

THE SIXTEENTH ANNUAL
INTERNATIONAL MARITIME LAW ARBITRATION MOOT



Memorandum for the Claimant

On Behalf of:

WESTERN TANKERS, INC.
(CLAIMANT)

Against:

LESS DEPENDABLE TRADERS, PTE.
(RESPONDENT)

DIENA HASANAH – INDIRA FATIMA – MEGA SEPTIANDARA

TEAM NO. 4

MEMORANDUM FOR THE CLAIMANT

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LIST OF ABBREVIATIONS

¶	Paragraph
§	Section
ASA	Atlantic Services Agency
ASA2	Atlantic STS Agency (ASA Angola Ltd)
CA	Court of Appeal
Cargo	30,960 MT Jet A1 aviation fuel and 72,190 MT gasoil
Ch	Chancery Division
Charterparty	SHELLTIME 4 Charterparty dated 26 May 2014
Claimant	Western Tankers Inc.
CLC	Commercial Law Cases
Co	Corporation
Comm	Commercial Court
Ed.	Edition
EWCA	England and Wales Court of Appeal
EWHC	High Court of England and Wales
Fixture Recap	FULLY FIXED RECAP / CP DATED 26 MAY 2014
GmbH	<i>Gesellschaft mit beschränkter Haftung</i>
HL	House of Lords
Inc	Incorporation
Kft	<i>Korlátolt Felelősségű Társaság</i>
Law and Litigation Clause	Clause 46 of SHELLTIME
Ltd	Limited
Master	Captain Stelios Smith
MT	Metric Tonnes
M/V	Motor Vessel
Plc	Public Limited Company
Procedural Order	IMLAM Procedural Order 2015
PT	<i>Perseroan Terbatas</i>
Pte	Private
QB	Queen's Bench Division

SA	<i>Société Anonyme</i>
SC	Supreme Court
SHELLTIME	SHELLTIME 4 Basis Proforma
Ship Broker	Bill of IMWMB
SpA	<i>Societa per Azione</i>
Srl	<i>Società a Responsabilità Limitata</i>
Tbk	<i>Terbuka</i>
Tribunal	Arbitration Tribunal in Melbourne
Respondent	Less Dependable Traders Pte
UK	United Kingdom
Western Dawn	M/T Western Dawn

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SUMMARY OF FACTS

Western Tankers Inc. (the “**Claimant**”) and Less Dependable Traders Pte (the “**Respondent**”) (the Claimant and the Respondent, together hereinafter referred to as (the “**Parties**”) conducted negotiations through a third party, IMWMB represented by Bill (the “**Ship Broker**”), to charter M/T Western Dawn (the “**Western Dawn**”).

Both Parties fixed their agreement into a time charter dated 26 May 2014 (the “**Charterparty**”) which is based upon SHELLTIME 4 Basis Proforma (“**SHELLTIME**”), with several amended terms and incorporated Special Provisions – such as Piracy Clause and the Respondent’s Rider Clauses – on a fixture recap of the same date (the “**Fixture Recap**”). Pursuant to the Charterparty, the Respondent agreed to charter the Western Dawn for 3 months, to deliver 30,960 metric tonnes (“**MT**”) Jet A1 aviation fuel and 72,190 MT gasoil (the “**Cargo**”) from Singapore to West Africa. The Charterparty also stipulates an obligation to the Respondent to pay and provide bunker for the Western Dawn.

Captain Stelios Smith (the “**Master**”) requested the Western Dawn to be bunkered with the amount of 1,500 MT of PBT Fuel. However, on 3 June 2014 the Respondent only provided the Western Dawn with the amount of 950 MT. The Master of the Western Dawn then protested to the Respondent regarding the amount of bunker supplied, which did not meet the required itinerary and was only enough to get the Western Dawn to the discharge area. The Respondent stated that additional bunker would be given when the Western Dawn passes Durban or Cape Town. The Cargo was loaded in Singapore on 8 June 2014, and the Western Dawn then proceeded to Luanda.

On 20 June 2014 the Western Dawn approached Durban. However, the Respondent did not provide further information regarding the additional bunker. Thus, on 25 June 2014, the

Claimant proceeded to Luanda and was forced to reduce the Western Dawn's speed to 12 knots from previously 13 knots.

On 28 June 2014, the Respondent informed the Master of the Western Dawn regarding the next bunker supply and the discharge coordinate in Ship-to-Ship ("STS") Area 1. A representative of ASA Angola ("ASA2"), Captain William Anya, sent a correspondence to the Master of the Western Dawn explaining that the Respondent had passed control to ASA Angola. He further detailed the STS operation and bunker supply. The Master of the Western Dawn replied confirming the instructions from Captain Anya.

As the Western Dawn was approaching the discharge location, the Master of the Western Dawn continuously sent correspondences to ASA2 but received no reply. On 4 July 2014, the Master of the Western Dawn sent a correspondent to the Claimant, the Respondent and ASA2 stating that the Western Dawn has reached the coordinate for STS operation. However, the agent was not in sight. Between 4 July 2014 and 16 July 2014, there was no contact with the Western Dawn. On 17 July 2014 the Master of the Western Dawn sent a report to both Parties concerning an event of pirate attack and Cargo diversion.

The Claimant initiated arbitral proceeding (the "**Proceeding**") against the Respondent under the auspices of Arbitration Act 1996 (UK) and submitted the Claim Submission on 1 November 2014. The Respondent submitted its Statement of Defence on 29 November 2014. The Claimant contended that the Respondent has breached the Charterparty by not commencing proper bunkering and not paying the second hire period. The Claimant also submitted that the Respondent has committed tort of fraud. The Respondent counter claimed by contending that the Claimant has failed to make Western Dawn seaworthy and breached its duty as bailee.

JURISDICTION

I. THE TRIBUNAL HAS JURISDICTION TO SETTLE THE PRESENT DISPUTE

1. This arbitration tribunal in Melbourne (the “**Tribunal**”)¹ can rule on its own jurisdiction to settle the matters brought by both Parties hereof (the “**Dispute**”).² The Parties have agreed that the Dispute is to be settled pursuant to Arbitration Act 1996 (UK),³ which provides that “... [T]he arbitral tribunal may rule on its own substantive jurisdiction that is, as to ... (a) whether there is a valid arbitration agreement ... (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.”⁴
2. The Claimant hereby submits that the Tribunal has jurisdiction to hear all of the Parties’ submissions in the Dispute, as (A) there is a valid arbitration agreement between the Parties, (B) the arbitration agreement is wide enough to cover all claims brought hereof and (C) the Tribunal may proceed to conduct the Parties’ arbitral hearing in Melbourne.

A. There is a Valid Arbitration Agreement between the Parties

3. Consent of the contractual parties in the form of a valid arbitration agreement gives an arbitral tribunal the capacity to resolve commercial disputes involving the contract between them,⁵ which must be express and duly incorporated to the relevant contract.⁶
4. Specifically for contracts involving a fixture recap, Judge Eder, in *The Pacific Champ*⁷ considered that if parties intend to incorporate standard form charterparties into a fixture recap that represents an agreed set of detailed terms, the standard reference should be

¹ Procedural Order No. 1. ¶ 1.

² *Dallah Real Estate and Tourism Holding v Pakistan* [2011] UKSC 46 (SC); *TXN Olaj-Es Gazkutato Kft v Claxton Engineering Services Ltd* [2011] EWCA Civ 410 (CA); *Golden Ocean Group Ltd. v PT Humpuss Intermoda Transportasi Tbk.* [2013] EWHC 1240 (Comm) (QB).

³ Clause 46 (Law and Litigation Clause), Shelltime.

⁴ Arbitration Act 1996 (UK) § 30 (1).

⁵ *Dallah Real Estate v Pakistan* [2011] UKSC 46 (SC); *Golden Ocean v Humpuss Intermoda* [2013] EWHC 1240 (QB).

⁶ *Trollope & Colls v North West Metropolitan* [1973] 1 WLR 601 (HL); *Lisnave Estaleiros v Chemikalien Seetransport* [2013] EWHC 338 (Comm) (QB).

⁷ [2013] EWHC 470 (QB).

“incorporated with logical amendments”.⁸ Such reference shall deem the charterparty, including the arbitration clause, incorporated into the fixture recap.⁹

5. In the present case, the Parties entered into a time charter fixed by way of a Fixture Recap,¹⁰ containing the terms “BASIS PROFORMA SHELLTIME 4 (DDECEMBER [sic] 2003 EDITION ... AS AMENDED LOGICALLY AND SPECIFICALLY BY THE FOLLOWING INCLUDED THEREIN”.¹¹ Applying the standard specified in *The Pacific Champ*,¹² the foregoing is sufficient to incorporate the terms of the SHELLTIME into the Fixture Recap, which is binding to the Parties.
6. Further, the Parties had consented to arbitration in the event of dispute by accepting SHELLTIME’s terms, including its Clause 46 (the “**Law and Litigation Clause**”)¹³ which provides that “*all dispute arising out of this charter shall be referred to Arbitration in London in accordance with Arbitration Act 1996 ...*”. Therefore, the requirement of a valid arbitration agreement, which acts as the basis for the Tribunal to entertain the Dispute, is established in the present case.
7. The Claimant acknowledges that the Respondent has argued that on a true construction of the Charterparty and in accordance with the intention of the Parties, the proper seat and forum in which this Dispute is to be determined is Singapore and Singapore arbitration.¹⁴ This submission, however, is unfounded and does not have any merit as the Respondent based its argument on the statement of its agent, “[*the Respondent is*] *really not keen on London arbitration as [it] had a bit of negative experience on this recently.*”¹⁵ In the case of

⁸ *Hyundai Merchant Marine Company Ltd v Americas Bulk Transport Ltd (The Pacific Champ)* [2013] EWHC 470 (QB).

⁹ *The Pacific Champ* (n. 8) ¶ 64 (xiii).

¹⁰ Moot Problem, p. 5-12.

¹¹ Moot Problem, p. 5.

¹² [2013] EWHC 470 (QB).

¹³ Clause 46 (Law and Litigation Clause), Shelltime.

¹⁴ Moot Problem, p. 66.

¹⁵ Moot Problem, p. 2.

Britoil v Hunt Overseas,¹⁶ communications which were not intended to be legally binding cannot be treated as superior to the document intended to record the parties' final agreement. Therefore, the Claimant submits that a single statement of the Respondent's concern does not dismiss, in any way, an existing binding and valid arbitration agreement showcased in the Law and Litigation Clause.

B. The Tribunal has Jurisdiction to Hear All Claims Brought by the Parties

8. In the present Dispute, aside from submitting contractual claims, the Claimant is also submitting a tortious claim, namely an action regarding negligent misstatement, to seek relief from the Respondent. The Claimant contends that the tort of negligent misstatement claim also falls within the ambit of the Tribunal's jurisdiction.
9. In the *Angellic Grace*,¹⁷ an arbitral tribunal may rule on contractual as well as tortious claims provided that (i) the wording of the arbitration clause is wide enough and (ii) the facts on the contractual and tortious claims have sufficient close connection.

i. The Wording in the Law and Litigation Clause is Wide Enough to Settle Contractual and Tortious Claims

10. According to the principle set out in the *Fiona Trust*,¹⁸ an agreement to arbitrate should start on the assumption that the parties involved, as prudent businessmen, are likely to intend any dispute arising out of their relationship to be settled by arbitration, unless a particular matter has been specifically excluded on the arbitration clause itself.¹⁹ This would be the case if the parties include the term 'arising out of' within the arbitration clause.²⁰
11. Under the Law and Litigation Clause, the wording 'arising out of' was used by the Parties to

¹⁶ [1994] CLC 561 (QB); Joseph Chitty, Hugh G. Beale, *Chitty on Contracts* (31st ed. Sweet & Maxwell, London 2014) 5–117, 5–122–5–129; *PT Berlian Laju Tanker TBK v Nuse Shipping Ltd (The Aktor)* [2008] EWHC 1330 (Comm) (QB); *Tartsinis v Navona Management Co* [2015] EWHC 57 (Comm) (QB)

¹⁷ [1995] 1 Lloyd's Rep. 12 (CA); *Impala Warehousing and Logistics (Shanghai) Co Ltd v Waxiang Resources (Singapore) Pte Ltd* [2015] EWHC 811 (Comm) (QB); *Compania Sud Americana v Hin-Pro International Logistics Ltd* [2014] EWHC 3632; *Ryanair Ltd v Esso Italiana Srl* [2013] 2 CLC 950 (CA).

¹⁸ *Premium Nafta Product Ltd v Fili Shipping Co Ltd and others (Fiona Trust)* [2007] UKHL 40 (HL).

¹⁹ *Fiona Trust* (n. 16) ¶ 1726.

²⁰ *Fiona Trust* (n. 16) ¶ 1730.

describe the disputes that may be entertained through arbitration.²¹ Thus, it shall be concluded that the Law and Litigation Clause is wide enough to cover both contractual and tortious claims.

ii. There is Sufficient Close Connection between the Facts of the Contractual Claims and the Tortious Claim

12. In the *Playa Larga and Marble Islands*,²² for an arbitral tribunal to be able to rule upon a tortious claim, the plaintiff must show that the contractual and tortious claims were so closely knitted together upon the facts that the agreement to arbitrate on one could properly be construed as covering the other.²³ In the aforementioned case, the wrongful act relied upon by the plaintiff is a breach of a particular section of the contract where the same also found the claim in tort.²⁴

13. In the present case, in establishing its claim in tort against the Respondent, the Claimant relies on the Respondent's negligent misstatements which resulted in their failure to provide sufficient bunker for the relevant voyage. As the Claimant's submission in this regard intertwines with the Respondent's contractual obligation to provide sufficient bunker under Clause 7 of the Charterparty, it shall be considered that both the Claimant's contractual and tortious claims are found upon the same basis.²⁵

14. On that account, the Claimant submits that there is sufficient close connection between the Claimant's contractual and tortious claim in this Dispute, which allows the Tribunal to also hear the Claimant's tortious claim against the Respondent.

²¹ Clause 46 (Law and Litigation Clause), Shelltime.

²² *Empresa Exportadora De Azucar v Industria Azucarera Nacional (The Playa Larga and Marble Islands)* [1983] 2 Lloyd's Rep. 171 (CA); *Ryanair Ltd v Esso Italiana Srl* [2013] 2 CLC 950 (CA).

²³ *Ashville Investment v Elmer* [1989] QB 488; *Empresa Exportadora De Azucar v Industria Azucarera Nacional (The Playa Larga and Marble Islands)* [1983] 2 Lloyd's Rep. 171 (CA).

²⁴ *Empresa Exportadora De Azucar v Industria Azucarera Nacional (The Playa Larga and Marble Islands)* [1983] 2 Lloyd's Rep. 171 (CA); *Ryanair Ltd v Esso Italiana Srl* [2013] 2 CLC 950 (CA).

²⁵ Moot Problem, p. 5.

C. The Tribunal May Proceed to Conduct the Parties' Arbitral Hearing in Melbourne

15. In Procedural Order 1 dated 12 December 2014, the Tribunal states that the hearings regarding the Parties' jurisdiction and liability issues are to be held in Melbourne.²⁶ Despite the Law and Litigation Clause specifying London as the seat of arbitration, it is possible to hold hearings in a venue other than the originally agreed venue, for example, in light of the tribunal's convenience.²⁷
16. The Respondent may argue that the shift of the venue of the arbitration from what was previously agreed, namely London, may constitute a breach of the Law and Litigation Clause. However, as widely upheld in the rulings of English courts,²⁸ since the legal 'seat' of arbitration must not be confused with the geographically convenient place chosen to conduct particular hearings,²⁹ the shift of the venue of the arbitration does not change the 'seat' of arbitration and it shall remain in the place initially agreed by the parties.³⁰ Accordingly, the commencement of the arbitral hearing of the Dispute in Melbourne shall be deemed appropriate and is not contrary to the Law and Litigation Clause.

²⁶ Procedural Order No. 1.

²⁷ *Naviera Amazonica v Compania Internacional* [1987] 1 Lloyd's Rep 116 (SC); *Channel Tunnel v Balfour Beatty* [1993] A.C. 334 (HL); *Shagang South-Asia v Daewoo Logistics* [2015] EWHC 194 (Comm) (QB).

²⁸ *Naviera Amazonica v Compania Internacional* [1987] 1 Lloyd's Rep 116; *Braes of Doune v Alfred McAlpine* [2008] EWHC 426 (Comm) (QB); *Shashoua v Sharma* [2009] EWHC 957 (Comm) (QB).

²⁹ Lord Collins of Mapesbury, C.G.J. Morse, David McClean, *Dicey, Morris and Collins on the Conflict of Laws* (15th ed., Sweet & Maxwell, London 2014) 16–035; See also *Enercon GmbH v Enercon (India) Ltd* [2012] EWHC 689 (Comm) (QB); *Shagang South-Asia v Daewoo Logistics* [2015] EWHC 194 (Comm) (QB).

³⁰ *Shashoua v Sharma* [2009] EWHC 957 (Comm) (QB); *Shagang South-Asia v Daewoo Logistics* [2015] EWHC 194 (Comm) (QB).

MERITS

II. THE RESPONDENT SHALL BE LIABLE FOR THE DAMAGE TO THE WESTERN DAWN

17. On or around the 4 July 2014, the Western Dawn was boarded by pirates that caused significant damage to the Western Dawn, including damage to its navigation equipment, main-deck hose crane and starboard-side accommodation ladder and bridge equipment (“Damage”).³¹ The Western Dawn’s susceptibility to pirates was due to it being stranded off the coast of Luanda, Angola, as part of their effort to seek for bunker.

18. The Claimant submits that the Respondent shall be liable for the loss arising out of the Damage to the Western Dawn due to (A) breach of the Charterparty by failing to provide proper bunkering, (B) negligent misstatement on its part and (C) its agent and thus, (D) caused Damage to the Western Dawn.

A. The Respondent Has Breached the Charterparty by Failing to Provide Proper Bunkering

19. The Respondent has duty to provide bunker during the course of Western Dawn’s voyage, as Clause 7 of the Charterparty stipulates an obligation for the charterer to provide fuel for the Western Dawn’s voyage.³² Despite this obligation, further notice made by the Master that the bunker was not enough,³³ and the Respondent’s promise to provide alternative bunker supply in Durban or Cape Town,³⁴ the Respondent did not fulfill this very duty.³⁵

20. As established in *Summit Invest v British Steel*,³⁶ a charterer who is bound by a clause governing the obligation to provide and pay for all fuel, shall at all times when the vessel is

³¹ Moot Problem, p. 41 & 42.

³² Clause 7 (Charterers to Provide), Shelltime: “Charterers shall accept and pay for all fuel..”.

³³ Moot Problem, p. 25.

³⁴ Moot Problem, p. 26.

³⁵ Moot Problem, p. 35 – 41.

³⁶ [1987]1 Lloyd’s Rep 230 (CA).

on-hire, be responsible to ensure the sufficiency of the specified fuel needs.³⁷ Further, in *The Captain Diamantis*,³⁸ Lord Denning rules that the wording ‘all fuel’ shall mean all fuel which is reasonably required in the course of the charter service and for the purpose thereof.³⁹

21. Clause 7 of the Charterparty stipulates that “*Charterers shall provide and pay for all fuel...* ”.⁴⁰ The Master informed the Respondent that the quantity of bunker required for the whole voyage – for delivering the Cargo to Luanda, until redelivery in Gibraltar – is 1,500 MT of ex PBT fuel. This specified all fuel required in this Time Charterparty.⁴¹
22. In fact, the Respondent only supplied 950 MT ex PBT fuel,⁴² which although would have taken the Western Dawn to the next discharge area,⁴³ would not be sufficient for the discharge operation in Luanda.⁴⁴ This has also been highlighted by the Master of Western Dawn that bunkering must happen before discharge.⁴⁵ However, no such additional bunker was given by the Respondent even until the Western Dawn was seized by pirates.⁴⁶ Considering the facts above, the Respondent has not fulfilled its duty to provide proper bunkering and therefore breached Clause 7 of the Charterparty.

B. The Respondent Has Made Negligent Misstatements

23. The Respondent’s breach of the Charterparty was coupled with an action of tort, namely in the form of negligent misstatement. It was clear from the outset, that the Claimant as the shipowner, is in need of proper bunkering to sail the Western Dawn. When the Respondent

³⁷ *Summit Invest Incorporated v British Steel Corporation (The Sounion)* [1987] 1 Lloyd’s Rep 230 ¶ 6 (CA); *Brogden v Investec Bank Plc* [2014] EWHC 2785 (QB).

³⁸ *The Mammoth Bulk Carriers Ltd. V. Holland Bulk Transport B.V. (The Captain Diamantis)* [1978] 1 Lloyd’s Rep. 346 (CA).

³⁹ *The Captain Diamantis* (n. 39).

⁴⁰ Clause 7 (Charterers to Provide), Shelltime.

⁴¹ Moot Problem, p. 21.

⁴² Moot Problem, p. 24 & 25.

⁴³ Moot Problem, p. 28.

⁴⁴ *Ibid.*

⁴⁵ Moot Problem, p. 32.

⁴⁶ Moot Problem, p. 41 & 42.

made statements that additional bunkering will be provided in Durban or Cape Town,⁴⁷ and through STS bunkering off the coast of Luanda,⁴⁸ it would be relied upon by the Claimant. When the Western Dawn arrived in those places, there was no bunkering available.⁴⁹

24. The Claimant submits that the Respondent in making these false or unfounded statements has committed a breach of duty of care. In order to establish the existence of a duty of care to the Claimant with respect to the Respondent's negligent misstatement, three requirements must be satisfied: (i) it must be reasonably foreseeable that the statement will be relied on, (ii) there must exist relevant degree of proximity between the parties, and (iii) it must be just and reasonable in all the circumstances to impose a duty of care on the part of the Respondent.⁵⁰ If the Respondent breaches such duty, the Claimant shall be entitled to recover such loss arising from the said breach.⁵¹

i. It is Reasonably Foreseeable That the Claimant Would Rely on the Statement Made by the Respondent

25. In cases involving negligent misstatement, a person making the claim shall prove that it is reasonably foreseeable that a statement will be relied upon. In the case of *Hedley Byrne v Heller*,⁵² this statement was made to the party receiving the statement with intention that he should rely on it.

26. In the present case, the Respondent did not satisfy the amount of bunker the Claimant had requested in Singapore. It is thus expected that the Respondent will need to provide additional bunkering elsewhere. Consequently, the Respondent made a statement that there

⁴⁷ Moot Problem, p. 25.

⁴⁸ Moot Problem, p. 35.

⁴⁹ Moot Problem, p. 36.

⁵⁰ *Al Saudi Banque and others v Clark Pixley* [1989] 3 All ER 361 (QB); *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 (CA); *Bezant v Rausing* [2007] EWHC 1118 (Ch) (QB).

⁵¹ *White v Jones* [1995] 2 A.C. 207 (HL); *Hooper v Fynmores* [2001] W.T.L.R. 1019 (QB); *Martin v Triggs Turner Bartons* [2009] EWHC 1920 (Ch) (QB).

⁵² [1964] A.C. 465 (HL); *Ross v Caunters* [1980] Ch. 297; *White v Jones* [1995] 2 A.C. 207 (HL); *Hooper v Fynmores* [2001] W.T.L.R. 1019 (QB); *Martin v Triggs Turner Bartons* [2009] EWHC 1920 (Ch) (QB); *Sebry v Companies House* [2015] B.C.C. 236 (QB).

would be additional bunker in Durban or Cape Town.⁵³ As such, it is incontrovertible that the Respondent intends that the Claimant would rely on its statement in order to fulfil the Claimant's initial request.

ii. *There is A Relevant Degree of Proximity between the Claimant and the Respondent*

27. In determining the degree of proximity, it is useful to consider whether there has been a voluntary assumption of responsibility, or whether there is a relationship equivalent to a contract.⁵⁴ Further, when a person is being asked for an advice, he has three options: (1) not to give advice, (2) give advice with a warning not to be relied upon, (3) give advice without such warning.⁵⁵ By choosing the last option, he will be considered to have voluntarily assumed responsibility.⁵⁶

28. In the present case, regardless of the contractual duty between the Parties, there is a duty of care that arises from the voluntary assumption of responsibility by the Respondent. That is because when giving the advice inquired by the Claimant regarding the details of the additional bunker supply, it didn't give any warning not to rely on its statement. Therefore, by taking responsibility of its statement beyond the contractual relationship, there is sufficient degree of proximity between the Respondent and the Claimant in tort.

iii. *It is Just and Reasonable in All Circumstances to Impose a Duty of Care on The Part of the Respondent.*

29. In the case of negligent misstatement, it is just and reasonable to impose duty of care as the inquirer reasonably trusted the representor to exercise such a degree of care when giving

⁵³ Moot Problem, p. 26.

⁵⁴ *Al Saudi Banque v Clark Pixley* [1989] 3 All ER 36 (QB); *Bezant v Rausing* [2007] EWHC 1118 (Ch) (QB).

⁵⁵ *Hedley Byrne v Heller* [1964] A.C. 465 (HL); *White v Jones* [1995] 2 A.C. 207 (HL); *National Westminster Bank Plc v Utrecht-America Finance Co* [2001] C.L.C. 442 (QB); *Sebry v Companies House* [2015] B.C.C. 236 (QB).

⁵⁶ *Hedley Byrne v Heller* [1964] A.C. 465 (HL); *Morgan Crucible Co Plc v Hill Samuel Bank Ltd* [1991] Ch. 295; *White v Jones* [1995] 2 A.C. 207 (HL); *Sebry v Companies House* [2015] B.C.C. 236 (QB).

inquirer the answer to his inquiry.⁵⁷ Further, the existence of foreseeability of his reliance and sufficient degree of proximity between the representor and the inquirer supports the fulfillment of this element.⁵⁸ In this instance, by proving that the reliance on the Claimant's part is foreseeable⁵⁹ and the sufficient degree of proximity between the Parties exists,⁶⁰ it would be just and reasonable to impose the duty of care for the Respondent when making its statement regarding the additional bunker supply to the Claimant.

30. Although duty of care exists in the present case, the Respondent did not fulfill such very duty. When the Claimant protested that the bunker did not satisfy the requested amount and asked for additional bunker, a duty of care arose as the Respondent made its statement that it will provide alternative bunker supply in Durban or Cape Town, and in Luanda.

31. When the *Western Dawn* was approaching Durban, the Master had informed the Respondent regarding the location of the *Western Dawn*. However, there was no response or any further attempt to follow-up the information from the Respondent. Since the Respondent's statements did not reflect what it was actually apparent, therefore it can be concluded that the Respondent have been negligent in making its statement.

32. Failing to exercise due care, the Respondent can be held liable for any loss with respect to its negligent misstatement regarding the bunker supply to the Claimant.

C. The Respondent Shall Be Responsible for the Action of Its Agent

33. Following the failed bunkering in Durban or Cape Town, the Respondent stated that the additional bunker will be available upon arrival in STS Area 1 through Respondent's agent.⁶¹ In cases of negligent misstatement, the principal shall be held liable for the false

⁵⁷*Hedley Byrne v Heller* [1964] A.C. 465 (HL); *Henderson v Merrett Syndicates Ltd (No.1)* [1995] 2 A.C. 145 (HL); *Bowden v Lancashire CC* [2001] B.L.G.R. 409; *Everett v Comojo (UK)* [2011] EWCA Civ 13 (CA).

⁵⁸*Caparo Industries v Dickman* [1990] 2 A.C. 605; *Temseel Holdings Ltd v Beaumonts Chartered Accountants* [2002] EWHC 2642 (Comm) (QB); *Everett v Comojo (UK)* [2011] EWCA Civ 13 (CA); *Harrison v Technical Sign Co Ltd* [2013] EWCA Civ 1569 (CA).

⁵⁹ See *supra* I.B.i.

⁶⁰ See *supra* I.B.ii.

⁶¹ Moot Problem, p. 26.

statement of their agent.⁶²

34. The Claimant submits that ASA2 is the agent of the Respondent. Under English law, principle-agency relationship may be established by virtue of apparent authority,⁶³ i.e. where the parties have no relationship but one of them represents the other as agent and a third party relies upon the representation.⁶⁴
35. In the present case, ASA2 represented the Respondent as its STS coordinator,⁶⁵ and the Claimant reasonably relied upon the representation as the Respondent told the Master to continue to liaise with its STS coordinator.⁶⁶ There has been a strong indication that the Respondent was indeed aware that the Master is in contact with ASA2. As a result of the reliance, the Master followed ASA2's direction to what was supposed to be STS Area 1.
36. ASA2 made a statement to the Master that the bunker will be available in STS Area 1 through M/V Antelope.⁶⁷ However, when the Western Dawn arrived at the designated STS Area 1 location, there was no sign of STS bunkering support being prepared.⁶⁸ This action of ASA2 amounts to negligent misstatement. As the agency relationship is established in the present case, the Respondent shall be liable for its agent's act.

D. The Improper Bunkering and Negligent Misstatement Caused Loss and Damage to the Western Dawn

37. Proximate cause needs to be discovered in order to determine the effective cause of the

⁶²*Armagas Ltd v. Mundogas S.A.* [1986] AC 717 (HL); *So v HSBC Bank Plc* [2009] EWCA Civ 296 (CA); *Playboy Club London Ltd v Banca Nazionale Del Lavoro SpA* [2014] EWHC 2613 (QB).

⁶³*Freeman v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QBD 640 (CA); *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QBD 549 (CA); *Magical Marking Ltd v Holly* [2009] ECC 10 (QB); *Rimpacific Navigation Inc v Daehan Shipbuilding Co Ltd* [2009] EWHC 2941 (Comm) (QB); *Accidia Foundation v Simon C Dickinson Ltd* [2010] EWHC 3058 (Ch) (QB); *Smith v Butler* [2012] EWCA Civ 314 (CA); *New Falmouth Resorts Ltd v International Hotels Jamaica Ltd* [2013] UKPC 11 (CA).

⁶⁴*Rama Corp Ltd v. Proved Tin & General Inv Ltd* [1952] 2 QB 147 (QB); *Hammersmith and West London College v Customs and Excise Commissioners* [2002] BVC 2102 (QB); *Hill Street Services Co Ltd v National Westminster Bank Plc* [2007] EWHC 2379 (QB).

⁶⁵ Moot Problem, p. 35.

⁶⁶ Moot Problem, p. 40.

⁶⁷ Moot Problem, p. 35.

⁶⁸ Moot Problem, p. 40.

resulting damage,⁶⁹ and considered when there are situations where two or more causes are closely matched to the resulting damage.⁷⁰ The Claimant submits that the two effective causes resulting the damage to the Western Dawn can be determined by proximate cause. The two causes are the Respondent's action in providing improper bunkering and tort of negligent misstatement committed by the Respondent and its agent.

38. In *Leyland Shipping v Norwich Union*,⁷¹ proximate cause would be an event causing the injury and has an actively continuing source of danger which actually contributed in part to the loss, which means that the chain of causation from the event to the loss was unbroken.⁷²
39. In the present case, the proximate cause would be the improper bunkering and the negligent misstatement. Had the bunker been provided properly and ASA2 did not give false statement, the Western Dawn would not have to be idle in STS Area 1 waiting for M/V Antelope to get the additional bunker. Due to the Western Dawn remained idle in pirate prone area,⁷³ it was subsequently hijacked by pirates that resulted into significant Damage to the Western Dawn.⁷⁴
40. Therefore, since the Respondent's breach of the Charterparty and negligent misstatement are the proximate causes of the Damage to the Western Dawn, the Respondent shall be liable for any loss arising out of such Damage.

⁶⁹ *Leyland Shipping Co. Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 (CA); *Monarch Steamship v A/B Karlshamns Oljefabriker* [1949] AC 196 (HL); *Mirant Asia Pacific Construction (Hong Kong) Ltd v Ove Arup & Partners International Ltd* [2007] EWHC 918 (TCC) (QB); *City Inn Ltd v Shepherd Construction Ltd* [2010] CSIH 68 (SC); *ENE 1 Kos Ltd v Petroleo Brasileiro SA Petrobas (The Kos)* [2013] 1 C.L.C. 1 (SC).

⁷⁰ *Reischer v Borwick* [1894] 2 QB 548 (SC); See also, *Wayne Tank and Pump Co. Ltd v Employers Liability Assurance Corp Limited* [1974] QB 57 (CA); *Harbutts "Plasticine" Ltd v Wayne Tank and Pump Co. Ltd* [1970] 1 QB 447; *ENE 1 Kos Ltd v Petroleo Brasileiro SA Petrobas (The Kos)* [2013] 1 C.L.C. 1 (SC).

⁷¹ [1918] AC 350; *Monarch Steamship v A/B Karlshamns Oljefabriker* [1949] AC 196 (HL); *Brownsville Holdings Ltd v Adamjee Insurance Co. Ltd (The Milasan)* [2000] 2 Ll Rep 458 (QB); *ENE 1 Kos Ltd v Petroleo Brasileiro SA Petrobas (The Kos)* [2013] UKSC 17 (SC).

⁷² *Leyland v Norwich* (n. 71) ¶ 357.

⁷³ Moot Problem, p. 35-41.

⁷⁴ Moot Problem, p. 42.

III. THE RESPONDENT IS LIABLE FOR THE PAYMENT OF THE SECOND HIRE PERIOD DUE AND OWED UNDER THE CHARTERPARTY

41. Clauses 8 and 9 of the Charterparty stipulate the obligation of the Respondent to pay hire per calendar month, at the time of the delivery of the Western Dawn to the time of redelivery.⁷⁵ The amount of the hire is \$19,950 per day pro-rated for 3 months +/- 30 days.⁷⁶
42. Pursuant to the above, the hire period starts when the Western Dawn was delivered to the Respondent, which is on 4 June 2014.⁷⁷ The second hire period is due 30 days later, which is on 3 July 2014. The Respondent has complied with the aforementioned Clauses by paying the first hire period on 4 June 2014.⁷⁸ However, the Respondent did not pay the second hire period that was due on 3 July 2014.⁷⁹ By this virtue the Respondent is liable to the Claimant for the outstanding payment of the second hire period.
43. Despite any submission to the contrary made by the Respondent,⁸⁰ the Claimant submits that the Respondent shall remain liable for the second hire period as (A) the Western Dawn cannot be regarded as off-hire due to its seizure by pirates and (B) the Charterparty was never frustrated.

A. The Western Dawn Cannot be Considered as Off-hire Due to Its Seizure by Pirates

44. The Respondent argued in its preliminary submission that the Western Dawn was considered as off-hire due to breach of order and/or neglect of duty in the Master's part.⁸¹ However, the Western Dawn cannot be considered as off-hire since (i) the Western Dawn remains on-hire during the attack by pirates, (ii) there is no breach of order and/or neglect of

⁷⁵ Clause 8 & 9, Shelltime.

⁷⁶ Moot Problem, p. 5.

⁷⁷ Moot Problem, p. 29.

⁷⁸ *Ibid.*

⁷⁹ Moot Problem, p. 39.

⁸⁰ Moot Problem, p. 68.

⁸¹ Moot Problem, p. 41 & 68.

duty in the Master's part. Further, (iii) the Respondent is not entitled to claim the Western Dawn as off-hire.

i. The Western Dawn Shall Remain On-hire During the Pirate Attack

45. Under the BIMCO Piracy Clause for Time Charter Parties 2013 of the Respondent's Rider Clauses incorporated by way of reference in the Fixture Recap, it is stated that "*if the Western Dawn is attacked by pirates, any time lost shall be for the account of the Charterers, and the Western Dawn shall remain on-hire*".⁸² Therefore, the terms which the Respondent provided do not consider the event of any seizure by pirates to become an off-hire event. Consequently, the Western Dawn shall remain on-hire since the date of its seizure.

ii. There is No Breach of Order and/or Neglect of Duty on the Master's Part

46. Contrary to the Respondent's preliminary submissions,⁸³ the Claimant submits that there has been no breach of order and/or neglect of duty on the Master's part. In the present case, regardless the Respondent's order to contact its agent at the discharge port,⁸⁴ it has been established above that ASA2 acted on behalf of the Respondent.⁸⁵ Thus, it can be concluded that the Master did not neglect his duty and breach the Respondent's order.

47. Without prejudice to the foregoing, the Claimant is entitled to rely with the statements of ASA2 and by doing so there is no breach of order. It is decided under *The Houda*⁸⁶ that lawful orders have to be obeyed, unless to do so would imperil the safety of the ship, crew, or cargo considering the surrounding circumstances. In the present case, although the Master continuously forwarded its correspondences with the Respondent to ASA since the

⁸² Moot Problem, p. 12.

⁸³ Moot Problem, p. 68.

⁸⁴ Moot Problem, p. 15.

⁸⁵ See *supra*, II. C.

⁸⁶ *Kuwait Petroleum Corp v I & D Oil Carriers Ltd (The Houda)* [1994] CLC 1037 ¶ 1051 (CA); *East West Corp v DKBS 1912* [2002] 1 C.L.C. 797 (CA); *Standard Chartered Bank v Dorchester LNG (2) Ltd* [2013] 1 CLC 797 (CA).

Western Dawn was anchored in Singapore,⁸⁷ he received no response. Therefore, when ASA2 contacted him it was reasonable for the Master to engage with ASA2 due to the circumstances that the Western Dawn was traversing in a pirate prone area. Not doing so, would imperil the safety of the Western Dawn as it would linger around a pirate prone area with insufficient amount of bunker. It can be concluded that the Master's action in contacting ASA2 does not constitute as breach of order.

iii. In any event, the Respondent is Not Entitled to Claim the Western Dawn as Off-hire

48. Pursuant to the case of *Board of Trade v Temperley Steam Shipping*,⁸⁸ the Court of Appeal held that if the Charterer's breach of an express or implied term of the contract had caused the loss of time, they cannot rely on the off-hire clause in declaring off-hire.

49. Parallel to the above, the seizure of the Western Dawn by the pirates in offshore Luanda was caused by the Respondent's breach of its obligation to provide proper bunkering⁸⁹ and commission of negligent misstatement.⁹⁰ As the event resulted from the Respondent's breach of obligation of Clause 7 of the Charterparty, as well as its negligent misstatement, the Respondent is not entitled to claim Western Dawn as off-hire.

B. The Charterparty was Never Frustrated

50. The Respondent alleged that the Charterparty was frustrated,⁹¹ which in turn, releases the Respondent of paying hire. A contract is frustrated when it is incapable of being performed without default of each party due to supervening event that renders the contract to be radically different,⁹² which is the cessation or non-existence of an express condition or state

⁸⁷ Moot Problem, p. 29-34.

⁸⁸ [1927] 27 Ll.L.Rep. 230 (CA); *Leolga Compania de Navigacion v Glynn (John) & Son* [1953] 1 WLR 846 (QB); *AB Marintrans v Comet Shipping Co Ltd (The Shinjitsu Maru No.5)* [1985] 1 W.L.R. 1270 (QB).

⁸⁹ See *supra*, II. A.

⁹⁰ See *supra*, II. B.

⁹¹ Moot Problem, p. 68.

⁹² *Davis Contractors v Fareham Urban District Council* [1956] UKHL 3 (HL); *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No.2)* [1982] A.C 724 (HL); *Ocean Tramp Tankers Corp v V/O Sovfracht (The*

of things, going to the root of the contract, and essential to its performance.⁹³

51. In the present case, the foundation of the contract is the delivery of the Cargo by the Claimant. The Respondent may argue that the Charterparty can no longer be performed due to the partial loss of the Cargo. However, the Claimant contends that the partial loss of the Cargo does not amount to cessation or non-existence of the basis to perform the contract, since there is still a substantial amount of Cargo on board of Western Dawn that needs to be delivered under the terms of Charterparty.⁹⁴

RESPONSE TO COUNTER CLAIMS

IV. THE CLAIMANT IS NOT LIABLE FOR ANY THIRD PARTY CLAIMS ARISING FROM THE LOSS OF THE CARGO

52. The Claimant is not liable for any third party claims arising from the loss of the Cargo, since (A) the Claimant has fulfilled its duty to provide a seaworthy vessel and (B) the Claimant did not breach its obligation as sub-bailee of the Cargo.

A. The Claimant has Fulfilled Its Duty to Provide a Seaworthy Vessel

53. A vessel can be considered as seaworthy if it is reasonably fit and suitably equipped to meet ordinary perils of the sea.⁹⁵ The Claimant submits that the Western Dawn is seaworthy since (i) it has been sufficiently equipped for the voyage and (ii) there is no proof that the Master and the crew have been incompetent.

i. The Western Dawn was Sufficiently Equipped for the Voyage

54. Contrary to the Respondent's submission that the Claimant has failed to take preventive

Euginia [1964] 2 Q.B 226 (CA); *CTI Group Inc v Transclear SA (The Mary Nour)* [2008] EWCA Civ 856 (CA); *Blankley v Central Manchester and Manchester Children's University Hospital NHS Trust* [2014] 1 WLR 2683 (QB).

⁹³ *Krell v Henry* [1903] 2 K.B. 470; *Gamerco SA v ICM/Fair Warning Ltd* [1995] 1 WLR 1226 (QB).

⁹⁴ Moot Problem, p. 42

⁹⁵ *Kopitoff v Wilson* [1875] 1 Lloyd's Law Report 277 (QB); *Clarke v National Insurance and Guarantee Corp* [1964] 1 QB 199 (CA); *Great China Metal Industries Co. Ltd v Malaysian International Shipping Corp (The Bunga Seroja)* [1999] 1 Ll. Rep. 512 (QB).

measures rendering the Western Dawn to become unseaworthy, the Claimant submits that (a) the Western Dawn has been properly equipped with preventive measures, and (b) the absence of razor wire on board of the Western Dawn is not the cause of the pirate attack.

a. The Western Dawn has been Properly Equipped with Preventive Measures in Accordance with the Standard Practice of the Industry

55. The degree of seaworthiness is measured by the standard of a reasonable shipowner, in accordance with international standards.⁹⁶ In this case, the relevant standard practice is reflected in the IMO Guidance on Piracy and Armed Robbery Against Ships,⁹⁷ which provides the most effective precaution in deterring pirate attack is early detection equipment, i.e. radio.⁹⁸

56. The Western Dawn in the present case is equipped with early detection equipment in form of radio as provided in the INTERTANKO QUESTIONNAIRE.⁹⁹ Furthermore, the Western Dawn is a BV-classed vessel that has been certified with a Safety Equipment Certificate,¹⁰⁰ which can be inferred that it has been equipped with a properly working detection equipment. Hence, it can be concluded that Western Dawn has been at all times seaworthy in terms of equipment.

b. The Absence of Razor Wire on Board of the Western Dawn is not the Cause of the Pirate Attack

57. In the present case, the Respondent submitted that the absence of razor wire renders the

⁹⁶ *Northern Shipping Co. v Deutsche Seereederei (The Kapitan Shkarov)* [2000] 2 Lloyd's Rep 255 (CA); *Fail Oil Co Ltd v Petronas Trading Corp Sdn Bhd (The Devon)* [2004] EWCA Civ 822 (CA); *Parsins Corp v CV Scheepvaartonderneming Happy Ranger* [2006] EWHC 122 (Comm) (QB); *Compania Sud Americana de Vapores SA v Sinochem Tianjin Import & Export Corp (The Aconcagua)* [2009] EWHC 1880 (Comm) (QB).

⁹⁷ IMO Piracy and Armed Robbery Againsts Ships: *Guidance to Shipowners and Ship Operators, Ship Masters and Crews on Preventing and Supressing Acts of Piracy and Armed Robbery Against Ship*, MSC.1/Circ. 1334, 23 June 2009.

⁹⁸ IMO, Piracy and Armed Robbery Againsts Ships: *Guidance to Shipowners and Ship Operators, Ship Masters and Crews on Preventing and Supressing Acts of Piracy and Armed Robbery Against Ships*, 16.

⁹⁹ Moot Problem, p. 49.

¹⁰⁰ *Ibid.*

failure of the Master to comply with the standard of protective measure for piracy¹⁰¹ and therefore shall be liable for the loss of the Cargo.¹⁰² On the contrary, the Claimant contends that the absence of the razor wire shall not be the determining factor to the pirates' capability to board the Western Dawn and cause the loss of the Cargo.

58. In practice, the usage of razor wire as a preventive measure is considered to be inefficient, due to the fact that pirates use grappling hooks to latch into the wire and tear it down.¹⁰³ This signifies the incapability of razor wire to prevent pirates to board the Western Dawn. Had it been deployed, pirate attack would have not been necessarily impeded.

59. Moreover, according to the Guidelines for Protection Against Piracy, razor wire would potentially make it difficult for STS operation and therefore other protection should be considered to protect the ship from pirate's attack.¹⁰⁴ In this case, an STS operation with M/V Antelope in Luanda was supposedly to take place after Western Dawn went passing Durban. In this sense, the Claimant argues that the Master's decision not to obtain razor wire in Durban was reasonable to enable Western Dawn carrying out the STS operation for the sake of bunkering.

60. In conclusion, the absence of razor wire on board of the Western Dawn shall not render the Claimant's failure to comply with standard practice and therefore is not liable for the loss of the Cargo.

ii. *There is No Proof that the Master is Incompetent*

61. Competency of master and/or crew of a vessel may be indicated by the ability to discover the problem that he may face during the course of the voyage and resolve it, such as fire and explosion during rebunkering process that requires the crew to have skill and knowledge in

¹⁰¹ Moot Problem, p. 69.

¹⁰² See *infra* II.a.iii.

¹⁰³ *Canadian Naval Review in Modern Piracy and Current Counter-Measure*, p. 26.

¹⁰⁴ IMO, *Interim Guidelines for Owners, Operators and Masters for Protection Against Piracy in the Gulf of Guinea Region* § 8.

firefighting.¹⁰⁵ To prove otherwise, it requires a disabling want of skill or knowledge,¹⁰⁶ i.e. beyond negligence. In *The Eurasian Dream*,¹⁰⁷ the master and/or crew of the vessel was deemed to be incompetent due to the lack of the master and crew's required skill and knowledge in dealing with particular situation. If it cannot be concluded that the crew has either disabling want of skill or knowledge, it is ruled that one mistake does not render the crew to be incompetent.¹⁰⁸

62. In the present case, in accordance with INTERTANKO QUESTIONNAIRE, both the Master and the crew of Western Dawn have been certified with the ISM Code,¹⁰⁹ the relevant for safety management of the shipping industry.¹¹⁰ Hence, it can be inferred that the Claimant has shown prudence by selecting their crew in due diligence and ensuring that the crew has been adequately trained and had the required knowledge for the voyage.

63. Furthermore, no action of the Master and the crew have shown disabling want of skill or knowledge. In the present case, the Master has the knowledge as to when the Western Dawn is urgently needed to be bunkered. Therefore, when facing the situation where an agent contacted him regarding bunker supply, it would be reasonable for him to follow his instruction. In any event, there is no mistake on the part of the Master as it has been established that there is no breach of order.¹¹¹ The Claimant submits that the Master's action to contact ASA2 cannot be constituted as disabling skill or knowledge, and thus, such action

¹⁰⁵ *Hong Kong Fir v Kawasaki* [1962] 2 QB 26 (CA); *Spar Shipping AS v Grand China Logistics Holding (Group) Co., Ltd* [2015] EWHC 718 (Comm) (QB); *Urban 1 (Blonk Street) Ltd v Ayres* [2014] 1 W.L.R. 756 (CA); *Telford Homes (Creekside) Limited v Ampurius Nu Homes Holdings Limited* [2013] EWCA Civ 577 (CA).

¹⁰⁶ *Papera Traders Co & Ors v Hyundai Merchant Marine Co Ltd & Anor (The Eurasian Dream)* [2002] 1 Lloyd's Rep 719 (QB); *JP Klausen & Co. AS v Mediterannian Shipping Co SA* [2013] EWHC 3254 (Comm) (QB).

¹⁰⁷ *The Eurasian Dream* (n. 110).

¹⁰⁸ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [1997] 1 Lloyd's Rep 360 (CA); *Savash v CIS General Insurance Ltd* [2014] EWHC 375 (TCC) (QB); *PT Buana Samudra Pratama v Maritime Mutual Insurance Association (NZ) Ltd* [2011] 2 C.L.C. 722 (QB).

¹⁰⁹ Moot Problem, p. 49.

¹¹⁰ IMO Article on "Safety Management"

<http://www.imo.org/OurWork/HumanElement/SafetyManagement/Pages/Default.aspx>, 14 April 2015.

¹¹¹ See *supra* III. A. i.

does not render the Master to be incompetent.

B. THE CLAIMANT DOES NOT BREACH HIS OBLIGATION AS BAILEE

64. The Respondent contends that the Claimant breached its obligation as bailee due to the loss of 28,190 MT of gasoil.¹¹² However, the Claimant argues that (i) the Respondent is not entitled to claim the loss of Cargo to the Claimant and (ii) the Claimant has exercised due care and skill in relation to the Cargo.

i. The Respondent is not Entitled to Claim the Loss of Cargo to the Claimant

65. The Claimant argues that the Respondent is not entitled to lodge claims against the Claimant regarding the loss of Cargo. The Respondent is recognised under the Bills of Lading as the consignee, who has the title to sue in accordance with Section 5(2)(a) of the Carriage of Goods by Sea Act (UK) 1992.¹¹³ However, the transfer of right from one lawful holder of bills of lading to another will deprive such right unless the documents have been reindorsed back to him.¹¹⁴ If the bills of lading were never reindorsed back to the consignee, it cannot be used as the basis to claim for the loss of the Cargo.¹¹⁵

66. In the present case, the Respondent was recognised as the consignee under the bills of lading.¹¹⁶ However, the bills of lading have been transferred to an unknown party and no further endorsement has ever occurred.¹¹⁷ Hence, applying the above mentioned principle, the fact that the bills of lading have never been reindorsed back to the Respondent, it can be concluded that the Respondent does not have the title to sue for the loss of Cargo.

ii. The Claimant Has Exercised Due Care and Skill in Relation to the Cargo

67. In the event where the tribunal finds that the Respondent is entitled to claim the damages, the Claimant must prove that the Cargo was lost without his breach of obligation or

¹¹² Moot Problem, p. 70.

¹¹³ Carriage of Goods by Sea Act (UK) 1992 § 5(2).

¹¹⁴ John F. Wilson, *Carriage of Goods by Sea* (7th ed. Pearson, London 2010) 138 § 2(5); See also *East West Corp v DKBS* [2003] 1 Lloyd's Rep. 239 (CA).

¹¹⁵ *East West Corp v DKBS* (n. 114).

¹¹⁶ Moot Problem, p. 43-44.

¹¹⁷ Procedural Order No.2.

negligence on the Claimant's part.¹¹⁸

68. Acting in due diligence amounts to exercise of reasonable care and skill,¹¹⁹ i.e. there are no lack of skill, lack of knowledge, or negligence on the Master and the crew's part¹²⁰ and for the vessel, this is applicable where it is sufficiently equipped for the ordinary incidents of the voyage.¹²¹ As it has been established above, the Western Dawn has been sufficiently equipped for the voyage¹²² and there were no disabling want of skill and knowledge, and negligence on the Master and the crew's part.¹²³ Therefore, it can be concluded that the Claimant has acted in due diligence as bailee of the Cargo.

INTEREST AND COST OF PROCEEDINGS

V. THE CLAIMANT IS ENTITLED FOR COMPOUND INTEREST

69. In accordance with the Section 49 of the Arbitration Act 1996 (UK), the arbitral tribunal has the power to award simple or compound interest unless otherwise agreed by the parties.¹²⁴ The Claimant submits that it is entitled for (A) the compound interest of the damages to the Western Dawn and (B) the payment of the second hire period owed by the Respondent.

A. The Claimant is entitled for the Compound Interest of the Damage to the Western Dawn

70. The Claimant submits that it is entitled to interest on the amount awarded on the damages.

¹¹⁸ *Levison and another v Patent Steam Carpet Cleaning Co Ltd* [1977] 3 All ER 498 ¶ 505 (CA); *Euro Cellular (Distribution) Plc v Danzas Limited t/a Danzas Aei Intercontinental, Danzas Aei (UK) Limited t/a Danzas Aei Intercontinental* [2003] EWHC 3161 (Comm) (QB).

¹¹⁹ *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)*, [2002] All ER (D) 101 ¶ 130 (QB); *JP Klausen v Mediterannian Shipping Co SA* [2013] EWHC 3254 (Comm) (QB).

¹²⁰ *The Amstelslot* [1963] 2 Lloyd's Rep. 223 ¶ 235; *Demand Shipping Co Ltd v Ministry of Food, Government of Bangladesh & Anor. (The Lendoudis Evangelos II)* [2001] C.L.C. 1598; *Papera Traders Co. Limited & Others v Hyundai Merchant Marine Co. Limited, The Keihin Co. Limited (Eurasian Dream)* [2002] EWHC 118 (Comm) (QB); *JP Klausen v Mediterannian Shipping Co SA* [2013] EWHC 3254 (Comm) (QB).

¹²¹ *The Kapitan Sakharov* [2000] 2 Lloyd's Rep. 255 ¶ 266 (CA); *Fail Oil Co Ltd v Petronas Trading Corp Sdn Bhd (The Devon)* [2004] EWCA Civ 822 2 C.L.C. 1062 (CA); *Parsins Corp v CV Scheepvaartonderneming Happy Ranger* [2006] EWHC 122 (Comm) (QB); *Compania Sud Americana de Vapores v Sinochem Tianjin Import & Export Corp (The Aconagua)* [2009] EWHC 1880 (Comm) (QB).

¹²² See *supra* IV. A. i.

¹²³ See *supra* IV. A. ii.

¹²⁴ Arbitration Act 1996 (UK) § 49.

Based on *Man Nutzfahrzeuge AG v Freightliner Ltd*,¹²⁵ it is stated that the award may be on the whole or part of any amount awarded by the tribunal in respect of any period up to the award. If simple interest does not adequately compensate the injured party, or reflect the benefits obtained by the wrongdoer,¹²⁶ arbitrators commonly award compound interest.¹²⁷ The Claimant therefore submits that compound interest should be paid on the damages in order to compensate the Claimant for the amount of money resulted from the damage of the Western Dawn's equipments.

B. The Claimant is Entitled for Compound Interest of Second Hire Payment Owed by the Respondent

71. In *Sempra Metals v Inland Revenue Commissioners*,¹²⁸ it is decided that compound interest includes the loss of the late payment of a debt. Analogous to the present case and since there is no agreement between the Parties on compound interest, therefore the Claimant is entitled for the compound interest to be paid in respect to the hire payment due and owed by the Respondent.

C. The Respondent is Liable for the Cost of Proceeding

72. The Claimant submits that the Respondent is liable for the costs of this proceeding incurred as a natural consequences of the breach of contract and negligent misstatement committed by the Respondent.¹²⁹ In accordance with Section 61 of the Arbitration Act 1996 (UK), the costs of arbitration may be awarded by the Tribunal has the authority to include costs of

¹²⁵ [2005] EWHC 2347(Comm) ¶ 321 (QB); *Barclays Bank Plc v Grant Thornton UK LLP* [2015] EWHC 320 (Comm) (QB); *Hut Group Ltd v Nobahar-Cookson* [2014] EWHC 3842 (QB); *Same v Mortgage UK Financial Services Ltd and others* [2012] Bus. L.R. 203 (QB).

¹²⁶ *Man Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm) ¶ 321 (QB); *Barclays Bank Plc v Grant Thornton UK LLP* [2015] EWHC 320 (Comm) (QB); *Hut Group Ltd v Nobahar-Cookson* [2014] EWHC 3842 (QB); *Same v Mortgage UK Financial Services Ltd and others* [2012] Bus. L.R. 203 (QB).

¹²⁷ *Man Nutzfahrzeuge AG v Freightliner Ltd* (n. 124).

¹²⁸ [2007] UKHL 34 (HL); *FJ Chalke Ltd v Revenue and Customs Commissioners* [2009] EWHC 952 (Ch) (QB); *John Wilkins(Motor Engineers) Ltd v Revenue and Custom Commissioners* [2010] EWCA Civ 923 (CA); *Littlewoods Retail Ltd v Revenue and Customs Commissioners* [2010] EWHC 1071 (Ch) (QB).

¹²⁹ Moot Problem, p. 63-65; See also *Hadley v Baxendale* [1854] EWHC Exch J70 (CA); *Euro Pools Plc v Clydeside Steel Fabrications Ltd* [2003] S.L.T. 411; *Douglas v Stuart Wyse Ogilvie Estates Ltd* [2001] S.L.T. 689; *Jackson v Royal Bank of Scotland* [2005] UKHL 3 (HL); *Transfield Shipping Inc. v Mercator Shipping Inc.(The Achilleas)* [2008] Bus. L. R. 1395 (HL).

Arbitration in its award in the absence of agreement between both parties.¹³⁰ Consequently, due to the non-existence of such agreement, the Respondent is liable for the costs of proceeding due to its breach of obligation and negligent misstatement committed against the Claimant.

PRAYER FOR RELIEF

For the reasons submitted above, the Respondent requests this Tribunal to:

DECLARE that this Tribunal has jurisdiction to hear this Dispute;

Further,

ADJUDGE that the Respondent is liable for the Damage to the Western Dawn, since the Respondent has committed:

- a. breach of obligation in commencing proper bunkering; and
- b. tort of negligent misstatement;

ADJUDGE that the Respondent is liable for the payment of the second hire period to the Claimant, and:

- a. the Western Dawn cannot be treated as off-hire; and
- b. the Charterparty was never frustrated;

ADJUDGE that the Claimant is not liable for any third party claims arising from the loss of Cargo.

And therefore,

AWARD damages and interest to the Claimant as claimed.

¹³⁰ Arbitration Act 1996 (UK) § 61.