IN A MATTER OF AN ARBITRATION
MEMORANDUM FOR THE CLAIMANT

ON BEHALF OF
AARDVARK LTD.
(CLAİMANT)

AGAINST
TWILIGHT CARRIERS
(RESPONDENT)

TEAM NO. 17
HESKY O. MANURUNG • PAULA APRIJANTO
SALMA IZZATII • YOGA B. PRANANTO
TEAM NO. 17

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<td>¶/para./paras.</td>
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<td>edn</td>
<td>Edition</td>
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<td>EWCA</td>
<td>England and Wales Court of Appeal</td>
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<td>EWHC</td>
<td>High Court of England and Wales</td>
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<td>Ex.</td>
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<td>FOSFA</td>
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<td>MBH</td>
<td>Mit Beschränkter Haftung</td>
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<td>mt</td>
<td>metric tonne</td>
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<td>Palm Fatty Acid Distillate</td>
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SUMMARY OF FACTS

1. Aardvark Ltd. (the ‘Claimant’) concluded a contract (the ‘Sales Contract’) with Beatles Oils and Fats, Ltd. (‘Beatles’) for the purchase of 4,000 metric tonnes (‘mt’) of Palm Fatty Acid Distillate – PFAD (the ‘Cargo’), agreed on CIF terms (Incoterms 2000). The Sales Contract was amended, in which the Cargo was priced USD 747.50 per mt, CIF Merseyside, Liverpool.

2. To execute its contractual obligation to deliver the Cargo to the Claimant, Beatles chartered the MT Twilight Trader (the ‘Vessel’) owned by Twilight Carriers (the ‘Respondent’) based on the standard form VEGOILVOY voyage charterparty (the ‘Charterparty’). Clause 31 of the Charterparty (‘Arbitration Clause’) was modified, in so far that it applies English law, and to have dispute settlement in London Arbitration.

3. On 25 October 2008, four standard Congenbill form bills of lading (the ‘Bs/L’) were issued under the Charterparty in Pasir Gudang, Malaysia. The Bs/L provide that the port of discharge shall be Liverpool, Merseyside, UK. Within its reverse side, it was stipulated that the terms within the Charterparty, including its law of the seat and the Arbitration Clause, shall be incorporated therein. The Vessel loaded the Cargo in Pasir Gudang, and further loaded another cargo in Dumai, Indonesia. On 5 November 2008, the Vessel sailed from Dumai and proceeded to Liverpool, via the Suez Canal.

4. On 14 November 2008, the Vessel entered the Gulf of Aden. On 15 November 2008, the Vessel was boarded by Somali pirates and detained for three months. The Vessel continued the voyage and arrived in Fujairah, UAE, on 21 February 2009 to undergo survey of the state of Cargo after the hijacking. The Cargo had been found contaminated with arsenic substance likely due to unauthorized access of pirates.
during the time of captivity. The deterioration of the Cargo has lowered its quality and price.

5. In or about mid-January 2009, the Claimant paid USD 2,986,671.38 for the Cargo. In return, it received the Bs/L. On 16 March 2009, the Claimant asserted that Beatles has committed repudiatory breaches of contract, terminating the Sales Contract. The Claimant further demanded repayment from Beatles of the contract price that it had paid on 26 January 2009.

6. Subsequent to the termination of the Sales Contract, Beatles requested the Claimant to deliver the Bs/L to them, which the Claimant refused. As the Claimant retained the Bs/L, Beatles issued a Letter of Indemnity to the Respondent in place of the Bs/L to discharge the Cargo in Rotterdam. On the other hand, the Claimant ordered the Respondent not to follow Beatles’s orders. On 20 March 2009, the Vessel arrived in Rotterdam and discharged all the cargo aboard.

7. On 23 March 2009, Beatles brought a petition to seize the Cargo to the Dutch court. On 23 May 2009, Beatles issued an application to the district court of Rotterdam for an order of sale of Cargo, granted on 24 July 2009. On 25 August, the Cargo was then sold to AB Buyers for USD 1,695,752.38. The Dutch court, pending resolutions of the London arbitration, retained the proceeds. The Claimant contested the decision to the Dutch Court of Appeal, which was dismissed, and the Claimant was ordered to pay court fees (USD 138,843.14) and lawyer fees (USD 107,913.12).

8. On 23 March 2009, the Claimant (based on an application to the Dutch court) arrested the Vessel as security for their claims against the Respondent for the delivery of the Cargo to Rotterdam without the production of the Bs/L. The Vessel was released with security of USD 1.4 million, which is the assessed value of the Cargo by the Dutch court.
9. On 16 April 2009, the Claimant bought 7,000 mt of PFAD on the basis of USD 522.50 per mt in order to fulfil the sales contract to its sub-buyers in Liverpool (Delta Ltd. and Caspian BV). The sub-buyers had stated that they would have accepted the pirated cargo.


**SUMMARY OF ARGUMENTS**

The Claimant files a suit against the Respondent for its action of discharging the Cargo in a port other than the one stipulated within the Bs/L and without the production of the Bs/L. Such act constitutes a breach of contract under the Bs/L and also amounts to tort of conversion. Further, the Claimant asserts that the Respondent is liable for the deterioration of the Cargo since the Respondent has provided unseaworthy vessel and did not carefully and properly carry the Cargo. For these reasons, the Respondent is not exempted under the Hague-Visby Rules (the ‘HV Rules’) or the Charterparty. The Claimant seeks to recover damages arising from this event, along with the interest. The Claimant also seeks to recover the costs it incurred in another proceeding in which the Claimant was embroiled because of the Respondent’s conduct. Further, the Tribunal has the jurisdiction to entertain all the claims presented before it since the Arbitration Clause covers tortious and contractual claims.
ARGUMENTS PRESENTED

I. THE TRIBUNAL HAS JURISDICTION TO HEAR THE PRESENT DISPUTE

1. The Tribunal can rule on its own jurisdiction based on Section 30(1) of the Arbitration Act 1996 of the United Kingdom. The article provides that “unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction...”\(^1\)

2. The Claimant submits that the Tribunal has jurisdiction to hear the present dispute, as there exists an arbitration agreement between the parties in the dispute (A). Further, the Tribunal can entertain all claims presented to it since the claims in tort are within the jurisdiction of the Arbitral Tribunal (B). In addition, the Tribunal should proceed and it should not grant a stay of proceedings (C).

A. There exists an arbitration agreement between the parties in the dispute

3. The legal relationship between the Claimant and the Respondent is governed by the Bills of Lading (‘Bs/L’).\(^2\) A reference by a bill of lading to an arbitration clause within a charterparty constitutes a valid arbitration agreement.\(^3\) Particularly in The Epsilon Rosa No. 1,\(^4\) it was established that the terms within the Congenbill form of bill of lading are sufficient to incorporate all the terms within the charterparty, including the arbitration clause, into the bill of lading. In addition, the case has also established that the incorporation includes all the written modifications made by the parties.

4. In the present case, the Bs/L are in Congenbill form.\(^5\) Thus, the Arbitration Clause\(^6\) along with its modification by the parties\(^7\), which state that the applicable law is

\(^1\) Section 30(1), UK Arbitration Act.
\(^2\) Section 2(1)(a) & 3, COGSA.
\(^3\) Horn Linie GmbH & Co. v Panamericana Formas e Impresos SA (The Hornbay) [2006] EWHC 373 (Comm).
\(^4\) Welex AG v Rosa Maritime Ltd. (The Epsilon Rosa)(No.1) [2002] EWHC 762 (Comm).
\(^5\) Bs/L No. PG1-PG4, Record, p. 15, 17, 19, 21.
\(^6\) Charterparty, Record, p. 11.
\(^7\) Correspondence from John Walker (Walker Brokers) to Paul Taylor (the Claimant), Record, p. 4.
English Law and the jurisdiction is given to the London Arbitration, are validly incorporated and binding between the Claimant and the Respondent.

**B. The tortious claim is within the jurisdiction of the Tribunal**

5. The Claimant submits that the Tribunal can entertain tortious claim since the Arbitration Clause is broad and the tortious claim and contractual claims are closely knitted together.

6. When a contract contains a broad arbitration clause, the jurisdiction of the arbitral tribunal goes as wide as governing not only contractual claims, but also any tortious claim.\(^8\) In *Harbour v Kansa*,\(^9\) Steyn J stated that the words "arising from" have almost invariably been treated as "words of very wide import". This is applicable when an arbitration clause states “arising from Charterparty” which can be found in the case at hand.\(^10\)

7. Furthermore, Mustill J in the case of *The Playa Larga and Marble Islands*\(^11\) held that for an arbitration tribunal to be able to rule upon a tortious claim, the claimant must show that the contractual and tortious claims are so closely knitted together on the facts that an agreement to arbitrate on one can properly be construed as covering the other.

8. The present claim on tort is related to the Bs/L as a contract of carriage. The tortious claim is closely connected to the performance under the Bs/L, which is to deliver the Cargo to the Claimant. Triggered by this event, the claims both in contract and tort arose. It can be seen that such tortious claim had arisen not only upon the existence of

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\(^10\) Clause 31, Charterparty, Record p. 11.

the contract, but had also arisen from the same events.\textsuperscript{12} Conversely, it is manifestly clear on the facts of the present case that the claim premised on the tort of conversion is closely knitted with the claims arising from contract of carriage evidenced in the Bs/L.\textsuperscript{13}

9. Conclusively, the Tribunal has the jurisdiction to entertain the tortious claim as it falls within the scope of the Arbitration Clause.

C. \textbf{The Tribunal should not grant a stay of proceedings}

10. The Respondent may argue that there is a risk of multiplicity of proceedings\textsuperscript{14} as a basis for a stay, which arose from the Claimant’s expressed intention to pursue the dispute over the Cargo with Beatles.\textsuperscript{15} However, such application should not be granted.

11. There has been reluctance to grant a stay,\textsuperscript{16} unless a strong reason exists which must be proven by the party claiming for it.\textsuperscript{17} In the judgment of \textit{J Jarvis \& Sons Limited v Blue Circle Dartford Estates Limited},\textsuperscript{18} Jackson J refused to grant a stay on the basis that the multiplicity of proceedings has only been imminent and not yet started. In that case, the risk of multiplicity of proceedings was based on the constant threat to litigate in other proceedings. However, the court held that that condition does not amount to a strong reason as to grant a stay.

12. In the context of the present dispute, the fact is that the Claimant has merely expressed its intention to pursue Beatles through Federation of Oil, Seeds and Fats

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\textsuperscript{12} See \S\ 24-50.
\textsuperscript{13} \textit{The Playa Larga and Marble Islands} (n 11).
\textsuperscript{14} In \textit{Oxford Shipping Co. Ltd. v Nippon Yusen Kaisha (The Eastern Saga)} [1984] 2 Lloyd's Rep. 373, multiplicity of proceeding is defined as a situation when there are two separate proceedings and the merits of there being only one.
\textsuperscript{15} Correspondence from Paul Taylor (the Claimant) to Mark Wiggins (Beatles), Record p. 35.
\textsuperscript{16} \textit{Cubitt Building and Interior Ltd. v Richardson Roofing (Industrial) Ltd.} [2008] EWHC 1020 (TCC).
\textsuperscript{18} \textit{J Jarvis \& Sons Limited v Blue Circle Dartford Estates Limited} [2007] EWHC 1262 (TCC).
Association (‘FOSFA’) contractual channels. As such, the purported risk of multiplicity of proceedings, at present, does not amount to a sufficient, let alone strong, reason for this Tribunal to grant a stay of proceedings.

II. THE RESPONDENT IS LIABLE UNDER BREACH OF CONTRACT AND TORT OF CONVERSION

13. The Respondent has directed the Vessel to discharge the Cargo in Rotterdam instead of Liverpool, an act which is inconsistent with the Bs/L. In addition, the discharge was made without presentation of the Bs/L. Such acts constitute a misdelivery of the Cargo. The Claimant submits that the Respondent shall be liable for the misdelivery under breach of contract (A) and tort of conversion (B).

A. The Respondent has committed a breach of contract

14. It is well-established that a lawful holder of bill of lading has the title to sue the shipowner under breach of contract. The Claimant is the lawful holder of the Bs/L pursuant to Section 2(2) of Carriage of Goods by Sea Act 1992 (‘COGSA’) as it has received the Bs/L after proper payment made to Beatles under the Sales Contract.

15. The Claimant submits that the Respondent has committed breach of contract because it unlawfully discharged the Cargo in Rotterdam instead of in Liverpool (1) and discharged the Cargo without the Bs/L production (2). Further, the Respondent’s actions cannot be justified by the Liberty Clause (3).

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19 Correspondence from Paul Taylor (the Claimant) to Mark Wiggins (Beatles), Record, p. 35.
21 Bs/L No. PG1-PG4, Record, p. 14, 16, 18, 20.
22 Surveys Inc. Report, Record, p. 48; Agreed Statement of Facts for the Arbitration Re: The Dutch Proceedings and Sale of the Cargo, Record, p. 53; Claim Submission ¶ 17, Record, p. 68; Defence Submissions ¶ 8, Record, p. 72.
24 Section 2(1)(a) of COGSA; The Playa Larga and Marble Islands [1983] 2 Lloyd’s Rep. 171; Primetrade AG v Ythan Ltd. (The Ythan) [2005] EWHC 2399 (Comm).
25 Correspondence between Paul Taylor (the Claimant) and Mark Wiggins (Beatles), Record, p. 25, 27.
1. The Respondent has unlawfully discharged the Cargo in Rotterdam instead of Liverpool.

16. The main aim of a contract of carriage is to bring the goods from one place to another. It is an obligation for the shipowner to deliver the cargo to the discharge port stated within the bill of lading for efficacy of business. Failing to do so would amount to breach of contract.

17. The Bs/L concluded by the parties provide for Liverpool, Merseyside, UK as the port of discharge. As such, the Respondent’s act of discharging the Cargo in Rotterdam amounts to a breach of contract.

2. The Respondent has unlawfully discharged the Cargo without the production of Bs/L.

18. It is a fundamental principle of a contract of carriage that a shipowner is obliged to discharge cargo against production of a bill of lading. If such condition was not complied by the shipowner, he would commit a breach of contract. Such principle is buttressed where the bill of lading provides the consignee as ‘to order’ (such as the Bs/L held by the Claimant). In this instance, it is implicit that the obligation of the

26 Leduc v Ward [1888] 20 QBD 475.
27 ibid.
28 ibid.
30 Agreed Statement of Facts for the Arbitration Re: The Dutch Proceedings and Sale of the Cargo ¶ 1, Record, p. 53.
32 ibid.
shipowner is to deliver the cargo to the holder of the bill of lading,\textsuperscript{33} since the bill of lading would also serve as a document of title.\textsuperscript{34}

19. This contractual obligation cannot be set aside even if the order to deliver the cargo is made by the charterers, or even if it is later proved that delivery was made to a person who is ultimately entitled to the goods.\textsuperscript{35} Regardless it might have been done in good faith, the carrier is neither obliged nor entitled to deliver the cargo to a person who merely appears to be entitled to it, unless that person can produce to the carrier an original bill of lading.\textsuperscript{36}

20. In the present case, the Bs/L contain the term ‘to order’\textsuperscript{37} and the holder of the Bs/L is the Claimant.\textsuperscript{38} The term imposes an obligation on the Respondent to deliver the Cargo only to the Claimant. Since the Respondent failed to comply with this obligation by not discharging the Cargo against the Bs/L, the Respondent has committed a breach of contract.

21. A shipowner, who discharges cargo against an indemnity, remains in breach of contract.\textsuperscript{39} The only possible defence for a shipowner, who has discharged cargo without production of an original bill of lading, is that he must do so upon enquiries to achieve reasonable satisfaction that delivery was made to the person entitled to possession of the cargo.\textsuperscript{40}

\textsuperscript{33} Motis Exports Ltd. v Dampskibsselskabet AF 1912, Aktieselskab & Anor [2001] EWHC 499 (Admlty); JI MacWilliam Co. Inc. v Mediterranean Shipping Co. SA (The Rafaela S) [2003] EWCA Civ 556.
\textsuperscript{34} Sacre Export SA v Northern River Shipping Ltd. (The Sormovski 3068) [1994] CLC 433, p. 438; Great Eastern Shipping Co. Ltd. v Far East Chartering Ltd. [2012] EWCA Civ 180.
\textsuperscript{35} Kuwait Petroleum Corp. v I & D Oil Carriers Ltd. (The Houda) [1994] CLC 1037, p. 1047.g; JI MacWilliam Co. Inc. v Mediterranean Shipping Co. SA (The Rafaela S) [2005] UKHL 11.
\textsuperscript{37} Bs/L No. PG1-PG4, Record, p. 14, 16, 18, 20.
\textsuperscript{38} Correspondence between Paul Taylor (the Claimant) and Mark Wiggins (Beatles), Record, p. 29.
\textsuperscript{39} The Houda (n 33).
22. In the present case, the Record does not show that the Respondent had made any enquiry to achieve reasonable satisfaction that delivery was made to the person entitled to possession. In fact, the Respondent stated that it had no knowledge of any arrangements made between the Claimant and Beatles. Having no basis to set aside its obligation to comply with the Bs/L, the Respondent shall remain in breach of contract.

3. The Respondent’s actions cannot be justified by the Liberty Clause

23. The Respondent stated that it was entitled to discharge Cargo at Rotterdam instead of Liverpool pursuant to Clause 29 of the Charterparty (‘Liberty Clause’), which takes the Vegoilvoy form. However, the interpretation of the Liberty Clause cannot be stretched so as to cover the circumstances in the present case.

24. The correct reading of the Liberty Clause has been conveniently provided in The Florida. The Liberty Clause operates if “… in the judgment of Owner or Master it is likely to give rise to risk of … delay or disadvantage to… the vessel or any part of the cargo, or to make it unsafe, imprudent or unlawful to commence or proceed on or continue the voyage or to enter or discharge at the port of discharge”, the shipowner may, “[6] when practicable, have the Vessel call and discharge the cargo at another or substitute port declared or requested by the Charterer”. To rely on such provision, the Respondent must show that there indeed had been circumstances that discharging the Cargo in the port of discharge is likely to give rise to risk of delay or disadvantage to the Vessel.

41 Defence Submission, ¶ 6, Record, p. 72.
42 Charterparty, Record, p. 11.
43 Defence Submissions, ¶ 1, Record p. 71.
44 Select Commodities Ltd. v Valdo SA (The Florida) [2006] 1 Lloyd’s Rep. 1.
45 Clause 29 line 2-4, Charterparty, Record, p. 11.
25. Assistance on the interpretation of the Liberty Clause was also given in The Washington Trader. The Liberty Clause confers upon the master of the vessel certain discretionary powers when, in their judgment, there are circumstances unexpected and beyond control of the owner that threaten the security of the vessel or cargo. The Liberty Clause is inapplicable when delivery to the contractual port of discharge can be done. It does not operate in so far as giving the liberty for the Respondent to discharge the Cargo to another port as it sees convenient.

26. In the present case, there are no reliable facts that there were circumstances that would threaten the security of the Vessel or the Cargo, if the Cargo were to be discharged in Liverpool. The Cargo would have been accepted, as there was market for the Cargo. It was indeed possible for the Vessel to continue to the contractual port of discharge.

27. Therefore, since there exists no circumstances that would trigger the operation of the Liberty Clause, the Respondent cannot rely on it to justify its actions.

28. Furthermore, the Respondent cannot rely on the Liberty Clause to discharge the Cargo without production of the Bs/L. In The Caspiana, it was held that the shipowner could only rely on the liberty clause to discharge the cargo at a substitute port if he discharges to the holder of the bill of lading. In The Houda, the Court justified the shipowner’s decision to refuse to discharge the cargo without production of the bills of lading under the charterer’s order, even though a liberty clause was present. The Court’s ruling was founded on the ground that the shipowner, without exception, must discharge cargo upon production of the bills of lading. Hence, the...
Liberty Clause cannot exonerate the Respondent’s obligation to discharge the Cargo only upon production of Bs/L. As such, notwithstanding the presence of Liberty Clause, the Respondent remains in breach.

B. The Respondent has committed tort of conversion

29. The action of discharging the Cargo in Rotterdam instead of Liverpool amounts to tort of conversion. However, it must be borne in mind that, liability in tort should not be seen as defeating the Respondent’s liability in breach of contract, as tort and breach of contract can co-exist simultaneously.52

30. Atkin J defined tort of conversion as “dealing with goods in a manner inconsistent with the right of the true owner, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right”.53 Based upon such definition, there are three elements that need to be fulfilled, namely: the Claimant still retains the Cargo ownership (1), the Claimant was deprived of their rights upon the Cargo (2), and the Respondent has the intention to deprive the Claimant’s right of the Cargo (3). It is the Claimant’s position that these three elements are fulfilled in the present case.

1. The Claimant still retains the Cargo ownership

a. The Claimant is the Cargo owner pursuant to the Sales Contract

31. In the present case, the Sales Contract between the Claimant, as the buyer, and Beatles, as the seller, is made under CIF terms.54 CIF terms, in essence, do not
regulate sales of goods, *per se*, but a sale of documents relating to goods.\(^5\) A CIF contract is fulfilled by delivery of documents and not by actual physical delivery of goods by the seller.\(^6\) As such, upon delivery of the documents, the Cargo ownership was transferred to the Claimant as the buyer, thereby concluding the Sales Contract.

32. In the present case, the Bs/L was delivered to the Claimant after a proper payment had been made to Beatles.\(^7\) Not only as shipping documents, the Bs/L serve as documents of title.\(^8\) Therefore, the Cargo ownership has been lawfully transferred to the Claimant.

\(b\). *The Cargo ownership has never passed to Beatles*

33. In its Defence Submission, the Respondent claims that the Claimant has allegedly waived its rights over the Cargo.\(^9\) The Respondent may rely on the fact that there were correspondences from the Claimant to Beatles for repayment of the Cargo pursuant to the termination of the Sales Contract\(^10\). However, a waiver must be clear and unequivocal,\(^11\) which does not exist in the present facts. Further, accepting the bill of lading for the goods carried also shows that a buyer had reserved their rights for shipments.\(^12\)

34. In the present case, the Claimant never stated in a clear and unequivocal manner its intention to ‘*have abandoned the goods*’ as the Respondent and Beatles may suggest.\(^13\) As a matter of fact, the Record strongly suggests that the Claimant wishes


\(^6\) Manbre Saccharin Co. Ltd. v Corn Products Co. Ltd. [1918-19] All ER Rep 980; Western Digital Corp. v British Airways Plc. [2001] QB 733.

\(^7\) Claim Submission ¶ 11, Record, p. 67; Correspondence from Paul Taylor (the Claimant) to Mark Wiggins (Beatles), Record, p. 29.

\(^8\) The Sormovskiy 3068 (n 32).

\(^9\) Defence Submissions ¶ 10 point 3, Record, p. 73.

\(^10\) Correspondence from Paul Taylor (the Claimant) to Mark Wiggins (Beatles), Record, p. 25.


\(^12\) ibid.

\(^13\) Correspondence from Mark Wiggins (Beatles) to Paul Taylor (the Claimant), Record, p. 34; Defence Submissions ¶ 10 point 3, Record, p. 73.
to reserve its rights over the Cargo at all times. Moreover, the Claimant has sent a notification letter to the Respondent, stating that the Claimant is the lawful holder of the Bs/L. None of the Claimant’s conduct can be deemed as a waiver of its rights over Cargo. In short, the Claimant holds the property of the Cargo.

2. The Claimant was deprived of its rights upon the Cargo

The second element of tort of conversion is fulfilled by depriving the rights of a true owner over the goods (e.g. misdelivery by a bailee to a person other than the true owner). However, it is not a requirement for the wrongdoer to actually take possession of the goods.

In defiance of its obligation under the Bs/L, the Respondent discharged the Cargo in Rotterdam instead of Liverpool. This conduct has deprived the Claimant’s right to possess the Cargo pursuant to the Bs/L.

3. The Respondent has intention to deprive the Claimant’s right to possess the Cargo

Another element to establish a tort of conversion is an intention to deprive the Claimant’s right to possess the Cargo. As laid out in Thunder Air Limited v Mr Hilmar Hilmarsson, “a refusal of a demand to deliver goods is the usual way of proving an intention to keep goods adverse to the owner.”

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64 Correspondence from Paul Taylor (the Claimant) to Mark Wiggins (Beatles), Record, p. 35.
65 Correspondence from the Claimant to the Respondent, Record, p. 36.
69 Thunder Air Limited v Mr Hilmar Hilmarsson [2008] EWHC 355 (Ch).
70 ibid.
38. Such refusal can be seen in the present case. Despite the Claimant’s request that the Cargo should not be discharged in Rotterdam, the Respondent proceeded to discharge the Cargo therein. Given such refusal, it can be concluded that the Respondent has intention to deprive the Claimant’s right to possess the Cargo.

39. In light of the above explanations, the Respondent has committed tort of conversion, as all the required elements are cumulatively proven. Having established the breach of contract and tort of conversion committed by the Respondent, the Respondent is liable for damages suffered by the Claimant.

III. THE RESPONDENT IS LIABLE FOR THE DETERIORATION OF THE CARGO

40. On its voyage to Liverpool, the Vessel was boarded by pirates. As an inevitable consequence of this event, the Cargo quality deteriorated. Specifically, these circumstances turned the Cargo from Good Merchantable Quality (‘GMQ’) into non-GMQ, as it is no longer fit for the purposes of commonly traded Palm Fatty Acid Distillate (‘PFAD’). In this vein, the Claimant submits that the Respondent is liable for the deterioration of the Cargo, since it has failed to fulfil its obligation under Article III rule 1 of the HV Rules, overriding the exemptions under the HV Rules (A) and under General Exception Clause within the Charterparty (B). Furthermore, the Respondent has also breached Article III rule 2 of the HV Rules (C).

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71 Correspondence from the Claimant to the Respondent, Record, p. 36.
72 Surveys Inc. Report, Record, p. 48; Claim Submissions ¶ 16, Record, p. 68; Defence Submissions ¶ 7, Record, p. 72.
73 Aspinall Lewis International Report ¶ 1.2.2., Record, p. 41.
A. The Respondent has failed to fulfil its obligation under Article III rule 1 of the HV Rules overriding the exemptions under Article IV rule 2 of the HV Rules

41. A shipowner cannot rely on the exemptions under Article IV rule 2 of the HV Rules, if it fails to perform its duty under Article III rule 1 of the HV Rules to provide a seaworthy vessel. The Claimant submits that the Respondent cannot rely on the exemptions under Article IV rule 2 of the HV Rules, as it has failed to fulfil its obligation under Article III rule 1 of the HV Rules, since the nominated Vessel lacks anti-pirate equipment (1), which in turn caused the damage to the Cargo (2).

1. The Vessel was unseaworthy as it lacks anti-pirate equipment

42. The definition of seaworthiness was explained in F.C. Bradley & Sons Ltd. v Federal Steam Navigation Co, where Scrutton LJ has provided that “… the ship must have that degree of fitness which an ordinary careful owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it.” As such, the vessel must be fit to take on perils of the sea and other incidental risk that she must be exposed on a particular voyage. By failing to provide such degree of fitness, the Vessel would be deemed unseaworthy. The standard of fitness includes the physical condition of the vessel and its equipment, the competence of the master and crew, and the adequacy of stores and documentation.

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43. The Gulf of Aden is an area notorious for piracy risks, significantly more commonplace compared to the rest of the world, especially in year 2008 when the voyage of the Vessel was undertaken. Further, it was found in *The Triton Lark*, that on the basis of contemporary material and expert evidence, the risk of a vessel being hijacked was exceptionally high in the Gulf of Aden during the end of year 2008. Thus, the Respondent should have taken this risk into account, when preparing the Vessel for the voyage.

44. A prudent shipowner, in such circumstances, would have prepared its vessel to undertake measures on passing through an area internationally notorious for pirates. As provided in the relevant guidelines, these measures include enhancing surveillance equipment, crew responses, and radio alarm procedures. Barbed wires and non-lethal weapons are advisable to be installed. Even in the event that pirates successfully board the vessel, all doors allowing access to the bridge, engine room, steering gear compartments, and officers' cabins and crew accommodation should still be secured and controlled. The intention is to establish secure areas, precluding any attacker to penetrate.

45. In the present case, it is evident that the Respondent did not prepare the Vessel on preventing pirates other than conducting anti-pirate watch. This was done despite the fact that there were other measures that could have been employed by the Respondent. For example, equipping non-lethal weapons or barbed wires would have

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84 *ibid.*, ¶ 22.
85 *ibid.*, ¶ 10.
86 Procedural Order No.2. ¶ 5, Clarification.
prevented the pirates from boarding the Vessel, or closing all entrances to the vessel if the pirates successfully gained access to the Vessel. In the present case, a mere anti-pirate watch left spacious room for any pirate to easily board the Vessel. Thus, this measure is undoubtedly far below, given the set standard at the relevant time and area, rendering the Vessel unseaworthy.

2. **The unseaworthiness of the Vessel caused the damages suffered by the Claimant**

46. The cause of the damage to the Cargo is the Respondent’s failure to keep the Vessel seaworthy to enter the voyage through the Gulf of Aden. To assess whether unseaworthiness or any other factor caused the damage, we must take into account the facts of the matter.87

47. The test of causation is whether the damage to the goods would not have occurred if the vessel has been made seaworthy.88 In the present case, the damage to the Cargo would not have occurred had the Vessel been seaworthy. Pirates would not have boarded the Vessel if the Vessel were equipped with all the proper measures, such as equipping non-lethal weapons and barbed wires, as to prevent her from being boarded. Had the Respondent taken higher measures to prevent pirates from boarding the Vessel, no damage would have occurred to the Cargo. The voyage would then have continued safely to the port of destination and the Cargo would not have been damaged.

48. In conclusion, the damage to the Cargo occurred because of the Respondent’s failure to make the Vessel fit for the voyage through the Gulf of Aden. Having established that it was the Respondent itself, which had caused the damage to the Cargo, it cannot

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88 The Eurasian Dream (n 77).
rely on the excepted perils in Article IV rule 2 of the HV Rules and is therefore liable for the damage to the Cargo.

B. **The Respondent cannot exempt its liabilities under General Exception Clause within the Charterparty**

49. The Respondent may argue that it is exempted by virtue of General Exceptions Clause within the Charterparty. *The Rossetti*[^89] established that an exception clause could only be applicable if the shipowner has provided all reasonable means to make the ship seaworthy. However, as established in the submission above, the Respondent has failed to make the Vessel seaworthy.[^90] Hence, the Respondent cannot rely on the General Exceptions Clause, and remains in breach.

C. **Furthermore, the Respondent has failed to fulfil its obligations under Article III rule 2 of the HV Rules**

50. Under Article III rule 2 of the HV Rules, a shipowner has the obligation to “*properly and carefully load, handle, stow carry, keep, care for, and discharge the goods carried.*”[^91] Such obligation would also impose a duty for a shipowner to deliver cargo from the ship’s tackle in the same apparent order and condition as upon shipment.[^92] Where the goods have arrived in a damaged condition, it may well be inferred that the goods were not properly or carefully cared for.[^93]

51. The Cargo in the present case was GMQ upon loading.[^94] However, based on the Records, the Cargo deteriorated as a result of act of pirates.[^95] This event still cannot exempt the Respondent from its liabilities, since it did not take reasonable care to

[^90]: See ¶ 53-6.
[^91]: Article III rule 2, HV Rules, emphasis added.
[^93]: Albacora v Westcott & Laurance Line (The Maltasian) [1966] 2 Lloyd’s Rep. 53 HL.
[^94]: Sales Contract, Record, p. 1, 2.
[^95]: Thomas, Cropper, Benedict Report, No. 4 paras.5-6, Record, p. 38.
avoid the excepted perils from occurring.\textsuperscript{96} The Claimant further contends that the Respondent has also failed to fulfil its duty under Article III rule 2 of the HV Rules, due to its decision on passing through routes known to be particularly risky.

52. One of the main duties of a shipowner is to use all reasonable care to bring the voyage to a successful conclusion, protecting the ship and cargo from undue risks.\textsuperscript{97} A shipowner is considered to have taken reasonable care when it takes a safer route without giving any disadvantages to the cargo.\textsuperscript{98} In the present case, the Respondent unilaterally chose to sail through the Gulf of Aden, thereby endangering its crew and the Cargo, despite having the knowledge that Gulf of Aden was prone to piracy at the time of sailing.\textsuperscript{99}

53. The Respondent may argue that it took the route as an exercise of its obligation to deliver the Cargo using the fastest route. However, this obligation must be reconciled with the obligation to maintain the safety of human lives and property at sea.\textsuperscript{100}

54. The Respondent has failed to comply with its obligation to keep the crew and the Cargo safe, because the Respondent decided to enter the Gulf of Aden thereby violating its duty under Article III rule 2 of the HV Rules.

IV. THE CLAIMANT IS ENTITLED TO THE AMOUNT OF DAMAGES CLAIMED

55. Having established the Respondent’s liabilities in relation to the Cargo misdelivery\textsuperscript{101} and deterioration\textsuperscript{102}, the Claimant is entitled to compensation for mitigation cost on

\textsuperscript{96} Guenter Treitel, \textit{Carver on Bills of Lading} (2nd edn, Sweet & Maxwell London 2005); See also \textit{The Teutonia} [1872] LR 4 PC 171; \textit{Gamlen Chemical Co. (Asia) Pty. Ltd. v Shipping Corporation of India Ltd.} [1978] 2 NSWLR 12.


\textsuperscript{99} See ¶ 54.


\textsuperscript{101} See ¶ 23-49.
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the basis of USD 522.50 per mt (A). Alternatively, the Claimant should be granted damages pursuant to GMQ market value of the misdelivered Cargo in Liverpool, which is on the basis of USD 517 per mt (B). Additionally, costs incurred in the Dutch proceedings are recoverable (C) and interest on compound basis should also be awarded along with the damages (D).

A. The Claimant is entitled to compensation for mitigation cost on the basis of USD 522.50 per mt

56. The principle, which is used to measure damages for both breach of contract and/or conversion,103 is to bring the injured party back to its original financial position had there been no breach.104 Such position is achieved by compensating the injured party with the amount of loss naturally flowing from the breach,105 including reasonable expenses to mitigate the loss.106 What is considered as reasonable expense is what a prudent man in the trade would have spent in the ordinary course of his business if he had been aggrieved.107

57. In The Kriti Rex,108 the plaintiff suffered loss because the vessel broke down in the middle of the voyage. However, there was a necessity to ship the cargo immediately

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102 See ¶ 50-64.
103 The Arpad (No. 2) [1934] P 189 (CA); Jabir v HA Jordan & Co. Ltd. [2010] EWHC 3465 (QB); Singh v Yaqubi [2013] EWCA Civ 23.
107 Dunkirk Colliery Company v Lever (1878) LR 9 Ch. D. 20 (James LJ); WL Thompson Ltd. v Robinson (Gunmakers) Ltd. [1955] 2 WLR 185; Owners of Steamship Enterprises of Panama Inc. v Owners of SS Ousel (The Liverpool) (No.2) [1960] 2 WLR 541; The Asia Star [2010] 2 Lloyd’s Rep. 121.
by arranging a substitute vessel. The Court therein held that the cost incurred by the plaintiff in arranging substitute vessel was recoverable, as it was an expense reasonably incurred to mitigate the loss.

58. In the present case, it was a reasonable action for the Claimant to buy substitute cargo to fulfil the sales contract that it had concluded with its sub-buyers.\textsuperscript{109} Such action shall be seen as a reasonable mitigation. Therefore, the Respondent shall compensate the Claimant for USD 522.50\textsuperscript{110} per mt as the cost of mitigation, to which the Claimant is entitled.

**B. Alternatively, the Claimant should be granted damages pursuant to market value on the basis of USD 517 per mt**

59. Alternatively, the Tribunal should consider the market value as the well-established formula on the measurement of damages in cases of non-delivery of goods.\textsuperscript{111} The formula was illustrated in *Rodocanachi, Sons & Co. v Milburn Brothers*,\textsuperscript{112} in which the court held that damages awarded must be based on the market value where and when the cargo should have been discharged. This is based upon the rationale that it is within the contemplation of a shipowner that if it fails to deliver the cargo, it would have to replace the cargo based upon the market value.

60. In the present case, the Respondent should have discharged the GMQ Cargo in Liverpool instead of Rotterdam. Applying the above principle, the measure of

\textsuperscript{109} D&F Brokers Ltd. Sales Note No. 0164, Record, p. 46-7.

\textsuperscript{110} ibid.


damages should be assessed based on the market value of GMQ PFAD in Liverpool during 20 to 30 March 2009. The best evidence of such price is shown in the Single Joint Expert Report which is USD 517 per mt.  

C. The costs incurred in the Dutch court proceedings are recoverable

61. The Claimant submits that the costs it incurred in the Dutch court proceedings, including the legal fees, are recoverable. In *Dadourian v Simms*, it was ruled that the costs in the previous foreign proceedings are recoverable since such loss was a direct result of being embroiled in a proceeding which would never have arisen had there been no breach. The Court granted such costs since it was a proper case to defend and bring, notwithstanding the fact that the plaintiff had lost in that proceeding.

62. Similarly in the present case, it is proper that the Claimant attempted to have security of the Vessel and appealing the order for sale of the Cargo as to preserve its rights over the Cargo. Further, the Claimant would not have been embroiled in the Dutch court proceedings had the Respondent did not commit its breach. Thus, notwithstanding that the Claimant had lost in the Dutch court proceedings, such costs are recoverable.

D. Interest on compound basis must be awarded

63. The Claimant further submits that it is entitled to claim for interest on damages. Section 49(3) of the Arbitration Act 1996, stipulates that an arbitral tribunal “may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case…”

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115 Agreed Statement of Facts for the Arbitration Re: The Dutch Proceedings and Sale of the Cargo, Record, p. 54-5.
116 See ¶ 23-49
117 Section 49(3), UK Arbitration Act.
64. In *Man Nutzfahrzeuge AG v Freightliner Ltd.*, Moore-Bick LJ stated “[t]here has been an increasing willingness to recognise that an award of simple interest does not fully compensate the injured party for the loss caused by being kept out of his money, nor does it adequately reflect the benefit to the wrongdoer of having had the use of it. As a result, it has become routine for arbitrators to award compound interest in the exercise of their powers under s 49(3) of the Arbitration Act 1996.”

65. For the reasons stated above, the Claimant is entitled for the compound interest to be adequately compensated for its loss. Based on the recommendations made by the Law Commission of the UK, the Claimant submits that interest rate shall be on the basis of 1.5% monthly, which is 1% above Bank of England’s 0.5% base rate in addition to the damages claimed.

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119 Law Commission, *Pre-Judgment Interest on Debts and Damages* (Law Com No 287, 2003), para. 3-43.
120 Bank of England Monetary Policy <http://www.bankofengland.co.uk/monetarypolicy/Pages/default.aspx> accessed 10 April 2013
PRAYER FOR RELIEF

In light of the submissions made above, the Claimant respectfully requests the Tribunal to:

DECLARE that the Tribunal has jurisdiction to hear the present dispute;

Further,

ADJUDGE that the Respondent has committed misdelivery and is liable towards the Claimant for:

   a. Breach of contract; and
   b. Tort of conversion;

ADJUDGE that the Respondent is liable for the deterioration of the Cargo since the Respondent has:

   a. Breached the duty to provide seaworthy Vessel; and/or
   b. Breached the duty to take care of the Cargo;

Therefore,

AWARD the Claimant for the loss of the Cargo in respect of:

   a. The mitigation cost on the basis of USD 522.50 per mt, accordingly in the amount of USD 2,090,000; or
   b. The market value on the basis of USD 517 per mt, accordingly in the amount of USD 2,068,000;

AWARD the Claimant interests and costs as follows:

   a. Dutch court fees of USD 138,843.14;
   b. Legal fees in respect of the Dutch court proceedings of USD 107,913.12;
   c. Interest on a compound basis pursuant to s. 49 of the Arbitration Act 1996; and
   d. The costs of the present Proceeding with compound interest on costs.