INTERNATIONAL MARITIME LAW ARBITRATION MOOT COMPETITION, 2017

TEAM NO. 3

MEMORANDUM FOR FURNACE TRADING PTE LTD

ON BEHALF OF

FURNACE TRADING PTE LTD.................................................................CLAIMANT

AGAINST

INFERNO RESOURCES SDN BHD

&

IDONCARE BERJAYA PTY LTD............................................................RESPONDENT

TEAM

ARMAAN GUPTA, SIMRAN PATEL, BRIJESH K CHHATROLA, RAJVEE BAVISHI
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• **G.W.R v Bristol Corp** [1918] 87 LJ Ch. 414 at 429.

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• **Interim Award in ICC Interim Award 8786**, 11(1) ICC Ct. Bull. 81, 82 (2000).

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• Re Cosslett (Contractors) Ltd [1988] 2 WLR 131.

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• Robertson v French [1803] 4 East 130, 102 ER 775.


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• *Tillmanns & Co v S.S. Knutsford Ltd.* [1908] 2 KB 385.
• *Xiamen Xindaan Trade Co Ltd v North China Shipping Co Ltd* [2009] EWHC 588 ("The Michalakis").
• *Yamashita Tetsuo v See Hup Seng Ltd* [2008] SGCA 49.
• *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27.
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• Seventh Secretariat Note, A/CN.9/264.
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• Sixth Secretariat Note (Government Comments), A/CN.9/263/Add.1.

**RULES/MANUALS:**


• Singapore Chamber of Maritime Arbitration Rules, 2015.

**STATUTES REFERRED:**

• Arbitration Act, 1996 (English).

• International Arbitration Act, 2002 (Chapter 143A).

• Torts (Interference with goods) Act, 1977.

• Supreme Court of Judicature Act, 2007.

• Civil Procedure Rules, 1998.

• Rules of Court, 2014.


**TREATIES/CONVENTIONS:**

• UNCITRAL Model Law.
STATEMENT OF FACTS

1. On 15th February, Imlam Consignorist GmbH (hereinafter referred to as ‘Shipowners’), time chartered the Vessel MV TARDY TESSA to Furnace Trading Pte Ltd (hereinafter referred to as ‘Claimant). On 1st September, the Claimant entered into a voyage charter-party with Inferno Resources Sdn Bhd (hereinafter referred to as ‘Respondent’) for the same vessel.

2. Loading was completed and Bills of Lading were issued by Shipowners to Idoncare Berjaya Utama PTY. Ltd. (the ‘Sub-Charterers’ The ship reached the port of Singapore on 10th October’16. The Respondent failed to pay the freight due on 9th October’16. Repetitively, the Claimant sent mails, requesting for nomination of a discharge port which they were supposed to do after the vessel passed Singapore. Following which, the owners, in an e-mail notice mentioned their rights to lien, damages, termination of the charter-party for breach of charter-party terms.

3. The Respondent justified their act of non-payment of freight as they had not received sub-freights from the sub-charterers.

4. The Respondent, then sent a mail requesting for permission from the Claimant to divert the vessel to port of Busan and offered to amend the freight rates due to the extra distance ship had to sail which was refused by the Claimant on the grounds of Safety due to the rumours of arrival of zombies from Seoul on board a train and because it was outside the range of the Charter Party.

5. The charterers again requested to nominate Busan as disport saying that it was safe area which was refused by owners. On 18th October’16 the Claimant again sent mail mentioning costs of breach and warned them to take lien over the cargo under terms of Charter-party and bills of
lading unless they get a satisfactory response on freight and disport to which charterers replied on 19th October by requesting owners to be patient until disport is nominated.

6. On the same day owners attached the calculation of breach and sent an URGENT mail which they warned charterers that if they fail to nominate a legitimate disport till 20th October’16, they will be forced to consider their behaviour was express, unconditional and unequivocal and that they do not have any intention to perform the contract under Charter-party and so they could reserve their right to terminate the charter-party and claim damages, costs and other losses they have suffered.

7. As the disport was not nominated till 20th October, the owners sent two different notices claiming lien on cargo on board on vessel TARDY TESSA and lien on sub-freights looking at the charterer’s intention to not abide to their obligations under Charter-party. On 21st October’16 charterers sent mail to owners to proceed to Ningbo as disport and that they won’t be able to make payment at that time.

8. Owners sent notice of termination to the Charterers as they did not receive any mail before 20th October. On 1st November’16, Furnace paid Imlam Consignorist for the month of November. On 25th November Furnace Trading PTE Ltd. issued notices of arbitration to both Idoncare Berjaya and Inferno Trading and on 26th November responses were sent by both the respondents.

9. On 30th November, IMLAM Consignorist mails Furnace the report it received from the master of the ship describing the condition of the ship and the crew. On 1st December, the claimant filed an URGENT application for consolidation and liberty to sell the cargo onboard TARDY TESSA which the tribunal has considered for hearing.
ARGUMENTS ADVANCED

I. THE ARBITRAL TRIBUNAL HAS JURISDICTION TO ORDER SALE OF CARGO PENDENTE LITE.

A. The seat of arbitration is Singapore.

The claimants and respondents have entered into a contract for carriage of goods by adopting the BIMCO standard contract form “COAL OREVOY”. The boxes in Part-I of the standard form have been filled and certain provisions modified through an e-mail exchange. This can be confirmed by the fact that the numbers and headings of many provisions in the e-mail correspond with the numbers and headings of the empty boxes in “Part-I” of the BIMCO standard form.

1. Law applicable to the interpretation of the arbitration agreement and clauses of the charter party is Singapore law.

Clause 29 of the e-mail could only form part of Box 30 (Dispute Resolution) or Box 32 (Additional Clauses) of the BIMCO form, and since Part-I prevails over Part-II in the event of any conflict between the two, it is definite and unambiguous that Singapore law and SCMA rules will apply. In accordance with the facts of the current case, the substantive law applicable to at least the arbitration agreement is the law of Singapore, as expressly provided in Clause 29 of the e-mail exchange. Any law chosen by parties usually indicates a choice of that law as at least the substantive law. It is also established that the interpretation of an arbitration agreement should be subject to the substantive law governing the agreement and that choice-of-law clauses apply

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1 Moot Scenario.
expansively, to all issues of validity, interpretation and performance of the contract.\(^4\) Hence the law applicable to the charter party and the arbitration agreement is Singapore law.

2. **Interpretation of “Singapore Law” of Clause 29 as including procedural law.**

Clause 29 states “Singapore law and arbitration as per SCMA rules with 3 arbitrators.”\(^5\) Choice-of-law clauses when applying to only substantive law are usually standalone in character. Such clauses are usually separate and independent, rather than part of the arbitration agreement\(^6\). Inclusion of the choice-of-law clause can lead to arguments that the law is meant to be applicable to the arbitral procedures as well.\(^7\) In *Naviera Amazonica Peruana SA*,\(^8\) “conditions and laws of England” was interpreted as London being the seat and procedural law being English Law\(^9\). In *Braes of Doune Wind Farm (Scotland) Ltd*,\(^10\) even though the contract expressly stated “seat” to be Scotland, “governed by laws of England” was interpreted as English law being the procedural law as the words were attached with “exclusive jurisdiction of the English Courts” implying procedural application. In accordance with the established principles and cited case law, the words “Singapore law” should be interpreted as including procedural law and therefore the Singapore International Arbitration Act (143A) should apply, even if the seat is not expressly mentioned in Clause 29.

3. **The objective principle of construction applied to the implied selection of Clause 26 (c) for Box 30.**

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\(^5\) Moot Scenario.


The objective principle of construction focuses on an impersonal and objective criterion to determine intention of the parties i.e. the terms of the contract.\textsuperscript{11}

Looking at Clause 29 and Clause 26 (a) as well as the entire factual matrix and background of the contract, it can be implied that “Singapore law”\textsuperscript{12} is the “law of the place mutually agreed by the parties”\textsuperscript{13} and the selection of SCMA rules implies the selection of Singapore as the place of arbitration and the rules as the “procedures applicable” by the parties. From the terms of the contract itself, it can be implied that the intention of the parties was to select clause 26(c). It cannot be a coincidence that clause 26 (c) talks about mutually agreed laws of the place and procedural rules, and the same two have been mentioned in Clause 29 of the e-mail. The similarity in the two clauses implies an agreement to choose Clause 26 (c). Even if the respondents contend that this was not their intention, the purpose of interpretation is to give effect to the intention of the parties as objectively ascertained\textsuperscript{14} i.e. what the contractual provisions indicate. To a reasonable person or from a “fly-on-the-wall”\textsuperscript{15} objectivity, the parties would seem to have intended to choose Clause 26(c), when both clauses are looked at. Regarding the background to the contract, this interpretation leads to a commercially viable result as the parties are in Singapore and the charter party is also concluded in Singapore. The seat and procedural rules being that of Singapore make business common sense. This further confirms the interpretation, since the subjective criterion of background\textsuperscript{16} is being met with as well.

\textbf{4. The Business Common Sense Principle.}

\begin{itemize}
\item[\textsuperscript{11}] Gerald McMeel, \textit{The Construction of Contracts: Interpretation, Implication & Rectification} (2nd edn, Oxford University Publication 2014).
\item[\textsuperscript{12}] Moot Scenario.
\item[\textsuperscript{13}] Moot Scenario.
\item[\textsuperscript{14}] \textit{Zurich Insurance (Singapore) Pte Ltd. v B-Gold Design & Construction Pte Ltd} [2008] SGCA 27.
\item[\textsuperscript{15}] \textit{Frederick E Rose (London) Ltd. v William H Pim Junior & Co Ltd} [1953] 2 QB 450 (CA).
\item[\textsuperscript{16}] \textit{Mannai Investments Ltd v Eagle Star Assurance Co Ltd} [1997] A.C. 749 (HL).
\end{itemize}
Assuming but not conceding that Clause 26 (c) is not impliedly agreed upon in the charter party, Box 30 would be left empty, and as a result of Clause 26 (e) of the BIMCO form, Clause 26 (a) would apply. Clause 29 of the e-mail would form part of Box 32 of the BIMCO standard form as an additional clause.

Commercial common sense is an essential part of the process of interpretation. The law generally favours a commercially sensible construction. Commercial documents must be construed in a business fashion. A Singapore Court also stated that due consideration must be given to the commercial purpose of a transaction or provision in a commercial contract while interpreting it. Such a sense must be given to the language that business men would give to it.

In the current facts of the case, it is relevant to mention that the chosen SCMA rules state that unless otherwise agreed by parties, the seat of jurisdiction shall be Singapore and state that regardless of the seat of arbitration, the proceedings shall take place in Singapore. It is also a material fact that the entire transaction is centred around Singapore. The claimants as well as the shipbrokers for the parties are in Singapore and the respondents are in Malaysia. The Charter party has been concluded in Singapore while the discharge port has been limited to ports in neighbouring China. From the above-mentioned facts, it is quite clear that applying business common sense to interpret Clause 29 would lead to the conclusion that the parties having impliedly agree upon Singapore as the seat of arbitration, as all significant business transactions and parties are in and

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22 Weardale Coal and Iron Co v Hadson [1894] 1 Q.B. 598.
23 Rule 22.1, SCMA Rules.
24 SCMA Rules.
around Singapore. Interpreting the charter party only on linguistic basis as them having agreed upon London as the seat of arbitration while following SCMA rules and Singapore substantive law would go against business common sense as it would lead to unnecessary expenses, constraints and inconvenience for both the parties.

Even if choosing London as the seat of arbitration does not completely flout business common sense, it has been established the absurdity is not a pre-condition to applying this principle. If a clause is capable of two meanings, neither of which flout business common sense, it is more appropriate to adopt the more, rather than the less, commercial construction. In accordance with this, the interpretation of Singapore law must be interpreted as including procedural law, to give a more commercially viable result.

5. **Latent Ambiguity.**

A latent ambiguity arises after the evidence of the circumstance surrounding the making of the instrument has been tendered, and in such a case further evidence is admissible to resolve the ambiguity. Ambiguity does not appear on the face of the document, but when the terms of the document are applied to the relevant facts, even when the provisions are perfectly clear and unambiguous In the current case, it seems that the clauses 29 of the e-mail and clause 26 of the BIMCO form are unambiguous, with Singapore Law applying, SCMA rules applying and England being the seat of arbitration. However, when the facts, as mentioned under Business Common Sense principle are applied to these provisions, an ambiguity occurs on whether “Singapore law” includes procedural law as well or not. In order to resolve such an ambiguity, evidence of direct intention of the parties is admissible.

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27 G.W.R v Bristol Corp (1918) 87 L.J. Ch. 414 at 429.
28 Re Jeffery [1914] 1 Ch 375.
It is relevant to mention that BIMCO adopted Singapore as the third choice for seat in its standard dispute resolution clause in 2003. The parties entered into a BIMCO standard form contract in 2016. Along with the facts already mentioned, this shows a strong indication towards the intention of the parties to choose Singapore law as the applicable procedural law and as the seat of arbitration.

6. Unreasonable Result.

The reasonableness of the result of any construction is a relevant consideration in choosing between rival construction.29 The rule that words must be construed in their ordinary sense is liable to be departed from where that meaning would involve an absurdity30 or would create some inconsistency with the rest of the document.31

A presumption in mercantile documents is that business men do not intend to do anything absurd.32 When an unreasonable result came from the express language of a lease, it was held that in spite of the words or language, the fair and commercial result must be considered as the correct construction.33

In the current case, allowing the provisions of the charter party in a manner that would let London be the seat of arbitration would lead to absurdity. It would be a discrepancy in a contract in which all aspects, law, procedure and parties are related to Singapore. Therefore Clause 29 should be construed as including procedural law of Singapore and implying that seat of arbitration is Singapore.

7. Standard forms versus written/typed terms.

30 Grey v Pearson (1857) 6 H.L.C 61, 106.
32 Tillmanns & Co v S.S. Knutsford Ltd. [1908] 2 K.B. 385.
In the event of inconsistency between standard text and additions and alterations, the approach of the courts has always been to give precedence to the latter.\footnote{Gerald McMeel, \textit{The Construction of Contracts: Interpretation, Implication & Rectification} (2nd edn, Oxford University Publication 2014).} In \textit{Robertson v French},\footnote{(1803) 4 East 130.} it was clearly stated that written words are to be favoured over printed text. Typewritten words are to be given precedence over printed material\footnote{Albert Slabotzky, \textit{Grain Contracts and Arbitration- For Shipments from the United States and Canada} (Lloyd’s of London Press 1984), 6.}, as clearly expressing the intentions of the parties.\footnote{Bernard Eder and others, \textit{Scrutton on Charter Parties and Bills of Lading} (23rd edn, Sweet & Maxwell 2015).}

In the current case, Clause 29 of the e-mail must be given precedence in accordance with the principle states above, thereby implying that the seat of arbitration will be Singapore, not London, as stated in Clause 26(a) of the BIMCO form, since it has been proved above that “Singapore Law” implies procedural law of Singapore.

8. \textit{Admissibility of surrounding circumstances.}

In construing any written agreement the tribunal is entitled to look at the evidence of the objective factual background known to the parties at or before the date of contract, even if the contract appears to be unambiguous.\footnote{Kim Lewison, \textit{The Interpretation of Contracts} (5th edn, Sweet & Maxwell 2011) 143.} The need for ambiguity in order to take background into consideration has now been rejected.\footnote{\textit{Chartbrook Ltd v Persimmons Homes Ltd.} [2009] A.C. 1101.}

The claimants therefore contend that even in the instance of the terms being absolutely clear, the surrounding circumstances and factual matrix need to be considered, which would lead to the conclusion that the procedural law applicable is that of Singapore.

B. \textit{International Arbitration Act (Chapter 143A) and UNCITRAL Model Law apply:}
Since it has been sufficiently proved that the procedural law is of Singapore and the seat of arbitration is Singapore, so current arbitral proceedings would be subject to the IIA and UNCITRAL Model Law. The Model Law has the force of law in Singapore\(^{40}\).

1. **International Arbitration:**

   Unless agreed by parties, IAA only applies to international arbitration\(^{41}\). In accordance with the act, an arbitration is international if one of the parties to the arbitration agreement has its place of business outside Singapore\(^{42}\), if a substantial amount of commercial obligations are to be fulfilled outside of Singapore\(^{43}\) or if the parties have expressly agreed the subject matter relates to more than one country\(^{44}\). In the current case, the respondents are in Malaysia i.e. outside of Singapore. Also in accordance with the charter party, the loading port is Australia while the discharge port is in China. Hence a substantial amount of commercial obligations need to be performed outside of Singapore. The arbitration is an international arbitration in accordance with IAA.

2. **Power to order interim sale:**

   Section 12 (1) (d) of the IAA provides that the tribunal has power to order preservation, interim custody or sale of any property\(^{45}\) thereby expressly indicating that a tribunal has the jurisdiction to order sale of cargo pendente lite. The UNCITRAL Model law states that the tribunal may grant any provisional measure that it deems necessary\(^{46}\), and this interim measure has been understood to include measures to preserve goods such as by depositing them with a third person or selling perishable items\(^{47}\); opening bank letters of credit\(^{48}\), using or maintaining machines or completing

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\(^{40}\) International Arbitration Act 2002 (Chap 143A), pt 2, s 3(1).
\(^{41}\) International Arbitration Act (Chap 143A), pt 2, s 5(1).
\(^{42}\) International Arbitration Act (Chap 143A), pt 2, s 5(2)(a).
\(^{43}\) International Arbitration Act (Chap 143A), pt 2, s 5(2)(b).
\(^{44}\) International Arbitration Act (Chap 143A), pt 2, s 5(2)(c).
\(^{45}\) International Arbitration Act (Chap 143A), pt 2, s 12(1)(d).
\(^{46}\) UNCITRAL Model Law [1985], art 17.
\(^{48}\) UNCITRAL, Sixth Secretariat Note: Government Comments (A/CN.9/263/Add.1) art 18, para 1, p 542.
phases of construction where necessary to prevent irreparable harm\textsuperscript{49}; preserving evidence until a later stage of the proceedings\textsuperscript{50}; and measures to protect trade secrets and proprietary information\textsuperscript{51}. The only requirement under the Model law is that there should be no agreement contrary to the power of tribunal to grant interim measures. No clause in the e-mail or the BIMCO contract form, have any such agreement, hence according to UNCITRAL Model law, interim measures, including a measure for sale can be granted by the arbitral tribunal, as it has jurisdiction to do so.

II. The Claimant has a valid and enforceable lien over the Cargo in respect of freight, detention, damages and all amounts due under the Charter party.

The Voyage Charter gives the Claimants a right of lien on the cargo for freight due to them under the Voyage Charter. Freight is still due to the Claimants from the Respondents, thereby giving the Claimant a right of lien.\textsuperscript{52} Further, (A) the right of lien can be exercised, even though a cargo is owned by a third party; (B) the Claimant gave sufficient notice of exercise of lien; (C) the shipowners are obligated to co-operate in the exercise of lien; and (D) the right of lien can be exercised on board and while enroute to the discharge port.

A. Lien can be exercised, even though the cargo is owned by a third party.

1. Lien can be exercised since the Bill of Lading incorporates the Charter Party granting the right of lien.

In Santiren Shipping Ltd.\textsuperscript{53} it was held that a contractual lien may even be exercised against a third party, where the Bill of Lading incorporates the Charter Party which gives the right of lien. The Fixture Recap between the Claimants and the Respondent refers to payment of freight after

\textsuperscript{49} UNCITRAL, Seventh Secretariat Note (A/CN.9/264) art 18, para 2, p 543.
\textsuperscript{50} UNCITRAL, Seventh Secretariat Note (A/CN.9/264) art 18, para 2, p 543.
\textsuperscript{51} UNCITRAL, Commission Report (A/40/17) para 167, p 547.
\textsuperscript{52} Moot Scenario.
\textsuperscript{53} Santiren Shipping Ltd \textit{v} Unimarine SA [1981] 1 Lloyd’s Rep 159.
releasing of Bills of Lading marked ‘freight payable as per charter party’. The Bill of Lading between the Claimants and Idoncare Ltd. is also marked ‘freight payable as per charter party’. Therefore, the Bill of Lading does incorporate the Charter Party. Further, in *The Aegnoussiotis*, it was held that even if the cargo is owned by a third party and not the charterer, the latter is obliged to make sure that there is a contractual lien in favour of the owner. If the charterer does not do this, the owner can still exercise the lien as against the charterer who cannot rely on its own breach of contract.  


Firstly, it can be concluded that the ‘charter party’ being referred to is surely a charter party whose terms are known to both the Claimants and the Respondents, viz., the Head Voyage Charter. Further, the Fixture Recap & the Bill of Lading mention the same ports as ports of discharge. Both these facts indicate that the Bill of Lading incorporates the Head Voyage Charter Party.

Secondly, in *The Heidberg*, it was held that the presumption that the head charter is incorporated is in any event displaced where the head charter is a time charter, and a relevant voyage charter is in existence. This is supplemented by the reason that ‘freight’ is an expression normally used in voyage charter parties, and not in time charter parties, which use the word “hire”. Further, frequently, a head time charter provides for a voyage charter on particular terms, and then the sub-charterer enters into a sub-voyage charter on different terms. In such a circumstance, if the bill of lading is unclear as to whether it is the voyage charter that is incorporated or the sub-voyage charter, it is presumed that it is the former that is referred to in the Bill of Lading, in line with

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the clear principle set out in *The Heidberg* and for practical reasons. Cooke states that although it can be said that the shipowner is not a party to the head voyage charter, and although the shipper may well be the sub-sub-charterer, the time charterer will usually have the lawful authority of the shipowner, as well as the commercial incentive, to sign and issue the bill of lading or to direct the master to sign and issue bills of lading, and similarly, to direct the shipowner to exercise carrier’s right under the bill of lading, in particular a lien, as his trustee. Further, in practice, since the shipper himself prepares and presents the Bill of Lading for signature, he has the remedy in his own hands and, if he omits to identify the charterparty, he has only himself to blame.\(^{58}\) This analysis has also been accepted in *Xiamen Xindaan Trade Co Ltd*.\(^{59}\)

Additionally, in *The SLS Everest*\(^{60}\), it was held that where the Charter Party cannot be identified because the date hasn’t been mentioned, then the Head Voyage Charter Party is the one that is considered to be incorporated.\(^{61}\) In *The Sevonia Team*\(^{62}\), Lloyd J, relying on *The San Nicholas*\(^{63}\), regarded the voyage charterparty as incorporated, and left the transportation contract between charterers and sub-charterers aside, as the former was apposite while the latter was regarded as inapposite.\(^{64}\)

Therefore, it can be concluded that the Charter Party referred to in the Bill of Lading is the Head Voyage Charter Party and not the Time Charter Party.

B. The Claimant gave sufficient notice of exercise of lien.

\(^{60}\) *The SLS Everest* [1981] 2 Lloyd’s Rep 389.
\(^{64}\) Ibid.
In order to exercise the lien, the owner must give a notice stating that it is exercising a lien and stating the sum that must be paid or its calculation. Further, the owner needn’t stipulate a sum, or may even claim an excessive sum, so long as he provides the cargo owner with sufficient material to determine the sum for himself.65 There is no special requirement as to form of the notice, as long as it brings the assignment to the attention of the party that owes the freight.66 The claimants sent out a mail regarding notice over the cargo67 to the Respondents.

C. The Shipowners are obligated to and are co-operating in the exercise of lien.

For exercising the lien, it is essential that the time charterers enjoy the support of the shipowners, for without the assistance of the Master and the Crew, the exercise of lien cannot be made practical. In short, the Claimants must be able to obligate the owners to extend help in their pursuance of lien.

The time charterer has the lawful power to direct the shipowner to exercise carrier’s right under the bill of lading, in particular a lien, as his trustee.68 As per the time charter, the Master shall be under the orders and directions of the Charterers as regards employment and agency.69

There is in any event, good business reason for the shipowner to be obliged to recover freight in the interests of charterer; the charterer may and often will need the freight due to pay an instalment of hire to the owner, who may, in the event of the non-payment of hire, withdraw the vessel. It is submitted that it may be that, just as the shipowner who recovers freight owes a fiduciary duty towards the beneficiary charterer to pay him such freight, there is likewise an equitable duty with regard to the cause of action for unpaid freight so that he can be compelled by the beneficiary

67 Pg. 65, Moot Scenario.
68 Ibid.
69 Clause 8, “Performance of Voyages”, Time Charter, Pg 3, Moot scenario.
charterer to sue for it or exercise a lien for it, although he would, on normal equitable principles, be entitled to an indemnity for any costs incurred in the process\textsuperscript{70}.

As is evidenced by the e-mail exchange between Peter Girvin and Gordon Grill, which states owner’s willingness to help\textsuperscript{71}.

We can conclude that the owners don’t just have an obligation, business incentive and an equitable duty to aid the exercise of lien but are also willing to do the same.

D. The Claimant can exercise lien on board and while enroute to the discharge port.

The discharge port, nominated by the respondents is Ningbo\textsuperscript{72}. The domestic law of the disport, has an effect on the lien clause\textsuperscript{73}. It may be possible to exercise a lien by refusing to complete the carrying voyage, but this can only be done when, owing to special circumstances, it is impossible to exercise a lien at the port of destination and any further carriage will lead to loss of possession of cargo following arrival at that port. In such circumstances a refusal to carry further can be said to be a denial of the receiver’s right to possession\textsuperscript{74}. The Shipowner may not be able to exercise his lien if the domestic law at the discharge port does not recognise his right to exercise lien\textsuperscript{75}.

Accordingly, the ship owners may need to instruct lawyers at the disport to determine the effectiveness of his lien under domestic law\textsuperscript{76} to take a decision as regards the place of exercise of lien.

Under Article 87 of the Chinese Maritime Code\textsuperscript{77}, the shipowner can only lawfully exercise a lien over the freight if the cargo is owned by the party who is liable to pay the overdue freight, i.e. the

\textsuperscript{71} Moot Scenario.
\textsuperscript{72} Pg. 67, Moot Scenario.
\textsuperscript{73} *The Indian Reliance* [1997] 1 Lloyd’s Rep 52.
\textsuperscript{74} *International Bulk Carriers (Beirut) SARL v Eulogia Shipping Co (The Milhalios Xilas)* [1978] Lloyd’s Rep 186.
\textsuperscript{75} *The Sinoe* [1972] 1 Lloyd’s Rep 201.
\textsuperscript{76} Gaskell, et. al, *Bills of Lading: Law and Contracts* (1st edn, LLP 2014) 18.20.
\textsuperscript{77} Article 269, Chinese Maritime Code.
charterer. The Respondents (charterers) are no longer the owners of the relevant cargo and are not the holders of the Bill of Lading, and therefore, the Claimant will be unable to exercise lien at the port of discharge.

Even if the contractual lien over the cargo would be enforceable under Singapore law, and even though the charter party may be subject to Singapore law and arbitration, the lien may not be exercisable in China, unless Singapore law is recognized as the applicable law by the local courts of the jurisdiction. Part Four of the Chinese Civil Procedure Law as amended in 2012 provides for civil procedures involving foreign elements. Although the amended law removed the requirement that parties to a contract with foreign elements may only choose the jurisdiction to which the concerned contract is actually connected, in practice, Chinese Courts are still inclined to seize jurisdiction on the basis that China is the jurisdiction with the real or closest connection to the claim. Further, pursuant to Article 282 of the Civil Procedure Law as amended in 2012, where a Chinese Court finds that the foreign judgement violates the basic principles of Chinese law or the public interests of China, the Court will reject any recognition and enforcement of that foreign judgement. It is seen that Chinese Courts are reluctant to uphold pre-printed jurisdiction clauses (whether to arbitrate or to litigate) on the basis that such a clause may be regarded as unfair and unconscionable. Thus, there is a risk that a foreign judgement on cargo claim may not be enforceable in China.

In *Five Ocean Corporation*, the lien was exercised over the Cargo outside the territorial waters off the last nominated port, Paradip because it was impractical to maintain their right of lien due

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79 *Compania Sud Americana deVapores SA v Hin-Pro International Logistics Ltd* [2015] EWCA Civ 401.
81 UK P & amp; I Club, ‘Cargo Claims under Chinese Law’, June 2016, Pg.7
to commercial and physical constraints at the Indian port. Similarly, in *The Clipper Monarch*[^83], when the voyage charterer failed to pay freight, deadfreight, demurrage and other charges, the claimant exercised a lien over the cargo on board and ordered the ship to wait outside China, in international waters. Further, in *London Arbitration No 13/87*[^84], the shipowners exercised their lien by remaining off Port Said (Egypt) on the grounds that it was impractical and commercially inadvisable to lien the cargo at the discharge port of Iskenderun. The arbitral tribunal held this to be valid.

Subject to the local law and practice the owner may do anything reasonable to maintain his lien and this has been held to include standing off the discharge port[^85]; and sailing from the discharge port to another convenient port to discharge[^86]. But he must deny possession to someone who wants it[^87]; and he must not give up possession of the cargo to a claimant nor waive his right of lien[^88]. Whilst he must retain possession, he may do so either on board or on land, at least where he retains exclusive control as against the person claiming possession[^89]. In the absence of a specific right of sale in the bill of lading or under the local law[^90]

Therefore, since the lien may not be enforceable in China, and since the vessel may be forced to discharge the cargo, thereby defeating the very purpose of maintaining lien, the lien must be exercised on board.

**III. IT IS JUST AND NECESSARY FOR THE TRIBUNAL TO ORDER THE SALE OF CARGO PENDENTE LITE.**

[^84]: *London Arbitration No 13/87* LMLN 205.
[^86]: *Cargo ex Argos* (1873) L.R. 5 P.C. 134.
[^88]: E.g., by delivering the cargo against a bill of exchange: see *Tamvaco v. Simpson* (1866) L.R. 1 C.P. 363.
As argued above in Issue I, Section 12 (1) (d) of the IIA of Singapore is applicable and empowers an arbitral Tribunal to order sale of any property which forms part of the subject matter of the dispute. Additionally, Section 12 (1) (i) empowers an arbitral tribunal to order any interim measure. Furthermore, Article 17 of the UNCITRAL Model Law empowers a tribunal to order any party to take such interim measure of protection as the tribunal may consider necessary in respect of the subject matter of the dispute.91

A. The cargo forms part of the subject matter of the dispute

In Emilia Shipping Inc., it was held that a cargo will form the subject matter of a dispute if that cargo was the subject matter of the claims (lien) for freight. The present dispute concerns unpaid freight, detention and other damages for the cargo on ‘Tardy Tessa’ and a consequent right of lien claimed by the Claimants over the cargo. Therefore, this arbitral tribunal can grant interim measures with respect to the cargo.92

B. The conditions for ordering interim sale are fulfilled.

1. The conditions for ordering interim sale are determined as per International Standards.

The law governing the granting of provisional measures by a Tribunal can either be the law of the arbitral seat93, or the law governing the parties’ underlying contract or relationship94, or the international standards95. The UNCITRAL Model Law as well as the IIA merely acknowledge the tribunal’s broad powers as to provisional relief, without purporting to provide substantive standards as to how such power is to be exercised96. Therefore, the law of the arbitral seat and the law governing the contract are silent as to conditions needed to be fulfilled for ordering sale.

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91 Article 17, UNCITRAL Model Law, 1985 Version.

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Consequently, international standards must be applied by this Tribunal to decide upon the granting of provisional measures, as they provide a uniform standard for doing so.97

2. The conditions for interim sale as required under international standards are fulfilled.

Most international arbitral tribunals require showing of (a) a risk of serious or irreparable harm to the claimant,98 (b) urgency,99 and (c) no prejudgment of the merits,100 and sometimes also require the claimant to establish a prima facie case on the merits, a prima facie case on jurisdiction (previously argued in Issue I), and to establish that the balance of hardships weighs in its favour.101

   a. Risk of serious or irreparable harm to the claimant.

While certain tribunals look for the criteria of “Irreparable harm” i.e. a harm that cannot be compensated by an award of damages102, other tribunals only look for substantial or serious harm103. Most decisions which state that damage must be “irreparable” do not appear to apply this formula, but instead require that there be a material risk of serious damage to the plaintiff.104

Further, certain injury needn’t be proved; proving a sufficient threat of injury is sufficient.105 In the current case, the ship “Tardy Tessa” is drifting off the port limits of Singapore, facing bad weather conditions and has run out of food supplies, fresh water and medicine. Also, the coal on board has shown signs of overheating and there are fears of it self-igniting as well. Coal may spontaneously heat due to moisture content106. Coal is a spontaneously combustible substance

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99 Biwater Gauff (Tanzania) Ltd v. United Repub. of Tanzania, Procedural Order No. 1 in ICSID Case No. ARB/05/22 of 31 March 2006.
102 Plama Consortium Ltd v. Repub. of Bulgaria, Order in ICSID Case No. ARB/03/24 of 6 September 2005, ¶38.

[29]
whose nature and properties may present a danger to coal carrying vessels\textsuperscript{107}, such combustion would lead to irreversible harm. The main concern is the condition of the crew, worsening day by day. Therefore, there is a sufficient risk of substantial and serious harm to both crew and cargo. In \textit{Five Ocean Corporation},\textsuperscript{108} very similar circumstances existed and the Singapore High Court considered it as necessary to order the sale of the cargo to prevent substantial harm. Certain tribunals require that such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.\textsuperscript{109} In the current case, the sale of cargo is not causing any harm to the respondents, but would ensure that the cargo’s value is not diminished further, which would be in the interest of the respondents as well. Further, any harm that is caused to the respondents would be monetary in nature and recoverable from Idoncare Ltd for their non-payment of. Alternatively, if it is not recoverable, the substantial harm to the health of the crew and physical condition of the ship that could be potentially caused by not ordering the sale of cargo outweighs the monetary harm that could be caused to the respondents by the sale of cargo. Hence the balance of convenience test\textsuperscript{110} stands satisfied. Furthermore, there are instances where tribunals have ordered specified actions even where the requesting party cannot show irreparable or even serious harm, merely because ordering these actions reduces the overall damages to the respondent and claimant in the arbitration.\textsuperscript{111} There is also a downward market trend for coal in China according to an export report, which also talks about the distressed value of the coal, which is another factor leading to reduction in the value of the cargo. Hence, the value of coal is decreasing, causing commercial harm to both the claimants

\textsuperscript{108} \[2015\] SGHC 311
\textsuperscript{109} Paushok v. Gov’t of Mongolia, Ad Hoc Order on Interim Measures of 2 September 2008.
\textsuperscript{110} Safe Kids in Daily Supervision Limited v. McNeill \[2010\] NZHC 605).
and respondents, and this must be considered as another factor by the tribunal to order sale of the cargo pendente lite.

b. There is urgency.

The degree of ‘urgency’ which is required may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award.\textsuperscript{112} In general, where there is a material risk of grave harm, tribunals do not attempt to draw fine lines in the timing of orders of provisional relief\textsuperscript{113}. They take a realistic commercial view of the likelihood that serious damage will occur prior to the end of the arbitral proceedings to decide on awarding provisional measures.\textsuperscript{114}

In the current case, the food supplies and fresh water have been exhausted long back, and the coal could possibly self-ignite and explode at any time. The insulin supplies of a diabetic crew members are also dangerously low. Therefore, the requirement of urgency is satisfied. In \textit{Five Ocean Corporation},\textsuperscript{115} the Singapore High Court considered it as urgent to order the sale of the cargo to prevent substantial harm in similar circumstances.

c. There is no prejudgment of the merits.

This requirement does not mean that the tribunal cannot consider the likelihood that the claimant will.\textsuperscript{116} The no prejudgement of merits requirement must fulfil the following: a) a grant of provisional measure should not preclude the tribunal from ultimately deciding the arbitration in any particular manner after the parties have presented the cases b) provisional measures have no res judicata or similar preclusive effect with regard to a decision on the merits c) a tribunal must

\textsuperscript{112} \textit{Quiborax SA v. Plurinat’l State of Bolivia}, Decision on Provisional Measures in ICSID Case No. ARB/06/2 of 26 February 2010, ¶150
\textsuperscript{113} \textit{Avco Corp. v. Iran Aircraft Indus.}, Order in IUSCT Case No. 261 of 27 January 1984
\textsuperscript{115} [2015] SGHC 311.
ensure that it does prejudge the outcome of the arbitration or even partially close its mind to one party’s submissions or deny one party an opportunity to be heard in subsequent proceedings; and (d) the same relief that is sought as final relief may ordinarily be issued on a provisional basis, subject to later revision.\(^{117}\)

In the current case, no provisions in the International Arbitration Act (Chapter 143A) or the UNCITRAL Model Law restrict the tribunal from changing or revising the provisional measure that it awards. Nor does a simple interim relief of sale of cargo in anyway preclude the tribunal from deciding finally against the claimants. Therefore, the condition that there should be no prejudgement of merits stands satisfied.

d. There is a Prima Facie Case.

Only in rare cases, where a claimant has failed to advance any plausible basis for its claims will tribunals deny provisional relief based on a prima facie view of the merits.\(^{118}\) In the current case, the respondents have clearly not paid freight even though it is due and did not nominate a valid discharge port when they were required to which entitles the claimant to demurrage and damages. In the e-mails as well, the respondents have failed to specify valid reasons for non-payment of freight or not nominating the discharge port, showing an intention to not complete its obligations under the charter party. The charter party also clearly mentions that the respondents are responsible for fulfilling the terms of the charter party even under sub-charters.\(^{119}\) Hence the reason that they have been unable to nominate the port or pay freight due to the same by shippers is not valid. The prima facie case clearly exists in favour of the claimants.

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\(^{119}\) Moot Scenario.
Alternatively, certain tribunals have also refused to require a prima facie case, as it is in contradiction to the “no prejudgement of merits” condition.120

C. Other interim measures ought not be granted by this Tribunal.

Any alternative provisional measure may result in the claimants losing their valid exercise of lien over the cargo, hence the interim measure of sale of cargo is necessary. Even if such alternative measure ensures lien is not lost, it may take time on part of the respondents or the tribunal to decide on such a measure and implement the measure, which the claimants have to incur further losses for demurrage and increasing damages for loss of value of cargo due to overheating. Such time taken may also cause substantial harm to the crew. In *Stelios B Maritime Ltd*, the court allowed sale of cargo, even though an alternative measure could be given, because the alternative measure would take time and the value of cargo would diminish due to demurrage and other charges incurred while the measure is implemented.121 In a case, the court allowed sale of cargo, when the plaintiffs had a valid lien, since the cargo was perishable and losing market value and the plaintiffs had already incurred heavy losses for storage of the cargo.122

D. Alternatively, conditions mentioned in analogous provisions of the law of the seat are satisfied.

Although Singapore law is silent as to the conditions to be satisfied by an arbitral tribunal, the closest to a provision for conditions is Section 12A (4) in the International Arbitration Act, which provides the conditions to be satisfied for a court to order provisional relief in case of urgency, which is the preservation of evidence or assets.123

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123 International Arbitration Act, 2002 (Chapter 143A), s 12A (4).
The Court of Appeal in a case stated that term "assets" under s 12A(4) of the IAA was drafted widely for the purpose of including choices in action or rights under a contract, this was limited to contractual rights that were capable of being preserved.\textsuperscript{124} The claimant’s valid right to lien can be considered as an asset within the meaning of Section 12-A(4) as the right of lien is in the nature of one of security. “Security is created where a person (the creditor) to whom an obligation is owed by another (the debtor) by statute or contract, in addition to the personal promise of the debtor to discharge the obligation, obtains rights exercisable against some property in which the debtor has an interest in order to enforce the discharge of the debtor's obligation to the creditor.”\textsuperscript{125} A contractual lien is in the nature of security and may be defined as a right to retain possession of goods or documents belonging to another until all claims against that other are satisfied.\textsuperscript{126} Hence, the exercise of lien is in the nature of an additional right capable of being preserved under S 12A(4) of the IAA.\textsuperscript{127} In an English case, the right similar to lien was considered within the ambit of “asset”\textsuperscript{128} in the Civil Procedure Rules. This provision was considered as an equivalent of Section 12 A(4) by the Singapore High Court.\textsuperscript{129} Therefore, the right to lien can be preserved and considered as an asset within the meaning of Section 12 A(4) of the IAA. The requirement of urgency has already been established above. Hence, the claimants would have satisfied the conditions required for granting interim measures.

Other statutes empowering courts to order interim measures mention similar conditions to be considered by the court to those mentioned above like preservation of assets\textsuperscript{130}, perishable

\textsuperscript{124} Maldives Airport Co Ltd v GMR Male International Airport Pte Ltd [2013] 2 SLR 449.
\textsuperscript{125} Bristol Airport plc v Powdrill [1990] Ch 744 at 760.
\textsuperscript{126} Re Coslett (Contractors) Ltd [1988] 1 Ch 495 at 508.
\textsuperscript{127} Five Ocean Corporation v. Cingler Ship Pte Ltd [2015] SGHC 311.
\textsuperscript{128} Rule 25.1, Civil Procedure Rules.
\textsuperscript{129} Five Ocean Corporation v. Cingler Ship Pte Ltd [2015] SGHC 311.
\textsuperscript{130} S. 5, First Schedule, Supreme Court of Judicature Act (Chapter 322).
property\textsuperscript{131}, preservation of subject matter of dispute.\textsuperscript{132} Hence under substantive law or law of arbitral seat, the conditions for interim measures would be satisfied by the claimants. It is therefore just and necessary to order the sale of the cargo.

IV. The Respondents are liable for additional costs due to detention caused as a result of non-nomination of discharge port.

The Respondents were supposed to nominate a discharge port as soon as the vessel passed Singapore for bunkering\textsuperscript{133}. Such a nomination, was to be done, from among the discharge ports mentioned on the Bill of Lading and per the fixture recap\textsuperscript{134}. If the bill of lading names a specific port or ports, the charterer will normally be regarded as having made a nomination to the like effect under the charter\textsuperscript{135}. Absent special features or circumstances, the right and the obligation to nominate the discharge port and berth remain vested in the charterer alone; no such right or obligation vests in the lawful holder of the bill of lading\textsuperscript{136}, hence, even if the sub-charterers did not nominate a discharge port, it was the charterer’s obligation and responsibility to do so, they cannot be excused. The claimants are entitled to damages for at least the number of days without any nomination of port by the Charterers after the Ship passed Singapore.

The charterers nominated Busan, South Korea, which was not valid as it was outside the range of ports specified in the bill of lading, and was also an unsafe port. The owners are not obligated to accept an invalid nomination.

\textsuperscript{131} Order 29, Rule 4, Rules of Court.
\textsuperscript{132} Order 29, Rule 2, Rules of Court.
\textsuperscript{133} E-mail sent Monday, 10 October, 2016 18:23 PM, Pg. 50, Moot Scenario.
\textsuperscript{134} Clause 19 ‘FREIGHT’, Fixture Recap, Pg. 22, Moot Scenario.
\textsuperscript{135} The Kostas K [1985] 1 Lloyd’s Rep. 231.
PRAYER

In the light of the above submissions, the Claimant requests the Tribunal to,

DECLARE that this tribunal has jurisdiction to order sale of the cargo on board *pendente lite*.

FIND that the claimant has valid lien over the cargo.

FIND that the claimant is entitled to damages for detention of cargo and vessel as well.

FIND that it is just and necessary to order sale of cargo *pendente lite* and order the same.

Dated on 19th April, 2017 by Solicitor for the claimant.