loss of profit. According to theses developed principles under the leading cases of Hadley,\textsuperscript{10} Victoria Laundries\textsuperscript{11} and the Heron II\textsuperscript{12}, only those damages can be recovered that "may fairly and reasonably be considered as arising naturally in the ordinary course of things".\textsuperscript{13} The conditions used in the previous jurisprudence, namely the landmark case of Achilleas,\textsuperscript{14} to specifically observe whether a loss of next fixture is categorized as a fair and reasonable loss in the ordinary course of things are: whether the Charterer had knowledge, at the time of entering the contract, that his breach will foreseeably and reasonably result in the specific loss of profit\textsuperscript{15} (1); Causation (2); assumption of liability (3); and mitigation of damages (4).

1. At the time of entering into Charterparty, Respondent did not have knowledge about the Next Fixture.

Respondent has not breached the Charterparty in the current dispute (1). Moreover, Claimant did not inform Respondent of any Next Fixture at the time entering into the Charterparty (2); and Respondent was not reasonably supposed to know about the Next Fixture given to its strict confidentiality (3).

1.1. Respondent did not breach the contract.

\begin{itemize}
\item \textsuperscript{10} Hadley v Baxendale (1854) EWHC J70 354.
\item \textsuperscript{11} Victoria laundry (Windsor) LD v Newman Industries LD (1949) 2 KB 528.
\item \textsuperscript{12} C Czarnikow LTD v Koufos (The Heron II) (1966) 1 Lloyds Rep 259, 731.
\item \textsuperscript{13} Hadley v Baxendale, op. cit.
\item \textsuperscript{14} Transfield Shipping v Mercator Shipping Inc (The Achilleas) (2007) 1 Lloyds Rep 19.
\item \textsuperscript{15} The Achilleas, op. cit.
\end{itemize}
The Charterparty between Parties, sets out the duration for "50-55 days WOG". The Vessel rested with Respondent for 91 days, of which 50 days were off-hire. The reason was due to Claimants failure to perform his obligation towards the health of the crew, which resulted in a detention of the Vessel by port authorities. The vessel was therefore on-hire only for 41 days, even 9 days less than the contractually agreed period. Respondent neither intended a delay nor neglected in any point of time.

1.2. Claimant never informed Respondent of any Next Fixture at the time of entering into the contract.

As a well-established rule, for recovering damages occurred for a loss of profit, the aggrieved party must prove that the defendant had knowledge about it at the time of entering into the agreement. Contrary to what Claimant submits, Respondent was never informed at the time of entering into the Charterparty. Respondent was only informed after the Next Fixture was concluded, and it is not reasonable to hold Respondent liable for a substantial sum of money demanded by Claimant, while he neither knew about it, nor breached his contract.

1.3. Respondent was not supposed to know about the Next Fixture because of its strict confidentiality.

Not only did Respondent not know about the Next Fixture, it is not presumable that Respondent could have known about it as well. Firstly, it was not logical for Claimant to fix their next charter when they didn’t know any exact time of redelivery of the ship because the

16 Moot Scenario, p 4.
17 See part III below.
18 Moot Scenario, p 74.
19 The Achilleas, op. cit.
20 Moot Scenario, p 34.
ship was under quarantine for an unknown time. Secondly, the first line of the Next Fixture stipulates that "Negotiations to be strictly private and confidential".  

2. The damage to Claimant is not attributable to Respondent or in the alternative it was not caused by Respondent.

The presence of a causal connection is a necessary prerequisite for the existence of liability in damages.  

22 At the same time, causation is a limitation on damages since compensation for losses can be claimed only to the extent that they were caused by the breach.  

23 The basic test for establishing causation is the "but-for" test in which the Respondent will be liable only if the claimant’s damage would not have occurred "but for" his breach. According to Clause 46 of the Charterparty, it was a responsibility of Claimant to ensure that all the crew onboard comply with all health regulations. The ship was under detention by port authorities exactly for this reason and the loss of Next Fixture was caused by Owners' own inaction. Respondent cannot be held liable for someone else's fault and no damage was caused by Respondent.

3. Respondent did not assume any liability for the loss of Next Fixture.

In regard to the loss of next fixture, the House of Lords stated that "the general understanding of the relevant market shows that a party would not reasonably have been regarded as assuming responsibility for such losses".  

24 Similarly, the aforementioned general rule applies to the present case, unless Claimant is able to illustrate to the contrary. However, there is no evidence in the present case leading to the result that Parties assumed any responsibility in

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21 Moot Scenario, p 30.
23 Ibid.
case of a lost profit. Moreover, Claimant’s email reserving any rights for the lost profit,\textsuperscript{25} was only after the conclusion of Next Fixture which does not meet the other cumulative criteria.

\textsuperscript{25} Moot Scenario, p 34.
III. Claimant must reimburse Respondent for the overpaid hire in the amount of USD 375,000.00 in accordance with Clause 17 and 40 of the Charterparty.

Under the NYPE form, the first question to be answered when considering a charterers claim for off-hire is whether the full working of the ship has been prevented (1).26 If the question was in positive, then it must be examined if there has been an off hire event (2).27

1. The full working of the Vessel was prevented during the detention by port authorities.

Whether the full working of the ship has been prevented will always be a question of the facts.28 The facts of the case clearly establish that in this period, the ship was prevented from moving to the berth and discharging the cargo, which is the most important part of a voyage for charterers. In a similar case of Apollo, delays arising out of diseases like the present case were considered as off-hire, where two crew members had suffered from typhus. the court found that the delays made by virus fall within the ambit of off-hire clause.29 Moreover, Parties have a specific agreement in regards to quarantine issues stipulated in Clause 44 of the Charterparty as an "off-hire event".

2. The detention of the Vessel by the port authorities is an off-hire event.

Parties have mutually agreed in Clause 44 of the Charterparty, that "Owners should be liable of any delay in quarantine arising from the master, crew having communication with shore or any infected area without the written consent of the charterers…. any time lost by such causes may be deducted as off-hire'.

27 Ibid.
28 Ibid.
29 Sidermar SA v Apollo Corporation (the Apollo) (1978) 1 Lloyd’s Rep 200.
In the present case, firstly, the delay in quarantine is arose from the crew as clearly illustrated by facts of the case.\textsuperscript{30} Secondly, Respondent never gave Claimant a written consent, rather an objection email in which Respondent explicitly notes that the vessel is off-hire.\textsuperscript{31} Therefore, by application of Clause 40 of the Charterparty, the overpaid hire must be reimbursed to respondent for the period of 50 days in which the Vessel was off-hire as a result of being quarantined.

\textsuperscript{30} Moot Scenario, p 24.
\textsuperscript{31} Moot Scenario, p 24.
IV. Respondent is entitled to be indemnified by Claimant.

On 27 June 2016, when the Vessel opened the hatch for discharge, it was clear that there had been severe damage to the cargo caused by water ingress. The crew had pumped sea water into the cargo hold instead of pumping it out and therefore, the damage was resulted from the negligence of the crew.

Respondent anticipated a substantial claim from the Receivers and hence, sent an email to Claimant holding it fully liable for all claims and costs arising from the negligence of Claimants’ crew.\textsuperscript{32} Claimant in its further submissions, has denied any liability as to the Cargo Claim. Claimant has further used the phrase “Cargo Claim is time barred” as an excuse to escape performing its payment obligation which in the present dispute, cannot be relied on; since: The damage caused to the cargo, is completely attributable to Claimant (1); and therefore, 100% of the Cargo Claim is for Claimant’s account under clause 8(a) of the ICA (2); Alternatively, 50% of the Cargo Claim is for Claimant’s account under clause 8(b) of the ICA(3).

1. The damage caused to the cargo, is attributable to Claimant.

The Cargo Claim has been raised as a result of damage to the cargo, caused by the improper use of the ballasting system by the crew of the Vessel.

Respondent, as the Charterer, is liable directly to the owners of damaged cargo as the carrier under the relative bill of lading.\textsuperscript{33} Nevertheless, this is the case in a normal course of affairs when the damage to the cargo has arisen due to carrier’s own fault or any crew working under his commands, which is clearly different from the current case.

In the present dispute, the damage to the cargo has resulted from the negligence of the crew which the Claimant has provided under clause 68 of the Charterparty.

\textsuperscript{32} Moot Scenario, p 38.
\textsuperscript{33} Moot Scenario, p 47.
This clause states that: “upon delivery and throughout the duration of this Charter, Vessel shall have a full and efficient complement of Master, Officers and crew for a Vessel of her tonnage and design, ... who shall be trained to operate the Vessel and her equipment competently and safely”.

Since, the crew of the Vessel have been provided by Claimant and they must have been “trained to operate the Vessel and her equipment competently and safely”, Respondent is not liable for “neglect of the cargo”. This view is further supported by case law.

In Gosse Millard Ltd. v. Canadian Government Merchant Marine Ltd, workmen left the vessel's hatches open and negligently failed to protect the open hatches from rain. Rain came through the hatches and damaged the cargo. The House of Lords held that this was “neglect of the cargo” and held the “ship-owner” liable for the ensuing rain damage.

In The Rona, the claimant’s cargo of flour was damaged by sea water which had come through the vessel’s deck and the court held that the master was negligent and that the shipowner was liable.

As a result, the damage caused to the cargo is completely attributable to Claimant as the provider of the crew.

2. 100% of the Cargo Claim is for Claimant’s account pursuant to clause 8(a) of the ICA.

After being informed of the damage to cargo, the Receivers, made a valid cargo claim to the Respondent within the due time. Since the damage has been caused due to the negligence of

34 Moot Scenario, p 13.
35 UK P&I Club, What are the key charterers’ risks? Available at: chrome extension://ngpampmnpnepgilofhadhnhmblaek/captured.html?back=1, p 1.
36 Gosse Millard v. Canadian Gov't Merchant Marine (H.L. 1928) All ER Rep 97, 98.
the crew which Claimant had provided, Respondent holds the position that Claimant is liable for 100% of this Cargo Claim under clause 8(a) of the ICA. This is due to the reason that Claimant itself has agreed under clause 53 of the Charterparty that liability for cargo claims, as between Owners and Charterers, shall be apportioned as specified by the Inter-Club New York Produce Exchange Agreement and any amendments thereto.40

Clause 8 of the ICA states with regard to the Cargo Claim that: “(a) Claims in fact arising out of unseaworthiness and/or error or fault in navigation or management of the vessel: 100% Owners”.

Respondent submits that Claimant is 100% liable for the Cargo Claim because the Vessel provided lacked the adequate seaworthiness (2.1.); and because of its fault / error in management of the vessel (2.2.).

2.1. Claimant is liable for 100% of the Cargo Claim because the vessel lacked seaworthiness.

The usual form of charter warrants that the vessel, upon her delivery, shall be in all respects seaworthy or that due diligence shall have been exercised to render her so41. Generally, the term means that the vessel must be in such condition as to be fitted for the intended service.42

The obligation of the ship owner (Claimant in the present dispute), also encompasses to supply a ship that is seaworthy in relation to the cargo which it has undertaken to carry.43 Thus, in order to be cargoworthy, the vessel must be capable of loading, discharging, and delivering the cargo safely at its destination.44

39 Moot Scenario, p 82; PO2, para 10.
40 Moot Scenario, p 10.
42 Ibid.
43 Girvin, Stephen, op. cit p 11; Stanton v Richardson (1872) LR 7 CP 421.
44 Girvin, Stephen, op. cit p 12.
The obligation to take care to make the vessel seaworthy does not, however, mean that the ship must be immune from the negligence of her crew. But on the hand, "Unseaworthiness involves liability on the shipowner only if it has caused the damage complained of".

In the at hand case, the act of default complained of, is a proximate cause of the alleged damage caused by negligence of Claimant’s crew. Therefore, liability follows because the unseaworthiness and more precisely, uncargoworthiness, is one of the causes of the loss, in the charterparty.

To further support this argument, in Steel v State Line Steamship Co (1877), a vessel’s orlop deck port was insufficiently fastened and water entered through the port during the voyage, damaging a cargo of wheat. The House of Lords unanimously held that there was an implied obligation to tender a seaworthy vessel and the vessel had been proved to be unseaworthy.

2.2. Alternatively, Claimant is liable for 100% of the Cargo Claim because of fault / error in management of the Vessel.

Even if the tribunal would hold that the Vessel was seaworthy, Respondent further submits that the negligence of the crew in ballasting the ship, is an error in management.

In time charter party, Claimant, as the Ship owner remains responsible for the safe carriage of the cargo during the voyage because it has a duty of "due diligence" to make the vessel seaworthy and “cargo worthy”. In other words, Claimant owes a duty to take reasonable care of the cargo.

46 Girvin, Stephen, op. cit p 23.
47 Ibid.
48 Girvin, Stephen, op. cit p 8; Steel v State Line Steamship Co (1877) 3 AppCas 72.
49 McDowell, Carl E., Gibbs, Helen M., op. cit, p 190.
50 Sup Lee, Eun, Ok Kim, Seon, op. cit, p 210; Zamora, S, ‘Carrier Liability for damage or loss to cargo in international transport’ (1975) (AmJCL) Vol 23.
51 Onego Shipping & Chartering BV v JSC Arcadia Shipping (Socol 3) (2010) EWHC 777.
In this case, the negligence of the crew in ballasting the Vessel, is considered an error in the management and hence, causes Claimant to be responsible for the whole amount of Cargo Claim. This view has been supported by case law.

In the *Glenochil* case\(^\text{52}\), an engineer pumped water into a ballast tank to secure the vessel's stability, without inspecting the pipes. The cargo was damaged by water leaking from the broken pipes. The Divisional Court held that this default was in the "management," of the vessel.\(^\text{53}\)

On the other hand, under the Hague Rules, the carrier's defaults are classified into Commercial Default and Vessel Management Default and Respondent as the Carrier, is not liable for Vessel Management Default\(^\text{54}\) since it has fulfilled his own duties, and hence, cannot be held liable for faults or errors in the management of the vessel\(^\text{55}\).

In addition, Hague-Visby Rules article IV (2),\(^\text{56}\) states that neither the carrier nor the ship shall be responsible for the loss or damage arising or resulting from "acts, neglect, or fault of the master, mariner, pilot, or the servants of the carrier in the navigation or management of the ship"\(^\text{57}\). In the present case, the crew were provided by Claimant and hence Respondent cannot be responsible for the damage to cargo *a fortiori*.

\(^{52}\) *The Glenochil* (1896) 73 LTR 416 Adm.


\(^{55}\) Sup Lee, Eun, Ok Kim, Seon, *op. cit* p 210; Zamora, S, *op. cit* p 55.

\(^{56}\) *International Convention For The Unification Of Certain Rules Of Law Relating To Bills Of Lading (Hague-Visby-Rules)* article IV (2).

\(^{57}\) Sup Lee, Eun, Ok Kim, Seon, *op. cit* p 212.
3. Alternatively, 50% of the Cargo Claim is for Claimant’s account.

In the situation that the tribunal would not accept that 100% of the Cargo Claim rests upon Claimant, Respondent submits that Claimant is liable for at least 50% of the Cargo Claim under clause 8(b) of the ICA.

According to this clause, “Cargo Claims shall be apportioned as follows... (b) Claims in fact arising out of... Unless the words “and responsibility” are added in clause 8...”. 58

As it can be seen on clause 8 of the NYPE 2015 Form, the words “and responsibility” are added. 59

In addition, as per clause 64 of the Charterparty, the Vessel was to be ballasted at the discretion of Master having due regard to seaworthiness of the Vessel.

Claimant had itself guaranteed that the Vessel will always be maintained in safe condition during ballast operations 60 but nevertheless, ballasting was performed negligently and the crew pumped water into the cargo hold which resulted in damage to the cargo.

Although the ballasting had been performed to keep the Vessel in good maintenance but in a Court of Appeal's case 61, Justice Greer stated, "If the negligence is negligent failure to “use the apparatus of the ship for the protection of the cargo”, the ship is not so relieved." 62

Furthermore, the Ferro Court established a distinction between "want of care of cargo and want of care of vessel indirectly affecting the cargo". 63 In the case at hand, ballasting as “want of care of vessel indirectly affecting the cargo” has resulted in the damage to cargo and it cannot be attributable to Respondent.

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58 Moot Scenario, p 72.
59 Moot Scenario, p 71.
60 Moot Scenario, p 12.
61 Gosse Millard v. Canadian Gov't Merchant Marine, op. cit p 103 Sup Lee, Eun, Ok Kim, Seon, op. cit p 216.
62 Sup Lee, Eun, Ok Kim, Seon, op. cit p 216.
63 Ibid p 215.
To conclude, Respondent states that the damage to the Cargo is attributable to Claimant and Claimant is liable to 100% of Cargo Claim. If not, 50% of the Cargo Claim lies on Claimant.

V. Claimant is not entitled to any interest.

Before making any award of interest, an arbitrator should observe the basis on which any claim for interest is being made. On the other hand, Interest is presumed always to have accrued where a sum of money is in arrears, to the benefit of the party who delays payment or the sum and to the detriment of the party entitled to its timely payment. Therefore, the interest which can be claimed should be biased on reasonable claim. This claim can be late payment of the debt or late compensation of the damage.

In the case at hand, Claimant has demanded damages which consist of: Hull cleaning costs; Costs of the voyage to South Island in order to perform hull cleaning; and Damages for late re-delivery. Furthermore, Claimant requested from arbitral tribunal to award interest on the basis of the aforementioned damages. But, Claimant is neither entitled for damages, nor for interests. Since awarding the interest is based on the alleged damage and there is no damage in the current case, the Claimant is not entitled for any interest.

1. The arbitral tribunal has discretion to award an interest in favour of Respondent

Where the interest is not recoverable as of right, an arbitral tribunal will still be able to make an award of interest by exercise of its discretionary power to do as such. A very wide discretionary power is contained in the Arbitration Act 1996 Section 49, which applies if the seat of arbitration is in England, Wales or Northern Ireland. In England, in the absence of a

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66 Moot Scenario, p 69.
67 Chartered Institute of Arbitrators, op. cit.
statutory provision, there is no power to award interest as (general) damages\textsuperscript{68}. According to article 49(3) of the arbitration act of 1996 “the tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case…”. In the case at hand, although the issue of awarding interest has referred by Respondent,\textsuperscript{69} but its details fall within the discretion of the tribunal. On the other hand as referred in Clause 80 of the Charterparty\textsuperscript{70} the seat of arbitration is London and English law will apply. Therefore, considering the aforementioned, the arbitral tribunal has discretion power to award interest.

\textbf{2. Respondent is entitled to interests.}

Interest is compensation allowed by law or fixed by the parties for the use or detention of money, or allowed by law as additional damages for loss of the use of money due as damages during the lapse of time since the accrual of loss.\textsuperscript{71} In a more clear wording, interest is the compensation that one person gives for the use and profit of another’s money, or, the legal damages he is obliged to pay to another person who has lost the use of his money through the payor’s act or negligence, although the payor may not have received any benefit therefrom.

Interest is allowed by law only on the ground of a contract, express or implied, or as damages for breach of contract, or violation of a duty. Therefore interest is divided into two great and well defined classes, the first being of contractual interest, and the second allowed as damages.\textsuperscript{72}

\textsuperscript{68} London, Chatham & Dover Railway Co \textit{v} South Eastern Railway Co (1893) AC 429.
\textsuperscript{69} Moot Scenario, p 69.
\textsuperscript{70} Moot Scenario, p 15.
\textsuperscript{71} McCormick, Charles T., ‘Interest As Damages’ (1931) 9 N C L Rev 237 238.
\textsuperscript{72} Perley, Sidney, \textit{Principles of the law of interest as applied by courts of law and equity in the united states and great Britain and the general interest statutes in force in the united states, great britain and the dominion of Canada} (George B. Reed Publishers, 1893), p 5.
The party withholding payment of the sum outstanding is unjustly enriched and continues to enjoy the benefit of the interest on the sum which it will eventually have to pay, and it is therefore reasonable that this gain should pass to aggrieved party. Furthermore, the duty to pay interest arises from the need to compensate the lost time value of money. Hence, as Lord Herschel, L.C, states “… the party who is wrongfully withholding the money from other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of other party who is entitled to its use”.

In England, the courts hold that damages bear interest generally from the time they are liquidated, and when it is due, they are not liquidated when neither of the parties cannot alone render it certain how much is due; that is, if property destroyed has a definite money value, susceptible of easy proof, interest will be allowed from time of the loss.

In the case at hand, Respondent has suffered damages due to cargo damages, to be calculated, and overpaid hire in an amount of USD 375,000,000. Therefore, the Respondent bases its Claim about interest on the aforementioned damages.

Regarding the periods which Respondent is entitled to receive interest; two periods should be considered: First, pre-award and second post-award. Turning to first period in the case of an award of damages, it will be important to assess the date when the relevant loss was suffered. Interest should be awarded from that date to the date of the award, and about second period between the date of the award and the date when the award is paid.

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73 Song, Lu, op. cit p 722.
74 Ibid.
76 Perley, Sidney, op. cit p 92.
77 Moot Scenario, p 74.
78 Harris, Bruce, Planterose, Rowan, Tecks, Jonathan, The Arbitration Act 1996 a commentary (Blackwell publishing, 4th ed, 2007) p 239.
79 Chartered Institute of Arbitrators, op. cit p 6.
80 Ibid p 12.
3. The arbitral tribunal should award compounded interest according to borrowing rate of USD.

There are two classes of rates percent of interest, the legal and conventional rate. The law regards a person as always bound to pay the legal rate unless there is an agreement for another.\textsuperscript{81} The legal rate is that rate percent established by law, either by constitution, statute or custom, for which all parties are conclusively presumed to have in absence of agreed rate, and which is also allowed as damages.\textsuperscript{82}

In the at hand case, there is no agreement either on awarding an interest, nor on its rate. Therefore, it is in tribunal's discretion to determine the proper rate of interest by considering the related regulations. However, In this regard, Respondent points out that according to the Law Commission recommendation in 2004, for awards or settlements of 15000 pound (other equal currencies) or more there should be a presumption that interest will be compounded.\textsuperscript{83} Furthermore, regarding interest rate, it is widely accepted that the appropriate rate of interest in commercial cases is to be computed by reference to prevailing borrowing costs and not by reference to potential loss of investment.\textsuperscript{84} Nevertheless, when the interest is payable in a foreign currency the arbitral tribunal is guided by the borrowing rate of that currency in its “home” country.\textsuperscript{85} Consequently, in the case at hand, the arbitral tribunal should award interest in compound form and according to US Prime Rate as a benchmark. This is the rate which banks in the US charge their most creditworthy business borrowers operating in the US.\textsuperscript{86}

\begin{itemize}
\item \textsuperscript{81} Perley, Sidney, \textit{op. cit} 145.
\item \textsuperscript{82} Perley, Sidney, \textit{op. cit} 151.
\item \textsuperscript{83} Chartered Institute of Arbitrators, \textit{op. cit} 9.
\item \textsuperscript{84} Rhidian, Thomas, ‘Commercial Arbitration The vexed issue of interest awards’, Lloyd's Maritime and Commercial Law Quarterly (LMCLQ) p 680.
\item \textsuperscript{85} Ibid.
\item \textsuperscript{86} Chartered Institute of Arbitrators, \textit{op. cit} 8.
\end{itemize}
Prayer for Relief

For the reasons set above, Respondent respectfully requests the tribunal to:

Reject the demands of Claimant in their entirety;

Order the reimbursement of hire in the amount of USD 375,000.00 in favour of Respondent;

Order damages to the cargo to be paid by Claimant in an amount to be calculated in future proceedings;

Award Interests and costs in favour of Respondent.

Served this 9th day of May 2019.

Solicitors for Respondent,

Knight and Protector