IN THE MATTER OF AN ARBITRATION HELD IN HONG KONG

Claimant
Reliable Tankers Inc
Reliable Holdings Inc

Respondent
Super Charters

MEMORANDUM FOR THE CLAIMANT

TEAM NO. 4

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LIST OF ABBREVIATIONS


Owners  Reliable Tankers Inc.

Charterers  Super Charters

Clause 2  Clause 2 of Reliable Tankers Inc. Standard Terms

The Vessel  The Reliable Butterfly

The Charterparty  The charterparty as constituted by the Fixture Recap of 19 November 2011, including Asbatankvoy 1977 with Super Charters Rider Clauses 1 to 61, and incorporating Reliable Tankers Inc.’s and Super Charters’ Standard Terms

Freight deemed earned  Clause 4 of Reliable Tankers Inc.’s Standard Terms

case

Clause 5  Clause 5 of Reliable Tankers Inc.’s Standard Terms

RH  Reliable Holdings Inc.

Clause 4  Clause 4 of Super Charters’ Standard Terms of Business
A. Owners can proceed with the present arbitration to enforce their contractual rights under English law even though they do not exist as a legal entity under Fruitland law. This is because the Charterparty is governed by English law and therefore, Fruitland law is not relevant to the determination of Owners' contractual rights under the Charterparty.

1. A plaintiff can bring proceedings to enforce his contractual rights under English law when the proper law of the contract is English law. Foreign law cannot operate to extinguish his contractual rights under English law.

2. Even if a foreign law is relevant to issues under dispute arising from a contract governed by English law, English courts have applied it only for the purpose of enforcing a plaintiff’s contractual rights under English law, and not where a defendant seeks to rely on a foreign law to discharge his contractual obligations under English law.

B. In the alternative, this Tribunal should substitute RH for Owners because RH is the universal successor of Owners, and the proceedings commenced in the name of Owners were under a misnomer.

1. A new party can be substituted for an original party under whose name an arbitration proceeding was commenced when the new party is the universal successor of the original party.

2. A new party can be substituted for an original party even if the new party would have been time-barred from commencing new proceedings.

3. A new party can be substituted for an original party in a proceeding where the naming of the parties at the time of commencement of the proceeding was a misnomer.
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1. Reliable Tankers Inc. ("Owners") is a ship-owning company. Super Charters ("Charterers") is a ship-chartering company. Both are long established companies in the shipping industry.

2. In October 2011, Charterers were interested in chartering a VLCC from Owners. In the course of negotiations, Charterers requested the deletion of the phrase “to either party whatsoever” in Clause 2 of Owners' Standard Terms. The original Clause 2 reads: “...IF IT BECOMES EVIDENT THAT SHIP WILL MISS HER CANCELLING DATE, OWNER TO GIVE A NEW ETA AND LAYCAN WHICH CHARTERER MUST EITHER CONFIRM OR DECLINE...IF CHARTERER ELECTS TO DECLINE, THEN C/P TO BE CANCELLED WITHOUT RECURSE TO EITHER PARTY WHATSOEVER.”1 ("Clause 2"). In an Internal Memorandum dated 14 November, circulated only within Owners' internal management, Owners recorded their agreement to delete the phrase “to either party whatsoever”, and their view that the deletion would not make any difference to the original meaning of Clause 2.

3. On November 17, Owners offered the charter of the Reliable Butterfly ("the Vessel") to Charterers in a Fixture Recap. The terms of the charterparty were also included in this Fixture Recap, which incorporated the Standard Terms of both contracting parties2. Clause 4 of Owners’ Standard Terms provides: “FREIGHT DEEMED EARNED IN FULL DISCOUNTLESS NON-RETURNABLE AND 95% OF MINIMUM FREIGHT PAYABLE UPON LIFTING SUBJECTS...”3 ("freight deemed earned clause"). The charterparty was also expressly stated to be governed by English law4.

4. On November 19, Charterers accepted the terms of the offer and requested that Owners confirm that the charterparty was fully fixed with subjects lifted at 1700h.

5. On the same day, Owners sent a second Fixture Recap of the charterparty ("The Charterparty") to Charterers and confirmed that the Charterparty was fully fixed with subjects lifted at 1700h. They also informed Charterers that the Vessel had commenced its preliminary voyage to the bunker port.

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1 See pg. 87 of the Moot Question.
2 See pg. 8 of the Moot Question.
3 See pg. 87 of the Moot Question.
4 See pg. 49 of the Moot Question.
and that it should be able to arrive at the loadport by the ETA of 3 December as stipulated in the Charterparty\(^5\).

6. On November 22, the Vessel was arrested at the bunker port. In an Internal Memorandum dated November 23, Owners expressed their frustration at the fact that they could not obtain the release of the Vessel because Charterers had not paid freight. This was despite the fact that freight had already fallen due upon the lifting of subjects on November 19.

7. Owners attempted to negotiate with the bunker suppliers for the release of the Vessel. However, the negotiations broke down. Thereafter, on November 25, Owners informed Charterers that they could not obtain the release of the Vessel, and expressed their regret that the Vessel would not be able to make her stipulated laycan of December 5. In the same correspondence, Owners promised to offer Charterers a revised laycan once they had sufficient information as to when the arrest would be lifted.

8. In response, Charterers terminated the Charterparty on November 27, before the stipulated laycan date of December 5. They informed Owners that they would have had terminated the Charterparty even if Owners had offered a revised laycan with determined dates.

9. Despite their act of terminating the Charterparty before the actual laycan had expired and their contractual right to cancel had arose, Charterers threatened to sue Owners for the cost of any replacement vessel that they might have to obtain. They also demanded that Owners reimburse them for all other costs that they might incur, despite the express limitation of liability clause in Owners’ Standard Terms (‘Clause 5’), which states: “IN NO EVENT SHALL OWNERS BE LIABLE FOR ANY CONSEQUENTIAL DAMAGES UNLESS CAUSED BY PROVEN GROSS NEGLIGENCE ON THE PART OF THE OWNERS, THEIR SERVANTS, OR AGENTS”\(^6\).

10. In response, Owners informed Charterers that pursuant to Clause 2, the termination of the Charterparty operated to release both parties from any further obligations and liabilities under the

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\(^5\) See pg. 47 and 89 of the Moot Question.  
\(^6\) See pg. 87 of the Moot Question.
Charterparty. Owners also reminded Charterers of their obligation to pay freight, which had accrued upon the lifting of subjects at 1700h on November 19.

11. Charterers subsequently entered into a new charterparty for two Suezmaxes with a third party. This was despite the fact that Owners had offered a sister VLCC to the Vessel to Charterers. At this point in time, the freight market for Suezmaxes was experiencing a sharp and sudden rise.

12. On January 28, on account of Charterers' refusal to pay any freight, Owners issued a notice of commencement of arbitration to recover freight due to them. Charterers did not reply until February 12. When they did, they stated that the notice of commencement of arbitration was invalid because Owners were not an existing separate legal entity under Fruitland law, given that Owners had amalgamated into their holding company, Reliable Holdings Inc. (‘RH’), in December. The delayed response was a tactical move on Charterers' part. In taking an unreasonably long time to reply, Charterers were positioning to rely on Clause 4 in their Standard Terms of Business to argue that RH was time-barred from commencing a new proceeding against Charterers (‘Clause 4’). Clause 4 states: “All claims against Super Charters must be notified to Super Charters within 10 days of discharge/re-delivery and/or when discharge/re-delivery would have taken place if for whatever reason it did not (as appropriate) and any suit or proceedings must be commenced within a further 10 days thereafter”. This was despite the fact that Charterers had agreed on November 20 to extend the time for commencing proceedings.

13. In its response of February 24, RH clarified that the commencement of arbitration in the name of Owners was a “misnomer” because Owners and RH were one and the same entity.

14. Since Charterers have refused to pay up on the outstanding freight, RH has joined Owners in the present arbitration proceedings in its capacity as Owners' universal successor to enforce Owners' contractual right to freight under the Charterparty.

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7 See pg. 88 of the Moot Question.
8 See pg. 104 of the Moot Question.
II. PART ONE – OWNERS’ CLAIMS

Commencement of the Arbitration Proceedings

A. Owners can proceed with the present arbitration to enforce their contractual rights under English law even though they do not exist as a legal entity under Fruitland law. This is because the Charterparty is governed by English law and therefore, Fruitland law is not relevant to the determination of Owners’ contractual rights under the Charterparty.

1. A plaintiff can bring proceedings to enforce his contractual rights under English law when the proper law of the contract is English law. Foreign law cannot operate to extinguish his contractual rights under English law.

15. A party can bring a claim to enforce his contractual rights under English law when the proper law of the contract is English law. This is so even if the claim might have been extinguished by a foreign law\(^9\). As the parties have specifically chosen English law to govern their contract, foreign law is irrelevant to the determination of any disputes arising under the contract\(^{10}\). Therefore, a defendant cannot rely on a foreign law to prevent the plaintiff from bringing proceedings to enforce his contractual rights under English law.

16. In *Anthony Gibbs*, the plaintiff brought an action for breach of contract. The defendant company was incorporated under French law, but the proper law of the contract was English law. The court allowed the plaintiff’s claim despite the fact that the defendant had been discharged of its liabilities under French law. It upheld the rule that a foreign law cannot be used to extinguish contractual rights and obligations under English law.

17. The necessary corollary of the *Anthony Gibbs* principle is that a defendant cannot rely on a foreign law to prevent a plaintiff from proceeding with a claim to enforce the latter’s contractual rights under English law\(^{11}\). This principle was held to apply even where the plaintiff knew that the

\(^{9}\) *Anthony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* [1890] 25 Q.B. 399. *[Anthony Gibbs]*

\(^{10}\) *Ibid.*, at 406.

\(^{11}\) *Global Distressed Alpha Fund v PT Bakrie Investindo* [2011] 1 W.L.R. 2038 at 26. *[Alpha Fund]*
defendant had been discharged of its obligations under a foreign law at the time the plaintiff acquired its contractual rights under English law by virtue of an assignment.

18. In the present case, the parties have expressly agreed that the Charterparty is to be governed by English law. Accordingly, since Owners' rights under the Charterparty are found in English law, Charterers cannot invoke Fruitland law to argue that Owners do not have a legal existence under Fruitland law so as to bar Owners from proceeding with their claim to enforce their contractual rights under English law.

2. Even if a foreign law is relevant to issues under dispute arising from a contract governed by English law, English courts have applied it only for the purpose of enforcing a plaintiff’s contractual rights under English law, and not where a defendant seeks to rely on a foreign law to discharge his contractual obligations under English law.

19. A foreign law is relevant for determining issues under dispute arising from a contract governed by English law only when it is used in order to enforce a party’s contractual rights under English law. On the other hand, a foreign law cannot be used by a defendant to defend claims that are made by a plaintiff to enforce the latter’s contractual rights under English law.

20. This principle was applied in the cases of Metliss and Adams. Although the facts were substantially similar in both cases, the House of Lords allowed the plaintiffs in Metliss to rely on a foreign statute to enforce their contractual rights under English law, whereas it prevented the defendant in Adams from relying on the very same foreign statute to defend claims which were made by the plaintiff to enforce the latter’s contractual rights under English law.

21. In Metliss and Adams, a Greek bank guaranteed the payment of interest under the bonds purchased by the plaintiff bondholders. The contract of guarantee was expressly governed by English law. The Greek bank was subsequently amalgamated into the defendant bank under a Greek amalgamation statute. When the bond-issuer defaulted on its interest payments, the plaintiff bondholders sued the

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12 Ibid., at 27.
13 See p. 49 of the Moot Question.
defendant bank as the guarantor of the bonds. The court in *Metliss* held that the plaintiff bondholders could rely on the Greek amalgamation statute to enforce their contractual rights. This was done by making the defendant bank pay the interest under the defaulted bonds, in its capacity as the universal successor of the original guarantor bank.\textsuperscript{16}

22. After *Metliss*, the Greek amalgamation statute was amended to provide that upon amalgamation, the successor bank would not assume the guarantor obligations of the original guarantee bank. Thus, in *Adams*, the defendant bank sought to rely on the amended Greek statute to defend itself against the plaintiff bondholders' claims. The House of Lords held that the defendant bank could not rely on Greek law to counter the plaintiffs' claims under English law as it would be unjust to allow a foreign law to bar proceedings brought by a plaintiff to enforce his contractual rights under English law.\textsuperscript{17}

23. Accordingly, a foreign law will be relevant only for the enforcement of contractual rights under English law. It cannot be used by the defendant to defeat claims that a plaintiff brings to enforce his contractual rights under English law.

24. In the present case, Charterers are relying on Fruitland law to defend Owners' claim to freight under English law. By relying on Fruitland law to assert that Owners were not a separate legal entity at the time of commencement of the present proceedings, Charterers are effectively arguing that the commencement of proceeding by Owners was a nullity. According to Charterers, RH, as the universal successor of Owners under Fruitland law, must commence fresh proceedings to enforce Owners' contractual rights. Since such fresh proceedings would be time-barred pursuant to *Clause 4* of Charterers' Standard Terms, the practical effect of Charterers' argument is that Fruitland law would operate to extinguish Charterers' contractual obligations under English law. However, for the reasons stated above, a party cannot rely on a foreign law to extinguish any contractual rights established under English law.

\textsuperscript{16} *Metliss*, supra note 14 at 525 and 529.

\textsuperscript{17} *Adams*, supra note 15 at 287.
B. In the alternative, this Tribunal should substitute RH for Owners because RH is the universal successor of Owners, and the proceedings commenced in the name of Owners were under a misnomer.

25. The curial law of an arbitration is the law of the place that is the seat of the arbitration\(^\text{18}\). Therefore, the Arbitration Act 1996 is the applicable curial law for the arbitration.

26. Section 34 of the Arbitration Act 1996 confers power on the arbitral tribunal “to decide on all procedural matters”\(^\text{19}\). Therefore, the Tribunal has the power to substitute a new party for an original party in an arbitration proceeding.

1. A new party can be substituted for an original party under whose name an arbitration proceeding was commenced when the new party is the universal successor of the original party.

27. In an arbitration proceeding, a new party can be substituted for an original party under whose name the proceeding was commenced. This is so when the new party is the universal successor of the original party under an amalgamation scheme. The new party can be substituted for the original party because the former acquires all the rights of the latter under the amalgamation scheme\(^\text{20}\). Specifically, it also acquires the right to the cause of action of the original party. Since it would be unsatisfactory and illogical that a universal successor be prohibited from continuing a proceeding commenced by a party that was amalgamated into it, the English courts have allowed a new party to be substituted for the original party under such circumstances\(^\text{21}\).

28. Although it may be argued that a proceeding commenced by a party with no separate legal existence is a nullity, the cases supporting such a proposition can be distinguished from the present case. In those cases where the proceedings were treated as a nullity\(^\text{22}\), there was in fact no


\(^{19}\) Section 34 of the Arbitration Act states: “(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.”


\(^{21}\) Industrie Chimiche Italia Centrale v Alexander G Tsavliris & Sons Maritime Co (The Choko Star) [1996] 1 W.L.R. 774 at 784C.

application for the substitution of the parties. On the contrary, in the present proceedings, RH is applying to be substituted for Owners.

29. In this case, since RH has acquired Owners' cause of action so as to enable it to bring the present arbitration proceedings against Charterers in its capacity as Owners’ universal successor, this Tribunal should allow RH to be substituted for Owners.

2. A new party can be substituted for an original party even if the new party would have been time-barred from commencing new proceedings.

30. A new party can be substituted for an original party even where the new party would have been time-barred from commencing fresh proceedings against the defendant if there had been no substitution in the original action. The reason is that since the cause of action remains unchanged irrespective of whether it is the new party or the original party bringing the proceedings, the defendant would not suffer any prejudice should the new party be substituted for the original party. Accordingly, the courts have allowed a new party to be substituted for an original party in a proceeding notwithstanding the operation of a time-bar.

31. In the present proceedings, since the cause of action to recover freight from Charterers is the same regardless of whether the plaintiff is RH or Owners, this Tribunal should substitute RH for Owners, notwithstanding the fact that RH could be time-barred if it commenced a new, separate proceeding against Charterers.

3. A new party can be substituted for an original party in a proceeding where the naming of the parties at the time of commencement of the proceeding was a misnomer.

32. A new party can be substituted for an original party when there is a misnomer as to the name of the party who commenced the proceedings. This is so when the identity of the party intending to bring the proceedings is clear to the defendant. The reason is because the law draws a distinction

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23 Yorkshire Regional Health Authority v Fairclough Building Ltd [1990] 1 W.L.R. 210 at 221B.
24 Ibid.
26 Ibid., at 207.
between the "name" of a party intending to bring a proceeding and its "identity". Hence, a defendant will not be prejudiced by a subsequent substitution of parties when there is no ambiguity as to the identity of the party intending to sue, even though the proceedings were commenced under a wrong name. Therefore, courts have treated such a misnomer as a mere irregularity, and have substituted a new party for an original party under whose name a proceeding was commenced.

33. In this case, the arbitration proceeding commenced in the name of Owners was clearly a misnomer. It was a well-known fact within the shipping industry that Owners were amalgamated to form RH in December. It was even reported in *the Daily* on January 3. Therefore, Charterers knew that Owners were merged into RH, and that RH had acquired Owners' cause of action under the Charterparty. Hence, Charterers did not have any misapprehension about the identity of the party that possessed the right to bring the present proceedings against them as they knew the identity of the relevant claimant party at all times. Accordingly, this Tribunal should substitute RH for Owners.

**Recovery of Freight**

C. Owners can recover freight under the "freight deemed earned" clause in the Charterparty because the subjects were lifted prior to the termination of the Charterparty.

1. A shipowner can recover freight under a charterparty clause stipulating "freight deemed earned upon [the occurrence of a specified event]" when the specified event has occurred.

34. A charterparty clause which stipulates "freight deemed earned upon [the occurrence of a specified event]" is paramount in determining a shipowner's right to freight, and effectively overrides the general common law rule that freight is payable only on delivery of the goods at the place of discharge. This is because such a clause indicates the intention of the parties to cast completely

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29 See pg. 100 of Moot Question.
30 *De Silvale v Kendall* (1815) 4 M. S. 37 at 42.
the risk of freight on the charterer\textsuperscript{31}. Since a contract must be construed in accordance with the parties’ intention\textsuperscript{32}, a shipowner can recover freight under a charterparty clause stipulating "freight deemed earned upon [the occurrence of a certain event]" when the specified event actually occurs or has occurred. Hence, once the right to freight has accrued upon the occurrence of the specified event, freight becomes a liability in debt that must be paid even where the voyage is frustrated, or the cargo is never delivered\textsuperscript{33}.

35. In this case, Owners and Charterers are long established commercial parties in the shipping industry. By agreeing to the “freight deemed earned" clause in Owners’ Standard Terms, the clear intention of both parties was to transfer the risk of freight onto Charterers once the subjects were lifted, notwithstanding any subsequent event that might deprive Charterers of the benefit of what they had contracted for. Accordingly, this Tribunal should give effect to the intention of the contracting parties and allow Owners to recover freight notwithstanding the termination of the Charterparty.

36. Moreover, the English courts have consistently upheld the right of shipowners to recover freight under "freight deemed earned" clauses despite the non-completion of the voyage or the failure of the shipowner to deliver the goods at the port of discharge. In The Karin Vatis, the court held that the shipowners’ right to freight under a clause providing for "freight to be deemed earned as the cargo is loaded" accrued as soon as the cargo was loaded\textsuperscript{34}. This right was not affected by the subsequent sinking of the vessel. In Bank of Boston Connecticut v European Grain & Shipping Ltd (The Dominique), the court held that the shipowners acquired an indefeasible right to freight under a clause providing for “freight deemed to be earned on signing of bills of lading” once the bills of lading had been signed\textsuperscript{35}. This was despite the fact that the voyage was never concluded due to the arrest of the vessel by the shipowners’ creditors.

\textsuperscript{32} Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) [2004] 1 A.C. 715 [The Starsin] at 737.
\textsuperscript{33} The Karin Vatis, supra note 31 at 332 and 335.
\textsuperscript{34} Ibid., at 332 and 336.
37. In the present case, the Charterparty expressly provides "freight deemed earned...and 95% minimum freight payable upon lifting subjects". It is not in dispute that the subjects were lifted on November 19. Since the stipulated event has clearly occurred, Owners are entitled to recover 95% of the freight.

2. A subsequent termination of the Charterparty does not affect a shipowner’s accrued right to freight.

38. Rights which have accrued under a contract are not affected by a subsequent termination of the contract. This is because termination of a contract takes effect prospectively, and not retrospectively\(^{36}\). Hence, a shipowner's right to recover freight, which has accrued before the termination of the charterparty, will not be affected.

39. In the present case, Owners’ right to freight accrued on 29 November when the subjects were lifted at 1700h. Given that Owners’ right to freight legally accrued before the termination of the Charterparty on November 27, this Tribunal should allow Owners to recover freight due under the Charterparty from Charterers.

D. Charterers cannot set-off the alleged damage suffered by them against their obligation to pay freight to Owners because it is a trite principle of English law that there is no right of set-off.

1. A charterer cannot set-off the damage suffered by him against his obligation to pay freight to the shipowner.

40. It is a well-established principle of English law that a charterer cannot set-off the damage suffered by him against his obligation to pay freight\(^{37}\). He has to initiate a separate cross-action should he wish to claim damages suffered by him under a Charterparty\(^{38}\). This is to prevent unscrupulous persons from making all sorts of unfounded allegations to avoid payment of freight\(^{39}\). In addition,
disallowing charterers the right of set-off also enables the speedy and efficient settlement of disputes on the issue of freight.\(^{40}\)

2. **Allowing Charterers a right of set-off would undermine commercial certainty and disturb the allocation of risk in the shipping industry.**

41. English courts have rejected charterers’ claim for a right of set-off in order to promote commercial certainty and preserve the existing commercial arrangements of parties in the shipping industry.\(^{41}\)

42. In *The Brede* and *The Aries*, the courts did not allow the respective charterers to set-off the damage suffered by them against their obligations to pay freight. This was because overturning the well-established rule against set-off would have unnecessarily complicated the many shipping transactions that would have been entered on the basis of it, thus disrupting the existing commercial arrangements of parties in the shipping industry.\(^{42}\)

43. For instance, the existing distribution of risk between a shipowner’s freight underwriters and its P&I club is premised on the understanding that a charterer cannot set-off the damage suffered by him against the shipowner’s claim for freight. As such, the shipowner’s freight underwriters will not be liable for any loss of freight. However, should the charterer be accorded a legal right of set-off against freight, the freight underwriters would consequently be liable to the shipowner for the loss of freight.\(^{43}\) This would unnecessarily complicate shipping insurance practices and the manner in which parties have traditionally allocated risks of the voyage.

44. Accordingly, this Tribunal should not allow Charterers a right of set-off.

\(^{40}\) *Dakin, supra* note 38 at 667.

\(^{41}\) *The Aries*, *supra* note 37 at 341-42.; *The Brede, supra* note 37 at 338 and 340-41.

\(^{42}\) *The Brede, supra* note 37 at 341.; *The Aries, supra* note 37 at 341-42.

\(^{43}\) *The Brede, supra* note 37 at 347.
III. PART TWO - DEFENCE TO CHARTERERS’ CLAIMS

Operation of Clause 2 to Absolve Parties from Further Liabilities

E. Upon the termination of the Charterparty, Clause 2 of Owners’ Standard Terms operates to absolve Owners of liability for all breaches, if any, incurred in Owners’ failure to meet the laycan of December 5 as stipulated in the Charterparty.

1. General principles of contract law pertaining to the interpretation of clauses in commercial contracts apply in the construction of maritime contracts.

45. The rule underpinning the construction of maritime contracts is that the general body of principles of contractual interpretation applying to commercial contracts are identically applicable to maritime contracts.44

2. The phrase “without recourse to either party whatsoever” in Clause 2 points unambiguously to the sole construction that Owners will not be liable for any breach of the Charterparty resulting in their failure to meet the stipulated laycan.

46. In interpreting a provision in a commercial contract, the court is to ascertain what a “reasonable person” would have understood the parties to mean.45 The “reasonable person” is one who possesses all the knowledge that would have affected the way in which the contract would have been understood by a reasonable man, with the exception that such knowledge must have been reasonably available to the parties before or at the point in time of entry into the contract.46

47. The court must look solely to the specific words that the parties have elected to use in the contract itself.47 If, taking into consideration the background and context in which the contract was entered

44 The Starsin, supra note 32 at 737-38.
47 Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 1 W.L.R. 601 at 609.
into, the language leads clearly to one particular conclusion, the court must give effect to such a conclusion, however surprising or unreasonable it might be\(^{48}\).

48. The terms of a commercial contract must be interpreted as they are used, or will be used, in their plain, ordinary and popular sense by businessmen in that particular industry\(^{49}\). This is to prevent the frustration of the reasonable expectations of ordinary businessmen\(^{50}\).

49. On the facts, it is not disputed that Owners' Standard Terms, including *Clause 2*, have been incorporated into the Charterparty\(^{51}\).

50. *Clause 2* of Owners' Standard Terms provides: “*IF CHARTERER ELECTS TO DECLINE, THEN C/P TO BE CANCELLED WITHOUT RECURS TO EITHER PARTY WHATSOEVER*”. It is an express cancelling clause that entitles Charterers to cancel the Charterparty should the Vessel not arrive at the loadport by the stipulated date of December 5 in the Charterparty.

51. While a charterer’s exercise of a cancelling clause will discharge the contract for both the charterer and the shipowner, the failure of the shipowner to meet the laycan does not, without more, entitle the charterer to sue the shipowner for breach of the charterparty\(^{52}\). To claim damages in respect of any losses suffered due to the shipowner’s failure to meet the stipulated laycan, the charterer must prove independently and separately that the failure to meet the cancelling date was due to the shipowner’s breach of his contractual obligations under the charterparty, such as an obligation to proceed with convenient despatch on the approach voyage\(^{53}\).

52. Therefore, taking into consideration that the general common law position is as described, the only logical and reasonable construction of the phrase “*without recourse to either party whatsoever*” is that Owners will be released from all liability for any breaches of the Charterparty resulting in their failure to meet the stipulated laycan. The interpretation that Charterers are contending for, that the phrase “*without recourse to either party whatsoever*” releases the parties only from further performance obligations but not liabilities incurred under the Charterparty, makes no commercial

\(^{48}\) Ibid.; *Kookmin Bank v Rainy Sky SA* [2010] EWCA Civ 582 at [19].

\(^{49}\) *The Starsin*, *supra* note 32 at 737.

\(^{50}\) *The Okehampton* [1913] P. 173 at 180.; *Glynn v Margetson & Co* [1893] A.C. 351 at 355-56.

\(^{51}\) See pg. 51 of the Moot Question.

\(^{52}\) *Mansel Oil Ltd v Troon Storage Tankers SA (The Ailsa Craig)* [2009] EWCA Civ 425 at [1].

sense. This is because such a construction is simply restating the well-established common law position and Owners would then have no reason whatsoever to intentionally include such a clause in their Standard Terms. In fact, it is clear from the parties’ negotiations that Charterers understood the phrase “without recourse to either party whatsoever” to mean a liability regime that was in favour of Owners.

53. In addition, it is general practice for shipping parties to use cancelling clauses in their charterparties because it is notoriously difficult to foresee, at the time when a charterparty is being negotiated, exactly when a vessel will reach the loadport. Since such cancelling clauses are invariably used in the ordinary course of business in the maritime industry, and Charterers are a well-established chartering company, Charterers must be taken to have knowledge of how a cancelling clause operates. Therefore, Charterers’ construction of Clause 2 is not one that a reasonable business entity in their position in the shipping industry would have made.

54. An amendment to Clause 2 to remove the words “to either party whatsoever” will not improve the position of Charterers. This is because it is the insertion of the specific phrase “without recourse” in the cancelling clause that modifies the rule that a charterer may claim damages upon proving that the shipowner has breached his obligation to proceed with reasonable despatch under the charterparty, resulting in his failure to meet the laycan. Therefore, even if the words “to either party whatsoever” are deleted, the retention of the phrase “without recourse” in the amended Clause 2 would be sufficient to release Owners from liability arising from any breaches under the Charterparty and that result in their failure to make the stipulated laycan.

55. Accordingly, even if this Tribunal should find that there was a common mistake as to the wording of Clause 2 such that rectification should be allowed to delete the words “to either party whatsoever”55, the words “without recourse” will still operate to release Owners from all liability arising from any breach of the Charterparty resulting in their failure to meet the stipulated laycan of December 5.

54 See pg. 3 of the Moot Question.
55 See pg. 8 of the Moot Question: “SAVE ‘TO EITHER PARTY WHATSOEVER’ IS DELETED FROM RELIABLE TANKERS TERMS”.

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F. In the alternative, there is no unilateral mistake on the part of Charterers with respect to the interpretation of Clause 2 so as to warrant rectification of Clause 2.

1. Owners’ Internal Memorandum of November 14 cannot be relied on by Charterers to prove unilateral mistake as to their interpretation of Clause 2.

56. Where a contracting party knows, or ought to have known, that the other party has made a mistake as to the terms of the contract, the court may find a unilateral mistake.

57. With respect to extrinsic evidence in the form of pre-contractual negotiations or the parties’ declarations of subjective intent, the rule is that it cannot be considered by the court for the purposes of contractual interpretation, except in three situations: (i) where it is being used to establish the factual context of the contract; (ii) where it is being used to establish a technical meaning used; or (iii) where it is being used to support a claim for rectification. However, even in these three situations, only extrinsic evidence constituting the factual background known to both parties at or before the date of entry into the contract is relevant for the purposes of construction.

58. In this case, Owners’ Internal Memorandum of November 14 cannot be used to prove the parties’ common understanding of Clause 2. As the Internal Memorandum was privy only to Owners, there is no possibility of it operating on the minds of Charterers when the latter entered into the Charterparty on November 19. Accordingly, the Internal Memorandum will be of no aid to Charterers in sustaining their claim for unilateral mistake.

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59 Prenn, supra note 56 at 1385.; Investors Compensation Scheme, supra note 46 at 897 and 913.
60 See pg. 3 of the Moot Question.
2. Even if this Tribunal should find a unilateral mistake as to the interpretation of Clause 2, rectification is nonetheless inappropriate in this case.

59. Where one party mistakenly believes that the document correctly expresses the parties’ common intention and the other party is aware of that mistake, rectification may be available. For this doctrine to apply, it must be shown that: (i) the claimant erroneously believed that the document in question contained a particular term; (ii) the defendant was conscious of this mistaken belief and knew that it was due to a mistake on the part of the claimant; (iii) the defendant omitted to draw the attention of the claimant to the mistake; and (iv) the mistake was one calculated to benefit the defendant. Above all, the defendant’s conduct must be such as to make it inequitable or unconscionable that he should be permitted to object to the rectification of the document in question.

60. The mere fact that a party has made a mistake, albeit a grave one, will not entitle it to seek rectification of the contract. This is because it is necessary for the claimant to prove that the defendant had actual knowledge of the claimant’s mistake, shut its eyes to the obvious, or wilfully or recklessly omitted to do what an honest and reasonable person would have done so that he can be said to have acted dishonestly or unconscionably.

61. On the facts, there was no unconscionability on the part of Owners. The mere fact that Owners did not clarify with Charterers the legal meaning of the terms “without recourse” and “without recourse to either party whatsoever” does not make the act of Owners so inequitable such as to warrant rectification.

62. In Smith v Hughes, the court stated that the failure of the seller to correct the buyer’s misconception with respect to a term of the contract did not constitute fraud or deceit, and that “whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform

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63 Ibid., at 515.
65 (1870-1871) LR 6 Q.B. 597. [Smith]
the purchaser that he is under a mistake, not induced by the act of the vendor”\textsuperscript{66}. While the remedy sought in \textit{Smith} was the voiding of a contract, the legal principle as described is applicable to the present rectification claim. This is because rectification is a “\textit{drastic}” remedy that has “\textit{the result of imposing on the defendant a contract which he did not, and did not intend to, make and relieving the claimant from a contract which he did, albeit did not intend to, make}”\textsuperscript{67}.

63. In this case, since Owners had never promised Charterers the interpretation that Charterers are presently contending for, it is clear that Owners did not induce the mistaken belief of Charterers. Accordingly, since there is no legal obligation on Owners to inform Charterers that Charterers are under a mistake, the failure of Owners to clarify with Charterers the latter’s understanding of \textit{Clause 2} is not unconscionable or dishonest.

64. Moreover, as both Owners and Charterers are commercial entities contracting at arms’ length, Owners are entitled to assume that Charterers knew what they were doing and that they would seek appropriate legal advice as and when necessary. Hence, the mistake made by Charterers was a result of their own carelessness for which Owners should bear no liability.

65. Accordingly, since there was no dishonesty or unconscionability on the part of Owners, this Tribunal should not allow rectification for unilateral mistake.

\textbf{Alleged breaches by Owners}

\textbf{G. Owners commenced the preliminary voyage to the loadport at a time such that the Vessel would be able to reach the loadport by the stipulated ETA of 3 December in the Charterparty.}

66. Where a charterparty contains an ETA provision and a clause that the ship will use all convenient or reasonable speed to get to the port of loading, the combined effect of these two clauses imposes an obligation on the shipowner to ensure that the vessel should start from wherever she may happen to be, at a date when by proceeding with convenient or reasonable despatch, she will arrive at the

\textsuperscript{66} \textit{Ibid.}, at 597, 603 and 607.
\textsuperscript{67} \textit{George Wimpey, supra} note 63 at [75].
port of loading by the expected date\textsuperscript{68}. Accordingly, a shipowner will be deemed to have met this obligation as long as he commences the preliminary voyage at a time such that the he can be reasonably certain that the vessel will arrive at the loadport by the stipulated expected date of readiness in the charterparty\textsuperscript{69}.

67. The “preliminary voyage” includes the approach voyage and any other voyage preceding the approach voyage as long as such voyages are within the contemplation of the Charterparty\textsuperscript{70}. In \textit{Hudson}, the shipowners entered into a voyage charterparty from Barbados to London. The charterparty allowed the shipowners to take cargo to a port outwards to Brazil, en route to Barbados. The ship was delayed on the voyage to Brazil due to adverse weather. The court held that the shipowners were not liable for the delay. The reason was that since the voyage to Brazil was one that was contemplated by the charterparty, the charterparty exceptions would apply to it. It was irrelevant that the contemplated voyage to Brazil was wholly separate from the immediate voyage of the vessel towards Barbados. Accordingly, a commencement of the preliminary voyage would entail the commencement of the approach voyage.

68. In this case, the Vessel’s voyage to the bunker port constitutes part of its preliminary voyage because it was contemplated by both parties that the Vessel be fully bunkered before it arrived at the loadport. This is further reinforced by Clause 36(C) of Charterers’ Rider Clauses, which states, “\textit{Vessel shall arrive at the first load port fully bunkered to perform the intended voyage.}”\textsuperscript{71} Therefore, Owners commenced the preliminary voyage on 19\textsuperscript{th} November when the Vessel sailed for the bunker port from its previous discharge port at Orangeland\textsuperscript{72}. It is also not in dispute that when the Vessel sailed on November 19, it was reasonably certain that the Vessel would arrive at the loadport by the stipulated ETA of December 3, and therefore, reach the loadport before the

\textsuperscript{68} \textit{Dreyfus (Louis) & Co Ltd v Lauro} (1930) 60 L.I. L. Rep. 94 at 97.; \textit{Evera S.A. Commercial v North Shipping Co Ltd (The North Anglia)} [1956] 2 Lloyd’s Rep. 367 at 372-73.; \textit{Geogas S.A. v Trammo Gas Ltd (The Baleares)} [1993] 1 Lloyd’s Rep. 215 at 225-26.\textsuperscript{69} \textit{Monroe Brothers Ltd v Ryan (CA)} [1935] 2 K.B. 28 at 37.; \textit{Hudson v Hill} (1874) 43 L. J. C. P. 273 at 279.; \textit{Barker v M’Andrew} (1865) 18 C.B. N.S. 759 at 772.\textsuperscript{70} \textit{Hudson v Hill} (1874) 43 L. J. C. P. 273 at 279.; \textit{Barker v M’Andrew} (1865) 18 C.B. N.S. 759 at 772.\textsuperscript{71} See pg. 71 of the Moot Question.\textsuperscript{72} See pg. 89 of the Moot Question.
stipulated laycan of December 5. Accordingly, Owners did not breach their contractual obligation to commence the preliminary voyage in time.

H. Owners did not commit anticipatory breach by renunciation of the Charterparty because they did not evince any intention not to perform their obligations under the Charterparty.

69. A party will be held to have renounced the performance of its contractual obligations only where it evinces a clear and absolute intention not to perform the contract73.

70. In this case, Owners never evinced an intention not to carry out their obligations under the Charterparty. After the Vessel was arrested, Owners negotiated to obtain its release. Even after negotiations had broken down and Owners were unable to secure the release of the Vessel, they nevertheless promised Charterers to provide a revised laycan as soon as they had the means to do so. As Owners have shown an utmost willingness to continue with the Charterparty despite the immense difficulties faced by them, this Tribunal should find that Owners did not commit a breach by renunciation.

I. Owners did not breach their obligation to proceed with convenient despatch because they had exercised due diligence in ensuring that the Vessel would arrive at its loadport by the ETA as stipulated in the Charterparty.

71. A shipowner's obligation to proceed on a charterparty voyage with convenient dispatch has the same legal meaning as the obligation to proceed with reasonable dispatch74. This is because both sets of obligations are designed for the purpose of saving time75. Therefore, case law relating to the obligation to proceed with reasonable dispatch is applicable to Clause 1 of the Asbatankvoy form, which uses the term “convenient despatch”76.


76 See pg. 52 of the Moot Question.
72. A shipowner will be liable only if he is at fault for failing to do something that can be reasonably foreseen to delay the vessel’s arrival at the loadport. In *The Kriti Rex*, the shipowner was found to have breached his obligation to proceed with reasonable dispatch because he had failed to exercise due diligence to examine regularly the vessel's engine lubricating oil. This caused the engine to fail, thus resulting in the delay of the vessel at the loadport. In *Suzuki*, the shipowner was found to be in breach when he neglected to increase coal consumption, thereby causing a slowdown in the speed of vessel and the resulting delay in arrival at the loadport. These decisions show that a breach of the obligation to proceed with reasonable dispatch requires a shipowner to have knowledge that his actions will cause the delay of the vessel arriving at the loadport.

73. In this case, Owners did not breach their obligation to proceed with reasonable dispatch because they had exercised due diligence in timely commencing the preliminary voyage to ensure that the Vessel reached its loadport by the ETA of 3 December. In fact, the Vessel had already commenced its preliminary voyage to the bunker port at the time of entry into the Charterparty. The Vessel was impeded in its voyage to the loadport only when it was arrested en route to the loadport at the bunker port, and Owners’ lack of funds to secure the release of the Vessel was caused by Charterers’ failure to pay freight timeously. In other words, the delay in the Vessel’s arrival at the loadport was not caused by Owners’ failure to exercise due diligence to proceed with reasonable dispatch, but by Charterers' fault in failing to fulfil their obligation to pay freight.


78 *The Kriti Rex*, supra note 73 at 183-185.

79 *Suzuki*, supra note 74 at 54.
Clause 5 and Gross Negligence

J. Should this Tribunal find for Charterers in respect of the issues under Section III, Charterers cannot claim any consequential losses as Owners' failure to provide security for the Vessel’s bunkers does not constitute gross negligence.

1. DAMAGES (c) AND (d) AS SET OUT IN CHARTERERS’ CLAIM SUBMISSIONS (2ND REFERENCE) ARE CONSEQUENTIAL LOSSES.

74. A person who breaches a contract is liable for any loss that falls within one of the following two limbs: (1) direct loss that arises naturally or according to the usual course of things from the breach; and (2) indirect or consequential loss that the parties would, at the time when they entered into the contract, have reasonably foreseen or expected to be the probable result of such a breach.\(^80\)

75. The general rule is that where there has been a delay in the delivery of goods, the direct measure of damages will be the difference in the price of the goods when they should have been delivered and the time when they were actually delivered. Other types of losses, such as loss of profits, are indirect losses that are claimable only where they were within the reasonable contemplation of both parties at the time of contracting.\(^81\)

76. In this case, damages (c) and (d), as set out in Charterers’ Claim Submissions (2nd Reference)\(^82\), are indirect losses. Since Owners knew that Charterers were chartering the Vessel for the purpose of the transportation of certain goods, and of the planned refinery shutdown\(^83\), such losses were within the reasonable contemplation of the parties. Hence, damages (c) and (d) constitute consequential losses.

77. Accordingly, Clause 5 of Owners’ Standard Terms operates such that damages (c) and (d) will be recoverable if and only if Charterers are able to prove that there was gross negligence on the part of Owners.

\(^{80}\) Hadley v Baxendale [1854] 9 Ex. 341 (HL) at 355-57.
\(^{81}\) Czarnikow Ltd v Koufos (The Heron II) [1969] 1 A.C. 350 at 414-420.
\(^{82}\) See pg. 112 of the Moot Question.
\(^{83}\) See pg. 89 and 96 of the Moot Question.
2. Owners’ failure to provide security for the Vessel’s bunkers does not constitute gross negligence so as to render Owners liable for the consequential losses suffered by Charterers.

78. *Clause 5* of Owners’ Standard Terms is an express limitation of liability clause that seeks to exempt Owners for liability for consequential damages unless such arose out of an act of gross negligence on Owners’ part.

79. The distinction between gross negligence and mere negligence is one of degree and not of kind. In *Red Sea Tankers Ltd and others v Papachristidis and Others Henderson, Baarma and Bouckley (Third Parties) (The Hellespont Ardent)*, the High Court of England examined the use of “gross negligence” in an exclusion clause in a commercial contract. Although the contract in that case was stated to be subject to New York Law, the court examined what the exclusion clause would mean under English law. It was declared that gross negligence was “*intended to represent something more fundamental than failure to exercise proper skill and/or care*” and could be defined as “*serious negligence amounting to reckless disregard*”. Above all, the defendant’s conduct had to be “*so seriously negligent*” and “*aberrant*” that he should not be permitted to rely on the exemption clause.

80. The meaning of “*gross negligence*” in a clause depends on the objective intentions of the parties at the time of contracting and is entirely a matter of contractual interpretation. In *Camerata Property v Credit Suisse Securities*, the court held that the parties could not have intended the term “*gross negligence*” to connote mere negligence, given that both expressions were used in the Terms and Conditions of the contract and therefore, some distinction between them must have been intended.

81. On the facts, both Owners and Charterers clearly intended the term “*gross negligence*” to take on a different meaning from “*ordinary negligence*”. This is because both parties could have, but did not,
modify the word “neglect” or “negligence” as used in Clause 19 and Clause 20(b)(ii) and (iv) of the Asbatankvoy 1977 form respectively.  

82. In this case, Owners’ failure to pay the security to the bunker suppliers to secure the release of the Vessel was not grossly negligent. Owners took reasonable steps to provide security for the bunkers insofar as they properly entered into negotiations with the bunker suppliers with the intention to negotiate a more reasonable sum that they could afford at that point in time. This shows that Owners had every intention of securing the release of the Vessel.

83. More importantly, their lack of funds was due to Charterers’ failure to make payment of freight due under the Charterparty. If Charterers had paid freight timely, Owners would then have been able to pay the bunker suppliers to secure the release of the Vessel. In fact, the whole purpose of stipulating for an advance freight clause in the Charterparty was so that Owners could have adequate funds for running their commercial operations. In light of this, Owners’ decision not to approach their P&I club for help was not grossly negligent.

84. Accordingly, this Tribunal should find that there was no gross negligence such that Owners will not be liable for any consequential losses suffered by Charterers.

**Failure to Mitigate Reasonably**

**K. Charterers’ claim for damage (a) as set out in Charterers’ Claim Submissions (2nd Reference)** cannot be allowed as they have failed to mitigate their losses reasonably.

85. A claimant cannot claim compensation from the defendant for loss that is not directly caused by the defendant’s breach, but by the claimant’s own failure to take all reasonable steps available to mitigate the extent of the damage caused by the breach. Therefore, the requirement to mitigate requires the claimant to take any step which a reasonable and prudent person would ordinarily take.

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91 See pg. 55 of the Moot Question.
92 The “freight deemed earned” clause: Clause 4 of Owners’ Standard Terms.
93 Allison v Bristol Marine Insurance Ltd [1876] 1 App. Cas. 209 at 226.
94 See pg. 112 of the Moot Question.
in the course of business to mitigate the loss\textsuperscript{96}. A claimant may even be required to accept a reasonable offer from the defendant if such an offer would make good the loss or part of it\textsuperscript{97}.

86. A claimant who has taken unreasonable steps cannot hold the defendant liable for loss that has been suffered as a result\textsuperscript{98}. In other words, he may not claim from the defendant, by way of damages, any greater sum than that reasonably needed for the purpose of making good the loss. The reason is that while the claimant is entitled to mitigate its losses in the manner it desires, it may not do so at the expense of the defendant\textsuperscript{99}.

87. In this case, Charterers failed to take reasonable steps to mitigate their losses when they refused to enter into negotiations with Owners upon Owners’ offer of a substitute sister VLCC to the Vessel to carry out the original voyage. Instead, Charterers hired two Suezmax vessels despite the fact that at that point in time, the freight rate for such vessels was increasing very steeply\textsuperscript{100}. The freight per day for the two Suezmax vessels under the new charterparty was $70,000, as compared to a mere $30,000 for a VLCC under the Charterparty\textsuperscript{101}. In fact, the total freight payable for the two Suezmax vessels was estimated to be at US$6, 018, 804, which is clearly much higher than that of US$ 4, 935, 368.75 currently payable under the Charterparty\textsuperscript{102}.

88. Accordingly, since Charterers failed to mitigate their losses reasonably, this Tribunal should find that Charterers are not entitled to claim the costs of their mitigation.

IV. PRAYER FOR RELIEF

For the reasons set out above, the Claimant requests this Tribunal to:

DECLARE that the Charterparty has been cancelled without recourse as set out above; and

FIND that the Claimant is entitled to the sum of US$4, 935, 368.75 by way of freight or damages in the same amount, and interest on the said amount.

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\textsuperscript{96} Dunkirk Colliery Co v Lever (1878) 9 Ch. D. 20 at 25.


\textsuperscript{98} Sotiros Shipping, supra note 80 at 608.


\textsuperscript{100} See pg. 99 of the Moot Question.

\textsuperscript{101} See pg. 99 of the Moot Question

\textsuperscript{102} See pg. 90 and 98 of the Moot Question.