16th INTERNATIONAL MARITIME LAW ARBITRATION MOOT, 2015

HIDAYATULLAH NATIONAL LAW UNIVERSITY, RAIPUR

MEMORANDUM FOR THE RESPONDENTS

ON BEHALF OF

Western Tankers Inc.

CLAIMANTS

AGAINST

Super Charterers Inc.

RESPONDENTS

TEAM NO. 20

Prashasti Janghel
Rinki Singh
Dinesh Dangi
Vivek Kumar Pandey
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STATEMENT OF FACTS

Claimant is Western Tankers Inc (the “Owners”), a company incorporated in BVI whereas respondent is LDT Pte. (the “Charterers”) which is incorporated in Singapore. Claimant owns the Western Dawn which is a Long Range 2 tanker (the vessel).

On 26 May 2014 by a charter party the claimant provided their vessel M/T Western Dawn for the purpose of transporting jet and gas oil respectively. The vessel was required to load and discharge “30,000mt MIN/MAX Jet A1 Plus 70,000mt +/- 10% Moloo Gas oil” (The Cargo).

Respondent hired the aforesaid vessel on an amended shell time 4 (herein after ST4) charterparty for a period of three months plus or minus 30 days. The charterparty in the present case was for a time charter trip which requires a voyage from Singapore to OPL Luanda, West Africa, with redelivery in the Mediterranean area.

On 8th of June 2014 the vessel completed its loading of the cargo and thus, the bills of ladings were issued on 8th of June 2014.

On 25th June 2014 the Master of Western Dawn informed the respondent that they shall require bunker recharge at/before Luanda discharge. It was further stated that Master/Owner will not be responsible for any delays caused by the charterers not supplying fuel in good time.

On 28th of June 2014 the Captain of the vessel was informed by the Atlantic STS agency ltd (ASA Angola ltd) that the charterers have passed the control of the vessel under the TCP to them. They further informed the captain of the vessel that they shall be the vessel’s STS (ship to ship transfer) coordinator. On this same date the ASA Angola ltd informed the master of the Western Dawn that their vessel Western Dawn will be aided by the vessel Antelope for the purpose of STS.
The communication by ASA Angola ltd on 28\textsuperscript{th} of June required from the Western Dawn to contact master of antelope for information regarding discharge rotations and quantities. On 28\textsuperscript{th} of June 2014 the respondent informed the claimant that the next bunker supply shall be on arrival to STS 1.

As required by the ASA Angola ltd, the Master of Western Dawn tried to contact Captain Anya of Antelope on 1\textsuperscript{st} of July 2014, 2\textsuperscript{nd} of July 2014 and 3\textsuperscript{rd} of July 2014 however the same were remain un-anwered.

On 3\textsuperscript{rd} of July 2014 claimant required the due hire from the respondent however on 4\textsuperscript{th} of July 2014 the respondent advised the charterer that they should consider the vessel as off-hire due to no contact with the charterer/receiver.

On 4\textsuperscript{th} of July 2014 the Claimant informed the respondent that Antelope did not arrived at STS 1, thereby this resulted in the failure of the vessel to get bunkered.

On 17\textsuperscript{th} of July 2014 the Master of Western Dawn communicated to the Owners as well as the charterer’s that the ship was attacked by the pirates however now the ship is under their control. Because of the pirate attack about 28190mt gasoil of the cargo was stolen by the pirates. It was further informed that due to small bunker the vessel is now proceeding towards Cape Town for assistance with an economical speed.

Hence, the present matter is brought forth the panel for arbitration with respect to due hire and damages for breach of charter party by the respondent.
ISSUES FRAMED

I. WHETHER THE CHARTER PARTY AGREEMENT CONTAINS A VALID ARBITRATION AGREEMENT AND THEREFORE THE TRIBUNAL HAS JURISDICTION TO TAKE UP THE PRESENT MATTERS?

II. WHETHER THE RESPONDENTS IS LIABLE TO PAY DAMAGES AND INTEREST THEREON?

III. WHETHER THE RESPONDENT IS LIABLE FOR TORT OF FRAUD?

IV. WHETHER THE RESPONDENT BREACHED THE CHARTERPARTY?

V. WHETHER THE VESSEL WAS UNSEAWORTHY?

VI. WHETHER THE CLAIMANTS ARE LIABLE UNDER BAILMENT?
ARGUMENTS

I. THE CHARTERPARTY AGREEMENT DOES NOT EMPOWER THE PRESENT TRIBUNAL TO ARBITRATE ON THE DISPUTES SO RAISED AND TORT OF FRAUD IS NOT AN ARBITRABLE ISSUE.

The Respondent submits that the present arbitral tribunal is not the correct forum entrusted with the power under the charterparty to hear the merits of this dispute. The respondent with respect to this submits that (I) the tribunal has competence to rule over its own jurisdiction; (II) there is no arbitration agreement empowering for London arbitration under the charterparty, and (III) the tribunal is not competent under the laws of England and The Arbitration Act, 1996, to hear the merits of the issue relating to tort of fraud.

I.A. THAT THE PRESENT TRIBUNAL HAS POWER TO RULE ON ITS OWN JURISDICTION.

It is a well-established principle of international commercial arbitration that an arbitral tribunal has an inherent power to rule on its own jurisdiction, including questions as to the validity of the arbitration agreement\(^1\). In the arbitral process the jurisdiction of the arbitral tribunal is derived simply and solely from the express or implied agreement of the parties.\(^2\) An agreement to arbitrate is when there is deliberate intention of the parties to the dispute to create or define the arbitrator’s jurisdiction and the tribunal’s power to deal with a dispute.\(^3\) The tribunal is entitled to inquire into the merits of the issue whether they have competence (jurisdiction) or not, not for the purpose of reaching any conclusion which will be binding

upon the parties, but for the purpose of satisfying themselves as a preliminary matter about whether they ought to go on with the arbitration or not.\textsuperscript{4}

**I.A.1. That the charterparty does not contain a valid arbitration clause**

In principle an arbitration clause may be incorporated by a reference to a standard form of contract or the particular terms of another contract in which the clause is set out, even without express reference to the clause. But it must be clear that the parties intended the arbitration clause to apply.\textsuperscript{5} The charterparty in the case in hand is amended SHELLTIME 4 [hereinafter referred as ‘ST4’] along with Rider Clauses. Clause 46 of ST4 is provision relating to Law and Litigation and thus the law governing the arbitration agreement in the case in hand, is the English Arbitration Act, 1996, as per sub clause (a) of clause 46 of the charterparty.\textsuperscript{6} Section 6(2) of the English Arbitration Act\textsuperscript{7} clarifies that a reference in a main agreement to a separate written arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the main agreement. What is pertinent to note that the English Arbitration act and UK courts\textsuperscript{8} have constantly emphasised on two tests for the validity of an arbitration agreement:

1. The arbitration agreement shows the clear consent of both the parties to resolve their present or future disputes through arbitration, and

2. The agreement is in writing or reference to an arbitration clause in a document is express\textsuperscript{9}

In the case in hand, it is clear that the Respondents were not willing for arbitration at London and

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\textsuperscript{4} Texaco Overseas Petroleum Company/ California Asiatic Oil Company v. The Government of the Libyan Arab Republic IV (YBCA) 176, 1979; UNCITRAL Model Law, Article 16(1).

\textsuperscript{5} MUSTILL & BOYD, *The Law and Practice of Commercial Arbitration in England* (2nd Ed, 1989) at p 106

\textsuperscript{6} Refer moot problem pg 5; TERENCE COGHLIN, ANDREW BAKER, JULIAN KENNY, JOHN KIMBALL, TOM BELKNAP, Time Charters, (7th Ed. Informa Law) pg 801.

\textsuperscript{7} The Arbitration Act, 1996.

\textsuperscript{8} Section 6(a) and Section 6(b) of Arbitration Act, 1996.

disagreement for the same was shown to the agents of the Charterer.\textsuperscript{10} The Respondents even chose to not conclude any concurrence on Clause 46 of ST4, and the same was left Blank. Thus, in the absence of any agreement for arbitration to be conducted in London, there exists no valid arbitration clause.\textsuperscript{11}

\textbf{I.B. THE TRIBUNAL IS NOT COMPETENT TO ARBITRATE ON ISSUE OF TORT OF FRAUD}

The respondents, have stated in their statement of defence\textsuperscript{12} that, the arbitral tribunal lacked competence to adjudicated the dispute because the arbitration clause was null and void. Alternatively, even if the arbitration agreement between the Claimants and Respondent is a valid arbitration agreement, the same does not extent to cover disputes relating to alleged tort of fraud. The scope of any arbitration clause is based on the parties’ expressed intention, and it is conceivable that the parties to a contract may agree that all disputes between them, should fall within the scope of the arbitration clause, which in turn is a matter of documentary construction.\textsuperscript{13} Also referred as ‘objective arbitrability’\textsuperscript{14} Article (II)(1) of the New York Convention\textsuperscript{15} states in the following words:

\textit{Each contracting state shall recognise an agreement in writing under which the parties undertake to submit to arbitration all disputes or any of the disputes or any of the differences which have arisen or which may arise between them in respect of a defined relationship, whether contractual or not, concerning the subject matter capable of settlement by arbitration.}

An issue of fraud is capable in principle of falling within the scope of an agreement to arbitrate\textsuperscript{16}, whether or not it does so depends on the wording of the agreement.\textsuperscript{17} To restrict the arbitrable issues to mere

\textsuperscript{10} Recap 23\textsuperscript{rd} MAY, moot problem pg 2.
\textsuperscript{11} GARY B. BORN Pg 659. A REDFERN AND M HUNTER, Law and Practice of International Commercial Arbitration (4\textsuperscript{th} Ed. 2004), Pg 60
\textsuperscript{12} Moot problem PARA-
\textsuperscript{13} Larsen Oil and Gas Pte Ltd v Petroprod Ltd, [2011] 3 SLR at 421.
\textsuperscript{14} GERAL AKSEN, MICHEAL J. MUSTILL, Global Reflection On International Law, Commerce and Dispute Resolution, ( See Amity Memo).
\textsuperscript{15} New York Convention on the Recognition and Enforcement of Foreign Awards, 1959.
\textsuperscript{16} Lords Wright and Porter in Heyman vs. Drawins Limited [ 1942] AC 356 at 378 and 392; Kenworthy vs. Queen Insurance Co. (1892) 8 TLR 211.
\textsuperscript{17} Heyman vs. Darwins pg. 108.
contractual disputes, a narrow arbitration clause is required; while keeping all potential issues within the realm of arbitration, including tort and statutory claims, requires a broad-form clause. In deciding whether the claim in tort lies within the arbitrator’s jurisdiction, the enquiry takes place in two stages:

1. The first is to identify the nature of the dispute, and
2. To decide whether the tortious claim has sufficiently close connection with claims under the contract to bring it within the scope of the arbitration clause.

In the case of *Premium NAFTA Products Ltd. v. Fili Shipping Company Ltd.* the question that heralded, was the scope of the terms ‘any dispute arising under this charter’. The House of Lords opined that since the parties to the dispute had through clear intention agreed to settle any disputes that arose between them under the said Charterparty, the words had to be liberally construed. However, the findings of the above case wouldn’t be applicable in the present case as in the wordings of the arbitration clause are narrow in scope. It has been stipulated that only disputes which the parties agreed to are arbitrable by the tribunal.

In the case in hand Clause 46(b) is the arbitration agreement between the parties and the words as follows: “all disputes arising out of this charter shall be referred to arbitration in London in accordance with Arbitration Act, 1996....”

These words, “arising out of a charterparty” are similar to “arising under a contract” and the same only signifies the intention of both the parties to bring only contractual disputes under the jurisdiction of the tribunal. Further the case of *Tracer Research Corporation vs. Environmental Services, Co.* the words “any controversy or claim arising out of this agreement was” construed narrowly as the parties intention was only to bring before the tribunal disputes which had directly breached the contract, and no tort claims could have been entertained.

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20 [2007] 2 CLC 553
21 Lord Hoffman Id. at
22 *Stellar Shipping Co LLC v Hudson Shipping Lines* [2010] EWHC 2985 (Comm)
24 42 F.3d 1292 (9th Cir. 1994).
II. THE RESPONDENT IS NOT LIABLE UNDER TORT OF FRAUD FOR THE LOSS SUFFERED BY THE CLAIMANT.

II.A. ATLANTIC SERVICE AGENCY (ASA2 ANGOLA LTD.) IS NOT THE AGENT OF THE CHARTERERS.

Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with the third parties, and the other of whom similarly assents so to acts or so acts pursuant to the manifestation.25 Representation26 and consent27 are two essentials of a valid agency.28 In the present matter both the requirement cannot be substantiated.

II.A.1 ASA 2 Angola Ltd was never represented as an agent of the Respondent

Representation forms the basis of a common understanding of the position of the agent29; that the agent represents the principal.30 Voyage orders For M/T WESTERN DAWN clearly provide in Agency Requirement at Clause 4 of the voyage order that at discharge port Atlantic service agency will be the agent of the respondent.31 And the agent shall be contacted at William@asa.com.an.32 The same has been acknowledged by the Claimant in their mails where they have Carbon copied the mail to the aforesaid ID.33 It is submitted that ASA 2 was never represented as the agent of the respondent and therefore in the absence of a valid representation there cannot be an attribution of an agency over the respondent.

II.A.2 Respondent never consented to ASA 2 being their agent

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26 Sorrell v Finch, [1976] 2 W.L.R 833
27 Crescent Oil & Shipping Services Corp Ltd v Importang UEE [1997] 3 All E.R. 428
28 Boardman v Phipps [1966] 3 W.L.R 1009
29 State of Netherlands v Youell and Hayward [1981] 1 Lloyds Rep 236
30 National Trust for Places of Historic Interest v Birden, [2009] EWHC 2023 (Ch)
31 Moot Problem Pg. 15 ¶ 4
32 Moot Problem Pg. 15 ¶ 4
33 Moot Problem Pg. 29
It was held in *Garnac Grane Co Inc v HMF Faure & Fairclough Ltd and Bunge Corp.*,\(^{34}\) that “the relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves neither of them have professed to disclaim it. But the consent must have been given by each of them either expressly or by implication from their words and conduct.” The question of consent has to be determined objectively and there has to be some evidence to suggest that the parties took deliberate steps to arrange the matters.\(^{35}\)

It is submitted that the respondent never consented to the fact of ASA 2 being their agent and thus there is no agency relationship between Respondent and ASA 2 Angola Ltd with respect to Claimant.

**II.A.3 ASA 2 Angola Ltd has neither Actual nor apparent authority to act as an agent**

**II.A.3.1 ASA 2 Angola Ltd has no actual authority to bind its principal**

Diplock L.J. defined actual authority in *Freeman & Lockyer (A firm) v Buckhurst Park Properties (Mangal)*\(^{36}\) as a “legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger, he may totally be ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the actual authority, it does create contractual rights and liabilities between the principal and the contractor.”

It is submitted that ASA Angola Ltd was the agent of the Respondent with actual authority to bind its principal i.e. Respondent. ASA 2 Angola Ltd has no actual authority to bind the respondent for their any liability.

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\(^{34}\) [1967] All E.R. 353  
\(^{35}\) *Altas Maritime Co SA v Avalon Maritime Ltd, The “Coral Rose”* (No.1) [1991] 4 All E.R. 769  
\(^{36}\) [1964] 2 W.L.R. 618
II.A.3.2 ASA 2 Angola Ltd has no apparent or ostensible authority to bind its principal

An apparent or ostensible authority is a legal relationship between the principal and the contractor created by a misrepresentation made by the principal to the contractor intended to be and in fact acted upon by the contractor that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the apparent authority so as to render the principle liable to perform any obligations imposed upon him by such contract.\(^{37}\)

It is submitted that the respondent has never represented ASA 2 Angola Ltd as their agent rather they represented ASA Angola Ltd as their agent.

II.A.3.3. Agency estoppel shall not lie.

There are three crucial elements of agency estoppel they are: a representation made by the principal, reliance upon the representation made by the third party and alteration of the third party’s position as a result of that reliance.\(^{38}\) It is submitted from aforesaid submissions that there was no representation from the respondent signifying ASA 2 Angola ltd as their agent and the alteration of claimant’s position cannot be attributed to the respondent and thereby no estoppels shall lie against the respondent.

II.B. THE RESPONDENT IS NOT LIABLE FOR TORT OF FRAUD.

Tort of Fraud / deceit is an act whereby a person suffered loss by acting on a statement which was made to him fraudulently by another person.\(^{39}\) A tort of deceit committed when there is a false representation made by the defendant or on behalf of the defendant to the representee; that the representation was made fraudulently; that the defendant intend the representee to act on it and that the representation was an inducement to his own action as a result of which the representee suffered the loss which he claims.\(^{40}\)

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\(^{37}\) Freeman & Lockyer (A firm) v Buckhurst Park Properties (Mangal), [1964] 2 W.L.R. 618

\(^{38}\) Polish Steamship Co v A J Williams Fuels (Overseas Sales) Ltd: The Suwalki, 1 Lloyd’s Rep. 511

\(^{39}\) Pasley v. Freeman (1793) 3 T.R. 51; Derry v. Peek (1889) 14 App. Cas. 337, HL at 363.

\(^{40}\) Cartwright, Misrepresentation, Mistake and Non-Disclosure (3rd edition, sweet & Maxwell, 2012) page 190, ¶ 5-06
II.B.1. The respondent did not make a false representation of providing bunkers to the Claimant.

In the tort of deceit/fraud the representee must show that a misrepresentation was made to him by which he was deceived. 41 If the representation is made by defendant himself, or through the agent 42, or if he manifestly approves and adopts a representation made by a third party, he is responsible for it and is liable in deceit if the other elements of the claim against him are established. 43

In the present case in hand, on 3rd June 2014, the charterers represented that a sufficient bunkers would be available passing Durban or Cape Town the charterer 44 never represented that ASA2 45 is a agent of charterer further the representation that the bunkers would be available at “STS Area 1” and the same day ASA2 on behalf of charterer instructed the vessel that she is under the control of ASA2 and that she would discharge 72,000mts gasoil/ balance cargo TBN at the nominated STS location, and that she would be receiving “300MT IFO bunkers” 46 was made by ASA2 which has no nexus with the charterer whatsoever

II.B.2 The representations made by the respondent were not Fraudulent.

Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly without caring whether it is true or false. 47 The representor is fraudulent if he has made the statement “recklessly, careless whether it be true or false” 48 “In the present case respondent was not reckless about the statements made regarding supplying bunkers on Durban/ Cape Town, which they did not provide. The representation by ASA2 was not on behalf of Charterer.

41 Cartwright, Misrepresentation, Mistake and Non-Disclosure (3rd edition, sweet & Maxwell, 2012) page 190, ¶ 5-05
42 ibid
44 Moot pronlem, page 34, ¶ 3.
45 Moot Problem, page 35, ¶ 1
46 ibid
47 Derry v peek (1889) 14 App. Cas. 337, HL.
48 Lord Herschell in Derry v. Peek, ¶. 5-14.
II.B.3 The claimant relied on the representations made by ASA2 and acted upon.

In tort of fraud it must be shown that the representor intended the representee to act on the representation in the manner which resulted in damage to him. ⁴⁹ There has to be representator’s intention that his statement would cause an act of reliance of the kind which the representee has established. ⁵⁰ In the present case in hand the charterer made the representation to the owners which were true. The Respondents never gave any directions to the vessel to reach at STS Area 1 with the any fraudulent intention that the master of the vessel would follow it. ⁵¹ The owners relied on the representations made by the ASA2 and the vessel followed the instructions of ASA2, which was a third party instruction as ASA2 is not the agent of Respondent. ⁵² Therefore it is submitted that reliance was over ASA2 representation and not on charterer and since there is no agency here the charterer will not be responsible.

II.C. THE LOSS SUFFERED AS A RESULT OF ASA2 FRAUDULENT MISREPRESENTATION WILL NOT HOLD CHARTERER LIABLE.

II.C.1 the piracy attack was not a result of respondent’s misrepresentation.

On acting upon the misrepresentations by ASA2 a third party and not by any agent of the Respondent, the vessel proceeded towards the STS Area 1. ⁵³ As a result of which the vessel in was standing in the International waters of Angola Coast waiting for further orders from the charterer, which they failed to provide. ⁵⁴ Piracy attacks usually occur whilst ships are transiting the straits, sometimes up to 15 miles offshore. ⁵⁵ The vessel was in the International waters while it was attacked by the pirates that resulted in

⁵¹ Moot problem, page 35, ¶ 1
⁵² Supra note 15.
⁵³ Supra Note 16
⁵⁴ Moot problem, page 41, ¶ 1
the damage to vessel and the theft of cargo.\footnote{Moot problem, page 42, ¶ 1} The vessel suffered damage to its navigation equipment, main-deck hose crane and starboard-side accommodation ladder and bridge equipment (including electronic navigation systems, radar and ECDIS) and about 30,000mts Jet A1 and 44,000mts Gasoil was robbed by the pirates.\footnote{Moot problem, page 42, ¶ 1}

**II.D. THE RESPONDENT HAD NOT BREACHED THE CHARTERPARTY.**

The respondent has no fault whatsoever here and they have abided by the charter party and thus they cannot be liable for breached of charterparty.

**II.D.1. The Charterers have not breached the charterparty by directing the vessel to a alternate discharge place.**

**II.D.1.1 The Charterers nominated OPL Luanda as discharge port in the voyage orders.**

In present case there is a trip charterparty which is a hybrid or has the attributes of both time and voyage charterparty.\footnote{Christopher Hill, *Maritime Law* (LLP London, 6th edition 2003), page 169.} In general terms a voyage charterparty specifies the respective la load port and discharge port.\footnote{Cf. Nelson, Donkin & Co v Dahl (1879) 12 Ch D 568 (CA), 580-581.} It is equally open for the charterparty to confer upon the charterer an option, which may be of a limited or extensive nature, to identify the port(s) of loading and discharge at time after the a contract has been entered into.\footnote{ibid} The charterer is obliged to nominate a load/discharge port, providing the obligation has crystallized.\footnote{Mansel oil Ltd v Troom Storage Tankers SA[2008] 2 Lloyd’s Rep 384.} In the present case, the discharge port was not mentioned in the Charterparty, the vessel was hired by the charterer on a Trip Charter from Singapore port to WAF port.\footnote{Charterparty agreement, moot problem, page 13.} In the voyage orders the charterers nominated “OPL Luanda” as discharge port in the voyage orders.\footnote{VOYAGE ORDER NUMBER LTDP. WD01/ WESTERN DAWN/ 27 MAY 2014, Moot problem, Page 13,}
III. THE RESPONDENTS ARE NOT LIABLE TO PAY ANY HIRE DUE.

III.A. THE CHARTERPARTY WAS FRUSTRATED BY NO LATER THAN 4TH JULY 2014.

If the ship is lost or destroyed, or damaged that no repair or recovery for further use is possible, the charterers’ obligation to pay hire comes to an end. Further performance of the charter will be impossible. And the charter will be frustrated and terminated. In the instant case, the ship gone missing and was lost from 4th July 2014. A loss may be caused by unseaworthiness for which the owners are liable under the terms of the charter. The loss of vessel in the instant case was a result of the unseaworthiness for the vessel as the master was incompetent and the vessel as not properly equipped. If a ship may be so damaged that, although capable of being repaired, no further performance of the charter is possible, in such an event, however, absent special terms, the charter is discharged. The ship was recovered from the pirates on 17th July and was damaged and thus, the Charter was discharged. Therefore, the Respondents obligation to pay hire comes to an end.

III.B. THE VESSEL WAS OFF-HIRE FOR BREACH OF ORDER AND NEGLECT OF DUTY BY THE MASTER.

Clause 21 (a) of the ST4 Charterpaty clearly specifies that on each and every occasion that there is an undisputed loss of time whether by way of interruption in the vessel’s service or, from reduction in the vessel’s performance, or in any other manner due to breach of orders or neglect of duty on the part of the

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68 Moot Problem, page 46.
69 Page 478, ¶ 26.7
70 *Blane Steamships v. Minister of Transport* [1951] 2 Lloyd’s Rep. 155
master\textsuperscript{71} or due to deficiency of stores and equipments\textsuperscript{72} and if the loss continues for more than six consecutive hours if resulting from interruption in the vessel’s service the vessel\textsuperscript{73} shall be “Off hire”.

\textbf{III.B.1 the master breached the orders and neglected his duty.}

The master failed to comply its duty to disregard any voyage related instructions received from third parties and to immediately refer such instructions to the charters.\textsuperscript{74} The master did not inform the charterers\textsuperscript{75} who the third party was claiming to be STS coordinators are and what instructions it gave to the vessel regarding the STS position and what quantity of goods to be discharged etc.\textsuperscript{76} The master breached its duty to follow the instructions from the Charterers as specified under Clause 12 of the ST4.\textsuperscript{77} Further, the master and the Owners failed to provide the vessel with proper equipments as specified in BMP4 guidelines and no stores were provided by the owners.\textsuperscript{78} The “loss of time” as includes not only interruption in service, but also reduction in performance.\textsuperscript{79} \textit{The Aditya Vaibhav}\textsuperscript{80} the vessel was held to be “off hire” on the basis of Clause 21(a) (ii) of the ST4.

As a result of Master’s breach of duty and neglect of duty and owner’s failure to equip the vessel the vessel was attacked by the pirates on 4\textsuperscript{th} July 2014 and was seized by them till 17\textsuperscript{th} July 2014. Therefore, the Vessel was on “off hire” for the said period.

\textsuperscript{71} Clause 21 (a) (ii) of ST4.
\textsuperscript{72} Clause 21 (a) (i) of ST4.
\textsuperscript{73} Ibid
\textsuperscript{74} Voyage Order number LTDP WD01/ Western Dawn/ 27 May 2015; Moot problem, Page 13, ¶ 2.
\textsuperscript{75} Moot problem, page 38, ¶ 2.
\textsuperscript{76} Moot problem, page 35 ¶ 1.
\textsuperscript{77} Clause 12 of ST4.
\textsuperscript{78} Moot problem, page 36. ¶ 1.
III.B.3. The vessel was attacked by the pirates.

The vessel was attacked and hijacked by the pirates from 4th - 17th July 2014. In the case of *Osmium Shipping Corp v Cargill International SA*81 said that where a charterparty provided for off-hire in some provisions and remedies for breach in others, the focus must be on the off-hire clause in determining an off-hire event and held that Vessel to be on “Off-hire” in the event of seizure of the vessel by the pirates. Therefore, it is humbly submitted the on the proper construction of the “off hire” clause, Vessel was on “Off-hire” period from 4th- 17th July 2014. Thus, there was no hire due and the Respondents not owing any payment of hire due.

III.C. THE CHARTERPARTY DID NOT REQUIRE TO STEM SUFFICIENT BUNKERS AT SINGAPORE.

The charterparty agreement required charterers to provide bunkers to the vessel at Singapore.82 Further clause 15 of ST4 provides that Charterers shall accept and pay for bunkers on board at the time of delivery, which means that the property in bunkers at the time of delivery is transferred from the owners to the charterers.83 The ST 4 required payment for bunkers to be at market prices current at delivery or redelivery, as the case may be, at the port of delivery or redelivery respectively,84 which means that the bunkers required should be at least sufficient to reach the nearest main bunkering port”.85

In the instant case the charters provided sufficient bunkers of 950mt ex PBT at the time of delivery at Singapore which was enough to get to the discharge area.86 Therefore, claimants are erroneous in contending that the Chartparty required the Respondents to stem sufficient bunkers for the voyage Singapore to OPL Luanda and thus, Charterers are not in breach.

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81 [2012] EWHC 571 (Comm).
82 Moot problem, page 5.
IV. THE CLAIMANT BREACHED THE CHARTERPARTY BY PROVIDING THE VESSEL WHICH WAS NOT FIT FOR THE SERVICES.

Clause 1 and clause 2 (a) of the Charterparty agreement imposes an absolute obligations on the owners to provide a seaworthy vessel at the date of delivery. The ship shall be “tight, staunch, strong and in every way fit for the service” which constitutes an express undertaking of seaworthiness. 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. The test of unseaworthiness is that “Would a prudent owner have required that it (sc the defect) be made good before sending his ship to sea, had he known of it?”

IV.A. THE MASTER OF THE SHIP WAS INCOMPETENT DUE TO WHICH THE RESPONDENT SUFFERED THE DAMAGES.

A ship may be rendered unseaworthy by the inefficiency of the master who commands her. Incompetency of a master can be derived from an inherent lack of ability; or from a lack of adequate training or instruction; or from a lack of knowledge about a particular vessel and/or its systems. A competent crew means that the staff are familiar with the vessel and its equipment and able to deal with any problem that may arise during the voyage.

IV.A.1. The Master of the ship followed the instructions than those given by the charterers.

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87 Shelltime 4, clause 1 and 2.
88 Time charters, page 660, ¶ 37.5
89 Clause 1 (c), time charters, page 661, ¶ 37.6; Golden Fleece Maritime Inc. Pontain Shipping SA v. ST Shipping And Transport Inc. [2008] EWCA Civ 584.
91 The Eurasian Dream
92 The Star Sea [1997] 1 Lloyd’s Rep. 360 at 373-374
Clause 13 of the charterparty clearly specifies that the charterers may request the owners by means of telex, facsimile or other form of communication that specifically refers to this clause, to discharge a quantity of goods either without the bills of lading or at a discharge place other than mentioned in the bills of lading.\(^95\) Firstly, the charterers never requested the master to discharge any quantity of goods at a place not mentioned in the bills of lading. Secondly, the master received instructions from a third party (ASA 2) to discharge the 72,000 mts gasoil at STS area 1, which did not specifically referred clause 13 (b) of the charterparty.\(^96\)

Further, the master failed to comply its duty to disregard any voyage related instructions received from third parties and to immediately refer such instructions to the charterers.\(^97\) The master did not inform the charterers who the third party was claiming to be STS coordinators and what instructions it gave to the vessel regarding the STS position and what quantity of goods to be discharged etc.\(^98\) Therefore, the master lacked ability to follow the instructions given by the charterers and thus, was incompetent to control the vessel.

**IV.A.2. The Master and the Owners failed to follow anti-piracy precautions as required under the Charterparty.**

The Vessel journeyed through the WAF area, Gulf of Aden, gulf of Oman, Arabian Sea and Indian Ocean\(^100\), which is a stretch of sea notorious for piracy.\(^101\) The Vessel’s Master and crew needed to be

\(^95\) Clause 13 (b) of Shelltime 4.
\(^96\) Moot problem, page no. 35, ¶ 1.
\(^97\) Voyage Order number LTDP WD01/ Western Dawn/ 27 May 2015; Moot problem, Page 13, ¶ 2.
\(^98\) Moot problem, page 38, ¶ 2.
\(^99\) Moot problem, page 35 ¶ 1.
acutely prepared, alert, competent and skillful to be able to combat the threat of piracy. Sub Clause (1) of Pircay clause of the Special Provisions to ST4 proforma requires that the owners to adhere to the latest version of Best Management Practices (“BMP”) and that owners shall be entitled to take reasonable preventative measures to protect the vessel, her crew and cargo by the proceeding in convoy, using escorts, avoiding day and night navigation and adjusting speed or course. The adequacy of stores is one the essentials to make ship seaworthy.

In the instant case the Vessel was not equipped well with the requirements provided under the BMP4. The vessel was delivered without proper equipments at the load port. No stores and spare sing were provided. The respondent argues that the Claimant failed to exercise due diligence to ensure the Vessel was properly equipped and supplied for and during the voyage.

IV.A.3. The Master failed to deploy, inter alia, razor wire and other protective measures required under BMP4.

The BMP4 requires that the vessel should be at the maximum safe speed. The ships proceeding at a speed over 18 knots are difficult to attack. Further, BMP4 provides that pirates mount their attacks from very small craft (skiffs) and weapons. Normally, two small high speed (up to 25 knots) open boats or ‘skiffs’ are used in attacks and use small arms fire and Rocket Propelled Grenades (RPGs) in an effort to intimidate Masters of ships to reduce speed and stop to allow the pirates to board. The use of razor wire water spray and/or foam monitors has been found to be effective in deterring or delaying pirates

103 Moot problem, page 8, ¶ 2.
104 The Eurasian Dream.
105 Moot problem, page 26, ¶ 2; page 27, ¶ 1.
106 Moot problem, page 36 ¶ 1; page 27, ¶ 2.
107 Moot problem, page 36, ¶ 1.
109 Ibid.
110 Section 2.2 of Best Management Practices for Protection against Somalia Based Pirates, version 4.
111 Section 4.1 of Best Management Practices for Protection against Somalia Based Pirates, version 4.
112 Section 4.3 of Best Management Practices for Protection against Somalia Based Pirates, version 4.
attempting to board a vessel.\textsuperscript{113} Also, Practising manoeuvring the vessel prior to entry into the High Risk Area is recommended under BMP4.\textsuperscript{114} Even if the crew had long experience and training, their lack of specific information could mean that they are incompetent to navigate a particular ship.\textsuperscript{115}

In the instant case the master proceeded before the attack at a speed of 12-14 knots.\textsuperscript{116} Further, the radar showed the two small fishing boats 5 miles to the west.\textsuperscript{117} The master should have taken care and increased the speed of the vessel and should have deployed the razor wire, water spray, manoeuvring with spares etc to prevent the pirates to board the ship and hijack it. The pirates hijacked the ship for a long 14 days and as a result the 30,000mts Jet A1 and 44,000mts gasoil (The cargo) was stolen from the ship through multiple STS operations.\textsuperscript{118} It is therefore evident that the master of the ship was not competent as he lacked the ability, adequate training and instructions and knowledge to operate a vessel in a high risk area. Thus, it is submitted that the master was incompetent.

The exercise of due diligence is equivalent to the exercise of reasonable care and skill”.\textsuperscript{119} Seaworthiness depends on the type of vessel and the voyage to be undertaken.\textsuperscript{120} In order to be seaworthy, a vessel must be fit for foreseeable perils of the sea and the duty relates to, amongst other things, the competence of the

\textsuperscript{113} Section 8.5 of \textit{Best Management Practices for Protection against Somalia Based Pirates}, version 4.
\textsuperscript{114} Section 8.8 of \textit{Best Management Practices for Protection against Somalia Based Pirates}, version 4.
\textsuperscript{116} Moot Problem, page 37, ¶ 1; page 36, ¶ 2.
\textsuperscript{117} Moot problem, page 40, ¶ 3.
\textsuperscript{118} Moot Problem, page 42, ¶ 1.
\textsuperscript{119} \textit{The Eurasian Dream} [2002] 1 Lloyd's Rep 719, 737; See also \textit{Union of India v NV Reederij Amsterdam} [1963] 2 Lloyd's Rep 223, 231: \textit{The Elli & The Frixos} [2008] 1 Lloyd's Rep 262, 275
\textsuperscript{120} \textit{The Fjord Wind} [1999] 1 Lloyd’s Rep 307, 315
master and crew, and the vessel’s equipment.\textsuperscript{121} An owner can be held to a higher standard if it is aware of the peculiarities of the voyage.\textsuperscript{122} The test is whether a reasonably prudent shipowner, knowing the relevant facts, would have allowed the vessel to put to sea with the particular master and crew, with their state of knowledge, training and instruction.\textsuperscript{123} If the answer is no, then the ship is not manned by a competent crew and is, therefore, unseaworthy.\textsuperscript{124} Hence, The respondents submits that the claimant failed to exercise due diligence to ensure the Vessel was seaworthy and properly manned. Therefore, the vessel was unseaworthy.

\textbf{IV.B. THE CLAIMANTS BREACHED THEIR OBLIGATIONS UNDER HAUQUE VISBY RULES (HVR).}

The HVR are applicable to a bill of lading when the contract it evidences expressly incorporates them or legislation giving effect to them.\textsuperscript{125} The HVR have the force of law when they are validly incorporated into a contract.\textsuperscript{126} The HVR as contained in the \textit{Carriage of Goods by Sea Act 1971} (UK) apply to the Bills of Lading\textsuperscript{127} because, the ‘Conditions of Carriage’, set out on the back of the Bills of Lading, specify that the HVR apply where the country of shipment or the country of destination has enacted them. The UK, as the country of destination, has enacted them.

\textit{IV.B.1. The claimant breached its obligation under article III: 1 of the HVR.}

Article III, rule 1 of the HVR imposes a duty on a carrier to exercise due diligence before and at the beginning of the voyage to make the vessel seaworthy and to properly man, equip and supply the vessel. The absolute duty at common law to provide a seaworthy ship is displaced by Article III, rule 1.

122}{Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1961] 1 Lloyd’s Rep 159.
123}{Ibid.}
124}{The Roberta (1938) 60 Ll L Rep 84
125}{Article X of HVR.
126}{Article 1.2, 1.3, 1.6, 1.7 of Carriage of Goods by Sea Act 1971 (UK).
127}{Clause 38 (1) of Shelltime 4.
of the Rules, which requires the carrier to exercise due diligence to provide a seaworthy ship ‘before and at the beginning of the voyage’.\textsuperscript{128} The Claimant breached Article III, rule 1 of the HVR because the Respondent failed to exercise due diligence before and at the commencement of the voyage. The vessel was unseaworthy as proved above. It was not properly equipped and manned as the master was incompetent and that the owners failed to supply proper equipments to protect the ship from the piracy attack as provided under BMP4. Also, the claimant failed to comply with the International Safety Management code as mentioned under the charterparty,\textsuperscript{129} to ensure that the ship is maintained in conformity with the provisions of the relevant rules and regulations and with any additional requirements which may be established.\textsuperscript{130}

\textbf{IV.B.2. The claimants cannot exclude its liability under article VI of HVR.}

Article IV, rule 2 of the HVR sets out the circumstances in which a carrier’s liability is excluded for loss or damage arising from certain events. Article IV, rule 2 (f) and 2 (q) of the HVR excludes the carrier from liability where there is an act of “public enemies” and loss or damage arises due to no fault of the carrier (or its agents respectively. The exceptions under Article IV, rule 2, may not be relied upon where the carrier is in breach of the ‘overriding obligation’ to provide a seaworthy ship under Article III, rule 1 and that breach is causative of the loss/damage.\textsuperscript{131} The exceptions in the HVR under Article IV Rule 2 are to be construed narrowly\textsuperscript{132} and strictly\textsuperscript{133} so as to preserve the compromise between the

\textsuperscript{129} Clause 1 (j) (i) of Shelltime 4.
\textsuperscript{130} Article 10.1 of International Safety Management code,
\textsuperscript{132} Gosse Millerd, Ltd. v Canadian Merchant Marine, Ltd. (1928) 32 Lloyd’s Rep. 91.
interests of carriers and shippers provided for in the HVR. If such a restrictive construction is adopted in the context of Rule 2(f), it is submitted that the term “public enemy” would extend to cover the acts of enemies of the state of the ship owner. Thieves, robbers or hijackers who, although at war with social order, are not in a legal sense defined as public enemies do not fall within the ambit of the exception. Therefore, Pirates do not fall under the term “Public enemies”.

In the instant case the claimant failed to provide a seaworthy ship and to exercise due diligence before and at the commencement of the voyage as the master was incompetent and the vessel was not properly equipped to protect the vessel from the pirates attack.

IV.C. THE CLAIMANT IS LIABLE FOR CONVERSION OF GOODS AND IS IN BREACH OF ITS DUTY AS A BAILEE.

The contract for the carriage of goods by sea, which is evidenced by a bill of lading, is a combined contract of bailment and transportation under which the ship owner undertakes to accept possession of the goods from the shipper, to carry them to their contractual destination and there to surrender possession of them to the person who, under the terms of the contract, is entitled to obtain possession of them from the ship owners. The duties of bailee arise out of the Voluntary assumption of possession of another’s goods. The voluntary taking of another’s goods into Custody constitutes the person taking such custody as bailee towards that other person (the owner of the goods).

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134 Encyclopaedia Britannica v Hong Kong Producer, 422 F.2d 7 at p. 11, (2 Cir. 1969), cert. denied, 397 U.S. 964. See also Campfire (Pan-American Trade and Credit Corp. v Campfire) 156 F.2d 603 at p. 605; and Varian Assocs. v C. G. T. 85 Cal. App. 3d 369 at p. 375; Sunkist Growers, Inc. v Adelaide Shipping Lines, Ltd. 603 F.2d 1327, at 1331
136 [1963] 1 Lloyd's Rep 81 (CA), 88; Homburg Houtimport BV v. Agrosin Private Ltd. (The Starsin) [2003] UKHL 12; [2004] 1 AC 715, at [132] (Lord Hobhouse); Boreals AB v Stragas Ltd (the Berge Sisar) [2002] 2 AC 205, at [18] (Lord Hobhouse); Albarcruz (Cargo Owners) v. Albazero ( Owners) (The Albazer0) [1977] AC 774, 841 (Lord Diplock); Evans v. Nichol (1841) 3 M & G 614; 133 ER 1286; 133 ER 1286; Bryans v. Nix (1839) 4 M & W 775; 150 ER 1634.
137 East west corp v. DKB S 1912 & AKTS Svendborg
The respondents submit that they have the title to sue the Claimants in bailment as they have an immediate right to the possession of the goods as the lawful holders of the B/L.

**IV.C.1 the claimant is liable for conversion of the cargo as the respondent did not receive or take the possession of goods removed.**

At common law there is imposed on the bailee a duty to take reasonable care of the goods and to redeliver the goods in accordance with the terms of the bailment. The bailee should take reasonable care, which entails ensuring that the goods are protected from damage or loss. There is a general duty on the bailee not to convert the goods, i.e. “not to do intentionally in relation to the goods an act inconsistent with the bailor’s right of property therein”, and to protect the goods bailed against theft. A B/L is a “key to the warehouse” and a document transferring constructive possession of goods. Thus, a holder of the B/L is entitled to the immediate possession of the goods. Wrongful interference with this right constitutes conversion.

The Respondents submit that the Claimant was in possession of 71,058.852 mts of Gasoil and had a duty as a bailee to protect the cargo from theft by the pirates. About 28,500 mts of Gasoil was removed from the vessel between 4 and 17 July 2014, which the respondent did not receive or take possession.

**IV.C.1. Receivers “Angola Energy Imports” did not receive or take the possession of goods removed between 4 and 17 July 2014.**

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140 Moot problem, page 43, 44.
141 Morris v CW Martin & Sons Ltd [1966] 1 QB 716 (CA), 731 (Diplock LJ).
142 Ibid.
143 Caxton Publishing Co. Ltd v Sutherland Publishing Co. [1939] AC 178
144 East West Corp v DKBS 1912 &AKTS Svendborg [2003] EWCA Civ 83; [2003] QB 1509, at fl (Mance LJ). See also Palmer (2009), ¶ 20-017
145 Sanders v Maclean (1883) 11 QBD 327, 341
147 MCC Proceeds Inc v Lehman Bros International (Europe) [1998] 4 All ER 675, 686.
148 Moot Problem, page 44.
149 Moot Problem, page 42.
The B/L acknowledges the receipt of the goods from the shipper for carriage to a destination and delivery there to the consignee. It therefore evidences a bailment with the carrier who has issued the bill of lading as the bailee and the consignee as bailor. In the instant case the consignee named in the B/L i.e. Angola Energy Imports and thus, are the bailor who did not receive or take possession of the goods removed between 4 and 17 July 2014. The Claimant owes a duty of reasonable care as a bailee to the receiver who by the virtue of B/L is a bailor.

V. QUANTIFICATION OF DAMAGES

V.A THE CLAIMANT IS LIABLE TO PAY DAMAGES FOR THE BREACH OF CHARTERPARTY.

The carrier is liable for the loss or damage caused or aggravated by the unseaworthiness, unless it exercised due diligence. Once the damage or loss of the goods so shipped is established by the Cargo-owner, the owner of the vessel becomes prima facie liable to the cargo-owner for the damages. Beside the charterer’s right to cancel the contract, when unseaworthiness frustrates the contract of carriage, he can claim damage for the loss or damage he suffered as a result of such unseaworthiness, e.g. loss or damage to cargo or costs to hire another vessel and transhipment … etc The mere fact of piracy will not excuse the Claimants as their faults were a dominant cause of the loss. The test is whether the breach was an effective and dominant cause of the loss and not immediacy in time. The unseaworthiness “operates

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150 Borealis AB v. Stargas Ltd. (The Berge Sisar) [2002] 2 AC 205; Bryans v Nix (1839) 4 M&W 775 and Evans v Nichol (1841) 3 M&G 614.
151 The Eurasian dream case The Kriti Rex [1996] 2 Lloyd’s Rep 171
152 The Farrandoc 36
154 De la Bere v Pearson Ltd [1908] 1 KB 280 (CA); Monarch Steamship Co Ltd v Karlshamns Oljefabriker [1949] AC 196 (HL).
directly as a cause” where the Vessel is unfit to meet a peril. The purpose of damages in the law of contract is to compensate the innocent party for losses sustained by a breach of contract.

In the Instant case, the breach of contract and the act of piracy caused the loss of the cargo. The vessel was unseaworthy and was not fit to protect to the cargo from the piracy attack. The Master of the vessel was incompetent and the owners failed to exercise due diligence to make the vessel seaworthy. Therefore, it is submitted that the Claimant is liable to compensate the respondents for the loss of 28,500 mts of Gasoil resulted of the piracy attack.

V.A.1. THE DAMAGE WAS FORESEEABLE.

Respondents can recover damages for losses that are fairly within the reasonable contemplation by the parties. Moreover, in the absence of knowledge of special circumstances, the party is supposed to assume responsibility for the losses that are a natural and probable result of the breach. The Claimants knew that the vessel has a voyage passing through WAF area including Gulf of Aden, Gulf of Oman etc, which is a High Risk Area. The Claimant would have probably known that the piracy attack would result in damage or loss of cargo. Further, the requirement of foreseeability extends only insofar as the type of loss and not the degree of loss or the precise manner of its occurrence. Therefore, it is submitted that the it is sufficient for the Respondents to have foreseen damage to the cargo.

V.A.1 the claimant cannot exclude liability under the principle of “novus actus interveniens”.

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158 Hadley v Baxendale (1854)9 Exch 341; Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949]2 KB 528.
The doctrine of *novus actus interveniens* means that the damage/loss to the goods has been caused by a third party intervention breaking the chain of causation. However, this doctrine is inapplicable in cases where the party in breach has a duty to guard against such an intervening act\(^\text{163}\) or when such an intervention is foreseeable.\(^\text{164}\) Herein, the Claimants were under such a duty to prevent damage to the cargo and therefore, the piracy attack was foreseeable. Hence, the Claimants cannot seek protection under this doctrine.


PRAYER FOR RELIEF

WHEREFORE, In light of the above submissions the Respondents request this Arbitral Tribunal to:

DECLARE that:

1. This Tribunal has no jurisdiction to hear the dispute.

2. The respondent is not liable for the tort of fraud committed by the respondents/persons acting on behalf of the respondents.

3. The Vessel was unseaworthy which caused damage to the Cargo.

ADJUDGE that the Claimant is liable –

1. To pay damages and loss as particularised in the phase relating to quantification of damages, incurred due to Unseaworthiness of the Vessel.

2. To indemnify the Respondents against the claims of third party under Bailmeant.

3. To pay interest (compound/simple) upon the sum found owing to the owner under section 49 of Arbitration Act, 1996 (UK)

4. Costs of the proceedings.

5. Any other order deemed fit by the tribunal

Place of Arbitration:

London, U.K.

Counsel for Respondent