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THE SIXTH NATIONAL LAW UNIVERSITY ODISHA – BOSE & MITRA & CO.

INTERNATIONAL MARITIME ARBITRATION MOOT, 2019

IN THE MATTER OF ARBITRATION TO BE

ADJUDICATED BY THIS ARBITRAL TRIBUNAL BETWEEN:

CITY SHIPPING COMPANY LIMITED………………………………….CLAIMANT

AND

UNITED MARITIME LOGISTICS PTE LTD …………………………..RESPONDENT

(MT INDIA)

MEMORIAL FOR RESPONDENT

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TABLE OF ABBREVIATIONS

ABBREVIATION	FULL FORM
&	And
B/L	Bill of Lading
C/P	Charter Party
cl	Clause
Corp	Corporation
HVR	Hague Visby Rules
IMAM	International Maritime Arbitration Moot
KB	King's Bench
LOP	Letter of Protest
LR	Law Reporter
Ltd.	Limited
MT	Metric Tonne
NOP	Notice of Protest
NOR	Notice of Readiness
Ors	Others
QB	Queen's Bench
Rep	Report
W.r.t.	With respect to

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STATEMENT OF JURISDICTION

The parties, City Shipping Company Limited and United Maritime Logistics Pte Limited have agreed to submit the present dispute to the arbitral tribunal pursuant to Clause 49 of the C/P dated 9 December 2018 read with Arbitration and Conciliation Act, 1996.

The parties agree to accept the decision of the arbitral tribunal as final and binding.

STATEMENT OF FACTS

[1] The Parties.

City Shipping Company Limited ["Owners"/"Carrier"] is the owner of the vessel MT INDIA. United Maritime Logistics Pte Ltd. ["Charterers"/"Shipper"] chartered the vessel as per the C/P contract.

[2] The Charter Party Agreement.

City Shipping Company Limited and United Maritime Logistics Pte Ltd. signed a Voyage Charter Party Agreement on 9 December 2018, wherein it was decided that 45,000 MT of Bach Ho Oil would be transported on the *MT INDIA*.

[3] The Notice of Readiness tendered on 10 December 2018 and the laytime calculation.

The Master on behalf of the owners tendered the NOR on 10 December 2018. Letter of Protest was also issued along with the same as free pratique could not have been procured. There lies a dispute as to calculation of laytime, Charterers alleging that the NOR was tendered without free pratique and thus, laytime be calculated from 11 December 2018 which was calculated from 10 December 2018 by the owners.

[4] Voyage instructions regarding cargo heating.

Charterers, on 13 December 2018, conveyed to the masters that the cargo was loaded with the pour point of 34 degree Celsius. On 25 December 2018, Charterers requested the master to maintain the cargo temperature over and above 55 degree Celsius to avoid solidification of the cargo, due to change in weather conditions. Owners claimed that cargo heating was not undertaken because of Charterer's failure to provide the instructions within the given time frame. On 15 January 2019 the Charterers came to know about the shortage of 157.50 MT of cargo due to solidification. They claimed damages for the same.

[5] Laytime calculation dispute at the second port.

On 6 January 2019, the Master provided the Notice of Arrival and the vessel was ordered to wait at the anchorage. The owners calculated the laytime from 6 January 2019 on the pretext that it was Charterers' fault of not providing the berth timely. Charterers on the other hand claim that the laytime should be calculated from 13 January 2019 when the actual NOR was tendered.

[6] Presentation of claim and documentation.

The Owners presented their laytime and demurrage claim on 10 March 2019, to which the Charterers questioned their calculation on the above stated reasons. The Charterers also

alleged that the Owners' inability to submit the pumping log within 60 days forfeit their entire claim.

[7] The invocation of Arbitration.

The Claimants invoked the arbitration under cl 49 of the C/P agreement. The Notice of Arbitration dated 19 March 2019 referred the dispute of non-payment of the demurrage claim. The Respondents rejected all the claims and made their counter-claim regarding cargo damage. Now, this matter lies before this arbitral tribunal for adjudication.

ISSUES RAISED

1. WHETHER THE ARBITRAL TRIBUNAL HAS JURISDICTION?
2. WHETHER UNITED MARITIME LOGISTICS PTE LTD ARE LIABLE TO CITY SHIPPING COMPANY LIMITED FOR DUES UNDER THE CHARTERPARTY?
3. WHETHER CITY SHIPPING COMPANY IS LIABLE TO UNITED MARITIME LOGISTICS PTE LTD FOR THEIR CLAIM? IF SO, TO WHAT EXTENT?
4. COSTS?

SUMMARY OF ARGUMENTS

[1] <u>THAT THE TRIBUNAL HAS THE JURISDICTION TO ADJUDICATE THE COUNTERCLAIMS.</u>

(A) It is humbly submitted that both being reasonable commercial parties must have intended to settle their disputes at one forum. Moreover, the acceptance of other disputes between the parties, invocation of arbitration under general cl 49 and no objection to the arbitrability of the counterclaim initially indicate towards the scope of the agreement to cover the counterclaim as well. Furthermore, the nature of the counterclaim makes it a transactional set-off and it would be absurd to infer that the rational parties would have intended to adjudicate them in separate forums. Also, following the practice of liberal interpretation of the arbitration agreement, the counsel argues that the cl 49.1 providing for arbitrability of all disputes should be considered as the source of power for the tribunal. Thus, the tribunal has the jurisdiction to adjudicate the counterclaim.

[2] <u>THAT THE UNITED MARITIME LOGISTICS PTE LTD ARE NOT LIABLE TO CITY SHIPPING COMPANY LIMITED FOR DUES UNDER THE CHARTERPARTY.</u>

(A) It is submitted that the laytime should be calculated from the time, loading of the cargo commenced because the Letter of Protest was issued along with the NOR, thereby, indicating the firm belief of the Owners that they will not be able to arrange free pratique within time. Not only this, absence of free pratique also indicates that the Owners were not ready legally. Moreover, the Charterers reserved their right to object upon the invalid NOR, as disclosing the same would result in tendering of the fresh NOR by the Owners, to protect their position.

(B) According to the provisions of the contract, the laytime was to commence after six hours of tendering a valid NOR. At the second port, NOR was not even given by the master at the first place. Only Notice of Arrival was given. Thus, according to the provisions, laytime cannot commence before NOR is issued.

(C) The Owners waived their right to demurrage claim under cl 20 due to their failure to submit the pumping log for discharge port 2. The clause created no duty on the Charterers to inform about the same in stipulated time. Furthermore, the language and nature of the clause qualifies for strict and literal interpretation creating an obligation to fulfill the requirements even if futile or irrelevant. Also, the continuous nature of demurrage calculation and the

intention of the parties reflecting through words like 'All Liability' and 'All and Any' enables the charterers to time bar the claim in its entirety.

[3] <u>THAT THE CITY SHIPPING COMPANY LINITED IS LIABLE TO UNITED MARITIME LOGISTICS PTE LTD FOR THEIR CLAIMS</u>

(A) It is humbly submitted that the Owners failed to follow the voyage orders which specifically provided for heating of the cargo. Pour point of the oil was also shared in furtherance of the same. General reasoning, reports of major industry players and news report indicate the standard industry practice to heat the cargo at least 10-12 degree Celsius above the pour point.

(B) Claimants failed to take reasonable care of the cargo breaching their obligations under the common law principle of bailment.

(C) The Owners breached their duty under the HVR. The undisputed fact that the cargo solidified during the voyage creates a rebuttable presumption of liability on the Owners. Furthermore, the Owners failed to establish a sound system to take care of the cargo on the lines of the carriage required by the Charterers. Failure to take a rational businessman or seafaring man like care signifies the negligence of the owners. This negligence of the Owners precludes them to rely on the exceptions provided under Article 1V of the HVR as the same cannot be used to lessen their burden of care. Moreover, the specific requirement of the voyage and the ability to protect the cargo through appropriate heating establishes the non-existence of any inherent vice in the cargo. Thus, the owners are liable for the loss.

[4] <u>THAT THE OWNERS ARE LIABLE TO THE FULL EXTENT.</u>

(A) Applying the common-sense approach to the principle of causation establishes the fact that non-heating of the cargo on voyage to a cold weather country above its Cloud point is the proximate cause for solidification. Even if the master's negligence is in concurrence with any other excepted peril cause, he will be liable to the full and his negligence will be the proximate cause.

[5] <u>THAT THE RESPONDENTS CLAIM THE COST OF ARBITRATION.</u>

(A) The rule, 'costs follow the event', should be applied. Also, the Claimants' ignorance to provision of amicable resolution of the dispute increases the burden of cost on the them.

ARGUMENTS ADVANCED

[1] THAT THE TRIBUNAL HAS THE JURISDICTION TO ADJUDICATE THE COUNTER-CALIMS

¶1. It is humbly submitted that the Charterers referred their counter-claim, for cargo damage due to the Master's inability to follow the voyage orders, to the arbitral tribunal. The counsel on behalf of the RESPONDENTS submit that the present tribunal has the jurisdiction to adjudicate on the above matter as the same is within the scope of arbitration agreement under which the present arbitration proceeding is invoked. This is because parties intended to have all disputes resolved through arbitration**[A]** and that the counter-claim is in the nature of set-off, to be adjudicated by the same tribunal**[B]** and that the arbitration agreement should be interpreted following literal interpretation**[C].**

[A] PARTIES INTENDED TO SETTLE ALL DISPUTES THROUGH ARBITRATION

¶2. The parties intended to resolve all their disputes through the same tribunal because there is a presumption of one-stop arbitration(**a**) and that the conduct of the parties indicated towards their intention to refer all disputes to the same arbitration tribunal(**b**).

(a) There is a presumption of one-stop arbitration.

¶3. Prudent commercial parties intend that all disputes arising between them should be decided at one place.[1] This reduces the cost and complexity of the dispute resolution process, which is an essential driving force behind incorporating arbitration clause as a dispute resolution mechanism in commercial contracts.[2] Requiring parties to arbitrate claims in different tribunals would force them to commence multiple proceedings at considerable expense, which is not desirable commercially.[3] In the instant case, both being commercial parties, having past commercial relationship, their intention is presumed to resolve the disputes efficiently.

¶4. Impractical and inconvenient processes as well as procedures, are not the purpose of arbitration agreement.[4] The tribunal should avoid a construction that is inconsistent with the purpose of arbitration.[5] In the present case, different forums for related disputes would have been inefficient and inconvenient for both the parties.

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[1] Fiona Trust & Holding Corporation v. Privalov, [2007] Bus. LR 1719.
[2] Patersons Securities Ltd. v. Financial Ombudsman Service Ltd., (2015) 108 ACSR 483.
[3] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1326 (2d ed. Wolters Kluwer 2001).
[4] Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 648.
[5] Pacific Carriers Ltd. v. B.N.P. Paribas, (2004) 218 CLR 451.

¶5. The intention of the parties to enter into arbitration can be presumed by the terms of the agreement.[6] 'Privacy and confidentiality' clause provided in the terms of C/P indicates that the parties intended to arbitrate their disputes.[7] Arbitration facilitates the commercial parties to protect their secrets. Therefore, cl 49 should be interpreted with the presumption of one-stop arbitration.

(b) Conduct of the parties indicate towards their intention to refer all disputes to the same arbitration tribunal.

¶6. Conduct of the parties, including the correspondences exchanged between them, indicates their mutual intention to invoke arbitration in the same tribunal.[8] It is, therefore, reasonable to use the same for determining the scope of the arbitration agreement.[9] CLAIMANTS, in the Notice of Arbitration, used the phrase '*including but not limited to*' before specifying the dispute.[10] It indicates a partial and non-restrictive list of disputes between the two parties.[11] Moreover, the notice has been invoked in accordance with cl 49 of the C/P. Cl 49 includes both cl 49.1 and cl 49.2 enumerating all the disputes which can be referred to arbitration.

¶7. Taking positive steps towards arbitration, including appointment of arbitrators without raising objections, constitutes an implied arbitration agreement.[12] In absence of any objection, the tribunal should assume the jurisdiction to arbitrate the disputes.[13] In the instant case, the CLAIMANTS raised no objection on the arbitrability of the counter-claim by the same tribunal.[14] This constituted a validly implied arbitration agreement.

[B] THE COUNTER-CLAIM SHOULD BE ADJUDICATED BY THE SAME TRIBUNAL.

¶8. Firstly, the counter-claim must be adjudicated by the same tribunal because the it is in the nature of a transactional set-off(**a**). Moreover, the parties intended to adjudicate the set-off at one forum(**b**). Notwithstanding the intention, the tribunal should assume the jurisdiction for set-off because of the close connection with the claim(**c**).

(a) The counter-claim is a transactional set-off

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6 Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719.
7 IMAM PROPOSITION 15.
8 Mc Dermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181.
9 D.D. Sharma v. Union of India, (2004) 5 SCC 325.
10 IMAM PROPOSITION 11.
11 BLACK'S LAW DICTIONARY (Bryan A. Garner, 8th ed. Thomson Reuters 2004).
12 Westminster Chemicals & Produce Ltd. v. Eichholz and Loeser, [1954] 1 Lloyd's Rep. 99 (QB).
13 CLARE AMBROSE & KAREN MAXWELL, LONDON MARITIME ARBITRATION 346 (3d ed. Informa Law from Routledge 2009).
14 IMAM PROPOSITION 12.

¶9. Transactional set-off is a counter-claim arising out of the same transaction or a closely related one, which operates as complete or partial defeasance of the claim.[15] Where the claim and counter-claim arise of the same contract and transaction, there is sufficient close connection between them, to consider the latter as a transactional set-off.[16]

¶10. In the instant case, the main claim and counter-claim arose from the same C/P and thus, form part of the same transaction.

¶11. It is not necessary that the subject-matter of the cross-claim should actually serve to reduce or diminish the claim itself.[17] Moreover, the availability of transactional set-off is not an exercise of discretion of the tribunal, but a matter of principle.[18] Thus, the counter-claim for cargo damage is in the nature of transactional set-off against the alleged claim of demurrage.[19]

(b)The parties must have had the intention to adjudicate the set-off at one forum.

¶12. It is undesirable to limit the jurisdiction to only one kind of disputes.[20] Hearing counter-claim or set-offs in the same reference ensures efficient and cost effective mechanism and is desired by every prudent commercial party.[21] Therefore, the parties' interest to decide claim and cross-claim simultaneously, outweighs the interest to preserve a different competence for the cross-claim[22].

¶13. For interpretation of agreements, common sense approach is preferred.[23] The tendency has been to consider closely connected claims as available for set-off in arbitration.[24] It would be absurd, in the instant case, to think that the parties framed the arbitration agreement to take away the jurisdiction of contending set-off under the same tribunal.

(c) The tribunal should assume jurisdiction to set-off because the claims are closely connected.

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[15] Glencore Grain Ltd. v. Agros Trading Company, [1999] EWCA (Civ) 1731.
[16] Bim Kemi AB. v. Blackburn Chemicals Ltd., [2001] 2 Lloyd's Rep. 93.
[17] STEPHEN FURST & VIVIAN RAMSEY, KEATING ON CONSTRUCTION CONTRACTS 784 (10th ed. Sweet & Maxwell 2016).
[18] Leon Corp. v. Atlantic Lines & Navigation Co. Inc., [1985] 2 Lloyd's Rep. 470.
[19] Uglands Rederi A/S v. President of India (The Danita), [1976] 2 Lloyd's Rep. 377.
[20] NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 110 (5th ed. Oxford University Press 2009).
[21] DR. P. C. MARKANDA ET AL., LAW RELATING TO ARBITRATION AND CONCILIATION 805 (9th ed. LexisNexis 2016).
[22] Klaus Peter Berger, *Set-Off in International Economic Arbitration*, 15 Arbitration International 1, 53.
[23] Jagatjit Jaiswal v. Karmajit Singh Jaiswal, (2007) SCC OnLine 1519.
[24] Norscot Rig Management Pvt. Ltd. v. Essar Oilfields Services Ltd., [2010] EHWC 195 (Comm).

¶14. It is likely that the arbitration tribunal possesses the jurisdiction to hear transactional set-offs.[25] Disregarding set-off defenses is perceived as miscarriage of justice.[26]

¶15. Arbitral tribunals usually expand the consent of parties to deal with transactional set-offs.[27] Swiss Rules of International Arbitration provides for tribunals to hear the counter-claims even outside the scope of arbitration agreement.[28] Conflicting forum selection clauses, relating to the cross-claim, are not *per se* a bar to set-off.[29] The trend in modern arbitration is to accept a set-off even if it is not covered by the arbitration agreement. 'Attraction of jurisdiction' is the rationale behind such an approach.[30] Therefore, in the instant case, the counter-claim should be adjudicated by the same tribunal.

[C] THE ARBITRATION AGREEMENT SHOULD BE INTERPRETED ON THE PRINCIPLES OF LITERAL INTERPRETATION.

¶16. Arbitration clauses are usually drawn in wide terms. It is to ensure that all disputes that arise out of or in connection with a particular contract, are referred to arbitration.[31] In cases of doubt, the scope must be extended to encompass disputed claims also.[32] Cl 49.1 provides for all disputes to be referred to arbitration in unambiguous terms. The use of 'furthermore' is only indicative of added emphasis.[33]

¶17. Moreover, in commercial contracts, especially charterparties,[34] conflicting clauses like 49.1 and 49.2 may be a result of an inartistic drafting of the terms by the parties. But no party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement.[35] Any doubts concerning the scope of arbitrability of issues should be resolved in the favor of arbitration.[36]

¶18. The tribunal should apply interpretation of contracts, which fairly provides for arbitration.[37] Restricting the jurisdiction of tribunal by interpreting cl 49.1 and 49.2 would

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[25] Aectra Refining v. Exmar B.V., [1994] 1 WLR 1634 (CA).
[26] Alexis Mourre, *The Set-off Paradox in International Arbitration*, 24 Arbitration International 387, 388.
[27] Alexis Mourre, *The Set-off Paradox in International Arbitration*, 24 Arbitration International 387, 388.
[28] The Swiss Rules of International Arbitration, art. 21-5.
[29] Alexis Mourre, *The Set-off Paradox in International Arbitration*, 24 Arbitration International 387, 388.
[30] PASCAL PICHONNAZ & LOUISE GULLIFER, SET-OFF IN ARBITRATION AND COMMERCIAL TRANSACTIONS 115 (Oxford University Press 2014).
[31] NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 225 (5th ed. Oxford University Press 2009).
[32] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1326 (2d ed. Wolters Kluwer 2001).
[33] CAMBRIDGE DICTIONARY 278 (2d ed. Cambridge University Press 2004).
[34] Total Transport Corp. v. Arcadia Petroleum Ltd., [1998] 1 Lloyds Rep. 351 CA.
[35] VISA International Ltd. v. Continental Resources (U.S.A.) Ltd., (2009) 2 SCC 55.
[36] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614.
[37] Dalimpex Ltd. v. Janicki, (2003) 64 O.R.(3d) 737.

create inconsistency in the clauses, due to lack of clear demarcation of disputes between the two jurisdictions. Such inconsistency will make the arbitration agreement void.[38]

¶19. Also, cl 49.1 does not provide for any substantial law governing the duties and obligations of the parties under the contract. Moreover, floating choice of law is not permissible.[39] Therefore, it would be absurd to interpret cl 49.1 providing for different forums instead of cl 49.2 that provides for resolution of disputes. Therefore, the tribunal has the jurisdiction to adjudicate the counter-claims.

[2] THAT THE UNITED MARITIME LOGISTICS PTE LTD ARE NOT LIABLE TO CITY SHIPPING COMPANY LIMITED FOR DUES UNDER THE CHARTERPARTY.

¶20. It is humbly submitted that the Charterers are not liable to the demurrage claims made by the Owners because the laytime should commence from 11 December 2018 at 1800**[A]**, The entire time from 6 January 2019 at 0600 to 13 January 2019 at 1005 is on Owners' account**[B]** and that the Owners claim for demurrage should be time barred due to their failure to provide the pumping log**[C]**.

[A] THE LAYTIME SHOULD COMMENCE FROM 11 DECEMBER 2018 AT 1800.

¶21. The counsel argues that the laytime cannot commence on the date calculated by the Owners because, both physical and legal readiness is essentially required for a ship to be ready to tender a valid NOR**(a)**, the owners had a strict belief of their inability to procure free pratique in time**(b)** and that the intention of parties expressed through the provisions of the contract, enumerates the requirement of free pratique essential**(c)**.

(a) Both physical and legal readiness required for a ready ship.

¶22. It is submitted that free prarique is one of the most important matters under the concept of readiness, which, failing to obtain, leads to the consideration of the vessel as an unready ship.[40]

¶23. For a vessel to tender NOR, it must be both physically and legally ready. In the ongoing case, the Owners failed to procure the free pratique which is one of the necessary documents for constituting legal readiness. Thus, the NOR tendered is invalid due to which laytime cannot commence on 10 December 2018.

¶24. If the vessel cannot earn the free pratique papers, charterers will not be able to have physical connection with the vessel for loading or discharging of the cargo, as advocated in

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[38] Lovelock (E.J.R.) Ltd. v. Exportles, [1968] 1 Lloyd's Rep. 163.
[39] Sonatrach Petroleum Corp. v. Ferrell International Ltd., [2002] 1 All ER (Comm) 627.
[40] YASHAR NASIRIAN, REVISION IN THE CONCEPT OF COMMENCEMENT OF LAYTIME AND DEMURRAGE 36 (Spring 2013).

Pan Cargo Shipping Corp v. United States[41]. An essential requirement for a ship to get the status of a ready ship is its capability of being at the Charterers' disposal from the very moment of tendering the NOR. If lack of free pratique prevents the Charterers from the physical connection with the ship, then it is not a ready ship and thus, the NOR tendered is invalid, thereby, asserting that the laytime cannot commence on 10 December 2018.

¶25. Moreover, the invalid notice will not be validated later, even if the charter stipulates that the vessel will be ready in the future.[42] Thus, the laytime will be calculated from the moment loading was commenced by the Charterers, which is 11th December 2018. This is because of the operation of cl 7.3[43] of the C/P, which stipulates that if the NOR tendered was invalid initially, the laytime will be calculated when the Charterers commence their operations.

(b) The interpretation of the contract shows free pratique as an essential document.

¶26. When interpreting and analysing the terms of a contract, such as a C/P, the will of the parties should always be considered.[44]

¶27. In London Arbitration 1/00 LMLN 538[45] and 11/00 LMLN 545[46], some charterparties expressly considered free pratique as an essential pre-condition to tender NOR. Since, a lot depends upon the intention of parties, while formulating a contract, the intention to require free pratique essentially is apparent by not incorporating a WIFPON clause in the C/P.

(c) Owners' belief of their inability to provide free pratique within time.

¶28. In the present case, LOP was tendered alongwith the NOR. The very requirement of tendering the LOP is when the Owners fail to procure free pratique six hours after tendering of the NOR. The act of tendering NOP along with NOR is itself suggestive of the Owners' belief of not being able to procure free pratique within the stipulated time.

¶29. Moreover, it is further submitted that, there was no express acceptance of the NOR by the Charterers, and thus, the right to object upon its validity is reserved by them. In *Surrey Shipping Co Ltd v. Compagnie Continentale (France) SA,*[47] the NOR was given prematurely, but was accepted by the receivers, because of which courts denied the right to object upon its validity later. However, in the present case, it was not accepted by the Charterers expressly.

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[41] Pan Cargo Shipping Corp. v. United States, 234 F. Supp. 623 (S.D.N.Y. 1964).

[42] YASHAR NASIRIAN, REVISION IN THE CONCEPT OF COMMENCEMENT OF LAYTIME AND DEMURRAGE 41 (Spring 2013).

[43] IMAM PROPOSITION 29.

[44] Despoina Aspragkathou, *The Happy Day and Issues of the Invalidity of a Notice of Readiness under English Law*, 38 J. Mar. L. & Com. 191, 210 (2007).

[45] London Arbitration 1/00 LMLN 538.

[46] London Arbitration 11/00 LMLN 545.

[47] Surrey Shipping Co. Ltd. v. Compagnie Continentale (France) S.A., [1978] 1 Lloyd's Rep.191.

Additionally, the question whether there was an agreement, waiver or estoppel is a question of law and fact, thereby, depending upon the circumstances of each case.[48]

¶30. In this particular case, it was believed by the Charterers that having been in the shipping business from long, the Owners must have known that the free pratique was required to be procured within the stipulated time frame according to the C/P, failing which, the NOR tendered would be considered immature and that, as a consequence, they will not commence the calculation of laytime therefrom.[49] Thus, there was no express disagreement to the NOR tendered at that particular time, as the RESPONDENTS relied upon the Owner's commercial sense, and had an opportunity to object only after it came in their knowledge after the presentation of the claims.

¶31. Moreover, *The Mexico 1*,[50] depicted that acceptance is not always enough to create an estoppel or waiver of the right to a valid notice of readiness. The conduct of the charterers could be regarded as legitimate, in relation to their intention to waive the invalidity of the notice, reserving the right, without disclosing the intention, as it is prevalent that if such intention or reservation was made clear, the owner would have immediately served a fresh NOR to protect his position.[51]

¶32. The fact that discharge had commenced to the knowledge of the charterers without protest or reservation on their part was not a sufficient happening to commence the laytime.[52] It can be reasonably concluded that mere proceeding with the operations, due to commercial viability, without protest or reservation, is not sufficient to make the laytime start.

¶33. It was noted in *The Mass Glory,*[53] that the commencement of laytime, when no valid notice of readiness is served should be viewed as unsafe. The acceptance of the very claim of commencing the laytime will make the essential requirement to tender a valid NOR by the Owners futile, as they suffer no loss and punishment due to their irresponsible act. Therefore, in the instant case, laytime should not commence from 10 December 2018.

¶34. In *Skanska Rasleigh Weatherfoil Ltd v. Somerfield Stores Ltd*[54], Lord Justice Neuberger said, "*the courts must be careful before departing from the natural meaning of the*

[48] Despoina Aspragkathou, *The Happy Day and Issues of the Invalidity of a Notice of Readiness under English Law*, 38 J. Mar. L. & Com. 191, 210 (2007).
[49] IMAM PROPOSITION 48.
[50] Transgrain Shipping v. Global Transporte Oceanico, [1990] 1 Lloyd's Rep. 507.
[51] Despoina Aspragkathou, *The Happy Day and Issues of the Invalidity of a Notice of Readiness under English Law*, 38 J. Mar. L. & Com. 191, 210 (2007).
[52] Glencore Grain Ltd. v. Flacker Shipping Ltd., [2001] 1 Lloyd's Rep. 754.
[53] Glencore Grain Ltd. v. Goldbeam Shipping Inc., [2002] 2 Lloyd's Rep. 244.
[54] Skanska Rasleigh Weatherfoil Ltd. v. Somerfield Stores Ltd., [2006] EWCA (Civ) 1732.

provision in the contract merely because it may conflict with its notions of commercial common sense of what the parties may must or should have thought or intended."[55]

¶35. As per clause 6.3.3[56] of the C/P, the intention of the parties is clear upon free pratique considered as an essential documentary requirement before tendering NOR. Thus, commencement of laytime, after tendering of the NOR without procuring free pratique in the prescribed time, would be unjust and against the intentions of the parties.

[B] THAT THE ENTIRE TIME FROM 6 JANUARY 2019 AT 0600 TO 13 JANUARY 2019 AT 1005 IS NOT ON CHARTERERS' ACCOUNT.

¶36. It is humbly submitted that the master on behalf of the Owners only provided notice of arrival at the second port and was unable to provide NOR**(a)**, even when it was expressly provided in the contract that it is possible to issue the same even while waiting at the anchorage**(b)**.

(a) Only Notice of Arrival was given and not of Readiness.

¶37. Where the words of a contract are clear, the court must give effect to them even if they have no discernible commercial purpose.[57] Applying the above statement, clause 7.3[58] of the C/P requires commencement of the laytime after six hours of tendering a valid NOR or when the loading/discharging starts, whichever is earlier. In the present case, the NOR was not tendered by the master on 6 January 2019. The requirement of a valid NOR was the intention of the contract, failing which, the laytime cannot commence.

¶38. In the *Franco-British Steamship Co v. Watson & Youell*, it was adjudged that the most important matter is charterer's awareness of arrival and readiness of the vessel, so if the vessel does not tender the notice, and charterers are aware about the readiness and arrival of the ship, laytime would start to run.[59] However, relying upon the above stated principle, the counsel on behalf of the Charterers puts forward the argument that the conjunction 'and' used between readiness and arrival suggests the significance of the notice of both arrival as well as the readiness of the vessel expressly. However, in the present case, only the notice of arrival was given by the Owners on 6 January 2019 and no information regarding the readiness of the vessel was communicated to the Charterers on that particular day. Thus, laytime cannot commence from 6 January 2019 at 0600.

(b) Master was allowed to tender the NOR at the anchorage.

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[55] KIM LEWISON, THE INTERPRETATION OF CONTRACTS 40 (4th ed. Sweet & Maxwell 2007).
[56] IMAM PROPOSITION 29.
[57] KIM LEWISON, THE INTERPRETATION OF CONTRACTS 43 (4th ed. Sweet & Maxwell 2007).
[58] IMAM PROPOSITION 29.
[59] YASHAR NASIRIAN, REVISION IN THE CONCEPT OF COMMENCEMENT OF LAYTIME AND DEMURRAGE 37 (Spring 2013).

¶39. Owing to clause 6.3.2[60] of the C/P, the Owners were allowed to tendered the NOR while waiting at the anchorage, which they did not, thus, having failed to communicate the readiness of the vessel, cannot commence the laytime from that day onwards. Moreover, the act of not tendering the NOR on that day, when there was an option given by the C/P, and tendering it on 13 January 2019, itself suggests that the vessel was not ready on the former date.

¶40. The burden of proof, however, is on the owners to show that laytime should start to run even though a notice of readiness was not given.[61]

¶41. Three conditions must be satisied before laytime can commence at either the load or the discharge port:

(1) the vessel must have arrived at the correct destination;

(2) she must be ready to load or to discharge the cargo;

(3) notice of both arrival and readiness, must have been given to the charterer or its agent.[62]

¶42. In the present case, all the three conditions are satisfied only on 13 January 2019, when an actual NOR was tendered by the master to the Charterers,[63] therefore, the laytime should commence after this date only.

¶43. Where a C/P provides for a valid notice of readiness to be tendered to commence the laytime and that the notice is tendered prematurely, laytime does not commence although the vessel started discharging later.[64] This means that in a case like this, the shipowners cannot claim demurrage for the delay, and the Charterers can claim dispatch money for the entire period of laytime, which does not start counting. As a conclusion, when even the immaturity of the notice does not allow the laytime to commence, then the non-tendering of the notice will absolutely restrict the calculation of laytime.

¶44. The vessel having become an arrived ship and being ready to load or to discharge, the remaining condition which must be fulfilled to start laytime running is that the vessel must give notice to the Charterer that she is in that state of readiness.[65] Therefore, the fault of the Owners of not giving the notice of the vessel's readiness cannot let the laytime commence.

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[60] IMAM PROPOSITION 29.

[61] *Notice of Readiness and the Commencement of Laytime* (Feb. 28, 2019, 12:30 PM), http://www.gard.no/web/updates/content/52983/notice-of-readiness-and-the-commencement-of-laytime.

[62] PROF. D. RHIDIAN THOMAS, THE EVOLVING LAW AND PRACTICE OF VOYAGE CHARTERPARTIES 137 (Informa London 2009).

[63] IMAM PROPOSITION 7.

[64] Glencore Grain Ltd. v. Flacker Shipping Ltd., [2001] 1 Lloyd's Rep. 754.

[65] PROF. D. RHIDIAN THOMAS, THE EVOLVING LAW AND PRACTICE OF VOYAGE CHARTERPARTIES 152 (Informa London 2009).

¶45. In the case of a port C/P, if the vessel waits due to unavailability of the berth, it will be considered as an arrived ship if it is within the commercial area of the port *and* also at the disposal of the Charterers, as resolved in *Leonis Steamship Co. v Rank*[66]. In the present case, although, the ship arrived at the anchorage, it was not at the disposal of the Charterers primarily. Thus, the laytime cannot commence as the ship cannot be considered as arrived, technically, thereby, making the consideration regarding readiness secondary.

[C] OWNERS' ENTIRE CLAIM FOR DEMURRAGE IS TIME BARRED AS THEY FAILED TO PROVIDE PUMPING LOG.

¶46. It is humbly submitted that the CLAIMANTS made their claim for demurrage on 10 March 2018, but failed to provide the pumping log for discharge at port 2, which was an essential supporting document for a valid demurrage claim under cl 20.2 of the amended C/P.[67] Moreover, the same was provided only after the limitation period of 60 days. Thus, CLAIMANTS are not entitled to recover their claim for demurrage as no duty was conferred upon the RESPONDENTS to inform the CLAIMANTS for insufficiency of documents**(a)**, the clause should be interpreted strictly**(b)** and the entire demurrage claim should be adjudged as time barred due to insufficiency of documents**(c)**

(a) There was no duty of Charterers to inform the Owners for insufficiency of documents.

¶47. Cl 20.1 of the C/P confers a duty upon the Owners to present all their claims along with the required documents, within 60 days after the discharge of the cargo.[68] There is no liability on the RESPONDENTS to inform the CLAIMANTS about the deficiency of the claim.[69] Therefore, even though the claim was made well within the limitation period, the RESPONDENTS owed no duty to reply within the same time. Thus, the RESPONDENTS cannot be opposed from barring the demurrage claim presented by the Owners.[70]

(b) The demurrage time bar clauses should be strictly interpreted.

¶48. Time Bar clauses are treated as limitation clauses and are interpreted strictly.[71] There is no justification in placing upon the language of the clause, a strained and artificial meaning, so as to avoid the exclusion or restriction of the liability contained in it.[72]

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[66] Leonis Steamship Co. v. Rank, [1908] 1 KB 499.
[67] IMAM PROPOSITION 17.
[68] IMAM PROPOSITION 17.
[69] Mabanaft International Ltd. v. Erg Petroli S.p.A., [2000] 2 Lloyd's Rep. 637.
[70] London Arbitration 8/01.
[71] Odfifell Seachem A/S v. Continentale des Petrolis et d'Investissenents, [2005] 1 All ER (Comm) 421.
[72] Photo Production Ltd. v. Securicor Transport Ltd., [1980] 2 WLUK 146.

¶49. Parties used the word '*shall*' to precede the documents constituting 'supporting documents' in cl 20.2 of the C/P.[73] This was done with an intention to impose a bounding duty on the Owners.[74] Liberal interpretation of the clause would make the use of 'shall' redundant and will be against the cannons of construction of contract.[75] Moreover, the parties' intention of strict interpretation of the clause can also be construed from the use of the phrase '*strictly in accordance with this clause*'. Therefore, the use of '*shall*' in cl 20.2 should be construed strictly giving a mandatory nature to the clause.

¶50. In *Chembulk New York*[76], based on a similar clause, the tribunal barred the claim due to failure of providing terminal time logs.

¶51. Furthermore, even if the the pumping log is irrelevant with respect to the demurrage claim in the instant case, it is a mandatory obligation of the Owners to follow the language and intent of the C/P.[77] The commercial common sense and surrounding circumstances cannot be used to undervalue the express language of the C/P.[78] No contractual obligation can be shred off just because it serves no useful purpose.[79] Even in case of doubt regarding the utility of the document, it should be given.[80]

¶52. Furthermore, cl 20.2[81] was added to the standard BPVOY4 form. Thus, more emphasis should be laid upon its literal interpretation as it is assumed that the parties must have agreed for the same consensually.

(c) The entire demurrage claim is time barred due to insufficiency of documents.

¶53. The counsel humbly puts forward that cl 20.1 uses the words '*a claim*'.[82] This represents the parties' intention to present the claim in a single form rather than multiple constituent parts. Also, the phrases '*all liability*' and '*all and any*' in cl 20[83] creates an assumption that parties always intended to bar the entire claim, if any, if the supporting documents are not presented.

¶54. Unless the precedented conditions mentioned in the charter are not fulfilled, payment obligation cannot be triggered.[84] In the instant case, presentation of demurrage claim with all

[73] IMAM PROPOSITION 17.
[74] BLACK'S LAW DICTIONARY 1407 (Bryan A. Garner, 8th ed. Thomson Reuters 2004).
[75] KIM LEWISON, THE INTERPRETATION OF CONTRACTS 355 (4th ed. Sweet & Maxwell 2007).
[76] New York Arbitration S.M.A. No. 3868.
[77] Lukoil Asia Pacific Pte. Ltd. v. Ocean Tankers (Pte.) Ltd., [2018] 1 Lloyd's Rep. 654.
[78] Arnold v. Britton, [2015] UKSC 36.
[79] Astor Management v. Atalaya Mining plc., [2018] EWCA (Civ) 2407.
[80] Mansel Oil Ltd. v. Troon Storage Tankers S.A., 2008 Int.Com.L.R. 06/09.
[81] IMAM PROPOSITION 17.
[82] IMAM PROPOSITION 17.
[83] IMAM PROPOSITION 17.
[84] Astor Management v. Atalaya Mining plc., [2018] EWCA (Civ) 2407.

the supporting documents including pumping log was a condition precedent,[85] failure of which should not confer any obligation on the RESPONDENTS.

¶55. Also, demurrage claim will be time barred in constituent parts only if such claim is divisible into such parts.[86] Demurrage claim is a continuous phenomenon which is calculated against the total time allowed versus the time used by the vessel in discharging the cargo.

¶56. In *The Sabrewings*,[87] it was held that where one composite claim for demurrage is made, then the the claim will be barred in entirety even if the missing documents only relate to a constituent part of the claim. In the instant case, even though the CLAIMANTS missed the document only with regard to discharging port 2, for the alleged demurrage, the entire claim should be barred.

[3] THAT THE CITY SHIPPING COMPANY LIMITED IS LIABLE TO UNITED MARITIME LOGISTICS PTE LTD FOR THEIR CLAIMS.

¶57. It is humbly submitted that the Owners are liable for the alleged cargo damages occurred on the vessel because the voyage orders were violated by the master**[A],** the Owners are liable for breach of common law obligation under bailment**[B],** and that the Owners are liable for the breach of Article III Rule 2 of HVR**[C]**.

[A] THE CLAIMANT FAILED TO FOLLOW THE VOYAGE ORDERS

¶58. The counsel argues that Cl 8[88] of the Additional Terms creates a responsibility upon the Owners to indemnify the Charterers for any loss arising out of any failure to comply with the Charterer's voyage orders. Charterers, on 9 December 2018, sent a voyage order to the master. Cl 3.1[89] of the same specifies the heating to be done according to '*standard industrial practice*'. Furthermore, the details regarding the pour point of the cargo were shared by the RESPONDENTS on 13 December 2018.

¶59. In *Volcafe Ltd,*[90] court affirmed the use of expert advice and studies, for establishing general industry practices. The court also emphasized on the studies produced by trade associations. According to two separate reports of, Charles Taylor and International Chambers of Shipping, being prominent members of in trade, fuel should be carried at least 10-12 degrees above pour point.[91]

[85] IMAM PROPOSITION 17.
[86] Transoceanic Co. Ltd. v. Newton Shipping Ltd., (Jan. 17, 2001).
[87] Waterfront Shipping Company Ltd. v. Trafigura Ag., [2007] EWHC 2482.
[88] IMAM PROPOSITION 15.
[89] IMAM PROPOSITION 3.
[90] Volcafe Ltd. v. Compania Sud Americana De Vapores S.A., [2018] UKSC 61.
[91] *Cargo Oil Heating Practices,* (Feb. 28, 2019, 10:30 PM), http://www.standardclub.com/media/2179911/cargo-oil-heating-practices.pdf.

¶60. Cloud Point is the temperature at which the fuel becomes cloudy due to the formation of wax crystals. The suggestion in the Nordic Times regarding the parties' awareness about the 'Cloud Point' indicated towards the general practice of the trade to keep the temperature above the same.[92] Thus, it is logical to conclude that standard commercial practice involves keeping the cargo temperature more than the Cloud Point.

¶61. According to email conversation dated 25 December 2018, no cargo heating was carried out.[93] Therefore, CLAIMANTS failed to follow the voyage orders, breaching the C/P terms and are, therefore, liable to indemnify the Charterers for the same.

[B] THE CLAIMANTS ARE LIABLE FOR BREACH OF COMMON LAW OBLIGATIONS UNDER BAILMENT.

¶62. The counsel on behalf of the RESPONDENTS submits the argument based upon common contractual principle that, by issuing the bill of lading as a receipt, a carrier acknowledges that, he is a bailee of the goods and is obliged to deliver them to the bailor in the same order and condition.[94] A common carrier for reward[95] has strict liability for loss or damage to the goods in-transit. It is submitted that the Owners, being in the shoes of a bailee for reward, despite having a strict liability, failed to deliver the goods in same quantity and condition.

¶63. The bailee's duty is to take reasonable care of the goods and, in the event of the goods sustaining damages during the period of bailment, the bailee bears the legal burden of proving that the damage had not been caused by his own negligence.[96] The shipowner is bound to take the same care of the goods as a person would take care of his own goods.[97]Although, in the instant case, the CLAIMANTS failed to heat the oil above the cloud point which, in the light of commercial common sense, is required in-transit of any crude oil. Thus, the burden lies upon the Owners to prove the contrary.

¶64. The contract, in the B/L, should be carried with reasonable care unless prevented by the expected peril.[98] No peril is a peril of sea which could be foreseen as one of the necessary incidents of the adventure.[99] Solidification of oil was an event foreseeable in case of temperature going below the cloud point. Thus, it would not qualify as a peril of sea.

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[92] IMAM PROPOSITION 51.
[93] IMAM PROPOSITION 6.
[94] Houtimport v. Agrosin, [2004] 1 AC 715.
[95] SIR THOMAS EDWARD SCRUTTON & F. D. MACKINNON, CHARTERPARTIES AND BILLS OF LADING 380 (8th ed. Sweet & Maxwell 1917).
[96] Volcafe Ltd. v. Cia Sud Americana De Vapores S.A., [2018] 3 WLR 2087.
[97] Laurie v. Douglas, (1846) 15 M. & W. 746.
[98] Notara v. Henderson, (1872) L. R. 7.
[99] Nugent v. Smith, (1875) 1 CPD 24; Nichols v. Marsland, (1876) 2 Ex D 1.

¶65. The exception in B/L only exempts the shipowner from the absolute liability of a common carrier and not from the consequence of the want of reasonable skill, diligence and care.[100] In the instant case, the Owners failed to show the above required skills. Therefore, the CLAIMANTS are liable for the breach of common law obligations under the contract of bailment.

[C] THE CLAIMANTS ARE LIABLE FOR BREACH OF ARTICLE III RULE 2 OF HVR.

The clause paramount in the C/P inculcates the HVR in the charterparty contract as well as the B/L. The Owners are liable for the breach of the same due to cargo damage during the voyage because the burden of proof is upon them to disregard the presumption of liability(**a**), the carriers were negligent(**b**), exceptions under Article IV Rule 2 of HVR cannot be relied upon(**c**) and the cargo did not suffer from inherent vice(**d**).

(a) The burden of proof is upon the owners to rebut the presumption of liability.

¶66. Article III rule 4 of the HVR creates refutable presumptions of liability on the carriers if they received the goods under a clean bill of lading and then has delivered them in a bad order and condition.[101] In the instant case, the master issued a clean bill of lading for 45,000 MT of Bach Ho oil but failed to deliver the goods in the same quantity and quality.[102]

¶67. The cargo owners neither need to establish the manner in which the damage or loss occurred, nor are they to adduce evidence of fault on behalf of the carrier.[103] In *The Devon*[104], the Court of Appeal entitled the cargo owner to the price of the contaminated oil, when the carrier failed to rebut the presumption.

¶68. Therefore, in the light of the established fact that the oil solidified in the custody of the carriers, the burden is upon CLAIMANTS to prove the contrary.

(b) The carriers were negligent.

¶69. Art III Rule 2 of HVR impose a duty on the carriers to '*properly and carefully*' carry, keep and take care of the cargo.[105]

¶70. 'Properly' means to adopt a system which is sound in light of all the knowledge which the carrier has or ought to have about the nature of the goods[106] and circumstances during the voyage[107]. In the instant case, the master was aware of the high pour point of the

[100] Notara v. Henderson, (1872) L. R. 7.
[101] The Hague Visby Rules 1968, art. III rule 4.
[102] IMAM PROPOSITION 8.
[103] Lagos Group Ltd. v. Talgray Shipping Inc., [2002] 580 LMLN 3.
[104] FAL Oil Co. Ltd. v. Petronas Trading Corporation Sdn Bhd, [2004] 2 Lloyd's Rep. 282;.
[105] The Hague Visby rules 1968, art. III rule 2.
[106] G.H. Renton & Co. Ltd. v. Palmyra Trading Corporation of Panama, [1957] AC 149.
[107] Albacora S.R.L. v. Westcott & Laurance Line Ltd., [1966] 2 Lloyd's Rep. 53.

cargo.[108] Moreover, the voyage was taking place from hot weather conditions to cold weather regions. It is reasonably expected that the master, being involved, in the same business ought to have enough knowledge as to the heating requirements for a particular pour point and in varying weather conditions.

¶71. Furthermore, a sound system requires a prudent and reliable basis for concluding that it will prevent the otherwise threatened damage.[109] Thus, the master's failure to heat the cargo during the voyage reflects his negligence to adopt a sound system for taking care of the cargo.

¶72. The word "carefully" means 'merely taking care' and is considered equivalent to the standards of reasonable care.[110] The exercise of reasonable care is assessed by comparing the acts of an ordinary prudent person in the similar circumstances.

¶73. In the instant case, a reasonable man would have heated the cargo to maintain the temperature at least above the cloud point, being 10-12 degrees above the pour point, to prevent solidification.

¶74. The carriers are expected to probe beyond the apparent condition of the goods and make an effort to investigate about its characteristics.[111]In *The Happy Ranger*,[112] the carrier breached Art III rule 2 of HVR because it failed to consult the specialized society with regard to the ability to handle cargo's weight. Similarly, in the instant case, the Owners failed to consult the specialists, to ensure the required temperature during the voyage.

¶75. Also, the content of voyage orders, as to the nature or carriage requirements of the cargo, is likely to be relevant to the standard of care required.[113] The voyage order #1 dated 9 December 2018, mentioned the heating requirements. Further, details including pour point were shared on 13 December 2018.[114] Therefore, the required standard of care expected on behalf of the CLAIMANTS was appropriate cargo heating.

¶76. Hence, the master on behalf of the Owners was negligent in taking proper and careful care of the cargo.

(c) The Owners cannot rely upon the exceptions under Article IV Rule 2 of HVR.

[108] IMAM PROPOSITION 5.
[109] Volcafe Ltd. v. Compania Sud Americana De Vapores S.A., [2018] UKSC 61.
[110] PROF. JOHN WILSON, CARRIAGE OF GOODS BY SEA 191 (7th ed. Longman 2010).
[111] Jahn v. Turnbull Scott Shipping Company, Ltd., [1967] 1 Lloyd's Rep. 1.
[112] Parsons Corporation v. C.V. Scheepvaartonderneming Happy Ranger, [2006] 1 Lloyd's Rep. 649.
[113] Caltex Refining Co. Pty Ltd. v. Bhp Transport Ltd., [1994] 1 Lloyd's Rep. 335.
[114] IMAM PROPOSITION 5.

¶77. The principle of carrier's 'duty of care' was developed to prevent unfair reliance by carriers on exclusion clauses.[115] Therefore, if negligence, on the part of the owners has contributed to the damage, they are not protected even under the exceptions.[116] Therefore, it is submitted that having failed to take reasonable care of the cargo, Owners acted negligently and waived their right to invoke the exceptions laid.

¶78. A party cannot lessen the duty laid down in Rule 2 of Art III of HVR, by invoking some of the exceptions in Article IV.[117]Hague rules were not intended to change the common law principle of non-reliance upon an exception where the carrier's negligence was a cause of loss,[118] even though, it deprives the words "*subject to*" of any real effect in relation to Article IV Rule 2, other than in sub-rules (a) and (b).[119] The oil solidified due to the carrier's negligence in heating during the voyage and became the proximate cause of the damage.

¶79. In *Shipping Corp of India v Gamlen Chemical Co (Australia) Pty*,[120] both negligence and peril of the sea were alleged to be the causes of damage, but the carrier was held liable disregarding the contention. It was concluded that, where there were two such concurrent causes or as a matter of causation the only relevant cause being the breach of Article III rule 2, the carrier is liable. The excepted peril of inherent vice, if assumed, occurred only due to the CLAIMANTS' failure to perform the assigned duty, thus, holding them liable.[121]

¶80. Therefore, the CLAIMANTS cannot take resort to exceptions. Furthermore, the legal burden of disproving negligence for the purpose of invoking an exception under Article IV Rule 2 is also upon the CLAIMANTS.[122]

(d) The oil did not suffer from any inherent vice.

¶81. '*Inherent vice is a situation where the cargo deteriorates in condition by its own want of power to bear the ordinary transit in a ship.*'[123] 'The '*ordinary transit*' means the kind of transit which the contract requires the carrier to afford.[124] In the instant case, the vessel was capable of heating the cargo upto 60 degree Celsius. Thus, the standard of care under this C/P requires the carrier to afford heating.

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[115] Paterson Steamships v. Canadian Co-operative Wheat Producers, [1934] AC 538 PC.
[116] J. Lauritzen A.S. v. Wijsmuller B.V., [1990] 1 Lloyd's Rep. 1.
[117] Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Corporation Berhad, [1999] 1 Lloyd's Rep. 512.
[118] Mediterranean Freight Services Ltd. v. B.P. Oil International Ltd., [1993] 1 Lloyd's Rep. 257.
[119] RICHARD AIKENS ET AL., BILLS OF LADING (2d ed. Informa Law 2016).
[120] Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Corporation Berhad, [1999] 1 Lloyd's Rep. 512.
[121] Grill v. General Iron Screw Collier Company, (1866) L.R. 1 C.P. 600.
[122] Volcafe Ltd. v. Compania Sud Americana De Vapores S.A., [2018] UKSC 61.
[123] The 'Barcore', [1896] P. 294.
[124] Albacora S.R.L. v. Westcott & Laurance Line Ltd., [1966] 2 Lloyd's Rep. 53.

¶82. For inherent vice, the carrier must show that all the reasonable steps failed to protect the cargo from damage.[125] In the instant case, the advice of Fulham Laboratories suggests that the Bach Ho oil can be protected from solidifying through heating.[126] Thus, the cargo, in contention, does not suffer from inherent vice in respect of the required standard of care.

¶83. Furthermore, the burden is upon the CLAIMANTS to prove that the appropriate standard of care was taken against inherent vice.[127]

[4] <u>THE OWNERS ARE LIABLE TO THE FULL EXTENT OF THE DAMAGE.</u>

¶84. It is humbly submitted that the master's negligence was the proximate cause of the solidification and therefore, the Owners are liable for the damages to the Charterers fully. The cause which is '*truly proximate*' is that which is proximate in efficiency.[128] In the instant case, the master's inability to keep the proper and careful care of the cargo lowered the efficiency of the oil to sustain the dangers of the voyage, making the same a proximate cause of damage.

¶85. The question of causation should be approached as a matter of common sense,[129] that is to a common sense of business or seafaring man.[130] Common sense dictates that keeping the oil below the cloud point would lead to solidification.

¶86. In *Smith, Hoggs,*[131]the court held that if the answer to the questions, "*was breach of contract a cause of the damage?*" is in affirmative, the owner is held liable, even though there were other co-operating causes. Thus, in the instant case, though there may be other concurrent causes, but the master's violation of Additional Terms by not following the orders is a cause of the damage, thereby, making the Owners liable to pay the full value of the Charterers' loss.

¶87. Furthermore, where the facts disclose that the loss was caused by the concurrent causative effect of an excepted and a non-excepted peril, the carrier remains liable. It does not suffice for the carrier to merely prove under Art. IV Rule2 of the HVR that a cause of the loss was a peril of the sea.[132] Therefore, arguing but not conceding, even if the cargo had an inherent vice, the master's negligence in not heating the cargo at a high pour point on a

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[125] Volcafe Ltd. v. Compania Sud Americana De Vapores S.A., [2018] UKSC 61.
[126] IMAM PROPOSITION 51.
[127] Volcafe Ltd. v. Compania Sud Americana De Vapores S.A., [2018] UKSC 61.
[128] Leland Shipping Co. v. Norwich Union Fire Insurance Society, [1918] AC 350.
[129] Wayne Tnk. & Pump Co. Ltd. v. Employers Liability Assurance Corp. Ltd., [1973] 2 Lloyd's Rep. 237.
[130] Global Process Systems Inc. v. Berhad, [2010] UKSC 5.
[131] Smith, Hogg v. Black Sea and Baltic General Insurance, [1940] AC 997.
[132] Aktieselskabet de Danske Sukkerfabrikker v. Bajamar Compania Naviera S.A. (The Torenia), [1983] 2 Lloyd's Rep. 210;Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Corporation Berhad, [1999] 1 Lloyd's Rep. 512.

voyage from hot weather place to cold weather place, will not reduce the liability of the Owners.

¶88. Therefore, the CLAIMANTS should be held responsible for the complete damage of the cargo.

[5] COST OF ARBITRATION.

¶89. Section 31 of the Arbitration Act gives the discretion to the arbitral tribunal to award on the cost of arbitration including the amount and time of payment of such costs.[133] The tribunal must exercise his discretion judiciously.[134] The general rule, that the unsuccessful party shall be ordered to pay the cost of the successful party,[135] should also be followed in the instant case. In *VV v. VW*[136], the tribunal awarded the costs in favor of RESPONDENTS when the claim was refuted, even though the cross claim lacked jurisdiction. Moreover, actual costs must be awarded rather than just nominal costs.[137]

¶90. The circumstances and conduct of the parties must be taken into account while deciding the costs.[138] Where one has been unnecessarily burdened with the proceedings, the other party needs to be compensated for the costs.[139] The CLAIMANTS forced the RESPONDENTS into the proceedings, without trying to resolve the dispute through amicable resolution. The RESPONDENTS, in the instant case, were even ready to arrange a meeting for the same. Misconceived claims against a party are not only to be rejected but the party initiating such claims has to be burdened with the costs.[140] Thus, according to Section 31A(3)(c) of the Arbitration Act, the liability of the CLAIMANTS to bear the costs is enhanced.

[133] Arbitration and Conciliation Act 1996 § 31A(1).
[134] Lewis v. Haverfordwest Rural District Council, [1953] 1 WLR 1486.
[135] Arbitration and Conciliation Act 1996 § 31A(2)(a).
[136] V.V. v. V.W., [2008] 2 SLR 929.
[137] Oriental Insurance Co. Ltd. v. Amira Foods (India) Ltd., (2010) 4 RAJ 499 (Del).
[138] Andrew v. Grove, [1902] 1 KB 625.
[139] N.H.A.I. Ltd. v. Unitech-N.C.C. J.V., (2010) 6 RAJ 321 (Del).
[140] All India Radio v. Unibros, (2010) 6 RAJ 217 (Del).

PRAYER

In light of the above submissions, the Respondents request the tribunal to declare:

(1) That the counter-claim is maintainable.

(2) That the Claimants failed to comply the provisions of the C/P; namely:

(a) The obligation of obtaining the free pratique;

(b) The obligation to tender NOR at the anchorage;

(c) The obligation to provide the pumping log.

(3) That the Claimants breached their obligations under the C/P and B/L; namely:

(a) The obligation to follow the voyage order;

(b) The obligation to take care under bailment;

(c) The obligation under Article III Rule 2 of Hague-Visby Rules.

(4) That Claimants are liable to the full extent of the damage caused.

And therefore, the following reliefs are prayed for:

(1) USD 236,250 as the cargo damage.

(2) Further or other reliefs.

AWARD interest and costs in favour of the Respondents.

Counsel for Respondents