

**EIGHTH ANNUAL INTERNATIONAL MARITIME LAW
ARBITRATION MOOT COMPETITION 2007**



**MURDOCH
UNIVERSITY**

PERTH, WESTERN AUSTRALIA

**In the matter of an Arbitration held at Archland
(No AR30/06)**

(Under the LMAA Rules 2006)

MEMORANDUM FOR THE CLAIMANT

CLAIMANT

Titan Lines BV
of 58 Starboard Drive
Horizon City, Genosa

RESPONDENT

Gulliver Oil Tankers Inc
of 37-51 Laridae Street
Harbour-town, Archland

Team 5

**Miss COHEN, Fiona
Mr MACKAY, Greg
Mr MALEY, Kristian
Mr MISTILIS, Michael**

**EIGHTH ANNUAL INTERNATIONAL MARITIME LAW
ARBITRATION MOOT COMPETITION 2007**

MEMORANDUM FOR THE CLAIMANT

TEAM 5

Table of Contents

Table of Contents	i
Table of Authorities	i
Cases.....	i
Statutes, Treaties and Rules.....	vi
Other Sources	vi
Abbreviations used in these submissions	vii
Statement of Facts	1
Cargo claim.....	1
Claim for repayment of hire	2
Questions Presented	3
Preliminary question	3
Claims.....	3
Jurisdiction	4
Arbitration agreement and forum	4
Time bar	5
Cargo claim in contract	8
Method of showing liability	8
There was a contract between the Purchaser and the Claimant.	10
Applicability of the HV Rules.....	13
Exercise due diligence to make the Vessel seaworthy	15
Properly care for the goods	17
Exclusions under the HV Rules	21
Contractual exclusions	22
Cargo claim in negligence	24
Cargo claim in bailment	27
Claim for repayment of hire	29
Response to Counterclaim	32
Prayer for relief	38

Table of Authorities

Cases

- Actis Co Ltd v The Sanko Steamship Co Ltd (The "Aquacharm")* [1980] 2 Lloyd's Rep. 237
- Actis Co Ltd v The Sanko Steamship Co Ltd (The "Aquacharm")* [1982] 1 Lloyd's Rep. 7
- Andre & Cie SA v Orient Shipping (Rotterdam) BV (The "Laconian Confidence")* [1997] 1 Lloyd's Rep. 139
- Ardennes, Owners of the Cargo of the v Owners of the Ardennes (The "Ardennes")* [1951] 1 K.B. 55; (1950) 84 Lloyd's Rep. 340
- Atlas Levante-Linie Aktiengesellschaft v Gesellschaft Fuer Getreidehandel AG and Becher (The "Phoenizien")* [1966] 1 Lloyd's Rep. 150
- Bangladesh Chemical Industries Corporation v Henry Stephens Shipping Co Ltd and Tex-Dilan Shipping Co Ltd (The "SLS Everest")* [1981] 2 Lloyd's Rep. 389
- Belcore Maritime Corporation v Flli Moretti Cereali SpA (The "Mastro Giorgis")* [1983] 2 Lloyd's Rep. 66
- Ben Line Steamers Ltd v Pacific Steam Navigation Co (The "Benlawers")* [1989] 2 Lloyd's Rep. 51
- Board of Trade (Minister of Materials) v Steel Brothers & Co Ltd* [1952] 1 Lloyd's Rep. 87
- Caltex Refining Co Pty Ltd v BHP Transport Ltd (The "Iron Gippsland")* (1993) 34 NSWLR 29; [1994] 1 Lloyd's Rep. 335
- Canadian Pacific (Bermuda) Ltd v Canadian Transport Co Ltd (The "HR Macmillan")* [1973] 1 Lloyd's Rep. 27
- Compania Naviera Maropan S/A v Bowaters Lloyd Pulp & Paper Mills Ltd (The "Stork")* [1955] 2 Q.B. 68; [1954] 2 Lloyd's Rep. 397
- Corbett v Packington* (1827) 6 B. & C. 268
- G H Renton & Co Ltd v Almyra Trading Corporation* [1957] AC 149; [1956] 2 Lloyd's Rep. 379
- Gardner & Sons v Trenchmen* (1884) 15 Q.B.D. 154
- Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] Q.B. 701; [1993] 1 Lloyd's Rep. 455
- Hobbs Padgett & Co (Reinsurance) Ltd v JC Kirkland Ltd and Kirkland* [1969] 2 Lloyd's Rep. 547
- Homburg Houtimport BV v Agrosin Private Ltd and Others (The "Starsin")* [2000] 1 Lloyd's Rep. 85
- Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26
- Islamic Investment Co 1 SA v Transorient Shipping Ltd and Alfred C Toepfer International GMBH (The "Nour")* [1999] 1 Lloyd's Rep. 1
- John Lee & Son (Grantham) Ltd v Railway Executive* [1949] 2 All ER 581
- K/S Penta Shipping A/S v Ethiopian Shipping Lines Corporation (The "Saga Cob")* [1992] 2 Lloyd's Rep. 545

Memorandum for the Claimant – Team 5

Knutsford (SS) Ltd v Tillmanns & Co [1908] AC 406

Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The "Evia (No 2)") [1983] 1 AC 736;
[1982] 2 Lloyd's Rep 307

Lauritzen Reefers v Ocean Reef Transport Ltd. SA (The "Bukhta Russkaya") [1997] 2 Lloyd's Rep. 744

Ludec v Ward (1888) 20 Q.B.D. 475

Mareva Navigation Co Ltd v Canaria Armadora SA (The "Mareva AS") [1977] 1 Lloyd's Rep. 368

Mediterranean Freight Services Ltd v BP Oil International Ltd (The "Fiona") [1994] 2 Lloyd's Rep. 506

Merak, Owners of Cargo On v The Merak (Owners) (The "Merak") [1965] P. 223

M'Gillivray v Hope and Another [1935] AC 1

Morris v CW Martin & Sons Ltd [1966] 1 Q.B. 716

Ocean v Hading [1928] 2 K.B. 371

Oceanfocus Shipping Ltd v Hyundai Merchant Marine Co Ltd (The "Hawk") [1999] 1 Lloyd's Rep. 176

Pacific Molasses Co and United Molasses Trading Co Ltd v Entre Rios Compania Naviera SA (The "San Nicholas") [1976] 1 Lloyd's Rep. 8

Photo Production Ltd v Securitor Transport Ltd [1980] AC 827; [1980] 1 Lloyd's Rep. 545

Reardon Smith Line Ltd v Australian Wheat Board (The "Houston City") [1956] 1 Lloyd's Rep. 1

Riverstone Meat Company Pty Ltd v Lancashire Shipping Company Ltd (The "Muncaster Castle") [1961] 1
Lloyd's Rep. 57

Seven Seas Transportation Ltd v Pacifico Union Marina Corporation (The "Satya Kailash" and "Oceanic Amity") [1982] 2 Lloyd's Rep. 465

Seven Seas Transportation Ltd v Pacifico Union Marina Corporation (The "Satya Kailash" and "Oceanic Amity") [1984] 1 Lloyd's Rep. 588

Sewell v Burdick (1884) 10 App.Cas. 74

Sidermar SpA v Apollo Corporation (The "Apollo") [1978] 1 Lloyd's Rep. 200

Silver v Ocean Steamship Co Ltd [1929] All ER 611

Smith v Dart (1884) 14 Q.B.D. 105

Stargas SpA v Petredec Ltd (The "Sargasso") [1994] 1 Lloyd's Rep. 412

Syros Shipping Co SA v Elaghill Trading Co (The "Proodos C") [1980] 2 Lloyd's Rep. 390

Telfair Shipping Corporation v Inersea Carriers SA (The "Caroline P") [1984] 2 Lloyd's Rep. 466

The "Annefeild" [1971] 1 Lloyd's Rep. 1

The "Glendarroch" [1894] P. 226

Memorandum for the Claimant – Team 5

- The "Minimar"* [1984] 3 WLR 1
- The "Njegos"* [1936] 53 Lloyd's Rep. 286
- The "Pioneer Container"* [1994] 2 All ER 256
- The "Rena K"* [1978] 1 Lloyd's Rep. 545
- The "Torepo"* [2002] 2 Lloyd's Rep. 535
- Tottenham Investments Pty Ltd v Carberetter Services* (1994) 40 NSW 1
- Travers & Sons Ltd v Cooper* [1915] 1 KB 73
- Tritonia Shipping Inc v South Nelson Forest Products Corporation* [1966] 1 Lloyd's Rep. 114
- TW Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1
- UBC Chartering Ltd v Liepaya Shipping Co Ltd (The "Liepaya")* [1999] 1 Lloyd's Rep. 649
- Uni-Ocean Lines Pte Ltd v C-Trade SA (The "Lucille")* [1983] 1 Lloyd's Rep. 387
- Unitramp v Garnac Grain Co Inc (The "Hermine")* [1979] 1 Lloyd's Rep. 212
- Vardinoyannis v The Egyptian General Petroleum Corporation (The "Evaggelos TH")* [1971] 2 Lloyd's Rep. 200
- A/B Helsingfors Steamship Company Ltd v Rederiaktiebolaget Rex (The "White Rose")* [1969] 2 Lloyd's Rep. 52
- Actis Co Ltd v The Sanko Steamship Co Ltd (The "Aquacharm")* [1982] 1 Lloyd's Rep. 7
- Andre & Cie SA v Orient Shipping (Rotterdam) BV (The "Laconian Confidence")* [1997] 1 Lloyd's Rep. 139
- Anglo-Saxon Petroleum Company Ltd v Adamastos Shipping Company Ltd (The "Saxonstar")* [1958] 1 Lloyd's Rep. 73
- Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322
- Balsamo v Medici*. [1985] Q.B. 716; [1984] 2 All ER 304
- Bangladesh Chemical Industries Corporation v Henry Stephens Shipping Co Ltd and Tex-Dilan Shipping Co Ltd (The "SLS Everest")* [1981] 2 Lloyd's Rep. 389
- Barkway v South Wales Transport Co Ltd* [1950] AC 185; [1950] 1 All ER 392
- Belcore Maritime Corporation v FLLi Moretti Cereali SpA (The "Mastro Giorgis")* [1983] 2 Lloyd's Rep. 66
- Ben Line Steamers Ltd v Pacific Steam Navigation Co (The "Benlawers")* [1989] 2 Lloyd's Rep. 51
- Board of Trade (Minister of Materials) v Steel Brothers & Co Ltd* [1952] 1 Lloyd's Rep. 87
- Borgship Tankers Inc v Product Transport Corporation Ltd (The "Casco")* [2005] 1 Lloyd's Rep. 565
- Bremer Handelsgesellschaft Schaft MBH v Vanden Avenne Izegem PVBA* [1978] 2 Lloyd's Rep. 109

Memorandum for the Claimant – Team 5

- Caltex Refining Co Pty Ltd v BHP Transport Ltd (The "Iron Gippsland")* (1993) 34 NSWLR 29; [1994] 1 Lloyd's Rep. 335
- Canadian Pacific (Bermuda) Ltd v Canadian Transport Co Ltd (The "HR Macmillan")* [1973] 1 Lloyd's Rep. 27
- Collinge v Heywood* (1839) 9 A.& E. 633
- Compania Naviera Maropan S/A v Bowaters Lloyd Pulp & Paper Mills Ltd (The "Stork")* [1955] 2 Q.B. 68; [1954] 2 Lloyd's Rep. 397
- Corbett v Packington* (1827) 6 B. & C. 268
- Day Morris Associates v Voyce* [2003] 12 EGCS 129
- Easson v London & North Eastern Railway Co* [1944] 2 All ER 425
- G H Renton & Co Ltd v Palmyra Trading Corporation of Panama* [1957] AC 149; [1956] 2 Lloyd's Rep. 379
- Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd* [1929] AC 223; (1928) 32 Lloyd's Rep. 91
- Hobbs Padgett & Co (Reinsurance) Ltd v JC Kirkland Ltd and Kirkland* [1969] 2 Lloyd's Rep. 547
- Homburg Houtimport BV v Agrosin Private Ltd and Others (The "Starsin")* [2000] 1 Lloyd's Rep. 85
- Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26
- Huntley v Sanderson* (1833) 1 Cr.& M. 467
- John Lee & Son (Grantham) Ltd v Railway Executive* [1949] 2 All ER 581
- K/S Penta Shipping A/S v Ethiopian Shipping Lines Corporation (The "Saga Cob")* [1992] 2 Lloyd's Rep. 545
- Knutsford (SS) Ltd v Tillmanns & Co* [1908] AC 406
- Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The "Evia (No 2)")* [1983] 1 AC 736; [1982] 2 Lloyd's Rep. 307
- Lauritzen Reefers v Ocean Reef Transport Ltd. SA (The "Bukhta Russkaya")* [1997] 2 Lloyd's Rep. 744
- Leeds Shipping Company Ltd v Societe Francaise Bunge (The "Eastern City")* [1958] 2 Lloyd's Rep 127
- Littlewood v George Wimpey & Co Ltd & British Overseas Airways Corporation* [1953] 2 QB 501
- Mareva Navigation Co Ltd v Canaria Armadora SA (The "Mareva AS")* [1977] 1 Lloyd's Rep. 368
- Margarine Union GmbH v Cambay Prince Steamship Company Ltd* [1969] 1 Q.B. 219; [1967] 2 Lloyd's Rep. 315
- Maxine Footwear Company Ltd and Morin v Canadian Government Merchant Marine Ltd* [1959] AC 589; [1959] 2 Lloyd's Rep. 105
- Mediterranean Freight Services Ltd v BP Oil International Ltd (The "Fiona")* [1994] 2 Lloyd's Rep. 506

Memorandum for the Claimant – Team 5

Merak, Owners of Cargo On v The Merak (Owners) (The “Merak”) [1965] P. 223

Mitsui & Co Ltd v Novorossiysk Shipping Co (The “Gudermes”) [1993] 1 Lloyd's Rep. 311

Moukataff v British Overseas Airways Corporation [1967] 1 Lloyd's Rep 396

Oceanfocus Shipping Ltd v Hyundai Merchant Marine Co Ltd (The "Hawk") [1999] 1 Lloyd's Rep. 176

Pacific Molasses Co and United Molasses Trading Co Ltd v Entre Rios Compania Naviera SA (The "San Nicholas") [1976] 1 Lloyd's Rep. 8

Pearl Carriers Inc v Japan Line Ltd (The “Chemical Venture”) [1993] 1 Lloyd's Rep. 508

Photo Production Ltd v Securitor Transport Ltd [1980] AC 827; [1980] 1 Lloyd's Rep. 545

Reardon Smith Line Ltd v Australian Wheat Board (The “Houston City”) [1956] 1 Lloyd's Rep. 1

Riverstone Meat Company Pty Ltd v Lancashire Shipping Company Ltd (The "Muncaster Castle") [1961] 1 Lloyd's Rep. 57

Scott v London and St Katherine Docks Co (1865) 3 H & C 596

Seven Seas Transportation Ltd v Pacifico Union Marina Corporation (The "Satya Kailash" and "Oceanic Amity") [1982] 2 Lloyd's Rep. 465

Seven Seas Transportation Ltd v Pacifico Union Marina Corporation (The "Satya Kailash" and "Oceanic Amity") [1984] 1 Lloyd's Rep. 588

Sidermar SpA v Apollo Corporation (The "Apollo") [1978] 1 Lloyd's Rep. 200

Silver v Ocean Steamship Co Ltd [1929] All ER 611

South Caribbean Trading Ltd v Trafigura Beeher BV [2005] 1 Lloyd's Rep. 128

Stilk v Myrick (1809) 2 Camp. 317, 170 E.R. 1168

Telfair Shipping Corporation v Inersea Carriers SA (The "Caroline P") [1984] 2 Lloyd's Rep. 466

The "Annefeild" [1971] 1 Lloyd's Rep. 1

The "Glendarroch" [1894] P. 226

The "Torepo" [2002] 2 Lloyd's Rep. 535

The “Athanasia Comminos” and “Georges Chr Lemos” [1990] 1 Lloyd's Rep. 277

The “Mahkutai” [1996] AC 650; [1996] 2 Lloyd's Rep 1

The “Peter der Grosee” (1875) 1 P.D. 414

The “Pioneer Container” [1994] 2 All ER 256

Toepfer v Warinco [1978] 2 Lloyd's Rep 569

Travers & Sons Ltd v Cooper [1915] 1 KB 73

Memorandum for the Claimant – Team 5

Tritonia Shipping Inc v South Nelson Forest Products Corporation [1966] 1 Lloyd's Rep. 114

TW Thomas & Co Ltd v Portsea Steamship Co Ltd [1912] AC 1

UBC Chartering Ltd v Liepaya Shipping Co Ltd (The "Liepaya") [1999] 1 Lloyd's Rep. 649

Uni-Ocean Lines Pte Ltd v C-Trade SA (The "Lucille") [1983] 1 Lloyd's Rep. 387

Vardinoyannis v The Egyptian General Petroleum Corporation (The "Evaggelos TH") [1971] 2 Lloyd's Rep. 200

Western Sealanes Corporation v Unimarine SA (The "Pythia") [1982] 2 Lloyd's Rep. 160

Wolmershausen v Gullick [1893] 2 Ch 514A/B *Helsingfors Steamship Company Ltd v Rederiaktiebolaget Rex (The "White Rose")* [1969] 2 Lloyd's Rep. 52

Statutes, Treaties and Rules

Arbitration Act 1996 (Archland)

Bills of Lading Act 1855 (UK)

Carriage of Goods by Sea Act 1936 (US)

Carriage of Goods by Sea Act 1971 (Archland)

Carriage of Goods by Sea Act 1971 (Genosa)

Carriage of Goods by Sea Act 1971 (UK)

Carriage of Goods by Sea Act 1992 (UK)

International Convention for the Safety of Life at Sea 1974

International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924
("Hague Rules")

London Maritime Arbitrators Association Terms (London : London Maritime Arbitrators Association, 2006)

Protocol of 1968 to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague-Visby rules")

Protocol of 1978 relating to the International Convention for Safety of Life at Sea

Sale of Goods Act 1979 (Archland)

Sale of Goods Act 1979 (Genosa)

Sale of Goods Act 1979 (UK)

Sea Carriage Documents Act 1992 (Genosa)

Other Sources

'Avian influenza ("bird flu") – Fact Sheet', World Health Organisation
<<http://www.who.int/mediacentre/factsheets/fs205/en/>> (3 March 2006)

Memorandum for the Claimant – Team 5

‘Current WHO phase of pandemic alert’, World Health Organisation
<http://www.who.int/csr/disease/avian_influenza/phase/en/> (3 March 2006)

Hill, Christopher, *Maritime Law*, 6th ed (Hong Kong : Informa, 2003)

Incoterms 2000, Introduction at “1. Purpose and Scope of Incoterms”, as Reproduced in the Report of the Secretary General of the United Nations Commission on International Trade Law (UNCITRAL), Document A/CN.9/479

Inert Gas Systems (London : International Maritime Organisation, 1983)

Wilford, M, Coghlin, T et al, *Time Charters*, 4th ed (London : Lloyd’s of London Press, 1995)

Abbreviations used in these submissions

AMC	Atlas Marine Consultants
Art	Article
BOL	Bill of lading
Cl	Clause
COGSA	Carriage of Goods by Sea Act
HV	Hague-Visby
IGS	Inert Gas System
LMAA	London Maritime Arbitrators Association
NYPE	New York Produce Exchange
s	Section
SOLAS	Convention for the Safety of Life at Sea
ss	Sections

Statement of Facts

1. For the duration of the time charterparty the Claimant company was the time charterer of the *Olympic Star* (the Vessel).
2. For the duration of the time charterparty the Respondent company was the owner of the Vessel.
3. Britannic Shipping Pty Ltd (the Voyage Charterer) –
 - a. carried on the business of a vendor of oil;
 - b. was the voyage charterer of the Vessel; and
 - c. was the consignor of a shipment of 82000 metric tonnes of superior quality crude oil carried under BOL /001 dated 3 May 2006 (the Consignment).
4. Oil Futures Limited (the Purchaser) –
 - a. carried on the business of importing oil into Archland;
 - b. contracted with the Voyage Charterer to purchase the Consignment; and
 - c. for the duration of the voyage, was the owner of the Consignment.
5. By time charterparty dated 10 September 2004 the Respondent chartered the Vessel to the Claimant for a period of 24 months, one month more or less at the charterer's option, at a rate of US\$39,000 per day.
6. By a voyage charter dated 29 March 2006 the Claimant chartered the Vessel to the Voyage Charterer for a voyage from Port Horizon to carry a cargo of 82,000 tonnes 5% more or less charterer's option dirty petroleum and/or superior quality crude oil.
7. The voyage charterparty was on modified ASBATANKVOY terms.

Cargo claim

8. Pursuant to the voyage charterparty the Vessel proceeded as ordered to Port Horizon, Genosa. On 30 April 2006 the Vessel tendered notice of readiness and the Claimant informed the Vessel and the Respondent of the importance of cleaning the tanks of the Vessel prior to loading.

Memorandum for the Claimant – Team 5

9. On 3 May 2006 the Claimant issued a BOL acknowledging that the Consignment was in good order and condition. During the voyage the BOL was transferred to the Purchaser.
10. On 3 May 2006, after the IGS was activated, the Vessel's master noted that the oil in tank 2 appeared discoloured.
11. On 23 May 2006, upon arrival at Aslan Port, Archland, the Purchaser's representative tested the oil in tank 2 and found it was contaminated with vapours of dirty petroleum product.
12. To restore the cargo to its condition upon loading, the Purchaser re-refined the contents of tank 2, being 13 673 metric tonnes of crude, at a cost of US\$555,059.00.
13. The Claimant as carrier has settled the Purchaser's cargo claim and seeks reimbursement from the Respondent of US\$555,059.00 –
 - a. as damages for breach of contract; alternatively
 - b. as damages for breach of its duties as bailee of the oil; alternatively
 - c. by way of indemnity pursuant to clause 24 of the time charterparty.

Claim for repayment of hire

14. While the Vessel was steaming for Aslan Port it suffered engine problems which caused it to arrive 5 days after its expected arrival date.
15. When the Vessel was readying to depart Aslan Port it was detained for 99 days 4 hours 43 minutes by the Aslan Port Authority due to an outbreak of bird flu.
16. After the detention came into effect the Claimant and Respondent agreed that the Vessel would be redelivered to the Respondent where she lay, at Aslan Port, on 30 August 2006.
17. Pursuant to clause 15 of the time charterparty the Claimant seeks repayment of hire for –
 - a. the delay caused by engine problems; and
 - b. the delay caused by detention.

AND THE CLAIMANT SEEKS:

18. An order that the Respondent pays the amount of US\$555,059.00 in relation to the cargo damage.

Memorandum for the Claimant – Team 5

19. An order that the Respondent repays US\$4,063,664.58 for hire paid –
 - a. for 5 days delay in arriving at Aslan Port; and
 - b. for the 99 day 4 hour 43 minute detention of the Vessel due to detention.
20. Interest to be assessed by the Tribunal.
21. Costs.

Questions Presented

Preliminary question

22. Does the Tribunal have jurisdiction to hear the dispute under Archlandish law?

Claims

23. Is the Respondent liable to repay the Claimant the amount it paid to the Purchaser?
24. Is the Respondent liable to repay the Claimant hire paid for –
 - a. delay caused by engine malfunction; or
 - b. time lost in port due to quarantine, detention or otherwise?
25. If the Respondent is liable, is its liability limited by an exclusion clause?

Jurisdiction

Arbitration agreement and forum

The tribunal has jurisdiction to hear the dispute.

1. The Tribunal may adjudicate the dispute under the *Arbitration Act 1996* (Archland)¹ if –
 - a. there is a valid arbitration agreement;
 - b. the tribunal has been properly constituted; and
 - c. the matters submitted to arbitration are in accordance with the arbitration agreement.

There is a valid arbitration agreement.

2. The Tribunal can arbitrate in commercial disputes where there is a valid arbitration agreement.²
3. An arbitration agreement must be in writing,³ however need not be detailed. In *Tritonia Shipping Inc v South Nelson Forest Products Corporation*⁴ it was ruled that the phrase “settled by arbitration in London” was enough to constitute a valid arbitration agreement. In *Hobbs Padgett & Co (Reinsurance) Limited v JC Kirkland Ltd*⁵ Salmon LJ explained that even a clause simply reading “arbitration” is enough to bind parties.
4. Clause 26 of the present time charterparty⁶ prescribes the forum for arbitration and the rules under which a Tribunal is to be constituted. These are far more explicit terms than the clauses interpreted in the cases referred to in para 3 above. The clause evidences a valid written contract to arbitrate. The only tenable interpretation of its effect is that it binds the parties to arbitrate and confers jurisdiction on the Tribunal.

The Tribunal is properly constituted.

¹ s 30

² Ambrose, *London Maritime Arbitration*, 2nd ed (London : Informa, 2003), 19

³ *Arbitration Act 1996* s 5(1)

⁴ [1966] Lloyd’s Rep. 114

⁵ [1969] Lloyd’s Rep. 547 at 549

⁶ See page 20 of the Evidence Brief

Memorandum for the Claimant – Team 5

5. The clause makes no special reference to the constitution of the Tribunal, or conditions precedent to the formation of the Tribunal. A Tribunal formed in accordance with the *LMAA Terms*,⁷ as provided in the arbitration clause, may be held to be properly constituted.

The matters submitted to the Tribunal are in accordance with the arbitration clause.

6. Paragraph 10 of the *LMAA Terms*⁸ allows the Tribunal to hear a wide range of matters, and allows parties to exclude matters by agreement.
7. Clause 26 gives a wide formulation of which disputes are to be brought to the Tribunal: “All disputes arising out of or in connection with the contract”.⁹ The parties have not agreed to limit the matters to be heard before the Tribunal.

Time bar

The Claimant commenced proceedings within the time limitation.

8. The action is not time barred because on the true construction of the contract there was a six month time bar for arbitration.
9. Clause 25 of the time charterparty expresses that “all disputes must be brought to arbitration within (sic) 3/6 months of the cause of action arising”.¹⁰ As a time limit was not elected the clause is ambiguous.
10. The Claimant clearly stipulated its arbitration terms on all pre-contractual correspondence with the Respondent. The Claimant did this by noting at the footer of each page that “[a]ll disputes with Titan Lines BV are to be brought to arbitration within 6 months”.¹¹ At no stage did the Respondent object to these terms.

⁷ *London Maritime Arbitrators Association Terms* (London : London Maritime Arbitrators Association, 2006)

⁸ *Id*

⁹ cl 26; See page 20 of the Evidence Brief

¹⁰ See page 19 of the Evidence Brief

¹¹ See pages 1 and 8 of the Evidence Brief

Memorandum for the Claimant – Team 5

11. The Respondent noted in its letter of 20 August 2004 that it “always contracts on this basis that the 3 month option is selected in clause 25 [of the time charterparty]”.¹² This is an expression of past fact, made during pre-contractual negotiations.
12. The Claimant’s position is that the entire agreement is contained in the written agreement of 10 September 2004.¹³ Although pre-contractual correspondence evidences an intention that actions would be limited by time, there is no indication of a common intention as to duration.

The time limit clause in the time charterparty must be read down to impose a six month limitation period.

13. In *Board of Trade v Steel Brothers & Co Ltd*,¹⁴ Morris LJ described a limitation clause as one that excludes the ordinary consequences that would flow from the contract being made. Any such clause must be written in clear and unambiguous terms.
14. In *John Lee & Son (Grantham) Ltd v Railway Executive*,¹⁵ Evershield MR explained that, in the case of an ambiguity, a time limitation clause must be read *contra proferentem* against the drafter of the instrument.
15. In the present matter, the agreement was drafted by the Respondent. The Claimant’s position is that under the standard imposed in *John Lee & Son (Grantham) Ltd*, a six month limitation period is in effect.

The cargo claim was brought within the six month time bar.

16. The six month time limitation period began on the date the Claimant paid the Purchaser, 5 July 2006.¹⁶ The Claimant indicated an intention to arbitrate within six months, in a letter dated 8 November 2006.¹⁷

¹² See page 2 of the Evidence Brief

¹³ See pages 16-20 of the Evidence Brief

¹⁴ [1952] 1 Lloyd’s Rep. 87 at 95

¹⁵ [1949] 2 All ER 581 at 583

¹⁶ See page 56 of the Evidence Brief

¹⁷ See page 62 of the Evidence Brief

Memorandum for the Claimant – Team 5

17. At common law, under a contract to indemnify a liability to a third party, a cause of action accrues when the Claimant is damnified (paid under the indemnity).¹⁸ This principle is codified in Art 6bis of the HV Rules, which imposes a minimum three month time bar for a claim of an indemnity, running from the date the claim is paid.
18. The limitation period therefore accrued when the Claimant paid compensation to the Purchaser.
19. In equity, a party can claim payment under an indemnity when the party's liability is ascertained¹⁹ or established.²⁰ However, in the case of an express indemnity, the time at which the cause of action arises depends on the construction of the contract.²¹
20. Clause 24 in the time charterparty provides that a “properly settled or compromised *and paid* cargo claim”²² will be indemnified. Therefore the contract is conditional on actual payment, and the cause of action only accrued when the payment was made on or after July 5 2006.²³ This fell within the six month time limitation.
21. Any action in bailment is dependent on the duty to redeliver goods in the condition on which they were bailed. The action therefore accrues when redelivery becomes due, and the bailee fails to redeliver in that condition. Redelivery became due on 23 May 2006,²⁴ and proceedings were commenced within six months of this date.

The off-hire claim was brought within the six month time bar.

22. The off-hire claim operates under clause 15 of the time charterparty.²⁵ The clause states that a vessel will be off-hire if any time greater than three hours is lost. The delay giving rise to the claim was

¹⁸ Not, for example, when the event giving rise to the liability occurs (*Huntley v Sanderson* (1833) 1 Cr & M 467), or when the liability is quantified (*Collinge v Heywood* (1839) 9 A & E 633).

¹⁹ *Littlewood v George Wimpey & Co Ltd & British Overseas Airways Corporation* [1953] 2 Q.B. 501

²⁰ *Wolmershausen v. Gukick* [1893] 2 Ch. 514

²¹ *The Caroline P* [1984] 2 Lloyd's Rep. 466 at 474 per Neill J

²² See page 19 of the Evidence Brief; emphasis added

²³ See page 56 of the Evidence Brief

²⁴ See page 48 of the Evidence Brief

²⁵ See page 19 of the Evidence Brief

caused by an engine malfunction. This fault caused the Vessel to proceed without full power, and was three hours behind its contractual schedule sometime after 14:10 12 May 2006.²⁶

23. The Claimant commenced proceedings within the time bar which fell six months after that date.

Cargo claim in contract

Method of showing liability

The Claimant seeks damages to compensate for loss caused by the Respondent's breach.

24. The Claimant's position is that –

- a. the Respondent owed the Claimant the carrier's duties under the HV Rules; and
- b. the Claimant owed the Purchaser the same duties.

25. Therefore if there was a breach of the HV Rules in relation to the cargo –

- a. the Respondent incurred a liability to the Claimant; and
- b. the Claimant simultaneously incurred a liability to the Purchaser.

26. Therefore if the Respondent breached its warranties to the Claimant, the Claimant necessarily breached its warranties to the Purchaser. If the Claimant thereby incurred a liability to the Purchaser, the Respondent is liable pay damages to the Purchaser to the value of the liability.

The Claimant seeks an indemnity under Clause 24 of the time charterparty.

27. Clause 24 of the time charterparty²⁷ provides that where a party has “properly settled or compromised and paid a cargo claim made under bills of lading” the other party will indemnify it to the extent that the claim is due to that party's act or omission.

28. In *The Benlawers*²⁸ it was held that such an indemnity clause gave a prima facie right of indemnity, provided the clause does not contradict other terms of the charterparty.

The indemnity is effective because the claim was settled on the best possible terms.

²⁶ See page 44 of the Evidence Brief

²⁷ See page 19 of the Evidence Brief

²⁸ [1989] 2 Lloyd's Rep. 51 at 57

Memorandum for the Claimant – Team 5

29. As there has been no formal judgment on the Claimant's liability to the Purchaser, "properly settled" in clause 24 of the time charterparty²⁹ means "on the best possible terms".³⁰ That is, the quantum could not have been reduced further with "a little more effort".³¹
30. The quantum of the Claimant's settlement with the Purchaser could not have been reduced further. In its correspondence of 7 June 2006³² the Purchaser clearly set out the basis of the quantum of its claim. Because the loss directly flowed from the breach, there was no possibility of negotiating the proportion of liability attributable to the Claimant. The Purchaser's loss was a clearly identifiable financial outgoing – there was no possible argument that the Purchaser could be restored to their original position by some lesser settlement.

The indemnity is effective because the Claimant paid the claim.

31. The requirement that the claim be "paid" is satisfied. The Claimant's letter to the Purchaser of 5 July 2006³³ shows that the Claimant paid the Purchaser US\$555,059 in full settlement of its cargo claim.

The Claimant was the proper party to settle.

32. The Claimant was the proper party to settle the cargo claim because it is was the contracting carrier as against the Voyage Charterer and Purchaser. In *The Starsin*,³⁴ Colman LJ considered that a party defined as a "carrier" in a BOL will be bound to undertake the obligations of carriage. The effect of this clause was that the time charterer, not the shipowner, owed the carriage duties to the cargo interest.³⁵ In the present case, the definition of 'carrier' is incorporated by reference to a charterparty,³⁶ and places the obligations of carriage on the Claimant.

²⁹ See page 19 of the Evidence Brief

³⁰ Hill, Christopher, *Maritime Law*, 6th ed (Hong Kong : Informa, 2003), 201

³¹ *Id*, 201

³² See page 55 of the Evidence Brief

³³ See page 56 of the Evidence Brief

³⁴ [2000] 1 Lloyd's Rep. 85

³⁵ *Id*

³⁶ See page 31 of the Evidence Brief

Memorandum for the Claimant – Team 5

33. The Claimant undertook the obligations of carriage because the BOL was signed by its agent; not the shipowner's.³⁷
34. In *The Muncaster Castle*,³⁸ an independent contractor carried out repairs on behalf of a carrier. The contractor was negligent, causing cargo damage. The court held that the carrier was liable to cargo interests for the damage. The Respondent similarly acts as a contractor of the Claimant in carrying out the obligations of carriage. Because the Respondent's negligence caused the cargo damage, the Claimant is liable to the Purchaser.

There was a contract between the Purchaser and the Claimant.

The Claimant's liabilities to the Purchaser in contract are determined with reference to the laws of Archland and Genosa.

35. In *The Bukhta Russkaya*,³⁹ charterers claimed an indemnity on the basis that they incurred a liability in contract to a cargo interest. The shipowners argued that the claim was not properly settled, because under the law of the forum there was no contractual relationship between the charterers and cargo interests. Thomas J rejected this argument, finding that a right to indemnity arose if the charterers incurred a liability in any jurisdiction.⁴⁰ On this principle, if the Claimant incurred a liability to the Purchaser in *any* jurisdiction, it has a right to be indemnified by the Respondent.
36. Under legislation in each jurisdiction,⁴¹ a third party endorsee of a BOL acquires rights under a contract of carriage on the terms of the BOL.

Under the law of the port of loading, the Purchaser acquired rights against the Claimant in contract under the BOL.

³⁷ See page 41 of the Evidence Brief

³⁸ [1961] 1 Lloyd's Rep. 57

³⁹ [1997] 2 Lloyd's Rep. 744

⁴⁰ *Id* at 748

⁴¹ In Genosa, the *Sea Carriage Documents Act 1992* (Genosa), in identical terms to *COGSA 1992* (UK); in Archland, the *Bills of Lading Act 1885* (UK); see page 75 of the Evidence Brief

Memorandum for the Claimant – Team 5

37. In the port of loading, Port Horizon, Genosa, the *Sea Carriage Documents Act 1992 (Genosa)*⁴² is in force. The effect of section 2 is that the transferee of a negotiable BOL acquires contractual rights to the terms of the BOL.
38. The Purchaser is the transferee of a negotiable BOL, and therefore acquires contractual rights on the terms of the BOL and incorporated voyage charterparty.
39. It is not a requirement of the *Sea Carriage Documents Act 1992 (Genosa)* that property in the cargo is passed with endorsement of the BOL. The Act will operate even when property is passed through a contract of sale, as in the present matter.⁴³
40. Thus once property passed to the Purchaser at the flange on loading, the Purchaser acquired all rights under the BOL, which in their hands is conclusive evidence of a contract of carriage and all the terms it validly comprises.
41. To claim the benefit of an indemnity, the Claimant must show a potential liability and actual loss under the law of the place in which the loss occurred. In *The White Rose*⁴⁴ a shipowner claimed an indemnity against a charterer for an injured stevedore's negligence claim. Donaldson J said that "what connected the accident with, and gives rise to, a potential liability and an actual loss" is the rule of law that created the liability.⁴⁵ For these reasons the Claimant became liable to the Purchaser for the amount claimed.

Under the law of the port of discharge, the Claimant was liable to the Purchaser in contract under the BOL.

42. In the port of discharge, Aslan, Archland, the *Bills of Lading Act 1855 (UK)* is in force.⁴⁶
43. Section 1 of the Act gives a consignee contractual rights on the terms of the BOL once property in the goods has passed to them by virtue of consignment or endorsement of the BOL.

⁴² See page 75 of the Evidence Brief

⁴³ See page 22 of the Evidence Brief

⁴⁴ [1969] 2 Lloyd's Rep. 52

⁴⁵ *Id* at 59

⁴⁶ See page 75 of the Evidence Brief

Memorandum for the Claimant – Team 5

44. The wide view of the *Bills of Lading Act 1855*, which is more popular with the judiciary, is that once property has passed under a contract of sale, section 1 is triggered and the consignee gains the right to sue. This approach is demonstrated by the judgement of the House of Lords in *The San Nicholas*.⁴⁷
45. Thus once the BOL was transferred, the Purchaser acquired contractual rights on the terms of the BOL, regardless of whether property passed then or at some other time.

Certain terms of the voyage charterparty are incorporated into the BOL.

46. Clause 1 of the BOL states that it incorporates the terms of a charterparty, but does not identify which charterparty.⁴⁸
47. The general rule is that if the identity of a charterparty purportedly incorporated into a BOL is ambiguous, the head charter (the charter to which the shipowner is a party) will be incorporated. This rule does not apply in the present case, because in *The San Nicholas*⁴⁹ it was held that the rule only applies where the head charter is a voyage charter.
48. In *The SLS Everest*⁵⁰ and *The Torepo*⁵¹ the courts considered similar fact patterns to the present case and found that an ambiguous BOL incorporation clause referred to the voyage charterparty. Both cases decided this because BOLs and voyage charters are contracts of carriage, while time charters are contracts for hire of a ship. In the present case clause 1 of the BOL similarly incorporates the terms of the voyage charterparty.
49. Only certain terms of the voyage charterparty are incorporated.⁵² *TW Thomas & Co Ltd v Portsea Steamship Co Ltd*⁵³ is authority for the proposition that a generally worded incorporation clause in a BOL will only incorporate those charterparty clauses relating to shipment, carriage and delivery of the

⁴⁷ [1976] 1 Lloyd's Rep. 8

⁴⁸ See page 42 of the Evidence Brief

⁴⁹ [1976] 1 Lloyds Rep. 8

⁵⁰ [1981] 2 Lloyds Rep. 389

⁵¹ [2002] 2 Lloyds Rep. 535

⁵² The charterparty is in modified ASBATANKVOY form; see page 31 of the Evidence Brief

⁵³ [1912] AC 1

Memorandum for the Claimant – Team 5

goods and payment of freight. Since the incorporation clause in the BOL⁵⁴ is very generally worded, only those clauses are incorporated.

The Claimant's liability in contract is not diminished by the voyage charterparty arbitration clause.

50. Clause 24 of the voyage charterparty is an arbitration clause prescribing that arbitration of all disputes will take place in either London or New York. Since this clause is not incorporated into the BOL, the Purchaser is not restricted to bringing actions in these jurisdictions. The Purchaser's rights and Claimant's liabilities are therefore determined with reference to the laws of Genosa and Archland.
51. An agreement to arbitrate cannot be incorporated into a BOL by reference unless one of the following are satisfied:
- a. The terms of the BOL specifically refer to the charterparty incorporation clause, as in *The Annefeild*.⁵⁵ The BOL does not do so in this case.⁵⁶
 - b. The arbitration clause in the charterparty specifically states that it is to govern disputes under the BOL, as in *The Merak*.⁵⁷ The charterparty does not do so in this case.⁵⁸

Applicability of the HV Rules

The Claimant owed the carrier's duties under the HV Rules to the Purchaser.

52. Cargo claim liability is limited by the HV Rules in Archland and Genosa by virtue of *COGSA 1971* (Genosa) and *COGSA 1971* (Archland).
53. The HV Rules apply to the contract of carriage –
- a. compulsorily under *COGSA 1971* (Archland),⁵⁹ because the BOL was issued in Genosa, a contracting state under that Act;

⁵⁴ See page 41 of the Evidence Brief

⁵⁵ [1971] 1 Lloyd's Rep. 1

⁵⁶ See pages 41-42 of the Evidence Brief

⁵⁷ [1964] 2 Lloyd's Rep. 283

⁵⁸ The voyage charterparty is in modified ASBATANKVOY form; see page 75 of the Evidence Brief

⁵⁹ *Id*

Memorandum for the Claimant – Team 5

- b. compulsorily under COGSA 1971 (Genosa),⁶⁰ because the Act applies to all BOLs issued in Genosa;
- c. because the BOL contains a clause paramount⁶¹ (incorporating the Rules by reference).

The Respondent owed the Claimant the carrier's duties under the HV Rules.

54. Clause 17(c)(i) of the time charter⁶² states that any claim “arising out of any loss of or damage to or in connection with the cargo...shall be subject to the Hague-Visby Rules”. In *The Casco*,⁶³ time charterers claimed an indemnity against shipowners for monies they had paid to voyage charterers (as in the present case). The time charterparty was in the *Shelltime 4* form, with a clause incorporating the HV Rules in identical terms to Cl 17(c)(ii) in the present case. Evans J said that the HV Rules would apply where the alleged breach is either⁶⁴ –
- a. for cargo damage or financial loss incidental to cargo damage; or
 - b. of charterparty obligations that are co-extensive with HV obligations.
55. Following the reasoning in *The Casco*,⁶⁵ the HV Rules apply in the present matter. As in that case, the claim is for an indemnity against a cargo claim or incidental financial loss.
56. Where a charterparty incorporates the HV Rules, if the Rules are inconsistent with the express terms of the charterparty the Rules will prevail. In *The Satya Kailash*⁶⁶ a charterparty contained an express obligation of *absolute* seaworthiness, and also incorporated the HV Rules' obligation to exercise *due diligence* to make the vessel seaworthy. Staughton J rejected the argument that express terms prevailed over the HV Rules.⁶⁷ He said that where the inconsistency was with a “principal feature” of the HV

⁶⁰ *Id*

⁶¹ Cl 2; see page 41 of the Evidence Brief

⁶² See page 18 the Evidence Brief

⁶³ [2005] 1 Lloyds Rep. 565

⁶⁴ *Id* at 570-572

⁶⁵ *Id*

⁶⁶ [1982] 2 Lloyd's Rep. 465, affirmed [1984] 1 Lloyd's Rep. 588

⁶⁷ *Id* at 465

Memorandum for the Claimant – Team 5

Rules,⁶⁸ the Rules would prevail. In the present case, the Claimant relies on the duties of due diligence, and the duty to properly care for the goods. As these were “principal features” in Straughton J’s analysis, the Respondent is bound to discharge these duties, despite any express exclusion clauses.

57. In *The Saxonstar*⁶⁹ a charterparty provided that the COGSA 1936 (US) was “to be incorporated in [the] charter-party”. It was common ground that the Vessel was unseaworthy for the purposes of the Hague Rules. The court held that the parties were subject to the obligations and exceptions in the Hague Rules. In the present case the Respondent is similarly bound to discharge the carrier’s duties under the HV Rules.

There was a breach of the carrier’s duties under the HV Rules:

58. The Respondent breached, and caused the Claimant to breach the duties –
- a. to exercise due diligence to make the ship seaworthy (Art 3(1)(a)); and
 - b. to properly care for the goods (Art 3(2)).

Exercise due diligence to make the Vessel seaworthy

The Respondent breached its duty to exercise due diligence to make the Vessel seaworthy.

59. In *The Muncaster Castle*⁷⁰ repairs were negligently carried out before a vessel sailed, causing damage during the voyage. It was held that the time to determine if a vessel is unseaworthy is the commencement of the voyage. Because the repairs caused the ship’s systems to be defective at the start of the voyage, the ship was unseaworthy. In this case, the Respondent’s duties to clean the tanks and operate a compliant IGS arose before the Vessel sailed. (Clause 2.7.1.3 of the *Inert Gas Systems*⁷¹ publication requires that the IGS be operated throughout the loading operation.) Breach of these duties therefore amounted to unseaworthiness, and a breach of Art 3(1)(a).

⁶⁸ *Id* at 469. The following were said to be “principal features”: the duty of due diligence; the duty to properly care for the goods; the exemption for neglect in navigation or management; the one year time limit; the package limit.

⁶⁹ [1958] 1 Lloyd’s Rep. 73

⁷⁰ [1961] 1 Lloyd’s Rep. 57

⁷¹ IMO, 1983

Memorandum for the Claimant – Team 5

If the damage was caused by IGS failure, the Respondent failed to exercise due diligence to make the Vessel seaworthy.

60. The publication *Inert Gas Systems*⁷² states at clause 6.2 that ships with a common IGS main (as in the present case) are susceptible to contamination by previous cargos. Clause 6.3 of the publication states that “unacceptable contamination from the flue gas may be encountered if proper control is not exercised over fuel quality, efficiency of combustion, scrubbing and filtering”. The publication sets out procedures for flushing lines and exercising control over engines, and states that the contamination risk can be “overcome” by following the procedures.
61. The Respondent admits engine problems occurred during the voyage and accepts liability for them. The Respondent has therefore admitted it failed to exercise proper control over “fuel quality, efficiency of combustion, scrubbing and filtering” as required by Clause 6.3 of the *Inert Gas Systems* publication. The Claimant submits that had the Respondent followed the procedures in the publication, the possibility of damage through IGS failure would be “overcome”. If the IGS failure occurred, the Claimant failed to follow the procedure, and therefore breached Art 3(1).

If the damage was caused by failure to clean the tanks, the Respondent failed to exercise due diligence to make the Vessel seaworthy.

62. In *The Fiona*⁷³ the UK Court of Appeal found that a shipowner’s failure to remove vapours of previous cargo from a petroleum carrier constituted a breach of the obligation to make the ship seaworthy.⁷⁴ As the damage in this case was also caused by vapour contamination, the failure to prevent this, by either washing the tanks adequately or maintaining a working IGS, constituted a breach of the seaworthiness obligation.

⁷² *Id*

⁷³ [1994] 2 Lloyd’s Rep. 506 at 514

⁷⁴ at 514

Memorandum for the Claimant – Team 5

63. The master was obliged to make the Vessel seaworthy before receiving cargo, even if a cargo interest requested otherwise. In *The Liepaya*⁷⁵ a cargo of petroleum was contaminated by a residue of another type of petrochemical that had not been removed from the tanks. The UK High Court said the master was bound to prevent contamination from previous cargo as a matter of “basic tanker practice”.⁷⁶ Even though the cargo interests were aware of possible contamination and ordered loading continue, the master was bound to make clear he could not continue to load without making the Vessel fit to receive the cargo. The Claimant submits that as part of “basic tanker practice” is an essential component of the obligation of seaworthiness.⁷⁷ By failing to clean the tanks, the master therefore breached the duty.
64. In *The Iron Gippisland*,⁷⁸ the master failed to properly isolate different grades of petroleum, leading to contamination. The determinative facts in that case (as in the present) were that the master was made aware of the high grade of the petroleum, and that this was evidenced by the ship owners’ appointing their own surveyor at the port of loading.⁷⁹ On those facts it was held the master knew or ought to have known that storing the petroleum cargo in such a manner was likely to cause contamination.⁸⁰ Given the strikingly similar fact pattern, the Claimant submits that in this case the master knew or ought to have known that failing to properly clean tanks when loading a superior grade product would likely or inevitably cause contamination. As the tanks were not cleaned, the Vessel was not fit to receive the cargo, and was unseaworthy.

Properly care for the goods

There was a *prima facie* breach of the obligation to properly care for the goods.

⁷⁵ *UBC Chartering Ltd v Liepaya Shipping Co Ltd (The ‘Liepaya’)* [1999] 1 Lloyd’s Rep. 649

⁷⁶ at 12

⁷⁷ at 12

⁷⁸ (1993) 34 NSWLR 29; [1994] 1 Lloyd’s Rep. 335

⁷⁹ *Id* at 357

⁸⁰ *Id* at 357

Memorandum for the Claimant – Team 5

65. In his judgement in *The Glendarroch*,⁸¹ Escher LJ set out the elements of a cargo claim. The cargo interest must first prove that –
- a. there was a contract of carriage (as discussed in paras 35 to 45 above);
 - b. the goods were delivered into the control of the carrier in good condition; and
 - c. the goods were delivered in a damaged condition (which is not in dispute).
66. In *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd*,⁸² Sumner VC said that once the elements set out in *The Glendarroch*⁸³ are satisfied, there is *prima facie* a failure to “properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried”. As Art 3(2) of the HV Rules is in the same form, the Claimant submits there is a breach of it in the present case.
67. The goods were delivered in good order and condition because –
- a. by the BOL⁸⁴ the Claimant represented that they were, and is estopped from departing from this representation; alternatively
 - b. on the evidence, on the balance of probabilities the damage occurred whilst the cargo was on the Vessel.

The goods were delivered in good condition because the BOL represented that they were.

68. In *Silver v Ocean Steamship Co Ltd*⁸⁵ Scrutton LJ held that where a BOL describes cargo as being shipped in “good order and condition”, the carrier will be estopped from asserting to an endorsee that the goods were defective in a way apparent upon reasonable examination. In *The Peter der Grosee*⁸⁶ a BOL contained the words “weight, contents and value unknown”, however this was held not to derogate from the representation of “good order and condition”. Similarly in the present case, the

⁸¹ [1894] P. 226

⁸² [1929] AC 223 at 234, (1928) 32 Lloyd’s Rep. 91 at 95 (HL)

⁸³ [1894] P. 226

⁸⁴ See page 41 of the Evidence Brief

⁸⁵ [1929] All ER 611 at 614

⁸⁶ (1875) 1 P.D. 414

Memorandum for the Claimant – Team 5

words “[w]eight measure, quality, quantity, condition, contents and value unknown” does not affect the representation of “good order and condition”.

69. BOLs signed by the Claimant in conformance with the time charterparty bind the Respondent.⁸⁷ The BOL complies with the charterparty if it conforms with the mates receipt.⁸⁸ The representations in the BOL binds the Respondent because –
- a. the representations were factually consistent with those in the mates receipt; alternatively
 - b. if the BOL departed from the mates receipt, it was only to the extent that strict compliance is not required; alternatively
 - c. the Respondent waived its rights in relation to the Claimant’s duty to sign in conformance with mate’s receipts; alternatively
 - d. the Respondent impliedly authorised the Claimant to issue a BOL not conforming with the mates receipt.
70. The BOL representations conformed with the mates receipt. It was impossible for the master to conduct a visual check *at the time of loading*, as this would require examination of the contents of loading pipes as they flowed. Examination was only possible after loading (by checking tanks), when damage may already have occurred. The mates receipt made representations as to the condition of the cargo once in the tanks, not at the time of passing the flange. In the intervening time, damage could have occurred through contamination. The representation in the BOL, that the cargo was received in good order and condition, conforms with the representation in the mate’s receipt as to the condition upon pumping of the cargo into the tank.
71. Strict conformance with the mates receipt is not necessary. In *The Hawk*⁸⁹ it was said that the court does not require BOLs to strictly comply with the form required by a charterparty. To do so would frustrate the clause’s purpose of simplifying dealings with third parties.⁹⁰

⁸⁷ *Tillmans & Co v SS Knutsford* [1908] AC 406, [1908] 2 KB 385

⁸⁸ Clause 21(a), see page 19 of the Evidence Brief

⁸⁹ [1999] 1 Lloyd’s Rep. 176

Memorandum for the Claimant – Team 5

72. The Respondent waived its rights in relation to conformance with mates receipts. On 3 May 2006,⁹¹ the Respondent's agent authorised the Claimant to order that the Vessel proceed, without waiting for visual checks to be completed. In *Bremer Handelsgesellschaft mbH v Vanden Avenne Izegem PVBA*,⁹² the House of Lords held that whether an obligation under a contract was waived depended on an analysis of the communication between the parties. The Respondent's communication via the Voyage Charterer clearly evidenced an intention that the BOL would make representations despite a visual check not being conducted. This amounted to a waiver of its rights in relation to non-conforming BOLs.
73. By agreeing that the cargo would not be inspected until after the Vessel was underway, the Respondent authorised the Claimant to issue a clean BOL. The Respondent authorised the Claimant to give the Vessel orders to leave port, impliedly authorising all things necessary to allow this to happen.⁹³ The Claimant's original authority to sign BOLs only in conformance with mate's receipts⁹⁴ was extended, such that in this instance the Claimant had authority to represent the cargo was in good order and condition.

On the balance of probabilities, the goods were delivered in good condition.

74. In addition to the above, the Claimant submits that on balance, the cargo was delivered in good condition. The AMC report⁹⁵ found the contaminant was vapours of dirty petroleum product, mixed through either failure to properly clean tanks, or failure of the IGS. The Vessel's previous cargo was dirty petroleum.⁹⁶ As the Respondent has not led expert evidence to contradict this report, the Claimant submits the Tribunal should accept it as factually correct.

⁹⁰ Id at 185

⁹¹ See page 38 of the Evidence Brief

⁹² [1978] 2 Lloyd's Rep. 109 at 116 per Wilberforce L

⁹³ Bowstead on Agency, 14th ed; Art 30 at p 86, referred to in *Toepfer v Warinco* [1978] 2 Lloyd's Rep. 569 at 577

⁹⁴ Clause 21(a) of the time charterparty; see page 19 of the Evidence Brief

⁹⁵ See pages 51-54 of the Evidence Brief

⁹⁶ See the AMC report, para 9, see page 52 of the Evidence Brief

Memorandum for the Claimant – Team 5

75. Only a single tank was contaminated. Although there is no evidence on this point, it is inconceivable that the cargo would have been loaded other than from a single admixed source. The contamination must therefore logically follow the division of cargo on loading. The Claimant therefore asks the Tribunal to make a finding of fact that the contamination occurred after loading.

Exclusions under the HV Rules

The Respondent cannot rely on the HV Rule exceptions.

76. As the Respondent breached its seaworthiness obligations under Art 3(1) (see paras 59 to 64 above), it is unable to rely on the exceptions in Art 4.⁹⁷

77. In *Maxine Footwear Company Ltd and Morin v Canadian Government Merchant Marine Ltd*⁹⁸ a vessel caught fire because the owners failed to exercise due diligence to make the vessel seaworthy. The Privy Council considered whether shipowners failing to make their vessel seaworthy could rely on the exclusion clause in Art 4 of the Hague Rules. Somervell LJ said that “the exceptions [are] subject to the performance by the carrier of his overriding obligation set out in Art 3(1)”.⁹⁹

The time bar in the HV Rules does not operate to limit liability.

78. A party making a cargo claim under the HV Rules for damage that is not apparent must give the carrier notice of the damage within three days of delivery of the goods.¹⁰⁰ Failure to do so is *prima facie* evidence of delivery in the condition described in the BOL.

79. Although the Purchaser did not give such notice, the presumption that the cargo in tank 2 was not damaged is overcome by the following:

- a. The master conducted a visual check of the oil in tanks 1 and 2 on the 3 May 2006 and noted slight discolouration in the oil in tank 2.¹⁰¹

⁹⁷ *The Fiona* [1994] 2 Lloyd’s Rep. 506 at 519

⁹⁸ [1959] AC 589; [1959] 2 Lloyd’s Rep. 105

⁹⁹ *Id* at 118

¹⁰⁰ Art 3(6)

¹⁰¹ See page 40 of the Evidence Brief

Memorandum for the Claimant – Team 5

- b. Mr Adams, the Purchaser’s agent, conducted another visual check at the port of discharge on 23 May 2006, confirming the master’s observation.¹⁰²
- c. AMC analysed a sample taken from the tanks before discharge and found the oil in tank 2 was contaminated.¹⁰³

Contractual exclusions

Clause 12 of the time charter does not operate where the master is negligent.

- 80. Clause 12 of the time charter¹⁰⁴ states that the “Charterers are to load, stow and trim the cargo at their expense under the supervision of the Master”.¹⁰⁵
- 81. This form of clause operates to make the Claimants responsible for loading and stowing,¹⁰⁶ except where the master is negligent. In *The Aquacharm*¹⁰⁷ a master negligently failed to take into account that a ship’s forward draught would increase in fresh water. Under an identical clause 8 of the NYPE form, the owner was found liable for the resulting early discharge of the cargo.
- 82. In this present case, the master was similarly negligent, by failing to observe “basic tanker practice” (as discussed at para 63 above). The Respondent is therefore unable to rely on clause 12 to escape liability for the cargo claim.

The purported indemnity of 12 September 2004 was ineffective.

- 83. On 12 September 2004,¹⁰⁸ 2 days after the time charterparty was signed, the Respondent wrote to the Claimant purporting to incorporate an exclusion and indemnity clause in favour of the Respondent into the charterparty, in relation to “occasions when [the Claimant is] shipping oil other than dirty petroleum product”.
- 84. This letter does not affect the Respondent’s liability to the Claimant because –

¹⁰² Para 7; see page 52 of the Evidence Brief

¹⁰³ See page 40 of the Evidence Brief

¹⁰⁴ See page 17 of the Evidence Brief

¹⁰⁵ This form is found in cl 8 of the NYPE form

¹⁰⁶ *The “Athanasia Comminos” and “Georges Chr Lemos”* [1990] 1 Lloyd’s Rep. 277 at 290

¹⁰⁷ [1982] 1 Lloyd’s Rep. 7

¹⁰⁸ See page 21 of the Evidence Brief

Memorandum for the Claimant – Team 5

- a. there was no acceptance by the Claimant of the Respondent's offer to vary the contract;
 - b. there was no consideration by the Respondent; and
 - c. even if contractual relations were varied, the indemnity is ineffective because the Respondent breached Art 3(1) of the HV Rules.
85. By clause 2 of the time charterparty¹⁰⁹ the Respondents agreed that “[a]t the date of delivery the Vessel under this charter shall...be in everyway fit to carry crude petroleum and/or its products”. Petroleum products are products derived from crude oil by a refining process. On its proper construction, this clause confers a right on the Claimants to carry petroleum products, and an obligation on the Respondents to supply a vessel fit to carry petroleum products.

There was no acceptance by conduct or otherwise.

86. There was no acceptance by conduct because the Claimant's actions were not unequivocally referable to acceptance of an offer contained in the letter. In *Day Morris Associates v Voyce*¹¹⁰ Black J of the UK Court of Appeal said that for an acceptance by conduct to operate “the conduct in question must be clearly referable to the offer and...not reasonably capable of being interpreted as anything other than acceptance”.¹¹¹ The Claimant's actions in giving orders to the Vessel are consistent with acceptance of the time charterparty and rejection of the offer contained in the letter.

There was no consideration.

87. It is trite law that a promise to perform an existing contractual obligation cannot be sufficient consideration.¹¹² In *South Caribbean Trading Ltd v Trafigura Beeher BV*¹¹³ a vendor was obliged to make delivery of a shipment of oil, and the consignor was obliged to pay a fixed price. The vendor refused to deliver the shipment unless the consignor agreed to pay a market-related price; this caused the consignor to vary the contract. Colman J said there was “a firmly established rule of law that a

¹⁰⁹ See page 16 of the Evidence Brief

¹¹⁰ [2003] 12 EGCS 129

¹¹¹ at 35

¹¹² *Stilk v Myrick* (1809) 2 Camp. 317, 170 E.R. 1168; *Halsbury's Laws of England* 4th ed, vol 9, para 328

¹¹³ [2004] EWHC 2676 (Comm); [2005] 1 Lloyd's Rep. 128

Memorandum for the Claimant – Team 5

promise to perform an enforceable obligation under a pre-existing contract between the same parties is incapable of amounting to sufficient consideration”.¹¹⁴

88. In this case, the letter does not purport to confer any right or other benefit on the Claimant. Even if it is inferred that the Respondent made a new promise to carry petroleum products, it was already obliged to under the time charterparty. Because the requirement for consideration is not met, the letter failed to vary the time charterparty.

An indemnity cannot operate to exclude Art 3(1) of the HV Rules.

89. As discussed in para 76 above, Art 3(1) of the HV Rules imposes an overriding obligation on the Respondent carrier to exercise due diligence to make the Vessel seaworthy.
90. The purported exclusion and indemnity in the Respondent’s letter attempts to circumvent the owner’s obligation of seaworthiness. The Claimant submits that even if the letter altered contractual relations between the parties, the purported exclusion and indemnity will fail to the extent that it abrogates the Respondent’s Art 3(1) obligations.

Cargo claim in negligence

The Respondent was liable to the Purchaser in negligence.

91. The Respondent owed a duty of care to the owners of the cargo on its Vessel. The Respondent breached this duty, causing damage to the Purchaser’s cargo. The Claimant settled the Purchaser’s cargo claim and is entitled to the contractual indemnity.¹¹⁵
92. In *The Starsin*,¹¹⁶ a cargo owner sued a shipowner in negligence for damage to cargo shipped under a sub-charterer’s BOL. The court said that “the duty of care owed by the shipowners in respect of the cargo in their possession is engendered by the proximity of the shipowners to the goods in their

¹¹⁴ at [107], Lloyd’s Rep. at 149. On the facts of that case, the new contract conferred another benefit that amounted to consideration.

¹¹⁵ Cl 21 of the time charterparty; page 19 of the Evidence Brief

¹¹⁶ [2000] 1 Lloyd’s Rep. 85

Memorandum for the Claimant – Team 5

possession”.¹¹⁷ In *The Gudermes*¹¹⁸ a shipment of fuel belonging to the plaintiffs was damaged. Staughton LJ said “those circumstances no doubt give rise to a duty of the owners to take reasonable care”.¹¹⁹ The Respondent similarly owed a duty of care in relation to the goods.

The Purchaser had property in the goods when the damage occurred.

93. In *Margarine Union GmbH v Cambay Prince Steamship Co*¹²⁰ Roskill J of the UK High Court found that an action against a carrier for negligence is only available to a person with title to goods at the time they were damaged. The Claimant’s position is that –
- a. title to the good passed at the Vessel’s flange at the port of loading;
 - b. the goods were damaged after passing the Vessel’s flange (as discussed in paras 68 to 75 above);
and
 - c. the Purchaser therefore had title when the damage occurred.
94. The *Sale of Goods Act 1979 (Genosa)* and *Sale of Goods Act 1979 (Archland)*¹²¹ only determine the passing of title under sale of goods contracts when parties do not evidence a different intention. Section 10 begins “Unless a different intention appears from the terms of the contract”. Sections 17(1), 18 and 20 are in similar terms. The intention of the parties is determined with regard to “the terms of the contract, the conduct of the parties and the circumstances of the case”.¹²² In correspondence from the Purchaser to the Voyage Charterer on 23 March 2006,¹²³ and from the Voyage Charterer to the Purchaser on 28 March 2006,¹²⁴ the parties explicitly stated that title was “to transfer at shipboard flange”. Title passed at the shipboard flange because this was the express intention of the parties.

¹¹⁷ *Id* at 102

¹¹⁸ [1993] 1 Lloyd’s Rep. 311

¹¹⁹ *Id* at 326

¹²⁰ [1969] 1 Q.B. 219; [1967] 2 Lloyd’s Rep. 315 at 337

¹²¹ Identical to the UK acts of the same name; see page 75 of the Evidence Brief

¹²² *Sale of Goods Act 1979 (Genosa)* s 17(2); *Sale of Goods Act 1979 (Archland)* s 17(2)

¹²³ See page 22 of the Evidence Brief

¹²⁴ See page 28 of the Evidence Brief

Memorandum for the Claimant – Team 5

95. The Voyage Charterer and Purchaser contracted on CIF (Cost Insurance Freight) terms,¹²⁵ a reference to Incoterms. Incoterms define common terms of sale of goods, but do not describe transfer of title of the goods.¹²⁶ As such, the sale on CIF terms is consistent with the parties' expressed intention that title would pass at the flange.
96. It is immaterial that events that lead to the damage transpired before the owner of the goods gained title. In *The Starsin*,¹²⁷ the Defendant claimed that because they negligently stowed the cargo before the Plaintiff gained title, there was no claim in negligence, even though the damage occurred after the transfer of title. Colman J rejected this argument,¹²⁸ saying that a party acquiring title will retain a cause of action where a breach of duty before the passing of title "has already set in motion a course of events leading immediately to the damage". In the present case, although the Respondent breached its duties before loading, it still breached a duty of care to the Purchaser because the damage did not occur until the cargo passed the flange.

The Respondents breached the duty of care.

97. In *The Gudermes*¹²⁹ the court considered whether a duty would be breached if shipowners failed to heat petroleum cargo. The court said this was not a breach, but said in *obiter* that there was a duty not to "mix it [the oil] with other matter on board which would cause contamination", in a similar way that pumping it overboard into the sea or steering the ship into a collision would. The present case was not one, as in *The Gudermes*, where significant cost would be involved in taking the measure. The Respondent could discharge its duty at negligible cost, merely by putting the requisite crew systems in place.

The Respondent was *prima facie* negligent on the *res ipsa loquitur* doctrine.

¹²⁵ See pages 22 and 28 of the Evidence Brief

¹²⁶ Incoterms 2000, Introduction at "1. Purpose and Scope of Incoterms", as Reproduced in the Report of the Secretary General of the United Nations Commission on International Trade Law (UNCITRAL), Document A/CN.9/479

¹²⁷ [2000] 1 Lloyd's Rep. 85

¹²⁸ *Id* at 102

¹²⁹ [1993] 1 Lloyd's Rep. 311

Memorandum for the Claimant – Team 5

98. Where the exact sequence of events leading to damage is unclear or incapable of proof, *prima facie* negligence may be proven through the *res ipsa loquitur* doctrine.¹³⁰ The following elements must be satisfied:
- a. The tortfeasor must have had control over the thing that caused the damage.¹³¹ In this case, the Respondent controlled the Vessel by employment of the crew.
 - b. The damage would not ordinarily have occurred without carelessness.¹³² The fact that the superior grade oil was contaminated by crude oil leads to an inference that the master did not take appropriate care.
 - c. The cause of the damage is unclear.¹³³ This is satisfied as the AMC Report concludes there were two possible causes of the damage.
99. As these elements are satisfied, the Respondent bears the onus of showing that the damage was not caused by its negligence.

Cargo claim in bailment

The Respondent was sub-bailee of the goods on the terms of the BOL.

100. In *The Pioneer Container*¹³⁴ Goff LJ considered a sub-bailment under the authority of the owner of the goods. He found a bailor and sub-bailee have the same relationship as a bailor and bailee. If the bailor has expressly or impliedly authorised the sub-bailment, the bailor is bound by its terms. The bailor was “taken to have authorized...the bailee to regulate the duties of the sub-bailee in respect of the goods entrusted to him, not only towards the bailee but also towards the owner”.¹³⁵
101. If the sub-bailee had notice that other parties had an interest in the goods, the sub-bailee will have voluntarily received the goods. By taking the goods into custody, the sub-bailee assumes the position of

¹³⁰ *Scott v London and St Katherine Docks Co* (1865) 3 H&C 596

¹³¹ *Easson v London & North Eastern Railways Co* [1944] 2 All ER 425

¹³² *Scott v London and St Katherine Docks Co* (1865) 3 H&C 596

¹³³ *Barkway s South Wales Transport Co Ltd* [1950] AC 185

¹³⁴ [1994] 2 All ER 256

¹³⁵ *Id* at 259

Memorandum for the Claimant – Team 5

bailee, even where the sub-bailee had no dealings with the bailor.¹³⁶ This position was confirmed by the Privy Council in *The Mahkutai*.¹³⁷

102. The Respondent had notice that the goods were being carried for third party voyage charterers. By telephone call on 12 April 2006 and facsimile dated 13 April 2006¹³⁸ the Claimant advised the Respondent that the Vessel was to be “utilised for a voyage charter”. It was thereby put on notice that some other party had an interest in the cargo, and assumed the position of bailee as against that party.

103. As discussed above at paras 35 to 51 above, the Purchaser is party to a contract on the terms of the BOL. The contract confers authority on the Claimant to sub-bail the goods to the Respondent, by stating that the duties of carriage are on the master.¹³⁹

The Claimant and Respondent, as bailees, breached the HV carrier’s duties owed to the Purchaser.

104. The Claimant and Respondent are therefore jointly and severally liable to the Purchaser in bailment on the terms of the BOL. As the BOL incorporated the HV Rules, the Claimant and Respondent both owed, and breached, the carrier’s duties in the HV Rules. As discussed, because there was a breach of the HV Rules owed by both parties, the Respondent is liable to indemnify the Claimant.¹⁴⁰

The Claimant and Respondent, as bailors, were bound to take reasonable care of the cargo.

105. In *Corbett v Packington*¹⁴¹ the court held that a bailee must take reasonable care of a bailor’s goods. In *Moukattaf v BOAC*,¹⁴² the court confirmed that this duty is also owed by sub-bailors.

106. The Purchaser, as bailor, has a right of action against the Respondent, as sub-bailee, if the Respondent failed to take reasonable care of the goods.

The Respondent bears the burden of proving that it discharged its duties as bailee.

¹³⁶ *The Pioneer Container* [1994] 2 All ER 256

¹³⁷ [1996] AC 650; [1996] 2 Lloyd’s Rep 1

¹³⁸ See page 34 of the Evidence Brief

¹³⁹ Clause 3, see page 30 of the Evidence Brief

¹⁴⁰ Clause 24 time charterparty, see page 20 of the Evidence Brief

¹⁴¹ (1827) 6 B. & C. 268

¹⁴² [1967] 1 Lloyd’s Rep 396 at pp 414-415; confirmed in *Balsamo v Medici* [1985] Q.B. 716; [1984] 2 All ER 304 at 310

Memorandum for the Claimant – Team 5

107. When a sub-bailee fails to return a bailor's goods in good order and condition, the sub-bailee bears the burden of proving that it either –¹⁴³
- a. took appropriate care of the goods; or
 - b. any failure to take appropriate care of the goods did not contribute to the damage.
108. As discussed in relation to negligence above, the Claimant submits that the Respondent is unable to discharge this burden of proof. The Respondent is therefore liable –
- a. to pay the Claimant damages for failing to return the cargo to the Claimant's possession in good order and condition; and
 - b. to indemnify the Claimant for its settlement of the Purchaser's claim, which was caused by the Respondent's failure to return the cargo to the Purchaser's possession in good order and condition.

Claim for repayment of hire

109. Off-hire exists as a warranty under a time charterparty. In *The Mareva AS*¹⁴⁴ Kerr J explained that it is for a charterer to bring themselves clearly within an off-hire clause. If a vessel for any reason is not in full working order to render the service then required from her, and the charterers suffer a loss of time in consequence, then hire is not payable for the time lost.

The Claimant seeks repayment of hire for delay caused by the engine malfunction.

110. Under the time charterparty, the Claimant can recover off-hire where there has been a delay due to the “breakdown of machinery”.¹⁴⁵
111. The Respondent has admitted -
- a. a delay of five days was caused by the engine malfunction; and
 - b. liability for the delay during the seven day period of the engines operating at a reduced capacity.

The Claimant seeks repayment of hire for delay in Aslan Port.

¹⁴³ *Travers & Sons Ltd v Cooper* [1915]1 KB 73

¹⁴⁴ [1977] 1 Lloyd's Rep. 368 at 381-2

¹⁴⁵ Cl 15(a)(i) and cl 15(b); see page 18 of the Evidence Brief

Memorandum for the Claimant – Team 5

112. The time charterparty provides for the Claimant to recover off-hire where there has been a delay due to “any other cause whatsoever...preventing the proper working of the vessel”.¹⁴⁶
113. The bulk of applicable case law has been in contemplation of the NYPE¹⁴⁷ off-hire clause, prior to the 1993 revision.¹⁴⁸ That clause accounts for delay due to “...any other cause preventing the full working of the vessel...”¹⁴⁹ and is sometimes amended to say “any other cause whatsoever”
114. The terms “proper working” and “full working” are analogous. In *The H.R. Macmillan*¹⁵⁰ Mocatta J discussed the “proper working” of a crane in contemplation of a “full working” clause.
115. In *The Aquacharm*,¹⁵¹ Denning MR laid down the process by which such clauses must be interpreted. The first inquiry must be into whether the “full working of the vessel” has been prevented, followed by a consideration of the cause.¹⁵²
116. In *The Apollo*,¹⁵³ Mocatta J held, with the use of the term “whatsoever”, the the *ejusdem generis* rule did not apply when considering cause.
117. In *The Mastro Giorgis*¹⁵⁴ Lloyd J explained that the inclusion of the term “whatsoever” extends the gambit of causes to those of any kind, including legal or physical, removing the need to consider the second part of the process laid down by Denning MR in *The Aquacharm*.¹⁵⁵
118. In *The Mastro Giorgis*¹⁵⁶ Lloyd J recognised that when considering whether “any other cause whatsoever” affects the full working of a vessel, a distinction must be drawn between causes that are totally extraneous and those which are attributable to the vessel itself. Lloyd J asserted that when there appears to be an immediate cause, attention must be paid to the underlying cause. Underlying causes

¹⁴⁶ Cl 15(a)(v) and cl 15(b); see page 18 of the Evidence Brief

¹⁴⁷ New York Produce Exchange

¹⁴⁸ Cl 15

¹⁴⁹ *The Laconian Confidence* [1997] 1 Lloyd’s Rep. 139 at 141

¹⁵⁰ [1973] 1 Lloyd’s Rep. 27 at 36 per Mocatta J

¹⁵¹ [1982] 1 Lloyd’s Rep. 7

¹⁵² *Id* at 9

¹⁵³ [1978] 1 Lloyd’s Rep. 200

¹⁵⁴ [1983] 2 Lloyd’s Rep. 66

¹⁵⁵ [1982] 1 Lloyd’s Rep. 7

¹⁵⁶ [1983] 2 Lloyd’s Rep. 66

Memorandum for the Claimant – Team 5

taken as not being extraneous include a vessel's qualities and characteristics, including history, and ownership.

119. In *The Laconian Confidence*¹⁵⁷ Rix J suggested, in *obiter*, that the inclusion of the word “whatsoever” in such clauses should extend to any case where an authority prevents the operation of a vessel, even where the reason is entirely capricious.
120. It is submitted that in the present matter, the full, or proper, working of the Vessel was prevented over the period. The Charterers were prevented from attracting further business for the period in question. The immediate cause of the delay was the quarantine imposed by the authorities. The underlying cause of the delay was the potential exposure to a dangerous disease. Under the test proposed in *The Mastro Giorgis*,¹⁵⁸ the Claimant is brought under the clause. Further, the detention by authorities meets the less strenuous requirement proposed in *the Laconian Confidence*.¹⁵⁹

Hire is not payable as the vessel was detained due to infectious disease.

121. In *The Apollo*¹⁶⁰ Mocatta J proposed that a detention by health authorities for reasons that were no mere formality brought such an off hire clause into play.
122. In *The Aquacharm*¹⁶¹ Griffiths LJ recognised the *Apollo*¹⁶² decision as correct on the basis that no responsible person would use a ship with a risk of carrying typhus.
123. It is submitted that the facts of the present matter are sufficiently analogous to *The Apollo*¹⁶³ case. The port authority similarly refused to allow the departure until the risk of transfer of the disease subsided. Applying the reasoning proposed by Griffiths LJ in *The Aquacharm*,¹⁶⁴ no responsible person would operate a vessel suspected of carrying a highly infectious and deadly virus.

Clause 17 does not operate to exclude the Respondent's liability.

¹⁵⁷ [1997] 1 Lloyd's Rep. 139 at 151

¹⁵⁸ [1983] 2 Lloyd's Rep. 66

¹⁵⁹ [1997] 1 Lloyd's Rep. 139

¹⁶⁰ [1978] 1 Lloyd's Rep. 200 at 205

¹⁶¹ [1982] 1 Lloyd's Rep. 7

¹⁶² [1978] 1 Lloyd's Rep. 200

¹⁶³ *Id*

¹⁶⁴ [1982] 1 Lloyd's Rep. 7

Memorandum for the Claimant – Team 5

124. In *Photo Production Ltd v Securitor Transport Ltd*¹⁶⁵ Wilberforce L cited the rule that exclusion clauses are to be read *contra proferentem*, and that clarity is required.
125. Clause 17 of the time charterparty¹⁶⁶ purports to exclude the Respondent’s liability for any loss, damage, delay, or failure except where otherwise provided in the agreement,¹⁶⁷ or otherwise restricted by “legislation or law”.¹⁶⁸
126. The Claimant submits that given the broad wording of clause 14(a)(v) (“any other cause whatsoever”), applying clause 17 to limit off-hire action yields ambiguity.
127. As provided above, the Claimant submits the delay in port is brought under clause 14. It falls under the description “elsewhere in the agreement”. The defendant is not protected by clause 17.

Response to Counterclaim

The Claimant did not breach its obligation to nominate a safe port.

128. By paragraph 6 of its preliminary submissions,¹⁶⁹ the Respondent alleges that the Claimant breached a contractual obligation to nominate a safe port. The Respondent claims damages including hire of the Vessel for the period detained.
129. Clause 1(b) of the time charterparty¹⁷⁰ expresses that “the vessel is to be employed...only between and at safe ports”. As a safe port clause is a contractual warranty,¹⁷¹ breach will give rise to damages, but may not be taken as repudiation.¹⁷²
130. The Respondent purports that Aslan was not a safe port due to the risk of detention of the Vessel as a result of the bird flu outbreak.

¹⁶⁵ [1980] AC 827 at 846

¹⁶⁶ See page 18 of the Evidence Brief

¹⁶⁷ Cl 17(a); see page 18 of the Evidence Brief

¹⁶⁸ Cl 17(b); see page 18 of the Evidence Brief

¹⁶⁹ See page 65 of the Evidence Brief

¹⁷⁰ See page 16 of the Evidence Brief

¹⁷¹ Wilson, *J Carriage of Goods by Sea* 5th ed (England : Pearson Education Limited, 2005)

¹⁷² *Hongkong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; *Associated Newspapers Ltd v Banks* (1951) 83 CLR 322

Memorandum for the Claimant – Team 5

131. It is the Claimant’s position that the express obligation in the time charterparty to nominate a safe port was not breached by entry into Aslan Port because –
- a. Aslan Port was safe at the time of nomination;
 - b. the outbreak of bird flu did not make the port prospectively unsafe;
 - c. the Claimant had no obligation to nominate another port once the outbreak had occurred.

Aslan Port was a safe port, as classically defined, at the time of nomination.

132. At the time of nomination Aslan Port was a safe port because the Vessel could utilise it for the predetermined purpose without any risk of detention.
133. As established in *The Eastern City*,¹⁷³ “a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship”. This definition was approved by the House of Lords in the *The Evia (No 2)*.¹⁷⁴
134. Accordingly, a charterer exercises its contractual right by giving the shipowner orders to travel to a particular port of loading or discharge. At this time the contractual promise regarding the safety of the intended port must be fulfilled.¹⁷⁵
135. The Claimant ordered the Vessel to Aslan Port, Archland on 13 April 2006 at 09:52.¹⁷⁶ At this time Aslan Port was safe because the bird flu outbreak had not yet emerged. The Vessel could travel to Aslan Port, use it and leave without being in any danger. Therefore, the Claimant had fulfilled their contractual obligation at the time of nomination.

Aslan Port was a prospectively safe port at the time of nomination.

¹⁷³ [1958] 2 Lloyd’s Rep. 127 at 131 per Sellers LJ

¹⁷⁴ [1983] 1 AC 736; [1982] 2 Lloyd’s Rep 307

¹⁷⁵ *The Evia (No 2)* [1983] AC 736

¹⁷⁶ See page 33 of the Evidence Brief

Memorandum for the Claimant – Team 5

136. *The Evia (No 2)*¹⁷⁷ established that the safety of a port is to be considered prospectively at the time when the charterer makes the order for the ship to visit a port. When judging the safety of a port at the stage of nomination and arrival, account must be taken of reasonably foreseeable changes in condition.¹⁷⁸ Therefore, if at the time the order was made to go to a particular port, it appears the ship will be able to enter, use and leave the port safely, the charterer satisfies their contractual obligation.¹⁷⁹
137. There is currently no authority on the question of whether a disease-ridden port can be an “unsafe port”. Therefore, whether a port can be considered unsafe due to the risk of detention in a bird flu infected region is a question of fact.¹⁸⁰ It is a key consideration that much remains unknown about the bird flu virus.
138. The risk presented by bird flu is low. Although bird flu is a geographically widespread and is common amongst birds, it very rarely affects humans.¹⁸¹ Since 1959, instances of human infection with the bird flu virus have been documented on only 10 occasions.¹⁸² Human infection generally results in only mild symptoms.¹⁸³ The virus is most common in rural and periurban households, and relatively rare in urban centres.¹⁸⁴
139. The World Health Organisation uses six phases of pandemic alert as a system for informing the world of the seriousness of the threat. Bird-flu is classified as phase 3, which indicates it causes disease in humans, but has not yet spread efficiently and sustainably among humans.¹⁸⁵
140. The virus does not spread easily from birds to humans. Infection can only be contracted by direct contact with infected poultry, or surfaces and objects contaminated by their faeces.¹⁸⁶ In no instance has the virus spread beyond first generation infection or caused illness in the general community.¹⁸⁷

¹⁷⁷ *Evia (No 2)* [1983] AC 736

¹⁷⁸ *The Evaggelos* [1971] 2 Lloyd’s Rep. 200

¹⁷⁹ *The Evia (No 2)* [1983] AC 736

¹⁸⁰ *The “Stork”* [1955] 2 QB at 105; [1954] 2 Lloyd’s Rep. 397

¹⁸¹ ‘Avian influenza (“bird flu”) – Fact Sheet’, World Health Organisation
<http://www.who.int/mediacentre/factsheets/avian_influenza/en/> (3 March 2006)

¹⁸² *Id*

¹⁸³ *Id*

¹⁸⁴ *Id*

¹⁸⁵ ‘Current WHO phase of pandemic alert’, World Health Organisation
<http://www.who.int/csr/disease/avian_influenza/phase/en/> (3 March 2006)

Memorandum for the Claimant – Team 5

141. In comparison to the number of birds affected, the number of human cases is minor especially considering the numerous associated opportunities for human exposure.¹⁸⁸ It is not presently understood why some people, and not others, become infected following similar exposures.¹⁸⁹
142. The reports of the bird-flu like illness did not surface until 12 May 2006,¹⁹⁰ one month after Aslan Port was nominated. The Port Authority advised that any risk could be avoided by the mere *practice of basic health precautions*.¹⁹¹ This advice remained in effect until the Vessel was detained, immediately before planned departure. In light of these health warnings, even if the port became prospectively unsafe, it was only at the time the Vessel was detained. There was objectively no risk of detention, and no reason to believe that an outbreak would prevent the Vessel from entering, discharging or leaving the port.
143. The onus is on the Respondent to establish a breach of the Claimant's unsafe port warranty. Given the nature of the virus, it is difficult to determine the risk it poses. The Claimant submits that given this difficulty the Respondent is unable to discharge its burden. The Respondent has not led evidence as to the physical or living conditions of Aslan. It cannot be established that the Claimant should have perceived the risk of detention.
144. The Aslan Times newspaper article dated 23 May 2006¹⁹² speculated that the virus was spreading human-to-human. This speculation was based on anecdotal rather than medical evidence and as such could not be relied on. It cannot be said that there was a pandemic in Aslan, as there was no efficient and sustained human-to-human transmission of the virus.¹⁹³

¹⁸⁶ 'Avian influenza ("bird flu") – Fact Sheet', World Health Organisation
<http://www.who.int/mediacentre/factsheets/avian_influenza/en/> (3 March 2006)

¹⁸⁷ *Id*

¹⁸⁸ *Id*

¹⁸⁹ *Id*

¹⁹⁰ See page 43 of the Evidence Brief

¹⁹¹ See pages 44, 46 and 48 of the Evidence Brief

¹⁹² See page 48 of the Evidence Brief

¹⁹³ 'Avian influenza ("bird flu") – Fact Sheet', World Health Organisation
<http://www.who.int/mediacentre/factsheets/avian_influenza/en/> (3 March 2006)

Memorandum for the Claimant – Team 5

The Claimant did not breach its secondary obligation to re-nominate a new safe port once it became aware of the danger.

145. The Claimant had a further obligation to ensure that the Vessel will be safe in a port.

146. If a prospectively safe port becomes unsafe at a time when the ship can avoid the danger, charterers come under a new obligation to order her to do so.¹⁹⁴ However, this new obligation only applies when it is still possible for the Vessel to leave that port without encountering danger.¹⁹⁵

147. Aslan Port only became prospectively unsafe when the Aslan Port Authority issued the notice of detainment at 11:17 on 24 May 2006.¹⁹⁶ At this time the Vessel was already in port and it was not possible to leave.

Even if Aslan Port was unsafe, the outbreak of bird flu constitutes an abnormal circumstance.

148. The outbreak of bird flu was not an attribute of the Aslan Port itself and therefore was an abnormal circumstance, excluding it from the classic *Eastern City*¹⁹⁷ safe port definition.

149. A port is not prospectively unsafe merely because a particular Vessel may come to harm there.¹⁹⁸ The danger must be able to be regarded as a normal characteristic of that port.¹⁹⁹ Charterers are not liable under a safe port clause for damages that are unrelated to the prevailing characteristics of a particular port. A port will not be unsafe where damage is due to isolated, abnormal or extraneous circumstances which do not arise from the qualities or attributes of the port itself.²⁰⁰

150. Abnormality of an occurrence is not judged by looking at the entire history of the port but at whether or not the defect is sufficiently long standing to be, for the time being, a characteristic of the port.²⁰¹ If at the time the ship is ordered to a port it is unsafe due to risks caused by a certain situation, the

¹⁹⁴ *The Evia (No 2)* [1983] AC 736 at 320 per Roskill L

¹⁹⁵ *Id*

¹⁹⁶ See page 49 of the Evidence Brief

¹⁹⁷ [1958] 2 Lloyd's Rep 127

¹⁹⁸ *The Saga Cob* [1992] 2 Lloyd's Rep. 545

¹⁹⁹ *The Chemical Venture* [1993] 1 Lloyd's Rep. 508

²⁰⁰ *The Evia (No 2)* [1983] AC 736; [1982] 2 Lloyd's Rep. 307 at 334

²⁰¹ *The Houston City* [1956] 1 Lloyd's Rep. 1

Memorandum for the Claimant – Team 5

subsequent increase in those risks due simply to a worsening of that situation does not amount to an abnormal occurrence.²⁰²

151. There is no evidence of previous outbreaks of the virus in Aslan or in the surrounding regions. The species barrier of the disease, as discussed above, is significant. The virus does not easily cross from birds to infect humans. Despite the infection of tens of millions of poultry over large geographical areas since mid-2003, fewer than 200 human cases have been laboratory confirmed.²⁰³ Human infection is abnormal.
152. As the outbreak had not occurred at the time the order was made, the increase in risk while the Vessel was in port does not affect its abnormality.
153. The Claimant did not breach its safe port warranty.

²⁰² *The Lucille* [1983] 1 Lloyd's Rep. 387

²⁰³ 'Avian influenza ("bird flu") – Fact Sheet', World Health Organisation
<http://www.who.int/mediacentre/factsheets/avian_influenza/en/> (3 March 2006)

Prayer for relief

154. For the reasons above, the Claimant requests that this Tribunal:
155. **DECLARE** that the Tribunal has jurisdiction to hear the Dispute;
156. **ADJUDGE** that the Respondent is liable –
- a. to the Claimant for breach of duty in contract, tort or bailment; or
 - b. to indemnify the Claimant for liabilities incurred due to the Respondent’s breach of duty to the Purchaser in contract, tort or bailment;
- and liable to compensate the Claimant in full for US\$555,059.00;
157. **ADJUDGE** that the Respondent is liable to repay the Claimant pursuant to the off-hire clause of the time charterparty for a period of 104 days, 4 hours and 43 minutes, in the amount of US\$4,063,664.58, being repayment of hire.
158. And therefore
159. **AWARD** the Claimant the following:
- a. Damages amounting to \$4,618,723.58;
 - b. Interest; and
 - c. Costs.