

EIGHTH ANNUAL
INTERNATIONAL MARITIME ARBITRATION MOOT 2007



TEAM NUMBER: 2

**MEMORANDUM FOR
RESPONDENT**

CLAIMANT

TITAN LINES B.V.
58 Starboard Drive
Horizon City
Genosa

RESPONDENT

GULLIVER OIL TANKERS INC
37-51 Laridae St
Harbour-Town
Archland

Counsel: Julia Bassingthwaighte; Philip Devenish; Sharad Sridharan; and Jamie Stollery

INTERNATIONAL MARITIME LAW
ARBITRATION MOOT 2007

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RESPONDENT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
ABBREVIATIONS	ix
STATEMENT OF FACTS.....	x
ARGUMENTS FOR THE RESPONDENT	1
1. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO ARBITRATE THE MERITS OF THE CARGO CLAIM BETWEEN THE CLAIMANT AND THE RESPONDENT.....	1
1.1 THE PARTIES AGREED THAT THE APPLICABLE TIME LIMIT TO RESOLVE THE DISPUTE WAS THREE MONTHS.....	2
1.2 THE CLAIMANT’S SUBMISSION THAT THERE WAS NO MEETING OF MINDS ON THE LIMITATION ISSUE MUST BE REJECTED.....	5
1.3 THE THREE MONTH TIME LIMIT ELAPSED PRIOR TO THE COMMENCEMENT OF THE ARBITRATION CONCERNING THE CARGO CLAIM ..	6
2. THE RESPONDENT IS NOT LIABLE TO REIMBURSE THE CLAIMANT FOR THE SETTLED CARGO CLAIM OF OIL FUTURES LTD.....	8
2.1 THE CLAIMANT AGREED TO INDEMNIFY THE RESPONDENT FROM ANY LOSS OR DAMAGE TO THE CARGO.....	8
(a) The Time Charterparty did not contain an agreement as to what cargo would be carried aboard the <i>Olympic Star</i>	8
(b) A separate contract (“the Cargo Contract”) between the Claimant and the Respondent provided for the specific cargo to be carried aboard the <i>Olympic Star</i> . A term of the Cargo Contract was the indemnification of the Respondent against “any loss or damage” arising out of the shipping of cargo other than dirty petroleum product	9
(c) The loss occasioned by the Claimant falls within the scope of the indemnity clause ..	11
2.2 IN THE ALTERNATIVE, THE RESPONDENT IS NOT LIABLE FOR THE DAMAGE TO THE CARGO.....	13

(a) There is insufficient evidence to prove that the inert gas system caused the contamination of the cargo or that the cargo tanks were not cleaned to the requisite standard	13
(b) In the alternative, if the Tribunal is of the view that the cargo damage was caused by the inert gas system, the Claimant is exempt from all liability under Clause 19 ASBATANKVOY	14
(c) In the alternative, if the Tribunal is of the view that the cargo damage occurred due to inadequate cleaning of the cargo hold, the Claimant is exempt from all liability by virtue of Article IV(2)(a) of the Hague-Visby Rules	17
2.3 IN THE ALTERNATIVE, OIL FUTURES LTD WAS NOT THE PROPER PARTY TO CLAIM FOR THE CARGO DAMAGE.....	19
(a) Oil Futures Ltd did not have title to sue since it was not the consignee under the Bill of Lading at the time the damage occurred to the cargo.....	19
3. THE RESPONDENT IS NOT REQUIRED TO REPAY THE CLAIMANT FOR HIRE PAID DURING THE DETENTION OF THE VESSEL AT THE PORT OF ASLAN.....	20
3.1 THE DETENTION OF THE VESSEL OCCURRED AFTER THE WRITTEN CONSENT OF THE CHARTERER TO ENTER ASLAN PORT.....	21
3.2 THE DETENTION OF THE VESSEL WAS NOT AFFECTED BY THE EFFICIENCY OF THE VESSEL.....	24
4. THE CLAIMANT IS LIABLE TO PAY DAMAGES TO THE RESPONDENT FOR BREACH OF THE SAFE PORT WARRANTY.....	26
4.1. THE COUNTER-CLAIM IS NOT TIME-BARRED.....	26
4.2. BY DIRECTING THE <i>OLYMPIC STAR</i> TO ENTER ASLAN, THE CLAIMANT BREACHED ITS OBLIGATION TO NOMINATE ONLY “SAFE” PORTS	27
(a) The time for determining whether a port is “safe” is when the charterer orders the Master to enter Aslan Port	27
(b) Port Aslan was an “unsafe” port	29
4.3. IN THE ALTERNATIVE, IF THE TRIBUNAL FINDS THAT THE PRIMARY OBLIGATION TO NOMINATE A “SAFE” PORT WAS	

DISCHARGED BY THE CLAIMANT’S NOMINATION OF PORT ASLAN ON
30 APRIL 2006, THE RESPONDENT SUBMITS THAT THE CLAIMANT HAS
BREACHED ITS SECONDARY OBLIGATION TO NOMINATE AN
ALTERNATIVE “SAFE” PORT IN THE EVENT THAT THE ORIGINAL
BECOMES “UNSAFE” WHILE *EN ROUTE*..... 32

4.4. THE CONDUCT OF THE MASTER DOES NOT BAR THE COUNTER-CLAIM.. 33

(a) The Master was obliged to follow the Claimant’s directions 33

(b) In any event, any waiver of a right to reject the nomination of Port Aslan does not bar
the Respondent’s counter-claim..... 35

PRAYER FOR RELIEF..... 36

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Bills of Lading Act 1855 (UK)

Limitation Act 1980 (UK)

ABBREVIATIONS

&	and
%	percent
Art./Artt.	Article/Articles
Britannic	Britannic Shipping Pty Ltd
ed.	edition
Claimant	Titan Lines BV or Claimants representative Mr Tony Teo.
Ltd	Limited
Mr	Mister
No.	number
Nos.	numbers
p./pp.	page/pages
para./paras.	paragraph/paragraphs
Pty	Proprietary
Respondent	Gulliver Oil Tankers Inc or Respondents representative Ms Sally Tern
s/ss	section/sections
SARS	Severe Acute Respiratory Syndrome
USD	United States dollars
v.	Versus
Vessel	Olympic Star
vol.	volume

STATEMENT OF FACTS

The Parties

Titan Lines BV (“**The Claimant**”) is a company incorporated under the laws of Genosa, engaged in the business of chartering oil tankers. Gulliver Oil Tankers Inc (“**The Respondent**”) is a company incorporated under the laws of Archland and carries on the business of a ship owner.

The Contractual Negotiations

On 13 August 2004, the Claimant wrote to the Respondent requesting standard Charterparty terms for the hire of an oil tanker on time charter for two years. On 20 August the Respondent provided the standard Time Charterparty, recommending the *Olympic Star*, and expressly notified the Claimant that any claim arising under the Time Charterparty must be brought to arbitration within 3 months of the cause of action arising. On 7 September 2004 and 10 September 2004, the Charterparty was signed by the Respondent and the Claimant respectively. The Claimant’s letter of 10 September 2004 provided the first written specifications of the Claimant’s desire to ship “dirty petroleum and various other qualities of oil”. Consequently, on 12 September 2004 the Respondent acknowledged receipt of the signed Time Charterparty in a letter addressed to the

Claimant. In this letter, the Respondent also offered to allow the carriage of dirty petroleum and other products if the Claimant agreed that an indemnity clause would apply where the Claimant shipped other than dirty petroleum product. The Claimant did not object to this provision and subsequently took delivery of the *Olympic Star*.

The Voyage Charterparty

On 23 March 2006, the Claimant entered negotiations with Britannic Shipping Pty Ltd (“**Britannic**”) to charter a vessel from Genosa to Archland. On 29 March 2006, both parties signed a Voyage Charterparty for the *Olympic Star* to be used, transporting “dirty petroleum product and/or superior quality crude oil”.

By email dated 13 April 2006, the Claimant informed the Respondent and the Master that the *Olympic Star* was to be used for a voyage charter for Britannic carrying dirty petroleum product. The Claimant informed the Respondent that they would contact the Master and inform him of the time frame and procedures necessary to carry the product.

The Contamination of Superior Quality Crude Oil

On 30 April 2006, the Master informed the Claimant that all cleaning procedures had been carried out with respect to the Claimant’s directions. Later that day, Britannic

informed the Claimant of a change in the cargo to be loaded from that of “dirty petroleum product” to “superior quality crude oil”, requesting notice from the Claimant in the event they should be unable to accommodate the change in the type of oil. The Claimant immediately informed the Master of the change in cargo and instructed him to “ensure the vessel was fit and ready to load [the] new cargo within the same time frame previously agreed”.

Britannic notified the Claimant that due to a shortage of time, Britannic’s’ surveyor and the Master did not take samples of Tank 1 and 2 prior to discharge. Shortly after departure from Port Horizon, the Master, as agreed, performed a visual inspection of the cargo. The Master noted “slight discolouration” in Tank 2.

The Bill of Lading

On 3 May 2006, a Bill of Lading between the Claimant and Britannic was drafted and signed. The Bill of Lading was made out “To Order” and it had not yet been negotiated. Accordingly, on 3 May 2006 the Consignee under the Bill of Lading was not yet determined. Condition 1 of the Bill of Lading purported to incorporate ‘all clauses of the Charter Party’, but did not specify the Charterparty being referred to.

The Engine Problems

On 12 May 2006 the Master informed the Claimant and the Respondent of engine problems being experienced by the *Olympic Star*. The Claimant informed the Respondent that it acknowledged the vessel was proceeding without full power, and that the Claimant intended to reserve all its rights pursuant to the charterparty. On 19 May 2006 the Master informed the Claimant and the Respondent that the engine problems of the *Olympic Star* had been resolved and that the vessel had resumed regular speed.

The Bird-Flu Outbreak and Subsequent Quarantine of the *Olympic Star*

On 12 May 2006 the Master informed both the Claimant and the Respondent of unconfirmed reports of people suffering symptoms of a bird-flu like illness. The Claimant instructed the Master to continue to Aslan, minimising time at shore.

On 20 May 2006 the Master informed the Claimant and the Respondent of an escalation in the bird-flu situation in Aslan. The Claimant instructed the Master to do everything possible to expedite discharge of the cargo in Aslan and the vessel's departure. On 22 May 2006 the *Olympic Star* issued a Notice of Readiness. Discharge commenced at 1100hrs on 23 May 2007.

At 1850hrs on 23 May 2006 the Master informed the Claimant and the Respondent of the first confirmed cases of bird-flu in Aslan. The Master stated that he had cancelled shore leave and demanded the immediate return of all crew. The Master informed the Claimant and the Respondent that vessel discharge should be completed by 1100hrs on 24 May 2006 and that all steps would be taken to depart promptly thereafter.

On 24 May 2006 at 1117hrs the Harbourmaster of the Aslan Port Authority issued a notice, closing the port to all traffic with immediate effect. The Harbourmaster re-opened the port with immediate effect at 1600hrs on 30 August 2006.

The Cargo Claim

On 7 June 2006 Oil Futures Limited (“OFL”) gave the Claimant written notice of the contamination, and demanded that the Claimant reimburse OFL for the cost of re-refining the oil. On 5 July 2006 the Claimant payed OFL’s claim, informing OFL that the payment was made without any admission of liability.

On 19 July 2006 Bow Peters and Neptune, lawyers for the Claimant, instructed the Respondent that the Claimant considered the Respondent responsible for the contamination of the oil. Bow Peters and Neptune informed the Respondent that if full repayment was not forthcoming within 21days, the Claimant would reserve its right to appoint arbitrators pursuant to Clause 26 of the Charterparty.

On 7 August 2006 Free-Stand Solicitors at Law, lawyers for the Respondent, informed Bow Peters and Neptune that the Respondent did not accept liability for the cargo damage and that the tanks had been cleaned to the required standards. It was also contended that in any event, the Claimant was liable pursuant to the indemnity agreed by the parties.

On 8 November 2006 Bow Peters and Neptune informed Free-stand that, pursuant to the arbitration clause contained in the Time Charter, it had appointed an arbitrator according to the LMAA TERMS 2002. On 29 November 2006 Free-stand informed Bow Peters and Neptune that it had appointed an arbitrator in the matter. Free-stand also informed Bow Peters and Neptune that although the time to arbitrate had expired, it would argue that point at the hearing.

ARGUMENTS FOR THE RESPONDENT

1. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO ARBITRATE THE MERITS OF THE CARGO CLAIM BETWEEN THE CLAIMANT AND THE RESPONDENT

The use of arbitration to resolve commercial disputes must be obtained from ‘the existence of an agreement between the parties’¹ and is dependent upon the consent of the parties.² The parties do not dispute the existence of an intention to arbitrate, nor that the writing requirements of section 5 of the *Arbitration Act 1996 (Archland)* (“*Arbitration Act*”) are satisfied.

The Respondent acknowledges that the Tribunal is competent to determine whether the substantive matters in dispute are within its jurisdiction in accordance with the *competence-competence* doctrine as embodied in section 30 of the *Arbitration Act*.

The Respondent submits that the Claimant has not brought the action to arbitration within the time limit agreed by the parties. In the event that the applicable time limit has expired, the Tribunal will not have jurisdiction to arbitrate the merits of the dispute because arbitration of such a claim would be beyond the powers which the parties have agreed to confer upon the present tribunal.

¹ Ambrose C and Maxwell K *London Maritime Arbitration* 2nd ed. Sweet & Maxwell 2002, p. 25.

² Redfern A Hunter M *Law and Practice of International Commercial Arbitration* 3rd ed. Sweet & Maxwell London 2003, at [1-06].

The Claimant has submitted that the Tribunal will have jurisdiction if:

- i) the parties have agreed that the time limit to bring an action in arbitration was six (6) months and this has not elapsed;³ or
- ii) the parties did not agree on the applicable time limit for arbitration resulting in the application of the default six (6) year time limit under the *Limitation Act 1980 (UK)*.⁴

The Respondent submits that the parties agreed that the time limit in which to bring an arbitration was three (3) months from the date that the cause of action arose. The Respondent further submits that this time limit has expired. Consequently, the Tribunal does not have jurisdiction to arbitrate the merits of the dispute.

1.1 THE PARTIES AGREED THAT THE APPLICABLE TIME LIMIT TO RESOLVE THE DISPUTE WAS THREE MONTHS

Clause 25 of the Time Charterparty Agreement between the parties (“*the Time Charterparty*”) provides that all disputes must be brought within three (3) or six (6) months of the cause of action arising.⁵ Whilst the parties failed to strike out the inapplicable time limit, the parties reached a clear agreement as to which of these options was applicable. The intention of the parties in respect of the applicable time limit is to be

³ *Claimant’s Submissions*, pp. 6-7.

⁴ *Claimant’s Submissions*, pp. 5-6.

⁵ *Facts*, p. 6.

found in the communications construed as a whole through which the Time Charterparty was made.⁶

The Claimant has submitted that they attained the ‘last shot’⁷ by sending the final correspondence which addressed the applicable time limit,⁸ expressly evincing an intention that the limitation period should be six (6) months. To this extent, the Claimant relied upon the Notice attached to the bottom of the letter dated 31 August 2004 which stated that “disputes with Titan Lines are to be brought to arbitration within 6 months”.⁹ The Respondent submits that the said Notice was merely a standard clause inserted as a matter of form, on the majority of correspondence from the Claimant, and therefore it did not amount to evidence of the contractual intention of the Claimant in respect of the time limit for arbitration.¹⁰ The standard nature of the Notice is evidenced by its repeated inclusion in correspondence issued by the Claimant that in no way pertains to arbitration.¹¹ Accordingly, the inclusion of the Notice in the letters dated 13 and 31 August 2004 was a mere representation as to the standard practice of the Claimant in respect of arbitration.

On the other hand, in the letter dated 20 August 2004, the Respondent clearly addressed the issue of whether the three (3) or six (6) month time limit in Clause 25 should apply and clearly expressed its intention to apply the former. Further, the Respondent disclosed

⁶ Heffey P Paterson J *Principles of Contract Law* Lawbook Co. 2002, at 12.05.

⁷ *Butler Machine Tool Co Ltd v Ex-Cell-O-Corp (England) Ltd* [1979] 1 WLR 401 (CA), per Lord Denning MR.

⁸ *Claimant’s Submissions*, p. 7.

⁹ *Ibid.*

¹⁰ *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163.

¹¹ *Facts*, pp. 1, 8.

to the Claimant the strength of its intention in this respect by notifying the Claimant that it “*always* contracted on the basis that the 3 month option is selected in clause 25 of the charter (*emphasis added*)”. In so doing, the Respondent clearly indicated to the Claimant that a time limit of six (6) months would not apply. Although the copy of the Time Charterparty which the Respondent provided to the Claimant did not strike out one of the options, the letter which enclosed that copy of the Time Charterparty made the terms of the Respondent’s offer plain and clear.

Although the Respondent’s express intention to apply the three (3) month time limit was followed by a subsequent letter dated 31 August 2004, this letter was in no way a response to the Claimant’s stipulation that the six (6) month time limit would apply. In this respect, the Respondent relies on the fact that the Notice included in the letter dated 31 August 2004 was identical to that included in the letter dated 13 August 2004. Further, the location of the Notice was at the very bottom of the letter in small print and failed to refer to clause 25 or address the Respondent’s strong stipulation in respect of the applicable time limit. These facts ensure that, if the Claimant had an intention that the standard Notice in the letter dated 31 August 2004 would become a term of the time charterparty as to the applicable time limit for arbitration,¹² the Claimant did nothing that was “necessary or reasonable to bring the [standard] clause to the notice of”¹³ the Respondent. Notice was necessary under these circumstances because the Respondent’s stipulation was so absolute in stating the three (3) month time limit term should prevail. Consequently the Claimant’s failure to expressly respond to such a clause does not

¹² *Butler Machine Tool Co Ltd v Ex-Cell-O-Corp (England) Ltd* [1979] 1 WLR 401 (CA), per Lord Denning MR.

¹³ *Ibid.*

provide protection, ensuring the small print condition on the bottom of all correspondence “disappear[ed] from the contract”.¹⁴ Thus the Respondents three (3) month clause is the binding term.

Rather, these facts evince the Claimant’s agreement with the three (3) month time limit stipulated by the Respondent in the letter dated 20 August 2004. Indeed this intention was consistent with the letter dated 31 August 2004 which was a general acceptance of the Time Charterparty and the terms, including the Respondent’s three (3) month stipulation, with which the Claimant had been provided.

Accordingly, when the Claimant signed the Time Charterparty, both parties reached an agreement as to the applicable time limit in the event of an arbitration. That time limit was three (3) months. It was in recognition of this agreement that the Claimant did not include its standard Notice relating to arbitration time limits in its letter dated 10 September 2004 which enclosed the Time Charterparty signed by the Claimant and the Respondent.

1.2 THE CLAIMANT’S SUBMISSION THAT THERE WAS NO MEETING OF MINDS ON THE LIMITATION ISSUE MUST BE REJECTED

The Claimant has submitted that the failure to indicate the applicable time limit in the Time Charterparty denotes that the parties did not reach final agreement on this point, and

¹⁴ *Butler Machine Tool Co Ltd v Ex-Cell-O-Corp (England) Ltd* [1979] 1 WLR 401 (CA), per Lawton LJ.

consequently that the default limit of six (6) years applies.¹⁵ This however, is not the case, as the parties expressly undertook correspondence in relation to the applicable time limit. Thus the Tribunal should strive to give effect to the agreement by looking into the circumstances of the case.¹⁶ The Tribunal cannot ignore the correspondence passing between the parties, and must ascertain what the effect of that correspondence is.

The Respondent submits the parties reached an agreement in respect of the limitation period within which arbitration must be commenced, and the agreed limitation period was three (3) months.

1.3 THE THREE MONTH TIME LIMIT ELAPSED PRIOR TO THE COMMENCEMENT OF THE ARBITRATION CONCERNING THE CARGO CLAIM

In the event that a three (3) month limit for commencing arbitration applies, it is necessary to determine:

- (i) when the cause of action arose; and
- (ii) when arbitral proceedings were commenced.

The Respondent is in agreement with the Claimant that the cause of action arose upon the date of realisation of liability, rather than when the damage occurred.¹⁷ Thus the Claimant's cause of action on the cargo claim arose when the Claimant settled Oil

¹⁵ *Limitation Act 1980* (UK) c 58 s 5.

¹⁶ Redfern A Hunter M Blackaby N Partasides C *Law and Practice of International Commercial Arbitration* 4th ed. Sweet & Maxwell 2004, paras. 3-14, 3-64.

¹⁷ *City of London v Reece & Co Ltd* [2000] Build LR 211.

Futures' claim on 5 July 2006.¹⁸ It follows that any arbitration concerning the cargo claim needed to be commenced on or before 5 October 2006.

Further, the Respondent concurs that because the parties did not agree upon a relevant date to commence arbitral proceedings,¹⁹ the proceedings commence when one party serves the other with written notice requiring the appointment of an arbitrator.²⁰ Hence the arbitration proceedings commenced on 8 November 2006, when the Claimant appointed an arbitrator.²¹

Given that the time limit for arbitration is three (3) months and the Claimant has not commenced proceedings within this time, the tribunal lacks jurisdiction to arbitrate this dispute. However, the Respondent accepts that the cause of action in relation to the claim for the repayment of hire did not arise until redelivery of the ship on 30 August 2006. Accordingly, regardless of the applicable limitation period, this aspect of the claim is within jurisdiction.

¹⁸ *Facts*, p. 56.

¹⁹ *Arbitration Act 1996* (Archland) c 23 a14(2).

²⁰ *Arbitration Act 1996* (Archland) c 23 a14(4).

²¹ *Facts*, p. 62.

2. THE RESPONDENT IS NOT LIABLE TO REIMBURSE THE CLAIMANT FOR THE SETTLED CARGO CLAIM OF OIL FUTURES LTD

2.1 THE CLAIMANT AGREED TO INDEMNIFY THE RESPONDENT FROM ANY LOSS OR DAMAGE TO THE CARGO

(a) **The Time Charterparty did not contain an agreement as to what cargo would be carried aboard the *Olympic Star***

Clause 2 is an agreement as to the “fitness” of the *Olympic Star*

Clause 2 of the Charterparty was an agreement as to the “fitness” of the *Olympic Star* and in no way related to the specific cargo to be shipped aboard the vessel. The common intention of the parties in this respect is evidenced by the title of Clause 2 which reads: “Condition of Vessel”. This intention is further compounded by the language of Clause 2: “fit to carry”;²² “in good order and condition”;²³ and “fit for the service”.²⁴

The single reference to “crude petroleum” in the Time Charterparty occurs in Clause 2

Clause 2(a) contains the single reference to “crude petroleum and/or its products” within the Time Charterparty and reads as follows:

“At the date of delivery the vessel of this charter shall:

²² *Facts*, p. 16.

²³ *Ibid.*

²⁴ *Ibid.*

a. be in everyway fit to carry crude petroleum and/or its products.”

Given the context and language of this clause, the common intention of the parties in respect of Clause 2(a) was to ensure the provision of a vessel *capable* of carrying crude petroleum and any of its derivatives. It follows that the parties did not reach agreement on the *specific* cargo to be carried aboard *Olympic Star* in the Time Charterparty.

(b) A separate contract (“the Cargo Contract”) between the Claimant and the Respondent provided for the specific cargo to be carried aboard the *Olympic Star*. A term of the Cargo Contract was the indemnification of the Respondent against “any loss or damage” arising out of the shipping of cargo other than dirty petroleum product

The Respondent offered to accept the risk attached to carrying goods other than dirty petroleum aboard the *Olympic Star* on the condition that the Claimant indemnify the Respondent from any loss or damage to such cargo

The first mention of the specific cargo to be carried aboard the *Olympic Star* came in the letter dated 10 September 2004. This letter indicated to the Respondent that the Claimant desired to ship “dirty petroleum product and various other qualities of oil”²⁵ aboard the *Olympic Star*.

²⁵ *Facts*, p. 15.

The Respondent replied to this letter and the representation of desired cargo therein in the letter dated 12 September 2004.²⁶ According to the learned Australian contract author Carter, “an offer is the expression of willingness to contract on terms stated.”²⁷ In the letter dated 12 September 2004, the Respondent indicated that it was willing to ship oil other than dirty petroleum product on the condition that the clause referred to in that letter (“*the Indemnity Clause*”) would apply in such cases.

The Cargo Contract is supported by good consideration

The presence of good consideration, which must move from the promisee to the promisor, is a requisite for any contract operating under Archlandish law.²⁸ Consideration most often takes the form of a promise that the promisee will act in a certain manner or, alternatively, that the promisee will allow the promisor to act in a certain manner.²⁹ In respect of the Cargo Contract, the Respondent’s consideration is the promise that the Claimant is able to ship “dirty petroleum and other qualities of oil” aboard the *Olympic Star*. As the Respondent and the Claimant have not yet agreed upon the specific cargo to be shipped, this consideration is not “past”.³⁰ Carrying both clean and dirty petroleum products creates a risk of cargo damage by contamination; indeed the very risk which has materialised here. The consideration for the cargo contract was the consent by the Respondent to this use of the ship provided that the additional risk was borne by the Claimant.

²⁶ *Facts*, p. 21.

²⁷ Carter J *Carter on Contract* (looseleaf) Butterworths 2002.

²⁸ *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at 853 per Viscount Haldane LC.

²⁹ Carter J *Carter on Contract* (looseleaf) Butterworths 2002 at 06-001.

³⁰ *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723.

The conduct of the Claimant amounted to an acceptance of the Respondent's Offer

It is a well settled principle of Archlandish law that an offer may be accepted by conduct.³¹ Where one party does not directly respond to an offer but engages in the doing of the very act contemplated by that offer, that conduct will amount to an acceptance of the offer.³²

In this case, the Claimant neither responded to nor rejected the Respondent's offer to allow the carriage of goods other than dirty petroleum product on the condition that the Indemnity Clause would apply. In that circumstance, and where the Claimant proceeded to ship a quality of oil "other than dirty petroleum product", the Claimant's conduct amounts to an acceptance of the Respondent's offer and the Indemnity Clause therein.

(c) The loss occasioned by the Claimant falls within the scope of the indemnity clause

The Indemnity Clause operates where the Claimant carries other than dirty petroleum product

³¹ *Chitty on Contracts (General Principles)* 27th ed. Sweet & Maxwell 1994, p. 102; Carter J Harland D *Cases and Materials on Contract Law in Australia* 4th Ed. LexisNexis Butterworths Australia 2004, p. 50; Greig D Davis J *The Law of Contract* The Law Book Company Limited 1987, pp. 281-82.

³² *Brogden v. Metropolitan Ry.* (1887) 2 App. Cas. 666; *Port Sudan Cotton Co. v. Govindaswanny Chettiar & Sons* [1977] 2 Lloyd's Rep. 5; *Jones v Daniel* [1984] 2 Ch. 322.

From the letter dated 12 September, it is clear that the Indemnity Clause operates where the Claimant ships “other than dirty petroleum product”. In this instance, the Claimant has shipped “superior quality crude oil”. Accordingly, the Indemnity Clause is operative.

The scope of the Indemnity Clause covers the loss suffered by Oil Futures Ltd

The Indemnity Clause reads as follows:

“The Owners will not be held responsible for any liability in relation to the hold cleanliness (including the tanks, lines and pumps) of the vessel. Charterers agree to indemnify the Owners in respect of any claim arising out of or in connection with loss or damage to cargo as a result of any contamination of the cargo or rejection of the cargo for any reason whatsoever.”³³

It is clear from the language of the Indemnity Clause that the parties agreed that if the cargo was contaminated and an action was brought against the Claimant in respect of that contamination, the Claimant could not then seek to recover damages from the Respondent. In the present case, the superior quality crude oil carried aboard *Olympic Star* was contaminated and Oil Futures Ltd suffered loss. As a result, the Claimant settled a claim by Oil Futures Ltd in respect of that loss.³⁴ By virtue of the Indemnity Clause, the Claimant can not now seek to recover damages from the Respondent for the settled cargo claim of Oil Futures Ltd.

³³ *Facts*, p. 21.

³⁴ *Facts*, p. 57.

2.2 IN THE ALTERNATIVE, THE RESPONDENT IS NOT LIABLE FOR THE
DAMAGE TO THE CARGO

- (a) There is insufficient evidence to prove that the inert gas system caused the contamination of the cargo or that the cargo tanks were not cleaned to the requisite standard**

The purpose of the ‘Survey Report’ issued by Atlas Marine Consultants on 27 May 2006 was to ascertain the cause of the contamination found to exist in the cargo of superior quality crude oil carried in tank 2 of the vessel *Olympic Star*.³⁵ At the time of issuing the report, Atlas Marine Consultants was in possession of all the relevant information required to come to a professional determination on the cause of the contamination.³⁶ The Respondent submits that given Atlas Marine Consultants’ status as an expert authority in the field of cargo contamination, it is not for the parties to this dispute to speculate as to the causes of contamination above and beyond the conclusions reached by Atlas Marine Consultants.

One of the conclusions reached by the Survey Report was that, “Though the contamination is consistent with vapours of dirty petroleum product, it is difficult to imagine how an IGS could become contaminated with residual vapours that have remained within the IGS from the carriage of cargo on a previous voyage. However I

³⁵ *Facts*, p. 51.

³⁶ *Facts*, pp. 51-54.

cannot rule out, beyond all doubt, that contamination of this kind is not possible.”³⁷ The Respondent submits that this tenuous conclusion cannot be found to establish on the balance of probabilities that the inert gas system caused the contamination of the cargo.

The Survey Report also concluded that, “One alternative may be that vapours were not fully removed from the tank during the cleaning process”.³⁸ In common English, the term ‘may’ refers directly to a ‘possibility’. The term ‘may’ does not refer to a ‘probability’. The Respondent submits that had Atlas Marine Consultants intended to conclude that the damage was ‘probably’ caused by a lack of adequate cleaning, the term ‘may’ would not have been employed in the Survey Report. Accordingly, the Respondent submits that there is insufficient evidence to prove on the balance of probabilities that the damage was caused by inadequate cleaning on the part of the Respondent. The consequence of the inadequacy of the evidence is that there is no sound basis for the Respondent to be found liable for the damage to the cargo.

(b) In the alternative, if the Tribunal is of the view that the cargo damage was caused by the inert gas system, the Claimant is exempt from all liability under Clause 19 ASBATANKVOY

The Respondent submits that Condition 1 of the Bill of Lading refers to the Voyage Charterparty between the Claimant and Britannic, and that it incorporates into the Bill of Lading both Clause 1 of the Voyage Charterparty and the exemption in Clause 19

³⁷ *Facts*, pp. 53-54.

³⁸ *Facts*, p. 54.

ASBATANKVOY. Accordingly, the Claimant was not liable for any cargo damage that may have been caused by the inert gas system, and the claim was improperly settled with Oil Futures Ltd.

Condition 1 of the Bill of Lading refers to the Voyage Charterparty which incorporates the ASBATANKVOY terms

The fact that Condition 1 of the Bill of Lading does not specify the date of the charterparty which it purports to incorporate³⁹ does not render incorporation impermissible under Archlandish law.⁴⁰

Although an undated bill of lading will generally be interpreted as referring to a head charterparty,⁴¹ this presumption is displaced in two instances: first, where the head charterparty is a time charterparty and a relevant voyage charter is in existence;⁴² and second, where the carrier under the bill of lading contract is the charterer rather than the ship owner.⁴³

Both of these exceptions apply in the current circumstances. Accordingly, the Respondent submits that the ‘Charter Party’ referred to in Condition 1 of the Bill of Lading must be interpreted as referring to the Voyage Charterparty.⁴⁴

³⁹ Procedural Order No. 2, Clarification 5.

⁴⁰ *The San Nicholas* [1976] 1 Lloyd’s Rep. 8, 11 per Lord Denning MR; *The SLS Everest* [1981] 2 Lloyd’s Rep. 389, 392 per Lord Denning MR.

⁴¹ *The San Nicholas* [1976] 1 Lloyd’s Rep. 8, 11 per Lord Denning MR.

⁴² *The Nanfri* [1978] 1 Lloyd’s Rep. 581, 591 per Kerr J; *The SLS Everest* [1981] 2 Lloyd’s Rep. 389, 392 per Lord Denning MR; *The Torepo* [2002] 2 Lloyd’s Rep. 535, 552 per Steel J.

⁴³ *Lignell v Samuelson* (1921) 9 Lloyd’s Rep. 361; Boyd S. Burrows A. Foxton D. *Scrutton on Charterparties and Bills of Lading* 20th ed. Street & Maxwell 1996, pp. 76-77.

⁴⁴ Voyage Charterparty between Titan Lines and Britannic Shipping, dated 29 March 2006 (*Facts*, p. 31).

Condition 1 of the Bill of Lading specifically incorporates Clause 19 ASBATANKVOY

An incorporation term involving ‘all clauses’ is sufficiently broad to include all charterparty clauses that make sense in the context of a bill of lading,⁴⁵ including amendments in writing to the charterparty.⁴⁶ Further, if a charterparty clause is germane to the subject matter of a bill of lading, it may be incorporated into the bill of lading without being referred to explicitly in the incorporation clause.⁴⁷ A clause will be germane to the subject matter of a bill of lading if it is relevant to the shipment, carriage and delivery of goods.⁴⁸

Clause 19 ASBATANKVOY, as incorporated into the Voyage Charterparty, addresses the issue of liability in the context of the shipment, carriage and delivery of the cargo. Further, Clause 1 of the Voyage Charterparty⁴⁹ defines the parties that are involved in the shipment, carriage and delivery of the cargo. Accordingly, the Respondent submits that both Clause 19 ASBATANKVOY and Clause 1 of the Voyage Charterparty are germane to the subject matter of a bill of lading, and must be incorporated into the Bill of Lading.

Clause 19 ASBATANKVOY exempts the Claimant from all liability for damage

Clause 1(a) of the Voyage Charterparty provides that “Owners” in the context of the Charter refers to the Claimant. Further, Clause 19 ASBATANKVOY expressly provides

⁴⁵ *The Merak* [1964] 2 Lloyd’s Rep. 283, at 291; *The Federal Bulker* [1989] 1 Lloyd’s Rep. 103; *Siboti K/S v BP France SA* [2003] 2 Lloyd’s Rep. 364.

⁴⁶ *Fidelitas Shipping Company Ltd v V/O Exportchleb* [1963] 2 Lloyd’s Rep. 113, 120-121 per Harman LJ; *The Heidberg* [1994] 2 Lloyd’s Rep. 287, 309-310 per Diamond J.

⁴⁷ *TW Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1; *The Annefield* [1971] 1 Lloyd’s Rep. 1; *Siboti K/S v BP France SA* [2003] 2 Lloyd’s Rep. 364.

⁴⁸ *TW Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1; *The Annefield* [1971] 1 Lloyd’s Rep. 1.

⁴⁹ *Facts*, p. 29.

that “the Vessel, her Master and Owner, shall not ... be responsible for any loss or damage ... arising from ... any act or omission of the Charterer or Owner, shipper or consignee of the cargo, their agents or representatives”.

The Respondent submits that Clause 19 ASBATANKVOY acts as an all-encompassing exemption clause which absolves the Claimant from all liability for damage that may have been caused by the inert gas system. Accordingly, it is submitted that the Respondent is not liable to reimburse the Claimant for the settled cargo claim of Oil Futures Ltd.

(c) In the alternative, if the Tribunal is of the view that the cargo damage occurred due to inadequate cleaning of the cargo hold, the Claimant is exempt from all liability by virtue of Article IV(2)(a) of the Hague-Visby Rules

Since the Hague-Visby Rules apply to proceedings brought under the Bill of Lading,⁵⁰ the Respondent accepts that, notwithstanding the breadth of Clause 19 ASBATANKVOY discussed above, Clause 19 cannot exempt the Respondent from liability for breaches of obligations set out in Article III of the Hague-Visby Rules. Should the Tribunal be of the view that the Respondent has breached its obligations under Article III Hague-Visby, the Respondent submits that it is nevertheless exempt from all liability by virtue of Article IV(2)(a) Hague-Visby.

⁵⁰ *Facts*, p. 42.

Article IV(2)(a) Hague-Visby provides that, “Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (a) Act, neglect, or default of the master ... in the ... management of the ship”. It was the duty of the Master to clean the cargo hold to the requisite degree.⁵¹ Accordingly, if the cargo hold was inadequately cleaned, it can only be due to a fault of the Master. Given that the ship had “in place a comprehensive scheme of cleaning requirements”,⁵² the Respondent submits that ensuring the ship is cleaned to the requisite degree falls within the ordinary definition of ‘management of the ship’.

Accordingly, the Respondent submits that the Claimant was not liable for any cargo damage that occurred due to inadequate cleaning of the cargo hold, and that the cargo claim of Oil Futures Ltd was not properly settled. Accordingly, the Respondent is not liable to reimburse the Claimant for the settled cargo claim of Oil Futures Ltd.

⁵¹ *Facts*, p. 26.

⁵² *Facts*, p. 26.

2.3 IN THE ALTERNATIVE, OIL FUTURES LTD WAS NOT THE PROPER PARTY TO CLAIM FOR THE CARGO DAMAGE

(a) Oil Futures Ltd did not have title to sue since it was not the consignee under the Bill of Lading at the time the damage occurred to the cargo

The cargo was loaded onto the *Olympic Star* on 2 May 2006.⁵³ By 3 May 2006 signs of contamination were already identified during a visual inspection of the cargo.⁵⁴ Accordingly, contamination cannot have occurred later than 3 May 2006.

The Bill of Lading between Britannic and the Claimant was issued on 3 May 2006.⁵⁵ The Bill of Lading was made out 'to order'⁵⁶ and it had not yet been negotiated. Accordingly, on 3 May 2006 Oil Futures Ltd was not yet the consignee under the Bill of Lading, and the title in the cargo had not yet passed from Britannic to Oil Futures Ltd.

Since Oil Futures Ltd was not the consignee under the Bill of Lading at the time the damage occurred to the cargo, Oil Futures Ltd was not vested with the relevant rights of suit under the *Bills of Lading Act*.⁵⁷ Further, the doctrine of privity of contract rendered Oil Futures Ltd devoid of any title to sue under common law.⁵⁸ Accordingly, it is

⁵³ *Facts*, p. 38.

⁵⁴ *Facts*, p. 40.

⁵⁵ *Facts*, p. 41.

⁵⁶ *Facts*, p. 41.

⁵⁷ See *Bills of Lading Act 1855* (UK) c 111.

⁵⁸ Davies M. Dickey A. *Shipping Law* 3rd ed. Lawbook Co. 2004.

submitted that the Respondent is not liable to reimburse the Claimant for the settled cargo claim of Oil Futures Ltd.

3. THE RESPONDENT IS NOT REQUIRED TO REPAY THE CLAIMANT FOR HIRE PAID DURING THE DETENTION OF THE VESSEL AT THE PORT OF ASLAN

It is the charterer's primary obligation, in the absence of an express contractual provision, to pay hire continuously and without interruption from the time of the vessel's delivery until the time of its redelivery. Hire must be paid in full as provided for by the charterparty unless the charterer can bring itself within an off-hire clause.⁵⁹

The onus is upon the charterer to prove that the ship is off-hire.⁶⁰ Because an off-hire clause is included for the charterer's sole benefit, where there is any ambiguity as to the off-hire clause, it is to be construed narrowly against the charterer and in favour of the owner.⁶¹

⁵⁹ *Nippon Yusen Kaisha Ltd v Scindia Steam Navigation Co Ltd (The Jalagouri)* [1999] 1 Lloyd's Rep 903.

⁶⁰ *Mareva Navigation Co Ltd v Canaria Armadora SA (The Mareva AS)* [1977] 1 Lloyd's Rep 368.

⁶¹ *Burton & Co v English* [1877] 6 Ch D 265; *J&J Denholm Ltd v Shipping Controller* [1920] Lloyd's L Rep 426; *Ocean Marine Navigation Ltd v Koch Carbon Inc (The Dynamic)* [2003] 2 Lloyd's Rep 693.

3.1 THE DETENTION OF THE VESSEL OCCURRED AFTER THE WRITTEN CONSENT OF THE CHARTERER TO ENTER ASLAN PORT

Under a time charter, the risk of detention by an authority is time fundamentally at the risk of the owners.⁶² The owner will remain liable to pay hire in all circumstances unless the detention falls within an off-hire clause provided for in the time charter, which brings the risk back to the charterers.

The Claimant has submitted that the *Olympic Star* was off-hire between 24 May 2006 and 30 August 2006 by virtue of Clause 15(a)(v),⁶³ since the circumstances surrounding its detention were not encompassed in any of the provisions of Clause 15(a), thereby expressly rejecting Clause 15(a)(iii).⁶⁴

In answer, the Respondent submits that the facts of this case were considered by Clause 15(a)(iii) of the Time Charterparty, with the circumstances falling simply and plainly within the words of the proviso to the off-hire clause.

Under Clause 15(a)(iii), the vessel will only be off-hire “due to any delay in quarantine arising from the master, officers or crew having communications with the shore at any infected area without the written consent or instructions of the Charterers of their agents”.⁶⁵

⁶² Davies M. Dickey A. *Shipping Law* 3rd ed. Lawbook Co. 2004.

⁶³ *Claimant Submissions*, p. 30.

⁶⁴ *Claimant Submissions* p. 33.

⁶⁵ *Facts*, p. 12.

The Claimant has submitted that the *Olympic Star* was not under quarantine but closed for investigative purposes. The Claimant submits that this is because there was no notice explicitly stating that the port or the vessel itself was under quarantine.⁶⁶

The Claimant's submission cannot stand because it requires an impermissibly narrow and technical reading of clause 15(a)(iii). Although the detention of the vessel between 24 May and 30 August was not explicitly referred to as "quarantine," the circumstances undoubtedly indicated and placed the vessel under quarantine. "Quarantine" is defined as the "isolation imposed on persons that have arrived from elsewhere or been exposed to, and might spread, infectious or contagious disease".⁶⁷ The bird flu is "highly infectious" and "fatal".⁶⁸ The *Olympic Star* was detained at Aslan Port because the Aslan Port Authority was concerned about the outbreak of bird flu, after 8 confirmed cases in the 24 hours prior to the Notice issued by the Authority.⁶⁹ Accordingly, the detainment of all vessels at the Aslan Port constituted a "delay in quarantine", and the situation that arose was expressly provided for in the Time Charterparty.

The Respondent submits that although the situation was considered to be one of quarantine, the Claimant's actions were such as to take the Claimant beyond the protection of the off-hire clause. If the intervention of the authorities, through the detention of the vessel, was capricious and not to be anticipated, the proviso concerning

⁶⁶ *Claimant's Submissions*, p. 33.

⁶⁷ The Shorter Oxford English Dictionary (5th edition).

⁶⁸ *Facts*, p. 46.

⁶⁹ *Facts*, p. 49.

written instructions of the charterer would not apply and the off-hire clause would apply. However, the detention of the *Olympic Star* arose only out of the nomination of Aslan, and the risk of bird-flu was a risk associated with the vessel's imminent call at that port and hence was "brought about by the act...of the charterer".⁷⁰

The Respondent was notified of the risks associated with the potential bird flu epidemic in Aslan on 12 May 2006⁷¹ and 20 May 2006⁷² respectively. The Claimant, acknowledging such warnings, most notably on 20 May 2006 at 1030hrs,⁷³ instructing the Master to continue the entry of *Olympic Star* into Port Aslan, requesting the "expediate discharge of cargo in Aslan and the vessel's departure," informing the Respondent they "should be able to get in and out before any health situation escalates".

Thus, the Respondent obtained from the Claimant written consent and instructions to enter the Aslan Port despite the possibility of a fatal health danger being apparent. Thus entry into Aslan Port was undertaken under the Master's leadership and the need to "require the return of the crew immediately"⁷⁴ from the shore only resulted because the Claimant expressly provided these clear instructions to enter Aslan Port and "expediently discharge of the cargo".⁷⁵

⁷⁰ *Ullises Shipping Corp v FAL Shipping Co Ltd Rev 1* [2006] EWHC 1729 at 368.

⁷¹ *Facts*, p. 43.

⁷² *Facts*, p. 46.

⁷³ *Facts*, p. 46.

⁷⁴ *Facts*, p. 48.

⁷⁵ *Facts*, p. 46.

Thus the Claimant's actions had the effect of taking the Claimant outside the protection of the off-hire clause for the whole of the period 24 May 2006 to 30 August 2006. The effect is to preclude the Claimant from asserting that the vessel was off-hire from that date.

Further, the Respondent admits that it is liable under Clause 15(a)(i) to repay hire for the period between 12 May 2006 at 1110hrs and 19 May 2006 at 1917hrs in which the vessel was proceeding at less than contractual speed due to engine problems.⁷⁶ The consequence of the Respondent's submission is that it is only off-hire for this period. Although the 'full working of the vessel' was prevented during the period 12 May 2006 and 19 May 2006, the off-hire clause, providing for the cease of payment during this time, applies "only to the extent that time is thereby lost".⁷⁷ Thus the engine problems are not causative of the detention at Aslan.

3.2 THE DETENTION OF THE VESSEL WAS NOT AFFECTED BY THE EFFICIENCY OF THE VESSEL

The Claimant has submitted that the *Olympic Star* was off-hire by virtue of Clause 15(a)(v), because the closure of the Aslan Port by port authorities was "due to any other

⁷⁶ *Facts*, p. 73.

⁷⁷ Weale J "The NYPE Off-Hire Clause and Third Party Intervention: Can an Efficient Vessel Be Placed Off-Hire?" (2002) 33 *Journal of Maritime Law and Commerce* 133-177, citing *Western Sealanes Corp v Unimarine SA (The Pythia)* [1982] 2 Lloyd's Rep at 168.

cause whatsoever” and the closure of the Aslan Port by port authorities “prevented the proper working of the vessel”.⁷⁸

The Respondent submits that although the proper working of a vessel may be prevented by external factors, including the detention of a vessel by port authorities,⁷⁹ the words “due to any other cause” must be interpreted *eiusdem generis* with those that precede them, and so are confined to other causes expressly provided for within the Time Charterparty.⁸⁰ Thus, because the Time Charterparty in Clause 15(a)(iii) specifically referred to ‘quarantine’, the detention of the vessel by the authorities was considered by the parties. The Claimant’s actions were such as to take the Claimant beyond the protection of the off-hire clause which the parties had agreed that the off-hire clause would confer.

Further, although the *Olympic Star* could not sail from Aslan without port authority, this was not because of a “cause preventing the proper working of the vessel”.⁸¹ Accordingly, the detention of the vessel was in no way reflected upon the *Olympic Star*’s efficiency as a ship.⁸²

The consequence is that the Claimant cannot discharge the onus it bears of showing that a relevant provision of the off-hire clause was engaged, and thus the Claimant must pay hire for the whole of the period for which the *Olympic Star* was detained in Aslan.

⁷⁸ *Claimant’s Submission*, p. 31.

⁷⁹ *Claimant’s Submission*, p. 32.

⁸⁰ *Mareva Navigation Co Ltd v Canaria Armadora SA (The Mareva AS)* [1977] 1 Lloyd’s Rep 368.

⁸¹ *The Aquacharm* [1982] 1 All ER 390.

⁸² *Ibid.*

4. THE CLAIMANT IS LIABLE TO PAY DAMAGES TO THE RESPONDENT FOR BREACH OF THE SAFE PORT WARRANTY

Clause 1(b) of the Time Charterparty (“**Clause 1(b)**”) provides that the Claimant must nominate and berth only at “safe ports”. The Respondent submits that the Claimant breached Clause 1(b).

If the Tribunal finds, as the Respondent submits that it will, that the vessel was not off-hire during the period from 24 May 2006 to 30 August 2006, the Respondent will have suffered no loss from the breach of Clause 1(b). Consequently, the Claimant will be liable to pay nominal damages only.⁸³

However, if the Tribunal finds that the ship was off-hire during the period from 24 May 2006 to 30 August 2006, the Respondent will have suffered loss of hire during that period. In this event, the Respondent submits that this loss of hire occurred as a result of the Claimant’s breach of Clause 1(b). Accordingly, Claimant is liable to pay damages to Respondent of an amount equivalent to the amount of hire otherwise liable to be repaid to Claimant.

4.1 THE COUNTER-CLAIM IS NOT TIME-BARRED

⁸³ *Marzetti v Williams* (1830) 1 B. & Ad. 415.

Regardless of what the Tribunal finds in respect of the time limit in which claims must be brought to arbitration, cross-claims that are wholly defensive are within jurisdiction of the Tribunal even if they would have been outside jurisdiction as claims in their own right by virtue of the scope of the arbitration agreement.⁸⁴

4.2 BY DIRECTING THE *OLYMPIC STAR* TO ENTER ASLAN, THE CLAIMANT BREACHED ITS OBLIGATION TO NOMINATE ONLY “SAFE” PORTS

(a) The time for determining whether a port is “safe” is when the charterer orders the Master to enter the Aslan Port

The Claimant relied heavily upon the decision of *Kodros Shipping Corporation of Monrovia v Empresa Cubana de Fletes (“The Evia (No. 2) (CA)”)* [1982] 1 Lloyd’s Rep 334 in support of the proposition that the obligation to nominate a “safe port” is discharged if the port is safe at the time when that port is originally chosen by the charterer.⁸⁵ In the Respondent’s submission, *The Evia (No. 2) (CA)* does not stand for that proposition. In *The Evia (No. 2) (CA)*, Lord Denning MR stated:

“At one time it was suggested that the duty of the charterer was limited to the time when he nominated the port of the time when the vessel was directed to the port. It

⁸⁴ *Metal Distributors (UK) Ltd. v ZCCM Investment Holdings Plc* [2005] EWHC 156 (Unreported, Queen’s Bench Division, Cresswell J, 14 January 2005); and *E.D. & F. Man v Société Anonyme Tripolitaine des Usines* [1970] 2 Lloyd’s Rep 416 Donaldson J; Mustill M Boyd S *Commercial Arbitration* 2nd ed Butterworths (1991), pp. 130-31.

⁸⁵ *Claimant’s Submissions*, p. 34.

was thought that, if the port becomes unsafe afterwards, that was no fault of his. He was not responsible for it. But that suggestion has gone by the board.”⁸⁶

Rather, a charterer is now under a continuing obligation to ensure that a “safe port” is nominated. This obligation crystallises when the charterer issues the direction to the master to enter a port. The position of the law of Archland in this respect is clearly articulated in the decision of Lord Diplock in the House of Lords decision of *Kodros Shipping Corporation of Monrovia v Empresa Cubana de Fletes*⁸⁷ (“***The Evia (No. 2)***” (HL)):

“It is with the prospective safety of the port at the time when the vessel will be there for the loading or unloading operation that the contractual promise is concerned and the contractual promise itself is given at the time when the charterer gives the order to the master or agent of the shipowner to proceed to the loading or unloading port.”⁸⁸

Given the significant advancement in technology in recent decades, a charterer is now more than capable of communicating with relevant authorities and with the vessel, as indeed the Claimant has done in this case, in order to determine whether a port is “safe”. For that reason, no narrow view should be taken on the duty of a charterer in discharging their obligation under the safe ports warranty.

⁸⁶ *The Evia No. 2 (AC)* [1983] 1 CA 736 at p. 5.

⁸⁷ *The Evia No. 2 (AC)* [1983] 1 CA 736.

⁸⁸ *The Evia No. 2 (AC)* [1983] 1 CA 736 at p. 10.

Further, the Respondent submits that, in the present case, a narrow view is inconsistent with the terms of the Time Charterparty. In particular, the expression “between *and at* safe ports (*emphasis added*)” in Clause 1(b) carries with it a temporal construction which suggests that the Claimant’s obligation was more than merely specifying the final port at the start of the voyage supports the Respondent’s position. These italicised words were not part of the provision of the Charterparty which was considered in “The Evia”.

Accordingly, in the Respondent’s primary submission, in order to determine whether the Claimant has breached the safe ports warranty, the Tribunal must determine whether, on 20 May 2006 when Claimant directed the Master to “do everything possible to expedite discharge of the cargo in Aslan”, Port Aslan was “unsafe”.

(b) Port Aslan was an “unsafe” port

A port will be “safe” if:

“...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.”⁸⁹

It follows that a port will be “unsafe” if “[i]t cannot be reached without exposure to danger that cannot be avoided by good navigation and seamanship” .⁹⁰

⁸⁹ *The Eastern City* [1958] 2 Lloyd’s Rep., p. 131; Wilford M, Coghlin T and Kimball J D *Time Charters*, 4th ed. Lloyd’s of London Press Ltd. 1995; *Unitramp v. Garnac Grain Co. Inc. (The “Hermine”)* [1979] 1 Lloyd’s Rep 212; *Independent Petroleum Group Ltd v Sea Carriers PTE Ltd* [2006] EWHC 3222.

Whilst the Claimant relies upon the English Court of Appeal and House of Lords decisions in *The Evia (No. 2)* to submit that Port Aslan was a “safe” port, that case is clearly distinguishable on its facts. In *The Evia (No.2)*, the charterer ordered The Evia to the Port of Basrah which “was a safe port for the vessel both when she was ordered to proceed there and when she got there”.⁹¹ It was only after the Evia was berthed that the port became “unsafe”. Conversely, in the current case, the possible presence of bird flu in Aslan was brought to the Claimant’s attention on 12 May 2006 and confirmed on 20 May 2006. Both of these instances occurred prior to the Claimant’s order to berth at Port Aslan.

Further the terms of the safe port warranty in *The Evia No. 2* are materially different to the terms of Clause 1(b). Whereas in *The Evia No. 2*, the charterer was contractually bound to employ the vessel “between good and safe ports”, Clause 1(b) provides that the *Olympic Star* is only to be employed “between and at safe ports (*emphasis added*)”. Given the factual disparity between *The Evia No. 2* and the present case, the Respondent submits that the decision in that case is not determinative of the question which the Tribunal must consider in the present case.

Rather, the Respondent submits that in this case, Aslan was clearly a port which could not be reached without “danger which cannot be avoided by good navigation and

⁹⁰ *Leeds Shipping Co Ltd v Société Française Bunge (“The Eastern City”)* [1958] 2 Lloyd's Rep 127.

⁹¹ *The Evia (No. 2) (HL)* [1983] 1 AC 736 at p. 12.

seamanship”.⁹² The *Olympic Star* could not reach Port Aslan without exposure to danger in the form of Severe Acute Respiratory Syndrome (“SARS”). Consistent with Archlandish authority, a “health epidemic” is capable of rendering a port “unsafe” and is not capable of being “avoided by good navigation and seamanship”.⁹³ The severe danger posed by SARS is, in this case, clearly evidenced by the death of 8 persons in Aslan within 24 hours⁹⁴ as a result of exposure to the “killer virus”.⁹⁵ Further, the very real risk of exposure to SARS is demonstrated by the decision of the Aslan Port Authority to close the port in response to the outbreak. Accordingly, Port Aslan was not a “safe port”.

Therefore, the Respondent submits that by directing the *Olympic Star* to enter Aslan, the Claimant breached its obligation to nominate only “safe” ports and is thereby liable to pay damages to the Respondent of an amount equivalent to the amount of hire otherwise liable to be repaid to Claimant.

⁹² *The Eastern City* [1958] 2 Lloyd’s Rep., p. 131.

⁹³ *G. W. Grace & Co. Ltd. v. General Steam Navigation Company Ltd (“The Sussex Oak”)* [1950] 83. Lloyd’s Rep 297; Schelin D J *The Charterer’s Right to Order the Master* 2002, p. 37.

⁹⁴ *Facts*, p. 49.

⁹⁵ *Facts*, p. 48.

4.3 IN THE ALTERNATIVE, IF THE TRIBUNAL FINDS THAT THE PRIMARY OBLIGATION TO NOMINATE A “SAFE” PORT WAS DISCHARGED BY THE CLAIMANT’S NOMINATION OF PORT ASLAN ON 30 APRIL 2006, THE RESPONDENT SUBMITS THAT THE CLAIMANT HAS BREACHED ITS SECONDARY OBLIGATION TO NOMINATE AN ALTERNATIVE “SAFE” PORT IN THE EVENT THAT THE ORIGINAL BECOMES “UNSAFE” WHILE *EN ROUTE*

Given current Archlandish law, the wording of Clause 1(b) and the facts of this case, the Respondent’s primary submission is that the obligation to nominate “safe” ports is a continuing obligation and crystallised when the Claimant ordered the Master to enter Port Aslan. However, if the Tribunal is of the view that the obligation to nominate a “safe” port is discharged at the moment that the charterer first nominates the given port and accordingly that the Claimant discharged its primary obligation on 30 April 2006,⁹⁶ the Respondent submits that the Claimant breached its secondary obligation to nominate an alternative “safe” port in the event that the first becomes “unsafe”.

It is clear from the decision in *The Evia (No. 2) (HL)* that where a port is originally perceived as “safe” and becomes “unsafe” *en route*, the charterer is under a secondary obligation to nominate an alternative port.⁹⁷ As evidenced in the correspondence dated 12 May 2006⁹⁸ and 20 May 2006⁹⁹ between the Claimant and the Respondent, the Claimant

⁹⁶ *Facts*, p. 35.

⁹⁷ *Uni-Ocean Lines Pty Ltd v C-Trade SA (“The Lucille”)* [1984] 1 Lloyd’s Rep 244; and Davies M Dickey *A Shipping Law* 3rd ed. Lawbook Co. 2004 p.372.

⁹⁸ *Facts*, p. 43.

became aware that Port Aslan was “unsafe”¹⁰⁰ while *en route* and failed to change its course, thereby breaching its secondary obligation to the Respondent.

4.4 THE CONDUCT OF THE MASTER DOES NOT BAR THE COUNTER-CLAIM

(a) The Master was obliged to follow the Claimant’s directions

In limited cases, the presumption that a charterer is liable to the owner for its direction to berth at a given port is rebutted if the Master’s decision to obey the charterer was not “lawful, reasonable and free from blame”.¹⁰¹ If the Master was merely doing “what an intelligent observer, knowing exactly how [he] was circumstanced, would have expected [him] to do, any damage resulting would be the direct and natural consequence of the breach of contract in giving the order”.¹⁰²

The Respondent further submits that the relationship between the Master and the Charterer is of a commercial nature. The bargain requires the Charterer to “pay hire for a vessel because he wants to make use of it. Crucial to the bargain, for him, are the terms which require the master to prosecute his voyages with the utmost despatch, which provide that the master (although appointed by the owner) shall be under the order and directions of the charterer as regards employment and which require the charterer to

⁹⁹ *Facts*, p. 46.

¹⁰⁰ See Chapter 4.2(a) above.

¹⁰¹ *Summers v Salford Corporation* [1943] A.C. 283 pp. 296- 97; *Grace v General S.N.Co.* (1949) 83 Lloyd’s Rep. 297, p. 308; *Reardon Smith Line Ltd v Australian Wheat Board* [1954] 91 CLR 233; *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd* [2001] 1 All ER 403.

¹⁰² *Reardon Smith Line Ltd v Australian Wheat Board* [1954] 91 CLR 233 at [10].

furnish the master from time to time with all requisite instructions and sailing directions”.¹⁰³ These obligations are in the present case, set out in clauses 12 and 19 of the Time Charterparty.

The House of Lords reasoning in the *Will Harmony* reiterates and crystallises the Respondents submission that the Master of the vessel was subject to and bound by contractual obligations to follow the direction of the Charterer with regards to ‘where the vessel shall go and what she shall carry, how (short) she shall be used, always subject to the terms of the Charterparty’.¹⁰⁴

The Respondent submits that the Master’s obligations are limited to “Matters falling within the specialised professional maritime expertise of the master, particularly where the safety or security of the vessel, her crew and cargo are concerned, where the technical questions concerning the operation of the vessel are for him. To this end the Master’s responsibility is confined to “decisions when, in the prevailing condition of wind, tide and weather, to sail from a given port is plainly a navigational matter”.¹⁰⁵

¹⁰³ *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd* [2001] 1 All ER 403 per Lord Bingham at [3].

¹⁰⁴ *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd* [2001] 1 All ER 403 per Lord Bingham at [14].

¹⁰⁵ *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd* [2001] 1 All ER 403 per Lord Porter at [3].

(b) In any event, any waiver of a right to reject the nomination of Port Aslan does not bar the Respondent's counter-claim

The Respondent submits and in doing so seeks to clarify its position at law that at no point did it “make an unequivocal representation”¹⁰⁶ that it understood the associated risks and consequences of docking at the Port of Aslan. The law specifies that the only permissible manner in which Respondent [As the owner of the vessel] may waive its right to reject the nomination of a Port is through an absolute and unequivocal representation. The Claimant in its submissions, has not identified with precision what the unequivocal representation is said to be. It is submitted that this is because no such unequivocal representation was made by the Respondent.

In any event, the manner of a right to reject the nomination of a port does not amount to a waiver of the right to claim damages.¹⁰⁷

¹⁰⁶ Davies M Dickey *A Shipping Law* 3rd ed. Lawbook Co. 2004 p. 373; *Anders Utkilens Rederi A/A v O/Y Lovisa Stevedoring Co A/B (The Golfstraum)* [1976] 1 Lloyd's Rep 547.

¹⁰⁷ *The Golfstraum* [1976] 1 Lloyd's Rep 547.

PRAYER FOR RELIEF

For the foregoing reasons, the Respondent respectfully requests the Tribunal to adjudge and declare as follows:

1. That so much of the Claimant's claim, as arises from the cargo claim, is beyond the jurisdiction of the Tribunal as that part of the claim was commenced out of time.
2. In the alternative, the Respondent is not liable to the Claimant in respect of the cargo claim.
3. That the *Olympic Star* was off-hire between 0758hrs on 17 May 2006 and 0800hrs on 22 May 2006 due to mechanical fault, but was not off-hire during any other period.
4. The Claimant breached its obligation to nominate only safe ports and if, which is denied, the *Olympic Star* was off-hire by reason of the quarantine delay, the Claimant is liable to the Respondent in damages for breach of that obligation.