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

Between

Panther Shipping Inc … Claimant

and

Omega Chartering Ltd … Respondent

TEAM 6
RESPONDENT’S MEMORANDUM

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

A. The Parties

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

B. The Charterparty

2. By way of a trip time charterparty, the Vessel was fixed for the carriage of a cargo of bulk harmless products from West Coast to ports in the Wahanda range, for a duration of about 50 to 55 days without guarantee. (the “Charterparty”).

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

(i) The redelivery clause in the Fixture Recap (the “Redelivery Clause”) which states “REDEL DLOSP 1SP WAHANDA RANGE, PORT IN CHRTRS OPTION, ATDNSHINC”.

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

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

(iv) Clause 83 of the Omega Rider Clauses (the “Hull-Fouling Clause”) which incorporates the BIMCO Hull Fouling Clause for Time-Charter Parties.

(v) Clause 17 of the NYPE 2015 (“the “General Off-Hire Clause”), which allows the Respondent to treat the vessel as off-hire for any loss of time from inter alia, “detention by Port State control or
other competent authority for Vessel deficiencies” or “any other similar cause preventing the full working of the Vessel”.

C. Performance of the Charterparty

4. On 18.03.2016, the Vessel commenced loading at West Coast. In the midst of loading operations, the West Coast Daily Echo reported the worsening condition of Ebola. The Vessel then sailed for Wahanda on 20.04.2016. A cargo of 1720 bags English breakfast tea of 5mt each were loaded.

5. On 7.05.2016, the Vessel was held at anchorage by the Wahanda Port State Control due to fears that the crew may be carrying Ebola. These fears resulted in a 50-day quarantine as a number of crew members were found by the Port State Control to be running a high fever, a symptom of Ebola.

6. As the vessel was held at the port for an extended period of time, the Vessel’s hull fouled and needed to be cleaned. However, Wahanda Port Services advised that cleaning at Wahanda was not possible due to poor visibility and lack of cleaning providers. The Claimant repeatedly rejected the Respondent’s offers of a lump sum payment in lieu of cleaning under Clause 83 or to clean at the nearby North Titan port which was only half a day’s voyage away. Instead, the Claimant demanded that the vessel be cleaned at South Island. It was later revealed in the Claimant’s submissions that South Island is where the Fairwind Fixture is located at, which would take two days.

7. The Vessel was finally permitted to berth on 26.06.2016 and discharging commenced. On discharge, the Respondent’s surveyors found that the cargo on board (English Breakfast Tea in bags) was severely water damaged. The water damage was caused by a crew member who opened the wrong valves during ballasting operations. The cargo receivers (“Receivers”) accordingly brought a cargo claim (“Cargo Claim”) against the Respondent.

8. As a result of the quarantine, the Vessel was redelivered only on 03.06.2016. Unbeknownst to the Respondent, this allegedly caused Claimant to miss the cancelling date of a follow-on fixture fixed with Champion Chartering Corp for two years (and an additional two-year charterers’ option), which had a laycan from 22.06.2016 to 28.06.2016. (the “Champion Fixture”) However, the Claimant entered into a
replacement into a replacement fixture with Fairwind International for 50-55 days (the “Fairwind Fixture”).

II. SUMMARY OF THE ISSUES

9. The issues before the Tribunal are as follows:

(i) The first issue is whether the Owners or Charterers are responsible for the hull cleaning costs.

(ii) The second issue is whether the damagers Owners are entitled to for the Charterer’s late redelivery of the Vessel should be quantified based on the hire duration and rate of the Champion Fixture.

(iii) The third issue is whether the Vessel was off-hire during the quarantine such that the Charterers can recover hire paid during the period of quarantine.

(iv) The fourth issue is whether the Owners should be apportioned 100% of the liability under the Cargo Claim pursuant to ICA.

III. THE CLAIMANT IS LIABLE FOR THE CLEANING COSTS OF THE VESSEL

A. Clause 83(c) of the Charterparty is inapplicable to make the Respondent liable for the costs, expenses and time incurred in cleaning, as the requirements under Clause 83(c) have not been complied with

10. Pursuant to Clause 83(c), the Respondent was to undertake cleaning at their own risk, cost, expense and time if either party calls for cleaning of the vessel’s underwater parts as a result of an inspection carried pursuant to Clause 83(b).

11. On the facts, no inspection of the Vessel was carried out. It is undisputed that neither party ordered an inspection at the redelivery port\(^1\) of Wahanda. Thus, even though the Claimant called for the Respondent to undertake cleaning, this call was not made based on any inspection pursuant to Clause 83(b).

\(^1\) Procedural Order, para 5.
12. The Respondent was therefore not contractually obliged to carry out cleaning at any point when the Charterparty was still subsisting. Any cleaning expenses incurred by the Claimant cannot be claimed by way of damages pursuant to Clause 83(c).

B. The Claimant cannot otherwise recover the cleaning costs from the Respondent because they are unable to rely on an implied indemnity

13. Since Clause 83(c) does not apply, the Claimant can only recover the cleaning costs from the Respondent if it can establish that it is entitled to an implied indemnity for complying with the Respondent's orders to discharge at Wahanda. However, the Claimant has no right to an implied indemnity on the facts of the case.

1. An indemnity for cleaning costs should not be implied into the Charterparty

14. An indemnity should not be implied for costs incurred by the Claimant for cleaning the hull of the Vessel. In *The Island Archon*\(^2\), it was held that whether an indemnity should be implied where the shipowner places the master under the orders of the charterer depends on whether such an indemnity is necessary for business efficacy.\(^3\) It is insufficient to justify such an implied term on the basis that it would be "reasonable" for the shipowner to stipulate for an express indemnity.\(^4\)

15. An implied indemnity for costs incurred in hull cleaning would not be necessary for the business efficacy of the Charterparty. The Parties have already contracted for an express allocation of cleaning costs as a result of compliance with the Respondent’s orders as to the Vessel’s employment under Clause 83. Since the parties have made contractual provisions for the exact type of situation which any purported implied indemnity would also cover, there is already a means under the contract for the Claimant to be compensated for expenses arising from marine fouling. It cannot therefore be said that this implied indemnity is necessary for the working of the contract.

\(^2\) *Triad Shipping Co. v Stellar Chartering & Brokerage Inc (The “Island Archon”)* [1995] 1 All ER 595 (CA).

\(^3\) *Ibid* 237 (Sir Donald Nicholls VC).

2. Even if there is an implied indemnity, the cleaning costs incurred by the Claimant do not fall within the scope of this indemnity

16. A shipowner is entitled to look to the charterer for an implied indemnity against the consequences of complying with an order as to the employment of the ship only if the following conditions are met: first, the loss must be one which the shipowner cannot be taken to have accepted; second, only losses which arise directly from the charterer’s instructions will fall within this implied indemnity. In the present case, the loss comprising the cleaning costs and expenses incurred by the Claimant does not fulfil these conditions. The loss accordingly falls outside the scope of any implied indemnity.

   a) The cleaning costs incurred by the Claimant fall outside an implied indemnity since the risk of fouling was foreseeable at the time of contracting.

17. Only unforeseen types of loss are within the scope of an implied indemnity. A loss that was an ordinary and foreseeable risk of the charterer’s orders may lead to the conclusion that it is not within the indemnity if this is a risk that the shipowner undertakes to bear.

18. In the present case, the risk that the Vessel would suffer hull-fouling due to inactivity in port was foreseeable at the time of conclusion of the Charterparty, and is thus a risk borne by the Claimant. The risk of the Vessel being fouled at Wahanda was foreseeable by the parties at the time of contracting for two reasons.

19. First, the redelivery port was contractually stipulated in the Fixture Recap to be “Wahanda Range”. Thus, the Claimant would have been aware at the time of contracting that the Vessel would be operating in the Wahanda region. They had the opportunity to consider the risk of fouling at Wahanda during

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5 ibid 238 (Sir Donald Nicholls VC).
6 ibid.
7 Ibid.
8 Ibid.
10 Moot Scenario, p 3.
20. Second, the fact that Wahanda itself used to offer cleaning services\(^\text{11}\) and that multiple neighbouring ports currently offer such services (South Island and North Titan) gives rise to the reasonable inference that ships operating in Wahanda range suffer from marine fouling. Fouling is therefore a foreseeable occurrence in this Charterparty.

21. Thus, where the risk of fouling due to inactivity in Wahanda for more than 30 days was foreseeable at the time of contracting, this risk is one that the Claimant agreed to accept.\(^\text{12}\) Therefore, the particular losses incurred by the Claimant from complying with the Respondent’s orders do not fall within the scope of any implied indemnity.\(^\text{13}\)

b) The Shipowner has no right to be indemnified by the Charterer for losses not caused by the Charterer’s employment orders

22. There must be an unbroken chain of causation between the Charterer’s orders and the loss by the Owner for the Owner to claim an implied indemnity\(^\text{14}\), as the indemnity extends only to those types of loss which are regarded as the consequence of the charterer’s direction.\(^\text{15}\) Where however the chain of causation is broken between the charterer’s order and the loss, the compliance with such orders is not the cause of such loss.\(^\text{16}\)

23. Applying these principles, the Respondent’s order to discharge at Wahanda did not cause the fouling of the Vessel because the chain of causation between the Respondent’s orders and the fouling was broken by an intervening event. This event was the detention imposed by the Wahanda Port State Control at

\(^{11}\) Moot Scenario, p 26.

\(^{12}\) The “Kitsa” (n 9) [25] (Aikens J).

\(^{13}\) ibid 439 (Aikens J); The “Island Archon” 236 (Evans, LJ), 238 (Sir Donald Nicholls VC).

\(^{14}\) The “Island Archon” 235 (Evans LJ); A/B Helsingfors Steamship Co Ltd v Rederiaktiebolaget Rex (The “White Rose”) [1969] 3 All ER 374 (QB) [59] (Donaldson J); Larrinaga Steamship Company Ltd v R (The “Ramon de Larrinaga”) [1944-45] 78 Lloyd’s Rep 167 (HL) 177 (Lord Porter).

\(^{15}\) The “Island Archon” (n 2) 238 (Sir Donald Nicholls VC).

\(^{16}\) The “White Rose” (n 14) [59] (Donaldson J).
anchorage due to the suspicion of Ebola amongst the crew. The detention lasted from 7.05.2016 till 26.06.2016 when the Vessel was eventually granted free pratique and cleared to berth, totalling 51 days.

Thus, a significant portion of the total time spent in Wahanda (approximately 55 days) was due to the quarantine by the authorities and not the Respondent’s orders to discharge at Wahanda. On the facts, discharge only took a mere four days after the Vessel was cleared to berth. The reasonable inference to draw is that a significant portion of fouling occurred during the period of the detention. Therefore, had the authorities not quarantined the Vessel, the Vessel would not have suffered fouling to such a significant extent as to require cleaning.

Thus, it is the extraneous acts of a third party, in this case that of the port authorities, which have caused the Vessel’s fouling and not the Respondent’s employment order of the Vessel. The Claimant will therefore fail in establishing the necessary causal link to claim an implied indemnity.

C. Alternatively, even if the Tribunal finds that the Respondent are liable for cleaning and have breached this obligation, the Respondent are only liable for a maximum of USD33,000 in damages.

1. The amount of damages the Claimant can claim as a result of the Respondent’s breach is limited by the principles of mitigation

Under the principles of mitigation of damages in the event of a contractual breach, the Claimant must take all reasonable steps to mitigate their loss consequent upon the defendant’s wrong. They cannot recover damages for any such loss which he could have but failed, through unreasonable action to avoid.

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17 Moot Scenario, p 25.
18 Moot Scenario, para 7.
19 Procedural Order, para 7: “discharge began on 27 June 2016.”; Para 17 of the Statement of Claim as admitted in Para 5 of the Defence and Counterclaim submissions: “The Vessel was re-delivered on 30.06.2016, discharge of the cargo having completed on the same day”.
20 The “White Rose” (at [59]) (Donaldson J).
2. **The Claimant has failed to mitigate their losses reasonably**

27. Applying these principles, in insisting on and proceeding to South Island for cleaning, the Claimant has failed to reasonably mitigate their losses and cannot claim the full quantum of cleaning costs incurred.

28. First, the Claimant rejected the Respondent’s offer to have the Vessel cleaned at North Titan port, which would have cost less than if cleaning were to be undertaken at South Island (USD33, 000\(^{22}\) at North Titan compared to the USD41, 000 at South Island). The amount of bunkers consumed to reach North Titan would also have been less since North Titan is only half a day’s voyage\(^{23}\) away while South Island is a two day’s voyage away.\(^{24}\)

29. Second, the Claimant themselves acknowledged that their own proposal of cleaning at South Island did not reposition the Vessel to their advantage on 30.06.2016.\(^{25}\) The Claimant had no subsequent voyage fixed at South Island at the time they decided to proceed to South Island for cleaning. It was only on 4.07.2016 that the Replacement Fixture with Fairwind was fixed (with delivery at South Island), by which time cleaning had already been completed (On 3.07.2016\(^{26}\)).

30. Thus, by proceeding to South Island for cleaning have not taken reasonable steps in mitigating their losses arising from the Respondent’s breach of their cleaning obligations.

D. **Further, the Claimant has no right to hire for the period of 30.06.2016 to 4.07.2016 because redelivery had already occurred on 30 June at Wahanda**

31. The Claimant cannot recover hire for the 4.2639 days during which the Vessel made its way from Wahanda to South Island for cleaning. The Claimant are not contractually entitled to hire for that period as the Vessel was no longer chartered to the Respondent after redelivery on 30.06.2016.

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\(^{22}\) Moot Scenario, p 35.
\(^{23}\) *ibid* p 39.
\(^{24}\) Procedural Order, para 6.
\(^{25}\) Moot Scenario, p 42.
\(^{26}\) *ibid* p 68, para 18.
32. The redelivery on 30.06.2016 was effective to stop hire from running, notwithstanding the Vessel was in a fouled state. In The Puerto Buitrago, the obligation to repair the vessel was found not to be a condition precedent to redelivery. This was because there were no clear words providing that complete performance of a particular stipulation can be a conditional precedent to redelivery. In addition, it was also not reasonable to construe the obligation to repair as a condition precedent to redelivery.

33. Applying these principles to the present case, the obligation to clean prior to redelivery cannot be construed as a condition precedent. First, there are no clear words in the Charterparty to that effect. The words “cleaning in accordance with this clause shall always be carried out prior to redelivery” are insufficient for such purposes as they pertain to the timing of cleaning, and do not in any way prohibit redelivery if cleaning is not carried out.

34. Second, a construction requiring cleaning to be a condition precedent to redelivery is unreasonable. This is because such a construction would lead to the absurd result that either party may retain the Vessel to its benefit depending on whether the market rate has increased or decreased.

35. In line with the submissions above on time lost in cleaning, the Claimant would only be entitled to damages equivalent to half a day’s hire to North Titan for cleaning.

IV. THE CLAIM FOR LOSS OF CHAMPION FIXTURE DUE TO LATE REDELIVERY IS TOO REMOTE AND SHOULD NOT BE ALLOWED

36. This Tribunal should not allow the Claimant’s claim of the sum of USD 15,330,000 for the loss of hire under the Champion Fixture, calculated as 4 years at USD 10,500 per day as the damages claimed are too remote to be awarded. The claim should be restricted to the difference between the Charterparty and the market rate of hire for the period of overrun.

27 Note however, it was pertaining to repairs and not hull cleaning.

28 Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH (The “Puerto Buitrago”) [1984] 1 All ER 129 (QB) 253 (Lord Denning MR).

29 Wye Shipping Company, Ltd v Compagnie Du Chemin De Fer Paris-Orleans [1922] 1 KB 617, [1922] 10 LLI Rep 85, 87. (McCardie J); The “Puerto Buitrago” (n 28) 253 (Lord Denning MR).
Alternatively, even if the claim is not held to be too remote, the duration of the Champion Fixture and the basis of damage calculations is 2 and not 4 years. Furthermore, the hire earned under the Replacement Fixture should be deducted from the damages claimed for late redelivery.

A. DAMAGES STEMMING FROM LOSS OF THE CHAMPION FIXTURE DUE TO LATE REDELIVERY ARE TOO REMOTE TO BE CLAIMED

1. The loss of the Champion Fixture cannot be claimed under the first limb of the Hadley v Baxendale rule

The assumption of responsibility definitively laid down by the majority in The Achilleas should be applied. In The Achilleas, the House of Lords unanimously held that loss of profits under a subsequent fixture could not be claimed under the first limb of the orthodox Hadley v Baxendale rules. Significantly, the Court applied an additional requirement of assumption of responsibility to the Hadley v Baxendale rules and held that the loss was too remote to be claimed as the Respondent did not assume liability for the loss of a following fixture. Two pertinent features in time charterparties warranted an additional assumption of responsibility requirement.

First, there is a general market understanding in the shipping industry that liability for late redelivery is restricted to the difference between the market rate and the charter rate for the overrun period. As highlighted by Lord Hope, this was a fact "that everybody who deals in the market" should know and can expect. This was because parties would naturally contemplate that if the Claimant lost a fixture, they would be able to enter the market for a substitute fixture. Even if the market rate is potentially lower, the availability of the market would protect the Claimant "for the most part."

38. Hadley v Baxendale (1854) 9 Ex 341 (Adelson J).
39. The Achilleas (n 30).
32. ibid [24] (Lord Hoffman), [34] (Lord Hope).
Second, the length and terms of a lost following fixture could be unknown to the charterer. Only the shipowner would be aware of such terms. A time charterer cannot be taken to have accepted a risk that "would be completely unquantifiable" at the time of contracting. As such, this warranted the assumption of responsibility test in the eyes of the House of Lords. Furthermore, *The Achilleas* can be contrasted with *The Sylvia*, where loss of profits of a subsequent fixture was allowed. Crucially, the length of time of the next fixture in *The Sylvia* concerned a sub-fixture of a time charterparty which would be of a definite length since it can never be longer than the time charterparty itself. Hence the loss was not “unquantifiable, unpredictable, uncontrollable or disproportionate” such that it would be too remote to be claimed.

Both circumstances in *The Achilleas* leading to the assumption of responsibility test are also present in the current case. First, the Charterparty is a time charterparty and hence the general market expectation in the shipping industry would be that damages for late redelivery should be limited to the difference between the market rate and the charter rate for the overrun period.

Second, the length or terms of the Champion Fixture were not conveyed to the Respondent at the time the Charterparty was made. In fact, the Champion Fixture was only concluded on 15.06.2016, a time well after the intended redelivery period. Whilst the Claimant did post on their Chatter account that they were looking to hire out the Vessel for 3 to 5 years, this advertisement does not aid the Claimant because the actual length of time of the actual subsequent fixture would still be unknown.

2. **The loss of the Champion Fixture cannot be claimed under the second limb of the Hadley v Baxendale rule**

The Claimant should not be allowed to claim for loss of the Champion Fixture even under the second limb of *Hadley v Baxendale* because the Respondent does not possess actual knowledge of the Champion Fixture. Contrary to the Claimant’s assertions, the Respondent does not possess actual knowledge such that the claim falls under the second limb.

35 *The “Achilleas”* (n 30) [23] (Lord Hoffman).
36 Moot Scenario, p 3.
37 *ibid* p 26.
38 Procedural Order.
Losses would be recoverable under the second limb only if a defendant possesses actual knowledge of special circumstance such that the loss is not too remote a loss to be claimed. Knowledge in “general and open-ended terms”\(^3\) that there is a contractual arrangement with a third party is insufficient to engage the second limb of *Hadley v Baxendale*. For instance in *The Achilleas*, Lord Rodgers observed, albeit in *obiter*\(^4\), that damages stemming from the loss of a subsequent fixture would be awarded only if the charterer’s attention had been drawn to the existence of a subsequent charterparty “of many months duration for which the vessel had to be delivered on a particular date” at the time the charterparty was made. Hence, a charterer will only be taken to know that a failure to redeliver in time would result in the loss of the next fixture if he is aware of the terms of the subsequent fixture.

In the present case, the Respondent did not possess actual knowledge. First, they did not know there was a subsequent fixture, let alone the terms of such a subsequent fixture as the Champion Fixture was only concluded on 15.06.2016, well after the time they concluded their Charterparty. Second, whilst the Respondent were aware of the two Chatter posts from the Claimant, these merely stated that the Claimant were looking to charter the Vessel for 3 to 5 years. This is clearly insufficient for the purposes of the second limb.

**B. THE CALCULATION FOR THE CLAIM FOR LOSS OF CHAMPION FIXTURE SHOULD BE LIMITED TO A PERIOD OF TWO YEARS**

Even if the Tribunal holds that the claim is not too remote, the claim for loss of Champion Fixture should be calculated based on the period of 2 years rather than 4 years. The Claimant has actually lost a chance at a 4-year fixture and not an actual 4-year fixture as the length of the Champion Fixture is dependent upon Champion’s actions. This is because the Champion Fixture is a 2-year fixture with an optional extension of two years. It is not certain that Champion would have exercised its option under the Champion Fixture.

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\(^3\) Howard Bennett, *Carver on Charterparties* (Sweet & Maxwell 2017) para 11.292.

\(^4\) *Achilleas* (n 30) [59] (Lord Rodger).
47. The Claimant can only make a claim for a loss of chance dependent on the hypothetical conduct of a third party if they can demonstrate that there was a “real” or “substantial\(^{41}\)” chance as opposed to a speculative one that the relevant actions would have happened. However, the Claimant have not presented any evidence to suggest that there was a real chance that Champion would have exercised their option and extended the Champion Fixture for a further 2 years. As such, the Claimant’s claim for a loss of chance in relation to the 2 years of the Champion Fixture should fall.

C. **THE CLAIMANT MUST GIVE CREDIT FOR HIRE RECEIVED UNDER THE REPLACEMENT FIXTURE**

48. Even if the Tribunal finds that the loss is not too remote to be claimed and that the duration of the Champion Fixture is 4 years. The Claimant must give credit for hire received under the Replacement Fixture. A party is entitled to the benefit accruing from the mitigation and is liable only for the loss as lessened.\(^{42}\)

V. **THE RESPONDENT CAN RECOVER USD 375,000 AS OVERPAID HIRE AS THE VESSEL WAS OFF-HIRE FOR THE PERIOD OF THE EBOLA QUARANTINE.**

A. The Vessel was put off-hire under Clause 44 (Omega Rider Clause) for the period of quarantine from 07.05.2016 to 26.06.2016, which allows the Charterer to treat any time lost caused by quarantine as off-hire.

1. *There was a loss of time caused by quarantine due to communication with an infected area.*

49. The Vessel was off-hire since there was (i) a “delay in quarantine arising from the Master, Officers, or crew having communication with the shore or any infected area” which (ii) resulted in delay due to quarantine.

\(^{41}\) *Allied Maples Group Ltd v Simmons & Simmons* [1995] EWCA Civ 17, [1995] 1 WLR 1602, 1614 (Stuart-Smith LJ); *McGregor on Damages* (n) 10.059.

\(^{42}\) *British Westinghouse Electric and Manufacturing Company Ltd v Underground Electric Railway Company of London Ltd* [1912] AC 673 (HL).
50. First, there was communication with an infected area. On 18.04.2016, there was already an “outbreak” of Ebola at West Coast, with “over 100 cases in the City and in the outlying areas” including amongst stevedores at the port.\textsuperscript{43} Based on the Claimant’s own account\textsuperscript{44}, the Vessel only completed loading at West Coast on 20.04.2016. It is logical that in the course of loading, the Vessel’s crew must have come into contact with West Coast.

51. Second, the quarantine was caused by the “fear that the crew may be carrying the [E]bola virus”\textsuperscript{45}, and indeed some of the crew members had Ebola symptoms.\textsuperscript{46} While the Claimant contend that the detention or quarantine “must be a mistake”\textsuperscript{47}, the cause of detention is immaterial. In \textit{The Global Santosh}\textsuperscript{48}, the vessel was off-hire during the period of arrest where, in the course of the arrest of cargo, the ship was mistakenly arrested.

\textbf{2. The Respondent did not give written consent for communication with an infected area.}

52. Clause 44 further provides that if communication with the shore was with the “written consent of the Respondent or their agents”, the Vessel is not off-hire. Here, no written consent was given.

53. The requirement of “written consent” should be construed narrowly, requiring the Claimant to expressly consent to communication with an infected area. It is insufficient that the Respondent’s order incidentally requires such communication. This approach is consistent with the trend to construe off-hire provisos narrowly. In \textit{The Global Santosh}\textsuperscript{49}, the off-hire clause covered arrest, unless it is “occasioned by any personal act or omission or default of the Respondent”. The majority interpreted “personal act or omission or default” narrowly, requiring “some nexus” between the arrest and the charterer’s act. (at [21]) Thus, the proviso did not apply in that case. Lord Sumption rejected the earlier view held in \textit{The Doric Pride}\textsuperscript{50},

\begin{itemize}
\item \textsuperscript{43} Moot Scenario, p 22.
\item \textsuperscript{44} ibid p 66.
\item \textsuperscript{45} ibid p 25.
\item \textsuperscript{46} ibid p 24.
\item \textsuperscript{47} Ibid.
\item \textsuperscript{48} Bulkship (Atlantic) NV v Cargill International SA (The “Global Santosh”) [2016] 1 WLR 1853 (UKSC), [21]-[25] (Lord Sumption).
\item \textsuperscript{49} Ibid.
\item \textsuperscript{50} Hyundai Merchant Marine Co Ltd v Furness Withy (Australia) Pty (The Doric Pride) [2006] 2 Lloyd's Rep 175 (CA) [49] (Rix LJ).
\end{itemize}
which held that it was sufficient that the off-hire event related to matters falling within the charterer’s responsibility. The court in *The Global Santosh*\(^5\) reasoned that it was commercially insensible for the charterer’s right to claim off-hire to be defeated if the charterer’s act merely “provided the occasion” for the off-hire event.

54. Thus, it is insufficient that the Respondent’s orders to load merely provided the occasion for quarantine. The Respondent’s written consent must expressly relate to such contact. On the facts, the Respondent gave no such written consent to load at West Coast despite the Ebola outbreak.

55. Since there was communication with an infected area without the written consent of the Respondent, Clause 44 operates to put the vessel off-hire for the period of quarantine.

B. **In the alternative, the Vessel was off-hire under Clause 17 of the NYPE 2015.**

56. In addition to clause 44, clause 17 also operates to put the vessel off-hire for the duration of the quarantine. Firstly, the quarantine may be treated as either a “detention by Port State control for vessel deficiencies”, or may alternatively fall under the catch-all “any other similar cause”. Secondly, the quarantine prevented the full working of the Vessel and caused a loss of time as required by clause 17.

1. **The quarantine falls within the meaning of “detention by Port State control for vessel deficiencies” or the catch-all “any other similar cause” under Clause 17.**

57. First, the quarantine was a “detention by Port State control for vessel deficiencies”. The word “detention” has been interpreted under the NYPE to mean “some physical or geographical constraint upon the vessel’s movements in relation to her service under the charter”.\(^5\) It is sufficient that she is prevented for proceeding to her discharging berth, even if the vessel was permitted to leave the port.\(^5\) On the facts, the Wahanda port authorities suspected that the crew had Ebola which caused the Vessel’s detention. Even if

\(^{51}\) *ibid* [31] (Lord Sumption).


the Vessel was able to leave Wahanda for hull cleaning at either North Titan or South Island, there is still “detention” because the Vessel was prevented from berthing by the authorities.

58. Second, the quarantine also falls within the catch-all provision. The phrase “any other cause” includes not just physical causes, but also administrative acts relating to the suspected condition of the ship or the crew\(^{54}\), provided that the “authorities act properly or reasonably pursuant to the (suspected) inefficiency or incapacity of the vessel”.\(^{55}\) Thus, the quarantine thus falls within the catch-all provision. The Wahanda authorities had good reason to suspect that the crew members had Ebola. The Vessel came into contact with an infected area, and crew members displayed symptoms of Ebola. The quarantine was therefore a proper or reasonable act by the authorities.

2. **The quarantine prevented “the full working of the vessel” and caused a “loss of time”**.

59. Further, as required by Clause 17 of the NYPE 2015, the “full working of the vessel” was prevented which caused “loss of time”.

60. The “full working of the vessel” is prevented if the ship was not “efficient to do what she was required to do when she was called upon to do it”.\(^{56}\) The “loss of time” requirement relates to the “full working of the vessel”, and is similarly judged by the service immediately required of the vessel.\(^{57}\) Put simply, the vessel will be off-hire for the duration that the off-hire event renders her unable to perform orders required by the charterer.

61. On the facts, the service immediately required by the Vessel was to berth and discharge. Due to the quarantine, the Vessel was unable to perform this service. The Vessel thus suffered a loss of time of fifty days, which the Respondent are entitled to treat as off-hire under Clause 17.

VI. THE APPELLANT IS RESPONSIBLE FOR 100% OF THE CARGO CLAIM BROUGHT BY THE RECEIVERS PURSUANT TO THE ICA


\(^{55}\) *Andre & Cie SA v Orient Shipping (Rotterdam) BV (The Laconian Confidence)* [1997] 1 Lloyd's Rep 139, 151 (Rix J).

\(^{56}\) *Hogarth v Miller, Brother & Co (The Westfalia)* [1891] AC 48 (HL), 56-7 (Lord Halsbury LC).

A. The Respondent’s claim is not time barred pursuant to clause 6

1. The notice served by the Respondent was within time

Clause 6 of the ICA states that the notice has to be given within 24 months of the date of the delivery. On the facts, the date of delivery is on 30.06.2016\(^{58}\). The Respondent were given a time extension totalling 6 months (without prejudice) by the Claimant for the purposes of the cargo claim under the charter. The first-time extension of 3 months was given was on 29.05.2017\(^{59}\) and the second time extension of 3 months was given on 28.08.2017\(^{60}\). Thus, the Respondent will have until 30.06.2018 to satisfy clause 6 of the ICA.

2. The content of the notice was sufficient for the purposes of clause 6

The notices served by the Respondent on 7.07.2016 and 17.12.2018 is sufficient notice pursuant to Clause 6 of the ICA as the notice has fulfilled the purpose of notifying the Claimant of the Cargo Claim.

Clause 6 of the ICA states that “Such notification, shall if possible include details of the contract of carriage, the nature of the claim and the amount claimed”. The inclusion of “if possible” arguably waters down the harsher obligations of the earlier 1984 ICA, which states that the clause “should record bill of lading details and the nature and amount of the claim”. Therefore, clause 6 of the 1996 version should be interpreted less strictly such that the provision of documents is not mandatory.

In Ipsos SA v Dentsu Aegis Network Ltd (previously Aegis Group plc), which concerned a notification clause that is almost identical to the one in the ICA\(^{61}\), the court distilled 3 principles concerning the law on claims notification clauses\(^{62}\):

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\(^{58}\) Moot Scenario, p 68.
\(^{59}\) ibid p 57.
\(^{60}\) ibid p 58.
\(^{61}\) Ipsos SA v Dentsu Aegis Network Ltd (previously Aegis Group plc) [2015] EWHC 1171 (QB) (Blair J): the notice was required to specify “in reasonable detail: (i) the matter which gives rise to the Claim; (ii) the nature of the Claim; and (iii) (so far as is reasonably practicable at the time of notification) the amount claimed in respect thereof (comprising the Purchaser’s good faith calculation of the loss thereby alleged to have been suffered).
a. The commercial purpose of a claim notification clause include ensuring the defendant knows in sufficiently formal terms that a claim for breach is to be made so that financial provision can be made for it. Such a purpose is not served if the notice is uninformative or unclear.

b. In construing the notice, the principle to be borne in mind when interpreting the clause is how would it be understood by a reasonable recipient with knowledge of the context within which it was sent.

c. The notice must specify that a claim is actually being made, rather than indicating the possibility that a claim may yet be made.

66. These principles should apply in the construction of clause 6 of the ICA since the purpose of the clause is to allow the recipient to “investigate the potential claim and prepare himself to deal with that”.\(^63\) Similarly, in the context of a demurrage time bar, the Court of Appeal in *The Abqaiq*\(^64\) ruled that the purpose behind requiring the provision of supporting documents was so that the Respondent was put in possession of the factual material which they required in order to satisfy themselves whether the claims were well-founded or not. Further, the court emphasised that as regards the provision of relevant documents, the touchstone of the approach ought to be a requirement of clarity sufficient to achieve certainty rather than a requirement of strict compliance which, if applied inflexibly, can lead to uncommercial results.

67. On 7.07.2018, the Respondent sent an e-mail to the Claimant\(^65\). The e-mail stated “please treat this message as a formal notice of claim against you” and included a surveyor’s report\(^66\) (Claimant and Respondent are in agreement with the findings\(^67\)) that detailed the damage sustained by the cargo and the cause behind it. It is submitted that this is valid notice because it allowed the Claimant to investigate the claim and be prepared for the forthcoming Cargo Claim. There was reference made to the Vessel and the

\(^{63}\) London Arbitration 16/02 (LMLN 2002/11).


\(^{65}\) Moot Scenario, p 45.

\(^{66}\) *ibid*, p 46.

\(^{67}\) Procedural Order, para 9.
discharging port, Wahanda. The surveyor’s report also listed the dates of inspection at Wahanda (28, 29, 30.06.2016), which coincides with the redelivery date of the Vessel (30.06.2016). This sufficiently canvasses the exact trip that led to the damaged cargo, especially when the Charterparty between the Claimant and Respondent is a time trip charterparty. The report had also pinpointed the cause behind the damaged cargo, allowing the Claimant to focus on checking the ballasting system and investigating crew members who dealt with the valves.

68. It is further submitted that this e-mail is valid notice despite a lack of details on the exact quantum of damages and contract of carriage.

69. First, it was impossible for the quantum of damages to be specified as the Receivers had yet to ascertain how much of the cargo can be salvaged. Thus, even if the Respondent did not provide the Claimant with the specific quantum of damages, the notice will not fall foul of clause 6 as the quantum of damages need only be provided if possible. In any case, the notice would have been sufficient for the Claimant to “prepare himself to deal with the claim” as it provided the Claimant with the quantum of damages should all the cargo be damaged and unsalvageable. The surveyor report stated that the cargo consists of 8,600mt of loose leaf tea and that said tea has a market value of US$60-$65 per kilo. This effectively gives the Claimant a range of the quantum of damages and allows for the Claimant to make “financial provision” for it.

70. Second, the absence of details on the contract of carriage will not fall foul of clause 6. The Respondent was unable to provide the bill of lading as the one they had on hand was merely a draft that would have not been able to provide clarity or certainty to the Claimant as regards the Cargo Claim. In any case, considering how the Charterparty is a time trip charterparty, the duration of the Charterparty will be measured by reference to a specified trip, i.e. the trip which resulted in the damaged cargo underlying the Respondent’s claim. Therefore, in light of the purpose of clause 6, the provision of details of the contract of carriage or lack thereof will not affect the position of the Claimant as there is only one trip in

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68 Moot Scenario, p 3.
69 Carver on Charterparties (n 39) para 7.002.
contemplation. There will not be any issue of the Claimant not knowing which trip to investigate so as to survey the damages.

b) **Notice served via the Respondent’s Defence and Counterclaim is good notice**

71. Further and in the alternative, the Respondent’s submissions on 17.12.2018 detailed the one trip taken under the Charterparty and the events leading up to the cargo damage. Finally, the Respondent claimed for an apportionment of liability for the Cargo Claim under the ICA. It is submitted that this is valid notice because the Claimant will be able to know from the submissions the exact vessel and trip that led to the damaged cargo, and what caused the damage. As such, the Claimant are fully equipped with the knowledge of which vessel to check so as properly defend themselves in the Cargo Claim.

72. It is further submitted that this e-mail is valid notice despite a lack of details exact quantum of damages and contract of carriage.

73. First, the amount to be claimed remains to be quantified at a later date as the Respondent were still in discussion with the Receivers. Thus, details on the amount to be quantified need not be provided as it was impossible to be provided at that time.

74. Second, it is clear that details on the nature of claim and the carriage itself has been illustrated. While the Respondent’s did not make reference to the contract of carriage, the details of the carriage should suffice to allow the Claimant to know about and investigate the Cargo Claim as specific details on the entire trip was provided for in the submissions. Further, as the Charterparty is a time trip charterparty, there is only one trip in contemplation, which is the trip from West Coast, Challaland to Wahanda, Bao Kingdom. The Claimant have also clarified that they have undertook their own investigation into the incident which confirms the findings of the surveyor report. This clearly shows that the Claimant did not in fact require any more details on the contract of carriage to investigate the claim and ascertain the cause of the damage.

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70 Moot Scenario, p 70-74.
71 Moot Scenario, p 3.
72 Procedural Order, para 9.
The purpose of clause 6 was thus fulfilled in that the Claimant were put in possession of factual material which they required in order to satisfy themselves whether the claims were well-founded or not.

B. The Cargo Claim was due to the fault of navigation or management of vessel, hence liability should be apportioned pursuant to clause 8(a) of the ICA

75. In *Weir v. Union Steamship Co Ltd*[^73^], the Smith L.J. held that “under an ordinary charter of a ship the shipowner is bound to provide the necessary ballast for his ship, the reason being that, as he is responsible for the navigation of the ship by his captain, he is responsible for the ballast necessary to enable his ship to perform the contemplated voyage”. Therefore, it follows that ballasting has been treated as a matter pertaining to the ‘navigation of vessel’.

76. Two seminal cases have established the ambit of “management of vessel” under English Law. The case of *The Glenochil*[^74^] established against the backdrop of the Harter Act that “management of vessel" is “The act done...in the proper handling of the vessel ... but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo”. There is thus a clear distinction between “want of care of cargo and want of care of vessel indirectly affecting the cargo”. This interpretation was affirmed by the House of Lords in the leading case of *Gosse Millard Ltd. v. Canadian Government Merchant Marine Ltd.*[^75^]

77. As ballasting entails providing the vessel with necessary stability to continue her voyage, it should naturally be regarded as an act done in the “proper handling” of the Vessel. The crew member opened the wrong valve, which was a part of the ballasting system, during the course of a ballasting operation. Thus, it is clear that the opening of the wrong valve should be regarded as the handling of the Vessel instead of the handling of the cargo.

[^73^]: *Weir & Co v Union Steamship Ltd* [1900] AC 525 (HL).
[^75^]: *Gosse Millerd, Ltd. v. Canadian Government Merchant Marine, Ltd.* [1929] A.C. 223 (HL), (1928) 32 L.L.Rep. 91 (Viscount Sumner): Upheld the dissenting judgement of Justice Greer in the court below; “If the cause of the damage is solely, or even primarily, a neglect to take reasonable care of the cargo, the ship is liable, but if the cause of the damage is a neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo, the ship is relieved from liability; for if the negligence is not negligence towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved.”.
The courts have also consistently held that an error in ballasting is an error of the management of the vessel. In *The Glenochil*\(^{76}\), the cargo was also damaged by water as a result of a ballasting operation. What caused the cargo damage was the mismanagement of a pipe that let the water into the cargo. It was held that there was indeed a “mismanagement of the vessel”\(^{77}\). By analogising with *The Glenochil* to the case at hand, there is thus also a mismanagement of the Vessel for the purposes of clause 8(a) of the ICA.

In interpreting the United States Carriage of Goods Act\(^{78}\) ("US COGSA"), the courts in the United States have also consistently held that an error in ballasting to be an error in the management of the vessel. While strictly speaking cases interpreting the US COGSA are not binding, they should be highly persuasive given that the US COGSA is based on the Hague Rules, an international convention to which UK is a party to. Further, the courts in the United States and the United Kingdom have construed the “management of vessel” in an analogous fashion\(^{79}\).

In *Orient Ins Co. v United S.S. Co*\(^{80}\), during a ballasting operation, the chief officer failed to stop the flow of water into the vessel, causing the cargo to be wet. It was held that such an error was an error in the management of vessel. Similarly, in *Leon Bernstein Company v. Wilhelm Wilhelmsen*\(^{81}\), the cargo sustained damages after sea water being taken on as ballast overflowed an open manhole in the top of a deep tank. The court also ruled that such an error arose out of the management of the vessel.

In conclusion, since the cargo was damaged by a crew member in the course of a ballasting operation, the Cargo Claim arises out of fault of navigation or management of the Vessel as ballasting comes within the ambit of both “navigation” and “management” of the vessel, rendering the Appellants to be 100% liable for the Cargo Claim pursuant to clause 8(a) of the ICA.

C. **Alternatively, the claim falls under clause 8(d) of the ICA**

\(^{76}\) Glenochil (n 74).
\(^{77}\) ibid
\(^{81}\) *Leon Bernstein Company v Wilhelm Wilhelmsen* 232 F.2d 771 (5th Cir. 1961).
Clause 8(d) of the ICA is a sweep up provision\textsuperscript{82} that covers “all other cargo claims whatsoever”. Pursuant to clause 8(d), 100% liability will be apportioned where there is clear and irrefutable evidence that the claim arose out of the act or neglect of one party or their servants/sub-contractors.

83. It is submitted that the Claimant should be 100% liable under the clause as it was the act of the Vessel’s crew member that caused the cargo to be damaged. The recent case of \textit{The MV Yangtze Xing Hua} ruled that “act” in clause 8(d) did not require any finding of fault. Thus, the \textit{mens rea} of the crew member is wholly irrelevant. What matters is that there is an unbroken chain of causation between the act of the crew member and the damage done to the cargo. On the facts, there is clear and irrefutable evidence contained in the surveyor’s report that the cargo was damaged solely as a result of the crew member opening the wrong valve. Further, the Claimant has also confirmed the findings contained in the surveyor’s report.

84. It is further submitted that a crew member falls within the ambit of “servant” pursuant to clause 8(d). It has been authoritatively established that a time charterparty (as was the case here\textsuperscript{83}) is merely a contract for services. A time charterer will transfer to the charterer no interest in or right to possession of the vessel; it is a contract of services to be rendered to the charterer by the shipowner through the use of the vessel by the shipowner’s own servants, the master and the crew, acting in accordance with such directions as to the cargoes to be loaded and the voyages to be undertaken as by the terms of the charterparty the charterer is entitled to give them.\textsuperscript{84} This is encapsulated in the non-demise clause in clause 26 of NYPE 2015 and clause 68 of the Omega Rider Clause which makes it abundantly clear that the crew members aboard the Vessel belong to the responsibility of the Claimant.

85. Further, in \textit{The MV Yangtze Xing Hua}, Teare J\textsuperscript{85} soundly rejected counsel’s submissions that shipowners cannot possibly be 100% liable for the acts of the master and crew members, irrespective of fault. It was held that the ICA is not concerned with hardship or lack of moral culpability, and serves to mechanically apportion liability as between Claimant and Respondent.

\textsuperscript{82} Transgrain Shipping (Singapore) Pte Ltd v Yangtze Navigation (Hong Kong) Co Ltd (MV “Yangtze Xing Hua”) [2017] EWCA Civ 2107, [2018] 1 Lloyd’s Rep 330.
\textsuperscript{83} Moot Scenario, p 3.
\textsuperscript{84} Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade) [1983] 2 AC 694 (HL).
\textsuperscript{85} Yangtze Xing Hua (n 82) [23] Teare J.
86. In conclusion, the Claimant should be 100% liable for the Cargo Claim pursuant to clause 8(d).

VII. PRAYER FOR RELIEF

87. For the reasons set out above, the Respondent seeks the following orders and declarations:

(i) A declaration that the Respondent entitled to be indemnified under the ICA for 100% of the Cargo Claim;

(ii) A declaration that the Vessel is off-hire for the period of quarantine and have therefore overpaid hire in the amount of USD 375,000;

(iii) A declaration that the Respondent is only liable for the reasonable costs of cleaning the Vessel’s hull which are no more than USD 33,000; and

(iv) A declaration that the Claimant is only entitled to damages calculated as the difference between the Charterparty rate of hire and the market rate of hire for the period of overrun.