FOURTEENTH ANNUAL INTERNATIONAL MARITIME LAW ARBITRATION MOOT COURT COMPETITION

2013

INDIAN MARITIME UNIVERSITY, CHENNAI, INDIA

IN THE MATTER OF AN ARBITRATION HELD AT LONDON

MEMORANDUM ON BEHALF THE RESPONDENTS

ON BEHALF OF: AARDVARK LTD
Aardvark House
The High Street Bootle
Merseyside

AGAINST: TWILIGHT CARRIERS

CLAIMANT RESPONDENT

TEAM NO.

MS. SHALINI JAYADEV, MR. SHAIZ CHOUTHAI, MR. CHETAN KH AJURIA
FOURTEENTH ANNUAL INTERNATIONAL MARITIME LAW
ARBITRATION MOOT COURT COMPETITION
2013

MEMORANDUM
FOR
THE RESPONDENTS

TEAM NO. 14
# LIST OF ABBREVIATION

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<td>Claimant/Consignee/Buyer</td>
<td>Aardvark Ltd.</td>
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<td>Respondent/Shipowner/Carrier</td>
<td>Twilight Carriers</td>
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<td>B/L</td>
<td>Bill of Lading</td>
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<td>IMLAM Competition 2013 Moot Problem</td>
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<td>PFAD</td>
<td>Palm Fatty Acid Distillate</td>
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<td>GMQ</td>
<td>Good Merchantile Quality</td>
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<tr>
<td>Non-GMQ</td>
<td>Non-Good Merchantile Quality</td>
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<tr>
<td>CIF</td>
<td>Cost Insurance Freight</td>
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<td>C/P</td>
<td>Charterparty</td>
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<td>Cl.</td>
<td>Clause</td>
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<td>FOSFA</td>
<td>Federation of Oils, Seeds and Fats</td>
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<td>COGSA</td>
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3. SUMMARY OF FACTS

3.1. The Claimant (Aardvark Limited), are the buyer and receivers of 4,000 mt Palm Fatty Acid Distillate (PFAD) carried on board the Vessel Twilight Trader. The Respondents (Twilight Traders) are the Owners of the Vessel who have chartered their vessel to the Charterer’s (Beatle Oils & Fats Ltd) by way of charter party dated 12th September 2008. The Bills of Lading provided for discharge of cargo at Liverpool, Merseyside.

3.2. The Twilight Trader had loaded full cargo of PFAD at Pasir Gudang, Malaysia and Crude Palm Oil at Dumai (Indonesia) in all her tanks. After completion of loading she sailed from Dumai on 5th November 2008 and proceeded to Liverpool, where she had to discharged the cargo, via the gulf of Aden and the Suez Canal. On 15th November the vessel was boarded by Somali pirates and was ordered by the pirates to sail to the Somali coast where the vessel was held hostage until she was released on 12th February 2009. As part of charterparty Cl.16 provides heating of the cargo which was the duty of the owners to take proper care of the cargo which was not complied by the owner and due to which the cargo went from being GMQ to Non-GMQ cargo

3.3. The claimants were prepared for Charterers to organise a sale on their behalf as long as they agreed to transfer the sale proceeds immediately to Claimants. The respondents informed that the claimants have abandoned the goods and they have no rights to order the charterer regarding the delivery of cargo.
3.4. As payers of the purchase price and holders of the bill of lading, claimants were therefore established as the clear legal owners of the cargo and accordingly would have to dispose of the cargo themselves and informed the Charterers to deliver the cargo to Liverpool. The vessel was proceeding to Rotterdam to unload the other cargo, the claimants considered selling the cargo to alternative buyers in Rotterdam.

3.5. However, during this period, it became increasingly clear that Charters/ Sellers were actively seeking to obtain security for the claim against Claimants. As a result Claimants were not to give Charterers the Bill of Lading. Charterers wrongly claimed that Claimants had abandoned the cargo and said that Claimants should release the Bill of lading to them. In a message of 20 March 2009 Charterers refused to change the destination in the bill of lading to Rotterdam and said that Claimants had no entitlement to give them or the owners orders in respect of the cargo.

3.6. On 20th March Claimants wrote to the Respondents informing that they were the lawful holders of the bill of lading. Notwithstanding that notification the respondents discharged the cargo on or about 20th – 22nd March 2009 to Charterers.

3.7. Claimants later discovered that on or about 19 March 2009 Charters issued letters of indemnity to the Respondents asking them to deliver the cargo to them (i.e. Shipper) at Rotterdam without production of the bills of lading. On or about 23 March 2009 Shipper arrested the cargo as security for their claims against Claimants despite this being prohibited by the FOSFA terms governing sales contracts.
3.8. Claimants tried to set aside the arrest of the Cargo in the Rotterdam Courts, but failed at first instance. Charterer then obtained permission from the Dutch Court for the Cargo to be sold. This sale has now taken place and, as ordered, by the Dutch Court, the proceeds are held in the Dutch Court account, pending a decision in the London arbitration. The Court of Rotterdam rejected Claimants appeal to set aside the arrest of the cargo. On 23 March 2009 Claimants arrested the Vessel in Rotterdam as security for their claims for damages against the Respondents for delivery of the cargo in Rotterdam without production of the Bills of Lading. The Vessel was released against security provided by Charterer on behalf of the Respondents. The Respondents appealed against the arrest of the Vessel. The Dutch Court of appeal maintained the arrest.
4. ARGUMENTS ADVANCED

4.1. THERE IS BREACH OF ARTICLE III RULE 2 OF THE HAGUE-VISBY RULES

4.1.1. It is humbly submitted before the Arbitral Tribunal that the Respondents/ Carriers are not in breach of the Article III of Hague –Visby Rules.

Art. III Rule 2 of Hague-Visby Rules says:

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

   (a) …. 
   (b) …. 
   (c) …. 

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

The obligation stated in this article depends also ‘upon the kinds of conditions which it is anticipated that the vessel will meet’.¹ This obligation depends upon the perils of the sea. When the vessel was captured by the pirates the respondents didn’t had any choice of heating the oil even if it is needed. The obligation is subject the perils of the sea.

¹ Great China, 196 CLR at 175 [34]
5.1.1. “Piracy” is a named peril in the most commonly used 1983 version of the Institute Time Clauses. By usage existing in maritime sector piracy is marine peril. Piracy comes under the “perils of the sea” and the “Act of Public Enemies”. In case of piracy attack the duty rests with the ship owner to prove that due diligence has been exercised to deter piracy and mitigate the damages caused by piracy. To prove this point the ship owner relies upon the Report submitted by Aspinall Lewis International after examining the Cargo of Palm Oil after hijacking at Somalia. The Reported was submitted by Julia Mynott, Associate Director, Aspinall Lewis International LLP.

5.1.2. The report in Para 1.2.4 states that the crew was not allowed applying the heating to the cargo for the period of captivity. It was impossible to record daily temperature of the cargo. Even though deck area was illuminated with light, a permanent look out was not allowed during the captivity period. It is clear from the report that the crew was never at freedom to preserve the quality of the cargo even though they had exercised due diligence.

5.1.3. It has been held recently in Hilditch (No 2), that the carrier will only escape liability if it can prove that the loss or damage was caused by an excepted peril alone. The Supreme Court of the United States enunciated, in Schnell v The Vallescura, a principle which is

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2 ITC (Hulls) Para.6.1.5.
3 Hague Visby Rule, Article IV 2 (c).
4 Hague Visby Rule, Article IV 2 (f).
7 293 US 296 at 306
8 Known as the Vallescura Rule
now codified as part of Art V r 7 of the Hamburg Rules. There, Stone J, delivered the opinion of the Court and said:

‘Where the state of the proof is such as to show that the damage is due either to an excepted peril or to the carrier’s negligent care of the cargo, it is for him to bring himself within the exception or to show that he has not been negligent …’

5.1.4. The obligation under art. 3(2), although a stringent one, is not absolute. The carrier must fulfil his obligations "properly and carefully", which does not mean, however, in a manner absolute and perfect. Lord Pearson, in Albacora S.R.L. v. Westcott & Laurance Line Ltd., stated: "The word 'properly' adds something to 'carefully', if 'carefully' has a narrow meaning of merely taking care. The element of skill or sound system is required in addition to taking care."

Lord Reid believed that "properly" meant in accordance with a sound system and went on:

"... the obligation is 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."

The word "properly" does not define the scope of the voyage or the port of discharge; rather they are decided upon by the parties in the bill of lading. Consequently under

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9 Schedule 2 to the Carriage of Goods by Sea 1991 (Cth)
10 The Vallescura 293 US at 306
11 [1966] 2 Lloyd's Rep. 53 at p. 64 (H.L.). See also Silversandal (Bache v. Silver Line Inc.) 110F.2d 60, 1940 AMC 731 (2 Cir. 1940).
FOSFA agreement there is no clause agreed which said the cargo has to be heated, as a result there was no need of cargo being heated.

Further, the carrier may avoid liability by proving that the loss or damage was in fact caused by one of the exceptions of art. 4(2)(a) to (q) because the obligations imposed by art. 3(2) are not absolute.

5.1.5. Therefore, the Respondents/Carriers have taken all due-care of the cargo and hence are not in breach of the Article III of Hague – Visby Rules.

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5.2. THERE IS BREACH OF CONTRACT BY DELIVERING THE CARGO AT ROTTERDAM

5.2.1. It is humbly submitted before the Arbitral Tribunal that the respondents have not done a breach of contract by delivering the cargo of claimants at Rotterdam.

5.2.2. It is clear from Clause 29 of Charterparty i.e.

“29. Liberty clause:
In any situation whatsoever and wheresoever occurring ... which in the judgment of the Owner or Master is likely to give rise to risk of ... delay or disadvantage to ... the Vessel or any part of her cargo, or to make it unsafe, imprudent or unlawful for any reason to commence or proceed on or continue the voyage or to enter or discharge the cargo at the port of discharge... the Owner or Master may discharge ... the cargo ... The Owner may, when practicable, have the Vessel call and discharge the cargo at another or substitute port declared or requested by the Charterers.”

Therefore, in the instant case the charterer has informed the shipowner to change the voyage to the Rotterdam. The claimant by letter has informed Mark Wiggins that they do not consider that the cargo should be sent to Liverpool where it would have no value. This clearly shows that the claimants have purportedly abandoned the goods and therefore they are not the rightful owner of the cargo.

5.2.3. Between 20 and 30 March 2009 the vessel was under the capture of pirates and according to claimant the goods went from GMQ to Non-GMQ and therefore it is not suitable to enter the human food chain. However, Single Joint Expert Report by Kevin Ackroyd says that there has always been a market for non-GMQ PFAD in the UK and so there were buyers who would have bought such product. There is also market for non-GMQ in Europe.
5.2.4. Further, the hijack in the Gulf of Aden was unexpected and claimants always took this risk. After the release of the ship from the pirates, the claimants refused to take the delivery of the cargo and informed that they want repayment of the contract price. Therefore, this shows the clear notice of an anticipatory breach of contract and this breach by the claimant is also accepted by the respondents. This breach brings the contract to an end. After the communicating the same the respondents are free to sail elsewhere and dispose of the cargo in mitigating the losses. Again by 16 March 2009 the claimants made it very clear that they accept the repudiatory breach which brings the contract to an end, hence making the claimant no more the owner.

5.2.5. Further, it is possible that under certain circumstances, a carrier may be obliged to land and sell cargo to prevent it from deteriorating. In *Lekas & Drivas v. Basil Goulandris*, it was held that: "... circumstances may arise when the master of a ship has not merely the authority but, under sect. 3(2) of *COGSA*, the duty to sell cargo that is at risk of further deterioration." Therefore the respondents contemplated that the goods may deteriorate and therefore sold it in Rotterdam to minimize the damages.

5.2.6. Therefore, respondents have not done a breach of contract by delivering the cargo at Rotterdam.
5.3. **THE OWNER IS NOT RIGHT IN DELIVERING THE CARGO WITHOUT PRODUCTION OF BILL OF LADING**

5.3.1. It is humbly submitted before the Arbitral Tribunal that the Owner is not right in delivering the cargo without production of Bill Of Lading.

5.3.2. As per letter dated 6 March 2009 from Aardvark Ltd to Beatles Oils & Fats Ltd stated that after relying on Feed Materials Assurance Scheme (FEMAS) Report Aardvark came to the conclusion that because of the reason of piracy the cargo cannot be used as food or feed ingredient and cannot be disposed to any non food. Beatles Oils & Fats Ltd replied through a letter dated 15 March 2009 that through conduct Aardvark Ltd is in anticipatory breach of contract. Twilight Carriers was instructed by Beatles Oils & Fats Ltd to sail to Rotterdam instead of Liverpool for unloading. The Beatles Oils & Fats Ltd requested Aardvark Ltd to return the original bill of lading but the request was not honored.

5.3.3. After receiving a letter of indemnity from Beatles Oils, Twilight Carriers unloaded as per instruction of the Charterers. The practice of issuing a letter of indemnity when there is original bill of lading is highly unusual. A few authors take a similar view that the letter of indemnity should be accepted as valid and enforceable where no fraud is intended.\(^{14}\) In the case of *Brown, Jenkinson & Co. v. Percy Dalton*,\(^{15}\) Lord Justice Pearce held that:

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“In trivial matters and in cases of bona fide dispute where the difficulty of ascertaining the correct state of affairs is out of proportion to its importance, no doubt the practice [of issuing a letter of indemnity] is useful.”

In *The Sormovskiy*16 Clarke J. held that:

“... a master or ship owner is not entitled to deliver goods otherwise than against an original bill of lading unless it is proved to his reasonable satisfaction both that the person seeking the goods is entitled to possession of them and that there is some reasonable explanation of what has become of the bill of lading.”

5.3.4. In the present case the Beatles requested the return of the original bill of lading but the same were not returned to the Beatles. So as far a reasonable explanation the Twilight Carriers can rely on the fact that bill of lading was not available to them. Twilight Carriers then opted for the next option that is the letter of indemnity given by the Beatles Oils & Fats Ltd.

5.3.5. Therefore it is humbly submitted before this Hon’ble Arbitral Tribunal that the respondent, in delivering the goods to the Beatles without presenting Bill of lading, is not in breach of contract.

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5.4. THE RESPONDENTS ARE LIABLE TO PAY DAMAGES FOR THE BREACH OF CONTRACT

5.4.1. It is humbly submitted before this Hon’ble Arbitral Tribunal that the respondent, is not in breach of their contractual duty and not liable to pay damages.

5.4.2. Where one party to a contract fails to perform the contract obligations or its performance fails to satisfy the terms of the contract, the party shall bear such liabilities for breach of contract as to continue to perform its obligations, to take remedial measures, or to compensate for losses.

5.4.3. In the instant case, claimants have abandoned the goods and as per the Liberty clause the respondents are have changed their destination to Rotterdam. There is no breach on the respondents side as the change of destination is only after the abandonment of goods by the claimant.

5.4.4. The correct calculation of the damages which has to be paid to the Aardvark Ltd is the market value of Cargo in the Port of Rotterdam (Discharge Port in accordance with Clause 29 of Charter Party). Market value can be determined from the sale of PFAD by the Beatles at USD 350 pmt. Any claim is limited to 1.4 million.

5.4.5. Therefore it is humbly submitted before this Hon’ble Arbitral Tribunal that the Claimant has made an anticipatory breach of contract and hence liable for damages.
PRAYER FOR RELIEF

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

ADJUDGE that:

a. There is no Breach of Article III Rule 2 Of Hague Visby Rules by the Respondents

b. There is no Breach of Contract by delivering the cargo at Rotterdam but there is anticipatory breach by the claimant itself

c. The owner is right in delivering the cargo

d. The respondents are not liable to pay damages for the breach of contract

And further,

AWARD the Respondents the following:

a. Cost incurred by the respondents to unload the cargo at Rotterdam

b. Loss sustained in mitigating the loss of cargo

c. Any other damages which the Tribunal thinks fit.

Most Respectfully Submitted

Sd/-

Counsel for the RESPONDENTS